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TAX CRIMES AND MONEY LAUNDERING

Share Options and Taxing Options

Tax Incentives for Petroleum Upstream Industry - Breaking New Grounds

Country-by-Country Implementation Package- Harbinger of Transfer Pricing Tidings

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CHARTERED TAX INSTITUTE OF MALAYSIA

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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contents

Tax Guardian

VOL.8/NO.3/2015/Q3
JULY 2015

40

INVITATION TO WRITE

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

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

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From the **President's Desk**

ARULJOTHI KANAGARETNAM

POST GST

I am pleased to report to you on the significant events which have taken place since the previous issue of *Tax Guardian*.

GST IMPLEMENTATION FROM 1 APRIL 2015

GST is finally here with effect from 1 April 2015. This should come as a relief to those who have been waiting for the implementation of GST since it was proposed several years ago.

It has also been reported in the news that the rising costs of goods and services seem to be out of proportion to the GST charged. Some quarters have attributed this to businesses using GST as an excuse to increase the price of their goods and services. The authorities have been employing the provisions of the Price Control and Anti-Profiteering Legislations to counter unreasonably high profiteering. There have been several cases of business owners being taken to court by the authorities following public complaints on the over-charging of goods.

CTIM members who are licensed GST agents under Section 170 of the GST Act are responsible for providing proper advice to their clients on GST implementation, GST filing and GST payment requirements. CTIM members who intend to apply to the Ministry of Finance to be licensed GST agents are required to attend the 6-day GST Training Course jointly organised with the Royal Malaysian Customs Department (RMCD) and pass the GST examination conducted by the RMCD.

INTERACTIONS WITH THE VARIOUS AUTHORITIES

The Institute was invited to sit on the GST Implementation Technical Committee chaired by the Director of the GST Division, RMCD and has attended the two meetings held to date since March 2015.

The Ministry of Finance (MoF) invited the Institute, the RMCD and other professional bodies to attend a meeting in March 2015 to discuss on the proportion of GST Tax Agents to GST Registrants. The Institute had written to the MoF with its feedback in April 2015.

The Institute submitted its comments on the review of the tax incentives regime to the Ministry of International Trade and Industry (MITI) in April 2015. The comments set-out some broad views on the Promotion of Investments Act 1986 specifically and on the incentives regime as a whole and with an overall view that a holistic review of the tax incentives regime in Malaysia is required.

The Institute also submitted its comments on issues relating to the administration of incentives to the Malaysian Investment Development Authority (MIDA) in April 2015.

The Lembaga Hasil Dalam Negeri (LHDNM) invited the Institute together with other professional bodies to attend the DESIRE Meeting No. 1/2015 in April 2015 to discuss on the compliance and operational issues submitted by them. The issues discussed included LHDNM's requirement for the filing of the employer's return form. The minutes of the meeting will be circulated to members via e-circular as soon as it is available.

CPD EVENTS

The National Tax Conference (NTC) 2015 will be held at the Kuala Lumpur Convention Centre from 25 to 26 August 2015. For those who are coming from outstation to attend this two-day signature event, I hope you have made your travelling and accommodation arrangements. I look forward to seeing you there.

Do also peruse the schedule of upcoming CPD events from July 2015 to September 2015 which can be found at the back page of this issue of *Tax Guardian* and on the Institute's website. The events are a mixture of Direct Tax and GST events. The next 6-day GST Training Course is scheduled in September 2015 in Petaling Jaya. The Institute's CPD Committee and Secretariat have done a wonderful job of putting these events together.

MEMBERSHIP

I am pleased to inform you that the CTIM membership has grown in excess of 3,250 members from about 3,170 members a year ago.

By the time you read this, the Institute's Annual General Meeting on 13 June 2015 would have been concluded. A new incoming Council will take on the responsibility of building up the Institute for the 2015/2016 term of offie. I am also pleased that the Institute's financials are healthy in terms of profit before tax of RM2.11 million and revenue of RM7.23 million as reported in the Annual Report 2014. These are largely due to the GST Training Courses which the Institute organised in collaboration with the RMCD. The year 2014 has been an exceptional year in terms of the Institute's financials which is unlikely to be repeated.

I would like to thank all members who have supported the Institute in one or more ways. The Institute represents and reflects its membership. I am grateful for this opportunity to serve and be part of this esteemed body for the past one year.

Editor'sNote

K. SANDRA SEGARAN

ENFORCING TAX CRIMES AND FACING INTERNATIONAL TAX DEVELOPMENTS

This issue brings you a diverse array of feature articles focussing on both domestic and international tax issues, involving money laundering and tax crimes, international tax developments arising from BEPS, analysis of anti-avoidance legislative developments, GST and Petroleum upstream incentives and analysis of court decisions.

Do tax crimes pose high money laundering risks? You will find that out in an article by Fu Shiow Chyun from the IRB. Money laundering, terrorist financing and tax crimes come within the purview of the Anti-Money Laundering Act (AMLA) since October 2010. Several tax offences, such as failure to furnish tax returns, submitting incorrect tax returns and wilful evasion are categorised as serious offences within the purview of AMLA, now known as Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUA). This Act provides the authorities with wide powers to search, detain, freeze bank accounts and forfeit assets.

The oil & gas sector has been an important revenue source for the government. To encourage growth and sustain oil and gas production, new initiatives are now in place to ensure its continued contribution to the economy. Rihanna Haryanti examines the economics and the path towards incentivising this industry.

Saravana Kumar and Siti Fatimah provide an insight into the GST appeal process and highlight the legal rights and recourses available in the face of a comprehensive penalty regime which is described as punitive in nature. Though the GST legislation was only recently introduced, it will not be surprising to see many GST appeals proceeding to the courts as we grapple with interpretation issues. The numerous variations on exempt and taxable supplies and the large number of guidelines though helpful, is just one too many!

Our regular writer, Dr. Nakha Ratnam reviews the taxation of perquisite arising to an employee from share options and the recent adverse decision in the Federal Court case in *Maxis Communication Berhad v DGIR*. The author hints that an abrogation of a right to acquire shares could be a capital sum to the employee and therefore not liable to income tax, whilst the Federal Court differed.

Dr. Benjamin Poh analyses the interaction of tax treaties and domestic legislation in specific reference to the general anti-avoidance regulations (GAAR) found in domestic tax legislation. Drawing from the experience in other jurisdictions and the ongoing Base Erosion and Profit Shifting (BEPS) project by OECD, he offers his opinion towards the legislative direction for Malaysia after considering the conflicts that may arise in interpreting treaties in the face of domestic anti-avoidance legislation. Recently the Korean Supreme Court for the second time overruled the treaty override legislation where it ruled that royalties paid in accordance with a patent license for patents registered outside of Korea are not subject to Korean withholding tax under the Korea-U.S. Tax Treaty; the judgement reaffirms that tax treaties take precedence over domestic law in determining the source of non-resident income.

Venkataraman Ganesan provides a timely and useful analysis on the transfer pricing development involving OECD's BEPS project. The OECD announced an update on the Country-by-Country (CbC) reporting and implementation package involving one of the 15 action points in the BEPS project. With this development and other treaty developments, multinational companies cannot ignore the impetus for BEPS readiness as cross border flow of information will be stepped up as the world acquaints itself to be "BEPS aligned".

With our regular columns also in place, this issue will offer an interesting read of local and international developments.

CPD EVENTS

A number of events were conducted in the 2nd quarter of 2015 as follows:

- LHDNM-CTIM Tax Forum 2015
- Seminar : Costly Mistakes to Avoid
- Analysis of Recent Tax Cases 2014 & Understanding Tax Appeal Processes
- Submitting Your First GST Return Correctly
- Accounting Issues for GST
- Understanding the Legal and Practical Aspects of Withholding Taxes
- Understanding the Legal and Practical Aspects of Capital Expenditure
- Understanding the Legal and Practical Aspects of Tax Audit & Investigation

The LHDNM and CTIM successfully organised the "LHDNM-CTIM Tax Forum 2015" in Kuala Lumpur, Johor Bahru, Penang, Kota Kinabalu and Kuching in March 2015. The forums were attended by local tax professionals and practitioners.

On 5 March 2015, CTIM organised a seminar on "GST: Costly Mistakes to Avoid". The seminar was conducted by Dato' Subromaniam Tholasy, Director of GST, RMCD and Mr. Thenesh Kannaa. This seminar highlighted the recent GST developments and the costly mistakes that businesses should avoid.

The Seminar on "Analysis of Recent Tax Cases 2014 & Understanding Tax Appeal Processes" was conducted by Mr. Abu Tariq Jamaluddin and Mr. Saravana Kumar at various major cities. The first seminar was held on 19 March 2015 at the Ramada Plaza Hotel, Melaka. The event was graced by YBhg Kolonel (K) Tan Sri Datuk Wira Dr. Hj. Mohd Shukor Hj. Mahfar, the Chief Executive Officer of LHDNM. The speakers provided comprehensive and practical commentary on selected important tax cases of 2014 and introduced the newly established "Dispute Resolution Proceedings".

Mr. Thenesh Kannaa together with Mr. Renganathan jointly conducted a seminar on 'Submitting Your First GST Return Correctly' on 6 April 2015. This seminar was focused on accounting software to generate the values for GST return and how to guide the accountant / tax advisors to take reasonable steps to ensure accuracy.

On 22 April 2015, Mr. Zen Chow conducted a workshop on "Accounting Issues for GST" at the Seri Pacific Hotel. Due to an overwhelming response, a re-run session was held on 28 April 2015 at the CTIM Training Room.

Three workshops were conducted by Mr. Kularaj during the months of April and May 2015 namely:

- Understanding the Legal and Practical Aspects of Withholding Taxes (9 April 2015, CTIM Training Room)
- Understanding the Legal and Practical Aspects of Capital Expenditure (20 April 2015, CTIM Training Room)
- Understanding the Legal and Practical Aspects of Tax Audit & Investigation (14 May 2015, CTIM Training Room)

HALF-DAY WITH YBHG DATO' SUBROMANIAM 'YOUR QUESTIONS ON GST ANSWERED'

A half-day event was organised jointly by the Sabah Branch and the RMCD on 3 June 2015. It was attended by Dato' Subromaniam Tholasy and Ms. Annie Thomas. Both participated actively at a Q&A session that specifically focused on the various issues arising from the implementation of GST. This first time event was much appreciated and participants provided positive feedback to the Institute.

The President, Mr. Aruljothi took this opportunity to meet the Sabah Branch Committee members who together paid a courtesy visit to the LHDNM Kota Kinabalu Branch where issues specific to the branches were discussed.

The Secretary General of Treasury, Ministry of Finance YBhg Tan Sri Dr. Mohd. Irwan Serigar Abdullah officially launched the book titled "A Guide to Malaysian Goods and Services Tax' authored by CTIM Council Member Professor Dr. Jeyapalan Kasipillai at Monash University Malaysia recently. Also present to grace the event was Professor Helen Bartlett, Pro Vice-Chancellor, Monash University Malaysia.

Dr. Mohd Khalid Abdul Samad (Malaysia Competition Commission (MyCC) Chief Executive Officer) with Mr. Poon Yew Hoe (CTIM Deputy President) following a meeting with MAICSA on matters relating to the Competitition Act 2010.

TAX CRIMES AND MONEY LAUNDERING

THE ADVANCEMENT OF TECHNOLOGY AND INTER-LINKAGES OF THE FINANCIAL SYSTEM HAS GIVEN BUSINESSES OPPORTUNITIES TO WIDEN THEIR ACCESS TO THE GLOBAL MARKET AS WELL AS THE MEANS AND WAYS TO EVADE TAX AND TO LAUNDER THEIR UNLAWFUL PROCEEDS INTO SOME FORMS THAT APPEAR LEGAL. IT CANNOT BE DENIED THAT BOTH TAX EVASION AND MONEY LAUNDERING HAVE BECOME SERIOUS GLOBAL ISSUES THAT CANNOT BE TAKEN LIGHTLY.

FU SHIOW CHYUN

TAX CRIME AND MONEY LAUNDERING

It is important to understand the risks of money laundering and terrorism financing which form the foundation of our legal framework and the formation of enforcement strategies and preventive measures. In response to the 2012 Financial Action Task Force (FATF) Recommendations, Malaysia has made significant legislative changes and conducted various money laundering / terrorism financing related initiatives. One of them being the National Risk Assessment (NRA) which was carried out under the supervision of the National Coordination Committee to Counter Money Laundering (NCC).

The NRA aims to attain a collective understanding of the money laundering and terrorism financing risks facing the country. The NRA was conducted based on the principles set out under the FATF's International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation.

Based on the analysis and methodologies employed, the NRA concluded that there are five types of crimes that pose high money laundering risk threat to the country. Those crimes are:

- Fraud
- Drugs trafficking,
- Corruption and bribery,
- Smuggling offences (including evasion of customs and excise duties), and
- Tax crimes.

The results of the NRA have helped in identifying the risks and threats facing the country and provided input for the drafting of strategies in mitigating these risks.

Tax crimes is one of the top five risks that were identified. With effect from 7 October 2010, several offences under the Income Tax Act 1967 (ITA) were gazetted as serious offences under Schedule 2 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA).

The offences gazetted were:

- **Section 112** : Failure to furnish return or give notice of chargeability
- **Section 113** : Incorrect returns
- **Section 114** : Wilful evasion

Offences under Sections 112, 113 and 114 of the ITA are among the predicate offences under Schedule 2 of the AMLATFA.

In an effort to strengthen Malaysia's anti-money laundering framework against criminal activities, extensive amendments were made to the AMLATFA, which was subsequently renamed as Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUA) effective from 1 September 2014. With the coming into force of the amendments to the AMLATFA, the maximum penalty for various provisions was increased. For instance, penalties on money laundering offence have been increased from an imprisonment for a term not exceeding five years or a fine of RM5 million or both, to an imprisonment for a term not exceeding 15 years and a fine of not less than five times the value of the proceeds of an unlawful activity or RM5 million whichever is the higher.

THE ROLE OF THE INLAND REVENUE BOARD MALAYSIA

The Inland Revenue Board Malaysia (IRBM) is one of the many law enforcement agencies (LEA) responsible for the enforcement of laws relating to the serious offences listed under the AMLATFPUA. As

mentioned above, offences under Sections 112, 113 and 114 of the ITA are gazetted as serious offences under the AMLATFPUA. The IRBM is hence the LEA conducting investigations into acts of money laundering which are predicated by tax offences.

In actual fact, the IRBM's involvement in tackling money laundering is focused on cases where there is an element of tax evasion. It plays an active role in detecting and investigating the laundering of the proceeds of tax evasion.

There have been some misconceptions among the taxpayers who are being investigated by IRBM that they are not involved in illegal activities and therefore should not be investigated under the AMLATFPUA. The interpretation of 'proceeds of an unlawful activity' has been redefined and made clearer in the recent amendments to mean 'any property or any economic advantage or economic gain from such property within or outside Malaysia which is wholly or partly derived or obtained, directly or indirectly, by any person

from any unlawful activity…'. Any activity which constitutes any serious offence would be interpreted as unlawful activity under the AMLATFPUA. When a person fails to declare or under-declares his tax liability, he has committed a serious offence according to Schedule 2 of the AMLATFPUA. Thus, money obtained from the offence for not paying or under-payment of tax is considered as proceeds from an unlawful activity where by so doing the person has derived an economic advantage.

The person investigated may be carrying on a legitimate business, but the broad definition gives IRBM the authority to investigate a case for money laundering because of the underlying alleged tax evasion.

It has also been argued that tax offences are minor offences compared to drugs, smuggling, corruption and other offences which are perceived to have a more severe social economic impact on the country and should not be investigated under the AMLATFPUA. It is important that the tax system is fair to all; that everybody capable of paying taxes must contribute their fair share and nobody can have an economic advantage over others by not paying the taxes due from them. Moreover, the proceeds of tax evasion may be moved and transferred through placement, layering and integration into the financial system and eventually into the economy. The true nature and source of money which is in reality the proceeds of tax evasion will be disguised and lost. IRBM plays an important role in detecting and investigating any such arrangements.

The income tax offences gazetted as serious offences under the AMLATFPUA provide more options under which a tax evader could be charged.

INVESTIGATIONS UNDER THE AMLATFPUA

Investigations under the AMLATFPUA can be conducted:

i. to carry out investigation for the purpose of charging a person for money laundering offence under the AMLATFPUA or to initiate forfeiture proceeding against the proceeds of crime; or
ii. to complement or to support the predicate investigation.

An investigation under the AMLATFPUA can be carried out simultaneously with the predicate offence investigation or initiated later during the course of the predicate offence investigation whenever trails of money laundering are detected.

The author of the predicate crime (from the IRBM's perspective, the person who evaded tax) can be self-laundering his own proceeds or laundering through another person or persons. If a person self-launders his own proceeds, he may be charged under the predicate offence as well as Section 4(1) of the AMLATFPUA for offence of money laundering. However if he launders through a third person, this third person may also be charged under the AMLATFPUA for money laundering.

The IRBM adopts the approach that prosecution is carried out to send a strong message to promote compliance and to deter tax evasion. Charges for predicate offences under the ITA will be handled by the legal counsel of IRBM whereas the charges under the AMLATFPUA will be under the purview of the Public Prosecutor.

COMPARING THE POWERS UNDER THE AMLATFPUA AND ITA

Power of access to buildings and documents

The power to access buildings and documents are provided under both the ITA (Section 80) and the AMLATFPUA (Section 31). Both acts allow an investigating officer to enter, inspect and search any premises belonging or in the possession or control of the person or his employee. The investigating officer may also detain, take possession and remove from the premises documents or information as he considers necessary.

However the AMLATFPUA grants more power of search to its officers in that the investigating officer is also empowered under subsection 31(2) of the AMLATFPUA to break open any outer or inner door of premises or conveyance, remove by force any obstruction to such entry and detain any person found on such premises or conveyance until the search is completed.

Power to search and to detain a person

In addition, the AMLATFPUA allows under subsection 31(1)(f) the investigating officer to search on any person who in the opinion of the investigating officer has documents or information which are necessary for the purpose of the investigation.

Under Section 33 of the AMLATFPUA, an investigating officer searching any person may detain the person for such period as may be necessary to have the search carried out which shall not in any case exceed 24 hours unless with the authorisation of a magistrate. The search shall be conducted by an investigating officer of the same gender and such search should be carried out with strict regard to decency. The ITA does not grant the investigation officers the power to search or to detain any person.

Investigating officer may arrest without warrant

An investigating officer appointed under Section 30 of the AMLATFPUA may arrest without warrant a person whom he reasonably suspects to have committed or to be committing any offence under the Act unlike the ITA where there is no such authority.

Freezing, Seizure and Forfeiture

In combating money laundering, the powers to freeze, seize or forfeit a property are provided under the AMLATFPUA to prevent the disappearance or disposal of the property. Property is defined to mean assets of every kind, movable or immovable, tangible or intangible, legal documents or instruments in any form whether situated within or outside Malaysia, fully or partially owned.

1. FREEZING ORDER

A freezing order may be issued to freeze any property of any person if the enforcement agency has reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrumentalities of an offence. The IRBM being an enforcement agency can issue the order under Section 44 of the AMLATFPUA. It may also vary the order with regard to the duration of the order, the payment of debts incurred in good faith before the making of the order and the provision of an allocation for reasonable subsistence of that person, his family or employees. However, IRBM may revoke such order or refuse the application to vary the order.

2. Seizure Order

Upon expiry of the order under Section 44 which is usually 90 days from the date of issue, where the Public Prosecutor, is satisfied that the information given to him by the investigating officer that any property which is the evidence relating to the commission of a money laundering offence or proceeds of an unlawful activity, may give an order under Section 50 for such property to be seized by the investigating officer or direct that no disposal be done until the order is varied or revoked.

3. Expiry of Seizure Order

Following the recent amendments in 2014, a new section was inserted under Section 52A to state that a seizure order made under the AMLATFPUA shall cease to have effect after the expiration of twelve months from the date of the seizure order, or where there is a prior freezing order, twelve months from the date of the freezing order, if the person has not been charged with an offence under the AMLATFPUA.

4. Forfeiture of Property upon Prosecution for an Offence

Under Section 55 of the AMLATFPUA, it is clearly stated that in any prosecution for an offence under subsection 4(1), the court shall make an order for the forfeiture of any property which is proved to be evidence relating to the commission of an offence of money laundering or proceeds of an unlawful activity.

5. Forfeiture of Property where there is no Prosecution

Section 56 of the AMLATFPUA empowers the Public Prosecutor before the expiration of twelve months from the date of seizure/freezing, apply to the High Court for an order of forfeiture of that property if he is satisfied that such property is proved to be evidence relating to the commission of an offence of money laundering or proceeds of an unlawful activity.

Joint Operations with other LEAs

In the complex business environment today, it is vital for LEAs to work together in their investigation works. By combining expertise and through sharing of information, the enforcement effort becomes more effective. The IRBM has been working closely in partnership with various LEAs and has involved itself in numerous joint operations over these past years. Cases investigated involve a wide range of businesses and industries including car importers and dealers, forwarders, content providers, diesel dealers, gaming business, cigarettes and liquor sellers, to name a few. Directors of companies and individuals were also investigated using the net worth method.

Statistics

Investigation under predicate offence with the support from investigation under the AMLATFPUA for the years 2012-2014 is as follows:

To date, no prosecution for money laundering offences under subsection 4(1) of the AMLATFPUA has been done with regards to tax evasion. However, the IRBM has in six cases successfully obtained an order of forfeiture of property under Section 56 of the AMLATFPUA. This is a breakthrough for the IRBM in money laundering investigation and with the publicity given to successful cases, the IRBM hopes to send a message of deterrence to tax evaders and would-be tax evaders that tax evasion is a serious crime.

YEAR	No. of Cases Settled	Amount of Settlement (RM million)
2012	88	225
2013	97	197
2014	151	241

Table 1

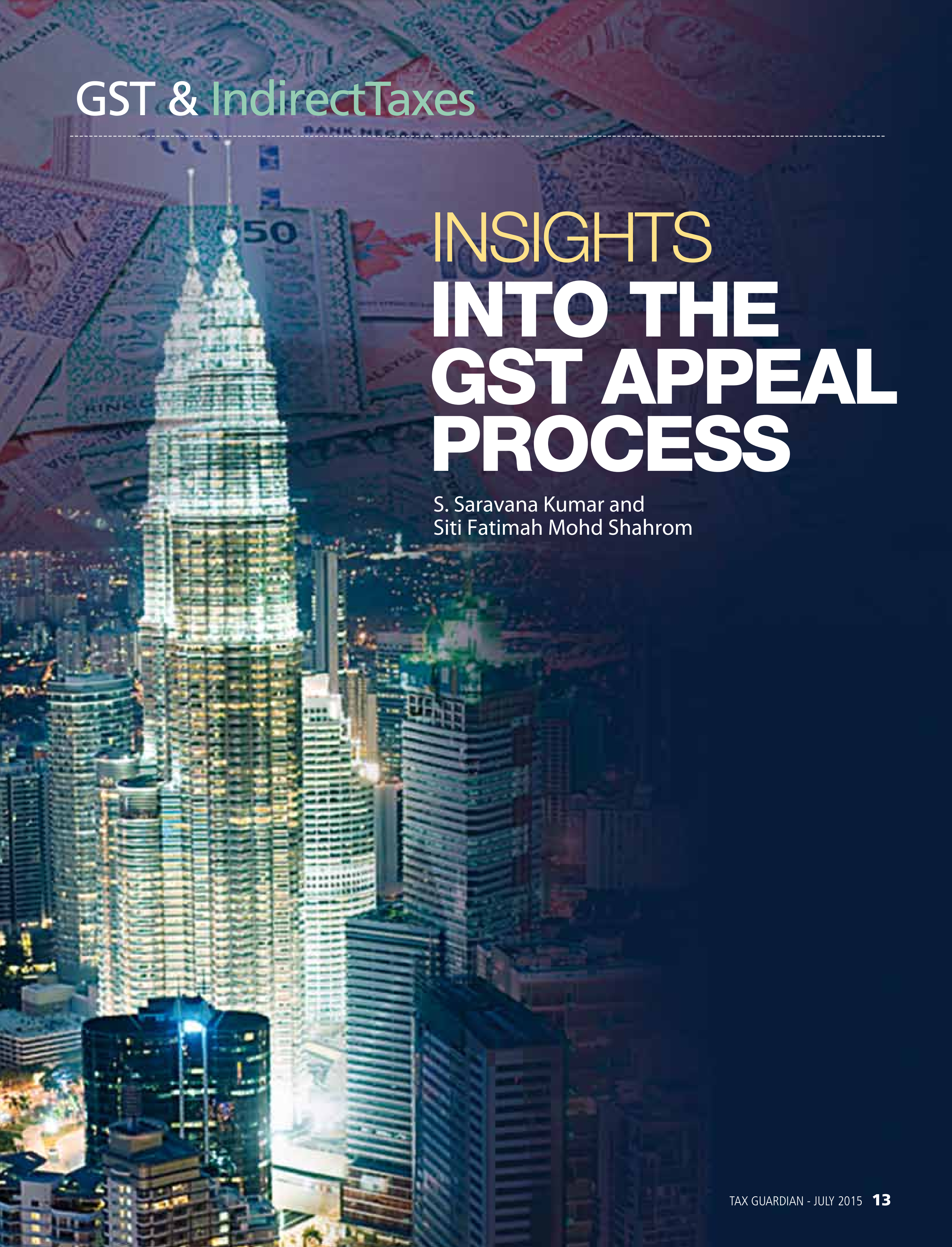
MALAYSIA BECOMING A FATF MEMBER

In June 2014, Malaysia was shortlisted to be considered to become a member of FATF. By becoming a FATF member country, due recognition is given by the international community as a country which is committed in the fight against money laundering and terrorism financing. Such recognition would enhance the strategic advantage of a member country in gaining wider access to the global financial market and business negotiations. As part of the membership process, FATF has conducted High Level on-site visit to Malaysia in October 2014 to confirm Malaysia's political commitment and readiness in the implementation of the FATF standards and to undergo Mutual Evaluation Exercise (MEE). MEE on Malaysia was jointly conducted by the FATF and Asia/Pacific Group on Money Laundering (APG) in November 2014 and the IRBM was evaluated on its legislative and enforcement measures during the visit. Malaysia has successfully completed the MEE and the report will be discussed at the FATF Plenary Meeting in June 2015.

WAY FORWARD

Following Malaysia's commitment in combating money laundering and terrorism financing, the IRBM has to target its resources and investigations towards these areas that pose greater risks. This opens a new chapter in the way investigations are to be conducted where a person may be simultaneously investigated for tax evasion under the ITA and money laundering under the AMLATFPUA.

__Fu Shiow Chyun is a__ Principal Assistant Director of Enforcement Cooperation Division, Investigation Department of the IRBM.



INSIGHTS INTO THE GST APPEAL PROCESS

S. Saravana Kumar and
Siti Fatimah Mohd Shahrom

The much anticipated Goods and Services Tax ("GST") replaced Malaysia's sales tax and service tax regime on 1 April 2015. Under the new GST regime, all the goods and services supplied in Malaysia (unless they are zero-rated, exempt supply or out of scope) will be subjected to GST at the rate of 6% at every stage of the supply chain. Although GST is conceptually a simple consumption tax, the confusion and uncertainties arising from the existing legislation (especially the wide zero-rated and exempt supply list), has made GST a fairly complex tax in Malaysia[1].

This is coupled with technical issues that will arise due to differing standpoints adopted by the Royal Malaysian Customs ("the Customs") and GST practitioners. It must be noted that the Goods and Services Tax Act 2014 ("the GST Act") also contains a comprehensive penalty regime which, from its drafting and intent, may be read to be punitive in nature. During the various roadshows nationwide, the Customs appear to have assured businesses and GST practitioners that it will take an educational approach at least in the first year of GST implementation and as such, the penalty provisions under the GST Act will be applied sparingly. This assurance is not legally binding and in any event, the Customs is not estopped from applying the full strength of the law if it wishes to impose penalty.[2]

With this background in mind, the authors discuss the GST appeal processes in Malaysia. This article will cover two major appeal avenues available to taxpayers namely the GST Appeal Tribunal and judicial review application.

GST Appeal Tribunal

The ordinary appeal route that is envisaged by Parliament when a taxpayer is aggrieved by the decision of the Customs in respect of GST matters is to appeal to the GST Appeal Tribunal ("Tribunal"). The establishment of the Tribunal is provided under Section 125 of the GST Act. The Tribunal has the jurisdiction to determine appeals in respect of GST matters except on the matters specified in the Fourth Schedule.[3] No reason has been provided by Parliament for making this exception and neither does the GST Act provide any alternative appeal remedy to taxpayers in the event that they are aggrieved by the decision of the Customs (including the Director-General of Customs). It is unfortunate that the GST Act is silent on this as the authors opine that Parliament should have either provided an appeal process for such matters or at least acknowledged that such matters could be appealed by way of judicial review application. It is the authors' opinion that taxpayers who are aggrieved by decisions in respect of matters specified in the Fourth Schedule may seek legal recourse by way of judicial review application, which is discussed below.

The salient features of the Tribunal are:

A. Membership

The membership of the Tribunal is rather wide and the appointment of Tribunal members is determined by the Minister of Finance.[4] The Chairman and the Deputy Chairman of the Tribunal will be appointed amongst the officers from the Judicial and Legal Service.[5] The Minister is required to appoint not less than five members whom in the opinion of the Minister have wide knowledge or extensive experience in any field of activities relating to goods and services tax, customs or taxation.[6] At the time of writing this article, the authors were unaware of any appointment being made by the Minister to the Tribunal. The Tribunal members shall hold office for a term not exceeding three years and are eligible for reappointment up to three consecutive terms.[7] The Minister shall also determine the remuneration and other terms and conditions of the members of the Tribunal including the Chairman.[8]

In the following circumstances, the appointment of a member of the Tribunal under Section 128(1)(b) of the GST Act may be revoked by the Minister[9]:

(a) his conduct, whether in connection with his duties as a member of the Tribunal or otherwise, has been such as to bring discredit to the Tribunal;
(b) he has become incapable of properly carrying out his duties as a member of the Tribunal;
(c) there has been proved against him, or he has been convicted of, a charge or charges in respect of:
   (i) an offence involving fraud, dishonesty or moral turpitude;
   (ii) an offence under any law relating to corruption;
   (iii) an offence under this Act, the Customs Act 1967 or the Excise Act 1976; or
   (iv) any other offence punishable with imprisonment for more than two years;
   (d) he is adjudicated a bankrupt;

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1 *http://www.themalaymailonline.com/malaysia/article/putrajayas-complex-gst-system-paving-way-for-confusion-say-tax-experts*
2 *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] CLJ 123*
3 *See Section 127(1) of the GST Act.*
4 *See Section 128 of the GST Act.*
5 *See Section 128(1)(a) of the GST Act.*
6 *See Section 128(1)(b) of the GST Act.*
7 *See Section 128(2) of the GST Act.*
8 *See Section 128(3) of the GST Act.*
9 *See Section 130 of the GST Act.*

(e) he has been found or declared to be of unsound mind or has otherwise become incapable of managing his affairs; or

(f) he absents himself from three consecutive sittings of the Tribunal without leave of the Chairman.

hearing of appeal

Any taxpayer who is aggrieved by the decision of the Director-General of Customs in respect of a GST matter except for the matters specified in the Fourth Schedule may appeal to the Tribunal within thirty days from the date the disputed decision was made known to the taxpayer.

A member appointed by the Minister may also resign from his office by giving a three month notice to the Minister.[10]

Section 133 of the GST Act provides for the appointment of a Secretary and an Assistant Secretary to the Tribunal to ensure the functions of the Tribunal are discharged accordingly.[11] The officials will report to the Chairman of the Tribunal.[12] Like any other tribunals, no action or suit could be instituted or maintained in any court against the members of the Tribunal.[13]

B. Hearing of appeals

Any taxpayer who is aggrieved by the decision of the Director-General of Customs in respect of a GST matter except for the matters specified in the Fourth Schedule may appeal to the Tribunal within thirty days[14] from the date the disputed decision was made known to the taxpayer. The appeal is to be made using the prescribed form[15] together with the prescribed fee.[16] The taxpayer is required to provide his particulars and state the grounds of appeal along with the remedy sought in the notice of appeal.

If a taxpayer has missed the thirty-day deadline, he may make an application in writing[17] to the Tribunal for an extension of time.[18] The Tribunal may grant the extension if it is satisfied that it is reasonable in all circumstances to do so. The Tribunal is required to grant the Customs the right to be heard before making its decision.[19]

An appeal is heard by a panel of three members[20] and each appeal is presided by the Chairman or the Deputy Chairman.[21] The taxpayer may conduct his case himself or may be represented by any person whom he may appoint for that purpose including a tax agent[22] or an advocate or solicitor.[23] Meanwhile, the Director General of Customs may be represented by an authorised officer.[24]

Although it is stated that any proceedings before the Tribunal shall be conducted without regard to formality and technicality, the Tribunal may have the authority to exercise the following[25]:

a) procure and receive evidence on oath or affirmation, whether written or oral, and examine any person as a witness, as the Tribunal thinks necessary to procure, receive or examine;

(b) require the production before it of books, papers, documents, records and things;

(c) administer the oath, affirmation or statutory declaration, as the case may require;

(d) seek and receive such other evidence and make such other inquiries as it thinks fit;

(e) summon the parties to the proceedings or any other person to attend before it to give evidence or to produce any document, record or other thing in his possession or otherwise

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[10] See Section 131 of the GST Act.
[11] See Section 133(1) of the GST Act.
[12] See Sections 133(2) of the GST Act.
[13] See Section 153 of the GST Act.
[14] See Section 126 of the GST Act.
[15] The prescribed form is Form B, see regulation 3(1) of the Goods and Services Tax (Review and Appeal) Regulations 2014 ("Regulations").
[16] The prescribed fee is RM200, see regulation 3(2) of the Regulations 11 See Section 133(1) of the GST Act.
[17] The prescribed form is Form C.
[18] See Regulation 5(1) of the Regulations.
[19] See Regulation 5(3) of the Regulations.
[20] See Section 135(1) of the GST Act.
[21] See Section 135(2) of the GST Act.
[22] See Section 170 of the GST Act.
[23] See Section 141(a) of the GST Act.
[24] See Section 141(b) of the GST Act.
[25] See Section 142(1) of the GST Act.

to assist the Tribunal in its deliberations;

(f) receive expert evidence; and

(g) generally direct and do all such things as may be necessary or expedient for the expeditious determination of the claims.

The authors welcome the insertion of Section 150 of the GST Act which states that no proceedings, award or other document of the Tribunal shall be set aside or quashed for want of form. The Tribunal is also empowered to award costs against the taxpayer and the Director-General of Customs in the circumstances prescribed under Section 151 of the GST Act.

The Tribunal is required to pronounce their decision without delay and where practicable, within sixty days from the first day the hearing before the Tribunal commences.[26] The Tribunal has the power to affirm, vary or set aside the Director-General of Customs' decision[27] and is required to give reasons for its decision.[28]

C. Further appeal

A party aggrieved by the decision of the Tribunal has the right to appeal to the High Court on a question of law or of mixed fact and law.[29] It must be noted that ordinarily in an appeal, no new or further evidence could be adduced on appeal. Further, the Tribunal members would be the judges of fact and upon examining all the evidence admitted to them, the Tribunal would form an opinion and draw conclusions from those facts. Although any error of law committed by the Tribunal could be set aside on appeal, it must be appreciated that an appellate court is usually reluctant to disturb the finding of facts unless it could be established that the facts found by the Tribunal are not supported by evidence or another reasonable Tribunal in the same circumstances would not have found the same.

The final court in respect of GST appeals originating from the Tribunal would be the Court of Appeal. A party dissatisfied with the decision of the High Court may lodge an appeal to the Court of Appeal within thirty days upon the pronouncement of the said decision. As GST appeals do not originate from the High Court, it is the authors' view that it may not satisfy Section 96(a) of the Courts of Judicature Act 1964 and thus, an appeal from the Court of Appeal to the Federal Court in respect of a GST matter determined by the Tribunal will not be possible.[30]

D. Negotiation

It is encouraging to observe that the mere fact that an appeal had been lodged before the Tribunal does not bar taxpayers and the Director-General of Customs from engaging in discussions and negotiations with the view of resolving the dispute amicably out of court.

In fact, Section 140(1) of the GST Act expressly provides that in appropriate circumstances, the Tribunal may assist parties to the proceedings to negotiate an agreed settlement in relation to the appeal. Where the parties reach an agreed settlement, the Tribunal shall approve and record the settlement and the settlement shall take effect as if it were a decision of the Tribunal.[31] However, in circumstances where it appears to the Tribunal that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the appeal or the parties are unable to reach an agreed settlement in relation to the appeal, the Tribunal shall proceed to determine the appeal.[32]

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[26] See Section 144(1) of the GST Act.

[27] See Section 144(2) of the GST Act.

[28] See Section 144(3) of the GST Act.

[29] See Section 148 of the GST Act.

[30] Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25.

[31] See Section 140(3) of the GST Act.

[32] See Section 140(4) of the GST Act.

Judicial Review

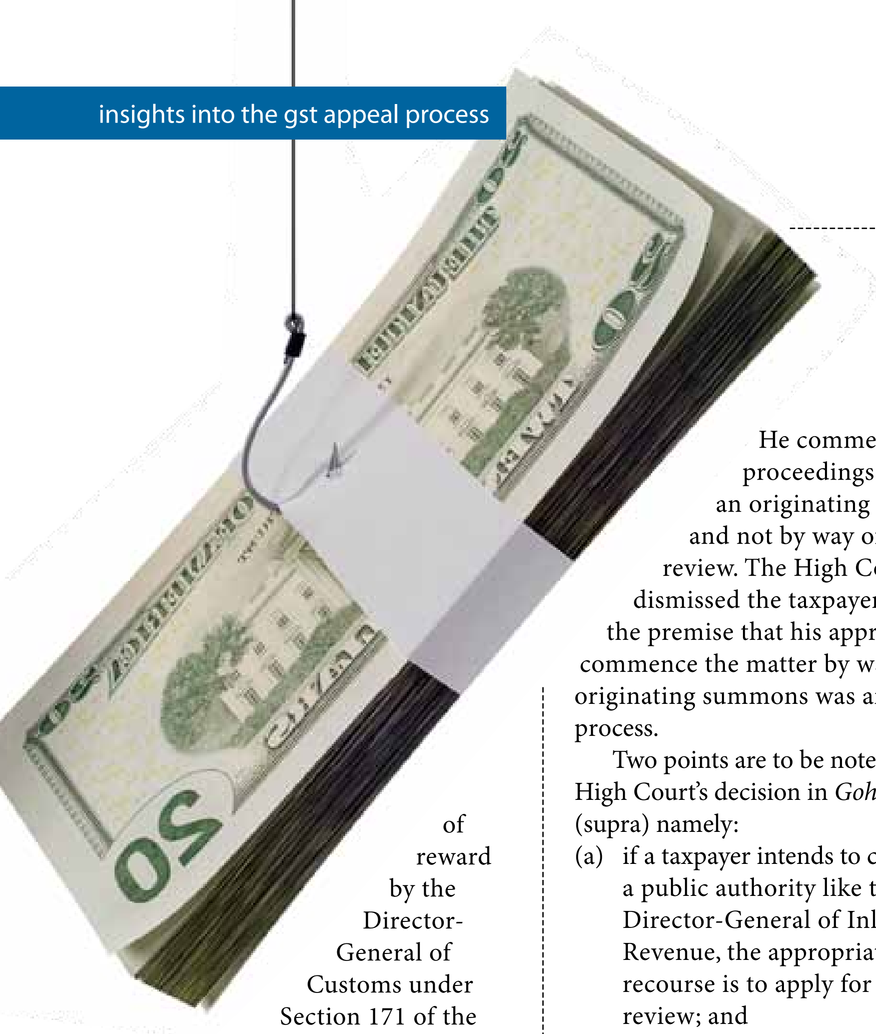
The Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 recognised that judicial review provides a means by which judicial control of administrative actions is exercised. The Malaysian Civil Procedure 2013 amongst others, succinctly explains that judicial review refers to the process of supervisory jurisdiction exercised by the High Court over decisions of persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.

In respect of GST matters, the authors foresee judicial review applications taking place when a taxpayer intends to bypass the Tribunal or is aggrieved by a matter which falls under the Fourth Schedule of the GST Act. A decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety, but also on the grounds of illegality, irrationality and proportionality (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). Unlike the Tribunal where no leave is required to lodge an appeal, in order to commence judicial review proceedings, the taxpayer must first obtain leave from the High Court. As held by the Federal Court in *Mohd. Nordin Johan v The Attorney-General, Malaysia* [1983] CLJ (Rep) 271, the sole question at the leave stage in a judicial review application is whether the application is frivolous. If leave is granted, the taxpayer may then commence his judicial review application and if successful, the taxpayer may pray for the High Court to exercise its jurisdiction to grant various remedies including an order of certiorari to quash the impugned

decision, grant declaratory relief and award damages including interest.

As explained earlier, the Tribunal is precluded from hearing matters specified in the Fourth Schedule and the GST Act does not provide any appeal remedy in respect of such matters. It is worth noting that the following matters are specified in the Fourth Schedule:

(a) any matter which is inherent of a statutory restriction under the GST Act;
(b) any direction to treat persons as a single taxable person under Section 23 of the GST Act;
(c) any refusal of voluntary registration under Section 24 of the GST Act;
(d) any refusal of group registration under Section 27 of the GST Act;
(e) any matter relating to reassignment of the taxable period under Section 40(4) of the Act;
(f) offsetting tax against refund under Section 45 of the Act;
(g) any seizure and selling of any goods for recovery of any amount under Section 47(2) of the Act;
(h) any refusal of payment by instalment under Section 51 of the Act;
(i) any decision to reduce or disallow any refund under Section 57(2) of the Act;
(j) any refusal to refund an amount paid by any person under Section 57(5) of the Act;
(k) any refusal to remit any penalty or surcharge under Section 62(2) of the Act;
(l) any refusal to approve any application for any scheme under Part VIII of the Act;
(m) any advance ruling made under Section 77;
(n) the exercising of powers under Part X of the Act;
(o) the compounding of offences under Section 121 of the Act;
(p) any matter relating to approval



of reward by the Director-General of Customs under Section 171 of the Act; and

(q) any matter relating to special refund under Sections 190, 191 and 192 of the Act.

In such circumstances, a taxpayer aggrieved by the decision of the Customs in respect of any one or more of the matters specified in the Fourth Schedule, may seek legal recourse by applying for judicial review. In *Goh Eng Hwa v Ketua Pengarah Lembaga Hasil Dalam Negeri & Anor* [2008] 8 CLJ 777, the taxpayer was issued a travel restriction notice under Section 104 of the Income Tax Act 1967 by the Director-General of Inland Revenue. Such notice was not appealable to the Special Commissioners of Income Tax as it was not an assessment and neither was there a remedy provided under the Income Tax Act 1967. The taxpayer sought a declaratory relief from the High Court *inter alia* to declare that he did not owe any outstanding tax and thus, the travel restriction notice was not sustainable. He commenced his proceedings by way of an originating summons and not by way of judicial review. The High Court dismissed the taxpayer's case on the premise that his approach to commence the matter by way of an originating summons was an abuse of process.

Two points are to be noted from the High Court's decision in *Goh Eng Hwa* (supra) namely:

(a) if a taxpayer intends to challenge a public authority like the Director-General of Inland Revenue, the appropriate legal recourse is to apply for judicial review; and

(b) in instances where the domestic remedy provided under the governing legislation has no jurisdiction to hear a decision made by a public authority under the same legislation and the said governing legislation does not provide for an alternative legal remedy or is silent on the same, then a taxpayer aggrieved by such a decision may seek legal recourse by way of judicial review.

In this regard, the authors are of the opinion that a taxpayer aggrieved by the decision of the Customs in respect of the matters precluded from being heard by the Tribunal, may seek legal recourse by way of judicial review.

Meanwhile, in exceptional circumstances, matters which are appealable to the Tribunal could be pursued at the High Court by way of judicial review. The exceptional circumstances are clear lack of jurisdiction, failure to perform a statutory duty and breach of natural justice. The existence of the Tribunal does not prevent taxpayers from commencing judicial review proceedings in exceptional circumstances as held by a number of decisions namely the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan*[33] and the High Court in *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri*.[34] It is notable that the decision of the High Court in *Metacorp* was unanimously affirmed by the Court of Appeal and the Director-General of Inland Revenue's leave application was dismissed unanimously by the Federal Court.

The Federal Court in *Sungai Gelugor* (supra) examined in detail the alternative remedy argument after studying various local and English authorities on this point. The Federal Court concluded that where genuine grounds for judicial review are alleged, it is the refusal rather than grant of relief which is the exceptional course. It was further stated that *"the reason for this is that whilst in theory the courts there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to Judicial Review, in practice, **the courts are often much kinder to the applicant with a good case on the most probably entertain his application as an exception**"*. The above clearly establishes that if taxpayers choose not to exercise the statutory appeal remedy, namely the Tribunal, the Courts' jurisdiction to hear such applications is not excluded. In fact, as a matter of practice the Courts are often inclined to grant judicial review to applications that have merit. This approach is also consistent with the position observed in *R V Chief Immigration Officer*

[33] *[1999] 3 MLJ 1.*

[34] *[2011] 5 MLJ 447.*

Gatwick Airport, ex parte Kharrazi,[35] where it was stated that "on countless occasions that the ***availability of appeal does not debar the court from quashing an order by certiorari and that everything depends upon the facts of the case***". This observation was unanimously endorsed by the Federal Court in *Sungai Gelugor*. The judicial pronouncements cited above illustrate that it is the refusal to grant judicial review which is an exception rather than the granting of judicial review in cases where there is an alternative remedy.

The authors opine that if an appeal is necessitated on the premise that the Director-General of Customs had abused his authority by applying the law erroneously and had acted beyond the powers conferred to him, then judicial review appears to be a better legal remedy to the taxpayers. This is because unlike the Tribunal, the High Court has the jurisdiction to stay the enforcement of the decision. Further, the Director-General of Customs' authority is not absolute and is open to judicial review. In *Kim Thye Co. v Ketua Pengarah Hasil Dalam Negeri,*[36] despite the existence of the Special Commissioners of Income Tax, the Director-General of Inland Revenue accepted as *"a matter of law that he is not immune from the process of judicial review and made no procedural objection"* to the taxpayer's application in that case.

[35] *[1980] 3 All ER 373.*

[36] *[1991] 3 CLJ 2507.*

[37] *http://www.theborneopost.com/2015/03/03/sabah-customs-aims-to-collect-rm1-2-billion-under-gst/.*

CONCLUSION

It is essential that taxpayers and GST practitioners are aware of their legal rights and the legal recourses available to them. Once they have determined the suitable legal recourse that they wish to pursue i.e. appeal before the Tribunal or judicial review application, then they must ensure that they comply with the necessary procedural requirements. Meanwhile, the Customs as the public authority entrusted with the implementation of the GST Act must ensure that it exercises its powers and discretion equitably and judiciously. Decisions should not be made arbitrarily and equally important, decisions should not be influenced by publicly declared target.[37] The authors respectfully conclude this article by highlighting the reminder issued by the Federal Court in *Government of Malaysia v Jasanusa Sdn Bhd* [1995] 2 CLJ 701 whereby the Courts need to balance the need of the government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The Courts are ever vigilant against taxpayers who may use procedures like applying for a stay of execution to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgement. The Courts should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfill the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.

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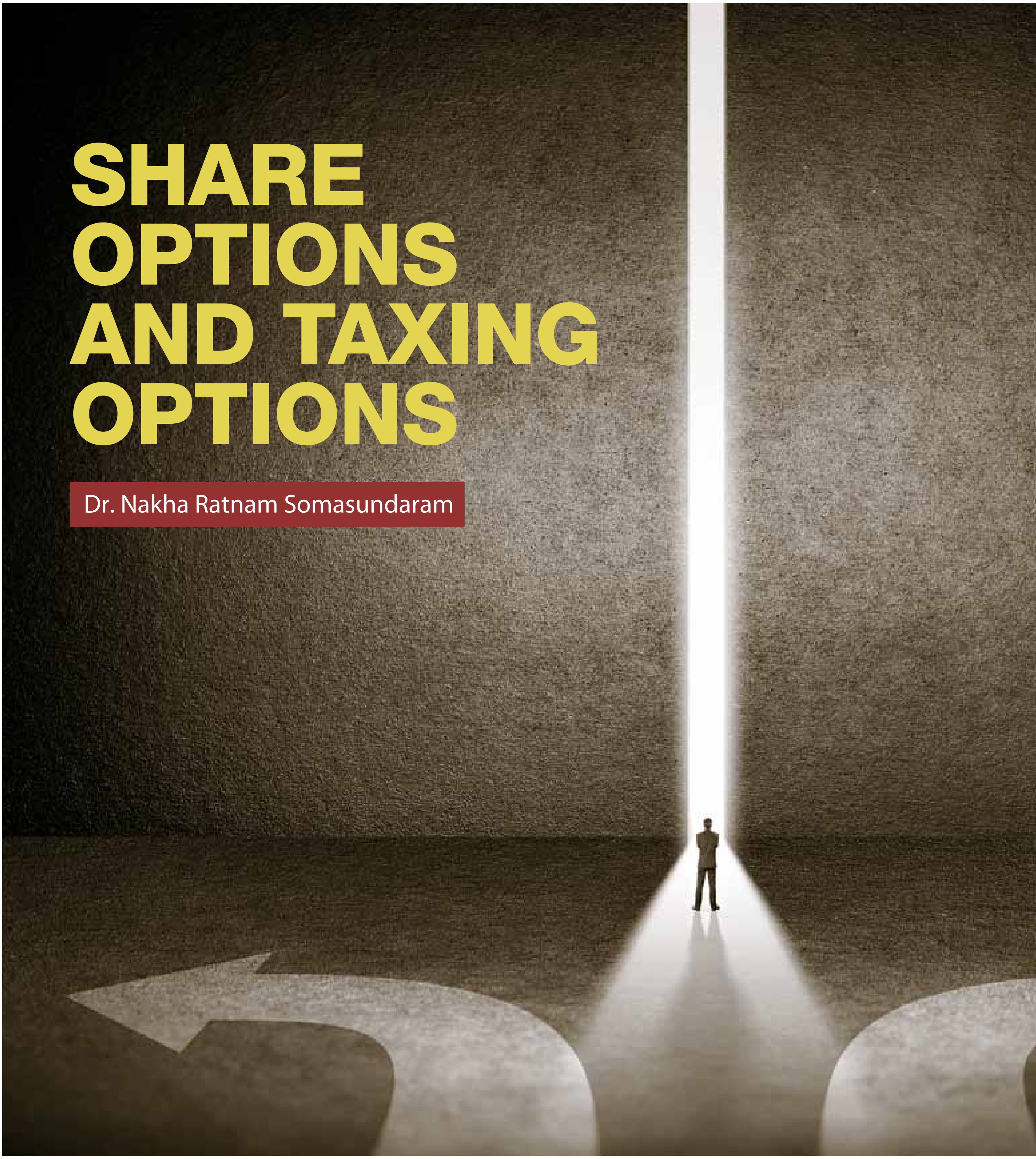

SHARE OPTIONS AND TAXING OPTIONS

Dr. Nakha Ratnam Somasundaram

THIS ARTICLE REVIEWS THE TAXATION OF PERQUISITE ARISING TO AN EMPLOYEE FROM SHARE OPTIONS AND THE RECENT CASE OF MAXIS COMMUNICATIONS BERHAD.[1]

Employees, particularly at the top management, are granted share options that allows them to buy shares in the company, usually at a price very much below the market value. The difference between market value and the cost of the share to the employee is treated as a perquisite liable to income tax under Section 13(1) (a)[2].

This principle of taxation was first established in the case of *Weight v Salmon* [19 TC 174].[3] In that case, a managing director was allowed to apply for the company's shares at par value; but as the market value was much higher, the revenue assessed the difference. On appeal it was held that the difference represented an advantage that arose from an office or employment and was accordingly assessable to income tax.

Sometimes where an employee is given a preferential right to acquire shares in a company, that right is considered not capital, but one that could be brought to charge on the basis that it was perquisite accruing to the employee.[4]

In other instances, an employee may be granted a stock appreciation rights (known as SARs) which essentially refers to the right to the gains from the redemption of the stocks.

In the Indian case of *Sumit Bhattarcharya v Assistant Commissioner* of *Income Tax* [(2008) 113TTJ 633][5] the taxpayer, working in India was granted a SAR in the United States. He received a sum of money upon the redemption of the SAR and was taxed by the Indian revenue authorities. The taxpayer claimed that the rights arose in the United States and he had no employer-employee relationship with that company in the United States. Also, as no shares were actually owned, there is no attributable cost, and capital gains tax would not apply either. The Indian court, in distinguishing the case from an ordinary 'share option' or 'share plan' situation, held that the sum is a cash bonus arising from his employment and accordingly liable to income tax.

In *Abbot v Philbin* [39 TC 82][6] a company secretary was given an option to purchase the company's shares at the then existing market value for which he had to pay £20. The taxpayer exercised his rights to buy the share some one and a half years later by which time the share price had rose substantially. On appeal, the House of Lords ruled that the option is a valuable right, and is a perquisite of the employment at the time it was granted. The value of the option is to be determined at the time the grant is made.

Basically, an option has to be taken into account only after it has been exercised, and the value then is determined in relation to the date the

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[1] *MSTC (2014) 3-086*

[2] *All sections refer to the Income Tax Act 1967 (as amended) unless otherwise stated.*

[3] *[19 TC 174]*

[4] *Tyrer v Smart [(1979) STC 34]*

[5] *[(2008) 113TTJ 633]*

[6] *[39 TC 82]*

grant was made. This of course would give rise to some timing difference in the assessment of the sum to tax.

Example

Mr. Arun was granted an option in 2006 to buy 1,000 of his employer's (a limited company) shares at RM1.00 per share. The share value at that date was RM3.00. Mr. Arun then exercised his option to buy the shares three years later. In 2009 the shares were valued at RM15.00 per share.

Following the *Abbot* decision, the value of the share option would be determined in 2009 - when the option was exercised. Assuming that the share option cost was RM300, this sum would be deducted in arriving at the assessable share option benefit.

The share option benefit would be computed as follows:

		RM
Market value of shares on offer date	1,000 shares x RM3	3,000
Less: Offer price	1,000 shares x RM1	1,000
Value of option		2,000
Less: Cost of option		300
Share option benefit liable to tax on Mr. Arun		1,700

Table 1

The assessment for the share option benefit would be related back to the year of assessment 2006, when the option was granted, not withstanding that the option was exercised in 2009.

Apparently this timing difference between the date of grant and the date of exercise of the option can cause some chaos under the self-assessment system, and hence from the year of assessment 2006, the perquisite would be taxed in the year the option is exercised [Section 25(1A)]. This means that in the above example, the assessment would be made in the year of assessment 2009 (and not 2006).

THE LAW FROM YEAR OF ASSESSMENT 2006

Two major sections were introduced in 2006-Sections 25(1A) and 32(1A).

Section 25(1A) reads as follows:

(1A) The gross income from an employment in respect of any right to acquire shares in a company of the kind to which paragraph 13(1)(a) applies, shall where the right is exercised, assigned, released or acquired in the relevant period be treated as gross income of the relevant person for that relevant period.

Under this section, the perquisite arising from the share option would be taxed in the year the option is exercised.

Section 32(1A) reads as follows:

(1A) (a) Where in the relevant period a relevant person acquired any right to acquire shares in a company of the kind to which paragraph 13(1)(a) applies, under his name or in the name of his nominee or agent, the amount

in respect thereof to be included in his gross income from the employment shall be—

(i) the market value of the shares where the right shall be exercised, assigned, released or acquired on a specified date or where the right shall be exercised, assigned, released or acquired within a specified period, the first day of that period; or

(ii) the market value of the shares on the date of the exercise, assignment, release or acquisition of the right,

whichever is the lower less the amount paid for the shares.

Market value is determined in subsection (b), to mean:

(i) in the case of a company listed on any stock exchange, the average price of the shares which is ascertained by averaging the highest and the lowest price of the shares for the day; or

(ii) in any other case, the net asset value of the shares for the day.

Section 32(1A) provides the mechanism for the computation of the value of the perquisite arising from the option upon its exercise. The value would be lower of:

a) The market value at the time the option was granted ; or

b) The market value at the time the option was exercised

Less: The option price

Example

Mr. Dorai is an employee of a listed company. He was granted an option on 1 January 2012 to acquire 10,000 of the company's shares, which was trading at RM5.00 at that time, at a nominal price of RM1.00 per share. This option is to be exercised on or before 31 December 2014. Mr. Dorai then exercised his option to buy the 10,000 shares on 1 September 2014, when the share price rose up to RM18.00. The cost of the option to Mr. Dorai was RM200.00.

The value of the perquisite to Mr. Dorai under Section 13(1) (a) would be computed as follows:

		RM
Value of perquisite chargeable under Section 13(1)(a)		
Lower of :		
(a) Market value of share on the date the option was granted or		5
(b) Market value at the date the option was exercised		18
Market value of share on offer date (being the lower)	10,000 shares x RM5	50,000
Less: Offer price	10,000 shares x RM1	10,000
Value of option		40,000
Less: Cost of option		200
Share option benefit liable to tax		39,800

Table 2

The actual monetary benefit to Mr. Dorai would be as follows:

		RM
Actual value of the share option to Mr. Dorai		
Market value of shares on the date the option was exercised		180,000
Less: Cost of shares	10,000 shares x RM1	10,000
		170,000
Less: Cost of option		200
Pecuniary benefit enjoyed by Mr. Dorai		169,800

Table 3

This is one of those few rare instances where the revenue is not going for the pound of flesh!

PUBLIC RULING NO 11/2012

On 13 December 2012, the Inland Revenue Board issued Public Ruling No 11 of 2012 ('the PR') which sets out the tax treatment of share options and the administrative procedure.

Briefly, in the case of a non-listed company, the value of the share at the time the option is granted is computed by reference to the net assets and the number of ordinary shares as follows:

Net value of assets / Number of ordinary shares = share value.

The perquisite is assessed in the year the option is exercised.

As for companies listed in the

Bursa Malaysia, the market value of the shares would be the average price based on the highest and lowest price of the shares for the particular day i.e.

(Highest price + Lowest price) / 2
= Average Price

One should note that the value as determined for income tax purposes is different from the Securities Commission guidelines for listed companies. Under that guideline, the market price for the shares shall be based on the five days weighted average market price with a discount of not more than 10% where appropriate.

In all these procedures to determine the perquisites and its value for income tax purposes, the key features are that the employer must offer the share option to the employee, the employee must exercise the option and above all, there must be some shares being bought and owned by the employee.

So, what happens when an employer grants a share option to an employee to purchase some shares at favorable prices, and before it could be exercised by the employee, circumstances change (that are beyond the employer's control) and the employer could not keep his part of the bargain, and in lieu of which he offers the employee a cash compensation – known as equivalent cash consideration [ECC] to offset the right to the shares under the ESOS offer now denied?

To the employee who is now left holding some cash instead of some shares, the following questions arise for income tax purposes:

a) Is the ECC a perquisite?
b) If yes, what should be the taxable value?
c) And, (if taxable), when should the assessment be raised?

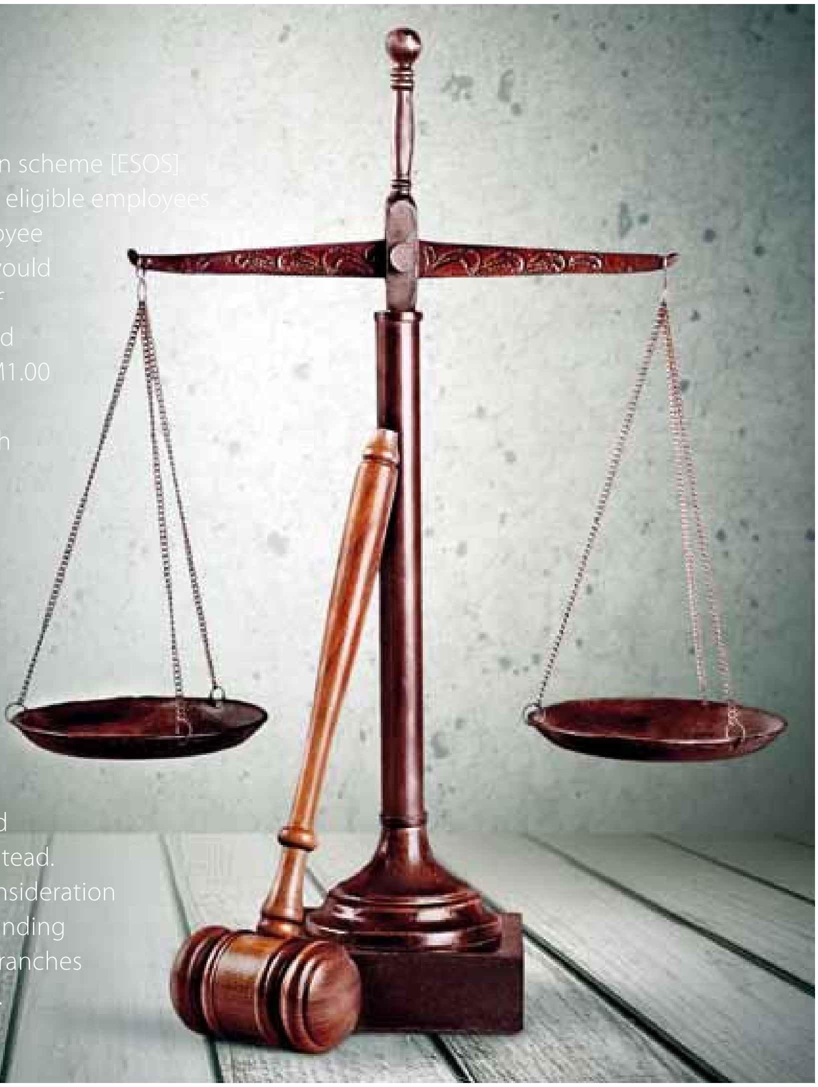
These are some of the questions that arose in the case of Maxis which was finally decided at the Federal

THE MAXIS CASE

Maxis launched an employee share option scheme [ESOS] when it was listed in the Bursa Malaysia, and eligible employees were given a letter of offer. Should the employee accept the offer, a share option agreement would be signed which provided for the number of shares to be accepted, the price per share and total amount payable – and a payment of RM1.00 as consideration to bind the contract. The option vested one-third of the shares on each anniversary over a three year period from the date of the offer. The employee could exercise the option up to ten years from the date of the first grant.

In May 2007 a company, Binariang GSM Sdn. Bhd. ['Binariang'] made a conditional takeover to acquire all voting shares in Maxis for a cash consideration. Resulting from this event, Clause 10 of the ESOS by-laws was invoked under which holders of the unvested option were entitled to a payment of ECC instead.

The ECC was essentially an alternative consideration in substitution, or in cancellation of all outstanding unvested shares. This ECC was to be paid in tranches following the original ESOS vesting schedule.



Court on 20 November 2014.

THE ISSUE

The question was how would the employees be assessed to income tax on the cancellation of all the outstanding unvested option in return for the payment of the ECC.

The Revenue took the position that the ECC payment made by Maxis to the eligible employees is a perquisite arising from an employment under Section 13(1) (a) but it is NOT a share based income to which Sections 25(1A) and 32(1A) applies, but should be taxed under Section 25(1) and reflected as income for the year in which it was received.

The taxpayer took the position that the ECC was a perquisite and that Sections 25(1A) and 32(1A) applied.

The appeal cases went through the High Court, Court of Appeal and finally the Federal Court.

The decision of these courts will be considered briefly in the next few paragraphs.

THE HIGH COURT DECISION

The High Court, in the judicial review application, decided in favour of the taxpayer – i.e. the income is a perquisite falling within the meaning of Section 13(1) (a) and the value should be determined under Sections 25(1A) and 32(1A). The High Court findings include the fact that Maxis' grant of the ESOS was made by a formal offer and accepted by eligible employees and supported by a binding consideration of RM1.00 paid to Maxis. This created for the employee a legally binding contractual right to shares in Maxis regardless of whether the option was vested or not – in other words, upon payment of the RM1.00, the offer is now a binding contract, and gave rise to a right to acquire shares.

The right to acquire shares was released when the respective employees surrendered their rights for cancellation in return for payment of the ECC. The High Court then held that the payment being related to shares, Section 25(1A) applied to gross income for employees and the treatment to tax fell under Section 32(1A).

the taxable benefit to the recipient is not so much the share as the right to acquire the shares and this arises when the right to acquire shares is granted to the employee. The case of *Abbot v Philbin* [(1961) AC 352] and *Williamson v Dalton* [(1981) STC 753] was quoted in support.

THE COURT OF APPEAL DECISION

The Court of Appeal set aside the decision of the High Court and affirmed the ruling of the Revenue dated 10 October 2008.

The gist of the Court of Appeal decision was that notwithstanding that there was a binding contract that gave the employees a right to acquire shares under the ESOS, the actual entitlement remained to be determined. Until it is determined, the shares remain unvested. As there are no shares to speak of, application of Sections 25(1A) and 32(1A) does not arise.

THE FEDERAL COURT DECISION

The taxpayer argued that the fact that the option under the ESOS has not yet vested, any shares to the employees is irrelevant, as Sections 25(1A) and 32(1A) does not distinguish between vested and unvested shares. The employee has a valid and enforceable contractual right under the ESOS notwithstanding that such option would only vest on an annual basis over a three year period. By accepting the offer and paying a RM1.00 consideration the employee has created a right to participate in the scheme. That obligation on the part of Maxis is not absolved by Binariang taking over Maxis – and the reason why Maxis agreed to pay an ECC to absolve itself from the ESOS obligation.

Furthermore, the taxpayer highlighted the fact that in an ESOS

It was also highlighted that the Revenue did not have any particular provision until 2006 to tax share based perquisite and instead relied on the general principles of taxation, and the Public Ruling No. 4/2004.

A fundamental argument submitted was that a Maxis employee would receive the ECC payment in cancellation of all outstanding and unvested options that the employee would be contractually entitled to. In essence the ECC was in consideration of the employee surrendering his right to the unvested options under the ESOS. The ECC sum was not a pecuniary benefit arising from having or exercising an employment. In plain language, it was not a cash remuneration arising from being an employee of Maxis but a payment to cancel the employee's right to Maxis' share.

The Federal Court held that the ECC payment constituted an employment income under Section 13(1)(a) and is a perquisite within the meaning of that section, and focused on the mechanism for taxing that income. It was of the view that under Section 25(1A) some element must exist under ESOS i.e. there must be a right to acquire shares, it must be owned by the employee under his name and if the right to acquire the share exists, the date when the right is exercised. In the case of Maxis, no shares were offered to the employee as yet since it will only vest on the employee one third on each anniversary of the grant of the option and upon exercise of the right to acquire such shares at that time.

On this fact, the Federal Court ruled that the ECC is not based on the ESOS and accordingly Sections 25(1A) and 32(1A) do not apply.

As for the payment of the RM1.00 creating a binding contract (as argued by the taxpayer) the Federal Court held that the payment merely indicates the employee's acceptance of the offer and does not give the employee the right to acquire the share as yet – it arises only on the anniversary date. The employee could not maintain the offer to purchase the shares as Maxis has been taken over by Binariang and as Maxis has become delisted, no shares are now available for purchase.

An employee who has an unvested option in ESOS has no right to acquire the shares before the anniversary date in which case the ECC received cannot be taxed in accordance with Section 25(1A) – instead, Section 25(1) would apply.

The appeal was accordingly dismissed with cost, and decision was given in favour of the Revenue.

[7] *Hamblett v Godfrey [(1978) STC 60]*

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CONCLUSION

This is an interesting case - one argued all the way to the Federal Court with flip-flop decisions along the way. This case involved a payment to the employee on cancellation of their right to the shares under ESOS.

One could argue that the ECC payment was for an abrogation of a right to acquire shares, whether now or in the future, and such a payment would be a capital sum to the employee and therefore not liable to income tax.

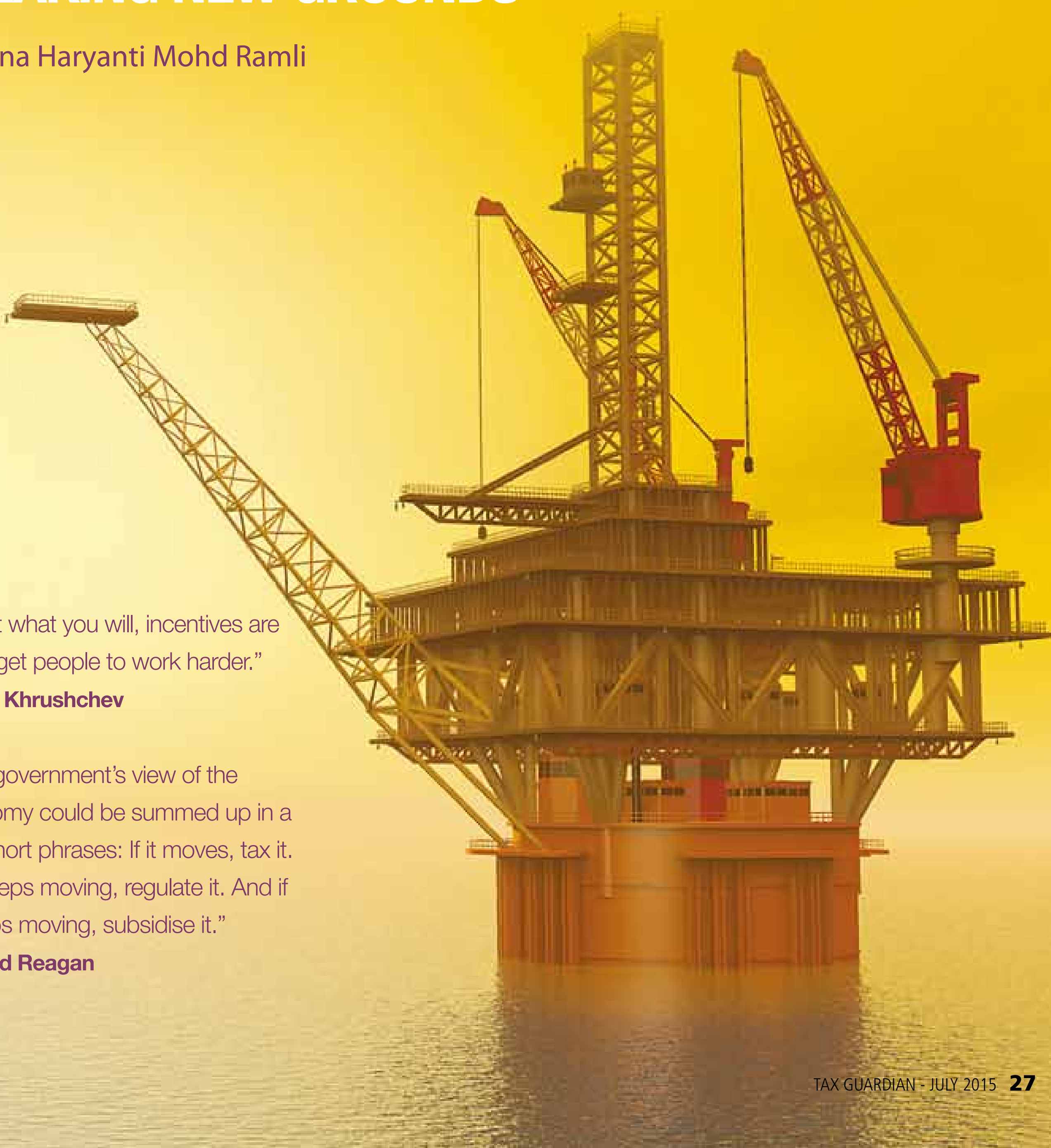
However, in the case of employment income, courts whether in England, India or Malaysia have tended to take the view that where payments received was on account of his employment or his status as an employee, it would be chargeable to tax - even where it is for a loss of right.[7]

Confusion aside, suffice to say that the law works in strange ways.

TAX INCENTIVES FOR PETROLEUM UPSTREAM INDUSTRY

BREAKING NEW GROUNDS

Rihanna Haryanti Mohd Ramli



"Call it what you will, incentives are what get people to work harder."
Nikita Khrushchev

"The government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidise it."
Ronald Reagan

To leverage on the competitive advantages available in Malaysia, the Malaysian government via the 10th Malaysia Plan announced the Economic Transformation Programme (ETP). The ETP is designed and formulated to provide the necessary framework for Malaysia in prioritising investment and provide the necessary policy support behind key growth engines available in the country. Twelve (12) National Key Economic Areas (NKEAs) were identified due to the significance of the Gross National Income (GNI) contribution that the NKEAs can provide to the Malaysian economy. Among the NKEA identified was the Oil, Gas and Energy sector.

The Oil, Gas and Energy ("OGE") sector of NKEA is targeting a 5% annual growth for the sector from 2010 to 2020.

To meet this target, the OGE NKEA will focus on four key thrusts which include sustaining oil and gas production, enhancing downstream growth, making Malaysia the number one Asian hub for oilfield services and building a sustainable energy platform for growth[1].

To meet the key thrust of sustaining oil and gas production, the OGE NKEA Lab in 2010 has identified three Entry Point Projects (EPPs), which include:

- Rejuvenating existing fields through Enhanced Oil Recovery
- Developing small fields through innovative solutions
- Intensifying exploration activities

INTRODUCTION OF PITA INCENTIVES

Malaysia's statistics for total oil production from 1980 to 2013 are reflected in **Exhibit 1** while Malaysia's statistics of its Proved Reserves from 1980 to 2014[2] are illustrated in **Exhibit 2**.

Exhibit 1: Malaysia Total Oil Production

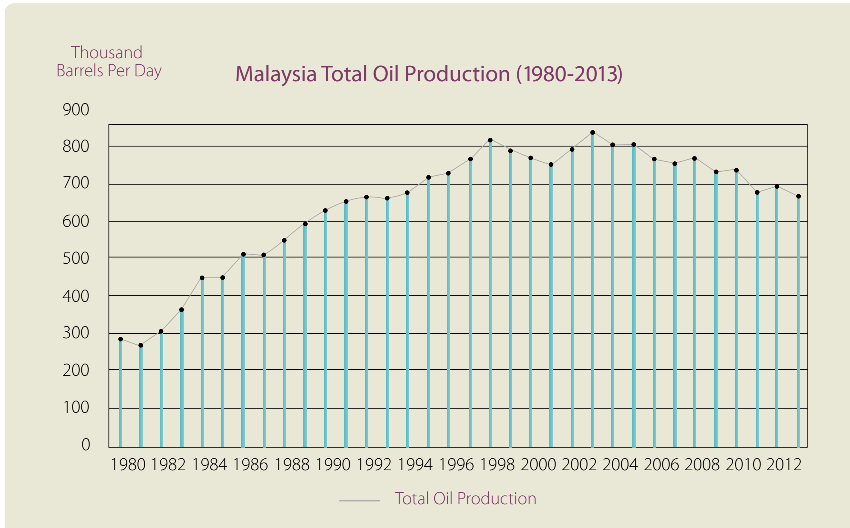


Exhibit 1: Malaysia Total Oil Production

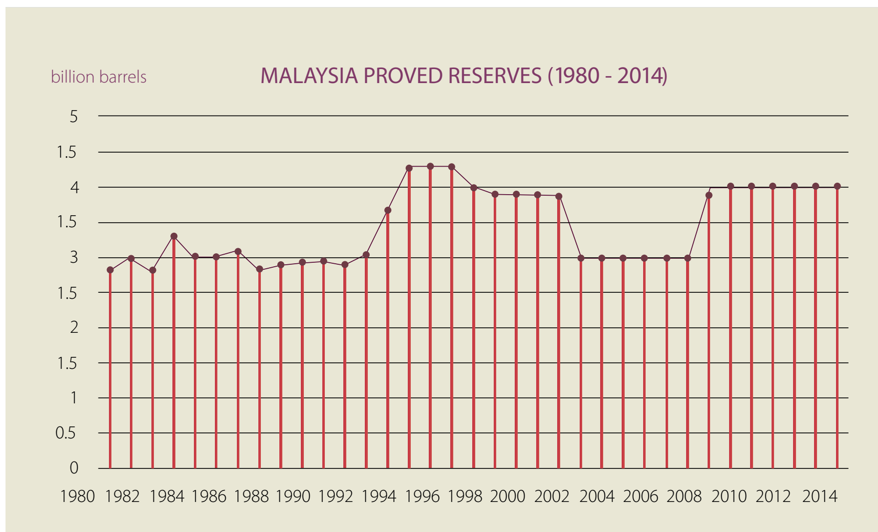


Exhibit 2: Malaysia Proved Reserves

Exhibit 2: Malaysia Proved Reserves

Based on **Exhibit 1**, there has been a 17% decline in the country's oil production from 2005 to 2013. Malaysia's proven reserves has also not seen any increase from 2008 and has remained unchanged up to 2014.

To address the worrying trends, there was a need for the Malaysian government together with Petroliam Nasional Berhad ("PETRONAS") to work on the introduction of tax incentives with the hope of encouraging foreign investors to invest in the oil and gas industry in Malaysia. The focused areas were no longer straightforward shallow fields but more challenging fields which require more technological resources and expertise to unlock

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[1] *http://etp.pemandu.gov.my annualreport2011/upload/ENG_NKEA_ Oil_Gas_Energy.pdf*

[2] *http://www.eia.gov/countries/country-data.cfm*

the potential reserves of the nation. The introduction is aimed to unlock and monetise stranded oil and gas resources and create more value to the Malaysian government.

In meeting the objectives of the OGE NKEA and focusing on the three EPPs, the Malaysian government announced the following tax incentives to be available within the Petroleum Income Tax Act 1967 (PITA) :

- An investment tax allowance of up to 60 per cent of capital expenditure to be deducted against statutory income to encourage the development of capital intensive projects in the area of enhanced oil recovery ("EOR"), high carbon dioxide ("CO2") gas fields, high pressure high temperature ("HPHT"), deep water and infrastructure projects for petroleum operations.
- Reduction on tax rate for marginal oilfield development from 38 per cent to 25 per cent to improve commercial viability of the development.
- Accelerated capital allowance for qualifying capital expenditure incurred on a marginal field up to five years instead of 10 years in the past, where full utilisation of capital cost deducted could improve project viability.
- Qualifying exploration expenditure transfer between non-contiguous petroleum agreements[3] with the same partnerships or sole proprietor to enhance contractors' risk-taking attitude, which could encourage higher levels of exploration activity.
- Waiver of export duty on oil produced and exported from marginal field development to improve project viability.

In making the incentives a reality,

RULES AND REGULATIONS INTRODUCED W.E.F 30 NOVEMBER 2010	TYPE OF INCENTIVE INTRODUCED
Petroleum (Income Tax) (Accelerated Capital Allowances) (Marginal Field) Rules 2013 [P.U. (A) 119/2013] Petroleum (Income Tax) (Exemption) Order 2013 [P.U. (A) 122/2013] Petroleum (Income Tax) (Marginal Field) Regulations 2013 [P.U. (A) 121/2013]	**Marginal fields** • Accelerated capital allowances which provides initial allowance of 25% and annual allowance of 15%. The statutory income from a marginal field is exempted based on the following formula:- $\boxed{\frac{A \times C}{B}}$ Where: A = Difference between the statutory PITA rate; 38% - 25% = 13% B = Statutory PITA rate; 38% C = Chargeable income of the marginal field Effectively, the above results in a petroleum income tax rate of 25%. Provides for the manner in determining and computing the chargeable income derived from a marginal field.
Petroleum (Income Tax) (Investment Allowances) Regulations 2013 [P.U. (A) 120/2013]	• Infrastructure projects. • Qualifying deepwater projects (capital intensified) which include EOR, HPHT, and High CO2. • Investment allowance of 60% on qualifying capital expenditure in respect of a qualifying project which can be set off against 70% of statutory income, for a period of ten years.
Para 3A First Schedule of Petroleum Income Tax Act 1967	Transfer of qualifying exploration expenditure between non-contiguous petroleum agreements

Table 1

[3] *Currently, a partnership which carries on petroleum operations under two or more contiguous areas petroleum agreements are allowed to consolidate expenditure incurred in the contiguous area against income from that contiguous area. However, there is no equivalent incentive for the transfer of losses incurred by one petroleum agreement before the introduction of the qualifying exploration expenditure available to non-contiguous blocks.*

the Petroleum Income Tax Act Bill Amendment was read and approved in Dewan Rakyat in June 2011 and approved by Dewan Negara in July 2011. In March 2013, the following rules were introduced as part of the Federal Government Gazette **(Table 1):**

HOW TO APPLY FOR THE PITA INCENTIVES?

The application is made via the following process[4]:

- The completed tax incentives application form is submitted to the Malaysian Petroleum Management ("MPM") of PETRONAS (who is the regulator of the oil and gas industry in Malaysia), which acts as the secretariat and verifier of the applications made for the upstream oil and gas industry.
- The technical evaluation of the qualifying project and infrastructure assets (i.e. to determine whether the project meets the definitions as provided in the Rules and Regulations above) is completed and evaluated by MPM for technical recommendation and endorsement.
- This technical recommendation together with the application form is then presented to the *"Jawatankuasa Insentif Industri Petroleum Huluan"* for its onward recommendation to the Minister of Finance as provided in the Rules and Regulations. Committee Members include representatives from the Ministry of Finance, Inland Revenue Board of Malaysia, Royal Malaysian Customs Department and PETRONAS.
- The committee will deliberate and provide its recommendation to the Minister of Finance. Any approval or any other communications will be made by the Ministry of Finance to the respective applicant companies.
- The processing of the application by the Ministry of Finance takes approximately one month, as the Committee convenes on as and when required basis.

IS THE TAX INCENTIVE ATTRACTIVE ENOUGH FOR INVESTORS?

In providing any tax incentives it is always a challenge to balance the needs of the government versus the needs of business. It becomes a bigger challenge when the tax incentive is given to an extractive industry where the assumption has always been that the minerals or hydrocarbons have been bestowed by nature to certain nations and as such, investors will be flocking to invest even if the government does not provide tax incentives. However, it is important to note that based on the earlier two exhibits, the decline in production and stagnation in growth can be attributed to the increased difficulty of the fields or areas and costs involved. As such, it is vital that the government sees and acknowledges that providing tax incentives to the upstream oil and gas industry is to enhance and unlock reserves and attract investors to continue the revenue generation for the Malaysian government.

At the same time, investors or businesses need to acknowledge that this introduction of incentives for PITA is a development which is moving towards a positive shift and realisation of the Malaysian government on the need for incentives for upstream industry in Malaysia. The introduction of the new incentives by the Malaysian government in 2010 was a breakthrough as no tax incentives were ever introduced for the upstream players in the oil and gas industry in Malaysia since its establishment or introduction of PITA in 1967. With this introduction, the Malaysian government has acknowledged the need for such incentives and are open to discussions and improvements for future potential incentives.

Among the main issues that have been raised via various parties:

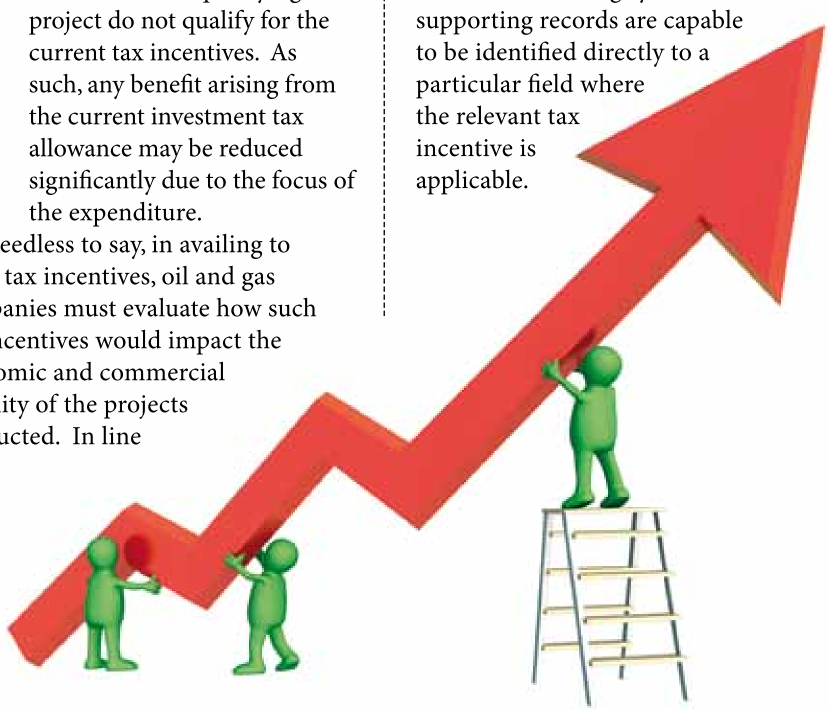
- Ring fencing tax incentive against income earned from

[4] *http://www.treasury.gov.my/index.php?option=com_content&view=article&id=3296:upstream-petroleumindustry&catid=443&Itemid=2536&lang=en*

the qualifying fields. The taxation basis of oil and gas companies under the PITA regime is unlike other companies in Malaysia. Under PITA, with the exception of PETRONAS, the Malaysia-Thailand Joint Authority and contiguous petroleum agreements, each Production Sharing Contract ("PSC") is treated as one chargeable person, where each PSC is required to submit separate tax returns. As such, if an oil and gas company has various PSCs with PETRONAS, each individual PSC is ring-fenced and submitted as different tax entities to the Inland Revenue Board of Malaysia ("IRBM"). There would be no ability to co-mingle or set off expenditure against income from different PSCs, except in situations of contiguous PSCs allowed under PITA. With the introduction of investment tax allowance incentive, there is a need to further ring fence the field where the qualifying project is carried on. As the project is capital intensive, the question is always whether the income earned from the qualifying field would be sufficient to set-off the investment tax allowance, while at the same time the PSC could have "normal" fields which are still producing and this results in a skewed tax position for the PSC (i.e. high capital expenditure but the taxation is still high).

- The current tax incentives focus on the capital expenditure incurred (i.e. tangible expenditure). However, the intangible costs incurred for certain qualifying projects such as drilling cost, water, chemicals, rental of equipment, etc., which could amount to nearly 70% of the total cost of the qualifying project do not qualify for the current tax incentives. As such, any benefit arising from the current investment tax allowance may be reduced significantly due to the focus of the expenditure.

Needless to say, in availing to these tax incentives, oil and gas companies must evaluate how such tax incentives would impact the economic and commercial viability of the projects conducted. In line with the legislative requirement to keep separate and proper documents, companies need to ensure that the accounting system and supporting records are capable to be identified directly to a particular field where the relevant tax incentive is applicable.



CONCLUSION

Improvements can still be made to further refine or expand the PITA incentive. However, it is a good sign for investors and business community with the introduction of such incentives for the upstream oil and gas business. It reflects a shift and acceptance by the Malaysian government on the need to incentivise this key sector.

A lot of excitement has been created with the introduction of incentives within the PITA framework as there have been no tax incentives introduced for upstream industry previously. However, as the IRBM guidelines were only issued on 22 May 2014, the impact is fairly new and certain upstream oil and gas players are still evaluating the viability of such application and its impact to their respective overall tax position in Malaysia. As the PITA incentives are still at its infancy stage, it is too early to predict the impact it would have on Malaysia and PETRONAS. Time would tell whether the objectives as set by the NKEA would be a reality and propel Malaysia as a developed nation by year 2020.

The views expressed are solely that of the author and do not represent either the views or the opinions of the firm of which she is a part.

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TAX TREATY AND GAAR OVERRIDE

Dr. Benjamin Poh Chee Seng

THIS ARTICLE SEEKS TO ANALYSE THE TAX TREATY MAKING POWER IN MALAYSIA, ITS LEGAL EFFECT, INTERPRETATION CHALLENGE FACING THE COURT IN RELATION TO TAX TREATY OVERRIDE AND ITS RELATIONSHIP WITH THE DOMESTIC ANTI-ABUSE TAX RULES. AND WHY IT IS CONCEPTUALLY DIFFICULT TO RESOLVE TAX TREATY ABUSE WITH THE APPROACHES ADVOCATED BY THE OECD COMMENTARY WITHOUT A COHERENT AND HARMONISED CONSTITUTIONAL AND LEGAL SYSTEMS IN DIFFERENT COUNTRIES. FINALLY, THE CONSIDERATION OF AN INDIAN SUPREME COURT CASE ON VIEWS OF TAX TREATY ABUSE AND THE AUTHOR'S OPINIONS ON THE ASPECTS THE MALAYSIAN GOVERNMENT SHOULD FOCUS ON IN RESPONSE TO THE RECENT OECD BEPS PROJECT.

Tax treaty override by a country may create undesirable consequences to a tax resident of the other contracting state and destabilise the international trade and investment, even though the main objective of override is to preserve revenue of a country concerned. Despite that, there is increasing use of statutory GAAR (general anti-abuse rules) or specific anti-abuse rules recently by countries such as the UK, Australia, Canada and India, to override tax treaty provisions in the event of conflicts to preserve revenue even to the extent of violating their international treaty obligations. Part I of this article seeks to analyse the tax treaty making power in Malaysia and its legal effect under the Income Tax Act 1967 (ITA 1967). Part II discusses briefly the interaction of domestic tax laws and tax treaty in Malaysia and some civil and common law countries. Part III discusses some experiences of tax treaty override in the UK and Australia. Part IV discusses briefly on the interaction between GAAR and tax treaty in different countries and the OECD's view on conflict between GAAR and tax treaty provisions. In conclusion, the consideration of an Indian Supreme Court case on tax treaty abuse and the author's views on the aspects which the Malaysian government should focus on in response to the recent OECD Base Erosion and Profit Shifting (BEPS) project.

PART I: TREATY LAW MAKING POWER

The Federal Constitution of Malaysia Article 74(1) provides Parliament with the power to make (a) treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country; (b) implementation of treaties, agreements and conventions with other countries. Article 76 (1) requires Parliament to enact legislation to give legal effect to international treaties signed with other states or countries. Nevertheless, Parliament does not negotiate and conclude treaty, rather the power of negotiating and concluding treaty rests with the federal government of Malaysia.

There is no specific provision in the Constitution to empower the federal government of Malaysia to enter into treaty with another state or country though conventionally the federal government of Malaysia executes and signs international treaty with the other states' federal government. Being inherited from the UK common law system, Malaysia's practice of international treaty and law making is quite similar to the UK's practice. For the UK, the treaty making power is the prerogative power of the Crown, i.e. the Executive. As per Lord Denning MR in *Blackburn v Attorney General [1971] All ER 1380, "the treaty making power rests...in the Crown; that is, Her Majesty acting on the advice of her Minister. When her Ministers negotiate and sign a treaty..... they act on behalf of the country as a whole. They exercise the prerogative of the Crown*"

Tax treaty or Double Taxation Agreement (DTA) like any other treaty is made according to the practice as described above. Parliament through the ITA 1967, gives legal effect to the DTA under Section 132.

PART II: INTERACTION OF DOMESTIC TAX LAW AND TAX TREATY

A treaty is based on the consent of the parties to it, is binding, and must be executed in good faith. The concept known as *pacta sunt servanda* ("agreements must be kept") is arguably the oldest principle of international law as envisaged by Article 26 of the Vienna Convention on the Law of Treaties (VCLT). In the context of tax treaty, the principle was legally recognised and implemented in Malaysia through legislation of Section 132(1) of ITA 1967 which states, "........ *those arrangements shall have effect in relation to tax or other taxes of every kind under any written law* ***notwithstanding anything in any written law****"* establishes

the supremacy of tax treaty over domestic tax legislations.

In the UK, the Taxation (International and Other Provisions) Act (TIOPA) 2010, Section 6 allows treaties to take effect *"despite anything in any enactment"*. In Australia, tax treaties concluded with other states are recognised under the International Tax Agreements Act 1953 and accordingly, under paragraph 2, Article 4, a tax treaty has priority over a domestic tax law. In the Singapore ITA 1948, Section 49 states that double taxation arrangements shall have effect *"notwithstanding anything in any written law"*. In The USA, treaty law is of equal status to domestic legislation, if conflict the "*later-in-time*" legislation is binding.[1] In civil law countries like Europe, international treaty or law is always given priority over their domestic law. In France, Article 55 of the French Constitution provides that a treaty has priority over general laws upon its proclamation. The Japanese civil system, which borrows heavily from the French tradition, also gives a treaty priority over its domestic law. The Swiss Constitution, Article 5, provides that international law has priority over domestic law.[2]

The superiority of tax treaty may not create controversies if the tax legislations predated the tax treaty. The likely contentious issue is that international tax law or treaty like any other piece of legislation made by Parliament, may always be overridden if Parliament subsequently decided to pass a new tax legislation with clear intention to override the existing tax treaty provisions. The following paragraphs discuss some of the challenges the UK and Australian courts face in interpreting treaty and domestic tax rules, especially when the treaty is abused, and considers the views of the OECD's Committee of Fiscal Affairs (CFA).

PART III: TAX TREATY OVERRIDE

Treaty override is against the principle of *pacta sunt servanda* incorporated in the VCLT, which also provides under Article 27 that *"a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."* The ramifications of treaty override could be serious as the fundamental rights of the persons involved in the contracting states are likely to be violated sometime without proper remedies even though there is always a Mutual Agreement Procedure (MAP) clause in DTA to resolve treaty violation issues.

Courts are more willing to invoke treaty override when it comes to the issue of specific treaty abuse cases through the subtle way of statutory interpretation as in *IRC v Collco Dealings Ltd [1961] 39 TC509* , a UK case concerning the DTA between the UK and Ireland on dividend stripping abuse where specific domestic anti-tax avoidance legislation had been passed in 1955 to prevent such abuse. The issue is whether the specific anti-avoidance legislation overrides

[1] Ibid., 45.

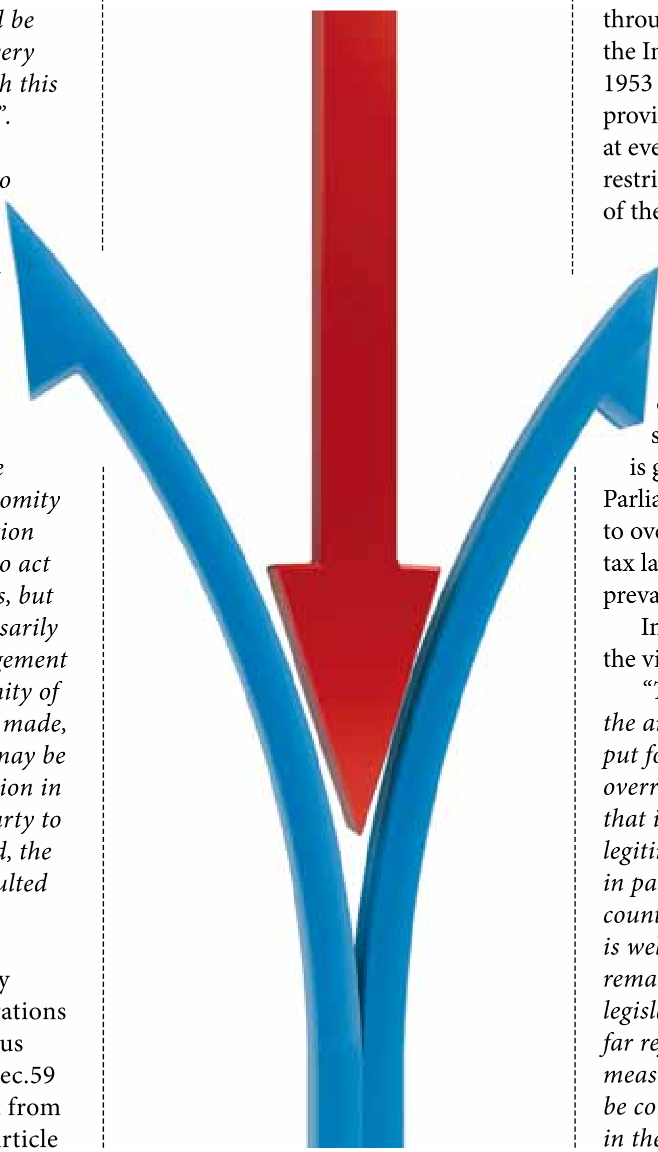
[2] Han, Sung-Soo, The Harmonization of Tax Treaties and Domestic Law, (International Law And Management Review, Volume 7), 44.

the provisions in the DTA. Lord Viscount Simonds adopted the view in *Maxwell on the Interpretation of Statutes, 10th Edition (Sweet & Maxwell), p143 & 149* and stated that *" but if the Statute is unambiguous, its provisions must be followed, even if they are contrary to international law", and he continued: "......neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it think fit to protect its own revenue law from gross abuse or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give here".*

Lord Reed however took a different ground: *"There is by no means so strong a presumption against Parliament having done that. Although the infringement of a treaty may cause loss to individuals, the only person properly entitled to complain of such infringement is the other party to the treaty. No doubt if that other party is aggrieved, the infringement is a breach of the comity of nations and there is presumption that Parliament did not intend to act contrary to the comity of nations, but I do not think that there is necessarily a presumption that every infringement of a treaty is a breach of the comity of nations. After a treaty has been made, circumstances may alter and it may be reasonable to take unilateral action in the expectation that the other party to the treaty will not object. Indeed, the other party may have been consulted and have raised no objection."*

Nevertheless, the UK had in numerous occasions unilaterally overridden its tax treaties' obligations through the enactment of various sections in its taxing statutes (Sec.59 (1) on exclusion of UK resident from benefiting from provisions of Article 7 of the OECD Model Convention; Sec.808B on meaning of "special relationship" not supported by tax treaties; Sec.812 on withdrawing rights to obtain repayment of tax credits; Sec.858 on not applying treaties on income and capital gains of UK resident partner, *Padmore v IRC[1987] STC 36).*

In Australia, *Lamesa Holding BV v Commissioner of Taxation [1999] FCA 612* concerning a dispute on whether income from disposal of shares in four Australian resident companies of which the bottom



company held a number of gold mining leases by the Dutch resident private limited company ("Lamesa") was taxable under the tax treaty, Article 13 "income from alienation of real property". The Federal Court held that, on a literal interpretation, the look-through provision only applied to real property held by the company whose shares were sold, it was only possible to look through one company, not several. The taxpayer won the appeal but subsequently the Australian government dissatisfied with the decision enacted Section 3A (Alienation of real property through interposed entities) under the International Tax Agreement Act 1953 to override the existing tax treaty provisions to allow look- through at every level of company instead of restricting inquiry of the first level of the company holding shares in a property company.

Given that the common law countries generally do not give priority to treaty over their domestic laws under their constitutional principle or law, it is submitted that tax treaty override is generally permissible if the Parliament clearly declares its intention to override, despite the fact that their tax laws clearly allow tax treaty to prevail.

In the context of tax treaty override, the view of the OECD CFA is:-

"The Committee has considered the arguments that might be put forward to defend the use of overriding legislation and recognised that in a number of cases the legitimacy of the objective pursued, in particular where they aim at counteracting abuse of conventions is well founded but the Committee remains strongly opposed to overriding legislation. Member countries have so far refrained from taking retaliatory measures (which all agree would not be conducive to better understanding in the international tax field)

Table 1 : 2011-12 tax treaties containing specific reference to the application of domestic anti-avoidance rules

2011	Barbados* - Czech Republic tax treaty
2011	Ethiopia - Egypt tax treaty
2011	United Arab Emirates - Estonia tax treaty
2011	India - Ethiopia tax treaty
2011	Cyprus - Germany tax treaty
2011	Hungary - Germany tax treaty
2011	Mauritius - Germany tax treaty
2011	Spain - Germany tax treaty
2011	Turkey - Germany tax treaty
2011	Taiwan - Germany tax treaty
2011	Malta - Hong Kong tax treaty
2011	Portugal - Hong Kong tax treaty
2011	Spain - Hong Kong tax treaty
2011	Switzerland - Hong Kong tax treaty
2011	Estonia - India tax treaty
2011	Tanzania - India tax treaty
2011	Malta - Israel tax treaty
2011	Spain - Singapore tax treaty
2012	Colombia - Czech Republic tax treaty
2012	Ireland - Germany tax treaty
2012	The Netherlands - Germany tax treaty
2012	Czech Republic - Hong Kong tax treaty
2012	Jersey - Hong Kong tax treaty

*In addition to preserving the application of domestic GAAR, these treaties contain a general treaty anti-abuse rule.

against overriding legislation but the Committee noted that there is growing dissatisfaction with the continued use of such legislation which could erode confidence in the international tax treaty network as a whole."

Alternatives available to the contracting states facing treaty override are to renegotiate existing tax treaty with new clause inserted or resort to MAP and subsequently to Arbitration if no resolution is found. But that will definitely take many years to remedy the violations leaving the unfortunate resident taxpayers to suffer without proper legal remedies. A more drastic step taken would be terminating the tax treaty by notifying the other contracting state, but that will definitely leave existing resident taxpayers in a dilemma if they have settled or planned their arrangements according to the tax treaty provisions.

PART IV: GAAR VS. TAX TREATY

As discussed above, the court is more likely to invoke treaty override if tax treaty is used mainly to achieve tax advantages such as treaty shopping. But when it comes to the position of conflict between GAAR and the tax treaty provisions, the tax laws of some developed countries from civil law and common law system tend to be clear on the priority of GAAR over tax treaty provisions. According to the Ernst & Young[3] 2013 survey, approximately half out of 24 countries allow their GAAR provisions to override existing tax treaties, either by overriding the treaty unilaterally or by agreeing with the treaty to allow the application of domestic GAAR. Countries allowing GAAR override includes the UK, Australia, India, France, Germany, Sweden, and Switzerland. Increasingly countries around the world have started to include clauses to preserve application of their domestic GAAR in the tax treaties. **Table 1** shows the examples of 2011-12 tax

[3] *Ernst & Young, GAAR Rising: Mapping tax enforcement's evolution (Ernst & Young, February 2013), 19.*

treaties containing specific reference to the application of domestic anti-avoidance rules[4]:

It would not be an issue for those countries with clear language in their domestic tax statute that GAAR could override tax treaty provisions even though that might create uncertainties for multinational companies utilising tax treaty for international tax planning purpose. Countries like Malaysia, Singapore and New Zealand without a GAAR override provision could present interpretation challenge to the courts to reconcile the scope of the GAAR and tax treaty, this is to preserve its international treaty obligations and at the same time to preserve national revenue from being eroded due to tax treaty abuse. Although under their respective Constitutions, these countries do have the right to override tax treaty like that which happened in the UK and Australia through subsequent legislations.

For the relationship between Tax Treaty and GAAR, OECD Model Convention Commentary on Article 1, Paragraph 9.1 raised two fundamental questions:

(1) Whether the benefits of tax conventions must be granted when transactions that constitute an abuse of the provisions of these conventions are entered into; and
(2) Whether specific provisions and jurisprudential rules of the domestic law of a contracting state that are intended to prevent tax abuse conflict with tax conventions.

Two conceptual approaches were discussed to resolve the two fundamental questions.
The first approach under Paragraph 9.2 states that the answer to the first question above is based on the answer to the second question. The Commentary's view is that ultimately it is the contracting state that exercises its taxing power based on domestic tax laws, as restricted by treaty law, after analysing the facts of each case giving rise to tax liability. Therefore any abuse of tax treaty could also be characterised as an abuse of domestic tax law since these anti-avoidance rules are not addressed in the tax treaties and therefore does not affect them. The Commentary noted in Paragraph 22.1, stated as a general rule, there will be no conflict between the domestic tax rules and the tax treaty. Paragraph 9.3 goes on to state the second approach of the abuse of tax treaty as opposed to the abuse of the domestic tax law, by stating that proper interpretation of the tax treaty with its object and purpose in mind, the abusive transaction can be disregarded if the transaction was entered with the view to obtaining unintended benefits under the tax treaty provisions. Paragraph 9.5 concluded with a guiding principle: *the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.*

Technically, only those countries with unilaterally clear treaty override specific provisions in their domestic tax statue may violate their international tax treaty obligations like the UK and Australia as discussed above. For those countries without clear treaty override provisions but with GAAR override provision, no conflict will arise when invoking GAAR to override

[4] *Ibid., 19.*

treaty provisions. Those countries without clear treaty override specific provisions and GAAR override provisions like Malaysia, Singapore and New Zealand, in determining whether to give treaty benefits when treaty abuse situation arises and a conflict between domestic tax laws and treaty provisions occurs, there are basically two resolutions:-

(1) If the treaty provisions has addressed anti-abuse transactions, then utilise the second approach advocated by the OECD Commentary. If the transaction meets the requirements of the anti-abuse provisions in tax treaty, then treaty benefits should be granted; or

(2) If the treaty provisions has not addressed the anti-abuse transactions, then utilise the first approach advocated by the OECD Commentary. If the transaction meets the requirements of the domestic anti-abuse provisions whether specific or general, then treaty benefits should be granted.

The assumption for the first resolution is that anti-abuse techniques incorporated into tax treaty provisions and the OECD Commentary is clear. This assumption may not be realistic as there are terms from tax treaty and the Commentary that has not reached consensus amongst OECD countries even today. These terms have even presented challenging interpretation for countries with different legal systems. For instance, the term "beneficial ownership" in tax treaty is not found in a civil law system whereas in a common law system it may be found initially thought similar to equitable ownership under trust law but may not entirely give the same legal meaning, otherwise trustee will not be given treaty protection. This flawed assumption has lead to a number of high profile cases on "beneficial ownership" like the *Indofoods*, *Prevost* and *Velcro* case. In addition, the first resolution is also difficult to apply in practice given that most of the treaty negotiation process and conclusion is held behind closed doors without much public consultation and publication.

The second resolution is based on the assumption that the anti-abuse rules in domestic tax law provisions be consistent with the Commentary's guiding principle's main purpose test. In Singapore, the GAAR enacted in Section 33 of the Income Tax Act 1948 does provide the main purpose test in Section 33(3) (b). In New Zealand through Subpart BG provides "*.........tax avoidance or effect is not merely incidental*" which is similar to the main purpose test. In Malaysia, the GAAR under Section 140 did not insert the word "purpose" though the word "effect" was there under Section 140 (1), that has created interpretational challenges to the courts on whether the intention of the Parliament when enacting the law did consider "main purpose test" is essential when Section 140 is invoked. Nevertheless, court cases[5] in past tend to imply that "main purpose test" was important in invoking Section 140, but whether it is essential to be proved by the taxpayer or the revenue is still unclear till today. Therefore if the Malaysian courts were to decide cases of treaty abuse based on Section 140, technically it could face treaty override challenge unless the courts could reconcile Section 140 and the guiding principle endorsed by the Commentary.

CONCLUSION

Tax treaty override and tax treaty abuse is inevitably intolerable to some countries facing substantial Base Erosion Profit Shifting (BEPS) especially in the western world after the financial crisis in year 2008. Nevertheless, not every country is concerned about BEPS especially developing countries, to quote the view of a leading author Roy

[5] *Newton v. Commissioner of Taxation (1958) A.C. 450, LD Timber v DGIR MLJ 203(1978), SBP Sdn Bhd v Director General of Inland Revenue (1988) 1 MSTC 2,053 , , Syarikat Ibraco-Peremba Sdn Bhd (SPS) v DGIR (2014) 1 LNS 605*

Rohtagi in international taxation, commented on the Indian Supreme Court case *Union of India v Azadi Bachao Andolan 263 ITR 607 (SC)* concerning the India-Mauritius tax treaty : *"Overall, countries need to take, and do take, a holistic view. The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant compared to other non-tax benefits to their economy. Many of them do not appear too much concerned unless the revenue losses are significant compared to other tax and non-tax benefits from the treaty, or the shopping leads to other tax abuse".*

The judge **B.N. Srikrishna** in the *Azadi Bachao Andolan* case gave his famous quote:

"There are many principles in fiscal economy which, though at first blush might appear to be civil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the respondents over the so called "abuse" of "treaty shopping", perhaps, it may have been intended at the time when the Indo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy."

Should Malaysia as a developing country be concerned about the BEPS project recently initiated by the OECD countries? At the recent luncheon hosted by CTIM in Kuala Lumpur on 19 May 2014, YBhg Tan Sri Mohd Shukor Hj. Mahfar, CEO of IRBM, mentioned that the IRBM is working on a BEPS action plan which could be tabled soon. The focus of the BEPS action plan would depend on the OECD BEPS initiatives. In the author's opinion, it could take years or even a decade for OECD's initiatives to come to a consensus given that some of its members are from different constitutional and legal systems and have differing views on the same subject. The Malaysian government should take a holistic approach to its international tax policy according to the country's future economic, social and political needs. First by reviewing its existing tax treaty signed with its trading partners whether in line with its domestic key industries (as identified in the Economic Transformation Programme) and trade requirements and the international norms. If possible, with some modifications on the Model Convention proposed by OECD and UN, so as to have its own tax treaty negotiation model as done by Australia, Singapore, US and other countries. Second is to review its existing GAAR whether it is in line with the domestic trade and business environment and the international norms, if possible clarify the circumstances that GAAR will be invoked and provide safe harbour for certain legitimate tax planning situations. Similar approach has been taken by countries like the UK[6] and India[7] which recently enacted their statutory GAAR with an independent GAAR Advisory Panel working along with the Revenue to monitor the invocation of GAAR. Lastly, is to review its existing legislation on the interaction between GAAR and its tax treaty provision whether it is in line with its domestic circumstances, treaty partners' tax provisions and international tax laws, so that to prevent unintentional treaty override and at the same time preserve the national revenue from erosion through deliberate tax treaty abuse.

[6] *Ernst & Young, GAAR Rising: Mapping tax enforcement's evolution (Ernst & Young, February 2013), 83.*

[7] *Ibid., 51.*

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Country-by-Country Implementation Package

Harbinger of Transfer Pricing Tidings

Venkataraman Ganesan

> "A person is wise if he listens to millions of advice and doesn't implement any of it"
>
> *Michael Bassey Johnson*

THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (HEREINAFTER REFERRED TO AS "OECD") ON 8 JUNE 2015 ISSUED A DOCUMENT TITLED "COUNTRY-BY-COUNTRY REPORTING IMPLEMENTATION PACKAGE" PURSUANT TO ACTION PLAN 13 FORMULATED UNDER THE AEGIS OF THE BASE EROSION AND PROFIT SHIFTING ("BEPS") INITIATIVE FORMULATED BY THE OECD AND ENDORSED BY THE G-20. THIS IMPLEMENTATION PACKAGE, CLOSELY FOLLOWING THE HEELS OF A GUIDANCE DOCUMENT ELUCIDATING THE IMPLEMENTATION OF TRANSFER PRICING DOCUMENTATION AND COUNTY-BY-COUNTRY REPORTING (HEREINAFTER REFERRED TO AS "CbC REPORTING")[1] THAT WAS ISSUED IN FEBRUARY 2015, HAS BEEN DESCRIBED AS A "GAME CHANGER" BY PASCAL SAINT-AMANS, DIRECTOR OF THE OECD CENTRE FOR TAX POLICY AND ADMINISTRATION (HEREINAFTER REFERRED TO AS "CTPA").

The *Country-by-Country Reporting Implementation Package* (hereinafter referred to as the "package") serves as a procedural guide encompassing within its confines model domestic legislation and competent authority agreements with an objective of facilitating an expedient exchange of data between multiple tax jurisdictions.

The package also places great emphasis (deservedly) on the imperative need to preserve, safeguard and maintain confidentiality of the information presented under the CbC Reporting. As a means of furthering this crucial objective, a comprehensive questionnaire titled "*Confidentiality and Data Safeguard Questionnaire*" is attached as an Annexure to the package.

This article strives to provide a broad and macro level perspective regarding a few salient aspects of the package. Avoiding a clause by clause scholarly dissection exercise, the article refrains from critically examining the intended feasibility and viability of the package. Instead, it broadly dwells into the underlying premise and overall rationale characterising the issue of this package by the OECD. The article concludes with a few key takeaways that ought to serve as markers to the taxpayers whilst they embark on a "BEPS Readiness" drive.

MODEL LEGISLATION RELATED TO CbC REPORTING

The Model Legislation relating to CbC Reporting encompasses within its sweep 8 Articles. **Article 1** lays down the definitions of various terms employed in the package. An interesting term is that of a "Surrogate Parent Entity" (hereinafter referred to as "SPE"). An SPE is defined in the Article as "*one Constituent Entity of the MNE Group that has been appointed by such MNE Group, as a sole substitute for the Ultimate Parent Entity, to file the country-by-country report in that Constituent Entity's jurisdiction of tax residence, on behalf of such MNE Group, when one or more of the conditions set out in subsection (ii) of paragraph 2 of Article 2 applies*".

The conceptualisation of an SPE has important ramifications. This designated entity is intended to ensure that there is no exemption from filing the CbC Report by an MNE even if the tax jurisdiction in which the ultimate parent of the MNE is situated, exempts the resident ultimate parent from the burden of complying with the CbC Reporting norm. In other words there is an automatic shifting of the onus or the responsibility pertaining to the filing of the CbC documentation from the top tier in an MNE structure to the immediately following tier (the second tier).

Article 2 of the Model Legislation on CbC Reporting deals with the filing obligations. This Article clearly encapsulates the various circumstances under which a designated SPE will be required to file the CbC Report instead of the ultimate parent entity. The circumstances as set out in the package are as reproduced herein below[2]:

i. *"The Ultimate Parent Entity of the MNE Group is not obligated to file a CbC Report in its jurisdiction of tax residence; or*
ii. *The jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has a current International Agreement to which [Country] is a related party but does not have a Qualifying Competent Authority Agreement (hereinafter referred to as "CAA") in effect to which [Country] is a party by the time specified in Article 5, for filing the CbC Report for the Reporting Fiscal Year; or*
iii. *There has been a Systemic Failure of the jurisdiction of tax residence of the Ultimate Parent Entity that has been notified by the [Country Tax Administration] to the Constituent Entity resident for tax purposes in [Country]"*[3]

Articles 3 and 4 dwell on the means of notifying the relevant tax jurisdictions details regarding the Ultimate Parent Entity and the SPE, and the details to be embedded within the CbC Report, respectively. While **Article 5** sets the timeframe or limit within which the CbC Report needs to be filed, **Article 6** deals with the preservation of confidentiality of data contained within the CbC Report. Since confidentiality constitutes a vital tenet and essence of this package, it is elaborated upon at much greater length in the succeeding paragraphs.

As is to be expected, the model legislation does not touch upon or broach the subject of penalties. **Article 7** delegates the responsibility of imposition of penalties for non-compliance upon the respective tax jurisdictions electing to embrace Action item 13 relating to CbC Reporting. The package assumes that jurisdictions would wish to extend their transfer pricing penalty

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[1] *http://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf*
[2] *Even if one of the said conditions is fulfilled, the reporting obligation will be attached to the designated SPE.*
[3] *Subsection 2 of Paragraph 2 to Article 2 relating to Filing Obligation.*

regime to the requirements to file the CbC. Thus there may arise a situation where there are multifarious penalty rates spanning multiple tax jurisdictions with various penalty rates depending upon the provisions (as contained within the domestic tax regulations) governing the administration of penalty prevalent at the time of a potential default.

The final Article in the Model Legislation on Reporting sets the effective date as beginning on or after 1 January 2016.

MULTILATERAL COMPETENT AUTHORITY AGREEMENT ON THE EXCHANGE OF CbC REPORTS

This part of the package is made up of 9 Sections and the articulation primarily relates to the mode of information exchange and protection of the data that is the subject matter of exchange. In a globalised world economy characterised by a seamless proliferation of technology and an unceasing flow of sensitive client/company specific data and strategic information across borders, even an inadvertent lapse in preservation of the sanctity of information might lead to calamitous consequences. The infamous "Lux Leaks"[4] provides ample testimony to the untoward consequences that invariably follow an unintended spillage of delicate information.

The term "non-reciprocal" jurisdiction has not been explicitly defined in the package. However recourse may be taken to the Non-Reciprocal Model Competent Authority Agreement[5] issued by the OECD for a better understanding of situations involving a non-reciprocal exchange of information. Paragraph 1 of Annexure 2 to the Non-Reciprocal Model Competent Authority Agreement elucidates that *"there may be situations where the automatic exchange of financial account information does not need to be reciprocal (e.g. because one of the jurisdictions does not have an income tax). In such cases the information would be sent out only by [Jurisdiction A] to [Jurisdiction B], but not by [Jurisdiction B] to [Jurisdiction A]. In this example it is Jurisdiction A that would be the non-reciprocal entity."*

Section 3 of the Multilateral Competent Authority Agreement

SECTIONS 1 & 2

Section 1 of this part of the package defines various relevant terms. **Section 2** provides guidance pertaining to the exchange of information with respect to MNE Groups. **Section 2** clarifies the fact that every relevant Competent Authority will exchange on an **automatic basis (emphasis supplied)** the CbC Reports received from each Reporting Entity with all such other Competent Authorities of jurisdictions with respect to which it has an Agreement in effect. Hence from a bare reading of the wordings as set out in this section, it is evident that for information to be exchanged between two or more Competent Authorities, there need to be formulated an information exchange agreement. However, Competent Authorities belong to jurisdictions listed as "non-reciprocal" do not have the option of receiving CbC Reports, but can send CbC Reports.

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[4] *Luxembourg Leaks (commonly known as Lux Leaks) refers to a financial scandal unearthed by a journalistic investigation conducted by the International Consortium of Investigative Journalists. This exercise concluded by making available to the public in November 2014 tax rulings for over three hundred multinational companies in Luxembourg.*

[5] *OECD (2014), "Non-Reciprocal Model Competent Authority Agreement", in Standard for Automatic Exchange of Financial Account Information in Tax Matters, OECD Publishing http:// x.doi org/10.1787/9789264216525-en*

on the Exchange of CbC Reports lays down the time and manner of exchange of information. A CbC Report needs to be exchanged only if the relevant Competent Authorities have an Agreement in place and their respective Jurisdictions have in effect a legislation that requires the filing of CbC Reports. Thus going forward one can expect a spate of Information Exchange Agreements to be filed between participating jurisdictions. The CbC Report will first need to be exchanged **no later than 18 months after the last day of that fiscal year (emphasis supplied)**. Thus assuming that the last day of the concerned fiscal year is 31 December 2016, the CbC Report needs to be exchanged no later than 30 June 2018.

Thereafter, post the first exchange, CbC Reports are to be exchanged as soon as possible and no later than 15 months after the last day of the fiscal year of the MNE Group to which the CbC Report relates. Thus assuming that the last day of the concerned fiscal year is 31 December 2017, the CbC Report needs to be exchanged no later than 31 March 2019.

Considering the fact that there would be a lag between the time transactions are consummated between entities forming part of an MNE and the deadline for the submission of the CbC Report, it is imperative that from a readiness perspective, taxpayers bolster their existing practice of documentation preparation and maintenance.

While **Section 4** prescribes ways and means of Collaboration on Compliance and Enforcement between Competent Authorities, **Section 5** sets out measures governing the Confidentiality, Data Safeguards and Appropriate Usage of the Information exchanged under the CbC Reporting. This Section mandates the use of data collected under CbC Reporting only for the following purposes:

- Assessing high-level transfer pricing (probably inferring to a macro level examination of potential transfer pricing risks);
- Base erosion and profit shifting related risks; and
- Economic and Statistical analysis (wherever appropriate)

Jurisdictions are also precluded from employing the CbC Report as a substitute for detailed transfer pricing analysis as the CbC Report in itself does not conclusively demonstrate the fact that transfer prices are either appropriate or inappropriate. Thus transfer pricing adjustments ought not to be made on the basis of information as set out in the CbC Report.

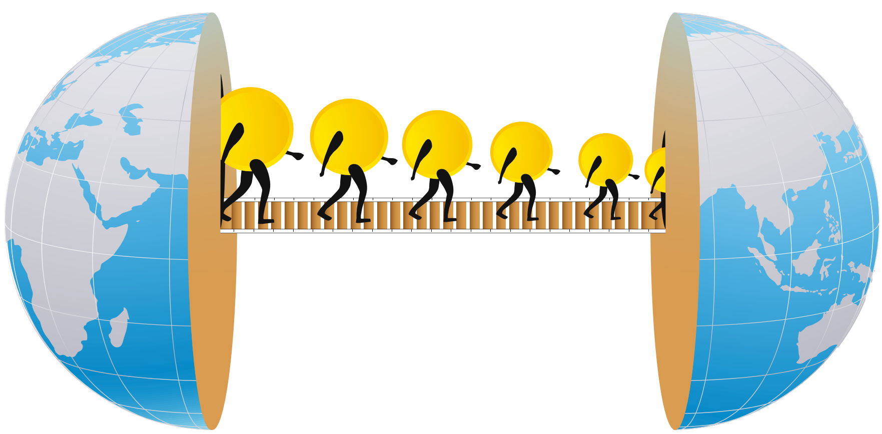
However, jurisdictions are not prohibited from employing the CbC report as a basis for making further enquiries into a Group's transfer pricing policy during the course of an audit, and as a consequence of such an examination, appropriate adjustments may be made to the taxable income of an entity/(ies) forming part of an MNE Group. The tax authorities are thus empowered to make an informed assessment of an MNE's transfer pricing policy on the basis of the data gathered under the CbC Reporting norms and upon further examination and assessment.

Section 5 provides the taxpayer with a relief mechanism in the form of a recourse to Competent Authority proceedings under all circumstances wherein a tax authority initiates a transfer pricing adjustment that is either not in accordance with or is inappropriate with, and thereby contravening the provisions and guidance as set out under this Section.

Section 6 provides an avenue for Consultations between the relevant Competent Authorities with a view to resolve issues arising out of undesirable outcomes suffered by a taxpayer/(s) as a result of an adjustment made to the taxable income of the said entities on the basis of data contained within the CBC Report.

Sections 7 and 8 are purely procedural in content and context, providing for consensual Amendments to the Competent Authority Agreements and detailing the terms of a Competent Authority Agreement respectively.

Section 9, the final Section to this part of the package highlights the notification functions of the



Coordinating Body Secretariat. Coordinating Body Secretariat[6] is defined to mean "the OECD Secretariat that pursuant to paragraph 3 of Article 24 of the Convention, provides support to the Coordinating Body".[7]

CONFIDENTIALITY AND DATA SAFEGUARD QUESTIONNAIRE

To reiterate what has been emphasised in the initial part of this article, great emphasis has been placed by the OECD on safeguarding of data and information forming part of a CbC Report, taking into consideration the potential consequences and portentous ramifications that might stem forth as a result of an inadvertent or even an unintended leakage of proprietary data.

A detailed Questionnaire attached as an Annexure to the Package is intended to assess the viability and reliability of existing information safeguarding mechanisms forming part of various tax jurisdictions across the globe. Information Security Management systems used by tax jurisdictions are targeted for adherence with stringent and specific standards ensuring the protection of confidential taxpayer data. Screening mechanisms for employees vested with the task of handling data, authorisation limits and clearly laid out information access trails are all deemed to be indispensable necessities. The Questionnaire particularly states that a tax administration needs to document compliance with the ISO/IEC 27000-series standards, or it needs to satisfactorily demonstrate that it possesses an equivalent information security framework governing protection of taxpayer information received by that tax administration.

The Annexure also contains a specific reference to the imposition of sanctions or penalties to tax jurisdictions that turn out to be errant. There is a suggestion for providing via the domestic laws of the participating tax jurisdictions, a framework of penalties or sanctions for improper disclosure or usage of taxpayer information gathered as part of the CbC Reporting mechanism.

As a follow up measure, the OECD intends to come out with an XML Schema accompanied by a related User Guide. The intention behind this action, being the facilitation of a smooth electronic exchange of CbC Reports.

THE FOLLOWING BROAD CATEGORIES ARE IDENTIFIED BY THE ANNEXURE AS POTENTIAL REALMS UNDER WHICH DATA AND INFORMATION RECEIVED NEED TO BE SAFEGUARDED BY A TAX ADMINISTRATION

- Background Checks and Contracts;
- Training and Awareness;
- Departure Policies;
- Physical Security: Access to Premises;
- Physical Security: Physical Document Storage;
- Planning documentation to develop, update, and implement security information systems;
- Configuration Management;
- Access Control Policies;
- Identifying and Authenticating users and devices;
- Audit and Accountability;
- Periodic and prompt maintenance of information systems and databases;
- System and Communications Protection;
- System and Information Integrity;
- Security Assessments;
- Contingency Planning;
- Risk Assessment;
- Systems and Services Acquisitions;
- Protection of information in printed or digital form;
- Protection of Treaty-Exchanged Data; and
- Information Disposal Policies

CONCLUSION

The world of transfer pricing is now that much closer to being "BEPS-aligned". With the OECD declaring an intent to stick to the stringent and arduous deadlines declared for the completion of the overall BEPS project, what once seemed an exercise in ambition is now beginning to resemble an endeavour bearing fruition. Efforts are being actively directed towards obtaining a consensus on outstanding items and the target is for the completion of base erosion and profit-shifting project with approval by the Committee on Fiscal Affairs on 22 or 23 September 2015.

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[6] *Subsection (l) of Section 1 to the Multilateral Competent Authority Agreement on the Exchange of CbC Reports*

[7] *Subsection (k) of Section 1 to the Multilateral Competent Authority Agreement on the Exchange of CbC Reports define Coordinating Body to mean "the Coordinating Body of the Convention that, pursuant to Paragraph 3 of Article 24 of the Convention, is composed of representatives of the Competent Authorities of the Parties to the Convention.*

The closure in fact, is expected to take the form of a presentation before a meeting of the G-20 Finance Ministers scheduled to be held on 8 October 2015. The perspicacity displayed by the OECD in not straying from a self-imposed timeframe, has been to say the least, remarkable.

MNE groups across the globe now need to shift their focus from an information and data assessing stage to a data delivery and reporting phase. Such a focus needs a constant alignment and sustained interaction between multiple organisational departments such as Information Technology ("IT") or Management Information Systems ("MIS"), Tax, Accounting, Finance and Human Resources. This is especially so in the case of CbC Reporting as the nature of data required to be analysed, assimilated and reported embrace both qualitative and quantitative aspects. Of late there have been a spate of information exchange agreements that have been concluded by many countries, thereby paving the way for cross border flow of information.

Similarly tax administrations also need to up the ante with reference to both enhancing the quantity and quality of human capital as well as upgrading their IT infrastructure. Many tax administrations currently suffer from a severe shortage of adequate manpower. Hence handling a huge influx of data in the form of information received under the CbC Reporting, analysing the potential risk implications embedded in such data and making an informed decision regarding a need to make further enquires and assessments might pose a veritable challenge from the perspective of the tax authorities. This constraint is accentuated manifold in the case of tax administrations struggling with tax mobilisation drives in the developing countries.[8] The OECD also recognises this fact and is intent on actively partnering with the tax administrations in developing countries thereby enabling capacity building[9].

There is no disputing the fact that CbC under BEPS is here to stay. The best way to expeditiously and uneventfully ride the potential waves of uncertainty would be for the tax authorities and taxpayers to work in tandem in an environment characterised by transparency, practicality and common sense.

For as the former President of the United States of America, Bill Clinton once memorably put it in his inimitable charismatic manner, "*We all do better when we work together. Our differences do matter, but our common humanity matters more.*"

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[8] *https://www.ids.ac.uk/files/dmfile TaxRevenueMobilisationDeveloping-Countries.pdf*

[9] *http://www.oecd.org/tax/tax-global/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf*

The views expressed are solely that of the author and do not represent either the views or the opinions of the firm of which he is a part.

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

CHINA (PEOPLE'S REP.)

Enterprise income tax incentives for small and low-profit enterprises expanded

The State Administration of Taxation (SAT) and the Ministry of Finance (MoF) jointly issued Cai Shui [2015] No. 34 on 13 March 2015 expanding enterprise income tax incentives for small and low-profit (SLP) enterprises. The notice retroactively applies from 1 January 2015.

SLP enterprises are subject to enterprise income tax at the rate of 20% on 50% of the taxable income, provided that the annual taxable income for the period does not exceed CNY200,000 from 1 January 2015 to 31 December 2017. For the purposes of this notice, SLP enterprises are those as defined under the Enterprise Income Tax Law and its implementation rules.

Previously, the threshold of the annual taxable income for qualification of the incentive was set at CNY100,000, and the period of the application was from 1 January 2014 to 31 December 2016 (Cai Shui [2014] No. 34). With this new notice, the incentive has been expanded in respect of the scope of the enterprises and the applicable period.

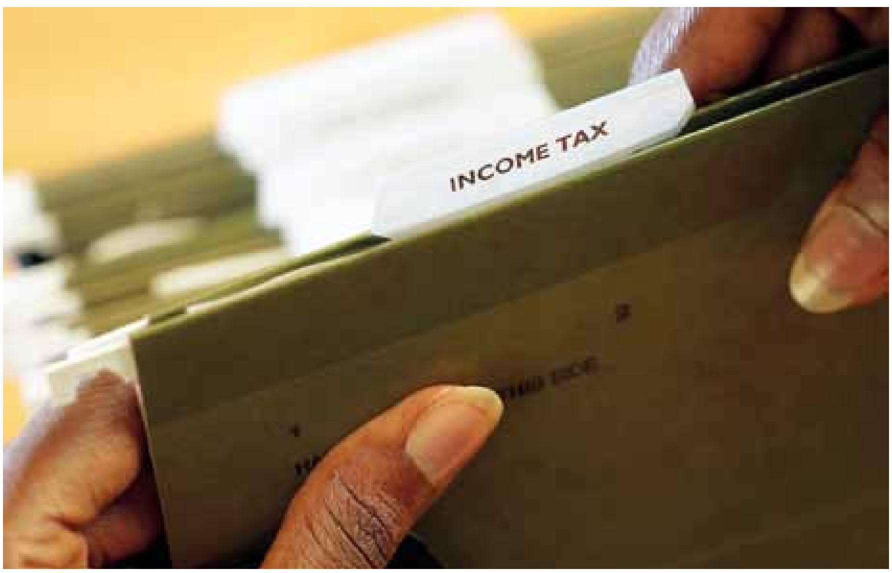
Further, the notice provides for the method of calculation of the number of employees, which is one of the qualification criteria for SLP enterprises.

Transfer pricing rules on payments to overseas related parties

On 18 March 2015, the SAT issued Gong Gao [2015] No. 16 on transfer pricing rules for services and royalty payments to overseas related parties. The announcement applies as from the issue date.

Service fees

According to the announcement, fees paid by an enterprise to an overseas related party that does not perform functions, bear risks nor have substantial business operations will not be deductible for the enterprise.



The prerequisite for a justified service fee payment to an overseas related party is that the paying enterprise benefits economically, directly or indirectly, from the services provided. Payments for services provided are not deductible for enterprise income tax purposes in the following specific circumstances:

- the services are not connected to the functions, risks and business operations of the enterprise;
- the services are controlling, managerial and supervisory in nature, and are provided by an overseas related party in order to protect the equity interest of direct or indirect investors;
- the services provided have already been purchased from a third party or have been performed by the enterprise itself;
- an enterprise has not directly received the actual services purportedly provided, although the enterprise has obtained unintended benefits as part of a group;
- the services have already been remunerated in other related transactions; and
- other services do not provide the enterprise with direct or indirect economic benefits.

Royalties

In cases where the royalties for intangibles are paid to an overseas related party, the enterprise must take into account the extent of each party's contribution to the value creation of such intangibles in determining the entitlement to the economic benefits. Payments to a related party that, in violation of the arm's length principle, merely has legal ownership of the intangibles but has not contributed to the value creation, are not tax deductible.

Royalties paid for the benefits derived from an initial public offering to a foreign holding or finance company incorporated by a Chinese enterprise for that purpose are not tax deductible.

Statute of limitations for adjustment of payments

Further, the announcement

states that payments that are not in accordance with the arm's length principle can be adjusted within 10 years of the statute of limitations as provided under Article 123 of the Implementation Rules of Enterprise Income Tax Law.

Individual income tax treatment of investments using non-cash assets

The MoF and the SAT jointly issued Cai Shui [2015] No. 41 on 30 April 2015 regarding the individual income tax treatment of investments using non-cash assets and the notice applies from 1 April 2015.

The contribution of non-cash assets for the purpose of investment made by an individual is considered to be both a disposal of such assets and an investment at the same time. The gains of the disposal must be taxed as a "transfer of property" under individual income tax law. For the purpose of this notice, non-cash assets are referred to as assets other than cash and bank deposits, such as shares, real property, results of innovation or other forms of non-cash property, and investment means capital contribution to a newly established enterprise, increase of the capital contribution to the invested enterprise or contribution by virtue of share exchange or other business restructuring.

An individual taxpayer is required to file a tax return before the 15th of the following month after the investment occurs. The individual may pay his income tax in a maximum of five instalments within five calendar years if he has difficulty making a one-off tax payment.

If the investor receives any cash payment for the contributed non-cash assets, the cash payment must be used to pay the tax due. There is no deferral for the tax payment. The same applies to the situation in which the investor partly or wholly disposes of his investment in the course of the instalments and receives cash payment as consideration. In such a case, the cash received must be used to pay the tax due.

HONG KONG

Budget for 2015-16

The Budget for 2015-16 was presented to the Legislative Council by the Financial Secretary on 25 February 2015. The key tax-related proposals are summarised below and will apply from 1 April 2015 once enacted.

Corporate taxation

- A one-off reduction of 75% of the current profits tax for the year of assessment 2014-15, up to a maximum of HKD20,000.
- Under specified conditions, interest for corporate treasury centres is proposed to be deductible under profits tax, and a reduction of 50% of the current profits tax for specified corporate treasury activities is proposed.
- An extension of the profits tax exemption to private equity funds.

Personal taxation

- A one-off reduction of 75% of the current salaries tax and tax under personal assessment for the year of assessment 2014-15, up to a maximum of HKD20,000.
- The child allowance and an additional one-off child allowance in the year of birth are proposed to be increased from HKD70,000 to HKD100,000 from the year of assessment 2015-16.

Consultation on automatic exchange of financial account information on tax matters released

On 24 April 2015, the government released a consultation paper on the proposed model for implementing automatic exchange of financial account information on tax matters (AEOI). The closing date for public consultation is 30 June 2015.

The proposed AEOI model for Hong Kong relates to the definitions of financial institutions (FIs), the types of information FIs must secure from account holders, the due diligence and reporting requirements FIs need to follow, the authority of the Inland Revenue Department to collect relevant information from FIs and forward such information to designated bilateral AEOI partners, and the sanctions for non-compliance and confidentiality provisions.

An amendment bill will be introduced into the Legislative Council in early 2016 in order to apply the AEOI requirements to Hong Kong through legislation.

INDIA

Budget for 2015-16

The Budget for fiscal year 2015-16 was presented to Parliament by the Finance Minister on 28 February 2015. The proposals, unless otherwise stated, should take effect from 1 April 2015.

Corporate tax

- Corporate tax rate is to be reduced from 30% to 25% over the next four years accompanied with rationalisation and removal of various corporate tax exemptions and incentives. These changes will take effect from 1 April 2016;
- Tax "pass through" is to be allowed to both Category I and Category II alternative investment funds, so that the tax is levied on the investors and not on the funds;
- Capital gains regime for the sponsors exiting at the time of listing of the units of real estate investment trusts (REITs) and infrastructure investment trusts (INVITs), subject to the payment of securities transaction tax, is to be rationalised;
- Permanent establishment (PE)/business connection rules are to be modified, to effect that, the mere presence of a fund manager in India would not constitute a PE/business connection of the offshore fund in India;
- The applicability of general anti-avoidance rules (GAAR) is to be deferred by two years. Accordingly, GAAR would be applicable from financial year 2017-18. Further, when implemented, GAAR will apply prospectively to investments made on or after 1 April 2017;
- Withholding tax rate on royalty and fees for technical services earned by a non-resident is to be reduced from 25% to 10%;
- Benefit of deduction for employment of new regular workmen under Section 80JJAA of the Income Tax Act 1961 (ITA) is to be extended to all business entities. Further, the eligibility threshold of minimum 100 workmen is to be reduced to 50;
- Wealth tax is to be abolished and is to be replaced with an additional surcharge of 2% on the super rich with a taxable income of over INR10 million;
- Provisions of "indirect transfer" as enshrined in the ITA are to be amended. Further, the Central Board of Direct Taxes will issue a clarificatory circular regarding the applicability of "indirect transfer provisions" to dividends paid by foreign companies to its shareholders;
- Threshold limit for the application of domestic transfer pricing rules is to be increased from INR50 million to INR200 million;
- Provisions of minimum alternate tax (MAT) are to be rationalised for foreign institutional investors (FIIs) and members of an association of persons (AOP);
- The benefit of a reduced rate of tax (i.e. 5%) under Section 194LD (i.e. interest on rupee denominated bond or government security) of the ITA is to be extended from 31 May 2015 to 30 June 2017;
- Settlement commission rules are to be rationalised;
- The direct tax code (DTC) is not to be implemented, considering the evolved jurisprudence under the ITA; and
- Recommendations of the tax administration reform commission (TARC) are to be implemented in the financial year 2015-16.

Individual tax

Increases in the limits for the following yearly deductions were proposed:

- Section 80D (i.e. health insurance premium);
- The threshold for senior citizens;
- The deduction limit under Section 80DDB (i.e. deduction on account of specified diseases) for very senior citizens ;
- The deduction limit under Section 80DD (i.e. person with disability) and Section 80U (i.e. person with severe disability);
- The deduction limit for contributions to a pension fund and the new pension scheme;
- Contributions to the new pension scheme under Section 80CCD of the ITA per year; and
- Exemption for transport allowance.

Indirect taxes

Goods and Services Tax (GST) Act is to be implemented from 1 April 2016;

- Standard *ad valorem* rate of basic excise duty is to be

- increased from 12% to 12.5%;
- Service tax rate is to be increased from 12.36% (including cess) to 14%;
- Swachh bharat cess at a rate of 2% is to be levied on all or any of the taxable services (applicable date to be notified); and
- The scope of services subject to service tax has been widened.

Advance pricing agreement rollback rules announced

On 14 March 2015, the government announced the much awaited advance pricing agreement (APA) rollback rules with respect to international transactions covered in an APA via notification No. 23/2015.

The APA will provide for determining the arm's length price (ALP) or specify the manner in which the ALP must be determined in relation to the international transaction entered into by the person during the rollback year.

Where the rollback provision specifies the manner in which the ALP must be determined in relation to an international transaction undertaken in any rollback year then such manner must be the same as the manner which has been agreed to be provided for determination of the ALP of the same international transaction to be undertaken in any previous year to which the agreement applies, not being a rollback year.

Rollback year

Rollback is available for the rollback years. A rollback year means any previous year within the period of four previous years, preceding the first previous year covered in the APA.

Necessary conditions for availing rollback

The international transaction should be the same as the international transaction to which the regular APA applies.

- The tax return and respective transfer pricing report (i.e. Form 3CEB) for the relevant rollback period should have been filed before the due date.
- The application for the rollback should cover all the rollback years in which the international transaction has taken place.
- The applicant should make an application in the prescribed form (i.e. Form 3CEDA).

Conditions where the rollback provision will not be provided, in respect of an international transaction

- If the determination of the ALP of the said international transaction for the said year has been the subject matter of an appeal before the Income Tax Appellate Tribunal (ITAT) and the ITAT has passed an order disposing of such appeal at any time before signing of the APA.
- If application of the rollback has the effect of reducing total income or increasing loss as declared in the tax return.

The timeline for applying for rollback, where the APA application has been filed before 1 January 2015 or where regular APA has already been entered into before 1 January 2015, will be 30 June 2015.

On confirmation of the rollback provisions, the applicant must file a modified tax return for the rollback year and must withdraw its appeal before the appellant authority for a rollback year on the issue which is the subject matter of the rollback provisions.

A similar provision is provided for the tax authorities to withdraw their appeal before the appellate authority within three months of filing the modified tax return. Any failure to comply with the above will be deemed to be the cancellation of the APA.

SINGAPORE

Budget 2015

The Budget for 2015 was presented to Parliament by the Finance Minister

on 23 February 2015. Details of the Budget, which (unless otherwise indicated) will apply from the year of assessment (YA) 2016, are summarised below.

Corporate taxation

- A 30% corporate income tax rebate capped at SGD20,000 per YA will be granted to all companies for YAs 2016 and 2017.
- A tax deduction for qualifying donations made in 2015 to institutions of a public character and other qualifying recipients will be increased to 300%. The rate will revert to 250% for qualifying donations made from 1 January 2016 until 31 December 2018.
- The Production and Innovation Credit (PIC) Bonus will lapse after YA 2015.
- The Mergers & Acquisition (M&A) scheme will be extended until 31 March 2020 with changes that will take effect from 1 April 2015.

- The qualifying expenditure under the double tax deduction for internationalisation scheme will be enhanced to include manpower expenses incurred for Singaporeans posted to new overseas entities capped at SGD1 million per approved entity per year, subject to conditions, applicable for expenses incurred from 1 July 2015 to 31 March 2020.
- The International Growth Scheme (IGS) will be introduced, whereby qualifying Singapore companies will enjoy a concessionary tax rate of 10% for up to five years on their incremental income from qualifying activities. This scheme will be administered by IE and the approval window will be from 1 April 2015 to 31 March 2020.
- The Angel Investors Tax Deduction (AITD) scheme will be extended until 31 March 2020. New qualifying investments that are co-funded by the government under the Start-up Enterprise Development Scheme (SEEDS) and the Business Angel Scheme (BAS) made from 24 February 2015 onwards will also qualify for AITD.
- A 5% concessionary tax rate will be accorded to approved venture capital fund management companies managing funds qualifying under Section 13H of the Income Tax Act (ITA), on their specified income. The approval window is from 1 April 2015 to 31 March 2020. The Pioneer Service Incentive will be withdrawn from 1 April 2015 as venture capital is no longer a pioneering activity in Singapore, although Pioneer certificates already issued will not be affected by this change. The tax exemption under Section 13H will be reviewed on 31 March 2020.
- The Investment Allowance – Energy Efficiency (IA-EE) scheme and IA-EE for green data centres will be combined into one scheme known as the Investment Allowance – Energy Efficiency Scheme from 1 March 2015 and extended until 31 March 2021. This scheme will be administered solely by the Economic Development Board (EDB).
- The Development and Expansion Incentive for International Legal Services (DEI-Legal) will be extended until 31 March 2020, with the same existing conditions.

- The Approved Foreign Loan (AFL) incentive will be reviewed on 31 December 2023. Additionally, the minimum loan requirement of the AFL incentive will be increased to SGD20 million from 24 February 2015.
- The approved royalties incentive will be reviewed on 31 December 2023.
- The Writing Down Allowance (WDA) scheme under Section 19A of the ITA will be reviewed on 31 December 2020.
- The tax concession under the Monetary Authority of Singapore (MAS) Notices 612 (subject to caps as stipulated under Section 14I of the ITA), 811 and 1005 will be extended to YA 2019 or 2020, depending on the financial year of the bank or finance company.
- The tax incentive schemes for insurance businesses will be extended until 31 March 2020 and will be known as the Insurance Business Development Incentive. The concessionary tax rate remains at 10%. A renewal framework will be introduced from 1 April 2015.
- The Enhanced-Tier Fund Tax Incentive Scheme will also apply to special purpose vehicles (SPVs) held by the master fund (subject to conditions) with effect from 1 April 2015.
- Tax concessions for real estate investment trusts (REITs) will be extended until 31 March 2020. The stamp duty concessions will lapse after 31 March 2015, while all other conditions remain the same.
- The Maritime Sector Incentive (MSI) has been enhanced and

extended until 31 May 2021. Some of the changes to MSI will take effect from 23 February 2015.

- The following incentives will be discontinued:
  - the concessionary tax rate on income derived from offshore leasing of machinery and plant (Section 43I of the ITA) will be withdrawn from 1 January 2016;
  - the Approved Headquarters Incentive (Section 43E of the ITA) will be withdrawn from 1 October 2015; and
  - the tax concession on royalties and other payments from approved intellectual property or innovation (Section 10(16) of the ITA) will be withdrawn from YA 2017.

Individual taxation

A new income tax rate structure will take effect from YA 2017 as follows (**Table 1**):

Chargeable income (SGD)	Marginal rate (%)
up to 20,000	0
20,001 – 30,000	2.0
30,001 – 40,000	3.5
40,001 – 80,000	7.0
80,001 – 120,000	11.5
120,001 – 160,000	15.0
160,001 – 200,000	18.0
200,001 – 240,000	19.0
240,001 – 280,000	19.5
280,001 – 320,000	20.0
over 320,000	22.0

Table 1

- A personal income tax rebate of 50% capped at SGD1,000 per taxpayer will be granted to all tax resident individuals for YA 2015.
- An individual who derives passive rental income from residential property in Singapore may claim a specified amount of rental expenses (based on 15% of the gross rental income) in lieu of claiming the actual amount of deductible expenses incurred (excluding interest expenses). This change, however, does not apply to rental income derived by an individual through a partnership in Singapore and from a trust property.
- Income derived by non-tax resident mediators for mediation works carried out in Singapore from 1 April 2015 to 31 March 2020 will be exempt from tax.
- The current tax exemption on income derived by non-residents on or after 3 May 2002 from arbitration work carried out in Singapore will be reviewed on 31 March 2020.
- The self-employed tax relief cap will be raised to SGD37,740 from YA 2017 onwards.

Goods and Services Tax

The Inland Revenue Authority of Singapore (IRAS) will simplify the pre-registration claim rules to allow newly GST-registered business to claim pre-registration GST in full on the following goods acquired within six months before the GST registration date of the business on goods held by business at the point of registration and property rental, utilities and services that are not directly attributable to any supply made before GST registration. This change will take effect from 1 July 2015. The GST remission for listed real estate investment trusts (REITs) and registered business trusts (RBTs) in the infrastructure business, ship leasing and aircraft leasing sectors will be extended until 31 March 2020. Additionally, the listed REITs and RBTs will be allowed to claim the GST on business expenses incurred to set up special purpose vehicles (SPVs) that are used solely to raise funds for the REITs or RBTs, and that do not hold qualifying assets of the REITs and RBTs, directly or indirectly. These REITs and RBTs will also be allowed to claim the GST on the business expenses of such SPVs. The enhancement will be effective from 1 April 2015 until 31 March 2020.

Other taxes and measures

- Vehicle tax: The Carbon Emissions-based Vehicle Scheme (CEVS) will be extended by two years, from 1 July 2015 to 30 June 2017. The CEVS surcharge and rebate bands will also be updated, and the maximum rebate and surcharge increased from SGD20,000 to SGD30,000.
- Road tax: a 1-year rebate will be provided for petrol vehicles

effective from 1 August 2015: (i) cars – 20%; (ii) motorcycles – 60%; and (iii) commercial vehicles and taxis – 100%.

- The CPF salary ceiling will be increased from SGD5,000 to SGD6,000.
- The Supplementary Retirement Scheme contribution cap will be increased to SGD15,300 (for Singaporeans/permanent residents) and SGD35,700 (for foreigners).

Changes to Medisave announced

During the Financial Year 2015 Committee of Supply Debate in Parliament on 12 March 2015, the Minister of Health announced the following changes to Medisave under the Central Provident Fund (CPF):

- The Medisave Minimum Sum requirement will be removed with effect from 1 January 2016. CPF members will no longer be required to top-up Medisave when withdrawing monies from their Ordinary and/or Special account at the age of 55.
- From 1 January 2016, the Medisave Contribution Ceiling will be renamed as the Basic Healthcare Sum (BHS). The BHS will be initially set at SGD49,800. Any amount above the BHS will be transferred to the CPF member's Special and Retirement accounts. The BHS amount will be adjusted upwards annually for CPF members below 65 years of age, but will be fixed once the CPF member turns 65 years of age.

VIETNAM

Decree No. 12

Decree No. 12/2015/ND-CP (Decree 12), on the implementation of Law No. 71/2014/QH13 dated 26 November 2014, was issued on 12 February 2015. Decree 12, which is effective from 1 January 2015, supplements and amends a number of tax laws. The main details of the tax measures are summarised below.

Corporate income tax

- Deductible expenses now include:
  - expenses incurred on occupational education and training activities for employees;
  - the interest expense on loans obtained for investment purposes if the company's capital is fully contributed; and
  - actual amount on life insurance incurred for employees. The previously

applicable cap of VND1 million per month per employee has been removed.
- New investment projects in the manufacturing sector are entitled to be taxed at 10% for 15 years subject to certain conditions. Decree 12 clarifies that major manufacturing projects with an investment capital of at least VND6 trillion and which have either an annual revenue of VND10 trillion or 3,000 employees, would be eligible for the incentive. (Note. Decree 12 now allows contract workers with a term of less than one year and part-time employees to be included in arriving at the threshold of 3,000.)
- Decree 12 confirms that tax incentives will not apply to income from trading and service activities implemented outside the economic zones, industrial zones, hi-tech zones and incentivised locations.
- Decree 12 reinstates a number of tax incentives previously available under Law 32/2013/QH13. The tax incentives, which had been abolished, will run for the taxpayer's respective remaining period (as per Decree 218), from the tax year 2015. The incentives generally apply to qualifying enterprises having investment expansion projects and having investment projects in prescribed industrial zones.
- Decree 12 has also extended the list of tax incentive entitlement areas.
- Decree 12 appears to introduce a new regulation to tax income from the capital transfer of foreign entities, i.e. offshore capital transfer transactions "irrespective of the place of business". However, pertinent details on the scope and administration of this regulation are lacking and more guidance is thus required.
- Income from processing agriculture and aquaculture products may be exempt from CIT subject to conditions. Decree 12 also supplements the application of the tax rate of 10% for income from the processing of agriculture, forestry and aquaculture products in areas with difficult socio-economic conditions and

15% for income from agriculture and aquaculture activities in other areas.

Personal income tax

Individuals carrying on a business are subject to PIT at the following deemed rates, depending on the industry in question (**Table 1**):

- One-off relocation allowances provided to Vietnamese citizens returning to Vietnam upon completion of their long-term overseas assignments will be exempted from PIT.
- Decree 12 also provides guidance on withholding obligations for the taxable benefit of life insurance premiums (excluding voluntary pension insurance) and other non-compulsory insurance of a cumulative nature purchased by the employers for their employees.
- A deduction not exceeding VND1 million is permitted for voluntary pension fund contributions.
- Vietnamese tax residents working overseas are entitled to deduct compulsory insurance contributions made in the work country.
- Employer-provided housing and other related benefits do not constitute taxable income if they are provided in designated industrial or hardship zones.
- Income derived from capital investment made by owners of a private entity or one-member limited liability companies will not be subject to PIT if CIT has been declared and paid on the same income.
- Taxable income on the transfer of securities and real estate will be determined based on the one-off transfer price. Such income will be taxed at deemed rates of 0.1% and 2% respectively. The option to pay tax based on the net profit is no longer available.
- 10% withholding tax is applicable on insurance provided by the employer or voluntary insurance benefits by either the employer or insurance provider.
- Lottery companies, insurance companies and multilevel marketing companies paying their agents an annual commission amounting to VND100 million or more are responsible for withholding PIT on such payments.

Value added tax

Circular No. 26/2015/TT-BTC (Circular 26) was subsequently issued on 27 February 2015 with further guidance in respect of VAT. The main details of the measures from both Decree 12 and Circular 26 regarding VAT are summarised below and are derived from Decree 12 unless otherwise stipulated.

- Fertilizers, livestock feed and equipment exclusively used for agricultural production are not subject to VAT. Previously, a VAT rate of 5% was applicable. Additionally, the input VAT relating to these goods will not be creditable but deductible for corporate income tax (CIT) purposes instead.
- Cigarettes, spirits and beer which are imported and subsequently re-exported shall not be entitled to output VAT of 0%.
- Enterprises which undergo dissolution, bankruptcy or termination before commencement of operations and which did not generate output VAT from the main business activities are not required to adjust the credited/ refunded input VAT. Circular 26 clarifies that where output VAT is generated, any refunded input VAT must be repaid to the tax office. The recovered amount shall not include input VAT on disposed assets. Further guidance is expected on the tax treatment of the transfer of investment projects, disposal of assets of the investment projects or a change in business purpose.

Nature of Business	Rate (%)
Leasing/rental	5.0
Insurance/multi-level marketing/lottery agent	5.0
Distribution/supply of goods	0.5
Services, construction without materials	2.0
Production, transportation, services associated with goods, construction with materials	1.5
Other business activities	1.0

Table 1

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

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

INCOME TAX

Income Tax (Exemption) Order 2015 [P.U. (A) 40/2015]

Income Tax (Exemption) Order 2015 [P.U.(A) 40/2015], gazetted on 5 March 2015, provides an income tax exemption on the withdrawal from a deferred annuity by an individual before reaching the age of 55 (early withdrawal), on schemes contracted from 1 January 2014 until 31 May 2014, with an insurer carrying on a life business or a takaful operator carrying on a family takaful business licensed under the Financial Services Act 2013 or Islamic Financial Services Act 2013 respectively. The Order also provides that Section 109G of the Income Tax Act 1967 (ITA) (that imposes an 8% withholding tax on any withdrawal of private retirement schemes' contributions before the age of 55, other than by reason of permanent total disablement, serious disease, mental disability, death or permanently leaving Malaysia) will not apply to the income exempted under this Order. The Order takes effect from the year of assessment (YA) 2014.

Income Tax (Exemption) (Amendment) Order 2015 [P.U. (A) 42/2015]

Income Tax (Exemption) (Amendment) Order 2015 [P.U.(A) 42/2015], gazetted on 9 March 2015, amends the Income Tax (Exemption) (No. 3) Order 2014 [P.U. (A) 167/2014] and is deemed to have come into operation on 1 January 2013. Paragraph 3(1) of the Income Tax (Exemption) (No. 3) Order 2014 [P.U. (A) 167/2014] provides an income tax exemption on the aggregate income of a qualifying angel investor for the basis period in the second YA following the YA in which a qualifying investment is made. The 2015 Amendment Order substitutes an amended Paragraph 3(2), to clarify that the aggregate income referred to in Paragraph 3(1) shall be the amount equal to the amount of the investment made by the angel investor in an investee company. The earlier Exemption Order had provided that the amount of income tax exempted under Paragraph 3(1) shall be equal to the amount of the investment made in an investee company.

Income Tax (Exemption) (No. 2) Order 2015 [P.U. (A) 50/2015]

Income Tax (Exemption) (No. 2) Order 2015 [P.U.(A) 50/2015], gazetted on 19 March 2015, provides an income tax exemption to a qualifying Multimedia Super Corridor (MSC) status company on 70 per cent of the statutory income derived from a qualifying activity for a period of five years beginning from the date determined by the Minister of Finance. The exemption period may be extended for another period of five years and the application for extension shall be made not later than 90 days before the expiry of the initial exemption period. Where the exemption period is extended, for the second five-year exemption period, the income tax exemption will be increased to a 100% income tax exemption on the statutory income derived from the qualifying activity. The Order takes effect from the YA 2015.

Income Tax (Exemption) (No. 3) Order 2015 [P.U. (A) 61/2015]

Income Tax (Exemption) (No. 3) Order 2015 [P.U.(A) 61/2015], gazetted on 30 March 2015, provides an income tax exemption on gains or profits derived, in lieu of interest, from *sukuk wakala* in accordance with the principle of Wakala Bil Istithmar. The Order also provides that Section 109 of the ITA (that imposes a 15% withholding tax on interest paid or credited to a non-resident person which is derived from Malaysia) will not apply to the income exempted under this Order. The Order takes effect from the YA 2015.

Income Tax (Deduction for Training Costs under Skim Latihan 1Malaysia for Unemployed Graduates) (Amendment) Rules 2015 [P.U. (A) 53/2015]

Income Tax (Deduction for

Training Costs under Skim Latihan 1Malaysia for Unemployed Graduates) (Amendment) Rules 2015 [P.U.(A) 53/2015], gazetted on 24 March 2015, amend the Income Tax (Deduction for Training Costs under Skim Latihan 1Malaysia for Unemployed Graduates) Rules 2013 [P.U.(A) 260/2013] and take effect from the YA 2015. The Rules provide a double deduction to a qualifying company in respect of expenses incurred for conducting the 1Malaysia training scheme (SL1M) approved by the Economic Planning Unit under the Prime Minister's Department (EPU) for a Malaysian unemployed graduate (trainee). Paragraph 3(5)(a) of P.U.(A) 260/2013 provides that interested companies should submit their applications and proposed programme of 8-12 continuous months to the EPU for approval (date of approval begins from 1 June 2012 until 31 December 2016). The 2015 Amendment Rules substitute an amended Paragraph 3(5)(a), to extend the approval period from 31 December 2016 to 31 December 2020.

2015 Tax Audit Framework

- The IRB has posted on its website a 2015 Tax Audit Framework in Bahasa Malaysia, titled "*Rangka Kerja Audit Cukai (Pindaan 1/2015)*" that takes effect from 1 February 2015. The new audit framework replaces the previous Tax Audit Framework (Part 1) that was effective on 1 April 2013. The content of the new tax audit framework is broadly similar to that of the earlier audit framework. Some of the important updates are as follows:
    - Includes Section 39(1A) of the ITA
    - Timeframe for tax audit settlement extended from three to four months
    - Includes the "Monitoring Deliberate Tax Defaulters (MDTD) Programme"
    - Change in the timeframe for the concessionary penalty rates for voluntary disclosure after a desk audit, i.e. the 35% rate is only applicable when the voluntary disclosure is made within 21 days after the letter of request for documents is issued.

Guidelines on Mutual Agreement Procedure

The IRB has recently issued the Mutual Agreement Procedure Guidelines to provide guidance on obtaining assistance from the Malaysian Competent Authority by persons that fall within the scope of an effective tax treaty that Malaysia has with its treaty partners. The Guidelines also provide additional guidance on the application for Bilateral Advance Pricing Arrangement (BAPA) and Multilateral Advance Pricing Arrangement (MAPA) as contained in the Advance Pricing Arrangement (APA) Guidelines.

Compulsory to use the correct business codes in ITRFs

The IRB, vide a letter dated 5 February 2015 addressed to all relevant professional bodies, informed that it is compulsory to use the correct business codes in the income tax return forms (ITRF) of companies and individuals with business income. The accurate business codes should be based on the Department of Statistics Malaysia's Malaysian Standard Industrial Classification (MSIC) codes. Failure to furnish correct and accurate information will result in the rejection of the ITRF by the IRB and action will be taken pursuant to Section 112 of the ITA.

Guideline on imposition of penalty under Section 112(3)

The IRB has issued an operational guideline in Bahasa Malaysia, titled *"Pengenaan Penalti di Bawah Seksyen 112(3) Akta Cukai Pendapatan 1967 (GPHDN 1/2015)"*, dated 5 March 2015, to explain the penalties that will be imposed under Section 112(3) of the ITA where a taxpayer fails to furnish its tax return within the deadlines set out in Sections 77 and 77A of the ITA. Section 112(3) of the ITA provides that if no prosecution is carried out, the Director-General of Inland Revenue ("DGIR") may impose a penalty equal to treble the amount of tax payable before any set-off, repayment or relief, on taxpayers who fail to comply with Sections 77(1) or 77A(1) of the ITA.

Guideline for income tax deduction on GST training costs

The Ministry of Finance (MoF) has issued a guideline in Bahasa Malaysia, titled "*Garis panduan bagi mendapat pengesahan JKDM ke atas latihan yang layak bagi tujuan potongan cukai pendapatan di bawah kaedah-kaedah cukai pendapatan (potongan bagi kos yang berhubungan dengan latihan untuk pekerja bagi pelaksanaan cukai barang dan perkhidmatan) 2014*". The objectives of the guideline are to (1) provide clarification to companies/employers in identifying the approved training programmes that qualify for the double deduction incentive; and (2) to ensure that the training content relates wholly to the implementation of the Goods and Services Tax (GST).

Guidelines on four new tax incentives which were announced in the 2015 Budget

On 6 April 2015, the Ministry of International Trade and Industry announced the details of the following four new tax incentives that were introduced in the 2015 Budget:

- Incentives for less developed areas
- Incentive for industrial area management
- Capital allowance to increase automation in labour-intensive industries
- Incentive for the establishment of principal hub

Some of the key details of each of the four incentives are set out below:

Incentives for less developed areas

- 100% income tax exemption for up to 15 years of assessment (5+5+5), commencing from the first YA that the company derives statutory income; or
- An investment tax allowance of

100% of the qualifying capital expenditure incurred by the company within a period of 10 years, which can be offset against 100% of statutory income for each YA
- Stamp duty exemption on transfer or lease of land or building used for development in relation to manufacturing and services activities
- Withholding tax exemption on fees for technical advice, assistance or services or royalty in relation to manufacturing and services activities up to 31 December 2020
- Import duty exemption on raw materials and components, machinery and equipment that are not produced locally and which are to be used directly in the manufacturing or services activities

Incentive for industrial area management

- 100% income tax exemption on statutory income for five years, commencing from the date the company commences its qualifying activities

Capital allowance to increase automation in labour-intensive industries

- 200% of automation capital allowance will be provided on the first RM4 million expenditure incurred within YA 2015 to 2017 (and including expenditure in 2014, if any) for high labour-intensive industries such as rubber products, plastics, wood, furniture and textiles.
- 200% of automation capital allowance will be provided on the first RM2 million expenditure incurred within YA 2015 to 2020 (including expenditure in 2014, if any) for other industries that do not fall under those in the first bullet point above.

Incentive for the establishment of principal hub

- An approved principal hub is eligible for a three-tiered corporate tax rate as shown below. The applicable tax rate will be based on the extent of the activities and commitments of the principal hub.

3-tier incentive	Tier 3		Tier 2		Tier 1	
Blocks (years)	5	+5	5	+5	5	+5
Tax rate	10%		5%		0%	

Table 1

LABUAN

Guidelines on the establishment of Labuan International Waqf Foundation

- The Labuan Financial Services Authority (FSA) has issued "Guidelines on the Establishment of Labuan International Waqf Foundation" that came into effect on 1 March 2015. The Guidelines outline the registration procedures and the regulatory requirements for an international waqf foundation in the Labuan International Business and Financial Centre (IBFC). The Guidelines also promote best practices in managing waqf assets that are in the interest of the beneficiaries and are in accordance with the intentions of the founder.

Guidelines on the establishment of Labuan trust and Islamic trust

The Labuan FSA has issued "Guidelines on the Establishment of Labuan Trust and Islamic Trust" that come into effect on 1 August 2015. The Guidelines will supersede the "Guidelines on Shariah Compliant Offshore Trust in Labuan International Business and Financial Centre (IBFC)", which was issued on 24 July 2008. The Guidelines are issued to provide guidance on the creation and regulation of Labuan trusts and Labuan Islamic trusts.

CUSTOMS AND EXCISE DUTIES

Customs (Anti-Dumping Duties) Order 2015 [P.U. (A) 24/2014]

The Order provides for the anti-dumping duties to be levied and paid by the importers in respect of the goods specified in columns (2) and (3) of the Schedule, exported from the countries specified in column (4) into Malaysia by the exporters or producers specified in column (5), at the rates specified in column (6). This Order has effect for the period of five years from 14 February 2015 to 13 February 2020.

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

STAMP DUTY

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2015 [P.U. (A) 49/2015]

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2015 [P.U.(A) 49/2015] was gazetted on 18 March 2015 and came into operation on the same date. The Order provides that any tax payable under the ITA on the money payable in respect of any agreement, note, instrument and document in relation to *sukuk murabahah* guaranteed by the government of Malaysia shall be remitted in full. Also remitted is any stamp duty payable under the Stamp Act 1949 in relation to the said instruments.

(14 February 2015 to 31 March 2015) and goods and services tax (from 1 April 2015 to 13 February 2020).

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

Customs Duties (Amendment) Order 2015 [P.U. (A) 39/2015]

The Order provides for an amendment in the First Schedule within the Customs Duties Order 2012 [P.U. (A) 275/2012] and is deemed to have come into operation on 10 March 2015.

The Order provides for a deletion of the subheading 29.03.77 630 and the particulars relating to it, in relation to heading 29.03 and a substitution of the words "20% with the words "15%" for some of the subheadings mentioned in the Order.

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

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2015 [P.U. (A) 43/2015]

The Order provides for amendments in the First Schedule and Second Schedule of the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2015 [P.U. (A) 277/2012], which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 10 March 2015.

The amendments made in the First Schedule are substitutions of some Chapters in relation to Annex 3 Product Specific Rules and the particulars relating to them as well as the substitution of Attachment 1 Substantial Transformation Criterion for Textiles and Textile Products with the attachment provided under Para 2 (b) of the Order. The other amendment made in the First Schedule is in relation to Annex 8 Operational Certification Procedure for The Rules of Origin under Chapter 3 in Rule 10, by substituting paragraph 1 with the paragraph stated under Para 2 (c) of this Order.

The Second Schedule is amended by substituting some of the subheadings and particulars relating to it with those provided in this Order.

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

Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China) (ASEAN Harmonised Tariff Nomenclature) (Amendment) Order 2015 [P.U. (A) 44/2015]

The Order provides for an amendment in the First Schedule and Second Schedule of the Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China) (ASEAN Harmonised Tariff Nomenclature) Order 2014 [P.U. (A) 248/2014], which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 10 March 2015.

The principal Order is amended in Part 1 of the First Schedule, in Rule 6, by substituting the words "Appendix A" with the words "Attachment B".

The principal Order is amended in the Second Schedule in relation to heading 29.03 by deleting subheading 2903.77.00 25 and the particulars relating to it. Further amendments made to the Second Schedule relates to the substitutions of subheadings and the particulars relating to it under heading 29.21, 39.17, 39.20, 39.21, 40.08, 57.04, 58.01, 70.03, 70.04, 70.05, 72.08, 72.11, 72.16, 73.15, 74.13, 84.18, 84.31, 84.80, 85.39, 87.11, 90.30, 96.19 and 97.01, and substitution of symbols and the placement of symbols under heading 48.02, with those that are provided for in this Order.

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

Customs (Anti-Dumping Duties) (No. 2) Order 2015 [P.U. (A) 45/2014]

The Order provides for the anti-dumping duties to be levied on and paid by the importers in respect of the goods specified in columns (2) and (3) of the Schedule exported from the countries specified in column (4) into Malaysia by the exporters or producers specified in column (5), at the rates specified in column (6). This Order has effect for the period of five years from 14 March 2015 to 13 March 2020.

The classification of goods specified in the Schedule shall comply with the Rules of Interpretation in the Customs Duties Order 2012 [P.U. (A) 275/2012]. The imposition of the anti-dumping duties under this Order is without prejudice to the imposition and collection of import duties, sales tax (14 March 2015 to 31 March 2015) and goods and services tax (from 1 April 2015 to 13 March 2020).

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

Customs (Amendment) Regulations 2015 [P.U. (A) 51/2015]

The Regulations provide for an amendment in the Second Schedule within the Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have come into operation on 1 April 2015.

The Regulations provide for amendments in Part I, by substituting Form Customs No. 1, 2, 3, 8 and 9 with the forms appended under subparagraph 2 (a) of the Regulations. Further amendment provided by the Regulations is in relation to Part II, by substituting Form JKED No.2 with the form appended under subparagraph 2 (b) of the Regulations.

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

Customs (Amendment) (No. 2) Regulations 2015 [P.U. (A) 83/2015]

The Regulations provide for an amendment in the First Schedule within the Customs Regulations 1977 [P.U. (A) 162/1977] and is deemed to have come into operation on 6 May 2015.

The Regulations provide for amendments in Part V of the First Schedule, by deleting the word "Ipoh" and the particulars relating to it, in relation to the heading "Inland Customs Station".

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

GOODS AND SERVICES TAX

Goods and Services Tax (Amendment) Regulations 2015 [P.U. (A) 56/2015]

The Regulations provide for amendments within the Goods and Services Tax Regulations 2014 [P.U. (A) 190/2014], which are referred to as the "principal Regulations" in these Regulations and are deemed to have come into operation on 30 March 2015 except for Regulations 3, 4, 5 and 6. Regulations 3, 4, 5 and 6 are deemed to have come into operation on 1 April 2015.

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

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

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

Goods and Services Tax (Exempt Supply) (Amendment) Order 2015 [P.U. (A) 57/2015]

The Order provides for amendments in the Second Schedule within the Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014], which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 30 March 2015.

The principal Order is amended in the Second Schedule in relation to sub-item 14 (b) 19 by inserting the words "or skills training provided by the skills training provider who conducts approved and accredited program under the National Skills Development Act 2006 [Act 652]" after the words "Private Higher Educational Institutions Act 1996 [Act 555]"; by substituting sub-item 16 (c) (iv) and item 20 with the sub-item and item provided in the Order under sub-paragraph 2 (b) and 2 (c) respectively; and by deleting sub-item 21 (c) and item 25.

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

Goods and Services Tax (Zero-Rated Supply) (Amendment) Order 2015 [P.U. (A) 58/2015]

The Order provides for amendments in the First Schedule and Second Schedule within the Goods and Services Tax (Zero-Rated Supply) Order 2014 [P.U. (A) 272/2014], which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 30 March 2015.

The principal Order is amended in the First Schedule in relation to sub-item 6 (1) by inserting the words "or the Water Ordinance 1994 [Sarawak Cap. 13]" after the words "Water Services Industry Act 2006 [Act 655]"; by deleting the word "yang" after the word "seseorang" in item 8 in the national language text; and by substituting the Appendix in the principal Order with the Appendix in the Order.

The principal Order is amended in the Second Schedule in relation to item 3, by substituting sub-item 3 (1) in the principal Order with sub-item 3 (1) in the Order; by inserting the words "issued and" after the words "Capital Markets and Services Act 2007 [Act 671]" in sub-item 12 (b) (iii) ; and by substituting item 24 in the principal Order with item 24 in the Order.

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

Goods and Services Tax (Relief) (Amendment) Order 2015 [P.U. (A) 59/2015]

The Order provides for amendments of paragraph 3, paragraph 5 and First Schedule within the Goods and Services Tax (Relief) Order 2015 [P.U. (A) 273/2014], which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 30 March 2015.

The principal Order is amended in paragraph 3 by inserting after the word "importing" the words "investment precious metal as specified in sub-item 4 (1) of the First Schedule to the Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014] or",; and in paragraph 5 by substituting sub-paragraph 5 (a) in the principal Order with sub-paragraph 5 (a) in the Order.

The First Schedule in the principal Order is amended in relation to item 6, by substituting the words "hospital established" with the words "healthcare facilities registered or licensed"; in item 13, column (4), paragraph (c), by substituting the word "principle" with the word "principal"; by inserting after item 16, the items in the Order; by substituting sub-paragraph (a) in the principal Order with sub-paragraph (a) in the Order in item 22 column (4); by substituting item 26 in the principal Order with item 26 in the Order; by inserting after the semicolon the word "and" in item 28 column (4) paragraph (a), by substituting the words "; and" with a full stop in paragraph (b), and by deleting paragraph (c); by substituting paragraphs (a) and (b) in the principal Order with the paragraph in the Order in item 29 column 4; and by inserting item 30 after item 29.

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

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

Siti Fatimah Mohd Shahrom

CASE

Ryoshindoh Manufacturing Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (High Court)

FACTS

The taxpayer was part of Mitsubishi's group of companies. The taxpayer was also the contract manufacturer for Mitsubishi. The taxpayer produced precision dual gauge and manufactured and produced copper coils and copper alloy.

After a field audit, the IRB refused the following expenditure:

(a) capital allowance on the capital expenditure totalling RM4,950 for an earth chamber on the ground that it was not an industrial building or part of an industrial building; and

(b) deduction under Section 33(1) of the ITA for payment of RM2,026,342 for the defective dual gauge and copper coils to Mitsubishi Shindoh Co Ltd, for the Year of Assessment 2004 on the ground that such payments were not made to produce income of the taxpayer.

The factory of the taxpayer was built in the year 1997, whereas the "earth chamber" was only built in the year 2001. It is to be noted that the "earth chamber" was separated from the factory and the two were connected through a copper coil.

The taxpayer manufactured products for Mitsubishi Shindoh according to the directions and specifications of the latter. Subsequently, Mitsubishi Shindoh sold the sold products to its customers.

In an event where Mitsubishi Shindoh received any complaints in relation to the products sold, the said products will be returned to the taxpayer for investigation. Where it was found that any fault or malfunction to the products was caused by the taxpayer's manufacturing process, Mitsubishi Shindoh will compensate the losses suffered by its customers and subsequently claimed warranties from the taxpayers.

Issues

1) Whether the income tax assessment raised with a six year delay was valid
2) Whether the capital expenditure totalling RM4,950 for an earth chamber was eligible for capital allowance
3) Whether the payments for defective dual gauge and copper coils to Mitsubishi Shindoh Co Ltd, for the Year of Assessment 2004 were allowable deduction under Section 33(1) of ITA

DECISION

Issue 1

The High Court held that it was not disputed that the assessment was raised after more than six years and pursuant to Section 91(3) of ITA, IRB must show negligence on the part of the taxpayer. However the SCIT did not find any evidence that the taxpayer was negligent and the allegation of IRB remained as such *(Ketua Pengarah Hasil Dalam Negeri v Debir Desa Development Sdn Bhd (No R1-14-20-07))*. As such, the assessment which was delayed for six years was not valid.

Issue 2

Although the earth chamber was fixed after the factory was built, the High Court held that it could still be considered as part of the factory based on the "entirety test" as decided in the cases of *Director-General of Inland Revenue v C Company of Malaysia Bhd [1980] 10 MLJ 64* and *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturing Sdn Bhd (CA)* .This is because without the earth chamber, the taxpayer's factory would not be able to operate effectively. The earth chamber functions to protect the safety of the factory and the workers therein from potential fire caused by lightning. Given the considerations above, the taxpayer was eligible to claim for capital allowance for the capital expenditure incurred.

Issue 3

The High Court held that the SCIT erred in taking into consideration the Marketing Agreement dated 1.11.2002. The Marketing Agreement had nothing to do with payment of warranty and was only related to Mitsubishi Shindoh marketing products in Southeast Asia. It was the Quality Assurance Agreement which was the relevant agreement to be referred to. Moreover, the production of the taxpayer's goods was part of the business process of the taxpayer and if defective, the customers ought to be compensated. As such, the payments for the defective dual gauge and copper coils to Mitsubishi Shindoh Co Ltd, for the Year of Assessment 2004 were allowable deductions under Section 33(1) of ITA.

Note: The IRB has appealed to the Court of Appeal.

CASE

TSD Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Special Commissioners of Income Tax)

FACTS

The taxpayer is a company incorporated on 4.5.1990 in Malaysia. The taxpayer's principal activities are property development, investment in real properties, renting and leasing of real estate. The taxpayer specifically constructed and owns a building rented out to Sekolah Seri O. Sekolah Seri O is a premier private school in Johor Bahru. The school is licensed and approved by the Minister of Education.

The taxpayer subjects the annual rental received from Sekolah Seri O as its business income under Section 4(a) of the Income Tax Act 1967. The construction of the building was completed in 2008 and it has been used as a school since then. The taxpayer incurred the sum of RM7,118,417.37 for the construction of the school building.

Accordingly, on 25.8.2011, the taxpayer filed a notice of appeal vide Form Q against their own assessment. Form Q was forwarded by IRB to the Special Commissioners of Income Tax ("SCIT") on 15.2.2012.

ISSUE

Whether the taxpayer is entitled to claim industrial building allowance pursuant to paragraph 42B of Schedule 3 read together with paragraph 60 of the same Schedule of the Income Tax Act 1967 (" ITA")

DECISION

This appeal raises the crux issue that is centred on the correct construction of paragraphs 42B and 60 of Schedule 3 of the ITA.

Paragraph 42B reads:

"Where in the basis period for the year of assessment a person has for the purpose of a business of his incurred capital expenditure on the construction or purchase of a building for a school or an educational institution approved by the Minister of Education or Minister of Higher Education or any relevant authority, that building shall be treated as an industrial building for the purpose of that business and there shall be substituted for the amount of the allowance which would otherwise fall to be made to him under paragraph 12, 16 and 24 an allowance is equal to one-tenth of the qualifying expenditure for that year and for each of the nine following years of assessment."

Paragraph 60 reads:

"Where a person who owns a building grants a lease thereof and that building is in use as an industrial building, then, in the application of this Schedule to that person in relation to that building any reference to a business of his shall be taken to be a reference to the source in respect of any income to which that person is entitled under the lease, and any reference to a basis period (in relation to any such reference to a business) shall be taken to be a reference to the basis period in relation to that source."

After giving due consideration to the facts, documents and admissions of fact and lengthy submissions the SCIT were unanimously of the considered view that the taxpayer was entitled to the Industrial Building Allowance (IBA) as claimed. Consequently, SCIT ordered that the appeal be allowed and the relevant assessment appealed against be amended accordingly to give effect to our decision.

The SCIT remarked that it had been greatly assisted by the decision of the Special Commissioners of Income Tax in *JTSB v Ketua Pengarah Hasil Dalam Negeri* on the interpretation of paragraph 42B of ITA. In the said case the learned Special Commissioners had unanimously ruled in favour of the taxpayer and held that the IRB had no legal basis to impose the requirement that the school must be operated by the taxpayer who constructed and owned the school building in order to claim industrial building allowance.

Flowing from the above, SCIT can do no better but to refer in extenso, to passages in the above said Case Stated and reproduce them verbatim where appropriate, on the basic principles or statutory construction pertaining to and confining in our present case, to paragraph 42B of the ITA:

"Certain basic principles of statutory construction must be stated first as a background to a construction of paragraph 42B and 42C Schedule 3 of the Act. The principles may be summarised as follows:

(i) No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him…and I think the only safe rule is to look at the words of the enactment and see what is the intention expressed by those words.

(ii) My Lords, there is a maxim of income tax which, though it

may sometimes be over-stressed, yet ought not to be forgotten. It is that subject is not to be taxed unless the taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion.

The correct approach to be adopted by the court when interpreting a taxing statute is that set out in the advise of the Privy Council delivered by Lord Donavon in *Mangin v Inland Revenue Commissioner (1971) AC 739.*

"First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidances device. As Turner J said in his (albeit dissenting) judgement in Marx v Inland Revenue Commissioner [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statute.

Secondly…one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used, (Per Rowlett J in Cape Brandy Syndicate v Inland Revenue Commissioner [1921] KB 64 at 71, approved by Viscount Simons LC [1945] 2 ALL ER 499, [1946] AC 119.

Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reason which led to its being passed may be used as an aid to its construction."

In the case of *Cape Brandy Syndicate v CIR 12 TC 358*, Rowlett, J said,

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"

The purpose of Parliament in enacting paragraph 42B and 42C was to encourage institutions of higher learning. Section 17A of the Interpretation Acts 1948 and 1967 inquires the court to adapt the purpose approach.

After setting out the common law principle, the SCIT was firmly of the view that paragraph 42B of Schedule 3 does not require the taxpayer to operate the school in order to qualify for industrial building allowance for the school building. Further, the SCIT cannot but fully agree with the taxpayer's contentions as revealed that even if the taxpayer does not operate the school, yet the taxpayer's lessee i.e. EY Sdn Bhd does!

Next, the SCIT did not agree with nor accept IRB's contention that the license was issued under the name of Puan Napisah not to EY Sdn Bhd. In rebuttal, the SCIT was of the considered view that there is no law that bars Puan Napisah from forming or causing to form a company to operate the license given to her. Indeed, a company EY Sdn Bhd was formed of which Puan Napisah is also a shareholder of EY Sdn Bhd which operates the school.

SCIT held that the Executive's intention and the provisions of the ITA do not bar the formation of 'joint ventures' between companies to undertake a business venture for the production of their respective income. In the present case, the taxpayer can be liken to be the 'capital-provider' providing the school building to the lessee- EY Sdn Bhd, the 'education-provider' to operate the school. To come to specifics, the provisions of paragraphs 42B and 60 of Schedule 3 do not expressly state nor by necessary implication imply that such an arrangement as found in the present appeal between the taxpayer and EY Sdn Bhd is prohibited. The SCIT was therefore not convinced by the IRB's myopic stand that because the taxpayer is not the licensee of the school, nor engaged in the business of providing education as one of its principal activities, so the taxpayer is not entitled to the IBA.

Note: The High Court affirmed the SCIT's decision and the IRB has appealed to the Court of Appeal.

Siti Fatimah Mohd Shahrom** is a senior associate with Lee Hishammuddin Allen & Gledhill where she specialises in Corporate Tax & GST advisory. Siti also regularly appears before the Special Commissioners of Income Tax and the superior courts. She can be contacted at **sfs@lh-ag.com.

OTHER BUSINESS DEDUCTIONS

FINES and PENALTIES

Siva Subramanian Nair

Generally speaking, penalties for infractions of the law or those incurred for breaching the law are not allowable because it is imposed on the offender as a personal deterrent and not incurred by him in his character of a trader. For example, if an accountant who does not stop when the traffic lights are red, is issued with a police summons and he settles the fine, the incurrence of that expenditure is absolutely unrelated to his employment as an accountant nor his practice as a consultant.

Candidates will note that the Income Tax Act 1967 does not specifically provide any provisions relating to the deductibility of such expenditure except for the general rule in Section 33(1). Therefore, we should look at precedents established in case law to throw light on whether such expenses would rank for a deduction.

CIR V EC WARNES & CO LTD [1919] 12 TC 227

FACTS OF THE CASE

In this case the company, which carried on the trade of oil merchants, had been sued for a penalty under Section 5(1) Customs (War Powers) Act 1915. This was in respect of the breach of certain orders and proclamations relating to the requirements of the Board of Customs and Excise with respect to a consignment of oil shipped by the company to Norway.

The company paid a legal fee of £560 and a mitigated penalty of £2,000 (to cover the costs of the Crown) and on all imputations as to the company's moral culpability being withdrawn and claimed a deduction for the penalty and its legal costs against its trading profits.

DECISION OF THE COURTS

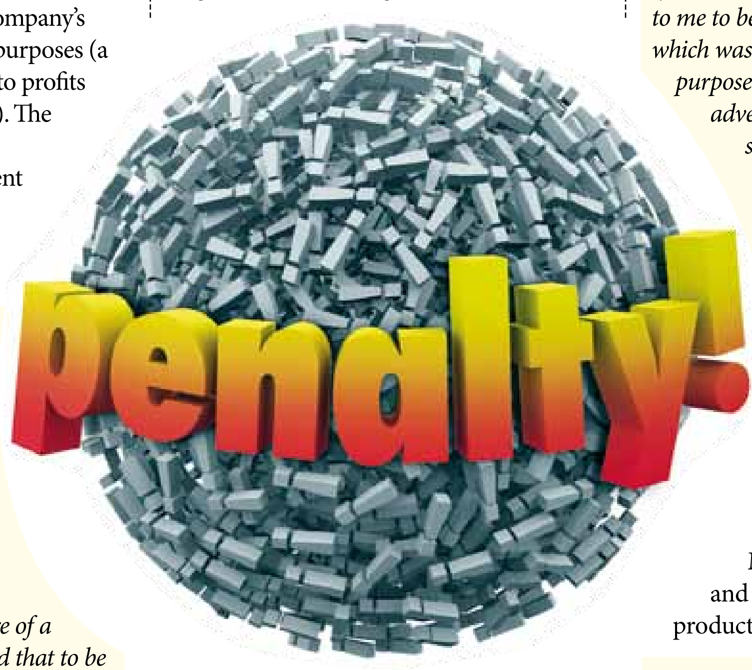
The General Commissioners allowed the expenses claimed but the High Court decided that the mitigated penalty and costs were not losses connected with and arising out of the company's trade. They were therefore not deductible in arriving at the profits of the company's trade for Excess Profits Duty purposes (a tax which applied at the time to profits over and above a certain level). The judge Rowlatt J opined that a penal payment for infringement of the law could not be a loss arising out of the trade. He states:

"…it seems to me that a penal liability of this kind cannot be regarded as a loss connected with or arising out of a trade. I think that a loss connected with or arising out of a trade must, at any rate, amount to something in the nature of a loss which is contemplable, and in the nature of a commercial loss. I do not intend that to be an exhaustive definition, but I do not think it is possible to say that when a fine, which is what it comes to, has been inflicted upon a trading body, it can be said that, that is "a loss connected with or arising out of" the trade within the meaning of this Rule. As I say, it is impossible to say what is such a "loss", but I have a clear view that this is not, and I can say no more than that."

In the very next year there was another relevant case of **CIR V ALEXANDER VON GLEHN & CO LTD [1920] 12 TC 232** which some regard as the case that gave birth to the doctrine of a public policy limitation for income tax deduction purposes.

FACTS OF THE CASE

The company of general produce merchants that exported goods to Russia and Scandinavia, had been sued for penalties for infringing the provisions of the Act in the course of its trade under the in respect of alleged infringements of the Customs (War Powers) Act 1915 in the course of its trade. The actions were settled by payment by the company (without costs). The company incurred legal costs amounting to £1,074 in respect of the proceedings and a compromise penalty of £3,000. The company claimed a deduction for these expenses against their trading profits.



DECISION OF THE COURTS

In the Court of Appeal, the Master of the Rolls, Lord Sterndale, concluded that whether the proceedings against the company were technically criminal was immaterial. He notes:

"…we had several authorities cited to us which seemed to establish that such proceedings as those are not technically criminal proceedings. I do not think that matters… it is in fact … a penalty."

He continues:

" … the expenditure was not a loss connected with the trade, but a fine imposed upon the company personally. The expense was not connected with and did not arise from the carrying on of the trade; it arose from infringing Customs regulations. …This business could perfectly well be carried on without any infraction of the law at all…[and it] does not seem to me to be…a disbursement or expense which was laid out or expended for the purpose of such trade, manufacture, adventure or concern; nor does it seem to me, though this is rather more questionable, to be a sum paid on account of a loss connected with or arising out of such trade, manufacture, adventure or concern."

At the Court of Appeal, Warrington, L J explained that a remote relation to the trade was insufficient to rank for a deduction (even in Malaysia it must be wholly and exclusively incurred in the production of income).

"That the expenditure arises out of the trade I think may well be conceded. It does arise out of the trade, because if it had not been that they were carrying on the trade they would not have had to incur this expenditure; but in my opinion it is not a loss connected with or arising out of the trade. It is a sum which the people conducting the trade have had to pay because in conducting it they have so acted as to render themselves liable to this penalty. It is not a commercial loss, and I think when the Act is talking about a loss connected with or arising out of such trade it means a commercial loss connected with or arising out of the trade……it cannot be said that the disbursement in the present case is made in any way for the purpose of the trade or for the purpose of earning the profits of the trade. The disbursement is made…because the individual who is

conducting the trade has, not from any moral obliquity, but has unfortunately, been guilty of an infraction of the law."

Another point to note was that the incurrence of the penalty was incurred after the profits had been earned. Scrutton L J explained:

'…were these fines and expenditure necessary to earn the profits? Were these fines made or paid for the purpose of earning the profits? The answer seems to me obvious, that they were not, they were unfortunate incidents which followed after the profits had been earned."

More recently we have the case of **McKNIGHT V SHEPPARD [1999] 71 TC 419.**

FACTS OF THE CASE

A stockbroker, was found guilty by the Stock Exchange council's disciplinary committee on four charges of gross misconduct and was suspended for six months on each charge. He was also reprimanded in relation to several findings of ordinary or minor misconduct. Upon appeal, the disciplinary appeals committee, amongst others, replaced the suspensions with fines. Mr. Sheppard incurred legal fees of over £200,000 in connection with the disciplinary proceedings and appeal. The Inspector declined to accept that the fines and fees were deductible.

DECISION OF THE COURTS

The Special Commissioners found that the expulsion of Mr. Sheppard from membership of the Stock Exchange, or suspension for six months, would have been the end of his firm. In fighting the proceedings and appeal and incurring the legal fees, Mr. Sheppard's intention was to preserve his business and accordingly held that the legal fees were deductible but the fines were not.

At the High Court, the Revenue's appeal against deducting the expenses was allowed and Mr. Sheppard's appeal against the disallowance of the fines was dismissed.

The Court of Appeal held that the legal costs were deductible but that a fine or penalty is not deductible because its purpose is to punish the person concerned and it may easily be concluded that the legislative policy would be diluted if that person were allowed to share the burden with the rest of the community by a deduction for the purposes of tax.

There is a literature which suggested that the allowance of a deduction for a fine reduces the ultimate impact or "sting" of the penalty by permitting the taxpayer to reduce the after-tax cost of the penalty, thereby reducing the deterrent value of the penal provision in the statute violated

by the taxpayer. This argument represents the single most persuasive reason for the disallowance of penalty deductions, and rests on the implicit premise that in such matters the tax objective of economic neutrality should be subservient to the general interests of society as reflected in its statutes and regulations.

However, fines and penalties arising through the negligence of employee during the normal performance of the duties of their office are deductible. This is illustrated in the case of **DAY & ROSS LTD. v THE QUEEN (1977) (76 DTC 6433).**

FACTS OF THE CASE

A New Brunswick company engaged in the trucking business was fined $70,153 during the taxation years 1966 to 1971 for violation of provincial highway weight restriction laws. The taxpayer, in computing its net income for the years in question, claimed the amount of the penalties imposed as a deduction and was successful in its claim before the Federal Court, Trial Division.

DECISION OF THE COURT

In reaching its conclusion that the fines paid were deductible, the Court had little difficulty in accepting that the outlay was made for the purpose of producing income for the plaintiff taxpayer as the fines paid by the plaintiff resulted from the day-to-day operation of its transport business and were paid as a necessary expense and were not precluded from deductibility on the basis of any "broader principle" applied to the facts of the case.

In reaching this conclusion the Court was influenced by four elements

(a) tight control was impractical, if not impossible in the highly competitive road transport industry;
(b) the violations were unintentional, in that the taxpayer in many instances

relied on weights declared by customers when loads were picked up en route from factories, potato plants, and fish ponds;

(c) the ready availability of advance overweight permits at the request of a shipper showed that the weight restrictions could easily be overcome; and

(d) the violations were "... not outrageous transgressions of public policy."

Generally candidates should follow the principle that statutory fines and penalties would definitely not qualify a deduction otherwise it would frustrate public policy. Imagine the mockery if a policeman gives you a summons and a tax deduction could be claimed in relation to its settlement. Therefore candidates should note that for examination purposes any indication of fines in relation to income tax, police, army, EPF, Socso, immigration etc. will not be deductible.

Now let us look at some examination questions relating to deductibility of fines and penalties paid.

TAX II JUNE 14 QUESTION 1

Note 11: Motor vehicle expenses:

This includes RM25,000 paid as fines and compounds for various traffic offences during the year.

Solution

The whole amount is not deductible and is added back in arriving at the adjusted income.

TAX IV DECEMBER 2004 QUESTION 6

The Perak Land & Mines Department served a notice on 20 December 2003 requiring Road Con Sdn Bhd to pay a fine of RM20,000 for unlawfully removing sand from state land located near Gopeng on 15 December 2003 without a valid permit issued by the said department. Incidentally Road Con Sdn Bhd had applied on 1 October 2003 for renewal of

its permit for the removal of sand. There was a delay in processing the application for the renewal of the permit. The permit was renewed on 30 January 2004 for a further two years commencing from 1 December 2003.

Candidates were required to state with reasons and by references to the provisions of the ITA and decided cases whether the fine of RM20,000 was tax deductible in arriving at the taxable profits of Road Con Sdn Bhd for the year of assessment 2003:

Solution

Candidates should state that fines imposed for violation of law is not tax deductible. Since removal of sand without valid permit issued by the Land & Mines Department is an offence under the law, Road Con Sdn Bhd cannot claim deduction for the fine of RM20,000. The basis of the disallowance as stated in decided cases is that breach of law is not a trading transaction and is not incurred in the production of income. Candidates may cite the following cases to support their answer:

- **CIR v. Alexander von Glehn Co. Ltd 12 TC 232**
- **CIR v. EC Warnes & Co Ltd 12 TC 227**
- **Robinson v. CIR (1965) NZLR 246**

However, if Road Con Sdn Bhd is able to demonstrate that the offence committed was merely technical since application for renewal of permit had already been made and the renewal permit was issued subsequently covering the period the offence was committed. Furthermore if the offence appears to be something connected and incidental to the business Road Con Sdn Bhd may succeed in getting deduction relying on the decision in *Day & Ross Ltd v The Queen 76 DTC 6 433*

Similarly in **Tax I December 2005 Question 2**, candidates were tested on fines of RM300 for late payment of assessment in relation to rental income.

Solution

Candidates had to disallow a deduction of the fine in arriving at the adjusted rental income for that year of assessment.

That ends our discussion on the deductibility of fines and penalties incurred.

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

FURTHER READING

Choong, K.F. Malaysian Taxation - Principles and Practice, (2015), Infoworld,
Kasipillai, J. A Guide to Malaysian Taxation (2015), Third Edition, McGraw Hill.
Malaysian Master Tax Guide, (2015), CCH Asia Pte. Ltd
Singh, V. Veerinder on Taxation (2013), CCH Asia Pte. Ltd
Thornton, R. Thornton's Malaysian Tax Commentaries, (2015), CCH Asia Pte. Ltd.
Thornton, Richard. 100 Ways to Save Tax in Malaysia for Partners and Sole Proprietors (2012), Thomson Reuters Sweet & Maxwell Asia
Thornton, R. 100 Ways to Save Tax in Malaysia for SMEs (2014), Sweet & Maxwell Asia
Yeo, M.C., Alan. Malaysian Taxation, (2015), YSB Management Sdn Bhd

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: July – September 2015

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JULY 2015								
Workshop: Capital Allowance Maximisation	2 July	9a.m – 5p.m.	Kuala Lumpur	Sivaram Nagappan	400	450	500	8 WS/014
Workshop: Understanding Malaysia Property and Tax Planning Strategy	7 July	9a.m. – 5p.m.	Kuala Lumpur	Dr. Tan Thai Soon	400	450	500	8 WS/020
Workshop: Capital Allowance Maximisation	7 July	9a.m. – 5p.m.	Johor Bahru	Sivaram Nagappan	350	400	450	8 WS/015
Workshop: Capital Allowance Maximisation	29 July	9a.m. – 5p.m.	Malacca	Sivaram Nagappan	350	400	450	8 WS/016
Public Holiday: ***(17 & 18 July – Hari Raya Aidilfitri)***								
AUGUST 2015								
Workshop: Capital Allowance Maximisation	5 Aug	9a.m. - 5p.m.	Penang	Sivaram Nagappan	350	400	450	8 WS/017
NATIONAL TAX CONFERENCE 2015 ***(jointly organised with Lembaga Hasil Dalam Negeri Malaysia)***	25 & 26 Aug	9a.m. - 5p.m.	Kuala Lumpur Convention Centre	Local & Foreign Speakers	Early Bird 1,300 Normal 1,500	Early Bird 1,400 Normal 1,600	Early Bird 1,500 Normal 1,800	25
Workshop: Capital Allowance Maximisation	7 Aug	9a.m. - 5p.m.	Kuching	Sivaram Nagappan	350	400	450	8 WS/018
Workshop: Capital Allowance Maximisation	12 Aug	9a.m. - 5p.m.	Ipoh	Sivaram Nagappan	350	400	450	8 WS/019
Public Holiday ***(National Independence Day :31 August)***								
SEPTEMBER 2015								
Workshop: Managing Income Tax Audits	8 Sep	9a.m. - 5p.m.	Johor Bahru	Renganathan	350	400	450	8 SE/021
Workshop: Accounting Issues for GST	14 Sep	9a.m. - 5p.m.	Kota Kinabalu	Zen Chow	350	400	450	16 WS/024
Workshop: Managing Income Tax Audits	17 Sep	9a.m. - 5p.m	Penang	Renganathan	350	400	450	8 SE/022
Workshop: Managing Income Tax Audits	21 Sep	9a.m. - 5p.m	Malacca	Renganathan	350	400	450	8 SE/023
Workshop: Accounting Issues for GST	21 Sep	9a.m. - 5p.m	Kuching	Zen Chow	350	400	450	8 SE/025
Seminar: Customs Law – Procedures, Audits & Investigations, Appeal Processes & Analysis of Customs Cases	22 Sep	9a.m. - 5p.m	Penang	Saravana Kumar	350	400	450	8 SE/015
Seminar: Customs Law – Procedures, Audits & Investigations, Appeal Processes & Analysis of Customs Cases	28 Sep	9a.m. - 5p.m	Johor Bahru	Saravana Kumar	350	400	450	8 SE/016
Seminar: GST: Challenges & Issues	28 Sep	9a.m. - 5p.m	Kuala Lumpur	Various Speakers	450	500	550	8 SE/014
Training Course for the GST Tax Agent (6 days) GST Examination Day *(subject to RMCD confirmation)*	**4, 5, 6, 11, 12 & 13** **26 Sep**	9a.m. - 5p.m	Petaling Jaya	Royal Malaysian Customs Dept.	2,200 *(fee for 6 days course)*	2,700 *(fee for 6 days course)*	3,000 *(fee for 6 days course)*	JV/010
Public Holiday ***(Malaysia Day : 16 Sep & Hari Raya Aidiladha : 24 Sep)***								

DISCLAIMER : The above registration fees are subjected to 6% GST. The information is correct and accurate at the time of printing. CTIM reserves the right to change the speaker (s)/date (s), venue and/or cancel the events if there is insufficient number of participants. A minimum of 3 days notice will be given.

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Closing Date : 14 August 2015

Conference Fees

* Registration of participants will be confirmed upon receipt of full payment or an acceptable employers guarantee and settlement of previous outstanding dues.
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* Certificate of Attendance will be issued upon full attendance and receipt of full payment.
* Normal rate will be applicable for unpaid early bird registrations after 31 July 2015.

Registration Fee	Early Bird Fee *(with payment before or on 31 July 2015)*		Normal Fee *(after 31 July 2015)*	
	Fee	Nett Fee (inclusive GST of 6%)	Fee	Nett Fee (inclusive GST of 6%)
LHDNM officer / CTIM member	RM1300	RM1378	RM1500	RM1590
Member's Firm Staff Member of Supporting Body Member / Staff of Supporting Sponsor	RM1400	RM1484	RM1600	RM1696
Non-Member	RM1500	RM1590	RM1800	RM1908
Overseas Delegates	Not applicable		RM2800	RM2968

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(As per IC)
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Tel ____________________ Fax ____________________

Email ____________________ Mobile No. ____________________

Personal Assistant *(if any)* ______________________________

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Mandarin Oriental Hotel
Contact Person: Sophia Fong
T: 03-2179 8657
F: 03-2179 8699
E: SophiaF@mohg.com

Traders Hotel Kuala Lumpur
Contact Person: Calvin Chiang
T: 03-2332 9834
F: 03-2332 2672
E: convention.thkl@tradershotel.com

Maya Hotel
Contact Person : Jamie Cheah
T: 03-2711 8866
F: 03-2711 2277
E: reservation@hotelmaya.com.my

Grand Hyatt Kuala Lumpur
Contact Person: Ann Foo
T: 03-2182 1235
F: 03-2182 1222
E: reservation.kuagh@hyatt.com

Impiana Hotel
Contact Person : Syafiq Ridha Ismail
T: 03-2147 1111
F: 03-2147 1028
E: syafiq.ridha@impiana.com

Renaissance Hotel Kuala Lumpur
Contact Person : Aniza Nazri Wong
T: 03-2716 9917
F: 03-2161 5555
E: aniza.nazri@renaissancehotels.com

IMPORTANT NOTES

Reservation can be made by email / facsimile / post but will only be confirmed upon receipt of registration form and payment.

Kindly contact the following Conference Secretariat for more information.

1. Chartered Tax Institute of Malaysia
B-13-1, Block B, 13th Floor, Unit 1
Megan Avenue II
No. 12, Jalan Yap Kwan Seng
50450 Kuala Lumpur, MALAYSIA

   Contact Person
   Ms Yus / Ms Ramya / Ms Jaslina / Mr Jason
   Tel : 03-2162 8989 Ext 121 / 119 / 131 / 108
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2. **Akademi Percukaian Malaysia, LHDNM**
Persiaran Wawasan
43650 Bandar Baru Bangi
Selangor, MALAYSIA

   Contact Person
   Mr Zura Zuwan / Mr Sualni / Ms Ismalina / Ms Suriani
   Tel : 03-8924 3792 / 3642 / 3673 / 3796
   Fax : 03-8925 7005
   E-mail : ntc@hasil.gov.my
   Website : www.hasil.gov.my

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

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

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

Recording
Video / Sound recording is strictly prohibited.

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

DAY 1 TUESDAY, 25 AUGUST 2015

7:30 – 9:00 am	**Registration & Arrival of Guests**
9:00 – 9:10 am	**Arrival of Guest of Honour** **YAB Dato' Sri Mohd Najib Tun Hj. Abdul Razak** *(invited)* *Prime Minister/Finance Minister of Malaysia*
9:10 – 9:20 am	**Welcoming Speech** **Mr Aruljothi Kanagaratnam** *President, Chartered Tax Institute of Malaysia*
9:20 – 9:30 am	**Opening Address** **YBhg Kolonel (K) Tan Sri Datuk Wira Dr. Hj. Mohd Shukor Hj. Mahfar** *Chief Executive Officer, Lembaga Hasil Dalam Negeri Malaysia*
9:30 – 10:00 am	**Keynote Address by Guest of Honour** **YAB Dato' Sri Mohd Najib Tun Hj. Abdul Razak** *(invited)* *Prime Minister/Finance Minister of Malaysia*
10:00 – 11:00 am	**Morning Refreshments/ Tour of Exhibition Booths/ Press Conference**
11:00 – 12:15 pm	**TOPIC 1: Forum: Outlook on Fiscal Policy – Countdown to 2020** Moderator: **YB Tan Sri Dato' Nor Mohamed Yakcop** *Deputy Chairman, Khazanah Nasional Berhad* Panel Members: **Tuan Haji Mohd Esa Abd. Manaf** *Undersecretary, Fiscal & Economics Division, Ministry of Finance* **YBhg Dato' Dr. R. Thillainathan** *Independent Non-Executive Director, Genting Berhad*
12:15 – 12:30 pm	**Question & Answer Session**
12:30 – 2:00 pm	**Networking Lunch & Tour of Exhibition Booths**
2:00 – 3:00 pm	**TOPIC 2: New Initiatives from LHDNM** Moderator: **Ms Yeo Eng Ping** *Co-Organising Chairman, National Tax Conference 2015* Speaker: **YBhg Kolonel (K) Tan Sri Datuk Wira Dr. Hj. Mohd Shukor Hj. Mahfar** *Chief Executive Officer, Lembaga Hasil Dalam Negeri Malaysia* Panel Member: **YBhg Dato' Chua Tia Guan** *Member of the Special Task Force to Facilitate Business of the Prime Minister's Department (PEMUDAH)*
3:00 – 3:15 pm	**Question & Answer Session**
3:15 – 4:30 pm	**TOPIC 3: AEOI & You: Updates and Implications** Moderator: **To be Advised** Panel Members: **Mr Dónal Godfrey** *Deputy Head of the Global Forum Secretariat,* *Organisation for Economic Co-Operation and Development (OECD)* **Ms Khodijah Abdullah** *Deputy Undersecretary,* *Tax Division, Ministry of Finance* **Ms Theresa Goh** *Council Member, Chartered Tax Institute of Malaysia*
4:30 – 4:45 pm	**Question & Answer Session**
4:45 – 5:30 pm	**End of Day 1 & Refreshments**

DAY 2 WEDNESDAY, 26 AUGUST 2015

8:50 – 9:00 am	**Overview of Day 1** **Mr Adzhar Sulaiman** *Co-Organising Chairman, National Tax Conference 2015*
9:00 – 10:15 am	**TOPIC 4: Enhancing Tax Compliance - Issues and Findings** Moderator: **Mr Poon Yew Hoe** *Deputy President, Chartered Tax Institute of Malaysia* Speaker: **YBhg Datuk Mohd Nizom Sairi** *Director, Investigation Department, Lembaga Hasil Dalam Negeri Malaysia* Panel Member: **Mr Soh Lian Seng** *Executive Director, KPMG Tax Services Sdn Bhd*
10:15 – 10:30 am	**Question & Answer Session**
10:30 – 11:00 am	**Morning Refreshments/Tour of Exhibition Booths**
11:00 – 12:30 pm	**TOPIC 5: Cross Border Taxation in ASEAN** Moderator: **Mr SM Thanneermalai** *Council Member, Chartered Tax Institute of Malaysia* Panel Members: **Ms Wan Ramiza Wan Ghazali** *Director, Multinational Audit Division, Lembaga Hasil Dalam Negeri Malaysia* **Mr Basuki Rakhmad** *Tax Expert,* *Directorate General of Taxes, Indonesia* **Mr New Aik Meng** *Group Tax Specialist,* *Corporate Tax-Large Corporations Branch,* *Inland Revenue Authority of Singapore* **Ms Dinh Thi Quynh Van** *General Director, PwC Vietnam*
12:30 – 12:45 pm	**Question & Answer Session**
12:45 – 2:15 pm	**Networking Lunch & Tour of Exhibition Booths**
2:15 – 3:45 pm	**TOPIC 6: Tax Cases Update** Moderator: **YBhg Tan Sri Abdul Gani Patail** *Attorney General, Attorney General's Chambers of Malaysia* Speaker: **Mr Abu Tariq Jamaluddin** *Director, Dispute Resolution Department, Lembaga Hasil Dalam Negeri Malaysia* Panel Member: **Ms Goh Ka Im** *Partner, Shearn Delamore & Co*
3:45 – 4:00 pm	**Question & Answer Session**
4:00 – 5:00 pm	**TOPIC 7: Round Table Discussion on Current Issues Affecting Taxpayers** Moderator: **YB Datuk Chua Tee Yong** *Deputy Finance Minister II, Ministry of Finance* Panel Members: **Mr Mahmood Daud** *Director, Tax Operation Department* *Lembaga Hasil Dalam Negeri Malaysia* **Ms Renuka Bhupalan** *Council Member* *Chartered Tax Institute of Malaysia*
5:00 – 5:30 pm	**End of Conference & Refreshments**

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