IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 157

Magistrate's Appeal No 9203 of 2018

Between

Allswell Marketing Pte Ltd

… Appellant

And

Public Prosecutor

… Respondent

JUDGMENT

[Criminal Law] — [Statutory offences] — [Income Tax Act]

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v
Public Prosecutor

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28 June 2019 Judgment reserved.

See Kee Oon J:

1 This is an appeal against the decision of the Magistrate in [2018] SGMC 48 ("GD"). The appellant was convicted after trial in relation to two offences under s 94A(3) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("ITA") for failing, without reasonable excuse, to file income tax returns for more than two years after the date specified pursuant to s 62(1). The main question in this appeal is whether a court should order a penalty under s 94A(3)(*a*) ITA while the assessment of the tax payable made by the Comptroller of Income Tax ("the Comptroller") is being challenged.

2 The appellant was represented by counsel throughout the duration of the trial. At the hearing of the appeal, the appellant was unrepresented. The appellant's director, Ms Loy Jen Ny ("Ms Loy"), was its authorised

representative in the appeal. To assist the court in determining the proper construction of s 94A(3) ITA, a young *amicus curiae* ("YAC"), Mr Joel Quek, was appointed to put forward submissions.

3 Having carefully considered the submissions of the parties as well as the YAC, I am of the view that the appeal is unmeritorious. In this judgment, I set out my reasons for dismissing the appeal.

The proceedings below

4 The appellant claimed trial to two charges under s 94A(3) ITA. The full text of this provision is reproduced below at [29]. Under s 62(1) ITA, the appellant was required to furnish the Comptroller with returns of income for the Year of Assessment ("YA") 2010 and YA 2011 by 30 November 2010 and 30 November 2011 respectively, as set out in the Notice to Companies to Submit Return of Income for the Year of Assessment 2010 (GN No 681/2010) and the Notice to Companies to Submit Return of Income for the Year of Assessment 2011 (GN No 168/2011).

5 A chronology of the main events can be found at Annex A. Essentially, the appellant did not dispute that it had defaulted in filing the returns but argued in its defence that it had a reasonable excuse for its non-compliance with s 62(1) ITA. The Magistrate held that what would constitute a reasonable excuse would depend on the circumstances of each case (GD at [15] and [19]).

6 The appellant's defence centred on various difficulties it had encountered in its business operations, which involved the supply of seafood. Ms Loy's medical issues were also highlighted (GD at [16]). The Magistrate found that these allegations were uncorroborated and unsupported by documentary evidence. Further, the Magistrate observed that the relevant time

frame in which the "reasonable excuse" should have arisen for the returns relating to YA 2010 was between 2009 and 30 November 2012, and for those relating to YA 2011, between 2010 and 30 November 2013. Any excuse arising in 2014 or later would not be relevant. Similarly, events that occurred well before the relevant financial periods would also not be relevant (GD at [20] to [23]).

7 The Magistrate did not accept Ms Loy's uncorroborated evidence that the appellant's computer system failed thrice. In any event, the onus was on the appellant to ensure that its accounting information was stored safely, and being busy or occupied with its day-to-day operations was not a reasonable excuse. Moreover, Ms Loy, as director of the appellant, bore the responsibility of engaging a suitably qualified person to prepare the accounts and file the requisite returns. The Magistrate thus held that the reasons provided by the appellant did not constitute reasonable excuses, and convicted the appellant of the two charges on 28 June 2017 (GD at [23] to [26]).

8 Upon the appellant's conviction, the respondent requested for time to review the appellant's documents and assess the tax payable. In due course, the Comptroller issued revised Notices of Assessment for YAs 2010 and 2011. The tax payable as assessed by the Comptroller totalled $142,388, while the appellant's own assessment was in the range of $19,000.

9 The appellant disputed the Comptroller's assessment but the Comptroller maintained in his Notices of Refusal to Amend ("NRAs") dated 25 May 2018 that he was not prepared to amend the assessment further. The appellant filed an appeal against the Comptroller's assessed tax amount to the Income Tax Board of Review ("the ITBR") on 24 June 2018 and thereafter sought to adjourn sentencing in view of its pending appeal. The Magistrate

declined to do so and proceeded to sentence the appellant on 10 July 2018. She observed that the text of s 94A(3) ITA does not contemplate that the tax assessed in the Comptroller's best judgment is to be determined only after all avenues of appeal have been exhausted. She opined that Parliament could not have intended for the criminal proceedings to wait indefinitely for the civil proceedings to conclude. The relevant assessment referred to in s 94A(3) must be that at the date of sentencing. The Magistrate also doubted whether the ITBR's (prospective) decision can be taken to be a "tax assessed by the Comptroller in his best judgment", such that a penalty under s 94A(3) can be ordered on this basis. The NRAs indicated that the tax payable had already been determined to the best of the Comptroller's judgment based on the documents available to him. Further, any prejudice perceived by the appellant would be entirely due to its own conduct. The appeal to the ITBR appeared to be a "thinly veiled attempt" to delay the payment of the penalty. If the appellant had been forthcoming and timely in providing the necessary documents to IRAS, the appeal to the ITBR could have been concluded before the sentencing hearing (GD at [34] to [36]).

10 Upon the appellant's application, the sentence was stayed pending its appeal against the Magistrate's decision.

The appellant's submissions

11 The appellant has not appealed against the convictions or the fines imposed by the Magistrate. It was made clear during the hearing of the appeal that, consistent with what was contained in the Petition of Appeal ("POA"), the sole focus on appeal was the penalty order.

12 The appellant took issue primarily with the Magistrate's rejection of its application to adjourn sentencing pending the hearing of its appeal to the ITBR.

This was in spite of the fact that the Magistrate had been aware of the appellant's right to appeal to the ITBR and of the various operational and administrative difficulties faced by Ms Loy in relation to the appellant's business. As the Comptroller's assessment was subject to revision on appeal, the imposition of the penalty on the basis of this assessment was prejudicial to the appellant. An adjournment would have allowed the tax owing to be assessed on the basis of accounting reports and records instead of using the Bank Deposits Method ("BDM"). At the hearing of the appeal, Ms Loy asserted that the assessment arrived at through the use of this presumptive method of assessment was not in the Comptroller's best judgment. According to Ms Loy, the appearance of "excessive income" was due to a loan that had not been recorded in the appellant's accounts. However, she also acknowledged that the Comptroller had not been provided with information such as the appellant's stock records.

13 The appellant further contended that there was reasonable doubt as to the correctness of the assessed tax amount and that it would be gravely prejudiced by the imposition of the penalty on this basis. This appears to have been primarily because there is a real risk of the appellant being wound up if the penalty is imposed, as the appellant is not likely to be able to pay the penalty. Such prejudice would be irremediable even if the ITBR later found in favour of the appellant.

14 The appellant also submitted that its delay in filing the tax returns was not deliberate but the result of numerous difficulties it faced since 2004. For example, it was in debt, its part-time accountant left in 2006, and its computer system crashed in 2008 and 2009. The appellant also faced other legal suits and was unable to engage another firm to rework the accounts. Ms Loy's various personal and medical problems were also emphasised. Given that the appellant had not appealed against its conviction, it appears to have highlighted these

difficulties to demonstrate that its delay in providing the records to the Inland Revenue Authority of Singapore ("IRAS") was not deliberate, and that it had not sought to take advantage of the time extensions granted to it by IRAS or the court below.

The respondent's submissions

15 According to the respondent, there are two separate "regimes" under the ITA: (a) tax assessment and collection, with its inbuilt processes for objection and appeal under Parts XVII and XVIII of the ITA; and (b) criminal enforcement and penalties. The present case focuses on the latter aspect. The proper interpretation of s 94A(3)(*a*) entails that the penalty order should be made on the basis of the amount of tax liability assessed by the Comptroller even where there is a pending appeal against that assessment. This interpretation accords with the ordinary meaning of the provision, which refers to the amount of tax the *Comptroller* assesses the offender to be liable. The determination and assessment of the appellate bodies cannot be the basis for the penalty under s 94A(3)(*a*) ITA. Where there is an appeal against the Comptroller's assessment, any revised assessment will be made by the ITBR and not the Comptroller. This is indicated by s 80(14) ITA, which refers specifically to "the assessment as determined by the Board". The same may be said of the High Court's determination. Therefore, the assessment by bodies other than the Comptroller cannot be the basis on which the s 94A(3)(*a*) penalty is ordered.

16 Interpreting s 94A(3)(*a*) to require that the sentencing judge impose the penalty based on the determination of the appellate tribunal in question would require reading additional words into the provision and undermine the legislative purpose to base the penalty on the Comptroller's assessment. If Parliament had intended to base the penalty on either the Comptroller's

assessment only where no appeal is pending or on the ITBR or an appellate court's determination where there is a pending appeal, express words to that effect would have been included in the provision. This is also indicated by the fact that the s 94A(3) penalty is not subject to the appeal provisions under Part XVIII of the ITA. Additionally, there is no extraneous material that assists as a guide to interpretation in this case as this issue was not discussed during the Parliamentary debates.

17 The respondent submitted that its proposed interpretation is supported by a comparison to s 72(3) ITA. Section 72(3) provides that the Comptroller may, according to the best of his judgment, determine the amount of chargeable income and assess the tax payable where a person has not delivered a return. Since both s 72(3) and s 94A(3) concern the situation in which the taxpayer fails to file his tax returns, it is the Comptroller's assessment under s 72(3) that the s 94A(3)(*a*) penalty is based. Other provisions in the ITA also demonstrate the "responsibility and trust" placed on the Comptroller's assessment of the taxpayer's liability. For example, under s 85(1) ITA, a taxpayer must pay his taxes on the basis of the Comptroller's assessment even where there is a pending appeal against that assessment.

18 Further, adopting the ordinary meaning of s 94A(3) would allow the criminal matter to be concluded expeditiously. In contrast, requiring the sentencing judge to impose the penalty on the basis of the appellate body's determination would require that sentencing be withheld until the conclusion of the statutory appeal. This would also encourage offenders to delay sentencing by seeking adjournments at the pre-hearing stages of the appeal against the Comptroller's assessment. Where the matter is appealed to the Court of Appeal, the sentencing might be adjourned for months. This would be an unworkable result that Parliament could not have intended. As such, the proper interpretation

of s 94A(3)(*a*) requires that the court impose a penalty on the basis of the Comptroller's assessment alone.

19 On the facts of the present case, the respondent submitted that there is no basis for the appellant's assertions that the Comptroller incorrectly assessed the tax payable or that the tax assessed ought to have been $19,636.22. No evidence was produced at the proceedings below to support these claims. The appellant would have needed to show how the Comptroller's assessment was erroneous: see *Comptroller of Income Tax v S & Co (Pte) Ltd* [1971-1973] SLR(R) 592 ("*CIT v S*") at [8]. Given that there had been no credible challenge made to the Comptroller's assessment in this case, the Magistrate was right to impose the penalty.

The YAC's submissions

20 The YAC was requested to address three questions pertaining to s 94A(3)(*a*) ITA which are germane to the determination of the present appeal. He reformulated them slightly to broaden their scope. I set out his reformulated issues below:

(a) Does the court have the power to impose a penalty under s 94A(3) ITA when the assessment by the Comptroller is subject to further amendment or review? ("Issue 1A")

(b) Does the court only have the power to impose a penalty under s 94A(3) ITA when the Comptroller's assessment is final and conclusive for the purposes of the ITA? ("Issue 1B")

(c) How should the assessment of the ITBR, High Court, or Court of Appeal affect the penalty to be imposed by the court, if at all? ("Issue 2")

(d) What factors should guide the exercise of the court's discretion to adjourn the proceedings pending an appeal against the Comptroller's decision? ("Issue 3A")

(e) What should be the threshold for appellate intervention in the exercise of such discretion? ("Issue 3B")

21 The five issues address substantially the same questions that were initially posed to the YAC. I shall go on in due course to address Issues 1A, 1B and 2 together as a question of statutory interpretation pertaining to the scope of the court's power to impose a penalty under s 94A(3) ITA. If the assessments of the appellate bodies are not relevant to the penalty, then it must follow *a fortiori* that the court has the power to impose a penalty under s 94A(3) even if the Comptroller's assessment is subject to further amendment or review. Issues 3A and 3B which pertain to the court's exercise of discretion would also be best addressed as a whole.

22 The YAC's submissions may be summarised as follows. First, he submitted that on a literal and purposive reading of s 94A(3) ITA, the court has the power to impose a penalty based on the Comptroller's assessment at the time of sentencing. This is in spite of the fact that the assessment may be subject to review and future changes.

23 The imposition of the penalty is not contingent on the Comptroller's assessment being final and conclusive under the ITA. If Parliament had intended otherwise, this would have been expressly stated, as in s 91(2) ITA. Section

91(2) ITA refers specifically to a final and conclusive assessment. A purposive interpretation of s 94A(3) would also not support the proposition that the court has no power to impose a penalty until all avenues of reviewing the assessment are exhausted. The object of s 94A(3) is to deter taxpayers from failing to file income tax returns, and to align the penalty imposed with that for under-declaring income. This would not be fulfilled if the court can only impose the penalty after the tax assessed to be payable is no longer subject to further revision, since there is no equivalent requirement for the offence of filing incorrect returns. Moreover, there can, for instance, be cases where the avenues of review are open for a theoretically indefinite period of time. The assessments can also be subject to judicial review. If the court's power to pass sentence is predicated on the exhaustion of these avenues, then the court would not be able to pass sentence. This would be an absurd outcome.

24 The YAC also submitted that any existing assessments of the ITBR, High Court or the Court of Appeal must be taken into account when the court computes the penalty to be paid under s 94A(3). To conclude otherwise would be an "unprincipled and overly technical application of the statute". The court should pass sentences based on the correct factual premise. As a matter of principle, any penalty to be imposed under s 94A(3) should be computed based on the updated assessment, regardless of whether the Comptroller formally amends his assessment.

25 Turning to the issue of how the court should exercise its discretion, the YAC noted that under s 228(6) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the court may pass sentence "on such day as it thinks fit". However, there are merits to computing the s 94A(3) ITA penalty on a final and conclusive assessment, and the court should strive to impose the penalty on that basis. The YAC submitted that "the assessment as it stands and whether that

assessment is subject to adjustment" are the most pertinent facts which the court needs to ascertain. A final and conclusive assessment would allow the court to ascertain with a large degree of certainty the relevant assessment to use in order to pass a fair sentence. The court must balance the need to ensure fairness in punishment, the swift and efficient administration of criminal justice, and the prevention of abuse of process.

26 The YAC submitted that where the assessment is not final and conclusive at the time of sentencing, the court should consider:

(a) The stage of the appeal process under Part XVII or XVIII of the ITA the parties are at and the status of the appeal at that stage (*ie*, how close that stage is to reaching its conclusion);

(b) The basis of any appeal;

(c) The potential prejudice suffered by the taxpayer in having the penalty sum imposed immediately where it contends this sum is excessive, and whether this prejudice is irremediable – the burden should be on the taxpayer to show to the court's satisfaction that this prejudice will result by reference to the difference in tax payable, the taxpayer's financial situation, and how the penalty would impact the latter;

(d) Whether the taxpayer or Comptroller has caused delay to the process, how long the delay has been, and whether the taxpayer is taking advantage of the appeal process to delay paying the s 94A(3) penalty; and

(e) Reasons for the taxpayer's disagreement with the assessment of the Comptroller or appellate body.

27 The fact that any sentence passed may be subject to criminal revision proceedings should not provide a *carte blanche* justification to pass sentence upon conviction regardless of the status of the appeal under Part XVIII as this may result in the expenditure of additional judicial time and resources.

28 Finally, the YAC submitted that appellate intervention would be warranted where the decision of the trial judge was wrong in law or against the weight of the evidence.

My decision

Issue 1: Interpretation of s 94A(3)(a)

Whether the imposition of a penalty is mandatory

29 Section 94A(3) provides that:

> (3) Any person who fails or neglects without reasonable excuse to comply with section 62 or 71(1) in respect of any year of assessment for 2 years or more shall be guilty of an offence and shall be liable on conviction to —
>
> (*a*) a penalty equal to double the amount of tax which the Comptroller assesses him to be liable for that year of assessment after determining, to the best of the Comptroller's judgment, the amount of his chargeable income; and
>
> (*b*) a fine not exceeding $1,000,
>
> and in default of payment to imprisonment for a term not exceeding 6 months.

30 The penalty and fine are complementary and coordinate components of the sentence to be imposed by the court.

31 A preliminary question is whether the reference to "shall be liable on conviction" should be taken to mean that the court has no discretion in imposing the penalty. It is evident that the court has no discretion as to quantum: s 94A(3)(*a*) states that the penalty is to be equal to double the amount of tax assessed. In *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892, Sundaresh Menon CJ held at [36] that courts should consider penal provisions introduced with the phrase "shall be liable" in their textual and legislative context in determining whether they confer a discretion.

32 I agree with the YAC that the imposition of the penalty pursuant to s 94A(3)(*a*) is mandatory. It is implausible that Parliament would have removed the court's discretion as to the quantum of the penalty while allowing the court to determine whether or not a penalty should be imposed. This reading is also suggested by the Minister of State for Finance's comments at the Second Reading for the Income Tax (Amendment Bill) 2007, where the Minister said that (*Singapore Parliamentary Debates, Official Report* (22 January 2007) vol 82 at cols 1043-1044 (Lim Hwee Hua, Minister of State for Finance)):

> Currently, the penalty for not filing an income tax return is significantly less severe than the penalty for under-declaring income. This creates an incentive for taxpayers to avoid taxation by not submitting their income tax returns. To discourage this practice, a penalty of double the amount of tax undercharged will be introduced for the failure to file a tax return in respect of any year of assessment within three years from the filing deadline.

33 Section 95(1) ITA provides for the penalty to be imposed for furnishing incorrect returns or information. It states that a person who contravenes this provision "shall be guilty of an offence for which, on conviction, *he shall pay a penalty* …" [emphasis added]. Section 95(1) ITA therefore makes clear that the penalty is not discretionary, and that the court *must* order such payment. Given that Parliamentary intention appears to have been to bring the penalties for these

two offences into closer alignment, s 94A(3) should be read as directive and not permissive.

*The ordinary and literal meaning of s 94A(3)(*a*)*

34 I turn next to examine the material portions of the provision. Section 94A(3)(*a*) refers to "the amount of tax which the Comptroller assesses him to be liable". The ordinary and literal meaning of the provision is obvious and unambiguous on its face. The penalty should be ordered only on the basis of the *Comptroller's* assessment. No reference is made to assessments made by any other body, whether on appeal or otherwise.

35 The YAC observed in this connection that the ITA does not provide that the Comptroller's assessment must be adjusted or revised to match the findings of the appellate bodies. Both the YAC and the respondent suggested that the assessments of the appellate bodies stand apart from that of the Comptroller. From the plain language of the provision, it would seem that an appellate body's assessment of the tax payable is only relevant in so far as it indicates that the Comptroller's assessment was not based on a determination which he had made "to the best of [his] judgment". Beyond this, the Comptroller's assessment would be the only relevant consideration in construing and giving effect to s 94A(3)(*a*). I agree that this appears to be the proper construction of s 94A(3) on an ordinary and literal reading.

36 It should be noted at the outset that a revision or annulment of the Comptroller's assessment on appeal need *not* be based solely on a finding by the appellate body that the Comptroller had not exercised his "best judgment". As was alluded to in *CIT v S* at [5], the question as to whether the Comptroller has properly exercised his judgment is reviewable by the ITBR. However, there

can be other grounds for revising the Comptroller's assessment, even if he had made fair and reasonable efforts to arrive at an assessment in good faith. These might include instances where new and relevant material is placed before the Comptroller for consideration (particularly since liability under s 94A(3) arises where no tax returns have been filed). There can also conceivably be self-initiated revision by the Comptroller himself. Indeed, the Comptroller may issue a recomputed assessment following an objection from a taxpayer under s 76(6)(*a*) ITA, thus resulting in the conclusion of the objection and appeal process. These instances do not depend on any finding that the Comptroller had not duly exercised his "best judgment".

37 I turn now to briefly address the "best judgment" requirement. The parties did not cite any authorities on what this entails, and there appears to be a paucity of local cases in this area. The exercise of the Comptroller's discretion has been considered under provisions referring to the Comptroller's satisfaction. In *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484, Yong CJ held that s 14(1)(*a*), which requires the Comptroller to be "satisfied that the interest was payable", conferred administrative discretion on the Comptroller that had to be exercised in good faith and in the interests of good administration. The Court of Appeal went on to apply the *Wednesbury* standard of unreasonableness, with reference to *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223. The Total Assets Formula used by the Comptroller was a logical mathematical method and not some arbitrary or unreasonable measure, and the Comptroller had appropriately exercised the administrative discretion conferred upon him (at [49] to [51]).

38 For present purposes, it suffices to state that the "best judgment" standard requires that the Comptroller must have made what he honestly believes to be a fair determination of the taxpayer's chargeable income based

on the material available to him. This decision must not be capricious, vindictive, wholly unreasonable, or against the interests of good administration: see [37] above; Butterworths' Annotated Statutes of Singapore vol 9(2) (Butterworths Asia, 2000 issue) ("Butterworths'") at pp 146 and 890, citing, amongst others, *Commissioners of Income Tax, United and Central Provisions v Badridas Ramrai Shop* (1937) 64 LR Ind App 102 at 114-115 and *Argosy Co Ltd (In voluntary liquidation) v Inland Revenue Commissioner* [1971] 1 WLR 514 at 516-517. The "best judgment" requirement would therefore appear to only contemplate limited cases where the Comptroller's assessment is likely to be impugned.

39 A number of questions arise when the ordinary meaning of the provision is considered in the context of the objection and appeal mechanisms in Part XVII and XVIII. Under the ITA, taxpayers who disagree with the Comptroller's assessment have tiered avenues of recourse. This may result from the Comptroller's assessment under s 72(3), which similarly pertains to the situation where no tax returns are filed. The appellate process begins with an appeal to the ITBR, and may ultimately only see its final determination before the Court of Appeal, should the parties exercise their (qualified) right of further appeal against the ITBR's decision. As I understand it, this is the *same* assessment that is referred to in s 94A(3)(*a*): indeed, it would be anomalous if the Comptroller assesses the tax payable differently under ss 94A(3)(*a*) and 72(3). As such, should there be an ongoing prosecution alongside an appeal to the ITBR, there may be two separate proceedings relating and referring to the Comptroller's assessment. Either one may commence before the other. It may or may not be possible for the appeal process (in relation to a disputed assessment) to run its course before the prosecution comes to a close. The Magistrate correctly alluded

to this at [36] of the GD in adverting to the possibility that the appeal to the ITBR could have been resolved before the sentencing hearing.

40 While s 94A(3) is not subject to the appeal process under Part XVIII ITA *per se*, the latter remains a significant and relevant feature of the statutory scheme. I consider its relevance to s 94A(3) by addressing two differing scenarios arising from an appeal against the Comptroller's assessment: first, where the Comptroller's assessment has been revised, and second, where the appeal remains pending.

Scenario 1: where the Comptroller's assessment has been revised on appeal

41 The first scenario I shall address is where the Comptroller's assessment has been revised, whether on appeal to the ITBR or the High Court or Court of Appeal. This of course has not yet arisen on the facts of the present case.

42 The pertinent question is whether, where an appellate body has arrived at a differing assessment of an offender's tax liability on grounds *other than* the Comptroller's exercise of best judgment, this should be relevant for the purposes of s 94A(3)(*a*). As I have outlined above at [15], the respondent took the view that, on a purely literal reading of s 94A(3)(*a*), the sentencing court can, and indeed must, impose a penalty based *only* on the Comptroller's assessment notwithstanding that it may have been revised by an appellate body. On the other hand, the YAC submitted that where appellate revision occurs before sentence is passed by a criminal court, any penalty that the court has to impose under s 94A(3)(*a*) should be computed based on the updated or revised assessment as the court should pass sentence based on the correct factual premise. I understood this to be a suggestion that to hold otherwise would lead to manifestly absurd or unreasonable outcomes. According to the YAC, it would

be "wholly artificial" to ignore a final and conclusive assessment of the ITBR or a higher court and to look solely to the Comptroller's assessment, which has since been overturned.

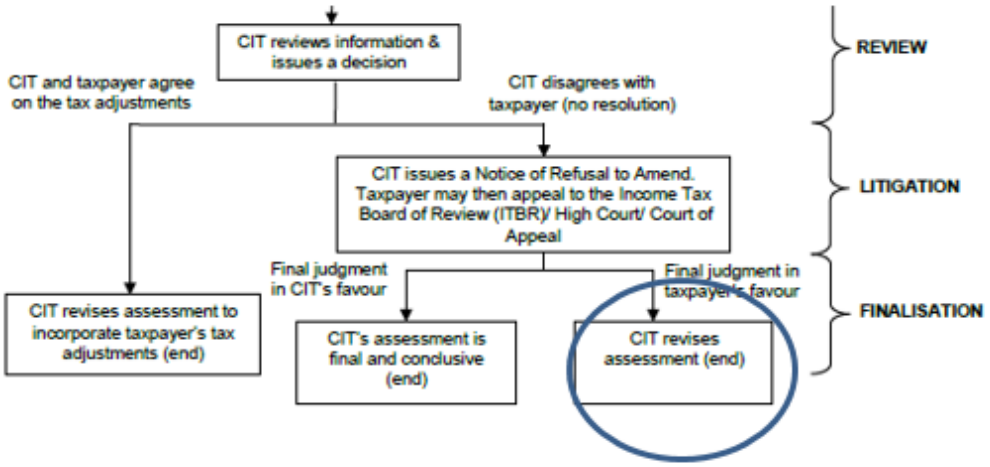
43 Having considered the provision in context, I am of the view that the ostensible difficulty posed by this issue is more illusory than real. I demonstrate my reasons by applying well-established principles of statutory interpretation. Having determined the ordinary meaning of the words of the provision, the next step is to ascertain the legislative purpose or object of the statute. In doing so, primacy should be given to the text of the provision and its statutory context: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [43]. Further, the purposive approach does not allow the court to construe the provision in a manner that would do violence to the express wording: *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [58].

44 The text of the provision indicates that Parliament intended for the Comptroller's assessment to be relied upon. At the hearing of this appeal, the YAC submitted that no real distinction is drawn between the Comptroller's assessment and that of an appellate body in s 84(1). The suggestion, as I understood it, was that the statutory scheme under the ITA does not place much emphasis on whether the assessment had been made by the Comptroller or an appellate body. I acknowledge that this may be true of certain provisions in the ITA, such as s 84(1). However, in comparison, s 94A(3)(*a*) clearly refers to the Comptroller's assessment. This is the text chosen by Parliament to embody and give effect to its purposes and objects, and is therefore of critical importance in identifying legislative intent: *Tan Cheng Bock* at [43] and [44]. In this regard, it is significant that s 94A(3) is not expressly subject to the provisions on appeal. In contrast, s 95(1) ITA, which provides the penalties for making incorrect

returns, giving incorrect information or the failure to comply with s 76(8) ITA, is expressly subject to the provisions of Part XVIII, unlike s 94A(3).

45 Further, the reference to the Comptroller's assessment is found within s 94A(3), under which an offence is committed where the taxpayer has failed to file its tax returns for two years or more. The natural consequence of this offence, as can be seen in the present case, is that the Comptroller may well have to make an assessment on the basis of inadequate or incomplete information. The Comptroller is under no general obligation to carry out exhaustive investigations to obtain information. Indeed, even if such investigations were carried out, it is unclear how fruitful these would be since the taxpayer is presumably better acquainted with his own affairs: see Butterworths' at 909. Therefore, *prima facie*, the penalty must be based on the Comptroller's assessment, where this is made *bona fide* and reasonably on the basis of the information before him. This is despite the fact that this may not be the most accurate measure of the tax that would have been payable had the taxpayer complied with its obligations to file its tax returns.

46 A plain *and* purposive reading of the provision would require that the penalty be imposed on the basis of the Comptroller's assessment as it stands on the date of sentencing. That said, I do not fully accept the respondent's submission. I do not agree that any revised assessment made by an appellate body must be disregarded under any circumstances. In this connection, I am fortified by two observations made by the YAC. First, the YAC referred me to the IRAS *e-Tax Guide on Corporate Income Tax – Objection and Appeal Process* (Second Edition) ("e-Tax Guide") which suggests that the Comptroller will act to revise his assessment after a decision is issued by the appellate body. The chart set out below depicts the relevant portion of the "Objection and Appeal Process", which can be found in the e-Tax Guide at paragraph 3.3:



47 Consistent with what IRAS has specified to be its practice in the e-Tax Guide, the Comptroller would generally be expected to revise his assessment forthwith to bring it in line with the determination of the appellate body. I fully accept that the e-Tax guide does not have the force of law. However, as I understand it, the Comptroller's revision of his assessment is not merely a practice, but a *statutory obligation* in view of s 80(14) ITA, which provides as follows:

> (14) Notice of the amount of tax payable under the assessment as determined by the Board shall be served by the Comptroller either personally or by registered post upon the appellant.

48 The reference to the Comptroller's revised assessment in the e-Tax Guide is quite plainly a reference to the way in which s 80(14) is given effect to in practice. Indeed, it seems self-evident that it is not open to the Comptroller to refuse to amend his assessment, particularly where this has been *annulled* by the ITBR. Once the Comptroller has revised his assessment, there is no issue of the sentencing court having to impose an anomalous or artificial order on the wrong factual premise. A further implication of this is that the imposition of the

penalty on the basis of the Comptroller's assessment need not be an artificial exercise in which the wrong factual premise is utilised, as suggested by the YAC. The problem is thus more illusory than real, and this becomes evident when s 80(14) is taken into account to support a plain and purposive reading of s 94A(3).

49 I am confident that the interpretation I have set out does not result in manifestly absurd or unreasonable outcomes: this is also indicated by the broad powers of the ITBR on appeal, as observed by the YAC. Where the ITBR does not agree with the Comptroller's assessment, it can order the Comptroller to adjust his assessment based on the ITBR's findings. This follows from the ITBR's broad powers under s 80(10) ITA to make such order as it sees fit. For example, this may include an order to recompute the tax assessment by excluding items of income the ITBR has found to be non-taxable in principle: Pok Soy Yoong *et al*, *The Law and Practice of Singapore Income Tax* (LexisNexis, 2nd Ed 2013) at para 47.40, n 53.

50 I should add that where an appeal has reached its conclusion, it remains possible that the Comptroller may not have formally revised his assessment in time for the sentencing court to impose the penalty. In such circumstances, the court can adjourn sentencing for an appropriate duration in order for the Comptroller to formally issue a revised assessment and place it before the sentencing court. I shall elaborate on my views in respect of the court's discretion to adjourn the proceedings in due course.

Scenario 2: where there is a pending appeal against the Comptroller's assessment

51 The second scenario which I shall consider is the one that arises in the present case: whether a sentencing court has the power to impose the penalty

despite a pending appeal against the Comptroller's assessment. The respondent and the YAC are in agreement that this should be answered in the affirmative. I concur with their conclusion.

52 The starting point once again is to look to the ordinary meaning of the provision. Section 94A(3) does not make reference to the appeal process, or indeed, to any of the appellate bodies. Consistent with my views as set out above, the relevant assessment to be used by the court in computing the penalty sum is the assessment of the Comptroller at the time of sentencing. This is subject to the requirement that his assessment was made in the exercise of his best judgment.

53 This is also indicated by a comparison with s 91(2) ITA, as highlighted by the YAC. Section 91(2) clearly distinguishes between the situation where: (1) an assessment has or has not been made; and (2) where the assessment made is final and conclusive. Express words indicating that this distinction is significant have not been included in s 94A(3) ITA In contrast, s 91(2) ITA states:

> (2) Subject to any rules made under section 7, deductions authorised by this section shall be made at such times and in such amounts as the Comptroller shall direct *whether or not the tax has been assessed*; except that *if on the assessment becoming final and conclusive* it appears that the deductions made exceed the tax payable, the tax overpaid by means of the previous deductions shall be repaid.
>
> [emphasis added]

54 Here, as above, I do not see any reason justifying a departure from the ordinary meaning of the provision.

55 There is nothing to indicate that Parliament intended for sentencing to be deferred until the statutory appeal process has been exhausted. The

Minister's statement (excerpted at [32] above) does not shed any light on whether or not the s 94A(3)(*a*) penalty is to be based on the Comptroller's assessment where there is a pending appeal. It also does not address the relevance of the appellate bodies' assessments.

56 The YAC placed some emphasis on Parliament's apparent intention to address the sentencing disparity between taxpayers who do not file their returns and those who under-declare their income. According to the YAC, this intention would not be fulfilled if the sentencing court does not have the power to impose the penalty until the tax assessed to be payable is no longer subject to further revision. This is because the "same tactical ploy" would not be available where the filing of incorrect returns is concerned. According to the YAC, the sum of undercharged tax would have been proved in the course of convicting the taxpayer. I was not persuaded by this argument. Section 95 ITA is not analogous: it makes no reference to the Comptroller's assessment, and is therefore unhelpful in interpreting s 94A(3)(*a*). Further, it is not clear to me that any significant disparity between the two offences would result in any event– after all, the penalty will still need to be paid at some point.

57 A more convincing argument is that interpreting s 94A(3) as requiring that the penalty be imposed only after the appeal process has been exhausted would give rise to unworkable and impracticable results. The YAC argued that there are avenues for review of the Comptroller's assessment under Parts XVII and XVIII ITA that are available for a "theoretically indefinite period of time". This is because ss 76(4) and 79(11) ITA confer discretion on the Comptroller and the Chairman of the ITBR respectively to allow the objection or appeal to proceed notwithstanding the fact that it is brought out of time. If the court's power to pass sentence is engaged only after all avenues of review are

exhausted, there could be an absurd outcome in some instances where the court might not be able to pass sentence at all.

58 While I agree that there is no reason to construe s 94A(3)(*a*) as requiring that the assessment be final and conclusive, I would not go so far as to say that requiring the assessment to be final and conclusive would lead to the potentially absurd result of the court *never* being able to pass sentence. Section 84(1) ITA provides that the assessment made is final and conclusive where no valid notice of appeal is filed within time. Rather, the impracticability arises from the fact that the appeal process may take a protracted period of time to complete. In some cases, this may result in the appeal being heard by the Court of Appeal. Requiring that the sentencing process be held in abeyance in *every case*, even where the appeal process may take several months to complete, would impede the efficient administration of justice.

59 No serious prejudice need result from this interpretation. I am conscious that should an appeal under Part XVIII of the ITA succeed, this may result in a revised assessment and a lower penalty or possibly even none at all. Where the matter has proceeded before the High Court on appeal, the court may be invited upon a taxpayer's successful appeal to exercise its revisionary powers to revise the initial order for the penalty made below. Correspondingly, the Prosecution should take steps to rectify the initial order for the penalty, to set the record straight in the interests of fairness and justice.

Conclusion on Issue 1

60 In summary, the correct interpretation of s 94A(3), in my view, requires a literal reading of the provision. Section 80(14) should however be taken into account to support a plain and purposive reading of s 94A(3). Where the

offender has not been sentenced but there is in existence a differing assessment made on appeal to the ITBR, High Court or Court of Appeal, the Comptroller should revise his assessment forthwith to bring this in line with the determination of the relevant appellate body. Where this step has been taken by the Comptroller, the penalty should be ordered on the basis of the revised assessment.

61 To be clear, therefore, the sentencing court can impose the penalty even if there is a pending appeal. The court is not constrained by the fact that the Comptroller's assessment might be subject to change at some future time. The provision does not specify otherwise, and there is nothing which suggests that this would be contrary to Parliamentary intention. There may be limited exceptions, for instance, where the court is not satisfied that the assessment has been made on the basis of the chargeable income as determined through the Comptroller's best judgment.

Issue 2: the court's discretion to adjourn proceedings

62 Following from my conclusions above, the second issue can be addressed fairly briefly. Since the court cannot decline to order a penalty, the question that remains in the present case is whether the court has any discretion to adjourn sentencing.

63 As a starting point, apart from s 228(6) CPC as highlighted by the YAC, it should be noted that s 238(1) CPC confers a general power to adjourn proceedings on such terms as the court deems fit for any reasonable cause. The respondent orally submitted that the proposition that the court has discretion to adjourn sentencing pending a Part XVIII appeal in some cases is not borne out by a plain reading of the provision, or, indeed, any other provision in the ITA.

Such discretion is allegedly also not supported by any extraneous material. Should the respondent's approach be adopted, it would mean that there can be no deferment of sentencing under any circumstances: an exception might be where the Comptroller's exercise of best judgment is concerned, but the respondent made no submissions on this point. With respect, I see no basis for the respondent's position. It cannot be correct in principle in view of the general discretion that is vested in the court under the CPC, which has not been expressly curtailed by any provision in the ITA.

64 In my view, an adjournment of sentencing should nonetheless only be permissible in limited instances, primarily where the offender mounts a credible challenge to the Comptroller's assessment on the ground that he has not exercised his best judgment. This is since the Comptroller's exercise of best judgment is a pre-requisite for the imposition of the penalty.

65 It would be incumbent on the offender to demonstrate to the satisfaction of the court that there is reasonable basis to question whether the determination of the offender's chargeable income had been arrived at through the Comptroller's exercise of his best judgment. If so, the sentencing court should adjourn the matter in favour of final resolution by the relevant appellate body. As I indicated at [50], an adjournment would also be appropriate where the Comptroller has yet to revise his assessment in order to bring it in line with that of the appellate body.

66 I do not exclude the possibility that adjournments might be warranted on other grounds, particularly where it would be prudent for a court to err on the side of caution. Some such instances, as suggested by the YAC, might be where the offender can demonstrate that substantial and irremediable prejudice

will result from the imposition of the penalty, or where the relevant appellate proceedings are close to reaching a conclusion.

67 The respondent argued that requiring the sentencing court to withhold sentencing until the conclusion of the appeal against the Comptroller's assessment is "unworkable and impracticable". I do not think that this is necessarily the case in every instance. Where the amount of tax payable does not exceed $200, or where the appeal raises purely factual issues, the decision of the Board will be final and no appeal will lie to the High Court or the Court of Appeal: ss 81(1) and 81(2) ITA. Further, there are strict timelines in place for the statutory appeal that will ameliorate the delay to some extent. Finally, as I had intimated above at [39], it may be a question of timing and fortuitousness as to when the appeal is concluded. I do not see why a short adjournment of sentence of up to a few months pending the ITBR's determination of the appeal would prove to be unworkable or impracticable.

Application to the present case

68 The respondent argued that since there was no credible challenge made to the Comptroller's assessment in this case, the Magistrate was correct to impose the penalty based on the Comptroller's assessment.

69 In the appellant's POA, it was asserted that due to "past utilised losses" which could be offset against the profits from later years, the tax assessed for 2010 should have been nil. While the POA also referred to YA 2009, this was not relevant in the present case. Second, the appellant asserted that the correct tax amount for YA 2011 should have been $19,636.22. As such, the total pay-out should have been $58,908.66 (comprising the tax payable and the "double

penalty"). Given that the Comptroller assessed the tax payable to be $142,388, the penalty amounted to $284,776, and the total pay-out to $427,164.

70 It appears to me that the appellant's main contention was that it did not under-declare its income and that the BDM should not have been used to determine its chargeable income. The appellant stated in its POA that:

> The company is willing to pay penalty based on true amount of tax based on our actual accounts instead of guessing figures based on wrong accusation of under declaration income and to pay tax amount that is under dispute.

71 The Comptroller utilised the BDM and explained that the signs of inadequate record-keeping were sufficient for it to construe that the appellant may have under-reported its revenue. While the appellant had suggested that this inference was wrong, it falls short of a suggestion that it was wholly unreasonable. In this regard, I note that the appellant appears to accept that the information it had provided the Comptroller was inadequate. Indeed, the main thrust of its submissions before me appeared to be that it ought to be given more time to put together records and entries that would show that the tax assessed was excessive. In the circumstances, there is no reason to doubt the reasonableness of the Comptroller's determination of the appellant's chargeable income, or the tax assessed thereon.

72 Applying the threshold for appellate intervention in respect of the exercise of judicial discretion, the test is whether the discretion was exercised on demonstrably wrong principles or without any grounds, or if the judge had ignored some relevant provision of law (*Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [40], citing *Kee Leong Bee and another v Public Prosecutor* [1999] 2 SLR(R) 768 at [21]). I do not think the Magistrate's decision to refuse the adjournment and proceed to pass sentence (inclusive of

the penalty) can be said to have been based on demonstrably wrong principles. While a perusal of the Magistrate's GD suggests that she may not have considered whether the appellant had challenged the Comptroller's exercise of judgment, the appellant for its part did not put forward any arguments which would have warranted such consideration.

73 In the circumstances, the Magistrate was justified in concluding at [35] of the GD that when the Comptroller refused to amend the assessment further on 25 May 2018, he had made this determination to the best of his judgment. I should add that I agree with the Magistrate's observation that the appellant's appeal to the ITBR appeared to be a "thinly veiled attempt" to delay the payment of the penalty (GD at [36]). The appellant had been afforded adequate time and opportunities to support its objections but was not forthcoming and timely in providing the necessary documents to IRAS. Notwithstanding any sympathy I may have for the appellant and Ms Loy's various difficulties, the present situation was ultimately of the appellant's own making.

Conclusion

74 To sum up, my decision is as follows:

(a) The imposition of the penalty pursuant to s 94A(3)(*a*) ITA is mandatory.

(b) On a plain and purposive reading of s 94A(3)(*a*), the penalty should be ordered on the basis of the Comptroller's assessment. However, any revised assessment of the ITBR, High Court or Court of Appeal should be adopted by the Comptroller as the basis for the penalty to be imposed by the sentencing court if the revised assessment is

already in existence at the time of sentencing. To this extent, the determination of an appellate body is relevant, albeit indirectly.

(c) The sentencing court may impose the penalty even where the assessment by the Comptroller is subject to further amendment and review.

(d) The court has a general discretion to adjourn sentencing (inclusive of the penalty), but in deciding whether to allow an adjournment, the court should consider whether the offender has raised a credible challenge in his appeal against the Comptroller's assessment on the basis that the Comptroller did not exercise his best judgment in determining the chargeable income.

75 I find that the appellant has not raised any credible challenge on the ground of the Comptroller's failure to exercise his best judgment in assessing the appellant's tax liability. Further, while there is some suggestion that irremediable prejudice would result from the imposition of the penalty, on the facts of this particular case, I am not persuaded that the Magistrate's decision to sentence the appellant and impose the penalty while the appeal to the ITBR remains pending was erroneous in any way. This is especially so when the procedural history of the present case is taken into account.

76 For the reasons stated above, I dismiss the appeal and affirm the decision of the Magistrate. I am grateful to the parties and the YAC for their detailed and helpful submissions.

See Kee Oon
Judge

Loy Jen Ny for the appellant;
Norman Yew and Ang Siok Chen (Attorney-General's Chambers)
for the respondent;
Joel Quek (Wong Partnership LLP) as young *amicus curiae*.

Annex A: Chronology of Events

S/N	Date	Event
1	30 November 2010	The appellant was required to submit return of income to the Comptroller for YA 2010.
2	30 November 2011	The appellant was required to submit return of income to the Comptroller for YA 2011.
3	24 May 2010	Notice of Assessment ("NOA") issued by Comptroller in respect of YA 2010 (tax assessed at $99,999.95).
4	3 July 2012	NOA issued by Comptroller in respect of YA 2011 (tax assessed at $99,999.95).
5	24 June 2014	A statement was taken from Ms Loy, who stated that the appellant had not been able to submit the tax returns due to staff turnover.
6	4 July 2014	IRAS informed the appellant to file the income tax returns for YA 2010 and 2011 by 28 February 2015 and 31 March 2015 respectively. The appellant was informed that prosecutorial action would be taken if this was not done.
7	28 February 2015 31 March 2015	The appellant did not submit the respective tax returns as required.
8	24 June 2015	Ms Loy called IRAS and proposed submitting the tax returns for both financial years by 15 August 2015.
9	14 August 2015	Ms Loy sent an email requesting to submit the tax returns by 11 and 18 September 2015. The request was rejected.
10	18 December 2015	IRAS filed two charges against the appellant for offences under s 94A(3) ITA. The summons was issued.

11	13 January 2016	The summons was served on the appellant.
12	3 March 2016	The appellant submitted the income tax return, unaudited accounts and tax computation in respect of YA 2010.
13	3 June 2016	The appellant submitted the income tax return, unaudited accounts and tax computation in respect of YA 2011.
14	9 June 2016	Field visit conducted by the Corporate Tax Division and the appellant's record-keeping was found to be questionable.
15	14 June 2016	The appellant was informed that there were signs of inadequate record-keeping.
16	14 September 2016	Comptroller re-assessed the tax payable for YA 2010 using the Bank Deposits Method ("BDM") due to inadequate record-keeping. Given the time-bar, the tax assessed remained that stated in the NOA issued on 24 May 2010.
17	21 November 2016	IRAS officers explained to Ms Loy and the appellant's accounts representative how the BDM was used. Ms Loy agreed to provide IRAS with information by 2 December 2016 to show that the BDM calculation was wrong.
18	28, 29 November 2016 1 December 2016	Ms Loy postponed the meeting with IRAS.
19	2 December 2016	Ms Loy failed to attend the meeting with IRAS.
20	12 December 2016	Ms Loy failed to attend the meeting with IRAS.
21	13 December 2016	Ms Loy called and informed an IRAS officer that she would save the information on a

		thumb drive and send it over on 14 December 2016.
22	14, 27 December 2016	Ms Loy failed to provide information to IRAS
23	28, 29 December 2016 4 January 2017	IRAS could not contact Ms Loy.
24	27 June 2017	Ms Loy submitted to IRAS the audited accounts for YA2011.
25	28 June 2017	The appellant was convicted after trial. The respondent asked for sentencing to be adjourned as the Comptroller required time to review the documents.
26	(13 October 2017)	The respondent applied for the 13 October 2017 hearing to be adjourned as IRAS required more time to assess the tax payable, allow the appellant to raise any objections, and for the Comptroller to respond.
27	22 November 2017	IRAS issued the amended NOAs for YA 2010 and YA 2011. Tax payable decreased to $58,873.21 and $83,514.79 respectively.
28	11 December 2017	Appellant stated at the adjourned sentencing hearing that it was objecting to the NOAs and applied for an adjournment for IRAS to consider and respond to its objections. Hearing was adjourned to 19 April 2018.
29	18 April 2018	The appellant applied to adjourn sentencing as it wanted to submit further documents to IRAS, and IRAS granted it a final extension to 27 April 2018.
30	22 May 2018	At the hearing, the appellant sought a further adjournment. IRAS stated that it had not received anything since 27 June 2017 despite

		the numerous extensions granted. It indicated that it would proceed to issue NRAs. The Magistrate adjourned sentencing to 10 July 2018 for IRAS to issue NRAs and for the mitigation plea to be prepared.
31	25 May 2018	The Comptroller issued NRAs for YA 2010 and YA 2011.
32	24 June 2018	The appellant filed its notice of appeal to the ITBR.
33	5 July 2018	The appellant tendered submissions seeking an adjournment of sentencing or a stay of execution pending appeal. The appellant stated that significant prejudice would result if the court proceeded to sentence despite the pending appeal.
34	10 July 2018	The appellant was sentenced and sentence is stayed pending appeal.