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**IN THE HIGH COURT IN MALAYA AT IPOH
IN THE STATE OF PERAK DARUL RIDZUAN**

**POST (WINDING UP) NO. AA-28PW-2-01/2022
(COMPANIES WINDING UP PETITION NO. 28-39-06/2012)**

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**In the matter of Carotech
Berhad
(Company No.:200964-W);**

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And

**In the matter of Section 434 and
527 of the Companies Act, 2016
(Act 777);**

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And

**In the matter of Rules of Court
2012 and the Inherent
Jurisdiction of this Honourable
Court**

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BETWEEN

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**KAWAN DYNAMIC ENGINEERING SDN BHD ... PETITIONER
(Company No.: 385603-U)**

AND

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**CAROTECH BERHAD ... RESPONDENT
(Company No. :200964-W)**

AND

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CAROTECH BERHAD ... APPLICANT
(Receiver and Manager Appointed) (In Liquidation)
(Company No.: 200964-W)

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AND

1. GOVERNMENT OF MALAYSIA

2. DIRECTOR GENERAL OF THE INLAND
REVENUE BOARD OF MALAYSIA

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...RESPONDENTS

JUDGMENT

Introduction

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[1] On 8 June 2022, this Court made a declaration, the net effect of which is that the Respondents namely, the Government of Malaysia and the Director General of the Inland Revenue Board of Malaysia, rank number 6 in the order of priorities of unsecured debts in a winding up as provided under **section 527 Companies Act 2016** and by reason thereto the sum of RM1,415,090.40 in the form of Real Property Gains Tax (“**RPGT**”) remitted by the Receiver and Manager of the Applicant (In Liquidation) to the Respondents by way of **payment under protest** be refunded to the Receiver and Manager. Dissatisfied, by notice of appeal dated 30 June 2022, the Respondents appealed to the Court of Appeal.

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Background

[2] The background leading to the application are non-contentious with the facts well summarised by learned counsel for the Applicant in their

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primary written submissions (Enclosure 11) and, this Court adopts them and set them out hereunder with some variations.

Banking facilities and Charge

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[3] The Applicant obtained banking facilities from the following financial institutions (the “Facilities”): -

- i) Maybank International (L) Ltd,
 - 80 ii) Oversea-Chinese Banking Corporation Limited, Labuan Branch,
 - iii) Malaysian Industrial Development Finance Berhad,
 - iv) RHB Bank Berhad,
 - v) Hong Leong Bank Berhad,
 - vi) OCBC Bank (Malaysia) Berhad,
 - 85 vii) Malayan Banking Berhad,
 - viii) CIMB Bank Berhad,
 - ix) Kuwait Finance House (Malaysia) Berhad, and
 - x) Malaysia Debt Ventures Berhad.
- (collectively called the “**the Financiers**”).

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[4] The security for the banking facilities that the Financiers received includes fixed and floating charges covering all the assets and undertakings of the Applicant as contained in a Debenture dated 1 April 2011 (the “**Debenture**”).

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[5] Among the Applicant’s assets that were subject to the Debenture were three pieces of immovable property held under issued documents of title:



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- i) Pajakan Negeri 371729, Lot 15637,
 - ii) Pajakan Negeri 371727, Lot 15635, and
 - iii) Pajakan Negeri 296031, Lot 15504
- all in the Mukim of Lumut, Daerah Manjung, Negeri Perak (collectively called the “**Lands**”).

105 **[6]** These Lands were specifically charged by the Applicant in favour of one of the Financiers, Maybank International (L) Ltd.

Default in Repayment

110 **[7]** Upon the Applicant defaulting in its repayment obligations under the banking facilities, and acting pursuant to the Debenture, Malaysian Trustees Berhad, who was the agent for the Financiers, appointed Duar Tuan Kiat on 1 November 2012 as the Receiver and Manager of the Applicant.

115 **[8]** The Applicant was ordered to be wound up by the High Court in Malaya at Ipoh under this Companies Winding Up action, on 30 November 2012.

[9] Slightly less than a year later, on 11 October 2013, pursuant to an order made in the High Court in Sabah and Sarawak at the Federal
120 Territories of Labuan in suit Originating Summons No. LBN 24-16/0-2013, the Lands which were first charged in favour of Maybank International (L) Ltd were ordered to be vested in Malayan Banking Berhad.

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Sale of the Lands & Real Property Gains Tax Exigible

130 [10] Exercising his powers under the Debenture, the Receiver and Manager sold the Lands by way of public tender on 10 January 2020 for a sum of RM24,300,000.00 (the “**Sale Price**”).

135 [11] In accord with the provisions of **subsection 21B (1) of the Real Property Gains Tax Act 1976** (the “**RPGT Act**”), on 21 May 2020, the Applicant remitted a sum of RM729,000.00 (the “**Retention Sum**”) equivalent to 3% of the Sale Price to the 2nd Respondent.

[12] For ease of reading, **subsection 21B (1) of the RPGT Act** is reproduced hereunder:

140 *“(1) Subject to subsection (1A), where on a disposal to which section 13 applies, the consideration consists wholly or partly of money, the acquirer shall retain the whole of that money or a sum not exceeding three per cent of the total value of the consideration whichever is the less, and (whether or not that amount is so retained) he shall within sixty days after*
145 *the date of such disposal pay that amount to the Director General.”*

[13] It should be mentioned that if the Retention Sum is not paid pursuant to the provisions of **subsection 21B (1)** above, the Applicant has to pay a penalty equal to ten per cent of the Retention Sum and the increased sum
150 shall be a debt due to the 1st Respondent and shall be payable forthwith to the 2nd Respondent, see **subsection 21B (2) of the RPGT Act**.



155 [14] Almost immediately after paying the Retention Sum, one week later on 27 May 2020, the Applicant (through its agent, KPMG Corporate Services Sdn Bhd) requested for the 2nd Respondent to refund the Retention Sum.

160 [15] On 6 July 2020, the 2nd Respondent issued a Notice of Assessment of RPGT and stated that from the disposal of the Lands, the Applicant was chargeable with RPGT in a total sum of RM1,415,090.40 (the “**RPGT Sum**”).

165 [16] With the Applicant having paid RM729,000.00 in the form of the Retention Sum, the Applicant was required by the Respondents to pay a further sum of RM686,090.40 being the balance of the RPGT Sum within 30 days, failing which a penalty would be imposed.

[17] The Applicant effected payment of the further sum of RM686,090.40 but under protest on 6 August 2020 to the 2nd Respondent.

Claim for Refund of the RPGT Sum

170 [18] The Applicant maintained that the full amount of the RPGT Sum ought to be refunded as Malayan Banking Berhad to whom the Lands were specifically charged, was entitled to a priority of payment from the [entire] proceeds of the sale of the Lands, over that of the RPGT Sum exigible and which had been paid to the 2nd Respondent under protest.

[19] Several requests were made by the Applicant for the refund but the 2nd Respondent declined to refund the RPGT Sum.



180 **[20]** On 27 January 2022, the Applicant filed its application (Enclosure 1)
seeking a declaration that the Respondents' entitlement to the RPGT Sum
is that as an unsecured creditor and what had been paid under protest ought
to be refunded to the Receiver and Manager to be dealt with in accordance
with the priority of payments as statutorily provided under **the Companies**
185 **Act 2016.**

Applicant's Position

190 **[21]** The Applicant concedes that real property gains tax is chargeable and
payable under the RPGT Act if there is a chargeable gain arising from a sale.

[22] However, the Applicant asserts that when a company like the Applicant
in this action, is in winding up or liquidation, the specific provisions of the
Companies Act 2016 ("CA 2016") on the order of distribution and payment
195 of funds comprising the assets of the company shall apply for how, when and
to which party, including the 1st Respondent (Government of Malaysia) is to
be paid.

200 **[23]** In the statutory list of priority of payments for unsecured creditors,
taxes, which of course, include RPGT, comes in at only number 6.

[24] Reliance was placed upon the provisions of **sections 434 and 527 of
the CA 2016** which are reproduced hereunder:

205 *"434. Government bound by certain provisions*



The provisions of this Part relating to the remedies against the property of a company, the priorities of debts and effect of an arrangement with creditors shall bind the Government.”

210 527. *Priorities*

(1) *Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts-*

215 (a) *firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 468, the remuneration of the liquidator and the costs of any audit carried out under section 514;*

220 (b) *secondly, all wages or salary, whether or not earned wholly or in part by way of commission, including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding fifteen thousand ringgit or such other amount as may be prescribed whether for time or piecework in respect of*
225 *services rendered by him to the company within a period of four months before the commencement of the winding up;*

230 (c) *thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;*

235 (d) *fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;*



240 (e) *fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees social security contribution and superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and*

245 (f) *sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.*”

250 [25] The Supreme Court in dealing with the priority of payment of sales tax, which is also a form of federal tax, in ***Director of Customs Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) [1995] 3 CLJ 316*** when applying the predecessor legislation in **section 292(1) of the Companies Act 1965** (which is in *pari materia* with **section**
255 **527 of the Companies Act 2016**) held that:

260 “***We have no hesitation in holding that S 292(1) of the Companies Act 1965 is a special provision dealing with a particular subject, and that it is in a special provision dealing with particular subject, and that it is in conflict with s 10(1) of the Government Proceedings Act 1956. Nevertheless, we must also assume that the Legislature must have had in mind the latter Act when enacting the subsequent Companies Act 1965, and did not intend to abrogate it altogether. The general rule of construction is such if having made the general Act the Legislature afterwards makes a special provision in conflict***
265 ***with the earlier legislation, the special provision so in conflict is treated as a mere exception to the general provision - Corp of Madras v Electric Tramways Ltd AIR 1931 Mad 152, ...***



270 We are therefore of the view that **the maxim specialia generalibus derogant applies**, and **s 292(1) of the Companies Act 1965** must be read as an exception to the general provision of **s 10(1) of the Government Proceedings Act 1956** but otherwise the latter section prevails over other debts.

275 We are entirely in agreement with the above rationale. If at all the Customs has priority right it must be a right over a debt as a whole where the amount is specified. **Section 69 of our Sales Tax** does not, in terms of its construction, direct payment away of the money so set aside nor does it instruct in any way how that money is to be applied and yet the **Sales Tax Act 1972** was enacted well after the **Companies Act 1965**. The only requirement contained in that section is for the liquidator to set aside a sum
280 sufficient to provide for tax payable then or thereafter. The sum to be set aside pursuant to the statute may not be necessarily the same as what is actually payable. The Legislature could not have forgotten about the priority right as contained in **s. 292 of the Companies Act 1965** when it enacted that provision on the **Sales Tax Act 1972**. On the true construction of these
285 two sections, we conclude that the omission to mention both matters i.e. on payment out and priority were deliberate acts of the Legislature. **We are firmly of the view that s. 69 of the Sales Tax Act 1972 is merely directive in nature. It merely directs the setting aside of moneys sufficient to provide for taxation but does not provide that Government debts shall rank in priority to all other secured debts.** If the Legislature had intended otherwise, it would have conferred that privilege in as clear and unequivocal words as possible.”
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295 **[26]** It was pointed out that consistent with the provisions on the chargeability of RPGT, **paragraph 5(2) of Schedule 1 to the RPGT Act** also provides that when a company is being wound up or is in liquidation, the liquidator is responsible for the payment of RPGT and the liquidator cannot distribute any of the assets of the company to its shareholders, unless he



has made provision for the payment of such tax. **Paragraph 5 (2) of**
300 **Schedule 1 of the RPGT Act** is reproduced hereunder:

305 *“(2) The liquidator of a company which is being wound up shall be responsible for the payment of any tax which he knows or might reasonably be expected to be payable by the company under this Act; and shall not distribute any of the assets of the company to its shareholders unless he has made provision for the payment of such tax.”*

310 **[27]** I observe that it is provided in **paragraph 5(3) of Schedule 1 of the RPGT Act** that if any liquidator fails to comply, he shall be liable to pay a penalty equal to the amount of the tax to which the failure relates.

315 **[28]** The provision **paragraph 5 (2) of Schedule 1 (supra)** is consistent with the provisions set out in the Companies Act that shareholders rank after federal taxes when payment is made out of company assets when a company is in winding up or liquidation.

320 **[29]** Whilst the Supreme Court in **Director of Customs Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation))(supra)** dealt with sales tax, in **Priority Artificial Lift Services, LLC v Eastern Energy Services Sdn Bhd [2021] 1 LNS 637** the High Court had to deal with RPGT and it was held that:

325 *“.....the obligation of the Liquidator to pay any taxes under the Real Property Gains Tax Act 1976 does not abrogate the fact that the payments to be made by the Liquidator under the provisions pertaining to the winding up of a company under the Companies Act 2016 and the ranking of payments thereto are.... to be observed by the Liquidator”*



330 [30] The High Court in *Priority Artificial Lift Services, LLC v Eastern Energy Services Sdn Bhd (supra)* cited with approval the case of *Chye Hup Heng Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] 1 LNS 90* where the applicant had similarly sought for a refund of the RPGT tax and claimed that the proceeds from the sale should be first utilized to pay the debt secured under the charges. The claim was allowed by the High Court
335 which held that:

“[26] ...since the Applicant is in liquidation in my view in accordance with **sections 291 and 292 of the Companies Act**, the Sale Proceeds received from the disposal of the Lands, which are charged under the
340 Charges, ought to be utilized in the following order of priority:

- i) Firstly, the Sale Proceeds shall be used to pay the Secured Debt in full;
- 345 ii) Secondly, in the event that there is any surplus after the full payment of the Secured Debt, the balance shall be used to pay the preferential debts in the order set out in **Sections 292(1)(a) to (f) of the Companies Act 1965**; and
- 350 iii) Thirdly, in the event there are any surplus after the payment of the debts stated in paragraphs 22(d)(i) and (ii) above, the balance shall be used to pay the Applicant’s unsecured debts.

[27] Therefore, the Secured Debt has priority over the RPGT sum claimed by the Respondent...

355 [28] Given that the Sale Proceeds ... are insufficient to settle the Secured Debt owing under the Charges, I accept the Applicant submission that the Sale Proceeds should not be used to pay the RPGT and any RPGT paid shall be properly ordered refunded to the Applicant...



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[29] ... it seems to be that the Respondent's claim for RPGT does not have a priority over the Secured Debt due to the Chargee. In the circumstances, the Respondent's Decision to demand immediate payment of the RPGT is illegal."

(emphasis added)

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[31] Accordingly, although when a company is in winding up and, the payment of RPGT is in priority to distribution to shareholders, the Applicant asserted it is settled law that a secured creditor takes priority over an unsecured claim such as the RPGT Sum.

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Respondents' Position

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[32] The Respondents assert that the provisions of **sections 434 and 527 CA 2016** do not bind them because the debt due is regulated by the **RPGT Act** and not the **CA 2016**.

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[33] Specifically, the Respondents assert that the provisions of **section 527 (1) (f) of the CA 2016** is only applicable if the tax due as a debt arise before the winding up of the Applicant or was assessed before the time fixed for the proving of debts has expired.

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[34] In this case, the debt in the form of the RPGT Sum was assessed with a Notice of Assessment issued on 6 July 2020, after the Applicant had been ordered to be wound up (on 30 November 2012) and at time when the Applicant is in liquidation.



[35] The Respondents assert that to accede to the Applicant's application would mean that the Respondents would have to file a proof of debt.

390 [36] On the filing of a proof of debt, the Respondents assert that firstly, as
the RPGT Sum has been paid, there is no debt, and secondly, if they are
required to prove their debt, which they deny, there is no provision for the
filing of any proof of debt in a situation where the debt was incurred **after** a
company has been wound up, with reliance placed on **subsection 523 (3)**
395 **of the CA 2016** with emphasis laid on the words emboldened the in the
subsection and reproduced hereunder:

"Description of debts provable in winding up

...

400 (3) *Save as provided in subsections (1) and (2), all debts and liabilities
present or future, certain or contingent, **to which the company is subject
at the date of the winding up order** or the resolution, or to which the
company may become subject before dissolution by reason of any obligation
incurred before the date of the winding up order shall be deemed to be debts
405 provable in winding up."*

[37] The Respondents go on to refer to the provisions of **subsections 14
(1), 21 (1) and (4) of the RPGT Act** as well as the authority of ***Kerajaan
Malaysia v. Mudek Sdn Bhd [2017] 10 CLJ 159 (FC)***, to assert that the
410 RPGT shall be payable on service of the notice of assessment and if not paid
within 30 days or within such longer period as may be allowed, the tax due
or so much of the tax as is unpaid shall without any further notice be
increased by a sum equal to ten per cent of the tax so unpaid.

415 [38] That the RPGT Sum is payable is not contested by the Applicants.
However, the Respondents cited the Supreme Court authority of ***Raja***



Arshad bin Raja Tun Uda & Anor v Director General of Inland Revenue [1990] 1 MLJ 106 to advance the point that the Supreme Court held that **section 21B (1) (a) of the RPGT Act** makes payment of RPGT a priority debt over the amount due to the debenture holder.

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[39] Finally, it was asserted that the 2nd Respondent is only liable to refund the RPGT Sum if it was in excess of the amount payable. As there is no dispute on the amount assessed or that the Applicant is asserting that the RPGT Sum ought to be remitted in whole or in part on grounds of poverty or undue hardship, or justice or equity by the [Finance] Minister, see **section 26 (1) (a) and (b) RPGT Act**, the Applicant is not entitled to the reliefs sought.

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Court's Analysis and Findings

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No Dispute that RPGT Sum Payable

[40] From the exchange of the affidavits and submissions, it is clear that the Applicants do not dispute that the RPGT Sum is correctly assessed.

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[41] The only point in contention is when is the RPGT Sum payable.

[42] It is indisputable that real property gains tax is a federal tax payable when lawfully due to the Government of Malaysia.

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Priority of Payments

[43] I agree with the Applicant that it is settled law that a secured creditor takes priority over an unsecured creditor. If at all an authority is required for



445 this principle, see ***Director of Customs Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) (supra)*** where at page 327 the Supreme Court decided that a secured debt enjoys priority over the Government's claim for federal taxes and held that:

450 *“On the aforesaid reasonings and determination, we have arrived at the conclusion that the proper provisions to apply in deciding the priority of payments in respect of the claims for debts arising from non-payment of sales tax is ss 291 and 292 of the Companies Act 1965, and the relevant date for the application of priority in this case is the date on which the*
455 *liquidator was appointed. ... The outcome from this situation in this case is obvious. **The automatically crystallized debenture debts having attained the characteristic of a secured debt must be paid first in preference over the unsecured sales tax debts.**”*

460 **[44]** In ***Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) (supra)*** at page 326 the Supreme Court had also cited with approval the principle in ***Re Your Size Fashions Ltd [1990] 3 NZLR*** that:

465 *“A secured creditor is entitled to stand aloof from the liquidation. Such a creditor may appoint a receiver and be entitled to interest due under an interest bearing security to the date of payment of principal sum.”*

[45] I observed that **section 434 of the CA 2016** which provides that the Part in the **CA 2016** relating to remedies against the property of a company and priorities of debts is binding upon the Government comes under Part IV on “Cessation of Companies”. This Part IV houses section 527 on priorities of payment of [unsecured] debts. Wherefore, I have no hesitation in finding that the provision on priorities of payment on unsecured debts contained in **section 527 of the CA 2016** is binding on the Respondents.



475 [46] This Court is of the considered view that the RPGT is akin to sales tax
in that it is but another specie of tax within the genus of federal taxes and by
reason thereto, this Court is bound to follow the decision of the Supreme
Court in *Director of Customs Federal Territory v Ler Cheng Chye*
(*Liquidator of Castwell Sdn Bhd (In Liquidation)*) (*supra*) that the special
480 provision on dealing with priority of payment of unsecured debts in **section**
527 will prevail over the **RPGT Act**.

[47] In my considered view, the RPGT Act only provides when real property
gains tax is payable but does not set out the order of priority of payment
485 when the RPGT as assessed is payable by a company in winding up or
liquidation.

[48] As there is a special provision to regulate the order of priority of
payments in such a situation housed within **section 527 CA 2016**, I am of
490 the considered view that the maxim *specialia generalibus derogant* ought to
be applied with full force, see *Simon Alexander Mathews V. Pengerusi*
Lembaga Pencegahan Jenayah & Ors [2022] 7 MLJ 248; [2021] 1 LNS
1217, where I had occasion to say at para [33]:

495 “On the application of this Latin maxim, see *Zulkifli Md Rodzi v. PP*
[2013] 4 CLJ 250 at para [10] where the Court of Appeal held that “it is trite
that if a special procedure is prescribed in the Act then the general provisions
found in the Act or other Acts cannot be followed. This principle is expressed
by the maxim *generalia specialibus non derogant*.” See also *Superintendent*
500 *of Pulau Jerejak & Anor v. Wong Cheng Ho [1979] 1 LNS 104 FC.*”

[49] In the circumstances, I agree with the decision in *Chye Hup Heng Sdn*
Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] 1 LNS 904 (HC), where



the applicant therein had similarly sought and successfully obtained an order
505 for a refund of the RPGT paid with Justice Hanipah Farikullah (now JCA)
deciding that the proceeds from the sale should be first utilized to pay the
debt secured under the charges and holding that the respondent's decision
to demand immediate payment of the RPGT to be illegal.

510 *Payment Under Protest*

[50] I find the Respondents' assertion that because the RPGT Sum has
been paid and there is, therefore, no debt for it to prove to be without merit
because the payment was made under protest by the Applicant in response
515 to an illegal demand and paid for purposes of avoiding being mulcted.

[51] It was in order for the Applicant to resort to effecting payment under
protest and then to seek relief from the Court so as to avoid the potential
danger of penalties in the form of increased tax exigible under **section 21**
520 **(4) RPGT Act** or suffer personal liability being imposed on the liquidator who
under subparagraph 5 (3) of **Schedule 1 RPGT Act** may be liable to pay a
penalty equal to the amount of RPGT payable if the Retention Sum and the
balance amounting to the RPGT Sum was not paid.

525 [52] Payment under protest is a common law right of ancient origin, see
Shaw v Woodcock et al., 7 B & C. 73. The payer can seek recovery by
condictio indebiti or money had and received. It is described as a payment
made "*where money is illegally demanded and paid, the payer adding to his*
530 *act of payment a more or less formal declaration to the effect that the money*
so paid is wrongfully exacted" by the learned author, Francis Fisher Kane in
his article "The Recovery of Money Paid Under Protest" and published in The



American Law Register (1852-1891) Oct., 1891 Vol. 39 No. 10
(<https://www.jstor.org/stable/3305300>).

535 **[53]** I find the Respondents' reliance upon **section 24 RPGT Act** and in particular on **subsection 24 (4) (b) RPGT Act** which provides that nothing in the section shall operate to compel the Government to refund the excess amount of tax paid in respect of an assessment unless the assessment has been finally determined to be without merit.

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[54] The Applicant is not challenging the assessment let alone seek a refund of any excess amount of tax paid.

545 **[55]** Instead, the Applicant is claiming that with it in winding up and in liquidation, the RPGT Sum is not payable as yet and the payment made should be refunded to enable it to pay the secured creditor. Only if there is any excess after having paid [all] the secured creditors, it would be paid in accordance with the priority of payments provided in **section 527 (1) of the CA 2016**. This, to my mind, is the correct legal position.

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Whether RPGT Assessed After the Date of Winding Up Order is Provable Under Subsections 523 (3) and 527 (1) (f) of the CA 2016

555 **[56]** I bear in mind that in ***Priority Artificial Lift Services, Llc v. Eastern Energy Services Sdn Bhd [2021] 1 LNS 637*** Justice Nadzarin Wok Nordin JC held that if a notice of assessment of RPGT is issued after a company has gone into winding up it will rank six in the list of preferential [unsecured] creditors and His Lordship went on to make an order that the Inland Revenue Board need not lodge a proof of debt form pursuant to **subsection 523 (3)**



560 **of the CA 2016.** With the greatest of respect, I am of the considered opinion
that it is for the Respondents to decide whether any of them wants to lodge
a proof of debt.

565 **[57]** Contrary to the assertion of the Respondents, even if a notice of
assessment of RPGT is raised after the company has been ordered to be
wound up, under the provisions of **subsection 523(3) of the CA 2016** the
Respondents are still entitled to lodge a proof of debt for the Retention Sum
and the balance due totalling the RPGT Sum if they wish to claim for it.

570 **[58]** To facilitate interpretation, it would be helpful to break down the
provisions of **subsection 523 (3) of the CA 2016** hereunder:

“Description of debts provable in winding up

575 *(1) Demands in the nature of unliquidated damages arising otherwise
than by reason of a contract, promise or breach of trust shall not be provable
in winding up.*

580 *(2) A person having notice of any winding up order in a winding up by
the Court or a resolution has been passed in a voluntary winding up shall
not prove under the winding up for any debt or liability contracted by the
company subsequent to the date of his so having notice.*

585 ***(3) Save as provided in subsections (1) and (2), all debts and
liabilities present or future, certain or contingent,
to which the company is subject at the date of the winding up order,
or the resolution,
or to which the company may become subject before dissolution by
reason of any obligation incurred before the date of the winding up
order,***



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shall be deemed to be debts provable in winding up.”

(emphasis added)

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[59] When broken down, for purposes of the instant case, it becomes clear that all debts and liabilities present **or future**, certain **or contingent** to which the company is subject at the date of the winding up order would undoubtedly include the banking facilities taken by the Applicant and which is yet to be settled (emphasis added).

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[60] The banking facilities is inextricably tied up with the security given by the Applicant in the form of its assets being liable to be realised to settle the banking facilities which have yet to be repaid.

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[61] In this case, the security includes the charge over the Lands which has been vested in Malayan Banking Berhad and which would be subject to realisation for purposes of settling any outstanding money owing under the banking facilities and this was what had happened here.

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[62] Any gains from the sale of the Lands would subject the Applicant to the future or contingent liability of being assessed for real property gains tax and **subsection 523 (3) of the CA 2016** expressly provides that such future or contingent liability shall be deemed provable in winding up.

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[63] Therefore, it would be for the Respondents to prove the tax exigible in the winding up of the Applicant armed with the added advantage that their assessment shall be deemed provable by operation of law.



[64] I find the assertion by the Respondents that because the RPGT Sum was assessed after the date of the commencement of the winding up subsection 527 (1) (f) of the CA 2016 would not apply, to be devoid of merit, because subsection 527 (1) (f) (*supra*) clearly provide “sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for proving of debts has expired” (emphasis added) and no dispute was raised by any party that the time for the proving of debts has not expired.

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[65] I agree with the Applicant that the case of *Kerajaan Malaysia v. Mudek Sdn Bhd (supra)* cited by the Respondents does not assist the Respondents seeing that the Applicant does not challenge that the RPGT Sum is payable in this case save that the Respondents will have to wait their turn.

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[66] Similarly, the case of *Raja Arshad Raja Tun Uda & Anor v. The Director-General of Inland Revenue [1990] 1 CLJ (Rep) 253* cited by the Respondents does not deal with a company in liquidation as to invoke the application of the provisions of section 527 of the CA 2016 on priority of payments when the company is in winding up.

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[67] As for the case of *Majlis Amanah Ra' ayat v The Official Receiver, Malaysia [1984] 1 CLJ (Rep) 240 (FC)* cited by the Respondents, with respect, this case does not assist the Respondents because the issue in *Majlis Amanah Ra' Ayat (supra)* was whether a debt or liability incurred after the presentation of a winding up petition but before the date of the order for winding up, can be proved, and the Federal Court held that it can because the effective date for purposes of determining the debt or liability of an insolvent company in liquidation by order of Court is the date of the order for

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winding up. In *Majlis Amanah Ra'ayat*, no issue was taken on the order of priority of payments of unsecured debts.

Conclusion

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[68] In the upshot, the Court granted an Order in terms of the application (Enclosure 1) that:

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- i) the Respondents are obliged to enable the Applicant to act in accordance with and to comply with the provisions set out in **sections 434 and 527 of the Companies Act 2016** which requires the Applicant to pay the sale proceeds of the disposal of the lands held under:

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- a) Pajakan Negeri 371729, Lot 15637,
b) Pajakan Negeri 371727, Lot 15635, and
c) Pajakan Negeri 296031, Lot 15504

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all in the Mukim of Lumut, Daerah Manjung, Negeri Perak (collectively called the "Lands") disposed under the Sale and Purchase Agreement dated 10 January 2020 to be paid to the secured creditor, Malayan Banking Berhad;

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- ii) that the sum of RM1,415,090.40 remitted to the Respondents from the sale proceeds towards payment of RPGT on the disposal of the Lands is in contravention of the **sections 434 and 527 of the Companies Act 2016** in the event the debts owed to the secured creditor, Malayan Banking Berhad, has not been fully settled;
- iii) that the Respondents shall within 30 days from the date of this Order remit the sum of RM1,415,090.40 to the Applicant for payment to the secured creditor, Malayan Banking Berhad; and



675 iv) costs of RM10,000 to be paid by the Respondents to the
Applicant.

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Dated: 28 July 2022

Su Tiang Joo

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**(SU TIANG JOO)
Judicial Commissioner
High Court in Malaya
Ipoh, Perak**

For Applicant : Ng Sai Yeang

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(together with Tan Shey Min)
[Messrs Raja, Darryl & Loh]

For Respondents : Umisalamah binti Abd Latiff

[Inland Revenue Board of Malaysia]

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[Notice: This Grounds of Judgment is subject to official editorial revision]

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Headnotes

Real property gains tax arising from the disposal of property belonging to a company whilst in winding up or in liquidation is a federal tax which is to be
705 treated as an unsecured debt and to be paid in accordance to the priority of payments provided in section 527 of the Companies Act 2016

Effecting a payment under protest and to seek repayment is a common law right where money is illegally demanded and paid

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