

Client Alert

21 October 2019

For further information, please contact:

Adeline Wong

Partner

+603 2298 7880

adeline.wong@wongpartners.com

Jason Liang

Partner

+603 2298 7983

jason.liang@wongpartners.com

Kellie Allison Yap

Senior Associate

+603 2298 7923

kellieallison.yap@wongpartners.com

Taxpayer Succeeds in Stamp Duty Appeal on the Transfer of Shares to a Labuan Entity

In a decision handed down by the High Court of Kuala Lumpur recently, Wong & Partners successfully represented a company ("**Plaintiff**") in its appeal against the decision of the Collector of Stamp Duties, Malaysia ("**IRB**").

The issue litigated before the Court concerned the application and interpretation of the Stamp Duty (Exemption) (No. 3) Order 2012 ("**Exemption Order**") which allowed stamp duty exemption on instruments executed by a Labuan entity in connection with a Labuan business activity.

Background Facts

The Plaintiff is a holding company incorporated under the Labuan Companies Act 1990. One of the activities carried out by the Plaintiff is the holding of shares in a trust structure.

The Plaintiff executed share transfer forms for the transfer of a certain number of ordinary shares in a Malaysian company incorporated under the Malaysian Companies Act 2016 by its shareholders to the Plaintiff ("**Share Transfer Forms**"). The Share Transfer Forms were then submitted to the IRB for adjudication and stamping. The IRB issued *ad valorem* assessments amounting to approximately RM 6.2 million. Wong & Partners advised the Plaintiff that the assessments were incorrect as the Share Transfer Forms should have been exempted from stamp duty under the Exemption Order.

The Plaintiff submitted notices of objection to the Defendant pursuant to Section 38A(1) of the Stamp Act 1949 setting out the Plaintiff's position that it satisfied all the requirements under paragraph 3(a) of the Exemption Order which provided an exemption for "*all instruments which are executed by a Labuan entity in connection with a Labuan business activity*", and therefore stamp duty exemption should apply.


However, the IRB rejected both notices of objection and affirmed the stamp duty assessed in respect of Share Transfer Forms. The Plaintiff appealed to the High Court.

Legal Questions Before The High Court

The legal questions for the determination of the High Court are:

- (a) Whether the Share Transfer Forms are exempted from stamp duty pursuant to the Exemption Order?; and
- (b) Whether the Defendant's decision to adjudicate the Share Transfer Forms as subject to *ad valorem* duty, is illegal and contrary to the Exemption Order read





together with the relevant provisions of the Stamp Act 1949, the Labuan Business Activity Tax Act 1990 and any other applicable laws?

Key Arguments

- **By the IRB**

The IRB argued that all instruments of transfer of shares relating to a Labuan entity must satisfy paragraph 3(c) of the Exemption Order which reads "*all instruments of transfer of shares in a Labuan entity.*" The IRB argued that the Share Transfer Forms are not eligible for the exemption of stamp duty as the Share Transfer Forms are in respect of the transfer of shares in a Malaysian company incorporated under the Malaysian Companies Act 2016 and not under the Labuan Companies Act 1990.

The IRB also alleged that the Share Transfer Forms are not eligible to be exempted from stamp duty pursuant to paragraph 3(a) of the Exemption Order as argued by the Plaintiff, but it did not provide further reasons to support the IRB's allegations.

- **By the Plaintiff**

The Plaintiff argued that it satisfied the requirements of paragraph 3(a) of the Exemption Order because the Plaintiff's business activity is in connection with "*a Labuan business activity*" as defined within the Labuan Business Activity Tax Act 2010 ("**LBATA**"). The Plaintiff's position has been that the transfer of shares in the Malaysian company was done in connection with its business activity of holding shares on trust, and the execution of the Share Transfer Forms by the Plaintiff (as transferee) was necessary for the Plaintiff to carry out its business activity.

Decision of the High Court

In coming to its decision, the High Court held that the IRB was wrong in insisting that paragraph 3(c) of the Exemption Order must be applied for transfer of shares involving Labuan entities. The judge agreed with the Plaintiff's submission that there is no wording within the Exemption Order which confined the transfer of shares to paragraph 3(c), as insisted by the IRB. Most crucially, the judge made clear that a taxpayer can rely on any provision within the Exemption Order as long as the requirements for the specific provisions have been satisfied. Given that the Plaintiff was relying on paragraph 3(a) of the Exemption Order, the judge went on to deliberate whether the Plaintiff had satisfied the requirements.

As a first step, the judge noted that the fact that the Share Transfer Forms are "*instruments executed by a Labuan entity*" was not in dispute. With regards to the requirement under paragraph 3(a) that the instrument must be executed "*in connection with a Labuan business activity*", the judge agreed with the Plaintiff that reference to the definition of "Labuan business activity" must be made based on section 2 of the LBATA at the relevant time of the transfer. The judge also agreed with the Plaintiff that the Share Transfer Forms were executed by a Labuan entity in connection with a "Labuan business activity", and therefore stamp duty exemption should apply.



Conclusion and Comments

The High Court's decision is much welcomed, as it provides legal certainty in correcting the long standing practice of the IRB in insisting that all transfer of shares relating to a Labuan entity must rely on paragraph 3(c) of the Exemption Order which effectively restricted the stamp duty exemptions to the transfer of shares in any Labuan entity.

Prior to this decision, many taxpayers and tax advisors had adopted the IRB's interpretation, which resulted in significant sums of stamp duties being paid in contravention of the law. This decision corrected the IRB's erroneous position and will realign the stamp duty practices with one of the purposes of the Labuan regime: a conducive and attractive jurisdiction for holding companies that is well placed to cater to the trust and wealth management industry.

www.wongpartners.com

Wong & Partners
Level 21
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur