Newsletter

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Shearn Delamore & Co
7th Floor
Wisma Hamzah Kwong-Hing,
No 1, Leboh Ampang
50100, Kuala Lumpur, Malaysia
T: 603 2027 2727
F: 603 2078 5625
E: info@shearndelamore.com
W: www.shearndelamore.com

Shearn Delamore &co.

Tax and Revenue

Tax Highlights of Malaysia's Budget 2021

In this article, Yeoh Yu Xian sets out the key highlights from Malaysia's 2021 budget.

Introduction

On 6 November 2020, the Malaysian Minister of Finance, Tengku Datuk Seri Zafrul Tengku Abdul Aziz, unveiled the Malaysian Budget 2021 ("Budget"). This Budget's allocation of RM 322.5 billion is the largest on record for the country[1].

Individual income tax rate

It was proposed in the Budget with effect from the year of assessment ("YA") 2021, the income tax rate for resident individuals within the chargeable income band of RM50,001 to RM70,000 be reduced from 14% to 13%. Please note that this Budget proposal has now been implemented vide the **Finance Act 2020**.

Income tax relief (*Please note that the following Budget proposals relating to income tax relief have now been implemented vide the **Finance Act 2020**.*)

- **Increase in limit of income tax relief on expenses for medical treatment, special needs and carer for parents**
  Previously, individual taxpayers were eligible to claim income tax relief of up to RM5,000 in regard to expenses for medical treatment, special needs and carer for parents. It was proposed that with effect from YA 2021,such income tax relief be increased from RM5,000

Contents

Tax and Revenue 2

Tax Highlights of Malaysia's Budget 2021 2

Dispute Resolution 7

Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat: Section 8 of the Land Acquisition Act 1960 7

Financial Services................................ 11

The Proposed Regulatory Framework for Digital Banks in Malaysia............ 11

Intellectual Property............................ 15

Pre-Trial Injunction — Preservation of the Status Quo 15

Employment and Administrative Law... 17

Enforcement of section 17A of the MACC Act — How does it affect an Employer.. 17

Corporate/M&A.................................. 21

Enhanced Rights Issue Framework: Temporary Relief Measures to Facilitate Fund Raising by Listed Issuers 21

to RM8,000.

- **Review of income tax relief for medical treatment expenses for self, spouse and child**
  Previously, individual taxpayers were eligible to claim income tax relief up to RM6,000 on medical expenses incurred on self, spouse, and child for serious diseases.

  It was proposed that with effect from YA 2021:

  – such income tax relief be increased from RM6,000 to RM8,000. The tax relief for full medical check-up expenses included in this amount will be increased from RM500 to RM1,000; and
  – the scope of the relief be expanded to include expenses incurred for specific vaccinations for pneumococcal, human papillomavirus ("HPV"), influenza, rotavirus, varicella, meningococcal, combination of tetanus-diphtheria-acellular-pertussis ("Tdap") and Coronavirus Disease 2019 ("COVID-19").

- **Increase in the limit of income tax relief for disabled spouse**
  It was proposed that with effect from YA 2021, individuals with a disabled spouse will be eligible for additional tax relief whereby the relief will be increased from RM3,500 to RM5,000.

- **Review of income tax relief for lifestyle expenses**
  Previously, individual taxpayers were eligible to claim income tax relief for lifestyle expenses up to RM2,500 on the purchase of reading materials, personal computers, smartphones/tablets, internet subscriptions, sports equipment and gymnasium membership fees.

  It was proposed that with effect from YA 2021:

  – the income tax relief limit for lifestyle expenses be increased to RM3,000 in which the additional amount of up to RM500 is allocated for the cost of purchasing sports equipment, entry/rental fees for sports facilities and participation fees in sports competitions; and
  – the scope of relief to the extent that it applies to printed daily newspapers be expanded to include the subscription for electronic newspapers.

Income tax exemption

- **Tax exemption on compensation for loss of employment**
  It was proposed that for YAs 2020 and 2021, the income tax exemption limit for compensation for loss of employment be increased from RM10,000 to RM20,000 for each year of service. Please note that this Budget proposal has now been implemented vide the **Finance Act 2020**.

- **Tax incentive for investments in equity crowdfunding**
  Equity Crowdfunding ("ECF") is an alternative financing method which complements bank financing and provides access to financing resources to start-up companies to meet their needs for capital injection at various stages of development.

It was proposed that income tax exemption on aggregate income equivalent to 50% of the investment amount be given for investments made from 1 January 2021 until 31 December 2023 subject to the following conditions being met:

- the exemption is limited to RM50,000 for each YA;
- the deduction is limited to 10% of the aggregate income for that YA;
- the investor must not have any family relationship with the investee company;
- the investment must be made through an ECF platform approved by the Securities Commission Malaysia;
- the investor, investee company and amount of investment made must be verified by the Securities Commission Malaysia; and
- the investment must not be disposed of either in full or in part within two years from the date of the investment.

Please note that the relevant subsidiary legislation to implement this Budget proposal has yet to be gazetted at the time of finalisation of this article.

Stamp duty exemption

- **Stamp duty exemption for the purchase of first residential home**
  Previously, a 100% stamp duty exemption was available for instruments of transfer and loan agreements for the purchase of the first residential home priced up to RM300,000 by Malaysian citizens.

It was proposed that the stamp duty exemption be enhanced to cover the purchase of first residential home priced up to RM500,000 where the sale and purchase agreement is executed between 1 January 2021 to 31 December 2025. Please note that the relevant subsidiary legislation to implement this Budget proposal has yet to be gazetted at the time of finalisation of this article.

Excise duty

- **Imposition of excise duty on electronic cigarette**
  Previously, electronic cigarettes including vapes were not subject to excise duty.

  It was proposed that with effect from 1 January 2021:

  - excise duty at the rate of 10% will be imposed for all types of electronic and non-electronic cigarette devices including vapes; and
  - excise duty at the rate of RM0.40 per mililiter will be imposed for liquid or gel used in electronic cigarettes including vapes.

  Please note that this Budget proposal has now been implemented vide the Excise Duties (Amendment) Order 2020 [P.U.(A) 417/2020].

Tourism tax

- **Expansion of the scope of imposition of tourism tax on accommodation booked through online platforms**
  Previously, tourism tax was only imposed on tourists (excluding Malaysian tourists and permanent residents) staying in accommodation premises registered under

the **Tourism Tax Act 2017** at a flat rate of RM10 per room per night.

To support the recovery of the tourism sector affected by the COVID-19 pandemic, tourism tax has been exempted from 1 July 2020 until 30 June 2021.

It was proposed that with effect from 1 July 2021, the imposition of tourism tax be expanded to accommodation premises reserved through online platform providers as well. Please note that the Tourism Tax (Amendment) Act 2020/2021 to implement this Budget proposal has yet to be gazetted at the time of finalisation of this article.

Other amendments proposed vide Finance Bill 2020[2] (*Please note that these proposed amendments have now been implemented vide the **Finance Act 2020**.*)

- **Tax payable notwithstanding institution of proceedings under any other written law**
  It was proposed that a new **Section 103B** be inserted into the ITA so that with effect from 1 January 2021, the institution of any proceedings under any other written law against the Government or the Director General of Inland Revenue ("DGIR") shall not relieve any person from liability for the payment of any tax, debt or other sum for which he is or may be liable to pay.

  Similar provisions were also proposed in the **Real Property Gains Tax Act 1976** (Section 21C), **Petroleum (Income Tax) Act 1967** (Section 48A) and **Labuan Business Activity Tax Act 1990** (Section 13B).

- **Failure to furnish contemporaneous transfer pricing ("TP") documents**
  Previously, there was no provision in the **Income Tax Act 1967** ("ITA") to penalise taxpayers for failure to furnish contemporaneous TP documentation.

  It was proposed that a new **Section 113B** be inserted into the ITA so that with effect from 1 January 2021:

  (a) any person who makes default in furnishing contemporaneous TP documentation in respect of any YA within the stipulated timeframe shall be guilty of an offence and shall, on conviction, be liable to a fine between RM20,000 and RM100,000 or to imprisonment for a term up to six months or both;

  (b) upon conviction, the court may make a further order for the said TP documentation to be furnished within 30 days (or such other period as the court deems fit) from the date of the order; and

  (c) if no prosecution has been instituted in respect of the default in furnishing contemporaneous TP documentation, the DGIR may by notice in writing or in the notice of assessment require that person to pay a penalty of between RM20,000 and RM100,000. The taxpayer may appeal against this to the Special Commissioners of Income Tax within 30 days.

- **Definition of "*plant*"**
  The word "*plant*" was not defined in the ITA and the determination of whether an asset amounts to a "plant" for the purposes of

claiming capital allowances has always been made by reference to case law and the facts of each case.

It was proposed that with effect from YA 2021, the word "*plant*" is to be defined as follows: "*an apparatus used by a person carrying on his business but does not include a building, an intangible asset, or any asset used and that functions as a place within which a business is carried on*".

- **Definition of "chargeable profits"**
  The phrase "*chargeable profits*" was not defined in the **Labuan Business Activity Tax Act 1990** ("LBATA").

  It was proposed that with effect from YA 2020, the "*chargeable profits*" of a Labuan entity carrying on a Labuan business activity for the purposes of Section 2B(1A) of the LBATA shall be the "*net profits as reflected in the audited accounts in respect of such Labuan business activity of the Labuan entity for the basis period for that year of assessment*".

- **Digital Stamping**
  It was also proposed that the stamping of instruments through an electronic medium or digital stamping be recognised under the **Stamp Act 1949**.

YEOH YU XIAN
TAX AND REVENUE PRACTICE GROUP

For further information regarding tax and revenue matters, please contact our Tax and Revenue Practice Group.

Endnotes:

[1] The 2021 Budget Speech: www.treasury.gov.my/pdf/speech/bs21.pdf.

[2] The Finance Bill 2020 has been passed by Parliament and the Finance Act 2020 has been gazetted on 31 December 2020.

Dispute Resolution

Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat: Section 8 of the Land Acquisition Act 1960

A case note by Rajasingam Gothandapani and Lynnette Tan Hui Ling.

Introduction

It is trite that a declaration in Form D under section 8(1) of the Land Acquisition Act 1960 ("LAA") lapses and becomes ineffective by effluxion of time if no award is made within two years from the date of its publication in the *Gazette*.

But what if there is an award of the Land Administrator that is made within the stipulated two-year period, but that award is subsequently quashed resulting in a subsequent award that is made outside the two-year period?

The Federal Court had the opportunity to consider this question in **Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat**[1].

The legal backdrop

The significance of Form D is to be found in section 8(1) of the LAA. When the State Authority decides that a land is to be compulsorily acquired, it shall publish in the *Gazette* a declaration in Form D.

Section 8(4) of the LAA reads:

> *"A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under subsection 14(1) within the said period of two years, and, accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect."*

Prior to the introduction of section 8(4) of the LAA in 1984 through the **Land Acquisition (Amendment) Act 1984 (Act A575)**, the delay occasioned by the relevant authority in compulsorily acquiring land was dealt with at common law according to the facts and circumstances of each case.

With the introduction of the subsection, Parliament intended to place a definite time limit within which the State Authority must act to effect an acquisition of land. The legislative purpose was to put an end to uncertainty and protracted litigation resulting from long delays between the publication of a declaration in the *Gazette* and the making of an award of compensation.

Thus, the Court of Appeal in **Pengarah Tanah dan Galian Negeri Kedah v Emico Development Sdn Bhd**[2] had held that a declaration in Form D under section 8(1) of the LAA lapses and becomes ineffective by effluxion of time if no award is made within two years from the date of its publication in the *Gazette*.

Facts of the case

The appellant ("Orchard Circle") was the registered owner of two parcels of land which were compulsorily acquired by the State Authority. On 10 December 2001, Form D of the LAA was issued to compulsorily acquire the lands for the purpose of building the Kajang Traffic Dispersal Highway ("SILK Highway").

On 24 December 2002, an inquiry before the Land Administrator was held in respect of the acquisition of the lands. Orchard Circle was awarded a nominal sum of RM1 as award for the compulsory acquisition. Reason being that a portion of the lands had already been surrendered to the State Authority. Form G ("Written Award of Compensation") and Form H ("Notice of Award and Offer of Compensation") dated 24 December 2002 were issued in relation to the first land inquiry ("First Award").

First judicial review proceedings

On 30 January 2003, Orchard Circle filed an application for judicial review for an order, amongst others, to quash the First Award of compensation and alternatively for a declaration that the acquisition of the lands is null and void ("first judicial review application"). Orchard Circle alleged that it was not given a right to be heard at the first land inquiry.

On 10 December 2010 (after nine years from the date of Form D and seven years from the date of filing of the first judicial review application), the High Court in Shah Alam allowed the first judicial review application and made the following orders:

- A *certiorari*[3] to quash the First Award; and
- A *mandamus*[4] to remit the matter back to the Land Office for a fresh second land inquiry.

An inquiry was conducted by the Land Administrator on 17 February 2011 to 17 November 2011 (the "second land inquiry") pursuant to the order of the High Court dated 10 December 2010.

At the second land inquiry before the Land Administrator, Orchard Circle raised the issue that Form D had lapsed because no award was made within two years from the date of Form D (premised on section 8(4) of the LAA).

On 20 April 2012, the Land Administrator in the second land inquiry proceeded to make the award in the second land inquiry. The Land Administrator's answer to Orchard Circle's objection was that the issue in relation to a lapsed Form D did not arise as the award was but an extension of the First Award when the High Court on 10 December 2010 in the first judicial review application ordered for a fresh land inquiry.

Dissatisfied with the decision of the Land Administrator in the second land inquiry, Orchard Circle filed the second judicial review application on 30 May 2012.

Decision of the High Court

The High Court allowed the second judicial review application and held that the validity of Form D was only for a period of two years from the date of its publication in the *Gazette* and quashed Form D dated 10 December 2001, Form G and Form H, both dated 20 April 2012 and all proceedings following thereon.

Decision of the Court of Appeal

The Court of Appeal allowed the appeal by the respondents, amongst others, on the grounds that section 8(4) of the LAA was complied with when the First Award was handed down by the Land Administrator on 24 December 2002 which was well within the two-year period from Form D dated 10 December 2001. The purpose intended in section 8(4) of the LAA would be defeated if a strict interpretation was adopted since the Land Administrator has no control over the legal challenges mounted by the litigants.

Leave application to the Federal Court

Orchard Circle sought leave to appeal to the Federal Court against the Court of Appeal's judgment. Leave was granted on two issues, but this article only considers one. That question is:

> "*Whether, pursuant to section 8 (4) of the Land Acquisition Act 1960, a declaration in Form D lapses and ceases to be of any effect where an award of the Land Administrator is made within the stipulated two year period but subsequently quashed resulting in a subsequent award made outside the two year period.*"

Decision of the Federal Court

The Federal Court upheld the judgment of the Court of Appeal. The Federal Court observed that the Court of Appeal's approach was correct and did not warrant any appellate intervention. The Federal Court held conclusively that the Form D in the present case had not lapsed and neither did the order of the High Court on 10 December 2010 quash the said Form D.

The Federal Court opined further that the first land inquiry was within the two-year period from the date stated in Form D. Therefore, Form D was very much valid even until the second land inquiry. Accordingly, the Federal Court declined to answer the postulated question contending that the way it was framed did not reflect or arise from the facts of the present case and neither did it come from the decision of the High Court dated 10 December 2010.

The Federal Court, in arriving at its decision, was of the view that it cannot be said that the Land Administrator in the second land inquiry had contravened section 8(4) of the LAA when it made the second award beyond the two-year period as the second land inquiry was only to substitute the first land inquiry. The issue of the land acquisition and taking possession of the lands and Form D were never declared as null and void by the Court.

The Court further noted that the purpose was to ensure that land proprietors whose lands were compulsorily acquired for public purpose were compensated speedily and that the insertion of section 8(4) of the LAA was in line with the decision of the **Federal Court in Pemungut Hasil Tanah Daerah Barat Daya (Balik Pulau), Pulau Pinang v Ong Gaik Kee**[5].

The Federal Court was persuaded by the fact that not only had the lands already been formally taken possession of by the State Authority when Form K was issued on 20 February 2003 in accordance with section 22 of the LAA, those lands had also vested in the State Authority. There was no provision in the LAA to revert the land to the landowner.

The Federal Court adopted the interpretation by the Supreme Court of India on section 11A of the Indian Land Acquisition Act in two of its cases, namely (i) **Satendra Prasad Jain v State of U.P.**

AIR[6] and (ii) **Mahadoe (D) Through Lrs v State of U.P** (Civil Appeal No 1944 of 2013), noting the substantial similarity of section 11A of Indian Land Acquisition Act to section 8(4) of the LAA.

Consequently, the Federal Court ruled that section 8(4) of the LAA did not apply when the acquisition proceedings were completed, and the lands were already vested in the State Authority. Instead, it applies to cases where proceedings are taken or being taken within the period of two years if the land acquisition has not been completed.

The Federal Court opined that it would be absurd to claim that the lands had reverted to Orchard Circle in the circumstances because the first judicial review application was decided only after seven years after it was filed. By then the SILK Highway project had been completed. Thus, it cannot be the case that Orchard Circle was still the owner of the land where the highway had been constructed.

The Federal Court was of the view that the determination of the appeal hinged on the interpretation of section 8(4) of LAA. It rejected the argument that section 8(4) ought to be given its literal and natural meaning because, firstly, it ignored the reason as to why the second land inquiry was made beyond the two-year period and, secondly, because a literal and ordinary interpretation of section 8(4) of the LAA in the context of the present case would lead to absurdity. In the upshot, the Federal Court gave deference to the purposive approach of interpretation of the section in line with section 17A of the **Interpretation Acts 1948 and 1967**.

RAJASINGAM GOTHANDAPANI
LYNNETTE TAN HUI LING
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding dispute resolution matters, please contact our Dispute Resolution Practice Group

Endnotes:

[1][2020] 1 LNS 1553.
[2][2000] 1 MLJ 257.
[3]A writ issued by a superior court for the re-examination of an action of a lower court.
[4]A judicial writ issued as a command to an inferior court or ordering a person to 5perform a public or statutory duty.
[5][1983] 2 MLJ 35.
[6]1993 SC 2517.

Financial Services

The Proposed Regulatory Framework for Digital Banks in Malaysia

In this article, Goh Hui Wen examines the proposed regulatory framework for digital banks in Malaysia.

Introduction

The global financial services industry has seen a momentous evolution over the past decades driven by new technology innovations. As customers gravitate towards digital experiences and products, the transformation of the traditional banking system has become inevitable. This is even more so with the on-going COVID-19 crisis which has undoubtedly spurred the need for the adoption of digital banks in Malaysia.

What is a digital bank? According to the Ministry of Finance, a digital bank is "*a virtual bank which operates in a digital environment and is devoid of brick-and-mortar presence of a traditional bank*" and which offers similar services to that of incumbent banks through digital and automated platforms[1].

Many countries or territories in the Asia Pacific region including the Republic of Korea, the Republic of Philippines, the Hong Kong SAR and Singapore have in the recent years established their own digital bank regulatory framework.

While the development of digital banks may be seen as a disruption to the traditional banking scene, it has been observed that the financial regulators in the Asia Pacific region "*tend to view technological development in financial services as a way to grow their economies and provide better outcomes to customers*"[2].

In Malaysia, Bank Negara Malaysia ("BNM") had in March 2020 issued the *Exposure Draft on Licensing Framework for Digital Banks* ("Draft Licensing Framework") which outlines its proposed licensing framework for digital banks subject to feedback received by 30 June 2020. A balance approach was adopted by BNM to support technological developments by enabling the establishment of digital banks whilst maintaining the stability and integrity of the financial industry and safeguarding the interests of depositors[3].

These outcomes are aimed to be achieved through the concept of a "*foundational phase*" whereby in the initial three to five years of operations, a defined asset threshold as well as a simplified regulatory requirement will be applied to licensed digital banks[4]. Initially, up to five digital bank licenses would be issued to qualified applicants under the finalised licensing framework[5].

Who may apply?

It has been made clear in the Draft Licensing Framework that existing licensed banks and licensed Islamic banks may digitalise their current business operations without having to apply for a separate license for digital banks[i]. Therefore, it would appear that the Draft Licensing Framework is catered to new players in the banking industry who do not currently hold a

banking license under the **Financial Services Act 2013** or the **Islamic Financial Services Act 2013**.

Incumbent banks that wish to form a joint venture company with other parties for the purposes of carrying out digital banking business are, however, required to apply for a digital bank license under the licensing framework[7].

In Singapore, the Monetary Authority of Singapore has indicated that incumbent banks may set up digital banks as subsidiaries under the existing internet banking framework and be assessed separately from the applications for digital bank licenses[8], implicitly suggesting that the five licenses to be issued under the Singapore digital bank licensing framework will not be made available to incumbent banks or their subsidiaries.

Sponsor requirements

BNM may require a shareholder which holds an interest in shares of more than 50% in a proposed licensed digital bank to organise all its financial and financial-related subsidiaries under a financial group, headed by a licensed institution or a financial holding company as the apex entity[9].

This is similar to the digital bank regulatory framework in the Hong Kong SAR whereby sponsors of the proposed licensed digital bank may either be a financial or non-financial firm, and the shareholder which holds more than 50% shares in the proposed licensed digital bank is required to be either a bank, a financial institution supervised by a recognised financial supervisor or an intermediate holding company subject to supervisory conditions[10].

Whilst the Monetary Authority of Singapore requires an applicant for a digital full bank license or a digital wholesale bank license to demonstrate that at least one entity in its group has three or more years of track record in operating an existing business in the technology or e-commerce field[11].

Ability to achieve financial inclusion

As part of the effort by BNM to achieve financial inclusion and boost economic growth, the proposed regulatory framework on digital banks focuses on reaching the underserved and unserved segment which includes retail as well as micro, small and medium enterprises ("MSMEs").

In the Draft Licensing Framework, one important factor that will be taken into consideration in assessing applications for a digital banking licence is an applicant' commitment and ability in driving financial inclusion and ensuring access to the underserved and unserved populations in a sustainable manner without jeopardising the depositors' interests[12].

This is similar to the regime in Singapore where the Monetary Authority of Singapore expressly requires applicants for digital banking licenses to provide:

> *"clear value proposition, incorporating the innovative use of technology to serve customer needs and reach under-served segments of the Singapore market, that differentiates it from existing banks"*[13].

Minimum capital

BNM also requires a licensed digital bank to always maintain capital funds with a minimum of RM100 million during the foundational phase[14]. Thereafter, a licensed digital bank will be subject to the same capital requirement as all other licensed banks, that is RM300 million[15]. This is different from the approach in the Hong Kong SAR where digital banks are required to maintain a minimum paid-up capital like other commercial banks at the onset[16].

In Singapore, a successful applicant for a digital full bank licence will commence its operations as a restricted digital full bank before becoming a full functioning digital full bank, and this transition is expected to take place within three to five years from commencement of business.

A restricted digital full bank is required to maintain at least SGD15 million as minimum paid-up capital throughout the entry phase (which is expected to last for one to two years). Thereafter, the minimum paid-up capital shall be progressively increased to SGD1.5 billion during the progression phase before it transitions into a fully functioning digital full bank[17].

On the other hand, the Monetary Authority of Singapore expects a licensed digital wholesale bank to meet similar minimum paid-up capital as the incumbent wholesale banks, which is SGD100 million[18].

Business limitation

In Malaysia, a limitation will be imposed on the asset size of licensed digital banks whereby the total asset size of a licensed digital bank shall always not exceed the limit of RM2 billion during the foundational phase[19].

In Singapore, business restriction comes in several forms. For example, a restricted digital full bank is subject to an aggregate deposit cap of SGD50 million during the entry phase (may be increased in progression phase subject to approval) and an individual deposit capped at SGD75,000 during both the entry phase and the progression phase[20].

During the entry phase, a restricted digital full bank is also not allowed to widely solicit deposits from the public, and may only solicit deposits from its shareholders, employees, related entities and any other persons who are familiar with the restricted digital full bank's parent or major shareholders' businesses[21].

As the regulatory requirements for digital banks in both Malaysia and Singapore are seemingly more relaxed during the initial phase of a digital bank, it would appear that limitations or restrictions are imposed by the regulators in order to minimise the impact of any potential operational issues during the initial operation phase and to safeguard the interest of the depositors.

To-date, many established digital conglomerates have expressed their interest in pursuing a digital bank licence in Malaysia. These include incumbent banks as well as non-bank players such as Grab (ride-hailing company, which owns e-wallet GrabPay), Axiata Group Bhd

(telecommunication company, which owns e-wallet Boost), Razer Fintech (gaming company, which owns e-wallet Razer Pay with Berjaya Corporation Berhad), all of which are familiar names in the financial services industry as well as digital consumer platform[22]. Property firms such as Sunway Berhad and Paramount Corporation Bhd were also reported to be interested[23].

Conclusion

Although the on-going Covid-19 crisis may have possibly delayed the issue of a Policy Document on Digital Banking following which applications may be submitted in Malaysia, it has no doubt put a focus on the need for a digital transformation in the banking industry in order to meet the increasing demands from consumers for uninterrupted and seamless digital banking services. No matter how the future unfolds, a robust regulatory framework must always be prioritised to safeguard the stability of the financial system.

GOH HUI WEN
FINANCIAL SERVICES PRACTICE GROUP

For further information regarding financial services matters, please contact our Financial Services Practice Group.

Endnotes:

[1]Economic Outlook 2021, Ministry of Finance Malaysia.
[2]"Digital banks in Asia Pacific: adding value to financial services?" Deloitte: https://tinyurl.com/y5p2vnxe.
[3]Paragraph 1.3 of the Draft Licensing Framework.
[4]Paragraph 1.4 of the Draft Licensing Framework.
[5]"Bank Negara intends to issue up to five digital banking licenses". The Edge Markets: https://tinyurl.com/y3pj424b.
[6]Paragraph 1.6 of the Draft Licensing Framework.
[7]Ibid at 3.
[8]"Digital Bank Licence". Monetary Authority of Singapore: https://tinyurl.com/y642s7d8.
[9]Paragraph 8.3 of the Draft Licensing Framework.
[10]Revised Guideline on Authorization of Virtual Banks issued on 30 May 2018 by the Hong Kong Monetary Authority: https://tinyurl.com/y6y3neot.
[11]Eligibility Criteria and Requirements for Digital Banks. Monetary Authority of Singapore: https://tinyurl.com/y5rgpxtu.
[12]Paragraph 7.2 of the Draft Licensing Framework.
[13]Ibid at 8
[14]Paragraph 12.2 of the Draft Licensing Framework.
[15]Paragraph 15.2 of the Draft Licensing Framework.
[16]Ibid at 2.
[17]Ibid at 11.
[18]Ibid at 11.
[19]Paragraph 13.1 of the Draft Licensing Framework.
[20]Ibid at 11.
[21]Ibid at 11.
[22]"Interest in digital bank licences picks up" The Edge Markets: https://tinyurl.com/yxmxnmfz.
[23]Ibid at 22.

Intellectual Property

Pre-Trial Injunction — Preservation of the Status Quo

A case note by Elyse Diong Tze Mei.

Introduction

The recent case of **Bellini Resources (M) Sdn Bhd v Mohamad Zaini bin Md Taha**[1] sets out the criteria for the preservation of the status quo pending trial where the ownership of a trade mark is in dispute.

Facts

The company plaintiff (the Company) registered the "CAP LESONG" mark in respect of:

> " … cooking oils, edible oils and fats, meat, fish, poultry and game, meat extracts, preserved, frozen, dried and cooked fruits and vegetables, jellies, jams, compotes, egg, milk and milk products."

in Class 29 in Malaysia on 16 January 2015 ("Disputed Mark").

Prior to his dismissal as a director of the Company, the defendant ("MZMT") recorded an assignment of the Disputed Mark from the Company to himself. There was no board resolution to approve the disposal of the Disputed Mark to MZMT.

The Company filed a suit against MZMT on the grounds that it did not consent or authorise the assignment of the Disputed Mark to MZMT and that MZMT had breached his fiduciary duty and trust ("Plaintiff's Suit").

The Company made an *ex-parte* application for the following interim orders against MZMT under Order 29 Rule 1 of the Rules of Court 2012 ("*Ex-Parte* Application") pending the full disposal of the Plaintiff's Suit:

- An injunction prohibiting MZMT from using or trading under the Disputed Mark;
- An injunction prohibiting MZMT from transferring, assigning or disposing of the Disputed Mark to any third party;
- An injunction prohibiting MZMT from stopping the Company from using the Disputed Mark; and
- A declaration that the Company can continue use and trade under the Disputed Mark.

The Law on *Ex-Parte* Injunction

Order 29 Rule 1 of the Rules of Court 2012 ("ROC") allows for an application for the grant of an interim injunction to be made before or after trial of a cause or matter. An injunction is a judicial order restraining or compelling a person to stop or to do certain acts.

The High Court applied the principles laid down by the Court of Appeal in **Keet Gerald Francis Noel John v Mohd Noor bin Abdullah**[2] for an interim injunction application:

- Whether the totality of the facts presented before him disclosed bona fide serious issues to be tried;
- If there are *bone fide* serious issues to try, where the justice of the case lies **considering** all relevant matters including the practical realities of the case; and

- The judge must have in the forefront of his mind that the grant of an injunction is discretionary, intending to produce a just result for the period between the date of the application and the trial proper as well as to maintain the status quo.

An application for an interim injunction can be made *inter-partes* or *ex-parte*. An *ex-parte* interim injunction can only be made in circumstances of extreme urgency[3] where an *inter-partes* application is not viable. The applicant is also under the obligation to make full and frank disclosure of all relevant material facts, including facts which are not in the applicant's favour[4]. Unless revoked or set-aside earlier, an *ex-parte* interim injunction is valid only for 21 days from the date it was granted and an *inter-partes* hearing must be fixed within 14 days from the date of order[5].

The High Court allowed the Company's *ex-parte* application on the grounds that there were *bona fide* serious issues to be tried, the balance of convenience lies in favour of the Company and there was a need to preserve the status quo of the matter.

The High Court found that the following were serious issues to be tried:

- Whether the Disputed Mark is a non-cash asset that belongs to the Company;
- Whether MZMT had wrongly obtained the Disputed Mark without authorisation or consent of the Company; and
- Whether there is a breach of MZMT's fiduciary duty under section 213 of the **Companies Act 2016**.

Balance of Convenience

The High Court in considering where the balance of convenience lies took into account that the Company's business is inextricably linked to the use of the Disputed Mark and that it is highly probable that MZMT or his representatives may attempt to cancel or dispose of the Disputed Mark to a *bona fide* third party.

The judge took note of the fact that MZMT after having been dismissed as a Director had, without the knowledge of the Company, written to JAKIM on the Company's letterhead to cancel the use of the Disputed Mark on the Company's products. The judge was of the view that the damage to Company's business will be disproportionately higher than the damage that MZMT may suffer as a result of the interim injunction.

Further, the Company had undertaken and was in a financial position to pay the damage suffered by MZMT as a result of the interim orders should the Company not succeed in its claims at trial.

Status Quo

The High Court in this case recognised the importance of maintaining and preserving the status quo of the Disputed Mark by preventing MZMT from transferring or disposing the ownership of the Disputed Mark to a third party pending the disposal of the case at trial.

Full and frank disclosure

The High Court was further satisfied that the Company had complied with the requirements under Order 29 Rule 1 of the ROC for full and frank disclosure.

Conclusion

An interim injunction is an important and useful tool for trademark owners to effectively stop the continuation of an alleged infringement as well as to prevent unauthorised disposal, transfer or assignment of ownership of a trademark. Taking legal action may diminish or avoid irrevocable impact and damage caused by the alleged infringer.

ELYSE DIONG TZE MEI
INTELLECTUAL PROPERTY PRACTICE GROUP

For further information regarding intellectual property law matters, please contact our Intellectual Property Practice Group.

Endnotes:

[1][2020] MLJU 1642.
[2][1995] 1 CLJ 293.
[3]Order 29 Rule 1(2) of the ROC.
[4]Order 29 Rule 1(2A) of the ROC.
[5]Order 29 Rule 1(2B) and (2BA) of the ROC.

Employment and Administrative Law

Enforcement of section 17A of the MACC Act — How does it affect an Employer

In this article, Benedict Ngoh Ti Yang looks at the new section 17A under the Malaysian Anti-Corruption Commission ("MACC") (Amendment) Act 2018.

Introduction

Pursuant to the recent Legal Notification PU(B) 247/2020, the **Malaysian Anti-Corruption Commission ("MACC") (Amendment) Act 2018**[1] has come into force effective 1 June 2020. The principal effect of the **MACC (Amendment) Act 2018** is the introduction of section 17A under the MACC Act.

Salient Features of the new provision Section 17A — "*Offence by commercial organization*"

Under section 17A of the MACC Act, a "*commercial organization*" commits an offence if a person "*associated*" with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent to:

- obtain or retain business for the commercial organisation; or

- obtain or retain an advantage in the conduct of business for the commercial organisation.

A "*commercial organization*" is defined as follows[3]:

- a company incorporated under the **Companies Act 2016** and carries on a business in Malaysia or elsewhere;
- a company wherever incorporated and carries on a business or part of a business in Malaysia;
- a partnership
  - under the **Partnership Act 1961** and carries on a business in Malaysia or elsewhere; or
  - which is a limited liability partnership registered under the **Limited Liability Partnerships Act 2012** and carries on a business in Malaysia or elsewhere; or
- a partnership wherever formed and carries on a business or part of a business in Malaysia.

Where a commercial organisation commits an offence, a director, controller, partner or officer or someone who is concerned with the management of its affairs is also deemed to have committed such offence (unless it is shown that the said individual did not consent and had exercised due diligence to prevent such corrupt activities).

Hence, it is important for employers to bear in mind that section 17A does not only provide for corporate liability but also personal liability, particularly for top-level management officers.

The essential aspects for a breach of section 17A include, without limitation"

- the activities were for the benefit of the commercial organisation; and
- the "*corrupt*" activities were committed by a person "*associated*" with the commercial organisation.

"*Corrupt activities*" which were not committed for the benefit and/or retention of an advantage for the commercial organisation appears not to be caught under this new provision.

Who are associated persons?

An interesting feature in the new provision is the concept of "*persons associated*".

For the purposes of section 17A, a person is associated with a commercial organisation if he/ she is

- a director;
- partner;
- an employee of the commercial organisation;
- a person who performs services for or on behalf of the commercial organisation[4].

Based on the new provision, an associated person may not necessarily even be an employee of the commercial organisation.

For example, where Company A engages a third-party contractor who offers bribes/gratification to other parties which would eventually benefit Company A. Under section 17A, Company A may still be liable.

Therefore, the threshold for a commercial organisation to be found guilty under section 17A is significantly lower than the provisions pre-amendments. There may even be instances

where commercial organisations may be guilty despite having no "*direct knowledge*" of such activities by its employees, directors or partners.

What can an employer do?

On that note, however, a commercial organisation charged under section 17A may raise a defence by proving that it had placed "*adequate procedures to prevent persons associated with the commercial organization from undertaking*"[ii] such "*corrupt activities*". It is pertinent to note that "*adequate measures*" are not defined under the MACC Act.

On 4 December 2018, the Prime Minister's Department released the Guidelines on Adequate Procedures ("GAP") to provide a skeletal outline of what commercial organisations can implement as part of its compliance with the "*adequate procedures*". The GAP outlined five main principles:

- Top Level Commitment;
- Risk Assessment;
- Undertake Control Measures;
- Systematic Review, Monitoring and Enforcement; and
- Training and Communication.

*(In short, **T.R.U.S.T**.)*

Briefly, the guidelines suggest the following:

Top Level Commitment

The GAP proposes that the all measures of anti-corruption start from the responsibility of the "*top level management*", which is defined as a person "*who is its director, controller, officer or partner*" or "*who is concerned in the management of its affairs*". Under this branch, top-level management officers of the commercial organisation are advised to carry out necessary efforts against any form of corrupt practices or potential corrupt activities. Amongst other things, the commercial organisations are advised to promote an integrity culture within the organisation. The idea is that the measures against corruption starts from the efforts taken by the top-level management and to be cascaded to its employees.

Risk Assessment

Under the Risk Assessment principle, commercial organisations are advised to regularly undertake corruption assessments to assess whether there are any risks for corruption, either internally or externally. The GAP also advised the commercial organisations to undertake these assessments every three years or whenever there is any update of the law.

Undertake Control Measures

According to the "*Undertaking*" measures, commercial organisations are advised to implement and put in place measures proportionate to the size of their organisation to address any corruption risks. Such measures include:

- carrying out due diligence on all relevant third parties and employees;
- implementing confidential reporting channels to promote whistleblowing and to prohibit retaliation against reports made in good faith; and
- establishing clear policies to govern matters relating to potential corrupt activities (for example, gifts, conflict of interest, donations).

Systemic Review, Monitoring and Enforcement

Pursuant to emplacing the necessary procedures, employers are required to monitor such measures. It is insufficient to merely introduce the measures without any enforcement. In this regard, top-level management officers are advised to implement monitoring programmes to ensure the employer's standard of compliance with its policies and procedures. These measures are put in place to encourage the employers to enforce their own internal policies.

In fact, the GAP suggested that commercial organisations engage external independent auditors once every three years to undertake these systemic reviews.

Training and Communication

The idea of this principle is that employers ought to communicate to their employees (or even third-party contractors) of these anti-corruption measures. Some examples of such communication could be by way of emails, memorandums, code of conduct or training programmes.

Conclusion

As the new section 17A is now in force, employers must play an active role in the battle against corruption. Employers are even more susceptible of being guilty under the new provision given the lower threshold. That said, employers ought to consider the Guidelines on Adequate Procedures and put in place sufficient measures against corruption.

BENEDICT NGOH TI YANG
EMPLOYMENT AND ADMINISTRATIVE LAW PRACTICE GROUP

For further information regarding employment and administrative law matters, please contact our Employment and Administrative Law Practice Group.

Endnotes:

[1]Act A1567.
[2]Section 17A (1).
[3]Section 17A (8).
[4]Section 17A (6).
[5]Section 17A (4).

Corporate/M&A

Enhanced Rights Issue Framework: Temporary Relief Measures to Facilitate Fund Raising by Listed Issuers

In this article, Gan Shao Qi discusses some of the recent measures announced to facilitate fund raising by listed issuers through a rights issue in Malaysia to assist companies and businesses that require access to immediate funding due to Covid-19.

Introduction

On 10 November 2020, Bursa Malaysia Securities Berhad ("Bursa Malaysia") and the Securities Commission Malaysia jointly announced, as a temporary relief measure, an enhanced rights issue framework[1] ("Enhanced Rights Issue Mandate").

New issue of securities under Bursa Malaysia's Main Market Listing Requirements ("Listing Requirements")

When a listed issuer intends to issue new securities, it is required to obtain prior shareholders' approval. Such shareholders' approval can take the form of a "*general mandate*" or where the issue of new securities departs from the requirements of the general mandate, the approval of the shareholders is to be obtained in a general meeting for the precise terms and conditions of the issue.

General mandate explained

Before the Enhanced Rights Issue Mandate and the 20% General Mandate described below, an issuance of securities can be undertaken by a listed issuer with a general mandate from its shareholders if the total number of shares or convertible securities to be issued, when aggregated with the total number of any such shares or convertible securities issued during the preceding 12 months, does not exceed 10% of the total number of issued shares (excluding treasury shares) of the listed issuer[2] ("General Mandate").

If the 10% limit is exceeded, the listed issuer will have to obtain shareholder approval in a general meeting with the precise terms and conditions of the issue before undertaking the issue of securities. A General Mandate, after it is obtained, authorises the listed issuer's board of directors to decide on the details of the issuance and allotment of securities as and when it deems appropriate.

Where a General Mandate is sought, the listed issuer is required to include in the statement accompanying the proposed resolution[3] information such as:

- whether the mandate is new or a renewal;
- where such mandate is a renewal or has been sought for in the preceding year, the proceeds raised from the previous mandate (if any) and the details and status of the utilisation of proceeds; and
- the purpose and utilisation of proceeds from the General Mandate sought[4].

One of the benefits of a General Mandate is that it expedites the fund raising of a listed issuer as a general meeting is not required to approve each capital increase. It also protects shareholders against dilution in their shareholding, as any issuance of securities will have to comply with the conditions in an approved General Mandate.

Increase in General Mandate limit to 20%

On 16 April 2020, Bursa Malaysia, recognising the need to give listed issuers fundraising flexibility to meet their working capital and operational expenditure during this challenging time, announced that the 10% limit under a General Mandate will be increased to 20%[5] ("20% General Mandate"). Listed issuers have until 31 December 2021 to utilise the 20% General Mandate.

In the statement accompanying proposed resolution, a listed issuer must disclose the views from its board of directors on whether the 20% General Mandate is in the best interest of the listed issuer and its shareholders, as well as the basis for such views.

Enhanced Rights Issue Mandate

Pursuant to the Enhanced Rights Issue Mandate[6], an eligible listed issuer[7] can have added flexibility to undertake a rights issue because an eligible issuer can now issue new rights ordinary shares to its existing shareholders on a pro rata basis, up to 50% of the total number of issued shares (excluding treasury shares).

In addition to the other requirements under Chapter 6 of the Listing Requirements for a rights issue, a listed issuer must also comply with the following in order to utilise an Enhanced Rights Issue Mandate:

- The Enhanced Rights Issue Mandate is only applicable for eligible listed issuers with existing controlling shareholders. A controlling shareholder is a person who is, or a group of persons who together are, entitled to exercise or control the exercise of more than 33% (or such other percentage as may be prescribed in the Take-Overs and Mergers Code as being the level for triggering a mandatory general offer) of the voting shares in a company, or who is or are in a position to control the composition of a majority of the board of directors of such company[8].
- The eligible listed issuer must procure the approval of its shareholders for the Enhanced Rights Issue Mandate at a general meeting. In the statement accompanying proposed resolution to seek approval for the Enhanced Rights Issue Mandate, in addition to the information as stipulated in Paragraph 6.03(3) of Chapter 6 of the Listing Requirements (as set out above), the eligible listed issuer has to include the views of its board of directors that the Enhanced Rights Issue Mandate is in the best interest of the eligible listed issuer and its shareholders, and the basis for such views.
- The Enhanced Rights Issue Mandate is only applicable for a rights issue of ordinary shares and not any other types of securities.
- The eligible listed issuer must procure irrevocable letter(s) of undertaking from its existing controlling shareholders to subscribe for their full entitlements under the rights issue.
- The rights shares are not priced at more than 30% discount to the theoretical ex-rights price.

As with the 20% General Mandate, the Enhanced Rights Issue Mandate may be utilised by an eligible listed issuer to issue rights shares until 31 December 2021.

Conclusion

With the 20% General Mandate (which also applies to other issue of securities such as a private placement) and the Enhanced Rights Issue Mandate, eligible listed issuers would be able to raise funds from their existing shareholders in a shorter time frame to meet their capital and financial needs.

An eligible listed issuer may issue rights shares of up to 50% of its total issued shares through the Enhanced Rights Issue Mandate in addition to the 20% General Mandate, irrespective of whether it has previously obtained or utilised the 20% General Mandate. It is hoped that this would assist eligible listed issuers in addressing and overcoming some of their operational challenges as a result of Covid-19.

GAN SHAO QI
CORPORATE/M&A PRACTICE GROUP

For further information regarding Corporate/M&A matters, please contact our Corporate/M&A Practice Group.

Endnotes:

[1]https://tinyurl.com/y3p96chs; https://tinyurl.com/y5f6g7g3.
[2]Paragraph 6.03(1), Chapter 6 of the Listing Requirements.
[3] A statement accompanying the proposed resolution refers to the explanatory note on a proposed resolution contained in the notice of general meeting of a listed issuer. Such statement is required to include certain information as stipulated in the Listing Requirements.
[4] Paragraph 6.03(3), Chapter 6 of the Listing Requirements.
[5]https://tinyurl.com/y5y2vual.
[6]https://tinyurl.com/y49a33jk.
[7]An eligible listed issuer means a listed corporation and a listed real estate investment trust. For the purpose of this article, the analysis on the utilisation of the Enhanced Rights Issue Mandate is limited to listed corporations.
[8]Paragraph 1.01, Chapter 1 of the Listing Requirements.

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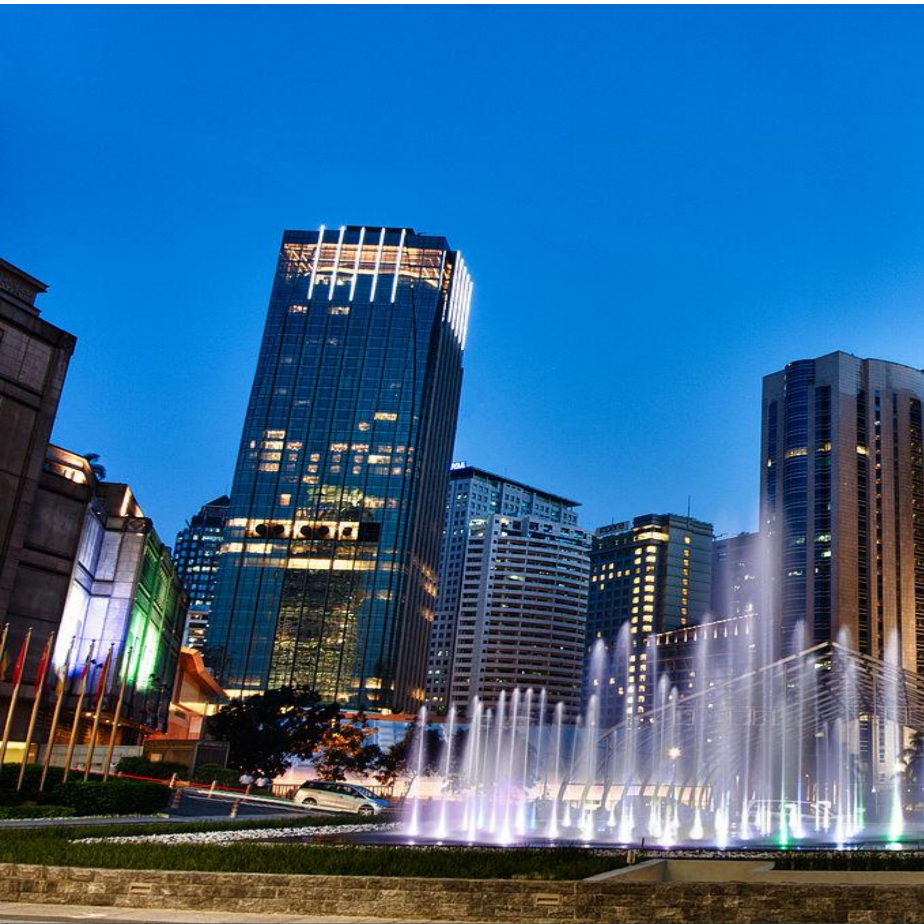

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