



### Abstract

- The interpretation of the withholding tax (WHT) law has been disputed as seen from the legal battle between taxpayers and the Inland Revenue Board (IRB)
- The apex court decided that the management fees paid to a company resident in the United Kingdom (UK) were not subject to tax in Malaysia as it had no permanent establishment in Malaysia.
- This had caused a significant impact to the Government to collect tax from the non-resident. This study aims to investigate the interpretation of the WHT law revisited under the Income Tax Act 1967 (ITA 1967).
- A qualitative approach by adopting action research methodology reporting six major cycles where each cycle consisted of diagnosis, planning, action-taking and evaluating was employed in this research.
- The results revealed that prior engagements with the stakeholders assist the Government in making a clear policy and drafting a clear WHT law.
- This research offers practical contribution whereby the revised WHT law has been passed by the Parliament with no appeal has been lodged to the IRB to date.

### Problem Statement

- A clear legal framework must be prepared to address any issues of tax involving **cross-border transactions**, primarily in the era of the digital economy.
- The courts have upheld the taxpayer's interpretation on "special classes of income" provision, thus, affecting the revenue of the Government.
- Aims to address the problem of the interpretation of the WHT and to introduce a revised WHT law successfully
- No amendment has been effected to make the law clearer (except the amendment to the scope of WHT provision in 2002 and 2017) even though the court has decided against the IRB ( Oil (Asia) Pte Ltd v DGIR, 1996), (SGS Singapore (Pte) Ltd v DGIR,2000) and (Euromedical Industries Ltd v DGIR, 1983)

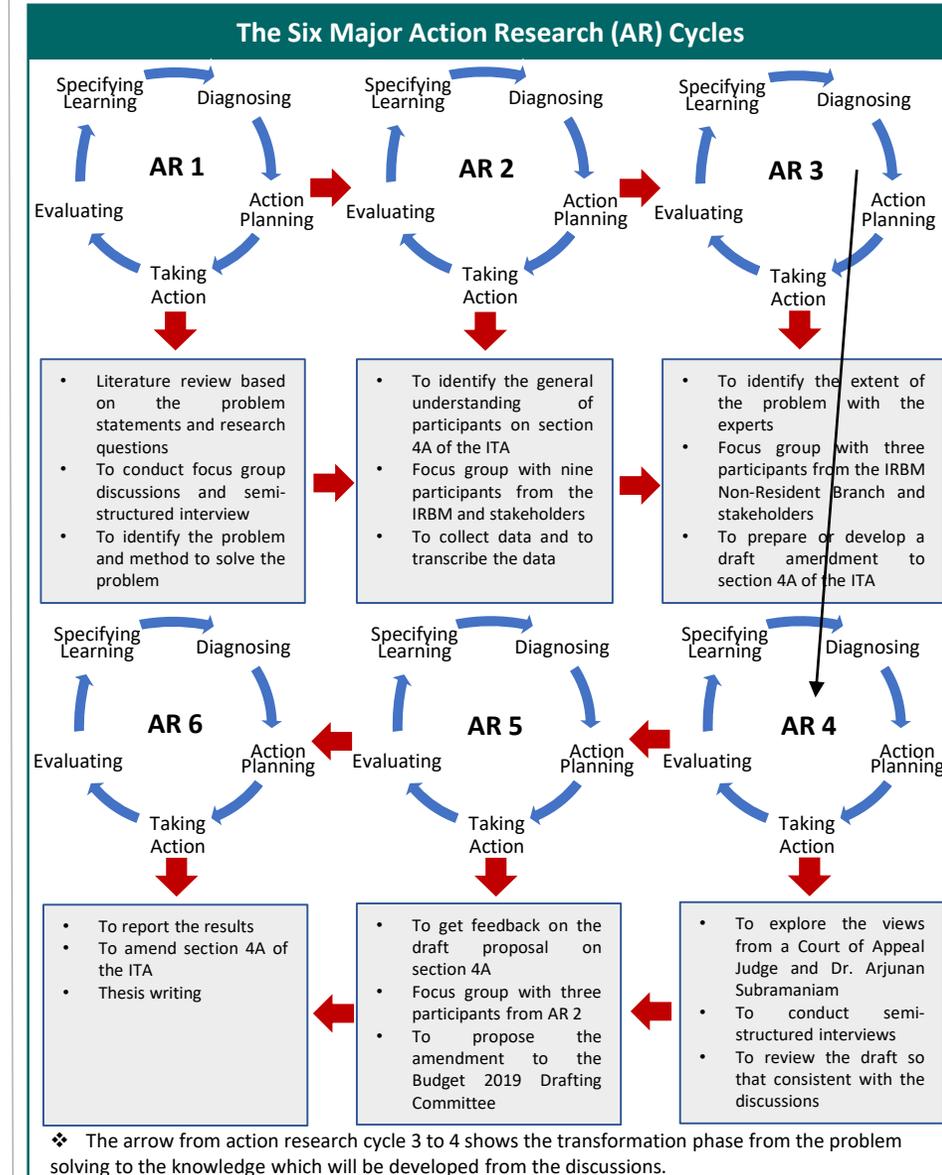
### Research Questions

- What is the perspective of the tax lawyers and tax agents who play a crucial role in advising taxpayers on the WHT provision?
- How can the interpretation of the law be improved?

### Objectives

- To assess the understanding of the stakeholders from IRB and private sectors on the WHT and the respective public ruling on the WHT on, "special classes of income."
- To provide clarity and avoid any ambiguities on section 4A(ii) of the ITA 1967 and the public ruling.
- To recommend improvements in the law to the Government.

### Framework



# Methodology

- Qualitative research was the most appropriate choice for the present research
- The action research model was used in this research to develop and identify the interpretation spectrums of the WHT provision
- Six action research cycles were implemented with the participation of the IRB legal and assessment officers, subject matter experts from the private legal and tax sectors, an Honourable Court of Appeal Judge, and a renowned senior tax lawyer.

## Action Research Cycles

- Action research cycle 1 : A literature review
- Action research cycle 2: Focus group with IRB officers, tax lawyers, stakeholders, and tax agents
- Action research cycle 3 : Interviews with the Director of the Non-Resident Branch
- Action research cycle 4: Drafting of the proposed law and a focus group discussion with two participants from the first focus group
- Action research cycle 5: A semi-structured interview with a Court of Appeal Judge and a renowned tax lawyer
- Action research cycle 6: Thesis write-up

# Findings

## Action Research Cycles

- **Action research cycle 1:** The ITA 1967 is a complex law and is caused by several reasons, including the drafting of the law. The negative impact of the difficulty in understanding the law may cause noncompliance of the WHT obligation.

- **Action research cycle 2:** All participants concurred that the drafting of section 4A(ii) is confusing and complicated. The users of the Act do not have a common understanding of the interpretation of the WHT provision.
- **Action research cycle 3:** The participants recommended that the provision of section 4A(ii) needs further refinement. The public ruling must also be revisited
- **Action research cycle 4:** The word “Connection” in initial proposed draft of section 4A(ii) needs to be studied more as it will always be interpreted by the taxpayer that the technical or consultancy services must be in line with management or administration work, and day to day management does not under this definition.
- **Action research cycle 5:** Section 4A(ii) is not in line with the law in Section 3, that is, only income derived in Malaysia is to be taxed. Therefore, cases decided on Section 4A(ii) are not in line. Further, it is not good for the attraction of foreign investment. Section 4A(ii) should be used only for WHT on foreign source of income.”

The improved provision on WHT in respect of “special classes of income” has removed the word “technical” and provides that all services rendered by a non-resident are subject to tax in Malaysia regardless of whether such services are technical or non-technical.

- The comparison of section 4A(ii) of the ITA 1967 between the prior amendment and post amendment:

| Prior Amendment  | Post Amendment  |
|--|---|
| “4A.(ii) amounts paid consideration of <b>technical</b> advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or” | “4A.(ii) amounts paid in consideration of any advice given, or assistance or services rendered in connection with any scientific, industrial or commercial undertaking, venture, project or scheme; or” |

Source: Income Tax Act 1967

# Conclusion

- The research has successfully developed an improved law on the WHT under section 4A(ii) of the ITA 1967 which has been passed by the Parliament and gazetted on 27 December 2018.
- The amendment can be said to enhance the interpretation of the new provision on WHT and solved the problem on the interpretation of the WHT. Before the amendment, the crux of the problem on the interpretation of the provision was centred on whether the law applies to technical and non-technical services which had caused divergent of interpretations.
- After almost a year the improvement on the law, it appears that there has not been an appeal filed by tax agents or lawyers. Thus, this may indicate that there is no dispute on the interpretation of the improved law.

# Research Gap

- There is no research done to date to identify the interpretation of the WHT. Moreover, recommendations to improve the clarity of the obligation on WHT under the ITA 1967 can be offered in this study and the potential impact of double taxation on consumers in Malaysia and WHT under the new Service Tax Act can be studied in the future.