

## **Tax Excellence Decoded**

### **Tax Disputes: Paving the Way**

*From the Boards of Review and Beyond*

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*Accredited Tax Advisor (Income Tax & GST) Ong Sim Ho, Counsel at Ong Sim Ho Advocates & Solicitors, shared his insight into the area of tax disputes and provided practical tips to improve the chances of success in tax litigations.*

**F**acts win the case, not the law,” says

Accredited Tax Advisor (Income Tax & GST) Ong Sim Ho, Counsel at Ong Sim Ho Advocates & Solicitors.

At a lively *Tax Excellence Decoded* session organised by the Singapore Institute of Accredited Tax Professionals (SIATP), Mr Ong shared his insight into the area of tax disputes, from the Board of Review (BOR) to the Court of Appeal. He also weighed in on the decision to (or not to) appeal and provided practical tips to improve the chances of success in tax litigations. In view of an anticipated rise in tax disputes, the session was timely, providing accredited tax professionals with legal insight into the new and ever-evolving tax landscape.

#### **TAX DISPUTES AND APPEALS**

Tax disputes generally arise when the taxpayer disagrees with the tax treatment adopted by the tax authority on a particular income or expense item. If the parties are unable to resolve their differences, the taxpayer may appeal to the BOR against the tax assessment raised. Where the appeal concerns only questions of fact, the BOR’s decision is final.

Where the tax issue involves a question of law or a question of mixed law and fact, the tax authority or the taxpayer may appeal to the High Court against the BOR’s decision. Either party may further appeal to the Court of Appeal, which is the highest court in Singapore, against the High Court’s decision.

#### **A question of law or a question of mixed law and fact**

A question of fact is one that must be answered by referring to the facts and evidence (primary facts), and making inferences from those facts (secondary facts). A question of law, on the other hand, is one that must be answered by applying relevant legal principles and by interpretation of the law.

Generally, the High Court will not review the finding of facts at the BOR and will only deal with legal issues. Hence, only tax issues that involve a question of law or a question of mixed law and fact may be appealed from the BOR. The concepts of question of fact and question of law are illustrated in the following example.

A taxpayer argued that he disposed of his property following the advice of his *fengshui* master. For this, whether or not the taxpayer sought the *fengshui* master's advice is a primary fact; whether or not the *fengshui* master's advice put the taxpayer in a state of unease to the extent that he decided to dispose of his property is a secondary fact. In arriving at the judgement on whether the taxpayer had the intention to trade his property (regardless of the *fengshui* master's advice), the judge had to answer a question of mixed law and fact by applying legal principles and making inferences from facts.

### **Appeal “by way of rehearing”**

Taxpayers may also appeal from the BOR “by way of rehearing” where the High Court judge will conduct a documentary review on the documents made available at the BOR. For this, the High Court judge will not be constrained by the issues that were raised by the parties or factual findings by the BOR, and will not be precluded from finding additional facts from the documents.

## **JURISDICTION**

### **Getting the forum right**

Choosing the appropriate forum is the first step in dealing with tax disputes. Most taxpayers appeal to the BOR (that is the Income Tax Board of Review, Goods and Services Tax (GST) Board of Review or Valuation Review Board) against the tax assessments raised. There are, however, situations where the BOR may not be the most appropriate forum to deal with the specific tax issues.

In situations where there is no dispute on the facts of the case, taxpayers may consider applying to the High Court for a case stated. This procedure essentially allows the case to bypass the BOR so that the High Court may judge on the legal issues directly, thus reducing legal costs for taxpayers.

If taxpayers are not contending on the tax assessments, but on the way the assessments were arrived at (for example, the taxpayer's application for an incentive was rejected by the Comptroller on what the taxpayer perceived to be unreasonable grounds), they may apply to the High Court for a Judicial Review instead. Separately, taxpayers should also keep in mind the option to raise an appropriate tax issue to the Minister.

### **Getting the party right**

One common (but serious) mistake that taxpayers make is to address their objections to tax assessments to the Inland Revenue Authority of Singapore (IRAS). As IRAS is a statutory board and is not the authorised person appointed under the Tax Acts or statutes to deal with tax matters, such objections addressed to IRAS are invalid. Instead, taxpayers should address their objections to the relevant authorised persons (for example, the Comptroller of Income Tax, the Comptroller of GST or the Chief Assessor/Comptroller of Property Tax).

## **BUILDING THE FOUNDATION**

### **Facts win the case, not the law**

A good case theory is essential to a successful tax litigation. One does not win a case by simply stating the laws to the judge; one wins by proper presentation of the relevant facts of the case within the proper legal framework. A good case theory should, therefore, be embedded with facts.

It should be emphasised that the selection of facts is not to make up evidence. It simply means that the taxpayer's counsel should ensure that the correct interpretation and narrative of facts within the context of established legal principles are presented without distorting the truth.

### **Evidential assessment and translation into proceedings**

Due to the importance of evidence in tax litigations, it is good practice to conduct evidential assessments early. When conducting evidential assessments, taxpayers should allow their counsels full access to the source documents as the counsels are in the best position to decide whether the documents are useful for the case.

As all evidence has to be provided by witnesses, taxpayers should work with their counsels to decide on the appropriate witnesses to present each piece of evidence at the trial.

### **Petition of appeal**

Based on Section 79(12) of the Income Tax Act, "an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds stated in his petition of appeal". As such, if a taxpayer would like to appeal to the BOR against the tax assessment raised, he ought to ensure that the Petition of Appeal covers all grounds to be relied on in a manner that does not unduly limit the scope of his appeal.

### **Pre-trial applications**

Pre-trial applications could be considered to further define the case to avoid ambiguity when it comes to the trial. The taxpayer's counsel should also ensure that witnesses (especially expert witnesses) called upon by the Comptroller only give evidence and do not provide any legal opinion.

## **DECISION TO APPEAL FROM BOR**

A good counsel would generally have constructed the case theory, conducted evidential assessment and planned for the translation into proceedings at the BOR stage, which would represent a high percentage of the work required. Hence, from a cost perspective, appealing from the BOR should be a non-decision.

## **DIFFERENTIAL ADVOCACY AND AUGMENTATIONS**

On adopting the appropriate advocacy style, generally, the higher the court, the greater the emphasis on written advocacy (as opposed to oral advocacy). At times, taxpayers and their counsels should also think about the possibility of (artfully) conceding certain arguments during the trial to narrow down the issues and potentially improving the chances of success on the key issues.

Taxpayers may also consider obtaining a second opinion from reputable counsels (such as Queen's Counsel) who may be able to provide an alternative approach or a different perspective to their cases. A

mock trial could also be considered to obtain feedback on the analysis and the delivery of the arguments. Both of these measures could provide valuable feedback to the taxpayers' counsels in making the necessary adjustments at the actual trials.

If you are now looking to appeal against your tax assessment, do not underestimate the importance of the facts of the case. After all, facts win the case, not the law.

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### About Mr Ong Sim Ho



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Sim Ho is a practising lawyer specialising in tax laws. Having started his career as a legal officer with the Inland Revenue Authority of Singapore before moving to private practice, Sim Ho has a wealth of experience in tax litigation and dispute resolution. His forte lies in his multi-disciplinary approach where he incorporates legal, finance, risk governance, and accounting perspective.

Clients appreciate his willingness to make judgment calls when it comes to grey areas as well as his extensive industry experience and commercial perspectives. He stays in touch with developments in business and commerce through his various board roles, including serving as a chairman of a life insurance company and on the Advisory Board of School of Accountancy at the Singapore Management University.

*This technical event commentary is written by SIATP's Tax Manager, Felix Wong. Felix has over eight years of experience in corporate and international tax. Previously from PwC, he now leads various tax initiatives in Singapore's first dedicated professional body for tax specialists to enhance Singapore's position as a centre of excellence.*

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