

TECHNICAL

Direct Taxation

TAX CASE UPDATE

Disposal of land – whether disposal of capital investment or stock in trade.

INSAF TEGAS SDN BHD v KPHDN

High Court of Malaya at Kuala Lumpur
Civil Appeal No: R1-14-14-10/2013
Date of Judgment: 27 October 2016

Facts and Issues:

This is an appeal against the decision of the Special Commissioners of Income Tax (SCIT) who dismissed the appellant's appeal against the assessment for the year of assessment (YA) 2014 dated 13.12.2012, which was issued with penalty imposed.

The appellant is a company which was involved principally in property investment. In 1997, the appellant purchased 50 acres of land in Ulu Selangor ("the said land") which it subsequently disposed of by way of a Deed of Assignment dated 16.4.2004 and 24.5.2004. The appellant submitted a return for Real Property Gains Tax (RPGT) following which it was issued with a Certificate of Exemption for RPGT on 9.5.2008. However, following a tax audit conducted by the respondent in August 2010, the appellant was issued with the Notice of Assessment mentioned above for the sum of RM4,005,593 with penalty in respect of the gains made from the disposal of the said land.

The appellant's appeal to the SCIT against the assessment was dismissed. Hence this appeal to the High Court ("the Court"). The issue for determination of the Court is whether:

1. the disposal of the said land by the appellant constituted a disposal of capital investment, or the disposal of stock in trade; and
2. the respondent had correctly exercised his discretion in imposing a penalty under S113(2) of the Income Tax Act 1967 (ITA). (All sections cited hereinafter refer to sections of the ITA unless otherwise stated.)

Decision:

Appeal dismissed. The grounds of the decision are summarized below:

1. The appellant contended that the disposal was consistent with a disposal of an investment and not a disposal of stock in trade. Based on the "badges of trade" used in determining whether a disposal is capital or revenue in nature, the appellant contended that the said land was purchased as an investment, as it was purchased in the name of the appellant, and not in the name of other property development companies owned by one Mr. Siah, who was the owner of the appellant. Furthermore, the Certificate of Exemption for RPGT issued by the respondent showed that he had agreed with the appellant's tax return, and no justification was provided for the subsequent change (of treatment) and issue of the assessment (for income tax) with penalty.

2. The Court, however, declared that after taking into consideration the circumstances surrounding the purchase and sale of the said land, it had concluded that the appellant's intention in purchasing the said land, was not for the purpose of investment, but as stock in trade.
3. The appellant clearly intended to develop the land for a profit. This was evident from the Sale and Purchase Agreement (SPA) between the appellant and the disposer of the said land, which (the Court found) contained specific conditions requiring compliance by the appellant that are consistent with the commercial development of the said land. The Court also noted that property development was the activity in which the appellant was engaged as stated in its Memorandum of Association.
4. Thus, based on the conduct of the appellant and circumstances surrounding the land transaction, the Court found that from the onset, the said land was purchased by the appellant solely for commercial development. This finding was supported by the following:
 - A company resolution was passed for the purchase of the said land in anticipation of the SPA, and a developer (Mixwell (Malaysia) Sdn Bhd) was appointed after the execution of the SPA;
 - 2 company resolutions were passed prior and subsequent to the execution of the SPA with the seller of the property.
5. The appellant's intention only changed following unfavourable market conditions when the said land was assigned to a third party pursuant to the appellant's debt settlement exercise. Nevertheless, it was evident that the appellant's intention from the onset was to develop it for profit.
6. The respondent's witness (R1) had testified that the provisions of the SPA was consistent with the appellant's intention to develop the said land commercially within 2 years, including the requirement for building plans to be submitted for approval within one year of the SPA's execution.
7. As the appellant had "*undisputedly disposed of its stock in trade in the course of carrying on a business*" it is chargeable to gains or profits from the disposal of the said land under S24(1).
8. On the imposition of the penalty under S113(2), it is clear that the stated section provides for the DGIR to be given discretionary power to impose a penalty on an incorrect return filed by a taxpayer irrespective of whether "*(the) return was made negligently, or in good faith or with intention to deceive or evade tax*", which discretion is to be exercised after due consideration of all relevant facts and circumstances. In view of the incorrect return submitted by the appellant, the imposition of penalty by the DGIR was found by the Court to be "*a lawful and proper exercise of the respondent's discretion*".

Members may read the full Grounds of Judgment at the [Institute's website](#) and the [LHDNM website](#).

Disclaimer

This document is meant for the members of the Chartered Tax Institute of Malaysia (CTIM) only. This summary is based on publicly available documents sourced from the relevant websites, and is provided gratuitously and without liability. CTIM herein expressly disclaims all and any liability or responsibility to any person(s) for any errors or omissions in reliance whether wholly or partially, upon the whole or any part of this E-CTIM.