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CHARTERED TAX INSTITUTE OF MALAYSIA

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THE MALAYSIAN 2017 BUDGET

The Malaysian 2017 Budget was tabled in Parliament on 21 October 2016.

Unravelling Reimbursements and Disbursements for GST Purposes

Taxing Offshore Services – Back to the Old Regime?

Exploring the New Malaysian Corporate Tax Rates for 2017 and 2018

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

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Tax Guardian

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Tax Guardian

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January 2017

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

FUTURE TRENDS

I would like to take this opportunity to wish everyone a Happy New Year 2017! The weeks leading up to 2017 have certainly been eventful with the "Trump Effect" affecting Malaysia just like all emerging economies, increasing uncertainties in trade relationships with other countries, especially the United States of America (USA). Funds are being pulled out from other countries and being diverted to the USA. A major consequence is the Malaysian Ringgit depreciation and volatility that has affected every household in that price increases are being seen across the board on imported items. It will take several months for the future to be clearer. You may be asking how this will affect tax professionals. Several outcomes can be predicted. The general economic uncertainty will pervade all economic sectors in that there will be a lot of stress on cash flows. Accountants and tax professionals will be at the forefront of facing these issues head on.

On a positive note, I am pleased to report that CTIM has played a big role in communicating the issues facing tax agents and as a result the government has listened to us and relaxed the conditions for the first time renewal of the GST tax agent licence, during the period up to 31 March 2020, and alleviated the problems faced by tax agents, as reported to members in the e-CTIM PP 9/2016 dated 4 October 2016. Moving forward, the Institute would like to inform members of the following future trends:-

Developments in Transfer Pricing and the Impending Introduction of Country-by-Country Reporting

In preparation for the impending introduction of country-by-country reporting (CbCR) in Malaysia, the tax authorities have included new income tax provisions in the Finance Bill 2016 which is expected to be gazetted soon, on penalties for failure to furnish the CbCR, furnishing incorrect CbCR and failure to comply with mutual administrative assistance rules in relation to CbCR. CbCR would be applicable to ultimate parent entities who are tax resident in Malaysia with worldwide consolidated revenue exceeding a predetermined threshold. The tax authorities have also indicated that CbCR Rules and Guidelines and revised Transfer Pricing Rules and Guidelines will be issued soon, which will provide further details on the requirements.

Implications of Several Proposals in the Finance Bill 2016

Several proposals in the Finance Bill 2016 are in respect of changes to the definition of "public entertainer" and "royalty" and changes to the scope of the derivation of special classes of income which will take effect on the coming into operation of the Finance Act 2017 and have wide withholding tax implications. Issues raised by members on these proposals as well as other proposals in the 2017 Budget Speech and Finance Bill 2016 have been submitted to the tax authorities in November 2016. Members can access the submission via our e-CTIM Tech-DT 103/2016 dated 1 December 2016.

CPD Events

The Institute successfully held a series of 2017 Budget Seminars from 3 November 2016 to 8 December 2016 in Kuala Lumpur and various cities around Malaysia. Each Seminar was well attended by participants who were informed on the changes and impact to taxpayers arising from the 2017 Budget Proposals and updated on the latest tax developments. This year, the Institute held an additional Seminar at the One World Hotel in Petaling Jaya and the venue was packed to full house. I would like to thank the chairmen, speakers and panellists from CTIM, the Ministry of Finance (MoF), the Inland Revenue Board Malaysia (IRBM), and the Royal Malaysian Customs Department (RMCD) for giving their time and effort in making the Seminars a success. I would also like to thank the CTIM Secretariat for the smooth organisation of the Seminars.

The Institute organised a series of half-day talks on GST updates by speakers from the RMCD, for the first time. The half-day talks were held in Kuala Lumpur and various other Malaysian cities from 14 November 2016 to 15 December 2016 and received good responses.

I am pleased to inform that the Institute, in collaboration with the RMCD, will be holding the National GST Conference (NGC) 2017 which is expected to take place on 28 February 2017 and 1 March 2017. Details on the NGC 2017 will be made available.

Membership

It gives me great pleasure to inform you that our membership numbers approximately 3,400 (2015: 3,300) associate members and fellow members. The increase in membership numbers is a good indication of the support that the Institute is receiving from members to move the tax profession forward.

Chief Executive Officer / Director General of Inland Revenue

YBhg Kolonel (K) Tan Sri Datuk Wira Dr. Hj. Mohd Shukor Hj. Mahfar has retired as Chief Executive Officer / Director General of Inland Revenue (CEO/DGIR) and YBhg Datuk Sabin Samitah has been appointed to the said position, on 12 December 2016. On behalf of the Institute, I would like to thank YBhg Kolonel (K) Tan Sri for the close working relationship between the IRBM and CTIM which has contributed to the successful co-organising of the annual National Tax Conference and Tax Forums, as well as Dialogues on issues of concern to tax practitioners over the years. At the same time, I would like to congratulate YBhg Datuk Sabin on his appointment as CEO/DGIR and I look forward to the Institute continuing the close working relationship with the IRBM.

The members of the Council and I would like to thank everyone for their participation, in one way or another, in the Institute's activities and events for the year 2016. Your efforts have helped, in no small way, to project the Institute as the premier body for tax professionals in Malaysia.

Editor'sNote

YEO ENG PING

WELCOME TO 2017!

We usher in the year with a new Chief Executive Officer at the helm of the Inland Revenue Board Malaysia (IRBM), Datuk Sabin Samitah who took office on 12 December 2016. These are of course exciting times from a tax angle, as we target a collection of RM127 billion for 2017 amidst a still uncertain global economy with low commodity prices. This is substantially more than the expected collection of RM110.5 billion in 2016. The IRBM

has announced the establishment of the "LHDN Tax Investigation Team 2017" comprising 272 intelligence and investigation officers to take action against tax evaders. Interestingly this team appears to be mandated for a limited period from 1 January to December 2017 and is given a target of RM2 billion.

We will also see a number of significant amendments to the tax legislation, effective early January 2017, via the anticipated Finance Act 2017. The article entitled "The Malaysian 2017 Budget" takes us through the salient changes. One of the more hotly debated change is the re-introduction of taxation of offshore services, and our article "Taxing Offshore Services – Back To the Old Regime?" provides a useful summary of the background to this law, and helps us navigate through the implications in light of recent case laws and double tax treaties. It is also understood that the IRBM intends to issue a guide to ease the transition, hopefully to help alleviate the tax burden from business transactions that have been negotiated and agreed, prior to the change in law – at the date of writing this note, I understand such guidance has yet to be released. In this edition there is an interesting analysis of the reduction of corporate income tax rate to 18% (on the first RM500,000 of chargeable income) for Small Medium Companies, together with a further special reduction of tax rate based on increased chargeable income for year of assessment 2016 and 2017. Taking a step back, this does beg the question what this policy change signals – is this a tentative step towards a broader reduction in corporate income tax rates? And what about the income tax rate for individuals? A quick observation that the divergence between corporate income tax rates and top personal tax rates will likely be an area of interest for certain taxpayers. I personally enjoy reading about new cases as it gives us a glimpse of the positions and thinking of the IRBM and the judiciary, and here, we have yet another article on a recent case, *Ketua Pengarah Hasil Dalam Negeri v Bandar Nusajaya Development Sdn Bhd*. This case is important as it deals with the taxability of a waiver of debt under Section 22 of the Income Tax Act 1967, and even more fascinating is the question of whether Judicial Review remains a valid route of appeal for tax cases. Read this article for a considered view of these issues. Finally, we also include an article that gives us a better appreciation of "reimbursements" and "disbursements" for Goods and Services Tax (GST) purposes. There are a multitude of technical issues surrounding GST and its implementation, and I hope to receive many more thought leadership contributions on GST as technical discourse is essential for an orderly and robust development of the GST law and regulation. There was a recent announcement that the Royal Malaysian Customs Department (RMCD) expects to collect an additional RM3 billion in GST for 2017, compared to 2016 (where the target was approximately RM39 billion) through the "Customs Blue Ocean Strategy Operations". This initiative was first launched on 1 September 2016, and focuses more on informed compliance - it was reported that as many as 200,000 of the 430,000 GST registrants will be visited by the RMCD. While we are on the topic, do join us for the National GST Conference 2017 to be held on 28 February to 1 March 2017.

I hope you find this edition of *Tax Guardian* enriching. Before I go, wishing all readers a happy and successful new year!

2017 BUDGET SEMINARS

On 3 November 2016, CTIM conducted its first annual Budget Seminar at the Renaissance Hotel, Kuala Lumpur. The session on the "Summary of 2017 Budget Proposals" was presented by Ms. Nurwaheeda Omar, Principle Assistant Secretary from the Tax Division, Ministry of Finance Malaysia. The second session "Forum discussion on 2017 Budget Proposals – Its Changes & Impact to Taxpayers" was dealt with by the panel members namely Mr. Muhammad Farid Jaafar (LHDNM), Ms. Annie Thomas (RMCD) and Ms. Renuka Bhupalan (CTIM) and chaired by the Deputy President, Ms. Seah Siew Yun.

The last topic of the seminar was on the "Tax Updates & Latest Developments" chaired by Ms. Yeo Eng Ping (CTIM) and presented by co-speakers Ms. Theresa Goh (CTIM) and Mr. Saravana Kumar (Lee Hishammuddin Allen & Gledhill).

CTIM also successfully organised a series of 2017 Budget Seminars at various locations namely Kuala Lumpur, Subang, Petaling Jaya, Penang, Ipoh, Johor Bahru, Melaka, Kuching and Kota Kinabalu.

The Budget seminars which was attended by over 2,000 participants comprise of tax practitioners and members from commerce and industry.

The Institute wishes to thank all the Chairmen, Panellists and Speakers who have contributed significantly to the success of these Budget seminars.

"The CTIM 21st Prize Giving and Graduation Ceremony was held on 5 November 2016 at the Seri Pacific Hotel Kuala Lumpur. The prize giving ceremony was held in honour of 40 students who passed the 2015 and 2016 examinations and became graduates of the CTIM examinations. The Guest of Honour from the IRBM, Deputy Chief Executive Officer for Policy, Dato' Noor Azian Abdul Hamid , Ms. Seah Siew Yun, CTIM Deputy President, Prof. Dr. Jeyapalan Kasipillai, Immediate past Chairman of the Examinations and Education Committee, Mr. K. Sandra Segaran, Chairman of the Examinations and Education Committee , Graduates and their family members, Guests and other Council Members attended the event to make it a joyous and memorable event for all graduates. Prizes were awarded to best performers in four subjects of the CTIM examinations. They were Fong Kin Wai for Personal Taxation & Advanced Taxation 1, Janet Anne Moses Aylesbury for Business Taxation, Choo Teang Siong for Advanced Taxation 2.

The Institute extends its heartiest congratulations and wishes to all graduates and look forward to their memberships in CTIM and as future contributing members to the profession and society.

CPD EVENTS

A series of workshops were conducted by CTIM in the 4th quarter of 2016:

- Tax Planning and Issues for Property Developers & Property Investors
- GST on Cross-Border Transaction: Practical Implications
- Property Developers: GST Latest Developments & Practical Issues
- Tax Incentives for Exporters
- Malaysian Taxation Principles & Procedures – MAICSA
- Half-Day Talk: Updates on GST

Dr. Tan Thai Soon presented a series of workshops on 'Tax Planning and Issues for Property Developers & Property Investors' at several venues namely Kuala Lumpur, Penang, Ipoh, Melaka & Johor Bahru. These workshop covered many aspects of Malaysian tax law, regulations and public rulings.

Three various workshops were conducted by Mr. Thenesh Kannaa during the months of October to December 2016. i.e the following:

- GST on Cross-Border Transaction: Practical Implications
- Property Developers: GST Latest Developments & Practical Issues
- Tax Incentives for Exporters

The Institute again successfully organised a series of workshops on "Practical Guide 2016: Taxation Principles and Procedures" in collaboration with the Malaysian Institute of Chartered Secretaries and Administrators (MAICSA). This popular compact 4-workshop course offered an in-depth introduction into the many facets of taxation, covering the relevant laws as well as the procedures necessary to comply with the requirements of the IRBM and include recent changes in compliance and highlights of the 2017 Budget. These workshops also catered to beginners as well as to more advanced students.

CTIM in collaboration with speakers from the RMCD presented a series of talks on the latest updates on GST at various major towns namely Kuala Lumpur, Johor Bahru, Penang, Kota Kinabalu, Kuching, Ipoh and Melaka. The recent 2017 Budget announcement and Finance Bill 2016 on changes to GST affects most GST registered organisations. Participants were able to engage and interact with the senior officials of the RMCD who are fully qualified to answer any burning questions that they had on their minds.

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PREMIER TAX EVENT OF THE YEAR

NATIONAL TAX CONFERENCE 2017

25 & 26 JULY 2017 | KUALA LUMPUR CONVENTION CENTRE

25 CPD points
(For purposes of Section 153, ITA 1967)

CLAIMABLE UNDER HRDF THE SBL SCHEME
Based on the merit of each applicant.

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

Lembaga Hasil Dalam Negeri Malaysia (LHDNM) and the Chartered Tax Institute of Malaysia (CTIM) will be co-hosting the National Tax Conference for the 17th successive year on 25 - 26 July 2017 at the Kuala Lumpur Convention Centre, Kuala Lumpur.

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

The chairmen / speakers / panelists of the conference are drawn from government and private sectors.

Proposed Conference Topics are (amongst other topics subject to changes) :

- Forum: Economic Outlook for 2017 & 2018
- LHDNM CEO Presentation
- Taxation of Services - Issues and Challenges
- Tax Implication on Amendment to Companies Act 2016 and Recent MFRS
- Collection Intelligent Arrangement (CIA)
- Tax Cases Update
- Tax Forum

CONFIRMED CONFERENCE DATES : 25 & 26 JULY 2017

Please contact CTIM Secretariat at 03-2162 8989
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or visit website at www.ctim.org.my

THE MALAYSIAN 2017 BUDGET

THE MALAYSIAN 2017 BUDGET WAS TABLED IN PARLIAMENT ON 21 OCTOBER 2016. AMID PROLONGED LOW CRUDE OIL PRICES AND AN UNCERTAIN GLOBAL ECONOMIC OUTLOOK, THE 2017 BUDGET HAS OUTLINED FIVE STRATEGIC INITIATIVES TO ACCELERATE SUSTAINABLE ECONOMIC GROWTH AND ENHANCE THE WELL-BEING OF THE RAKYAT, PARTICULARLY THE BOTTOM 40% HOUSEHOLDS (B40) AND MIDDLE 40% HOUSEHOLDS (M40).

Chua Siong Chee & Amarjeet Singh

The five strategic initiatives are:-

- **Rakyat first**
- **Accelerating economic growth**
- **Empowering human capital**
- **Strengthening inclusive development**
- **Improving public service delivery**

Despite the challenging global economic climate, Malaysia's real gross domestic product (GDP) is expected to register a growth of between 4% and 5% in 2017. The projected growth by sectors in 2017 is as follows:-

	Projected growth in 2017 (%)
Agriculture	1.5
Mining and quarrying	1.4
Manufacturing	4.1
Construction	8.3
Services	5.7

Source: Economic Report 2016 / 2017

It was highlighted in the 2017 Budget announcement that the digital economy currently contributes to about 16% of Malaysia's GDP. The government recognises the importance of digital technologies as an enabler to achieve higher economic growth. In this regard, the government plans to introduce the Malaysia Digital Hub and the world's first Digital Free Zone. The Digital Free Zone will merge physical and virtual zones, with additional online and digital services to facilitate and spur international e-commerce and Internet-based innovation.

During his official visit to China in early November 2016, the Prime Minister announced the appointment of Alibaba Group's Founder and Executive Chairman, Jack Ma, as the Malaysian government's digital economy adviser. This appointment certainly shows that the government is serious in its plans and efforts to embrace the digital revolution. Malaysia Digital Economy Corporation (MDEC) has been entrusted to spearhead and drive Malaysia's digital economy transformation.

The government is committed to achieve a near-balanced budget by 2020 through prudent spending. For 2017, Malaysia aims to further reduce its budget deficit to 3% from 3.1% in 2016. Apart from prudent spending, the government will rely heavily on tax revenue collections to achieve the goal of a 3% budget deficit. Looking at the 2017 Federal government revenue estimates (see table), the government expects a growth in direct tax revenue (including withholding tax) and indirect tax revenue of 9.2% and 5.7% respectively.

As Malaysia's economy is only expected to grow by 4% to 5% in 2017, we can expect increased tax enforcement activities by the Inland Revenue Board Malaysia (IRBM) and the Royal Malaysian Customs Department (RMCD) to ensure that the tax revenue collection targets are achieved.

In order to increase the effectiveness and efficiency of tax enforcement, the following have been proposed:

ESTABLISHMENT OF THE COLLECTION INTELLIGENCE ARRANGEMENT (CIA) UNDER THE MINISTRY OF FINANCE (MoF)

The CIA will involve the Companies Commission of Malaysia (CCM), the IRBM and the RMCD. These agencies will share data and information to enhance effectiveness and efficiency in tax collection and compliance.

Federal Government Revenue (RM billion)	2016 RE	2017 BE	Estimated increase (%)
Direct taxes			
Corporate income tax	63.2	69.2	9.5%
Individual tax	28.2	29.9	6.0%
Petroleum income tax (PIT)	8.5	10.6	24.7%
Withholding tax and others	2.6	2.7	3.8%
Others (real property gains tax, stamp duty, etc.)	8.0	8.3	3.8%
Total direct taxes	**110.5**	**120.7**	**9.2%**
Indirect taxes			
Goods and services tax (GST)	38.5	40.0	3.9%
Sales tax and Service tax	0.1	-	(100%)
Others (export duties, import duties, excise duties, etc.)	18.0	19.8	10%
Total indirect taxes	**56.6**	**59.8**	**5.7%**
Total tax revenue	**167.1**	**180.5**	**8.0%**
Total non-tax revenue	45.5	39.2	(13.8%)
TOTAL REVENUE	**212.6**	**219.7**	**3.3%**

Source: Economic Report 2016 / 2017 (RE = revised estimate, BE = budget estimate)

INTRODUCTION OF A PRESCRIBED DEVICE FOR THE PURPOSES OF COLLECTING GOODS AND SERVICES TAX (GST)-RELATED INFORMATION

A new Section 34A will be introduced into the GST Act 2014 to provide for the following:

- Any GST-registered person as prescribed by the MoF shall provide information on all supplies made and payments received by him to the Director General of the RMCD using a device prescribed by the MoF.
- The Director General of the RMCD can approve a third-party

contractor to install, configure and integrate the prescribed device at the GST-registered person's business premises.

The establishment of the CIA and the introduction of a prescribed GST device will be game-changers for tax enforcement. Businesses will need to ensure that all submissions and reporting to the relevant agencies are timely, consistent and accurate.

PROPOSED TAX CHANGES

We now turn our focus to several key proposed tax changes and discuss some of the issues and tax implications thereof.

Reduced corporate income tax rate on incremental chargeable income

Currently, the following entities are subject to corporate income tax generally at the rate of 24%:-

- A company (both resident and non-resident)
- A limited liability partnership (LLP)
- A trust body, a receiver appointed by the court and executor of an estate of a deceased individual who was domiciled outside Malaysia at the time of his/her death

There is a proposal to reduce the corporate income tax rate by between 1% and 4%, depending on the percentage of increase in chargeable income as compared to the immediate preceding year of assessment (YA), as follows:-

% of increase in chargeable income as compared to the immediate preceding YA	Corporate income tax rate reduction (%)	Reduced corporate income tax rate on incremental chargeable income
< 5%	Nil	24%
5% - 9.99%	1%	23%
10% - 14.99%	2%	22%
15% - 19.99%	3%	21%
20% and above	4%	20%

The reduced corporate income tax rate incentive is only applicable for YA2017 and YA2018. It will only apply on incremental chargeable income and will be gazetted by way of a statutory order. This incentive may or may not apply to a non-resident company (e.g. a Malaysian branch of a foreign company), depending on the conditions set out in the statutory order. The 2017 Budget speech did not suggest that the application of the reduced corporate income tax rate would be restricted only to income from business sources. However, the examples presented by the IRBM at the National Tax Seminar 2016 held on 27 October 2016 indicate that the reduced corporate income tax rate will only apply to the incremental chargeable business income and would not apply to non-business income such as passive interest income or passive rental income. The IRBM's examples also suggest that the effective reduction in corporate income tax rates on incremental chargeable income will be effected by way of exempting part of the chargeable income from tax.

The following verbal clarifications were given by the MoF and the IRBM at the National Tax Seminar 2016 and at the 2017 Budget Seminar organised by the Chartered Tax Institute of Malaysia:-

- The reduced corporate income tax rate would not be available to companies that enjoy certain tax incentives (e.g. reinvestment allowance, 70% tax exemption under pioneer status, etc.).
- The reduced corporate income tax rate is also not available to companies which are in a business loss position in the immediate preceding YA.

The non-application of the reduced corporate income tax rate incentive to such companies appears to be unfair to such companies and may result in the incentive being enjoyed only by a limited number of companies. Hopefully, the MoF and the IRBM will change their position on this matter, to enable more companies to benefit.

Reduction in corporate income tax rate for small and medium enterprises (SMEs)

The following entities are categorised as SMEs for income tax purposes:-

- A resident company incorporated in Malaysia which has a paid-up ordinary share capital of RM2.5 million or less at the beginning of the basis period for a YA; and

- A resident LLP in Malaysia which has a total contribution of capital (whether in cash or in kind) of RM2.5 million or less at the beginning of the basis period for a YA

Currently, a SME is subject to income tax at the preferential corporate income tax rate of 19% on its first RM500,000 chargeable income. The remaining chargeable income is taxed at the prevailing corporate income tax rate of 24%. In order to increase the competiveness of SMEs in Malaysia, it is proposed that the preferential corporate income tax rate on the first RM500,000 of chargeable income be reduced from 19% to 18%, effective from YA2017.

The corporate income tax rate on the remaining chargeable income will remain at 24%. However, SMEs with increased chargeable income in the years of assessment 2017 and/or 2018 can also enjoy the 1% to 4% reduction in corporate tax rate on incremental chargeable business income, as discussed above.

The preferential corporate income tax rate will not apply if the company is directly or indirectly related by more than 50% in terms of paid-up ordinary share capital, to another company that has a paid-up ordinary capital of more than RM2,500,000 at the beginning of a basis period for a YA. A similar limitation applies to an LLP which is a SME.

Widening of the scope of withholding tax on special classes of income

Currently, amounts paid or credited to a non-resident person in respect of the following special classes of income under Section 4A(i) and Section 4A(ii) of the Income Tax Act 1967 (ITA) will only be subject to withholding tax under Section 109B of the ITA if the services are performed in Malaysia:

- Amounts paid in consideration of services rendered by a non-resident person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such non-resident person
- Amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme

Amounts paid or credited to a non-resident person in respect of services performed outside Malaysia are currently not deemed to be derived from Malaysia (due to the proviso to Section 15A of the ITA) and hence are not subject to withholding tax under Section 109B.

It is proposed that the proviso to Section 15A of the ITA be removed. This proposal will be effective upon entry into force of the Finance Act, which is expected to be around January 2017. With the removal of the proviso to Section 15A, amounts paid or credited to a non-resident person in respect of the special classes of income under Section 4A(i) and Section 4A(ii) of the ITA as listed above will be subject to withholding tax under Section 109B of the ITA, irrespective of whether the services are performed in Malaysia or outside Malaysia. In fact, this was the withholding tax position in Malaysia prior to 21 September 2002. It is quite unexpected that Malaysia is reverting to this position. We set out below our comments on this proposed change:

- The proposed change will have significant impact on cross-border service contracts, particularly contracts where a significant portion of the services are performed outside of Malaysia. Certain taxpayers may now seek to re-visit whether the "Business Profits" Article in a tax treaty would provide treaty protection against the withholding tax under Section 109B, if the non-resident does not provide services through a permanent establishment (PE) in Malaysia. The IRBM is firm in its position that the "Business Profits" Article in a tax treaty would not provide treaty protection against the withholding tax under Section 109B as Section 109B imposes withholding tax on special classes of income under Section 4A, and not

Section 4(a) business income. In other words, the IRBM's position is service income of a non-resident (as well as rent and other income from the use of movable property) is distinct from business profits and hence, the withholding tax under Section 109B is applicable notwithstanding that the non-resident does not have a PE in Malaysia. The only exception is payments to Australian residents where the IRBM concedes that withholding tax under Section 109B will not apply if the Australian resident does not have a PE in Malaysia. This is a special concession.

- It is important to note that many of the tax treaties that Malaysia has signed include a "Technical Fees" article (e.g. United Kingdom, Netherlands and Hong Kong) which provides that technical fees derived from Malaysia may be taxed in Malaysia (i.e. subject to withholding tax in Malaysia). This technical fees article may, in certain cases, provide for preferential rates of withholding tax on technical fees (e.g. 8% in the Malaysia-United Kingdom tax treaty). In addition, these tax treaties usually have a provision under the "Business Profits" Article which is similar to Article 7(5) of the Malaysia-United Kingdom tax treaty, as reproduced below:

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

- Essentially, Article 7(5) of the Malaysia-United Kingdom tax treaty reinforces Malaysia's right to impose withholding tax on technical fees as it provides that the provisions under the "Technical Fees" Article will not be affected by the provisions under the "Business Profits" Article.
- The Malaysia-Singapore tax treaty also has a "Technical Fees" Article (Article 13). Pursuant to Article 13(1) of the Malaysia-Singapore tax treaty, technical fees derived from Malaysia by a resident of Singapore who is the beneficial owner thereof may be taxed in Malaysia (i.e. subject to withholding tax in Malaysia) at the rate not exceeding 5%. It is interesting to note that Article 13(4) of the Malaysia-Singapore tax treaty provides that technical fees shall be deemed to arise in Malaysia when the payer is a resident in Malaysia and the services are performed in Malaysia. Hence, there will be a conflict between Article 13(4) of the Malaysia-Singapore tax treaty and our domestic legislation when the proposed change is enacted. Based on case law principles, the tax treaty provision should prevail over the domestic legislation. In view of this, there may be technical grounds to contend that payments to a resident of Singapore in respect of technical services performed outside Malaysia should not be subject to the withholding tax under Section 109B despite the removal of the proviso to Section 15A of the ITA. A similar position would apply in respect of the Malaysia–Spain tax treaty.
- The professional tax and accounting bodies have submitted a joint memorandum to the IRBM requesting the IRBM to confirm the position under Malaysia's tax treaties with Singapore, Spain and Australia.
- The Malaysia-Turkmenistan tax treaty does not have a "Technical Fees" article. However, it has an "Other Income" article (i.e. Article) 21). Pursuant to Article 21(1) of the Malaysia-Turkmenistan tax treaty, items of income of a resident of Turkmenistan, wherever arising, not dealt with in the foregoing Articles of the tax treaty shall be taxable only in Turkmenistan. In view of this, arguably, service payments to a resident of Turkmenistan should not be subject to the withholding tax under Section 109B pursuant to Article 21(1) of the Malaysia-Turkmenistan tax treaty, unless such services are performed through a PE in Malaysia.
- The proposed change may also exacerbate the arguments between taxpayers and the IRBM on what types of services would fall within the ambit of withholding tax under Section 109B. The IRBM's position is that the scope of withholding tax under Section 109B is wide enough to cover technical and non-technical services with limited exceptions as provided in their Public Ruling No.1/2014: Withholding Tax on Special Classes of Income (PR No. 1/2014), although there may be technical grounds to argue that only services which involve specialised expertise and skills should fall within the ambit of withholding tax under Section 109B.
- With this proposed change in law, we believe it would be an opportune time for the IRBM to re-visit its position that reimbursements or disbursements relating to services performed by non-

residents are also subject to withholding tax, as subjecting all reimbursements and disbursements (even those relating to services performed outside Malaysia) to withholding tax would be extremely burdensome.
- Based on the presentation by the IRBM at the National Tax Seminar 2016, the amended law will be applicable on any services performed on or after the effective date, notwithstanding that the invoice is issued or payment is made before the effective date. On the contrary, if the services have been performed before the effective date but the invoice is only issued or payment is only made after the effective date, withholding tax will not be applicable. Hence, it would be important to keep sufficient documents to substantiate when the services are actually performed.

Broadening of the definition of royalty in Section 2 of the ITA

The definition of royalty in Section 2 will be broadened to also include any sums paid as consideration for, or derived from:

- The use of, or the right to use software
- The reception of, or right to receive, visual images or sounds, or both, transmitted to the public by satellite or cable, fibre optic or similar technology
- The use of, or the right to use, visual images or sounds, or both, in connection with television broadcasting or radio broadcasting, transmitted by satellite or cable, fibre optic or similar technology
- The use of, or the right to use, some or all of the parts of the radio frequency spectrum specified in a relevant licence
- A total or partial forbearance in respect of the items covered in the royalty definition

The proposal will be effective upon entry into force of the Finance Act. The proposal aims to widen the scope of withholding tax under Section 109 of the ITA on royalty payments to non-residents. Although the definition of royalty in domestic tax legislation will be broadened, the definitions of royalty in Malaysia's tax treaties remain unchanged. Where the definition of royalty in the

tax treaty differs from the definition of royalty in the ITA, based on case law principle, the definition of royalty in the tax treaty should prevail. If that is the case, treaty protection should still be available in many cases.

It appears that the proposed inclusion of "software" within the royalty definition is to align the tax legislation with the position adopted by the IRBM in practice and perhaps also to counter the decision in the case of *Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30-033.* In the Damco case, AP Moeller-Maersk A/S Group ("APMM") developed Electronic Data Process ("EDP") Systems. The EDP Systems were made available for the use of its group of companies in the course of their business. The EDP Systems were necessary for the taxpayer to conduct its operations in Malaysia as part of the global activities of the APMM Group. The taxpayer paid EDP charges for the EDP services and did not withhold tax from the EDP charges made to APMM. The IRBM, however, treated the EDP charges as "royalty" under the ITA. Since the taxpayer did not withhold tax under Section 109 of the ITA, the IRBM refused to allow the taxpayer to claim the EDP charges as deductible expenses.

The main issue raised by the taxpayer involved the determination as to whether EDP charges were in fact royalty, and if so, the taxpayer should have withheld tax from the EDP charges made to APMM. The High Court ruled that the nature of payments in this case could not constitute royalty under Article XII of the Malaysia-Denmark tax treaty because they were merely payments for services rendered by APMM, where the taxpayer accessed and used APMM's information technology (IT) system and communication network. There were no involvements of know-how to allow the taxpayer to acquire any rights or partial rights in this contract of service. The IRBM was aggrieved by the decision of the High Court and subsequently appealed to the Court of Appeal. The Court of Appeal dismissed the IRBM's appeal and affirmed the High Court's decision. In addition, the IRBM's application for leave to appeal to the Federal Court in respect of the Court of Appeal's decision was also dismissed.

It is important to note that whilst the word "software" will be included within the royalty definition in the domestic tax legislation, the royalty definition in the tax treaties that Malaysia has signed, generally do not contain the word "software". Hence, the decision in the Damco case would generally still be relevant. Having said that, whilst payments to non-residents for the access and use of EDP and IT systems may be argued to be payments for services (as opposed to royalty payments) based on the royalty definition in the relevant tax treaty and the decision in the Damco case, the parallel widening of the scope of withholding tax on service fees to also include services rendered outside Malaysia as discussed earlier, would mean that payments for the access and use of EDP and IT systems may now fall within the ambit of withholding tax under Section 109B of the ITA.

Having said the above, it is important to note that a software-related payment to a non-resident may well be a payment for the acquisition of copyrighted software for personal use or business use where the payer is not given the right to commercially exploit the copyright of the software (e.g. right to reproduce and distribute the software to the public). Payments for the acquisition of copyrighted software for personal use or business use may not fall within the royalty definition in the relevant tax treaty and should not be viewed as payments for services or royalties. Instead, such payments should simply be considered to be payments for the purchase of a product, which should not fall within the ambit of the withholding tax under Section 109 and Section 109B.

In view of the above, it is important to review the contract with the non-resident to ascertain the nature and characterization of the payment. It is also necessary to analyse the relevant tax treaty to determine whether treaty protection is available.

The withholding tax issue on royalty has always been a complex and contentious tax issue in Malaysia. With the broadening of the definition of royalty in the domestic legislation, more disputes with the IRBM are expected to arise.

Redefinition of public entertainer in Section 2 of the ITA

Payments of remuneration or other income to a non-resident public entertainer in respect of services performed in Malaysia are currently subject to 15% withholding tax under Section 109A of the ITA. "Public entertainer" is currently defined in Section 2 to mean a stage, radio or television artiste, a musician, sportsperson or an individual exercising any profession, vocation or employment of a similar nature.

In order to widen the scope of withholding tax under Section 109A, it has been proposed that public entertainer be redefined as follows:-

"Public entertainer" includes:

(a) A compere, model, circus performer, lecturer, speaker, sportsperson, an artiste or individual exercising any profession, vocation or employment of a similar nature; or

(b) An individual who uses his intellectual, artistic, musical, personal or physical skill or character in,

carrying out any activity in connection with any purpose through live, print, electronic, satellite, cable, fibre optic or other medium, for film or tape, or for television or radio broadcast, as the case may be".

The proposal will be effective upon entry into force of the Finance Act. It is interesting to note that moving forward, lecturers and speakers will be regarded as public entertainers. It is also important to note that only remuneration or other income in respect of services performed in Malaysia by a non-resident public entertainer will be subject to the withholding tax under Section 109A.

With the redefinition of public entertainer, there may be an overlap between Section 109A and Section 109B in certain circumstances. Examples of these circumstances are as follows:

- According to Public Ruling No.1/2014: Withholding Tax on Special Classes of Income (PR No. 1/2014), payment to a non-resident for specially-tailored training courses conducted in Malaysia is subject to withholding tax under Section 109B. Moving forward, there may be an overlap with Section 109A as lecturers and speakers are regarded as public entertainers.
- PR No. 1/2014 also provides that payment to a model

for a magazine photo shoot in Malaysia is subject to withholding tax under Section 109B as the income from the photo shoot is considered a special class of income in relation to a commercial undertaking and there is no element of entertainment during the photo shoot. Moving forward, there will be an overlap with Section 109A as models are regarded as public entertainers.

The question that has arisen is in the event of an overlap, which withholding tax provision should prevail? A clarification from the IRBM is required on this matter to ensure greater certainty for taxpayers.

Industrial building allowance (IBA) on certain buildings which are rented out

As proposed during the 2016 Budget, a new Paragraph 16B of Schedule 3 of the ITA has been introduced effective from YA2016. Pursuant to the new Paragraph 16B, IBA is no longer available where a building listed below or part of such building is rented out (including where such rental is undertaken as part of a business of letting property):

- Licensed private hospital, maternity home and nursing home;
- Building used for research;
- Building used as warehouse;
- Building for approved service project;
- Building used as hotel;
- Airport;
- Motor racing circuit;
- Building used for the provision of living accommodation or provision of child care facilities for employees employed by a person carrying on a manufacturing, hotel or tourism business or approved service project under Schedule 7B; and
- Building used for an approved school or educational institution

Based on the Minutes of the Dialogue on the Joint Memorandum on Issues arising from 2016 Budget and Finance Bill, the IRBM has clarified that Paragraph 16B would not apply to existing buildings acquired prior to YA 2016 and would only apply to new buildings acquired from YA 2016.

In the 2017 Budget, it is proposed that the following two amendments be made to Paragraph 16B:

- The scope of Paragraph 16B be expanded to include buildings used for approved industrial, technical or vocational training. This type of building was not included in the original Paragraph 16B. It will now be included effective from YA2016, i.e. a retrospective application. Subject to confirmation from the IRBM, it is hoped that Paragraph 16B should similarly not apply to existing buildings used for approved industrial, technical or vocational training which were acquired prior to YA2016.
- To include a "one-tenth rule" in Paragraph 16B such that:
- If one-tenth or less of the total floor area of the building is rented out, the whole building would qualify for IBA.

Example

Only 5% of the total floor area of a building used for an approved educational institution is rented out. In this regard, the cost of the whole building will qualify for IBA.

- If more than one-tenth of the total floor area of the building is rented out, then only the area which is not rented out would qualify for IBA

Example

20% of the total floor area of a building used for an approved educational institution is rented out. In this regard, only cost attributable to the 80% of the building (which is not rented out) will qualify for IBA.

The "one-tenth rule" is effective from YA2016, i.e. a retrospective application.

Based on the Minutes of the Dialogue on the Joint Memorandum on Issues arising from the 2016 Budget and Finance Bill, the following interesting clarifications were given by the IRBM:

- As a concession to licensed private hospitals, part of the hospital premises rented out to doctors operating in the hospital will not be included in the determination of the "one-tenth rule".
- In determining what is to be included in the "one-tenth rule" for hospitals, the IRBM will look at the reason for renting out the space. If it is not for the purpose of complementing the activities of the hospital (e.g. florist, mini market, canteen), it may be included in the "one-tenth rule". The IRBM will consider this matter and will come up with some guidelines / examples on this matter.

Whilst the "one-tenth" exception has been extended to all relevant buildings in Budget 2017 (and is not limited to hospitals), as it stands, the second concession above appears to apply only to licensed private hospitals. In many cases, the floor space rented out by operators of the buildings listed under Paragraph 16B is for the purpose of complementing the principal activities carried out by the taxpayers in such buildings, e.g. floor spaces in an approved private college building which are rented out to a bookshop, convenience store and cafeteria. The abovementioned concessions given to hospitals should also be extended to others. It is hoped that the IRBM will issue a public ruling

or guidelines on this matter as soon as possible to provide clarity on the application of Paragraph 16B, especially on the IRBM's interpretation of the term "complementing the activities of the taxpayer".

Amendment to Paragraph 12B of Schedule 6

Paragraph 12B of Schedule 6 of the ITA currently states that any expenses incurred in relation to exempt single-tier dividend income (e.g. interest expense on loan obtained to finance the acquisition of the shares) shall be disregarded for the purpose of ascertaining the adjusted income.

The Finance Bill 2016 has proposed that the words "expenses incurred" and "adjusted income" be replaced with the words "deductions" and "chargeable income" respectively. This proposal is effective from YA2017.

So what is the impact of this amendment? This amendment essentially widens the amounts which could potentially be disallowed. For example, with this amendment, a tax deduction for an approved donation at aggregate income level may be restricted. Let's say a company has business source income and exempt single-tier dividend. Currently, the company will claim the approved donation in full against the aggregate income (assuming the approved donation does not exceed 10% of the company's aggregate income). With this amendment, the approved donation may have to be apportioned between the taxable business income and the exempt single-tier dividend based on the percentage of gross income of each source. Only a portion of the approved donation which is attributable to the taxable business income will be allowed for a tax deduction. This proposed amendment appears to have been inspired by the decision in the case of *KPHDN v Perbadanan Kemajuan Economi Negeri Johor (2009) MSTC 4,399.*

Introduction of three (3) new penalty provisions in the ITA

Table 01 shows three (3) new penalty provisions for failure to comply with the Mutual Administration Assistance Arrangement (MAAA) procedures (including country-by-country reporting), will be introduced:

The above new penalty provisions will be effective upon entry into force of the Finance Act.

Extension of the application period for tax incentives for new 4- and 5-star hotels

In order to further promote the tourism industry in Malaysia, the application period for the following tax incentives for new 4- and 5-star hotels, which is supposed to end by 31 December 2016, will now be extended for another two years:

Peninsular Malaysia:

Pioneer status with income tax exemption of 70% of statutory income for a period of five (5) years; or

- 60% investment tax allowance on qualifying capital expenditure incurred within a period of five (5) years that can be offset against up to 70% of

Table 01

	Section 112A	Section 113A	Section 119B
Type of non-compliance	Failure to furnish a country-by-country report (CbCR) in accordance with the relevant rules	• Make an incorrect return, information return or report by omitting the information required to be provided in accordance with the relevant rules; or • Give any incorrect information in relation to any information required to be provided in accordance with the relevant rules	Failure to comply with any rules made to implement or facilitate the operation of MAAA
Upon conviction	• Fine of RM20,000 to RM100,000; or • Imprisonment for a term not exceeding six months; or • Both	• Fine of RM20,000 to RM100,000; or • Imprisonment for a term not exceeding six months; or • Both	• Fine of RM20,000 to RM100,000; or • Imprisonment for a term not exceeding six months; or • Both

statutory income for each year of assessment

Sabah and Sarawak:

- Pioneer status with income tax exemption of 100% of statutory income for a period of five (5) years; or
- 100% investment tax allowance on qualifying capital expenditure incurred within a period of five (5) years that can be offset against up to 100% of statutory income for each year of assessment

The applications for the abovementioned tax incentives must be received by the Malaysian Investment Development Authority (MIDA) by 31 Dec 2018.

Double deduction for Structured Internship Programme (SIP)

In order to encourage more companies to participate in a Structured Internship Programme (SIP) approved by Talent Corporation Malaysia Berhad (TalentCorp), the current double deduction incentive, which is supposed to expire in YA2016, will be extended for another three (3) years until YA2019. In addition, the scope of the SIP will be expanded to include Malaysian students pursuing full-time vocational level courses (Malaysian Skills Certificate Level 3). Double deductions are available in respect of the following qualifying expenses:

- Internship monthly allowance of not less than RM500 per student
- Expenses incurred for the provision of training to the students*
- Expenses incurred on meals, for travelling and accommodation for the students during the internship programme*
- Fee paid to a person who has been appointed to conduct an approved internship programme*

* The total amount of these expenses which will qualify for double deduction is capped at RM5,000 per student per YA.

Stamp duty on the transfer of real estate worth more than RM1 million

In the 2017 Budget, it was proposed that the rate of stamp duty on instruments of transfer of real estate worth more than RM1 million be increased from 3% to 4% effective from 1 January 2018. This proposal was not included in the Finance Bill 2016. It is generally expected that the increased stamp duty rate of 4% will only apply to amount in excess of RM1 million and not the entire value of the real property.

Period	Current	Proposed
First 30 days	5%	10%
31 - 60 days	15%	25%
61 days and beyond	25%	40%

Penalty for late payment of GST

Currently, where a taxable person fails to make payments, a penalty of up to 25% (see table above) is imposed on the tax due and payable, depending on the length of the delay. It is proposed that with effect from 1 January 2017, where a taxable person and a non-taxable person fail to make payments, a penalty of up to 40% (see table above) shall be imposed on the remaining tax unpaid, depending on the length of the delay.

CONCLUSION

2017 is expected to be the start of the "next wave" in tax enforcement. The establishment of the CIA and the introduction of a prescribed GST device will be game-changers in this regard. Businesses must be prepared to meet these challenges if they wish to avoid business disruption, tax risk and unwanted tax controversy. As tax authorities evolve and enhance their capabilities, taxpayers need to meet these challenges head-on and proactively work to mitigate risk. The proposed widening of the scope of withholding tax on several types of payments to non-residents may lead to more tax conflicts. It is therefore hoped that more details, clarifications and guidance will be provided by the tax authorities on the implementation and application of some of the proposed tax changes in order to provide greater certainty to taxpayers.

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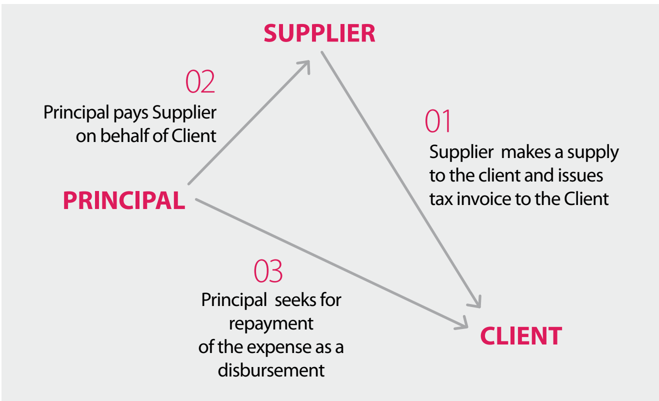
This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax or other professional advice. Please refer to your advisors for specific advice. This article is also not intended to cover all the proposed tax changes. The authors have only focused on several key proposed tax changes and discussed some of the issues and tax implications thereof. The views expressed above are the views of the authors and do not necessarily reflect the views of the global EY organisation or its member firms.

UNRAVELLING REIMBURSEMENTS AND DISBURSEMENTS FOR GST PURPOSES

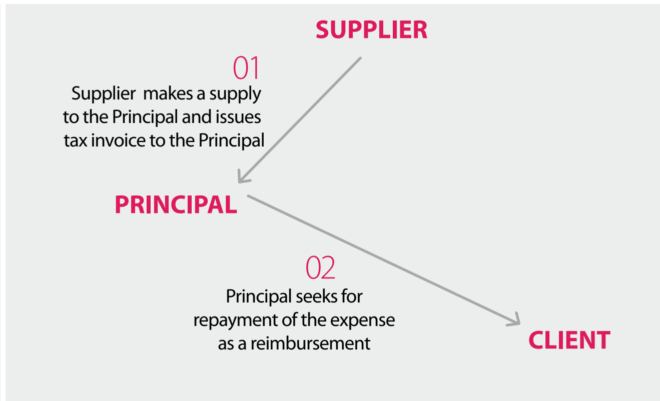
Alan Chung

Reimbursements and disbursements are concepts that are often misunderstood and misused. Prior to the introduction of goods and services tax (GST), the Malaysian business community had often used both terms interchangeably without realising their differences. In the light of the implementation of GST, it is vital to understand the differences between a reimbursement and a disbursement as the GST treatment for a reimbursement varies greatly from that of a disbursement.

Disbursement



Reimbursement



The GST treatment of reimbursements and disbursements are not embodied in the Goods and Services Tax Act 2014 (GST Act) nor its accompanying regulations and orders. The GST treatment is instead, applied based on the attributes of the reimbursements or disbursements. Hence, it is all too easy to apply the wrong GST treatment without a deep understanding of the nature of the reimbursements or disbursements.

Generally, reimbursements and disbursements occur when a person (referred to as "the principal" in line with the Director General's Decision 5/2015) makes payment to a supplier for an expense and then makes a claim for the expense from another person (referred to as "the client" in line with the Director General's Decision 4/2015 & 5/2015, although in many situations a client or contractual relationship with the principal may not exist). At the risk of oversimplification, the main differentiator between a reimbursement and a disbursement is the person who incurs the expense. If the principal who made the payment had incurred the expense, then the principal's claim for repayment from the client will be a claim for a reimbursement. Conversely, had the client incurred the expense and the principal had merely made payment on behalf of the client, the principal's claim for repayment may be a claim for a disbursement.

Disbursement

A disbursement is, in a nutshell, an expense of the client. The supplier had made the supply directly to the client and the client is the person liable to make payment for that supply. The principal made a payment on behalf of the client to the supplier and subsequently, claims for repayment from the client as a disbursement (see **Diagram 1**). The principal has no obligations in the original supply from the supplier to the client and does not partake in the original supply with the exception of making a payment to the supplier.

There are several elements of a disbursement that distinguishes it from a reimbursement and the client's obligation to pay the supplier for the original supply stands out as a key attribute of a disbursement. If the supplier invoices the client for the original supply, it would be a strong indicator that the client and not the principal, that is obligated to pay for the original supply. This however, is not conclusive in the application of GST in Malaysia as you would see later that a Director General's Decision spells out the criteria to be fulfilled in order for a transaction to be treated as a disbursement.

Reimbursement

A reimbursement, on the other hand, is usually an expense of the principal. The supplier will not invoice the client as the principal is obligated to the supplier for the supply. It is the principal who is responsible to pay the supplier and the supplier will invoice the principal. The principal will then re-supply the original expenses purchased to the client and claim the re-supply from the client as a reimbursement (see **Diagram 2**). The

main feature of a reimbursement is that the principal makes a supply of the reimbursement to the client.

Director General's Decision

The Royal Malaysian Customs Department (RMCD) attempted to provide some clarity on 30 April 2015 by stating the criteria of a reimbursement and a disbursement in Item 6 of the Director General's Decision 5/2015 (see **Diagram 3**). Unfortunately, there were instances where a transaction fulfils some of the criteria of a reimbursement as well as some of the criteria of a disbursement stated in the Director General's Decision, making it difficult or impossible to determine whether the transaction is a reimbursement or disbursement. This would occur if all the criteria for disbursement applies but the principal varies the amount that he is claiming for repayment, or when the claim for repayment has all the criteria of a reimbursement but the tax invoice is issued by the supplier to the client.

The RMCD attempted to remove such ambiguities and clarified Item 6 of the Director General's Decision 5/2015 by amending it with effect from 6 June 2016. The amendment essentially removed the criteria of a reimbursement and retained only those for a disbursement (see Paragraph 3 of **Diagram 4**). In addition, it specifically provided that in order for a transaction to be treated as a disbursement, it has to fulfil all the criteria listed in the amended Director General's Decision. Consequently, that if a transaction does not possess one or more criteria listed in the amended Director General's Decision, that transaction cannot be a disbursement and will automatically be a reimbursement.

The key concern after this amendment is that some intended disbursements are now reimbursements because one or more of the criteria of disbursements stated in the Director General's Decision are not met. Thus, any transactions that do not fulfil

Diagram 3: Director General's Decision: 5/2015 (30.4.2015)

NO	ISSUES	DECISION
6.	Disbursement and reimbursement What is the **GST** treatment for disbursement and reimbursement	1. Recovery of expenses may be treated as disbursement or reimbursement and this will depend on whether the expenses are incurred by a principal or an agent acting on behalf of a client 2. GST treament on disbursement and reimbursement are as follows:-

Disbursement	Reimbursement
Not a supply	Is a supply
Not entitled for input tax claim	Entitled for input tax claim

1. In general, the criteria for disbursement reimbursement for GST purposes are as follows -

Disbursement	Reimbursement
Incur expenses as an agent acting on behalf of the client.	Incur expenses as principal
The client is the recipient of the supply (invoice is in the client's name)	The client is not the recipient of the supply (invoice is in the principal's name)

Director General's Decision: 5/2015 (30.4.2015)

NO	ISSUES	DECISION	
		The client is the person responsible to pay for the supply	The principal is the person responsible to pay for the supply
		The payment is authorised by the client	The payment is not authorised by the client
		The client knew that the supply is made by a third party	The client has no knowledge that the supply is made by a third party
		The exact amount is claimed from the client and the agent has no right to alter or add on the value of the supply.	The principal has the right to alter or add on the value of the supply
		The payment is clearly an additional to the supply made to the client.	The payment is for the supply made to the client

all the criteria must be treated as a reimbursement. Many taxpayers may have continued to apply the GST treatment prior to the amendment and unwittingly made errors when they did not account for the changes.

Paragraph 2 of either version of the Director General's Decision purportedly sets out the GST treatment of reimbursements and disbursements. It however, merely states whether a reimbursement or disbursement is a supply and the entitlement to claim input tax. While not clearly stated, the provisions of Paragraph 2 are viewed from the perspective of the principal.

Diagram 4: Director General's Decision: 5/2015 (30.4.2015)
Decision By Director General, Royal Malaysian Customs Department

ITEM 6: Disbursement and Reimbursement

What is the GST treatment for disbursement and reimbursement.

1) Recovery of expenses may be treated as disbursement or reimbursement and this will depend on whether the expenses are incurred by a principal or an agent acting on behalf of a client.
2) GST treatment on disbursement and reimbursement are as follows:

Disbursement	Reimbursement
Not a supply	Is a supply
Not entitled for input tax claim	Entitled for input tax claim

3) In general, to determine whether recovery of expenses is a disbursement for GST purposes, a registered person must fulfil all the following criteria, (Subst, w.e.f. 6/6/2016)
   i) Incur expenses as an agent acting on behalf of the client.
   ii) The client is the recipient of the supply (invoice is in the client's name)
   iii) The client is the person responsible to pay for the supply.
   iv) The payment is authorised by the client.
   v) The client knew that the supply is made by a third party.
   vi) The exact amount is claimed from the client and the agent has no right to alter or add on the value of the supply.
   vii) The payment is clearly an additional to the supply made to the client.

It is provided that the principal is not making a supply when he is claiming for a disbursement from the client and the principal is not entitled to claim for input tax credit (on the GST charged by the supplier). Conversely, the principal is stated to be making a supply when he is claiming a reimbursement from the client and the principal is entitled to claim input tax credit (again, on the GST charged by the supplier).

GST Treatment

Despite attempting to provide guidance to determine the GST treatment of reimbursements and disbursements, neither version of the Director General's Decision specifically spell out the GST treatment for reimbursements and disbursements. They did, however, state that a disbursement is not a supply. In view that a disbursement is not a supply, it follows then that GST is not applicable on a disbursement. The principal is not allowed to charge any GST on the disbursement as the claim for disbursement is not a supply on which GST may be chargeable. The supplier invoices the client and in view that the tax invoice has the client's name, the client is entitled to claim for input tax credit for the GST stated in the tax invoice.

Nonetheless, the same cannot be inferred from either Director General's Decision on the GST application for a reimbursement. Both Director General's Decision merely state that a reimbursement is a supply and the principal is entitled to claim input tax credit for the GST on the original supply. They did not state the GST treatment that should be applied to reimbursements. In the absence of specified GST treatment on reimbursements, GST has to be applied on a reimbursement based on applicable GST principles and the facts surrounding each reimbursement.

Foremost, it must be determined whether the reimbursement is a standalone claim, or is a claim in addition and ancillary to another underlying supply made by the principal. A reimbursement is ancillary to another underlying supply if the principal is claiming an expense from the client in addition to his underlying supply to the client. An example of this would be a claim for freight charges for shipping the goods to the client. The reimbursed expense is necessary in the provision of the supply, ie the provision of goods, and it is claimed by the principal as a reimbursement in addition to the underlying supply of goods.

When an expense is claimed as a reimbursement in addition to another underlying supply, the expense constitutes an input to the principal in his provision of the underlying supply to the client. The principal had in a sense, consumed the expense in the process of providing his underlying supply to the client and this expense then becomes a component of the underlying supply. Therefore, the general GST treatment for that reimbursement will follow the GST treatment of the underlying supply.

On the other hand, if the reimbursement is a standalone claim that is not ancillary to another underlying supply, the reimbursement will become a supply on its own. The circumstances surrounding onward supply or the reimbursement must then be examined for the application of the GST treatment.

Challenges

The GST treatment for a standalone reimbursement is considerably more complex than a reimbursement that is ancillary to an underlying supply. In practice, there are difficulties in determining the exact nature of the standalone reimbursement from the principal to the client especially if there is a lack of consumption of the original expense by the principal. This usually occurs when the expenses are pass-through to the client. The nature of the standalone reimbursement could closely mimic that of the original expense when the principal had incurred it, making it difficult to establish the nature of the standalone reimbursement.

Nevertheless, it must be emphasised that the principal is not necessarily making a supply of the same nature as the expense when the principal had incurred it. This creates the possibility of the principal incurring a GST standard-rated expense and the claim for a reimbursement of this expense is a zero-rated or exempted reimbursement. Similarly, the principal could incur a GST exempted or GST zero-rated expense and has to claim for a reimbursement of this expense as a GST standard-rated reimbursement.

Let's take the situation where a holding company (or the principal in the context of the Director General's Decision) took a group insurance policy for life insurance and one of the directors of its subsidiary (or the client in the context of the Director General's Decision) is insured. The insurer would have invoiced the holding company. When the holding company claims for repayment for the portion attributed to its subsidiary's director, the claim cannot constitute a disbursement because the tax invoice was not issued to the subsidiary. If it is a reimbursement, would it follow then that the holding company had provided insurance service to the subsidiary?

One could take the position that holding company indeed provided insurance service to the subsidiary and sub-contracted the policy to the insurer. If this is the case, the nature of the reimbursement that the holding company is claiming from the subsidiary will then be that of life insurance and the GST treatment which is exempted must follow. The holding company could unwittingly become a mixed-supplier. However, this contradicts the fact that the holding company is not licensed to provide insurance services and the associated legal issues that may be attached to it. In addition, the contractual obligations of the insurer are arguably directly to the director of the subsidiary and any claims for such insurance may not involve the holding company.

There are practical difficulties in determining the nature of the supply of a standalone reimbursement, creating challenges in applying the GST treatment. Based on various representations verbally made by GST officers of the RMCD in dialogues, seminars and conferences, it would appear that the RMCD is of the opinion that the nature of a standalone supply would not share the same nature of the original expense when it was incurred by the principal. The RMCD has a pragmatic approach to this and views that the principal's claim for reimbursement takes the nature of a service of arranging and facilitating payment for the original expenses. A reimbursement in this instance will most

certainly be GST chargeable as a GST standard-rated supply.

If the RMCD's approach is applied to the example of life insurance above, the holding company will be deemed to have provided services to arrange for the life insurance and facilitate the payment to the insurer. This will be the nature of the standalone reimbursement for which is a standard-rated supply.

Disbursements are also not without their challenges. The amended Director General's Decision specifically provided that all the criteria listed therein must be fulfilled in order for the claim to be treated as a disbursement. An odd situation would arise if the supplier had issued his tax invoice to the client, but one or more of the criteria in the amended Director General's Decision are not fulfilled. The claim of expenses is a reimbursement in accordance to the Director General's Decision but the principal would not be eligible to claim input tax credit for the GST charged by the supplier, as the supplier's tax invoice is in the name of the client. Likewise, the eligibility of the client to claim input tax credit on the supplier's tax invoice is unclear given that the claim of expenses by the principal is a reimbursement and not a disbursement.

Common Errors

Treating a claim of expenses as a disbursement when it is not a disbursement is probably one of the most common mistakes that taxpayers make. Many taxpayers, fuelled by either ignorance or reluctance to charge or to be charged GST, would attempt to treat a claim of expenses as a disbursement. Taxpayers are not cognisant of the fact that all the criteria in the amended Director General's Decision have to be fulfilled in order for a claim of expenses to be treated as a disbursement.

In practice, many taxpayers also fail to recognise that a reimbursement is an onward supply of a good or service which is different from the original expense when it was incurred by the principal. It is not uncommon for principals to apply the same GST treatment of the original expense to a reimbursement. If the GST treatment of the onward supply of reimbursement is different from the GST treatment when the principal incurred it as an expense, an incorrect GST treatment would be applied to the reimbursement.

Future Guidance

The RMCD is understood to be in the process of attempting to replace the amended Director General's Decision with clearer guidance in the form of a comprehensive guideline. While the forthcoming guideline will be welcomed, the extent of the comprehensiveness of the guidance remains to be seen.

Due to the endless permutations and circumstance that apply to claims of expenses, the pending guidelines should ideally be more focused on providing guiding principles to determine the GST treatment, as opposed to providing the GST treatments for specific situations and circumstances. A stated GST treatment for a given situation is useful as an example but they have the tendency to be rigid and it is not possible to provide examples for all the possible circumstances. Taxpayers, on the other hand, may use guiding principles to determine the GST treatment for any given situation. Unfortunately, it is the experience of the author that many prefer to be handed a fish instead of being taught how to fish.

Countries which implemented GST or VAT for decades are still struggling with determining the GST treatment of reimbursements and disbursements. As latecomers to the game, we have the advantage of learning from their mishaps and get it right from the get-go. However, the confusion and misunderstanding that still surrounds the application of GST treatments to reimbursements and disbursements suggest that more needs to be done and a comprehensive guideline from the RMCD is certainly a step towards that direction.

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TAXING OFFSHORE SERVICES

BACK TO THE OLD REGIME?

Yee Wing Peng

THE BUDGET 2017 WAS TABLED ON 21 OCTOBER 2016 FOLLOWED BY THE RELEASE OF THE FINANCE BILL 2016 ON 26 OCTOBER 2016. ONE OF THE MOST SIGNIFICANT CHANGES IS THE REMOVAL OF THE PROVISO TO SECTION 15A OF THE INCOME TAX ACT 1967 ("THE ACT") WHICH PRECLUDES MALAYSIA FROM IMPOSING WITHHOLDING TAX ON FEE FOR SERVICES PERFORMED OUTSIDE MALAYSIA. BY THE TIME THIS ARTICLE IS PUBLISHED, THE ABOVE PROPOSAL MAY BE LAW.

SOME BACKGROUND TO SECTIONS 4A AND 15A OF THE ACT

Section 4A was introduced in 1983, and is widely believed to address the issue contended in the case of *DGIR v Euromedical Industries Ltd [(1983) 2 MLJ 57]* ("Euromedical case"). Euromedical Industries Ltd ("EIL"), a tax resident of UK had no permanent establishment ("PE") in Malaysia. EIL entered into an agreement with a Malaysian company to set up EISB in Malaysia to manufacture catheters. EIL provided managerial, planning, training, technical, operational, marketing and development services to EISB. EISB paid managerial fees to EIL for the services provided.

In this case, the managerial fees paid would fall under the definition of "royalty" in Section 2 of the Act which, at that time, included any amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme. However, in the Malaysia – United Kingdom Double Tax Agreement ("MUKDTA"), royalty is defined as:

> *A payment of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, any patent, trademark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.*

There was an inconsistency in the definition of royalty in the Act compared with the definition in the MUKDTA. Under the Act, the managerial fee provided would fall under the definition of royalty in Section 2 and hence, taxable as royalty income under Section 4(d). However, in the MUKDTA, it would not be "royalty". Furthermore, Article IV of the MUKDTA provides that:

> *The income or profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State, unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, tax may be imposed in that other Contracting State on the income or profits of the enterprise but only on so much thereof as is attributable to that permanent establishment.*

Therefore, the Federal Court decided that in the event of an inconsistency as shown in this instance, the provisions of the DTA would override the Act. Consequently, the Act was amended and Section 4A was introduced with effect from 21.10.1983, creating a special class of income which is apparently excluded from relief provided in the

DTAs, including the protection under the article on business profits, unless there is a provision specifically referring to the special classes of income.

The aforesaid proviso was not in the original Section 15A resulting in the imposition of withholding tax not only on onshore services, but also on offshore services. There is a school of thought that Special Classes of Income under Section 4A was supposedly special and should not be covered under the article on business profit. This point is highly controversial because the Malaysian treaty partners would not have and probably would never agree on it as one could not imagine that a fee derived by a consulting firm for instance, is not a business income.

With the proposed removal of the proviso in Section 15A, it would effectively be re-imposing withholding tax on services rendered outside Malaysia. The re-imposition of withholding tax on offshore services could once again give rise to uncertainty in many cases where the taxpayer's country of residence has a double tax agreement with Malaysia.

AMENDMENT TO SECTION 15A IN 2002

When Section 15A was introduced into the Act, payment for services rendered outside Malaysia would be deemed to be derived from Malaysia if the payment is made by a resident in Malaysia or charged as an expense in the accounts of a business carried on in Malaysia and hence, taxable in Malaysia. Hence, income under Section 4A which is deemed to be derived from Malaysia under Section 15A could be subject to withholding tax under Section 109B of the Act regardless of whether the service was rendered in Malaysia or outside Malaysia.

In a case which reached the High Court (appeal to the Court of Appeal was withdrawn), *SGS Singapore (Pte) Ltd v Ketua Pengarah Hasil Dalam Negeri [(2000) MSTC 3814]* ("SGSS case"), services which were largely rendered by SGSS outside Malaysia was found to be not subject to withholding tax as relief was available under the then Malaysia – Singapore Double Tax Agreement ("MSDTA").

In this case, SGSS, a Singapore resident company received payments from Petronas Carigali Sdn Bhd ("PCSB"), a Malaysian resident company, for the provision of third party inspection and expediting services for a particular project. Withholding tax under Section 109B of the Act was deducted from the payments made to SGSS. SGSS appealed, contending that the company did not have a permanent establishment in Malaysia and hence, should not be subject to tax in Malaysia. The Special Commissioners of Income Tax held that the payments were chargeable to tax under Section 4A of the Act and were not excluded under Article IV of the MSDTA.

On appeal, the High Court overruled the decision of the Special Commissioners and decided in favour of SGSS and held that relief was available to SGSS as it had met the three conditions provided in Article IV of the MSDTA, i.e. SGSS is a "Singapore enterprise", which does not "carry on business" through a "permanent establishment" in Malaysia and derives "income or profits" from Malaysia within the meaning of Article II of the then MSDTA.

Although SGSS may have derived income from Malaysia, it does not have permanent establishment ("PE") in Malaysia and hence, cannot be subject to tax in Malaysia. Nevertheless, this case was under the then MSDTA which had specifically provided a definition of "income or profits". Notwithstanding, this case reinforces that where a double tax agreement is in place, the provisions of the double tax agreement can override the provisions of the domestic law. Section 132(1) of the Act provides that the provisions of a treaty would prevail.

With the proposed removal of the proviso in Section 15A, it would effectively be re-imposing withholding tax on services rendered outside Malaysia. The re-imposition of withholding tax on offshore services could once again give rise to uncertainty in many cases where the taxpayer's country of residence has a double tax agreement with Malaysia.

THE PUBLIC RULINGS

Despite the above cases, the IRBM often disputes that fees for such technical services are taxable under Section 4A of the Act and hence, the provisions for taxing business profits only where there is a PE provided in the DTA do not apply. Public Ruling ("PR") No. 4/2005 was issued on 12 September 2005 followed by two addendums issued on 30 November 2007 and 4 January 2010 respectively to articulate the IRBM's stance on withholding tax on special classes of income. PR No. 1/2014 was issued to replace the earlier PR and its addendums. In the PR, the IRBM expressed its views that the services referred to in paragraph 4A(ii) of the ITA covers technical and non-technical services, i.e. technical assistance, non-technical assistance, technical services or non-technical services rendered in connection with scientific, industrial or commercial undertaking, venture, project or scheme.

In spite of the issuance of the PR, uncertainties may still arise for payments made to non-residents who have DTA with Malaysia.

THE ALAM MARITIM CASE

In *Lembaga Hasil Dalam Nergeri Malaysia v Alam Maritim (M) Sdn Bhd [(2012) MSTC 30-049]* ("Alam Maritim case"), the applicability of withholding tax on income received by the taxpayer, which is its business profits was once again disputed.

In this case, the taxpayer had entered into time charter contracts with non-resident companies which were operating the business of time charter of ship and crew over the period 1998 to 2004. These non-residents did not have any PE in Malaysia and were also residents of countries which had DTA with Malaysia. The taxpayer had submitted an application to the Director General of Inland Revenue ("DGIR") for a decision that it was correct in not deducting withholding tax from the payments it made to the non-residents. The DGIR replied that withholding tax was applicable under Section 109B of the Act. The taxpayer then filed for a judicial review of the DGIR's decision. The High Court and Court of Appeal found in favour of the taxpayer. .

Discontented, the IRBM obtained leave to appeal to the Federal Court which decided in favour of the IRBM, reversing the decision of the Court of Appeal. In allowing the appeal, the Federal Court opined that the provisions should be interpreted in line with the intention of Parliament and hence, if Section 4A of the Act was inserted with the intention to collect tax from non-residents who received payments from Malaysians, it is then only effective to allow the collection of tax at source, i.e. under Section 109B of the Act. The Federal Court opined that Article IV of the MSDTA was not applicable to the income received under Section 4A(iii) and hence, the payments were taxable and withholding tax under Section 109B would be triggered.

IN SITUATIONS WHERE THERE IS A DTA BUT WITHOUT AN ARTICLE ON TECHNICAL FEES

DTAs would have an Article on business profits which provides that the profits of an enterprise shall be taxable in a country only if it carries on business in that country through a PE situated in that country. The Article on business profits in the DTAs would usually also provide that where the income or profits are

specifically dealt with under another Article in the DTA, the Article on business profits shall not apply to those Articles.

However, in view of the different outcomes in the above court cases, there is likely to be uncertainty as to whether the payment for offshore service to a non-resident in the form of business income in the hands of the recipient would still be subject to withholding tax, given that the non-resident would not have a PE in Malaysia. If the outcome of the Alam Maritim case were to be applied, without specific relief for such income, with the removal of the proviso in Section 15A, withholding tax would be applicable regardless of where services are rendered. One should note that the Federal Court's judgement in Alam Maritim differs from those made by the High Court and Court of Appeal. Whilst the SGSS case was relied on in the lower courts, the Federal Court seems to have taken a different approach by looking at other articles in the DTA such as the transportation article, etc. Though the tax authority may use the principles in Alam Maritim as a "weapon of all seasons", taxpayers would really need to analyse the Alam Maritim position in greater detail as there could be room to uphold the principle of "No PE, no tax on business profits" in the case where there is no technical fee article in the DTA.

If the taxpayer in complying with the provisions of the Act deducts and remits the withholding tax to the IRBM, the non-resident taxpayer may then face a challenge in obtaining foreign tax credit as the respective tax authority may not recognise the claim as valid if the income should not have been taxable in the first place due to the relief accorded under the business profits article of the applicable DTA.

Furthermore, in the outcome of a recent Court of Appeal case, *Ketua Pengarah Hasil Dalam Negeri v Teraju Sinar Sdn Bhd [(2014) MSTC 30-080]* ("Teraju Sinar case"), the Courts held that the taxpayer was responsible to withhold tax and to discharge its duties as taxpayer under the Act. It is the non-resident payee that may claim relief from the liability to tax under the DTA and not the taxpayer who is the payer. The responsibility of the taxpayer and the non-resident is entirely distinct and hence it was for the non-resident to avail itself of the relief under the DTA. The outcome of this case goes against the grain of the practice of taxpayers in general where relief under DTAs is available as the decision to deduct or otherwise rests with the resident payer.

THE AUSTRALIAN CONTEXT

The DTA with Australia provides under Article 5 on PE that an entity shall be deemed to have a PE if it furnishes services, including consultancy services, in that the other State through employees or other personnel engaged by the enterprise for such purpose, but only where those activities continue (for the same or a connected project) within the other State for a period or periods aggregating more than three months within any twelve-month period.

Based on the above, where the duration of the services rendered by an Australian company (for the same or a connected project) within Malaysia is for a period or periods aggregating less than three months within any twelve-month period, no PE would be created by the Australian company. Consequently, no WT under Section 109B will apply to the payment. However, it would seem that this concession is a result of the negotiation between both governments over the years (i.e. both governments/competent authorities have taken the position that profits from the consultancy services are part of the business profits and in the absence of a PE in Malaysia, Malaysia does not have the taxing right on the business profits of the tax resident in Australia). However, with the removal of the proviso and the outcome of the Teraju Sinar case, this may once again present difficulty for the taxpayer whether to withhold tax as it is not likely the Australian authority would change its view in this matter.

IN CASES WHERE THERE IS DTA WITH ARTICLE ON TECHNICAL FEES

Meanwhile, where the DTA has a specific Article dealing with "Technical Fees", it should be clear that where the nature of the income is "technical fee", the Article on business profits shall not apply in view that there is a separate Article dealing specifically with this nature of income. About half of the DTAs entered into by Malaysia with other countries now contains provisions for technical fees in the DTA including Brunei, France, Germany, Hong Kong, Netherlands, Singapore and the United Kingdom.

"Technical fee" is largely defined in the DTAs to mean payments of any kind in consideration for any services of a technical, managerial or consultancy nature. In addition, it is also stated in such DTAs that technical fee shall be deemed to arise in a Contracting State when the payer is a resident of that State. This general definition would seem to fit with the definition for such services under Section 4A and the derivation of such income under Section 15A of the Act and hence, the above dispute should not arise, i.e., withholding tax would be applicable regardless of whether the services are rendered in or outside Malaysia.

However, peculiarly, the DTA with Singapore also states in Paragraph 4, Article 13:

> *Technical fees shall be deemed to arise in a Contracting State when the payer is a resident of that State and the services are performed in that State.*

Also in the DTA with Spain, Paragraph 7, Article 12 states that:

> *Fees for technical services shall be deemed to arise in a Contracting State when services are rendered in that State.*

In light of the additional provisions in the DTAs with Singapore in Spain, it would appear once again that there shall be dispute if technical fee payable to a resident of Singapore or Spain should be taxed on services that is not rendered in Malaysia.

BACK TO THE OLD REGIME?

When the proviso to Section 15A took effect on 21 September 2002, it was lauded by taxpayers as being progressive since the dispute over the validity of the taxing rights was eliminated and it has eased the burden of withholding tax and hence, cost of doing business between Malaysian taxpayers and the non-residents.

With the removal of the proviso and hence reverting to the old regime, the dispute on whether a non-resident without PE can be taxed in Malaysia could re-emerge. Businesses would put in effort to defend their position so as not to pay tax that is more than necessary as their primary objective is to build a profitable business and pay only the right amount of tax. Likewise, the tax authority would want to make sure businesses pay tax as provided by the law. Such disputes may distract the attention of both parties from attaining their core objectives while they engage themselves in such disputes. I understand that the tax authority would be issuing guidelines on the application of the new proviso. I trust that related issues arising from this can be addressed so that Malaysia remains a country that has one of the most progressive and business friendly tax regimes in the world that facilitate the intensified global trades and investments.

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THE BANDAR NUSAJAYA DEVELOPMENT CASE

IS THIS THE END OF THE JUDICIAL REVIEW PATH IN TAX MATTERS?

Datuk D.P. Naban & S. Saravana Kumar

The recent decision of the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Bandar Nusajaya Development Sdn Bhd* caught many in the legal practice by surprise. The Federal Court ordered that the taxpayer should have commenced their appeal before the Special Commissioners of Income Tax rather than proceeding via the judicial review route.

This article will discuss the Bandar Nusajaya Development case and examine whether this decision marks the end of judicial review path in tax matters.

FACTS

The facts in this case are not in dispute. The taxpayer is involved in the development of Iskandar Malaysia. On 17.11.1994, Renong Berhad (now known as UEM Land Berhad ("UEML")) agreed to provide a loan up to a maximum of RM875 million to the taxpayer. The initial interest was at the rate of 12% p.a. and it was subsequently reduced to a lower rate. In the years of assessment 2003 to 2005, the taxpayer claimed a tax deduction on the interest accrued, which as at 31.12.2005 was RM222,062,659.00.

The tax deduction on interest expense was taken against two different sources of income of the taxpayer namely:

(i) business income, which amounted to RM40,198,833.00; and

(ii) non-business interest income, which amounted to RM181,863,826.00;

Although the interest deduction was taken by the taxpayer, it did not disburse any payment to UEML. The interest remained owed to UEML. After much consideration, UEML decided to release Bandar Nusajaya Development from the obligation to pay the interest owed. Being released from the debt, the taxpayer complied with Section 30(4) of the Income Tax Act 1967 ("ITA") and brought RM40,198,833.00 to income tax. However, the taxpayer did not bring RM181,863,826.00 to income tax on the basis that it did not fall under Section 30(4).

The Revenue conducted a tax audit and brought the sum of RM181,863,826.00 to income tax on the basis that a waiver of debt falls under Section 22(2)(a) of the ITA and raised a notice of additional assessment with penalty on 22.9.2011.

JUDICIAL REVIEW BEFORE THE HIGH COURT

Error of law

On the premise that a waiver of debt does not come within Section 22(2)(a), the taxpayer argued that the Revenue had misconstrued / misinterpreted the provision in raising the additional assessment.

The taxpayer argued that it is settled law that misinterpretation of a statute is an error of law. *Halsbury's Laws of Malaysia [Vol. 9 para 160.076]* succinctly explains that:

> "Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof."

In *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765,* the Federal Court also held that a decision making authority whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. This decision makes it clear that the previous distinction between errors of law that went to jurisdiction and errors of law that did not, has been for all practical purposes, abolished. This position of error of law is also well settled in our jurisdiction where the then Supreme Court in *Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18* held that:

"In other words, if there is an error of law on which the award of the Industrial Court is founded, such error whether interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity…

As the Revenue is a public authority, it must exercise its powers according to the law and due consideration must be given to the clear wordings of Section 22(2)(a)(i) of the ITA. If the Revenue makes an error in reading a provision of the law, then it exceeds its jurisdiction and its decision is illegal and *ultra vires* as held in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65.* The Revenue's decision to raise the additional assessment based on the erroneous interpretation of the law was thus made with a clear lack of jurisdiction.

Interpretation of the provisions

There are two provisions of the ITA that are of particular relevance to this appeal i.e. Section 22(2)(a) and Section 30(4) of the ITA.

First, an income must fall under the charging provisions of Section 3 and Section 4 of the ITA to be brought to income tax. Although, the word "income" is not defined, it ordinarily refers to money coming in, such as gains or profits arising from business or employment source.

However, a release of debt is not income. Reference is made to the House of Lords decision of *The British Mexican Petroleum Company Limited v Jackson (H.M. Inspector of Taxes) & Anor 16 TC 570,* which is within all four corners of the present matter. The tax authority in The British Mexican attempted to bring to income tax the release of debt granted to the taxpayer. The House of Lords, Court of Appeal and High Court unanimously held that the tax authority cannot subject a release of debt to income tax. The following illuminating paragraphs of the decision are instructive:

(a) "What is chargeable to Income Tax under either the First or Second Case of Schedule D…-the trading case- is the profit which is made by comparing the amount which you receive from selling goods or rendering services, or whatever it is, with the amount which you pay out in putting yourself in a position to do that by buying goods and equipping yourself, finding the expenses for rendering the services or whatever it is- with the necessary adjustments in the account to allow for the stock which is carried over from year to year… that is what it is, the difference which you enjoy between what you receive and what you have to pay out in the year's trading. How on earth the forgiveness in that year of a past indebtness can add to those profits I cannot understand. It is not a matter depending upon the form in which the accounts are kept. It is a matter of substance, looking at the thing as it happened, as a man who knows nothing of scientific accountancy might look at it- it is the receipts against the payments in trading."

(b) "The Appellant's alternative contention, which was not seriously pressed by the Attorney-General, is equally unsound, in my opinion. I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted."

As a release of debt is not ordinarily an income for the purposes of income tax, this led the British Parliament to enact Section 36 of the Finance Act 1960 to bring to income tax a debt for which a deduction has been allowed and thereafter that debt is released. In Malaysia, the equivalent provision is Section 30(4) of the ITA. But for Section 30(4), any release of debt would not be

subjected to income tax.

However, it must be appreciated that not all release of debt is subject to income tax. Our Parliament had only intended debt that had been deducted against a business source income to be brought to income tax. Hence, of the total release of debt amounting to RM222,062,659.00, the taxpayer had brought RM40,198,833.00 to income tax pursuant to Section 30(4). This is because the taxpayer had previously deducted RM40,198,833.00 against its business source income. The taxpayer did not bring RM181,863,826.00 to income tax as this amount was deducted against a non-business source income. The wordings of Section 30(4) are clear and as such, this amount did not fall within the ambit of Section 30(4). The taxpayer's treatment in this regard is also not disputed by the Revenue.

The dispute between the parties were the Revenue's decision to being the sum of RM181,863,826.00 to income tax under Section 22(2)(a).

IS SECTION 22(2)(A) APPLICABLE HERE?

The High Court and the Court of Appeal agreed with the taxpayer that Section 22(2)(a) was not applicable in bringing the sum of RM181,863,826.00 to income tax. This led the courts to rule that the Revenue had misinterpreted Section 22(2)(a). Basically, Section 22(2)(a) is in regards to treating as income, sums receivable or deemed to be received in respect of insurance, indemnity, recoupment, recovery, reimbursement or otherwise where such sums are (i) in respect of the kind of outgoings and expenses deductible….; or (ii) under a contract of indemnity.

First, it is very clear that the intention of Parliament is that only release of debt in respect of debt that had been deducted against a business source income is subject to income tax. This explains why the wordings and operations of Section 30(4) of the ITA are restricted. If Parliament had intended to subject all release of debt irrespective against which income it was deducted, then there is absolutely no necessity for Parliament to draft the provision in such restrictive terms.

Second, if Section 22(2)(a) is also said to include the release of debt, then it begs the question as to the purpose of Parliament enacting or why did Parliament enact a specific provision such as Section 30(4) of the ITA for release of debt or why is there a specific provision such as Section 30(4).

Third, it must be noted that Parliament does not act in vain. The very reason that Parliament enacted a specific provision i.e. Section 30(4), clearly indicates that Parliament was aware that Section 30(4) was needed as Section 22(2)(a) does not sufficiently allow for the inclusion of release of debt in determining a taxpayer's income. Reference is made to the Federal Court decision in *Lim Phin Khiah v Kho Su Ming [1996] 1 MLJ 1,* which was applied recently in *Saujana Hotel Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 213.*

Fourth, if Parliament had intended that all release of debt to be subjected to income tax irrespective whether it had been deducted against a business source or otherwise, then Parliament would have surely specified this clearly in Section 30(4) of the ITA. Reference is made to the House of Lords' decision in *Saxone Lilley & Skinner (Holdings) Ltd v Commissioners of Inland Revenue [1967] 44 TC 122,* where Lord Reid commented "The Crown's main argument was that 'in use for the purposes of a trade' or of a part of a trade means wholly and mainly in use for such purposes. But that involves writing in words which are not there, and I can see nothing in the context to make that necessary. Moreover, it requires no feat of imagination in a draftsman to see that cases may arise where the same building or the same part of it is being used for two purposes, and if it were intended to exclude such cases I would expect that to be made clear…"

Fifth, where there is a specific provision, it has to be applied. It lies in the rule of construction expressed in the maxim generalibus specialia derogant. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision (see: *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng@ Tan Tien Chi & Anor [1995] 3 CLJ 520).*

Section 30(4) of the ITA is the specific provision enacted by Parliament. Meanwhile, Section 22(2)(a) of the ITA is a general provision (which in any event is not applicable here) and the Revenue/Appellant is not entitled to use a general provision to bring an item that is not charged to tax under the specific provision.

A RELEASE OF DEBT IS NOT A RECEIVABLE

Essentially, Section 22(2)(a) relates to what is considered gross income of a person and covers sum receivable or deemed received, in regard to outgoings

and expenses deductible, by way of "insurance", "indemnity", "recoupment", "recovery", "reimbursement" or "otherwise".

As an illustration, where an expense had been deducted in respect of a source and the taxpayer had recovered such expense by way of "insurance", "indemnity", "recoupment", "recovery", "reimbursement" or "otherwise", that amount is to be included as gross income of the taxpayer.

In ordinary sense, a release of debt is not any receivable or a receivable that is deemed to have been received. The release of debt in the present application is essentially the waiver of interest owed by the taxpayer to UEML whereby UEML wrote off from its books the interest owed by the taxpayer. Correspondingly, the taxpayer withdrew from its books the indebtedness (i.e. the interest owed) to UEML.

The High Court and Court of Appeal held that the word "receivable" in the context of Section 22(2)(a) refers to a sum of money that is receivable (or a receivable that is deemed to have been received) as income of a taxpayer from a source of his income. "Receivable" in the ordinary sense is something to be received and must be from a source of the taxpayer's income in the ordinary sense. One of the features of "income" under common law is that it refers to something that "comes in" (see: *Tennant v Smith [1892] AC 150)* and not what is saved from going out (see: *Federal Commissioner of Taxation v Cooke & Sherden 29 ALR 202).* However, here the taxpayer does not receive or is not deemed to have received the debt on the discharge of that obligation.

This is a position covered under Section 30(4) where the discharge of a debt is considered income only in that limited circumstances. The present application is not one of which falls in that limited circumstances.

The word "receivable" has been defined as "able to be received" and "capable of receiving" (see *The New Shorter Oxford English Dictionary)* and "capable of being admitted or accepted", "awaiting receipt of payment (accounts receivable)" and "subject to a call for payment (a note receivable)" (see *Black's Law Dictionary)).*

In this regard, the interest payable to UEML is not and cannot in any circumstances be regarded as an income of the taxpayer as it is neither receivable nor a receivable that is deemed to have been received from a source of the taxpayer's income. It is undisputed that the sources of the Taxpayer's income are the interest arising from the advances made to its subsidiaries and the business profits from its property development business.

Further, the above construction is also consistent with Section 30(4), which clearly provides for the inclusion of release of debt as part of a taxpayer's income from a business source. If Section 22(2)(a) is said to include the release of debt, then it begs the question as to the purpose of Parliament enacting Section 30(4). It must be noted that Parliament does not act in vain and this clearly indicates that Parliament was aware that Section 30(4) was needed as Section 22(2)(a) does not allow for the inclusion of release of debt in determining a taxpayer's income.

The release of debt does not in any manner or circumstance fall within the meaning of the words "insurance", "indemnity", "recoupment", "recovery" and "reimbursement". In *Pacific & Orient Insurance Co. Sdn. Bhd. v R. Kathirvelu [1992] 1 CLJ 348,* the "ejusdem generis" rule was applied where it was recognised as a canon of construction that where a particular enumeration is followed by such words as 'or other' the latter expression ought, if not enlarged by the context, to be limited to matters ejusdem generis with those specially enumerated. The cannon is attended with no difficulty except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms and subject matter.

Hence, in construing the word "otherwise", the principle of ejusdem generis must be applied. This means "otherwise" has a restricted meaning. It is confined to things of the same kind as specified in the preceding words. In *Tenaga Nasional Bhd v Ong See Teong & Anor [2010] 2 CLJ 1* held that: presumed to be restricted to the same genus as the particular words. Meaning: the general expression is to be read as comprehending things of the same kind as that designated by the preceding particular expression unless there is something to show that a wider sense was intended."

One must examine whether a release of debt is capable of falling under the receding words such as "insurance", "indemnity", recoupment", recovery" and "reimbursement". Very clearly, release of debt will not fall within those words. Each of the preceding words i.e. insurance", "indemnity", "recoupment", "recovery" and reimbursement" all have a common character. Each of these words connotes a receipt, a coming in. On the other hand, a release of debt is a discharge of an obligation. This is because, if it did, then it defeats the entire purpose of Parliament legislating Section 30(4) of the ITA. As highlighted earlier, Parliament does not act in vain.

FEDERAL COURT'S DECISION

However, the Federal Court did not consider any of the above and merely ruled that Bandar Nusajaya Development should have lodged its appeal before the Special Commissioners of Income Tax. In fact, the Federal Court did not also address the question of law before them, which read:

"Whether misinterpretation of subparagraph 22(2)(a)(i) of the Income Tax Act 1967 by the Revenue (if there is, which is denied in full) amounted to an error of law, thus the decision to raise the additional assessment was made with a clear lack of jurisdiction?"

As discussed earlier, "errors of law" includes misinterpretation of a statute or any other legal document or a rule of common law. In our jurisprudence, the current governing principle is that an "inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law… If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction" (see Titular Roman Catholic Archbishop of Kuala Lumpur (supra)).

This means any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law. In this context, it is rather difficult to fathom the rational and logic of the Federal Court's decision especially in the absence of a written grounds of judgement.

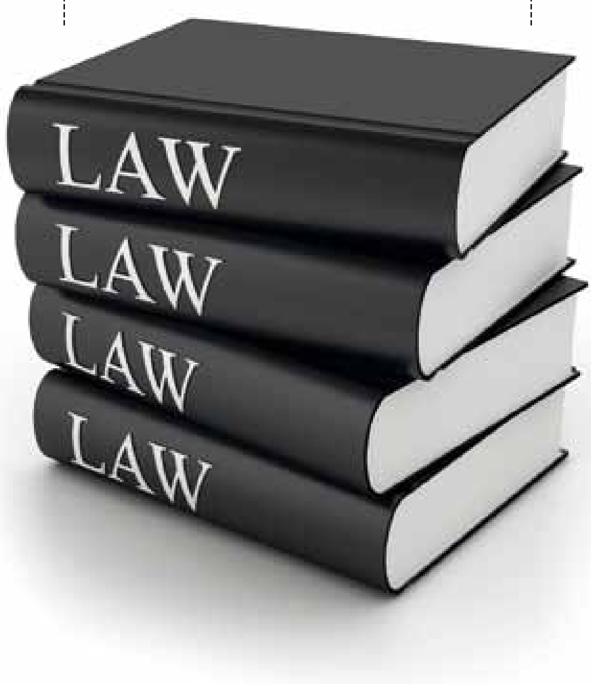
END OF THE JUDICIAL REVIEW PATH IN TAX MATTERS?

Be that as it may, this decision does not mark the end of the judicial review path in tax matters. The Federal Court did not rule that judicial review is not available in tax matters. In fact, the then Supreme Court in *Government of Malaysia & Anor v Jagdis Singh [1987] CLJ 110 (Rep)* held that the Revenue is not immune from the process of judicial review. The Supreme Court observed that:

"… It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review…"

It is notable that the Supreme Court in Jagdis Singh held that judicial review in tax cases is available in exceptional cases. The exceptional cases are:

"…a clear lack of jurisdiction



or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice…"

The existence of domestic remedy is not a bar for judicial remedy as held by the Federal Court in *Majlis Perbandaran Pulau Pinang (supra)*. This principle was applied later in the concurrent decisions of the High Court and the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Metacorp Development (Rayuan Sivil No. W-01-239-11)*. In fact, the Revenue's application for leave was dismissed by the Federal Court on the premise that the existence of the Special Commissioners does not bar the taxpayer from commencing judicial review proceedings in exceptional circumstances.

The authors stand by the decisions in *Majlis Perbandaran Pulau Pinang (supra) and Metacorp Development (supra)* as the Revenue in exercising a quasi-judicial function or purely an administrative function as a public decision maker has no jurisdiction to commit an error of law. Where there is an "error of law" or "abuse of power" which affects the legality of the conduct of the decision-making authority, the availability of an alternative domestic remedy will not shut down an application for judicial review.

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CONCLUSION

The then Supreme Court in *Government of Malaysia v Jasanusa Sdn Bhd [1995] 2 CLJ 701* aptly commented that tax disputes require courts 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 Supreme Court reminded courts of 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.

The *Court of Appeal in Mudek Sdn Bhd v Kerajaan Malaysia [2013] 1 LNS 281* ruled that every exercise of statutory power including the raising of an assessment cannot be arbitrarily exercised. Every exercise of statutory power must not only be in conformity with the express words of the statute, but above all must also comply with certain implied legal requirements. The Court added that it has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. The Revenue Department is not an exception to the said jurisprudence.

In concluding, the Federal Court's decision in the Bandar Nusajaya Development case does not mark the end of judicial review as a route of litigation in tax matters. 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. When genuine grounds for judicial review are alleged, it is the refusal rather than the grant of relief which is the exceptional course. It is trite law that if an applicant in judicial review proceedings can demonstrate illegality, that is to say unlawful treatment, it would be wrong to insist that he exhaust his statutory right of appeal where one is available.

When unlawful conduct is proved before a court of justice, it should generally be willing to say so and grant relief, whether an equally convenient, beneficial and effectual alternative remedy exists or not. Likewise, if a complaint raises a question of law which could be dealt with by appeal or by judicial review, the latter may be preferable on the ground that judicial review may be quicker than the appeal procedure.

EXPLORING THE NEW **MALAYSIAN CORPORATE TAX RATES** FOR 2017 AND 2018

Kenneth Yong Voon Ken & Lee Fook Koon

In any new tax legislation, one key item – above all else – usually generates a lot of attention (or aversion): the tax rate.

For over a decade, determining the corporate tax rate has been a relatively straightforward affair. A "standard" tax rate applies to all companies; but Small and Medium Companies (SMCs) enjoy a 'preferential' tax rate on a portion of their chargeable income, followed by the "standard" tax rate on the remaining chargeable income.

This relatively straightforward approach has been in use for over a decade. But the Malaysian 2017 Budget brought a change that disrupts the otherwise familiar formula. This article describes the new corporate tax rate mechanism and discusses some implications of its adoption.

THE NEW CORPORATE TAX RATE

2017 Budget reduces the 'preferential' income tax rate for Small and Medium Companies (i.e. resident Malaysian companies with ordinary share capital of not more than RM2.5 million at the beginning of the basis period; see para 2A and 2B of the First Schedule of the Income Tax Act 1967 for full definition) to 18% - an unsurprising 1% reduction in view that the government had previously indicated a gradual reduction in tax rates as a consequence of adopting the Goods and Services Tax (GST). The 'preferential' 18% rate only applies to the first RM500,000 of Chargeable Income of SMCs; the excess is still taxed at the "standard" corporate tax rate.

However, the "standard" corporate tax rate remained unchanged at 24% for YA 2017. What's new is the introduction of a third 'situational' tax rate (in addition to the 18% and 24%) that is applied only to any increase in Chargeable Income ("CI") from YA 2016 to YA 2017 or to any increase in CI from YA 2017 to YA 2018. This incentive is only for YA 2017 and YA 2018; it is applicable to both SMCs and non-SMCs, as well as to Limited Liability Partnerships (LLP) and Trust Bodies.

This 'situational' tax rate (a term coined by the authors) is a third tax rate that is used only if there is a sizeable increase in CI; the value of the 'situational' tax rate will depend on the percentage of increase in CI; and the 'situational' tax rate is only used on the quantum of the increase in CI. Refer to **Table 1**.

DETERMINING THE NEW 'SITUATIONAL' TAX RATE

While well-intended, the actual mechanism of the 'situational' tax rate can be complicated as its invocation involves various conditions and steps. The 'situational' tax rate will NOT apply if:

(a) there is no increase in CI; or
(b) the increase in CI is less than 5% (see **Table 1**)

To make matters worse, the process of ascertaining and applying the tax rates is slightly different for SMCs and non-SMCs. Please refer to **Table 2** for examples of computation.

For non-SMCs, the bottom line is that qualifying non-SMCs get to enjoy the 'situational' tax rate (20% to 24%) first, before being taxed at the "standard" tax rate of 24%.

Meanwhile for SMCs, the CI is first taxed based on the 'preferential' rate of 18% on the first RM500,000, followed by the 'situational' tax rate on CI in excess of RM500,000. However, the amount of CI that can enjoy the 'situational' tax rate is restricted to the increase in CI from YA 2016 to YA 2017 (or from YA 2017 to YA 2018). Any excess CI is then taxed at the "standard" tax rate of 24%, thus potentially creating three portions of CI taxed at three different rates – a process that can be prone to errors.

In short, the SMC first enjoys the 18% preferential tax rate, followed by the 'situational' tax rate (20% to 24%) and only then, does it apply the "standard" corporate tax rate of 24%.

NUMERICAL EFFECT

From **Table 1**, it can be observed that the 'situational' tax rate reduces (not increases) with a higher percentage of increase in CI from the previous YA. The 'situational' tax rates range from 20% to 24% - very approximately filling the gap between the 'preferential' tax rate of SMCs (18%) and the "standard" tax rate of all companies (24%).

On the positive end, the maximum savings from this 'situational' tax rate is 4% (assuming a large increase in CI of more than 20% over the previous YA). This maximum 4% tax savings (reduction from 24% to 20%) is relatively sizeable since the usual reduction in tax rates as announced by annual Budgets are generally more modest (i.e. usually 1% reduction). However, the 'situational' tax rate is – situational – meaning that not all companies will be able to enjoy it; so it remains to be seen if tax savings will be pervasive amid the challenging business environment.

Interestingly, the manner of determining the 'situational' tax rates seems like, superficially at least, a "regressive" approach whereby 'the more you earn, the less you pay' - a departure from the usual Malaysian system of applying progressively higher tax rates as income increases.

By her own admission, a representative from the Ministry of Finance had cited (during a 2017 Budget Conference organised by the Chartered Tax Institute of Malaysia) that this was the first time she had witnessed a system of reducing tax rates based on the increase in chargeable income from previous year – which perhaps tells about the novelty factor attached to this approach.

Table 1: The new 'situational' tax rates for YA 2017 and YA 2018 based on increase in Chargeable Income compared to immediate preceding YA

% increase in Chargeable Income compared to immediate YA	Reduction in tax rate (from 24%)	'Situational' tax rate
Less than 5%	Nil	24%
5% to 9.99%	1%	23%
10% to 14.99%	2%	22%
15% to 19.99%	3%	21%
20% and above	4%	20%

The 'situational' tax rate (a term coined by the authors) is to be multiplied by the quantum of the incremental portion of Chargeable Income over previous YA.

RATIONALE

Supportive of raising business activity, the 'situational' tax rate incentivises companies to work harder by offering conditionally lower effective tax rates, leaving such companies with more funds for expansion and to be more competitive.

The roll-out of the 'situational' tax rates based on percentage of increase in CI, coupled with its limited years of invocation (only for YA 2017 and YA 2018), fuels speculation that this incentive is intended to accelerate near-term tax collections by encouraging companies to raise their CI in YA 2017 or YA 2018. In practice, the coming years may be challenging for businesses, which in turn may inhibit widespread application of this incentive.

More optimistically, this system of 'situational' tax rates may perhaps be a prelude to a full tax rate reduction looming in YA 2019, temporarily delayed as the policy setters juggle with public finances. After all, SMCs were bestowed a 1% reduction in preferential tax rates for YA 2017, so the 'situational' tax rate may be a temporary sweetener to appease non-SMCs as they did not get a corresponding 1% reduction in the "standard" tax rate.

IMPLICATIONS

At this preliminary stage, a few implications can be conjectured for this system of 'situational' tax rates:
(a) Placing tax consultants in a guarded situation
(b) Companies may only achieve a one-year increase in CI
(c) Impact of pre-2017 tax audits on computation of the increase in CI
(d) Impact of increase in CI on post-2018 tax audits
(e) Complications in financial reporting

Each item is briefly explored and discussed in turn.

Table 2: Examples of how the new corporate tax rates may be applied for YA 2017

	CI for YA 2016	CI for YA 2017	RM increase in CI	% increase in CI	Portion of CI	Applicable tax rate
Non-SMC	Nil	RM 460k	RM 460k	> 20%	RM 460k **Total RM 460k**	x 20%
Non-SMC	RM 460k	RM 520k	RM 60k	10% to 14.99%	RM 60k RM 460k **Total RM520k**	x 22% x 24%
Non-SMC	RM 520k	RM 2m	RM 1.48m	> 20%	RM 1.48m RM 520k **Total RM 2m**	x 20% x 24%
Non-SMC	RM 2m	RM 520k	Nil	Nil	RM 520k **Total RM 520k**	x 24%
SMC	Nil	RM 460k	RM 460k	> 20%	RM 460k **Total RM 460k**	x 18%
SMC	RM 460k	RM 520k	RM 60k	10% to 14.99%	RM 500k RM 20k **Total RM 520k**	x 18% x 22%
SMC	RM 520k	RM 2m	RM 1.48m	> 20%	RM 500k RM 1.48m RM 20k **Total RM 2m**	x 18% x 20% x 24%
SMC	RM 2m	RM 520k	Nil	Nil	RM 500k RM 20k **Total RM 520k**	x 18% x 24%

SMC: 'Small and Medium Companies' which qualify for the preferential tax rate of 18% on the first RM500k of CI. **CI:** Chargeable Income

Note:* *Actual legislation was not available at the time of writing.

PLACING TAX CONSULTANTS IN A GUARDED SITUATION

For most of Malaysian corporate tax history, the corporate tax rate can be easily described. Ask any tax consultant and they would readily be able to state the corporate tax rate or describe its determination with relative ease.

But embarrassingly, for YA 2017 and YA 2018, describing the corporate tax rate becomes a complicated affair. Not only will tax consultants NOT be able to pin down a single tax rate (as there is a range of possible tax rates), but they will also struggle to explain to corporate taxpayers the relatively complex process of determining the correct 'situational' tax rate.

Worse yet, the final leg of the tax computation (i.e. computing the tax expense) will become more problematic for YA 2017 / 2018 given the more complex process for ascertaining the tax rates. As the process involves extracting the past CI, computing the increase, and determining the applicable tax rate, errors may be expected, even if the computation is systemised.

To address this, tax consultants will need to redesign worksheets that can correctly compute the applicable tax rates to be applied to various portions of Chargeable Income for SMCs and non-SMCs (each requires a different algorithm). In-house review processes would need to be intensified to address the heightened possibility of error in extraction and computation, which also necessitates training and hands-on practice, giving tax practitioners yet another issue to contend with.

In addition, it would be just that much harder to forecast the CP204 tax estimates of companies given that the tax rate is difficult to ascertain without first estimating the increase in CI.

COMPANIES MAY ONLY ACHIEVE A ONE-YEAR INCREASE IN CI

Because the 'situational' tax rates are based on an increase in CI from YA 2016 to YA 2017, or YA 2017 to YA 2018, it would appear to be more advantageous to have a large CI increase in one YA (i.e. bigger reductions in 'situational' tax rate), than modest increases in CI over two years (i.e. two small reductions in 'situational' tax rate).

It is unclear whether there will be any anti-avoidance provisions to prevent potential profit-shifting to an earlier year, as this entails the double effect of: firstly, reducing overall taxes through a lower 'situational' tax rate (undesirable to the IRBM), and secondly, accelerating tax collections to an earlier year (desirable).

Furthermore, it would be relatively more challenging to enjoy the incentive for two consecutive years, because showing continuous increases in profits is made more difficult by a growing denominator/base effect.

Nonetheless, it is envisaged that certain companies may readily show large increases in CI:

(i) Companies emerging from tax holidays in YA 2016/2017 e.g. cessation of Pioneer Status, Investment Tax Allowance or Reinvestment Allowance.
(ii) Companies depleting their brought forward tax losses or brought forward capital allowances in YA 2016/2017.
(iii) Previously dormant companies with significant pick-up in activity in YA 2017.

As the detailed legislation on this matter has yet to be issued, it is still unknown if companies with tax holidays as described in (i) above will actually qualify for the 'situational' tax rates. It is hoped that further guidance will be provided in due course.

IMPACT OF PRE-2017 TAX AUDITS ON COMPUTATION OF THE INCREASE IN CI

Because the determination of the 'situational' tax rates is dependent on increase in CI, any revisions to the CI of YA 2016 (say, due to a subsequent tax audit) will either impact the YA 2017 tax rate or quantum of the YA 2017 CI being taxed at the 'situational' rate – meaning a change in YA 2016 taxes can spillover to YA 2017.

As tax audits mostly result in increases in taxes – which is a major objective of tax audits in the first place – this will negatively affect the potential increase in CI of YA 2017, and consequently, reduce the potential tax savings from the 'situational' tax rates.

But will there be any penalties imposed on YA 2017 as a result of this spillover from additional assessments in YA 2016? Surely, such penalties on YA 2017 can be viewed as unreasonable since the error was a consequential one (spillover from YA 2016) and not a deliberate error generated in YA 2017. This is, as yet, something for the IRBM to clarify in due course.

IMPACT OF INCREASE IN CI ON POST-2018 TAX AUDITS

Quite naturally, there will be some inclination for companies to early-recognise income in YA 2018 compared to YA 2019, since there are potential tax savings for YA 2018 through the 'situational' tax rates.

Billing and invoicing may be more concentrated prior to cut-off dates close to the financial year end as companies scramble to maximise YA 2018 CI over YA 2019. However, such strategy may possibly backfire in two ways.

Firstly, while it is still unknown whether there is any expected reduction in corporate tax rate in YA 2019, judging from the stated objective of the authorities to gradually reduce income taxes, a drop in future corporate tax rates cannot be ruled out (and this would neutralise any perceived benefit of early-recognition of profits into YA 2018).

Secondly, deliberate over-shifting of profits into YA 2018 could set a volatile pattern for the IRBM's trend-spotting software, heightening the probability of pre-YA 2017 and post-YA 2018 tax returns being red-flagged for tax audits due to lower reported profits. A similar phenomena was observed in Malaysia during the 1999 'Waiver Year' (where 1999 profits enjoyed tax exemption) which saw rampant tax audits focused on profit-shifting into the 'Waiver Year'.

COMPLICATIONS IN FINANCIAL REPORTING

Another foreseeable (albeit lesser) impact of the 'situational' tax rates is that on financial reporting. MFRS 112 "Income Taxes" requires that deferred tax assets and deferred tax liabilities be:

"measured at the tax rates that are expected to apply to the period when the asset is realised or the liability is settled, based on tax rates … that have been enacted or substantively enacted …".

Given that the 'situational' tax rates are elusive (i.e. difficult to ascertain in advance), it can be a challenge determining the correct tax rate to be used in computing the deferred tax assets and deferred tax liabilities of affected companies, especially SMCs that potentially have up to three portions of CI subjected to varying tax rates.

CONCLUSION

True to expectations, 2017 Budget had limited offerings in terms of tax goodies. In view of the cut in government oil and gas revenues, the 1% reduction in SMC 'preferential' tax rate to 18% is certainly a welcomed move, even if not entirely unexpected.

Many tax incentives have drawn inspiration from past practices, but few can be touted as novel. The 'situational' tax rates based on increase in CI of the past YA are certainly a fresh direction in reducing the effective tax rate. The approach is, at first blush, as innovative as it is confusing. But the determination of tax rates is very important because it affects every company, and thus, has widespread impact on the design of the tax computation worksheet and review procedures.

Even though this incentive is only for YA 2017 and YA 2018, its implications on tax audits may spread beyond the two targeted years. Meanwhile, all eyes will be focused on YA 2019 for the next major announcement of a tax rate reduction.

At the time of writing, the applicable statutory order was not yet released. Therefore, this article does not incorporate any details that may subsequently accompany the final legislation.

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

CHINA (PEOPLE'S REP.)

New income tax policy on stock options and capital contributions in the form of technology – published

On 20 September 2016, the MoF and the SAT jointly issued Cai Shui [2016] No.101 regarding the tax treatment of stock options and capital contributions. The main points are summarised below:

Stock incentive schemes granted by unlisted companies

Employees participating in stock incentive schemes such as stock options, equity options, restricted shares and bonuses in shares granted by unlisted companies are not subject to individual income tax at the time of granting, but are taxable at the time of disposal provided that the company granting such schemes has filed relevant record filing forms provided in SAT Announcement [2016] No. 62 with the tax authority and the following requirements are met:

- the scheme is initiated by a resident enterprise;
- the scheme has been approved by the board of directors;
- the scheme concerns only the resident company's own shares;
- the employees receiving the incentives are the key technical staff and managers and account for a maximum of 30% of the average total personnel in the last six months;
- the holding period for stock and equity options is three years from the granting date and that for restricted shares is 1 year after the restriction is removed;
- the time span between the granting date of the schemes and the date of exercise of the rights is less than 10 years; and
- the company granting the schemes is not listed in the catalogue of the sectors in which stock incentive schemes are not permitted.

The income derived from the disposal is calculated as the difference between the sales proceeds of the shares and the purchase price of the options plus fees and taxes associated with the disposal and taxed as income from transfer of property at a rate of 20%.

Stock incentive scheme granted by listed companies

The individual income tax on income from the disposal of the underlying shares can be paid within 12 months after the date of the disposal if the schemes are filed with the tax authority. With the publication of this notice, Cai Shui [2009] No. 40 will be abolished.

Incentives for investment in technological achievements

Enterprises and individuals investing in technological achievements of a resident company, may opt to tax deferral treatment.. In which income tax is deferred to the time when the acquired shares are disposed and the income is calculated on the sale proceeds of the shares minus the original value of the technology achievements together with the taxes and fees associated with the transfer.

Tax collection and administrative rules on stock option incentive scheme and capital contribution in the form of technology published

On 28 September 2016, the SAT issued an announcement concerning the collection and administration of income tax on stock option incentive schemes and capital contributions in the form of technology achievements (SAT Gong Gao [2016] No. 62), implementing Cai Shui [2016] No. 101 on the same subject. The announcement retrospectively applies from 1 September 2016. The main content of the announcement is summarised below.

Individual income tax

For the qualified stock option incentive schemes of an unlisted company, the average number of employees is determined by the average number of the company's employees in the last six months as reported in the withholding tax returns for wages and salaries prior to the granting of such schemes.

If the unlisted companies undergo changes and as a result, no longer satisfy the conditions for the

tax deferral treatment of incentive schemes, the individual income tax of employees should be withheld and remitted within 15 days after such changes.

The fair market price of the shares of a listed company is determined by reference to the closing price on the trading day. The fair market price of the shares of an unlisted company is determined by using the net asset method, the analogy method or another reasonable method.

All qualified stock option incentive schemes and the tax deferral treatment of the contribution in the form of technology must be filed with the competent tax authority.

Enterprise income tax

The enterprise that applies the deferred tax treatment should be an enterprise that is taxed on actual profits (not on deemed profits) and makes the investment by contributing the proprietary right of the self-developed technology.

An enterprise applying the tax-deferral treatment is required to file the contribution in the form of technology with the tax authority, and the tax authority is authorised to make adjustments to the value of the contribution if it is unreasonable.

Rules on advance pricing agreements updated

On 11 October 2016, the SAT issued SAT Gong Gao [2016] No. 64 updating the rules on advance pricing agreements (APAs). The announcement, pursuant to the enterprise income tax law and the tax administration law, seeks to improve APA management and implement the tax treaties concluded by China. The announcement will apply from 1 December 2016, and chapter 6 of the Implementation Rules on Special Tax Adjustments (Guo Shui Fa [2009] No. 2) will be abolished on the same date. The main contents of the announcement are summarised below.

Main amendments

The said notice amends Guo Shui Fa [2009] No. 2 on the following:

- the authority to accept an APA application is extended to the competent tax authorities. An enterprise for which the total annual amount of related transactions exceeds CNY40 million in the preceding three years, prior to the tax year when the Notice of Tax Items concerning the acceptance of negotiation intentions by the competent tax authority is delivered, may reach an APA with its competent tax authority concerning the pricing policies and calculation methods for its related transactions in future years;
- the whole application procedure for an APA is rescheduled and consists of six steps: (i) preliminary meeting, (ii) negotiation intention, (iii) analysis and evaluation, (iv) formal application, (v) negotiation and signing, and (vi) monitoring and implementation;
- under Notice SAT Gong Gao [2016] No. 64, the application year of an APA starts from the day the Notice of Tax Items concerning the acceptance of negotiation intentions by the competent tax authority is delivered to the enterprise. A concluded APA generally lasts from three to five years. Previously, the application year of an APA started from the following year the enterprise submitted its formal application;
- the negotiation intention and formal application of an enterprise may be turned down by the competent authorities, and priority of handling a formal application for an APA may be given by the competent tax authorities under some circumstances; and
- an article of exchange of information on a unilateral APA is introduced. Based on the minimum standards under the OECD BEPS Project, China is committed to include the unilateral APA concluded after 1 April 2016 into the framework of the mandatory spontaneous exchange of information with relevant countries and regions.

Application for an APA

An enterprise may apply for a unilateral APA with the competent tax authority. A unilateral APA proposal must contain the following information:

- the tax year for which the APA should apply;
- related parties and transactions involved in the APA;
- organisation and management structure of the enterprise and the group;

- business operations, financial statements, audit report and contemporaneous documentation of the enterprise in the preceding three to five years;
- function and risk analysis of related parties;
- the proposed transfer pricing principle and calculation methods to be used, and the functional and comparability analyses, the assumptions on which the transfer pricing principle and calculation method used are based;
- value chain or supply chain analysis, and the consideration about location savings such as cost saving, market premium;
- market statement, including industry development trend and the competitive environment;
- the forecast and estimate of the annual business scale, profits and plans for the APA period;
- the possibility of the APA applying retrospectively;
- domestic and foreign laws and regulations affecting the APA; and
- other information required by the competent tax authorities.

An enterprise may apply for a bilateral or multilateral APA to the SAT and the competent tax authority simultaneously. Besides the information mentioned above, a bilateral or multilateral APA proposal must contain the following:

- the information concerning the application for an APA to the competent tax authority of treaty partners;
- business operation and related transactions of related parties in the preceding three to five years; and
- the possibility of double taxation.

HONG KONG

Advance ruling on amalgamation published

On 18 August 2016, the Inland Revenue Department (IRD) published Advance Ruling Case No. 58 that sets out the profits tax treatment of amalgamation. The ruling is effective from the year of assessment 2016/17 onwards.

The ruling states that no profits or losses will arise or be deemed to arise for the acquiring and the acquired company as a result of the amalgamation. Any unutilised tax losses incurred by acquired company prior to the amalgamation will be available for set-off against acquiring company's assessable profits for the year of assessment 2016/17 and subsequent years of assessment, provided that such assessable profits are derived by the acquiring company from the same trade or business carried on by the acquired company B up to the day immediately before the amalgamation.

Guidance on implementing automatic exchange of financial account information released

Following the passage of the Inland Revenue (Amendment) (No.3) Ordinance 2016, the government will start implementing the new international standard for automatic exchange of financial account information in tax matters (AEOI). On 9 September 2016, the Inland Revenue Department announced that the legislation for implementing the AEOI is in place. The relevant guidance will be provided to financial institutions wishing to comply with their obligations under the new legislation.

Departmental interpretation and practice notes on taxation of corporate treasury activity released

The IRD issued Departmental Interpretation and Practice Notes No. 52 (DIPN 52) on the taxation of corporate treasury activities on

9 September 2016. DIPN 52 sets out the IRD's interpretation and practice in relation to the relevant provisions under the Inland Revenue (Amendment) (No. 2) Ordinance 2016, which enables the government to implement a new interest deduction rule for the intra-group financing business of corporations and the concessionary profits tax rate for qualifying corporate treasury centres (QCTCs). Key features of DIPN 52 are set out below.

Definition of intra-group financing business

A corporation carrying on an intra-group financing business borrows money from and lends money to associated corporations in the ordinary course of its business. To constitute an intra-group financing business, a sufficient number of intra-group borrowing and lending transactions with a number of associated corporations is required, involving a significant amount of funds, taking into account the nature and scale of the business operations of the multinational corporation. In general, in the opinion of the Commissioner, a corporation carries on an intra-group financing business if:

- the corporation conducts at least four borrowing or lending transaction per month;
- each borrowing or lending transaction exceeds HKD250,000; and
- borrowing or lending transactions involve at least four associated corporations in the relevant basis period.

Interest on money borrowed from/lent to associated corporations

A corporate borrower carrying on an intra-group financing business in Hong Kong is allowed to deduct the interest payable on money borrowed from a non-Hong Kong associated corporation subject to specific conditions:

- the deduction claimed is in respect of interest payable by a corporation (i.e. the borrower) on money borrowed from a non-Hong Kong associated corporation (i.e. the lender) in the ordinary course of an intra-group financing business;
- in respect of the interest, the lender is subject to a similar tax in a territory outside Hong Kong at a rate is not lower than the reference rate; and
- the lender's right to use and enjoy the interest is not restricted by a contractual or legal obligation to transfer such interest to another person, unless the obligation arises as a result of a transaction between the lender and a person other than the borrower dealing with each other at arm's length.

However, interest paid to non-corporate associates outside Hong Kong (e.g. partnerships, trusts) is not eligible for deduction.

If a corporation (other than a financial institution) lends money to a non-Hong Kong associated corporation in the course of its intra-group financing business carried on in Hong Kong, the interest income and relevant gains or profits derived will be subject to profits tax.

Qualifying corporate treasury centres (QCTC)

A corporation is a QCTC if:

- it is a dedicated corporate treasury centre (CTC) which has not carried on any activity other than one or more corporate treasury activities in Hong Kong;
- it is a CTC which has satisfied relevant safe harbour rules, although it has carried on activities other than a corporate treasury activity in Hong Kong; or
- it is a CTC defined as such by the Commissioner.

A QCTC is subject to profits tax at a concessionary rate of 8.25% only if:

- in a year of assessment, the central management and control of the corporation is exercised in Hong Kong, and the activities that produce its qualifying profits in that year are carried on in Hong Kong by the corporation, or arranged by the corporation to be carried on in Hong Kong; and
- the corporation has elected in writing, which is irrevocable, that the half rate concession applies to it.

However, a financial institution is not eligible to be a QCTC. Therefore, a financial institution is not entitled to the profits tax concession even if it only performs corporate treasury activities for its associated corporations.

Consultation on measures to counter BEPS published

The Financial Services and Treasury Bureau published a consultation paper on measures to counter base erosion and profit shifting (BEPS) on its website.

According to the press release, "Hong Kong is supportive of international efforts to promote tax transparency and combat tax evasion. Implementation of measures to counter BEPS signifies its commitment to international tax co-operation" and "the priority of Hong Kong is to put in place the necessary legislative framework for transfer pricing rules which cover the latest guidance from the OECD, spontaneous exchange of information on tax rulings, country-by-country reporting requirement, the cross-border dispute resolution mechanism and the Multilateral Instrument".

The plan of the Hong Kong government is to introduce the relevant amendment bills into the Legislative Council in mid-2017.

INDIA

GST Council suggests a four-tier rate structure for GST

On 3 November 2016, the GST Council finalised a four-tier goods and services tax (GST) rate structure of 5%, 12%, 18% and 28%. While food items of mass consumption would be zero-rated, the GST Council suggested a lower rate of 5% for goods of common household consumption and a higher rate of 28% for luxury cars, aerated drinks and tobacco. The GST Council has yet to decide on the rate structure for services.

In the subsequent meeting, it is expected that the GST Council will specify a list of goods falling in the respective rate structure. The GST Bill was passed earlier by both the Upper House (Rajya Sabha) and Lower House (Lok Sabha) of Parliament. Subsequently, the Bill obtained approval from the President on 8 September 2016.

Online content downloads and purchases from offshore service providers to be subject to service tax

On 9 November 2016, the Central Board of Excise and Customs (CBEC) issued four interlinked notifications (Notification No. 46/2016 to Notification No. 49/2016) amending several rules for the implementation of service tax on downloads and purchases of digital goods from offshore service providers. The new amendment aims to bring fairness and uniformity to online services offered by local and offshore providers.

With effect from 1 December 2016, all persons, including resident individuals who made purchases for non-commercial purposes from offshore service providers (i.e. business-to-customer (B2C) transactions), will have to pay 15% service tax. Foreign businesses providing such services to Indian residents will have to register with the service tax department via Form ST1A, and collect and pay such taxes to the government on a monthly basis.

Notification No. 48/2016 also provides that a person will be deemed to be a resident of India if the person complies with any two of the following conditions:

- the address provided by the service recipient via the Internet is located in the taxable territory;
- the credit/debit card used for payment is issued in India;
- the billing address of the service recipient is located in the taxable territory;
- the bank account used for payment is located in the taxable territory;
- the IP address of the service recipient is located in the taxable territory;
- the country code of the subscriber identity module (SIM) card used by the service recipient is of the taxable territory; or
- the landline through which the service recipient accesses the services is located in the taxable territory.

Lower house of Parliament approves higher taxes and penalties on black money bill

On 29 November 2016, the lower house of Parliament (Lok Sabha) passed the Taxation Laws (Second Amendment) Bill 2016, which aims to impose a higher tax rate and more stringent penalty provisions in respect of black money.

The overview of the amendments proposed is summarised below.

Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana 2016 (PMGKY)

This alternative scheme was introduced in the Bill, where a person who voluntarily declares its undisclosed income (the declarant) will be required to pay a 30% tax and 10% penalty on the income. An additional 33% surcharge tax will also be levied. This calculates to a combined approximate total of 50% taxes and penalties being imposed on the income.

Twenty five per cent of the income (after taxes) will remain with the declarant. The remaining 25% will be deposited into an interest-free deposit scheme, which will be locked-in for four years and will be used to fund welfare programs such as irrigation, housing, toilets, infrastructure, primary education and health.

Provisions for taxation and penalty of unexplained credit, investment, cash and other assets (under Sections 115BBE and 271AAC of the Income Tax Act 1961)

If a person refuses the voluntary declaration under the PMGKY scheme mentioned above and is caught under these provisions, a total of taxes and penalties of up to 85% of the income will be imposed.

Penalty for search seizure cases (under Section 271AAB of the Income Tax Act 1961)

For income that is found in raids, a penalty of up to 60% of the income will be imposed on the assessee. However, if the person admits to how the undisclosed income was derived, pays the relevant taxes (including interest) and furnishes the tax return, the penalty will be reduced to 30% of the income.

INDONESIA

Tax amnesty law – further regulations issued

The Ministry of Finance (MoF) has issued further regulations in respect of the tax amnesty law, key of which are as follows:-

One of the regulations is Regulation No. 123/PMK.08/2016 (PMK-123) which became effective on 8 August 2016. PMK-123 amends the MoF's Regulation No. 119/PMK.08/2016 which details the procedure for repatriating funds back into the country and placing them in the financial market.

PMK-123 reaffirms that funds must be repatriated to special accounts with designated gateway banks. Subsequently, the funds may be managed by other gateways such as investment management or related securities companies. Under PMK-123, repatriated funds may be invested in futures traded on the Indonesia Future Exchange and investment-link products. PMK-123 also provides details of procedures for changing gateways within a three-year period. In total, 55 companies, comprising of banks, investment managers and brokers, have been designated as gateways by the MoF.

The MoF also issued Regulation No.122/PMK.08/2016 (PMK-122) of 8 August 2016 regarding details of and procedures for investing repatriated funds outside the financial market. The repatriation process is similar to that of investing them in the financial market. Under PMK-122, taxpayers are allowed to invest in other assets such as gold, infrastructure projects and properties.

Under Regulation No. PER-08/PJ/2016 issued by the Directorate General of Taxes, for tax amnesty purposes, registration and reactivation of taxpayers' identification numbers may be done outside Indonesia: at the Consulate General of the Republic of Indonesia in Hong Kong, the Indonesian embassies in Singapore and London, and other places as determined by the Minister of Finance.

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 August 2016 and 15 November 2016 including Public Rulings and guidelines issued by the Inland Revenue Board Malaysia (IRBM), the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Public Ruling No. 5/2016 – Tax incentives for employers who provide child care centres

Public Ruling (PR) No. 5/2016 - Tax Incentives for Employers Who Provide Child Care Centres, published on 22 August 2016, explains the tax treatment of the following incentives given to employers who provide child care centre facilities for the benefit of their employees (see **Table 01**).

Public Ruling No. 6/2016 – Group relief for companies

PR No. 6/2016 - Group Relief for Companies, published on 22 August 2016, explains the group relief provisions under Section 44A of the ITA, which applies only to companies which are incorporated and tax-resident in Malaysia. Section 44A allows a company in a group to surrender (surrendering company) not more than 70% of its adjusted loss for a year of assessment to one or more related companies within the same group (claimant companies). However, this is subject to the non-application conditions and also the following tests:

- First level test: Ordinary shareholding requirement (Section 44A(3) of the ITA)
- Second level test: Beneficially entitled to residual profits and residual assets available for distribution to the company's equity holders (Section 44A(7) of the ITA)

Table 01

Incentive	Provision and maintenance of a child care centre (revenue expenditure)	Child care allowances paid to employees
Single deduction	Provided under Section 34 (6)(i) of the ITA	Provided under Section 33(1) of the ITA
Further deduction	Provided under Income Tax (Deduction for the Provision of Child Care Centre) Rules 2013 [P.U.(A) 15]	

Public Ruling No. 7/2016 – Basis period for companies under liquidation

PR No. 7/2016 - Basis Period for Companies under Liquidation, published on 7 October 2016, explains the determination of the basis period for companies under liquidation. Liquidation or the winding-up of a company is a process where all the company's assets will be seized and realised, with the resulting proceeds used to pay the debts and liabilities of the company. The determination of the basis period for a company under liquidation is provided under Section 21A(3) of the ITA and in accordance with the principles set out in the PR No. 8/2014 - Basis Period of a Company, Limited Liability Partnership, Trust Body and Co-Operative Society.

Guidelines on automatic double deduction for R&D projects

The IRBM has issued guidelines dated 2 September 2016 and captioned "Garis Panduan Berkaitan Potongan Dua Kali Secara Automatik Bagi Projek Penyelidikan Dan Pembangunan (R&D)" (only available in Bahasa Malaysia). These guidelines provide an explanation on the procedures and conditions that need to be fulfilled by the SMEs to enjoy the automatic double deduction on certain expenses incurred in respect of in-house R&D projects for the years of assessment 2015 to 2018. It was proposed during the 2016 Budget that Small and Medium Enterprises (SMEs) be allowed to automatically claim a double deduction for research and development (R&D) expenditure under Section 34A of the ITA of up to RM50,000 for each year of assessment.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 4) Order 2016

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 4) Order 2016 [P.U. (A) 224] was gazetted on 19 August 2016 and came into operation on 22 August 2016. The Order provides that any tax payable under the ITA and any stamp duty payable under the

- Stamp Act 1949 in relation to the following shall be remitted in full:
- Murabahah Term Financing Facility Agreement of RM2.2 million (Facility Agreement); or

Guarantee provided or to be provided by the government of Malaysia on the Facility Agreement by the Employees Provident Fund Board and Perbadanan Tabung Pendidikan Tinggi Nasional

Also included in the exemption is any party to whom the Facility Agreement is transferred or assigned.

LABUAN

Updates on the Guidelines on establishing a Labuan International Commodity Trading Company under the GIFT

programme

The "Guidelines on the establishment of a Labuan International Commodity Trading

Company under the Global Incentives for Trading programme" dated 26 June 2013 are applicable to all Labuan companies licensed as a Labuan International Commodity Trading

Company (LICTC) to conduct International Commodity Trading business in Labuan IBFC under the Global Incentives for Trading (GIFT) programme. The GIFT programme is a framework of incentives for traders of specified commodities to use Malaysia as their international trading base to undertake international commodity trading business in Labuan IBFC. The Guidelines clarify the legal provisions pertaining to the licensing and operational requirements. The Labuan Financial Services Authority (LFSA) has updated the Guidelines with effect from 6 September 2016.

The changes, as set out below, are minor and essentially serve to remove out-of-date provisions and to update the contact details of LFSA:

Paragraph 7.2 of the 2013 Guidelines on the 100% income tax exemption on the chargeable profit of a LICTC (licensed before 31 December 2014) set up purely as an LNG (liquefied natural gas) trading company is removed.

The contact details (provided in Paragraph 11.4) of LFSA on matters pertaining to the Guidelines have been updated.

Paragraph 12 of the 2013 Guidelines that relates to transitional provisions has been removed as the provisions are no longer applicable.

CUSTOMS DUTIES

Customs Duties (Exemption) (Amendment) (No.2) Order 2016

The Customs Duties (Exemption) (Amendment) (No.2) Order 2016 [P.U. (A) 225] was gazetted on 19 August 2016 and deemed to have come into operation on 22 August 2016. This Order provides for an amendment in Part I of the Schedule to include "(xix) Coastal Energy KBM Sdn Bhd".

Customs (Import Licence Fee for Motor Vehicle (Amendment) (No.2) Regulations 2016

The Customs (Import Licence Fee for Motor Vehicle) (Amendment) (No.2) Regulations 2016 [P.U. (A) 226] were gazetted on 24 August 2016 and deemed to have come into operation on 25 August 2016. The Regulations provide for an amendment in the Schedule to the principal order by substituting for the words "Syarikat SRS Bumi Motors Sdn. Bhd.", the words "Kemas Maju Motors Sdn. Bhd.".

Customs (Anti-Dumping Duties) (Administrative Review) Order 2016

The Customs (Anti-Dumping Duties) (Administrative Review) Order 2016 [P.U. (A) 239], gazetted on 14 September 2016, will have effect for the period from 14 September 2016 to 29 March 2019. The anti-dumping duties shall be levied on and paid by the importers in cash, in respect of the goods exported from the country into Malaysia by the exporter or producer at a rate specified in the Schedule. The classification of goods specified in the Schedule shall comply with the Rules of Interpretation in the Customs Duties Order 2012, and the heading or subheading is only for ease of reference and has no binding effect on the classification of goods.

Customs (Provisional Safeguard Duties) Order 2016

The Customs (Provisional Safeguard Duties) Order 2016 [P.U. (A) 241], gazetted on 23 September 2016, will have effect for the period from 26 September 2016 to 13 April 2017. The provisional safeguard duties shall be levied on and paid by the importers in respect of the goods of the Schedule exported from the countries into Malaysia at a rate specified in the Schedule. The provisional safeguard duties levied under this Order shall be guaranteed by a security which is equal to the amount of the duties levied. The classification of goods specified in the Schedule shall comply with the Rules of Interpretation in the Customs Duties Order 2012, and the heading or subheading is only for ease of reference and has no binding effect on the classification of goods.

Customs (Provisional Safeguard Duties) (No.2) Order 2016

The Customs (Provisional Safeguard

Duties) (No.2) Order 2016 [P.U. (A) 242], gazetted on 23 September 2016, will have effect for the period from 27 September 2016 to 14 April 2017. The provisional safeguard duties shall be levied on and paid by the importers in respect of the goods of the Schedule exported from the countries into Malaysia at a rate specified in the Schedule. The provisional safeguard duties levied under this Order shall be guaranteed by a security which is equal to the amount of the duties levied. The classification of goods specified in the Schedule shall comply with the Rules of Interpretation in the Customs Duties Order 2012, and the heading or subheading is only for ease of reference and has no binding effect on the classification of goods.

Customs (Prohibition of Exports) (Amendment) (No.3) Order 2016

The Customs (Prohibition of Exports) (Amendment) (No.3) Order 2016 [P.U. (A) 250] was gazetted on 30 September 2016 and deemed to have come into operation on 1 October 2016. This Order provides for an amendment in the First Schedule to the principal order by deleting Item 2 and the particulars relating to it. The Second Schedule is also amended by substituting the following particulars in relation to item 7 and item 8 of the Schedule as in **Table 02**.

Table 02

Description of Goods	Chapter / Heading / Subheading
"Minerals (excluding salt, iron pyrites, sulphur, natural graphite, quartz, cement and natural borates"	Chapter 25 (excluding 2501.00000 – 25.04, 25.06, 25.23 and 25.28)"; and
"All kinds of natural sands	25.05"

Customs Duties (Exemption) (Amendment) (No.3) Order 2016

The Customs Duties (Exemption) (Amendment) (No.3) Order 2016 [P.U. (A) 253] was gazetted on 7 October 2016 and deemed to have come into operation on 7 October 2016. This Order provides for an amendment in Part I of the Schedule to include "(vi) Repsol Oil & Gas Malaysia Limited".

Customs Duties (Exemption)(Amendment) (No.4) Order 2016

The Customs Duties (Exemption) (Amendment) (No.4) Order 2016 [P.U. (A) 281] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in Part I of the Schedule by deleting the words "30 days per trip, subject to a maximum period of" and inserting the particulars in relation to item 118 after item 117.

Customs Duties (Labuan) Order 2016

The Customs Duties (Labuan) Order 2016 [P.U. (A) 286] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an imposition of tax at the rates specified in the First Schedule to the prevailing Customs Duties Order in respect of intoxicating liquors, tobacco products and cigarettes which are imported into Labuan.

Customs Duties (Langkawi) (Amendment) Order 2016

The Customs Duties (Langkawi) (Amendment) Order 2016 [P.U. (A) 287] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in Paragraph 2 of the principal order by substituting for the words "and ikan bilis", the words ", anchovies, intoxicating liquors, tobacco products and cigarettes".

Customs Duties (Tioman) (Amendment) Order 2016

The Customs Duties (Tioman) (Amendment) Order 2016 [P.U. (A) 288] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in Paragraph 2 of the principal order by inserting the words "intoxicating liquors, tobacco products and cigarettes" after the words "motor vehicles".

Customs Duties (Exemption) (Amendment) (No.5) Order 2016

The Customs Duties (Exemption) (Amendment) (No.5) Order 2016 [P.U. (A) 292] was gazetted on 9 November 2016 and deemed to have come into operation on 10 November 2016. This Order provides for an amendment in Part I of the Schedule to include "(xx) ConocoPhillips Malaysia Ltd".

EXCISE DUTIES

Excise Duties (Exemption) (Amendment) Order 2016

The Excise Duties (Exemption) (Amendment) Order 2016 [P.U. (A) 251] was gazetted on 6 October 2016 and deemed to have come into operation on 10 October 2016. This Order provides for an amendment in Part I of the Schedule to the principal order, by substituting the particulars in relation to item 6, with the particulars in the Order.

Excise Duties (Exemption) (Amendment) (No.2) Order 2016

The Excise Duties (Exemption) (Amendment) (No.2) Order 2016 [P.U.(A) 282] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. The Order provides for amendments in Part 1 of the Schedule to the principal order, in relation to item 30 by deleting the words "30 days per trip, subject to a maximum period of"; and inserting the particulars in relation to item 34 after item 33.

Excise Duties (Langkawi) Order 2016

The Excise Duties (Langkawi) Order 2016 [P.U. (A) 283] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an imposition of tax at the rates specified in the Schedule to the prevailing Excise Duties Order in respect of intoxicating liquors, tobacco products and cigarettes which are imported into Langkawi.

Excise Duties (Labuan) Order 2016

The Excise Duties (Labuan) Order 2016 [P.U. (A) 284] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an imposition of tax at the rates specified in the Schedule to the prevailing Excise Duties Order in respect of intoxicating liquors, tobacco products and cigarettes which are imported into Labuan.

Excise Duties (Tioman) (Amendment) Order 2016

The Excise Duties (Tioman) (Amendment) Order 2016 [P.U. (A) 285] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in Paragraph 2, by inserting the words "intoxicating liquors, tobacco products and cigarettes" after the words "motor vehicles"; and by substituting "prevailing specified rates" with the words "rates specified in column 4 to the Schedule of the prevailing Excise Duties Order".

GOODS AND SERVICES TAX (GST)

Goods and Services Tax (Imposition of Tax for Supplies In Respect of Designated Areas) (Amendment) Order 2016

Goods and Services Tax (Imposition of Tax for Supplies In Respect of Designated Areas) (Amendment) Order 2016 [P.U. (A) 278] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in Paragraph 2, by deleting the word "and" in subparagraph (d); by substituting the full stop at the end of the paragraph with the words "; and"; by inserting subparagraph (f) after subparagraph (e), "on the supply of wine, spirit, beer, malt liquor, tobacco and tobacco products to the designated areas or the importation of such goods into the designated areas".

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) Order 2016

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) Order 2016 [P.U.(A) 279] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in the First Schedule by substituting for item 3 the particulars listed in the Order.

Goods and Services Tax (Relief) (Amendment) Order 2016

Goods and Services Tax (Relief) (Amendment) Order 2016 [P.U. (A) 280] was gazetted on 31 October 2016 and deemed to have come into operation on 1 November 2016. This Order provides for an amendment in relation to item 13 by deleting the words "30 days per trip, subject to a maximum period of"; and by inserting the particulars for item 32 to item 38 after the particulars relating to item 31. The Second Schedule is also amended in relation to item 3, by substituting the particulars in column (2) with the following, "Person licensed under section 65D of the Customs Act 1967 to operate a duty free shop in Malaysia other than a designated area".

*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.*

TaxCases

CASE 1

YUNG LUNG HOLDINGS SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2016) MSTC ¶30-128

BRIEF FACTS

The company filed an appeal against the decision of the Special Commissioners of Income Tax who affirmed the decision of the Director General of Inland Revenue ("DGIR"). The DGIR had imposed a penalty of RM85,212.20 against the company for the inadequate payment of tax for the year of assessment ("YA") 2010.

For a chargeable income of RM1,804,242.00, the tax assessed for the company was RM426,061.00. The company had paid RM245,000.00 by 7.1.2011, i.e. before the last due date for submission of the tax return for the said year of 2010, which was 31.7.2011. However, the company only submitted its tax return for the YA 2010 on 7.1.2012.

The DGIR had decided to impose a penalty of RM85,212.20 which he assessed based on 20% of the tax assessed at RM426,061.00 and not on the difference between the assessed tax and RM245,000.00 which the company had paid in advance before the due date of 31.7.2011.

The company's counsel argued that the assessment of the amount of tax could not be made under Sections 90(1) and 90(2) of the Income Tax Act 1967 ("ITA") because the said Section only applied to a taxpayer who had not filed his return. The company's counsel had further argued that the 20% penalty was unfair since the company had paid in advance the sum of RM245,000.00 before the due date of 31.7.2011.

ISSUES

The three issues in this case were:

(i) Whether the finding of the Special Commissioners in respect of the assessment of tax made by the DGIR under Section 90(3) of the ITA is correct in fact and in law;

(ii) Whether the penalty of RM85,212.20 imposed under Section 112(3) of the ITA for late submission of the return form is correct in law; and

(iii) Whether the imposition of penalty amounting to 20% of the taxed amount of RM426,061.00 is justified in law.

DECISION

The Court held that the counsel's argument that the assessment of the amount of tax cannot be made under Sections 90(1) and 90 (2) because the said Sections only apply to a taxpayer who has not filed his return cannot be upheld because of the clear wording of Section 90(3) i.e. "…has not furnished a return in accordance with Section 77 or Section 77A…". The clear meaning conveyed by the words in the context of this case is compliance with the timeline prescribed by Section 77A on the due date for submission of the tax return.

Similarly, the wording of Section 112(3) ("…default in furnishing a return in accordance with subsection 77(1) or 77A(1)") empowers the DGIR to impose the penalty for the company's failure to comply with the timeline of seven months prescribed by Section 77A(1).

The amount of penalty that the DGIR is allowed the impose according to Section 112(3) of ITA is "…equal to treble the amount of that tax…", i.e. three times the amount of tax. The penalty imposed by the DGIR was 20% of the tax assessed for the year. The 20% penalty should not be based on the difference between the tax payable and the tax already paid because that is not what Section 112(3), whether expressly or impliedly, provides.

Section 112(3) of the ITA pure and simple, gives the DGIR the power to impose a penalty to the maximum of three times the amount of tax when there is no prosecution for the failure to comply with Sections 77(1), 77A(1) and 77(3) and not "if" there was none.

CONCLUSION

Penalty under Section 112(3) of the ITA applies not only in the event of non-filling of tax return but also in the event of late filling of tax return. Further, penalty under Section 112(3) of the ITA can be imposed on the full amount of tax payable without taking into consideration any advance tax paid.

The Court in this case applied the strict interpretation rule and was guided by the decision in *Connaught Housing Development Sdn. Bhd v Kerajaan Malaysia [2003] 4 MLJ 75* which applied the principle mentioned by the Supreme Court in *National Land Finance Cooperative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99* on page 106 as follows:

"Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J. in *Cape Brandy Syndicate v Inland Revenue*

Commissioners [12 TC 358]:

> *…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 a 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 Court also referred to the Judicial Committee in *Oriental Bank Corporation v Wright [1880] 5 AC 842, 856* "that the intention to impose a charge upon a subject must be shown by clear and unambiguous language".

CASE 2

PASDEC CORPORATION SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2016) MSTC ¶30-126

BRIEF FACTS

The Appellant mainly carried on the business of housing and property development. The Appellant prepared its accounts from year 1980 to 2006 based on the date of the defect liability period ("DLP method"), before the introduction of the Inland Revenue Board Malaysia (IRBM) Public Ruling 3/2006. The Public Ruling prescribed the use of the Certificate of Fitness method instead.

The Appellant took the view that the DLP method was in accordance with industry practice and was also a generally accepted accounting standard in Malaysia. For the three YAs under appeal (YAs 1999, 2000 (current year basis) and 2002), the Appellant computed its accounts for income tax purposes based on the DLP method to recognise the income from its development projects.

The Respondent did not revise or make adjustments to the Notices of Assessment (Form J) for YA 1999 and 2000 until 30.8.2007. The Respondent took the view that it was right in adopting a different accounting method in ascertaining the profit of the Appellant (based on the "Certificate of Fitness" for YAs 1999, 2000 and 2002) and that the method adopted by the Appellant amounted to deferment of income reporting.

ISSUES

The two issues in this case were:

(i) Whether the Appellant was guilty of fraud and/or wilful default and/or negligence to justify the Respondent's act in imposing additional taxes; and

(ii) Whether the Respondent was right in law in adopting a different accounting basis in ascertaining the profit of the Appellant.

DECISION

The Court observed that prior to the Public Ruling 3/2006, which came into effect beginning YA 2006, no law or guideline had been issued by the Respondent that prescribed the use of the Certificate of Fitness Method in the property development industry.

As there was no law to regulate the computation of income with respect to property and housing development and the Respondent had accepted and fully endorsed the DLP method adopted by the Appellant for 26 years, the Appellant which had consistently adopted a method of accounting which was a generally well-accepted method in the industry could not be accused of committing fraud and/or wilful default or negligence. Hence, the Court held that the Respondent had failed to discharge the burden imposed by Section 91(3) of the ITA.

Further, the Court observed that the DLP method was an accepted accounting method in accordance with the standard practice of commercial accounting involving property and housing development at the material time and was not questioned by the Respondent for 26 years. There was no specific guideline and/or law which provided the method for computing the income earned by the housing developer or property business for the purpose of income tax.

As such, any acceptable accounting method could be used to ascertain the income of a taxpayer. This principle had been settled in cases such as *Whismer & Co. v The Commissioners of Inland Revenue 12 TC 818; Gallagher v Jones (Inspector of Taxes) (1993) STC 537* and *Odeon Associated Theatres Ltd v Jones (Inspector of Taxes) (1971) 1 WLR 442*. As there were two accounting methods

which could be used, the Appellant ought not to be faulted if it had opted for the DLP method.

In addition, Public Ruling 3/2006 had come into existence only on 13.3.2006. Hence, it was unreasonable for the Respondent to impose the Public Ruling on the Appellant retrospectively so as to affect all the assessments made before the coming into force of Public Ruling 3/2006.

CONCLUSION

The Respondent cannot impose a public ruling retrospectively and an accepted accounting method in accordance with the standard practice of commercial accounting can be applied if there is no law/ specific guideline that prescribes a specific method to be applied.

CASE 3

MUDAH.MY SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2016) MSTC ¶30-132

BRIEF FACTS

The Applicant's main business was providing online or web-classified advertisement services. In the course of its business, the Applicant relied on various software from various other vendors. It also relied on software developers to provide software development services.

On 10.7.2014, the Respondent issued a letter ("impugned letter") intimating to the Applicant that there were non-compliance issues with respect to withholding taxes for YAs 2010, 2011 and 2012 respectively. The Applicant was notified that payment of the management fee, legal fee and consultancy fee were subject to withholding taxes pursuant to Section 109B of the ITA.

ISSUES

The five issues in this case were:

(i) Whether there was in fact a decision within the meaning of Order 53 rule 2(4) of the Rules of Court 2012 which is amenable to judicial review and as such whether the judicial review application was prematurely filed;

(ii) Whether payments for technical and management services paid to Malaysian residents were subject to withholding tax;

(iii) Whether payments for technical and management services paid to non-residents are subject to withholding tax;

(iv) Whether payments for software are subject to withholding tax; and

(v) Whether the Applicant must exhaust its remedy by way of an appeal process provided under the ITA first before approaching the court by way of a judicial review application.

1ST ISSUE

The Respondent contended that the impugned letter issued by the Respondent was not a decision within the meaning of Order 53 rule 2(4), that is a decision, action or omission by the Respondent which had adversely affected the Applicant, because the purpose of the impugned letter was only to inform the Applicant of the various findings of non-compliance of the ITA.

The Court applied the definition of 'decision' given in *Australian Broadcasting Tribunal v Bond and Others (1990) 170 CLR 321* that where a statute requires the decision-maker to determine the issue of fact as an essential preliminary to the taking of ultimate action or the making of the ultimate order, then the determination of the issue of fact would be a reviewable decision.

The Court held that the relevant provision which empowers the Respondent to make an assessment or additional assessment is Section 91 of the ITA, if it appears to the Respondent that no sufficient assessment had been made. It could be gleaned from the impugned letter, read in its entirety that a decision was in fact made by the Respondent under Section 91 of the ITA.

Guided by the definition given in *Australian Broadcasting Tribunal v. HCA (1990) 170 CLR 321*, the finding of fact contained in the impugned letter was clear and all the documents and information pertaining to the issue at hand had been furnished to the Respondent for his consideration.

Hence, the impugned letter could be termed as a decision which had adversely affected the Applicant within the context of Order 53 rule 2(4).

2ND ISSUE

The Court held that Section 109B only applies to payments made to a non-resident and transactions entered into and payments made to resident companies do not attract withholding taxes. The Court referred to the case of *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd (2013) MSTC ¶30-068* where the Federal Court held that:

*"[36] In the circumstances of the case as the non-resident companies in this appeal are taxable, Section 109B of the Act is triggered, and the respondent is forthwith statutorily bound to withhold a portion of the payments as tax. To reiterate, this provision is a **tax collection mechanism primarily to ensure collection of the tax due from any person liable to make payments to a non-resident person (or non-resident companies in the circumstances of the case)** (The Law and Practice of Singapore Income Tax by Pok Soy Yoong p,405). In this appeal the **two preconditions** do exist viz the respondent is liable to make payments, and **the payment is to a non-resident(s)** for the use of moveable property."*

Therefore, the decision of the Respondent in imposing withholding taxes on transactions involving Malaysian residents and entities as shown above was flawed on the ground of illegality and/or was *ultra vires* Section 109B of the ITA.

3RD ISSUE

The Court held that there are certain requirements to be fulfilled before the Respondent could impose withholding tax pursuant to Section 109B of the ITA as not all transactions are subject to withholding tax. It is clear that only Section 4A type of income would attract withholding tax.

The impugned letter mentioned that the payments with respect to management fee, legal fee and consultancy fee are all types of transactions which fall within the ambit of "services" under Section 4A of the ITA. However, a perusal of Section 4A would show that for the said income to be taxed, the income must be deemed to be derived from Malaysia. In the event that these services were performed outside Malaysia, the income would fall outside the ambit of Section 4A of the ITA as the income is not sourced in Malaysia. Thus, such income would definitely not attract withholding tax.

4TH ISSUE

The Respondent contended that these transactions ought to be classified as royalty payments which were subject to withholding tax under Section 109 of the ITA. The Court observed that the transactions were concerned with software products, access code for online platforms or applications and the purchase of the entire intellectual property rights to the Blocket Software. The Court held that the Applicant merely purchased the software but did not acquire a right to use the copyright. It was merely a right to use or operate the copyrighted programme for the intended purpose. The Court referred to *Damco Logistic Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30-033* and held that 'royalty' was for payment for the use of rights.

The Court also held that access code for online platforms where the provider makes available to the subscribers a website to access digital content upon payment of an access fee to the site, the fee could be classified as a payment for obtaining a contractual right, data or services and is not payment for a licence or right to use a copyright. The acquisition of data transmitted in the form of digital signals could not be classified as the usage of copyright. The Court referred to *Alcatel-Lucent Malaysia Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC ¶30-028.*

Thus, Issue 4 was answered in the negative.

5TH ISSUE

The Court held that the Respondent had committed errors of law and fact by considering irrelevant matters and/or had ignored crucial matters in arriving at his decision. Thus, the Court would not bar the Applicant from approaching the Court by way of a judicial review to seek a remedy against certain administrative decisions despite the availability of an alternative avenue for redress. The Court followed the cases of *Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2008) MSTC 4, 362, Metacorp Development v Ketua Pengarah Hasil Dalam Negeri MSTC¶30-024* and *Majlis Perbadanan Pulau Pinang v Syarikat Kerjasama Serbaguna Sungai Gelugor [1999] 3 CLJ 65.*

CASE 4

IDAMAN PELITA SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2016) MSTC 30-123

Recently, the Taxpayer applied to the High Court for an order requiring the Special Commissioners of Income Tax ("SCIT") to find further facts and to state a supplementary case to the High Court and to produce notes of evidence (NOE) of the appeal to the SCIT for the purposes of the current appeal before the High Court ("This Appeal"). The High Court was reluctant to order the SCIT to find further facts and state a supplementary case but ordered the production of the NOE for the purposes of This Appeal.

BRIEF FACTS

- The Taxpayer purchased a piece of land for development and subsequently entered into a joint venture agreement ("JVA") with Luxor Properties Sdn Bhd ("LPSB"). The Taxpayer sold all its rights and interest in the land to LPSB to develop the land.

- The Taxpayer received 20% of the aggregate sale price of the first phase of the development project and 22.5% of the aggregate sale price of each subsequent phase.
- From 1999-2005, the Taxpayer treated the consideration received under the JVA as income on the percentage of completion basis of the development project. However, in 2006 the Taxpayer submitted revised tax computations based on outright sale basis which took place on 2 February 2009 and therefore, all income derived in the basis year 1999 was exempted from income tax.
- The DGIR held that the last of the condition precedent to the JVA was satisfied in 2001, therefore the JVA became unconditional and the Taxpayer's income was deemed to have been derived in YA 2001 and raised a notice of assessment of income tax with penalty for YA 2001.
- The Taxpayer appealed to the SCIT and in the course of the trial, the undisputed evidence showed that there was an outright sale of the land by the appellant to LPSB; however the SCIT decided that it was a JVA between the parties and not an outright sale.
- The Taxpayer appealed and a draft case stated was prepared by the SCIT, however none of the Taxpayer's comments which included the undisputed evidence was included.
- The Taxpayer applied to the High Court and sought an order requiring the SCIT to find further facts and to state a supplementary case to the High Court as well as to produce notes of evidence ("NOE") of the appeal before the SCIT.

INITIAL APPEAL TO SCIT

- In the initial appeal to the SCIT, all the relevant witnesses from both parties have been cross-examined, documentary evidence tendered and both parties have presented their written submissions.
- The Undisputed Evidence indicated that there was an outright sale of the land by the Taxpayer to LPSB.
- However, the SCIT decided that:
- There was no outright sale between the Taxpayer and LPSB but it was a JVA;
- The Taxpayer had acted negligently and/or had committed willful default and therefore the DGIR was entitled to raise notice of assessment for 2001; and
- The appeal to the SCIT was dismissed and notice of assessment for 2001 was affirmed.

HIGH COURT'S APPEAL

Taxpayer's Contention

- The Taxpayer appealed against the decision of the SCIT to the High Court. The Taxpayer applied for a preliminary application for the notes of evidence of the appeal at the SCIT to be produced on the premise that the Case Stated did not include the undisputed evidence. The Taxpayer contends that as all three SCIT had completed their terms of appointment and for the purposes of a just disposal, the High Court should order the production of the notes of evidence.
- The Taxpayer also submits that the High Court has the power under paragraph 39(c) of Schedule 5 of the Income Tax Act 1967 ("ITA") to order the production of the notes of evidence for the purpose of the appeal.

Revenue's Argument

- The Revenue takes the position that the SCIT are the sole judges of fact in an Appeal to the SCIT. Accordingly, neither the High Court nor the Taxpayer can dictate what other additional facts that should be included by the SCIT in the case stated.
- The Revenue further argues that the SCIT are under no obligation under the ITA to accept and include any of the Taxpayer's comments in the Case Stated nor are there any provisions in the ITA to give reasons for not including any of the Taxpayer's comments in the Case Stated.
- Additionally, the Revenue also contends that a Case Stated is only an appeal on a point of law, and there is no need to adduce the NOE for the purpose of the present appeal in the High Court.

Decision

- The Court stated that it was satisfied that the SCIT had broadly covered the area to be dealt with by the Taxpayer's comments. Therefore, the Court is reluctant to exercise its discretion under Paragraph 40(b) of Schedule 5 to require the SCIT to find further facts and to state a supplementary case.
- The Court also stated that since all three SCIT have completed their terms of employment, judicial discretion under Paragraph 40(b) should not be exercised in vain.
- The Court exercised its discretion under Paragraph 39(c) and ordered the production of NOE which it may use in deciding the present appeal. It was explained that the order to produce the NOE does not in any manner prejudice the Respondent as the Respondent is

entitled to dispute the NOE.

- The High Court further explained that the order to produce the notice of evidence is not appealable to the Court of Appeal for the following reasons as Section 102(4) of the ITA read together with Paragraphs 23,34 and 41 of Schedule 5 states that parties may only appeal to the Court of Appeal against a decision of the High Court on questions of law referred to the High Court in the Case Stated.
- Further, it was also held that the order to produce the NOE for purposes of this Appeal does not in any way prejudice the Respondent, as assuming the Appellant is successful in this appeal, the Respondent can appeal to the Court of Appeal on the point of law as well challenge the validity of the Order to Produce the NOE.

CONCLUSION

The High Court ordered for the production of the NOE which may be considered by the court in deciding This Appeal.

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TaxCases

In *UBS AG (Respondent) v. Commissioners for Her Majesty's Revenue and Customs (Appellant); DB Group Services (UK) Ltd (Respondent) v. Commissioners for Her Majesty's Revenue and Customs (Appellant)*[1], the UK Supreme Court was once again asked to look at tax avoidance schemes.

The dispute related to two £90 million employee bonus plans ("**the schemes**") set up by UBS AG ("**UBS**") and DB Group Services (UK) Ltd ("**DB**") (collectively, "**the banks**") in 2003.

Her Majesty's Revenue and Customs ("**HMRC**") sought to argue that the schemes amounted to tax avoidance and sought £50 million respectively in income tax and national insurance contributions payments from the banks.

The schemes were designed to take advantage of exemptions under Chapter 2 of Part 7 of the Income Tax (Earnings and Pensions) Act 2003 ("**the Act**"), as amended by Schedule 22 to the Finance Act 2003.

- Under Section 425(2) of the Act, an exemption is conferred on the award to employees of "restricted securities", defined by Section 423 of the Act as shares which are subject to provision for their forfeiture if some contingency occurs.
- Under the schemes, the banks decided to award discretionary bonuses to their employees, but rather than paying the bonuses to them directly, the banks instead used the amount of the bonuses to pay for redeemable shares in offshore companies set up for the purposes of the schemes. The shares were then awarded to the employees in place of the bonuses.

Conditions were attached to these shares to qualify for the exemption. In the **UBS** case, the condition was a specified rise in the FTSE 100 within the next three (3) weeks. In the **DB** case, the condition was the employee voluntarily resigning or being dismissed for misconduct during a period of about eight (8) weeks. In both cases, the conditions were unlikely to occur and were hedged against to mitigate any possible losses to employees.

HMRC decided that tax should be assessed as if the employees' bonuses had been paid in cash.

UBS's and DB's appeals to the First Tier Tribunal were dismissed. The Upper Tribunal heard the cases together and allowed UBS's appeal. DB's appeal was, however, dismissed on the basis that the scheme failed to comply with a technical requirement for exemption. The Court of Appeal dismissed HMRC's appeal in the UBS case, and allowed DB's appeal. On appeal by the HMRC in both cases, the Supreme Court allowed the appeals, reversing the decision of the Court of Appeal.

These appeals bear importance in the Malaysian context for the reasons given below. The Supreme Court in reversing the decision of the Court of Appeal, drew on the principles famously laid down in *W T Ramsay Ltd v. Inland Revenue Commissioners*[2] i.e. the emphasis upon the courts taking (1) a purposive approach to statutory construction of taxing statutes; and (2) a holistic view of a scheme by the court and not a step by step examination of it. Lord Reed, in delivering the decision of the Supreme Court, referred in this regard to the following summary of the Ramsay principle by Ribeiro PJ in *Collector of Stamp Revenue v. Arrowtown Assets Ltd*[3] i.e. "[t]he ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

REAFFIRMATION OF THE PURPOSIVE APPROACH

It is to be noted that the reaffirmation of the purposive approach by the UK Supreme Court, is consistent with the approach taken by our Federal Court in a series of recent cases. The Ramsay principle was first adopted and followed by our Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal*[4]. This purposive approach has since then gained further traction following the cases of *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd*[5] and *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corp & Ors*[6]. It is to be pointed out though, that in the latter two decisions, the Federal Court expressly preserved the traditional strict interpretative approach and held that it is to be applied in conjunction with the modern day purposive approach.[7]

SCHEMES TO BE CONSIDERED AS A WHOLE

The second limb of the Ramsay principle requires the court to consider the schemes as a whole. Lord Wilberforce delivering the leading speech in *W T Ramsay Ltd v. Inland Revenue Commissioners*[8], said

> *"3.It is for the fact-finding commissioners to find whether a document, or a transaction is genuine or a sham. In this context to say that a document or transaction is a 'sham' means that while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is what it professes to be, and it does not mean anything more than that. I shall return to this point.*
>
> *…*
>
> *4.Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of Inland Revenue Comrs v Duke of Westminster [1936] AC 1, 19 Tax Case 490. This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended*

> *as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form."*

Applying this principle, the Supreme Court found the schemes to be a composite transaction forming a commercial unity. Consequently, the commercial significance of what had occurred could only be determined by considering the transaction as a whole. Therefore, the statute was construed as referring to the effect of that composite transaction.

In the UBS case, the Supreme Court held that the condition imposed by UBS should be disregarded because (1) the condition was completely arbitrary, without business or commercial rationale beyond tax avoidance; and (2) the economic effect of the restrictive condition was largely nullified by the hedging arrangements. Similarly, the condition imposed by DB in the DB case, was found by the Supreme Court to be equally artificial as it operated only for a very short period, during which the possibility that it might be triggered lay largely within the control of the employee who would be adversely affected. The condition did not serve a genuine business or commercial purpose.

EXTENT OF APPLICATION OF RAMSAY PRINCIPLE TO DEPEND ON PARTICULAR FISCAL CONTEXT

Despite finding that the schemes were unlawful, the Supreme Court did not accept HMRC's broad version of the Ramsay argument to treat the banks' employees as if they had received cash. The Supreme Court held instead that the proper basis for taxation of the bonuses was as shares. Specifically, the conditions were to be disregarded for the purpose of deciding whether the shares were restricted securities, but they did not have to be disregarded for the purpose of assessing the value of the perquisite. This point illustrates that the extent of the application of the Ramsay principle must ultimately depend upon the particular fiscal context.

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1 *[2016] UKSC 13*
2 *[1982] AC 300*
3 *[2003] HKCFA 46*
4 *[2005] 3 MLJ 97*
5 *[2014] 2 MLJ 1*
6 *[2015] 6 MLJ 612*
7 *Sudharsanan Thillainathan and Tania Edward, "Interpretation of Taxing Statutes - an Amalgam of the Old and New", Tax Guardian, Vol. 9/No. 2/2016/02*
8 *supra note 2*

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BUSINESS DEDUCTIONS

TAX TREATMENT OF INVENTORY

FROM THE DETAILED DISCUSSIONS ON EXPENDITURE RANKING FOR A DEDUCTION, WE NOW STEER OUR COURSE OF ANALYSIS TO INVENTORY PREVIOUSLY REFERRED TO AS STOCKS.

The valuation of inventory influences the quantum of profits. This is evident from the fundamentals of accounting whereby the determination of gross profit is the variance between sales and the cost of sales and in turn, the cost of sales is the sum of the opening inventory and the purchases for that year less the closing inventory.

The accounting profits in consequence impacts the amount of tax payable as usually the tax computations for a business commences with profit before tax. This is further reinforced from the reading of Section 35(1) "….in ascertaining the adjusted income of a person from a business for the basis period for a year of assessment, the value of the stock in trade of the business at the beginning and at the end of that period shall be taken into account …"

Further in subsection 2 it is explained that where the value of the stock in trade is greater at the end of the basis period than it was at the beginning of that basis period, the total deduction shall be reduced by the amount of that excess, thus resulting in an increase in the adjusted income and vice versa for the reverse situation.

> *A good point to start would be to determine what constitutes inventory or stocks.*

WHAT IS INVENTORY IN THE INCOME TAX ACT 1967?

Section 2 of the Income Tax Act 1967 defines "stock in trade" as in relation to a business, [it] means property of any description, whether movable or immovable, being either:

(a) property such as is sold in the ordinary course of the business or would be so sold if it were mature or if its manufacture, preparation or construction were complete; or

(b) materials such as are used in the manufacture, preparation or construction of any such property as is referred to in paragraph (a) of this definition, and includes any work in progress;

Therefore basically inventory includes raw materials, work in progress and finished goods. However, one must not lose sight of the fact that inventory encompasses a vista of items aside from the normal 'goods for sale" i.e. professional services by accountants, lawyers, doctors, architects etc. where the services are performed but no payment has been received i.e. a debt for the work done has arisen, are also inventory.

Nonetheless the value of services partly rendered but for which no demand can be made at law are not included, as in the words of Barwick, CJ in *Henderson v. FCT (1970) 1 ATR 596:*

> *"…there is, in my opinion no basis, when determining the income derived in a period, for estimating the value of the services so far performed but for which payment cannot properly be demanded and treating that value a part of the earnings of the professional practice up to the time…"*

Next we need to look at the valuation of inventory. The relevant accounting standard provide a barrage of methods; all noted as generally acceptable accounting practices. So what do we have in our income tax legislation for valuing stocks?

METHOD OF VALUING STOCK IN TRADE IN THE INCOME TAX ACT 1967

Section 35(3) addresses this issue as follows:

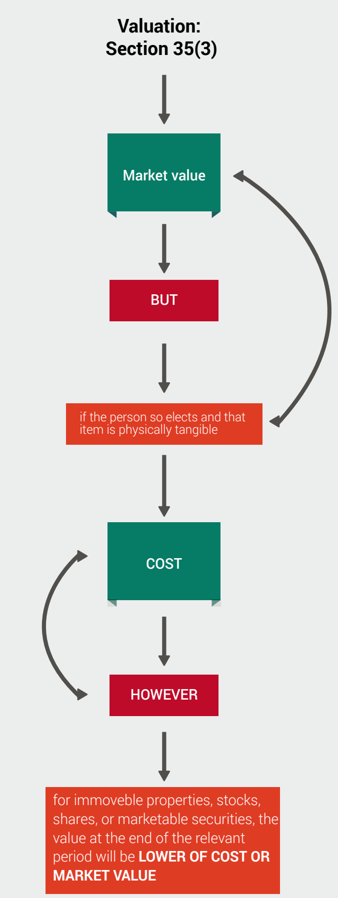
(a) the value of any particular item of the stock at the end of the relevant period shall be taken to be:

i) an amount equal to its market value at that time; or

ii) if the relevant person so elects and that item is physically tangible, an amount equal to the total cost to him of acquiring that item (or any materials used in its manufacture, preparation or construction) and bringing it to its condition and location at that time:

Provided that in the case of any item of the stock consisting of immovable properties, stocks, shares, or marketable securities, the value there of at the end of the relevant period shall be taken to be an amount equal to its cost price to that relevant person or its market value at that time, whichever is the lower.

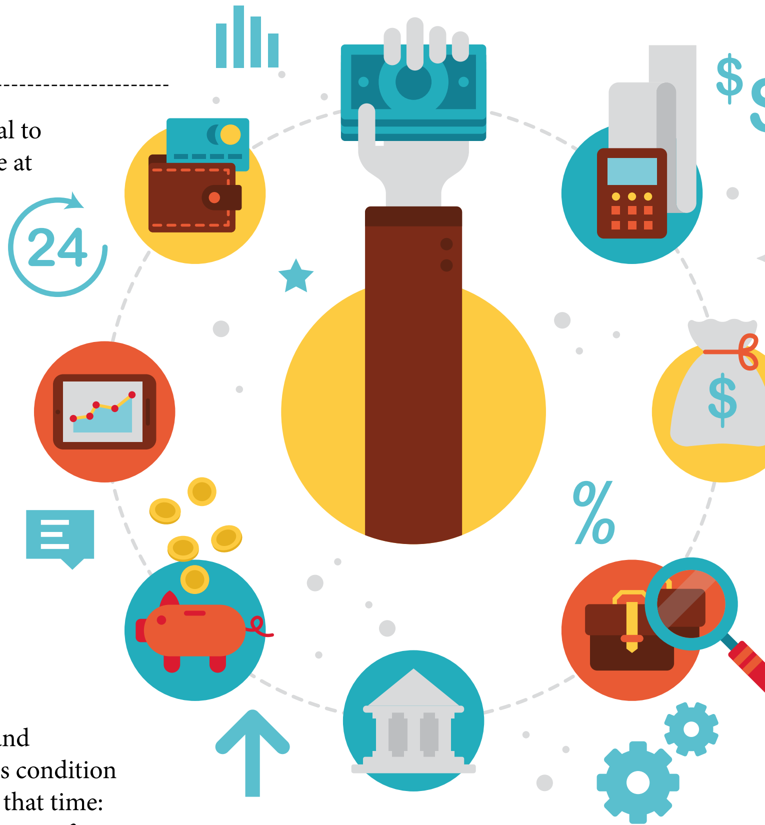
SUMMARY OF VALUATION OF STOCK IN TRADE



WHAT CONSTITUTES COST?

The Public Ruling 4/2006 clearly indicates that in the case of a manufacturing business, the total cost or the historical cost should include:

- the direct cost of material and labour used in the manufacture of the finished products,
- a proportion of production overhead costs that relate to the manufacture of the finished products, and
- any other cost of putting the stock in trade in its present location and condition.



For a retail business, total cost should include the cost of acquiring the stock in trade and the cost of bringing it to its location and condition (such as custom duties, transportation costs and packaging costs).

Further the cost of keeping the asset in its condition should not be added to its original cost. For example, if a trader keeps perishable stock in trade for some time, he may have to incur expenditure on keeping it in good condition, that is, on refrigeration. The refrigeration cost is expenditure incurred on maintaining the stock in trade in good condition, and as such it will NOT form part of the cost of the stock in trade proper.

In the case of work in progress, the Public Ruling 4/2006 prescribes that it should be valued either at cost or market value. The cost of work in progress should include not only the direct cost incurred in manufacturing the product but also the cost of production overheads such as factory office expenses. If there is no market for uncompleted goods which can be sold as raw material of another manufacturer, the uncompleted goods should be valued at cost.

CONGRUENCE BETWEEN OPENING INVENTORY THIS YEAR AND THE CLOSING INVENTORY FOR THE PRECEDING YEAR

Note that part (b) of Section 35(3) emphasises that "the value of any particular item of the stock at the beginning of the relevant period (except where the business was commenced by the relevant person in the relevant period) shall be taken to be an amount equal to its value as ascertained under paragraph (a) at the end of the basis period for the year of assessment immediately preceding the year of assessment to which the relevant period relates".

So, basically you have quite a choice in the valuation of your inventory BUT [as per Public Ruling 4/2006] any acceptable method used in the valuation of stock in trade or work in progress should be applied consistently. However if there is a valid reason for a change (for example, to give a more accurate valuation of stock in trade at cost or market value), details of the change should be appropriately documented and disclosed in the statement of accounts and/or the tax computation AND the effect of the change on the profits of the company should be reflected in the tax computation for that particular year.

Public Ruling 4/2006 provides an example of one Syarikat ABC Sdn Bhd which in 2006 decided to change the valuation of its stock in trade from cost to market value. The opening stock in trade in 2006 which was originally valued at cost was RM10,000 became RM12,0000 using market value.

The effect of the change of opening stock in trade values of RM2,000 (RM12,000 - RM10,000) should be taxed i.e. added to the profit before tax in arriving at the adjusted income from that business. Similarly, if the figures for the opening stock in trade were reversed, the difference should be allowed as a deduction.

Therefore, as stated by Dr. Veerinderjeet Singh, the basis of valuation of stocks must:

- be in accordance with Section 35(3) of the Income Tax Act 1967
- conform to generally accepted accounting principles
- be consistently applied from year to year

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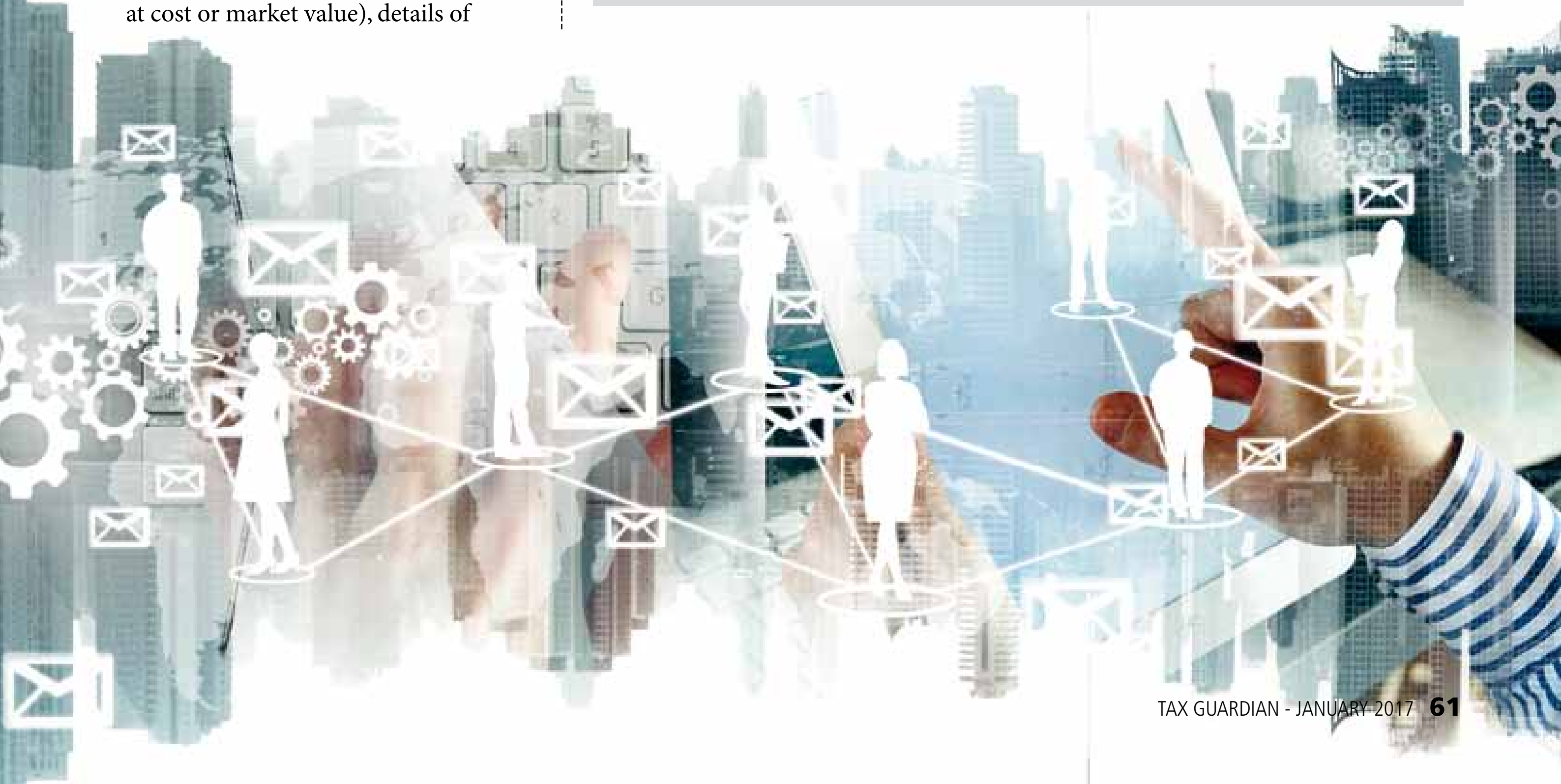

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JANUARY – MARCH 2017

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JANUARY 2017								
Workshop: Employer's Statutory Requirement in 2017	5 Jan	9a.m. - 5p.m.	Kuala Lumpur	Sivaram Nagappan	400	500	600	8 WS/004
Workshop: Tax Planning and Issues for Property Developers & Property Investors	9 Jan	9a.m. - 5p.m.	Kuching	Dr. Tan Thai Soon	350	400	450	8 WS/002
Workshop: International Taxation: Malaysian Perspective	10 - 11 Jan	9a.m. - 5p.m	Kuala Lumpur	Thenesh Kannaa	800	1,000	1,200	16 WS/001
Workshop: Tax Planning and Issues for Property Developers & Property Investors	16 Jan	9a.m. - 5p.m	Kota Kinabalu	Dr. Tan Thai Soon	350	400	450	8 WS/003
Public Holiday ***(Chinese New Year: 28 & 29 Jan)***								
FEBRUARY 2017								
Workshop: Tax Planning for Individuals (in collaboration with MAICSA)	15 Feb	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/001
Workshop: GST Practical Issues on Import & Export of Goods and Cross Border Services	16 Feb	9a.m. - 5p.m	Kuala Lumpur	Thenesh Kannaa	400	500	600	8 WS/005
Seminar: GST & Customs Health Check from Legal & Operational Perspective	20 Feb	9a.m. - 5p.m	Penang	Saravana Kumar & Annie Thomas	450	550	650	8 SE/001
NATIONAL GST CONFERENCE 2017	**28 Feb - 1 Mar**	**9a.m. - 5p.m**	**Kuala Lumpur Convention Centre**	**Local & Foreign Speakers**	**Early Bird 1,400** **Normal Fee 1,600**	**Early Bird 1,500** **Normal Fee 1,700**	**Early Bird 1,600** **Normal Fee 1,900**	**25 GST/001**
Public Holiday ***(Thaipusam: 10 Feb)***								
MARCH 2017								
Seminar: GST & Customs Health Check from Legal & Operational Perspective	7 Mar	9a.m. - 5p.m	Kota Kinabalu	Saravana Kumar & Annie Thomas	450	550	650	8 SE/002
Seminar: GST & Customs Health Check from Legal & Operational Perspective	9 Mar	9a.m. - 5p.m	Kuching	Saravana Kumar & Annie Thomas	450	550	650	8 SE/003
Workshop: Employer's Statutory Requirement in 2017	14 Mar	9a.m. - 5p.m	Penang	Sivaram Nagappan	350	400	450	8 WS/006
Workshop: Tax Planning for Companies (in collaboration with MAICSA)	14 Mar	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/002
Seminar: GST & Customs Health Check from Legal & Operational Perspective	16 Mar	9a.m. - 5p.m	Johor Bahru	Saravana Kumar & Annie Thomas	450	550	650	8 SE/004
Seminar: GST & Customs Health Check from Legal & Operational Perspective	23 Mar	9a.m. - 5p.m	Melaka	Saravana Kumar & Annie Thomas	450	550	650	8 SE/005
Workshop: Tax Planning for Companies (re-run) (in collaboration with MAICSA)	28 Mar	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/003
Seminar: GST & Customs Health Check from Legal & Operational Perspective	30 Mar	9a.m. - 5p.m	Ipoh	Saravana Kumar & Annie Thomas	450	550	650	8 SE/006

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

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

NATIONAL GST CONFERENCE 2017
MANAGING THE GST ECOSYSTEM

REGISTRATION FORM
Please ☑ the appropriate checkboxes.

PARTICIPANTS' DETAILS

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

____

Designation: ______________ I/C No: ______________

Email ______________ Membership No.: ______________

*☐ CTIM Member/RMCD Officer *☐ Member's firm staff/Member of Supporting Body *☐ Non-Member

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

____

Designation: ______________ I/C No: ______________

Email ______________ Membership No.: ______________

*☐ CTIM Member/RMCD Officer *☐ Member's firm staff/Member of Supporting Body *☐ Non-Member

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

____

Designation: ______________ I/C No: ______________

Email ______________ Membership No.: ______________

*☐ CTIM Member/RMCD Officer *☐ Member's firm staff/Member of Supporting Body *☐ Non-Member

ORGANISATION'S DETAILS

Organisation: ______________

Industry: ______________ Contact Person: ______________

Address: ______________

____

Email: ______________ Tel: ______________ Fax: ______________

TAX INVOICE to be issued under:

☐ Company

☐ Individual

Signature & Company Stamp:

CONFERENCE FEES*

Category	Early bird fee (with payment before or on 30 Jan 2017)	Normal fee (after 30 Jan 2017)
CTIM member/ RMCD officer	RM1,484	RM1,696
Member's firm staff/ Member of Supporting Body	RM1,590	RM1,802
Non-Member	RM1,696	RM2,014
Overseas participant	Not Applicable	RM3,074

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

Closing Date : 13 February 2017

Conference Secretariat:

- **REGISTRATION & ADMINISTRATIVE MATTERS**
  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
  Fax : 03-2161 3207 / 2162 8990
  E-mail : cpd@ctim.org.my
  Website : www.ctim.org.my

- **SPONSORSHIP & EXHIBITION OPPORTUNITIES**
  Ms Ally Ext 123 Email: ally@ctim.org.my
  Ms Nur Ext 106 Email: nur@ctim.org.my

Registration is on a first-come-first-served basis.
Only fully completed registration form will be processed.

PAYMENT METHOD

I / we hereby enclose

☐ **Cash** for Amount of RM ______________

☐ **Cheque** No. ______________
For Amount of RM ______________
(Non-refundable and made payable to "CTIM-CPE"

☐ **Online Payment** via CIMB Clicks
(Please attach together the transaction slip)

☐ **MASTER / VISA Credit Card**
For amount of RM ______________
Please complete the credit card details

Credit Card details

Card No ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ Expiry Date ______________

Cardholder's Name *(as per credit card)*

____

Cardholder's Signature

Company Stamp & Signature

Date

TERMS & CONDITIONS

RESERVATION
Reservation can be made by email / facsimile / post but will only be confirmed upon receipt of registration form with full payment or an acceptable employers guarantee and settlement of previous outstanding dues.

CANCELLATION POLICY
Conference fees are non-refundable once reservation has been confirmed. No refund is given for cancellations or withdrawals. Cancelled unpaid registrations will also be liable for full payment of the Conference fees.

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

MEMBER'S FIRM STAFF / MEMBER OF SUPPORTING BODY / MEMBER OR STAFF OF SUPPORTING SPONSOR
Member's Firm Staff is the staff of a CTIM member within the same firm. Member of Supporting Body or Member or Staff of Supporting Sponsor, kindly indicate which body you are associated with in the registration form.

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

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

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

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