Official Journal of the Chartered Tax Institute of Malaysia

tax guardian

Vol.8/No.1/2015/Q1

AUTHORITATIVE • RELEVANT • GLOBAL EXCELLENCE

CHARTERED TAX INSTITUTE OF MALAYSIA

RM28.00

BUDGET 2015 DIRECTION AND DESTINATION

ARE 'PLANT' AND 'SETTING' MUTUALLY EXCLUSIVE CONCEPTS IN TAX LAW?

ENTERTAINMENT REDEFINED

CONTRACTS SPANNING THE GST START DATE

ISSN 0128-7583

The Chartered Tax Institute of Malaysia (CTIM) is a company limited by guarantee incorporated on 1 October 1991 under Section 16(4) of the Companies Act 1965. The Institute's mission is to be the premier body providing effective institutional support to members and promoting convergence of interest with government, using taxation as a tool for the nation's economic advancement and to attain the highest standard of technical and professional competency in revenue law and practice supported by an effective Secretariat.

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Tax Guardian

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Tax Guardian

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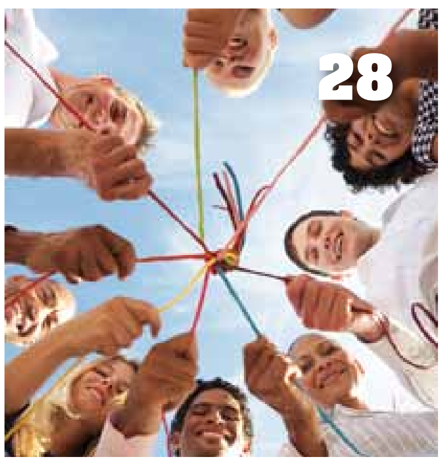

INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers, academicians and students. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 2,500 to 3,500 words submitted in a typed single spaced format using font size 10 in Microsoft Word via email.

Contributions intended for publication must include the author's name, contact details and short profile of not more than 60 words, even if a pseudonym is used in the article. The Editorial Committee reserves the right to edit all contributions based on clarity and accuracy of contents and expressions, as may be required.

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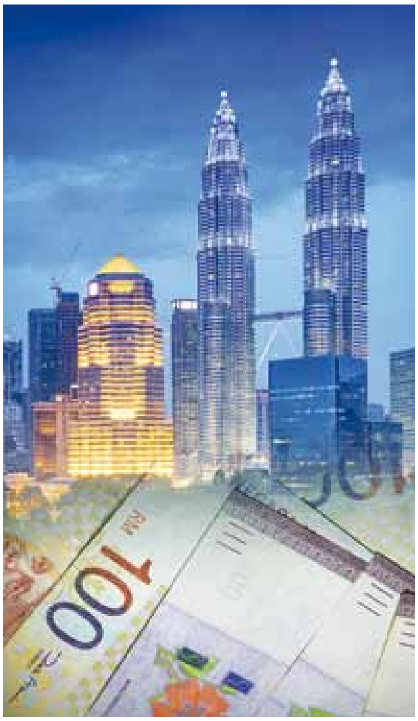
ARULJOTHI KANAGARETNAM

FUTURE DEVELOPMENTS

Seasons Greetings and a Happy New Year 2015!

At first glance, the year 2015 appears to be no different from other years. However, what distinguishes 2015 is the Goods and Services Tax (GST) implementation from 1 April 2015. GST being a consumption tax affects all walks of life.

The Institute recognises the importance of GST and has been organising GST courses with the Royal Malaysian Customs Department (RMCD). In this connection, I am pleased to inform you that the Institute is organising its first National GST Conference 2015 with the RMCD. More details can be found in the updates on upcoming Continuing Professional Development (CPD) events below.



BUDGET 2015

Following the Honourable Prime Minister's Budget 2015 announcement on 10 October 2014 and the issuance of the Finance Bill (No.2) 2014 on the same day, the Institute held its 2015 Budget Seminar on 29 October 2014 at the Renaissance Hotel, Kuala Lumpur. The number of attendees exceeded 700 persons for the first time in years. Besides covering the Budget proposals and latest tax developments by speakers from the Inland Revenue Board Malaysia (IRBM), the Ministry of Finance (MoF) and the private sector, the Budget Seminar also included a forum discussion on GST with the Head of the RMCD's GST Unit. The Institute also held several Budget Seminars in other Malaysian cities in November and December 2014.Although there were not as many proposed amendments in the Finance Bill (No. 2) 2014 compared to the previous year, the implications of some of these proposed amendments are significant. For instance, the utilisation of reinvestment allowance is narrowed down to a deduction against statutory income from a business source in respect of a qualifying project. Also, certain classes of non-business income relating to certain related party transactions are deemed to be obtainable on demand in the basis period following the relevant period where it first becomes receivable. It is heartening to note that the taxpayer's right of appeal is extended to include deemed assessment aggrieved by any prevailing practice of the Director-General (DG) at the time when the assessment is made.

The Institute together with other professional bodies has prepared a joint memorandum on issues arising from the Budget 2015 and Finance Bill (No. 2) 2014 based on feedback received from members and tax professionals. The joint memorandum was submitted to the authorities in November 2014 with a request for a dialogue on the issues raised. Members can access the joint memorandum and receive updates via our e-circulars or by visiting our website.

RECENT TECHNICAL DEVELOPMENT

In July 2014, the Institute informed members via e-circular on the issuance of the gazette order on the accelerated capital allowance (ACA) on information and communication technology (ICT) equipment with effect from years of assessment (YA) 2014 to 2016. Feedback from members centred on the applicability of the gazette order in practice. Members have highlighted that any person who has qualified for a deduction of statutory audit fees cannot claim the ACA based on the wording of the gazette order. The Institute has raised this matter to the authorities. Members will receive updates via our e-circulars or by visiting our website.

RECENT PUBLIC PRACTICE DEVELOPMENT

As mentioned in our e-circulars, IRBM has announced a new procedure for tax practitioners to engage with IRBM officers with effect from 1 December 2014 onwards. Tax practitioners have indicated that the new procedure would pose challenges for them to engage with IRBM officers. The Institute together with

other professional bodies have made representations to the authorities to reconsider implementing the new procedure. At the time of writing, the authorities have deferred the implementation date for the new procedure from 1 December 2014 to 1 February 2015. The matter is in the discussion process with the authorities. In view of the above development, more members may consider applying to the MoF for approved Tax Agent licence under S.153 of the Income Tax Act 1967 (the Act). The Institute reminds members who hold the approved Tax Agent licence under S.153 of the Act to apply to the Institute for a practising certificate with the designation "Certified Tax Practitioner" pursuant to Article 20(6) of the Institute's Articles of Association. More details on applying for a practising certificate can be found on our website.

UPCOMING CPD EVENTS

The Institute in collaboration with the RMCD is organising its first National GST Conference 2015 which will be held at the Sime Darby Convention Centre in Kuala Lumpur on 20 January 2015. Speakers include senior officers from the RMCD and eminent local and overseas professionals who are well versed in GST implementation. They will be focusing on practical issues prior to the GST implementation on 1 April 2015 as well as post GST implementation issues from 1 April 2015. Attendance to this event comes with 15 CPD points which will be recognised by the MoF for renewal of the GST Tax Agent licence. Registration forms have been circulated to members and are also available on our website. Register early to avoid disappointment.

The Institute is also in discussions with the RMCD to plan for future GST courses for the first six months of 2015. The schedule of courses can be found in our *Tax Guardian* and on our website. Members will also be informed of upcoming courses via our e-circulars.

EDUCATION

The CTIM professional examinations in December 2014 were the first to be conducted under the new syllabus. I am also pleased to inform that the Companies Commission of Malaysia (CCM) has approved an amendment to the Institute's Articles of Association regarding the issuance of the tax technician certificate. The Institute has introduced the tax technician qualification with the CTIM professional examinations in December 2014 onwards. As such, students who have completed the required number of examination papers at the intermediate level under the new syllabus will be issued a prescribed certificate that denotes qualification at the level of tax technician.The Institute also organised a 2-day intensive revision course for the CTIM professional examination paper on revenue law which was conducted by a CTIM member in November 2014. Future intensive revision courses for CTIM professional examination papers will depend on the availability of qualified trainers to conduct the courses.

MEMBERSHIP

I am pleased to inform you that the CTIM membership numbers exceed 3,200 currently. I would like to thank members for their continuing support of the Institute.

The Institute has plans for the year 2015 which will be translated into action throughout the year. Do look out for our e-circulars or visit our website for updates.

Editor's Note

K. SANDRA SEGARAN

GST : THE MARCH IS ON

GST developments are taking place at a frantic pace with the issuance of about 50 guides by the RMCD. We feature two GST articles in this issue that will be of great interest, one a general one and another an industry specific article. **Nicolaos Giannopoulos** and **Raja Kumaran** examine one important transitional aspect in relation to contracts spanning the GST start date, i.e. 1 April 2015. While highlighting the key issues, anomalies and overseas practices are also analysed for those following the developments in Malaysia. Useful suggestions are made by the authors for those who are caught in long-term contracts. **Kenneth Yong's** article will be welcomed by the Travel and Tour industry. This article focusses on the issues and complications of the industry. The writer highlights the complexities in the industry. It is not all smooth sailing in view of the varied outputs. Contentious issues and myriad of classification will provide some challenge for the industry.

Base Erosion and Profit Shifting (BEPS) project of the OECD is perhaps the most significant international tax development that is taking place at a furious pace. While some jurisdictions have introduced changes to their legislation following the developments, most jurisdictions wait anxiously for the final outcome before tinkering and fortifying their legislation to protect their respective bases. Malaysia too watches keenly the ongoing developments. **Kok Choy Ha** from the IRBM exposes the Revenues thoughts and experience in this issue. While there are 15 action points in this project, Malaysia's current focus is transfer pricing , ie,, cross border issues of related parties and treaty abuse.

On what constitutes 'plant' for purposes of capital allowance claim continues to be a disputed area depending on the nature of the business and type of expenditure. There is a legal pronouncement that 'setting' and 'plant' are not mutually exclusive conceptions. The key question being whether it fosters trade beyond a setting or premise and also plays a functional role to be considered 'plant'. **Foong Pui Chee** analyses this aspect by reviewing local court decisions on this area.

Dr. Nakha, our regular columnist examines the Budget 2015 announcements and the proposed changes to tax legislation amidst significant global and economic development. Several pertinent changes to tax legislation which annually draws the attention of tax practitioners and taxpayers alike are dissected. Legislative changes in relation to tax rates and breaks consequential to the introduction of GST relates to announcements made in last year's Budget. Taxpayers would certainly welcome several of these changes relating to reduction in tax rates and the expansion of the scope of appeal which were curtailed last year. The writer has also expressed his analytical views on the piecemeal approach to legislative amendments and structural changes or the lack of it to our economy and fiscal system in particular.

The piecemeal approach to amendments in the Income Tax Act 1967 since the introduction of the Self-Assessment System (SAS) beckons a timely review of the system introduced in 2001. In an erstwhile initiative, CTIM set up a special team known as the Self-Assessment System Working Group (SASWG) to review the provisions in the Act which was premised on the Official Assessment System. The team has identified the gaps and disparities that have surfaced and suggested recommendations to the authorities. It is hoped that the authorities will study this voluntary effort to improve the administration of the SAS. The findings and recommendations have been submitted to the authorities in September 2014.

Thanks to **PwC** for sharing an article from their internal publication on the developments on 'entertainment' expenditure following the amendment to restrict promotional expenditure in the last Budget. Interestingly the explanatory notes to the Bill indicates that it is meant to clarify that the expenses incurred by a person for the purpose of promoting his business with or without consideration fall within the definition of "entertainment". One would clearly view this as a substantive change in legislation rather than clarifying an existing position following the unequivocal clarification time and again by the courts in Malaysia on this subject. The IRBM has prevailed in construing promotional expenditure as "entertainment" which the author describes as harsh, punitive, discouraging and a burdensome development to the business community.

Our regular columns on Technical Updates, International News updates and Learning Curve continue to adorn this journal. Learning Curve's focus this time is tax issues surrounding "goodwill". Even practitioners should find this useful.

CHARTERED TAX INSTITUTE OF MALAYSIA

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GOODS & SERVICES TAX (GST) TRAINING COURSE 2015

HIGHLIGHTS

GST is an indirect tax that may affect all inputs and outputs of a business organisation and this tax will replace the existing sales and services tax regime. To ensure you are GST ready, a coordinated effort within the business organisation is essential. It is just another tax issue to be left only with the Finance and Accounts Department. Rather, it is a "crossfunctional" issue that can affect the entire business structure and hence require input from all key business units.

CTIM is pleased to present out members a 6-day modular course with the cooperation and support of Royal Malaysian Customs Department. A 1-day examination will be conducted after the course.Attendance to all sessions is compulsory. The Royal Malaysian Customs Department will only issue a certificate to those participants who attend all sessions and sit for the examination. Speaker for these training courses are representatives from the GST Implementation Unit of the Royal Malaysian Customs Department.

SERIES	VENUE	COURSE DATES	EXAMINATION DATE	EVENT CODE
1/2015	**Renaissance Hotel, Kuala Lumpur**	**January 2015** 10, 11, 12, 24, 25 & 26	***31 January 2015***	**JV/004**
2/2015	**Gurney Hotel, Penang**	**January 2015** 16, 17, 18, 23, 24 & 25	***31 January 2015***	**JV/005**
3/2015	**Pullman Hotel, Kuching**	**February 2015** 6, 7, 8, 13, 14, 16	***28 February 2015***	**JV/006**
4/2015	**The Saujana Kuala Lumpur, Shah Alam**	**February 2015** 28 **March 2015** 1, 2, 7, 8 & 9	***28 March 2015***	**JV/007**
5/2015	**Mutiara Hotel, Johor Bahru**	**March 2015** 7, 8, 9, 15, 16 & 20	***28 March 2015***	**JV/008**
6/2015	**Seri Pacific Hotel, Kuala Lumpur**	**May 2015** 9, 10, 11, 16, 17 & 18	***30 May 2015***	**JV/009**

KEY COURSE CONTENTS

- Overview of GST in Malaysia
- Scope of GST
- Types of supply
- Accounting for GST
- Input Tax Credit
- Transitional rules
- Special scheme available

WHO SHOULD ATTEND

- Tax practitioners and agents
- Management
- Finance department staff
- Operations and Methoc department staff

WHY YOU SHOULD ATTEND

- To prepare you and your organisation when GST is implemented and to ensure GST readiness
- To evaluate the impact of GST to the business
- To identify and deal with major GST issues

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CPD EVENTS

NATIONAL GST CONFERENCE 2015

In collaboration with the Royal Malaysian Customs Department (RMCD), for the first time ever, CTIM is organising the "NATIONAL GST CONFERENCE 2015" on Tuesday, 20 January 2015 at the Sime Darby Convention Centre, Kuala Lumpur. The Conference with the theme "GST: A Catalyst Towards a Developed Nation" is designed to equip industry players with the knowledge and capability to comply with the implementation of the GST. It will focus on the practical issues prior to the implementation of the GST on 1 April 2015 as well as deal with the post GST issues after April 2015 and Price Control & Anti-Profiteering Act. This will also provide the participants an opportunity to hear from the most senior officials from the Royal Malaysian Customs Department and eminent local and overseas professionals who are well versed in the implementation of GST.

Members will benefit significantly from attending this Conference as follows:

(a) Develop a fundamental understanding of the GST implementation issues.
(b) Highlights the possible effects of GST on your business activities.
(c) Equip yourself with the knowledge and skills to build an effective GST implementation plan.
(c) Lessons to be learnt on how to manage the transition.
(d) Insight on overcoming potential errors and avoiding pitfalls in GST implementation.

15 CPD points recognised by the Ministry of Finance (MoF) will be awarded to the participants of the Conference for renewal of the GST Tax Agent licence.

2015 BUDGET SEMINARS

On 29 October 2014, CTIM conducted its annual Budget Seminar at the Renaissance Hotel, Kuala Lumpur. The first session of the seminar was on the "Summary of 2015 Budget Proposals" presented by Puan Khodijah Abdullah, Senior Deputy Under-Secretary from the Tax Division, Ministry of Finance Malaysia. The second session of the seminar i.e "Forum Discussion on 2015 Budget Proposals – Its Changes & Impact to Taxpayers" was dealt diligently by the moderator, Mr. SM Thanneermalai. The panel members for this session were Puan Khodijah Abdullah (MoF), YBhg. Dato' Subromaniam Tholasy (RMCD), Encik Abu Tariq Jamaluddin (IRBM) and Ms. Yeo Eng Ping (CTIM).

The last topic of the seminar was on the "Tax Updates & Latest Developments" presented by co-speakers namely Mr. Tan Hooi Beng (Deloitte Tax Services Sdn. Bhd) and Mr. S. Saravana Kumar (Lee Hishammuddin Allen & Gledhill).

The seminar which was attended by over 700 participants comprised of tax practitioners and members from commerce and industry.

CTIM also organised a series of 2015 Budget Seminars at various cities, namely Kuala Lumpur, Subang, Penang, Ipoh, Johor Bahru, Malacca, Kuantan, Kuching and Kota Kinabalu.

GST TRAINING COURSES FOR THE GST TAX AGENT

CTIM & the Royal Malaysian Customs Department (RMCD) successfully organised the 6-day modular GST Training Courses and 1-day examination at various locations i.e Kuching, Johor Bahru, Kota Kinabalu, and Subang. Various topics on GST were discussed by the speakers from the GST Implementation Unit of the RMCD. CTIM has also finalised the dates with RMCD for similar courses in 2015.

ONLINE SUBSCRIPTION OF TECHNICAL RESOURCES FOR MEMBERS AVAILABLE AT CTIM'S RESOURCE CENTRE

Members may access the following online resources via the computer terminal at the Resource Centre of the Institute. Below are brief descriptions of the online resources currently available to members.

1) OECD iLibrary

One of the most comprehensive online resources on the world economy, society, education and environment. It contains publications and statistics published since 1998 by the OECD (Organisation for Economic Cooperation and Development). It has 6,200 e-book titles, 1,000 journal issues, 12,000 articles, 2,700 working papers, 14,000 tables and graphs and 290 cross-searchable datasets.

Taxation theme is one of the 17 thematic collections of the OECD iLibrary. It includes a broad range of taxation information, such as tax evasion, harmful tax practices, administration of tax policy, environmental taxes, tax standards setting and international comparable statistics, etc. The OECD Taxation iLibrary has over 200 e-books, more than 100 issues and articles as well as over 75 datasets.

2) CCH Online

(a) Malaysia and Singapore Tax Cases
(b) Malaysian Revenue Legislation
(c) Malaysian Tax Treaties

3) PNMB-LawNet

This is an Internet Division of Percetakan Nasional Malaysia Berhad (PNMB), providing an Online Library of Malaysian Laws which contains the authoritative text of the Laws of Malaysia. LawNet started its operation in 1998 and has since included Updated Acts of Parliament, Principal Acts (Original), Amendment Acts, Ordinances, Bills Supplement, Updated Rules & Regulations, Legislative Supplement (A), Legislative Supplement (B), Federal Constitution, Criminal Procedure Code, Penal Code, National Land Code, Rules of Court, Court Forms, General Orders and "Arahan Perbendaharaan". LawNet launched its electronic Gazette (e-Gazette), an electronic version of Malaysia Gazette printed by PNMB, the official printer appointed by the Government of Malaysia since 2001. LawNet also contains among others value-added services such as the Istilah Undang-undang, Latin Dictionary, Index of Subsidiary Legislation and selected Judgements of the Privy Council.

The Institute plans to invest in additional online subscription technical facilities and members will be informed accordingly.

BUDGET 2015

DIRECTION AND DESTINATION

Dr. Nakha Ratnam Somasundaram

THIS ARTICLE LOOKS BRIEFLY AT THE RECENT BUDGET 2015 ('THE BUDGET') IN THE CONTEXT OF THE GLOBAL AND NATIONAL ECONOMIC DEVELOPMENT, REVIEWING SEVERAL OF THE PROPOSALS AND HIGHLIGHTING PERTINENT CHANGES TO THE TAX LAWS, WITH OVERVIEW AND COMMENTS FOR CHANGES.

The Budget was presented by YAB Dato' Seri Mohd. Najib Tun Razak on 10 October 2014 who is both the Prime Minister of Malaysia and the Minister of Finance. It was themed the '2015 Budget: The People's Economy' and was based on seven main strategies of strengthening the economic growth, enhancing fiscal governance, developing human capital and entrepreneurship, advancing the Bumiputra agenda, upholding the role of women, developing national youth transformation programmes and finally prioritising the well-being of the Rakyat (Malaysian citizens).

THE GLOBAL ECONOMY SCENARIO

The Malaysian economy must operate in the context of the global realities which does not seem very rosy. For a start, the economic pace is slowing down for various reasons– for example the geopolitical tensions in Eastern Europe and the Middle East continues to be of concern to the major economies around the world.

Recoveries in the advanced economies like Japan and Europe are fizzling out while China is heading for a soft landing. These countries including the United States, are Malaysia's major trading partners and the impact will certainly be felt here sooner or later. The United States' expected interest rate normalisation could also trigger some financial waves around the region, quite similar to the effect of its 2008 subprime crisis on Asian economies.

The falling oil price is another upstart to be reckoned with. It has fallen to below USD85 in October 2014 - that is a 27% fall from the highest point in the year. This fall comes after a relatively stable oil price averaging USD110 per barrel for nearly four years.

While the fall of the oil price may be good for consumer driven economies, it is not so good for oil producing countries, including Malaysia. Government Budget that is based on expectations of oil price remaining at above USD100 should do some serious thinking – for example the Russian Budget (a net oil exporter) would balance only if the oil price is above USD104 per barrel or at USD 110 in Venezuela, another country greatly dependent on oil revenue.[1]

But then again, high cost of oil production in countries like the United States, Canada and Brazil may also be affected by the lower price and this could threaten global oil stocks – and Malaysia may be shaken up too.

THE MALAYSIAN ECONOMY SCENARIO

The numbers bandied about in the local headlines seem to indicate a Malaysian economy that is most reassuringly cheerful, and growing at a healthy 6% of the GDP, higher than the International Monetary Fund projection of only 5% for Malaysia, but some doubt the figures and the resilience of the economy.[2] **(Table 1)**

They point out to the country's huge debt burden, over-reliance on commodity income and the narrowing of the current account balance – it was 16% of the GDP in 2008 but now it is down to about 4% - certainly not a financially comfortable situation.

The government debt to the GDP ratio stands at around 53% (at least officially) and is certainly a high figure that has ballooned from the 32% in 1998. The household debt is at a scary 85% of the GDP.

The external debt is equally petrifying at RM729 billion (about 68% of the GDP), most of it short-term , with a real potential to seriously harm the local economy in times of economic stress (remember the 1998 financial meltdown? – that was caused by foreign investors pulling out their short-term investments from Malaysia in a hurry).

Malaysia's inflation rate is expected to be between 4 and 5 per cent next year (it was about 3% in 2013), and is more than enough to wipe out your fixed deposit interest earnings! **(Table 2)**

Malaysian Budget deficit has been trimmed from a high of 7% in 2009 to 3.9% in 2013 – but some experts do not place much reliance on these figures. This could be on account of

[1] *Jonathan Fahey, 'Falling oil prices shakes up global economies', Associated Press, Oct 16 2014.*

[2] *Lee Shi-Ian, 'Putrajaya hiding real deficit figures' The Malaysian Insider, 9 Nov 2014.*

Table 1 Malaysian Gross Domestic Product (GDP)

YEAR	2010	2011	2012	2013	2014*	2015**
GDP (RM Millions)	676,653	711,351	751,471	787,611	832,773	876,446

Table 2 Malaysia's Budget Deficit

YEAR	2008	2009	2010	2011	2012	2013	2014*	2015**
Deficit (%)	4.8	7	5.4	4.8	4.5	3.9	3.5	3

Source: Economic Report 2014/2015 **Estimate* *** Forecast* the muddled readings of the economy by different people – for example, the international rating agency Fitch has not revised its 'negative' outlook for Malaysia; whereas the other two agencies, Standard & Poor's and Moody's have put on a 'stable' and 'positive' label respectively on a country where most people are already confused.[3]

Incidentally, 'standard', 'poor' and 'moody' seem to be appropriate terms for agencies that assigns perplexing labels on a country's economic health.[4]

THE BUDGET HIGHLIGHTS

The Budget 2015 comes with a lower fiscal deficit this time, with an allocation of RM273.9 billion of which operating expenditure takes up about RM223 billion and development expenditure about RM50 billion. Payment to civil servants sucks the largest portion of the operating expenditure (at about RM66 billion) while the Federal revenue collection stands at about RM236 billion – and thus the deficit. **(Table 3)**

The Goods and Services Tax (GST) is finally here and will be implemented from 1 April 2015 at a 6% rate for starters, and is projected to collect RM23 billion but after adjustment for the abolition of the Sales Tax and the Service Tax, GST exemptions, and channeling of the subsidies and handouts (BR1M for example), the net sum left over is expected to be only RM690 million – not sufficient to even pay the country's civil servant's salary !

Table 3 Federal Government Revenue (RM billion)

DIRECT TAXES	2011	2012	2013	2014	2015
Corporate tax	46.9	51.3	58.2	67.7	72.6
Individual	20.2	22.9	23.1	26.7	26.6
Petroleum	27.7	33.9	29.8	28.3	25.6
Others	7.4	8.8	9.52	10.4	10.8
Total	**102.2**	**116.9**	**120.62**	**133.1**	**135.6**
Indirect taxes					
Service tax	5	5.6	5.9	6.8	1.9
Other taxes	27.7	29.1	29.5	31.8	45.8
Total	**32.7**	**34.7**	**35.4**	**38.6**	**47.7**
TOTAL REVENUE*	**185.4**	**207.9**	**213.4**	**225.1**	**235.2**

Source: Economic Report 2014/2015 **Note: This would include other non-tax revenue*

INCOME TAX CHANGES – INDIVIDUALS

Individual tax rates have been fiddled with to give a reduction of between 1 and 3 per cent over the nine bands, giving some savings of between RM50 at the lower end to RM7,200 at the upper end. **(Table 4)**

Table 4 Proposed Tax Rates and Resultant Tax Savings for Individuals

CHARGEABLE INCOME (RM)	EXISTING RATES (%)	PROPOSED RATES (%)	REDUCTION (%)	TAX SAVINGS (RM)
1-5,000	0	0	0	50
5,001-20,000	2	1	1	150
20,001-35,000	6	5	1	300
35,001-50,000	11	10	1	450
50,001-70,000	19	16	3	1,050
70,001-100,000	24	21	3	1,950
100,001-250,000	26	24	2	4,950
250,001-400,000	26	24.5	1.5	7,200
above 400,000	26	25	1	7,200

Source: Budget 2015

The changes come into effect from the year of assessment 2015.

RELIEF

Relief for medical expenses under Section 46(1)(g) of the Income Tax Act 1967 (as amended) [ITA][5] incurred for serious diseases have been increased from the current RM5,000 to RM6,000.

Disabled child relief has been increased from RM5,000 to RM6,000 under Section 48(2)(b) effective from the year of assessment 2015. Similarly, relief for the purchase of

[3] *Cecilia Kok, 'Tough balancing act to reform Malaysia's economy', The Star, Oct 11 2014*

[4] *The opinions expressed in this article are those of the writer's and does not reflect that of CTIM.*

[5] *All reference to Sections in this article is to the Income Tax Act 1967 (as amended) unless otherwise stated.*

Table 5 Taxpayers Banned From Leaving Malaysia

	INCOME TAX	REAL PROPERTY GAINS TAX
YEAR	NUMBER OF TAXPAYERS	
2012	9,339	1,594

Source: http://sspi2.imi.gov.my/default.aspx

basic supporting equipment for the disabled has also been increased from the current RM5,000 to RM6,000 available under Section 46(1)(d). Basic supporting equipment would include haemodialysis machines, wheelchairs, artificial limbs and hearing aids, but does not include reading glasses!

PENALTIES FOR LEAVING THE COUNTRY WITHOUT PAYING INCOME TAX

The maximum fine of RM20,000 is proposed for taxpayers who leave Malaysia after the issuance of the certificate under Section 104. The certificate is usually issued if taxes remain unpaid for some time. Under the law, the taxpayer could also be imprisoned for up to six months. The minimum fine of RM200 however remains unchanged.

The law comes into effect as soon as the Finance Bill (No. 2) 2014 comes into operation. **(Table 5)**

INVESTMENT ACCOUNT PLATFORM INCENTIVE

The profit from this funding model which is based on the *Syariah* principle to finance projects and venture companies would now be exempted in the hands of individual investors. This incentive aims to boost financing of startup small and medium companies and enterprises. The incentive comes with some conditions and is likely to be gazetted in an exemption order.

MONTHLY TAX DEDUCTIONS TO BE *FINAL* TAX

The monthly deductions would be treated as the final tax in cases where the employee received employment income under Section 13(1)(b) [benefits in kind] and 13(1)(c) [living accommodations], and is employed by the same employer in that year.

Currently, this treatment is only applicable to employees receiving employment income under Section 13(1)(a), 13(1)(d) and 13(1)(e) i.e. excluding those falling under Section 13(1)(b) and 13(1)(c) and those employed for at least 12 months in the basis period for the relevant year of assessment.

With this proposal in place, more taxpayers could come into the fold and benefit from the hassle of filing an annual tax return.

UNIT TRUSTS

Interest derived from Malaysia and paid by a bank licensed under any development financial institution regulated under the Development Financial Institutions Act of 2002, in addition to those paid under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983, would be exempted from tax, effective from the year of assessment 2015.

COMPUTATION OF CHARGEABLE INCOME – SECTION 5

Interest income and profits distributed or credited out of family fund, family re-takaful fund or general fund are subjected to withholding tax under Section 109C and 109E – and are excluded from the computation of chargeable income – the withholding tax deducted being treated as the final tax.

This treatment is now extended to income derived from the withdrawal of contributions made to a deferred annuity or private retirement scheme under Section 109G.

The proposal would be effective from the year of assessment 2015.

INCOME TAX CHANGES – COMPANIES AND UNINCORPORATED BUSINESSES

Malaysian resident companies that provide scholarships for vocational and technical studies (such as computer programming, automotive and textile related studies) in institutions recognised by the government would be eligible for double deduction.

This is a limited time deduction for years of assessment 2015 to 2016 only and would become law upon gazetting of the statutory order.

STRUCTURED INTERNSHIP PROGRAMMES AND TRAINING EXPENSES

The currently available double deduction for expenses incurred by Malaysian resident companies participating in an approved structured internship programme would now be extended to full time students pursuing courses at vocational and diploma levels. The existing conditions and the deductibility criteria would be maintained.

This too is a limited time deduction law for years of assessment 2015 to 2016 only and would become law upon gazetting of the statutory order.

A further deduction is also proposed for training expenses incurred by companies to enable employees to obtain industry recognised certificates and professional qualifications in areas like accounting, finance, and project management. These must be approved by agencies appointed by the Ministry of Finance and will come into effect from the year of assessment 2015.

INCOME TAX ASSESSMENT CONSEQUENT TO A TRANSFER PRICING ADJUSTMENT

The Budget proposes a new Section 91(5) under which where it appears to the Director-General of Inland Revenue (DGIR) that no or no sufficient assessment has been made in consequence of his determination pursuant to Section 140A(3) may in that year, or within seven years after its expiration make an assessment or additional assessment in respect of that person.

Example

AB Sdn Bhd (financial year end 31 Dec) was audited on their related party transaction in 2015 and the DGIR found that no sufficient assessment was raised for that year of assessment.

He can now raise an assessment for the year of assessment 2015 on or before 31 December 2022 to make good any shortfall in the tax charged for that year of assessment.

Transfer pricing adjustments following a tax audit in respect of transactions between related parties usually take some time to complete. This law merely gives 'extra time' (the existing time bar is five years) to the DGIR to raise an assessment or additional assessment, if necessary.

It is understood that tax professionals and taxpayers are not exactly excited about this new law.

CONTROLLED TRANSACTION AND TRANSACTIONS BETWEEN RELATIVES

New Sections 29(4) and (5) is proposed under which where a person

is entitled to receive gross income from a Malaysian source and where that amount first becomes receivable to the person in the relevant period arising from a transaction between persons one of whom has control over the other, or between individuals who are relative of each other or persons both of whom are controlled by some other persons, then such amount which first becomes receivable in the relevant period shall be deemed to be obtainable on demand in the following basis period, and be treated as gross income in that following period.

DEEMED ASSESSMENT AND THE RIGHT OF APPEAL

A taxpayer who is aggrieved by a deemed assessment made on him either under Section 90(1) or under Section 91A because of compliance with the Public Rulings issued by the DGIR under Section 138A, could file an appeal under Section 99(1) to the Special Commissioners.

But what if you are aggrieved with an assessment arising from matters like the practice of the Director-General?[6]

Tax professionals had expressed concern with that legislation as marking the 'gradual erosion of the taxpayer's rights' - because under Section 99(4) an appeal was available only to a person who is aggrieved by the Public Ruling made under Section 138A.[7]

Section 99(4) is now amended by inserting after the words 'Section 138A' the words 'or any practice of the Director-General generally prevailing at the time when the assessment is made'.[8] This legislation now returns to him the fundamental rights of the taxpayer to appeal.

It sounds like the IRB is listening!

SMALL VALUE ASSETS

A minor amendment has been made to Para 19A(1) of Schedule 3 to increase the value of each asset from the present RM1,000 to RM1,300 and the maximum limit to the total value of the assets increased from RM10,000 to RM13,000. But this threshold does not apply to small and medium enterprises which enjoy no restriction of the maximum amount.

PENALTY FOR OFFENCES UNDER THE ACT

There are several compliance requirements under the Act and any person who without reasonable excuse fails to comply with those provisions particularly those under Section 120(1) would be guilty of an offence, and on conviction would be liable to a fine of not less than RM 200 and not more than RM2,000 or to an imprisonment for a term not exceeding six months or to both.

There are about 22 such offences under Section 120(1) and it is proposed under the Budget that the maximum fine of RM2,000 be increased to RM20,000 for the failure to comply with those provisions, and becomes effective upon entry into force of the Finance Act. The minimum penalty sum of RM200 remains unchanged.

Failure to furnish a return or give notice of chargeability would, if convicted of an offence, be liable to a minimum fine of RM200 and a maximum of RM2,000 or to an imprisonment for a term not exceeding six months or both. Amendments to Section 112(1) now provides for the maximum fine to be increased to RM20,000.

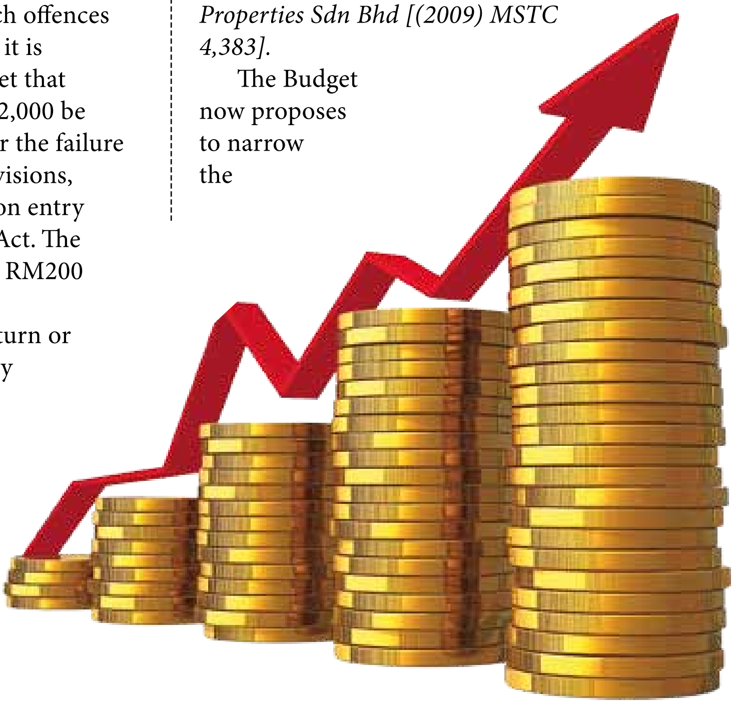
Non-compliance is now an apparently expensive affair.

CLAIM OF ALLOWANCE FOR QUALIFYING FOREST EXPENDITURE

In the timber business it is quite common for timber concession holders to subcontract the timber extraction works to subcontractors who will then do the actual work of extracting the timber from the forest. In order to gain access to the timber concession, expenditure on road, bridges and building for the welfare as well as living accommodation for the workers ('the forest expenditure') are incurred by the subcontractor for the purposes of the business.

The issue is whether a subcontractor who actually incurred the forest expenditure is entitled to a forest allowance (and not the concession holder or the licensee). As the law is less than clear, a decision in favour of the subcontractor was awarded in the case of *Ketua Pengarah Hasil Dalam Negeri v Primary Properties Sdn Bhd [(2009) MSTC 4,383]*.

The Budget now proposes to narrow the definition of the forest expenditure in Para 8(1) of Schedule 3 to qualifying capital expenditure incurred only by the person who holds the concession or license to extract timber (and not the subcontractor).



Example

Malaysian Timber Sdn Bhd ('the company') was granted a license by the State government to extract timber from a forest in Kelantan. The company however did not carry out the extraction owing to cash flow problems and instead arranged with a subcontractor to fell and extract the timber from the concession area, and do all such things as are required under the licence granted to the company.

The subcontractor incurred RM180,000 on the construction of access roads to the forest concession, RM50,000 on building used for the welfare of the workers, and RM120,000 on building for the worker's accommodation in the forest.

As the law stands, the subcontractor can claim a forest allowance under Schedule 3 in respect of the expenditure incurred on the roads and buildings as a deduction in arriving at the statutory income.

Under the proposed amendment, however, the subcontractor would be denied a claim for the forest allowance. The forest allowance could, however, be given to Malaysian Timber Sdn Bhd had it incurred the expenditure.

In a related situation, a person who has in use a qualifying industrial building, and incurs capital expenditure on a new building to be used as a living accommodation for workers, that expenditure would also qualify as an industrial building and allowances could be claimed. However in order to claim, he must make an election by notice in writing to the Director-General within three months of the beginning of the year of assessment in the basis period for which that expenditure was incurred. This can lead to some uncomfortable situation.

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6 *See TSD Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri; SETM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri.*

7 *Renuka Bhupalan, 'The 2014 Budget: Gradual erosion of taxpayer's rights?' Tax Guardian Vol. 7/No. 2/2014/Q2*

8 *Amendment to Section 99 under Section 14 of the Finance Bill 2014*

Example

Murugan Spices Sdn Bhd ('the company') manufactures curry powder in its factory in the outskirts of Seremban. As its workers find it difficult to travel to the factory, the company constructed a building ('the constructed building') next to the factory to accommodate its workers. The building cost RM300,000 and was completed in November 2014. The company closes its accounts on 31 December each year.

Under the existing legislation, the company must make an election by notice in writing to claim industrial building allowance on the constructed building before the end of March 2014 i.e. within three months of the beginning of the year of assessment in the basis period for which the expenditure was incurred.

But this is not possible as the expenditure was incurred in November 2014 i.e. at the tail end of the year of assessment.

Amendments are now in place to Schedule 3 Para 42(1) of the ITA to make the claims in the tax return for the basis period for a year of assessment in which the relevant expenditure was incurred, and thus falls in line with the flow of the self-assessment system.

CORPORATE INCOME TAX RATES

The income tax rates for the following entities have been reduced as follows:

(a) Company, trust body, an executor of an estate of an individual not domiciled in Malaysia at the time of death, a receiver appointed by the court and a limited liability partnership would be taxed at 24% from the year of assessment 2016

(b) A resident company incorporated in Malaysia with a paid up capital of RM2.5 million and less at the beginning of the basis period for a year of assessment and a Malaysian resident limited liability partnership with a total capital contribution –whether in cash or kind – of RM2.5 million and less at the beginning of the basis period for a year of assessment would be taxed at the following rates:

(i) 19% on the chargeable income up to RM500,000; and

(ii) 24% on the remaining chargeable income.

The new rates come into effect from the year of assessment 2016 with amendments to Schedule 1 Paragraph 2, 2A and 2D of Part 1 of the ITA.

LIMITED LIABILITY PARTNERSHIP

Under the amendments, every partner of a partnership shall continue to be personally assessable and chargeable to tax on the chargeable income for the year of assessment in which the conversion occurred and for the previous years of assessment before the conversion.

The limited liability partnership on the other hand shall be assessed and chargeable to tax on the chargeable income of the converting company in the manner and amount as the company would have been assessed and charged for the year of assessment in which the conversion occurred and for any previous years of assessment before the conversion.

Example

A partnership of ABC Enterprise with two partners, Mr. Lim and Mr. Anand, converted to a limited liability partnership in the year of assessment 2015. The forms that need to be submitted would be as follows:

(a) For the year of assessment 2015:
  - (i) Mr. Lim and Mr. Anand would each submit a Form B
  - (ii) They will also submit a Form P

(b) For the year of assessment 2016:
  - (i) Mr. Lim and Mr. Anand need not submit any Form B
  - (ii) The limited liability partnership would only submit a Form PT

Note: This example assumes that Mr. Lim and Mr. Anand do not have any other chargeable income

INSURANCE BUSINESS: DEDUCTION FOR COST OF ACQUISITION AND DISPOSAL OF INVESTMENTS

There was some ambiguity as to the expenses relating to investments acquired, held and disposed of by insurance companies that could be claimed and allowed.

The Finance Bill now introduces a new Section 60(4C) where for the purposes of ascertaining the adjusted income of the life fund, shareholder's fund or general insurance business, the cost of acquiring and realising any investments or rights for the basis period for a year of assessment shall include expenses incurred in managing those investments or rights, to be determined according to the following formula:

A x B / C

Where:

A= the cost of acquiring any investments or rights which is realised in that period in respect of such fund or general business

B= total cost of acquiring all investments and rights held during that period in respect of such fund or general business; and

C= the total expenses incurred in that period for managing all investments or rights held during that period in respect of such funds or general business

Tax professionals appear to be a little apprehensive of this new law as the inclusion of the words 'general business' in the section would now introduce an apportionment that restricts the amount of claim of expenses relating to management of investment – it is now aligned with the actual amount of investments disposed . Previously the general business had claimed the full deduction for the expenses relating to management of the investments.

I suppose you win some and lose some.

GST TRAINING EXPENSES

Expenses incurred for the training in accounting and information and communications technology relating to GST readiness would be allowed a double deduction for the years of assessment 2014 and 2015. The law will be gazetted by way of a statutory order.

DIRECTION AND DESTINATION

Nitty gritty tax provision fiddling aside, questions are asked as to whether we are heading in the right direction – and the answer seems to be varied – depending on who is holding the compass.

For a start long-term structural issues that really matter were not addressed in the budget. The allocation for the operational expenditure, for example, seems to be vastly more than what was allocated for development.

The nation suffers from falling international competitiveness, capital outflows and brain drain in addition

[9] Tan Sri Ramon Navaratnam, 'Many thanks for the goodies, Mr. PM', Free Malaysia Today, 14 Oct 2014

[10] Tan Yi Lian, 'Budget 2015: GST, tax breaks and BR1M among highlights' The Star, 10 Oct 2014

[11] Tengku Razaleigh Hamzah, 'All at risk with Malaysia's economy' The Malay Mail, 30 Oct 2014.

[12] See footnote 1

to rising inflation, corruption, wastage of government expenditure, industrial protectionism and sheer inefficiencies but these too seem to have escaped notice in the budget.[9]

Operations budget and expenditure from revenue were plainly pointed in the direction of consumption to spur growth when it should be development investments that should be doing the job. In this context, cash handouts , high civil service payout and energy subsidies will bleed the economy. You cannot sustain the economy in the long run with minimal development allocations as it does not build capacity for economic growth. However the government thinks that these spending are acceptable as it is based on 'affordability of the Government'.[10]

One of the fundamental cornerstones of a good tax system is that it should spread out the income and wealth of the nation among its citizens, but it appears that in Malaysia this is not happening. For example, it is estimated that the top 10% own more than the combined income of the bottom 70%.[11]

Malaysia is quite dependent on oil to fuel the economy – but oil is a dwindling resource and is made more precarious with frightening falling oil prices in recent months.[12] Malaysia needs to pin its forward momentum on more than oil to lubricate future developments.

There is also the need to re-look at the tax system and the tax structure in a holistic manner and one appropriate for Malaysia that would be simple, fair and participative. Old and archaic tax provisions could be removed and replaced with more practical ones, and be one with the global practice - while avoiding making changes in halting steps or in incremental process.

Tax compliance should be one that should be voluntary, and not enforced through checks and tax audits while a delivery system should be in place that is seen as transparent and efficient.

Compliance can be made simpler and easier with some serious effort at convergence between the accounting profit (as prepared by accountants using the FRS) and taxable profit (as 'prepared by tax officers using the ITA'). The present affair reminds me of developers building houses according to some approved design, and house owners, immediately upon purchase, breaking down the walls to fit in their own design.

Personal tax too should be reviewed not with a populist approach but with a financial pragmatism in mind – the myriad of relief for example, can be collapsed into a few broad categories while tax revenue from individuals safeguarded. But at every budget, the number of individual taxpayers who would be not taxable (as a result of some proposed changes) keeps rising - for example in the 2013 Budget about 170,000 were left out of the tax net as a result of rate changes; in the 2015 budget the figure is an estimated 300,000.

In a self-assessment environment, tax certainty is a key factor and this could be enhanced with greater co-operation between tax agencies and corporate citizens, particularly those involved in offshore transactions. Tax risk management is key to such co-operation and should come with greater constructive engagement and accountability to enhance corporate citizenship.

CONCLUSION

The Budget 2015 is the last of the Budgets under the 10th Malaysia Plan and the next Five Year Plan will begin with the 11th Malaysia Plan expected to be unveiled in 2015. The government is taking a new approach to sustainable development through the Malaysian National Development Strategy that will form the foundation for the 11th Malaysia Plan. We will have to wait and see where we would be arriving in 2020.

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

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 piecemeal 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.

CTIM set up a working group (called the Self-Assessment System Working Group (SASWG)) which compiled a memorandum that was submitted to the Tax Division of the Ministry of Finance (MoF) in September 2014.

CTIM has requested for a dialogue to discuss the memorandum with the MoF and the IRBM to take this forward so that the tax compliance process can be further improved under the Self-Assessment System.

SCOPE OF REVIEW

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

(a) Identify provisions in the tax law that are unfair to taxpayers in 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.

EXECUTIVE SUMMARY

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

AREA OF REVIEW	FINDINGS	RECOMMENDATIONS
1. Penalties **1.1** 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.
1.2 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 compared to penalty under Section 77B(4) which is based on the additional tax payable.	• 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, instead of the tax undercharged, to be in line with Section 77B(4).
1.3 Willful 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).
2. Mechanics of assessment **2.1** 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.
2.2 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 (DG) 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.
2.3 Duty to keep records [Sections 82 and 82A]	• The time frame for keeping records of seven years is not the same as the time bar of five 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 five years (three years for SMEs). • Section 82 and Section 82A be combined to remove duplication.
2.4 Return by employer [Section 83(6)]	• Section 83(6) may result in the deemed employer deducting "Potongan Cukai Bulanan" (PCB) and withholding taxes (WHT) on the same payment to individuals. This will burden the individual and would be impractical where the	Section 83(6) be narrowed to exclude taxpayers who: • Comply with WHT provisions; • Do not pay remuneration directly to a deemed employee; or

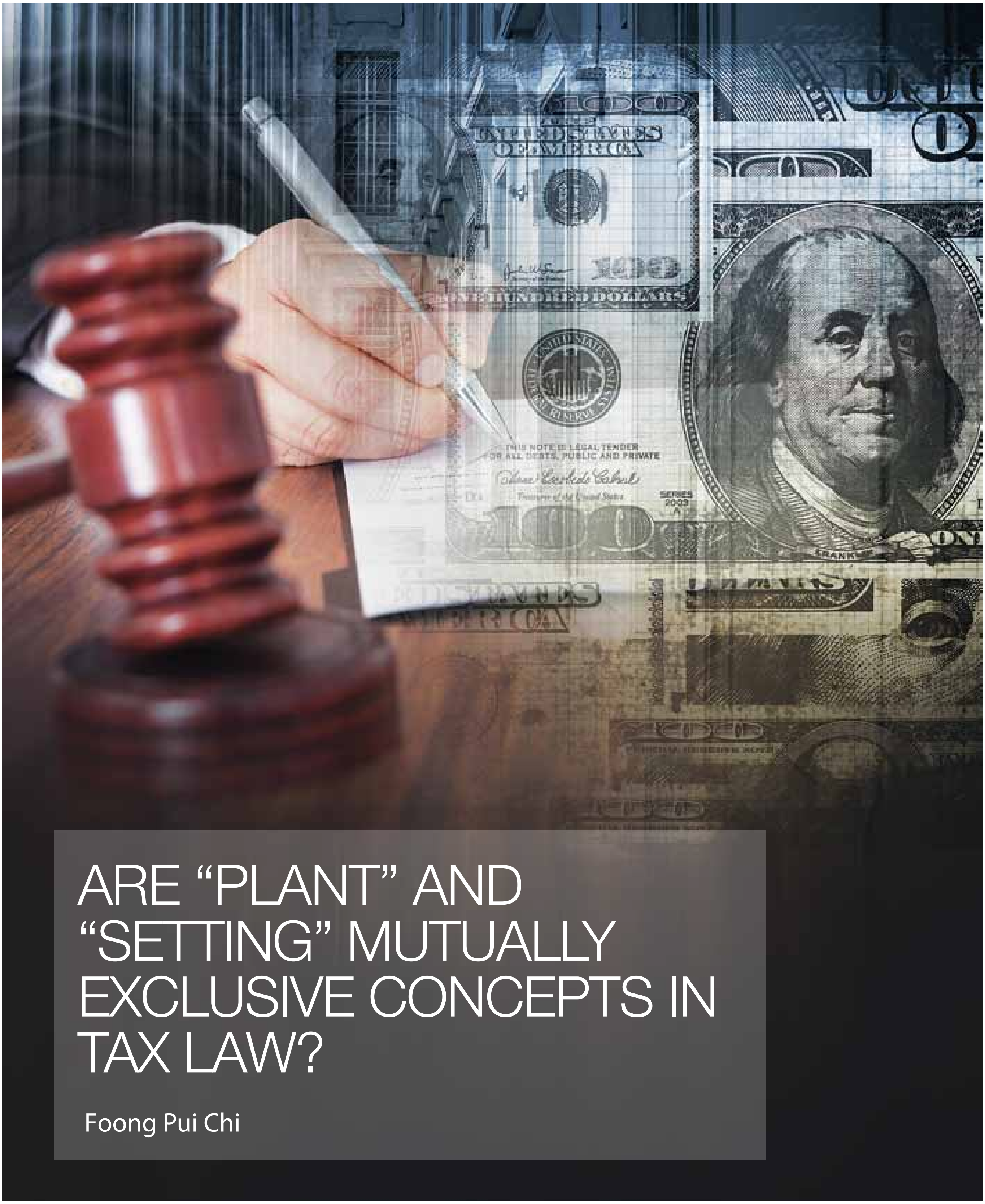
AREA OF REVIEW	FINDINGS	RECOMMENDATIONS
	deemed employer is not responsible for paying the individual.	• Pay remuneration to non-resident individuals who are exempted from tax under Paragraph 21 of Schedule 6.
2.5 Duty to furnish particulars of payment made to an agent, etc. [Section 83A]	• Section 83A 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.
2.6 Assessment and additional assessments in certain cases [Section 91]	• The 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.
2.7 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.
2.8 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 five working days from the date of notice of assessment or postal date.
2.9 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 assessment (YA).
2.10 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 two 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.

<table>
<tr><th>AREA OF REVIEW</th><th>FINDINGS</th><th>RECOMMENDATIONS</th></tr>
<tr><td>2.11 Notification of non-chargeability [Section 97A(1)]</td><td>• Section 97A(1) appears to indicate that notification of non-chargeability is at the DG's discretion.</td><td>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.</td></tr>
<tr><td>3. Miscellaneous

3.1 Payment of tax [Sections 103(1) and 103(1A)]</td><td>• 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.</td><td>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 five 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 five YAs.</td></tr>
<tr><td>3.2 Estimate of tax payable and payment by instalments for companies [Section 107C(3)]</td><td>• 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.</td><td>• 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.</td></tr>
<tr><td>3.3 Estimate of tax payable and payment by instalments for companies [Section 107C(7)]</td><td>• The DG's practice of considering an appeal to revise estimates after the ninth month of the basis period is not legislated.</td><td>Provisions be included in the legislation to allow:
• Appeals for revised estimates after the ninth month of the basis period to be submitted for the DG's approval.
• A revised estimate after the ninth month of the basis period to be submitted within 60 days from the end of that basis period.</td></tr>
</table>

AREA OF REVIEW	FINDINGS	RECOMMENDATIONS
3.4 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.
3.5 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 offence and the amount is due to the taxpayer.	• Section 111D(4)(b) be deleted.
3.6 Relief in respect of error and mistake [Sections 131(1)]	• Currently, the provisions for the claim of Section 131 relief is available to tax payable cases only.	• The provisions for the claim of Section 131 relief be amended to cover both tax payable (whether paid or not) and non-tax payable cases.
3.7 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.
3.8 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.
3.9 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.

Prepared by the Self-Assessment System Working Group (SASWG) and summarised by the Technical Department of CTIM.



ARE "PLANT" AND "SETTING" MUTUALLY EXCLUSIVE CONCEPTS IN TAX LAW?

Foong Pui Chi

In this article, Foong Pui Chi analyses three Court of Appeal decisions on claims for capital allowances ("CAs") in light of a recent decision of the Special Commissioners of Income Tax ("SCIT").

In a tax appeal that was recently concluded at the SCIT level, the taxpayer ("Taxpayer"), the owner and operator of two USGA golf courses and a clubhouse, had claimed CAs on the capital expenditure incurred on the construction of its golf courses and clubhouse under Schedule 3 of the Income Tax Act 1967 ("ITA"). However, the Director-General of Inland Revenue ("Revenue") raised notices of additional assessment to disallow such claims. The Taxpayer appealed to the SCIT under Section 99 of the ITA and, having heard the evidence and legal arguments of the parties, the SCIT decided in favour of the Taxpayer and allowed the Taxpayer's CA claims in full.

The word "plant" has long been the subject of debate in various tax cases both within and outside Malaysia. In order to qualify for CAs, one would have to determine whether a particular asset constitutes "plant" if it does not fall within the ambit of "machinery".

However, the word "plant" is but one of the many terms such as "income", "trade" and others not defined in the ITA. Hence, it is left to the courts to interpret them. As described by Lord Wilberforce in the case of *Commissioners of Inland Revenue v Scottish & Newcastle Breweries Ltd:*

> *"…It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or dictionary meaning. This is certainly true of 'plant'. No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant — yet each of these has been held to be so…"*

So the question now is — can a building, a large permanent structure, a theme park or even a golf course which stretches over acres of land also constitute "plant"? Does size really matter?

KETUA PENGARAH HASIL DALAM NEGERI V TROPILAND SDN BHD ("TROPILAND")

In the recent case of Tropiland, the taxpayer had sought to claim CAs on the capital expenditure incurred on the construction of a multi-storey car park. The Court of Appeal had not only affirmed that the word "plant" must be given a broad and purposive meaning but it also held that the categories of "plant" are not closed and will grow over time. The Court of Appeal also went on to hold that a court should take a "holistic" approach and look at the taxpayer's operations as a whole:

> *"There is thus clearly a need to take a holistic approach in every case and look at the taxpayer's business in its entirety instead of taking particular facts in isolation. The need to refrain from viewing the taxpayer's business in a fragmented fashion when determining whether an apparatus is a 'plant' was reinforced by the High Court of Australia in W. Nevill & Co. Ltd. V. Federal Commissioner of Taxation [1937] 56 CLR 290 where it was held:*
>
> > *'In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary for income tax purposes, to look at a business as a whole set of operations directed towards producing income.'" (emphasis added)*

Further, the Court of Appeal referred to the decision of Sir Donald Nicholls V-C in *Carr v Sayer* where his Lordship held that:

> *"…the expression 'machinery or plant' is apt to include equipment of any size. If fixed, a large piece of equipment may readily be described as a structure, but that by itself does not take the equipment outside the range of what would normally be regarded as plant. The equipment does not cease to be plant because it is so substantial that, when fixed, it*

attracts the label of a structure or, even, a building.

…and this follows from the above, equipment does not cease to be plant merely because it also discharges an additional function, such as providing the place in which the business is carried out…" (emphasis added)

To illustrate the above, the Court of Appeal in Tropiland referred to the following foreign superior court cases in which large and permanent structures were held to be "plant" rather than a "setting" or a "place of business" due to the function or role which they play in the respective businesses:

- in *Commissioners of Inland Revenue v Barclay Curle & Co Ltd*, the House of Lords held that: "*…every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that it is wrong to regard either the concrete or any part of the dock as a mere setting or part of the premises on which this operation takes place. The whole dock is … the means by which, or plant with which, the operation is performed…*";
- in *Schofield (HM Inspector of Taxes) v R & H Hall Ltd*, the Court of Appeal of Northern Ireland held that: "*…the Respondents' activities, in which these silos participate, should be viewed as a whole and not piecemeal, that the functions of the silos in the Respondents' trade should be considered. … The silos are not just buildings capable of being put to any purpose. They were specially built having been presumably designed, for the purpose of rendering better and more efficient the process of unloading and distribution…*"; and
- in *Commissioner of Inland Revenue v Waitaki International Ltd*, the New Zealand Court of Appeal held that: "*…I refer to the building as a whole because I consider a piecemeal approach treating the panels on the one hand and steel frame, roof and floor on the other as separate components, to be totally unreal … On my assessment of the evidence the freezer or cold-store structure is an essential part of the refrigeration process operated by these taxpayers. The crucial importance of insulation in the refrigeration process is strikingly reflected … No sensible businessman would have constructed the buildings in this way unless they wanted substantial insulation, and in my view the insulated panels must be regarded as a major and integral part of the structure … the freezer and cold-store form part of the taxpayers' operations and are to be characterised as plant*".

Accordingly, based on the facts of Tropiland, the Court of Appeal concluded that the multi-storey car park, considered as a whole, clearly constitutes "plant" under the ITA as it is an integral part of the taxpayer's business, without which the taxpayer could not have generated its income. In other words, the multi-storey car park is the company's apparatus or tool by means of which the company's business activities are carried on. The Court of Appeal also pointed out that the multi-storey car park is something that the taxpayer used in its business and it is not part of its stock-in-trade.

Based on the decision of the Court of Appeal in Tropiland, it is obvious that "plant" can be extended to buildings or structures where the same constitute "an apparatus or a tool of the taxpayer by means of which business activities were carried on". In the words of Donovan LJ in Jarrold v John Good & Sons Ltd:

> *"… 'setting' and 'plant' are not mutually exclusive conceptions. The same thing may be both. … All the Income Tax Acts require in this context is that the plant shall have provided 'for the purpose of the trade', an expression wide enough to cover assets which play a passive as well as an active role in the accomplishment of that purpose."(emphasis added)*

KETUA PENGARAH HASIL DALAM NEGERI V RESORT PORESIA BHD ("PORESIA")

A more recent case is the case of Poresia which involves a golf club business. In this case, although the Court of Appeal had decided in favour of the Revenue, it is crucial to note that the claim in Poresia was only confined to the grass and turfing and it did not cover the entire golf course and clubhouse of the taxpayer. Grass and turfing are merely one of the many categories of capital expenditure that would be incurred when constructing a golf resort.

The facts found by the SCIT in Poresia were also very limited as the only fact found by the SCIT was that the types of grass used were not synthetic grass and neither were they artificial. No fact was found as to the species and special features of the grass used or if the grass complied with international golf championship standards.

Further, the fact that the Court of Appeal's decision in Poresia was "more recent" than that of Tropiland does not mean that Poresia is somehow "more binding" than Tropiland. Based on the trite and well honoured principles outlined in *Young v Bristol Aeroplane Co Ltd*, where there are two conflicting Court of Appeal decisions, the court may choose which to follow regardless of which decision was earlier.

KETUA PENGARAH HASIL DALAM NEGERI V MSDC SDN BHD ("MSDC")

Apart from Tropiland and Poresia, the Court of Appeal's case of MSDC also dealt with a building/ structure, namely the training ground of a driving school. In this case, although the Court of Appeal had reversed the decision of the High Court and decided in favour of the Revenue, no written judgement had been issued to set out in clear terms what the reasons behind the decision were. Thus, in the absence of a written judgement, it is manifestly unsafe for the Revenue or any taxpayer to speculate on the grounds of the Court of Appeal's decision in MSDC.

Analysing the claims in the above three Court of Appeal cases, it would appear that Poresia and MSDC are narrow and superficial as they are only concerned with "surface type claims". They do not extend beyond the surface to cover excavation works, earthworks, irrigation, drainage and piping systems, landscaping, rockworks and so on, all of which could play a functional role in certain businesses.

Accordingly, the case of Tropiland may well be the preferred precedent among the three as a comprehensive analysis of the case law on CAs was undertaken by the Court of Appeal in Tropiland but not in Poresia and MSDC.

CONCLUSION

From the above, it is clear that "plant" and "setting" were never meant to be mutually exclusive concepts because it has been widely recognised in various cases that a building or a large permanent structure such as a dry dock, silo or car park complex can not only be the place within which a business is carried on but also the means by which the business is so carried on. It is the function of the asset in relation to the business, and not the size, that really matters.

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ENTERTAINMENT REDEFINED

YOU ENTERTAIN WHEN YOU PROMOTE YOUR BUSINESS?

THE POSITION UP TO THE YEAR OF ASSESSMENT (YA) 2013

"Entertainment" includes –

(a) the provision of food, drink, recreation or hospitality of any kind; or

(b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a),

by a person or an employee of his in connection with a trade or business carried on by that person.

The above definition of "entertainment" within Section 18 of the Income Tax Act 1967 (the Act) prior to amendment by Act 761 of 2014, along with Section 39(1)(l) of the Act operate to limit 50% tax deduction on expenses caught within that definition notwithstanding that the expense is incurred in the production of income. This wide definition of "entertainment" has inevitably spawned a slew of litigations in the Malaysian courts.

The expenses challenged in these cases range from promotional items sold together with goods, cash incentives given to reward sales agents upon achieving set targets, and for industries which are prohibited from advertising directly to consumers, expenses incurred to promote products through other channels. The bone of contention in these litigations involves expenses which lay businesspersons would regard as promotional expenses rather than entertainment expenses. However, the Inland Revenue Board (the IRB) seems to view promotion and entertainment as synonymous, inseparable subjects.

Technically, the question is whether an expense is "food, drink, recreation or hospitality of any kind" as defined in Section 18 of the Act. In this respect, statute interpretation requires that the meaning of each of the words "food, drink, recreation and hospitality"

must be imported from and cohere with each other. Where food, drink and recreation exist, it must be given hospitably and where hospitality is given it must be in the category of food, drink and recreation. Therefore what generally remains is the need to zero-in on the meaning of 'hospitality'.

In the case of *United Detergent Industries Sdn Bhd v DGIR [1998] MLJU 138,* the High Court referred to dictionaries on the ordinary meaning of the word "hospitality" which connotes the action of entertaining someone gratuitously without that someone having to subscribe (give something, a price) towards the cost incurred by the host. Relief was hailed in from 2007 when the Court of Appeal delivered a landmark decision in the case of *Aspac Lubricants (Malaysia) Sdn Bhd v KPHDN (2007) MSTC 4,271* (the Aspac case). The Courts have through the Aspac case along with other cases set the law clear on the definition of entertainment - it excludes promotional expense and a bargain.

Aspac was in the business of blending and selling lubricants for motorised vehicles as well as selling equipment and other products. Aspac gave away promotional items such as mugs, t-shirts and umbrellas (customer items) to its customers who purchased its products. These items carried Aspac's company logo. Aspac deducted the expenses incurred on these customer items from its gross income on the basis that these were expenses wholly and exclusively incurred in the production of its gross income. However, the IRB disallowed these expenses on the basis that they were entertainment expenses.

The Court of Appeal held that the customer items are not entertainment and are deductible on the following grounds:

(i) where the dominant, if not sole purpose of the customer items is to promote business, it cannot be described as entertainment; and
(ii) the consumer items were part of the bargain made between Aspac and its customers in that the consumer items and the products are collectively the consideration moving from Aspac to its customer in exchange for the consideration moving from its customer, i.e. the purchase price.

Despite the Court's decision in the Aspac case and subsequent similar decisions in other cases, the IRB persisted in challenging entertainment expenses. The government eventually amended the definition of entertainment to explicitly include promotional expense and a bargain. Effectively, the Court's position taken in the various cases has been negated when Finance Act 2014 was sanctioned. The IRBM prevailed.

THE AMENDED DEFINITION OF ENTERTAINMENT (WITH EFFECT FROM YA 2014)

The definition of entertainment with effect from YA 2014 now reads as follows (words in bold denote the new insertion):

"Entertainment" includes –

(a) the provision of food, drink, recreation or hospitality of any kind; or
(b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a),

by a person or an employee of his, **with or without consideration paid whether in cash or in kind, in promoting or** in connection with a trade or business carried on by that person.

As promotional activities are indispensable in today's competitive business environment, the amendment is harsh, punitive, discouraging and burdensome to the business community.

The IRB's intention behind the amendment is that effective from YA 2014, all food, drink, recreation including related travel or accommodation incurred by businesses to promote business in the production of income is 'deemed' as entertainment. Therefore, such expenses will follow the tax treatment of entertainment, that is, 50% of such promotional expenses incurred in the production of income are not tax deductible unless they fit into the following exceptions (where 100% deduction is still allowed) as prescribed under Section 39(1)(l) of the Act:

(i) the provision of entertainment to his employees except where such provision is incidental to the provision of entertainment for others;
(ii) the provision of entertainment by a person who carries on a business which consists of or includes the provision for payment of entertainment to clients or customers of that business and that entertainment is provided for payment by the clients or customers in the ordinary course of that business;
(iii) the provision of promotional gifts at trade fairs or trade or industrial exhibitions held outside Malaysia for the promotion of exports from Malaysia;
(iv) the provision of promotional samples of products of the business of that person;
(v) the provision of entertainment for cultural or sporting events open to members of the public, wholly to promote the business of that person;
(vi) the provision of promotional gifts within Malaysia consisting of articles incorporating a conspicuous advertisement or logo of the business;
(vii) the provision of entertainment which is related wholly to sales arising from the business of that person;
(viii) the provision of a benefit or amenity to an employee consisting of a leave passage to facilitate a yearly event within Malaysia which involves the employer, the employee and the immediate family members of that employee.

'ENTERTAINMENT RELATED WHOLLY TO SALES'

The above exceptions are generally clear and straightforward to apply save for exception (vii). The phrase "related wholly to sales" is perhaps the remaining provision to be clarified. The scope of "related wholly to sales" has not been tested in the Courts as cases brought before the Courts have so far related to the period prior to the insertion of subsection (1)(l)(vii) "… related wholly to sales …" to Section 39(1)(l).

The IRB has in its Public Ruling No. 3/2008 – Entertainment Expense (the PR) interpreted 'entertainment related wholly to sales' to mean 'entertainment directly related to sales provided to customers, dealers and distributors but excluding suppliers'. In the PR, the IRB has also provided examples of types of expenses that it envisages to fall within its interpretation. The examples are as follows:

(a) Expenses on food and drink for launching of a new product.
(b) Redemption vouchers given for purchases made.
(c) Cash vouchers, discount vouchers, shopping vouchers, meal vouchers, concert or movie tickets.
(d) Free gifts for purchases exceeding a certain amount.
(e) Redemption of gifts based on a scheme of accumulated points.
(f) "Free" maintenance/service charges or contribution to sinking fund by property developers.
(g) Lucky draw prizes given to customers for purchases made.
(h) Expenditure on trips given as an incentive to dealers for achieving sales target.
(i) Expenditure incurred on refreshment given to its customer while waiting for their cars to be serviced.

The common threads from the above examples appear to be as follows:

(i) they are incurred at point-of-sale and
(ii) they are given based on actual sales, both of which have elements of business promotion. However the above is arguably not conclusive as the examples are unlikely to cover all situations.

Section 39(1)(l)(vii) "… wholly related to sales" was not simultaneously amended together with the definition of "entertainment" to also explicitly exclude promotional items given in a bargain. It would be interesting to observe how the newly amended definition of entertainment and the phrase 'related wholly to sales' would operate together. A strict interpretation would mean that so long an expense is related wholly to sales, it is fully deductible even if the expense is promotional.

CTIM would like to thank PricewaterhouseCoopers for contributing this article. This article was published in the PwC Alert issue 115 October 2014.

CONTRACTS SPANNING THE GST START DATE

Nicolaos Giannopoulos and Raja Kumaran

A key feature of the Malaysian GST is the liability for the tax on any taxable supply of goods and services falls on the supplier[1]. Under GST your contract sum is treated as the consideration for your supply of goods and services; this amount includes the value of your supply, with the addition of GST i.e. is inclusive of GST[2]. This means in the absence of any legal right of recovery under the terms and conditions of the contract with the counterparty[3], the supplier will have to bear the GST.

For these reasons, as businesses prepare for GST, one area which should not be overlooked is existing contracts with customers and vendors which will span the GST start date (1April 2015).

1 APRIL 2015

The GST will come into effect 1 April 2015. No GST is chargeable on any supply of goods and services made before 1 April 2015[4]. However GST is chargeable where before 1 April 2015:

a) Any payment is received in connection with any supply that would be made on or after 1 April 2015; or
b) An invoice was issued relating to any supply that would be made on or after 1 April 2015.[5]

Hence one cannot invoice or pay their way out of GST by accelerating payment or invoicing before 1 April 2015 for supplies they will make post 1 April 2015.

Supplies made under an agreement that begins before the GST effective date and ends on or after the GST effective date are subject to GST, but only on the proportion of the value of the supply which is attributed to the period on or after the GST effective date[6].

Where the supply is services, the supply is taken to be made continuously and uniformly over the period of the agreement; the proportion of the supply which is attributed to the period on or after the GST effective date is calculated on a pro-rata basis and chargeable to tax[7].

Where such contracts are silent on GST, the supplier will be exposed to adverse GST consequences.

In light of this the government has proposed relief from liability for GST but only for what it terms as contract with no opportunity to review[8].

The proposed relief provides for zero rating of the payment received under such a contract for a period of:

a) Five years from 1 April 2015; or
b) Until a review opportunity arises, whichever is earlier[9].
   The relief allows the supplier firstly to avoid liability for GST and secondly to claim input tax for acquisitions in making this supply.

To obtain the relief you must satisfy the following:

i) The contract must be entered into on or before 1 April 2013;
ii) The supplier and the recipient of the supply are GST registered persons;
iii) The supply is a taxable supply;
iv) The recipient is making wholly taxable supplies; and
v) The supply is made pursuant to a *contract with no opportunity to review*.

By affording such a relief provision it is recognised and accepted that the imposition of GST will impact on existing contracts and may create an unforeseen financial burden which could fall on the supplier or his customer.

Yet the chosen cut-off date (1 April 2013) for contracts which may benefit from the above relief raises some questions: if the public announcement of GST was made on 25 October 2013 by the Prime Minister, one would expect this to have been the chosen cut-off date.

Yet those who have entered into agreements before the public announcement, without having the opportunity to provide in the contract for the GST burden, are now penalised. The intent should be not to penalise those who entered into contractual arrangements before the public announcement. Yet this is not the outcome.

Another condition is the supplier and recipient must both be GST registered persons. It is the supplier's obligation to verify the recipient is a registered person. Logically this should have been ascertained when the written agreement was signed (but neither party would have known about the GST at that point). The supplier will need to ensure that by the time the first supply is made on or after 1 April 2015 the GST registration status of the recipient has been verified.

The supply also must be a taxable supply – if I have entered into a contract before 1 April 2013 to develop and sell residential apartments and the development is completed after 1 April 2015, then I would have incurred input tax on my development costs (e.g. contractors)

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1 *Subsection 9(3) of the Goods and Services Tax Act 2014*
2 *Subsection 15(2) of the Goods and Services Tax Act 2014*
3 *Even if your customer refuses to pay you the GST this does not alter your GST liability; however you can claim a relief for the GST, subject to certain criteria (Section 58 of the Goods and Services Tax Act 2014)*
4 *Subsection 183(1) of the Goods and Services Tax Act 2014*
5 *Subsection 183(2) of the Goods and Services Tax Act 2014*
6 *Subsection 188(1) of the Goods and Services Tax Act 2014*
7 *Subsection 188(2) of the Goods and Services Tax Act 2014*
8 *Section 187 of the Goods and Services Tax Act 2014*
9 *Subsection 187(2) of the Goods and Services Tax Act 2014*

for work performed after 1 April 2015.

As the developer is locked into the contract, and the contract has no opportunity to review, the developer would be unable to increase his contract sum to recover this irrecoverable costs incurred due to the introduction of the GST. Unfortunately as this is not a taxable supply he will not be able to alleviate himself by way of zero rating to claim the input tax. This appears as an inequitable position for the developer.

CONTRACT WITH NO OPPORTUNITY TO REVIEW

A contract with no opportunity to review means any written contract or agreement which has no provision for a general review of the consideration for the supply for such a period until a review opportunity arises[10] (emphasis added).

The Royal Malaysian Customs Department (RMCD) has issued a GST Guide on Transitional Rules (dated 17 July 2014) which provides examples citing that "an increasing rent scale, a market review or Retail Price Index cost of living increase are not regarded as a review opportunity"[11]. But apart from this, the said Guide does not provide further direction or clarification on the interpretation taken by the RMCD of when a contract has no provision for a general review of the consideration.

However, guidance on this matter can be obtained from overseas GST jurisdictions such as Australia.

Australian courts have viewed this to infer that a contract which has a general review of the consideration which is limited to only a portion of the consideration (e.g. a rent review clause which limits the price review to only a part of the base rental, which forms only a part of the overall payment payable under the lease), is a contract with no opportunity to review[12].

In *FCT v DB Rreef Funds Management Ltd,* this issue, of whether a contract provided the lessor with an opportunity to conduct a "general review of the consideration" was considered by the court. The consideration for the supply comprised an annual rent amount in addition to reimbursement by the lessee of the lessor's outgoings. The

court decided that as the contributions to the lessor's outgoings could not be reviewed and this amounted to 17% of the consideration for the supply, the court decided that the contract did not provide for a general review of the consideration for the supply.

In *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd*[13] the court held that the supplier did not have an opportunity to conduct a general review of the consideration for the supply because two components of the consideration, which amounted to 48% of the total consideration, could not be reviewed.

Thus Australian courts appear to have interpreted that a general review would require a complete, or almost universal, review of the consideration for the supply; anything short of this could be a contract with no opportunity to review.

Many agreements may contain contract terms and conditions which can be varied subject to mutual consent at any time, with no direct reference to pricing.

Such clauses could be viewed as general in nature, merely restating the position at contract law as to the right of the parties to seek to vary the agreement at any time via mutual consent. If the consideration, under such a contract were to be varied it would most likely give rise to a new agreement altogether (rather than be a general review of the consideration).

Such a contract does not have provision for the supplier to conduct a general review of the consideration until there is mutual consent from both parties to do so, until such point there will be no opportunity to review the consideration.

REVIEW OPPORTUNITY

Once a contract satisfies the above five criteria, it will be zero rated for the period of five years or until a review opportunity[14] arises for the supplier under the contract (either acting alone or with agreement with one or more of the other parties to the contract) to;

i) Change the consideration directly or indirectly because of the imposition of GST

This implies that a contract with specific GST clause which imposes directly on the recipient a duty to pay GST or a contract which allows the amount of goods/services supplied to be reduced because of GST would

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[10] *Subsection 187(3) (a) Goods and Services Tax Act 2014*

[11] *Refer to paragraph 49, example 10 of the GST Guide on Transitional Rules*

[12] *FC of T v DB Rreef Funds Management LTD 2006, AFC*

[13] *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd 2006 ATC 4363*

[14] *Subsection 187(3)(b) of the Goods and Services Tax Act 2014*

provide a review opportunity. However, it would likely exclude a clause which allows for a change in contract price due to the consumer price index (CPI). An increase in the contract price due to CPI does not constitute an opportunity to review directly or indirectly because of the GST, as the change would not be predominately due to GST but to a range of factors.

ii) Conduct on or after the GST effective date a general review, renegotiation or alteration of the consideration; or

This would likely include market review clauses or clauses enabling payment to be renegotiated to reflect changed market conditions; as the market value post GST would be inclusive of GST, such clauses would provide for a review opportunity. [15] The main difference between 'market' and CPI reviews is that CPI probably reflects GST exclusive pricing, whereas 'market' reflects GST inclusive pricing.

iii) Conduct before the GST effective date a general review, renegotiation or alteration of the consideration that takes into account the tax.

If the opportunity to review the consideration occurs before 1 April 2015 then no zero rating relief would apply. This would be the case for contracts which allow the supplier at any time under the terms of the contract to review the consideration.

The outcome of the above is as follows: a commercial property owner enters into a 15 year lease signed on 1 July 2010 to 30 June 2025. The contract is a contract with no opportunity to review but contains a clause for a market review to be conducted on 1 July 2018; the time of the first review opportunity.

Thus the lease payments received from 1 April 2015 till 1 July 2018 will be zero rated; subsequent lease payments received on and after 1 July 2018 will be subject to 6% GST.

WHAT HAPPENS AFTER 1 APRIL 2020?

Where the contract with no opportunity to review duration is more than five years after 1 April 2015, the supplier will be liable for GST on the payment received from 1 April 2020.

This will result in reduced income for the supplier who now has to account for GST of 6/106 of the payment received. The recipient on the other hand will have a 'windfall' being now entitled to claim input tax of 6/106 of the payment made, as the supply will now be a standard rated supply to them from 1 April 2020. This is of course an inequitable situation for the unfortunate supplier.

In Australia this was overcome by granting suppliers a statutory right to adjust the consideration of the supplies under the agreement to add GST after the five year grace period.

KEY AREAS FOR REVIEW

There will be businesses that have entered into long-term contracts which will span the introduction of the GST on 1 April 2015. The parties have agreed to a price for the supply under the contract.

With the introduction of the GST, the supplier may be unable under the terms of the contract to recover the GST from the recipient (purchaser). It would be unfair to impose GST liabilities on the supplier in such instances.

To overcome this, the transitional rules enable supplies made under contracts entered before 1 April 2013 to be zero rated for 5 years or until the first opportunity to review (whichever is earlier), if certain conditions are met. This would alleviate any adverse GST consequences.

In the opinion of the authors, to reduce costs to businesses post GST introduction, the criteria for

non-reviewable contracts should be amended as follows:

(a) The contract must be entered into on or before 25 October 2013; and
(b) The supply is made pursuant to a contract which has no opportunity to review.

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[15] *Orti-Tullo & Anor v Sadek & Anor [2001] NSWSC*

GST COMPLICATIONS OF THE TRAVEL AND TOUR INDUSTRY

Kenneth Yong Voon Ken

Beautiful beaches. Lush landscapes. Holiday hideaways.

These are some of the images that spring to mind when thinking about 'Travel and Tour' – a colourful industry capable of mobilising millions of people in the spirit of "Visit Malaysia Year", while generating enormous multiplier effects that contribute significantly to the economy.

GST COMPLICATIONS

However, beneath all the glitz and glamour, the 'Travel and Tour' industry in Malaysia – like any other industry – faces its set of challenges when implementing Goods and Services Tax (GST), some of which are highly complicated, even contentious.

In general, some of the GST "problem areas" for Travel / Tour agencies include:

(a) Many different GST classifications for 'products' offered
(b) Difficulty in distinguishing between "Principal" vs "Agent"
(c) GST transparency and its related problems
(d) Tour price impact of transitional issues
(e) Reporting of 'Imported Services' by smaller tour operators
(f) Interaction of 'GST Guide on Travel' and rules on 'Designated Areas'

MULTIPLE GST CLASSIFICATIONS

Much of the GST complications arise from the fact that there are so many "products" that can be sold by a 'Travel or Tour agency', whereby different products have different GST classifications. A summary of various "products" and their GST classifications are shown in **Figure 1** (non-exhaustive list).

Given the diversity of the GST classifications for various 'products' on offer, familiarising with the myriad of GST treatments is the first challenge that all GST-registered Travel / Tour agencies must grapple with.

For a start, all in-house personnel involved in sales, reservations, billing and accounting must be properly trained on the various GST treatments, and the entire operations must be supported by a capable IT infrastructure – a task that larger Travel / Tour agencies may be well-poised to pull off, but will certainly present some challenges to small-medium operators.

'COMPOSITE' VS 'MIXED' SUPPLY

The situation is further aggravated by the fact that a 'Tour' – although separately identifiable as a "product"

– is in truth, a combination of various sub-items woven together into a comprehensive package. In GST jargon, this is technically known as a "Composite Supply".

Some sub-items may be zero rated while others are standard rated, but the 'Tour' as a whole may carry a different GST charge from the sum of its parts.

"Inbound" tours, for example, are standard rated (6% GST is charged on the full price of the tour) despite the fact that one of its major components – air ticket from overseas to Malaysia – does not carry any GST.

Adding to the confusion are multi-destination tours (also referred to as "regional tour packages") which are to be treated differently from other tours.

'Frequently Asked Question No 13' of the GST Guide on Travel Industry (version 10.8.2014) demonstrates that "regional tour packages" are required to be decomposed, and different GST treatments apply to local portions and overseas portions of the said tour. (Technically, "regional tour packages" are regarded by the RMCD as "mixed supplies" in GST terminology).

Given such complexities, Travel / Tour agencies must learn the intricacies of the various GST classifications in order to correctly treat certain items as separable items (single GST treatment), others as "composite supplies" (single GST treatment for the package), while yet others as "mixed supplies" (multiple GST rates for various sub-components of a package) – a meticulous task involving an evaluation of all tour products on offer.

SIMILAR ITEMS – DIFFERENT GST RATE

Another problem directly arising from the diverse "products" offered by Travel / Tour agencies is: Items may appear very similar but actually carry different GST treatments. **Figure 2** presents certain 'similar' items whose GST treatments are divergent.

Flights and tours appear similar enough, but flights from overseas into Malaysia are zero rated, while tours involving travel from overseas into Malaysia are standard rated. This divergence in treatment seems the more pronounced when considering that the former (flight) is a natural prelude to the latter (tour).

Similarly, cruise to an International Port is zero rated, but 'cruise to nowhere' in international waters is standard rated; giving rise to GST treatments that seem at odds with each other as both cases involve crossing international waters.

Clearly, the subtle differences above have significant GST impact. Thus, staff involved in billing or price-setting must be properly trained to get it right first time and avoid

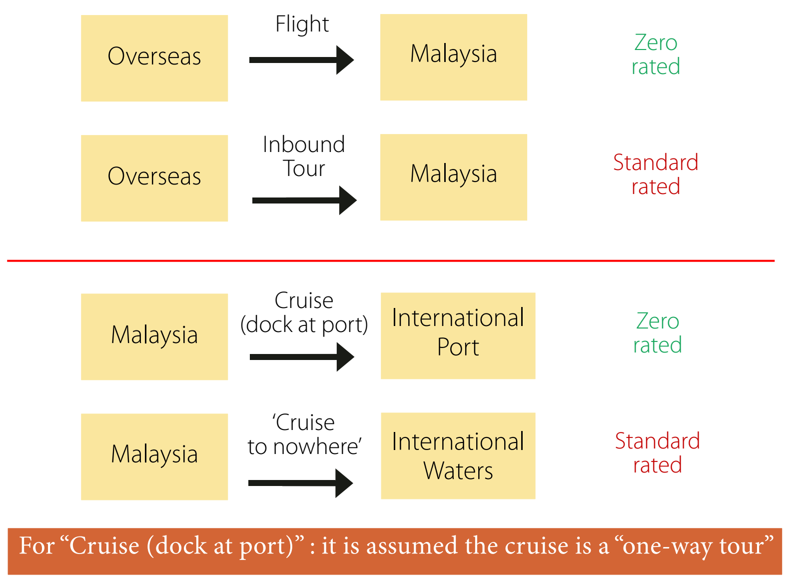
Figure 1: Selected Travel / Tour products and their GST treatments

TOUR PACKAGES	GST RATE
Sale of Inbound Tour Package to local or foreign tourist	SR
Sale of Outbound Tour Package to local or foreign tourist	ZRE
Sale of Haj / Umrah tour	ZRE
Air ticketing service fee (for international and domestic flights)	SR
COMMISSION INCOME	
Commission from local hotels	SR
Commission from other Local Tour Agents	SR
Commission earned by Local Tour Agent assisting Foreign Agent to sell Outbound Tour Package (*)	ZRE
FLIGHTS	
Domestic flight	SR
International flight	ZRE
Domestic flight which is part of international journey	ZRE
NON-AIR TRANSPORTATION	
Rail (KTM, LRT, MONORAIL & ERL)	ES
Excursion bus for Domestic Tour	SR
Taxi	ES
Airport Taxi	SR
Cruise (local destination)	SR
OTHERS	
Service fees charged to other Local Tour Agent for arranging Outbound Tour	SR
Commission for arranging Travel Insurance for Outbound Tour	SR
Commission for arranging Travel Insurance for Inbound Tour	SR
Compensation for changing dates	OS

SR = Standard Rated
ZRE = Zero Rated (Export)
ES = Exempt Supply
OS = Out-of-Scope

(*) Assumption: Such services are under a contract

Figure 2: Similar transactions - Different GST treatments



embarrassing corrections or expensive penalties.

After all, when GST is over-charged, the Travel / Tour agent suffers damage to reputation, possibly even loss of business from unforgiving customers. But worse still, where GST is under-charged, the Travel / Tour agent suffers additional GST exposure and potential penalties for erroneous reporting.

It must also be pointed out that charging of GST on a zero rated supply is an offence under Section 33(1)(a)(ii) of the Goods and Services Tax Act 2014 (the "Act"), even if the GST erroneously collected is paid over to the RMCD.

"PRINCIPAL" VS "AGENT"

In the Travel and Tour industry, every operator is an "agent" – a generic term that is ubiquitous and commonplace in the industry, but one that seems misplaced (even confusing) when examined from a GST-perspective.

This is because under GST rules, all business operators are broadly categorised into "GST Principal" and "GST Agent" – the latter being clearly different from the "agent" terminology so commonly embraced in the Travel / Tour industry. Unfortunately, the distinction between "GST Principal" and "GST Agent" may not always be clear-cut.

A "GST Principal" is a business operator who assumes risks and rewards for a supply of goods or services. Accordingly, a "GST Principal" recognises Sales and Purchases, and can issue a Tax Invoice (for sales) of goods / services made.

Conversely, a "GST Agent" merely facilitates a sale, but does NOT actually supply the underlying goods or services. Accordingly, a "GST Agent" only recognises "commission income" (or any other equivalent term). The actual Sales of the underlying item does NOT form part of the taxable turnover of the "GST Agent", but instead, should be recognised in the books of the "GST Principal".

Accordingly, Travel / Tour operators must be able to ditch their operational "agent" label and correctly re-categorise themselves into either "GST Principal" or "GST Agent" on a transaction by transaction basis. This has implications for the following:

(a) *GST Registration Threshold of RM500,000;*
For a GST Agent, only "commission income" (or an equivalent label) should be counted towards the RM500,000 threshold for GST-registration purposes. The actual Sales of the underlying item are to be ignored (already counted in the books of the GST Principal).

(b) *Charging of GST in Tax Invoice;*
Rightfully, it is the GST Principal who charges GST (if any) on a supply of goods / services. The GST Agent can only charge GST on "commission income" (or equivalent term) and NOT on the actual Sales of the underlying goods / services.

TRANSPARENCY AND PROFIT EXPOSURE

Separate, but not unconnected with the above, is the issue of revealing the ticketing fee (profit margin of a Travel agent) in the Tax Invoice – a highly contentious and controversial issue for the industry.

The GST Guide prescribes that an international air ticket is zero rated. But the same Guide also stipulates that all ticketing fee / service fee, regardless of destination, is standard rated. This means a Travel agent assisting a tourist to buy an international air ticket has to separately treat:

(a) International air ticket as zero rated; and
(b) Service Fee for booking the air ticket as standard rated.

By extension of the above, the Travel agent would be compelled to separately disclose the service fee (essentially the Travel agent's profit margin) in order to charge the 6% GST thereon in the Tax Invoice.

This effectively means revealing the Travel agent's profit margin for all to scrutinise – an outcome that is quite understandably, distasteful for Travel agents.

TICKETING FEE AS PART OF TICKET PRICE

Naturally, this has led to a re-interpretation of the 'GST Guide on Travel Industry' to explore whether the selling price of an air ticket (inclusive of the Travel agent's profit margin) can qualify for zero rating, and thus, providing affected Travel agencies an escape route from exposing their profit margins to their customers and competitors.

Preliminary indications from the RMCD are that such re-interpretations will cause the ticketing fee / service fee for international air tickets to slip through the GST net, resulting in loss of revenue for the RMCD. However, this matter remains unresolved as at the time of writing.

TOUR PRICE AND TRANSITIONAL RULES

For most businesses, GST will only truly impact them upon actual implementation on 1 April 2015. However, no such luxury is given to the Travel / Tour industry which must already incorporate GST into its price-setting, specifically for selected tours sold currently but travel / tour dates occur on or after 1 April 2015 (herein called "transitioning tours").

The problem lies with the Transitional Rules on Time of Supply: GST is triggered if the travel / tour dates fall on or after 1 April 2015. But tours sold before GST implementation date are not allowed to carry a 6% GST rate. So how can the tour operators charge GST on 'transitioning tours' where:

- sales invoice issued before 1 April 2015; but
- tour occurs on or after 1 April 2015?

For transitioning tours that are standard rated (i.e. inbound tours) or standard rated air travel (e.g. domestic air tickets), the Travel / Tour agent has to bear the GST portion (being '6/106' of the selling price of the tour) and pay GST to the RMCD in the first Taxable Period (presumably the period covering April 2015) following the Transitional Rules of GST.

This means Travel / Tour operators must re-price their inbound tours to factor-in the GST into the selling prices for such transitioning tours. Travel / Tour agencies who fail to set a GST-inclusive price will automatically see their profit margins slashed by the fraction '6/106' (approximately 5.66%) as they need to bear the GST that was not passed on to their customers.

IMPORTED SERVICES

Arguably one of the most onerous issues for smaller tour operators is 'Imported Services'. This can happen when a foreign tour agent introduces tourists for inbound tours, and accordingly, charges 'commission' for such introductory services (the "imported service").

The local tour operator is required to "self-charge" GST on the amount paid to the foreign tour agent and "self-report" this GST. This rule applies even if the local tour operator is NOT GST-registered, forcing even micro tour operators to be vigilant of GST on imported services.

Where a local tour operator is GST-registered, it will be able to recover the amount of "self-charged"

GST as Input Tax Credits – thus, not suffer any net GST.

However, a local tour operator who is NOT GST-registered cannot recover any Input Tax Credit, and so being, will suffer actual GST outflow on the GST "self-charged" on imported services. The relevant form to be used by a non-registered local tour operator for reporting imported services is Borang GST-04.

DESIGNATED AREAS

The islands of Langkawi, Labuan and Tioman have been granted the title "Designated Areas" which, beyond a mere geographic reference, has a major tax advantage: GST is not chargeable for goods and services provided entirely within these islands – giving insular restaurants, hotels and retail outlets a cost-advantage for tourists.

Unusually, this tax break brings with it a fair degree of confusion upon interacting with other GST guides.

Firstly, the GST Guide on Travel Industry (version 10.8.2014) seems to provide a preliminary contradiction to the tax-sparing principle of "Designated Areas".

Following Para 14 of the Guide:

"Optional tours … to be consumed or enjoyed in Malaysia are subject to GST at a standard rate e.g. Tioman Island Tour.". This may appear contradictory to Section 155 of the GST Act 2014, but the GST Guide on Designated Area (version 11.11.2013) may offer some clarification. Para 9 states: "… services supplied from Malaysia to designated area are subject to GST as they are local supplies".

Thus, the interaction of the two Guides suggests that tours which originate from Malaysia into a "Designated Area" may still carry a GST charge – regardless of whether the tour operator is based in a "Designated Area" or not.

Secondly, there may be a supposition that tour agencies with head offices based in a "Designated Area" will derive a GST-savings, translating to a pricing advantage that will displace other 'external' tour operators.

However, Section 157 of the Act stipulates that "tax shall be charged on all goods or services supplied within Malaysia by a taxable person whose principal place of business is located in a designated area", thus clarifying that even head offices in a "Designated Area" must still follow the 'normal rules' of GST when making supplies in non-designated areas.

Tour operators within and outside "Designated Areas" need to thoroughly examine the (admittedly complicated) GST rules to ensure correct treatment of tours involving Langkawi, Labuan and Tioman. Further clarification by the RMCD through revised GST Guides may also help dispel such ambiguity.

CONVENTIONAL GST SOFTWARE

Off-the-shelf GST software – which is envisaged to be the staple for many small-medium Travel and Tour agencies – will undoubtedly ease the burden of GST compliance, but such software carry one major drawback: settings that are more adapted for a trading / retail environment than for Travel / Tour.

One such setting to view with caution is the automatic zero rated designation for an overseas customer. Under ordinary circumstances, sales to an overseas customer will enjoy zero rated status, there being a presumption that goods or services are exported. Thus, generic GST software may automatically assign zero rated status to a Tax Invoice carrying an overseas customer address.

However, for the Travel / Tour industry, this conventional wisdom fails miserably. All inbound tours have been mandated as standard rated, despite the fact that they mostly involve overseas customers (tourists). Thus, using off-the-shelf GST software without proper customisation may cause the Travel / Tour operator to wrongly (and unknowingly) apply zero rated status to tourists on an inbound tour – an outcome with disastrous consequences for the Tour operator.

CONCLUSION

Unlike a McDonalds' menu where every item on display is subject to GST at standard rate of 6%, Travel / Tour operators have it tough. Each of their (varied) outputs may carry different GST rates, thus complicating the GST-adoption and invoicing process.

Aside from facing contentious issues such as exposure of their profit margins (ticketing service fee), Travel / Tour agencies will be racing against the clock learning up the myriad of GST classifications, customising necessary GST software, and re-evaluating the GST-inclusive pricing of all standard rated travel / tour currently on offer (but delivery in the GST-era).

While tour packages will continue to be sold in the months leading up to 1 April 2015, it is somewhat ironic that Travel agencies themselves will probably wave goodbye to the prospect of vacation at beautiful beaches, lush landscapes and holiday hideaways as GST preparations predominate their near-term itinerary.

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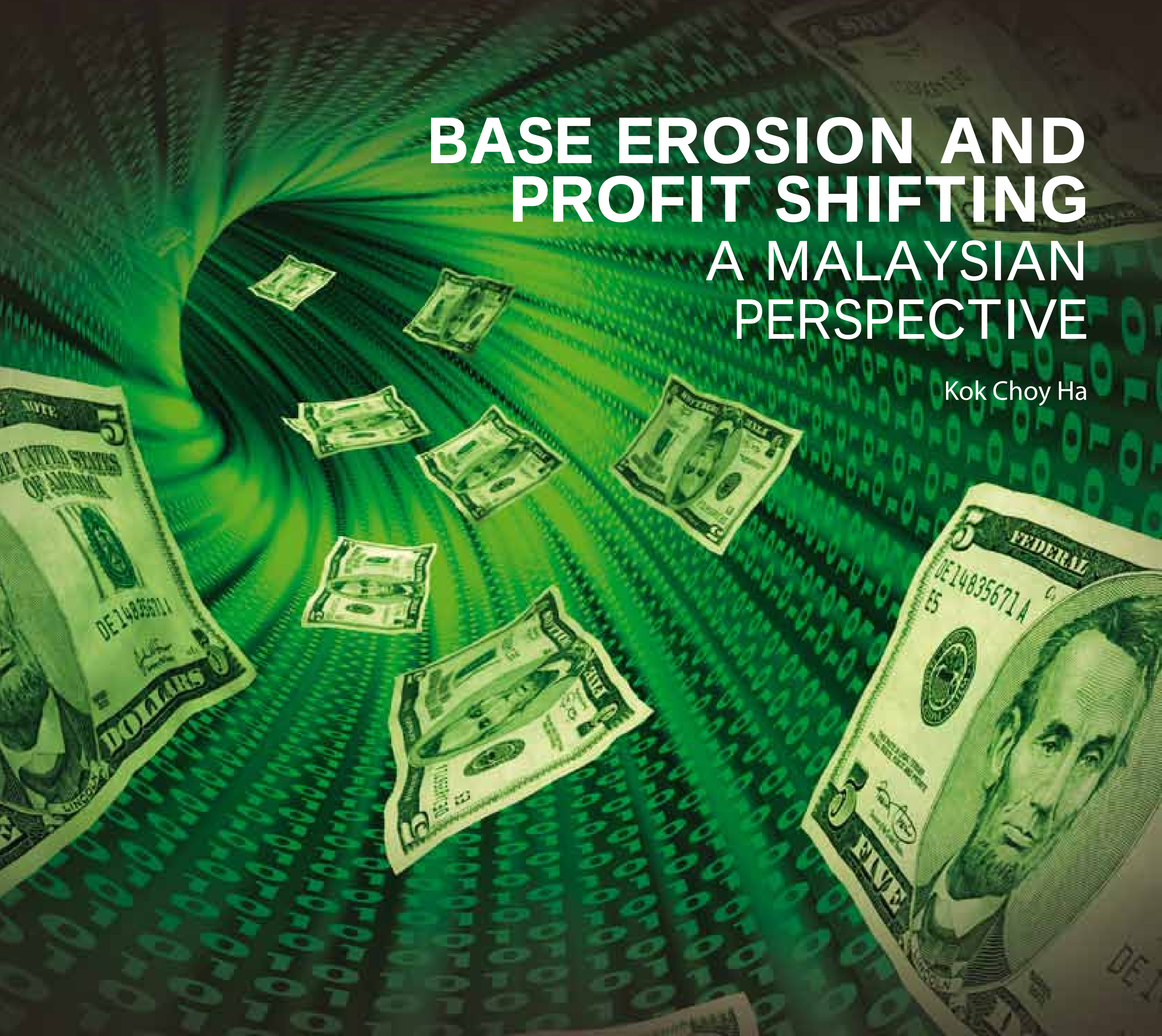
Information contained in this article is based mainly on the GST Guide on Travel Industry (version 10.8.2014). As GST guides may be revised, it is possible that the eventual GST treatment may be different from that discussed.



BASE EROSION AND PROFIT SHIFTING

A MALAYSIAN PERSPECTIVE

Kok Choy Ha

THE ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT'S (OECD) CENTRE FOR TAX POLICY AND ADMINISTRATION EXPLAINS THAT BASE EROSION AND PROFIT SHIFTING (BEPS) "REFERS TO TAX PLANNING STRATEGIES THAT EXPLOIT LOOPHOLES IN TAX RULES TO MAKE PROFITS DISAPPEAR FOR TAX PURPOSES OR TO SHIFT PROFITS TO LOCATIONS WHERE THERE IS LITTLE OR NO REAL ACTIVITY BUT WHERE THEY ARE LIGHTLY TAXED, RESULTING IN LITTLE OR NO OVERALL CORPORATE TAX BEING PAID."[1]

Although BEPS is technically legal, it is almost unethical as BEPS schemes exploit the gaps in domestic tax laws of different countries, treaty provisions and international systems that provided the opportunities to eliminate or significantly reduce taxes.

Base erosion and profit shifting has been around for ages, but it has not received much prominence internationally until recently when high profile cases involving Google, Starbucks and Microsoft generated intense media scrutiny that, commanded unprecedented attention of top level politicians and created immense public furore. This backdrop impelled the leaders of the G20 countries to mandate the OECD to develop an action plan to combat BEPS. On 19 July 2013 OECD released the Action Plan on Base Erosion and Profit Shifting[2] (Action Plan) which comprised of fifteen action points.

Base erosion and profit shifting too is not a new phenomenon in Malaysia. The Inland Revenue Board of Malaysia (IRBM) has its fair share of cases involving profit shifting. In the year 2013, receipts from income tax contributed 54.5%[3] of the total Federal Government Revenue, with corporate tax contributing 50.3% of that amount. BEPS, is therefore of significant concern for Malaysia which relies heavily on corporate tax as a source of income. Besides leakages in tax revenues, BEPS can undermine the sovereignty and integrity of the Malaysian tax system due to negative public perception which will inadvertently impact the voluntary tax compliance by good taxpayers.

BEPS is a pressing issue which affects most if not all countries with multinational companies (MNCs) presence in their jurisdiction. It needs immediate attention of tax administrators, including IRBM due to its magnitude and the increasing trend of profit shifting by MNCs. On the international front, IRBM has the privilege of being involved in both the OECD and United Nations (UN) meetings on BEPS. Malaysia's presence in the various Working Parties at OECD as well as in the UN Committee of Experts on International Co-operation in Tax Matters have not only given us quick access to comprehensive information on issues related to the BEPS Action Plan, but also allow views from a Malaysian tax authority perspective to be presented and considered.

BEPS issues that are of significant concern to Malaysia include:-

i. Excessive or unwarranted payments to foreign affiliates

The rampant use of intragroup service payment as a tool for profit shifting is not unique to Malaysia and is a big issue in many developing countries. Cross border payments that create BEPS concern in Malaysia include:-

a) Management fees and fees for low value added services (LVAS);
b) Technical fees including payment for research and development services;
c) Royalty payment for intellectual properties;
d) Interest deductions and other financial payments such as guarantee fees; and
e) Other types of payments between related enterprises (Example, payment for insurance premiums)

Malaysia being the payor of such fees is greatly susceptible to the risks of BEPS via these kinds of payments as these payments are generally tax deductible when computing taxable income of a company. In most cases, it is difficult to obtain full information to assess whether such payments commensurate with services received, or whether they are excessive or without substance.

IRBM has encountered cases of Malaysian tax base erosion through payments of interest on loans to tax havens. A company is usually financed through a mixture of debt and equity. Excessive interest payments can arise if the company is thinly capitalised, or the interest is overpriced. Although Thin Capitalisation provision was introduced under Subsection 140A(4) of the Income Tax Act in 2009, its implementation is deferred until the end of 2015.

In cases where payments are excessively priced or made to favourable tax jurisdictions, amongst counter measures that can be considered include the introduction of limitation of deduction rule. Reference can also be made to best practices of countries which have implemented specific measures to handle payments to preferential tax regimes as well as the guidance prepared by OECD on how to limit base erosion via financial payments as addressed in Action 4, once delivered.

To counter unwarranted payments

for low value added services, a simplified mechanism such as a cap or safe harbour can be considered. However, this is only implementable if "low-value-added services" are clearly defined and identified and (preferably) agreed upon by jurisdictions where the provider as well as recipient of services is situated in order to avoid double taxation.

ii. Inappropriate / low return for services rendered

Often encountered are cases where, the compensation does not commensurate with the functions performed and the risks borne by the local entities. In such cases, local entities are inappropriately or at times not compensated for services rendered. Examples of some of the concerns encountered include:-

- Low compensation for routine service distribution, manufacturing or similar types of common business functions.
- No compensation given for services rendered or sharing of technical know-how e.g. no compensation for marketing activities performed to capture the local market
- No mark-up for services rendered e.g. affiliates are only charged at cost for administrative services without mark-up
- Low compensation for significant research and development functions performed.

iii. Profit shifting through supply chain restructuring that contractually reallocates risks and associated profits to affiliates in tax friendly jurisdictions.

Globalisation and rapid technological changes have resulted in restructuring of MNC business models and operation resulting in a shift from traditional business models to new business global value chain model or centralised business model. Such business models make it easier for MNEs to shift profits between different tax jurisdictions, thus giving rise to tax planning opportunities. With this ability to contractually shift risk between members of the group, MNEs can plan where their profits are reported. Malaysia has its fair share of cases of supply chain restructuring where risks are contractually transferred out, resulting in profits being shifted from a local company to a regional office overseas.

However, testing the arm's length nature of the restructuring require extensive information, technical skills and sophisticated analysis due to the interaction of numerous tax rules.

In this regard, the Action Plan aims to provide guidance to assure that the transfer pricing outcomes are in line with value creation.

iv. Treaty Abuse

While bilateral treaties are effective in preventing double taxation, concerns arise over the use of 'treaty shopping' to obtain treaty benefits in situations where such benefits are not intended. Payment to non-treaty countries can be routed to treaty partners to obtain treaty benefits. Thus, aside from treaty measures such as the limitation of treaty benefit rule, existing domestic anti-abuse provisions must be effective enough and properly applied to curb such abuse.

Malaysia in its endeavour to combat BEPS, is faced with numerous challenges including:-

i. Information Asymmetry /Limitation to access of Information

(a) *Lack of information;*
This is due to the difficulties in obtaining the relevant information from taxpayers especially regarding the business operations of the MNC, their foreign affiliates, the global value chain, and financial information of affiliates or information regarding setting of transfer prices done by overseas affiliates.

(b) *Lack of transparency on the part of the MNC in disclosing relevant information on international dealings necessary for understanding the global business;*

Such lack of transparency/ information and poor compliance can hinder the ability to adequately address the risk of BEPS, and to effectively challenge the taxpayer's arrangement.

Therefore, there is a need for effective rules that require MNCs to supply relevant information to the tax administrators. Action Point 13 calls for re-examination of transfer pricing documentation and development of a common template for reporting purposes. It is important that the new reporting structure require mandatory disclosure of relevant information so that tax administrators will be able to gain access to adequate and much needed information to apply their transfer pricing rules with enhanced transparency.

Also with regard to transparency, reference can be made to recommendations arising from Action 12 which requires mandatory disclosure by taxpayers, for aggressive tax planning. Alternatively, a more approachable programme such as co-operative compliance to assess information in an amicable environment can also be considered.

Availability and access to information via cooperation between tax administrations is critical in the fight against tax evasion and a key aspect of that cooperation is exchange of information. Malaysia has endorsed the Declaration on Automatic Exchange of Information in Tax Matters during the Meeting of OECD Council at Ministerial level on 6 May 2014. This new standard on automatic exchange of information will ensure that more information will be made available more easily and can be obtained on a timely basis and at a lower cost.

ii. Capacity and Resource Limitation

(a) *Lack of technical expertise of tax officials to identify and deal with profit shifting issues;*
Experienced and highly skilled officials are needed to handle BEPS issues as international cross border tax schemes normally involve interplay of complex international tax laws, tax treaties and local laws. These officials will also have to deal with professionals who are highly experienced in creating tax schemes.

(b) *Insufficient number of personnel to deal with high risk cases and AEOI;*
Besides tax audit and investigations, strengthening capabilities in other areas in anticipation of the new global development of Automatic Exchange of Information also needs to be considered.

iii. Adequacy of existing legislations to address BEPS

To ensure that all potential BEPS risks are addressed, the existing Sections 140 and 140A, the Income Tax Act 1967 and relevant rules may need to be re-examined. Attention will be given towards addressing loopholes or gaps as well as interaction of our domestic legislation with international rules and treaty provisions that provide opportunities for BEPS.

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Summary

To keep abreast with the changing landscape of the development of BEPS, it is probable to expect relevant amendments and changes to other domestic legislations particularly those related to transfer pricing and treaty provisions, to effectively combat BEPs in line with the OECD/G20 recommendations.

Undoubtedly, the BEPS initiative will trigger a change in taxpayers' behaviour and actions when structuring their tax planning strategies. On its part, IRBM will continue its efforts in ensuring capacity issues are addressed by providing training and resources in relevant areas, in understanding BEPS behaviours, as well as harmonising its actions with development globally, to effectively handle the BEPS menace.

References:-
1 http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm
2. http://www.oecd.org/ctp/BEPSActionPlan.pdf
3. http://www.treasury.gov.my/pdf/economy/er/1314/jp6_3.pdf

This column only covers selected developments from countries identified by the CTIM and relates to the period 16 August 2014 to 15 November 2014.

CHINA (PEOPLE'S REP.)

Tax base of business tax on bond transactions clarified

On 28 August 2014, the State Administration of Taxation (SAT) issued Gong Gao [2014] No. 50 regarding the determination of the tax base of business tax on bond transactions, which takes effect from 1 October 2014.

The tax base of business tax is equal to the sale proceeds minus the purchase price (price paid for acquisition of the bonds minus all the income (including interest) received in the holding period of the bonds.

For financial enterprises engaging in the bond trade are required to calculate the tax base of business tax in accordance with this announcement, which also applies to the unsettled tax issues that occurred before the announcement's issuing date. The purchase price is calculated by subtracting all the income received in the holding period from the acquisition price.

Threshold of VAT and business tax exemption increased for small/low-profit enterprises and sole traders

To boost the growth of small and low-profit enterprises and individual entrepreneurs in China, the Ministry of Finance (MoF) and the SAT jointly issued a notice on 25 September 2014 (Cai Shui [2014] No.71). According to the notice, a small-sized VAT taxpayer is exempt from VAT and a business tax taxpayer is exempt from business tax, if the monthly sale proceeds do not exceed CNY30,000 (including CNY 30,000).

This increase of the exemption threshold applies between 1 October 2014 and 31 December 2015.

New rules on deduction and accelerated depreciation of fixed assets for small/medium-size enterprise (SME)

The MoF and SAT jointly issued Cai Shui [2014] No. 75 on 20 October 2014 to implement the new measures on the deduction and accelerated depreciation of fixed assets for SME's. The announcement retroactively applies from 1 January 2014 and its content is summarised below:

(a) *Research and development (R&D) activities* – for machinery and equipment that is purchased after 1 January 2014 for development R&D purposes and the value of which is less than CNY1 million may be brought into account for the deduction as cost in the current accounting period. For machinery and equipment which exceeds CNY1 million, the (prescribed) depreciation period can be reduced by 60%. The taxpayer may also opt for the doubling of the (prescribed) periodic depreciation.

(b) *Fixed assets worth less than CNY 5,000* – a deduction at cost can be taken in the current accounting period if the value of a single asset is less than CNY5,000.

(c) *Encouraged industries* - The depreciation period of the fixed assets that are purchased after 1 January 2014 by the encouraged industries may be reduced by 60%; or the taxpayers may opt for the doubling of the (prescribed) periodic depreciation regardless of the investment amount. The encouraged industries include pharmaceutical manufacturing; special equipment manufacturing; transportation equipment manufacturing (i.e. railways, shipyards, aviation, and others); electronic manufacturing (i.e. computers, telecommunications, and other digital products); measuring instrument manufacturing; and software and information technology.

Resource tax on coal amended and reintroduction of import duty on coal products

The State Council (SC) decided to amend the resource tax on coal on 29 September 2014. As from 1 December 2014, the tax base of resource tax on coal will be changed to a system based on the price instead of quantity. The exact tax rate will be determined by the provincial governments within a prescribed range. At the same time, the SC urged the local governments to repeal the local (illegal) fees and charges on the coal mining

industry.

Also, the current import duty on the following coal products is zero, whereby the Committee on Customs Tariffs of the SC has decided to reintroduce import duty under Shui Wei Hui [2014] No. 47:

- 3% on anthracite;
- 3% on coking coal;
- 6% on other bituminous coal except coking coal;
- 5% on other coal; and
- 5% on coal-based fuels such as briquette, etc.

The new tariffs apply from 15 October 2014.

Resource tax on oil and gas amended

The MoF and the State Administration of Taxation (SAT) jointly issued a circular regarding the amendments to the resource tax on oil and gas on 9 October 2014 (Cai Shui [2014] No. 73). The amendments, which apply from 1 December 2014, are mainly concerned with the fee for the mineral resource compensation, higher rate for resource tax, and tax preferential treatment available for crude oil and natural gas. The content of the circular Cai Shui [2014] No. 73 is summarised below.

(a) *Rate for crude oil and natural gas;*
The resource tax rate for crude oil and natural gas will be increased from 5% to 6%, and the mineral resources compensation fees for crude oil and natural gas will be exempted.

(b) *New tax preferential treatment for crude oil and natural gas;*
- The crude oil and natural gas for heating in the transportation of heavy oil within the oilfield will be exempt from resource tax.
- The resource tax rates on heavy oil, high pour-point oil and natural gas with a high sulphur content will be reduced by 40%.
- The resource tax on tertiary oil recovery will be reduced by 30%.
- The resource tax on fields with a low abundance of oil and gas will be temporarily reduced by 20%.
- The resource tax on deepwater oil and gas fields will be reduced by 30%.

In cases where two or more terms of the preferential treatment are met, only one can be enjoyed and claimed.

(c) *Tax administration on joint ventures with foreign companies in oil and gas fields;*

For contracts concluded before 1 November 2011 by joint ventures with foreign companies in oil and gas fields, the fees imposed on mining activities shall be continually paid and the resource tax is exempt. For contracts newly concluded after 1 November 2011, the resource tax applies and the fees on mining activities are exempt.

Stamp duty exemption for contracts on loans to small and micro enterprises

The MoF and the SAT jointly issued Cai Shui [2014] No. 78 on 24 October 2014 on stamp duty exemption. According to the notice, the contracts on loans to small enterprises provided by financial institutions will be exempt from stamp duty in the period between 1 November 2014 and 31 December 2017.

A small enterprise (as defined in Gongxinbu Lianqiye [2011] No. 300) of the Ministry of Industry and Information, is one the business revenue of which does not exceed CNY 3 million on an annual basis, and the number of the personnel is less than 20. An enterprise that falls under that threshold, in terms of the business revenue and personnel, is defined as a micro enterprise.

Tax exemption for capital gains derived by Qualified Foreign Institutional Investor (QFII) and Renminbi Qualified Foreign Institutional Investor (RQFII)

- The MoF, the SAT and China Securities Regulatory Commission jointly issued Cai Shui [2014] No.79 on 31 October 2014 regarding the enterprise income tax exemption for capital gains derived from disposal of shares or other equity interest sourced in China by the QFII and RQFII.

- The exemption applies only to the gains derived from 17 November 2014 onwards. Gains derived before that will remain subject to a 10% withholding tax. The notice applies to the QFIIs and RQFIIs which do not have a PE in China or have a PE but the gains derived are not connected with that PE.

HONG KONG

Directors' fees derived by taxpayer from overseas incorporated company listed in Hong Kong subject to salaries tax in Hong Kong

The Inland Revenue Board of Review (IRBR) recently published case D21/13 where it held that directors' fees derived by a taxpayer from an overseas incorporated company listed in Hong Kong were derived from Hong Kong and thus were subject to Hong Kong salaries tax.

The facts are such that the taxpayer held his office as an independent non-executive director in the company and received a director's fee of HKD120,000 for each of the years of assessment (YAs) 2005/06 and 2006/07. The company was incorporated as an exempted company with limited liability outside Hong Kong. It was registered as an overseas company in Hong Kong under the Companies Ordinance and its shares were listed on the Stock Exchange of Hong Kong Limited. The company has its principal place of business, Branch Share Registrar and Transfer Office, in Hong Kong and its head office was located in mainland China. The company carried on a business of investment holding at the Hong Kong office. The board meetings of the company for the YAs 2005/06 and 2006/07 were usually conducted by telephone-conference in Hong Kong as the majority of the directors of the company were mainland China residents who were working at the company's head office. The taxpayer took the view that both the

centre of management and residence of the company were located in mainland China and therefore, the directors' fees received were sourced outside Hong Kong and should not be subject to salaries tax.

The IRBR disagreed and held that the company was resident in Hong Kong and the directors' fees derived by the taxpayer were derived from Hong Kong and therefore subject to Hong Kong salaries tax based on the following observations by the IRBR:

- the office of a director is located in the place where the company is located rather than the place where such office is exercised;
- the test for a company's residence is not where it is registered but where its real business is carried on;
- the place of the board meeting of the company is in itself only a factor to consider. In this particular case, the factor of the "place of board meeting" is not so dominating for one to conclude that the place of management and control of the company was in mainland China; and
- irrespective of whether it is also resident elsewhere, the company was resident in Hong Kong by taking into account the following factors:

i. the main activities of the company in which the taxpayer held the office of his directorship were to maintain its status as a listed company in Hong Kong and to leverage on the Hong Kong banking and financial infrastructure to obtain corporate finance;

ii. the company maintained its principal place of business, Branch Share Registrar and the Transfer Office in Hong Kong;

iii. the company carried on a business of investment holding in Hong Kong;

iv. the company was listed in Hong Kong. The appointment of the taxpayer as an independent non-executive director of the company was to comply with and was governed by Hong Kong Listing Rules;

v. the annual general meetings of the company were held in Hong Kong;

vi. the company filed returns with the Companies Registry, employer's returns and Profits Tax Returns with the IRD; and

vii. the company employed staff, maintained bank accounts and had its accounts audited in Hong Kong

INDIA

◆ Notification issued to clarify "wholesale trading"

The MoF issued Notification No. 45/2014/F No. 500/1/2014-APA-II dated 23 September 2014 clarifying that where the variation between the arm's length price (ALP) determined under Section 92C of the Income Tax Act 1961 (ITA) and the price at which the international transaction or specified domestic transaction (transaction value) has actually been undertaken does not exceed 1% of the latter in respect of wholesale trading and 3% of the latter in all other cases, the transaction value shall be deemed to be the ALP for the financial year 2013-14 (i.e. 1 April 2013 to 31 March 2014).

The "wholesale trading" term was clarified to include an international transaction or specified domestic transaction of trading in goods that fulfills the conditions of purchase cost of finished goods is 80% or more of the total cost for such trading activities; and the average monthly closing inventory of such goods is 10% or less of the sales pertaining to such trading activities.

◆ Circular issued on approval of long-term bonds and rate of interest

The Finance (No. 2) Act 2014 amended Section 194LC (i.e. interest on foreign currency loan, paid by an Indian Company) of the Income-Tax Act 1961 (ITA) with effect from 1 October 2014. Consequent to the amendment, the concessional rate of withholding tax was extended to borrowings by way of any long-term bond, not limited to a long-term infrastructure bond. Further, the concluding date of the period of borrowing eligible for concession under Section 194LC, which was previously 1 July 2015, was extended to borrowings made before 1 July 2017. Thus, pursuant to the above changes, the approval of the Central government was further required in respect of each long-term bond issued and the rate of interest to be paid on such borrowing.

In order to avoid compliance burden on the borrower/issuer of bond, the Central Board of Direct Taxes (CBDT) with the approval of the Central government, via Circular No. 15/2014 (F.NO.133/50/2014-TPL) dated 17 October 2014, has provided for automatic approval of the Central government in respect of the issue of long-term bonds including long-term infrastructure bonds by Indian companies which satisfy the following conditions:

- the bond issue is at anytime on or after 1 October 2014 but before 1 July 2017;
- the bond issue by the Indian company should comply with the External Commercial Borrowings (ECB) regulations issued by the Reserve Bank of India (RBI);
- the bond issue should have a loan registration number issued by the RBI; and
- the term "long-term" means that the bond to be issued should have an original maturity term of three years or more.

Further, the Central government has also provided for automatic approval for interest rates which are within all-in-cost ceilings specified under the ECB regulations.

Lastly, the circular also clarifies that consequent to the amendment to section 194LC, the approval of the central government contained in Circular No. 7/2012 dated 21 September 2012, in so far as it applies to borrowings by way of a loan agreement shall be valid for the borrowings made on or before 30 June 2017 instead of 30 June 2015.

INDONESIA

Rules for electronic VAT invoicing issued

Following the plan for compulsory electronic VAT invoicing, the Directorate General of Taxation (DGT) issued rules to regulate the procedure for the making and reporting of electronic VAT invoices, pursuant to DGT Regulation No. PER-16/PJ/2014 dated 1 July 2014. The rules, which apply to VAT-registered taxpayers, stipulate the following:

(a) It is compulsory for the taxpayer to prepare electronic VAT\ invoices for:
- the supply of taxable goods and taxable services within the customs zone (article 4(1)(a) and article 4(1)(c) of the VAT Law); and
- the supply of taxable goods where the initial purpose is not for trade (article 16D of the VAT Law).

(b) There is exemption from the requirement for electronic VAT invoices for the supply of taxable goods or services from:
- a retailer as defined by article 20 of Government Regulation No. 1 of 2012;
- a retail shop that sells to foreigners, as defined by article 16E of VAT Law; and
- taxpayers who may use other documents instead of VAT invoices, e.g. tax payment receipts for the use of foreign intangible goods or receipt of supply of telecommunication services, as stipulated by article 13(6) of the VAT Law.

(c) The format and information disclosed in the electronic VAT invoice is basically similar to the non-electronic VAT invoice but with an electronic signature. The invoice must use the Indonesian Rupiah as the currency (the DGT provided a sample of an electronic VAT invoice through DGT announcement No. PENG-01/PJ.02/2014 dated 30 June 2014).

(d) In the case of invoice cancellation, the taxpayer issuing the invoice must cancel the electronic invoice by using the application provided by the DGT. If the information in the invoice is incorrect, the taxpayer may create a replacement invoice through the application system.

(e) Reporting of electronic VAT invoices is conducted via uploading to the DGT application and receiving the approval from the DGT for each invoice. Electronic VAT invoices without approval from the DGT are not considered VAT invoices. However, it is not compulsory to print a hardcopy of the electronic VAT invoice.

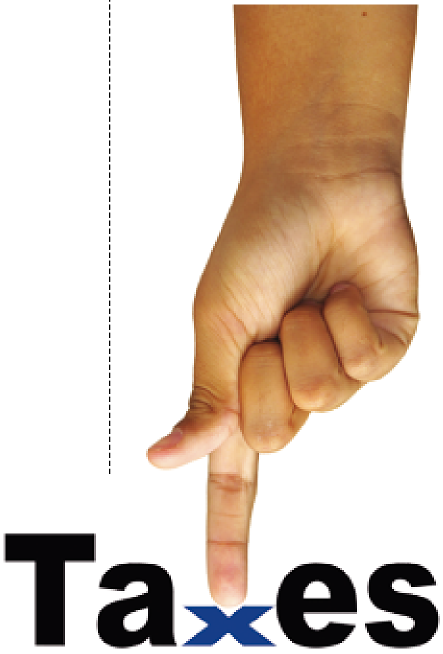
(f) For lost or damaged data in respect of an electronic invoice, the taxpayer can ask for the data from the DGT through the tax office where the taxpayer is registered, provided the data has been uploaded to the DGT application (DGT has provided procedures to request the data of electronic VAT invoices through DGT Circular Letter No. SE-21/PJ/2014 dated 20 June 2014).

(g) The taxpayer may also choose not to use electronic VAT invoices and use hardcopy VAT invoices instead in certain situations, e.g. during war, riots, natural disasters, strikes or fire. Thereafter, the data pertaining to the invoices must be uploaded to the DGT application.

Furthermore, pursuant to DGT Decision No. KEP-136/PJ/2014 dated 20 June 2014, 45 selected taxpayers are required to use electronic VAT invoices from 1 July 2014 and taxpayers within the jurisdiction of the regional office for large taxpayers, foreign investment, Jakarta, Java and Bali are required to use electronic VAT invoices from 1 July 2015.

Tax treatment for e-commerce

The Ministry of Trade disclosed its



plan to regulate e-commerce transactions for both domestic and cross border transactions, based on Law No. 7 of 2014 on trading, and its further plan is to issue a government regulation for e-commerce transactions.

The plan above is in line with the plan for taxing e-commerce transactions as disclosed by the Directorate General of Taxes (DGT) which issued a circular letter, SE-62/PJ/2013 dated 27 December 2013 (SE-62), to provide clarification on the tax treatment of e-commerce transactions for goods and services.

SE-62 clarifies the tax treatment, including compliance for income tax, VAT and sales tax for luxury goods, for e-commerce transactions (which are defined as the trading of goods and/or services through an electronic system). SE-62 provides examples of the tax treatment for different business models, i.e. online marketplace, classified ads, daily deals and online retail.

Under SE-62, an e-commerce transaction may be subject to withholding tax pursuant to Articles 21, 22, 23 and 26 of the Income Tax Law (ITL) or subject to final tax pursuant to Article 4(2) of the ITL, while the overall income of the e-commerce transaction may be subject to income tax pursuant to Article 15 or Article 17 of the ITL. Any person and company receiving services or goods in an e-commerce transaction is obliged to collect withholding tax.

For VAT purposes, an e-commerce transaction is subject to VAT and some issues need to be taken into account such as types of taxable services or goods provided, the taxable amount and the time of taxation which is related to when a VAT invoice has to be made.

SINGAPORE

Tax deduction for borrowing costs other than interest expenses

The Inland Revenue Authority of Singapore (IRAS) issued the second edition of the e-Tax Guide on Tax Deduction for Borrowing Costs other than Interest Expenses on 18 August 2014.

This update is to expand the list of deductible borrowing costs. With effect from the year of assessment (YA) 2014, the list of deductible borrowing costs as prescribed under the Income Tax (Deductible Borrowing Costs) Regulations 2008 will also include the following items:

- conversion/amendment fees: fees payable to the lender to convert the interest rate specified in the loan agreement which is applicable at the point of the conversion to a lower interest rate (prior to YA 2014, conversion fees referred to fees payable to the lender to convert the interest rate charged from a prime based rate to a lower snap rate); and
- front-end/back-end fees: fees payable to the lender either at the beginning or at the end of the term of borrowing and fees equivalent to the interest that the borrower would otherwise be required to pay to the lender under the loan agreement.

Tax treatment of director's fees and bonuses from employment

On 12 September 2014, the IRAS issued the second edition of the e-Tax Guide to clarify the tax treatment of director's fees and bonuses from employment.

The contents of the e-Tax Guide remain largely unchanged except for the following amendments:

- a company may claim a deduction for directors' fees and employees' bonuses only when its liability to pay such fees and bonuses actually arises; and
- companies are required to retain relevant documents/ information, which are only to be submitted upon request by the Comptroller of Income Tax, for a period of at least five years from the relevant year of assessment.

Deduction for statutory and regulatory expenses

On 12 September 2014, the IRAS issued an e-Tax Guide on the deductions allowed for qualifying statutory and regulatory expenses under Section 14X of the Income Tax Act (ITA).

Currently, Section 14(1) of the ITA allows a deduction for expenses that are wholly and exclusively incurred in the production of income. With effect from YA 2014, IRAS has introduced a new specific deduction under Section 14X of the ITA to promote good corporate governance and voluntary compliance with statutory and regulatory requirements.

Qualifying statutory and regulatory expenses are expenses incurred by a taxpayer for the taxpayer's business and in the production of income accruing in or derived from Singapore or received in Singapore from outside Singapore, and for the following purposes:

(a) compliance by the taxpayer with any written law of Singapore or another country;

(b) compliance by the taxpayer with any code, standard, rule, requirement or other document issued by the government, a public authority established by or under any public Act, or by the government or a public authority of another country, or by a securities exchange;

(c) to study the impact of any proposed law referred to in (a) that has yet to be enacted; or proposed document referred to in (b) that has yet been issued;

(d) to prevent or detect any non-compliance with any law referred to in (a) or document referred to in (b); and

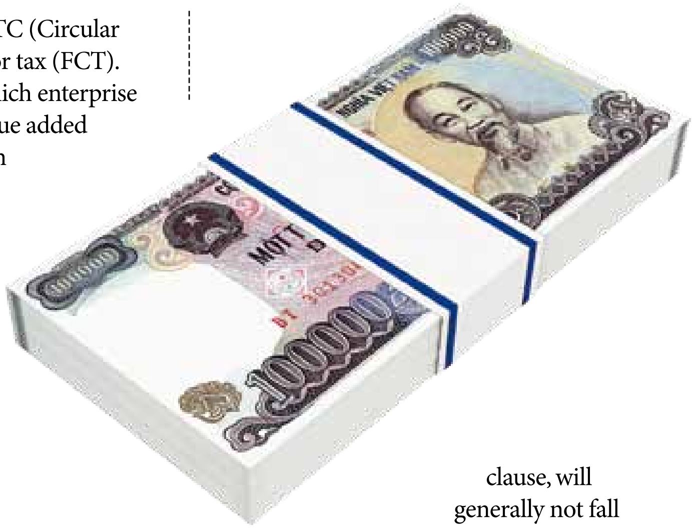
(e) to voluntarily comply with a requirement of any law referred to in (a) or document referred to in (b), even though the taxpayer is exempted from complying with the requirement.

These qualifying expenses must be directly related to compliance by the taxpayer with the relevant statutory or regulatory rules.

VIETNAM

Circular 103 on foreign contractor tax

On 6 August 2014, the MoF issued Circular 103/2014/TT-BTC (Circular 103) on foreign contractor tax (FCT). FCT is the method by which enterprise income tax (EIT) and value added tax (VAT) are imposed on foreign companies and individuals that carry out business in Vietnam (irrespective of whether or not a permanent establishment is deemed).



Circular 103 replaces Circular 60/2012/TT-BTC and is effective from 1 October 2014. The key changes brought about by Circular 103 are summarised below:

Scope of application

The scope of application has been extended to cover foreign entities and individuals who:

- distribute goods in Vietnam or supply goods into Vietnam under Incoterms where the foreign seller bears the risk of delivery within Vietnam (previously, FCT was limited to goods sold under DDP, DAT and DAP terms);
- wholly or partly distribute goods or render services in Vietnam where they either retain ownership of the goods, are responsible for the quality of the goods/services sold and bear the related distribution, marketing and advertising costs or have the authority to determine the selling price of the good/service concerned;
- conclude contracts in their own name via authorised Vietnamese entities and individuals; and
- are involved in the export/import and distribution of goods in Vietnam.

Items not subject to FCT

Supply contracts, with a warranty clause, will generally not fall within the scope of FCT so long as the warranty services are not carried out in Vietnam.

Additionally, FCT would not apply to the use of a customs bonded warehouse or inland container depot (ICT) port to store goods for international transport, transit, transhipment or for further processing (by a Vietnamese company).

Other changes

- The deemed VAT rate (for FCT purposes)for oil and gas services has been revised upwards to 10% from 7% for drilling services and 5% for other services; and has been decreased to 2% (from 3%) for other services.
- Foreign contractors who receive compensation for breach of contract from Vietnamese entities may opt to tax the proceeds at a flat EIT rate of 2% or to apply the actual EIT rate (currently 22%) on the difference between the related compensation and the related financial loss incurred.
- Construction/installation services (including equipment supply) will be taxed at a corporate income tax (CIT) rate of 2% and VAT rate of 3% if the contract cannot be split between the value of the services provided and the equipment

itself. If the contact can be segregated, the following rates will apply:

- value of the services: 5% CIT and 5% VAT;
- value of equipment: 1% CIT and no VAT; and
- construction work: 2% CIT and 3% VAT.

Circular 103 is currently only available in the Vietnamese language.

Resolution 63 and Circular 119 issued

The MoF issued Resolution 63 and Circular 119 on 25 August 2014 to help ease the economic burden of taxpayers and to reduce their administrative obligations. Details are as follows:

Resolution No. 63/NQ-CP

Resolution No. 63 was issued to assist enterprises facing various financial difficulties. Whilst the following proposals in Regulation No. 63 have been approved by the government, the relevant guiding decrees and circulars (required for implementation) are only expected to be issued by the end of the month. Further details will be provided at such time.

(a) Corporate income tax

i. CIT incentives will be extended to include the business expansion of an enterprise which was entitled to such CIT incentives during the period 2009-2013.

ii. CIT incentives will also be extended to include the subsequent stages of an investment project where the initial stage of the project was entitled to CIT incentives; and at the point of application, a definitive timeline was submitted.

iii. Expenditure on staff welfare is deductible for CIT purposes but is capped at one month's average salary.

iv. Provisional quarterly CIT filings may be abolished but the quarterly provisional payments are to remain. However, if the sum of the provisional tax payments made is less than 80% of the final CIT liability, the shortfall that exceeds 20% of the finalized tax payable will be subject to interest on overdue tax.

(b) Personal income tax (PIT)

i. Taxpayers may opt to pay PIT on transfers of real estate at either 25% of the net profit or 2% of the gross sales proceeds.

ii. Taxpayers may opt to pay PIT on transfers of shares at either 20% of the net gains (and file an annual tax return) or at 0.1% of gross sales proceeds.

(c) Value added tax

Companies with an annual revenue of VND50 billion or below can declare VAT on a quarterly basis.

Circular 119

Circular 119 contains a number of amending regulations that were issued to reform and simplify the current tax administrative procedures. The key changes have been summarized below and are effective as of 1 September 2014.

(a) Tax administration

New forms have been issued for the VAT declaration; payment of real estate registration fee; PIT declaration of income from real estate transfer; and PIT declaration form for income from inheritance or real estate.

(b) Personal income tax

Subject to conditions, the PIT obligations of an expatriate will be computed based on the month of arrival and departure. Previously an expatriate's obligations were computed from 1 January in the year of arrival and up to 31 December in the year of departure.

(c) Value added tax

i. Enterprises are not required to calculate and pay VAT for goods and services internally produced and used for the business operation.

ii. A new business is no longer required to invest VND1 billion in assets to be entitled to adopt the VAT credit method. Additionally, such a business may continue to use the VAT credit method even if it fails to generate VND1 billion in revenue (as is currently required) if it maintains a full accounting and invoice regime.

iii. Commercial invoices may be used in VAT refund claims on exported goods.

By Rachel Saw and Janice Loke
of the International Bureau of Fiscal Documentation (IBFD). The International News reports have been sourced from the IBFD's Tax News Service. For further details, kindly contact the IBFD at ibfdasia@ibfd.org.

TechnicalUpdates

The technical updates published here are summarised from selected government gazette notifications published between 16 August 2014 and 15 November 2014 including Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Public Ruling No. 6/2014 – Taxation of Foreign Fund Management Company

Public Ruling (PR) No. 6/2014 published on 4 September 2014 provides an explanation on the tax treatment of the income received by the foreign fund management company (FFMC) that provides fund management services to foreign and local investors. The PR is not applicable to a FFMC that issues, offers or makes an invitation to subscribe or purchase units of conventional unit trust funds.

Public Ruling No. 7/2014 – Taxation of Unit Trusts

Public Ruling (PR) No. 7/2014 published on 4 November 2014 replaces PR No. 6/2013 published on 23 May 2013. The PR explains the taxation of unit trust funds and property trust other than a real estate investment trust or property trust fund regulated by the Securities Commission.

Public Ruling No. 8/2014 – Basis Period of a Company, Limited Liability Partnership, Trust Body and Co-Operative Society

Public Ruling (PR) No. 8/2014 published on 1 December 2014 replaces PR No. 5/2001and PR No. 7/2001, both dated 30 April 2001, and is in line with the amendments to Section 2 subsection 21A(3) and subsection 21A(4) of the Income Tax Act 1967 which is effective from year of assessment 2014. The PR explains the determination of the basis period for a company, a limited liability partnership (LLP), a trust body and a co-operative society:

- On commencement of operations; and
- Which is in operations and changes its accounting period.

Mandatory filing of income tax return forms (ITRFs) for dormant companies

Vide letters dated 18 August 2014 and 11 November 2014, the IRB has indicated the following:

- All dormant companies must file the income tax return form (ITRF) with effect from year of assessment (YA) 2014. This includes companies which have not commenced operations.
- Upon receipt and review of the ITRF for YA 2014, for the dormant companies, the IRB will determine whether prior year ITRFs need to be submitted on a case to case basis.
- Dormant companies are required to submit the Form CP204 with effect from YA 2016 if the provisions of Section 107C(4) and Section 107C(4A) of the Income Tax Act 1967 are applicable. (This means that companies which have not commenced operations are not required to submit the Form CP204.)
- Any letter of exemption from filing the ITRF from the IRB branches is cancelled with effect from 18 August 2014.

Updated list of certification bodies for quality systems and standards certification and halal certification

Pursuant to Section 34(6)(ma) of the ITA, with effect from YA 2005, expenses incurred in obtaining halal certification as well as quality systems and standards certification will be given a double deduction. The IRB has recently issued an updated list of the certification bodies on its website (see Item No. 12 of the Technical Guidelines under Law and Regulations). The notes ("catatan") column in Appendix B highlight the new certification bodies as well as the extended validity dates for some existing certification bodies.

REAL PROPERTY GAINS TAX

Conversion to Limited Liability Partnership - Real Property Gains Tax (Exemption) Order 2014 [P.U. (A) 229/2014]

Real Property Gains Tax (Exemption) Order 2014 [P.U.(A) 229/2014], gazetted on 11 August 2014, exempts any person from the payment of real property gains tax (RPGT) on chargeable gains accruing on the conveyance of any chargeable asset relating to the conversion of a conventional partnership or a private company to a limited liability partnership (LLP) which is registered from 1 January 2013 until 31 December 2017. The conveyance of the chargeable asset shall be deemed to take place on the date the conventional partnership or a private company is registered as a LLP under Section 32 of the LLPA. The Order is deemed to have come into operation on 1 January 2013.

STAMP DUTY

Conversion to Limited Liability Partnership - Stamp Duty (Exemption) (No. 2) Order 2014 [P.U. (A) 230/2014]

Stamp Duty (Exemption) (No. 2) Order 2014 [P.U.(A) 230/2014], gazetted on 11 August 2014, provides a stamp duty exemption on all instruments of transfer of land, business, asset and shares in relation to the conversion of a conventional partnership or a private company to a LLP which is registered from 1 January 2013 until 31 December 2017. The Order applies to the instrument executed within 12 months from the date of the registration of the conversion. The Order is deemed to have come into operation on 1 January 2013.

CUSTOMS AND EXCISE DUTIES

Customs (Anti-Dumping Duties) (Expedited Review) Order 2014[P.U. (A) 155/2014]

The Order provides for the non-imposition of anti-dumping duties under the Customs (Anti-Dumping Duties) (No.3) Order 2013 [P.U. (A) 339/2013] on imports from Novowell ETP Limited, producer of electrolytic tinplate from the People's Republic of China for the period from 5 June 2014 to 12 September 2014 while the expedited review is being carried out.

Customs (Anti-Dumping Duties) (No.3) Order 2013 [P.U. (A) 339/2013] requires importers to pay anti-dumping duties in cash in respect of the goods specified in the Schedule exported from specified countries into Malaysia by specified exporters at the specified rates. The imposition of anti-dumping duties shall be without prejudice to the imposition and collection of import duties under the Customs Act 1967 and sales tax under the Sales Tax Act 1972 [Act 64].

Please refer to P.U (A) 339/2013 and P.U. (A) 155/2014 for details.

Customs (Import License Fee for Motor Vehicle) (Amendment) Regulations 2014 [P.U. (A) 159/2014]

The Order provides for an amendment in No. 11 of the Schedule within the Customs (Import License Fee for Motor Vehicle) Regulations 2009 [P.U. (A) 491/2009] and is deemed to have come into operation on 18 June 2014.

The Schedule within the Customs (Import License Fee for Motor Vehicle) Regulations 2009 [P.U. (A) 491/2009] lists current import license holders who, by Regulation 2, will be subject to a fee for each unit of motor vehicle imported. The 2014 Amendment substitutes the words "IBM Automobiles Sdn. Bhd." in No. 11 with the words "Ismo Automobiles Sdn. Bhd.".

Please refer to P.U (A) 491/2009 and P.U. (A) 159/2014 for details.

Customs (Amendment) Regulations 2014 [P.U. (A) 160/2014]

The Order provides for an amendment in Regulations 19(1) and 25(3) of the Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have come into operation on 1 July 2014.

Regulation 19(1) of the Customs Regulations 1977 [P.U. (A) 162/1977] pertains to the fee chargeable to obtain a license for the importation of intoxicating liquor, tobacco and denatured spirit where such license is obtained on the basis of monthly or six consecutive months issuance. The 2014 Amendment substitutes the words "$10" and "$48" with the words "RM20.00" and "RM96.00" respectively.

Regulation 25(3) of the Customs Regulations 1977 [P.U. (A) 162/1977] pertains to the fee payable by an owner requesting further survey to confirm the quantity of his intoxicating liquors imported after an official application has been made. The 2014 Amendment substitutes the words "$20" with the words "RM40.00".

Please refer to P.U (A) 162/1977 and P.U (A) 160/2014 for details.

Customs (Prohibition of Imports) (Amendment) (No. 2) Order 2014 [P.U. (A) 172/2014]

The Order provides for an amendment in Part II of the Fourth Schedule to Customs (Prohibition of Imports) Order 2012 [P.U. (A) 490/2012] and is deemed to have come into operation on 1 July 2014.

Part II of the Fourth Schedule within the Customs (Prohibition of Imports) Order 2012 [P.U. (A) 490/2012] pertains to the conditional prohibition of goods listed from importation except those conforming to the Malaysian Standard and/or other standards approved by the Malaysian authorities and in the manner provided and does not apply to the free commercial zones. The 2014 Amendment substitutes the particulars related to items 1 and 2 covering iron and steel products, aluminium products in Part II of the Fourth Schedule with new particulars as listed in Section 2 of the Customs (Prohibition of Imports) (Amendment) (No. 2) Order 2014.

Please refer to P.U (A) 490/2012 and P.U. (A) 172/2014 for details.

Customs (Amendment) (No. 2) Regulations 2014 [P.U. (A) 218/2014]

The Order provides for an amendment in Regulation 3(1), Regulation 3(4) and Part I of the First Schedule within the Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have come into operation on 1 August 2014.

Regulation 3(1) of the Customs Regulations 1977 [P.U. (A) 162/1977] pertains to the ordinary hours during which customs offices and warehouses are open to the public. The 2014 Amendment inserts a line detailing the operating hours of the office located at the Teluk Rubiah Maritime Terminal, Perak to be 24 hours on any day.

Regulation 3(4) of the Customs Regulations 1977 [P.U. (A) 162/1977] pertains to the ordinary hours during which goods other than personal effects of bona fide travellers can be loaded, unloaded or shipped. The 2014 Amendment inserts a line detailing the ordinary hours for such activity at the Teluk Rubiah Maritime Terminal, Perak to be 24 hours on any day.

Part I of the First Schedule within the Customs Regulations 1977 [P.U. (A) 162/1977] represents a list of recognised customs ports and legal landing places within the States of Malaya. The 2014 Amendment recognises Teluk Rubiah, Perak as such a port with details of goods and legal landing place given as per Regulation 3 of the Customs (Amendment) (No. 2) Regulations 2014.

Please refer to P.U (A) 162/1977 and P.U. (A) 218/2014 for details.

Customs (Amendment) (No. 3) Regulations 2014 [P.U. (A) 235/2014]

The Order provides for an amendment in Regulation 3(6) and Part VI of the First Schedule to Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have come into operation on 15 August 2014.

Regulation 3(6) of the Customs Regulations 1977 [P.U. (A) 162/1977] pertains to the ordinary hours during which goods, other than the personal effects of bona fide travellers which are not deposited in a customs warehouse may be removed from customs control. The 2014 Amendment inserts a line detailing the ordinary hours at Nilai Inland Port to be 24 hours on any working day.

Part VI of the First Schedule to Customs Regulations 1977 [P.U. (A) 162/1977] pertains to a listing of Inland Clearance Depots as recognised by Customs in Malaysia. The 2014 Amendment substitutes the particulars relating to the word "Seremban" with the particulars as prescribed in Regulation 3 of the Customs (Amendment) (No. 3) Regulations 2014.

Please refer to P.U (A) 162/1977 and P.U. (A) 235/2014 for details.

Customs Duties (Exemption) (Amendment) Order 2014 [P.U. (A) 236/2014]

The Order provides for an

amendment in item 66, Part I of the Schedule to Customs Duties (Exemption) Order 2013 [P.U. (A) 371/2013].

Part I of the Schedule to Customs Duties (Exemption) Order 2013 [P.U. (A) 371/2013] pertains to persons exempted from paying customs duty on the goods specified. The 2014 Amendment inserts into item 66 a new line item "(xvi) Hess Exploration and Production Malaysia B.V.".

Please refer to P.U (A) 371/2013 and P.U. (A) 236/2014 for details.

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2014 [P.U. (A) 247/2014]

The Order provides for an amendment in the Second Schedule to Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012 [P.U. (A) 277/2012] and is deemed to have come into operation on 15 September 2014.

Please refer to P.U (A) 277/2012 and P.U (A) 247/2014.

Customs Duties (Goods Under the Framework Agreement On Comprehensive Economic Co-Operation Between Asean and China) (Asean Harmonised Tariff Nomenclature) Order 2014. [P.U.(A) 248/2014]

The above Order came into operation on 15 September 2014 and revoked the Customs Duties (Goods under the Early Harvest Programme and the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and China) Order 2008 [P.U.(A) 228/2008].

The First Schedule to the Order laid down the Rules of Origin for the ASEAN-China Free Trade Area and the Operational Certification Procedures (OCP) for the Rules of Origin of the ASEAN-China Free Trade Area.

The Second Schedule sets out Classes of goods with rate of import duty by % under the ASEAN-China Free Trade Area. The classification of goods shall be governed by the General Rules for the Interpretation of the Harmonised System under the International Convention on the Harmonised Commodity Description and Coding System.

The Third Schedule contains the lists of products excluded.

Please refer to P.U.(A) 248/2014

Customs (Amendment) (No.4) Regulations 2014 [P.U. (A) 250/2014]

The Order amends Regulation 3, sub-regulations (1), (4), (6) and Part IV of the First Schedule to Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have come into operation on 10 September 2014.

The 2014 Order inserts into sub-regulation 3(1), 3(4) and 3(6) of Customs Regulations 1977 [P.U. (A) 162/1977], a new line item "at Kuala Lumpur International Airport 2 (klia2), Sepang, the hours shall be at all times on any day."

Within the Customs (Amendment) (No. 4) Regulations 2014 pertains to principal regulations. The 2014 Order inserts into Part IV of the First Schedule to the Customs Regulations 1977 [P.U. (A) 162/1977], after the word "Pulau Redang (Terengganu)" the words "Kuala Lumpur International Airport 2 (klia2), Sepang, all goods.".

Please refer to P.U. (A) 162/1977 and P.U. (A) 250/2014.

Customs (Anti – Dumping Duties) (Expedited Review) (No. 2) Order 2014 [P.U. (A) 258/2014]

The Customs (Anti - Dumping Duties) (Expedited Review) (No. 2) Order 2014 that comes into operation from 13 September 2014 to 15 November 2018 states that the anti-dumping duties at 0% shall be imposed upon electrolytic tinplate (H.S. Code 7210.12.200) imported from Novowell ETP Limited, People's Republic of China.

Please refer to P.U. (A) 258/2014.

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2014 [P.U. (A) 259/2014]

The Order is a corrigendum to Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2014 [P.U. (A) 247/2014].

Please refer to P.U. (A) 247/2014 and P.U. (A) 259/2014.

Customs (Prohibition of imports) (Amendment) (No.3) Order 2014 [P.U. (A) 264/2014]

The Order amends Part I of the Second Schedule to the Customs (Prohibition of Imports) Order 2012 [P.U. (A) 490/2012] by substituting the words "(excluding go-karts and ambulances)" in sub-item 1(2) column 2 with the words "(excluding go-karts, ambulances and all terrain vehicles (ATV))". The Order is deemed to have come into operation on 30 September 2014.

Please refer to P.U. (A) 490/2012 and P.U. (A) 264/2014.

Customs Duties (Goods Under Agreement on Comprehensive Economic Partnership Among Member States of the ASEAN and Japan) (Amendment) Order 2014 [P.U. (A) 266/2014]

The Order provides for an amendment in Part II of the First Schedule of the Customs Duties (Goods Under Agreement on Comprehensive Economic Partnership Among Member States of the ASEAN and Japan) Order 2008 [P.U. (A) 476/2008] and is deemed to have come into operation on 1 October 2014.

Please refer to P.U. (A) 476/2008 and P.U. (A) 266/2014.

Customs (Provisional Anti-Dumping Duties) Order 2014 [P.U. (A) 276/2014]

The Customs (Provisional Anti-Dumping Duties) Order 2014 that came into operation on 17 October 2014 and is effective until 13 February 2015 states that provisional anti-dumping duties listed in Paragraph 2 of the Schedule shall be imposed upon specific goods classified within the Rules of Interpretation in the Customs Duties Order 2012 [P.U. (A) 275/2012].

Please refer to P.U. (A) 276/2014 and P.U. (A) 275/2012.

Customs (Provisional Anti-Dumping Duties) (No.2) Order 2014 [P.U. (A) 302/2014]

The Customs (Provisional Anti-Dumping Duties) (No.2) Order 2014 that came into operation on 14 November 2014 and is effective until 13 March 2015 states that provisional anti-dumping duties listed in Paragraph 2 of the Schedule, shall be imposed upon specific goods classified within the Rules of Interpretation in the Customs Duties Order 2012 [P.U. (A) 275/2012].

Please refer to P.U. (A) 302/2014 and P.U. (A) 275/2012.

Excise Duties (Amendment) Order 2014 [P.U. (A) 287/2014]

The Order provides for an amendment in the Schedule of the Excise Duties Order 2012 [P.U. (A) 350/2012] and is deemed to have come into operation on 1 November 2014.

The Excise Duties (Amendment) Order 2014 provides a substitution of the words "RM250.00 and 20%" with the words "RM0.28 per stk and 20%" within subheadings 2402.10 000, 2402.90 100, 2402.20 200, 2402.20 900 and 2402.90 200 of the Excise Duties Order 2012.

Please refer to P.U (A) 350/2012 and P.U. (A) 287/2014 for details.

GOODS AND SERVICES TAX

Goods and Services Tax (Imposition of Tax for Supplies in Respect of Designated Areas) (Amendment) Order 2014 [P.U. (A) 260/2014]

The Goods and Services Tax (Imposition of Tax for Supplies in Respect of Designated Areas) Order 2014 [P.U. (A) 187/2014] is amended in paragraph 2(a) by inserting after the word "gas" the words "to or".

Please refer to P.U. (A) 187/2014 and P.U. (A) 260/2014.

Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014]

The Order specifies the list of items (goods and services included) that are exempted from Goods and Services Tax (GST).

Please refer to P.U. (A) 271/2014.

Goods and Services Tax (Zero Rated Supply) Order 2014 [P.U. (A) 272/2014]

The Order specifies the list of items (goods and services included) subject to Goods and Services Tax (GST) at zero rate.

Please refer to P.U. (A) 272/2014.

Goods and Services Tax (Relief) Order 2014 [P.U. (A) 273/2014]

The Order specifies the list of items (goods and services included) that are relieved from Goods and Services Tax (GST).

Please refer to P.U. (A) 273/2014.

*Contributed by **Ernst & Young Tax Consultants Sdn. Bhd.** The information contained in this article is intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgement. On any specific matter, reference should be made to the appropriate advisor.*

OTHER BUSINESS DEDUCTIONS

GOODWILL

Siva Subramanian Nair

The Malaysian Accounting Standards Board (MASB) explains in its standard on deferred taxes that "goodwill is the excess of the cost of an acquisition over the acquirer's interest in the fair value of the identifiable assets and liabilities acquired". Simply put, it is the variance between the purchase price and the net assets of the business acquired.

Goodwill can take the form of personal goodwill or business goodwill. The MASB also note that the Inland Revenue Board does not allow the amortisation of goodwill as a deductible expense in determining taxable profit. (www.masb.org.my).

Similarly the Malaysian professional bodies in their Draft Discussion Paper on "TAX IMPLICATIONS RELATED TO THE IMPLEMENTATION OF MFRS 136 / FRS 136: IMPAIRMENT OF ASSETS" state that "goodwill would be treated as capital in nature for tax purposes and thus is neither tax deductible nor eligible for CA claim. Any impairment loss has no effect on the deductible expenditure."

So generally, goodwill arising on consolidation or mergers and acquisition would be capital in nature and in consequence not rank for a deduction in ascertaining the adjusted income of the payer company. However, payments in relation to preserving goodwill i.e. maintaining a cordial and good relationship with parties associated with the conduct of the business of the company would qualify for a deduction from gross income of that business.

Dr. Veerinderjeet Singh discusses two cases where the payments are analogous with payments for goodwill

BOLAM v REGENT OIL CO. LTD. (1956) 37 TC 56

FACTS OF THE CASE

This case took place when there was a transition in Britain in relation to the petrol supplies to the public; a switch from a uniform brand of pool petrol to branded petrol. Regent Oil Co. Ltd, a petroleum company was determined to safeguard its market share and accordingly undertook to reimburse sums expended by some of the petrol retailers on painting and decoration of the premises, resiting and maintenance of petrol pumps and the general improvement or rehabilitation of the premises in return for them agreeing to buy for resale only Regent petrol. Payments were based on the quantity of petrol supplied. Initially payments were for periods of a year or less and were made after the retailer had incurred approved expenditure. Later on payments were made in advance. In response to competition, agreements were (in some cases) offered for longer terms, up to five or six years. In arguing that the payment should be deductible, the company reiterated that it was compelled to adopt this course because a similar policy had already been commenced by its two main competitors, as a result of which the company was losing customers to its competitors

DECISION OF THE COURT

The judge equated this payment to a sales rebate or discount and explained that it would give rise to an allowable deduction for the payer and that it makes no difference if the rebate takes the form of an upfront payment intended to cover several years:

'It seems to me that there would have been no doubt if the payments had been made by reference to the amount of petrol sold to the retailers in each year; it would plainly have been expenditure, particularly if paid in the form of a rebate, which was expended by Regent Oil Co. in the course of its trade in the making of its profits. Does it make any difference because in the circumstances of the case there has to be some lump sum fixed which is paid to secure the same result, and even if payment is made in advance for several years?…It seems to me that this expenditure, adopted by reason of the policy of the competitors of the Regent Oil Co., was an expense which the trading company, the Regent Oil Co., had to incur from time to time in order to earn its profits, and in the course of earning those profits. Therefore, it seems to me that the Commissioners reached the right conclusion in holding that it was expenditure of a nature which was deductible.'

It was held that the payments were of an income nature made to preserve the company's goodwill and that it did not create a capital asset of an enduring nature. To that end, the payment whether paid as a lump sum in advance or paid over the period of trading was merely the mode of dispensing a revenue payment. However, Dr. Singh opines that the fact that the payments were related to the supply of petrol favoured the company whereas if the payment was a lump sum in consideration for the prevention of that retailer from buying from other suppliers and bore no reference to the quantum of supplies, the payment would have been construed to be capital since it would be to secure a monopoly of the retailer's trade. Therefore candidates should note this point in addressing questions posed in examinations.

The second case discussed by Dr. Singh is **OGDEN v MEDWAY CINEMAS LTD. (1934) 18 TC 691**

FACTS OF THE CASE

A person obtained the lease of a hall to be used as a cinema theatre, and by a supplemental deed executed on the same day he was also permitted the use of the goodwill for an annual payment of GBP500. He subsequently assigned his rights under the lease to the cinema company. The company carried on the cinema business and claimed a deduction for the goodwill of GBP500

DECISION OF THE COURT

The judge held that the payment of GBP500 was not the payment of the capital sum but was a necessary revenue expense of the company because it constituted the use of an asset as opposed to the acquisition of an asset.

Similarly in the case **DEVIDAS VITHALDAS & CO. v C.I.T., BOMBAY CITY 1973 AIR 318,** payment for the use of goodwill was held to be revenue in nature.

FACTS OF THE CASE

P and A carried on a business as Chartered Accountants in the name of D.V. & Co. On P retiring from the partnership a deed of dissolution was executed which provided that the business would be carried on by A. By Clause 2 of the deed, P, who owned the rights and interest in the goodwill, "agreed to sell" the goodwill to A and "as consideration for and in full satisfaction of the purchase price of the goodwill" A was to pay eight annas in the rupee in the net profits of the business payable during the life time of P and after him during the life time of his wife and then to their son during his life time.

Clause 6 provided that in the event of A entering into a partnership or transferring or assigning his business so long as the business was carried on in the name of D.V. & Co., the partnership, the assignee or the transferee was to pay the share in the profits in the manner provided in Clause 2. A entered into a partnership with C, the deed of partnership reciting that the goodwill of the business belonged solely to P which A had "bought" in consideration of his agreeing to pay a share of eight annas in the rupee and that the parties thereto pay five annas four pies share in the profits, by way of purchase price of the goodwill as agreed by P. The firm paid to P's wife, after the death of P, various amounts during the years 1955-59. It claimed that those amounts should be deducted in its assessments for those years.

The Income Tax Officer and the Appellate Assistant Commissioner rejected the claim holding that the payments were capital and not revenue payments and the transaction evidenced by the deed of dissolution was one of outright sales.

DECISION OF THE COURT

The Tribunal held that the payment constituted only fee or rent for the use of the goodwill so long as it was used and accordingly they were in the nature of revenue expenditure:

"It is no doubt true that Clause 2 of the agreement refers to sale of goodwill and the agreed payments constituting full satisfaction of the purchase consideration. If the payments are stopped, it is not stated that there will be any right of action for any definite quantified and liquidated amount. It would mean that with the stoppage of payments the assessee will only lose the right to its contact with the clientele and opportunity to earn profits, thereafter. These considerations only go to show that in the peculiar circumstances of the case the agreement is virtually a licence granted for user of the goodwill upon payment of one-third of the net profits derived for such user." In this view the Tribunal held that the payments constituted only a fee or rent for the use of the goodwill so long as it was used and accordingly they were in the nature, of revenue expenditure.

However this decision was overturned by the High Court.

The Appellate Court (with one judge dissenting) held that in this case the transaction was a licence and not, a sale of the goodwill. The disbursements in question, therefore, were in the nature of royalty and must be treated as admissible deduction.

Now let us look at some examination questions relating to goodwill.

EXAMINATION QUESTIONS

Tax II D96 Question 1

The question had an item in the income statement of goodwill written-off under amortisation of intangible assets. Obviously since it is just a general statement with no details provided, the logical conclusion should be that it is capital and should be added back to the profit before tax figure in arriving at the adjusted income of the company.

In ACCA Dec 2000 Q1

Dealing with Easi Sdn Bhd, a manufacturer of electrical appliances, goodwill payments to settle complaints by customers in respect of malfunctioning appliances of RM 19,000 was held to be deductible because it represented compensation payment to customers and as such constitute revenue expenditure relating to the day-to-day operations of the company.

In ACCA J05 Q2

Two individuals, Silk and Satin, who are architects carrying on a professional partnership; intend to transfer their activity into a new company S&S Sdn. Bhd. and one of the items transferred was goodwill of RM300,000 (cost is NIL). For a single mark candidates were just required to state that the sale or transfer of business goodwill is a capital transaction and attracts no tax liability.

This concludes our discussion on the deductibility of goodwill payments.

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CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JANUARY - MARCH 2015

Month /Event	Details				Registration Fee (RM)			CPD Points / Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JANUARY 2015								
Workshop: GST on Rental Income & Service Charges	6 Jan	9a.m. – 5p.m.	Kuala Lumpur	Thenesh Kannaa	380	430	490	8 WS/001
Evening Talk: Technical - GST treatment for Mixed supplies and Capital Goods Adjustments	6 Jan	4a.m. – 6p.m.	Ipoh	Thenesh Kannaa	35	NA	40	2 BR/001
Workshop: GST on Employer & Employee Benefits	8 Jan	9a.m. – 5p.m.	Kuala Lumpur	Zen Chow	380	430	490	8 WS/002
Workshop: GST for Property Developers & Construction Companies	12 & 13 Jan	9a.m. – 5p.m.	Kuala Lumpur	Thenesh Kannaa	760	860	980	16 WS/003
NATIONAL GST CONFERENCE 2015 *(in collaboration with the Royal Malaysian Customs Dept.)*	20 Jan	9a.m. – 5p.m.	Sime Darby Convention Centre	Various Speakers	600	700	800	15 GST/001
Half-day Seminar: Transfer Pricing Documentation	26 Jan	9a.m. – 1p.m.	Kuching	SM Thanneermalai	125 subsidised fee	350	400	4 SE/001
Workshop: Tax Planning for Individuals *(in collaboration with MAICSA)*	29 Jan	9a.m. – 5p.m.	MAICSA Training Room	Vincent Josef	*380 *to be advised	*430 *to be advised	*490 *to be advised	8 JV/001
Training Course for the GST Tax Agent *(6-days)* GST Examination Day *(subject to RMCD confirmation)*	10, 11, 12, 24, 25 & 26 31 Jan	9a.m. – 5p.m.	Kuala Lumpur	Royal Malaysian Customs Dept.	2,200 *(fee for 6 days course)*	2,700 *(fee for 6 days course)*	3,000 *(fee for 6 days course)*	JV/004
Training Course for the GST Tax Agent *(6-days)* GST Examination Day *(subject to RMCD confirmation)*	16, 17,18, 23, 24 & 25 31 Jan	9a.m. – 5p.m.	Penang	Royal Malaysian Customs Dept.	2,200 *(fee for 6 days course)*	2,700 *(fee for 6 days course)*	3,000 *(fee for 6 days course)*	JV/005
Public Holiday ***(New Year: 1 Jan, Maulidur Rasul: 3 Jan)***								
FEBRUARY 2015								
Workshop: GST for Property Developers	11 Feb	9a.m. - 5p.m.	CTIM Training Room	Fennie Lim	300	350	400	8 JWS/005
Half-day Seminar: Transfer Pricing Documentation	17 Feb	9a.m. - 1p.m.	Kuala Lumpur	SM Thanneermalai	125 *subsidised fee	350	400	4 SE/002
Training Course for the GST Tax Agent (6-days) GST Examination Day *(subject to RMCD confirmation)*	6, 7, 8, 13, 14, & 16 Feb 28 Feb	9a.m. - 5p.m.	Kuching	Royal Malaysian Customs Dept.	*2,200 (fee for 6 days course)	2,700 (fee for 6 days course)	3,000 (fee for 6 days course)	JV/006
Public Holiday ***(Federal Territory Day: 1 Feb, Thaipusam: 3 Feb, Chinese New Year: 19 & 20 Feb)***								
MARCH 2015								
IRBM-CTIM TAX FORUM 2015								
IRBM-CTIM Tax Forum	10 Mar	9a.m. - 1p.m.	Kuala Lumpur	IRBM & CTIM	250	300	350	4 RS/001

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JANUARY - MARCH 2015

Month /Event	Details				Registration Fee (RM)			CPD Points / Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
MARCH 2015								
IRBM-CTIM Tax Forum	18 Mar	9a.m. - 1p.m.	Johor Bahru	IRBM & CTIM	250	300	350	4 RS/002
IRBM-CTIM Tax Forum	19 Mar	9a.m. – 1p.m.	Penang	IRBM & CTIM	250	300	350	4 RS/003
IRBM-CTIM Tax Forum	25 Mar	9a.m. – 1p.m.	Kota Kinabalu	IRBM & CTIM	250	300	350	4 RS/004
IRBM-CTIM Tax Forum	26 Mar	9a.m. – 1p.m.	Kuching	IRBM & CTIM	250	300	350	4 RS/005
Workshop: GST – Costly Mistakes to Avoid	5 Mar	9a.m. - 5p.m.	Kuala Lumpur	Thenesh Kannaa	380	430	490	8 WS/004
Workshop: Submission of Return Forms 2014 *(In collaboration with MAICSA)*	17 Mar	9a.m. – 5p.m.	MAICSA Training Room	Vincent Josef	*380 *to be advised	*430 *to be advised	*490 *to be advised	8 JV/002
Seminar: Managing Tax Controversies – Update of Recent Tax Cases 2014 & Exploring Dispute Resolution Proceedings	19 Mar	9a.m. – 5p.m.	Malacca	Abu Tariq & Saravana Kumar	420	470	520	8 SE/003
Workshop: Tax Planning for Companies *(in collaboration with MAICSA)*	24 Mar	9a.m. – 5p.m.	MAICSA Training Room	Vincent Josef	*380 *to be advised	*430 *to be advised	*490 *to be advised	8 JV/003
Seminar: Managing Tax Controversies – Update of Recent Tax Cases 2014 & Exploring Dispute Resolution Proceedings	30 Mar	9a.m. – 5p.m.	Kuala Lumpur	Abu Tariq & Saravana Kumar	420	470	520	8 SE/004
Training Course for the GST Tax Agent (6-days) GST Examination Day *(subject to RMCD confirmation)*	28 Feb 1, 2, 7, 8 & 9 Mar 28 Mar	9a.m. - 5p.m.	Subang	Royal Malaysian Customs Dept.	2,200 (fee for 6 days course	2,700 (fee for 6 days course)	3,000 (fee for 6 days course)	JV/007
Training Course for the GST Tax Agent (6-days) GST Examination Day *(subject to RMCD confirmation)*	7, 8, 9, 15, 16 & 21 Mar 28 Mar	9a.m. - 5p.m.	Johor Bahru	Royal Malaysian Customs Dept.	2,200 (fee for 6 days course)	2,700 (fee for 6 days course)	3,000 (fee for 6 days course)	JV/008

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ENQUIRIES : Please call Ms Yus, Ms Ramya, Mr Jason, Ms Jas or Ms Ally at 03-2162 8989 ext 121, 119, 108, 131 and 123 respectively or refer to CTIM's website ***www.ctim.org.my*** for more information on the CPD events.

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Conference Fees

* Registration of participants will be confirmed upon receipt of full payment or an acceptable employers guarantee and settlement of previous outstanding dues.
* Walk–in participant registration is subject to availability of seats and full payment.
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Kindly contact the Secretariat for more information.

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Date 20 January 2015 (Tuesday)
Time 9:00 am – 5:00 pm
Venue Sime Darby Convention Centre, Kuala Lumpur

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- Practical issues on implementation of GST (prior to 1st April 2015)
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