

Tax e-Alert

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Section 15(1) Stamp Duty Relief:

The Court Of Appeal Rules In Favour Of Taxpayer In *Pemungut Duti Setem v CT Sdn Bhd* (2018)

The issue was whether the Memorandum of Transfer (“**MOT**”) executed by CT Sdn Bhd (“**CT**”) pursuant to a Sale of Business Agreement (“**SBA**”) enjoys relief from *ad valorem* stamp duty pursuant to Section 15(1) of the Stamp Act 1949 (“**SA**”). We successfully represented the taxpayer in this matter before the High Court and the Court of Appeal.

Ordinarily, stamp duty chargeable on an MOT pursuant to a sale/transfer of asset is based on the *ad valorem* rate prescribed in item 32 of the First Schedule of the SA.

Nevertheless, a taxpayer may apply for relief from stamp duty in the execution of instruments pursuant to scheme for the reconstruction of any company or the amalgamation of any companies by making an application under Section 15(1) of the SA, subject to the satisfaction of the following conditions:

- (a) A company with limited liability has been registered of there is an increase of the nominal share capital of a company within six months before the commencement of the SA;
- (b) The company has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per centum of the issued share capital of, any particular existing company; and
- (c) The consideration for the acquisition consists of not less than ninety per centum thereof, where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company.

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In CT's case, an SBA was executed between CT and AM Sdn Bhd ("**AM**") for CT to acquire the business of AM ("**Undertaking**") which includes all of AM's assets and liabilities, including a plot of land held by AM, which is the subject of the appeal.

Subsequent to the SBA, CT and AM executed an MOT to effect the transfer of the said plot of land. CT then submitted an application for relief to the Collector of Stamp Duty ("**Collector**") pursuant to Section 15(1) of the SA. However, the Collector had rejected CT's application and raised a notice of assessment for stamp duty for the sum of RM7,391,520.00 by applying the *ad valorem* rate.

CT, being dissatisfied with the assessment made and having paid the disputed stamp duty under protest filed an originating summons at the High Court. During the hearing at the High Court, the Collector had admitted that CT had satisfied all the conditions to qualify for relief under Section 15(1) of the SA. However, they went on the premise that only the SBA was exempted from stamp duty but not the MOT.

The High Court's Decision

The High Court ruled CT's favour and ruled that the MOT is exempted from *ad valorem* rate under Section 15(1) of the SA for the following reasons:

- (a) The relevant provision is Section 15(1) of the SA which provides for the conditions to be satisfied in order to qualify for an exemption from stamp duty;
- (b) If the Collector's contention is correct, in that the MOT is a subsidiary instrument and the SBA is the primary instrument, then by virtue of Section 4(3) of the SA, the MOT is also exempt from stamp duty. This is because where a document is exempt from stamp duty, all subsidiary documents accessory to the primary purpose are also exempt. The MOT is clearly a document necessary to the primary purpose of the SBA as it was executed pursuant to the SBA;

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- (c) Section 15(1) is to be given its plain meaning without implying anything into the provision or read anything else other than looking at the language used, based on the principle of interpreting taxation statutes as enunciated in *UMBC v Pekeliling Triangle* (1991) 1 CLJ Rep 474; and
- (d) Section 15(1) does not restrict the stamp duty exemption to one instrument only, as it clearly states that any instrument liable to stamp duty under Item 32(a) or (b) in the First Schedule of the SA shall not be chargeable to stamp duty.

The High Court had also awarded interest at the rate of 8% per annum on the stamp duty refund payable by the Collector to CT from the date of the High Court order until the date of the refund is made.

The Collector then appealed to the Court of Appeal, arguing that the MOT was an instrument separate from the SBA, and accordingly, Section 4(3) of the SA should not be applicable. The Collector also argued in the Court of Appeal that interest should not have been awarded to CT on the refund payable.

Our Arguments At The Court Of Appeal

We argued that the High Court was correct in its findings and further submitted on the following:

- (a) It was clearly stipulated in the SBA that the said plot of land is to be transferred from AM to CT and that the purchase consideration of the SBA had made provisions for the transfer of the said plot of land. As such, the transfer of the said plot of land is incidental to the SBA;
- (b) The MOT is the only instrument in existence to effect transfers of land and is therefore essential to transfer the said plot of land from AM to CT. As the transfer of land is required to complete the SBA, then the MOT is clearly a subsidiary instrument to the SBA, qualifying it for an exemption from *ad valorem* rate by virtue of Section 4(3) of the SA; and
- (c) On the issue of interest, the Collector did not raise this issue in their memorandum of appeal and accordingly, it was not proper for them to do so. Additionally, the High Court has the discretion to award interest where the court thinks fit and proper to do so.

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The Court of Appeal's Decision

In a unanimous decision, the Court of Appeal was not persuaded to reverse the decision of the High Court and dismissed the Collector's appeal with costs. The Court of Appeal also maintained the award of interest at the rate of 8% per annum on the refund payable by the Collector to CT.

Conclusion

This decision demonstrates that it is crucial that taxpayers do not take the stamp duty relief available under Section 15(1) of the SA for granted. Unlike in the past, the Collector is scrutinising such applications. Hence, it is important that the sale of business agreement in transactions involving the acquisition of an undertaking is properly drafted to ensure full compliance with the elements of Section 15(1) of the SA and the principles of stamp duty law.

The Tax, GST & Customs Practice of Lee Hishammuddin Allen & Gledhill represented the taxpayer in this stamp duty dispute.

Please contact us at tax@lh-ag.com if you have any queries in respect of this case or stamp duty matters.

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