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***Selling Your Properties
To Foreigners ?***

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SELLING YOUR PROPERTIES TO FOREIGNERS ?

1.0 Introduction

Prior to March 25, 1985, there was no restriction as far as origin, race and citizenship went with regard to ownership of land in Malaysia. Pursuant to Act A587 of 1984 (hereinafter referred to as "the 1984 Amendment"), Part Thirty-Three (A) was inserted in the National Land Code, the effect of which was to impose restriction on foreign ownership of landed properties. In the case of land subject to the category "agriculture", there was an absolute prohibition on its dealings in favour of foreigners. But in the case of land subject to the category "building", a disposal could be effected in favour of a non-citizen upon the prior written consent of the State Authority. Any acquisition of land in contravention of these provisions shall be null and void. However, land subject to the category "industry" can be acquired freely by the foreigners.

This amendment was followed shortly by the National Land Code (Amendment) (No.2) Act 1985¹ which came into force on September 13, 1985 in which subsections (3), (4) and (5) were inserted to section 433B, which provides that the restrictions on dealing in land with regard to foreigners shall not apply to any charge effected or lien created in their favour whether before or after the commencement of Act A624. In other words, landowner may charge or create any lien on the land to a foreign individual company without obtaining prior approval of the State Authority but this foreigner is not allowed to bid at the sale of agricultural land without the approval of the State Authority².

Part Thirty Three (A) had a short life span and was repealed in less than two years via Act A658/1986 (hereinafter referred to as "the 1986 Amendment"), with effect from January 1, 1987 giving effect to no limitation as far as foreign ownership was concerned. This move was reflective of the government's desire to deregulate the property market which was going through a slump period between 1984 to 1986 and provides a fresh impetus to investors, especially foreigners to establish a sound footing in the Malaysian property market.

In the year 1988, Malaysia experienced an unprecedented economic growth, and Johor Bahru once again experienced the in flow of "hot money" similar to that encountered in the 70's, when Singaporeans flocked into its property market to buy properties especially residential and agricultural properties. Due to the fall of nearly 40% in the value of the ringgit against the Singapore dollar, Johor Bahru properties became "hot properties" resulting in a boom in the property market which in turn brought negative repercussion to the locals, in the form of soaring cost of living, high inflation rates, traffic congestion problems and exorbitant real

¹ Act A624

² Section 433B (4)

property values. Statistics show that foreign nationals and companies owned a total of 5615 hectares of land between the year 1987 to April 1992.³ Due to this widespread selling of landed properties to foreigners, especially in Johor, the State Government in 1990 made proposals to the Federal Government to amend the National Land Code to restrict foreign purchase of certain types of land in the state⁴.

Now, we are witnessing another set of Part Thirty-Three (A), re-introduced, with certain modifications to the repealed 1984 version, via Act A832 (hereinafter referred to as "the 1992 Amendment"), which came into force on January 1, 1993. The law provides that the State Authority has the discretion in approving foreign purchase of land subject to the category agriculture and building. However, this restriction has certainly not had any negative impact on the number of foreigners buying property in Malaysia, for example in Johor Bahru alone, the number of application for approval of foreign purchased increases from 384 in 1993 to 1293 applications in 1995.⁵ Due to the extensive property activity involving foreigners, and the need to curb excessive speculation in property and to safeguard domestic interests against purchase of property especially residential property by foreign interests, the NLC was again amended in 1996 via Act A941 (hereinafter referred to as "the 1996 Amendment") which provides for the imposition of levy by the State Authority of any purchase of land by foreigners.

Hence, within a span of 12 years i.e. from 1984 to 1996, we are witnessing five major sets of amendments to the law with regard to foreign land ownership in the country. In addition to the restrictions imposed by law, there arise the need to conform to the Foreign Investment Committee (F.I.C.) guidelines which regulate and control foreign investment and also to the various and changing States land policies with regard to this matter.

The writer hereby seeks to give an overview of the law and policies with regard to foreign purchase of land in this country with special reference to Johor.

2.0 Scope of paper

This paper will deal with the following matters :

1. The various form of restriction on foreign landownership i.e.

³ Zalil Baron, "Kesan Pemilikan Tanah oleh Warganegara Asing". Seminar on Amendments to the National Land Code 1992. Its Implications on Property Development Jan. 19-20. 1993 UTM, Skudai, Johor.

⁴ The Star, August 1, 1991

⁵ Teo Guan Kiang, "Implikasi pengenaan levi RM100,000 ke atas pemilikan tanah oleh warganegara asing", Bachelor of Surveying (Property Management) dissertation, UTM (1997) at p.53

- (a) Restrictions in respect of foreign land acquisition under the National Land Code
 - (b) State Government of Johor policy on foreign ownership
 - (c) FIC guidelines
2. The implication of these restriction on land ownership and property market.

3.0 Restrictions of foreign land acquisition under the National Land Code

The imposition of the levy of RM100,000/- in respect of foreign purchase of land and acquisition of interests in land was first announced in the 1996 Budget in Parliament by the Minister of Finance on the 27 October 1995. This subsequently led to the amendment of the NLC via Act 941, gazetted on February 1, 1996 and came into force on February 16 the same year.

The National Land Code (Amendment) Act 1995 which consist of eight provisions, *inter alia*, seek to enable the State Authority to impose a levy when it grants the approval to a non-citizen or foreign company to purchase land or acquire an interest in land. The amount of levy payable is as prescribed in the respective State Land Rules.⁶

Who is a "foreigner"? "Non citizen" is defined by the Code as "a natural person who is not a citizen of Malaysia".⁷ A new definition of "foreign company" was introduced by the 1996 Amendment.⁸ This new definition is to widen the scope of foreign company to cover not only foreign company incorporated outside Malaysia, but also include local companies with 30% or more foreign equity. Prior to the 1996 Amendment, locally incorporated foreign companies were treated as "local companies". However under the present legislation, a local company with at least 30% foreign equity will be subjected to the restriction and imposition of levy on its acquisition of property.

3.1 What is "levy"?

The term "levy" was introduced via the 1995 Amendment but it is nowhere defined by the Amendment. According to *Words and Phases Legally Defined* the word "levying" signifies the execution of legislative power which charges on person or property the obligation of or liability for a tax.⁹ Prior to this

⁶ Section 433B(2) 1996 Amendment

⁷ Section 433A NLC

⁸ Section 5 of 1996 Amendment

⁹ Yang Pei Keng, 1996, "The National Land Code (Amendment) Act 1996 in Journal INSAF, Vol.xxv No. 1 1996

Amendment, "levy" does not exist under the Code. This means that the State Authority has no power to impose levy as opposed to "fees" as provided under section 14 (1)(g) of the NLC. With the insertion of the word levy after the word "fees" under section 14(1)(g), the State Authority is given the power to impose a levy on foreign acquisition. However, section 8 of the 1996 Amendment gave retrospective powers to the State Authority to imposed levy before the 1996 Amendment came into force. In other words, levy collected by the State Authority before 16 February 1996, but after the 1996 Budget announcement on 25 October 1995 is valid and no action or legal proceeding can be brought against the state or its agent for any levy collected during this time.

3.2 When to pay levy?

Prior to the 1996 Amendment, an instrument can be registered only upon the payment of rent due in respect of the land.¹⁰ Via the amendment to section 301A of the NLC¹¹, in addition to the payment of rent, the foreign landowner is also required to pay a levy before any instrument is to be presented for registration at the Land Office or the Registry. Failure to do so will render the instrument presented as not registrable.

Section 433B (2) of the 1996 Amendment provides that levy has to be paid to the State Authority after approval has been obtained from the State Authority.

The 1996 Amendment further requires that the levy shall be paid in full within 30 days of service of notice of approval by the State Authority and on failure to comply within such time limit, the approval shall lapse.¹²

3.3 Types of foreign land acquisition/transaction subject to the payment of levy

There are two distinct types of land transaction which are subject to the payment of levy under the 1995 Amendment i.e.

1. Acquisition by foreigners of any alienated land or any interest as provided under section 433B i.e. by means which require registration for eg. disposal under Division II of the NLC¹³ for eg. acquisition of land by way of alienation of State land, by land dealings - transfer, charge or lease, registering land as trustee, registering land as a personal representative and obtaining land by way of transmission under the Small Estate

¹⁰ Section 301A NLC

¹¹ Section 3 1995 Amendment

¹² Section 433G NLC

¹³ Section 62 to 92 NLC for eg. reservation of land, temporary occupation license, permit, permit to use air space on state land and reserve land, disposal by alienation.

Distribution Act 1955 or the Probate and Administration Act. In this regard, a non-citizen of foreign company must have the prior approval of the State Authority and paid the levy so imposed before any instrument is to be presented for registration at the Land Office or Registry.

2. Acquisition by foreigners of any alienated land or any interest as provided under section 433E i.e. by means which do not require registration under the Code for eg. purchasing of property - condominium, flat or apartment in which strata title has not been issued, by way of sale and purchase agreement and deed of assignment. Thus, any person or body desiring to convey or dispose of land or interest to a foreigner by way of disposal or conveyance under section 433E, i.e. other than those mentioned in section 433B(1) NLC, must first obtain the approval of the State Authority before any agreement or deed is to be executed.

In both types of foreign acquisition mentioned above, prior approval of the State Authority is necessary before payment of levy is made. Non compliance of the requirements imposed under section 433B and section 433E will render the transaction null and void.¹⁴ However, any person or body conveying or disposing of, or any foreigner accepting the conveyance or disposal of, any alienated land without prior approval of the State Authority i.e. in contravention of section 433E (1) shall be guilty of an offence and liable on conviction to a fine not less than RM100,000.

3.4 Who apply for State Authority approval?

Section 433B (1) requires that an application in writing be made by the foreign purchaser or acquirer for approval of the State Authority. But in the case of foreign land transaction which falls under section 433E, the law requires that the application be made by the vendor or disposer of the property. Once approval is obtained by the vendor/disposer of property for the conveyance of the property via the sale and purchase agreement, the purchaser need not have to apply again for another approval when he submitted the memorandum of transfer for registration¹⁵. However, if the purchaser later disposes of this property to another foreigner, then another approval and levy will be imposed before registration can be effected.

The need to apply for the State Authority's approval and imposition of levy is with respect of foreign purchase or acquisition of land subject to the category "agriculture" and "building" only. Foreigners purchasing or acquiring lands subject to the category industry or to any condition requiring its use for any

¹⁴ Section 433C and 433E(5) NLC

¹⁵ See the second proviso to section 433B(1) NLC

industrial purposes are not required to obtain the approval of the State Authority, and therefore no levy may be imposed.¹⁶

3.5 Who pays the levy - purchaser or vendor?

The imposition of levy forms part of the approval process, and should not be treated separately. In other words, a foreigner must first obtain approval of the State Authority in order to purchase land or acquire an interest in land; and if the State Authority grants such approval, then the payment of a levy will be a consideration of the approval. Thus the obligation to pay the levy has to be borne by foreign purchaser. However for foreign acquisition of property under section 433E, as the application for approval is on the vendor or disposer of the property, then the obligation to pay the levy will be on the vendor.¹⁷

3.6 Power of Attorney

Any deed or instrument effected as at the commencement of the 1996 Amendment, i.e. 16 February 1996, by a foreigner under a power of attorney in respect of alienated land in favour of any person or body shall be void but if it is effected prior to that date and stamped within one month of that date i.e. before 16 March 1996, is valid. Thus any deed or instrument executed by foreigner under a power of attorney as at 16 February 1996 onwards shall be void and in the case of an instrument of dealing, be incapable of registration.¹⁸

3.7 Validity of instrument /deed executed before 27 October 1995

Any instrument or deed executed before the 1996 Budget announcement i.e. prior to 27 October 1995, is valid if it is stamped in accordance with the Stamp Act 1949 before 16 March 1996 i.e. within one month from the commencement of this section. This means that foreigners who acquire property before the 1996 Budget announcement and fulfill the stamping time limit requirement, need not have to obtain the State Authority's approval and pay the RM100,000 levy as this transaction is a valid transaction (section 433E (4) NLC).

¹⁶ Proviso to section 433B (1) and proviso to section 433E (1) NLC

¹⁷ Section 433E (1) & (2) NLC

¹⁸ Section 433F

3.8 Validity of instrument / deed executed as at 27 October 1995 but before the commencement of the 1996 Amendment i.e. 16 February 1996

Foreign acquisition of land by execution of instrument/ deed on the 27 October 1995 but before 16 February 1996 is valid if the following requirements are fulfilled :

- (a) application in writing is made by the foreigner within 3 months of enforcement of the 1996 Amendment i.e. before 16 May 1996, for State Authority's approval
- (b) any levy imposed has been paid, and
- (c) instrument / deed has been stamped before 16 March 1996

4.0 Policies of the State Government of Johor Restricting Foreign Ownership

Attention now is likely to be focused on Johor. Johor with its rapid industrialisation program and its proximity to Singapore has attracted many foreign purchasers especially its residential properties which have been a cause of much concern to the State Government.

This is reflective by the restriction imposed on foreign land ownership as early as May 7, 1987 via Circular of the PTG No. 3/1987. This administrative directive requires all Land Administrators in Johor on alienation and re-alienating of land under the surrender and re-alienation procedure, to impose restrictions against foreign purchase of "residential" and "shop" properties by endorsing on the document of title the following restriction:

"The land herein shall not be sold, leased or transferred in any form whatsoever, to foreign nationals or foreign company without prior written approval of the State Authority"

As in the case of other states such as Penang, Malacca and Perak, the state of Johor have also formulated its own guidelines with regard to foreign land acquisition. The guidelines was formulated in early 1993 and later impoverished in late 1996. The current guidelines with regard to foreign acquisition of land which came into force on 1 January 1997 and thus replacing the previous guidelines could be summarised as follows :

Residential properties that foreigner cannot buy :

- (a) Single storey terrace house
- (b) One and half storey terrace house
- (c) Double storey terrace house

- (d) Medium / low cost house
- (e) Bumiputra lot
- (f) Low cost apartment

Residential properties that foreigner can buy :

- (a) Condominium / apartment / flat costing above RM350,000 on condition that the number purchased cannot exceed 30% of the total unit of each block
- (b) Semi-detached house costing above RM350,000 provided that the number purchased by foreigner cannot exceed 10% of semi-detached house available in that development
- (c) Bungalows and holiday home costing above RM500,000. Foreigners are allowed to purchase 10% of the bungalow lots available in that particular development but for holiday homes, the maximum number available for foreigners are 30% of each block.

Commercial properties that foreigner can buy :

- (a) three storey and above shop lot costing above RM500,000 provided that 10% of the shop lot available in that development
- (b) office/retail space provided that only 20% of the total space area available for foreigner

Agricultural land :

Foreigner as at January 1, 1997 cannot purchase land subject to the category "agriculture".

As regard to land subject to the category "industry", no form of restriction imposed and foreigner can freely purchase this property.

In line with the recent amendment to the NLC, the Johor State Government on February 15 of the same year, amended its State Land Rules by inserting after item 30 in Schedule V the following provision :

"31. *Registration of dealing* 433B 100,000"
in favour of non-citizen or
foreign company under NLC

However, this amendment came into force on the 27 October 1995. In order to regulate matters with regard to the imposition of the levy, the state came out with JDLM Circular which provides that foreigner who acquires property prior to the

1996 Budget announcement, will be exempted from the RM100,000 levy if he has the document stamped before that date i.e. before 27 October 1995. This circular is clearly in contradiction with section 433E (4)(a) of the NLC, which not only validates transaction executed before 27 October 1995 provided that it is stamped by the 15 March 1996 but exempt him from the imposition of levy.

The circular further provides that in addition to the above requirement, the foreigner will be exempted from the levy if all documents / instruments relating thereto, is submitted to the Land Office within 5 months from the date of commencement of the section i.e. by the 26 March 1996. This provision seems to disregard "dealings" which falls under section 433E of the NLC. Does this mean that a foreign purchaser of condominium in which strata title has not been issued yet and who has obtain prior approval of the State Authority and paid the levy, be subjected again to the same requirements i.e. approval and payment of levy, if he were to submit his application for registration after 26 March?

Other form of restriction imposed by the state of Johor but not specifically against foreign ownership are :

- a. General restriction
- b. Bumiputra restriction

The general restriction is imposed on certain free lots or open lots and it is endorsed on the document of title to the lots or land as follows:

"This alienated land shall not be transferred, leased, charged or transmitted in whatever form including the use of a sale and purchase agreement intending to transfer or sell the land, without prior approval of the State Authority"

The objective of the State Authority in imposing this type of restrictions is to control dealings on the particular lot or land. However, this prohibition against subsequent dealings is not absolute as the registered owner may apply for approval via a form and attaching with it a processing fee of RM10 to the Land Office.

"Bumiputra lot" is another form of restriction in interest imposed by the State Authority on alienation or on realienation of the land under the surrender and realienation procedure, to the effect that the ownership of this particular category of land limited to Bumiputras only and dealings to non-Bumiputras are prohibited. This restriction is endorsed on the document of title of the land as follows:

"The land herein once transferred to a Bumiputra, shall not, subsequently, be sold, leases or transferred in any form whatsoever, to a non-Bumiputra without prior approval of the State Authority"

This means that once approval of the State Authority is obtained to transfer or lease this type of land to a non-Bumiputra then the new proprietor who later intends to sell the land to another non-Bumiputra, need not have to apply for approval from the State Authority. He is deemed to have complied with the restriction in interest but the approval given by the State Authority on application made by the previous Bumiputra owner of the land. However, this does not mean that the Bumiputra restriction has been “lifted” or removed from the document of title as it still runs with the land and thus, binds the proprietor of the land. In other words, once this land changes into the hands of a Bumiputra proprietor, then this restriction will take effect.

What is the effect of non-compliance with the restriction in interest? The law explicitly provides that the transfer of land subject to the restriction in interest or a dealing not in compliance with the restriction in interest is incapable of registration and thus the transfer is null and void¹⁹. In such cases the Johor Land Office will impose a penalty on land owners who fail to comply with the restriction in interest. For example in housing projects, an agreement made between the housing developer and the State Authority, would provide that in cases of sales of Bumiputra single-storey terrace houses to non-Bumiputra without prior approval of the State Authority, the developer would be fined RM400/ per lot. The penalty imposed depends on each case and at the discretion of the State Authority and in fact is a condition for approval from the State Authority. This means that once a fine is paid by the housing developer for the breach, approval will be given by the State Authority and thus the dealing is registered in favour of the purchaser.

Therefore, the effect of non-compliance with the restriction on interest does not have the effect of nullifying the transaction or made the transaction incapable of registration but the registered proprietor of the land is merely subject to a penalty in the form of a fine which is also a pre-condition for approval. Hence, the reason for many of these Bumiputra lots being transferred to non-Bumiputra and also foreigners.

5.0 Restrictions Imposed by Other Laws and Regulations

Other forms of restrictions on landownership imposed by other laws but not specifically against foreigners, are the Malay Reservation Enactments of the respective Malays States, the National Land Code (Penang and Malacca Titles) Act 2/1963, Customary Tenure Enactment (FMS Cap, 215), Land (Group Settlement Areas) Act 1960, and the Aborigines Peoples Act 1950. These legislations serve to preserve land within the possession of certain groups of people. However, the Malay Reservation law became one of the country's laws which was “entrenched” in the Federal Constitution.²⁰ Being closely identified

¹⁹ Section 301 (c) of the National Land Code

²⁰ Article 89 thereof

with the special rights of the Malays, any change in the Malay Reservation law requires not only the two-thirds majority vote of the people's representatives in both the State and the Federal legislature, but also the concurrence of the Conference of Rulers.

Malay reservation land refers to that special category of land situated within the territorial boundaries of each state in Peninsular Malaysia which can only be owned or held by Malays. The State Authority, in exercising its powers of disposal under the Code, can alienate such lands only to Malays, and what constitutes a "Malay" depends on the definition and interpretation of that term as determined in the respective State legislations. Dealings in respect of such lands, such as transfers, leases, charges and easements, can only be transacted amongst Malays, and any dealings involving non-Malays on such Malay reserve lands will be held null and void²¹

6.0 Other Forms of Limitation on Landownership

The Foreign Investment Committee (FIC) which was formed in 1974 under the Economic Planning Unit (EPU) of the Prime Minister's Department acts as the government's watchdog in regulating private sector investment by both the local and foreign investors in the country. Although the policy of the government is to encourage foreign investment in the country, it is vital that national interests are given priority when forming investment policy guidelines in the country. Thus, with the setting up of the FIC, the government hoped to achieve a balanced ownership and control, in line with the New Economic Policy (NEP) which provides a 30% allocation for Bumiputra participation, 40% for the non-Bumiputra and 30% to the foreigner.

In controlling the acquisition of fixed assets by foreigners in the country, the FIC approval is required for every purchase of real property, regardless of price. Thus, prior to registration of the transfer, the purchaser must have a certificate from the FIC approving its purchased and this certificate is attached to the Memorandum of Transfer to be submitted to the Land Office. If the certificate of approval from the FIC is not obtained then the Land Registration Office is not expected to register the transfer even though the requirements of the National Land Code were fulfilled. The FIC via its 1974 guidelines requires that all foreign purchases of immovable property including terrace units, bungalows, apartments and condominiums require its approval²².

²¹ FMS, subsection (i) of section 19; Johor, subsection (i) of section 20; Terengganu, subsection (i) of section 21; Kelantan, subsection (1) of section 12; Perlis, subsection (ii) of section 5 and subsection (ii) of section 5A; Kedah, subsection (2) of section 6. See the cases of Haji Hamid b. Ariffin V. Ahmad B. Mahmud (1976) 2 MLJ 79. Ho Giok Chay v. Nik Aishah (1961) MLJ 49 and Idris b. Hj. Mohamed Amin v. Ng Ah Siew (1935) FMSLR 70

²² "Builders in a fix over directive", New Straits Times Jun 19, 1992

The 1992 FIC's guidelines can be summarised as follows:

1. Condominium units costing more than RM300,000 will no longer be subject to conditions on use or length of ownership. (Under the previous guidelines condominiums above RM500,000 could only be resold after five years of purchase). However, approval of the FIC need to be obtained for such acquisition.
2. Foreign individuals and companies cannot buy residential property worth less than RM80,000.
3. acquisition of a shop house must be made by a company that is at least 70% owned by locals.
4. A foreigner may buy only one unit of residential property for his own use or investment.
5. If foreigners want to buy more than one property, this must be done through a local company with at least 70% Malaysian equity.
6. Condominiums and apartments priced between RM80,000 and RM300,000: foreigners may purchase for owner-occupation, but cannot resell within three years of purchase. If it is rented out, then, it cannot be resold within five years of purchase.
7. Bungalows worth more than RM500,000: foreigners may purchase for owner occupation but cannot resell within three years of purchased were rented out by owners, they cannot be resold within five years of purchase.
8. Bungalows worth RM80,000 to RM500,000: foreigners may purchase for owner-occupation: cannot be resold within three years of purchase.
9. Terrace houses and link houses worth more than RM200,000: foreigners may purchase for owner-occupation; cannot be resold within three years of purchase. If rented out, cannot be resold within five years of purchase.
10. Terrace houses and link house worth between RM80,000 and RM200,000: foreigners may purchase for owner-occupatuon; cannot be resold within three years of purchase and cannot rent out the property.

In June 1995, the National Land Council promulgated a new set of guidelines on foreign acquisition of landed properties. Since land matters are constitutionally under state jurisdiction, some states have made minor adjustments to the guidelines. The guidelines include the following :

- Industrial property - No restriction
- Residential property : Foreigners are not allowed to buy :
- terrace houses of two storeys and below
 - low cost and medium cost houses
 - low cost and medium cost flats / apartments
 - condominium of less than RM250,000 each,
 - properties under the Bumiputra quota

Foreigners are allowed to buy less than 10% of bungalows and semi-detached properties in any development. If the property is to be redeveloped, then a local company with local equity of 49% (including 30% Bumiputra equity must be set up).

Foreigners can buy condominium costing more than RM250,000 and holiday homes on condition that the numbers do not exceed 30% of each block.

Thus, now lies the question as to whether the rules of a State supercede those of a body with federal powers such as the Foreign Investment Committee ? According to the Director General of Lands and Mines Malaysia, the FIC guidelines are merely administrative in nature and have no legal standing and the State Authority may register land in favour of the foreigners even if the guidelines are not complied with.²³

This contradiction is further highlighted since FIC was not formed pursuant to any Act of Parliament but merely as a government watchdog to oversee that local interests are protected. Its role is to monitor and ensure compliance with the New Economic Policy. In the Federal Court case of *David Hey v. New Kok Ann Realty Sdn Bhd*,²⁴ even though the Court expressed its willingness to regard the guidelines as public and not merely political policy, it did not expressly state that the guidelines have the force of law.²⁵ Moreover, as registration of land ownership is a state matter, the role and authority of the FIC in imposing conditions and restrictions at its discretion when approving acquisition by foreign nationals is questionable.

Another form of limitation on foreign ownership is in the form of control imposed by Bank Negara Malaysia to the amount of financing made available to foreign nationals who want to purchase properties here. Prior to 1988 there was no borrowing limit for foreign nationals, i.e. 100% domestic financing was available

²³ Interview with Dr. Nik Mohd. Zain Nik Yusof, Director General of Land & Mines Malaysia on June 9, 1992

²⁴ (1985) 1 MLJ 167

²⁵ Salleh Buang. "Foreign Ownership of Land: Implications of the NLC (Amendment) Act 1992". A paper presented at the Seminar in Amendments to the NLC: Its Implications on Property Development, January 19 to 20 1993, UTM, Skudai

to them. However, in 1988, foreigners could only borrow up to a maximum of 70% of the value of the property purchased. A further reduction to this limit was introduced in early 1990 whereby a maximum limit of 50% domestic financing was set. However via a directive dated November, 9 1990, Bank Negara provided that no approval of domestic financing for property acquisition and development by non-citizens and non-citizen controlled companies will be given by the central body.²⁶ The main reason for the imposition of this restriction was to encourage funds from abroad for investment purposes thus saving the country foreign currency exchange which is more profitable.

However it could not be ascertained how many of these foreign purchases were actually funded by domestic financing and thus the effectiveness of controlling foreign ownership by reducing domestic funding to foreigners is doubtful.

In view of the current overheated market and to hamper intense speculation in land, the government amended the Real Property Gains Tax Act 1976 by re-introducing the two-tier system of tax for its citizens and non-citizens. Under the new provision, any disposal of property made by foreigner after 25 October 1995, will be subjected to a flat rate tax of 30%, regardless of the time of acquisition of the property. However, if foreigner acquires property prior to 25 October 1995 but dispose it after this date, he will be subjected to the same rate imposed to a citizen i.e. between 5% - 30% for disposal within 2 to 6 years and above.

7.0 CONCLUSION

It has been featured that in the past 12 years, attempts were made both at Federal and State levels to impose limitation on foreign land ownership in the form of law, policies and other form of restriction such as the FIC's approval prior to registration and the imposition of a flat rate of 30% under the RPGT for disposition of property by foreigner. As land is a state matter, most of the States has formulated its own set of guidelines with regard to this matter which resulted in various and differing policies and guidelines pertaining to this matter, giving rise to confusion and uncertainty. Hence, efforts were made to streamline these guidelines and policy for eg. in June 1995 the National Land Council promulgated a set of guidelines which is to be used uniformly in all the States. Although all the States have agreed to this guidelines, some states wanted minor adjustments according to its particular needs, for instance, in Penang foreigners can buy commercial properties of three storeys and above costing RM1.5 million whereas in Johor the price ceiling for this type of property is RM500,000.

Most of the guidelines pertaining to foreign acquisition of property in Malaysia are based mainly on three factors i.e. value of property, types of property and quota in particular property development.

²⁶ The Star Business Section, November 21, 1990

However, it is also observe that the current legislation and policy with regard to foreign ownership is not totally devoid from discrepancies. The obvious setback in the policy and guidelines lies in the discetionary powers of approval of the State Authority. There were no clear cut, written guidelines as to its power of approval for transfer or disposal of land to foreigners. It has been reported that 40% out of 800 individual applications submitted for State approval by foreigners in the first four months of 1996, were rejected²⁷. Thus, what is the basis for approval or in this case, rejection, assuming that all the requirements provided under the guidelines (price ceiling eligibility, type and quota) fulfilled? This "discretionary powers" are viewed by certain quarters as indicating "inconsistency" which may drive investors away, but others may viewed it as indicating "flexibility." There is undoubtedly a need for achieving a balance between the importance of foreign investment in the country on the one hand, and the need to safeguard local interests. Thus, the approval power of the State Executive Council should be fettered by law rather than based on mere political considerations prevalent at the time, because if left unfettered, there will be a tendency for abuse.

Statistics shows that the number of foreign land transaction in Johor Bahru has decreased in number from 1293 applications made in 1995 to 1005 applications in 1996 with the imposition of levy. Generally the imposition of levy has succeeded in hampering foreign land speculation activities. Many housing developers in Johor Bahru were of the opinion that the imposition of levy has a dampening effect on its property market i.e. between 0% to 5% in a residential development project. It has undoubtedly drive short term foreign speculators away but studies indicated a change in preference, for eg. in residential properties, to top ranged price properties costing over RM501,000 after the levy imposition came into force. This indicate that the RM100,000 levy did not have much impact on foreign speculators acquisition of top range property i.e property costing above RM1 million. Thus this imposition of levy should not depend upon a flat rate of RM100,000 but as exercise by the system of taxing under the RPGT i.e. depending upon the value of property acquired.

These restrictions on foreign landownership the latest being, the imposition of levy, was not to cause any undue hardship or to hamper the economic development of the country. This move was merely reflecting the government's desire to ensure that our economic development will not be adversely affected by excessive speculation in the property sector and steer foreigners from areas of conflicting interest. Despite criticism, anxiety, outcry over its implementation, these restrictions - law, guidelines and policy- is here to stay.

²⁷ "Hot debate on levy on foreign buyers", The Edge, June 3, 1996

REFERENCES

1. **Adibah Awang**, "A Study on Landownership by Non-Citizens in Johor Bahru", Master of Comparative Laws dissertation, Petaling Jaya : International Islamic University (1992) (Unpublished)
2., "The Law and Policies with regard to foreign purchase of land with special reference to Johor", The Surveyor (1993) Vol. 28 No.2
3. **Ahmad Hj. Hashim**, "Garis-garis Panduan Jawatankuasa Pelaburan Asing Mengenai Perolehan Rumah-rumah Kediaman oleh Kepentingan Asing", Seminar on Amendments to the National Land Code 1992; Its Implications on Property Development. Skudai, January 19 & 20, 1993, UTM.
4. **Fatimah bt. Abdullah**, "Dasar-Dasar Pengurniaan Tanah di Negeri Johor dan Masalah-Masalah dalam Melaksanakannya", Tesis Diploma Pentadbiran Awam, Kuala Lumpur: Universiti Malaya (1976) (Unpublished)
4. **Grace Xavier**, "Implications of the Restrictions on Foreign Ownership following the Amendments", Seminar on Amendments to the National Land Code 1992; Its Implications on Property Development, Skudai, January 19 & 20, 1993, UTM.
5. **Kaloo Vanajam**, "Current Legislation and Impact on Real Estate", The Surveyor (1993) Vol. 28 no.2
6. **Mani Usilappan**, "The Impact-Implication Assessment on foreign ownership", Conference on the Malaysian land laws, Pan Pacific Kuala Lumpur 12 - 13 October 1995, Asia Business Forum Sdn. Bhd.",
7. **Nik Abdul Rashid Nik Abdul Majid**, "Issues on Property Development following the Amendments to the NLC", Seminar on Amendments to the National Land Code 1992; Its Implications on property Development, Skudai, January 19 & 20, 1993, UTM
8. **Nik Mohd Zain Yusof**, "Land Ownership Policies", Commercial Property Transactions and Land Ownership Policies Seminar Johor Bahru, January 20, 1992, Centre for Management Technology
9., "The Guidelines for Foreign Land Ownership", One day Conference, 28 May 1996, Kuala Lumpur, Mentor
10. **Rashida Mat Rani**, "Pindaan KTN 1992 Pemilikan Tanah oleh warganegara asing (Kesan ke atas pemilikan harta tanah kediaman) Bachelor of Surveying (Property Management) dissertation, Johor Bahru: Universiti Teknologi Malaysia (1995) (Unpublished)

11. **Salleh Buang**, Associate Prof., "Foreign Ownership of Land: Implications of the NLC (Amend) Act 1992", Seminar on Amendments to the National Land Code 1992; Its Implications, on Property Development, Skudai, January 19 & 20, 1993, UTM
12. **Teo Guan Kiang**, "Implikasi Pengenaan Levi RM100,000 ke atas pemilikan harta tanah oleh warganegara asing", Bachelor of Surveying (Property Management) dissertation, Johor Bahru, UTM (1997) (Unpublished)
13. **Yidris b. Abdullah**, "Amendment to the NLC : Imposition of levy in respect of foreign purchase of land and acquisition of interest in land", Seminar on Malaysian Land Law, 1 August 1996, Persatuan Pengurusan Tanah Malaysia, Crown Princess, Kuala Lumpur.