

**TECHNICAL**

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**Direct Taxation**

**TAX CASE UPDATE**

**Compulsory Land Acquisition**

Whether the gains arising from the compensation for compulsory acquisition of land were subject to income tax?

***Ketua Pengarah Hasil Dalam Negeri v Metacorp Development Sdn Bhd (2013) (Federal Court)***

**Facts:**

This was a judicial review application by the taxpayer seeking for:

- (a) A Declaration that the Revenue was bound by and shall give effect to the decisions of the Supreme Court in *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 and the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 2 CLJ 835, which held that gains arising from the compensation for compulsory acquisition of land are not subject to income tax as the element of compulsion vitiates the intention to trade; and
- (b) An Order of Certiorari to quash the decision of Revenue to raise notices of additional assessment dated 9 December 2009 for the years of assessment 2004 and 2005 against the taxpayer as the Revenue had acted *ultra vires* and without any factual or legal basis in raising the said notices.

The taxpayer was a property developer. In 1994, the taxpayer purchased two parcels of land in Mukim Ayer Keroh, Melaka. On two different occasions, one on 31.10.2003, and another on 26.10.2004, the State Government of Malacca issued notices of award and offered compensation pursuant Section 16 of the Land Acquisition Act 1960 to compulsorily acquire the taxpayer's land. The taxpayer received the compensation but did not subject the compensation to income tax. The Revenue issued notice of additional assessment with penalty for years of assessment 2004 and 2005. The taxpayer did not appeal against the assessment to the Special Commissioners of Income Tax in accordance with Section 99 of the Income Tax Act 1967. Instead, the taxpayer filed for a judicial review and had obtained leave from the High Court on 6.1.2010.

**Issue:**

Whether the gains arising from the compensation for compulsory acquisition of land were subject to income tax?

**Decision:**

The main issue of contention was whether or not the gains arising from the compensation for compulsory acquisition of the taxpayer's land were subject to income tax under the law. The contention of the taxpayer was based on the decision of the Court of Appeal in *Ketua Pengarah*

*Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 2 CLJ 835 which held that the compulsory acquisition of land could not constitute a sale. Taking the position that profits derived from the compensation paid to the tax payer on account of compulsory acquisition of the land was not profit that arises from taxpayer's business. The superior Courts in *Penang Realty Sdn Bhd* (supra) and *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 had held that compensation for compulsory acquisition of land was not subject to income tax. The principle established in those two cases was based on the premise that the element of compulsion vitiates the intention to trade. The general law and the law on income tax, requires that a sale must be consensual. It must be based on one's own free will. Thus, since gains derived from compensation paid to the taxpayer were on the account of compulsory acquisition, it was not profit arising out of the taxpayer's business activity.

For this reason the taxpayer submitted, the Revenue's decision which based on the Decision Impact Statement ("DIS") was clearly without any legal authority. The DIS was defective and the Revenue in issuing and relying on the DIS had acted *ultra vires*. It also attracted a constitutional issue under Article 96 of the Federal Constitution which provides that "*no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law*". The DIS had no legal effect and cannot override the decisions of the superior courts. Since the DIS was not issued pursuant to any power given by law, it had no force of law relying on the decision in *Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121 and *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224.

The High Court added that matters of tax involve *inter alia*, balancing the need of the Government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessment brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessment may be influenced by the target to be achieved rather than the correctness of the assessment.

According to the High Court, upon examining the decision of the Court of Appeal in *Penang Realty*, it was clear that the facts of that case that were relevant to the present case.

The decision of the High Court was unanimously affirmed by the Court of Appeal. The Revenue's application for leave to appeal to the Federal Court was unanimously dismissed by the Federal Court.

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