IN THE COURT OR APPEAL, MALAYSIA
AT PUTRAJAYA

[APPELLATE JURISDICTION]

CIVIL APPEAL NO: J-01-577-10

Between

KETUA PENGARAH HASIL DALAM NEGERI - APPELLANT

And

RESORT PORESIA BHD - RESPONDENT

[In the Matter of High Court of Malaya
at Johor Bahru, Johor Darul Takzim
(Bahagian Rayuan & Kuasa-Kuasa Khas)
Civil Appeal No: 14-02-2009]

Between

Resort Poresia Bhd - Appellant

And

Ketua Pengarah Hasil Dalam Negeri - Respondent

CORAM:

Abdul Wahab Patail, JCA
Balia Yusof Haji Wahi, JCA
Abdul Aziz Abd Rahim, JCA

Date of Judgment: 8th January 2013

JUDGMENT OF THE COURT

[1] In the Year of Assessment 1995, Resort Poresia Bhd had incurred the sum of RM18,094,547.00 as capital expenditure on turfing and grass on a golf course. It was disallowed as qualifying expenditure by the Ketua Pengarah Hasil Dalam Negeri.

[2] Upon an appeal by Resort Poresia Bhd, the Special Commissioners of Income Tax held that the golf course was premises within which the membership fees were derived and the business was carried out. It could not be considered as a means but rather a premise in which the business was carried out. The Special Commissioners confirmed the assessments and dismissed the appeal by Resort Poresia Bhd.

[3] In the High Court, by way of a case stated by the Special Commissioners under Paragraph 34 of Schedule 5 of the Income Tax Act 1967, the appeal by Resort Poresia Bhd was allowed, holding:

> "After thorough perusal of the cause papers and full submission of the parties, I find that the Special Commissioners have applied the wrong tests in determining the issue whether the capital expenditure incurred was qualifying plant expenditure.

Appeal allowed.

No order as to costs."

[4] Qualifying expenditure refers to expenditure which the taxpayer is allowed to write off for tax purposes. It is provided for in Schedule 3 as follows:

> Qualifying expenditure:
>
> 1. Subject to this Schedule, qualifying expenditure for the purposes of this Schedule is qualifying plant expenditure or qualifying building expenditure within the meaning of paragraph 2 to 6.
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> 2. (1) Subject to sub-paragraph (2) and paragraph 67, qualifying plant expenditure is capital expenditure incurred on the provision of machinery or plant used for the purposes of a business, including
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> a) expenditure incurred on the alteration of an existing building for the purpose of installing that machinery or plant and other expenditure incurred incidentally to the installation thereof;

[5] The key issue in this appeal is whether the expenditure on turfing and grass on the golf course falls within the meaning of expenditure on "machinery or plant"?

[6] While biologically turf and grass are plants, the term "machinery or plant" has a different meaning in business and law. Although not specifically defined, the term usually presents no difficulty for income tax purposes. But whether it extends to expenditure incurred on, as in this case, turfing and grass on a golf course is another matter, although there is no doubt turf and grass are assets in a golf course run as a business.

General Principles

[7] "Machinery" and "plant" are not one and the same thing. If an asset on which qualifying expenditure is sought is not machinery, then the next step is to consider whether it is "plant".

[8] Machinery is easier to identify. It is usually devices or equipment, mechanical or electronic, which is used for or performs useful work. The ordinary meaning is applied. The instant appeal is not concerned with "machinery".

[9] "Plant" however is more difficult. Where not defined by law, then resort is made by applying principles from case-law. The various "tests" employed in the various cases, such as the "premises test" or the "setting test" ***(J. Lyons & Co v Attorney-General [1944] Ch 281)*** and the "business test" or the "functionality test" (***Hinton v Maden &***

Ireland [1959] 1 WLR 875), the "premises test" (***Lingfield Park (1991) Ltd. v Shove (HM Inspector of Taxes) [2004] CA 89)*** and the "apparatus for the carrying out of the business" as in ***Yarmouth v France (1887) 19 QBD 647***, demonstrate there is no single or exclusive test, but whether an asset is "plant" used *in* carrying on the business and not for example "premises" *from* which the business is carried on, is a very specific finding of fact depending upon the particular facts of the case as to how the particular asset is deployed or employed.

[10] In ***Benson v Yard Arm Club Ltd [1979] 2 All ER 336***, a restaurant business purchased a barge and an old ship and used it as its restaurant. Templeman LJ said:

> 'It plainly appears, therefore, that if, and only if, land, premises or structures in addition to their primary purpose perform the function of plant, in that they are the means by which a trading operation is carried out, then for the purposes of income tax and corporation tax the land, premises or structures are treated as plant.'

The Instant Appeal

[11] In the instant appeal, Resort Poresia Bhd had appealed to the Special Commissioners against the assessment levied by the Ketua

Pengarah Hasil Dalam Negeri. The appeal failed. Resort Poresia Bhd appealed to the High Court by way of a case stated by the Special Commissioners.

[12] In its grounds of decision, the High Court set out briefly the background, the issue put before and the facts found by the Special Commissioners, the contentions of Resort Poresia Bhd, the reply by the Ketua Pengarah Hasil Dalam Negeri, the findings of the Special Commissioners and proceeded to consider what is and the case-law pertaining to "plant" and noted, in arriving at the conclusion, that the decision of the Special Commissioners was flawed:

> 21. Although this House of Lords decision was cited by both the respondent and appellant in their submission it is unfortunate that the SCIT did not cho[o]se to comment on the case nor draw assistance from the principles and guidance afforded by the case.
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> 22. Although parties have submitted on the issue of function or functionality, no finding was made by the SCIT on this issue except for an oblique reference to St. John's School v Ward [1974] 49 TC 524 which case the SCIT opined did not give any weight to the issue of function.
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> 27. It appears from the CS that in deciding the issue, the SCIT applied the principle laid down in Yarmouth's case and

held that the golf course is a premise within which the business was carried out, and on that basis, dismissed the appeal (see last paragraph of paragraph 9 page 12-13 CS).

28. Whilst it may not be disputed that the golf course was a premise within which the appellant's business was carried out, the SCIT appears to have lost sight of the issue at hand which is whether expenditure incurred in respect of the golf course turfing and grass is qualifying expenditure incurred on the provision of machinery or plant used for the purpose of the appellant's business.

29. The SCIT should have made a finding in respect of the nature and function of the grass and turfing before applying the principle laid down in Yarmouth's case. This is because there was unchallenged evidence before the SCIT from the appellants in the form of a Capital Allowance Study marked as 'B-I' and the testimony of AW2 on the functionality of the various grasses used in the fairways and greens in issue. As recorded in the CS, AW1, one Mr. Lim Beng Yeow, the Assistant Manager of Arthur Anderson & Co. and AW2 is Mr. Daigo Sugiki, the Director of the Appellant testified on behalf of the appellant. No finding was made in respect of the appellant's evidence.

31. The SCIT had purportedly found the primary facts as a result of the evidence adduced before them, both oral and documentary (see pages 3-4 CS). However no finding of facts

were made in respect of the appellant's evidence which as pointed out earlier, was unchallenged and relevant to the case at hand. The SCIT have not, in the CS, made any reference at all to their evidence, whether admitted or not or whether due consideration was given at all to their evidence.

32. With respect, I am of the view that the SCIT should have but failed to state their finding in respect of the appellant's evidence and this has gravely prejudiced the appellant.

33. The SCIT had, even in addressing the issue at hand appeared to be confused as to whether it was the turfing and grass or the golf course itself that required the determination of whether it is "plant" within the meaning of qualifying expenditure of Schedule 3 of the Act

34. This is clearly shown in pg. 10 where they posed the following questions:

> "Thus, by applying the principle as laid down in Yarmouth, the question is whether the golf course turfing and grass functions as a plant or premises in which the business was conducted? If it is an apparatus or tool for the appellant to carry out its business, then the golf course is plant. On the other hand, if the golf course is a premise in which business was carried on, it is not plant."

35. The SCIT has made a finding of fact that the appellant's income comprised licence fee recognised, subscription and other club operations income (see para (viii) of Findings of facts pg. 4 CS).

36. From this finding of fact, it went on to infer that since the golf course especially the greens were specially constructed for the purpose of the appellant's trade as a golf club, 'Thus, the greens were premises in which the membership fees were derived" and "the golf course in which the turfing and grass was planted cannot be considered as a mean in which the business was carry out. Instead the golf course was rather a premise within which the business was carried out" (pg. 12 CS). This begs the question: was the SCIT deliberating on the golf course or the turfing and grass?

37. The finding of the SCIT and the inference drawn as stated above is fundamentally flawed as the SCIT has failed to distinguish the golf course from the turfing and grass.

[13] The High Court then discussed the decision in ***Family Golf Centres Ltd v Thorne (Inspector of Taxes) [1998] STC (SDC) 106***, noting and concluding as follows:

39. The Special Commissioner held that while the greens were an important adjunct to the carrying on of the taxpayer's business, so was the rest of the golf course. The greens were

part and parcel of the golf course as were the fairways and bunkers and the greens and were part of the place whereon the taxpayer's trade was carried on. Accordingly they did not qualify as plant.

40. Learned counsel for the appellant has submitted at length on why Family Golf is in the appellant's favour. It is argued that the facts differ from this instant case and even the legislation relied on is different.

41. Upon a thorough perusal of the case I concur with learned counsel for the appellant that insofar as the facts are concerned, the facts differ slightly in that Family Golf concerns the capital expenditure incurred in respect of three new putting greens that replaced three old ones. Here, is our instant case, it is in respect of capital expenditure for turfing and grass and it appears to involve different legislation.

42. The issue for determination however is the same: was the particular item claimed to be qualifying expenditure "plant".

43. However the marked difference between Family Golf and this case is that the Special Commissioner in her lucid decision had set out all the relevant evidence adduced in evidence. A perusal of her decision shows very clearly the sound reasoning behind her decision in relation to the relevant statutory provisions and the decided cases cited.

> 44. Unfortunately, this was not done here. As is evident from the CS, the SCIT seem to be unaware of the difference between the golf course and turfing and grass and have erroneously equated the two to mean one and the same, and consequently, one is unsure of what test is applied to what.
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> 45. In view of the foregoing, I am of the view that the decision of the SCIT cannot stand. Hence, the appeal is allowed.

[14] With regard to paragraphs 21 and 22 of the grounds, we do not think it mandatory that the Special Commissioners must so necessarily deal with each and every submission made by a or both parties, or to set out the reasons for not giving weight where from the whole of the judgment and the nature of the appeal the reasons are obvious. Understanding must be accorded that Special Commissioners and Judges for that matter, given the number of cases and the time within which grounds of decision are to be completed, no longer have the luxury and leisure to address each and every issue, whether necessary or not, for the fair and just disposal of the matter before them. It suffices that the grounds of judgment makes clear the facts, findings and reasoning that led to the conclusion.

[15] The summation at paragraph 27 of the grounds is correct. It is not necessary to address paragraph 28 on the question whether the

Special Commissioners had lost sight of the issue. It serves no useful purpose. We proceeded to paragraph 29 and the paragraphs following it.

[16] The fact testimony on selection of turf and grass and as to the functionality of the various grasses used on greens and fairways was unchallenged means the selection and functionality was accepted. That being so, it may be tidier for the Special Commissioners to so state. But their not having done so does not necessarily amount to an error without it being shown what is the injustice that resulted from such failure.

[17] Accepting the evidence of Resort Poresia Bhd on selection of turf and grasses and their functionality does not alter the fact that the functionality afforded by the different grasses are part and parcel of the quality of the golf course itself. A golf course is the sum total of all its parts and components. To put it another way, the course and its layout, with the turf and the grasses planted thereon are what makes the course a course for golf to be played thereon, therefore a golf course. The argument that turf grasses is distinct from the golf course, overlooks the facts a course is a golf course only when the grasses planted thereon allows golf to be played on it. The grasses chosen are therefore an inseparable part and parcel of the golf

course, and therefore if the golf course is premises the business of Resort Poresia Bhd is carried on from, the turf and grasses are part and parcel of such premises. The High Court gravely erred in holding that the Special Commissioners appear to be confused as to whether it was the turfing and grass or the golf course itself that required the determination of whether it is "plant" within the meaning of qualifying expenditure of Schedule 3 of the Act, with the rhetorical question "was the SCIT deliberating on the golf course or the turfing and grass?"

[18] The question then remains whether a golf course falls within the meaning of "plant" and qualifies as qualifying expenditure. In ***Yarmouth v France (1887) 19 Q.B.D. 647***, Lindley L.J. made observations as to the meaning of "plant" which have since been regarded as authoritative. He stated (at page 658) as follows:

> "There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business."

[19] We remind ourselves that the power of the High Court in respect of a case stated to it is limited to questions of law. It is set out in paragraph 39 of Schedule 5:

> 39. The High Court shall hear and determine any question of law arising on a case stated under paragraph 34 and may in accordance with its determination thereof -
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> (a) order the assessment to which the case relates to be confirmed, discharged or amended;
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> (b) remit the case to the Special Commissioners with the opinion of the court thereon; or
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> (c) make such other order as it thinks just and appropriate.

[20] The germane question is whether the Special Commissioners in making their finding whether expenditure on turfing and grass on a golf course is qualifying expenditure had erred in their application of the principles set out in relevant case-law.

[21] The "apparatus test" and the various subsequent tests were attempts to put into words what is considered in the mind of the judge in making a finding of fact whether the asset for which capital allowance was claimed was an asset used to carry out the business or the place from which the business was carried out. In the instant

case, Resort Poresia Bhd's income comprised licence fees, subscription and other club operations income from persons who come to enjoy the facilities provided by Resort Poresia Bhd.

[22] Bearing in mind (a) the above, (b) the fact the golf course was such a facility upon which players could play golf and (c) that it would do violence to the language to say the golf course was a facility with which golf is played, or in other words it is not a plant used in carrying out the business of Resort Poresia Bhd, but premises from which the business is carried on, it cannot be said that the Special Commissioners, on the basis of case-law had erred in making its finding. It was a finding the Special Commissioners were well entitled to make. As Lord Lowry observed in ***Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd [1982] 1 WLR 322 HL***, there are cases that on the facts found are capable of decision either way. Lord Wilberforce observed that:

> "There is no universal formula which can solve these puzzles. In the end each case must be resolved, in my opinion, by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade. I do not think that the court should shrink, as a backstop, from asking whether it can really be supposed that Parliament desired to encourage a particular

expenditure out of, in effect, taxpayersômoney, and perhaps ultimately, in extreme cases, to say that this is too much to stomach."

[23] Where the finding by the Special Commissioners is one they were entitled to have made, their finding should not have been disturbed.

[24] We therefore allowed the appeal, set aside the order of the High Court and reinstated the decision of the Special Commissioners of Income Tax.

sgd
(DATUK ABDUL WAHAB PATAIL)
Judge,
Court of Appeal, Malaysia
Putrajaya

Dated: 4th June 2013

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