IN-DEPTH

Tax Disputes And Litigation

MALAYSIA

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Tax Disputes and Litigation

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In-Depth: Tax Disputes and Litigation (formerly The Tax Disputes and Litigation Review) is a practical overview of the common issues that give rise to tax disputes in key jurisdictions, the procedures for resolving those disputes, and the powers and approach of local tax authorities. With a focus on recent developments, it offers insights into the process, timescale and cost of resolving complex difficulties when they arise across multiple jurisdictions.

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Malaysia

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Summary

Introduction

Generally, tax disputes take between one and five years to be resolved, depending on the nature of the dispute, complexity of the issues involved and the quantum at stake. The mode of proceedings used will also have a bearing.

There are two specialised tribunals set up to hear and decide tax disputes: the Special Commissioners of Income Tax (SCIT) for income tax disputes and the Customs Tribunal (CT) for customs disputes. The volume of cases that are heard by these bodies and the relatively limited number of commissioners and tribunal members who sit on them have tended to limit their expediency at the commercial courts. In certain circumstances, taxpayers may be able to resort to judicial review to challenge decisions made by the tax authorities. Judicial review applications are commenced at the High Court (HC) and tend to have comparatively shorter timelines for resolution.

On an ad hoc basis, special voluntary disclosure programmes may be implemented by the Malaysian Inland Revenue Board (IRB), under which taxpayers would be encouraged to make voluntary declarations of income at the benefit of reduced penalty rates. The current Special Voluntary Disclosure Programme (SVDP) 2.0 commenced on 6 June 2023 and will come to an end on 31 May 2024. Taxpayers who participate in the SVDP are able to regularise past irregularities in their tax affairs without facing financial penalties.

Outside of such programmes, the IRB has tended to be very active in carrying out audits and investigations to ensure compliance with tax laws. Indeed, the IRB has warned taxpayers that the SVDP 2.0 is a 'last chance to come clean' and that the authorities would be out to 'enforce the full force of the law' after the programme ends.[2]

For matters involving genuine differences in the interpretation of tax laws, the IRB may be more amenable to negotiations and discussions. The IRB's own Tax Audit Framework[3] has also assured that matters arising from technical adjustments would not attract the imposition of penalties under Section 113(2) of the Income Tax Act 1967 (ITA). However, there are certain areas where the IRB would be less amenable to such discussions. These include cases of tax evasion or fraud, where taxpayers have intentionally engaged in attempts to defraud the tax authorities and to understate their income. The IRB has displayed their willingness to invoke the criminal provisions under the ITA and other laws to prosecute taxpayers who commit such offences.

For income tax disputes, the ITA has prescribed a 12-month period of review before a tax appeal filed by the taxpayer can be forwarded to the SCIT. During this period, the IRB will hold dispute resolution proceedings (DRP) as a medium to explore a possible settlement. These proceedings are chaired by a dedicated DRP department or the relevant state director's office, which would act as a neutral party in the discussions. For customs disputes, taxpayers may engage in settlement discussions with the Royal Malaysian Customs Department (RMCD) on their own accord. The Customs Act 1967 (CA) similarly allows taxpayers to apply to the Director General of Customs (DGOC) to review any decision that the DGOC has made.

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.[4]

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. The courts have, however, rejected such an approach, holding that mere differences in interpretation alone do not constitute negligence on the taxpayer's part.

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.[5] 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 HC 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 HC 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.[6] Upon hearing and determining the question of law in such an appeal, the HC may, among other things, order such assessments to be confirmed, discharged or amended. Parties dissatisfied with the HC'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 HC[7] to challenge a tax assessment.

Taxpayers cannot commence judicial review as of right but must first obtain leave of the court to 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.[8] Decisions of the HC 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'.[9]

However, the courts have also dismissed judicial review applications where it was held that exceptional circumstances did not exist.[10] Taxpayers intending to pursue judicial review

should thus obtain legal advice at the earliest opportunity to evaluate whether this is suitable.

Stay of payment

Once an assessment is raised, taxes are ordinarily due and payable whether or not an appeal is made.[11] 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.[12]

Unlike the HC, 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.[13]

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.[14] The Court of Appeal (COA) has previously confirmed this in Berjaya Times Square.[15] The legality and constitutionality of Section 106 ITA have also recently been upheld by the Federal Court in Mohd Najib Hj Abd Razak v. Government of Malaysia & Another Appeal [16] after being the subject matter of a high-profile challenge brought by a former prime minister of Malaysia.

The courts and tribunals

i SCIT and Customs Tribunal

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).[17] 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 HC are to be adopted and applied with the necessary modifications.[18]

The CT was created by the CA 1967.[19] 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.[20]

CT 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 court[21] unless the other proceedings have been commenced earlier or unless the tribunal appeal is withdrawn, abandoned or struck out. Through an amendment in 2018,[22] advocates and solicitors who were previously not allowed to appear at the tribunal are now able to do so.

Generally, the role of the SCIT and CT are to make findings of facts and decide questions of law. The SCIT and CT's decisions provide guidance to taxpayers and the IRB on how similar issues will be decided. However, they may be overruled by the appellate courts or subsequently departed from by a different SCIT or CT panel. The SCIT and CT are independent of the IRB and RMCD, respectively. However, they are both organisations under the MoF, which also oversees the tax authorities.

ii HC, COA and FC

Appeals from the SCIT to the HC are made by way of filing a notice of appeal 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.[23] 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.[24] FC appeals are heard and decided by a panel of between five and 11 judges.

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.[25]

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. It is also an offence for taxpayers to 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.

The tax authorities generally impose civil or financial penalties in lieu of criminal prosecution. Taxpayers who participate in the SVDP 2.0 voluntary disclosure programme may be able to benefit from waiver or reduced penalty rates. Pursuant to the IRB's Tax Audit Framework, in cases involving understatement of income, penalties will be imposed at a scale rate of 15 per cent for a first offence, 30 per cent for a second offence, and 45 per cent for the third and subsequent offences. Penalties would not be imposed in matters arising out of technical adjustments. However, penalties would be imposed at the rate of 100 per cent against taxpayers who are found to have intentionally underreported their income.

Other than civil and financial penalties, the tax authorities have demonstrated an increasing willingness in recent times to invoke their powers to prosecute recalcitrant tax evaders via criminal proceedings. Taxpayers who face criminal proceedings are entitled to put forth any defence that they may have for the relevant offence.

Tax claims

i Recovering overpaid tax

A taxpayer who has overpaid taxes can submit a claim for refund within five years of the end of the YA to which the claim relates.[26] 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.[27] This formula entitles taxpayers who receive late refunds to a compensation of 2 per cent per annum. The IRB has issued Operational Guidelines on the criteria and procedure for refund applications.[28] The refund process for overseas taxpayers and locally domiciled taxpayers is the same.

There are no specific measures addressing tax disputes between commercial parties. Generally, civil actions are subject to a limitation period of six years as prescribed by Section 6 of the Limitation Act 1953.

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'.[29] In Malaysia, the courts are not confined merely to the decision-making process, but may examine the merits of the decision itself.[30]

As discussed, exceptional circumstances would have to be demonstrated for leave to be obtained where the alternative remedy of a SCIT appeal exists. Among others, legitimate expectations may have arisen on the part of taxpayers as a result of conduct by the tax authorities, whether this is past conduct against the taxpayer or conduct against other taxpayers. In such cases, taxpayers may resort to judicial review to seek parity in treatment. 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.

The IRB is empowered to issue public rulings pursuant to Section 138A ITA. Such rulings set out the DGIR's interpretation in respect of tax law and the policy and procedure that the IRB would apply.[31] However, the courts have held that public rulings have no force of law and are not binding on taxpayers if they are inconsistent with the ITA. They would, however, be binding against the DGIR pursuant to Section 138A(3) ITA. From 1 January 2024, the DGIR has been given power to issue guidelines where necessary to clarify the provisions of the ITA or facilitate compliance with the law. Such guidelines have been issued to facilitate the implementation of e-invoicing in Malaysia.[32] Apart from public rulings and formal guidelines issued under the ITA, the tax authorities routinely issue informal guidance in the form of circulars and other guidelines. Similarly, these are only intended as a guide and cannot create additional requirements or conditions beyond those already prescribed under the ITA.

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.[33] 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 based on 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[34] 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 ITA[35] itself and the DGIR public rulings have drawn distinctions between public rulings and 'practice of the DGIR generally prevailing'.[36]

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' that 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 in Wiramuda (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (KPHDN) [37] that Section 4C is unconstitutional,[38] 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'. The HC's recent decisions in Lush Development Sdn Bhd v. KPHDN [39] and Tanda Bestari Sdn Bhd v. KPHDN [40] have also indicated that judicial review would be available for taxpayers to seek refund of taxes paid pursuant to legislation that has been held to be unlawful.

In certain limited situations, a taxpayer may mount a challenge against a decision by the tax authority that has been issued to another party. The recent case of Akamai Technologies Malaysia Sdn Bhd & Anor v. Ketua Pengarah Hasil Dalam Negeri [41] 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 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.[42] 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 apply for an administrative review, file an appeal to the Customs Tribunal or file a judicial review application at the HC 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 a 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 any person:

1. by whom any money is due or accruing or may become due and payable to the company;
2. who holds or may subsequently hold money for or on account of the company;
3. who holds or may subsequently hold money for or on account of any person for payment to the company; or
4. who has authority from another person to pay money to the company.[43]

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.[44]

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.[45] 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.[46] The 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 HC, COA and the FC,[47] cost awards are discretionary in nature[48] 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.

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.[49] The DGIR is legally bound by its ruling once a taxpayer has duly relied and acted upon the ruling.[50] 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[51] that a taxpayer would not have been 'adversely affected' until an assessment is issued.

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.[52] 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.[53]

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. Among others, the HC has held that the burden is on the DGIR to prove that a taxpayer's transaction had been a sham.[54] 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'.[55] 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 of the ITA.[56] The courts have maintained this approach in recent years,[57] 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. Regarding the EU Anti-Avoidance Directive, Malaysia has also been making commitments to reform its tax policies to be in line with the Directive.

Malaysia has also given indication of its commitment to introduce the global minimum tax rate as recommended under Pillar Two 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.

Double taxation treaties

As of 27 March 2024, Malaysia has entered into double taxation agreements (DTAs) with 74 countries and is currently negotiating DTAs with another 24 countries.[58] These DTAs have legal effect under the ITA.[59] 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.[60]

In Alam Maritim,[61] 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, 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-.[62] 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.

Year in review

The following recent tax cases decided by the courts are of particular interest in shedding light on the type of disputes that occur between taxpayers and the tax authorities.

i Public rulings by the tax authority cannot modify taxpayer's rights in primary legislation

In Seiwa Podoyo Sdn Bhd v. KPHDN, the HC had previously allowed the taxpayer's appeal. Importantly, it held that:

1. mere difference in interpretation of tax legislation cannot constitute negligence for the purpose of lifting time-bar, particularly where the taxpayer had acted upon professional advice; and
2. public rulings issued by the IRB have no force of law or legal authority and merely represent the IRB's interpretation of ITA provisions.

In December 2023, the COA upheld the HC's and dismissed the DGIR's appeal.

ii Capital receipts are not taxable income

In Mass Rapid Transit Corporation Sdn Bhd v. KPHDN, the HC upheld the trite principle that income tax under the ITA can only be levied on 'income'. Income tax cannot be imposed upon capital receipts. In this case, funds received by the taxpayer from the government as capital injections and were recorded as equity in the taxpayer's audited financial accounts could not possibly be regarded as income.

iii Full range (minimum to maximum range) can constitute arm's-length range in transfer pricing matters

The courts previously established that in transfer pricing (TP) matters, the interquartile range (25th to 75th percentile) 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.[63]

In December 2023, the SCIT decided in a landmark decision that the full range (minimum to maximum range) can constitute a representation of the arm's-length range where there are no comparability defects in the selected comparable companies. This represents an affirmation of the SCIT and HC's decisions in Sandakan Edible Oils that the courts will not countenance belated and unsubstantiated allegations of comparability defects to justify TP adjustments. It is expected that TP disputes, particularly as to the circumstances that could warrant TP adjustments would continue to persist under the newly created Income Tax (Transfer Pricing) Rules 2023 (TPR 2023).

iv Burden to prove negligence for time-barred assessment lies with the tax authority

In Impressive Edge Sdn Bhd v. KPHDN,[64] the HC decided that differing tax treatment and filing of alleged incorrect or inaccurate tax returns cannot ipso facto amount to negligence. Instead, the tax authority is required to prove more than an inaccurate or incorrect return by establishing a positive act of negligence to justify the lifting of the limitation period under Section 91(1) ITA.

v Judicial review is available for taxpayers to seek refund for taxes paid pursuant to unlawful legislation

In Wiramuda (M) Sdn Bhd (supra), the Federal Court has held Section 4C ITA to be unlawful as it contravenes Article 13(2) of the Federal Constitution. Accordingly, gains received from taxpayers from the compulsory acquisition of their land should not be subject to tax. In Lush Development (supra) and Tanda Bestari (supra), the HC allowed the taxpayers leave to commence judicial review against the DGIR's refusal to refund taxes paid pursuant to Section 4C ITA. In granting leave, the Court opined that the DGIR has no right to retain taxes paid pursuant to legislation that has been held to be unlawful and that the DGIR had been unjustly enriched from the collection and retaining of such taxes.

Outlook and conclusions

The introduction of e-invoicing is a game-changer that is expected to reshape tax compliance and enforcement strategies. This would enable near real-time validation and storage of transactions, empowering the IRB to carry out more effective and efficient audits and investigations against defaulting taxpayers. Separately, disputes are also expected to arise from the implementation of capital gains tax, particularly as to its interplay with the existing real property gains tax regime. Finally in TP matters, the introduction of the TPR 2023 is controversial and represents a marked departure from international standards and practice. The definition of the arm's-length range as the range between the 37.5th and 62.5th percentile is unprecedentedly narrow and does not appear to accord with the law and practice of jurisdictions worldwide. TP disputes are expected to be fully litigated particularly as the taxes at stake are often significant.

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.

Endnotes

1 Jason Tan Jia Xin and Chris Toh Pei Roo are partners and Chua Chun Yang is an associate in the tax, customs and trade practice group of Lee Hishammuddin Allen & Gledhill. Back to section

2 https://thesun.my/business/tax-matters-svdp-20-the-last-chance-to-come-clean-FI11087165. Back to section

3 https://phl.hasil.gov.my/pdf/pdfam/RK_Audit_Cukai_2022_1.pdf (available in Malay language only). Back to section

4 https://phl.hasil.gov.my/pdf/pdfam/RK_Audit_Cukai_2022_1.pdf (available in Malay language only). Back to section

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

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

7 Order 53, Rules of Court 2012 (ROC 2012). Back to section

8 *Government of Malaysia & Anor v. Jagdis Singh [1987] CLJ (Rep) 110.* *Back to section*

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

10 *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.* *Back to section*

11 Section 103 ITA. Back to section

12 Section 103(5) ITA. Back to section

13 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. Back to section

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

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

16 [2023] 10 CLJ 329. Back to section

17 Section 98, ITA 1967. Back to section

18 Paragraph 42A, Schedule 5 ITA 1967. Back to section

19 Section 141B, CA 1967. Back to section

20 Section 141C, CA 1967. Back to section

21 Section 141N, CA 1967. Back to section

22 Section 11, Customs (Amendment) Act 2018 amending Section 141Q, CA 1967. Back to section

23 *Ketua Pengarah Hasil Dalam Negeri v. Teraju Sinar Sdn Bhd [2014] 8 CLJ 169.* *Back to section*

24 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. Back to section

25 Sections 116 to 120, ITA 1967. Back to section

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

27 Section 111D ITA 1967. Back to section

28 Guideline on Compensation on Late Refund of Overpayment of Tax (Available in Malay language only): https://phl.hasil.gov.my/pdf/pdfam/GPO_2_2021.pdf. Back to section

29 SeeThe Tax Disputes and Litigation Review, Edition 6, Chapter on Singapore. Back to section

30 *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248.* *Back to section*

31 https://www.hasil.gov.my/en/legislation/public-rulings/. Back to section

32 https://www.hasil.gov.my/media/lnaj4l2q/irbm-e-invoice-specific-guideline-version-20.pdf. Back to section

33 Section 131 ITA 1967. Back to section

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

35 Section 99(4). Back to section

36 Grounds of judgment have yet to be published by the COA. Back to section

37 [2023] 8 CLJ 21. Back to section

38 SeeThe Tax Disputes and Litigation Review, Edition 11, Chapter on Malaysia, Section I.iv. Back to section

39 [2023] CLJU 2573. Back to section

40 [2023] CLJU 2574. Back to section

41 (2022) MSTC 30-511. Back to section

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

43 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. Back to section

44 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. Back to section

45 Paragraph 32, Schedule 5, ITA 1967. Back to section

46 Paragraph 29, Schedule 5 ITA 1967. Back to section

47 For appeals originating from the HC. Back to section

48 Order 59, Rule 2 ROC 2012. Back to section

49 Section 138B ITA 1967. Back to section

50 Section 138B(4) ITA 1967. Back to section

51 Court of Appeal decision reported asKetua Pengarah Hasil Dalam Negeri v. IBM Malaysia Sdn Bhd [2020] 7 AMR 798. Back to section

52 Section 140A(3) ITA. Back to section

53 Section 140A(3A) ITA. Back to section

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

55 ibid. ^ Back to section

56 *Sabah Berjaya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1999] 3 CLJ 587.* ^ *Back to section*

57 See e.g.,Ensco Gerudi (M) Sdn bhd v. Ketua Pengarah Hasil Dalam Negeri (WA-25-101-05/2013); and Ensco Gerudi (M) Sdn bhd v. Ketua Pengarah Hasil Dalam Negeri [2021] 9 CLJ 918. ^ Back to section

58 https://www.hasil.gov.my/en/international/double-taxation-agreement/. ^ Back to section

59 Section 132 ITA 1967. ^ Back to section

60 *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.* ^ *Back to section*

61 *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421.* ^ *Back to section*

62 *Wira Swire Sdn Bhd. v. Ketua Pengarah Hasil Dalam Negeri [2019] 1 LNS 1026.* ^ *Back to section*

63 *KPHDN v. Sandakan Edible Oils Sdn Bhd [2023] CLJU 616; KPHDN v. Procter & Gamble (Malaysia) Sdn Bhd [2022] CLJU 754.* ^ *Back to section*

64 High Court Appeal No. WA-14-29-11/2022). ^ Back to section

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