

Tax e-Alert

15 NOVEMBER 2019

Review Period In Tax Appeals

The ordinary route of appeal for taxpayers in Malaysia is the filing of a notice of appeal to the Special Commissioners of Income Tax (**SCIT**). This appeal route is commenced by the filing of Form Q as prescribed under Section 99(1) of the Income Tax Act 1967 (**ITA**).

However, most taxpayers are not aware that an appeal would not be heard immediately by the SCIT as Section 101(1) of the ITA requires the Director General of Inland Revenue (**DGIR**) to review such appeals within 12 months.

If the DGIR maintains the assessments after the review, then the notice of appeal must be forwarded to the SCIT within the 12-month period. Our High Court in the *Scania (Malaysia)* case held that the failure by the DGIR in not forwarding the assessments within 12 months will render the assessments null and void.

Recently, we successfully represented a taxpayer and applied the *Scania (Malaysia)* principle in a tax dispute which resulted in an assessment amounting to about RM12 million being reduced to about RM200,000.

Our Tax, SST & Customs partners, Datuk D P Naban and S Saravana Kumar, represented the taxpayer in the *Scania (Malaysia)* case, which is said to be the first of its kind in Malaysia.

Brief Facts

The taxpayer's notice of appeal was not forwarded to the SCIT within the 12-month period. In the *Scania (Malaysia)* case, the notices of appeal were only forwarded to the SCIT nearly 42 months after they were filed.

After hearing the parties, the SCIT in *Scania (Malaysia)* ruled in favour of the taxpayer and the notices of additional assessments were declared null and void. The DGIR appealed to the High Court, which affirmed the decision of the SCIT.

Contact persons:



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



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

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The Legal Position

Once a notice of appeal is received by the DGIR, Section 101(1) provides that:

- “(1) On receipt of a notice of appeal under subsection 99(1), the Director General shall, **within twelve months** from the date of receipt of the notice of appeal, **review the assessment against which the appeal is made** and for that purpose may:
- (a) require the appellant to furnish such particulars as the Director General may think necessary with respect to the income to which the assessment relate and any other matter relevant to the assessment in the Director General’s opinion;
 - (b) require the appellant to produce all books or other documents in the appellant’s custody or under the appellant’s control relating to any source to which the assessment relates or any other matter relevant to the assessment in the Director General’s opinion;
 - (c) summon any person who in the Director General’s opinion is able to give evidence respecting the assessment to attend before the Director General; and
 - (d) examine any person so attending on oath or otherwise.”

If the DGIR requires a longer period to review the notice of appeal, the DGIR may apply to the Minister of Finance under Section 101(1A) of the ITA for an extension, but such application must be made no later than 30 days before the expiry of the 12-month period. Further, according to Section 101(1B) of the ITA, such extension shall not exceed six months, essentially giving the DGIR a maximum of 18 months to review a notice of appeal.

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Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122
Email: tax@lh-ag.com

Meanwhile, Section 102(1) of the ITA empowers the DGIR to forward the notice of appeal to the SCIT within the 12-month period from the date of receipt of Form Q if he is of the opinion that there is no reasonable prospect to settle the matter.

DGIR's Arguments

The DGIR's arguments in *Scania (Malaysia)* can be summarised as follows:

- There was no failure by the DGIR to comply with Section 102(1) as it was not mandatory for him to forward Form Q to the SCIT within the 12-month period.
- There was no requirement to apply for an extension of time under Section 101(1A) as such extension is for the DGIR to review the assessment, and not for him to forward Form Q to the SCIT.
- The delay in forwarding the appeal to the SCIT was due to the negotiations between both parties, hence the delay was reasonable and justified.
- The taxpayer's right to be heard on the substantive merit of the appeal was not denied, despite the delay.
- The ITA does not provide for remedy resulting from a non-compliance with Section 102(1).
- The DGIR had forwarded Form Q to the SCIT at convenient speed, as provided under Section 54(2) of the Interpretation Acts 1948 & 1967.

Taxpayer's Arguments

The taxpayer contended that the assessments were null and void due to the delay, as:

- The wording of Section 102(1) is clearly mandatory and prescribes a statutory duty on the DGIR to forward Form Q to the SCIT within 12 months.

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- The ongoing negotiations with the taxpayer, which were initiated by the DGIR, cannot be used as a reason to justify the delay.
- Neither the DGIR nor the SCIT has the jurisdiction to confer an extension of the prescribed time frame of 12 months.
- Section 102(1) is mandatory in nature as Section 101(1A) clearly prescribes that if the DGIR requires more time, it is incumbent on him to apply for, and obtain, an extension of time from the Minister of Finance.
- The DGIR's delay had caused unnecessary injustice and prejudice to the taxpayer as, among others, the taxpayer bears the burden of proof and the delay can give rise to a grave risk of the taxpayer not having a fair trial.
- Although Section 102(1) is silent as to the effect of its non-compliance by the DGIR, the SCIT could be aided to grant relief to the taxpayer on the authority of the *Sunthararaju Pachayappan* case, in which the High Court held that the failure of the Director General of Customs to comply with the procedural provisions of the Customs Act 1967 rendered his decision null and void.

The Decision

The SCIT and the High Court in *Scania (Malaysia)* ruled in favour of the taxpayer and held that:

- The legislative introduction of Section 101(1A) and (1B) to the ITA shows by necessary implication that Section 102(1) of the ITA is mandatory in nature.
- If the DGIR's interpretation is accepted, it would render Sections 101, 101(1A) and 101(1B) superfluous and an unnecessary appendage in the ITA, which cannot be the intention of Parliament.

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- Extrinsic evidence clearly suggests that these provisions were introduced by Parliament as a check and balance mechanism to curb delays that have occurred in the past.
- As to the effect of the non-compliance of the statutory duty under Section 102(1) by the DGIR, the principle of “where there is a right, there is a remedy” is applicable.
- Although the ITA is silent on the effect of such non-compliance by the DGIR, the principle in the *Sunthararaju Pachayappan* case is applicable and the assessments would be rendered null and void.

Contact persons:

Datuk D. P. Naban

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

S. Saravana Kumar

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

Hence, the SCIT held that the non-compliance by the DGIR with Section 102(1) resulted in the assessments raised against the taxpayer being unenforceable and rendered null and void. The SCIT also ordered the taxes paid to be refunded to the taxpayer within 30 days.

Conclusion

These cases show that the DGIR as a government authority is required to act in strict compliance of the ITA including in relation to provisions on the statutory time frame. This is especially so in tax cases where taxpayers are required to pay the disputed taxes before an appeal can be sought. *Scania (Malaysia)* is a good reminder for taxpayers as well on the importance of observing the timeline prescribed under the ITA as non-compliance would prejudice their position and rights.

If you have queries pertaining to the above or require assistance in challenging the assessments raised by the DGIR, please contact our Tax, SST & Customs partners **Datuk D P Naban** or **S Saravana Kumar** at tax@lh-ag.com

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