

# Tax e-Alert

5 DECEMBER 2019

## The Right To Carry Forward Unutilised Allowances Indefinitely

On 27.11.2018, the Finance Act 2018 (**FA 2018**) was gazetted. Section 10 of the FA 2018 imposes a seven-year time limit for the carrying forward of unutilised investment allowances by a taxpayer.

Recently, two taxpayers filed applications for judicial review challenging the imposition of the seven-year time limit on the tax incentives granted by the Minister of Finance (**MoF**). Our lawyers from the firm's Tax, SST & Customs Practice succeeded in obtaining leave from the High Court to commence judicial review proceedings.

### Background Facts

The principal activities of the taxpayers are the operation and maintenance of power plants for the purpose of the generation, transmission, distribution and retail of electricity. They applied to the MoF for tax incentives to be granted (**Applications for Tax Incentives**) under Schedule 7B of the Income Tax Act 1967 (**ITA**).

The MoF approved the taxpayers' Applications for Tax Incentives (**Approval for Tax Incentives**) under Schedule 7B of the ITA, where, among others, the taxpayers are entitled to carry forward any unutilised allowances for a particular YA to subsequent YAs indefinitely, until the entire amount of the allowance has been claimed. In reliance upon the Approval for Tax Incentives, the taxpayers proceeded with the investments in their new power plant projects, under which significant expenses were incurred.

Subsequently, during the tabling of the 2019 Budget, the MoF announced a seven-year time limit on the carrying forward of allowances in respect of incentives granted under Schedule 7B of the ITA through amendments to be introduced by the FA 2018. In light of this, the taxpayers wrote to the MoF for confirmation that they would be exempted from the seven-year time limit. Among others, the taxpayers highlighted that:

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- (a) This was necessary to ensure that they would be able to enjoy the incentives granted under the terms of the Approval for Tax Incentives; and
- (b) The taxpayers' decision to carry out the new projects and to incur the expenditure under them had been based on, and in reliance upon, the terms of the Approval for Tax Incentives, under which the seven-year time limit had not been imposed at the material time.

Notwithstanding the above and various representations by the taxpayers to the MoF that the terms of the Approval for Tax Incentives should be given effect, the MoF arrived at its impugned decision to reject the taxpayers' appeal for the MoF to uphold the terms of the Approval for Tax Incentives. In particular, the MoF refused to maintain and honour its approval for the unutilised allowances to be carried forward indefinitely. Aggrieved by the MoF's decision, the taxpayers applied for judicial review.

### Taxpayers' Contentions

The taxpayers argued that leave should be granted on the basis that they satisfy the "adversely affected" threshold *locus standi* test and that the applications are not frivolous.

#### *MoF's decision 'adversely affects' the taxpayers*

The taxpayers contended that they have clearly been "adversely affected" by the MoF's decision to renege on the terms of the Approval for Tax Incentives, notwithstanding that the taxpayers had acted and relied upon the same. The taxpayers argued that:

- (a) their interest in the subject matter is genuine; and
- (b) their right to enjoy the benefits of the Approval for Tax Incentives had been altered by the MoF's decision.

#### *The leave application is not frivolous*

The taxpayers further contended that the leave applications are clearly not frivolous and merit further argument at the substantive stage as the MoF's decision had clearly arisen from

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an error of law as it had failed to take into account the following relevant considerations.

(i) *Breach of the taxpayers' vested rights*

The taxpayers argued that the MoF had failed to consider their vested rights, which entitled the taxpayers, among others, to carry forward any unutilised allowances for a particular YA to subsequent YAs indefinitely, until the entire amount of the allowance has been claimed. These vested rights have been preserved by Section 30 of the Interpretations Act 1948 and 1967 (**Interpretations Act**), which reads:

“(1) The repeal of a written law in whole or in part shall not —

...

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law.”

In the circumstances, the MoF had disregarded Section 30 of the Interpretations Act and the decisions of the superior courts as:

- (a) There is a presumption that the amendments by the FA 2018 are not to apply retrospectively;
- (b) The construction that the amendments apply to the taxpayers should be avoided as this would inflict a detriment upon the taxpayers by taking away or impairing their vested rights;
- (c) There is nothing in the FA 2018 which has expressly taken away the taxpayers' vested rights; and
- (d) As there is doubt whether Parliament had intended to impair the taxpayers' vested rights, such ambiguity must be construed in favour of the taxpayers.

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*(ii) Denial and frustration of the taxpayers' legitimate expectations*

The taxpayers also argued that the MoF had failed to consider their legitimate expectations that their vested rights and the terms of the Approval for Tax Incentives upon which the taxpayers had acted and relied would be upheld. Specifically, the taxpayers had acquired a legitimate expectation that they would be entitled to carry forward any unutilised allowances indefinitely to subsequent YAs.

The MoF had disregarded the decisions of the superior courts and the English courts for the following reasons:

- (a) It would not be open for the MoF to impose further conditions on the Approval for Tax Incentives, i.e. the seven-year time limit, as this would be an abuse of power that is unduly oppressive, and a violation of the taxpayers' legitimate expectations that they would be free to enjoy the benefits of such approvals;
- (b) The taxpayers had a legitimate expectation that they would be entitled to carry forward any unutilised allowances indefinitely until the entire amount of the allowance has been claimed; and
- (c) The MoF had induced a legitimate expectation that is substantive and not merely procedural, and the frustration of such expectation through the MoF's refusal to honour the terms of the Approval for Tax Incentives was so unfair such that it would amount to an abuse of power.

*(iii) Duty to give reasons*

The taxpayers further argued that the MoF had failed to consider that the circumstances of the matter, i.e. the sudden imposition of additional limitation, and the MoF's failure to maintain and honour the terms of the Approval for Tax Incentives demanded that reasons be given for the decision. Since the MoF had failed to give any reasons for its decision, the decision was liable to be quashed as being bad in law.

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## Our Comments

While the MoF enjoys executive freedom to formulate policies and decisions, it does not enjoy unfettered discretion and, accordingly, its decision may be judicially reviewed if it is found that the decision has arisen from an error of law.

Further, the imposition of the seven-year time limit to carry forward allowances would most significantly affect strategic projects involving heavy capital investments with relatively long gestation periods. As such, taxpayers are advised to review their tax treatments frequently and keep track of their allowances to ensure that they receive the optimum tax advantage in the manner prescribed by law.

The taxpayers were successfully represented by partner, S Saravana Kumar, together with associates, Chris Toh Pei Roo and Ng Kar Ngai, from the firm's Tax, SST & Customs Practice.

If you have queries pertaining to the carrying forward of unutilised losses or allowances, please contact our Tax, SST & Customs partners **Datuk D P Naban** or **S Saravana Kumar** at [tax@lh-ag.com](mailto:tax@lh-ag.com)

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