



Dato' Nitin Nadkarni  
Partner  
**Tax, SST & Customs**  
T: +603 6208 5866  
E: [nn@lh-ag.com](mailto:nn@lh-ag.com)

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## Duty of Public Decision-Making Bodies to Give Reasons: Does This Apply to the Tax Authorities?

In our LHAG Insights of 21 January 2021, [“Revisiting ‘Exceptional Circumstances’ and ‘Legitimate Expectation’ in Tax Judicial Review”](#), we highlighted that a taxpayer aggrieved by a tax assessment may challenge it by way of judicial review if he could show “*exceptional circumstances*” in the form of:

- (a) A clear lack of jurisdiction;
- (b) A blatant failure to perform some statutory duty; or
- (c) A serious breach of the principles of natural justice.



Jason Tan Jia Xin  
Partner  
**Tax, SST & Customs**  
T: +603 6208 5873  
E: [tjx@lh-ag.com](mailto:tjx@lh-ag.com)

Evaluating whether the Inland Revenue Board (**IRB**) had lacked jurisdiction or failed to perform a particular *statutory* duty in issuing an assessment may be relatively straightforward. One is guided (as the courts invariably are in tax cases) by the letter of the law<sup>1</sup> i.e. the Income Tax Act 1967, the Customs Act 1967, or other taxing statutes, as the case may be.



Chris Toh Pei Roo  
Associate  
**Tax, SST & Customs**  
T: +603 6208 5945  
E: [tpr@lh-ag.com](mailto:tpr@lh-ag.com)

Determining whether the principles of natural justice have been breached is often less straightforward. After all, “*the so-called rules of natural justice are not engraved on tablets of stone*”.<sup>2</sup> In particular, for instance, although the trend of the law has been towards the recognition of a duty to give reasons by public authorities,<sup>3</sup> this has developed hitherto on a case-by-case basis.<sup>4</sup>

The recent decisions in *Uniqlo*<sup>5</sup> and *Alcatel*<sup>6</sup> by the Court of Appeal and the Federal Court, respectively, appear to confirm that the duty

<sup>1</sup> *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1993] 4 CLJ 339 (SC)

<sup>2</sup> *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665, citing *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 (which in turn, refers to *Lloyd v McMahon* [1987] 1 AC 625)

<sup>3</sup> *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265 (FC)

<sup>4</sup> *Stefan v General Medical Council* [1999] 1 WLR 1293 (Privy Council)

<sup>5</sup> *Uniqlo (Malaysia) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2020] 9 CLJ 521

<sup>6</sup> *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1

to give reasons can arise even in tax cases, and that failure by the tax authorities to do so may render the decision liable to be quashed.

## Background

The existence of a duty to give reasons by the IRB was previously called into doubt in *Alcatel*, where the taxpayer's submission that the IRB had failed to give reasons was rejected by the Federal Court. Nevertheless, the decision in *Alcatel*, in our view, should be confined to its particular facts, where the Federal Court observed that "*in the circumstances of the case, with there being more than ample documents or reasons surfacing in the course of the negotiations which are self-explanatory, the need to give an overt explanation is superfluous*". The Federal Court also accepted that judicial interference is permissible if the circumstances warrant it.

In *Uniqlo*, the Court of Appeal confirmed that the Director General of Customs and Excise (**Customs DG**) has a duty to give reasons for its decision as a public decision-making body, applying the Federal Court's decision in the *Kesatuan Pekerja-Pekerja* case.<sup>7</sup> Importantly, the court held that:

- (a) The absence of specific provisions in the statute (in this case, the Goods and Services Tax Act 2014 (**GST Act**)) requiring the Customs DG to give reasons does not mean that he has no duty to do so. If the Customs DG does not have to give reasons for its decision, the GST Act must expressly state so.
- (b) A reasoned decision can be an additional constituent of the concept of fairness.
- (c) The duty to give reasons arises at the time the decision is conveyed, and not subsequently after the judicial review application had been filed. Subsequent reasons should be rejected as an afterthought.

The court also provided guidance on the particular circumstances in which the duty may arise. In *Uniqlo*, this duty was implied by the court in quashing the Customs DG's decision to reject the taxpayer's special refund application under the GST Act as the decision is not straightforward but hinges on many factors, including compliance with legal requirements under the GST Act, and where the taxpayer is faced with the onerous burden of submitting accurate data under s 191(3) of the GST Act.

## Key takeaways

The decision in *Uniqlo* should be welcomed for confirming that the duty to give reasons can arise even in tax cases, and for providing important guidance on when this duty can arise. The important caveat is that the court will continue to be prudent in scrutinising

the facts of each case before implying such a duty and will not do so lightly.

In appropriate cases, however, failure by the IRB or the Customs DG to give reasons for their decisions to raise tax assessments or Bills of Demand may yet amount to a “serious breach of the principles of natural justice” to warrant judicial review.

Chris Toh Pei Roo ([tpr@lh-ag.com](mailto:tpr@lh-ag.com))

If you have any queries pertaining to tax assessments which have been raised by the IRB, please contact associate Chris Toh Pei Roo or his team partners, [Dato' Nitin Nadkarni](#) and [Jason Tan Jia Xin](#), at [tax@lh-ag.com](mailto:tax@lh-ag.com)

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia

T +603 6208 5888  
F +603 6201 0122/0136  
E [enquiry@lh-ag.com](mailto:enquiry@lh-ag.com)  
W [www.lh-ag.com](http://www.lh-ag.com)

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