NEW BOUNDARIES IN TAX LAW:
Capital Allowance For Car Park, RPGT v Income Tax & Compulsory Land Acquisition

This edition analyses four recent landmark tax decisions, which featured our tax lawyers, Datuk D.P. Naban, Mr S. Saravana Kumar and Ms Siti Fatimah Mohd Shahrom as the taxpayers’ counsel.

Case 1: Capital Allowance For Car Park
*Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd* (2012) (Court of Appeal)

Facts:

The taxpayer carried on the business of car park operation. By an agreement dated 1 October 1984, the taxpayer entered into a lease agreement with the Penang Development Corporation (“PDC”) pursuant to which the taxpayer leased a piece of land from PDC for a period of 30 years. The terms of the lease agreement required the taxpayer to erect a multi-storey car park on the land known as “Komtar’s Car Park”.

The taxpayer expended a sum of RM10,064,676.00 on the construction of the car park. The multi-storey car park in question was constructed under a privatisation scheme of PDC, and the privatisation contract between PDC and the taxpayer provided, among other matters, that the taxpayer shall ensure that the multi-storey car park was primarily used as a car park, the sole purpose and function of which shall be to service the users and occupiers of Kompleks Tun Abdul Razak.

On 11 August 1998, the Revenue issued notices of additional assessment disallowing the taxpayer’s capital allowance claim on the car park. The taxpayer disputed the Revenue’s additional assessment on the ground that the construction of the multi-storey car park should qualify for capital allowance under Schedule 3 of the Income Tax Act 1967 (“the Act”).

Issue:

Whether the purpose built car park is a plant in the course of the taxpayer’s business and thus, whether it qualifies for capital allowance?
Decision:

It was not disputed that the words “machinery” and “plant” are nowhere defined in the Act. However, the categories of what constitutes “machinery” or “plant” are not closed and the matters listed in subparagraphs (1)(a), (b) and (c) of paragraph 2 of Schedule 3 of the Act merely elaborate what those words encompass without restricting their scope only to the items stated therein. The meaning to be given to the word “plant” is a question of law and the Court of Appeal adopted the following test formulated in *Yarmouth v. France* [1887] QBD 647 for determining if an item qualified as “plant”:

“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: see Blake v. Shaw.”

The Court of Appeal explained that it was mindful of the following passage from *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd* [1982] 2 All ER 230 which served as an apt reminder that in considering what constitutes a “plant”, due consideration must be given to the particular industry concerned as well as the specific circumstances of the individual taxpayer’s own business:

“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: see Blake v. Shaw.”

In the present case, the taxpayer constructed the multi-storey car park pursuant to a privatisation agreement with PDC. The terms of that agreement conferred on the 30 year lease of the land for the sole purpose of erecting a multi-storey car park to be used primarily as a car park to service the users and occupiers of Kompleks Tun Abdul Razak. The agreement also dictated that the multi-storey car park is to be built in accordance with the plans drawn up by PDC’s architects, engineers and consultants. The agreement bestowed the taxpayer the right to operate the multi-storey car park for the duration of the lease and to
thereafter surrender the building and land to PDC upon expiry of the lease.

From the terms of the lease agreement, it was not disputed that the taxpayer’s business was providing a car park for the users and occupiers of Kompleks Tun Abdul Razak. The taxpayer’s income or revenue was derived from the provision of bays to the users and occupiers of Kompleks Tun Abdul Razak to park their vehicles. Without the multi-storey car park, the taxpayer could not have generated an income from the land since the lease agreement expressly restricts the use to which the taxpayer may put the land.

The multi-storey car park was also clearly not part of the taxpayer’s stock in trade. It was not something the taxpayer purchased or constructed for sale. It was something that the taxpayer used permanently for his business – at least for as long as the lease subsists. In this regard, the Court of Appeal commented that more was not needed to then conclude that the multi-storey car park was in fact an apparatus or tool the taxpayer used for carrying on its business.

The test of what passes as a ‘plant’ in Yarmouth v. France (supra) was coined in a general fashion to give the word the widest possible sense whereby the Court then had the foresight that a whole host of considerations must be taken into account in determining what was a ‘plant’ in any given set of facts. A restrictive meaning assigned to the word would have disastrous consequences to business enterprise and economic activity since the tools or apparatus of a business man for carrying on his business undergo constant changes with passing time and advancing technology.

According to the Court of Appeal, there was thus clearly a need to take a holistic approach in every case and look at the taxpayer’s business in its entirety instead of taking particular facts in isolation. There was a need to refrain from viewing the taxpayer’s business in a fragmented fashion when determining whether an apparatus was a ‘plant’. An excellent illustration could be found in the case of Leeds Permanent Building Society v. Proctor (Inspector of Taxes) [1982] STC 821 where the taxpayer put up some advertisement screens in the windows of the taxpayer’s branch offices. The General Commissioners decided that the advertisement screens did not perform any business function but on appeal, the English High Court held that the advertisement screens were plant. The Court found that the advertisement screens were part of the apparatus employed in the commercial activities of the taxpayer’s business.

It follows that the multi-storey car park that the taxpayer constructed in this case cannot be discounted as a plant solely on account of the fact that it was a large structure that can be characterised as a building. The taxpayer was a car park operator; that was its business in line with the terms of the lease agreement with PDC. In order to carry on this business, the taxpayer was required by the same agreement to construct the multi-storey car park. Once constructed, it was to be used to service the users and occupiers of Kompleks Tun Abdul Razak. The
multi-storey car park was an essential component of the taxpayer’s business without which the taxpayer could not have generated its revenue. In the circumstances, the Court of Appeal unanimously ruled that the Revenue’s appeal was to be dismissed with cost.

The Revenue had recently withdrawn its application for leave to the Federal Court to challenge the decision of the Court of Appeal.

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Case Study 2: RPGT v Income Tax
Ketua Pengarah Hasil Dalam Negeri v Gracom Sdn Bhd (2013) (High Court)

Facts:

The taxpayer was incorporated on 11.7.1988. Under its Memorandum and Articles of Association, the principal activity of the taxpayer, amongst others, was an investment holding company. On 23.10.1989, the taxpayer purchased 2 parcels of land registered as H.S.(D) 86910 (No. PT 97) and H.S.(D) 86911 (No. PT 98) from S Resort (M) Bhd. The 2 parcels of land were part of Master Title G 28578, Lot 13567, Mukim Damansara, Selangor. On 15 December 1995, the taxpayer had sold the land held under No. PT 97 to H Dinamis Sdn. Bhd. and the land held under No. PT 98 to S Sdn. Bhd. On 11.4.2000, the Revenue raised a notice of additional assessment for income tax (“Borang JA”) for the year of assessment 1997 for the sum of RM8,540,810.70 against the taxpayer for the gains made from the disposal of the two parcels of land. On 21.9.2007, the taxpayer’s tax consultants filed a notice of appeal to the Special Commissioners Of Income Tax (“Form Q”) against the notice of additional assessment for income tax dated 11 April 2000 on behalf of the taxpayer.

The taxpayer’s witness (AW1) said in evidence that he had retired from S Consolidated Berhad as its Director of Business Development in 2010. He said the taxpayer was part of P (Malaysia) Sdn Bhd which was the ultimate holding company of S Consolidated Berhad. Between 1997 and 2003, AW1 was a Director of the taxpayer. Between 1989 and 1999, AW1 was also the Senior Finance Manager in charge of OPD Sdn Bhd, one of the Master Title owners. By virtue of this, he was involved directly in the application for sub-division and development of the Master Title. The relevant testimony of AW1 pertaining to this case was as follows:

(a) The taxpayer did not purchase any other parcels of land except for the two parcels of land (namely H.S.(D) 86910 (No. PT 97) and H.S.(D)
86911 (No. PT 98)) (“the Two Parcels”), which the Taxpayer purchased as an investment.

(b) The taxpayer had consistently held the Two Parcels as “property development expenditure” items, i.e. non-current assets, in its audited accounts from the time the Two Parcels were purchased and sold. Other than holding the Two Parcels and some shares for the purposes of investment, the taxpayer did not have any other business. The taxpayer was then a dormant company.

(c) Although the audited accounts state that one of the taxpayer’s principal activities was property development, the taxpayer never undertook any such activity. In fact, even after the Two Parcels had been disposed of, the principal activity was continued to be stated to be of property development although the taxpayer owned no land.

(d) From AW1’s experience having been involved at the time the taxpayer purchased the Two Parcels and managing the various applications and AW1’s interaction with the taxpayer’s directors then, it was apparent and clear to AW1 that the taxpayer purchased the Two Parcels for investment.

(i) The value of the Two Parcels was projected to increase substantially in the future due to the up and coming infrastructure improvements in the surrounding areas;

(ii) The S Golf and C Club, which was located in the same area, was a Government initiative to set up a golf club in Kuala Lumpur to attract investors and industrialists. Given that this was a Government initiative with huge potential for success, the taxpayer was of the view that the Two Parcels were lucrative investments; and

(iii) The Two Parcels were strategically located near the then international airport, Lapangan Terbang Subang.

For the reasons above, the taxpayer purchased the Two Parcels for the purposes of investment.

(e) The taxpayer took no steps to develop the Two Parcels. In fact, nothing was done by the taxpayer to exhibit such intention. The taxpayer was only interested in capital appreciation. This was evident from the fact that the taxpayer had consistently held the Two Parcels as “property development expenditure” items, i.e. non-current assets, in its audited accounts from the time the Two Parcels were purchased and until it was sold. If the taxpayer had intended to develop the Two Parcels, it would have held the Two Parcels as current assets.
(f) AW1 was clear about the taxpayer's intention and purpose, which was to hold the Two Parcels as investment, as besides being the taxpayer's director between 1997 and 2003, AW1 was also the officer in charge of the taxpayer's financial affairs for the years 1994 and 1995. Further, AW1 was also employed by the vendor's then ultimate holding company at the time the Taxpayer purchased the Two Parcels. The taxpayer's intention to hold the Two Parcels as an investment was present from the time it was purchased up until the time the Two Parcels were sold off. There was no change of intention and the taxpayer took no steps to develop the Two Parcels.

(g) The taxpayer did not hold a developer's licence. Undertaking such development activities without a developer's license amounts to an offence and one would be subjected to various civil and criminal sanctions. The taxpayer had no experience in property development. From corporate and financial perspectives, it would have been much easier and efficient to use an existing subsidiary that was in property development to purchase the Two Parcels if the intention was to develop the Two Parcels. This was because the existing subsidiary would have the necessary licenses and permits from the local authorities and professional bodies to undertake the development on the Two Parcels. Prior to the disposal of the Two Parcels, the taxpayer was a loss-making company and with a record like this, the taxpayer could not undertake property development. The taxpayer also had no income whatsoever. With such financial record, it was impossible for the taxpayer to obtain the necessary approvals from the authorities and gain public confidence to undertake property development. No one would take the taxpayer seriously.

(h) At the time of purchase, the Two Parcels were classified as agriculture land and it remained so until the Two Parcels were sold. The taxpayer did not make any application to convert the status of the Two Parcels or to subdivide the Two Parcels. The taxpayer did not engage a surveyor to survey the Two Parcels. Further, the taxpayer did not make any plan for irrigation and draining on the Two Parcels. The taxpayer did not take any effort to level or clear the Two Parcels and did not employ any engineer, architect or contractor. The taxpayer was not a property developer as the Taxpayer did not do anything to the Two Parcels and did not even submit any plan to the authorities or engage consultants to exhibit intention to develop the land.

(i) The taxpayer sold the Two Parcels on 15 December 1995. At the time the Two Parcels were sold, the Taxpayer was owned by D Sdn Bhd, which was owned by P (Malaysia) Sdn Bhd. Sometime in 1995, P conducted a group restructuring exercise in view of strengthening S Consolidated Berhad's position for public listing purposes. In giving effect to this
exercise, the taxpayer was required to sell the Two Parcels to S Sdn Bhd’s subsidiaries, namely H Dinamis Sdn Bhd and Se Sdn Bhd. Further, since the Two Parcels had appreciated in value, the taxpayer thought it would be a good time to realise the investment. The Two Parcels remained agriculture land in terms of status and remained untouched since it was first purchased by the taxpayer. The nature and character of the Two Parcels at the time of the sale remained the same as how it was at the time the taxpayer purchased it. The taxpayer did not pay the premium as it never intended to change the nature of the land. But for the group restructuring activity, the taxpayer would not have sold the Two Parcels.

(j) The taxpayer did not appoint any broker or agent to sell the Two Parcels as the taxpayer was not trading in land. The taxpayer kept the Two Parcels for six years. The Two Parcels were meant as an investment and thus, the taxpayer did not do anything to mature the Two Parcels. The taxpayer wanted the Two Parcels to be an investment only. The taxpayer took no steps at all to develop the Two Parcels or commence the business of property development.

Accordingly, the taxpayer contended that the Two Parcels were held as investment and thus, the gains arising from the disposal of the Two Parcels were not subject to income tax. Meanwhile, the Revenue argued that the taxpayer was a property development company, which therefore meant that the gains from the disposal of the two parcels were business income. According to the Revenue, there was profit seeking motive by the taxpayer at the time of the acquisition of the said land since it was foreseeable that various development steps would be undertaken by the Government to develop the area.

**Issue:**

Whether the gains from the disposal of the 2 parcels of land were trading receipts and taxable under Section 4(a) of the Income Tax Act 1967 as business income or capital receipts and taxable under the Real Property Gains Tax Act 1976?

**Decision:**

In order to resolve this issue, The Special Commissioners of Income Tax ("Special Commissioners") held that it was necessary to determine the intention with which the taxpayer acquired the subject land. The intention of the taxpayer must be judged against the background of its acts and conduct and the circumstances of the case. The question whether a profit realised on the sale of real estate is a realisation or change of investment or an act done in the carrying
on of a business is to be determined in the light of the facts in each case. The intention must be shown to have existed at the time of the acquisition of the asset. It was also of critical importance to note that the intention must amount to an intention in law. Based on this and the facts highlighted above, the Special Commissioners found that when the taxpayer acquired the subject land, its intention was for investment.

According to the Special Commissioners, the intention must be shown to have existed at the time of the acquisition of the asset. In this respect reference may be made to *Lower Perak Co-operative Housing Society Bhd. v. DGIR* (994) 2 MLJ 713 where Edger Joseph Jr S.C.J. referred to the judgment of *Lord Wilberforce in Simmon v. IRC* (1980) STC 350 as follows:

“One must ask, first what the Commissioners were required or entitled to find. Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further question: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intention may be changed. What was first an investment may be put into the trading stock, and, I suppose, vice versa. If finding of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company’s accounts, and, possibly, a liability to tax (of Sharkey (Inspector of Taxes) v. Wernher (1955) 2 All ER 493; (1956) AC 58). What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other, even though, and this seems to be legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely, that situations are open to review.”

The Special Commissioners added that it is also of critical importance to note that the intention must amount to an intention in law. On the proper meaning of an intention in law reference may be made to *Cunliffe v. Goodman* (1950) 1 All ER 720 referred to by Edger Joseph Jr S.C.J. in the *Lower Perak case* where Asquith L.J. said at p. 724:
“An ‘intention’ to my mind connotes a state of affairs which the party ‘intending’ - I will call him X - does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decided, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition. X cannot, with any due regard to the English Language, be said to ‘intend’ a result which is wholly beyond the control of his will. He cannot ‘intend’ that it shall be a fine day tomorrow. At most he can hope or desire or pray that it will. Nor, short of this, can X be said to ‘intend’ a particular result if its occurrence, though it may not be wholly uninfluenced by X’s will, is dependent on so many other influences, accidents, and cross currents of circumstances that not merely is it likely not to be achieved at all, but if it is achieved, X’s volition will have been no more than a minor agency collaborating, with, or not thwarted by, the factors which predominately determine its occurrence.

... This leads me to the second point bearing on the existence in this of ‘intention’ as opposed to mere contemplation. Not merely is the term ‘intention’ unsatisfied if the person professing it has too many hurdles to overcome or too little control of events; it is equally inappropriate if at the material date the person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile. A purpose so qualified and suspended does not, in my view, amount to an ‘intention’ of ‘decision’ within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision.”

Accordingly, the Special Commissioners unanimously held that when the taxpayer acquired the Two Parcels, its intention was for investment based on the following:

(a) The taxpayer acquired the Two Parcels due to its strategic location i.e. near the international airport, Lapangan Terbang Subang and the S Golf and C Club. The value of the land was also projected to increase substantially in the future due to the up and coming infrastructure, and improvement in the surrounding areas.

(b) As testified by AWI, the taxpayer’s ultimate holding company P Group had intended, amongst other, that the taxpayer hold the Two Parcels as investment, which is consistent with the taxpayer’s principal activity as an investment holding company, as per the Memorandum and Articles of Association.
(c) The Two Parcels were consistently held as non-current assets item in the taxpayer’s audited accounts and the taxpayer’s auditors agreed to this treatment after making their due inquiry.

(d) The taxpayer held the Two Parcels for almost 6 years before disposal. This was further evidence of its intention to hold the subject land for investment.

(e) As testified by AW1, the taxpayer did not have the finance, relevant experience and expertise, necessary licenses such as a developer’s licence for example to undertake property development activities. Apart from acquiring the Two Parcels and after their disposal, the taxpayer did not acquire any other land way before as well as after their acquisitions and sale, nor dealt in the business of real estate. This was further evidence of the taxpayer’s intention to hold the Two Parcels as investment before their disposal.

(f) The disposal of the Two Parcels was triggered by the taxpayer’s ultimate holding company’s group restructuring exercise, otherwise the taxpayer would have retained the land, as per AW1’s testimony that was not challenged or contradicted.

(g) The taxpayer did not make any alteration or improvement to the Two Parcels to enhance their marketability. In fact the character or quality of the land had never been changed. For instances, the Two Parcels remained as “agricultural land” on the day it was purchased and later sold; the Taxpayer did not level or clear the land; the Taxpayer did not make any application to convert the status of the land nor made any application to sub-divide the land; no surveyor was engaged to survey the land; nor did the taxpayer submit any development plans or proposal in respect of the land. The land remained in their pristine, untouched state from the date of purchase till the date of their disposals. This was strong evidence of the taxpayer’s intention of holding them for investment purposes, as AW1’s testimony pertaining to the above was not challenged or contradicted.

(h) The Revenue’s contention regarding the accounting treatment can best be answered as follows. In the light of the facts and circumstances of this case, given that there was no frequency of transactions, no physical enhancement to the land, no organised effort to promote sale, the plausible but unchallenged reason stated by AW1 to smooth the way for the public listing of S Consolidated Bhd. etc, the accounting treatment did not alter the nature of the transactions.
The High Court upheld the Special Commissioners’ decision and ordered the notice of additional assessment for income tax to be discharged. The Revenue did not appeal to the Court of Appeal against the High Court’s decision.

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Case Study 3: Compulsory Land Acquisition

*Ketua Pengarah Hasil Dalam Negeri v Metacorp Development Sdn Bhd* (2013) (Federal Court)

**Facts:**

This was a judicial review application by the taxpayer seeking for:

(a) A Declaration that the Revenue was bound by and shall give effect to the decisions of the Supreme Court in *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 and the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 2 CLJ 835, which held that gains arising from the compensation for compulsory acquisition of land are not subject to income tax as the element of compulsion vitiates the intention to trade; and

(b) An Order of Certiorari to quash the decision of Revenue to raise notices of additional assessment dated 9 December 2009 for the years of assessment 2004 and 2005 against the taxpayer as the Revenue had acted *ultra vires* and without any factual or legal basis in raising the said notices.

The taxpayer was a property developer. In 1994, the taxpayer purchased two parcels of land in Mukim Ayer Keroh, Melaka. On two different occasions, one on 31.10.2003, and another on 26.10.2004, the State Government of Malacca issued notices of award and offered compensation pursuant Section 16 of the Land Acquisition Act 1960 to compulsorily acquire the taxpayer’s land. The taxpayer received the compensation but did not subject the compensation to income tax. The Revenue issued notice of additional assessment with penalty for years of assessment 2004 and 2005. The taxpayer did not appeal against the assessment to the Special Commissioners of Income Tax in accordance with Section 99 of the Income Tax Act 1967. Instead, the taxpayer filed for a judicial review and had obtained leave from the High Court on 6.1.2010.
Issue:

Whether the gains arising from the compulsory for land acquisition were subject to income tax?

Decision:

The main issue of contention was whether or not the gains arising from the compensation for compulsory acquisition of the taxpayer’s land were subject to income tax under the law. The contention of the taxpayer was based on the decision of the Court of Appeal in Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd [2006] 2 CLJ 835 which held that the compulsory acquisition of land could not constitute a sale. Taking the position that profits derived from the compensation paid to the taxpayer on account of compulsory acquisition of the land was not profit that arises from taxpayer’s business. The superior Courts in Penang Realty Sdn Bhd (supra) and Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 had held that compensation for compulsory acquisition of land was not subject to income tax. The principle established in those two cases was based on the premise that the element of compulsion vitiates the intention to trade. The general law and the law on income tax, requires that a sale must be consensual. It must be based on one’s own free will. Thus, since gains derived from compensation paid to the taxpayer were on the account of compulsory acquisition, it was not profit arising out of the taxpayer’s business activity.

For this reason the taxpayer submitted, the Revenue’s decision which based on the Decision Impact Statement (“DIS”) was clearly without any legal authority. The DIS was defective and the Revenue in issuing and relying on the DIS had acted ultra vires. It also attracted a constitutional issue under Article 96 of the Federal Constitution which provides that “no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law”. The DIS had no legal effect and cannot override the decisions of the superior courts. Since the DIS was not issued pursuant to any power given by law, it had no force of law relying on the decision in Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121 and Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors [1979] 2 MLJ 224.

The High Court added that matters of tax involve inter alia, balancing the need of the Government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessment brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessment may be influenced by the target to be achieved rather than the correctness of the assessment.
According to the High Court, upon examining the decision of the Court of Appeal in *Penang Realty*, it was clear that the facts of that case that were relevant to the present case.

The decision of the High Court was unanimously affirmed by the Court of Appeal. The Revenue’s application for leave to appeal to the Federal Court was unanimously dismissed by the Federal Court.

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**Case Study 4: Interest Against The Revenue**  
*Ketua Pengarah Hasil Dalam Negeri v Pelangi Sdn Bhd*  
(2012) (Federal Court)

**Facts:**

The taxpayer was a property developer and in 2008, the taxpayer received compensation for the compulsory acquisition of its land. It did not subject the compensation to income tax following the decisions in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 2 CLJ 835 and *Lower Perak Cooperative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540.

The Revenue disregarded the decisions in *Penang Realty* and *Lower Perak* and relied on its Decision Impact Statement and subjected the compensation to income tax. Accordingly, the taxpayer filed a judicial review application on 17.2.2011 and was granted leave by the High Court on 8.4.2011. On 22.8.2011, the High Court held that:

(a) The Revenue was bound by the decisions in *Penang Realty* and *Lower Perak*.

(b) The Revenue’s Decision Impact Statement had no legal effect.

(c) The Revenue’s decision to subject the compensation shall be quashed.

(d) The Revenue was to refund the taxes unlawfully collected and retained with interest at 4% per annum to the taxpayer.
Issue:

Whether the High Court may award interest against the Revenue?

Decision:

The High Court held that the cases cited by the taxpayer illustrated clearly that the High Court was vested with discretion to impose interest payment as compensation under Section 11 of Civil Law Act 1956. According to the High Court, this position was affirmed in a number of Federal Court decisions. Interest is awarded in the nature of compensation to remedy the aggrieved party whose money has been unlawfully deprived by the other party. In the circumstances of the case, the High Court ordered the Revenue to pay interest to the taxpayer on the sum unlawfully retained by the Revenue from date of the Revenue’s decision.

The High Court observed that the position of Revenue in such a situation, which was conferred with coercive power of the state, having the benefit of a massive interest free loan as fruit of an unlawful action. Reference was made to the House of Lords’ decision in Woolwich Building Society, where the concept of unjust enrichment or unjust benefit was considered in awarding interest to the taxpayer. The High Court commented that the House of Lords observed that it was unacceptable to deny interest to a taxpayer especially when the taxpayer had paid large sums of money to the Revenue based on invalid regulations and retained free of interest, pending a court decision.

In the present case, the Revenue had subjected the gains arising from the compensation for compulsory acquisition of land to income tax despite the decisions of the superior Courts. As the tax unlawfully retained by the Revenue was at all material times rightful money belonging to the taxpayer, the High Court ordered the Revenue to return the retained tax to the taxpayer with interest of 4% running from the date of the Revenue’s decision to unlawfully retain the tax.

The decision of the High Court was unanimously affirmed by the Court of Appeal. The Revenue’s application for leave to appeal to the Federal Court was unanimously dismissed by the Federal Court.

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