

COMPANIES (EXEMPTION) ORDER 2020 – DOES MINISTER POSSESS THE POWER TO MAKE SUCH ORDER?

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Covid-19 pandemic has proven to be a life changing event, and the Law is not precluded from the need to adapt to the changes caused by the pandemic. The Malaysian government has rolled out economic stimulus packages and other measures in a bid to mitigate the effects of Covid-19 on the economy. The latest of these measures is the introduction of the Companies (Exemption) Order 2020. Whilst these measures are needed in a desperate time like this, it is also important to ensure that the measures comply with the law.

By an Order gazetted on 22.4.2020 (at paragraph 2), the Minister exercised his powers under s.615 of the Companies Act 2016 to “*exempt the provision which determines that any company shall be deemed unable to pay its debt if the company neglect any notice of demand by any creditor to pay its debt or to secure its debt or compound of its debt to the satisfaction of the creditor within the period of twenty-one days after a notice of demand is being served on him*”. Effectively, the Minister had exercised his powers under s.615 to exempt the applicability of s.466(1)(a)¹ until 31 December 2020.

S.615(1)² which provides that “*The Minister may, upon the recommendation of the Commission, by order exempt any person, corporation or class of corporations from all or any of the provisions of this Act*” clearly empowers the Minister to exempt the applicability of s.466 (which the Minister appears to have done). The Companies (Exemption) Order 2020 appears to have complied with all the requirements under s.615(1) (i.e. recommendation of the Commission, and that the exemption was made by an Order). Therefore, there is no issue on the validity of paragraph 2 of the Order.

However, the Companies (Exemption) Order 2020 does not stop there. In the purported exercise of his powers under s.615, the Minister continued to make a further order by stating that “*Notwithstanding paragraph 2, the company referred to in paragraph 2 shall be deemed unable to pay its debt under paragraph 466(1)(a) of the Act if the company neglects any notice of demand by any*

creditor to pay its debt or secure its debt or compound its debt to the satisfaction of the creditor within the period of six months after the notice of demand is being served upon him” at paragraph 3 of the Order. The issue with regard to paragraph 3 of the Order is whether the Minister possess the power to make such Order. S.615 only empowers the minister to **exempt** all or any of the provisions of the Act. It does not empower the minister to **amend** any provision of the Act. Paragraph 3 of the Order effectively amends s.466(1)(a) by changing the 21-days period for companies served with a winding up notice to pay or to secure or to compound for its debt to 6 months.

Although some may argue that paragraph 3 of the Order was made pursuant to s.615(2)(c)³ of the Act which provides that “*In exercising his powers under this section, the Minister may ; (c) impose any terms and conditions as he thinks fit*”, paragraph 3 is in no way a term and condition of the exemption under paragraph 2. It is effectively an amendment to s.466(1)(a). The 21-days period stipulated in s.466(1)(a) is a statutory provision and is not open to any ministerial discretion. Under s.466(1)(a). Minister can only exercise his discretion with regard to the threshold of debt as the debt threshold stipulated in the Act is “*a sum exceeding the amount as may be prescribed by the Minister*”. The Minister has no power to amend the period to pay or to secure or to compound for the debt.

Therefore, the Minister had acted ultra vires when he effectively amended s.466(1)(a) through the Companies (Exemption) Order 2020 without following proper procedures to amend the provision. It follows that paragraph 3 of the Companies (Exemption) Order 2020 is unenforceable. Whilst it may have been done with good intention to mitigate the effect of Covid-19 on the businesses, it must be balanced with the need to comply with the principles of rule of law. As such, s.466(1)(a) needs to be amended to give effect to the Companies (Exemption) Order 2020.

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1. 466(1) A company shall be deemed to be unable to pay its debt if –
 - (a) The company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has serves a notice in demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or to compound for it to the satisfaction of the creditor.
 2. 615(1) The Minister may, upon the recommendation of the Commission, by order exempt any person, corporation or class of corporations from all or any of the provisions of this Act.
 3. 615(2) In exercising his power under this section, the Minister may-
 - (a).....
 - (b).....
 - (c)impose any terms and conditions as he thinks fit.