

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)**

GUAMAN SIVIL NO: S6-21-94-2008

ANTARA

KERAJAAN MALAYSIAPLAINTIF

DAN

KL DEVELOPMENT SDN BHDDEFENDANT

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 1993 inclusive of 10 % increment under section 21 (4) Real Property Gains Tax Act 1976 for the amount of RM 810,660.45.

The Defendant raised the following as triable issue:

- a) The claim by the Plaintiff is invalid, wrongly construed and cannot be sustained in law;
- b) The Defendant never received the Assessment Notice for the year 1993;

c) The Plaintiff's cause of action is caught by the Limitation Act 1953.

The first and second issue

The Claim is invalid, wrongly and cannot be sustained in law

The defendant never received the Assessment Notice for the year 1993.

The tax amount has become due and payable on the service of the notice of assessment on the Defendant. Refer to the case of ***Chong Woo Yit v Government of Malaysia*** [1989] 1 CLJ (rep) 9 where the Supreme Court held that:

“ On service of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government.”

The Notice of Assessment has been shown to be duly served on the Defendant. The Notice of Assessment dated 19.9.1998 (Exhibit NAA-1 in enclosure 8) was sent to the Defendant's address based on the address provided by the Defendant through its Return of Disposal of Chargeable Assets. The Notice of Assessment had been sent to the Defendant's last known address and shall be deemed served on the Defendant pursuant to section 145 (2) of the Income Tax Act. (Refer to the case of ***Kerajaan Malaysia v Saratoga Sdn Bhd*** [2006] 7 CLJ 229.

Further the Plaintiff avers in its affidavit that the Notice of Assessment which was sent to the Defendant's last known address has never been returned. The case of ***Kerajaan Malaysia Iwn Rimo Jaya (M) Sdn Bhd*** [2005] 8 CLJ 303 ruled that this averment is sufficient evidence that the service of the notice of assessment is proper and in accordance with sub section 53(2) of the Income Tax Act.

The 3rd Issue

The Plaintiff's cause of action is caught by the Limitation Act 1953

The Plaintiff's cause of action is not time barred by virtue of the proviso of section 33 (1) of the Limitation Act 1953.

This had been affirmed in the case of ***Chong Woo Yit v Government of Malaysia*** [1989] 1 MLJ 473 where the Supreme Court held that:

“ By virtue of the provision to s. 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the Government for the recovery of any tax or interest thereon.”

As far as the issues raised by the Defendant on assessment, they are pleas which the court should not be entertained and this court is not the proper forum to entertain the plea or allegation raised by the Defendant.

This is provided 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).”

Further in the case of ***Kerajaan Malaysia v Abdul Rahim bin Mohd Aki*** [1994] 4 MLJ 376 where the court ruled that:

“...in any civil proceedings to recover income tax allegedly due and payable, the Court must close its ears and shut its eyes to any suggestion or indication that the amount claimed is excessive or incorrectly increased under subsection 21 (4)”.

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 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”.

A case which ruled on the same point is 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."

Therefore, 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 matters 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)."

Thus, from the above, it is clear that the Defendant has failed to raise issues that merits a trial. Therefore I grant order in terms for the application for Summary Judgment under 0 14 RHC for the Plaintiff with costs.

Datin Zabariah Mohd Yusof
Tarikh 7.7.2009

Bagi Pihak Plaintiff : Puan Ruzaidah
Lembaga Hasil Dalam Negeri.

Bagi Pihak Defendant : Encik Saravanha
Tetuan C. Sukumaran & Co.