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27 AUGUST 2019

## **Court Of Appeal Grants Stay To Taxpayers**

*SDSB & Ors v Ketua Pengarah Hasil Dalam Negeri*

Last Thursday, in a landmark decision, the Court of Appeal granted three taxpayers an order for stay of proceedings pending the determination of their appeals. The order enables the trio to defer payment of disputed taxes collectively amounting to more than RM50 million.

The taxpayers were successfully represented by lawyers from the firm's Tax, SST & Customs Practice, led by partner, Rosli Dahlan.

### **Brief Facts**

In 1994, the taxpayers, who are in the business of general investment, jointly acquired a piece of land, which they held as investment property and subsequently disposed of in 2007. The gains arising from the land disposal were exempted from real property gains tax.

However, in 2019, the Director General of Inland Revenue (**DGIR**) decided to subject the gains to income tax and raised notices of additional assessment against the taxpayers. Aggrieved by the DGIR's decision, the taxpayers sought to commence judicial review proceedings together with an order for stay of proceedings.

The High Court did not grant leave for judicial review on the basis that the question of law raised by the taxpayers was best determined before the Special Commissioners of Income Tax. Nor did the High Court grant the application for an order to stay. However, the High Court granted an interim stay for 30 days for the taxpayers to make payment. In the meantime, the taxpayers filed an appeal to the Court of Appeal and also applied for a stay order against the payment of the disputed taxes pending the appeal.

### **Taxpayers' Contentions**

The issue was whether the gains arising from the disposal of land ought to be subject to income tax or real property gains tax. Lead counsel for the taxpayers relied on the Court of Appeal's decision in the *Alf Properties* case, in which it was held that gains from disposal of investment property are not subject to income tax. Accordingly, the taxpayers sought an interim stay pending the disposal of the appeal pursuant to Section 44 of the Courts of Judicature Act 1964.

The taxpayers submitted that the Court of Appeal has the jurisdiction to grant an interim stay pending appeal, and that the legal test to grant a stay under Section 44 is lower than the special circumstances test. The purpose of a stay under Section 44 is to preserve the integrity of the statutory appeal and, as such, an interim stay should be granted pending the outcome of the appeal. An interim order would prevent prejudice to the taxpayers who were likely to be wound up as the amount of taxes raised was substantial. Further, the DGIR's decision had caused manifest injustice to the taxpayers as the tax audit was only conducted more than 10 years after the land disposal. The taxpayers highlighted that they had no tax liability for the past 12 years until they were slapped with the disputed assessments.

Additionally, there are merits to this appeal as the relevant question based on the *Alf Properties* case, and merit is a factor to be considered by the Court of Appeal in exercising its discretion to stay. The taxpayers also emphasised that the DGIR has the power to:

- impose further penalty at the rate of 10% and 5%;
- order travel restriction on the directors;
- freeze bank accounts under the anti-money laundering law; and
- commence a civil suit against the taxpayers and its directors.

### **DGIR's Response**

The DGIR submitted that there was no merit to the taxpayers' appeal as the High Court had dismissed their requests for leave and stay. He added that the High Court only granted an interim stay of 30 days for the taxpayers to pay taxes, but not to appeal to the Court of Appeal.

The DGIR also submitted that the taxpayers had applied to make an instalment payment plan, which had been accepted. As such, there was no threat of civil proceedings against the taxpayers and their directors, provided that they complied with the instalment payment plan.

### **Court of Appeal's Decision**

The Court of Appeal agreed with the arguments advanced by our tax lawyers, and unanimously granted the interim stay application pending the disposal of the appeal against the High Court's decision. The Court of Appeal found that there were merits to the taxpayers' appeal and, as such, the granting of an interim stay was appropriate.

### **Conclusion**

The main consideration of the Court of Appeal in granting the interim stay was whether the integrity of the appeal could be preserved, which is a lower threshold compared to the special circumstance test. Hence, subject to the merits of a taxpayer's appeal, the Court of Appeal may grant an interim stay order under Section 44, especially to

a taxpayer mounting a *bona fide* appeal to challenge the legality of any tax assessments.

**Rosli Dahlan** ([rd@lh-ag.com](mailto:rd@lh-ag.com)), who also heads the firm's Corporate and Commercial Disputes Practice, was assisted by associates, Keith Lim and Chris Toh, from the firm's Tax, SST & Customs Practice.

If you have any dispute with the tax authority, please contact our partners, **Datuk D P Naban** or **S Saravana Kumar**, at [tax@lh-ag.com](mailto:tax@lh-ag.com)

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Published by the Tax, SST & Customs Practice

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