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Circular No 073/2023
Dated 13 Mar 2023

To Members of the Malaysian Bar

Update (13 Mar 2023) | Legal Professional Privilege:
Director General of Inland Revenue v Malaysian Bar

We refer to Circular No 156/2021 dated 6 May 2021, wherein we updated Members on, *inter alia*, the application for leave to appeal to the Federal Court by the Director General of Inland Revenue ("DGIR"). As Members are aware, the High Court and Court of Appeal found in favour of the Malaysian Bar. The orders and judgments of the High Court and Court of Appeal can be found here (see pages 2 to 94).

On 23 Aug 2021, the Federal Court granted leave to the DGIR to appeal against the Court of Appeal's decision of 3 Mar 2021.

The Sabah Law Society and the Advocates Association of Sarawak subsequently applied to be admitted as *amicus curiae* and their applications were allowed by the Federal Court.

The Malaysian Bar's solicitors requested a panel of seven or nine Justices, and the Federal Court convened a bench of seven Federal Court Justices.

On 20 July 2022, the Federal Court heard and dismissed the DGIR's appeal, and affirmed the decision of the Court of Appeal. With this decision, Members are reminded that the terms of the High Court Order (now affirmed by the Court of Appeal and Federal Court), require Members to reject any request or demand of the Revenue for access to, or disclosure of all communications, books, objects, articles, materials, documents, things, matters or information passing between Members and client(s) or advice given to client(s), whether contained in any book, statement, account or other record of any description whatsoever, unless privilege is expressly waived by the client in writing.

The Order of the Federal Court dated 20 July 2022 can be viewed here (see pages 95 and 96), and the broad grounds of the Federal Court can be viewed here (see pages 97 to 100).

Thank you.

Anand Raj
Secretary
Malaysian Bar

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN & KUASA-KUASA KHAS)

SAMAN PEMULA NO: WA-24-12-03/2017

Dalam perkara Seksyen 3 Akta Undang-Undang Sivil, 1956

Dan

Dalam perkara Seksyen-seksyen 126, 127, 128 dan 129 Akta Keterangan, 1950

Dan

Dalam perkara Akta Profesion Undang-Undang, 1976

Dan

Dalam perkara Seksyen-seksyen 80, 142(5) dan Bahagian V Akta Cukai Pendapatan, 1967

Dan

Dalam perkara, Perkara 5 dan 96 Perlembagaan Persekutuan

Dan

Dalam perkara Aturan 7, Aturan 15 kaedah 16 dan Aturan 28 Kaedah-Kaedah Mahkamah, 2012.

Antara

BAR MALAYSIA — PLAINTIF

Dan

KETUA PENGARAH HASIL DALAM NEGERI — DEFENDAN

DI HADAPAN HAKIM
KAMALUDIN BIN MD. SAID
PADA 2 APRIL 2018

DALAM MAHKAMAH TERBUKA

P E R I N T A H
(Lampiran 1)

ATAS PERMOHONAN pihak Plaintif yang ditetapkan untuk keputusan pada hari ini **DAN SETELAH MEMBACA** Saman Pemula bertarikh 7 Mac 2017,

Afidavit-afidavit dan Hujahan-hujahan Bertulis pihak-pihak yang kesemuanya difailkan di sini **DAN SETELAH MENDENGAR** Anand Raj (Foong Pui Chi bersamanya), Peguambela bagi pihak Plaintif dan Ahmad Isyak Bin Mohd Hassan, Peguam Kanan Hasil (Ruzaidah bt. Yaacob, Peguam Hasil, bersamanya), bagi pihak Defendan, **ADALAH DIPERINTAHKAN**:

1. satu Deklarasi bahawa Seksyen 142(5) Akta Cukai Pendapatan 1967 ("**ACP**") tidak memberi hak atau kuasa kepada Defendan untuk mengetepikan hak keistimewaan ("privilege") di bawah undang-undang Malaysia yang melindungi kesemua komunikasi, buku, objek, artikel, material, dokumen, benda, perkara atau maklumat yang dihantar antara ("passing between") seorang Peguambela dan Peguamcara dan anakguamnya atau nasihat yang diberi oleh seorang Peguambela dan Peguamcara kepada anakguamnya, sama ada terkandung dalam mana-mana buku, pernyataan, akaun ataupun rekod lain yang merangkumi apa jua deskripsi (kemudian dari ini dirujuk secara kolektif sebagai "**Komunikasi Anakguam**"), dan yang mana hak keistimewaan tersebut dirujuk dengan pelbagai cara di bawah undang-undang Malaysia sebagai "hak keistimewaan profesional perundangan", "hak perlindungan profesional perundangan", "hak keistimewaan peguam-anakguam", "hak perlindungan peguam-anakguam", "hak keistimewaan perundangan" atau "hak perlindungan perundangan" (kemudian dari ini dirujuk sebagai "**Hak Keistimewaan**") dengan meminta atau menuntut akses kepada, atau pendedahan, Komunikasi Anakguam sedemikian daripada mana-mana Peguambela dan Peguamcara, kecuali jika Hak Keistimewaan itu dilepaskan oleh anakguam;

2. satu Deklarasi bahawa Bahagian V ACP secara umumnya, dan Seksyen 80 ACP secara khususnya, tidak memberi hak atau kuasa kepada Defendan untuk mengetepikan Hak Keistimewaan yang melindungi kesemua Komunikasi Anakguam dengan meminta atau menuntut akses kepada, atau pendedahan, sebarang Komunikasi Anakguam sedemikian daripada mana-mana Peguambela dan Peguamcara, kecuali jika Hak Keistimewaan itu dilepaskan oleh anakguam;

3. satu Deklarasi bahawa Hak Keistimewaan di bawah undang-undang Malaysia secara umumnya, dan sepertimana yang dirujuk dalam Seksyen-seksyen 126, 127, 128 dan 129 Akta Keterangan 1950 secara khususnya, mengkehendaki seseorang Peguambela dan Peguamcara untuk menolak mana-mana permintaan atau tuntutan Defendan untuk diberikan akses kepada, atau pendedahan, sebarang Komunikasi Anakguam, kecuali jika Hak Keistimewaan itu dilepaskan oleh anakguam; dan

4. kos sebanyak RM5,000.00 dibayar oleh Defendan kepada Plaintif dan tertakluk kepada fi Alokatur.

Bertarikh 2 April 2018.

METERAI MAHKAMAH TINGGI MALAYA
KUALA LUMPUR

NORAZLIN BINTI OTHMAN
Timbalan Pendaftar
Mahkamah Tinggi Malaya
.....Kuala Lumpur.....

Timbalan Pendaftar
Mahkamah Tinggi Malaya
Kuala Lumpur

Perintah ini difailkan oleh Tetuan Shearn Delamore & Co., Peguamcara bagi Plaintif yang alamat penyampaiannya di Tingkat 7, Wisma Hamzah-Kwong Hing, No. 1, Leboh Ampang, 50100 Kuala Lumpur. SD (TAX) 3471695 (AR) 1893193_1

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN & KUASA-KUASA KHAS)

SAMAN PEMULA NO: WA-24-12-03/2017

Dalam perkara Seksyen 3 Akta Undang-Undang Sivil, 1956

Dan

Dalam perkara Seksyen-seksyen 126, 127, 128 dan 129 Akta Keterangan, 1950

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Dalam perkara Akta Profesion Undang-Undang, 1976

Dan

Dalam perkara Seksyen-seksyen 80, 142(5) dan Bahagian V Akta Cukai Pendapatan, 1967

Dan

Dalam perkara, Perkara 5 dan 96 Perlembagaan Persekutuan

Dan

Dalam perkara Aturan 7, Aturan 15 kaedah 16 dan Aturan 28 Kaedah-Kaedah Mahkamah, 2012.

Antara

BAR MALAYSIA — PLAINTIF

Dan

KETUA PENGARAH HASIL DALAM NEGERI — DEFENDAN

BEFORE JUSTICE
KAMALUDIN BIN MD. SAID
ON 2 APRIL 2018 — **IN OPEN COURT**

O R D E R
(Enclosure 1)

UPON THE APPLICATION of the Plaintiff which was fixed for decision on this day **AND UPON READING** the Originating Summons dated 7 March 2017, the

Affidavits and the Written Submission of the parties which have all been filed herein **AND UPON HEARING** Anand Raj (Foong Pui Chi with him) of Counsel for the Plaintiff and Ahmad Isyak Bin Mohd Hassan, Senior Revenue Counsel (Ruzaidah bt. Yaacob, Revenue Counsel, with him), for the Defendant, **THE FOLLOWING DECLARATIONS ARE ORDERED**:

1. a Declaration that Section 142(5) of the Income Tax Act 1967 ("**ITA**") does not entitle nor empower the Defendant to disregard the privilege under Malaysian law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his/her client, whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as "**Client Communications**"), and which privilege is referred to variously under Malaysian law as "legal professional privilege", "solicitor-client privilege" or "legal privilege" (hereinafter referred to as "**Privilege**") by requesting or demanding access to, or disclosure of, such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

2. a Declaration that Part V of the ITA generally, and Section 80 of the ITA in particular, do not entitle nor empower the Defendant to disregard the Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

3. a Declaration that Privilege under Malaysian law generally, and as referred to in Sections 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require an Advocate and Solicitor to reject any request or demand of the Defendant for access to, or disclosure of, any Client Communications, unless Privilege is waived by the client; and

4. costs in the amount of RM5,000.00 be paid by the Defendant to the Plaintiff and subjected to an Allocatur fee.

Dated 2 April 2018.

.....
Deputy Registrar
High Court of Malaya
Kuala Lumpur

This Order is filed by Messrs Shearn Delamore & Co., Solicitors for the Plaintiff whose address for service is at 7th Floor, Wisma Hamzah-Kwong Hing, No. 1, Leboh Ampang, 50100 Kuala Lumpur. SD (TAX) 3471695 (AR) 1893186_1

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

SAMAN PEMULA NO: WA-24-12-03/2017

Dalam perkara Seksyen 3 Akta Undang-Undang Sivil, 1956

Dan

Dalam perkara Seksyen-seksyen 126, 127, 128 dan 129 Akta Keterangan, 1950

Dan

Dalam perkara Akta Profesion Undang-Undang, 1976

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Dalam perkara Seksyen-Seksyen 80, 142(5) dan Bahagian V Akta Cukai Pendapatan, 1967

Dan

Dalam perkara, perkara 5 dan 96
Perlembagaan Persekutuan

Dan

Dalam perkara Aturan 7, Aturan
15 Kaedah 16 dan Aturan 28
Kaedah-Kaedah Mahkamah.
2012

Antara

BAR MALAYSIA ... PLAINTIF

Dan

KETUA PENGARAH HASIL DALAM NEGERI ... DEFENDAN

GROUNDS OF JUDGMENT

INTRODUCTION

1. The Plaintiff filed an Originating Summon ("OS") dated 7.3.2017 against the Defendant seeking the following relief; --

   (i) a Declaration that section 142(5) of the ITA does not entitle or empower the Defendant to disregard the privilege under Malaysian Law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his / her client, whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as "Client Communications"), and which privilege is referred to variously under Malaysian law as "legal privilege (hereinafter referred to as "Privilege") by requesting or demanding access to, or disclosure of, such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client ;

   (ii) a Declaration that Part V of the ITA generally, and Section 80 of the ITA in particular, do nor entitle or empower the Defendant to disregard the

Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

(iii) a Declaration that Privilege under Malaysian law generally, and as referred to in Sections 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require and Advocate and Solicitor to reject any request or demand of the Defendant for access to, or disclosure of, any, Client Communications, unless Privilege is waived by the Client.

2. Both parties have duly filed the following cause papers –

(i) Originating Summons dated 07.03.2017;

(ii) Affidavit in Support affirmed by Karen Cheah Yee Lyn on 07.03.201;

(iii) Affidavit in Reply affirmed by Hazlina binti Hussain on 28.04.2017;

(iv) Affidavit in Reply affirmed by Karen Cheah Yee Lyn on 26.05.2017; and

(v) Affidavit in reply affirmed by Chan Weng Keng on 29.05.2017.

3. Both parties have filed their respective written submissions. The Plaintiff's OS was heard on 16.1.2018 and the decision was adjourned to 29.3.2018 and subsequently on 2.4.2018.

BRIEF FACTS

4. The Plaintiff had written in to the Defendant on 3.11.2016 to state that: -

   (i) the Plaintiff had received complaints from members of Malaysian Bar that officers of the Defendant have been carrying out raids on the Plaintiff's member's law firms to conduct audit of their client's account and insisting to have sight of the relevant accounting books and records;

   (ii) Plaintiff's has taken a stance that such audit breaches the principle of solicitor-client privilege;

   (iii) Section 142(5) of Income Tax Act 1967 should not and does not prevail over the solicitor-client privilege.

5. The Plaintiff has also on 29.11.2016 wrote in to the Defendant as a follow up reminder to his letter dated 3.11.2016.

6. The Defendant had replied to the Plaintiff's letter vide letter dated 7.12.2016 and states that: -

(i) the Defendant believes that in providing service to the public, the Plaintiff has always ensured that their duty was observed in accordance with the law, but in ensuring tax compliance amongst the Taxpayers, the Defendant is under a duty to conduct audit to ensure that the tax assessment made is in accordance with the provision of the Income Tax Act 1967;

(ii) the Defendant took the stand that subsection 142(5) of Income Tax Act 1967 overrides the provisions of Chapter IX of Part III, Evidence Act 1950 and the Legal Profession Act 1976. In other words, the audit conducted by the Defendant did not breached the principle of solicitor-client's privilege;

(iii) The Defendant's stand is based on the followings: -

(a) Basic legal provision regarding the solicitor-client's privilege had been provided under section 126 Chapter IX Part III Evidence Act;

(b) However, the provision of subsection 142(5) and (b) of ITA in specific overrides provisions of Evidence Act and the Legal Profession Act.

(c) In addition, it is pertinent to stress that the Defendant's officers are statutorily empowered under subsection 80(1) to have full and free access to all lands, buildings and places to all books, documents etc.

(d) Therefore, the failure of the lawyers or their clients in giving access of the documents to the audit officers are in breach of the ITA 1967 and can be prosecuted under paragraph 116(a) of ITA 1967.

THE ISSUES

7. The Plaintiff in this case had relied on **Section 126 of the Evidence Act 1950** ("EA 1950") which generally provides for the evidentiary provision of the legal privilege principle whilst the Defendant argues that **Section 142(5) of the Income Tax Act 1967** ("ITA 1967") which specifically provides for LAW FIRM'S client's account was not protected by Privilege by its overriding effect over Section 126 of the EA 1950. Amidst all this, the question of law for the determination of this Court is whether Section 142(5) of ITA 1967 prevails over Section 126 of Evidence Act 1950 as there is conflict between both provisions.

8. If the answer is in the affirmative, then the Defendant is entitled to be given access to, or disclosure to the Plaintiff's member's (hereinafter referred to as the law firm) client's account for the purpose of tax audit / investigation.

9. After hearing the oral submissions from the Plaintiff's counsel and the Senior Revenue Counsel (SRC) for the Defendant and also referred to their written submissions and the authorities cited therein, the answer to the above issue which is the opinion of this Court is stated in the following paragraphs of this Judgment.

Whether Section 142(5) of the Income Tax Act Overrides Section 126 of Evidence Act 1950

10. I have considered the Defendant's positon especially the submission that subsection 142(5) (b) of the ITA has made it clear that its overriding effect extended to the operation of section 126 of EA 1950.The term ***"save as provided in para (b)"*** **in** subsection 142(5)(a) of ITA 1967 connotes that the operation of section 126 of EA 1950 which was part of Chapter IX of Part III of EA 1950 is **subjected to** and **has been ousted** by the operation of subsection 142(5) (b) of ITA 1967. When Section 142(5) of ITA containing the said clause refers to any particular provision which it intends to override, inter alia, Section 126 of EA 1950, it is permissible to hold that it excludes the whole application of the Section 126 of EA 1950.

11. I do not agree that section 142(5) (b) of the ITA 1967 goes beyond the provision of Section 126 of EA 1950. The argument is misconceived.

12. Section 126 of the Evidence Act 1950 ("EA") lies within Chapter IX Part III of EA which provides that-

> "(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure-
>
> (a) Any such communication made in furtherance of any illegal purpose;
>
> (b) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

"Save as provided" in s.142 (5) (b) of ITA 1967

13. Firstly, section 142 (5) (b) of ITA 1967 says-

Save as provided in paragraph (b) nothing in this Act shall –

(i) *affect the operation of Chapter IX of Part III of the Evidence Act 1950 (Act 56; or*

(ii) *be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.*

(b) ***Notwithstanding the provisions of any other written law****, where any document, thing, matter, information, communications or advice consists wholly or partly of , or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director General or any authorized officer if it is contained in, or comprises the whole or part of, any*

book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner of firm of practitioners or any other person.

14. My reading of the above provision is that only Paragraph (b) of section 142 (5) of the ITA 1967 excludes or overrides privilege conferred in other written law. The Act does not affect the operation of *Chapter IX of Part III of the Evidence Act 1950 (Act 56; or be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.*

15. **Paragraph (b)** of section 142 (5) which was inserted vide the amendment made in Income Tax (Amendment) Act 1974 commence with the words ***"Notwithstanding the provisions of any other written law".*** Therefore, my view is as far as other written law which prohibit the disclosing or producing any document, thing or information to a court, the Special Commissioners, the Special Commissioners, the Director General, such protection or privilege does not apply. Para (b) overrides that Chapter or those provisions in that written law. **Paragraph (b)** saves Chapter *IX of Part III of the Evidence Act 1950* from operation of ITA 1967. In other words, Section 126 of the Evidence Act 1950 ("EA") which lies within Chapter IX Part III of EA is saved and not caught under section 142 (5) of the ITA 1967. Section 126 of the EA shall prevail over section 142 (5) of the ITA 1967 but of course the proviso

in section 126 does not protect privilege to disclose or produce any document, thing or information to communication made in furtherance of any illegal purpose and for showing that any crime of fraud has been committed by the Advocate.

16. The wordings of Section 142(5) of ITA 1967 is clear and unambiguous and it should not be misinterpreted or assigned with another meaning. This has been decided by Federal Court in ***Positive Vision Labuan Limited v Ketua Pengarah Hasil Dalam Negeri and other appeals (2017) MLJU 183;***

> "*The wordings of section 3B of the ITA and sections 3A and 2(3) of LABATA as well as the Exemption Order are clear and unambiguous.* ***It is trite that when the provisions of law are clear and does not admit of any ambiguity, then the provisions must be strictly interpreted.*** *This court in the case of Krishnadas Achutam Nair & Ors v Maniyam Samykano (1997)1MLJ94 had held:*
>
> > *"the function of a Court when construing an Act of Parliament is to interpret he statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie,* ***every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in***

a stature or subsidiary legislation or to treat them as superfluous or insignificant. *It must be borne in mind that:*

"As a general rule a Court will adopt that construction of a ***statute which will give some effect to all of the words which it contains*** *Per Gibbs J in Beckwith v. R. (1976)12ALR333, at p.337."*

17. I inclined to agree with the Plaintiff's submission that the Defendant has clearly failed to appreciate that the ancient rules of Privilege were framed to protect clients' confidentiality and thus it should not be treated in such a cavalier fashion as the Defendant had submitted before this Court. The Defendant has clearly confused themselves as they have failed to understand Privilege and also failed to address it.

18. I agree with the Plaintiff that the Defendant has wholly misconstrued the applicability of non-obstante clause in the instant case. The correct operation of a non-obstante clause has been explained by the recent Federal Court in the case of ***Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor [2015] 4 MLJ 166*** where Zulkefli CJ held:

*"[39] Although s 40(1) of the Act begins with the words '**notwithstanding...**'. it is a general principle that a non-obstante clause cannot go outside the limits of the Act itself. We are in agreement with the contention of the plaintiff that non-obstante*

clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself. ...

19. Further, in ***Smt. Geeta v. State of U.P & AMP LNIND 2010 SC 1218***, the Indian Supreme Court cited a few earlier Supreme Court cases, including ***A.G. Varadarajulu and another v. State of Tamil Nadu and others (1998) 4 SCC 231*** (which has been cited with approval by ***Ho Tack Sien (supra)***), to emphasize the importance of ascertaining the legislature's intention in interpreting non-obstante clauses (at pages 288 of PBA4):

> *"38. This Court also held in the case of ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Ors, reported in (2006) 10 SCC 452, that the wide amplitude of a non-obstante clause must be kept confined to the legislative policy and it can be given effect to, to the extent the Parliament intended and not beyond the same and that in construing the provisions of a non-obstante clause, it was necessary to determine the purpose and object for which it was enacted (See page 465- 6).*
>
> *39. In Central Bank of India v. State of Kerala & Ors, reported in (2009) 4 SCC 94, this Court reiterated that while interpreting a non-obstante clause the court is required to find out the extent to which the legislature intended to give it an overriding effect."*

20. Accordingly, care has to be exercised in construing the non-obstante nature of **Section 142(5) of the ITA** to give effect to the intention of the Parliament and not beyond the purpose and object for which **Section 142(5) of the ITA** is enacted.

21. Whilst **Section 142(5)(b) of the ITA** was enacted by the Parliament to *"enable disclosure of information contained in records to be required and to be made and prevents privilege from being claimed in respect of such information, notwithstanding any other written law to the contrary"* according to the Explanatory Statement, my view is that **Section 142(5)(b) of the ITA**, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing the their clients and it does not extend to "advocates and solicitors". I agree with the Plaintiff that this is because it is clear from **Section 142(5)(b) of the ITA** itself that Parliament had used two different terms, namely "practitioner" and "advocate and solicitor".

22. It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers (See the judgment of Thomson CJ in ***Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1***. It is a principle of statutory interpretation that when the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different

meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly (see NS Bindrai's Interpretation of Statutes (8th Ed) at p 275) (See His Lordship Arifin Zakaria FCJ in the recent Federal Court case of ***Manokaram a/l Subramaniam v. Kaur a/p Nata Singh [2009] 1 MLJ 21)***

23. Accordingly, in **Section 142(5)(b) of the ITA**, Parliament had clearly used different words as it recognized that "practitioner" and "advocate and solicitor" are different persons and it is trite that Parliament does not act in vain and significance must be given to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded – ***Foo Loke Ying & Anor v Television Broadcasts Ltd & Ord [1985] 2 MLJ 35.***

24. I further agree with the Plaintiff that the terms "practitioner" and "advocate and solicitor" in **Section 142(5)(b) of the ITA** are meant to refer to different persons, especially in light of the numerous times the term "advocate" has been used throughout the statute. The meaning of "practitioner" and "advocate and solicitor" must be consistent throughout the **ITA** as a statute must be read as a whole – ***Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 MLJ 513.***

25. The intention of the Parliament and the object and purpose of **Section 142(5)(b) of the ITA** has been thoroughly explained in the Plaintiff's written submission as follows:

(i) the deliberate and conspicuous dropping of the word "legal" preceding "practitioner";

(ii) in reading the **ITA** as a whole, the word "practitioner" only appears in **Section 142(5)(b) of the ITA** whereas the word "advocate" appears 6 times and is clearly intended to refer to an advocate and solicitor – **Section 3 of the Interpretation Acts 1948 and 1967**;

(iii) the **LPA** uses "legal practitioner" throughout the Act;

(iv) **Section 142(5)(b) of the ITA** contains a reference to "advocate and solicitor" and a reference to a "practitioner". As Parliament does nothing in vain, 2 different phrases must convey 2 different meanings – ***Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors [1985] 2 MLJ 35***, ***Funk David Paul v. Asia General Asset Bhd [2014] 1 MLJ 681***, ***Gurbachan Singh v. Public Prosecutor [1967] 2 MLJ 220***, ***Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581***;

(v) "advocate and solicitor" is a technical phrase and it is not to be supposed that Parliament uses the phrase in any other sense – ***Mohindar Singh and another v. Rex [1950] 16 MLJ 97***, ***DP Vijandran v. Majlis Peguam [1995] 3 MLJ 576***, ***All Malayan Estates Staff Union v. Rajasegaran & 2 Ors***

[2006] 5 AMR 585, Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707.

(vi) the terms "contained in records" of the Explanatory Statement demonstrate that **Section 142(5) of the ITA** does not enable the disclosure of Privileged communications per se, i.e. any documents pertaining to Client Communications found in the possession of solicitors to the Defendant; and

(vii) the phrase "notwithstanding the provisions of any other written law" in **Section 142(5)(b) of the ITA** does not eliminate the operation of common law.

26. Therefore, **Section 142(5)(b) of the ITA** cannot be used by the Defendant as an excuse to be given access to the clients' account with a view to taxing the advocates and solicitors.

The Common Law on Privilege

27. I am also of the view that the words *"notwithstanding the provisions of any other written law"* in **Section 142(5) (b) of the ITA** does not exclude the operation of common law.

28. In ***Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257***, the Federal Court discussed **Article 160(2) of the Federal Constitution** which recognizes that common law is different from that of written law (at pages 307 of PBA4):

> *"The Court of Appeal correctly referred to the definition of 'law' in art 160(2). It reads as follows:*
>
> > *Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof."*

29. It is trite that in enacting a statute, the Parliament may elect to exclude common law. The High Court of Australia held in the case of ***Blunden v. Commonwealth of Australia [2003] HCA 73*** that-

> *"For the purposes of s 80 of the Judiciary Act the words 'laws of the Commonwealth' related only to statute law and did not include common law."*

30. **Section 142(5) of the ITA** makes no reference to common law and the Plaintiff therefore, such an exception should not be read into the statute. This has been

confirmed in ***Yeo Hock Cheng v Rex [1938] 1 MLJ 104*** where the Court confirmed the pronouncement in the case of Arthur v Bokesham 11 Mod 150 that-

> *"The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare."*

31. The Supreme Court in ***Manilal & Sons (M) Sdn Bhd v M Majumder [1988] 2 MLJ 305*** cited Walsh v Alexander (1913) 16 CLR 293 with approval:

> *"... that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains."*

32. This is fortified by the judgment of New Zealand Court of Appeal in ***Commissioner of Inland Revenue v. West-Walker [1954] NZLR 191:***

"*And where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law*".

33. Applying the above authorities, I agree with the Plaintiff that Parliament does not intend to apply **Section 142(5)(b) of the ITA** to the exclusion of the common law on Privilege and that **Section 142(5)(b) of the ITA** cannot be given effect to the extent beyond the Parliament's intention! At most, **Section 142(5) (b) of the ITA** may only apply to the possible secondary cases.

Section 126 of the EA is the specific provision

34. I also agree with the Plaintiff that the Defendant has also misunderstood and misapplied the Latin maxim of *Generalia Specialibus Non Derogant* in this case. Based on the clear and express language in **Section 126 of the EA**, it cannot be disputed that the **EA** is the specific statute which governs matters pertaining to Privilege. Although **Section 126 of the EA** was enacted before **Section 142(5) of the ITA**, it is a specific provision on Privilege, and as such excludes the operation of the general provision of **Section 142(5) of the ITA** to the extent of any inconsistency (See ***Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600 and*** **Bennion on Statutory Interpretation, Sixth Edition*).***

35. The Plaintiff has submitted numerous authorities on the subject matter of privilege. The Defendant cannot ignore the superior and apex courts' judgments that Privilege is absolute and it remains so until waived by the privilege holder.

36. In the very recent case of ***Gideon Tan v. Tey Por Yee and another appeal [2017] 1 MLJ 352*** decided by the Court of Appeal and Federal Court, a lawyer sought to rely on privileged information to defend himself in a committal proceeding. In rejecting the same, the Court of Appeal and Federal Court once again affirmed that Privilege affords protection to clients only and not to lawyers.

37. Further, the Federal Court in ***Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 MLJ 14*** held that **Sections 126 to 129 of the EA** embody the common law position and expressly held that "*Legal professional privilege under s. 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client.*". This goes to show that Privilege is grounded and inherent in common law and **Section 142 of the ITA** simply cannot take away such fundamental principles.

38. In **Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2014] 3 CLJ 367** the Court has held that that-

> *"The solicitor-client privilege is absolute and permits of only one exception which is waiver: (a) upon the express consent of the client given and*

directed to the advocate; and (b) such consent must be intentional and deliberate.

...

The law is very clear that this privilege is absolute and permits of only one exception which is upon the express consent of the client given and directed to the advocate and which consent must be intentional and deliberate. The common law maxim "once privileged, always privileged" as embodied in ss. 126 to 129 of the Evidence Act 1950 must be recognized."

[See also ***Protasco Bhd v. PT Anglo Savic Utama & Ors [2016] 7 MLJ 523]***

39. As submitted by the Plaintiff, **section 126 of the EA** embodies every Privileged communication, including the Client Communications. The terminology of "in the course and for the purpose of (an advocate's) employment" is repeated numerous times throughout **Section 126 of the EA**. However, **Section 142(5)(b) of the ITA** merely makes reference to the term "in connection with any client". The terminology of "in connection with" is far from specific and is extremely general as to its meaning as well as its applicability.

40. As such, the **EA** is undeniably more precise, unambiguous and specific. With those circumstances in mind, it is my considered opinion that **Section 126 of the EA** must take precedence over **Section 142(5) (b) of the ITA** to the extent of any inconsistency in respect of matters relating to Privilege.

41. It is to be noted that the Defendant in fact has admitted that the ITA is a general legislation by citing the following passage from the case of ***Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217***:

> *"[3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under art. 96 of the Federal Constitution which provides "No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law." The LPA is a specific legislation whilst the ITA is a general legislation. Where there is a conflict between the LPA and ITA provisions, the LPA prevails. ..."*

42. I would agree with the Plaintiff that the fact that the Parliament would have had in mind the earlier (although not general) Act (the **EA**) when it enacted the later Act (the **ITA**) and intentionally chose a different terminology, i.e. "practitioner" as opposed to "advocate", is evident of the Parliament's intention that **Section 142(5)(b) of the ITA** is not to be applied to advocates and solicitors. Otherwise, the Parliament would have used the same terminology in the **ITA** having in mind the **EA**.

Basis for Looking into the Client's Accounts

43. The Defendant has stressed that the Defendant is clear with its objective in requesting for a view to the law firm's client's account which is to ensure that the law firm itself do not understate its income and therefore, an audit on the full documents held by the Applicant is necessary which also includes the "client's account". The Plaintiff has a duty to regulate LPA which includes providing for the keeping by advocates and solicitors at banks for client's money pursuant to **Section 78 of the LPA**. In furtherance to that, **Rule 2 of the Solicitors' Account Rules 1990 ("SAR")** provides that a *"client account"* means *"a current or deposit account at a bank* ***in the name of the solicitor*** *in the title of which the word "client" appears.*

44. Based on the same provision it can be concluded and it is also never disputed that the Plaintiff's members (law firms) had full access to maintain the client's account. Therefore, the client's account is never fully protected from misuse by the law firms and this is supported by myriads of cases where law firms had misuse client's account which also includes circumstances whereby the client's account was use to hold transfers which was done fraudulently by law firms.

45. Defendant submitted that this illegal conduct is not foreign in other developing countries. In fact, few attempts had been done by local authorities in other developing country to curb the matter. Relying on the same basis, the Defendant finds it important to ensure that the Plaintiff did not use the client's account as a means to park the law firm's own incomes which will then result to an

understatement of income by the respective law firm. The decision to look into the respective law firm's client's account was not done arbitrarily but in fact in accordance with the law. Had the law did not provide for the same, the Defendant would not have decided to look into the Plaintiff's member's client's accounts.

46. In essence, what the Defendant is trying to say is that although as contended by the Plaintiff, "client's account" does not hold monies of lawyers but it is rather a subjective matter open to challenge. This is because, few cases cited had proven that "client's account" had been misused by law firms as the account was actually made in the name of the solicitor itself. This shows multiple possibilities of misuse of "client's account" for law firm's income.

47. The Plaintiff in reply submitted that the equitable doctrine that an Act of Parliament (in this case, the **ITA**) shall not be used as an instrument of fraud has long been recognized and applied in numerous English and Malaysian cases (see ***British Railways Board v. Pickin [1974] AC 765***, House of Lords and ***Koh Siew Keng (P) & Anor v. Koh Heng Jin [2008] 3 MLJ 822***, Court of Appeal). In the instant case, it was the Plaintiff's contention that the Defendant have sought to use the **ITA** as an instrument of fraud purportedly to fish for information on the clients of the law firms.

48. Further, the audits carried out by the Defendant on the law firms and the documents related to Client Communications are in the guise of a fishing

expedition to unlawfully fish for information on the clients of the law firms. Such unmeritorious conduct of the Defendant in seeking to use **Section 142(5) of the ITA** as an engine of fraud is abusive, unlawful and illegal.

49. In the case of ***S.R. Batliboi & Co. v. Department of Income Tax (Investigation) LNIND 2009 DEL 689***, the High Court of India held-

> *"It appears plain to us, therefore, that for a search or seizure to be legal it should not be firstly ordered for malafide, extraneous or for oblique reasons. Secondly, it must be predicated on information received by the Authority who would have reason to believe that it is necessary to conduct such an operation. Thirdly, it should not be in the nature of a roving or fishing exercise. These three factors must be observed rigorously and even punctiliously since the exercise of such powers invariably result in a serious invasion of the privacy and freedom of the citizen...*
>
> *It is also our view that the Income Tax Department cannot make fishing or roving inquiry to initiate proceedings against all these companies which are the clients of the Petitioner."*

50. The Plaintiff contended that the Defendant failed to comprehend that, by looking into the clients' accounts of the law firms in the process of auditing the law firms, the Defendant could never be able to ascertain the income of the law firms, as the

clients' accounts do not in any way constitute part of the income of the law firms – ***Choong Yik Son v. Majlis Peguam Malaysia [2008] 7 MLJ 215***. It is also held that any advocate and solicitor caught meddling with the client's account must face the wrath of the law.

51. Applying the above authorities, The Plaintiff submitted that the contention by the Defendant is merely an excuse for the Defendant to unlawfully fish for information from the clients of the law firms. The Defendant's contention which is based on presumption does not hold water and is bound to fail.

52. My observation is that while the Defendant may have its own purpose and objective, however, any action done must be in accordance with the law. It is understood that the Defendant relied on section 142 (5) of the ITA to view the "client's account". But while I agree that paragraph (b) of section 142 (5) does not protect privilege communication or documents in other written law, the fact remains that solicitor -clients privilege under section 126 of the Evidence Act 1950 ("EA") which lies within Chapter IX Part III of EA is not affected by the operation of ITA 1967.

53. Be that as it may, section 126 of the EA does not protect the privilege in the following circumstances-

i) Any such communication made in furtherance of any illegal purpose;

ii) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment

54. It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

55. **In my considered opinion, before the Defendant is required to view the "client's account" there must some information of an illegal act/purpose and/or any crime of fraud or reasonable belief that the Plaintiff has used the client's account as a means to park the law firm's own incomes which resulted to an understatement of income by the respective law firm which warrant an investigation.**

CONCLUSION

56. In conclusion, the summary of my decision are follows-

1. Privilege is absolute unless it is waived by the privilege holder or falls within the proviso to **Section 126 of the EA** and it therefore affords protection to clients and not to lawyers;

2. it is not open for the Defendant to have any access to the clients' account with a view to checking whether the law firms have understated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms;

3. the Defendant cannot be allowed to use the **ITA** as an instrument of fraud purportedly to fish for information on the clients of the law firms;

4. the non-obstante nature of **Section 142(5)(b) of the ITA** ought to be read in accordance with the actual words of Parliament;

5. **Section 142(5)(b) of the ITA**, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing their clients and it does not extend to "advocates and solicitors";

6. in **Section 142(5)(b) of the ITA**, Parliament had clearly used different words as it recognised that "practitioner" and "advocate and solicitor" are different persons;

7. **Section 142(5)(b) of the ITA** does not oust the common law on Privilege; and

8. based on the clear and express language in **Section 126 of the EA**, it cannot be disputed that **Section 126 of the EA** is the specific provision which governs matters pertaining to Privilege. The Defendant has misunderstood and misapplied the Latin maxim of *Generalia Specialibus Non Derogant*.

57. In the result, the answer to the issue is in the negative. I allowed the Plaintiff's application in the Originating Summon with Cost of RM 5,000.00.

Dated: 2nd April 2018

(KAMALUDIN BIN MD SAID)

JUDGE

HIGH COURT KUALA LUMPUR

SOLICITORS

Messrs. Shearn Delamore & Co (Anand Raj and Foong Pui Chi) for the Plaintiff

Ahmad Ishak bin Mohd Hassan and Ruzaidah bte Yaacob) for the Defendant

ACTS OF PARLIAMENT REFERRED TO

Section 80, 142(5) of the Income Tax Act 1967

Sections 126, 127, 128 and 129 of the Evidence Act 1950

Section 3 of the Interpretation Acts 1948 and 1967;

Section 78 of the Legal Profession Act 1976

Rule 2 of the Solicitors' Account Rules 1990

BOOKS/ARTICLES REFERRED TO

CCH's Malaysian Tax Reporter in 3 Volumes: Commentary On Malaysian Revenue Law

Bennion on Statutory Interpretation, Sixth Edition

CASES REFERRED TO

Balakrishnan V. Ketua Pengarah Perkhidmatan Awam Malaysia and The Government of Malaysia, Federal Court (1981) 2 MLJ 259

Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret Davil Wildson (2010) 5 CLJ 889

Ghulan Nabi and Others V. State of Jammu And Kashmir and others (2013) CLJ 1

Sazean Engineering & Construction Sdn Bhd V. Bumi Bersatu Resources Sdn Bhd (2016)1LNS 1356

Luggage Distributors (M) Sdn Bhd V. Tan Hoe Teng @ Tan Tien Chi & Anor (1995)1 MLJ 719

Commissioner of Income Tax V. Shahzada Nand & Sons AIR 1966 SC134,

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) (1995) 2 MLJ 600

Shunmuga Vadevu s Athimulam & Ors V. The Malaysian Co-Operative Insurance Society Ltd & Anor (1999)1CLJ 231

Positive Vision Labuan Limited v Ketua Pengarah Hasil Dalam Negeri and other appeals (2017) MLJU 183;

Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor [2015] 4 MLJ 166

Smt. Geeta v. State of U.P & AMP LNIND 2010 SC 1218,

A.G. Varadarajulu and another v. State of Tamil Nadu and others (1998) 4 SCC 231

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1

Manokaram a/l Subramaniam v. Kaur a/p Nata Singh [2009] 1 MLJ 21

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ord [1985] 2 MLJ 35

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 MLJ 513

Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors [1985] 2 MLJ 35

Funk David Paul v. Asia General Asset Bhd [2014] 1 MLJ 681

Gurbachan Singh v. Public Prosecutor [1967] 2 MLJ 220

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581

Mohindar Singh and another v. Rex [1950] 16 MLJ 97

DP Vijandran v. Majlis Peguam [1995] 3 MLJ 576

All Malayan Estates Staff Union v. Rajasegaran & 2 Ors [2006] 5 AMR 585

Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257

Blunden v. Commonwealth of Australia [2003] HCA 73

Yeo Hock Cheng v Rex [1938] 1 MLJ 104

Manilal & Sons (M) Sdn Bhd v M Majumder [1988] 2 MLJ 305

Commissioner of Inland Revenue v. West-Walker [1954] NZLR 191:

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600

Gideon Tan v. Tey Por Yee and another appeal [2017] 1 MLJ 352

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 MLJ 14

Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2014] 3 CLJ 367

Protasco Bhd v. PT Anglo Savic Utama & Ors [2016] 7 MLJ 523

Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217:

British Railways Board v. Pickin [1974] AC 765

Koh Siew Keng (P) & Anor v. Koh Heng Jin [2008] 3 MLJ 822,

S.R. Batliboi & Co. v. Department of Income Tax (Investigation) LNIND 2009 DEL 689

Choong Yik Son v. Majlis Peguam Malaysia [2008] 7 MLJ 215

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. W-01(A)-304-05/2018

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... **PERAYU**

DAN

BAR MALAYSIA ... **RESPONDEN**

[Dalam Perkara Mengenai Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Rayuan & Kuasa-Kuasa Khas)
Saman Pemula No. WA-24-12-03/2017

Antara

Bar Malaysia ... Plaintif

Dan

Ketua Pengarah Hasil Dalam Negeri ... Defendan]

KORAM :
YAACOB BIN HJ MD SAM, HMR
S NANTHA BALAN, HMR
DARRYL GOON SIEW CHYE, HMR

PADA 3 MAC 2021 **DALAM MAHKAMAH TERBUKA**

PERINTAH

RAYUAN INI ditetapkan untuk pendengaran pada hari ini dalam kehadiran Ahmad Isyak bin Mohd Hassan, Peguam Kanan Hasil (Mohammad Hafidz bin Ahmad, Peguam Kanan Hasil dan Mohammad Danial bin Ahmad, Peguam Hasil bersamanya) bagi pihak Perayu dan Anand Raj (Foong Pui Chi dan Abhilaash Subramaniam bersamanya), Peguam-Peguam bagi pihak Responden **DAN SETELAH MEMBACA** Rekod Rayuan dan kesemuanya yang

difailkan di sini **DAN SETELAH MENDENGAR** hujahan pihak-pihak yang tersebut **MAKA ADALAH DENGAN INI DIPERINTAHKAN DENGAN SEBULAT SUARA** bahawa:-

(a) rayuan ini ditolak;

(b) Perintah Mahkamah Tinggi Malaya di Kuala Lumpur bertarikh 2 haribulan April 2018 disahkan; dan

(c) tiada perintah untuk kos diberikan.

DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 3 haribulan Mac 2021.

Bertarikh pada 23-Mac-2021

METERAI MAHKAMAH RAYUAN MALAYSIA

NUR SYAFAWATI ARIFIN
Penolong Kanan Pendaftar
Mahkamah Rayuan
Putrajaya

.....
PENOLONG KANAN PENDAFTAR
MAHKAMAH RAYUAN MALAYSIA
PUTRAJAYA

Perintah ini difailkan oleh Tetuan Shearn Delamore & Co., Peguamcara bagi pihak Responden, yang alamat untuk penyampaiannya ialah di Tingkat 7, Wisma Hamzah-Kwong Hing, No. 1, Leboh Ampang, 50100 Kuala Lumpur.

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. W-01(A)-304-05/2018

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... **PERAYU**

DAN

BAR MALAYSIA ... **RESPONDEN**

[Dalam Perkara Mengenai Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Rayuan & Kuasa-Kuasa Khas)
Saman Pemula No. WA-24-12-03/2017

Antara

Bar Malaysia ... Plaintif

Dan

Ketua Pengarah Hasil Dalam Negeri ... Defendan]

CORAM :
YAACOB BIN HJ MD SAM, HMR
S NANTHA BALAN, HMR
DARRYL GOON SIEW CHYE, HMR

ON 3RD MARCH 2021 **IN OPEN COURT**

ORDER

THIS APPEAL fixed for hearing on this day in the presence of Ahmad Isyak bin Mohd Hassan, Senior Revenue Counsel (Mohammad Hafidz bin Ahmad, Senior Revenue Counsel and Mohammad Danial bin Ahmad, Revenue Counsel, with him) for the Appellant and Anand Raj (Foong Pui Chi and Abhilaash Subramaniam with him) of Counsel for the Respondent **AND UPON READING** the Record of Appeal and all which have been filed herein

AND UPON HEARING the submissions of the parties **IT IS HEREBY UNANIMOUSLY ORDERED** that:-

(a) this appeal be dismissed;

(b) Order of the High Court of Malaya at Kuala Lumpur made on the 2nd day of April 2018 be affirmed; and

(c) no order as to costs be given.

GIVEN under my hand and Court seal on the 3rd day of March 2021.

.....
SENIOR ASSISTANT REGISTRAR
COURT OF APPEAL OF MALAYSIA
PUTRAJAYA

This Order is filed by Messrs. Shearn Delamore & Co., Solicitors for the Respondent, whose address for service is at 7th Floor, Wisma Hamzah-Kwong Hing, No. 1, Leboh Ampang, 50100 Kuala Lumpur. SD (TAX) 3471695 (AR) 2182509_1

IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: W-01(A)-304-05/2018

BETWEEN

KETUA PENGARAH HASIL DALAM NEGERI ...APPELLANT

AND

BAR MALAYSIA ...RESPONDENT

[In the High Court of Malaya at Kuala Lumpur

(Appellate & Special Powers Division)

Originating Suit No.: WA-24-12-03/2017

Between

Bar Malaysia ...Plaintiff

And

Ketua Pengarah Hasil Dalam Negeri ...Defendant]

CORAM

YAACOB BIN HJ MD SAM, JCA

S. NANTHA BALAN, JCA

DARRYL GOON SIEW CHYE, JCA

JUDGMENT

[1] On 3rd of November 2016, the Respondent, the Malaysian Bar, wrote to the Appellant, the Ketua Pengarah Hasil Dalam Negeri. By this letter, the Appellant was informed that the Respondent had received complaints from its members. The complaints were that the Appellant had been carrying out raids on law firms to conduct audits on their clients' accounts and insisting on having sight of accounting books and records pertaining to these accounts.

[2] In its letter, the Respondent expressed its objections and its view that the documents and information sought by the Appellant were protected by solicitor-client privilege and may not be made available to the Appellant.

[3] On 7th December 2016, the Appellant replied. The Appellant maintained that the audits complained of were necessary to ensure "tax compliance" by taxpayers. The Appellant maintained that the audits were not in breach of any solicitor-client privilege by reason of section 142(5) of the Income Tax Act 1967 (**"ITA"**) which overrides the provisions of Chapter IX of Part III of the Evidence Act 1950 (**"EA"**) and the Legal Profession Act 1976 (**"LPA"**). Accordingly, it was maintained that the actions of the Appellant complained of were not in breach of any solicitor-client privilege.

[4] In light of the divergent views of the parties and their disagreement as to whether the law relating to solicitor-client privilege was being ignored and under threat by the Appellant's actions complained of, the Respondent brought the matter to Court seeking several declarations on the issue.

[5] On 2nd April 2018, the High Court ruled in favour of the Respondent and made the declarations sought. In essence the learned High Court Judge (as his Lordship then was) held that section 142(5) of the ITA did not override section 126 of the EA. Thus, the privilege provided under section 126 of the EA precluded the Appellant from

insisting on documents or information in respect of or relating to the clients' accounts of advocates and solicitors. The Appellant appealed.

[6] This is the decision of the Court in respect of the Appellant's appeal.

The declarations sought by the Respondent

[7] The declarations sought by the Respondent were set out in the judgment of the High Court and they are reproduced below:

> "(i) a Declaration that section 142(5) of the ITA does not entitle or empower the Defendant to disregard the privilege under Malaysian Law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his / her client,whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as "Client Communications"), and which privilege is referred to variously under Malaysian law as "legal privilege (hereinafter referred to as "Privilege") by requesting or demanding access to, or disclosure of, such Client

Communications from any Advocate and Solicitor, unless Privilege is waived by the client ;

(ii) a Declaration that Part V of the ITA generally, and Section 80 of the ITA in particular, do not entitle or empower the Defendant to disregard the Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

(iii) a Declaration that Privilege under Malaysian law generally, and as referred to in Sections 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require an Advocate and Solicitor to reject any request or demand of the Defendant for access to, or disclosure of, any, Client Communications, unless Privilege is waived by the Client."

[8] The key legislative provisions are reproduced hereunder for ease of reference.

[9] Section 80 of the ITA states as follows:

"**Power of access to buildings and documents, *etc.***

80. (1) For the purposes of this Act the Director General shall at all times have full and free access to all lands, buildings and places and to all books and other documents and may search such lands, buildings and places and may inspect, copy or make extracts from any such books or documents without making any payment by way of fee or reward.

(1A) Where the Director General exercises his powers under subsection (1), the occupiers of such lands, buildings and places shall provide the Director General or an authorized officer with all reasonable facilities and assistance for the exercise of his powers under this section.

(2) The Director General may take possession of any books or documents to which he has access under subsection (1) where in his opinion—

(a) the inspection of them, the copying of them or the making of extracts from them cannot reasonably be undertaken without taking possession of them;

(b) they may be interfered with or destroyed unless he takes possession of them; or

(c) they may be needed as evidence in any legal proceedings instituted under or in connection with this Act.

(3) Where in the opinion of the Director General it is necessary for the purpose of ascertaining income in respect of the gains or profits from a business for any period to examine any books, accounts or records kept

otherwise than in the national language, he may by notice under his hand require any person carrying on the business during that period to furnish within a time specified in the notice (not being less than thirty days from the date of service of the notice) a translation in the national language of the books, accounts or records in question:

Provided that in East Malaysia this subsection shall have effect as if the words "or English" were inserted after the words "national language" wherever they occur."

[10] Section 142(5) under Chapter 3 of ITA states as follows:

"Evidential provisions

142. (1) ...

...

(5) (a) Save as provided in paragraph (b) nothing in this Act shall—

(i) affect the operation of Chapter IX of Part III of the Evidence Act 1950 [Act 56]; or

(ii) be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he

would not be required or permitted to produce or give to a court.

(b) Notwithstanding any other written law, where any document, thing, matter, information, communication or advice consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director General or any authorized officer if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person.

(c) Paragraph (b) shall also apply with respect to any document, thing, matter, information, communication or advice made or brought into existence before the commencement of that paragraph."

[11] Section 126 of the EA, including the explanation provided thereunder, states as follows:

"Professional communications

126. (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation—The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an advocate: "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A, a client, says to B, an advocate: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure."

The issues in this appeal

[12] For the purpose of its appeal, the Appellant distilled and set out in its submissions three issues that need to be determined by the Court, namely:

> "a. Whether Section 142(5) of the ITA 1967 overrides the Solicitor-Client Privilege as provided under section 126 of the EA 1950.
>
> b. Whether the Client's Account under the Legal Firm's name and administered by the Firm falls within the ambit of Privilege under section 126 of the EA 1950 as section 126 of the EA 1950 provides Privilege onlyfor communications between solicitors and client.
>
> c. Whether the word "practitioner" in section 142(5)(b) of the ITA 1967 refers to and includes "advocate and solicitor" or it merely refers to other practitioners such as tax agent and accountant."

The term "solicitor-client privilege" is here used to refer specifically to the privilege provided under section 126 of the EA.

[13] Central to this entire appeal is the construction and interpretation of the ITA and its possible effect on the EA and as such, it is appropriate that what has been adopted by the Federal Court as the correct approach be reiterated. In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97, Gopal Sri Ram JCA (sitting in the Federal Court) stated as follows:

> "78 .... The correct approach to be adopted by a court when *interpreting a taxing statute* is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739 :
>
> > First, the *words are to be given their ordinary meaning.* They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
> >
> > Secondly, '... *one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied.*

One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119).

Thirdly, the o*bject of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended.* If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction."

(Emphasis added)

Whether section 142(5) of the ITA overrides section 126 of the EA and whether an advocate and solicitor is included in the term "practitioner" in section 142(5)(b) of the ITA

[14] Issues (a) and (b) posed by the Appellant are here dealt with together as they are necessarily inter-related. The determination of whether section 142(5) of the ITA overrides section 126 of the EA would require the consideration and determination whether advocates and solicitors are included in the term "practitioner" in section 142(5)(b) of the

ITA. It is well settled that the construction of any document, be it a written contract or statute, should not be compartmentalised or considered in isolation such as to exclude other provisions in that same contract or statute that may shed light on the provision being construed (see *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and Another Appeal* [2015] 4 MLJ 701).

[15] It was contended by the Appellant that the opening words in section 142(5)(a) of ITA namely, "save as provided in paragraph (b) ...", means "except" or "other than", relying on the observation of Ariffin Zakaria FCJ in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 5 CLJ 321 at p 340. On this basis it was contended that section 126 of the EA, being part of Chapter IX of Part III of the EA, is subject to and has been ousted by section 142(5)(b), by virtue of the provision in section 142(5)(a). Putting it another way, the operation of Chapter IX of Part III of the EA, was made subject to section 142(5)(b) – accordingly, section 142(5)(b) would prevail over that part of the EA.

[16] This argument made on behalf of the Appellant was followed by another that relates to the opening words of section 142(5)(b) namely, "Notwithstanding any other written law ...". The word "other" was omitted in the Appellant's written submissions. This was no doubt due to a

typographical error. This non-obstante clause, it was contended, allows section 142(5)(b) to override the provisions of Chapter IX of Part III of the EA, and along with it, section 126 of the EA and those provisions that cater for solicitor-client privilege. Such is the effect of a non-obstante clause, so held by the Federal Court in *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and The Government of Malaysia* [1981] 2 MLJ 259. Reference was also made to the decision of the Federal Court on this point in *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret David Wilson* [2010] 5 CLJ 899. Also cited was the decision of the India Supreme Court in *Ghulam Nabi Dar and Others v State of Jammu and Kashmir and Others* [2013] 7 CLJ 1.

[17] It was further contended on behalf of the Appellant that while the provisions of the ITA in question are clear, however, should there be any doubt or "grey area" as it was put, the purposive approach should be adopted. This would be an approach consonant with section 17A of the Interpretation Acts 1948 and 1967. To this end, and in line with Lord Donovan's fourth point in *Mangin,* regard should be had to the Explanatory Statement to the Bill of Act A225 1974 which resulted in the current section 142(5), where it was stated:

> "The amendment of section 142 of the Act proposed in Clause 3 of this Bill would enable disclosure of information contained in records to be required and to be made and prevents Privilege from being claimed in respect of such information, notwithstanding any other written law to the contrary. This amendment is to be deemed to have come into force on 1st January 1974."

The explanatory statement it was contended, clearly discloses the purpose of the amendment. It was to oust or exclude any privilege that is attached to professional communication such as those provided in section 126 of the EA.

[18] Accordingly, it was maintained on behalf of the Appellant that coupled with the provisions in section 80 of the ITA, the Appellant may require the documents that it had been seeking from the clients' accounts of advocates and solicitors and thus legal firms.

[19] It was also submitted on behalf of the Appellant that the learned Judge had erred when he concluded that the word "practitioner" in section 142(5)(b) does not include an advocate and solicitor. It was submitted that no other person except advocates and solicitors are protected with the shield of privilege provided under section 126 of the EA. That

advocates and solicitors are recognised as "practitioners" accords with the decision in *S.D. Rani & Ors v John Pillai* [1970] 2 MLJ 21.

[20] The Respondent's contrary contention was that the privilege afforded by section 126 of the EA should not be abrogated save by clear and unequivocal legislative language, which is absent in this case. It was also contended that the non obstante provision cannot go beyond its limits (See *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor* [2015] 4 MLJ 166). In essence, section 126 of the EA was not overridden by section 142(5)(b) of the ITA upon a proper construction of the latter.

[21] As a starting point, with respect, we find the explanatory statement given to the legislature in respect of the amendment to section 142 of the ITA somewhat unhelpful in respect of the issues to be determined. While it is clear that the amendment seeks to prevent any assertion of privilege, its *extent* appears to be unclear. The phrase "notwithstanding *any other written law*" (emphasis added) is reproduced in the explanatory statement. What then is that "other written law"? Indeed, did the provision introduced go to the extent of abrogating or removing "solicitor-client privilege" altogether *vis a vis* the Appellant? It is obvious that such was not expressly spelt out.

[22] It would seem that the issue whether section 142(5) has the effect of overriding the privilege provided under section 126 of the EA has never been tested, despite the existence of section 142(5) for over forty years.

[23] To start with, section 142(5) begins with a paragraph (a). While this paragraph (a) begins with a qualifying proviso, it then goes on to state in (i) that nothing in the ITA shall affect the operation of Chapter IX of Part III of the EA. Thus, a particular chapter, and part, of the EA was specifically stated and expressed to be unaffected, "save as provided in paragraph (b)". Within Chapter IX of Part III of the EA is found section 126 and the provision relating to the privilege provided.

[24] Quite apart from the fact that the operation of Chapter IX of Part III of the EA is not affected as expressly stated in paragraph (i), section 142(5)(a)(ii) spells out that nothing in the ITA shall be construed as "requiring or permitting" any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by Chapter IX or those provisions he would not be required or permitted to produce or give to a court.

[25] Thus, the provisions in section 126 of the EA relating to privilege, is among those recognised and expressed to be unaffected or undermined, "save as is provided in paragraph (b)" i.e. section 142(5)(b).

[26] Two points may be drawn from section 142(5)(a). First, the legislature specifically singled out that part of the EA which includes section 126 and expressed that its operation is not to be affected by the Act. Secondly, by reason of the proviso, that part of the EA singled out may only be affected "... as provided in paragraph (b)".

[27] The question then arises as to the extent or in what way, the operation of Chapter IX of Part III of the EA is affected by section 142(5)(b).

[28] Having expressly referred to and identified Chapter IX of Part III of the EA in section 142(5)(a), section 142(5)(b) then begins with the words "notwithstanding any other written law".

[29] In *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713, p 762, Heliliah FCJ made it clear that:

"The term 'notwithstanding' means generally 'not to stand against it', or 'in the way' or 'overriding'".

[30] Thus, having expressed in paragraph (a) that, subject to paragraph (b), the operation of Chapter IX of Part III of the EA is not to be affected by the ITA, the non obstante provision in paragraph (b), under the same subsection, then refers to "other written law". The question that follows is whether "other written law" refers to Chapter IX of Part III of the EA or some undisclosed "other written law".

[31] Section 142(5)(b) may be dissected into three parts. The first is the non obstante provision. The second deals with what may be described as the subject matter of the provision i.e. the document, thing, matter information, communication etc... "of a person". In parenthesis, it is made clear that the "person" referred to in section 142(5)(b) may be an advocate and solicitor, his client or any other person. Third, the *circumstances* in which privilege from disclosure may not be invoked, and against whom.

[32] The second part of section 142(5)(b) is directed very broadly at any document, thing, matter, information, communication or advice which is then narrowed down to only those consisting or relating wholly or partly

to receipts, payments, income, expenditure, or financial transactions or "dealings of a person". Although not of any great significance for the purposes of this case, the term "dealings" would probably have to be read *ejusdem generis* to the preceding items i.e. to be financial in nature. As for who that "person" might be, as indicated, it may be any one whether an advocate and solicitor, his client or "any other person". At this juncture it is to be noted that advocates and solicitors are specifically referred to as such. It is also to be noted that what is of concern here is the document, thing, matter, information, communication etc... of "a person", who could be an advocate and solicitor, his client or any other person.

[33] As for the third part of section 142(5)(b), it removes any claim of privilege from disclosure *vis a vis* the Court, the Special Commissioners, the Director General or authorised officers, of any of the subject matter described that is "*prepared or kept by* any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person" (emphasis added).

[34] Learned counsel for the Appellant maintained that "practitioner" or "firm of practitioners" in this context can only mean advocates and solicitors as no one else enjoys the privilege that advocates and solicitors do under section 126 of the EA.

[35] With respect, firstly, it is quite settled law that the privilege is not that of the advocate and solicitor but a privilege of the client of an advocate and solicitor (see *Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669 at pp 686 para 25). Hence, only the client may waive the privilege or consent to its waiver.

[36] Secondly, by token of this same argument made on behalf of the Appellant, one would therefore expect the legislature to refer only to, and to use the term, advocate and solicitor. Instead however, another term is used i.e. "practitioner", within that very same provision. The different term used here results in a third entity being brought into the equation, i.e. a "practitioner", who has the information sought in any book, account, statement or other record prepared or kept by him. As such, the provision can only mean the required data or information found in any record kept or prepared by a third party and not the "person" (which includes an advocate and solicitor or his client) himself.

[37] By way of contrast, learned counsel for the Respondent pointed to section 16A of the New Zealand Inland Revenue Department Act of 1952. Section 16A was said to have been brought about by a decision of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v West Walker* [1954] NZLR 191.

[38] Section 16A of the New Zealand legislation provided as follows:

"***Privilege for confidential communication between legal practitioners and their clients***

16A (1) Subject to subsection two of this section, any information or book or document shall, for the purposes of sections thirteen to sixteen of this Act, be privileged from disclosure, if-

(a) It is a confidential communication, whether oral or written, passing between a *legal practitioner* in his professional capacity and his client, whether made directly or indirectly through an agent of either; and

(b) It is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and

(c) It is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

(2) Where the information or book or document consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions of a specified person (whether the *legal practitioner*, his client, or any other person), it shall not be privileged from disclosure if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by the *legal practitioner* in connection with a trust account of the *legal*

practitioner within the meaning of section seventy of the Law Practitioners Act 1955.

(3) Except as provided in subsection one of this section, no information or book or document shall for the purposes of sections thirteen to sixteen of this Act be privileged from disclosure on the ground that it is a communication passing between a *legal practitioner* and his client.

(4) Where any person refuses to disclose any information or book or document on the ground that it is privileged under this section, the Commissioner or that person may apply to a Magistrate for an order determining whether the claim of privilege is valid; and, for the purposes of determining any such application, the Magistrate may require the information or book or document to be produced to him. An application under this subsection may be made in the course of an enquiry under section fifteen of this Act to the Magistrate who is holding the inquiry.

(5) For the purposes of this section the term *"legal practitioner"* means a barrister or solicitor of the Supreme Court, and references to a *legal practitioner* include a firm in which he is a partner or is held out to be a partner.

(6) This section shall apply with respect to information, books, and documents made or brought into existence before the commencement

of this section as well as to information, books, and documents made or brought into existence after the commencement of this section."

(Emphasis added)

Reference was then made to the successor of section 16A, namely section 20 of the New Zealand Tax Administration Act 1994.

[39] There may be similarities between the section 16A of the New Zealand legislation and section 142 of the ITA, but they are not the same. There are clearly differences in the language used. As such, the New Zealand legislation is of little assistance in the interpretation of section 145(2) of ITA. However, the point made by learned counsel for the Respondent is the fact that the term "legal practitioner" is *expressly* used in the New Zealand legislation thus leaving no ambiguity or room for doubt. Indeed, not only the term "legal practitioner" is used, it is also specifically defined to include a barrister or solicitor of the Supreme Court.

[40] The use of the term "practitioner" in section 142(5)(b) does give rise to difficulty when viewed *vis a vis* section 126 of the EA. Section 126 itself makes no reference to "practitioner" or "practitioners". It is expressly and specifically limited to advocates and solicitors and their clients. Thus,

"any other written law" in the opening words of section 142(5)(b), would appear to exclude section 126 of the EA.

[41] The term "advocate and solicitor" appears only once in the ITA and that is in section 142(5)(b). Elsewhere in the ITA, for example sections 98(3), 153(1)(b) and also in Schedule 5, the term "advocate" is used. Although the term "advocate and solicitor" is not defined under the ITA, it certainly has a statutory meaning. Section 3 of the Legal Profession Act 1976 defines "advocate and solicitor" to mean an advocate and solicitor of the High Court admitted and enrolled under that Act or under any written law, prior to the coming into operation of the Act.

[42] What therefore is clear is that the term "advocate and solicitor" used in section 142(5)(b) is possessed of a technical and statutory meaning. As the learned High Court Judge pointed out, it is not to be supposed that Parliament had intended the term to be used in a different sense. Indeed, there is equally no reason to suppose that the term was intended to be equated with the word "practitioner" when that term "practitioner" is specifically used in section 142(5)(b) instead of, and *after* the express use of, the term "advocate and solicitor".

[43] In fact, the concluding words of section 142(5)(b) are "... practitioner or firm of practitioners or *any other person*" (emphasis added). Again, the choice made was to use "any other person" but not "advocate and solicitor".

[44] As Thomson CJ said in *Lee Cheng (f) v Seow Peng Kwang* (1960) 26 MLJ 1 at p 3, and an observation referred to by the learned High Court Judge:

> " It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly."

Though the term practitioner is not "used repeatedly" in the provisions under consideration, the general inference that different words refer to different things remain.

[45] Similarly, in *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21, p 33, Arifin Zakaria FCJ (as his Lordship then was) stated that:

> "[33] ... It is a principle of statutory interpretation that when the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended, and *if different language is used in contiguous provisions, it must be presumed to have done so designedly* (See NS Bindrai's Interpretation of Statutes (8th Ed) at p 275).'
>
> (Emphasis added)

It would follow *a fortiori*, where different words are used *within* the same provision.

[46] It is therefore difficult to avoid the conclusion that a difference was intended when the term "practitioner" rather than "advocate and solicitor" was the term expressly chosen by the legislature.

[47] Even though it may be contended that the term "practitioner" could be wider than the more specific term "advocate and solicitor", it is nevertheless difficult to avoid the conclusion that when the two different terms are used within the very same provision, *in the manner set out in section 142(5)(b) of the ITA*, the narrower term would have been carved out of the wider term and excluded.

[48] Thus section 142(5)(b) may be distilled into its constituent parts and read as follows:

(i) notwithstanding any *other* written law,

(ii) any document, thing, matter, information, communication or advice,

(iii) *consisting wholly or partly of* or relating wholly or partly to, receipts, payments, income, expenditure, or financial transactions or dealings,

(iv) of *a person* (whether an advocate and solicitor, his client or any other person),

(v) *shall not be privileged* from disclosure to a Court, the Special Commissioners or any authorised officers,

(vi) if it is *contained in*, or comprises the whole or part of, any book, account, statement or other record,

(vii) *prepared or kept by any practitioner* or *firm of practitioners* in connection with any client or clients of the practitioner or firm of practitioners or any other person.

[49] We would respectfully agree with the learned High Court Judge that as it stands, section 142(5)(b) precludes the claim to any privilege from disclosure, information that are "prepared or kept by" any practitioner

or firm of practitioners and the terms "practitioner" or "firm of practitioners" do not include "advocate and solicitor" or "firm of advocates and solicitors".

[50] It should be borne in mind that the privilege under section 126 of the EA is an absolute one. Once privilege attaches, it continues no matter in whose hands the privileged data might end up in. The common law principle "once privileged, always privileged" applies. There is only one instance where privilege, when it exists, may cease and that is if the person who enjoys that privilege, the advocate and solicitor's client, *expressly* consents to its disclosure. This was so held by the Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14. In that case when dealing with section 126 of the EA, Nik Hashim FCJ stated at p 27:

> "[23] Similarly, the Court of Appeal's finding at p 311 that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege does not accord with the clear imperative terms of s 126 which makes no such reference, either expressly or by implication, to such a contention.
>
> [24] It is true that a legal opinion sought is implicitly confidential but the exception under s 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder i.e. the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to

be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating 'privilege' as being co-extensive with 'confidentiality' is untenable.

[25] Hence, I hold that the legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client."

See also *Dato' Au Ba Chi v Koh Keng Kheng* [1989] 3 MLJ 445.

[51] Among the questions posed to the Federal Court in the case of *Anthony See Teow Guan* was, specifically, whether the principle at common law relating to legal professional privilege, namely 'once privileged, always privileged' is recognised under the Evidence Act. The answer to this question was provided by the Federal Court in the affirmative.

[52] In *Anthony See Teow Guan* the privileged document, a legal opinion, had in fact been published by the appellant to various persons. The legal opinion was nevertheless held inadmissible by reason of the legal professional privilege provided under section 126 of the EA. In fact, the legal opinion in question was handed to the respondents in that case, i.e. the plaintiffs, by the auditors of the company who had secured the

legal opinion. In allowing the appeal, Nik Hashim FCJ explained where the Court of Appeal had erred, at p 26:

> "**[20]** ... I agree with the appellant that the Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' (see per Cockburn CJ in *Bullock & Co v Corry & Co* (1878) 3 QBD 356 at p 358) as being embodied in ss 126–129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi v Koh Keng Kheng* [1989] 3 MLJ 445 which was adopted by the learned trial judge in the present case. Relying on the wording of s 126 of the Act, Eusoff Chin J (as he then was) in *Dato' Au Ba*'s case held the maxim 'once privileged always privileged' applied. The court said at p 447:
>
> > Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v Corry & Co*)."

[53] In the case of *Dato' Au Ba Chi,* which was approved by the Federal Court in *Anthony See Teow Guan,* the privilege that existed continue to prevail even though the document in respect of which privilege

was claimed, had been given by the defendant's solicitors to one of the plaintiffs.

[54] Thus, but for section 142(5)(b) of the ITA, financial information that enjoys the protection of privilege under section 126 of the EA contained in any document prepared by or in the possession of practitioners such as accountants, tax advisors or agents and financial advisors would continue to be privileged from disclosure.

[55] By virtue of section 142(5)(b) of the ITA, the principle "once privileged, always privileged" is no longer subject to the one and only exception namely, where the person who enjoys the privilege expressly consents to its waiver. That then is the extent of the incursion into, or curtailment of, the privilege catered for under section 126 of the EA brought about by section 142(5)(b) of the ITA. In our view, no absurdity results from this interpretation of section 142(5)(b) of the ITA. It is also an interpretation that promotes the purpose of the legislation to delimit the extent of the privilege under section 126 of the EA. This interpretation is also in conformity with section 17A of the Interpretation Acts 1948 and 1967 which provides as follows:

"17A. Regard to be had to the purpose of the Act.

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

[56] It therefore cannot be said that the purpose of section 142(5)(b) to remove privilege from disclosure has not been achieved. That purpose is to preclude a claim of privilege from disclosure, *in the circumstances therein set out*. The purpose or objective of section 142(5)(b) was not to have the effect of repealing or abrogating section 126 of the EA or to deny its applicability altogether *vis a vis* the "... court, the Special Commissioners, the Director General or any authorised officer". If that was the intention of the legislature, it could and would have been spelt out quite simply in an obvious and clear manner.

[57] The rationale for excluding advocates and solicitors in favour of the term "practitioners" is also apparent. If the objective is to investigate advocates and solicitors, suffice it to say that the client's account is a trust account in which is kept the client's monies, not monies of the advocate and solicitor. Until monies in such trust accounts are for valid reasons

removed into the advocate and solicitor's "office account" or own account, the monies in the trust account are meant to be held for the client.

[58] That monies held or received for or on account of a client are to be kept in a separate client's account is a requirement to be found in the Solicitors' Account (Deposit Interest) Rules, 1990 (**'SAR'**) made pursuant to subsections (1) and (2) of the section 78 of the Legal Profession Act 1976.

[59] Rule 3 of the SAR states as follows:

> '3. Duty to pay money into client account
>
> (1) Subject to rule 9, every solicitor who *holds or receives client's money*, or money which under rule 4 he is permitted and elects to pay into a client account, shall without delay pay such money into a *client account*.'
>
> (Emphasis added)

[60] Under the SAR, "client account" means a current or deposit account at a bank in the name of the solicitor in the title of which the word "client" appears. "Client's money" means "money held or received by a solicitor on account of a person for whom he is acting in relation to the

holding or receipt of such money either as solicitor or in connection with his practice as solicitor, agent, bailee, stakeholder or in any other capacity and includes solicitors' trust money but does not include money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners of the firm." For completeness, "solicitor" is defined to mean "an advocate and solicitor of the High Court and includes a firm of solicitors."

[61] Conversely, if the objective is to investigate the clients of advocates and solicitors, it would seem quite reasonable that the legislature should direct its attention to "practitioners" who would *prepare or keep* the type of information or communication, of a fiscal nature, of any person including those of advocates and solicitors and their clients. This is what the legislature has done in section 142(5)(b) and it has been done in a manner that includes not only information, communication etc... of clients of advocates and solicitors but also of advocates and solicitors themselves and any other person i.e. anyone else.

[62] Courts must be slow to conclude that a provision in a particular legislation has the effect of negating or undermining a provision in another, save where the Legislature has manifested its intention so to do, in clear and unambiguous terms.

[63] In addition, and in this case, the privilege protected under section 126 of the EA is an ancient and important one. As pointed out by Richard Malanjum CJ (Sabah and Sarawak) (as his Lordship then was) in the case of *Tan Chong Kean,* at p 686:

> '[27] The principle in s 126 was postulated centuries ago as an English common law principle in the case of *Berd v Lovelace* (1576) 21 ER 33 in which the full report reads:
>
> > Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same; and that he shall be in no danger of any contempt, touching the not executing of the same process."

[64] His Lordship went on to explain the rationale and importance of the privilege, at pp 686 – 687:

> '[28] The rationale in the principle is to enable and protect an individual's ability to access to the justice system with complete disclosure of all necessary information to his legal adviser free from any

hindrance in the form of fear that any disclosure by him of any communication may prejudice him in the future.

[29] The courts regard client legal privilege as a "substantive general principle which plays an important role in the effective and efficient administration of justice by the courts" (see: *Goldberg v Ng* (1995) 185 CLR 83).

[30] In *Regina v Secretary of State Home Department, ex parte Leech (No 2)* [1994] QB 198 Steyn LJ said this at p 211:

> Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice. *It is not without significance that counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly.*
>
> (Emphasis added)

[31] In the Canadian case of *Canada (Attorney General) v Federation of Law Societies of Canada* (2015) SCC 7; [2015] 1 SCR 401 the Supreme Court (per LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ and delivered by Cromwell J) held that:

Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice

...

... The expectation of privacy in solicitor-client privileged communications is invariably high regardless of the context and nothing about the regulatory context of the Act or the fact that a regulatory agency undertakes the searches diminishes that expectation. ... Solicitor-client privilege must remain as close to absolute as possible. *There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege no more than absolutely necessary.*

... It should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Principles of fundamental justice have three characteristics. They must be a legal principle; there must be significant societal consensus that they are fundamental to the way in which the legal system ought fairly to operate; and, they must be sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The lawyer's duty of commitment to the client's cause meets this test. First, it

is a normative legal principle and a basic tenet of our legal system. It has been recognized as a distinct element of a lawyer's broader common law duty of loyalty. Second, jurisprudence demonstrates that the principle is sufficiently precise to provide a workable standard. It does not countenance a lawyer's involvement in, or facilitation of, illegal activities and it is consistent with a lawyer taking appropriate steps to ensure that his or her services are not used for improper ends. Third, there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause. The duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer's duty of commitment to the client's cause is essential to maintaining confidence in the integrity of the administration of justice.'

(Emphasis added)

[65] The foregoing observations, manifests the importance of the privilege enshrined in section 126 of the EA, as among other things, an "... important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice." They also testify as to why, "solicitor-client privilege must remain as close to

absolute as possible. There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege *no more than absolutely necessary*" (emphasis added).

[66] Thus, before this important principle preserved by the legislature in the form presented in section 126 of the EA may be abrogated or undermined, the intention to do so must be manifest by the use of clear and unambiguous language. Anything less will not do.

[67] It is equally significant that, in the circumstances of this case, a contrary conclusion would have very far reaching consequences. The authority and power that may be effected by the Appellant would have a blunderbuss effect. Without any cause, just or otherwise, the Appellant may investigate numerous individuals through their legal advisors, many of whom the Appellant may not even be aware of. Again, such wide ranging power, should it be allowed, may only be allowed upon the express intention of the Legislature, in clear and unequivocal terms.

[68] In our view, we do not find that section 126 of the EA has been overridden in its entirety by Section 142(5)(b) of the ITA such that an advocate and solicitor may not assert the privilege provided under section 126 of the EA as against the Appellant. We are of the view that it cannot

be concluded that such was the clear and unequivocal intention of the Legislature.

[69] We hasten to add that if, however, there is basis upon which the Appellant may rely on the proviso to section 126 of the EA, they remain able to do so. That proviso makes it clear that the privilege under section 126 of the EA does not apply to communications made in furtherance of any illegal purpose and to any fact observed by an advocate in the course of his employment as such, showing that any crime or fraud has been committed.

[70] In the context of the Appellant's avowed purpose of wanting to access the clients' accounts of advocates and solicitors i.e. to ensure "tax compliance" by taxpayers, it is significant that the ITA creates a host of offences including for example the failure to furnish return or give notice of chargeability (section 112), making incorrect returns (section 113) and willful evasion (section 114). Therefore, if there is any legitimate basis for wanting to gain access to the clients' accounts of advocates and solicitors the Appellant may do so by invoking the proviso to section 126 of the EA.

[71] Unless the Appellant can establish that the proviso to section 126 of the EA applies, the privilege provided thereunder will endure as against the Appellant.

[72] As for the Appellant's reference to section 80 of the ITA, it need only be said that as a general provision, it is of no assistance to the Appellant in the interpretation of section 142(5) of the ITA. Of course, if indeed section 126 of the EA is overridden by section 142(5)(b) of the ITA, section 80 would provide authority for the Director General or an authorised officer to gain access to the documents and information sought.

Whether a solicitor's "client account" enjoys the privilege under section 126 of the EA

[73] Insofar as section 126 of the EA is concerned, it was contended on behalf of the Appellant that the privilege does not extend beyond advice and communications between the client and his lawyer. Such would not include for example, an invoice rendered or documents in the client's account. In this regard reliance was placed on the observations of Connolly J of the Supreme Court of Queensland in *Re Packers and Others v Deputy Commissioner of Taxation* 53 ALR 589.

[74] In *Re Packers and Others* Connolly J of the Supreme Court of Queensland held in that case that legal professional privilege is confined to documents brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. It was held that trust account ledgers are not communications made for the purpose of obtaining advice and cannot be regarded as a revelation of the nature of advice given. However, that was not a case concerned with any statutory provision on privilege such as section 126 of the EA.

[75] Section 126 of the EA is not as narrowly crafted as is suggested by the Appellant. The privilege in section 126 is in respect of three identifiable classes of information namely:

(i) communication made to an advocate in the course and for the purpose of his employment as such advocate by or on behalf of his client;

(ii) contents or condition of any document with which the advocate has become acquainted in the course and for the purpose of his professional employment; and

(iii) advice given by the advocate to his client in the course and for the purpose of such employment.

[76] The classes of information protected under section 126 are clearly very wide. No doubt this is necessary as an advocate and solicitor's legal brief can be multifaceted and wide ranging.

[77] As is evident, legal advice given by an advocate to a client is but only one of the three classes of information protected by privilege.

[78] The term communication is not defined in the EA. However, the meaning of the word includes the means of sending or receiving of information (see the Concise Oxford Dictionary) or the imparting or exchange of information or something communicated, e.g. a message (see Collins Concise Dictionary). Financial information or data exchanged between an advocate and his client and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment as an advocate, would all come within the ambit of section 126 of the EA.

[79] We are therefore unable to agree with the Appellant's contention that the client's account and information relating thereto do not come within the purview of section 126 of the EA.

Conclusion

[80] Having regard to the foregoing and for the reasons given, the Appellant's appeal was dismissed. Given the circumstances of the case, the Court, in the exercise of its discretion, made no order as to costs.

Dated this 27th day of October 2021

- sgd -

(DARRYL GOON SIEW CHYE)
JUDGE
COURT OF APPEAL MALAYSIA
PUTRAJAYA

SALINAN DIAKUI SAH

KHATUN BINTI ALI
Setiausaha Kepada
YA Datuk Darryl Goon Siew Chye
Hakim Mahkamah Rayuan Malaysia
Putrajaya

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Acts

- Bill of Act A225 1974
- Section 126 and Chapter IX of Part III of the Evidence Act 1950,
- Section 16A of the New Zealand Inland Revenue Department Act of 1952
- Section 20 of the New Zealand Tax Administration Act 1994
- Section 78 Legal Profession Act 1976
- Section 80, 98(3), 142, 142(5), 142(5)(a)(ii), 142(5)(b) & 153(1)(b) of the Income Tax Act 1967
- Solicitors' Account (Deposit Interest) Rules, 1990

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DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: 01(f)-11-09/2021(W)

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... PERAYU

DAN

BAR MALAYSIA ... RESPONDEN

(DALAM MAHKAMAH RAYUAN MALAYSIA
BIDANG KUASA RAYUAN
RAYUAN SIVIL NO. W-01(A)-304-05/2018

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... PERAYU

DAN

BAR MALAYSIA ... RESPONDEN)

KORAM:

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HANIPAH BINTI FARIKULLAH, HMR

PADA 20 JULAI 2022 **DALAM MAHKAMAH TERBUKA**

PERINTAH

RAYUAN INI telah ditetapkan untuk pendengaran pada hari ini dalam kehadiran Hazlina Hussain, Ketua Peguamcara Hasil (Ahmad Isyak

bin Mohd Hassan, Mohamad Asyraf bin Zakaria, Athari Faris Ammerry bin Hussein, Mohammad Danial bin Ahmad dan Nurul Nasyrah Mohd Nasir bersamanya), bagi pihak Perayu dan Anand Raj (Foong Pui Chi, Abhilaash Subramaniam, Jeevitha Thurai Rathnam dan Choo Kelly bersamanya), bagi pihak Responden, Alvin Leong (Roger Chin bersamanya) bagi pihak Sabah Law Society, Antonio Sim Peak Khiong (Gurvir Singh Sandhu dan Pushpa Ratnam bersamanya) bagi pihak Advocates Association of Sarawak pihak-pihak Amicus Curiae **DAN SETELAH MEMBACA** Rekod Rayuan yang kesemuanya difailkan di sini **DAN SETELAH MENDENGAR** hujahan peguam-peguam yang tersebut di atas **MAKA ADALAH DENGAN SEBULAT SUARA DIPERINTAHKAN** bahawa:

(a) rayuan ini ditolak dengan tiada perintah untuk kos; dan

(b) Perintah Mahkamah Rayuan bertarikh 3 Mac 2021 dikekalkan.

Bertarikh pada 20 Julai 2022.

METERAI MAHKAMAH PERSEKUTUAN MALAYSIA

SITI HAJAR BINTI MUSTAFFA
Timbalan Pendaftar
Mahkamah Persekutuan
Putrajaya

.....

Timbalan Pendaftar
Mahkamah Persekutuan Malaysia
Putrajaya

Perintah ini difailkan oleh Tetuan Shearn Delamore & Co., Peguamcara bagi pihak Responden yang alamat untuk penyampaiannya ialah di Tingkat 7, Wisma Hamzah-Kwong Hing, No. 1, Leboh Ampang, 50100 Kuala Lumpur. Ruj: SD 3471695 (AR) 2316516_1

Appeal No. 01(f)-11-09/2021 (W)

Ketua Pengarah Hasil Dalam Negeri v Bar Malaysia

Broad Grounds

(1) This is our unanimous decision.

(2) The Appellant has made it clear that the purpose of their invoking section 142(5)(b) is for the purpose of 'auditing' the income received by a law firm. In doing so, the Inland Revenue has equated a client's account of a law firm, with the income received by a law firm. It appears to us that the Inland Revenue has failed to comprehend that the contents of a client's account comprise monies and documents belonging to a client and made or given in the course of employing a solicitor for services. In short, the contents of a client's account belong to the client of the solicitor and NOT the solicitors themselves.

(3) Therefore, the question that arises is why is it necessary to audit an account belonging to a client in order to ascertain the income of the solicitor himself or his firm for the purpose of imposing tax on the solicitor or his firm. There has been no credible reason accorded for seeking to sight a third party's accounts in order to impose tax on the solicitor or the firm.

(4) On the issue of the statutory construction to be adopted when construing section 142(5) of the Income Tax Act and section 126 of the Evidence Act, we are of the clear view that section 142(5)

of the Income Tax Act does not oust section 126 of the Evidence Act.

(5) Therefore, the contents of the client's account which relates to accounts and monies belonging to the client are covered by solicitor-client privilege. It is therefore, not open to a solicitor to divulge or make available the contents of the client's account to the Inland Revenue by reason of section 126 of the Evidence Act. That privilege belongs to the client and not the solicitor. It requires the client to waive the privilege in order that the solicitor may make available the content of the client's account to the Inland Revenue.

(6) This privilege conferred by section 126 of the Evidence Act is of course subject to the proviso. This in turn means that where there is an illegal activity or act or omission which comes to the knowledge of the solicitor he is not bound by the privilege but bound to report the illegal activity. This provides sufficient safeguard against persons trying to illegally evade the imposition of tax.

(7) The purpose and object of the Income Tax Act is to impose tax. That is premised on documentation given by the taxpayer. Where there is a clear misleading statement or fraudulent attempt by the taxpayer, here the solicitor or firm of solicitors, that points to other sources of income which has come to the notice of the Inland Revenue, this provision would come into play. But it

envisages a situation where there is some basis to enable the Inland Revenue to do so. Not as a fishing expedition to go through all accounts of taxpayers with a view to imposing tax.

(8) Section 142(5)(b) can only be read with and in conjunction with section 142(5)(a). And that in turn means that solicitor-client privilege is expressly preserved save for the limited purposes of section 142(5)(b). And (b) firstly refers to persons other than advocates and solicitors; secondly it makes no inroads into section 142(5)(a) or Part IX of Chapter 3 of the Evidence Act.

(9) So, far from encroaching on the solicitor-client privilege, section 142(5)(a) and (b) preserve solicitor-client privilege but ensure that a person cannot utilise 'privilege' to escape or prevent the Inland Revenue from procuring evidence of a receipt or payment out of monies contained perhaps in a series of banking transactions or receipts, simply because they are stored in a client's account.

(10) Ultimately, in relation to question (a) our answer is no or in the negative; with respect to questions (b) and (c), first, we say that the questions are too general as in every case it is necessary to identify the particular document or statement in issue. However, it would prima facie fall within the privilege conferred by section 126 of the Evidence Act. As for question (d) we concur with the Court of Appeal that the term 'practitioner' does not include an advocate and solicitor.

(11) In the circumstances, the appeal is dismissed with no order as to costs.

Dated: 20 July 2022

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia

(NALLINI PATHMANATHAN)
Judge,
Federal Court of Malaysia

(VERNON ONG LAM KIAT)
Judge,
Federal Court of Malaysia

(HARMINDAR SINGH DHALIWAL)
Judge,
Federal Court of Malaysia

(RHODZARIAH BINTI BUJANG)
Judge,
Federal Court of Malaysia

(MOHAMAD ZABIDIN BIN MOHD DIAH)
Judge,
Federal Court of Malaysia

(HANIPAH BINTI FARIKULLAH)
Judge,
Court of Appeal Malaysia