

**TECHNICAL**

---

**Direct Taxation**

**TAX CASE UPDATE**

**Project to build, operate and transfer a bridge – whether cash payment and land alienated to the developer constituted revenue or capital income of the developer.**

**KPHDN v WOODVILLE DEVELOPMENT SDN BHD**

High Court in Sabah & Sarawak  
Appeal No: MYY-14-1/6-2012  
Date of Judgment: 15 January 2013

**Facts and Issues:**

This is an appeal against the decision of the Special Commissioners of Income Tax (SCIT) which was given by way of a case stated under a Deciding Order (DO) dated 6.12.2011. The appeal by the taxpayer pertained to the year of assessment (YA) 2004, for which 2 additional assessments were raised on the taxpayer, as follows:

<i>Date of Notice</i>	<i>For the sum of (RM)</i>
31.10.2005	17,562,082.72
23.7.2008	47,495,325.92 (inclusive of penalties)

The respondent (the Taxpayer) had entered into a Concession Agreement (CA) with the Government of Sarawak (the Government) to build, operate and transfer (BOT) a bridge over the Batang Baram in Miri Division, Sarawak. In consideration of the Taxpayer undertaking the project, the Government agreed to:

- (a) alienate to the taxpayer 5000 acres of land which was valued by the Government at an estimated value of RM78 million;
- (b) pay the sum of RM10 million to the Taxpayer, in a manner specified in the CA;
- (c) confer exclusive right to the Taxpayer for a period of 30 years, to collect and retain tolls for its own benefits, from vehicles using the bridge.

Upon expiry of the agreement, the bridge will revert to the Government, free from all costs. The Taxpayer incurred costs of RM90,178,955 on the construction of the bridge, which was opened to the public on 31.8.2003. Toll collection began on 1.09.2003.

The Taxpayer was issued with the above additional assessments for YA 2004 on the stated dates, against which it made separate appeals to the SCIT by way of Form Q. The 2 appeals were consolidated and heard together in April 2010. In their decision given on 6.12.2011, the SCIT held that:

- (a) Apart from the toll concession business, the Taxpayer was also carrying on the business of building the bridge.
- (b) the payment of RM10 million and alienation of 5000 acres of land to the Taxpayer under the CA to finance the costs of the bridge was a revenue receipt for YA 2004 and not a subsidy or

grant and should not be exempted under the Income Tax (Exemption) No. 4 Order 2003.

- (c) the market value of the property was RM78 million as agreed in the CA.
- (d) the construction cost of the bridge amounting to RM90,175,988 was an allowable expense.
- (e) the penalty of RM32 million imposed under S113(2) of the Income Tax Act 1967 (ITA) for YA 2004 should not be imposed.

The appellant, being dissatisfied with the DO of the SCIT, appealed to the High Court (the Court). The issues for determination were whether the SCIT were correct in their decisions stated under (c), (d) and (e) above.

### Decision:

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

1. The appellant relied on the case of *Lower Perak Co-operative Housing Society Bhd v KPHDN [1994] 3 CLJ 540* in support of its contention that the onus was on the Taxpayer to satisfy the SCIT that the assessments were wrong or should be set aside. However, in the present appeal before the High Court, the Court was of the view that the appellant in this appeal, i.e. the DGIR, “*undertakes the onus that the decision of the SCIT on the questions of law raised were wrong*” (as the appeal was not brought by the Taxpayer).
2. The Court noted that the second additional assessment by the appellant was issued to amend the first additional assessment. The amendments made were –
  - land was valued at RM107 million instead of RM144.8 million as in the previous assessment;
  - the deduction of RM90 million (construction costs) which was allowed previously was withdrawn, and industrial building allowance (IBA) was allowed instead.

The appellant submitted that the reason why the Taxpayer was not entitled to any deduction under S33(1) was because the Taxpayer had already claimed IBA under Sch. 3 of the ITA. Thus to allow deduction of the costs of RM90 million (as decided by the SCIT) would amount to double deduction.

3. In rejecting this ground of appeal, the Court made the following points:
  - The Taxpayer treated the receipt of RM10 million and alienation of land to itself as capital receipts because it did not consider itself as engaging in a business of building bridges, but only carried out the business of a toll concessionaire. Therefore it claimed IBA under Sch. 3 of the ITA.
  - There was ample evidence to support the SCIT’s finding that the Taxpayer carried on the business of a toll concessionaire and also engaged in a business of building a bridge. The SCIT also found that the receipts in question (payment in money and alienation of land) were not subsidies or grants and hence not exempted under the IT (Exemption) No. 4 Order 2003. The appellants did not challenge the findings of the SCIT that the receipts in question were revenue and not capital receipts for YA 2004. Therefore, (as shown in the case stated) the SCIT did not allow the Taxpayer’s claim for IBA because they ruled that the payments were revenue and not capital receipts. Instead, they allowed the deduction of construction costs of RM90 million in calculating profits for YA 2004. This was in line with the appellant’s decision in the first additional assessment. “*It was obvious that the*

*(SCIT) did not allow any double deductions as the Appellant had contended."*

4. The second issue was whether the SCIT were correct in assessing the value of the land at RM78 million. The Court referred to the 3 different valuations of the land canvassed before the SCIT which were estimated at RM78 million (by the state government), RM72.7 million (by City Valuers & Consultant Sdn Bhd) and RM107.2 million (by JPPH), and reviewed the method used in arriving at the valuation by each party. The Court declared that *"there is no reason to disturb the findings made by the (SCIT) with regards to the valuation of the land at RM78 million"* and came to the following conclusion:

*"The CA entered into between the Sarawak Government and the Respondent was at arm's length. Therefore it was correct for the (SCIT) to accept the valuation of RM78 million for the land made by the Sarawak Government. The Sarawak Government being the owner of the land, was in the best position to value the land via its various agencies and or departments."*

5. On the last issue on whether the appellant was correct in imposing the penalty, the Court noted the following:
- The appellant submitted that the Taxpayer had made an incorrect return by failing to disclose all proceeds received under the CA, and that Revenue had absolute discretion to impose penalty under S113(2) of the ITA after considering all relevant facts and circumstances.
  - However, in deciding that the penalty imposed was not justifiable, the SCIT were of the opinion that some leeway should be given in the case of self assessment.
  - The facts showed that the taxpayer had disclosed the CA, the payment of RM10 million and the alienation of the land in its annual return and audited financial statements for 2002, 2003, and 2004. However, (rightly or wrongly) the last 2 were treated as capital receipts and government grants instead of revenue. These findings were made by the SCIT who made adjustments to treat these items as income receipts chargeable to tax.

Therefore these were technical adjustments and not submission of an incorrect return by understating income or furnishing incorrect information on any matter affecting the chargeability to tax. Hence, the SCIT were correct in disallowing the imposition of penalty under S113(2).

Members may read the full Grounds of Judgment at the [Institute's website](#) and the [www.highcourt.sabah.sarawak.gov.my](http://www.highcourt.sabah.sarawak.gov.my) 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.