

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
(BAHAGIAN SIVIL)  
GUAMAN SIVIL NO: S3-21-54-2007**

**ANTARA**

**KERAJAAN MALAYSIA .....PLAINTIF**

**DAN**

**SPONTANEOUS HOLDINGS SDN BHD .....DEFENDANT**

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**GROUND OF JUDGMENT**

This is the application by the Plaintiff against the Defendant for Summary Judgment under 0 14 RHC for real property gains tax which is due and payable by the defendant for the year of assessment 1990 inclusive of 10 % increment under section 21 (4) Real Property Gains Tax Act 1976 for the amount of RM 1,848,000.00

The Defendant raised the following as triable issue:

- a) the returns is made for the year 1990 but the asset was not acquired yet in 1990.
- b) the Act attracts real property gains tax for chargeable gain (see Section 2 & 7 of the Act), whereas in the case before this Court the defendant had made a loss of RM175,000.00.

Therefore there is no chargeable gain in this transaction and hence no property gains tax ought to be levied;

- c) the Notice of Assessment does not mention the mandatory requirements as stated in Section 17 of the Act;
- d) the Notice of Assessment states the chargeable gain as RM 8,600,000.00 when in fact there was no such chargeable gain;
- e) Notice of Assessment shows a levy of a penalty of RM 20,000.00 but the Defendant has not breached Section 29 (3) (a) of the Act.
- f) Plaintiff has not shown how the notice was posted, when the notice was posted, who posted the notice and there is no acknowledgement of receipt of the Notice of Assessment (Section 21 of the Act).
- g) the rate of tax for disposal in the third year after acquisition is at April 1995 is 15% but the Plaintiff has charged the rate of 20%

The Defendant submits that all the above show manifest errors on the face of the Notice of Assessment. This shows that there are triable issues in this matter and that the matter is not suitable for a summary judgment as envisaged by Order 14 of the Rules of the High Court 1980.

## The Court's Findings:

For the matters in para (a), (b), (d), (g) above, these are matters which falls under “pleas” which shall not be entertained by the court. This is provided for under section 23 (3) of the Real Property Gains Tax Act 1976. Section 23 provides as follows:

“23. (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

(2).....

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 21(4).”

This provision finds its support in the case of ***Teng Chua Huat v Government of Malaysia*** [1999] 7 CLJ 358 where the Court held that:

[1] Assessment of tax by the Revenue can never be construed as a triable issue. Section 23(1) of the Real Property Gains Tax Act 1976 ('the Act') enacts that tax due and payable may be recovered by the government by civil proceedings as a debt due to the government whilst s. 23(3) of the Act provides that the court may not entertain any plea which disputes the amount of tax sought to be recovered. Further, s. 21 (1) of the Act provides that upon being served with the

notice of assessment, the tax shall be due and payable whether or not the person assessed appeals against the assessment. Thus, the question whether the assessment itself was proper or otherwise was not for this court to determine. "

The Defendant should have brought up the issue on the assessment to the Special Commissioner of Income Tax who have the jurisdiction to hear and determine the said issue.

This was explained in the case of ***Sun Man Tobacco Co. Ltd v Government of Malaysia [1973] 2 MLJ 163*** where the Supreme Court ruled that:

"In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts".

Further support on this point can be found in the case of ***Government of Malaysia v Dato' Mahindar Singh (1996) 5 MLJ 626*** where it was held that:

".... the short answer to them is that these issues similarly could be raised before the special commissioners and not before the court in an application for summary judgment under 0 14 of the RHC 1980. The law is clear that once an assessment is made, the Inland Revenue Department can invoke as 130 and 106 of the Act which make the tax payable under the assessment due and payable at the place specified in the notice of assessment upon service on the taxpayer of the notice whether or not the taxpayer appeals against the assessment."

Thus, from the above authority the Defendant cannot raise the defence of the amount being excessive or inaccurate, as triable issues. Moreover in an application under 0 14 RHC it is trite law that in income tax cases, the order should be in favour of granting summary judgment. The case of ***Chong Woo Yit v Government of Malaysia*** [1989] 1 CLJ (Rep) 9 where the Supreme Court cited the case of ***Government of Malaysia v Abdul Rahman*** [1975] 1 MLJ 276, and states that:

"When proceedings are commenced under 0.14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under section 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under section 106 (1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the

court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal, or incorrectly increased under section 103(4) or (5)."

Although some of the cases are cases involving the Income tax Act, the principle is applicable for cases under Real Property Gains Tax Act. Therefore the right forum is before the Special Commissioner of Income Tax under section 18 of the Real Property Gains Tax Act 1976.

As for the issue on the notice of assessment which the defendant submits that the Plaintiff has not shown how the notice was posted, section 53 (2) (a) (ii) of the Real Property Gains Tax Act 1976 is clear on this issue.

The notice of assessment have been duly shown to have been served on the Defendant in accordance to the provision of section 53 (2) (a) (ii) of the Real Property Gains Tax Act 1976 . Therefore the real property gains tax assessed on the Defendant shall be due and payable by the Defendant, and this is a debt is recoverable by civil proceedings by the Government.

Moreover the Plaintiff had issued out a certificate under section 48 (1) of the Real Property Gains Tax Act 1976. This is sufficient evidence for the court to grant Summary Judgment, as the amount of tax due could no longer be questioned. (Refer to the case of ***Government of the Federation of Malaysia v Lee Tain Tsung*** [1992] 1 MLJ 269).

The Defendant have failed to raise any triable issue and I grant order in terms for Summary Judgment under 0 18 RHC with costs against the Defendant.

Datin Zabariah Mohd Yusof  
Tarikh 3.7.2009

Bagi Pihak Plaintiff : Encik Rizal Jafry Isa  
Lembaga Hasil Dalam Negeri.

Bagi Pihak Defendant : Encik J. Doshi  
Tetuan C. Sukumaran & Co.