

Tax e-Alert

3 OCTOBER 2018

Alam Maritim Decision Distinguished

Recently, the Kuala Lumpur High Court allowed the judicial review (**JR**) application sought by ORA, a Danish company, against the Director General of Inland Revenue (**DGIR**). In so doing, the court upheld the trite principle that the provisions of a double taxation agreement (**DTA**) shall prevail over those of the Income Tax Act 1967 (**ITA**) in the event of a conflict.

Contact persons:

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

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

Our tax lawyers successfully represented ORA.

Facts

ORA is a non-resident company providing offshore shipping services in Malaysia and international waters. As part of its operations, ORA had dealings with WS Sdn Bhd (**WS**), a Malaysian company, where ORA was paid for the services provided to the latter. WS did not subject payments that it made to ORA to withholding tax. 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.

However, since 2009, the company has not subjected its income to income tax in Malaysia by virtue of Article IX of the Malaysia-Denmark DTA. Article IX stipulates clearly that the 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.

Notwithstanding this, the DGIR took the stance that the payments made to ORA should have been subjected to withholding tax pursuant to Section 4A(iii) of the ITA. The DGIR invoked Section 39(1)(j) of the ITA to disallow the deduction of the payments made to ORA by WS and raised notices of additional assessments with penalty for the sum of over RM100 million against WS.

CHAMPIONING TAXPAYERS

We represent taxpayers. Be it tax litigation, advisory or structuring,
we focus on clarity, certainty and solutions.
Make us your confidante today.

Aggrieved by the DGIR's decision, ORA commenced judicial review proceedings. The challenge was mounted on the basis that the DGIR's decision was contrary to, among others, the decisions of our courts in *Damco Logistics*,¹ *Maersk Malaysia*² and *Thomson Reuters*,³ which held that provisions of the DTA would prevail over those of the ITA. Our tax lawyers successfully represented the taxpayers in all three cases.

ORA successfully obtained leave to apply for judicial review and a stay order against the DGIR. Although the DGIR appealed to the Court of Appeal against the granting of leave and the stay order, he eventually withdrew the appeal subsequent to the exchange of written submissions between both parties.

DGIR's arguments

Among others, the DGIR submitted that:

- (a) ORA had not exhausted the alternative remedy of an appeal to the Special Commissioners of Income Tax; and
- (b) ORA does not fall within the ambit of the Malaysia-Denmark DTA.

Further, the DGIR sought to rely on the Federal Court's decision in *Alam Maritim*,⁴ which had held that the taxpayer is not entitled to relief from double taxation under the Malaysia-Singapore DTA⁵ if the payments fall under Section 4A of the ITA, as this provision has created a special class of income under which the taxpayer's income should be taxed in Malaysia.

Our sub-specialisation includes:

INCOME TAX <ul style="list-style-type: none"> • Tax Litigation & Dispute Resolution Proceedings • Tax Advisory & Planning • Tax Audit & Investigation • Transfer Pricing & Thin Capitalisation 	GOODS & SERVICES TAX <ul style="list-style-type: none"> • GST Litigation • GST Legal Advisory • GST Audit & Investigation • Anti-Profitting 	TRADE FACILITATION & INCENTIVES REAL PROPERTY GAINS TAX PETROLEUM INCOME TAX SALES & SERVICES TAX STAMP DUTY
INTERNATIONAL TAX <small>(Including Cross-border Transaction Tax & Withholding Tax)</small>	CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY & ANTI-DUMPING DUTY	

www.lh-ag.com

- ¹ *Ketua Pengarah Hasil Dalam Negeri v Damco Logistics Malaysia Sdn Bhd* (Rayuan Sivil W-01-424-11)
- ² *Maersk Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2013) MSTC-046
- ³ *Thomson Reuters Global Resources v Ketua Pengarah Hasil Dalam Negeri* (2015) MSTC 10-048
- ⁴ *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 3 CLJ 421
- ⁵ Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Malaysia-Singapore)

Lee Hishammuddin Allen & Gledhill

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

ORA's arguments and High Court's decision

The DGIR's arguments were rejected by the High Court, which found merit in the submissions presented on behalf of ORA.

According to the High Court, based on the affidavit evidence available, ORA had shown that its vessels did travel to international waters and thus fell within the ambit of Article IX of the Malaysia-Denmark DTA. Further, the DGIR itself had also previously given effect to the DTA by refunding overpayment of taxes to the company for certain years of assessments.

Finally, the High Court also agreed that the Federal Court's decision in *Alam Maritim* can be distinguished. In *Alam Maritim*, the Federal Court had given recognition to and affirmation of the general prominence of the DTA. However, it was held that Article IV of the Singapore-Malaysia DTA, which had been in force since 3.8.1973, could not afford relief to the taxpayer as Parliament had subsequently enacted Section 4A of the ITA in 1984. By so doing, Parliament had intended Section 4A to prevail over the DTA.

Our sub-specialisation includes:

INCOME TAX

- Tax Litigation & Dispute Resolution Proceedings
- Tax Advisory & Planning
- Tax Audit & Investigation
- Transfer Pricing & Thin Capitalisation

INTERNATIONAL TAX

(Including Cross-border Transaction Tax & Withholding Tax)

GOODS & SERVICES TAX

- GST Litigation
- GST Legal Advisory
- GST Audit & Investigation
- Anti-Profitshifting

CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY & ANTI-DUMPING DUTY

TRADE FACILITATION & INCENTIVES

REAL PROPERTY GAINS TAX

PETROLEUM INCOME TAX

SALES & SERVICES TAX

STAMP DUTY

www.lh-ag.com

Lee Hishammuddin Allen & Gledhill

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

In the present matter, by contrast, Article IX of the Malaysia-Denmark DTA was ratified and incorporated as part of our domestic law subsequent to the enactment of Section 4A(iii) of the ITA. Clearly, Parliament must have intended Article IX to prevail over Section 4A of the ITA. This is consistent with trite jurisprudential principles that Parliament does not legislate in vain⁶ and that it is presumed to know all the relevant law upon which it legislates.

Contact persons:

Datuk D. P. Naban

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

S. Saravana Kumar

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

Based on the above and upon due deliberation, the High Court allowed ORA's application with costs.

If you have queries pertaining to DTAs or withholding tax, we are available to assist you. Please contact our tax partners Datuk D P Naban or S Saravana Kumar at tax@lh-ag.com

**Published by the Tax, SST & Customs Practice,
Lee Hishammuddin Allen & Gledhill**

Our sub-specialisation includes:

INCOME TAX

- Tax Litigation & Dispute Resolution Proceedings
- Tax Advisory & Planning
- Tax Audit & Investigation
- Transfer Pricing & Thin Capitalisation

INTERNATIONAL TAX

(Including Cross-border Transaction Tax & Withholding Tax)

GOODS & SERVICES TAX

- GST Litigation
- GST Legal Advisory
- GST Audit & Investigation
- Anti-Profitshifting

CUSTOMS DUTY, EXCISE DUTY, SAFEGUARD DUTY & ANTI-DUMPING DUTY

TRADE FACILITATION & INCENTIVES

REAL PROPERTY GAINS TAX

PETROLEUM INCOME TAX

SALES & SERVICES TAX

STAMP DUTY

www.lh-ag.com

⁶

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] CLJ Rep 122

Lee Hishammuddin Allen & Gledhill

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

