COURT OF APPEAL REVERSED THE HIGH COURT'S DECISION: PAYMENT FOR RELEASE OF BUMIPUTERA QUOTA IS NOT DEDUCTIBLE UNDER SUBSECTION 33 (1)

DIRECTOR GENERAL OF INLAND REVENUE
v.
TAMAN EQUINE (M) SDN BHD

COURT OF APPEAL

March 22nd , 2022

Legal Department, IRBM

CORAM

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- YA DATO' CHE MOHD RUZIMA BIN GHAZALI
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Keywords: Bumiputera quota – Deductible expenses – Ss. 33(1) – Penalty in nature – Wholly and exclusively

The taxpayer, as a housing developer, is required by the Selangor State Government to reserve and sell a percentage of units in a development project to Bumiputera purchasers. However, an application can be made to the state government to release the Bumiputera quota units subject to payment of a certain sum to the State Government, which was made, and the taxpayer claimed the said payments as business expenses under ss. 33(1) ITA 1967.

The Special Commissioner of Income Tax (SCIT) dismissed the taxpayer's appeal on the grounds that the payment made to the State Government is penalty in nature and not wholly and exclusively incurred for the purpose of producing the gross income. Hence, the payments are not allowable under ss. 33(1) and prohibited under ss. 39(1) of the ITA 1967.

The SCIT's decision was reversed by the High Court and this decision was appealed by the Director General of Inland Revenue to the Court of Appeal.

Before the Court of Appeal, the Senior Revenue Counsel argued that the SCIT had made a finding that the nature of the payment is penalty for breach of condition imposed by the State Government. This is a finding of fact which is unassailable. Breach of law,

rules or condition laid down by the relevant authorities do not form part of the taxpayer's income producing activity. Hence, any expenditure arising from such breach is not incurred in the production of gross income as envisaged by ss. 33(1) ITA 1967. Apart from that, the payment is for the purpose of bringing into existence an advantage in terms of procuring the permission/consent from the state authority for the enduring benefit of the business. It is to release the units to enable it to be sold to the non-Bumiputera. Hence, it is capital in nature and prohibited under ss39(1) ITA 1967. does not rank for deduction under Section 33(1) of ITA.

In reply, the taxpayer's counsel argued that the payment was wholly and exclusively incurred in the production of gross income and deductible under ss. 33(1) ITA 1967. The taxpayer, being unable to sell the Bumiputera units, opted to obtain the release of the units to sell to non-Bumiputera purchasers. It is necessary for the taxpayer to do so. The payment flowing from the act formed the essence of the taxpayer's business made for the purpose to earn revenue. Without the payment being made, the taxpayer would not been able to generate its income. The High Court Judge correctly appreciated that the payment is not stipulated as non-deductible under ss. 39(1) ITA 1967.

The Court of Appeal unanimously held that the payment does not fall under ss. 33(1) ITA 1967. The appeal is allowed, the order of the High Court is set aside and the SCIT's decision is restored.

Editorial Note:

The issue of the payment for release of Bumiputera quota has been argued before the Court of Appeal in two cases and the Court has decided in favour of the DGIR in both cases.