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Tax Guardian

AUTHORITATIVE - RELEVANT - GLOBAL EXCELLENCE

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Money Laundering, Combating Terrorist Financing And Tax Crimes

Reclaiming 108 "Shortfall": A Case For Taxpayers To Revisit Their Strategy

Top Personal Income Tax Rates Increase In 2012

COMMENTS ON THE 2013 MALAYSIAN BUDGET AND THOUGHTS ON TAX REFORMS: A WAY FORWARD

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

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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.

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From the President's Desk

SM THANNEERMALAI

PUSH TOWARDS INCREASING COMMUNICATION WITH MEMBERS

Since taking office as President, I have pressed on relentlessly to provide our members with timely information and in this endeavour, I have received the unwavering support of the Secretariat managed by our able Executive Director, Thomas Simon, and his technical team. I invite all of you to join me to applaud them for their excellent effort which is clearly evidenced by the increased number of e-CTIMs that have been published in 2012. CTIM plans to recruit more staff in the New Year to add to the resources so that our services in all areas can be increased. In due course you will receive more communication from the other departments on matters relevant to yourselves. In return, I need to ask our members to respond to the Secretariat's request for feedback or comments so that they can respond to the authorities with conviction and use the information to plan activities for the members. I hope all of you will cooperate with the Secretariat.

INCREASED TRANSPARENCY ON DEALING WITH THE AUTHORITIES

I have recently initiated a move with the agreement of the Council Members to summarise (without contravening any law such as the Official Secrets Act, or touching on specific sensitive matters) all documents submitted to various authorities and send them out to members as e–CTIMs or post them on our website as soon as possible so that members are aware of the positions taken by CTIM and the developments on new matters. I have also requested all committees subsequent to their meetings with the relevant authorities to send out short notes to members via e-CTIMs. This practice is important so that members are up-to-date on matters pursued by the Council on their behalf and it will also give an opportunity for members to respond in a timely manner to provide constructive suggestions to the committees.

ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT (AMLA)

The provisions in Section 112, 113 and 114 of the Income Tax Act 1967 are also to be found in AMLA and any offence under these provisions is a serious offence which can attract a maximum penalty of five years jail or a fine of RM5 million or both and there are other provisions in AMLA that attract both severe jail and monetary penalties.

Frankly if a taxpayer is charged under AMLA , it can be very frightening for the taxpayer. The seriousness of the matter is clearly stated in a recent press release issued by the IRB, which reads :

CRIME IN TAXATION

Cyberjaya, 29 August – The Inland Revenue Board of Malaysia (IRBM) today reminded taxpayers not to take their tax affairs for granted if they do not want to be charged under the Income Tax Act (ITA) 1967 and the Anti-Money Laundering and Anti-Terrorism Financing Act 2001(AMLATFA 2001).

Three types of tax offences enacted by the Government of Malaysia on 7 October 2010 as serious in AMLATFA 2001 are:

- *Failure to submit the Income Tax Return Form (ITRF) for a year of assessment.*
- *Submit an incorrect return.*
- *Wilfully and with intent to evade tax.*

If found guilty, the offender shall be liable to severe punishment of a fine not exceeding RM5 million or imprisonment for a term not exceeding five years or both for each offence.

The above matter was highlighted by Tan Sri Dr. Mohd Shukor Hj. Mahfar, IRBM CEO in a statement today.

He added, IRBM can freeze, seize or forfeit property suspected of the offence during the investigation. During the year 2011, the IRBM has frozen the bank accounts of 1,389 companies and individuals believed to be committing and abetting in the above offence. He stressed that the actions taken by the IRBM is severe enough to combat tax criminals affecting the peace, economic and political stability of the nation.

This is a matter of grave concern, not only to taxpayers but also to tax agents and all others working in the tax industry, as we will inevitably be requested by our clients or our employers, who may be investigated under AMLA, to provide guidance...and, yes we need answers. In this connection, CTIM has already commenced its discussions with the IRB on 30 November and the IRB has agreed to have a special dialogue to discuss the issues surrounding AMLA, *vis-a-vis* criminal & civil investigations and tax audits under the provisions of the Income Tax Act. My concern here is the responsibilities of the tax agents in such cases to their clients and the rights of taxpayers and tax agents.

In my opinion, AMLA-type tax investigations should be confined to cases where there is clear evidence of money laundering involving tax evasion; otherwise the cases should be dealt with through the civil investigation or tax audit process. Ultimately taxpayers should not be fearful of taking a legitimate tax position in relation to an income or expense. In our future dialogues we need to convey this message to the Tax Authorities and any Authority administering AMLA.

Season greetings

Finally another year is coming to an end and I would like to take this opportunity to wish all our members a HAPPY NEW YEAR and to our friends celebrating Christmas, a MERRY CHRISTMAS.

Editor'sNote

DATO' RAYMOND LIEW LEE LEONG

UPLIFTING THE PROFESSION AND NATION

When *Tax Guardian* was conceptualised, one of our key goals was to provide authoritative and relevant commentary on current issues and trends. This helps develop the competency of our members and the profession in line with global standards and benchmarks, thus making Malaysian tax professionals into a marketable cross-border commodity. At the same time, our thought leadership correctly positions the profession as a key contributor to economic growth and development. Tax policies are not only a major source of financing for the government, but tax incentives and interventions are a major driver for economic sustainability and progression - or conversely regression.

Annually, the Government tables a Budget that is meant to fuel sustainable development; lately, the Budget's policy interventions are designed to help propel the country to the status of full development and high income by 2020 according to the goals of the ETP (Economic Transformation Programme). But is Malaysia doing enough from the perspective of tax to drive sustainable economic reforms? While commenting extensively on the recently tabled 2013 Malaysian Budget proposals, Dr. Veerinderjeet Singh argues that it is timely to review the tax system holistically and develop one that is sustainable and effective. He criticises the prevailing method of "tinkering with the system on an ad hoc basis" such that there are leakages, abuses and misperceptions. Also under fire is the politicising of the Budget; we should dispense with the crafting of populist election budgets to appease voters and instead should embrace fiscal discipline in order to prosper in the long-term. Among his recommendations are the need for a five year plan to outline the nation's fiscal policy direction as well as comprehensive fiscal reform to ultimately mould a world-class tax system. To find out more, turn to page 8.

> ▪ TAX PROFESSIONALS WILL HAVE TO MAKE IT THEIR BUSINESS TO KNOW ABOUT THE RISKS OF MONEY LAUNDERING AND TERRORISM FINANCING IN ORDER TO NAVIGATE A LANDSCAPE THAT EMPHASISES REGULATORY COMPLIANCE AND GOOD GOVERNANCE TO MITIGATE REPUTATIONAL RISKS.

We also carry an extensive treatise on combating money laundering and terrorist financing. But are these even related to tax crimes? According to academics Dr. Jeyapalan Kasipillai and Dr. Shanthy Rachagan, tax offences fall on the borderline of what is and isn't considered laundering. But under legislation such as the Financial Action Task Force on Money Laundering, recommendations were made in 2012 to include tax crimes under the scope of money laundering predicate offences. Therefore, combating money laundering and terrorist financing might eventually come under the expanding scope of the tax profession.

We can see from recent financial scandals that even big names in banking have been implicated in money laundering and terrorism financing. Tax professionals will have to make it their business to know about the risks of money laundering and terrorism financing in order to navigate a landscape that emphasises regulatory compliance and good governance to mitigate reputational risks.

We hope that our content continues to provide new insights for all our readers. Our aim, as ever, is to help elevate the calibre and competency of all tax professionals and to contribute to talent development and nation-building. Talent is the pivot on which we build a highly-developed nation; taxes are a means for the government to finance itself and the prosperity of the nation. This profession is an essential component of the Malaysian landscape and we have an obligation to uplift ourselves in order to optimise our contributions.

Going forward, we are optimistic that *Tax Guardian* can continue to enrich the knowledge base of the Malaysian tax profession. Do write in to us with suggestions as to how we can improve our content. We look forward to hearing from you and wish you a happy and prosperous 2013.

Sincerely,

Editor

2012 AOTCA – SEOUL, SOUTH KOREA

The Asia-Oceania Tax Consultants Association (AOTCA) International Tax Conference was held from 17 to 20 October 2012 in Seoul, South Korea. CTIM was represented by the Deputy President and Executive Director. CTIM is a founder member of the AOTCA which was formed in 1992 for the specific purpose of exchanging information on current issues in international taxation and enhancing international cooperation in taxation matters. The Conference was preceded by the Annual General Meeting of AOTCA and this year the meeting proceeded to approve an increase in member bodies' annual subscription to defray annual costs and change the governing structure of AOTCA to simplify the decision making process and enhance the effectiveness of AOTCA.

The papers presented at the Conference by speakers from Malaysia, Australia, China ,India, Japan, UK, Indonesia, Vietnam, Hong Kong, Philippines, Taiwan, Canada, South Korea and Austria were on the following topics:

- Regulations of Tax Professionals
- Recent developments in the OECD
- Recent developments in Transfer Pricing
- Taxation of Foreign Entities in selected jurisdictions
- Tax audits
- Recent developments in Taxpayers' Charter
- Discussions on Multi-Disciplinary Practice
- Tax Systems in Europe- The impact of a Single Market

CAREER TALK BY CTIM'S EDUCATION COMMITTEE AND COUNCIL MEMBER

The Institute was invited by Kolej Professional MARA, Ayer Molek branch campus, Melaka to conduct a career talk on 31 October 2012. Dr. Loo Ern Chen represented the Institute in promoting the CTIM Professional Examination. The presentation was attended by 80 students who are currently pursuing the Diploma in Accountancy course at the college.

On 1 November 2012, CTIM which was represented by Dr. Loo Ern Chen was invited along with other professional bodies to present a career talk at Kolej Professional MARA, Penawar, Johor. Students from two local high schools were invited to listen to the talk along with students pursuing the Diploma in Accountancy course from the MARA college. A total of 150 participants attended the session.

University Tun Abdul Razak had a career talk for their undergraduates on 21 November 2012. The Institute was invited to speak to the students and was represented by Ms. Seah Siew Yun and Ms. Nancy Kaaur .

CPD EVENTS

In conjunction with the 2013 Budget proposals which was tabled by the Honourable Prime Minister of Malaysia/Minister of Finance, YAB Dato' Sri Mohd Najib Tun Haji Abdul Razak on 28 September 2012, CTIM successfully organised a series of Budget Seminars at various locations in the month of October 2012. CTIM invited a speaker from the Tax Analysis Division, Ministry of Finance Malaysia to clarify and highlight the pertinent issues of the 2013 Budget proposals. Senior representatives from the Inland Revenue Board of Malaysia were also involved as speaker and panelist in the forum discussion to share their views on the impact and effects of the 2013 Budget proposals.

CTIM presented the Goods & Services Tax (GST) training course to members with the cooperation and support of the Royal Malaysian

Customs Department to ensure that tax practitioners are GST ready. The course included a 10-day modular course between 1 November 2012 to 1 December 2012, followed by a 3-day revision session and a 1-day examination.

On 6 November 2012, CTIM organised a seminar on "Transfer Pricing (TP) & Advanced Pricing Arrangement (APA) Rules – An In-Depth Understanding of the Rules" at Hotel Istana, Kuala Lumpur. The seminar had several TP experts who shared their knowledge with participants. These experts are:

- Mr. SM Thanneermalai (Senior Director, PricewaterhouseCoopers and President, Chartered Tax Institute of Malaysia)
- Mr. Vinay P. Nichani (Director, Ernst & Young Tax Consultants Sdn Bhd)
- Ms. Theresa Goh (Executive Director, Deloitte KassimChan Tax Services Sdn Bhd)

The Institute provided subsidies to CTIM members from small and medium firms. The subsidy was financed through grants received from the Government for the purpose of enabling tax practitioners to face the challenges of liberalisation of the service sector.

Mr. Richard Thornton and Mr. Thenesh conducted several workshops in Kuala Lumpur on several topics such as "Income from Letting Real Properties - for Investment Holding Companies and other Investors", "Withholding Tax – the basics and the advanced" and "Real Property Gains – the tax implications and the planning opportunities" in November and December 2012.

The Institute in collaboration with MAICSA organised a workshop on "Practical Guide: Malaysian Taxation Principles and Procedure" consisting of five (5) series of workshops conducted by Mr. Vincent Josef from November until December 2012.

A series of workshops were conducted in the fourth quarter of 2012 as follows:

1. Maximising Capital Expenditure for the Year End 2012
2. Tax Responsibilities of Directors, Managers and Employers
3. Criminal Tax Investigation

The workshop on "Maximising Capital Expenditure for the Year End 2012 was conducted by Mr. Sivaram Nagappan. This workshop focused

on implications arising on issues on capital allowances claims from plant & machinery and other assets as well as industrial building allowances.

The numerous issues relating to the duties and responsibilities of directors and managers were discussed through case law, case studies and working examples by the speaker, Mr. Vincent Josef at the workshops on "Tax Responsibilities of Directors, Managers and Employers".

The workshop on "Criminal Tax Investigation" was conducted by Datuk D.P Naban and Mr. Saravana Kumar at all the major cities where CTIM branches are located. The speakers provided insights on the manner of maintaining records, accounts, and documents to bolster taxpayers / clients cases in the event of criminal tax investigations.

The Institute financially supported CTIM members from small and medium firms to attend a 3-day course on "Taxation of Supply Chain Management and Business Restructuring" and a 5-day course on "Principles of International Taxation" organised by the International Bureau of Fiscal Documentation (IBFD) in October and November 2012 in Kuala Lumpur. This financial support was made available with the abovesaid Government grants.

CoverStory

COMMENTS ON THE 2013 MALAYSIAN BUDGET AND THOUGHTS ON TAX REFORMS : A WAY FORWARD

Dr. Veerinderjeet Singh

The Budget proposals for 2013 were tabled on 28 September 2012 by the Prime Minister who is also the Minister of Finance. In line with the Budget theme of 'Prospering the Nation and Enhancing the Well-Being of the 'Rakyat' (Malaysian citizens), the following were the key areas of focus in the budget: ▪ Boosting Investment Activity ▪ Strengthening Education and Training ▪ Inculcating Innovation, Increasing Productivity ▪ Fiscal Consolidation and Enhancing the Public Service Delivery ▪ Enhancing the Well-Being of the Rakyat

THE BUDGET PROPOSALS ALSO REFLECT A KEY CHALLENGE TO THE GOVERNMENT IN LIGHT OF INFLATIONARY TRENDS IN RISING HOUSING, FOOD AND FUEL PRICES.

The Budget initiatives complement the stimulus measures announced under the 12 National Key Economic Areas objectives, under which a number of Entry Point Projects have already come on stream as part of the Economic Transformation Programme (ETP). These initiatives partly account for the fact that the economy expanded by 5.1% in the first half of 2012 with overall expansion anticipated to be around 4.5% to 5.0% for the full year of 2012. These efforts will continue to drive the economic growth of the Malaysian economy. Projections of growth for 2013 is likely to be a credible 4.5% to 5.5% largely driven by private investment and consumption which are expected to grow at 13.3% and 5.7% respectively. The construction sector is expected to play a significant contributing role with growth expected to be at 11.2%. The services sector which is an increasingly important sector is expected to grow at 5.6%.

The Budget proposals also reflect a key challenge to the Government in light of inflationary trends in rising housing, food and fuel prices. This makes it increasingly difficult for the current subsidies on these commodities to be removed in light of challenges faced by the lower and middle income groups. Whilst the burden of such subsidies continue to be a drag on efforts to alleviate the budget deficit, expected to be around 4.5% of the Gross Domestic Product (GDP) in 2012, the oncoming elections has compounded the difficulty. This is why announcement of the implementation of the Goods and Services Tax (GST) was again put off.

A total of RM251.6 billion is allocated for the 2013 operating and development expenditure. Of this amount, RM201.9 billion is for operating expenditure and the rest for development expenditure. Total Government revenue is expected to increase to RM208.6 billion in 2012, and hence the anticipation of a decline in the fiscal deficit from 4.5% to 4% of GDP in 2013.

PROPOSALS - *With these issues in mind, the key thrust of the 2013 Budget is as outlined below:*

THE 2013 BUDGET'S fiscal thrust, much similar to that of 2012, is tax neutral in many respects – no new taxes were introduced and neither were there any substantive increases in tax rates to combat the fiscal deficit issue. The Budget proposals dealt mainly with allocations of Government revenues toward rural and social development and financial assistance for the lower income groups, with not much leftover for capacity expansion of the economy. To a certain extent, these measures are expected to be addressed through the ETP and government transformational plans.

IN KEEPING with recent trends and practices, there will be greater reliance on the tax authorities carrying out more tax and transfer pricing audits and enforcement of tax compliance initiatives to ensure tax revenue collection targets are achieved.

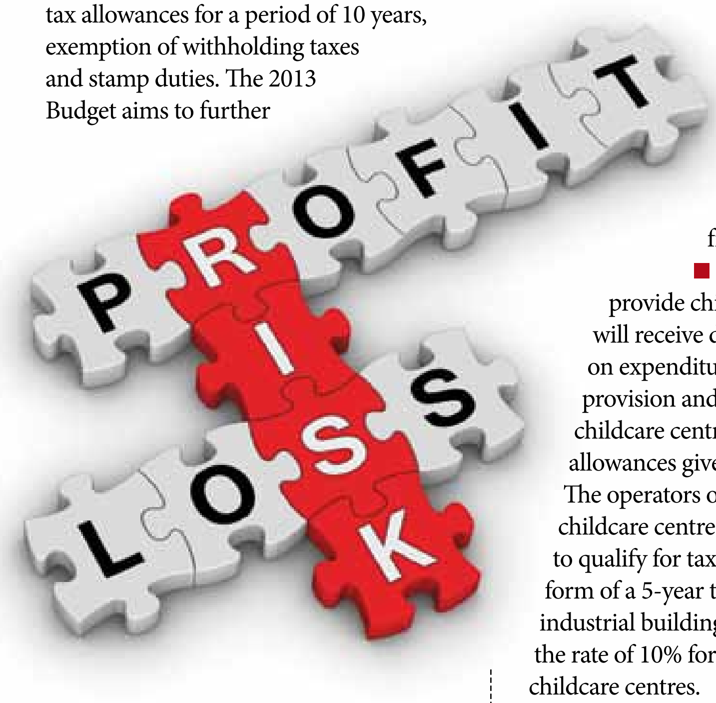
THE SERVICES SECTOR is expected to remain the key driver of growth and continued efforts to further liberalise the services sector (including the professional sub-sectors) and stimulating the capital and financial markets through measures introduced to further promote Malaysia as an international financial hub is a positive move.

THE SOCIAL aspect of Government spending is again a major feature of the budget. It includes a slew of measures intended to benefit the less privileged and financially challenged segments of Malaysian society.

The uncertainties in the global environment, coupled with the slowdown in China, would suggest that achieving the projected growth rate and deficit reduction targets may prove to be challenging.

Against this backdrop of the Budget macro drivers, some of the more significant tax measures outlined in the budget proposals are outlined below:

- The Government has undertaken several strategic measures to position Malaysia as a global integrated trading hub for oil & gas as well as for refining and storage. Several large projects under the ETP have already been given 100% income tax exemption or investment tax allowances for a period of 10 years, exemption of withholding taxes and stamp duties. The 2013 Budget aims to further



encourage investment in the sector with such tax incentives. The Budget also announced the offer of 100% income tax exemption for the first 3 years of operations for LNG trading companies under the Government Incentives For Trading (GIFT) programme.

The existing tax incentives for commercialisation of R & D findings of public research institutions have been extended to include commercialisation activity in non-resource based activities/ products. This provides investor companies with full tax deduction equivalent to their investment made in subsidiaries undertaking the commercialisation activity, whilst the subsidiary itself would enjoy 100% income tax exemption for a period of 10 years.

- Angel investors undertaking funding of venture companies will receive a tax deduction equivalent to the total investment made in a venture company against all income sources, subject to certain conditions.
- Promotion of the tourism sector continues with an extension of tax incentives for tour operators, providing a 100% tax exemption on income derived from operating inbound tour packages as well as tour packages within Malaysia and the incentives apply from 2013 to 2015.
- Employers who provide childcare centres will receive double deduction on expenditure incurred for provision and maintenance of childcare centres or for childcare allowances given to their employees. The operators of new and existing childcare centres are also slated to qualify for tax incentives in the form of a 5-year tax exemption and industrial building allowances at the rate of 10% for buildings used as childcare centres.
- Private preschool education was singled out for incentives in the form of full tax exemption for operators of private preschools for a period of 5 years as well as industrial building allowance at an annual rate of 10% on preschool buildings.
- To promote issuance of Islamic *sukuk* (i.e. bonds) for the agriculture sector, it is proposed that double deduction be given for expenses incurred in the issuance of approved Agro-*Sukuk*. To reduce the cost of issuance of retail *sukuk* and retail bonds and to encourage individual investors to participate in the capital market, a double deduction is proposed to be given on additional expenses involved in the issuance of such bonds. Stamp duty exemption will also be given on instruments relating to the subscription of retail *sukuk* and bonds.
- Proposals were announced for the establishment and development of 'Business Trusts' as defined in the Capital Market and Services (Amendment) Act 2012 and it is proposed that such business trusts (essentially a listed vehicle established to offer investors strong and stable returns derived from investing in capital intensive assets) will have similar tax treatment as companies. There will be stamp duty and real property gains tax exemptions to facilitate transfer of businesses, assets or real property into the business trust and these will be provided on a one-off basis at the initial stage of the establishment of the business trust.
- In a move to support revival of abandoned housing projects, the Budget proposes to provide the rescuing contractor a double deduction for interest expense and all costs involved in obtaining loans to revive the project as well as stamp duty exemptions on instruments relating to the financing and transfer of land or houses. The banking and financial institutions involved in the provision of finance will obtain tax exemption on the interest income received from the rescuing contractor. Finally, the original house purchaser can expect to receive stamp duty waivers in respect of the instruments of loan agreements for additional financing as well as on the transfer of the house. A question does arise as to why does a bank need a tax exemption on interest received from a rescuing contractor of an abandoned housing scheme?
- Proposals have been made for the amendment of the income tax legislation to provide for the taxation of limited liability partnerships (LLP) registered under the Limited

Liability Partnerships Act 2012. With the amendments, a limited liability partnership will be treated for tax purposes similar to companies and not as partnerships. This means that tax neutrality will be sacrificed if a partnership (where the individual partners are subject to personal tax at scale rates) was to convert to a limited liability partnership. In certain circumstances, a tax benefit could arise whereas in others the result could be a tax disadvantage. Unutilised tax losses and capital allowances of an existing entity/partnership will also be allowed to be carried forward to a limited liability partnership upon conversion, subject to certain limitations. An issue is that an existing partnership is not a person under the Income Tax Act 1967 and so can the unutilised losses/capital allowances due to the existing partners be transferred to a LLP which is a person under the Act? Why is there no tax neutrality in terms of the transfer of assets/business of an existing partnership/company to a LLP in terms of income tax, real property gains tax (RPGT) and stamp duty?

■ Companies acquiring and holding treasury shares (i.e. their own shares) will obtain a special deduction (for the cost of the shares less the amount paid by the employees) in the event such treasury shares held are offered to employees under employee share ownership schemes. This may be a worthwhile consideration for companies in the practice of acquiring and holding their own shares as treasury stock. The special deduction is to be given in the year of assessment the employee exercises his right to acquire the shares, making tracking and effecting such claims a challenge. This is a good move but keeping track of the costs, etc. to follow a FIFO system can be tedious. An averaging of the costs for the year may be a better approach.

■ Interest income will not be taxed as a business source unless it arises from a licensed business of lending money. This proposal is aimed at nullifying some court decisions which have held that such interest income may be taxed as part of the business source. This creates certainty but it overlooks basic principles like the application of the badges of trade and the more we move away from restricting the application of basic principles, the more complex the tax system becomes.

■ Besides administrative proposals to bring the petroleum income tax legislation in line with that under the income tax legislation, measures have been proposed to introduce transfer pricing provisions for transactions between related parties operating in the upstream sector. The proposals extend to provision of financial assistance and thin capitalisation.

■ Resident individual income tax rates will see a reduction of 1% across the chargeable income bands from RM2,501 to RM50,000. However, the top rate remains at 26%. Income tax rates of Co-operative Societies are also to be reduced by 1% to 7% across all chargeable income bands. There is a widening of the income bands and the top rate is to be restricted to 25%.

■ Contributions made by parents for their children to the national education savings scheme will be given higher relief of RM6,000 from RM3,000 previously. Child relief was also increased for children over 18 years of age and attending university or college from RM4,000 to RM6,000 with commensurate increased deductions for disabled children.

■ Annuity funds will be tax exempt on income received and this is intended to spur individuals to invest in annuity schemes to add to their retirement savings.

■ First time purchasers of residential property will continue to receive the benefit of a 50% stamp duty exemption as this exemption has been extended to agreements executed up to 31 December 2014.

■ In a further attempt to curb speculative activities in the real property market, it is proposed that gains on disposal of real property and shares in real property companies from 1 January 2013 be taxed at a higher rate of 15% (currently 10%) if such disposals occur within 2 years of acquisition. For disposals within the third to fifth year of acquisition, the rate is revised from the current 5% to 10%. Disposals in the sixth year and thereafter continue to be free of tax. I hope we can bring back RPGT in its original form soon though I do agree that a gradual increase is more appropriate at the moment.

OUTLOOK

THE 2013 BUDGET proposals are broad-based and wide-ranging in its socio-economic objectives. It is seen as a people-friendly and an election Budget. The positive aspect of the 2013 Budget proposals is that the Government is of the view that the country's economic growth is not overly-dependent on the global economies and external trade. Whether this view will be justified is left to be seen given that Malaysia is a major export-driven economy. The key assumption that belies the growth in GDP and income levels is that the many initiatives and projects planned under the ETP will bear fruit and drive domestic growth and consumption. If these projects do not meet their projections or yield the desired financial benefits, it would place considerable doubts on the ability of the Government to reduce the budget deficit and safeguard the well-being of the economy and the people. Reining in corruption and increasing crime rates is also a prerogative and Malaysia needs to showcase itself as being a transparent, well-organised, civil and safe country for its people and investors. It is hoped that these aspirations will come true in 2013 and beyond.

COMMENTS

The tax revenue base is reported to be extremely narrow. The 2012/2013 Economic Report states that 11% of registered companies and 14.8% of employees pay income taxes. With 1.7 million persons paying income taxes compared to a workforce of 12 million, this puts into focus the extremely narrow base from which the Government tries to extract its tax revenue. In addition, oil-related revenues generate around 33% of the total revenue of the Government.

The personal tax base is affected by the granting of too many personal reliefs and there is a need to collapse these into 4 or 5 broad categories. Instead, as part of political expediency, we keep increasing reliefs. The 2013 Budget proposal to lower personal income tax rates is a populist move which takes 170,000 taxpayers out of the tax net and this is a continuation of policies in the past 15 years where taxpayers went out of the tax net for similar reasons. This will make it more difficult to sell GST to the sizeable group which does not pay any income tax. As for the corporate tax rate, it will be a challenge to lower it under current economic circumstances if there is no additional tax revenue generator. Thailand recently announced a move to a 20% tax rate. As part of the move to draw FDI and remain competitive, Malaysia too needs to move similarly with probably a 1% annual cut but with a GST in place.

As such, the Government does face some serious constraints and the issue of tax evasion and under-reporting of income is also an area that needs substantial research as the hidden and informal sectors could well generate substantial tax revenue. A robust fiscal framework (over say a 5 to 10 year time frame) to outline the way forward is what we need.

Given the 2020 target and the tremendous changes needed in achieving developed nation status, is it not appropriate to review the tax system holistically and develop one which is sustainable and effective? We have failed to carry out a broad-ranging review of the Malaysian tax system and have resorted to tinkering with the system on an ad hoc basis so much so that there are leakages, abuse and misperceptions. The tax revenue to GDP ratio is still low compared to advanced economies.

We need to focus on making tax compliance a way of life and a national duty. Continuous education cannot be limited to media advertisements by the tax agencies. Some suggestions include the following:

- We need to have a tax file number allocated to all persons irrespective of the tax status of a person.
- We need to widen the scope of withholding taxes to cover all payments among residents and exempting such

withholding only if a tax file number is disclosed to the payer.

- We need effective consultation with all stakeholders and not just pay lip service and there is a need for an explicit ethical framework that should apply to all participants in the tax consultation process.
- We need knowledge and access to information through robust information sharing mechanisms.

The 2013 Budget Speech stated the following which is certainly encouraging though it could be anybody's guess as to what is being implied. It reads:

" Apart from the transition from bulk subsidies to targeted subsidies, a review of Malaysia's taxation system will be continued to ensure the taxation system better reflects the household's financial position. The transition from income based taxation system to a more comprehensive and fair taxation system will eventually benefit the rakyat"

It is hoped that this outlines a holistic review of the entire tax system and not just a shift to a consumption tax. Time will tell!

What is happening to the roll-back of certain tax incentives that was started in 2012? We made a good start with shipping incentives last year only to defer it for 2 years. We need to carry out a review and decide which tax incentives do we really need and cease pandering to vested interests. Introducing incentives for say the commercialisation of research and development (R & D) findings needs to be followed up with close monitoring to study its effectivenesss. We actually require a revamp of the tax treatment of R & D and should benchmark this to other economies which have achieved success in this area.

SUGGESTIONS

In the past, many countries have relied on the support of international bodies such as the IMF, World Bank and other inter-governmental assistance of various forms to begin the process of tax reform, both in respect of designing the tax system itself and in respect of improving the ability to collect taxes. In the post 'credit crunch' world, it has become increasingly apparent that the operational ability of Ministries of Finance and tax authorities to increase tax revenues is somewhat limited. A new hands-on approach is required to assist the public sector, generating increased tax revenues and driving corporate activity without raising taxes or damaging international competitiveness.

Like any business, a Government has costs (e.g. social security payments, health, education, etc.) and it has revenues (e.g. taxes). No business manages its affairs simply by focusing on costs, so why should a Government operate any differently? A framework is required to help Governments optimise the out-turn from their current tax system, balancing this need with the creation of the right incentives for citizens and businesses to stimulate the economy. This is a difficult balance to achieve, but it is possible to create tax systems that give Governments the revenue they need, whilst providing citizens and businesses with the ingredients for long-term growth and economic success, including low rates of taxation.

To achieve this, experience in working with Finance Ministers and Governments is typically structured around three core work streams:

- Tax Reform Design - Modelling the economy and designing a new system of taxation appropriate for the jurisdiction, with the emphasis on simplicity, fairness, participation and economic stimulus.

- Tax Compliance - Building the taxpayer base to minimise tax evasion and ensure all taxpayers have paid the correct amount of tax under the law and will continue to do so.
- Tax Operational Improvements - Underpinning both streams, identifying and delivering detailed operational improvements, ensuring transparency of data and processes within the tax administration, across Government departments and with taxpayers.

The importance of sound tax risk management processes for large businesses' corporate governance is also an area that needs to be looked into by the tax authorities. Managing tax risk well is core to good corporate governance, particularly if a company is operating in international markets. The tax authorities need to commit towards developing a better relationship with taxpayers in the interests of an efficient, internationally competitive tax system. Corporate reporting and disclosure laws make it important for the Board of Directors to be appropriately informed about material tax risks. By being transparent, accountable and engaging constructively with the tax authorities, a taxpayer demonstrates good corporate citizenship and should lower its tax risk profile, with the benefits to reputation that follow. Experience with corporate governance and relationship based products - such as the Annual Compliance Arrangements in Australia - show that better relationships with large business leads to fewer audit interventions and improved certainty for both the tax authorities and the taxpayer. Malaysia needs to look into creating a similar mechanism.

It is thus important to work towards securing a fair, competitive and sustainable tax base for the future prosperity of the nation. Of concern would be some of the emerging threats to the corporate tax base posed by some of the structural changes in the global economy, which are being exacerbated by various tax planning practices of many multinational corporations. Low effective tax rates could reflect the ability of companies to shift income to low or no tax jurisdictions.

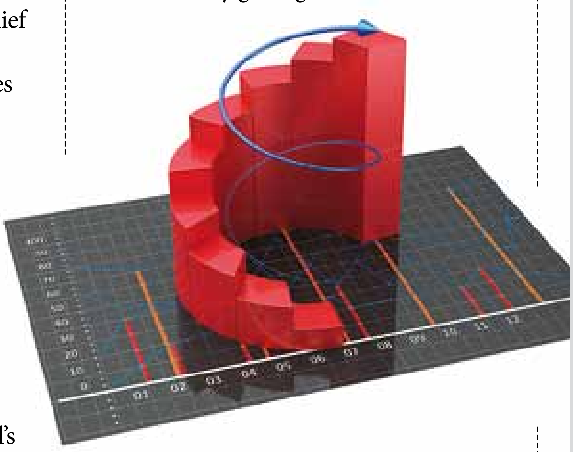
There is a strong public interest in drawing attention to practices that have the potential to undermine the future sustainability of Malaysia's corporate tax base.

Governments all around the world need to rethink many of the key rules of international taxation.

A number of areas (including that of enhancing tax administration) have been suggested by various organisations which require to be looked at so as to improve the Malaysian tax system and make it efficient, simple and encourage effective compliance. These include the following:

- Introduce a strategic plan on the direction forward in respect of developing and improving the sources of tax revenue especially since oil reserves (from which petroleum income tax and royalties are generated) will dwindle in the near future.
- Review the legislative framework holistically to simplify current provisions and to remove archaic ones. In doing this, the private sector must be consulted to provide its input and assistance.
- Keep tabs on improvements in the tax legislation in the region and other parts of the world. Make proactive suggestions to reform and enhance the current structure so that we are in step with worldwide developments.
- To assist in making compliance easier, there should be a general convergence between accounting profits and taxable profits.

- Revise the income tax rates downwards after the GST is introduced. The Government should look at committing itself to a phased reduction in income tax rates.
- Revamp the tax incentives legislation to remove certain incentives that have not been attractive, curtail certain incentives and review the type of incentives as the same type of incentive may not apply equally to different types of industries.
- Enhance the current group relief provisions to allow a transfer of 100% of current business losses to companies within a group.
- Review the way individuals with only employment income have to file tax returns. Why not make the deductions from salaries a final tax and avoid more paper circulating in the system?
- Enhance and protect taxpayers' rights by improving and monitoring the Taxpayer's/ Client Charter. Perhaps, the Auditor-General's Office should monitor the effectiveness of the Charter??
- Focus on the educational role so as to be able to disseminate tax information including using the website effectively which includes listing all tax case law decisions. Make voluntary compliance a way of life.
- Collect what is due and penalise intentional non-compliance quickly. Attempt to avoid arrears and avoid chasing for collection of tax liabilities years after these have been established.
- Introduce an effective human resource policy so that technical capabilities are enhanced i.e. get the right personnel. Outsource certain aspects, for example the research into a highly technical area which may be the subject of an advance ruling so that there is an effective understanding of the specific issue and the industry.
- Train officers of the tax authorities by getting contributions from even the private sector so that we develop staff with a broader mindset and more business knowledge.



- Utilise technology effectively to provide services to taxpayers, to assist staff to respond on a timely basis and to collect taxes quickly. We must use technology in a holistic manner and not in a piecemeal manner so that systems are integrated effectively. The authorities must also know the latest status and not force a taxpayer to prove that the tax liability for the relevant year of assessment has been paid.

This article has been developed from various publications of the author in Malaysian Business, the STAR newspaper and in various presentations made at various think tank meetings.

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CONCLUSION

SO ALL IN, a one year plan can only take us so far. We need a five year plan at least to outline the fiscal policy direction for the nation and we need to be bold in our outlook. This includes changing the mindset of the citizens, having consistent application of rules across the nation as well as enforcing and monitoring effectively. One cannot take a populist approach in everything. At times, we have to bite the bullet and endure some pain so that our resilience and ability to respond is up to the mark!

It is timely that Malaysia announces a comprehensive fiscal reform which is wide-based and wide-ranging and puts into place a long-term plan to mould a world class tax system that will be comparable to the leading developed nations in the world. It is time to let go of the 'ad-hoc' approach of tinkering with the tax system-let us get on with it !

MONEY LAUNDERING, COMBATING TERRORIST FINANCING AND TAX CRIMES

Dr. Jeyapalan Kasipillai *and* Dr. Shanthy Rachagan

MONEY LAUNDERING REFERS TO THE CONVERSION OR TRANSFER OF PROPERTY, KNOWING THAT SUCH PROPERTY IS DERIVED FROM CRIMINAL ACTIVITY; FOR THE PURPOSE OF CONCEALING OR DISGUISING THE ILLICIT ORIGIN OF THE PROPERTY. IT ALSO ENCOMPASSES ASSISTING ANY PERSON WHO IS INVOLVED IN THE COMMISSION OF SUCH ACTIVITY TO EVADE THE LEGAL CONSEQUENCES OF HIS OR HER ACTION[1].

Laundered income is not the same as "hidden income" but they could overlap. The term "hidden income" is used interchangeably with 'underground', 'unofficial' or 'submerged' income and associated with 'black' or 'grey' labour or moonlighting. Essentially, the designation "hidden income" refers to those economic activities that should be reported or measured by the techniques, currently used for measuring economic activity, but are not. These gains may take the form of evaded taxes, non-compliance with costly regulation, income from prohibited and criminal activities or fraudulent receipt.

FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING

The Financial Action Task Force on Money Laundering (FATF), a 36-member inter-governmental body established by the 1989 G-7 Summit in Paris, was set up to define standards for combating money laundering and terrorist financing (MLTF). It works in close cooperation with other key international organisations,

MONEY LAUNDERING AND TERRORISM ACTIVITIES

Money laundering is a major threat and can pose devastating economic, social and political consequences especially to developing countries. Initially money laundering was associated with drug trafficking and organised crimes. After September 11 2001[2] when the link between money laundering and terrorism activities was recognised, countries around the world shifted to an aggressive drive to implement laws to combat money laundering and terrorism financing. The number of cases prosecuted under this crime is minimal but the revenue loss for governments, in terms of tax evasion, around the world is enormous.

[1] *This definition is found in Article 1 of the 1990 Council of Europe Convention*

[2] *The September 11 attacks (also referred to as 9/11) were a series of four suicide attacks that were committed by Al Qaeda in the United States on September 11 2001.*

including the International Monetary Fund (IMF), the World Bank and the United Nations. The FATF has primary responsibility for developing a worldwide standard for anti-money laundering (AML) and combating terrorist financing (CTF). The FATF has issued 40 recommendations to guide international action against money laundering, and nine Special Recommendations on Terrorist Financing[3]. These recommendations set the international standard for AML/CTF regimes.

It also carried out mutual evaluation studies to ensure that the legislative arrangements made by a country comply with the standards. Over 180 countries around the world, including Malaysia, are members of FATF and they adhere to the global standards. All member countries have passed suitable legislation to counter money laundering and terrorism financing[4].

THIS ARTICLE TRACES THE HISTORY OF MONEY LAUNDERING AND OUTLINES MALAYSIAN LAWS RELATED THERETO. IT ALSO ENDEAVOURS TO HIGHLIGHT THE LINK BETWEEN TAX EVASION AND CRIMES, AND MONEY LAUNDERING.

TRACING MONEY LAUNDERING

Money laundering can also be referred to as "cleaning monies that is dirtied due to illegal and/or a criminal element". Therefore, the task of the money launderer is to make the proceeds of crime appear to be legal so that any attempt to link it with criminal activity would be futile.

One of the first prescribed definitions of money laundering is found in the 1988 Vienna Convention. Article 3(1) of the Vienna Convention states that money laundering refers to:

- **conversion or transfer**

of property, knowing that such property is derived from any offence or offences established in accordance with sub-paragraph (a)[5] of this paragraph, or from an act of participation in such offence or offences for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of his actions, and

- **concealment or disguise**

of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that such property is derived from an offence or offences established …or from an act of participation in such offence or offences.

[3] *See http://www.fatf-gafi.org/pages/aboutus/ for details.*

[4] *http://theconversation.edu.au/hsbcs-money-laundering-scandal-is-more-than-just-risky-business-practice-8309.*

[5] *Sub-para (a) criminalises the various aspects of illicit traffic in narcotic drugs and psychotropic substances.*

LAUNDERED MONIES AND HIDDEN INCOME

The IMF has placed the value of globally laundered monies to be between two to five per cent of the world's GDP, which is estimated to be US$3.61 trillion[6]. The Tax Justice Network, an independent organisation launched in the British Houses of Parliament in 2003 dedicated to analyse data, and advocate research in the field of tax and regulation reported that developing countries lose an estimated US$858.6 billion to US$1.06 trillion annually in illicit financial outflows, thereby foregoing badly needed tax revenue. Money laundering also has an effect on national policy because measurement errors on national account statistics and it also threatens monetary instability due to unsound asset structures in commodities, according to the United Nations Department of Public Information.[7]

Kasipillai (1997) used the monetary demand approach of Tanzi (1982) to develop estimates of the size of the hidden income and tax evasion in Malaysia for the period 1971 to 1994. The estimates are indicative of the hidden economic activity and tax evasion which declined since the mid-1990's with decreasing income tax rates, a booming legal economy and deregulation in many sectors which enhanced the attractions of working "above ground". The research findings show that over the period 1983 to 1994, there was a gradual decline in the size of hidden economy and the level of tax evasion. For instance, in 1994, the hidden economy and tax evasion was estimated at 3.73 per cent and 0.5 per cent of gross national product respectively. The ratio of tax evaded to total income tax collections stood at 5.8 per cent in 1994 and a high of 27.2 per cent in 1974. To our knowledge, similar tax data for the post-1994 era is not available.

HISTORY OF MONEY LAUNDERING

It is believed that the term 'money laundering' was first applied in the United States during the 1920s. During this time in order to avoid detection by the authority, Mafia gangs set up 'front' businesses to hide their illegal money (example, bars and laundrette). The first ever move to combat money laundering was carried out in the city of Chicago during the 1930s. During this time the authorities found it extremely difficult to connect the Mafia gang leader (Al-Capone) to money crimes as there was insufficient evidence. Al-Capone was however, finally convicted for tax evasion.

The United States was also the first country in the world to establish laws and jurisdiction to fight money laundering by implementing the Bank Secrecy Act 1970, and the Money Laundering Control Act 1986.

MALAYSIAN LAWS ON MONEY LAUNDERING

Malaysia passed the Anti-Money Laundering Act (AMLA) in 2001. The act was amended in 2003 to encompass terrorism financing within the realm of the anti-money laundering regulatory system. The AMLA was re-named Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) and it became effective from 6 March 2007[8].

STANDARD GUIDELINES FOR DESIGNATED NON-FINANCING BUSINESS AND PROFESSIONS

On 2 February 2012, Bank Negara Malaysia issued Standard Guidelines for Designated Non-Financing Business and Professions relating to Anti-Money Laundering and Counter Financing of Terrorism. These guidelines were made pursuant to its power to issue rules under Sec 83 AMLATFA 2001 (as amended).

The primary offence of money laundering and the offence of attempting or abetting the commission of money laundering are found in Sec 4(1) AMLATFA. Section 4(1) states the following:

Any person who-

- **engages in** or attempts to engage in; or
- **abets the commission** of, money laundering, commits an offence and shall on conviction be liable to a fine not exceeding RM5 million or imprisonment for a term not exceeding five years or both.

[6] *Peter Rueter and Edwin M. Truman, Chasing Dirty Money: The Fight Against Money Laundering(2004) 16.*

[7] *http://www.dialogo-americas.com/en_GB/articles/rmisa/features/special_reports/2011/03/31/feature-ex-2036*

[8] *Gazette Order P.U. (B) 66/2007*

PENAL CODE AND AMLATFA

In order to assist in the interpretation of some of the words such as 'abet', and 'conspiracy' in Sec 4(1) of AMLATFA, one has to refer to other statutes such as Penal Code (Act 574). Section 107 of the Penal Code defines 'abetment' as the conduct of a person who engages with one or more other persons in any conspiracy for the doing of a thing. Section 120A of the Penal Code defines 'conspiracy' as the agreement of two or more persons to do, or cause to be done, an illegal act or an act by illegal means.

Section 4(1) AMLATFA must be read together with the definition of money laundering under Sec 3(1) AMLATFA which states:

'money laundering' means the act of a person who:

- **engages directly** or indirectly, in a transaction that involves proceeds of any unlawful activity;
- **acquires**, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
- **conceals, disguises** or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where:

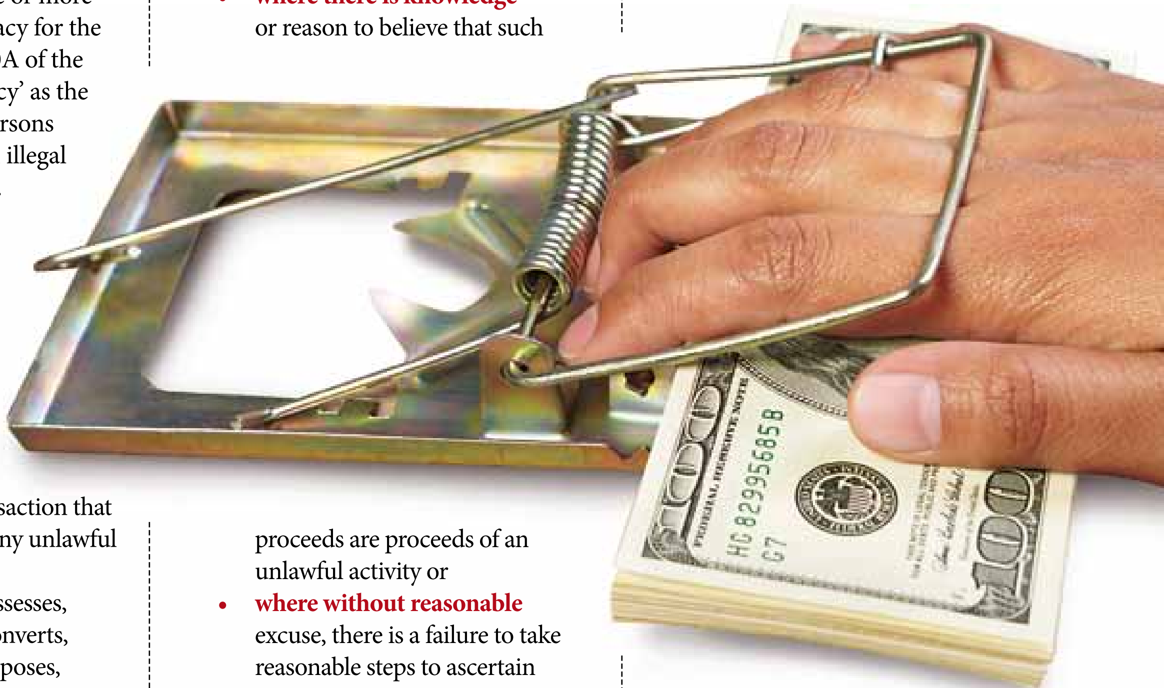
(a) as may be inferred from objective factual circumstances, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(b) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

CONCEPTS AND DEFINITIONS

In light of these provisions, it can be seen that the offence of money laundering is expressed in very wide terms. As such, the offences included are, *inter alia*, the dealing in, concealing, disguising, converting, transferring or removing, acquiring, or using the proceeds of any unlawful activities:

- **where there is knowledge** or reason to believe that such proceeds are proceeds of an unlawful activity or
- **where without reasonable** excuse, there is a failure to take reasonable steps to ascertain whether or not such proceeds are proceeds of unlawful activity.



The term, 'proceeds of unlawful activity' is defined as 'any property derived or obtained directly or indirectly by any person as a result of any unlawful activity.'[9] 'Property' is broadly defined and it includes movable or immovable property of every description, whether situated in or outside Malaysia and whether tangible or intangible and also includes an interest in any such movable or immovable property.

'Unlawful activity' means 'any activity which is related, directly or indirectly to any serious offence or any foreign serious offence.'[10] 'Serious offence' means any predicate offence listed in the Second Schedule of AMLATFA and includes any attempt to commit, or the abetment, of any of those listed offences.[11] The predicate offences range from corruption and criminal breach of trust to kidnapping, theft and drug trafficking. Clearly, the term 'money laundering' has been defined in AMLATFA in the widest of terms and, therefore, makes it easier to secure a conviction.

INTERPRETATION ACT

The money laundering offence applies to both natural and legal persons. The Interpretation Acts 1948 and 1967 (Act 388) defines 'person' to include a body of persons, corporate or incorporated. Furthermore, Sec 87(1) of AMLATFA provides that when an offence is committed by a body corporate or an association of persons, a person who was at that

[9] *Anti-Money Laundering and Anti-Terrorism Financing Act 2001, S 3(1).*

[10] *Anti-Money Laundering and Anti-Terrorism Financing Act 2001, S 3(1).*

[11] *Anti-Money Laundering and Anti-Terrorism Financing Act 2001, S 3(1).*

time a director, controller, officer or partner, or who was concerned in the management of the affairs of the entity, is deemed to have committed the offence unless that person proves that the offence was committed without his or her consent.

AMLATFA defines a 'foreign serious offence' as one that is against the law of a foreign state as certified by that state and that consists of or includes an act or activity which, if it had occurred in Malaysia, would have constituted a 'serious offence'.[12] Therefore, there is no money laundering offence where the predicate conduct occurred in a foreign state but was not an offence in that state. Clearly, this dual criminality requirement could hinder successful prosecution if the predicate offence takes place overseas. At present, there is lack of uniformity among the jurisdictions in relation to money laundering predicate offences. For example, Australia considers tax evasion as a predicate offence, but in Malaysia tax evasion is not a predicate offence because it is treated as a civil offence.[13] Greater uniformity in the predicate offence would facilitate prosecution.[14]

UNFETTERED POWERS

It is interesting to note that Sec 4(2) of AMLATFA allows unfettered powers to a person to be convicted of a money laundering offence, irrespective of whether there is a conviction in respect of the specific predicate offence from which the illegal fund is generated.[15] AMLATFA does not require the prosecution to establish a link between the predicate offence and the money laundering offence, but in practice this is usually done by the prosecution.

However, this practice places a significant barrier to the successful prosecution of money laundering offences because the prosecutor often faces difficulties trying to prove that the laundering activity involved the proceeds of a predicate offence under the Second Schedule of AMLATFA.[16] This is because criminals will normally merge the proceeds of different crimes in order to make it impossible to differentiate the sources of the proceeds.

(i) In the initial or placement stage (see **Figure 1**), the launderer introduces the illegal funds into the financial system (for example, making 'structured' cash transactions into bank accounts).

(ii) In the next phase known as layering, the launderer moves the funds to distance it from its source by moving, dispersing or disguising illegal funds or assets to conceal their true origin (for example, using a maze of complex transactions involving multiple banks and accounts, or corporations and trusts).

(iii) In the final stage known as integration, the funds re-enter the

CLEARLY, THIS DUAL CRIMINALITY REQUIREMENT COULD HINDER SUCCESSFUL PROSECUTION IF THE PREDICATE OFFENCE TAKES PLACE OVERSEAS. AT PRESENT, THERE IS LACK OF UNIFORMITY AMONG THE JURISDICTIONS IN RELATION TO MONEY LAUNDERING PREDICATE OFFENCES. FOR EXAMPLE, AUSTRALIA CONSIDERS TAX EVASION AS A PREDICATE OFFENCE, BUT IN MALAYSIA TAX EVASION IS NOT A PREDICATE OFFENCE BECAUSE IT IS TREATED AS A CIVIL OFFENCE.[13]

12 *Anti-Money Laundering and Anti-Terrorism Financing Act 2001, S 3(1).*

13 *Nor Hashimah Mohd. Yassin, Legal Aspects of Money Laundering in Malaysia from the Common Law Perspective (2007) 169.*

14 *An Analysis of the Malaysian Anti-Money Laundering Laws and their Impact on Banking Institutions, Aspalela A.Rahman, PhD thesis, 2008.*

15 *This scenario exists for instance, when a person working in the regulated sector knows or suspects that another person is engaged in money laundering but fails to report that knowledge or suspicion to law enforcement.*

16 *An Analysis of the Malaysian Anti-Money Laundering Laws and their Impact on Banking Instutions, Aspalela A. Rahman (2008)*

STAGES OF MONEY LAUNDERING

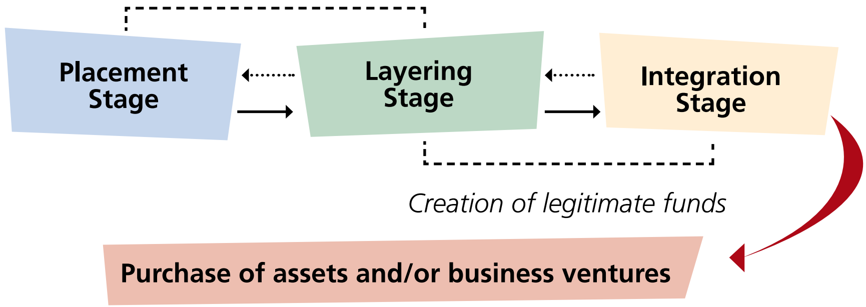


***Figure 1**: Stages in the Money Laundering Process*

launderer's portfolio as legitimate money, and would be used for investing these now distanced funds or assets in further criminal activity or legitimate business, or purchasing high-value assets and luxury goods. At this stage the funds or assets appear to have been legitimately acquired.

It can, however, be problematic to differentiate and distinguish each of these three processes. Money laundering tends to occur in countries with low risk of detection but in places where there are stable financial systems.

SOURCES OF MONEY LAUNDERING

The international community is increasingly concerned about the growing incidence of money laundering activities. Such illegal activities divert resources, encourage crime and corruption, slow growth and distort international trade and capital flows in a country. Money laundering is not restricted to the proceeds of drug trafficking. It includes proceeds from other criminal activities such as armed robbery, tax evasion, smuggling, human trafficking and prostitution, terrorism, arms dealing, fraud, forgery and counterfeiting, bribery and corruption.

DRUG TRAFFICKING

Drug trafficking is the production and transit of illegal drugs such as heroin, methamphetamine and marijuana. Heroin and marijuana form the highest share of drug earnings. The 1995 report, *Estimates of the extent of money laundering in and through Australia* (Walker 1995)[17] suggested that around $3.5b per annum were believed to be generated by crime in Australia and laundered either in Australia or elsewhere, with the bulk generated by fraud and then drugs. This went against the prevailing international consensus, which was that the majority of laundered money was generated by drug offences.

The British Broadcasting Coporation (BBC) reported that Mexican drug cartels have so much cash at their disposal that they have managed to consistently infiltrate police, from the grassroots level to the very top.[18]

HUMAN TRAFFICKING

Human trafficking continues to be a problem on a global scale and particularly acute in Southeast Asia. There is growing evidence that criminals are turning to human trafficking and the smuggling of migrants to a greater extent as these crimes are seen as highly profitable. According to the United Nations Office on Drugs and Crime (UNODC), this is the third largest source

[17] *Estimates of the Extent of Money Laundering in and through Australia, Prepared for the Australian Transaction Reports and Analysis Centre, John Walker Consulting Services, September 1995.*

[18] *http://www.dialogo-americas.com/en_GB/articles/rmisa/features/special_reports/2011/03/31/feature-ex-2036*

of income for the organised crime groups after drug and arms trafficking.[19]

International 'sex tourism' is another form of generating illegal wealth, where wealthy men visit countries with widespread prostitution and child-sex and this leads to huge amount of illegal money being transacted. However, domestic prostitution markets account for considerably higher amount of revenue than the international flesh trade.

Human trafficking continues to be a problem on a global scale and particularly acute in Southeast Asia.

SMUGGLING ACTIVITIES

Arms trade is one of the biggest revenue generating smuggling activities. The size of the armed forces and its access to weapon systems may encourage such activities, particularly where the accounting and inventory standards are easily exploited. Such cases can be seen in the states of the former Soviet Union, whereby illegal sales of arms have formed a significant component of the economic base of the armed forces within the services.

FRAUDULENT PRACTICES

Fraudulent practices come in a variety of forms and it is a fast growing source of criminal revenue globally. Credit card fraud has seen remarkable growth in East Asian

mainland and Asia-Pacific's leading financial centres. The emergence of new fraud phenomena – internet stock promotions, particularly in the Asian countries highlights the lack of supervisory and regulatory guidelines in these stock markets.

TAX EVASION AND TAX CRIMES

Basically, criminal organisations avoid paying tax because the perpetrators are able to elude revenue from tax authorities. The other issue which is a hotly debated topic relates to whether money laundering laws do or even should relate to tax crimes. The issue here revolves around two main areas. The first of which is whether tax offences are a "predicate crime" within any particular jurisdiction. In some countries, governments do not necessarily raise tax revenue through income tax; hence evasion of income tax cannot be a crime.

Secondly, a basic principle of international law is that one country cannot enforce the tax laws of another. The former is not applicable to the European Union (EU) as all the governments of the EU do raise tax revenue through charging income tax. The latter does pose a problem, though the question of whether tax laws are a predicate offence for the purposes of money laundering laws is a question of the express provision of the anti-money laundering laws, or the interpretation of those laws by the Court. In most countries, including the EU, that have 'all crimes' anti-money laundering laws, it is possible that tax crimes could fall within the catchall provisions.

Tax offences fall on the border of what is and what is not considered as laundering. This is due to the fact that

CORRUPTION

Corruption and corrupt practices provide cover for other criminal activities. The issue of corruption can be divided into the following:

- **Bribery** Payments demanded in return for being allowed to do business. The payment is the license to do business.
- **Election corruption** Illegal payments made during elections to gain continuous support from voters.
- **Protection** Authorities accepting payments from criminal bodies in exchange for permitting them to carry out illegal businesses.
- **Systematic top-down corruption** National wealth is systematically siphoned off or exploited by ruling elites.

[19] *Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants, The Financial Action Task Force (FATF) , July 2011.)*

the money a person lawfully receives cannot be laundered. Let us look at the following example. If a person receives a sum of RM1,000 (from an illegal source) and is liable to pay a 20 per cent marginal tax rate and the taxpayer chooses not to declare the income, the RM200 is considered as tax evaded. In order to retain the RM200, the individual could place the whole amount of RM1,000 through the laundering process. The individual has to show that he or she received RM1,000 legitimately. The evaded sum of RM1,000 could be concealed through offshore financial centres; disguised as earned income, and by the use of other money laundering techniques.

The Financial Action Task Force on Money Laundering has in 2012 recommended that the scope of money laundering predicate offences be expanded to include tax crimes. This effectively means that a person found guilty of tax evasion may be charged with money laundering. In this regard, Hong Kong has included tax crimes within the scope of money laundering predicate offences some years ago whereas Singapore has formally committed in adopting the latest FATF recommendations.[20]

METHODS OF MONEY LAUNDERING

The crime of money laundering involves diverse and often sophisticated approaches. It corrupts and intermingles with legitimate transactions in areas such as, casinos and gaming, structuring deposits, high-value assets like real estate and luxury vehicles, international trade, masked as insurance recoveries and international remittance as well as foreign exchange services.

An illustration of money laundering approaches is provided by referring to casinos and internet gambling. Casino operations and other gambling institutions can be exploited by money launderers. This is because internet gambling generates about US$1.5 million a month in the Pacific Islands region (FATF Report, 10 Feb 1999). The sources of proceeds represents a major new business trend and another potential vulnerability for money laundering and financial crime. As with any avenue for money laundering, it is difficult to state with certainty the amounts processed through internet gambling.

STRUCTURING DEPOSITS

Also known as smurfing, the structuring of deposits entail breaking up large amounts of money into smaller, less-suspicious amounts (for example, in the United States, this smaller amount has to be below US$10,000 - the dollar amount at which US banks have to report the transaction to the Government). The money is then deposited into one or more bank accounts either by multiple people or by a single person over an extended period of time (refer to **Figure 2**)

OVERSEAS BANKS

Money launderers often send money to various “offshore accounts” in countries that have bank secrecy laws, meaning that for all intents and purposes, these countries allow anonymous banking. A complex scheme can involve hundreds of bank transfers to and from offshore banks. Major offshore centres include the Bahamas, Bahrain, the Cayman Islands, Hong Kong, Antilles, Panama and Singapore.

SHELL COMPANIES

Shell companies are fake business entities that exist for no other reason than to launder money. They take in dirty money as “payment” for supposed goods or services but actually provide no goods or services; they simply create the appearance of legitimate transactions through fake invoices and balance sheets.

[20] *http://www.mas.gov.sg/en/News-and-Publications/Press-Releases/2012/FATF-Enhanced-Measures.aspx*

INVESTING IN LEGITIMATE BUSINESSES

Launderers sometimes place dirty money in otherwise legitimate businesses to clean it. They may use large business like brokerage firms; casinos and currency exchanges that deal in so much money, hence, it is easy for the dirty money to blend in, or they may use small, cash-intensive businesses like bars, car washes, strip clubs or check-cashing stores. These businesses are normally "front companies" that actually provide a good or service but whose real purpose is to clean the launderer's money. This method typically works in one of two ways: The launderer can combine his dirty money with the company's clean revenues. In this regard, the company reports higher revenues from its legitimate business than it is actually earning; or the launderer can hide his dirty money in the firm's legitimate bank accounts.

INSURANCE POLICIES

Single premium insurance policies, for which the premium is paid in an upfront lump sum rather than in annual instalments is a popular mechanism used by money launderers. Launderers or their clients purchase the policies and then redeem them at a discount, paying the administrative fees and fines and receiving payment from the insurance company. In addition, relatively complex cases involving single premium contracts, involves slower procedures and less liquid transactions. These longer-term processes offer launderers a lower risk of detection. In essence, time itself provides the layering by separating the predicative crime from the eventual payoff.

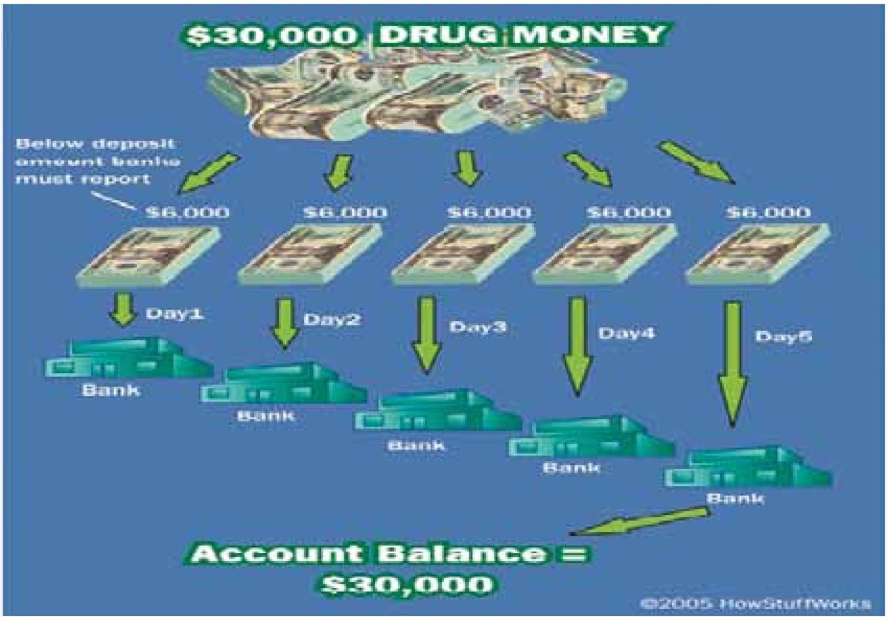


***Figure 2**: How Money Laundering Works Smurfing Outline*

MONEY LAUNDERING AND TERRORIST FINANCING

As mentioned earlier, "money laundering" refers to the conversion or transfer of property, knowing that such property is derived from criminal activity; for the purpose of concealing or disguising the illicit origin of the property.

After the September 11 2001 episode (the 9/11 episode), terrorist financing was closely watched and monitored by government authorities. Consequently, the United States passed the USA PATRIOT Act to ensure that both combating the financing of terrorism and anti-money laundering was given adequate focus by US financial institutions. After the 9/11 episode, it has become more difficult for terrorists to raise funds from charities and as such they have resorted to money laundering. Terrorists are now working with drug traffickers and criminals to make and launder the proceeds of crimes like fraud, prostitution, intellectual property theft and smuggling. Terrorists use low value but high volume fraud activity to fund their operations. For example, terrorist groups in Northern Ireland are using legitimate businesses such as hotels, pubs and taxi operators to launder money and fund political activities.

***Table 1**: Movement of money from US to Al-Qaeda watch list countries (2001)*

Country Funds Moved (US$)	Billion
Malaysia	2.221
Indonesia	0.565
Saudi Arabia	0.487
United Arab Emirates	0.233
Egypt	0.148
Total Top-5 countries	3.653
Other countries (20)	0.619
Total	**7.926**

***Source:** US Department of Justice, 2001*

Malaysia was among the top countries which received huge sums of illegal money from the Al-Qaeda group (US$2.2 billion) in 2001 (see Table 1). According to the US Department of Justice, the Al-Qaeda group has laundered a total of US$4.3 billion in the year 2001 alone, thereby denying the US government huge amount of tax revenue.

INLAND REVENUE BOARD AND AMLATFA

On 29 August 2012, the Malaysian Inland Revenue Board (MIRB) released a media statement advising the public that the revenue authority will take appropriate action for tax offences under the Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA) 2001.

The AMLATFA (Amendment of Second Schedule) Order 2010[21], has included the following tax offences as "serious offences' in the Second Schedule of AMLATFA:

- Failure to furnish return or give notice of chargeability [Sec 112 Income Tax Act 1967 (ITA)];
- Submitting incorrect income tax returns [Sec 113, ITA]; and
- Wilful tax evasion [Sec 114, ITA].

Any person who is found guilty of the above offences shall be liable to a fine not exceeding RM5 million and/or jailed for up to five years. The MIRB can freeze, seize or confiscate the person's property during investigation. The MIRB informed that in the year 2011, 1389 bank accounts had been frozen under this law.

It is questionable as to whether "failure to furnish return or give notice of chargeability" (Sec 112 ITA) and "submitting incorrect tax returns (Sec 113 ITA) are serious enough offences that warrant for their inclusion in the Second Schedule of AMLATFA. To our knowledge, we are not aware of other countries having taken such harsh measures in their respective legislations.

[21] *[P.U.(A) No. 343/2010], gazetted on 7 October 2010*

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CONCLUSION

The AMLATFA (2001) (as amended) is a legal document that enables measures to be taken by the government for the prevention of money laundering and terrorism financing offences. It also provides for the forfeiture of terrorist property and property involved in, or derived from, money laundering and terrorism financing offences. This Act applies to any property, whether it is situated in or outside Malaysia.

According to Sec 3 AMLATFA, the "enforcement agency" includes a body of agencies that is responsible in Malaysia for the enforcement of laws relating to the prevention, detection and of investigation of any serious offence. In this context, the Inland Revenue Board is also an enforcement agency for the implementation of AMLATFA.

CAN THE PRINCIPLES IN THE ALAM MARITIM CASE BE APPLIED TO THE PRESENT DAY SITUATION?

Tan Hooi Beng

My first love was and is still international tax. Ever since the case of Alam Maritim[1] was reported, I have been asked on how I feel about the decision handed down by the High Court ("HC") and Court of Appeal ("COA")[2]. My first reaction was that this should be a well celebrated case. However, what crossed my mind immediately was as to which treaty was relied on? Was it the old Malaysia-Singapore treaty ("old treaty") or the new Malaysia-Singapore treaty ("new treaty")[3]? There are several key differences if one compares both treaties. Against the above background, this article is intended to highlight to my fellow tax practitioners that one should not be overjoyed with the decision in Alam Maritim as the taxing right for the rental of moveable equipment appears to remain with Malaysia pursuant to the new treaty.

THE FACTS OF THE CASE

ALAM MARITIM (M) Sdn Bhd ("AMSB") is a private company whose main activities are confined to the ownership of vessels and the provision of vessel hire and management. The company's operations centred on providing services to Petroliam Nasional Berhad.

FROM 1998 TO 2004, the company entered into the "Uniform Time Charter Party for Offshore Service Vessels" contracts which concerned the payment of charter fees for the supply of ships together with crew in the form of services with non-resident companies operating the business of time charter of ship and crew ("Time Charter Services").

THROUGHOUT the duration of the said period, these non-resident companies received payment in full of such charter fees from AMSB without withholding tax ("WHT").

NONE OF THESE non-resident companies have a permanent establishment ("PE") in Malaysia.

MAJORITY (17 out of 22) of these non-resident companies were from Singapore. The rest were from other countries which had entered into avoidance of double taxation treaties.

ON 16 MAY 2005, AMSB's tax adviser wrote to the Malaysian Inland Revenue ("IRB") and sought for a private ruling that its payments to the non-resident companies without deduction of WHT was correctly done.

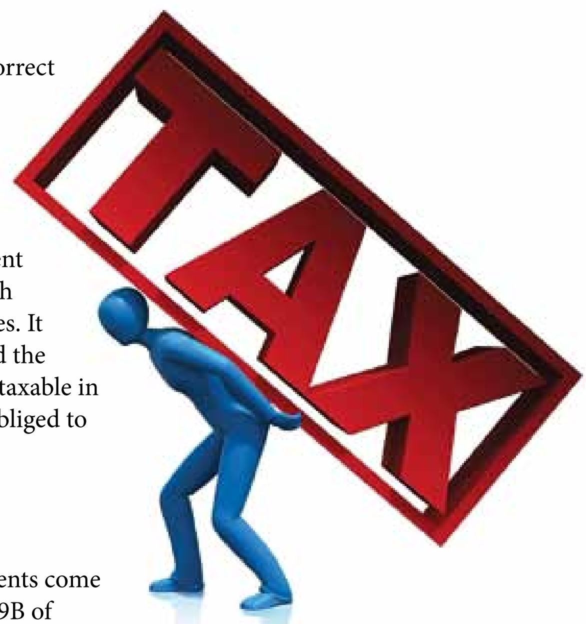
ON 7 JULY 2005, the IRB rendered its opinion that the payment is subject to WHT under Section 109B of the Malaysian Income Tax Act 1967 ("ITA"). On 1 August 2005, the IRB requested the company to confirm that the said WHT has been paid.

ON 16 AUGUST 2005, the company's solicitors submitted an application to the IRB for a decision on the issue of WHT.

ON 2 MAY 2007, the IRB by way of a letter, gave its reply to the effect that AMSB is obliged to deduct WHT on the payments made by the applicant pursuant to Section 109B of the ITA based on the stand taken by the IRB in its letter dated 7 July 2005 that payment of "charter fees" to non-resident companies constitute a special class of income under Subsection 4A(iii) of the ITA.

AGGRIEVED with the IRB's position, the company then filed an application before the High Court for a judicial review.

AMSB's Contention



AMSB contended that the decision of the IRB was incorrect or unfair and that no reasonable man would have reached the same decision. In essence, AMSB submitted that once the IRB had classified the payment of charter fees as coming within the provisions of Section 4A (iii) of the ITA, then the tax authorities ought to refer to the Malaysia–Singapore Double Taxation Avoidance Agreement (in this case the old treaty) and in particular Art IV[4], which afforded relief from taxation to the non-resident companies. It was thus AMSB's contention that the payments constituted the business income of the non-resident companies and were taxable in their country of residence and that the taxpayer was not obliged to deduct any WHT in relation to the charter fees.

IRB's Contention

On the other hand, the IRB contends that as the payments come within Section 4A of the ITA, the provisions of Section 109B of

[1] *Alam Maritim (M) Sdn Bhd v LHDN Malaysia (2012) MSTC 30-048 (Judicial Review No R1-22-148-2007), LHDN Malaysia v Alam Maritim (M) Sdn Bhd (Appeal No W-01-268-2010).*

[2] *The author understands that the tax authorities have appealed further to the Federal Court.*

[3] *Effective 1 January 2007.*

[4] *Article IV(1)(a) of the old treaty – The income or profits of a Singapore enterprise shall not be taxable in Malaysia unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only so much thereof as is derived by that permanent establishment in Malaysia.*

can the principles in the alam maritim case be applied to the present day situation?

the ITA apply. Also, the IRB contends that Article IV of the old treaty does not apply because as submitted by its counsel, the said article means that the Government of Malaysia may tax business through a PE in Malaysia. Only then, Article IV of the old treaty applies.

The Decisions

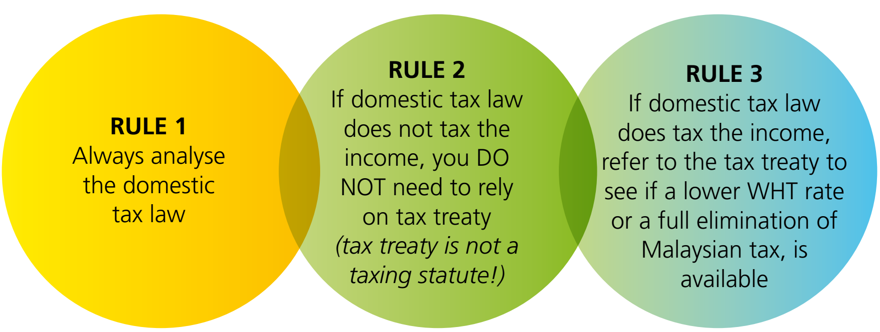
The HC and COA found in favour of AMSB. In essence, it was held that the treaty protection under Article IV of the old treaty is applicable given that the Singaporean companies that derived business income did not have PE in Malaysia.

The Author's Technical Analysis[5]

The 3 rules mentioned below could be used as a practical guide in determining the appropriate tax treatment in a cross-border transaction *(Graph 01)*.

RULES 1 & 2 - THE FIRST THING TO ANALYSE IS THE LOCAL TAX LEGISLATION ITSELF, NAMELY THE ITA.

Only if the ITA imposes tax on a particular income, then tax treaty, if any, should be considered further. Whilst it is trite law that tax treaty prevails over the domestic tax law[6], it is crucial to ask whether a treaty can impose a higher tax burden under domestic law. In other words, can a tax treaty act as a taxing statute (i.e. taxing right is provided in the tax treaty but no taxation is imposed by the local law)? Over the years,



Graph 01

[5] The author has taken into account:

- *The decisions of the Special Commissioners of Income Tax ("SCIT"), HC and COA in the following cases:*
  - ** DGIR v EIL (1983) 2 MLJ 57*
  - ** WW (S) Pte Ltd v DGIR (1988) 1 MSTC 319, WW (S) Pte Ltd v DGIR (1990) 1 MSTC 3,146*
  - ** (SCIT found in favour of the IRB but the HC found in favour of taxpayer)*
  - ** OA Pte Ltd KPHDN (1996) MSTC 2752 and the unreported decisions of HC and COA*
  - ** (SCIT found in favour of the IRB but HC and COA found in favor of taxpayer)*
  - ** SGSS (Pte) Ltd v KPHDN (1998) MSTC 2997 and SGSS (Pte) Ltd v KPHDN (2000) MSTC 3814*
  - ** (SCIT found in favour of the IRB but HC found in favour of taxpayer)*
- *The relevant commentaries to the Organisation For Economic Co-Operation and Development ("OECD") Model Tax Convention ("MTC)*

[6] Sec. 132 of the ITA, DGIR v EIL (supra)

different jurisdictions have adopted different approaches but by and large, majority of the jurisdictions adopt the view that the tax treaties are meant to relieve and not impose a higher tax than what exists under the domestic law. From the Malaysian perspective, the majority view is adopted and supported by the ratio diciendi laid down in *WW (S) Pte Ltd (supra)*. Therefore, it is submitted that where local tax law does not impose tax on a particular income, tax treaty need not be referred to. A classical example is the right to impose WHT on dividends that could be found in certain Malaysian treaties. As for now, the right from the Malaysian perspective is not relevant for a simple reason – the ITA does not impose dividend WHT.

APPLICATION OF RULES 1 AND 2 TO ALAM MARITIM'S CASE

Based on the above, one should then apply Rules 1 and 2 to Alam Maritim's case. Based on the facts above, it appears that there is no dispute between the tax authorities and taxpayer in terms of Malaysia's taxing right under the ITA. In this case, both parties seemed to agree that the payment for charter services are capable of falling within the ambit of Section 4A(iii) income and if so, potential WHT under Section 109B would kick in, after having satisfied one of the conditions in Section 15A.

Pursuant to Section 4A(iii)[7], rental of ships would be part of the special classes of income and subject to Malaysian WHT pursuant to Section 109B of the MITA. The rental income is deemed to be derived from Malaysia pursuant to Section 15A of the MITA which reads as follows:

Gross income in respect of:

a. amounts paid in consideration of services rendered by a person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person;

b. amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;

c. rent or other payments made under an agreement or arrangement for the use of any moveable property

shall be deemed to be derived from Malaysia:

a. if responsibility for payment of the above or other payments lies with the Government, a State Government or a local authority;

b. if responsibility for the payment of the above or other payments lies with a person who is a resident for that basis year; or

c. if the payment of the above or other payments is charged as an outgoing or expense in the accounts of a business carried on in Malaysia:

Provided that in respect of paragraphs (a) and (b), this section shall apply to the amount attributable to services which are performed in Malaysia.

Given to the aforesaid deeming provision and without taking into account the old treaty, there is no dispute that the payments for charter hire from AMSB to the Singapore resident companies would be deemed to be derived from Malaysia pursuant to either Section 15(c)(ii) or Section 15(c)(iii) of the ITA. As such, the WHT obligation pursuant to Section 109B of the MITA must be adhered to by AMSB.

RULE 3 - NEXT, WHERE LOCAL LAW, NAMELY THE ITA DOES INDEED TAX THE INCOME, ONE SHOULD ANALYSE THE TREATY TO SEE IF TREATY PROTECTION IS AVAILABLE.

The protection could come in the form of reduced WHT rate or total elimination. For example, under Article 12 of the new treaty, the preferential WHT rate for royalty is 8% as opposed to 10% under the ITA[8]. Of course, it is important to note that various conditions need to be met before the 8% could be applied for e.g. the recipient of the royalty must be a tax resident in Singapore and the beneficial owner of the income etc. In respect of total elimination, this particularly refers to business profits where the basic international tax principle clearly provides that a contracting state has no right to impose tax on the business profits of the enterprise of another contracting states unless the profits are attributable to the PE of the enterprise of another contracting state in the first contracting state[9].

APPLICATION OF RULE 3 TO AMSB'S CASE

Herein lies AMSB's contention – even if ITA does grant Malaysia the WHT tax right under relevant

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[7] 4A. Notwithstanding the provisions of Section 4 and subject to this Act, the income of a person not resident in Malaysia for the basis year for a year of assessment In respect of:
(i) ..
(ii) …
(iii) rent or other payments made under any agreement or arrangement for the use of any moveable property, which is derived from Malaysia is chargeable to tax under this Act.

[8] Part II, Schedule 1 of the ITA.

[9] This is commonly referred to as "no PE, no tax" principle and has been endorsed by the court in SGSS (supra), OA (Supra) and WW (S) Pte Ltd (Supra)

provisions[10], the protection under the old treaty should not be overlooked. The right to invoke the treaty protection is enshrined in Section 132 of the ITA and there are various case law precedents to confirm this point[11]. I would like to stress that if one applies the domestic tax legislation without having regard to the provisions of the tax treaties, this action would militate against one of the most fundamental international tax principles.

The old treaty is peculiar in a way that its structure and wordings deviates significantly from most conventions that Malaysia has entered into.

In the old treaty, Article IV (1) (a) provides that "the income or profits of a Singapore enterprise shall not be taxable in Malaysia unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only so much thereof as is derived by that permanent establishment in Malaysia" As far as Article IV is concerned, this is fairly consistent with Article 7(1) of the OECD Model Tax Convention. Paragraph 11 of the OECD Commentary to Article 7 provides that "The first principle underlying paragraph 1, i.e. that the profits of an enterprise of one Contracting State shall not be taxed in the other State unless the enterprise carries on business in that other State through a permanent establishment situated therein, has a long history and reflects the international consensus that, as a general rule, until an enterprise of one State has a permanent establishment in another State, it should not properly be regarded as participating in the economic life of that other State to such an extent that the other State should have taxing rights on its profits". In simple terms, this is commonly referred to as "no PE, no tax" rule.

In Alam Maritim's case, there is no dispute that the Singaporean resident companies did not have any PE in Malaysia.

It is noteworthy that Article 2(1)(l) of the old treaty provides that "the terms "income or profits of a Malaysian enterprise" and "income or profits of a Singapore enterprise" do not include rents or royalties in respect of literary or artistic copyrights, motion picture films or of tapes for television or broadcasting or of mines, oil wells, quarries, or other places of extraction of natural resources or of timber or forest produce, or income in the form of dividends, interest, rents, royalties or fees or other remuneration derived

10 Section 4A (iii), Section 15A, Section 109B and Part V, Schedule 1 of the ITA,

11 See EIL (Supra), SGSS (Supra), OA Pte Ltd (Supra) etc

from the management, control or supervision of the trade, business or other activity of another enterprise or concern or remuneration for labour or personal services or income derived from the operation of ships or aircraft.

Whilst this "exclusion" clause was deliberated in the case of *OA Pte Ltd (Supra)* and *SGSS Pte Ltd (supra),* it was not done in Alam Maritim's case presumably because this contention has not succeeded in the said old cases. Instead, the IRB has put up a very interesting argument, that is, Article IV of the old treaty is not applicable as "the said article means that the Government of Malaysia may tax business through a PE in Malaysia. Only then, Article IV of the treaty applies."

Whilst both the HC and COA in Alam Maritim's case have concurred on the treaty protection under Article IV of the old treaty and therefore no WHT is applicable, one should not lose sight of Article VIII of the old treaty that deals with royalty. Of note, Article VIII was not discussed at all in Alam Maritim's case[12].

Article VIII of the old treaty reads as follows:

a. *Royalties derived from sources within one of the Contracting States by a resident of the other Contracting State may be taxed in the Contracting State from which the royalties are derived*

b. *The term "royalties" as used in this Article means payments of any kind received as consideration for the use of, or the right to use, any copyright, patent, trademark, design or model, plan, secret formula or process or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience, but does not include any royalty or other amount paid in respect of literary or artistic copyrights or of motion picture films or of tapes for television or broadcasting or of the operations of a mine, oil well, quarry or other place of extraction of natural resources or of timber or forest produce.*

c. …..

d. ….

e. …

f. *Royalties as defined in paragraph 2 of this Article shall be treated as derived from sources within the Contracting State in which the property from which such royalties are derived is used.*

g. …

At issue is whether Article VIII should have also been considered in Alam Maritim's case. The definition under paragraph 2 appears to be wide enough to cover rental of ships. The definition of royalty that include the payments of any kind received as consideration for the use of, or the right to use industrial, commercial or scientific equipment is based on the older version of the OECD MTC. Since then, the OECD has taken a position the lease of equipment should be dealt with as business profits[13]. As far as Malaysian treaties are concerned, in most treaties (including the new treaty), Malaysia's taxing right on payment for the use of industrial, commercial or scientific equipment continues to be preserved.

Given the nature of payment in Alam Maritim' case, at first glance, it appears that both Article IV and Article VIII of the old treaty could potentially apply. Nevertheless, as

[12] The author is fully aware that Article IV was deliberated in the case of WW (S) (supra) and OA (supra).

[13] Paragraph 9 to the Commentary to Article 12 - Whilst the definition of the term "royalties" in the 1963 Draft Convention and the 1977 Model Convention included payments "for the use of, or the right to use, industrial, commercial or scientific equipment", the reference to these payments was subsequently deleted from the definition. Given the nature of income from the leasing of industrial, commercial or scientific equipment, including the leasing of containers, the Committee on Fiscal Affairs decided to exclude income from such leasing from the definition of royalties and, consequently, to remove it from the application of Article 12 in order to make sure that it would fall under the rules for the taxation of business profits, as defined in Articles 5 and 7.

mentioned above, Article VIII was not mentioned at all in the case. Rather, both Courts took a position that the sole provision that is to be used is Article IV, the "no PE, no tax" rule[14].

I wish to stress that this article is not aimed at debating the decisions made by the courts. Rather, it is intended to analyse as to whether the principles used in Alam Maritim could also be used in the present day situation under the new tax treaty.

Hence, to answer this, we need to read the new treaty, in particular the following:

- *Article 7 (Business profits), especially Article 7(7)*
- *Article 12 (Royalty), especially Article 12(4)*

Whilst the effect of Article 7(1) of the new treaty is similar to that of Article IV (1) of the old treaty, Article IV of the old treaty does not have an Article 7(7) of the new treaty equivalent which provides for the following:

"Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article"[15]

We should ask ourselves this question – what did the treaty negotiators have in mind when inserting 7 (7)? And, the answer to this should not be complex since the same wordings have been borrowed from the OECD MTC. Hence, it is sensible to refer to the OECD Commentary. The following are of relevance:

PARAGRAPH 10 OF THE COMMENTARY TO ARTICLE 7[16]

"Paragraph 1 incorporates the rules for the allocation of taxing rights on the business profits of enterprises of each Contracting State. First, it states that unless an enterprise of a Contracting State has a permanent establishment situated in the other State, the business profits of that enterprise may not be taxed by that other State. Second, it provides that if such an enterprise carries on business in the other State through a permanent establishment situated therein, the profits that are attributable to the permanent establishment, as determined in accordance with paragraph 2, may be taxed by that other State. As explained below, however, paragraph 4 restricts the application of these rules by providing that Article 7 does not affect the application of other Articles

of the Convention that provide special rules for certain categories of profits (e.g. those derived from the operation of ships and aircraft in international traffic) or for certain categories of income that may also constitute business profits (e.g. income derived by an enterprise in respect of personal activities of an entertainer or sportsman)(emphasis added).

PARAGRAPH 74 OF THE COMMENTARY TO ARTICLE 7[17]

" The question, however, could arise with respect to other types of income and it has therefore been decided to include a rule of interpretation that ensures that Articles applicable to specific categories of income will have priority over Article 7. It follows from this rule that Article 7 will be applicable to business profits which do not belong to categories of income covered by these other Articles, and, in addition, to income which under paragraph 4 of Articles 10 and 11, paragraph 3 of Article 12 and paragraph 2 of Article 21, fall within Article 7. This rule does not, however, govern the manner in which the income will be classified for the purposes of domestic law; thus, if a Contracting State may tax an item of income pursuant to other Articles of this Convention, that State may, for its own domestic tax purposes, characterise such income as it wishes (i.e. as business profits or as a specific category of income) provided that the

[14] *The author's personal opinion is that if Article IV is read together with Article 2(1)(l) of the 1968 treaty, it could be argued that Article VIII would prevail over Article IV. The author believes that the net result of this would be consistent with the intention of Article 7(6) of the present OECD MTC as well as the OECD Draft MTC (1963). However, this position was not accepted by the Courts in OA (supra) and WW (Supra). It is very important for tax practitioners to understand as to why the Courts have held that the leasing income of the Singaporean enterprises was treaty protected. In essence, the Courts, in both cases, took the position that the protection under Article IV of the old treaty (i.e. no PE, no tax) was applicable. One point that is not to be missed out is that the special classes of income under Section 4A of the ITA had not been introduced at that point in time.*

[15] *The wordings are exactly the same with those in Article 7(4) of the OECD MTC.*

[16] *On Article 7(4) of the OECD MTC*

[17] *Ibid*

tax treatment of that item of income is in accordance with the provisions of the Convention.

PARAGRAPH 76 OF THE COMMENTARY TO ARTICLE 7[18]

"Finally, it should be noted that two categories of profits that were previously covered by other Articles of the Convention are now covered by Article 7. First, whilst the definition of "royalties" in paragraph 2 of Article 12 of the 1963 Draft Convention and 1977 Model Convention included payments "for the use of, or the right to use, industrial, commercial, or scientific equipment", the reference to these payments was subsequently deleted from that definition in order to ensure that income from the leasing of industrial, commercial or scientific equipment, including the income from the leasing of containers, falls under the provisions of Article 7 or Article 8 (see paragraph 9 of the Commentary on that Article), as the case may be, rather than under those of Article 12, a result that the Committee on Fiscal Affairs considers appropriate given the nature of such income (emphasis added).

Having analysed the above, it follows that the taxing right on the rental of vessel/ship would rest with Malaysia under the new treaty given the existence of Article 7(7) of the treaty which could not be found in the old treaty. The fact that Malaysian treaties continue to maintain the payment for the use or the right to use industrial, commercial or scientific equipment in the definition of royalty simply means that the treaty negotiator wished to reserve the WHT right on this payment.

As mentioned above, tax treaty is not a taxing statute. As such, one may contend that the meaning of royalty under the ITA should be looked at. In this regard, the definition under Section 2 of the ITA does not seem to cover the payment for the use of moveable equipment[19]. Given this, is it appropriate for one to adopt the treaty meaning with a view to asserting a taxing right whereas the ITA's definition does not seem to cover certain payments? I take the view that by applying the treaty definition of royalty to assert Malaysia's taxing right does not contravene any international treaty practice for a simple reason – there is already a tax liability under the ITA even without treaty application[20]. Indeed, treaty application will result in a lower WHT rate of 8%, as opposed to local rate of 10% if the payment is correctly categorised as royalty under the new treaty.

Conclusion

Article 7(7) of the new treaty plays an important role as a "tie-breaker". Whilst the principles in SGSS (supra) were well celebrated, i.e. no PE, Malaysia tax, the inclusion of Article 13 (technical fees) in the new treaty put the issue of whether the principles in SGSS could still be used in present day to rest. Hence, on the same basis, it will be a daunting task for one to apply the decisions in Alam Maritim to the present day-situation given the above reasoning. It goes without saying, Rule 1 above must first be considered – i.e. the taxation right must first exist in the ITA in which case, it does for technical services as well as rental of moveable equipment.

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[18] *Ibid*

[19] *Section 2 of the ITA - "royalty" includes-*
(a) any sums paid as consideration for the use of, or the right to use-
(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;
(ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
(b) income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of this definition;

[20] *Section 4A(iii), Section 15A and Section 109B*

OUTSOURCING ARRANGEMENT FROM A MALAYSIAN TRANSFER PRICING AND REGULATORY PERSPECTIVE

Lim Phaik Hoon, Jagdev Singh, Ong Ai Ling *and* Choo Mei Ping

TRANSFER PRICING COMPLIANCE RULES

The transfer pricing landscape in Malaysia has been continuously changing with the recent introduction of the Income Tax (Transfer Pricing) Rules ("Transfer Pricing Rules") that was gazetted on 11 May 2012. The Transfer Pricing Rules provide taxpayers with further guidance and direction as to how the arm's length standard will be applied, and the type of documentation that taxpayers are expected to maintain. Subsequently on 20 July 2012, the new Transfer Pricing Guidelines ("the Guidelines") were issued to replace the previous Transfer Pricing Guidelines in 2003.

With the introduction of the Transfer Pricing Rules and the new Guidelines, there is now clear requirement for taxpayers to prepare and maintain contemporaneous transfer pricing documentation at the point of developing, implementing and reviewing controlled transactions. The purposes of preparing contemporaneous transfer pricing documentation is aimed not only at increasing the level of awareness and self-initiated compliance with the arm's length standard, but also at facilitating any review by the tax authorities of the transfer pricing arrangements of a particular taxpayer. The transfer pricing documentation does not have to be submitted together with the tax returns but will have to be made available to the Malaysian Inland Revenue Board ("IRB") on request. In this regard, there has been an increased focus by the IRB in the area of transfer pricing given the recent transfer pricing audits conducted by the IRB on companies operating in various industries.

INCREASING ISSUE FOR INSURERS

Transfer pricing is increasingly becoming an area of focus by both the central bank of Malaysia ("Bank Negara Malaysia" or "BNM") and the IRB. In view of this, the principles of transfer pricing is also inherent within the 'Guidelines on Outsourcing for

Insurers' which sets out the minimum expectation of BNM for Malaysian insurers that outsource or plan to outsource, any of its business activities, functions or processes, particularly, that of to their related parties.

Generally, the outlook for the financial services industry, particularly in the insurance sector, is positive as Malaysia's increasing population and rising disposable income will result in more people requiring financial services. This is particularly evident from 2011's finance and insurance sector growth rate of 5.9%, which was higher than the national GDP of 5.1% mainly due to the strong performance in bank lending and the increase in the premiums provided in the insurance sector[1]. The growth in the insurance sector naturally translates to more intra-group services and support to be provided to Malaysian insurers either from their regional hubs and / or head offices. As such, this sector will come under greater focus by the authorities in terms of compliance with transfer pricing requirements.

On a group wide basis, most multinational based insurers usually have in place global policies determining their pricing of support services provided by the head office or regional office. In most cases, there is also global transfer pricing documentation describing the pricing mechanism adopted by the group companies. From a Malaysian transfer pricing perspective, there is a need to ensure that such policies comply with the requirements of the Malaysian authorities and regulators as well as the availability of tailored local documentation to justify compliance with local rules and guidelines.

Increasing competition, changes in consumer preferences, and the more stringent regulatory environment in the insurance sector, are contributing factors which are driving insurance companies to change their business models, streamline their operations, and improve processes. The benefits associated with shared services and shared competence centres are increasingly being considered by industry leaders. Due to the high savings potential of cross-border consolidation, this is particularly relevant for insurers operating on a global basis. Many companies choose to set up their shared services centre in Malaysia due to strong governmental support, a cost efficient environment and availability of a skilled multi-lingual workforce.

From a transfer pricing perspective, companies with shared services centres will need to ensure that they have documentation in place in support of their transfer pricing arrangements.

INTRA-GROUP SERVICES AND SUPPORT

The IRB is known to be particularly focusing on intra-group services and support by scrutinising the nature of services and the related basis of charging for such services. This emphasis is mainly due to the following reasons:

- Unlike physical transfer of goods (which are often accompanied by logistical or importation records), it is more difficult to ascertain whether a service has in fact been provided, particularly, for services and support provided by the regional hubs and / or head offices, where service description and deliverables are generic and not clearly defined.
- Many hubs and / or head offices play oversight roles on the subsidiaries' business operations and undertake strategic decision-making; it is often a challenge to make a distinction between the provision of services or the oversight role.
- Lack of details on cost incurred by the regional hubs and / or head offices for services and support provided. This becomes a challenge from the recipients' viewpoint in justifying the charges allocated to them.
- Many taxpayers still do not adequately document nor justify the charges for such services.

Based on the above, intra-group services is an area of focus for the IRB and hence, it is important that specific transfer pricing documentation be compiled on a contemporaneous basis to support the intra-group services for insurance companies in Malaysia according to the Transfer Pricing Rules and the Guidelines.

In addition, compliance with the Transfer Pricing Rules and the Guidelines is referred to constantly by BNM for related parties transactions and head office cost allocation. The basic principles and requirements set out in the Guidelines on Outsourcing

[1] *Business Times: 'Malaysia's insurance sector outlook positive' - http://www.btimes.com.my/Current_News/BTIMES/articles/20120720122615/Article/index_html.*

for Insurers' is consistent with the Transfer Pricing Rules (and the Guidelines) and is in fact more stringent in certain circumstances.

In respect of this, based on our experience and dealings with a few Malaysian insurers, we observed that BNM has been scrutinising outsourcing of core activities by Malaysian insurers to their related parties, in particular allocation of holding company/head office expenses to the Malaysian

insurers. Generally, it would appear to us that BNM expects Malaysian insurers to ensure, amongst others the following conditions are met prior to outsourcing of their activities to related parties:

- Service provided by related parties are supported by a sound outsourcing business case, taking into consideration anticipated benefits against outsourcing risks that may arise. In this case, BNM expects Malaysian insurers to have proper justification in ensuring that the services provided are not available locally at comparable cost and at required service levels;
- For services outsourced, the Malaysian insurers are required to ensure that adequate expertise and resources are retained in-house to support and monitor the outsourced activities in accordance with the service agreement, associated risk and outsource objectives;
- Services which are part of oversight activities undertaken by related parties, in particular by holding company or head office should be clearly distinguished and not be reimbursed from the Malaysian insurers;
- Any outsourcing of services with related parties should achieve the objective of cost savings and provide economic or commercial value. Malaysian insurers are required to consider the cost of the outsourcing arrangement (including costs associated with the internal resources required to oversee and manage the outsourcing arrangement) relative to anticipated benefits. Where possible, Malaysian insurers should consider whether an independent enterprise in comparable circumstances would be likely to outsource the activity; and
- Compliance with the Inland Revenue Board ("IRB") of Malaysia's Transfer Pricing Guidelines. BNM expects the pricing for related party outsourcing arrangements are consistent with accepted arms length principles.

In applying the arm's length principle and demonstrating that intra-group services are conducted on an arm's length basis, it is important for Malaysian insurers to consider the following:

- The nature of the services.
- The value or extent of the benefit of the service to the recipient.
- The basis of charging for such services including the costs incurred by the service provider in providing the service.
- The amount an independent recipient would be prepared to pay for similar services in comparable circumstances.
- Other options realistically available to the recipients.

Considering the above, Malaysian insurers would require documentary evidence which include various supporting documents to be able to substantiate that:

- Sound business case for outsourcing to the related parties.
- Adequate expertise and resources are available in-house to support and monitor the outsourcing activities.
- Services have been rendered.
- Service recipients receive benefits that are of economic or commercial value.
- Such services are not a duplication of activities carried out by the service recipients (i.e. the Malaysian insurers in most cases).

- Charges for such services must be consistent with the relative benefits intended from the services.

Based on the above, a common issue noted is the inconsistencies between the services provided and the services received from both the perspective of the service provider and the service recipient. In addition, there is often a tendency for taxpayers to allocate all intra-group services costs on the basis of each service recipient's turnover as the only allocation key. Although this is convenient, the IRB has known to challenge the nexus between the allocation key and the benefits received by service recipients in consideration for the services rendered by the service provider. As such, it is important for taxpayers to assess the nature of the intra-group services provided / received and ensure that the allocation and apportionment of the costs are carried out in a defensible manner.

CONCLUSIONS AND RECOMMENDATIONS

In the recent years, the IRB have been increasing their scrutiny on transfer prices, especially in transactions involving the provision of intra-group services across borders. Consequently, the pricing of intra-group services for insurance companies operating in Malaysia is a growing area of concern given the IRB's increased focus on intra-group services. The risks involved mainly relates to the lack of adequate documentation in the first instance to substantiate the intra-group charges on the part of the Malaysian insurers (whether from a services provider or service recipient perspective). BNM also requires all related parties to have adequate documentation in place to support their arrangements.

Under the Self Assessment System, the burden of proof lies with the taxpayer. With this, the Malaysian Guidelines is intended to assist the taxpayers in their efforts to determine arm's length transfer prices and at the same time comply with the local tax laws and the administrative requirements of the tax authorities. Therefore, it is increasingly important that taxpayers pay greater attention to their transfer pricing arrangements and then related party transactions, ensuring that robust and contemporaneous transfer pricing documentation to support such arrangements is maintained. By having sufficient documentation in place, taxpayers will be able to respond on a timely basis to any request for documentation and deal with audits more efficiently and effectively.

For more information on transfer pricing and regulatory aspects on outsourcing arrangement for insurers, please contact the following:

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FeatureArticle

RECLAIMING 108 "SHORTFALL": A CASE FOR TAXPAYERS TO REVISIT THEIR STRATEGY

S. Saravana Kumar *and* Siti Fatimah Mohd Shahrom

THIS ARTICLE ARISES FROM A RECENT JUDICIAL REVIEW APPLICATION (I.E. C.A. SDN BHD V MENTERI KEWANGAN MALAYSIA & ORS) IN WHICH ONE OF THE AUTHORS REPRESENTED A TAXPAYER IN RECLAIMING THE 108 "SHORTFALL"[1].

THE TAXPAYER had paid the "shortfall" due to the requirements under the Savings and Transitional Provisions ("Provisions"). The authors take this opportunity to examine the legality of the Provisions in respect of the "shortfall", especially Section 46 of the Finance Act 2007 ("FA 2007") and Section 49 of the Finance Act 2009 ("FA 2009").

Prior to the year of assessment ("YA") 2008, dividends in Malaysia were declared under the imputation system. Under this system, companies maintained an account known as a "Section 108 account", into which the income tax paid was credited. The credit accumulated by a company in this account was generally known as "Section 108 credit". Upon declaring dividends to shareholders, the then Section 108 of the Income Tax Act 1967 ("the ITA") required a company to deduct tax from the dividends declared before it could pay or credit the dividends to shareholders.

However, companies were entitled to set off the tax that had been deducted from the dividends out of the Section 108 credit. In the event the tax set off by a company was in excess of its Section 108 credit, the Director-General of Inland Revenue would issue a notice of requisition to the company to demand for the credit shortfall.

Subject to the exception explained below, from the year of assessment 2008 onwards, dividends were to be declared under the single tier system. This meant the income tax paid by a company would no longer be credited to the Section 108 account as it would no longer be entitled to deduct tax before paying or crediting dividends to shareholders.

THE PROVISIONS

By virtue of Section 40 of the FA 2007, companies that have a Section 108 credit as at 31.12.2007 (referred to as the "108 balance") have until 31.12.2013 to declare dividends under the imputation system to utilise their 108 balance. By virtue of Section 52 of the FA 2007, if the company fails to utilise this balance by 31.12.2013, then the said balance shall be deemed forfeited.

In the case of C.A. Sdn Bhd ("C.A."), its 108 balance as at 31.12.2007 was RM223,032.00. In 2008, it received a tax refund of RM4,596,964.00 for the overpayment of tax for the year of assessment 2007. Section 46 of the FA 2007 provides that if a company receives a tax refund for any tax paid which had been taken into account to compute the 108 balance, then the said balance shall be reduced by the amount of tax refunded.

As such, the application of Section 46 of the FA 2007 in determining C.A.'s 108 balance resulted in a shortfall of

RM4,373,932.00. The calculation is as follows:

Balance as at 31.12.2007	:	RM 223,032
Deemed tax refund arising from tax overpaid for YA 2007	:	- RM 4,596,964
Shortfall of	**:**	**- RM 4,373,932**

The repeal of Section 108 of the ITA and the introduction of Section 46 of the FA 2007 resulted in a shortfall of RM4,373,932.00 in C.A.'s Section 108 account. At that stage, i.e. in 2007, the shortfall did not result in a debt due to the Malaysian government. However, by reason of Section 49 of the FA 2009, the said shortfall became a debt due to the government whereby the government may demand the same from the taxpayer. Very clearly, Section 46 of the FA 2007 and Section 49 of the FA 2009 irredeemably prejudiced C.A. as it deprived C.A. of some of the rights that had been acquired before the introduction of the Provisions.

It is clear that but for the introduction of Section 46 of the FA 2007 and Section 49 of the FA 2007 and the repeal of Section 108 of the ITA (as it stood before 1.1.2008), the deemed tax refund would not have created a shortfall in C.A.'s

[1] *Upon considering the taxpayer's written and oral submissions, the Respondents agreed to the taxpayer's application for a refund. Consequently, a consent judgement was recorded by the parties.*

Section 108 account. This is simply because the income tax paid by C.A. in YA 2008 and 2009 would have been credited into its Section 108 account (prior to the repeal of Section 108 of the ITA).

THE SHORTFALL

C.A. was aggrieved by the shortfall that arose by virtue of Section 46 of the FA 2007 and Section 49 of the FA 2009. It paid the shortfall on a "without prejudice" basis on the advice of its tax agent. This was done to avoid any penalty for late payment. Consequently, pursuant to Section 127(3A) of the ITA, C.A. applied to the Minister of Finance ("the Minister") for an exemption from the onerous parts of the Provisions. C.A. explained that Section 46 of the FA 2007 and Section 49 of the FA 2009 deprived it of some of the rights that it had acquired before the introduction of the Provisions, and attached a new disability in regard to events already past.

Unfortunately, the Minister rejected C.A.'s application without providing any reason for his decision. This led C.A. to seek legal advice from the authors, whom advised C.A. to challenge the Minister's decision by way of judicial review. The authors argued that Section 46 of the FA 2007 and Section 49 of the FA 2009 which resulted in the shortfall were illegal and unlawful and thus, null and void.

THE LEGAL FRAMEWORK

Section 49 of the FA 2009 reads:

"(1) Where the amount of tax discharged, remitted or refunded under Section 46 of the Finance Act exceeds the 108 balance or revised 108 balance, as the case may be, the excess shall be a debt due from the company to the Government and the debt shall be due and payable on the last day of the seventh month (in this section referred to as "due date") from the date following the close of the accounting period of the company to which the tax is discharged, remitted or refunded."

Meanwhile, Section 46 of the FA 2007 reads:

"Where during the period from the first day of the basis period for year of assessment 2008 to 31 December 2013 -

(a) the tax charged on the chargeable income of a company for the year of assessment 2000 on a current year basis and prior year of assessment is discharged or remitted; or

(b) any amount of tax paid by that company which has been taken into account for the purpose of computing the 108 balance is refunded, the 108 balance of the company, shall on the day the tax is discharged, remitted or refunded, be reduced by such amount of tax discharged, remitted or refunded (in this Part referred to as "revised 108 balance")."

C.A.'s case was premised on the illuminating decision of the then Supreme Court in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339*, in which the following passages are instructive:

(a) A statute would not be read retrospectively to deprive someone of existing and acquired rights. The Privy Council in Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 commented:

"Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not ... (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed..."
The above is adopted in Section 30 of the Interpretation Act 1967.

(b) The Interpretation Act applies to the construction of a taxing statute. The House of Lords in Floor v Davis (Inspector of Taxes) [1980] AC 695 held that in construing provisions of the UK Finance Acts, one must, as when construing provisions of other Acts, have regard to the Interpretation Act. It must be borne in mind that the Interpretation Act is to apply unless a contrary intention is shown. It is not the case that an intention that the Act should apply has to be shown for it to apply.

(c) There are ample authorities to show that courts have refused to adopt a construction of a taxing Act that would impose liability when doubt exists. In Re Micklewait [1855] 11 Exch 452, it was held that:
"A subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable the government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated in Cape Brandy Syndicate…"

(d) A retrospective operation should not be given to a statute to impair an existing right, as has been stated by the Court of Appeal (United Kingdom) in EWP. Limited v Moore [1992] 1 All ER 880 at 891:
"... that those who have arranged their affairs, as the saying is, in

reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ..."

(e) *One should avoid a construction that inflicts a detriment, and as observed in Yew Bon Tew (supra):*
"…a retrospective enactment inflicts a detriment if it takes away or impairs vested right acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."

NATIONAL LAND FINANCE

Convinced by the legal rationale in National Land Finance (supra), C.A. argued that an amending provision or statute such as Section 49 of the FA 2009 had to state in clear terms that the amendment was intended to be retrospective. However, retrospective operation should not be given to a statute to impair an existing right. Drawing support from EWP Limited (supra), C.A. explained that having arranged its affairs in reliance on the law before the amendments that introduced the Provisions including Section 46 of the FA 2007 and Section 49 of the FA 2009, it should not find that its plans have been retrospectively upset.

The retrospective enactments, i.e. Section 46 of the FA 2007 and Section 49 of the FA 2009, inflicted a detriment on C.A. as, in the words of Yew Bon Tew (supra), they took away or impaired a vested right acquired under the then existing laws or created a new obligation, or imposed a new duty, or attached a new disability, in regard to events already past. Although both Section 46 of the FA 2007 and Section 49 of the FA 2009 suggest that they have retrospective effect, they do not also expressly provide that Part I of the Interpretation Acts 1948 and 1967, which includes Section 30 of the same Act, shall not apply.

Section 30 of the Interpretation Acts 1948 and 1967, among others, states that the repeal of a written law in whole or in part shall not:

(a) *affect the previous operation of the repealed law or anything duly done or suffered thereunder; or*

(b) *affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law.*

In this regard, as held in National Land Finance, Section 46 of the FA 2007 and Section 49 of the FA 2009 must be construed as having regard to the Interpretation Acts 1948 and 1967. There is therefore a doubt whether Parliament had intended to impair the existing right of C.A. and inflict a detriment on it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt, the argument advanced was that the ambiguity must be construed in favour of C.A.

Moreover, neither Section 46 of the FA 2007 nor Section 49 of the FA 2009 state that it was intended to impair or disadvantage a taxpayer who had arranged its affairs based on the then existing law. Especially construed in light of Section 30 of the Interpretation Acts, it creates a doubt as to whether Parliament had intended to deprive the taxpayer of its acquired right and inflict a disability or attach a burden.

It is notable that National Land Finance was unanimously applied by the Court of Appeal in the subsequent case of *Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-operative Insurance Society Ltd [2000] 1 MLJ 561 ("MCIS").*

Accordingly, the authors argued on behalf of C.A. that Section 46 of the FA 2007 and Section 49 of the FA 2009 were illegal, unlawful and void for these reasons:

THE PROVISIONS should not be read retrospectively to deprive the taxpayer of some of the acquired rights before the enactment of the Provisions;

THE REPEAL of a written law in whole or in part shall not affect the previous operation of the repealed law or anything duly done or suffered thereunder by the taxpayer;

THE REPEAL of a written law in whole or in part shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law;

THE RETROSPECTION by the Provisions was constitutionally bad because it had the effect of denying the taxpayer some of the acquired rights before the Provisions were enacted;

ONE SHOULD avoid a construction that inflicts a detriment as it takes away or impairs the vested right acquired under the existing laws and attaches a new disability in regard to events already past; and

THE PROVISIONS did not expressly state that Part 1 of the Interpretation Acts 1948 and 1967 shall not apply and in this regard, there is a doubt whether the legislature had intended to impair the existing right of, and inflict a detriment on, the taxpayer as it takes away a vested right under the existing law in relation to the Section 108 account.

The authors further contended that by ignoring the rulings in National Land Finance and MCIS, the Minister's decision was therefore rendered unreasonable and unlawful. Having studied the above arguments, to the surprise of C.A., the Minister agreed to refund the shortfall that was paid by C.A. and the matter was resolved out of court. This was, of course, to the relief of C.A.. However, as the matter was resolved, the High Court did not have the opportunity to make a ruling on the strength of the arguments discussed above. Legally speaking, the law remains untested.

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NEVERTHELESS, the authors still subscribe to the view that Section 46 of the FA 2007 and Section 49 of the FA 2009 are bad in law and thus, illegal and unlawful. In light of C.A., taxpayers who have been subjected to making "shortfall" payments may have an arguable case to reclaim the said payments. In fact, there may be a compelling case to advance that the "shortfall" payments were made as a result of a demand by the Revenue for payments based on bad law and, if successful, taxpayers may be able to pray for the "shortfall" payments to be returned with interest following the recent decision of the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Pelangi Sdn Bhd (No. 08-355-04/2012(W)).* In conclusion, C.A.'s experience amplifies the need for taxpayers and tax practitioners to examine the constitutionality of "new" provisions such as Section 46 of the FA 2007 and Section 49 of the FA 2009, rather than accepting them grudgingly and suffer the injustice in silence.

The technical updates published here are summarised from selected Government gazette notifications published between 1 September 2012 and 15 November 2012 including Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Royal Customs Department and other regulatory authorities.

INCOME TAX

Public Ruling No. 6/2012: Reinvestment allowance

Public Ruling No. 6/2012 issued on 12 October 2012 replaces Public Ruling No. 2/2008 that explains the tax incentive of reinvestment allowance (RA) under Schedule 7A of the Income Tax Act 1967 and also provides clarification in relation to projects that qualify for RA, period of eligibility of RA and computation of RA.

Public Ruling No. 7/2012: Taxation of unitholders of Real Estate Investment Trusts / Property Trust Funds

Public Ruling No. 7/2012 issued on 29 October 2012 explains how a unitholder will be taxed on distributions received from real estate investment trusts (REITs) and property trust funds (PTFs).

Public Ruling No. 8/2012: Real Estate Investment Trusts / Property Trust Funds – An overview

Public Ruling No. 8/2012 issued on 2 November 2012 provides the background, regulatory framework, structure and brief description of the tax treatment of the REITs / PTFs and Islamic REITs in Malaysia.

Income Tax (Deduction from Remuneration)(Amendment) Rules 2012

The Income Tax (Deduction from Remuneration)(Amendment) Rules 2012 [P.U.(A)285] gazetted on 10 September 2012 amend the Income Tax (Deduction from Remuneration)Rules 1994 and took effect from 1 January 2012. The amended Rules incorporate changes pursuant to the computerised calculation method which the IRB has included within the IRB's software since 1 January 2012.

Petroleum (Income Tax) (Deduction for Expenditure incurred for the Provision of an Approved Internship Programme) Rules 2012

The Petroleum (Income Tax) (Deduction for Expenditure incurred for the Provision of an Approved Internship Programme) Rules 2012 [P.U.(A)334] were gazetted on 15 October 2012 and will take effect from YA 2012 until YA 2016. The Rules provide a double deduction on expenses incurred by companies that have implemented a structured internship programme for students that is approved by Talent Corporation Malaysia Berhad (Talent Corp) in collaboration with the Ministry of Higher Education.

Technical guideline – Section 44(6) approval for religious worship management funds

Following the amendment to the definition of "organisation" in Section 44(7) pursuant to the Income Tax (Amendment) Act 2012 gazetted on 22 June.2012, the IRB , on 27 September 2012, issued a guideline on the application for Section 44(6) approval for religious worship management funds.

New double tax agreements (DTAs)

The following DTAs were recently gazetted:

a. Double Taxation Relief (The Government of the Republic of India) Order 2012 [P.U.(A)338] – gazetted on 17 October 2012

b. Double Taxation Relief (The Government of the Hong Kong Special Administrative Region of the People's Republic of China) Order 2012 [P.U.(A)366] – gazetted on 7 November 2012

CUSTOMS AND EXCISE DUTIES

List of goods exempted from sales tax

Effective from 31 October 2012:

a. Schedule A (which specified goods exempted from sales tax) to the Sales Tax (Exemption) Order 2008 has been deleted. Please see Sales Tax (Exemption) (Amendment) (No. 5) Order 2012, Sales Tax Act 1972 [P.U. (A) 353/2012] for details.

b. Goods exempted from sales tax [previously specified in Schedule A to the Sales Tax (Exemption) Order 2008] are now listed in the First Schedule to the Sales Tax (Rates of Tax No.2) Order 2012. Please see Sales Tax (Rates of Tax No.2) Order 2012, Sales Tax Act 1972 [P.U. (A) 355/2012].

Sales Tax (Exemption) (Amendment) (No. 4) Order 2012, Sales Tax Act 1972 [P.U. (A) 352/2012

Effective from 1 January 2012 (backdated), cash registers [Terminal Point-Of-Sales (POS)] classifiable under HS code 8470.50 000 are exempted from sales tax.

Please see P.U. (A) 352/2012 for details.

Customs (Prohibition of Exports) (Amendment) Order 2012, Customs Act 1967 [P.U. (A) 302/2012]

Effective from 19 September 2012:

a. Item 2 (Rattans) has been deleted from the First Schedule to the Customs (Prohibition of Exports) Order 2008.

b. Rattans (see details below) have been listed as Item 48 to the Second Schedule to the Customs (Prohibition of Exports) Order 2008]. Exports of such rattans from Peninsular Malaysia only must be accompanied by an export licence from the Malaysian Timber Industry Board:

Description of Goods	HS codes
Rattans:	
Whole	**1401.20 100**
Split core exceeding 12mm in diameter	**1401.20 990**

Please see P.U. (A) 302/2012 for details.

Customs Duties Order 2012, Customs Act 1967 [P.U. (A) 275/2012]

Effective from 31 October 2012, the Customs Duties Order 2012 came into operation and the Customs Duties Order 2007 [P.U. (A) 441/2007] has been revoked.

Please see P.U. (A) 275/2012 for details.

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012, Customs Act 1967 [P.U. (A) 277/2012]

Effective from 31 October 2012, the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012 came into operation and the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2007 has been revoked.

Please see P.U. (A) 277/2012 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.*

In this article, Irene Yong Yoke Ngor reviews the current case of *wincor nixdorf (m) sdn bhd v minister of finance and director general of customs & excise* relating to the novel issue for customs duties and sales tax purposes, and whether a ministerial discretion is subject to judicial review proceedings.

CASE 1

Wincor Nixdorf (M) Sdn Bhd v Minister of Finance and Director General of Customs & Excise

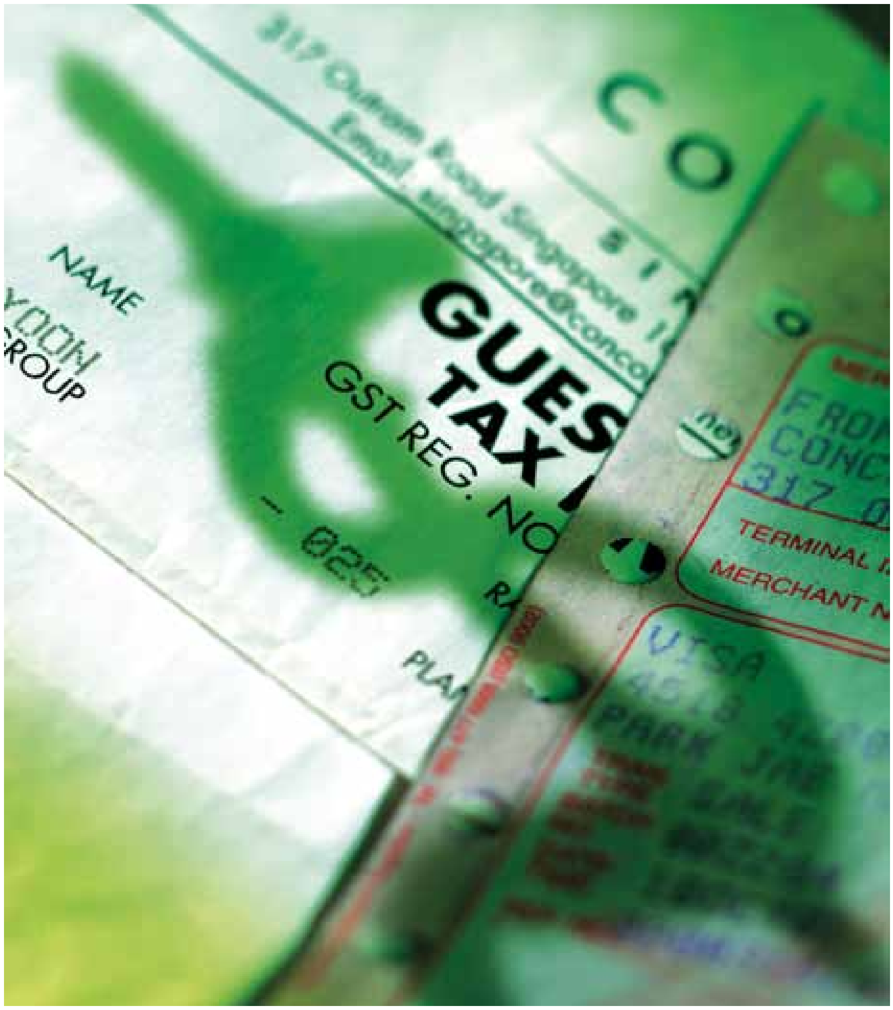
FACTS

Wincor Nixdorf (M) Sdn Bhd ("WN") carried on the business of distributing automated teller machines ("ATMs") and other products and solutions and had engaged certain freight forwarders to handle the importation of the ATMs and parts into Malaysia. However, without WN's knowledge or authorisation, the forwarders had engaged other forwarders ("unauthorised forwarders") to clear the goods through the Customs Department ("Customs").

Upon suspicion of commission of fraud or other wrongdoing ("Fraud") by the unauthorised forwarders, Customs commenced investigations in 2007 into the operations of the unauthorised forwarders.

A notice of demand was thereafter issued by Customs alleging short payment of customs duties and sales taxes which WN was required to make good. The alleged short payment had taken place over a period of almost 22 months.

As WN had already paid the relevant duties and taxes to its appointed forwarders, it denied liability for the Fraud and sought a remission of the said duties and taxes from the Minister of Finance ("MoF") under S 14A of the Customs Act 1967 and S 33 of the Sales Tax Act 1972 respectively. The relevant provisions are as follows:



Section 14A of the Customs Act 1967 reads:

"The minister may, if he thinks it just and equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of the customs duties or any other prescribed fees or charges payable under this Act."

Section 33 of the Sales Tax Act 1972 reads:

"The Minister may, if he thinks it just and equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of any sales tax due and payable under this Act, or the whole or any part of any penalty payable under the provision in Section 24."

Accordingly, under S 14A of the Customs Act 1967 and S 33 of the Sales Tax Act 1972, respectively, the MoF may, where it thinks it just and equitable to do so, remit the duties and taxes as it deems fit. However, WN's remission application was rejected by the MoF.

Subsequently, WN filed an application for judicial review to the High Court to, among other things, quash the MoF's decision on the basis that the MoF's decision had been arrived at unreasonably considering the facts and circumstances of the case.

DECISION

The Court quashed the MoF's decision and held that while the Minister was given the discretion on whether or not to grant the remission, such discretion was not unfettered, and referred to the Federal Court case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd,* where Justice Raja Azlan Shah AG CJ (Malaya) (as His Majesty then was) held that an unfettered discretion to be a contradiction in terms.

Based on the facts of the instant case, the Court found that WN was a victim in a scam that was well beyond its control. The Court also found that there was uncontroverted evidence tending to point towards negligence on the part of the officers of Customs as the ATM machines had been released from controlled areas within the absolute control and supervision of Customs officers without the proper taxes having been paid for their release.

The Director General of Customs & Excise ("DG") thus had the attendant statutory duty to regulate this activity, as well as the capacity and capability to detect and probe the matter thoroughly and at the earliest opportunity as all the irregular particulars were captured in the declaration Form K1 and these numerous declarations in Form K1 were at all material times in the possession of the Customs.

Further, it was for the Customs to regulate the appointment or accreditation of forwarding agents whom the Customs had licensed to be permitted to clear goods on behalf of their clients.

In this regard, the MoF and the DG had contended that the forwarding agents were agents of WN so that WN can recover or otherwise be indemnified by the forwarding agents based on the principal–agent principle. WN, on the other hand, contended that the forwarding agents were merely independent contractors and there was no vicarious liability or fiduciary duty between them.

In holding that the forwarders were not agents of WN, the Court applied the principles enunciated in *Kennedy v de Trafford.*

The Court held, quoting Lord Greene MR in the case of *Associated Provincial Picture House Ltd v Wednesbury Corporation,* that the public expectation of public officials in discharging their public functions, including in exercising their discretion, "must produce a result which does not offend against common sense".

The Court further held that,

"... had the First Respondent [MoF] taken into account relevant factors such as those alluded to above, he would not have been so misdirected in the exercise of his discretion so as to deny the remission that was urged upon him to be exercised in favour of the Applicant, a remedy that was founded upon the elements of justice and equity that must of necessity be considered on the simple yet hallowed altar of reasonableness."

Subsequent to the substantive decision, the Court granted relief of 100% remission on the duties and taxes on 23 July 2012.

CONCLUSION

The power to grant a remission of duties is to be found in a number of tax statutes. The principles enunciated in this case have a far-reaching effect on how such discretionary powers should be exercised.

The MoF and DG have filed an appeal against the High Court's decision.

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The column only covers selected developments from countries identified by CTIM and relates to the period 16 August 2012 to 15 November 2012.

CHINA (PEOPLE'S REP.)

Surcharge on electronic waste introduced

The State Administration of Taxation (SAT) issued an Announcement (Gong Gao [2012] No.41) on 20 August 2012 which introduced a surcharge on electronic waste in China. According to the Announcement, all the manufacturers supplying electronic products within China are subject to a contribution to a fund for the disposal of electronic waste as from 1 July 2012. The SAT is in charge of collecting the charges and the manufacturers are required to file a special return for this purpose and to pay charges to the local tax authority. The surcharge rates are:

PRODUCT	SURCHARGE PER PIECE (CNY)
Television	13
Refrigerator	12
Washing machine	7
Air conditioning	7
Compact calculator	10

The export of electronic products is, however, exempted.

Change of surcharge for culture development

The Ministry of Finance (MoF) and the SAT jointly issued a Circular on 29 August 2012 (Cai Zong [2012] No. 68) regarding the surcharge for culture development imposed on the advertising business. The Circular retroactively applies from 1 January 2012.

According to the Circular the enterprises and individuals being liable to this surcharge have to calculate as: surcharge payable = the value added tax (VAT) due x 3% after the taxpayer's liability has been transformed from business tax to VAT in light of the pilot VAT reform programme. The fees are to be collected at the same time as the tax liability of VAT arises.

The enterprises and individuals engaged in the advertising business are subject to a surcharge for culture development on the basis of a circular of the MoF and the SAT issued in 1997 (Cai Shui Zi [1997] No. 95).

Tax treatment of commissions received by security broker clarified

The SAT issued an Announcement on 12 September 2012 (Gong Gao [2012] No.45) clarifying the tax treatment of commissions received by security brokers. The Announcement applies as from 1 October 2012.

According to the Announcement, the commission received by a security broker from a security company must be treated as "professional service" under the Individual Income Tax Law and taxed accordingly. In determining the taxable commission, the security broker may deduct business tax and surcharge imposed on the basis of business tax (for instance urban construction and maintenance surcharge), and business cost which is deemed to be 40% of the total commission received. The security company is required to withhold the individual income tax of the security broker.

Administrative Review Committee of Appeal established

It has been reported that the Administrative Review Committee of Appeal of the SAT was set up on 26 October 2012.

The first Deputy Commissioner of SAT is appointed as head of the Committee. The members of the Committee consist of the representatives of 11 different divisions of SAT, 4 professors from universities, 3 representatives from Chinese tax law firms and the chief editor of the *China Taxation News* (the largest tax newspaper in China).

The Committee is intended to become a body of the highest level within the SAT to review the appeals of taxpayers in administrative disputes on key and complex tax issues.

New bilateral advanced pricing agreements with Beijing tax authorities signed

It was reported in the *China Taxation News* on 12 November 2012 that the tax authorities of the Haidian district, Beijing and Microsoft have concluded a bilateral advanced pricing agreement (BAPA). The BAPA is expected to protect Microsoft against transfer pricing investigation over a span of 15 (past and future) years. Meanwhile, the tax authority of Chaoyang district of Beijing has extended the BAPA with Maersk.

According to the report five other multinational companies are currently negotiating a BAPA with the Beijing tax authorities (the state and local tax bureaus).

HONG KONG

Stamp duty – further measures to address overheated property market to be introduced

It was announced on 26 October that the Hong Kong government would introduce further measures to address the overheated property market, including amending the Stamp Duty Ordinance to adjust the Special Stamp Duty (SSD) rates and extend its coverage period, and introducing a Buyer's Stamp Duty (BSD) on residential properties.

It is stipulated by the adjusted regime, any residential property acquired on or after 27 October 2012, either by an individual or an enterprise (regardless of where it is incorporated), and resold within 36 months, would be subject to the new rates of SSD: (i) the tax rate is 20% if the property has been held for 6 months or less; (ii) the tax rate is 15% if the property has been held for more than 6 months but not more than 12 months; and (iii) the tax rate is 10% if the property has been held for more than 12 months but not more than 36 months.

The newly introduced BSD will be levied on all residential property acquired by any person (including enterprises) except a Hong Kong permanent resident. The BSD is to be charged at a flat rate of 15% in addition to the existing stamp duty and the SSD if applicable.

Buyer's stamp duty exemptions clarified

The government clarified the exemptions in respect of the newly introduced Buyer's Stamp Duty (BSD) in response to press enquiries on 30 October 2012.

The exemptions are summarised as follows: (i) acquisition of residential property by a Hong Kong Permanent Resident (HKPR) jointly with one or more close relatives (i.e. spouse, parents, children, brothers and sisters) who is/are not HKPR; (ii) transfer of residential property to one or more close relatives, one or more of whom is/are not HKPR; (iii) nomination of a close relative(s) who is/are not HKPR to enjoy the interests of the residential property; (iv) addition/deletion of the name(s) of a person(s) who is/are not HKPR from a sale and purchase agreement liable to stamp duty or a conveyance in respect of residential property, if the person(s) is/are a close relative(s) of the original buyer; (v) acquisition or obtaining transferred residential property in accordance with a court order, which includes a foreclosure order obtained by a mortgagee whether or not it falls under the definition of a financial institution within the scope of Article 2 of the Inland Revenue Ordinance; (vi) acquisition or transfer of mortgaged residential property in various ways by a mortgagee of a financial institution referred to in Article 2 of the Inland Revenue Ordinance, or by a receiver appointed by such a mortgagee; (vii) acquisition or transfer of residential property which relates solely to the inheritance rights of a deceased person; (viii) a corporate body's acquisition of residential property from its associated corporate body, or the transfer of residential property between associated corporate bodies; (ix) acquisition of residential property (including vacant land) for the construction of a prescribed number of residential property after demolishing the existing residential property if applicable, provided the residential property is completed and put up for sale and reconstruction within a specified period after acquisition of the first residential property; (x) acquisition of a residential property substitute due to the sale of the original residential property to the Urban Renewal Authority under the Urban Renewal Scheme or where the original residential property is taken back by the government in accordance with the Lands Resumption Ordinance;

(xi) resale or transfer of residential property to the government; and (xii) donation of residential property to charitable organisations that are exempted from tax under Article 88 of the Inland Revenue Ordinance.

It was also announced that if a company transfers its residential property to its subsidiary on or after 27 October 2012, and subsequently sells the shares of the subsidiary to a non-associated body corporate or person within 2 years, such property transfer will not be exempted from the *ad valorem* stamp duty and the BSD.

INDIA

Notification of the variation range for transfer pricing purposes issued

The Indian authorities have issued Notification No. 31/2012 dated 17 August 2012 whereby when the variation between the arm's length price determined under Section 92C of the Income Tax Act 1961 and the price at which the international transaction has actually been undertaken does not exceed 5%, the authorities will accept the international transaction price to be the arm's length. This would be applicable for the financial year 2011/12.

Notification for rules regarding Advanced Pricing Agreements Scheme issued

The Central Board of Direct Taxes issued notification No. 36 of 2012 dated 30 August 2012 providing for the rules regarding the recently introduced advanced pricing agreement (APA) scheme in the Finance Act 2012. Further, the MoF has also issued a Press Release dated 31 August 2012 notifying the APA scheme. The APA scheme which came into force from 30 August 2012 is summarised as follows: (i) the APA is allowed for a maximum of 5 years;(ii) the APA scheme provides for unilateral, bilateral and multilateral APAs; (iii) prefiling consultation would be held between the taxpayer and the tax authorities before applying for an APA; (iv) the application for an APA would be filed before the CBDT (for unilateral APA) or the competent authority of India (for bilateral or multilateral APA); (v) the taxpayer may revise the application before finalisation of the APA; (vi) the components of an executed APA; (vii) an APA would not bind the parties if there is a change in any of the critical assumptions or failure to meet conditions specified in APA; (viii) The taxpayer is obliged to furnish Annual Compliance Reports for each of the years covered in an APA; (ix) an APA could be revised by the tax authorities; (x) the taxpayer is allowed to renew an APA under some conditions.

Expert Committee issues its draft report on GAAR

The Expert Committee on General Anti-Avoidance Rules has submitted its draft report vide a press release dated 1 September 2012 recommending a number of amendments to the Income Tax Act 1961 as well as to the Income Tax Rules 1962. In brief, the draft report provides for the following: (i) recommendations for amendments in the Income-tax Act, 1961; (ii) recommendations for guidelines to be prescribed under the Income Tax Rules 1962; (iii) recommendations for circular that provides clarifications and illustrations for implementation of GAAR; (iv) recommendations in respect of improving the tax administration.

Tax Residence Certificate rules issued

The Indian Central Board of Direct Taxes issued Notification No. 39/2012 dated 17 September 2012 introducing a new rule in the Income Tax Rules 1962 in relation to a Tax Residence Certificate (TRC). The new Rule prescribes the manner in which a non-resident can present a TRC in order to claim relief under an applicable tax treaty. The Rule also prescribes a format for Indian residents to make an application to the tax authorities for the purpose of obtaining a TRC and a format in which the TRC can be issued by the tax authorities.

Circular issued on conditions applicable for lower interest withholding tax rate of 5%

The Indian Central Board of Direct Taxes issued Circular No. 7 of 2012 dated 21 September 2012 in relation to foreign borrowings by Indian companies. With the issuance of this Circular, the Central Government provides automatic approval (no specific approval required) to all borrowings that satisfy the relevant conditions. Further, the Central Government provides automatic approval for interest rates which are within all-in-cost ceilings specified under ECB regulations.

Expert Committee issues draft report on Indirect Transfer

The Expert Committee on General Anti-Avoidance Rules has issued its draft report vide a Press Release dated 9 October 2012 on the retrospective amendments to the Income Tax Act 1961 (ITA) as introduced via the Finance Act 2012 in relation to the indirect transfer of shares or interests in a foreign company that substantially derives its value from assets located in India.

Accounting Standards Committee Releases Final Report

The Accounting Standards Committee established by the Indian Central Board of Direct Taxes has submitted its final report on 29 October 2012 that provides for the Tax Accounting Standards (TAS) for computing taxable income. The Committee has examined 31 Accounting Standards issued by the Institute of Chartered Accountants of India meant for maintaining books of accounts and has recommended a separate Accounting Standards for computing taxable income on 14 issues under the Indian Income Tax Act 1961. It further states that the taxpayer is not required to maintain a separate set of books on the basis of TAS and is merely applicable for computation of income chargeable to tax.

INDONESIA

Benchmark Behavioural Model for tax compliance

The Directorate General of Taxation has issued Ruling No. SE-40/PJ/2012 dated 16 August 2012 regarding the making of a Benchmark Behavioural Model. The benchmark will be used as a tool to understand tax potential from the taxpayers' tax compliance and may not be used as the basis for tax assessment. The benchmark is made by comparing the financial indicators from similar taxpayers and will be created and updated by the Regional Tax Office twice a year.

Personal allowance increased

The government, through Regulation of the Minister of Finance No. 162/PMK.011/2012 dated 22 October 2012, has increased the personal allowance for income tax. The changes, effective from 1 January 2013, are as follows:

	IDR
taxpayer	24,300,000
spouse	2,025,000
each dependant *(maximum 3)*	2,025,000

There is an additional IDR24,300,000 personal allowance if the income from the taxpayer's wife is combined with the taxpayer's income.

SINGAPORE

GST Guides issued – logistics, refiner and contractor, containers, investment precious metals

The Inland Revenue Authority of Singapore (IRAS) issued the following e-tax Guides recently on GST:

Guide for the logistics service industry dated 28 August 2012

This Guide covers the GST treatment for transportation services (including ancillary handling activities such as stuffing, loading and unloading), handling services and storage services. Generally, all supplies of the abovementioned services made in Singapore are subject to GST, and only international services may be zero-rated.

Approved refiner and contractor scheme dated 3 September 2012

The approved refiner and contractor scheme (ARCS) confers the following benefits to persons who qualify as ARCS persons, with effect from 1 October 2012: (i) GST suspension on importation of goods; (ii) waiver of GST payment on goods supplied between ARCS persons; and (iii) special input tax recovery for ARCS persons.

GST exemption of investment precious metals dated 3 September 2012

This Guide covers the GST treatment of investment precious metals (IPM) which would effect from 1 October 2012. The importation and supply of IPM in Singapore are exempt from GST, while the supply of exported IPM continues to be zero rated. A local supply of IPM will be an exempt supply.

Zero-rating of container services and the sale & lease of containers dated 10 September 2012

This Guide provides details of when the supply of container services and the sale and leasing of containers may be zero-rated for GST purposes. Container services include repair and maintenance, management and other ancillary services such as transportation, storage and handling. Qualifying containers must satisfy 2 criteria: (i) they are used or to be used for international transportation of goods; and (ii) they adhere to the prescribed definitions.

MALAYSIA

Malaysia – treaty development

San Marino and Malaysia signed an investment protection agreement (IPA) on 27 September 2012.

Ukraine and Malaysia initialled an income tax treaty in October 2012.

Malaysia and New Zealand signed an amending protocol to the Malaysia – New Zealand Income Tax Treaty (1976) on 6 November 2012.

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TOP PERSONAL INCOME TAX RATES INCREASE IN 2012

THE 2011 HOLDING PATTERN FOR PERSONAL INCOME TAX RATES IS NOW SEEING A RETURN TO THE 2010 TREND OF INCREASING RATES WITH THE GLOBAL AVERAGE TOP PERSONAL INCOME TAX RATE GOING UP BY 0.3 PER CENT.

The annual Individual Income Tax and Social Security Rate Survey produced by KPMG's International Executive Services (IES) practice shows this is only the third time that an increase has been observed over the past ten years that KPMG's survey has been produced.

"In large part, this upward tick in personal tax rates is the result of a lack of economic recovery and increasing debt concerns," says Brad Maxwell, a partner with KPMG's IES practice in Switzerland. "Many economies deemed it necessary to increase their highest rate of personal income tax through one of two approaches: either through the creation of new income tax rate bands for very high income earners, or through the introduction of temporary taxes to address immediate budgetary deficit concerns."

The most prominent examples of this pointed out in the survey are seen in the recent French and Spanish reforms.

France's reforms saw the introduction of two new tax rate bands for high income earners which has resulted in the top rate increasing from 41 per cent to 45 per cent. The rate increases are generally deemed as an 'exceptional contribution' which affects individuals reporting incomes of above €250,000.

Maxwell notes, "Further increases may be on the horizon, with incoming President François Hollande considering the introduction of a 75 per cent tax rate band for taxpayers earning over €1,000,000."

Starting in January 2012, Spain's 'complimentary tax' aims to help address the country's public deficit. The tax applies to all taxpayers, and ranges from 0.75 per cent to 7 per cent depending on the individual's income level. This effectively means that the rate of tax for individuals earning above €300,000 has risen from 45 per cent to 52 per cent.

Elsewhere in Europe, there is very little change. Western Europe continues to have the highest personal tax rates of any sub-region globally (46.1 per cent).

The average rate for Eastern Europe (16.7 per cent) is still less than half of that of other European sub-regions, largely due to the prevalence of low flat tax initiatives. Poland and the Ukraine are notable for being the only two Eastern European countries of those surveyed to maintain a progressive tax band structure.

In Northern Europe, the average top personal income tax rate is 36.5 per cent. Very little movement was observed in this sub-region during 2012, with the only changes being on the municipal front, as combined rates in Finland, Sweden and Iceland all experienced minor adjustments.

"Change, however, is on the way in the United Kingdom where the government has already announced plans to reduce the current top tax rate from 50 per cent down to 45 per cent effective April 2013," notes Maxwell.

Aside from the changes in Spain, rates in Southern Europe have remained relatively stable at an average of 31.7 per cent.

Interestingly, while the world's eyes have been keenly focused on Greece's economy for much of 2012, the country's top rate has remained unchanged at 45 per cent since 2010 when it was increased from 40 per cent.

Western Asia has also seen some movement in tax rates over the past year. In October 2011 (shortly after the

IN LARGE PART, THIS UPWARD TICK IN PERSONAL TAX RATES IS THE RESULT OF A LACK OF ECONOMIC RECOVERY AND INCREASING DEBT CONCERNS.

BRAD MAXWELL
PARTNER WITH KPMG'S IES PRACTICE IN SWITZERLAND.

publication of last year's survey), Cyprus increased its top marginal income tax rate from 30 per cent to 35 per cent, and applied the change retroactively from 1 January 2011. In 2012, Armenia also raised its tax rate by 5 per cent and plans to introduce a further 1 per cent increase in 2013. Israel also increased its top marginal tax rate (by three percentage points to 48 per cent) and Georgia, which has not altered its top rate of tax for several years, signalled an intention to decrease its rate from 20 to 18 per cent effective 2013.

TAX CUTS ARE ONCE AGAIN SCHEDULED TO EXPIRE AT YEAR'S END MEANING THAT, IF THE EXPIRATION REMAINS ON SCHEDULE, THE TOP US FEDERAL TAX RATE WOULD INCREASE FROM 35 PER CENT TO 39.6 PER CENT IN 2013.

While the remainder of Asia was largely quiet on the rate change front, South Korea introduced an additional tax band with a 3 per cent increase in an effort to target high earners as a source of additional revenue. Hong Kong and Singapore continue to offer very attractive personal income tax rates, and rates remained constant in the other Asian heavyweights (China, Japan and India) who have not altered their top rate of tax in the last ten years.

However, there are indications that this trend is set to change with permanent residents of Japan soon becoming subject to a Special Reconstruction Surtax which will start next year with the intention of helping fund the rebuild in the aftermath of the Great East Japan Earthquake.

Aside from the Fijian reforms mentioned above, top rates in the Oceania region remain stable.

Some change has been noted in Africa with Egypt introducing a new 25 per cent tax band to target super high income earners, and Zimbabwe increasing its top tax rate by over 10 per cent (bringing it back in line with 2008 levels).

Top rates across North America remained relatively unchanged throughout the year, though Canada's most populated province (Ontario) recently announced a hike for high income earners which will increase the top combined federal and provincial rate by 1.56 per cent, putting the jurisdiction onto the list of locations that introduced an additional tax band for its highest earners in 2012.

And while there were no changes to top federal rates in the United States in 2012, the Bush Tax Cuts are once again scheduled to expire at year's end meaning that, if the expiration remains on schedule, the top US Federal tax rate would increase from 35 per cent to 39.6 per cent in 2013.

Overall, Latin America has also kept top rates constant during 2012, though we note that Mexico is scheduled to decrease its top rate from 30 per cent to 29 per cent next year, and a further reduction to 28 per cent is scheduled for 2014. Guatemala is also scheduled to decrease its top rate in 2013.

The survey shows that the highest income tax rates in the world are seen in the small Caribbean island of Aruba with a top rate of 58.95 per cent, Other countries with top rates in excess of 50 per cent are largely European: Sweden (56.6 per cent rate), Denmark (55.4 per cent rate), Netherlands (55 per cent rate), Austria (50 per cent rate), Belgium (50 per cent rate) and United Kingdom (50 per cent rate). There were exceptions to this from Asia and Africa, specifically Japan (50 per cent rate), and new survey participant Senegal (50 per cent rate).

"While these top rates may appear high, it is important to remember that a country's highest personal income tax rate is only one indicator of what taxes individuals may pay on their income," says Maxwell. "Just as influential are which other taxes may apply and on which income thresholds those rates are charged."

KPMG's Individual Income Tax and Social Security Rate Survey is a cross-border survey of personal tax and social security rates with historical data from 2003-2012. The report covers 114 countries, concentrating on the highest level of personal tax payable to the central government.

The study was commissioned by KPMG's IES practice, comprising professionals from across our global network of member firms.

OTHER BUSINESS DEDUCTIONS

Siva Subramanian Nair • continuation from vol.5/no.4

Having discussed deductible expenditure as detailed in the Income Tax Act 1967 (the Act), and looked at pre-commencement expenditure that rank for a deduction in the last article, we shall look at some of the general principles of deductibility based on precedents established in tax cases or as detailed in Public Rulings.

We shall start with legal and professional expenses. Public Ruling No. 6/2006 issued on 6 July 2006 deals with tax treatment of legal and professional expenses.

The general rules prescribed in the Public Ruling clarify that:-

- Legal or professional expenses are deductible where these are incurred in the maintenance of trade rights or trade facilities, existing or alleged to exist, irrespective of whether the action is successful or not.
- However, where the expense is incurred for the purpose of acquiring new rights or facilities it is not deductible, the reason being that it is of a capital nature.
- Legal and professional expenses which are not wholly and exclusively incurred in the production of gross income or prohibited from deduction under Subsection 39(1) of the Act are not deductible.

Having seen the general principles, the Public Ruling moves on to describe specific circumstances. However, instead of reproducing the Public Ruling, I shall re-arrange the items so that candidates will be able see clearly in respect of a specific item what is deductible and what is not. I shall indicate the non-deductible item in italics to facilitate quick referencing.

DEBT COLLECTION

Legal and other expenses incurred by a person in the course of collecting trade debts from customers.

Legal and other expenses incurred by a person in the collection of non-trade debts and loans of a capital nature.

RENEWAL OF LOANS

Legal expense incurred in renewing existing loans will be deductible ONLY if it is incurred by a finance company.

Generally legal expenses incurred by a trading or commercial company in respect of renewal of loans, legal expenses on renewal of a mortgage on premises or the transfer of a mortgage on business premises do not rank for a deduction. In addition cost of raising additional capital whether by means of a loan or otherwise (even for a person carrying on a business of banking or money-lending).

DEFENDING AN ACTION CONNECTED WITH A TRADE OR BREACH OF TRADING CONTRACTS

- Expenditure incurred by a person in resisting a claim that he has broken a trading contract is allowable unless the breach was deliberate and dishonest.

Examples:

(i) Cost incurred by a moneylender in defending an action in connection with a loan made to him by a company (loans are the trading stock of a moneylender's business).

(ii) Cost to a dairy farmer in successfully defending a charge of adulteration of milk .

- Averting a threat to the goodwill of a business.
- Preservation and / or protection of a capital asset that does not result in the creation of a new asset. This includes legal expenses incurred in connection with defending a person's title to the ownership of an asset that is used in the business. The title to the ownership by the person remains the same and had been maintained with nothing added or taken away.

However, the acquisition of capital assets or the sale or transfer of capital assets is not deductible. These include:

- *the formation, renewal, variation or dissolution of a partnership.*
- *increasing or reducing share capital or altering the Memorandum and Articles of Association of a company.*
- *floatation, registration, winding up or liquidation of a company.*
- *valuation charges relating to probate, company reconstruction and change of ownership.*
- *securing an enduring advantage for a trade or business*

- Where litigation ensues after a customer withholds payments wholly or in part on the grounds of inferior workmanship, sub-standard material, non-fulfillment of contract requirements or for other reasons, the legal action is regarded as an ordinary incident of trade.
- Litigation against claims for libel arising from published documents in respect of a newspaper or publishing business.
- Defending legal action taken against a professional in respect of negligence in undertaking work for a client.

LEGAL COST INCURRED IN DISPUTES OVER TRADING CONTRACTS WHEN INCURRED FOR:

- Enforcement of a contract for the supply to a litigant of goods which would be resold for profit.
- The establishment of an agreement between the litigant and another under which the litigant is entitled to render services for specific remuneration.
- Determination of fares fixed by a transport company for carrying passengers.
- Attempting to recover sums which would have been taxable if received.
- Claim for compensation for trading goods destroyed, defective or lost in transit.

RENEWAL OF LEASES AND LICENSES

However, obtaining a trading license, new leases, mortgages, loan or credit facilities and the grant of a lease of business premises are NOT deductible

LEGAL FEES AND AGENCY FEES INCURRED IN CONNECTION WITH EMPLOYMENT AGREEMENTS AS WELL AS IN CONNECTION WITH PREPARATION OF TRADING CONTRACTS OR AGREEMENTS.

However, costs of legal proceedings incurred in pursuing a claim for unlawful or unjust dismissal by an employee are not deductible.

The Ruling also specifies what legal expenses rank for a deduction for a property developer or dealer. These are detailed below.

- for obtaining end-financing facility for the benefit of house purchasers.
- for valuation of land.
- legal fees paid for transfer of land titles, sub-division and conversion of land.
- survey fees.
- litigation costs incurred on renewal of a lease.

In addition the Ruling also disallows expenditure in respect of the following:

COST OF DEFENCE IN A FRAUD CASE

- The cost of defending criminal prosecution or in connection with unlawful acts in the operation of a business.

LEGAL EXPENSES INCURRED TO VARY VEHICLE LICENSES

- A variation of vehicle licenses from ordinary lorries to articulated vehicles. Now let us explore the tax treatment of other professional fees.

ACCOUNTING FEES

The Ruling provides for ordinary expenses of keeping books and preparing financial records and accounts including

charges for accountancy work. This is an expenditure incurred in the normal course of business and therefore, should rank for a deduction.

AUDIT FEES

This is not incurred in the production of income but rather after the production of income for a basis period, therefore, would not rank for a deduction under normal rules. However there is a gazette order i.e. P.U.(A) 129 - Income Tax (Deduction For Audit Expenditure) Rules 2006 which permits a deduction for expenditure incurred by companies in respect of statutory audit fees.

TAX FEES

The Rulings specifically disallows cost of filing of tax returns and tax computations and cost of appeal against income tax assessment i.e. to the Special Commissioners of Income Tax and the Courts.

SECRETARIAL FEES

Annual corporate filings and meeting expenses and annual general meeting (AGM) expenses do not rank for a deduction in arriving at adjusted income. In the case of AGMs, even before the issue of this Public Ruling, the associated costs were disallowed based on the precedent established in *Sharikat KM Bhd. v DGIR [(1972) 1 MLJ 224]*. In this case the company sought to claim the following expenses:

a. postage for sending out notices for general meeting - RM100
b. printing of notices for general meeting, minutes of previous meeting, directors report and statement of account - RM360
c. cost of *nasi briani* for shareholders attending the general meeting – RM300

The company's appeal to the High Court was only in respect of items (a) and (b). However, the judge disallowed these expenses on grounds that they could not be regarded as an integral part of the income-earning process of the company.

However, candidates should note (when practicing past year exam questions) that prior to year of assessment 2006, both tax compliance costs and routine secretarial fees were allowed a deduction as a concession by the Revenue authorities.

However note that audit fees and secretarial fees for mergers, restructuring or listing purposes or tax fees for advisories, appeals or specialised studies for example on capital allowances are not deductible.

Having seen the details in the Public Ruling let us now look at a few past year examination questions to acquaint ourselves with the manner in which questions on legal and professional fees can be asked.

TAX II DEC 2011 QUESTION 1

Legal & professional fees consist of:	RM'000	Adjustment in the tax computation
Technical fees paid to a foreign consultant in Korea for services rendered in Malaysia. *(withholding tax has been deducted and remitted to IRB within the timeframe.)*	240	Nil
Legal fees for contract on purchase of new plant	30	Add back RM30
Legal fees for recovery of trade debts	35	Nil
Audit fees	70	Nil
Staff recruitment fees	60	Nil
Approved research and development expenditure	205	Nil

TAX II DEC 2009 QUESTION 1

Legal & professional fees of RM900,000 incurred includes:	RM'000	Adjustment in the tax computation
i Business development advise – to assist company in identifying potential business partners for business collaboration	25,000	Nil
ii Architect's fee for renovation plans for college premises	8,000	Add back RM8,000 *(but remember can claim for IBA)*
iii Legal fees on a legal suit against Bijak by the owner of premises rented by Bijak	20,000	Nil
iv Retainer fee to Star Electrical Works for electrical maintenance works for Wisma Bijak	150,000	Nil

TAX II DEC 2008 QUESTION 1		
Legal & professional fees of RM200,000 were incurred on:	**RM'000**	**Adjustment in the tax computation**
i Legal action against trade debtors	20,000	Nil
ii Audit fees	30,000	Nil
iii Tax compliance fees	10,000	Add back RM10,000
iv Drafting of sale and purchase agreement for the disposal of shares in Xylene Distributors Sdn Bhd	120,000	Add back RM120,000
v Legal fees on the purchase of a piece of land for the company's new factory	20,000	Add back RM20,000

TAX IV DEC 2005 QUESTION 6 (D)

In 2004, the company incurred legal costs amounting to RM50,000 in relation to advice and documentation needed to close down two of the East Malaysian branches located in Kuching and Kota Kinabalu which have been sustaining heavy losses since they were set up in 2000.

State with reasons and by reference to provisions of the ITA and decided cases whether the company can claim tax deduction for the year of assessment 2004 in respect of the legal fees of RM50,000 incurred for closing down the unprofitable branches located in Kuching and Kota Kinabalu.

The general rule is that legal expenses are deductible if incurred for the maintenance of existing trade rights or assets. However, legal expenses incurred for the purpose of new rights or assets are capital in nature and hence not deductible. (New Zealand Dairy Farm Mortgage Co. Ltd v Commissioner of Taxation 1941 NZLR 83). The closing down of branches affect the business structure of the company, a capital asset. Therefore, legal expenses incurred in connection with altering the company's business structure are capital in nature and hence not allowable as deduction. Foley Bros Pty Ltd v. F.C. of T. (1965) ATD 562.

Currently of course it is clear from the Public Ruling that the above expenditure is not deductible.

This concludes our discussion on the deductibility of legal and professional fees.

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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, (2012) CCH Asia Pte. Ltd.

Singh, Veerinderjeet;: Veerinder on Taxation (latest edition) CCH Asia Pte. Ltd.

Thornton, Richard. Thornton's Malaysian Tax Commentaries, (Latest Edition) Sweet & Maxwell, Asia.

Thornton, Richard. Richard Thornton: 100 Ways to Save Tax in Malaysia for Small Businesses (latest edition) Sweet & Maxwell Asia

Yeo, Miow Cheng, Alan. Malaysian Taxation, (Latest Edition), YSB Management Sdn Bhd

ERRATA

In the last article on pre-commencement expenditure, there was an error in the summary at the end of the article. The deduction for qualifying pre-operational business expenditure is in arriving at total income and not aggregate income as indicated in the article. The corrected diagram is reproduced below. The error is regretted.

PRE-COMMENCEMENT EXPENDITURE QUALIFYING FOR A DEDUCTION

IN ARRIVING AT

ADJUSTED INCOME

SINGLE DEDUCTION
- Incorporation expenses
- Business training
- Recruitment of employees
- Franchise fee
- Establishment expenditure of REIT or PTF
- Establishment of an Islamic Stockbroking Business

DOUBLE DEDUCTION
- Approved Training – Manufacturing companies

TOTAL INCOME
- Qualifying pre-operational business expenditure

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: January 2013 – March 2013

Month /Event	Details				Registration Fee (RM)			CPD Points
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JANUARY 2013								
Workshop: Tax Audit & Investigation Framework – A Legal & Practical Perspective	7 Jan	9a.m. - 5p.m.	Kuala Lumpur	Kularaj	350	400	460	8 WS / 001
Workshop: Tax Responsibilities for Directors, Managers & Employers (postponed from 23 Oct 2012)	8 Jan	9a.m. - 5p.m.	Johor Bahru	Vincent Josef	335	385	435	8 WS / 002
Workshop: Reinvestment Allowance & Industrial Building Allowance	15 Jan	9a.m. - 5p.m.	Kuala Lumpur	Chow Chee Yen	350	400	460	8 WS / 003
Workshop: Tax Responsibilities for Directors, Managers & Employers (postponed from 26 Sep 2012)	16 Jan	9a.m. - 5p.m.	Johor Bahru	Vincent Josef	335	385	435	8 WS / 010
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	16 Jan	9a.m. - 5p.m.	Kota Kinabalu	Sivaram Nagappan	335	385	435	8 WS / 013
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	17 Jan	9a.m. - 5p.m.	Kuching	Sivaram Nagappan	335	385	435	8 WS / 014
Workshop: Reinvestment Allowance & Industrial Building Allowance	17 Jan	9a.m. - 5p.m.	Penang	Chow Chee Yen	335	385	435	8 WS / 004
Workshop: Reinvestment Allowance & Industrial Building Allowance	18 Jan	9a.m. - 5p.m.	Ipoh	Chow Chee Yen	335	385	435	8 WS / 005
Workshop: 2012 Top Controversial Tax Issues	22 Jan	9a.m. - 5p.m.	Kuala Lumpur	Tan Hooi Beng	350	400	460	8 WS / 020
Workshop: Reinvestment Allowance – Practical Issues with Understanding of Public Rulings	29 Jan	9a.m. - 5p.m.	Kuala Lumpur	Kularaj	350	400	460	8 WS / 012
Workshop: Reinvestment Allowance & Industrial Building Allowance	30 Jan	9a.m. - 5p.m.	Johor Bahru	Chow Chee Yen	335	385	435	8 WS / 006
Public Holiday *(Prophet Muhammad's Birthday: 24 January 2013)*								
FEBRUARY 2013								
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	1 Feb	9a.m. - 5p.m.	Ipoh	Sivaram Nagappan	335	385	435	8 WS / 015
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	5 Feb	9a.m. - 5p.m.	Melaka	Sivaram Nagappan	335	385	435	8 WS / 016
Workshop: Reinvestment Allowance & Industrial Building Allowance	5 Feb	9a.m. - 5p.m.	Kota Kinabalu	Chow Chee Yen	335	385	435	8 WS / 007
Workshop: Reinvestment Allowance & Industrial Building Allowance	6 Feb	9a.m. - 5p.m.	Kuching	Chow Chee Yen	335	385	435	8 WS / 008

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: January 2013 – March 2013 *(continued)*

Month /Event	Details				Registration Fee (RM)			CPD Points
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
FEBRUARY 2013								
Workshop: Tax Responsibilities for Directors, Managers & Employers (postponed from 24 Sep 2012)	14 Feb	9a.m. - 5p.m.	Penang	Vincent Josef	335	385	435	8 WS / 011
Workshop: Reinvestment Allowance & Industrial Building Allowance	21 Feb	9a.m. - 5p.m.	Melaka	Chow Chee Yen	335	385	435	8 WS / 009
Workshop: Tax Planning for Individuals (in collaboration with MAICSA)	20 Feb	9a.m. - 5p.m.	Kuala Lumpur	Vincent Josef	350	N/A	450	8 JV / 001
Half-day Seminar: Anti-Avoidance	TBA	9a.m. - 1p.m.	Kuala Lumpur	SM Thanneermalai & Vijey M. Krishnan	180	200	230	4 SE / 001
Public Holiday ***(Chinese New Year: 10 - 11 February 2013)***								
MARCH 2013								
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	1 Mar	9a.m. - 5p.m.	Penang	Sivaram Nagappan	335	385	435	8 WS / 017
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	5 Mar	9a.m. - 5p.m.	Johor Bahru	Sivaram Nagappan	335	385	435	8 WS / 018
CTIM-IBFD In-house course: Structuring Tax Efficient Investments via Holding Companies	7 - 8 Mar	9a.m. - 5p.m.	Kuala Lumpur	IBFD	1,200 *(after 50% training subsidy)*	2,400	2,400	8 JV / 002
Workshop: Tax Planning on Individual's Income from Employment & Statutory Requirements by Employers	14 Mar	9a.m. - 5p.m.	Kuala Lumpur	Sivaram Nagappan	350	400	460	8 WS / 019
Return Forms B, C & R, E - Submission, Challenges & Implications (in collaboration with MAICSA)	20 Mar	9a.m. - 5p.m.	Kuala Lumpur	Vincent Josef	350	N/A	450	8 JV / 004

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

ENQUIRIES : Please call Fadeah, Yus, Jason, Ally or Nur at 03-2162 8989 ext 113, 121, 108, 123 and 106 respectively or refer to CTIM's website ***www.ctim.org.my*** for more information on the CPD events.

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CEO/DG OF INLAND REVENUE MALAYSIA

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Master Class Awards in Engineering
PT. Atmindo
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Master Class Awards in Food & Beverages
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Master Class Awards in Hospitality & Tourism
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Young Achiever Entrepreneur of the Year
Mr. Tan Lay Seong
GREAT IDEALS GROUP

Emerging Entrepreneur of the Year
Mr. Richard Woo Poh Sun
FOOD CHANNEL SDN. BHD.

Emerging CEO of the Year
Mr. Benson Ooi
AFCAR AUTO (M) SDN. BHD.

Emerging CFO of the Year
Mr. Djauhar Mauladi
PT. RUKUN RAHARJA

Emerging Woman Entrepreneur of the Year
Ms. Chermaine Poo
CHERMAINE POO PRODUCTIONS

Industry Class

Industry Class Awards in Advertising
Alma Signs Ltd.
MR. SOTIRIS ANTONIADES

Industry Class Awards in Construction & Engineering
Mersing Construction & Engineering Sdn. Bhd.
MR. LIM CHEE KON

Industry Class Awards in Creative
Juteras Vision Sdn. Bhd.
MR. KHOO BOO SIEW

Industry Class Awards in Distributorship
OEL Realty Holdings Sdn. Bhd.
MR. HENG KUAN CHOR

Industry Class Awards in Event Management
Kampton Exhibition Design Sdn. Bhd.
MR. RON LEE CHYE WHYE

Industry Class Awards in Financial Assurance
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Fitness Concept Specialist Chain Sdn. Bhd.
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Industry Class Awards in Healthcare
Germax Sdn. Bhd.
MS. KAREN PUA LUAN CHING

Industry Class Awards in Information Security
Pyramid Cyber Security & Forensic Pte. Ltd.
MR. SUNIL BHALLA

Industry Class Awards in Logistics
LBL Global Holdings Sdn. Bhd.
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Industry Class Awards in Oil & Gas Services
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Industry Class Awards in Professional Services
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Industry Class Awards in Consumer Electrics
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