



TAXING *BOSSKU*: THE LEGAL ISSUES ARISING FROM DATO' SERI NAJIB RAZAK'S TAX CASE

1. Introduction

1.1 While the verdict of Dato' Seri Najib Razak's ("**DSNR**") criminal trial on various charges relating to SRC International was handed down in the last week of July 2020, tax professionals are looking at the tax recovery action against the former Malaysian Premier.

1.2 In June 2019, the Inland Revenue Board ("**IRB**" or "**the Revenue**"), through the Government of Malaysia initiated proceedings under the Income Tax Act 1967 ("**ITA**") to recover tax arrears and penalties from DSNR for the period of 2011 to 2017. In response, DSNR filed a Notice of Appeal to the Special Commissioners of Income Tax ("**SCIT**") against this tax assessment. Pending the determination of said appeal, despite the taxpayer's best efforts, DSNR was unsuccessful in applying for a stay of proceedings brought by the IRB earlier this year. Subsequently on July 22 2020, summary judgment was granted for the IRB ruling that DSNR is liable for RM1.69bil in additional income tax plus penalties. With judgment passed, what recourse does the taxpayer have in situations such as these? And what steps can future taxpayers take to avoid such a position?

1.3 This article will discuss the issues arising from the Revenue's efforts to recover unpaid taxes through the Courts.

2. When Does A Debt Arise?

2.1 Before we proceed further it is necessary to briefly look at how the taxpayer ended up in this situation to begin with. When a Notice of Assessment or Additional Assessment is served upon a taxpayer, a debt is created which must be paid by the stated due date, regardless of whether or not the taxpayer files an appeal to the SCIT[1].

"103. (1) Except as provided in subsection (2), tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment.[2]"

2.2 An appeal does not "stop the clock" and the taxpayer becomes liable to pay the tax arrears first, and upon successful appeal he would be refunded whatever excess

amount he has paid. After being served with the Notice of Assessment, the taxpayer has 30 days to pay the amount due lest penalties are imposed[3].

3. Recovering the Tax Debt

3.1 Once the debt arises, an action for recovery can be commenced via section 106. Indeed, section 142 of the ITA 1967 creates a very low threshold for the Revenue to establish their prima facie case against the taxpayer.

“(1) In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.”[4]

3.2 It should be noted that at this stage, the merits of the assessment are not being scrutinized[5] - that will only be done when the taxpayer’s appeal under section 99 ITA is heard by the SCIT. The Federal Court in the case of Sun Man Tobacco Co Ltd v Government of Malaysia[6] stated:

*“the effect of the relevant provisions of the Income Tax Act, 1967 is that on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the Government by civil proceedings as a debt due to the Government. **On such civil proceedings being brought by the Government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.**”[7] (emphasis added)*

3.3 Indeed, the court will not entertain any plea that the assessment was excessive, incorrectly assessed, under appeal or incorrectly increased. In the case of Government of Malaysia v Dato’ Mahindar Singh[8], the High Court stated that:

*“The law is clear that once an assessment is made, the Inland Revenue Department can invoke ss 103 and 106 of the Act which make the tax payable under the assessment due and payable at the place specified in the notice of assessment upon service on the taxpayer of the notice whether or not the taxpayer appeals against the assessment. The taxes so due and payable may be recovered by the government by civil proceedings as a debt due to the government. **Under s 106(3), the court is debarred from entertaining any plea which claims that the amount of taxes sought to be recovered is excessive, incorrectly assessed under appeal or incorrectly increased under s 103(4),***

(5) or (5A). By s 142 a certificate signed by the director general, which includes, the deputy director general, assistant director general, senior assistant director and assistant director, giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.”[9] (emphasis added)

3.4 This covers the common contentions against Notices of Assessment issued to taxpayers, thus the way is clear for the Revenue to enter summary judgment against them.

4. Summary Judgment Application

4.1 Usually the court will only grant summary judgment when it is convinced that the Defendant does not have a defence[10] and that the Defence has not raised triable issues[11] i.e. issues that can only be resolved at full trial. However, where the debt owed is income tax, the usual standard is not applied and instead the abovementioned provisions of the ITA are applied.

4.2 In the case of Government of Malaysia v Abdul Rahman[12], the court considered the question of what rules applied for summary judgments in tax recovery cases. Arulanandom J (as he then was) stated that:

*“When proceedings are commenced under O.14 the **normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act.** Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under section 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under section 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5). In this case the Director General had exercised his powers under section 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within thirty days further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the Government. Under section 103(1) regarding payment of tax, the section reads:–*

“103.(1) Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.”

It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the Notice of Assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.”[13]

4.3 This position was later agreed with and approved by the Supreme Court in the case of Chong Woo Yit v Government of Malaysia[14] where their Lordships quoted the above excerpt from Arulanandom J’s dicta[15].

5. Can A Stay Order Be Granted?

5.1 Generally, when the notice of assessment is duly served, the taxes become due and payable regardless of whether or not the taxpayer has filed an appeal. The Federal Court in the case of Arumugam Pillai v Government of Malaysia[16] stated that:

“Section 103(1) provides that tax payable under an assessment or a composite assessment shall be payable within the time specified in the notice, whether or not that person appeals against the assessment or the composite assessment. Subsection (2) makes a similar provision with regard to an increased assessment made on appeal to the Special Commissioners. The tax legislation clearly intends that the tax as assessed should first be paid and therefore makes provisions that such part of the tax paid as shall be determined at the final “accounting” to be not due and payable shall be refunded. This provision of “pay first and talk afterwards” may be arguably a harsh one but it is an intentional provision of the legislature, having regard to the incidence of tax evasion.”[17]

5.2 Nonetheless, the courts have always maintained that they have the inherent jurisdiction[18] to grant a stay order (whether it be of recovery proceedings or of execution of a judgment pending appeal before the SCIT)[19] when it can be shown that “special circumstances” exist in a particular case. In addressing the Revenue’s arguments that a stay was wrongly granted, the Supreme Court in the case of Kerajaan Malaysia v Jasanusa Sdn Bhd[20] stated that:

“With respect, in our view, neither s 103(1) nor s 106(3) bars a court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case.”[21]

5.3 But what exactly counts as “special circumstances” is harder to define in definite terms, Raja Azlan Shah J (as His Majesty then was) in the case of Leong Poh Shee v Ng Kat Chong[22] stated that:

“Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.”[23]

5.4 The definition of “special circumstances” is at once both wide and restrictive. It is wide in the sense that what could possibly constitute “special circumstances” is “infinite”[24]. But it is also restrictive in the sense that the judicial tendency is to not grant a stay so as not to override substantive law.

The High Court in Layar Baiduri Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri[25] stated that:

“The starting point to address this argument would therefore be the interpretation that has been given to O 92 r 4. In this regard, I am assisted by the interpretation given to r 137 Rules of the Federal Court 1995 (‘r 137’), which is in pari materia with O 92 r 4.

*The Federal Court has held that the rule is part of procedural law and cannot be read to override substantive law. The rule stipulates that no provision in the Rules of the Federal Court 1995 should be construed as to limit or affect the inherent powers of the court to prevent injustice or to prevent an abuse of the process of the Federal Court. The rule is directed at the provisions of the Rules of the Federal Court 1995. (see *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201).*

*The above interpretation would apply with equal force to O 92 r 4. **The inherent power in O 92 r 4 is intended to prevent injustice or abuse of the process of the ‘High Court’. The rule being part of procedural law cannot be read to override substantive law.***”[26] (emphasis added)

5.5 Indeed, in the hearing of DSNR’s application for a stay of recovery proceedings pending his appeal before the SCIT, the learned Dato’ Ahmad Bache J considered the above point and stated that:

“this court agrees with the plaintiff that a stay should only be granted when there is a very clear evidence on ‘special circumstances’, taking into consideration that any stay order would principally defeat the whole substratum of tax recovery legislation as enshrined in ss 103 and 106 of the Act.”[27]

5.6 While both Stay of Proceedings and Stay of Execution are inherent powers of the court exercised only on “special circumstances”, in the context of tax cases a distinction must be made between both types of stays. The High Court in DSNR’s case explained as follows:

“This court would like to make a distinction between a stay of execution and a stay of proceeding. A stay of execution means that there was a judgment or order that was arrived at by the court or tribunal to be enforced. An example will be a summary judgment that was entered against a tax payer. The present case involves civil recovery proceeding where no judgments or orders have been entered against the defendant as yet. Hence, there is no judgment or order to be executed/enforced. It follows that there is no necessity for a stay.”[28]

5.7 Thus, we see that in tax cases, a stay of execution is easier to obtain than a stay of proceedings.

6. Examples of Special Circumstances Accepted by the Court

6.1 One of the most common examples of “special circumstances” is rendering the subsequent appeal nugatory. In the case of Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd[29] Augustine Paul JCA (as he then was) stated:

“It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established.”[30]

6.2 However in the context of tax cases, an appeal being rendered nugatory has been generally denied as the DGIR is seen as being able to refund any amount it may owe. This was seen in the unreported case of Mass Rapid Transit Corporation Sdn Bhd v KPHDN (Civil Appeal No W-01(1A)-684-12 of 2018), where the High Court stated that:

“I am of the considered opinion that since the subject matter of the case involves the payment of tax, there is no issue of the appeal being rendered nugatory. Any collection of tax from the Applicant can be refunded by the DGIR added to that, there cannot be any special circumstances in this case where the DGIR is empowered to collect taxes under the ITA 1967.”

This general position was affirmed by the Court of Appeal in the subsequent appeal of that case.

6.3 In the *Jasanusa* case[31] (cited above), the Revenue had failed to forward the taxpayer’s Notice of Appeal (Form Q) to the SCIT and failed to give a valid reason for this, as such the High Court granted a stay of execution. This was later affirmed by the Federal Court.

6.4 Likewise, in Chong Woo Yit v Government of Malaysia[32] along with granting summary judgment against the taxpayer, the Supreme Court granted a stay of execution because of the incompetence of the Revenue.

“We were satisfied that in this case there are no triable issues and therefore dismissed the taxpayer’s appeal with costs. However, as it was not due to any fault on the part of the taxpayer that his appeal to the Special Commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the Special Commissioners of the taxpayer’s appeal against the assessments raised against him. We also ordered that the deposit of \$500 be paid to the Revenue to account of taxed costs.”[33]

6.5 A commonality can be seen in the cases where stays of execution were granted - namely, that there existed procedural irregularities or negligence on the part of the Revenue that affected the taxpayer’s appeal to the SCIT.

6.6 This is something that the learned Dato’ Ahmad Bache J noted in his decision of DSNR’s stay application, where he stated that:

“This court observed that there exists one common or universal element found in all the three authorities cited by the defendant thus:

12.1 In all the said three authorities, Summary Judgments have been entered against the defendants, whereas in the present case, the Summary Judgment’s Application has yet to be heard.

12.2 The stay of execution (in contrast to a stay of proceeding) granted in those cases were based on the following factors:

(i) There was a delay on the part of the plaintiff to forward the appeal to the SCIT;

(ii) The case was still under review by the plaintiff despite the defendant’s request for the appeal to be forwarded;

(iii) Through no fault of the defendant, the appeal before the SCIT was not heard.”[34]

7. Government of Malaysia v Mohd Najib bin Hj Abd Razak

7.1 With the law now explained, it is plain to see that the Revenue’s recovery suit against DSNR was not out of the ordinary. In fact, it is a rather good example of the tax recovery process in action.

7.2 Having properly served the Notice of Assessment upon DSNR, the taxes became due and payable (s103(1) & (2) ITA). When DSNR failed to pay the sum, notwithstanding that he had served his Notice of Appeal to the Revenue, penalties were incurred (s103(3)-(6) ITA). Subsequently, the Revenue, through the Government of Malaysia initiated a recovery suit against DSNR, (s106(1)-(3) ITA).

7.3 DSNR then applied for a stay of proceedings (pending his s99 appeal before the SCIT and disposal of the multiple cases against him), in his application, through his lawyers, he raised seven arguments[35] which were as follows:

“(a) if the defendant’s appeal to the SCIT was successful, the stay would be rendered nugatory and if the stay was refused, the defendant could not be restored to his original position due to colossal financial damage;

(b) as the defendant would not be in a position to pay the substantial amount claimed, there was a risk that he would be declared a bankrupt or bankruptcy proceedings would be taken against him, consequently, there was a risk of losing his qualification as a Member of Parliament by virtue of bankruptcy proceedings;

(c) the stay of proceedings did not cause prejudice to the plaintiff in this action as the defendant was exercising its right to appeal to the SCIT;

(d) there was delay in forwarding Form Q to the SCIT;

(e) the assessments were made beyond the statutory limitation period;

(f) the civil proceedings would prejudice the defendant’s right of fair trial in on-going criminal proceedings against the defendant; and

(g) merit of an appeal was a relevant factor to be considered in a stay application.”[36]

When looking at the case law, it is easier to see the uphill battle that DSNR had – the same battle that is shared by the average taxpayer in the same position.

7.4 Firstly, the Malaysian tax recovery regime was legislated to deal with taxpayers who intend to use the court process to stall for time to dissipate the funds and evade tax[37]. Thus, we can see how provisions within the ITA work together to create the debt, compel prompt payment, and if necessary - facilitate summary judgment against the errant taxpayer.

7.5 Secondly, stay orders are granted only in “special circumstances” as mentioned above, which are rare indeed. While the taxpayer in this case is unusual (being a former prime minister & finance minister), we can see that the circumstances of his total legal position by themselves were not sufficient to persuade the court to exercise

its inherent jurisdiction to grant a stay of proceedings. Even the arguably “special” circumstance of on-going criminal proceedings was refused on the grounds that it would not be in the public’s interest to block the tax recovery mechanisms.

“The defendant’s application for stay includes pending, not only the disposal of this tax recovery appeal but includes the many ongoing criminal trials being heard and yet to be heard. If stay is to be granted, this would mean that the hearing of the present suit will be postponed indefinitely. This is against public interest whereby case of this nature and magnitude involving public figures like the defendant, to be heard and disposed off speedily.”[38]

8. What Next?

8.1 Even though summary judgment has been entered against DSNR, this is not the end. He would still be able to apply for an order to stay execution of the said judgment pending his appeal to the SCIT.

8.2 As noted above, while both a stay of execution and a stay of proceedings are similar, there is a difference in that they preserve the status of the parties at a different stage. And this difference is key. If a stay of proceedings was granted, the status of DSNR’s tax case would be left in stasis “indefinitely”, which would be against the public interest.

8.3 The indefinite nature of the stay of proceedings applied for by DSNR, would have also been contrary to parliament’s intention in regards to tax recovery. On the other hand, a stay of execution, merely allows the parties to retain their status quo, pending the appeal before the SCIT – DSNR’s tax recovery case would thus have been disposed of in accordance with the law.

9. Conclusion

9.1 The base position in Malaysian tax law is that taxpayers, once properly served with a Notice of Assessment, must “pay first, talk later”. Failure to pay first will result in a higher tax bill with the imposition of penalties for delayed payment and this undesirable consequence should be avoided.

9.2 Nonetheless, where “special circumstances” exist, taxpayers can obtain a stay of proceedings or a stay of execution, but this, as shown above, is rarely granted.

9.3 As noted in our earlier article (‘When the Taxman Comes Knocking’, 11 June 2020), the taxpayer has a statutory right under section 99 of the ITA to lodge an appeal to the SCIT against any Notices of Assessment received - something which

DSNR has already done. This appeal does not serve as a stay and the Revenue will always have the right to sue for recovery, as such it is always advisable to consult with tax lawyers as soon as you receive a notice of assessment.

-
1. Income Tax Act 1967, Section 103(1)
 2. *ibid*
 3. *Ibid*, Section 103(5)
 4. *Ibid*, Section 142 (1)
 5. *Ibid*, Section 106 (3)
 6. [1973] 2 MLJ 163
 7. *Ibid* at 165
 8. [1996] 5 MLJ 626
 9. [1996] 5 MLJ 626
 10. Rules of Court 2012, Order 14 r.1
 11. See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400
 12. [1975] 1 MLJ 276
 13. *Ibid*
 14. [1989] 1 MLJ 473
 15. *Ibid* at 475
 16. [1980] 2 MLJ 283
 17. *Ibid* at 287
 18. Rules of Court 2012, O.92, r.4.
 19. The principles applicable for Stay of Proceedings and Stay of Execution are generally the same: see *Kerajaan Malaysia v Ekran Bhd* [2006] 2 MLJ 749 at 756, where Lau Bee Lan J stated that: "I am of the view that the factors to be considered in determining an application for stay of proceedings pending appeal would be the same as in the approach taken with respect to an application for stay of execution pending appeal as the effect therein is the same."
 20. [1995] 2 MLJ 105
 21. *Ibid* at 117
 22. [1966] 1 MLJ 86
 23. *ibid*
 24. *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 at 111
 25. [2019] MLJU 707
 26. [2019] MLJU 707 at paras 10 - 12
 27. *Government of Malaysia v Mohd Najib bin Hj Abd Razak* [2020] 9 MLJ 618
 28. *Ibid* at 634
 29. [2004] 1 MLJ 257
 30. *Ibid* at 268
 31. [1995] 2 MLJ 105
 32. [1989] 1 MLJ 473
 33. *Ibid* at 475
 34. *Government of Malaysia v Mohd Najib bin Hj Abd Razak* [2020] 9 MLJ 618 at 636 - 637
 35. *Government of Malaysia v Mohd Najib bin Hj Abd Razak* [2020] 9 MLJ 618
 36. *Ibid*
 37. As noted by the Federal Court earlier in the case of *Arumugam Pillai v Government Of Malaysia* [1980] 2 MLJ 283, they are quoted above, see footnote 18.
 38. *Government of Malaysia v Mohd Najib bin Hj Abd Razak* [2020] 9 MLJ 618 at 637

Prepared by:



Abu Daud Abd Rahim
Partner
Tax (Litigation & Advisory)
DL: 603 2118 5013
E: a.daud@azmilaw.com



Khairul Anwar Mohamed
Associate
Tax (Litigation & Advisory)
DL: 603 2118 5069
E: khairulanwar@azmilaw.com



Chong Han Jie
Associate
Tax (Litigation & Advisory)
DL: 603 2118 5119
E: chonghanjie@azmilaw.com

If you require tax advisory or litigation services, please contact us today to see how we can help you.

Corporate Communication
Azmi & Associates
07 August 2020