
TAX LAW

TOWER REIT: A COMMENTARY

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In the Kuala Lumpur High Court case of *Ketua Pengarah Hasil Dalam Negeri v Tower Real Estate Investment Trust* [2023] 2 MLRH 583 (this case hereinafter referred to as “**Tower REIT**”) the Respondent Taxpayer in this case (“**Taxpayer**”) was a real estate investment trust (“**REIT**”) scheme that was constituted under a principal deed dated 17 February 2006 and restated by a deed dated 29 May 2014 entered into between GLM REIT Management Sdn Bhd (GLM) acting as its manager, and AmTrustee Berhad (AmTrustee) acting as its trustee, and was regulated by the Securities Commission (“**SC**”).

The Taxpayer was assessed to real property gains tax (“**RPGT**”) by the Appellant in this case, the Inland Revenue Board Of Malaysia (“**LHDN**”), under Part II of Schedule 5 of the Real Property Gains Tax Act 1976 (“**RPGTA**”) on the gains from the disposal of 19 parcels of office units in an office building that it had acquired in two tranches, the 1st of which was on 16 October 2006 (1st tranche), and the second on 7 May 2010 (2nd tranche). The rate of RPGT levied in the assessments was the rate of RPGT prescribed for a company as provided under Part II.

Following the issuance of the assessments, the Taxpayer filed an appeal to the Special Commissioners of Income Tax (“**SCIT**”) against the Notice of Assessment (Form K) and Notice of Additional Assessment (Form KA) for the Year of Assessment (YA) 2014, both dated 11 September 2015 issued by LHDN. The decision of the SCIT was to allow the appeal by the Taxpayer stating *inter alia*

“...bahawa pelupusan aset oleh Perayu pada tarikh 29 December 2014 berkenaan tahun taksiran 2014, **kadar Keuntungan Cukai Harta Tanah adalah berdasarkan Bahagian 1 Jadual 5 Akta Keuntungan Cukai Harta Tanah 1976** [Akta];

DAN bahawa Notis Taksiran (Borang K) dan Notis Taksiran Tambahan (Borang KA) bertarikh 11 September 2015 **adalah salah dikeluarkan terhadap Perayu yang sepatutnya dikeluarkan terhadap Pemegang Amanah bagi pihak Perayu iaitu AmTrustee Berhad;**”

The LHDN, aggrieved with the SCIT's decision, filed an appeal to the High Court. The High Court was asked to consider the two main issues which were:

- (a) Whether the applicable RPGT rate on the disposal of the Asset by the Taxpayer should be based on Part II (rate levied on a disposer company – which was the rate levied in the assessments in question by the LHDN) or Part I (for all other cases not falling under Part II and III) of Schedule 5 of the RPGTA in force for the YA 2014; and

(b) Alternatively, whether the Notice of Assessment (Form K) and Notice of Additional Assessment (Form KA) for the YA 2014 dated 11 September 2015 were wrongly issued against the Taxpayer when they ought to have been issued to AmTrustee Berhad as trustee for the Taxpayer under the REIT?

In addressing the first issue, the High Court asked itself the question, "is a trust a company"? As the REIT was formed and regulated under the provisions of the Capital Markets and Services Act 2007 ("**CMSA**") and the Guidelines on REIT issued by the SC, the Court decided that it is a trust of which the trustee is AmTrustee with GLM REIT Management Sdn Bhd acting as the management company of the Taxpayer. Therefore, the Court held that the Taxpayer does not fall into the category of a company, and is merely a unit trust scheme which cannot exist independently without a trustee, a management company, and beneficiaries.

The Court also noted that the LHDN itself does not recognise a REIT to be a company pursuant to para 4 of Public Ruling 2/2015 which states that "...a REIT/PTF is not a company but a trust body...". In essence, the High Court was of the view that the SCIT had correctly held that the disposal of the Asset should be based on the RPGT rate prescribed under Part I Schedule 5 of the RPGTA, the rate which is reserved for all other disposers who do not fall under Part II (companies) or Part III (non-citizens or non-permanent residents).

In answering the second question, the Court turned to the RPGTA. Relying on the provisions of section 6, and paragraph 8 of Schedule I of the RPGTA, the Court held that, when trust assets are disposed, the person chargeable to tax for the disposal is the trustee. Furthermore, under paragraph 35(1) of Schedule 2 of the RPGTA it provides that "where an asset is an asset of a trust or partnership, then in whatever persons the ownership of the asset is vested, any acquisition or disposal of the asset shall be treated as an acquisition or disposal by the trustee..., and any gain or loss in respect of a disposal shall be assessed on or attributed to the trustee or the partnership."

This effectively means that the LHDN had mistakenly assessed the Taxpayer for the disposal when it should have taxed AmTrustee Berhad instead. In light of the above findings, the High Court dismissed the LHDN's appeal.

Commentary:

The Tower REIT case, despite not being that complex in its issues, is nevertheless an important milestone in tax law in Malaysia. Prior to the decision in the case, it had been unclear as to how the LHDN would levy RPGT on a REIT entity in its disposal of real property. The High Court's decision effectively means that Part II (as it stood then) would only be applicable to a company.

The RPGTA has since been amended to state that Part II of Schedule 5 of the RPGT Act specifies the rates of RGPT applicable to companies incorporated in Malaysia, trustees or societies registered under the Societies Act 1966. The provision now reads as follows:

"PART II

In the case where the disposer is a company incorporated in Malaysia or a trustee of a trust or body of persons registered under any written law in Malaysia the following rates of tax shall apply:"

The other relevant impact of this case is that the LHDN will have to re-examine its hitherto practice of issuing notices of assessment to REITs in cases of taxation under the RPGTA. The Court held that the correct party to be addressed is the REIT's trustee companies. This decision may also have an impact on past assessments already issued by the LHDN in the REIT's name as such assessments may be subject to appeal by the taxpayer. However, it is to be noted that the LHDN has filed an appeal against the High Court decision to the Court of Appeal and we await further developments.

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