

 Court of Appeal, Putrajaya

 March 1, 2021

 Legal Department, IRBM

LANDMARK DECISION : THE APPLICATION OF PARA. 34A SCH. 2 OF REAL PROPERTY GAINS TAX ACT 1976 TO DISPOSAL OF SHARES IN DEVELOPER COMPANIES

**CONTINENTAL CHOICE SDN BHD &
CB VENTURES SDN. BHD**

v.

DIRECTOR GENERAL OF INLAND REVENUE

Keywords: Interpretation of Paragraph 34A Schedule 2 Real Property Gain Tax Act 1967 (RPGTA) – Real Property Company (RPC) – Real Property Company Shares

JUDGES

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The Court of Appeal had delivered a landmark decision on 1st March 2021 on the issue of whether the disposal of shares in a developer company will attract tax under Paragraph 34A Schedule 2 of RPGTA when the property had been held by that company as stock in trade.

The Special Commissioners of Income Tax (SCIT) had allowed the taxpayers' appeal but the said decision was later overturned by the High Court and subsequently affirmed by the Court of Appeal.

The taxpayers had argued that the decision of the High Court in *Binastra Holdings Sdn. Bhd. v. KPHDN* [2001] 5 MLJ 481 ought to be followed because it was the only decision where written grounds were made available in respect of the interpretation of paragraph 34A.

It was contended that despite the fact that the Court of Appeal had overturned the the High Court decision in *Binastra*, the High Court decision remains a binding authority and its precedent value is not diminished. In the absence of the Court of Appeal's written grounds, the High Court's decision remained as good law and the weight of its decision was unaffected.

The taxpayers further contended that Paragraph 34A Schedule 2 of the RPGTA must be given a purposive interpretation which is in line with the Parliament's intention of inserting paragraph 34A to the RPGTA. Hence Bioford is not a real property company according to paragraph 34A Schedule 2 of the RPGTA.

In response, the Head of Revenue Solicitor, Dr. Hazlina Hussain argued that paragraph 34A of Schedule 2 of RPGTA should be read strictly as the law is clear and unambiguous. Thus, there is no necessity to go beyond the plain wordings of the provision or launch an investigation to discover the Parliament's intention by referring to the Explanatory Statements as an aid of construction.


The panel of judges led by Datuk Hanipah Farikullah, JCA unanimously dismissed the appeal with costs. The decision of the panel are as follows:

"This is our unanimous decision. We are satisfied that paragraph 34A of Schedule 2 of RPGT does not make any distinction between land held as a stock in trade or capital asset. Consistent with the purpose of the legislation, the intention of the Parliament is to impose real property gains tax on disposal of shares in real property company as defined, regardless of whether the real property held by company is a capital asset or stock in trade. Based broadly on the above reason, the appeal is dismissed, and the decision of the High Court is affirmed."

Editorial Note:

The decision of the Court of Appeal had put the final nail in the coffin on the long contentious issue of the application of paragraph 34A Schedule 2 of RPGTA, as the Court of Appeal had affirmed that paragraph 34A Schedule 2 of RPGTA is clear and unambiguous and would be applicable so long as the disposal of shares is the disposal in a company that falls within the definition of RPC. This decision is thus consistent with the Court of Appeal Order in the Case of Binastra Holdings Sdn. Bhd (Mahkamah Rayuan Rayuan Sivil No. W-01-80-05).

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