MEMORANDUM ON THE REVIEW OF THE INCOME TAX ACT 1967 UNDER THE SELF-ASSESSMENT SYSTEM OF TAXATION

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Self-Assessment System Working Group (SASWG)

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REVIEW OF THE INCOME TAX ACT 1967 UNDER THE SELF-ASSESSMENT SYSTEM OF TAXATION

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REVIEW OF THE INCOME TAX ACT 1967 UNDER THE SELF-ASSESSMENT SYSTEM OF TAXATION

1. Introduction

With the introduction of the Self-Assessment System in 2001, changes have been made to the Income Tax Act 1967 (the Act), albeit on a piece-meal basis. The majority of the changes made have been in respect of provisions relating to penalty imposition, assessments and filing of return forms.

The Act, designed primarily for the previous "official assessment" system, and the "preceding year basis of assessment system, has been amended as and when the need arose. However, the tax practitioners have from time to time pointed out some disparities in the provisions, in the context of the Self-Assessment System, and the Current Year Assessment System.

The Chartered Tax Institute of Malaysia (CTIM) has taken the initiative to set up a working group (called the Self-Assessment System Working Group (SASWG)) to put together a memorandum to be presented to the Authorities.

2. Scope of review

The SASWG was presented with the responsibility of deliberating on the provisions of the Act to achieve the primary objectives:

(a) Identify provisions in the tax law that are unfair to taxpayers in the light of the application of the self assessment system of taxation;

(b) Identify provisions in the tax law that are missing to effect a full and proper self assessment system, and

(c) Propose the deletion of existing provisions which are redundant in the application of a proper self-assessment system.

3. Executive Summary

The SASWG's areas of review, findings and recommendations are summarised in the table below.

Area of review	Findings	Recommendations
4. <u>Penalties</u>		
4.1 Late filing of return [Section 112(3)]	• Penalties are imposed in cases where tax has already been paid.	• Penalties be imposed on outstanding tax. Penalty rates be linked to commercial rates. A tiered system of penalty rates to reflect a taxpayer's record of default.
4.2 Incorrect returns [(Sections 113(1) and 113(2)]	• Section 113(2) does not provide for defence of good faith found in section 113(1). • The penalty under section 113(2) is based on the tax undercharged	• Section 113(2) be consistent with section 113(1) on the provision for defence of good faith. • The penalty under section 113(2) be based on the additional tax payable,

Area of review	Findings	Recommendations
	compared to penalty under section 77B(4) which is based on the additional tax payable.	instead of the tax undercharged, to be in line with section 77B(4).
4.3 Wilful evasion [Sections 114(1) and 114(1A)]	• The penalty under Section 114(1) [offence by taxpayer] is heavier than the penalty under Section 114(1A) [offence by taxpayer's advisor].	• The minimum fine under Section 114(1A) be reduced to RM1,000 to be consistent with Section 114(1).
5. <u>Mechanics of assessment</u>		
5.1 Self-amendment of tax return [Section 77B]	• Self-amendment is allowed for understatement of tax only. The 6-month time frame for self-amendment is too short. Self-amendment is not allowed before the tax filing due date.	• Self-amendment also be allowed for overstatement of tax. Consider extending the time frame for self-amendment to 24 months after the financial year end. Self-amendment also be allowed before the filing due date.
5.2 Waiver to furnish tax return [Sections 77 and 77A]	• The wording of section 77 is not clear on whether the taxpayer needs to request for waiver. • Currently, there is no similar provision which enables the Director General to grant a waiver from filing the income tax return form under section 77A.	• The law specify the means for the taxpayer to seek a waiver. • A provision similar to section 77(2) be inserted in section 77A.
5.3 Duty to keep records [Sections 82 and 82A]	• The time-frame for keeping records of 7 years is not the same as the time bar of 5 years. The section 82(1)(b) threshold should not over burden small and medium enterprises (SMEs). Section 82 and section 82A duplicate each other in many aspects.	• The time-frame for keeping records be reduced to 5 years (3 years for SMEs). Section 82 and section 82A be combined to remove duplication.
5.4 Return by employer [Section 83(6)]	• Section 83(6) may result in the deemed employer deducting "Potongan Cukai Bulanan" (PCB)	• Section 83(6) be narrowed to exclude taxpayers who: ➢ Comply with WHT

Area of review	Findings	Recommendations
	and withholding taxes (WHT) on the same payment to individuals. This will burden the individual and would be impractical where the deemed employer is not responsible for paying the individual.	provisions; ➢ Do not pay remuneration directly to a deemed employee; or ➢ Pay remuneration to non-resident individuals who are exempted from tax under paragraph 21 of schedule 6.
5.5 Duty to furnish particulars of payment made to an agent, etc [Section 83A]	• Section 83A gives rise to practical problems which result in added compliance costs.	• The terms "agent", "dealer" and "distributor" be narrowed down to the group of taxpayers that the IRB is focusing on. A reasonable threshold be included in section 83A e.g. for amounts in excess of RM10,000.
5.6 Assessment and additional assessments in certain cases [Section 91]	• The Director General (DG) can issue an assessment without providing details on why additional tax is due.	• To incorporate a requirement for the DG to provide computations and grounds for adjustments in Section 91.
5.7 Deemed assessment on the amended return [Section 91A]	• Section 91A is in respect of deemed assessment or additional assessment only.	• Section 91A be changed to reflect the possibility of reduced assessments consistent with our recommendation for section 77B.
5.8 Form and making of assessment [Section 93]	• In practice, there are cases where the assessments were received late.	• Allow for a 'grace period' for late delivery, say 5 working days from the date of notice of assessment or postal date.
5.9 Discharge of double assessments [Section 95]	• Section 95 appears to indicate that the discharge is at the DG's discretion. A delay in discharge will burden taxpayers.	• Section 95 be amended as follows: ➢ To replace the word "may" with "shall". ➢ Include a fixed time-frame for the discharge. ➢ There should not be any late payment penalty to the extent the assessment relates to tax on the same income for the same year of

Area of review	Findings	Recommendations
		assessment (YA).
5.10 Basis period of a person other than a company, trust body or co-operative society [Section 21]	• Section 21 provides that the basis year (calendar year) shall constitute the basis period for a YA. The basis period for partnerships, associations and societies with non-31 December financial year end straddles 2 financial periods. This has led to complications arising from preparing estimated tax computations and changes in partnership.	• To improve the efficiency of tax compliance by persons other than a company, trust body or co-operative society, we recommend that the provisions of section 21A(4) be applicable to such persons.
5.11 Notification of non-chargeability [Section 97A(1)]	• Section 97A(1) appears to indicate that notification of non-chargeability is at the DG's discretion.	• The provisions of section 90(1) and section 97A(1) be amended so that the DG is deemed to have made a notification of non-chargeability where a return with nil chargeable income is filed in accordance with section 77 and section 77A.
6. <u>Miscellaneous</u> 6.1 Payment of tax [Sections 103(1) and 103(1A)]	• A taxpayer who makes good a genuine mistake by volunteering to file an amended return under section 77B and pay additional taxes under section 103 will be subject to penalty under the tax legislation.	• Section 77B and section 103 be reviewed: ➢ To allow submission of amended returns before the due date. ➢ To impose nil penalty on additional taxes arising from submission of amended returns after the due date if the taxpayer was not penalised or did not submit an amended return in the immediate past 5 YAs. ➢ To impose a penalty on the additional tax payable based on commercial borrowing rates if the taxpayer was penalised or submitted an amended return in the immediate past 5 YAs.

Area of review	Findings	Recommendations
6.2 Estimate of tax payable and payment by instalments for companies [Section 107C(3)]	• The DG's practice of reviewing applications for estimates of tax payable for the current YA which are less than 85% of the immediately preceding YA's estimate on a case by case basis is not legislated.	• Provisions be included in the legislation to allow applications for estimates of tax payable for the current YA which are less than 85% of the immediately preceding YA's estimate to be submitted for the DG's approval.
6.3 Estimate of tax payable and payment by instalments for companies [Section 107C(7)]	• The DG's practice of considering an appeal to revise estimates after the 9th month of the basis period is not legislated.	• Provisions be included in the legislation to allow: ➢ Appeals for revised estimates after the 9th month of the basis period to be submitted for the DG's approval. ➢ A revised estimate after the 9th month of the basis period to be submitted within 60 days from the end of that basis period.
6.4 Appeal by the payer [Sections 109H(1) and 109H(2)(b)]	• Based on the provisions of section 109H(1) and section 109H(2)(b), it is not clear whether an appeal against the applicability of WHT can be made because the disallowance of the payment to the non-resident can only take place when the return is submitted under the self-assessment system which is after the appeal period has lapsed.	• Section 109H(2)(b) be deleted.
6.5 Compensation for overpayment of tax [Sections 111D(1) and 111D(4)]	• Section 111D(4)(b) provides that the compensation for overpayment of tax under section 111D is not applicable to tax refund due to tax set-off under section 110 although it is not connected to an offense and the amount is due to the taxpayer.	• Section 111D(4)(b) be deleted.
6.6 Relief in respect of error and mistake	• Currently, the provisions for the claim of section 131 relief is available to	• The provisions for the claim of section 131 relief be amended to cover both

Area of review	Findings	Recommendations
[Sections 131(1)]	tax payable cases only.	tax payable (whether paid or not) and non-tax payable cases.
6.7 Electronic medium [Section 152A(5)(d)]	• In the case where the prescribed forms are furnished on an electronic medium by a tax agent on behalf of a taxpayer, the taxpayer is required to sign the hardcopy of the prescribed forms and this has created a lot of administrative work.	• Section 152A(5)(d) be deleted.
6.8 Power to call for statement of bank accounts [Section 79]	• There are practical issues for the taxpayer to furnish the bank account information of the taxpayer's spouse. • It appears that the DG can request the taxpayer to furnish information on past chargeability to tax with no time limit on the past.	• Separate notices for information be issued to each spouse where an election for combined assessment has been made. • A provision for a time limit for the word "past" be inserted in section 79(e) except for cases involving fraud.
6.9 Right of appeal [Section 99]	• Section 99 requires appeals to be submitted by way of a Form Q which is inconsistent with section 102(3) which provides that such an appeal is not required where the DG and the appellant have come to an agreement. • Section 99(4) does not allow taxpayers to appeal against deemed assessments in any circumstances except where the taxpayers are aggrieved by the PR. This restricts the taxpayers' rights of appeal.	• The tax legislation be amended to re-introduce the past practice of accepting an appeal under section 99 to be made by way of letter instead of a Form Q. • Section 99(4) be deleted.

4. Penalty

4.1 Penalty imposed on late filing of Return

4.1.1 Existing legislation / practice

a) The Law

Section 112(1) [Penalty for default] *- Any person who makes default in furnishing a return in accordance with section 77(1) or 77A(1) or in giving a notice in accordance with section 77(3) shall, if he does so without reasonable excuse, be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than two thousand ringgit or to imprisonment for a term not exceeding six months or to both.*

Section 112(3) [Penalty for default where no prosecution] *- Where in relation to a year of assessment a person makes default in furnishing a return in accordance with section 77(1) or 77A(1) or in giving a notice in accordance with section 77(3) and no prosecution under subsection (1) has been instituted in relation to that default—*

(a) the Director General may require that person to pay a penalty equal to treble the amount of the tax which, before any set-off, repayment or relief under this Act, is payable for that year; and

(b) if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

b) The Practice

Currently, the IRB practice for imposing penalty under Section 112(3) on late submission of tax returns is as follows:

Submitting by up to 12 months (1 Year) after the due date	20%
Submitting by up to 24 months (2 Years) after the due date	25%
Submitting by up to 36 months (3 Years) after the due date	30%
Submitting by in excess of 36 months (> 3 Years) after the due date	35%

4.1.2 Issues

Penalty rates seem inequitable particularly in cases where tax has already been paid as, in such instances, there is no economic loss to the Government.

4.1.3 Recommended Changes / Proposals

a) It is proposed that penalty rates be linked to commercial borrowing rates, and be differentiated between a “normal” taxpayer and the “delinquent” one.

b) It is also proposed that penalties be based on the amount of tax that is outstanding with due regard therefore being given to instalments of tax already paid.

c) It is also proposed that where a tiered system of penalty rates is used this should reflect the taxpayer's record of default and not just the delay in submission. Penalties could increase in line with the number of occasions that a taxpayer has defaulted in lodging returns over say a five-year moving period.

4.1.4 International Practice

a) In the United Kingdom, Her Majesty's Revenue and Customs (HMRC) generally impose a flat rate penalty of £100 where a tax return is filed late which is increased by a further £100 after three months. Where there are three late filings in a row the penalty is increased to £500 and by a further £500 after three months.

In cases where returns are filed very late a penalty of 10% of the unpaid corporation tax can be imposed. In cases of severe delay the penalty can be increased to 20% of the unpaid corporation tax.

Separate penalties are imposed by HMRC where tax revenue is not paid due to a failure to notify HMRC of chargeability to tax.

b) In Australia the Australian Taxation Office imposes Failure to Lodge on Time (FTL) penalties for the late filing of returns. The FTL penalties range from AUD$170 to AUD$4,250 depending on the delay in filing and the size of the defaulting company. Separate penalties are imposed on outstanding tax.

4.2 Penalty in respect of Incorrect Returns

4.2.1 Existing legislation / practice

The Law

Section 113(1) [Penalty for incorrect return, incorrect information] *- Any person who—*

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

*shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in **good faith**, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.*

Section 113(2) [Penalty for incorrect return, incorrect information] *- Where a person—*

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person;

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

4.2.2 Issues

a) There is an anomaly between section 113(1) and section 113(2) whereby although the wordings of the provisions are the same, section 113(2) does not expressly provide for the defence of “good faith”. In order to ensure consistency between the two provisions and given that section 113(2) is widely invoked by the IRB, perhaps it is appropriate for the defence of “good faith” to be expressly provided for under section 113(2).

b) The penalties under sections 113(2) and 77B(4) are for incorrect returns and amended returns respectively. The penalty under section 113(2) is based on the tax undercharged (i.e. the understated tax liability) whereas the penalty under section 77B(4) is based on the additional tax payable. There are instances where the tax undercharged and the additional tax

payable may differ e.g. where there is a set-off under section 110 against the tax charged to arrive at the tax payable. This can lead to a situation where an amended return can have tax undercharged but no additional tax payable. Where that amended return is submitted within 6-months of the due date, there is no penalty because there is no additional tax payable [pursuant to section 77B(4)]. Where that amended return is submitted more than 6-months after the due date, there is a penalty because there is tax undercharged [pursuant to section 113(2)].

4.2.3 Recommended Changes / Proposals

a) To provide consistency in section 113(1) and section 113(2), it is proposed that the defence of “good faith” be expressly provided for under section 113(2).

b) It is also proposed that the penalty under section 113(2) be based on the additional tax payable, instead of the tax undercharged, to be in line with section 77B(4).

4.3 Penalty in respect of Wilful Evasion

4.3.1 Existing legislation / practice

The Law

Section 114(1) [Penalty for wilful evasion] *- Any person who wilfully and with intent to evade or assist any other person to evade tax—*

(a) omits from a return made under this Act any income which should be included;

(b) makes a false statement or entry in a return made under this Act;

(c) gives a false answer (orally or in writing) to a question asked or request for information made in pursuance of this Act;

(d) prepares or maintains or authorizes the preparation or maintenance of false books of account or other false records;

(e) falsifies or authorizes the falsification of books of account or other records; or

(f) makes use or authorizes the use of any fraud, art or contrivance,

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both, and shall pay a special penalty of treble the amount of tax which has been undercharged in consequence of the offence or which would have been undercharged if the offence had not been detected.

Section 114(1A) [Penalty for understatement of tax liability] *- Any person who assists in, or advises with respect to, the preparation of any return where the return results in an understatement of the liability for tax of another person shall, unless he satisfies the court that the assistance or advice was given with reasonable care, be guilty to an offence and shall, on conviction, be liable to a fine of not less than two thousand ringgit and not more that twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both.*

4.3.2 Issues

An offence committed under section 114(1) by a delinquent taxpayer is subject to heavier penalty than an offence under section 114(1A) which in respect of a person who assists or advises taxpayer in respect of preparation of tax return without exercising reasonable care.

4.3.3 Recommended Changes / Proposals

To provide consistency between section 114(1) and section 114(1A), it is proposed that the minimum fine under section 114(1A) be reduced to RM1,000, the amount stipulated in section 114(1).

4.3.4 Rationale

It is an anomaly if the minimum fine imposed under section 114(1) which requires an intention to defraud, is lower than that imposed on an offence under section 114(1A) which may not have the intention to defraud.

5. Mechanics of Assessment

5.1 Self-Amendment of Tax Return

5.1.1 Existing legislation / practice

The Law

Section 77B(1) [Amendment of return in prescribed form] *- Where for a year of assessment a person has furnished a return in accordance with subsection 77(1) or 77A(1), that person may make amendment to such return in an amended return as prescribed by the Director General in respect of the amount of tax or additional tax payable by that person on the chargeable income or on the amount of tax which has been or would have been wrongly repaid to him.*

Section 77B(2) [Time allowed for amendment] *- An amended return under subsection (1) shall only be made after the due date for the furnishing of the return in accordance with subsection 77(1) or 77A(1), but not later than six months from that date.*

Section 77B(3) [Particulars of amended return] *- For the purposes of this section, the amended return shall—*

(a) specify the amount or additional amount of chargeable income and the amount of tax or additional tax payable on that chargeable income;

(b) specify the amount of tax payable on the tax which has or would have been wrongly repaid to him;

(c) specify the increased sum ascertained in accordance with subsection (4); or

(d) contain such particulars as may be required by the Director General.

Section 77B(4) [Determination of increased sum] *- The tax or additional tax payable under subsection (1) shall—*

(a) if the amended return is furnished within a period of sixty days after the due date for the furnishing of the return in accordance with subsection 77 or 77A(1), be increased by a sum equal to ten per cent of the amount of such tax or additional tax; or

(b) if the amended return is furnished after the period of sixty days from the due date for the furnishing of the return in accordance with subsection 77(1) or 77A(1) but not later than six months from that date, be increased by a sum which shall be determined in accordance with the following formula:

B + [(A + B) x 5%]

Where A is the amount of such tax payable or additional tax payable; and

B is ten per cent of the amount of such tax payable or additional tax payable,

and the amount of the increased sum shall constitute part of the amount of tax or additional tax payable under subsection (1).

Section 77B(5) [Amendment allowed once] *- The amendment under subsection (1) shall only be made once.*

Section 77B(6) [Determination of increased sum] *- Where—*

(a) a return for a year of assessment has been furnished in accordance with subsection 77(1) or 77A(1); and

(b) the Director General has made an assessment for that year of assessment under section 91,

no amendment shall be allowed under this section.

5.1.2 Issues

a) The law allows self-amendment only if there is an understatement of tax. However, in practice, there could be cases where amendment results in a reduction of tax. Currently the only avenue for this is via section 131 which involves an 'application'.

b) It appears that taxpayers who file their tax returns after the due date will not be entitled to self-amend their tax returns (since they do not comply with section 77(1) or section 77A(1)).

c) The time frame for the self-amendment of a tax return, i.e. 6 months, is too short.

d) The law does not allow a taxpayer to amend his tax return before the due date.

5.1.3 Recommended Changes / Proposals

a) In the spirit of self-assessment, it is proposed that the right to amend a tax return be widened to allow amendments for a reduction in tax as well as an increase in tax.

b) It is also proposed that the time frame for self-amendment be extended to 24 months from the close of the financial year.

c) It is also proposed that self-amendment of a tax return before the due date without imposing penalty be allowed. (Please also refer to item 6.1.3).

5.1.4 Rationale

In the vast majority of cases, mistakes are not deliberately made and hence a reasonable level of flexibility should be allowed in a self-assessment regime. Further, the time frame should also be extended in the event that mistakes are only subsequently discovered. We suggest that a 24-month time frame is a reasonable period based on the international practice outlined below.

5.1.5 International Practice

The UK allows a 12-month period after 31 January following the end of the tax year; Australia recognises that amendments are a part of the self-assessment system and generally allows a 2-year time frame for individuals and small businesses and 4 years for other taxpayers. Amendments of returns which result in additional taxes are treated as voluntary disclosures and this is taken into account in any imposition of penalties, which will be imposed at a concessional rate.

5.2 Waiver to furnish tax return

5.2.1 Existing legislation / practice

The Law

Section 77 - Return of income by a person other than a company, a limited liability partnership, trust body or co-operative society

Section 77(1) [Filing of returns] *- Every person, other than a company, trust body or co-operative society to which section 77A applies, shall for each year of assessment furnish to the Director General a return in the prescribed form—*

(a) ..

(b) in any other case than the case in paragraph (a), not later than 30 April in the year following that year of assessment:

Provided that that person has—

(a) chargeable income for that year of assessment; or

(b) no chargeable income for that year of assessment, but has chargeable income or has furnished a return or has been required under this Act to furnish a return, for the year of assessment immediately preceding that year of assessment."

Section 77(2) [Waiver] *- Where a person is required to furnish a return under paragraph (b) of the proviso to subsection (1), the Director General may by way of notification waive that requirement for any year of assessment.*

Section 77A - Return of income by every company, limited liability partnership, trust body or co-operative society

Section 77A(1) [Return to be furnished within seven months] *- Every company, limited liability partnership, trust body or co-operative society shall for each year of assessment furnish to the Director General a return in the prescribed form within seven months from the date following the close of the accounting period which constitutes the basis period for the year of assessment.*

Section 77A(1A) [Return to be furnished in accordance with s 152A] *- For the purposes of this section, a company shall furnish to the Director General a return in the prescribed form on an electronic medium or by way of electronic transmission in accordance with section 152A;*

Section 77A(2) [Change of accounting date] *- Notwithstanding subsection (1), where there is a change in the accounting period of a company, limited liability partnership, trust body or co-operative society such that the accounts are not closed on any date in a year, that company, limited liability partnership, trust body or co-operative society shall furnish to the Director General a return in the prescribed form for that year and the year of assessment in which the accounts are closed within seven months from the date following the close of the accounting period.*

Section 77A(3) [Particulars of return] *- For the purposes of this section, a return for a year of assessment shall—*

(a) specify the chargeable income and the amount of tax payable (if any) on that chargeable income for that year; and

(b) contain such particulars as may be required by the Director General.

***Section 77A(4) [Return furnished to be based on audited accounts]** - The return furnished by a company under this section shall be based on accounts audited by a professional accountant, together with a report made by that accountant which shall contain, in so far as they are relevant, the matters set out in subsections 174(1) and (2) of the Companies Act 1965*

5.2.2 Issues

a) It is not clear from the wording of the provision in section 77(2) whether the taxpayer needs to request for the waiver.

b) Currently, there is no similar provision which enables the Director General to grant a waiver from filing the income tax return form under section 77A.

5.2.3 Recommended Changes / Proposals

a) It is proposed that the provision in section 77(2) specify the means by which the taxpayer may seek a waiver.

b) It is also proposed that a provision similar to section 77(2) be inserted in section 77A.

5.3 Duty to Keep Records

5.3.1 Existing legislation / practice

The Law

Section 82 - Duty to keep records and give receipts

Section 82(1) [Records and receipts] *- Notwithstanding section 82A and subject to this section, every person carrying on a business—*

(a) shall keep and retain in safe custody sufficient records for a period of seven years from the end of the year to which any income from that business relates to enable that income from that business for each year of assessment or the adjusted loss from that business for the basis period for any year of assessment to be readily ascertained by the Director General or an authorized officer; and

(b) if the gross takings from the business for the basis year for any year of assessment exceeded one hundred and fifty thousand ringgit from the sale of goods or one hundred thousand ringgit from the performance of services, shall issue a printed receipt serially numbered for every sum received in that year of assessment in respect of goods sold or services performed in the course of or in connection with the business and shall retain a duplicate of every receipt so issued.

Section 82A - Duty to keep documents for ascertaining chargeable income and tax payable

Section 82A(1) [Keep and retain documents] *- Subject to this section, every person who is required to furnish a return of his income for a year of assessment under this Act shall keep and retain in safe custody sufficient documents for a period of seven years from the end of that year of assessment for the purposes of ascertaining his chargeable income and tax payable.*

Section 82A(2) [Where a return is not furnished] *- Where a person referred to in subsection (1) has not furnished a return as required under this Act for a year of assessment, that person shall keep and retain the documents referred to in subsection (1) that relate to that year of assessment for a period of seven years after the end of the year in which the return is furnished.*

5.3.2 Issues

a) If the provisions of section 82 and section 82A are to enable the Director General to ascertain if returns are correct, then the time-frame for keeping records should be the same as that in relation to the time bar, i.e. five years

b) The threshold in section 82(1)(b) should be reviewed in order to not overly burden small and medium enterprises (SME).

c) Both section 82 and section 82A mirror each other in many aspects.

5.3.3 Recommended Changes / Proposals

It is proposed that:

a) The time-frame for keeping records be reduced from seven years to five years.

b) The time-frame for keeping records for SMEs be further reduced to three years.

c) The provisions of section 82 and section 82A be combined to remove duplication.

5.3.4 Rationale

This is to be in line with the changes of time bar to raise an assessment or additional assessment as well to ease SMEs' burden.

5.3.5 International Practice

The Australian law requires records to be retained for five years from the date on which the record was prepared or obtained or from the time a relevant transaction or act was completed, whichever is later. If the period within which the Commissioner can amend a taxpayer's assessment is extended, the retention period for the records is correspondingly extended.

Besides the above, a taxpayer who has made a tax loss is required to retain records relevant to the ascertainment of that loss until the end of the statutory retention period or the end of the period or review for the year of income when the loss is fully deducted, whichever is later. Further, where a formal dispute arises in relation to a loss, a taxpayer is required to retain relevant records until any objection or appeal in relation to a loss has been finally determined.

5.4 Return by Employer

5.4.1 Existing legislation / practice

The Law

Section 83(6) [Deemed employer] *- For the purposes of this section and section 107(4), any person to whom or for whose benefit a service is rendered or performed by another person shall be deemed to be an employer whether or not he employs that other person or is responsible for paying remuneration to that other person.*

5.4.2 Issues

This is potentially wide-reaching and it is difficult to implement in practice. Further this could result in an incidence of cash flow problems for the individual, as the individuals may be subject to "potongan cukai bulanan" (PCB) as well as to withholding taxes under sections 109B or 107A, or to an instalment scheme. Further, where the deemed employer is not responsible for paying the individual, it would be impractical for PCB to be deducted as the deemed employer would not be aware of the individual's remuneration level.

5.4.3 Recommended Changes / Proposals

It is recognised that this provision is important to ensure that taxes are not avoided, particularly by non-residents. However, this provision needs to also take into account the various withholding tax provisions in place and to distinguish between engaging individuals directly from those who may be employees of other entities which are subject to withholding taxes, particularly under section 107A. This provision needs to be narrowed by excluding the following persons:

a) Taxpayers who comply with withholding tax provisions.

b) Taxpayers who do not pay remuneration directly to a deemed employee.

c) Taxpayers who pay remuneration to non-resident individuals employed for a period of not exceeding sixty days in a basis year for a year of assessment or for a continuous period not exceeding sixty days which overlaps the basis years for two successive years of assessments or for a continuous period not exceeding sixty days which overlaps the basis years for two successive years of assessment and for a period or periods which together with that continuous period do not exceed sixty days.

5.4.4 Rationale

As mentioned in item 5.4.2 above, this section is very wide-reaching and imposes an onerous obligation on the 'deemed employer', in the absence of information of an individual's remuneration levels. For instance, where a Malaysian company engages a foreign company to provide services in Malaysia, the payment will be subject to withholding tax under section 109B or section 107A. Where the Malaysian company is then also deemed to be the employer of the employees of the foreign company, difficulties arise:

- The Malaysian company will not be aware of the remuneration of the employees of the foreign company.
- Where the foreign company has a permanent establishment in Malaysia, then the three per cent withholding tax under section 107A(1)(b) will already be deducted from the payment made to the foreign company, the latter would also be expected to deduct PCB from its employees, and in addition, if section 83(6) is followed, the Malaysian company would also technically as the "deemed employer" be required to deduct PCB.
- Where non-citizen individuals exercise employment in Malaysia for less than 60 days, they are exempt from tax. Hence, in modifying this provision, it would be good to incorporate the 60-day exemption.

Further, this section would also apply to engaging self-employed individuals who may be subject to an instalment scheme issued by the IRB. This would result in cash-flow problems for the individual concerned. Such individuals could also potentially be dealers and agents etc as an appointment as a dealer or agent, could constitute 'employment' under the Income Tax Act, 1967. (Such individuals would also be covered by section 83A – please refer to the comments in item 5.5.3 below).

5.5 Duty To Furnish Particulars of Payment Made To an Agent, Etc

5.5.1 Existing legislation / practice

The Law

Section 83A(1) [Prepare and provide prescribed form] *- Every company shall for each year prepare and provide to each of its agent, dealer or distributor a copy of the form prescribed by the Director General containing—*

(a) particulars of payment (whether in monetary form or otherwise) made during that year of assessment to that agent, dealer or distributor;

(b) name and address of that agent, dealer or distributor; and

(c) such other particulars as may be required by the Director General.

Section 83A(2) [Prescribed form to be provided by 31 March] *- For the purpose of subsection (1), the prescribed form shall be provided to the agent, dealer or distributor not later than 31 March in the year immediately following the year mentioned in that subsection.*

Section 83A(3) [Keep and retain] *- The company shall keep and retain the prescribed form in safe custody and shall make it readily accessible to the Director General.*

Section 83A(4) [Interpretation of agent, dealer and distributor] *- In this section, "**agent", "dealer"** or **"distributor"** means any person who is authorised by a company to act as its agent, dealer or distributor, and who receives payment (whether in monetary form or otherwise) from the company arising from sales, transactions or schemes carried out by him as an agent, dealer or distributor.*

5.5.2 Issues

This section gives rise to practical problems which result in added compliance costs.

5.5.3 Recommended Changes / Proposals

a) It is proposed that the terms 'agent', 'dealer' and 'distributor' be clearly defined and the definition be narrowed to capture the group of 'taxpayers' that the IRB is focussing on. This is because, as mentioned in item 5.4.4, the appointment of 'agents', 'dealers' etc. could also be construed as 'employment' under Section 2 of the Income Tax Act, 1967.

b) It is also proposed that a reasonable threshold be included in the provisions of Section 83A, e.g. for amounts in excess of RM10,000 to any particular, agent, dealer or distributor.

5.6 Assessment and additional assessments in certain cases

5.6.1 Existing legislation / practice

The Law

Section 91(1) [Circumstances which give rise to advance assessment] *- The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.*

Section 91(2) [Where tax repaid to person by mistake] *- Where the Director General discovers that the whole or part of any tax repaid to a person (otherwise than in consequence of an agreement come to with respect to an assessment pursuant to section 101(2) or in consequence of an assessment having been determined on appeal) has been repaid by mistake whether of fact or law, the Director General may make an assessment in respect of that person in the amount of that tax or that part of that tax, as the case may be:*

Provided that no such assessment shall be made—

(a) if the repayment was in fact made on the basis of, or in accordance with, the practice of the Director General generally prevailing at the time when the repayment was made; or

(b) in respect of any tax, more than five years after the tax has been repaid.

Section 91(3) [Fraud, wilful default or negligence] *- The Director General where it appears to him that—*

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

Section 91(4) *[**Determination, revocation, withdrawal or cancellation**] - Where in a year of assessment—*

(a) any assessment made under this Act or the Real Property Gains Tax Act 1976 [Act 169] in respect of a person for any year of assessment has been determined by the court on appeal or review; or

(b) any exemption, relief, remission or allowance granted to a person for any year of assessment pursuant to any provision of this Act or any other written law in respect of income of that person which is subject to tax under this Act has been withdrawn, revoked or cancelled for failing to comply with any condition imposed in granting such exemption, relief, remission or allowance,

the Director General may in the first mentioned year of assessment or within five years after its expiration make an assessment in respect of that person for any year of assessment for the purpose of giving effect to the determination, revocation, withdrawal or cancellation, as the case may be.

5.6.2 Issues

The Director General can issue an assessment under the law without providing details of why additional tax is due – based on "best of Director General's judgment". To allow taxpayers to submit a detailed appeal, the Director General should provide the computations and the grounds giving rise to additional tax

5.6.3 Recommended Changes / Proposals

It is proposed that a requirement for the Director General to provide the computations and the grounds for adjustments in the spirit of self-assessment be incorporated into the provisions of section 91.

5.7 Deemed Assessment on the Amended Return

5.7.1 Existing legislation / practice

The Law

Section 91A(1) [Deemed amendment or additional assessment upon furnishing an amended return] *- Where a person has furnished an amended return in accordance with section 77B for a year of assessment, the Director General shall be deemed to have made, on the day on which the amended return is furnished, an assessment or additional assessment in respect of that person—*

(a) in the amount of tax or additional tax payable on the chargeable income; or

(b) in the amount of tax which has been or would have been wrongly repaid,

the tax or additional tax and the chargeable income being the respective amounts as specified in the amended return.

Section 91A(2) [Where return is deemed a notice of assessment or additional assessment] *- For the purpose of this Act, where the Director General is deemed to have made an assessment or additional assessment under subsection (1)—*

(a) the amended return referred to in that subsection shall be deemed to be a notice of assessment or additional assessment; and

(b) the deemed notice of assessment or additional assessment shall be deemed to have been served on the person on the day on which the Director General is deemed to have made the assessment or additional assessment.

5.7.2 Issues

Changes have been recommended to Section 77B in item 5.1.3. As Section 91A relates to Section 77B, Section 91A would also need to be changed to reflect the changes in Section 77B.

5.7.3 Recommended Changes / Proposals

It is proposed that the provisions of Section 91A be changed to reflect the possibility of a reduced assessment and should no longer be confined to tax payable situations only.

5.8 Form and making of assessment

5.8.1 Existing legislation / practice

The Law

Section 93 *- An assessment, other than an assessment under subsections 90(1) and 91A(1), in respect of a person shall—*

(a) be made in the appropriate prescribed form;

(b) indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and

(c) specify in the appropriate space in that form the date on which that form was duly completed,

and, where that form appears to have been duly completed the assessment shall, until the contrary is proved, be presumed to have been made on the date so specified.

5.8.2 Issues

In practice, there are cases where the assessments were received late.

5.8.3 Recommended Changes / Proposals

It is proposed that a 'grace period' for late delivery, say 5 working days from the date of notice of assessment or postal date be allowed.

5.8.4 International Practice

In Australia, under the Income Tax Regulation 40, a notice of assessment may be served personally, by leaving it at the taxpayer's address for service or by sending it by prepaid post to that address. If sent by post, the notice of assessment is regarded as having been served at the time it would have arrived in the ordinary course of the post (i.e. on the fourth working day after when it was posted) unless the contrary is proved.

Provided one of the prescribed procedures is followed, a notice of assessment will be treated as properly served, notwithstanding that it has not actually come to the personal notice of the taxpayer. On the other hand, even if one of the set procedures is not followed, a notice of assessment may nevertheless be treated as served if it is clear that it was actually received, e.g. where it was posted to the taxpayer's residential address (not the address for service) and was admittedly received by the taxpayer.

5.9 Discharge of double assessments

5.9.1 Existing legislation / practice

The Law

Section 95 *- Where two or more assessments have been made with respect to a person on the same income for the same year of assessment, the Director General may discharge such of those assessments as need to be discharged in order to ensure that the income is charged to tax only once for that year.*

5.9.2 Issues

This provision appears to indicate the discharge of the double assessment is at the discretion of the Director General. In the event there is a delay in discharging the double tax it will burden taxpayers with additional cash outflow.

5.9.3 Recommended Changes / Proposals

Under self-assessment system a tax payer should not be assessed twice on same income. It is proposed that the provision of section 95 be amended to take into account the following:

a) the word “may” be replaced with “shall”;

b) a fixed time frame be included by which the Director General needs to discharge the assessment; and

c) a taxpayer not be subject to any late payment penalty to the extent the assessment relates to tax on the same income for the same year of assessment.

5.9.4 Rationale

To relieve the taxpayer from financial burden of having to pay tax on the same income twice.

5.10 Basis period of a person other than a company, trust body or co-operative society

5.10.1 Existing legislation / practice

The Law

Section 21 *- The basis year for a year of assessment shall constitute, in relation to a source of a person other than a company, limited liability partnership, trust body or a co-operative society, the basis period for that year of assessment.*

It thus means that the basis period of a partnership, association, society registered under the Society Act for a year of assessment would be the basis year of the year of assessment (i.e. calendar year). These bodies would have to be taxed based on their taxable income from 1 January to 31 December irrespective of their financial year end.

5.10.2 Issues

Partnerships, associations and societies which do not adopt 31 December as their financial year end would have their basis period for a year of assessment that straddles over two financial years. They would be required to time apportion their adjusted income and segregate their capital allowances for two financial years in order to file their return for a year of assessment.

Thus, the filing of the tax computation for one year of assessment would require-

- firstly, the filing of an estimated chargeable income for a year based on the accounts of the first financial year and an estimated chargeable income for the second financial year. In arriving at the computation, there is a need to segregate the assets purchased in the two financial years based on the year of purchase and compute the capital allowances for the year of assessment; and

- secondly, the submission of a revised computation after the finalization of the second financial year.

For example, a partnership which adopted 30 August as its financial year end would have to file its return for say year of assessment 2013 by 31 July 2014. Its tax computation would have to be computed based on:-

- the adjusted income for the eight months (January 2013 to 31 August 2013) in the financial year ended 31 August 2013; and

- four months (1 September 2013 to 31 December 2013) in the financial year ended 31 August 2014.

In the above example, the partnership's accounts for the year ended 31 August 2014 would not be finalised by the due date for tax filing, i.e. 31 July 2014. Hence, an estimated computation would have to be filed by 31 July 2013 and then followed by a revised computation after the finalization of the 2014 accounts.

Another issue relating to partnership is that for commercial reasons, the admissions of partners and the new profit sharing ratio are usually made at the beginning the partnership's financial year. The overlapping of the financial years for income tax purposes would make the computation of the tax liabilities of newly admitted as well as the existing partners much more complicated.

5.10.3 Recommended Changes / Proposals

We are of the view that the existing section 21 on partnership, association and society has created unnecessary difficulties, inefficiency and complications for the taxpayers as well as the IRB. The existing section 21 which has the effect of requiring the above mentioned bodies to submit a revised computation is not consistent with the spirit of self-assessment. It is also not in line with the provisions applicable to companies, co-operative societies and limited liability partnerships under the recently amended (in 2014) section 21A(4) which accepts the financial years of these entitles as their basis period.

There are commercial reasons why these bodies do not close their accounts on 31 December and these include:

- For partnerships engaging in professional services, their busy season usually starts a couple of months before 31 December and 5 months to 6 months thereafter. As such, they would avoid having to put undue hardship and additional pressure on their resources by closing their accounts after their busy season.

- For those partnerships with international networks, they would usually close their accounts which coincide with the accounts of the networks so as to facilitate group reporting.

- For associations, societies and co-operative societies, there are other commercial reasons for not adopting 31 December as their financial year end such as business cycle and convenience for their members.

For reasons stated above, it is proposed that the provisions for determining the basis period under the recently amended (in 2014) section 21A(4) be extended to partnerships, associations and registered societies. This would make the compliance of the self–assessment by these bodies much more easy and efficient.

5.11 Notification of non-chargeability

5.11.1 Existing legislation / practice

The Law

Section 97A(1) [Notification in writing] *- Where in ascertaining the chargeable income of a person, it appears to the Director General that—*

(a) no assessment shall be made in respect of that person for any year of assessment by reason of—

(i) absence of adjusted income, statutory income, aggregate income or total income of a person from any of his sources of income; or

(ii) exemption granted to that person under this Act or the Promotion of Investments Act 1986; or

(b) assessment has been made in respect of that person, but that person has no statutory income from a source consisting of a business,

the Director General may notify that person in writing—

(i) in respect of paragraph (a), that no assessment shall be made for that year of assessment and provide a computation with regard to it; or

(ii) in respect of paragraph (b), the adjustment, if any, made in respect of that source consisting of a business and provide a computation with regard to it.

5.11.2 Issues

This section provides that the Director General "may" notify the taxpayer of non-chargeability – as this notification constitutes an assessment, the Director General must notify the taxpayer.

5.11.3 Recommended Changes / Proposals

a) It is proposed that to avoid the Director General having to notify each and every taxpayer of non-chargeability, section 90(1) of the Income Tax Act, 1967 be amended. The following **(underlined in bold)** is a suggestion of how section 90(1) may be amended:

Section 90(1) [Deemed assessment upon filing of a return] *- Where a person has furnished a return in accordance with section 77 or 77A to the Director General for a year of assessment, the Director General shall be deemed to have made, on the day on which the return is furnished, an assessment in respect of that person in the amount of tax on the chargeable income, the tax and the chargeable income being the respective amounts as specified in the return* ***and where the there is no chargeable income, the Director General is deemed to have made a notification of non-chargeability under the provisions of Section 97A.***

Section 90(2) [Where return deemed a notice of assessment] *- For the purposes of this Act, where the Director General is deemed to have made an assessment under subsection (1)—*

(a) the return referred to in that subsection shall be deemed to be a notice of assessment; and

(b) the deemed notice of assessment shall be deemed to have been served on the person on the day on which the Director General is deemed to have made the assessment.

Section 90(3) [Assessment by Director General] *- Where a person for a year of assessment has not furnished a return in accordance with section 77 or 77A, the Director General may according to the best of his judgment determine the amount of the chargeable income of that person for that year and make an assessment accordingly:*

Provided that the making of an assessment in respect of a person under this subsection shall not affect any liability otherwise incurred by that person by reason of his failure to deliver the return.

b) It is also proposed that together with the above amendment, section 97A(1) should be amended as follows:

Section 97A(1) [Notification in writing] - ***Notwithstanding Section 90,*** *where in ascertaining the chargeable income of a person, it appears to the Director General that — ….*

5.11.4 Rationale

The purposes of section 97A is partly to allow taxpayers to appeal against any assessment even where there is no tax payable e.g. to challenge the amount of losses or capital allowances carried forward. Taxpayers should not have to wait for the Director General to issue a notification of non-chargeability in order to do this.

6. Miscellaneous

6.1 Payment of Tax

6.1.1 Existing legislation / practice

The Law

Section 103(1) [Due and payable on due date] *- Except as provided in subsection (2), tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment.*

Section 103(1A) [Due and payable upon furnishing the amended return] *- Where an assessment or additional assessment has been made under section 91A, the tax or additional tax payable under the assessment shall be due and payable on the day the amended return is furnished whether or not that person appeals against the assessment or additional assessment:*

Provided that where the amended return is furnished within a period of sixty days after the due date and the amount of tax due and payable has not been paid within the period of sixty days from the due date, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being served be further increased by a sum equal to five per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.

6.1.2 Issues

a) Presently, section 77B(2) allows an amended return to be submitted only after the due date. A taxpayer who wishes to submit an amended return prior to the due date may not do so. Instead, he has to wait until the due date is over, thereby subjecting himself to penalties, should there be additional income taxes arising from the amended returns. There are also no provisions to cater for the payment of additional taxes for amended returns submitted before the due date.

b) A penalty is imposed on an additional tax payable arising from the filing of amended return. There is no room for a good taxpayer to make good a genuine mistake and volunteer to file amended returns and pay the additional taxes, without being penalised.

6.1.3 Recommended Changes / Proposals

a) It is proposed that section 77B be reviewed to allow the submission of amended returns before the due date and that section 103 be reviewed to cater for the payment of additional taxes without penalties.

b) It is also proposed that section 77B be reviewed to allow the submission of amended returns after the due date and to allow a nil penalty rate to be applied on the additional taxes arising, provided that the taxpayer has not been subjected to any penalties or filed an amended return in the immediate past five years of assessment.

c) If the taxpayer has been subjected to penalties or filed an amended return in the immediate past five years of assessment, it is also proposed that a penalty with the rate that is linked to commercial borrowing rates be applied on the amount of additional tax that has to be paid as opposed to the additional tax arising from the amended return.

6.1.4 Rationale

a) An amended return should be allowed to be submitted prior to the due date and penalties should not be applied if any additional taxes arise from the amended returns and the payment of such additional taxes are made prior to the due date.

A taxpayer should be accorded the right to submit the amended returns prior to the due date and make good the payment of any additional income taxes without penalties in the spirit of self-assessment. It represents no loss in the collection of income taxes as the payments are made prior to the due date. A taxpayer should not be unfairly made to wait until the due date is over and prejudice himself to penalties.

It promotes early filing of returns as a taxpayer would have the opportunity to file an amended return without penalties. Presently, it is no different to the taxpayer to file an amended return a day after the due date compared to filing an amended return six months after the due date.

b) A delinquent taxpayer would be unlikely to offer to file an amended return and voluntarily pay additional tax. Taxpayers who file amended returns are usually those who have made genuine mistakes, often arising from human errors. They should be accorded the opportunity to file an amended return and pay the additional taxes without being penalised.

This proposal to impose a nil penalty on a taxpayer with a clean recent track record will help distinguish a good taxpayer from those who habitually make mistakes and file amended returns.

c) A taxpayer may also have a tax overpayment for that year of assessment at the time an amended return is filed. It is inequitable to penalise such a taxpayer on the amounts that he has already remitted to the IRB that have yet to be repaid to him. Consequently, it is proposed that the penalty be applied only on the additional tax payable.

6.2 Estimate of Tax Payable and Payment by Instalments for Companies

6.2.1 Existing legislation / practice

a) The Law

Section 107C(3) [Estimate for current assessment] *- The estimate of tax payable for a year of assessment shall not be less than eighty-five per cent of the revised estimate of tax payable for the immediately preceding year of assessment or if no revised estimate is furnished, shall not be less than eighty-five per cent of the estimate of tax payable for the immediately preceding year of assessment.*

b) The Practice

In practice, applications for estimates lower than eighty-five per cent are reviewed on a case-by-case basis but this practice is not provided in the legislation.

6.2.2 Issues

Under the existing legislation, the estimation of tax payable is restricted to not less than eighty-five per cent of the immediately preceding year of assessment's estimate or revised estimate.

6.2.3 Recommended Changes / Proposals

To provide clarity and transparency, it is proposed that provisions be included in the legislation to state that where an estimation of tax payable is less than eighty-five per cent of the immediately preceding year of assessment's estimate or revised estimate such an estimate may be submitted for the Director General's approval.

6.2.4 Rationale

The Director General's practice to exercise his discretion to accept estimates that are less than eighty five per cent of the immediately preceding year of assessment's estimate or revised estimate is commendable for his understanding of the oscillating cycles of the business world. Nonetheless, The Director General is not specifically empowered by the Act to accept such estimates. This should be rectified with specific legislations to empower the Director General to accept such estimates.

6.3 Estimate of Tax Payable and Payment by Instalments for Companies

6.3.1 Existing legislation / practice

The Law

Section 107C(7) [Furnish of revised estimate] *- A company, limited liability partnership, trust body or co-operative society may in the sixth month or the ninth month, or in both months; of the basis period for a year of assessment furnish to the Director General a revised estimate of its tax payable for that year in the prescribed form and –*

(a) where the revised estimate exceeds the amount of instalments which is payable in that year prior to that revised estimate, the difference shall be payable in the remaining instalments in equal proportion; or

(b) where the amount of instalments which is payable in that year prior to that revised estimate exceeds the revised estimate, the remaining instalments shall cease immediately.

6.3.2 Issues

An estimation referred to in the section above may only be revised in the sixth or ninth month of the basis period. There are no provisions in the legislation to allow for revisions in other periods. Where an extraordinary and unanticipated income is received after the ninth month, the taxpayer cannot revise his estimation. However, the Director General has confirmed that the taxpayer should voluntarily make payment and an appeal will be considered.

6.3.3 Recommended Changes / Proposals

It is proposed that provisions be made for *revisions of estimation in other months* or clarity and transparency be shown by including provisions in the legislation to allow a taxpayer to submit an additional (third) revised estimate at any time after the ninth month to cater for unanticipated events with material impact on tax payable for the year. The taxpayer may submit a revised estimate within sixty days from the end of the basis period and substantiate it with documented evidence during / upon a tax audit.

6.3.4 Rationale

The IRB has confirmed at least twice (Reference: Paragraph 2.8 of the minutes, Majlis Dialog Antara LHDN dan Persatuan Akauntan Bertauliah – Bil. 1/2004 and Paragraph 2.17, Minit Mesyuarat Majlis Dialog Antara Lembaga Hasil Dalam Negeri dan Persatuan Akauntan Bertauliah Bil. 1/2005) that the Director General will review appeals based on the merits of each case of under estimation and on good cause, remit the penalties imposed. There has been a general reluctance to release guidelines and guidance as to what amounts to good cause.

In practice, only part of the penalties are remitted by the Director General even when a taxpayer's under-estimation is caused by an unanticipated event that

he is unable to remedy with a revised estimation as the unanticipated event occurred after the ninth month.

Unanticipated events occurring after the ninth month that cause a significant increase in taxable income and the resulting tax payable are not impossibilities and they have occurred. Whilst the taxpayer may make voluntary payments and appeal against the resulting underestimation, the legislation per se imposes a penalty on the underestimation.

A good taxpayer should not be penalised for unanticipated events and subsequently made to appeal against an underestimation that is not anticipated. He should be given a right in the legislation to make good the underestimation. Penalties should be applicable only to taxpayers who failed to make good an underestimation.

6.4 Appeal by the Payer

6.4.1 Existing legislation / practice

The Law

Section 109H(1) [Appeal to special commissioners] *- A payer referred to in sections 109, 109B or 109F may, within thirty days (or any period extended by the Director General) from the date an amount is due to be made to the Director General under that section, appeal to the Special Commissioners by reason that such amount is not liable to be paid under this Act and the provision of this Act relating to appeals shall apply accordingly with any necessary modification.*

Section 109H(2) [Non-application of s 109H] *- Where an amount is due from the payer to a non-resident person, this section shall not apply or cease to apply if—*

(a) an appeal has been filed to the Special Commissioners by the non-resident person to whom the payer was liable to pay the amount of interest or royalty, or payment under section 4A or paragraph 4(f), of which the amount due under subsection (1) relates;

(b) such payment to the non-resident made by the payer is disallowed as deduction under section 39 in arriving at the adjusted income of the payer; or

(c) the amount due under subsection (1) has not been made to the Director General by the payer.

6.4.2 Issues

The avenue of appeal by the payer to the Special Commissioners of Income Tax against the applicability of withholding tax provided under this section does not apply in 3 situations:

a) Where an appeal has been filed to the Special Commissioners of Income Tax by the non-resident recipient.

b) Where the payment to the non-resident is disallowed as deduction to the payer under section 39.

c) Where the withholding tax has not been paid to the Director General of Inland Revenue by the payer.

It is not clear under what circumstances the situation in section 109(H)(2)(b) would arise in view that subsection (1) requires the appeal to be made within 30 days from the date the withholding tax is due to be made to the Director General while disallowance of the payment to the non-resident by the Director General can only take place after the tax return is submitted by the payer under the self-assessment system which is after the appeal period has lapsed.

6.4.3 Recommended Changes / Proposals

It is proposed that the situation set out in section 109H(2)(b) be deleted.

6.5 Compensation for Over-Payment of Tax

6.5.1 Existing legislation / practice

The Law

Section 111D(1) [Conditions for compensation] *- Subject to this section and subsection 111(4A), an amount of compensation may be payable to a person if the amount refunded to that person for a year of assessment under section 111 is made after —*

(a) ninety days from the date a return for that year of assessment is required to be furnished under this Act, in the case of return furnished by way of electronic transmission; or

(b) one hundred and twenty days from the date a return for that year of assessment is required to be furnished under this Act, in any other case.

Section 111D(4) [Non-application] *- This section shall not apply—*

(a) if a person fails to furnish return for a year of assessment in accordance with section 77 or 77A;

(b) in respect of excess of amount payable referred to in subsections 111(1A) and (1B); or

(c) if a person appeals against an assessment under section 99.

6.5.2 Issues

Subsection (4) provides that the compensation for over-payment of tax under section 111D does not apply "in respect of excess of amount payable referred to in subsections 111(1A) and (1B)" which is the tax refund due to tax set-off under section 110.

6.5.3 Recommended Changes / Proposals

It is proposed that subsection (4)(b) be deleted.

6.5.4 Rationale

The provisions of section 111D should apply to the tax refund due to tax set-off under section 110 as it is not connected to an offense and the tax refund is an amount due to the taxpayer. Further as the determination of the amount to be refunded is fairly straight-forward (after verification of dividend vouchers) and not likely to be subjected to dispute, the refund process should not be delayed. Compensation should therefore be paid under section 111D for any delay in refund.

6.6 Relief in respect of error or mistake

6.6.1 Existing legislation / practice

The Law

Section 131(1) [Time limit of five years] *- If any person* ***who has paid tax*** *for any year of assessment alleges that an assessment relating to that year is excessive by reason of some error or mistake in a return or statement made by him for the purposes of this Act and furnished by him to the Director General prior to the assessment becoming final and conclusive, he may within five years after the end of the year of assessment within which the assessment was made, make an application in writing to the Director General for relief.*

6.6.2 Issues

The provisions for the claim of section 131 relief should not be confined to persons who have paid tax.

6.6.3 Recommended Changes / Proposals

It is proposed that the provisions for the claim of section 131 relief cover both tax payable (whether paid or not) and non-tax payable cases.

6.6.4 Rationale

The new section 97A was introduced effective 1 January 2009 to allow for appeal under section 99 to be made on non-tax payable cases. Similar provisions should be introduced for the claim of relief under section 131 in respect on non-tax payable case.

6.7 Electronic medium

6.7.1 Existing legislation / practice

The Law

Section 152A(1) *- The Director General may allow any forms prescribed under this Act to be furnished by any person or by any class of persons on an electronic medium or by way of any electronic transmission.*

Section 152A(3) [Authorize in writing] *- For the purposes of subsection (1), a person may authorize in writing a tax agent to furnish on his behalf any form prescribed under this Act in the manner provided for in subsection (1).*

Section 152A(5) [Application of s 152A(3)] *- Where subsection (3) applies—*

(a) ..

(b) ..

(c) ..

(d) the hard copy shall be signed by the person;

6.7.2 Issues

The requirement for the hard copy of the prescribed forms (e.g. Forms CP204, 204A, C, R, etc.) to be signed by taxpayers has created a lot of administrative work.

6.7.3 Recommended Changes / Proposals

It is proposed that the provision under section 152A(5)(d) be deleted.

6.7.4 Rationale

The provisions under section 152A(3) and section 152A(4) which require taxpayers to sign the Form CP55 are sufficient to ensure that taxpayers are responsible for the Forms CP204, C, R, etc. submitted by their tax agents on their behalf. Hence, it would be unnecessary to request taxpayers to sign the hard copy of the Forms CP204, C, R, etc. again. Moreover, e-filing is supposed to ease the filing process and not make it more cumbersome.

6.8 Power to call for statement of bank accounts

6.8.1 Existing legislation / practice

The Law

Section 79 *- The Director General may by notice under his hand require any person to furnish within a time specified in the notice (not being less than thirty days from the date of service of the notice) a statement containing particulars of–-*

(a) all banking accounts–-

(i) in his own name or in the name of a wife or dependent child of his or jointly in any such names;
(ii) in which he is or has been interested jointly or solely; or
(iii) on which he has or has had power to operate jointly or solely,

being accounts which are in existence or have been in existence at any time during a period to be specified in the notice;

(b) all savings and loan accounts, deposits, building society accounts and co-operative society accounts in regard to which he has or has had any interest or power to operate solely or jointly during that period;

(c) all assets which he and any wife or dependent child of his possess or have possessed during that period;

(d) all sources of his and the gross income from those sources; and

(e) all facts bearing upon his present or past chargeability to tax.

6.8.2 Issues

a) There are practical issues in complying with the provisions of section 79 in the following circumstances:

- The bank will not release any information without the spouse's permission; or
- The individual and spouse are separated.

b) In the case of section 79(e), it appears that there is potentially no time limit for the word "past" used in this section.

6.8.3 Recommended Changes / Proposals

a) It is proposed that separate notices be issued to each spouse where an election for combined assessment has been made.

b) It is also proposed that a provision for a time limit for the word "past" be inserted in section 79(e) subject to exceptional cases involving fraud etc. to prevent abuse.

6.9 Right of Appeal

6.9.1 Existing legislation / practice

The Law

Section 99(1) [Notice of appeal] *- A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.*

Section 99(2) [Agent's rights] *- …*

Section 99(3) [Representative may act for principal] *- …*

Section 99(4) [Non-applicability of section to assessment made under sub-s 90(1) or s 91A] *- This section shall not apply to an assessment made under subsection 90(1) or section 91A, except where a person in respect of such assessment is aggrieved by the pubic ruling made under section 138A.*

6.9.2 Issues

a) An appeal under section 99 is required to be submitted by way of a Form Q. It is very tedious and not cost effective to file a Form Q for every single issue. This requirement seems to be inconsistent with section 102(3) which provides that an appeal shall not be forwarded to the Special Commissioners if the Director General and taxpayer have come to an agreement in respect of the disputed issue(s).

b) The recent addition of subsection (4) by Act 761 limits the taxpayer's right to appeal against deemed assessments where the taxpayer is aggrieved by reason of public rulings only. This leaves taxpayers with no avenue to appeal against deemed assessments where the issue involved is not covered by a public ruling. The right to appeal is a fundamental right of taxpayers in any tax system. Any restriction of the right could potentially discourage transparency on the part of taxpayers, thus compromising the spirit of self-assessment.

6.9.3 Recommended Changes / Proposals

a) It is proposed that the past practice of accepting an appeal under section 99 to be made by way of letter instead of a Form Q, be re-introduced. It is further proposed that the law be amended to permit the Director General to allow this practice.

b) It is also proposed that subsection (4) be deleted.