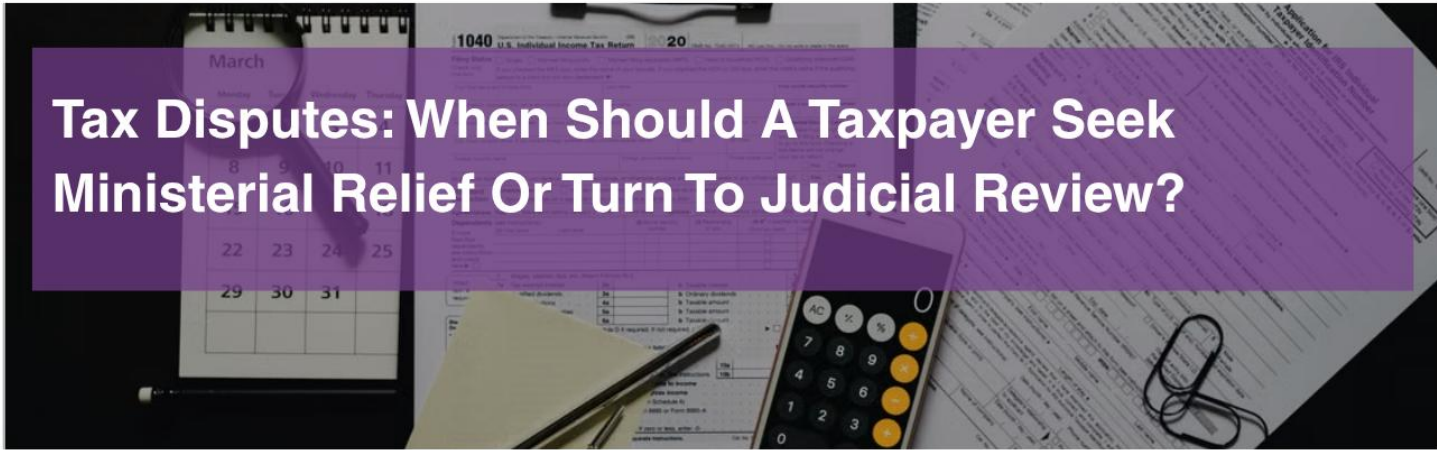




## Tax Disputes: When Should A Taxpayer Seek Ministerial Relief Or Turn To Judicial Review?

7 October 2026

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When faced with an adverse tax position, taxpayers may have more than one avenue available to them. The conventional route is familiar: challenge the assessment through the statutory appeal process. But in appropriate circumstances, a taxpayer may also consider seeking an exemption from the Minister of Finance under Section 127(3A) of the Income Tax Act 1967 (ITA) or challenge an unlawful administrative decision through judicial review.

These remedies serve different purposes and should not be treated as interchangeable.

The practical challenge is identifying which route fits the particular dispute and doing so early enough to preserve the taxpayer's rights.

This alert examines these issues against the backdrop of Section 127(3A), the decision in *Kidurong Power Generation Sdn Bhd v Menteri Kewangan Malaysia* and the increasing importance of judicial review in Malaysian tax disputes.

### Section 127(3A): A Special Ministerial Power

Section 127(3A) of the ITA gives the Minister of Finance a broad discretionary power, in a particular case, to exempt a person from all or any provisions of the ITA, either generally or in relation to particular income or a particular class of income.

This is not the ordinary tax appeal mechanism. For taxpayers considering an application under Section 127(3A), two practical questions are particularly important.

First, is the taxpayer's situation sufficiently unusual that it is not adequately addressed by existing provisions or incentives?

Second, can the taxpayer demonstrate compelling economic, policy, public-interest or national-interest considerations supporting the exemption?

An application is therefore likely to require considerably more than an argument that the tax treatment produces an undesirable result for the taxpayer. The taxpayer should be able to explain why the circumstances warrant the exercise of a special ministerial discretion.

Recent tax cases continue to demonstrate the practical relevance of Section 127(3A). For instance, in *Ketua Pengarah Hasil Dalam Negeri v Senai Airport City Sdn Bhd*, the Special Commissioners of Income Tax allowed a taxpayer's appeal concerning the application of an exemption previously granted by the Minister under Section 127(3A).

### **There May Be No Quick Answer**

A practical difficulty with a ministerial application is timing. There is no prescribed timeline within which the Minister must determine an application under Section 127(3A). Depending on the complexity of the matter, supporting documentation and consultation with agencies such as the Inland Revenue Board (IRB), the process can be lengthy. That has an important consequence.

A taxpayer should not allow a pending ministerial application to cause it to lose its statutory appeal rights. Where an assessment has been issued, Section 99 of the ITA requires an aggrieved taxpayer to submit its appeal in the prescribed form to the Director General within 30 days after service of the notice of assessment.

The prudent approach may therefore be to preserve the statutory appeal while separately pursuing the ministerial application where appropriate.

### **Preserve The Form Q**

This point deserves particular emphasis. Taxpayers sometimes focus on negotiations, representations or alternative avenues of relief while the statutory appeal period continues to run. That can be dangerous. It must be noted that where a taxpayer disputes an assessment, the statutory right of appeal should be considered immediately. The IRB itself continues to emphasise that an appeal under Section 99 must be made using Form Q within the prescribed 30-day period.

A ministerial application should therefore not ordinarily be treated as a substitute for preserving the taxpayer's statutory rights.

This reflects a broader principle in tax disputes: Keep every legitimate avenue open until there is a reason to close it.

## What Happens When Government Changes An Earlier Tax Position?

A different problem arises where a taxpayer has already obtained an approval or incentive and has arranged its affairs in reliance upon it, only for the authorities subsequently to adopt a different position.

This issue arose prominently in *Kidurong Power Generation Sdn Bhd v Menteri Kewangan Malaysia*, where the taxpayer had obtained approval for an investment allowance under Schedule 7B of the ITA. At the time of the approval, unutilised allowances could be carried forward without the subsequent time restriction introduced by amendments to the legislation. The taxpayer proceeded with its investment in reliance upon the approval.

Following the legislative amendment, a dispute arose over whether the new limitation could effectively restrict the benefit previously granted. The High Court allowed the taxpayer's judicial review application.

Among the important issues considered were the taxpayer's vested rights and legitimate expectation arising from the earlier approval. The High Court held, in substance, that the taxpayer's existing rights under the approval could not simply be disregarded in applying the subsequent legislative change. This decision is important beyond the particular incentive involved.

## Legitimate Expectation Matters

Businesses frequently make substantial and long-term investments based upon regulatory approvals, government representations, published guidelines or other official positions.

What happens if the authority subsequently changes its position?

Public law recognises that, in appropriate circumstances, a representation or established position adopted by a public authority may give rise to a legitimate expectation. The concept does not mean that every commercial expectation becomes legally enforceable. The expectation must be legitimate in law.

But where a taxpayer has received a clear approval or representation and has materially arranged its affairs in reliance upon it, a subsequent administrative decision inconsistent with that position may warrant closer examination. The questions may include:

- Has the taxpayer acquired an existing or vested right?
- Was there a clear and unqualified representation by the relevant authority?
- Did the taxpayer rely upon that representation?

- Has the authority properly considered those existing rights before changing its position?
- Does the legislation clearly authorise the interference with those rights?
- Has the authority provided adequate reasons for its decision?

Where these issues concern the legality of the administrative decision itself, the dispute may move beyond an ordinary disagreement over the correctness of an assessment and into the territory of judicial review.

### **Tax Appeal Or Judicial Review?**

This distinction is fundamental. The statutory tax appeal mechanism is generally concerned with whether an assessment is correct.

Judicial review is different. It concerns the lawfulness of the decision-making process. A taxpayer should therefore not resort to judicial review simply because it believes the IRB or another authority has reached the wrong conclusion. Judicial review becomes relevant where there is an identifiable public-law issue, for example, illegality, irrationality, procedural impropriety, failure to consider relevant matters, taking irrelevant matters into account, or a legally significant failure to respect vested rights or legitimate expectations.

The existence of a statutory appeal route is also important. Courts generally expect taxpayers to pursue the domestic remedy provided by Parliament unless there are proper grounds justifying judicial intervention.

The correct route therefore depends on the nature of the complaint. If the dispute is fundamentally about the merits of an assessment, the statutory appeal mechanism may be the appropriate avenue.

If the complaint concerns the legality of the exercise of public power itself, judicial review may need to be considered.

### **“Pay First, Talk Later” And The Question Of A Stay**

Tax disputes can create an immediate cash-flow problem. An assessment may remain payable notwithstanding that the taxpayer disputes its correctness. Where the amount involved is substantial, payment before the dispute is finally determined can have serious consequences for the business.

This is particularly significant because tax disputes may take years to move through the statutory appeal process and subsequent appeals. In an appropriate judicial review case, the taxpayer may therefore consider whether to seek an interim stay.

A stay should not be regarded as automatic merely because an assessment is challenged. The court must balance the competing considerations, including the public

interest in tax collection and the prejudice to the taxpayer. Where there is a serious issue of illegality and immediate enforcement could materially prejudice or even cripple the taxpayer's business, the question of interim protection can become commercially critical.

### **The Best Time To Prepare May Be Before The Assessment**

One of the most practical lessons from the discussion was that taxpayers should not wait until an assessment arrives before considering dispute strategy. By the later stages of an audit or investigation, a taxpayer may already have a reasonable indication of the position the IRB intends to take. That is the point at which the taxpayer and its advisers should begin considering:

- the likely basis of the assessment;
- the evidence and documents required to rebut it;
- whether the dispute concerns merits, legality or both;
- whether a Form Q will be required;
- whether ministerial relief should be explored;
- whether there are grounds for judicial review;
- whether interim relief may ultimately be required; and
- the relevant procedural deadlines.

This early preparation matters because statements made and documents submitted during the audit may later form part of the evidential record. What a taxpayer says to the tax authority before litigation begins can therefore be just as important as what its lawyers argue once proceedings commence.

### **A Changing Tax Dispute Landscape**

These issues assume greater importance as Malaysia continues its movement towards self-assessment across different areas of taxation. Greater reliance on self-assessment places greater responsibility on taxpayers to determine and defend their tax positions. It also increases the importance of effective mechanisms for resolving disagreements between taxpayers and the revenue authorities.

Businesses should consequently regard tax dispute management as part of their broader tax governance framework rather than something that begins only after an assessment is issued.

## Key Takeaways For Taxpayers

A taxpayer facing a significant tax dispute should consider its strategy at the earliest possible stage as follows:

### *Preserve statutory rights*

If an assessment is disputed, identify and comply with the applicable appeal deadline. Do not assume that negotiations or a ministerial application stop the clock.

### *Consider Section 127(3A) carefully*

Ministerial relief may be relevant in exceptional circumstances, particularly where existing provisions do not adequately address a unique situation and there are compelling economic, policy or public-interest considerations.

### *Identify the real nature of the dispute*

A disagreement over the correctness of an assessment and a challenge to the legality of administrative action are not necessarily the same thing.

### *Protect vested rights and legitimate expectations*

Where substantial investments have been made in reliance upon government approvals or representations, later changes should be examined carefully.

### *Consider cash-flow consequences early*

Where an assessment is substantial, the practical consequences of “pay first, dispute later” may influence litigation strategy and the need to consider interim relief.

### *Build the record before the dispute reaches court*

Documents, representations and correspondence generated during the audit or administrative process may ultimately determine the strength of the taxpayer's position.

## Conclusion

The most effective tax dispute strategy often begins before the dispute formally crystallises. Section 127(3A), the statutory tax appeal process and judicial review each perform different functions. The challenge for taxpayers is not simply to identify every available remedy, but to understand how those remedies interact and which one addresses the real issue in dispute.

The experience from cases such as *Kidurong Power Generation* demonstrates that tax disputes are not always confined to questions of computation or interpretation. They may also concern fundamental public-law questions about vested rights, legitimate expectations and the lawful exercise of governmental power.

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