



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

5 JULY 2019

Judicial Review To Challenge Taxing Of Compensation

WSB v Ketua Pengarah Hasil Dalam Negeri

Last week, the High Court granted leave for a judicial review application filed by WSB to set aside the tax assessment issued by the Director General of Inland Revenue (**DGIR**). The DGIR had invoked Section 4C of the Income Tax Act 1967 (**ITA**) to subject the compensation received by WSB for the compulsory acquisition of its land to income tax.

The High Court also directed that the payment of the disputed tax be stayed in the interim, pending the hearing of the stay application.

WSB was successfully represented by Datuk D P Naban, senior partner and head of the firm's Tax, SST & Customs Practice, and pupil, Tan Iyan Xin.

Brief Facts

WSB owned four parcels of land (**the Land**) that it had originally acquired in the 1990s for housing development. When it failed to obtain the necessary approval, WSB commenced a quarry business on some parts of the Land that was subsequently licensed to a third party, for which WSB received royalty income from the quarry rocks sale. The quarry business ceased operations in 2011 and WSB has remained dormant since, with the Land left idle.

Between 2015 and 2016, the State Authority decided to compulsorily acquire part of the Land and issued two declarations in Form D (**the 1st and 2nd Form D**) under the Land Acquisition Act 1960 (**LAA**). Following an inquiry hearing, the Land Administrator issued notices of award of compensation (**Form H**) to WSB in respect of the compulsory acquisition. Subsequently, the notices that possession had been taken of the land (**Form K**) were also issued to WSB.

However, the particulars of the part of the Land compulsorily acquired and those stipulated in Forms H and K did not correspond to those listed in the 2nd Form D. Having discovered this error, the State Authority issued another Form D (**the 3rd Form D**) to correct the particulars of the part of the Land listed in the 2nd Form D. The 3rd Form D corresponded to the details in Forms H and K. The validity of the 3rd Form D was challenged in a separate judicial review

application that had been filed earlier to challenge the validity of the 3rd Form D, which was eventually set aside by the High Court. Accordingly, the compulsory acquisition of a significant portion of the Land as per the 3rd Form D was declared to be invalid.

Notwithstanding this, the DGIR conducted a tax audit on WSB and decided that the parts of the Land that were compulsorily acquired were the stock of WSB. The DGIR invoked Section 4C to subject the compensation for the said compulsory acquisition to income tax, even though a significant portion of the compulsory acquisition via the 3rd Form D had been declared invalid by the High Court.

Leave Application Before The High Court

The High Court granted WSB leave for judicial review to challenge the tax assessment raised by the DGIR. The legal arguments advanced on behalf of WSB were that:

- Since a significant portion of the compulsory acquisition had been held invalid previously by the High Court, the amount received by WSB is not compensation under the LAA. Hence, it cannot be “amounts receivable arising from the compulsory acquisition” within the meaning of Section 4C of the ITA.
- Even if the land acquisition was valid, Article 13 of the Federal Constitution provides that a landowner is entitled to receive adequate compensation. Section 4C effectively takes away the adequate compensation received. On the one hand, it would be unfair to grant a landowner adequate compensation, but on the other hand, subject it to tax. Accordingly, if Section 4C contradicts the spirit of Article 13, the tax assessment is invalid.
- Under the Real Property Gains Tax Act 1976, compensation received from the compulsory acquisition of land is deemed as a “no gain no loss” transaction. There is no real property gains tax chargeable. However, Section 4C was introduced in the year of assessment 2014 to subject compensation for compulsory land acquisition to income tax. Section 4C was introduced following the *Penang Realty* and *Metacorp* cases, which held that such compensation is not subject to income tax as the element of compulsion vitiates the intention to trade.
- In any event, Section 4C only applies where the compulsorily acquired land is the taxpayer’s stock-in-trade. However, the land in question was not WSB’s stock-in-trade, but its investment asset. Gains from the disposal of investment asset cannot be subject to income tax.

Conclusion

This is an interesting case as the constitutionality of Section 4C is being challenged for the very first time. Section 4C essentially provides that the amount receivable from the compulsory acquisition of any stock in trade is subject to income tax. Prior to the introduction of this provision, it was a settled principle of law, as held by our courts in the *Penang Realty* and *Metacorp* cases, that compensation from the compulsory acquisition of land is not liable to income tax. The

introduction of Section 4C has the effect of making such settled principle of law inapplicable, thus subjecting the compensation received from the compulsory acquisition of land to income tax where the land is the taxpayer's stock-in-trade.

WSB was successfully represented by senior partner Datuk D P Naban, assisted by pupil, Tan Iyan Xin, from the firm's Tax, SST & Customs Practice. Datuk Naban also successfully represented the taxpayers in the *Penang Realty* and *Metacorp* cases.

If you require legal representation to challenge and stay a tax assessment, please contact **Datuk D P Naban** or **S Saravana Kumar** at tax@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
F +603 6201 0122/0136
E enquiry@lh-ag.com
W www.lh-ag.com

Published by the Tax, SST & Customs Practice

© Lee Hishammuddin Allen & Gledhill. All rights reserved. The views and opinions attributable to the authors or editor of this publication are not to be imputed to the firm, Lee Hishammuddin Allen & Gledhill. The contents of this publication are intended for purposes of general information and academic discussion only. It should not be construed as legal advice or legal opinion on any fact or circumstance.

[Feedback](#)

[Unsubscribe](#)