



Direct Tax: **Effective Appeals**

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Audit / Tax / Advisory

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The tax self-assessment system (“SAS”) for companies was introduced in Malaysia back in 2001. Subsequently, this was expanded for businesses, partnerships, co-operatives and employed individuals in 2004.

The introduction of the SAS shifted the duty of computing and preparing the taxpayer's annual tax returns from the Inland Revenue Board (“IRB”) to the taxpayers. Effectively, the burden and responsibility to declare the appropriate amount of tax liabilities in accordance with the prevailing tax laws and legislation were transferred to the taxpayers.

The introduction of the SAS also gave rise to the introduction of tax audits. Tax audits is a tool used by the IRB to ensure taxpayers are in compliance with the prevailing tax laws and legislation when submitting their tax returns.

As there are always two sides to a coin, it is therefore unavoidable for situations to arise where the IRB and the taxpayer do not agree on the applied tax treatments and assessments issued by the IRB. As such, there are avenues to appeal against a notice of assessment, additional assessment or reduced assessment issued by the IRB.

What Are Tax Audits?

Taxpayers are required to submit their tax returns within the statutory deadline as legislated in the Income Tax Act 1967. A tax audit is an event carried out by the IRB to ensure that the taxpayers have declared their income in full and computed the appropriate amount of tax in accordance with the prevailing tax laws and legislation.

Generally, there are two (2) types of tax audits that are carried out by the IRB which are as follows:



General Review

- The more common type of tax audit which is usually straightforward in terms of the tax matters in dispute.
- The IRB will write to the taxpayer to request for documents and / or information, and perform the audit based on the documents and / or information provided.
- If required, the IRB may call in the taxpayer for interviews to gather further information.



Comprehensive Review

- Generally targeted towards specific taxpayers in which the IRB has identified to be non-compliant. Therefore, the audit will be more complex in terms of the tax matters in dispute.
- The IRB will write to the taxpayer to request to visit the taxpayer's premises to perform a detailed review of all the relevant supporting documents.
- In extreme cases, the IRB may turn up unannounced at the taxpayer's premises to perform the field audit.

Upon completion of the tax audit, the IRB will issue its tax audit findings to the taxpayer. The taxpayer will be afforded with an opportunity to object against the audit findings with additional supporting documents and / or information.

If the taxpayer is unable to satisfy the IRB on the tax audit findings, the IRB will proceed to close the tax audit case by issuing the Notice of Assessment or Notice of Additional Assessment to the taxpayer.

How Are Tax Audit Cases Selected?

The following are some factors that may trigger the IRB to perform a tax audit on a taxpayer:



IRB's system which analyses and reviews the taxpayer's annual tax returns, assesses the risk profile of the taxpayer and highlights red flags which may give reason for a tax audit to be performed.



Taxpayers which are in selected industries or taxpayer groups which may have inherent tax issues, e.g doctors running their practice via a Company, property developers, etc.



Taxpayers that have significant related party transactions within their group of companies. Usually, these are for Transfer Pricing cases.



Taxpayers that have large tax refund positions annually.



Tax audit cases selected could also be based on the location of the taxpayer's business premises.



Taxpayers that are enjoying tax incentives, i.e. Reinvestment Allowance, Pioneer Status, Investment Tax Allowance, etc.



Taxpayers that have recorded significant decrease in profits upon expiry of their tax incentive period.

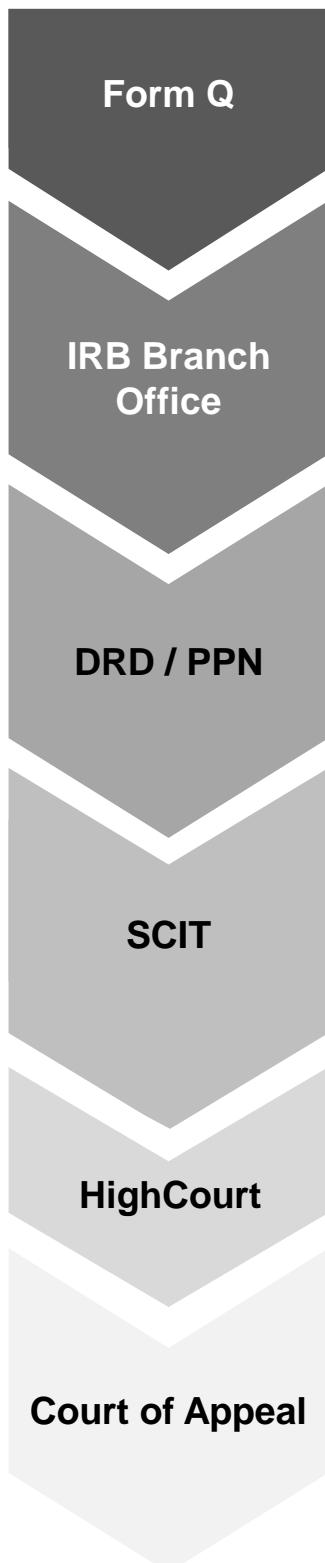


Information provided by third parties on under-declaration or omission of income, or over-declaration of expenses and allowances.



References within the IRB. E.g., the IRB team performing a corporate tax audit may find issues pertaining to Transfer Pricing, withholding tax or Real Property Gains Tax. The corporate tax audit team may refer the matters to their counterparts.

The Appeal Process



Taxpayers may appeal against an assessment by submitting the Form Q within thirty (30) days from the date of the Notice of Assessment / Notice of Additional Assessment.

The IRB Branch Office may review the case and try to reach a settlement with the taxpayer on the tax appeal. If there is failure to reach a settlement, the IRB has within sixty (60) days from the date of the Form Q to forward the Form Q to the Dispute Resolution Department ("DRD") / State Director's Office ("PPN") for review.

The DRD / PPN will review the appeal and will discuss with the taxpayer on the tax matters in dispute. If possible, both parties may agree on a settlement of the tax appeal. If there is failure to reach a settlement, the DRD / PPN has within twelve (12) months from the date of the Form Q to register the Form Q with the Special Commissioners of Income Tax ("SCIT")

Once the Form Q has been registered with the SCIT, the IRB's Legal Department will take over the appeal. At this stage, the taxpayer may discuss with the IRB's legal department to seek a settlement of the tax appeal. If there is failure to reach a settlement, a date will be set for a Court Hearing before the SCIT to decide on the tax appeal.

If the taxpayer or IRB is aggrieved by the decision of the SCIT, they may appeal further to the High Court to decide on the tax appeal.

If the taxpayer or IRB is aggrieved by the decision of the High Court, they may appeal further to the Court of Appeal to decide on the tax appeal. This is the final stage of appeal. The decision of the Court of Appeal is final, and no further avenues of appeal are available.

How to Navigate An Effective Appeal

Navigating an effective appeal against a tax assessment is similar to preparing a football team for a European Champions League Final. The process does not just start at the submission of Form Q (i.e., start of the football match) but it starts the moment you identify your opponent (i.e., the IRB) and the tactics and strategies that they have at their disposal. Similar to football, the key to a successful appeal is to have a solid plan to navigate the entire appeal process.

Here we will look at the various processes to navigate an effective appeal.

The Inland Revenue Board of Malaysia

To quote Sun Tzu, The Art of War:-

"If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle."

The IRB's objective in conducting tax audits is to encourage taxpayers to comply with the prevailing tax laws and legislation while deterring bad tax practices. As such, the IRB is always open to discussions with taxpayers on the settlement of tax appeals where taxpayers have acted in good faith. Therefore, in order to mount a successful appeal, one must understand the tax audit process and IRB's guidelines in relation to the case.





How to Navigate An Effective Appeal (cont.)

Tax Audit Findings

Upon completion of the IRB's review on the relevant documents and information, the IRB will issue a report on the tax audit findings to the taxpayer. The report will include the amount and tax matter in dispute together with the IRB's justification on why the matter in dispute is not in compliance with the prevailing tax laws and legislation. The IRB will also compute the adjusted tax computation to take into account the adjustments that they have made.

This would be the first opportunity to know the tax matters that the IRB is attacking and for the taxpayer to raise its first offensive by way of objections (akin to the first half of a football match where both sides are feeling each other out). The taxpayer will be given eighteen (18) days to respond to the IRB's adjustments by way of submitting an official letter of objection which clearly states the taxpayer's reasons for objecting against each tax matter in dispute individually together with the relevant tax laws and legislation, supporting documents and information.

All supporting documents and information provided to the IRB must be checked thoroughly to ensure that they are accurate and complete as these documents and information can be used by the IRB against the taxpayer at the various levels of appeal later.

Submission of Form Q

Failure to reach a settlement with the IRB on the tax audit findings will result in the IRB issuing the Notice of Assessment (Form J) or Notice of Additional Assessment (Form JA), as the case may be, to the taxpayer.

Upon receipt of the Form J or Form JA, the taxpayer has within thirty (30) days to file the Notice of Appeal to the Special Commissioners of Income Tax (Form Q) to the IRB Branch Office. Together with the Form Q, the taxpayer must submit their grounds of appeal which clearly state the reasons for disagreeing with the Form J or Form JA, the tax matter(s) in dispute and their justifications for making the appeal.

The Form Q has to be signed by the taxpayer or an authorized person under Section 75 or 75B of the Income Tax Act 1967. The completed Form Q together with the grounds of appeal have to be submitted in four (4) copies to the IRB with at least one (1) copy being the original Form Q.



How to Navigate An Effective Appeal (cont.)

IRB Branch Office

Upon receipt of the Form Q, the IRB Branch Office has to, within sixty (60) days from the date of the Form Q, forward the appeal to the Dispute Resolution Department or State Director's Office. In this sixty-day period, the IRB Branch Office may review the case and afford the taxpayer with another chance to negotiate a settlement on the tax dispute.

One may view that this is the second opportunity for the taxpayer to appeal against the tax matters in dispute (akin to injury time at the end of the first half of a football match). At this stage, the taxpayer should have a better understanding of the IRB's stand on the tax matters in dispute as well as having had more time to better prepare the supporting documents and any other information to object against the tax matters in dispute.

Dispute Resolution Department ("DRD") / State Director's Office ("PPN")

If no settlement can be reached between the taxpayer and IRB Branch Office, the Form Q will be forwarded to the DRD / PPN for review on the appeal. Subsequently, the DRD / PPN has within twelve (12) months to forward the appeal to the Special Commissioners of Income Tax ("SCIT"). During this period, the appeal will be taken over by the DRD / PPN which gives the taxpayer another round to reach a settlement on the tax matters in dispute.

One may view that this is the third opportunity for the taxpayer to appeal against the tax matters in dispute (akin to the second half of a football match). The Dispute Resolution Proceedings ("DRP") was introduced as an alternative means for taxpayers to reach a settlement of the tax matters in dispute where the DRD / PPN acts as a neutral party (i.e., unrelated to the officers who raised the tax assessment) to review each appeal.

As there is a longer period for negotiations during this Dispute Resolution Proceedings ("DRP"), this stage represents an opportunity for taxpayers to put forth their case afresh together with all the supporting documents and information before the DRD / PPN for their independent review. If there is a strong basis to consider the taxpayer's appeal, the DRD / PPN will attempt to reach a settlement with the taxpayer. This exercise is to save the cost and time of going through the long appeal process for both the IRB and the taxpayer.

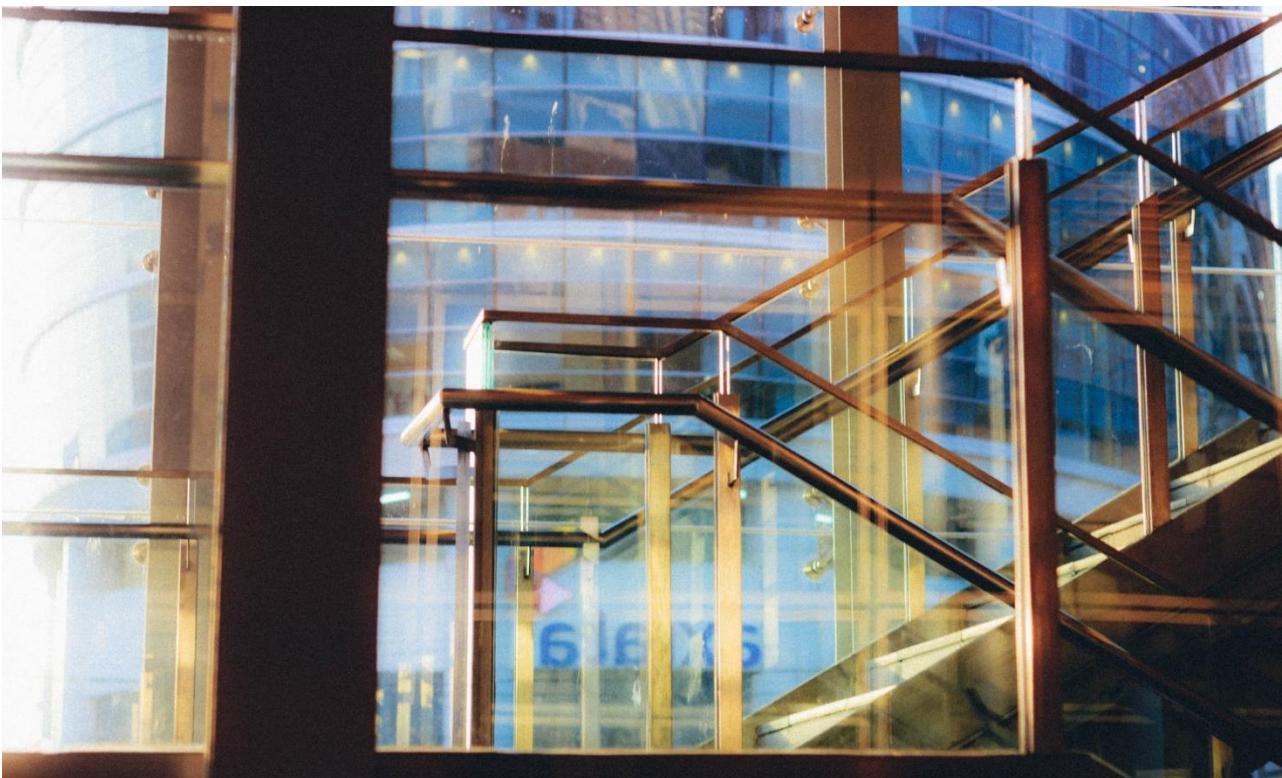
How to Navigate An Effective Appeal (cont.)

IRB's Legal Department

If no settlement can be reached at the DRP within twelve (12) months from the date of the Form Q, the DRD / PPN will register the Form Q with the SCIT. At this stage, the IRB's legal department will take over the appeal.

One may view that this is the fourth opportunity for the taxpayer to appeal against the tax matters in dispute (akin to extra time of a football match). The taxpayer may opt to reach out to the IRB's legal department with the appeal together with the supporting documents and information to see if there is a final avenue to reach a settlement before the case is heard at the SCIT. Similar to the DRP, the IRB's legal department is also independent of the officers who raised the tax assessment, and therefore may have a different view of the tax matters in dispute.

This is the final chance to reach an out of court settlement between the taxpayer and the IRB. Failure to reach a settlement would mean that the date will be set for a Court Hearing before the SCIT to decide on the tax appeal.



How to Navigate An Effective Appeal (cont.)

SCIT, High Court and Court of Appeal

This is the final stretch (akin to a penalty shootout of a football match) where the appeal will be heard and decided. Depending on which side wins at the three stages (SCIT, High Court or Court of Appeal), the losing party may decide on whether to appeal further. For instance, the decision of the SCIT can be appealed further to the High Court and the decision of the High Court can be appealed further to the Court of Appeal. For tax appeals originating at the SCIT level, the Court of Appeal's decision is final and no further avenues of appeal is available beyond the Court of Appeal.

It is important to note that only the following authorized representatives are allowed to represent the taxpayer at the various stages of appeal.

Court	Authorized Representative
SCIT	Taxpayer, Tax Agent and/or Practising Lawyer
High Court	Practising Lawyer
Court of Appeal	Practising Lawyer

Taxpayers may want to consider the costs of engaging a tax agent and / or a lawyer to represent them before embarking on the appeal process as the costs may exceed the potential tax savings from the appeal. The IRB will often challenge the tax dispute all the way to the Court of Appeal if the decisions are not in their favor.

Letters of Objection and Letters of Appeal

Together with the supporting documents, the drafting of the letters of objection and / or letters of appeal for submission to the IRB is equally important. The letters should be drafted in a clear manner which sets out the taxpayer's background and facts of the case including the tax matters in dispute, basis of appeal, relevant tax laws and legislation, and referencing supporting documents and information that are true, accurate and complete.

Due caution should be given when drafting the letters as the contents together with all its attachments may be used by the IRB when the appeal is heard before the courts. Therefore, any incorrect or inaccurate statements or supporting documents that are provided to the IRB may be detrimental to the taxpayer in its subsequent appeal at the courts.

Summary



The appeal on tax assessments may be a long-drawn process that may take years in order for the final decision to be obtained.

Taxpayers should be aware of this and be prepared to expend their time and costs if they wish to commit towards appealing against a tax assessment.

Throughout the various stages of the appeal process and dealing with the various parties, there is a constant that the taxpayer has to take note. This constant is that the taxpayer has to ensure that sufficient supporting documents and information have to be kept in an organized manner in case the tax treatments adopted in its tax returns are challenged by the IRB.

This process starts at the onset when income is being generated or transactions are being executed at the operational level. All information should be documented, and all supporting documents should be well filed to avoid being wrongly accused of under-declaration of taxes.

Need help with your tax appeals? Please feel free to reach out to us. We will be more than happy to assist you.



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