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2 OCTOBER 2019

## **Taxpayer Granted Stay Order**

### *SPSA v Ketua Pengarah Hasil Dalam Negeri*

Yesterday, in another landmark decision, the Court of Appeal granted a stay order to a taxpayer pending the determination of the taxpayer's appeal against the refusal of the High Court to grant leave to commence judicial review. The stay order allows the taxpayer to defer the payment of disputed taxes amounting to more than RM15 million.

The taxpayer was successfully represented by lawyers from the firm's Tax, SST & Customs Practice, led by senior partner, Datuk D P Naban, who was assisted by associate, Jhuliann Nasshvind, and pupil, Wong Eu Ca Matthew.

### **Brief Facts**

The taxpayer is a company within one of the biggest multinationals in the world. It is a party to a contractual arrangement for the sharing of services and resources within the scope of a Cost Contribution Arrangement (**CCA**) within its group. The CCA allows the main service companies to render management services to its affiliates within the group. As a participant of the CCA, the taxpayer derives mutual and proportionate benefits by having access to, and receiving services from, other participants of the CCA.

On 31.7.2019, the Director General of Inland Revenue (**DGIR**) took a different view and invoked Section 140A of the Income Tax Act 1967 (**ITA**), raising additional assessments against the taxpayer. The additional assessments were as a result of the DGIR's refusal to recognise the CCA. Instead, the DGIR recharacterised the CCA as an intra-group services arrangement and contended that the services provided by the taxpayer should have been subjected to a mark-up. Aggrieved by the DGIR's decision, the taxpayer sought to commence judicial review proceedings together with an order for stay of proceedings. The taxpayer's key argument was that Section 140A does not empower the DGIR to recharacterise a transaction from that of a CCA to intra-group services.

The High Court did not grant leave for judicial review on the basis that the question of law raised by the taxpayer was best determined before the Special Commissioners of Income Tax. The court, however, granted an interim stay of 30 days to enable the taxpayer to appeal to the Court of Appeal.

## Taxpayer's Contentions

The main issue was whether or not the DGIR is entitled in law to disregard and recharacterise the CCA by arbitrarily invoking Section 140A, instead of Section 140(1), of the ITA. Datuk Naban argued that based on the then Supreme Court's decision in the *Hup Cheong Timber* case, in which the DGIR was of the view that the transaction had been entered into for the purpose of avoiding taxes, the DGIR should then invoke Section 140(1) to make an adjustment, and, in doing so, must provide particulars of the adjustment made.

Accordingly, the taxpayer sought an interim stay order pending the disposal of the appeal pursuant to Section 44 of the Courts of Judicature Act 1964. The taxpayer submitted that the Court of Appeal has the jurisdiction to grant an interim stay pending appeal, and that the legal test to grant a stay under Section 44 is lower than the special circumstances test.

The purpose of a stay under Section 44 is to preserve the integrity of the statutory appeal and, as such, an interim stay should be granted pending the outcome of the appeal. An interim order would prevent the pending appeal from being rendered nugatory — this is because the purpose of the judicial review proceedings sought is to challenge the DGIR's assessments. Thus, the refusal to grant a stay and to allow the DGIR to enforce payment by the taxpayer would be detrimental to the effectiveness of the pending appeal.

## DGIR's Response

The DGIR submitted that the taxpayer had attempted to delay the enforcement of the assessments by filing the judicial review application alongside a certificate of urgency within 30 days of the additional assessments. This had resulted in the initial High Court hearing to be heard which resulted in an interim stay of 30 days. The DGIR asserted that the taxpayer has the financial capability to pay the additional assessments as it had applied for an instalment payment scheme.

## Court of Appeal's Decision

The Court of Appeal agreed with the arguments advanced on behalf of the taxpayer and unanimously granted the interim stay application pending the disposal of the appeal against the High Court's decision. The Court of Appeal found that the taxpayer's pending appeal would be rendered nugatory if the stay order sought is not granted.

If you have any tax dispute with the DGIR or the Director General of Customs, please contact our Tax, SST & Customs partners, **Datuk D P Naban** and **S Saravana Kumar**, at [tax@lh-ag.com](mailto:tax@lh-ag.com)

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