

22 SEPTEMBER 2021

Stamp Duty Assessments Set Aside By The Court Of Appeal

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdslawpartners.com

Recently, in *KEM v Pemungut Duti Setem, UTC Johor Bahru*¹, the Court of Appeal ruled in favour of the taxpayer where the stamp duty assessments issued by the Collector of Stamp Duties were held to be erroneous.

This alert highlights the key points of contention and the significance of this case.

Background Facts

On 16.6.2017, the taxpayer entered into a sale and purchase agreement to purchase two properties (First Subject Lot and Second Subject Lot) located in Johor. The taxpayer then submitted the land transfer form (Form 14A) to the Collector for adjudication of stamp duty pursuant to Section 36 of the Stamp Act 1949 (SA) for the First Subject Lot and Second Subject Lot respectively at the consideration sums of RM 1 million and RM 5 million respectively.

The Collector assessed the duty payable under item 32(a) of the First Schedule of the SA, which provides that the stamp duty levied is ad valorem based on “*the money value of the consideration or the market value of the property, whichever is the greater*”. In this regard, the ad valorem stamp duty assessments were calculated based on the market value of the Lots determined by the Valuation and Property Services Department (Government valuer) at RM 2.08 million for the First Subject Lot and RM 13.9 million for the Second Subject Lot respectively.

The taxpayer objected to the market value determined by the Government valuer and submitted a valuation report prepared by a private valuer to the Collector. The market value determined by the taxpayer’s valuer on the two properties were RM 1.1 million and RM 6.7 million respectively.

¹ [2021] MLJU 1269

**REIMAGINING
TAX
SOLUTIONS**

Being aggrieved by the stamp duty assessments, the taxpayer subsequently filed an appeal to the High Court pursuant to Section 39(1) of the SA 1949.

The High Court's Decision

On 31.10.2019, the High Court dismissed the taxpayer's appeal and held the following:

"It is trite law that the report of a private valuer is resorted to only if it is proved that the valuation officer of JPPH had wrongly exercised his discretion or had contravened the law by acting in excess of his powers provided by the Stamp Act."

The High Court was of the view that the taxpayer had failed to show the Government valuer had wrongly exercised his discretion nor was there any contravention of law committed by him. Hence, the taxpayer failed to establish the market value of RM 1.1 million for the First Subject Lot and RM 6.7 million for the Second Subject Lot. In coming to its decision, the High Court adopted the principle established by the Federal Court in *Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association*. The principle reads as follows:

"The question is, was the learned judicial commissioner right in rejecting the valuation of the holding by the JPPH valuation officer, in preference of the valuation by the Defendant's private valuer...No doubt it is open for the learned judicial commissioner to reject the valuation of the valuation officer but it can only be done if it can be shown that the valuation officer had wrongly exercise his discretion or he had contravened the law by acting in excess of the powers given by the Act. "

Thus, in accordance with the above principle, the High Court held that the Collector's valuation report was preferred to that of the taxpayer's valuation report. Being aggrieved by the High Court's decision, the taxpayer appealed to the Court of Appeal.

OUR EXPERTISE:

Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

Trade Facilitation & Incentives

Real Property Gains Tax

Stamp Duty

Anti-Profitteering

GST Disputes

Issues Before the Court of Appeal

The main issues considered by the Court of Appeal were:

- Whether the High Court had erred by failing to order the Collector to refund the excess stamp duty payment made by the taxpayer for both Lots?
- Whether the High Court failed to apply the correct principle of law as to what constitutes the comparable method of valuation?

The Taxpayer's Contention

The taxpayer submitted that the High Court had erred in coming to the decision based on the following reasons:

- The valuation report by the taxpayer's private valuers was more suitable and reliable;
- The comparable lot chosen by the Government valuer as the best comparative lot to determine the market value of the Second Subject Lot is not the most accurate comparative lot. Thus, the Government valuer had used the wrong comparable; and
- The purchase price of the First Subject Lot is RM 1 million and for stamp duty assessment, the market price is either higher or the consideration, it could not go below the purchase price. Thus, the taxpayer's market price of RM 1.1 million for the First Subject Lot is more accurate.

The Collector's Contention

The Collector argued that the High Court had correctly decided in its favour based on the following reasons:

- The Comparable Lots used by the taxpayer's valuers are not suitable and the fair value per square feet based on the said comparable are not reliable; and
- The Valuation Report prepared by the private valuer did not conform to the Malaysia Valuation Standard.

OUR EXPERTISE:

Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

Trade Facilitation & Incentives

Real Property Gains Tax

Stamp Duty

Anti-Profiteering

GST Disputes

The Court of Appeal's Decision

Upon reading and hearing submissions by both parties, the Court of Appeal allowed the taxpayer's appeal and set aside the High Court's decision.

The Court of Appeal came to the following decision:

- (1) for the First Subject Lot, stamp duty to be assessed based on the market value of RM 1.1 million;
- (2) for the Second Subject Lot, stamp duty to be assessed on the market value of RM 8.3 million; and
- (3) excess duty shall be refunded to the taxpayer.

The Court of Appeal held that the High Court had erred in holding that the Government valuer's valuation report was more suitable than the valuation report prepared by the taxpayer's valuer.

First Subject Lot

After taking into account the terms of the land use, the date of transaction, prices of sales of similar lands in the neighbourhood and locality, the more appropriate comparable lot would be the one relied on by the taxpayer. It was held that the Collector could not justify the value of RM 220 per square meter used to determine the market value of the First Subject Lot.

The Court of Appeal further held that the High Court had erred in deciding that the Government valuer used due care and diligence in arriving at the market value of the First Subject Lot. This is because the principle of "*the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions*" established by the Federal Court in the case of *Ng Tiou Hong v Collector of Land Revenue, Gombak* is binding on the High Court by virtue of the doctrine of stare decisis.

OUR EXPERTISE:

Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

Trade Facilitation & Incentives

Real Property Gains Tax

Stamp Duty

Anti-Profiteering

GST Disputes

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdslawpartners.com



Second Subject Lot

The Court of Appeal held that the High Court had erred in holding that the Government valuer arrived at the “fair value per square metre” in determining the market value of the Second Subject Lot. The High Court had not specified “the differing factors” and “necessary upward and downward adjustment” in arriving at the said fair value per square metre. By looking at the land use and the date of transaction, prices of sales of similar lands in the neighbourhood and locality, the more appropriate comparable lot would be the taxpayers. Thus, the Government valuer had used the wrong comparable for the Second Subject Lot and in this regard, the High Court had erred for the same reasons as stated above.

Conclusion

The Court of Appeal’s decision is much welcomed, as it reminds us that an aggrieved taxpayer is not left without any recourse. When a stamp duty assessment is arbitrarily raised by the Collector, the said assessment can be challenged especially when an error of law has been committed by the Collector. Whilst the Collector has the power to collect stamp duty from taxpayer, the Collector shall not arbitrarily raise the assessment.

Authored by Nur Hanina Mohd Azham, an associate with the firm’s Tax, SST & Customs practice.

About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

**REIMAGINING
TAX
SOLUTIONS**