



PERBADANAN PEMBANGUNAN PULAU PINANG

v.

PEMUNGUT DUTI SETEM, MALAYSIA

01(f)-28-10/2023(K)

The duty payer filed an appeal against the decision of the Court of Appeal (“COA”), in allowing the Collector’s appeal against the High Court’s decision. The dispute centers on the Collector’s rejection of the duty payer’s remittance application, in which the Collector treated the letter of undertaking from the State Government as a “security”, resulting the duty payer to be ineligible for the remission order.

 **FEDERAL COURT**



**YA TAN SRI DATUK NALLINI PATHMANATHAN, HMP
YA DATO' RHODZARIAH BINTI BUJANG, HMP
YA DATUK ABDUL KARIM BIN ABDUL JALIL, HMP**



17 SEPTEMBER 2024

The duty payer obtained a RM100 million loan from Bank Islam Berhad (“the Bank”) on 6.5.2019, with no security attached. The State Government later issued a letter of undertaking to the Ministry of Finance (“MOF”), as part of the condition precedent stipulated in the letter of offer and the Tawarruq facility.

The Collector argued that it was not in dispute that the duty payer’s Facility Agreement was secured by the letter of undertaking from Penang State Government as provided at Paragraph (D)(1) of the Third Schedule to the Facility Agreement and Conditions Precedent of the Letter of Offer dated 06.05.2019: “Third Schedule (D) (1) Letter of Undertaking from Penang State Government via Jabatan Kewangan Negeri to Ministry of Finance that the State Government was to be accountable for the Facility of RM100,000,000.00 with the Bank”. In the Letter of Offer, one of the Conditions Precedent was a Letter of Undertaking from Penang State Government via Jabatan Kewangan Negeri to the MOF from the State Government was to be accountable for the RC-I facility of RM100 million with the Bank. As a condition precedent to the Facility Agreement, the Penang State Government through Jabatan Kewangan Negeri issued the undertaking latter dated 9.8.2019 which Penang State Government had given an assurance to the MOF that the Penang State Government would be accountable for the loan facility amounting to RM100 million granted by the Bank. In the said letter, the Penang State Government clearly stated that: “3. Sehubungan itu, Kerajaan Negeri memberi akujanji untuk bertanggungjawab sepenuhnya ke atas Pinjaman Kredit Tidar berjumlah RM100 juta daripada Bank Islam Malaysia Berhad tersebut.”

However, the duty payer took the position that the Letter of Undertaking (“LOU”) by the Penang State Government addressed to the MOF dated 9.8.2020 was not a security because the LOU was only between the Penang State Government and the Federal Government and the Bank was not privy to the State’s LOU. Added to that, the LOU was merely “letter of compliance” or “letter of assurance” to the MOF that the State Government was responsible for the loan. Further, the LOU did not create any charge, pledge or assign any assets as a collateral for the Facility. The word ‘security’ must be given a wide meaning.

In the Facility Agreement, “security” was defined as: “the security provided by the Security Party to the Bank in respect of the obligations and liabilities of the Customer (including but not limited to the payment of the Indebtedness) under and in connection with the Facility and particularized in Section 7 of the First Schedule and any other security for the time being or from time to time constituting security for the obligations and liabilities (including but not to limited to the payment of the indebtedness) of the Customer under and in connection with the facility.

The LOU issued by the Penang State Government to the Ministry of Finance on 9.8.2019 served as a clear assurance that the state government would take full responsibility for the loan amount. The Penang State Government’s undertaking to be responsible for the loan secured the repayment of the loan facility to the Bank. As a result of this assurance being provided to the MOF, the payment of the RM100 million facility was guaranteed by the State Government. Additionally, the LOU provided a guarantee to the Bank that the duty payer had the capability to repay the loan amount at all times. Thus, the LOU served as a security for the Facility Agreement in multiple ways.

Even though the LOU was a letter between the Penang State Government and the MOF, it also guaranteed the entire RM100 million loan provided by the Bank to the duty payer. The LOU from the Penang State Government provided an exceptional security and complete assurance for the repayment of the loan amount. The State Government borne full responsibility for the loan amount, and as such, ensured that agencies under its jurisdiction, such as the duty payer, maintain strong financial capability at all times to enable the repayment of the loan amount to the Bank.

The Bank was a Federal Government GLC, whilst the duty payer was a State entity. Hence, the relationship between the Bank and the duty payer was not strictly commercial, but are guided by the government policies. Therefore, instead of the usual security in the nature of mortgages or charges, the Letter of Offer issued by the Bank specified the requirement of a LOU from the State Government, in compliance with the Federal Government's policy. This was also clearly stated in the Third Schedule of the Facility Agreement.

The Federal Court, by a unanimous decision, allowed the duty payer's appeal with cost of RM50,000.00 to be paid by the Collector to the duty payer subject to allocator.