

# Tax e-Alert

30 MAY 2019

## Interim Stay Against Payment Of Disputed Tax

*BTSSB v Ketua Pengarah Hasil Dalam Negeri [2019] (CA)*

The taxpayer filed an application for an interim stay of proceedings at the Court of Appeal pending its appeal (**Appeal**) against the High Court's dismissal of its leave application for judicial review (**Leave Application**).

On 10.5.2019, our lawyers from the Tax, SST & Customs Practice successfully represented the taxpayer at the Court of Appeal and secured an interim stay order.

### Brief Facts

The taxpayer is in the business of property development and investment. Upon completion of its shopping complex in 2003, the taxpayer divided the completed lots into stocks (for the purpose of sale) and investment units (to be retained for long-term investment). The taxpayer has retained, among other things, two large units as its investment property, and had classified the units as such in its audited accounts.

In 2016, the taxpayer disposed of the two large units to a government agency and submitted the real property gains tax (**RPGT**) return forms to the Director General of Inland Revenue (**DGIR**). In 2018, instead of assessing the taxpayer for RPGT, the DGIR conducted a tax audit on the taxpayer and alleged that the gains from the sale of the said units were subject to income tax under Section 4(a) of the Income Tax Act 1967 (**ITA**).

The DGIR subsequently raised additional assessments for income tax for nearly RM70 million against the taxpayer. Aggrieved by the DGIR's decision, the taxpayer filed the Leave Application and order for stay. The High Court granted an interim stay pending the disposal of the Leave Application, but subsequently dismissed the Leave Application.

However, the High Court granted another interim stay pending the taxpayer's appeal to the Court of Appeal against the High Court's decision.

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## Taxpayer's Contentions

The taxpayer argued that the main issue here relates to the disposal of the two units in question and reference was made to the Court of Appeal's decision in the *ALF Properties* case, in which it was held that a disposal of investment property would be subjected to RPGT instead of income tax. Accordingly, the taxpayer sought an interim stay pending the disposal of the Appeal pursuant to Section 44 of the Courts of Judicature Act 1964 (**CJA**), which reads:

### *Incidental directions and interim orders*

- (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
- (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
- (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

Among other things, the taxpayer's argument was that the Court of Appeal has the power to grant an interim stay of proceedings pending the Appeal. The taxpayer argued that the legal test to grant a stay order under Section 44 is lower than the special circumstances test, as held recently by the Court of Appeal in the *Ong Joh Hou* case.

The purpose of a Section 44 stay is to preserve the integrity of a statutory appeal and, as such, the interim stay should be granted pending the outcome of the Appeal.

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The taxpayer further argued that the Appeal before the Court of Appeal would be rendered nugatory, and that any proceedings taken by the DGIR in the meantime would be unfairly prejudicial to the taxpayer. The taxes and penalty imposed by the DGIR were of a substantial amount and would cause an operational crisis on the taxpayer's business. Additionally, the detriment and negative effects that the taxpayer would suffer were not quantifiable and would not be compensated by way of damages.

In any event, the taxpayer also submitted that even if the Court of Appeal were minded to apply the special circumstances test in this case, the facts would warrant a stay of proceedings as well for these reasons:

- The balance of convenience was heavily tilted to the granting of stay;
- The threat of civil action being brought against the taxpayer;
- The abuse of power by the DGIR.

### DGIR's Response

The DGIR argued that income tax recovery operates in a "pay first, talk later" mechanism, whereby Section 103(1) of the ITA provides that taxes payable under an additional assessment must be paid, regardless whether or not an appeal has been brought against the assessment. The DGIR is empowered to institute civil proceedings to recover the taxes due and payable under Section 106(1) of the ITA.

The DGIR further contended that the decision in the *ALF Properties* case relied on by the taxpayer relates to the merits of the Appeal, and should not be a factor in the granting of stay of proceedings.

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## Court of Appeal's Decision

The Court of Appeal agreed with the arguments advanced by our tax lawyers on behalf of the taxpayer, and unanimously granted the application for an interim stay pending the disposal of Appeal against the High Court's dismissal of the Leave Application. The Court of Appeal held that the stay is to preserve the integrity of the Appeal.

## Conclusion

Previously, our courts took the position that a stay under Section 44 will only be granted if there are special circumstances supporting the application. Following the recent decision in the *Ong Joh Hou* case, it is clear that the main consideration of the Court of Appeal in granting a stay is to consider whether the integrity of the Appeal could be preserved, which is a lower threshold as compared to the special circumstance test. Hence, the Court of Appeal is likely to lean towards the favour of an appellant taxpayer in a *bona fide* application and grant a Section 44 stay in a fit and proper case, unless the application for stay is indeed frivolous.

The taxpayer was successfully represented by tax partners, Datuk D P Naban and S Saravana Kumar, together with associate, Chris Toh Pei Roo, from the firm's Tax, SST & Customs Practice.

If you require any legal representation or strategy to challenge the assessments raised by the DGIR, please contact our tax partners **Datuk D P Naban** and **S Saravana Kumar** at [tax@lh-ag.com](mailto:tax@lh-ag.com)

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