REIMAGINING TAX SOLUTIONS

Recent Tax Cases

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DGIR v PPC

Claiming for Income Tax Allowance and Industrial Building Allowance

Facts

The taxpayer who is in the business of providing healthcare and medical services was claiming for Investment Tax Allowance (“**ITA**”) amounting to RM91,421,922.00 and Industrial Building Allowance (“**IBA**”) amounting to RM77,154,982.00 in constructing an integrated multi-storey car park as part of a hospital building.

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Core Issues

1. Whether the capital expenditure incurred by the Taxpayer to construct an integrated multi-storey car park as part of the hospital is eligible for ITA pursuant to the Income Tax (Exemption) (No.12) Order 2006 and the Income Tax (Exemption) Order 2012?
2. Whether the capital expenditure incurred by the Taxpayer to construct an integrated multi-storey car park as part of the hospital is eligible for IBA pursuant to Paragraph 37A of Schedule 3 of the Income Tax Act 1967?

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The Revenue's Contentions

- The restriction on the claim was made pursuant to Paragraph 66, Schedule 3 of the ITA as the total area of the industrial building which is not in use in the business is more than 10% of the total area of the building.
- The multi-storey car park which was leased to a third-party car park operator is not eligible to ITA and IBA on the basis that the car park is not part of the Taxpayer's healthcare business, and the multi-storey car park creates another source of income for the Taxpayer.

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The Taxpayer's Contentions

- The Revenue should look at the taxpayer's business as a whole and not in isolation. The multi-storey car park is essential and integral, and it forms part and parcel of the hospital building. Without the multi-storey car park, the hospital cannot function properly, as the hospital employees, patients and their visiting family members would be unable to park their cars. This illustrates that the multi-storey car park fulfils the entirety and functionality test in claiming IBA.
- The Income Tax Act 1967 allows a taxpayer who grants a lease on a building that is in use as an industrial building to claim for capital allowance.
- The Revenue is not in the position to dictate how a taxpayer runs its business (i.e.: whether to operate the multi-storey car park themselves or contract it out to a third-party operator).

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The Court of Appeal's Decision

The Court of Appeal had affirmed the High Court's decision in allowing Taxpayer's ITA and IBA claim:

- In relation to the ITA claim, the Taxpayer has fulfilled all the requirements under the Exemption Order 2012. Therefore, the Revenue has no basis under the Exemption Order to isolate the multi-storey car parks from the Taxpayer's ITA claim. Further, the multi-storey car park is an integral part, and it forms part and parcel of the hospital building.
- Whereas for the IBA claim, the multi-storey car park which is integrated to the hospital building is clearly part of the hospital building and an "industrial building" under the ITA 1967. The multi-storey car park has fulfilled both entirety and functionality tests in claiming IBA.

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WM v DGIR

Tax Treatment for Compulsorily Acquired Land

Facts

In 2015, the State Government of Selangor compulsorily acquired the Taxpayer's land and offered compensation to the Taxpayer. Vide a tax audit, the Revenue issued a notice of assessment and subjected the compensation under Section 4C read with Section 24(1)(aa) of the Income Tax Act 1967. A sum of RM52,966,517.27 was imposed on the Company. Following the assessment, the Company applied to quash the notice of assessment by way of a judicial review application.

Issue

Whether the compensation received for the compulsory acquisition should be subject to tax under Section 4C of the Income Tax Act 1967 in light of Article 13(2) of the Federal Constitution?

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The Taxpayer's Contentions

- Right to adequate compensation in the case of compulsory acquisition by the Government forms part of the fundamental rights enshrined under Article 13(2) of the Federal Constitution.
- The Legislature cannot make laws restricting such fundamental right by introducing Section 4C of the ITA. Such an attempt would be inconsistent with the principle of constitutional supremacy provided under Article 4(1) of the Federal Constitution as Section 4C undermines the spirit of Article 13(2) of the Federal Constitution.
- Parliament does not have power to enact laws, for instance Section 4C, that offend the basic structure of the Federal Constitution as components of basic structure cannot be changed, amended or removed as it is safeguarded by Article 4(1) which is an eternity clause.

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The Revenue's Contentions

- Section 4C of the ITA is clear, unambiguous and consistent with Article 96 of the Federal Constitution.
- The introduction of Sections 4C and 24(1)(aa) vide the Finance Bill (No.2) 2013 is intended to subject compensation arising from compulsory acquisition of land by the Government to income tax on the basis that the land is a trading stock of the taxpayer and hence the profit from such disposal falls within the scope of business income.
- The scope of Article 13(2) of the Federal Constitution is confined to determining the amount of compensation, which is the prerogative power of the Land Administrator.

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The Federal Court's Decision

The five-member bench Federal Court led by the Chief Justice had reversed the Court of Appeal's decision and handed down a unanimous ruling that Section 4C of the Income Tax Act 1967 is unconstitutional as it contravenes Article 13(2) of the Federal Constitution by depriving the Taxpayer of adequate compensation arising from the compulsory acquisition of land by the Government.

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BP v DGIR

Taxpayer's Rights with the Amendment of Law

Facts

- In 2016, the MOF granted taxpayer approval for Project Balingian as an Approved Service Project ("**ASP**") and for tax incentives in the form of investment allowance under Schedule 7B of the Income Tax Act 1967 ("**ITA**"). The details are as follows:
  i. Investment allowance to be claimed at 80% of the qualifying capital expenditure incurred within 5 years from the years of assessment ("**YAs**") 2016 to 2020 and to be set off against 85% of the taxpayer's statutory income of each YA; and
  ii. The right to carry forward any unutilised investment allowance for a particular YA to the subsequent YAs indefinitely until the entire amount of the allowance has been claimed.
- The taxpayer subsequently incurred significant expenses amounting to more than RM 3 billion in its investment in Project Balingian. However, in late November 2018, the MOF announced that, amongst others, a 7-year time limit would be imposed on the carrying forward of allowances in respect of incentives granted under Schedule 7B of the ITA. This was implemented through the amendments introduced by Section 29 of the Finance Act 2018.
- In December 2018, the taxpayer attended a meeting with the MOF's office to discuss the effect of the 7-year time limit on the 2016 Tax Incentive Approval. However, the MOF rejected the taxpayer's right to claim the unutilised investment allowance indefinitely without providing any reasons ("the Decision").
- Being aggrieved by the Decision, the taxpayer filed an application for judicial review to challenge the MOF's decision.

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The Taxpayer's Contentions

1. The impugned decision by the Minister has breached the Applicant's vested rights under Section 30 of the Interpretations Act 1948 & 1967 and is tainted with illegality and ultra vires as Section 29 of the Finance Act 2018 is not intended to have a retrospective operation. **(*National Land Finance Co-operative Society Ltd v Director General of Inland Revenue*[1993] 4 CLJ 339 SC)**

2. The Minister has failed to consider the legitimate expectation of the applicant that its vested rights under the 2016 Approval. **(*Ketua Pengarah Hasil Dalam Negeri v Latex Manufacturing Sdn Bhd* [2016] 9 CLJ 86)**

3. The Minister has failed to give reasons for his failure to maintain and honour the terms of the 2016 Approval. The silence in the ITA ought not to be taken to mean that there was no duty on the part of the Minister to give reasons. That in itself is a ground for the impugned decision to be quashed as being bad in law. (***Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor*[2016] 2 MLJ 495 CA)**

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The Revenue's Contentions

1. The 2016 Approval was not withdrawn as the whole purpose of the amendment was to impose a time period of 7 years for investment allowances and not perpetually as before. The Minister was acting in accordance with Para 5A of Schedule 7B and by virtue of Sections 29(b) and 30 of FA 2018.
2. The impugned decision does not prejudice the applicant in any way. Under Section 30 of the FA 2018, the Applicant could now plan to claim all allowances under Schedule 7B within the 12-year period. The period is calculated in reference to 5 years from the 2016 Approval and a further 7 years for the term of restriction pursuant to Section 29 of the FA 2018.
3. The Applicant's application was for exemption and extension from the restriction on the time limit to carry for up to 7 years on the unabsorbed investment allowance. Therefore, the question of legitimate expectation does not arise.
4. The applicant has not shown to this Court that the purported representation made by the Minister was a clear and unambiguous promise, an established practice or a public announcement (***Ambiga a/p Sreenevasan v Director of Immigration, Sabah & Ors*** **[2018] 1 MLJ 633 CA**)
5. The Minister is not required by law to give any reason for his decision (***Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor*** **[2017] 1 MLJ 563 FC**) and the Court cannot compel the Minister to give reasons for his decision where there is no duty to do so (***Minister of Labour, Malaysia v Chan Meng Yuen*** **[1992] 1 CLJ Rep 216 SC**)

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The High Court's Decision

1. Nowhere in the approval letter states that the ASP was subject to other terms and conditions or a possible review in the future. In short, it was a blanket approval. This means that if the intervening amendment was made to Schedule 7B in the future, it should not deprive the applicant of the benefit that the Minister had allowed it to enjoy.

2. In the absence of such an express condition, the 2016 Approval has created a legitimate expectation on the part of the applicant that it is entitled to enjoy the tax incentives indefinitely. The legitimate expectation need not necessarily be anchored on any legal right. A reasonable expectation is sufficient.

3. The Minister can only revisit the 2016 Approval and impose new terms and conditions, provided that he must have some "rational grounds". Unfortunately, the impugned decision did not state any reason. It was a bare rejection under the guise of *pertimbangan yang teliti dan mendalam*.

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MB v DGIR

Tax Treatment of Borrowing Cost

Brief Facts

- The Director General of Inland Revenue ("**Revenue**") took the view that the loan upfront fees/ borrowing costs of the Taxpayer are not deductible under Section 33(1) of the Income Tax Act ("**ITA**") and raised notice of additional assessment for the years of assessment ("**YAs**") 2010 to 2014 amounting to RM4,632,311.37.

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The Taxpayer's Contentions

- The SCIT in ***K(M) Bhd v KPHDN*** decided that borrowing costs such as legal and professional fee, arrangement fee and all other similar expenditure that is incidental and in relation to the loans obtained by the taxpayer are deductible under Section 33(1) of the ITA.
- The correct test to be applied in ascertaining the character of the financing expenses is to determine the purpose of the loan or financing.
- Applying the "purpose test":
  - The borrowing costs are analogous to interest expense which is revenue in nature
  - The borrowing costs are directly linked to the Taxpayer's business operations of producing income
- As such, the borrowing costs are deductible under Section 33(1) of the ITA.

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The Revenue's Contentions

- The borrowing costs were not incurred wholly and exclusively for the purpose of the production of gross income in the relevant basis period.
- The borrowing costs were incurred by the Taxpayer before the loan was obtained as the Taxpayer's source of income.
- The borrowing costs are expenses not allowed for deduction under Section 39(1)(b) of the ITA.

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The SCIT's Decision

- In order to determine whether an expense is deductible, Section 33(1) of the ITA must be satisfied, i.e. the expense must be incurred wholly and exclusively in the production of gross income during the basis year.
- In determining whether an expense is incurred wholly and exclusively in the production of gross income, one must look at the purpose of the expense and also the principle of ordinary commercial trading.
- In the current matter, the loan was obtained by the Taxpayer to earn profit and produce business income, and not to generate capital.
- The borrowing costs were incurred wholly and exclusively for the production of its business income.
- As such, the borrowing costs are deductible under Section 33(1) of the ITA.

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DGIR v MESB

Judicial Review and Stay of Proceedings

Brief Facts

The DGIR disallowed the taxpayer's deduction of the Project Accrued Expenses under Section 33(1) of the ITA on the basis that the expenses were provisional in nature. As a result, the DGIR adjusted the amount of losses that the taxpayer was entitled to surrender for group relief under Section 44A(a) of the ITA and imposed an additional tax liability amounting to RM11,993,408.46 under Section 44A(9)(a) of the ITA for the YAs 2015 and 2016. The DGIR is also seeking to reduce the amount of losses and capital allowances the taxpayer could carry forward in YA 2017 by RM32,948,424.00 and RM32,408,759.00.

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Aggrieved by the DGIR's Decision, the taxpayer filed an application for judicial review at the High Court but the application was dismissed by the learned High Court judge at the leave stage. The taxpayer then appealed to the Court of Appeal which ruled in favour of the taxpayer. An order for a stay was also granted to maintain the status quo of the parties pending the substantive judicial review hearing. Unsatisfied with the Court of Appeal's findings, the DGIR appealed to the Federal Court and leave was granted accordingly on the following questions of law:

i. Whether the issue of domestic remedy may only be canvassed and decided at the substantive stage?

ii. Whether a stay order granted by the Court of Appeal after allowing the leave application contravenes the tax recovery scheme pursuant to Section 103, 103B and 106 of the Act?

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The Appellant's Contentions

1. To determine whether or not the Court should exercise its discretionary power in a JR application involving revenue cases, the Court should consider the case holistically at the leave stage, i.e. the availability of domestic remedy at the substantive stage. As the taxpayer's challenge is primarily questioning the merits of the assessments, which involves the question of facts to be determined by the SCIT. Hence, SCIT is the proper forum to determine whether the assessments raised by the DGIR are correct.

2. The Respondent did not establish any exceptional circumstances to warrant the Court to grant an interim stay.

3. The stay would unquestionably defeat the whole substratum of tax recovery legislation as enshrined in Sections 103, 103B and 106 of the ITA 1967 (***Chong Woo Yit v Government of Malaysia*** **[1989] 1 CLJ (Rep) 9;** ***Sun Man Tobacco Co. Ltd. v. Government of Malaysi*****a [1973] 2 MLJ 163;** ***Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor*** **[2008] 6 CLJ 235**)

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The Taxpayer’s Contentions

1. The question on the issue of domestic remedy should only be canvassed and decided at the substantive stage. The threshold for leave to be granted in a JR application is extremely low with the sole question being whether the application is frivolous and/or vexatious.
2. The issue and/or contentions raised in a JR application cannot be properly dealt with on an ex-parte basis where the court is only in possession of the Applicant’s first Affidavit in support for leave.
3. A question of law cannot be decided in a vacuum and all facts will have to be laid down before the court. (***Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor*** **[2020] 4 MLJ 133**)
4. The Putative Respondent’s role at the ex-parte stage is limited. (***Kanawagi a/l Seperumaniam v Dato’ Abdul Hamid bin Mohamed*** **[2004] 5 MLJ 495**)
5. The Courts have the inherent jurisdiction to grant a stay notwithstanding Sections 103, 103B and 106 of the ITA. A stay ought to be granted where special circumstances exist. (***Kosma Palm Oil Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd*** **[2003] 4 CLJ 1**)
6. The stay is necessary to preserve the status quo of the Respondent as there exists a possibility that the decision may be reversed on appeal.

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The Federal Court's Decision

1. The Federal Court affirmed the decision of the COA that leave for judicial review should be granted in tax cases in various circumstances despite the existence of an appellate structure in the legislative structure before recourse to judicial remedies. The non-exercise of the internal appeal procedure is no bar to a judicial review application.

2. The Federal Court affirmed the decision of the COA which held that a stay order granted by the Court of Appeal after allowing the leave application does not contravene the tax recovery scheme pursuant to Sections 103, 103B and 106 of the ITA.

EL v DGIR
Income Tax Act (ITA) v Real Property Gains Tax (RPGT)

Brief Facts

- Taxpayer is a company incorporated in Malaysia, engaged in leasing of properties and property investment.
- In year 2012, Taxpayer entered into SPA with OSK Trustee Berhad who held the asset as a trustee for Axis Real Estate Investment, for the acquisition of a warehouse in Shah Alam for RM 23,600,000.
- The intention was to derive rental income and capital appreciation from the warehouse, which was consistently treated as the Taxpayer's investment property.
- In 2013, Taxpayer granted an 8.5-year lease to SR Technics Malaysia Sdn Bhd and undertook essential maintenance works on the warehouse as per the Lease Agreement.
- On 2014, Taxpayer received an offer from RHB Trustees Berhad, who is also a trustee for Axis Real Estate Reinvestment to purchase the warehouse for RM 52,500,000.
- Subsequently, the Taxpayer submitted RPGT Returns on 22.8.2014 and received a certificate of clearance on 24.2.2015, confirming exemption from RPGT pursuant to the Real Property Gain Tax (Exemption) Order (No.4) 2003.
- In 2017, the Inland Revenue Board raised a notice of additional assessment, amounting to RM 7,231,103.96 in respect of gains derived from the disposal of the warehouse in YA 2014 pursuant to Section 4(a) of the Income Tax Act 1967.
- Aggrieved by the decision of the Revenue to subject disposal of warehouse to ITA instead of RPGT, the Taxpayer filed an appeal before the Special Commissioners of Income Tax.

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The Taxpayer's Contentions

- The Warehouse is the one and only land ever purchased and kept by the Taxpayer for investment purposes (***Alf Properties***)
- Throughout the period of ownership, the Taxpayer's intention of keeping the warehouse as its investment did not change, which is evident in the Taxpayer's audited accounts
- Taxpayer held property only for 2 years, however, there is case law such as ***DEF v The Comptroller of Income Tax***, which held that even though the disposal of land was within 3 weeks after acquiring it, it is held to be the taxpayer's investment.
- The Taxpayer has never advertised the warehouse for sale, on the contrary, was approached by the REIT Company, who acted voluntarily in making an offer to purchase it. In 2003, the Minister of Finance issued the Real Property Gains Tax (Exemption) Order (No.4) 2003 ("**Exemption Order**"), which provides an exemption from RPGT for any person who disposes of chargeable assets to a Real Estate Investment Trust ("**REIT**") that has been approved by the Securities Commission.
- Renovation / maintenance work was done to the warehouse only due to the agreement entered into with the lessee.
- Taxpayer is under a contractual obligation with the lessee
- The fact that the buyer and seller is the same person does not make this a trading transaction. There is no case law or presumption in law that makes it as such.
- Disposal of the warehouse was done at the prevailing market price and the transactions were at arm's length.
- Up to date, the certificate of clearance has not been revoked by the revenue and to subject the disposal of warehouse to ITA, would amount to double taxation, in which the Revenue has no legal basis to do so, as per ***Commissioner of Inland Revenue v Garvin***

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The Revenue's Contentions

The disposal of the warehouse by the Taxpayer is a trading receipt based on the following reasons:

- Warehouse is developed in a strategic and developed business location in Shah Alam
- Taxpayer set up a company to buy the warehouse
- Taxpayer had changed his intention from investment to trading upon receiving an offer from RHB Trustee Bhd
- The warehouse is disposed of within 2 years of acquiring
- A repeated transaction by the Taxpayer as the buyer and seller are the same trustee.
- The Taxpayer conducted renovations and maintenance work on the warehouse which in essence increases the value of the warehouse.

Based on the reasons above, the revenue was of the opinion that the Taxpayer had profit-seeking motives.

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The SCIT's Decision

- Upon hearing the submissions from the parties, the Special Commissioners of Income Tax found that there were merits in the Taxpayer's submissions and allowed for the appeal.

- The Notice of additional assessment were set aside.

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TNB v DGIR

Reinvestment Allowance – Are you in the business of manufacturing?

Facts

The taxpayer is a company involved in the business of the generation, transmission, distribution and sales of electricity. The taxpayer made a claim for reinvestment allowance ("RA") for the year of assessment 2018 and the claim was disallowed by the revenue.

The main issue to be determined is whether the Applicant's principal activity of generating electricity is in the business of manufacturing electricity and falls under the scope of a ''qualifying project'' entitled for the RA under Schedule 7A of the ITA .

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The Taxpayer’s Contentions

1. The taxpayer contended that it is in the business of manufacturing;
2. The taxpayer does not fall within paragraph 7 of Schedule 7A of the ITA which lays out specific circumstances whereby a taxpayer cannot claim RA and does not fall within the Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012;
3. The dictionary meaning of manufacturing should apply;
4. The law on RA and definition of manufacturing must be read purposively;
5. Definition of manufacturing must be construed narrowly; and
6. The Revenue’s internal interpretation of Schedule 7A ITA has no force in law.

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The Revenue's Contentions

The main thrust of the Revenue's contention is that the Taxpayer had made a wrong claim under Schedule 7A of the ITA. Instead, it should have claimed an Investment Allowance **(''IA'')** under Schedule 7B of the ITA which applies to the service sector, including utility companies like the Taxpayer. The basis for the Revenue's main contention is as follows:

1. The function of the disputed items claimed by the Taxpayer for the RA under Schedule 7A is not related to manufacturing;
2. The disputed items do not fall within the definition of manufacturing;
3. The disputed items are not plant or machinery used for the purposes of a qualifying project; and
4. The disputed items do not constitute the qualifying project under paragraph 8(a) of Schedule 7A ITA.

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The High Court's Decision

- The High Court relied on various Commonwealth authorities such *as* ***Maritime Electric Company Limited v Minister of National Revenue*** **65 DTC 282** to arrive at a conclusion that the production of electricity is akin to manufacturing.
- Further it is clear that nowhere in Paragraph 7 of Schedule 7A nor in the Rules 2012 that state generating of electricity is excluded from the activity of manufacturing.
- Moreover, Parliament cannot be said to restrict the activity of generating electricity as manufacturing and disqualify for RA as if the Parliament had intended to do so, it could have stipulated in the ITA.
- The Revenue has argued that there must be a new product in order for the Taxpayer to claim for RA. However, the High Court finds that is not the requirement prescribed under the law. Paragraphs 7 and 8 Schedule 7A ITA do not state as such. The requirement is only stated in the Revenue's Public Ruling which is not binding on the Taxpayer.

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The High Court's Decision (con't)

- The High Court also held that the definition and the manner in how electricity is produced from internet sources have no legal value and are not binding. Such sources are not even considered to be persuasive. The High Court reiterated that the Federal Court case of ***Majlis Perbandaran Seberang Perai v Tenaga Nasional Berhad [2004] 4 CLJ 389 FC*** has clearly established that the applicant is in the business of manufacturing electricity.
- The Revenue had attempted to distinguish the case of ***Seberang Perai (supra)*** by stating that no definition of "manufacturing" was provided in the Local Government Act 1976 and in contrast, the word "manufacturing" was defined under Schedule 7A of the ITA. This is incorrect as prior to YA 2009, "manufacturing" was not defined in Schedule 7A. When the taxpayer first claimed RA in YA 2003, "manufacturing" had not been defined in the ITA.
- As such, the High Court allowed the Judicial Review application with costs.

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KPHDN v Ng Huan Tong

Income Tax Act (ITA) v Real Property Gains Tax (RPGT)

Brief Facts

- The taxpayer is a Malaysian citizen involved in trading and breeding of ornamental fishes.
- Throughout the period of year 2011-2013, the taxpayer had disposed 10 plots of land ("the Plots of Land") and filed CKHT forms.
- All Plots of Land did not generate income for the taxpayer as they were used to contain chicken farms, young oil palm trees and old oil palm trees.
- The Revenue issued Notice of Assessment ("Form K") and Notices of Additional Assessment ("Forms KA") for RPGT for the YAs 2011-2013.
- Despite the above, the Revenue also issued Notices of Additional Assessment ("Forms JA") under the ITA for the same YAs on 29.11.2016.

Main Issue

- Whether the disposal of the Plots of Land satisfied the Badges of Trade Test and is subjectable to income tax instead of RPGT.

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The Taxpayer's Contentions

- The principal activity of the taxpayer is trading and breeding of ornamental fish, not land trading.
- The acquisition of the Plots of Land is for the purpose of long-term investment and hence, the taxpayer did not alter or improve the quality of the Plots of Land to make them more merchantable.
- No application was made to sub-divide the Plots of Land for project development.
- The taxpayer did not appoint any architect or contractor to survey the market value of the Plots of the Land throughout the period of ownership.
- The taxpayer was under pressure to sell the Plots of Land as the landlord for its subsidiary company refused to renew the tenancy agreement. Hence, purchasing a new land parcel HSM 2079 for its subsidiary would solve the rental problem.
- Moreover, the sale of Land is also necessary to reduce the limit of the overdraft facility procured from Maybank Berhad.
- Hence, the gains arising from the disposal of the Plots of Land should be subject to RPGT instead of income tax.

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The Revenue's Contentions

- The volume of plots of land and the repetition activity of buying and selling of lands make the taxpayer a trader in lands.
- The 10 Plots of Land was hold in a short period of time for a maximum period of 4 years only before the disposal.
- Alteration/ Enhancement was made to the land to make it more merchantable- chicken sheds was built to rear 150,000 chickens per cycle, poultry-house broiler or "automatic farming system" was built to attract buyer from the plantation industry.
- The sale through a broker is as good as advertisement and it is one of the methods employed to dispose of the property.
- There is no documentary evidence to show that MBB requested for the overdraft facility to be paid immediately and in one lump sum.
- Hence, he disposal of the Plots of Land amounts to an adventure in the nature of trade and the gains should be subject to income tax.

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The High Court's Decision

- Affirming the SCIT decision in favour of the taxpayer, the High Court held that the taxpayer has not satisfied the Badges of Trade Test:
  i. The question of what the intention of a taxpayer was when he acquired an asset is a question of fact and the intention of the taxpayer in this case is for investment solely because of the company's financial circumstances.
  ii. The short period of ownership is not an indicating factor to show that the taxpayer was indulging in land trading.
  iii. The taxpayer's conduct in disposing his land serves as a safety net in rescuing the taxpayer's company.
  iv. The installation of coops and coop fences is not sufficient to conclude that the taxpayer had taken steps to increase the value of the Plots of Land.
- Hence, the disposal gains should be subjected to RPGT instead of income tax.

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Mitraland Kota Damansara Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

Bumiputera Release Payment is a Deductible Expenditure

Facts

- The taxpayer, who is in the property development business, applied to the Lembaga Perumahan dan Hartanah Selangor (LPHS) to sell Bumiputera units to non-Bumiputera purchasers.
- LPHS granted its approval on the condition that an amount that is equivalent to the discount given to the Bumiputera purchasers has to be refunded to LPHS by the developer for each sale of a Bumiputera unit to a non-Bumiputera buyer ("**Bumiputera Release Payment**").
- The taxpayer made the Bumiputera Release Payment to LPHS for the release of unsold units reserved for the Bumiputera purchasers and claimed a deduction on the said payment.
- The Revenue disallowed the deduction taken by the taxpayer on the basis that it is capital in nature, and hence, not deductible under Section 33(1) of the Income Tax Act 1967.

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Main Issue

Whether the Bumiputera Release Payment made to the LPHS to procure the approval of the LPHS to sell Bumiputera units to non-Bumiputera purchasers is deductible pursuant to Section 33(1) of the ITA?

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The DGIR's Contentions

The DGIR disagreed that the Bumiputera Release Payment is a deductible expenditure under Section 33(1) of the ITA on the following basis:

- The Bumiputera Release Payment is punitive in nature as it is a pecuniary punishment imposed on the taxpayer for violating the State Authority's policy on division of the development units between Bumiputera and non-Bumiputera purchasers.
- Even if the payment is not penalty, it is also not deductible as the element of consideration or benefit exists in the form of release of the Bumiputera reserved units. Thus, the Bumiputera Release Fee should be regarded as a capital expenditure.

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The Taxpayer’s Contentions

The Bumiputera Release Payment is a deductible expenditure under Section 33(1) of the ITA for the following reasons:

- The Bumiputera Release Payment is **NOT a fine or penalty**, but a payment made merely to procure approval from the State Government to sell Bumiputera units to non-Bumiputera purchasers.
- The Bumiputera Release Payment is an **expenditure incurred wholly and exclusively in the production of the taxpayer's gross income**.
- The Bumiputera Release Payment is **NOT capital in nature** as it did not bring about any capital nor enduring benefit to the taxpayer's business.

The Court of Appeal’s Decision

In affirming the High Court’s decision, the Court of Appeal held that the Bumiputera Release Payment was deductible under Section 33(1) of the ITA for the following reasons:

- There is **no gain in terms of the net sales income** to the taxpayer from the sale of the Bumiputera units to non-Bumiputera purchasers as the taxpayer was required to return the amount equivalent to Bumiputera discount to the State Government.
- The effect of the said payment to LPHS was to achieve sales, and hence, **the payment is exclusively and directly related to taxpayer's business operations** in order to **generate income**.
- The said payment **recurs every time** a Bumiputera unit is sold to a non-Bumiputera purchaser.
- The said payment **should not be construed as capital expenditure** as it did not bring about any enrichment or improvement to any fixed capital.
- The taxpayer had, all along, the right to sell these Bumiputera units, as they were the taxpayer’s stock-in-trade.

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