DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN, MALAYSIA

(BAHAGIAN KUASA-KUASA KHAS)

PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO. WA-25-83-02/2020

Dalam perkara keputusan-keputusan Responden Pertama dan Responden Kedua yang terkandung di dalam surat Responden Kedua kepada Responden Ketiga bertarikh 8.11.2019 yang dimaklumkan oleh Responden Ketiga kepada Pemohon melalui mel elektronik bertarikh 12.11.2019 dan surat Responden Kedua bertarikh 29.1.2020

Dan

Dalam perkara Perlembagaan Persekutuan, khususnya Perkara-Perkara 5, 8, 13 dan 96

Dan

Dalam perkara Akta Perlindungan Data Peribadi 2010 (Akta 709), termasuk, di antara yang lain, Seksyen-seksyen 8, 39 dan 45

Dan

Dalam perkara Akta Cukai Pendapatan 1967 (Akta 53), termasuk, di antara yang lain, Seksyen-seksyen 80 dan 81 dan Bahagian V

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012 dan Perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 (Akta 91)

Antara

GENTING MALAYSIA BERHAD **... PEMOHON**

Dan

1. PESURUHJAYA PERLINDUNGAN DATA PERIBADI

2. TIMBALAN PESURUHJAYA PERLINDUNGAN DATA PERIBADI

3. KETUA PENGARAH HASIL DALAM NEGERI

... RESPONDEN-RESPONDEN

JUDGMENT

[1] This is a judicial review application filed by the Applicant for reliefs prayed for in its Notice of Application dated 7.2.2020.

[2] By this application, the Applicant is seeking inter alia the following reliefs:

a. an Order of Certiorari to quash the decision of the 1st and 2nd Respondent contained in the letter of the 2nd Respondent to the 3rd Respondent dated 8.11.2019 which was conveyed by the 3rd Respondent to the Applicant vide the 3rd Respondent's electronic mail ("**email**") dated 12.11.2019 and the 2nd Respondent's letter dated 29.1.2020 (the "**Personal Data Decision**") which purports to hold the Applicant may/should disclose information in the Applicant's possession pertaining to its customers which falls within the definition of "Personal Data" in section 4 of the Personal Data Protection Act 2010 ("**PDPA**") to the 3rd Respondent pursuant to section 39 (b) (ii) of the PDPA

read together with section 81 of the Income Tax Act 1967 without obtaining prior consent of the customers;

b. a Declaration that the Personal Data Decision is invalid in law;

c. an Order of Certiorari to quash the decision of the 3rd Respondent in adopting and conveying the decision of the 1st and 2nd Respondent;

d. a Declaration that the Director General of Inland Revenue's ("**DGIR**") decision is invalid in law;

e. a Declaration that the assertions, claims and/or demands made by the 3rd Respondent in purporting to request or demand access to, or disclosure of, the Personal Data from the Applicant purportedly pursuant to, among others, section 81 of the Income Tax Act 1967 ("**ITA**") and/or sections 39 (b) (i), 39 (b) (ii) and/or 45 (2) (a) (iii) of the PDPA (the "**DGIR's Demands**") are invalid in law;

f. a Declaration in that the 3rd Respondent is bound by and cannot disregard the provisions of the PDPA generally, and sections 39 (b) and/or 45 (2) (a) PDPA in particular, including the Personal Data Protection Principles enumerated in section 5 (1) of the PDPA that protect the Personal Data (hereinafter referred to as "**Protection**"), by purporting to request or demand access to, or disclosure of, such Personal Data from the Applicant, or to otherwise process such Personal Data, until and unless the consent of the Applicant's Customers is obtained by the 3rd Respondent or the 3rd Respondent has demonstrated that there is reasonable suspicion

that any specific, identified and/or identifiable Customer had not complied with any material provision of the ITA relating to the assessment or collection of tax to warrant a disclosure of the Personal Data of that particular Customer, and/or the 3rd Respondent has established that there is no real, actual and substantive prejudice against the purpose for which such Personal Data had been collected by the Applicant to the satisfaction of the High Court as evidenced by an appropriate court order for disclosure to the 3rd Respondent;

g. a Declaration that Part V of the ITA generally, and section 81 of the ITA in particular, do not entitle or empower the 3rd Respondent to disregard the Protection that protects the Personal Data, by purporting to request or demand access to, or disclosure of, such Personal Data from the Applicant, or to otherwise process such Personal Data, until and unless the consent of the Applicant's Customers is obtained by the 3rd Respondent or the 3rd Respondent has demonstrated that there is reasonable suspicion that any specific, identified and/or identifiable Customer had not complied with any material provision of the ITA relating to the assessment or collection of tax so as to warrant a disclosure of the Personal Data of that particular Customer, and/or the 3rd Respondent has established that there is no real, actual and substantive prejudice against the purposes for which such Personal Data had been collected by the Applicant to the satisfaction of the

High Court as evidenced by an appropriate court order for disclosure to the 3rd Respondent;

h. a Declaration that the Protection under the PDPA generally, and as referred to in section 8 of the PDPA in particular, require the Applicant to reject any disclosure of, any Personal Data, or to otherwise process such Personal Data, until and unless the consent of the Applicant's Customers is obtained by the 3rd Respondent or the 3rd Respondent had demonstrated that there is reasonable suspicion that any specific, identified and/or identifiable Customer had not complied with any material provision of the ITA relating to the assessment or collection of tax so as to warrant a disclosure of the Personal Data of that particular Customer, and/or the 3rd Respondent has established that there is no real, actual and substantive prejudice against the purposes for which such Personal Data had been collected by the Applicant to the satisfaction of the High Court as evidenced by an appropriate court order for disclosure to the 3rd Respondent;

i. an Order of Prohibition to prohibit the 3rd Respondent from taking any steps, enforcement, actions or proceedings relating to or arising from any part or the whole of the Personal Data Decision, the DGIR's Personal Data Decision and/or the DGIR's Demands including, without limitation, making demands for any Personal Data from the Applicant, issuing notices of demand, or taking any steps to enforce or implement the Personal Data Decision, the DGIR's Demands or any

similar findings or decisions as the Personal Data Decision and/or the DGIR Demands, until and unless the consent of the Applicant's Customers is obtained by the 3rd Respondent or the 3rd Respondent had demonstrated that there is reasonable suspicion that any specific, identified and/or identifiable Customer had not complied with any material provision of the ITA relating to the assessment or collection of tax so as to warrant a disclosure of the Personal Data of that particular Customer, and/or the 3rd Respondent as established that there is no real, actual and substantive prejudice against the purposes for which such Personal Data had been collected by the Applicant to the satisfaction of the High Court as evidenced by an appropriate court order for disclosure to the 3rd Respondent;

j. a Declaration as to when, under what circumstances, to what extent or scope and/or what type of Personal Data the exemption under section 39 (b) and/or 45 (2) (a) of the PDPA apply to, or pursuant to which, the Applicant is required to disclose any Personal Data of any Customer to the 3rd Respondent;

k. a Declaration that any information or Personal Data of the Applicant's Customers that is subject to the privacy or personal data protection laws of any other jurisdiction(s) or law(s) outside Malaysia shall be excluded from any permissible disclosure of Personal Data by the Applicant to the 3rd Respondent, until and unless the 3rd Respondent and the Applicant have each

obtained final written confirmation or final order from a competent court of any such jurisdiction(s) which is not subject to further appeal or challenge in any jurisdiction, that the Applicant is required to make such disclosure under the privacy or personal data protection laws of such jurisdiction(s) or such law(s) outside Malaysia;"

Salient Facts

[3] The Applicant is a company incorporated in Malaysia under the Companies Act 1965 on 7.5.1980.

[4] The Applicant operates an integrated resort business at Genting Highlands, Pahang known as "Resort World Genting" and its principal activities cover leisure and hospitality services consisting of gaming, hotels, food and beverage, theme parks, retail and entertainment attractions.

[5] Customers of the Applicant who are from the gaming and non-gaming categories ("**Customer/Customers**") are eligible to apply for membership of the Applicant's Genting Rewards Loyalty Programme ("**Genting Loyalty Programme**") subject to certain conditions being satisfied.

[6] Upon approval of the membership application, members of the Genting Loyalty Programme will each be issued with a membership card ("**Genting Rewards Card**") which can be used to collect and redeem reward points and gain tier points when purchasing goods and/or services from merchants participating in the Genting Loyalty Programme. A

Customer who wishes to become a member of the Genting Loyalty Programme is required to fill in information such as, but not limited to, the individual's name, gender, date of birth, Malaysian Identity Card or passport number, address, email address, telephone number, amongst others, into the relevant Application Form.

[7] The said Application Form contains a "Declaration By Member" as follows:

> *"3. Personal Data Processing Statement (PDPS)*
>
> *I hereby expressly declare that I have read, understood and voluntarily and unconditionally agreed to the terms and conditions stipulated in the Personal Data Processing Statement and hereby consent to the processing of my Personal Data in the manner described in the Personal Data Processing Statement."*

[8] The Applicant has always provided information when required/requested for an investigation by the 3rd Respondent (hereinafter referred to as the "**Revenue**"), when such investigation is against specific individuals/customers.

[9] Vide a letter dated 23.11.2018 to the Applicant, the Revenue had requested information pertaining to the name, Malaysian Identity Card number, passport number, company registration number, address and postcode of members of the Applicant's association, society or club for the years 2016 and 2017 as well as the amount of any annual membership fee. In other words, the Revenue was asking for the Personal Data of the Applicant's Customers. The Revenue stated that such information would assist the Revenue to enlarge its tax base and increase tax collection.

According to the Revenue, the disclosure of such information to the DGIR is permitted by section 81 of the ITA and section 39 of the PDPA;

[10] On 7.12.2018, the Applicant responded to the Revenue's letter dated 23.11.2018 and clarified that the Applicant is a company registered under the Companies Commission of Malaysia and not an association, society or club registered under the Registrar of Societies of Malaysia and the Applicant does not collect any membership fee.

[11] Despite this explanation, the Revenue reiterated its demands for the Personal Data of the Applicant's Customers vide its email of 12.12.2018.

[12] On 24.12.2018, the Applicant responded to the Revenue and stated that it could not disclose the Personal Data to the Revenue as such disclosure would contravene section 39 of the PDPA because section 81 of the ITA only empowers the Revenue to request information relating to the Applicant's taxes or tax returns and not to protected Personal Data of the Applicant's Customers.

[13] Further exchanges ensued between the Applicant and the Revenue in 2019 wherein the Revenue sought further Personal Data of the Applicant's Customers including the name, Malaysian Identity Card number or company registration number, membership account number, total funds brought into and taken out from the Applicant's casino and total winnings and losses at the Applicant's casino of individuals and junket operators with transactions of more than RM1,000,000 during the period from 1.1.2018 to 31.12.2018. The Revenue sought the personal data of the Applicant's Customers who had received services in the years 2016, 2017 and 2018 and stated that the disclosure was permitted by sections 39(b)(i), 39(b)(ii) and 45(2)(a)(iii) of the PDPA and that section 81 of the ITA also empowers the DGIR to obtain information from a third party and

failure to comply with section 81 of the ITA amounts to an offence under section 120(1)(a) of the ITA.

[14] The Revenue stated that even if the Applicant does not provide the personal data to them, they would still be able to conduct tax audits and/or investigations on companies within the Genting Group and obtain the Personal Data as such Personal Data forms part of the transactional data for their tax audits and/or investigations. The Revenue stated that it was seeking such information so that they could enlarge their tax base, increase their tax collections and reduce tax evasion.

[15] The Applicant responded to the Revenue and restated its position in regard to such requests as follows:

i. the Applicant emphasised that it is not an association, society or club;

ii. that it could not disclose the Personal Data to the DGIR as such disclosure would contravene the provisions of the PDPA;

iii. that since the Applicant has customers from all over the world, the Applicant is also required to comply with international privacy or personal data protection laws such as the European Union's General Data Protection Regulation and the Personal Data Protection Act 2012 of Singapore;

iv. that since the Personal Data were being requested or demanded by the Revenue for the purposes of enlarging the tax base, increasing tax collection and reducing tax evasion, such purposes do not fall within the scope of section 39(b)(i) of the PDPA which only

allows disclosure of Personal Data where it is necessary for the purposes of the prevention, detection or investigation of a crime;

v. that section 81 of the ITA, which falls within Part V of the ITA, only empowers the DGIR to request information relating to the Applicant's tax returns. Since the Personal Data are not tax returns under section 81 of the ITA, the Applicant's failure to disclose the Personal Data to the DGIR does not amount to an offence under section 120 of the ITA and section 39(b)(ii) of the PDPA, which allows disclosure of personal data if it was required or authorized by or under any law or by the order of a court, does not apply;

vi. that since the personal data were not processed for the assessment or collection of tax, the exemption to the Disclosure Principle under section 45(2)(a)(iii) of the PDPA does not apply; and

vii. assured the Revenue that the Applicant would always provide information required for any investigation by the Revenue on specified individuals.

[16] On 9.4.2019, the Revenue's 'Jabatan Tindakan Khas' ("**JTK**") sent a letter dated 8.4.2019 to the Applicant via email requesting information on individuals and junket operators in the Applicant's casino. JTK carries out the function of investigation, among others for offences committed under the Anti-Money Laundering, Anti-Terrorism Financing and

Proceeds of Unlawful Activities Act 2001 ("**AMLAFTPUAA**"). The information requested by JTK was made pursuant to the provisions under the AMLAFTPUAA.

[17] On 25.7.2019, officers of the 1st Respondent's (hereinafter referred to as the "**Commissioner**") office visited the Applicant's office at Genting Highlands pursuant to section 101 of the PDPA to check the Applicant's data protection systems. According to the Applicant, during the visit, an officer of the Commissioner's office verbally confirmed that enforcement agencies can only request personal data of specific individuals for specific reasons allowable under the PDPA and no law enforcement agency has the right to obtain the Personal Data of the entire customer database of a company.

[18] On 23.9.2019, the Applicant contacted another officer of the Commissioner's office, who also clarified that a law enforcement agency can only request personal data of specific individuals for specific reasons allowable under the PDPA and no law enforcement agency has the right to obtain the personal data of the entire customer database of a company.

[19] However, on 12.11.2019 the Revenue forwarded to the Applicant, a letter dated 8.11.2019 that was written by the 2nd Respondent (hereinafter referred to as the "**Deputy Commissioner**") to the Revenue containing the Deputy Commissioner's purported view that the Applicant may disclose the Personal Data to the DGIR on the basis of section 39(b)(ii) of the PDPA. This letter was written by the Deputy Commissioner in response to a letter dated 15.10.2019 that was written by the Revenue to the Deputy Commissioner that was not shared at the material time with the Applicant.

[20] On 12.12.2019, the Applicant wrote to the Deputy Commissioner to inform that the Applicant does not agree with the views or position in the Deputy Commissioner's letter dated 8.11.2019 for, amongst others, the following reasons:

i. the choice/prerogative of whether to disclose the Personal Data to the DGIR even in the circumstances provided in section 39 of the PDPA remains with the Applicant since section 39 PDPA contains the words "may be disclosed". As such, the Applicant cannot be compelled to make the disclosure;

ii. Section 81 of the ITA should at most only cover information pertaining to the tax affairs of the Applicant as a corporate taxpayer and not the personal data of others obtained in its capacity as a data user;

iii. the Latin maxim "*generalia specialibus non derogant*" which was applied in the case of **Bar Malaysia v. Ketua Pengarah Hasil Dalam Negeri [2018] 9 MLJ 557** (hereinafter referred to as the "**Malaysian Bar** case"), applies to the present scenario such that the relevant PDPA provisions, being the provisions of a specific Act enacted for the protection of personal data, should prevail over the general provisions of the ITA including section 81 of the ITA;

iv. the PDPA was also enacted much later than the ITA and, when in doubt, or in the case of conflict, priority should be given to the later statute, which is the PDPA;

v. the DGIR's various requests or demands for the Personal Data was a blanket request with the sole

intention of "fishing" for the personal information of the Applicant's Customers since it was not supported by any reasonable suspicion of any misconduct or criminal conduct on the part of any particular/identified Customer of the Applicant. Such requests or demands, if acceded to, would therefore defeat the very protection afforded by the PDPA;

vi. the High Court in the **Malaysian Bar** case found that the DGIR had used the ITA as an "engine of fraud" and held that the DGIR should not be allowed to use the provisions of the ITA to go on unlawful "fishing expeditions". As that decision is binding upon the DGIR, any such attempts or similar attempts would be illegal; and

vii. as such, until and unless the Applicant is able to obtain the consent of its Customers, the Applicant would not be able to disclose the Personal Data to the DGIR due to the specific legal obligations owed by the Applicant to its Customers under the PDPA.

[21] Vide a letter dated 29.1.2020 written by the Deputy Commissioner to the Applicant, the Deputy Commissioner stated that:

i. the Applicant could disclose the Personal Data to the DGIR because the Deputy Commissioner understands from the DGIR that section 81 of the ITA empowers the DGIR to request related information;

ii. therefore, the interpretation of section 81 of the ITA, as informed by DGIR to the Deputy Commissioner, is in accordance with section 39(b)(ii) of the PDPA which

allows the disclosure of personal data where such disclosure was required or authorised by or under any law or by the order of a court; and

iii. accordingly, such disclosure does not contravene the Disclosure Principle under Section 8 of the PDPA.

[22] The Applicant responded to the Deputy Commissioner vide a letter dated 3.2.2020, to seek a meeting with the Deputy Commissioner to discuss the matter further and expressed regret that a decision was made without it being given the opportunity to be heard but no response has been received in this regard.

Summary of the Applicant's Contentions

[23] Summarily, the Applicant contends the followings:

i. that the Revenue has breached the right to privacy under the Federal Constitution;

ii. that the Respondents have failed to recognise and apply the mandatory principles of revenue law and statutory interpretation applicable to tax cases;

iii. disclosure under section 39 of the PDPA is permissive and not mandatory and the discretion lies with the data user;

iv. the DGIR/Revenue are not part of the Government of Malaysia and accordingly have no right to demand Personal Data which is protected under the PDPA;

v. the Revenue's conduct in fishing for information amounts to using the ITA as an engine of fraud;

vi. section 39 PDPA does not apply as the Respondents have failed to meet the test of necessity and acted contrary to the right to privacy;

vii. section 39 PDPA does not apply as the Respondents have failed to establish that the ITA requires/authorises Personal Data be disclosed to the Revenue;

viii. section 45(2) PDPA does not apply as the Applicant did not "process" Data for the purposes of assessment/collection of tax;

ix. PDPA provisions prevail over ITA provisions to the extent of any conflict/inconsistency;

x. the decision of the Commissioner and the Deputy Commissioner that purported to state that the Revenue has the power to undertake such fishing expeditions, contrary to the protections offered under the PDPA and the right to privacy under the Federal Constitution, is illegal and ultra vires;

xi. There is clearly a decision made by the Commissioner and the Deputy Commissioner, which is the decision not to uphold the Disclosure Principle and the Constitutional right to privacy, which they are duty bound to protect and uphold. The abdication of their administrative and regulatory functions must be answered with certiorari.

Summary of the Commissioner's and Deputy Commissioner's Contentions

[24] In a nutshell, the followings are the contentions of the Commissioners and Deputy Commissioners:

i) that they did not make a decision;

ii) even if they did make a decision, the Applicant is not adversely affected by it;

iii) even if they did make a decision, there was no error in the decision; and

iv) the Applicant failed to specify the provision that it had relied upon in seeking declaratory relief and the Court is restricted in granting declaratory relief.

Summary of the Revenue/DGIR's submission

[25] The entirety of the Revenue's submission seeks to argue that section 81 of the ITA gives them wide and unfettered powers to demand information and that they are allowed to make such demands. It is the Revenue's position that the Personal Data requested by them falls within section 81 of the ITA and the disclosure would not be in breach of the provisions of the PDPA.

[26] According to the Revenue, the usage of the word "any person" in section 81 of the ITA denotes that the provision does not limit the request to a taxpayer, nor does the information must relate to that particular taxpayer. It is argued that the scope of the request is all-encompassing as it covers "all such information or particulars", subject to the information or particulars being "in the possession or control" of that person where in this case, there is no issue that the information is in the possession or control of the Applicant.

[27] It is submitted that the request for the disclosure of the Personal Data is for the purpose of implementing the Revenue's duty under the ITA, among others –

i. to identify and detect individuals who had escaped the tax net by not declaring or registering as a taxpayer, even though that person is in actual, liable to tax which is an offence under section 112 of the ITA and may give rise to assessment of tax on the individuals;

ii. to identify and detect taxpayers who are under declaring their income which is an offence under sections 113 and 114 of the ITA and may give rise to assessment of tax on the taxpayers;

iii. to update taxpayers' record, especially those who are untraceable and cannot be contacted by the Revenue for the purpose of collection of tax.

[28] It is further argued that the facts of this case show that the consent of the Applicant's Customers had, in fact, been obtained when the Applicant's Customers submitted the Application Form to become a member of the Genting Loyalty Programme.

[29] In addition, it is submitted that the general principle in section 6(1)(a) PDPA is not absolute as the Applicant may disclose the Personal Data, among others, for the purposes of complying with any legal obligation imposed on the Applicant, the exercise of any functions conferred on any person under section 81 of the ITA and for the exercise of the Revenue's functions under the ITA.

[30] According to the Revenue, such request is allowed under sections 39 (a) and 39(b)(i) and/or (ii) of the PDPA.

[31] The Revenue further submits that since the Personal Data is needed by the Revenue for the purposes of preventing or detecting criminal

offences and the assessment or collection of tax, the disclosure to the Revenue is exempted under section 45(2) of the PDPA.

[32] In their written submission in reply, the Revenue submits that they cannot discern any explanation on how the Revenue's email enclosing and forwarding the Deputy Commissioner's letter to the Applicant amounts to a decision. It is submitted further that an email enclosing or forwarding a letter from another public authority could not and would not by any stretch of imagination amounts to a decision and treating the email from them as a decision is misconceived.

Findings

[33] The material issues for the determination of this court are as follows:

(i) Whether the Personal Data requested by the Revenue falls within section 81 of the ITA; and

(ii) Whether the disclosure of the Personal Data to the Revenue under section 81 of the ITA would be in breach of the provisions of the PDPA.

[34] This is the case where the Revenue is claiming that they can seize the database of the Applicant's Customers who are members of the Genting Loyalty Programme.

[35] The first question raised by the Respondents is whether there is a 'decision' by them that is amenable for judicial review which is final and determinative of the issue under consideration. It is the contention of the Respondents that the decision upon which the Applicant has sought for judicial review on are the letters of the Deputy Commissioners dated 8.11.2019 and 20.1.2020 (the "**letters**") and that both letters do not in any

manner or under any circumstances constitute 'decision' within the ambit of O.53 rule 2(4) of the Rules of Court 2012 ("**ROC**").

[36] On this issue, this court finds that at this stage, the question of whether there is a decision in this matter is res judicata. The argument that the Commissioner and Deputy Commissioner's letters of 8.11.2019 and 29.1.2020 are not decisions but merely their "views" was raised by the Attorney General's Chambers ("**AGC**") on behalf of the Commissioner and Deputy Commissioner and ventilated at the leave stage of these proceedings. The court had allowed leave for judicial review against the Commissioner and Deputy Commissioner on the basis that the letters were in fact a decision and that the Applicant was aggrieved with the same. No appeal was filed by the AGC and the Commissioner and/or the Deputy Commissioner. In the event the Commissioner/Deputy Commissioners were of the view that leave ought not to have been granted by the High Court, they ought to have filed a setting aside application against the decision of this court (see **Orange Rederiet Aps v. Ketua Pengarah Hasil Dalam Negeri [2018] MLJU 218**)

[37] In relitigating the issue at this stage, the Respondents are inviting the court to act in a manner that would be functus officio by altering a decision that the court has already made in granting leave to review a decision that where the Applicant is aggrieved or adversely affected. The only question before this court at this stage is whether the judicial review ought to be granted on the merits.

[38] In any event, it is of the considered view that the decision in the present matter must be taken from the fact as a whole as there are letters and emails exchanged between the parties which ultimately carries an implication that if the information is not produced, the Revenue may prosecute the Applicant under the ITA whilst the Applicant on the other

hand is constraint by the PDPA where if they were to give the information wrongly, they may be prosecuted under the PDPA. Obviously, the Applicant is in peril of one or the other.

[39] It must be emphasised that it is not for the Commissioner/Deputy Commissioner to merely declare that the Applicant will be protected vide the provisions of the PDPA from criminal prosecution. The very purpose of these judicial review proceedings is to determine the scope of powers/responsibilities of the Respondents (including whether they have breached the same) and the proper interpretation of the provisions of the PDPA and the ITA. These are functions of the court and the fact remains that the Applicant is aggrieved by the decisions of the Respondents.

[40] It is also not for the Commissioner and/or Deputy Commissioner to determine or guarantee that no prosecution will be instituted against the Applicant. Section 134 of the PDPA states that: "*No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.*"

[41] The Commissioner/Deputy Commissioner "guarantee/promise" that the Applicant will be protected from criminal prosecution is therefore ultra vires the PDPA. Their refusal to take any action is also not conclusive as section 93 of the PDPA provides that any person who is aggrieved by the refusal of the Commissioner to carry out any investigation initiated by a complaint made under Part VIII, may challenge such refusal vide the Appeal Tribunal. If the Applicant were to disclose protected Personal Data pursuant to the Revenue's request that the Commissioner/Deputy Commissioner have provided the green light for, it would nevertheless potentially still constitute a breach of the provisions of the PDPA if the PDPA on a proper interpretation, does not allow the same. Such a determination in this regard necessitates this judicial review.

[42] It cannot be guaranteed as well that the disclosure of the Personal Data to the Revenue would not expose the Applicant to complaints under the PDPA and/or civil suits by its Customers for violating the provisions of the PDPA. It is not for any of the Respondents to rely on clauses in the Applicant's Personal Data Processing Statement and purport that the same will protect the Applicant in the event of suits /actions from the data subjects. The Respondents do not speak nor represent the clients of the Applicant nor their interests nor can they predict future court proceedings.

[43] It is of the considered view that the consent to disclosure by the Applicant's Customers (if any), is always subject to such disclosure being in accordance with the law. The Applicant would suffer grave injustice, commercial hardship and serious financial prejudice and may even potentially face criminal punishment. It is crystal clear therefore that the Applicant has clearly satisfied the "*adversely affected*" test.

[44] There is indeed a decision that has been made that affects how the Applicant is to respond or allowed to respond to the Revenue in this respect. The Revenue themselves for that matter had stated that the letters authorised them to seek such Personal Data and it is abundantly clear that the letters contained 'decision' of the Commissioner and/or Deputy Commissioner. This court further finds that from the Revenue's submission and the fact that they relied on the same letters to demand the Personal Data of the Applicant's Customers, they have in fact accepted that the Commissioner/Deputy Commissioner's letters are "decisions".

[45] Further, the expression of a view, an opinion or statement can constitute decisions for the purposes of Judicial Review. In **Wee Choo Keong v. Ketua Pengarah Perkhidmatan Awam, Malaysia [2011] 3 CLJ 331** where Mohd Zawawi Salleh J (as His Lordship then was) found as follows:

"[30] ***The Respondent submits that the letter does not constitute a decision. It merely explained, inter alia, the reasons for non-payment of the Applicant pension and the applicable provisions*** *which disqualified the Applicant from grant of pension under Act 237.*

[31] ***The letter does not constitute an ultimate, final and operative determination of the Applicant's application for grant of pension. It merely expressed opinion or statement on the applicable provision of law.*** *The Respondent has not exercised any discretion whether to grant of pension or not under paragraph 14 of the Schedule of the Act 237 until the Respondent "dimaklumkan mengenai apa-apa penghapusan hilang kelayakan tuan bagi maksud perenggan 14(2) Jadual Pertama kepada Akta Ahli Parlimen (Akta 237)". (See Australia Broadcasting Tribunal v. Bond [1990] HCA 331).*

[32] ***With respect, I disagree. Looking at the content of the letter in its entirety, I am satisfied that the Applicant would be affected by the decision of the Respondent as contained in the letter and therefore the decision is amenable to judicial review.*** *On this issue I refer to the oft-cited case of Council of Civil Service Union & Ors v. Minister for Civil Service [1984] 3 All ER 935 where Lord Diplock said at page 408 as follows:*

"Judicial review, now regulated by R.S.C., Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person

(or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.

To qualify as subject for judicial review the decision must have consequences which affect some person (or body of person) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn ..." [Emphasis added]

[46] The part quoted in the above of the judgment in **Wee Choo Keong's** case (above) was left undisturbed by the Court of Appeal.

[47] In the case of **Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3) [1999] 2 MLJ 1**, the High Court held that a direction can even be communicated in the form of a request or suggestion so long as there is compulsion to obey it. The High Court held:

"A direction is therefore something that is stated authoritatively. Whether I tell my secretary: 'Please type

this notes of evidence' in a calm and polite voice or utter the same words in a loud and commanding tone, it still amounts to a direction as she is compelled to obey it. Thus, the tone in which a direction is given becomes irrelevant where the person to whom it is given is compelled to obey it. A direction can therefore be communicated in the form of a request, suggestion, instruction or in any other manner provided that there is a compulsion to obey it. As a matter of fact, a perusal of the notes of evidence reveals that Dato Mohd Said had used the words 'asked', 'urged', 'wanted', 'directed', 'told' and 'instructed' to describe the communications between him and the accused. The communications from the accused to Dato Mohd Said and Dato Amir Junus would therefore amount to a direction if they felt compelled to obey them."

[48] The same position was also taken by the Court of Appeal upon appeal in **Dato' Seri Anwar bin Ibrahim v. Public Prosecutor [2000] 2 MLJ 486** where the Court stated:

"We would like to say this in clear terms that even when the head of a department wants something to be done by a subordinate of his, he need only say: 'I suggest you do this or that.' It will be taken as a direction or instruction. A 'request' is certainly a stronger word than a 'suggestion'. In the words of PW1 thus: 'This is because he was then the DPM and not an ordinary person. Because of that I felt compelled to do it.' We do not think the counsel's submission or rather complaint deserves any further discussion."

[49] The decisions of the High Court and Court of Appeal in **Dato' Seri Anwar bin Ibrahim's** case were subsequently affirmed by the Federal Court.

[50] In this case, the letter that triggers the matter herein is from the Revenue to the Applicant dated 23.11.2018 with the heading "*Permohonan Untuk Mendapatkan Maklumat Ahli Persatuan/Pertubuhan/Kelab Bagi Tahun 2016 & 2017*". In the third paragraph of the letter it is stated that the information is needed "*untuk membesarkan asas cukai*" or to increase the Revenue's tax base. This letter makes it clear that this is not a specific exercise to an identified person but a general sweeping exercise to ask for the entire Personal Data of the Applicant's Customers.

[51] Then there is the email of 28.11.2018 relating to the letter of 23.11.2018 from the Revenue Officer to the Applicant requesting for the Personal Data of the members of the "*Ahli Persatuan/Pertubuhan/Kelab Bagi Tahun 2016 & 2017*". Again, this is a generic email in the broadest general terms where this court agrees with the Applicant, is a fishing expedition on the part of the Revenue.

[52] It is not disputed that the Revenue has the general power under the ITA to request for disclosure of information but there exist other considerations that must be taken into account and in this instance, it is the PDPA that restricts disclosure of information.

[53] Subsequently, there was the email dated 12.12.2018 from the Revenue to the Applicant requesting for the information of the Applicant's reward card holders and this time around was for the purpose to update their data warehouse. This, again is not a specific request for any specific

individual. At this juncture it must be noted that the letters and email came from the Profiling Unit of the Revenue.

[54] Moving on, there was the letter dated 29.4.2019 from the Revenue's "*Jabatan Perisikan dan Profiling*" with the same approach requesting for the information of the members/Customers of the Applicant. The nature of information requested are as follows:

> "*1.Nama*
>
> *2.KP Baru (untuk individu)*
>
> *3.Nombor ROC (SSM) (untuk syarikat)*
>
> *4.Nombor Passport (jika bukan warganegara)*
>
> *5.Alamat dan Poskod*
>
> *6.Kod Luar Negara (O untuk alamat luar negara, L untuk alamat dalam negara)*
>
> *7.Bayaran Yuran Setahun*"

[55] It is therefore clear that the Revenue was also asking for information relating to the Applicant's foreign Customers. It can be seen as well that the information requested does not have to do much with tax purposes as the Applicant cannot be said to know the income of their Genting Loyalty Customers.

[56] On 23.9.2019, there was an email from the Applicant's representative thanking the representative from the Commissioner's office for providing clarification that a law enforcement agency can only request Personal Data of specific individuals for specific reasons allowable under the PDPA and that no law enforcement agency has the right to obtain Personal Data of any company's entire database. The

Commissioner/Deputy Commissioner in one of their affidavits avers that what was said by their representative reflected in this email of 23.9.2019 has been taken out of context in this case. However, it must be noted that they do not dispute that a discussion relating to the present matter did take place between the Commissioner's and the Applicant's representatives. It is also important to note that the Applicant has been very careful in taking their position as there is in existence, the PDPA.

[57] Then came the letter of the Commissioner/Deputy Commissioner dated 8.11.2019 which was after the Revenue's visit to the Applicant's office. This letter was forwarded to the Applicant by the Revenue thereafter. In this letter of 8.11.2019 the Commissioner/Deputy Commissioner stated that the Applicant can disclose the personal data of its members to the Revenue because section 81 of the ITA gives the Revenue the power to ask for the information. Paragraph 4 of the letter 8.11.2019 states as follows:

> *"4. Sehubungan dengan itu, Jabatan ini ingin menjelaskan bahawa pihak Genting Malaysia boleh menzahirkan data peribadi kepada pihak LHDN kerana seksyen 81 di bawah Akta Cukai Pendapatan memperuntukkan kuasa kepada pihak LHDN untuk meminta maklumat. Ini selaras dengan seksyen 39 (b) (ii) Akta 709 yang memperuntukkan bahawa penzahiran adalah dikehendaki atau dibenarkan oleh atau mana-mana undang-undang."*

[58] As stated earlier, the letter from the Commissioner/Deputy Commissioner of 8.11.2019 was forwarded to the Applicant on 12.11.2019. It must be borne in mind that the Applicant has resisted the stand taken by the Revenue all the way. Now, the Revenue has obtained a 'no objection' letter from the Commissioner/Deputy Commissioner and

conveyed it to the Applicant. This court is of the considered view that there is a decision wherein the Commissioner/Deputy Commissioner had decided not to stand in the way of the Revenue. It is therefore clear that there are two regulators in the form of the Commissioner and the Revenue which have decided that the Applicant is to provide the information required by the Revenue.

[59] On 12.12.2019, the Applicant put in their position letter to the Commissioner informing that they do not agree with the views or position in the Deputy Commissioner's letter dated 8.11.2019.

[60] Despite the explanations provided by the Applicant in the letter of 12.12.2019 and without giving the Applicant the opportunity to be heard, vide a letter dated 29.1.2020 the Deputy Commissioner wrote to the Applicant, and stated that:

i. the Applicant could disclose the Personal Data to the DGIR because the Deputy Commissioner understands from the DGIR that section 81 of the ITA empowers the DGIR to request related information;
ii. the interpretation of section 81 of the ITA, as informed by DGIR to the Deputy Commissioner, is in accordance with section 39(b)(ii) of the PDPA which allows the disclosure of personal data where such disclosure was required or authorized by or under any law or by the order of a court; and
iii. accordingly, such disclosure does not contravene the Disclosure Principle under section 8 of the PDPA.

[61] As stated earlier, the Applicant responded to the Deputy Commissioner vide a letter dated 3.2.2020 and seek for a meeting with

the Deputy Commissioner to discuss the matter further but no response was received in this regard.

[62] In acting mechanically by adopting the Revenue's stand without any critical thoughts demonstrated in their response, it is clear that the Commissioner/Deputy Commissioner have also decided that they don't have jurisdiction over the ITA.

[63] It is embedded in our Federal Constitution ("**FC**") the constitutional right of privacy as an element of personal liberty under Article 5 (1) and that is how the PDPA ought to be construed. Article 5 (1) FC states:

> "*No person shall be deprived of his life or personal liberty save in accordance with law.*"

[64] The Federal Court in **Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333** confirmed that Article 5(1) of the FC also includes the right to privacy. Speaking on behalf of the Court, Gopal Sri Ram FCJ (as he then was) stated as follows:

> *"In the present instance, the appellant bases his case on the 'personal liberty' limb. Learned senior federal counsel submits that the concept 'personal liberty' in art 5(1) should receive the narrow and restricted meaning ascribed to it by a two member bench of this court in Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72. With respect this submission must be rejected as being without merit. The authorities referred to earlier in this judgment are clearly against such an approach to constitutional interpretation...*
>
> ***It is patently clear from a review of the authorities that 'personal liberty' in art 5(1) includes within its compass***

other rights such as the right to privacy." [Emphasis added]

[65] The Court of Appeal in **Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors [2015] 3 MLJ 513**. recognised that Article 21 of the Indian Constitution which is in *pari materia* with Article 5(1) of our FC protects the dignity of human life and one's right to privacy. The Court stated as follows:

> *"We accept the submission of learned counsel for the appellants that the issues in the Indian Supreme Court case of National Legal Services Authority v Union of India and others [2014] 3 MLJ 595 are directly on point with most of the issues herein.*
>
> *The court considers the stigmatisation and discrimination faced by transgenders in society (at para [55] of the judgment) and ruled as follows:*
>
> *(c)**that art 21 (our art 5(1)) protects the dignity of human life and one's right to privacy**..."*
>
> *"Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc."* [Emphasis added]

[66] The High Court in **Toh See Wei v Teddric Jon Mohr & Anor [2017] 11 MLJ 67** had also stated that:

> "*The right to privacy is a multi-dimensional concept. In this modern society,* ***right to privacy has been recognised both in the eye of law and in common parlance. The right to privacy refers to the specific right of an individual to control the collection, use and disclosure***

of personal information. *Personal information could be in the form of personal interests, habits and activities, family records, education records, communication (including mail and telephone) records, medical records, to name a few. An individual could easily be harmed by the existence of computerised data about him/her which is inaccurate or misleading and which could be transferred for an unauthorised third party at high speed at very little cost. Innovative technologies make personal data easily accessible and communicable and there is inherent conflict between right to privacy and data protection.*

In short, ***the right to privacy means the right to be let alone, the right of a person to be free from unwarranted publicity and the right to live without undue interference by the government*** *or any private individual* ***in matters with which the public is not concerned****. The 'right to privacy' is recognised as basic human right in article 12 of the Universal Declaration of Human Rights 1948.* ***Malaysia recognises the rights and liberties of the individual in the Federal Constitution as part of human rights protected by the supreme law of the land.*** *The question is whether there is any right to privacy guaranteed under our Constitution? If such right exists, what is the source and what are the contours of such a right as there is no express provision in our Constitution making provision for the 'right to privacy'."*

...

... the Federal Court for the first time accepted, the notion of privacy in its decision in Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507. The court was seized with a challenge to vires s 46A(1) of the Legal Profession Act 1976. The apex court while construing the art 5(1) of the Federal Constitution held that:

> *It is patently clear from a review of the authorities that 'personal liberty' in art 5(1) includes within its compass other rights such as the right to privacy.*

This case shows that though the right to privacy is not enumerated as a fundamental right in our constitution but has been inferred from art 5(1) of the Federal Constitution. Thus, ***our constitution recognises the right to privacy under art 5(1) of the Federal Constitution.****"* [Emphasis added]

[67] Since the right to privacy is protected by our Constitution, any statute, and in the instant matter the PDPA must be construed harmoniously with Article 5 of the FC. The Court of Appeal in **Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 2 MLJ 498** has stated that an interpretation that is contrary to the safeguards under the FC relating to right of privacy is illegal. The Court held:

> "*This approach is in keeping with the presumption that Parliament does not intend its Acts to violate the Constitution. In other words, there is a strong presumption in favour of the constitutionality of a statute. Hence, a statute must be read harmoniously with the Constitution to*

avoid any conflict between them which will result in the statute becoming void."

[68] It is apposite to note at this juncture the mandatory principles of revenue law and statutory interpretation relating to tax cases which are binding upon the court and they are as follows:

(a) there is no room for intendment in tax legislation where the court can only look fairly at the language used;

(b) tax cannot be imposed in the absence of clear and unambiguous words;

(c) any ambiguity in the meaning of a taxing statute must be construed in favour of the taxpayer;

(d) the Revenue must bring the taxpayer within the letter of the law to impose tax regardless of however apparently within the spirit of the law the case might otherwise appear to be;

(e) the Revenue has no general supervisory jurisdiction unless specifically invested with those powers by statute;

(f) the Revenue cannot tax by analogy but by statute;

(g) it is not the function of a court of law to give to words a strained and unnatural meaning merely to apply a taxing section which, had the legislature thought of it, would have been covered by appropriate words;

(h) if a statute is to be given its literal meaning, the practical outcome must be considered;

(i) statutes cannot be interpreted to frustrate their operation, cause injustice, inconvenience or hardship;

(j) the court must seek to avoid constructions which produce an absurd result;

(k) taxpayers are not to be unreasonably harassed by the tax authorities;

(l) statutes must be read as a whole;

(m) statutes cannot be read in such a way that Parliament has acted in vain or enacted surplusage; and

(n) the law requires that the various provisions of a statute be given a harmonious interpretation.

[69] In **National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1994] 1 MLJ 99**, the Supreme Court through the judgment of Gunn Chit Tuan CJ in applying the principles of interpreting taxing statues stated:

> "***There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In Re Micklewait it was held that a subject was not to be taxed without clear words.*** *..., we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in Cape Brandy Syndicate v Inland Revenue Commissioners:*
>
> *...in a taxing Act 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 as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...*

It has also been said by the Judicial Committee in Oriental Bank Corp v Wright 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language'. ..."

[Emphasis added]

[70] Earlier, the Supreme Court in **Director General of Inland Revenue v. HMP Ltd ([1988] 2 MLJ 99** ("**HMP**") adopted and applied the principle laid down in **Wolfson v. Commissioners of Inland Revenue (1949) 31 T.C. 141** ("**Wolfson**") where the Court stated:

"...In Wolfson v. Commissioners of Inland Revenue (1949) 31 T.C. 141 at p. 169, Lord Simons remarked:

"...It is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the Legislature thought of it, would have been covered by appropriate words. It is the duty of the Court to give to the words of this sub-section their reasonable meaning and I must decline on any ground of policy to give to them a meaning which, with all respect to the dissentient Lord Justice, I regard as little short of extravagant..."..

Further, it was submitted that if the words give rise to certain ambiguity in a legal sense in that the words are "open to diverse interpretation, i.e. capable of two alternative meanings" then the construction most favourable to the taxpayer should be adopted. ...."
[Emphasis added]

[71] The **HMP** and **Wolfson** (supra) cases established that the Respondents cannot ask this Court to strain the language of the ITA and disregard binding case law solely in order to request or demand from the Applicant for access to, or disclosure of, Personal Data of its Customers.

[72] Subsequently, the overriding principle of interpretation which must be applied by Malaysian courts in tax cases was laid down in **Exxon Chemical (M) Sdn Bhd v. Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428**, where Gopal Sri Ram JCA (as he then was) held that:

> *"[10]* ***In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour.*** *The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99).* ***The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head."*** *[Emphasis added]*

[73] Premised on the position of the law as illustrated in the above it is of the considered view that the Revenue, in wanting to seize the Applicant's Customers entire database without any evidence if any particular Customer has engaged in any under declaration of income or any criminal offences under sections 112, 113 and 114 of the ITA, the conduct of which if allowed to stand would destroy the right to privacy. The Revenue cannot be allowed to have access to the Applicant's Customers' database or any taxpayer for that matter until and unless the Revenue has

demonstrated that there is reasonable suspicion that any specific, identified and/or identifiable Customer had not complied with any material provision of the ITA relating to the assessment or collection of tax so as to warrant a disclosure of the Personal Data of that particular Customer. It is of the considered view that in the present matter, the Revenue has not shown any specific investigations or due cause for the request for Personal Data. Instead, the Revenue is asking for a blanket disclosure and is attempting to conduct a fishing expedition without meeting the requisite standards of necessity and proportionality to justify an infringement of the right to privacy which is protected under Article 5 (1) of the FC.

[74] Sections 80 and 81 of the ITA commonly adopted by the Revenue in conducting audits on taxpayers relied upon by them and in asserting that they have the wide powers under the ITA to seek information and documents from any persons are provisions that are general in nature.

[75] Both sections are reproduced:

Section 80 of the ITA:

"(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, documents, objects, articles, materials and things and may search such lands, buildings and places and may inspect, copy or make extracts from any such books, documents, objects, articles, materials and things without making any payment by way of fee or reward..."

Section 81 of the ITA:

"The Director General may require any person to give orally or may by notice under his hand require any person to give in writing within a time specified in the notice all such information or particulars as may be demanded of him by the Director General for the purposes of this Act and which may be in the possession or control of that person...".

[76] Sections 80 and 81 of the ITA are provisions which have been in the ITA since 1967 with no significant amendments being made to them throughout the years. The Revenue is relying on the general powers they have under these provisions in the ITA to override or overcome the exceptions of the provisions of the PDPA. On the other hand, the PDPA came in much later in 2010. It is a specific statute which deals with Personal Data Protection Principles in safeguarding Personal Data. As such, the Latin maxim, "*generalia specialibus non derogant*" which was applied in the **Malaysian Bar** case applies in the instant case where the PDPA provisions being the provisions of a specific Act enacted for the protection of personal data, must prevail over the general provisions of the ITA including section 81 of the ITA.

[77] The principle of "*generalia specialibus non derogant*" is illustrated in the case of **Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600** where the Court held:

"Where there are two conflicting provisions of the Legislature and the question arises which of the two should govern the case, it is the court's duty to see the terms of which provisions are more appropriate in the circumstance of the case...

The relevant maxim in the present appeal is generalia specialibus non derogant – general statements or provisions do not derogate from special statements or provisions, or conversely, specialia generalibus derogant– special provisions derogate from general...

The general rule of construction is such if having made the general Act the Legislature afterwards makes a special provision in conflict with the earlier legislation, the special provision so in conflict is treated as a mere exception to the general provision – Corp of Madras v Electric Tramways Ltd AIR 1931 Mad 152, wherein Reilly J remarked:

If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the Legislature afterwards makes a special Act in conflict with it, we must assume that the Legislature had in mind its own general Act when it made the special Act, and made the special Act which is in conflict with the general Act, as an exception to the general Act. Where there was a conflict between s 27 of the Evidence Act 1872 and s 162 of Criminal Procedure Code 1898, as amended in 1923 (s 162 of Act No 2 of 1974), Din Mohammad J opined in Hakam Khudayar v Emeror AIR 1940 Lah 129 152."

[78] More recently, the maxim has also been applied by the Federal Court in the case of **Lau Keen Fai v. Lim Ban Kay @ Lim Chiam Boon & Anor [2012] 2 MLJ 8**, where the Federal Court held that:-

"[13] It is also to be noted the provision of s 96(a) of the CJA is a provision regulating civil appeals in general to the

Federal Court. The LPA is an Act relating to the legal profession in Malaysia, specifically to regulate the legal profession. ***The maxim generalia specialibus non derogant is applicable here which states, inter alia, that where a special provision is made in a statute as in s 103E of the LPA that special provision excludes the operation of a general provision in the general law*** *(see the case of Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600)."* [Emphasis added]

[79] It is clear that Parliament had intended for the PDPA to prevail over the ITA, to the extent of any conflict, in terms of the fundamental principle of no disclosure and privacy.

[80] In the **Malaysian Bar case** (supra), which was affirmed by the Court of Appeal, the Revenue, in relying on their general investigation powers under sections 80/81 and 142(5) of the ITA, demanded to be given access to books and records pertaining to the clients' accounts of law firms. The learned High Court Judge in that case agreed with the argument that the Latin maxim *"generalia specialibus non derogant"* applied and held that the relevant provisions of the Evidence Act 1950, which is a specific Act governing matters pertaining to legal professional privilege, prevails over the general provision of the ITA to the extent of any inconsistency as the ITA is general in nature. The High Court stated the followings:

"...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 s 126 of the EA, it cannot be disputed that the EA is the specific statute which governs matters pertaining to

privilege. Although s 126 of the EA was enacted before s 142(5) of the ITA, it is a specific provision on privilege, and as such excludes the operation of the general provision of s 142(5) of the ITA to the extent of any inconsistency.

...

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

...

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 ...'.

[81] The Applicant in the instant matter collects and processes the Personal Data of its Customers that has been obtained with the Customers' consent, for the purposes only as agreed to by such

Customers. The Applicant is accordingly a "data user" for the purposes of the PDPA.

[82] The PDPA must be read as whole. It deals with the following Personal Data Protection Principles in safeguarding Personal Data as set out in Section 5 PDPA which states:

> ***"Personal Data Protection Principles***
>
> *5. (1) The processing of personal data by a data user shall be in compliance with the following Personal Data Protection Principles, namely—*
>
> *(a) the General Principle;*
>
> *(b) the Notice and Choice Principle;*
>
> *(c) the Disclosure Principle;*
>
> *(d) the Security Principle;*
>
> *(e) the Retention Principle;*
>
> *(f) the Data Integrity Principle; and*
>
> *(g) the Access Principle,*
>
> *as set out in sections 6, 7, 8, 9, 10, 11 and 12.*
>
> *(2) Subject to sections 45 and 46, a data user who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding three hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both."*
>
> ***General Principle***
>
> *6. (1) A data user shall not—*
>
> *(a) in the case of personal data other than sensitive personal data, process personal data about a data subject unless the data subject has given his consent to the processing of the personal data; or*

(b) in the case of sensitive personal data, process sensitive personal data about a data subject except in accordance with the provisions of section 40.

(2) Notwithstanding paragraph (1)(a), a data user may process personal data about a data subject if the processing is necessary—

(a) for the performance of a contract to which the data subject is a party;

(b) for the taking of steps at the request of the data subject with a view to entering into a contract;

(c) for compliance with any legal obligation to which the data user is the subject, other than an obligation imposed by a contract;

(d) in order to protect the vital interests of the data subject;

(e) for the administration of justice; or

(f) for the exercise of any functions conferred on any person by or under any law.

(3) Personal data shall not be processed unless—

(a) the personal data is processed for a lawful purpose directly related to an activity of the data user;

(b) the processing of the personal data is necessary for or directly related to that purpose; and

(c) the personal data is adequate but not excessive in relation to that purpose.

Notice and Choice Principle

7. (1) A data user shall by written notice inform a data subject—

(a) that personal data of the data subject is being processed by or on behalf of the data user, and shall provide a description of the personal data to that data subject;

(b) the purposes for which the personal data is being or is to be collected and further processed;

(c) of any information available to the data user as to the source of that personal data;

(d) of the data subject's right to request access to and to request correction of the personal data and how to contact the data user with any inquiries or complaints in respect of the personal data;

(e) of the class of third parties to whom the data user discloses or may disclose the personal data;

(f) of the choices and means the data user offers the data subject for limiting the processing of personal data, including personal data relating to other persons who may be identified from that personal data;

(g) whether it is obligatory or voluntary for the data subject to supply the personal data; and Personal Data Protection

(h) where it is obligatory for the data subject to supply the personal data, the consequences for the data subject if he fails to supply the personal data.

(2) The notice under subsection (1) shall be given as soon as practicable by the data user—

(a) when the data subject is first asked by the data user to provide his personal data;

(b) when the data user first collects the personal data of the data subject; or

(c) in any other case, before the data user—

(i) uses the personal data of the data subject for a purpose other than the purpose for which the personal data was collected; or

(ii) discloses the personal data to a third party.

(3) A notice under subsection (1) shall be in the national and English languages, and the individual shall be provided with a clear and readily accessible means to exercise his choice, where necessary, in the national and English languages.

Disclosure Principle

8. Subject to section 39, no personal data shall, without the consent of the data subject, be disclosed—

(a) for any purpose other than—

(i) the purpose for which the personal data was to be disclosed at the time of collection of the personal data; or

(ii) a purpose directly related to the purpose referred to in subparagraph (i); or

(b) to any party other than a third party of the class of third parties as specified in paragraph 7(1)(e).

Security Principle

9. (1) A data user shall, when processing personal data, take practical steps to protect the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction by having regard—

(a) to the nature of the personal data and the harm that would result from such loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction;

(b) to the place or location where the personal data is stored;

(c) to any security measures incorporated into any equipment in which the personal data is stored;

(d) to the measures taken for ensuring the reliability, integrity and competence of personnel having access to the personal data; and

(e) to the measures taken for ensuring the secure transfer of the personal data.

(2) Where processing of personal data is carried out by a data processor on behalf of the data user, the data user shall, for the purpose of protecting the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction, ensure that the data processor—

(a) provides sufficient guarantees in respect of the technical and organizational security measures governing the processing to be carried out; and

(b) takes reasonable steps to ensure compliance with those measures.

Retention Principle

10. (1) The personal data processed for any purpose shall not be kept longer than is necessary for the fulfilment of that purpose.

(2) It shall be the duty of a data user to take all reasonable steps to ensure that all personal data is destroyed or permanently deleted if it is no longer required for the purpose for which it was to be processed.

Data Integrity Principle

11. A data user shall take reasonable steps to ensure that the personal data is accurate, complete, not misleading and kept up-to date by having regard to the purpose, including any directly related purpose, for which the personal data was collected and further processed.

Access Principle

12. A data subject shall be given access to his personal data held by a data user and be able to correct that personal data where the personal data is inaccurate, incomplete, misleading or not up-to-date, except where compliance with a request to such access or correction is refused under this Act."

[83] It is clear from the above provisions in the PDPA, the obligations of the Applicant as a data user in regards to Data Protection Principles are cast in mandatory terms by the usage of the words "shall". It is imperative to bear in mind the principle that Parliament is assumed to know the law upon which it legislates and does not act in vain and the seven principles were legislated by the Parliament to protect Personal Data.

[84] Personal Data of individuals cannot be disclosed without the consent of the "data subject" and in this case, the consent of the Applicant's Customers for any purpose other than the purpose for which the Personal Data was to be disclosed at the time of its collection or any other purpose directly related to that purpose. This is in accordance with the "Disclosure Principle" under section 8 of the PDPA as cited in the above.

[85] It is also clear that a breach of the Disclosure Principle as set out under section 8 of the PDPA carries with it potential penal consequences as set out in Section 5(2) of the PDPA as follows:

Section 5(2) of the PDPA

"Subject to sections 45 and 46, a data user who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding three hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both."

[86] Sections 39 and 45 (2) of the PDPA are specific provisions which allow disclosure of Personal Data and such disclosure are limited and specific. Sections 39 and 45(2) of the PDPA, provides as follows:

Section 39

"Notwithstanding section 8, ***personal data of a data subject may be disclosed by a data user*** *for any purpose other than the purpose*

for which the personal data was to be disclosed at the time of its collection or any other purpose directly related to that purpose, ***only under the following circumstances****:*

(a) the data subject has given his consent to the disclosure;

(b) the disclosure –

(i) ***is necessary for the purpose of preventing or detecting a crime, or for the purpose of investigations; or***

(ii) was required or authorized by or under any law or by the order of a court;

(c) the data user acted in the reasonable belief that he had in law the right to disclose the personal data to the other person;

(d) the data user acted in the reasonable belief that he would have had the consent of the data subject if the data subject had known of the disclosing of the personal data and the circumstances of such disclosure; or

(e) the disclosure was justified as being in the public interest in circumstances as determined by the Minister." [Emphasis added]

[87] Section 45(2)(a) of the PDPA further provides as follows:

Section 45(2)

"Subject to section 46, personal data –

(a) processed for –

(i) ***the prevention or detection of crime or for the purpose of investigations;***

(ii) the apprehension or prosecution of offenders; or

(iii) the assessment or collection of any tax or duty or any other imposition of a similar nature,

shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act; ..." [Emphasis added]

[88] The word "shall" in at least seven provisions in the PDPA juxtaposed with the word "may" in section 39 of the PDPA is significant. The fact that all other obligations of the Applicant as the data user in the PDPA are set out to be mandatory by the use of the words "shall", it is of the considered view that the word "may" in section 39 of the PDPA is therefore indicative to be permissive and not mandatory. The Supreme Court in **Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 691** had held that:

> *"The use of the word 'may' or 'shall' has led to some confusion in the interpretation of provision of a statute.* ***In ordinary usage, the word 'may' is permissive, and the word 'shall' is imperative. The courts have always construed these words with reference to the context in which it is used. In order to find out whether these words are being used in a directory or mandatory sense, the intent of the legislature should be looked into, along with the pertinent circumstances***" [Emphasis added]

[89] Even if one were to argue that the word "may" in section 39 PDPA is mandatory, the Respondents herein have failed to show that it is so. The burden is on them to show the compulsory meaning of the word "may". This is reflected in the case of **Tan Sri Eric Chia Eng Hock v Pendakwa Raya [2006] 3 MLJ 693** where the Court of Appeal in applying the decision of the Apex Court in Australia in **Finance Facilities Pty Ltd**

v Federal Commissioner of Taxation [1970–1971] 127 CLR 106, stated:

> *"...it is necessary to bear steadily in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the prima facie presumption that permissive or facultative expressions operate according to their natural meaning. 'The authorities clearly indicate that it lies on those who assert that the word 'may' has a compulsory meaning to show, as a matter of construction of the Act, taken as a whole, that the word was intended to have such a meaning".*

[90] The Court of Appeal in the same case went on to hold that:

> "*Applying the contextual approach as the learned majority judges of the High Court of Australia in the Finance Facilities (ibid) which I respectfully accept as appropriate and meaningful to the construction of s 8(3), I am of the view that "may" in the first provision is not discretionary but permissive or facultative*."

[91] It must be noted as well that nowhere in the evidence herein shows the circumstances laid down in section 39 (b) (i) (ii) (c), (d) and (e) of the PDPA where Personal Data of a data subject may be disclosed by a data user have been made out by the Revenue herein.

[92] The Revenue has failed to show or establish that the disclosure of the Personal Data of the Applicant's Customers is *necessary* for the purpose of preventing or detecting a crime, or *necessary* for the purpose of investigations since the Revenue has merely indicated that their requests/demands were made for the broad purposes of increasing tax

collection ("*meningkatkan lagi hasil kutipan negara*") and reducing tax evasion ("*mengurangkan ketirisan cukai*").

[93] Cases from the United Kingdom and Europe are highlighted to the court where the courts have stated that the test of "*necessity*" must be met to justify an infringement of the right to privacy. This court agrees with the Applicant's contention that the use of the word "*necessary*" which similarly appears in our section 39 of the PDPA clearly shows that the same standards/tests apply in the Malaysian context.

[94] The first is the English case of **R (on the application of Alan Lord) v. The Secretary Of State For The Home Department [2003] EWHC 2073 (Admin)** that established the test of necessity is a strict one and must be proportionate and that the onus is on the party seeking to rely on it to establish the same. The Court stated:

> *"A "real risk" is not enough. I cannot accept that the important rights intended to be conferred by section 7 are intended to be set at nought by something which measures up only to the minimal requirement of being real, tangible or identifiable rather than merely fanciful. Something much more significant and weighty than that is required. After all, the Directive, to which I must have regard in interpreting section 29(1), permits restrictions on the data subject's right of access to information about himself only (to quote the language of recital (43)) **"in so far as they are necessary to safeguard" or (to quote the language of Article 13(1)) "constitute a necessary measure to safeguard" the prevention and detection of crime (emphasis added). The test of necessity is a strict one. The interference with the rights conferred on the data***

subject must be proportionate to the reality as well as to the potential gravity of the public interests involved. It is for those who seek to assert the exemption in section 29(1) to bring themselves within it, and, moreover, to do so convincingly, not by mere assertion but by evidence that establishes the necessity contemplated by the Directive. *" [Emphasis added]*

[95] It is therefore important that if the Revenue wishes to come within the exception of the seven principles under section 39 of the PDPA, they must convincingly demonstrate as such to the court. The Revenue has failed to do so herein. When the Revenue asserted that they needed the Personal Data of the Applicant's Customers for the purpose of increasing their data warehouse, it cannot be gainsaid that the reason relates to any investigation of any sort involved.

[96] In the English case of **The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) 2016 Scot (D) 25/7 [2016] UKSC 51**, the English Supreme Court had stated as follows:

"The test imposed by condition 5(b) in Schedule 2 and condition 7(1)(b) in Schedule 3 to the DPA requires that ***disclosure must be 'necessary'*** *for the exercise of statutory functions (which must again refer to the functions of the person to whom the disclosure is made, given that section 35(1), read with section 27, requires that a data processor who is under a statutory duty to make the disclosure must comply with Schedules 2 and 3: a requirement which would be pointless if it were met ex*

hypothesis). The meaning of 'necessary' was considered by this court in South Lanarkshire Council v Scottish Information Comr. [2013] UKSC 55 ; 2014 SC (UKSC) 1 ; [2013] 1 WLR 2421 . As was explained there at paras 25-27, it is an expression whose meaning depends on the context in which it falls to be applied. ***Where the disclosure of information constitutes an interference with rights protected by article 8 of the ECHR, as in the present context (as explained at paras 75-77 below), the requirement that disclosure is 'necessary' forms part of a proportionality test: the disclosure must involve the least interference with the right to respect for private and family life which is required for the achievement of the legitimate aim pursued.*** *Disclosure where the data processor considers that the information is likely to be relevant cannot be regarded as necessary* ***if the legitimate aim could be achieved by something less. It cannot be 'necessary', in that sense, to disclose information merely on the ground that it is objectively relevant, let alone on the ground that a particular body considers that it is likely to be relevant.*** *Relevance is a relatively low threshold: information may be relevant but of little significance.* ***A test of potential relevance fails to recognise the need to weigh the importance of the disclosure in achieving a legitimate aim against the importance of the interference with the individual's right to respect for her private and family life. ...***"

[97] Bearing in mind of the constitutional right of privacy, there must be a specific instant as contemplated by the statute and not a general sweeping and inconsistent reasons for the disclosure to be given. Further and as stated by the Supreme Court in **The Christian Institute** (supra) case, if the Revenue can still perform their function without the disclosure, then it cannot be necessary for them to request for the entire data base of the Applicant's Customers. All along the Revenue has been functioning since 1967 and the court is constraint to accept that now it becomes necessary for them to be given the disclosure of the entire data base of the Applicant's Customers when juxtapose with the Constitutional right of privacy and the PDPA.

[98] Another authority highlighted to the court is the seminal case of **Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources, (C-293/12)** considered by the Grand Chamber (Apex Court) of the European Court of Human Rights relating to the primacy of the right to privacy (as recognised under our Federal Constitution) in the context of access to personal data requests by National Agencies.

[99] In that case, there were certain Directives within the European Union with regard to the processing of personal data in the electronic communications sector. In particular there were directives that protected personal data and the right to privacy in accordance with Article 8 of ECHR. However, member States could implement legislation to restrict such rights, only where "necessary" for the prevention, detection and investigation of crimes, similar to our PDPA legislation. As stated by the Court:

> *"Article 15 of Directive 2002/58*

'Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a ***necessary,*** *appropriate and proportionate measure within a democratic society* ***to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system,*** *as referred to in Article 13(1) of Directive 95/46/EC."* [Emphasis added]

[100] The Digital Rights Ireland instituted a challenge to the legality of the national legislative and administrative measures (in particular, a Directive 2006/24) which required telephone communications service providers to retain traffic and location data relating to those providers for a period specified by law in order to "prevent, detect, investigate and prosecute crime and safeguard the security of the State" and to allow the National Authorities to access that data. The legal challenge succeeded and it was found that such general and sweeping measures went further than what was "necessary" for the purposes of prevention, detection or investigation of criminal offences and was inconsistent with the right to privacy under Article 8 of the ECHR. It was also found that no objective criteria was laid down to justify such breach of the right to privacy. The Court stated:

"***By requiring the retention of the data*** *listed in Article 5(1) of Directive 2006/24* ***and by allowing the competent national authorities to access those data, Directive 2006/24, as the Advocate General has pointed out, in particular, in paragraphs 39 and 40 of his Opinion,***

derogates from the system of protection of the right to privacy..."

...

Furthermore, ***the access of the competent national authorities to the data constitutes a further interference with that fundamental right...***"

...

As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. ***However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight.***

So far as concerns the right to respect for private life, ***the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary.***

...

*...**Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences** that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 **simply refers**, in Article 1(1), **in a general manner** to serious crime, as defined by each Member State in its national law."*

...

Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits."

...

..Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the

fundamental rights *enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary."*

...

Adopting Directive 2006/24, ***the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.... is that Directive 2006/24 is invalid.***"

[101] It can be gleaned from the above authorities, general sweeping attempts or measures to secure disclosure of personal data is unacceptable to the court. If a national agency such as the Revenue is allowed to access data in the way the Revenue did herein, it will derogate from the system protection of the right to privacy.

[102] It is not disputed that the Applicant has continuously cooperated with the Revenue when the latter makes a specific request in respect of a specific individual which is an objectively defensible and justifiable approach. The Applicant had never denied disclosure totally but they cannot agree to a sweeping request because in the context of the PDPA and the fundamental right to privacy, it is not possible under the law.

[103] As a body corporate, the PDPA is applicable to the Revenue as they are not part of the Federal or State Government of Malaysia. Section 3 of

the PDPA provides that the PDPA shall not apply to the Federal and State Governments. Section 3 of the PDPA states:

Section 3 PDPA

"(1) This Act shall not apply to the Federal Government and State Governments."

[104] As a body corporate (see: section 3 of the Inland Revenue Board of Malaysia Act 1995), the Revenue are a tax collection agent on behalf of the Government and this can be found in section 10 of the Inland Revenue Board of Malaysia Act 1995 which states that:

10. The functions of the Board shall be-

(a) to act as agent of the Government and to provide services in administering, assessing, collecting and enforcing payment of income tax, petroleum income tax, real property gains tax, estate duty, stamp duties and such other taxes as may be agreed between the Government and the Board;

[105] It is clear from the foregoing that the Revenue is a body corporate and is merely a service provider to the Government for the collection of taxes and are not as an agency tasked with the prevention, investigation or detection of criminal activities and is not the Government (Federal and State). Accordingly, the Revenue cannot come under one of the exceptions provided therein.

[106] The requests/demands that were made by the Revenue were not in regard to any specific investigation undertaken by the Revenue in regard to any specific taxpayer, but was a blanket demand for all the Personal Data of Customers of the Applicant. Hence, the observation made by His

Lordship Kamaludin Md Said J (as His Lordship then was) in the **Malaysian Bar** case is instructive. In that case the Revenue was contended to have used the general provision of Part V of the ITA specifically sections 80 and 81 and 142 (5) of the ITA to fish for information. The learned Judge agreed and stated as follows:

> *"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.*
>
> ***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 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;***
>
> ***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;*** *..."* [Emphasis added]

[107] The decision of the High Court in the **Malaysian Bar** case was recently affirmed by the Court of Appeal in **Ketua Pengarah Hasil Dalam Negeri v Bar Malaysia (W-01(A)-304-05/2018)**.

[108] The High Court in the **Malaysian Bar** case also referred to and applied the case of **S.R. Batliboi & Co. v. Department of Income Tax**

(Investigation) LNIND 2009 DEL 689 where the High Court of India held that:

> *"It appears plain to us, therefore, that for a search or seizure to be legal it should not be firstly ordered for mala fide, 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 clients of the Petitioner."* [Emphasis added]

[109] In **Distt. Registrar & Collector, Hyderabad & Anr. V. Canara Bank etc. LNIND 2004 SC 1478**, documents executed between private parties and retained in the custody of a bank in the ordinary course of loan advancing transactions were inspected by the inspecting officer. The Supreme Court of India held that:

> *"Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate with the purpose sought to be achieved and, therefore, a*

reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist."

[110] In **S.R. Batliboi & Co**. (supra), the tax regulator sought to access and/or acquire electronic records present in laptops that belong to the auditor of the taxpayer which was being audited by the tax regulator. In allowing the application of the auditor to prevent the tax regulator from forcibly gaining access to the data in the laptops and applying the principles enunciated by the Supreme Court in **Canara Bank** (supra), the High Court held (at page 11 of ABA 2):

> *"It has been argued orally as well as in the synopsis that the Petitioner cannot assist any party in breaking the law; this submission is illogical since it cannot be presumed that the accounts relating to 46 other clients of the Petitioner contained in the two laptops are of this character. The rigours of the law, inter alia the necessity to have reasons to believe so must be recorded and be followed by warrants. An indiscriminate search frustrates the whole scheme of Section 132 and emasculates the protective measures against these draconian powers.*" (Emphasis added)

[111] The law does not allow 'fishing expedition' to gain information and the PDPA is designed to cater to this position of the law. The Revenue's reliance on sections 80 and 81 of the ITA to gain information and personal data without any basis of the Applicant's Customers is clearly perverse, illegal and contrary to the maxim "*equity will not permit statute to be used as an engine of fraud*" more so when the request by the Revenue defeats the very protection granted by the PDPA.

[112] The equitable doctrine that an Act of Parliament (in this case, the ITA) shall not be used as an engine of fraud has long been recognised and applied in numerous English and Malaysian cases such as **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).

[113] The application of this maxim/doctrine in the Malaysian context was succinctly explained in the Court of Appeal case of **Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1995] 3 MLJ 141** where Gopal Sri Ram JCA (as his Lordship then was) held:

> "*Another way of stating the doctrine when applying it to written law is comprised* ***in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation...***
>
> ***The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case....***
>
> ***The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed ...***" [Emphasis added)

[114] In **Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113**, Gopal Sri Ram JCA again pointed out that:

> ***"The equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the***

provisions of a statute is also contained in the maxim 'equity will not permit statute to be used as an engine of fraud'. ...

The category or class of statutes to which the maxim may be applied is not closed *and its development, like much of equity jurisprudence, falls to be dealt with on a case by case basis, taking into account policy considerations that may govern a particular statutory provision." [Emphasis* added]

[115] This court agrees with the Applicant's submission that the Revenue has no legal basis to abuse sections 80 and 81 of the ITA to go on fishing expeditions to get a hold of information and Personal Data found in the possession of the Applicant.

[116] The United Kingdom and the European Union from whose laws our PDPA legislation is based upon have gone to great lengths to ensure that Personal Data is not subject to baseless and blanket searches by authorities undertaking fishing expeditions.

[117] The Malaysian PDPA is closely based upon the old Data Protection Act 1988 of the United Kingdom ("**UK DPA**"). Like our PDPA, sections 29(1) and 29(3) of the UK DPA similarly contain provisions in regard to the exemptions to the 'disclosure principle' for the purposes of prevention or detection of a crime or assessment or collection of any tax or duty. The provision is reproduced:

"29.(1) Personal data processed for any of the following purposes—

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders, or

(c) the assessment or collection of any tax or duty or of any imposition of a similar nature, are exempt from the first data protection principle ...

...

(3) Personal data are exempt from the non-disclosure provisions in any case in which—

(a) the disclosure is for any of the purposes mentioned in subsection (1), and

(b) the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters mentioned in that subsection."

[118] It can be seen that the UK DPA similarly does not explicitly exclude fishing expeditions, but the UK's Information Commissioner i.e. the equivalent of the Commissioner herein, has issued guidelines on the interpretation of the UK DPA and has stated that the same does not permit disclosure to the authorities in the course of a 'fishing expedition'. It also maintains that the discretion to disclose lies always with the data user and not the requesting authority. The **Information Commissioner's Office Guideline – Using The Crime and Taxation Exemption (Data Protection Act)** is reproduced herein:

"Disclosing information to prevent or detect crime

...

35. This exemption also applies on a case by case basis. This means that each time a request for disclosure is received, ***a data controller needs to decide whether or not to comply with the request based on the circumstances of the particular case. Responsibility for applying the exemption lies with the data controller making the disclosure, not the person requesting the information****. The disclosing party needs to be satisfied*

that the disclosure is for the crime prevention or taxation purposes and that the prejudice test is met in each case.

36. Application of the exemption is discretionary - ***it allows disclosure in specific circumstances but does not require it.***

37. The exemption should only be applied to the extent that it is necessary to do so to avoid prejudicing the crime and taxation purposes. This means that the data controller making the disclosure must do as much as it can to comply with the usual requirements of the DPA. ***A data controller should only disclose the information that is necessary for the purposes, and should not assume that all the data they hold is exempt. Speculative requests for personal data, especially about large numbers of people, are unlikely to meet the tests of necessity and prejudice.***

- *Example:*

Full-time students are exempt from council tax, but a non-student who lives with other students is not. A local authority is concerned that non-students in these households are deliberately failing to register on the electoral roll in order to avoid paying council tax. The authority writes to letting agents in areas with a high student population asking them to disclose all rental agreements, so that they can compare names with the electoral roll.

Without specific evidence of potential criminal activity, the local authority is undertaking a 'fishing expedition' which will mean disclosing the personal data of mainly innocent people. There is not enough evidence to suggest that the detection of crime would be prejudiced in the case of each specific disclosure." [Emphasis added]

[119] It is important to note that the ITA does not specifically deal with the provision relating to the PDPA. Sections 80 and 81 of the ITA do not provide specifically as to the requirement of Personal Data disclosure or authorisation for the data user to do so. It must be borne in mind that one cannot read such requirement into the provision when such provision is not there. In **Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 2 MLJ 498** the Court of Appeal stated:

"I am of opinion that the requirement of which the proviso speaks refers to a requirement imposed by law...

I could only judge that from the words of the requirement. Where would I find the words of the requirement? Parliament did not tell us. Parliament supposed that there was or there would be such a requirement. Whose requirement did Parliament envisage? The answer that immediately suggested itself was the requirement of the law or of something that has the force of law...

The next pertinent issue raised in this appeal is that the proviso to s 5 is ambiguous in that it fails to state in clear terms whether the requirement for approval is a requirement in law or a requirement under the agreement,

and it is a principle of construction of tax legislation that any ambiguity ought to be construed in favour of the tax payer."

The exceptions stipulated in section 39 (b) (ii) of the PDPA cannot be widen to incorporate the Personal Data disclosure as the PDPA itself contains very specific and strict test to allow for the Personal Data to be disclosed."

[120] Unlike the ITA, other Acts of Parliament contain provisions that states the non-applicability of the PDPA. One example is section 76 of the Credit Reporting Agencies Act 2010 which specifically states:

"*Section 76: Personal Data Protection Act 2009 shall not apply*

The provisions of the Personal Data Protection Act 2010 [Act 709] shall not apply to the processing of credit information by a credit reporting agency."

[121] Section 4 of the PDPA specifically excludes the Credit Reporting Agencies Act 2010 from the operation of the Act as well:

"Section 4 of the PDPA: Interpretation

personal data" means any information in respect of commercial transactions, which—

....but does not include any information that is processed for the purpose of a credit reporting business carried on by a credit reporting agency under the Credit Reporting Agencies Act 2010;"

[122] Since the ITA does not contain similar provision to section 76 of the Credit Reporting Agencies Act 2010 therefore, it cannot be assumed that sections 80 and 81 of the ITA allow for the disclosure of Personal Data.

[123] In regards to the principles to be applied in construing tax statutes the Court of Appeal in **Palm Oil Research and Development Board Malaysia v. Premium Vegetable Oils Sdn Bhd [2005] 3 MLJ** held:

> "***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...***"
>
> *When construing a taxing or other statute,* ***the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity****: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein."*
> [Emphasis added]

[124] Further, the fact that the ITA and in the ten years since the PDPA came into force, various amendments have been made in regard to the powers of the Revenue and yet, unlike the Credit Reporting Agencies Act 2010, no specific provision has been made to exclude the Revenue from the operation of the PDPA, to "require" that Personal Data be disclosed by a data user or to "authorise" a data user to disclose such Personal data.

[125] It can be garnered from the above fact that the exception of the Revenue from the operation of the PDPA does not exist. In **Lim Phin Khian v. Kho Su Ming [1996] 1 MLJ 1**, Gopal Sri Ram JCA stated as follows:

"Now, there is a presumption of great antiquity which operates in the sphere of statutory interpretation. It is an irrebuttable presumption. It is that ***Parliament is presumed to know all the relevant law upon the particular subject upon which it legislates****. In the context of the present dispute, Parliament is presumed to have known the nature and content of the Macnaghten test.*

... ***the meaning and effect to be given to a statute or to one or more of its provisions must depend upon the terms of the particular enactment and its objective aim. In ascertaining that aim, it is the duty of the court, to have regard to the consequences that would ensue from holding a statute to be retrospective or prospective and to avoid any construction that would produce absurd results.***

I think that it is a perfectly proper approach for judicial interpreter to take by asking himself, as I have done in this case, whether the legislature could have contemplated so strange a result as that adverted to*. Indeed that is the very question that Lord Mustill asked himself in "The Boucraa" [1994] 1 All ER 20 at pp 28-19. He answered that question in the negative. Upon the terms of the statute before me, I would do likewise.*

In my judgment, the correct approach is to look at the substance and general purpose of the legislation in order to discover its objective aim or purpose. And when I do that, I am much moved to the conclusion that Parliament could not have intended those horrendous

consequences of which I spoke a moment ago. To hold otherwise would mean that Parliament went through the elaborate process of creating the Court of Appeal and endowing it with all the appellate powers and jurisdiction theretofore enjoyed by the Supreme Court, only to leave it bereft of any business. It would mean that Parliament was legislating in vain. With respect, I do not think that it is open for me to reach such a conclusion." *[Emphasis added].*

[126] In addition and for the purpose of context, section 45 of the PDPA must be addressed as well. Section 45(2) of the PDPA states:

"Subject to section 46, personal data –

(a) processed for –

(i) the prevention or detection of crime or for the purpose of investigations;

(ii) the apprehension or prosecution of offenders; or

(iii) the assessment or collection of any tax or duty or any other imposition of a similar nature,

shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act; …"

[127] Firstly, the fact that the words "tax" or "duty" or "collection" appear in section 45 PDPA but not Section 39 PDPA is indicative of the fact that Parliament specifically chose not to include the same in the exceptions to disclosure under section 39 PDPA. This is bolstered by the fact that the words pertaining to 'prevention and detection of crimes and investigations'

appear in both sections 39(b)(i) and 45(2)(a)(ii) PDPA but the words pertaining to "tax", "assessment" and "collection, only appear in section 45(2)(a)(iii) PDPA and not section 39 PDPA.

[128] Secondly, section 45(2)(a)(iii) PDPA must be read strictly and confined to only where data is processed for the assessment or collection of any tax (which is not the case here) to prevent absurdity as the Supreme Court has stated in **Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 2 MLJ 35** that:

> *"The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance 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."*

[129] Thirdly, section 45 PDPA does not apply in favour of the Revenue herein. The data processed herein is the Applicant's Customers Data. So, it is the Applicant as the data user who processed the data and not the Revenue. It is obvious that the Applicant did not in any way process their Customers data for the purposes of assessment or collection of tax. The exemption will only apply if the Revenue becomes the data user and process their own data. The fishing expedition and blanket demands for the Personal Data of the Applicant's Customers by the Revenue has nothing to do with the Personal Data that was processed by the Applicant and therefore section 45 of the PDPA has no application in the instant matter.

[130] This court is reminded of the considerations and standards of the Malaysians Courts in determining judicial review applications in particular on the emphasis placed in the manner in which the Government/Administration and other authorities have exercised their statutory powers and limits and extent of discretion that such authorities have in the course of conducting their duties.

[131] In the instant case, this court finds that the Respondents have acted in clear violation of the provisions of the ITA and PDPA. They have acted ultra vires their statutory powers and the FC and have ignored binding Malaysian case law. In regards to the Revenue, not only that they came before the court giving sweeping and general reasons to justify their conduct in undertaking a fishing expedition over the taxpayer/Applicant herein, they have also ignored key facts and considerations and the Commissioner/Deputy Commissioner have condoned the same. It has been highlighted to the court that this is not the first case in which the Revenue has used the ITA to access protected information or the first case in which the Revenue has attempted to go on a fishing expedition for information as can be seen from the **Malaysian Bar** case where the Court of Appeal has found that such attempt is illegal.

[132] Undauntingly, this time around the Revenue in their submission and in justifying their access to the Personal Data of the Applicant's Customers has referred to several Australian cases of:

i. **Australia And New Zealand Banking Group Limited v Konza [2012] FCAFC 127**

ii. **Deloitte Touche Tohmatsu (A Firm) And Ors v Deputy Commissioner Of Taxation, (1998) 98 ATC 5192**

iii. Mccormack v Deputy Commissioner Of Taxation Large Business & International 2001 ATC 4740

[133] The Applicant in their reply has argued that it is perverse for the Revenue to seek to argue these limited, Australian cases (which are not even in the Apex Court) which have allowed for the Australian revenue to undertake fishing expeditions and the same ought to be applied in Malaysia. This court agrees with the argument.

[134] Firstly, as stated earlier, the Revenue is fully aware that the Court of Appeal of Malaysia in the **Malaysian Bar** case affirmed the decision of the High Court that using section 81 of the ITA to undertake a fishing expedition is illegal. The Revenue's purpose for demanding Personal Data in this case was purportedly for them to enlarge its tax base or "*gudang data*", increase its tax collections and reduce tax evasion which are glaring that it is a general fishing expedition and not a specific audit /investigation. It must be noted that the Revenue failed to bring the **Malaysian Bar** case (which is binding) to the attention of this court when the same is squarely on point and was held that such fishing expedition by the Revenue (even using section 81 ITA) are illegal. Instead, the Revenue raised irrelevant Australian case law.

[135] In any event, the position in Australia is irrelevant as our ITA is not based upon Australian legislation and our Section 81 of the ITA is not comparable to section 264 of the Australian Income Tax Act 1936.

[136] Furthermore, it is pointed out to the court that none of the cases relied upon by the Revenue are applicable as none of the cases cited involve the Australian revenue authorities trying to use their powers to access personal data that is protected by statute. It was further highlighted that none of the information that was requested in those Australian cases,

was protected under any national statute (unlike our PDPA which protects the Personal Data from disclosure). The only obligations against disclosure in the Australian cases cited by the Revenue in Australia, were contractual and non-statutory obligations.

[137] The case of **Australia And New Zealand Banking Group Limited v Konza [2012] FCAFC 127** had nothing to do with Personal Data protected under a national statute. There was no duty to protect the information requested by the Australian revenue authority under their national legislation. There was only a non-statutory duty of non-disclosure and a foreign law obligation of non-disclosure and both were held to not be able to override national law that permitted disclosure. In that case, the Court found as follows:

> *"The respondents accepted for present purposes that ANZ Vanuatu was subject to a non-statutory duty of confidentiality under the law of Vanuatu in respect of the account information of its customers:...*
>
> *Any non-statutory duties of confidentiality under the law of Vanuatu, and the correlative rights of customers, are displaced by the requirement to furnish the information under s 264(1)(a) of the ITAA 1936...*
>
> *...it would be an unwarranted limitation on the power conferred by s 264(1)(a) if that power could be ousted by any foreign law that purported to prohibit the disclosure of information in Australia to the Commissioner. To give such primacy to foreign law would be "an unacceptable encroachment on the domestic country's legitimate interest..."*

[138] The case of **Deloitte Touche Tohmatsu (A Firm) And Ors v Deputy Commissioner Of Taxation** again, has nothing to do with Personal Data protected under a national statute. In that case there was no duty to protect the information requested by the Australian revenue authority under their national legislation and it is a case relating to a challenge against the Revenue as to whether the Revenue adhered to their own guidelines in requesting information that there was a contractual obligation for non-disclosure. Likewise in the case of **McCormack v Deputy Commissioner Of Taxation Large Business & International**.

[139] The Revenue also referred to the case of **Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd & Ors [2021] MLJU 452**. This is also of no application in the instant case and is on completely different facts. This case did not involve a blanket request for information, or a fishing expedition by an authority but relates to the use of court documents in proceedings between private parties. It relates to an order by the Court to make disclosure of documents.

[140] The Commissioner/Deputy Commissioner not only had acted contrary to the protections offered under the PDPA and the right to privacy under the FC by giving the 'green light' (to which the Revenue has admitted in their submission) to the Revenue the power to undertake a fishing expedition, as a regulator of Personal Data in Malaysia, they have also failed in their duties to protect Personal Data under the PDPA as reflected in section 48 of the PDPA which states:

> *"The Commissioner shall have the following functions:*
>
> *(b) to implement and enforce the personal data protection laws, including the formulation of operational policies and procedures...*

(k) to carry out such activities and do such things as are necessary, advantageous and proper for the administration of this Act, or such other purposes consistent with this Act as may be directed by the Minister..."

[141] In the Hansard for the statements of the Promoter of the Personal Data Protection Bill (Bil 13-DR 05.04.2010) relating to responsibilities that the Data Commissioner is entrusted with by Parliament, the followings are highlighted:

"Tuan Yang di-Pertua, Ahli-ahli Yang Berhormat peranan dan fungsi pejabat Pesuruhjaya Perlindungan Data Peribadi adalah perkara asas bagi pelaksanaan akta ini. Adalah menjadi harapan kerajaan agar pejabat Pesuruhjaya Perlindungan Data Peribadi dapat ***berfungsi sebagai sebuah badan kawal selia yang berkesan untuk memastikan tiada penyalahgunaan data peribadi yang dijadikan komoditi yang boleh diurus niaga serta diceroboh oleh seseorang lain atau pihak-pihak lain. Akta ini lebih merupakan undang-undang pematuhan dengan izin, compliance legislation****. Saya yakin Ahli-ahli Yang Berhormat ingin melihat Pesuruhjaya Perlindungan Data Peribadi dapat nanti menjalankan tanggungjawab yang diamanahkan. ...*

Secara ringkasnya wajar ditegaskan sekali lagi fungsi rang undang-undang ini yang merangkumi perkara-perkara berikut:

(i) melindungi data peribadi individu supaya tidak disalah guna;

(ii) ***mematuhi Undang-undang Perlindungan Data Peribadi supaya hak rakyat terpelihara;*** *dan*

(iii) *tindakan penguatkuasaan* ***untuk membanteras penyalahgunaan data peribadi.***"

[142] Upon reading the Hansard cited in the above specifically on the part that the Commissioner/Deputy Commissioner is to protect abuse of any kind on the Personal Data, it is rather disturbing for a public authority/regulator entrusted by the statute to protect personal data of data subjects had the following to say in their submission:

> "*Paragraph 59: First and Second Respondent's Written Submissions*
>
> *If section 39(b)(ii) of the PDPA is to be interpreted to exclude any "fishing expeditions", this would impose an obligation on the PDPD to start questioning or investigating into the motives or intentions of all statutory or regulatory bodies when they request for disclosure from a data user under the relevant provision of law which they are seeking the disclosure. Parliament certainly could not have intended and would not have expected that such an obligation be imposed on the PDPD when it drafted section 39(b)(ii) of the PDPA.*"

[143] This court cannot disagree with the Applicant that from the above submission, it is a testament that the Commissioner/Deputy Commissioner have no interest in fulfilling their statutory duties and responsibilities and will not act to protect the Personal Data from even unreasonable, baseless and blanket demands by the authorities. It shows

that they will ask no questions as to the intention of the authorities and will give away such Personal Data freely.

[144] In acceding to the Revenue's stand that section 81 of the ITA enables the Revenue to demand the Personal Data information under section 39 (b) (ii) of the PDPA without further inquiry and deliberation on the position taken by the Applicant, the Commissioner/Deputy Commissioner are acting mechanically by adopting the interpretations of any person/authority who seeks to undertake a fishing expedition for Personal Data without taking issue with the fact that the Revenue took the position that they have the power to interpret both the provisions of the ITA and PDPA. When the Revenue has effectively stated that the provisions of the ITA are wide ranging and override the PDPA, the proper determination of the question ought to be by the court.

[145] It must be observed that in their submission the Commissioner/Deputy Commissioner has taken a contrary position wherein before this court at paragraph 24 of their written submission they have submitted that the Revenue cannot compel the Applicant to disclose any Personal Data and that the discretion at all times as whether Personal Data may be disclosed remains with the Applicant, a stand which is consistent with the Applicant's. However, the absolute discretion said to remain with the Applicant did not appear in the Commissioner/Deputy Commissioner's letters. The flip-flop stand by the Commissioner/Deputy Commissioner has therefore discredits the Revenue's case where the entirety of the Revenue's submissions seeks to argue that section 81 of the ITA gives them wide and unfettered powers to demand information.

[146] It is of the considered view that the Respondents have acted in a manner that no authority would and that the Commissioner/Deputy Commissioner have taken into account irrelevant considerations.

[147] The Supreme Court in **Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97** made clear that the scope of the meaning of the term 'ultra vires' and its application in regard to Judicial Review Proceedings are as follows:

> ***"The normal practice is for an aggrieved party affected by the ultra vires act to challenge its validity by judicial review either under O 53 r 1 by way of certiorari or by a declaration under O 15 r 16 of the Rules of the High Court 1980****, ie by direct attack. As a general rule the court will allow the issue of invalidity to be raised in any proceedings where it is relevant.*
>
> ...
>
> ***to start with the term ultra vires is apt to suggest the paradigm of a public authority stepping outside a clearly defined sphere of competence*** *as is illustrated in the cases of AG v Great Eastern Railway and Ashbury Railway Carriage & Iron Co v Riche and like cases cited in the judgment of the learned judge. On the other hand, official action, while being of a kind for which the authority is empowered, may be in some way erroneous and subject to reversal or modification by a higher authority on appeal or by other process of judicial review. A clear distinction has to be made on the character and effect of the official action for the purpose of a defence. Ultra vires as used in the cases quoted above is now referred to as the narrow or contemporary notion of ultra vires. However, since the case of Anisminic Ltd v Foreign Compensation Commission & Anor 10,* ***it has become increasingly clear from the***

authorities that the contemporary notion of ultra vires is by no means confined to a situation where a public authority steps outside the boundaries of the field of activity allocated to it by the law. The notion of ultra vires now encompasses a situation where the public authority commits an error of law albeit that the authorities' action is undeniably of a kind falling within the field of activity allocated to it by the law. *See Wade on Administrative Law (6th Ed) p 43. At p 44, Prof Wade commented:*

In general, however, the courts adhere firmly to the wide meaning of 'jurisdiction', since this is the sheet-anchor of their power to correct abuses. ***They appear to be willing to stretch the doctrine of ultra vires to cover virtually all situations where statutory power is exercised contrary to some legal principle ...***

The development of the doctrine of ultra vires since has led some writers to classify the new concept of ultra vires as ultra vires in the broad sense. Thus, where official action while being within the scope of the authority of the law or a corporation if it becomes erroneous on some grounds such action would now be described as ultra vires, being outside jurisdiction, under the broad concept of ultra vires. Examples of ultra vires used in this sense and the grounds therefore are succinctly illustrated by Lord Pearce in the Anisminic case 10 at p 195, Lord Reid in the same case at p 171 and Lord Greene in Associated Provincial Picture Houses Ltd v Wednesbury Corporation. 19 For the sake of convenience,

the remarks of Lord Reid at p 171 of the Anisminic case 10 is reproduced:

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly ...

Although Lord Reid was talking about a tribunal, the same principle would apply in the case of an officer exercising his discretion or authority under the provisions of a statute."

[148] The Supreme Court in **Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor [1987] 1 MLJ 124** in discussing the "Wednesbury principle" had in held that:

"*In exercising his functions in this regard, the Registrar had an unfettered discretion which was subject to the duty to act responsibly in the Wednesbury sense (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation), that is to say,* ***if a decision-making body comes to its decision on no evidence or comes to an unreasonable finding – so unreasonable that a reasonable person would not have come to it – then the courts will interfere.***"

[149] The "Wednesbury principle" has since been applied and expanded by the Supreme Court in the case of **Kumpulan Perangsang Selangor Bhd. v. Zaid Bin Hj. Mohd Noh [1997] 1 MLJ 789**.

[150] In the case of **Rekapacific Bhd v. Securities Commission & Anor & Other Appeals [2005] 2 MLJ 269**, Gopal Sri Ram JCA then quoted from the judgment of the Federal Court delivered by Abdoolcader SCJ in **Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower & Anor [1981] 2 MLJ 199** where the learned Judge quoted from the exposition on this aspect by Lord Denning MR in **General Electric Co. Ltd v. Price Commission [1975] ICR 1, 12** as follows:

"... The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of

words, the courts will decide it by declaring what is the correct interpretation: see Punton v Ministry of Pensions and National Insurance [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation, they can set its order aside: see Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320. ... ***If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, 1007. 1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then again the courts will interfere: see Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1[48] 1 KB 223. If the decision-making body goes outside its powers, or misconstrues the extent of its power, then, too, the courts can interfere: see Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see Sydney Municipal Council v Campbell [1925] AC 338. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons – in a case when it may reasonably by expected to do so, the courts may infer that it has no good reason for***

reaching its conclusion and act accordingly. See Padfield's case [1968] AC 997, 1007, 1061. *" [Emphasis added]*

[151] This court further finds that in the absence of sufficient and real reasons to justify the Respondents' conduct, and acting contrary to the rights of privacy enshrined in the FC, it is open to the court to conclude that there were no good reasons for making the decision (see:**Hong Leong Equipment Sdn Bhd v Liew Fook Chuan And Another Appeal [1996] 1 MLJ 481**).

[152] The Court of Appeal in the recent case of **Rekapacific Bhd** (supra) had again stressed that:

"It is now too well settled that where a public law decision is impugned on the ground of Wednesbury unreasonableness or of proportionality (as is the position in the present instance) it is for the public decision-maker to provide reasons to justify his decision. ***And where a public decision-maker fails to provide reasons, then the court is entitled to conclude that he has no good reason for making the decision in question."*** *[Emphasis added]*

[153] The case of **Ghazi Bin Mohd Sawi v. Mohd Haniff Bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333** is also brought to the court's attention where Haji Mohd Jemuri Serjan CJ (Borneo) held as follows:

"... As we have pointed out in the case of Harpers (M) Sdn. Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 in law there are two categories of unreasonableness one of which is referred to as comprehensive

unreasonableness and the other is a distinct category of unreasonableness altogether which, with reference to a decision, amounts to an absurd or perverted decision which is a perverse finding, so devoid of plausible justification that no reasonable body of persons could have reached it. Both categories are now known as Wednesbury principles of unreasonableness because they were first pronounced by Lord Greene MR in the case of Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223. Perhaps, for the purpose of emphasis it bears repetition to state what Lord Greene actually meant when he spoke of the two types of unreasonableness at pp. 229 and 234 (ibid). On the broad or comprehensive unreasonableness this is how Lord Green MR explained the expression at p.229:

I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.

It is true the discretion must be experienced reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. " [Emphasis added]

Conclusion

[154] In the upshot, this court rejects the manner in which the Respondents read the provisions of the PDPA and the ITA which would infringe upon the right to privacy safely guarded by the FC. There is an abdication of statutory duty entrusted by the Parliament on the part of the Commissioner/Deputy Commissioner in protecting Personal Data of the Applicant's Customers and in addressing the real issues in this case. Despite the clear and binding decision of the Court of Appeal in the **Malaysian Bar** case, the Revenue continues to assert unlawfully that they have the absolute power and unfettered discretion under the ITA to encroach the constitutionally and statutorily protected right to privacy by attempting to have access to the Applicant's Customer database without any shred of evidence that any particular individual being the Applicant's

Customer has engaged in any under declaration of income or any offence under the ITA.

[155] The Respondents have therefore acted ultra vires the ITA and PDPA. They have acted irrationally in a way no other authority would act. Accordingly, and premised on the above discussion, this court granted order in terms of the Applicant's judicial review with costs.

Dated:25.12.2021

[NOORIN BINTI BADARUDDIN]

Judge

High Court of Malaya

Kuala Lumpur

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