



Datuk D P Naban
Senior Partner
Tax, SST & Customs
T: +603 6208 5858
E: dpn@lh-ag.com



S Saravana Kumar
Partner
Tax, SST & Customs
T: +603 6208 5813
E: sks@lh-ag.com

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Disposal Of Land Is Not Trading

In a key ruling delivered on 28.5.2019, the Special Commissioners of Income Tax (**SCIT**) held that the gains made by an individual taxpayer from the disposal of 10 plots of land were not taxable under the Income Tax Act 1967 (**ITA**).

Our senior associate, Jason Tan, and associate, Keith Lim, from the Tax, SST & Customs Practice successfully represented the taxpayer in this matter.

Brief Facts

The taxpayer is an oil palm planter who also breeds ornamental fishes. He had been acquiring oil palm smallholdings since 1992, for the purposes of yielding income as well as investment. Between 2011 and 2013, the taxpayer had acquired 10 plots of land which he not only intended to use for planting oil palm and vegetables, but also as a chicken farm. He incurred considerable expenses in building sheds for the chicken farm and purchasing fertiliser for the young oil palm planted on the land.

However, due to unforeseen circumstances, the taxpayer had to dispose of the 10 plots of land within five years to meet his financial needs. The taxpayer fell into financial difficulties, where among others, he had to immediately repay bank overdraft facilities. He also had to acquire a new plot of land for his ornamental fish breeding as the tenancy of the land housing the existing fish farm was coming to an end, and the landowner refused to extend the tenancy.

Upon disposing of the 10 plots, the taxpayer duly submitted real property gains tax returns and was assessed accordingly by the Director General of Inland Revenue (**DGIR**). However, a few years later, the DGIR had a change of heart and alleged that the gains from the disposal of the 10 plots of land should be subjected to income tax under the ITA. The DGIR alleged that the taxpayer had acquired the 10 plots with the intention to trade in light of the frequency of the disposals within a short span of time.

Taxpayer's Arguments

The taxpayer disagreed with the DGIR and advanced the following arguments:

- (a) The taxpayer has no intention to trade in land. This was evident from the fact that he had been acquiring palm oil smallholdings as investment since 1992, and this fact was not disputed by the DGIR.
- (b) The taxpayer's sole intention in acquiring the 10 plots was to invest and engage in long-term activities such as oil palm smallholding and vegetable and chicken farming.
- (c) There is no legal requirement that requires the investment asset held by the taxpayer to be income-producing. The SCIT and the High Court in *Gra Sdn Bhd's* case had held that the taxpayer's land in that case was investment property, although the taxpayer did not derive any rental income.
- (d) The disposal of the 10 plots of land within five years is not indicative that all the plots were trading stock. In the *DEF* case, it was held that the land was the taxpayer's investment although he had disposed of the land within three weeks after purchasing it.

Decision

The SCIT agreed with the taxpayer and unanimously ruled that the gains from the disposal of the 10 plots of land are not taxable under the ITA. Based on the testimony of the taxpayer, the SCIT was satisfied that the taxpayer did not have the intention to trade in land at the time he acquired and disposed of the land. The reason for the disposal of the plots of land was to meet the financial needs. They acknowledged that the taxpayer was compelled to dispose of the 10 plots of land due to his dire financial position.

The SCIT further added that while the period of ownership in the present matter was short, this cannot be the sole factor to hold that the 10 plots of land were acquired for the purposes of trade. It was necessary to consider all badges of trade, as laid down in the *NYF Realty Sdn Bhd* case, and the surrounding circumstances as well in arriving at a holistic approach in determining the taxpayer's intention.

If you have any queries on the taxation of land transactions, please contact our tax partners from the Tax, SST & Customs Practice, **Datuk D P Naban** and **S Saravana Kumar**, at tax@lh-ag.com

For queries on land law-related matters, please contact Head of the Corporate & Commercial Disputes Practice, **Rosli Dahlan** (rd@lh-ag.com)

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia

T +603 6208 5888

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F +603 6201 0122/0136

E enquiry@lh-ag.com

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