Technology, Media and Telecommunications & Data Protection

Determining the Extent of Inland Revenue Board's Powers to Request for Disclosure of Personal Information: *Genting Malaysia Berhad v Personal Data Protection Commissioner & Ors*

Under the Income Tax Act 1967 ("**ITA**"), the Inland Revenue Board of Malaysia ("**IRB**") has broad powers and tools to ensure effective collection of tax revenue for the Malaysian government. This includes wide information gathering powers such as those provided for under Section 81 of the ITA which empowers the Director General of the IRB ("**DGIR**") to demand the disclosure of any information or particulars that is in the possession or control of a person for the purposes of the ITA. Failure to comply with a request made under Section 81 of the ITA amounts to an offence punishable with a fine of not less than RM 200, and not more than RM20,000, or imprisonment for a term not exceeding six months, or to both.[1]

The scope of the DGIR's power to request information was recently tested in the case of *Genting Malaysia Berhad v Personal Data Protection Commissioner & Ors* (Case No. WA-25-83-02/2020), where the DGIR relied on Section 81 of the ITA to make a blanket request for all customer data from Genting Malaysia Berhad ("**GMB**").

In this case, between November 2018 to November 2019, the DGIR exercised his powers under Section 81 of the ITA to make broad demands to GMB, requiring GMB to disclose the personal data of all its customers who were members under the Genting Rewards Loyalty Programme ("**Loyalty Programme**") for the purposes of enlarging IRB's tax base, increasing tax collections, updating the IRB's data warehouse and reducing tax evasion. The scope of information demanded by the DGIR included the names of members, their respective identity card numbers, passport numbers, addresses, postcodes, Loyalty Programme membership account numbers, total funds brought into and taken out from GMB's casinos and the total winnings and losses of each member.

GMB refused to accede to the demand based on the following grounds:

(1) Section 81 of the ITA only empowers the DGIR to request information relating to GMB's taxes or tax returns as a corporate taxpayer, and not the personal data of GMB's customers obtained by GMB in its capacity as a data user under the Personal Data Protection Act 2010 ("**PDPA**");

(2) complying with DGIR's request would result in GMB breaching its obligations to its customers under the PDPA; and

[1] Section 120(1)(a) of the ITA.

(3) verbal confirmation from officers of the Personal Data Protection Department (*Jabatan Perlindungan Data Peribadi* or "**JPDP**") that no enforcement agencies (such as IRB) have the right to request disclosure of the entire customer database of a company under the PDPA.

In response, the DGIR relied on certain exemptions under the PDPA (i.e., where disclosure is necessary for crime detection, prevention or investigation[2]; where disclosure is required or authorised under any law[3]; and where processing of personal data is for the purpose of assessment or collection of tax[4]).

Additionally, the DGIR also conveyed to GMB written confirmations made by the Deputy Personal Data Protection Commissioner ("**Deputy Commissioner**") confirming the DGIR's position that the blanket disclosure of information to the DGIR is allowed under the PDPA, and such disclosure would not contravene the relevant provisions of the PDPA.

The dispute between GMB and the DGIR eventually led to GMB filing a judicial review application with the Kuala Lumpur High Court in February 2020 against (1) the Personal Data Protection Commissioner ("**Commissioner**"); (2) the Deputy Commissioner; and (3) the DGIR, for the High Court to review the legality of the blanket demand made by the DGIR under the ITA and the PDPA.[5]

On 27 July 2021, the High Court ruled in favour of GMB and held that the PDPA does not allow the DGIR to make such blanket demands in view of the protection afforded to individuals by the PDPA over their personal data. As of the date of this Update, the Commissioner, the Deputy Commissioner and the DGIR have all filed appeals against the High Court's decision with the Court of Appeal, and the matter is currently pending before the Court of Appeal.

Nonetheless, the High Court's decision in this case is significant as it is the first time our courts have heard a challenge brought against the powers of government authorities to request for disclosure of personal data pursuant to the PDPA.

Pursuant to the recent issuance of the High Court's full grounds of judgment, this Update seeks to provide a summary and brief analysis of the High Court's findings, as well as examine the potential ramifications of the High Court's decision on organisations carrying out personal data processing activities under the PDPA.

[2] Section 39(b)(i) of the PDPA.
[3] Section 39(b)(ii) of the PDPA.
[4] Section 45(2)(a)(iii) of the PDPA.
[5] The Minister of Communications of Multimedia was initially joined as one of the respondents to the judicial review application. However, the High Court in its Order dated 29 July 2020 only granted leave to GMB to proceed with the judicial review application against the Commissioner, the Deputy Commissioner and the DGIR.

A Balancing Exercise between the ITA and the PDPA

A central question in this case is whether the protection provided to data subjects under the personal data protection principles of the PDPA would withstand the power of the DGIR under Section 81 of the ITA (which empowers the DGIR to request for information from organisations) to request for information pertaining to the data subjects from data users.

Under the PDPA, data users such as GMB are required to comply with the 7 Personal Data Protection Principles ("**PDP Principles**") when processing personal data, including the Disclosure Principle under Section 8 of the PDPA. As a general rule, the Disclosure Principle provides that data users (i.e., GMB) are not allowed to disclose the personal data of individuals (i.e., GMB's customers) to third parties without first obtaining their consent to the disclosure.

However, this general rule is subject to certain exceptions provided under the PDPA. The exceptions include Sections 39(b) and 45(2)(a)(iii) of the PDPA which were relied upon by the DGIR to justify his blanket demand for information. Sections 39(b) and 45(2)(a)(iii) of the PDPA essentially allow the disclosure of the personal data of individuals without their consent, if the disclosure is:

(1) necessary for the purpose of prevention or detection of crime, or for the purpose of investigations;[6]

(2) required, or authorised by or under any law (i.e., Section 81 of the ITA);[7] or

(3) for the purposes of assessment or collection of any tax or duty or any other imposition of a similar nature.[8]

Based on the competing provisions in the ITA and PDPA highlighted above, there were two main issues up for determination in the judicial review proceedings before the High Court:

(1) whether the personal data requested by the DGIR falls within the scope of Section 81 of the ITA; and

(2) whether the disclosure of the personal data to the DGIR under Section 81 of the ITA would be in breach of the provisions of the PDPA.

[6] Section 39(b)(i) of the PDPA.
[7] Section 39(b)(ii) of the PDPA.
[8] Section 45(2)(a)(iii) of the PDPA.

Summary Findings of the High Court and Requirements for Disclosure of Personal Data under Section 81 of the ITA

In summary, the High Court concluded that (a) Section 81 of the ITA does not allow the DGIR to make such blanket demands for personal data; and (b) allowing such blanket disclosure of personal data would amount to a breach of the provisions of the PDPA.

The Court held that the DGIR cannot demand that GMB disclose its customers' personal data under Section 81 of the ITA, unless and until:

(1) the DGIR obtains the consent of GMB's customers to the disclosure of their personal data;

(2) the DGIR can demonstrate that there is reasonable suspicion that any specific, identified and/or identifiable customer had not complied with any provisions of the ITA relating to the assessment or collection of tax so as to warrant a disclosure of the personal data of that customer; or

(3) the DGIR obtains a court order authorising the demand made for the disclosure of personal data.

Further, the High Court imposed an additional requirement in relation to personal data that is also regulated by the personal data protection laws of other jurisdictions. Specifically, the High Court held that this category of personal data cannot be disclosed to third parties under the exceptions provided in Sections 39(b) and 45(2)(a)(iii) of the PDPA,[9] unless both the disclosing party (i.e., GMB) and the requesting party (i.e., DGIR) have each obtained a final court order from the court of that jurisdiction authorising the disclosure of the personal data. However, as the High Court did not provide any further explanation or legal basis for this principle, we are of the view that this principle will likely be subject to appeal by JPDP and may be overturned on appeal.

Principles Propounded by the High Court

In arriving at its decision, the following principles were enunciated by the High Court (which have been summarised in view of the length of the grounds of judgment):

(1) The blanket demand made by the DGIR is an infringement of the right to privacy under Article 5(1) of the Federal Constitution, which guarantees the fundamental liberties of every person;[10]

[9] As explained above, Sections 39(b) and 45(2)(a)(iii) of the PDPA allow data users to disclose the personal data of individuals without their consent, if the disclosure is (i) necessary for the purpose of prevention or detection of crime, or for the purpose of investigations; (ii) required or authorised by or under any law; or (iii) for the purposes of assessment or collection of any tax or duty or any other imposition of a similar nature.
[10] Paragraph 63 of the High Court's full grounds of judgment.

(2) The test of necessity must be satisfied in order for the exemptions under the PDPA to apply. In this regard, the High Court held that any interference with the protection safeguarded by the 7 Personal Data Protection Principles under the PDPA must satisfy the test of necessity.[11]

The test of necessity is a strict one, wherein the test requires that any interference with the rights of data subjects under the PDPA:

a. must be proportionate to the reality as well as to the potential gravity of the public interests involved; and

b. must be based on a *"specific instant (*of disclosure) *contemplated by the statute and not a general sweeping and inconsistent reasons for the disclosure to be given"*;

The blanket demand made by the DGIR is tantamount to an abuse of the ITA as well as the use of the ITA for unlawful purposes based on the legal maxim *"equity will not permit statute to be used as an engine of fraud"*. The High Court held that the DGIR's reliance on Section 81 of the ITA to gain access to the personal data of GMB's customers without any proper legal basis contravenes the equitable doctrine as the DGIR is not allowed to use the ITA as an instrument of fraud to conduct 'fishing expeditions' in order to gain bulk access to the personal data of GMB's customers;[12]

(3) The disclosure exemption under Section 39 of the PDPA is not mandatory, and the discretion to disclose personal data under Section 39 of the PDPA lies with the data user;[13]

(4) The exemption under Section 45 of the PDPA only applies to the personal data processed by the data user who is processing the personal data for the purposes specified under Section 45 of the PDPA.

However, we are of the view that this principle will likely be challenged on appeal by JPDP, as the principle propounded by the High Court in this case may result in unintended ramifications. By extension of this principle, all exemptions under section 45 would be applicable to the data users only. For example, in relation to the exemption on Disclosure Principle pursuant to the discharge of regulatory functions (section 45(2)(e) of the PDPA), by reason of this High Court decision, the exemption would only apply to the processing of personal data by regulatory or statutory bodies, but does not apply to the data users which hold the personal data requested by the regulators. In this regard, data subjects' consent is required before any disclosure to the regulators can be made, which makes it impractical for authorities to request for personal data for the purpose of discharging

[11] Paragraphs 72 to 73 and 93 to 101 of the High Court's full grounds of judgment.
[12] Paragraphs 106 to 115 of the High Court's full grounds of judgment.
[13] Paragraphs 88 and 118 of the High Court's full grounds of judgment.

their regulatory functions and therefore renders the exemption under section 45 superfluous and ineffective;[14]

(5) The Commissioner and the Deputy Commissioner do not have the power to declare or guarantee that data users (i.e., GMB) will be protected from criminal prosecution under the provisions of the PDPA;[15]

(6) Additional requirements apply in respect of personal data that is also regulated by the personal data protection laws of other jurisdictions, namely that this category of personal data cannot be disclosed to the requesting authority unless both the disclosing party (i.e. GMB) and the requesting party (i.e. DGIR) have each obtained a final court order from the court of that jurisdiction authorising the disclosure of the personal data;[16]

(7) To the extent of any conflict between the ITA and the PDPA, the PDPA prevails as the PDPA is a specific and more recent legislation enacted for the protection of personal data;[17] and

(8) Regulatory authorities that are statutorily incorporated body corporates are still bound by the regulatory requirements prescribed under the PDPA. Notwithstanding Section 3(1) of the PDPA which exempts the Federal Government and the State Government from the PDPA, the High Court held that regulatory authorities (such as the IRB), which are actually body corporates established pursuant to statute, are bound by the PDPA.[18]

Significance of the High Court's Decision to Entities Processing Personal Data under the PDPA

As mentioned above, the decision of the High Court in this case is significant as this is the first formal challenge in respect of the powers of government authorities to request for disclosure of personal data.

The High Court's decision and findings in this case have essentially placed limits on the DGIR's data-gathering powers under Section 81 of the ITA by (1) imposing requirements that must be fulfilled by the DGIR in making such requests; and (2) only permitting the DGIR to request for the personal data of specific and/or identifiable customers.

Moving forward, data users should take note of the following key principles when handling data disclosure requests from government authorities:

[14] Paragraph 129 of the High Court's full grounds of judgment.
[15] Paragraphs 39 to 43 of the High Court's full grounds of judgment.
[16] Paragraph (j) of the final order dated 27 July 2021 granted by the High Court.
[17] Paragraphs 74 to 76 of the High Court's full grounds of judgment.
[18] Paragraphs 103 to 105 of the High Court's grounds of judgment.

(1) Data users must assess data disclosure requests received from government authorities / regulators on a case-by-case basis, and in any event data users should bear in mind that government authorities / regulators are generally not permitted to make a blanket request for all or a large bulk of personal data from a data user;

(2) In deciding whether to accede to a data disclosure request, data users should ensure that:

   a. the request is made in accordance with the law; and

   b. the request fulfils the test of necessity as propounded by the High Court in this case (and summarised above); and

(3) Should the data user decide to accede to the data disclosure request, the data user must ensure that:

   a. the disclosure complies with the usual disclosure requirements prescribed under the PDPA (i.e. the requirements set out in Sections 8, 39 and 45 of the PDPA); and

   b. only personal data that is necessary for the purposes stated by the requesting authority is disclosed.

Over and above this, the High Court's decision will also be a relevant consideration to parties that are exporting personal data from the European Economic Area ("**EEA**") to Malaysia, and are required to conduct a legal assessment on the adequacy of protection provided by Malaysian data protection laws.[19] In this regard, the High Court's decision will be relevant as an example of the availability of judicial redress and the imposition of limits on laws granting government / regulatory authorities' powers to request for bulk access to personal data.

Apart from the above, pursuant to a public consultation paper entitled "*Public Consultation Paper No. 01/2020: Review of Personal Data Protection Act 2010 (Act 709)*" issued by the Commissioner in February 2020, the Commissioner is proposing to issue guidelines on the level of disclosure of personal data to government authorities under Section 39 of the PDPA, as the Commissioner has noted reluctance on the part of data users when requested by government authorities to disclose personal data. Although no official guideline on this matter has been issued by the Commissioner pursuant to the public consultation paper, the High Court's decision in this matter will likely have a bearing on the approach that will be adopted in the guideline that is to be proposed by the Commissioner.

[19] Such adequacy assessments are intended to determine whether it can be said that Malaysia has a level of data protection that is essentially equivalent to the level that is ensured in the EEA, pursuant to the General Data Protection Regulation ("**GDPR**") and the Charter of Fundamental Rights of the European Union ("**EU Charter**").

In conclusion, we are of the view that the High Court's decision is a welcome development in the Malaysian data protection landscape, as it provides added clarity and sets the necessary parameters in relation to the powers of government authorities (in this case, IRB) in requesting for disclosure of personal data from a data user, and also sets limitations against any blanket request for personal data from a data user.

However, having said the above, caution needs to be exercised by organisations in relying on the High Court decision in its entirety, as some parts of the decision may be reversed or set aside by the Court of Appeal once the matter comes before them. Nevertheless, this case serves to indicate that the powers of government authorities and regulators are subject to certain limits.

We trust the above provides you with a summary and brief analysis of the case. Should you require any assistance or clarification regarding the above or about any other matter pertaining to personal data protection, please feel free to get in touch with us at your convenience.

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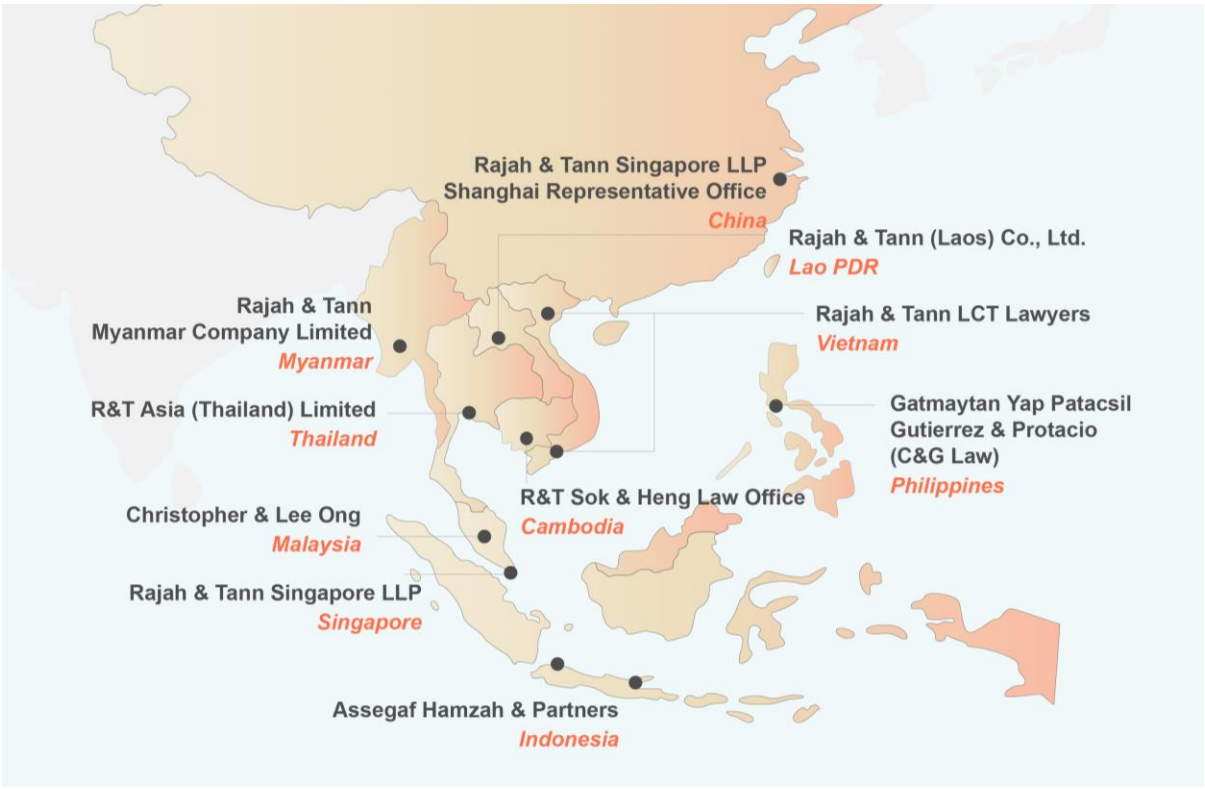

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