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AKAMAI: PROTECTING INVESTMENTS THROUGH DTA SUPREMACY AND JUDICIAL REVIEW

by Dato' Nitin Nadkarni, Chris Toh Pei Roo & Soon Jia Ying

1. ***Akamai Technologies International AG v Ketua Pengarah Hasil Dalam Negeri & Lembaga Hasil Dalam Negeri Malaysia***[1]
2. ***Akamai Technologies Malaysia Sdn Bhd & Akamai Technologies International AG v Ketua Pengarah Hasil Dalam Negeri***[2]

On 25 June 2026, the Kuala Lumpur High Court ("**High Court**") quashed the Director General of Inland Revenue's ("**Revenue**") decision and additional assessments amounting to over RM 32 million for the Years of Assessment ("**YAs**") 2015 to 2019, in judicial review applications brought by Akamai Technologies International AG ("**Akamai Swiss**") and Akamai Technologies Malaysia Sdn Bhd ("**Akamai MY**"). In so doing, the High Court made the following important decisions:

[1] WA-25-149-03/2022
[2] WA-25-150-03/2022

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1. An applicable DTA prevails over inconsistent provisions of the Income Tax Act 1967 (“**ITA**”) pursuant to Section 132;

2. The Revenue acts unlawfully where it fails to follow binding judicial authority and give effect to its statutory duty under Section 132;

3. The interpretation of a written agreement and the proper legal definition of "royalty" are questions of law suitable for determination by the High Court;

4. The availability of an appeal to the SCIT does not bar judicial review where illegality or other recognised grounds of review are established;

5. The filing of Form Q does not, by itself, preclude judicial review.

As the High Court previously granted a stay of the Revenue's decision and the Assessments pending disposal of the judicial review applications, the disputed tax liabilities were not enforceable while the legality of the Revenue's actions was determined.

Multinationals conducting business in Malaysia can take comfort that the courts will hold the Revenue to its obligations under applicable DTAs and will not permit the Revenue to disregard binding treaty provisions.

Brief Facts

Akamai MY entered into a Services Reseller Agreement with Akamai Swiss, pursuant to which Akamai MY was appointed as a non-exclusive reseller authorised to market, resell and support Akamai Swiss’s proprietary services in Malaysia (“**Akamai Services**”). In consideration of its appointment, Akamai MY paid annual fees to Akamai Swiss (**“Services Reseller Payments**”). Akamai MY was not granted access to, or any right to use, Akamai Swiss's software, intellectual property, know-how or proprietary information.

Akamai Swiss sought confirmation from the Revenue that the Services Reseller Payments did not constitute "royalties” under Article 12 of the Switzerland–Malaysia Double Taxation Agreement (“**Swiss–Malaysia DTA**”) and were therefore not subject to withholding tax. In support of its position, Akamai Swiss relied on Section 132 of the ITA and longstanding binding judicial authority establishing that an applicable DTA prevails over inconsistent provisions of the ITA.

However, by email dated 24 January 2022, the Revenue decided that the Services Reseller Payments were royalties under Section 2 of the ITA, being payments for the use of software, without addressing the Swiss–Malaysia DTA or Section 132 of the ITA (“**Revenue’s Decision**”). The Revenue also raised additional assessments on Akamai MY for YAs 2015 to 2019 (“**Assessments**”).

Dissatisfied with the Revenue’s Decision and Assessments, the Taxpayers commenced judicial review proceedings seeking to quash:

Dissatisfied with the Revenue's Decision and Assessments, the Taxpayers commenced judicial review proceedings seeking to quash:

(a) The Revenue's email dated 24 January 2022; and
(b) The Notices of Additional Assessment for the YAs 2015 to 2019.

Revenue's Position

The Revenue contended, among other things, that:

1. Judicial review should not be entertained because the Taxpayers had an alternative statutory remedy by way of an appeal to the SCIT, and Akamai MY had already filed Form Q;

2. The dispute involved technical investigations, tax computations and questions of fact that should be determined by the SCIT; and

3. The Revenue's decision was not affected by illegality, irrationality or procedural impropriety.

Taxpayer's Arguments

The Taxpayers contended that:

1. Pursuant to Section 132 of the ITA, the definition of "royalty" in the Swiss–Malaysia DTA prevailed over the definition in section 2 of the ITA;

2. The Revenue acted unlawfully by failing to follow binding judicial decisions, specifically brought to its attention during the audit, which had consistently held that an applicable DTA prevails over inconsistent provisions of the ITA;

3. The Services Reseller Payments were not royalties under the Swiss–Malaysia DTA because Akamai MY had not acquired any right to use Akamai Swiss's software, intellectual property, know-how or proprietary rights; and

4. The additional assessments for YAs 2015 and 2016 were time-barred under Section 91(1) of the ITA.

High Court's Decision

The High Court allowed both judicial review applications. The key findings of the High Court are summarised below.

1. **An Appeal to the SCIT Does Not, by Itself, Bar Judicial Review**

   The High Court reaffirmed that the availability of an alternative statutory remedy does not bar judicial review where the taxpayer establishes clear illegality, unlawful treatment, excess of power or a breach of natural justice.

Crucially, the High Court held that the filing of Form Q **does not**, by itself, preclude judicial review. A taxpayer is not necessarily confined to the SCIT process merely because Form Q has been filed.

2. The Dispute Raised Questions of Law for the High Court

The High Court rejected the Revenue's characterisation of the dispute as one requiring technical investigation, tax computation or factual determination by the SCIT. The Court held that the applications raised questions of law, including:

(a) Whether the Revenue was legally entitled to apply the domestic definition of “royalty” in Section 2 of the ITA notwithstanding section 132 and binding decisions holding that the applicable DTA prevails; and

(b) The proper interpretation of the Services Reseller Agreement, since the interpretation of a written agreement is a question of law.

The High Court was therefore the appropriate forum to determine those questions.

3. The Swiss–Malaysia DTA Prevails Over the ITA

Applying Section 132 of the ITA, the High Court held that the definition of “royalty” in the Swiss–Malaysia DTA prevailed over and displaced the broader domestic definition in Section 2 of the ITA. The applicable legal test was therefore the definition contained in the DTA, not the domestic definition relied upon by the Revenue.

4. Failure to Follow Binding Decisions Amounted to Illegality

The High Court found that the Revenue had, without explanation, failed to follow the binding decisions in:

(a) ***Director-General of Inland Revenue v Euromedical Industries* [1983] CLJ Rep 128;**
(b) ***Damco Logistics v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30-033;**
(c) ***Wira Swire v Ketua Pengarah Hasil Dalam Negeri* [2019] 1 LNS 722; and**
(d) ***Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters* (2016) MSTC 30-124.**

Those decisions consistently recognised that, pursuant to Section 132, an applicable DTA prevails over inconsistent provisions of the ITA. The High Court held that the Revenue's failure to follow those decisions constituted illegality. It further amounted to a failure to perform the Revenue's statutory duty to give effect to Section 132 of the ITA.

5. **The Services Reseller Payments Were Not Royalties**

   Applying ***Damco Logistics***, the High Court held that the Services Reseller Payments were not royalties. Akamai MY had merely been appointed as a non-exclusive reseller authorised to market, resell and support Akamai Swiss's proprietary services in Malaysia. Akamai MY had not been granted access to, or any right to use, Akamai Swiss's software, intellectual property, know-how or proprietary information. There was therefore no transfer or grant of any right to use software, know-how or proprietary rights capable of constituting a royalty under the Swiss–Malaysia DTA.

6. **The Assessments for YAs 2015 and 2016 Were Time-Barred**

   The High Court found that the material facts had already been brought to the Revenue's attention in 2014, but the additional assessments were only issued on 31 December 2021. The additional assessments for YAs 2015 and 2016 were therefore issued outside the statutory time limit and were time-barred.

The High Court's broad grounds of decision can be viewed here.

Conclusion

The *Akamai* decisions reinforce that, pursuant to Section 132, an applicable DTA prevails over inconsistent provisions of the ITA, and that the Revenue must exercise its statutory powers accordingly. A failure to give effect to binding judicial authority and Section 132 may amount to illegality and is amenable to judicial review. The decisions have important implications for taxpayers involved in cross-border technology, software, licensing, cloud, platform and digital service arrangements, and more broadly whenever the Revenue seeks to apply a domestic definition without first giving proper effect to an applicable DTA.

The High Court also confirmed that the filing of Form Q does not, by itself, bar judicial review. Taxpayers may file Form Q to preserve their statutory appeal rights while separately pursuing judicial review where the dispute raises questions of law, illegality or a failure to perform a statutory duty. The existence of the statutory appeal mechanism does not immunise an unlawful decision from judicial scrutiny.

Equally significant is the High Court’s confirmation that the filing of a Notice of Appeal in Form Q does not, by itself, bar judicial review. The existence — or even invocation — of the statutory appeal mechanism does not immunise an unlawful decision from judicial scrutiny. Where a dispute concerns a question of law, the legality of the Revenue’s decision-making process, a failure to follow binding authority or a failure to perform a statutory duty, the High Court may remain the appropriate forum.

The Taxpayers were represented at the leave stage by **Dato' Nitin Nadkarni**, **Jason Tan Jia Xin** and **Chris Toh Pei Roo**, and at the substantive hearing by Dato' Nitin Nadkarni and Chris Toh Pei Roo, of Lee Hishammuddin Allen & Gledhill's Tax, Customs & Trade Practice.

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