DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-01-83-97

ANTARA

MENGAWARTI SDN. BHD. ……. PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

(Dalam Perkara Mahkamah Tinggi Malaya Kuala Lumpur
(Bahagian Rayuan dan Kuasa-Kuasa Khas)
Rayuan Sivil No: R1-14-11-95

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MENGAWARTI SDN. BHD ……. PERAYU

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KETUA PENGARAH HASIL DALAM NEGERI …. RESPONDEN)

CORAM:

MOHD. GHAZALI BIN MOHD YUSOFF, JCA
LOW HOP BING, JCA
VINCENT NG KIM KHOAY, JCA

LOW HOP BING, JCA
(DELIVERING THE JUDGMENT OF THE COURT)

I. APPEAL

[1] On 10 June 1997, the Kuala Lumpur High Court affirmed the deciding order of the Special Commissioners of Income Tax ("the Special Commissioners") in dismissing the claims by the appellant ("the taxpayer") for deduction of two amounts viz RM767,918 and RM63,442 from the taxpayer's gross income for two years of assessment viz 1982 and 1984 respectively.

[2] This is the taxpayer's appeal against the decision of the High Court.

II. FACTUAL BACKGROUND

[3] The taxpayer's memorandum and articles of association state that the main objective of the taxpayer, incorporated on 20 January 1979, is that of a housing developer.

[4] The taxpayer had applied to the State Government of Melaka ("the State Government") for alienation of 250 acres of leasehold land for the purpose of housing development. The State Government approved the application vide notification dated 1 February 1980. The taxpayer had to pay the premium and other statutory charges, amounting to RM831,340 (collectively "the land-alienation costs") within two months from the date of receiving the notification.

[5] On 5 March 1980, the taxpayer entered into an agreement with another housing developer, Masa Merdeka Sdn. Bhd ("Masa Merdeka") to develop the land, at a consideration of RM3.5million to be paid by Masa Merdeka to the taxpayer, as follows:

(1) RM850,000, before 1 April 1980 ie the expiry date of the notification dated 1 February 1980; and

(2) The balance sum of RM2,650,000, to be paid proportionately by reference to the area of the land developed.

[6] The notification was subsequently replaced by another notification, dated 16 May 1980, which required the taxpayer to pay an increased amount of RM858,050 for the alienation of the land.

[7] A qualified title was issued by the State Government on 18 September 1980.

[8] On 31 December 1980, the taxpayer and Masa Merdeka entered into another agreement which varied the consideration from RM3.5million to RM900,000 ("the 31 December 1980 agreement") payable as follows:

(1) RM831,340 within two weeks from the date of the letter of approval from the land administrator of Melaka Tengah; and

(2) Balance sum RM68,660, to be paid upon completion of the housing estate.

[9] The taxpayer's balance sheet carried, *inter alia*, the following entries:

	Period	**Item**	**Amount**
1.	For the year ended 31 December 1980	(a) Land for Development (b) Advanced (unsecured)	RM831,340 RM864,503
2.	For the year ended 31 December 1981	(a) Land for development (b) Advance (unsecured)	RM831,340 RM864,600
3.	For the year ended 31 December 1982	(a) Land for Development (b) Advance (unsecured)	Increased to RM858,050 from RM831,340 Increased to RM900,000 from RM864,600 and reclassified as "Deferred Income"

[10] On 8 July 1983, a supplemental agreement was entered into between the taxpayer and Masa Merdeka, providing for the

payment by Masa Merdeka to the taxpayer of an additional consideration of 50 sen per sq ft when the buildings are completed and sold by Masa Merdeka.

[11] The taxpayer was assessed to tax as follows:

Year of Assessment	**Tax**
1982	RM831,340
1984	RM 68,600

[12] Being dissatisfied, the taxpayer lodged an appeal with the Special Commissioners.

III. ISSUES BEFORE THE SPECIAL COMMISSIONERS

[13] Two issues raised for determination by the Special Commissioners were:

(1) Was the sum of RM900,000 received by the taxpayer as “advance” or “income”? and

(2) If the sum of RM900,000 were received as “income”, should the land-alienation costs be allowed as deductible expenses?

[14] In essence, the Special Commissioners' findings of facts and deciding order are to the following effect:

(1) The sum of RM900,000 was not "advance" but "income" ie profit from the sale of development rights and hence assessable to tax under the Income Tax Act 1967; and

(2) The land-alienation costs should not be allowed as deductible expenses against the income of RM900,000 as there was no evidence of the date and the actual amount paid to the State Government.

IV. ISSUE BEFORE THE HIGH COURT

[15] Before the High Court, the taxpayer abandoned the contention that the sum of RM900,000 represented "advance" and conceded that it was "income", but continued to assert that the land-alienation costs were deductible against the income of RM900,000 ("the income"). Hence, the only issue before the High Court was whether the land-alienation costs were deductible from the income.

[16] The High Court rejected the taxpayer's assertion and held that the land-alienation costs:

(1) were capital expenditures for the acquisition of the land; and

(2) were not wholly and exclusively incurred in the production of the income, nor incurred in the period when the taxpayer received the income.

v. ISSUE BEFORE THIS COURT

[17] The sole issue raised for determination by this Court is whether the land-alienation costs were allowable as deductions from the income.

VI. FINDING OF FACTS

[18] Ms Neng Juliana Ismail (assisted by Ms Noor Kamaliah and Mr Mohamad Japeri) submitted for the Director General of Inland Revenue ("the Revenue") that the findings of primary facts by the Special Commissioners are unassailable and can neither be overruled nor supplemented by the High Court. For this proposition, the Revenue cited **Chua Lip Kong v Director General of Inland Revenue (1982) 1 MLJ 235, 236 PC.**

[19] Taxpayer's learned counsel Dato' WSW Davidson (Mr Francis Tan and Mr HL Wong with him) contended that the Revenue's submission is incorrect as *Chua Lip Kong, supra*, makes a distinction between the findings of primary facts and inferences drawn from primary facts, and relied on **Edwards (Inspector of Taxes) v Bairstow and Another (1956) AC 14, 29 HL.**

[20] I would first extract the essential principles expounded in the speech of Viscount Simonds in the *House of Lords in Edwards v Bairstow, supra,* as follows:

(1) 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;

(2) The primary facts may not reasonably be supported if:

(a) They do not justify the inference or conclusion which the Commissioners have drawn; or they lead irresistibly to the opposite inference or conclusion; or

(b) The finding is perverse.

[21] *Edwards v Bairstow, supra*, was followed in *Chua Lip Kong, supra*, by Lord Diplock in delivering the advice of the Privy Council. His Lordship set out the following relevant established principles:

(1) In every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly the findings of fact upon which their decision is

based and not the evidence upon which those findings, so far as they consist of primary facts, are founded;

(2) Findings of primary facts by the Special Commissioners are unassailable, and cannot be overruled or supplemented by the High Court;

(3) Occasionally, the primary facts may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated; in that event, it will be necessary for the Case to be remitted to the Commissioners for further findings;

(4) It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been “admitted or proved”;

(5) From the primary facts admitted or proved, the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners’ findings of primary facts; but they may be, or may involve (and very often do) assumptions as to the legal effect or consequences of primary facts, and there are always questions of law upon which it is the function of the High Court on consideration of a Case

Stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumptions as to the relevant law; and

(6) In a Case Stated, the Special Commissioners should set out, in a separate paragraph from that which contains their findings of primary facts, such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences viz whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

(See also **U.H.G. v Director General of Inlands Revenue (1974) 2 MLJ 33, 34G**).

[22] Reverting to the mainstream of the instant appeal, it needs to be noted that the Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs by the taxpayer to the State Government. This crucial finding is to be found at p.45 of the appeal record and merits reproduction as follows:

"In fact, no evidence was adduced to indicate exactly how much and when the land alienation costs had actually been paid by the Taxpayer to the State Government".

[23] In applying the above established principles set out in *Chua Lip Kong, supra,* I am of the view that the Special Commissioners' finding (that there is no evidence of the date and actual amount paid to the State Government) is unassailable; neither can it be overruled nor supplemented by the High Court.

[24] Notwithstanding that, the High Court found as follows:

"But according to the evidence, only the sum of RM831,340 was paid by the Appellant to the State Government. This must be in pursuance to the amount stated in the notification of 1st February 1990 mentioned earlier. This amount must have been paid in 1980 for the document of title was issued on 18th September 1980". (See p.23 of the appeal record).

[25] The finding of the High Court is in direct contradiction to the Special Commissioners' finding. The High Court has assailed, overruled or supplemented the Special Commissioners' finding of primary facts, contrary to the well-known principles set out by Lord Diplock in *Chua Lip Kong, supra.* In this regard, the High Court has erred. The Special Commissioners' finding, as triers or finders of facts, is to be preferred. The Special Commissioners' deciding order, being free from any error, should be affirmed.

[26] For completeness, even by accepting the finding of the High Court that there was evidence that the taxpayer had in **1980** paid the land-alienation costs to the State Government, the learned judge was correct on the law as the land-alienation costs were capital expenditures for acquiring the land, and not revenue expenditures. In any event, these expenditures 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**. Clearly, such requirement that all outgoings and expenses must have been wholly and exclusively incurred during the said period is expressly contained in s.33(1) of the Income Tax Act 1967 which reads as follows:

> "33(1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses <u>wholly and exclusively incurred during that period</u> by that person in the production of gross income from that source, …..". (Emphasis added).

VII. CONCLUSION

[27] The Special Commissioners and the High Court judge were correct in arriving at their respective conclusions, albeit on different grounds.

[28] The answer to the sole issue for determination is therefore in the negative. The taxpayer's appeal, being without merits, is dismissed with costs. Deposit to the Revenue (respondent) on account of taxed costs.

[29] My learned brothers, Mohd. Ghazali bin Mohd Yusoff, JCA and Vincent Ng Kim Khoay, JCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the Court.

[30] His Lordship Vincent Ng Kim Khoay, JCA has also complemented as follows:

> "(1) I would however wish to make a further addition. In my view the landmark House of Lords case of Edwards (Inspector of Taxes) and Baistow and Another (1956) AC14, 29HL has established the following principles which are now pretty well settled:
>
> (a) a distinction must be made between pure findings of primary facts and inferences drawn from such findings of primary facts;
>
> (b) if the findings of primary facts are equivocal or insufficient to enable the High Court to decide the question of law sought to be raised in the Case

Stated it is incumbent on the Court to remit to the Commissioners for further findings;

(c) the Court is precluded from setting aside or overruling a pure finding of fact which is neither equivocal nor insufficient;

(d) however, the Court may set aside or overrule a pure finding of fact if such finding is clearly perverse or ill-founded.

(2) The crucial point here is that the Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs. This, in my view, is a pure, and indeed, clear and unequivocal finding of fact which is neither a perverse nor ill-founded finding. As such, being the triers of facts, the Special Commissioners' finding is unassailable by the High Court. In the event, the tax payer's appeal must be dismissed with costs".

T.T.
DATUK WIRA LOW HOP BING
Judge
Court of Appeal, Malaysia
PUTRAJAYA.

Dated this 10th day of April 2009.

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REFERENCE:

1. **Chua Lip Kong v Director General of Inland Revenue (1982) 1 MLJ 235, 236 PC;**

2. **Edwards (Inspector of Taxes) v Bairstow and Another (1956) AC 14, 29 HL;** and

3. **U.H.G. v Director General of Inlands Revenue (1974) 2 MLJ 33, 34G**.