



COURT OF APPEAL AFFIRMS PRIORITY PAYMENT TO SECURED CREDITOR OVER INLAND REVENUE BOARD FOR REAL PROPERTY GAINS TAX

The Court of Appeal recently upheld the decision of the High Court which had decided in favour of our client, ordering that the real property gains tax ('RPGT') that had been paid to the Inland Revenue Board ('IRB') under Section 21B of the Real Property Gains Tax Act 1976 ('RPGT Act') be refunded to our client for payment to the secured creditor who has priority over the IRB in respect of the RPGT assessed.

Background

A company ('Company') had obtained banking facilities from several financial institutions and provided charges over its assets as security under a Debenture. The Company was subsequently wound up and the Receiver that was appointed under the Debenture sold the charged lands for the Debenture-holder.

Upon disposal of the lands, 3% of the purchase price was retained and paid to the IRB pursuant to Section 21B (1) of the RPGT Act. The IRB further assessed there was chargeable gain from the disposal of lands and sought payment of the balance RPGT assessed.

The Company, through the Receiver, made payment under protest of the balance RPGT sum and further sought full refund of the total RPGT sum paid, on the basis that the Debenture-holder as secured creditor was entitled to priority payment of the full purchase price over and above IRB. The IRB declined, and the matter was brought to court to be determined.

The High Court Action

The High Court allowed the application and declared that the Government of Malaysia and Director General of the IRB ranked 6th in the order of priorities of unsecured debts in winding up as provided under Section 527 of the Companies Act 2016 ('CA 2016') and that the RPGT remitted should be refunded to the Company.

In coming to its decision, the High Court made the following observations, inter alia:

- a. that the provision on priorities of payment on unsecured debts contained in Section 527 of the CA 2016 binds the IRB,
- b. that the specific provision on dealing with priority of payment of unsecured debts in Section 527 of the CA 2016 prevails over the RPGT Act which only provides when RPGT is payable but does not set out the order of priority of payment when the RPGT as assessed is payable by a company in winding up or in liquidation,
- c. the proceeds from the sale should be first utilised to pay the debt secured under the charges and that the IRB's decision to demand immediate payment of the RPGT is illegal,



- d. the Court agreed that it was proper for the Company to resort to effecting payment 'under protest' and to thereafter seek relief from the Court to avoid being mulcted, and
- e. that even if the notice of assessment of RPGT is raised after the Company is ordered to be wound up, under section 523(3) of the CA 2016, IRB is at liberty to lodge a proof of debt.

The Court of Appeal

The Court of Appeal upheld the decision of the High Court and dismissed IRB's appeal. No application was made for leave to appeal to the Federal Court by the IRB.

Conclusion

The decision affirms that RPGT being a federal tax ranks 6th pursuant to Section 527(1)(f) of the CA 2016 as an unsecured debt.

The unreported High Court Judgment can be found at Carotech Berhad (Receiver & Manager Appointed) (In Liquidation) v Government of Malaysia & Anor [2022] 1 LNS 1649.

The Applicant was represented by Ng Sai Yeang and Tan Shey Min of Messrs Raja, Darryl & Loh.

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