

The Scope of “Executor” and Its Liability to Income Tax – To Sign or Not to Sign the Income Tax Form B for the Deceased Person?

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Introduction

Income tax liability does not cease after the death of the taxpayer. The Income Tax Act 1967 (“the Act”) empowers the tax authorities to recover any outstanding taxes and penalty from the executor.¹ In 2006, the Federal Court was asked to spell out the parameters of an “executor” in the decision of *Kerajaan Malaysia v Yong Siew Choon*² (“*Yong Siew Choon*”) where it was held that the meaning of “executor” included a legal representative, which was the spouse of the deceased taxpayer irrespective of whether a grant of probate had been obtained or there were no assets to be distributed to the beneficiaries.

The facts

The deceased was a partner in a legal firm and had settled his income tax liability up to the year of assessment (“YA”) 1983. He passed away on January 12, 1984 leaving behind his wife and a son. The widow did not apply for the grant of probate or letters of administration as the deceased did not leave any distributable assets. The tax authorities issued the tax return Form B under the name of the deceased for YAs 1984 and 1985 as there was income from the legal firm being the share of profits paid to the deceased. An additional sum of RM280,000 was paid to the widow.

The widow completed the Form B for the deceased as legal representative. Under the paragraphs which required her to state the deceased’s share of the partnership income/loss, she wrote, “refer to the legal firm’s file”. The tax authorities then issued the notice of assessment for YAs 1984 and 1985 covering the following basis periods:

YA	Basis Period
1984	1 January 1983 – 31 December 1983
1985	1 January 1984 – 12 January 1984

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1 See ss 64 and 74 of the Act.

2 [2006] 2 AMR 93.

The total income tax payable amounted to RM290,919. She, however, did not pay the tax that had become payable on the ground that she was not the executor and it was not her responsibility to make the payment to the tax authorities. The tax authorities imposed penalties on the non-payment of tax.

The government was determined to collect the outstanding income taxes from the deceased through the widow. This could only be done if she was the executor of the deceased as provided in s 74 of the Act. When she failed to settle the tax and penalty, the tax authorities commenced recovery proceedings against her in her capacity as executor by virtue of ss 106 and 142 of the Act. She contended that she was never an executor as no grant of probate was extracted, and that it was not her responsibility to make the payment to the tax authorities.

The crux of the issue was whether the widow could be held as an executor under the Act given the fact that she did not apply for the grant of probate or for letters of administration as the deceased did not leave any assets to be distributed. The only act she did for the deceased was filing the income tax returns form for YAs 1984 and 1985.

The arguments

The wife testified that she was a housewife with no income whatsoever. After the demise of her husband, she did not petition for any grant of probate or for letters of administration as the deceased did not leave behind any assets. The wife contended that she did not in any way administer or manage the estate of the deceased because there was nothing for her to administer. She argued that the income tax of RM290,919 assessed on the husband’s income was never her responsibility because she was not indebted to the tax authorities.

The tax authorities contended otherwise. They found that the wife who had signed the Form B for the deceased, must have acted as a legal representative, falling squarely within the definition of “executor” as defined in s 2 of the Act. Section 2 reads as follows:

“executor” means the executor, administrator or other person administering or managing the estate of a deceased person.

The filing of Form B on behalf of the deceased and the signature of the wife were fatal. They denoted that she was administering or managing the estate of a deceased and was an executor under the Act. She could be sued and was responsible for the deceased husband’s tax.

The High Court’s decision

RK Nathan J at the High Court rejected the widow’s argument that a legal representative could only exist when there were assets to be administered. His Lordship was of the opinion that the position of a legal representative unfolded itself immediately upon the death of the person concerned, until such time a grant

of probate or letters of administration was obtained. Therefore, the wife was the executor notwithstanding that no grant of probate or letters of administration had been applied for. RK Nathan J opined:

I have no hesitation in holding that the defendant clearly fell into the third category of a person defined as executor, namely as a person administering or managing the estate of the deceased person.³

The High Court held that despite the fact that the wife of the deceased did not apply for a grant of probate or letters of administration, she was clearly administering the estate of her deceased husband when she signed the Form B for YAs 1984 and 1985. Thus, she fell within the meaning of “executor”. Judgment was entered against the widow in the sum of RM290,919.

RK Nathan J held:

To my mind the definition in s 2 [of the Act] clearly encompasses persons under the category of the defendant. Although she had neither taken probate nor letters of administration, she was clearly administering the estate of her deceased husband when she signed the Form B for the years 1984 and 1985. ...

It is clear therefore that until probate or grant of legal administration is obtained, the person most acceptable to manage the estate of the deceased until such time as the grant is obtained is the legal representative. In this case, it is the wife. She contends that since there was nothing left in the estate, she had nothing to administer and therefore, she could not be the legal representative. The position of a legal representative does not impose itself only when there are assets to administer. That position unfolds itself immediately upon the death of the person concerned, until such time as probate or legal administration is obtained.⁴

In conclusion, the signing of the respective tax returns form for the deceased was held to be an act of administering the estate of the deceased. She was then termed as legal representative, falling into the third category of the executor. She was liable to the tax claimed by the tax authorities.

Dissatisfied, the wife appealed to the Court of Appeal.

The Court of Appeal’s decision

In the Court of Appeal, Gopal Sri Ram JCA acknowledged the tax authorities’ intention in impleading the estate of the deceased was to recover the tax from it and not from the widow’s personal assets. However, his Lordship found that such a recovery action against the estate was governed by Order 15 r 6A of the Rules

3 [1997-2002] AMTC 2090 at 2095.

4 Ibid at 2094-2095.

of High Court 1980 (“RHC”) which required the extraction of letters of representation as the prerequisite. This was not fulfilled.

The rule of substantive law required an action to be commenced *only* after letters of representation had been extracted. It was only in an action against the duly appointed legal representative of the estate that a judgment may be obtained and enforced against the assets of the estate. Failure to comply with this fundamental requirement rendered the recovery by the government illegal and null. The case was dismissed and it was held that the wife was not liable for the amount. The case was even at this stage.

The tax authorities, being dissatisfied, appealed to the Federal Court.

The Federal Court’s decision

The Federal Court was asked to determine the following point of law:

Whether in view of the provisions of the Act, Order 15 r 6A of the RHC is applicable to an action or proceeding raised under s 106 of the Act in relation to an assessment in the name of an executor as defined in the Act.⁵

Augustine Paul FCJ delivering the judgment of Federal Court however held that Order 15 r 16A of RHC has no application to the proceedings for the recovery of tax in the light of ss 64 and 74 of the Act.

Section 64 of the Act sets out the liability of an executor, i.e. the executor being the person assessable and chargeable to tax in the case of an estate of a deceased. Therefore, proceedings can be commenced against an executor for the recovery of income tax due and payable. Section 2 of the Act defines “executor” as:

“executor” means the executor, administrator or other person administering or managing the estate of the deceased person.

His Lordship examined the scope of “executor” as defined in s 2 of the Act and concluded that the definition encompassed two groups of persons. The first group was persons who had obtained the grant of probate or letters of administration of a deceased. These persons were legally appointed. The second group referred to persons “administering or managing the estate of the deceased person” which must refer to those who were not legally appointed. The widow fell into the latter group and was therefore an executor and would be liable to tax.

Augustine Paul FCJ held that:

It follows that reference in ss 64 and 74 of the Act to an “executor” includes a person who is administering or managing the estate of a deceased person. Such a person is assessable and chargeable to tax and is therefore a person who can

5 [2006] 2 AMR 93 at 97.

be sued in law. The corollary is that Order 15 r 6A will have no application to proceedings under the Act against such a person. The extension of the scope of Order 15 r 6A by the Court of Appeal to proceedings under the Act cannot therefore be sustained. The answer to the question posed to us must therefore be in the negative.⁶

The final victory went to the tax authorities. The tax recovery from the widow was valid in law as she was the executor as defined by the Act.

Yong Siew Choon postscript

It was the finding of the High Court that the wife of the deceased taxpayer was the person administering the estate of the deceased when she signed the Form B for YAs 1984 and 1985 as legal representative. RK Nathan J opined:

The agreed documents in the CABD show that it was the defendant who had completed and signed Form B, being the “Return of income by an individual” for years of assessment 1984 and 1985. She had declared herself on signing the said forms as the wife of Abdul Hamid bin Tun Azmi (deceased). ... To my mind, the definition in s 2 clearly encompasses persons under the category of the defendant. Although she had neither taken probate nor letters of administration, she was clearly administrating the estate of her deceased husband when she signed the Form B for the years 1984 and 1985.⁷

Reading the above passage, does it mean that if she had not signed the Form B, she could have escaped the tax liability of RM290,919?

The answer is, “Yes and No”. It is felt that if the deceased taxpayer had distributed his wealth to his beneficiary before his death for a bona fide consideration, then the tax authorities would have no recourse from the beneficiaries. However, if there was ample circumstantial evidence that the deceased taxpayer had distributed his wealth during his lifetime solely to avoid his income tax responsibility, the tax authorities could have recourse from those beneficiaries notwithstanding that none of them had signed the Form B on behalf of the deceased and were not executors under the Act.

Conclusion

Yong Siew Choon’s decision is a landmark authority in tax recovery from deceased persons. It defines the scope and responsibility of an executor under the Act. Its complexity is shown through the various opinions expressed by the learned judges of the High Court, Court of Appeal and Federal Court. This decision will have great impact on succession planning. So now, to sign or not to sign the Form B?

⁶ Ibid at 106-107.

⁷ [1997-2002] AMTC 2090 at 2094.