Rödl & Partner

NEWSFLASH MALAYSIA

GROWING STRATEGICALLY

Issue:
April 2021

Latest News on Law, Tax and Business in Malaysia

www.roedl.de/malaysia | www.roedl.com/malaysia

Rödl & Partner

NEWSFLASH MALAYSIA

GROWING STRATEGICALLY

Issue:
April 2021

Read in this issue:

→ Spot on Malaysia

→ Directors Liability under the Malaysian Income Tax Act

– Background of the Rules

– Background of the Mahawira Case

– CA's Decision

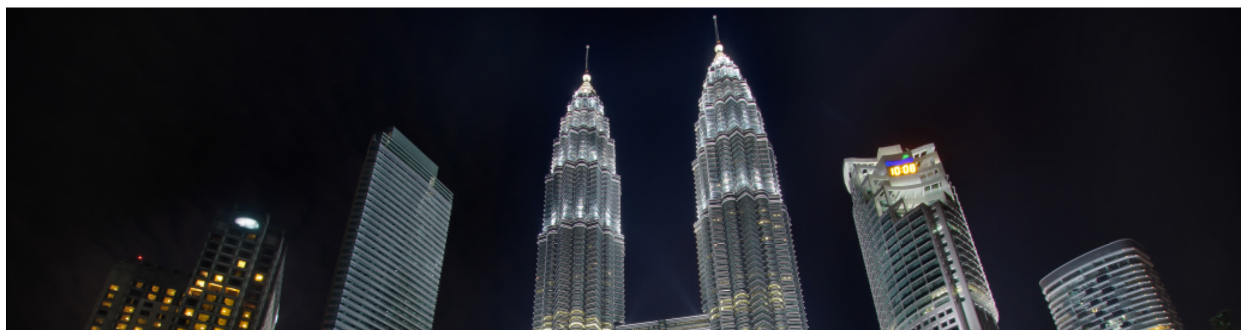
– Our view

→ Increase of threshold for filing winding-up

– Background and content of the new Federal Government Gazette Notification No. 4159

– Our view

→ Spot on Malaysia



Dear readers,

We highly appreciate your ongoing interest in our newsflashes, publications and webinars.

Much has happened and a lot is going on. Please find our short summary in the following:

We hosted several webinars, among others about the Impact of Covid-19 on Transfer Pricing Documentation & Benchmarking and on RCEP and CAI – New perspectives for European investors in ASEAN and China.

We are currently hosting a joint webinar series on supply chain in Asia Pacific together with MIDA and the UOB. You can find our first two out of three webinars about Trends and Challenges in Supply Chains in Asia Pacific and Malaysia as Alternative Supply Chain Hub in Asia Pacific on our website.

We have also published a new article on New Disclosure Rules and Nominee Structures in Malaysia on our website.

Stay tuned – Follow us on LinkedIn or subscribe to our YouTube channel for further updates.

Kind regards

Christian Swoboda

christian.swoboda@roedl.com

Please note: We have received and registered your contact details for the purpose of providing you with our Malaysia Newsflash. We assume that you are still interested in receiving this publication. Should you wish though to no longer receive the Newsflash, please simply send “unsubscribe” to: ezreenda.ayobazari@roedl.com.

→ Directors Liability under the Malaysian Income Tax Act

On March 12, 2021The Malaysian Court of Appeal ("CA") has rejected the Malaysian Inland Revenue Board's ("MIRB") appeal in the case of Government of Malaysia v Mahawira Sdn Bhd & Anor [2019] ("the Mahawira Case"). The main issue with this case is whether a director's liability under the Malaysian Income Tax Act 1967 ("MITA") can be imposed retrospectively and result in a company director´ s liability to pay tax due by that company for a period in which the director did not assume the directorship role in that company.

Background of the Rules

Section 75A of the MITA provides that the directors of a company will be jointly and severally liable for any tax/debt which is due and payable by that company, and such amounts due are recoverable from the directors during the "period in which the tax/debt is liable to be paid by the company". In other words, a company director can be made personally liable (provided that the director holds, directly or indirectly, more than 20 percent of the company shares), for taxes during the period in which that tax is liable to be paid by the company.

Where directors are jointly and severally liable for any tax or debt that is due and payable by the company, certain actions may be taken, including being prevented from leaving the country, and becoming subject to a civil suit along with the company. In this respect, it would be important for directors to clearly understand the legal implications of assuming their role as a company director. In particular, they should obtain a clearer understanding of the regulations regarding the directors' extent of responsibility and the timing of liabilities, in order for the directors to discharge their duties satisfactorily while mitigating the risk of assuming personal liabilities.

Based on MIRB's Public Ruling of Director's Liability (Public Ruling No.2/2019), the MIRB appears to have interpreted Section 75A of the MITA, in particular, the words "the period in which that tax is liable to be paid", to start with the date of the notice of assessment (Form J) being served. This interpretation may implicate directors with retrospective liability in respect of their company's taxes in years of assessment during which the director has yet to assume responsibility as a director.

Background of the Mahawira Case

In the Mahawira Case, the MIRB served the Form J against the Company on 31 October 2014 for taxes relating to the years of assessment 2001 to 2004. Subsequently, the MIRB commenced civil proceedings at the High Court against the Company and its directors for recovery of these taxes. The Director had been a 20 percent shareholder and director of the Company since 19 December 2003.

The High Court ruled against the director, but only for the year of assessment 2004. The High Court stated that the director could not be held liable for taxes relating to the years of assessment 2001, 2002, and 2003, as the director had not been a director in those years.

The MIRB appealed the decision of the High Court to the CA, contending that the Form J for years of assessment 2001 to 2004 had all been issued in 2014. Such taxes were therefore due and payable in 2014, when the company director had already been appointed.

CA's Decision

The CA rejected the MIRB's argument as the MIRB's interpretation of Section 75A of the MITA would mean that no matter the point in time anyone becomes a director of a company, he or she would still be held liable for the tax/debt of the company for the years of assessment preceding their appointment as a director.

The CA further commented the MIRB's interpretation to be untenable, inappropriate and unfair. The CA remarked that the MIRB is empowered to raise and assess taxes and to produce notices. As such, it would be unreasonable and unfair to be suddenly confronted with an obligation to pay tax after many years on account of the indolence of the MIRB.

The CA unanimously agreed with the High Court's judgement and dismissed the MIRB's appeal with costs.

Our view

In our view, the decision of the CA is just, and gives company directors a clearer picture on their role and responsibilities, as well as on the extent of

their “joint and several” liabilities to discharge their duties as directors effectively.

If a different outcome had been decided by the CA, such a decision would have been inequitable and burdensome for anyone assuming a directorship position. This would discourage anyone from assuming directorships, and may give rise to tedious due diligence exercises prior to assuming the role, which can be costly and time consuming.

The CA’s decision in the Mahawira case also serves as a good reminder to taxpayers that the role of the MIRB is to administer the tax legislation. Whilst the MIRB plays a large role in the interpretation and practical application of the tax legislation, it is not the MIRB’s role to write, or rewrite the tax legislation. That said, the MIRB interpretation or guidance on the tax legislation is not law itself or conclusively binding on taxpayers.

Contact for further information

Priya Selvanathan

priya.selvanahan@roedl.com

→ Increase of threshold for filing winding-up

Background and content of the new Federal Government Gazette Notification No. 4159

Section 466(1)(a) of the Companies Act 2016 (CA 2016) provides that a company shall be deemed to be unable to pay its debts if it fails to satisfy a demand for the sum exceeding a minimum amount prescribed by the Minister for a period of 21 days following the service of the statutory demand notice. The minimum amount prescribed under the 2017 Federal Government Gazette was RM 10,000.

As a result of the Covid-19 pandemic, there were two winding-up petition reliefs. The first available relief was through the Companies (Exemption) Order No.2 which provided a temporary winding-up protection for six months i.e. companies had six months to respond to the notice of demand for statutory notice served between the period of April 23, 2020 until December 31, 2020. This protection has now expired and reverted back to the 21 days demand period.

The second relief was the increase of the minimum debt threshold from RM10,000 to RM50,000 for the issuance of a statutory notice of demand which was supposed to expire on 31 December 2020. By default, the debt threshold was to be reverted to the prescribed RM10,000 set out in the 2017 Federal Government Gazette on January 1, 2021.

However, a new gazette has been issued as temporary measure under the Federal Government Gazette Notification No.21841 dated December 23, 2020, whereby the amount of indebtedness for the purposes of ‘inability to pay debts’ under section 466(1)(a) of the CA 2016 has been increased to an amount exceeding RM50,000 from January 1, 2021 until March 31, 2021. Thus, the Federal Government Gazette Notification No.21841 has revoked the 2017 Federal Government Gazette. Subsequently, on March 22, 2021 the Federal Government Gazette Notification No.4159 has been issued to permanently raise the amount of indebtedness threshold of companies to exceeding RM50,000 effective April 1, 2021.

The effect of this new Federal Government Gazette is that creditors may only commence winding-up proceedings against a debtor for inability to pay debts under section 466(1)(a) CA 2016, if the debtor fails to satisfy a debt exceeding RM50,000 within 21 days after a notice of demand has been served upon the debtor at its registered office.

The increase in the company indebtedness threshold was initiated by the Malaysia government to help keep companies afloat in the wake of the challenges posed by the Covid-19 pandemic, and is expected to further reduce the number of winding-up petitions so that the companies will be able to continue doing business while still complying with the law.

Our view

The increase of the threshold for winding-up petition comes at a time where the International Monetary Fund has highlighted the potential insolvency risks in Europe and the Asia-Pacific region early this month.

In our view, that companies doing business in Malaysia should address the potential risk of business partners in financial distress. This can be done by revising the payment terms, considering collaterals, and revising their internal KYC policy.

Contact for further information

Geetha Salva
Advocate & Solicitor
Geetha Salva & Associates in Association with Rödl & Partner

geetha.salva@gsa-law.com

Nur Zawani Zulkufli

nurzawani.zulkufli@roedl.com

Imprint

Malaysia News Flash, Issue April 2021

Publisher:
Roedl Consulting Sdn Bhd
Unit 18-12, Menara Q Sentral
No. 2A, Jalan Stesen Sentral 2
Kuala Lumpur Sentral 50470
Rödl & Partner

Responsible for the content:
Christian Swoboda
christian.swoboda@roedl.com

Layout/Type:
Christian Swoboda
christian.swoboda@roedl.com

This Newsletter offers non-binding information and is intended for general information purposes only. It is not intended as legal, tax or business administration advice and cannot be relied upon as individual advice. When compiling this Newsletter and the information included herein, Rödl & Partner used every endeavour to observe due diligence as best as possible, nevertheless Rödl & Partner cannot be held liable for the correctness, up-to-date content or completeness of the presented information

The information included herein does not relate to any specific case of an individual or a legal entity, therefore, it is advised that professional advice on individual cases is always sought. Rödl & Partner assumes no responsibility for decisions made by the reader based on this Newsletter. Should you have any further questions please contact Rödl & Partner contact persons.