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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

TDCSB
V.
DIRECTOR GENERAL OF INLAND REVENUE
MOF.PKCP.700-7/1/1151-1153

The Taxpayer's principal activity is a property development. The Taxpayer had been granted with the approval to release the Bumiputera lots to Non-Bumiputera purchasers subject to the Taxpayer making contribution payment of the Bumiputera Discount Payment to Lembaga Perumahan dan Hartanah Selangor ("LPHS").

The Director General of Inland Revenue ("the DGIR") raised Notices of Additional Assessment for Years of Assessment ("YAs") 2015, 2016 and 2018 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 to release the Bumiputera units to Non-Bumiputera purchasers which widens its category of purchasers; and the sole purpose for incurring Bumiputera Release payment is to expedite the sales of the 18 unsold Bumiputera units. 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 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 made the choice and elected to sell the Bumiputera units to Non-Bumiputera purchasers prior to the approval being granted and the completion of the projects, which tantamount to the breach of the original conditions stipulated 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 subparagraph 13 Schedule 5 ITA 1967 and 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