

# 'State has no authority to impose tax on foreigners'

**STRICT INTERPRETATION:** Pretam argues there is no legal basis for the Johor state authority to impose tax on foreigners



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Perusing the National Land Code (NLC) with a fine toothcomb, I am unable to find a single provision in the whole Code that enables the State Government of Johor to collect taxes where property owners are foreigners. In my humble opinion, collection of increased tax not backed by any valid law is certainly unlawful and unconstitutional. As Suriyadi Hallim Omar J said in **Swi Realty Sdn Bhd v Jabatan Perkhidmatan Pembentungan & Others [2003] 8 CLJ 733**, "Such a demand now would smell of extortion on the part of a government agency, to say the least."

Before proceeding further, perhaps at this stage, this poser should be considered first i.e. under what category does this proposed tax fall under? Is it a tax, rate, levy or what? The relevancy of this question becomes obvious when one were to scrutinise the Federal Constitution, especially Article 96.

Article 96 states that no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.

If a charge or a financial levy cannot be imposed through an administrative act under a general power to make regulations, except when the parent Act specifically confers power for the purpose, how then is a contribution by way of tax justified when there is a default (deficiency or lack) in its very foundation. (MP Jain at pg. 109 in **Administrative Law of Malaysia and Singapore**).

In striking contrast to the Sales Tax Act 1972, the Service Tax Act 1975 and the Income Tax Act 1967, which are Acts enacted to charge, levy, collect and impose specific types of taxes, the NLC is an Act to amend and consolidate the laws relating to land and land tenure, the registration of titles to land and of dealings therewith and the collection of revenue therefrom and so on and so forth.

If the NLC which is a specific Act is enacted to collect tax, levy, charge or some sort of duty, it must be made clear with unambiguous words alluded to it.

A strict interpretation approach thus must also be applied and any doubt must tilt in favour of the aggrieved party. (Halsbury Laws of England (3rd Edn) Vol 36, pp. 416/417.

Having reviewed all the facts, the dearth of such an empowerment must be construed as a flaw or an inconsistency, which makes the imposition of the proposed tax unjustified.

However laudable the motive of the state government is in imposing this tax, I submit that it is unconstitutional and contrary to law. See **Howe Yoon Chong v Chief Assessor, Property Tax, Singapore [1978] 1 LNS 65; [1978] 2 MLJ 87**.

**'Deprivation of property'**

The collection of tax can also amount to deprivation of property without adequate compensation. The state government has no legislative authority to impose such a condition and that it is merely acting in accordance with government policy. In support of these contentions, we can refer to the following authorities:

- (i) **Youngstown Sheet & Tube Company v Charles Sawyer [1951] VS SC 343 585 588;**
- (ii) **Eshugbayi Eleko v Officer Administering the Government of Nigeria [1951] AC 662;**
- (iii) **Belfast Corporation v OD Cars Ltd [1960] AC 490;**
- (iv) **Sir Kameshwar Singh v The Province of Bihar (1959) Patna 392 402-471; and**
- (v) **McClintock v The Commonwealth [1947] 75 CLR 124.**

The gist of these authorities may be summarised as follows: No person shall be deprived of his property by a mere executive, administrative or prerogative act. If the executive takes the property of any person, it must be prepared to justify that act under the authority of a valid law.

This is not new to us as Article 13 of the Federal Constitution provides: "13 (1) No person shall be deprived of property save in accordance with law;

(2) No law shall provide for the compulsory acquisition or use of property

without adequate compensation."

**Late penalty fees**

The issue of "Denda Lewat" (Late Payment Penalty), a form of tax for late payment of assessment arose in the Federal Court case of **Generation Products Sdn Bhd v Majlis Perbandaran Klang [2008] MLJU 0425**.

In this case, Generation Products purchased two pieces of properties located within Klang City Council. It was later discovered that the rates for the two properties had not been paid since 1985.

The council sent a notice to the company to pay up and in the same notice, imposed "fees" of 2 per cent for every amount unpaid on a half yearly basis and in 1992 the fees were increased to 10 per cent.

The company challenged the imposition of the fees which were charged on a six monthly basis on sums remaining outstanding to the council. The company argued that the fees may be imposed only once (and not from time to time) and they must be towards the cost of collection of the arrears of rates due to the council and not to be treated as a penalty. The fact that the so-called fees imposed pursuant to Section 147, are intended to be a penalty is never denied by the council. In fact, its contention is that the "fees" are imposed to encourage property owners to pay up their rates early. Even the bills sent by the council to property owners refer to these charges as "denda lewat".

Held by Zaki Tun Azmi, PCA:

"When it comes to assessing whether the authority has exercised its power for any improper purpose, the motive of exercising the power is irrelevant. Unlike cases where the exercise of power is challenged on grounds of mala fide, when personal spite, animosity, malice, fraud, corruption or dishonesty becomes relevant in respect of the earlier instance, however, even if the authority has the

best of intentions, if its act falls outside the scope of the power conferred upon it, the exercise of power is deemed ultra vires and therefore liable to be declared void. (See **Padfield v Minister of Agriculture and Fisheries and Food [1968] 1 AER 694**). The fact that the statute uses very general words does not mean that the exercising authority has the power that it claims. The court has to look at the objective and purpose of the law."

**Strict interpretation**

Rates chargeable by the local authority are no doubt a form of tax. Section 147(1) is a provision of tax and therefore must be read strictly. In the case of **National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99** at page 106, Gunn Chit Tuan, CJ (Malaya) said:

"There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In **Re Micklewait**, it was held that a subject was not to be taxed without clear words."

The provision that imposes tax (local authority rates are but one example) confers power on the relevant authority

to recover the expenses incurred by the local authority for the services rendered. When a person who is subjected to such tax fails to pay the tax,

a penalty may be enforced against him and he has to be penalised for that failure.

All local authorities outside the Federal Territories are directly under the exclusive jurisdiction of state governments. This means state governments have wide powers to control the local authorities and to ensure their effectiveness and efficiency.

**Estimated gross annual rent**

Annual Rateable Value (ARV) means the estimated gross annual rent at which the holding might reasonably be expected to let from year to year, the landlord paying the expenses of repair, insurance, maintenance or upkeep and all rates and taxes. The annual rates payable is calculated by multiplying a gazetted rate percentage against the ARV.

The following three factors are taken into consideration while determining the ARV of a property:

1. The rent payable by the tenant (actual rent);
2. The municipal valuation of the property; and
3. The fair rental value (market value of a similar property in the same area)

The annual value of vacant land, therefore, although ascertained by reference to capital value, must be a value which in the year of assessment can be obtained from the land by building on it and has nothing to do with ascertaining its potential building value in the future, such as must be taken into account when assessing the capital value for compulsory acquisition.

It appears to me that it is an elementary principle of justice that a person who is taxed should be informed not only of the particular property in respect of which he is taxed, but the actual value put on different portions of his property where such portions vary as regards access and general suitability for development. See: **Kim Seng Land Company Limited v the Rural Board Singapore [1935] 1 MLJ 153; Terrell J.**

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