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## Tax Clauses in Agreements and Late Payment Penalty

Modern commercial agreements may contain a clause that specifies the party who bears the contractual obligation to pay the consumption taxes chargeable on the transaction. Recently, the High Court in *L & L Glass Aluminium Trading Sdn Bhd (in liq) v MBond Manufacturers Sdn Bhd & Anor (2021) MSTC 30-459* made an interesting decision on the issue of whether, in instances where the party who is contractually liable to pay the consumption taxes delays in payment, the same party would also be liable for any late payment penalty imposed by the Royal Malaysian Customs Department (**Customs**).

### Background

L & L was a company registered under the Goods and Services Tax Act 2014 (**GST Act**). It was placed under liquidation in September 2016.

In July 2017, L & L entered into a sale and purchase agreement (**SPA**) with MBond for the sale of two plots of land. Pursuant to clause 7.1 of the SPA, both parties acknowledged that MBond, as the purchaser, shall pay the GST chargeable on the transaction.

In May 2018, L & L issued invoices to MBond for the land. The invoices included the purchase price and the GST amount. However, MBond only paid the purchase price.

In September 2018, Customs issued a notice to L & L to demand the GST payable in respect of the sale and purchase of the land. L & L did not pay the GST amount to Customs as it had not received the sum from MBond. Customs proceeded to impose late payment penalty on L & L.

In October 2018, L & L requested MBond to pay the GST amount and penalty. MBond paid part of the amount, which L & L has remitted to Customs. However, MBond failed to settle the balance and L & L commenced an action against MBond in the Sessions Court. In its defence, MBond submitted that it was not liable for the



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GST amount as L & L had failed to comply with clause 7.4 of the SPA which requires them to provide their GST registration number. The Sessions Court held in favour of MBond, and L & L appealed to the High Court.

### High Court's decision

The High Court allowed L & L's appeal and ordered MBond to pay the remaining GST amount and penalty to Customs. According to the High Court:

- (a) clause 7.1 of the SPA clearly states that MBond, as the purchaser, shall bear the GST amount. It is the duty of the court to give effect to the clear intention of the parties as expressed in the agreements which is in clear, unambiguous and unmistakable language. If those words are clear, the court must give effect to the plain meaning of the words however much it may dislike the result.
- (b) MBond knew that L & L was under liquidation when executing the SPA. Therefore, L & L would not bear or advance the GST on its behalf since this would have an adverse effect on the other creditors of L & L.
- (c) MBond had never raised the issue of non-compliance with clause 7.4 of the SPA when making partial payment of the GST to L & L. The partial payment was made without objection or reservation. Therefore, it was improper for MBond to raise the issue with respect to clause 7.4 of the SPA in court; and
- (d) MBond was responsible for paying the GST amount as well as the penalty imposed by Customs as it was its failure to comply with clause 7.1 of the SPA which resulted in L & L being asked to pay the GST and penalty by Customs.

### Our comments

Based on the written grounds, it appears that the High Court has considered the case from a commercial perspective rather than L & L's obligations as the taxable person under the GST Act. Pursuant to s 41 of the GST Act, the burden to pay GST rests on the taxable person or entity registered under the GST Act. A similar provision is provided under s 26 of the Sales Tax Act 2018 and the Service Tax Act 2018. The taxable person's obligation to pay is not subject to payment by the end consumer (although, in the case of service tax, there is a grace period of one year from the date the taxable service is rendered).

In the circumstances, it is arguable that, notwithstanding the absence of payment by the purchaser (as the party contractually liable to bear the consumption taxes), the taxable person should have paid the GST amount to Customs within the stipulated

period. The taxable person may then recover the GST amount from the purchaser. In the event that the taxable person is unable to recover the GST amount, he may proceed to claim bad debt in accordance with the provisions under GST Act.

If the taxable person had paid the GST amount within the stipulated period, the issue of late payment penalty would not have arisen. The penalty is consequential to the taxable person's failure to pay the GST to Customs within the stipulated time. Therefore, the purchaser should arguably not be liable for the penalty for late payment of GST, unless it is expressly provided in the agreement that the purchaser will also indemnify any penalty arising from any late payment. There should be a distinction between the liability to pay GST and the liability to bear the penalty arising from any late payment.

It is unclear from the written grounds whether the High Court has considered the above in arriving at its decision. It is also unclear whether the court would have arrived at a different decision if L & L was not under liquidation and no conflicting interest of other creditors was involved. We understand from the solicitors representing MBond that they have filed an appeal against the High Court's decision to the Court of Appeal. The appeal is currently in the case management stage.

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If you have any queries pertaining to bills of demand which have been raised by Customs, please contact the authors or their team partners, [Dato' Nitin Nadkarni](#) and [Jason Tan Jia Xin](#), at [tax@lh-ag.com](mailto:tax@lh-ag.com)

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