ARE THE TAXPAYERS' RIGHTS ADEQUATELY PROTECTED IN MALAYSIA?

KOK FIE SEE

An Academic Project submitted in partial fulfillment for the degree of Master of Laws

2010/2011

UNIVERSITI MALAYA

ORIGINAL LITERARY WORK DECLARATION

Name of Candidate: KOK FIE SEE (I.C/Passport No: [redacted])

Registration/Matric No: LGA 090018

Name of Degree: LLM (MASTERS OF LAW)

Title of Project Paper/Research Report/Dissertation/Thesis ("this Work"):

ARE THE TAXPAYERS' RIGHTS ADEQUATELY PROTECTED IN MALAYSIA ?

Field of Study: LAW & SOCIETY

I do solemnly and sincerely declare that:

(1) I am the sole author/writer of this Work;
(2) This Work is original;
(3) Any use of any work in which copyright exists was done by way of fair dealing and for permitted purposes and any excerpt or extract from, or reference to or reproduction of any copyright work has been disclosed expressly and sufficiently and the title of the Work and its authorship have been acknowledged in this Work;
(4) I do not have any actual knowledge nor do I ought reasonably to know that the making of this work constitutes an infringement of any copyright work;
(5) I hereby assign all and every rights in the copyright to this Work to the University of Malaya ("UM"), who henceforth shall be owner of the copyright in this Work and that any reproduction or use in any form or by any means whatsoever is prohibited without the written consent of UM having been first had and obtained;
(6) I am fully aware that if in the course of making this Work I have infringed any copyright whether intentionally or otherwise, I may be subject to legal action or any other action as may be determined by UM.

Candidate's Signature [redacted]

Date 15/06/2011

Subscribed and solemnly declared before,

[redacted]

Witness's Signature

Date 15/6/2011

Name: OOI SYN CHIEH
Designation: LAWYER

Acknowledgement

The aim of this paper is to discuss the level of protection of the rights conferred on the taxpayers in Malaysia. This paper is written based on the proposition that revenue can only be levied in accordance with the Federal Constitution and the law should not be abused or manipulated to cause injustice to the taxpayers, bearing in mind the need of compliance with constitutional and administrative law requirements which may turn out to be mandatory. The paper focuses on the judicial approach in interpreting revenue law and its variables affecting the decision making process of the courts and how different conclusions were arrived at in cases involving similar facts or circumstances. In this connection, the Indian texts and case law have been referred to and were discussed if the experience and lessons in India could be used to address the deficiency in revenue law or judicial administration system in the protection of taxpayers' rights in Malaysia.

I wish to thank the many people who have been supportive of my interest in pursuing the LLM course. First ad foremost, I thank my sister, Fie Yee and my friends who have always been supportive and provided much moral support to me. I also thank Dr Gan and the Faculty for allowing me and giving me guidance in the course of writing this paper. Without which, this paper would not have been completed in time. I hereby express my heartfelt thanks and appreciation to Dr Gan and everyone in the Faculty.

Lastly, to all my fellow coursemates of the Advanced Administrative Law LXGA 6180, I record my thanks and appreciation for any assistance rendered to me during the course. Good luck to all for the coming examinations.

The law is stated as at April 1, 2011.

Kok Fie See

April 15, 2011

Abstract

Income tax is the main source of revenue income for the Malaysian Government. There is an inherent danger of abuse in the current income tax administration system -- the administrative body for direct taxes (including income tax), i.e., the Inland Revenue Board Malaysia is part of the Ministry of Finance of Malaysia. Further the independence of the Special Commissioners of Income Tax ("SCIT") in disposing of the appeals of the taxpayers is tainted by the fact that the SCIT are officers of the Treasury of Malaysia. In limited circumstances, the taxpayers are allowed to circumvent the normal appeal procedure before the SCIT under the Income Tax Act 1967 ("ITA") and to apply for judicial review instead to the High Court against the decision of the Director General of Inland Revenue. The appeal procedures do not preserve the rights of the taxpayers pending the determination of the appeals by the SCIT or the High Court. The taxpayers are still required to pay the taxes in dispute and have limited defences in the civil recovery actions for taxes due and payable to the Malaysian Government. Reform of income tax administration system is of utmost importance with a view of improving the level of protection of the taxpayers' rights in Malaysia.

(Bahasa Malaysia)

Cukai pendapatan adalah sumber hasil cukai utama bagi Kerajaan Malaysia. Terdapatnya bahaya semulajadi penyalahgunaan kuasa dalam sistem pentadbiran cukai pendapatan semasa – badan pentadbiran bagi cukai langsung (termasuk cukai pendapatan) iaitu Lembaga Hasil Dalam Negeri Malaysia adalah sebahagian daripada Kementerian Kewangan Malaysia. Selanjutnya kebebasan Pesuruhjaya Khas Cukai Pendapatan ("PKCP") dalam menyelesaikan rayuan pembayar cukai adalah dicemar oleh hakikat bahawa PKCP adalah pegawai-pegawai Perbendaharaan Malaysia. Dalam keadaan-keadaan tertentu sahaja, pembayar cukai dibenarkan untuk memintas prosedur rayuan

biasa kepada PKCP di bawah Akta Cukai Pendapatan 1967 ("ACP") dan memohon semakan kehakiman di Mahkamah Tinggi terhadap keputusan Ketua Pengarah Hasil Dalam Negeri yang dibuat di bawah ACP. Prosedur-prosedur rayuan tidak mengekalkan hak-hak pembayar cukai semasa menunggu pemutusan rayuan oleh PKCP atau Mahkamah Tinggi. Pembayar cukai masih dikehendaki untuk membayar cukai yang dipertikaikan dan mempunyai pembelaan terhad dalam tindakan-tindakan sivil untuk tuntutan cukai yang kena dibayar kepada Kerajaan Malaysia. Reformasi sistem pentadbiran cukai pendapatan adalah sangat penting bagi tujuan meningkatkan tahap perlindungan hak-hak pembayar cukai di Malaysia.

TABLE OF CONTENTS

Chapter 1. Introduction

1.1 Taxation and Law

Article 96 of the highest law of Malaysia, the Federal Constitution provides that, "*No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.*" Hence taxes in Malaysia can only be imposed by a law and the collection of which must be authorized by a law which is valid according to the Federal Constitution. A valid law which means (i) the law imposing a tax must be the legislative competence of the legislature, i.e. it must be covered by an item listed in the legislative power of the legislature in the Federal Constitution,[1] (ii) the law imposing a tax must be validly enacted by the legislature in accordance with the manners stipulated in law,[2] and (iii) the law imposing a tax must not violate any articles in the Federal Constitution.[3]

1.2 Revenue Law as a Branch of Public Law

Taxation, besides being a major source of revenue,[4] is one of most important weapons by which a state can mitigate the inequalities of wealth in the society. In other words, taxation is an instrument for implementing an equal economic and social policy by redistributing the income on a socially desirable pattern. On this ground, a taxation system encompassing

---

[1] See K.D. Gaur, Tax Offences, Black Money and the Law, pp 24 and 25.
[2] See K.D. Gaur, Tax Offences, Black Money and the Law, pp 24 and 25. See also *Bharat Kala Bhandar v Dhamangoon Municipality*, AIR 1966 SC 262.
[3] See K.D. Gaur, Tax Offences, Black Money and the Law, pp 24 and 25. See also *Balaji v ITO*, AIR 1962 123; *Khandige Sham Bhat v Agricultural Income Tax Officer*, AIR 1963 SC 591, 594; *Purshotam Govindji Halai v BN Desai Add. Collector, Bombay*, AIR 1956 SC 20; *Thangal Kunju Musaliar v Venktachalam*, AIR 1856, SC 246.
[4] In Malaysia, tax collection is the main source of income of the Federal Government. Based on the Annual Report of the IRBM for 2008, the IRBM collected a total of RM90.65 billion in taxes in 2008. Total tax collections of RM90.65 billion contributed 56.11% of the total Federal Government's income of RM161.56 billion for 2008.

the legislative framework and the tax administration must be fair, just and transparent towards the interests of the members in the society.

This paper seeks to discuss the effectiveness of the existing taxation system in Malaysia in particular, the income tax law, in distribution of wealth in the society and at the same time adequately protecting the taxpayers' rights.

Chapter 2. Implementation and Administration of Income Tax Law in Malaysia

2.1 Inland Revenue Board of Malaysia ("IRBM")

The IRBM is one of the main revenue collecting agencies of the Ministry of Finance of Malaysia. IRBM was established on 1 March 1996 pursuant to the Inland Revenue Board Act 1995. IRBM's predecessor prior to 1 March 1996 was the Department of Inland Revenue of Malaysia which was a department in the Ministry of Finance and did not have independent administration system from the Ministry of Finance. In view of giving the main revenue authority more autonomy especially in financial and personnel management as well as to improve the quality and effectiveness of tax administration in Malaysia, the Department of Income Revenue of Malaysia transformed into the IRBM.[5] The IRBM is responsible for the administration of several direct taxes in Malaysia including the Income tax under the Income Tax Act 1967 ("ITA").[6]

The functions and powers of the IRBM are clearly provided in the Inland Revenue Board Act 1995. The functions of the IRBM are inter-alia:-[7]

(a) To act as agent of the Government of Malaysia and to provide services in administering, assessing, collecting and enforcing payment of income tax, petroleum income tax, real property gains tax, estate duty, stamp duties and such other taxes as may be agreed between the Government of Malaysia and the IRBM;

---

[5] http://www.hasil.gov.my/lhdnv3e/index.jsp?process=3000&menu1=0&m2=0&ms2=IRBM's%20Profile&pg_title=IRBM's%20Profile.

[6] Other direct taxes are Petroleum income tax under the Petroleum (Income Tax) Act 1967, Real property gains tax under the Real Property Gains Tax Act 1976, Income tax under the Promotion of Investments Act 1986, Stamp duty under the Stamp Act 1949 and Income tax under the Labuan Offshore Business Activity Tax Act 1990.

[7] Section 10 of the Inland Revenue Board Act 1995.

(b) To advise the Government of Malaysia on matters relating to taxation and to liaise with the appropriate Ministries and statutory bodies on such matters;

(c) To participate in or outside Malaysia in respect of matters relating to taxation;

(d) To perform such other functions as are conferred on the IRBM by any other written law;

(e) May act as a collection agent for and on behalf of any body for the recovery of loans due for repayment to that body under any written law.[8]

Generally the IRBM has powers to do all things necessary or convenient to be done for or in connection with the performance of its above functions[9] which include *inter alia*, to engage in any activity, either alone or in conjunction with other organisations or international agencies, to promote better understanding of taxation.[10]

Though the IRBM is a body corporate from the Government of Malaysia which has separate legal personality,[11] there is doubt as to the independence of IRBM from the

---

[8] Section 10A of the Inland Revenue Board Act 1995.

[9] Section 11(1) of the Inland Revenue Board Act 1995.

[10] Other powers listed in section 11(2) of the Inland Revenue Board Act 1995 are:-

a. To enter into contracts;
b. To utilise all property of the IRBM, movable and immovable, in such manner as the Board may think expedient including the raising of loans by mortgaging such property;
c. To provide technical advice or assistance, including training facilities, to tax authorities of other countries;
d. To impose fees or charges for services rendered by the IRBM;
e. To grant loans to employees of the Board for any purpose specifically approved by the IRBM;
f. To provide recreational facilities and promote recreational activities for, and activities conducive to, the welfare of employees of the Board;
g. To provide training for employees of the IRBM and to award scholarships or otherwise pay for such training; and
h. To do anything incidental to any of its powers.

[11] Section 3 of the Inland Revenue Board Act 1995 provides that:
"There is hereby established a body corporate by the name "Inland Revenue Board of Malaysia" with perpetual succession and a common seal, and which may sue and be sued in its name and, subject to and for the purposes of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest therein vested in the Board upon such terms as it deems fit."

control of the Government of Malaysia. By virtue of section 6 of the Inland Revenue Board Act 1995, the IRBM shall consist of the Secretary General to the Treasury who will be the Chairman of the IRBM, the Attorney General or his representative, the Director General of Public Service or his representative, and the Minister of Finance is empowered to appoint the Government representatives in the IRBM. The chief executive officer of the IRBM is the Director General of Inland Revenue ("DGIR") who is the main person who manages the income tax system under the ITA.[12] The IRBM must give effect to the general directions given by the Minister of Finance which are not inconsistent with the ITA.[13] Hence post establishment of the IRBM, the doubt as to whether the IRBM may discharge its duty independently remains. However the influence of the Government of Malaysia seems to be inevitable as the Government of Malaysia is the ultimate tax policy maker in Malaysia while the IRBM is the body corporate implementing the tax policy laid down by the Government of Malaysia.

2.2 Malaysian Income Tax System in General

Income tax is imposed in Malaysia mainly under the ITA. The formal or traditional income tax assessment system was practiced in Malaysia prior to the year 2001. Under the formal or traditional assessment system, the taxpayers were required to submit all the relevant accounts and records to the IRBM, and the IRBM will go through and check to ensure the return is correct and raise an appropriate assessment based on the return filed by the taxpayers. The assessment will be made in the prescribed assessment form.[14]

[12] Section 134(1) of the ITA.
[13] Section 14(1) of the Inland Revenue Board Act 1995.
[14] It is the notice of assessment which is commonly known as Form J.

The self assessment system was announced by the Government of Malaysia in 1999 and took effect from the Year of Assessment 2001 for corporations and the Year of Assessment 2004 for individuals, sole proprietors, partnerships and trusts. Under the self assessment system, taxpayers are required to complete and submit their returns in a prescribed form within the stipulated time period for a year of assessment. For this purpose, the taxpayers have to compute the income tax payable by them for that year of assessment in accordance with the income tax law in force at the material times. No notice of assessment will be issued to the taxpayers. The taxpayers are not required to submit all the relevant supporting documents for the returns to the IRBM, nonetheless the taxpayers must keep and maintain these documents for the purposes of tax audit which will be carried out by the IRBM at a later date after the returns are filed by the taxpayers. Tax audits are important as it is one of the methods which can be used by the IRBM to ensure the taxpayers have prepared and filed their returns in accordance with the ITA and other sub-legislations. During the tax audit, the IRBM will have access to and inspect all documents relating to the income tax assessment of a taxpayer. Should the IRBM is of the opinion that there is insufficient evidence to support the particulars in the return, the taxpayer will be called upon to furnish all the relevant documents to prove such particulars and to substantiate any deduction or allowances claimed in his return. In the event that the taxpayer fails to prove to the belief of the IRBM that all the particulars in his return are correctly reported in accordance with the ITA and the relevant sub-legislations, and that the DGIR is of the opinion that the taxpayer has understated his income or the taxpayer is not entitled to claim certain deductions or allowances, the DGIR may assess the taxpayer to additional tax payable and issue a notice of additional assessment in the prescribed form to the taxpayer.[15] If the DGIR deems appropriate, a penalty will be imposed on the taxpayer for failing incorrect return under section 113(2) of the ITA.

[15] It is the notice of additional assessment or commonly known as Form JA.

2.3 The Special Commissioners of Income Tax ("SCIT")

The SCIT are appointed by the Yang di-Pertuan Agong pursuant to section 98(2) of the ITA. Section 98(3) of the ITA stipulates the qualifications of the SCIT; the SCIT must be persons with judicial or other legal experience i.e. the experience as an advocate, as a member of the judicial and legal service or as the holder of an office to which the Judges' Remuneration Act 1971 applies. The Yang di-Pertuan Agong may appoint more than three SCIT and to appoint one of them to be the Chairman of the SCIT if the Yang di-Pertuan Agong considers it expedient to do so.[16] Each of the SCIT holds his office for a period and the terms specified by the Minister of Finance of Malaysia and the SCIT are the public servant within the meaning of section 21 of the Penal Code.[17] The SCIT and some other officers form the Income Tax Appeal Management Division of the Treasury of Malaysia, the head of which is the Chairman of the SCIT.[18]

In particular, under section 102 of the ITA, the SCIT are empowered to dispose of appeals forwarded by the DGIR. Hence the SCIT are the trial judges of the first instance of all the tax appeals under the ITA in Malaysia. The main purpose of setting up the forum of appeal before the SCIT is to facilitate the disposal of tax appeals in the efficient manners where the SCIT being men of common-sense from the same social and cultural background as the average taxpayers, will be better able to judge the factual evidence which is placed

---

[16] Section 98(3) of the ITA.
[17] Section 98(4) of the ITA.
[18] The function of the Income Tax Appeal Management Division is to adjudicate on appeals by taxpayers who are aggrieved by assessments raised by the DGIR under the following statutes:-
(a) the ITA;
(b) the Real Property Gains Tax 1976; and
(c) the Petroleum (Income Tax) Act 1967.
See http://www.treasury.gov.my/index.php?option=com_content&view=article&id=498&Itemid=152&lang=en.

before them.[19] Especially where it is required that the SCIT must be persons having judicial or legal experience, their observation of judicial parameters together with similar social and cultural background as the average taxpayers, makes the tax judicial system work more harmoniously.

2.4 Assessment Processes under the ITA

Under the self assessment system, the assessment process starts from the filing of return by the taxpayers. A return is essentially an estimate of the tax payable by a taxpayer for a year of assessment. Under Part V of the ITA, different provisions relating to the filing of returns apply to different classes of taxpayers.[20] Further the DGIR is given power to give notice in writing to a taxpayer requiring him to furnish a fuller or further return if he thinks fit.[21]

On the day of the submission or filing of the returns by the taxpayers in accordance with the provisions in the ITA, it is deemed by law that the DGIR has made an assessment in respect of the taxpayer in the amount of tax on his chargeable income. As the DGIR is deemed to have made such assessment, the return filed by the taxpayer shall also be deemed to be a notice of assessment, and further it is deemed served on the taxpayer on the same day when the return is filed.[22] If a taxpayer has failed to submit his return in accordance with the provisions in the ITA, the DGIR is conferred with discretion to determine the amount of his chargeable income for that year of assessment and make an

---

[19] See http://www.treasury.gov.my/index.php?option=com_content&view=article&id=504&Itemid=152&lang=en.

[20] For example, section 77 provides for the return of income by a person other than a company, trust body or co-operative society while section 77A makes provision for the return of income by every company, trust body or co-operative society.

[21] Section 87 of the ITA.

[22] Section 90(1) and (2) of the ITA.

assessment accordingly based on the best of his judgment.[23] This discretion cannot be fettered. The DGIR must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the taxpayer's circumstances, and his own knowledge of previous returns by and assessments of the taxpayer, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work.[24] His decision made in pursuant to the exercise of his discretion must be subject to the review by the SCIT or the courts if it can be shown to have been arrived at without an honest exercise of judgment.

2.4.1 Additional Assessments and Limitation Period

In addition to the assessment made under section 90 of the ITA, section 91(1) of the ITA provides for the making of assessments or additional assessments by the DGIR. Where for any year of assessment it appears to him that no or no sufficient assessment has been made on a taxpayer chargeable to tax, the DGIR may in that years or within six years after its expiration make an assessment or additional assessment, as the case may be in respect of that taxpayer in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of his judgment, the assessment with respect to that taxpayer ought to have been made for that year.

---

[23] Section 90(3) of the ITA.
[24] Per Lord Russell of Kullowen in *Commissioner of Income-tax, Central and United Provinces v Laxminarain Badridas* [1937] 5 ITR 170 (PC).

This section again confers discretionary power to the DGIR to assess the taxpayer according to his best judgment. As stated above, this discretion must not be exercised arbitrarily. The issue was discussed by the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh.*[25] In this case, the taxpayer filed a notice of motion for an order of certiorari to quash the notices of additional assessment raised by the DGIR. The taxpayer contended "that the notices of assessment are based on conjecture and have been issued maliciously and as a vindictive act." Adopting *Commissioner of Income Tax, Central and United Provinces v Laxminarain Badridas,*[26] the Supreme Court had referred to paragraph 13 of Schedule 5 to the ITA and came to the conclusion the onus of proof was on the taxpayer and he had failed to discharge the burden of proof in proving that assessments were arbitrary or based on conjecture or surmise.

It should however be noted that the following obiter dicta in the Supreme Court's decision is wrong and should not be quoted as an established principle of law in light of the current development of constitutional and administrative law:-

"The onus is on the respondent to prove the allegations he made in his statement in support of the notice of motion. There is a presumption that the administration exercises its powers in good faith and for public benefit."

No assessment or additional assessment shall be made beyond the limitation of 6 years from the expiration of the relevant year of assessment save for cases of fraud, willful default or negligence on the part of the taxpayer.[27] To issue an assessment or additional assessment beyond 6-year limitation, the DGIR bears the burden of proof in proving that fraud or wilful default has been committed by or on behalf of the taxpayer or the taxpayer

[25] [1987] 2 MLJ 185.
[26] [1937] 5 ITR 170.
[27] Section 91(3) of the ITA.

has been negligence. The courts have upheld this position of law in various instances. In *Government of Malaysia v Gan Chuan Lian and Another Action*,[28] it was held that under sections 91(1) and (3), the DGIR may make an assessment for any year of assessment where there has been fraud, willful default or negligence on the taxpayer's part. In such a case, the Director General must adequately support his allegation of fraud, willful default or negligence. If the DGIR fails to discharge this burden, he cannot legally make an additional assessment after the lapse of time prescribed in the ITA.[29]

'Fraud', 'wilful default' and 'negligence' have been judicially considered in many English cases. In connection with 'fraud', Lord Denning in *Barclays Bank v Cole*[30] explained that:-

""Fraud" in ordinary speech means the using of false representations to obtain an unjust advantage: see the definition in the Shorter Oxford Dictionary. Likewise in law "fraud" is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false – Derry v Peek (1889) 14 App. Cas 337 per Lord Herschell."[31]

---

[28] [1992] 1 MLJ 449.

[29] The court observed that:-
"In this case the plaintiff relies on s 91(3) for the legality and validity of its assessments but s 91(3) only gives the Director General a right to impose tax for any year of assessment where it appears to him that (a) any form of fraud or willful default has been committed by or on behalf of any person; or (b) any person has been negligent. As this is a penal law it must be construed strictly and therefore the courts can only pronounce judgment on the claim if the claim is supported by allegations of fraud or willful default or negligence. It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessment but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or willful default or negligence on the part of the taxpayer before it can decide whether the assessment was barred by limitation."

[30] (1967) 2 QB 738.

[31] The above passage was followed by the High Court in *Paramount (M) (1963) Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan* (2002) MSTC 3,908. Similar observation was made by the High Court in *Magnum Finance Berhad v Tan Ah Poi & Anor* [1997] 4 CLJ Supp 44 where the court said as follows:-
"Fraud is simply, dishonesty and there is no magic in that word. According to Osborn's Concise Law Dictionary (7th Edn.,) "fraud is obtaining of a material advantage by unfair or wrongful means; it involves moral obliquity. It must be proved to sustain the common law action of deceit. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false..."

It is however highlighted fraud could not be adequately defined as whether fraud exists is a question of facts; judges should be aware of the danger of applying the precedents blindly to a particular set of facts.[32] The standard of proof where it involves allegation of fraud in civil proceedings is beyond reasonable doubt as confirmed in *Paramount (M) (1963) Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan.*[33] It was held that:-

"It was unanimously held by the Federal Court in Ang Hiok Seng v Yim Yut Kiu (1997) 1 CLJ 497 (as per Mohd. Azmi FCJ) that where the allegation of fraud in civil proceedings concerns criminal fraud, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities and an allegation cannot be based on suspicion or speculation merely."

In relation to 'wilful default', the High Court in the above case referred to *Frederick Lack Ltd v Doggett*[34] and said that:-

"Plowman, J. in Frederick Lack v Doggett *46 TC 524, while discussing fraud and wilful default, quoted at p. 531 what Wilberforce, J. said in Wellington v Reynolds (1962) 40 TC 209 as follows:*

> *... what is meant by wilful default? ... if one looks at Section 504(2) of the Income Tax Act, one finds that criminal proceedings in certain cases may lie in respect of 'any ... fraud or wilful default in connection with or in relation to income tax'. Therefore, says the Counsel for the Appellant, it is apparent that wilful default must be default of some gravely serious kind such as might, in appropriate cases, lead to criminal proceedings."*

---

[32] In *PJTV Densen (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, the court said that:-
"whether fraud exists is question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud."

[33] (2002) MSTC 3,908.

[34] 46 TC 524.

In relation to "negligence", the SCIT referred to textbooks and summarized in *EPM Inc v Ketua Pengarah Hasil Dalam Negeri*[35] that:-

"Malaysia Taxation – Third Edition-by Veerindeerjeet Singh says, at page 105 –

> *"A taxpayer is guilty of default if he fails to do what the Act required him to do, and so far as a person's responsibilities in relation to taxation are concerned, there would appear to be no essential difference between default and negligence.*

Whiteman on Income Tax – Third Edition states at page 1361 –

> *"Neglect" means negligence or a failure to give any notice, make any return, statement or declaration or to produce or furnish any list, document or other information required by the Income Tax Acts, but a person is not deemed to have failed to do anything required in a limited time if he does it within such extended time as the Commissioners or officer concerned may allow, and where a person has a reasonable excuse for not doing anything required he is deemed not to have failed to do if he does it without unreasonable delay. It should be noted that even though an incorrect return was not made fraudulently or negligently originally, a subsequent failure to remedy it without unreasonable delay may result in the return being treated as having been made negligently ab initio."."*

2.4.2 Meaning of Assessment

An assessment is defined in the ITA to mean any assessment or additional assessment made under the ITA.[36] In this regard, section 90 of the ITA provides for making of an

---

[35] (2001) MSTC 3,306.
[36] Section 2 of the ITA.

assessment while section 91 of the ITA provides for the making of an additional assessment by the DGIR. By literal reading of the provisions, it appears that an 'assessment' is the notice of assessment. The courts in cases have explained that an 'assessment' is not a paper but the act of computing the taxable income or the amount of taxes payable. In *A.B.C. v The Comptroller of Income Tax, Singapore*,[37] the court referred and applied the following passage made in *The King v The Deputy Federal Commissioner of Taxation for South Australia; Ex Parte Hooper*[38] where the High Court of Australia held that:-

"An 'assessment' is not a piece of paper: it is an official act or operation; it is the commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment' ... But neither the paper sent nor the notification it gives is the 'assessment.' That is and remains the act or operation of the commissioner."

The court went on and ruled that:-

"*The assessment itself is the administrative act of the Comptroller and determines the quantum of the tax and as was stated by Mr. Hill it involves a mathematical calculation and the exercise of judgment. See Gamini Bus Co. v. Commissioner of Income Tax (Colombo) (1952) AC 571.*"

[37] (1959) 25 MLJ 162.
[38] [1926] 37 CLR 368.

The Privy Council had also given a similar ruling in *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue*:-[39]

"In my opinion the expression 'make assessments' in the context of s 17, means the process by which the commissioner carries out his statutory obligation to ascertain the amount on which tax is payable and the amount of tax. I find nothing in the section, nor in the statutory scheme to justify a conclusion that the commissioner only makes an assessment where he determines that there is tax payable. A conclusion that there is no amount on which tax is payable and that as a consequence there is no tax payable involves making an assessment from the returns and other information in his possession just as much as if the result of the assessment were to find that there was an amount on which tax was payable and consequently there was tax payable."

The implication of the above principle has a great impact on the protection of taxpayers' rights as there could be circumstances where the DGIR does not issue a notice of assessment or a notice of additional assessment for previous year of assessment, but by revising the assessment for a subsequent year, the taxpayer is assessed to pay additional taxes for previous year of assessment. This is illustrated in *PSSSB v Ketua Pengarah Hasil Dalam Negeri*.[40] In its tax returns for the Years of Assessment 1997 to 2000 (Preceding Year Basis), the taxpayer had claimed capital allowances under Schedule 3 to the ITA. These capital allowances claims were initially allowed by the DGIR via notice of assessment for the Years of Assessment 1997 to 1999. These capital allowances were unabsorbed and being brought forward to and sought to be utilized by the taxpayer in the Year of Assessment 2000 (Current Year Basis). In 2006, the DGIR issued notice of additional assessment for the Year of Assessment 2000 (Current Year Basis), disallowing

[39] [1992] 2 NZLR 1.
[40] (2010) MSTC 574.

the utilization of such capital allowances in the same year. The taxpayer contended that the DGIR was time-barred from disallowing in 2006, the utilisation of capital allowances for the Year of Assessment 2000 (Current Year Basis) which have been brought forward from the Years of Assessments 1997 to 2000 (Preceding Year Basis) because the actions of the DGIR in disallowing the capital allowances claimed in the Years of Assessments 1997 to 2000 (Preceding Year Basis) to be brought forward to the Year of Assessment 2000 (Current Year Basis) must obviously require re-computing the assessment for the Years of Assessment 1997 to the Year of Assessment 2000 (Preceding Year Basis). The DGIR on the other hand contended that the notice of additional assessment was in relation to the Year of Assessment 2000 (Current Year Basis), clearly it was done within the 6-year limitation under section 91(1) of the ITA. The SCIT agreed with the taxpayer that the DGIR's act of re-computing the assessment for the Years of Assessments 1997 to 2000 (Preceding Year Basis) in relation to the capital allowances, was in clear contravention of the 6 year time-bar contained in section 91(1) of the ITA. In reliance on *A.B.C. v The Comptroller of Income Tax, Singapore*,[41] *The King v The Deputy Federal Commissioner of Taxation for South Australia; Ex Parte Hooper*[42] and *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue*,[43] the SCIT held that such re-computation amounts to an "assessment".

Accordingly the SCIT concluded that the DGIR was prohibited by virtue of section 91(1) of the ITA to revise the assessment of the Year of Assessment 2000 (Current Year Basis) on account of the capital allowances carried forward from the Years of Assessment 1997 to 2000 (Preceding Year Basis), and the notice of additional assessment for the Year of

[41] (1959) 25 MLJ 162.
[42] [1926] 37 CLR 368.
[43] [1992] 2 NZLR 1.

Assessment 2000 (Current Year Basis) issued in 2006 in relation to the capital allowances disallowed was invalid and in contravention of section 91(1) of the ITA.[44]

It is highlighted that the above cases are not inconsistent with Section 93 of the ITA.[45] In essence, section 93 stipulates the necessary form of an assessment, not the act of assessment by the DGIR. It was relied upon by the High Court and the Court of Appeal in *Enesty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[46] in holding that there was no assessment made by the DGIR as there is formality, ritual and deliberateness in making an assessment, i.e. the prescribed form must be used and the it must contain certain particulars as stated in section 93. In this case, the DGIR disallowed the annual allowances claimed by the taxpayers for the qualifying plant expenditure incurred from January 1981 to December 1985. Section 99(1) of the ITA stipulates that such an appeal could only lie against an assessment. However the DGIR refused to issue notices of assessment as the taxpayers had no chargeable income in respect of the said years. Dissatisfied, the taxpayers applied for an order of mandamus to direct the DGIR to issue and serve on them notices of assessment for the said years. The application was rejected by the Court of Appeal on ground that:-

"According to s. 93 there is formality, ritual and deliberateness in making an assessment... Any other determination as to chargeable income or tax liability made in some other

---

[44] The High Court agreed with the decision of the SCIT relating to the limitation issue in *Rayuan Sivil No. R1-14-09* and the DGIR has filed appeal against the decision of the High Court.

[45] Section 93 of the ITA provides that:-

"An assessment, other than an assessment under subsections 90(1) and 91A(1), in respect of a person shall -

(a) be made in the appropriate prescribed form;

(b) indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and

(c) specify in the appropriate space in that form the date on which that form was duly completed,

and, where that form appears to have been duly completed the assessment shall, until the contrary is proved, be presumed to have been made on the date so specified."

[46] [2003] 3 CLJ 10.

medium, or for some purpose other than for completion of the assessment form, or made before that date, is not, or is not yet, the making of an assessment. Even if the form is completed, no assessment will have been made until the date is specified. Any work, inquiry or calculation done before that would be not the making of the assessment but an effort made towards the making of the assessment, which is the completion of the form coupled with the dating of it, and the assessment that is made comprises the matters indicated in the form as stated in para. (b) of the section.

The Court of Appeal then concluded that:-

"In view of section 93 and of the fact that no question arose before us that assessment forms had been completed for the three years of assessment in question, we agreed with the learned judge that no assessments had been made in respect of those years and therefore the respondent was under no duty under s. 96(1) to have notices of assessment served on the appellants."

It is submitted that *Enesty* case was considered and decided in different context. It involved an issue of notice of assessment being prerequisite for filing an appeal before the SCIT as required by section 99 of the ITA. Perhaps the Court of Appeal was influenced by its construction of section 90(1) of the ITA that no notice of assessment is not required if there is no chargeable income and in such cases, it would be wrong to compel the DGIR to issue notice of assessment.

2.5 Power to impose penalty

Section 113(2) of the ITA allows the DGIR to impose penalty in cases where a taxpayer makes an incorrect return by omitting or understating his income,[47] or he gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person.[48] A penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information could be imposed. As penalty could involve a substantial amount of money, issue often arises as to whether the penalty should be imposed on the taxpayers under section 113(2). Further if the imposition of penalty is justified in the circumstances of a particular case, the next question is whether the quantum of the penalty imposed is right after taking into consideration the relevant facts of the case.

The ITA is silent as to whether a taxpayer may appeal for the penalty imposed on him without disputing the correctness of the assessment made by the DGIR. Section 99(1) of the ITA only allows a person aggrieved by an assessment made by the DGIR to appeal to the SCIT against the assessment. May the "assessment" in section 99(1) be extended to cover the imposition of penalty stated in a notice of assessment? This was answered by the Supreme Court's in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co.*[49]

"we are more readily inclined to the view that a penalty imposed under section 113(2), notwithstanding e.g. the preceding para, is appealable to the Special Commissioners as an assessment referred to in s.99 of the Act for reasons stated above, especially that there can be no unfettered discretion unless it is expressly enacted in the Act that such penalty under s.113(2) of the Act is not appealable to the Special Commissioners of the Income Tax."

---

[47] Section 113(2)(a) of the ITA.
[48] Section 113(2)(b) of the ITA.
[49] [1992] 2 MLJ 708.

The courts have construed section 113 to mean that the DGIR has a discretion to impose penalty under section 113.[50] While it is the discretionary power of the DGIR under section 113 to impose penalty on the taxpayers, the discretion is not unfettered. The DGIR must exercise its discretionary power in accordance with the law.[51]

The abuse of discretion or non-exercise of discretion by the DGIR under section 113(2) can be seen in *BN v Ketua Pengarah Hasil Dalam Negeri.*[52] In this case, the DGIR had ignored and failed to apply its mind to the significance of the relevant facts and circumstances of the case but had instead strictly followed the public rulings or guidelines issued by the IRBM relating to the imposition of penalties. The SCIT held that the penalty imposed was invalid because the DGIR had failed to exercise its discretion in imposing the penalty.[53]

---

[50] In *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708, the Supreme Court in agreeing with the lower court, said that:-
"The learned judge found from s 113(2), a discretion vested in the Revenue, as to whether or not to impose a penalty thereunder. His Lordship said:'... He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances ...'."

[51] The Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708 said that:-
"... it would be of salutary effect to remind ourselves of the inspiring words of Raja Azlan Shah Ag CJ (as he then was) in Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd in which, while dealing with a claim for unfettered discretion, his Lordship said:

> *I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of Pyx Granite (ante) and its progency compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realized that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days, when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasize what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place'."*

[52] (2009) MSTC 3828.

[53] The SCIT said that:-

While the above early cases show the judicial activism in protecting the taxpayers' right of appeal against the penalty imposed under the ITA, some recent judicial decisions have done the otherwise. While the SCIT in *NVA Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[54] held that as long as the taxpayer's claim was made in good faith, the imposition of the penalty was wrong,[55] the High Court has overturned this ruling[56] and said that good faith is not a defence under section 113(2) of the ITA.

"Since RW 1 (the assessor) admitted that he just follow the guideline of the Director General of Inland Revenue on penalty, it means RW 1 did not apply his mind to the facts and circumstances of the case before imposing the 60% penalty. Therefore we are of the opinion that the Respondent failed to use their discretion properly when they imposed the penalty concern."

[54] (2009) MSTC 3897.

[55] The SCIT ruled that:-

"Regarding the penalty under section 113(2) of the Act imposed on the Appellant in this case, we are of the opinion that the imposition of that penalty is wrong in law as even assuming that the expenses claimed are not allowable. Based on the facts of this case the claimed was made based on the Appellant's interpretation in good faith. Therefore the penalty shall not be imposed."

[56] *Ketua Pengarah Hasil Dalam Negeri v NV Alliance Sdn Bhd*, High Court Civil Suit No. R1-14-04-2009.

Chapter 3. Appeal Procedures, Remedies and Judicial Review

3.1 Appeal Procedures to the SCIT

Section 99 of the ITA sets out the appeal procedures against any assessment or additional assessment made by the DGIR.[57] Firstly, the taxpayer must give a written notice of appeal to the DGIR within 30 days after the service of the notice of assessment or additional assessment.[58] The written notice of appeal must be made in the prescribed form[59] and it must disclose the grounds of appeal.[60] Upon receipt of the notice of appeal, the DGIR will review the assessment in dispute within 12 months.[61] During the 12-month period, the DGIR may require the taxpayer to furnish any information or documents as the DGIR might think relevant or summon any person to give evidence relating to the assessment and examine his testimony.[62] This process could end up in 2 scenarios: (1) the DGIR and the taxpayer come to an agreement in writing as to the amount of tax or the additional tax which the taxpayer is obliged to pay;[63] (2) if there is no agreement reached by the parties, the DGIR shall forward the notice of appeal to the SCIT for their determination of issues.[64] In the former situation, the tax liability of the taxpayer is deemed to be finalised and no appeal to the SCIT is allowed. On the other hand, when a notice of appeal has been

---

[57] Section 99(1) of the ITA says that, "*A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.*"

[58] See section 99(1) of the ITA.

[59] It is known as Form Q.

[60] Section 99(1) of the ITA.

[61] Section 101(1) of the ITA. Should the DGIR require more time to review the assessment, an application for extension of time can be made to the Minister of Finance 30 days before the expiry of the 12 month period pursuant to section 101(1A). The grant of extension is at the discretion of the Minister of Finance under section 101(1B).

[62] Section 101(1) of the ITA.

[63] Section 101(2) of the ITA.

[64] Section 102(1) of the ITA.

forwarded to the SCIT, Schedule 5 to the ITA is applicable to regulate the hearing and determination of the appeal.[65] Pending the hearing before the SCIT, there is still room for negotiations between the parties and the taxpayer may withdraw his appeal.[66] Where the DGIR and the taxpayer come to a settlement/agreement relating to the assessment in question or the taxpayer withdraws his appeal, the proceedings before the SCIT relating to the appeal shall abate.[67]

3.2 Hearing before the SCIT

The appeal proceedings before the SCIT are set out in Schedule 5 to the ITA. Every appeal shall be heard by three SCIT,[68] the Chairman of the SCIT shall preside at the hearing of the appeals if he is present at the hearing,[69] in his absence, the SCIT present at the hearing shall choose one of them to preside at the hearing.[70] Further the parties are required to attend at the time and place fixed for the hearing either personally or by an authorized representative.[71] The SCIT have power to consolidate the appeals under paragraph 10 of Schedule 5 provided that the parties to the appeals have been given an opportunity to be heard.[72] Pursuant to paragraph 19 of Schedule 5 to the ITA, the SCIT are empowered to:-

---

[65] Section 102(4) of the ITA.
[66] Section 102(5) of the ITA.
[67] Section 102(7) and (8) of the ITA.
[68] Paragraph 1(1) of the Schedule 5 to the ITA.
[69] Paragraph 1(2) of the Schedule 5 to the ITA.
[70] Paragraph 1(3) of the Schedule 5 to the ITA.
[71] Paragraph 14 of the Schedule 5 to the ITA where it is provided that:-
"For the purposes of an appeal -
(a) the Director General may be represented by an authorized officer, a legal officer or an advocate;
(b) the appellant may be represented by an advocate or a tax agent or by both an advocate and a tax agent; and
(c) if the appellant is the principal within the meaning of section 67, he may be represented by the representative within the meaning of that section."
[72] Paragraphs 10 and 11 of Schedule 5 to the ITA which provide that:-
"10. One of the Special Commissioners may order -
(a) two or more appeals by the same person; or

(a) summon witnesses and examine them on oath or otherwise;

(b) require witness to produce any books, paper or documents which are in his custody or under his control and which the SCIT consider necessary for the purpose of the appeal;

(c) exercise all the powers of a subordinate court with regard to the enforcement of attendance of witnesses, hearing of evidence an oath and punishment for contempt;

(d) admit or reject any evidence adduced;[73] and

(e) postpone or adjourn the hearing an appeal.

The SCIT have wide powers to regulate the court proceedings before them pursuant to paragraph 22 of Schedule 5.[74] In regulating the procedures, the SCIT must ensure that justice and fairness to all parties is not affected.[75] The Privy Council in *Arumugam Pillai v*

(b) two or more appeals by different persons, if they agree, to be heard together.
11. One of the Special Commissioners may make an order under paragraph 10 (a) either of his own motion or on the application of a party to one of the appeals in question, but no such order shall be made until the parties to those appeals have been given an opportunity to be heard."

[73] In *Director General of Inland Revenue v Ee Sim Sai* [1977] 2 MLJ 32, the SCIT rejected the documentary evidence Form 14A which was adduced by the DGIR as to the value of the land of RM126,472. Instead they accepted the oral testimony of the taxpayers' witnesses and the documentary evidence tendered by the taxpayer. The DGIR appealed to the High Court and objected to the admissibility of any evidence which is to contradict Form 14A on ground that it would cause mischief to the IRBM as it would be difficult for the tax officers to complete the capital worth of a taxpayer. This contention was rejected by the High Court where the court held that:-
"In my view not only greater mischief but also injustice would be cause if the consideration stated in Form 14A is irrebuttable and the amount of the taxpayer's capital worth is thereby deemed to be that amount when, for instance, he has raised part if not all of the amount by a loan from a bank.
As to the facts I am satisfied that there is overwhelming evidence adduced by respondent to justify the Special Commissioners in coming to their decision that the sum of $43,500 was in fact respondent's purchase price of his 2/3 share in the 14 lots."

[74] Paragraph 22 of Schedule 5 to the ITA states that:-
"Subject to this Act and any rules made under section 154(1)(d), the Special Commissioners may regulate the procedure at the hearing of an appeal and their own procedure."

[75] In *Regina v Special Commissioners (ex parte Martin)*,[75] the court ruled that:-

"It is very important that the procedure before the Commissioners should be flexible to deal with widely various types of cases which come before them."

Director General of Inland Revenue[76] observed that, under paragraph 22 of Schedule 5 to the ITA, the SCIT may regulate their own procedure at an appeal provided always that the taxpayers must be given a full and adequate hearing or reasonable opportunity to be heard:-

"... it is apparent that the Special Commissioners may largely regulate the procedure at the hearing before them, subject always to the important consideration that the Appellant must be given a full and adequate hearing or reasonable opportunity to be heard. The Special Commissioners were aware of their rights to regulate procedure and also of the great advantage in not being hide-bound to a rigid code of procedure."

He who alleges must prove, in a tax appeal the onus of proof is primarily on the appellant, i.e. the taxpayer to prove that the assessment in dispute is excessive or erroneous.[77] The SCIT are the judges of facts. The fundamental duty of the SCIT is to review all relevant and available evidence at the hearing and to apply their common sense to such materials. In *Inland Revenue Commissioners v L.B. (Holdings) Ltd (In Liquidation)*,[78] Lord Thankerton observed that:-

"The question for the Special Commissioners... is one of fact, and is peculiarly one for the application of their business knowledge and common sense."

After completing the hearing of an appeal, the SCIT will give their decision in a Deciding Order. The SCIT may:-

(a) confirm the assessment of the DGIR and dismiss the appeal of the taxpayer;

---

[76] [1981] 1 MLJ 171.
[77] Paragraph 13 of the Schedule 5 to the ITA provides that:-
"The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the appellant."
[78] (1946) 28 TC 34.

(b) discharge the assessment of the DGIR and allow the appeal of the taxpayer;

(c) direct the assessment be amended by the DGIR to reflect the decision of the SCIT.[79]

In particular relating to amendment of assessment, in *UHG v Director General of Inland Revenue,*[80] the taxpayer contended that the SCIT had no power to direct the DGIR to amend the notices of additional assessment which would have effect of increasing the assessment. It was held by the Federal Court that the SCIT have such power pursuant to paragraph 26 of Schedule 5 and section 96(2) of the ITA[81] to increase the assessment if the circumstances justify so where the court stated that:-

"Reference was made to the powers of the Special Commissioners to direct the respondent to amend a notice of assessment which would have the effect of increasing the assessment beyond that specified in the notice. On this point it was suggested to us that this was nothing more than a matter of academic interest because the Special Commissioners are equipped with power to do so under para 26 of the Fifth Schedule to the Income Tax Act, 1967 read with section 96(2) of the Act. Nothing of practical interest turns on this ground of appeal."

3.3 Further Appeal to the High Court and the Court of Appeal

---

[79] Where amendment is ordered, paragraph 26 of Schedule 5 to the ITA provides that a deciding order must:-

(a) specify the appropriate amendments;
(b) require the appropriate amendments to be determined by agreement between the parties or, failing agreement, by the Special Commissioners; or
(c) specify some of the appropriate amendments and require the other to be so determined.

[80] [1974] 2 MLJ 33.

[81] Section 96(2) of the ITA provides that:-
"where the tax charged under an assessment is increased on appeal to the Special Commissioners or a court, then, as soon as may be after the appeal has been decided there shall be served on the person in respect of whom the assessment was made a notice of increased assessment."

3.3.1 Case Stated

Either the taxpayer or the DGIR who is dissatisfied by the decision of the SCIT may appeal to the High Court on a question of law. In this connection, the taxpayer or the DGIR may request the SCIT to state a case for the opinion of the High Court whether the SCIT's decision is correct in law based on the findings of facts by the SCIT. The case stated shall include:-

(a) the statement of facts admitted or proved;

(b) the contentions on behalf of the Appellant;

(c) the contentions on behalf of the Respondent;

(d) the question of law submitted; and

(e) the grounds of decision.

A Case Stated is not a judgment of a court and it does not set out the recorded evidence at the hearing before the SCIT.[82] In practice, the draft Case Stated will be sent to the taxpayer and the DGIR for any amendments or suggestions. The SCIT will then consider the comments or suggestion of the parties if they are to be included in the Case Stated. The importance of a properly prepared Case Stated was highlighted by the Federal Court

[82] This has been explained clearly in *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33, where Raja Azlan Shah FJ (as he then was) held that:-
"It is well established that where the appeal is by way of a Case Stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The court of appeal is not concerned with the evidence given in the Case Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach."

in *E v Comptroller general of Inland Revenue* where the court approved a passage in a textbook, *Simon's Income Tax*:-[83]

"After a stated case has been drafted it is normally sent first to the successful party for him to suggest such alterations, additions or amendments as he may think fit. At this stage the taxpayer will do well to consult his solicitor, if he has not already done so. The stated case is the document on which the Court will found its opinion, and it ought to be professionally settled... Care should be taken that all the facts upon which the party revising the case intends to rely are clearly stated as proved at the appeal, and that the result of any effective cross-examination is faithfully reproduced. It is worth while framing one's contentions carefully. They ought not, of course, to go outside what was said at the appeal, but within these limits a party is usually given a free hand in settling the wording of his own contentions."

Once the Case Stated is finalised and signed by the SCIT, the parties are bound by the Case Stated and no objection as to its insufficiency will be allowed.[84]

3.3.2 Role of the Appellate Courts

The High Court's role in relation to an appeal from the SCIT's decision is limited to the determination of question of law based on the findings of facts by the SCIT. The High Court may not disturb the findings of facts by the SCIT save for in some circumstances. In

---

[83] [1970] 2 MLJ 117.

[84] *NTS Arumugam Pillai v Director General of Inland Revenue* [1977] 2 MLJ 63. The court said that:-
"The Special Commissioners are now required, before finalizing the statement of the case, to seek the views of both Revenue and the taxpayer. If they have done so, and the parties have agreed, if necessary, after amendments, to the final form of the Case Stated, then neither party can afterwards take objection either to the form or to any alleged insufficiency of the statement".

the landmark case of *Edward v Bairstow,*[85] the House of Lords had established the fundamental principles that a finding of fact by the SCIT may be reversed by the High Court if there is no evidence to support such finding or the only reasonable construction of the evidence does not support the finding made by the SCIT. Lord Radcliffe categorically said that:-

"When the Case comes before the Court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex-facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex-facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this had been responsible for the determination. So there, too there had been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or is one in which evidence is inconsistent with the contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination."

Edward v Bairstow[86] was accepted by Malaysian courts in numerous instances. For example it was approved by the Supreme Court in *Lower Perak Housing Cooperative Society v Ketua Pengarah Hasil Dalam Negeri*[87] and by the Privy Council in *Chua Lip*

---

[85] 36 TC 207.
[86] 36 TC 207.
[87] [1994] 2 MLJ 713. It was followed by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Pan Century Edible Oils Sdn Bhd* (2002) MSTC 3,967 where the Court of Appeal observed that:- *"An appeal from the decision of the Commissioners is only on a question of law by way of case stated. The court will interfere only if the case contains anything ex facie which is bad in law and which bears upon the determination, or if facts found are such that no person judicially and properly instructed as to the relevant law could have come to the determination under appeal – see Edwards v Bairstow (1956) Ac 14, Director General of Inland Revenue & Central Sugars Bhd (1978) 2 MLJ*

Kong v Director-General of Inland Revenue.[88] Thus although the SCIT are the judges of fact, they must not misdirect themselves and they must draw conclusions from facts having probative value.[89] The court in *Mamor Sdn Bhd v DGIR*[90] gave examples of grounds for the High Court to review the decision of the SCIT:-

"With respect I am of the opinion that it is open for the High Court to review the decision of the Special Commissioners, if the Special Commissioners:

(i) misdirect themselves on the law; or

(ii) answer the wrong question; or

(iii) omit to answer a question which they ought to have answered; or

(iv) took into account factors which they ought not to have; or

(v) reached a conclusion on the facts which is not supported by the evidence before them; or

(vi) made a finding of facts which no reasonable person in the circumstances would have arrived at".

At this stage, the rules of court i.e. the Rules of High Court 1980 ("RHC") apply. After hearing the appeal and determining the questions of law, the High Court may affirm or overturn the decision of the SCIT. The party who is aggrieved by such decision of the High

---

71; Lower Perak Co-Operative Housing Society v Ketua Pengarah Hasil Dalam Negeri (1994) 3 MLJ 713 SC."

[88] [1982] 1 MLJ 235 where the Privy Council unanimously held that:-
"... in which case it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable Special Commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in Edwards v Bairstow [1956] AC 14, 36. It is a conclusion or decision of the Special Commissioners which the High Court was entitled to and ought to have set aside."

[89] Lord Oliver in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] 2 MLJ 161 stated that:-
"The special commissioners ... in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions."

[90] [1981] 1 MLJ 117 and the decision was affirmed by the Privy Council in [1986] 1 MLJ 1.

Court may appeal to the Court of Appeal. The appeal before the Court of Appeal is the final appeal and there is no further appeal to the Federal Court in accordance with section 96(a) of the Court of Judicature Act 1964 as the case was initially heard at the SCIT level.

3.4 Judicial Review

3.4.1 General Principles and Procedures

Judicial review is the procedure which allows the courts to review the decisions or conducts of the following:-

(a) the lower courts and tribunals; and

(b) other bodies or persons carrying quasi-judicial functions or charged with the performance of public acts and duties.[91]

It is not the default appeal procedure provided under the ITA.[92] The procedure for an application for judicial review is laid down in Order 53 of the RHC. It involves a single procedure for an application seeking any directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Federal Constitution, or any of them, or for any purpose.[93]

[91] Halsbury's Laws of Malaysia, Volume 9, Administrative Law, Malayan Law Journal, 2001.
[92] The appeal procedure under the ITA i.e. the appeal to the SCIT pursuant to section 99 of the ITA and further appeal to the civil courts, is governed by Schedule 5 to the ITA.
[93] Order 53 rule 1(1) of the RHC.

First and foremost, an application for judicial review requires leave of court under Order 53 rule 3(1) of the RHC. An application for leave must be made ex parte to a High Court Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.[94] In accordance with Order 53 rule 3(6), an application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the High Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days. During a leave application hearing, the applicant must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application, and that the applicant has an arguable case or a prima facie case.[95] Lord Diplock explained this in the following words:-[96]

"If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be arguable case in favour of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion which the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

---

[94] Order 53 rule 3(2) of the RHC.
[95] *Association of Bank Officers v Malayan Commercial Banks* [1990] 3 MLJ 228.
[96] *Inland Revenue Commissioners v National Federation of Self Employed & Small Business Ltd* [1982] AC 617 at p 644.

The leave stage in Order 53 of the RHC is important to filter out frivolous and vexatious applications. In this connection, this policy consideration is concisely explained in the following passage in *MAS Golden Boutique Sdn Bhd v Md Zain Abu*:-[97]

"The leave stage in Order 53 proceedings serves a number of purposes. First, it may safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for them to become a party to litigation. The requirement may also prevent administrative action being paralysed by a pending, but possibly spurious, legal challenge. Secondly, for the High Court, the leave procedure provides a mechanism for the efficient management of the growing judicial review caseload. A large proportion of applications can be disposed of at the leave stage with the minimum use of the court's limited resources. Thirdly, for the applicant the leave stage, for from being an impediment to access to justice, may actually be advantageous since it enables the litigant expeditiously and cheaply to obtain the views of a High Court judge on the merits of his application."

During the leave stage, pursuant to Order 53 rule 2(4), to reduce the possibility of by-standers filing frivolous or vexatious filing application for judicial review against the public authority, only a person who is "adversely affected" by the decision of any public authority shall be entitled to make the application under Order 53 of the RHC. In Malaysia, this rule of locus standi in an application for judicial review was laid down in *Government of Malaysia v Lim Kit Siang.*[98] It was held that the rule stated by Buckley J. in *Boyce v Paddington Borough Council*[99] as accepted by the House of Lords in *Gouriet v Union of Post Office Workers and Others* applies.[100]

---

[97] [1999] 3 CLJ 610.
[98] [1988] 2 MLJ 12.
[99] [1903] 1 Ch 109.
[100] [1977] 3 All ER 70; [1978] AC 435.

"A clear statement of it was stated by Buckley J. in Boyce v Paddington Borough Council [1903] 1 Ch 109 as follows:

> *"A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g. where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."*

... Thus, in my view, there shall be a stringent requirement that the applicant, to acquire locus standi, has to establish infringement of a private right or the suffering of special damage: see Gouriet v Union of Post Office Workers [1977] 3 All ER 70; [1978] AC 435, and also Boyce's case [1903] 1 Ch 109 and this I consider to be the relevant test to apply when determining the question of standing."

Subsequently in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*,[101] in delivering judgment of the Court of Appeal, Gopal Sri Ram JCA affirmed that there is only one test for locus standi requirement under Order 53 of the RHC:-

"There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned (see Finlay v Canada [1986] 33 DLR 421). This includes cases where

[101] [2006] 3 MLJ 164.

the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, ex debito justitiae, grant the applicant threshold standing. See, for example Thorson v Attorney General of Canada [1975] 1 SCR 138. At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation."

The Court of Appeal further concluded that:-

"In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person 'adversely affected'."

In typical revenue cases, a taxpayer who is aggrieved by an assessment or a decision made by the DGIR in relation to the amount of tax payable by him, will generally be considered as a person 'adversely affected' within the purview of Order 53 of the RHC. Hence issue of locus standi is not common in revenue cases and hence there is not discussion about who may have the locus standi in the revenue cases involving application for judicial review. In *ACC v Comptroller of Income Tax,*[102] the Singapore revenue authority disputed that the taxpayer had locus standi in an application for judicial review. The taxpayer and its subsidiaries are in the business of leasing certain machinery. Most of the

[102] (2009) MSTC 7865.

subsidiaries are special purpose companies incorporated in the Caymans Islands. Each special purpose company entered into separate loan agreements with one or more offshore banks to finance the purchase of its machine. In order to hedge its exposure to floating rate interest charged by the offshore banks on the loans, the taxpayer and the special purpose companies came to an arrangement whereby the taxpayer entered into interest rate swap agreements with Singapore banks or Singapore branches of foreign banks on behalf of the special purpose companies. Then the taxpayer entered into interest rate swap agreements with each relevant special purpose company mirroring those which the taxpayer entered into on such special purpose company's behalf. The Singapore Comptroller of Income Tax took the position that the payments made by the taxpayer to the special purpose companies is subject to withholding tax. The taxpayer applied to Singapore High Court for leave to quash such decision. The Singapore Comptroller of Income Tax defended the application and contended that it was a decision made in relation to the tax payable by the special purpose companies and thus only the party against whom tax is sought to be imposed, i.e. the special purpose companies had the locus standi, not the taxpayer. This contention was rejected by the court and the application was allowed. The Singapore High Court rightfully pointed out that:-

"The position advanced by counsel for the Comptroller erroneously assumes that only the party against whom tax is sought to be imposed (i.e. the SPC) has a sufficient interest in judicial review of tax assessment decisions. In R v Paddington Valuation Officer, ex parte Preachy Property Corporation [1996] 1 QB 380, fore example, it was held that a ratepayer, challenging the validity of valuation lists in which his name had been included, would be regarded as having standing to so do, even though the ratepayer had suffered no damage. A fortiori, in the present case where the Applicant is directed by the Comptroller to withhold tax on pain of such amount being recoverable against him as a debt if he should fail to do so, the Applicant surely can have locus standi.

What is all the more egregious is the position taken on behalf of the Comptroller that not only does the Appellant allegedly lack locus standi but the SPC too would not be able to object because no notice of assessment had been served on the SPC. In other words, the contention is that in this instance, executive power may be exercised without the possibility of review by any judicial body. The Applicant would not have locus standi because it allegedly lacks sufficient interest in the transaction and the SPC, against whom no assessment of tax has been made, would not be able to bring the matter before the Income Tax Board of Review. Such a contention, in my view, is untenable. In any case, I hold that the Applicant does have locus standi."

Are all actions or conduct of the DGIR subject to judicial review of the court? Clearly from the cases above, an assessment or a decision to direct the taxpayer to withhold taxes are held to be "decisions" contemplated by Order 53 of the RHC. Complication arises when the DGIR takes certain stances relating to the tax liability of a taxpayer but no action has been taken, e.g. no assessment has been made, could the taxpayer apply for judicial review against an assessment which is threatened to be issued by the DGIR. In *Raja Segaran v Bar Council,*[103] the High Court said as follows:-

"This fact is clearly shown in the case of Tengku Jaffar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156 where the court held that to possess locus standi, the applicant should be seeking to protect or vindicate an interest of his own. So long as the plaintiff has shown that he has the locus to make the application and so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act

[103] [2004] 1 MLJ 34, 59.

complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants."

From the above passage, it appears that a taxpayer may apply for judicial review after the DGIR has informed that an additional assessment could be issued against the taxpayer and before an assessment is actually issued by the DGIR. Nonetheless, the contrary was upheld in *M & W Zander (M) Sdn Bhd v Director General of Inland Revenue.*[104] The taxpayer had a construction contract to design, manage and construct a Wafer Fabrication Facility at Sama Jaya, Kuching, Sarawak ("the project"). For the financial years 1999, 2000, 2001 and 2002, the taxpayer submitted the requisite returns to the IRBM which were based on the taxpayer's audited accounts. The taxpayer contended that the audited accounts were prepared in accordance with relevant accounting standards relating to the treatment of revenue and costs for construction contracts which span different accounting periods. In 2004, the officers of the IRBM visited the taxpayer's offices in Kuching and seized various files and accounts books relating to the project. Since then various meetings have taken place between the taxpayer, its tax representatives and officers of the IRBM. As a result of these meetings it has become apparent that the taxpayer and the IRBM compute the amount of tax payable by the taxpayer on differing principles and the officers of the IRBM allegedly requested the taxpayer to submit a recomputation of tax payable based on the principles outlined by the IRBM. The taxpayer has refused to do so. Instead, the taxpayer re-submitted its tax re-computations based on those principles which it has outlined above, and which the taxpayer maintained the DGIR should adhere to. According to the taxpayer, there was '0' chargeable income for each of the relevant years of assessment while the IRBM's re-computations initially showed a total of RM66 million as outstanding tax for the same years of assessment. Subsequently, at a meeting between officers of the IRBM, the taxpayer and its tax representatives, the IRBM refused to change

[104] [2005] 6 CLJ 336.

its position on the disputed principles on which the taxpayer's tax was being computed and, according to the taxpayer, indicated that notices of assessment would be issued to the taxpayer. The taxpayer contended that there was a grave danger that the DGIR will immediately proceed to issue an assessment based on erroneous principles. Therefore the taxpayer filed an application for judicial review seeking declaratory orders that inter-alia, under the contract no income has accrued to it which is chargeable to tax, or that the DGIR has acted on wrong principles in ascertaining the income of the taxpayer in relation to the project. Further the taxpayer sought an order of prohibition to prohibit the DGIR from acting in contravention or in violation of any of the principles upon which its declarations are sought, in making an assessment of any tax payable by the taxpayer in connection with the project. In essence, the taxpayer sought to stop the DGIR from issuing the notice of additional assessment relating to its income from the project for the relevant years of assessment.

It was undisputed fact that the DGIR has not yet made any assessment of income tax against the taxpayer. The taxpayer relied on *Datuk Syed Kechik v. Government of Malaysia*[105] and argued that the court's jurisdiction to grant declaration and other reliefs may be exercised even in cases 'where no traditional wrong has been committed or immediately threatened' but would do so where 'a condition of affairs discloses the existence of a cloud upon the plaintiff's rights, a cloud that endangers his peace of mind, his freedom and his pecuniary interest'. In reply, the DGIR contended that to invoke the

[105] [1979] 2 MLJ 101. In *Datuk Syed Kechik v. Government of Malaysia,* the plaintiff issued an originating summons seeking to have it declared that he was a person belonging to the State of Sabah and that his right to permanently reside in Sabah could not be cancelled. Prior to the action the plaintiff had already been issued an Entry Permit entitling him to reside permanently in Sabah as well as with a Sijil Anak Negeri of Sabah by a Native Court which status accorded him certain privileges as a Native of Sabah. There was a move by the Government of Sabah to deny him his status as a permanent resident and an Anak Negeri of Sabah, so the plaintiff went to court to have his rights declared. Having been issued with an Entry Permit and a Sijil Anak Negeri the locus standi of the plaintiff to apply for the declarations he sought was not in question, and neither was his application regarded as being prematurely made as he was seeking declarations to protect a status and rights which he had already acquired, and over which 'a cloud' had appeared.

judicial review powers of the court under Order 53 of the RHC, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.[106] Accordingly, since the DGIR has not issued any assessment against the taxpayer, there has not being decision of the DGIR which has adversely affected the taxpayer and therefore has no locus standi to make the application. Further, it was the DGIR's submission that when an assessment is eventually issued and the taxpayer disagrees with it, the taxpayer may appeal to the SCIT under section 99 of the ITA, it would be premature for the court to intervene at this stage and pre-empt the SCIT from performing their statutory function of adjudicating any dispute that may arise between a taxpayer and the DGIR.

The High Court disagreed with the submission of the taxpayer's counsel that that the factual situation of the case can be described as a decision and distinguished the facts of the case from the authorities sought to be relied by the taxpayer. Instead the court gave the ordinary meaning to the word 'decision'.[107] Accordingly, the High Court concluded that in the absence of a decision by the DGIR, the taxpayer did not have a sufficient interest or locus standi to make the application for judicial review and it was premature in the circumstances. The leave application was dismissed. This unclear position of law may

---

[106] See *Council of Civil Service Union & Ors v. Minister for Civil Service* [1984] 3 All ER 935 at p. 936 para 'a to d' and p. 949 para 'e'.

[107] The court said that:-

"The court would clearly be in danger of doing just that here if it accedes to Mr. Lau's contention that a mere indication by officers of the Inland Revenue Board as to how they compute the applicant's chargeable income constitutes a decision in the sense of an assessment made by the Director General of the tax payable by the applicant. On her part, the learned Senior Federal Counsel has given the word 'decision' its plain ordinary meaning. As there is no ambiguity in that word, I cannot fault her for doing so as it is a rule of interpretation that a court must give effect to the plain ordinary meaning of words unless this produces an absurd result that cannot reasonably be supposed to have been intended by the Rules Committee, in which event a secondary or extended meaning which they are capable of bearing may be attributed to them. Here, it is not difficult to see that by giving the word 'decision' its plain and ordinary meaning, no absurdity results whereas if an extended meaning is given to it such absurdity will result. Further, for the same reasons, neither can it be said that by giving to the word its plain ordinary meaning, a rule of court has been interpreted in such a way as to result in unfairness or produce a manifest injustice."

adversely affect the taxpayers in Malaysia and that the taxpayer may not be able to obtain remedies to prevent the damage to be done i.e. the issue of a notice of assessment being issued which imposes heavy tax liability on the taxpayer. If there is a real danger of issuance of an assessment, would the taxpayer nonetheless have to wait till the actual assessment is issued before he could seek any relief?

3.4.2 Grounds of Judicial Review

Is judicial review available to the taxpayers notwithstanding that there is another appeal avenue under section 99 of the ITA? Will the taxpayer be required to exhaust the statutory remedy before the taxpayer may resort to an application for judicial review under Order 53 of the RHC? The landmark case here is *Government of Malaysia & Anor v Jagdis Singh.*[108] The taxpayer had received few notices of additional assessment for the Years of Assessment 1979 to 1984. The taxpayer's accountant wrote to inform the IRBM of the taxpayer's desire to appeal against the additional assessments to the SCIT. However, the taxpayer filed an application for judicial review to quash the said notices of additional assessment on grounds that "the notices of assessment are based on conjecture and have been issued maliciously and as a vindictive act." The taxpayer's application was allowed by the High Court. On appeal to the Supreme Court, the question was whether judicial review is available in cases where there is an alternative remedy open to the taxpayer to appeal to the SCIT. The Supreme Court ruled that:-

"A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is

[108] [1978] 2 MLJ 185.

always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

In Re Preston was a tax case. It was quite clear from the speeches of their Lordship in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice."

This case has laid down the guiding principles for judicial review in revenue cases, i.e. in the presence of the statutory remedy under the ITA, an application for judicial review is only allowed in exceptional circumstances, and the examples given by the Supreme Court are clear lack of jurisdiction, blatant failure to perform some statutory duty and serious breach of the principles of natural justice.

Jagdis Singh was followed in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri.*[109] The taxpayer sold its land. The DGIR charged the taxpayer with income tax on sale proceeds under section 4(a) of the ITA. The taxpayer objected to assessment and contended tax payable should be assessed under the Real Property Gains Tax Act 1976. Subsequently, the taxpayer filed an appeal to the SCIT. Before the appeal could be heard by the SCIT, the taxpayer applied to the High Court under Order 53 of the RHC for certiorari to quash the notice of assessment on ground that the notice of assessment was

[109] [2009] 1 MLJ 555.

invalid and it contained an error of law on the face of it. The High Court dismissed the taxpayer's application. The High Court has concisely summarized the principles governing leave application under Order 53 as follows:-[110]

"It is useful to revisit the principles which our courts have established in dealing with an application for leave to obtain the relief of judicial review by way of certiorari under O. 53 as follows:

(1) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such arguments as is necessary on the law.

(2) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(3) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted: see eg Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224 HC, per Visu Sinnadurai J (as he then was); Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 2 MLJ 442 SC, per Edgar Joseph Jr SCJ (as he then was).

(4) The applicant must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application: per Ajaib Singh SCJ (as he then was) in Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 3 MLJ 228 SC.

(5) An application will fail where there is an alternative remedy: Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal For Ulu Kinta & Ors [1972] 1 MLJ 70

[110] [2004] 6 CLJ 398.

FC, per Chang Min Tat J (later FJ); on appeal to the Federal Court per Ong Hock Thye CJ (Malaya), Ali and Ong Hock Sim FJJ (as they then were); Badat bin Drani v. Tan Kheat [1953] MLJ 67; Melayu Raya Press Limited v. WL Blythe The Colonial Secretary [1951] MLJ 89; Government of Malaysia & Anor v. Jagdis Singh [1987] 2 MLJ 185 SC. Lim Kui Siam & Anor, (Representing all the members of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang) v. Pentadbir Tanah, Daerah Kluang [1995] 1 CLJ 846; and T Mohan a/l Ellen & Ors v. Pentadbir Tanah Daerah Petaling [2000] 2 MLJ 431 per Abu Samah J.

(6) Where there is an alternative remedy of appeal, leave to issue certiorari will only be granted in exceptional circumstances such as:

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty;

(c) a serious breach of the principles of natural justice: see eg National Land Finance Co-operative Society Ltd v. Ketua Pengarah Hasil Dalam Negeri [1998] 4 CLJ Supp 232 HC; per Nik Hashim J (now JCA);

(d) illegality: Majlis Perbandaran.

(7) The categories of exceptional circumstances are not closed, and the burden is on the applicant to prove the existence of any of the exceptional circumstances: Lim Kui Siam."

The Court of Appeal affirmed the decision of the High Court and dismissed the appeal on ground that although the taxpayer alleged that there was a 'blatant failure by the DGIR to perform some statutory duty', this was not pleaded in the application.[111] Therefore the

[111] The Court of Appeal said that:-
"The ground pleaded in the certiorari application was, 'Form J is invalid and that it contains an error of law on the face of the Form J'. In a gist, advertence to 'blatant failure to perform some statutory duty' by the Director-General was never pleaded as one of the exceptional circumstances of the impugned application under O 53 r 2 of the Rules of the High Court 1980. It is trite law that the onus of proving any allegation in support of the leave application is on the appellant, and as it were, even on this basis it had failed, entitling the court to dismiss the appeal without more."

attempt by the taxpayer to show one of the exceptional circumstances as per *Jagdis Singh* failed.

In relation to the taxpayer's contention that the notice of assessment in question was invalid and contained an error of law on its face, the Court of Appeal opined that the allegation went to the merit of the assessment and the SCIT should be the correct forum to hear the matter:-

"This course of action was taken up, as somehow the appellant had been distracted, eventually to be deviated by the guidelines of Jagdis Singh, resulting in the unwittingly failure to discuss this ground. It must be understood that a court listening to a certiorari application sits in a supervisory jurisdiction, and merely to scrutinise the manner the assessment was arrived at by the Director-General. Put another way, the court is only concerned with the legality of the decision making process and not the eventual decision ie that 1998 assessment, in relation to the current case. To state that the impugned Form J is invalid, and that it contains an error of law on the face of that Form J, is a question pertaining to the merits of the assessment, a matter better reserved for the Special Commissioners or a matter to be transmitted as case stated to the High Court."

From the decided cases in Malaysia, the following grounds were used by the taxpayers in an application for judicial review which falls within one of the exceptional circumstances in the landmark case of *Jagdis Singh*:-

(a) Issuance of notice of assessment without evidence

In *Sabah Berjaya Sdn Bhd v Director General of Inland Revenue Department,*[112] the taxpayer filed a notice of motion for, inter alia, an order for an extension of time for the filing of its application for leave to apply for certiorari to quash the directions issued by the DGIR. In 1987, the DGIR issued a series of notice of additional assessment and directions under section 91 and 140 of the ITA to the taxpayer. The directions stated that the payments made by the taxpayer to the Sabah Foundation would be treated as dividends and hence not allowed as deductions for tax purposes. The taxpayer filed formal appeals against the directions and the notices of additional assessment with the SCIT. During the hearing before the SCIT, it was revealed that at the time of issue of the directions, the DGIR had no evidence of new facts to raise additional assessment. The documents which may have justified the issue of directions and the notices of additional were extracted from Sabah Foundation after the directions and the notices were issued. Hence the DGIR issued the directions and the notices of additional assessment and then proceeded to look for evidence to justify his actions retrospectively. In the circumstances of the case, the court was satisfied the explanation given by the taxpayer for the delay in filing the application for leave, the extension of time to file application for leave was then granted to the taxpayer. In relation to the principles governing judicial review in tax cases, the court said as follows:-

"The rule that a party must exhaust its domestic remedy before applying for judicial review is not an absolute rule going to the jurisdiction and exceptional circumstances may exist to displace the rule.

In support the following cases were cited:

(1) Government of Malaysia v Jagdis Singh [1987] 2 MLJ 185;

(2) Gnanasundran v Public Services Commission [1966] 1 MLJ 157;

[112] [1996] 5 MLJ 366.

(3) R v HM Inspector of Taxes for District of Ashford & Ors, ex p Frost [1973] STC 579...

Another excuse for delay in seeking judicial review may include a 'matter newly come to the knowledge of the applicant' (London Corp v Cox (1867) Lr HL 239 cited in Broad v Perkins (1888) 21 QBD 533). The evidence of Doraisamy only emerged during the hearing before the second respondent and would not have been reasonably discovered earlier."

The High Court referred to *Jagdis Singh* case and came to the conclusion that:-

"I do not agree with the submission of learned counsel for the respondents that the applicant should have exhausted all domestic remedies before applying for certiorari... The discovery of this new fact by the applicant may come within the exception in Jagdis Singh that 'certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform a statutory duty or in appropriate cases a serious breach of the principles of natural justice."

(b) Lack of jurisdiction

The taxpayer in *Central Coldstorage Kuching Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[113] in the hearing of application for leave for judicial review, sought to rely on *Jagdis Singh* case and tried to argue that the DGIR had acted without jurisdiction or statutory power to issue the disputed notices of additional assessment. If the taxpayer succeeded, the notices will be held illegal and that it would amount to exceptional circumstances in *Jagdis Singh* case. The taxpayer had obtained the Investment Tax Allowance for 'processed poultry products' pursuant to section 27 of the Promotion of Investment Act 1986. It was granted by the Minister of International Trade and Industry ("MITI"). Later the

[113] [2010] MLJU 736.

DGIR carried out an audit exercise on the taxpayer and the result of the audit was that the taxpayer was not processing poultry products, but was only dealing in chicken parts, hence the taxpayer was not entitled to claim the Investment Tax Allowance and additional assessments were raised against the taxpayer. The taxpayer contended that by doing so, the DGIR had in effect withdrawn the Investment Tax Allowance illegally as only the Minister of MITI had the power to do so. The High Court dismissed the contention of the taxpayer that the DGIR had acted without jurisdiction. Hence the application was dismissed and the court ruled that the DGIR is the taxing authority that has been entrusted by Parliament to levy income tax, accordingly the DGIR has the power to determine the tax liability of the taxpayer under the ITA not being affected by the Promotion of Investments Act 1986. Further it is the duty of the DGIR to make a determination whether a taxpayer had brought himself within the ambit of any exemption that has been granted.

This ground of lack of jurisdiction was discussed in *M & W Zander (M) Sdn Bhd v Director General of Inland Revenue.*[114] It was argued that declaratory orders sought by the taxpayer must be granted, otherwise if the DGIR proceeds to make an assessment on the basis that allegedly to be incorrect, the DGIR will have committed errors of law or abuse of power which, according to the taxpayer's counsel was accepted as constituting an exceptional circumstance in *Jagdis Singh* case. This contention was rejected by the court and the court said as follows:-

"Further it is clear to me in Jagdis Singh, that the then Supreme Court was not referring to what is nowadays popularly referred to as an error of law that goes to jurisdiction as coming within the expression 'exceptional circumstances' because in Jagdis Singh, Hashim Yeop Sani SCJ spoke about 'a clear lack of jurisdiction', ie, the decision maker acting without jurisdiction in the true sense of the word, a good example of which is the

[114] [2005] 6 CLJ 336.

case of General Commissioners for Purposes of Income Tax For Kensington v. Aramoyo [1916] AC 215 where the court there granted an order of prohibition against the Commissioners For Kensington from raising taxes in respect of an area, namely, the City of London, which came under the jurisdiction of the Commissioners of the City of London for tax purposes, because the Commissioners For Kensington were clearly acting outside their jurisdiction or with lack of jurisdiction in the true sense of the word."

(c) The DGIR fails to perform a statutory duty

In *Bandar Utama City Corp Sdn Bhd v Director General of Inland Revenue and Another Action,*[115] the DGIR raised additional assessments against the taxpayer by way of an adjustment under section 140(1)(c) of the ITA. The adjustment was allegedly made on the basis that the taxpayer had evaded or avoided its liability to pay income tax under the ITA. In accordance with section 140(5),[116] where an adjustment was made under section 140(1), 'particulars of the adjustment' is required to be sent to the taxpayer together with the notices of additional assessment. In this case, the DGIR had refused to issue the said particulars. The taxpayer then sought an order of mandamus to compel the DGIR to do so in its application for judicial review. The High Court granted the order of mandamus and held that section 140(5) imposes a statutory duty on the DGIR to issue 'particulars of the adjustment'. In deciding so, the court referred to *Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd*[117] and *Director General of Inland Revenue v Rakyat*

---

[115] (1999) MSTC 3725.

[116] Section 140(5) states that:-
"Where in consequence of any adjustment made under this section an assessment is made, a right to repayment is refused or a return of a repayment of tax is required, particulars of the adjustment shall be given with the notice of assessment, with the notice refusing the repayment or with the notice requiring the return of a repayment, as the case may be."

[117] [1085] 2 MLJ 322 where the Supreme Court observed that:-
"If from evidence the Revenue was satisfied that the transaction whereby the taxpayer paid the sum of $1,400,000 to the Persatuan was a transaction made for the purpose of evading or avoiding liability to pay income tax, the Revenue should take action pursuant to section 140 to make adjustment with a view to counter-acting the effect of the transaction, and in that event the Revenue

Berjaya Sdn Bhd[118] which have confirmed that where the DGIR invokes its power under section 140(1), 'particulars of the adjustment' must be issued to the taxpayer.

(d) Misdirection in law

In *Board of Trustees of Sabah Foundation v DGIR*,[119] the taxpayer was granted an order of certiorari to quash the DGIR's decision that the taxpayer was not a charitable institution and so not entitled to tax exemption under item 13 of Schedule 6 of the ITA.[120] The DGIR's decision was grounded on 2 reasons: (i) the taxpayer was not established purely for charitable purposes; and (ii) the taxpayer has vast powers to engage in business. On a proper construction of item 13 of Schedule 6, the court held that a charitable institution may engage in business that is not carried out in pursuit of the institution's charitable objectives. However a charitable institution is entitled to an exemption under item 13(3) only to the extent that its business income is derived from a business carried out in pursuit of its charitable purposes. Therefore the DGIR had clearly misconstrued the provision and had acted outside the clear words in item 13 where the court concluded that:-

"It seems to me in the present case the Respondent for reasons stated above has clearly misdirected himself in law in holding that the Sabah Foundation was not a charitable

---

should under subsection (5) give to the taxpayer particulars of the adjustment together with the notice of assessment."

[118] [1984] 1 MLJ 248 where the Federal Court said that:-
'As to section 140 we need only say that it was not raised by the parties and relied on by the Revenue. The learned Judge need not have to refer to it. Suffice to say that if the Director-General wishes to invoke his power under the section then section 104(5) requires that "particulars of the adjustment shall be given with the notice of assessment."

[119] (2002) MSTC 3894.

[120] Item 13(3)(a) of Schedule 6 provides that:-
Where a business is carried on by an institution, a trust body, body of persons or an organization referred to in subparagraph (1), the income from the business shall be exempt from tax if:-
) the business is carried on in the course of the actual carrying out of a primary purpose of the stitution, trust body, body of persons or organization."

institution and therefore all its business income were not entitled to exemption under item 13 of Schedule 6."

The High Court further ordered the taxpayer's application for tax exemption be remitted to the DGIR for consideration in light of the grounds of judgment provided by the High Court.

(d) The SCIT have acted beyond their jurisdiction conferred by the ITA

Like the decisions or conducts of the DGIR or the IRBM, the decisions or conducts of the SCIT are also amenable to judicial review. Judicial review application has been allowed where the SCIT had exceeded their jurisdiction or did not have jurisdiction to hear and decide a matter or an appeal. For example, in *Ketua Pengarah Hasil Dalam Negeri v Rheem (Far East) Pte Ltd,*[121] the DGIR issued a requisition (i.e. Form S) demanding for payment by virtue of section 108(5) of the ITA against the taxpayer.[122] The taxpayer appealed to the SCIT against the requisition issued by the DGIR. The DGIR raised a

---

[121] [1998] 2 CLJ Supp 351.

[122] The court had explained section 108 requisition in the following words:-
"As regards the application of s. 108 of the said Act on the issue of requisition the counsel for the applicant explained as follows. In Malaysia the company taxation is based on the imputation system which means that the full amount of income tax paid by a company is imputed to the shareholders. Under s. 108 every company resident in Malaysia or a company resident in Singapore and which has declared itself to be a resident in Malaysia for the purpose of Article VII on dividends of the double taxation agreement Malaysia – Singapore of which the respondent was such a company, is required to deduct income tax at the rate of 35% (applicable rate at the material time) from any dividend paid to the shareholders. However, the company is entitled to frank the income tax to be deducted out of the income tax which it has previously sufferred on its taxable profits. For this purpose the company is required to maintain an account known as the "s. 108 account" in order to keep track of the amount of tax franking credit available. Entries to s. 108 account are in the form of credits and debits. The credit total represent tax paid or payable by the company for the current or previous years of assessment. This is called the compared aggregate. The debit total represent the amounts of tax deducted or deemed deducted from dividends paid for the current years of assessment. This is called the compared total.
At the end of the assessment year, the director General of Inland Revenue (DGIR) will compare the compared total with the compared aggregate. When the compared total exceeds the compared aggregate the amount of the excess is a debt due to the government from the company. In such a situation, the DGIR will issue a written requisition under s. 108(5) of the said Act calling upon the company to pay the amount of the debt. The rationale behind this is that, if not for this charge the government would be paying out (in the form of tax credit to a shareholder of the company) more money than the Government has received from the company on its profits since tax deducted or deemed deducted is imputed to the shareholders as income tax paid in advance."

preliminary objection that the SCIT had no jurisdiction to hear an appeal regarding a requisition under section 108(5). After hearing both parties, the SCIT held that they had the jurisdiction to hear the appeal. Dissatisfied with such decision, the DGIR applied by way of judicial review to the High Court for an order of certiorari to quash the decision of the SCIT. The DGIR's contentions were that (i) section 108 requisition was not an assessment; and (ii) the debts requisitioned under section 108(5) were not "taxes". The High Court found in favour of the DGIR and granted the order of certiorari. The court held that the amount demanded in a requisition was not tax but a debt due and payable to the Government from the taxpayer,[123] and that section 108 requisition is not an assessment.[124] As such, the SCIT had committed errors of law on concluding that the requisition meant a demand for tax and that a requisition was an assessment. Accordingly the SCIT had exceeded their jurisdiction under the ITA.[125]

---

[123] In this regard, the High Court ruled that:-
"Thus on the basis of the above explanation, it is very clear that the amount demanded in a requisition is not a tax. S. 108(5) of the said Act states that the amount is a "debt" due and payable on the service of the requisition. It is not described as a tax as such. The word "debt" is also used in s. 108 (7) and (8) of the said Act. Under s. 108 (8) the DGIR is authorized to make any necessary revisions in the requisition because of revisions in the compared total and compared aggregate due to any assessment, composite assess, composite assessment or any repayment of tax."

[124] The court followed the decision in *Enesty Sdn Bhd v KPHDN* [1997] 5 MLJ 104 and held as follows:-
"As to the issue whether a requisition is an assessment which the Special Commissioners concluded that it was, the applicant referred to the case of.
On the other hand s. 108(5) of the said Act requires a requisition to be in a prescribed form and that the company be called to pay the amount of the debt. The form prescribed is form S which is distinctly different from form J in form and in substance. Form S does not indicate any right of appeal. In the circumstances as mentioned above there cannot be any doubt whatsoever to conclude that a requisition is not an assessment because it is not in respect of a tax but a debt due and payable."

[125] In relation to the jurisdiction of the SCIT, the court commented that:-
"As to the issue of the extent of the jurisdiction of the Special Commissioners under the said Act it cannot be disputed that their powers are limited unlike the powers of the High Court. They are creatures of statute and as such their jurisdiction has to be clearly spelt out by statute and in this case the said Act. In the case of the High Court which has unlimited jurisdiction, its powers may be taken away if it is specifically so stated in any statute. In other words if the statute is silent the High Court will have the jurisdiction. This principle cannot be applied in the case of the Special Commissioners. There is no mention in the said Act that they have jurisdiction to deal with matters under s. 108 of the said Act. Hence no amount of inference or analogy can confer such powers to them to deal with matters under s. 108 of the said Act. Therefore for the Special Commissioners to conclude that they had the jurisdiction to deal with matters under s. 108 of the Act by way of assumption and logic they had also committed a very serious error of law."

The decision of the High Court was subsequently confirmed by the Court of Appeal by way of a consent judgment.

3.4.3 Correct Avenue of Appeal

It is clear and established that an appeal to the SCIT is not the only appeal avenue available to an aggrieved taxpayer. An aggrieved taxpayer may file an application for judicial review under Order 53 RHC against a decision of the DGIR. In this regard, judicial review is important as an alternate way of addressing the complaint of a taxpayer. Especially where the decisions made by the DGIR which does not amount to an "assessment" and are not appealable to the SCIT pursuant to section 99 of the ITA, judicial review in fact is the only appeal avenue of the aggrieved taxpayers.

In *Malayan United Industries Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor,*[126] the taxpayer, through its tax agent filed its income tax returns for the Years of Assessment of 1987 to 1989. In 1990, the DGIR requested the tax agent to provide certain information concerning the taxpayer under section 108 of the ITA for Years of Assessment of 1985 to 1989. The tax agent duly furnished the requisite information to the DGIR. Only in 2001, the DGIR issued requisition under section 108 of the ITA for Years of Assessment of 1987 to 1993 in the prescribed Form S. The taxpayer disputed the liability to pay the requisition under Form S for the Year of Assessment for 1987 to 1993 on the basis that the requisitions under Form S were time-barred as they were issued more than six years after the expiration of the Years of Assessment of 1987 to 1993. Subsequently the DGIR issued a Notification of Civil Proceedings under section 106 of the ITA to recover the amount stated in Form S. In allowing the application for judicial review for an order of certiorari to

[126] [2005] 6 MLJ 259.

quash the decision of the DGIR in the Notification of Civil Proceedings, the High Court considered and explained the nature of a section 108 requisition in length:-

"Section 108 of the ITA is a mechanism for the implementation of the imputation system in Malaysia. Under the imputation system, the income tax paid by a company on its profits is fully passed on or imputed to the shareholders when a dividend is paid. In Malaysia the company taxation is based on the imputation system which means that the full amount of income tax paid by a company is imputed to the shareholders. Under s 108 every company resident in Malaysia or a company resident in Singapore and which has declared itself to be a resident in Malaysia for the purpose of Article VII on dividends of the double taxation agreement Malaysia-Singapore of which the respondent was such a company, is required to deduct income tax at the rate of 35% (applicable rate at the material time) from any dividend paid to the shareholder. However, the company is entitled to frank the income tax to be deducted out of the income tax which it has previously suffered on its taxable profits. For this purpose the company is required to maintain an account known as the 's. 108 account' in order to keep track of the amount of tax franking credit available. Entries to s 108 account are in the form of credits and debits. The credit total represent tax paid or payable by the company for the current or previous years of assessment. This is called the compared aggregate. The debit total represent the amounts of tax deducted or deemed deducted from dividends paid for the current years of assessment. This is called the compared total. At the end of the assessment year, the Director General of Inland Revenue ('DGIR') will compare the compared total with the compared aggregate. When the compared total exceeds the compared aggregate the amount of the excess is a debt due to the government from the company. In such a situation, the DGIR will issue a written requisition under s 108(5) of the said Act calling upon the company to pay the amount of the debt. The rationale behind this is that, if not for this charge the government would be paying out (in the form of tax credit to a shareholder of the company) more money than the

Government has received from the company on its profits since tax deducted or deemed deducted is imputed to the shareholders as income tax paid in advance."

Having considered the above and following an earlier decision in *Ketua Pengarah Jabatan Hasil Dalam Negeri v Rheem (Far East) Pte Ltd,*[127] the High Court ruled that section 108 requisition is not an assessment, and thus it cannot be appealed to the SCIT. The High Court stressed that:-

"Accordingly, the only avenue to seek judicial resolution of the matter would be to apply for judicial review under O 53 of the Rules of the High Court 1980, which the applicant did in this case. Hence the submission by the respondents that judicial review is a wrong procedure adopted by the applicant cannot be right. To me, due to DGIR's own conduct in Rheem's case, judicial review is the most appropriate, convenient and suitable procedure for the applicant to challenge the DGIR's decision on s 108 of the ITA."

Although it seems to be a clear cut case thus far, the High Court in *Ngee Tai Shipping Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[128] expressed another view which is in favour of the revenue authority.[129] The High Court disagreed with *Rheem* case and *Malayan United Industries* case and held that a section 108 requisition is essentially an assessment, hence it is appealable to the SCIT:-

"... a requisition issued under s 108 of the ITA 1967... only creates a statutory presumption that a statutory debt is created within the mechanism of s 108. However, if one objects to the mechanism the statutory debt has arisen as in this case, then it is clear

---

[127] [1998] MLJU 402.
[128] (2008) MSTC 4308.
[129] This case involves a requisition issued under section 108 of the ITA and the taxpayer contended that the DGIR had erred in law in arriving at the decision to issue such requisition, hence the taxpayer filed an application for a judicial review to seek an order of certiorari to quash the decision of the DGIR.

that there is a tax dispute, relating to assessment of tax. Support for the proposition is reflected in various provisions of the said section itself and other sections such as s 110... the debt due and owing is inextricably interwoven with tax liability and/or assessment as the whole issue is anchored on whether there was profit or no profit subject to tax."

Accordingly the High Court ordered the matter be referred to the SCIT and be dealt with under section 99 of the ITA.[130] In the conclusion, there are different approaches taken in the High Court's decisions in relation to section 108 requisition and it is submitted that the approach taken in *Malayan United Industries* case is preferred as in the circumstances of the case, judicial review could be the more expedient or suitable procedure to challenge a decision made by the DGIR under section 108 or any other provisions in the ITA, and the courts should not forthwith dismiss an application for judicial review in the interest of justice. Further, in the case of *Korea Development Corporation v Government of Malaysia*,[131] the High Court expressly held that the withholding tax under section 107A was not an advance assessment under the ITA and ruled that the SCIT do not have jurisdiction to entertain any appeal in respect of matters arising from the collection and recovery of tax, i.e. Part VII of the ITA.[132] As section 107A falls within Part VII, the SCIT do no have jurisdiction to hear the matter in *Korea Development Corporation.* On the same token, section 108 falls within Part VII of the ITA relating to collection and recovery of tax, hence it could only be correct to conclude that the SCIT do not have the jurisdiction to hear an

---

[130] The learned High Court judge also said in his judgment that:-
"If one were to argue in reliance on Rheem's case, supra, that since s 106 crystallises a sum due and owing as a debt, all disputes in relation to s 106 must be referred to the court by way of judicial review and not to the special commissioners then such interpretation will totally make the special commissioners redundant. Further, to say s 106 relating to an assessment has become a statutory debt and in consequence any claim relation to assessment must be made within 6 years limitation period or it will be statute-barred, will create much loss of revenue for the government and public will be affected."

[131] [1985] 1 CLJ 178.

[132] The court said that:-
"Section 107A is within Part VII of the Act which deals with Collection and Recovery of Tax. Section 107A provides a method of collection of tax which may or may not have been assessed. The Special Commissioners do not have jurisdiction to entertain any appeal or complaint in respect of matters or questions that arise from or in respect of the collection and recovery of tax."

appeal relating to section 108 requisition, and that judicial review is the most appropriate procedure to challenge such requisition.

3.4.4 Selected Specific Issue

Can a taxpayer bypass the Order 53 procedure by applying instead under Order 15 rule 16 of the RHC for a declaration?[133] In *Goh Eng Hwa v Ketua Pengarah Lembaga Hasil Dalam Negeri & Satu Lagi,*[134] the court did not refer to *Sivarasa* case and it was held that a taxpayer must not bypass the Order 53 procedure otherwise the Order 15 rule application will constitute an abuse of the process of the court and will be dismissed accordingly. The taxpayer applied for a declaration inter-alia that there is no tax owing by the taxpayer to the DGIR. The DGIR raised preliminary objection that the action was an abuse of court process because the taxpayer should have filed an application for judicial review instead of an originating summons for a declaratory order. The High Court discussed the pre 2000 amendment cases including *Sugumar Balakrishnan v Chief Minister of the State of Sabah & Anor*[135] and *Teh Guan Teik v Inspector General of Police & Anor,*[136] and post 2000

---

[133] Order 15 rule 16 of the RHC provides that:-
"No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed."

[134] [2008] 8 CLJ 777.

[135] [1989] 1 MLJ 233 where the High Court said that:
"The cases of O'Reilly v. Mackman & Ors [1982] 3 All ER 1124 and Cocks v. Thanet District Council [1982] 3 All ER 1135 were based on the new provisions of the English O. 53 which was introduced in 1977. They cannot be followed since the new English O. 53 and its statutory underpinning (under s. 31 of the UK Supreme Court Act) have not been accepted here... With due respect, the ratio decidendi in the aforesaid two English cases cannot be followed here since we have not accepted the English new O. 53 and its statutory underpinning (that is to say, s. 31 of the English Supreme Court Act). Our present O. 53 is in pari materia with O. 53 under the pre-1977 English Rules. Therefore, there is no justification for me to depart from the principle enunciated by the highest court in England prior to January 1978 (the date of coming into force of the English new Rules) and which had been accepted by our courts. I am inclined to follow the decision in the Supreme Court case of Government of Malaysia v. Lim Kit Siang; United Engineers (M) Bhd v. Lim Kit Siang [1988] 2 MLJ 12, whereby the majority of the quorum declined to follow the English new O. 53 in relation to the rule of locus standi, and instead followed the rule of locus standi accepted by the highest court in England prior to the said new O. 53."

amendment cases, i.e. *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor*,[137] *Lim Oh & Ors v Allen & Gledhill*,[138] *Subramaniam Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Ors*[139] and *Arab-Malaysian*

---

[136] [1998] 3 CLJ 153 in which the court held that:-
"... In passing, also in order to lay any possible spectre of any future contention of per incuriam against the present decision of this court for not mentioning the case of O'Reilly v. Mackman [1982] 3 All ER 1124 which held the litigant in that case to a remedy of certiorari and not allowing the remedy of declaration, I will say a few words about this case. Of course, it was feared that the remedy of declaration would virtually destroy the remedy of certiorari by replacing the latter and this, inter alia, led in 1977 to the law reform as embodied in O. 53 of the Rules of Supreme Court of England which is different from our own O. 53 of the RHC. Order 53 of England brought ten main changes to the earlier O. 53, according to the White Book of 1979 at p. 842; please see the changes set out there. The House of Lord's decision of O'Reilly v. Mackman, in interpreting such changes brought about by the law reform has, according to the guru of administrative law Prof Wade in Administrative Law (6th Ed) at p. 678, caused 'great uncertainty' and a serious setback for administrative law'. The decision was expressly not followed, for obvious reasons, in our courts, eg in Sugumar's case and was also not followed by the Court of Appeal of Singapore. The decision is not relevant to us and need not be discussed further, based as it was on the law reform, which we have, with all deliberateness not adopted in our RHC."

[137] [2004] 4 CLJ 775. The issues for consideration before the court were (a) whether the plaintiffs were by this suit seeking relief or remedy for the infringement of rights protected by public law or private law; and (b) if it is held that the plaintiffs were enforcing their rights under public law and should therefore seek their remedy under O. 53 of the RHC, whether their claims fell within the exceptions to the general principal stated in *O'Reilly v. Mackman* [1983] 2 AC 237. The court ruled that:-
"It is also my view that the first prayer sought by the plaintiffs herein, that the said Direction was 'null and void and of no legal effect', although couched or cast and sought as a declaration, is clearly in the nature of a certiorari to have the Direction quashed for the same grounds and reasons stated in the suit, but the plaintiffs have attempted to circumvent the protections afforded to public authorities by O. 53 RHC, particularly the requirement to obtain leave. In arriving at the above conclusions I have not overlooked a submission of the plaintiffs that the court should not by the mere characterisation of the plaintiffs' claim as one founded in public law, exclude them from having their claims considered by an, ordinary action. According to counsel for the plaintiffs, to do so would create procedural exclusivity or dual system of law leading to rigidity and procedural hardship for plaintiffs in the choice of forms of action, which would defeat the flexibility which the new O. 53 RHC was supposed to afford when seeking relief. According to counsel this was especially so as there is no saving provision found in our O. 53 which is equivalent to the English O. 53 r. 9(5) which allows the court to convert an application for judicial review into a writ action in the event the wrong form of action was selected. I have tried in the course of this judgment to show that for the reasons given, this is not a case where the plaintiffs' claims have been simply characterised as one arising in public law. Further, since the amendment to O. 53 RHC, all the reliefs and remedies which the plaintiffs seek in this action were at its commencement available to them under O. 53 and the court has not put any obstacles in their way to avail themselves of the flexibility afforded by the new O. 53, but if they have not availed themselves of it the court should not be blamed for any hardship they now face as a result of the route they have chosen. With regard to the submission that the Court should not interpret the new O. 53 in such a way as to create rigidity and procedural exclusivity leading to a dual system of law, I should point out that the Courts in Malaysia have for a long time now recognised the distinction between public law rights or remedies and private law rights or remedies. See Baltim Timber Sdn Bhd v. The Minister of Resource Planning & 2 Ors [1993] 2 CLJ 327; see Subramaniam a/l Vythilingam v. The Human Rights Commissioner of Malaysia (Suhakam) & 5 Ors [2003] 6 CLJ 175; see *Yahya bin Kassim v. Government of Malaysia [1997] 3 MLJ 749; see Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339."*

[138] [2001] 3 CLJ 233.

[139] [2003] 6 CLJ 175. The court held that:-

Finance Bhd v. Steven Phoa Cheng Loon & Ors.[140] The High Court recognised that the 2000 amendment to Order 53 of the RHC[141] is in *pari materia* with provision in the English Supreme Court Rules post 1977, and hence adopted the reasonings in those post amendment cases that the position taken in *O'Reilly v Mackman*[142] should be followed in Malaysia:-

"Tindakan plaintif/perayu adalah untuk mencabar keputusan defendan/responden iaitu sebuah badan awam yang bertindak di bawah undang-undang. Tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah 'judicial review'. Ini selaras dengan pindaan kepada A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 melalui PU(A) 342/2000 iaitu mulai 22 September 2000 semua permohonan untuk mencabar keputusan pihak berkuasa awam hanya boleh dibuat melalui permohonan untuk semakan kehakiman (judicial review)."

3.5 Conclusion

"The plaintiffs should have pursued his public law remedy through judicial review proceedings under O. 53 RHC and not by way of originating summons. By not pursuing the remedy through O. 53, the plaintiff was deliberately attempting to get around the stringent requirements enumerated in O. 53 RHC, including inter alia the need to serve the leave application on the Attorney General's Chambers. Enclosure (1) thus constituted an abuse of the process of the court and ought to be struck out."

[140] [2003] 1 CLJ 585.

[141] PU(A) 342/2000.

[142] [1983] 2 AC 237. The issue before the House of Lords is whether it is an abuse of the process of the court for the plaintiffs to commence a writ action to challenge a decision of a public authority, instead of proceeding by way of judicial review. It was held that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was a declaration that the board of visitors adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoiding the protection afforded to statutory tribunals.

In conclusion, judicial review is not a 'popular' recourse for the taxpayers, based on a limited number of applications for judicial review in Malaysia. On the other hand, the number of cases filed for the determination of the SCIT has increased from year to year. It is submitted that this could be attributable to the concern of the judicial review application might be rejected eventually as the default procedure is to appeal under the ITA and the problem of having to prove the case falls within the exceptional circumstances as expounded by the court in *Jagdis Singh*.[143] Hence the taxpayers in Malaysia tend to play safe and go by way of normal appeal procedure set out in the ITA. Nonetheless the taxpayers should examine their cases thoroughly and consider if a judicial review application is more suitable and effective. In cases of the DGIR acting without or beyond his authority or there is abuse of power by the DGIR, to forthwith protect the rights of the taxpayers and to prevent further damage to the taxpayers, judicial review highly recommended and should be considered by the taxpayers even before an assessment or additional assessment is made against them.

[143] [1978] 2 MLJ 185.

Chapter 4. Recovery Proceedings

4.1 "Pay First and Appeal Later"

As discussed in Chapter 3, the taxpayer has a right to appeal against any assessment made by the SCIT under the ITA. However while the appeal against an assessment is pending hearing by the SCIT, a taxpayer is required by law to pay the tax under dispute. The DGIR is empowered by few provisions in the ITA to collect taxes although the assessment may be challenged by the taxpayer. Section 103(1) of the ITA clearly provides that tax payable under an assessment for a year of assessment shall be due and payable on the date, whether or not the taxpayer appeals against the assessment. The Government of Malaysia may by civil proceedings recover the tax due and payable as a debt to the Government of Malaysia.[144] Hence

4.2 Arbitrary Law

The law on civil recovery suits is arbitrary and also leaves the taxpayers with no defence to such proceedings. In order to obtain judgment against a taxpayer, the DGIR would only need to produce a certificate signed by him giving the name and address of the taxpayer and the amount of tax dues from the taxpayer. Such certificate shall be significant evidence of the amount due and sufficient authority for the court to give judgment for that amount.[145] By virtue of this production of this certificate, the chances of the DGIR in obtaining the summary judgment under the rules of the court are high. The taxpayer is debarred by section 106(3) of the ITA from raising the defence that the amount of tax is

[144] Section 106(1) of the ITA.
[145] Section 142(1) of the ITA.

excessive, incorrectly assessed, under appeal or incorrectly increased under the provisions in the ITA. As a result, over years, the taxpayers have failed to overcome this draconian provision. Summary judgment or order were given to the Government of Malaysia no matter the court may have had sympathy for the taxpayers.[146] In view of this clear provision of law, the courts have been applying the law without looking into the merits of the taxpayers.[147]

No defence of the amount of tax is excessive, incorrectly assessed, under appeal or incorrectly increased is originated from the idea that if a civil court e.g. the High Court has decided on the issue of limitation, the SCIT who are bound by the High Court decision, could not then listen to the tax appeal. It is interesting to note that the court in *Government of the Federation of Malaysia v Lee Tain Tshung*,[148] in allowing the summary judgment application by the Government of Malaysia, pointed out that: *"it is pertinent to note that section 106(3) as worded did not state that the defendant is precluded from raising a defence at all but section 106(3) confined itself to certain "pleas" which cannot be raised."* Hence there were limited cases which have been successful in defending the summary judgment application by the Government of Malaysia. These limited defences are mostly technical grounds. In *Connaught Housing Development Sdn Bhd v Kerajaan Malaysia*,[149] the taxpayer's appeal against the summary judgment granted to the Government of Malaysia was allowed. The court accepted the defence raised by the taxpayer was that the notices of assessment did not comply with section 96(4)(c) of the ITA which provides for the formality of a notice of assessment.[150] It was contended that the notices of assessment

---

[146] These cases include *Government of Malaysia v DC* [1973] 2 MLJ 161, *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163, *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29, *Government of the Federation of Malaysia v Lee Tain Tshung* [1992] 1 MLJ 629 etc.

[147] In *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29, Gill CJ categorically confirmed this position and said that: *"the court to put it bluntly, had only one function to perform, and that was to give judgment in favour of the Government."*

[148] [1992] 1 MLJ 629.

[149] [2003] 8 CLJ 144

[150] Section 96(4)(c) of the ITA provides that:-

were defective as the place at which payment was to be made was not stated, the penalty for late payment was not stated and the notices did not point out any right of appeal existing under the ITA. As the Government of Malaysia did not response to this contention, the court set aside the summary judgment and directed the matter to proceed to trial. In *Kerajaan Malaysia v Kemayan Bina Sdn Bhd*,[151] similar issue was raised. The High Court affirmed the decision of the senior assistant registrar which dismissed the Malaysian Government's application for summary judgment on the grounds that the notices of assessment had failed to comply with section 96(4)(c) of the ITA. The taxpayer had also successfully raised triable issue that the Government had failed to serve the notices on the taxpayer.[152]

Having said the above, the position is unclear if a taxpayer may raise defence in civil recovery proceedings that the assessments made are made out of time as provided in section 91(1) of the ITA. In *Government of Malaysia v Ng Song Choon*,[153] the court adopted the literal reading of the provision and held that:-

"... It is essentially a legal issue and it falls outside the scope of section 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section

---

(4) A notice served under subsection (1) or (2) shall be in the prescribed form and shall indicate, in addition to any other material included therein -
(a) in the case of a notice served under subsection (1) the year of assessment income and the tax charged thereon or the amount of the tax or additional tax, as the case may be;
(b) in the case of a notice served under subsection (2) , the year of assessment and the amount of the increase in the tax charged; and
(c) in either case -
(i) the place at which payment is to be made;
(ii) the increase for late payment imposed by section 103(5), (6), (7) or (8); and
(iii) any right of appeal which may exist under this Act.

[151] [2007] 1 AMR 120.

[152] On the facts the court found that the plaintiff in its affidavit did not specify the date and to whom the notices were posted, whether by normal post or registered post. Further the Government of Malaysia had failed to establish that the notices of assessment were posted through any post office or any post box available. The High Court had delivered similar judgment in *Kerajaan Malaysia v Sun City Development Sdn Bhd* [2007] 1 AMR 589.

[153] [1975] 1 MLJ 131.

103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court. Although this may be a tax case as was stated earlier one cannot read more into the Act than what is expressly and unambiguously stated. The taxpayer, the defendant in this case is not precluded from raising the plea that the claim is statute barred and until and unless the court is satisfied that the Director General exercised his powers correctly when making the assessment under section 91(3) the court cannot possibly adjudicate."

However the Federal Court in *NTS Arumugam Pillai v Government of Malaysia*[154] held otherwise. It was followed by *Government of Malaysia v Preston Corporation (M) Sdn Bhd*[155] where the court had categorically said that "*a contention that the assessment of tax was made out of time in contravention of section 91(1) of the Income Tax Act is a plea that the tax was incorrectly assessed and therefore could not be entertained under section 106(3) of the Act.*"[156]

In 1992, the High Court in *Government of Malaysia v Gan Chuan Lian*[157] had chosen to follow *Ng Song Choon* case and ruled that whether the Government of Malaysia's claim was statute-barred was a triable issue, hence no summary judgment will be granted.[158] In *Kerajaan Malaysia v Dato' Hj Ghani Gilong,*[159] the Federal Court disagreed with the decisions in *Gan Chuan Lian* and *Ng Song Choon* and held that the High Court has no

---

[154] [1976] 2 MLJ 72. The court said that, "section 106(3) of the Income Tax, 1967 provides that "*in any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5)." In the circumstances the learned judge had no power to entertain any of the pleas raised before him by the appellant in opposing the plaintiff's application for leave to sign final judgment.*" This was followed by the Supreme Court in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473.
[155] [1982] 1 MLJ 293.
[156] [1982] 1 MLJ 293.
[157] [1992] 1 MLJ 449.
[158] [1992] 1 MLJ 449.
[159] [1995] 2 MLJ 119.

power to entertain a plea of limitation under section 91(1) and (3) of the ITA on the following grounds:-

"If counsel for the taxpayer were correct in his contention that the plea of limitation based on s 91(1) and (3) of the Act is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the special commissioners, then a decision by the High Court on the question of limitation would prevent the special commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court, thereby abdicating their fact-finding function of determining whether there has been fraud or wilful default within the meaning of s 91(3a) of the Act. Alternatively, even if the special commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the special commissioners on the identical question of limitation. These would not be reasonable results and, what is unreasonable, cannot be the law." To date, this has been taken as the position of law on this matter and has been applied in subsequent cases.[160]

The grievance suffered by a taxpayer is further aggravated by the fact that the Limitation Act 1953 does not apply to any proceedings by the Government of Malaysia/IRBM for recovery of any tax or interest on the tax.[161] Therefore the Government of Malaysia may institute actions to recover tax or interest on the tax due and payable by the taxpayers anytime as it wishes.

---

[160] E.g. *Government of Malaysia v Dato' Mahindar Singh* [1996] 5 MLJ 626 (HC).

[161] Section 33(1) of the Limitation Act 1953 provides that:
"Save as in this Act otherwise provided and without prejudice to the provisions of section 3 of this Act, this Act shall apply to proceedings by or against the Government in like manner as it applies to proceedings between subjects and for the purposes of this Act a proceeding by petition of right shall be deemed to be commenced on the date on which the petition is presented:
Provided that this Act shall not apply to any proceedings by the Government for the recovery of any tax, duty or interest thereon or to any forfeiture proceeding under any written law in force in Malaysia relating to customs duties or excise or to any proceedings in respect of the forfeiture of a ship."

4.3 Stay of Execution

The hardship to the taxpayers pursuant to the "pay first and appeal later" principle could be alleviated by a stay of execution after summary judgment or order granted to the Government of Malaysia for the amount of tax due and payable. In *Chong Woo Yit v Government of Malaysia*,[162] summary judgment was obtained against the taxpayer and it was appealed to the Supreme Court. The Supreme Court upheld the summary judgment. However after taking into consideration that after four years, the taxpayer's appeal to the SCIT had still not been heard, the court exercised the court's inherent jurisdiction in granting a stay of execution until determination by the SCIT of the matter.[163]

In *Kerajaan Malaysia v Jasanusa Sdn Bhd*,[164] the Government of Malaysia had obtained summary judgment against the taxpayer, but the taxpayer successfully obtained a limited stay of execution for 6 months. Later the taxpayer obtained an extension of the order of stay on grounds *inter alia*, the DGIR had still not referred the taxpayers appeal to the SCIT. The Government of Malaysia appealed against the High Court decision in granting the extension. In dismissing the appeal, the Supreme Court held that neither section 103(1) nor 106(3) bars a court in appropriate circumstances from exercising its inherent powers of granting a stay. The court further explained that granting a stay is about the exercise of the discretion to stay:-

"Matters of this nature involve, inter alia, balancing the need of the government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The court should be ever vigilant against taxpayers who may use the

---

[162] [1989] 1 MLJ 473.
[163] The court said that:- *"... However, as it was not due to any fault on the part of the taxpayer that his appeal to the special commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the special commissioners of the taxpayer's appeal against the assessments raised against him ..."*
[164] [1995] 2 AMR 1477.

procedure of the court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment. It should not be much of a difficulty for the court to see the genuineness of an appeal or the willingness of the taxpayer to comply with all reasonable requests of the director, if they exist, and thus move the court to stay the execution."

It is therefore an established position of law that, while a taxpayer may not be able to resist a claim or a summary judgment in civil court for tax due and payable pursuant to section 103 and section 106 of the ITA, there is possibility that if the circumstances of the case justifies, a taxpayer may obtain a stay of execution of the judgments obtained by the Government of Malaysia in such civil recovery proceedings, this includes the special circumstances where there is delay in the hearing of appeal before the SCIT[165] and failure to forward an appeal to the SCIT to hear the appeal.[166]

[165] *Chong Woo Yit v Govt of Malaysia* [1989] 1 MLJ 473.
[166] *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 119.

Chapter 5. Indian Experience in Judicial Administration of Revenue law

5.1 Income Tax Law in India

Income tax is one of the direct taxes levied in India.[167] The governing law for income tax in India is the Indian Income Tax Act 1961 ("**IITA**"). Similar with the Malaysian Constitution, Article 265 of the Indian Constitution expressly states that, "No tax shall be levied or collected except by authority of law." This principle has been well guarded by the courts in India where in many instances the courts struck down a taxing statute which was not authorised by law,[168] and was in contravention with the fundamental rights guaranteed in the Indian Constitution.[169] This chapter provides the basic background information on the income tax system in India and focuses on the income tax appeal procedures in India.

5.2 Income Tax Assessment Procedures

5.2.1 Central Board of Direct Taxes

The Central Board of Direct Taxes is a statutory authority which administers income tax law in India through the Income Tax Department of India. It is a part of the Department of Revenue in the Ministry of Finance of India. The Central Board of Direct Taxes was

---

[167] Other direct taxes levied in India are gift tax and wealth tax.

[168] In *Yasin v Town Area Committee* (1952) SCR 572, the court held that the fees imposed by the Town Area Committee on persons who sold or purchased vegetables or fruits within local area was illegal. The U.P. Municipality Act only empowered the Town Area Committee to charge fee for the use and occupation of any property vested in or entrusted to the management of the Town Area Committee

[169] See cases where a taxing statute was held to be infringing (i) Article 14, *Kunnathat Mopil Nair v State of Kerala*, AIR 1961 SC 552; (ii) Article 20, *Maqbool Hussein v State of UP*, AIR 1953 SC 325; (iii) Article 21, *Purshotam Govindji Halai v BM Desai, Add. Collector of Bombay*, AIR 1956 SC 20 etc.

established under the Indian Central Boards of Revenue Act 1963.[170] Like the IRBM, the main function of the Central Board of Direct Taxes is to formulate broad policies and to give "orders, instructions and directions" to all officers and persons engaged in the execution of the IITA.[171] In this regard, the Central Board of Direct Taxes also issues rules in connection with the interpretation of income tax law which represent the standpoint of the Central Board of Direct Taxes' interpretation of certain income tax law provisions.

The maximum number of the members of the Central Board of Direct Taxes is seven. Its members are appointed by the Government of India among its officials in the Indian Revenue Service, a premier civil service of India, whose members constitute the top management of Indian Income Tax Department. Currently the Central Board of Direct Taxes has 6 members. Among these 6 members, a Chairman will be appointed to head the Central Board of Direct Taxes.[172]

5.2.2 Assessment Procedures

From the outset, it is highlighted that the administration process and assessment procedures of income tax in India are slightly different from those in Malaysia. Chapter VII of the IITA stipulates the assessment procedures of income tax in India. The income tax

[170] The Central Board of Revenue as the Department apex body charged with the administration of taxes came into existence as a result of the Central Board of Revenue Act, 1924. Initially the Central Board of Revenue was in charge of both direct and indirect taxes. However, when the administration of taxes became too unwieldy for one board to handle, the Central Board of Revenue was split up into two, namely the Central Board of Direct Taxes and Central Board of Excise and Customs with effect from 1 January 1964. This bifurcation was brought about by constitution of these two boards under the Central Boards of Revenue Act 1963. See http://www.incometaxindia.gov.in/CCIT/CBDT.asp.

[171] Section 119(1) of the IITA.

[172] The members are Member (Income Tax), Member (Legislation and Computerisation), Member (Revenue), Member (Personnel & Vigilance), Member (Investigation) and Member (Audit & Judicial).

authorities under the IITA[173] are under the control of the Central Board of Direct Taxes,[174] and they shall exercise the powers and perform the function conferred on or assigned to them by the IITA in accordance with the directions issued by the Central Board of Direct Taxes.[175] Among these income tax authorities,

(a) the Assistant Commissioner of Income-tax;

(b) the Deputy Commissioner of Income-tax;

(c) the Assistant Director of Income- tax;

(d) the Deputy Director of Income-tax; and

(e) the Income-tax Officer,

are the assessing officers under the IITA.[176]

In general section 4 of the IITA provides that the income tax is levied on the total income of a person in a year and the scope of total income of a person is determined according to the provisions in section 5 of the IITA. A taxpayer for income tax purposes is commonly known as an "assessee" in India. Self-assessment system for income tax is being practised in India. Under this system, and pursuant to section 139 of the IITA, an assessee

---

[173] For the purposes of the IITA, section 116 of the IITA lists down the income tax authorities in India:-

(a) the Central Board of Direct Taxes;
(b) the Directors-General of Income-tax or Chief Commissioners of Income-tax;
(c) the Directors of Income-tax or Commissioners of Income-tax or Commissioners of Income-tax (Appeals);
(d) Additional Directors of Income-tax or Additional Commissioners of Income-tax or Additional Commissioners of Income-tax (Appeals);
(e) Joint Directors of Income-tax or Joint Commissioner of Income-tax;
(f) Deputy Directors of Income-tax or Deputy Commissioners of Income-tax or Deputy Commissioners of Income-tax (Appeals);
(g) Assistant Directors of Income-tax or Assistant Commissioners of Income-tax,
(h) Income-tax Officers;
(i) Tax Recovery Officers; and
(j) Inspectors of Income-tax.

[174] Section 118 of the IITA.

[175] Section 120(1) of the IITA.

[176] Section 2(7A) of the IITA.

is required to file a return of his total income every year. After an assessee has filed a return, the Assessing officer may conduct enquiry before a formal assessment is made, by serving on the assessee a notice requiring him to produce such accounts or documents as the Assessing officer may require.[177] If the Assessing officer is satisfied with the particular or information furnished by the assessee in his return, the Assessing officer may assess and levy tax based on the return.[178] However if the Assessing officer considers it necessary or expedient to ensure that the assessee has not understated the income, the Assessing officer may serve on the assessee a notice requiring him either to appear before him or to produce evidence to support the particular stated in his return.[179] After hearing such evidence produced by the assessee and after taking into account all relevant material which the Assessing officer has gathered, he may make an assessment by an order of assessment in writing.[180] An assessment is completed upon an order of assessment is made. Such order of assessment must be made before the expiry of two years from the end of the assessment year in which the income was first assessable.[181]

Where an assessee fails to file a return under section 139 of the IITA or fails to appear or produce evidence in support of his return under section 142 of the IITA or section 143(2) of the IITA, section 144(1) of the IITA empowers the assessing officer to make assessment to the best of his judgment after giving the assessee opportunity of being heard, i.e. the Assessing officer shall serve a notice on the assessee to call upon the assessee to show cause why the assessment should not be made to the best of the Assessing officer's judgment. The "best of his judgment" is not free of limitations and is subject to the scrutiny of the Indian courts. In *State of Kerala v Velukutty*,[182] the Supreme Court held that the authority making a best judgment must make an honest and fair estimate of the income of

[177] Section 142(1) of the IITA.
[178] Section 143(1) of the IITA.
[179] Section 143(2) of the IITA.
[180] Section 143(3) of the IITA.
[181] Section 153(1)(a) of the IITA.
[182] (1966) 60 ITR 239 (SC).

the assessee and it must not be capricious. The opportunity given to the assessee to be heard is essential as the assessment procedures have been held to be quasi-judicial in nature.[183]

If the assessing officer has reason to believe that any chargeable income of an assessee has escaped assessment, he may assess or reassess the chargeable income which has escaped assessment.[184] In this connection, the Indian Supreme Court in *ITO v Lakhmani Mewal Das*,[185] held that the belief of the assessing officer should be based on some "specific, reliable and relevant information" and not vague, indefinite, remote or far fetched information.[186] The IITA further provides that before making the assessment or re-assessment under section 147, the assessing officer must serve on the assessee a notice requiring him to furnish a return of his income and the necessary particulars.[187] In addition, the assessing officer must also record his reasons for issuing the notice under section 148 prior to the issuance of such notice.[188] There are safeguards against such assessment or re-assessment in the IITA; it shall not be made after the expiry of four years from the end of the relevant assessment year, unless it is due to the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under section 142(1) or section 148 or to disclose fully and truly all material facts necessary for his assessment.[189] Section 149 also provides that generally no notice under section 148 shall be issued after expiry of four years to ten years from the end of the relevant assessment year. An order of assessment or re-assessment must be made before the expiry of two

---

[183] See e.g. *Dhakeshwari Cotton Mills Ltd v Commr.*, AIR 1955 SC 65; (1954) 26 ITR 775.
[184] Section 147 of the IITA.
[185] AIR 1976 SC 1753.
[186] See also *ALA Firm v CIT* (1991) 189 ITR 285 and *Phool Chand Bajrang Lal v ITO*, AIR 1993 SC 239.
[187] Section 148(1) of the IITA.
[188] Section 148(2) of the IITA.
[189] Proviso to section of 147 of the IITA.

years from the end of the financial year in which the notice under section 148 was served.[190]

5.2.3 Internal Review of the Assessments Made by the Assessing Officers

The above assessment procedures by the Assessing officer are subject to the review by the higher income tax authority. Firstly section 144A provides that a Deputy Commissioners of Income-tax may, on reference made by an assessing officer, or on application of the assessee, call for and examine the records of any proceeding in which an assessment is pending, and may issue such directions as he deems fit for the guidance of the assessing officer to enable him to complete the assessment and such directions are binding on the assessing officer. The Deputy Commissioner of Income-tax may only issue the directions upon giving the assessee an opportunity being heard if such directions are prejudicial to the assessee. Late Professor MP Jain opined that this kind of control goes against the established notion of a quasi-judicial body should exercise its own independent judgment without any interference from a superior authority.[191] However he further added that by having such control, it brings more advantages in the revenue administration system in India: protection against improper and dishonest conduct of an assessing officers; uniformity of decision in the cases decided by the assessing officers functioning under the control of one superior officer; and the benefit arising out of the wider knowledge and maturer judgment of the superior officer as compared to the assessing officers.[192]

---

[190] Section 153(2) of the IITA.
[191] See M P Jain and S N Jain, Principles of Administrative Law, Volume 1, 6th enlarged edition, p 670.
[192] *Ibid.*

An assessee may submit a case for internal review within the tax department where an appeal to the Deputy Commissioner of Income-tax (Appeals) or Commissioner (Appeal) may be filed pursuant to sections 246 and 246A of the IITA. Such appeal must be filed within 30 days from the date of service of the assessment order.[193] The procedures relating to such internal review before the Deputy Commissioner and the Commissioner are laid down in section 250 of the IITA. At the hearing of an appeal, the Deputy Commissioner or Commissioner must give the right to be heard to the assessee, the assessing officer or their representatives.[194] The procedures are not rigid and the assessee is allowed to rely on grounds of appeal which are not specified in the form of appeal if the Deputy Commissioner or Commissioner is satisfied that the omission is not wilful or unreasonable.[195] The Deputy Commissioner or Commissioner has the power under section 251(1)(a) of the IITA to confirm, reduce, enhance or annual the assessment, or to set aside the assessment and refer the case back to the assessing officer for making a fresh assessment. His decision and the reasons for the decision must be made in writing and communicated to the parties.[196] To avoid delay of the proceedings, section 250(6A) specifies that where it is possible, the Deputy Commissioner or Commissioner shall hear and make his decision within a period of one year from the end of the financial year in which the appeal is filed before him.

5.2.4 Appeal Procedures to the Appellate Tribunal

An assessee who is aggrieved by the order made by the Deputy Commissioner or Commissioner under section 250 of the IITA, may appeal to the Appellate Tribunal

[193] Section 249(2)(c) of the IITA.
[194] Section 250(2) of the IITA.
[195] Section 250(5) of the IITA.
[196] Section 250(6) and (7) of the IITA.

pursuant to section 253(1) within 60 days from the date of service of the such order.[197] A memorandum of cross-objection may be filed by the other party within 30 days from the date of receipt of the notice of appeal.[198]

The Appellate Tribunal is a creation of statute pursuant to the Indian Income Tax (Amendment) Act 1939. It was established as an independent authority disposing the tax appeals under the IITA. It is not an income tax authority under section 116 of the IITA, hence it is not under control of the Central Board of Direct Taxes. Further it is part of the Indian Ministry of Law, as opposed to the Ministry of Finance which the administrative department collecting taxes. This arrangement is believed to be in place so as to enhance the independence of the Appellate Tribunal.[199] Under section 252(1) of the IITA, the Central Government of India may appoint as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by the IITA. The requirements for qualification of a judicial member and an accounting member are stricter as compared to the requirements of the SCIT under the ITA. In this connection, a judicial member shall be a person who has for at least 10 years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade II of that Service or any equivalent or higher post for at least 3 years or who has been an advocate for at least 10 years.[200] On the hand, an accountant member shall be a person who has for at least 10 years been in the practice of accountancy as a chartered accountant under the Indian Chartered Accountants Act 1949, or as a registered accountant under any law formerly in force or partly as a registered accountant and partly as a chartered accountant, or who has been a member of the Indian Income-tax Service, Group A and has held the post of Additional Commissioner of Income-

---

[197] Section 253(3) of the IITA.
[198] Section 253(4) of IITA.
[199] See M P Jain and S N Jain, Principles of Administrative Law, Volume 1, 6th enlarged edition, p 672.
[200] Section 252(2) of the IITA.

tax or any equivalent or higher post for at least 3 years.[201] It is headed by the President who is selected among the judicial members of the Appellate Tribunal.[202] The President may constitute benches among the members of the Appellate Tribunal, and the appeals may be heard by the one of the benches which consists of one judicial member and one accountant member.[203]

All proceedings before the Appellate Tribunal are deemed to be judicial proceedings and the Appellate Tribunal is deemed to be a civil court.[204] In dealing the appeals, the Appellate Tribunal has the powers to regulate its own procedure and the procedure of its benches in all matters arising out of the exercise of its powers of the discharge of its function under the IITA.[205] The parties to the appeal must be given an opportunity of being heard.[206]

To expedite the appeal process, the Appellate Tribunal, where it is possible, may hear and decide an appeal within a period of four years from the end of the financial year in which such appeal is filed.[207] After hearing the parties, the Appellate Tribunal may pass any orders as it thinks fit in the circumstances of the appeal.[208] Where one party is absent at the hearing and the appeal is dismissed by the Appellate Tribunal on merits after hearing the other party, the Appellate Tribunal has the jurisdiction to restore and rehear the appeal.

---

[201] Section 252(2A) of the IITA.
[202] Section 252(3) of the IITA.
[203] Section 255(1) and (2) of the IITA.
[204] Section 255(6) of the IITA provides that:-
"The Appellate Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the Income-tax authorities referred to in section 131, and any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898)."
[205] Section 255(5) of the IITA.
[206] Section 254(1) of the IITA.
[207] Section 254(2A) of the IITA.
[208] Section 254(1) of the IITA.

In *ITO v Murlidhar Sarda & Another*,[209] the assessee who had fallen ill was absent at the hearing before the Appellate Tribunal. The assessee's appeal was then dismissed. Later the assessee made an application before the Appellate Tribunal to request the appeal be restored and reheard. The application was refused on ground that the Appellate Tribunal had no power to do so. On an application under Article 226 of the Indian Constitution, the Calcutta High Court held that the Appellate Tribunal should have all powers to ensure that the opportunity to be heard given to the parties is fair, adequate and proper. Hence it is the inherent power of the Appellate Tribunal in an appropriate case to give a party an opportunity of rehearing after the appeal has been disposed of in the absence of the party.

Where the Appellate Tribunal passes an ex parte order, the Appellate Tribunal may set aside such order decided on merits. In *ITO v Fagoomal Lakshmi Chand,*[210]on an appeal by the income-tax department against an order of the Appellate Assistant Commissioner, the assessee filed a cross-objection against the same. The assessee was absent at the hearing and the Appellate Tribunal disposed of the revenue's appeal and dismissed the memorandum of cross-objection of the assessee. The assessee thereafter filed an application to set aside such order and it was allowed by the Appellate Tribunal. Dissatisfied with such order, the revenue filed a writ petition to quash the order contending that the Appellate Tribunal does not have power to set aside its ex parte order. The Madras High Court held that an appeal before the Appellate Tribunal may be heard ex parte and hence an ex parte order could be made. In accordance with rule 24 of the Income-tax (Appellate Tribunal) Rules 1963, the court further held that the Appellate Tribunal has the power to restore an appeal including a memorandum of cross-objection. In this case as the cross-objection was restored, the Appellate Tribunal had to necessarily

[209] AIR 1974 Cal 272.
[210] (1979) 118 ITR 766.

set aside the ex parte order passed by them in relation to the main appeal filed by the revenue.

Typically the Appellate Tribunal may annul an assessment, to set aside an assessment, to affirm an assessment or to direct the assessing officer to make fresh assessment.[211] In addition, the Appellate Tribunal is given power to amend its order with a view to rectifying any mistake apparent from the record, at any time within four years from the date of such order upon application by the assessing officer or the assessee. In doing so, no amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall be made without giving prior notice and a reasonable opportunity of being heard to the assessee.[212]

Lastly, the Appellate Tribunal possesses an additional power which the SCIT do not have the equivalent: granting of an order to stay tax recovery proceedings pending an appeal before the Appellate Tribunal. This was held in *ITO v M. K. Mohammed Kunchi*[213] where the Indian Supreme Court examined the relevant provisions in the IITA and had come to a conclusion that the statute had to be read as a whole and although the IITA is silent on this, the Appellate Tribunal must possess this power as incidental or ancillary to its appellate jurisdiction to make the exercise of powers vested in it fully effective. In this regard, the Indian Supreme Court said that:-

"There can be no manner of doubt that by the provisions of the Act or the Income-tax Appellate Tribunal Rules 1963 powers have not been expressly conferred upon the Appellate Tribunal to stay proceedings relating to the recovery of penalty or tax due from

---

[211] See M P Jain and S N Jain, Principles of Administrative Law, Volume 1, 6th enlarged edition, p 674.
[212] Section 254(2) of the IITA.
[213] AIR 1969 SC 430.

an assessee... the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction... when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory."[214]

However as a creature of a statute, it was held that the Appellate Tribunal can only decide the dispute between the assessee and the revenue in terms of the provisions of the IITA. Therefore the question of *ultra vires* of a provision of the IITA is out of the scope of its jurisdiction and the Appellate Tribunal cannot make an order on the *ultra vires* of the provisions of the IITA.[215]

5.2.5 Appeals to the Courts

The Appellate Tribunal is the last fact finding authority under the IITA.[216] The order of the Appellate Tribunal is final so far as facts are concerned.[217] However, an assessee or the Commissioner of Income-tax may, within 60 days from the date of service of the Appellate Tribunal's order, require the Appellate Tribunal to refer to the Indian High Court any question of law arising out of such order.[218] The Appellate Tribunal does not have any discretion in this matter but to state a case for the reference of the High Court within 120

---

[214] However the power must be exercised with due care. The court said as follows:-
"It will only be when a strong prima facie case is made out that the tribunal will consider whether to stay the recovery proceedings and on what conditions and the stay will be granted in most deserving and appropriate cases where the tribunal is satisfied that the entire purpose of appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."

[215] *Venkataraman & Co Ltd v State of Madras* AIR 1966 SC 1089.

[216] See http://www.incometaxindia.gov.in/Pamphlets_Split/APPEALS.asp.

[217] See http://www.incometaxindia.gov.in/Pamphlets_Split/APPEALS.asp.

[218] Section 256(1) of the IITA.

days of the receipt of the application by the assessee or the Commissioner of Income-tax.[219] However the Appellate Tribunal may only reject such application on ground that there is no question of law arises pursuant to section 256(2) of the IITA. In such situation, the assessee or the Commissioner of Income-tax may appeal to the High Court against the Appellate Tribunal's refusal to state a case within 6 months from the date of service of such decision. Where the High Court is satisfied that the Appellate Tribunal's refusal is wrong, the High Court may require the Appellate Tribunal to state a case and to refer it to the High Court accordingly.[220] Reference may be made directly to the Indian Supreme Court under section 257 of the IITA if the Appellate Tribunal is of the opinion that it is expedient to do so where there is a conflict in the decisions of the High Courts in respect of any particular question of law. In a reference proceeding, the Indian High Court has limited jurisdiction and its decision is confined to the question of law stated by the Appellate Tribunal.[221] The question of law must be heard by not less than 2 judges of the High Court.[222]

Besides stating a case for the opinion of the High Court under section 256, the assessee or the Commissioner of Income-Tax may also file an appeal to the High Court if the case involves a substantial question of law pursuant to section 260A(1) within 120 days from the date of service of the Appellate Tribunal's order.[223] This is only limited to cases where in the opinion of the High Court, it involves a substantial question of law arising out of the order of the Appellate Tribunal. The memorandum of appeal must clearly state the substantial question of law involved in the case. The High Court will then formulate the substantial question of law and that question will be heard and decided by the High

---

[219] Section 256(1) of the IITA.
[220] Section 256(2) of the IITA.
[221] *Commissioner of Income-tax v Bansi Dhar & Sons* AIR 1968 SC 421.
[222] Section 259 of the IITA.
[223] Section 260A(2) of the IITA.

Court.[224] Similar to the proceeding under section 256, the appeal under section 260A will be heard by the High Court by a bench of not less than 2 judges.[225] The High Court has wide power under section 260A; its jurisdiction is not limited by the issue determined by the Appellate Tribunal.[226]

In addition, the Appellate Tribunal's decision is subject to the review of the Indian High Court where an assessee may file an application to the Indian High Court under Article 226 of the Indian Constitution. Availability of remedy by way of reference to the Indian High Court against the Appellate Tribunal's decision given on merits in appeal is no bar to writ application pursuant to Article 226.[227]

Further appeal against the High Court's decision under section 256 or 260A lies to the Indian Supreme Court.[228] Such appeal can only be filed before the Supreme Court if the High court certifies it to be a fit case for appeal to the Supreme Court. The application before the High Court for certificate of fitness should be filed within 60 days.[229] Where the High Court refuses to grant such a certificate, the assessee may file a Special Leave Petition before the Supreme Court under Article 136 of the Indian Federal Constitution to hear the appeal.[230] The hearing before the Supreme Court is governed by the IITA and provisions in the Indian Code of Civil Procedure 1908 (5 of 1908) relating to appeals to the Supreme Court.[231]

---

[224] Section 260A(3) and (5) of the IITA.
[225] Section 260B of the IITA.
[226] Section 260A(6) of the IITA.
[227] *ITO v Murlidhar Sarda & Another* AIR 1974 Cal 272.
[228] Section 261 of the IITA.
[229] See http://www.incometaxindia.gov.in/Pamphlets_Split/APPEALS.asp.
[230] See http://www.incometaxindia.gov.in/Pamphlets_Split/APPEALS.asp.
[231] Section 262 of the IITA.

As decided in *Venkataraman & Co Ltd v State of Madras*,[232] the Appellate Tribunal cannot decide on the question of *ultra vires* of the provisions of the IITA, hence such question will not be contained in the Appellate Tribunal's order. The High Court can only decide questions of law that arise of such order. Accordingly, the Supreme Court held that the High Court cannot possibly give any decision on the same question and neither the Supreme Court. Nonetheless it can be raised in a writ application to the High Court.

5.3 Settlement Commission

5.3.1 Constitution of the Settlement Commission

Settlement Commission was set up under section 245B of IITA with effective from 1 April 1976 with its headquarters at New Delhi.[233] It has been set up pursuant to recommendations made by Direct Taxes Enquiry Committee which was popularly known as Wanchoo Committee.[234] The objective of setting up the Settlement Commission is to provide a body comprising of persons of integrity and outstanding ability, having special knowledge of and experience in, problems relating to direct taxes and business accounts, for settling across the board, tax liabilities in complicated cases with doubtful benefit to revenue avoiding endless and prolonged litigation and consequential strain on investigational resources of Indian Income-tax Department.[235] Simply put, it was established with a view to compound cases of tax evasion rather than to proceed by way

[232] AIR 1966 SC 1089.
[233] See http://www.lexsite.com/services/network/settlement/about.shtml.
[234] See http://www.lexsite.com/services/network/settlement/about.shtml.
[235] See http://www.lexsite.com/services/network/settlement/about.shtml.

of prosecution and conviction of tax evaders.[236] This was explained by the Karnataka High Court in *N. Krishnan v Settlement Commission*:-[237]

"... the Settlement Commission was to be constituted for settling the complicated claims of chronic tax evaders as an extraordinary measure, for giving an opportunity to such persons to make true confession and to have the matters settled once for all, and for earn peace of mind., it is a forum for self surrender..."

It consists of a Chairman, Vice-Chairmen and other members appointed by the Central Government of India.[238] The jurisdiction, powers and authority of the Commission are exercised by its Benches which will be presided over by the Chairman or a Vice-Chairman and 2 other members.[239] The Bench for which the Chairman is the presiding officer is the Principal Bench and the other Benches are known as the Additional Benches.[240] In accordance with section 245BA(5A), the Chairman has the power to constitute a Special Bench consisting of more than 3 members for the disposal of any particular case. The cases may be transferred from one Bench to another on the application of the assessee or the Chief Commissioner of Income-Tax or the Commissioner of Income Tax or on the Chairman's own motion.[241]

5.3.2 Applications made to and Procedures before the Settlement Commission

---

[236] See M P Jain and S N Jain, Principles of Administrative Law, Volume 1, 6th enlarged edition, p 678.
[237] 1989 Tax LR 1152.
[238] Section 245B(2) of the IITA.
[239] Section 245BA(1) and (2) of the IITA.
[240] Section 245BA(3) of the IITA. The Delhi Bench is known as the Principal Bench. The other Benches are functioning at Mumbai, Calcutta and Chennai and these are known as the Additional Benches. Four Benches of the Commission are functioning at the date of this paper. See http://www.lexsite.com/services/network/settlement/about.shtml.
[241] Section 245BC of the IITA.

Section 245F(7) of the IITA allows the Settlement Commission to regulate its own procedure and procedure of its Benches in all matters arising out of exercise of its powers or discharge of its functions under the IITA. In this connection, the Indian Income-tax Settlement Commission (Procedure) Rules 1997 were passed.[242] These Rules lay down the procedure for filing the settlement applications before the Settlement Commission. The Settlement Commission has vast powers under the IITA. In addition to the express provisions relating to the settlement, it also has all powers which are vested in the income-tax authority under the IITA.[243] Hence it is not surprising that the IITA specifically provides that the proceedings before the Settlement Commission are deemed to be judicial proceedings.[244]

Pursuant to section 245C(1) of the IITA, an assessee may, at any stage of a case relating to him, make an application containing a full and true disclosure of his income which has not been disclosed before the assessing officer, the manner in which such income has been derived, the additional amount of income tax payable on such income, to the Settlement Commission to have the case settled.[245] Once the application has been made, the assessee is not allowed to withdraw the application.[246]

Upon receipt of such application, under section 245D(1) of the IITA, the Settlement Commission will require the Commissioner of Income-Tax to submit a report within 45 days from the date of request of the Settlement Commission and on the basis of the

---

[242] It replaced the Indian Income-tax Settlement Commission (Procedure) Rules 1976.
[243] Section 245F(1) of the IITA.
[244] Section 254L of the IITA provides that:-
"Any proceeding under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, 1860 (45 of 1860)."
[245] It is subject to the following:-
(a) The assessee has furnished the return of income which he is or was required to furnish under any of the provisions of the IITA; and
(b) The additional amount of income-tax payable on the income disclosed in the application exceeds one hundred thousand rupees.
[246] Section 254C(3) of the IITA.

materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved, the Settlement Commission may allow the application to be proceeded with or reject the application. The assessee must be heard before the Settlement Commission decides to reject his application.

Where the application is allowed to proceed, the assessee must pay the additional amount of income tax payable on the income disclosed in the application within 35 days of the date of receipt of the Settlement Commission's order to allow the application, and shall furnish proof of such payment to the Settlement Commission.[247] The Settlement Commission will call for the relevant records from the Commissioner of Income-Tax. If the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it has the power under section 245D(3) to direct the Commissioner of Income-Tax to make further enquiry or investigation and furnish a report on the matters covered by the application. Pending any proceeding before it, the Settlement Commission has the ancillary power to attach provisionally any property of the assessee for the purpose of protecting the interest of the revenue.[248] Such attachment is valid for 6 months from the date of the order and it may be extended for a total period of extension of less than 2 years.[249]

After examination of the records and the reports of the Commissioner of Income-Tax and other relevant evidence, and after hearing the assessee and the Commissioner of Income-Tax, the Settlement Commission may pass an order for the matters covered and not covered by the application in accordance with section 245D(4) of the IITA. Such order of settlement is conclusive save for cases of fraud and misrepresentation of facts where the

[247] Section 245D(2A) of the IITA.
[248] Section 245DD(1) of the IITA.
[249] Section 245DD(2) of the IITA.

settlement shall be void.[250] In *I.T. Commr., Calcutta v B.N. Bhattacharjee*,[251] the court explained that the Settlement Commission's order is conclusive both on questions of fact and law.

Where the settlement is void for fraud or misrepresentation of facts, the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and such proceedings must be completed before the expiry of 2 years from the end of the financial year in which the settlement became void.[252]

Among the special powers conferred to the Settlement Commission under the IITA, the Settlement Commission is empowered by section 245E to reopen completed proceedings under the IITA which are related to the matters in the application if it thinks fit that it is necessary or expedient to do so, on one condition that no proceeding shall be reopened if the period between the end of the assessment year to which such a proceeding relates and the date of application for settlement exceeds 9 years. In addition, where the Settlement Commission is satisfied that the assessee has given co-operation during the proceedings before the Settlement Commission and has made full and true disclosure of his income, the Settlement Commission may grant immunity to the assessee from prosecution for any offence under the IITA or the Indian Penal Code or any other legislation and from the imposition f an penalty under the IITA, unless the prosecution proceedings have been instituted before the date of receipt of the settlement application.[253] On the other hand, where the assessee has not co-operated with the Settlement Commission in the settlement proceedings, the Settlement Commission has the discretion

---

[250] Sections 245-I and 245D(6) of the IITA.
[251] AIR 1979 SC 1724.
[252] Section 245D(7) of the IITA.
[253] Section 245H(1) of the IITA.

to send the case back to the assessing officer and the appeal will proceed as if no settlement application has been made.[254]

The decisions of the Settlement Commission are subject to the review of the superior courts. In *I.T. Commr., Calcutta v B.N. Bhattacharjee,*[255] the Indian Supreme Court were satisfied that the Settlement Commission is a tribunal and held that its decision are appealable to the Indian Supreme Court under Article 136 of the Indian Constitution.[256] Karnataka High Court in *N. Krishnan v Settlement Commission*[257] further ruled that the Settlement Commission is subject to the writ jurisdiction of the High Court under Article 226 and 227 of the Indian Constitution.

"... the power of judicial review of administrative action including those of courts and tribunals conferred on the High Courts under Articles 226 and 227, constitutes one of the basis strictures of the Constitution. Therefore, irrespective of the nature of an administrative tribunal or the width of its power or a provision in the relevant provision of law that its decision is final and conclusive, the High Court's power of judicial review remains unaffected, though the scope of judicial review might vary. That power can be curtailed or varied only by a constitutional provision ... the Settlement Commission is ... a Tribunal ... the petitioner is entitled to seek judicial review of the order of the Settlement Commission in a petition under Articles 226 and 227 of the Constitution of India."[258]

---

[254] Section 245HA(1) of the IITA.
[255] AIR 1979 SC 1724.
[256] The court said that: - *"... the amplitude of Article 136 is wide enough t bring within its jurisdiction orders passed by the Settlement Commission..."*
[257] 1989 Tax LR 1152.
[258] On the scope of interference under Article 226 against a decision of the Settlement Commission, the High Court said as follows:-
"... a decision of Settlement Commission could be interfered with only:
(i) if grave procedural defect such as violation of the mandatory procedural requirements of the provisions in the Chapter XIX-A and/or violation of rules of natural justice is made out;
(ii) If it is found that there is no nexus between the reasons given and the decision taken by the Settlement Commission.

5.4 Conclusion

In *pari materia* with section 103 of the ITA, section 265 of the IITA provides that notwithstanding that a reference has been made to the Indian High Court or the Indian Supreme Court or an appeal has been preferred to the Indian Supreme Court, tax shall be payable in accordance with the assessment in the case. In other words, the Indian income tax legislation also upholds the notion of "pay first, appeal later". However the taxpayers or assessees in India enjoy greater protection of their rights under the IITA than those in Malaysia though by and large, the appeal procedures under the IITA are similar to those under the ITA. Several layers of review or appeal procedures/mechanisms safeguard the rights of the assessees against the misuse of powers or discretion of the authorities under the IITA. From the internal review within the department to the appeal to Indian Supreme Court, the assessees would be given opportunities to be heard and to defend themselves in the appeals. This enhances transparency and accountability in the Indian tax administration system.

(iii) This Court cannot interfere either with an error of fact or error of law, alleged to have committed by the Settlement Commission."

Chapter 6. Proposals for Reforms and Conclusion

6.1 Review of the Income Tax Act 1967

The income tax administration system in Malaysia is not flawless. The ITA is modeled on English income tax law. Its predecessor, the Income Tax Ordinance 1947 was introduced in the Federation of Malaya by the British. The Income Tax Ordinance was based on the Model Colonial Territories Income Tax Ordinance 1922 which was specifically designed for the British colonies. The income tax law in the United Kingdom has undergone many rounds of reform. Many antiquated income tax provisions in the United Kingdom have been removed or modified in view of development of law and social economic condition of the society in the United Kingdom. On the other hand, the income tax law in Malaysia since independence remains static and there have not been substantial changes to the ITA.

There are weaknesses in the law and judicial administration system and there exists circumstances in which the taxpayers in Malaysia are vulnerable to abuse or are left with no resorts. Few of these circumstances are stated in the following. First and foremost, the ultimate guardian of the rights of the taxpayers under the ITA i.e. the SCIT are officers of the Income Tax Appeal Management Division of the Treasury of Malaysia. Their independence in disposing appeals is tainted by the fact that there could be an inherent danger of abuse where the SCIT may follow directions given by the Ministry of Finance bearing in mind that revenue collection is the main objective of the Ministry of Finance.

To date, there are 6 SCIT[259] and they form only one panel which sits to hear and dispose of appeals. It leads to another problem in the Malaysian income tax judicial administration. With the increasing number of appeals filed pursuant to section 99 of the ITA[260] and only one panel of the SCIT, cases which are registered with the SCIT in 2010 will only be heard in 2012. Bearing in mind that in these cases, the notice of appeal i.e. Form Q has been filed by the taxpayers in 2008 or 2009,[261] it takes almost 3 years for the SCIT to redress the grievance of the taxpayers. Justice delayed is justice denied. The delay in the judicial system does not promote the protection of the rights of the taxpayers in Malaysia. While the taxpayers have done every effort to protect their rights by filing an appeal within 30 days from the date of the assessment or additional assessment, their appeals will only be disposed after 3 years. At the same time, the taxpayers are required to pay the tax. Hence an early disposal of the appeal is very important to the taxpayers for finality of the matter and to claim refund of the tax paid.

Unlike the Appellate Tribunal in India, the SCIT do not have the powers to stay the recovery proceeding while pending the hearing of the appeals before the SCIT. Hence civil actions to recover taxes allegedly due may be initiated against the taxpayers and by virtue of section 106 of the ITA, it is very likely a summary judgment can be obtained against the taxpayers. These could effectively render the decision of the SCIT nugatory when the appeals of the taxpayers are allowed by the SCIT as taxes have been paid to the IRBM. Refund will be denied until the decision of Court of Appeal has been delivered. The taxpayers' position is further deteriorated if the payment of taxes would affect badly cash

[259] They are Dato' Haji Zaini Bin Hj. Abd. Rahman, Othman bin Abdullah, Mohd Nor bin Lamsah, Dato' Abu Hassan bin Md Akhir, Mohamed Saman Mohd Ramli and Datuk Haji Sahari bin Haji Mahadi.

[260] See Appendix 1 and 2 of this paper.

[261] Section 102 of the ITA requires the DGIR to forward an appeal by the taxpayer to the SCIT within 24 months from the date of receipt of the notice of appeal from the taxpayer.

flow of the taxpayers, bearing in mind that inability to pay debts is a ground for winding up under the Companies Act 1965.[262]

Delay in disposing the appeals by the taxpayers does not only happen in the process of scheduling the hearing before the SCIT. The DGIR may take more than 12 months from the date of receipt of the notice of appeal of the taxpayers, to forward the appeal to the SCIT under section 102(1) of the ITA. In an unreported case of *Sri Binaraya Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*,[263] the SCIT took for than to forward without any extension of time granted under section 101 of the ITA. The SCIT had disregarded the complaint by the taxpayer and did not consider validity of such act of the DGIR which was obviously *ultra vires* the provisions of the ITA. The repercussion of such *ultra vires* act has been ignored and has been taken as procedural irregularity.

6.2 Lessons to be Learned from Foreign Model and Reform Proposals

A reform committee should be established to review the income tax administration system and to address the particular issues stated in Chapter 6.1. Foreign models could be looked into and detailed research could be carried out to study how similar issues have been resolved in foreign jurisdictions and if the solutions could be adopted in Malaysia taking into account different cultural backgrounds and economic condition in these jurisdictions. For example, the Indian income tax judicial administration model could be studied. The IITA provides for comprehensive appeal procedures and right protection system. Firstly, in relation to the independence of the SCIT in disposing appeals of the taxpayers, the equivalent in India i.e. the Appellate Tribunal is part of the Indian Ministry of Law, as

[262] Section 218(1)(e) of the Companies Act 1965.
[263] Appeal No. PKCP (R) 46/2007.

opposed to the Ministry of Finance. Therefore in order to eliminate the possibility or the doubt that the decision of the Ministry of Finance will affect the impartiality of the SCIT, the SCIT should not be placed under the supervision of the Ministry of Finance. However there is no Ministry of Law in Malaysia. The only alternative is to include the SCIT as part of judiciary in Malaysia to uphold the notion of judiciary independence.

The IITA expressly provides that the President of the Appellate Tribunal may constitute benches to hear the appeals of the taxpayers.[264] As at the date of this paper, there are 27 benches of the Appellate Tribunal in India.[265] In this regard, the ITA is silent as to the number of benches or panels of the SCIT which can be constituted to hear the appeals. Nonetheless by virtue of paragraphs 1(1) and 1(3) of Schedule 5 to the ITA, more than one panel comprises of 3 SCIT could be constituted to hear the appeals concurrently at any one time.[266] Hence in order to overcome the issues of backlog cases pending for determination of the SCIT and the delay in hearing, more SCIT should be appointed and more than one panel could be formed to hear the appeals concurrently. The provisions in the ITA should be amended to expressly grant the power to constitute more panels or benches to the Chairman of the SCIT.

Further to mitigate the possibility that there is long delay in disposing an appeal, a time limit should be set for the determination of an appeal by the SCIT. It is indeed provided under section 254(2A) of the IITA which sets a limit of 4 years by which an appeal should be disposed off where it is possible. Thorough study must be conducted in determining the

---

[264] Section 255(1) and (2) of the IITA.

[265] These are Jabalpur, Allahabad, Lucknow, Amritsar, Jodhpur, Jaipur, Chandigarh, Visakhapatnam, Hyderabad, Indore, Rajkot, Ahmedabad, Ranchi, Guwahati, Cuttack, Patna, Kolkata, Cochin, Bangalore, Chennai, Bilaspur, Agra, Delhi, Panaji, Pune, Nagpur and Mumbai. See http://itat.nic.in/.

[266] Paragraphs 1(1) and 1(3) of Schedule 5 to the ITA provide that:

"(1) *Every appeal shall be heard by three Special Commissioners, at least one of whom shall be a person with judicial or other legal experience within the meaning of subsection 98(3)…*

(3) *Two or more hearing of appeals may be heard concurrently at any one time...*"

time limit which is appropriate or suitable in Malaysia, and not to follow the Indian model blindly by prescribing the 4 year-limit. An amendment to the ITA is recommended:-

"In every appeal, the Special Commissioners, where it is possible, may hear and decide such appeal within a period of [...] years from the end of the financial year in which such appeal is forwarded to the Special Commissioners under sub-section (1) of section 102."

In light of development of public law in India, the judiciary in India has been protective of fundamental rights including ones of taxpayers. Although the IITA does not expressly provide for these, the Indian Supreme Court had yet held that the Appellate Tribunal possesses the power to grant an order to stay tax recovery proceedings pending an appeal before the Appellate Tribunal[267] and the Calcutta High Court held that the Appellate Tribunal has the inherent power to restore and rehear an appeal after an appeal has been dismissed in absence of the taxpayers.[268] As the concept of public law is not at the back of the taxpayers' minds, these have not been raised or discussed in decided revenue cases in Malaysia. In absence of judicial activism or creativity in Malaysia, the ITA should be amended to give the SCIT (i) the power to stay the recovery proceeding while pending the hearing of the appeals before the SCIT, and (ii) the power to restore and rehear an appeal if an appeal has been dismissed in absence of the taxpayers.

Besides filing an application to state a case for the opinion of the High Court, the IITA allows an assessee or the Commissioner of Income-Tax to file an appeal against the Appellate Tribunal's decision to the High Court if the case involves a substantial question of law.[269] Distinguished from a reference proceeding, the High Court has wide power and

---

[267] *ITO v M. K. Mohammed Kunchi* AIR 1969 SC 430.
[268] *ITO v Murlidhar Sarda & Another* AIR 1974 Cal 272.
[269] Section 260A(2) of the IITA.

its jurisdiction is not limited by the issue determined by the Appellate Tribunal.[270] This eliminates a situation where the Appellate Tribunal states the wrong questions of law in the case stated for the opinion of the High Court and the High Court is bound to answer those questions. Hence section 260A of the IITA could be adopted in Malaysia and be incorporated in the ITA.[271]

In addition, the IITA permits the Appellate Tribunal to make a reference directly to the Indian Supreme Court if the Appellate Tribunal is of the opinion that it is expedient to do so where there is a conflict in the decisions of the High Courts in respect of any particular question of law.[272] This is particularly relevant in Malaysian context where the High Courts in Malaysia too deliver conflicting decisions especially in areas which are fact sensitive, for instance, deductibility of an expenses or whether an expense or income is revenue or capital in nature. As finality lies in the decision of the Court of Appeal, the SCIT too should

---

[270] Section 260A(6) of the IITA.

[271] Section 260A of the IITA reads as follows:-

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be a filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner.

(c) In the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which - (a) Has not been determined by the Appellate Tribunal : or

(b) Has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1)

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

[272] Section 257 of the IITA.

be allowed to state a case for the opinion of the Court of Appeal in certain cases. In this connection, an amendment to the ITA is recommended:-

"If, on an application made pursuant to paragraph 34 by either party to proceedings before the Special Commissioners against a deciding order made in those proceedings, the Special Commissioners are of the opinion that, on account of a conflict in the decisions of the High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to the Court of Appeal, the Special Commissioners may state a case for the opinion of the Court of Appeal."

Lastly, it is noted that the review of the assessment against which an appeal has been filed by a taxpayer under section 99 of the ITA, by the DGIR before forwarding an appeal to the SCIT under section 102 of the ITA[273] could serve as a mechanism for internal review of the income tax assessment officers' decisions. This is similar to the proceedings under the IITA where an assessee may submit a case for internal review within the tax department pursuant to sections 246 and 246A of the IITA. Having an additional level of review within the IRBM could encourage the income tax assessment officers to act more carefully and to apply their minds to different sets of circumstances and not to fetter their discretion. However under section 246 and 246A of the IITA, it is a proper appeal to the Deputy Commissioner of Income-tax (Appeals) or Commissioner (Appeal) to adjudicate the validity of an assessment whereby the procedures laid down in the IITA are similar to those before the SCIT in Malaysia.[274] A full blown appeal process will be carried out. On the other hand, the internal review under section 101 of the ITA is structured to be merely a review of the case before the appeal is being heard by the SCIT. The appeals are filed and intended to be heard by the SCIT, hence the procedures under section 101 are more of a 'filter' to

[273] Section 101 of the ITA.
[274] Section 250 of the IITA.

evaluate the validity of an appeal filed to the SCIT and is never being emphasizes as another level protection of the rights of the taxpayers. In essence, there is no avenue of appeal against the DGIR's decision made pursuant to the appeal as failing to resolve the issue, the DGIR will just simply forward the appeal for the determination of the SCIT. This leads to the problem where the DGIR may delay in forwarding the appeal to the SCIT under section 102(1) of the ITA and the adverse effect of such delay is ignored as it is regarded as procedural irregularity. Therefore the provisions in the ITA relating to the review by the DGIR could be amended to incorporate the following points:-

(a) separate appeal avenue for the taxpayers;

(b) detailed appeal procedures before the DGIR; and

(c) appeal to the SCIT against the DGIR's decision made pursuant to the review.

6.3 Conclusion

Judicial experience in foreign jurisdiction is important in assisting to improve the income tax judicial administration system in Malaysia. Lack of judicial activism and creativity in Malaysia is the main reason why the income tax law has not undergone much development as compared to other Commonwealth jurisdictions including India. The taxpayers in Malaysia are social conditioned in believing that income tax law is private law and do not associate their rights under the ITA with the state responsibilities in light of constitutional and administrative law. Reforms of income tax law and administration system are urged to get rid of antiquated provisions or practices which may lead to abuse of fundamental rights of the taxpayers in Malaysia.

Table of Cases

1. A.B.C. v The Comptroller of Income Tax, Singapore (1959) 25 MLJ 162
2. ACC v Comptroller of Income Tax (2009) MSTC 7865
3. ALA Firm v CIT (1991) 189 ITR 285
4. Alam Maritim (M) Sdn Bhd v Lembaga Hasil Dalam Negeri, Permohonan Semakan Kehakiman No. R1-22-148-2007
5. Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585
6. Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29
7. Arumugam Pillai v Director General of Inland Revenue [1981] 1 MLJ 171
8. Association of Bank Officers v Malayan Commercial Banks [1990] 3 MLJ 228
9. Bandar Utama City Corp Sdn Bhd v Director General of Inland Revenue and Another Action (1999) MSTC 3725
10. Barclays Bank v Cole (1967) 2 QB 738
11. BN v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3828
12. Board of Trustees of Sabah Foundation v DGIR (2002) MSTC 3894
13. Boyce v Paddington Borough Council [1903] 1 Ch 109
14. Central Coldstorage Kuching Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2010] MLJU 736
15. Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473
16. Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235
17. Commissioner of Income-tax v Bansi Dhar & Sons AIR 1968 SC 421
18. Commissioner of Income-tax, Central and United Provinces v Laxminarain Badridas [1937] 5 ITR 170 (PC)
19. Connaught Housing Development Sdn Bhd v Kerajaan Malaysia [2003] 8 CLJ 144
20. Council of Civil Service Union & Ors v. Minister for Civil Service [1984] 3 All ER 935
21. Datuk Syed Kechik v. Government of Malaysia [1979] 2 MLJ 101
22. Dhakeshwari Cotton Mills Ltd v Commr., AIR 1955 SC 65; (1954) 26 ITR 775
23. Director General of Inland Revenue v Ee Sim Sai [1977] 2 MLJ 32
24. Director General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd [1085] 2 MLJ 322
25. Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248

26. E v Comptroller general of Inland Revenue [1970] 2 MLJ 117
27. Edward v Bairstow 36 TC 207
28. Enesty Sdn Bhd v KPHDN [1997] 5 MLJ 104
29. Enesty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2003] 3 CLJ 10
30. EPM Inc v Ketua Pengarah Hasil Dalam Negeri (2001) MSTC 3,306
31. Frederick Lack Ltd v Doggett 46 TC 524
32. Goh Eng Hwa v Ketua Pengarah Lembaga Hasil Dalam Negeri & Satu Lagi [2008] 8 CLJ 777
33. Gouriet v Union of Post Office Workers and Others [1977] 3 All ER 70; [1978] AC 435
34. Government of Malaysia v Dato' Mahindar Singh [1996] 5 MLJ 626 (HC)
35. Government of Malaysia v Gan Chuan Lian and Another Action [1992] 1 MLJ 449
36. Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185
37. Government of the Federation of Malaysia v Lee Tain Tshung [1992] 1 MLJ 629
38. Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12
39. Government of Malaysia v Ng Song Choon [1975] 1 MLJ 131
40. Government of Malaysia v Preston Corporation (M) Sdn Bhd [1982] 1 MLJ 293
41. Inland Revenue Commissioners v L.B. (Holdings) Ltd (In Liquidation) (1946) 28 TC 34
42. Inland Revenue Commissioners v National Federation of Self Employed & Small Business Ltd [1982] AC 617
43. I.T. Commr., Calcutta v B.N. Bhattacharjee AIR 1979 SC 1724
44. ITO v Fagoomal Lakshmi Chand (1979) 118 ITR 766
45. ITO v Lakhmani Mewal Das AIR 1976 SC 1753
46. ITO v M. K. Mohammed Kunchi AIR 1969 SC 430
47. ITO v Murlidhar Sarda & Another AIR 1974 Cal 272
48. Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119
49. Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 AMR 1477, [1995] 2 MLJ 119
50. Kerajaan Malaysia v Kemayan Bina Sdn Bhd [2007] 1 AMR 120
51. Kerajaan Malaysia v Sun City Development Sdn Bhd [2007] 1 AMR 589
52. Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co [1992] 2 MLJ 708
53. Ketua Pengarah Hasil Dalam Negeri v NV Alliance Sdn Bhd, High Court Civil Suit No. R1-14-04-2009
54. Ketua Pengarah Hasil Dalam Negeri v Pan Century Edible Oils Sdn Bhd (2002) MSTC 3,967

55. Ketua Pengarah Jabatan Hasil Dalam Negeri v Rheem (Far East) Pte Ltd [1998] MLJU 402
56. Ketua Pengarah Hasil Dalam Negeri v Rheem (Far East) Pte Ltd [1998] 2 CLJ Supp 351
57. Korea Development Corporation v Government of Malaysia [1985] 1 CLJ 178
58. Kunnathat Mopil Nair v State of Kerala, AIR 1961 SC 552
59. Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue [1986] 2 MLJ 161
60. Lim Oh & Ors v Allen & Gledhill [2001] 3 CLJ 233
61. Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1992] 2 NZLR 1
62. Lower Perak Housing Cooperative Society v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713
63. Magnum Finance Berhad v Tan Ah Poi & Anor [1997] 4 CLJ Supp 44
64. Malayan United Industries Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2005] 6 MLJ 259
65. Mamor Sdn Bhd v DGIR [1981] 1 MLJ 117
66. Maqbool Hussein v State of UP, AIR 1953 SC 325
67. MAS Golden Boutique Sdn Bhd v Md Zain Abu [1999] 3 CLJ 610
68. M & W Zander (M) Sdn Bhd v Director General of Inland Revenue [2005] 6 CLJ 336
69. Ngee Tai Shipping Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2008) MSTC 4308
70. N. Krishnan v Settlement Commission 1989 Tax LR 1152
71. NTS Arumugam Pillai v Director General of Inland Revenue [1977] 2 MLJ 63
72. NTS Arumugam Pillai v Government of Malaysia [1976] 2 MLJ 72
73. NVA Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3897
74. O'Reilly v Mackman [1983] 2 AC 237
75. Paramount (M) (1963) Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan (2002) MSTC 3,908
76. Phool Chand Bajrang Lal v ITO, AIR 1993 SC 239
77. PJTV Densen (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136
78. PSSSB v Ketua Pengarah Hasil Dalam Negeri (2010) MSTC 574
79. Purshotam Govindji Halai v BM Desai, Add. Collector of Bombay, AIR 1956 SC 20
80. QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164

81. Raja Segaran v Bar Council [2004] 1 MLJ 34
82. Regina v Special Commissioners (ex parte Martin) 48 TC 1
83. Sabah Berjaya Sdn Bhd v Director General of Inland Revenue Department [1996] 5 MLJ 366
84. Shaharuddin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor [2004] 4 CLJ 775
85. State of Kerala v Velukutty (1966) 60 ITR 239 (SC)
86. Subramaniam Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Ors [2003] 6 CLJ 175
87. Sugumar Balakrishnan v Chief Minister of the State of Sabah & Anor [1989] 1 MLJ 233
88. Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163
89. Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2009] 1 MLJ 555
90. Teh Guan Teik v Inspector General of Police & Anor [1998] 3 CLJ 153
91. The King v The Deputy Federal Commissioner of Taxation for South Australia; Ex Parte Hooper [1926] 37 CLR 368
92. UHG v Director General of Inland Revenue [1974] 2 MLJ 33.
93. Venkataraman & Co Ltd v State of Madras AIR 1966 SC 1089
94. Yasin v Town Area Committee (1952) SCR 572

Table of Statutes

1. Federal Constitution
2. Inland Revenue Board Act 1995
3. Income Tax Act 1967
4. Petroleum (Income Tax) Act 1967
5. Real Property Gains Tax Act 1976
6. Promotion of Investments Act 1986
7. Stamp Act 1949
8. Labuan Offshore Business Activity Tax Act 1990
9. Judges' Remuneration Act 1971
10. Court of Judicature Act 1964
11. Rules of the High Court 1980
12. English Supreme Court Rules 1977
13. Limitation Act 1953
14. Indian Income Tax Act 1961
15. Indian Constitution
16. Indian Central Boards of Revenue Act 1963
17. Indian Income Tax (Amendment) Act 1939
18. Indian Chartered Accountants Act 1949
19. Income-tax (Appellate Tribunal) Rules 1963
20. Indian Income-tax Settlement Commission (Procedure) Rules 1997
21. Indian Penal Code
22. Income Tax Ordinance 1947
23. Model Colonial Territories Income Tax Ordinance 1922
24. Companies Act 1965

Bibliography

1. Choong, Kwai Fatt, "Appeal Procedures under Malaysia's Self Assessment Regime", [2004] 6 *Current Law Journal Supplemental* i – xi.
2. Choong, Kwai Fatt, "Fraud, Wilful Default and Negligence", [2004] 5 *Current Law Journal Supplemental* liii – lix.
3. Choong, Kwai Fatt, "The New Penalty Regime for Tax Understatement", [2001] 5 *Current Law Journal Supplemental* i – vii.
4. Choong, Kwai Fatt, "The Rule of Interpretation of Tax Statutes – A Malaysian Perspective", [2002] 4 *Malayan Law Journal* clxxxiii – cxcii.
5. Davidson, W. S. W., "Recovery of Taxes – The Authorities Enforcement Strategy", *Malaysian Institute of Taxation Seminar: Tax Cases and Critical Issues*, (Kuala Lumpur, 21 May 2006).
6. Durga Das Basu and A. K. Nandi, *Administrative Law*, (Calcutta: Kamal Law House, 1998).
7. K.D. Gaur, *Tax Offences, Black Money and the Law,* (New Delhi: Deep & Deep Publications, 1987).
8. Lee, Seng Huat, "Tax Appeals", [1986] 1 *Malayan Law Journal* cxix – cxxiv.
9. LexisNexis, *Halsbury's Laws of Malaysia Volume 19, 2007 Reissue*, (Kuala Lumpur: LexisNexis, 2007).
10. Mokhtar B. Hj. Sidin, "Tax System and Laws of Malaysia", [1982] 1 *Malayan Law Journal* lv – lxvii.
11. M P Jain and S N Jain, *Principles of Administrative Law*, Volume 1, 6th enlarged edition, (New Delhi: Wadhwa and Company Nagpur, 2007).
12. M P Jain and S N Jain, *Principles of Administrative Law*, Volume 2, 6th enlarged edition, (New Delhi: Wadhwa and Company Nagpur, 2007).
13. Teo, Keong Sood, "Control of the Director General Discretionary Power under s 140 of the Income Tax Act 1967", [1982] 2 *Malayan Law Journal* liii – lix.
14. Wan Azlan Ahmad and Mohsin Hingun, "Income Taxation in England and Malaysia – The Historical Origins", [1994] 2 *Current Law Journal* i – xviii.
15. Wong, Kim Fatt, "Stay of Execution Pending Appeal in Civil Litigation", [1999] 1 *Malayan Law Journal* i – xl.

Appendix 1

Appeals Disposed

Jumlah Rayuan yang Diselesaikan Mulai Tahun 1968 - 2009

Tahun *Year*	Baki Dibawa Ke Hadapan *Brought Forward*	Kes Didaftar *Registered*	Kes Diselesaikan *Disposed Of*	Baki *Balance C/F*
1968	-	43	18	25
1969	25	41	44	22
1970	22	39	38	23
1971	23	19	33	9
1972	9	38	27	20
1973	20	15	29	6
1974	6	12	9	9
1975	9	18	17	10
1976	10	22	13	19
1977	19	18	16	21

1978	21	19	24	16
1979	16	15	18	13
1980	13	23	10	26
1981	26	26	26	26
1982	26	19	27	18
1983	18	16	13	21
1984	21	3	17	7
1985	7	27	11	23
1986	23	24	16	31
1987	31	27	17	41
1988	41	33	22	52
1989	52	34	13	73
1990	73	14	13	74
1991	74	30	20	84

1992	84	7	16	75
1993	75	18	17	76
1994	76	15	62	29
1995	29	38	45	22
1996	22	29	29	22
1997	22	26	43	5
1998	5	25	23	7
1999	7	100	49	58
2000	58	13	51	20
2001	20	21	13	28
2002	28	25	28	25
2003	25	37	29	33
2004	33	42	30	45
2005	45	32	21	56

2006	56	60	25	91
2007	91	58	47	102
2008	102	57	57	102
2009	102	74	42	134

Source:
http://www.treasury.gov.my/index.php?/en/20080713505/InfoPerhubungan/PKCP/jumlah-rayuan-diselesaikan (as at 12 March 2011)

Appendix 2

Statistic Of Result Of Appeals

Statistik Keputusan Rayuan Cukai Pendapatan Mulai Tahun 1968 - 2009

Tahun *Year*	Diselesaikan *Disposed*	Dibenarkan *Allowed*	Ditolak *Dismissed*	Ditarik Balik *Withdrawn*	Selesai Dengan Persetujuan *Settled by Agreement*
1968	18	1	6	10	1
1969	44	2	16	21	5
1970	38	4	15	16	3
1971	33	11	10	12	-
1972	27	11	8	6	2
1973	29	22	5	2	-
1974	9	1	4	1	-
1975	17	3	7	7	-
1976	13	2	7	4	-
1977	16	6	4	5	1
1978	24	10	7	7	-
1979	18	3	5	7	3
1980	10	1	5	4	-
1981	26	4	7	15	-

1982	27	7	10	10	-
1983	13	3	4	5	1
1984	17	4	11	2	-
1985	11	2	2	7	-
1986	16	5	6	3	2
1987	17	5	10	2	-
1988	22	6	11	4	1
1989	13	6	3	4	-
1990	13	2	3	7	1
1991	20	3	8	7	2
1992	16	5	7	4	-
1993	17	5	11	1	-
1994	62	9	39	11	3
1995	45	7	26	10	2
1996	29	6	16	6	1
1997	43	5	18	17	3
1998	24	4	12	6	2
1999	49	4	21	15	9
2000	51	12	10	11	18
2001	13	1	6	3	3

2002	28	7	9	3	9
2003	29	8	11	11	7
2004	30	9	11	3	7
2005	21	4	7	8	2
2006	25	6	8	5	6
2007	47	16	16	7	8
2008	57	9	18	13	17
2009	42	12	14	8	8

Source:
http://www.treasury.gov.my/index.php?/en/20080713506/InfoPerhubungan/PKCP/statistik-keputusan-rayuan-cukai-pendapatan (as at 12 March 2011)