



📍 The Special Commissioners  
of Income Tax

📅 October 18, 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

**SPECIAL COMMISSIONERS RULED THAT PAYMENT MADE TO SELANGOR STATE AUTHORITY TO PROCURE APPROVAL TO SELL UNITS OF DEVELOPMENT RESERVED FROM BUMIPUTERA TO NON-BUMIPUTERA NOT DEDUCTIBLE PURSUANT TO SUBSECTION 33(1) OF THE INCOME TAX ACT 1967**

— **MKDSB v KETUA PENGARAH HASIL DALAM NEGERI**

## FACTS

The Appellant had applied from Lembaga Perumahan dan Hartanah Negeri Selangor (LPHS) to sell the units of development of bumiputera quota to non-bumiputera. The reason given for the application was because the Appellant was unable to meet the quota despite stepping up its marketing efforts.

LPHS approved the Appellant's application to sell the units of bumiputera quota to non-bumiputera provided that the Appellant pays LPHS a sum of 7% or 10% equivalent to the bumiputera discount and 5% of the selling price for '*caj pelanggaran mekanisme pelepasan kuota bumiputera*' for each of the sales made before the approval was granted.

## MKDSB'S CONTENTIONS

1. The Appellant contended that the Government charges imposed by LPHS were not penalty or capital in nature and that the expenses were wholly and exclusively incurred in the generation of income of the Appellant. The expenses should qualify for tax deduction under subsection 33(1) of the Income Tax Act 1967 (ITA).
2. The Appellant contended that the amount paid was payment directly connected to the sales of the development units of the Appellant. If the Appellant did not pay the said amount, the units would not or could not be sold and therefore no gain or profit can be made.
3. There is no prohibition for the deduction of the said amounts pursuant to Section 39 of ITA.

4. All the Government charges were paid in the course of carrying on the business of the Appellant and for the purpose of earning income and therefore, should be deductible.
  5. The Appellant contended that they did not make any incorrect return. As such, no penalty should be imposed pursuant to subsection 113(2) of ITA.
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## **KPHDN'S CONTENTIONS**

1. In order for outgoings and expenses to be allowed as deductions, they must be wholly and exclusively incurred IN the production of gross income. To qualify for deductions, it is not sufficient that the expenses incurred are related and pertinent to the production of income, but it must be wholly and exclusively incurred in the production of income. The said payment to LPHS shall be considered as the payment made FOR the production of the Appellant's income as without such payment, the Appellant cannot discharge themselves from selling the units of bumiputera quota to non-bumiputera.
  2. With payment of 7% or 10% paid to LPHS, the Appellant can sell to the non-bumiputera purchasers at a normal price instead of 7% or 10% less for the said bumiputera units. Thus, the 7% or 10% paid to LPHS could not be said as expenses under subsection 33(1) ITA as it was made FOR the production of the Appellant's income and thus, capital in nature.
  3. The amount of 5% paid by the Appellant to LPHS was in fact a penalty paid to the State Government through LPHS for violating the terms of the quota imposed by the State Authority. The "penalty" payment does not fall under the allowable expenditure under subsection 33(1) of the ITA.
  4. The expenses claimed by the Appellant were not wholly and exclusively incurred in the production of its gross income because the expenses incurred must be attached to the performance of the business operation and performed bona fide for earning an income. In this instance, the expenses were incurred by the Appellant due to the failure to follow certain rules and regulations imposed by the State Authority.
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## **COURT'S DECISION**

The Special Commissioners of Income Tax dismissed the Appellant's appeal and ruled that the payment made to LPHS is not deductible under subsection 33(1) of ITA and penalty imposed under subsection 113(2) of ITA is maintained.