

17 FEB 2021

## Stay In Civil Recovery Proceedings Commenced by The IRB

### 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

The Income Tax Act 1967 (ITA) confers power to the Inland Revenue Board (IRB) to recover outstanding taxes in the event taxpayers fail to settle any taxes payable within the stipulated period. By virtue of Section 106 of the ITA, taxes due and payable may be recovered by the IRB through the Government of Malaysia, by way of civil proceedings as a debt due to the government.

When adjudicating such civil recovery proceedings, Section 106(3) of the ITA provides that the courts cannot entertain any plea when it is argued that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased. This means that the IRB may commence civil proceedings regardless if the assessment raised is wholly misconceived, and obtain a judgment summarily. The power of our courts to scrutinise significant aspects of a taxpayer's plea are restricted, thus rendering the recovery proceeding indefensible. However, our courts have established that the ITA does not abridge the court's inherent jurisdiction to grant a stay of proceedings.

### Stay Application

When faced with civil recovery proceedings initiated by the IRB, taxpayers may consider making an application for a stay of proceedings. The key factor for the Courts in allowing or refusing a stay is whether special circumstances exist. In *Government of Malaysia v Jasanusa Sdn Bhd*<sup>1</sup>, the Supreme Court held that the existence of special circumstances would justify the granting of a stay in tax matters notwithstanding Sections 103 and 106 of the ITA.

---

<sup>1</sup> [1995] 2 MLJ 105

**REIMAGINING  
TAX  
SOLUTIONS**

There are myriad circumstances that could constitute special circumstances with each case depending on its own facts.<sup>2</sup>

## Special Circumstances

Firstly, the courts have held that the existence of an appeal to the Special Commissioners of Income Tax (SCIT) by taxpayers, constitutes a special circumstance that warrants the granting of a stay.<sup>3</sup> In relying on the existence of an appeal before the SCIT, taxpayers are in a position to provide a projected timeline before the courts in justifying the order sought. In such a circumstance, the granting of a stay would be necessary and essential to preserve the integrity of the taxpayer's appeal and to prevent the said appeal, if successful, from being rendered nugatory. On various occasions, the courts had even acknowledged that the merits of an appeal should be a factor to be taken into consideration in granting a stay.<sup>4</sup>

Further, the possibility of a settlement between the taxpayer and the IRB pursuant to Section 102(5)(a) of the ITA also gives rise to a special circumstance, warranting a stay of proceedings.<sup>5</sup> The existence of a real possibility that tax disputes may be resolved through settlement negotiations or Dispute Resolution Proceedings (DRP) cannot simply be disregarded as an amicable settlement that would result in the discharge of the disputed assessments.

Bearing in mind the restrictive nature of the ITA as illustrated in established judicial precedents, there is a real threat of a judgment being entered against taxpayers, and this will inadvertently lead to corollary effects. It is possible that the absence of a stay will inflict

### OUR EXPERTISE:

#### Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

#### Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

#### Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

#### Trade Facilitation & Incentives

#### Real Property Gains Tax

#### Stamp Duty

#### Anti-Profitteering

#### GST Disputes

<sup>2</sup> *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Sebausaha Makmur Bhd* [2003] 4 CLJ 1

<sup>3</sup> *Kerajaan Malaysia v Berjaya Times Square* [2018] 1 LNS 720

<sup>4</sup> *Kerajaan Malaysia v Raja a/l Veerasamy* (2014) MSTC 30-074

<sup>5</sup> *Berjaya Times Square* (supra)

serious and irreparable damage to the taxpayers' reputation, which may affect the public's confidence in the taxpayer's corporate outlook, not to mention that there exists a real risk of winding up or bankruptcy proceedings being initiated. Such damages suffered by taxpayers cannot be adequately quantified nor remedied by way of a refund of the disputed tax. Therefore, taking into account the balance of convenience between the taxpayers and the IRB, a stay of proceedings should be granted in such circumstances to avoid the negative effects should a stay be refused.<sup>6</sup>

### Commentary

In light of the current COVID-19 pandemic, there is no doubt that businesses face hardships as the financial crisis resulted in cash flow problems, operational restrictions and a slump in demand. This grave situation may sufficiently give rise to special circumstance warranting a stay of proceedings to be granted, depending on the facts of each case. The various economic aid packages pronounced by the government, although beneficial to stimulate the economy, would likely lead to a rapid increase in government's expenditure which, in turn, would result in more civil recovery proceedings to regenerate as much revenue as possible. In this regard, the courts should take cognisance of the current pandemic and lean in favour of granting a stay where there are special circumstances.

Further, the effect of the newly inserted Section 103B into the ITA might raise concerns on whether Section 103B would affect the granting of stay orders by our courts. It is pertinent to note that Section 103B would not carry such an effect as to interfere with the courts' inherent jurisdiction to grant a stay order in civil

#### OUR EXPERTISE:

##### Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

##### Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

##### Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

##### Trade Facilitation & Incentives

##### Real Property Gains Tax

##### Stamp Duty

##### Anti-Profitteering

##### GST Disputes

---

<sup>6</sup> *Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor* [2015] 7 MLJ 305

## 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

proceedings commenced by the IRB in light of the decision of the Supreme Court in *Jasanusa* (supra).

Authored by Brandon Chee, an Associate with the firm's Tax, SST & Customs practice.

## About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

**REIMAGINING  
TAX  
SOLUTIONS**