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27 MAY 2020

## Top Eight Considerations for Tax Assessments Received During and After the CMCO

Although there is no guarantee that the ongoing Conditional Movement Control Order (**CMCO**) will come to an end soon, many businesses are resuming operations and striving to adapt to the “new normal”. Government and public related agencies, including land offices, the Royal Malaysian Customs Department and the Inland Revenue Board (**IRB**) of Malaysia, have also reopened, albeit with expected restrictions. Sooner or later, the days of IRB officers knocking on businessmen’s doors and having assessments raised will return.

Thus, we highlight the following eight legal considerations for businesses upon receiving an assessment from the IRB during and after the CMCO:

### 1. Payment of taxes

When an assessment is raised by the IRB against a taxpayer, the additional taxes payable shall be due and payable on the day in which the assessment is served on the taxpayer. The obligation to pay the additional taxes will continue despite any appeal filed by the taxpayer.<sup>1</sup>

If such taxes are not paid within 30 days from the date of service of the assessment, a 10 per cent penalty will be imposed on any unpaid taxes under the assessment without further notice.<sup>2</sup>

If these taxes are left unpaid, the government of Malaysia can recover these sums as a debt due to the government and file an action against the taxpayer in court.<sup>3</sup> In such proceedings, the court cannot entertain any plea that the amount of tax claimed is excessive, incorrectly assessed or increased, or under appeal.<sup>4</sup> Taxpayers should be mindful that this obligation remains unchanged despite the current climate, save for instances where

<sup>1</sup> Income Tax Act 1967 (**ITA**), s 103(2). All references shall be to the ITA, unless otherwise stated.  
<sup>2</sup> Section 103(5)  
<sup>3</sup> Section 106(1)  
<sup>4</sup> Section 106(3)

an application for instalment is made or a stay order from the court is obtained.

## 2. **Application for instalments**

After an assessment is raised, the Director General of Inland Revenue (**Director General**) has the discretion to allow the additional taxes to be paid by instalments, as well as the power to determine the amount and period of instalment.<sup>5</sup>

Hence, a taxpayer faced with an assessment has the option of applying to the IRB for an instalment scheme by filing a formal application, supported by evidence of financial difficulties suffered. Should the taxpayer intend to file an appeal against the assessment, such application can still be made by stating that the payment of taxes shall not be construed as an admission of liability and is made under protest.

In usual cases, taxpayers are required to submit a number of post-dated cheques according to the months of instalment granted. For taxpayers who intend to apply for the instalments scheme, it is advised that such applications be made with haste to mitigate the imposition of any further penalty.

## 3. **Filing of appeal (Form Q)**

Taxpayers aggrieved by the decision of the IRB have the right to appeal against such assessments by filing a written notice of appeal (Form Q) to the Director General within 30 days from the receipt of such assessment. Form Q should be accompanied by the taxpayer's grounds for disagreeing with the IRB's position.

As such notices of appeal would first be reviewed by the Director General within 12 months, with the possibility of being resolved<sup>6</sup> before they are forwarded to the Special Commissioners of Income Tax (**SCIT**)<sup>7</sup>, it is advisable for such notices to contain sufficient particulars for the purposes of subsequent dispute resolution proceedings. Again, it should be borne in mind that the filing of an appeal would not absolve taxpayers of their obligation to settle such taxes.

Notwithstanding the operation of the CMCO, the statutory 30-day period to file an appeal must be complied with to ensure that any appeals would be accepted and operative in the eyes of the law. If any taxpayer fails to file an appeal within the statutory time frame, he or she must seek an extension of time from the IRB and be subject to their discretion.

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<sup>5</sup> Section 103(5)  
<sup>6</sup> Section 101(1)  
<sup>7</sup> Section 102(1)

#### 4. Extension of time to file an appeal

Taxpayers can seek an extension of time to file an appeal and must be made through a formal application (Form N) to the Director General within seven years after the lapse of the 30-day period.<sup>8</sup> Form N must be accompanied by sufficient grounds (e.g. restriction of movement due to the CMCO or difficulties obtaining professional advice) to justify such delay.

If the Director General is satisfied that there are reasonable causes for the delay, an extension of time to file an appeal will be granted. This avenue is readily available under the ITA, regardless of any announcement (or the lack thereof) by the IRB.

Should such application for extension be denied, taxpayers still have the avenue to provide further representations against such denial and these representations would be heard and decided by the SCIT, whose decision is final.

In the FAQ released by the IRB, it has been conceded that the IRB will allow all applications for extension of time if the last day of the 30-day period to file an appeal falls within the Movement Control Order (**MCO**) period.<sup>9</sup>

#### 5. Judicial review application (Leave and stay)

Taxpayers who receive tax assessments have the option of filing a judicial review application against such assessments to the High Court. The ordinary threshold for leave for a judicial review application is extremely low, with the sole question being whether the application is frivolous. Even in tax cases where an alternative remedy of appeal exists under s 99 of the ITA, judicial review remains available so long as exceptional circumstances are present.

The leading case in the matter is *Jagdis Singh*,<sup>10</sup> where the (then) Supreme Court laid the legal foundation of the availability of judicial review where an alternative remedy exists. This is provided that the cases consist of any of the exceptional circumstances:

- (a) A clear lack of jurisdiction;
- (b) A blatant failure to perform some statutory duty;
- (c) A serious breach of the principles of natural justice.

A stay order in a judicial review application is not the same as a stay of execution after judgment in judicial proceedings. It is

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<sup>8</sup> Section 100(1)

<sup>9</sup> IRB's Frequently Asked Questions on Tax Matters During the Movement Control Order and the Conditional Movement Control Order Period (18 March 2020 to 12 May 2020) updated on 20 May 2020, question C(3)

<sup>10</sup> *Government of Malaysia & Anor v Jagdis Singh* [1987] CLJ 110 (Rep)

given a wide interpretation to enhance the effectiveness of the judicial review jurisdiction. This is to preserve the status quo by suspending the assessment under challenge pending the determination of the judicial review application, and to prevent the applicant from being denied the full benefit of a successful challenge.

A stay order could also be granted due to the existence of special circumstances in the judicial review application which warrants the grant of a stay. The test for special circumstances is subjective and it is not referred to as an exhaustive list, therefore the existence of special circumstances is specific to each individual's case by design and the courts will look into it on a case-by-case basis.

In light of the previous MCO and the CMCO, the scope of special circumstances may be extended to the realm of the sudden restriction of business operations of taxpayers, especially those not considered as "essential services", and the drastic economic downturn. The restriction of business operations would dramatically affect the taxpayers' cash flow operations, especially when business transactions are interrupted.

The economic downturn may also bring the special circumstance of the possibility of insolvency. As business operations slowly come to a pause, it is possible to show that the execution of the assessment challenged could drain the taxpayer's finances which will lead to eventual insolvency, thus moving the hands of the court to grant a stay.

## **6. Commencement of civil recovery proceedings**

Section 106 of the ITA empowers the government of Malaysia to commence civil recovery proceedings against taxpayers who have taxes due and payable to them. Although the IRB may provide concessions that tax recovery will not be initiated within a certain period, these are merely concessions and have no legal effect of preventing the government from commencing civil recovery proceedings on unpaid taxes in the future.

This may be so despite the current economic climate caused by the global pandemic. The implementation of fiscal policies and measures to aid and boost the country's economy would have caused a surge in the government's spending which, in turn, would only provide more incentives for the government to efficiently commence civil recovery proceedings to obtain the most revenue possible.

## **7. Stay in civil recovery proceedings pending appeal to SCIT**

The government should take cognisance of the current pandemic and defer the commencement or continuation of civil recovery

proceedings<sup>11</sup> to recover unpaid income taxes in light of the hardship that is certain to be faced by all taxpayers. In such proceedings, the courts have held that the ITA does not bar the court's inherent jurisdiction to grant a stay where appropriate.<sup>12</sup> The test applied by the courts in deciding whether stay applications should be allowed is whether or not special circumstances exist. For taxpayers affected by the pandemic, the current circumstances may perhaps be regarded as sufficiently special for a stay to be granted.

Such is the approach that has been taken in India, where the High Court of Allahabad has ordered that all recovery proceedings by state authorities be temporarily deferred in light of the extraordinary situation brought about by COVID-19. This order was only stayed by the Supreme Court of India upon assurances given that the government of India is "fully conscious of the prevailing situation and would itself evolve a proper mechanism to assuage concerns and hardships faced by everyone".<sup>13</sup>

Therefore, it could be argued that the global financial crisis brought about by this pandemic has resulted in major cash flow problems across all sectors of businesses, which will serve as a "special circumstances" in granting a stay in civil recovery proceedings, the lack of which may bankrupt a great extent of companies in the country that have suffered a consequence not of their own doing.

## 8. Travel restrictions

The Director General may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all taxes due and payable.<sup>14</sup>

A notice of the issuance of the certificate shall be served personally or by registered post on the person to whom the certificate relates. However, the non-receipt of the notice by that person will not invalidate anything done under this section.

The Commissioner of Police or Director of Immigration can take all such measures as may be necessary to give effect to the certificate. Such measures include, but are not limited to, the use of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person.

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<sup>11</sup> Sections 103 and 106

<sup>12</sup> *Government of Malaysia v Jasanusa Sdn Bhd* [1995] 2 CLJ 701

<sup>13</sup> *UOI v P D Sunny* (Supreme Court) <<https://itatonline.org/archives/uoivspdsunny-supreme-court-coercive-recovery-of-taxes-etc-during-corona-virus-crisis-the-orders-of-the-allahabad-kerala-high-courts-directing-the-authorities-to-defer-coercive-recovery-of-taxes/>>

<sup>14</sup> Section 104(1)

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Published by the Tax, SST & Customs Practice

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