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Would Accepting A Compound Constitute An Admission Of Guilt?

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In Malaysia, the Price Control Anti-Profiteering Act 2011 (PCAP) is a social legislation which was introduced to protect consumers from excessive profiteering. The Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) Regulations 2018 (Regulations) which came into effect on 6.6.2018 has extended its scope to cover any goods sold or offered for sale and any services supplied or offered for supply.

Under Section 14 of the PCAP, any person who makes an unreasonably high profit, in selling or offering to sell or supplying or offering to supply any goods or services, in the course of trade or business commits an offence. The Regulations impose a formula-based mechanism in determining whether the profit is unreasonably high.

Non-compliance with the anti-profiteering laws constitutes a criminal offence under Section 18 of the PCAP, which carries:

- For a corporate entity:

A fine not exceeding RM 500,000 for the first offence and not exceeding RM 1 million for the second and subsequent offences.

- For any person other than a corporate entity:

A fine not exceeding RM 100,000 and/or imprisonment or up to three years, or both, for a first offence, and not exceeding RM 250,000 and/or imprisonment for up to five years for the second and subsequent offences.

However, in certain circumstances, pursuant to Section 58 of the PCAP, the Price Controller can make a written offer to the person to compound the offence with the written consent of the Public Prosecutor.

This alert discusses whether the acceptance of an offer to compound would amount to an admission of guilt and whether

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the offer to compound can be challenged by way of judicial review.

Whether An Acceptance Of A Compound Constitutes An Admission Of Guilt

In *Abadi Motor Sdn Bhd v Ewwa bt Mohd Yusoff & Ors* [2019] 9 MLJ 1, the applicant brought a judicial review proceeding against the Customs officers for, amongst others, the imposition of composition for alleged offences committed during the importation of certain vehicles. Following multiple seizures of the applicant's motor vehicles and investigations conducted, the Customs made an offer to compound the offences under the Customs Act 1967.

In dismissing the judicial review application, the High Court held that if the applicant did not commit any offence under the Customs Act 1967, there was no need to accept the offer to compound the offences and pay the fine. The relevant excerpt from the decision reads:

"Following investigations, and upon the respondents being satisfied that offences under the Act had been committed, offers to compound the offences were made pursuant to the provisions of the Act and the Regulations referred to earlier. The applicant had a choice of accepting the offer to compound the offence or rejecting it and appearing in court to challenge the charges. The applicant did not elect to appear in court to challenge the charges. Instead, the applicant chose to accept the offer of compound for Case No 1, Case No 3 and Case No 4 and paid the compound in full. Such acceptance amounts to an admission of guilt in so far as the offences are concerned."

In the Singapore case of *Re Lim Chor Pee* [1991] 2 MLJ 154, the solicitor was charged with a number of tax offences including wilful tax evasion and criminal breach of trust. The charges on wilful tax evasion charges were compounded and the criminal breach of trust charges were subsequently withdrawn.

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The High Court in *Chor Pee* answered the question of whether the acceptance of the compound would constitute an admission of guilt in the negative based on the following reasons:

- First, the fact that the payment made by the solicitor was in fact a large sum of penalty that was imposed at the same rate applicable upon conviction of the offence by a court is not a valid ground for raising the inference of guilt against the alleged offender.
- The effect of composition is no further action can be taken by the prosecuting authority against the accused on the offence of compounding or indeed any other offence in respect of which he could plead *autrefois acquit* (previously acquitted) or *autrefois convict* (previously convicted).

It should be noted that the High Court in *Abadi Motor* took a different position from *Chor Pee*, where it was held that the full payment of compound amounts to an admission of guilt. Despite the conflicting positions taken by these cases, it is pertinent to note that the High Court in *Abadi Motor* did not consider the *Chor Pee* case. However, it must be noted that the *Chor Pee* case is only persuasive given that it is a Singaporean case.

One should exercise caution in accepting a compound as this may potentially lead to an admission of guilt.

Whether One Can Challenge The Offer To Compound Through Judicial Review

The High Court in *Abadi Motor* held that an offer to compound offences is part and parcel of the enforcement of criminal law, which is beyond the jurisdiction of civil courts. Furthermore, it was also held that an offer to compound an offence was not an administrative decision but a decision made in the course of a criminal investigation.

In the recent case of *Sharil @ Sharil bin Ab Samad v Ketua Pesuruhjaya Pencegahan Rasuah Malaysia & Anor* [2020] MLJU 758, the applicant filed a judicial review against the decision made by the Chief Commissioner of the Malaysian

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Anti-Corruption Commission pursuant to Section 92 of the Anti-Money Laundering, Anti-Terrorism and Proceeds of Unlawful Activities 2001 in the form of Notices to Compound. The applicant's grounds were that the Notices to Compound were unconstitutional, irrational, disproportionate, tainted with procedural impropriety and in breach of the principle of natural justice.

The High Court adopted the principles established in *Abadi Motor* and dismissed the applicant's judicial review application.

In light of the decisions in *Abadi Motor* and *Sharil*, a notice of compound issued by the Price Controller would be amenable to judicial review as a civil court cannot interfere with matters that arise in the course of criminal law enforcement.

Conclusion

By virtue of the widened scope of the Regulations 2018, businesses are advised to be mindful in monitoring their pricing policies diligently and vigilantly to ensure compliance with legislation is in place. Proper documentation should be kept in place to support the reasons for change of pricing mechanism. If an offer to compound is made to a business by a regulator, it is important to assess the pros and cons including assessing the future implications.

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Authored by Yap Wen Hui, associate with the firm's Tax, SST & Custom practice.

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