

THE TAX DISPUTES
AND LITIGATION
REVIEW

ELEVENTH EDITION

Editor
David Pickstone

THE LAWREVIEWS

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PREFACE

It is increasingly common for tax practitioners to be involved in disputes that span multiple jurisdictions. We operate in a global economy. Supply chains cross continents, and the increasing role of technology accelerates the pace at which economic activity becomes divorced from the structures intended to tax it. The pace of economic and technological change potentially increases the gap between the reality of commerce and that of taxation.

Although supranational agencies, such as the European Commission and the Organisation for Economic Co-operation and Development, work hard to keep pace with change, there is an inevitable lag between intention and action. Of late we have seen individual countries start to take unilateral actions, with digital taxation being a prime example. In coming years, a combination of economic developments and unilateral actions by individual countries is likely further to emphasise the importance of double tax treaties and the OECD multilateral instrument.

Hot on the heels of the economic impact of the covid pandemic, tax authorities face the compounding impact of the war in Ukraine and hugely increased energy prices. Pressure on government budgets, particularly in the UK, is increasing. In response, the UK and EU have introduced windfall taxes, and the US government has threatened an equivalent. Both the UK and EU are looking closely at compliance as a way to close the tax gap. The UK has increased compliance focus on individuals, and the EU has proposed VAT measures, including a move to real-time reporting and e-invoicing for cross-border businesses, and a single VAT registration across the EU.

Regardless of whether tax authorities increase in cooperation or increase in competition, one thing is certain: they will not stand still. Tax, and particularly the international approach to tax, is a permanent fixture on the political agenda. The resulting frequent (and sometimes abrupt) changes in key elements of tax law inevitably lead to high-value and complex disputes, which often take many years to resolve.

The purpose of this book is to provide insight into the issues that give rise to tax disputes in different jurisdictions, the procedures for resolving those disputes and the powers and approach of local tax authorities. It is hoped that it will provide valuable insight into the process, timescale and cost of resolving complex difficulties when they arise across more than one jurisdiction.

We are lucky to have contributions from many leading and impressive tax practitioners across a wide range of jurisdictions. Each provides an up-to-date insight into dealing with contentious tax issues in their jurisdiction. I have enjoyed and learned from reading their contributions and I hope you will do, too.

I would like to thank my friends and colleagues Victor Cramer, Lee Ellis and Anastasia Nourescu for their valuable assistance in compiling this and previous editions.

David Pickstone
Stewarts Law LLP
London
February 2023

MALAYSIA

Jason Tan Jia Xin, Chris Toh Pei Roo and Chua Chun Yang¹

I INTRODUCTION

Effective 1 January 2020, the Income Tax Act 1967 was amended to allow a single Commissioner sitting alone to hear and decide tax appeals at the Special Commissioners of Income Tax (SCIT). This author previously expressed cautious optimism that this would help achieve the expeditious hearing and disposal of tax appeals.

Unfortunately, the full potential of the anticipated improvements has yet to be fully unlocked. Section 98(1) of the Income Tax Act 1967 (ITA) provides for the existence of ‘three or more’ commissioners. However, at the time of writing, there remains only three active commissioners (including the chair). This is far below the full complement of six commissioners, which the SCIT had at its height in the past. Under these circumstances, the expediency at which tax appeals can be decided is naturally limited. The SCIT’s ability to hear cases remotely also appear to be restricted by an apparent lack of resources.

The recent conclusion of the tumultuous 15th general election, and the appointment of a Minister of Law and Institutional Reform under the newly formed government has reignited hopes that these important institutional issues would be considered and addressed. In the meantime, however, the courts at all levels must be commended for continuing to deliver important tax decisions, ensuring the unhindered development of tax law. In the past two years, decided cases of interest include those outlined below.

i SCIT

Taxability of a real estate investment trust under the Real Property Gains Tax Act 1976

In *TREIT v. Ketua Pengarah Hasil Dalam Negeri* (2020) MSTC 10-115, the SCIT agreed with the taxpayer that unlike a company, a real estate investment trust (REIT) is not a body corporate as it has no legal personality and does not constitute a separate legal entity. Accordingly, a REIT cannot be regarded as a company for the purposes of computing the tax rate for real property gains tax (RPGT). Instead, as recognised under the Real Property Gains Tax Act 1976 (RPGTA), it is the trustee who is the chargeable person against whom tax assessments should be issued. This was the first decision in Malaysia addressing the legal status of a REIT under the ITA.

¹ Jason Tan Jia Xin is a partner, Chris Toh Pei Roo is a senior associate and Chua Chun Yang is an associate in the tax, customs and trade practice group of Lee Hishammuddin Allen & Gledhill.

Transfer pricing

In a landmark decision in February 2021, the SCIT rejected the Inland Revenue Board's (IRB) usage of the median as the determinant of arm's-length pricing and accepted instead the taxpayer's arguments that the interquartile range should be used. This was one of the first decisions in Malaysia to address Section 140A ITA and the Income Tax (Transfer Pricing) Rules 2012 (the TP Rules), and on the correctness of certain longstanding practices by the IRB in transfer pricing (TP) audits.²

RPGT versus income tax: whether a taxpayer is trading

In *CBM Berhad v. Ketua Pengarah Hasil Dalam Negeri* (2021) MSTC 10-131, the SCIT ruled that income tax was not payable by a landowner that received a share of the gross revenue generated from a development, under a joint venture agreement with the developer. This decision (for which grounds were issued in September 2021) is believed to be one of the first addressing the taxability of returns made by a company that provided land to a developer under a joint venture agreement in return for a percentage of the gross sales, rather than a fixed price.

Right to relief in respect of errors or mistakes under Section 131 ITA

The SCIT allowed a taxpayer's application for relief under Section 131 ITA in a decision delivered in July 2022.³ The taxpayer had mistakenly subjected the gains from disposal of various plots of land to income tax under the ITA. Sometime later upon receiving professional legal advice, the taxpayer discovered its error and applied to the Director General of Inland Revenue (DGIR) for relief to correct the mistake and to obtain a refund of the taxes paid.

The DGIR rejected the application, contending that there had not been any 'error' or 'mistake', as the gains were taxable under the ITA. Among other things, the DGIR argued that the lands had never generated income and had only been held by the taxpayer for a short period of time (three to seven years). On appeal, the SCIT agreed with the taxpayer that the gains were capital receipts taxable under the RPGTA and allowed the taxpayer's appeal on the principal issue in dispute.

The DGIR's power to impose penalties under Section 112(3) ITA

In *SM Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2022) MSTC 10-153, the taxpayer had over-reported its income and overpaid its income tax after filing its tax returns based on draft financial statements. Upon finalisation of its audited accounts, the taxpayer filed its amended tax returns. The DGIR treated the original returns as a nullity and imposed penalties on the entirety of the taxpayer's income for the yearly accounts in dispute under Section 112(3) ITA. The SCIT ruled that the taxpayer's original returns had been duly filed in accordance with Section 77A ITA and that the DGIR had no basis to impose penalties under Section 112(3) ITA.

2 *SEO Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2021) MSTC 10-129; On 27 May 2022, Euromoney's Benchmark Litigation Asia-Pacific Awards 2022 recognised this decision as one of Asia Pacific's Impact Cases of the Year.

3 *PFR Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2022) MSTC 10-051.

ii High Court

The DGIR's power to impose penalties under Section 112(3) ITA

In a case with similar facts to *SM Sdn Bhd*, the SCIT had previously dismissed the taxpayer's appeal and upheld the DGIR's imposition of penalties. However, the High Court (HC) allowed the taxpayer's appeal and set aside the assessments and penalties in *Transocean Drilling Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2022) MSTC 30-496. The HC ruled that the taxpayer's returns had complied with the requirements Section 77A ITA, and that the SCIT had erred in upholding the DGIR's imposition of penalties against the taxpayer.

TP

The HC upheld the SCIT's decision in *SEO Sdn Bhd* and dismissed the DGIR's appeal.⁴ This was also consistent with its decision in *Ketua Pengarah Hasil Dalam Negeri v. Procter & Gamble (Malaysia) Sdn Bhd* [2022] 1 LNS 754, which dealt with the DGIR's powers to make TP adjustments under Section 140 ITA. These decisions established the following key principles in TP matters:

- a the TP Guidelines issued by the Organisation for Economic Cooperation and Development (OECD) are highly relevant and cannot be disregarded in TP audits;
- b the DGIR does not have unfettered discretion to make TP adjustments, whether under Section 140 ITA or Section 140A ITA, notwithstanding the promulgation of the TP Rules;
- c proper documentation submitted contemporaneously during audits are highly important in defending against TP assessments; and
- d the interquartile range is recognised internationally as a suitable determinant of arm's-length pricing. Therefore, where the taxpayer's financial results fall within the arm's-length interquartile range, no adjustments should be made.

The DGIR's right to request information

Genting Malaysia Bhd v. Pesuruhjaya Perlindungan Data Peribadi & Ors [2022] 4 CLJ 399 is an important decision concerning the extent of the DGIR's powers to request information under the ITA. Here, the DGIR had requested information concerning the personal data of the taxpayer's customers from the taxpayer. The DGIR opined that this was within its powers under Section 81 of the ITA and that this would help broaden its tax base and increase tax collection. The DGIR also provided a letter issued by the Personal Data Protection Commissioner (the PDPA Commissioner) stating that the taxpayer may disclose the personal data to the DGIR and that this does not contravene the requirements of the Personal Data Protection Act (PDPA).

The taxpayer filed a judicial review application to challenge the decisions of the DGIR and the PDPA Commissioner. The HC agreed with the taxpayer, ruling that the DGIR's request for a blanket disclosure amounted to a fishing expedition that would breach the right to privacy under Article 5 of the Federal Constitution. The DGIR also failed to demonstrate a reasonable suspicion that specific customers of the taxpayer had failed to comply with the ITA.

⁴ *Ketua Pengarah Hasil Dalam Negeri v. Sandakan Edible Oils* (WA-14-2-02/2021).

Meaning of negligence under Section 91(3) ITA

In *Seiwa Podoyo Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2022) MSTC 30-482, the HC allowed a taxpayer's appeal and set aside time-barred assessments issued by the DGIR consequent to the disallowance of reinvestment allowance claimed by the taxpayer. Apart from its findings on the reinvestment allowance and penalty issues, the HC grounds made the following points on time bars and negligence:

- a a taxpayer cannot be said to have been negligent for not complying with a public ruling;
- b a taxpayer was not negligent if it acted based on advice or instructions that it reasonably believed was correct. Misinterpretation of a highly technical provision of the law does not *ipso facto* mean that the taxpayer is negligent; and
- c the mere fact that the tax returns contained an error is insufficient to establish negligence. The Revenue must prove that the error was committed negligently. While a taxpayer may be 'punished' for submitting an inaccurate return, there is no legal duty under the ITA requiring the taxpayer to be correct. If the mere filing of an incorrect return constitutes 'negligence', then the limitation defence under Section 91(1) ITA would be meaningless.

RPGT versus income tax: whether a taxpayer is trading

In *Ketua Pengarah Hasil Dalam Negeri v. Cash Band (M) Bhd* (2022) MSTC 30-494, the HC upheld the SCIT's decision in *CBM Berhad* and dismissed the DGIR's appeal. In addition to the grounds given by the SCIT:

- a the HC rejected the DGIR's contention that a director's personal skills and experience can be transposed upon a taxpayer company to justify an intention to trade. The HC held that this 'cannot by any legal imagination' be allowed;
- b the mere execution of a joint venture agreement does not constitute trading. The DGIR's own Public Ruling No. 1/2009: Property Development recognises that a landowner that enters into a joint venture project is not undertaking a business if they do not take an active part in the development activities; and
- c the taxpayer's directors were discharging their duty in taking steps to ascertain the maximum value of the land disposed of. These steps cannot be construed as reflective of a change of intention from investment to trading.

Timeline to file appeal against the SCIT's decision

Prior to 1 January 2020, paragraph 35, Schedule 5 of the ITA stipulated that a party intending to appeal to the High Court must be done within 21 days of service of the SCIT's deciding order. Effective 1 January 2020, the law was amended by the Income Tax (Amendment) Act 2019, whereby an appeal must now be filed within 21 days of the date of the SCIT's decision. This difference is material because in practice, there is often a gap between the date on which the SCIT delivers its oral decision and the date on which the SCIT's deciding order is served.

The implications of this difference and the 2020 amendment became material in *Courts (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 1 LNS 546. Here, the SCIT had served its deciding order 11 days after having delivered its decision. The taxpayer filed its appeal within 21 days of receipt of the deciding order, but almost one month after the SCIT's decision was delivered. The notice of appeal was rejected by the SCIT for being out of time, and the taxpayer applied to the High Court by way of originating summons to seek an extension of time. The High Court dismissed the application, holding that 'ignorance of

the law is not an excuse'. This decision highlights the fundamental importance of adhering to the strict procedural timelines imposed by the ITA, failing which a taxpayer may lose its right of appeal.

DGIR's duty to provide its own valuation report to substantiate market value for computing RPGT payable

In *Speed Modulation Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 9 CLJ 239, the taxpayer had disposed of land to a related company. Such a transaction is deemed under the RPGTA to have been entered into for a consideration equal to market value. The taxpayer obtained an independent valuation report from a firm of registered valuers and adopted their valuation of market value for RPGT purposes. The DGIR issued assessments on the taxpayer based on a market value, which was almost 100 per cent higher than that provided by the independent valuers, resulting in a tripling of the RPGT payable. The IRB purported to rely on valuations provided by the Valuation and Property Management Department (namely the JPPH) but did not provide any details of the purported valuations.

The HC granted leave for the taxpayer to commence judicial review and a stay of the disputed RPGT. Amongst others, the HC held that the DGIR had breached its duty to give reasons by failing to furnish the valuation report on which it is relying for its decision. If indeed a proper valuation report had been prepared, there is no reason for the DGIR's refusal to provide it.

iii Court of Appeal

Employee share option scheme expenses

In 2022, the Court of Appeal (COA) dismissed the DGIR's appeal in *Ketua Pengarah Hasil Dalam Negeri v. Asia Energy Services Sdn Bhd*. The COA upheld the SCIT and HC's decisions,⁵ which have allowed the taxpayer's deductions of employee share option scheme (ESOS) expenses. In short, these decisions recognise that ESOS expenses are revenue in nature and should be allowed deduction under Section 33(1) of the ITA.

ESOS are part of a company's compensation package to employees and incentivise them to perform more efficiently. This will in turn enhance the taxpayer's profits over the long term. At all levels, the courts have firmly rejected the DGIR's argument that ESOS payments to employees are capital in nature and that such payments result in the creation of an enduring benefit for the employers' businesses.

Availability of alternative remedy to be ventilated at substantive stage of judicial review

A recurring issue in judicial review in tax cases is whether a particular dispute should be handled instead via the domestic remedy of a SCIT appeal. The DGIR and Inland Revenue officers have also developed the practice of appearing regularly at the *ex parte* leave proceedings to object. In *Muhibbah Engineering (M) Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 1 LNS 1069, the COA confirmed the trite principle that judicial review remains available notwithstanding the availability of an alternative remedy. Further, the COA emphasised

⁵ *Ketua Pengarah Hasil Dalam Negeri v. Asia Energy Services Sdn Bhd* (2020) MSTC 30-407.

that the question of whether a particular matter is suitable for judicial review or not should be determined at the substantive stage and not at the preliminary leave stage. The DGIR's objections at the leave stage was thus held to have been premature.

iv Federal Court

Legality of the 'pay first talk later' provisions to be determined

Section 103 ITA provides that taxes assessed are due and payable whether or not the amount is appealed against. Section 106 ITA provides that these taxes may be recovered through civil proceedings as a debt due to the government. Together, these provisions created the 'pay first talk later' scheme of income tax in Malaysia, which has been long been applied by the Malaysian courts.

On 10 May 2022, the Federal Court (FC) granted leave to the former primer minister Dato Seri Najib Razak and his son on nine questions of law concerning the constitutionality of these provisions.⁶ The FC's decision is highly anticipated. Should these provisions be held to be unconstitutional, the scheme of income tax in Malaysia will be fundamentally altered whereby taxpayers would no longer be required to pay taxes before their appeals have even been heard (much less, determined).

The DGIR's powers to request information versus legal privilege

The Malaysian Bar had received complaints from members that the DGIR's officers had been carrying out raids on law firms and requesting documents and information relating to their clients' accounts. The Malaysian Bar sought declarations that the DGIR's actions were in breach of solicitor–client privilege and that the DGIR and his officers are not empowered under the ITA to obtain disclosure of this information. The HC and COA had earlier ruled in favour of the Malaysian Bar.⁷ Dissatisfied, the DGIR applied for and obtained leave to appeal to the Federal Court.

On 20 July 2022, the FC dismissed the DGIR's appeal.⁸ In delivering the FC's decision, the chief justice held that the DGIR cannot embark on a fishing expedition by requesting information relating to the clients' accounts of law firms. Without the consent of their clients, the law firms are entitled to refuse disclosure of such information. However, the chief justice added the caveat that solicitor–client privilege does not apply in the presence of illegal activities of the clients, especially where this has come to the knowledge of the solicitor. Barring such circumstances, taxpayers should now be assured of the confidential nature of their accounts and documents in the hands of their lawyers.

6 <https://www.theedgemarkets.com/article/najib-and-son-nazifuddin-allowed-challenge-income-tax-summary-judgement>.

7 *Bar Malaysia v. Ketua Pengarah Hasil Dalam Negeri* [2018] 4 CLJ 635 (HC); *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia* [2022] 1 CLJ 81 (COA).

8 <https://www.theedgemarkets.com/article/apex-court-denies-irb-access-client-accounts-law-firm>.

Availability of alternative remedy to be ventilated at substantive stage of judicial review

On 1 December 2022, the Federal Court rejected the DGIR's application for leave to appeal against the COA's decision in *Muhibbah Engineering*.⁹ This appears to confirm the COA's decision that issues relating to the availability of an alternative remedy should be ventilated at the substantive stage, and not during the leave stage.¹⁰

Legality of Section 4C of the ITA

Here, the DGIR had subjected gains received by the taxpayer from the compulsory acquisition of its land to tax under Section 4C of the ITA. The taxpayer commenced judicial review proceedings against the DGIR, arguing amongst other things, that Section 4C is unconstitutional. The taxpayer argued that Section 4C contravenes Article 13(2) of the Federal Constitution as it prevents a taxpayer from receiving adequate compensation from the compulsory acquisition of its land. The HC and COA dismissed the taxpayer's application and ruled in favour of the DGIR.¹¹ The taxpayer obtained leave to appeal to the FC. On 9 December 2022, the FC allowed the taxpayer's appeal. The grounds of judgment by the FC are eagerly anticipated to confirm the taxability of gains received by other taxpayers in similar circumstances.

II COMMENCING DISPUTES

i Income tax

The self-assessment system

The self-assessment system has been implemented in Malaysia respectively since 2001 for companies, and 2004 for businesses, partnerships, cooperatives and salaried individuals. Under the previous official assessment system, taxpayers would be assessed for income tax under the ITA by the IRB pursuant to the tax returns they filed. By contrast, taxpayers under the self-assessment system would file their tax returns based on computations of their own tax liability, resulting in deemed assessments and payment of taxes accordingly.

To ensure compliance and to avoid tax leakages under the self-assessment system, the IRB is equipped with wide powers by the ITA. Among others, Sections 78 to 81 of the ITA grants the DGIR the power to call for specific returns and production of books, bank accounts statements, access to buildings and documents and for all such information that may be relevant. Armed with these powers, audits are carried out by the IRB on a post-assessment basis, including: desk audits (from the IRB's office) and field audits (at the taxpayer's premises with prior notice). The IRB periodically issues its Tax Audit Framework, which sets out its stated practice and procedure in carrying out audits.¹²

9 *Ketua Pengarah Hasil Dalam Negeri v. Muhibbah Engineering (M) Bhd* (Civil Application No. 01(f)-2-02/2022(W)).

10 <https://www.theedgemarkets.com/article/muhibbah-engineering-gets-nod-challenge-tax-assessments-imposed-irb>.

11 *Wiramuda (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Judicial Review Application No. WA-25-273-06/2019) (HC); *Wiramuda (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 6 CLJ 869 (COA).

12 https://phl.hasil.gov.my/pdf/pdfam/RK_Audit_Cukai_2022_1.pdf (available in Malay language only).

Preliminary findings letters are issued to taxpayers who would usually be afforded a chance to respond to any issues raised. Audits are concluded with a final audit findings letter pursuant to which taxpayers can choose to sign a letter of acknowledgment of the IRB's position and to pay. Where taxpayers decline to do so, notices of assessment (Form J) or notices of additional assessment (Form JA) will be issued in respect of taxes alleged to have been underpaid. Section 91 ITA only allows assessments to be raised within a period of five years after a year of assessment, except in circumstances of fraud or wilful default of negligence. In practice, time-barred assessments are common as the IRB appears to adopt the view that negligence exists where taxpayers' tax treatment differ from their own.¹³

Disputing assessments

There are two ways for taxpayers to dispute tax assessments by the IRB: an appeal to the SCIT or a judicial review.

SCIT appeal

A taxpayer aggrieved by an assessment raised against him or her can file a notice of appeal (Form Q) to the SCIT together with the grounds of the appeal within 30 days of the date of service of the assessment. Upon receipt of the Form Q appeal, the DGIR has a 12-month review period during which dispute resolution proceedings will be conducted to explore the possibility of an amicable settlement. These proceedings can result in an agreement under Section 101(2) between the DGIR and the taxpayer on the proper amount of taxes payable.

If no agreement is reached during the review period, the Form Q will be forwarded to the SCIT for registration of the appeal. Case management will be conducted, during which directions are given for the filing of cause papers and for a hearing date to be fixed. In recent times, it is common for hearing dates to be fixed two to three years after registration because of the high number of appeals pending. An appeal may be heard by either a panel of three special commissioners, or a single commissioner sitting alone if this is deemed by the chair of the SCIT to be in the interests of achieving the expeditious and efficient conduct of the appeal.¹⁴ At any time before completion of the hearing, the taxpayer may still arrive at an agreement for settlement with the DGIR that can be recorded before the SCIT. Where there is no settlement, the SCIT will hear the case and give its deciding order for the assessments to be confirmed or discharged.

Parties dissatisfied with a deciding order may appeal to the High Court on questions of law by filing a notice in writing with the Secretary of the SCIT within 21 days from the date of the SCIT's decision. A copy of the notice must be extended to the Registry of the High Court and served upon all other parties to the proceedings. The appellant must also apply in writing to the secretary for the notes of proceedings and grounds of decision. Appellants are required to prepare records of appeal.¹⁵ Upon hearing and determining the question of law in such an appeal, the High Court may, among other things, order such assessments to be

13 The High Court has rejected this view in *Seiwa Podoyo*.

14 Paragraph 1A, Schedule 5 ITA as inserted by Section 4(a) of the Income Tax (Amendment) Act 2019.

15 Paragraph 34A, Schedule 5 ITA as inserted by Section 4(g) of the Income Tax (Amendment) Act 2019.

confirmed, discharged or amended. Parties dissatisfied with the High Court's decision have a further right of appeal to the Court of Appeal. A taxpayer cannot appeal to the Federal Court for a matter originating at the SCIT.

Judicial review

Under certain circumstances, a taxpayer may also file a judicial review application at the High Court¹⁶ to challenge a tax assessment.

Taxpayers cannot commence judicial review as of right but must first obtain leave of the court to do so. The threshold for leave to be granted is ordinarily low and will be satisfied where it is proven that the application is not frivolous. Even where an alternative remedy exists in the form of a SCIT appeal, the courts have held that taxpayers would not be barred from judicial review so long as exceptional circumstances are proven. The three categories of exceptional circumstances are a clear lack of jurisdiction, blatant failure to perform some statutory duty and a serious breach of the principles of natural justice.¹⁷ Decisions of the High Court in judicial review proceedings are appealable up to the Federal Court.

Judicial review is unsuitable where there are factual disputes, which should be resolved by the SCIT as the tribunal of fact. Judicial sentiment on the role of judicial review in challenging abuses of power is perhaps best reflected in the Federal Court's pronouncement in the landmark case of *Indira Gandhi* that 'the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts' and that 'if an exercise of power under a statute exceeds the four corners of that statute, it would be ultra vires and a court of law must be able to hold it as such'.¹⁸

However, the courts have also dismissed judicial review applications where it was held that exceptional circumstances did not exist.¹⁹ Taxpayers intending to pursue judicial review should thus obtain legal advice at the earliest opportunity to evaluate whether this is suitable.

Stay or payment

Once an assessment is raised, taxes are ordinarily due and payable whether or not an appeal is made.²⁰ Payments have to be made within 30 days of service of the notice of assessment upon the taxpayer, failing which the amount of taxes unpaid shall be increased by an amount of 10 per cent.²¹

Unlike the High Court, the SCIT does not have the power to grant a stay of the effect of tax assessments raised by the IRB. Where payment has not been made and the courts have not granted a stay, the government of Malaysia may commence civil recovery proceedings against the taxpayer to seek recovery of these taxes as a debt due to the government.²²

16 Order 53, Rules of Court 2012 (ROC 2012).

17 *Government of Malaysia & Anor v. Jagdis Singh* [1987] CLJ (Rep) 110.

18 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak and others* [2018] 1 MLJ 545.

19 *Ketua Pengarah Hasil Dalam Negeri v. Mudah.My Sdn Bhd* [2017] 5 CLJ 283; *Keysight Technologies Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri Malaysia* [2018] 1 LNS 20; *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; *Saujana Triangle Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 171; *Melody Park Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & other Applications* [2020] 1 LNS 1048; *BLDSB v. Ketua Pengarah Hasil Dalam Negeri* (unreported).

20 Section 103 ITA.

21 Section 103(5) ITA.

22 Section 106 ITA; the constitutionality of Section 103 ITA and Section 106 ITA is set to be determined by the Federal Court in an appeal filed by the former prime minister.

However, taxpayers may still be able to obtain a stay of the civil recovery proceedings if special circumstances can be proven. The courts have held that Sections 103 and 106 ITA do not prevent the court from exercising its inherent jurisdiction to grant a stay where special circumstances exist.²³ The COA has previously confirmed this in *Berjaya Times Square*.²⁴

ii Goods and services tax

The Goods and Services Tax Act 2014 (the GST Act 2014) had been repealed in 2018 by the Goods and Services Tax (Repeal) Act 2018 (the GST Repeal Act 2018). For completion's sake, this chapter will briefly address common issues in Goods and services tax (GST) appeals as there are still appeals pending resolution.

Under the GST regime, taxable persons have to furnish returns on a monthly or quarterly basis depending on the total amount of their taxable turnover.²⁵ Where returns have not been filed or contain incorrect information, best judgment assessments²⁶ may be issued by the Director General of Customs (DGOC) against the taxable person.

A person dissatisfied with any decision by a GST officer may make an application for review to the DGOC within 30 days of notification of the decision.²⁷ The DGOC will arrive at his or her decision within 60 days of receiving the application or within a practicable time. In practice, decisions on applications can generally be expected within six months.

A person dissatisfied with the DGOC's decision may file an appeal to the GST Tribunal within 30 days of the decision being communicated.²⁸ The hearing will be conducted before a single tribunal member of a panel of three members, and the appellant may opt to be self-represented or by any representatives he or she may wish to appoint.²⁹ Decisions of the GST Tribunal can be appealed to the High Court,³⁰ which can then be further appealed to the Court of Appeal.

After the GST Act 2014 was abolished by the GST Repeal Act 2018, pending appeals at the GST Tribunal will now be heard by the Customs Appeal Tribunal (Customs Tribunal).³¹

Decisions of the Customs Tribunal are deemed to be an order of a Sessions Court and enforceable as such.³² Parties dissatisfied with the Customs Tribunal's decision may appeal to the High Court on a question of law or of mixed law and fact,³³ and there is a further right of appeal to the Court of Appeal.

iii Sales and service tax

The process for filing returns, and the raising of and appeals against assessments is similar under the Sales Tax Act 2018 and Service Tax Act 2018 regimes.

23 *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701; *Chong Woo Yit v. Government of Malaysia* [1989] 1 CLJ Rep 9.

24 *Kerajaan Malaysia v. Berjaya Times Square Sdn Bhd* (Appeal No. W-01(IM)(NCVC)-148-04/2017).

25 Monthly (taxable turnover exceeding 5 million ringgit), quarterly (taxable turnover not exceeding 5 million ringgit).

26 Section 43 GST Act 2014.

27 Section 124 GST Act.

28 Section 126 GST Act.

29 Usually a GST agent or an advocate and solicitor.

30 Section 148 GST Act.

31 Section 5(3), GST Repeal Act 2018.

32 Section 141V, Customs Act 1967 (CA 1967).

33 Section 141W, CA 1967.

Taxable persons must file their returns by the last day of the month following the end of the taxable period to which the return relates.³⁴ Where returns have not been furnished or contain incomplete or incorrect information, or where a taxable person has failed to apply to be registered as such, best judgment assessments may be raised by the DGOC against him or her.³⁵

A person aggrieved by the DGOC's decision may make an application for review to the DGOC within 30 days of being notified of the decision. The DGOC will then review his or her decision and decide on the application within 60 days of receiving such application, where practicable.³⁶ In practice, it is anticipated that applicants would wait up to six months for the DGOC's decision on applications.

The DGOC's decision on an application for review may be appealed to the Customs Appeal Tribunal in writing within 30 days after the decision is communicated to the taxable person. The legal effect of the Customs Tribunal's decision, and the appeal process have been dealt with in Section II.ii.

III THE COURTS AND TRIBUNALS

i The SCIT

The SCIT is an institution created by the ITA 1967 that prescribes for a minimum of three commissioners. Appointment of the commissioners is by the Yang di-Pertuan Agong (the Ruler) and their tenure, remuneration and allowance are as determined by the Minister of Finance (MoF).³⁷ The procedure for hearings at the SCIT and their powers are stipulated under Schedule 5 of the ITA 1967.

SCIT appeals are usually heard before a panel of three Commissioners with at least one having judicial or other legal experience. Effective 31 December 2019, appeals may be heard a special commissioner sitting alone if deemed expeditious and efficient by the chair. Two or more appeals may be heard concurrently, and taxpayers may be represented by either an advocate or tax agent or both during the hearing. Subject to the ITA, the SCIT is also statutorily empowered to regulate its own procedure. Where not otherwise provided for, the procedure and practice at the subordinate court or the High Court are to be adopted and applied with the necessary modifications.³⁸

Practical and institutional improvements to the SCIT have been contemplated recently. To date, some changes have been implemented, such as the amendment to allow for appeals to be heard by a special commissioner sitting alone. The Minister of Finance's suggestion in Budget 2020 that the SCIT and Customs Tribunal³⁹ will be merged into a single Tax Appeal Tribunal had not materialised. Further reforms and improvements, especially those relating to the appointment and tenure of the SCIT are important to maintain their continued ability to hear and decide tax appeals expeditiously.

34 Section 26, Sales Tax Act 2018; Section 26, Service Tax Act 2018.

35 Section 27, Sales Tax Act 2018; Section 27, Service Tax Act 2018.

36 Section 96, Sales Tax Act 2018; Section 81 Service Tax Act 2018.

37 Section 98, ITA 1967.

38 Paragraph 42A, Schedule 5 ITA 1967.

39 www1.treasury.gov.my/pdf/speech/2020/bs20.pdf at paragraph 196.

ii GST Appeal Tribunal

The hearing of GST appeals pending at the now-defunct GST Tribunal have been taken over by the Customs Tribunal.

iii Customs Appeal Tribunal (Customs Tribunal)

The Customs Tribunal was created by the CA 1967.⁴⁰ The appointment of a chair and a maximum of two deputy chairs from members of the Judicial and Legal Service is prescribed, together with a minimum of seven other members deemed to have sufficient knowledge or experience in customs or taxation matters. Tribunal members are appointed by the MoF, which also determines the terms, conditions and remuneration of the appointment.⁴¹

Tribunal hearings are heard before a panel of three members, but may be heard before a single tribunal member where deemed fit by the chair in the interests of expediency and efficiency. Where a tribunal appeal has been lodged, the same issues cannot be raised between the same parties in another court⁴² unless the other proceedings have been commenced earlier or unless the tribunal appeal is withdrawn, abandoned or struck out. Through an amendment in 2018,⁴³ advocates and solicitors who were previously not allowed to appear at the tribunal are now able to do so.

iv HC, COA and FC

Appeals from the SCIT to the HC are made by way of filing a notice of appeal (see Section II.i) on questions of law. The HC in its role as an appellate court in appeals would be slow to disturb fact findings by the SCIT, but may intervene where findings have been wholly unsupported by facts or evidence.⁴⁴ HC decisions can be appealed to the COA within 30 days of the HC's decision. COA appeals are heard and decided by a panel of three judges.

Appeals to the FC from COA decisions are possible in proceedings commenced by way of judicial review at the HC. Prospective appellants cannot appeal as a right but must first obtain leave to appeal from the FC through an application for leave filed within a month of the date of the COA's decision. For leave to be granted, applicants must satisfy the court that the question proposed to be answered involves a question of general principle decided for the first time, or a question of importance upon which further argument and a decision of the FC would be to public advantage.⁴⁵ FC appeals are heard and decided by a panel of between five and 11 judges.

40 Section 141B, CA 1967.

41 Section 141C, CA 1967.

42 Section 141N, CA 1967.

43 Section 11, Customs (Amendment) Act 2018 amending Section 141Q, CA 1967.

44 *Ketua Pengarah Hasil Dalam Negeri v. Teraju Sinar Sdn Bhd* [2014] 8 CLJ 169.

45 Section 96, Courts of Judicature Act 1964 (CJA 1964); Appeals against decisions of constitutional importance may also merit leave under Section 96(b) CJA 1964.

IV PENALTIES AND REMEDIES

i Penalties

The ITA imposes various responsibilities imposed on taxpayers and their principal officers. These obligations are enforced through offences and penalties in the form of fines and even imprisonment listed at Part VIII of the Act.⁴⁶

Common offences include failure to furnish returns (fine of between 200 and 20,000 ringgit or imprisonment of up to six months, or both; a special penalty equal to treble the amount of taxes underpaid to which the failure relates can be imposed for failure to furnish returns for two years of assessment or more) and furnishing of incorrect returns (fine of between 1,000 and 10,000 ringgit and a special penalty of double the amount of taxes underpaid to which the failure relates). Where a taxpayer has not been prosecuted for the furnishing of incorrect returns, a penalty of up to the amount of tax to which the failure relates (i.e., a maximum 100 per cent penalty rate) may still be imposed by the DGIR. The recently passed Finance Bill 2020 also makes it an offence for taxpayers who fail to furnish contemporaneous TP documentation (fine of between 20,000 and 100,000 ringgit or imprisonment for up to six months, or both), in lieu of which a penalty of between 20,000 and 100,000 ringgit can be imposed by the DGIR instead.

ii Voluntary disclosure programmes

On an ad hoc basis, special voluntary disclosure programmes may be implemented by the IRB, under which taxpayers would be encouraged to make voluntary declarations of income through reduced penalty rates. There is currently no such programme in place.

V TAX CLAIMS

i Recovering overpaid tax

A taxpayer who has overpaid in taxes can submit a claim for refund within five years of the end of the YA to which the claim relates.⁴⁷ A taxpayer dissatisfied with the refund amount may appeal to the SCIT within 30 days of being notified of this amount. Where a refund is due, compensation for late refund may also be obtained in accordance with the formula prescribed by the ITA.⁴⁸

ii Challenging administrative decisions

The availability of judicial review to dispute tax assessments by the IRB has been discussed above in Section II.i.

Judicial review in some other jurisdictions 'focuses on the process and the scope of the decision rather than the merits of the decision taken'.⁴⁹ In Malaysia, the courts are not confined merely to the decision-making process, but may examine the merits of the decision itself.⁵⁰

46 Sections 116 to 120, ITA 1967.

47 Section 111 ITA 1967 (or within five years after the assessment was raised where the overpayment was subsequent to an assessment raised).

48 Section 111D ITA 1967.

49 See the *Tax Disputes and Litigation Review* – edition 6, Singapore chapter.

50 *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248.

As discussed, exceptional circumstances would have to be demonstrated for leave to be obtained where the alternative remedy of a SCIT appeal exists. Apart from tax assessments, other administrative decisions in tax may also be amenable to judicial review. For instance, MoF decisions on tax exemptions under Section 127(3A), or pioneer status under the Promotion of Investment Act 1986 may also be susceptible to challenge by judicial review.

iii Claimants and related parties

A taxpayer who has overpaid in taxes by reason or some error or mistake in a return or statement furnished to the IRB may also seek repayment of the amount overpaid through an application for relief to the DGIR in respect of such error or mistake.⁵¹ A taxpayer dissatisfied with the DGIR's decision on the application can bring an appeal within six months of being informed of the decision by requesting the DGIR to forward the application to the SCIT. Unsatisfactorily, however, the ITA does not prescribe a time limit for the DGIR's decision to be made and applications may occasionally languish under review.

Importantly, Section 131(4) of the ITA states that no relief shall be given if the error or mistake was made on the basis of the 'practice of the DGIR generally prevailing' at the time when the return or statement was made. An issue that arose for determination in *Rapid Growth Technology*⁵² was whether or not a taxpayer who had relied on a public ruling by the DGIR would be precluded from obtaining relief on the basis that the public ruling amounts to a 'practice of the DGIR generally prevailing'.

On the final appeal, the COA held that Section 131(4) ITA cannot prevent a taxpayer from obtaining relief. In doing so, the COA agreed with the taxpayer's arguments that both the ITA⁵³ itself and the DGIR public rulings have drawn distinctions between public rulings and 'practice of the DGIR generally prevailing'.⁵⁴

Similarly, the SCIT's decision in *PFR Sdn Bhd* has also demonstrated the courts' willingness to allow relief under Section 131 ITA provided that the taxpayer can prove the existence of an 'error or mistake' which resulted in an assessment being excessive.

A person who has paid or who is liable to pay tax can also apply to the Minister of Finance 'on grounds of justice and equity' for such taxes to be remitted by the Minister under Section 129(1)(b) of the ITA. A Minister's rejection of an application for remission could also be challenged as an administrative decision via judicial review (see Section V.ii).

In light of the FC's decision of 9 December 2022 that Section 4C is unconstitutional (see Section I.iv), taxpayers who have paid income tax on compensation from compulsory acquisition may also wish to explore the possibility of an application to the Minister for remission of taxes paid on the grounds of 'justice and equity'.

In certain limited situations, a taxpayer may mount a challenge against a decision by the tax authority which has been issued to another party. The recent case of *Akamai Technologies Malaysia Sdn Bhd & Anor v. Ketua Pengarah Hasil Dalam Negeri*⁵⁵ is one example. The DGIR has taken the position that certain payments made by a Malaysian company to a non-resident entity amounts to royalty and should be subject to withholding tax. The non-resident entity pursued the action against the DGIR as a co-applicant on the basis that it was also

51 Section 131 ITA 1967.

52 *Rapid Growth Technology Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (P-01(A)-234-07/2017).

53 Section 99(4).

54 Grounds of judgment have yet to be published by the COA.

55 (2022) MSTC 30-511.

an aggrieved party who is adversely affected by the DGIR's decision. In judicial review, an applicant need only show a genuine and real interest in the decision being challenged.⁵⁶ This is most commonly satisfied by the 'adversely affected' test.

Indirect tax refunds

Malaysia has abolished goods and services tax (VAT equivalent) with effect from 1 September 2018. The current indirect tax regime in Malaysia is the sales tax and services tax (SST) regime. Under both indirect tax regimes, any person aggrieved by the decision of the DGOC can either apply for an administrative review, file an appeal to the Customs Tribunal or file a judicial review application at the High Court within the prescribed time period.

Arguably, a party to whom disputed GST or SST has been passed on can also qualify as a 'person aggrieved by the decision' of the DGOC. Such persons may also be able to challenge the DGOC's decision even if the decision had been issued to another party, such as a decision issued to a supplier of goods or services, provided that they can prove that they have a real and genuine interest. This can arguably be satisfied on the basis that the potential applicant's financial position would be adversely affected where the DGOC's decision has the ultimate result of imposing GST or SST on them. Apart from judicial review, a taxpayer in such a position can also consider making a direct application to the DGOC for a decision or customs ruling and challenge the decision.

If a company is found to have underpaid taxes (GST or SST), the DGOC has the power to collect the taxes underpaid (by notice in writing) from:

- a* any person by whom any money is due or accruing or may become due and payable to the company;
- b* any person who holds or may subsequently hold money for or on account of the company;
- c* any person who holds or may subsequently hold money for or on account of any person for payment to the company; or
- d* a person having authority from any other person to pay money to the company.⁵⁷

Thus, it is possible for the DGOC to demand taxes underpaid by a company from any person who owes money to the company (e.g., the customers and other trade debtors). Any such payment made shall be deemed to be made on behalf and with the authority of the company that has underpaid taxes.⁵⁸

VI COSTS

Cost awards by the SCIT are strictly regulated by the ITA, which stipulates that no costs order can be made except as expressly provided for.⁵⁹ The SCIT may only order costs of up to 5,000 ringgit to be paid to it where the appeal is frivolous or vexatious in nature.⁶⁰ The

56 *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145.

57 See Section 48(1) of the GST Act 2014, Section 29(1) of the Service Tax Act 2018 and Section 29(1) of Sales Tax Act 2018.

58 See Section 48(2) of the GST Act 2014, Section 29(3) of the Service Tax Act 2018 and Section 29(3) of Sales Tax Act 2018.

59 Paragraph 32, Schedule 5, ITA 1967.

60 Paragraph 29, Schedule 5 ITA 1967.

taxpayer may make representations as to why such an order ought not to be made within 21 days of service of the deciding order. No provision exists for the recovery of costs by successful taxpayers.

At the High Court, COA and the FC,⁶¹ cost awards are discretionary in nature⁶² and would usually follow the event (i.e., costs would usually be awarded to the winning party). In practice, cost awards are often nominal and may not reflect the actual costs incurred by litigants. Where a consent order is to be recorded for settlement, it is common for parties to agree for no order to be made as to costs. Each party would bear its own costs.

VII ALTERNATIVE DISPUTE RESOLUTION

Other than litigation, the only formal method of resolving tax disputes is through the dispute resolution proceedings in the 12-month review period after a Notice of Appeal (Form Q) is filed, but before the matter is forwarded to the SCIT for registration. Dispute resolution proceedings are conducted by the IRB's Dispute Resolution Department (i.e., a separate department from the assessing branch that issued the assessments). In recent times, dispute resolution proceedings do not appear to have been tremendously successful, as reflected in the increasing number of pending SCIT appeals.

Taxpayers desiring certainty may apply for an Advance Ruling from the IRB on the application of ITA provisions to proposed arrangements to be entered into.⁶³ The DGIR is legally bound by its ruling once a taxpayer has duly relied and acted upon the ruling.⁶⁴ However, a taxpayer dissatisfied with an Advance Ruling by the IRB cannot challenge it by way of judicial review as the Federal Court has held in *IBM Malaysia*⁶⁵ that a taxpayer would not have been 'adversely affected' until an assessment is issued.

VIII ANTI-AVOIDANCE

As with most countries, Malaysia's tax legislation contains general anti-avoidance provisions. Section 140 ITA empowers the DGIR to disregard, vary or make such adjustments as they deem fit to transactions that have the direct or indirect effect of altering tax incidence, relieving, evading or avoiding tax liability or hindering or preventing the operation of the ITA.

Effective January 2009, Section 140A ITA was also inserted to specifically address transfer pricing issues. In short, the DGIR may substitute the price in respect of any transaction for the acquisition of supply of property or services if they have reason to believe that the transacted price had not been at arm's length.⁶⁶ The DGIR may also disregard any structure adopted by a person if the economic substance of the transaction differs from its form, or if the arrangement differs from what would have been adopted by independent persons behaving in a commercially rational manner.⁶⁷

61 For appeals originating from the High Court.

62 Order 59, Rule 2 ROC 2012.

63 Section 138B ITA 1967.

64 Section 138B(4) ITA 1967.

65 Court of Appeal decision reported as *Ketua Pengarah Hasil Dalam Negeri v. IBM Malaysia Sdn Bhd* [2020] 7 AMR 798.

66 Section 140A(3) ITA.

67 Section 140A(3A) ITA.

As can be gleaned from the provisions above, the DGIR's powers under the ITA are wide. However, the courts have imposed certain criteria that the DGIR must fulfil before these powers can be invoked. Amongst others, the High Court has held that the burden is on the DGIR to prove that a taxpayer's transaction had been a sham.⁶⁸ A taxpayer is entitled to mitigate their tax incidence so long as they do not evade or avoid taxes for 'it is never the province of either the DGIR or even the courts to tell people how to conduct their business'.⁶⁹ The COA has drawn a distinction between tax mitigation and tax avoidance, holding that a taxpayer is free to mitigate their liability to tax and that this will not be caught by Section 140 ITA.⁷⁰ The courts have maintained this approach in recent years,⁷¹ and have also given increasing recognition to the need for the DGIR to give reasons when invoking their powers under such provisions.

Malaysia is signatory to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI); it has recently joined the OECD Inclusive Framework on Base Erosion and Profit Shifting (BEPS) Package as an associate member and has implemented various regulations in line with the BEPS action plans. With regard to the EU Anti-Avoidance Directive, Malaysia has also been making commitments to reform its tax policies to be in line with the Directive. This includes two exemption orders on foreign-sourced income to taxpayers in Malaysia.⁷²

Malaysia has also given indication of its commitment to introduce the global minimum tax rate as recommended under Pillar 2 of BEPS Action Plan 1, and to implement a qualified domestic minimum top-up tax. Malaysia has previously targeted completion of these initiatives by 2024 in the announcement of Budget 2023. However, the subsequent formation of a new coalition government may affect the original projected timeline. Further studies and engagement with stakeholders are anticipated in the coming months as the authorities continue to take steps to comply with international taxation standards.

IX DOUBLE TAXATION TREATIES

As of 12 December 2022, Malaysia has entered into double taxation agreements (DTAs) with 74 countries and is currently negotiating DTAs with another 24 countries.⁷³ These DTAs have legal effect under the ITA.⁷⁴ The courts have also confirmed that in the event of a conflict between DTA and ITA provisions, it is the former that is to prevail.⁷⁵

In *Alam Maritim*,⁷⁶ the FC held that the taxpayer is precluded from relief under the Malaysia–Singapore DTA as the disputed payments fell within Section 4A of the ITA,

68 *Port Dickson Power Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2012) MSTC ¶30-045.

69 *Port Dickson Power*, above.

70 *Sabah Berjaya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1999] 3 CLJ 587.

71 See e.g., *Ensko Gerudi (M) Sdn bhd v. Ketua Pengarah Hasil Dalam Negeri* (WA-25-101-05/2013); and *Ensko Gerudi (M) Sdn bhd v. Ketua Pengarah Hasil Dalam Negeri* [2021] 9 CLJ 918.

72 Paragraph 28 of Schedule 6 of ITA; Income Tax (Exemption) (No. 5) Order 2022; Income Tax (Exemption) (No.6) Order 2022.

73 <https://www.hasil.gov.my/en/international/double-taxation-agreement/>.

74 Section 132 ITA 1967.

75 *Director General of Inland Revenue v. Euromedical Industries Ltd* [1983] CLJ (Rep) 128; *Damco Logistics Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30-033; *Maersk Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2013) MSTC 10-046.

76 *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421.

which has created a special class of income under which the taxpayer's income should be taxed in Malaysia. However, this decision was distinguished by the HC in *Wira Swire Sdn Bhd.*⁷⁷ The HC agreed with the taxpayer that the Malaysia–Denmark DTA here had been ratified subsequent to the enactment of Section 4A and must have clearly been intended by Parliament to take precedence.

X AREAS OF FOCUS

Disputes relating to the taxability of gains from real property disposals will remain heavily contested as the IRB may regard these cases as low-lying fruit. Their factual nature has previously limited their suitability for determination by judicial review. However, the rejection of key arguments commonly relied on by the IRB in these disputes over the past year may bring about a rise in judicial review applications against such assessments in the coming year.

Similarly, the DGIR's longstanding practice of adjusting to the median in TP audits has firmly been rejected by the High Court in *Sandakan Edible Oils* and *Procter & Gamble*. It is anticipated that the correctness of the High Court's decisions will be decided by the COA in 2023. In the meantime, taxpayers facing TP audits should be cognisant of the key principles laid down by the High Court's decisions and seek legal advice at the earliest juncture should they come across IRB's officers who contravene these principles.

In light of the FC's decision in *Wiramuda* on the unconstitutionality of Section 4C, taxpayers who have been taxed on the compensation they receive from compulsory acquisition of real property in the past will also be expected to bring legal proceedings against the DGIR for the refund of taxes paid. The measure to which these proceedings may find success would depend on the extent of the FC's decision in allowing the taxpayer's appeal in *Wiramuda*. It is hoped that the FC will issue its grounds of judgment as soon as possible to prevent uncertainties in tax treatment for taxpayers in these circumstances.

XI OUTLOOK AND CONCLUSIONS

Recent decisions by the superior courts have confirmed that issues relating to the availability of an alternative remedy should be aired at the substantive stage rather than the leave stage. In light of this, the DGIR's practice of appearing at the *ex parte* leave stage to contest and object to applications filed by taxpayers will appear increasingly indefensible. With the absence of the putative respondent, leave proceedings would most likely be heard and disposed of more quickly, and matters can be expected to proceed more swiftly to the substantive stage for determination of the principal issues in dispute. Tax jurisprudence will be able to develop expediently, and important questions of law relating to tax legislation and principles can also be decided, thus providing increased certainty to taxpayers.

As always, taxpayers must continue to identify and manage their tax risks and potential tax exposures. In encounters with the IRB, obtaining legal advice at the earliest opportunity is also strongly advised to ensure that the taxpayer's interests are best protected as it is inevitable that these interests would not be in alignment with the IRB's own objectives.

77 *Wira Swire Sdn Bhd. v. Ketua Pengarah Hasil Dalam Negeri* [2019] 1 LNS 1026.

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