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High Court Rules Agreement For The Installation Of Gas Compressor Is Subject To RM 10 Stamp Duty

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Recently, the High Court ruled in favour of the taxpayer and held that an agreement executed by a leading oil and gas company for the installation of a gas compressor is to be stamped at the nominal rate of RM10. The Collector of Stamp Duties (the Collector) had previously imposed stamp duty based on *ad valorem* rate.

The taxpayer was successfully represented by the firm's Tax, SST & Customs partner S. Saravana Kumar together with associate, Yap Wen Hui.

Facts

The taxpayer is principally engaged in the production of oil and gas. In the course of business, an agreement was executed between the taxpayer and the contractor for the provision of supply, delivery, and commissioning of the gas compressor (the Agreement). The taxpayer submitted the Agreement for stamp duty adjudication to the Collector, which is a department under the Inland Revenue Board.

The Collector subsequently raised a stamp duty assessment by subjecting the Agreement to *ad valorem* rate under item 22(1)(a) of the First Schedule of the Stamp Act 1949 (SA). The taxpayer dissatisfied with the Collector's decision, filed a notice of objection pursuant to Section 38A(1) of the SA. Amongst others, the taxpayer took the stance that the Agreement should be subjected to the nominal rate of RM10.

The Collector disregarded the taxpayer's appeal and maintained its position without giving any reasons. Being aggrieved by the Collector's decision, the taxpayer filed an appeal to the High Court under Section 39(1) of the SA.

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Issue

The issue is whether the Agreement is subject to stamp duty under item 4 at a nominal rate of RM10 or item 22(1)(a) at *ad valorem* rate.

Item 4 of the First Schedule of the SA reads:

"AGREEMENT OR MEMORANDUM OF AGREEMENT

Made under hand only, and not otherwise specially charged with any duty, whether the name is only evidence of a contract or obligatory on the parties from its being a written instrument..."

Meanwhile, item 22(1)(a) of the First Schedule of the SA reads:

"BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:

(1) *Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any sum secured by a duly stamped instrument, nor rent reserved by a lease or tack –*

(a) *For a definite and certain period so that the total amount to be ultimately payable can be ascertained"*

For an instrument to fall within the ambit of item 22(1)(a), the requirements stated below must be satisfied:

- (i) The instrument can be a bond, covenant, loan, services, equipment lease agreement or instrument of any kind whatsoever.

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- (ii) The said instrument should be the principal or primary security agreement for any annuity, not being interest for any sum secured by a duly stamped instrument.
- (iii) The said instrument is for a definite and certain period so that the total amount to be ultimately payable can be ascertained.

The Collector's Contention

The crux of the Collector's case was that the Agreement should be subject to *ad valorem* duty under item 22(1)(a) for the following reasons:

- (i) First, the Agreement was not solely for supplying material or equipment but also involves services rendered by the contractor.
- (ii) Second, item 4 applies only to an instrument which was a service agreement including in instances where the price for the agreement is not determined. In the present case, the price of the Agreement was determined in full.
- (iii) Third, the Collector submitted that there is no statutory duty to provide reasons for its decision.

The Taxpayer's Contention

The crux of the taxpayer's submission is that item 22(1)(a) is not applicable for the following reasons:

- (i) The Agreement failed to satisfy the requirements stipulated under item 22(1)(a):
 - (a) First, the Agreement does not constitute security as it is solely for the supply and commissioning of the gas compressor. The definition of "security" as decided by the Court of Appeal in *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem* [2017] 6 MLJ 564 is stated as follows:

"A security is an encumbrance, vested in a creditor, over the property of his debtor, for the purpose of securing the repayment of a

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debt. It is a right in the property of another, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, to realise it from that property. The purpose of a security is to ensure, of [sic] facilitate, the fulfilment, or enjoyment, of some other right vested in its owner. Securities may be classified into:

- (i) *Mortgages*
- (ii) *Pawns*
- (iii) *Floating charges*
- (iv) *Lien*

This word has a variety of meaning:

- (i) *The general name for all mortgages, charges, debentures, etc, whereby repayment of money is assured or secured.*
- (ii) *Any document by which any claim may be enforced."*

- (b) Second, none of the clauses in the Agreement demonstrated that there was an annuity agreed between parties. Based on the definition given in the Lexis Nexis publication of Words, Phrases and Maxim – Legally and Judicially Defined, the word "annuity" has the meaning of:

"a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, either payable under a personal obligation of the grantor or charged upon his pure personalty although it may be made a charge upon his freehold or leasehold land, in which latter case it is commonly called a recharge."

- (ii) There was no absolute contract value for the Agreement. As clearly stated in the Agreement, the unit rate stated for the optional incidental services was only for indicative purposes.

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- (iii) The Agreement should be subjected to a nominal rate under item 4 as it did not fall under other items in the First Schedule of the SA.
- (iv) Following the Federal Court in *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265, the absence of statutory duty to give reasons does not free the Collector from giving reason for raising the disputed assessment.

Commentary

Upon hearing both parties' submissions, the High Court held that the Agreement should be subjected to nominal stamp duty under item 4 of the First Schedule of the SA. Amongst others, the High Court held that item 4 must be given effect to as there was no legal basis for the Collector to subject the Agreement to Item 22(1)(a) on the following basis:

- (i) The Collector had failed to advance evidence to demonstrate that the Agreement was either an "annuity" or a "security" under item 22(1)(a).
- (ii) No reasons had been given by the Collector in the stamp duty assessment to subject the Agreement to stamp duty under item 22(1)(a).
- (iii) The price stated in the scope of the optional incidental work stated in the Agreement was not final and conclusive as it was merely an estimation.

The High Court had also ordered that the Collector is required to pay interest at the rate of 8% from the time the stamp duty was paid until the date of refund. This decision is welcomed as this is probably the first time an agreement of this nature has been ruled to be an instrument falling under item 4 of the First Schedule of the SA since the introduction of item 22 by the Collector to subject service agreements to *ad valorem* rate stamp duty. This High Court decision brings substantial stamp duty savings to companies especially those in the oil and gas industry as they usually execute hundreds of written contracts of this nature in a year.

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Whilst the Collector has the power to collect stamp duty from taxpayers, the Collector is not empowered to raise stamp duty assessments without providing reasons. This decision also serves as a good reminder to the Collector that discretion cannot be exercised arbitrarily in raising assessments without observing the perimeters of the SA. Any conduct resulting from an arbitrary decision including a stamp duty assessment is subject to judicial scrutiny.

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

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