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SPECIAL COMMISSIONERS OF INCOME TAX

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RELEASE OF BUMIPUTERA QUOTA LOTS

SECTION 33(1) INCOME TAX ACT 1967

SSQSB
V.
DIRECTOR GENERAL OF INLAND REVENUE

The Taxpayer's principal activity is a property development. The Taxpayer had been granted with the approval to release 30% of Bumiputera units at Nautica Condominium to be sold to Non-Bumiputera purchasers and required to pay RM2,967,262.00 to Lembaga Perumahan dan Hartanah Selangor ("LPHS") for the release.

The Director General of Inland Revenue ("the DGIR") raised Notice of Additional Assessment for Year of Assessment 2015 in disallowing the Taxpayer's expenditure claims pursuant to section 33(1) Income Tax Act 1967 ("ITA 1967") in relation to the contribution payment made to LPHS. The Taxpayer contended that the contribution payment made to LPHS is a business expense incurred in the production of its business income. The Taxpayer relied on the recent Court of Appeal's case of *KPHDN v Mitraland Kota Damansara Sdn Bhd* (2023) 6 CLJ 701 and held that the payment made to LPHS is a revenue expense that is deductible under section 33(1) ITA 1967. The Taxpayer argued that the payment was wholly and exclusively incurred for its business, and it is a revenue expenditure and is not penal in nature.

In response, the DGIR asserted that in determining the word "*wholly and exclusively*", one must ascribe to the business dealing and industrial practice. Therefore, the determination of "*wholly and exclusively*" under section 33(1) ITA 1967 must only be confined to the nature of "revenue expenditure" and it must not encroach into the nature of 'capital expenditure'. The DGIR argued that in determining the nature of the payment made to LPHS, Pekeliling PTGS Bil. 3/2007 ("Pekeliling 3/2007") should be read in its entirety, where it sets out the guidelines imposed by the State Authority to be adhered by any developer. In particular, paragraph 2.4 Pekeliling 3/2007 should be read in tandem with paragraph 3.2 of the same, where the nature of the payment made to LPHS was in fact penalty for the breach of the rules and regulations imposed by LPHS.

The DGIR further argued that under Pekeliling Bil. 3/2007, there is a requirement to advertise the Bumiputera lots three (3) months prior to the application being made which the Taxpayer was forbidden from selling the lots to Non-Bumiputera before getting an approval from the LPHS. In this case, the Taxpayer had sold the Bumiputera units to Non-Bumiputera before the approval was granted based on the facts that the units were sold one day after the advertisement was issued which was before the launching date of the project. The Taxpayer, at all material times, did not have the intention to comply with the original requirement stipulated under Pekeliling Bil. 3/2007 as the application for the release of Bumiputera units was made to LPHS even before the said project was completed. Further, it is contended that the case of *Mitraland* is distinguishable to the facts at hand as the Taxpayer failed to adduce evidence to show that the remaining Bumiputera units could not be sold accordingly if the Taxpayer had waited for the project to be completed. The Court in *Mitraland* also did not make any comments and/or findings on the purpose of the introduction of Pekeliling Bil. 3/2007. In essence, it is the DGIR's contention that the Taxpayer's actions were tantamount to a breach of the original conditions under Pekeliling Bil. 3/2007.

The SCIT had on 27.10.2023 dismissed the Taxpayer's appeal and held that the DGIR was correct to disallow the deduction on the payment made to the LPHS. The SCIT also held that the Taxpayer failed to discharge its burden of proof under paragraph 13 Schedule 5 ITA 1967 and the DGIR has the basis in law to impose penalty.

Editorial Note

The Appellant has the right to appeal against the decision of the SCIT within twenty-one (21) days from the date of the decision of the SCIT