

Tax Excellence Decoded

To Pursue or Not to Pursue?

Considerations from the crossroads of tax disputes

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Mr Liu Hern Kuan, Head of Tax at Rajah & Tann Singapore LLP, addressed a capacity-filled room of tax professionals and business leaders on considerations in tax disputes.

Tax law is essentially a creature of statute.¹ The interpretation of tax law, however, may vary from one person to the next. Such differences in interpretation between taxpayers and the Comptroller of Income Tax (CIT) invariably lead to tax disputes.

What is a tax dispute?

Essentially, there are two forms of tax disputes – civil and criminal. A civil tax dispute typically involves disagreements between the CIT and taxpayer on the appropriate tax treatments. In a civil tax dispute, a company would have, based on its own interpretation of the tax law, taken certain positions on the income or expenses in its tax return. If the CIT disagrees with any tax position taken by the company in its tax return, a civil tax dispute arises.

Unlike civil tax dispute, criminal tax dispute generally revolves around the notion of tax offences (whether the taxpayer has committed any tax offences by concealing income, or by filing wrongful tax returns through gross negligence or fraud, etc). Hence, if a company is tax compliant, it may still be subject to civil tax disputes (due to disagreements with the CIT on the appropriate tax treatments) although it is likely to avoid criminal tax disputes. How then should a company best manage potential civil tax disputes?

Pre-dispute

Managing potential civil tax disputes should start before such disputes arise. It is advisable for companies to consistently keep proper records to ensure that all major decisions are documented contemporaneously. This point was reinforced during a recent Tax Excellence Decoded session by the Singapore Institute of Accredited Tax Professionals. The session was helmed by Liu Hern Kuan, Head of Tax, Rajah & Tann Singapore LLP, where he demystified civil tax disputes and provided practical tips to companies on the subject.

¹ JD Ltd v Comptroller of Income Tax [2005] SGCA 52

The CIT generally views such documentation which existed at the time the tax return was filed or when the relevant transaction to which the dispute relates (such as minutes of Board of Directors meetings, company resolutions, telephone memos and emails), and neutral documentation (such as newspaper or other reports) to be more reliable and persuasive. Other examples of proper documentation include records of the terms of employee secondment incorporated in appointment letters and inclusion of the nature and extent of rights and obligations in royalty agreements.

To illustrate, if a company has decided not to declare a receipt as it believes the receipt is capital in nature and hence not taxable, it should ensure the supporting documents (such as technical analysis or professional advice sought at the point in time the receipt arose) are in order, to be able to explain its position. In the absence of such documents, the company may face an uphill task convincing the CIT that it has omitted a receipt on technical grounds rather than an omission with the intent to conceal the income.

Besides maintaining good documentation, taxpayers may also take advantage of the advance ruling system to manage potential civil tax disputes. An advance ruling is the CIT's written interpretation of the tax law in relation to how certain issues that arise from a proposed arrangement are to be treated for tax purposes. As the advance ruling is binding on the CIT, it will serve to avoid future tax disputes with the CIT on the proposed arrangement.

It is interesting to note that while an advance ruling is binding on the CIT, it is not binding on the taxpayer. As such, it is possible for a taxpayer to file its tax return on the basis that it does not accept the CIT's ruling, and subsequently object when the CIT issues its Notice of Assessment (NOA) based on the positions taken in the advance ruling.

Civil tax disputes

Civil tax disputes arise when the CIT holds a different view on the appropriate tax treatment from the taxpayer. Typical issues include whether an item is an income receipt, whether an expense is deductible, or whether a tax treatment is applicable.

At the start of a civil tax dispute, the CIT will issue an NOA to the company based on its assessment. If the company disagrees with the CIT, it may file a Notice of Objection and provide precise grounds of objection to the CIT within two months from the date of the NOA.

Upon receiving the Notice of Objection, the CIT will consider the merits of the objection. If the CIT maintains its position, it will issue a Notice of Refusal to Amend to the company. Should this happen, the company will have to decide if it would accept the CIT's assessment, settle with CIT, or appeal to the Income Tax Board of Review (ITBR).

To pursue or not to pursue

The decision to pursue or not to pursue may be affected by multiple factors. One of the key considerations is often that of dollars and cents. The size of the claim, typically at least a million dollars (S\$1 million), should be significant enough for the appeal to be financially worth pursuing. When estimating the size of the claim, the company should also take into consideration if the issue is recurrent in nature.

Sometimes, the decision to pursue or not to pursue may not depend on financial reasons. For example, a company may decide to accept the CIT's assessment if it wishes to expedite the finalisation of its tax matters, or if it is not prepared to invest additional resources (in terms of time and personnel) to engage the CIT or to appeal to the ITBR. It must also be noted that civil tax disputes may be reopened up to four years from the year of assessment.

- **Accepting the CIT's assessment**

If the company accepts the CIT's assessment, the assessment will be regarded as final and conclusive.

- **Settlement with the CIT**

A middle-ground avenue a company may choose is to agree on a settlement. The various tax statutes do not provide for settlement of tax disputes since at law, either a receipt is taxable or not, and an expense is either deductible or not. 'Settlement' therefore is a position agreed to by parties to resolve the dispute without a strictly technical basis. Based on the strength of the case and the likelihood of success, the taxpayer may propose to CIT a percentage of tax to be split. For example, the company may propose and justify to CIT that a 60-40 split on the tax proposed is reasonable. If CIT agrees, 60% of this tax proposed will be payable.



- **Appeal to ITBR**

On the other extreme, the taxpayer, upon receiving the Notice of Refusal to Amend from CIT, may be unwilling to accept CIT's assessment or resolve the issue through settlement. It may then file a Notice of Appeal to the ITBR within 30 days. This is followed by another 30 days from the Notice of Appeal to submit a Petition of Appeal (containing a statement of the grounds of appeal). If the company is unable to file the Notice of Appeal or Petition of Appeal within the stipulated time, it is possible to request an extension of time.

Before deciding to appeal to ITBR, the taxpayer may consider obtaining a second opinion from an advisor to affirm its position. In addition to expert technical views, the advisor may also be able to provide different perspectives or point out other important issues to the taxpayer.

ITBR is an independent board set up under the Ministry of Finance to hear appeals made by taxpayers against an income tax assessment made by the CIT. It reviews evidence, hears and subpoenas witnesses, awards costs and enjoys judicial immunity. While it has the powers of a district court, ITBR is an administrative tribunal and is subject to judicial review by the High Court.

ITBR is made up with one chairman and two other members (layperson). If there is a conflict of interest (or a perceived conflict of interest), the company may object to certain members of ITBR on the basis that the decision made may be biased.

The Income Tax Act allows a company to appeal to ITBR directly as a taxpayer, through an accountant or through a lawyer. In practice, however, companies usually appeal to ITBR through their lawyers. It is interesting to note that unlike other court cases, it is mandatory for tax cases to go through the ITBR (and not allowed to be heard directly in higher courts) notwithstanding the size of the claim.

The CIT will be notified on filing of the Petition of Appeal. A pre-trial conference (PTC) will be scheduled between the CIT and the company to sort out administrative issues, such as identifying the issues in dispute, exploring if the case may be settled, fixing dates of hearing or number of days of hearing required, deciding whether affidavits are required to be filed, etc. The PTC is usually scheduled six to eight weeks from the date of filing of the Petition of Appeal.

When appealing to ITBR, it is essential to note that the burden of proof is on the taxpayer to show that the CIT's tax assessment is excessive or the amount of any unabsorbed losses, allowances or donations that may be carried forward ought to be of a higher amount. In other words, if the company is unable to discharge its burden, the CIT's decision will be upheld by ITBR. It is therefore important that the company has a prima facie case to begin with.

Following the ITBR hearing, ITBR will decide whether to give an oral or written judgment. At the discretion of ITBR, costs of proceedings may also be awarded to the winning party. If the CIT or taxpayer wishes to appeal to the High Court against the ITBR's decision, the appeal must be based on either a question of law or a question of mixed law and fact.

It is also important to note that evidence can only be adduced at ITBR. No new evidence may be introduced subsequently at the High Court or Court of Appeal, which focuses only on the question of law. Hence, all facts must be asserted at ITBR.

The decision to pursue or not to pursue is often a question of delicate judgement rather than a science. Depending on actual circumstances, companies need to consider their course of actions carefully. Meanwhile, it does not hurt to continue maintaining those contemporaneous documentation and obtaining expert advice from the tax professionals.

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About SIATP's Technical Discussions

SIATP's technical discussions have continually been very well received by accredited tax professionals. Unlike the run-of-mill Continuing Professional Educational courses which typically cover tax fundamentals, SIATP's interactive technical discussions are designed to cover tax issues that do not have clear-cut solutions or situations that may have different interpretations. Over time, these discussions contribute in boosting the overall tax standards in Singapore.

About Mr Liu Hern Kuan



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Hern Kuan has wide experience in Revenue Law, having lectured in it at the Law Faculty in the National University of Singapore, practiced as a tax manager in Big-4 accounting firms, and as the Chief Legal Officer of the Inland Revenue Authority of Singapore (IRAS) for some 11 years.

At IRAS, Hern Kuan provided legal and tax advice on tax law interpretation, tax rulings, international matters, enforcement proceedings, audit, investigation and criminal prosecution matters, and drafting tax legislations. He has also represented IRAS as lead counsel in civil and criminal court proceedings in the boards of review and Supreme Court. Hern Kuan was IRAS's lead counsel in several landmark Court of Appeal Tax cases such as JD Pte Ltd (interest restriction formula), AQQ (tax avoidance), IA (nature of interest), T Ltd (commencement of business) and AQP (theft of company funds by director).

This technical event commentary is written by SIATP's Tax Manager, Felix Wong. Felix has over eight years of corporate and international tax experience working in both international accounting firm and multinational corporation. He now leads various initiatives of the national tax institute to boost the standards of tax practice, technical competency and capability of tax professionals to enhance Singapore's position as a centre of tax excellence.