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IRB's Objection To Exclude A Witness Dismissed

HB v Ketua Pengarah Hasil Dalam Negeri (SCIT, 2018)

During an ongoing tax appeal before the Special Commissioners of Income Tax (**SCIT**), the Director General of Inland Revenue (**DGIR**) raised a preliminary objection on the taxpayer's decision to call a second witness. The objection was on the basis that the second witness had been present in court when other witnesses had testified. The issue before the SCIT was whether the second witness, who is the taxpayer's accountant, should be excluded from testifying solely based on the reason that she had been present in court from the day the hearing commenced.

The SCIT accepted the arguments advanced by HB's counsel and dismissed the DGIR's preliminary objection. The arguments advanced by HB were:

- (1) Paragraph 42A, Schedule 5 of the Income Tax Act 1967 (**ITA**) states that where any matter or procedure or practice is not provided for in this Schedule, the procedure and practice for the time being in use in the subordinate court or in the High Court shall be adopted and followed with necessary modifications. As the ITA is silent on whether the second witness may testify, the procedure and practice currently in use in the subordinate court or the High Court should be followed.
- (2) The issue as to whether a witness who had remained in court during the hearing could reserve his or her right to give evidence was decided in *Mohamed Nor v PP* [1939] 1 MLJ 305. In *Mohamed Nor*, the Magistrate had refused to accept the evidence of a witness because the witness had remained in court and had not retired when witnesses were asked to do so. On appeal, it was held that "the fact that a witness remains in court during the progress of a trial is no ground for refusing to allow him to give evidence, although it may reduce the weight to be attached to such evidence as may be given".

The position adopted in *Mohamed Nor* was subsequently referred to by the High Court in *PP v Dato' Seri Anwar bin*

Ibrahim (No 3) [1999] 2 MLJ 1. In essence, the principle applicable is that the court could not disregard such evidence but may apply proper weight to the evidence given.

- (3) Further, Practice Note No 1 of 1972 on “Calling of Witnesses Present in Open Court” makes it clear that rejection of the evidence of such witness being taken is wrong and may result in a miscarriage of justice.

Based on the above, the SCIT ruled that the second witness may testify before them. The main issues for determination in this appeal were whether HB was entitled to claim a double deduction under Section 34A of the ITA on its research and development projects, and whether HB was entitled to claim a double deduction under Section 34B of the ITA for the use of services of an approved research institute.

The taxpayer, HB, was represented by [Datuk D P Naban](#), Senior Partner from the firm’s Tax, SST & Customs Practice, together with a tax associate, Keith Lim.

If you have any queries pertaining to tax or are aggrieved by any decision of the Special Commissioners of Income Tax, please contact [S Saravana Kumar](#) at tax@lh-ag.com

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