



Datuk D P Naban
Senior Partner
Tax, SST & Customs
T: +603 6208 5858
E: dpn@lh-ag.com



S Saravana Kumar
Partner
Tax, SST & Customs
T: +603 6208 5813
E: sks@lh-ag.com

30 APRIL 2019

High Court Confirms DTA's Precedence Over Domestic Tax Law

WSSB v Ketua Pengarah Hasil Dalam Negeri (HC)

Yesterday, the Kuala Lumpur High Court allowed the judicial review (**JR**) application brought by WSSB, a Malaysian company, against the Director General of Inland Revenue (**DGIR**).

The DGIR had sought to subject payments made by WSSB to ORA (a non-resident Danish company for offshore shipping services in Malaysia and international waters to WSSB) to withholding tax under Section 109B(1)(c) of the Income Tax Act 1967 (**ITA**) for the years of assessment 2013 to 2015. This is despite the fact that the DGIR had concluded in a tax audit in 1989 that such payments do not attract withholding tax as such payments were ORA's shipping income under Section 54 of the ITA. Further, on 4.9.2018, the Kuala Lumpur High Court had also allowed a separate JR application brought by ORA to seek a ruling on the same matter (see our Tax e-Alert, "[Alam Maritim Decision Distinguished](#)").

Our partner, S Saravana Kumar from the firm's Tax, SST & Customs Practice, together with tax associate, Chris Toh Pei Roo, successfully represented both ORA and WSSB.

Facts

WSSB had engaged the services of ORA, which provided offshore shipping services. WSSB had not subjected such payments to withholding tax pursuant to Section 109B(1)(c) of the ITA. This is because ORA had a permanent establishment in Malaysia and had been subjecting its income to tax in Malaysia under Section 54 of the ITA since the 1980s. This tax treatment had been confirmed in writing by the DGIR upon concluding a tax audit on ORA in 1989.

Although ORA subjects its shipping income to tax in Malaysia, it has not made any income tax payment in Malaysia since 2009 by virtue of Article IX of the new Malaysia-Denmark double taxation agreement (**DTA**). Article IX stipulates that profits derived by an enterprise of a contracting state from the operation of ships or aircraft in international traffic shall be taxable only in its home country, which is Denmark in the present matter. Again, this tax treatment was also confirmed by

the DGIR in 2014 when the DGIR refunded the income tax that ORA had paid in Malaysia, notwithstanding Article IX.

However, in 2016, despite Article IX and the tax clearance issued in 1989, the DGIR persisted in his view that WSSB's payments to ORA should have been subjected to withholding tax pursuant to Section 4A (iii), read with Section 109B(1)(c) of the ITA. The DGIR proceeded to invoke Section 39(1)(j) of the ITA to disallow WSSB's deduction of the payments made to ORA and raised notices of additional assessments with penalty for a sum of more than RM100 million against WSSB.

Aggrieved by the DGIR's decision, both ORA and WSSB commenced JR proceedings. On 4.9.2018, ORA's JR application was allowed. On 12.4.2019, the DGIR's appeal to the Court of Appeal in the ORA case was unanimously struck out on procedural grounds.

High Court's Decision In WSSB

The High Court agreed with the arguments advanced by counsel on behalf of WSSB and held, among others, as follows:

- (1) The decisions of the superior courts in *Damco Logistics, Maersk Malaysia* and *Thomson Reuters* are clear in holding that DTA provisions would prevail in the event of a conflict with domestic tax law. There was no reason for the High Court to depart from those decisions in the present application and, in any event, the High Court would be bound by them.
- (2) Here, the precedence of the Malaysian-Denmark DTA over that of Sections 4A(iii) and 109B(1)(c) of the ITA is also in accordance with Section 132(1)(b) of the ITA.
- (3) The DGIR's position also draws no support from the Federal Court's decision in *Alam Maritim*, in which the taxpayer was not afforded relief under the DTA as it was held that Section 4A had been enacted subsequent to Malaysia's ratification of the then Malaysia-Singapore DTA in that case.

In contrast, Malaysia's ratification of Article IX of the Malaysia-Denmark ITA in 2009 is a clear indication of Parliament's intention for Article IX to prevail over Section 4A as Parliament is presumed not to act in vain.

- (4) The High Court also took judicial notice of the decision in ORA, whereby the rulings granted in that matter are the same as that sought by WSSB and the factual matrix of both matters is the same, the principle of *res judicata* applies. The DGIR was estopped from raising the same argument again.
- (5) The DGIR's objection against WSSB's decision to use the JR route instead of an appeal to the Special Commissioners of Income Tax (**SCIT**) had no merit as the DGIR's objection had been previously struck out by the High Court and the DGIR had also withdrawn his appeal on the objection to JR at the Court of Appeal.

Based on the above, the High Court allowed WSSB's application with

costs and, among others, the notices of additional assessments amounting to more than RM100 million were set aside.

Please contact our tax partners [Datuk D P Naban](#) and [S Saravana Kumar](#) at tax@lh-ag.com if you have any queries pertaining to DTAs or withholding tax.

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
W www.lh-ag.com

Published by the Tax, SST & Customs Practice

© Lee Hishammuddin Allen & Gledhill. All rights reserved. The views and opinions attributable to the authors or editor of this publication are not to be imputed to the firm, Lee Hishammuddin Allen & Gledhill. The contents of this publication are intended for purposes of general information and academic discussion only. It should not be construed as legal advice or legal opinion on any fact or circumstance.

[Feedback](#)

[Unsubscribe](#)