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LHAG update

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IRB's Appeal Struck Out

Ketua Pengarah Hasil Dalam Negeri v ORA (CA)

Yesterday, the Court of Appeal (**CA**) unanimously struck out the Director General of Inland Revenue's (**DGIR**) appeal against the High Court's decision due to non-compliance with the rules of civil procedure. The CA emphasised that mere inadvertence and oversight on the part of the litigant has never been, and can never be, a reason for non-compliance with civil procedure rules. Previously, the High Court allowed the judicial review (**JR**) application sought by ORA, a Danish company, against the DGIR to subject the payments received by them to withholding tax.

Brief Facts

After the High Court's decision in favour of ORA (please refer to our earlier Tax e-Alert, "Alam Maritim Decision Distinguished" for details), the DGIR had proceeded to file its notice of appeal to the court. However:

) The DGIR had failed to serve the notice of appeal upon the taxpayer in accordance with Rule 6 of the Rules of the Court of Appeal 1994 (**ROC 1994**). Rule 6 clearly requires the notice of appeal to be served on all parties directly affected by the appeal.

> The CA has recently reminded in *Chen Kong Theatres Sdn Bhd (in liquidation) & Ors v Lee Giok Tee & Anor* [2018] 8 CLJ 10 that Rule 6 is mandatory in its terms, and that non-compliance would render the appeal incompetent.

) Further, the DGIR had failed to file and serve the records of appeal within time nor provided the taxpayer's solicitors with the index for the records of appeal.

> The CA has stated, too, in *Chen Kong* (*supra*) that non-service of the notice of appeal would be further compounded by late service of the records of appeal. In *Pentadbir Tanah Kuala Selangor v Maybank Islamic Bhd; Menteri Besar Selangor Diperbadankan* [2015] 9 CLJ 197, the CA also struck out an appeal based on among others, the public body's failure to file

its records of appeal within time.

Additionally, ORA further submitted that:

) Although the court has a discretion to extend time, this was not an unprincipled discretion and there must be some relevant evidential material provided on which the discretion could be exercised.

The DGIR had merely stated that the notice of appeal had not been served due to inadvertence and oversight on its part. No reasons were given for the failure to file and serve the records of appeal on time.

) The DGIR had filed its motion for an extension of time only after ORA had filed its motion to strike out the appeal.

Similarly, in *Pentadbir Tanah Kuala Selangor* (*supra*), the CA had stated their agreement with the observation by the Zambian Supreme Court in *Nahar Investment Limited v Grindlays Bank International (Zambia) Limited* [1984] ZMSC 1 that:

> "Appellants who sit back until there is an application to dismiss their appeal, before making their own frantic application for an extension, do so at their own peril."

CA's Unanimous Decision

The CA unanimously agreed with our submission that the DGIR's application for an extension of time should be dismissed and that the appeal be dismissed with costs. In doing so, the CA agreed that the court must be provided with some material on which its discretion could be exercised in deciding whether an extension of time should be granted. An extension could not be granted in the present case where no reasons have been provided or this would open the floodgates in encouraging litigants to flout the strict rules of civil procedure. Mere inadvertence and oversight on the part of the litigant has never been, and could never be, a sufficient reason for an extension to be granted.

The taxpayer was successfully represented by our tax partners, **Datuk D P Naban** and **S Saravana Kumar**, together with associate, Chris Toh Pei Roo, from the firm's Tax, SST & Customs Practice.

If you have any queries on tax appeal process or tax concerns, please contact Datuk Naban or Saravana at **tax@lh-ag.com**

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