



📍 The Special Commissioners
of Income Tax

📅 September 27, 2019

🏛️ Tax Litigation Division,
Legal Department

JUDGES

Tn Azahari Abu Hanit
Tn Effendi Nazila Abdullah
Pn Rosidah Abu Bakar

REVENUE COUNSELS

Abdul Aziz Harun
Farah Afiqah Nordin
Norhamizah Ab Han

PAYMENT MADE TO STATE GOVERNMENT FOR THE RELEASE OF BUMI QUOTA IS PENALTY AND NOT DEDUCTIBLE UNDER SECTION 33 OF INCOME TAX ACT 1967

— **TESB v. KETUA PENGARAH HASIL DALAM NEGERI**

FACTS

TESB (“the Appellant”) had applied from Lembaga Perumahan dan Hartanah Selangor (“LPHS”) to release 30% of the Bumiputera quota for one of their projects because the sales for the Bumiputera lots did not receive favorable and satisfactory responses.

LPHS approved the Appellant’s application for the release of the Bumiputera quota provided that the Appellant to refund 10% of the sales price and pay a penalty of 5% to the State Government through LPHS for violating the terms of the quota.

ISSUES

1. Whether the amount of 10% of the sales price paid to the State Government through LPHS is deductible under Section 33(1) of the Income Tax Act 1967 (“ITA”).
2. Whether the 5% penalty paid to the State Government through LPHS is deductible under Section 33(1) of the ITA.

APPELLANT’S CONTENTIONS

Appellant contended that the ITA does not provide that a penalty is not deductible and it was not expenditure restricted from deduction under Section 39 of ITA. The payments were made to widen the group or class of people whom the Appellant could sell the units to, thus increased the chance to sell the units faster. The payments were not made to obtain the right to sell.

There is no asset or enduring benefit that has been acquired by the payments. The payments were made to remove an obstacle to greater profit. It's a circulating capital.

The 5% is not a penalty because they did not breach any rules and regulations imposed by the LPHS.

RESPONDENT'S CONTENTIONS

The 10% payment made to LPHS was not wholly and exclusively incurred in the production of gross income but for the production of the Appellant's income. The payment was made to enable the Appellant to release the Bumiputera quota and to sell the units to non-bumiputera purchasers at a normal price instead of 10% less. Thus, such expense was for the production of the Appellant's income and was capital in nature.

The amount of 5% paid by the Appellant to LPHS was a penalty for violating the terms of the quota. Penalty does not fall under the allowable expenditure under Section 33(1) of the ITA. This expense was incurred due to the Appellant's failure to follow rules and regulations imposed by the State Authority and was not related to the performance of the business operation, performed bona fide for earning an income.

COURT'S DECISION

The Special Commissioners of Income Tax dismissed the Appellant's appeal and ruled that the payments made to LPHS were penalty for the release of Bumiputera quota and not deductible under Section 33(1) of the ITA.