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COURT OF APPEAL

YA DATUK S. NANTHA BALAN
YA DATO' MOHD NAZLAN BIN MOHD GHAZALI
YA DATO' DR. CHOO KAH SING

8th MAY 2024

ITA v RPGTA - Section 4(a) Income Tax Act 1967 - Section 90(3) Income Tax Act 1967 - Best Judgment Assessment

DIRECTOR GENERAL OF INLAND REVENUE
v.
REVENUE POINT SDN BHD
[W-01(A)-103-02/2022]

The Court of Appeal had unanimously allowed the appeal by the Director General of Inland Revenue (DGIR) against the decision of the High Court and thereby, reinstating the decision of the Special Commissioners of Income Tax (SCIT).

The Taxpayer was assessed to income tax under the Income Tax Act 1967 (ITA 1967) for the disposal of 59 apartment units which were located in Fahrenheit 88, Kuala Lumpur. The Taxpayer contended that the gains from the disposal of 59 units of apartment were not subject to tax under the ITA 1967 as the true purpose of acquiring the property was solely for investment and the sale of the apartments were made due to the irresistible offer from the purchaser.

The disposals were carried out by the Taxpayer on four separate occasions from the Year of Assessment (YA) 2010 to YA 2011. The gains from the 3 apartment units were subjected to the additional assessment in YA 2010 whilst the disposal for the balance of 56 apartment units (sold en-bloc) in YA 2011 had been declared by the Taxpayer in its Tax Return and thus, a deemed assessment by the DGIR. For YA 2009 and 2010, the Taxpayer had failed to submit its Tax Return, and thus the DGIR had raised a best judgment assessment under section 90(3) ITA 1967 on 27.9.2012.

The DGIR argued that one of the criteria to indicate that the property was acquired as a permanent investment when the investment was sold in order to acquire other more satisfactory investment. However, when all the 59 apartment units were sold, the Taxpayer had not acquired any other properties as the SCIT was told that the apartment units were the only investment made by the Taxpayer. There was also no evidence as to how the proceeds were used. The Taxpayer's conduct was inconsistent with the proclaimed intention of holding the property for investment by getting rental income. Further, the derivation of rental income does not *ipso facto* mean that a property was an investment property. The rental income derived from the properties were merely incidental as the Taxpayer was fully aware of the huge potential of profit from the construction and opening of the nearby Pavilion. By the Taxpayer's witness own admission, the acquisition was not purely for rental income, but rather the anticipated profits from resale. The DGIR argued that the properties were acquired with a view to resell at a profit and the wait of 3 years had matured the assets and ensure a good price to the Taxpayer. The said properties were located at a strategic and developed business location in the Kuala Lumpur Golden Triangle. The Taxpayer faced no difficulties at all in disposing the said properties as the properties itself would attract interested buyers. The disposal of the said properties was made within a short period of 3 years, which clearly did not signify long term investment as claimed by the Taxpayer.

The four disposals were repetitious transactions which indicated the purpose was for resale at a profit. In any event, even if the four disposals were regarded as an isolated transaction that isolated transaction could constitute an adventure or concern in the nature of trade. If the properties were intended for investment, renovation could make it more tenantable, and thus fetch a higher rental. On the other hand, if the apartment units were intended for resale, it would make no sense to renovate the properties beforehand as it might not meet the intended purchaser's requirements. Hence, the said properties would be more marketable and saleable without any alterations. In the present case, the SCIT found that there was no renovation being done to the apartment units bearing in mind that apart from the rented units there were also some non-rental units.

The nature of the properties themselves, which were located in a strategic and developed business location would by itself be a very good ready-made advertisement without the need for any special exertion to find buyers for the properties. The Taxpayer had also relied on its financial statements to contend that since the properties were classified as fixed assets prior to the sale, then the properties were investment properties. The accounting evidence must be construed by weighing it against other evidence. In the instant case, the sale was not due to any immediate need of funds or forced sale. The circumstances leading to the disposal of the said properties reflected the existence of profit-making scheme.

The Court of Appeal held that the SCIT had correctly decided that the Taxpayer had failed to discharge its burden of proof that the assessments which had been raised by the DGIR were erroneous or excessive. The findings of the SCIT were based on facts, supported by evidence and therefore unassailable and should not have been disturbed by the High Court. The assessments as raised by the DGIR and confirmed by the SCIT were correct as the Taxpayer had been in trading and should not be capital gain when disposing its 59 apartment units, and neither was there any legitimate basis for the Taxpayer to challenge the validity or propriety from the issuance of the best judgment assessments and the penalty which had been imposed by the DGIR against the Taxpayer. The Court of Appeal reinstated the decision of the SCIT and set aside the decision of the High Court.