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CHARTERED TAX INSTITUTE OF MALAYSIA

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CHOOSING A VEHICLE TO RUN YOUR BUSINESS - IS IT THE TAXMAN'S BUSINESS?

Diversion of income or splitting income is one of the most common forms of tax avoidance.

Study on Consumers' Goods and Services Tax (GST) Knowledge

Interpretation of Taxing Statutes - An Amalgam of the Old and New

Cooperative Compliance - A Step Forward for Malaysian Individual Tax Management

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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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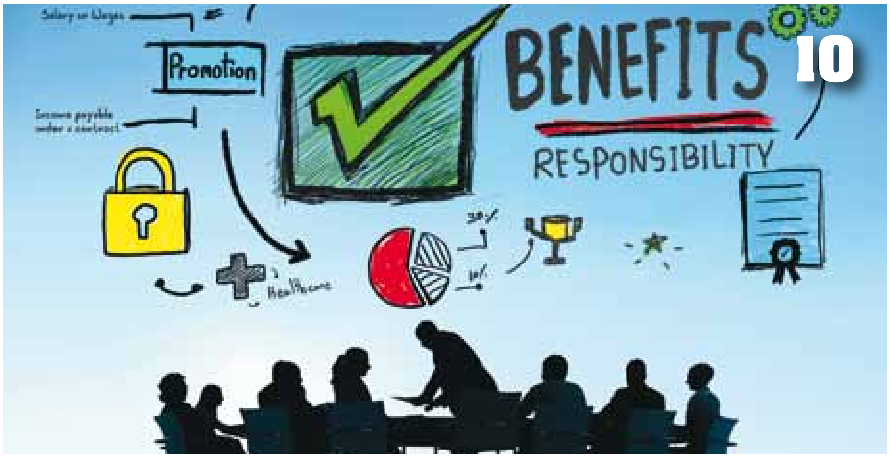

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Note: The views expressed in the articles contained in this journal are the personal views of the authors. Nothing herein contained should be construed as legal advice on the applicability of any provision of law to a given set of facts.

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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P R E M I E R   T A X   E V E N T   O F   T H E   Y E A R

NATIONAL TAX CONFERENCE 2016

9 & 10 AUGUST 2016 | KUALA LUMPUR CONVENTION CENTRE

Official Opening by Prime Minister / Minister of Finance *(invited)*

Lembaga Hasil Dalam Negeri Malaysia (LHDNM) and the Chartered Tax Institute of Malaysia (CTIM) will be co-hosting the National Tax Conference for the 16th successive year on 9 - 10 August 2016 at the Kuala Lumpur Convention Centre, Kuala Lumpur.

This conference will provide a good platform for interaction and building mutual understanding amongst key players in the tax arena; taxpayers, tax practitioners, tax administrators and tax policy makers.

The theme of this year's conference is "Broadening Perspectives, Enhancing Our Tax Base" and will bring tax experts from various fields to discuss topical issues in taxation. The chairmen / speakers /panelists of the conference are drawn from government and private sectors.

The key conference topics are:
- Forum: Economic Recalibration – What to Expect Next
- LHDNM's Strategies: Synergy Beyond Boundaries
- Tax Issues Surrounding the Digital Economy – The Malaysian Perspective
- SMEs – Common Tax Issues
- Resolving Issues in Transfer Pricing Audits
- Tax Cases Update
- Round Table Discussion on Current Issues Affecting Taxpayers

NOTE 9 & 10 AUGUST 2016 ON YOUR DIARIES!

Please contact CTIM Secretariat at 03-2162 8989
Unit B-13-1, Block B, 13th Floor, Megan Avenue II No.12, Jalan Yap Kwan Seng, 50450 Kuala Lumpur, Malaysia
or visit website at www.ctim.org.my

NATIONAL TAX CONFERENCE 2016

Closing Date : 25 July 2016

Conference Fees

* Registration of participants will be confirmed upon receipt of full payment or an acceptable employers guarantee and settleme nt of previous outstanding dues.
* Walk–in participant registration is subject to availability of seats and full payment.
* Certificate of Attendance will be issued upon full attendance and receipt of full payment.
* Normal rate will be applicable for unpaid early bird registrations after 11 July 2016.

Registration Fee	Early Bird Fee *(with payment before or on 11 July 2016)*	Normal Fee *(after 11 July 2016)*
	Nett Fee *(inclusive of GST 6%)*	Nett Fee *(inclusive of GST 6%)*
LHDNM officer / CTIM member	RM1378	RM1590
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Reservation can be made by email / facsimile / post but will only be confirmed upon receipt of registration form and payment. Registration is subject to the acceptance of the Organiser's absolute descretion.

Kindly contact the following Conference Secretariat for more information.

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Replacements
Please note registrations for the event are not interchangeable but replacements are acceptable. Please notify us at least five days prior to the event if you intend to send a replacement. CPD points will be allocated to the designated attendee. If the replacement is not a Member but a Member's Firm Staff or Non-Member, the appropriate fees will apply.

Member's Firm Staff / Member of Supporting Body / Member or Staff of Supporting Sponsor
Member's Firm Staff is the staff of a CTIM member within the same firm. Member of Supporting Body or Member or Staff of Supporting Sponsor, kindly indicate which body you are associated with in the registration form.

Confirmation of Registration
A confirmation letter will be issued within 3 weeks before the conference. Please contact us immediately if you have not received the confirmation letter 7 days prior to the conference.

Reminder
Certificate of Attendance will only be released to registered participants (must register before 11.00am on day 1), full attendance with full payment and after completion of the Conference.

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ARULJOTHI KANAGARETNAM

FUTURE PLANS

In the previous issue of the *Tax Guardian,* I wrote that our nation is facing challenging times in which objectivity, perseverance and initiative are needed in order to come out of it stronger and wiser. I would like to applaud the Honourable Prime Minister's announcement of the 2016 Budget Recalibration at the end of January 2016 to ensure strong growth in our economy and to protect and safeguard the welfare and wellbeing of the people.

One of the measures announced in the Budget Recalibration was to enhance revenue collection and reduce tax leakage by giving special consideration on relaxing the penalty on taxpayers who come forward and declare their past years' income and settled their arrears before 31 December 2016. Another measure which was announced is the reduction of the employees' contribution to the Employees Provident Fund (EPF) by 3% beginning from March 2016 to December 2017. Employees have the option of maintaining their existing rate of contribution. I welcome these measures for taxpayers and employees to take them into consideration in their future plans.

The first quarter of 2016 also saw the issuance of the filing programme for income tax return forms in the year 2016 by the Inland Revenue Board of Malaysia and the commencement of e-filing from 1 March 2016 onwards for returns by employers, individuals, partnerships and associations (refer to our e-CTIM TECH-DT 10/2016 and e-CTIM TECH-DT 21/2016). I would urge members to make plans to set aside time and resources to ensure that the filing and payment requirements are complied on a timely basis during this busy period.

Meanwhile, I am pleased to inform you regarding several key happenings involving the Institute since January 2016 as listed below.

Dialogue with the tax authorities on issues arising from the 2016 Budget and Finance Bill 2015

The Institute together with other professional bodies attended a dialogue with the LHDNM and Ministry of Finance (MoF) on the Institutes' joint memorandum on issues arising from the 2016 Budget and 2015 Finance Bill on 29 February 2016. The Institute also took the opportunity to seek clarification from the tax authorities on the status of the prior years' budget proposals which had not been gazetted to date. The minutes of the dialogue will be circulated to members when it is made available by the LHDNM.

LHDNM's briefing to the Institute, other professional bodies and associations on the reduction of penalties and waiver of tax increase

As you are aware, the LHDNM issued the Operational Guidelines No. 1/2016 dated 10 February 2016 on the offer which is effective within a stipulated period this year as stated in the Guidelines, to reduce the penalty for voluntary disclosure and waive the tax increase for settlement of tax in arrears in support of the 2016 Budget Recalibration measure mentioned above. In this conjunction, the LHDNM presented a briefing on the said offer to the Institute, other professional bodies and associations at an event hosted by the MoF on 3 March 2016. The Institute took the opportunity to raise issues and seek clarification on the offer from the LHDNM. Members will be updated by e-Circular on any further developments given in writing by the LHDNM in relation to the offer.

CTIM Members' Dialogues organised by CTIM branches

The Southern Branch and Perak Branch of the Institute organised and hosted dialogues for CTIM members in the first half of January 2016 where various operational, technical and public practice issues were discussed. Also present at the dialogues were several members of the CTIM Council. The dialogues were generally well received.

CPD Events

This year is the fifth consecutive year that the Institute is partnering with the LHDNM to conduct the LHDNM-CTIM Tax Forums. Kuala Lumpur was the first venue for the Tax Forum and was replicated next in Penang followed by Johor Bahru, Kota Kinabalu and Kuching within the month of March 2016. I hope that all participants have benefited from the Tax Forums. I would like to thank the chairpersons, speakers and panel members for their efforts in making the events possible.

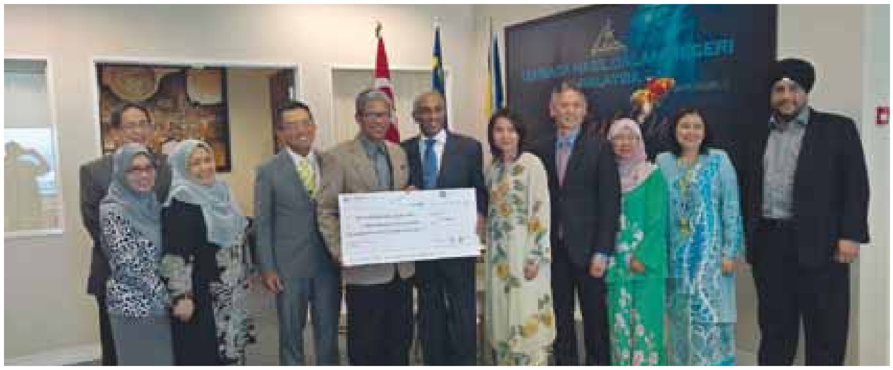
I am pleased to inform that the Institute in collaboration with the Royal Malaysian Customs Department (RMCD) is organising its National GST Conference 2016 which will be held at the Berjaya Times Square Hotel in Kuala Lumpur over a 2-day period from 31 May 2016 to 1 June 2016. Attendance to this event comes with 25 CPD points which will be recognised by the MoF for renewal of the GST Tax Agent licence. Do look out for the registration forms and register early to avoid disappointment.

Another major CPD event to mark in your diaries is the National Tax Conference 2016 which the Institute is co-organising together with the LHDNM which will be held at the Kuala Lumpur Convention Centre from 9 August 2016 to 10 August 2016.

Membership

I would encourage eligible tax practitioners who are not CTIM members to take up membership with the Institute. I would also encourage eligible CTIM members who are engaged in public practice and possess a valid tax licence issued by the Ministry of Finance under Section 153 of the Income Tax Act 1967 to apply for the CTIM Practising Certificate, if you have not already done so. The eligibility criteria and application procedure for CTIM membership and the CTIM Practising Certificate are available in the membership section of the Institute's website at **www.ctim.org.my**.

We would like to thank the members for supporting the Institute.



NTC 2015 cheque presentation ceremony

Sabah Branch visit to LHDNM office

Editor'sNote

K. SANDRA SEGARAN

COOPERATIVE COMPLIANCE – THE WAY FORWARD

Is the choice of a personal service company to capture one's personal service income generated from self-effort, an attempt to divert or alienate income solely for a tax advantage? "Choosing a vehicle to run your business – is it the taxman's business" is the question that Dr. Kuek examines based on current legislation and by drawing parallels from more advanced tax jurisdictions that have regulated such arrangements. He concludes that the choice should remain with individuals and the tax authorities should not dictate the choice. In short, it is not the taxman's business to dictate the choice of business structures to the taxpayers.

Cooperative compliance, a recent coinage which developed in the OECD circle is a relationship model based on an exchange of greater upfront transparency by the taxpayer in return for more certainty from the tax authorities to achieve a result of reduced compliance costs and increased efficiencies due to better utilisation of resources by both parties. It is a concept that should be welcomed as it favours collaboration over confrontation. Inbuilt mechanisms that provide a better level of service and reducing burdensome compliance requirements are significant features of this model. Significant benefits could potentially be reaped from cooperative compliance to create a culture of collaboration where businesses and tax authorities learn to trust each other in support of compliance and accountability. The Revenue authorities have taken advantage of developments in technology and introduced various online initiatives and have increased the level of electronic services to users on various aspects such as filing,

payment, registration, ledger details, obtaining clearance, stamping, etc., for stakeholders. The growth of this model will depend on concerted effort by all stakeholders. The author opines that companies also need to play their part in enhancing cooperative compliance by putting in place internal reporting systems that keep hyper-accurate tracking of records to enable minimum reporting requirements.

In a study by UTAR academics in Perak, conducted after four months of implementation of the GST, it was found that the level of awareness and knowledge of the GST system among taxpayers is reasonably high. This is attributed to the efforts undertaken by the government which delayed the implementation of GST to educate businesses and the public in general. Policy-makers will be happy to note, if the findings of this study can be relied on, that the sizable amount of money spent on increasing public awareness has borne fruits.

Dr.Nakha, our regular contributor has provided a brief analysis of the Teraju Sinar Court of Appeal decision on a withholding tax issue, an area which has never failed to elicit controversy. While the duty to withhold taxes lies with the resident taxpayer, it appears that the resident taxpayer needs to take a conservative decision to deduct rather than argue that withholding tax is not due from a treaty perspective as it is the duty of the non-resident taxpayer to proof his case for treaty relief. The Court clearly ruled that this is not a case for treaty relief unlike the earlier cases on withholding tax which was appealed by non-resident taxpayers, such as the the SGSS Pte Ltd, OA Pte Ltd,Walter Wright Pte Ltd, etc.

Thenesh Kannaa in a useful article examines and analyses the corporate tax implications of GST, specifically of input tax and output tax, following the changes introduced in the 2016 Budget. With useful illustrations, the general and specific rules and exceptions are explained in detail. The writer also hopes that the IRB will soon issue a Public Ruling to explain its position of the new amendments to the Law.

Sudharsanan and Tania provide us with an insight of recent developments in the interpretation of taxing statutes in Malaysia where the Federal Court delivered several judgements which underscores the increasing relevance of the purposive approach, wherein the true intention of Parliament is examined beyond the words that the legislation appear to convey.

Together with the regular columns, this issue should be useful and interesting. Happy reading!

CPD EVENTS

The following important workshops were presented by CTIM in the 1st quarter of 2016:

- Real Property Gains Tax; The Basics and The Advanced
- GST – Latest Developments and Its Practical Implications
- Withholding Tax; Theory & Practice
- GST Accounting for Property Developers & Contractors
- Latest Tax Developments on Employers' Statutory Requirements in 2016, Including the Implications of Employee Related Payments
- Tax Planning for Individuals (in collaboration with MAICSA)

The workshop on "GST – Latest Developments and its Practical Implications" was conducted at the Seri Pacific Hotel on 23 February 2016. The speaker focused on the key developments and its practical implications that simplify the mammoth task of updating knowledge with GST developments. Due to overwhelming response, a re-run session was conducted on 25 February 2016 at the Renaissance Hotel Kuala Lumpur.

Dr. Tan Thai Soon presented a series of workshops on "GST Accounting for Property Developers & Contractors" at several venues i.e Penang, Melaka, Johor Bahru, Kota Kinabalu & Kuching. This workshop focused on the basic understanding of the scope of supply and output tax, input tax credit, GST adjustments for mix suppliers, GST accounting and double entries.

The workshop on "Latest Tax Developments on Employers' Statutory Requirements in 2016, Including the Implications of Employee Related Payments" was conducted by Mr. Sivaram Nagappan at all the major cities where CTIM branches are located. The speaker shared his knowledge with the participants on tax planning initiatives from the latest tax updates and developments as well as the implications of the Goods and Services Tax (GST) to employers on benefits provided to employees. He also covered the highlights on the recent tax developments including proposals from Budget 2016 and Public Rulings.

CTIM in collaboration with MAICSA organised a workshop on "Tax Planning for Individuals" on 2 February 2016 at MAICSA's Auditorium, Kuala Lumpur. Mr. Vincent Josef discussed the latest amendments to the Income Tax Act and answered the many questions that were asked.

For the fifth consecutive year, CTIM in collaboration with Lembaga Hasil Dalam Negeri Malaysia (LHDNM) organised the "LHDNM-CTIM Tax Forum 2016" in Kuala Lumpur on 8 March 2016 that was attended by more than 200 participants. The session on Operational Issues covered topics on Filing of Tax Returns and Enforcement of Tax Liability on Directors Personally. The session on Challenges Faced by LHDNM & Taxpayers, covered the topic on Bad Debts. The forum was also held at other venues.

LHDNM-CTIM Tax Forum 2016

CHOOSING A VEHICLE TO RUN YOUR BUSINESS

IS IT THE TAXMAN'S BUSINESS?

Dr. Kuek Tee Say

DIVERSION OF INCOME or splitting income is one of the most common forms of tax avoidance. As a tax avoidance measure, some taxpayers use companies (known as personal service companies) as vehicles through which to provide personal services to clients[1].

The incorporation of personal service companies (PSCs) is common among professional service providers such as finance professionals, architects, ICT consultants, engineers, construction workers and medical practitioners. Originally, the concept of personal service income (PSI) and its rules comes from the common practice of using company and trust structures to transfer income from a key person to a lower tax rate entity. Contracting through a company brings many advantages (both tax and non-tax) and, in particular, channeling the profits of an individual through a company offers certain tax benefits especially if the tax rate on company is lower than that of an individual. A related objective is also to qualify for business deductions which might not be so readily available to an individual. Alternatively, individuals often provide their services to clients through a PSC rather than being employed by their clients to avoid certain tax liabilities and obligations imposed on employees (such is the case in the UK). Clearly, forming a PSC could be a very effective way of sheltering income and many governments see this as an area of unacceptable tax avoidance because the corporate form has been exploited to avoid tax. For this reason, the tax authorities in Australia and the UK have specific legislations to prevent individuals from reducing their tax by alienating their PSI to a company or working as 'disguised employees' through a PSC.

Originally, the concept of personal service income (PSI) and its rules comes from the common practice of using company and trust structures to transfer income from a key person to a lower tax rate entity.

DOCTRINE OF ASSIGNMENT OF INCOME

Personal service income is income produced mainly from personal skills or efforts as an individual[2]. In Australia, PSI is defined under Sections 84 – 85 of the Income Tax Assessment Act 1997 (ITAA 1997) as ordinary or statutory income that is gained mainly as a reward for

the personal efforts and skills of an individual. Tax avoidance schemes using personal service companies go against the doctrine of assignment of income, i.e. income that relates to a particular individual is taxable on that individual and cannot be alienated. The impact of the PSI rules is income within the so-called interposed entity (personal service entity or PSC) can be attributed back to the individual taxpayer. Further, the range of deductions available is restricted to those typically available to individuals. In reality, the amount received by the company was for the labour, skills or expertise of the taxpayers concerned. In turn the taxpayers will pay themselves remuneration through the companies that they have incorporated. From the tax authority's perspective, they are viewed as 'disguised employees'. PSI does not affect an individual if he is truly an employee receiving only salaries and wages outside the context of this purported tax avoidance scheme. It is important to note that a business can have both PSI and non-PSI income. Therefore, the concept of PSI is not applied across an entire business.

It is a long-standing principle that gross income includes all income from whatever source derived[3]. The "assignment of income" doctrine states that income is taxed to the one who earns it[4]. A taxpayer cannot avoid tax by assigning his income to another party or entity. This means that compensation, interest, rents, dividends, and other forms of income usually must be included in the gross income of the recipient even if the income was transferred to another individual. The person who earns the income cannot deflect the tax on it by attempting to assign or transfer the income to another person or entity. The test of taxability is based on who controls the earning of the income and not who is the ultimate recipient of the income. In short, once a taxpayer has derived income, he or she will be subject to tax regardless of what is subsequently done with the income. There is no tax advantage to be gained by a taxpayer who transfers income after its receipt.

The impact of the PSI rules is income within the so-called interposed entity (personal service entity or PSC) can be attributed back to the individual taxpayer. Further, the range of deductions available is restricted to those typically available to individuals.

The notion of who is subject to tax is expressed in Section 66 as a general principle. According to Section 66 of the Malaysian Income Tax Act 1967 (ITA 1967), the income of any person is assessable and chargeable to tax, and that person shall be the person assessable and chargeable to tax in respect of that income. In short, if an income belongs to the taxpayer, he will be the one subject to income tax on that income. This provision could act to counteract any income transfers leading to income splitting or divestment of income. More specific legislation exists especially in the use of trusts or settlements for the redirection of income or transfer of property[5]. However, there is no specific provision to prevent individuals from reducing their tax by transferring their PSI. Although there are no PSI rules in the Malaysian tax law, the general anti-avoidance rules (Section 140) may apply where a tax arrangement's main purpose is to obtain a tax benefit without commercial justification[6].

MALAYSIAN TAX TREATMENT OF PSI

PSCs are frequently used in Malaysia for contract jobs by many professionals. As mentioned earlier, there are no PSI rules in Malaysia. However, the general anti-avoidance rules may be invoked by the Inland Revenue Board (IRB) to combat tax avoidance through the use of PSCs. Section 140 of the Act is a

comprehensive provision that enables the Director-General of Inland Revenue to disregard any transaction which directly or indirectly has the effect of avoiding the incidence of tax. In Malaysia, the personal income tax is a progressive tax i.e. the tax takes an increasing proportion of income as income rises so that the burden of tax is heavier on higher income earners. The reason for a progressive income tax system is the appropriation and redistribution of increases in taxpayers' economic wealth. Therefore, the success of the system depends upon the correct tax entity being identified and taxed at the relevant rate. The diversion of income (i.e. by splitting income) with parties who pay tax at a lower rate undermines the system. Income splitting offers taxpayers the opportunity to pay lower tax by taking advantage of the tax thresholds of the persons receiving the diverted income. Perhaps, a PSI anti-avoidance provision should be enacted in Malaysia for the purpose of preventing the splitting of income using PSCs. This will lead to certainty in the tax treatment of PSI in Malaysia and will help taxpayers to know the parameters of using PSC for tax planning purposes. However, based on the experiences in Australia and the UK, PSI rules can create complexities in the tax affairs of an individual.

AUSTRALIAN TAX TREATMENT OF PSI

The use of income assignments for the purpose of income tax avoidance is common in Australia. Section 25(1) of the Australian tax statute states, *inter alia,* that the assessable income of a taxpayer includes the gross income derived directly or indirectly by the taxpayer. Once a taxpayer has derived income, he or she will be subject to tax regardless of what is subsequently done with the income. Alienation of income refers to an arrangement under which income that would otherwise be assessable to a taxpayer becomes income of a different taxpayer. As stated previously, the reason is to channel income from a high-income individual to a related individual or other entity with a lower tax rate. Another reason is to qualify for business deductions

which might not be so readily available to an individual. A special tax regime for PSI was introduced in 2000 to prevent individuals from reducing their tax by alienating their PSI to an associated company, partnership, trust or individual, or by claiming appropriate "business" deductions (ITAA 1997 Pt 2-42). However, this PSI regime does not overrule the operation of the general anti-avoidance rules of Part IVA.
The salient features of the Australian provision governing PSI are briefly discussed below.

Assessment of personal service income:

Income which is mainly a reward for an individual's personal efforts or skills is the individual's personal services income. "Mainly" means more than half of the relevant amount of ordinary or statutory income. If the income is more than 50% of the effort and skill then the income is classified as PSI. Such income may include salary or wages, income payable under a contract which is wholly or principally for the labour or services of a person and income derived by consultants from the exercise of personal expertise. Income derived from selling or supplying goods or using an income-producing asset is not classed as PSI. This is the tax treatment irrespective of whether it is for doing work or producing a result, whether it is payable under a contract (Sections 84-85 ITAA 1997) or whether it is the income of another tax entity such as a company, trust, partnership or other individual. It would also not apply to income derived from a business structure such as income that flows from a partnership interest.

The Commissioner considers that the characterisation of income as PSI is a question of fact depending on the circumstances of each case. This would also include the substance of the agreement under which services were provided. A company, partnership, or trust whose ordinary income or statutory income includes the PSI of one or more individuals is referred to as a personal service entity (PSE).

Income which is mainly a reward for an individual's personal efforts or skills is the individual's personal services income. "Mainly" means more than half of the relevant amount of ordinary or statutory income. If the income is more than 50% of the effort and skill then the income is classified as PSI. Such income may include salary or wages, income payable under a contract which is wholly or principally for the labour or services of a person and income derived by consultants from the exercise of personal expertise.

An individual's PSI that is income of a PSE is included in the assessable income of the individual (Section 86–15 ITAA 1997) except for the following income:

1. the part of the PSE's income that is income from conducting a personal services business;
2. amounts that are paid to the individual as employee salary or wages before the end of the 14th day after the PAYG payment period during which the amount became income of the entity;
3. exempt income of the PSE; and
4. deductions of the PSE that are permitted to be offset against PSI.

Deductions:

The amount of PSI included in the individual's assessable income may be reduced by the amount of certain deductions to which the PSE is entitled (Section 86-20 ITAA 1997). The deductions are:

1. deductions to which the PSE is entitled that are deductions relating to the PSI (this excludes entity maintenance deductions and deductions paid for wages to the individual); and
2. the part (if any) of the PSE's maintenance deductions that exceeds the entity's assessable income from sources other than PSI. If the PSI is identified with more than one individual, any reduction for this

element is apportioned to the individuals on a *pro rata* basis.

The effect of the application of PSI regime

1. PSI is included in the assessable income of the individual whose personal efforts or skills generated the income, notwithstanding that it may have been alienated to another interposed entity. *(**Note:** The same income will not be taxed again on the personal company).*
2. There are restrictions on the deductions that may be claimed by the individual or interposed entity, so that they broadly correspond to the deductions available to employees, e.g. expenses relating to the individual's private residence, certain travel expenses, and payments made to spouses or other associates.
3. Interposed entities may have additional PAYG *(Pay As You Go) withholding obligations (unless they fall under the exceptions).*

UK TAX TREATMENT OF PSI

In UK, the HM Revenue & Customs (HMRC) has implemented IR35[7] rule to prevent the loss of tax revenue by workers using 'personal service companies' to reduce their income tax and National Insurance Contributions (NICs)[8]. Individuals often provide their services to clients through a PSC rather than taking up employment with the clients. The clients then make payments to the PSC without deducting income tax under PAYE (i.e. monthly tax deduction of employees) or NICs. In turn, the taxpayers incur a lower tax by paying themselves a lower remuneration and by paying corporation tax at 20% resulting in tax savings and NICs[9]. According to the guidance on IT35[10], all payments to the intermediary (which includes a PSC) are treated as the taxpayer's employment income and the intermediary must pay any tax and NICs due[11]. Basically, the aim of the rules is to tax most of the income of the company as if it were salary of the person doing the work. The main features of the rules are that the income of the company will be charged to NICs and income tax at personal tax rates rather than corporate tax rates. As a result, there may be little difference to the net income whether a taxpayer operates as a company or an individual. The intermediary is responsible for ensuring compliance with the IR35 legislation if IR35 applies. Failure to comply with IR35 may result in interest and penalties being charged on any additional tax and NICs.

IR35 will be invoked if an individual is working for a client under circumstances that if it were not for the existence of the limited company or partnership ("intermediaries") would be one of employment. Anyone who works through an intermediary will be affected by the rules if they fail the IR35 test. The test is whether the employee is provided by his company to an ultimate client on terms and conditions which would usually constitute an employment with that client[12]. If he is effectively an employee, then IR35 rules apply. To determine whether an individual taxpayer is self-employed or an employee, the consideration of case law principles will apply i.e. whether a contract for service or contract of service. If the taxpayer is in control of the working relationship with the client, providing his own equipment, hiring his own staff, bearing the risk of the contract, then the relationship can be categorised as a self-employed relationship. Each case is different and the Revenue will consider all factors to decide whether a person carries on business on his own or is an employee. Since its introduction, IR35 remains controversial and the UK government has no intention of withdrawing it at the moment. To improve the effectiveness of IR35, a discussion document was published on 17 July 2015 to invite the public to comment on how to improve the existing "intermediaries legislation"[13].

CONCLUSION

The types of business vehicles chosen by professionals to conduct their businesses are entirely up to them (subject to the rules of the governing professional bodies) and the tax authorities cannot interfere with their decisions. In short, it is not the taxman's business to dictate the choice of business structures to the taxpayers. It is still possible for professionals to incorporate a business for the purpose of tax planning provided there are a few shareholders instead of a single shareholder who controls a company wholly. The less reliance on one key individual for the activities of a company, the more likely the income will not be PSI but income from a business structure. Generally, the Malaysian judiciary embraces the Westminster principle i.e. a taxpayer is entitled to arrange his affairs in such a manner as to attract the minimum liability to tax[14]. However, where a tax planning exercise is not carried out for bona fide commercial reason, Section 140 will be invoked. In the case of unacceptable tax avoidance, it will normally lead to reassessment and a penalty is imposed if the tax arrangement is viewed as an under-declaration of income or as the submission of incorrect tax return.

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1 *Example of such an arrangement/business structure can be seen in the case of S Sdn Bhd v DGIR 3439 MSTC 1995 where the taxpayer acted as consultant to a company which is wholly owned by him.*

2 *It does not include income that is mainly generated by the use of assets or the sale of goods.*

3 *Section 3 of the ITA 1967 provides the scope of charge to income tax in Malaysia.*

4 *The assignment of income doctrine is a judicial doctrine developed in United States case law Lucas v. Earl 281 U.S. 111 (1930).*

5 *The settlement legislation requires that if income from property arises under a 'settlement', and the settlor has an interest in the property, then the income is taxed as income of the settlor. See s 65 of ITA 1967.*

6 *See Sungei Batu Perlombongan Sdn Bhd v DGIR (1988) 1 MSTC 243, 2053 where the only reason for the takeover of a loss making company is to obtain tax avoidance benefit without any commercial reason. S 140 was invoked to disallow the use of the business loss from the takeover company.*

7 *HMRC publishes guidance on the IR35 rules on Gov,uk.*

8 *IR35 is the common name for the Intermediaries Legislation, which is introduced to combat tax avoidance. Although the circumstance for introducing this piece of legislation is different from Australia, the legislative intention is the same i.e. to counteract tax avoidance by using limited companies or partnerships.*

9 *The tax advantages mainly arise by extracting the next taxable profits of the company by way of dividend which will not attract National Insurance contributions.*

10 *The legislation was introduced in April 2000 to counteract using personal service companies to avoid tax.*

11 *Her Majesty Revenue & Customs, "IR35: find out if it applies" (HMRC Publications) at https://www.gov.uk/guidance/ir35-find-out-if-it-applies viewed on 16 February 2016.*

12 *In the past, this has been a problem in the construction industry but the practice of using PSC has become more widespread.*

13 *Her Majesty Revenue & Customs, "Intermediaries Legislation (IR35): discussion document" (HMRC Publications) at https://www.gov.uk/government/consultations/intermediaries-legislation-ir35-discussion-document viewed on 29 January 2016.*

14 *See Chu Lip Kong v DGIR [1950 – 1985] MSTC 58 and DGIR v Rakyat Berjaya Sdn Bhd [1950 – 1985] MSTC 58.*

STUDY ON CONSUMERS' **GOODS AND SERVICES TAX (GST)** KNOWLEDGE

Ng Yen Hong, M. Krishna Moorthy,
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ABSTRACT | An initial discussion started back in year 1988 by the Malaysian government to introduce Goods and Services Tax (GST) in the country. Finally after much delay, on 1 April 2015, GST was implemented in Malaysia replacing the Sales and Services Tax (SST). The implementation of GST in Malaysia will assist the country to overcome the persistent annual budget deficits since 1999. The GST system is expected to be more effective and efficient in collecting indirect tax. According to past literature, consumers' knowledge and level of acceptance towards GST has a positive and significant relationship. Hence, with greater consumers' knowledge, consumers' acceptance towards GST will be improved. This study assesses consumers' knowledge on the GST system after four months of implementation. Data were collected through a questionnaire which was designed to assess the knowledge level of consumers on GST. A total of 400 questionnaires were collected in the state of Perak using a convenience sampling method. Descriptive statistical analysis was performed and the results showed that the surveyed respondents possess moderate to high level of knowledge towards the GST system. The findings of this study conclude that the awareness campaigns carried out by the government were effective towards consumers' GST education and the amount spent on this campaign has been efficiently used.

INTRODUCTION

Goods and Services Tax (GST), also known as value added tax (VAT) is a form of multiple stage consumption tax (Moomal & Zakaria, 2014). GST has been implemented in over 160 countries, including the European Union and Asian countries (Royal Malaysian Customs Department, 2012). In Malaysia, the GST replaced the Sales and Services Tax (SST) and SST should be referred to as old or conventional - not a current tax system. For instance, GST is able to eliminate the cascading effect in SST (Ministry of Finance Malaysia, 2014). During the time of SST, sales tax of 10% is charged on goods sold by a manufacturer to a service provider, like a bottle drink sold by a restaurant for instance. Thereafter, when the restaurant sells the bottle drink to the consumer, service tax of 6% is imposed on the product price which had already included the 10% sales tax. In other words, SST results in double taxation in some instances.

GST is preferred as it is capable of providing income consistency and it has the ability to strengthen the country's economic growth. According to the Ministry of Finance Malaysia (2014), GST is a better tax system in comparison to SST. In terms of effectiveness and efficiency in collecting tax revenue, GST is transparent. Taxes will be fair among all businesses involved in the country and this will enhance the level of competitiveness in the global market.

Background

According to Moomal & Zakaria (2014), the implementation of GST was initially discussed in year 1988. However, the plan to implement GST was deferred on numerous occasions. Subsequently, the implementation of GST was once again announced in budget 2005 with the intention of replacing SST in year 2007 (Mansor & Ilias, 2013). However, on 22 February 2006, the Malaysian government decided to postpone the GST implementation to a later date (Mansor & Ilias, 2013). The decision to postpone was necessary as the government required traders to make necessary preparation to set-up the computing system and provide appropriate training to their staff who are involved in the GST system development. Furthermore, collection of views from various relevant parties and further research was crucial before the GST implementation could be announced.

According to the Federal government Budget 2016 reported by the Ministry of Finance Malaysia, indirect tax (21.9%) represents the second largest revenue source for the Malaysian government. Income tax (43.9%) remains as the main revenue source, while non-tax revenue (15.9%) is the third largest revenue source for the Malaysian government. Due to the rising subsidy bills, and the impact of the economic downturn during 1997 to 1999, the budget deficits have reached unsustainable levels (Narayanan, 2007). In actual fact, Malaysia has been experiencing difficulties in managing the deficit budget since year 1970 to present (with the exception of five good years from 1993 to 1997) (Narayanan, 2014). The global economic crisis which struck Malaysia between year 2008 and 2009 has brought a profound impact to the Malaysian economy. According to Narayanan (2007), the Gross Domestic Product (GDP) for 2008 and 2009 were only 5% and 3.5% respectively. Even after the economic crisis , deficit budgets continued. Since GST is a better tax collection system, its implementation would benefit the country and hopefully solve the deficit budget. Choong and Lai (2006) highlighted that GST is not an additional tax imposed on consumers. It merely replaced the SST system. Since GST is more effective and efficient in the collection of indirect tax compared to SST, such move is essential to the nation. As explained by Prime Minister Datuk Seri Najib Tun Razak, the implementation of GST would provide the country with sustainable national revenue without resorting to international loans (Syed Umar, 2013). Finally, the Malaysian government decided to replace SST with GST starting from 1 April 2015.

Problem statement

GST implementation represents part of the government's tax reform agenda to improve their capability, effectiveness and transparency of tax administration and management. Thereafter, the Malaysian government undertook concerted effort in providing sufficient education and clarifications to consumers on how the GST system could benefit them in various aspects in the long-run. The awareness of GST need to be satisfactory in order to increase the confidence level among Malaysians that the tax collected from GST will be well managed and be used in their best interest. Consequently, many initiatives were taken by the Malaysian government to improve the public awareness and knowledge towards the GST system. In addition, funds were also allocated by the Malaysian government to educate businesses and staff, in order to allow a smooth transition from SST to GST. According to the Budget 2014 announced by Prime Minister and Minister of Finance, Datuk Seri Najib Tun Razak, a GST training grant of RM100 million was allocated to various business sectors in allowing them to send their employees for GST training in year 2013 and 2014 (Bank Negara Malaysia, 2013). In addition, financial assistance of RM150 million was provided to SMEs in year 2014 and 2015 for the purchase of accounting software (Bank Negara Malaysia, 2013). As for the public, RM17 million was allocated and spent in providing the public with workshops, seminars, public meetings, talks, briefings and printouts (Ibrahim, 2014; and Free Malaysia Today, 2015).

Research gap

A study was conducted by Shamsuddin, Ruslan, Halim, Zahari and Fazi (2014) which concluded that GST awareness would improve the Malaysian public perception and acceptance towards GST. Hence, the study prompted the relevant authorities to carry out awareness campaigns on the GST system to the public through advertisements in television, radio, billboards and even social network. However, Moomal & Zakaria (2014) commented that there are currently no studies conducted in evaluating the outcome of the intensive awareness campaigns carried out. Thus, this study would fill the gap of knowing the consumers awareness on GST after four months of implementation.

Objective of the study

Under the GST system, there are three types of supplies of goods and services, namely: standard-rated supplies, zero-rated supplies and exempt supplies (Mansor & Ilias, 2013). As explained by the Royal Malaysian Customs Department (2012), standard-rated supplies are defined as goods and services which are subject to standard rate and the GST registered person is eligible to claim input tax credit on his business expense in making taxable supplies. Zero-rated supplies are defined as those taxable supplies which are subjected to zero rate. Businesses are eligible to claim input tax credit. Items that fall under the GST (Exempt Supply) Order 2014 and 2015 are exempted from GST. Businesses are then not eligible to claim input tax credit. The objective of this study is to quickly investigate the Perak state consumers' knowledge level on the newly implemented GST system including the various components of the GST system like standard-rated supplies, zero-rated supplies and exempt supplies.

Significance of the study

This study would help the government to evaluate the outcome of the intensive awareness campaigns carried out for consumers through workshops, seminars, public meetings, talks, briefings and printouts after four months of implementation and to develop their future strategy towards building up the confidence of the consumers.

RESEARCH METHODOLOGY

Research Design

In order to study the consumer awareness, this study used the quantitative and cross sectional method. According to Bahrick, Bahrick, and Wittlenger (1975), cross sectional study observes one phenomenon in a short period of time. Mann (2003) observed that this method is cheap and quick. This survey has been done to find out the awareness of the consumers about the newly introduced GST. Large quantity of data can be collected in a short time with a lower cost in the survey research method (Kaiser, 2011).

Population

The target population for this study consists of consumers aged above 18 living in all towns (including Ipoh, Kampar, Setiawan, Teluk Intan, Taiping and Tapah) in the Perak state. Since there are large number of consumers in the Perak state, there is no sampling frame available for this study.

Sampling

As sampling facilitates generalisation of results to a larger population, sampling is needed to conduct a research (Ahmad & Taylor, 2009). According to Kitchenham and Pfleeger (2002), the researchers can reduce administrative costs and have ability to administer controlled follow-up procedures through sampling procedures. As there is no sampling frame available, this study used non-probability sampling method, which is cost and time efficient. Huysamen (1993) also emphasised that non-probability sampling is suitable for survey research. In order to get the data from a large population, convenience sampling method, which is an easy method, has been used. Cope (2003) suggested that convenience sampling is economical, convenient, simple and less time consuming. A sample size of 300 is considered as good (Comrey & Lee, 1992). Hence, 400 questionnaires were distributed to the consumers in the Perak state who consented to take part in the survey. The completed questionnaires were collected back immediately by the researchers. A total of 400 questionnaires were fully completed and utilised in the statistical analysis.

Research Instrument

This study used a self-administrated questionnaire as they are time and cost-efficient. Kaiser (2011) mentioned that questionnaires allow easier coding and data analysis for the researchers. Questionnaires were delivered personally by hand to the consumers. The respondents completed the questionnaires in the presence of researchers and the completed questionnaires were collected back immediately.

Constructs Measurement

There were three sections in the questionnaire.

In Section A, the demographic profile of the respondents was presented by using nominal and ordinal scale as scale of measurement.

In Section B, questions related to some of the provisions of the newly introduced GST were included. There were a total of 42 questions in Section A and Section B. Most of the questions in Section B contained 'yes' or 'No' answers to make it easy for the respondents to answer the questions.

DATA ANALYSIS

Demographic Profile of Respondents

A total of 400 questionnaires were distributed and collected from consumers staying in the Perak state. Section A of the questionnaire collects demographic information of the respondents, while Section B assesses the respondents' knowledge on the GST system in Malaysia. The respondents' demographic profile is shown in **Table 1**.

Table 2 shows the descriptive analysis results on respondents' knowledge towards the GST system in Malaysia. The general awareness of consumers is high. 79.5% of the consumers surveyed are aware that there are three types of supplies of goods and services, namely: standard-rated supply, exempt supply and zero-rated supply. A huge majority of the consumers surveyed (94.8%) knows the GST rate is 6%.

Table 1: Demographic Profiles of Respondents

Demographic Factors	Category	Frequency	Percentage
Gender	Male	184	46.0
	Female	216	54.0
Age	18-21 years old	38	9.5
	22-30 years old	188	47.0
	31-40 years old	83	20.8
	41-55 years old	64	16.0
	56 years old and above	27	6.7
Marital Status	Single	236	59.0
	Married	157	39.2
	Separated and divorced	7	1.8
Ethic Group	Malay	102	25.5
	Chinese	244	61.0
	Indian	46	11.5
	Others	8	2.0
Education Level	O-level equivalent/High school certificate equivalent	111	27.8
	Diploma	47	11.8
	Degree	160	40.0
	Postgraduate	82	20.4
Income Level (RM monthly)	RM2,000 and below	216	54.0
	RM2,001-RM5,000	143	35.8
	RM5,001-RM8,000	36	9.0
	RM8,001 and above	5	1.2

There were 36 questions in Section B of the questionnaire to assess the level of consumers' knowledge on the GST system in Malaysia. Respondents' awareness were assessed through the 'Yes' or 'No' questions. Based on the percentage scores of the correct answers, the level of consumers' knowledge was divided into four levels:

(a) High (with percentage scores of 75 to 100)
(b) Moderate (with percentage scores of 50 to 74)
(c) Low (with percentage scores of 30 to 49)
(d) Poor (with percentage scores below 30)

One of the integral parts of the questionnaire is a list of twenty-six individual items, consisting of a mix of standard-rated supplies, exempt supplies and zero-rated supplies. The purpose is to assess consumers' knowledge in differentiating items which should and should not be subject to the 6% standard rate of GST by the merchants. Out of the twenty-six items listed, ten items are subjected to GST while the remaining sixteen items are not subjected to GST. The items listed are commonly used household items, such as, groceries, clothing, transportation etc. As shown in **Table 2**, only three out of the twenty-six items are commonly answered wrongly by the respondents. The three items were medical fees from clinic visitation, laboratory test on

Table 2: Descriptive Analysis on Respondents' Knowledge

Item	Category	Frequency	Percentage	Level of Knowledge
Knowledge on the three types of supplies of goods and services	Yes	318	79.5	High
	No	82	20.5	
Percentage of GST charges	5%	17	4.2	High
	6%	379	94.8	
	8%	2	0.5	
	10%	2	0.5	
Percentage scores on the correct answer obtained from respondents on the twenty-six items	High (75-100)	10	38.5	Moderate
	Moderate (50-74)	13	50.0	
	Low (30-49)	3	11.5	
Knowledge on only registered businesses are allowed to collect GST	Yes	318	79.5	High
	No	82	20.5	
Knowledge on the consumers' rights to file complaints on matters related to GST	Yes	392	98.0	High
	No	9	2.0	
Channel to complaint on GST related matters	RMCD[a]	103	25.8	Moderate
	IRB[b]	17	4.2	
	MDTCC[c]	97	24.3	
	RMCD & MDTCC	78	19.5	
	Other wrong answers	105	26.2	
Knowledge on the requirement of printed tax invoice for GST collection	Yes	363	90.8	High
	No	37	9.2	
Ability in identifying a valid simplified tax invoice	Yes	184	46.0	Low
	No	216	54.0	

[a] RMCD represents the Royal Malaysian Customs Department.
[b] IRB represents the Inland Revenue Board Malaysia.
[c] MDTCC represents the Ministry of Domestic Trade, Co-operatives and Consumerism.

blood glucose and the 12kg cylinder cooking gas (liquefied petroleum gas). All these three items are not subjected to GST, however, the majority of the respondents mistook that GST will be charged on these three items. Nevertheless, half of the questions (i.e., thirteen out of twenty-six items) had percentage scores of 50 to 74. Hence, the findings of this study suggest that the level of knowledge of the consumers surveyed is moderately high.

A high percentage (79.5%) of the respondents has the knowledge that only registered businesses are allowed to collect GST from consumers. On top of that, 98% of the respondents are aware of their rights in filing complaints on GST related matters; however, only 19.5% of the respondents got the channel in filing the complaints correctly. The right channels to file GST related complaints are the Royal Malaysian Customs Department (RMCD) and the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC). Nevertheless, 25.8% and 24.3% of the respondents obtained one of the channels in filing GST related complaints correctly. Hence, it is worth noting that overall, 69.6% of the respondents will be filing GST related complaints in one of the correct channels (i.e. either RMCD or MDTCC). In other words, consumers' knowledge level in filing complaints at the correct channels is moderate.

Lastly, the questionnaire assessed the respondents' knowledge on tax invoice. Over ninety per cent of the respondents are aware that a printed tax invoice must be issued when a merchant is collecting the GST. However, only 46% of the respondents are able to spot that the simplified tax invoice provided in the questionnaire is invalid. In other words, 54% of the respondents have mistaken the invalid simplified tax invoice as valid. The confusion on the simplified tax invoice could be due to the multiple formats approved by the RMCD. On the other hand, 85.8% of the respondents were able to identify a valid full tax invoice.

Overall, the level of consumers' knowledge on the GST system in the Perak state is considered to be between moderate and high level.

DISCUSSION AND CONCLUSION

Before the implementation of GST on 1 April 2015, significant efforts were undertaken by the Malaysian government in educating the public with knowledge of the GST system. A total of RM17 million was spent by the government in order to carry out awareness campaign for the public through workshops, seminars, public meetings, talks, briefings and printouts. The objective of this study is to assess consumers' knowledge on the GST system in answering the call of past literatures. The findings of this study suggest that the knowledge level of consumers on the GST system is moderately high. The findings implied the awareness campaign carried out by the Malaysian government has been effective in raising the public's knowledge on the the GST system. As supported by past studies, tax awareness is positively correlated to tax acceptance (Shamsuddin et al., 2014). Hence, it can also be concluded that the respondents who possessed a good understanding of the GST system will have a high level of acceptance of the GST system. Lastly, this study would like to suggest to the Royal Malaysian Customs Department to standardise the format of the simplified tax invoice, so that consumers will not be confused over multiple approved formats for simplified tax invoice.

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2016 BUDGET UPDATE

INCOME TAX DEDUCTIONS AND ALLOWANCES

IN RELATION TO GST BORNE BY A BUSINESS

Thenesh Kannaa

Being a transactional tax, the implications of the Goods and Services Tax ("GST") on accounting and income tax should be carefully considered. Following the 2016 Budget, several rules were introduced in the Income Tax Act 1967 ("ITA") to address the treatment of GST for the purposes of income tax. This article illustrates the application of these rules.

The rules apply retrospectively from the year of assessment ("YA") 2015. This effectively means that the income tax implication of GST in respect of all transactions that occur on or after 1 April 2015 must be considered in light of the recently enacted rules[1].

Before considering the rules in detail, it is useful to begin with the accounting and income tax implications of GST on some typical transactions.

GST is themed as a consumption tax and thus the general scheme of GST would usually not affect the accounting profit or income tax, as illustrated in Example 1 below.

Example 1: Typical GST-registered business:

XYZ Sdn Bhd is a GST-registered mini market with monthly taxable periods. In January 2016, it acquired inventory for RM53,000, inclusive of RM3,000 GST. This is recorded as **Table 1**.

Although XYZ Sdn Bhd pays its supplier RM53,000, it would claim RM3,000 from the Royal Malaysian Customs Department ("RMCD") and thus only RM50,000 is recognised as an expense for accounting and income tax purposes. Given that the accounting and income tax treatment is consistent, there is no need to make an adjustment in the tax computation.

In the same month, XYZ Sdn Bhd made sales of RM74,200, inclusive of RM4,200 GST. This is recorded as **Table 02**.

Table 01

	Dr.	Cr.	FS type
Purchases or cost of goods sold	50,000		IS
GST: input tax credit	3,000		BS
Payables		53,000	BS

Table 02

	Dr.	Cr.	FS type
Accounts Receivable	74,200		BS
GST: output tax		4,200	BS
Sales Revenue		70,000	IS

Abbreviation of accounting terms:

"FS" represents Financial Statement.

"IS" represents Income Statement or Statement of Comprehensive Income.

"BS" represents Balance Sheet or Statement of Financial Position.

"Dr." represents debit.

"Cr." represents credit.

Although XYZ Sdn Bhd receives RM74,200 from its customers, RM4,200 of that amount is regarded as collected "on behalf" of the RMCD, and thus only RM70,000 should be recognised as revenue for accounting purposes and as gross income for tax purposes. Given that the accounting and income tax treatment is consistent, there is no need to make an adjustment in the tax computation.

Assuming there is no other transaction in the taxable period, it would have to pay RM1,200 (i.e. output tax RM4,200 less input tax credit RM3,000) to the RMCD by 29 February 2016. This may be recorded as **Table 03**.

The GST paid to the RMCD is out of the money collected or to be collected from the customers. Thus the payment to the RMCD should not be recognised as an expense for accounting or income tax purposes.

GST borne as business cost

Although a good starting point, Example 1 above is over-simplified for many reasons. In particular, it assumes that the GST itself does not appear as cost in the financial statements of a business. Although this is a valid proposition in the general scheme of the GST, in the following situations, GST would be a cost borne by the business:

- Input tax incurred on acquisition of goods and services by a business that is not GST-registered.
- GST-registered business acquires goods or services but the input tax is blocked (for example, in respect of acquisition, repair and maintenance of passenger motorcar, medical expenses, family benefits and entertainment other than for employees and existing customers[2]) .
- GST-registered business which is a mixed supplier[3] and the acquisition of goods or service is either attributable to exempt supplies or common to both taxable and exempt supplies.
- GST-registered business which is not in a position to claim input tax credit in respect of a particular acquisition due to absence of documentary evidence such as tax invoice.
- Output tax borne by a GST-registered businesses on deemed supply (such as gift of goods worth more than RM500).

To understand the income tax treatment of these costs, the rules introduced in the 2016 Budget are be considered in detail, as follows.

Deduction in respect of input tax not entitled for credit under the GST Act

There is no statutory provision in the ITA that expressly permits a deduction in respect of any input

Table 03

	Dr.	Cr.	FS type
GST: output tax	4,200		BS
GST: input tax credit		3,000	BS
Bank		1,200	BS

Table 04

	Dr.	Cr.	FS type
Utility expenses	212		IS
Payables		212	BS

tax. However, the new Subsection 39(1)(o) expressly states that no deduction is allowed for any amount paid or to be paid in respect of GST as input tax by a person if he is entitled under the GSTA to credit that amount as input tax.

Where the Subsection 39(1)(o) applies, it does not necessarily mean that an adjustment has to be made in the income tax computation. It must be first ascertained whether such amount had been deducted in arriving at the accounting profit, which usually is the starting point for tax computation for businesses. As pointed out in Example 1, where a business is GST-registered, any input tax paid or to be paid (RM3,000 in that example) by the business usually does not affect the accounting profit, which is consistent with the prohibition above for income tax. Given that the accounting and income tax treatment is consistent, no adjustment is to be made in the tax computation.

For more specific application of the rule, consider the examples below and **Diagram 1**.

Example 2 – Non-registered business:

Kecil Sdn Bhd is not GST registered and the value of taxable supply it makes is below the registration threshold of RM500,000 per annum. It receives utility bills amounting to RM212, including RM12 GST. The accounting entry is as **Table 04**.

Given that Kecil Sdn Bhd is not a taxable entity for the purposes of GST, it would not be entitled to credit the RM12 as input tax under the GSTA[4]. Thus, the RM12 would not be restricted by Subsection 39(1)(o) and would be deductible for income tax purposes provided the underlying expense is tax deductible (this will be discussed further in Example 4 below). Given that the income tax deduction is consistent with the amount recognised as expense in the Income Statement, no adjustment has to be made in the tax computation.

Example 3 – Blocked input tax:

SS Bhd, a GST-registered businesses, incurs RM1,060 (inclusive of RM60 GST) on repair of a passenger motorcar that it uses for business purposes. The input tax on this cost is blocked, i.e. GSTA specifically provides that no credit shall be given in respect of this acquisition[5]. The accounting entry may be presented as either **Table 05** or **Table 06.**

Regardless of the mechanics and presentation, this transaction reduces the accounting profit by RM1,060.

Given that no credit is given under the GSTA for the RM60, it would not be restricted by Subsection 39(1)(o) for income tax purposes. Thus, the total deduction for income tax is RM1,060, which is consistent with accounting.

Example 4 – GST that relates to underlying costs which are not tax deductible:

Kecil Sdn Bhd decided to acquire an office building for RM318,000 (inclusive of RM18,000 GST). Given that it is not a taxable entity for the purposes of GST, it would not be entitled to credit the RM18,000 as input tax under the GSTA. As such, the RM18,000 would not be restricted by Subsection 39(1)(o) but this does not necessarily mean that it should be deductible. Section 39 is not a permissive provision, but a provision that restricts what would otherwise be deductible under Section 33.

The underlying cost of RM300,000, being a capital expenditure, does not satisfy the criteria under Section 33. As such, the author is of the view

Table 05

	Dr.	Cr.	FS type
Motor vehicle repair	1,000		IS
Irrecoverable input tax	60		IS
Payables		1,060	BS

Table 06

	Dr.	Cr.	FS type
Motor vehicle repair	1,060		IS
Payables		1,060	BS

that the RM18,000 should also be regarded as not satisfying Section 33. No deduction should be given for the purposes in respect of the RM300,000 or RM18,000[6]. Where the entire RM318,000 is capitalised in the Balance Sheet, no adjustment is to be made in the tax computation. Where only RM300,000 is capitalised and RM18,000 is deducted in the accounting profit[7], the RM18,000 must be added to the profit in arriving at the adjusted income for tax purposes.

On a similar basis, if Kecil Sdn Bhd incurs RM530 (inclusive of RM30 GST) on entertaining its suppliers, no credit is claimable under the GSTA on the RM30[8]. Given that the underlying cost of RM500 itself is only 50% tax deductible[9], only RM15 of the GST of RM30 should be deductible for the purposes of income tax.

Example 5 – Entitled but did not claim under the GSTA:

For administrative reasons, a business chose not to claim any credit under the GSTA in respect of any acquisitions where the GST is negligible (typically on parking, stationery and utility bills).

The fact that the business did not actually claim the input tax under the GSTA appear irrelevant. What matters is that the company was entitled under the GSTA to credit that amount and thus the restriction under Subsection 39(1)(o) would apply – unless the IRB provides an administrative concession in light of the bona fide intention of the taxpayer (given that credit under the GSTA is more beneficial to the business than an income tax deduction on the GST amount).

Example 6 – Simplified tax invoice:

Mohan is a proprietor of a restaurant and is GST-registered. He acquired supplies for the restaurant from a hypermarket, for which he was given a simplified tax invoice with GST amounting to RM50. Where a business has only simplified tax invoice in respect of an acquisition, the amount allowed as input tax under the GSTA is limited to RM30[10].

It is dubious whether the excess RM20 would be restricted by Subsection 39(1)(o), or be deductible for the purposes of income tax. Some may perceive that based on the documents available at the time when the income tax return is being furnished, Mohan is only entitled for credit of RM30 under the GSTA and thus the excess RM20 should be deductible for the purposes of income tax. On the other hand, others may perceive that Mohan is entitled to claim credit of RM50 under the GSTA as he could have requested the supplier to issue a full tax invoice[11]. In fact, it is possible, although impractical in many situations, for the full tax invoice to be given to the customer after the income tax return is furnished. Thus, there may be a 'double dip' if income tax deduction is given in respect of the RM20.

On the same train of thought, ambiguity is present in respect of transactions where the customer is given a document that is entitled 'Tax Invoice' but is not complete with all particulars prescribed in Regulation 22 of the GST Regulations 2014. At the time of writing, the IRB's interpretation on these matters has not been clarified in any guideline in the public domain.

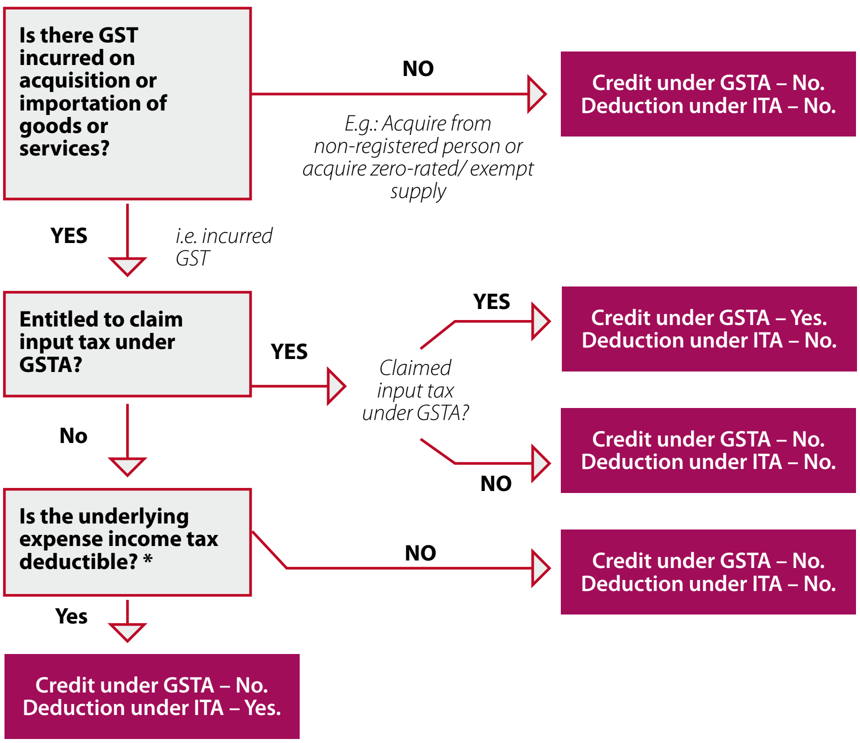
credit that amount as input tax.

The rule also applies in respect of reinvestment allowance[12], investment allowance for service sector[13] and investment tax allowance[14].

Example 7 – Acquisition of asset with blocked input tax:

Danger Sdn Bhd, a GST-registered business, acquired a passenger motorcar

DIAGRAM 1: FLOWCHART FOR INCOME TAX DEDUCTION FOR INPUT TAX



** ITA does not expressly state this criteria in respect of input tax. Based on the reasoning in Example 4 and the practice in certain other jurisdictions, the author is of the opinion that this criteria should apply. At the time of writing, it is not certain whether the IRB will concur with the author's opinion.*

Capital allowances in respect of input tax not entitled for credit under the GST Act

Akin to Subsection 39(1)(o), paragraph 2E of schedule 3 of the ITA provides that qualifying expenditure on plant, machinery and industrial building shall not include any amount paid or to be paid in respect of GST as input tax by the person if he is liable to be registered under the GSTA and has failed to do so, or if he is entitled under the GSTA to

for RM84,800 (inclusive of GST RM4,800). The input tax on this cost is blocked, i.e. the GSTA specifically provides that no credit shall be given in respect of this acquisition[15]. The accounting treatment of this cost is as

Table 07

	Dr.	Cr.	FS type
Property, plant & equipment	84,800[16]		BS
Payables		84,800	BS

Table 07:

For income tax purposes, the RM4,800 should not be deductible in arriving at the adjusted income of the business as it does not satisfy Section 33. However, it should be regarded as part of the qualifying expenditure for the purposes of capital allowances given that the underlying cost qualifies for capital allowances and the input tax was not credited under the GSTA. Thus, capital allowances are available based on the qualifying expenditure of RM84,800.

Note that if Danger Sdn Bhd had acquired a lorry (rather than a passenger car), it would have been entitled to claim RM4,800 as credit under the GSTA. Thus, qualifying expenditure for the purposes of capital allowance would have been only RM80,000.

Output tax borne by a business

As illustrated in Example 1, output tax accounted by a business to the RMCD is generally part of the consideration received from the customer and thus it does not affect revenue for the accounting profit or gross income for income tax purposes.

However, certain transactions carried out without any consideration is deemed by the GSTA as a supply and thus GST has to be accounted to the RMCD on the market value of such supply (for example, gift of goods worth more than RM500)[17]. Given that these transactions are carried without any consideration, it is common for the supplier to bear the output tax. In such an event, the output tax would be considered as an expense that reduces the accounting profit.

Subsection 39(1)(p) of ITA expressly states that no deduction is allowed for any amount of output tax paid or to be paid under the GSTA which is borne by the person if he is registered or liable

Table 08

	Dr.	Cr.	FS type
GST output tax expense	90		IS
GST output tax		90	BS

to be registered under the GSTA. This restriction applies regardless whether the cost of the underlying supply is deductible for the purposes of income tax.

Example 8 – output tax on deemed supply:

Panda Bhd is a GST-registered company that manufactures and sells computers. One of its key customer is organising an annual dinner and Panda Bhd gifted a laptop from its inventory for the annual dinner. The normal sales price of the laptop is RM1,590 (inclusive of RM90 GST). Under the GSTA, Panda Bhd is required to account for output tax of RM90. The accounting treatment of this is as **Table 08**.

Although the cost of the laptop itself may be either 100% deductible or 50% deductible[18], there is no deduction in respect of the output tax expense of RM90, prohibited by Subsection 39(1)(p). Given that this amount has been deducted in computing the accounting profit, it must be added to the accounting profit in arriving at the adjusted income for tax purposes.

At present, it is unclear whether Subsection 39(1)(p) should be interpreted as prohibiting deduction in the situations outlined in the first column of **Table 09** The author's views are expressed in the second column.

Mixed supplier adjustments

A business that makes both taxable supplies and exempt supplies are commonly referred to as 'mixed supplier' for GST purposes. Where a mixed supplier is GST-registered, he is allowed to claim under the GSTA credit for a portion of the residual input tax (i.e. input tax which is common to both taxable and exempt supply). Such amount is subsequently subjected to the following adjustments:

Table 09: Issues that need clarification on whether Subsection 39(1)(p) applies

Description of the issue	Author's view
Output tax borne by a GST-registered business as part of marketing campaign (for example, "you buy, we pay GST")	These marketing phrase should be understood as synonym to the phrase "no price increase". Where price of a product is displayed as RM10 under this kind of marketing campaigns, the GSTA requires a tax invoice to be issued for RM9.43 plus GST of 57 sen[19]. Thus, the accounting entry would be as follows: Dr. Cash RM10.00 (BS) Cr. Output tax RM0.57 (BS) Cr. Revenue RM9.43 (IS) Given that only RM9.43 is treated as revenue for accounting and thus gross income for taxation, there is no reason to regard the RM0.57 as an expense in the first place. As such, the question of whether the restriction under Subsection 39(1)(p) applies becomes redundant.
Output tax borne by a GST-registered business as a result of poor drafting of business contracts.	Same as (1) above.
Output tax borne by a business because it had incorrectly treated a standard-rated supply as otherwise.	Where a standard-rated supply has been incorrectly exempt or zero-rated, the GSTA allows the supplier to issue a debit note to the customer to recover the GST[20]. Where a debit note is issued and the GST is recovered from the customer, there is no cost to the business. However, it is not always possible to do so. For example, if a hypermarket had incorrectly interpreted the GST (Zero-Rated Supply) Order 2014 and thus sold a particular product to thousands of customers without GST, it is impractical to subsequently issue debit note to recover the GST from each customer. The hypermarket is nevertheless required to account for output tax to the RMCD. From a policy perspective, it would not be equitable if this output tax borne by the hypermarket does not reduce the adjusted income of the business.
Output tax borne by a taxable person in respect of retrospective [late] registration	From a policy perspective, the output tax borne by the business should reduce the adjusted income of the business.
Output tax accounted in respect of non-payment to supplier within six months from acquisition and in respect of bad debts recovery	From an accounting perspective, the corresponding entry to the output tax in these cases are to the Balance Sheet. As such, these output taxes does not result in an expense and thus there is no issue of deductibility for income tax. *Note: The author recognises that clarity is needed in respect of the quantum bad debts deduction for income tax where no bad debts relief claimed under the GSTA in respect of the GST amount – but that issue is not related to the application of Subsection 39(1)(o).*
Output tax accounted in respect of mixed supplier adjustments (i.e. annual adjustment, capital goods adjustment and 'change of use' adjustment – see below for explanation).	The mixed supplier adjustments could result in either input tax or output tax. These should be dealt pursuant to Section 91 and provisions in Schedule 3 and so on. Subsection 39(1)(p) should not apply to any output tax borne in relation to mixed supplier adjustments.

- Annual adjustment (also known as longer period adjustment). This applies in respect of all input tax on costs that are common to both taxable and exempt supply[21].
- Capital goods adjustment. This applies to input tax on acquisition of capital goods worth RM100,000 or more. The adjustment is performed over either 10 intervals (in respect of land and building) or five intervals (in respect of all other assets)[22] .

Further, a mixed supplier may be required to make adjustments in respect of change of use[23].

Specific rules have been enacted to ensure that such adjustments are taken into account for the purposes of income tax. These rules are business-friendly as it does not involve retrospection but are nevertheless complex. Space constraints does not allow this article to explain further on the rules in respect of mixed supplier adjustments[24].

SUMMARY

In a nutshell, this article illustrates two key principles.

First, no income tax deduction is granted for an input tax entitled for credit under the GSTA. Where the input tax is not entitled for credit under the GSTA, the income tax deductibility of the input tax should, in the view of the author, be based on the deductibility of the underlying cost.

Second, where any output tax is borne by a business, no income tax deduction is available in respect of the output tax – regardless whether the underlying cost is deductible.

Given the limited publishing space, it is regretfully not possible to explain (except for the brief mentions in Table 9) the application of the income tax rules in events of GST retrospective (late) registration, credit under the GSTA in respect of input tax incurred prior to registration[25], quantum bad debts deduction for income tax where no bad debts relief claimed under the GSTA in respect of the GST amount, assessments raised by the RMCD during GST audits, and so on.

Given that businesses with 31 December year-end has to file the tax return taking into account the newly enacted income tax rules by either 30 June 2016 (individuals) or 31 July 2016 (companies), it is hoped that the IRB would soon express its interpretation of these new rules by way of a public ruling or a technical guideline.

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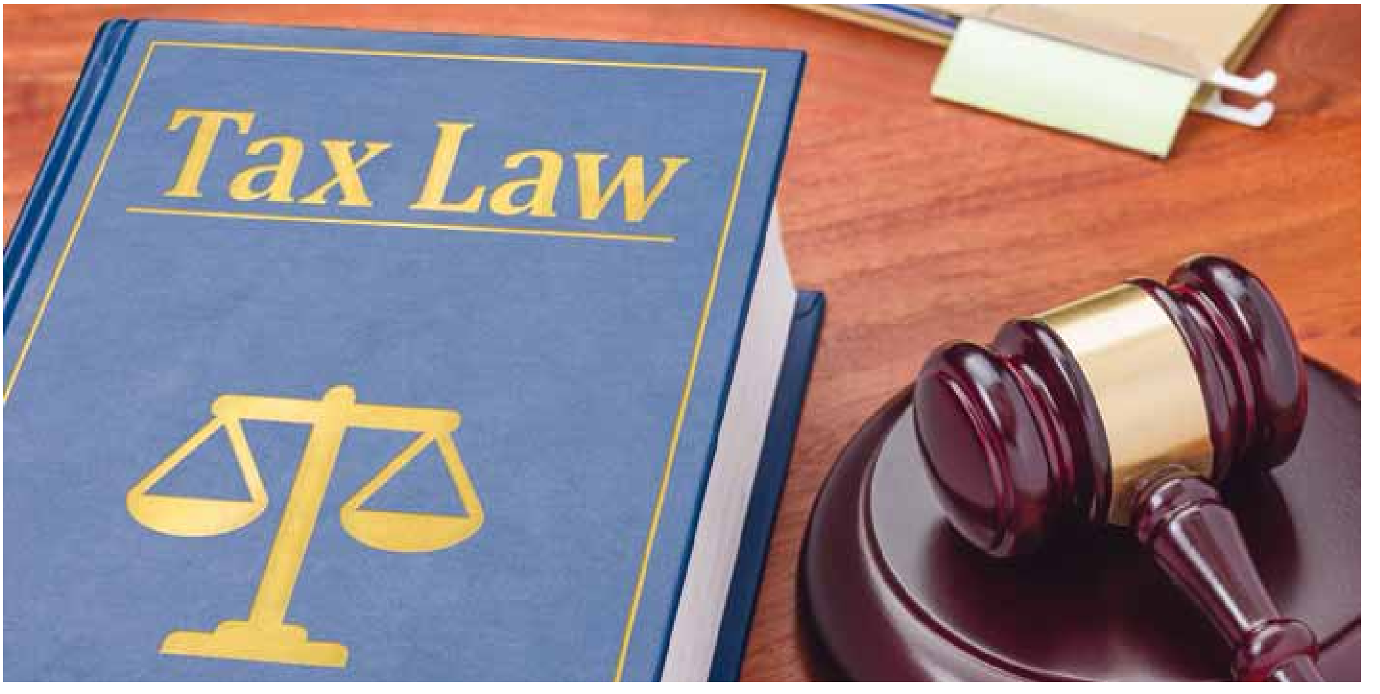
1. *For example, the basis period for YA 2015 for a company with 30th April year-end would be 1 May 2014 to 30 April 2015 – thus the first month of GST is not missed by the rules. Later months would constitute the basis period for YA 2016 and so on, which are also periods covered by the rules. Instead, if the company's year-end is 31 January, the rules would, technically speaking, apply from YA 2015, which has the basis period from 1 February 2014 to 31 January 2015. However, in such a case there would be no practical implication for YA 2015 (as the basis period ends prior to the GST implementation date of 1 April 2015) and the rule would have meaningful application for YA 2016 and thereafter.*
2. *Section 38(12) of the GST Act 2014 ("GSTA") and Regulation 36 of GST Regulations 2014.*
3. *A business that makes both taxable and exempt supplies*
4. *Section 39 of the GSTA*
5. *Regulation 36 of GST Regulations 2014. Assume the criteria in Director-General's decision 2/2014 is not met to claim credit under the GSTA*
6. *Where the capital expenditure is incurred on plant, machinery or industrial building (rather than office building), the input tax not credited under the GSTA would, along with underlying cost, qualify for capital allowances under Schedule 3 of the ITA – see 'Input tax credit – capital allowances' below*
7. *The author is of the opinion that such accounting treatment would usually not be the correct application of the accounting standards. Although some accounting software automatically expense-off the GST when tax code 'BL' is used, it is no excuse for non-compliance with accounting standards, namely Paragraph 16(a) of MFRS 116 and para 17.10(a) of Section 17 of MPERS which require 'non-refundable purchase taxes' to be included in the cost of the asset.*
8. *No credit under the GSTA for any entertainment, other than entertainment of employees and existing customers. Section 38(12) of the GST Act 2014 ("GSTA") and Regulation 36 of GST Regulations 2014.*
9. *Section 39(1)(l) of the ITA and Public Ruling No. 4/2015.*
10. *Regulation 38(1)(a)(ii) of GST Regulations 2014.*
11. *Proviso to Section 33(3) of the GSTA*
12. *Paragraph 1D, Schedule 7A, ITA*
13. *Paragraph 1A, Schedule 7B, ITA*
14. *Section 29Q, Promotion of Investments Act 1986 ("PIA")*
15. *Regulation 36 of GST Regulations 2014.*
16. *Paragraph 16(a) of MFRS 116 and para 17.10(a) of Section 17 of MPERS require 'non-refundable purchase taxes' to be included in the cost of the asset.*
17. *See First Schedule of the GSTA.*
18. *100% deduction where the laptop is with business logo (proviso (vi) to Section 39(1)(l)). 50% deduction where no business logo (Section 39(1)(l)). See also Public Ruling No. 4/2015.*
19. *It is an offence under the GST Act to issue tax invoice for a standard-rated supply without any GST.*
20. *Section 35 of the GSTA and Regulation 25 of GST Regulations 2014. See item (b)(i) of para 75 of the RMCD's Guide on Tax Invoice and Records Keeping dated 30 December 2015.*
21. *Regulation 43 of GST Regulations 2014*
22. *Regulations 57 to 60 of GST Regulations 2014*
23. *Regulations 44 and 45 of GST Regulations 2014*
24. *For further information, see Subsection 91(6), paragraph 67C of schedule 3, paragraph 1D of schedule 7A and paragraph 1A of schedule 7B of the ITA and Section 29R of PIA.*
25. *Regulation 46 of GST Regulations 2014*



INTERPRETATION OF TAXING STATUTES
AN AMALGAM OF THE OLD AND NEW

Sudharsanan R. Thillainathan & Tania K. Edward

Tax is peculiarly a creature of statute. Interpretation of taxing statutes is therefore a daily focus for those involved in tax and revenue law practice.

In Malaysia, Art 96 of the Federal Constitution ("the Constitution") makes it clear that tax can only be levied by or under the authority of federal law:-

No taxation unless authorised by law

Art 96 No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law."

GENERAL RULES OF INTERPRETATION

It is settled law that there are three basic rules, or more accurately, three basic approaches or guides **(Lim Phin Khian v Kho Su Ming)**[1] to statutory interpretation i.e. the Literal Rule, the Golden Rule and the Purposive Rule (previously referred to as the Mischief Rule).

LITERAL RULE

The duty of the court is to ascertain and give effect to the true meaning of what Parliament has said in the particular statutory provision, by simply taking the statute as it stands, and construing the words according to their natural significance[2]. Generally, the words in statutory provisions are clear, plain and unambiguous. In other words, they are capable of only one meaning, and the court is bound to give effect to that meaning irrespective of the consequences[3]. The duty of the court was expressed succinctly by Lord Esher in 1892:-

> "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity the court has nothing to do with the question whether the legislature has committed an absurdity."

GOLDEN RULE

However, attention should not be confined and a literal interpretation necessarily given to statutory provisions, as things are often more complex. In these circumstances, the Golden Rule comes into effect. The Golden Rule is that the court should generally follow the literal approach, with the words of the statutory provision given their prima facie meaning, unless it produces an inconsistency, absurdity or inconvenience so great as to firstly, convince the court that the intention could not have been to use them in their ordinary signification and secondly, justify the court in putting on them some other signification, in which case, the court should find some other meaning.

PURPOSIVE RULE

While the Literal and Golden Rules direct attention purely at the words themselves, the Purposive Rule encourages the court to have regard to the context in which the words appear. The application of the Purposive Rule is where a statutory provision is defined more broadly in order to fill gaps within the legislation. It considers why the Act was passed, then, applies that knowledge in giving the words under consideration whatever meaning will best accord with the purpose of the legislation.

There can be little doubt that the Literal Rule has traditionally been the dominant rule. Today, however, the Purposive Rule is widely accepted as the dominant approach to statutory interpretation. In Malaysia, this is plainly evident from Section 17A of the Interpretation Acts 1948 and 1967 ("the Interpretation Acts"), which reads:-

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

INTERPRETATION OF TAXING STATUTES – STRICT RULE

It has long been perceived that the interpretation of taxing statutes is subject to special rules[4]. Further, it has often been said that the fundamental and long established principle is that taxing statutes must be interpreted strictly and precisely. This principle, as famously enunciated by Rowlatt J in *Cape Brandy Syndicate v CIR*[5] *("Cape Brandy")*:-

> "...means that in taxation you have to look simply at what is clearly said. There is no room for any intendment, there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing; but you look fairly at what is said and what is said clearly and that is the tax…"

In *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue*[6] ("NLFCS"), the Special Commissioners of Income Tax ("SCIT") found that the appellant, a society registered under the Co-operative Societies Ordinance 1948 was exempted from payment of income tax under Section 13(i)(f)(ii) of the Income Tax Ordinance 1947 ("the Ordinance"). The Income Tax Act 1967 ("the 1967 Act") repealed the Ordinance but the exemption was continued by para 33 of Sch 9 of the 1967 Act. In case No PKR 256, the SCIT held that by virtue of para 33, the appellant continued to enjoy the exemption. In 1980, the

Income Tax (Amendment) Act 1980 ("the 1980 Amendment Act") removed the exemption and by Section 1(5), amended the 1967 Act retrospective to the year of assessment 1968. The Director-General of Inland Revenue ("the DGIR") then raised assessments afresh on the appellant. The SCIT discharged the assessments, holding that the amendment to para 33 of Sch 9 of the 1967 Act did not remove the exemption. The High Court reversed the decision of the SCIT and held that the appellant no longer enjoyed the exemption by virtue of the amendment. The appellant appealed.

The Supreme Court in allowing the appeal, decided that despite the fact that the legislature had made its intention clear in Section 1(5) of the 1980 Amendment Act that Section 16 therein which amended Sch 9 of the 1967 Act shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment, the amending Act did not expressly provide that Pt I of the Interpretation Acts 1948 and 1967 shall not apply. Therefore, there was a doubt whether the legislature intended to impair the existing right of the appellant and inflict a detriment to it. As there was a doubt, the ambiguity must be construed in favour of the appellant as the exemption from tax had not been removed by sufficiently clear words to achieve that purpose. The Supreme Court in its' judgement reiterated the principle of strict interpretation as stated by Rowlatt J in Cape Brandy.

The strict approach promulgated by the Federal Court in NLFCS has been followed in several cases, notably by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-operative Insurance Society Ltd [2000] 1 MLJ 561.*

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[1] *[1996] 1 MLJ 1*

[2] *Inland Revenue Commr v Herbert [1913] AC 326, p332*

[3] *PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685*

[4] *[1897] AC 145*

[5] *The Lord Advocate v Fleming or Robertson and Anor 12 C 358 at 366, as per Lord Halsbury L.C.*

[6] *[1994] 1 MLJ 99*

INTERPRETATION OF TAXING STATUTES – INTRODUCTION OF THE PURPOSIVE APPROACH

The strict rule applied in NLFCS remained the highest authority in Malaysia with regard to the interpretation of taxing statutes for many years until it was jettisoned in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd and another appeal [2005] 3 MLJ 97 ("Premium Vegetable Oils")* (see paragraphs 11 to 15). In Premium Vegetable Oils, the respondent extracts crude palm oil ("CPO") from whole palm fruits and crude palm kernel oil ("CPKO") from the kernel of oil palm fruits. By virtue of the Palm Oil (Research Cess) Order 1979 ("the 1979 Order") made under the authority of the Palm Oil Research and Development Act 1979 ("the 1979 Act"), palm oil millers were required to pay cess for every metric ton of crude oil. The respondent contending that the cess on CPKO was invalid, but not that on CPO, brought an action in the High Court for a declaration that the appellant was not empowered to impose cess on CPKO. The High Court found in favour of the appellants but the Court of Appeal later reversed the High Court decision.

The appellant appealed and the issue before the Federal Court was whether the 1979 Order which provided for the levying and collection of cess by the appellant from palm oil millers in respect of both CPO and CPKO was *ultra vires* the parent statute, i.e. the 1979 Act. The Federal Court in dismissing the appeal with costs, held that the principle of strict interpretation of statutes enunciated by Rowlatt J could not be regarded as the *locus classicus* on this issue. The Federal Court then held that the Ramsay principle should be applied in Malaysia in consonance with Section 17A of the Interpretations Act, as this provision enjoined the purposive approach to the interpretation of statutes, including taxing statutes. It appears that the Federal Court jettisoned the traditional approach and held that only the Purposive Rule was to apply to the interpretation of taxing statutes. Further, the Federal Court found no distinction between the interpretation of taxing statutes and statutes on any other subject.

INTERPRETATION OF TAXING STATUTES – RECENT FEDERAL COURT DECISIONS

Following the decision in Premium Vegetable Oils, the Federal Court has consistently decided that taxing statutes are to be interpreted in the same way as any other statute and further cemented the purposive approach to interpretation of taxing statutes.

In *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 2 MLJ 1 ("Alam Maritim")*, the respondent, a private company resident in Malaysia, entered into 'Uniform Time Charter Party for Offshore Service Vessels' ("UTC") contracts with non-resident companies from Singapore which hired out vessels, services and crews to the respondent. In consideration, payments were made to the non-resident companies under the UTC contracts. Believing that the non-resident companies were in receipt of business income and only subject to Singaporean laws, the respondent made full payment without deducting withholding tax. Section 109B of the Income Tax Act 1967 ("ITA") provides for the statutory deduction from payments made to non-residents for services rendered. An issue in this appeal was whether payments made by a resident company in Malaysia to non-resident companies in Singapore were subject to withholding tax under Section 109B(1) of the ITA (read with Section 4A(iii) and Section 24(8) of the ITA).

In *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal [2015] 4 MLJ 701 ("Arunamari")*, the Minister of Plantation, Industries and Commodities made an order ("the 2007 Order") under Section 35 of the Malaysia Palm Oil Board Act 1998 ("POBA") for the imposition of cess on

certain classes of oil palm producers. The cess was to be utilised to compensate producers and packers of cooking oil for losses suffered by them as a consequence of the rising prices of crude oil and to stabilise the price of cooking oil. The respondents, oil palm owners subjected to the 2007 Order, challenged the legality of the 2007 Order on the grounds that it was *ultra vires* Art 96 and Art 8 of the Federal Constitution ("Constitution"). One of the issues to be determined on appeal was whether the collection of cess under the 2007 Order for the purpose of subsidising the price of cooking oil was within the listed purposes for which cess collected could be utilised under Section 33 of the POBA.

In the case of *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2015] 6 MLJ 612 ("CIDB")*, the appellant was authorised to impose a levy on every registered contractor under the Construction Industry Development Board Act 1994 ("CIDBA"). The appellant imposed a levy of RM 13,129,934.05 on the respondent, a registered contractor, who disputing the levy sum, only paid RM 2,802,130.02 arguing that the latter amount was the correct levy. The respondent contended that this was arrived at by disregarding sums attributed to 'offshore works' (which are not within the definition of 'construction works' found in Section 2 of the CIDBA) and 'non-construction works' as both are outside the ambit of Section 34 of the CIDBA. The appeal involved, *inter alia*, the interpretation of 'offshore works' and 'non-construction works'.

- **Taxing Statutes are to be interpreted in the same way as any other statute**

In Alam Maritim (see paragraph 15), the Federal Court referred to the case of *Attorney General v Carlton Bank [1899] 2 QB 158*, where Lord Russel of Killowen CJ held that all Acts ought to be construed no differently, whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the Legislature (see also *Inland Revenue Commissioners v McGuckian [1997] 3 All ER 817)*.

In both Alam Maritim (see paragraph 19) and Arunamari (see paragraph 62), the Federal Court referred to Premium Vegetable Oils where Steve Shim CJSS stated that the duty of a court is in all cases the same, whether the Act to be construed relates to taxation or any other subject.

In CIDB (see paragraph 44), the Federal Court confirmed that with a litany of cases in abundance, it is now well established that taxing statutes are to be interpreted like all other statutes.

- **Purposive approach to interpretation of taxing statutes**

In Alam Maritim, the Federal Court in allowing the appeal held that:-

"In gist, when interpreting provisions in a taxing Act the intention of Parliament must be construed from the language used and for the court to interpret it accordingly...The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning. On the other hand if the words are not so explicit, then it is incumbent upon the court to undertake an exercise to seek out the purpose of Parliament, but without sacrificing justice or importing the absurd."

The shift in approach of the British courts from *AG v Carlton Bank [1899] 2 QB 158* to *WT Ramsay Ltd v Inland Revenue Commission [1982] AC 300 ("WT Ramsay"), to Pepper (Inspector of Taxes) v Hart [1993] AC 59*, in taking into consideration the purpose of an Act, is in consonance with s. 17A of Malaysia's Interpretation Acts 1948 and 1967 ("IA"). Consequently, the Federal Court held that the intention of Parliament to collect tax from non-residents who received payments from Malaysians, as expressed in Section 4 of the ITA, would be rendered ineffective unless associated provisions, namely Section 109B of the ITA, were also promulgated to allow the collection of tax at source.

In Arunamari, the Federal Court in allowing the appeal with costs, found that the Court of Appeal had misdirected itself in giving Section 33(d) of the POBA a narrow and restricted interpretation, thereby failing to appreciate the extent of the objective and purpose of the Act and the role and function of the board in the context of the wider interest and impact in the palm oil industry in Malaysia. In this respect, the Federal Court shared the view of Lord Wilberforce in WT Ramsay, that courts in construing expressly listed purposes are not confined to undertaking a literal interpretation of the words therein but are permitted to construe the listed purposes in the context and scheme of the relevant Act as a whole. The Federal Court was also of the view that in construing a taxing statute, the function of the court is to discover the true intention of the Parliament and in so doing, the court is under a duty to adopt an approach that promotes the purpose or object underlying the particular statute although that such purpose or object is not expressly set out therein. The Federal Court stressed that to understand the purpose behind the imposition of cess on oil palm products, Section 35 of the POBA cannot be read in isolation from the rest of the provisions of the POBA. The Federal Court agreed with the appellants' submission that the objectives, role and functions of the appellants cannot be viewed in the narrow sense, but must be viewed in the context of the industry. Further, there was no contravention of Art 96 or Art 8 of the Constitution.

In CIDB, the Federal Court in allowing the appeal, held that:-

> "It is well settled that the language of a statute imposing a tax, duty, charge or levy must be strictly construed, and with no intendment permitted. Words must be given their ordinary meaning. Nothing is to be read in, and nothing is to be implied, and once that meaning is clear due regard must be given to them."

These general principles of interpreting a tax imposing statute are still woven into the fabric of the principles of construction of taxing provisions despite the introduction of Section 17A of the Interpretations Act, which enjoins a purposive reading to be undertaken when interpreting a statute. With this statutory backing, a literal and blinkered approach must now compete with the context and purpose of the Act as legislated by Parliament.

The Federal Court stated that the consequential effect of the rapid economic growth in this country, where mega projects and joint ventures by Malaysian based companies together with offshore entities are no more a rarity, makes it all the more imperative that the objective and purpose of the Act be implemented. This purposive and practical approach will surely assist and fulfill the task of the appellant, together with the levy mechanism, to manage, develop and regulate the construction industry tremendously. It was held then, that the words 'offshore works' and 'non-construction works' are within the ambit of Section 34 of the CIDBA.

CONCLUSION

Taxing statutes are not a planet of their own, subject to special rules, but are to be approached as one would any other statute. The Federal Court was of the view in Alam Maritim that the purposive approach is here to stay, in Arunamari, that in construing a taxing statute, the function of the court is to discover the true intention of the Parliament and in CIDB, that the purposive approach is to be applied unless circumstances demand otherwise.

From the progressive development of the rules of interpretation of taxing statutes, it can be seen that the emphasis is now on the object or purpose of the taxing statute, or more to the point, the taxing provision in question. Be that as it may, the traditional interpretative principles have not been discarded altogether and still remain of relevance.

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TERAJU SINAR SDN BHD – TO DEDUCT OR NOT TO DEDUCT WITHHOLDING TAX ?

Dr. Nakha Ratnam Somasundaram

This article looks at the case of Teraju Sinar Sdn Bhd, a taxpayer who thought that a withholding tax deduction need not be made on a payment to a non-resident while the Inland Revenue Board (IRB) thought otherwise – a clear case of the law being less than clear and consequently, posing tremendous tax risk to management.

Facts of the case

Teraju Sinar Sdn Bhd (the taxpayer) was a company incorporated in Malaysia and trading in electrical items. It is a controlled company with two shareholders. The taxpayer paid 'repacking and handling charges' (the charges) to a Singapore resident company, Union Concept Manufacturing Pte. Ltd. (the Singapore company). The electrical items would be imported in complete built up units (CBU) by the Singapore company and then disassembled using admittedly very low skills – this operation (the services) being wholly performed in Singapore. The disassembled parts are then exported to Malaysia as completely knocked down parts (CKD) or semi knocked down parts (SKD). In Malaysia, the taxpayer would reassemble the CKD and SKD parts into complete electrical items and distribute them to its customers.

The taxpayer made payments to the Singapore company – the payments being for the electrical items, accessories, and for documentation for cargo import declaration (customs import duty) – the whole payment being labelled as 'repacking and handling charges' in the Malaysian accounts of the taxpayer.

This disassembly and reassembly operations were resorted to because of the huge difference in customs duty on a CBU as compared to a CKD or a SKD part **(see Table 1)**.

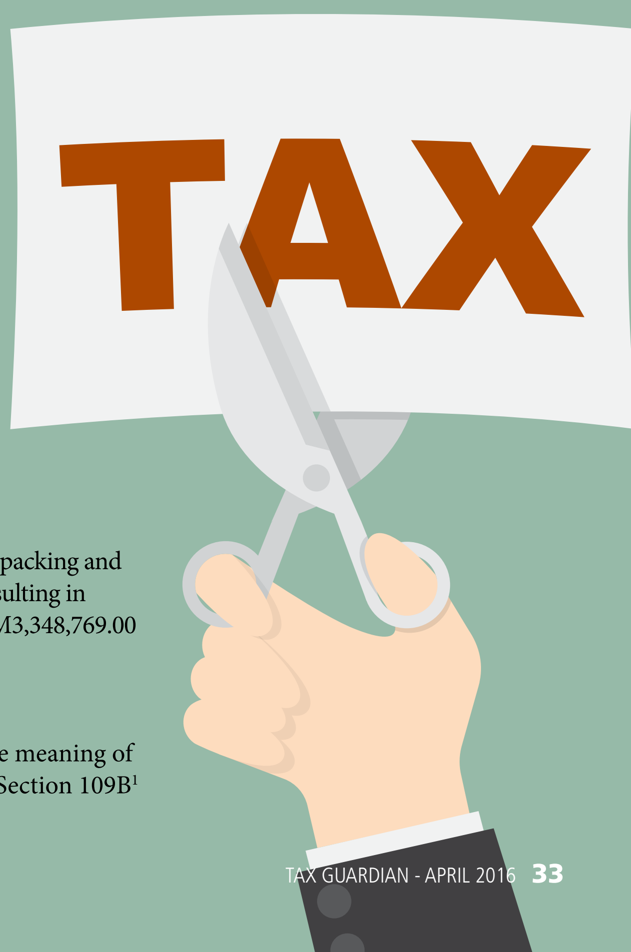

TABLE 1: Difference in customs duty between CBU and CKD or SKD

Customs Duty	CBU	CKD or SKD
Singapore	2.5%	-
Malaysia	20%	0.5%

A sister of one of the Malaysian company's shareholder owns the Singapore company.

The Malaysian company did not deduct any withholding tax on the payments made to the Singapore company.

Based on an Inland Revenue Board's (IRB) tax investigations in 2002, the 'repacking and handling' charges were disallowed because no withholding tax was deducted, resulting in additional assessments for the years of assessment 1998 to 2002 in the sum of RM3,348,769.00

The taxpayer appealed to the Special Commissioners.

The issue

The taxpayer contended that the services paid for does not fall within the meaning of the provisions of Section 4A(ii) [special classes of income] and accordingly, Section 109B[1] [the Section requiring the deduction of withholding tax from payments falling under Section 4A(ii) made to non-residents] does not apply, and consequently, Section 39(1)(j) [the Section which disallows the claim for a deduction of the 'repacking and handling charges' if withholding tax is not deducted] – is irrelevant.

Besides, the payment being a business income of the Singapore company, it is liable to tax only in Singapore.

The IRB contended that the payments to the non-resident fall within the meaning of Section 4A (ii) and includes both technical and non-technical services, accordingly Section 109B would apply. Furthermore, as the withholding tax was not deducted, the 'repacking and handling charges' charged in the accounts of the taxpayer would be disallowed under Section 39(1) (j).

Arguments

The taxpayer argued that for Section 4A (ii) to apply, two elements must be present –

(a) That the '…services are in connection with'; and

(b) It must be of a '…technical management and administration of scientific, industrial or commercial undertaking, venture…'

In other words, not all services are caught in the provisions of Section 4A (ii), for example the head office expense as in the Esso case[2]. Furthermore, the income is not deemed derived from Malaysia where services are rendered outside Malaysia, as is evidenced by the provision of Section 15A which is effective from 21 September 2002[3].

Additional argument included the fact that the Singapore company does not have a permanent establishment (PE) in Malaysia and thus the services provided by the Singapore company would constitute its business income.

The IRB's contention was as per the earlier paragraph.

Special Commissioners

The Special Commissioners decided that the 'repacking and handling charges' fell within the meaning of Section 4A (ii) and therefore withholding taxes should be deducted. However, the withholding tax does not apply to the customs export declaration charges.

High Court

On appeal, the High Court held that the IRB has erred in disallowing the 'repacking and handling charges' and upheld the exclusion of the customs export declaration fees from withholding tax.

The Inland Revenue Board being dissatisfied with the High Court decision, appealed to the Court of Appeal.

Court of Appeal

At the Court of Appeal, the focus was on whether the income paid to the Singapore Company was derived from Malaysia.

The wordings in Section 4A(ii), 15A (b) and 109B (b) introduced effective from 21 October 1983 are identical, providing for certain classes of income derived from Malaysia by a non-resident to be charged to tax under the special classes of income. It was held that Section 15A is wide enough to cover the payment made to the Singapore company, and the fact that the services were performed outside Malaysia is irrelevant (this was prior to the amendment).

It upheld the view of the Special Commissioners that the payment fell within the meaning of Section 4A(ii) and further that Section 15A applies to deem the gross income to the Singapore company as derived from Malaysia – in which case the payment is subject to withholding tax as the responsibility for the payment lies with a person who is resident for that basis year; or if the payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia, withholding tax provisions would apply to the payment made.

As for the taxpayer's argument based on the provisions of the Double Tax Agreement between Malaysia and Singapore[4], the Court of Appeal found that the party that is relieved of the liability to tax is the Singapore company. It emphasised that Section 4A created three special classes of income derived from Malaysia of a person not resident in Malaysia that may be chargeable to tax, particularly where Section 15A deems these income to be derived from Malaysia. In addition, Section 109B imposes the duty to make deductions of withholding tax[5]. Once a liability is established, it is for the Singapore company to claim relief under the relevant Double Tax Agreement[6].

The Court of Appeal also held that the taxpayer's failure to act upon Section 109B [i.e. to deduct the withholding tax from the income falling under Section 4A (ii)] would attract the operation of Section 39(1) (j) [the disallowance of the charges in arriving at the adjusted income] and that the Double Tax Agreement in this instance is not applicable.

The Inland Revenue Board's appeal on the allowance of the customs declaration fees was dismissed.

Conclusion

The case was first stated by Special Commissioners for the opinion of the High Court in May 2007 and was finally disposed of by the Court of Appeal in April 2014.

In the meantime, much water has passed under the bridge. For example, assuming that the service did fall within the meaning of Section 4A (ii), the fact that the services were performed entirely in Singapore would have precluded the need to deduct withholding tax [proviso to Section 15A that came into effect from 21 September 2002].

The payments made is certainly not gains or profits falling under Section 4(f) and therefore the application of Section 109F, which came into effect from 1 January 2009, would not apply either[7].

But one would be perplexed to understand why the services performed by the Singapore company should be treated as falling under Section 4A (ii) – and as a result get embroiled in the withholding tax issue.

From the facts of the case, it is clear that the payment made to the Singapore company was for the purchase of electrical items in their CKD or SKD form, including charges connected with some customs formalities that forms part of the purchase consideration – i.e. it is a purchase for the Malaysian buyer , and a business income to the Singapore seller.

The High Court decision could not be sighted at the time of writing this article, but at the Court of Appeal decision, there was a reference to the High Court bypassing Section 4A (ii) and treating the payment received by the Singapore company as its business income – in which case the issue of the application of Section 4A (ii) and Section 15A and Section 109B all becomes redundant.

The Court of Appeal seems to have focused solely on the issue of the derivation of the income, rather than what is the payment for. As per the judgement of the Court of Appeal at paragraph 29:

'the germane question is whether the income is derived from Malaysia…' [and further that] Section 15A is a deeming provision. If it is wide enough then the fact the service is wholly performed in Singapore is irrelevant…'

The judgement also appears to declare that *'the taxpayer in Malaysia is imposed the duty to make deductions of withholding tax to the KPH*[8] if the responsibility for the payments to a non-resident lies with a Malaysian resident, or if the payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.

This seems to be a frightening proposition.

Perhaps, instead of labelling the payment as 'repacking and handling services', would it have made any difference if the payment was simply labelled as 'purchases of electrical items' from Singapore?

Or if it was an issue of form versus substance, was the substance part overlooked in this case?

More importantly, if a Malaysian taxpayer thinks that withholding tax is not deductible from a payment made to a non-resident, and the Inland Revenue Board thinks otherwise, what is the recourse?

And what is the tax risk exposure for a company making that kind of decision?

It appears that both the taxpayer and the tax agents should be on the alert for this kind of risk, and be prepared with documentation giving the correct description – and ensuring that both form and substance match the transaction.

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1 *All sections quoted in this article refer to the Income Tax Act 1967 (as amended) unless otherwise specified.*

2 *See Esso Production Malaysia v DGIR [(20030 MSTC 4017].*

3 *At the time this case was litigated, the proviso to section 15A was not legislated as yet. That proviso excludes from withholding tax payments for services performed outside Malaysia. Also see SGS Singapore Pte. Ltd. v DGIR [(2000) 7 MLJ 229]*

4 *The argument was that as the Singapore company did not have a permanent establishment in Malaysia, the income derived from Malaysia would be its business income, liable to tax only in Singapore. As a business income, it will not fall within the meaning of section 4A(ii) or be subject to withholding tax under section 109B.*

5 *In Erria Shipping Pte Ltd v Cara Timur Transport Sdn Bhd [(1988) 1 LNS 173] Chong Siew Fai J held that the issue to consider whether the income earned by the non-resident is subject to withholding tax , and whether the payer is legally obliged deduct tax therefrom – and the issue of whether the nonresident is liable to pay tax in Malaysia is irrelevant.*

6 *See United Overseas Bank Ltd v Ketua Pengarah Hasil Dalam Negeri [(1997) 3 MLJ 359]*

7 *See section 4(f), 109F and Public Ruling No. 1/2010*

8 *Per the Court of Appeal judgement at Para 41 page 26.*

COOPERATIVE COMPLIANCE - A STEP FORWARD FOR MALAYSIAN INDIVIDUAL TAX MANAGEMENT

Hilda Liow

THE CONCEPT OF COOPERATIVE COMPLIANCE was first mooted in the 2002 OECD Forum on Tax Administration. The concept, not known at that time as Cooperative Compliance, took at least a decade, and various studies later for it to be rebranded in the May 2013 OECD report entitled "Cooperative Compliance: A Framework". The 2013 report expressed features of earlier studies on related subjects such as "enhanced relationship", "improving tax compliance" and "role of tax intermediaries", and even though the report was issued in preliminary form, it received greater attention than any of the earlier publications.

COOPERATIVE COMPLIANCE: A DEFINITION

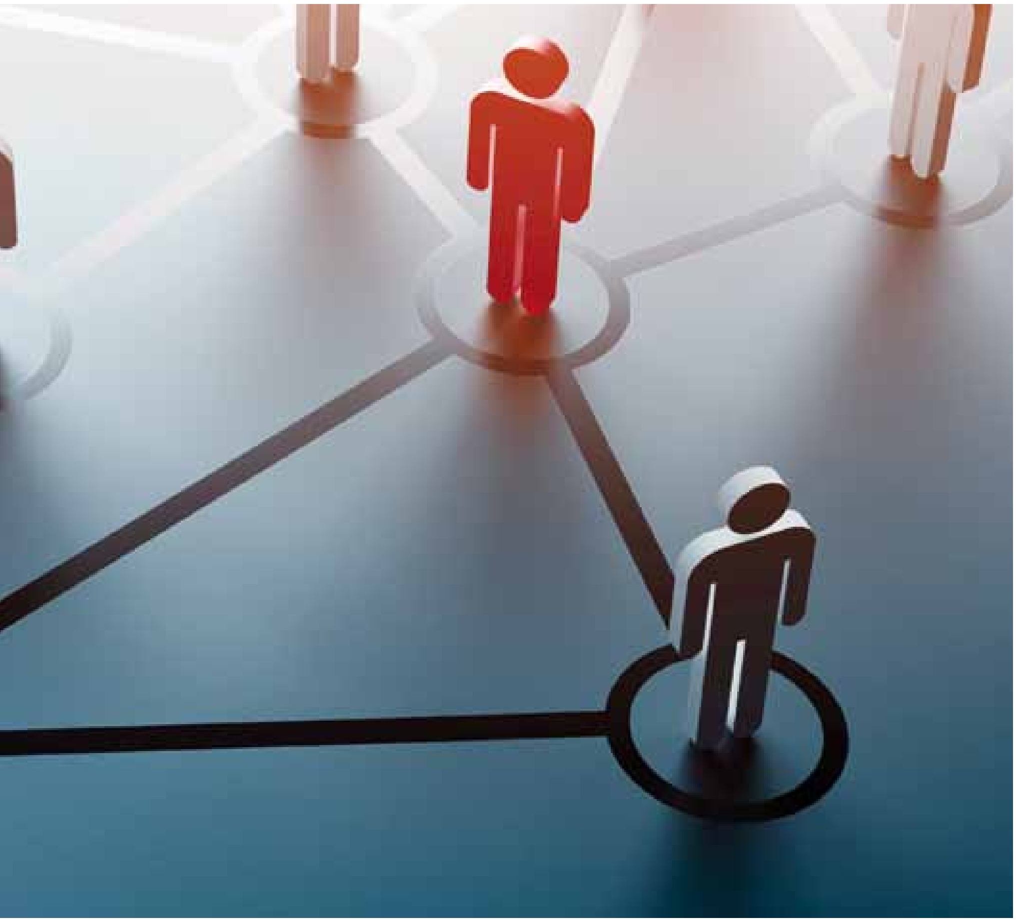
Broadly, Cooperative Compliance is a relationship model based on an exchange of greater upfront transparency by the taxpayer in return for more certainty from the tax authorities to achieve a result of reduced compliance costs and increased efficiencies due to better utilisation of resources by both parties.

The OECD distinguished Cooperative Compliance from an obligation-based relationship by referring to the concept as "a relationship that favours collaboration over confrontation, and is anchored more on mutual trust than on enforceable obligations" and "a relationship with revenue bodies based on cooperation and trust with both parties going beyond their statutory obligations" [1].

APPLYING THE FRAMEWORK

At the time of the publication of the 2013 framework, 24 countries were listed to have widely established such collaborative relationships between large corporative taxpayers and revenue bodies. In particular, the publication detailed the Australia and Singapore initiatives to illustrate the principles that have been translated into practice. Various customised forms of Cooperative Compliance have since been implemented, or are in the process of being implemented, in different compliance risk management settings to streamline tax processes.

The growing commercial awareness of Cooperative Compliance has raised no less discussion from the perspective of individual tax administration. Can Cooperative Compliance be pursued



to enhance individual tax management and are there any success stories?

Many countries are already embracing Cooperative Compliance to improve individual tax compliance. In this context, authorities leading the pack include the UK HM Revenue & Customs ("HMRC") and the Australian Tax Office ("ATO"), demonstrating commendable efforts in driving user-centred processes that involve ongoing interactions and multiple connection points with taxpayers. User-centred methodologies adopted by these authorities aim to guide the design and delivery of innovations and are underpinned by the principle of working collaboratively with taxpayers and intermediaries.

Some of the efforts moving in the direction of Cooperative Compliance can be exemplified by the following country specific initiatives:

COUNTRY SPECIFIC EXAMPLES

• SINGAPORE

Stemming from the new paradigm to provide seamless self-service channels to reduce costs of tax administration, the Inland Revenue Authority of Singapore ("IRAS") introduced the No-Filing Service ("NFS") in 2007. Under the NFS, individual taxpayers do not need to file a tax return if they only have auto-included income and claim the same standard set of personal tax deductions each year. Eligible taxpayers receive information advising them they have been selected for inclusion in NFS and do not need to file a tax return unless they have additional income to declare or changes to their relief claims. Their assessments are sent directly to them and may be adjusted if they are incorrect within 30 days from the date of the assessment. Through a tax portal, eligible taxpayers may now verify details of auto-included information and preview their assessments for a specified period up to the filing due date for individuals.

The NFS began with a pilot group of 45,000 taxpayers in 2007 and by 2014 this number expanded to 1.26 million individual taxpayers, representing 64% of the total taxpayer population in Singapore[2].

Although this effort could only be regarded as a very basic form of Cooperative Compliance, it was a simple initiative that proved to have a positive impact on public perception encouraging openness amongst taxpayers, to which extent the country's level of compliance could be improved.

• UNITED KINGDOM

The HMRC rules allow for a relaxation of the pay-as-you-earn ("PAYE") requirements where individuals visit the UK for business trips, such that no PAYE needs to be withheld and paid to HMRC as long as the employer and employee satisfy certain conditions.

Recently, the HMRC further enhanced the relaxation by introducing a new "payment scheme", which will reduce the filing and reporting requirements where individuals visit the UK for business trips but fail the conditions set out for the current PAYE relaxation. The new "payment scheme" allows UK employers to make a single tax payment at year end, in respect of individuals who do not meet the current short-term criteria, releasing the employer from the risk of PAYE failure.

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[1] *Co-operative Compliance: A framework from enhanced relationship to co-operative compliance (OECD, 2013)*

[2] *Increasing Taxpayers' Use of Self-service Channels (OECD, 2014)*

This move demonstrates that the HMRC acknowledges the importance of globally mobile business travellers and the onerous and challenging payroll requirements for these travellers and is well received in recognition that typical short-term business visitor populations need to be split into specific categories, rather than including these individuals into a one-size-fits-all model. More importantly, in the true spirit of building trust and mutual transparency, the announcement of this facility indirectly encourages companies to have a full overview of their business visitors to enable them to organise such individuals into manageable populations in order that they can be correctly accounted for and reported.

• Denmark

The initiative for tax filing simplification by Denmark nearly a decade ago is a much cited example. The administration of their individual income tax return involves two steps. The issuance of a preliminary income tax assessment that forecasts the income and deductions for the following year and advising the employer about the amount of tax to withhold, followed by the issuance of the annual (final) assessment. If the preliminary income tax assessment provided to individual taxpayers is incorrect, for example, due to change of employment or personal circumstances, the taxpayer is required to advise the Danish Tax and Customs Administration ("SKAT") of this change, so it is incorporated into tax calculations and the final assessment issued is correct. This system was first implemented in 1997 and initially, the information issued to employers was printed and provided on "tax cards". While the preliminary assessment was available online and individual taxpayers were able to make changes online, it was only in 2006 that taxpayers were able to print their own tax cards, and in 2009 the SKAT began to send relevant tax card information electronically to employers. As a result of having this end-to-end digital service, Denmark has now seen a significant increase in users of the online preliminary assessment simplifying the tax filing process for employees.[3]

• Netherlands

The Netherlands' experience of Cooperative Compliance is demonstrated through the establishment of proper administrative behaviour. Based on the principle of Cooperative Compliance, it developed what is termed "horizontal compliance," a process that has been a foundational example of the OECD's Cooperative Compliance initiative. Employers can seek approval from the Dutch tax authorities, where, once approval is obtained, the company's payroll withholding system is generally considered to yield the final Dutch liability relating to assignees working in the Netherlands. Tax returns for certain individuals need not be filed and assessments and notices from the Dutch tax authorities are also eliminated. In order to obtain approval, a company must demonstrate the quality of the payroll filings and the controls surrounding the payroll process.

• Australia

The premium product of the Cooperative Compliance model in Australia is the adoption of the Annual Compliance Arrangement (ACA)[4] to manage compliance relationship regarding disclosure and service between large businesses and the Australian Tax Office ("ATO"). The ACA is built around two main concepts, i.e. large organisations (1) having sound tax risk management processes; and (2) committing ongoing open and transparent relationship through full and true disclosure of major tax risks in real time environment. One of the outcomes prompted by the ACA model is the willingness by large multinational companies to voluntarily seek specific relaxation in the tax filing process especially for short-term business travellers. While there is, at the moment, no real precedent for the ATO to enter into pre-agreed filing arrangements for specific groups of individuals, such pre-negotiated arrangements clearly fit into the compliance attitude that the ACA promotes.

Against the ACA backdrop of "nurturing willing participation", it is also worth mentioning one of the ATO's more impactful digital initiatives towards serving the individual taxpayer, the Progress of Return ("POR") self-service check4. Individual taxpayers in Australia are given access to two self-service channels to check on the progress of income tax returns lodged, i.e. through an interactive voice response call or online portal. In addition, the ATO launched a mobile app in 2013, which, among other services, included a POR check.

In spite of the practices heralded by countries embracing the model, it was observed in a 2015 report by the International Monetary Fund[5] that relatively few revenue bodies comprehensively monitor their service demand and most of these regulatory bodies have limited understanding of reasons why taxpayers fail to comply.

COOPERATIVE COMPLIANCE IN THE MALAYSIAN CONTEXT

We need to acknowledge that the Malaysian tax system has evolved progressively in the last fifteen years or so. Beginning with the monthly payroll tax withholding (Potongan Cukai Berjadual) introduced on 1 January 1995; followed by the radical one-time 1999 tax waiver when the country switched from the preceding year system to current year assessment system; through to the launch of the self-assessment system in 2004 for the individual taxpayer; and recently, the option for certain taxpayers to elect for Monthly Tax Deduction ("MTD") as final tax.

Advancing into this current environment of collaborative behaviour, it is necessary to find new ways to enhance the relationship between tax authorities, taxpayers and intermediaries to deliver quality compliance.

In Malaysia, collaboration could take the form of formal Cooperative Compliance agreements, special rulings or even dispensation from the tax authorities to avoid certain income tax reporting requirements. Over time, such cooperation may even transform into specific tax legislation for taxpayers meeting certain criteria to eliminate onerous reporting requirements.

Simplifying tax filing system

Today's digital society demands a relevant and engaging experience where government services are concerned. In particular, taxpayers seek easily and widely accessible, secure and responsive services from their authorities. Many revenue bodies, including the Dutch authorities and the ATO, as seen in the examples above, have taken steps to transform taxpayer services offering contemporary and

[3] *Increasing Taxpayers' Use of Self-service Channels (OECD, 2014)*

[4] *Annual Compliance Arrangements, Australian Taxation Office (ato.gov.au, 2014)*

[5] *Current Challenges in Revenue Mobilization: Improving Tax Compliance (IMF, 2015)*

[6] *Increasing Taxpayers' Use of Self-service Channels (OECD, 2014)*

tailored digital self-services that make it easier for taxpayers to comply with their obligations. The Malaysian Inland Revenue Board ("IRB")'s challenge is to provide such types of services while continuing to improve efficiency.

Aligned with the proposed framework for the evolution of digital self-service as part of the project on "Increasing taxpayers' use of self-service channels"[6], the IRB has also successfully implemented initiatives leveraging on technology moving our system away from the phone, paper and face-to-face channels to more sophisticated online portals and mobile service offers. A few creditable efforts are tools such as the Monthly Tax Deduction ("MTD") programme software and online calculator catering for employers to calculate MTD close to the taxpayers' actual tax liabilities; the online application enabling m-filing though mobile devices; the Pre-Fill facility benefiting certain categories of taxpayers; and the recent introduction of e-SPC enabling the online application for tax clearance and electronic settlement of final tax liabilities.

Furthermore, the introduction of MTD as final tax, concurrent with the mandatory inclusion of benefits-in-kind and personal relief election for MTD, was a bold move as the rule seeks to eliminate the need to file annual tax returns for a significant proportion of the employee population.

Still, the tax authorities need to aim for the majority of employees' to opt for "final tax" in order to ensure that the good intent of this initiative is purposeful and successful. Taxpayer education has to take the direction of gaining the trust of employees in the processes involved, e.g. employers' monthly payroll calculation systems are supported for quality and accuracy, employees are given sufficient time and opportunities to make claims that will allow them to exhaust all relief entitlements and no punitive actions are taken against minor, learning-curve non-compliances. These would, in turn, require greater proficiency amongst employers to comply with the correct reporting of employment income and apply MTD accurately. The success of this initiative would be dependent on the level of engagement and transparency - the mainstay of collaborative behaviour - the IRB is able to demonstrate to this targeted group of taxpayers.

With many of the administrative functions automated, taxpayers and the tax authorities should naturally be disposed to more collaborative and strategic interactions. For example, organisations would be encouraged to demonstrate sound establishment of their internal control framework relating to payroll deduction and employees' income reporting to provide the assurance in the eyes of the IRB. Building that assurance means that organisations are in control of their tax compliance and ultimately less likely to attract full audit reviews by the authorities.

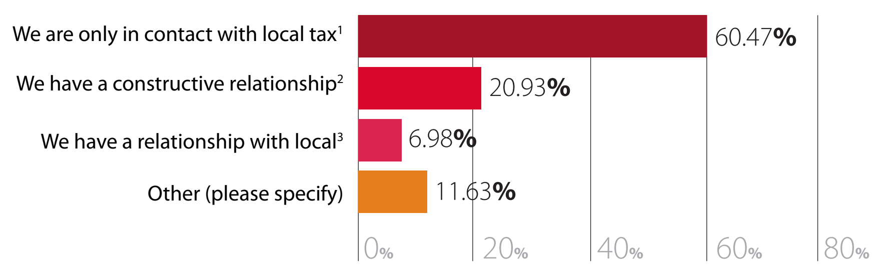
Pursuing the concept for tax administration of cross-border employees

As multinational companies source talents from around the world to find the right skills and capabilities to meet global business needs, they struggle to keep up with the tax compliance issues associated with such demand. A cooperative approach is an excellent starting point that befits the complexity of managing tax compliance issues surrounding global mobility. Sadly, this is an area that has not received sufficient attention in keeping with the current state of managing mobility, and the alignment of tax compliance with business compliance objectives. Only 21% of the respondents surveyed in a November 2015 joint research project carried out by the RES Forum[7] and PwC said they have regular discussions with their regulatory authorities about opportunities to simplify tax compliance.

In the same research project by the RES Forum and PwC, the top three identified risks in the area of global mobility tax compliance relate to:

- short-term business travellers;
- global compensation collection; and
- permanent establishment issues.

Q: Out organisation's relationship with the local tax authorities can be described as: (Please choose one option only that most accurately describes your organisation).



Source: *2015 Global Mobility Tax Compliance Survey, RES Forum[8] and PwC*

Almost half of the respondents indicate that they are unaware of their business traveller population, and the majority of respondents are not in agreement with or are unfamiliar with the procedures their organisation has formalised to assess the completeness and correctness of global compensation data. More than half of the respondents are not aware of or not involved in Base Erosion and Profit Shifting ("BEPS") readiness checks and/or cooperative compliance requirements[9]. This calls for greater breadth and interdependency between the organisations' stakeholders, local authorities and intermediaries early on in the processes to reduce non-compliance risks expressed through costs and fines as well as reputational dangers.

With the many initiatives the IRB are undergoing towards seeking higher levels of compliance among taxpayers whilst administering tax in an efficient manner, it now needs to pursue opportunities to increase their cooperation with taxpayers. Given the IRB focus on higher risk taxpayers, and in line with the efforts by the IRB to encourage reliance on the self-assessment service system, some organisations have already matured into embracing Cooperative Compliance and are seeking justifiable opportunities to engage with the IRB to find or expand solutions for certainty over tax liabilities and innovative ways to tackle voluminous tax administration.

To reciprocate such intent, the IRB could, for instance, formally waive annual tax filings and tax exemption claims for certain groups of short-term business travellers carrying professional visit passes or agree for single reporting submission per year as part of clearance processes rather than with each departure. A definitive set of criteria to qualify for the waiver and clear instructions could be set by the IRB, similar to the HMRC PAYE relaxation rules. Companies will then be expected to present their tax control framework that governs payroll and withholding compliance, and share complete compensation data with the IRB for verification purposes. The UK example is easy to emulate in the context of Malaysian tax rules.

The cost savings and increased efficiency resulting from the elimination of filing tax returns for a specific population of mobile employees under a Cooperative Compliance agreement can be significant. Greater certainty regarding tax obligations also has the benefit of avoiding unnecessary late filing penalties, and the reputational risks associated with it. A company pursuing a Cooperative Compliance approach inevitably demonstrates the qualities of a "good corporate citizen", i.e. it is being transparent, accountable and engaged with the tax authorities.

Applying the concept to strive for compliance among high net worth individuals

Even prior to the publication of the 2013 Cooperative Compliance Framework, the OECD had already recognised the importance for tax administrations to engage high net worth individuals due to the complexity of their tax affairs, their revenue contribution, the opportunity for aggressive tax planning, and the impact of their compliance behaviour *vis-à-vis* the integrity of the tax system. With the world's wealthiest individuals in the spotlight, the OECD launched a publication "Engaging with high net worth individuals on tax compliance" in 2009 examining tax administration

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[7] *The RES Forum is an independent, highly engaged and international community of senior in-house international HR professionals with members in over 40 countries.*

[8] *The RES Forum is an independent, highly engaged and international community of senior in-house International HR professionals with members in over 40 countries.*

[9] *Developing global mobility for the future: 2015 tax compliance survey conducted by the RES Forum and PwC.*

strategies directed at this taxpayer segment.

Since the Study was published, authorities have engaged the wealthiest taxpayers on compliance issues, ultimately with the objective of saving time and lowering compliance costs. As a result, a number of tax jurisdictions have attempted to develop a series of expedient measures designed to encourage transparency. We are also seeing more collaboration between tax authorities. In the UK, in conjunction with the OECD's BEPS project, the HMRC is part of the Joint International Tax Shelter Information Collaboration, a group of more than 20 tax administrations that collaborate and exchange information on complex tax avoidance schemes and structures involving multinational enterprises and high net worth individuals.

Since the C-suites and high net worth individuals are increasingly becoming a focus, in Malaysia, a special dedicated unit, stupendously termed "Large Taxpayer Unit", has been established since 1 January 2015. The unit aims to gain a more comprehensive understanding of the affairs and behaviour of high-profile taxpayers with aggregate income exceeding RM1 million. The unit hopes that this would lead to significant improvements in compliance and a better understanding of the risks posed by such high profile individual segment.

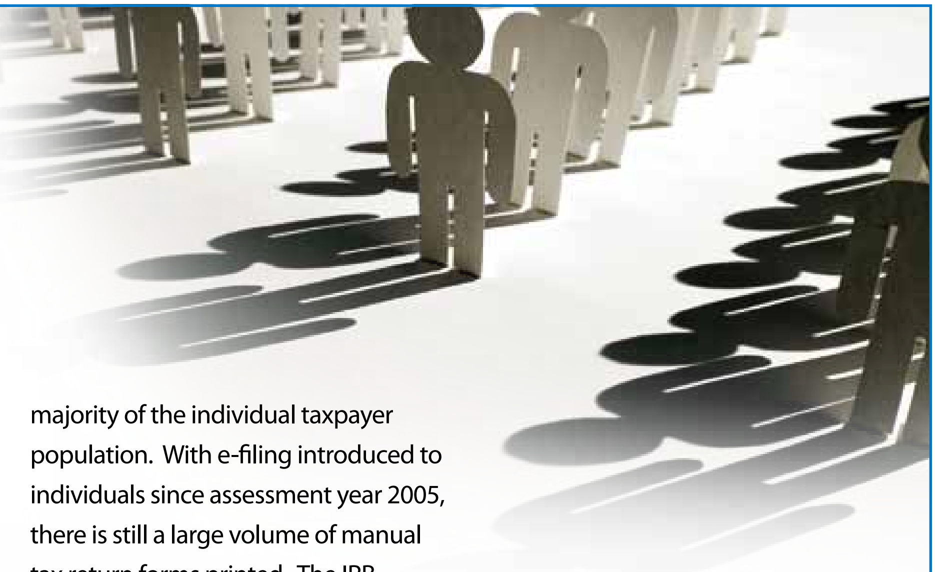
Despite this, the efforts in our local scene are still more reactive, rather than proactive. How can the unit up the game? As in any collaborative environment, the unit has to demonstrate that it is willing to engage on compliance issues and build a more constructive, open relationship. In return, this group of taxpayers could benefit from reduced risk of tax controversy, lower compliance costs, a better understanding of the legislative environment, both locally and internationally, and most importantly, saved time.

Some success factors include customer-centric, dedicated unit equipped with the appropriate level of knowledge of, not just high net worth individuals, but also enterprises controlled by wealthy individuals; understanding of complex business structures and their information support; and an approach that considers the overall economic picture of such enterprises.

The renewal of the tax amnesty programme in 2016 was an encouraging move by the tax authorities, and since, in recent years, penalties of punitive nature has caused taxpayers to become wary of the authorities, the programme hopefully would motivate more taxpayers to come forward with undeclared income in return for reduced penalties or an exemption from legal action.

Nevertheless, more could be done to promote greater transparency and open relationship. Some success factors include customer-centric, dedicated unit equipped with the appropriate level of knowledge of, not just high net worth individuals, but also enterprises controlled by wealthy individuals; understanding of complex business structures and their information support; and an approach that considers the overall economic picture of such enterprises. The tax authorities could further, simplify some of the common types of expense claims. For example, the Singapore tax authorities allow taxpayers earning rental income the option of claiming a flat 15% of gross rental income as expenses to reduce administration involved for collating and auditing the expense claims by taxpayers and the authorities, respectively.

The dedicated unit has to have a practical set of criteria to select individuals for monitoring, giving due consideration for various risk factors such as the complexity of business affairs, unusually large cross-border transactions of money, gifts, investments in sectors that are deemed high-risk such as real estate, and also the choice of adviser and intermediary.



CONCLUSION

Three years after the Cooperative Compliance concept was rebranded, what barriers have been broken and what gaps and challenges still exist? Credit is due in that our local tax administration is cognisant of policy recommendations in the global arena. The changing landscape, against which modern businesses operate, calls for similar awareness to ensure that initiatives receive the buy-in and support of taxpayers.

Leveraging on the emergence of new technology, expedient tax administration measures need to be in place. Malaysia still operates under extremely stringent filing timelines, both for individuals as well as employers. Furthermore, the current penalty regime and tax audit framework is viewed as harsh and inflicting. In an environment promoting collaboration, the authorities must aim to find ways to encourage compliance through simplifying filing, or even, to waive the requirement to file for the majority of the individual taxpayer population. With e-filing introduced to individuals since assessment year 2005, there is still a large volume of manual tax return forms printed. The IRB needs to improve on how it articulates the beneficial use of self-service filing to taxpayers. Furthermore, to complement the e-filing system, it could also include the provision of decision support tools, such as personal tax calculators, effective tax guides and on-line assessments to test eligibility for exemptions/concessions.

Global businesses operating in an increasingly borderless environment are starting to see the emergence of more multilateral Cooperative Compliance relationships involving two or more revenue bodies. In Malaysia, it would be a step forward when we see such relationships formed based on IRB's commercial awareness and impartiality, and in turn, taxpayers' openness to disclose voluntary information. Finally, companies also need to play their part in enhancing Cooperative Compliance by putting in place internal reporting systems that keep hyper-accurate tracking of records to enable minimum reporting requirements.

With the importance of good corporate governance to support transparency and disclosure, tax is becoming a part of the agenda in the boardroom because the failure to properly manage tax-related risks can have damaging financial as well as reputational consequences. Significant benefits could potentially be reaped from Cooperative Compliance, and now is the time to create that culture of collaboration where businesses and tax authorities learn to trust each other in support of compliance and accountability.

The changing landscape, against which modern businesses operate, calls for similar awareness to ensure that initiatives receive the buy-in and support of taxpayers. Leveraging on the emergence of new technology, expedient tax administration measures need to be in place.

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The column only covers selected developments from countries identified by the CTIM and relates to the period 16 November 2015 to 15 February 2016.

CHINA (PEOPLE'S REP.)

Rules on individual income tax on stock incentives and conversion of retained earnings/profits clarified

The State Administration of Taxation (SAT) issued Gong Gao [2015] No. 80 on 16 November 2015 clarifying the individual income tax treatment of stock incentives as provided in Cai Shui [2015] No. 116 which stipulates certain tax incentives for National Innovation Demonstration Zones. This applies from 1 January 2016 and is summarised below.

The individual income tax base of stocks must be calculated by reference to the fair market value(FMV) at the time the stocks are received by employees. For listed companies, the FMV is the closing price of the stock on that day and for non-listed companies, the value must be ascertained on the basis of net asset method, comparable method or other reasonable methods which can be applied in consultation with the tax authority. The value is included in the taxable income of the employee as salary and wages.

Conversion of retained earnings to stocks

Non-listed companies that convert undistributed profits, retained earnings and mandatory accumulation of profits to stocks for distributions to individual shareholders are required to withhold individual income tax on stock dividends. If the stocks (as stock dividends) are distributed by a listed company, the tax treatment of dividends from listed companies depending on the holding period of the underlying shares will apply.

On the basis of Cai Shui [2015] No. 116, employees receiving stocks and shareholders receiving stock dividends may pay the individual income tax over a period of five years if certain requirements are satisfied. The company granting or distributing the stocks must file the tax payment in instalments with the competent tax authority by submitting certain documents such as certification of high-technology enterprise, the resolution of general meeting of shareholders on such plans, stock valuation reports and financial statements of the company.

Taxation of income from qualified investment funds in mainland China and Hong Kong clarified

The Ministry of Finance(MoF), the SAT and the China Security Supervision Committee jointly issued Cai Shui [2015] No. 125 on 14 December 2015 concerning the taxation of mutually recognised investment funds in mainland China and Hong Kong. This applies from 18 December 2015 and is summarised as per **Table 1**.

Table 1

Capital gains on trading in Hong Kong investment funds realised by Chinese domestic individuals through recognised funds	Capital gains on trading participations in Hong Kong investment funds realised by domestic Chinese enterprises through recognised funds	Capital gains on trading participations in mainland China investment funds realised by Hong Kong individuals or enterprises through recognised funds
Exempt from income tax (from 18 December 2015 to 17 December 2018). However, a withholding tax of 20% will apply (if investments are made through agents maintained in mainland China by Hong Kong investment funds).	Subject to enterprise income tax.	Exempt from income tax.
Subject to Hong Kong stamp duty on transactions pertaining to participations in Hong Kong investment funds.	Subject to Hong Kong stamp duty on transactions pertaining to participations in investment funds.	Withholding tax of 10% will apply if dividends distributed by Chinese domestic listed companies to the Chinese domestic investment funds (for corporate bonds, the withholding tax is 7%). When the gains or income are subsequently distributed to Hong Kong investors, no withholding tax will be imposed.
		Exempt from stamp duty on transactions relation to participations in Chinese investment funds.

VAT exemption for cross-border e-commerce in Hangzhou pilot area – notice issued

On 18 December 2015, the MoF and the SAT jointly issued Cai Shui [2015]

No.143 on the value added tax (VAT) exemption policy applicable to the export of goods through e-commerce in the cross-border e-commerce pilot area (Hangzhou).

Goods exported by enterprises located in the pilot area (Hangzhou) without any valid purchase certificates being issued are exempt from VAT until 31 December 2016, provided that the following conditions are satisfied:

- the exported goods are supervised by what is known as a "Single Window platform"; and
- export enterprises keep accurate records of the information available on the suppliers of the exported goods.

Note. *Hangzhou is the city in which China's largest e-commerce enterprise, Alibaba, is located.*

Implementation rules on super-deduction for R&D clarified

The SAT issued Gong Gao [2015] No. 97 published on 11 January 2016 on the implementation rules on super-deduction for research and development (R&D) activities on 29 December 2015. The rules contained in the announcement apply to the tax year 2016 and the subsequent tax years. The main content of the announcement is summarised below.

Definition of R&D employees

Employees involved in R&D include researchers, technical staff and assistants. It is clarified that researchers are experts in the field and assistants must be technical workers (but not those performing ancillary duties).

Calculation of expenses relating to accelerated depreciation of fixed assets

If the fixed assets used in R&D activities are depreciated on an accelerated basis, the depreciation expenses calculated for accounting purposes can be taken into account in determining the total expenses for super-deduction provided that the total amount does not exceed the amount provided for in the tax law.

The mixed activities (R&D and non-R&D activities) must be split up and the expenses must be calculated separately. Only the R&D expenses portion is eligible for super-deduction. The material costs of products resulting from an R&D activity are excluded from super-deduction if these products are sold.

Further, the announcement provides that the expenses are not eligible for super-deduction if they are incurred by foreign research institutes or foreign individuals to whom research activities are assigned. Foreign research institute is referred to as an organisation established under the laws of a foreign country (including Hong Kong, Macao and Taiwan).

The enterprises applying super-deduction are required to file the following documents with the tax authority when filing the tax return of enterprise income tax: the project plan and decision on the project of the enterprise; a list of employees involved in the R&D project; contracts on assignment or joint research registered with the competent science-technology department; allocation chart of the expenses on research staff, machines and equipment for R&D activities (including a time sheet for usage); charts of the budget and breakdowns of the expenses and the information on sharing of the benefits; sub-ledger for R&D expenses; the opinion of the local science-technology department regarding the valuation of the project if it is available; and other information stipulated by the provincial tax bureau.

List of cross-border e-commerce trial zones expanded

On 12 January 2016, the State Council issued Guo Han [2016] No. 17, allowing 12 cities to set up cross-border e-commerce trial zones (the CBEC trial zones), being Tianjin, Shanghai, Chongqing, Hefei, Zhengzhou, Guangzhou, Chengdu, Dalian, Ningbo, Qingdao, Shenzhen and Suzhou. In March 2015, the State Council had designated Hangzhou as the first zone of this nature.

To foster the increase in e-commerce, the central government is eager to provide regulations and incentives on e-commerce activities. Outside the CBEC trial zones, goods imported are generally subject to customs duty, VAT and consumption tax, while inside the CBEC trial zones, goods imported are subject to parcel tax, i.e. a duty levied on imported personal articles by the customs department. However, the goods imported into the CBEC trial zones enjoy preferential treatment and bear a lower tax burden than goods imported into places outside the CBEC trial zones. This situation has led to unfair competition between e-commerce enterprises located in both zones.

It has been reported that, in order to leverage fair competition and promote e-commerce, the central government is considering the introduction of a uniform duty for all imported e-commerce goods. The rate of such a new tax, which is intended to combine customs duty and indirect tax into a single tax, would be between the parcel tax rate and the integrated rate applicable to goods imported outside the CBEC trial zones. However, no concrete proposals have been made to date.

HONG KONG

Measures on interest deduction rules and profits tax incentives proposed

The Inland Revenue (Amendment) (No. 4) Bill 2015 was gazetted on 4 December

2015. By amending the Inland Revenue Ordinance, the Bill seeks to enhance the existing interest deduction rules for the intra-group financing business of corporations, and introduce a concessionary profits tax rate for qualified corporate treasury centres. In addition, legislative amendments clarifying profits tax and stamp duty treatments of regulatory capital securities that meet Basel III capital adequacy requirements are also proposed.

The Bill contains relevant anti-avoidance provisions to ensure the proposals are consistent with the latest international standards to combat base erosion and profit shifting. The Bill was introduced into the Legislative Council for first reading on 16 December 2015.

◆◆ Guidance on profits tax treatments of court-free amalgamation issued

Hong Kong's new Companies Ordinance (Cap.622), which became effective on 3 March 2014, introduced the court-free amalgamation regime to facilitate an amalgamation of two or more wholly-owned intra-group companies without a preliminary court approval. However, at that time, no amendments were made to the Inland Revenue Ordinance (IRO) to reflect the new court-free amalgamation regime, nor did the Hong Kong Inland Revenue Department (IRD) provide any guidance on the tax treatment of court-free amalgamation, which led to considerable tax uncertainties. As such, on 30 December 2015, the long-awaited guidance was issued by the IRD.

Guidance on court-free company amalgamation

According to the Guidance, if the Commissioner is satisfied that the court-free amalgamation is not carried out for the purpose of obtaining tax benefits, the provisions in Sections 61A or 61B of the IRO will not be applicable to the amalgamation (e.g. the denial of losses carried forward from the merging company to the merged company) and the merged company will be regarded as the continuation of the merging company for the purposes of the IRO. The IRD is considering making amendments to the IRO to provide a statutory framework for the court-free company amalgamation. Before the amendments are enacted, the Assessor will make an assessment in accordance with the following practice:

(a) Amalgamation with sale of assets

If a court-free amalgamation is structured with a sale of assets on an arm's length basis, the provisions concerning sale of assets will be applied to assess any deemed trading receipts and to make balancing adjustments.

(b) Amalgamation without sale of assets

The merging company will be treated on the day before the amalgamation as having ceased to carry on its trade, profession or business and realised its trading stock in the open market.

The merged company will be treated on the effective date of amalgamation as having:

- continued to carry on the trade, profession or business of the merging company by way of succession;
- qualified for annual allowances in respect of commercial/industrial buildings or structures by way of its entitlement to the relevant interests. However, the disposal of such interests will be subject to balancing charges;
- qualified for annual allowances in respect of machinery or plant by reference to the reducing values of unclaimed allowances. However, the disposal of machinery or plant will be subject to balancing charges;
- qualified for any unexpired allowances/deductions in respect of capital expenditure incurred by the merging company. However, the disposal of such capital assets will be subject to the assessment of proceeds as trading receipts on sale;
- entitled to deductions that the merging company would have been allowed but for the amalgamation; and
- taken over the amount that would have been income or trading receipt of the merging company but for the amalgamation.

(c) Tax losses

Tax losses of a company cannot be transferred to other group companies. Group loss relief and deduction for acquired losses through court-free amalgamation procedure are not allowed. However, tax losses can be used to set off against profits of the merged company in the following situations:

- tax losses are incurred after both the merging and the merged company have become wholly owned subsidiaries of the same group;
- tax losses are carried forward by the merging or merged company in a trade or business, which continues until amalgamation:
- if tax losses are brought forward in the merged company, the merged company has adequate financial resources (excluding intra-group loans) to purchase the trade or business of the merging company even if the amalgamation is not conducted; and
- if tax losses are brought forward from the merging company, such losses can only be used to set off against the profits of the merged company derived from the same trade or business succeeded from the merging company.

If tax losses available for setting off are considerably large, the merging and merged company should consider applying for an advance ruling under Section 88A of the IRO.

In addition, the Guidance also clarifies the rights and obligations of the merged company.

◆ Inland Revenue (Amendment) Bill 2016 gazetted – implementation of new international standard for automatic exchange of financial account information in tax matters

The Inland Revenue (Amendment) Bill 2016 was gazetted by the government on 8 January 2016. By amending the Inland Revenue Ordinance, the Bill seeks to put in place a legal framework for Hong Kong to implement the new international standard for automatic exchange of financial account information in tax matters (AEOI) as promulgated by the OECD.

The main content of the Bill is summarised below:

- scope of financial institutions (FIs) and financial accounts to be reported;
- obligations on FIs to identify reportable accounts and collect information from account holders;
- scope of information to be furnished by FIs to the Inland Revenue Department (IRD); and
- enforcement powers for the IRD and sanctions against non-compliance.

The Bill was introduced into the Legislative Council on 20 January 2016.

◆ List of qualifying debt instruments eligible for preferential profits tax treatment published

The list of qualifying debt instruments eligible for preferential profits tax treatment was published by the Inland Revenue Department on 22 January 2016. Profits derived from qualifying debt instruments are eligible for profits tax concession (i.e. taxed at 50% of the normal profits tax rate) or profits tax exemption.

INDIA

◆ Draft guidelines on determining place of effective management – issued

The Central Board of Direct Taxes (CBDT) issued a draft report on Guidelines for Determining Place of Effective Management (POEM) (F. No. 142/11/2015-TPL) (the draft guidelines) dated 23 December 2015 for stakeholders' comments.

The draft guidelines were issued further to the amendment of Section 6(3) of the Finance Act 2015 on the tax residence test for a company, which replaced "control and management of its affairs" with "place of effective management". The draft guidelines state that a company is regarded as a resident of India if it is incorporated in India or if its place of effective management in the tax year concerned is in India. The process of determining the POEM is primarily based on whether the company is engaged in active business outside India.

With respect to a company engaged in active business outside India

- The POEM is presumed to be outside India if the majority of the meetings of the board of directors (BOD) of the company are held outside India. However, if the BOD is not exercising its powers of management, but such powers are being exercised by either the holding company in India or any other person resident in India, then the company's POEM will be considered to be in India.
- To determine whether the company is engaged in an active business outside India, the average of the data for the previous year and two years prior to that will be taken into account. If the company has existed for a shorter period of time, then the data of such period will be considered.

"Active business outside India" is defined as:

- having passive (aggregate of income from purchase and sale of goods from/to its associated enterprises and income by way of royalty, dividend, capital gains, interest or rental income) income less than 50% of total income;
- having assets in India less than 50% of total assets;
- having number of employees less than 50% of total number of employees; and
- having payroll expenses of such employees in India less than 50% of total payroll expenses.

With respect to a company engaged in active business in India

Determining the POEM is a two-stage process: first, it involves identifying or ascertaining the person who actually makes the key management and commercial decisions for the conduct of the company's business as a whole; second, the location where these decisions are made needs to be determined. This is more important than the place where such decisions are implemented. The following guiding principles should be noted:

- the place where the BOD's meeting is regularly held, provided that the BOD retains and exercises its authority to govern the company and does in substance make the key management and commercial decisions necessary for the conduct of the company's business as a whole;
- the place where senior managers or other persons, including shareholders, make key decisions, provided that the BOD has delegated the de facto authority and does nothing more than routinely ratifying the decisions that have been made;
- the location of the head office;
- the place where directors or persons taking decisions, or the majority of them, reside; and
- the residuary POEM, i.e. the place where the main and substantial activity of the company is carried out, or where the accounting records of the company are kept.

It is also clarified that day-to-day routine operational decisions undertaken by junior and middle management are not relevant for the purpose of determining the POEM.

"Senior management" means any person or persons generally responsible for developing and formulating key strategies and policies for the company and ensuring or overseeing the execution and implementation of those strategies on a regular and ongoing basis.

The draft guidelines negate the possibility of establishing the POEM in India in the following circumstances:

- the Indian company being a wholly-owned subsidiary of a foreign company;
- one or more directors of a foreign company residing in India;
- the local management being situated in India in respect of activities carried out by a foreign company in India; and
- the existence in India of support functions that are preparatory and auxiliary in nature.

The Finance Bill 2016 which was announced on 29 February 2016 has deferred the implementation to 1 April 2017.

SINGAPORE

Transfer pricing guidelines amended

On 4 January 2016, the Inland Revenue Authority of Singapore (IRAS) issued the third edition of the e-Tax Guide on the transfer pricing guidelines.

The contents of the e-Tax Guide remain largely unchanged. The latest amendments are summarised as follows:

- enhanced guidance on the cost-plus method (CPM):
- in applying the CPM, the direct and indirect costs of producing a product or providing a service are normally used to compute the cost base and such costs are limited to the costs of the supplier of goods or services and should take into account an analysis of the supplier's functions performed, assets used and risks assumed. The methods of determining the

cost base should be consistent over time; and
- if the supplier of the goods and services is the tested party and is a taxpayer in Singapore, the cost base should be determined according to the Singapore Financial Reporting Standards. Where necessary, adjustments will be made to ensure the cost base is arm's length i.e. the cost base may include cost not reflected in the tested party's accounts (an example is included in the guide);
- enhancement of the mutual agreement procedure (MAP) and advance pricing arrangement (APA) process:
- the acceptance of taxpayers' request for an APA period and rollback years is subject to the taxpayers' observation of the APA process. The general rule regarding when a financial year is considered a roll-back year (paragraph 8.19) has been replaced with examples on the APA period and roll-back years;
- the IRAS is not precluded from conducting an audit on the taxpayer if there is non-compliance with Singapore's tax law;
- the diagram of the MAP process (paragraph 9.2) has been updated to provide more clarity; and
- various amendments to reflect the enhanced APA process:
- when initiating meetings with IRAS, taxpayers or tax agents are required to provide the basic information as indicated in Annex B2 of the e-Tax Guide;
- the IRAS will indicate if it is inclined to accept the APA request at least four months before the first day of the APA period;
- taxpayers should submit a formal application to IRAS within three months from the receipt of IRAS' indication that the application can be submitted; and
- for bilateral and multilateral APAs, where the filing deadline imposed by a foreign competent authority is earlier than that of IRAS, taxpayers should observe the earlier filing deadline. This, however, will not affect IRAS' consideration and observation of the timeline under its APA process.

CAMBODIA

Change of tax regime

On 25 December 2015, the Ministry of Economy and Finance issued Prakas No. 1819 MEF-PK on the classification of taxpayers under the real regime of taxation (RRT), which was promulgated by Royal Kram No. 1215/016 of 17 December 2015.

Taxpayers with businesses in Cambodia are now classified into three categories as follows:

- small taxpayers: sole proprietors, joint ventures or partnerships with turnover from KHR250 million (USD62,500) to KHR700 million (USD175,000);
- medium-sized taxpayers: enterprises with turnover from KHR700 million (USD175,000) to KHR2 billion (USD500,000) or registered legal entities; and
- large taxpayers: enterprises with turnover over KHR2 billion (USD500,000), subsidiaries of foreign companies, government institutions or qualified investment project (QIP) enterprises.

Previously, under the estimated tax regime (ETR), small taxpayers were allowed to negotiate their annual tax liabilities upfront with the General Department of Taxation (GDT). This is now effectively abolished.

Patent tax fee – revised

On 25 December 2015, the Ministry of Economy and Finance issued Prakas No. 1821 MEF-PK on rules and procedures for management of patent tax collection, which had been promulgated by Royal Kram No. 1215/016 of 17 December 2015.

Following the abolishment of the estimated tax regime (ETR), the patent tax has been revised accordingly based on the types of taxpayers listed below:

Type of taxpayers	Patent tax fee
Small taxpayers	KHR400,000 (USD100)
Medium-sized taxpayers	KHR1,200,000 (USD300)
Large taxpayers	
– with turnover from KHR2 billion to KHR10 billion	KHR3,000,000 (USD750)
– with turnover over KHR10 billion KHR5,000,000	KHR5,000,000 (USD1,250)
– with branches, warehouses, factories and workshops located in a different capital	additional KHR 3,000,000 (USD750)

Previously, the official government fee for patent tax was KHR1,140,000 (approximately USD285), regardless of the level of turnover.

PHILIPPINES

Tax Incentives Management and Transparency Act passed

On 9 December 2015, the Tax Incentives Management and Transparency Act (TIMTA) was passed as law by the President. TIMTA had been proposed by the Senate on 13 March 2015 via Bill 2669 aimed at enhancing transparency in the management and accounting of tax incentives administered by investment promotion agencies (IPAs)

All registered business entities are required to submit their tax returns and annual tax incentives reports to the

respective IPAs. Any non-compliance with reporting requirements will be subject to penalties ranging from a fine of PHP100,000 (first violation) and PHP500,000 (second violation) to cancellation of the registration of the registered business entity (third violation).

The new rule took effect 15 days after publication in either the Official Gazette or at least one newspaper of general circulation.

INDONESIA

Tax treatment of collective investment contracts – regulation issued

The Ministry of Finance (MoF) has issued regulation No. 200/PMK.03/2015 (PMK-200) on the tax treatment for specific collective investment contracts (Kontrak Investasi Kolektif, KIK) focused on real estate to enhance the financial sector (i.e. real estate investment trusts or REITs). PMK-200 was issued on 10 November 2015 and became effective on the same date.

Previously, a REIT was subject to tax as follows, resulting in double taxation: when its special purpose companies received income from transfers of assets or rent (5% of gross transaction value and 10% of gross rental fee respectively); and when it received dividends distributed by its special purpose companies.

PMK-200 defines a REIT (Dana Investasi Real Estat, DIRE) as a vehicle to collect funds from investors for subsequent investment in real estate, real estate-related assets, and cash or cash equivalents. Additionally, a special purpose company (SPC) is defined as a limited liability company whose share capital is at least 99.9% owned by a DIRE that is established in the form of a KIK whereby the SPC is incorporated solely for the purpose of administering the DIRE.

Under PMK-200, the MoF provides the following tax facilities:

- dividends received by the KIK-DIRE from an SPC are not subject to tax as the SPC is treated as an integral and inseparable component of the KIK-DIRE;
- the transfer of land and buildings to an SPC or KIK-DIRE will not be subject to a final tax of 5% of the transfer value. However, any gains from the transfer of real estate to the DIRE will be subject to tax under normal rules; and
- the SPC is considered as a low-risk entrepreneur whereby it can obtain preliminary refunds of value added tax (VAT) overpayments.
- To qualify for the above tax facilities, the KIK-DIRE must comply with various administrative requirements.

***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.*

The technical updates published here are summarised from selected government gazette notifications published between 16 November 2015 and 15 February 2016 including Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Finance Act 2015

The Finance Act 2015, incorporating changes proposed in the 2016 Budget, gazetted on 30 December 2015, essentially adopts all the changes proposed in the Finance Bill 2015. The Finance Act 2015 has, however, legislated a different effective date on the proposal for the mandatory electronic submissions of the employer's return (Form E) and estimate/revised estimate of tax payable (CP204/CP204A). The Finance Act 2015 has legislated the effective date (that was to be effective from the year of assessment (YA) 2016 based on the Finance Bill 2015) to be as follows:

The electronic submission of the Form E is mandatory with effect from the year ending 31 December 2016 and subsequent years.

The electronic submission of the Forms CP204/CP204A is mandatory with effect from the YA 2018 and subsequent years of assessment.

Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) (Amendment) Rules 2015

Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) (Amendment) Rules 2015 [P.U.(A) 284], gazetted on 2 December 2015, amend the Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2014 [P.U.(A) 217] that provide a 100% accelerated capital allowance (ACA) (made up of an initial allowance of 20% and an annual allowance of 80% on the purchase (and installation) of information and communication technology (ICT) equipment (as specified in the Schedule to the Rules) for the years of assessment 2014 to 2016.

In the 2014 Rules, the non-application paragraph denies a person granted an incentive under the Promotion of Investments Act 1986, reinvestment allowance under Schedule 7A of the Income Tax Act 1967 (ITA), investment allowance under Schedule 7B of the ITA, any exemption under Section 127 of the ITA, and a person that has qualified for a deduction under any other rules made under Section 154 of the ITA, from making an ACA claim. In recognition that the non-application paragraph was drafted very widely, the 2015 Amendment Rules amend the non-application paragraph to make it clear that the non-application paragraph is confined to incentives granted on the asset related to the ACA claim. Thus, the ACA claim will only not be applicable where a person who has incurred capital expenditure on the qualifying ICT equipment for a basis period for a year of assessment, has also claimed any of the tax incentives mentioned in respect of that same ICT equipment. The 2015 Amendment Rules are deemed to have taken effect from the year of assessment 2014.

Income Tax (Deduction from Remuneration) (Amendment) Rules 2015

Income Tax (Deduction from Remuneration) (Amendment) Rules 2015 [P.U.(A) 311], gazetted on 29 December 2015, take effect from 1 January 2016 and amend the Income Tax (Deduction from Remuneration) Rules 1994. Income Tax (Deduction from Remuneration) Rules 1994 provide that the employer must determine and make monthly tax deductions (MTD) from the employees' salaries based on either the Schedule of MTD or the computerised calculation method. The amendments are as follows:

The maximum fine pursuant to Rule 17 that relates to the deduction from remuneration of employees is increased from RM2,000 to RM20,000. Table 1 under Paragraph 4 of the Schedule is amended to take into account the 2016 income tax rates for high income earners. For individuals with chargeable income of between RM600,001 and RM1 million, the tax rate is increased from 25% to 26%, whilst the tax rate is increased to 28% for chargeable income above RM1 million. Paragraph 7 of the Schedule is also amended where all employment income receivable for any particular period will be deemed received and taxed in the year of receipt with effect from YA 2016. Thus, where additional remuneration for the years prior to the year 2016 is received in the current year, the remuneration shall be calculated in accordance with the relevant method with MTD applicable to the year it is received.

Income Tax (Deduction for Expenditure on Issuance of Sukuk) Rules 2015

Income Tax (Deduction for Expenditure on Issuance of Sukuk) Rules 2015 [P.U.(A) 318], gazetted on 30 December 2015, and take effect from the year of assessment 2016 until 2018. The Rules provide that the expenditure incurred on the issuance of *sukuk* (under the principles of *Ijarah* or *Wakalah*) shall be allowed as a deduction to ascertain the adjusted income of a company.

Public Ruling No. 8/2015 – Loan or advances to a director by a company

Public Ruling (PR) No. 8/2015: Loan or advances to a director by a company, which was published on 30 November 2015, explains the tax treatment under Section 140B of the ITA in respect of loans or advances provided by a company to its director. Section 140B provides that where a company makes any loans or advances to a director of that company out of the company's internal funds, that company shall be deemed to have gross income consisting of interest from such loans and advances.

Public Ruling No. 9/2015 - Deduction of interest expense and recognition of interest income for loan transactions between related persons

PR No. 9/2015: Deduction of interest expense and recognition of interest income for loan transactions between related persons, which was published on 3 December 2015, explains the income tax treatment for loan transactions between related persons, in relation to the introduction of Section 29(3) and Section 33(4) of the ITA.

Public Ruling No. 10/2015 – Investment holding company

PR No. 10/2015: Investment holding company, which was published on 16 December 2015, replaces the existing PR No. 3/2011 issued on 10 March 2011. Similar to the previous PR, the new PR explains the tax treatment of an investment holding company (IHC) resident in Malaysia and goes on to discuss the tax treatment of an IHC which is listed on the Bursa Malaysia as well as the tax treatment of an unlisted IHC. The new PR is amended to take into account the amendments to the computation of permitted expenses under Section 60F of the ITA, as proposed in the 2014 Budget.

Public Ruling No. 11/2015 - Tax incentive for angel investor

PR No. 11/2015: Tax incentive for angel investor, which was published on 16 December 2015, explains the tax incentive offered to an angel investor who has invested in a specified investee company. The incentive granted to an angel investor is a tax exemption on the aggregate income of a qualifying angel investor for the basis period of the second year of assessment following the year of assessment in which a qualifying investment is made.

Public Ruling No. 12/2015 - Recovery from persons leaving Malaysia

PR No. 12/2015: Recovery from persons leaving Malaysia, which was published on 17 December 2015, explains the circumstances and procedures for recovering tax and debt due from taxpayers who will be leaving Malaysia. Under Section 104 of the ITA, the Director-General (DG) may issue a certificate to a Commissioner of Police or a Director of Immigration requesting that a taxpayer be prevented from leaving Malaysia until the taxpayer has paid all the tax, sums and debt so payable or furnishes security for such payments to the satisfaction of the DG.

Public Ruling No. 1/2016 – Agriculture allowances

PR No. 1/2016: Agriculture allowances, which was published on 20 January 2016, explains the types of qualifying agriculture expenditure, the computation of agriculture allowances/ charges and the tax treatment on receipt of a grant/subsidy. A person who has incurred qualifying agriculture expenditure for the purposes of his business will be entitled to claim agriculture allowances, which can be deducted against the adjusted income from that business to arrive at the statutory income. "Agriculture" means any form of cultivation of crops, animal farming, aquaculture, inland fishing and any other agricultural or pastoral pursuit, including the reforestation of timber.

Implementation of thin capitalisation deferred to 1 January 2018

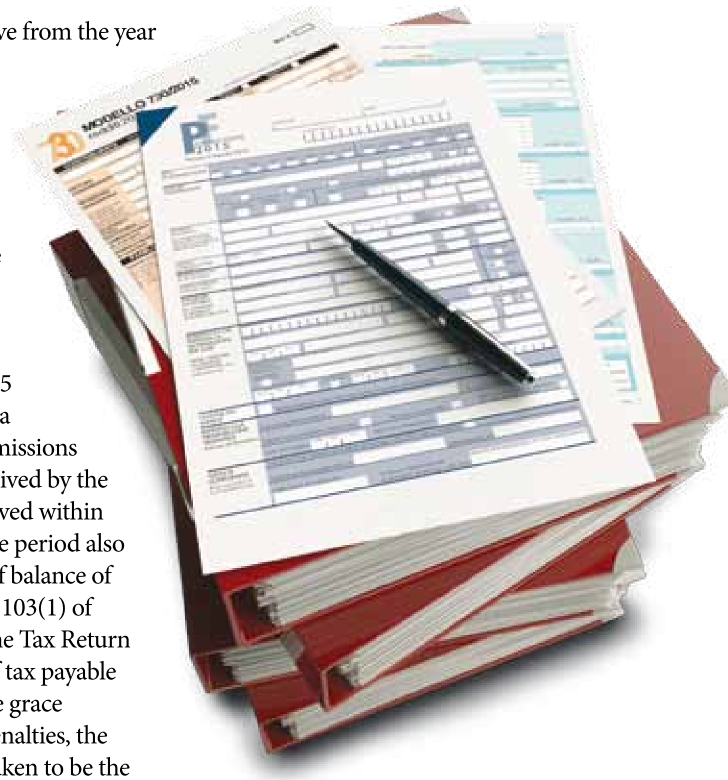
The Ministry of Finance has announced, via a letter dated 30 December 2015, that the implementation of the thin capitalisation rules will be deferred for another two years, i.e. until 31 December 2017 and will take effect from 1 January 2018.

Monthly Tax Deduction 2016

The IRB has issued/updated the following on its website:

- Guidelines for MTD under Income Tax (Deduction from Remuneration) (Amendment) (No. 2) Rules 2015 dated 1 January 2016 (only available in Bahasa Malaysia)
- Specification for MTD calculations using computerised calculation for 2016 dated 1 January 2016
- Form PCB TP1 (1/2016) Individual Deduction and Rebate Claim Form
- Form PCB TP3 (1/2016) Previous Employer Employment Information in Current Year for MTD Purpose
- Questions on MTD calculation using computerised calculation method 2016
- Table of Monthly Tax Deductions effective from year 2016

The above are updated to take into account the 2016 Budget proposals which have been gazetted via the Finance Act 2015. Updates include changes in tax reliefs and tax rates effective from the year of assessment 2016.



2016 Filing programme

The IRB has made available on its website the 2016 income tax return filing programme. The 2016 filing programme is broadly similar to the 2015 filing programme. Where a grace period is given, submissions shall be deemed to be received by the stipulated due date if received within the grace period. The grace period also applies to the settlement of balance of tax payable under Section 103(1) of the ITA. Where the Income Tax Return Form ("ITRF")/balance of tax payable is not furnished within the grace period, when imposing penalties, the original due date will be taken to be the due date for the purpose of calculating the penalties.

In addition to the grace period, an application for extension of time to submit the ITRF is allowed on the merits of each case. However, it was highlighted in the 2016 programme that an application for extension of time is no longer allowed (previously, taxpayers could submit an application for an extension of time to the IRB for consideration at least 30 days before the due date). The withdrawal of the extension of time is effective as follows,

Form (including electronic forms)	Effective date
Forms E, BE, B, BT, M, MT, P, TP, TJ and TF	Year of assessment 2015
Forms e-C, C1, PT, TA, TC, TR and TN	Year of assessment 2016

STAMP DUTY

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 4) Order 2015

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 4) Order 2015 [P.U. (A) 278] was gazetted on 30 November 2015 and came into operation on the same date. The Order provides that any tax payable under the ITA in respect of any money payable under any agreement, note, instrument or document in relation to the *Sukuk Murabahah* Programme, *Sukuk Murabahah* issued by Prasarana Malaysia Berhad or any agreement, note instrument and document guaranteed by the government of Malaysia, shall be remitted in full. Also remitted is any stamp duty payable under the Stamp Act 1949 in relation to the said instruments. For the purpose of this Order, *Sukuk Murabahah* Programme is defined to mean Islamic Medium Term Notes of up to RM5 billion.

Stamp Duty (Exemption) Order 2015

Stamp Duty (Exemption) Order 2015 [P.U.(A) 303], gazetted on 22 December 2015, exempts from stamp duty all instruments relating to a restructuring scheme of a licensed insurer or takaful operator or its corporate group. The exemption shall apply to instruments which are executed between 1 November 2014 and 30 June 2018 in relation to a transaction which has been approved or not objected to by Bank Negara Malaysia. The Order shall be deemed to have come into operation on 1 November 2014.

Stamp Duty (Remission) Order 2015

Stamp Duty (Remission) Order 2015 [P.U.(A) 308], gazetted on 29 December 2015, came into operation from 1 January 2016 until 31 December 2017. The Order provides a 20% stamp duty remission on the stamp duty chargeable under sub-item 27(a) of the First Schedule of the Stamp Act 1949 on the principal or primary instrument of financing made in accordance with the principles of *Shariah* for the purpose of financing the purchase of a residential property. The Order effectively extends the Stamp Duty (Remission) (No. 2) Order 2009 [P.U.(A) 409], that was effective from 1 January 2010 to 31 December 2015.

Stamp Duty (Exemption) (Amendment) Order 2015

Stamp Duty (Exemption) (Amendment) Order 2015 [P.U.(A) 309], gazetted on 29 December 2015, amends the Stamp Duty (Exemption) (No. 5) Order 2013 [P.U.(A) 91]. The Order is deemed to have come into operation on 1 January 2016 and expires on 31 December 2017. Stamp Duty (Exemption) (No. 5) Order 2013 provides stamp duty exemption on financing instruments and instruments of transfer executed by the original house purchaser. The Order now also applies to a wider range of financiers, which now include a co-operative society, any employer who provides an employee housing loan scheme, Malaysian Building Society Berhad and Borneo Housing Mortgage Finance Berhad.

Stamp Duty (Exemption) (Amendment) (No. 2) Order 2015

Stamp Duty (Exemption) (Amendment) (No. 2) Order 2015 [P.U.(A) 310], gazetted on 29 December 2015, amends the Stamp Duty (Exemption) (No. 6) Order 2013 [P.U.(A) 92]. The Order is deemed to have come into operation on 1 January 2016 and expires on 31 December 2017. Stamp Duty (Exemption) (No. 6) Order 2013 provides stamp duty exemption on the financing instruments and instruments of transfer executed by the rescuing contractors or developers. Similar to Stamp Duty (Exemption) (Amendment) Order 2015, the Order now also applies to a wider range of financiers.

REAL PROPERTY GAINS TAX

Real Property Gains Tax (Exemption) Order 2015

Real Property Gains Tax (Exemption) Order 2015 [P.U.(A) 302], gazetted on 22 December 2015, exempts any person from the payment of real property gains tax (RPGT) on chargeable gains accruing on the disposal of any chargeable asset relating to a restructuring scheme of a licensed insurer or takaful operator or its corporate group. The exemption shall apply to a disposal which is made between 1 November 2014 and 30 June 2018 and has been approved or not objected to by Bank Negara Malaysia. The Order shall be deemed to have come into operation on 1 November 2014.

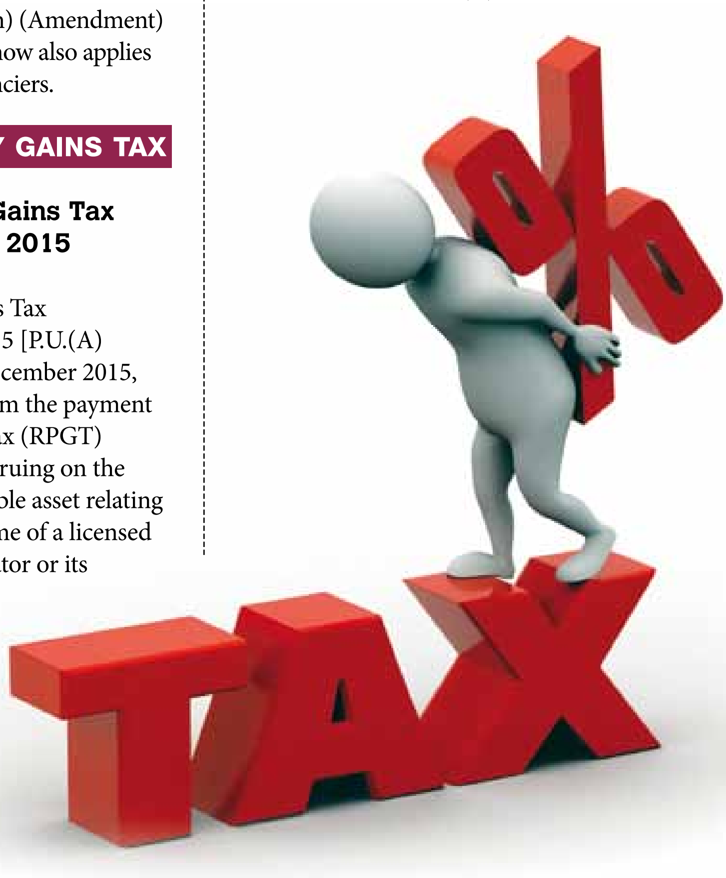
CUSTOMS AND EXCISE DUTIES

Customs (Amendment) (No.3) Regulations 2015 Customs Act 1967 [P.U. (A) 268/2015]

The Regulations provide for an amendment in the First Schedule within the Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have commenced on 17 November 2015.

The Regulations provide amendments in Part VI under the heading "INLAND CLEARANCE DEPOT", by substituting the word "Segamat" and the particulars relating to it with the particulars shown under Paragraph 2 of the Regulations.

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



Customs (Prohibition of Imports) (Amendment) (No. 7) Order 2015 – Corrigendum Customs Act 1967 [P.U. (A) 285/2015]

The Order provides for the corrigendum in P.U. (A) 226 published on 9 October 2015, by substituting the words "item 11" and "item 12" in Paragraph 4, with the numbers "12" and "13" respectively in column (1) of the table in Paragraph 4.

Please refer to P.U. (A) 226/2015

Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-operation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea) (ASEAN Harmonised Tariff Nomenclature) Order 2015 Customs Act 1967 [P.U. (A) 286/2015]

The Order provides for the import duties to be levied on and paid by the importers in respect of the goods specified in the Second Schedule, originating from Korea and ASEAN countries or from Korea or ASEAN countries imported into Malaysia, at the rate of import duty specified in column (5) of the Second Schedule. This Order is deemed to have come into operation on 1 January 2016.

The classification of goods specified in the Second Schedule shall be subject to the General Rules for the Interpretation of the Harmonized System under the International Convention on the Harmonized Commodity Description and Coding System. The imposition of the import duties under this Order is without prejudice to the imposition and collection of the goods and services tax under the Goods and Services Tax Act 2014.

Customs Duties (Amendment) (No.3) Order 2015 Customs Act 1967 [P.U. (A) 305/2015]

The Order provides for amendments in the First Schedule of the Customs Duties Order 2012 [P.U. (A) 275/2012], which is deemed to have commenced on 1 January 2016.

The Order provides for amendments in the First Schedule, in relation to heading 44.18, by substituting subheading 4418.72 000 and the particulars relating to it with the subheadings and particulars shown under paragraph 2 (a); in relation to subheading 8419.19 100, by substituting the figure "30%" with the figure "5%" in column (4); in relation to subheading 8419.90 100, by substituting the figure "25%" with the figure "5%" in column (4); in relation to subheading 8419.90 410, by substituting the figure "30%" with the figure "5%" in column (4); and in relation to subheadings 8421.29 510, 8421.29 600, 8421.39 900 and 8421.99 100, by substituting the figure "25%" with the figure "5%".

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

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No.3) Order 2015 Customs Act 1967 [P.U. (A) 306/2015]

The Order provides for amendments in the Second Schedule of the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff

Nomenclature and ASEAN Trade in Goods Agreement) Order 2012 [P.U. (A) 277/2012], which is deemed to have commenced on 1 January 2016.

The Order provides for amendments in the Second Schedule, in relation to heading 44.18, by substituting for tariff code 4418.72.00 00 and the particulars relating to it with the tariff codes and particulars shown under paragraph 2 (a); in relation to subheading 8419.19.10 00, by substituting the figure "30%" with the figure "5%" in column (5); in relation to subheading 8419.90.13 00, by substituting the figure "25%" with the figure "5%" in column (5); in relation to subheading 8419.90.21 30, by substituting the figure "30%" with the figure "5%" in column (5); in relation to subheadings 8421.29.30 00, 8421.29.50 00, 8421.39.90 00, 8421.9920 10, 8421.99.30 00, 8421.99.95 10 and 8421.99.99 20, by substituting the figure "25%" with the figure "5%" in column (5) and in relation to subheadings 8511.30.41 00, 8511.30.49 00, 8511.30.91 00 and 8511.30.99 00, by substituting the figure "5%" with the word "Nil" in column (5).

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

◆◆ Customs (Import Licence Fee for Motor Vehicle) (Amendment) Regulations 2015 Customs Act 1967 [P.U. (A) 319/2015]

The Regulations provide for amendments in relation to Regulation 1, Regulation 2 and Schedule of the Customs (Import Licence Fee for Motor Vehicle) Regulations 2009 [P.U. (A) 491/2009], which are referred to as the "principal Regulations" in these Regulations. These Regulations are deemed to have commenced on 31 December 2015.

The principal Regulations are amended in sub-regulation 1(2) by deleting the words "to 31 December 2015"; sub-regulation 2(1) by substituting the words "Customs (Prohibition of Imports) Order 2008 [P.U. (A) 86/2008]" with the words "Customs (Prohibition of Imports) Order 2012 [P.U. (A) 490/2012]; and in the Schedule, in relation to item 1, in column (3), by substituting the words "6287-V" with the words "62847-V" and in relation to item 44, in column (3), by substituting the words "91431-U" with the words "92431-U".

Please refer to P.U. (A) 491/2009

◆◆ Customs (Values of Imported Completely Built-Up Motor Vehicles) (New) (Amendment) Order 2015 Customs Act 1967 [P.U. (A) 322/2015]

The Order provides for amendments in the Schedule of the Customs (Values of Imported Completely Built-Up Motor Vehicle) (New) Order 2006 [P.U. (A) 108/2006]. This Order is deemed to have commenced on 31 December 2015.

The Order provides for amendments in the Schedule, in relation to word substitution in column (2) and insertion of items and the particulars relating to them which are shown in this Order.

Please refer to P.U. (A) 108/2006

◆◆ Customs (Anti-Dumping Duties) Order 2016 Countervailing and Anti-Dumping Duties Act 1993 and Customs Act 1967 [P.U. (A) 11/2016]

The Order provides for the anti-dumping duties to be levied on and paid by the importers in respect of the goods specified in columns (1) and (2) of the Schedule exported from the countries specified in column (3) into Malaysia by the exporters or producers specified in column (4) at the rates specified in column (5). This Order is deemed to have commenced on 24 January 2016.

The classification of goods specified in the Schedule shall comply with the Rules of Interpretation in the Customs Duties Order 2012 [P.U. (A) 275/2012]. The imposition of anti-dumping duties under this Order is without prejudice to the imposition and collection of import duties under the Customs Act 1967 and the goods and services tax under the Goods and Services Tax Act 2014.

◆◆ Customs (Provisional Anti-Dumping Duties) Order 2016 Countervailing and Anti-Dumping Duties Act 1993 and Customs Act 1967 [P.U. (A) 12/2016]

The Order provides for the provisional anti-dumping duties to be levied on and paid by the importers in respect of the goods specified in columns (1) and (2) of the Schedule exported from the countries specified in column (3) into Malaysia by the exporters or producers specified in column (4) at the rates specified in column (5). This Order has effect for the period from 25 January 2016 to 23 May 2016.

The classification of goods specified in the Schedule shall comply with the Rules of Interpretation in the Customs Duties Order 2012 [P.U. (A) 275/2012]. The imposition of provisional anti-dumping duties under this Order is without prejudice to the imposition and collection of import duties under the Customs Act 1967 and the goods and services tax under the Goods and Services Tax Act 2014.

Customs Duties (Amendment) Order 2016 Customs Act 1967 [P.U. (A) 19/2016]

The Order provides for amendments in the First Schedule of the Customs Duties Order 2012 [P.U. (A) 275/2012], which is deemed to have commenced on 1 February 2016.

The Order provides for amendments in the First Schedule, in relation to subheadings 7204.10 000, 7204.29 000, 7204.30 000, 7204.41 000 and 7204.49 000, in column (5), by substituting the figure "10%" with the word "Nil".

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

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2016 Customs Act 1967 [P.U. (A) 20/2016]

The Order provides for amendments in the Second Schedule of the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and

ASEAN Trade in Goods Agreement) Order 2012 [P.U. (A) 277/2012], which is deemed to have commenced on 1 February 2016.

The Order provides for amendments in the Second Schedule, in relation to subheadings 7204.10.00 00, 7204.29.00 00, 7204.30.00 00, 7204.41.00 00 and 7204.49.00 00, in column (6), by substituting the figure "10%" with the word "Nil".

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

GOODS AND SERVICES TAX

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) Order 2015 Goods and Services Tax Act 2014 [P.U. (A) 290/2015]

The Order provides for amendments to the First Schedule and the Second Schedule within the Goods and Services Tax (Zero-Rated Supply) Order 2014 [P.U. (A) 272/2014], which is referred to as the "principal Order" in this Order and is deemed to have commenced on 1 January 2016.

The principal Order is amended in Regulation 19 by inserting sub-regulation (8A) after sub-regulation (8); the interpretation of "passenger motor car" in Paragraph (a) under Regulation 34 by inserting after the word "Land Public Transport 2010 [Act 715]", the words ",Commercial Vehicles Licensing Board Act 1987 [Act 334]"; sub-regulation 40(3) by substituting the words "89(2) (a)" with the words "88(2) (a)"; Paragraph 45(1) (a) by inserting after the words "which has", the word "not"; Regulation 47 by inserting sub-regulation (2A) after sub-regulation (2); Paragraph 80 (a) by inserting after the word "Malaysia" the words "not less than eighteen years of age"; sub-regulation 94 (1) by inserting after the words "registered person", the words "under Section 20 of the Act"; and Paragraph 113(1)(b) by substituting the word "Monday" with the word "Sunday".

The principal Regulations are further amended in the heading of the First Schedule, in the national language text, by substituting the word "INSTITUT" with the word "INSTITUSI"; Third Schedule by inserting Paragraph "(q) and (r)" after Paragraph (p); and Fourth Schedule by inserting after the word "Muar" and the particulars relating to it under subheading 'Johore' in Item I of the First Schedule, the word "Batu Pahat".

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

Goods and Services Tax (Relief) (Amendment) (No.2) Order 2015 Goods and Services Tax Act 2014 [P.U. (A) 291/2015]

The Order provides for amendments in Paragraph 3, First Schedule and Second Schedule within the Goods and Services Tax (Relief) Order 2014 [P.U. (A) 273/2014], which is referred to as the "principal Order" in this Order and is deemed to have

commenced on 1 January 2016.

The principal Order is amended in Paragraph 3, by deleting the words "investment precious metal" as specified in sub-item 4(1) of the First Schedule to the Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014]. The First Schedule of the principal Order is amended in relation to Item 5, by the substitution of words and paragraph, insertion of paragraph and deletion of words as specified under Paragraph 3 of this Order. Further amendments are made in the Second Schedule of the principal Order, by the substitution of item and paragraph as specified under Paragraph 4 of this Order.

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

Goods and Services Tax (Exempt Supply) (Amendment) (No.2) Order 2015 Goods and Services Tax Act 2014 [P.U. (A) 292/2015]

The Order provides for amendments in the Second Schedule within the Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014], which is referred to as the "principal Order" in this Order and is deemed to have commenced on 1 January 2016.

The principal Order is amended in the Second Schedule in relation to Item 22, in sub-item (b), by deleting the word "and"; by substituting for the full stop at the end of sub-item (c) the words "; and"; and by inserting after sub-item (c) the sub-item specified under subparagraph 2(c) of this Order.

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

Goods and Services Tax (Amendment) (No.2) Regulations 2015 Goods and Services Tax Act 2014 [P.U. (A) 293/2015]

The Regulations provide for amendments in Regulation 2, Regulation 38, Regulation 41, Regulation 58, Regulation 85 and Regulation 91 within the Goods and Services Tax Regulations 2014 [P.U. (A) 190/2014], which are referred to as the "principal Regulations" in these Regulations and are deemed to have commenced on 1 January 2016.

The principal Regulations are amended in Regulation 2, in relation to Paragraph (a), by substituting the words "should be" with the words "is liable to"; Regulation 38, in relation to sub-regulation 38(1), by substituting Paragraph (e) with the paragraph specified in Regulation 3 of these Regulations; Regulation 41, in relation to Paragraph (h), by deleting the word "or" at the end of the paragraph, Paragraph (i), by substituting the 'full stop' at the end of the paragraph with a 'semi-colon', and by inserting after Paragraph (i) the paragraph specified under Regulation 4.

The principal Regulations are further amended in Regulation 58, in relation to sub-regulation 58(3), by substituting the words "registered person" wherever appearing in Paragraphs (a), (b) and (c), with the words "taxable person"; by substituting the words ";and" at the end of Paragraph (d) with a full stop; and by deleting Paragraph (e). Regulation 85 of the principal Regulations is amended in relation to sub-regulation 85(1), by substituting the words "81(1)(b)" with the words "81(b)"; and Regulation 91 is amended in relation to Paragraph 91(1) (a), by inserting before the words "value of supplies" the word "total" and by substituting the words "a person" with the words "any person".

Please refer to P.U. (A) 190/2014

*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.*

CASE 1

KETUA PENGARAH HASIL DALAM NEGERI V CLEAR WATER SANCTUARY GOLF MANAGEMENT BHD (APPEAL NO: W-01-97-03/2014) (COURT OF APPEAL)

Counsel for the Taxpayer:
Datuk D.P. Naban & S. Saravana Kumar of Lee Hishammuddin Allen & Gledhill

Counsel for the Director-General of Inland Revenue:
Abu Tariq Jamaluddin, Norhisham Ahmad & Azrul Safinas

The case is an income tax appeal from the High Court. The facts of the case were as follows:

- The taxpayer operated a golf and recreation club, membership of which was available under a licence agreement;
- Under the licence agreement, an interested party would pay an entrance fee to join the club as a member;
- Members would also make an advance payment to the taxpayer under the licence agreement. The advance payment is the total annual licence fee payable by a member to the taxpayer for the term of the licence;
- Members paid an annual licence fee for services rendered by the taxpayer in a financial year. The fee was payable each year during the term of the licence, but was collected upfront as security;
- The taxpayer set off the advance payment against the annual licence fee that was due for the services rendered by the taxpayer in a financial year;
- If membership was terminated or transferred, the portion of the advance payment in respect of the unexpired portion of the term of the licence was refunded to the member;
- The taxpayer subjected the entrance fee to income tax in the year it was received, on the basis that it had accrued to the taxpayer;
- The advance payment was not subjected to income tax in the year it was received, on the premise that it had yet to accrue to the taxpayer. Instead, it was recognised as the taxpayer's liability, rather than income. The Inland Revenue Board ("the IRB") had accepted this treatment and assessed the taxpayer accordingly;
- However, consequent to a tax audit in 2003, the IRB subjected the advance payment to income tax in the year it was received.

The issue was whether the licence fees received in advance by the taxpayer were correctly brought to tax under Section 24 of the Income Tax Act 1967 ("the ITA").

The Special Commissioners of Income Tax ("the SCIT") ruled against the taxpayer and held that the licence fees should have been brought to tax under Section 24 of the ITA when it was received by the taxpayer.

On appeal by the taxpayer before the High Court judge, which is posited upon the premise that the DGIR has no legal or factual basis to subject the payment of advance licence fees to tax as the licence fees received were not a debt owing to the taxpayer and since no services had been rendered by the taxpayer, Her Ladyship allowed the appeal and held that the SCIT had committed an error of law by misconstruing or failing to take into account the contents of the licence agreement and the rules and regulations. The SCIT had failed in its duty to appreciate and give effect to the bargain of the parties according to their intention which was put in writing.

In this context, the advance payment was not a "debt" owed to the taxpayer for the following reasons:

- The advance payment was paid as security for the due and punctual payment of the annual licence fees by a member during the term of the licence;
- The annual licence fee was payable annually in advance of the stipulated due dates during the

term of the licence;
- The advance payment shall be set off against the annual licence fee payable by the member on the due dates annually until the full amount of the advance payment was set off;
- The advance payment did not belong to the taxpayer. If there was a transfer of licence, the remaining portion of the advance payment belonging to the member would be assigned to the transferee. Beneficial ownership of the advance payment remained with the member during the term of the licence;
- If a member was suspended or whose licence was suspended, his membership would be transferred to another person, along with the remaining advance payment made;
- For the advance payment to constitute income and taxable on the taxpayer in the year of receipt, it must have accrued to the taxpayer. The taxpayer must have an unconditional right to receive and keep the advance payment;
- Although advance licence fee was advanced as security in the form of advance payment, the annual licence fee would only accrue to the taxpayer on the due date which falls annually.

The phrase "services rendered" in Section 24(1)(b) of the ITA clearly requires services to be rendered for there to be a debt owing in respect of such services rendered. Only then shall the debt be treated as gross income. For fees to be considered income, these must not only have been received, but must also have "come home" to the taxpayer. Mere receipt of the advance payment is not synonymous with income.

The Director-General of Inland Revenue's appeal before the Court of Appeal was unanimously dismissed with costs.

Notwithstanding the decision of the Court of Appeal affirming the High Court's decision, it is noted that the Finance Act 2015, which was enacted in 2015, has subsequently amended Section 24(1) of the ITA. Following this amendment, which will be effective from year of assessment 2016 onwards, and notwithstanding that no debt is owing to a relevant person in respect of services or such use or enjoyment of property on account of services yet to be rendered or use or enjoyment of property yet to be dealt with, the sum received by the taxpayer shall be treated as the gross income of the relevant person from the business for the relevant period.

CASE 2

KETUA PENGARAH HASIL DALAM NEGERI V TANAH SUTERA DEVELOPMENT SDN BHD (APPEAL NO: R-14-1-9/2014) (HIGH COURT)

Counsel for the Taxpayer:
Datuk D.P. Naban & S. Saravana Kumar of Lee Hishammuddin Allen & Gledhill

Counsel for the Director-General of Inland Revenue:
Cik Ashrina bte Ramzan Ali

The case is an income tax appeal by the Director-General of Inland Revenue ("the DGIR"). The facts were as follows:

The taxpayer is a property developer whose principal activities consisted of property development, investment in real properties, as well as renting and leasing of real estate.

The taxpayer incurred expenditure and constructed a school building, to which it remained as the proprietary owner. The building was rented to a premier private school that was licensed and approved by the Minister of Education. The school was used solely for the purposes of an educational institution.

The taxpayer then subjected the rental income received from the school as its business income under Section 4(a) of the Income Tax Act 1967 ("the ITA"). When filing its tax returns, the taxpayer took a prudent approach in not claiming for industrial building allowance under Schedule 3 of the ITA. The taxpayer subsequently appealed against its deemed assessment and it was subsequently forwarded by the IRB to the Special Commissioners of Income Tax ("the SCIT").

The issue was whether the taxpayer was entitled to claim industrial building allowance pursuant to paragraph 42B of Schedule 3 of the ITA, read together with paragraph 60 of the same Schedule.

The SCIT held that paragraph 42B states that when a person constructs a building for a school building in the course of its business, that building shall be treated as an industrial building.

Further, to qualify for industrial building allowance under the said paragraph, the following elements need to be satisfied:

(i) for the taxpayer's business;
(ii) the taxpayer had incurred capital expenditure;
(iii) the building must be a school or educational institution;
(iv) the school or educational institution must be approved by the Minister of Education; and
(v) the building must be treated as an industrial building for the purposes of the business.

The SCIT agreed with the taxpayer's proposition that industrial building allowance was not restricted to the operator of the building. The SCIT further found that the taxpayer was well within the ambit of paragraph 42B of Schedule 3 as it satisfied all the elements under that provision and allowed the taxpayer's appeal.

The DGIR appealed, but this was dismissed by the High Court. The DGIR further appealed to the Court of Appeal but later withdrew its appeal.

Following the decision of Tanah Sutera (supra), the enactment of the Finance Act 2015 introduced an amendment with effect from year of assessment 2016 onwards, which stated that no allowance shall be made to a person under paragraphs 12 and 16 of Schedule 3 of the ITA for a year of assessment in respect of any expenditure incurred in relation to the specified paragraph of the Schedule relating to industrial building where the building or part thereof is used by that person for the purpose of letting of property, including the business of letting such property.

With the amendment, it will appear contrary to the decision in Tanah Sutera (supra) as taxpayers who are industrial building owners will not be eligible for tax relief for expenditure incurred for the construction/purchase of industrial buildings which are then let out to third party operators.

CASE 3

KASB V KETUA PENGARAH HASIL DALAM NEGERI (2016) MSTC 10-055 (SPECIAL COMMISSIONERS OF INCOME TAX)

Counsel for the Taxpayer:
Datuk D.P. Naban & S. Saravana Kumar of Lee Hishammuddin Allen & Gledhill

Counsel for the Director-General of Inland Revenue:
Duna bte Mohd Isa & Kevin Hal Lai Keong

The case concerns an income tax appeal against the decision of the Director-General of Inland Revenue in disallowing the taxpayer's reinvestment allowance claim. The facts were as follows:

- The taxpayer was in the business of waste management. This involved scheduled waste collection, storage, treatment and disposal;
- The taxpayer treated scheduled waste before its safe disposal. In treating the scheduled waste, the processes it undertook resulted in producing new products from the scheduled waste that was originally collected;
- The taxpayer claimed reinvestment allowance on machineries including mini-incinerators, physical/chemical treatment plant, leachate treatment plant and laboratory equipment for the years of assessment 2003 to 2007 and 2011;
- However, consequent to a tax audit in 2011, the Inland Revenue Board ("the IRB") had rejected the taxpayer's reinvestment allowance claim in its entirety on the basis that it was not for a "qualifying project" within the meaning of paragraph 8(a) of Schedule 7A of the Income Tax Act 1967 ("the ITA").

The issue was whether the taxpayer was entitled to the reinvestment allowance claim on its machineries in light of paragraph 8(a) of Schedule 7A.

The IRB contended that the taxpayer was not entitled as the treatment of the scheduled waste did not produce or manufacture any end products and/or products that were marketable and from which the taxpayer's income was derived. The IRB's opinion was that the taxpayer had merely transformed the scheduled waste into inert waste residue for safe disposal at the secured landfill, instead of adding value to the scheduled waste. As such, the IRB argued that the taxpayer's business income was derived merely from the charges for the services that it had rendered.

In this context of determining whether the taxpayer had fulfilled the requirements of the term "qualifying project" under paragraph 8(a) of Schedule 7A, the definition of the terms "manufacturing", "process" and "product", which ae not defined in the ITA, became essential.

The Special Commissioners of Income Tax ("the SCIT") ruled in favour of the taxpayer. Since the terms were not defined in Schedule 7A of the ITA, they should be given ordinary meaning. It was held that it was incorrect for the IRB to state that there was no added value to the taxpayer's activity when the term "product" was not defined in Schedule 7A, nor had paragraph 8(a) stated that the product must have value, be marketable or is to be sold.

In fact, the SCIT went on to consider the fact that the peculiar nature of the taxpayer's business activity had protected the environment and created safe and healthy clean surroundings for all and for the future, there was no benchmark on what monetary value could be attached to such an intangible product — a safe, clean and healthy environment.

The SCIT also held that the taxpayer's business was conducted in accordance with the licence issued by the Ministry of International Trade and Industry ("Miti") in light of Section 3(1) of the Industrial Coordination Act 1975 ("the ICA"). Thus, the interpretation of "manufacturing activity" in Section 2 of the ICA was relied on and adopted by the SCIT. The SCIT further referred to the insertion of the definition of "manufacturing" at paragraph 8(a) of Schedule 7A (post-amendment). It was held that the amendment to the provision at paragraph 8(a) was applicable to the taxpayer's reinvestment allowance claim for the year of assessment 2011.

On top of that, having considered the stages involved in the taxpayer's business activity, the SCIT took the view that the treatment of the scheduled waste to alter the form and character of the waste to inert waste involved "processing" of a product.

The IRB appealed against the SCIT's decision to the High Court on whether the SCIT was correct in law.

CASE 4

KETUA PENGARAH HASIL DALAM NEGERI V OKA CONCRETE INDUSTRIES SDN BHD (2015) MSTC 30-091 (HIGH COURT)

Counsel for the Taxpayer:
Datuk D.P. Naban & S. Saravana Kumar of Lee Hishammuddin Allen & Gledhill

Counsel for the Director-General of Inland Revenue:
Neng Juliana bt Ismail & Wan Hamdanie bt Wan Mohamed

This case involved two types of incentives available to the taxpayer on capital expenditure incurred, i.e. reinvestment allowance and capital allowance. The facts of the case were as follows:

- The taxpayer manufactured and sold ready-mix and precast concrete products;
- The taxpayer claimed reinvestment allowance on the capital expenditure incurred on its factory (fencing, maintenance parts storage area, office, bridge, road and pile shoe fabrication yard) as well as plant and machinery (mixer trucks, batching plant, cranes and compressor, lorries and weigh bridge);
- The reinvestment allowance claim was disallowed by the Inland Revenue Board ("the IRB") on the premise that the items were not involved in production activity as required under Schedule 7A of the ITA;
- The taxpayer claimed capital allowance on the capital expenditure incurred to purchase the mixer trucks and batching plant;
- There was no dispute that the mixer trucks and batching plant constituted plant and machinery. However, the capital allowance claim was rejected by the IRB on the grounds that those items although expenditure incurred by the taxpayer, they were not physically operated by the taxpayer, but by its holding company, OET Sdn Bhd.

The issues in question were whether the taxpayer was

entitled to claim reinvestment allowance and capital allowance on the items mentioned above.

For the claim on reinvestment allowance, the taxpayer contended that the capital expenditure incurred on the items was necessary and an integral part of the taxpayer's factory and manufacturing activity. The IRB disputed that the items did not fall within the scope of "qualifying project" under paragraph 8(a) of Schedule 7A of the ITA.

On the capital allowance claim, the taxpayer argued that the mere fact that the mixer trucks and batching plant were operated by OET on behalf of the taxpayer did not mean that the items were not used for the purposes of the taxpayer's business of precast concrete.

The Special Commissioners of Income Tax ("the SCIT") ruled in favour of the taxpayer and the IRB appealed to the High Court. The High Court held that the SCIT's decision and reliance on *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd (2012) MSTC 30-039* was correct. The High Court's decision in Success Electronics, which was subsequently affirmed by the Court of Appeal, had affirmed the SCIT's decision that reinvestment allowance could not be restricted to "production area" alone. The High Court in Success Electronics also highlighted that for the IRB to impose conditions on "production area", when it was not contained anywhere in Schedule 7A of the ITA, was tantamount to rewriting the law. Had Parliament intended to restrict reinvestment allowance claims to "production area" only, then it would have specified this clearly in Schedule 7A.

The High Court in this present appeal further affirmed the SCIT's decision that the said items played a necessary and integral role in the taxpayer's manufacturing activity. The SCIT was found to be correct in adopting the functionality test.

On the claim for capital allowance, the High Court remarked that the taxpayer was the owner of the mixer trucks and batching plant. The court accepted that the preparation of ready-mix concrete was sub-contracted to a wholly-owned subsidiary of the taxpayer's holding company, OET, under an arrangement that the latter were merely labour contractors to whom a consideration was paid. OET's labours were, at all material times, under the taxpayer's instruction and supervision, and the products were made to the taxpayer's specifications.

In the circumstances, the High Court agreed with the taxpayer's contention that "the law only requires the mixer trucks and batching plant to be used for the purposes of the taxpayer's business. The law does not require the taxpayer to physically operate the mixer trucks and batching plant". The court was of the view that the IRB had no room to read in the additional requirement that the mixer trucks and batching plant could not be operated by contract labour on behalf of the taxpayer. The High Court held that as long as the taxpayer had incurred capital expenditure on the mixer trucks and batching plant, remained the owner of the items and used those items in its business of manufacturing precast concrete, the taxpayer was entitled to the capital allowance claim. The IRB had no authority to dictate how a taxpayer should conduct its business.

The High Court affirmed the SCIT's decision which was in favour of the taxpayer.

The Director-General of Inland Revenue subsequently appealed to the Court of Appeal, but the appeal was later withdrawn.

***Heng Jia** and **Ngo Su Ning** are tax lawyers with Lee Hishammuddin Allen & Gledhill, where they specialise in various income tax matters. They have assisted the firm's tax partners, Datuk D.P. Naban and S. Saravana Kumar in major tax appeals, which enabled them to be well versed with tax issues like income recognition, deduction, capital allowance, reinvestment allowance and tax avoidance. Heng Jia read law at the University of Exeter and Ngo Su Ning read law at the Cardiff University.*

OTHER BUSINESS DEDUCTIONS

GAZETTE ORDERS

Siva Subramanian Nair

In this article we shall look at the following Gazette Orders.

- Income Tax (Deduction For Benefit And Gift From Employer To Employee) Rules 2009 [P.U. (A) No. 153/2009]
- Income Tax (Deduction Of Pre-Commencement Of Business Expenses Relating To Employees Recruitment) Rules 2008 [P.U.(A) No. 361/2008]
- Income Tax (Deduction For Expenditure On Franchise Fee) Rules 2012 [P.U.(A) 76/2012]
- Income Tax (Deduction For Expenditure To Obtain The 1-Innocert Certification) Rules 2012 P.U. (A) 109

INCOME TAX (DEDUCTION FOR BENEFIT AND GIFT FROM EMPLOYER TO EMPLOYEE) RULES 2009

These Rules came into effect from the year of assessment 2008. It complements the list of benefits provided by an employer which are fully exempt in the hands of the employee under Income Tax (Exemption) Order 2009 [P.U. (A) No. 152/2009], by providing a deduction for the employer for these benefits provided.

Therefore, in ascertaining the adjusted income of a person resident in Malaysia from his business in the basis period for a year of assessment, there shall be allowed as deduction expenses incurred by such person in respect of the following benefit and gift to his employees:

- payment of monthly bill for subscription of broadband, fixed line telephone, mobile phone or pager issued in the name of the employee or in the name of such person as the employer;
- personal digital assistant, telephone, mobile phone or pager.

The next expense represents an example of a pre-commencement expenditure which ranks for a deduction.

INCOME TAX (DEDUCTION OF PRE-COMMENCEMENT OF BUSINESS EXPENSES RELATING TO EMPLOYEES RECRUITMENT) RULES 2008

Who gets the deduction?

- a person resident in Malaysia carrying on a business

At what stage is the deduction given?

- in arriving at the adjusted income from the business

What conditions must be fulfilled?

- The expenses are on the recruitment of employees to enable the person to commence his business
- They are of the kind allowable under Section 33 of the Act relating to the recruitment of employees; and
- They are incurred within the period of one year prior to the commencement of his business.

When is the deduction given?

- The expenses shall be deemed to be incurred on the day the business commences.
- Yet another example of a pre-commencement expenditure which ranks for a deduction is franchise fees.

In the case of *Shaklee Products (M) Sdn Bhd V Ketua Pengarah Hasil Dalam Negeri,* the Court of Appeal dismissed the taxpayer's appeal that the franchise fee paid by the taxpayer to the franchisor is wholly and exclusively incurred in the production of the taxpayer's gross income and deductible under Subsection 33(1) of the Income Tax Act 1967.

The court held that the franchise fee paid by the taxpayer is capital in nature. It was payment to acquire rights to operate the business of the franchisor in Malaysia, by using the name, business system and products of the franchisor. [2012 Budget Commentary and Tax Information issued by CTIM, MIA & MICPA]

However, the government has recognised that payment of a franchise fee is an imperative prerequisite in commencing a franchise business whereby the franchisee is given the rights to offer, sell or distribute products or services based on the systems and marketing plans set by the franchisor. Accordingly, a deduction is given for franchise fee paid to a franchisor prior to the commencement of that franchise business.

INCOME TAX (DEDUCTION FOR EXPENDITURE ON FRANCHISE FEE) RULES 2012

Who gets the deduction?

- a qualified person; i.e. the person must be resident in Malaysia and is a franchisee within the meaning of Section 4 of the Franchise Act 1998;
- the person should be carrying on a franchise business i.e. be using a local franchise brand,
- "local franchise brand" means a trademark or service mark that is registered under the Trademarks Act 1976 by a franchisor whose franchise business is registered under Section 6 of the Franchise Act 1998;

What is the nature of the expense?

- "franchise fee" means a fee paid by a qualified person to the franchisor for the right to use a mark, [as defined under Section 4 of the Franchise Act 1998] trade secret, confidential information, intellectual property or system of franchise owned by that franchisor in accordance with the terms of a franchise agreement EXCLUDING royalty payment or other periodical payments [Note: Similar to deduction for acquisition of proprietary rights, this is because payment of royalties is revenue in nature and therefore already qualifies for a deduction under Section 33(1)]
- "franchisor" means
- a franchisor within the meaning of Section 4 of the Franchise Act 1998
- who wholly owns the local franchise brand and in relation to a company incorporated under the Companies Act 1965, and

- at least 70% of the issued share capital of the company is owned by Malaysian;

At what stage is the deduction given?

- in arriving at the adjusted income from the business

What conditions must be fulfilled?

- the franchise fee must be paid to a franchisor, for his franchise business prior to the commencement of that business.
- the franchise fee paid by the qualified person to the franchisor for his franchise business shall not be refundable

When is the deduction given?

- The expenses deemed to be incurred in the basis period for a year of assessment in which the franchise business commences.

Let us look at an examination question relating to deductibility of franchise fee.

June 2013 [SPECIALISED INDUSTRIES] Question 1

Note 5: Franchise fee

The company obtained a new franchise on fried chicken from a local franchise brand held by a Malaysian company in which non-residents hold 20% of the issued share capital. The franchised fried chicken would be sold in a separate department to maintain the franchise identity.

Solution

The franchise fee paid for the acquisition of the franchise of the fried chicken from a local franchise held by a Malaysian company would be now an allowable deduction effective from the year of assessment 2012 (previously such payment would be treated as a capital expenditure and therefore not qualifying for deduction, as in the Shaklee case).

INCOME TAX (DEDUCTION FOR EXPENDITURE TO OBTAIN THE 1-INNOCERT CERTIFICATION) RULES 2012 PU (A) 109

A “1-InnoCERT Certification” is defined to encompass a 1-Innovation Certification for Enterprise Rating & Transformation issued by Small and Medium Enterprises Corporation Malaysia to a qualified person who has been rated AAA, AA or A by SIRIM Berhad. The qualified person has to make an application to obtain an 1-InnoCERT Certification not later than 31 December 2014

What expenses qualify for a deduction?

- a certification fee of RM5,000; and
- expenses incurred by SIRIM Berhad's auditors which consist of:-
    - cost of travelling to and from their office to the qualified person's premises including mileage, toll and parking fee; or in the case of travel by air, the cost of economy class airfare and airport transfer claim;
    - accommodation cost in a standard room or lodging allowance; and
    - meal allowance.

Table 1

Industry	No. of Employees	Achieved Annual Sales
Manufacturing Industry, Manufacturing Related Services Industry And Agro-Based Industry	NOT < than 5 and NOT > than 150 full-time employees	NOT <than RM250,000 and NOT > than RM25,000,000
Services Industry, Primary Agriculture, Information And Communication Technology Industry	NOT < than 5 and NOT > than 50 full-time employees	NOT <than RM200,000 and NOT > than RM5,000,000

Who is a qualified person?

- A person who is resident in Malaysia
- who at the end of the basis period for a year of assessment has achieved the above (**Table 1**):

At what stage is the deduction given?

- in arriving at the adjusted income from the business for the basis period for a year of assessment

When is the deduction given?

- The expense shall be deemed to be incurred in the basis period for the year of assessment in which the 1-InnoCERT Certification is granted to the qualified person

In the next article we shall look at further gazette orders.

Siva Subramanian Nair *is a freelance lecturer. He can be contacted at sivasubramaniannair@gmail.com*

FURTHER READING

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Thornton, R. 100 Ways to Save Tax in Malaysia for SMEs (2014), Sweet & Maxwell Asia
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CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: April – June 2016

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
APRIL 2016								
Workshop: GST: Practical Issues & Recent Developments	6 Apr	9a.m – 5p.m.	Kuala Lumpur	Thenesh Kannaa	400	450	500	8 WS/040
Workshop: Latest Updates on Withholding Tax & Double Taxation Agreements in 2016	7 Apr	9a.m. – 5p.m.	Penang	Sivaram	350	400	450	8 WS/33
Workshop: GST: Practical Issues & Recent Developments	12 Apr	9a.m. – 5p.m.	Kota Kinabalu	Thenesh Kannaa	350	400	450	8 WS/027
Workshop: GST: Practical Issues & Recent Developments	13 Apr	9a.m. – 5p.m.	Kuching	Thenesh Kannaa	350	400	450	8 WS/028
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	14 Apr	9a.m. – 5p.m.	Johor Bahru	Kularaj	350	400	450	8 WS/020
Workshop: Tax Incentives – an overview of incentives available & eligibility criteria and conditions	19 Apr	9a.m. – 5p.m.	Kuala Lumpur	Farah Rosley	400	450	500	8 WS/019
Workshop: GST: Practical Issues & Recent Developments	21 Apr	9a.m. – 5p.m.	Ipoh	Thenesh Kannaa	350	400	450	8 WS/029
MAY 2016								
Workshop: Managing Tax Audits	4 May	9a.m. - 5p.m.	Johor Bahru	Renganathan	350	400	450	8 WS/036
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	5 May	9a.m. - 5p.m.	Penang	Kularaj	350	400	450	8 WS/021
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	10 May	9a.m. - 5p.m	Malacca	Kularaj	350	400	450	8 WS/022
GST Training Course Examination Day	7, 8, 9, 14, 15 & 16 May 11 June	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/003
NATIONAL GST CONFERENCE 2016	**31 May & 1 Jun**	**9a.m. - 5p.m**	**Berjaya Times Square Hotel, Kuala Lumpur**	**Local & Foreign**	**Early Bird 1,484** **Normal 1,696**	**Early Bird 1,590** **Normal 1,802**	**Early Bird 1,696** **Normal 2,014**	**25 GST/001**
Public Holiday ***(Labour Day: 1 May, Wesak Day: 21 May)***								

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: April – June 2016

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JUNE 2016								
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	6 Jun	9a.m. - 5p.m.	Kuala Lumpur	Kularaj	350	400	450	8 WS/023
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	13 Jun	9a.m. - 5p.m.	Kuching	Kularaj	350	400	450	8 WS/024
Workshop: GST: Practical Issues & Recent Developments	16 Jun	9a.m. - 5p.m	Melaka	Thenesh Kannaa	350	400	450	8 WS/030
Workshop: Latest Updates on Withholding Tax & Double Taxation Agreements in 2016	20 Jun	9a.m. - 5p.m	Kuala Lumpur	Sivaram	400	450	500	8 WS/034
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	23 Jun	9a.m. - 5p.m	Kota Kinabalu	Kularaj	350	400	450	8 WS/025
Workshop: GST: Practical Issues & Recent Developments	24 Jun	9a.m. - 5p.m	Penang	Thenesh Kannaa	350	400	450	8 WS/031
Workshop: Latest Updates on Withholding Tax & Double Taxation Agreements in 2016	29 Jun	9a.m. - 5p.m	Johor Bahru	Sivaram	350	400	450	8 WS/035
Workshop: Reinvestment Allowances - Understanding Schedule 7A ITA 1967	30 Jun	9a.m. - 5p.m	Ipoh	Kularaj	350	400	450	8 WS/026
Public Holiday ***(DYMM Agong's Birthday: 4 June)***								

DISCLAIMER : The above information is correct and accurate at the time of printing. CTIM reserves the right to change the speaker (s)/date (s), venue and/or cancel the events if there are insufficient number of participants. A minimum of 3 days notice will be given.

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.

NATIONAL GST CONFERENCE 2016

ENSURING FISCAL SUSTAINABILITY WITH GST

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Please ☑ the appropriate checkboxes.

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Participant 1 Full name as per I/C (Dato' / Datin / Dr / Mr / Mrs /Ms): ☐ Vegetarian Meal

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Email ______________

*☐ Member *☐ Non-Member Membership No.: ______________

Participant 2 Full name as per I/C (Dato' / Datin / Dr / Mr / Mrs /Ms): ☐ Vegetarian Meal

____

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Email ______________

*☐ Member *☐ Non-Member Membership No.: ______________

Participant 3 Full name as per I/C (Dato' / Datin / Dr / Mr / Mrs /Ms): ☐ Vegetarian Meal

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CONFERENCE FEES

Category	Early bird fee (with payment before or on 30 April 2016)	Normal fee (after 30 April 2016)
CTIM member/ RMCD officer	RM1,484	RM1,696
Member's firm staff, Member of Supporting Body, Member/staff of supporting body	RM1,590	RM1,802
Non-Member	RM1,696	RM2,014
Overseas participant	Not Applicable	RM3,074

** The above conference fees is inclusive of 6% GST.*

Conference Secretariat:

- **Registration & Administrative Matters**
  Chartered Tax Institute of Malaysia
  B-13-1, Block B, 13th Floor, Unit 1
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  Contact Person
  Ms Yus / Ms Ramya / Ms Jaslina / Mr Jason
  Tel : 03-2162 8989 Ext 121 / 119 / 131 / 108
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Industry: ______________ Contact Person: ______________

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TERMS & CONDITIONS

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CANCELLATION POLICY
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REPLACEMENTS
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CONFIRMATION OF REGISTRATION
A confirmation letter will be issued within 2 weeks before the conference. Please contact us immediately if you have not received the confirmation letter 7 days prior to the conference.

CERTIFICATE OF ATTENDANCE
Certificate of Attendance will only be released to registered participants (must register before 11.00am) upon full attendance with full payment and after completion of the Conference.

WALK-IN PARTICIPANT
Walk-in participant registration is subject to availability of seats and full payment.

DISCLAIMER
All information contained in this brochure is correct and accurate at the time of printing. The Conference Organisers reserves the right to cancel, make any amendments and/ or changes to the programme if warranted by circumstances beyond the control of the Organisers. The Conference Organisers also reserve the right to make alternative arrangements without prior notice should it be necessary to do so. Upon signing the registration form, you are deemed to have read and accepted the terms and conditions.

DAY 1 TUESDAY, 31 MAY 2016

Programme Outline

7:30 am	**Registration & Arrival of Guests**
9:00 am	**Arrival of Guest of Honour**
	Y.A.B Dato' Sri Mohd Najib bin Tun Hj Abdul Razak *(invited)* Prime Minister / Finance Minister of Malaysia
9:10 am	**Welcoming Speech**
	Mr Aruljothi Kanagaratnam President, Chartered Tax Institute of Malaysia
9:20 am	**Opening Address**
	YBhg Dato' Sri Khazali Haji Ahmad Director General of Customs, Royal Malaysian Customs Department
9:30 am	**Keynote Address by Guest of Honour**
	Y.A.B Dato' Sri Mohd Najib bin Tun Hj Abdul Razak *(invited)* Prime Minister / Finance Minister of Malaysia
10:00 am	**Morning Refreshments/ Tour of Exhibition Booths/ Press Conference**
10:45 am	**Topic 1 : Progress on GST Implementation & The Future Focus of RMCD**
	Moderator: Dr Jeyapalan Kasipillai Council Member, Chartered Tax Institute of Malaysia Speaker: YBhg Dato' Sri Khazali Haji Ahmad Director General of Customs, Royal Malaysian Customs Department Panel Members: Ms Khodijah Abdullah *(invited)* Undersecretary, Tax Division, Ministry of Finance Malaysia YBhg Datuk Wira Dr Hj Ameer Ali Mydin Council Member, Malaysia Retailers Association (MRA) / Managing Director, Mydin Mohamed Holdings Bhd
12:15 pm	**Question & Answer Session**
12:30 pm	**Networking Lunch & Tour of Exhibition Booths**
2:00 pm	**Topic 2 : Discussion on GST Hot Topics (e.g Disbursement/Reimbursement, Property, Import / Export Services – interaction between Customs & GST rules)**
	Moderator: Mr SM Thanneermalai Council Member, Chartered Tax Institute of Malaysia Speaker: YBhg Dato' Subromaniam Tholasy Deputy Director General, Customs & GST, Royal Malaysian Customs Department Panel Members: Mr David Lai Council Member / Chairman of Technical Commitee - Indirect Tax, Chartered Tax Institute of Malaysia Mr Raja Kumaran Executive Director, PricewaterhouseCoopers Taxation Services Sdn Bhd Mr Tan Eng Yew GST Executive Director, Deloitte Tax Services Sdn Bhd
4:00 pm	**Question & Answer Session**
4:30 pm	**End of Day 1**

NATIONAL GST CONFERENCE 2016

DAY 2 WEDNESDAY, 1 JUNE 2016

Programme Outline

8.50am	Overview of Day 1 Ms Farah Rosley Co-Organising Chairman of NGC 2016
9:00 am	**Topic 3 : Round Up of International GST Decisions**
	Moderator: Mr Tan Sim Kiat Director of Customs (GST), Royal Malaysian Customs Department Speakers: Mr S Saravana Kumar Partner, Lee Hishammuddin Allen & Gledhill Mr Irving Aw Director, Tax & Private Client Practice, Camford Law Corporation Panel Member: YM Dato' Raja Rozela Raja Toran Director of Customs (Legal), Royal Malaysian Customs Department
10:15 am	**Question & Answer Session**
10:30 am	**Morning Refreshments/ Tour of Exhibition Booths**
11:00 am	**Topic 4 : International Segment: Sharing of Audit & Compliance Experience from Singapore & Australia**
	Moderator: YBhg Dato' Paddy Abd Halim Director of Customs (Compliance), Royal Malaysian Customs Department Speakers: Mr Yeo Kai Eng Partner & GST Lead, Ernst & Young Singapore Mr Andrew Ditchfield Executive Director, Financial Services International, Digital and Financial Services Indirect Tax, Australian Taxation Office Panel Member: Ms Lorraine Parkin Senior Executive Director - GST, Grant Thornton
12:15 pm	**Question & Answer Session**
12:30 pm	**Networking Lunch & Tour of Exhibition Booths**
2:00 pm	**Topic 5 : Preparing an Appeal to a Tax GST Tribunal**
	Moderator: Mr K. Sandra Segaran Council Member, Chartered Tax Institute of Malaysia Speaker: Ms Aslina Joned *(invited)* Chairman, GST Appeal Tribunal
3:00 pm	**Question & Answer Session**
3:15 pm	**Topic 6 : Round Table Discussion: Interaction Between GST, Income Tax & Customs**
	Moderator: YBhg Tan Sri Dr Mohd Irwan Serigar Abdullah *(invited)* Secretary General, Ministry of Finance Malaysia Panel Members: YBhg Dato' Hj Zulkifli Yahya Assistant Director General of Customs (Enforcement), Royal Malaysian Customs Department YBhg Kolonel (K) Tan Sri Datuk Wira Dr Hj Mohd Shukor bin Hj Mahfar Chief Executive Officer, Lembaga Hasil Dalam Negeri Malaysia Ms Ng Sue Lynn Executive Director, Indirect Tax, KPMG Tax Services Sdn Bhd
4:30 pm	**Question & Answer Session**
4:45 pm	**End of Conference & Refreshments**

NATIONAL GST CONFERENCE 2016

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Officiated by:	Y.A.B Dato' Sri Mohd Najib bin Tun Hj Abdul Razak Prime Minister/Finance Minister of Malaysia *(invited)*
Conference Date:	31 May & 1 June 2016
Conference Venue:	Berjaya Times Square Hotel, Kuala Lumpur

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