



Datuk D P Naban
Senior Partner
Tax, SST & Customs
T: +603 6208 5858
E: dpn@lh-ag.com



S Saravana Kumar
Partner
Tax, SST & Customs
T: +603 6208 5813
E: sks@lh-ag.com

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IRB's Appeal To Reinstate Company Dismissed

Ketua Pengarah Hasil Dalam Negeri v Suruhanjaya Syarikat Malaysia & AHBH (Liquidator) (CA)

In a landmark decision on Wednesday, the Court of Appeal unanimously dismissed the appeal by the Inland Revenue Board (**IRB**) against the High Court's decision on the interpretation of Section 535 (1) of the Companies Act 2016 (**CA 2016**).

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

Brief Facts

The IRB filed an application at the High Court to reinstate a company that had been dissolved in order to raise additional tax assessments. The IRB's application had been made under Section 535(1), and named the Companies Commission of Malaysia and the former liquidator of the company as co-defendants. Section 535(1) reads:

"Where a company has been dissolved, the Court may, at any time within two years after the date of dissolution, on an application of the liquidator of the company or of any other person who appears to the Court to be interested, make an order upon such terms as the Court thinks fit declaring the dissolution to have been void, and such proceedings may be taken as might have been taken if the company had not been dissolved."

The IRB's application was made just within the two years from the date of the company's dissolution. However, by the time the matter was fixed for trial, the two-year period had lapsed. The question arose as to whether the two-year period refers to the period within which the application had to be made OR the making of the order by the court.

On an application by the liquidator for a determination of a question of law under Order 14A and/or Order 33 of the Rules of Court 2012, the High Court agreed with the liquidator that it had no jurisdiction to make such an order after expiration of the two-year period. The IRB's application was therefore dismissed. The IRB filed its appeal to the Court of Appeal against this decision.

IRB's arguments

The IRB argued that Section 535(1) contained an ambiguity which requires it to be given a purposive interpretation. Further, it would be prejudiced by the literal interpretation as it would mean that the court would have no jurisdiction to make the order, even though its application had been filed within two years from the date of dissolution of the company. Alternatively, the court also has the power to extend time either based on its inherent jurisdiction, or under Section 582 of the CA 2016.

The IRB relied on various decisions from other jurisdictions, such as England, Hong Kong, New Zealand and Australia, all of which have provisions similar to Section 535 of the CA 2016. These decisions took the view that the two-year period refers to the making of the application, and not the granting of the order. As litigants are unable to control the date on which the court makes the order, it would cause practical inconvenience and unfairness to read it otherwise.

The liquidator's arguments

Our lawyers, who appeared for the liquidator, highlighted that statutory provisions have to be given their literal meaning as to do otherwise would be tantamount to a usurpation of the legislative function of Parliament by the courts. Further, the cases relied on by the IRB are all from jurisdictions that have subsequently amended their respective provisions to clarify the law. By contrast, Malaysia has adopted Section 355 from the Companies Act 1965 in its entirety in enacting Section 535.

Here, Section 535(1) does not contain any ambiguity and the two-year period clearly refers to the making of the order by the court. The cases referred to by the IRB have not actually identified any ambiguity in the provision but rather have been based on perceived practical inconveniences on a literal interpretation. In Malaysia, however, the Federal Court has held unequivocally on several occasions that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.

Court of Appeal's Decision

The Court of Appeal agreed with the arguments advanced on behalf of the liquidator and dismissed the IRB's appeal. The Court of Appeal held that it is constrained to give effect to the literal and plain meaning of Section 535(1). The two-year time period refers to the making of the order and not the filing of the application. Any remedy to perceived inconveniences with this provision would lie with Parliament and not the courts.

Conclusion

This case is a reminder that the IRB is continuing its intense efforts to collect additional taxes, even against companies that have been wound up. Taxpayers, liquidators and former directors should be mindful of this and seek proper legal consultation at the earliest opportunity to preserve their rights.

If you require any representation or legal strategy to challenge the IRB's tax recovery mechanisms, please contact our Tax, SST & Customs partners, **Datuk D P Naban** or **S Saravana Kumar**, at tax@lh-ag.com

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia

T +603 6208 5888
F +603 6201 0122/0136
E enquiry@lh-ag.com
W www.lh-ag.com

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