

# Tax e-Alert

7 MARCH 2019

## Judgments From IRB's Civil Proceedings Can Be Set Aside

The Inland Revenue Board of Malaysia (**IRB**) is armed with wide powers under the Income Tax Act 1967 (**ITA**) to ensure taxes due, including disputed taxes, are collected. Section 106(1) and (3) of the ITA allow the IRB to recover any tax due and payable by civil proceedings as a debt due to the government, notwithstanding any contention or plea by the taxpayer that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased. Hence, the civil proceedings initiated by the IRB would more than likely end with a speedy summary judgment or judgment in default, which could spell misfortune for any taxpayer, especially when the taxes due are in dispute.

However, as acknowledged by our courts, the IRB's assessments are not immune to error. In a recent decision, the High Court acknowledged that judgments from the IRB's civil recovery proceedings are not set in stone and can be set aside if the circumstances warrant it.

Our tax lawyers successfully represented the taxpayer in a case where the High Court and the Court of Appeal had dismissed the IRB's application to strike out the taxpayer's action to set aside a civil recovery judgment obtained by the IRB about 10 years ago.

### Facts

The taxpayer, a dual purpose company in the business of property investment and property development, held certain properties as stock and investment properties, respectively. The taxpayer then executed several sale and purchase agreements (**SPAs**) for the sale of properties held as stocks. However, some of the SPAs were subsequently aborted, rendering the sales incomplete. There was no disposal of the properties in question, and the taxpayer did not obtain any receivable income in respect of these transactions to be taxed under the ITA. To date, the

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taxpayer still owns the affected properties, a fact that has also been acknowledged by the IRB in a subsequent tax audit.

Notwithstanding that the SPAs had been aborted, the IRB proceeded to raise several notices of additional assessment against the taxpayer, which included the profit purportedly made from the aborted sales. When the taxpayer refused to pay the disputed taxes, the IRB proceeded to commence three separate civil recovery proceedings, obtaining one judgment in default and two summary judgments against the taxpayer (**Judgments**).

Many years later, in another recent tax audit, the IRB alleged that the properties in relation to the aborted SPAs were stocks that had been withdrawn for own use and raised further assessments. Prompted by this unreasonable approach of the IRB, the taxpayer then filed a writ action to set aside the Judgments on the grounds that, among others, the IRB had abused the process of court by wrongfully, fraudulently and in bad faith misrepresented the facts of the taxpayer's case before the High Court in obtaining the Judgments.

In response, the IRB applied to strike out the taxpayer's setting aside application. The IRB's application was dismissed by the High Court and the Court of Appeal.

### The Law On Striking Out

Order 18 rule 19(1) of the Rules of Court 2012 states:

- “(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
- (a) it discloses no reasonable cause of action or defence, as the case may be;
  - (b) it is scandalous, frivolous or vexatious;
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the Court,

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and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The basic principles governing the exercise of this power are:

- It ought not to be invoked save in a plain and obvious case (*Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 3 CLJ 305).
- So long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and unlikely to succeed at the trial is no grounds for the pleadings to be struck out (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7).
- The party seeking to strike out has the burden of showing that the case is plainly and obviously unsustainable (*Michael Philip Spears v Ketua Pengarah Penjara Kajang* [2017] 3 CLJ 161).

### IRB's Arguments

The IRB's striking out application was on the premise that the taxpayer's action was frivolous, vexatious and an abuse of court process. In support of this contention, the IRB argued that:

- The Judgments obtained were valid and in order as they were based on the notice of assessments raised by the IRB pursuant to the provisions of the ITA.
- The Judgments have been “admitted” by the taxpayer as it had made partial payment.
- The taxpayer's action concerned technical aspects of taxation which should have been heard before the Special Commissioners of Income Tax and not the civil courts.

### Taxpayer's Arguments

The taxpayer contended that the setting aside application did not warrant a summary disposal via striking out as:

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- There are various issues to be tried and the taxpayer has a meritorious claim.
- The pleadings clearly showed the existence of sustainable cause of actions and raised issues which warranted a full trial before the High Court.
- There were serious conflicts on the material facts evinced through the conflicting affidavits, particularly relating to the issues on the existence of fraud, which could only be resolved through cross-examination and not by a trial on affidavits.
- New or further evidence was only obtained subsequently when the IRB shifted its position on the unsold properties.

The taxpayer further highlighted that in obtaining the Judgments, the IRB had misrepresented to the High Court that there were sales of properties allegedly made by the taxpayer when it very well knew that:

- Some of the SPAs were subsequently terminated and aborted.
- No profits were made by the taxpayer in relation to the aborted SPAs.
- These properties are still held by the taxpayer.

The taxpayer submitted that the IRB had wrongfully, fraudulently and *mala fide* misrepresented to the High Court in obtaining the Judgments by abusing the court process and the ITA.

## Judgment

Upon hearing the submissions of the parties, both the High Court and the Court of Appeal agreed that the taxpayer's action involves the determination of facts which can only be proved through witness testimonies and documentary evidence in a full

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trial. It was decided that the various issues raised clearly showed that the case was not suitable to be determined via summary procedures.

On that note, the IRB's striking out application was dismissed by both the High Court and the Court of Appeal and the Judgments obtained are still susceptible to be set aside after a full trial.

## Conclusion

This matter was concluded recently with the IRB entering into a consent judgment before the High Court to set aside the Judgments. This case shows that judgments obtained through civil recovery proceedings by the IRB are not absolute. If such judgments are deemed to be obtained through erroneous grounds, they may still be reopened and be subjected to the scrutiny of the courts.

If you have queries pertaining to the above or require assistance in reviewing your tax position, please contact our tax partners **Datuk D P Naban** or **S Saravana Kumar** at [tax@lh-ag.com](mailto:tax@lh-ag.com)

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