THE TAX DISPUTES AND LITIGATION REVIEW

SEVENTH EDITION

Editor
Simon Whitehead

THE LAWREVIEWS

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PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the seventh edition, we have continued to add to the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax, in response, no doubt, to political pressure to address tax avoidance. In the United Kingdom alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal.

Over the past year, the focus on perceived cross-border abuses has continued with European Commission decisions against past tax rulings in Belgium, Ireland and Luxembourg, and the BEPS Project reaching a crescendo in the announcement of a 'diverted profits tax' to impose an additional tax in the United Kingdom when it is felt that a multinational is subject to too little corporation tax even in an EU context and a digital services tax in the United Kingdom introducing provisions that appear in principle to pre-empt the Commission's action in the area. The general targeting of cross-border tax avoidance now has European legislation behind it with the passage last year of the second Anti-Tax Avoidance Directive. The absence of much previous European legislation in direct tax has always been put down to the need for unanimity and the way in which Member States closely guard their taxing rights. The relatively speedy passage of this legislation (the Parent–Subsidiary Directive before it took some 10 years to pass) and its restriction of attractive tax regimes indicates the general political disrepute with which such practices are now viewed.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Joseph Irwin in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2019

Chapter 17

MALAYSIA

D P Naban, S Saravana Kumar and Chris Toh Pei Roo[1]

I INTRODUCTION

Compared to its counterparts in neighbouring jurisdictions, the Malaysian Inland Revenue Board (IRB) has arguably adopted a more aggressive approach in recent years. While the Singaporean contributor to this publication described the Inland Revenue Authority of Singapore (IRAS) as 'generally conservative and risk-averse' last year,[2] the IRB is known, by contrast, for its tendency to issue strongly worded statements in the Malaysian press. Among others, the IRB has defended criticisms of its alleged high-handed tactics (described by some quarters as 'tax terrorism') on grounds of promoting efficiency and increasing revenue collection.[3]

Perhaps not uncoincidentally, tax disputes are strongly litigated in the country, with statistics presented by the IRB at the National Tax Conference in June 2018 showing a balance of 915 cases that have yet to be resolved in the Malaysian courts. On the one hand, the continued capability of the courts to efficiently hear and decide the ever-increasing number of tax disputes remains a valid concern. On the other hand, the healthy appetite for litigation in Malaysian taxpayers may perhaps be reflective of a renewed confidence in the judiciary's ability and impartiality in providing long-due clarification in areas of tax law where genuine disagreement and uncertainty exists.

Cases of interest from the past year are outlined below.

i High Court

The following decisions were rendered by the Kuala Lumpur High Court (KLHC) in the past year:

a a landmark decision upholding the imposition of safeguard duties by the Ministry of International Trade and Industry in the steel sector;[4]

b reinforcing the trite principle that double taxation agreement provisions shall prevail over that of the Income Tax Act 1967 (ITA);[5]

1 D P Naban is a senior partner, S Saravana Kumar is a partner and Chris Toh Pei Roo is an associate at Lee Hishammuddin Allen & Gledhill.

2 https://thelawreviews.co.uk/edition/the-tax-disputes-and-litigation-review-edition-6/1167738/singapore.

3 https://themalaysianreserve.com/2017/11/17/govt-defends-irbs-aggressive-approach/.

4 *The Steel Wire Association of Malaysia v. The Ministry of International Trade and Industry and others* (Judicial Review Application No. WA-25-157-06/2017).

5 *Orange Rederiet Aps v. Ketua Pengarah Hasil Dalam Negeri* (Judicial Review Application No. WA-25-75-03/2017).

c that Section 127(3A) is an enabling provision which does not allow the Minister to take away an entitlement to tax incentive of a taxpayer;[6]

d that an advance ruling by the IRB under Section 138B ITA amounts to a decision amenable to judicial review. In this case, the KLHC allowed the taxpayer's judicial review application on the grounds that the advance ruling had been tainted with illegality;[7] and

e that the ITA cannot be used by the IRB as an instrument to fish for information on the clients of law firms.[8]

ii Court of Appeal

The Court of Appeal (COA) allowed the taxpayer's appeal and held that taxpayers who have relied on the IRB's stance as contained in public rulings issued under Section 138A(1) ITA cannot be precluded from obtaining relief in respect of errors or mistakes under Section 131(4) ITA.[9]

The COA upheld the KLHC's granting of a stay of the civil recovery proceedings commenced by the government of Malaysia against the taxpayer pending the taxpayer's appeal to the Special Commissioners of Income Tax (SCIT).[10]

The COA agreed with the taxpayer's preliminary objection that an order by the High Court for the production of notes of proceedings from the SCIT is not an appealable decision under Section 67 of the Courts of Judicature Act 1964 (CJA).[11]

Although a softer approach in tax collection has been indicated under the new regime,[12] the pressing need for revenue will undoubtedly influence the IRB's stance and policy in the coming year.

II COMMENCING DISPUTES

i Income tax

The self-assessment system

The self-assessment system has been implemented in Malaysia since 2001 for companies and since 2004 for businesses, partnerships, cooperatives and salaried individuals. Under the previous official assessment system, taxpayers would be assessed on income tax under the ITA by the IRB pursuant to the tax returns they filed. By contrast, taxpayers under the self-assessment system would file their tax returns based on computations of their own tax liability, resulting in deemed assessments and payment of taxes accordingly.

To ensure compliance and to avoid tax leakages under the self-assessment system, the IRB is equipped with wide powers by the ITA. Among others, Sections 78 to 81 of the ITA

6 *Foxconn Technology Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Appeal No. WA-14-11-09/2018).

7 *IBM Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] 1 LNS 1010.

8 *Bar Malaysia v. Ketua Pengarah Hasil Dalam Negeri* [2018] 4 CLJ 635.

9 *Rapid Growth Technology Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Appeal No. P-01(A)-234-07/2017).

10 *Kerajaan Malaysia v. Berjaya Times Square Sdn Bhd* (Appeal No. W-01(IM)(NCVC)-148-04/2017).

11 *Ketua Pengarah Hasil Dalam Negeri v. Idaman Pelita Sdn Bhd* (Appeal No. W-01(IM)-62-03/2016).

12 http://www.theedgemarkets.com/article/tax-collection-target-challenge-now-no-more-rough-house-tactics-says-minister.

grant the Director General of Inland Revenue (DGIR) the power to call for specific returns and production of books, bank account statements, access to buildings and documents, and for all such information that may be relevant. Armed with such powers, audits are carried out by the IRB on a post-assessment basis, including desk audits (from the IRB's office) and field audits (at the taxpayer's premises with prior notice).

Preliminary findings letters are issued to taxpayers, who will usually be afforded a chance to respond to any issues raised. Audits are concluded with a final audit findings letter pursuant to which taxpayers can choose to sign a letter of acknowledgment of the IRB's position and to pay. Where taxpayers decline to do so, notices of assessment (Form J) or notices of additional assessment (Form JA) will be issued in respect of such taxes alleged to have been underpaid. Section 91 ITA only allows assessments to be raised within a period of five years after a year of assessment (YA), except in circumstances of fraud, wilful default or negligence. In practice, time-barred assessments are common as the IRB appears to adopt the view that negligence exists where taxpayers' tax treatment differs from their own.

Disputing assessments

There are two ways for taxpayers to dispute tax assessments by the IRB: they may appeal to the Special Commissioners of Income Tax (SCIT) or undergo judicial review.

SCIT appeal

A taxpayer aggrieved by an assessment raised against him or her can file a notice of appeal (Form Q) to the SCIT together with the grounds of the appeal within 30 days from the date of service of the assessment upon him or her. Upon receipt of the Form Q, the DGIR has a 12-month review period during which dispute resolution proceedings will be conducted to explore the possibility of an amicable settlement. Such proceedings can result in an agreement under Section 101(2) between the DGIR and the taxpayer on the proper amount of taxes payable.

If no agreement is reached during the review period, the Form Q will be forwarded to the SCIT for registration of the appeal. Case management will be conducted, during which directions are given for the filing of cause papers and for a hearing date to be fixed. Recently it has become common for hearing dates to be fixed two to three years after registration because of the large number of appeals pending. At any time before completion of the hearing, the taxpayer may arrive at an agreement for settlement with the DGIR that can be recorded before the SCIT.

Where there is no settlement, the SCIT will hear the case and give its deciding order for the assessments to be confirmed or discharged. Parties dissatisfied with a deciding order may appeal to the High Court on questions of law by requiring the SCIT to state a case for the opinion of the High Court (appeal by way of case stated). Upon hearing and determining the question of law in such an appeal, the High Court may, *inter alia*, order such assessments to be confirmed, discharged or amended. Parties dissatisfied with the High Court's decision have a further right of appeal to the Court of Appeal. A taxpayer cannot appeal to the Federal Court for a matter originating at the SCIT.

Judicial review

Under certain circumstances, a taxpayer may also file a judicial review application at the High Court[13] to challenge a tax assessment.

Taxpayers cannot commence judicial review as of right but must first obtain leave of the court to so. The threshold for leave to be granted is ordinarily low and will be satisfied where it is proven that the application is not frivolous. Even where an alternative remedy exists in the form of an SCIT appeal, the courts have held that taxpayers would not be barred from judicial review so long as exceptional circumstances are proven. The three categories of exceptional circumstances are a clear lack of jurisdiction, blatant failure to perform some statutory duty and a serious breach of the principles of natural justice.[14] Decisions of the High Court in judicial review proceedings are appealable to the Federal Court.

Judicial review is especially apt where the dispute involves questions of law as opposed to factual disputes, which should be resolved by the SCIT as the tribunal of fact. Judicial sentiment on the role of judicial review in challenging abuses of power is perhaps best reflected in the Federal Court's recent pronouncement in the landmark case of *Indira Gandhi* that 'the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts' and that 'if an exercise of power under a statute exceeds the four corners of that statute, it would be *ultra vires* and a court of law must be able to hold it as such'.[15]

However, the courts have also dismissed judicial review applications where it was held that exceptional circumstances did not exist.[16] Taxpayers intending to pursue judicial review should thus obtain legal advice at the earliest opportunity to evaluate whether this is suitable.

Stay or payment

Once an assessment is raised, taxes are ordinarily due and payable whether or not an appeal is made.[17] Payment have to be made within 30 days of service of the notice of assessment upon the taxpayer, failing which the amount of taxes unpaid shall be increased by an amount of 10 per cent.[18] Where taxes have been increased under Section 103(5) ITA, a further increase of 5 per cent of any amount of taxes remaining will be made after the expiry of 60 days from the date of such increase.[19]

Unlike the High Court, the SCIT does not have the power to grant a stay of the effect of tax assessments raised by the IRB. Where payment has not been made and the courts have not granted a stay, the government of Malaysia may commence civil recovery proceedings against the taxpayer to seek recovery of such taxes as a debt due to the government.[20]

However, taxpayers may still be able to obtain a stay of the civil recovery proceedings if special circumstances can be proven. The courts have held that Sections 103 and 106 ITA

13 Order 53, Rules of Court 2012 (ROC 2012).

14 *Government of Malaysia & Anor v. Jagdis Singh* [1987] CLJ (Rep) 110.

15 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak and others* [2018] 1 MLJ 545.

16 *Ketua Pengarah Hasil Dalam Negeri v. Mudah.My Sdn Bhd* [2017] 5 CLJ 283; *Keysight Technologies Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri Malaysia* [2018] 1 LNS 20; *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; *Saujana Triangle Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 171.

17 Section 103 ITA.

18 Section 103(5) ITA.

19 Section 103(7) ITA.

20 Section 106 ITA.

do not prevent the court from exercising its inherent jurisdiction to grant a stay where special circumstances exist.[21] This has recently been confirmed by the Court of Appeal in *Berjaya Times Square*.[22] The IRB has since withdrawn its motion for leave to appeal to the Federal Court.

ii Goods and services tax

The Goods and Services Tax Act 2014 (the GST Act 2014) was repealed in 2018 by the Goods and Services Tax (Repeal) Act 2018 (the GST Repeal Act 2018). This section will briefly address common issues in GST appeals since there are still such appeals pending resolution.

Under the short-lived GST regime, taxable persons must furnish returns on a monthly or quarterly basis depending on the total amount of their taxable turnover.[23] Where such returns have not been filed or contain incorrect information, best judgement assessments[24] may be issued by the Director General of Customs (DGOC) against the taxable person.

A person dissatisfied with any decision by a GST officer may make an application for review to the DGOC within 30 days upon notification of the decision.[25] The DGOC will aim to arrive at his decision within 60 days of receiving the application; in practice, however, decisions on such applications can generally be expected within six months.

A person dissatisfied with the DGOC's decision may file an appeal to the GST Tribunal within 30 days after the decision is communicated to him.[26] The hearing will be conducted before a single Tribunal member or a panel of three members, and the appellant may opt to represent himself or appoint representatives.[27] Decisions of the GST Tribunal can be appealed to the High Court,[28] which can then be further appealed to the Court of Appeal.

The authors are aware of no appeals that have been made from the GST Tribunal to the High Court in the few years that the GST Act 2014 had been in force. Since the GST Act 2014 was abolished by the GST Repeal Act 2018, pending appeals at the GST Tribunal will now be heard by the Customs Appeal Tribunal (Customs Tribunal).[29]

Decisions of the Customs Tribunal are deemed to be an order of a Sessions Court and are enforceable as such.[30] Parties dissatisfied with the Customs Tribunal's decision may appeal to the High Court on a question of law or of mixed law and fact,[31] and there is a further right of appeal to the Court of Appeal.

21 *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701; *Chong Woo Yit v. Government of Malaysia* [1989] 1 CLJ Rep 9.

22 *Berjaya Times Square*, see footnote 10.

23 Monthly (taxable turnover exceeding 5 million ringgit), quarterly (taxable turnover not exceeding 5 million ringgit).

24 Section 43 GST Act 2014.

25 Section 124 GST Act.

26 Section 126 GST Act.

27 Usually a GST agent or an advocate and solicitor.

28 Section 148 GST Act.

29 Section 5(3), GST Repeal Act 2018.

30 Section 141V, Customs Act 1967 (CA 1967).

31 Section 141W, CA 1967.

iii Sales and service tax

The process for filing returns, and the raising of and appeals against assessments is similar under the Sales Tax Act 2018 and Service Tax Act 2018 regimes.

Taxable persons must file their returns by the last day of the month following the end of the taxable period to which the return relates.[32] Where such returns have not been furnished or contain incomplete or incorrect information, or where a taxable person has failed to apply to be registered as such, best judgement assessments may be raised by the DGOC against him or her.[33]

A person aggrieved by the DGOC's decision may make an application for review to the DGOC within 30 days after being notified of such decision. The DGOC will then review his decision and aim to decide on the application within 60 days after receiving it.[34] In practice, however, applicants may have to wait up to six months for the DGOC's decision.

The DGOC's decision on an application for review may be appealed to the Customs Appeal Tribunal in writing within 30 days after the decision is communicated to the taxable person. The legal effect of the Customs Tribunal's decision, and the appeal process, have been discussed in Section II.ii.

III THE COURTS AND TRIBUNALS

i The Special Commissioners of Income Tax (SCIT)

The SCIT is an institution created by the ITA 1967, which prescribes for a minimum of three Commissioners. Appointment of the Commissioners is by the Yang di-Pertuan Agong (the Ruler) and their tenure, remuneration and allowance are as determined by the Minister of Finance (MoF).[35] The procedure for hearings at the SCIT and their powers are stipulated under Schedule 5 of the ITA 1967.

SCIT appeals are heard before a panel of three Commissioners, with at least one having judicial or other legal experience. Two or more appeals may be heard concurrently, and taxpayers may be represented by either an advocate or tax agent or both during the hearing. Subject to the ITA, the SCIT are also statutorily empowered to regulate their own procedure. Where not otherwise provided for, the procedure and practice at the subordinate court or the High Court are to be adopted and applied with the necessary modifications.[36]

Practical and institutional improvements to the SCIT have been contemplated in recent months. Among others, the SCIT's independence have been questioned considering that the tenure and remuneration of the Commissioners are determiend by the same MoF who oversees the running of the IRB. Further, the limited number of SCIT Commissioners have also appeared to struggle with the increasing volume of tax appeals in recent years.

ii GST Appeal Tribunal

The hearing of GST appeals pending at the now-defunct GST Tribunal have been taken over by the Customs Tribunal.

32 Section 26, Sales Tax Act 2018; Section 26, Service Tax Act 2018.

33 Section 27, Sales Tax Act 2018; Section 27, Service Tax Act 2018.

34 Section 96, Sales Tax Act 2018; Section 81 Service Tax Act 2018.

35 Section 98, ITA 1967.

36 Paragraph 42A, Schedule 5 ITA 1967.

iii Customs Appeal Tribunal

The Customs Tribunal was created by the CA 1967.[37] The appointment of the chairman and a maximum of two deputy chairmen from members of the Judicial and Legal Service is prescribed, together with a minimum of seven other members deemed to have sufficient knowledge of experience in customs or taxation matters. Tribunal members are appointed by the MoF, who also determines the terms, conditions and remuneration of the appointment.[38]

Tribunal hearings are heard before a panel of three members, but may be heard before a single Tribunal member where deemed fit by the chairman in the interests of expediency and efficiency. Where a Tribunal appeal has been lodged, the same issues cannot be raised between the same parties in another court[39] unless the other proceedings have been commenced earlier or unless the Tribunal appeal is withdrawn, abandoned or struck out. Through an amendment in 2018,[40] advocates and solicitors who were previously barred from appearing at the Tribunal are now able to do so.

iv High Court, Court of Appeal and the Federal Court

Appeals from the SCIT to the High Court are made by way of case stated (see Section II.i, 'The self-assessment system') on questions of law. The High Court, in its role as an appellate court in such appeals, would be slow to disturb fact findings by the SCIT, but may intervene where such findings have been wholly unsupported by facts or evidence.[41] High Court decisions can be appealed to the COA within 30 days of the High Court's decision. COA appeals are heard and decided by a panel of three judges.

Appeals to the Federal Court (FC) from COA decisions are possible in proceedings commenced by way of judicial review at the High Court. Prospective appellants cannot appeal as of right but must first obtain leave to appeal from the FC through an application for leave filed within a month from the date of the COA's decision. For leave to be granted, applicants must satisfy the court that the question proposed to be answered involves a question of general principle decided for the first time, or a question of importance upon which further argument and a decision of the FC would be to public advantage.[42] FC appeals are heard and decided by a panel of between five and 11 judges.

IV PENALTIES AND REMEDIES

i Penalties

The ITA imposes various responsibilities on taxpayers and their principal officers. These obligations are enforced through offences and penalties in the form of fines and even imprisonment listed in Part VIII of the Act.[43]

Common offences include failure to furnish returns (fine of between 200 and 20,000 ringgit and imprisonment of up to six months; a special penalty equal to treble the amount

37 Section 141B, CA 1967.

38 Section 141C, CA 1967.

39 Section 141N, CA 1967.

40 Section 11, Customs (Amendment) Act 2018 amending Section 141Q, CA 1967.

41 *Ketua Pengarah Hasil Dalam Negeri v. Teraju SInar Sdn Bhd* [2014] 8 CLJ 169.

42 Section 96, Courts of Judicature Act 1964 (CJA 1964); Appeals against decisions of constitutional importance may also merit leave under Section 96(b) CJA 1964.

43 Sections 116 to 120, ITA 1967.

of taxes underpaid to which the failure relates can be imposed for failure to furnish returns for two YAs or more) and furnishing of incorrect returns (fine of between 1,000 and 10,000 ringgit and a special penalty of double the amount of taxes underpaid to which the failure relates). Where a taxpayer has not been prosecuted for the furnishing of incorrect returns, a penalty of up to the amount of tax to which such failure relates (100 per cent penalty rate) may still be imposed by the DGIR.

ii Voluntary disclosure programme

On an *ad hoc* basis, special voluntary disclosure programmes (SPVDs) may be implemented by the IRB under which taxpayers would be encouraged to make voluntary declarations of income through reduced penalty rates.

The current SPVD was announced in the government's 2019 budget speech and the IRB's subsequent media release in November 2018.[44] Beginning 3 November 2018 until 30 June 2019, taxpayers who make voluntary SPVD disclosures will be subjected to a lower penalty rate of between 10 and 15 per cent compared to the penalty rate of between 80 and 300 per cent after the SPVD period.[45]

V TAX CLAIMS

i Recovering overpaid tax

A taxpayer who has overpaid in taxes can submit a claim for a refund within five years after the end of the YA to which the claim relates.[46] A taxpayer dissatisfied with the refund amount may appeal to the SCIT within 30 days after being notified of this amount. Where a refund is due, compensation for a late refund may also be obtained in accordance with the formula prescribed by the ITA.[47]

ii Relief for error or mistake

Further, a taxpayer who has overpaid in taxes owing to an error or mistake in a return or statement furnished to the IRB may also seek repayment of the amount overpaid through an application for relief to the DGIR in respect of such error or mistake.[48] A taxpayer dissatisfied with the DGIR's decision on the application can bring an appeal within six months upon being informed of the decision by requesting the DGIR to forward the application to the SCIT. Unsatisfactorily, however, the ITA does not prescribe a time limit for the DGIR's decision to be made and applications may occasionally languish under review.

Importantly, Section 131(4) of the ITA states that no relief shall be given if the error or mistake was made on the basis of the 'practice of the DGIR generally prevailing' at the time when the return or statement was made. An issue that arose for determination in *Rapid*

44 http://lampiran1.hasil.gov.my/pdf/pdfam/IRBMMediaRelease_021120182_SPECIALVOLUNTARYDISCLOSUREPROGRAMME.pdf.

45 The reduced SPVD penalty rates are listed in the IRB's Media Release dated 2 November 2018.

46 Section 111 ITA 1967 (or within five years after the assessment was raised where the overpayment was subsequent to an assessment raised).

47 Section 111D ITA 1967.

48 Section 131 ITA 1967.

Growth Technology[49] was whether or not a taxpayer who had relied on a public ruling by the DGIR would be precluded from obtaining relief on the basis that the public ruling amounts to a 'practice of the DGIR generally prevailing'.

On the final appeal, the COA held that Section 131(4) ITA cannot prevent a taxpayer from obtaining relief. In doing so, the COA agreed with the taxpayer's arguments that both the ITA[50] itself and the DGIR public rulings have drawn distinctions between public rulings and 'practice of the DGIR generally prevailing'.[51]

iii Challenging administrative decisions

The availability of judicial review to dispute tax assessments by the IRB has been discussed in Section II.i, 'Disputing assessments'.

Judicial review in some other jurisdictions 'focuses on the process and the scope of the decision rather than the merits of the decision taken'.[52] In Malaysia, it is clear that the courts would scrutinise decisions 'not only for process, but also for substance'.

As discussed, exceptional circumstances would have to be demonstrated for leave to be obtained where the alternative remedy of an SCIT appeal exists. Apart from tax assessments, other administrative decisions in tax may also be amenable to judicial review. For instance, the court has held that the DGIR's decision on a taxpayer's advance ruling application under Section 138B ITA would be amenable to judicial review.[53] Further, MoF decisions on tax exemptions under Section 127(3A), or pioneer status under the Promotion of Investment Act 1986 may also be susceptible to challenge by judicial review.

VI COSTS

Cost awards by the SCIT are strictly regulated by the ITA, which stipulates that no costs order can be made except as expressly provided for.[54] The SCIT may only order costs of up to 5,000 ringgit to be paid to it where the appeal is frivolous or vexatious in nature.[55] The taxpayer may make representations as to why such an order ought not to be made within 21 days upon service of the deciding order. No provision exists for the recovery of costs by successful taxpayers.

At the High Court, COA and the FC,[56] cost awards are discretionary in nature[57] and would usually follow the event (i.e., costs would usually be awarded to the winning party). In practice, cost awards are often nominal and may not reflect the actual costs incurred by litigants. Where a consent order is to be recorded for settlement, it is common for parties to agree for no order to be made as to costs. Each party would bear their own costs.

49 *Rapid Growth Technology Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (P-01(A)-234-07/2017).

50 Section 99(4).

51 Grounds of judgment have yet to be published by the COA.

52 https://thelawreviews.co.uk/edition/the-tax-disputes-and-litigation-review-edition-6/1167738/singapore.

53 *IBM Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] 1 LNS 1010.

54 Paragraph 32, Schedule 5, ITA 1967.

55 Paragraph 29, Schedule 5 ITA 1967.

56 For appeals originating from the High Court.

57 Order 59, Rule 2 ROC 2012.

VII ALTERNATIVE DISPUTE RESOLUTION

Other than litigation, the only formal method of resolving tax disputes is through dispute resolution proceedings in the 12-month review period after a notice of appeal (Form Q) is filed, but before the matter is forwarded to the SCIT for registration. Dispute resolution proceedings are conducted by the IRB's Dispute Resolution Department (a separate department from the assessing branch that issued the assessments). In recent times, dispute resolution proceedings do not appear to have been tremendously successful, as reflected in the increasing number of pending SCIT appeals.

Taxpayers desiring certainty may apply for an advance ruling from the IRB on the application of ITA provisions to proposed arrangements to be entered into.[58] The DGIR is legally bound by its ruling once a taxpayer has duly relied and acted upon the ruling.[59] The High Court has recently confirmed in *IBM Malaysia*[60] that an advance ruling by the IRB amounts to a decision amenable to judicial review and can be quashed if tainted with illegality.

VIII DOUBLE TAXATION TREATIES

As of 28 November 2018, Malaysia has entered into double taxation agreements (DTAs) with 74 countries.[61] These DTAs have legal effect under the ITA.[62] The courts have also confirmed that in the event of a conflict between DTA and ITA provisions, the former is to prevail.[63]

In *Alam Maritim*,[64] the FC held that the taxpayer is precluded from relief under the Malaysia–Singapore DTA as the disputed payments fell within Section 4A of the ITA, which has created a special class of income under which the taxpayer's income should be taxed in Malaysia. However, this decision was recently distinguished by the High Court in *Orange Rederiet Aps*.[65] The High Court agreed with the taxpayer that the Malaysia–Denmark DTA had been ratified in Malaysia subsequent to the enactment of Section 4A and must have clearly been intended by Parliament to take precedence.

IX AREAS OF FOCUS

The implementation of the current SPVD until 30 June 2019 reflects the government's and the IRB's recognition that maximising voluntary self-compliance is vital under a self-assessment system. However, persistently recalcitrant taxpayers can expect the full force of the IRB's wrath through stricter enforcement and penalties after the SPVD period.

58 Section 138B ITA 1967.

59 Section 138B(4) ITA 1967.

60 See footnote 7.

61 http://www.hasil.gov.my/bt_goindex.php?bt_kump=5&bt_skum=5&bt_posi=4&bt_unit=1&bt_sequ=1.

62 Section 132 ITA 1967.

63 *Director General of Inland Revenue v. Euromedical Industries Ltd* [1983] CLJ (Rep) 128; *Damco Logistics Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30-033; *Maersk Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2013) MSTC 10-046.

64 *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421.

65 See footnote 5.

In judicial review, it would be interesting to observe whether the IRB would persist with its publicly declared stance of objecting to all judicial review applications at the leave stage,[66] after the Attorney General Chamber's statement on the 'importance of promoting judicial review as a means of developing public law'.[67]

Internationally, Malaysia, as an associate member of the Organisation for Economic Co-operation and Development's Inclusive Framework, has announced its commitment to implement the Base Erosion and Profit Shifting (BEPS) Action Plan.[68] In the coming year, managed service companies especially, which have been identified for evaluation by the Forum on Harmful Tax Practices, will need to ensure that they comply with the minimum standards under the new rules.

X OUTLOOK AND CONCLUSIONS

Domestically, direct tax disputes are expected to continue to be fiercely litigated especially where the quantum disputed is significant with regard to litigation costs. Institutional and practical reforms to the SCIT are also direly needed as the number of tax appeals continues to increase to ensure that development of Malaysian tax law continues at an expeditious pace. Indirect tax disputes are expected to see less litigation at the Customs Appeal Tribunal at least in the initial stages of the implementation of the new sales and service tax regimes. Internationally, Malaysia's commitment to international tax standards is to be lauded. It would be desirable, however, for policymakers to strike a balance between compliance with such standards and ensuring that the country remains an attractive destination for foreign investment.

Moving forward, taxpayers must continue to identify and manage their tax risks and potential tax exposures and should take advantage of the ongoing SPVD where suitable. In encounters with the IRB, obtaining legal advice at the earliest opportunity is also strongly advised to ensure that the taxpayer's interests are best protected as it is inevitable that such interests will not be in alignment with the IRB's own objectives.

66 https://www.thesundaily.my/archive/inland-revenue-board-well-object-all-applications-judicial-review-AUARCH541171.

67 http://www.agc.gov.my/agcportal/uploads/files/Publications/Press/2018/Kenyataan%20Media%20berhubung%20Semakan%20Kehakiman%20(BI).pdf.

68 http://www.treasury.gov.my/index.php/en/tax/malaysia-s-commitment-in-international-tax-standard.html.

Appendix 1

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