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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.

Corporate/M&A

Companies (Amendment) Bill 2020 — Proposed Changes to Beneficial Ownership of Shares in Private Companies

In this article, Lee Yuan Yao looks at the proposed disclosure requirements on beneficial ownership of shares in private companies under the proposed Companies (Amendment) Bill 2020.

Introduction

On 29 July 2020, the Companies Commission of Malaysia ("CCM") released a consultative document seeking feedback on the proposed Companies (Amendment) Bill 2020 ("CA Bill 2020"). One of the key proposed amendments to the **Companies Act 2016** ("CA 2016") is in relation to improving transparency of shareholding in companies in Malaysia by enhancing the disclosure framework for beneficial ownership.

Current framework

"*Beneficial owner*" is defined under section 2 of the CA 2016 to mean "*the ultimate owner of the shares and does not include a nominee of any description*". Based on a literal reading of the wording under section 56 of the CA 2016, unless specifically directed by the CCM, a stock exchange or the Securities Commission Malaysia[1], a company incorporated under the CA 2016 is empowered, but not required, to send several notices under section 56(1) to (3) of the CA 2016 to obtain information of beneficial owners of the shares in the company.

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Generally, these notices are issued by the company to its shareholder and any person who has an interest in any of the voting shares in the company to, amongst others, inform the company whether he or she is holding the shares in the company as a beneficial owner or a trustee (and in this case, to indicate the beneficial owner(s) and the nature of their interests in the shares)[2], and whether another person is entitled to control the shareholder in exercising the voting rights, and particulars of the agreement or arrangement in respect of the control[3].

The information obtained pursuant to the written notices under section 56(1) to (3) of the CA 2016 must be inscribed against the shareholder's name in a separate part of the company's Register of Members.

Having said that, in the CCM's *Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons* which became effective on 1 March 2020 ("BO Guideline"), it is compulsory for companies to send out the written notice under section 56(1) of the CA 2016 at least once in a calendar year, and companies are recommended to send out notices pursuant to section 56(1) to (3) of the CA 2016 frequently to update the CCM on the beneficial ownerships of their shareholders.

In addition, the CCM has imposed a duty on companies to lodge beneficial ownership information together with the annual return, under the general catch-all item of "*such other information as the CCM may require*" under section 68(j) of the CA 2016.

Proposed framework under the CA Bill 2020

Under the CA Bill 2020, the CCM will remove and replace the existing provisions relating to beneficial ownership of the CA 2016 with that set out below:

- Replacing definition of "*beneficial owner*": for the purposes of the proposed beneficial owner disclosure framework of the CA 2016, "*beneficial owner*" is defined to mean "*a natural person who ultimately owns or controls a company and includes an individual who exercises ultimate effective control over a company*"[4].

  Although it can be argued that the phrase "*ultimate owner*" under the existing definition can cover a person who controls the company, this proposed definition expressly goes beyond the direct ownership of shares by covering the perspective of effective control over a company. With the introduction of this definition, it is clearer that a person who is not listed as a shareholder may still be categorised as a beneficial owner.

  It is currently unclear what is the extent and threshold of ownership and control of a person over the shares in a company to fall within the definition of "*beneficial owner*". The current BO Guideline (which sets out certain thresholds for a person to be categorised as beneficial owner) was drafted based on the existing provisions under the CA 2016 and will likely require amendment following the enactment of the CA Bill 2020.

- Obligation to obtain beneficial ownership information: Unlike the existing provisions under the CA 2016, a company incorporated under the CA 2016 will be required to send written notices to obtain information of beneficial owners of the shares in the company. These notices are as follows:
  - Written notice by the company to its shareholder to, amongst others, inform the company about the beneficial owner of the shares held by the shareholder. Failure to send such notice without any reasonable ground to do so is an offence and is, on conviction, punishable to a fine of not exceeding RM50,000 as per the general penalty under the present section 588 of the CA 2016.
  - Written notice by the company to (aa) any person whom the company knows or has reasonable grounds to believe is a beneficial owner of the company; and (bb) any person whom the company knows or has reasonable grounds to believe knows the identity of a person who is a beneficial owner of the company or is likely to have that knowledge, to state whether he knows or has reasonable grounds to believe that any other person is a beneficial owner of the company.
- Obligation on beneficial owners: beneficial owners are required to notify and provide information required to be included in the Register of Beneficial Owners, including any changes of the beneficial owner[5]. Failure to comply with this requirement constitutes an offence that is punishable in accordance with the general penalty under the aforementioned section 588 of the CA 2016.
- Introduction of a new register of Beneficial Owners: every company incorporated under the CA 2016 must keep a Register of Beneficial Owners and record details of beneficial owners of the shares in the company[6].

  Failure to comply with the requirement to keep a Register of Beneficial Owners is an offence that is punishable on conviction to a fine not exceeding RM10,000 and, in the case of continuing offence, to a further fine not exceeding RM500 for each day during which the offence continues after conviction[7].

  The company is required to notify the CCM of any change in the particulars in the Register of Beneficial Owners[8].

  A foreign company registered under the CA 2016 will have to maintain a new register of members of foreign companies with information of local and foreign shareholding in Malaysia in lieu of the current branch register.

- The company is required to submit beneficial ownership information as part of the company's annual return through the proposed amendment of section 576(2) of CA 2016.
- Disclosure of beneficial ownership: The beneficial ownership information in the Register of Beneficial Owners that is lodged with the CCM will only be made available to the beneficial owners listed in the register, the persons authorised by the beneficial owners, and the following bodies under the proposed clause 56C(7) of the CA 2016:

    i. Royal Malaysian Police;
    ii. Malaysian Anti-Corruption Commission;
    iii. Royal Malaysian Customs Department;
    iv. Bank Negara Malaysia; and
    v. Securities Commission Malaysia.

Companies exempted from the beneficial ownership reporting framework

The CA Bill 2020 intends to exempt companies that are licensed or regulated by Bank Negara Malaysia, Securities Commission Malaysia or traded on a stock exchange (in Malaysia or otherwise), from the beneficial ownership reporting framework[9]. This is to ensure that these companies are not over-burdened as these entities are already subject to rules or regulations pertaining to disclosure of shareholders' interest and obligations.

Implication

Once the CA Bill 2020 is enacted into law, companies incorporated under the CA 2016 must prepare a Register of Beneficial Owners that is always up to date. Further, it would also be compulsory for a company to send written notices to its shareholders, any person whom the company knows or has reasonable grounds to believe is a beneficial owner of the company, and any person whom the company knows or has reasonable grounds to believe knows the identity of a person who is a beneficial owner of the company or is likely to have that knowledge, to obtain information of beneficial owner of the shares in the company.

In tandem with these notices, beneficial owners must notify and provide information required to be included in the company's Register of Beneficial Owners. In addition, there would be an express requirement for beneficial ownership information to be submitted to the CCM as part of the company's annual return.

Although the aforesaid obligations under the CA Bill 2020 are imposed on the company, generally, a company secretary has the duty to maintain and keep updated all the registers, records and books which are required to be kept at the registered office of the company[10].

Further, companies whose shareholders have adopted trust arrangements to obtain certain regulatory licences may need to be mindful of any implication of the beneficial ownership disclosure framework since there is a Register of Beneficial Ownership that can be used to check the beneficial owners of the companies.

Summary

The proposed amendments to the beneficial ownership disclosure framework under the CA Bill 2020 serve to improve Malaysia's corporate governance and transparency of shareholding structure. The company secretary must also ensure that the Register of Beneficial Owners and relevant template written notices are put in place pending the enactment of the CA Bill 2020 as law.

Companies with trust arrangements regarding shareholding structure and have been issued with relevant regulatory approval and licences may need to evaluate its shareholding structure in view of the proposed requirements in the CA Bill 2020.

LEE YUAN YAO
CORPORATE/M&A PRACTICE GROUP

[1] Section 56(6) of the CA 2016
[2] Section 56(1) of the CA 2016
[3] Section 56(3) of the CA 2016
[4] Proposed clause 56B(1) of the CA 2016
[5] Proposed clause 3 of the CA Bill 2020
[6] Proposed clause 3 of the CA Bill 2020
[7] Proposed clause 3 of the CA 2020
[8] Proposed clause 3 of the CA Bill 2020
[9] Proposed clause 3 of the CA Bill 2020
[10] Paragraph 27, Guidelines Relating to Practising Certificate for Secretaries under section 241 of the CA 2016.

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

Dispute Resolution

He-Con Sdn Bhd v Bulyah bt Ishak & Anor [2020][1]: Extension to the Requirements for Deferred Indefeasibility?

A case note by Datin Jeyanthini Kannaperan and Koo Yin Soon.

The Legal Backdrop

Indefeasibility of title is the immunity obtained by a registered proprietor or interest holder in property. This concept is encoded in Section 340 of the **National Land Code 1965** ("Section 340") which sets out both how such immunity operates and the exceptions to the immunity.

Previous debate on whether the proviso in Section 340 ("Proviso") applied to immediate purchasers (giving rise to an "*immediate indefeasibility*") or subsequent purchasers ("*deferred indefeasibility*") ended with the Federal Court in **Tan Yin Hong v Tan Sian San**[2] unanimously holding that a correct reading of Section 340 only allowed subsequent purchasers to rely on the Proviso.

The current position is best summarised as follows:

No.	Party	Relevant Provision	Law
1.	Proprietor	Section 340(1),(2) & (3)	Holds indefeasible title but subject to following instances involving the following exceptions: (a) fraud or misrepresentation, (b) registration obtained by forgery or by means of an insufficient or void instrument (c) unlawfully acquired by exercise of authority conferred by written law
2.	Immediate Purchaser		
3.	Subsequent Purchaser	Section 340(1), (2), (3) and Proviso	Subject to exceptions but Proviso allows subsequent purchaser who can show title acquired in good faith and for valuable consideration to maintain indefeasible title

The extent of deferred indefeasibility was best mirrored in the case of **CIMB Bank Berhad v AmBank Berhad**[3] ("CIMB") where the immediate purchaser (fraudster) obtained registered title to property (from CIMB Bank Berhad) and charged the same to AmBank Berhad. The Federal Court maintained that AmBank Berhad, who could demonstrate its charge was created in good faith and for valuable consideration, had a valid charge over the property.

However, the dissenting judgement of Justice Jeffrey Tan FCJ applying **Wright v Lawrence**[4] proposed that the immediate purchaser from whom the subsequent purchaser obtains title must also be a *bona fide* purchaser on the reasoning "*that transactions cannot be contrived by fraudsters and accomplices".*

He-Con Sdn Bhd v Bulyah Ishak[5] ("He-Con")

Facts

In 1997, En Nor Zainir ("Buyer") purchased Lot 31 from He-Con who, in exchange for the full purchase price, executed a Power of Attorney in favour of the Buyer. The Buyer in turn executed a Power of Attorney in favour of En Bulyah Ishak and passed away shortly thereafter. Although En Bulyah was appointed joint-executor of the Buyer's estate (together with the Buyer's widow Puan Noraini binti Abdullah), due to He-Con Sdn Bhd refusing to effect a direct transfer and En Bulyah not being able to afford sufficient stamp duty at the time, Lot 31 remained in the name of He-Con.

He-Con subsequently charged one Lot 31 to a licensed financial institution ("FI") and upon He-Con's default on payment FI commenced foreclosure proceedings.

Decisions of the High Court[6], Court of Appeal[7] and Federal Court

The joint executors ("Plaintiffs") challenged the foreclosure proceedings but the High Court, while recognizing that He-Con was a bare trustee for the deceased ("First Finding"), held that the FI was a *bona fide* purchaser under section 340 and could proceed with foreclosure proceedings ("Second Finding"). The Plaintiffs appealed against the Second Finding.

The Court of Appeal allowed the Plaintiffs' appeal on the Second Finding holding that the FI was an "*immediate purchaser"* (having obtained its charge directly from He-Con) who could not rely on the Proviso and therefore did not have indefeasible title.

The Federal Court dismissed the FI's appeal to the Federal Court, holding that the transaction between the He-Con and the FI was a "*direct and immediate purchase"* and liable to be vitiated by the exceptions in Section 340 (in this case "*insufficient and/or void instrument"*).

The "*Extension*"

The Federal Court did not stop there and in paragraph 92 of the judgment, discussing a variation of the facts where the FI had obtained its interest from an immediate purchaser (Mr A) stated:

> "*[92] It would have been different if the fourth defendant (FI) had entered into the charge agreement with a person, say Mr A, who had bought the said property from the first defendant (He-Con) and that Mr A then charged the said property to the fourth defendant.* ***There is however a caveat to be made here, namely, that when Mr A bought the said property from the first defendant, Mr A must have bought the said property in good faith****. In the scheme of things, that Mr A would stand in a position of an immediate purchaser. As such, although he is a bona fide purchaser, his title over the said property, although registered, is defeasible by virtue of s. 340(2) of NLC. As an immediate purchaser, Mr A cannot pass a good and an indefeasible title to whoever were to purchase the said property from him*." (emphasis added)

And at paragraph 102 stated that:

> "*[102] The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is bona fide for value. Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible, although it is duly registered.*"

This was an express departure from the way the majority decision in CIMB where the dissenting reasoning was quoted and expressly applied.

Conclusion

It is expected that more cases premised on this concept of "*double bona fides*" will come before the courts in the coming months and with that provide more clarity on the application of this new concept as opposed to the traditional position of indefeasibility of title.

DATIN JEYANTHINI KANNAPERAN
KOO YIN SOON
DISPUTE RESOLUTION PRACTICE GROUP

[1] [2020] 7 CLJ 271 presided over by a five-member panel of the Federal Court.
[2] [2010] 2 CLJ 269.
[3] [2017] 5 MLJ 142.
[4] [2007] 278 DLR 698.
[5] [2020] 7 CLJ 271.
[6] Shah Alam Civil Suit No. 22NCVC-307-04-2013.
[7] Court of Appeal Civil Appeal No. B-02(NCVC)(W)-803-04-2016.

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

Intellectual Property

Whether a Sub-Licensee of a Registered Industrial Design Owner has the Required Standing to Sue for Design Infringement

A case note by Sim Sook Eng.

Introduction

Does a sub-licensee of a registered industrial design owner have the required standing to bring an action for design infringement?

Section 33(4) of the **Industrial Designs Act 1996** ("IDA") provides that for the purpose of infringement proceedings:

> *" … 'owner of a registered industrial design' means the registered owner and includes an assignee, a licensee or the beneficiary of a compulsory licence granted under section 27; but if any proceedings are instituted by a person other than the registered owner, it must be proved that that person had made a prior request to the registered owner to institute proceedings for the infringement complained of by him and that the registered owner had refused or failed to institute the proceedings within three months from the receipt of the request, without prejudice however to the registered owner's right to join in such proceedings."*

While section 33(4) of the IDA refers to the word "*licensee*", it is unclear whether this would include a sub-licensee. This raises the question as to whether a sub-licensee enjoys the rights of a licensee and has the *locus standi* to sue for design infringement.

In the case of **CMN International Sdn Bhd v Dart Industries Inc**[1], the Court of Appeal considered the standing of a sub-licensee in an action for design infringement.

The facts

This case concerns six appeals from a decision of the High Court at Kuala Lumpur in relation to two industrial design infringement suits which were heard together.

The first plaintiff in this case, Dart Industries Inc ("Dart"), commenced actions against the defendants, CMN International Sdn Bhd & four others ("CMN"), for infringing its registered industrial designs.

One of the issues considered in this case was whether the second plaintiff, Tupperware Brands Malaysia Sdn Bhd ("Tupperware") (who is a sub-licensee of Dart), has the right to file an action for design infringement.

Findings of the High Court

The High Court in considering this issue took the view that there are two limbs in section 33(4) of the IDA by virtue of the use of the semicolon in the provision. It held that under the first limb, an assignee, a licensee or a beneficiary of a compulsory license granted under section 27 of the IDA may file a design infringement suit.

The second limb provides that if an industrial design infringement action is instituted by a person who is not the registered industrial design owner, it must be shown that that prior request was made to the registered industrial design owner to institute the infringement suit and the registered industrial design owner has refused or failed to initiate an action within three months from the receipt of such request.

The High Court took the position that the first limb of section 33(4) of the IDA is subject to the second limb due to the word "*but*" and hence a licensee can only file an action for design infringement if the second limb is satisfied.

To sum up, the High Court held that Tupperware as a sub-licensee is not entitled to bring an action for design infringement under section 33(1) and (4) of the IDA. The findings were based on the following grounds:

- Tupperware Products Inc ("TPI"), who is a licensee of Dart, is barred by the second limb from filing any design infringement suit since Dart as the registered industrial design owner has instituted the suits;
- Tupperware as Dart's sub-licensee has no right under section 33(4) of the IDA to institute the design infringement suits; and
- even if Tupperware is not barred by section 33(4) of the IDA from filing the infringement suits, Tupperware is estopped by the relevant clauses in the Sub-Licence Agreement entered between TPI and Tupperware from bringing any action[2].

Findings of the Court of Appeal

On appeal to the Court of Appeal, the question as to whether Tupperware as a sub-licensee has the right to initiate design infringement action was one of the grounds of appeal.

Contrary to the findings of the High Court on this issue, the Court of Appeal held that the first limb of section 33(4) of the IDA has expanded the definition of "*owner*" for the purpose of conferring the right to bring an infringement action and that the second limb of the provision is merely procedural. The second limb would only be applicable if the infringement action is commenced by a person other than the registered owner and without the presence of the registered owner.

In the present case, the infringement actions were commenced by Dart, who is the registered owner. The need for Tupperware to show consent from Dart in a case where Dart commenced action together with Tupperware is an absurd proposition. Thus, the Court of Appeal held that the second limb had no application in the present case. A licensee who cooperates with the registered proprietor and becomes co-plaintiff in an infringement action should not be prevented from recovering damages because of the infringing acts of the defendant.

The Court of Appeal added that the intention of the second limb is a procedural safeguard to prevent an alleged infringer being subjected to two or more separate actions by a registered owner and by a licensee for the same acts of

alleged infringement. The absence of the second limb of section 33(4) of the IDA may result in multiple infringement actions filed against an alleged infringer for the same acts of alleged infringement.

The Court of Appeal held that section 33(4) of the IDA is worded in a broad manner in conferring a right to sue which is not only limited to an exclusive licensee. As such, section 33(4) of the IDA could not have intended to exclude the possibility that the licence might be granted by an agent of the owner.

The Court of Appeal concluded that section 33(4) conferred rights to sue on all licensees whether exclusive or non-exclusive. A sub-licensee is a licensee of the ultimate licensor, the registered industrial design owner and accordingly does have the required *locus standi* to sue in an infringement action.

The Court of Appeal further held that the High Court's reliance on section 61(1), (2) and (3) of the **Patents Act 1983** ("PA") when interpreting section 33(4) of the IDA was erroneous. The Court of Appeal held that the wordings of section 61(1), (2) and (3) of the PA differ significantly from section 33(4) of the IDA. If section 33(4) of the IDA is intended to reproduce the same effect as section 61(1), (2) and (3) of the PA, the Parliament would have adopted the same wordings for section 33(4) of the IDA. The Court of Appeal took the position that the wording of section 33(4) of the IDA is clear and hence it is not necessary to consider section 61 of the PA when determining the ambit of section 33(4) of the IDA.

Regarding the High Court's findings that Tupperware was estopped from filing a design infringement action by reason of the relevant clauses in the Sub-Licence Agreement entered between TPI and Tupperware, the Court of Appeal disagreed with the findings of the High Court.

The Court of Appeal held that the party entitled to the benefit of the contract (which is TPI in the present case) may choose to enforce it or not according to its own commercial interest. CMN, who are not parties to that contract, do not have any right to require the contractual provision of that contract to be enforced for their benefit. In any event, the Court of Appeal found that the clauses in the Sub-Licence Agreement do not prevent Tupperware from bringing an action for design infringement.

Based on the above reasons, the Court of Appeal held that Tupperware has the *locus standi* to bring an action for industrial design infringement and does not require consent from the registered owner to commence proceedings concerning any infringement since the registered owner was the party who commenced the actions.

Conclusion

The novel issue of whether a sub-licensee has the *locus standi* to sue in an action for design infringement has been clarified by the Court of Appeal in this case. It was held that section 33(4) of the IDA confers a right to sue in an industrial design infringement action on all licensees which would include sub-licensees.

SIM SOOK ENG
INTELLETUAL PROPERTY PRACTICE GROUP

[1] [2020] MLJU 903.
[2] [2019] MLJU 120.

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

Employment and Administrative Law

Make Working from Home Work — Employers' Considerations for Remote Working

In this article, Grace Chai Huey Yann explores common issues relating to remote working arrangements implemented by employers in response to the Covid-19 pandemic.

Introduction

The Covid-19 pandemic has caused unprecedented impact on businesses worldwide, especially when international borders are closed and various degrees of lockdown are introduced in response to the pandemic. Since the first quarter of this eventful year, virtual working has become the option for many employers. It is safe to say that by now, Working from Home ("WFH") is no longer a foreign concept.

Although Malaysia has entered the Recovery Movement Control Order ("RMCO") period since June where most businesses had resumed operations subject to compliance with the relevant Standard Operating Procedure ("SOPs") in place, the situation of the pandemic remains uncertain both locally and internationally.

Consequently, employers continue to review their employees' working arrangements to ensure continuity of their businesses. It is therefore important that employers understand their legal obligations to ensure that any measure taken is lawful.

Temporary or permanent arrangement?

Different employers may have different plans in mind. Some are considering long-term WFH arrangements: Twitter has announced the option for its employees to WFH permanently. There are also some who intend to implement this arrangement temporarily only as a reaction to the Covid-19 situation. Regardless of the plan, communication with employees is the key.

If an employer plans to ask its employees to eventually return to their workplace, even if they were able to work from home previously, it is important that the employer ensures its communications to the employees are clear that any WFH arrangements are not intended to extend indefinitely.

This is because if the employer is not clear in its communications that the arrangements are meant to be temporary, the employees could assert that these arrangements have become permanent through custom and practice due to the conduct and behaviour of both parties, or due to an expectation or assumption.

For there to be a custom and practice, the arrangement must be long-standing and established. Further, it must be continuously applied, certain and known to the parties. As such, there is a risk of such expectations arising if employees continue to WFH for an extended period.

It is imperative for employers to note that generally any changes to their employees' terms and conditions of employment must be with the employees' consent. Therefore, in the event that the WFH arrangements are intended to become permanent, it is advisable for the relevant changes to the employees' terms and conditions of employment, such as a change in the place of

work, be documented in writing as soon as reasonably practicable.

Additionally, employers should undertake a review of their policies to ensure that they remain fit for purpose whilst the employees work remotely. For example, any health and safety policy will need to be suitably tailored.

Do temporary WFH arrangements impose additional obligations on employers?

The obligations of employers remain, such that employees working from home must continue to receive their salary at their usual rate and the usual employment terms and conditions still apply.

Where a benefit or entitlement is contractual, employers are obliged to continue paying the employees such benefits, even if they are working remotely. For example, eligible employees should continue to be reimbursed for any overtime worked in accordance with the company's applicable overtime policy.

Whilst temporary WFH arrangements do not impose additional contractual obligations on the employers, employers should be mindful of its implied duty of trust and confidence towards their employees. This may include having employees' expenses for certain home-working equipment reimbursed or providing the employees with equipment or software to enable them to perform their usual duties at home. As part of this, companies may consider updating their expenses policies accordingly. Ultimately, employers should ensure that their employees are not shouldering the business costs of the company.

Although it may not be practical for employers to assess the health and safety of their employees' remote working location, employers can consider providing guidelines or advice for employees to carry out basic risk assessments at home. Employers may also issue policies to make sure that, ultimately, it is the employees' responsibility to maintain a safe and ergonomically sound work environment.

Other considerations

As employees work offsite, certain sensitive information can be susceptible to abuse. As such, employers should consider updating any policies relating to the use of IT, personal data and confidential information to prevent them from being misused or mislaid whilst the employees work remotely.

Some examples include issuing policies to ensure that employees keep their equipment password protected, store the equipment in a safe and clean space when not in use, follow all data encryption and protection standards and prohibiting the use of the company's equipment by anyone other than the employee.

As remote working is a relatively new arrangement for most of us, employers should continue to provide adequate support to the employees to ensure the efficiency of the workforce, albeit in a virtual format.

For example, it may be prudent for employers to clarify that any WFH arrangement is not intended to be a substitute for in-home child or dependent care. In this regard, employers can consider giving guidance to employees to make appropriate arrangements to ensure that the expected attention is devoted to job performance during their work hours.

Employers should also keep in regular contact with the employees to ensure effective communication between the parties, including

on the well-being of the employees.

Conclusion

As the Covid-19 situation continues to evolve, it is prudent that employers remain flexible and open to adopting changes in the work environment to ensure the continuity of businesses. If proper implementation of remote working arrangements allows businesses to continue their productivity, returning to work post-Covid-19 may not necessarily require one to return to the office desk anymore.

GRACE CHAI HUEY YANN
EMPLOYMENT AND ADMINISTRATIVE LAW PRACTICE GROUP

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

Real Estate

PENJANA Short-Term Economic Recovery Plan: Incentives for Property Sector

In this article, Tang Yen Yi examines the PENJANA Short-Term Economic Recovery Plan in relation to the property sector.

During these unprecedented times of a global pandemic due to COVID-19, the Government of Malaysia announced the recovery plan for the country's economy: PENJANA Short-Term Economic Recovery Plan ("PENJANA").

PENJANA includes plans to stimulate the economy with incentives for real estate transactions. The Home Ownership Campaign which was first introduced in 2019 was reintroduced by the Government as part of PENJANA in June 2020. By Federal Government Gazette P.U. (A) 216/2020 and P.U. (A) 217/2020 both dated 28 July 2020, the Stamp Duty (Exemption) (No. 3) Order 2020 and the Stamp Duty (Exemption) (No. 4) Order 2020 (collectively, "Exemption Orders") came into operation on 1 June 2020 pursuant to the Exemption Orders an individual is entitled to exemption from the stamp duty chargeable on the instrument of transfer and loan agreement for residential properties, subject to the stipulated requirements.

The Exemption Orders apply only to Malaysian citizens purchasing residential properties. For the purpose of the Exemption Orders, "*residential property*" means a house, a condominium unit, an apartment or a flat in Malaysia and includes a service apartment and a small office home office ("SOHO"), owned by an individual, jointly or solely, which is used only as a dwelling house.

A "*property developer*" referred to in the Exemption Orders means a property developer registered with the:

- Real Estate and Housing Developers' Association Malaysia ("REHDA");
- Sabah Housing and Real Estate Developers Association ("SHAREDA"); or
- Sarawak Housing and Real Estate Developers' Association ("SHEDA").

Subject to paragraph 2(1) of each of the Exemption Orders, the stamp duty exemptions apply only to the purchase of a residential property under the Home Ownership Campaign 2020/2021, the value of which is more than RM300,000.00 but not more than RM2.5 million and the loan agreement for the same property, subject to the conditions stipulated below.An individual shall submit to the Inland Revenue Board Malaysia a Home Ownership Campaign 2020/2021 Certification issued by REHDA,

SHAREDA or SHEDA for the purpose of obtaining the stamp duty exemption.

Stamp duty exemption on acquisition of residential property

The stamp duty exemption shall only be for the stamp duty that is imposed on instruments of transfer for the first RM1 million or less from the value of the residential property and stamp duty of RM3.00 shall be imposed for every RM100.00 of the balance amount of the value of the residential property which is in excess of RM1 million.

The conditions to be fulfilled to qualify for the exemption of the stamp duty chargeable on all instruments of transfer are provided in paragraph 2(3) of the Stamp Duty (Exemption) (No. 4) Order 2020:

> "*2. (3) The stamp duty exemption under subparagraph (1) shall only apply if —*
> *the sale and purchase agreement for the purchase of the residential property is between an individual and a property developer;*
> *the purchase price in the sale and purchase agreement referred to in subparagraph (a) is a price after a discount of at least ten per cent from the original price offered by the property developer except for a residential property which is subject to controlled pricing; and*
> *the sale and purchase agreement for the purchase of the residential property is executed on or after 1 June 2020 but not later than 31 May 2021 and is stamped at any branch of the Inland Revenue Board Malaysia.*"

For the purpose of exemption of stamp duty, paragraph 2(4) of the Stamp Duty (Exemption) (No. 3) Order 2020 provides that the value of the residential property shall be based on the market value.

Example of calculations of the stamp duty payable on the instrument of transfer with exemption of stamp duty under this Order:

Value of the residential property: RM1.5 million

Calculation of the stamp duty chargeable:

First RM1,000,000.00	Exempted
Balance RM500,000.00	RM3.00 x RM500,000.00 ÷ RM100.00 =RM15,000.00

Under the Exemption Orders, the total stamp duty payable for a residential property with the purchase price of RM1.5 million will be RM15,000.00.

If not for the Exemption Orders, the stamp duty payable under the Stamp Act 1949 for the same purchase price of RM1.5 million would be as follows:

First RM100,000.00 (1%)	RM1,000.00
For the next RM400,000.00 (2%)	RM8,000.00
For the next RM500,000.00 (3%)	RM15,000.00
For the balance RM500,000.00 (4%)	RM20,000.00
TOTAL stamp duty payable:	RM44,000.00

Stamp duty exemption on loan agreement for acquisition of residential property

Unlike the Stamp Duty (Exemption) (No. 4) Order 2020 which provides for stamp duty exemption up to only the first RM1 million of the value of the residential property, the Stamp Duty (Exemption) (No. 3) Order 2020 provides for the exemption of 100% of the stamp duty chargeable on the loan agreement to finance the purchase of residential property.

The conditions to be fulfilled for such exemption of the stamp duty chargeable on the loan agreement are provided in Paragraph 2(2) of the Stamp Duty (Exemption) (No. 3) Order 2020:

> *"2. (2) The stamp duty exemption under subparagraph (1) shall only apply if —*
>
> *the sale and purchase agreement for the purchase of the residential property is between an individual and a property developer;*
>
> *the purchase price in the sale and purchase agreement referred to in subparagraph (a) is a price after a discount of at least ten per cent from the original price offered by the property developer except for a residential property which is subject to controlled pricing; and*
>
> *the sale and purchase agreement for the purchase of the residential property is executed on or after 1 June 2020 but not later than 31 May 2021 and is stamped at any branch of the Inland Revenue Board Malaysia*."

Real property gains tax exemption

Other than the acquisition of residential property, individuals who are Malaysian citizens who dispose of their residential properties between 1 June 2020 and 31 December 2021 will be exempted from payment of real property gains tax ("RPGT").

By Federal Government Gazette P.U. (A) 218/2020 dated 28 July 2020, the Real Property Gains Tax (Exemption) Order 2020 came into operation on 1 June 2020 and a Malaysian is exempted from payment of tax on the chargeable gains accruing on the disposal of a residential property, subject to the conditions stipulated below.

For the purposes of this Order, "*residential property*" has the same definition provided in the Stamp Duty (Exemption) (No. 3) Order 2020 and the Stamp Duty (Exemption) (No. 4) Order 2020.

The conditions to be fulfilled for the exemption of RPGT are provided in Paragraph 3(2) of the Real Property Gains Tax (Exemption) Order 2020:

> *"3. (2) The exemption referred to in subparagraph (1) shall be applicable on the condition that —*
>
> *not more than three units of residential property disposed of shall be eligible for each disposer;*
>
> *the residential property disposed of is not acquired within the period from 1 June 2020 until 31 December 2021 —*
>
> *by way of a transfer between spouses; or*
>
> *by way of a gift between spouses, parent and child, or grandparent and grandchild where the donor is a citizen; and*
>
> *the sale and purchase agreement for the disposal of the residential property is executed on or after 1 June 2020 but not later than 31 December 2021 and is duly*

stamped not later than 31 January 2022 or where there is no sale and purchase agreement, the instrument of transfer for the disposal of the residential property is executed on or after 1 June 2020 but not later than 31 "December 2021 and is duly stamped not later than 31 January 2022."

For a conditional contract which requires the approval of the Federal Government or a State Government, the exemption shall only be applicable if the contract for disposal of the residential property is executed on or after 1 June 2020 but not later than 31 December 2021 and is duly stamped not later than 31 January 2022, and the approval of the Federal Government or the State Government concerned for the disposal of the residential property is obtained on or after 1 June 2020.

Despite the exemption of RPGT, Malaysians who dispose of their residential property between 1 June 2020 and 31 December 2021 are still required to comply with any requirement to submit any return or to furnish any other information under the **Real Property Gains Tax Act 1976**.

Conclusion

The cost of acquiring a new residential property from a property developer during the period from 1 June 2020 until 31 May 2021 is reduced by the reduction of stamp duty chargeable on the instrument of transfer and exemption of stamp duty chargeable on the loan agreement, subject to the conditions stipulated in the Stamp Duty (Exemption) (No. 3) Order 2020 and Stamp Duty (Exemption) (No. 4) Order 2016.

On the other hand, for a disposer, the cost of disposing of any residential property is reduced by the exemption of RPGT, subject to the conditions stipulated in the Real Property Gains Tax (Exemption) Order 2020.

TANG YEN YIK
REAL ESTATE PRACTICE GROUP

For further information regarding real estate law matters, please contact our Real Estate Practice Group.

Tax and Revenue

SWW v Ketua Pengarah Hasil Dalam Negeri[1]— The Granting of Judicial Review by the High Court of Malaya in Tax Proceedings.

A case note by Abhilaash Subramaniam.

Introduction

In the recent case of **SWW v Ketua Pengarah Hasil Dalam Negeri**, the High Court of Malaya granted the taxpayer leave to apply for judicial review, a stay of proceedings pending the disposal of the taxpayer's application for judicial review and subsequently allowed the taxpayer's judicial review application on the merits, ordering a prohibition on all collection and enforcement action relating to disputed taxes and assessments raised by the Inland Revenue Board ("Revenue").

Facts

The taxpayer was a property development company that was established for the purposes of being the master developer of a Petrochemical and Maritime Industrial Centre ("TMI Centre") in Johor. The Johor State Government alienated a

number of plots of leasehold land to the taxpayer for it to undertake the establishment and development of the TMI Centre.

The taxpayer subsequently undertook extensive development of the TMI Centre to convert the relevant plots of land into a suitable and utilisable state to be sold to prospective buyers who would use the facilities at the TMI Centre. This included, amongst others, land reclamation, the setting up of roads, the building of bridges, the building of land barriers and others.

Due to the nature of the relevant plots of land that are located a significant distance from the city of Johor Bahru and the specific function of the TMI Centre, the taxpayer had to undertake efforts to identify potential buyers for the relevant plots of land.

In 2008, the taxpayer identified a purchaser who wished to acquire a portion of land ("the Johor Land") situated in a larger plot of land ("Master Plot of Land") at the TMI Centre. Accordingly, the taxpayer disposed of its leasehold interest in the Johor Land for the duration of 30 years (renewable for a further 30 years) to the purchaser.

The taxpayer wished to dispose of the entire leasehold interest in the Johor Land to the purchaser but was constrained as the Johor Land was leasehold land and still formed part of the larger Master Plot of Land. The **National Land Code** only allowed the taxpayer to dispose of the leasehold interest in the Johor Land for a duration of 30 years at a time.

Following the above, the taxpayer (as a property developer) deducted the property development expenditure it incurred to develop the Johor Land from the income received from the disposal of the leasehold interest in the Johor Land to the purchaser.

The Revenue subsequently audited the taxpayer and took the position that the disposal of the 30 + 30-year leasehold interest in the Johor Land to the purchaser was not a "*sale of land*". The Revenue further purported that for the purposes of the transaction, the taxpayer was not engaged in the business of property development but the business of leasing land and, accordingly, that the taxpayer was not entitled to any deductions of its property development expenditure against the income for the disposal of the leasehold interest in the Johor Land to the purchaser.

According to the Revenue, the taxpayer would only have been entitled to its property development expenditure if it subdivided the Master Plot of Land, obtained a separate title for the Johor Land and thereafter disposed of the full 99-year leasehold interest in the Johor Land to the purchaser.

The Revenue accordingly raised Notices of Additional Assessment in October 2019 amounting to more than RM27 million with penalties against the taxpayer ("Disputed Notices"). The Disputed Notices had the effect of taxing the taxpayer on its gross income with no deduction for its expenditure.

The taxpayer filed an application for judicial review before the High Court to challenge the conduct of the Revenue in raising the Disputed Notices. It was argued before the High Court that the taxpayer was constrained by the provisions of the **National Land Code** and accordingly could not dispose of the full 99-year leasehold interest in the Johor Land (at the relevant time) and it was perverse for the Revenue to disregard the **National Land Code** and purport to introduce further conditions (such as the requirement to subdivide the Master Plot of Land) that do not exist in law.

It was further argued that the fact that the taxpayer disposed of a 30-year leasehold interest

in the Johor Land (with the option to renew) did not change the fact that the taxpayer was nevertheless engaged in the business of property development and accordingly was entitled to deduction of its property development expenditure.

Decision of the High Court

At the leave stage, the High Court granted the taxpayer leave to apply for judicial review and further ordered a stay of proceedings and enforcement, pending the disposal of the taxpayer's judicial review application on the merits.

At the merits stage, the High Court recognised that this matter involved important questions of land law and accordingly granted the taxpayer's application for judicial review and ordered a prohibition on all attempts to enforce and/or collect the taxes and penalties under the Disputed Notices pending the determination of the validity of the Disputed Notices in the judicial review proceedings (including any appeals arising therefrom) and/or the determination of the taxpayer's appeal under sections 99 to 102 of the **Income Tax Act 1967** (including any appeals arising therefrom).

The Revenue has appealed against the decision of the High Court.

ABHILAASH SUBRAMANIAM
TAX AND REVENUE PRACTICE GROUP

[1]JA-25-61-11/2019.

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

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