BEVERLY TOWER DEVELOPMENT SDN BHD
v.
KETUA PENGARAH HASIL DALAM NEGERI

High Court Malaya, Kuala Lumpur
Noorin Badaruddin J
[Civil Appeal No: WA-14-33-06-2020]
10 August 2022

Revenue Law: *Income tax — Property tax — Appeal against order of Special Commissioners of Income Tax ("SCIT") which held that gains from disposal of 50 apartments were trading receipt, not capital receipt — Whether derivation of rental income signified that property was investment property — Whether capital receipt — Whether character of subject property could be changed from stock to investment — Whether SCIT erred in decision — Whether principle activity of appellant was property development or investment — Whether penalty imposed justified — Whether good faith defence available*

The appellant purchased commercial lands to develop a residential project, including two residential towers and classified them as current assets in the financial statements of year end ("YE") 2003. In its 2003 Financial Statement, the appellant declared property development as its principal activity. Between year of assessment ("YA") 2003 and 2009, the appellant sold 587 units of said apartments and declared gains under Income Tax Act 1967 ("ITA"). 50 apartment units remained unsold. In 2006 and 2007, the appellant entered into interior design and renovation contracts for the 50 apartment units, respectively. After that in 2008, the appellant also engaged management and leasing services with respect to 46 out of 50 apartment units. Consequently, in the financial year 2008, the appellant reclassified its assets by putting the 50 apartment units from inventories to investment properties. The appellant had claimed all the development costs in tax computation for YA 2003-2006 without any split. Under the sales and marketing expenses in its income tax statement for YE 2009, the appellant claimed "marketing & selling Expense (50 units)" as the expenditure incurred for marketing and selling the 50 apartment units. In 2010, the appellant sold the 50 apartment units and entered into a supplementary agreement to sell the units to end purchasers with a guaranteed rental return of 6% per annum. The respondent conducted a tax audit in 2016 and held that the gains from the disposal of 50 apartment units were trading receipt taxable under the ITA and also imposed 45% penalty. The appellant filed an appeal before SCIT which was disallowed. Thereafter the appellant filed the instant appeal before the High Court.

Held (dismissing the appellant's appeal):

(1) The appellant failed to prove that the subject lands were intended for the purpose of investment from the very beginning. The appellant had treated the

50 units as its stock in trade from day one. Until the Financial Statements for YE 2009, there was no evidence that the 50 apartment units were intended to be an investment and the principal activity of the appellant was property development. (paras 47, 53, 54 & 72)

(2) The 50 units were the appellant's business income under s 4 of the ITA. Reclassification in the financial statement of YE 2008 did not signify any change of intention on the part of the appellant. There was no record of the company's minutes or the resolution of board meetings supporting the appellant's intention to retain the 50 units for investment. Before the 50 units could change their character to investment, the appellant should have exercised withdrawal of stock under s 24 of the ITA. (paras 45, 56 & 77)

(3) The derivation of rental income did not *ipso facto* mean that the property was an investment property. (para 57)

(4) In absence of supporting evidence, the statement regarding the appellant's original intention remained inconclusive. Therefore the SCIT had not erred in pointing out that the "original intention" claimed by the appellant was not proven. (para 71)

(5) The gains from the sale of the 50 apartment units were taxable under the ITA. The sales list and the option agreement did not reflect the intention of the appellant to hold the 50 apartment units for purpose of investment. (paras 39 & 92)

(6) In imposing the penalty, the respondent correctly exercised the discretion under s113(2) of the ITA. Good faith defence for incorrect return was not accepted in the case because a substantial amount of tax revenue would have been lost. (paras 96 & 101)

Case(s) referred to:

ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri [2005] 1 MLRA 714 (refd)

AS Sdn Bhd v. Director General Of Inland Revenue [1991] 1 MSTC 434 (refd)

Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 MLRA 757 (refd)

Director-General Of Inland Revenue v. Lahad Datu Timber Sdn Bhd [1977] 1 MLRA 246 (refd)

E v. Comptroller-General Of Inland Revenue [1970] 1 MLRA 92 (refd)

GRA Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] MTSC 10-038 (distd)

I Investment Ltd v. Comptroller-General Of Inland Revenue [1975] 1 MLRA 669 (refd)

Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [Rayuan Sivil No W-01(A)-295-08-2016] (refd)

Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal [2006] 1 MLRA 585 (refd)

Ketua Pengarah Hasil Dalam Negeri v. Promet (Langkawi) Resorts Sdn Bhd [2010] 3 MLRH 330 (distd)

Leeming v. Jones [1930] 1 KBD 279 (refd)

Luxor Network Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLRH 153 (refd)

Mount Elizabeth (PTE) Ltd v. The Comptroller of Income Tax [1986] 2 MLRH 297 (folld)

Mount Pleasure Corp Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1997] 2 MLRH 524 (refd)

Mr Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2004] 2 MLRH 639 (refd)

NFY Realty Sdn Bhd v. Comptroller Of Inland Revenue [1974] 1 MLRH 39 (refd)

P Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1995] 2 MSTC 2392 (refd)

Perak Construction Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2001] 3 MLRH 763 (distd)

Pickford v. Quirke (13 TC 251) (refd)

Sri Binaraya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [Rayuan Sivil (2016) MSTC 1J30-130] (refd)

Simmons (As Liquidator of Lionel Simmons Properties Ltd) v. Inland Revenue Commissioners [1980] 2 All ER 798 (refd)

Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2014] MLRAU 193 (refd)

Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] MLRHU 221 (refd)

Teoh Chai Siok v. Director General Of Inland Revenue [1981] 1 MLRA 608 (refd)

The CIR v. The Forth Conservancy Board 16 TC 103 (refd)

UHG v. Director General Of Inland Revenue [1974] 1 MLRA 494 (refd)

Legislation referred to:

Income Tax Act 1967, ss 2(1), 4(a), 24(2), 113(2)

Counsel:

For the appellant: S Saravana Kumar (Sophia Choy, Yap Wan Hui & Athena Yu Yun Lei with him); M/s Rosli Dahlan Saravana Partnership

For the respondent: Normareza Mat Rejab (Syazana Safiah Rozman with her); Senior Revenue Counsel

JUDGMENT

Noorin Badaruddin J:

[1] This is an appeal filed by the appellant against the decision of the Special Commissioners of Income Tax ("SCIT") dated 29 May 2020 who

had unanimously disallowed the appellant's appeal against the respondent's decision to challenge the notice of assessment dated 30 December 2016 which resulted in a tax liability of RM15,292,007.40.

Facts

[2] The appellant was incorporated on 6 April 2001. The appellant's Memorandum and Articles of Association ("M&A") empowers the appellant to among others, deal in land and be a housing developer.

[3] On 18 July 2002, the appellant purchased two pieces of commercial land at Jalan Pinang, Kuala Lumpur from Tiger Properties (Malaysia) Sdn Bhd for RM70,000,000.00 ("the two lands"). The purpose is to develop on the two lands the Marc Service Residence project, an upmarket service apartment which consists of two tower blocks (Tower A and Tower B) ("the Project") located in Kuala Lumpur City Centre ("KLCC").

[4] The two lands for the Project were classified under current assets in the appellant's Balance Sheet in its Financial Statements for Year Ending ("YE") 31 December 2003.

[5] On 10 July 2003, the appellant entered into a Concessional Facility Agreement with Kingsize Management Limited (appellant's direct shareholder) ("Kingsize") to finance the development of the Project.

[6] The amount received was USD6,320,000.00 (interest free) and as consideration, the appellant shall pay to Kingsize 100% of balance of profit of the Concessional Facility. The shared profit derived from the Project, is inclusive of the sale from 50 service apartments (the impugned units hereinafter referred to as the "50 apartment units"). Needless to say, the Project was a flagship project of the appellant located in a strategic location in a prime area.

[7] On 14 August 2003, the appellant entered into an Option Agreement with Skyboost Investments Ltd ("SI") to grant SI a call option to purchase all the apartment units in Tower A, except 18 units located at levels 25 and 26. The Option Agreement does not include any units from Tower B (32 units from Tower B were sold to LaBelle.)

[8] The appellant declared in its Financial Statement ending 31 December 2003 that its principal activity is property development. There was no mention of property investment.

[9] Construction for the Project commenced in 2004 and completed in 2007. Sale of Tower A was launched in 2003 and Tower B in 2004.

[10] Between the Year of Assessments ("YA") 2003 and 2009, the appellant had sold 587 units of the service apartment under the Project and declared the gains under the Income Tax Act 1967 ("ITA").

[11] However, the 50 apartment units of the Project remained unsold. The 50 apartment units which were unsold consist of:

a. 18 units in Tower A (Level 25 and 26); and

b. 32 Units in Tower B (Level 33, 33a and 35)

[12] The Certificate of Occupation for Tower A and Tower B was issued by DBKL on 16 June 2008.

[13] In June 2006, the appellant engaged The Box Interior Architecture (M) Sdn Bhd for interior design work for the 50 apartment units.

[14] In September 2007, the appellant entered into a Renovation Contract with Altogether Sdn Bhd for the renovation of 45 out of the 50 apartment units.

[15] On 27 February 2008, the appellant engaged Ascott International Management (Malaysia) Sdn Bhd to provide management and leasing services in respect of 46 out of the 50 apartment units.

[16] In its financial year 2008, the appellant reclassified its assets into Current Assets (Inventories) and Non-Current Assets (Investment Properties). The reclassification of Investment Properties was done due to the transfer of development costs amounting to RM27,118,690.00 (representing the costs of the 50 apartment units previously in current assets) to investment properties (non-current assets).

[17] All the development costs had been claimed in the appellant's tax computation for YA 2003 until 2006 - full claim for development costs and no split was made between units to be sold and the 50 apartment units sold to La Belle which units are now claimed as investment properties. Reclassification of the assets was done by way of prior year adjustments and it was admitted by the appellant's witness (AW2) that the adjustment was done retrospectively.

[18] On 22 October 2008, the 50 apartment units were pledged to Maybank as security for Overdraft facility.

[19] Subsequent to the disposal of the 50 apartment units, other unsold units of the Project were pledged. The appellant claimed "Marketing & Selling Expense (50 units)" under Sales & Marketing Expenses in its Income Statement for YE 31 December 2009, being expenditure incurred for marketing and selling the 50 apartment units.

[20] On 15 October 2010, the appellant sold the 50 apartment units to LaBelle Capital Limited. On the same date, a Supplementary Agreement was entered into for resale and purchase of the 50 units.

[21] Under the Supplementary Agreement, even though the 50 apartment units were sold to LaBelle, they were rented to the appellant with a guaranteed rental return of 6% to be paid until year 2013. The appellant was appointed as

an agent to sell the units to end purchasers with a guaranteed rental return of 6% per annum based on the purchase price.

[22] A tax audit was conducted in year 2016, where the respondent had made an audit finding that the gains from the disposal of the 50 apartment units are subject to income tax and not real property gains tax.

[23] On 30 December 2016, the revenue raised notice of assessment (Form J) amounting to RM15,292,007.40 for YA 2010.

The Issue Before The SCIT

[24] The issue before the SCIT was whether the gains arising from the appellant's disposal of the 50 apartment units are trading receipt taxable under the ITA or capital receipt taxable under the Real Property Gains Tax Act 1976 ("RPGTA").

Material Findings Of The SCIT

[25] The SCIT found that the gains arising from the disposal of the 50 apartment units are subject to the ITA and the panel affirmed that the imposition of 45% penalty on the appellant is correct and allowable. The material findings of the SCIT are as follows:

a. No evidence to show that the 50 apartment units were for the purpose of investment.

b. The launching brochures produced were unacceptable as it did not evince that the initial purpose of the 50 apartment units was for the purpose of investment.

c. The facts had shown that from the very beginning, the construction of the Marc Service Apartment Residence was for the purpose of trading.

d. The appellant has to pay a high distribution of profit to Kingsize ie 100% of the balance of profit. RM12 million was paid in 2012 and RM22.8 million was paid in 2011. The distribution of profit is inclusive of the sale proceeds of the 50 apartment units.

e. The appellant has an obligation to make the high distribution of profit annually to Kingsize arising from the loan.

f. The construction of Marc Service Apartment, inclusive of the disputed 50 apartment units was done for the purpose of trading and to attain high profits.

g. The Marc Service Apartment, including the disputed 50 apartment units were never intended as a real long-term investment for a long period of time. The 50 apartment units were later sold on the basis of receiving the highly profitable offer.

h. The 50 apartment units is known as "the unsold units" in the documentation for Maybank's financing facilities and were a "security" for that purpose before it was sold to LaBelle Capital Limited.

i. The 50 apartment units were sold 2 years after completion when it could still be rented out. This is inconsistent with the purpose for investment. There was no other justification for the sale of the units other than the high price offered by LaBelle Capital Limited. The Marc Service Residence is sitting next to KLCC and has a high prospect for sale.

j. Under the Sale and Purchase Agreement with LaBelle Capital Limited dated 15 October 2010, the appellant has guaranteed a rental returns of 6% per annum for 3 years.

k. This guarantee indicates an organised and planned sale of the 50 apartment units to maximise profits and attract potential buyers to offer a high price.

l. The appellant's true intention at the time of acquisition of the lands was not for investment but to trade with a view of profit. Therefore it is a business income taxable under the ITA and not RPGTA.

m. Based on the evidence of SR1, the SCIT found that the construction of Marc Service Apartment, (including the disputed 50 apartment units) was for the purpose of trading in view of higher profit. Based on the facts of the case, the 50 apartment units formed part of the appellant's 'stock in trade' as per the other units that had been previously sold.

Summary Of The Appellant's Contentions

[26] The crux of the appellant's contentions can be summarised as follows:

i. That the SCIT had erred in subjecting the appellant's gains arising from the disposal of the 50 apartment units to be taxed under s 4(a) ITA on the grounds that:

  a) The findings of the SC1T were made without factual and legal basis;

  b) The SCIT failed to recognised that the 50 apartment units in dispute are the appellant's investment properties; and

  c) The SCIT failed to acknowledge that the disposal of the 50 apartment units is not a trading activity

ii. The SCIT erred in upholding the imposition of the penalty by the respondent under subsection 113(2) ITA.

Summary Of The Respondent's Contentions

[27] In summary, it is the respondent's contention that the SCIT's finding is unassailable and there is no error when the SCIT found that the appellant has failed to discharge the burden of proving that the 50 apartment units were for the purpose of investment and that the disposal of the same is taxable under the ITA and not the RPGTA. It is further contended that the imposition of penalty under subsection 113(2) ITA is correct and the respondent has acted within the provision of the law.

Findings

[28] In an appeal by way of a case stated, the Court must look into the facts found therein and it is points of law upon those facts the Court has to decide. In other words, the question for the Court is whether given the facts as stated, the SCITs were justified in law in reaching the conclusions they did reach (see *UHG v. Director General Of Inland Revenue* [1974] 1 MLRA 494).

[29] The general position of the law is that findings of primary facts by the SCIT are unassailable. In *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 MLRA 757, the Privy Council held the followings:

> "Their Lordships cannot stress to strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. **Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself**; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case Stated to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved". **From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law...**"
>
> [Emphasis Added]

[30] The Court is further reminded by strong authorities that the decision of the SCIT is not to be disturbed even if on the same material the Court would have come to a different conclusion. In *Director-General Of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1977] 1 MLRA 246, Lee Hun Hoe CJ (as he then was) held the followings:

"With respect, the learned judge was wrong to interfere with the decision of the Special Commissioners as there was sufficient evidence to support their conclusion. **The learned judge, in exercising appellate jurisdiction, was not supposed to alter conclusion of facts simply because he feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did**. In *Bracegirdle v. Oxley* Lord Goddard CJ made these observations:

> "It is, of course said that we are bound by the findings of fact set out in the Case by the justices, and it is perfectly true that this court does not sit as a general court of appeal against justices' decisions in the same way as quarter sessions, for instance, sit as a court of appeal against the decisions of courts of summary jurisdiction. **In this court we only sit to review the justices' decisions on points of law, being bound by the facts which they find, provided always that there is evidence on which the justices can come to the conclusions of fact at which they arrive**."

[Emphasis Added]

[31] The main issue in contention herein is whether the 50 apartment units are part of the appellant's stock in trade or its investment properties. If the 50 apartment units formed part of the appellant's stock in trade, the gains from the sale are taxable as the appellant's business income under s 4(a) ITA. If the 50 apartment units were the appellant's investment properties, the gains from the disposal are capital gains subject to the RPGTA.

[32] In rebutting the SCIT's reasoning that its main business activity is property development and in acquiring the lands on which Marc Service Residence was built at the price of RM70 million as a property to be developed, the applicant argued that the SCIT had failed to consider documentary evidence and testimonies of its witnesses that it is a dual-purpose company whereby its principal activities consist of property development as well as in investment holding. It can be understood that this contention is based on the objects of the appellant as stated in its M&A. The appellant contends that the documentary evidence and testimonies of its witnesses before the SCIT clearly show that the appellant had consistently intended and held the 50 apartment units as its investment properties and the 50 apartment units were never part of the stock in trade, disposed of as investment properties and were not part of a trading activity.

[33] The Court of Appeal in *ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 1 MLRA 714 had held that to come to a safe conclusion in determining the taxpayer's principal activity, the SCIT has to go into the activities of the taxpayer whether in the past or in the present to find out whether the activities are one of the stated objects of the taxpayer, in the words of Raja Azian Shah FCJ (as His Majesty then was) in *I Investment Ltd v. Comptroller-General Of Inland Revenue* [1975] 1 MLRA 669, "one must look at what business it actualiy carries on and not what business it professes to carry on..."

[34] The SCIT made a finding of fact that the construction of the Project was for the purpose of trading since the very beginning which includes the 50 apartment units. In other words, since the beginning of the Project, the 50 apartment units and the other units sold by the appellant are its stock in trade. In their analysis, the SCIT stated as follows:

> "[187] Analisis
>
> (i) Tiada keterangan yang dikemukakan oleh perayu yang boleh menunjukkan bahawa 50 unit service apartment tersebut dibuat untuk tujuan pelaburan.
>
> (ii) Perayu hanya mengemukakan launching brochures dan ini tidak dapat diterima oleh panel kerana ia tidak menunjukkan tujuan di peringkat awal yang sebenar 50 unit service apartment tersebut dibina yang menurut perayu adalah untuk tujuan pelaburan.
>
> (iii) Wujudnya fakta yang menunjukkan dari peringkat awal lagi bahawa pelaburan perayu yang berkaitan dengan pembangunan Marc Service Apartment Residence adalah bagi tujuan perdagangan - 'trading'
>
> (iv) Perayu memperolehi pinjaman sebanyak USD6.32 juta dari Kingsize Management Limited tanpa faedah dikenakan dan tiada penjelasan yang munasabah diberikan perayu akan bagaimana pinjaman berjumlah besar tanpa faedah yang sedemikian diperolehi oleh perayu.
>
> (v) Tiada juga penjelasan munasabah diberikan mengenai jumlah pembahagian keuntungan yang tinggi yang perlu dibayar oleh perayu kepada Kingsize iaitu "100% of the balance of profit" Dalam tahun 2012, perayu telah membayar keuntungan sebanyak RM12 juta dan pada tahun 2011, sebanyak RM22.8 juta di mana semuanya adalah hasil dari penjualan apartment termasuk 50 unit yang menjadi pertikaian dalam rayuan ini.
>
> (vi) Panel mendapati perayu mempunyai obligasi untuk membuat bayaran keuntungan yang tinggi kepada Kingsize setiap tahun hasil dari pinjaman yang diberikan oleh Kingsize.
>
> (vii) Oleh yang demikian, berdasarkan kepada faktor-faktor yang dikemukakan kepada panel ditambah pula tiada penjelasan yang munasabah diterima daripada perayu, panel merumuskan pembangunan Marc Service Apartment termasuk 50 unit servis apartment yang menjadi pertikaian dalam rayuan ini adalah bagi tujuan "trading" dan untuk mendapatkan keuntungan yang tinggi.
>
> (viii) Panel mendapati Marc Service Apartment termasuk 50 unit yan dipertikaikan tidak pernah dimaksudkan untuk tujuan pelaburan yang sebenar bagi satu jangka masa yang panjang.
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> (ix) Ini termasuk dengan penjualan yang dibuat ke atas hamper keseluruhan unit meninggalkan 50 unit tersebut dan beberapa unit besar yang lain. 50 unit tersebut juga kemudiannya dijual atas alasan telah menerima tawaran yang sangat menguntungkan.

(x) 50 unit tersebut juga dikenali sebagai "unsold units" dalam dokumen kemudahan perbankan Maybank dan menjadi 'security' untuk kemudahan perbankan iaitu OD yang ditawarkan oleh Maybank sebelum dijual kepada LaBelle Capital Limited.

(xi) Panel juga mendapati tiada alasan munasabah diberikan perayu dalam waktu yang singkat selepas 50 unit servis apartment tersebut siap dan disewa (2 tahun) yang kemudiannya 50 unit servis apartment itu telah dijual kepada LaBelle Capital Limited, sedangkan pada ketika itu perayu masih boleh memperolehi hasil dari sewaan 50 unit service apartment tersebut sekiranya perayu sememangnya mahu membuat pelaburan sewaan pangsapuri tersebut, selain atas alasan telah menerima tawaran yang sangat menguntungkan daripada LaBelle Capital Limited.

(xii) Keterangan SP1 mengesahkan bahawa Marc Service Residence yang berlokasi di KLCC (termasuk 10 unit yang menjadi pertikaian, mudah untuk dijual.

(xiii) Semakan yang dibuat oleh SR1, mendapati dari Perjanjian Jual Beli di antara perayu dan LaBelle Capital Limited bertarikh 15 Oktober 2010, perayu telah memberi jaminan pulangan sewa sebanyak 6% setahun berdasarkan harga jualan yang telah ditetapkan selama 3 tahun kepada LaBelle.

(xiv) Jaminan ini menunjukkan bahawa penjualan ini telah dilakukan dengan cara terancang di antara perayu dan LaBelle Capital Limited dalam memaksimakan keuntungan dan jaminan pulangan sewa adalah untuk minat pembeli untuk membeli dengan harga yang tinggi.

(xv) Oleh itu dapat dilihat niat sebenar perayu semasa memperoleh hartanah-hartanah tersebut bukanlah untuk pelaburan tetapi sebaliknya adalah bagi tujuan perdagangan dan mencari keuntungan dan ia adalah pendapatan perniagaan yang tertakluk kepada ACP 1967 dan bukannya pendapatan dari pelupusan yang tertakluk kepada ACKHT 1976."

[35] Since the Property involves land which is capable of being both investment and trading, the SCIT had examined the whole transaction before arriving at their conclusion. The SCIT started off by looking at the intention of the appellant when purchasing the land. It could be garnered from the facts finding of the SCIT that the 50 apartment units are not the only property sold by the appellant. The 50 apartment units were only held for 3 years before being sold and had always been classified as the appellant's inventory before reclassification was done in 2008. Generally, a long period of ownership before disposal would be more likely regarded as an investment.

[36] In the case of *AS Sdn Bhd v. Director General Of Inland Revenue* [1991] 1 MSTC 434 it was held that the period is to be computed from the time the taxpayer is in complete possession of the asset. The Court stated:

"According to Sharma J **the fact that a property is held for a short time after its acquisition and then resold tends to indicate that the sole purpose of the acquisition is resale at a profit. On the other hand a property held for a longer**

> **time after acquisition indicates investment**. By way of comparison, most of the lands here were held from one to three years, and hence the property was held for trading and therefore subjected to income tax. In this particular case, the land was held for seven years and therefore indicates that this particular land was held for investment. However, if one examines this case in depth, one will note that the appellant company was not the sole proprietor of this land for seven years. The sale and purchase agreement dated 17 July 1973 conferred only 96/98 portion of the land to the appellant. The remaining 2/98 portion was only acquired in 1979. **It would not be correct to say that the complete lot of this land was owned by the company for seven years as the company was the sole proprietor of it only in 1979**. This complete lot was subsequently sold in February 1981 in exchange for $3m shares of the new company. **It would therefore appear that the appellant company was the sole proprietor of the whole lot for only two years before its disposal.** This period of ownership is the same pattern as its previous disposals, ie held for a comparatively short period after its acquisition and, therefore, according to this criterion this land was sold for trading."
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> [Emphasis Added]

[37] Apparently, the appellant's witness, AW1 was questioned during cross-examination whether there is any document to support that the 50 apartment units were meant for investment to which AW1 relied on the launching brochures which were not produced before the SCIT.

[38] AW1 then relied on the Sales List or the launch chart to which the SCIT observed did not contain any information of the maker and date it was prepared. This Court agrees with the SCIT's rejection as to the Sales List because it contained information relating to transactions from 2003 to 2008 where the reasonable inference is that it must have been prepared after 2008. This Sales List cannot be said to have been prepared in 2003 when the sales of the Project were first launched.

[39] AW1 further relied on the Option Agreement to which the SCIT found that it was not indicative of the intention for investment as it does not even cover the whole 50 units. So apart from the brochures not produced before the SCIT, the Sales List and the Option Agreement do not reflect the intention of the appellant to hold the 50 apartment units for purpose of investment.

[40] It was stressed upon by learned counsel for the appellant that the intention of the appellant to hold the 50 apartment units as investment can be gleaned from the fact that there were renovation and refurbishment done on the 50 apartment units and that reflects that they were for investment purposes. Ascott International was then appointed to manage them. It is of the considered view that the SCIT cannot be said to have erred in seeing the act of renovating and refurbishing done on the 50 apartment units and the sale thereafter were made in a planned and organised manner where there is guaranteed rental return which will attract higher price from buyers. In this regard, the SCIT's findings are supported by the Singapore case of *Mount Elizabeth (PTE) Ltd v. The*

Comptroller of Income Tax [1986] 2 MLRH 297 ("*Mount Elizabeth*"). In that case, the taxpayer similarly carried on the business of property developer. Some of the flats built were rented out and later sold. The taxpayer contended that the sold flats were its investment properties. The Court viewed as follows:

> "...a company which describes its business as a property development or itself as property developer is *prima facie* carrying on the business of property development for sale and not for investment or for both.

[41] In *Mount Elizabeth* the learned Judge further stated:

> "..I have no difficulty in concluding that a more credible explanation for the retention of the 8 flats was the appellant's desire to await an upturn in the property market and to be let out in the meantime, rather than to fulfil a prior intention to hold as investment."

[42] The facts in *Mount Elizabeth* are quite similar to the instant matter. The taxpayer therein was a property developer who had constructed high rise apartments (flats) for sale and 8 units were retained. 7 of the retained units were also fully furnished for purpose of letting. The taxpayer later sold 6 of the retained units. The High Court in considering the facts before the SCIT relied on by the taxpayer, observed that the following facts were colourless (neutral):

> "What was the tenor of the undisputed facts relied on by the appellant? Except for the oral evidence of AW1 on Darmadi's intention, substantially all the other material facts that were garnered in aid of the appellant's case were colourless facts. There facts were:
>
> (1) **the retention of 8 flats for 6 years** - see *Oliver v. Farnsworth* 37 TC 51 5355 (sale proceeds of house built by builder in 1929 and sold in 1953, held to be trading receipt); *James Hobson & Sons Ltd v. Newali* (where houses built by company were not saleable and let for almost 24 years, held that houses were part of trading stock);
>
> (2) **the statements to the Controller of Housing that 8 flats were retained as investments and the classification of 8 flats as "Fixed Assets" in balance sheets of appellant from 1974 to 1981** - see *Shadford v. Fairweather & Co Ltd* 43 TC 291 299 (land purchased in 1958 by company and described as fixed asset in its accounts sold in 1960, held: a trading transaction *Bowie (HM Taxes) v. Reg Dunn (Builders) Ltd* 49 TC 469 479 (property held by company, a builder, since date of purchase in 1958 as a fixed asset in its accounts until 1966 when it was sold: held, a trading asset, *WM Robb Ltd v. p 47 TC 465* (property shown in accounts as a fixed asset for the years 1952 to 1962, held a trading asset);
>
> (3) **the statements in Directors' Reports for the financial years 1976 to 1981 that the appellant's activities were property development and the holding of property for rental** - see authorities referred to in (2) above;
>
> (4) **the Memorandum of Association had as one of its objects the business of proprietors of flats** - see *WM Robb Ltd v. Page* (where there was a similar object clause) and *Commissioners of Inland Revenue v. Hyndland*

Investment Co Ltd 14TC 694 (where Lord President Clyde said, in relation to a memorandum of association which had as one of its objects the acquisition of land and the holding of the same as an investment, that the question was not what business the taxpayer professed to carry on but what business he actually carried on);

(5) **the furnishing of the 7 flats at considerable expense for letting** - see *West v. Phillips* 38 TC 203 207 (where Wynn-Parry J. said at p 214, in relation to houses built for investment, that redecoration, making ready for sale and advertising for sale were colourless facts in that they do not change the character of such houses to stock-in-trade);

(6) **the appellant did not have external borrowings for the Highpoint development and therefore was under no financial pressure to sell the 8 flats**."

[Emphasis Added]

[43] The High Court then proceeded to examine the evidence that lent credence to the taxpayer being a property developer for the purpose of sale. The Court stated:

"In contrast, there was a considerable body of evidence before the Board which pointed in the direction of the appellant being a property developer for sale, ie

(1) the incorporation of a company to purchase the property for development of luxury fiats and the appellant applying for a developer's licence for sale;

(2) the appellant describing its business as property development, itself as a property developer and describing its principal activity from 1971 to 1973 and its (only) activity from 1974 to 1975 as being the development and construction of luxury apartments for sale;

(3) the omission of the appellant to document in its records as soon as practicable its alleged intention to retain part of the Highpoint development for investment;

(4) the omission of the appellant to distinguish in its accounts or its sales brochure between the flats to be sold and the 8 flats to be retained for investment, until after the other 51 units had already been sold.

(5) the omission of the appellant to object to rental income of the 8 flats being assessed as part of its trading profits."

[44] It can be seen that the evidence pointed out by the High Court in *Mount Elizabeth* correspond to the facts of the present case.

[45] Firstly, the appellant had purchased the two lands for the development of the Project. It is undisputed that the appellant is a property developer with the licence to sell. Secondly, the appellant described its principal activity as property development from 2003 until 2008. No mention of investment holding

even though the construction had completed in 2007. Investment holding was mentioned from 2009 onward, but sale of development properties remains one of its principal activities. Thirdly, the appellant similarly had no records in the form of company's resolution and minutes of board meeting of its alleged intention to retain the 50 units for investment. Fourthly, the appellant had similarly omitted to distinguish in its accounts between the units to be sold and the 50 apartment units. Sales brochure was not tendered as evidence and the Sales List was rejected by the SCIT.

[46] It was further held in *Mount Elizabeth* that the decisive factor against the taxpayer was the failure to call one person by the name of Darmadi, to establish the intention to hold the retained units as investment because the taxpayer's witness had given evidence that the retained units were held as investment upon the instruction of Darmadi, being the real owner of the taxpayer. However, this intention was not reflected in the taxpayer's accounts or other corporate records. There was also no explanation why the units could not then be classified as investment and the development costs be separately itemised in the taxpayer's Balance Sheets.

[47] Similarly in the instant case, the appellant had not called the person who had personal knowledge of the events at the material time when the assets were acquired to support the appellant's intention. AW1 does not have personal knowledge to give evidence on the intention of the appellant at the material time when the two lands were acquired in 2002 and the apartment units were first launched in 2003. As stated earlier, AW1's oral evidence is uncorroborated by any documentary evidence. AW1 is not a competent witness to testify as to the appellant's intention relating to the 50 apartment units. Hence, there was no evidence to establish that the 50 apartment units were intended as investment properties of the appellant from the very beginning.

[48] It must be borne in mind that the burden is on the appellant to prove that the subject lands were purchased for investment purposes and such intention must be shown to have existed at the time of the acquisition of the asset. In *Mr Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] 2 MLRH 639, the taxpayer was similarly a property developer and had acquired several pieces of land which were later disposed. The taxpayer argued that the lands were acquired for the purpose of investment and therefore, ought to be subjected to real property gains tax. The SCIT held that the lands were not acquired for the purpose of investment. The High Court upheld the decision of the SCIT and stated as follows:

> "[17] I agree with the approach taken by the Special Commissioners in dealing with the status of the subject lands. With regard to the intention of the appellant in purchasing the subject lands, the evidence do not support the appellant's contention that the subject lands were purchased for investment. The appellant's memorandum and article of Association described its business activities which include, amongst others:

> (I) to acquire by purchase, lease, exchange, hire or otherwise any land or property to any tenure or any interest in the same in Malaysia or elsewhere and to sell, lease, let, mortgage or otherwise dispose of such lands, houses, buildings and other property of the company.

[18] **It is clear from the above, that the appellant describes its business as a property development**. In *Mount Elizabeth (Pte) Ltd v. CIR* [1986] 2 MLRH 297 at p 139 it was held:

> A company which describes its business as a property development or itself a property developer is *prima facie* carrying on the business of property development for sale and not for investment or for both.

[19] **Thus, the description by the appellant of its business in the Memorandum and Article of Association draws a *prima facie* presumption that the appellant was carrying on the business of property development and the onus is on the appellant to rebut the said presumption which the appellant had failed to do so.** In fact, the burden is on the appellant to prove that the subject lands were purchased for investment purposes, and such intention must be shown to have existed at the time of the acquisition of the asset."

[Emphasis added]

[49] In the instant matter, it cannot be refuted that the object in the appellant's M&A with regard to dealing in land and being a housing developer had in fact been carried out. The appellant was a property developer for the Project and sales of the completed apartment units were made in the course of that business and was taxed as the appellant's business income.

[50] Further indication as to the true business of the appellant can be seen from the description of its principal activity in the Financial Statements for YE 31 December 2003. The 2003 Financial Statements is a crucial indicator of the appellant's actual business as this is the year where the appellant had actually commenced its operation. It is pertinent to note that the description of the appellant's principal activity did not state anything regarding investment holding.

[51] The appellant had not tendered its Financial Statements for the subsequent financial years ending 31 December 2004 - 31 December 2007. As such it is reasonable to assume that for these periods, the appellant's principal activity remained as property developer.

[52] In the Financial Statements for YE 31 December 2008, it appears that the appellant's principal activity remained as a property developer even though it is stated that the appellant had commenced leasing activities. However, it is important to note that at this point of time, the construction of the Project had already been completed in 2007. Yet, the principal activity of the appellant in its 2008 Financial Statements had not mentioned anything concerning investment holdings.

[53] The principal activity of the appellant that was described to include investment properties holdings first appeared in the appellant's Financial Statements for YE 2009. Nevertheless, sales of developed properties still remained as the appellant's principal activity.

[54] In the testimony of AW1, it is apparent that apart from the Project (Marc Residence Apartment), the appellant was also involved in other construction and development projects of middle/high service apartments in Pandan Perdana, Wangsa Maju and Taman Equine. It is therefore clear that until the Financial Statements for YE 2009, there is no evidence that the 50 apartment units were in fact intended to be an investment from the time of the acquisition of the Property.

[55] Premised on the principal activities as described by the appellant in its Financial Statements, there is no evidence that the 50 apartment units were in fact intended as investment holding properties from the first day the Property was acquired, as claimed by the appellant. Thus, the rental of the 50 apartment units do not indicate that it is an investment property. This Court cannot disagree with the SCIT's findings that the appellant had held the 50 apartment units in order to allow for the value to appreciate and thereby, maximising its profits. The rental of the property also made it attractive to potential buyers due to its strategic location and guaranteed leasing return.

[56] The fact that the appellant had made a reclassification in its Financial Statements for YE 31 December 2008 whereby the development costs for the 50 apartment units amounting to RM27,118,690.00 were transferred from inventories to non-current assets under Investment Properties does not signify any change of intention on the part of the appellant. In fact, the appellant's witness AW2 admitted that the reclassification was a 'retrospective adjustment' for accounting purposes. The appellant had also all along contended that the 50 apartment units were investment properties from day one to which this Court agrees with the SCIT that there is no evidence that the 50 apartment units were in fact intended as investment holding properties from the first day the Property was acquired, as claimed by the appellant.

[57] This Court is further persuaded by the respondent's argument that derivation of rental income does not *ipso facto* mean that a property is an investment property. In *NFY Realty Sdn Bhd v. Comptroller Of Inland Revenue* [1974] 1 MLRH 39 Sharma J explained as follows:

> "...However, the Act (ie the Income Tax Act) does require that taxable income shall include:
>
> (1) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or
>
> (2) profit arising from the carrying on or carrying out of any profit making undertaking or scheme.

> Most of the cases which have been decided on the subject have involved the application of the first of the above requirements. In determining the application of these requirements **the focal point of enquiry is the dominant purpose for which the particular property was originally acquired. If it is established that the dominant purpose in the acquisition of property was its resale at a profit, the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area**."
>
> [Emphasis added]

[58] In *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 1 MLRA 585, the taxpayer was a company carrying on the business of housing development. The taxpayer bought the subject land and built houses on it. The houses were rented out to the Royal Australian Air Force ("RAAF") for 17 years until 1981. The RAAF later vacated the houses but the taxpayer was reluctant to rent out the houses to locals as they would receive lesser income. The houses were then sold from 1981 to 1984. One of the issues in this case was on the assessment on the profits made from the disposal of the houses. The taxpayer disputed the assessment on the ground that the houses were built for the purpose of investments. The Court of Appeal upheld the decision of the High Court and the SCIT on this issue. The reason behind the decision of the courts may be seen from the following reasoning by the learned High Court Judge in the followings:

> "I think from the facts as found by the Special Commissioners the single case of *Simmons v. Inland Revenue Commissioners* [1980] 2 All ER 798 will assist in resolving the issue as to whether the sale of the appellant's 88 units of houses built on the subject land is the realisation of its investment and therefore any profits derived from the transaction will not be subject to tax, or the disposal in the course of the appellant's business, which profits are subject to the payment of income tax...
>
> **Intention of a person must be gathered from the surrounding circumstances, in 1956 when the subject land was purchased by the appellant, the dominant intentions was to sell it, of course at a profit**. Thus the various sale transactions of portions of the still undeveloped subject land. Then the opportunity of making more profits came along the way with the coming of the RAAF to set up its base in Penang. It needed accommodation for the personnel, it is admitted that the RAAF was prepared to pay a higher rental than any local could. It was a good 'investment' for the appellant instead of selling out chunks of the undeveloped subject land, to construct houses on the unsold portions of it to be rented out to the RAAF. But the RAAF were not going to be there forever or to rent its houses forever. A time will come when they would cease to rent these houses of the appellant. What will happen then? **If the intention of the appellant is true that the houses were built for investment purposes, those houses would be kept as an investment to be rented out to whoever else and to reap the rental income out of the investment. But this is not true because as the evidence before the Special Commissioners would show, the appellant was not prepared to rent them out any longer to persons other than the RAAF for the simple reason**

that these persons were not going to pay rental as high as the RAAF did. Immediately the appellant has to find market to sell these houses, of course at a profit. This it succeeded. **So, in my view, under no stretch of imagination, can it be said that the construction of those units of houses on the subject land meant for sale, be construed as an investment by the appellant.** The construction of the houses on the subject land, on the fact, cannot be taken to be a permanent investment. **There is no evidence to suggest that the sale of the 88 units of houses by the appellant was for the purpose of acquiring another investment thought to be more satisfactory. The shifting of the position of the account of the appellant from fixed assets to current assets then back to fixed assets as found by the Special Commissioners from the evidence does not, in the circumstances, truly represent the shift in the intention of the appellant from business to investment.** The decision of Sharma J in *NYF Realty Sdn Bhd v. Comptroller of Inland Revenue* [1974] 1 MLRH 39 is also of help to resolve the issue...

The dominant purpose for which the subject land was originally acquired is clear, ie its resale at a profit. The construction of the houses on the yet unsold portion of the subject land was nothing but **to enhance the value of that portions where the houses stood so that when that portions were to be sold later on when their immediate purpose for the construction is served, more profits could be derived**. I share the view of Sharma J that the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area..."

[Emphasis added]

[59] In the same case, the Court of Appeal further held as follows:

"[17] **In my view, the learned judge had stated the issue in respect of the sale of the 88 units of houses correctly. He had analysed the facts in the present appeal in the most appropriate manner and correctly. I find that there was no error in his judgment in respect of the 88 houses**. There is nothing much I could add to what have been said by the learned judge. The only thing I wish to add is the element of forced sale as in *West v. Phillips* and *Lower Perak Co-operative Housing Society Bhd* cited by the taxpayer. In both cases cited by the taxpayer, it was in evidence that if the taxpayer kept those properties as stock in trade the taxpayer would suffer increasing losses from year to year. **In the present appeal, the taxpayer failed to show that in keeping those houses for rental, the taxpayer wouid suffer losses. The taxpayer submitted that if those houses were kept for rental then the rental received from the locals would be less than the rental paid by the RAAF. In other words, if those houses were kept by them and rented out to the locals they did not generate as much income as they had been rented out to the RAAF. There was no evidence to show that the taxpayer had suffered losses when those houses were rented out to the locals.** In *West v. Phillips*, it was shown that the taxpayer suffered losses in maintaining those houses for rentals. For that reason, in the present appeal, I could not find any justification for the taxpayer to dispose of those houses. The element of forced sale was not present in the present appeal."

[Emphasis Added]

[60] The findings of facts by the SCIT in the instant appeal reveal that the dominant purpose of the appellant in acquiring the two lands was to develop the two lands for the Project and sell the apartment units. This fact is supported by the description of the appellant's principal activity and classification of the two lands under current assets in its 2003 Financial Statements. No evidence had been adduced to show that there has been an intention to keep part of the apartment units as investment properties since from the very beginning. There was also no evidence to show that the appellant was suffering from losses by renting out the 50 units.

[61] It is contended by the appellant that the SCIT had also failed to give probative value to the classification of the 50 apartment units in its accounts. At all material times, the appellant's auditors had classified the 50 apartment units as investment properties and placed under the heading of "non-current assets". The appellant referred to the case of *Perak Construction Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2001] 3 MLRH 763 where the Court had stated:

> "The very act of capitalising the subject lots showed that the subject lots were not treated as stock-in-trade. The learned special commissioners did not give due and adequate consideration to this fact and to other circumstances of the case.... A company can hold trading stock and capital investment. And where capital investments were kept in separate accounts from trading stock, this is a strong demarcation line between the two."

[62] As stated earlier, the re-classification exercise was only done in 2008. It must be emphasised that as early as 14 August 2003, when the Option Agreement was entered, 18 units claimed to be for the purpose of investment and should have been excluded from sale was still kept under inventories. The sales list made up for the launching of the sales of Tower A and B in 2003 and 2004 had supposedly identified the 50 apartment units as investment. Yet, the accounts had kept the 50 apartment units as inventories and only reclassified in 2008. The Design Agreement with The Box was entered into on 29 June 2006. Thus, if the units involved were for the purpose of investment, the appellant would have classified the units as investment properties. Yet again, the accounts had kept these units as inventories and reclassification was only done in 2008.

[63] The case of *Perak Construction Sdn Bhd (supra)* referred to by the appellant can be distinguished with the instant matter. That case involved compulsory acquisition and, therefore, the disposal of the subject lots cannot be held as disposed of in the ordinary course of business. The appellant could not be said to be trading in the subject land, as the fact of the compulsory acquisition, not being a sale or commercial transaction, negatived any intention of trade. The special commissioners' conclusion that the 'subject land satisfied the definition of stock-in-trade' was therefore held to be untenable. The special commissioners was found to have had erred when holding that the subject lots were purchased for development. There was no evidence adduced as to the original intention at the time of purchase in 1975. The applications for development were made in 1981 after the government had issued a notice to

acquire the land. The intention to trade in 1975 when the subject lots were purchased cannot be established. Further, when the property was capitalised in the taxpayer's accounts, the taxpayer had no history of trading in land and no developer's licence in respect of the land.

[64] In the instant matter, the 50 units were not capitalised from the very beginning. The 50 units were classified as the appellant's inventory from the very beginning.

[65] The case of *GRA Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2012] MTSC 10-038 also referred to by the appellant can further be distinguished with the instant matter. In that case, the property was consistently held under non-current assets in the taxpayer's audited accounts. Although the taxpayer's audited accounts stated that it is in the business of property development, the taxpayer never undertook that activity. The taxpayer owned no other land apart from the subject land, before and after the disposal. In short, the taxpayer was not in the business of dealing with land/property. No steps had been undertaken to develop the property, nor had any alteration or improvement made to enhance the property's marketability. The property was held for almost 6 years before disposal. The reason for sale was due to the Group's restructuring exercise.

[66] Another case referred to by the appellant is *Ketua Pengarah Hasil Dalam Negeri v. Promet (Langkawi) Resorts Sdn Bhd* [2010] 3 MLRH 330. In that case the taxpayer was not a property developer or in the business of dealing in lands. Except for the sale of the subject lands, there was no evidence of other land transaction. The sale was made due to request by the then Prime Minister. If not for that request, the taxpayer would not have sold the subject lands. The subject lands were not acquired as part of the taxpayer's trade.

[67] The legal effect of accounting evidence was explained by Raja Azlan Shah FJ (as His Majesty then was) in *I Investment (supra)* as follows:

> "Perhaps it is pertinent to be reminded of a passage from the judgment of Lord Denning in *Heather v. PE Consulting Group LTd*:
>
> > "The courts have always been assisted greatly by the evidence of accountants. Their practice should be given due weight: but the courts have never regarded themselves as being bound by it It would be wrong to do so. The question of what is capital and what is revenue is a question of law for the courts. They are not to be deflected from their true course by evidence of accountants, however eminent."

[68] The strongest authority cited in the above would mean that the method of accounting kept by a taxpayer can be taken as a guide. However, it is not conclusive in determining question of law. As stated earlier in its 2008 Financial Statements, the appellant had transferred property development costs relating to the 50 units amounting to RM27,118,690.00 from its inventories to non-current assets as investment properties. AW2 had explained the transfer as reclassification of its assets, done by way of retrospective prior year

adjustments. In the 2003 Financial Statements, it can be seen that the two lands were classified as the appellant's current assets, and no distinction or provision was made for the 50 units as investment properties. Reference is made again to the dicta of the learned Judge in *Mount Elizabeth (supra)*:

> "If, as alleged by AW1, Darmadi had told AWI that he did not want to sell all the flats and specifically instructed AW1 to keep two penthouses for himself and to retain 8 apartments as investment, there was no reason why the appellant could not have reflected such intention in its accounts or other corporate records upon or shortly after these apartments became identifiable on the approved plans or the sales brochure; **likewise there was no satisfactory explanation why the 8 flats could not then have been classified as an investment and their development cost separately itemised in the appellant's Balance Sheets from 1971 onwards**; here, I should interpose to say that AW1 was not unfamiliar with the principles and complexities of revenue law - see *STU v. The Comptroller of Income Tax* [1962] 1 MLRH 229, (where AW1 appeared as counsel for the Comptroller); he must or ought to have realised that the earlier Darmadi's intention was documented and/or communicated to the Comptroller, the easier it would be to prove the existence of such intention. I should further add that, **in the absence of any expert evidence that accountancy principles and practice prevailing in Singapore did not permit such classification or accounting entry, I am unable to accept the explanation offered by counsel for the appellant that it was neither practical nor realistic to document such intention earlier than the completion of the 8 flats**."
>
> [Emphasis Added]

[69] Just as in the case of *Mount Elizabeth (supra)*, the question is why were the 50 apartment units not classified as an investment and not separately itemised from the very beginning?

[70] It has been highlighted by the respondent that AW2 had given evidence that the transfer of the development costs from its inventories and reclassification of the 50 units to investment properties were by the advice of the accountants in order to correspond with the appellant's original intention to hold the units as investment. Hence, Note 30 in the 2008 Financial Statements provided for 'prior year adjustments'. AW2 then said it was meant to rectify an accounting error or accounting inconsistency from the past. AW2 was questioned by the SCIT regarding the source of information in the statement "consistent with its original intention to hold the said 50 units for leasing activities" made in Note 30. To this, AW2 replied that he was not the one who prepared the audited accounts (AW2 prepared the tax computation). AW2 then proceeded to share his 'insights' on the preparation of accounts - wherein auditors would speak to the directors and ask for secondary evidence for support. AW2 then gave his speculation as to the sort of evidence that the auditors would rely to support the director's contention.

[71] It is of the considered view that the SCIT has not erred in pointing out that the accounts were prepared by another person and the secondary evidence

relied on by the auditors were not produced before the SCIT to support the 'original intention' of the appellant. This Court agrees with the respondent's submission that in the absence of the supporting evidence, the statement regarding the appellant's original intention remains inconclusive.

[72] In addition, the evidence given by AW2 that the appellant had not claimed the development costs for the 50 units had been rebutted during cross-examination as AW2 had admitted that based on the appellant's tax computations, the development costs claimed for YA 2003 - 2006 were for the whole Project, in which the 50 units were not excluded for the period of YA 2003 - 2006, the development costs for the 50 units had been in fact claimed by the appellant in the appellant's tax computation. It is only in YA 2007 that the retrospective adjustments were made in the appellant's accounts. This Court agrees with the respondent's argument that the fact the development costs were shown to have been claimed from 2003 - 2006 clearly indicates that the appellant had treated the 50 units as its stock in trade from day one.

[73] The respondent further highlighted certain other issues. The respondent's witness RW1 had testified before the SCIT that in reference to the appellant's income statement for YA 2009, there was a claim made for marketing and selling expenses for the 50 apartment units. This fact negates the appellant's contention that there was no special exertion to attract purchasers where there was no advertising or marketing done for the 40 out of the 50 apartment units. It is therefore apparent that there were indeed efforts made by the appellant to market the 50 apartment units for sale which indicate an undertaking of profit-making.

[74] One other issue relates to the frequency of transaction. The appellant has adduced evidence that it had sold 587 units under the Project between YA 2003 and 2009 and the appellant was also involved in the development and sale of other housing projects around Klang Valley. The fact is the 50 apartment units were also part of the apartment units constructed by the appellant under the Project. It is therefore reasonable for the SCIT to make an inference from these background facts that the disposal of the 50 apartment units cannot be treated as a single isolated transaction *albeit* they were disposed simultaneously in one transaction. Reference is made to the case of *Mount Pleasure Corp Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1997] 2 MLRH 524 where Raus J (as he then was) stated the followings:

> "[28] Thus, to ascertain the business of the appellant, we must look at what business it actually carries on and not what business it professes to carry on (*I investment Ltd v. Comptroller-General of Inland Revenue* [1975] 1 MLRA 669). In the present case, as found by the Special Commissioners that there was no admissible oral evidence to establish that the said property was acquired as an investment. **The Special Commissioners in deciding what was the intention of the appellant when they acquired the said property, whether as an investment or not, made inferences from the facts proved. From the facts proved, the said property was not the only property the appellant dealt**

> **with at the material time. Together with the said property, the appellant have had five dealings in properties. Thus, the Special Commissioners were right to conclude that the appellant's frequent dealings raised a *prima facie* inferences that the appellant were carrying on a business of land dealings either as a land developer or as a real estate merchant**. As found by the Special Commissioners, the appellant had failed to rebut the said inferences."
>
> [Emphasis added]

[75] The frequency test was commented by Rowlatt J in *Pickford v. Quirke (13 TC 251)* at p 263 as follows:

> "Now of course, it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade... "

[76] In any event, even single isolated transaction may amount to adventure in nature of trade. In *Teoh Chai Siok v. Director General Of Inland Revenue* [1981] 1 MLRA 608, the Privy Council had held that:

> "the Special Commissioners, the High Court and the Federal Court were right in holding that the transaction, although an isolated one, was an adventure or concern in the nature of trade."

[77] The Court's attention is taken to the provision of s 24(2) of the ITA. The respondent submits that the transfer or reclassification of the 50 units from inventories to investment properties was unacceptable by the respondent to indicate that the 50 units were investment properties when disposed of because, the 50 units formed part of the appellant's stock in trade since day one. Hence, before the 50 units can change its character to investment, the appellant must exercise withdrawal of stock under s 24(2) ITA 1967. Since this is not done, the 50 units remain as the appellant's stock in trade and the gains from the disposal are taxed as the appellant's business income under s 4 ITA 1967.

[78] Section 24(2) of the ITA provides that any trading stock of a business that is withdrawn, among others for the taxpayer's own use, or without any consideration being received must be treated as the taxpayer's gross income based on the stock's market value at the time of its withdrawal. In other words, the taxpayer is required to purchase his own trading stock at market value before the trading stock can be taken out of the business sale circulation.

[79] The effect if trading stock is transferred as investment properties without complying with s 24(2) ITA was addressed in *P Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1995] 2 MSTC 2392 (Penang Realty at SCIT level). In that case, the houses built for the RAAF were classified under 'current assets' during its construction and upon its completion, transferred as its 'fixed assets'. The SCIT found that there was no transfer of the subject property from the trading

stock to the fixed assets in the accounts of the appellants within the meaning of s 24(2) ITA 1967. Similarly, the minutes of the taxpayer do not have any resolution to that effect. The SCIT then held as follows:

> "The submission of learned Counsel adverted to earlier is further complicated by the fact that there has been no compliance with s 24(2)(a) of the Income Tax Act 1967 after the alleged shift in the status of the subject properties. **The clear words of the section dictate that where there is a withdrawal of a stock in trade then an amount equal to the market value of the stock in trade at the time of its withdrawal shall be treated as gross income. Such income must be declared in the accounts as having been received in respect of it**. This was tersely stated by Peh Swee Chin J (as he then was) in *Yoon Lian Realty Sdn Bhd v. DGIR* (Ipoh High Court Tax Appeal No 14 March 1989, unreported) where his Lordship said in the judgment:
>
> > "I was also of the view that the building, once transferred to the fixed assets accounts was no longer part of the stock in trade of the business of housing developer of the appellant then a sum must appear in the trading account as having been received in respect of it, and the sum ought to be the market value."
> >
> > (see also *Sharkey (Inspector of Taxes v. Wernher* 36 TC 275)).
>
> **No such market value has been declared by the appellants. Neither was any explanation offered by the appellants for the failure to do so. Learned Counsel for the appellants, in the course of his submission, suggested that this defect can be rectified by the Inland Revenue Department by imposing a tax now on the change made. This, to our mind, is ludicrous without proper evidence being advanced in support of the change. This will enable taxpayers to re-classify an asset without declaring the market value at that time and, declare it years later after the asset has been disposed off at a higher profit thereby giving them the option of paying a lower tax. It must also be noted that the transfer of a property from the trading stock to the fixed asset accounts of a company must be done by way of a company resolution** (see s 169 of the Companies Act 1965). There was no evidence of compliance with this requirement. **Judged in the totality of the evidence adduced in the case it is our view that the classification of the subject properties in the audited accounts as fixed assets is not a proper description of the actual nature of the transaction**."
>
> [Emphasis added]

[80] This Court further agrees that pursuant to this non-compliance, the subject properties were held as the appellant's trading stock and subjected to s 4 ITA 1967. If the appellant had withdrawn the stock in accordance with s 24(2) ITA 1967, then the reclassification of the 50 units as investment properties would be proper and the subsequent disposal would be subjected to the RPGTA 1976.

[81] It is pertinent to note s 4(a) ITA provides for several classes of income that are taxable. The section reads as follows:

> "4. Classes of income on which tax is chargeable
>
> "Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of
>
> (a) Gains or profit from a business, for whatever period of time carried on;
>
> (b) Gains or profits from an employment;
>
> (c) Dividends, interest or discounts;
>
> (d) Rents, royalties or premium;
>
> (e) Pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
>
> (f) Gains or profits not falling under any of the foregoing paragraphs."

[82] Further, s 2(1) ITA defines 'business' to include:

> "..professions, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment."

[83] Since the word "trade" is not defined in the ITA, guidance can be found in the words of Lord Buckmaster in *The CIR v. The Forth Conservancy Board 16 TC 103* whereby His Lordship held that:"... trade involves something in the nature of a commercial undertaking, of which the buying and selling are most obvious characteristics."

[84] In *E v. Comptroller-General Of Inland Revenue* [1970] 1 MLRA 92 Gill FCJ had the occasion to interpret the meaning of trade under the then Income Tax Ordinance, where His Lordship stated as follows:

> "...**Whilst a trade usually consists of series of transactions implying some continuity and repetition of acts of buying and selling, or manufacturing and selling, in view of the definition of 'trade' in the English income Tax Act which I have mentioned above, the mere fact that there is only one transaction does not preclude the possibility that the transaction is in the nature of trade. Thus, one single purchase and sale or one purchase and many sales have been held in the English and Scottish courts to be trading...**"
>
> [Emphasis Added]

[85] The current provision in the ITA defines 'business' to include 'trade' and 'adventure or concern in the nature of trade'. The English cases thus apply in equal force.

[86] Apart from gains or profits from 'trade', a taxpayer may also be taxed under s 4 ITA 1967 for gains or profits arising from adventure or concern in the nature of trade. The application of the concept 'adventure or concern in the nature of trade' ordinarily arises when it is contended that there is only an

isolated profitable transaction, compared to a series of transactions of buying and selling that would signify trading.

[87] In *Leeming v. Jones* [1930] 1 KBD 279, Rowlatt J had remitted the case back to the Commissioners to decide whether there was or not an adventure or concern in the nature or trade. Pursuant to the learned judge's order and guidance, the Commissioners decided that the transaction involving the sale of rubber estate was not a concern in the nature of trade, and thus not liable to income tax. Though Rowlatt J and the Court of Appeal felt very strongly that on the facts there should have been a finding there was an adventure in the nature of trade, they decided not to interfere with the finding of facts by the Commissioners as they considered the facts were for the decision of the Commissioners. Lord Hanworth MR gave his reasons at p 346:

> .. It would make an Inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion. The Commissioners are far better judges of these commercial transactions than the courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade."

[88] Based on the abovementioned cases, it is understood that trading occurs when:

(a) it involves buying and selling;

(b) it consists of a series of transaction, continuously and repeatedly of buying and selling; and in certain situation

(c) it also includes an isolated or single transaction.

[89] Of paramount importance, Lord Wilberforce in addressing the question of 'what is trading' in *Simmons (As Liquidator of Lionel Simmons Properties Ltd) v. Inland Revenue Commissioners* [1980] 2 All ER 798, answered 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 questions: **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. Intentions may be changed. What was first an investment may be put into the trading stock, and, I suppose,** *vice versa*. If findings 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... **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...**"
>
> [Emphasis Added]

[90] The Malaysian courts have laid down various guidelines or tests in determining whether gains or profits from a transaction arise from the disposal of an investment or constitute gains or profits from trade or adventure or concern in the nature of trade. The acid test is known as the 'Badges of Trade', which are listed down as follows:

i. Motive / intention of the taxpayer;

ii. Formation of a company;

iii. Subject matter of transactions;

iv. Period of ownership;

v. Frequency of transaction;

vi. Alterations to the property;

vii. Circumstances responsible for the realisation;

viii. Methods employed in disposing the property; and

ix. Accounting evidence

[91] So here is the case where the SCIT had made a finding of facts that there is no evidence to show intention on the part of the appellant not to trade the 50 apartment units at the time when the Property was acquired. As Sharma J had stated in *NFY Realty Sdn Bhd (supra)*:

> "The question of what the intention of a taxpayer was when he acquired an asset ie whether he bought it as an investment or with a view to selling it at a profit, is a question of fact. It has to be determined by inference from proved facts and such an inference is one of fact and not of law...."

[92] The SCIT had found that the appellant had failed to discharge its burden to prove that the 50 apartment units are for investment purposes from the time of the acquisition of the Property. Except for the reclassification of the 50 apartment units in its 2008 Financial Statements to be investment properties, to which the reclassification was done by way of retrospective prior year adjustments, what was before the SCIT are documentary evidence to show that the appellant's intention at the time of the acquisition of the two lands/ Property for the Project was for purpose of trading and that the 50 apartment units were never intended for long term investment. If indeed the 50 apartment units were for investment purposes, there is no evidence before the SCIT that the 50 apartment units were sold to acquire more satisfactory investment but rather to gain profits from trading. The shift of the 50 apartment units from the category of asset to investment does not change the appellant's intention which is to be determined from the time the Property was acquired or even at the inception of the Project. Based on the badges of trade, the appellant is clearly trading in properties and the disposal of the 50 apartment units was done in the

course of it carrying on its business as property developer. The gains from the sale of the 50 apartment units are therefore taxable under the ITA.

Penalty

[93] In regard to the issue of imposition of penalty by the respondent on the appellant, the SCIT had found as follows:

> "[188] Perayu mendakwa penalti seharusnya tidak dikenakan ke atas mereka berdasarkan:
>
> (i) Telah bertindak dengan niat yang baik dan tiada niat untuk mengelak dari dikenakan cukai;
>
> (ii) Pendedahan yang penuh;
>
> (iii) Mendapatkan nasihat professional; dan
>
> (iv) Isu teknikal
>
> [189] Responden pula berpendapat penalti pada kadar 45% tersebut adalah wajar berbanding 100% yang boleh dikenakan dibawah s 113(2) ACP 1967. Kadar penalti tersebut dikenakan setelah mengambil kira dan mempertimbangkan kes perayu secara keseluruhan.
>
> [190] Keterangan SR1 menjelaskan kesalahan yang dilakukan ialah dengan mengemukakan "incorrect return" apabila tidak melaporkan pendapatan perniagaan daripada keuntungan pelupusan 50 unit service apartment yang tertakluk kepada cukai pendapatan.
>
> [191] Menurut SR1 lagi, kes ini merupakan kes semakan audit dan hanya disedari oleh pihak responden melalui aktiviti semakan audit luar yang dijalankan dan bukannya pengakuan suka rela oleh perayu.
>
> [192] Sekiranya responden tidak membuat semakan audit dan menerima sahaja Borang CKHT 1A yang dikemukakan oleh perayu, isu sebenar berkenaan cukai pendapatan yang sepatutnya dikenakan kepada perayu tidak akan diketahui oleh responden dan ini akan mengakibatkan kerugian ke atas kerajaan apabila kutipan cukai ke atas perayu berkurangan.
>
> [193] Rekod SR1 juga mendapati perayu telah gagal menjelaskan sepenuhnya bayaran cukai tambahan bagi Tahun Taksiran 2010 yang dikenakan walaupun responden bersetuju membenarkan ansuran bayaran sebanyak 35 kali mulai 2017."

[94] This Court agrees with the SCIT on the penalty imposed by the respondent. The burden is on the appellant to provide an accurate return failure of which penalty is therefore an essential part of assessment. In imposing the penalty, the respondent is deemed to have exercise his discretion after due consideration of all relevant facts and circumstances. As stated by the SCIT, the penalty imposed is calculated only at 45% of the tax instead of at 100% to which this Court consider to be an undercharged.

[95] The discretion may be exercised regardless of whether the taxpayer's return was made negligently, or in good faith or with intent to deceive or evade tax. In *Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [Rayuan Sivil No W-01(A)-295-08-2016], where the High Court's decision had been affirmed by the Court of Appeal, the High Court stated that:

> "6.11 On the issue as to whether the respondent have correctly exercised its discretion in the respondent's imposition of penalty on the appellant, pursuant to s 113(2) of the Act, it is clear from the stated provision that the Director General is given the discretionary power to impose a penalty on an incorrect return filed by a taxpayer.
>
> The Director General has a right to impose the penalty irrespective that the taxpayer's return was made negligently, or in good faith or with intent to deceive or evade tax. The Director General however, is not duty bound to require penalty payment but, to exercise that discretion after due consideration of all relevant facts and circumstances."

[96] Good faith cannot be a justification to an incorrect return all the time. It depends on each fact and circumstance of the case. In this case the defence of good faith is difficult to be accepted because had the respondent did not carry out the audit exercise, a substantial amount of revenue would be lost.

[97] In the case of *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2012] MLRHU 221 which was affirmed by the Court of Appeal, the High Court held as follows:

> "[47] The evidence in this case shows that the Revenue Board became aware of the RM18,000,000.00 claimed as deduction only upon auditing. Not for the auditing the respondent would not be aware that the deductible rental should be lesser instead. The appellant therefore would be paying less tax. The contention by the appellant that it was made in good faith due to the differing interpretation of the law cannot hold because ignorance of law cannot be a defence.
>
> [48] This country is now adopting a self-assessment regime. Thus in line with the present policy where submission of returns are based on self-assessment by tax payer, a taxpayer must be mindful of his responsibility to submit correct returns and must necessary consultation to ensure correct returns are submitted."

[98] In *Luxor Network Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLRH 153 Kamaludin Md Said J (as His Lordship then was) stated:

> "In this present case, I agree with the respondent that this country is now adopting a self-assessment regime. Thus in line with the present policy where submission of return is based on self-assessment by taxpayer, a tax payer must be mindful of his responsibility to submit correct returns and must necessarily do so upon necessary consultation to ensure correct returns are submitted. Therefore, any contention that the incorrect return or incorrect information was made in good faith cannot be a good defence."

[99] In *Sri Binaraya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [Rayuan Sivil (2016) MSTC 1J30-130] Abang Iskandar Abang Hashim J (as His Lordship then was) discussed the application of good faith as a defence in the followings:

> "As regard to the issue of the imposition of penalty by the KPHDN on the taxpayer under purported exercise of its discretion under s 113(2) of the ITA 1967, the learned SCIT had found at p 40 of the case stated as follows:
>
> > "The appellant had acted in good faith when submitting accounts in compliance with accounting standards specifically MASB 7 and there is no evidence to show that the appellant has done everything to evade the income for the purpose of computing tax."
>
> They then went on to say as follows:
>
> > "As the respondent has failed to exercise proper discretion in imposing the penalties on the appellant, we believe the penalties imposed under s 113(2) should not be imposed."
>
> ....
>
> With respect, this Court is with the KPHDN on this score. Pertaining to this matter on the imposition of a penalty by the DGIR under s 113 (of the ITA of 1967), 2 issue have emerged. One is concerned with the exercise of the discretion by the DGIR that the said section of ITA of 1967 has conferred on him. **Secondly is whether a plea of good faith by the taxpayer would constitute a valid defence that would be open to the defaulting taxpayer. From the facts of this case, the taxpayer in this case had submitted inaccurate tax return after an audit exercise was conducted on its accounts for the year 2003, and once that fact has been established as in this case, the DGIT was within his discretion to impose the penalty on the taxpayer.** It is to be noted that there was no prosecution mounted against the taxpayer relating to the tax matter pertaining to this case.
>
> The KPHDN had the discretion conferred by law to impose up to 100% of the amount of the tax had been undercharged but in this case the KPHDN had exercised its discretion by imposing a penalty of 28% only against the taxpayer after taking into account all the circumstances pertaining to this case involving an audit on the taxpayer's account for the relevant year. **In the absence of any proof of any bad faith on part of the KPHDN in coming to its discretion in exercising its discretion, it would not be fit and proper for this Court to interfere with the exercise of its discretion.**
>
> **Premised on the above finding by this Court on the imposition of penalty issue, this Court is of the view that the learned SCIT were in error when they found that no penalty ought to have been imposed on the taxpayer account of what they perceived as "good faith" having been exhibited by the taxpayer in the overall scheme of things pertaining to this case, This court is of the view that good faith is not an element that ought to feature and be considered, in cases of imposition of penalty by the KPHDN under s 113(2) of the ITA, that could provide the taxpayer with a semblance of a shield of immunity against the imposition of such penalty. The language, as was employed in that subsection, as compared to the one immediately**

> **preceding it, would strongly convey the message that such has not been the intention of Parliament, namely that good faith is not a defence in a s 113(2) imposition of penalty by KPHDN**."
>
> [Emphasis Added]

[100] In *Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2014] MLRAU 193 on the issue of penalty it was decided by the Court of Appeal as follows:

> "It is without doubt that s 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para 2(a) or (b) of s 113. Hence the use of the phrase "the Director General may require that person to pay a penalty." There is a clear distinction between subsection 113(1) and subsection 113(2). Although paras 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of subsection 113(1) is different from subsection 113(2). Subsection 113(1) provides for an offence being committed in the circumstances provided for in paragraph (a) or (b) unless that person "satisfies the court that the incorrect return or incorrect information was made or given in good faith". Whereas subsection 113(2) provides for a situation where there is no prosecution under subsection 113(1) has been instituted in the circumstances provided for in para 113(2)(a) or (b), the Director General may require that person to pay penalty. That being the case, the defence of "good faith" as found in subsection 113(1), and not found in subsection 113(2), does not apply to the Director General's discretion under subsection 113(2). We therefore disagree with the appellant's submission on this score. "

[101] It is of the considered view that the imposition of penalty under s 113(2) ITA on the appellant was correctly imposed by the respondent in accordance with the law.

Conclusion

[102] Premised on the discussion alluded to in the above, the appellant's appeal was therefore dismissed with costs.