Vol.6/No.4/2013/Q4

Official Journal of the Chartered Tax Institute of Malaysia

Tax Guardian

AUTHORITATIVE - RELEVANT - GLOBAL EXCELLENCE

RM28.00

NATIONAL TAX CONFERENCE 2013

MANAGING THE TAX ECOSYSTEM

ctim

CHARTERED TAX INSTITUTE OF MALAYSIA

ISSN 0128-7583

9 770128 758008

- 2014 Budget Memorandum
- Intra-Group Services: Negotiating the maze of transfer pricing assessments
- A summary update of the CP58 conundrum

Announcement

2014 Malaysian Budget PROPOSALS

Date	Venue	Date	Venue
7 November 2013	Renaissance Hotel, Kuala Lumpur	3 December 2013	Ramada Plaza Hotel, Malacca
22 November 2013	Holiday Inn Glenmarie, Subang	4 December 2013	MS Garden Hotel, Kuantan
25 November 2013	Impiana Hotel, Ipoh	4 December 2013	The Pacific Sutera, Kota Kinabalu
28 November 2013	M Suites Hotel, Johor Bahru	5 December 2013	Four Points Sheraton, Kuching
2 December 2013	Traders Hotel, Penang	9 December 2013	Seri Pacific Hotel, Kuala Lumpur

The 2014 Malaysian Budget Proposals will be announced and tabled in Parliament on the 25th October 2013 by Prime Minister/Minister of Finance, YAB Dato' Sri Mohd Najib bin Tun Abdul Razak.

The theme for this year's Budget is "Fulfilling Promises, Accelerating Transformation" is in line with the Government's various initiatives to enhance the nation's competitiveness through promotion of innovative and high value added economic activities.

CTIM is organising a one-day Budget Seminar that will provide participants with the updates on the 2014 Budget Proposals. The invited speakers from IRBM will analyse key budget proposals and the implications of these proposals on you and your business from a tax perspective which will be followed up by a forum discussion. The afternoon session will focus on tax updates and latest development. Don't miss this opportunity to hear the viewpoints from the experts!

BENEFITS TO PARTICIPANTS:

- Obtain information and clarification from the Ministry of Finance (MOF) / Inland Revenue Board of Malaysia (IRBM) on the changes and impact to taxpayers with regard to the 2014 Budget Proposals.
- Get to know the tax updates & latest developments.
- Gain knowledge on Inland Revenue Board Malaysia (IRBM)'s significant current practices and processes.
- Receive 10 CPD points recognised by MOF as one of the mandatory Budget Seminars for the purposes of application and renewal of tax agent licence under Section 153(3), Income Tax Act 1967.
- Get a complimentary copy of the 2014 Budget Commentary & Tax Information booklet.

MARK YOUR DIARY AND DON'T MISS THE BOAT!

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.

INSTITUTE ADDRESS

The Secretariat, Unit B-13-2,
Block B, 13th Floor, Megan Avenue II,
No. 12 Jalan Yap Kwan Seng,
50450 Kuala Lumpur
Telephone : 603 2162 8989
Facsimile : 603 2162 8990
E-mail : secretariat@ctim.org.my
Website : www.ctim.org.my

PUBLISHING CONSULTANT

Executive Mode Sdn Bhd (317453-P)
Tel: +603-7118 3200, 3205, 3230
Fax: +603-7118 3220
e-mail: executivemode@executivemode.com.my
web: www.executivemode.com.my

PRINTER

BHS Book Printing Sdn Bhd (95134-K)
Lot 17-22 & 17-23, Jalan Satu, Bersatu Industrial Park
Cheras Jaya, 43200 Cheras, Selangor DE
Tel: +603-9076 0816, 9076 0825, 9074 7558
Fax: +603-9076 0785, 9074 7573
e-mail: bhsprint@tm.net.my

Tax Guardian

Tax Guardian is the official journal of the Chartered Tax Institute of Malaysia and is distributed to members and students of CTIM as well as subscribers, both corporate and individual. The contents of *Tax Guardian* do not necessarily reflect the views or opinions of CTIM and no liability is accepted in relation thereto. CTIM does not accept liability for any views or opinions published herein. Advertisements appearing within this journal should not be taken to imply any direct support for or sympathy with the views and aims of CTIM.

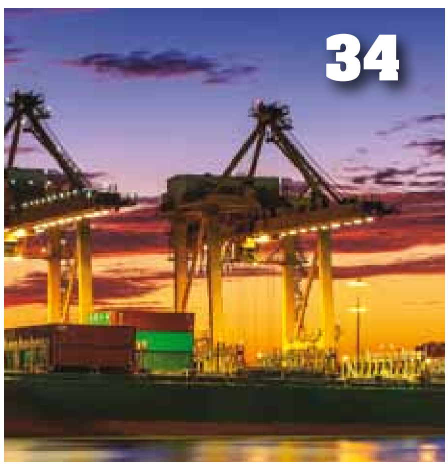
IMPORTANT DISCLAIMER

No person should rely on the contents of this journal without first obtaining advice from a professionally qualified person. This journal is distributed/sold on the terms and understanding that (1) the author(s) and/or CTIM is not responsible for the results of any actions taken on the basis of information in this journal nor from any error or omission contained herein; and (2) that, in so far as this journal is concerned, neither the author(s) nor CTIM is engaged in rendering legal, accounting, professional or other advice or services. The author(s) and/or CTIM expressly disclaim any and all liability and responsibility to any person, whether a purchaser, a subscriber or a recipient; reader of this journal or not, in respect of anything and/or of the consequences of anything done or omitted to be done by such person in reliance, either wholly or partially, upon the whole or any part of the contents of this journal. If legal advice or other expert assistance is required, the service of a competent professional person should be sought.

Tax Guardian

VOL.6/NO.4/2013/Q4
OCTOBER 2013

contents



INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers and academicians. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 1,800 to 2,000 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.

Contributions may be sent to:
The Chairman, Editorial Committee
Chartered Tax Institute of Malaysia
Unit B-13-2 Block B, 13th Floor, Megan Avenue II,
No.12 Jalan Yap Kwan Seng, 50450 Kuala Lumpur
Email: *publications@ctim.org.my*

SM THANNEERMALAI

GST – IT IS AT OUR DOORSTEP!

I believe that the government is very serious this time in introducing GST and the clearest signal we have had so far is from the Secretary-General of the Ministry of Finance, Tan Sri Mohd Irwan Serigar Abdullah, who said, on August 29, that the Treasury had proposed to the Prime Minister to include GST in his forthcoming 2014 Budget speech. He also added that "GST is a must, not an option." It is also timely to introduce GST as part of a holistic package of fiscal reforms to address the budget deficit issue, which is one of the concerns raised by the international ratings agency, Fitch when it downgraded the sovereign credit rating outlook of Malaysia recently. The government has already started the fiscal reform process with the 20-cent increase in the petrol and diesel prices on 2 September, and it has announced plans to increase the BR1M payment from RM500 to RM1,200 to alleviate the suffering of the lowest sections of our society.

The time has now arrived for CTIM members, who are at the forefront of the tax industry advising their clients or their employers, to become fully equipped to handle GST matters. In this regard CTIM has recently commenced the second full programme of over six weeks with the assistance of the Royal Malaysian Customs (RMC) to provide comprehensive education to our members on GST. In addition, more one-day events will be organised around the country to bring our members up–to-date on GST matters. The first in the series of such events will be in October when the GST bill and case laws from similar international GST/VAT regimes will be explained and followed up on the same afternoon with sessions highlighting some of the practical issues that could arise upon implementation of the new tax regime.

I would urge all our members to be prepared to take up this opportunity to help the nation implement GST efficiently.

On the matter of GST licensing, it is clear that the authorities will be sticking to their position that a separate licence will have to be obtained before a person can deal with the RMC on GST matters on behalf of their clients. We will, now, need to find out the exact GST-licensing process - will it be via exams or interviews or via classes etc.? This is a matter that the Technical Committee-Indirect Taxation needs to address immediately and an e-CTIM will be issued as soon as we become aware of the details from the RMC or the Tax Review Panel (TRP) headed by YBhg Dato' Kamariah Binti Hussain.

What are the Committees in CTIM up to?

Each of our Committees is very active and a quick summary is as follows:

TECHNICAL COMMITTEE - DIRECT TAXATION (I)

- CP58 issues have been raised at separate meetings which resulted in the IRB issuing CP58 guidelines (Guidelines on responsibility for providing details of payments made to agents, distributors or dealers in CP58 form for purposes of the provisions under Section 83A, Income Tax Act (ITA) 1967) and the CP58 Addendum.
- Review of the ITA 1967 to identify the gaps in the course of implementing the self-assessment regime – work in progress and is expected to be finished this quarter.
- The Committee has compiled a list of unresolved issues over the years to be discussed at a meeting with the IRB Technical Department. An e-CTIM will be sent out to members to communicate these issues and to seek any other important issues affecting the tax fraternity.
- On the transfer pricing front, I have followed up on the recommendations I made during the National Tax Conference (NTC) 2013 in July with a letter to the IRB. As this develops I will keep you informed via e-CTIMs.

TECHNICAL COMMITTEE - DIRECT TAXATION (II) [TC-DT (II)]

- It has been reviewing the Stamp Duty legislation and will review the Real Property Gains Tax (RPGT) legislation since the IRB is also in the process of revamping both legislations. At the moment, these are in early stages of discussion and as the matters become more firmed up you will be updated via e-CTIMs.

- TC-DT (II) is planning to engage the Securities Commission and Bank Negara on the issues arising in the capital markets and financial sector.
- There are plans to meet the authorities to discuss the matters concerning intellectual property.

● TECHNICAL COMMITTEE-INDIRECT TAXATION

- It has been very active in providing feedback to the RMC and the TRP on the various draft GST guides issued for different sectors (26, to date). Our feedback to the RMC and the TRP is available to members through our website.

● CPD COMMITTEE

- The new Committee has been very actively involved in planning for CPD events with new topics and speakers. I would encourage all members who will greatly benefit from tax updates and other technical matters to support the Institute by participating in these CPD events. Your participation will ensure the success of these events.

● EDITORIAL COMMITTEE

- This Committee is actively focused on revamping the journal to make it more relevant to members such as by diverting the focus more towards technical articles. In addition to thought-leadership articles, which will provide ideas on the future direction of Malaysia's fiscal policies, there will now be an equal weighting given to the "bread-and-butter" issues faced by taxpayers and tax practitioners, such as deductions of finance-related expenses, Section 33(2) updates, source issues, Section 4B and Section 4(f) issues, withholding tax matters, underlying principles behind the imposition of penalties etc. These matters will be penned down in the future issues and I urge new writers, who wish to contribute, to come forward please!

● MEMBERSHIP COMMITTEE

- It has begun approaching the accounting firms and companies to recruit new members.
- It is actively looking into ways to engage members to understand their needs and often it is working in tandem with other Committees such as the Technical and Public Practice Committees.

● PUBLIC PRACTICE COMMITTEE (PPC)

- The PPC has been developing a public practice programme for members who wish to apply for a practising certificate.
- In October there will be a Members' Technical Round Table Discussion between the Technical Committees and the members in our office in Kuala Lumpur and this is an example of all these Committees working together.

● EDUCATION COMMITTEE

- Very active in visiting colleges and educational institutions to encourage students to become members of the tax profession.

● EXAMINATIONS COMMITTEE

- Very active with the exams which are now conducted twice a year and this is a huge task which involves many man-hours.
- Another very important milestone that will be achieved shortly is to change the syllabus of the exams to ensure relevance to all our stakeholders.

● RESEARCH COMMITTEE

- It is actively supporting the Malaysian Tax Research Foundation to review the research programmes proposed by the Trustees and the papers submitted by the researchers.

● FROM THE PRESIDENT

I am spending anywhere of up to 20 to 25% of my working week engaging the various Committees and the various government Ministries and their agencies such as MoF, IRB, RMC, MIDA, SC, InvestKL etc. Additionally, I have been attending to the day-to-day matters of CTIM (but needless to say that this burden is largely on the shoulders of our capable Executive Director, Thomas Simon) and finally dealing with Press enquiries. I am also encouraged and pleased to report that the Ministry of Finance has responded positively to our request and given a grant of RM100,000 to the Institute for providing subsidies to our members for attendance of selected CPD programmes. I hope that you, as a member, will take advantage of this facility which is available for a limited period only.

● 2014 BUDGET IS ON FRIDAY, 25 OCTOBER 2013

I am looking forward to hear major fiscal reforms being introduced in this Budget. In addition to the various budget proposals CTIM has put forward, I have pressed home the need to give a tax deduction for the fees paid to tax agents for compliance work – somewhat similar to the audit fee deduction given in an earlier budget. I am sure this is your wish too. We certainly deserve the deduction when we are helping the IRB to collect close to RM140 billion in the year ending 31 December 2013!!!

Editor'sNote

K. SANDRA SEGARAN

FAST-FORWARDING FISCAL REFORM

Malaysia has high hopes of becoming a high-income and a developed nation by 2020. We do not have the luxury of ample time to achieve this vision, and tax strategies – especially those to be announced in the upcoming Budget, will be a key instrument in economic transformation.

Budget 2014 will be presented on 25 October 2013 and fiscal reform would likely be the thrust under the theme of "Fulfilling Promises, Accelerating Transformation." In our Budget Memorandum, we enumerate the strategies that we think will be necessary to spur reform and accelerate transformation. Key to these is to simplify and encourage tax compliance by improving the transparency and clarity of tax laws and regulations. This in turn will enable Malaysia to achieve the larger goal of increasing the tax base and reducing revenue leakages to fund sustainable and transformative growth.

It is essential to manage the tax ecosystem holistically and effectively in order to achieve the nation's financial goals. Unsurprisingly, the theme of the National Tax Conference 2013 (NTC 2013) - which is one of our leading and high-profile collaborations between CTIM and LHDN to advance the Malaysian taxation sector - focused on precisely that: "Managing the Tax Ecosystem". Perhaps the key takeaways of the NTC 2013 were these: one, there is a compelling need to develop our tax professionals to meet globally comparable standards. With the increasingly borderless nature of business, it is imperative that Malaysian tax professionals be well-versed in international taxation issues to prevent further outflows of service revenues. Two, there is a need to improve compliance and plug leakages by implementing innovative and revolutionary approaches to tax management. Do read our highly comprehensive report on the NTC 2013 to get a grasp of the direction in which Malaysian taxation is heading.

The concept of substance over form is vital in accounting, and also in taxation. Bart Kosters of the IBFD addresses the application of the principle of "substance over form" under tax treaties, and also takes a look at case law in several countries apart from analysing the OECD's position.

Also in this issue is the final part of "Ships and Water Snakes", which delves into the tax issues of the shipping industry comprehensively. The author argues that Malaysia must reform its maritime tax laws in order to place the Malaysian shipping industry on a level playing field with its competitors.

Navigating the maze of transfer pricing arrangements and the implications for taxation is exceptionally challenging. Management services or Intra-Group services is a complicated area. In this issue, Venkataraman Ganesan, a transfer pricing practitioner provides a helpful overview regarding the various possible forms of Intra-Group services and their ramifications. Chiefly, he explains the implications of the OECD transfer pricing guidelines, elucidates the requirements on Intra-Group services according to Malaysian guidelines and analyses the nature of evidence and extent of documentation expected by the tax authorities in the context of a transfer pricing audit. Two recent case summaries have been presented in this issue together with a useful summary of the Form CP58 development over the last three years.

As ever, it is CTIM's hope that the articles contained in this issue of *Tax Guardian* will enhance the development of our members and improve our global relevance and competitiveness. This in turn will support the sustainability of the profession as we strive to play our part in Malaysian economic development and transformation.

BUILDING A GLOBAL PRESENCE

From a household name in the local automobile business to a diversified conglomerate, the Naza Group is poised on the pathway to a global presence. Over three decades, it has grown rapidly transforming itself into a world class corporation built on excellence, professionalism and dedication. It is this foundation that is driving the Naza Group forward as a recognized Malaysian brand globally. Today, the Naza Group is synonymous for cars, bikes, property, hospitality, transportation and logistics, research and development, after-sales service, finance and plantation. Indeed, the strength of the Group lies in the diversity of its business activities and its ability to take it to new levels. This is our vision, a clear pathway to reinvent the Naza brand beyond local shores and far into the realms of the 21st century.

PEUGEOT
NASIM SDN BHD

The Power to Surprise
NAZA KIA MALAYSIA SDN BHD

CITROËN
NAZA EURO MOTORS SDN BHD

driving difference
NAZA AUTOMOTIVE MANUFACTURING SDN BHD

NAZA ACADEMY SDN BHD

NAZA TTDI
NAZA TTDI SDN BHD

NZ DINERS cafe • restaurant • bistro
NZ DINERS SDN BHD

Tutti Frutti FROZEN YOGURT
TUTTI FRUTTI FROZEN YOGURT (MALAYSIA) SDN BHD

GYU-KAKU JAPANESE BBQ RESTAURANT

NAZA · TALYYA HOTELS
NAZA HOTEL MANAGEMENT SDN BHD

NZGALAXY
NZ GALAXY SDN BHD

LAMAN PREMIUM
PIONEERING IN INNOVATION

LAMAN ASIANA
LAMAN ASIANA SDN BHD

LAMAN KONKRIT
Laman Konkrit Sendirian Berhad

EIGHT VALUATIONS SDN BHD

NAZA AUTO SOLUTIONS (ASIA) SDN BHD
(Formerly known as Asiakia Sdn Bhd) Company No. 924242-A

~A Big Thank You~

PREMIER TAX EVENT OF THE YEAR

NATIONAL TAX CONFERENCE 2013

24 & 25 JUNE 2013 | KUALA LUMPUR CONVENTION CENTRE

The Chartered Tax Institute of Malaysia (CTIM) would like to express its appreciation to all those who contributed to the success of the National Tax Conference 2013:

Co-Organising Partner from the Malaysian Tax Academy

Mr Adzhar bin Sulaiman
(Co-Organising Chairman, NTC 2013)

Mr Mustafa Said
Ms Ruedah Karim
Multimedia Team

Dr Nik Abdullah Sani Nik Mohamed
Mr Jayendra Patel
IRB Public Relations Officers

Ms Latifah Othman
ICT Team

SPEAKERS

Dr Yeah Kim Leng
RAM Holdings Berhad

Mr Mohd Nizom Sairi
Lembaga Hasil Dalam Negeri Malaysia

Mr Muazmir Mohd Yusof
Lembaga Hasil Dalam Negeri Malaysia

Mr Abu Tariq Jamaluddin
Lembaga Hasil Dalam Negeri Malaysia

Mr SM Thanneermalai
Chartered Tax Institute of Malaysia

Mr Jagdev Singh
PricewaterhouseCoopers Taxation Services Sdn Bhd

CHAIRMEN

YBhg Datuk Dr Rebecca Fatima Sta Maria
Ministry of International Trade and Industry

Mr Dzulkifli Ahmad
Commercial Crimes Unit
Attorney General's Chambers

Yang Arif Dato' Haji Zaini Haji Abd Rahman
Special Commissioners of Income Tax

Mr Shaharudin Ali
Nik Saghir & Ismail

Ms Goh Ka Im
Shearn Delamore & Co

Professor Dr Jeyapalan Kasipillai
Chartered Tax Institute of Malaysia

PANELISTS

Professor Dr Zakariah Abdul Rashid
Malaysian Institute of Economic Research

Mr S Vijaya Retnam
Veizay & Co

YBhg Datuk Francis Tan Leh Kiah
Chartered Tax Institute of Malaysia

Ms Salamatunnajan Besah
Lembaga Hasil Dalam Negeri Malaysia

Dr Nik Abdullah Sani Nik Mohamed
Lembaga Hasil Dalam Negeri Malaysia

YBhg Tan Sri Yong Poh Kon
Federation of Malaysian Manufacturers

YBhg Dato Mohammad Sait Ahmad
Lembaga Hasil Dalam Negeri Malaysia

Ms Farah Rosley
Ernst & Young Tax Consultants Sdn Bhd

Conference Sponsors

Gold Sponsors

CIMB BANK, Maybank, NAZA, PNB Permodalan Nasional Berhad, POS Malaysia

Silver Sponsors

PNMB, Sime Darby

Bronze Sponsors

axiata, TM, Tenaga Nasional, Thomson Reuters

Supporting Sponsors

Bank Islam, CCH a Wolters Kluwer business, HANS, LexisNexis, media prima, MyClear, Public Bank, Public Mutual, SME Bank, Universiti Tun Abdul Razak, UMW, Ygl

Media Partner

The Edge Malaysia

Professional Supporting Bodies

ACCA, CPA Australia, CPA Malaysia, MAICSA, MFPC, MIA, ACCCIM, Federation of Malaysian Manufacturers, MICCI

MARK YOUR DIARY FOR 2014 NTC
12 & 13 AUGUST 2014, KUALA LUMPUR CONVENTION CENTRE

THE CHARTERED TAX INSTITUTE OF MALAYSIA (CTIM) COUNCIL MEMBERS 2013/2014

President

Thanneermalai A/L
SP SM Somasundaram

Deputy President

Lim Thiam Kee

Council Members

Poon Yew Hoe

Lew Nee Fook
@ Liu Nee Choong

Chow Kee Kan @
Chow Tuck Kwan

Datuk Tan Leh Kiah

Lai Shin Fah @
David Lai

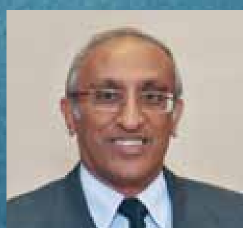
Jeyapalan A/L Kasipillai

Seah Siew Yun

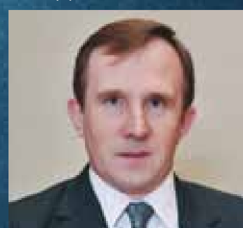
Sandra Segaran A/L
Karuppiah

Phan Wai Kuan

Ong Chong Chee



Aruljothi A/L
Kanagaretnam



Nicholas Anthony Crist

Renuka Thuraisingham

Yeo Eng Ping

21ST ANNUAL GENERAL MEETING

The Chartered Tax Institute of Malaysia (CTIM) held its 21st Annual General Meeting (AGM) on 15 June 2013 at the Renaissance Hotel Kuala Lumpur. A total of 80 members attended the AGM.

Pursuant to Article 59, Khoo Chin Guan, Dato' Liew Lee Leong, Lim Kah Fan and Yeo Eng Hui retired and are not eligible for re-election to the Council.

Pursuant to Article 57 (ii), the following were elected as new members of the Council:-

1) Aruljothi A/L Kanagaretnam
2) Nicholas Anthony Crist
3) Renuka Thuraisingham
4) Yeo Eng Ping

The first Council meeting for the 2013/2014 term was held on the same day. Pursuant to Article 63, the Council has elected from amongst the Council Members as listed below for the term 2013/2014, the President and the Deputy President.

PRESIDENT
Thanneermalai A/L SP SM Somasundaram
DEPUTY PRESIDENT
Lim Thiam Kee
COUNCIL MEMBERS
Poon Yew Hoe
Lew Nee Fook @ Liu Nee Choong
Chow Kee Kan @ Chow Tuck Kwan
Datuk Tan Leh Kiah
Lai Shin Fah @ David Lai
Jeyapalan A/L Kasipillai
Seah Siew Yun
Sandra Segaran A/L Karuppiah
Phan Wai Kuan
Ong Chong Chee
Aruljothi A/L Kanagaretnam
Nicholas Anthony Crist
Renuka Thuraisingham
Yeo Eng Ping

The Council Members are all committed to the Institute by pledging their own time and resources to realising the objectives of the Institute and in achieving its mission.

Career Talks at Asia Pacific University and the Malaysian Taxation Academy

The Asia Pacific University's School of Accounting, Finance and Quantitative Studies organised a career talk for students interested in pursuing a career in Taxation. It was held on 23 September 2013 during the Maths and Accounting Week of the University.

The Institute also participated in *Program Kem Cerdik Cukai* organised by the Malaysian Taxation Academy (MTA) on 4 September 2013, which was attended by approximately 200 Lower Six students throughout the country. The director of MTA Tuan Haji Adzhar bin Sulaiman was present and shared his experiences in Taxation during the session.

In both the career talks, the Institute was represented by the Chairman of the Education Committee and Council Member, Mr. Lew Nee Fook and Dato' Harjit Singh Sidhu who is a member of the Education Committee.

CPD EVENTS

On 16 & 17 July 2013, a workshop on "Understanding Public Rulings on Tax Deductibility of Expenses" was conducted by Mr. Kularaj at CTIM Training Room, Kuala Lumpur. This two-day workshop covered the topic on deductibility of expenses and non-deductible expenses. The speaker also reviewed the relevant tax cases and discussed case studies. By attending the workshop, the participants had a better understanding of the DGIR's interpretations as per the Public Rulings and common compliance related provisions provided in the Income Tax Act 1967 as well as court decisions via tax cases.

A workshop on "Employment Tax Issues – Impact on employers & employees" was conducted on 29 July 2013 at CTIM Training Room by Mr. Krishnan KSM. The workshop focussed on exploring the various issues in structuring a tax effective remuneration package which will provide comfort and satisfaction for both employers and employees. Participants also had a better understanding in managing the various tax planning issues relevant to an employment situation and their impact on the business.

CTIM organised the second series of the Goods & Services Tax (GST) Training Course with speakers from the Royal Malaysian Customs (RMC) Department during the months of August and September 2013. The participants sat for an examination on 21 September 2013 and thereafter those who pass the examination will be issued a certificate by the RMC.

BRANCH MEETING

In conjunction with the National Tax Conference 2013, a Branch Meeting was held on Monday, 24 June 2013 at the Kuala Lumpur Convention Centre. Those Branch Chairmen who participated in the NTC 2013 attended the meeting.

The meeting was chaired by the President, Mr. SM Thanneermalai and attended by the Deputy President, Mr. Peter Lim Thiam Kee and Council Member, Mr. Lew Nee Fook. The President welcomed and thanked the Branch Chairmen for their hard work and efforts in organising CTIM activities and in increasing the membership numbers at branches.

A report of the action plans and upcoming activities for the next six months was presented by each Branch Chairman. The following activities were reported:

To increase publicity with the media so as to create awareness about the CTIM membership and professional examinations.

To conduct career talks at local universities and colleges so as to strongly encourage students to join the tax profession.

To diversify the CPD speakers and topics/programmes to attract more participants.


POS
MALAYSIA
Layan Diri
Self-service Kiosk
POS

NATIONAL TAX CONFERENCE 2013

MANAGING THE TAX ECOSYSTEM

The National Tax Conference 2013 (NTC), was held at the KL Convention Centre from 24 to 25 June, with the theme: Managing the Tax Ecosystem. NTC, the signature event of the Chartered Tax Institute of Malaysia (CTIM), is one of the most high-profile collaborative efforts between CTIM and Lembaga Hasil Dalam Negeri (LHDN). It is an annual event which attracts thousands of delegates from the public and private sectors, the accounting industry and the tax profession, as well as academia. NTC 2013 was officially opened by Dato' Mat Noor Nawi, Deputy Secretary-General of Treasury (Policy), of the Ministry of Finance.

GIVING THOUGHT TO TAX

"Thought leadership is at the core of this year's theme," said CTIM President SM Thanneermalai in his welcome address. "The four main topics of the Conference will directly impact management and sustainability of the tax ecosystem. The focus on tax crime, for instance, is aimed at persons who have intentionally evaded taxes; some people regard themselves as privileged and above the law. CTIM supports measures taken against tax crimes which undermine the integrity of the tax system. On the issue of abusive transfer pricing adopted by many big corporations to avoid paying tax, we need to aggressively target such abusive avoidance practices. However, mechanisms should be set up to balance taxpayers' rights and the discretionary powers of authorities."

He added that the annual NTCs were also intended to bring our tax professionals to standards comparable to the world. With an increasing number of Malaysian businesses moving abroad, "Malaysian businesses need local advisors to advise them on international tax issues and new developments across the world," he said. "If our professionals are not prepared, they are likely to seek advice from overseas professionals and consequently there will be outflow of service revenues."

The theme was further elaborated upon by Tan Sri Dr. Mohd Shukor bin Hj Mahfar, CEO of LHDN, in his opening address. Describing the themes of the NTCs as relevant and timely, he noted that the annual events were strongly supported by professionals, academia and the public sector, and that every edition saw a growth in attendance, indicating an increasing awareness of the need to keep abreast of developments.

THE CHANGING TAX ENVIRONMENT

"Rapid changes in the world of commerce have made it necessary for us to change our strategies," Tan Sri remarked. "The tax system must be fair and transparent. It should facilitate, not frustrate, the public's efforts to comply. To this end, IRB has introduced measures to improve its services. There have also been commissions to review and overhaul processes where necessary. We try constantly to apply innovative, revolutionary approaches to tax management."

One such measure is to deal with disputes without resorting to the courts, in order to reduce the time taken and costs incurred. Remarking

"The four main topics of the Conference will directly impact management and sustainability of the tax ecosystem. The focus on tax crime, for instance, is aimed at persons who have intentionally evaded taxes; some people regard themselves as privileged and above the law."

SM Thanneermalai
CTIM President

that managing change has never been easy (more so when it involves collecting taxes), Tan Sri Dr. Mohd Shukor added that the tax system should be regarded as a public asset as it is directly related to the well-being of the public. This issue was carried further in the keynote address which was delivered by Dato' Mat Noor Nawi, on behalf of the Minister of Finance. The address pointed out that the old order was being replaced with new business models and challenges; thus it was important to keep abreast of developments. This situation was not peculiar to Malaysia – it was being experienced by all countries, which made it imperative that it be addressed in a concerted manner.

To do this, the challenges require careful study and counter-measures must be identified to mitigate any negative impact. "There is a need to maintain healthy interaction between all components of the tax ecosystem," he said. "This is necessary to maintain the health of the economy. The system is geared towards the collection of tax revenue which involves many players, including the government, businesses and taxpayers. We cannot afford to have anything that affects tax collection; it needs the concerted effort of all parties to ensure that tax revenue is not affected." While commending the performance of the IRB, he said that CTIM too had played an important role in ensuring taxpayer compliance, and that a platform like the NTC could produce new ideas for improving tax collection and management.

The keynote address also noted that collection targets had been exceeded in recent years. In 2010, RM86 billion in taxes were collected, increasing to RM110 billion in 2011. In 2012, this increased to RM120 billion. For 2013, the target has been set at RM130 billion. The increases were attributed in part to the e-filing system which had been streamlined to make filing of tax returns simpler and more expedient for the taxpayer. "E-filing was also responsible for speedier refunds," he noted. "It used to take a few months," he remarked, "now, it takes just a few days." With the encouraging response to its efforts, the IRB has continued to introduce better services and has improved its interaction with the public, thereby enriching the tax ecosystem.

"The government will continue to support these efforts," he said. "We will continue to listen to the public. The changes in the commercial world mean that we will have to adapt our strategies accordingly. IRB and the government have a great responsibility in this area, as has CTIM. While CTIM provides skills upgrades for its members, IRB provides competitive service. Its officers are often the first line of contact between the public and the tax system, so they need to give a good impression. We have a zero tolerance policy when it comes to blatant misreporting of tax. This is to enable taxpayers to play their role as good citizens, and to protect the nation's tax revenue. Both IRB and CTIM are central to ensuring a healthy business environment, and both have so far been very responsible about it."

Following the keynote address and the official opening of the Conference, the first session, Economic Challenges for Malaysia saw the discussion of whether Malaysia was on track to becoming a high-income economy by 2020. The speaker for this session was Dr. Yeah Kim Leng, Group Chief Economist of Rating Agency Malaysia Bhd, while the panelist was Prof. Dr. Zakariah Abdul Rashid, Executive Director of the Malaysian Institute of Economic Research (MIER). Chairing the session was Datuk Dr. Rebecca Fatima Sta Maria, Secretary-General of the Ministry of Trade & Industry (MITI). Central to the discussion were the current economic challenges, how these need to be addressed, the prognosis, and what can be expected in the future.

Pointing out that Malaysia's transformation since independence has made it a World Bank model, Dr. Yeah said that it was important to understand that the growth which accompanied its structural transformation needed to be sustained, and to achieve this, the country needed to move from its present mid-income level to higher mid-level, and then to high-income levels. "We are on the right track," he said, "but we want higher growth rates, and there is a substantial gap before we reach high-income level. It's not just about money. Associated with development are higher levels of health, economy and society in general. There is a strong correlation between these elements and higher income."

CHANGE IS IMPERATIVE TO GROWTH

He added that it had taken 19 years, from 1950, for Malaysia to transition from a low-income economy to a lower middle-income economy, and from there to upper middle-income level, where it has been for the past 18 years. "We need to move out now, or be forever caught in the middle-income trap," he emphasised. "But how do we

do this? We need to move to sectors that provide and sustain income growth." Unfortunately, Malaysia has experienced a slowdown in the manufacturing sector since 2000.

Services are replacing manufacturing as the driving factor of the economy but low-end services, which are what Malaysia offers for the most part now, do not encourage high growth rates. Focus must therefore shift to high-end services. "We have already plucked the low-hanging fruits of industrialisation," he said, "it's time we moved to higher branches." But with this move will come economic challenges, some of which the nation has never faced before, or even anticipated. There are ten main groups of challenges: sustaining growth and escaping the middle-income trap; stagnation; the reinvigoration of the manufacturing sector; sustaining industrial competitiveness; boosting of private investment; attraction of more FDI; closing the technological gap and building on industrial competitiveness; raising entrepreneurship levels; stepping up the pace of K-Economy transformation; and increasing the number of women in the workforce.

The middle class – and its mid-level incomes – registered strong growth in the 1970s and 1990s but this has slowed down, in part due to the economic crisis faced by our export markets and competition from other emerging economies. It is necessary for us to compete on innovation, and add value to our products – something that will apply to all sectors. "One of our problems is over-consumption," Yeah added, "and we will have to deleverage on the one hand, while coping with unemployment on the other, if this happens."

CAUTION: UNEVEN ROAD AHEAD

The decline in manufacturing has contributed, in part, to the inability of manufacturers to spend more on R&D, which in turn makes them unable to move up the value chain. They cannot sustain industrial competitiveness if they do not expand their range of goods and services; any decline in manufacturing affects profits, which will further decrease the amount which can be expended on R&D. They cannot bank on private investment, which has been low since 1998. In fact, Malaysia's net FDI outflow has exceeded inflow since 2006.

Less R&D spending also means that the technology gap continues to

widen, and our industrial competitiveness will continue to decline. How then do we address these issues? One way is to raise entrepreneurship levels. "A dynamic business sector is key," he said, "the Malaysian level is relatively flat in terms of the development of new companies. What we need is more start-ups with more high-end services. We also need venture capital and government incentives; banks do not generally lend to start-ups." Yeah added that measures to transform the nation into a Knowledge Economy should be stepped up, and the participation of female labour in the workforce should be encouraged as this was not being fully utilised at present.

"These ten challenges are a combination of sword and shield," he said, describing them as measures that will address growth challenges while addressing imbalances and vulnerabilities. They also have the potential of reducing reliance on foreign labour and the current strain on finance. "Short- and medium-term challenges will need to be addressed, in order to cope with long-term issues," he emphasised. "If a growth rate of three per cent annually can be achieved, we can reach our target by 2020 – provided there is no economic downturn – and become a high-income economy. In the course of working towards this, we will also, hopefully, succeed in developing a culture of excellence, nurture dynamic businesses and consolidate our industrialisation in the process."

PAINFUL STATISTICS

In support of Yeah's presentation, panel speaker Prof. Dr. Zakariah Abdul Rashid pointed out that the Malaysian household debt is on the rise. "The Malaysian technological structure was not as efficient as that of other countries," he said. "It needs reform," he stated.

Commenting on rising household debt, Yeah said that the increase was surprising but most of it could be attributed to civil servants and the shadow banking sector, as well as younger people who are just entering the workforce, who are taking loans for the first time. "Income levels will have to increase, for household debt to decrease," he said. However, Prof. Zakariah closed on a warning note about increasing incomes. "We would like to increase incomes, but are we more productive?" he queried, stating that one of the reasons for growing household debt is the current structural inequality.

WHY YOU SHOULD PAY TAX

The presentations on Malaysia's economic challenges and how they relate to the tax ecosystem were followed by the session on Tax Crime by Mohd Nizom Sairi, IRB's Investigation Department Director, and chaired by Dzulkifli Ahmad, Head of the Commercial Crimes Unit in the Attorney-General's Chambers. "While tax crime was not new," Dzulkifli said, "it undermined the efforts of the honest taxpayer and, by extension, efforts at national development. Capacities of different government departments have to be harnessed to fight tax crime. Collaboration of various enforcement agencies is necessary. Tax crime has been criminalised; convicted fraudsters are liable to be jailed and fined. In 2011, a special task force was established to combat money laundering. Tax crime is on the rise."

Nizom's presentation covered the initiatives taken to combat tax crime, and the measures other countries have been taking, including policies and strategies. International conferences on the matter, such as the Oslo Dialogue, launched by the OECD at the first global Tax and Crime Conference in March 2011, and the 2nd OECD Annual Forum On Tax And Crime held in Rome in June 2012 are platforms on which mechanisms to fight the problem are suggested, and recommendations are made to improve countries' tax systems. Among the measures suggested to mitigate tax crime were the enhancement of enforcement activities, increasing the compliance rates and public confidence in the tax system, and treating compliant taxpayers with fairness and equitability.

BE AWARE OF THE LAW

The session on Tax Crime was followed by a detailed presentation on Tax Offences Leading to Criminal Investigation, chaired by Dato' Haji Zaini Abdul Rahman, Chairman of the Special Commissioners of Income Tax. The speaker for this session was Muazmir Mohd Yusof, Senior Revenue Counsel of IRB's Legal Department, while the panelist was S. Vijaya Retnam, Partner with Veizay & Co. Muazmir's presentation incorporated a comprehensive overview of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) and the extent of IRB's authority in conducting criminal investigation under the Income Tax Act (ITA) 1967.

"An income tax dodger cheats not only the government but his fellow men as well," stated Muazmir, quoting Justice Suffian in *PP v Choo Swee Huat*. For that reason, the authorities have started to come down hard on dodgers. Processes and enforcement have been tightened in recent years but the task has not become easier. From 2004 to 2013, a total of RM18,016,662 in tax offences was investigated, involving 69 cases. How does the IRB identify tax dodgers? Muazmir confirmed that it has several sources of information, including press reports, government departments, informers and the Internet.

The IRB has extensive powers with regard to conducting criminal investigation, he added. "It has the authority to call for specific returns and production of books by those suspected of tax fraud or evasion," he said. "The taxpayer can also be compelled to provide details of all banking accounts, assets and sources of income, not only for himself but for his spouse and children. The IRB is also empowered to search and seize land, buildings and offices for books, documents or other evidence of evasion or fraud." Under AMLATFA, its powers are even more extensive. Section 41 of this Act empowers IRB to make arrests, while Section 44 allows it to freeze property, and Sections 50, 55 and 56 let it seize the movable property of financial institutions, even forcing forfeiture whether or not there is prosecution.

KNOW WHO YOUR FRIENDS ARE

It isn't just the tax criminal who will be liable; those found aiding or abetting him will be deemed just as guilty. "Any person who assists or advises in the preparation of any return which results in an understatement of the liability for tax of any other person, is guilty of an offence as well," Muazmir confirmed, "unless, of course, he can prove that he has acted with reasonable care." Some may find the criminal prosecution of tax evasion unduly harsh, but there is a reason for this. "Criminal prosecution is primarily to deter more serious non-compliance, including willful evasion. It is also meant to prevent abuse of the self-assessment system, and to demonstrate fairness to the taxpayers who do take the trouble to comply."

Day two of NTC 2013 opened with a recap of the previous day's highlights by Adzhar Sulaiman, the Co-Organising Chairman of the Conference. Adzhar's short presentation set the stage for the eagerly-anticipated update on tax cases, presented by Abu Tariq Jamaluddin, Director of the IRB's Tax Appeal Division in the CEO's Office. The panelist for this session was Datuk Francis Tan Leh Kiah, a CTIM Council Member; Shaharuddin Datuk Ali, Partner with Nik Saghir & Ismail, chaired the session.

Abu Tariq stated that in the previous 12 months, 67 cases had been disposed of in the Courts. Twenty-two had been heard in the High Court, and 45 in the Court of Appeal (CoA). The CoA case on Kyros Kebab Sdn Bhd, a fast food chain, was cited as an example of when franchise fees received from outside the country were income from a foreign source and should not be subject to Malaysian income tax. The case of *Dr. Zanariah bte Ramli v KPHDN* was quoted to illustrate taxability of gains arising from the bond market. In this case, the gains made from the buying and selling of bonds, derived from 400 transactions conducted over two years, were treated as income by IRB. The taxpayer appealed and the CoA found in favour of the IRB. The judge concluded that the repetitive nature of the transactions suggested the carrying on of a trade in the said activity. In another case concerning Ekran Bhd and relating to the Bakun Dam project, the matter to be determined was whether payment received by the taxpayer should have been regarded as revenue or capital gains. The Court dismissed the taxpayer's appeal and affirmed the

High Court decision that a Letter of Intent was not a concluded contract, and therefore could not confer legal rights; hence, the consideration received is not capital receipt for any loss of rights or loss of capital assets.

Deductibility of expenses was explained in the case of *KPHDN v Shiuh Dong Industries Sdn Bhd*, a factory manufacturing galvanized iron sheets. This case involved interest in respect of loans used to construct a factory. The CoA affirmed the High Court decision that there is no evidence to substantiate that the factory was in use in the years of assessment under appeal. Hence interest cannot be deductible under Section 33(1)(a)(ii). In the case of Resort Poresia Sdn Bhd, the taxpayer carried on the business of running a golf club and had to establish, maintain and provide golf course and recreational activities. The capital expenditure incurred in respect of golf course turfing and grass was treated as plant and the taxpayer claimed capital allowances (CA) on the qualifying expenditure. The CoA reinistated the decision of the Special Commissioners of Income Tax that the golf course was the premises within which the business was carried on and therefore not a plant. The case is in contrast with that of Tropiland Sdn Bhd. In the latter case, the CoA ruled that capital expenditure on the Komtar carpark incurred by the taxpayer was held to be a plant and qualified for CA as the car park is an income-generating tool of the taxpayer's trade. The CoA took into consideration the service industry, and the lease/privatisation agreement entered into by the taxpayer. The *KPHDN v Ipoh Cargo Terminal Sdn Bhd*, further illustrates the issues relating to determination of qualifying capital expenditure. The taxpayer ran dry port activities of importing and exporting cargo and claimed capital expenditure incurred in respect of warehouse, electrical substation and lamp posts as qualifying plant expenditure. The CoA held that the expenditure fell within the definition of building used as a dock, wharf or jetty or other similar buildings as provided for in Paragraph 63, Schedule 3 of the Income Tax Act 1967. Also mentioned was the case of *KPHDN v Hicom Suzuki Manufacturing (M) Sdn Bhd*, where the taxpayer incurred supervision fees on installation and commissioning of new machinery, tools, etc. and claimed reinvestment allowance. The CoA affirmed the High Court decision that capital expenditure included cost of bringing the machinery into working condition and if capital allowance was given on the same capital expenditure, it should also be given in the form of reinvestment allowance.

SOME THINGS ARE INDEFENSIBLE

Abu Tariq then went on to update participants on some of the cases discussed during the 2012 NTC. "There is a need to look at the individual facts in each of the respective cases," emphasized Abu Tariq. "Good faith is not a defence. The Director-General has to look at the facts, and if an audit raises the matter, it points to the negligence of the taxpayer, especially in this age of self-assessment." His comprehensive presentation provided a great deal for panelist Francis Tan to comment on.

"In the case of Ekran Bhd, the decision was a good one although there had been no written judgement," he said. "It is imperative that we study the various cases, and the reasons for the respective judgements that were handed down. In some cases, there have been conflicting decisions by the CoA, and under present laws, the CoA's decisions are final." Is there any way of ensuring that Courts provide written judgement? The ITA,

however, does ensure secrecy although Section 138 states that everything must be open and transparent when defending an assessment. Proceedings before the High Court are all open; the name of the taxpayer is disclosed, and requests to be heard in open court will also be entertained. It was generally agreed that there is a need to revamp the ITA, and that although self-assessment should be simple, it really wasn't that easy – hence the importance of making it simpler in the future.

The session that followed was "Practical Implementation of the Transfer Pricing Rules and Regulations" chaired by Goh Ka Im, Partner of Shearn Delamore & Co, and presented by CTIM's President, SM Thanneermalai. IRB's Director of Policy & Compliance Division, Salamatunnajan Besah, was the session's panelist. "Many of the practitioners are not well-versed in this area, and may need clarification," said Goh. "But when dealing with transfer pricing, the rule of thumb is, 'apply business sense.'"

PUT YOURSELF IN SOMEONE ELSE'S SHOES

Urging practitioners to look at transfer pricing from three perspectives, she said that there really wasn't very much law around it. "It's more a matter of logic and reasoning. How would third parties deal with each other? You have to look at it from the perspectives of tax practitioners, tax authorities and businesses." Transfer pricing documents must be well prepared, or taxpayers will run the risk of paying penalties. Most countries have already put in place measures to regulate transfer pricing. Practitioners therefore have to be aware of what is required in the respective countries and be able to advise their clients accordingly.

"Transfer pricing operates on the "arm's length" principle," Thanneermalai explained. "It has to be accompanied by proper documentation, as per the Transfer Pricing Guidelines 2012. These carry no force of law, but are issued by the tax authorities, so they should be followed to ensure smooth compliance. The Transfer Pricing Rules and Guidelines were issued on 11 May 2012 and 20 July 2012 respectively but were applied retrospectively from 1 January 2009. The tax authorities may not follow the guidelines completely; they may make changes from time to time – but this is acceptable." He added that the guidelines dealt comprehensively with most aspects of transfer pricing, and set out IRB's interpretation and views while providing clarity on compliance, among other things.

"There is also the definition of control and persons controlling the company, as well as an interpretation of prescribed thresholds. Businesses with a gross income of RM25 million or less, and total related party transactions of RM15 million or less will not have to prepare documents but may not be totally exempt from transfer pricing rules. But if such companies have already started with full documentation, they are advised to carry on with it, as all taxpayers who enter into controlled transactions are required to prepare contemporaneous transfer pricing documentation."

WRITE IT DOWN

He pointed out that "the diligent preparation of contemporaneous documentation is good business practice which will help you defend yourself." "Many companies were not aware of the fact that the guidelines had come into effect retrospectively," he added, advising that the necessary documentation should be done as close to the company's financial year as possible. Losses or fluctuations in price have to be explained, and concrete reasons have to be given to justify the setting of the transfer pricing.

Setting transfer pricing involves a myriad of elements, among them the availability of data. Year-on-year comparisons are required but current data is not always readily available. Business and product life cycles also need to be taken into account. Transfer pricing changes if the business model changes; recharacterisation of transactions may have to be considered as their forms and substance may no longer be the same. "But when form and substance are similar, the IRB's Director-General can recharacterise your business or organisation and adjust the structure of transactions accordingly," he advised. While the compliance requirements for documentation are regarded by many businesses as onerous and too expensive, these measures are intended to streamline overall efficiency and transparency.

Speaking from the IRB perspective, Salamatunnajan Besah clarified that what distinguished Section 140A from Section 140 was the burden of proof. "The guidelines are intended to explain the administrative aspects of the system," she said, and added that where use of historical data is concerned, the taxpayer tends to set the price lower, probably below the threshold, so as to be closer to the threshold from the start." The 2012 Guidelines were an expansion of existing rules. "It was more a matter of wanting to expedite, not penalise," she said.

NO, IT'S NOT EASY

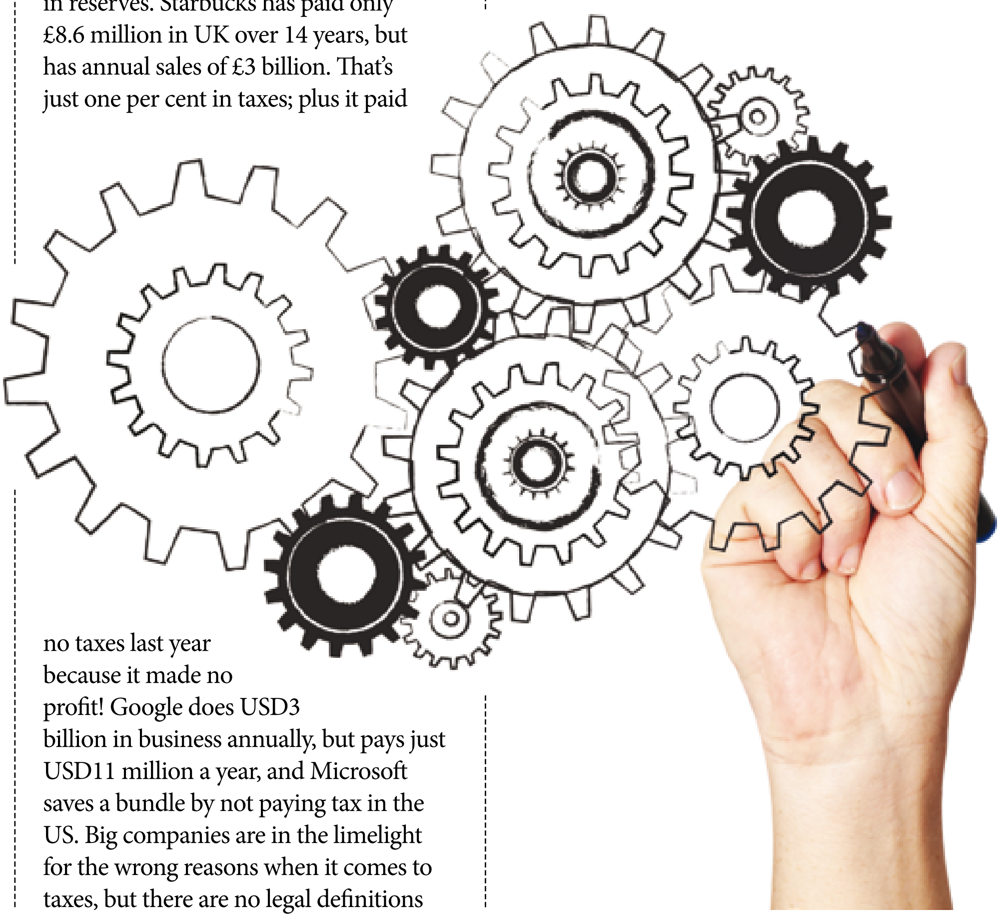
She conceded that trying to set a workable process that could satisfy everyone's needs was definitely not easy. "There are many issues to consider, and more input is required from practitioners and the public," she said. "Business environment is dynamic; it is constantly changing and becoming more complicated by the day. Transfer pricing is a complex, time-consuming matter, and it is necessary to understand the business environment when dealing with it. There is a need to decrease the time taken to audit transfer pricing but when IRB requests more documentation, it is an attempt to understand the business better."

It is worth noting that contemporaneous documentation cannot be demanded when guidelines have not been introduced. Guidelines have no force of law. It was timely therefore that the next session covered the Limitation of Tax Avoidance. It was chaired by Prof. Dr. Jeyaplan Kasipillai, Council Member of CTIM; the speaker was Jagdev Singh, Senior Executive Director of PricewaterhouseCoopers Taxation Services Sdn Bhd; and the panelist was Dr. Nik Abdullah Sani Nik Mohamed, Director of International Training & Tax Education at IRB's Malaysian Tax Academy. "Our understanding of tax avoidance is that it is legal, while tax evasion is illegal," remarked Prof. Jeyapalan at the start of the session, "but what is legal, and what isn't?"

The lines between legal and illegal are blurring. "Tax avoidance, evasion and mitigation have been in the news a lot lately," said Jagdev Singh. "Quite a number of high-profile people have had to deal very publicly with tax fraud charges. But how is this defined? Different countries have different perspectives of it, and there is a need to distinguish it from tax mitigation and tax planning." Big corporations like Amazon, Apple, Starbucks, Google, Yahoo and Microsoft, through astute tax planning, have been able to take advantage of legislative loopholes in several countries, to avoid paying millions in taxes.

THE MORE THEY HAVE, THE MORE THEY WANT

"Amazon, for instance, employs people but channels profits through Luxembourg," he said. "Apple pays no tax in Ireland, and has USD100 billion in reserves. Starbucks has paid only £8.6 million in UK over 14 years, but has annual sales of £3 billion. That's just one per cent in taxes; plus it paid no taxes last year because it made no profit! Google does USD3 billion in business annually, but pays just USD11 million a year, and Microsoft saves a bundle by not paying tax in the US. Big companies are in the limelight for the wrong reasons when it comes to taxes, but there are no legal definitions of tax avoidance that differentiate it from tax evasion. There is no indication of the point at which it becomes criminal, and when it is still legal."



While it is difficult to distinguish, tax avoidance is being increasingly viewed as tax evasion – although taxpayers may justify it as tax mitigation when they find a way of not paying it. "Malaysia has laws to deal with tax evasion, which includes deliberate concealment, misrepresentation, and dishonest reporting," he continued. "Tax avoidance is loosely used in the media as something akin to tax evasion, but from the legal perspective, it is tax planning. There are two categories: ineffective and effective avoidance. Under the Income Tax and General Anti-Avoidance Rules (GAAR), the burden of proof has been shifted to the taxpayer. Tackling tax avoidance is inherently difficult; tax legislation is limited, and governments are likely to continue focusing on tax avoidance and evasion for some time to come."

He urged companies to engage more with IRB, and stressed that more robust, contemporaneous documentation was necessary. Panelist Dr. Nik Abdullah Sani's frank opinion was that no government can announce a tax system and expect citizens to pay without complaint, or without trying to avoid payment, wherever possible. "Over time, even the most honest taxpayers will get fed up of being taken advantage of by other less honest taxpayers," he asserted. "There will always be attempts to avoid paying tax. No country has been able to draw up laws that can comprehensively distinguish tax avoidance from tax evasion – and all the shades of grey in between. Anti-avoidance provisions are primarily to ensure taxpayers pay as much as possible."

WHAT THE TAXPAYER NEEDS

What was required, therefore, was balance. Taxpayers need to be provided with certainty, not insecurity. Improvements in the areas of risk management, transparency of ownership and operations, and the impact of these on business, are necessary. "The problem may be one of giving too many perks and incentives," he said, suggesting that there should perhaps be a forum that encourages companies to "proudly declare how much tax they have paid." The session on Tax Avoidance, and the presentations of the panelist and speaker set the stage for the final session of the Conference, the Round Table Discussion on Current Issues Affecting Taxpayers, moderated by Tan Sri Yong Poh Kon, President of the Federation of Malaysian Manufacturers.

"The whole purpose of tax is to raise money for the country, but we have to remember why incentives are necessary. Some companies – and even whole industries – may not even have been set up in the first place, if there hadn't been incentives," he said. "It's not just corporate taxes; it's the individual taxes paid by the people who are employed, and the indirect taxes paid by the consumers, that also contribute to national development." Panelist Farah Rosley felt that incentives were still needed in some areas, particularly for science, innovation and creativity.

Conceding that the ten KPIs for IRB officers were in fact a challenge to better IRB services and make them more efficient, IRB's Deputy CEO of Tax Operations, Dato Mohammad Sait bin Ahmad said they were benchmarking against the rest of the world, and were now able to show results. For example, "refunds can be made in four days, if returns are filed in early March," he said. "MITI and MIDA are the authorities which approve incentives. LHDN allows or disallows according to the rules and regulations. All this is done with a view to national competitiveness, by the time the incentive period is over." Tax incentives are usually given for hi-tech, high-value industries which the country wants to establish, or to encourage foreign investment.

SPURRING THE ECONOMY

While incentives are acknowledged as a means to increase jobs, consumption and growth, there are some businesses which have become dependent on them. "They are abusing the incentives," stated Dato Mohammad Sait flatly. "They ask for extension after extension of the incentive period, but use the incentives as shelters. In this way, they are not really contributing to the economy; they haven't grown up." There have also been claims that the lack of incentives in Malaysia has forced them to relocate to other countries. Dato Mohammad Sait cautioned that when IRB auditors find that a company has abused its incentives, the incentives will very likely be withdrawn.

On the matter of self-assessment, Farah quipped, "We should all be glad that we pay taxes; it means we have income! But it has been ten years or more since the implementation of the self-assessment system, and penalties are still being levied. Does this mean that there are shortfalls in the system?" In reply, Dato Mohammad Sait said, "we certainly don't penalise on a whim – but it takes considerable education to understand how everything works. Penalties are deterrents and therefore cannot be too low, but it cannot be so high that it becomes a deterrent to payment. Either way, the taxpayer is not incentivised to pay. If there is a concrete reason for late filing, IRB will make allowances."

It was on that note that the NTC 2013 came to a close.

2014 BUDGET MEMORANDUM

Chartered Tax Institute of Malaysia

THE GOVERNMENT TRANSFORMATION PROGRAMME (GTP), AN INTEGRATED AND COMPREHENSIVE ECONOMIC AGENDA TO DRIVE NATIONAL TRANSFORMATION, IS THE MOVING FORCE IN MALAYSIA'S EFFORTS FOR ECONOMIC GROWTH. IT WAS INTRODUCED TO TRANSFORM THE PUBLIC SERVICE, AND STRENGTHEN THE EFFECTIVENESS OF DELIVERY OF SERVICES AND THE ACCOUNTABILITY OF THE OUTCOMES. THE SUCCESS OF THE GOVERNMENT'S NEW ECONOMIC POLICIES WILL DEPEND ON AN UNWAVERING LEADERSHIP AND FIRM POLITICAL WILL AS WELL AS THE SUPPORT OF ALL STAKEHOLDERS.

The theme of the 2014 Budget, "Fulfilling Promises, Accelerating Transformation", reflects the need to explore approaches that have a greater possibility of success in achieving these aims. In practical terms, it may mean using tried and tested ways adopted by other countries but applied appropriately to suit our needs. It would also require a closer partnership among the government authorities, CTIM and other stakeholders to formulate policies and strategies that are practical and easily implementable.

The first strategy is to increase the tax base and reduce revenue leakage, to finance transformation programmes. A step in this direction is to Enhance Tax Compliance by Small and Medium-sized Businesses. Generally, the rate of tax compliance by the small and medium-sized businesses / enterprises (SMEs) is low due to complicated tax compliance requirements, high costs of compliance and hefty potential back duty.

Many sole proprietorship and partnership SMEs are required to file their tax returns on a calendar year basis. Hence, where the financial year-end is not 31 December, the SME is required to apportion the yearly income and other relevant figures, etc. In addition, some of the existing SMEs who have yet to comply with the tax law, are reluctant to come forward to pay their dues for fear that the potential impact of back duty might drive them bankrupt. In this connection, it is proposed as follows:

SMEs should be allowed to file their returns within a specified period after the financial year-end as is done by companies. The personal reliefs should be simplified into fewer categories. The Memorandum on the Improvement of Individual Taxation submitted to the Ministry of Finance by CTIM contains details of the proposal.

As SMEs have fewer resources, they have to rely on external professionals to assist them in complying with the tax legislation. In this connection, the professional fees for tax compliance and advisory should be allowed a deduction. In addition, the size of the businesses of SMEs may not make it cost-effective for information-gathering purposes; hence, SMEs should be excluded from complicated reporting requirements such as CP58, transfer pricing requirements, etc. The SME could be allowed to dispense with the requirement to estimate its tax liability in advance. In line with this, the estimated tax payable could be based on the assessment of the preceding year unless the SME applies for an adjustment. No penalty on underestimation should be imposed on the excessive difference (more than 30%) between the actual tax payable and the estimated tax payable, unless the SME applies for a downward adjustment. In such cases, a 10% penalty on the under-estimation which is in excess of the 30% threshold shall apply.

The Government could provide an amnesty period of five years for SMEs to report their income and be included in the tax system. During the amnesty period, income will be reported on the current year basis and any back duty will not go beyond five years, and penalty on back duty will not exceed 10% on outstanding.

EXIT TAX UPON BUSINESS MIGRATION is another step. Malaysia offers good infrastructure and attractive incentives to both local and foreign multinationals to develop their business in the country. However, upon expiry of the incentive or after having successfully built their market presence, some of these businesses may, by way of downsizing or restructuring or directly shutting down local operations, shift their businesses to another country to enjoy a lower tax rate. To discourage tax-motivated business migration, it is proposed that any migration offshore of any valuable part of a business in Malaysia shall be subjected to an exit tax, a one-time tax based on the capital value of the business transferred out.

RENTAL PAID TO FOREIGN LANDLORDS has been generally missed out from the tax net. Currently, there is no mechanism to ensure that the landlords pay the income tax due from them except through tax audit. Foreigners, whether tax residents or non-tax residents in Malaysia, who are landlords, receive rental income from property situated in Malaysia. They sometimes do not pay income tax on their rental income. This leakage in revenue collection can be prevented by, among other steps, requiring all non-resident individuals to appoint a property management agent upon acquisition of a real property; and requiring the property management company to deduct a 26% withholding tax on the gross rental which is received and attributable to a non-resident person, individual or otherwise.

THE SECOND STRATEGY IS TRANSFORMATION FOR TAX COMPLIANCE. Various measures are proposed, one of which is to ease the cost of tax compliance. With the increasing complexity in tax compliance, there is a greater need for taxpayers to seek the services of the tax professional in areas such as transfer pricing, stamp duty, e-commerce, etc. in filing their tax returns. It is proposed that the taxation fee paid to an approved tax agent be allowed as a tax deduction. Alternatively, it is proposed that professional fees on taxation services be legislated to be allowed a specific deduction, aligned with the tax treatment of statutory audit fees [Income Tax (Deduction for Audit Expenditure) Rules 2006] [P.U.(A)129/2006].

Simplification of Tax Compliance is also an important measure. The Income Tax Act (ITA) 1967 which had been drafted based on the preceding year basis of assessment under the official assessment regime, needs to be reviewed. Some suggestions on the areas for review include the following:
(a) Capital Allowance (CA) Claims. The varying rates of capital allowances (e.g. normal rates, accelerated CA, and the 100% claim for small-value assets), the functions and uses of the assets, etc. vary between industries. Arising from this, taxpayers spend a significant amount of time and resources to compute capital allowances in arriving at their statutory income. To address these challenges, CTIM proposes the following ways to simplify Capital Allowance computation: consider convergence of capital allowance claims with accounting depreciation; alternatively, consider adopting a simplified method of claiming capital allowances on a broad basis such as a pooling basis. In essence, if the asset is eligible for CA, the sales proceeds of assets that are sold would be deducted from the brought forward written down value, and any excess would be taxable.
(b) Computation of Section 33(2) Interest Restriction. Due to sophisticated methods of financing, it is difficult to identify where the borrowed funds of a business have been channelled.

Hence, it is proposed that the interest restriction provision be removed to stimulate business activities. Alternatively, the computation of interest restriction should be simplified. Any unabsorbed interest should be allowed to be carried forward for set off against the income of a non-business source.

ONEROUS LAWS AND PROVISIONS are also matters to be reckoned with. One area to be addressed is the basis periods for companies / Malaysian branches. The accounting periods (from the date of incorporation / registration to the financial year-end) for new companies or Malaysian branches should be adopted as the basis periods, in line with the basis periods of members of a group of companies. This will facilitate compliance without the need to direct the basis periods for the relevant years of assessment. Another area is with regard to the disclosure of exempt benefits in employment cases. The disclosure requirement should be removed as the benefits are already tax-exempt and there is no revenue to be derived by its disclosure.

The restriction on eligibility of group relief needs a re-look. A common scenario: a company may surrender not more than 70% of its adjusted loss in the basis period for a year of assessment to one or more related companies, resident and incorporated in Malaysia; and 70% of the shareholding of the claimant is held, whether directly or indirectly by the surrendering company or vice versa or 70% of the shareholdings of both companies are held by a common holding company. To address the challenge on the restriction in shareholding, it is proposed that (a) the definition of related companies be amended to be in line with the provisions of the Companies Act 1965; (b) the restriction of a 70% shareholding should be removed; and (c) the losses to be surrendered are to be restricted only by the aggregate income of the claimant company and not limited to only 70%.

To facilitate tax compliance, there must be transparency and clarity of laws and regulations. One challenge faced is the unavailability of decided tax cases. Case law is relied upon by taxpayers, tax practitioners and tax officers. However, the reports of recent decisions are not readily available to both the public and the tax practitioner. Although the IRB has published some of the cases on their website it is preferable if the full judgement could be provided. The proposal relating to publication of decided tax cases is that tax cases decided by the Special Commissioners of Income Tax (SCIT), Customs Appeal Tribunal (CAT) and the Courts should be made available to the public through timely dissemination via the IRB and Customs websites, or other means, and also SCIT and CAT websites.

THE NON-APPLICATION OF DECIDED TAX CASES poses another challenge. There are concerns over the practice whereby the tax authorities continue to apply their own interpretation despite a court decision having already been made, on the grounds that the Revenue is appealing the case. It is submitted that the decision of a Court represents the law of the land until it is overruled by a higher Court, irrespective of whether or not the tax authority has filed an appeal on the decision to the higher Court. It is proposed that in preparing their tax computations, taxpayers should be allowed to adopt the decisions and interpretation of the Courts irrespective of the stage of appeal of the case. There should be no penalty imposed on the taxpayer for following such Court decisions.

In connection with the legislative aspects, it is common to find that the legislative framework of Budget proposals is only available much later after the Budget announcement. In addition, some of these legal frameworks contain restrictions that have not been mentioned in the Budget announcement. It is proposed that a timeline be set for the legal framework to be issued after the Budget announcement. In addition, to minimise the problems that may arise during implementation, stakeholders and the professionals in the relevant areas could be consulted on the draft legislation before finalisation.

Currently several Guidelines and Public Rulings issued by the tax authorities are effective retrospectively. This has been a cause for concern to the investors and taxpayers as they are unable to take the views of the tax authorities into consideration at the time of submission of their tax returns - although they may wish to comply with them. It is proposed that all Guidelines and Public Rulings issued by the tax authorities should be applied prospectively.

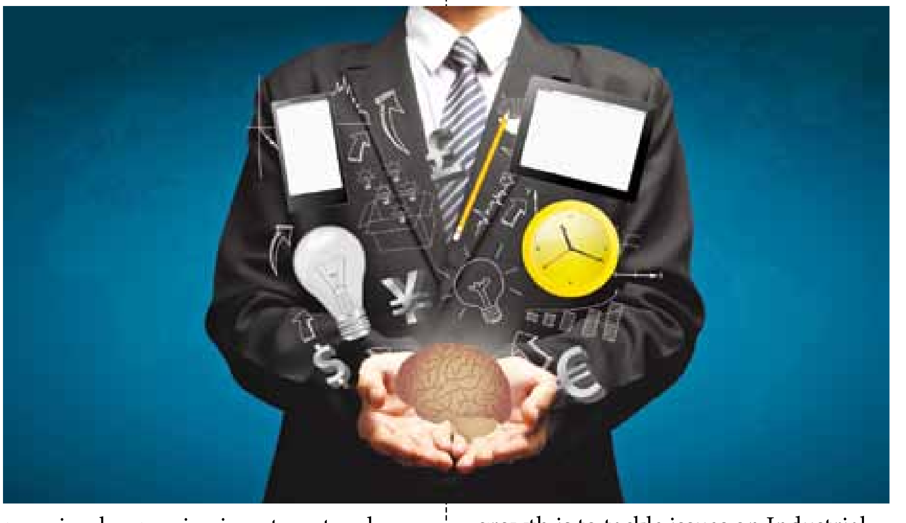
A review of the penalty provisions seems unavoidable. The penalty provisions were originally drafted based on the preceding year basis of assessment under the official assessment regime, under which tax would be raised after the tax return had been filed with the IRB. There was a perceived need to impose a heavy penalty to deter taxpayers from filing their tax returns late (with the advantage of a "delay" in paying the tax). Under the self-assessment regime, with the introduction of the current-year basis of assessment, at least 70% of the tax would have been collected before the filing of the return. Any under-estimation of the tax payable by an amount in excess of 30% is subject to a penalty. In many cases, there are refunds to be made to the taxpayers, and generally there is no tax advantage in filing the Return late.

It is from this perspective that there is a perceived unfairness in the penalty regime, especially when penalty is imposed on the tax payable, although in reality the tax outstanding (which is tax payable less the tax paid to date) is minimal. Where all the tax due has been fully settled, the penalty imposed will be seen as inequitable since there is no outstanding tax liability. In this connection, it is proposed as follows:

That an independent Penalty Review Panel, comprising representatives from the Ministry of Finance, Inland Revenue Board, Chartered Tax Institute of Malaysia and industry & commercial sectors, be established to look into the revision of the penalty provisions.

That penalty should be commensurate with the gravity of the offence; where there is no tax advantage to be gained from the error, the penalty should be nominal. Further, when imposing a penalty, there is a need to differentiate between the occasional oversight and unintentional mistake committed by an "ordinary" taxpayer, from that committed by a repeat offender. In connection with this, it is proposed that discretionary power should be given to the Director-General to mitigate the effects of the penalty provision in extenuating circumstances. However, for transparency and clarity, clear guidelines, with examples, must be provided as to when and how the discretionary power may be used.

Section 112(3) should be amended to impose penalty based on tax liability outstanding (i.e. after set-off and deduction for tax instalment payments paid and deduction of credit balance in account), instead of tax payable before any set-off.



The third strategy is fulfilling promises by spurring investment and facilitating business growth. This can be achieved through enhancing the growth of the services industry. The Government's promoting of the services sector and emphasis on the knowledge economy calls for a review of tax policies and incentives. One proposed action step relates to the scope of recognition of professional courses. Currently, the fees expended on certain courses are allowed a deduction under Section 46(1)(f) of the Income Tax Act (ITA)1967 as a relief, subject to a maximum of RM5,000. The proposals are: In line with the promotion of a knowledge-based economy, individuals should be encouraged to pursue more diverse courses of interest (including a foreign course / professional examination not available locally) and be allowed deductions (as reliefs) for expenses incurred. Such a policy will assist in strengthening our education industry and encouraging and supporting the spirit of lifelong learning. In this regard, the list of local professional institutions recognised by the Government for the purposes of allowing a deduction under Section 46(1)(f) of ITA in respect of educational expenses incurred in pursuing a local course / professional examination should be extended to include others, such as CTIM, MICPA, etc. which conduct their respective professional examinations.

Another way to facilitate business growth is to tackle issues on Industrial Business Allowance for business buildings. Currently, only buildings used in specific sectors and approved services projects qualify for industrial building allowances. Although capital expenditure incurred on acquisition/ construction of office buildings is generally the single largest capital expenditure for a service entrepreneur, there is no allowance accorded to capital expenditure incurred on commercial buildings and office complexes. To promote the growth of the services sector, it is proposed that (a) The scope of Schedule 3 Paragraph 63 of the ITA be extended so that building allowances are given on capital expenditure expended on or after 1 January 2014, on all buildings which are used solely for the purposes of a business; and (b) The eligibility to claim such building allowances be extended to the owners or lessors of non-industrial buildings.

The call for giving Capital Allowance for renovation costs is not to be missed out. Following the incentive given under the Second Economic Stimulus Package introduced on 10 March 2009, it is proposed that building allowances be allowed on expenditure on renovation and alteration of all business premises incurred on or after 1 January 2014 without any limit on the amount of capital expenditure incurred.

SPURRING GROWTH BY INNOVATION is unavoidable. Currently the incentives for innovation are available in a few areas e.g. research and development (R&D), although they are only given in respect of science and technology, and acquisition/registration of intellectual property (IP), etc. Pursuant to the Income Tax (Deduction for Cost of Acquisition of Proprietary Rights) Rules 2002, among others, the cost of acquisition of proprietary rights such as patents, industrial designs and trademarks may be claimed over five years of assessment by a manufacturing company which has incurred the same, or by the manufacturing company's subsidiary if the proprietary rights are transferred to the latter.

However, as the Government transitions to a services and knowledge economy, similar incentives could be accorded to other areas. In this connection, it is noted that currently, there is no special incentive to attract multinationals to set up their R&D bases in Malaysia. Proposals for consideration relating to research and development include (a) extension of the definition of R&D on science and technology to cover development or improvement of processes and commercial processes; (b) simplifying the claim for double deduction on R&D expenditure incurred by a Malaysian company; and (c) granting an R&D allowance of say 20% on the increase in R&D expenditure incurred in Malaysia during the year.

Efforts in innovation also include developing Malaysia into an intellectual property(IP) and R&D hub, the specific proposals for which are: (a) The incentive in respect of income tax deduction for IP rights could be extended to all companies, in particular service providers, to encourage these companies to acquire new technologies and intellectual properties to evolve into innovation-driven and knowledge-based companies; and (b) For a company resident in Malaysia and having its IP registered in Malaysia, a special tax rate of say 10% could be accorded as an incentive for income derived from the IP.

PROMOTING SMALL AND MEDIUM-SIZED BUSINESSES cannot be overlooked, as small and medium-sized enterprises (SMEs) play a significant role in supporting the growth of our economy. The tax policy should be reviewed to promote the development of SMEs. To promote the growth of SMEs and broaden the tax base, it is proposed that SMEs be assessed at a preferential income tax rate of 10% flat. In addition, to encourage the use of information technology (IT) to enhance efficiency, it is suggested that (a) an additional 50% of the capital expenditure incurred on IT software and hardware be considered for the purpose of claiming capital allowances; and (b) an additional 50% of expenditure on IT e.g. on implementation of services, training, travel costs, etc, be given a deduction.

Not to be overlooked is the promotion of digital economy. To ensure that Malaysia has a share in the growing global digital economy, the Government must provide the necessary infrastructure and ensure that tax policies are in place to facilitate the operations of a digital economy. The requirements include: (a) an efficient and competitive delivery network to reduce the delivery costs within Malaysia on goods supplied; (b) attracting foreign companies to host their websites in Malaysia, with tax holiday incentives; and (c) improvement in infrastructure to facilitate e-commerce activities, and ensuring that the latest generation of telecommunication systems is rolled out as soon as possible and the fibre optics networks are available extensively in the whole country.

TRANSFORMATION FOR HUMAN RESOURCES (HR) is an equally important part of the equation for investment and business growth. The focus in the area of HR would touch on incentives for professional training. Whilst there is a huge gap in competency between the graduates from our education system and market expectations, the success enjoyed by professional bodies in producing suitable professionals has somewhat mitigated the problem. However, no assistance is given to the professional bodies to fill the gap. It is observed that there is a restriction with regard to approved training institutions: double deduction is given for training conducted by a few approved institutions and the courses offered are limited. There is also restriction on double deduction for training expenditure. Currently, double deduction is given for training conducted by approved institutions but expenses on in-house training will need an approval before being eligible for a double deduction. Outsourced training will not qualify for double deduction. Similarly, expenditure on scholarships for the poor will not be eligible for double deduction if the scholarship is for a course leading to a degree.

Similarly, the CPD/CPE courses conducted by the recognised professional bodies for the purpose of maintaining and ensuring the quality and professional standards of the members are not given any training incentive.

To encourage the investment in human resources and attract professional bodies to participate, CTIM proposes that double deduction of training expenses be extended to cover (i) all resident service providers; (ii) a wider variety of courses including education and training programmes conducted by professional bodies which lead to the attainment of a professional qualification; (iii) fees and expenses incurred by companies on training and/or retraining of employees through programmes conducted by professional bodies; and (iv) more approved training institutions, including professional bodies.

Assistance towards building human capital can be facilitated by (i) an additional 50% deduction for training conducted internally or outsourced; (ii) extending the double deduction on scholarships which are given to poor people to include scholarships for diploma courses and vocational schools; and (iii) allowing CPD/CPE course fees a deduction under Section 46(1)(f), of the ITA.

With regard to infrastructural aspects, it is proposed that Accelerated Building Allowance of 20% be granted on qualifying expenditure incurred on the construction or purchase of buildings used as a training centre.

PROFESSIONAL INDEMNITY INSURANCE (PII) plays a key role in the development of the services sector. To assist the development of the services sector, CTIM is of the view that the tax authorities could consider a change in the policy with regard to PII. The Institute proposes as follows: (a) that all professional service providers be allowed to claim a tax deduction on premium paid on PII to a local insurer. This will allow them to hedge their business risks and ensure a healthy growth of the services sector; (b) that the income from the stand-in duties of a professional, such as that of a locum, be treated as business income from carrying out his profession and the premium on PII be allowed as a deduction against such income; and (c) that proceeds from PII be taxable and the payment (out of the proceeds received) to the claimant be deductible.

THE FINAL STRATEGY IS TO FULFILL THE PROMISE OF INCLUSIVE DEVELOPMENT

To create an inclusive society, the following measures are proposed: (a) Improve the public-private sector consultation process; (b) Allow the basis year business loss of an individual to be set off against the income of the spouse; (c) Increase the limit of 10% of the aggregate income of a company, with regard to donations to approved institutions, and extend the provision to individuals; (d) Combat tax evasion and bribery by incorporating specific provisions into the Income Tax Act 1967 to disallow bribes and other expenditures incurred in the furtherance of corrupt conduct, whether paid to local or foreign officials, to secure an advantage in arriving at the adjusted income from the business; and (e) Enhance the features and period in respect of the incentives on carry back of current year losses, similar to that available under the Second Stimulus Package, 2009.

SHIPS AND WATER SNAKES

FINAL PART

RESIDENT SHIPPING OPERATORS

Dr. Nakha Ratnam Somasundaram

As much as a ship could sink, companies owning ships too can sink. For example, in 1730, during the reign of King George II, two brothers in Britain bought an interest in a sailing vessel and thus started Britain's oldest shipping firm – The Stephenson Clarke Shipping Ltd. The company specialises in the dry bulk shipping, transporting cargo such as coal, grain, and iron ore. In the face of the recent worst shipping downturn in history, the company shut-down and sold the last of its ships in July 2012, after sailing the seas for 300 years[1].

It is the consensus in the industry that shipping as a whole is now facing a very bleak future. For example, in the Port of Aarhus, Denmark's second biggest port city, huge cranes that can load and unload one million containers a year are standing idle or working at half capacity.

Most shipping firms in Europe are on the path to bloodletting: bankruptcies, shrinking, consolidation, limited or cancelled orders for new builds and the last straw – scrapping. Some firms are sending newly built ships straight to the scrapyard – a clear sign as it could get for a bleak shipping scene.

In Malaysia, Swee Joo Bhd went into bankruptcy in 2011, while others in the region are going for consolidation - six container shipping firms from Singapore, Japan, and Korea recently formed a partnership to create a vessel network of 90 ships to improve efficiency. As for the bulk and container ships, some of the ships are still floating only because the banks are desperately trying to avoid seizing assets – for one banks do not know how to sail ships, and because a bank sale is a fire sale and can only worsen an already bad situation[2].

Some big names in the shipping industry like A.P. Moeller-Maersk which holds 16% of the global shipping trade, is removing ships from the Asia-Europe trade lanes while shifting investments away from shipping lines into higher and stable profit generators[3] . Vale, the world's largest iron ore producer is cancelling 19 of the 35 orders it had placed for very large crude carriers (VLCC), each with a unheard of capacity of 400,000 dwt (deadweight tonnage). South Korea, the world's largest shipbuilding nation, has suffered a USD3bil loss arising from cancelled orders in 2012 alone.

About 90% of the world's trade (by volume) is carried by ships and the sector therefore provides a relatively reliable indicator of the health of the global economy - which started to slip after the Wall Street crisis in 2008.

The growth towards recovery is very slow - predicted at 2.7%, and later trimmed to 1.9% by the World Bank – a revision triggered by the Eurozone debt crisis (despite desperate attempts by the German Chancellor and the French President to keep the euro intact) as well as China's economy approaching a soft landing, the Middle East Crisis, the slower than expected recovery of the US economy and worst of all, shrinking freight rates. For example, in August 2011, the freight rate for a container unit from China to Denmark was USD830 – a far cry from the USD2,170 in March 2011[4].

In addition, high iron ore inventories in China, falling ore prices and slowdown of steel productions, as well as reduced iron ore production in Latin America adds to the troubled waters[5].

Add to this the rising bunker fuel prices (which account for about 60-80% of the ship's operating cost)[6] and rising impact of operational and management cost from the need to comply with various mandatory shipping rules and regulations documentation (talk about keeping records for income tax purposes!) introduced by the International Maritime Organization and the classification societies[7].

Overcapacity is another major problem[8]. In 2003 and 2004, the global economy was booming, and the shipping industry saw a surge in demand for capacity and large orders were placed then for bigger capacity ships and carriers. These ships are now being delivered and entering service at a time when the economy is uncertain, and as one writer put it, 'adding insult to injury'.

On the other hand, the brighter side is that the new ships are bigger (18,000 TEU as compared to the current largest vessel being only 16,000 TEU), greener (the shipping industry is the sixth largest polluter)[9] and provide higher economies of scale. A nagging issue is

[1] *'Slump sinks Britain's oldest shipping firm' The STAR, Monday, August 13, 2012 http://thestar.chttp://thestar.com.my/maritime/story.asp?file=/2012/8/13/maritime/11847314&sec=maritimeom.my/maritime/story.asp?file=/2012/8/13/maritime/11847314&sec=maritime. Retrieved March 9, 2013*

[2] *Insight: From binge to hangover, shipping firms bleed. The STAR, Friday, March 2, 2012. http://biz.thestar.com.my/news/story.asp?file=/2012/3/2/business/20120302081918&sec=business. Retrieved March 9, 2013.*

[3] *Maersk to shift away from shipping operations. The STAR, Tuesday, November 20, 2012. http://biz.thestar.com.my/news/story.asp?file=/2012/11/20/business/12342321. Retrieved March 9, 2013*

[4] *Nazery Khalid: Choppy outlook for shipping. The STAR, Monday January 16, 2012. http://thestar.com.my/maritime/story.asp?file=/2012/1/16/maritime/10259415&sec=maritime. Retrieved March 9, 2013.*

[5] *Sharidan M. Ali: Bleak outlook for dry bulk shipping amid slow recovery. The STAR, Monday, July 23, 2012. http://thestar.com.my/maritime/story.asp?file=/2012/7/23/maritime/11703508&sec=maritime. Retrieved March 9, 2013.*

[6] *Megan Goldin and David Fogarty: Shipping's burden. The STAR, Tuesday May 25, 2010. http://thestar.com.my/lifestyle/story.asp?file=/2010/5/25/lifefocus/6294812. Retrieved March 9, 2013.*

[7] *Sharidan M. Ali: Local shipping industry facing difficulty to survive under current situation, says association. The STAR, Monday, August 13, 2012. http://thestar.com.my/maritime/story.asp?file=/2012/8/13/maritime/11837693&sec=maritime. Retrieved 9 March, 2013.*

[8] *According to Moody's Corporate Finance Group vice-president, Marco Vetulli , the current dry-bulk order book is equal to about 46% of the tonnage on the water, and around 80% of these vessels are due for delivery over the next two years i.e. 2012-2013, creating a supply-demand imbalance that will continue to depress freight rates. The STAR, Monday, July 18, 2011. http://thestar.com.my/*

whether the existing ports can handle these massive cargo ships[10].

THE SHIPPING SITUATION FOR MALAYSIA

The Malaysian shipping industry has not been spared the global impact of the worsening shipping woes, including the oversupply of vessels, high bunker fuel costs, falling freight rates, falling demand for shipping as well as declining asset value of ships. For example, the price of a newly built VLCC in 2008 was about USD140mil, but fell to USD100mil in 20011[11]. In some cases, newly built vessels whose orders are cancelled late, are sold by the building yards for half the construction cost to recover cash[12].

The present space allocation assigned for the Malaysian ports, too, is considered very limited due to the declining demand, and shipping companies are now filling up the space on their ships from other ports of loading, especially China.

The Asia-Europe trade lane (known as the AE lane) was badly affected by the global economic crisis and in turn affected Malaysian shipping as well. Freight rates in the Asia-Europe route have declined by between 50-80%.

One of the casualties of this economic deterioration is Malaysia's MISC Bhd which is now focusing on the intra-Asia trade for its container business, and terminating its liner business. MISC however could remain floating on its earning from liquefied natural gas and its offshore and heavy engineering division which makes up a substantial portion of its group earnings. A bigger casualty is Halim Mazim Bhd and Nepline Bhd which are posting losses[13].

It is against this background that the 2012 Budget proposed the current 100% exemption on shipping income be reduced to 70% i.e. the balance of the 30% would be brought to charge (estimated to bring in additional income tax revenue of more than RM100mil – a paltry sum by shipping standards or even IRB collections). The announcement took everyone in the industry by surprise. It is possible that the government woke up one morning to find that the tax exemption policy for shipping income has not been reviewed for some 27 years and that the time has come to act now. But it happened to be a bad morning. Not everyone is excited about the proposal. The proposals are reviewed in the following paragraphs.

2012 BUDGET PROPOSALS [14]

Currently, the statutory income of a resident person who carries on the business of transporting passengers or cargo by sea on a Malaysian ship or the letting on charter a Malaysian ship owned by him on a voyage or a time charter is fully exempted from tax.

The 2012 Budget however proposed the following changes:

- The income tax exemption for shipping companies be reduced from 100% to 70% of the statutory income; and the balance of the 30% of the statutory income would be deemed the total income chargeable to income tax.
- The income derived from each Malaysian ship shall be treated as income from a separate and distinct

[9] Supra (28)

[10] Sharidan M. Ali: The shipping sector is set to continue finding itself in choppy waters. The STAR, Monday Dec 24, 2012. http://thestar.com.my/maritime/story.asp?file=/2012/12/24/maritime/12499540&sec=maritime. Retrieved 9 March 2013.

[11] Supra (29)

[12] Tee Lin Say: Shipping Company starts well but could not last the storm. The STAR, Monday, April 26,2010. ttp://biz.thestar.com.my/news/story.asp?file=/2011/6/3/business/8829012&sec=business%3Cbr%20/%3E. Retrieved March 9, 2013.

[13] Sharidan M Ali: Shipping companies still face uncertainties for rest of year. The STAR, Saturday June 20, 2012. http://biz.thestar.com.my/news/story.asp?file=/2009/6/20/business/4129881&sec=business. Retrieved March 9, 2013.

[14] 2012 Budget Commentary and Tax Information. Published by CTIM, MIA and CPA Malaysia, 2011

business source

- Any unabsorbed capital allowance of a Malaysian ship for a year of assessment shall be carried forward to subsequent years of assessment to set off against the adjusted income of the same ship until the amount is fully deducted
- Any unabsorbed capital allowance of a Malaysian ship for a year of assessment shall be carried forward to subsequent years of assessment to be set off against the adjusted income of the same ship until the amount is fully deducted
- Where the unabsorbed capital allowances for the year of assessment 2011 arose from more than one Malaysian ship, such an amount shall be apportioned to each of the ships in accordance with the following formula:

A/B X C

Where:

A is the gross income in respect of a Malaysian ship for the year of assessment 2011

B is the total gross income in respect of all Malaysian ships for the year of assessment 2011

C is the unabsorbed capital allowances for the year of assessment 2011 in respect of all the Malaysian ships.

The amount apportioned to each of the ships shall be used to set off against the adjusted income for the year of assessment 2012 and subsequent years of assessment in respect of the same ship only.

- The current year adjusted loss in respect of a Malaysian ship shall not be available as a deduction against any other income in arriving at the total income for that year of assessment.
- Any unabsorbed loss of a Malaysian ship for a year of assessment shall be carried forward to subsequent years of assessment to set off against the 70% of the statutory income which is exempted from tax until the amount has been fully utilised. The statutory income after offsetting is credited to the tax exempt income account.
- Where the unabsorbed losses for the year of assessment 2011 arose from more than one Malaysian ship, such amount shall be apportioned to each of the ships in accordance with the following formula:

A/B X C

Where:

A is the gross income in respect of a Malaysian ship for the year of assessment 2011

B is the total gross income in respect of all Malaysian ships for the year of assessment 2011

C is the unabsorbed losses for the year of assessment 2011 in respect of all the Malaysian ships.

The amount apportioned to each of the ships shall be used to set off against the 70% of the statutory income (if any) which is exempted from tax for subsequent years of assessment in respect of the same ship only, until it is fully deducted.

Essentially, the year of assessment 2011 is the watershed year and capital allowances and losses in respect of Malaysian ships in that year would be reallocated to ships that qualify for the 70% exemption and to other ships that do not qualify for exemption, on the basis of the gross income.

As can be seen from the above computation, 30% of statutory income of each of the ships is subject to income tax regardless of whether there are any

Example

Assuming that the following information is available in respect of two ships, Hang Tua 1 and Hang Tua 2 for the year of assessment 2011:

YA 2011	***RM***
Unabsorbed capital allowance c/f to YA 2012	4,500
Unabsorbed losses c/f to YA 2012	6,000
Gross income for YA 2011	
Hang Tua 1	10,500
Hang Tua 2	21,000
Total gross income for YA 2011	31,500

Based on the above information in this instance, under the proposed amendments, the capital allowance and the losses would be apportioned to the two ships in accordance with the formula, as follows:

Apportionment of CA for the YA 2011		
Hang Tua 1	10,500/31,500 x 4,500	1,500
Hang Tua 2	21,000/31,500 x 4,500	3,000
Apportionment of loss for the YA 2011		
Hang Tua 1	10,500/31,500 x 6,000	2,000
Hang Tua 2	21,000/31,500 x 6,000	4,000

The income tax computation and the treatment of the capital allowance, exempt account and the deduction for losses for the year of assessment 2012 in respect of each of the ships would then be as follows:

Computation for YA 2012			
Hang Tua 1			
Gross income (say)			45,000
Less: Allowable expenses			7,500
Adjusted income			37,500
Less: Capital allowance			
Current year		700	
Unabsorbed CA b/f		1,500	2,200
Statutory income			35,300
Exempted income	70% of	35,300	24,710
Less: Unabsorbed loss b/f			2,000
Credited to exempt account of Hang Tua 1			22,710
Deemed total income	30% of	35,300	10,590
Tax charged	25% of	10,590	2,647.50
Effective tax rate	2,648/35,300 x 100		7.50%
Computation for YA 2012			
Hang Tua 2			
Gross income (say)			18,000
Less: Allowable expenses			10,500
Adjusted income			7,500
Less: Capital allowance			
Current year		2,000	
Unabsorbed CA b/f		3,000	5,000
Statutory income			2,500
Exempted income	70% of	2,500	1,750
Less: Unabsorbed loss b/f			4,000
Credited to exempt account of Hang Tua 2			Nil
Balance of loss c/f (4,000 less 1,750)			(2,250)
Note: This loss of RM2,250 will be allowed only against Hang Tua 2 in the year of assessment 2013 and subsequent years of assessment.			
Deemed total income	30% of	2,500	750
Tax charged	25% of	750	187.50
Effective tax rate	188/2,500 x 100		7.52%

current year losses or even unabsorbed losses brought forward from an earlier year of assessment, whether from shipping or a non-shipping business source. Both the capital allowance and the losses are 'ring-fenced' to the specific ship. The losses too are of little value in reducing the income brought to charge as it (the loss) is used to reduce the exempted income credited to the exempt account (and is not available for deduction against the taxable income which will then go to reducing the tax liability), and in this sense, it is certainly not equitable from a tax point of view[15].

SHIPPING AND THE TAX LEGISLATION – SOME ISSUES

The exemption on the shipping income was originally designed to develop Malaysia's shipping sector in order for the nation to achieve self-sufficiency in shipping services and to reduce the heavy outflow of foreign exchange for freight payments.

The incentive has apparently assisted in the growth of the shipping industry from 6.4 million dwt in 2000 to 12.4 million dwt in 2010. Apart from this growth, the industry does not seem to have fared well – for example, there is a continuous mismatch between demand for shipping services and the ability of the Malaysian shipping industry to meet those demands – resulting in about 80% of the Malaysian trade still being carried by foreign ships.

As for enjoying the 100% tax exemption, there are about 176 shipping companies in Malaysia but only six companies appeared to have enjoyed the exemption to its full effect. The proposed reduction in the tax exemption level would certainly make Malaysian shipping less competitive as compared with other maritime nations like Taiwan

and Singapore where shipping is a highly promoted industry, and is provided with full exemption on shipping profits. In this scenario, reducing the exemption level may even drive the shipping companies to relocate in more shipping friendly nations – not a remote possibility since even for MISC, only 48 out of its 82 vessels are Malaysian flagged.

The IRB expects voluntary compliance. And in a self-assessment environment, one should expect that. However the laws under which one does a self-assessment should also be amiable to easy and clear understanding i.e.

[15] *Steve Chia, PricewaterhouseCoopers Taxation Services Sdn Bhd, Kuala Lumpur. 2011*

taxpayers should be able to understand the law in a manner that leaves no doubt as to it intent and meaning -this is one of the Canons of Taxation as propounded by the famous economist, Adam Smith in the Wealth of Nations[16] . And in a specialised industry that operates in a turbulent environment (not to mention bad weather!), it is imperative that the law should clearly applied[17]. Hence, the current law on the exemption of shipping income and the application of Section 44(6) deduction for donation in situations where part of the income is exempted leaves one blur and confused.

Steve Chia, a senior executive director of PricewaterhouseCoopers Taxation Services Sdn Bhd, for example, is of the view that the shipping industry in Malaysia needs a broader approach to solving maritime problems rather than merely scaling up or down the exemption levels. He is of the view that the focus should be on addressing issues in the entire system through a holistic approach[18].

A similar view is held by Tun Dr. Mahathir, the former Malaysian Prime Minister who had called on the government to review the current taxation mechanism in the shipping sector as a whole.

Similarly, the Offshore Support Vessel Association (OSVA) President Tasripin Masotee felt that the government should take a holistic approach to provide a fair level playing field to make the industry competitive. He is of the view that the current shipping laws are unfavourable in terms of fiscal and monetary legislations. He points that in Malaysia, tax exemption for shipping applies only to merchant cargo ships and not for other vessels like OSV[19]. On the other hand, Singapore offers fiscal benefits and tax exemption on all OSVs registered there[20].

CONCLUSION

The shipping industry is trying every trick in the trade to keep afloat despite legal, fiscal, as well as commercial obstacles and trade cycles, and even piracy.

Cost cutting and emission cutting are as much on the agenda as making profits and making an international presence. For example, one of the emerging technologies being used now is skysails that harness the wind to sail ships[21] (NO, not a sailing ship –that one was used by Christopher Columbus to sail to America) saving fuel by as much as 30% on a single voyage and cutting down on pollution[22] – while others are venturing to tap into the economies

[16] *See 'The Wealth of Nations' edited by Edwin Cannan, New York, 1994 pp. 887-890*

[17] *For a comprehensive discussion of the application of a particular section where the law is less than clear, see Nakha Ratnam Somasundaram, 'Ticket to Taxes', Tax Nasional, 2Q/2005.*

[18] *Steve Chia: Shipping industry – sink or float? The STAR, Monday October 17, 2011. http://thestar.com.my/maritime/story.asp?file=/2011/10/17/maritime/9684197&sec=maritime. Retrieved March 9, 2013.*

[19] *OSV include support vessels like tugboat, supply vessels, barge and lighters which are not recognised as a 'Malaysian ship' under the ITA.*

[20] *Tun Dr. Mahathir urges Govt. to study taxation mechanism in shipping sector. The STAR, Thursday, February 23, 2012. http://biz.thestar.com.my/news/story.asp?file=/2012/2/23/business/20120223131622&sec=business%3Cbr%20/%3E. Retrieved March 9, 2013*

[21] *The 'skysail' was created by the German inventor Stephen Wrage. It works in a manner similar to a paraglide canopy and is able to move around to harness the wind from different directions (unlike a sail) and can propel ships faster while saving fuel by as much as 30% for a single voyage. As about 80% of a ship's operational cost is from burning fuel, the 'skysail' adds to a considerable savings in shipping operations, while reducing pollution to some extent. However, the 'skysail' is not cheap – it comes at a cost of about US$5mil apiece and is not catching up with marginal operators.*

[22] *Megan Goldin and David Fogarty: Shipping's burden. Under the United Nation's Kyoto Protocol, a scheme has been developed under which ships would be penalised for inefficient fuel use and rewarded for conserving fuel, hopefully leading to a greener investment in the expensive and conservative shipping industry. However, the scheme is politically charged (western nations against developing nations) and legally complex with full of leaking holes (for example a British ship – from a developed nation - could be registered in land locked Mongolia, which under the Kyoto Protocol is a developing country, and therefore not obliged to cut carbon emissions-in addition to not having to comply with several other tight maritime laws on a 'common but differentiated responsibilities scheme'). The STAR, Tuesday May 25, 2010. http://thestar.com.my/lifestyle/story.asp?file=/2010/5/25/lifefocus/6294812. Retrieved March 9, 2013.*

of scale by building larger and higher tonnage vessels. Filling these giant ships, however, remains a dubious question given the ongoing rate wars.

Still others are taking calculated risk, if not reckless risk, to stay afloat. For example, the tough new European Union sanctions on Iran, aimed at stopping Iran's oil exports to the European countries[23] also bans European insurers and reinsurers from covering oil tankers carrying Iranian crude – and some 90% of the world's tanker insurers are in Europe. A ship carrying 2 million barrels of crude oil would need an insurance coverage of about US$1billion against personal injury and pollution claims.

But one Indian shipping company, Shipping Corporation of India is willing to transport the crude with an insurance coverage of only US$50 million, risking any claims above that sum should an incident occur. A major oil spill for example, would leave a company with billions of dollars in damages. The Exxon Valdez disaster in Alaska in 1989 for example cost US$7 billion in cleanup cost, fines and penalties[24] - not to mention the lingering ecological disaster to wildlife and economic ruin to coastal communities that depended on fishing in that area for a livelihood.

For Malaysia, the legislation as regards shipping and exemption of shipping income certainly needs a major overhaul as the present legislation do not seem to cover the needs of the industry as a whole to address the aspirations of becoming a self-sufficient maritime nation. The lopsided approach to granting exemption to only a certain class of ships while ignoring others, denying deductions or allowing deductions for capital allowances and adjusted losses in a very restrictive manner, or applying specific rules designed to reduce the exempted income and so on do not bode well to achieve the national aspiration of a strong Malaysian maritime presence.

In addition, there is the ever present danger that in a competitive global economy, we may, even drive existing Malaysian ships to be foreign flagged – not a very remote possibility given that we have very enterprising maritime neighbours.

Hopefully in the year of the Water Snake[25], we hope the shipping industry will overcome all its woes and will sail more smoothly just like the water snake coursing effortlessly through the ocean.

[23] Roberta Rampton: US Senate approves new sanctions for Iran energy, shipping. The sanctions seek to stem the flow of petrodollars to Tehran to force the OPEC member to halt a nuclear programme the West suspects is intended to produce weapons. In December 2012, the U.S. Senate approved new sanctions on trade with Iran's energy, port, shipping and shipbuilding sectors in its latest effort to ratchet up economic pressure on Tehran over its nuclear programme. http://thestar.com.my/news/story.asp?file=/2012/12/1/worldupdates/2012-11-30T161833Z_3_BRE8AT0TK_RTROPTT_0_UK-USA-IRAN-SANCTIONS-VOTE&sec=Worldupdates. Retrieved 17 March 2013.

[24] Nidhi Verma and Randy Fabi: Exclusive-Indian shipping firms to carry Iran crude despite reduced insurance. Currently, liability limits for oil spills have extended to beyond US$1billion and for other incidents (like collision and sinking) to US$3billion. According to Shipping Corp of India's chairman, S. Hajara, it would be impossible for Indian insurance companies to get reinsurance when the sanction (supra) sets in fully. Japanese insurers for example are now only covering one tanker at a time for carrying Iranian crude because their ability to provide cover is limited without the European reinsurance backup. A tanker carrying Iranian crude takes about 10 days to move through the Gulf, and thus only about three to four ships can be insured in a month (as compared to about ten ships previously when reinsurance was available). http://thestar.com.my/news/story.asp?file=/2012/4/24/worldupdates/2012-04-24T093319Z_1_BRE83N0DN_RTROPTT_0_UK-INDIA-OIL-IRAN&sec=Worldupdates. Retrieved 16 March 2013.

[55] In the Chinese Lunar Calendar, there are twelve animals depicted in a 12-year cycle, with the year 2013 being the Year of the Snake.

***Dr. Nakha Ratnam Somasundaram** is a Tax Specialist with the Multimedia University, Cyberjaya Campus. He was the former State Director of the Inland Revenue Board, Kelantan, and Tax Consultant of Chua and Chu of Kota Bharu. He can be contacted at nakharatnam@yahoo.com.* *The writer wishes to gratefully acknowledge the assistance rendered by **Mr. Steve Chia Siang Hai**, Senior Executive Director of PricewaterhouseCoopers Taxation Services Sdn. Bhd. for reviewing this article.*

Organisers

McMillanWoods
Professionalism at the forefront

8.3Km Early morning riser
McMillan Woods Charity Walkathon 2013

Pause…Walk for fun, health & charity

Date : Saturday, 2 November 2013

Time : 7.00am

Venue : Forest Research Institute Malaysia,
52109 Kepong, Selangor, Malaysia

Let's all make a concerted effort towards giving back to society by our "Pause…walk for fun, health & charity." Entry fee is inclusive of T-Shirt, 8.3KM Finisher Medal and participating partners' goodies.

Find us at www.mcmillanwoodsglobalawards.com under the "McM Care" event.

***We anticipate about 1,000 individuals to participate in this Charity Walkathon.**

ENTRY FEE
RM50 per participant
(All net proceeds will be donated to charity)

Scan the QR code for more information

For registration and further information, please contact the 8.3Km Hotline at **+603-7665 1738** or email to **pennie@mcmillanwoods.com**

Find us on: facebook

@MCMGlobalAwards

www.mcmillanwoods.com

Participating Partners

MALAYSIA SME THE SME PAPER · ACCA · maref · TV3 · PATHLAB Your One-Stop Healthcare Centre · ARFF · JCI · GERMAX · SPHERE CORPORATION · MYDIN MYDIN MOHAMED HOLDINGS BHD · executive mode

SUBSTANCE OVER FORM UNDER TAX TREATIES

Bart Kosters

THE AUTHOR ADDRESSES THE APPLICATION OF THE SUBSTANCE OVER FORM PRINCIPLE IN INTERNATIONAL TAXATION, TAKING INTO CONSIDERATION THE POSITIONS OF THE **OECD**, **UN** AND **CASE LAW** IN SELECTED JURISDICTIONS.

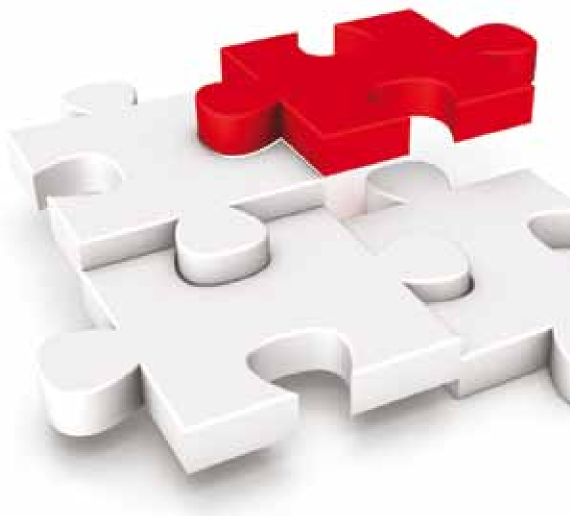
1. INTRODUCTION AND SUMMARY

This article will address the application of the principle of "substance over form" under tax treaties, and will, apart from the OECD position, also look at case law in a number of countries.

In section 2 of this article, I shall deal with defining the concept of substance over form in taxation. Section 3 will address the OECD's position as to the applicability of the doctrine under tax treaties and section 4 will focus on the United Nations Model Double Taxation Convention between Developed and Developing Countries as of 2011 (UN Model). Case law from selected jurisdictions is discussed in section 5.

The OECD refers regularly to substance over form and takes the view that this doctrine can be applied under tax treaties. In its Commentary to the OECD Model Convention on Income and Capital as of 2010 (OECD Model), the OECD specifically refers to the use of substance over form in the context of the so-called "improper use of tax treaties", and in the definitions of "dividends", "interest" and "employer". The UN Model also addressed the unintended use of tax treaties in its Commentary. It concludes that substance over form can be applied under tax treaties, although the argument deviates from that of the OECD. Regarding dividends, interest, royalties and the term "employer" in

CASE LAW FROM DIFFERENT COUNTRIES SEEMS TO CONFIRM THAT IN PRINCIPLE, THE SUBSTANCE OVER FORM DOCTRINE CAN BE APPLIED UNDER TAX TREATIES AS WELL. WHETHER IT IS TO BE APPLIED DEPENDS ON THE FACTS AND CIRCUMSTANCES OF THE CASE.



article 15, the UN Model merely repeats the Commentary on the OECD Model.

Case law from different countries seems to confirm that in principle, the substance over form doctrine can be applied under tax treaties as well. Whether it is to be applied depends on the facts and circumstances of the case.

2. THE MEANING OF "SUBSTANCE OVER FORM"

According to *www.wikipedia.org*, the substance over form doctrine is an accountancy principle that is intended:

> to ensure that financial statements give a complete, relevant and accurate picture of transactions and events. If an entity practices the 'substance over form' concept, the financial statements will show the financial reality of the entity (economic substance), rather than the legal form of transactions (form). In accounting for business transactions and other events we measure and report the economic impact of an event instead of its legal form. Substance over form is critical for reliable financial reporting. It is particularly relevant in case of revenue recognition, sale and purchase agreements, etc.

In view of the above, the meaning of this accountancy principle is to reflect the economic reality. However, the meaning of the term for accountancy purposes is not necessarily relevant for taxation purposes. For this reason, this article will focus on the definition that has been provided by the IBFD's International Tax Glossary, which describes substance over form as an:

> anti-avoidance doctrine under which the legal form of an arrangement or transaction is ignored, tax being levied in accordance with the economic substance. The legal form refers to the legal conditions used to define a tax rule and typically includes private law concepts. Although the doctrine is generally associated with common law legal systems, similar concepts exist in civil law countries.

An example of a substance over form approach in taxation is the following:

> A company is not allowed to deduct the interest payments to a creditor, because the loan (form) is actually an equity contribution (substance). Therefore, the interest payments are treated as dividend payments and thus, not deductible. The legal documents might state that this is a loan. However, the economic substance says that it is a dividend.[1]

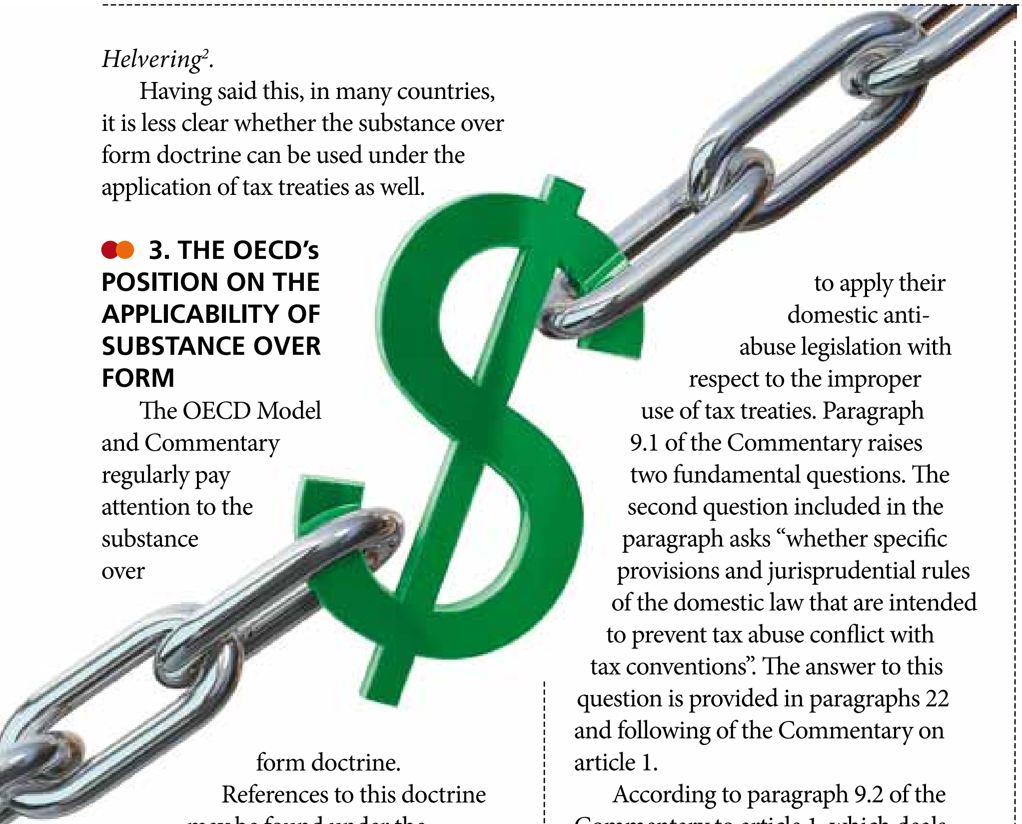
It has been long established that the substance over form doctrine can be applied in taxation under domestic law. Although the doctrine is generally associated with common law systems, such as the systems in place in the United Kingdom (UK) and the United States (US), the substance over form approach is also applied in several civil law countries like the Netherlands. Furthermore, the possibility to apply substance over form is sometimes, but not always, explicitly laid down in the domestic legislation. The essence of the substance over form principle is that it is applied when tax motivation is seen to outweigh business purpose and/or the profit objective on the evidence evaluated. When the doctrine is applied, the intended tax benefits will be denied.

Early case law on the subject demonstrates that for a long time, the judiciary was rather unwilling to depart from the legal reality and was reluctant to apply the substance over form concept. However, substance over form was sanctioned in the US in the landmark case of *Gregory v.*

1 *This example has been taken from www.substanceoverform.com.*

Helvering[2].

Having said this, in many countries, it is less clear whether the substance over form doctrine can be used under the application of tax treaties as well.



3. THE OECD's POSITION ON THE APPLICABILITY OF SUBSTANCE OVER FORM

The OECD Model and Commentary regularly pay attention to the substance over form doctrine.

References to this doctrine may be found under the heading "Improper use of the Convention" in the Commentary to article 1 of the OECD Model. Further (implicit) references may be found in paragraph 3 of the Commentary on article 10, paragraph 6 of the Commentary on article 11, paragraph 4 of the Commentary on article 12, and paragraph 2 of the Commentary on article 15 of the OECD Model. In the following subparagraphs, I shall take a closer look at the various parts of the Commentaries to the OECD Model.

3.1. COMMENTARY ON ARTICLE 1

Under the heading "Improper use of tax treaties" (paragraphs 7 and following of the Commentary on article 1 of the OECD Model), undesirable phenomena such as treaty shopping and other forms are addressed. This section of the OECD Commentary also pays attention to the measures that can be taken to combat this improper use of tax treaties. Paragraph 7.1 of the Commentary to article 1 mentions that states may want to apply their domestic anti-abuse legislation with respect to the improper use of tax treaties. Paragraph 9.1 of the Commentary raises two fundamental questions. The second question included in the paragraph asks "whether specific provisions and jurisprudential rules of the domestic law that are intended to prevent tax abuse conflict with tax conventions". The answer to this question is provided in paragraphs 22 and following of the Commentary on article 1.

According to paragraph 9.2 of the Commentary to article 1, which deals with the so-called autonomy of domestic anti-abuse provisions, it is mentioned that many states take the approach that domestic anti-abuse provisions may also be applied under tax treaties. An alternative approach is the purposive interpretation of tax treaties[3]. Under this approach, some types of abuse are seen as being abuse of the tax treaty itself, rather than the domestic legislation. States that follow this approach consider that "the proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with a view to obtaining unintended benefits under the provisions of these Conventions".

The substance over form doctrine is specifically mentioned in paragraph 22 of the Commentary on article 1 as one of these domestic legislation approaches. According to paragraph 22.1, there is no conflict between the anti-abuse provisions in domestic legislation and the provisions of tax treaties, as the anti-abuse provisions are "not addressed in tax treaties and are therefore not affected by them" [4].

Substance over form is also explicitly mentioned in paragraph 28.[5] The OECD takes the view that judicial doctrines that are part of the domestic law such as substance over form may be applied under tax treaties. This is for instance mentioned in paragraph 30 of the Commentary on article 1, as follows:

> While the interpretation of tax treaties is governed by general rules that have been codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, nothing prevents the application of similar judicial approaches to the interpretation of the particular provisions of tax treaties. If, for example, the courts of one country have determined that, as a matter of legal interpretation, domestic tax provisions should apply on the basis of the economic substance of certain transactions, there is nothing that prevents a similar approach to be adopted with respect to the application of the provisions of a tax treaty to similar transactions.

Doubts may be raised as to whether this rather bold statement in the OECD Commentary is fully correct and applicable in all cases, in view of the good faith requirement under the Vienna Convention under the Law of Treaties. Under this concept, in applying treaties in general, states must act in good faith towards treaty partners.

3.2. COMMENTARY ON ARTICLES 10, 11 AND 12

Articles 10, 11 and 12 of the OECD Model deal with the attribution of taxing rights with respect to dividends, interest and royalties respectively. The Commentary to these articles contains in various places, the substance over form approach. In this respect, one can think of parts of the Commentary to articles 10(3), 11(6) and 12(5) of the OECD Model. Section 3.2.1. below will examine the substance over form approach towards dividends, section 3.2.2. will focus on the approach towards interest and section 3.2.3. discusses the approach towards royalties.

3.2.1. DIVIDENDS

Article 10(3) of the OECD Model contains the definition of dividends. According to this definition, the term "dividends" means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares, by the laws of the state of which the company making the distribution is a resident. However, paragraph 25 of the Commentary to article 10[6] stipulates that under certain conditions, interest is to be considered as a dividend for tax treaty purposes. This is the case when the underlying instrument should be recharacterised as the provision of equity rather than debt. From a legal perspective however, it remains a loan on which interest is being paid by the debtor.

3.2.2. INTEREST

The Commentary to article 11 of the OECD Model deals in several places with the substance over form principle. This is mainly the case in paragraph 3 of the Commentary, which contains the definition of the term "interest". Paragraph 19 refers to paragraph 10 of the Commentary to article 10 (see section 3.2.1. above) with respect to interest on loans that should be considered as a dividend if the

2 *Gregory v. Helvering 293 U.S. 465 (1935). In this case, the US Supreme Court ruled that: It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganisation was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that if a reorganisation in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. … But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said. When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made 'in pursuance of a plan of reorganisation' (Section 112(g) of corporate business); and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose – a mere device which put on the form of a corporate reorganisation as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganise a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised, it immediately was put to death.*
In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganisation, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

3 *Under this view, "taxes are ultimately imposed under domestic law, as restricted ... by the provisions of tax conventions. Thus, any abuse of the provisions of a tax convention could also be characterised as an abuse of the provisions of domestic law under which tax will be levied. For these States, the issue then becomes whether the provision of tax conventions may prevent the application of the anti-abuse provisions of domestic law ... As indicated in paragraph 22.1 below, the answer to that second question is that to the extent these anti-avoidance rules are part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability, they are not addressed in tax treaties and are therefore not affected by them. Thus, as a general rule, there will be no conflict between such rules and the provisions of tax treaties."*

4 *Paragraph 22.1 mentions as an example that where "the rules referred to in paragraph 22 result in a recharacterisation of income or in a redetermination of the taxpayer who is considered to derive such income, the provisions of the Convention will be applied taking into account these changes".*

5 *The text of paragraph 28 is as follows: In the process of determining how domestic tax law applies to tax avoidance transactions, the courts of many countries have developed different judicial doctrines that have the effect of preventing domestic law abuses. These include the business purpose, substance over form, economic substance, step transaction, abuse of law and fraus legis approaches. The particular conditions under which such judicial doctrines apply often vary from country to country and evolve over time based on refinements or changes resulting from subsequent court decisions.*

6 *The text of paragraph 25 is as follows: Article 10 deals not only with dividends as such but also with interest on loans insofar as the lender effectively shares the risks run by the company, i.e. where repayment depends largely on the success or otherwise of the enterprise's business. ... The question whether the contributor of the loan shares the risks run by the enterprise must be determined in each individual case in the light of all circumstances, as for example the following: – The loan very heavily outweighs any other contribution to the enterprise's capital (...) and is substantially unmatched by redeemable assets; – The creditor will share in any profits of the company; – Repayment of the loan is subordinated to claims of other creditors or to the payment of dividends; – The level of payment of interest would depend on the profits of the company; – The loan contract contains no fixed provisions for repayment by a definite date.*

loan effectively shares the risks run by the debtor company.

Further, paragraph 21.1 of the Commentary to article 11 states that:

> the definition of interest in the first sentence of paragraph 3 does not normally apply to payments made under certain kinds of nontraditional financial instruments where there is no underlying debt (for example, interest rate swaps). However, the definition will apply to the extent that a loan is considered to exist under a "substance over form" rule, an "abuse of rights" principle, or any similar doctrine.

These so-called non-traditional financial instruments can, under certain circumstances, be recharacterised as equity and therefore the income from such an instrument is considered to be a dividend.

It can also be maintained that article 11(6), which deals with the case where between associated parties, a too high interest is being paid, allows for a substance over form approach with respect to the excess amount of interest. The Commentary to this paragraph does not explicitly mention substance over form. However, paragraph 35 of the Commentary to article 11 leaves the possibility open to apply substance over form.[7]

3.2.3. ROYALTIES

Article 12 of the OECD Model deals with royalties and does not refer to substance over form. Article 12(2) contains the definition of what are considered as royalties for the purposes of the Model. This definition may imply that something is considered to be a royalty for treaty purposes but not under domestic law and vice versa. Further, article 12(4) contains a provision that is similar to article 11(6), which allows for transfer pricing adjustments in the case where too high royalties are being paid between associated enterprises (see section 3.2.2. above).

3.3. THE DEFINITION OF "EMPLOYER"

A clear example of a substance over form approach can be found in the Commentary to paragraph 2 of article 15 of the OECD Model, which concerns the meaning of the term "employer" in situations that are considered to be international hirings out of labour. In paragraph 8.4 of the Commentary,[8] explicit reference is made to the substance over form approach in determining who should be considered the employer as meant in article 15(2)(b) of the OECD Model. According to this paragraph of the Commentary, it is relevant to distinguish between a contract of service (in other words an employment relation) and a contract for services (where there is no employment relation).

Paragraph 8.8 of the Commentary[9] prescribes that a substance over form approach may be taken in abusive cases. Paragraph 8.14 subsequently lists factors that may lead to the conclusion that not the formal employer but the user of the labour (the material employer) is to be considered the employer as meant in article 15(2)(b) of the OECD Model. Relevant factors for deviating from the legal employment relationship are:

- who has the authority to instruct the individual regarding the manner in which the work has to be performed;
- who controls and has responsibility for the place at which the work is performed;
- the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;
- who puts tools and materials necessary for the work at the individual's disposal;
- who determines the number and the qualifications of the individuals performing the work;
- who has the right to select the individual who will perform the work and to terminate the contractual arrangement entered into with that individual for that purpose;
- who has the right to impose disciplinary sanctions related to the work of that individual; and
- who determines the holiday and work schedule of that individual.

4. SUBSTANCE OVER FORM IN THE UN MODEL

In the most recent update of the UN Model of 2011, new commentary has been added in many areas, which is different from the OECD Model.

Like the OECD Model, the UN Model also contains paragraphs in the Commentary on "Improper use of tax treaties". The relevant paragraphs in the Commentary are paragraphs 28 to 30, which deal with the application of judicial doctrines that are part of domestic law under tax treaties.[10] Although the outcome of the Commentary of the UN Model is the same as the outcome of the wording of the OECD Commentary, the wording is clearly different.

The Commentary to article 10(3) (the definition of the term "dividends") and the Commentary to article 11(3) (the definition of the term "interest") of the UN Model are copied from the OECD Model (see sections 3.2.1. and 3.2.2. above). Here, the UN Model follows the OECD Model. However, paragraphs 19.1 and following paragraphs of the Commentary to article 11 of the UN Model deviate from the OECD Model.

Paragraph 19.1 of the Commentary to article 11 of the UN Model deals with non-traditional financial arrangements and observes that:

> in a number of countries, certain non-traditional financial arrangements are assimilated to debt relations under domestic tax law, although their legal form is not a loan.

Therefore, the income on these products is considered as being interest for the purposes of the tax treaty. Further, according to paragraphs 19.2 to 19.4 of the Commentary, income from certain Islamic financial instruments is also covered by the interest article in the UN Model.[11]

Regarding the meaning of the term "employer" in article 15 of the UN Model, the Commentary to the UN Model merely copies the Commentary to article 15 of the OECD Model (see section 3.3. above).

5. SELECTED CASE LAW

Over the years, courts in many countries occupied themselves with the application of the substance over form principle under tax treaties. In this section, I will focus on some decisions delivered by courts in a number of countries. There seems to be consensus among the judiciary that substance over form can, in principle, be applied under tax treaties.

THE NETHERLANDS

The Supreme Court of the Netherlands has in several decisions dealing with international hiring out of labour followed the OECD Commentary and applied a substance over form approach.[12] In one of the decisions, the Supreme Court confirmed a decision by the Court of Appeal in The Hague, which ruled upon the interpretation of the term "employer" in the tax treaty between the Netherlands and Germany of 16 June 1956, as amended, that the Netherlands was bound to the OECD Commentary.[13] In this respect, it should also be mentioned that the Supreme Court of the Netherlands is extremely hesitant to apply domestic anti-abuse provisions under tax treaties.

SWITZERLAND

In a recent case, the Swiss Federal Supreme Court held that the concept of beneficial ownership, as stated in a tax treaty, has to be interpreted

[6] *The text of paragraph 25 is as follows:*
Article 10 deals not only with dividends as such but also with interest on loans insofar as the lender effectively shares the risks run by the company, i.e. where repayment depends largely on the success or otherwise of the enterprise's business. ... The question whether the contributor of the loan shares the risks run by the enterprise must be determined in each individual case in the light of all circumstances, as for example the following:
– The loan very heavily outweighs any other contribution to the enterprise's capital (...) and is substantially unmatched by redeemable assets;
– The creditor will share in any profits of the company;
– Repayment of the loan is subordinated to claims of other creditors or to the payment of dividends;
– The level of payment of interest would depend on the profits of the company;
– The loan contract contains no fixed provisions for repayment by a definite date.

[7] *The text of paragraph 35 is as follows:*
With regard to the taxation treatment to be applied to the excess part of the interest, the exact nature of such excess will need to be ascertained according to the circumstances of each case, in order to determine the category of income in which it should be classified for the purposes of applying the provisions of the tax laws of the States concerned and the provisions of the Convention. This paragraph permits only the adjustment of the loan in such a way as to give it the character of a contribution to equity capital. For such an adjustment to be possible under paragraph 6 of Article 11 it would be necessary as a minimum to remove the limiting phrase "having regard to the debt-claim for which it is paid". If greater clarity of intent is felt appropriate, a phrase such as "for whatever reason" might be added after "exceeds". Either of these alternative versions would apply where some or all of an interest payment is excessive because the amount of the loan or the terms relating to it (including the rate of interest) are not what would have been agreed upon in the absence of the special relationship. Nevertheless, this paragraph can affect not only the recipient but also the payer of excessive interest and if the law of the State of source permits, the excess amount can be disallowed as a deduction, due regard being had to other applicable provisions of the Convention. If two Contracting States should have difficulty in determining the other provisions of the Convention applicable, as cases require, to the excess part of the interest, there would be nothing to prevent them from introducing additional clarifications in the last sentence of paragraph 6, as long as they do not alter its general purport.

[8] *The text of paragraph 8.4 is as follows:*
In many States, however, various legislative or jurisprudential rules and criteria (e.g. substance over form rules) have been developed for the purpose of distinguishing cases where services rendered by an individual to an enterprise should be considered to be rendered in an employment relationship (contract of service) from cases where such services should be considered to be rendered under a contract for the provision of services between two separate enterprises (contract for services). That distinction keeps its importance when applying the provisions of Article 15, in particular paragraphs (2)(b) and (c). Subject to the limit described in paragraph 8.11 and unless the context of a particular convention requires otherwise, it is a matter of domestic law of the State of source to determine whether services rendered by an individual in that State are provided in an employment relationship and that determination will govern how that State applies the convention.

[9] *The text of paragraph 8.8 is as follows:*
As mentioned in paragraph 8.2, even where the domestic law of the State that applies the Convention does not offer the possibility of questioning a formal contractual relationship and therefore does not allow the State to consider that services rendered to a local enterprise by an individual who is formally employed by a non-resident are rendered in an employment relationship (contract of service) with that local enterprise, it is possible for that State to deny the application of the exception of paragraph 2 in abusive cases.

based on a "substance over form" approach.[14]

UNITED STATES

In US case law, many cases can be found that deal with the issue of substance over form in cross-border situations as well as under tax treaties. Most of the case law is very factual. In the case *New York Guangdong Finance Inc v. Commission of Internal Revenue, 95 T.C.M. (CCH) 1228, Case Docket No. 14809-04*, which was decided by the US Tax Court on 11 March 2008, it was decided that generally speaking, a taxpayer cannot invoke a substance over form approach.[16]

***Bart Kosters** is a Senior Principal Research Associate at IBFD. The views expressed in this article are those of the author and should not be attributed to IBFD. This article was originally published in the January/February 2013 issue of the IBFD's Asia-Pacific Tax Bulletin journal.*

10 *The text of paragraphs 28 to 30 is as follows:*
28. In the process of determining how domestic tax law applies to tax avoidance transactions, the courts of many countries have developed different judicial doctrines that have the effect of preventing domestic law abuses. These include the business purpose, substance over form, economic substance, step transaction, abuse of law and fraus legis approaches. The particular conditions under which such judicial doctrines apply often vary from country to country and evolve over time based on refinements or changes resulting from subsequent court decisions. 29. These doctrines are essentially views expressed by courts as to how tax legislation should be interpreted and as such, typically become part of the domestic tax law.
30. While the interpretation of tax treaties is governed by general rules that have been codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, nothing prevents the application of similar judicial approaches to the interpretation of the particular provisions of tax treaties. If, for example, the courts of one country have determined that, as a matter of legal interpretation, domestic tax provisions should apply on the basis of the economic substance of certain transactions, there is nothing that prevents a similar approach to be adopted with respect to the application of the provisions of a tax treaty to similar transactions.

11 *Paragraphs 19.2 to 19.4 are as follows:*
19.2. The definition applies, for instance, to Islamic financial instruments where the economic reality of the contract underlying the instrument is a loan (even if the legal form thereof is not). This may be the case, for example, of murabaha, istisna'a, certain forms of mudaraba and musharaka (i.e., profit-sharing deposits and diminishing musharaka) and ijara22 (where assimilated to finance lease), as well as sukuk based on such instruments.
19.3. Countries that do not deal specifically in their domestic law with the above-mentioned instruments and generally follow an economic-substance based approach for tax purposes may, nevertheless, apply the definition of interest to payments made under those instruments. Alternatively, such countries, as well as those following a purely legal approach for tax purposes, may wish to refer expressly to such instruments in the definition of interest in the treaty. This may be done by inserting the following after the first sentence: The term also includes income from arrangements such as Islamic financial instruments where the substance of the underlying contract can be assimilated to a loan.
19.4. It is clear that the definition does not apply to Islamic financial instruments the economic substance of which cannot be considered as a loan.

12 *Hoge Raad, 1 December 2006, several cases including case numbers 39.710 and 40.088, BNB 2007/78 and 79.*

13 *Consideration 6.16 of the decision of the Court of Appeal in the Hague of 29 April 2003, case number 01/01971, is a very important consideration that goes beyond the issue of substance over form and more in general affects the position of the OECD Commentary. The consideration 6.16 states: "Nu zowel Nederland als Duitsland zonder Observation paragraaf 8 van het Commentaar bij artikel 15 OESO-modelverdrag hebben geaccepteerd, moet het ervoor worden gehouden dat zowel Nederland als Duitsland zich met dit Commentaar hebben verenigd." (In English: Now both the Netherlands and Germany have accepted without Observation paragraph 8 of the Commentary to article 15 OECD Model Tax Convention, it should be held that both the Netherlands and Germany have agreed with this Commentary.)*

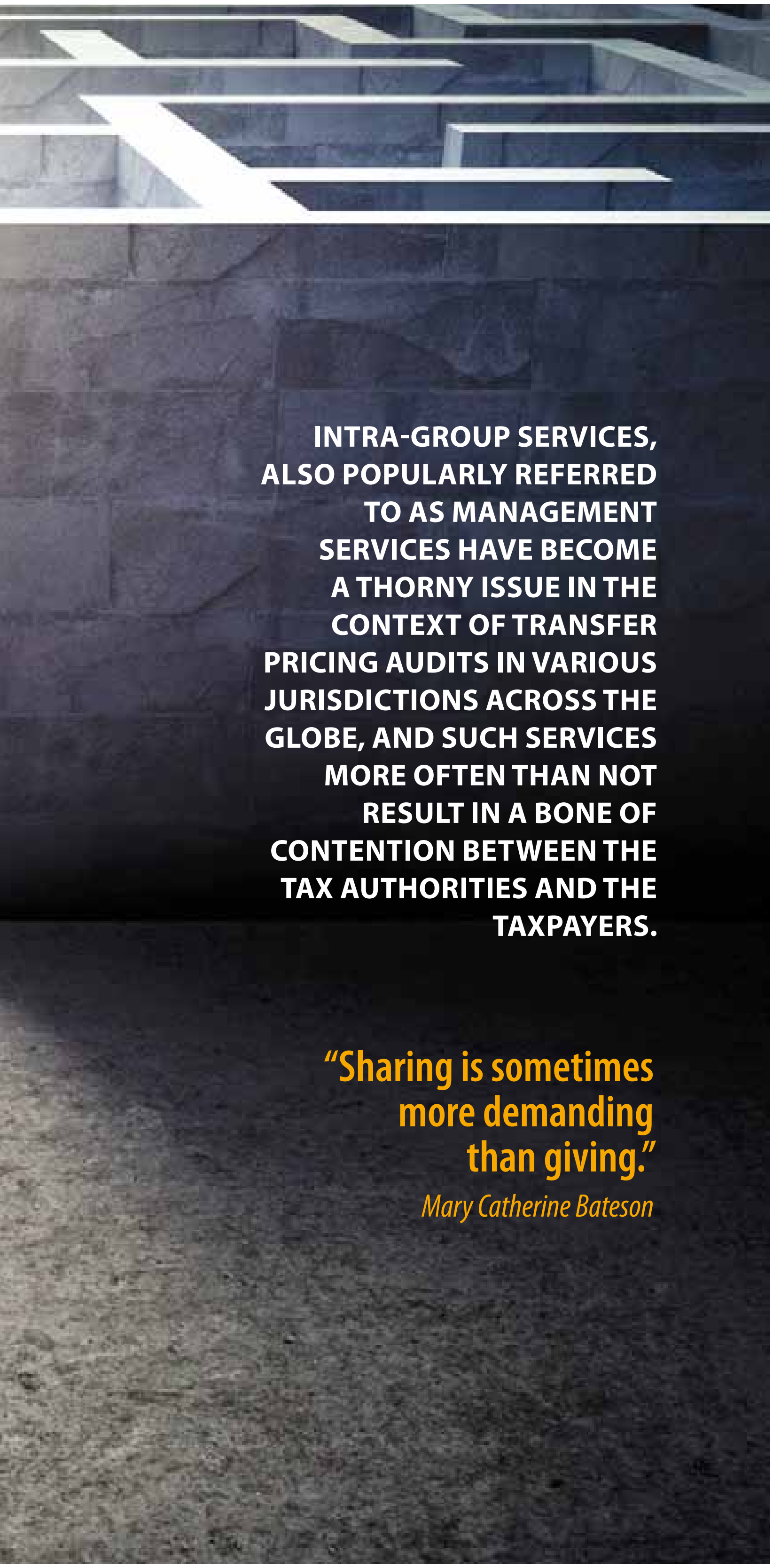
14 *Swiss Federal Supreme Court, 7 March 2012, Case A-6537/2010.*

15 *For instance US Court of Appeal, 8 June 2001, United States – Del Commercial Properties, Inc. v. Commissioner of Internal Revenue, Case Docket No. 00-1313.*

16 *The US Tax Court ruled: "As a general rule, a taxpayer is bound by the form of the transaction that the taxpayer has chosen. Framatome Connectors USA, Inc. v. Commissioner, 118 T.C. 32, 47 (2002), affd. 108 Fed. Appx. 683 (2d Cir. 2004). A taxpayer may argue that the substance of the transaction should prevail over its form only in limited circumstances "where his tax reporting and actions show an honest and consistent respect for the substance of a transaction." Estate of Weinert v. Commissioner, 294 F.2d 750, 755 (5th Cir. 1961), revg. and remanding 31 T.C. 918 (1959). The taxpayer "must provide objective evidence that the substance of the transaction was in accord with the position argued by * * * [the taxpayer] rather than the form set forth by all the relevant documents." Groetzinger v. Commissioner, 87 T.C. 533, 541 (1986); see also Commissioner v. Natl. Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149 (1974) ("while a taxpayer is free to organise his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, * * * and may not enjoy the benefit of some other route he might have chosen to follow but did not")."*

INTRA-GROUP SERVICES
NEGOTIATING THE MAZE OF TRANSFER PRICING ASSESSMENTS

Venkataraman Ganesan



INTRA-GROUP SERVICES, ALSO POPULARLY REFERRED TO AS MANAGEMENT SERVICES HAVE BECOME A THORNY ISSUE IN THE CONTEXT OF TRANSFER PRICING AUDITS IN VARIOUS JURISDICTIONS ACROSS THE GLOBE, AND SUCH SERVICES MORE OFTEN THAN NOT RESULT IN A BONE OF CONTENTION BETWEEN THE TAX AUTHORITIES AND THE TAXPAYERS.

"Sharing is sometimes more demanding than giving."

Mary Catherine Bateson

In the Malaysian Transfer Pricing context, this particular sphere of inter-company transactions receives specific attention in the Malaysian Transfer Pricing Guidelines 2012 (hereinafter referred to as "MTPG") wherein emphasis is laid on a clear demonstration of the 'Benefit Test'. This means that during the course of a Transfer Pricing audit, the demonstrable evidence required to justify the payments effected by the taxpayer in respect of availing such Intra-Group services needs to be both exhaustive as well as concrete in nature.

THIS ARTICLE ENDEAVOURS

- To provide an overview regarding the various possible forms of Intra-Group services[1];
- To elaborate on the existing rules for Intra-Group services as laid down under the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter referred to as "OECD Guidelines");
- To elucidate on the requirements pertaining to Intra-Group services as encompassed by the MTPG;
- To set out in a brief and concise manner the nature of evidence and extent of documentation expected by the tax authorities in the context of a Transfer Pricing audit.

INTRA-GROUP SERVICES – A PRIMER

Intra-Group services, from the parlance of a layman refer to services which are rendered by one or more enterprises forming part of a Multinational Group (hereinafter referred to as "MNE"), to one or more enterprises forming part of the same MNE. Though not the exact norm, such services are usually provided by the headquarters of the parent company to confer certain benefits to the Associated Enterprises/affiliates (hereinafter referred to as "AEs") of such a parent company.

Also a basic premise underlying the provision of such Intra-Group services at the headquarter level, revolves around the concept of 'economies of scale'. The provision of services at a centralised level by a parent company to various AEs spread across multiple jurisdictions would

[1] *It may be mentioned that the various forms of Intra-Group services discussed in the paper are merely illustrative in nature, considering the numerous probable services that may constitute and land within the ambit of such Intra-Group services.*

entitle the MNE as a whole to reap the benefits conferred by the economies of scale. The cost incurred in providing such Intra-Group services may initially be borne by the parent/headquarters.

Any AE forming part of the MNE, and which perceives a need to avail specific Intra-Group services may acquire the same from the parent/headquarters. It may also be mentioned in this regard that in an MNE, there may exist dedicated service providing enterprise/s designated as such which would render Intra-Group services to other members constituting the Group. In such a case any AE perceiving a need to avail any Intra-Group service, would approach the designated service providing entity with a request to render the requisite services.

THE RENDERING OF INTRA-GROUP SERVICES MAY CONFER BENEFITS

- On the AE to whom such services have been specifically lent; or
- The Group as a whole where the Intra-Group services are rendered by the parent/headquarter/designated service provider to all the entities forming part of the MNE.

In some cases, rendering of an Intra-Group service by the headquarter/parent/designated service provider might relate to only one or some enterprises forming part of the Group but such a service incidentally would result in conferring benefits of an incidental nature upon other group entities as well. Such economic benefits may be in the nature of enhancing the efficiencies, or through other synergistic aspects. The OECD Guidelines provide that such incidental benefits ordinarily would not cause these other group members to be treated as receiving an Intra-Group service because the activities producing the benefits would not be ones for which an independent enterprise ordinarily would be willing to pay[2].

An illustrative description of the types of Intra-Group services that may be provided is as set out herein below:

INFORMATION TECHNOLOGY RELATED SERVICES

A classic example of Information Technology (hereinafter referred to as "IT") related services would be one where the headquarters would be responsible for procuring software licenses from independent, unrelated third parties for the Group as a whole. The licenses so procured would be distributed amongst the various entities forming part of the Group. The recovery in respect of the distribution of such licenses may be effected by charging the user enterprises a fee based on a rational and scientific approach[3].

MARKETING SUPPORT SERVICES

Such support services may be either in relation to product support or it may be a support involving marketing processes, or a combination of both.

ACCOUNTING AND FINANCIAL REPORTING SERVICES

This would comprise centralised accounting and reporting services where consolidated reports would be required to be submitted to various statutory authorities regarding multi-country accounting and financial analysis. Centralised provision of financial services would also encompass the following:

- Aiding and assisting in the implementation and monitoring of key budgets and indicators;
- Centralised negotiations for arranging multifarious financing support for the Group as a whole;
- Aiding and assisting in the laying down of, implementation and systematic follow-up of the directives and financial/cost accounting procedures and incidental mechanisms relating to financial control;
- Control and monitoring of quarterly, and annual accounts/reports and statements;
- Investment advisory services

[2] *Paragraph 7.12 of the OECD Guidelines for Transfer Pricing.*

[3] *One method could be to recover the costs from the user enterprises on the basis of the number of workstations.*

and other project evaluation and analytical services

TREASURY & TAX SERVICES

- Centralised negotiation and execution of contracts;
- Key advice on Intra-Group restructuring and other tax related matters;
- Centralised management of tax litigation and claims

PUBLIC RELATIONS RELATED SERVICES

- Preparation and release of brand promotional materials such as pamphlets, tracts, brochures etc;
- Active liaisioning with industry media;
- Preparation and release of press kits and other information memoranda;

LEGAL SERVICES

Some of the prominent Intra-Group services in the legal domain may include:

- Drafting of vital legal documents/ representations;
- Helping in protecting and preserving crucial intangibles such as trademarks, patents, brand names, brand logos et al;
- Centralised management and execution of major litigations, and claims;

OECD PERSPECTIVE ON INTRA-GROUP SERVICES

The OECD Guidelines embed certain key tenets with respect to Intra-Group services vide chapter VII of its Transfer Pricing Guidelines[4]. The OECD Guidelines recognise the fact that in any Multinational Enterprise, arrangements would be made "for a wide scope of services to be available to its members, in particular administrative, technical, financial and commercial services. Such services may include management, coordination and control functions for the whole group"[5].

Table 1

SL NO	NATURE OF THE SERVICES TO WHICH THE COSTS RELATE	CHARACTERISTIC FEATURES OF SUCH SERVICES
01	Activities relating to the juridical structure of the parent	1. Meetings of shareholders of the parent company; 2. Issuing of shares in the parent company; 3. Cost of supervisory board.
02	Reporting requirements	4. Consolidation of reports
03	Fundraising	5. raising funds for the acquisition of its participation

SHAREHOLDER ACTIVITY, STEWARDSHIP ACTIVITY AND 'ON-CALL ACTIVITY'

Shareholder Activity

The Guidelines also make a critical distinction between Intra-Group services which are rendered with a view to conferring perceivable benefits to the AEs and Intra-Group services which are rendered to group companies, even though those group companies would not be in need of such services. These kinds of services would generally be resorted to solely due to the fact that the entity rendering such services possesses an ownership interest in one or more group entities. These services collectively are termed as "shareholder activity"[6].

Stewardship Activity

The Guidelines refer to Stewardship activities to mean "a range of activities by a shareholder that may include the provision of services to other group members, for example services that would be provided by a coordinating centre. These latter types of non-shareholder activities could include detailed planning services for particular operations, emergency management or technical advice (troubleshooting), or in some cases assistance in day-to-day management[7].

The Guidelines in a Report issued in 1984 have provided certain illustrative examples regarding the nature of Shareholder activities. The examples provided in the report are as tabulated herein above.[8] **(Table 1)**.

On call Services

On call services refer to those Intra-Group services which are provided "on call". In other words, these services represent those kinds of services, where a service provider is on hand or on standby to render assistance at any time. The Guidelines provide the following examples which illustrate the nature of "on call" services[9]:

- A parent company or a group service centre may be on hand to provide services such as financial, managerial, technical, and legal or tax advice and assistance to

[4] The Chapter is entitled "Special Considerations for Intra-Group Services."

[5] Paragraph 7.2 of the OECD Guidelines for Transfer Pricing

[6] Paragraph 7.9 of the OECD Guidelines for Transfer Pricing

[7] Ibid

[8] Paragraph 7.10 of the OECD Guidelines for Transfer Pricing

[9] Paragraph 7.16 of the OECD Guidelines for Transfer Pricing.

members of the group at any time. In that case, a service may be rendered to associated enterprises by having staff, equipment, etc., available.

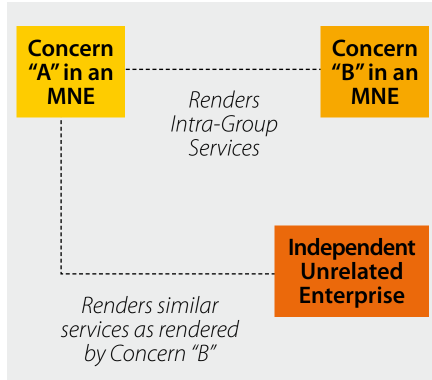
- An independent enterprise may pay an annual "retainer" fee to a firm of lawyers to ensure entitlement to legal advice and representation if litigation is brought.
- A service contract for priority computer network repair in the event of a breakdown.

It may be noted that such type of services may not be rendered by the service provider for a long period of time as the necessity to avail such services is purely contingent upon the occurrence or non-occurrence of a particular event, which may be either planned or spontaneous.

CHARGEABILITY OF INTRA-GROUP SERVICES

As is the case with any International transaction, it becomes essential to ascertain whether the amount of charges paid in respect of the Intra-Group services is in consonance with the Arm's Length principle. The Guidelines also recognise this facet and provide that "the charge for Intra-Group services should be that which would have been made and accepted between independent enterprises in comparable circumstances. Consequently, such transactions should not be treated differently for tax purposes from comparable transactions between independent enterprises, simply because the transactions are between enterprises that happen to be associated"[10].

Hence the determination of the Arm's Length charge in respect of Intra-Group services would ideally commence with ascertaining whether the Intra-Group service that has been rendered by a concern forming part of the Multinational Group could have been rendered by an independent unrelated enterprise. In simple terms, such a measure would seek to endeavour as to whether the enterprise availing the Intra-Group service, if provided with an option would be successful in identifying and entering into a contract/ arrangement with an unrelated service provider for procuring such services.

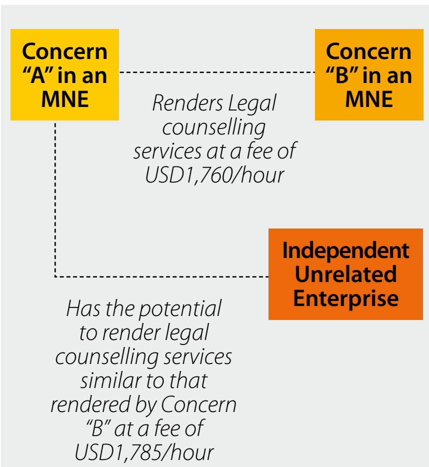


In the event there exists comparable service providers, the Comparable Uncontrolled Price (hereinafter referred to as "CUP") Method may be employed. The applicability of the CUP method would be a feasible option where there exists comparable services provided between independent enterprises in the geography where the receiver of services is based, or by the associated enterprise providing the services to an independent enterprise in circumstances that are comparable.

Hence the determination of the Arm's Length charge in respect of Intra-Group services would ideally

[10] *Paragraph 7.19 of the OECD Guidelines for Transfer Pricing.*

commence with ascertaining whether the Intra-Group service that has been rendered by a concern forming part of the MNE could have been rendered by an independent unrelated enterprise. In simple terms, such a measure would seek to endeavour as to whether the enterprise availing the Intra-Group service, if provided with an option would be successful in identifying and entering into a contract/arrangement with an unrelated service provider for procuring such services.



In the aforementioned illustration, Concern A has the option of availing legal counseling services either from its AE "B" at a cost of USD1,760 per hour or from an independent unrelated enterprise at a cost of USD1,785 per hour. In this instance, the CUP Method can be adopted for benchmarking the international transaction, where Concern "A" chooses to avail the legal counseling services from Concern "B". However it needs to cautioned that whilst justifying the payment for the Intra-Group services, the differential sum of USD20/hour needs to be adjusted for factors such as geographical differences, dissimilar market conditions, contractual differences, terms and conditions governing the payment for services received etc.

However where comparable prices are not available, such an absence precludes the tax payer from employing

the CUP Method to justify the charges incurred in respect of the Intra-Group services availed by the taxpayer. Under such circumstances, other appropriate methods such as the Cost Plus Method etc. may be utilised.

The result under the Cost Plus Method is more reliable, if the gross margin can be accurately determined for the taxpayer and the comparable transaction. This is possible provided the method of treatment of cost is uniform. However, due to the paucity of information, it is not practically feasible to determine the method of determining costs and expenditures of the comparable companies.

Further, the method of treatment of cost differs from company to company. Due to the paucity of information enabling any adjustments to gross margin and lack of consistent data the Cost Plus Method would generally be considered infeasible to determine the Arm's Length price of the Intra-Group services.

Another factor which precludes the applicability of the Cost Plus Method is the determination of the appropriate mark-up which should be earned by the entity rendering the Intra-Group service. The mark-up to be earned by the service recipient ought to appropriately reflect the role played by the service provider, the responsibilities assumed and the nature and complexity of the services rendered. This aspect is extremely vital as in such a circumstance, the remuneration or the compensation to be provided to the renderer of service must be reflective of the role assumed by the service provide rather than the kind of services rendered.

For example, where the role of the service provider is in the nature of a mere pass through entity or an intermediary, the appropriate compensation to be received by the service provider ought to reflect the performance of the pass through/intermediary functions rather than the performance of the services themselves.

CIRCUMSTANCES UNDER WHICH THE RENDERING OF INTRA-GROUP SERVICES DOES NOT CREATE ANY CHARGE

Identical services or duplicity of services

No charge should be levied in respect of such Intra-Group service which is rendered by a member of an MNE which mirrors a service that another member forming part of the same MNE is performing for its own benefit.

Shareholder Activities

As has been elucidated in the preceding paragraphs, shareholder services represents such services that would generally be resorted to solely due to the fact that the entity rendering such services possesses an ownership interest in one or more group entities.

The following flow chart illustrates the test for determining the chargeability or other wise in respect of Intra-Group services: **(Chart 1).**

METHOD ADOPTED FOR THE CHARGING OF A MANAGEMENT FEE

Direct Method

This method if adopted by an Associated Enterprise to charge a fee for management services rendered to its affiliates would at times provide a basis for the determination of the ALP in respect of the management charges.

Eg. Where an Associated entity has been charged in respect of a service rendered to it by its affiliate and where the affiliate also renders similar services to independent unrelated entities, it would not be a constraint to determine the ALP in respect of such services rendered to the Associated Enterprise. The ALP in this instance would be the price charged by the service provider to the independent service recipient

Indirect Method

Where an Associated entity renders management services solely to its affiliates or where there are no identifiable means to measure the cost of services rendered by the Associated entity to its affiliates, the management charges would be on the basis of a cost allocation or cost apportionment.

Eg. Where an Associated entity provides services in respect of Information Technology upgradation for the entire MNE group, the allocation of management charges to every service recipient in the MNE set up might be on the basis of a cost apportionment/ allocation on the basis of the number of workstations employed by each service recipient in the MNE group.

Where the indirect method has been adopted to charge management fees, care should be taken to ensure that the basis followed for the allocation/ apportionment of costs is rational, scientific and systematic. In other words the allocation key employed should be reflective of recognised accounting principles and sound commercial expediency.

It needs to be mentioned that the MTPG specifically frowns on the adoption of turnover as a 'blanket allocation key' for the allocation of Indirect charges[11].

Functional Analysis

A function asset risk analysis of the constituents in an MNE would facilitate not only the reasonableness of the charge but also the nexus between the activities of a service recipient and the need for availing management services. The OECD states that "It may be helpful to perform a functional analysis of the various members of the group to

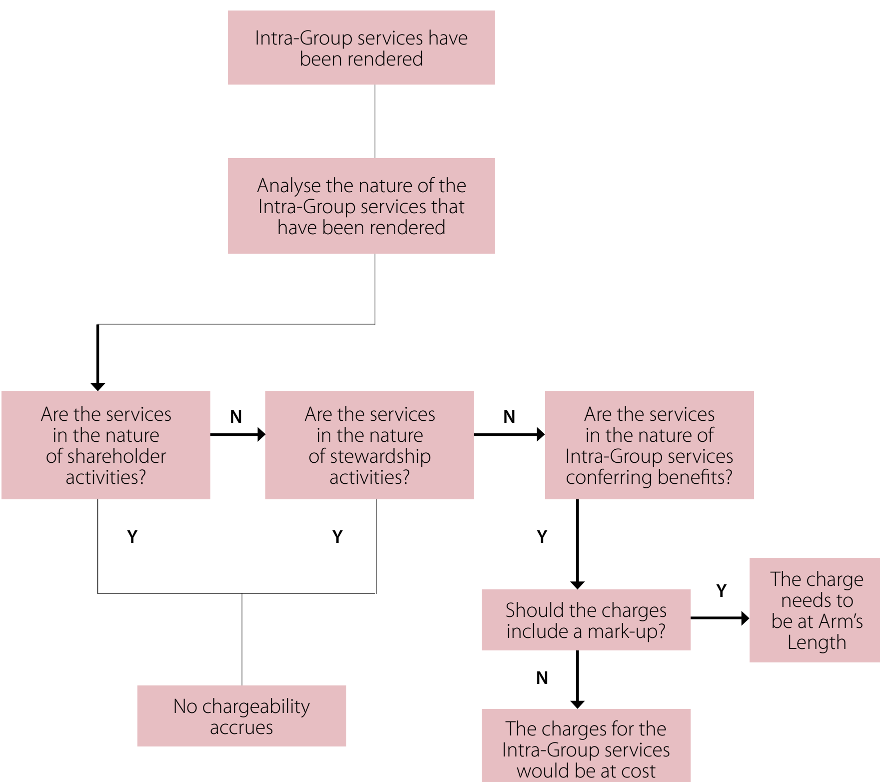


Chart 1

[11] *Paragraph 20.5 of the MTPG*

establish the relationship between the relevant services and the member's activities and performance. In addition it may be necessary to consider not only the immediate impact of a service, but also its long term effect bearing in mind that some costs will never actually produce the benefits that were reasonably expected when they were incurred."[12]

GUIDELINES PERTAINING TO INTRA-GROUP SERVICES AS PER THE MALAYSIAN TRANSFER PRICING GUIDELINES 2012

The Transfer Pricing provisions in Malaysia are contained within the Income Tax Act 1967 (hereinafter referred to as the "Act") and the Income Tax Rules 1967 (hereinafter referred to as the "Rules").

The MTPG vide Part VI of the said document postulates specific guidelines with respect to factors such as:

- Delineation between chargeable and non-chargeable services;
- Characteristic features and distinction between core and incidental services;
- Demarcation between Intra-Group services and shareholder/ stewardship activities;
- Circumstances under which services are to be charged out with a mark-up

Since the MTPG derives its content and colour from the OECD Guidelines, most of the critical tenets involving Intra Group services mirror the propositions of the OECD Guidelines. Some of the key elements propounded by the MTPG *vis-à-vis* Intra-Group services are:

- No Intra-Group service to be incorporated for Shareholder activities, duplicative services, services that provide passive/ incidental association benefits and for On-call services;[13]
- Charges for the Intra-Group services to be commensurate with the relative benefits derived from such services;[14]
- Specialised services such as engineering services in the Oil & Gas industry might warrant a higher mark-up;[15]
- Where a Malaysian entity is the recipient of an Intra-Group service, a mark-up by an overseas AE service provider fulfilling an Arm's Length requirement in the concerned AE's country need not automatically be deemed Arm's Length in Malaysia;[16]
- In charging for the provision of services, a service provider can adopt either the Direct Method or the Indirect Method of charge;[17]
- The Indirect charge method is based upon cost allocation and apportionment with reference to an allocation key which must be appropriate to the nature and purpose of services rendered[18]

TRANSFER PRICING AUDITS AND INTRA-GROUP SERVICES

Justification for the payments made in respect of Intra-group services from the stand point of the taxpayer, at times may genuinely result in a stretch of resources and also an exasperating consumption of time, and effort. The level of data/information required by the tax authorities is generally exhaustive and an added complication in this regard would be the lag between the time such Intra-Group services have been received/ rendered and the time at which the case of the taxpayer comes up for scrutiny by the tax authorities in a transfer pricing assessment.

The probable questions that a taxpayer might need to render answers to at the time of a transfer pricing assessment are as elucidated herein below:

EVIDENCE OF THE INTRA-GROUP SERVICES ACTUALLY HAVING BEEN RENDERED TO THE ASSESSEE

The tax authorities would endeavour to satisfy themselves that there was actually a rendering of Intra-Group services to the taxpayer by one or more members of the Multinational Enterprise of which the taxpayer is a constituent. In order to obtain conclusive evidence with respect to such a fact, the tax authorities would require the assessee to produce

[12] *Paragraph 7.32 of Chapter VII of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*
[13] *Paragraph 20.3 of the MTPG*
[14] *Paragraph 20.4 of the MTPG*
[15] *Paragraph 20.7 of the MTPG*
[16] *Ibid*
[17] *Paragraph 20.5 of the MTPG*
[18] *Ibid*

appropriate information/evidence which would provide adequate and sufficient proof of Intra-Group services having been availed. The tax authorities would require the taxpayer to demonstrate the following with respect to the Intra-Group services:

- Evidence illustrating negotiations between the provider and recipient of services which would help to effectively dispel any notion that the recipient of the Intra-Group service paid an amount in excess of the Arm's Length Price for having availed the Intra-Group services;
- Copies of agreement entered into between the service provider and the recipient for the provision and availing of Intra-Group services. The agreement must comprehensively lay down the nature and scope of the Intra-Group services that are envisaged from the perspective of both the service provider as well as the service recipient;
- Detailed workings representing the calculation of the charges for Intra-Group services and comparable data and the basis and source by means of which such comparable data has been obtained in cases where the CUP method has been adopted;
- Comprehensive calculations detailing the apportionment of expenses and the basis adopted in respect to such an allocation of expenses;
- Group policy with regard to the treatment of Intra-Group services and the basis of recovery of Intra-Group services by the designated service providing entity.
- Where select/key employees of an AE have been deputed/seconded for a training provided by independent third party training organisations, the furnishing of the course completion certificates would need to be furnished as an evidence of the training services having been rendered to the deputed/seconded employees of the Associated Enterprise

NECESSITY FOR AVAILING THE INTRA GROUP SERVICES

The taxpayer needs to demonstrate that there was a need for him to avail the services rendered by an affiliate in the Multinational Enterprise. The services rendered by the affiliate to the assessee must not constitute "duplication" of the activities being hitherto carried on by the assessee in the normal course of business.

The taxpayer would be required to justify the necessity for having availed the Intra-Group services, by providing *inter alia* justifications of the following nature:

- The business which the taxpayer is engaged in is still in a very nascent stage requiring continuing support from the corporate to shore up the prospects of the taxpayer in the various spheres such as marketing, sales and customer service;
- The business operation carried on by the taxpayer constitute a niche business and thereby requires a conglomeration of skill sets predominantly different from the skill sets demanded by business in general;
- The services rendered by the service provider to the taxpayer is with a view to improving the business prospects of the latter which in-turn would lead to tangible benefits in the form of an increase clientele base and enhanced brand patronage;
- As a corollary to the fact of the business of the taxpayer being a niche industry demanding unique skill sets, it is but inevitable that the required technicalities and manpower are in scarcity. Consequently the taxpayer has to revert to its parent for support in the areas where the latter enjoys expertise.

NEXUS BETWEEN THE INTRA-GROUP SERVICES AND ACCRUAL OF BENEFITS

The taxpayer is required to demonstrate benefits accrued as a result of availing such management services. Such benefits may either be tangible or intangible. Some examples of the benefits which might accrue to the taxpayer as a result of availing management services are as tabulated herein ***(see Table 2).***

The inability of the taxpayer to furnish the documentation as demanded by the tax authorities or a default by the taxpayer in providing the requisite information as requested for by the tax authorities would result in the undesirable consequence of the tax authorities taking a stance that the payment of Intra-Group service charges is not at Arm's Length as the said payments are in the nature of

Tangible benefits	Intangible benefits
Reduced costs as a result of implementation of improved processes	Enhanced brand patronage
Increase in market share	Increased goodwill
Consistent increase in revenue	

Table 2

a tribute payable by the subsidiary to its holding company. The prime contentions of the Transfer pricing authorities in disallowing payments in the nature of management charges would be:

- No specific tangible services are rendered against the payments as the benefits are not identifiable;
- No evidence to prove that the company effecting the payments derives any commercial benefits in return for such payments; and
- No data to prove that the comparable companies make similar payments;

DOCUMENTATION AND RISK MITIGATING MEASURES

In order to demonstrate to the conviction of the Transfer Pricing Officer that the payment for the management charges were genuine and were necessitated on account of business considerations and that the payments do not just constitute tribute payments the assessee needs to maintain the following documentation as a support for the charge of management/technical services ***(see Table 3)***.

Table 3

Sl No	Particulars
1	Cost sharing agreement for rendering management/technical services;
2	Documents supporting: • Categories (such as chargeable and non chargeable) into which the management/technical services rendered are classified; • Basis for the categorisation; • Reasons why each particular type of activity is considered to be chargeable or non-chargeable; • Nature of technical/management support; • Reasons why support is required by the Malaysian company; • Benefit to the Malaysian company from such a support. • Reason for availing such service
3	• Documents supporting: • Basis of charge of cost to the Malaysian company such as • Time sheets of personnel working in respect of the Malaysian company, invoices for other direct costs attributable to the Malaysian company; • In case time sheets are not available, the basis of allocation of such costs • Indirect costs being allocated to the Malaysian company – invoices for total indirect costs and the basis for allocating the same; and • Basis of allocation of and the reasons for adopting the specific method of allocation.
4	Basis of allocation of costs to other group companies
5	Applicability of withholding tax on the cross charge of expenses
6	Minimisation of the PE exposure in case it involves deputation of employees to other countries
7	Wherever possible, certificate from an independent professional authorised to certify such document regarding the basis of charging costs, calculation of costs as per the basis, and the basis of apportionment of overhead costs, etc and that no mark up has been charged to the Malaysian company. Such a certificate would be of assistance in justifying the charge of cost during income tax audits.

The above mentioned proofs are required to show that management services have been rendered and a fee is required to be paid for these services.

CONCLUSION

In an era characterised by a rapid explosion of technology and evolution of innovative ideas and concepts, it is but imperative that companies resort to the twin pronged strategies of differentiation and innovation so as to be the pioneers in offering cutting edge products and services to the customers. This being the case, there would be a proliferation of niche ideas and unique value added offerings in the global market. With a view to shoring up the prospects of being at the forefront of the knowledge revolution, large multinational groups would adopt conventional as well as unconventional measures to improve their market share and to enhance brand loyalty.

With the tax authorities tending to adopt rigorously rigid and stringent postures when it comes to the treatment of management charges, a taxpayer having incurred a substantial amount of expenditure on Intra-Group services would invariably tend to view the "spectre" of a Transfer Pricing assessment with trepidation and anxiety in the same manner as a Damocles would have viewed a throne with the sword hanging perilously over his head.

Venkataraman Ganesan *is a Senior Manager, Transfer Pricing with Deloitte KassimChan Tax Services Sdn Bhd / Deloitte Touche Tohmatsu Tax Services Sdn Bhd. He can be contacted at veganesan@deloitte.com.*

The views expressed in this article solely constitute the personal opinion of the author and are not representative of the firm in which he is employed.

A SUMMARY UPDATE OF THE CP58 CONUNDRUM

Seah Siew Yun

A company has to prepare and furnish each agent, dealer and distributor, a copy of the prescribed Form CP58 containing particulars of payments (whether in monetary form or otherwise) made by the company to the agent, dealer or distributor, arising from sales, transactions or schemes carried out by the agent, dealer or distributor.

The announcement of the requirements of Section 83A of the ITA on 23 December 2011 and the issuance of Form CP58[2011], a prescribed form for agents, distributors and dealers, by the IRB on 10 April 2012 led to a slew of meetings and clarifications followed by concessions and issuance of guidelines by the IRB. CTIM and industry players' perseverance in seeking clarifications led to the issuance of a Concession (dated 22 March 2013), IRB Guidelines (dated 1 July 2013) and finally an Addendum to the Guidelines (dated 15 Aug 2013) to clarify the form, scope and timing for the preparation and issuance of Form CP58. During this period, CTIM members were constantly updated of the development in various e-CTIMs. For more details see e-CTIM TECH issues, No. 82-2012, No. 29-2013, No 42-2013, No. 78-2013 and No. 106-2013.

The soft copy of the new Form CP58 [Pin. 1/2013]) is now available in the IRB website. By downloading the information page in Excel format from the IRB's website, the payer company can prepare the reporting requirements in CD/DVD-ROM. The submission of CD/DVD-ROM to the IRB has to be accompanied by a confirmation letter regarding information on the recipients and payments. The specific format of Appendix A can also be downloaded from the IRB's website. The CD/DVD-ROM is to be prepared in two copies. One is for submission by hand or by post to the IRB branch office handling the payer company's Q file (companies without a Q file will have to send it to the nearest IRB branch office) and the other is to be kept by the payer company for future examination by the IRB. Form CP58 must be retained by the payer company for a period of seven years from the end of the calendar year in which the payment was made.

In view of the uncertainty and administrative issues with regards to the CP58, the IRB had graciously granted extension of time for the submission of Form CP58 i.e. since the saga of the Form CP58 commenced some three years ago. The compliance requirement does not merely involve certain industries such as Multilevel Marketing (MLM) dealers and distributors but also include all other sectors that incentivise their agents, dealers and distributors. Guidance can be sought for the compliance requirements from the following:

- Guidance notes on the filling up Form of CP58

- Guidelines for Form CP58 issued by the IRB on 1 July 2013
- Addendum to the above Guidelines issued on 15 August 2013
- Guidelines on submission of Form CP58 information (for soft copy submission)

Form CP58 only needs to be prepared and issued by the payer company to agents, dealers and distributors if the total value of monetary and non-monetary incentives for a calendar year exceeds RM5,000. Note that even if the RM5,000 is not exceeded, the payer company must still prepare the Form CP58 upon request by the agents, dealers or distributors and a copy of which must be retained by the payer company

For non-monetary incentives such as motor vehicle or house, the value to be reported is the actual amount incurred by the payer company and generally it should be a form of expense claimable under Section 33(1) of the ITA. For both monetary and non-monetary incentives received, the recipients have to declare the benefit in their tax return in the year of assessment in which the incentives are received.

For the sake of clarity, some examples set out in both the Guidelines are reproduced below for covering situations where Form CP58 must be prepared and situations where it is not required:

INCENTIVES SUBJECT TO REPORTING IN CP58

- Two agents receiving commission / student referral fees of RM15,000 each. Form CP58 have to be prepared for each of the agents and the payer company can claim the expenses.
- Incentive trip of RM8,000 to New Zealand for achieving sales target to be paid to the Agent A. CP58 is to be prepared for the agent and the payer company can claim the expense. If Agent A instead awards the New Zealand trip to another distributor, Agent B without consideration, the payer company still needs to prepare Form CP58 for Agent A who is the agent eligible for the award.
- A payer company organised a seminar in Thailand for the purposes of increasing product knowledge and dealers' leadership skills. Form CP58 is to be prepared and the payer company can claim the expenses.
- Distributor C was awarded a house worth RM500,000 after achieving the sales target. Form CP58 has to be prepared and the payer company can claim the RM500,000 as deductible expense.
- A cosmetic company awarded its own cosmetic products to an agent who achieved the sales target. Form CP58 is to be prepared for the agent.
- Lucky draws such as house, car or computer that is awarded as a result of the agent achieving sales target has to be reported in Form CP58.

INCENTIVES NOT SUBJECT TO REPORTING IN CP58

- Bulk discount and prompt payment discount which are not incentives.
- Free gifts given as a promotion of the company's products to purchasers making purchases exceeding a specified amount and where the purchaser in turn brings in other purchasers to buy the company's products for a specified amount. The purchasers are not appointed agents but mere customers and hence Form CP58 is not required to be prepared for such purchasers. Appreciation night hosted by a payer company in Malaysia for the appreciation of contribution made by the agents, dealers or distributors who have achieved sales targets including events such as Gala Dinner, entertainment, and accommodation provided to the invited agents, dealers or distributors.
- Dinner or entertainment events provided by the payer company in Malaysia in conjunction with the celebration of Hari Raya Puasa, Chinese New Year, Deepavali, Christmas, company anniversaries and other festivals.
- Conventions organised for the agents in Malaysia especially for leadership training sessions, management sessions and other activities for the purpose of increasing sales and which do not form part of the travel programme or package where it has been treated as non-cash incentive.

It is comforting to note that the IRB was receptive to suggestions from professional bodies and industry players that cleared doubts on the scope of application of the Form CP58. Whilst in the past companies would have still issued income statements for monetary payments, the Form CP58 requirement is more extensive and companies have to contend with an additional compliance requirement that has implications on cost of doing business.

***Seah Siew Yun** is the Tax Senior Executive Director at SJ Grant Thornton. She can be contacted at seah@gt.com.my*

Technical Updates

The technical updates published here are summarised from the selected government gazette notifications published between 16 May 2013 and 15 August 2013 including Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Royal Malaysian Customs Department and other regulatory authorities.

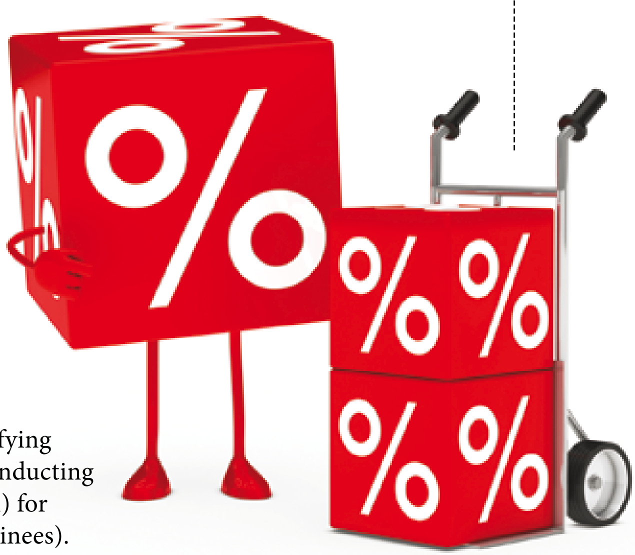
INCOME TAX

Income Tax (Deduction for Cost of Acquisition of Foreign Owned Company) Rules 2013

The Income Tax (Deduction for Cost of Acquisition of Foreign Owned Company) Rules 2013 [P.U.(A) 218] were gazetted on 4 July 2013 and are deemed to have come into operation on 3 July 2012. The Rules provide a deduction to a qualifying local company on the cost of acquisition of a qualifying foreign-owned company and apply to a qualifying local company that submits an application to the Malaysian Investment Development Authority (MIDA) on or after 3 July 2012 but not later than 31 December 2016.

Income Tax (Deduction for Training Costs under Skim Latihan 1Malaysia for Unemployed Graduates) Rules 2013

The Income Tax (Deduction for Training Costs under Skim Latihan 1Malaysia for Unemployed Graduates) Rules 2013 [P.U. (A) 260] were gazetted on 5 August 2013 and are deemed to have come into operation on 1 June 2012. The Rules provide a double deduction to a qualifying company on expenses incurred for conducting the 1Malaysia training scheme (SL1M) for Malaysian unemployed graduates (trainees).



Income Tax (Exemption) (No. 10) Order 2013

The Income Tax (Exemption) (No. 10) Order 2013 [P.U.(A) 262] was gazetted on 6 August 2013 and came into operation on 12 August 2013. The Order provides a 100% income tax exemption to BNM Kijang Berhad or any holder of Sukuk Kijang on any income derived from Sukuk Kijang. Income exempted under this Order will not be subject to withholding tax under Section 109 or 109B of the Income Tax Act 1967 (ITA).

Public Ruling No. 5/2013: Taxation of Unit Holders of Unit Trust Funds

Public Ruling (PR) No. 5/2013 issued on 23 May 2013 explains the tax implications on income distributions received by unitholders from unit trusts.

Public Ruling No. 7/2013: Unit Trust Funds Part I – An Overview

PR No. 7/2013 issued on 28 May 2013 explains the regulatory framework and key features of unit trust funds/property trust funds other than a real estate investment trust (REIT) or a property trust fund (PTF) governed by the Securities Commission.

Public Ruling No. 6/2013: Unit Trust Funds Part II – Taxation of Unit Trusts

PR No. 6/2013 issued on 23 May 2013 explains the tax treatment of unit trust funds and property trust funds other than a REIT or PTF governed by the Securities Commission.

Public Ruling No. 8/2013: Gratuity

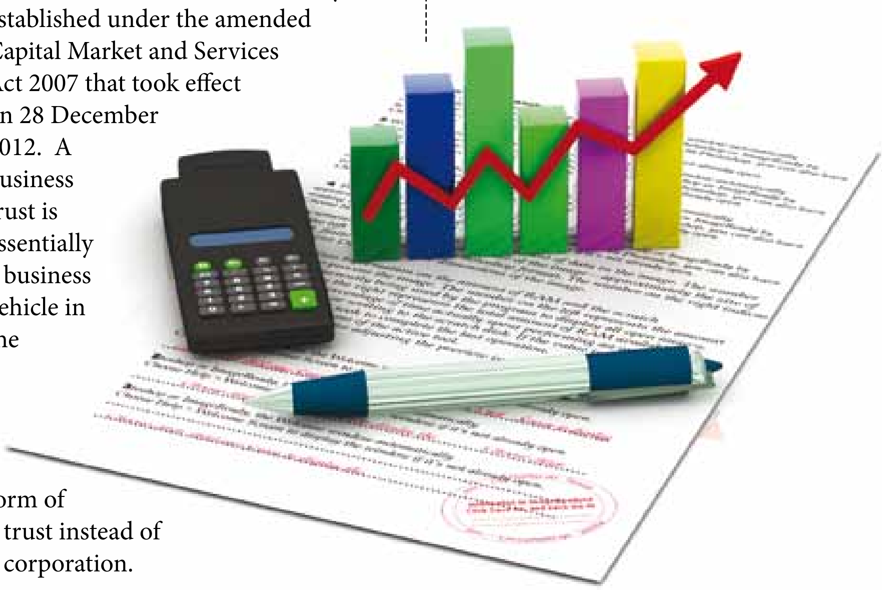
PR No. 8/2013 issued on 25 June 2013 replaces PR No. 10/2011 and provides an explanation on how to characterise lump-sum payments received by employees upon the termination of their employment for tax purposes and the tax treatment of such payments.

Public Ruling No. 9/2013: Special deduction for expenditure on treasury shares

PR No. 9/2013 issued on 27 June 2013 provides an explanation on the special deduction for expenditure on treasury shares that was proposed in Budget 2013 and introduced as an amendment in Section 34D of the ITA.

Public Ruling No. 10/2013: Taxation of business trust

PR No. 10/2013 issued on 3 July 2013 provides an explanation on the tax treatment accorded to a business trust registered with the Securities Commission of Malaysia, a new investment vehicle in Malaysia established under the amended Capital Market and Services Act 2007 that took effect on 28 December 2012. A business trust is essentially a business vehicle in the form of a trust instead of a corporation.



Guidelines on the tax treatment of Malaysian Financial Reporting Standards (MFRS) 5

The IRB has issued "Guidelines for Income Tax Treatment of Malaysian Financial Reporting Standards (MFRS) 5: Non-Current Assets Held for Sale and Discontinued Operations" dated 4 June 2013 that would be effective from YA 2013. The guidelines set out the income tax treatment of the adoption of the MFRS 5 and they are supported by the relevant provisions in the ITA and/or the Public Ruling where applicable.

Guidelines on the tax treatment of Malaysian Financial Reporting Standards (MFRS) 123

The IRB has issued "Guidelines for Income Tax Treatment of Malaysian Financial Reporting Standards (MFRS) 123: Borrowing Cost" dated 4 June 2013. The guidelines set out the income tax treatment of the adoption of the MFRS 123 and they are supported by the relevant provisions in the ITA and/or the Public Ruling where applicable.

Guidelines on the tax treatment of Malaysian Financial Reporting Standards (MFRS) 140

The IRB has issued "Guidelines for Income Tax Treatment of Malaysian Financial Reporting Standards (MFRS) 140: Investment Property" dated 4 June 2013. The guidelines set out the income tax treatment of the adoption of the MFRS 140 and they are supported by the relevant provisions in the ITA and/or the Public Ruling where applicable.

Guidelines on Form CP58

The IRB has issued "Garis Panduan Berkaitan Tanggungjawab Mengemukakan Butiran Bayaran Kepada Ejen, Pengedar Atau Pengagih Dalam Borang CP58 Bagi Maksud Peruntukan Seksyen 83A Akta Cukai Pendapatan 1967" dated 1 July 2013 (available only in Bahasa Malaysia). The guidelines provide an explanation on the requirements to furnish the Form CP58 to the agent, dealer and distributor under Section 83A of the ITA.

2013 Tax Audit Framework

The IRB has issued a 2013 tax audit framework that covers tax audits, petroleum audits and transfer pricing audits. The audit framework took effect from 1 April 2013. It clarifies the role and responsibilities of the IRB, the taxpayer and the tax agent, and sets out the penalties that will be imposed depending on the situation. It also provides that if there is any unprofessional conduct on the part of the taxpayer or the IRB, either party has the right to make a complaint to the relevant body.

Announcement on the definition of "personal computer"

On 15 July 2013, the IRB made an announcement on its website to advise that for the purpose of personal relief under Section 46(1)(j) of the ITA, the Ministry of Finance has defined personal computer as being a desktop computer, a laptop computer, a Notebook and an Ultrabook. A personal tax deduction of up to RM3,000 is given once in every three years to an individual for the purchase of a personal computer.

STAMP DUTY

Stamp Duty (Exemption) (No. 9) Order 2013

The Stamp Duty (Exemption) (No. 9) Order 2013 [P.U. (A) 180], gazetted on 14 June 2013, provides a stamp duty exemption on instruments relating to Islamic banking, *takaful* and Islamic capital market activities in order to promote the Malaysian International Islamic Financial Centre (MIIFC). The exemption applies to instruments executed between 1 January 2007 and 31 December 2016 by a qualifying person and a resident or non-resident customer for transactions relating to Islamic banking or *takaful* activities in currencies other than the Ringgit; and instruments relating to the issuance of Islamic bonds in Ringgit or foreign currencies approved by the Securities Commission from 1 January 2007 to 31 December 2016.

Stamp Duty (Exemption) (No. 10) Order 2013

The Stamp Duty (Exemption) (No. 10) Order 2013 [P.U.(A) 237] gazetted on 24 July 2013 provides for an exemption on stamp duty on all instruments executed by BNM Kijang Berhad in relation to Sukuk Kijang and executed by any person in relation to the issuance of transfer of Sukuk Kijang . The Order came into effect on 25 July 2013.

REAL PROPERTY GAINS TAX

Real Property Gains Tax (Exemption) (No. 2) Order 2013

The Real Property Gains Tax (Exemption) (No. 2) Order 2013 [P.U. (A) 236] gazetted on 24 July 2013 provides a real property gains tax exemption to any person in respect of chargeable gains accruing on the disposal of any chargeable assets in relation to Sukuk Kijang.

Guidelines on real property gains tax

The IRB has introduced a new set of guidelines on real property gains tax (RPGT) dated 18 June 2013 to replace the earlier guidelines dated 2 February 2010 (available only in Bahasa Malaysia). The guidelines provide a brief history of the RPGT regime, explain and provide examples that illustrate the RPGT position for the period between 1 January 2010 to 31 December 2011, between 1 January 2012 to 31 December 2012, and with effect from 1 January 2013.

LABUAN

Labuan Business Activity Tax (Forms) Regulations 2013

The Labuan Business Activity Tax (Forms) Regulations 2013 [P.U. (A) 224] gazetted on 12 July 2013 provide a list of Schedule of Forms to be used for the purposes of the Labuan Business Activity Tax Act 1990. These Regulations revoke the Labuan Offshore Business Activity Tax (Forms) Regulations 1991 [P.U.(A) 157] and are deemed to have come into operation on 11 February 2010.

Revised guidelines on establishing a LITC under the GIFT programme

The revised guidelines on the establishment of a Labuan International Commodity Trading Company (LITC) under the Global Incentives for Trading (GIFT) programme have been issued and took effect from 26 June 2013. The guidelines supersede the guidelines issued on 15 January 2013 to incorporate the announcement of the Prime Minister of Malaysia that the GIFT programme would be widened to allow a LITC to deal with residents, in any currency other than the Ringgit, in respect of the commodities of petroleum and petroleum-related products including liquefied natural gas (LNG) and coal.

Guidelines on establishing and operating a Labuan leasing business

The Labuan Financial Services Authority (LFSA) has issued revised guidelines on the establishment and operation of a Labuan leasing business and an Islamic leasing business in the Labuan International Business and Financial Centre and the guidelines came into effect from 1 August 2013.

CUSTOMS AND EXCISE

Customs (Prohibition of Exports) (Amendment) Order 2013

Custom Act 1967 [P.U. (A) 177/2013

Effective from 12 June 2013, Item 7 [Column (2)] of Part 1 of the Third Schedule to the Customs (Prohibition of Exports) Order 2012 has been amended from "Edible bird nest (except raw-cleaned, 1,000 grammes and below per person, hand carried and applicable to Peninsular Malaysia and Labuan only)" to "Edible bird nest (except hand carried of any weight of edible birds' nest and applicable to Peninsular Malaysia and Labuan only)".

Customs (Provisional Anti-Dumping Duties) Order 2013

Countervailing and Anti-Dumping Duties Act 1993 and Customs Act 1967 [P.U. (A) 232/2013]

Effective from 20 July 2013 to 15 November 2013, importation of goods listed below from exporters (as specified) from the following countries are subject to anti-dumping duties (**see Table 1**).

Please refer P.U (A) 232/2013 for details

Customs (Prohibition of Exports) (Amendment) (No. 2) Order 2013

Customs Act 1967 [P.U. (A) 235/2013]

Effective from 23 July 2013, rubber and rubber products (see details below) have been listed as Item 38 and Item 39 in the Third Schedule of the Customs (Prohibition of Exports) Order 2012. Export of such rubber and rubber products must be accompanied by an export licence from the Malaysian Rubber Board. (**see Table 2**).

Please see P.U. (A) 235/2013 for details.

*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.*

No	HS Code/ (AHTN Code)	Description of goods	Country	Exporter/producer	Rate of duty [% of the Cost, Insurance and Freight (CIF)]
1	7210.12 200 (7210.12 90 00)	Electrolytic Tinplate	Republic of Korea	1. Dongbu Steel Co. Ltd. 2. SHINHWA SILUP Co, Ltd. 3. TCC Steel 4. Others	13.84% 3.31% 4.46% 25%
			People's Republic of China	1. Baoshan Iron & Steel Co. Ltd. 2. Zhongshan Zhongyue Tinplate Industrial Co. Ltd. 3. Shanghai Meishan Iron & Steel Co. Ltd. 4. Handan Steel Group Hengshui Cold Rolling Steel Co. Ltd. 5. Others	NIL NIL NIL 7.4% 16%

Table 1

Item	Description of goods	Chapter /Heading/ Subheading	Destination	Manner of export
'38	Rubber and rubber products 1. Natural rubber, balata, gutta-percha, guayule, chicle and similar natural gums, in primary forms or in plates, sheets or strips	40.01	All countries	That the export is accompanied by the CC and DD Certificate issued by or on behalf of the Director-General of the Malaysian Rubber Board
	2. Synthetic rubber and factice derived from oils, in primary forms or in plates, sheets or strips; mixtures of any products of heading 40.01 with any products of this heading, in primary forms or in plates, sheets or strips	40.02		
	3. Reclaimed rubber in primary forms or in plates, sheets or strips	40.03		
	4. Waste, parings and scraps of rubber (other than hard rubber) and powders and granules obtained therefrom	40.04		
	5. Compound rubber, unvulcanised, in primary forms or in plates, sheets or strips	40.05		
	6. Other forms (for example, rods, tubes and profile shapes) and articles (for example, discs and rings) of unvulcanised rubber gloves, mittens and mitts for all purposes, of vulcanised rubber	40.06		
'39	Gloves, mittens and mitts for all purposes, of vulcanised rubber	4015.11 4015.19	All countries	That the export is accompanied by the EE Certificate or a letter of exemption issued by or on behalf of the Director-General of the Malaysian Rubber Board

Table 2

Siti Fatimah Mohd Shahrom

CASE

MBM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri
Kuala Lumpur High Court, Civil Appeal No. R2-12-04-2010

FACTS

The taxpayer was in the business of selling both brand new and used cars. The used cars were sold vide the secondary sales channel and were sourced from the new cars range, which were registered under the taxpayer's name and driven for a prescribed distance. The used cars were immediately available for sale to the public and were priced lower than the brand new cars.

Part of the taxpayer's advertising and promotion strategy to create and sustain the brand solely to promote the business of the taxpayer was to support and organise various high profile events that attract lots of publicity. The taxpayer sponsored a fashion show to profile itself. The taxpayer also sent its dealers who met their sales target to Germany.

The taxpayer was contractually and legally bound to pay the holdback margins and target and standard margins to its dealers who met their sales target.

The Revenue disallowed the expenses incurred by the taxpayer to sponsor the fashion show and sending the dealers to Germany on the basis that the expenses were not wholly and exclusively incurred under Section 33(1) of the Income Tax Act 1967 ("ITA"), and as for the margins, on the basis that it was not ascertainable. The Revenue also disallowed the deduction claimed under Section 35 of the ITA on the written down value of the used cars on the basis that they were withdrawn as stock in trade for the taxpayer's own use.

The Special Commissioners of Income Tax ("SCIT") dismissed the taxpayer's appeal. Aggrieved by the decision, the taxpayer appealed to the High Court.

ISSUES

The main issues before the High Court were as follows:

- Whether the payments to sponsor the fashion show and sending the dealers to Germany were deductible under Section 33(1) of the Income Tax Act 1967 ("ITA");
- Whether the target and standard margins and holdback margins were deductible under Section 33(1) of the ITA; and
- Whether the cars sold in the secondary sales channel were stock-in-trade withdrawn for the taxpayer's own use as envisaged under Section 24(2) of the ITA.

DECISION

- ***Fashion show and dealers incentive***

On the first issue, the SCIT disallowed the deduction for the fashion show on the basis that it was sponsorship. On appeal, the High Court disagreed with the findings of the SCIT and held that the payment was made by the taxpayer to promote its business. The purpose of the payment was to enhance the taxpayer's business prominence, by prominently displaying its brand name and logo and associating its brand with fashion in order to market its cars as fashionable cars. The most important aspect in the taxpayer's selling techniques was its association with fashion, celebrity and events to maintain brand value and presence.

The High Court further held that the SCIT was erroneous in deciding that the other expenses incurred by the taxpayer were entertainment expenses under Section 18 of the ITA because they were expenses paid to non-employees. The taxpayer had aimed for high sales and the sales incentive trips were to motivate individual dealers to meet their sales target and sell more cars. In dismissing the SCIT's decision on this issue, the High Court found that it has been held consistently by the Superior Courts that business promotion expenses incurred with the sole purpose of promoting the business are deductible under Section 33(1) of the ITA.

- ***Target and standard margins and holdback margins***

On the deductibility of margins, the SCIT did not recognise the expenses payable to the taxpayer's dealers and holdback margin as deductible expenses under Section 33(1) of the ITA on the basis that they were based on performance of dealers which was not ascertainable, because legal obligation will only arise upon performance. The High Court disagreed with the SCIT and held that the word "incurred" for the purposes of Section 33(1) of the ITA was not confined to actual disbursement. "Incurred" also includes expenses of a sum of which there is an obligation to pay, or outgoings to which the taxpayer is definitely committed in the year of income. The pertinent question to be asked is whether the taxpayer was under a legal obligation to incur the expenditure in respect of the margins. In this case, the margin was calculated as per the formula prescribed in the dealer agreement. Under the agreement, the taxpayer was under a contractual legal obligation to make the payment. A legal obligation had incurred on the taxpayer to pay the margins, relying on the principles in *Exxon Chemical (M) Sdn Bhd v KPHDN [2005] 4 CLJ 810.*

The next question which arose was whether the margins incurred were sufficiently accurate or capable of reasonable estimate. In determining the margins, the taxpayer and third party dealers were required to apply the rates prescribed in the dealer agreement. The margins were certain and definite as it was determined according to the rates prescribed in the dealer agreement. It was found that as the margins were paid to third party dealers, it had to be certain and accurate as otherwise the third party dealer would have commenced legal action against the taxpayer. It was thus held by the High Court that since the margins were sufficiently accurate or capable of reasonable estimate, the issue of it being incapable of being inaccurate could not arise.

- ***Withdrawal of stock***

On the second issue, the SCIT found that the written down value of the used cars should not be allowed as deduction under Section 35 of the ITA on the basis that the taxpayer had withdrawn its stock in trade for its own use when the new vehicles were registered in the taxpayer's name. Since the status of the used cars changed from the taxpayer's trading stock to its assets by the fact of registration, though the stocks were sold again, the SCIT held that it had changed its character from stock in trade to fixed assets. The High Court held that the SCIT failed to consider that the taxpayer was involved in the business of selling both brand new and used cars. Registration of the cars was done as it was a requirement under the law to enable the cars to be driven on the road to achieve the prescribed distance, and was a process which the taxpayer did in order to create stock for the secondary sales channel. It was clear that the taxpayer had two modes of earning profits in one trade. The High Court found that the particular manner in which the manufactured stock was dealt with whether by immediate sale as brand new cars or as used cars in the secondary sales channel could not alter the true character of the taxpayer's business.

The facts in this appeal were clearly distinguishable from case relied on by the Revenue in the House of Lords decision in *Sharkey v Wernher [1955] 36 TC 275*. In Sharkey, a few studs which were the taxpayer's stock in trade were transferred by the taxpayer for her own use for the purposes of recreational activity. The House of Lords in that case held that there was a withdrawal of stock for the taxpayer's own use, as the horses no longer formed part of the taxpayer's stock upon its transfer to the taxpayer's recreational activity. Further, there was no income ever brought to the taxpayer's stud farming business.

In contrast with the taxpayer's business in MBM, the vehicles continued as its stock in trade despite the registration and upon the sale in the secondary sales channel, the payment received for the registered cars were duly brought to tax. It was held by the High Court that the taxpayer's business had to be looked at as a whole set of operations directed towards producing income and the mere registration of the vehicles did not *ipso facto* mean that there was withdrawal of stock for own use. In drawing this conclusion, the High Court relied on the Australian High Court of *W. Nevill & Co Ltd v FCT (1937) 56 CLR 290* which held:

> *"In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary, for income tax purposes, to look at a business as a whole set of operations directed towards producing income."*

The Revenue is appealing against the decision of the High Court, which is currently pending at the Court of Appeal.

Siti Fatimah Mohd Shahrom
is a Senior Associate with Lee Hishammuddin Allen & Gledhill. She can be contacted at sfs@lh-ag.com

Foong Pui Chi and Anand Raj

In this case note, Foong Pui Chi and Anand Raj review the recent High Court case of Petronas Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri.

CASE

***PETRONAS Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[1]**

FACTS

PETRONAS Penapisan (Terengganu) Sdn Bhd's ("PPTSB") main source of income has always been from its principal business of refining crude oil and condensates into petroleum products and sale thereof. PPTSB also derived interest income from placements of its excess funds in short-term call deposits with commercial banks and financial institutions ("Placements"). Such interest was treated by PPTSB as gains or profits from a business income under Section 4(a) of the Income Tax Act 1967 ("ITA") for years of assessment ("YAs") 2003 and 2004.

However, following a tax audit in August 2006, the Director-General of Inland Revenue ("DGIR") took the view that PPTSB's interest income should be subject to tax under Section 4(c) and accordingly raised Notices of Assessment in Forms J charging PPTSB to additional taxes and penalties. PPTSB lodged Notices of Appeal in Forms Q to appeal against the said Forms J to the Special Commissioners of Income Tax ("SCIT"). As the Revenue subsequently agreed to remit the penalties imposed upon PPTSB under the Forms J, this appeal therefore proceeded in respect of the dispute on the tax only.

Section 4 of the ITA provides as follows:

"Classes of income on which tax is chargeable.

Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of –

gains or profits from a business, for whatever period of time carried on;

- gains or profits from an employment;
- dividends, interest or discounts;
- rents, royalties or premium;
- pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
- gains or profits not falling under any of the foregoing paragraphs."

In cases in which income is classified under Section 4(c) of the ITA (that is, a non-business source), only expenses which are incurred in the derivation of such interest income can be deducted against the same. Any business losses suffered by the taxpayer would be regarded as arising from a different source of income and such losses cannot be set off against its interest income under Section 4(c) of the ITA.

However, if such interest is treated as gains or profits arising from a business under Section 4(a) of the ITA (that is, business income), any business losses suffered (whether in regard to the same business source or another business source) can be set off against the business income (arising from the interest) and this would eventually reduce the amount of income chargeable to tax.

ANALYSIS OF PRECEDENTS

PPTSB contended that interest received from the Placements should be taxed as gains or profits from a business under Section 4(a) and not under Section 4(c) because the interest received was business income or was ancillary or incidental to its principal business. PPTSB relied upon various Malaysian superior court cases in support of its contention, such as:

***Ketua Pengarah Hasil Dalam Negeri v Pan Century Edible Oils Sdn Bhd ("PCEO")*[2]**

Like PPTSB, PCEO also carried on the business of refining (that is, refining of palm oil) and the facts in PCEO are, in general terms, analogous to the facts of PPTSB. PCEO placed its excess cash on short- and long-term deposits. The placements were done regularly and repetitively and skill was exercised to manage the placements. The Court of Appeal held that the interest received by PCEO, despite the fact that it was referred to in Section

[1] *MTKL No. R2-14-23-2011*
[2] *[2002] MSTC 3,967*

4(c) of the ITA, could nevertheless constitute business income under Section 4(a) of the ITA as such interest was receivable in the course of carrying on a business of putting the taxpayer's excess cash to gainful and profitable use by placing it on short and long-term deposits.

***American Leaf Blending Co Sdn Bhd v Director General of Inland Revenue ("ALB")*[3]**

The Court of Appeal in PCEO applied the decision of the Privy Council in ALB which held that the rents received from the letting out of property, which would ordinarily be classified under Section 4(d) of the ITA, could constitute gains or profits from a business under Section 4(a) of the ITA. The Privy Council held that the classes of income under Section 4 of the ITA are not mutually exclusive and, as such, there is room for overlapping between one paragraph and another.

***Ketua Pengarah Hasil Dalam Negeri v Isyoda (M) Sdn Bhd ("Isyoda")*[4]**

Isyoda involved a construction company which was compelled to place monies in fixed deposits for the purposes of obtaining banking facilities for its business and Isyoda succeeded before the SCIT, High Court and Court of Appeal in arguing that interest income arising from the fixed deposits falls to be taxed under Section 4(a) of the ITA.

The DGIR however urged the SCIT to apply the following cases:

***Avos (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri ("Avos")*[5]**

In the case of Avos, the taxpayer, which was also a construction company compelled to place monies with banks, lost before both the SCIT and High Court. The High Court affirmed the approach taken by the SCIT of looking at the nature of the business activities of the taxpayer and held that since Avos was not in the business of financing, the placements were not an integral part of its business. As such, income from the placements could not be treated as the business income of Avos under Section 4(a) of the ITA.

***Ketua Pengarah Hasil Dalam Negeri v Nilai Cipta Sdn Bhd ("Nilai Cipta")*[6]**

In Nilai Cipta, the taxpayer (another construction company which was compelled to make placements of funds) succeeded before the SCIT and High Court with largely similar facts as Avos and Isyoda. However, the Revenue appealed to the Court of Appeal and the Court of Appeal allowed the appeal but did not provide any grounds of judgement. Only a draft of the Court of Appeal Order was tendered before the SCIT in PPTSB's case.

DECISION OF THE SCIT

Having heard the evidence and arguments of the parties, the SCIT dismissed PPTSB's appeal in purported reliance upon the decisions in Nilai Cipta and Avos.

DECISION OF THE HIGH COURT

PPTSB appealed to the High Court and the High Court held that the decision of the SCIT was flawed for the following reasons:

The reasons behind the Court of Appeal's decision in Nilai Cipta remain speculative and PCEO is still good law.

As there is no written judgement of the Court of Appeal, the reasons behind the Court of Appeal's decision in Nilai Cipta cannot be equivocally ascertained. As such, any attempt to rely upon it would be based purely on speculation. Accordingly, the decision of the Court of Appeal in PCEO, which followed ALB, is still good law and the SCIT had erred, and disregarded the doctrine of judicial precedent, in failing to follow the binding decisions of the Privy Council in ALB and the Court of Appeal in PCEO respectively. Further, as Nilai Cipta and PCEO are both decisions of the Court of Appeal, it is therefore wrong to suggest that Nilai Cipta took precedence over PCEO.

The SCIT had disregarded primary facts found and reached a conclusion which was inconsistent with the primary facts. The SCIT also failed to recognise the material similarities between the facts in this case and the facts in PCEO.

The SCIT's decision was inconsistent with its own findings of fact because on the one hand, the SCIT had placed emphasis on the content of PPTSB's board paper to show that the placement of excess funds on call deposits was merely for investment purposes but on the other hand, the SCIT accepted that PPTSB's excess funds arose from its core business operations and were part of its working capital.

The SCIT also tried to distinguish the present case with that of PCEO in that, in PCEO, the taxpayer exercised managerial skills in the placement of its funds whereas in the present case, the Placements were not done by PPTSB but by its holding company. However, although the Placements were done by PPTSB's holding company, PPTSB also exercised managerial skills in deciding the amount of the funds to be placed on

[3] *[1979] 1 MLJ 1*
[4] *Civil Appeal No W-01-46-2008*
[5] *Tax Appeal No 14-01-2006-1*
[6] *Civil Appeal No W-01-201-09*

call deposits and the period of such Placements.

Like in PCEO, PPTSB had no intention to place its excess funds on long-term basis but had placed them on short-term call deposits instead. However, despite making extensive findings of fact which clearly established that PPTSB clearly intended to make numerous temporary placements of its excess funds, turn them over for a quick profit and plough the proceeds back into its business (like in PCEO), the SCIT had ignored these primary facts and other documentary evidence when they concluded that the Placements were not made in the course of PPTSB's business or ancillary or incidental to the same, but were done for investment purposes. It is therefore clear that the SCIT had acted inconsistently with the primary facts found and reached a perverse conclusion.

The SCIT had disregarded the presumption of business.

The SCIT have failed to appreciate that PPTSB is clearly covered by the presumption of business as it is a company incorporated for profit. This presumption is difficult to displace as stated in ALB or "sukar disangkal" as stated in *Oil (Asia) Pte Ltd v Ketua Pengarah Hasil Dalam Negeri*[7]. Accordingly, as PPTSB had put its excess funds to gainful and profitable use, this would trigger the presumption that any income derived therefrom should be treated as business income under Section 4(a) of the ITA.

The SCIT also ignored the principle that any ambiguity in statutory provisions should be construed in favour of the taxpayer.

The Privy Council in ALB had recognised that there is room for overlapping between one paragraph and another in Section 4 of the ITA and as such overlapping gave rise to ambiguity, such ambiguity should be construed in favour of the taxpayer.

This ambiguity is further reinforced by the introduction of a new Section 4B into the ITA, which has effect from YA 2013 onwards, as follows:

Non-business income

For the purpose of Section 4, gains or profits from a business shall not include any interest that first becomes receivable by a person in the basis period for a year of assessment other than interest where subsection 24(5) applies."

It is clear from the language of the above that the Revenue seeks to codify their position that interest income received from placement of funds could not be regarded as business income under Section 4(a) for future YAs. However, if it had been clear that such income falls under Section 4(c) and not under Section 4(a), it would not have been necessary for the Revenue to specifically introduce a new provision in the Finance Bill 2012 to clarify the same.

Accordingly, whilst the insertion of a new Section 4B into the ITA is strictly within the powers and functions of Parliament, the learned High Court Judge agreed with PPTSB's contention that the proposal to introduce Section 4B into the ITA is in itself fatal to the Revenue's case in the instant appeal as it clearly demonstrates that but for the new Section 4B, the interest received from the placement of funds would fall under Section 4(a) as per ALB, PCEO and Isyoda.

CONCLUSION

The Revenue has appealed against the decision of the High Court to the Court of Appeal and it remains to be seen whether the Court of Appeal will follow the decision of PCEO or Nilai Cipta.

[7] *Tax Appeal No R2-14-15-96. The decision of the High Court was affirmed by the Court of Appeal in Civil Appeal No W-01-4-1997*

[8] *Finance Act 2013 was gazetted on 10 January 2013.*

***Foong Pui Chi** and **Anand Raj** are advocates & solicitors in the Tax & Revenue Practice Group of Shearn Delamore & Co. This article is published with the permission of Shearn Delamore Corporate Services Sdn. Bhd. The writers can be contacted at foongpuichi@shearndelamore.com and anand@shearndelamore.com*

BiZZT@X TAX SOFTWARE

10 REASONS TO CHOOSE BIZZTAX

RELIABILITY
Customers' grooming and LHDNM's work-together over the years, further makes our company and our software solution a reliable and accepted by the industry.

TIMELY UPDATES
Bizztax Tax Computing Software is always up-to-date to tax compliance, complying fully to LDHNM requirements.

AFFORDABLE PRICES
Whatever your organization size is, we have got the right package for you. From Upfront package to rental scheme, from Mini Package to Full Package, at affordable prices.

CONTINUOUS IMPROVEMENTS
BiZZTAX proactively seek for users' feedback to determine where efficiency improvement can be made to increase the value of your investment; most importantly, all new features are FREE!!

DATA SECURITY
With our Auto Back-Up feature, you can be rest-assured that all your data is kept safe & secured.

E-FILING WITH A FINGER TOUCH
Our powerful "Push2E-Filing" module eliminates tedious redundant input process and simplifies the process of doing tax filing to a PUSH of ONE button

TIME SAVING
Previous years' records are kept for current year calculations. Redundant entrys eliminated.

EXCELLENT CUSTOMER SUPPORT
Our In House tax software consultant and technical team offer good and prompt customer support coupled with relentless tax helps

GROUP & ASSOCIATES DISCOUNTS
Special discount will be given to Group & Associates Purchase.

REFERRAL REWARD
Cash Voucher will be reward to existing users who successfully refer their friends to employ Bizztax Tax Computing Software.

BiZZT@X Tax Software

- Easy-to-Use Interface
- Time & Effort Saving
- Multi Business Income Source
- Auto Synchronization
- Automatic Data Loss Protection
- Client Monitoring & Administration
- Notes-to-Accounts Attachments
- Push-2-e-filing to LHDMN
- Prompt Update of Tax Rules & Compliance
- FREE downloads of new features
- FREE Billing Module
- FREE Mobile Version
- Multi-Level & Muliti-Users Accessibility Control
- Auto Capture of e-Filing Submission Date
- PAPERLESS Filing of related documents
- Friendly & Professional Support

BIZZTAX Alliance Sdn Bhd
19-1, Jalan Puteri 1/4, Bandar Puteri, 47100 Puchong, Selangor D.E.
Tel : 03.8061.0002 Fax : 03.8062.6805

For FREE Product Demonstration, please contact Miss Serene See - 012.6059011
www.BiZZTAX.com serene@bizztax.com

BiZZT@X SME100 MSC

BENEFITS OF LABUAN COMPANY

1. **Corporate Tax :** Investment Activities - 0%; Trading Activities - 3% or Maximum Ringgit Malaysia 20,000
2. **0% Indirect Tax** (such as Sales Tax, Service Tax, GST, VAT and Custom Duty)
3. **0% Personal Income Tax** for Non-Malaysian Director
4. **Audit** is not compulsory (for certain activities)
5. Labuan is a Tax Free Port • **0% Stamp Duty**
6. 50% Exemption on Gross Employment Income of Non-Citizen Resident Managers
7. No Exchange Control Regulations • **Free** Flow of Funds; Stop Tax Heavens Abuse Act - Does not apply in Labuan
8. Investment Protection Agreement (IGA) with more than 50 countries
9. Double Tax Agreements with more than **68** countries
10. **0% Withholding Tax:** • Dividend • Royalty • Lease Rental • Interest • Technical or Management Fee

HANS 撼世
Incorporating Labuan Co. & Tax Planning

ABOUT US

Hans Advisory & Trust Co Ltd is a trust company licensed under Labuan Trust Companies Act, 1990. We are also:

- Members of Institute of Bankers Malaysia (IBBM)
- Licensed to provide Escrow Service by a unit under Central Bank of Malaysia.

Hans' professional team comprises of certified trustees, accountants, lawyers and engineers to provide full range of services for your international business and cross border investment.

OUR SERVICES

Incorporation of Labuan Companies:
- Investment and Trading Company
- Leasing Company
- Shipping Company
- Limited Liability Partnership (LLP)
- Investment Bank, Offshore Bank, Factoring Company
- Insurance Company and related activities
- Fund Management Company, Public & Private Fund
- Labuan International Trading Commodity Company (GIFT)

Wealth Protection:
- Private Trust Company, Foundation, Trust

Capital Raising & Project Financing

Cross Border Investment & Tax Advisory

Other Related Services
- Corporate Trustee, Executor, Agent and Custodian
- Administration, Accounting, Legal and Taxation
- Employment Pass and Payroll
- Provision of Virtual Office
- Migration of Company to/ from Labuan

CONTACT US TODAY
www.hansworldwide.com
sue@hansworldwide.com

Hans Advisory & Trust Co Ltd (LT 0045)
LABUAN OFFICE
A020, Level 1, Podium Level, Financial Park Complex, 87000 Labuan FT, Malaysia.
HP : +6011-1297 7745
F: +6087-428845 T: +6087-427745

Hans Worldwide Sdn. Bhd.(694802-A)
KUALA LUMPUR OFFICE
43-2, Jalan USJ 21/10, UEP Subang, 47630 Selangor, Malaysia.
HP : +6011-1299 7745
F: +603-8024 9945 T: +603-8024 7745

CONTACT US TODAY
www.hansworldwide.com
sue@hansworldwide.com

Hans Advisory & Trust Co Ltd (LT 0045)
LABUAN OFFICE
A020, Level 1, Podium Level, Financial Park Complex, 87000 Labuan FT, Malaysia.
HP : +6011-1297 7745
F: +6087-428845 T: +6087-427745

Hans Worldwide Sdn. Bhd.(694802-A)
KUALA LUMPUR OFFICE
43-2, Jalan USJ 21/10, UEP Subang, 47630 Selangor, Malaysia.
HP : +6011-1299 7745
F: +603-8024 9945 T: +603-8024 7745

International News

The column only covers selected developments from countries identified by the CTIM and relates to the period 15 May 2013 to 16 August 2013.

CHINA (PEOPLE'S REP.)

Income tax incentives for software enterprises – clarified

On 25 July 2013, the SAT issued SAT Gong Gao [2013] No. 43 clarifying the application of tax incentives designed for software enterprises as per Notice Cai Shui [2012] No. 27 which grants a tax exemption in the first two years and a 50% tax reduction in the subsequent three years.. The announcement applies retroactively to qualified software enterprises from 1 January 2011. The incentives apply only to enterprises recognised by the authorised government agency (via an official certificate) and which are taxed based on actual accounting profits (i.e. not taxed on a deemed profit basis). The relevant income of the enterprise is as per Article 6 of the Enterprise Income Tax, i.e. income from sale of goods, providing services, disposal of property, dividends, interest, royalties, rental income and donations. The tax incentive period starts the year in which the enterprise earns taxable income of the enterprise. Once the tax holiday period commences, it cannot be interrupted or suspended by losses in a certain year or other reasons. Unless otherwise provided, the Notice Guo Shui Fa [2008] No. 116 on software enterprises' research and development (R&D) deduction continues to apply. Software enterprises which are established before 31 December 2010 and not recognised by the authorised government agency may apply for such recognition (per article 1 of the Notice Cai Shui [2008] No. 1 and Notice of the information department Xin Bu Lian Chan [2000] No. 968) and enjoy the remaining period of the tax holiday that was previously granted.

Rules for overseas payments on service items relaxed

The State Administration of Foreign Exchange (SAFE) and the SAT jointly issued Gong Gao SAT and SAFE No. 40 concerning tax clearance for overseas payments on service items on 9 July 2013, which applies from 1 September 2013. Domestic entities and individuals remitting abroad a sum of foreign currency equivalent to at least USD50,000 (per transaction) are required to register with the competent local tax authority. In other words, as of 1 September 2013, a tax clearance certificate is no longer required for overseas payments on listed service items below USD50,000. The overseas payments referred to include:

- payments to foreign entities or individuals for transport, travel, telecommunication, construction, installation, contracted labour service, insurance, financial service, computer and IT service, royalty service, sport, culture, entertainment and other commercial and governmental services;
- wages/salaries paid to foreign individuals and dividends, profits, interest of direct debts, guarantee fees, donations, compensation, tax, incidental income received by foreign entities or individuals, etc.; and
- rental income of financial leases, gains on transfer of real property and gains on transfer of shareholdings derived by foreign entities or individuals.

If the competent tax authority is the local tax authority, the sum remitted must be registered with the state tax bureau at the same level. Further, the registration can only take place by submitting the stamped contracts/agreements and the copies of other relevant certificates. With publication of this notice, the following notices (Hui Fa is the code for the notices issued by SAFE or circulars on tax clearance and remitting foreign exchange will cease to apply on 1 September 2013: (i) Guo Shui Fa [2001] No. 139; (ii)Guo Shui Fa [2002] No. 107;(iii) Guo Shui Fa [2005] No. 28;(iv) Hui Fa [2008] No. 64;(v) Guo Shui Fa [2008] No. 122;(vi) Hui Fa [2009] No. 1;(vii) Hui Fa [2009] No. 52; and (viii) SAT Gong Gao [2012] No. 54

Tax treatment of hybrid financing of investment clarified

The SAT issued a notice concerning tax treatment of hybrid (equity–debt) financing of investment on 15 July 2013 (SAT Gong Gao [2013] No. 41). The notice applies as from 1 September 2013 and its content is summarised below. In the case of an equity–debt investment made by an enterprise, the interest paid by the invested enterprise must be recognised on the due date of the interest (including guaranteed minimum interest, fixed profit or fixed dividend) and included in the taxable income of the investing enterprise. Correspondingly, the same interest is deductible for the paying enterprise at the same time by reference to the tax laws and Gong Gao 2011 No. 34 for the purposes of enterprise income tax. For the investment repaid by the invested enterprise, the difference between the amount of repayment(or amount of redemption and the cost of investment (the principal amount) must be treated as gains or losses of debt restructuring which must be included in the taxable income of the current period.

VAT and business tax exemptions for small-sized enterprises

The Ministry of Finance (MoF) and the SAT jointly issued a notice announcing value added tax (VAT) and business tax exemptions for small-sized enterprises on 29 July 2013 (Cai Shui [2013] No. 52). The notice took effect as from 1 August 2013 and provided that the VAT small-sized taxpayers or business taxpayers whose average sales proceeds on a monthly basis do not exceed CNY20,000 are respectively exempt from VAT or business tax. With this measure, the Chinese government hopes to stimulate small businesses that create more jobs and investment at a time when the government is slowing down its spending due to the threat of a debt crisis.

Policy on nationwide implementation of VAT pilot programme published

The MoF and the SAT jointly issued a notice on the tax policy concerning nationwide implementation of the VAT pilot programme on 24 May 2013 (Cai Shui [2013] No. 37). The notice consolidates most provisions of the previously published notices on the VAT pilot programme and includes production, showing and publishing of broadcast, television and films as taxable services.

INDIA

Tax residency certificate – further rules issued

In order to claim the benefits under a tax treaty, the Income Tax Act 1961 requires a non-resident taxpayer to produce a Tax Residency Certificate (TRC), and with effect from 1 April 2013, to also provide such other documents and information as may be prescribed. Pursuant to Notification No. 57/2013 [F.NO. 142/16/2013-TPL]/SO 2331 dated 1 August 2013, as issued by the Indian Central Board of Direct Taxes (CBDT), a non-resident taxpayer would now have to provide the following information in Form No. 10F together with the TRC:

- status (i.e. individual, company, firm, etc.);
- nationality for individuals and for other persons, country of incorporation or registration ;
- tax identification number in the country of residence and where there is no such number, then, a unique number on the basis of which the taxpayer is identified by the government of that country ;
- period for which the residential status, as mentioned in the TRC is applicable; and
- address of the taxpayer in the country of residence, during the period for which TRC is applicable.

The taxpayer is not required to provide the above information, if it is already contained in the TRC. The taxpayer is also required to keep and maintain documents to substantiate the information provided in Form No. 10F as may be required by the tax authorities to validate any treaty benefit claimed by the taxpayer.

Circular on development centres operating as contract research and development units amended

The Indian CBDT had issued Circular No. 3/2013 dated 26 March 2013 to provide clarification on development centres operating as contract research and development (R&D) units in India. Following complaints that Circular No. 3 failed to provide the clarity sought by the taxpayer community, the CBDT has issued Circular No. 6/2013 dated 29 June 2013 which effectively amends Circular No. 3 and further details the conditions which are relevant to identify development centres engaged in contract R&D services with insignificant risks. Circular No. 6 also highlights that if the foreign principal is located in a country/territory perceived as a low or no-tax jurisdiction, it will be presumed that the foreign principal is not controlling economically significant risks. However, the development centre may rebut this presumption to the satisfaction of the tax authorities. Additionally, Circular No. 6 also advocates that the TPO's/Assessing Officers, as the case may be, should take a decision based on the totality of the facts and circumstances of the case.

APA Guidance Released

The Indian Central Board of Direct Taxes (CBDT) recently released an *http://www.incometaxindia.gov.in/Archive/TPI_43_09052013.pdf" \t "_blank Advance Pricing Agreement Guidance with FAQs on India's* advance pricing agreements (APAs) scheme, which is available on the CBDT's website. The APA scheme was introduced on 30 August 2012 via Notification No. 36/2012, which contained detailed rules and forms for implementation and compliance.

INDONESIA

New guidance on Transfer Pricing Audits issued

The Directorate General of Taxation (DGT) issued Regulation No. PER-22/PJ/2013 (PER-22) dated 30 May 2013 on tax audit procedures with regard to taxpayers with special relationships, revoking DGT Decision No. KEP-01/PJ.07/1993 on transfer pricing audits. The Regulation is effective from 1 July 2013 and also applies retroactively to tax audits not yet completed before the issuance of this Regulation. PER-22 stipulates the procedures in a transfer pricing audit.

Tax rates for Small Medium Enterprises – Regulations issued

The Indonesian government has issued Government Regulation No. 46/2013 (known as PP 46) dated 12 June 2013 regarding income tax earned or received by taxpayers with certain gross revenue. Known as the Regulation for Taxation of Small Medium Enterprises, it is effective from 1 July 2013 and provides for a final tax rate of 1% on gross income for the following taxpayers:

- Both individual and corporate taxpayers but excluding permanent establishments;
- The income must be derived from business activities and not from an employment or a profession;
- The gross income should not exceed IDR4.8 billion (approximately USD483,630) in one fiscal year.
- The Regulation excludes individual taxpayers who have a makeshift facility that could be dismantled and who use a public place for business or sales.
- For corporate taxpayers, the Regulation excludes companies which have not started its commercial operation; and companies whose income exceeds IDR4.8 billion in one fiscal year after starting its commercial operation.

If the taxpayer's gross income exceeds IDR4.8 billion in one fiscal year, the tax rate applied for the next fiscal year will be based on article 17 of the Income Tax Law. The tax compliance for the income should be based on the taxpayer's monthly income. The taxpayer is unable to offset losses of one year with profits of another year. Further regulations will be issued.

SINGAPORE

Updated e-Tax Guide on tax treatment of employee stock options and other forms of employee share ownership plans

IRAS issued the second edition of the e-Tax Guide on the Tax Treatment of Employee Share Options and other forms of Employee Share Ownership Plans on 24 June 2013. This e-Tax Guide was first published on 29 June 2012 and provides details of the tax treatment of gains and profits derived from employee share options (ESOP) and employee share ownership (ESOW) plans as well as the relevant administrative requirements. The e-Tax Guide is a consolidation of the previously issued six e-Tax Guides.

IRAS e-Tax Guide on Equity Remuneration Incentive Scheme (ERIS)

On 26 April 2013, the IRAS published a revised *http://www.iras.gov.sg/irasHome/uploadedfiles/e-Tax_Guide/etaxguides_IIT_ERIS_2013-04-26.pdf\t "_blank* e-Tax Guide on the Equity Remuneration Incentive Scheme (ERIS). The e-Tax Guide was first published on 9 July 2012 to provide details on the tax exemption of gains derived by an employee under ESOP and ESOW plans granted by the employer, and consolidates three e-Tax Guides issued on ERIS by IRAS:

- Entrepreneurial Employee Stock Option Scheme (renamed as ERIS (SMEs) with effect from 16 Feb 2008), published on 31 Mar 2000;
- Company Stock Option Scheme (renamed as ERIS (All Corporations) with effect from 16 Feb 2008) published on 31 Mar 2001; and
- ERIS (Start-ups) published on 1 Aug 2008 .
- The e-Tax Guide was revised to incorporate the 2013 Budget announcement that the ERIS would be phased out.

VIETNAM

Amendments to Corporate Income Tax Law

On 19 June 2013, the National Assembly approved the following key amendments to the CIT Law, which take effect from 1 January 2014 (unless otherwise stated):

- Tax rates will be reduced to 22% (from 25%) with effect from 1 January 2014 and 20% from 1 January 2016.
- Enterprises having total revenue of less than VND20 billion must apply a 20% rate from 1 July 2013, excluding certain types of transactions such as the transfer of capital, transfer of real property, transfer of the right to explore, mine and process minerals, etc.
- Other taxable income now also includes income from: (i) transfer of investment projects; (ii) transfer of right to participate in investment projects; (iii) transfer of right to contribute capital; (iv) transfer of the right to explore, mine and process minerals; and (v) income from transfer, leasing out or liquidation of valuable papers. Amounts recovered from contingency reserves no longer constitute other income.
- For tax declaration and payment purposes, the following income is to be accounted for separately: (i) real property transfers; (ii) transfer of rights to participate in investment projects; (iii) transfer of rights to explore, mine and process minerals.
- The scope of investment entitled to CIT incentives has been broadened to include large manufacturing projects in excess of VND6,000 billion (approximately USD300 million) and investment projects in selected industrial zones. Incentives are also now available to both new and expanded qualifying projects.
- The cap for the deduction of advertisement and promotion expenses will increase to 15% (from 10%) and payment discounts will be fully deductible. Payments to voluntary retirement funds/social welfare funds/voluntary retirement insurance programme for employees will be deductible. Expenses incurred for sponsoring scientific research will also be fully deductible.

Amendment of article 170 – Re-registration of FDI enterprises

Art.170 was first introduced in 2005 with the Law on Enterprise, and it was a requirement for Foreign Direct Investment (FDI) enterprises in Vietnam that were licensed pre-2006 to re-register by 2008. However, due to poor response, the deadline was subsequently postponed numerous times and by 2013 less than 50% of the FDI enterprises had re-registered. Those that did not re-register not only risked running afoul of the law, but also had to continue to operate within the confines of the licences that were issued to them. This meant that they could not supplement their existing operations or expand into new areas.

Advanced Pricing Agreement

1 July 2013 saw the introduction of the Advanced Pricing Agreement process between the Vietnamese tax authority and taxpayers, or the Vietnamese tax authority, taxpayers and the tax authorities of tax treaty countries. The details of the APA process however will only be revealed via subsequent Decrees/regulations.

Regulatory Decree on e-commerce

Decree No. 52/2013/ND-CP (Decree No. 52) was issued on 16 May 2013 on the regulatory requirements concerning e-commerce businesses. Decree No. 52 replaces Decree No. 57 (issued in 2006) and is effective from 1 July 2013. Essentially, Decree No. 52 categorises e-commerce websites into:

- e-commerce business websites, whereby the websites are established to market/conduct the business of the website's owners; and
- e-commerce service provider websites which provide the facilities for third parties to conduct e-commerce trading. Such service provider websites include e-commerce platform websites, online auction websites and online promotion websites.

Decree No. 52 requires e-commerce service provider websites to be registered with the Ministry of Industry and Trade. E-commerce business websites however, are only subject to notification requirements.

*By **Rachel Saw** and **Nina Haslinda Umar** 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.*

MOBILE WORKFORCE AS POPULAR AS EVER: SURVEY RESULTS HIGHLIGHT VALUE TO THE BUSINESS

Organisations all over the world are leveraging the benefits of a globally mobile workforce. According to a KPMG International survey, 72 per cent of over 600 respondents use global mobility programmes to support overall business objectives.

KPMG International's 15th annual Global Assignment Policies and Practices (GAPP) survey provides a wealth of information for those responsible for or interested in global mobility. The detailed data found in these pages is an opportunity to compare or contrast one's current practices to those of their peers or other types of organisations. Further, it allows for critical learning of best practices and new ways of thinking.

"A globally mobile workforce is as popular as ever," says Achim Mossmann, Principal, KPMG's International Executive Services, KPMG in the US. "Over the 15 years of this survey's existence, in those companies where use of mobility is the norm, we have seen continued expansion and adaptation to the programmes. We even see companies with headquarters in Nordic and Asia Pacific regions beginning to jump on the globalisation bandwagon and needing to move their people to new strategic growth locations."

Flexibility and adaptability of programmes to address changing demands is strongly evidenced through the variety of assignment types offered:

- 81 per cent offer short term assignments
- 96 per cent offer long term assignments
- 47 per cent offer permanent transfer/indefinite length assignments.

Surprisingly, given the current economic environment, and the noted desire to support the business, only 12 per cent of survey participants say that cost control and assurance of an acceptable return on investment (ROI) are of importance.

According to Mossmann, "Having agreed upon metrics to demonstrate ROI helps any global mobility programme demonstrate objectively their value to the broader organisation and secure continued programme funding. However, a notable amount of survey participants struggle to track ROI information as it relates to international assignments—27 per cent do not know the percentage of assignees that leave the organisation within 12 months of repatriation and 31 per cent do not know why they leave."

Encouragingly, survey participants, year-on-year, continue to exhibit inclusionary mindsets as it relates to the definition of a "family" within their policies for benefit purposes. Fifty-five per cent include unmarried domestic partners/companions of the opposite gender and 49 per cent include unmarried domestic partners/ companions of the same gender. These broader definitions are most evident in European and Asia Pacific-headquartered organisations, and also within the financial services and high technology industries.

In circumstances where organisations may offer incentives for assignees to accept international opportunities, many survey participants also take into consideration dual-career couples and their children. For instance 21 per cent provide job search support in the host country and 21 per cent reimburse education expenses for the spouse/partner. Forty-one per cent offer language training and 37 per cent offer cross-cultural training to the assignee, spouse and their children.

Overall, the use of international assignees will remain the same amount or more for 86 per cent of survey participants.

OTHER BUSINESS DEDUCTIONS

Siva Subramanian Nair • Compensations – Part 1

Compensatory payments for damages etc. are not discussed in any provision in the Income Tax Act 1967 and shall be the focus of this article.

Compensation is paid under many circumstances; early termination of a contract, avoiding exposure to litigation, buying off competition etc. Even under employment, compensation is payable for loss of employment or change in status or contractual remuneration.

The general rule applies i.e. as long as it is an outgoing or expense incurred during that period in the production of income and it is not of a capital nature then the expenditure should qualify for a deduction. Therefore, the compensation paid must be related to the business of the taxpayer.

This is illustrated in *Herald & Weekly Times Ltd. V FCT [48 CLR 113]*

FACTS OF THE CASE

The taxpayer published an evening newspaper and incurred legal fees of £3,131 in connection with defending and settling an action for libel. A deduction was claimed but the Commissioner disallowed the claim on the grounds that it was not 'wholly and exclusively laid out or expended' to produce assessable income'.

DECISION OF THE COURT

In allowing the claim the court opined that a newspaper is published for the purpose of increasing its circulation and attracting advertisements. Income is gained and produced and liability is sometimes incurred. Publication is at once the source of income and the cause of liability. Payments subsequently made by way of compensation in respect of this liability or for costs to escape such liability relate back to publication. As publication is the common source of income and liability the necessary connection between the carrying on of the business of the newspaper and the liability which causes the expenditure is complete, therefore, a claim should be acceptable.

Candidates can find a list of compensatory payments or payment for damages which are generally allowable in Dr. V Singh's book which are detailed below:

- arising from the negligence of the trader or his employees in the course of carrying on a business; including professionals such as doctors, lawyers and accountants
- breach of warranty
- failure to perform a trading contract
- for cancellation of rights under a service agreement

He also includes compensation for removing an onerous character, be it an employee or a director but this shall be discussed in the next article.

However, where the contract involves the acquisition of a capital asset or an enduring benefit, it will be regarded as capital in nature.

Swadeshi Cotton Mills Co. Ltd. v. CIT [1967] 63 ITR 65 (SC)

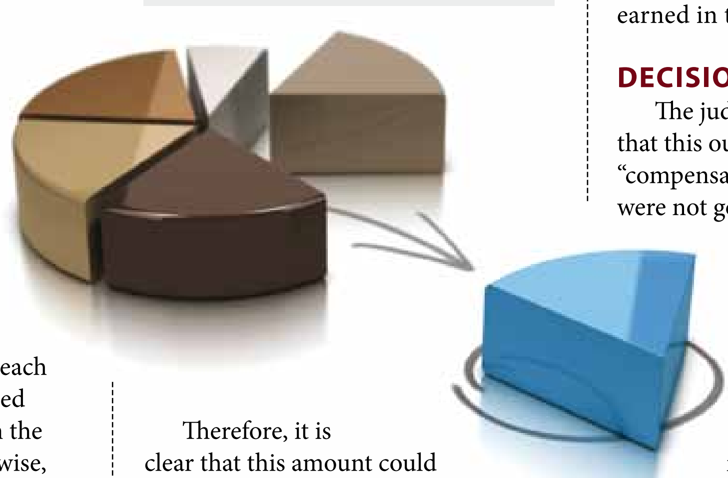
FACTS OF THE CASE

The appellant is a public-limited company carrying on the business of manufacturing and selling cloth and other textile goods. The appellant entered into two contracts with two other parties for purchase of textile machinery in order to expand its factory. Subsequently, the appellant-company, having regard to altered circumstances, decided to cancel both the contracts as, in its opinion, the machinery to be purchased would not be required for its business. On cancellation of these contracts, the appellant had to pay a sum of Rs.15,000 as compensation to one of the contracting parties and Rs.20,000 to the other contracting party who demanded compensation for breach of contract. The appellant claimed that these amounts were paid in the interest of its business as, otherwise, the appellant would have had to track very costly machinery which would not have served any useful purpose, so this was an expenditure incurred by the company wholly and exclusively for the purpose of its business.

DECISION OF THE COURT

The courts held that payment was of a capital nature because the payment was:

- to avoid a larger capital expenditure that would not have served the interests of the appellant-company.
- made clearly in the nature of a capital expenditure and not an expenditure incurred wholly or exclusively for the purpose of the business.
- neither made for the purpose of earning profits, nor for the purpose of furthering, protecting or continuing its business which was to be carried on from day to day.
- made with the object of avoiding an unnecessary investment in capital assets, and
- an amount which was altogether outside the account of profits and gains, in the computation of which deductions are allowable for expenditure incurred wholly and exclusively for earning those profits and gains.



Therefore, it is clear that this amount could not have been claimed as a legitimate deduction

Similarly in the case of *"Countess Warwick" Steamship Co. Ltd. v. Ogg [8 TC 652]*, a deposit was paid for the acquisition of a ship but later the company did not wish to pursue that contract and paid a further sum for the release of the obligation. The payment was held to be of a capital nature.

Sometimes the compensatory payments are precautionary in nature whereby a company makes a payment to avoid litigation or any law suits for breach of agreements. This is generally not a deductible expenditure as illustrated in the case of *Godden v A.Wilson Stores [40 T.C. 161]*.

FACTS OF THE CASE

One of the managers in a rubber plantation company was employed under a contract which was terminable by six months' notice to be given on 31 March or 30 September in any year. In March 1950 the company decided to discontinue its operations and entered into an agreement to sell of its estates. The manager was given notice of termination of his employment and on 28/3/1958, he was paid £1,900 representing the salary due to him for the six months to 30/9/1958 including an estimated commission which he would have earned in that period.

DECISION OF THE COURT

The judge Upjohn LJ acknowledged that this outlay was effectively "compensation for the fact that they were not going to employ him for the full time for which they were bound so to employ him" and in consequence represented a payment "to get rid of a possible law suit after discontinuance" and did not rank for a deduction.

However, where a sum is paid to circumvent a claim for damages made against the company which would have seriously affected its reputation if the claim had succeeded was held to be deductible in *Golder v Great Boulder Proprietary Gold Mines Ltd [1952] 33TC75*

FACTS OF THE CASE

The company was a gold-mining concern which in 1934 and 1935 entered into transactions connected with the formation of other companies. The £27,500 profits from these transactions were included in subsequent tax assessments. In 1941 and 1942 civil actions were brought against the company in connection with the formations, and the company paid £25,000 to settle the actions. Legal costs were also incurred.

The Revenue were of the opinion that in spite of the earlier assessment on the profits earned from the formation of the companies, nevertheless the company was not engaged either in a separate trade of company promotion or in a composite trade of gold mining and company promotion. Therefore, the £25,000 and legal costs were NOT laid out wholly and exclusively for trade purposes.

DECISION OF THE COURT

Donovan J. opined that the company was indeed involved in trade promotions and the claim made against the company was one that would have been very damaging to its trade had it succeeded. Therefore, the cost of settling the claim was an allowable expense.

The supportive arguments put forward were:

- the trade of company promotion was carried on and profits earned by the sale of assets to the company which had been promoted, were taxed.
- the trade had not been abandoned.
- a claim for damages, which arose out of that trade, was made against the company and would have seriously affected its reputation as a company promoter if the claim succeeded.
- the company was avoiding a very large and serious liability in costs with which the company would be faced, so it would be cheaper to settle for £25,000 than to run a risk

Similarly in G Scammell & Nephew Ltd v Rowles [1939] 22TC479

FACTS OF THE CASE

G Scammell & Nephew Ltd carried on the trade of motor engineers. The company's directors acquired a controlling interest in Blue Belle Motors Ltd which carried on the trade of running motor coaches and became its directors. Blue Belle Motors Ltd became indebted to G Scammell & Nephew Ltd on trading account and issued debentures in its favour to secure the debt. However, another director (Toms) of Blue Belle Motors Ltd issued a writ against the two companies and the new directors which could result in about £12,000 owed by Blue Belle Motors Ltd to G Scammell & Nephew Ltd being lost. A compromise was thereupon reached on terms that included, amongst other things:

- the sale of the directors' shareholding in Blue Belle Motors Ltd to Toms, the surrender of its debentures for cancellation and the settlement of its indebtedness to G Scammell & Nephew Ltd on agreed terms,
- the payment of a contribution of some £60 towards Toms' costs, and
- the withdrawal of a slander action commenced against Toms by the directors. G Scammell & Nephew Ltd paid £7,500 to secure his assent to such withdrawal.

G Scammell & Nephew Ltd incurred costs of some £50 in connection with the compromise.

DECISION OF THE COURT

The Court of Appeal confirmed that the expenditure was deductible. Sir Wilfrid Greene stated that the compromise was entered into "to obtain payment of as much of the balance of the account as they could persuade Mr. Toms to agree to, and that account being, as I have said, a trading account, it seems to me that the compromise was a compromise effected for the purpose of the Company's trade and for the purpose of enabling them to recover the payment of a trading debt owing to them from a customer, which would come into computation in their trading account. On that basis, payments made as a condition of obtaining that compromise which secured that payment to them would have been payments wholly and exclusively laid out or expended for the purposes of the Appellant Company's trade…"

The discussion on other forms of compensatory payments will continue in the next article.

Siva Subramanian Nair is a freelance lecturer. He can be contacted at sivanair@tm.net.my

FURTHER READING

Choong, K.F. Malaysian Taxation - Principles and Practice, (Latest Edition), Infoworld,
Kasipillai, J. A Comprehensive Guide to Malaysian Taxation under Self-Assessment (Latest Edition), McGraw Hill.
Malaysian Master Tax Guide, (2013), CCH Asia Pte. Ltd.
Singh, V. Veerinder on Taxation (latest edition), CCH Asia Pte. Ltd.
Thornton, R. Thornton's Malaysian Tax Commentaries, (Latest Edition), Sweet & Maxwell, Asia.
Thornton, Richard. 100 Ways to Save Tax in Malaysia for Partners and Sole Proprietors (latest edition), Sweet & Maxwell Asia.
Thornton, R. 100 Ways to Save Tax in Malaysia for SMEs (latest edition), Sweet & Maxwell Asia.
Yeo, M.C., Alan. Malaysian Taxation, (Latest Edition), YSB Management Sdn Bhd.

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: October 2013 – December 2013

Month /Event	Details				Registration Fee (RM)			CPD Points
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
OCTOBER 2013								
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	3 Oct	9a.m. - 5p.m.	Melaka	Lee Hishamuddin Allen & Gledhill	168 ** Subsidised fee*	385	435	8 WS / 077
Workshop: Employment Income *(in collaboration with MAICSA)*	7 Oct	9a.m. - 5p.m.	MAICSA Training Room, KL	Vincent Josef	250	400	450	8 JV / 010
Members' Technical Round Table Discussion	8 Oct	2.30p.m. - 4.30p.m.	CTIM Training Room, KL	Technical Committee Members	50	NA	NA	2 ET / 002
Workshop: Understanding Public Rulings on Tax Deductibility of Expenses *(POSTPONED FROM 30-31 JULY 2013)*	8 – 9 Oct	9a.m. - 5p.m.	Penang	Kularaj	670	770	870	16 WS / 062
Seminar: Goods & Services Tax (GST)	17 Oct	9a.m. - 5p.m.	Kuala Lumpur	Various Speakers	120 ** Subsidised fee*	475	45	8 SE / 005
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	17 Oct	9a.m. - 5p.m.	Kuala Lumpur	Lee Hishamuddin Allen & Gledhill	175 ** Subsidised fee*	400	450	8 WS / 078
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	22 Oct	9a.m. - 5p.m.	Ipoh	Lee Hishamuddin Allen & Gledhill	168 ** Subsidised fee*	385	435	8 WS / 079
Workshop: Understanding Public Rulings on Tax Deductibility of Expenses *(POSTPONED FROM 14-15 AUG 2013)*	22 – 23 Oct	9a.m. - 5p.m.	Melaka	Kularaj	670	770	870	16 WS / 063
Evening Talk: Tax Audit Framework & Latest Development	22 Oct	2.30p.m. - 4.30p.m.	CTIM Training Room, KL	Chris Low	50	70	100	2 ET / 003
Workshop: Allowances & Deductions *(in collaboration with MAICSA)*	22 Oct	9a.m. - 5p.m.	MAICSA Training Room, KL	Vincent Josef	350	400	450	8 JV / 011
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	24 Oct	9a.m. - 5p.m.	Johor Bahru	Lee Hishamuddin Allen & Gledhill	168 ** Subsidised fee*	385	435	8 WS / 080
Workshop: Income from Letting of Real Properties	29 Oct	9a.m. - 5p.m.	CTIM Training Room, KL	Richard Thornton & Thenesh Kannaa	300	350	400	8 WS / 084
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	31 Oct	9a.m. - 5p.m.	Penang	Lee Hishamuddin Allen & Gledhill	168 ** Subsidised fee*	385	435	8 WS / 081
Public Holiday ***(Hari Raya Aidiladha 15 October 2013)***								
NOVEMBER 2013								
Workshop: Special Topics I *(in collaboration with MAICSA)*	11 Nov	9a.m. - 5p.m.	MAICSA Training Room, KL	Vincent Josef	350	400	450	8 JV / 012
Workshop: Real Property Gains Tax	13 Nov	9a.m. - 5p.m.	CTIM Training Room, KL	Richard Thornton & Thenesh Kannaa	300	350	400	8 WS / 085
Evening Talk: Private Retirement Scheme (PRS)	14 Nov	2.30p.m. – 4.30p.m.	CTIM Training Room, KL	Zen Chow	50	70	100	2 ET / 004
Workshop: Making the Most of Double Tax Agreements	19 Nov	9a.m. - 5p.m.	CTIM Training Room, KL	Tan Hooi Beng	300	350	400	8 WS / 090
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	21 Nov	9a.m. - 5p.m.	Kota Kinabalu	Lee Hishamuddin Allen & Gledhill	168 ** Subsidised fee*	385	435	8 WS / 082

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: October 2013 – December 2013

Month /Event	Details				Registration Fee (RM)			CPD Points
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
AUGUST 2013								
Workshop: Breaking New Ground: Landmark Decisions on Reinvestment Allowance & Capital Allowance	22 Nov	9a.m. - 5p.m.	Kuching	Lee Hishamuddin Allen & Gledhill	168 ** Subsidised fee*	385	435	8 WS / 083
Workshop: Achieving Tax-Aligned Mergers and Acquisitions	28 Nov	9a.m. - 5p.m.	CTIM Training Room, KL	Tan Hooi Beng	300	350	400	8 WS / 089
Workshop: Special Topics II *(in collaboration with MAICSA)*	28 Nov	9a.m. - 5p.m.	MAICSA Training Room, KL	Vincent Josef	350	400	450	8 JV / 013
Public Holiday ***(Deepavali : 2 November 2013, Awal Muharam: 5 November 2013)***								
DECEMBER 2013								
Public Practice Certificate Programme	4 Dec	9a.m. - 5p.m.	CTIM Training Room, KL	TBA	TBA	TBA	TBA	TBA
Workshop: Tax Savings Opportunities for Exporters; deductions and exemptions	10 Dec	9a.m. - 5p.m.	CTIM Training Room, KL	Richard Thornton & Thenesh Kannaa	150 ** Subsidised fee*	350	400	8 WS / 086
Reinvestment Allowance – Understanding Schedule 7A ITA 1967	12 Dec	9a.m. - 5p.m.	CTIM Training Room, KL	Kularaj	150 ** Subsidised fee*	350	400	8 WS / 087
Workshop: Pioneer Status or Investment Tax Allowance; making a choice	17 Dec	9a.m. - 5p.m.	CTIM Training Room, KL	Richard Thornton & Thenesh Kannaa	150 ** Subsidised fee*	350	400	8 WS / 088
Workshop: Making the Most of Double Tax Agreements	19 Dec	9a.m. - 5p.m.	CTIM Training Room, KL	Tan Hooi Beng	300	350	400	8 WS / 090
Public Holiday ***(Christmas : 25 December 2013)***								
2013 BUDGET SEMINARS								
2014 Budget Seminar *(with Ministry of Finance)*	7 Nov	9a.m. - 5p.m.	Kuala Lumpur	MoF, IRB & tax practitioners	330	400	430	10 BS / 002
2014 Budget Seminar	22 Nov	9a.m. - 5p.m.	Subang	IRB & tax practitioners	330	400	430	10 BS / 003
2014 Budget Seminar	25 Nov	9a.m. - 5p.m.	Ipoh	IRB & tax practitioners	330	400	430	10 BS / 004
2014 Budget Seminar	28 Nov	9a.m. - 5p.m.	Johor Bahru	IRB & tax practitioners	330	400	430	10 BS/005
2014 Budget Seminar	2 Dec	9a.m. - 5p.m.	Penang	IRB & tax practitioners	330	400	430	10 BS / 006
2014 Budget Seminar	3 Dec	9a.m. - 5p.m.	Melaka	IRB & tax practitioners	330	400	430	10 BS / 007
2014 Budget Seminar	4 Dec	9a.m. - 5p.m.	Kuantan	IRB & tax practitioners	330	400	430	10 BS / 008
2014 Budget Seminar	4 Dec	9a.m. - 5p.m.	Kota Kinabalu	IRB & tax practitioners	330	400	430	10 BS / 009
2014 Budget Seminar	5 Dec	9a.m. - 5p.m.	Kuching	IRB & tax practitioners	330	400	430	10 BS / 010
2014 Budget Seminar	9 Dec	9a.m. - 5p.m.	Kuala Lumpur	IRB & tax practitioners	330	400	430	10 BS / 011

DISCLAIMER : 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 three days notice will be given.

ENQUIRIES : Please call Yus, Jason, Ally or Nur at 03-2162 8989 ext 121, 108, 123 and 106 respectively or refer to CTIM's website ***www.ctim.org.my*** for more information on the CPD events.