

# LHAG Insights

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### High Court issues Grounds of Judgment in *KPHDN v C Bhd*: Gains from Disposal of Lands through a Joint Venture Agreement is not chargeable to Income Tax

In our LHAG Insights of [19 August 2021](#) and [11 August 2022](#), we wrote about the decisions of the Special Commissioners of Income Tax (**SCIT**) and the High Court. Both decisions confirmed that income tax was not payable by a landowner who received a share of the gross revenue generated from a development, under a joint venture agreement (**JVA**) with a developer. Recently, the High Court has issued its grounds of judgment for dismissing the Revenue's appeal. The grounds of judgment can be viewed [here](#).

The key new propositions from the High Court judgment are:

#### 1) **Directors' expertise and skills cannot be imposed on a Taxpayer Company**

As is invariably the case, the Revenue contended that one of the Taxpayer's directors has experience and skills in development activities and projects with other companies. This was said to be indicative of an intention to trade on the part of the Taxpayer company. The High Court categorically rejected this contention, holding that:

***"The personal expertise and special skills of an ordinary company director, if at all, cannot, by any legal imagination, be imposed on the company."***

The firm rejection of the notion that a director's personal skills and experience can be transposed upon a taxpayer company to justify an intention to trade is consistent with company law, and the existence of the corporate veil. Failure by the Revenue to adhere

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to this decision in issuing future assessments could constitute a basis for judicial review.

**2) Mere execution of a JVA does not constitute trading**

The execution of a JVA to develop lands originally acquired as capital assets did not constitute trading. The Revenue's own Public Ruling No. 1/2009: Property Development recognises that a landowner who enters into a joint venture project is not undertaking a business if he does not take an active part in the development activities (paragraph 15.3(a)). In this case, the terms of the JVA showed that the entire development was to be carried out by the joint venture partner, with the Taxpayer being merely a passive landowner.

This is believed to be one of the first decisions concerning the tax treatment of gains derived by a landowner under a JVA, which is based on a percentage of the gross revenue rather than a fixed price. The High Court's decision has confirmed that this alone would not be sufficient to warrant a conclusion of trade.

**3) Steps taken to ascertain the maximum value of land does not constitute a change of intention**

The evidence showed that before entering the JVA, the directors of the company had contemplated several alternatives, including developing the land themselves. The Court rejected the Revenue's argument that exploring various options constituted a change of intention from investment to trading. It is perfectly legitimate for the directors to explore various options to ascertain the maximum value of the land, before settling on a JVA; indeed, it is the duty of the board of directors to do this.

The taxpayer was successfully represented both at the SCIT and the High Court by lawyers from LHAG's Tax, Trade & Customs Practice: Dato' Nitin Nadkarni and Jason Tan Jia Xin.

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