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TECHNICAL

Direct Taxation

TAX CASE UPDATE

Government of Malaysia's Claim for Debt In Respect of Chargeable Gain Pursuant to Real Property Gains Tax Act 1976

Mudek Sdn Bhd v Kerajaan Malaysia (2013) **[CA] (Civil Appeal No: B-01(IM)-100-11)**

Facts and Issues:

Mudek Sdn Bhd (the appellant) entered into a Sale and Purchase Agreement with Yeng Chong Realty Sdn Bhd (Purchaser). However, the appellant alleged that the Purchaser had not fulfilled the condition of sale and the appellant had filed 2 suits in the High Court for default in payment of the purchase price.

This is an appeal by the appellant against the decision of the High Court to allow the Government of Malaysia to enter summary judgment in respect of a purported claim for debt arising from chargeable gain pursuant to the Real Property Gains Tax Act,1976 (the Act). The central complaint of the appellant is that there is no chargeable gain as stated in section 3 of the Act, and the property has not been disposed of or the purchase price received pursuant to section 2 of the Act. The essence of the appellant's argument is that because of non-payment, the property has not been disposed of yet within the meaning of section 2 of the Act, so that no chargeable gain had arisen upon which the respondent (Kerajaan Malaysia) could raise an assessment in accordance with section 3 of the Act. In consequence, the appellant argues that the issue above will stand as a triable issue.

Decision:

Appeal allowed.

The Act is only triggered if there is a disposal within the meaning of section 3 of the Act. Paragraphs 15 and 16 of Schedule 2 of the Act in relation to section 7 (chargeable gains and allowable losses) further fortifies the argument that there must be complete disposal or receipt of the purchase price before liability can be attached. The Court is of the view that the appellant's argument that there is breach (of the sale agreement) and there are 2 suits pending before the court, will stand as triable issues. The case of *Ketua Pengarah Hasil Dalam Negeri v The Petaling Rubber Estates Limited (2010) MLJ 1301* was cited, wherein it was asserted by the Special Commissioners of Income Tax that to be liable to real property gains tax, there must be chargeable gain within the ambit of section 3 of the Act. In the instant case, the duty of the trial court is to ascertain whether there was in fact a disposal as envisaged by the Act.

Every exercise of statutory power must not only be in conformity with the express words of the statute but must also comply with certain implied legal requirements. (*Pemungut Hasil Tanah*, *Daerah Barat Daya, Pulau Pinang, Ong Gaik Kee l1983] 2 MLJ 35)* The Court will treat as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. The Revenue Department is not an exception to the said jurisprudence.

Members may read the full ***Grounds of Judgment*** from the Kuala Lumpur Law Courts Official website.

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IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO: B-01(IM)-100-11

BETWEEN

MUDEK SDN BHD (026454-H) ...APPELLANT

AND

KERAJAAN MALAYSIA ...RESPONDENT

[In the High Court of Malaya in Shah Alam
Civil No: MT1-21-50-2008]

Between

KERAJAAN MALAYSIA ...Plaintiff

And

MUDEK SDN BHD (026454-H) ...Defendant

CORAM:

CLEMENT ALLAN SKINNER, JCA
MAH WENG KWAI, JCA
HAMID SULTAN BIN ABU BACKER, J

Hamid Sultan Bin Abu Backer, J (Delivering Judgment of The Court)

[1] This appeal was heard on 27.11.2012 and judgment was reserved for decision on 25.02.2013. The dissenting judgment is delivered by my learned brother Datuk Clement Allan Skinner. My learned brother Dato' Mah Weng Kwai has read the majority judgment and approved the same. This is the judgment of the majority.

Brief Facts

[2] The Appellant appeals against the decision of the learned High Court Judge who allowed the Plaintiff to enter summary judgment in respect of a purported claim for chargeable gain pursuant to the Real Property Gains Tax Act 1976 (the Act).

[3] The central complaint of the Appellant is that the Act in the instant case is not triggered as there is no chargeable gain as stated in section 3 of the Act and the property has not been disposed of or the purchase price received pursuant to section 2 of the Act. Section 3 (1) of the Act states:

> *"3. (1) A tax, to be called real property gains tax, shall be charged in accordance with this Act in respect of chargeable gain accruing on the disposal of any real property (hereinafter referred to as "chargeable asset").*

[4] Section 2 of the Act on the meaning of dispose states:

"dispose" means, subject to subsection (4), sell, convey, transfer, assign, settle or alienate whether by agreement or by force of law."

[5] In the instant case it is not in dispute that the Appellant has entered into a Sale and Purchase Agreement with Yeng Chong Realty Sdn Bhd (Purchaser). It is alleged the Purchaser has not fulfilled the condition of sale and the Appellant has filed 2 suits in the High Court namely, Writ Summons No. S-22-1468-2005 and No. S-22-448-2005 for the default in payment of the purchase price. In essence the Appellant argues the property because of non payment has not been disposed of yet within the meaning of section 2 of the Act for the Respondent to raise any assessment on 'chargeable gain' as envisaged by section 3 of the Act. In consequence the Appellant argues that the issue stated above will stand as a triable issue and also the Appellant is candid in asserting that if there is a disposal then the Respondent is entitled to raise an assessment and any dispute as to assessment must be referred to the Special Commissioners as provided for under section 18 of the Act which states:

"(1) A person aggrieved by an assessment made on him may appeal to the Special Commissioners against the assessment in the same manner as an appeal against an assessment of income tax made under the Income Tax Act 1967, and sections 99, 100, 101, 101(A), 101(1B), 101 (1C) and 102 of that Act, as far as they are applicable and with the necessary modifications, shall

apply to an appeal against an assessment made under this Act as if –

(a) Every reference in those sections to income tax or to tax were a reference to real property gains tax; and

(b) Every reference in those sections to income were a reference to chargeable gains.

[6] In addition the Appellant also argues as an alternative ground that on the facts of the case whether the assessment must be made under the Income Tax Act 1967 (ITA 1967) or the Act is also an issue as the property was sold by a company. The Appellant relies on the case of Binastra Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2003] 5 CLJ 221 (page 80-93 Appellant's Bundle of Authorities, where it was stated:

"..When a company sells the property, RPGT cannot be imposed and the assessment is under income tax. Therefore in this instance, the asset of the company was not real property comprising land, but stock in trade with no chargeable asset under RPGT".

[7] The Appellant also takes issue that the notice was not duly served and/or received by the Appellant. We do not think it is necessary for us to deal with the issue for reasons stated below.

Respondent's Submission

[8] The learned counsel for the Respondent concedes that there is no case directly on point on the Act issue and attempts to rely on cases relating to the Income Tax 1967. We do not intend to deliberate on the submission of the Respondent in detail save to say that the ITA 1967 and the Act for the purpose of assessment and subsequent recovery is not one and the same and the provisions and/or case laws cannot be arbitrarily referred to to justify collection of revenue when it is trite, that in a taxing statute there cannot be any intendment and/or equity about a tax. The Court is bound to look at what is clearly stated in the Act. And the strict rule is that nothing can be read into or implied pursuant to the Act. Where there is an ambiguity the benefit must be given to the tax payer. In Connaught Housing Development Sdn Bhd v Kerajaan Malaysia (2003) 8 CLJ 144 which the Appellant relies the court stated:

> *"In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. If there is any ambiguity in the interpretation of the relevant applicable section, then the benefit must be given in favour of the tax payer".*

[9] We have read the appeal record, the Memorandum of Appeal and the submission of the parties in detail. We are grateful to the counsel for the comprehensive submissions. It will serve no useful purpose to

repeat the submissions save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the Respondent, we take the view that the appeal must be allowed. Our reasons inter alia are as follows:

(a) It is trite that any person (specified) can be subject to an assessment and/or assessment notice pursuant to the ITA 1967. This is clearly spelled out in section 3 of the ITA 1967 which states:

> *"Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia."*

(b) It is also trite that once an assessment is raised under the ITA 1967 the aggrieved person can appeal to the Special Commissioners of Income Tax pursuant to section 99. Section 99(1) states:

> *"A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section*

> *92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form."*

[10] It must be noted here that any person who is mentioned in section 3 and where assessment is raised and intends to dispute the assessment will fall within the phrase of aggrieved person. However, if the person who is not mentioned in section 3 and is made a subject of assessment then section 99(1) will not apply *ab initio* and the said assessment can be declared null and void by a court of competent jurisdiction. A crude example of a person who will not be caught under section 3, will be a foreigner who has never stepped into Malaysia or has no nexus to Malaysia and the Revenue Department has purportedly raised an assessment.

[11] We must say the Respondent's argument that once the assessment is raised and the assessee wants to dispute it; in all cases he falls within the meaning of "aggrieved person" under s.99 of the ITA 1967 is flawed. If the assessment is a valid assessment dealing with persons stated in section 3 of the ITA 1967, then it follows from decided case laws and also as per the provisions of the ITA 1967 it can crystalise into a debt and be a subject matter of summary judgment. And any issue as to

specific liability or quantum in such a case must be ventilated before the Special Commissioners of Income Tax and will not stand as triable issues when the Revenue Department attempts to recover the said sum pursuant to section s.106(3) of the ITA 1967. [See *Government of Malaysia v Margaret Au Nyat Fah* [2007] ILNS 436].

[12] There is no equipollent section to section 3 of the ITA 1967 in the Act. The general scheme of the Act does not apply to all persons. The Act will only be triggered if there is a disposal as envisaged in section 3 of the Act. And the *sine qua non* for disposal is stated in the meaning of dispose. Further, paragraphs 15 and 16 Schedule 2 of the Act in relation to section 7 (chargeable gains and allowable losses) further fortifies the argument that there must be complete disposal or receipt of the purchase price before liability can be attached. For example paragraphs 15(1), 15(2) and 15(3) states as follows:

> "*15.(1) Except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place –*
>
> *(a) Where there is a written agreement for the disposal of the asset, on the date of such agreement; or*
>
> *(b) Where there is no written agreement, on the date of completion of the disposal of the asset.*

(2) Except where this Schedule provides otherwise, where there is a disposal of an asset, the date of acquisition of the asset by the acquirer shall be deemed to coincide with the date of disposal of that asset by the disposer to that acquirer.

(3) For the purposes of this Schedule –

(a) the date of completion of a disposal means-

(i) The date on which the ownership of the asset disposed of is transferred by the disposer; or

(ii) The date on which the whole of the amount or value of the consideration (in money or money's worth) for the transfer has been received by the disposer,

Whichever is the earlier;

(b) a transfer of ownership of an asset is deemed to take place on the date when the last of all such things shall have been done

under any written law as are necessary for the transfer of ownership of the asset."

And paragraph 16 states:

"Where a contract for the disposal of an asset is conditional and the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless –

(a) the acquisition or disposal requires the approval by the Government or a State Government or an authority or committee appointed by the Government or a State Government, the date of disposal shall be the date of such approval; or

(b) the approval referred to in subparagraph (a) is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied."

[13] It must be noted that paragraph 15(1)(a)(b) is qualified by paragraph 15(3). And in addition, paragraph 16 qualifies the date of disposal when it is a conditional contract such as the instant case where the Appellant is arguing that there is breach and there are 2 suits pending before the court which in our view will stand as triable issues.

[14] In Matair Suhaili & Anor v Rose Foo Chin Lau & Ors [2007] 5 CLJ 406 the Court of Appeal on the facts made the following observation:

> *"under real property gains tax 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is chargeable gain....chargeable gain is deemed to accrue on the date on which the whole of the value of the consideration was received by the 1st Defendant".*

[15] We are surprised to note that the learned counsel for the Revenue Department did not bring to our attention a reported decision of Justice Aziah binti Ali J (as her Ladyship then was) in the case of *Ketua Pengarah Hasil Dalam Negeri v The Petaling Rubber Estates Limited* [2010] MLJU 1301; where on similar issues the Special Commissioners have inter alia asserted that to be liable to real property gains tax, there must be chargeable gain within the ambit of section 3 of the Act. In that case the Special Commissioners' decision was upheld by the High Court and that will mean it will be wrong for the Revenue Department to raise an assessment when in law and fact the assessee is not liable to RPGT at the material time.

[16] We do not think it is necessary to go into further adumbration on the Respondents right to summary judgment at this stage, as it is very clear from the instant case the Appellant has raised triable issues which ought to be ventilated at a full trial taking into account that the Act will

not apply to all persons and the *sine qua non* for the Revenue Department to trigger the Act must relate to a disposal as envisaged by the Act. It must not be forgotten that where the language of the Act is clear and explicit the Court is duty bound to give effect to it. We must make it clear in the instant case the duty of the trial court is to ascertain whether there was in fact a disposal as envisaged by the Act. If the court comes to a finding in favour of the Revenue Department then the liability and/or quantum arising from the assessment cannot be a subject matter of dispute in the court exercising its original jurisdiction and that jurisdiction in the first instance is vested only with the Special Commissioners.

[17] It must also be stated that it is well settled that every exercise of statutory power (in this case the raising of an assessment) cannot be arbitrarily exercised. The Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang, Ong Gaik Kee* [1983] 2 MLJ 35 had endorsed the proposition that every exercise of statutory power must not only be in conformity with the express words of the statute but above all must also comply with certain implied legal requirements. And the court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. [See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948]; *Saratogoa Sdn Bhd v Pentadbir Tanah Johor Bahru* [2012]]. The Revenue Department is not an exception to the said jurisprudence.

[18] For reasons stated above the appeal is allowed with costs of RM5,000.00 to be paid by the Respondent to the Appellant. The suit is fixed for case management before the High Court on 11.3.2013. The deposit is to be refunded to the Appellant.

We hereby order so.

Dated: 01 March 2013

SGD

(DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER)
Judge
High Court
Kuala Lumpur

Note: Grounds of Judgment subject to correction of error and editorial adjustment etc.

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