

**IN THE COURT OF APPEAL, MALAYSIA
AT PUTRAJAYA**

[APPELLATE JURISDICTION]

CIVIL APPEAL NO: W-01-665-2010

Between

- 1. KETUA PENGARAH HASIL DALAM NEGERI**
- 2. LEMBAGA HASIL DALAM NEGERI MALAYSIA - APPELLANTS**

And

MAXIS COMMUNICATION BERHAD - RESPONDENT

**[Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
Dalam Wilayah Persekutuan, Malaysia
(Bahagian Rayuan dan Kuasa-Kuasa Khas)
Permohonan bagi Semakan Kehakiman No. R3-25-335-2008**

Between

Maxis Communication Berhad - Applicant

Dan

- 1. Ketua Pengarah Hasil Dalam Negeri**
- 2. Lembaga Hasil Dalam Negeri Malaysia - Respondents**

CORAM:

**Syed Ahmad Helmy Syed Ahmad, JCA
Abdul Wahab Patail, JCA
Abdul Aziz Abd Rahim, JCA**

Date of Judgment: 14th August 2012

JUDGMENT OF THE COURT

[1] Having heard the submissions of the parties, this Court allowed the appeal with costs fixed at RM15,000.00. The order of the High Court was set aside and the ruling of the Director-General of Inland Revenue dated 10/10/2008 was affirmed.

[2] The appeal was against the order of the High Court which allowed the Respondent's application for judicial review filed under Order 53 rule 2 of the Rules of the High Court 1980 and setting aside the ruling by the Director-General that:

- i. Pursuant to Clause 7.1.1 of ESOS Scheme Byelaws, the options only vested from the date of the first anniversary that the employee is offered the option and not from the date of grant;
- ii. Consequently, an employee does not have any rights in an unvested option before the date of the first anniversary and the requirement that there be a "...right to acquire shares in a company..." in s 25(1 A) of the Act is not fulfilled;

- iii. From a legal standpoint, before the amendment to ss 25(1) and 32(1) of the Act, these un-amended provisions did not apply to IS because the ECC offered to the employees were not offered in their original form i.e. as shares and the price has been ascertained without reference to the material market value. It is further not subject to market risks as ordinary ESOS schemes are;

- iv. When Maxis employs Clause 10.1 of the ESOS Scheme Byelaws, Maxis substitutes the cancellation of the ESOS Scheme with an alternative consideration. In this instance, Maxis' employees are paid an alternative consideration in return for the cancellation of the ESOS Scheme. The alternative consideration is no longer in the form of shares which need to be valued, and to the contrary, it is the receipt of cash arising from employment; and

- v. Maxis' employees are not offered fresh share options as a consequence of the takeover and instead are paid a sum of money the value and timing of which is based

on the ESOS Scheme. Further, Maxis' employees do not have to pay anything to receive the said payment and this is different from the ordinary ESOS where an employee has to make payment to enforce the offer of shares given to him.

[3] A brief description of the background is necessary in understanding the issue before the Court.

Background

[4] There was in place a binding Maxis Employee Share Option Scheme (ESOS Scheme) offered by Maxis and accepted by its employees. When Binariang GSM Sdn Bhd takeover offer succeeded, Maxis could no longer honour its obligations under the ESOS Scheme. Maxis proposed and the employees accepted in lieu thereof an Equivalent Cash Consideration ("ECC"), the acceptance of which would relieve Maxis of its contractual obligations under the ESOS Scheme to offer shares to participating employees.

[5] The issue is whether:

- a) the ECC payment is ordinary cash remuneration to which section 13(1)(a) of the Income Tax Act 1967 (Revised 1971) applied, or
- b) the ECC payment to release the employee of his right to acquire shares and is gross income to which section 25(1A) and section 32(1A) of the Act applies.

[6] The argument for the Respondent is that the ECC payment was to relieve Maxis from having to honour its contractual obligation under the ESOS Scheme and was therefore not a salary or ordinary cash remuneration under s 13(1)(a) of the Act, but was, instead, a share based payment to which the special provisions on the right to acquire shares under ss 25(1A) and 32(1A) of the Act applies.

The Law

[7] Gross income of an employee in respect of gains or profits from an employment is defined in section 13 of the Act to include any wages, salary, remuneration, leave pay, fee. Commission,

bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment.

[8] Section 25 concerns the basis period to which the gross income is related. Subsection (1A) provides that the gross income from an employment in respect of any right to acquire shares in a company of the kind to which paragraph 13(1)(a) applies, shall where the right is exercised, assigned, released or acquired in the relevant period be treated as gross income of the relevant person for that relevant period.

[9] Section 32(1A) sets out the special provisions for determination of the amount to be included in his gross income and the relevant period. It was provided that the amount shall be the market value of the shares

a) on the date of; or

b) on the date specified for; or

c) the first day of the period specified for

the exercise, assignment, release or acquisition of the right to the shares.

[10] Paragraph (b) of subsection (1A) what is meant by the term market value of the shares.

[11] In our view, section 32(1A) means that the exercise, assignment, release or acquisition of the right to the shares relates to shares an employee is determined to be entitled to since in order for vesting to occur the number of shares awarded or offered must be determined. The ECC exercise does not appear to be part of any such an exercise. Under the ECC, Maxis was in fact to be relieved of the contractual obligation to make such award or offer. There was no vesting of any shares the rights to which may be exercised, assigned, released or acquired. It was not, therefore, made under the ESOS Scheme *per se* but was a collateral and separate exercise to relieve Maxis of the ESOS Scheme obligation while the shares were not yet awarded or offered and was therefore unvested. Following **Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetables Oils Sdn Bhd [2004] 2 CLJ 265 CA** as to interpretation of a taxing statute, and looking fairly at the language used, it is true there was a binding contractual obligation giving the employees a right to acquire shares under the terms of the Scheme, but the actual entitlements remained

to be determined, e.g. the passage of time the employee remained in employment. There was no right to specific shares yet. They remained unvested. The ECC was dealing with these unvested shares. We conclude that the application of Sections 25(1A) and 32(1A) does not arise.

[12] It is evident that the High Court has misconstrued the law and the Director-General of Inland Revenue had not. There was no reason for judicial intervention by the High Court.

[13] For the foregoing reasons, we made the decision first above set out.

sgd.

**(DATUK ABDUL WAHAB BIN PATAIL)
JUDGE
Court of Appeal, Malaysia
Putrajaya**

Dated: 20th February 2013

Counsels/Solicitors

for the Appellants:

Ms Hazlina Hussain &
Mr. Ahmad Khairuddin Abdullah

Lembaga Hasil Dalam Negeri Malaysia
Menara Hasil, Aras 11
Ibu Pejabat LHDNM
Persiaran Rimba Permai, Cyber 8
63000 Cyberjaya

for the Respondent:

Mr. Rishwant Singh, Mr. P. Jayasingam &
Mr. Gandhi Mohan

Messrs Zul Rafique & Partners
D3-3-8, Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur