IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERITORY OF KUALA LUMPUR, MALAYSIA
(SPECIAL POWERS DIVISION)
APPLICATION FOR JUDICIAL REVIEW NO.: WA-25-149-03/2022

BETWEEN

AKAMAI TECHNOLOGIES INTERNATIONAL AG

… APPLICANTS

AND

(1) KETUA PENGARAH HASIL DALAM NEGERI

(2) LEMBAGA HASIL DALAM NEGERI MALAYSIA

… RESPONDENTS

(HEARD TOGETHER WITH)

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERITORY OF KUALA LUMPUR, MALAYSIA
(SPECIAL POWERS DIVISION)
APPLICATION FOR JUDICIAL REVIEW NO.: WA-25-150-03/2022

BETWEEN

1. AKAMAI TECHNOLOGIES MALAYSIA SDN BHD

2. AKAMAI TECHNOLOGIES INTERNATIONAL AG

… APPLICANT

AND

KETUA PENGARAH HASIL DALAM NEGERI … RESPONDENT

<u>NOTA PROSIDING</u>

Khamis, 25.6.2026, 4.37 petang (Zoom)

Jenis Prosiding:	Keputusan
Peguam Pemohon:	Dato' Nitin Nadkarni dan Chris Toh Pei Roo
Peguam Kanan HASIL & Peguam HASIL:	Mohammad Hafidz Bin Ahmad dan Mohd Zharif Bin Abd Hamid

Di Hadapan YA Dato' Hajah Aliza Binti Sulaiman

Mah. : The Court thanks learned counsels for the oral and written submissions. After having considered the cause papers and the submissions by the parties, the broad grounds of decision are as follows.

1. In these applications for judicial review, the Applicants are seeking reliefs in the form of orders of certiorari, declaration and mandamus in relation to the decisions by the Respondents in the e-mail dated 24.1.2022 and in the Notice of Additional

Assessment for the Years of Assessment ('**YA**') 2015, 2016, 2017, 2018 and 2019 dated 31.12.2021.

2. The main issue for determination in these applications is whether the services reseller payments paid by Akamai Technologies Malaysia Sdn Bhd ('**Akamai MY**') to Akamai Technologies International AG ('**Akamai Swiss**') are royalties under s 2 of the Income Tax Act 1967 ('**ITA 1967**') and thus, subject to withholding tax under s 109 of the ITA 1967.

3. The Respondents grounds for defending the decisions made are that –

(a) there are no exceptional circumstances to warrant a judicial review and the Applicants have the remedy to appeal against the tax treatment to the Special Commissioner of Income Tax ('**SCIT**') upon issuance of the notices of assessment;

(b) the dispute involves technical investigation procedures, tax calculations and question of facts and must therefore be brought before the SCIT for determination; and

(c) there is no illegality, irrationality or procedural impropriety in the decision-making process.

4. It is my finding, among others, that –

(a) based on the case authorities cited by the Applicants, the existence of an alternative remedy does not bar judicial review if there is clear illegality, unlawful treatment, excess of power or breach of the rules of natural justice;

(b) the fact that Form Q has been filed by the Applicant does not by itself bar a judicial review;

(c) the Applicants have shown that there are questions of law which arise in these applications, primarily, whether the Respondents can apply the definition of "*royalty*" in the ITA 1967 in the light of the court decisions which have held that the definition in the DTA must prevail and be applied. Further, interpretation of a written agreement such as the Services Reseller Agreement dated 13.3.2012 is a question of law. This Court is the appropriate forum to decide on these questions of law;

(d) applying s 132 of the ITA 1967 which provides that Double Taxation Agreements ('**DTA**') shall have effect notwithstanding anything in any written law, the Swiss-Malaysia Agreement for the Avoidance of Double Taxation ('**Swiss-Malaysia DTA**') must prevail. The definition of "*royalty*" in the Swiss-Malaysia DTA applies and overrides the definition of "*royalty*" under s 2 of the ITA 1967. Accordingly, the right to use software is not taxable under the Swiss-Malaysia DTA;

(e) for reasons which have not been explained by the Respondents, they have not followed the pronouncement by the courts in the cases described by the Applicants as "Binding Decisions", namely –

(i) *Director-General of Inland Revenue v Euromedical Industries* [1983] CLJ Rep 128;

(ii) *Damco Logistics v KPHDN* (2011) MSTC 30-033;

(iii) *Wira Swire v KPHDN* [2019] 1 LNS 722; and

(iv) *KPHDN v Thomson Reuters* (2016) MSTC 30-124,

which held that pursuant to section 132 of the ITA 1967, the DTA provisions must prevail. In this regard, the Applicants have established illegality as the Respondents did not follow the Binding Decisions. Further, there was a failure by the Respondents to perform a statutory duty as they did not give effect to s 132 of the ITA 1967;

(f) applying the decision in *Damco Logistics*, there was no transfer, grant or the use of know-how or proprietary rights to Akamai MY and the payments were not for the use of, or the right to use, software. Akamai Swiss appointed Akamai MY as a non-exclusive reseller authorised to market, resell and support Akamai Swiss's proprietary services. In this role, Akamai MY provided the services to the customers of Akamai Swiss in Malaysia. Akamai MY was not granted any access or right to any intellectual property, software or proprietary information. There was no importation of "know-how" from Akamai Swiss to Akamai MY; and

(g) the Respondents only issued the tax assessments for YA 2015, 2016, 2017 and 2018 on 31.12.2021 when the material facts were already brought to their attention in 2014. The notices of assessment issued in respect of YA 2015 and YA 2016 are time-barred.

5. The Applicants' applications for judicial review in Application Nos. 149 and 150 are therefore allowed, namely the reliefs in subparagraphs 1(a) – (h), encl. 1 in Application No. 149 and in subparagraphs 1(a) – (k), encl. 1 in Application No. 150.

: Para 1(l) in Application No. 150 is not necessary?

PP : That is so. The parties have agreed to RM5,000.00 as costs i.e. RM2,500.00 for each application.

SRC : We confirm.

Mah. : Costs of RM2,500.00 for each application.

PP : As the decision is important, request for full GoJ.

Mah. : Full GoJ will be provided in due course.

Dato' Aliza Binti Sulaiman JCA
Sitting as Judge, High Court in Malaya
at Kuala Lumpur (BKK1)
26.6.2026