
TECHNICAL

Direct Taxation

TAX CASE UPDATE

Whether land alienation cost is deductible against income of a housing developer

[MENGAWARTI SDN BHD. v. KPHDN](#)

Court of Appeal, Malaysia
Civil Appeal No: W-01-83-97

Date of Judgment: 10 April 2009

Facts and Issues:

The appellant (the taxpayer) is a company incorporated in 1979, whose main business is that of a housing developer. The taxpayer successfully applied to the Melaka State Government for alienation of 250 acres of land for housing development, and was required to pay "land-alienation costs" amounting to RM831,340 (made up of premium and other statutory charges) to the state government within 2 months from the date of receiving the notification of approval (dated 1 February 1980). The taxpayer had entered into several agreements (on different dates) with another housing developer, Masa Merdeka Sdn Bhd (MMSB), to develop the land. Under the agreement dated 31 December 1980, MMSB agreed to pay in consideration, an amount of RM900,000 to the taxpayer, payable as follows:

1. RM831,340 within 2 weeks from the date of the letter of approval from the land administrator of Melaka Tengah; and
2. Balance sum of RM68,660 to be paid upon completion of the housing estate.

The taxpayer's balance sheet showed the following amounts under the item "Advance (unsecured)" for each respective year ending 31 December:

1980	RM864,503
1981	RM864,600
1982	RM900,000 (reclassified as "Deferred Income")

A supplemental agreement signed on 8 July 1983 provided for an additional consideration of 50 sen per sq. ft. to be paid by MMSB when the buildings were completed and sold by MMSB.

The taxpayer was assessed to tax as follows:

YA	Tax*
1982	RM831,340
1984	RM 68,600

* Note by CTIM – It is noted that the amounts shown in the "Tax" column coincides exactly with the amounts of "advance" payments to the taxpayer. It is unlikely that tax assessed amounts to exactly the same as advance/ income subjected to tax. Perhaps the heading "Tax" is erroneous, and that column actually shows the amounts of "advance" assessed for each YA, or the amounts shown are erroneous.

The taxpayer then appealed to the **Special Commissioners of Income Tax (SCIT)**, whose findings of fact were that (1) the sum of RM900,000 was not "advance" but income i.e. profit from

the sale of development rights and therefore taxable; (2) the land alienation costs are non-deductible expenses as there was no evidence of the date and actual amount paid to the state government.

In the subsequent appeal to the **High Court**, the taxpayer conceded that the amount of RM900,000 was “income”, and so the only issue for determination was whether land alienation costs were deductible against the income. The High Court held that land alienation costs were non-deductible, being capital expenditure for acquisition of land, and were not “wholly and exclusively incurred in the production of the income”. Nor were they incurred in the period when the taxpayer received the income.

The taxpayer then appealed to the Court of Appeal.

Decision:

Appeal dismissed. The SCIT had found as a fact that there was no evidence at all of the existence of the payment of the land-alienation costs. This, in the view of the Court, is a clear and unequivocal finding of fact that is neither perverse nor ill-founded. Being the triers of facts, the SCIT’s finding is unassailable by the High Court.

The following is a summary of the grounds of judgment:

1. The Court referred to the following “essential principles” expounded in the case of *Edwards (Inspector of Taxes) v Bairstow and Another (1956) AC 14, 29 HL*:
 - (a) a pure finding of fact may be set aside if it appears that the Commissioners have acted without any evidence, or upon a view of the facts which could not reasonably be ascertained;
 - (b) The primary facts may not reasonably be supported if they do not justify the inference or conclusion which the Commissioners have drawn; or they lead irresistibly to the opposite inference or conclusion, or the finding is perverse.
 2. The principles from *Edwards v Bairstow, supra* were applied in the case of *Chua Lip Kong v DGIR (1982) 1 MLJ 235, 236 PC*. Among the principles enumerated in this case are the following:
 - (a) Findings of primary facts by the SCIT are unassailable, and cannot be overruled or supplemented by the High Court;
 - (b) It is primary facts so found by the SCIT that they should set out in the Case Stated as having been “admitted or proved”;
 - (c) “From the primary facts admitted or proved, the Commissioners are entitled to draw inferences;...inferences of pure factare as unassailable as the Commissioners’ findings of primary facts; but they.... may (also) involve....assumptions as to the legal effect or consequences of primary facts, (or) questions of law upon which it is the function of the High Court....to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumptions as to the relevant law.”
 3. In the present case, the SCIT had found *no evidence at all of the existence of the payment of the land-alienation costs by the taxpayer to the State Government*.
 4. Applying the principles in *Chua Lip Kong, supra*, the Court is of the view that the SCIT’s finding (as stated above) is unassailable, neither can it be overruled nor supplemented by the High Court.
 5. The finding of the High Court is in direct contradiction to the SCIT’s finding. In this regard, the High Court has erred. The SCIT’s finding, as triers or finders of facts is to be preferred, and their Deciding Order, being free from any error, should be affirmed.
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6. Even if the High Court's finding is accepted, the decision of that Court was correct in law as the land-alienation costs were capital expenditure for acquiring the land and not revenue expenditure, and were not "wholly and exclusively incurred in the production of the taxpayer's gross income of RM900,000, nor were they incurred in the period when the taxpayer received the income in 1981 and 1983.

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

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