

IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR
IN FEDERAL TERRITORIES, MALAYSIA
CIVIL APPEAL NO: R1-14-14-10/2013

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BETWEEN

INSAF TEGAS SDN BHD

... APPELLANT

AND

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KETUA PENGARAH HASIL DALAM NEGERI

... RESPONDENT

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FOUNDATIONS OF JUDGMENT

1. INTRODUCTION

This is an appeal by the Appellant against the income tax assessment with penalty for the Assessment Year 2014 dated 13 December 2012 by the
20 Special Commissioner of Income Tax ("the SC") which disallowed
Appellant's appeal by way of Form Q. The Appellant lodged the appeal on
24 January 2011 by way of Notice of Appeal (Form Q) dated 21 January
2011.

25 2. CAUSE PAPERS

For the purpose of this appeal, the following documents were filed and referred to by this Court –

- a. Statement of Case Stated dated 1 October 2013, made pursuant to paragraph 34, Schedule 5 of the Income Tax Act 1967 (Enclosure 1);
- b. The Statement of Agreed Facts dated 25 July 2012 – “A”.
- c. The Statement of Issues To Be Tried dated 25 July 2012 – “B”.

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3. FACTUAL BACKGROUND

3.1 The Appellant is a company involved principally in property investment. On 16 January 1997, the Appellant purchased fifty acres of land from Ligamas Sdn Bhd known as Lot No. 2398 Mukim Batang Kali, District of Ulu Selangor (“the said land”). The Appellant subsequently disposed the said land to Mixwell (Malaysia) Sdn Bhd by way of a Deed of Assignment dated 16 April 2004 and 24 May 2004.

3.2 Consequent to the Appellant’s submission of a tax return for Real Property Gain Tax (“RPGT”), the Respondent issued the Appellant a Certificate of Exemption for RPGT on 9 May 2008. Following an audit on the Appellant on 26 August 2010, the Respondent issued a notice of assessment against the Appellant’s income for the sum of RM4,005,593.51 with penalty in respect of the gains made from the Appellant’s disposal of the said land.

3.3 The Appellant file a Notice of Appeal to the SC against the Notice of Assessment for Assessment Year 2004 for the sum of RM4,005,593.51 which was registered as the Appellant's Form Q, PKCP(R)84/2011.

5 **4. ISSUES FOR THE COURT'S DETERMINATION**

The issue for the Court's determination is whether the Appellant's disposal of the said land constitute disposal of a capital investment or, disposal of a stock in trade, and the gains on whether the Respondent had correctly exercised its discretion to impose a penalty pursuant to section 113(2) of the
10 Income Tax Act 1967 ("the Act").

5. APPELLANT'S CONTENTION

5.1 Appellant's disposal of the said land, was contended to be consistent with that of an investment and, not a disposal of stock in trade. Based on
15 the six pre requisites determining whether Appellant's disposal of the said land constitute an investment or badges of trade, the said land was contended to have been purchased as an investment, as it's purchase was made in the Appellant's name and, not in the name of other property development companies owned by the Appellant's owner, Mr. Siah.

5.2 The Respondent had accepted the Appellant's tax return and, a certificate of exemption for RPGT had been issued by the Respondent to the Appellant. The Respondent had thus agreed that the said land had been disposed as an investment. The Respondent changed, amended and, subsequently issued the impugned assessment with penalty without providing any justification for its imposition.

5.3 The Respondent's impugned assessment was contended to have been made without application and compliance with the pre requisites of badges of trade namely subject matter of the transaction, period of ownership, frequency of transaction, alteration of property, methods and, circumstances of property disposal.

6. GROUNDS OF JUDGEMENT

6.1 In dismissing the Appellant's appeal, the Court took into consideration the circumstances surrounding the Appellant's purchase and, disposal of the said land and, concluded that Appellant's intention for the purchase of the said land was not for the purpose of an investment as was contended by the Appellant but, as stock in trade.

6.2 The Appellant clearly intended to develop the land for a profit as evident from Appellant's execution of the SPA with Ligamas Sdn Bhd which

contain specific conditions requiring Appellant's compliance which the Court found to be consistent with the commercial development of the said land. The Appellant's Memorandum of Association described the Appellant's business activity as property development and, allowed the Appellant to enter into any contract to build buildings and other construction work.

6.3 Further, the Appellant, in anticipation of the SPA had passed a company resolution for the purchase of the said land. In furtherance of the same, the Appellant further appointed a developer Mixwell (Malaysia) Sdn Bhd consequent to Appellant's execution of the SPA.

6.4 The Appellant's true intent in its purchase of the said land is further evident in the Appellant's passing of two company resolutions prior and, consequent to Appellant's execution of the SPA with Ligamas Sdn Bhd. The Court thus find from the Appellant's conduct and circumstances surrounding the land transaction that from the onset of the land purchase, the Appellant's intention was solely for the commercial development of the land.

6.5 The Appellant's intention only changed following unfavourable market condition where the said land was subsequently assigned to a third party, pursuant to the Appellant's debt settlement exercise. It is thus evident to the Court that notwithstanding the changes, the Appellant's intention from the

onset of its purchase, had been for the purpose of its development for a profit.

5 **6.6** The Court is therefore satisfied that the Appellant's intention to purchase the said land was to develop and dispose at a profit and that the intention existed at the time of the Appellant's acquisition of the said land which accordingly is consistent with any trade operation and, not as a capital investment.

10 **6.7** This conclusion is evidently supported by the Respondent's witness, R1 who in his statement confirmed the Respondent's finding that Appellant's disposal of the said land constitute a stock in trade. R1 confirmed that the provision of the Appellant's SPA with Ligamas Sdn Bhd is consistent with the Appellant's intention to commercially develop the said land within two years, subject to approval of the building plan. Pursuant to the SPA, the Appellant was further required to submit the necessary building plan within
15 one year of SPA's execution.

6.8 Accordingly, the Court find the Appellant's appeal to the Respondent against the later's purported erroneous assessment, misconceived and, without merit. It is established that in any appeal by a taxpayer against the SC's assessment under the Act, unless the taxpayer is able to prove to the

SC, that the assessment is excessive or erroneous, the SC's assessment shall prevail and remain payable.

6.9 The Act impose on a tax payer, the burden of proving by evidence, an excessive or erroneous tax assessment as provided in paragraph 13 of the Fifth Schedule of the Act which provides as follows –

“13. The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the Appellant.”.

6.10 As the Appellant have undisputedly disposed its stock in trade in the course of carrying its business activity, pursuant to the provision of section 24(1) of the Act, tax is accordingly chargeable on any gain or profit from Appellant's disposal, as provided in the following –

“Basis period to which gross income from a business is related.

24. (1) Where in the relevant period a debt owing to the relevant person arises in respect of –

(a) any stock in trade sold (or parted with on requisition or compulsory acquisition or in a similar manner) in or before the relevant period in the course of carrying on a business, the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period.”.

6.11 On the issue as to whether the Respondent have correctly exercised it's discretion in the Respondent's imposition of penalty on the Appellant, pursuant to section 113(2) of the Act, it is clear from the stated provision
5 that the Director General is given the discretionary power to impose a penalty on an incorrect return filed by a taxpayer. The Director General has a right to impose the penalty irrespective that the taxpayer's return was made negligently, or in good faith or with intent to deceive or evade tax. The Director General however, is not duty bound to require penalty payment but,
10 to exercise the discretion after due consideration of all relevant facts and circumstances.

7. CONCLUSION

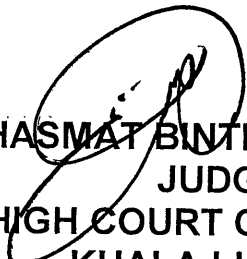
7.1 As the Appellant was found to have made an incorrect return,
15 irrespective of Appellant's contention, for as long as the amount is incorrect, the Director General have the right to impose a penalty. In view of the incorrect return, the Respondent was correct in his imposition of a penalty pursuant to section 113(2) of the Act.

7.2 In conclusion, the Respondent's exercise of discretion to impose a
20 penalty on the Appellant pursuance to section 113(2) of the Act was found to be a lawful and proper exercise of the Respondent's discretion. The

Appellant's purchase of the said land constitutes a stock in trade pursuant to Appellant's course of business. The Appellant's intention to purchase the land was undisputedly to develop the said land and that its disposal was as a stock of trade and not, capital investment. Accordingly, the Appellant's
5 appeal against the Respondent's assessment is dismissed with costs of RM4,000.00.

Dated 27 October 2016

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(NIK HASMAT BINTI NIK MOHAMAD)
JUDGE
HIGH COURT OF MALAYA
KUALA LUMPUR

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20 Legislation referred:
Income Tax Act 1967.

Counsels:

Jason Tan and Heng Jia for the Appellant.

25 (Messrs Lee Hishammuddin Allen & Gledhill)

Abdul Aziz b. Harun and Kevin Hal Lai Keong for the Respondent.
(Lembaga Hasil Dalam Negeri Malaysia)