CHARTERED TAX INSTITUTE OF MALAYSIA

The Malaysian Institute of
Certified Public Accountants

JOINT REVIEW OF THE STAMP ACT 1949

Prepared by:

Stamp Duty Task Force

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Contents

1.0 PREAMBLE:

The Chartered Tax Institute of Malaysia (CTIM) and The Malaysian Institute of Certified Public Accountants (MICPA) are pleased to answer the call by the Inland Revenue Board (IRB) to look into ways to improve the Malaysian Stamp Act 1949 (MSA).

Following the briefing by the IRB on 2 November, 2011, a Stamp Duty Task Force (SDTF) was formed, comprising representatives from various taxation firms, law firms, and members of the accounting and taxation bodies, to deliberate on the matter. The much appreciated input by the SDTF forms the basis of this paper, which represents the contribution by the institutes to the IRB.

The SDTF understood that the objectives of the research on the improvement on the Stamp Act 1949 should result in legislation which would accomplish the following: alignment with the economic advances of the times, simplification of computation of stamp duty; speedier processing of documents for stamping; increased compliance, and usage of simplified, easily understood language – all this, whilst safeguarding revenue collection.

2.0 EXECUTIVE SUMMARY

The SDTF would like to propose the following:-

1. Retain the current instrument-based stamp duty mode of tax and not introduce transaction-based tax in order not to add cost to doing business and not to reduce the efficiency of the stock market in Malaysia;
2. Remove ad valorem stamp duty on service agreements in view of the Government's objectives and initiatives under the Economic Transformation Plan to promote the service sector;
3. Remove "instrument of any kind whatsoever" from item 22 of the First Schedule, Stamp Act 1949 as it is used as a catch-all provision resulting in additional costs of doing business and it creates ambiguity and uncertainty in relation to the stamp duty chargeable for instruments;
4. Remove the par value method for assessing stamp duty on loss companies as par value valuation method gives a "distorted" value of the shares and there is a recommendation by the Corporate Law Reform Committee of the Companies Commission of Malaysia to abolish the concept of par value for shares.

3.0 SALIENT FEATURES AND INFORMATION

a) Valuable input for a revamp of the MSA came from the practical experience (of the SDTF) in handling stamp duty transactions. Besides this, the SDTF looked at the legislation available in some of the countries with similar historical regimes, such as Singapore, Hong Kong and the United Kingdom, for input and insight.

b) Reference to the tax and revenue-generating efforts of different countries throw some light and some guidance, as follows;-

i. **Hong Kong** saw the benefit for imposing stamp duty on residential property at point of transaction. Stamp duty was also used as an anti-speculative measure to curb spiraling of property prices. (Malaysia already has RPGT).

ii. In **UK**, it was argued that stamp duty is a relatively inefficient way to raise revenue (compared with other taxes on capital gains). It reduces the efficiency of the stock market for UK listed companies. It imposes a disproportionately large burden on marginal investment projects compared with a corporate tax; and it distorts merger and acquisition activities, producing a bias towards foreign rather than UK ownership (this will encourage UK companies to incorporate overseas). From the experience of the U. K., it seems more reasonable not to expand the tax base for stamp duty, rather the intention should be to narrow the scope.

c) Any move to transaction-based stamp duty should be justifiable in terms of the following: a positive economic impact; generation of stamp revenue; a reduced cost of compliance, inevitable cost of administration / collection; avoiding an outcome that affects the business climate negatively; avoiding an impact on cash flow; and minimising an impact on private funding / investment caused by cost of capital involved. In addition, any future stamp duty on share loans / property transaction could lead to an increase in a company's cost of capital. Therefore, the SDTF is of the view that the current instrument-based stamp duty is the preferred mode of duty as opposed to the transaction-based stamp duty as this will not give rise to additional cost of doing business.

d) With regard to the revenue structure, the SDTF is of the opinion that Malaysia should be moving towards consumption-based taxes i.e. GST, and not rely on stamp duty to generate revenue. Any negative impact may nullify the revenue increase from stamp duty.

e) There are also some measures to be noted: Stamp duty should not overlap with that of income tax (corporate tax) and that of tax on real property transaction profits (Real Property Gains Tax (RPGT)); and the imposition of stamp duty has a cost impact - it is compliance cost to transacting parties, and an administrative cost to the IRB.

f) In this context, the authorities need to consider the overall economic impact when expanding the scope or changing the stamp duty tax base. In short, any proposal to revamp stamp duty should keep in view the government's objectives and initiatives under the Economic Transformation Plan, which include the following:-

i. Promote private investment into projects (shares and land transactions are expected to increase in 2012 to 2015, and increases are expected in capital market activities);
ii. Improve market efficiency and promote competitiveness; and
iii. Make services sector the driver, and increase competitiveness. (With regard to this, it is proposed that ad valorem stamp duty currently imposed on 0.1 percent on service contracts be reduced to a fixed duty of RM10.00.)

The SDTF also proposes that the words "instrument of any kind whatsoever" currently found in item 22, First Schedule, Stamp Act 1949 which are applied widely resulting in excessive stamp duty liabilities to businesses be removed. With the wordings "instruments of any kind whatsoever" in item 22, it is used as a catch-all provision imposing stamp duty for example on purchase of equipment which involves an extended payment arrangement. Our proposal to remove "instruments of any kind whatsoever" in item 22 is to remove ambiguity and uncertainty in respect of the instruments which are subject to stamp duty. It is our view that one must specify expressly only the type of instruments to which item 22 applies. We believe this is also consistent with the objective of the IRB in carrying out a review of the Stamp Act 1949 which is usage of simplified, easily understood language which does not give rise to uncertainty.

g) Valuation methods tie in very closely with the simplification of computation of stamp duty. In this context, the SDTF has made a comparison of stamp duty valuation methods on transfer of private limited shares in Malaysia, Singapore and Hong Kong. The SDTF proposes to remove par value method for transfer of shares in loss companies. The conclusion is as follows:

i. The par value valuation method will likely give a "distorted" value of the shares as "*the par value is only a face value of the company while the value of a company waxes and wanes, amongst other things, according to its performance and outlook."* [The Court of Appeal, Malaysia Putrajaya, Appellate Jurisdiction, Civil Appeal No: P-01-105-2007 between Malaysia Smelting Corporation Berhad and Pemungut Duti Setem, Pulau Pinang.]
ii. In addition, there is a recommendation by the Corporate Law Reform Committee of the Companies Commission of Malaysia to abolish the concept of par value for shares. This reinforces our proposal that the concept of par value is no longer relevant and the par value method should not be used as the valuation method

4.0 MATERIALS APPENDED TO THIS REVIEW

a) The detailed proposals to revamp the Malaysian Stamp Act 1949 (MSA) have been provided in two sets of tables, using the format suggested by the IRB, and are attached as :

i. **Appendix 1A**. **--** Proposals to Amend the Provisions of MSA, and

ii. **Appendix 1B --** Proposals to Regularise the Words and Provisions of MSA.

b) A write-up on "**Why Transaction-Based Stamp Duty Should Not Be Introduced In Malaysia"** is attached as **Appendix 2.**

c) A write-up on "**Comparison of stamp duty valuation methods on transfer of private limited shares in Malaysia, Singapore and Hong Kong and proposal to remove par value method for transfer of shares in loss companies"** is attached as **Appendix 3.**

5.0 CONCLUSION

The proposals made above, substantiated by research in the related areas, have been made with the best interest of the nation and the public in mind. The Institutes hope that the above information will be beneficial to the IRB in its move to revamp the Stamp Act 1949.

Proposals to Amend the Provisions of the Malaysian Stamp Act 1949 (MSA) — Appendix 1A

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
1.	Section 4A(1) of the Stamp Act, 1949	The transfer under an instrument executed outside Malaysia effecting a transfer of movables or immovables situated in any part of Malaysia will not take place unless the instrument is brought into Malaysia and stamped. i) There is ambiguity under Section 4A(1) For example, if a debtor is incorporated in Malaysia but is managed and conducts its business solely outside Malaysia, where the debt is transferred under an instrument, where is that debt located for the purposes of Section 4A? Where there is a chose	Section 4A (1)	To delete Section 4A(1). If the Stamp Office has specific concerns, then this should be addressed via specific provisions.	This provision is arguably unnecessary. Item 32 *ad valorem* duty clearly applies to a conveyance on sale (which is broadened by Section 16 of the Stamp Act, 1949) on usual conveyances. Further, a conveyance instrument has to be prepared and used where there are mandatory forms prescribed by law e.g. Form 32A of the Companies Act, 1965 and Form 14A of the National Land Code. It creates uncertainty. When is property situated in Malaysia? The location of certain types of movable or immovable property is not clear at law. In fact the classification of certain property as movable or immovable itself is fraught with difficulties. Most jurisdictions recognize the ability of parties to a transaction to freely contract on what law applies

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		in action as a result of a breach of contract in a cross border transaction, where is the property located for the purposes of Section 4A? ii) There is difficulty in compliance (particularly in the situation where all the parties to the instrument are foreign) as well. Section 4A appears to cover genuine situations where all parties to an instrument are not in Malaysia and there should therefore be no need to bring the instrument into Malaysia. Furthermore, foreign stamp duty may also be applicable.			subject to such choice being *bona fide* and the chosen law having connection to the transaction. Section 4A ignores such recognition and creates a conflict of law. In the case of movables, the law that governs the transfer of moveable property is explained in the maxim *mobilia sequuntur persona* - goods follow the person. Section 4A ignores fundamental principles of law.
2.	Relief from Stamp Duty (Sections 15 and 15A)	The "90% relationship" rules stipulated in Sections 15(1)(b) and (c); and 15A(2) appear	Sections 15(1)(b) and (c); and 15A(2)	To reduce these thresholds from 90% to 75%.	This is to be in line with the Real Property Gains Tax Act (e.g. in the definition of Real Property Company).

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		high.			The threshold of 75% is also adopted in the UK Finance Act 2003.
3.	Relief from Stamp Duty (Section 15)	Whether to expand section 15(4) to allow other categories of persons who may sign a statutory declaration (apart from lawyers).	Section 15(4)	To expand to include directors and company secretary of the applicant.	In most cases, even when lawyers sign the statutory declaration, the client would have to first confirm the accuracy of the contents of the statutory declaration where the lawyer does not have personal knowledge. Hence, it is logical to allow a director or company secretary of the applicant to also sign the statutory declaration as an alternative to a lawyer. In Hong Kong, the concept of "*responsible officer of the parent company*" is used.
4.	Relief from Stamp Duty (Section 15)	The phrase "S*hares in another company"* in Section 15(5)(c).	Section 15(5)(c)	To amend "*shares in another company" to "shares in the existing company*".	This is to be consistent in terminology with the rest of Section 15 when the "*existing company*" is intended to be referred.
5.	Relief from Stamp Duty (Section 15)	Conflict between Section 15(5)(b) and Section 15(5)(c)	Section 15(5)(c)	To insert the words "*or in compliance with Government policy on capital participation in industry*" in Section	Section 15(5)(b), which deals with a transfer of undertakings, allows the existing company to sell its consideration shares within the first 2 years if it is to comply with such

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
				15(5)(c) after "liquidation" (with the appropriate consequential amendments)	Government policy. However, Section 15(5)(c), which deals with a transfer of shares, does not allow the transferee company to sell shares in the existing company within the first 2 years if it is to comply with such Government policy. As the change in Government policy could equally affect shares in any company, this exception should also apply to Section 15(5)(c).
6.	Relief from Stamp Duty (Section 15)	The phrase "*to the holders of shares in the existing company*" in section 15(1)(c)(ii)	Section 15(1)(c)(ii)	To expand to include trustee or nominees of the holders of shares in the existing company or beneficial owners of the shares in the existing company for which the holders are nominees	It should not matter whether the shares are issued to the trustee of the holder or the beneficial owner of the holder, so long as the consideration shares are issued to the beneficial owners or the vendors of the sale shares.
7.	Relief from Stamp Duty (Section 15A)	Section 15A stamp duty relief is restrictive. Even though transfers of beneficial interest in properties are between companies which are beneficially owned by	Section 15A(2) and Schedule 6 only allow transfers of beneficial interest in properties between transferor and transferee	To expand the applicability of section 15A relief to the following situations:- (a) where the entity ("Said Entity") is the ultimate parent in the chain of	This proposed amendment is to keep in tandem with corporate development where developed countries have introduced new entities, e.g. limited liability partnerships.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		the parent company, they are precluded from claiming stamp duty relief.	companies (and where they are not directly held - all the companies in the chain) to be companies with issued share capital	entities, the Said Entity need not necessarily be a company with issued share capital but may take other forms (e.g. society, co-operative, company limited by guarantee, company with unlimited liability, company with limited liability with no issued share capital etc.) <u>provided that</u> it is capable of owning shares/interests in another entity; (b) where the Said Entity is an intermediate (but not ultimate parent) entity in a chain of entities, the Said Entity need not necessarily be a company with issued share capital but may take other forms (e.g. limited liability partnerships, bodies created by statute, company with unlimited liability, company with limited liability with no issued share capital etc.)	Essentially, the amendment will allow relief for corporate group structures where there are ultimate or intermediary entities which are not companies with issued share capital. It is more common nowadays to find corporate group structures which comprise entities which are not companies with issued share capital.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
				provided that it is capable of owning shares/interests in another entity and it has shares/interests which are capable of being owned by another entity.	
8.	Relief from Stamp Duty (Section 15A) – *format of statutory declaration*	Requirement to obtain regulatory approval	There is no requirement in section 15A for regulatory approval to be obtained. However, paragraph 9 of the statutory declaration (which forms part of the application for section 15A stamp duty relief) requires such approval to be obtained.	To remove the requirement to obtain regulatory approval in the statutory declaration	Application for stamp duty relief is required to be submitted within 30 days from date of execution of instrument of transfer. Generally, regulatory approval is obtained well after 30 days from the date of execution of the instrument of transfer (for example Business Transfer Agreement).
9.	Relief from Stamp Duty (Section 15A) – *format of statutory declaration*	Requirement for transfer to be undertaken for organizational reasons only and that it is intended that the beneficial interest in the property which will be so	There is no such requirement in section 15A. However, paragraph 10 of the statutory declaration (which forms part of the	To remove such requirement in the statutory declaration	Section 15A(4) already provides sufficient protection and is also reproduced in paragraph 11 of the statutory declaration. Hence, paragraph 10 is not required.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		transferred will be retained by the transferee company and that there will be no change in the relationship between the companies.	application for section 15A stamp duty relief) contains such requirement.		
10.	Section 21(1)	It is not clear where the exception falls	Any contract or agreement made in Malaysia under seal or under hand only, for the sale of any equitable or interest in any property whatsoever, except lands, tenements, hereditaments, or heritages, or property locally situate out of Malaysia, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share or property of or in any ship or vessel, shall	"Every contract or agreement made in Malaysia under seal or under hand only, for the sale of – (a) Any equitable estate or interest in any property; or (b) Any estate or interest in any property except :- (i) lands,tenements, hereditaments, or heritages, or (ii) property locally situate out of Malaysia, or (iii) goods, wares or merchandise, or (iv) stock, or marketable securities, or	Similar interpretation is included in Section 22 of the Singapore Act and Section 59 of the UK Stamp Act 1891

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
			be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold	(v) any ship or vessel, or part interest, share or property of or in any ship or vessel shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold.	
11.	**Item 22** Bond, Covenant, Loan, Services, Equipment Lease Agreement or Instrument of any kind whatsoever	Item 22 has a wide coverage – "covenant", and "instruments of any kind whatsoever" <u>Instruments of any kind whatsoever</u> i) Based on the current practice of the Stamp Office, agreements for example royalty agreements, property licence agreements, attract stamp duty of 0.5	First Schedule, Item 22, was amended and was effective from 1 January 2009	For the purpose of clarity, the scope of item 22 should be reviewed – suggest to remove "covenant" and "instruments of any kind whatsoever" as this gives rise to ambiguity and uncertainty in respect of the instruments subject to stamp duty. One must specify expressly only the type of instruments to which item 22 applies	To reduce the cost of doing business. Countries such as Hong Kong, Singapore and UK do not impose ad valorem duty on royalty, licence, service agreements and sale of equipment where it involves milestone payments. This amendment will make the provision certain which is an essential feature in the smooth operation of stamp duty.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		percent under item 22(1)(b). ii) If the sale agreement which involves an extended payment arrangement for the purchase of equipment, there is ambiguity whether the duty is chargeable under item 4 (fixed duty of RM10) or item 22(1)(b) which provides for ad valorem stamp duty at the rate of 0.5 percent This gives rise to punitive stamp duty costs. <u>Covenant</u> Means an agreement which creates an obligation contained in a			

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		deed Item 22 previously could be widely worded (i.e. “bond covenant or instrument of any kind whatsoever“) because *ad valorem* duty applied to all instruments with the characteristics or nature expressly specified in 1(a) and (b)		To delete the words “or sum periodically payable”	This will avoid any ambiguities in the provision and promote certainty.
		Para 1(a) and (b) have been fundamentally altered and the addition of the words “Loan, Services, Equipment Lease” is confusing and causes ambiguity and uncertainty given particularly how widely para (1) (b) is now worded. Furthermore, with the amendment of para (1) (a), the duty under that heading should only			An instrument with a single payment should not be seen or treated as a “security” instrument for stamp duty purposes and should attract duty at a fixed rate only.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		apply to annuities (instruments with yearly/annual payments) and the duty should therefore not be calculated by reference to "sum periodically payable". Item 22 (1) previously contained the words "at stated periods".		The words "at stated periods" should be inserted under the current item 22 (1) (b)	
12.	**Item 22** Bond, Covenant, Loan, <u>Services</u>, Equipment Lease Agreement or <u>Instrument of any kind whatsoever</u>	Service Agreements – even though stamp duty in excess of 0.1 percent is remitted pursuant to Stamp Duty (Remission) (No. 4) Order 2010, it is still very prohibitive from a cost perspective for companies to procure services. The words "services" and "instruments of any kind whatsoever" have been given the widest application resulting in	First Schedule, Item 22(1)(b)	To remove ad valorem stamp duty and re introduce fixed duty (RM10) for service agreements. The duty for service agreements should be specified under a separate item	The National Key Economic Areas ("NKEA")s are identified to be the engines of growth for Malaysia. There are 12 NKEAs that were jointly identified by the private and public sectors to kickstart the Economic Transformation Programme. These NKEAs represent economic sectors that will drive the highest possible income over the next 10 years. In all the NKEAs, services play a leading and important role towards Malaysia achieving its goal of becoming developed nation by 2020.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		"excessive" imposition of stamp duty. For example - **Agreement to purchase equipment /turnkey contracts** Stamp duty has been determined under Item 4, First Schedule and is exempted for agreement to purchase equipment. However, if the purchase of equipment includes installation of equipment, stamp duty is determined under Item 22(1)(b) with ad valorem stamp duty at 0.1 percent on the entire contract value even though the payments for equipment and for installation are segregated in the agreement.			

Proposals to Regularise the Wordings and Provisions of the Malaysian Stamp Act 1949 (MSA). Appendix 1B

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
1.	Interpretation	Definition of "instrument"	Section 2	Define the word "instrument" to differentiate it from the word "document" used in the Act.	The word "instrument" as defined in the Act is *"includes every written document"* which does not really explain anything. In the Act, only instruments listed under Schedule 1 are subject to duty but readers tend to think that "document" is "instrument", which, technically, it is not.
2.	Interpretation	Definition of "cheque"	Section 2	"cheque" means a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand <u>and includes a cashier's order and demand draft issued by a banker</u>	Based on the current definition of "cheque", a cashier's order technically falls within the definition of "promissory note".
3.	Interpretation	Definition of "policy of insurance"	Section 2	"policy of insurance" includes every writing whereby any contract of insurance <u>or contract of takaful</u> is made or agreed to be made or is evidenced, and the expression "insurance" includes assurance <u>and takaful</u>	The current definition does not cover takaful.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
4.	Interpretation	Definition of "policy of sea insurance"	Section 2	"policy of sea insurance" – (a) means any insurance, including re-insurance, made upon any ship or vessel, …. (b) includes any insurance of goods, merchandise or property for any transit which includes, ….<u>and</u> (c) <u>includes any takaful certificate in respect of the subject matter described in paragraph (a) and/or (b) above.</u>	The current definition does not cover takaful.
5.	Interpretation	The word "financing" is undefined		To add a definition of "financing" in Section 2 of the Act. "financing" means the lending of money or any scheme of financing which is in accordance with the principles of Syariah.	To clarify that "financing" covers both conventional and Islamic.
6.	Section 12		Section 12	The counterpart of instrument of lease should be deleted as all instruments are to be adjudicated according to Section 36.	This is old British Law which allowed the counterpart to be stamped first if it is executed by the lessee and not the lessor. This is outdated after the amendment to Section 36 above.
7.	Instruments Chargeable	Explanatory note under		*Note* – An agreement for or relating to the supply of goods on hire,	To accord similar treatment for leasing and hire-purchase,

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
	with Stamp Duty	Item 4 First Schedule		<u>whether by way of hire-purchase or leasing,</u> ~~whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied,~~ shall be charged with stamp duty as an agreement~~, or, if under seal, as a deed~~.	and to do away with the distinction between execution under hand and under seal.
8.	Section 28(2)	Conflict between Section 28(2) and Section 36	Section 28(2)	To review Section 28(2) as it is not consistent with Section 36.	Section 28(2) provides that open security cannot be adjudicated and cannot be final and is inconsistent with Section 36 which provides otherwise
9.	Section 40		Section 40	To review Section 40 to synchronize it with Section 47.	Before the amendment to Section 36, Section 40 applied to adjudicated cases whereas Section 47 provided for cases which were not adjudicated.
10.	Section 41		Section 41 allows an instrument to be stamped before or at the time of execution.	To review Section 41 as it has been made redundant with the amendment to Section 36.	As the present law requires all instruments to be executed before adjudication, which is compulsory, it is necessary to consider whether to retain Section 41.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
11.	Section 43		Section 43	To simplify Section 43	As the only item applicable now is "cheque", a review of section 43 may be necessary.
12.	Section 57		Section 57	To define the words "any party", "some necessary party" and "any person".	The words "any party", "some necessary party" and "any person'' are confusing and have been easily misinterpreted. The confusion appears to have arisen because of the judgement of a court case where the judges were of the opinion that the above-mentioned words were interchangeable.
13.	Instruments Chargeable with Stamp Duty		Item 22 First Schedule	Bond, Covenant, ~~Loan~~ <u>Financing</u>, Services~~, Equipment Lease~~ Agreement or Instrument of any kind whatsoever	To accord similar treatment for leasing and hire-purchase. The term "Financing" covers both conventional and Islamic.
14.	Item 27(a)(ii) of the 1st Schedule	Definition of "foreign currency loan" and reference to "loans" are too limiting. Does "loan"	Charge or mortgage, agreement for a charge or agreement, bond, covenant, debenture (not being a marketable security), bill of sale by way of	Item 27(a)(ii) be changed to :- "where the financing is a foreign currency financing or any scheme of financing which is in accordance with the principles of Syariah"; "financing" should be defined in the Stamp Act to mean "loans or lending	A lot of financing nowadays is not necessarily in the form of a straight forward loan, it could be other forms of financing.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
		include exposure in a derivatives contract?	security and warrant of attorney to confess and enter up judgment : being the only or principal or primary security (other than equitable mortgage or an assignment of receivables or the kind mentioned in paragraph (d)) for the payment or repayment of where the loans is a foreign currency loan or financing was made according to syariah in currencies other than in Ringgit. "Foreign currency loan" is defined as "any loan denominated wholly in currencies other than the Ringgit"	of money".	
15.	Instruments Chargeable with Stamp Duty	Para (b)(i) of Exemptions under Item 32 First Schedule		(b)(i) of a bill of exchange, cheque<u>,</u> ~~or~~ promissory note <u>or negotiable instrument</u>	To provide clarity that transfer by endorsement of negotiable instruments is exempted.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
16.	Instruments Chargeable with Stamp Duty	Para (b)(iii) of Exemptions under Item 32 First Schedule		b)(iii) of a policy of insurance ~~other than a policy of life insurance~~;	To accord similar treatment for life and non-life policies.
17.	Instruments Chargeable with Stamp Duty	To add a new paragraph of Exemptions under Item 32 First Schedule		(e) Transfers of debentures or Islamic securities approved by the Securities Commission.	Currently exempted under Stamp Duty (Exemption) (No.23) Order 2000
18.	Instruments Chargeable with Stamp Duty	Item 50 First Schedule		~~Letter~~ Contract of guarantee (as defined in Contracts Act 1950) given by a person, a body corporate or a banker, irrespective of manner of execution.	The current practice is for Item 50 to only cover guarantees signed under hand. It is also currently unclear whether a performance bond issued by a banker falls under Item 50 or Item 25 or Item 22.
19.	Instruments Chargeable with Stamp Duty	Item 60 First Schedule		~~Promissory Note~~	To accord similar treatment for bills of exchange and promissory notes. Bills of exchange are not subject to stamp duty.
20.	Instruments Chargeable with Stamp Duty	Item 78 First Schedule		~~Trust Receipt granted on the occasion of a loan or overdraft on goods, if unattested~~	To accord similar treatment for bills of exchange and trust receipts. Bills of exchange are not subject to stamp duty.

No	Topic of proposal	Issue	Provisions in MSA	Proposal	Rationale/Justification for the proposal
21.	Schedule 3		Schedule 3.	Let the parties to the agreement decide who ought to pay duty chargeable.	As long as an instrument is duly stamped, it does not matter who is liable to pay duty.
22.	Complete the exemption for transfer between family members to mirror the exemptions available under paragraph 12, Schedule 2 of the RPGT Act.	Currently, stamp duty exemption is only available for transfer of immovable property operating as a voluntary disposition/ gift from husband to wife or wife to husband.		Proposal is to also allow stamp duty exemption for transfers by way of gift between parent and child; grandparent and grandchild.	Since it is deemed just and equitable for such disposals to be exempt for RPGT, the same should apply to stamp duty.

Appendix 2

<u>WHY TRANSACTION-BASED STAMP DUTY SHOULD NOT BE INTRODUCED IN MALAYSIA</u>

1. INTRODUCTION

Based on the briefing held by the Inland Revenue Board ("IRB") on 2 November 2011, it has been communicated that the Inland Revenue Board is looking into the concept of transaction- based stamp duty in Malaysia.

Currently, the Stamp Act, 1949 provides that stamp duty is chargeable on instruments and not upon transactions. Hence, if a transaction is effected without creating an instrument, there would be no Malaysian stamp duty payable.

The implementation of transaction-based stamp duty which is being considered by the IRB, if introduced, would fundamentally change the system how stamp duty operates. Instead of being dutiable upon an instrument, it would be dutiable upon transactions even though there is **<u>no written instrument</u>.**

There is a whole host of issues which should be deliberated and considered before considering the introduction of transaction-based stamp duty. Below are some of the issues which resulted from the introduction of transaction based stamp duty:-

For the purpose of this paper, we make reference to the UK stamp duty system as UK has, for some time now, adopted transaction-based stamp duty i.e. the Stamp Duty Reserve Tax ("SDRT") and the Stamp Duty Land Tax ("SDLT"), and studies have been made of that regime.

2. BRIEF WRITE-UP ON SDRT AND SDLT

<u>What is SDRT and SDLT?</u>

<u>SDRT - Stamp Tax On Transfer Of Shares</u>

There are two types of stamp taxes on transfer of shares in the UK i.e. stamp duty and SDRT. SDRT is payable on share transfers where no physical document is used (paperless transactions) while stamp duty is payable when a physical document is used

<u>SDLT - Stamp Tax On Transfer Of Properties</u>

SDLT replaced stamp duty on purchases of houses, flats and other UK land and buildings and certain leases as from 1 December 2003. SDLT is a tax on land transactions. The UK Inland Revenue requires an SDLT Return with payment of the SDLT (if chargeable) to be submitted on freehold, leasehold and other land transactions.

The SDLT is enforceable through a tough compliance regime which requires taxpayers to self- assess.

3. IMPACT OF SDRT ON THE UK ECONOMY

3.1 Introduction On SDRT

SDRT which was introduced in the UK in 1986 is a tax collected on an agreement to transfer shares where there is no written instrument of the transfer. After the introduction of an electronic settlement system in the UK – CREST in 1996, the SDRT has become the main source of tax for transaction shares[1].

3.2 Impact On Companies

a) Reduces the efficiency of the stock market

Based on the article "Stamp Duty on Share Transactions: Is there a Case for Change? Mike Hawkins and Julian McCrae, The Institute for Fiscal Studies, June 2002" ("Hawkins and McCrae Report"), transaction tax, such as stamp duty, reduces the efficiency of the stock market as it stifles trade that would be beneficial to both parties to the transaction. Correspondingly, it would result in an inefficient economy as the process of reallocating resources to where they are most productive is delayed.

In the research conducted by Hawkins and McCrae, they assumed that the total transaction cost was within the range of 1 – 3%. This is based on the average of commission rates in UK, where it ranges between 0% for large institutional traders, and 5% for small private traders (London Stock Exchange, 2000). Hawkins and McCrae studies shows that based on the same trend, the share turnover would increase, by double, with the abolishment of stamp duty. Clearly, it shows that transaction-based stamp duty would affect the share turnover which then affects the efficiency of the share market.

Furthermore, Hawkins and McCrae (2002) also mentioned that the imposition of transaction based stamp duty may drive investors to alternative domestic or overseas assets where stamp duties are not payable, especially in a small open economy. It is their belief that the share-price would have to be reduced, in order to provide the same post-tax returns as other assets would, in order for investors to continue buying shares. Most certainly, the efficiency of the stock market would be reduced as a result of transaction cost.

b) It imposes a disproportionately large burden on marginal investment projects compared with a corporate tax

"The primary role of the stock market is to provide a source of finance for companies. As well as making the stock market less efficient, stamp duty has a direct effect on the returns from equity investment. There will be investment projects that are marginal, in the sense that the expected rate of return is just only sufficient to persuade investors that the project is worthwhile. In the

presence of the tax, such projects may not even be undertaken, even though they would be worthwhile if the tax had not been levied. The failure to undertake such projects is a direct efficiency loss for the economy”

(Extract from Hawkins and McCrae Report)

In the UK, transaction-based stamp duty is taxed across at a flat rate of 0.5%. As such, it would appear to be a burdensome form of tax for investors involved in marginal investment projects, as 0.5% of this transaction cost can be a significant amount of taxes to pay. Furthermore, there are other transaction costs which have to be considered as well.

What should be taken into consideration as well is that stamp duty is a rather inefficient means of collecting taxes as opposed to corporate tax. As mentioned earlier, stamp duty in the UK is taxed across at a flat rate, it does not have any regard to the profitability of the potential investment. Corporate tax on the other hand, runs on a scale basis where the higher the profitability the more taxes the investors would be expected to pay.

Corporate taxes in the UK provide for investment allowances, where there may be allowances (of up to 100% of investment) being written off against tax, when the investments are made. This will help to reduce or avoid the taxes a marginal investment bears. On the other side of the spectrum, stamp duty does not provide for such form of allowances. In the event the UK Company chooses to sell its shares which command a high market value, the transaction of shares will give rise to taxes. Thus, stamp duty appears to be taxing on both the returns on investment and the investment itself[2].

c) It distorts *merger and acquisition* activities, producing a bias towards foreign rather than local ownership

A study conducted by Hawkins and McCrae (2002) in relation to the UK scene highlighted a few scenarios on the potential cash flow and the tax base charges for merger and acquisition activities. The diagram is depicted below –

		Bidder	
Target		**UK**	**Foreign**
	UK	Base: no charge Cash flow: pays stamp duty	Base: decreases Cash flow: pays stamp duty
	Foreign	Base: increases Cash flow: none	Base: no charge Cash flow: none

Based on the diagram above, Hawkins and McCrae (2002) highlighted a good point on stamp duty taxes. When a UK company acquires a foreign company, it will result in the increase in stamp duty base and a corresponding cost to its shareholders. This will result in a higher acquisition cost to the UK company which then will cause the UK company to reconsider the acquisition only if would be able to provide other significant and measurable advantages to the UK company that can outweigh the cost of the acquisition.

When a foreign company acquires ownership of a UK company, they will only be subjected to 0.5% rate on the share capital acquired. This will provide a high level of short-run revenues, however, take note that subsequently no further taxes will be collected. Shares will be traded outside the UK, as the combined company is incorporated overseas.

As such, when stamp duty poses a significant enough threat to companies, it may bring about the emigration of companies overseas, to jurisdictions where taxes are low or where stamp duty is not imposed. This would only make economic sense as companies would seek to protect shareholders' wealth and increase company's profits. The greater effect of this would result in a possible slowdown of the country's economy or slow down the development of the country, due to the lack of robust competition to drive it.

3.3 Impact On Individuals, Households And Pensioners

Based on the report "Stamp duty: Its impact and the benefits of its abolition" prepared by Oxera Consulting Ltd for Association of British Insurers, City of London Corporation, Investment Management Association, UK and London Stock Exchange May 2007 ("Oxera Report"), there are significant costs impact, resulting from the imposition of SDRT

a) Stamp duty is a significant cost to individuals, reducing the value of their savings and other investments

A significant proportion of total annual stamp duty revenue (£2,930m) is derived from pension funds (£574m), savings and other investments managed by insurance firms (£627m) and individual stock holdings (£514m). Around £534m of total stamp duty payments is associated with authorised funds and investment trusts.

b) Stamp duty constitutes a considerable cost to pensioners throughout the lifetime of their savings, resulting in a strong effect on the size of total pension savings at retirement

For an average occupational scheme member who starts saving in 2006, stamp duty reduces the fund at retirement by around 1.52% (increasing to 2.38% for equity-based portfolios). This is equivalent to a reduction of the pension fund at retirement (in 2006 money) by around £6,441 (increasing to £11,538 for equity-based portfolios).

3.4 Impact On Trading Activity

The Oxera Report analysed the impact on the trading activity in the UK.

a) Impact on equity activity

The proportion of equity trading activity in the UK through the derivatives route has seen a significant increase over the last few years. Stamp duty is one of the factors affecting these changes. Interviews with market participants have confirmed that some investors actively choose between equities, contracts for differences and futures, and that stamp duty is one of the factors negatively affecting the relative attractiveness of direct equity investments.

b) Changes in trading behaviour

Stamp duty has a potentially significant impact on the trading activity in UK listed equities. In particular, there is considerable evidence showing that transaction costs affect the level of trading activity.

4. IMPACT OF SDLT ON THE UK ECONOMY

Distortion of the Housing Market

Based on an article by the National Association of Estate Agents of UK, the current structure of SDLT, which is based on a step cost basis, causes a sharp rise in the amount of duty payable as the price of property is transferred from one band to the next, as taxes are paid based on the value of the property as a whole, not on a marginal value basis. Due to the step cost and the compulsory nature of SDLT, the housing market is distorted as properties, which are just above the threshold percentage of a lower threshold, would suffer a higher tax rate. Buyers may reconsider their decision to purchase the property due to the high tax rates imposed. Under a more dramatic circumstance, it would distort the housing market as realtors would be forced to lower the purchase price of properties that lie just above the threshold, robbing the properties of their true market value.

5. BACK TO THE HOMEFRONT - MALAYSIA

As one can appreciate from the above negative impact which was brought on by the introduction of transaction-based stamp duty in the UK, it is not apt for such tax to be introduced to Malaysia.

The reasons for not introducing transaction based stamp duty to Malaysia are compelling and plentiful–

i. The introduction of transaction-based stamp duty during this time, when there is economic slowdown in the United States, Europe and Japan coupled with the European debt crisis, will severely impact the stock and property market activity;

ii. Erosion of savings in pension funds due to their investment activities. According to the EPF, 73% of contributors have less than RM 50,000 saved while only 17% have over RM100,000 at their retirement age;

iii. The current scope of stamp duty is very wide and the introduction of transaction-based stamp duty will significantly add on to transaction costs;

iv. Transaction-based stamp duty operates in a self-assessment regime. This will place onerous obligations on duty payers and add on to their cost of compliance. Malaysia has already adopted self assessment system for income tax. In spite of this, any move towards transaction-based stamp duty places a heavy burden on the authorities to provide clear rules and guidelines on the compliance procedures, which are necessary to adequately educate the public on the operations of stamp duty before self-assessment can be introduced smoothly.

v. The Government has announced that it will implement the Goods and Service Tax ("GST"). GST is a tax on transactions and the introduction of transaction-based stamp duty would inevitably lead to double taxation on the same transaction.

Furthermore, it is important that any proposal to revamp stamp duty should keep in view the Government's objective and initiatives under the Economic Transformation Program ("ETP") which includes the following:-

- To promote private investment into projects; and
- To improve market efficiency and promote competitiveness.

6. CONCLUSION

Based on the facts presented by the studies conducted in the UK, it is evident that the transaction-based stamp duty has many negative implications to the economy and its people. A number of organisations have appealed for the abolition of transaction-based stamp duty. Therefore, it is our request that the Inland Revenue Board does not introduce transaction based stamp duty due to the reasons deliberated above.

Appendix 3

COMPARISON OF STAMP DUTY VALUATION METHODS ON TRANSFER OF PRIVATE LIMITED SHARES IN MALAYSIA, SINGAPORE AND HONG KONG AND PROPOSAL TO REMOVE PAR VALUE METHOD FOR TRANSFER OF SHARES IN LOSS MAKING COMPANIES

1. Stamp Duty Valuation Methods Adopted In 3 Jurisdictions:-

a) Malaysia

Based on the Stamp Office's guidelines, the value of the ordinary shares for stamp duty assessment would be determined based on any of the following valuation methods which give rise to the highest stamp duty liability:

i. Actual consideration paid;
ii. Net Tangible Assets;
iii. P/E ratio at a multiple; or
iv. Par value.

b) Singapore

The Singapore Stamp Office computes stamp duty payable based on the higher of the sale consideration or net asset value of the shares. Where the net asset value is negligible and the transfer is done based on the low net asset value, the Stamp Office generally accepts that value. The par value is never used. In any case, the concept of "par value" no longer applies in Singapore.

c) Hong Kong

The valuation methods employed are dividend yield, price earnings ratio and net asset basis.

2. Issue

For loss companies, the par value method is adopted by the Malaysian Stamp Office for transfer of shares and this gives rise to excessive stamp duty when the company is highly capitalized.

3. Proposal

The par value method should not be adopted to value loss making companies as it does not indicate the true value of a company. The valuation methods to be adopted for loss companies are the net tangible assets or the sale consideration, whichever is greater.

4. Rationale

a. The par value valuation method will likely give a "distorted" value of the shares as "*the par value is only a face value of the company while the value of a company waxes and wanes, amongst other things, according to its performance and outlook.*" [The Court of Appeal, Malaysia Putrajaya, Appelate Jurisdiction, Civil Appeal No:P-01-105-2007 between Malaysia Smelting Corporation Berhad and Pemungut Duti Setem, Pulau Pinang.]

b. In addition, there is a recommendation by the Corporate Law Reform Committee of the Companies Commission of Malaysia to abolish the concept of par value for shares. This reinforces our proposal that the concept of par value is no longer relevant and the par value method should not be used as the valuation method