

TECHNICAL

TAX CASE UPDATE

Real Property Gains Tax – Determination of date of disposal under conditional contracts, statute barred assessment and appellate intervention by the Court.

[Kenny Heights Development Sdn. Bhd. v Ketua Pengarah Hasil Dalam Negeri \(2014\) \(Court of Appeal\)](#) (Civil Appeal No: W-01-200-06/2014)

Date of Judgment: 11 March 2015

Facts

The case concerns 2 agreements (“the said agreements”) for the sale of land (“the subject land” by Kenny Heights Development Sdn. Bhd (“KHD”) to Mycom Bhd, and Olympia Industries Bhd. (“OIB”) respectively, both of which were dated 14 August 2000. The said agreements were subject to “preconditions” which included obtaining necessary approvals by the Securities Commission and various other approvals from the relevant authorities. By Supplemental Agreements both dated 14 February 2003, the sale and purchase price was reduced. The preconditions had been satisfied by 27 April 2007. The notices “Notis Tahun Taksiran 2000” and “Notis Tahun Taksiran 2000 (Tambahan)”, both dated 31 December 2008 were issued in respect of the disposal of lands under the said agreements. KHD being dissatisfied with the assessments by the Ketua Pengarah Hasil Dalam Negeri (“KPHDN”), appealed to the Special Commissioners of Income Tax (“SCIT”).

Issues

Before the SCIT, the issues were

- (a) *whether there was any disposal of the subject land within the meaning of paragraph 16 of Sch. 2 of the [Real Property Gains Tax Act 1976](#), (“RPGT Act”) in YA 2000;*
- (b) *whether the disposal of the subject land is exempted under the RPGT (Exemption) (No.2) Order [P.U. (A) 146/2007] (“the said Order”) which exempted disposals after 31/3/2007 to 31/12/2009;*
- (c) *whether there were any chargeable gains in the year 2000 within the meaning of Sch. 3 of the RPGT Act.*

The SCIT held in favour of KHD and its deciding order made on 1 March 2013, set aside the determination by the KPHDN. The KPHDN appealed against the SCIT’s decision.

In the High Court, both parties raised the same issues. The High Court summed up the issues to one question:

Whether the disposals of land in the Land Acquisition Agreements are subject to the exception provided under Paragraph 16(a) and (b), Schedule 2 to Real Property Gains Tax Act 1976 (as amended by Finance Act 2006)?

The High Court allowed the appeal on 22 May 2014. Hence this appeal to the Court

The central issues were summed up by the Court of Appeal as

- (a) what are the disposal dates and consideration price of the said agreements (dated 14 August 2000) amended by the Supplemental Agreements (dated 14 February 2003);
- (b) whether KHD is exempted from RPGT on the disposal of the subject lands under the said Order [P.U. (A) 146/2007];
- (c) whether the Notice of Assessment dated 31 December 2008 is statute barred by virtue of S.15(1) of the RPGT Act.

Decision of Court of Appeal:

Appeal allowed. Decision of the High Court was set aside and the deciding order of the SCIT restored.

Summary of Grounds of Decision:

1. The operative words of paragraph 16 of Sch. 2 of the RPGT Act are “*unless the amount of the consideration depends on the value of the asset at the time when the condition is satisfied in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied.*” In this case, the conditions were satisfied by 27 April 2007 and by that date, the consideration price was not the original price set out in the said agreements, but the amended price set out in the Supplementary Agreements. “*In other words, the Notice of Assessment for YA 2000 dated 31 December 2008 was based upon a fiction.*”
2. By operation of paragraph 16, the date of disposal was 27 April 2007. Therefore KHD is clearly entitled to exemption under the said Order [P.U. (A) 146/2007] (providing exemption “in respect of any disposal of chargeable assets after 31 March 2007”) which came into force on 1 April 2007 and remained in force until 31 December 2009.
3. S.15(1) of the RPGT Act places a limitation of 5 years after the end of the YA to make an assessment or additional assessment, except in cases of any form of fraud or willful default. The 5-year limitation is applicable to assessments determined by the Court on an appeal or review and assessments on conditional contracts, even though the determination by the Court and the date by which the conditions were complied with are outside the control of the Inland Revenue Board (LHDN). Accordingly, the Notice of Assessment for YA 2000 dated 31 December 2008 is statute barred by virtue of S.15(1) of the RPGT Act.

4. Further finding of the Court of Appeal

Paragraph 23 of Sch. 5 of the Income Tax Act 1967 (“ITA”) provides that the decision of the SCIT is final. Appeal to the Court is allowed on a question of law and not any grievance. Paragraph 39 of Sch. 5 of the ITA is specific that *the High Court shall hear and determine any question of law arising from the case stated.*

After examining the case stated by the SCIT, the Court (of Appeal) is of the view that it “*shows a meticulous presentation of the facts, the evidence, the submissions, the relevant law and reasoning on the SCIT. It demonstrated a thorough appreciation and consideration of the facts. It does not betray ex facie any error on any question of law as to warrant appellate intervention.*”

On re-examining the Grounds of Judgment of the High Court, it was observed that the High

Court only *“had a different view of paragraph 16 of Sch. 2 of the RPGT Act, but it failed to provide its reasoning for that different view. It also failed to demonstrate where the SCIT had erred on a question of law. Without doing so, the intervention by the High Court was without justification and was an interference with the decision of the SCIT.”* The submission for the KPHDN before the Court had also *“failed to demonstrate*

- (a) where on the case stated, the SCIT had erred and*
- (b) that the High Court had dealt with and corrected the errors.”*

5. The Court is of the view that *“the SCIT fully appreciated the nature and terms of approvals by the Securities Commission...and took into consideration”* certain *“essential facts”* including the fact that the two subject agreements were essentially conditional agreements, and that listing of the new OIB and Mycom shares on Bursa Malaysia took place on 27 April 2007. The SCIT were *“acutely aware”* of the importance of their decision on whether the disposal of the subject lands took place on the date the subject agreements were signed (14 August 2000) or the date the new share listing took place (27 April 2007), *“that being the date when the last remaining condition under the conditional agreements was fulfilled.”*
6. *“The findings of the SCIT were made upon a full appreciation of the facts. The findings of facts were not perverse to the evidence. There was no reason to interfere with its findings of fact. The SCIT addressed the correct questions of law. ”*

Members may read the full [Grounds of Judgment](#) from the Official website of the Office of Chief Registrar, Federal Court of Malaysia.

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