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TAX LAW

Budget 2013 proposals

IN THIS ARTICLE, PENNY WONG SOOK KUAN HIGHLIGHTS SOME PROPOSED CHANGES PURSUANT TO BUDGET 2013.

The recent Budget 2013, which was tabled in Parliament on 28 September 2012, was entitled "Prospering the Nation, Enhancing Well-Being of the Rakyat: A Promise Fulfilled". Some of the proposed changes pursuant to Budget 2013 are highlighted below. Unless otherwise stated, the budget proposals discussed below, when passed by Parliament, shall take effect from Year of Assessment ("YA") 2013.

Direct taxes — income tax

- **Reduction in income tax rates for residents**
  Presently, income tax charged on resident individuals are calculated on scale rates ranging from 0% to 26% where the rate of 26% is charged on individuals with chargeable income exceeding RM100,000. The rate will be reduced by 1% for chargeable income bands between RM2,501 to RM50,000.

- **Reduction of time bar**
  The time bar for the Director General of Inland Revenue ("DGIR") to raise an assessment or additional assessment will be reduced from six to five years save in cases involving fraud, wilful default or negligence. This proposed amendment will only come into force on 1 January 2014 and similar amendments have been proposed for real property gains tax and petroleum income tax.

- **Treatment of interest income as business income**
  With the introduction of a new section 4B into the Income Tax Act 1967 ("ITA"), only interest income which falls under the proposed amended subsection 24(5) (in relation to the business of lending money) will be treated as business income.

  Where a person has treated its interest income as business income prior to the introduction of the new subsection 24(5) and section 4B of the ITA, any unabsorbed business losses and unutilised capital allowances for YA 2012 from that interest source will be carried forward and deducted against the aggregate statutory income from any other business source in YA 2013.

- **Withholding tax — right of payer to appeal**
  The introduction of a new section 109H into the ITA allows an aggrieved payer, who is of the view that he is not liable to make any withholding tax payments, to appeal to the Special Commissioners of Income Tax ("the Special Commissioners") within 30 days from the date the supposed withholding tax is due to be made to the DGIR. Nonetheless, the proposal shall not apply if:

  (i) an appeal has been filed with the Special Commissioners by the non-resident person to whom the payer was liable to pay the amount of interest or royalty, or payment under section 4A or 4(f) of the ITA;

▪ In This Issue ▪

01 ▪ Budget 2013 proposals

03 ▪ Amendments to Practice Note 15 of the Malaysian Code on Take-overs and Mergers 2010

05 ▪ Mind your Tweet!

07 ▪ The Securities Commission's retail bonds and sukuk framework

08 ▪ No "person aggrieved" tag for infringers

10 ▪ Dynacraft Industries Sdn Bhd V Kamaruddin Bin Kana Mohd Sharif & Ors

(ii) the payment to the non-resident made by the payer is disallowed as deduction under section 39 of the ITA in arriving at the adjusted income of the payer; or

(iii) the amount due has not been made to the DGIR by the payer.

Real property gains tax ("RPGT")

- **RPGT rates**
  In order to curb real estate speculation activities, the RPGT rates on the disposal of real properties and shares in real property companies are to be reviewed such that for disposals made within two years from the date of acquisition, the RPGT rate shall be 15%, whereas for disposals made between two to five years from the date of acquisition, the RPGT rate shall be 10%. Any disposal of property or shares made five years after the date of acquisition is exempted from RPGT. These rates are applicable for disposals made from 1 January 2013 onwards.

Tax incentives

- **Public sector research and development ("R&D") findings**
  It is proposed that the tax incentives below be extended to the commercialisation of non-resource-based R&D findings. Non-resource-based activities or products are subject to the list of promoted activities or products under the Promotion of Investments Act 1986. The tax incentives are:

  (i) the tax deduction equivalent to the value of investment made in the subsidiary company which undertakes the commercialisation of the R&D findings is given to an investor company; and

  (ii) the subsidiary company which undertakes the commercialisation of the R&D findings will be given income tax exemption of statutory income of 100% for a period of 10 years.

  Applications received by the Malaysia Investment Development Authority ("MIDA") from 29 September 2012 until 31 December 2017 would be eligible for the above tax incentive package.

- **Investment in a venture company**
  To attract more angel investors, it is proposed that a deduction be allowed in relation to the total investment made by an angel investor in a venture company against all his income, where the angel investor satisfies the following qualifying criteria:

  (i) prior to investing, the angel investor is an individual who is not associated with the venture company;

  (ii) the angel investor is a tax resident with an annual income of not less than RM180,000;

  (iii) the angel investor pays for the shares in cash and holds at least 30% of the shares in the venture company for a period of at least two years;

  (iv) 51% of the shares in the venture company is owned by Malaysians;

  (v) the qualifying activities carried out by the venture company are approved by the Minister of Finance; and

  (vi) the venture company's accumulated profits is not more than five million ringgit and has a track record of less than three years.

- **Investment in refinery activities**
  With a view of encouraging more companies to invest in oil and gas projects in Malaysia, it is proposed that qualifying companies investing in such refinery activities be given a 100% Investment Tax Allowance for a period of 10 years.

Stamp duty

- **Instruments for purchase of first residential property**
  It is proposed that the instruments on the transfer and loan agreements executed by Malaysians for the purchase of their first residential property not exceeding RM400,000 be given a stamp duty exemption of 50%. The exemption can only be claimed once and applies to sale and purchase agreements executed between 1 January 2013 to 31 December 2014.

Petroleum (Income Tax) Act 1967 ("PITA")

- **Introduction of transfer pricing and thin capitalisation provision**
  Almost four years after the implementation of transfer pricing and thin capitalisation provisions in the ITA, the same provisions are now proposed to be introduced into the PITA.

Other proposals

- **Tax treatment of limited liability partnership**
  With the coming into force of the Limited Liability Partnership Act 2012[1], it is proposed that limited liability partnership will be taxed in the same way as a company.

  Any profits paid, credited or distributed to partners by a limited lia-

bility partnership will be exempt from tax. Any remuneration made to a partner of a limited liability partnership not made in accordance with section 9 of the Limited Liability Partnership Act 2012 shall not be deductible.

Companies or partnerships which convert into a limited liability partnership are allowed to carry forward any unabsorbed losses and unabsorbed capital allowances to be set off in the following year of assessment.

- **Business trust**[2]
  A business trust is a specific type of unit-trust scheme established under the Capital Markets and Services Act 2007, and to promote the development of business trusts, the following have been proposed:

  (i) the income tax, stamp duty and RPGT treatment for business trusts are to be the same as that of a company;

  (ii) at the initial stage of establishing a business trust, a one-off stamp duty exemption on instruments of transfer of businesses, assets or real properties acquired will be given; and

  (iii) similarly, on the disposal of shares in a real property company to a business trust, a one-off exemption from RPGT will be given.

- **Special deduction for expenditure on treasury shares**
  A company that offers treasury shares to its employee will be allowed a deduction (being the cost of acquiring the treasury shares less any amount payable by the employee) in the basis period when the employee exercises his rights to acquire the treasury shares.

- **Private retirement scheme**
  In order to discourage withdrawals of contributions from a private retirement scheme before an individual reaches the age of 55, it is proposed that the payer is required to deduct tax at the rate of 8% and the tax withheld shall be paid to the DGIR within one month from making the payment to the individual. In the event the payer fails to withhold the tax, the amount will be increased by 10% of the amount that is due to the DGIR.

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[1] The Limited Liability Partnership Act 2012 has been gazetted on 9 February 2012 but is not yet in force.

[2] The Capital Markets and Services (Amendment) Act 2012 received its royal assent on 3 July 2012 but is not yet in force.

CORPORATE LAW

Amendments to Practice Note 15 of the Malaysian Code on Take-overs and Mergers 2010

IN THIS ARTICLE, HUNG KIAN HOONG DISCUSSES THE AMENDMENTS TO PRACTICE NOTE 15 OF THE MALAYSIAN CODE ON TAKE-OVERS AND MERGERS 2010.

In September 2012, the Securities Commission ("SC") issued an expanded Practice Note 15 ("Expanded PN15") of the Malaysian Code on Take-overs and Mergers 2010 ("Code") by inserting new paragraphs 3.1 to 3.28. These amendments, which came into effect on 1 November 2012, provide further guidance and requirements to be complied with by the independent advisers in making recommendations to the shareholders of a company that is subject to a take-over offer.

Currently, a company that is subject to a take-over offer is required to appoint an independent adviser to provide comments, opinions, information and recommendation on the take-over offer in an independent advice circular.[1] The independent advice circular is subject to the SC's review and has to be cleared by the SC before it can be issued and despatched to the offeree shareholders.[2] With the Expanded PN15 taking effect, the independent adviser will have to undertake sufficient analysis and review of a take-over offer in accordance with the Expanded PN15 before reaching its conclusion.

Fair and reasonable

Under the Code, the independent advice circular shall include comments and advice from the independent adviser on the reasonableness of the take-over offer.[3] In this regard, the independent advisers have an important role to play as they are required to advise the offeree shareholders who are faced with the decision of whether to accept the take-over offer, that is whether to sell or retain their shares in the company.

As a matter of convention, the independent advisers will satisfy this require-

ment by evaluating whether the offer is "fair and reasonable". The adoption of such convention has been allowed by the SC for consistency reasons although there is no requirement to use the standard of "fair and reasonable".[4] In the Consultation Paper[5] issued by the SC in year 2010, it was noted that the SC was concerned that the term "fair and reasonable" is not clearly defined in certain situations and the lack of a precise definition has given rise to the term being interpreted in different ways.

Pursuant to the Expanded PN15, in relation to a take-over offer, the independent advisers are required to analyse the term "fair and reasonable" as two distinct criteria, ie whether the offer is "fair" and whether the offer is "reasonable", rather than as a composite term.[6]

"Fair"

In analysing whether a take-over offer is fair, the independent adviser is to consider the quantitative aspect. Under the Expanded PN15, the general criteria for a take-over offer to be considered "fair" would be based on the following:

(a) if the offer price (or value of consideration) is equal to or higher than the market price and is also equal to or higher than the value of the securities of the offeree, the take-over offer is considered as "fair"; and

(b) if the offer price (or value of consideration) is equal to or higher than the market price, but is lower than the value of the securities of the offeree, the take-over offer is considered as "not fair".[7]

"Reasonable"

In evaluating whether a take-over offer is "reasonable", the Expanded PN15 requires the independent advisers to take into consideration all relevant factors (other than the valuation of the securities that are the subject of the take-over offer) including but not limited to the following:

(a) the existing shareholding of the offeror and persons acting in concert with the offeror in the offeree and their ability to pass special resolutions or control the assets of the offeree;

(b) any other significant shareholding in the offeree (other than (a) above);

(c) the liquidity of the market in the offeree's securities;

(d) the expected market price if the take-over offer is unsuccessful;

(e) the likelihood and value of alternative offers or competing offers before the close of the take-over offer.[8]

Not fair but reasonable

The Expanded PN15 provides that a take-over offer would generally be considered "reasonable" if it is "fair", but an independent adviser may also recommend for shareholders to accept the take-over offer despite it being "not fair", if the independent adviser is of the view that there are sufficiently strong reasons to accept the offer in the absence of a higher bid and such reasons should be clearly explained.[9]

Pursuant to the Expanded PN15, in the event that the independent adviser concludes that a take-over offer is "not fair but reasonable", the independent adviser must clearly explain what is meant by "not fair but reasonable", how the conclusion has been reached, and the course of action that the shareholders are recommended to take pursuant to the conclusion.[10] The take-over offer of Bandar Raya Development Berhad by its major shareholder is an example of a take-over where the independent adviser in the independent advice circular dated 18 September 2012 concluded its opinion that the offer was "not fair but reasonable" and recommended the shareholders of that company to accept the offer.[11]

Valuation methodology

In addition, the Expanded PN15 requires independent advisers to exercise due care, skill and professional judgment in selecting the most appropriate valuation methodology or methodologies (relevant guidance is provided) to be used in assessing the fairness and reasonableness of a take-over offer and this must be supported by reasonable grounds and logical assumptions.[12]

Assumptions

The Expanded PN15 also sets out the criteria in relation to the assumptions on which the independent adviser's recommendation is based. These include:

- that the assumptions should be reasonable[13];
- that all material assumptions are to be disclosed[14];
- that the assumptions should be specific and clear[15]; and
- that, where possible, the reasons for adopting the assumptions should be explained and general assumptions that are not relevant to the subject of valuation should be excluded[16].

Conclusion

The Expanded PN15 was introduced pursuant to the positive feedback on the Consultation Paper[17] issued by the SC in year 2010[18] wherein the SC noted from their review that the quality of the independent advice circulars could be improved[19]. The Expanded PN15 is viewed as a step implemented by the SC to enhance offeree shareholders' protection by ensuring that adequate, meaningful and useful information is made available in the independent advice circulars that are issued to offeree shareholders to ensure that they will be well-equipped to make an informed decision as to the merits of a take-over offer.

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[1] Paragraph 15(1) of the Code.
[2] Paragraph 15(7) of the Code.
[3] Paragraph 4 of the Second Schedule of the Code.
[4] Paragraph 3.1.2 of the Public Consultation Paper 2/2010 — Proposed Updates to Guidelines on Offer Documentation of the Malaysian Code on Take-Overs and Mergers 1998.
[5] Public Consultation Paper 2/2010 — Proposed Updates to Guidelines on Offer Documentation of the Malaysian Code on Take-Overs and Mergers 1998.
[6] Paragraph 3.1(a) of PN 15.
[7] Paragraph 3.2 of PN 15.
[8] Paragraph 3.5 of PN 15.
[9] Paragraph 3.4 of PN 15.
[10] Paragraph 3.6 of PN 15.
[11] Bandar Raya Development Berhad's announcement dated 18 September 2012 via Bursa Malaysia (Reference No BR-120918-31724).
[12] Paragraph 3.14 of PN 15.
[13] Paragraph 3.16 of PN 15.
[14] Paragraph 3.17 of PN 15.
[15] Paragraph 3.18 of PN 15.
[16] Paragraph 3.18 of PN 15.
[17] Public Consultation Paper 2/2010 — Proposed Updates to Guidelines on Offer Documentation of the Malaysian Code on Take-Overs and Mergers 1998.
[18] The SC's Press Release dated 25 September 2012.
[19] Paragraph 2.1.1 of the Public Consultation Paper 2/2010 — Proposed Updates to Guidelines on Offer Documentation of the Malaysian Code on Take-Overs and Mergers 1998.

DISPUTE RESOLUTION

Mind your Tweet!

IN THIS ARTICLE, AARTHI JEYARAJAH ANALYSES THE DECISION OF THE HIGH COURT IN **DATO' MOHAMAD SALIM FATEH BIN FATEH DIN V NADESWARAN A/L RAJAH (NO 1)**[1] IN AN ACTION FOR LIBEL.

In recent times, social media has become a popular form of communication, easily accessible to all, providing an interactive platform for user-generated information.

People are free to post their opinions and views on virtually anything on social media websites which include Twitter, Facebook, YouTube, LinkedIn and Flickr. Social media has become a powerful tool, and one of the fastest tools, for dissemination of information.

According to Muneeza, Aishath, The Milestone of Blogs and Bloggers in Malaysia, (2010), Malaysia Law Journal Articles [2010] 3 MLJ cvii:

> *"This is the era of technology, paper-based media is diffident. With the advent of blogs people have found the means to liberally express themselves across the borders at zero cost. Freedom of expression is a constitutional right, which has its limitations. Violating another individual's privacy, the leaking of official information, threatening national interest, passing seditious remarks and last but not least, infringing copyright laws are common occurrences in the blogoshere."*

Whether in the "blogosphere" or in social media websites, the lackadaisical attitude of those who post comments will apparently no longer go unpunished.

The High Court of Malaya, in the recent decision of **Dato' Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1)**, after taking into account a number of factors, awarded damages to Dato' Mohamad Salim in the sum of RM300,000 for general damages and another RM200,000 for aggravated damages, along with an injunction against Nadeswaran to restrain him, whether by himself, his servants or agents, from further publishing any statements defamatory of Dato' Mohamad Salim[2].

The action was brought by Dato' Mohamad Salim against Nadeswaran for two defamatory statements posted by Nadeswaran on his Twitter account that was available for public viewing.

Among the issues considered by the Judge were:

(i) the fact that Nadeswaran's solicitors failed to serve a defence, and Nadeswaran was deemed to have admitted all the averments made by Dato' Mohamad Salim. In an action for libel, the plaintiff would have to prove the following[3]:

- the words are defamatory;
- the words refer to the plaintiff; and
- the words were published.

As all the averments in the Statement of Claim of Dato' Mohamad Salim

were deemed to be admitted, Dato' Mohamad Salim did not have to prove his case. However, the learned Judge of the High Court addressed these points in the judgment in order to substantiate the award of damages. Nadeswaran was permitted to testify for the purposes of mitigation of damages only.

(ii) the Court took note of a number of delaying tactics that were purportedly put forward by Nadeswaran's counsel and the physical absence of Nadeswaran on the hearing date.

The nature of the libelous statements

In giving evidence, Dato' Mohamad Salim's witness described the nature of statements made on Twitter and the potential effect of such statements made as follows:

> *"PW1 has a twitter account of which he admits to being a frequent twitter user. He describes twitter as a 'free internet mass-messaging service which can be used to post messages to a network of contacts known as 'followers'. A message sent to your twitter account would result in its being distributed to all your followers. A 'Tweet' is a message limited in length to 140 characters that is sent through twitter. Tweets can also be 'Retweeted', that is, a recipient of a tweet can forward the message to all his followers at the click of a button."*[4]

The two statements published on Twitter by Nadeswaran were found to be, in their natural and ordinary meaning, defamatory of Dato' Mohamad Salim.

Mode and publication of the statements and its effects

The Court found statements posted on a social media website as capable of being defamatory. The Court went on to assess the number of followers Nadeswaran had and took note of the fact that Nadeswaran's "tweets" would be distributed in real time to all his followers. In this case, Nadeswaran did have a fairly large number of followers[5] and the Court had *"no doubt that the plaintiff is a man of standing and importance in business, both locally and regionally/internationally, and in society"*. The Court held that the statements made had seriously damaged Dato' Mohamad Salim's reputation.

Absence of remorse

It would seem that the absence of a correction, retraction or an apology from Nadeswaran contributed to the award of damages. When Dato' Mohamad Salim wrote to Nadeswaran indicating the intention to commence legal proceedings in respect of the defamatory statements, Nadeswaran not only failed to reply but instead published a further statement on his twitter website stating, *"…I love a good battle! War is now declared! I'll take him on"*[6] .

Degree of care required from social media users

When the Court was deciding on the amount of damages to be awarded to Dato' Mohamad Salim, the Court considered the fact that Nadeswaran's Twitter website garnered heavy traffic and, therefore, a greater degree of care should be exercised in posting statements as it could and would be seen by many.

The amount of damages and aggravated damages awarded was meant to send a strong message to those who are in a position to disseminate information widely, whether through traditional media or through the Internet, that proper degree of care and diligence must be exercised not to injure others.[7]

Conclusion

It is clear that statements made on the Internet through social media or networking websites will no longer be above the law, especially in light of the fact that anonymity on the Internet is also no longer an option with the various methods of tracing the publisher and the introduction of section 114A[8] of the Evidence Act 1950. It is clear that statements made on the Internet will not be taken lightly, as their effect can be widespread and such statements can be held as defamatory.

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1 [2012] 10 MLJ 203.
2 [2012] 10 MLJ 203, at p 220.
3 *Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315.*
4 [2012] 10 MLJ 203, at paragraph 14, p 208.
5 As at 22 December 2010, the Defendant had 1,822 followers; 26 September 2011, the Defendant had 4,113 followers and as at 27 April 2012 the Defendant had 4,997 followers. (Note: The defamatory statements were made on 12 July 2010 and 22 December 2010 respectively.)
6 [2012] 10 MLJ 203, at paragraph 61, page 218-219.
7 [2012] 10 MLJ 203, at paragraph 44, page 219-220.
8 Section 114A of the Evidence Act creates a presumption of fact, unless proven to the contrary, that (i) any person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication, is presumed to have published or re-published the contents of the publication; (ii) any person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication; and (iii) any person who has in his custody or control any computer

on which any publication originates from is presumed to have published or re-published the content of the publication.

FINANCIAL SERVICES

The Securities Commission's retail bonds and sukuk framework

IN THIS ARTICLE, PAMELA KUNG CHIN WOON REVIEWS THE SECURITIES COMMISSION'S RETAIL BONDS AND SUKUK FRAMEWORK AND THE INCENTIVES AFFORDED IN BUDGET 2013.

Introduction

On 7 September 2012, the Securities Commission Malaysia ("SC") launched the retail bonds and *sukuk* framework in line with the initiatives set out under the SC's Capital Market Masterplan 2 to facilitate greater retail participation in the bonds and *sukuk* market.[1] According to the SC, industry input and feedback were sought and practices adopted in other countries were taken into consideration in the development of the retail bonds and *sukuk* framework. As such, the framework is consistent with international practices and development initiatives.[2]

The retail bonds and *sukuk* framework provides retail investors direct access to invest in bonds and *sukuk* by enabling such bonds and *sukuk* to be issued and traded either on Bursa Malaysia (the Kuala Lumpur stock exchange) or over-the-counter via appointed banks. This is intended to meet retail investors' demand for access to a wider range of investment products. At the same time, it also allows issuers to have access to a larger pool of investors. Prior to this, bonds and *sukuk* had been primarily accessible to institutional investors and high-net-worth individuals essentially due to the higher board lot size, while retail investors were largely confined to investments in bond funds.

Phases of retail bonds and *sukuk* market

In order to provide retail investors time to gain the necessary understanding and familiarity with investing and trading in bonds and *sukuk*, the retail bonds and *sukuk* market will be introduced in phases.[3]

Under the introductory or first phase, the eligible issuers are the Malaysian Government and any company whose issuances are guaranteed by the Malaysian Government. It is believed that issuances by these issuers will naturally be subject to their own funding needs and requirements.[4]

In the second phase, retail investors will be able to invest in bonds and *sukuk* issued by:

- a public company listed on Bursa Malaysia;
- a bank licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983;
- Cagamas Berhad; and
- an unlisted public company whose bonds and *sukuk* issuance is guaranteed by Danajamin Nasional Berhad ("Danajamin"), the Credit Guarantee and Investment Facility or any of the eligible issuers above.[5]

The relevant regulations and guidelines for the second phase of retail bonds and *sukuk* market are targeted to be issued in January 2013.[6]

Following the launch of the retail bonds and sukuk framework, the SC, Bursa Malaysia and industry players are expected to work closely to enhance the level of awareness and knowledge of investors in the bonds and *sukuk* market.

Investor protection

The SC has also announced an investor protection framework which supports the broadening of access for retail investors. This investor protection framework comprises:

- a robust disclosure regime which includes prospectus and continuous disclosure requirements and checks and balances in the form of a trustee and trust deed;
- mandatory credit rating for all bonds and sukuk that are offered to the retail market by a registered credit rating agency; and
- investor education initiatives to enhance investor understanding and knowledge of investing in bonds and *sukuk*.[7]

Retail investors may access information regarding such retail bonds and *sukuk* which they have invested in through Bursa Malaysia's website, banks from which they have purchased such retail bonds and *sukuk*, media announcements which may be made from time to time, and any other platforms as may be designated by the SC.

Certain categories of issuers, for instance, Malaysian Government or government-guaranteed issuances, may be exempted from some of the above requirements. However, where such issuances are issued and traded on Bursa Malaysia, they would need to comply with the relevant continuous disclosure requirements.

Incentives under Budget 2013

The Malaysian Government has, in the Budget for 2013, proposed that additional expenses incurred in issuing retail bonds and *sukuk* be given a double deduction for four years effective from year of assessment 2012 to 2015. Fur-

ther, individual retail investors will be given stamp duty exemption on instruments relating to retail bonds and *sukuk*. These incentives are put in place to encourage companies to issue retail bonds and *sukuk* and are expected to help boost the growth of the debt market.

To spearhead issuance of retail bonds, DanaInfra Nasional Berhad ("DanaInfra") will issue retail bonds worth RM300 million by the end of 2012 to finance the mass rapid transit ("MRT") development project. DanaInfra is a Ministry of Finance Incorporated unit, which was formed to help finance the country's largest construction project.

The Government has allocated RM400 million to Danajamin for the next two years. This additional fund is expected to multiply the issuance value between RM4 billion and RM6 billion. Danajamin was established to provide guarantee facilities to viable companies to obtain funds from the bonds and *sukuk* market at a reasonable cost.

Conclusion

The introduction of the retail bonds and *sukuk* framework and the incentives afforded in Budget 2013 are welcome moves for the further development and growth of the Malaysian debt market, besides giving retail investors wider range and choices of investments.

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[1] The SC's Press Release dated 7 September 2012.
[2] SC's FAQs on retail bonds and *sukuk*.
[3] SC's FAQs on retail bonds and *sukuk*.
[4] SC's FAQs on retail bonds and *sukuk*.
[5] SC's FAQs on retail bonds and *sukuk*.
[6] SC's FAQs on retail bonds and *sukuk*.
[7] SC's FAQs on retail bonds and *sukuk*.

INTELLECTUAL PROPERTY

No "person aggrieved" tag for infringers

IN THIS ARTICLE, TAMARA LEE CIAI CONSIDERS THE FEDERAL COURT'S JUDGMENT OF **LB (LIAN BEE) CONFECTIONERY SDN BHD V QAF LTD**[1] ON "PERSON AGGRIEVED" AND "USE OF TRADE MARK BY REGISTERED USER".

The judgment of the Federal Court in **LB (Lian Bee) Confectionery Sdn Bhd v QAF Ltd** earlier this year is a landmark judgment relating to use of a trademark by a registered user and an "aggrieved person" under section 46(1) of the Trade Marks Act 1976.

Facts

QAF Ltd ("QAF") registered its "Squiggles" trademark in 2004 for, amongst others, cream-filled buns. By a License Agreement of 2003, it authorised its subsidiary Gardenia Bakeries (KL) Sdn Bhd ("Gardenia Bakeries") to use the "Squiggles" trademark for and in relation to, amongst others, cream-filled buns. The application for the recordation of Gardenia Bakeries was only made on 3 April 2008, and it was only on 8 April 2008 that Gardenia Bakeries was formally entered on the Register as the registered user of the "Squiggles" trademark. Meanwhile, LB (Lian Bee) Confectionery Sdn Bhd ("LB") in 2007 commenced use of "Squiggle" (a mark deceptively and confusingly similar to QAF's registered "Squiggles" trademark) for and in relation to cream-filled buns as well.

Where the registered proprietor authorises or licenses any person to use the registered trademark for all or any of the goods in respect of which the mark is registered, that person so authorised may be entered on the Register as a registered user. "Permitted use" in relation to a registered trademark means the use of the registered mark by a recorded user in relation to goods with which he is connected in the course of trade and in respect of which the trademark remains registered and he is recorded as a registered user. The use of the registered trademark by the recorded registered user shall be deemed to be use by the registered proprietor to the same extent as the use of the trademark by the registered user. In order that the registered proprietor can benefit from the use of the registered trademark by the authorised, licensed or permitted user, the latter would have to be recorded as the registered user, and the registered proprietor would have to retain and exercise control over the use of the trademark and over the quality of the goods provided by the registered user in connection with that trademark.

Pursuant to section 46(1)(b) of the Trade Marks Act 1976, LB sought to expunge the QAF's "Squiggles" trademark on the grounds that:

(i) they are an aggrieved party because they are prevented by QAF's reg-

istered mark "Squiggles" from using their "Squiggle" trademark for cream-filled buns and;

(ii) for a period up to one month of their application for expunction, there was no use in good faith of QAF's registered "Squiggles" trademark by QAF as the registered owner or any user registered on or in relation to cream-filled buns for a period of not less than three years.

QAF applied for a trade descriptions order against LB under section 16(1) of the Trade Description Act 1972 for infringement of QAF's "Squiggles" trademark.

Both the High Court and Court of Appeal decided in favour of QAF. The appeal to the Federal Court relates to LB's application to expunge QAF's "Squiggles" trademark. LB did not seek leave to appeal against the order of the Court of Appeal dismissing its appeal in relation to the application for trade descriptions order.

Decision

The Federal Court dismissed LB's appeal.

In its judgment, the Federal Court said:

> *"As rightly found by the Court of Appeal, there is nothing in Section 46 of the Trademarks Act or Regulation 81(2) of the Trademark Regulations which could be read to preclude the use of a trademark by a registered user to be in force retrospectively before the date of the application to register the registered user. We are also of the view that Section 48 of the Trademarks Act must be applied purposely and meaningfully, and must meet commercial realities and objectives.*
> *It cannot be right that a "registered user" status, including the recognised period of use, takes effect only on the date of registration of the user status. Section 48(1) clearly recognises the pre-existence of the licensing agreement between the proprietor and the intended user by virtue of the opening words ... **where the registered proprietor of a trade mark grants, by lawful contract, a right to any person to use the trade mark.**"*

Quite apart from reading section 48 purposively, the Federal Court did not consider regulation 81(2) (which provides that the date on which the application was made for the recordation of the registered user to be the date on which the registered user is regarded as having been so recorded) as affecting the registered proprietor's entitlement to benefit from the use of the registered trademark by the registered user as of the date he grants authorisation or as licence for the use of the registered mark.

Since the QAF's "Squiggles" trademark was lawfully subsisting and was in good faith used in the course of trade by the registered user since 2003 on or in relation to cream-filled buns, the subsequent use by LB of its "Squiggle" trademark on or in relation to cream-filled buns in 2007 was tantamount to both infringement and passing off. As an infringer and applying the principle of construction in *bonam partem*, LB cannot in law be regarded as an aggrieved party. In support, the Federal Court cited Bennion on Statutory Interpretation, (2005), (5th Ed), Lexis Nexis, p 792, as follows:

> *"Construction in bonam partem. In pursuance of the principle that law should serve the public interest, the courts have evolved the important technique known as construction in bonam partem (in good faith). If a statutory benefit is given on a specified condition being satisfied, it is presumed that Parliament intended the benefit to operate only where the required act is performed in a lawful manner.*
>
> *Construction in bonam partem is related to three specific legal principles. The first is that a person should not benefit from his own wrong. Next is the principle allegans suam turpitudinem non est audiendus. If a person had to prove an unlawful act in order to claim the statutory benefit, this maxim would preclude him from succeeding. The third related principle is stated by Coke in the words ubi quid generaliter conceditur inest haec exceptio si non aliquid sit contra jus fasque (where a grant is in general terms there is always an implied provision that it shall not include anything which is unlawful or immoral)..."*

Finally, the Federal Court has this to say of LB:

> *"...Furthermore, if the appellant is to be regarded as a 'person aggrieved' for the purposes of s 46(1)(b) of the TMA, it would mean that all infringers may apply to expunge the very trademark they have been infringing and this would be contrary to the time-honoured principle of not allowing them to benefit from their very own wrong or unlawful act."*

Conclusion

It is clear from the Federal Court judgment that:

(i) the right of an authorised or permitted user (a registered user in the context of the Malaysian Trademarks Act 1976 and hereafter referred to as the "registered user") of a registered trademark is effective as of the date of the authorisation or the licence; not when the registered user applies for or is recorded as the registered user against the registered mark at the Registry and, consequently, the use of the registered mark by the registered user as of the date of the authorisation or licence is deemed use of the registered trademark in the course of trade by the registered owner; and

(ii) an infringer cannot be an aggrieved party entitled to have the registered mark expunged on the grounds of non-use even if when the application for expunction is made, the registered user has not yet been formally entered or recorded on the Register as the registered user.

This case serves as an important reminder to those who seek to benefit from their unlawful acts, that the courts will not entertain infringers of trademarks who claim to be an "aggrieved party" as a result of being prevented from using a registered trademark by a registered proprietor. Furthermore, the right of the registered user in relation to use is clarified by the court's recognition that the date of the authorisation or licence is deemed use of the registered trademark in the course of trade by the registered owner.

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[1] [2012] 4 MLJ 20.

CASE NOTE

Dynacraft Industries Sdn Bhd V Kamaruddin Bin Kana Mohd Sharif & Ors

IN THIS ARTICLE, WONG SUE MAY LOOKS AT THE DECISION IN **DYNACRAFT INDUSTRIES SDN BHD V KAMARUDDIN BIN KANA MOHD SHARIF & ORS**[1] IN APPLYING THE PRINCIPLE OF LAST IN, FIRST OUT IN EFFECTING A RETRENCHMENT.

It is a well-established principle in industrial law that in effecting a retrenchment, an employer should comply with the principle of last in, first out ("LIFO") unless there are valid reasons for departing from that principle. In simple terms, the principle of LIFO requires the latest recruits to be retrenched before those recruited earlier in the same category.

For years, the prevailing view had been that in computing the relevant length of service for the purposes of applying LIFO, it was only the actual service with the employer and not service with another entity which was relevant; particularly in the context of mergers and acquisitions where businesses are being acquired resulting in a change of ownership in the business and the employees of the business acquired are invariably offered continued employment with the acquirer or purchaser of the business.

However, in the recent decision of **Dynacraft Industries Sdn Bhd v Kamaruddin bin Kana Mohd Sharif & Ors**, the Federal Court, in the above-mentioned context, held that in applying the principle of LIFO, the period of service which an employee has served with an entirely separate legal entity should be taken into account, instead of confining it to the actual years of service the employee had served with his present employer.

Facts

The appellant, Dynacraft Industries Sdn Bhd ("Dynacraft Industries"), was a subsidiary of Malaysia Pacific Industries Berhad ("MPI"). Pursuant to a sale and purchase agreement entered into between, among others, MPI and Dynacraft Sdn Bhd ("DSB"), the assets and business of DSB were transferred to Dynacraft Industries.

Thereafter, vide letters dated 19 January 1996, DSB informed its employees, which included Kamaruddin bin Kana Mohd Sharif & Ors (the "Affected Employees"), that with the sale of its assets and business to MPI, their employment with DSB would cease at midnight on 20 January 1996.

Through letters similarly dated 19 January 1996, Dynacraft Industries had made offers of continued employment to all of DSB's employees, which included the following term:

> *"Your period of employment with Dynacraft Sdn.Bhd.: Penang/Dynacraft Asia Pacific Sdn. Bhd., Penang shall be deemed to be continuous employment with us."*

Dynacraft Industries' offer of continued employment was accepted by the Affected Employees.

In 1998, Dynacraft Industries' business was adversely affected by the economic downturn at the time and it was forced to undertake a reorganisation and rationalisation of its operations. This resulted in a number of positions becoming redundant. By letters dated 17 July 1998, Dynacraft Industries retrenched the redundant employees, which included the Affected Employees.

The Affected Employees thereafter filed a claim for reinstatement under section 20 of the Industrial Relations Act 1967. Although the learned chairman of the Industrial Court had found that Dynacraft Industries' reorganisation of its operation (which included the reduction of its workforce) was justified, he held that in the circumstances, the application of the LIFO rule necessitated due consideration of the Affected Employees' past services with DSB. Since Dynacraft Industries had ignored such past services in its determinations, it had breached the rule in LIFO and, therefore, the Affected Employees' dismissals were without just cause and excuse. The decision of the Industrial Court was upheld by both the High Court and the Court of Appeal.

In the appeal before the Federal Court, it was submitted for Dynacraft Industries that the Industrial Court's application of the LIFO principle was erroneous. Firstly, DSB was a completely separate entity from Dynacraft Industries. Secondly, the Affected Employees had only commenced employment with Dynacraft Industries together with the other employees on 20 January 1996 pursuant to the change in ownership of DSB's business.

It was further contended that the recognition of the Affected Employees' past services with DSB was only for the purposes of computing benefits and entitlement. It did not create nor was it intended to artificially change the employment dates of the Affected Employees or bypass those employees who had been in service with Dynacraft Industries even before the offers of continued employment had been extended to the Affected Employees. In this regard, it was submitted that the Affected Employees were the workmen who came last and should, therefore, applying LIFO, be retrenched before those more senior in their category.

Decision

In dismissing Dynacraft Industries' appeal, the Federal Court had emphasised the fact that the present matter was not a simple case involving a transfer of business from one entity to another. There had been no break in the Affected Employees' service and they had been made offers of continued employment. Further, the transfer of DSB's business did not alter the position of its employees including the Affected Employees as only the ownership of the business changed hands.

The Federal Court agreed with the Industrial Court's findings that based on clause 6.4 of the sale and purchase agreement entered into between DSB and MPI, there was a continuation of employment of the Affected Employees in the widest possible sense. The contract prohibited Dynacraft Industries from adversely altering the terms of employment, or reducing the salaries or other employment benefits due to the employees, and that it had envisaged a one-year transition period for the transfer of the employees from DSB to Dynacraft Industries so it was not as if the Affected Employees had ceased employment with DSB on 19 January 1996 and began a new employment contract with Dynacraft Industries on 20 January 1996. The Industrial Court had also construed the words "other employment benefits" found in that clause to include benefits that would follow in tandem with seniority in terms of years of service.

None of the relevant documentation contained an express provision stating that the offer to recognise the Affected Employees' past service with DSB was limited only for the purpose of computing benefits and entitlement. The Federal Court found that in light of Dynacraft Industries' promise that the Affected Employees' past service would be recognised, it would have been unconscionable for it to subsequently ignore the same for the purposes of applying the LIFO principle.

Conclusion

It would be pertinent to note that the Federal Court emphasised that it had arrived at its decision based on the circumstances of the case, particularly in light of the following essential facts:

- the Affected Employees were offered continued employment with Dynacraft Industries upon the transfer of the business;
- Dynacraft Industries' offer of employment had expressly provided that the period of the Affected Employees' previous employment with DSB was deemed to be continuous employment with Dynacraft Industries; and
- there was continuity in fact, and not in law, of the Affected Employees' employment.

If similar circumstances were to occur in future, it would appear that unless a specific provision is made to the effect that recognition of past services is limited to the computing of benefits and entitlements, an employee's previous years of service with a different entity must be taken into consideration in the application of LIFO in a retrenchment.

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