Supporting judgment.

1. The respondents filed an application for judicial review for an order of certiorari to quash the appellant's decision contained in a letter dated 14.04.2008 addressed to the first respondent's tax agent. Based on the said letter, the first respondent was required to pay withholding tax for the years of assessment 2001-2005 in the sum of RM1,507,674.80. The appellant in the abovementioned letter referred to sections 109 and 109B of the Income Tax Act 1967 (the Act) as the legal provisions subjecting the payments to withholding tax.

2. The basis for the respondents' application for judicial review for an order of certiorari to set aside the decision contained in the said letter was two-fold:-

    i. That the appellant was uncertain as to the exact application of the relevant provision and so the appellant was unreasonable in applying both sections 109 and 109B;

    ii. The appellant failed to give reasons for the decision.

3. The respondent averred that the appellant had committed an error of law in the manner it took in exercising its administrative function under the Act.

4. The Court of Appeal dismissed the appellant's appeal on the ground that the appellant had acted unreasonably by invoking both sections 109 and 109B of the Act in deciding that the payments were royalties within the meaning of s 2 of the same. Question no. 1 in this appeal stemmed from the above decision of the Court.

5. On the issue of failure to provide reasons, the Court of Appeal was of the view that section 140(5) of the Act does not apply to the facts of this case. However after making this finding the Court did not make any determination as to whether the facts and circumstances of the case disclosed that the appellant had given reasons for its decision.

6. Instead the Court referred to a statement of law that in the absence of reasons being given by an administrative body the Courts are at liberty to conclude that it has no good reason in making its decision. We are in agreement with our learned brother Suriyadi FCJ, that such statement of law must be applied cautiously.

7. The correct application of the law concerning the duty of administrative authorities to give reasons for decisions has been explained by the Privy Council in **Dr Stefan v The General Medical Council (1999)1 WLR 1293**. It must be emphasised that the law does not impose a general duty upon decision makers to give reasoned decisions. The trend of the law is towards giving reasons, but on a case by case basis. Among the determining factors when

reasons ought to be given by administrative decision makers lie in the nature and character of the decision making and when the giving of reasons will be required as a matter of fairness and openness.

8. The above principles enunciated by the Privy Council in **Dr Stefan** has also been endorsed by this Court in **Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan** - [1999] 3 MLJ 1 and **Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan -** [2002] 3 MLJ 72.

9. Reverting to the appeal before this court, the appellant was granted leave to appeal on two questions namely:

   i. Whether the letter of the Director General of Inland Revenue dated 14.04.2008 referring to both sections 109 and/ or 109B of Income Tax 1967 is bad in law?

   ii. If the answer (for Question 1) is in the negative, are the payments for the services as referred in the Agreement exhibited as "PC-3" royalties under section 109 of the Income Tax Act 1967.

10. Learned counsel for the respondents submitted that the respondent's complaint stemmed from the defective notice of assessment. It was averred that if the appellant was uncertain and unclear as to which legal provision is applicable in order to withhold the tax, it would fundamentally be unreasonable to require

taxpayers to withhold the taxable portion. The assessment could not have been made based on two statutory provisions of the law resulting in it being void for ambiguity.

11. The Court of Appeal took the position that the appellant had acted unreasonably by invoking both sections 109 and 109B of the Act in deciding that the payments were royalties within the meaning of s 2 of the Act. The Court of Appeal was of the view that the appellant in holding that the payments were royalties and chargeable as withholding tax under s 109 of the Act made an implied admission that the payment was not chargeable under section 109B of the Act. Therefore the appellant had not only acted unreasonably in the circumstances of the case but had also committed an error of law, exceeding his statutory power in relying on both the said sections of the Act.

12. At the outset, it must be highlighted that the administrative decision contained in the letter of 14.04.2008 concerned assessment of withholding tax. The abovementioned letter was in fact a notice of assessment issued by the appellant. The crux of the appeal is whether the appellant's administrative decision contained in the letter dated 14.04.2008 is void when it relied on two provisions of law?

13. It is our view that the applicable test governing issues of validity of an assessment or a notice of assessment is to be found in section 143 of the Act; which reads as follows:-

143. Errors and defects in assessments, notices and other documents

(1) **No assessment, notice or other document** purporting to be made or issued for the purposes of this Act shall be quashed or deemed to be void or voidable for want of form, or be affected by any mistake, defect or omission therein, if it is in **substance and effect** in conformity with this Act or in accordance with the intent and meaning of this Act and—

(a) in the case of an assessment, the person assessed or intended to be assessed or affected thereby is designated according to common intent and understanding; and

(b) in any other case, the person to whom it is addressed and any other person referred to therein are so designated.

(2) An assessment purporting to be made or issued for the purposes of this Act shall not be impeached or affected by reason of a mistake therein as to—

(a) the name of a person charged to tax;

(b) the **description of any income**; or

(c) the amount of chargeable income assessed or tax charged,

and a notice of assessment purporting to be so made or issued shall not be impeached or affected by any such mistake if it is served on the person in respect of whom the assessment was made or intended to be made (or served in

accordance with subsection 67(5)) and contains in substance and effect the particulars contained in the assessment.

(3) Notwithstanding subsection (2), if the amount of tax charged by an assessment has been incorrectly calculated by reference to the amount of the chargeable income and the appropriate rate of tax applicable thereto, the amount of tax charged as shown in the assessment and the notice of assessment may, if the Director General so directs, be taken to be the amount of tax which ought to have been charged if it had been correctly calculated.

(4) A notice of tax payable purporting to be issued for the purposes of this Act shall not be impeached by reason of a mistake therein as to the name of the person liable to pay the tax if the notice is served on that person.

(emphasis added)

14. Referring to section 143 of the Act, any error or mistake committed by the appellant in the exercise of its administrative function under the Act does not render an assessment void or voidable unless there is error in substance and is against the provisions of the Act. It must be emphasised however, that defect in procedure cannot displace the underlying liability for tax imposed by the statute.

15. A perusal of appendix 1, which was attached to the letter of 14.04.2008 shows that sections 109 and 109B were referred to for payments of Leased Communication and Facilities.

16. The two sections apply to different types of income. The duty to withhold tax on royalty income falls under section 109. The special class of income under section 4A is dealt with in section 109B. It could be observed that the error committed by the Appellant lies in the description of income which was subject to withholding tax.

(our emphasis)

17. Applying section 143 (2) (b) of the Act, the assessment contained in the letter dated 14.04.2008 shall not be impeached or affected merely by reason of a mistake therein as to “the description of any income”.

18. In the instant appeal, the appellant was found to be uncertain and unclear in its decision making when it listed down section 109 and section 109B without more, in the said letter. The question then arises: Whether the substance and effect of the assessment and notice issued by the appellant could have been affected by such uncertainty and therefore bad in law? After perusing the letter and provisions of the Act in its entirety we find that this is not the case since both sections 109 and 109B are the withholding tax provisions under the Act. An erroneous statement of the law as such, would

not bar the Appellant from claiming the withholding tax, as provided for in the Act.

19. It is pertinent to note that the Revenue does not by assessment impose on the taxpayers the liability to tax but that that liability is directly imposed by the statute itself. The following statement made by MacCarthy J in **Reckitt & Colman (New Zealand) Ltd v. Taxation Board of review** [1996] NZLR 1032 is persuasive. It states that:-

> "Liability for tax is imposed by the charging sections…The Commissioner acts in the quantification of the amount due, but it is the Act itself which imposes, independently, the obligation to pay. The assessment and objection procedures are merely machinery for quantifying: they do not cast liability."

20. Applying section 143(1) of the Act, even if the Appellant was uncertain as to the exact applicable provision, it does not render the assessment void for want of form. To put it in a nutshell, the allegation of procedural impropriety ought not to be permitted to vitiate the Appellant's statutory duty to assess and collect the correct amount of tax.

21. A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under section 109 or 109B is not left without any remedy. In the circumstance of this case, if it is

dissatisfied with the assessment or notice of assessment issued by the appellant, the 1st respondent ought to have exercised its right to appeal under section 99 of the Act. Before the Special Commissioners, the 1st respondents would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits, and give evidence if necessary.

22. Thus the first question is answered in the negative. The letter of the Director General of Inland Revenue dated 14.04.2008 referring to both sections 109 and/ or 109B of Income Tax 1967 holds good and is therefore not bad in law.

23. Referring to Question no.2, since the Respondents failed to file an appeal to the Special Commissioners under section 99 of the Act, the court should not delve into the merits of the matter which in any case ought to be resolved by the Special Commissioners. On this, we agree with the view expressed by our learned brother Suriyadi FCJ at paras 56-64 of his judgment. Thus Question 2 need not be answered.

sgd

Tan Sri Datuk Zainun Ali
Federal Court Judge.