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Stamp Duty Relief Under Section 15 Of The Stamp Act 1949

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Stamp duty is a type of tax chargeable on a variety of written instruments listed in the First Schedule of the Stamp Act 1949 (SA). Since the subject matter of stamp duty is the instrument and not the transaction, no stamp duty is payable if a transaction can be effected without creating an instrument of transfer, such as an agreement made verbally.

Section 15 of the SA provides relief from stamp duty under items 32(a) and 32(b) of the First Schedule in respect of instruments executed in cases of reconstruction or amalgamation of companies, subject to the conditions for the relief being satisfied. This legal alert highlights the legal principles established in the landmark case of *Cititower Sdn Bhd v Pemungut Duti Setem* [2017] 8 CLJ 710 for a taxpayer in making an application for stamp duty relief pursuant to Section 15.

Our Senior Partner, Datuk D.P. Naban and Tax, SST & Customs Partner, S. Saravana Kumar successfully represented the taxpayer in the *Cititower Sdn Bhd* case.

Relief Under Section 15

In cases of reconstruction or amalgamation of companies, key legal documents such as the Sale and Business Agreement (SBA) and the Memorandum of Transfer (MOT) in relation to sale or transfer of assets are subject to stamp duty at the *ad valorem* rate as prescribed in item 32 of the First Schedule of the SA.

In such circumstances, a taxpayer is allowed to make an application for stamp duty relief in the execution of instruments provided that the scheme for reconstruction or amalgamation complies with the conditions specified in Section 15(1).

Although the SA does not provide the definition of 'reconstruction' and 'amalgamation', this was considered by our Supreme Court in *Cold Storage (Malaysia) Bhd v Pemungut Duti* [1988] 2 MLJ 93 in which the dicta in

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Brooklands Selangor Holdings Ltd v Inland Revenue Commissioners [1970] 2 All ER 76 was cited and applied.

There are 3 conditions to be satisfied for a scheme for reconstruction of a company:

- (1) There must be a transfer of undertaking of an existing company to a new company;
- (2) The members of the new company should substantially be the same persons who were members of the existing company; and
- (3) The new company must carry on substantially the same business as the business transferred to it.

The phrase 'scheme for the amalgamation of any companies' was also considered in the case of *Crane Fruehauf v IRC* [1975] 1 ALL ER 429, where the Court held that such a scheme may be achieved in two classes of case:

- (1) By a transaction whereunder the business of an existing company is acquired by another company (the transferee company) in return for an issue of shares in the transferee company to the transferor company or to its shareholders; and
- (2) By the acquisition by the transferee company of shares of the existing company in exchange for shares in the transferee company issued to the shareholders of the existing company.

The conditions specified for relief in Section 15(1) of the SA is outlined as follows:

- (a) A company with limited liability has been registered, or the share capital of a company has been increased since the commencement of the SA or within 6 months before the commencement thereof; 33
- (b) A transferee company is to be registered in Malaysia or has been incorporated in Malaysia or has increased its share capital to acquire either not less than 90% of the issued share capital of a particular existing company or its undertaking;

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- (c) In the case of an undertaking to be acquired, the consideration for the acquisition must consist of not less than 90% in the issue of shares in the transferee company or to holders of shares in the existing company; and
- (d) In the case of shares to be acquired, the consideration for the acquisition must consist of not less than 90% in the issue of shares in the existing company in exchange for the shares held by them in the existing company.

Brief Facts Of The *Cititower Sdn Bhd* Case

In the *Cititower Sdn Bhd* case, the taxpayer and AM Sdn Bhd (AM) entered into an SBA to acquire AM's business (Undertaking) which includes all of AM's assets and liabilities which include a plot of land held by AM. The SBA is subject to a fixed duty of RM10 pursuant to Item 4 of the First Schedule of the SA.

Subsequently, an MOT between the taxpayer and AM was executed via Form 14A to effect the transfer of the said plot of land. The taxpayer later submitted an application for relief under Section 15(1) to the Collector of Stamp Duty (Collector), which was rejected by the Collector. The Collector had rejected the taxpayer's application and raised a notice of assessment for stamp duty for the sum of RM7.4 million by applying the *ad valorem* rate under item 32 of the First Schedule.

The taxpayer being dissatisfied with the assessment made and having paid the disputed stamp duty, appealed against the assessment to the High Court via an originating summons. During the hearing at the High Court, the Collector submitted that only the SBA as the primary instrument for the undertaking was exempted from stamp duty, while the MOT as a subsidiary instrument with its sole purpose to complete the undertaking was not exempted.

High Court's Decision

The issue in the *Cititower Sdn Bhd* case was whether the MOT by the taxpayer pursuant to the SBA enjoys relief from *ad valorem* stamp duty under Section 15(1) of the SA.

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The High Court ruled in the taxpayer's favour and held that the MOT is exempted from the *ad valorem* rate under Item 32 of the First Schedule for the following reasons:

- (a) If the Collector's contention in that the MOT is a subsidiary instrument and the SBA is the primary instrument is correct, then by virtue of Section 4(3) of the SA, the MOT is also exempted from stamp duty. Section 4(3) of the SA reads:

"Where in the case of any sale, lease, charge, settlement, exchange or partition several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in the First Schedule for the conveyance, lease, charge, settlement or partition and each of the other instruments shall be chargeable with a duty of ten ringgit only; and the parties may determine for themselves which of the instruments so employed shall, for the purpose of this subsection, be deemed to be the principal instrument."

Furthermore, in accordance with the legal principles established in *Cheah Choon Gan v Registrar of Titles, Kedah* [1973] 1 MLJ 107, where a document is exempted from stamp duty, all subsidiary documents accessory to the primary purpose are also exempted. In the *Cititower Sdn Bhd* case, the MOT is clearly not a stand-alone instrument as it was executed pursuant to the SBA.

- (b) Applying the principle of interpreting taxing statutes as enunciated in *UMBC v Pekeliling Triangle* (1991) 1 CLJ Rep 474, Section 15(1) must be given its plain meaning without implying anything into the provision or read anything else other than looking at the language used. As such, Section 15(1) of the SA does not restrict the stamp duty exemption to one instrument only. The relevant part of the provision reads:

"then, subject to this section, stamp duty under Item 32(a) or (b) in the First Schedule shall not be chargeable on any instrument"

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made for the purposes of or in connection with the transfer of the undertaking or shares...

Section 15(1) clearly states that in the event that the conditions were satisfied, then stamp duty under Item 32(a) or (b) of the First Schedule should not be chargeable on any instrument qualifying for an exemption from stamp duty; and

- (c) The word used by the Parliament was “any instrument” which clearly envisaged one or more instruments regardless of whether the said instrument was the principal or secondary instrument. Furthermore, Section 15(1) provides that any instrument liable to stamp duty under Item 32(a) or (b) of the First Schedule of the SA shall not be chargeable to stamp duty. If Parliament had intended the exemption to apply to only one instrument or a specific instrument, then Parliament would have specified this clearly in Section 15(1) of the SA.

By ruling in the taxpayer’s favour, the High Court had also awarded interest at the rate of 8% per annum on the stamp duty refund payable by the Collector to the taxpayer from the date of the High Court order until the date the refund was made.

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Subsequently, being dissatisfied with the High Court’s decision, the Collector appealed to the Court of Appeal on the grounds that Section 4(3) of the SA was inapplicable as the MOT was a separate instrument from the SBA. Furthermore, the Collector also argued that interest should not have been awarded to the taxpayer on the refund payable.

The Court of Appeal unanimously dismissed the Collector’s appeal with costs and maintained the award of interest at 8% per annum on the refund payable by the Collector to the taxpayer.

Commentary

In brief, no tax can be imposed upon a subject without words in an Act of Parliament clearly showing this intention to impose the tax liability. Such strict interpretation to taxing statutes was

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adhered to by our superior courts such as in the case of *National Land Finance Co-operative Society Ltd v Director-General of Income Tax* (1994) 1 MLJ 99, where it was held that “there are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists... a subject was not to be taxed without clear words...”.

Whilst the Collector has the power to collect stamp duty from taxpayer, the Collector shall not raise a notice of assessment for stamp duty when the said instrument clearly fulfills the conditions listed in Section 15(1). As such, the Collector cannot adopt a meaning of the provision of the SA which is inconsistent with the plain language of the statute. In the present context, where two or more instruments or documents are executed pursuant to a scheme for reconstruction, all of these instruments or documents should be taken into account in assessing the objective of the scheme, and in determining whether relief should be granted under Section 15 of the SA.

Authored by Yap Wen Hui.¹

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