

Tax e-Alert

8 JUNE 2018

The IRB's Tax Investigation Framework 2018

Recently, the Inland Revenue Board (**IRB**) issued the Tax Investigation Framework, which replaces a similar one released in 2013, to alert taxpayers to the agency's tax investigation procedures.

Salient points

Under the self-assessment system, it is the taxpayers who determine their tax treatment and tax liability. Tax investigation is one of the methods used by the IRB to ensure that tax treatment is in accordance with the Income Tax Act 1967 (**ITA**). A tax investigation entails a visit or raid, without notice by the IRB, at the taxpayer's business premises, residence, tax agent's office, third party supplier's office and any other places deemed necessary to assist in the investigation. The IRB may also conduct a tax investigation in accordance with the provisions of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (**AMLATFA**) as the offences under Sections 112 to 114 of the ITA are listed as serious offences under Schedule 2 of the AMLATFA.

Under the framework, the IRB undertakes to inform the taxpayer whether the investigation is being carried out under the ITA, the AMLATFA, or both. An investigation under the ITA will not be a hindrance to further investigation under the AMLATFA.

Tax investigation involve the examination of books, documents, objects, articles, materials and things relating to a taxpayer's business and financial matter, including personal documents. The IRB can seek documents and information from anyone concerned to assist in the investigation. Actions may be taken to freeze, seize and dispose of the movable and immovable properties obtained using proceeds from tax offences if the investigation involves AMLATFA offences.

Investigation procedures

The framework stipulates that during a tax investigation, agents of the IRB shall:

- Introduce themselves and show authority cards bearing their names and photographs.

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- Inform the taxpayer of the purpose of the visit at the outset.
- Read and explain to the taxpayer, his representative or residents of the premises under visit, the powers of the IRB under Section 80 of the ITA.
- Conduct full and free access to search all land, buildings and premises, any books, documents, objects, articles, materials and other matters.
- Search the land, building and such places and may examine, make copies or extracts from any such book, document, object, article, material and matter without making any payment.
- Seize and retrieve relevant documents.
- Access, download and retrieve relevant information from any electronic media equipment.
- Take photos of the location of the document being seized.
- Notify the taxpayer of the scope and duration of the examination as well as the documents to be taken for the investigation.
- Inform him of the names of the IRB officers and branch director in charge of the investigation as well as the IRB's office and email addresses.
- Inform the taxpayer of his rights and responsibilities during the examination.
- Interview and take statements from taxpayers and persons concerned at the premises visited.
- Prepare the receipt of confiscation and document receipts signed by the IRB officers and the taxpayer.

Commentary

The High Court has ruled in several cases that the IRB's internal policy and guidelines have no force of law. However, it is clear that the IRB has wide authority under the ITA, especially under Section 80, when conducting a tax investigation. Despite the wide authority to obtain information from a taxpayer, such power of the IRB is certainly not without legal restriction.

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In *Bar Malaysia v Ketua Pengarah Hasil Dalam Negeri* (unreported), the High Court held that legal privilege is absolute unless waived by the privilege holder, and that the ITA cannot be used by the IRB as an instrument of fraud to fish for information without any reasonable suspicion of misconduct or criminal conduct on the part of the law firms. Further, the IRB cannot use its powers under the ITA to access or seize a legal opinion issued by a tax solicitor to their clients. Unlike an opinion or advice issued by an accountant or tax agent, a legal opinion or advice issued by a tax solicitor enjoys legal privilege (see *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKHC 1).

In *Bar Malaysia*, the court applied the case of *SR Batliboi & Co v Department of Income Tax (Investigation)*, in which the Indian High Court held that for a search or seizure to be legal, it should not be firstly ordered for *mala fide*, extraneous or for oblique reasons. Secondly, it must be predicated on information received by the authority who would have reason to believe that it is necessary to conduct such an operation. Thirdly, it should not be in the nature of a roving or fishing exercise. These three factors must be observed rigorously and even punctiliously since the exercise of such powers invariably results in a serious invasion of the privacy and freedom of the citizen.

As such, the IRB's legal authority in conducting tax investigations is subject to legal scrutiny. A tax investigation should not be made *mala fide*, nor should it be in the nature of a roving or fishing exercise. When a power vested in it is exceeded, any act done in excess of the power is invalid as being *ultra vires*.

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In view of the current tax climate where the IRB continues to be aggressive in its tax investigations and audits, it is advisable for taxpayers to consult their tax lawyers to safeguard their legal rights. Many past and recent instances have shown that it is in the best interest of taxpayers to engage tax agents and tax lawyers to work as a team in providing joint representation in such tax investigations.

Based on our experience in dealing with the IRB during tax investigations, we have encountered situations where taxpayers were pressured to answer questions and provide documentary evidence to support their tax affairs for a period beyond the seven-year requirement to store business documents. Taxpayers should also be mindful of what they say and provide to the IRB to ensure that they do not incriminate themselves. Thus, having a tax lawyer present during the examination by the IRB would ensure that a taxpayer's legal rights are preserved. If taxpayers reach a settlement with the IRB after a tax investigation, such settlement agreement should be reviewed by a tax lawyer. This is to ensure that the terms of the said agreement are clearly set out, and that there is no ambiguity that may present an opportunity for the IRB to loosely interpret the agreement and revisit the issue.

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