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TRANSFER PRICING AND THE BRIGHT LINE TEST

A CURIOUS BEAM OF MISDIRECTED LIGHT

Why Question of Law

IRBM's 2017 Strategic Direction

Cultivating Good GST Compliance Culture Via CBOS 3.0

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

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April 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

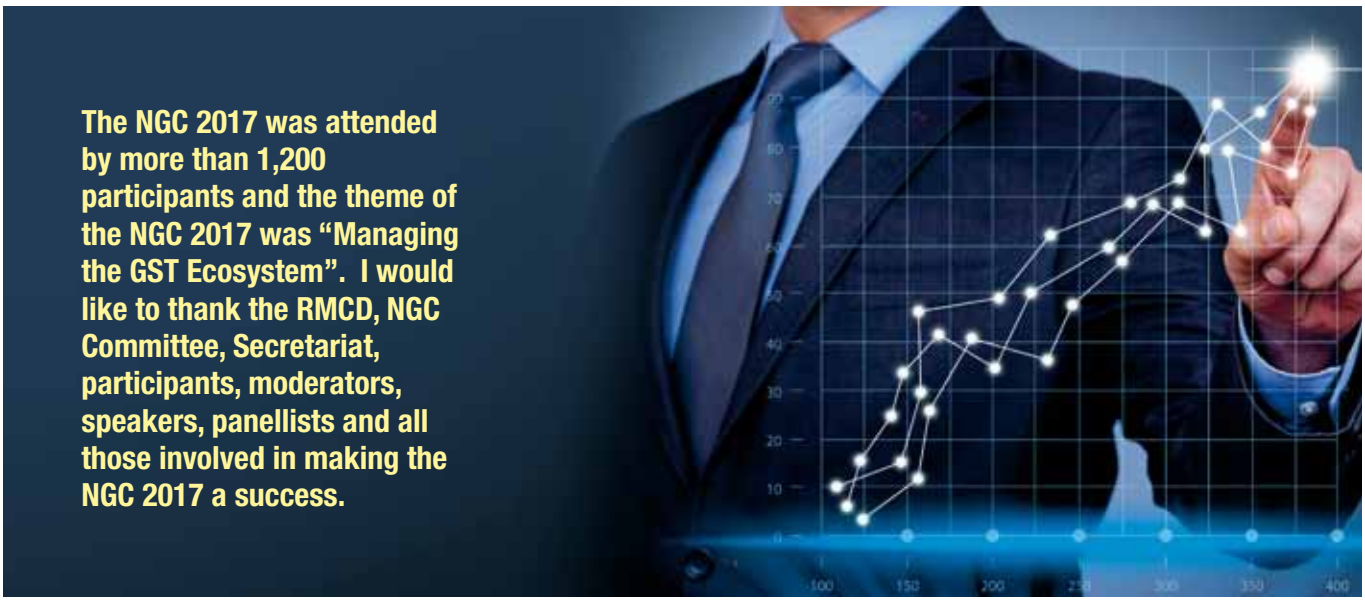
UPDATES ON CTIM ACTIVITIES

Greetings! The first quarter of 2017 has been eventful for the Institute in terms of engaging with various stakeholders. Firstly, I am pleased to inform that the Institute in collaboration with the Royal Malaysian Customs Department (RMCD) successfully organised the third National GST Conference (NGC 2017) at the Kuala Lumpur Convention Centre on 28 February 2017 and 1 March 2017. The NGC 2017 was attended by more than 1,200 participants and the theme of the NGC 2017 was "Managing the GST Ecosystem". I would like to thank the RMCD, NGC Committee, Secretariat, participants, moderators, speakers, panellists and all those involved in making the NGC 2017 a success.

In the previous edition of the *Tax Guardian,* I mentioned that YBhg Datuk Sabin Samitah had been appointed to the position of Chief Executive Officer / Director General of Inland Revenue (CEO / DGIR), on 12 December 2016. On 3 March 2017, I together with fellow members of the Institute's Executive Committee paid a courtesy visit to YBhg Datuk Sabin at his office in Menara Hasil, Cyberjaya. We were warmly welcomed by YBhg Datuk Sabin and his senior officers. YBhg Datuk Sabin gave us an update on the activities that the IRBM will be undertaking such as the setting-up of the Aggressive Tax Planning Unit to act on aggressive tax planning schemes, other measures to increase revenue collection and the dispute resolution process being undertaken by the IRBM Branches moving forward. Once again, I would like to congratulate YBhg Datuk Sabin on his appointment. I am also pleased to note that he is a fellow member of the Institute (FCTIM).

YBhg Datuk Sabin has graciously accepted our invitation to be the Guest of Honour at the Institute's 25th Anniversary (Silver Jubilee) Celebration Dinner which is to be held on 5 May 2017 at the One World Hotel in Petaling Jaya, Selangor. I understand that you have already received the Institute's e-Circular to notify you of the upcoming CTIM Silver Jubilee Dinner. On behalf of the Organising Committee, I would like to invite members and friends of the Institute to make this a memorable event by joining us in the celebration. Registration for the Dinner can be found in the said e-Circular. Do register early as seats are limited.

The NGC 2017 was attended by more than 1,200 participants and the theme of the NGC 2017 was "Managing the GST Ecosystem". I would like to thank the RMCD, NGC Committee, Secretariat, participants, moderators, speakers, panellists and all those involved in making the NGC 2017 a success.



Recent Tax Developments

On 24 January 2017, I together with the Institute's Technical Committee Chairman attended the Dialogue with the IRBM on the issues arising from the 2017 Budget Speech and Finance Bill 2016 as set-out in the Institute's Joint Memorandum with other professional bodies. The

Dialogue was chaired by YBhg Datuk Noor Azian Abdul Hamid, Deputy CEO (Policy). The minutes of the Dialogue is in the midst of being finalised. The finalised minutes will be circulated to members as soon as it has been issued by the IRBM.

It has come to my attention that members have several concerns regarding the Guidelines on the Deduction of Secretarial Fee and Tax Filing Fee which was issued by the IRBM recently. The Institute is aware of the issues raised and will bring it up to the IRBM for due consideration and deliberation. Members will be updated on the developments via e-Circular.

Members' Dialogues

Members Dialogues have been organised at the CTIM Branches in Ipoh (16 February 2017), Penang (9 March 2017) and Kuantan (23 March 2017). The Members Dialogues were well attended (more than 50 members attended at each venue) and well received. The issues/questions discussed were mainly on technical and operational matters. I attended several of the Members Dialogues together with the Public Practice Committee Chairman (Datuk Harjit Singh Sidhu) and several members of the Council. I also took the opportunity to speak to members on the Institute's procedures on raising issues to the tax authorities.

CPD Events

The National Tax Conference 2017 with the theme "Managing Tax Issues for Growth and Nation Building" will be held at the Kuala Lumpur Convention Centre on 25 July 2017 and 26 July 2017. Do mark these dates in your diary. I would encourage you to register as soon as the registration form is available to avoid disappointment.

Membership

The Institute has been seeing a constant increase in membership numbers quarter by quarter. This is a noteworthy achievement. It is my sincere hope that our membership will continue to grow in quantity and quality.

My fellow Council Members and I would like to thank everyone for their assistance and involvement, in one way or another, in the Institute's activities and events which have helped to bring up the Institute as the premier body for tax professionals in Malaysia.

Editor'sNote

YEO ENG PING

There is a palpable feeling that the tax audits and investigations are aggressively growing and the tax landscape a lot more challenging. Latest is the news that the Inland Revenue Board Malaysia (IRBM) is conducting tax audits and investigations on 30 large enterprises, and looking to claw back some RM1.9 billion in lost revenues due to tax avoidance and penalties. Moreover, it was announced that from 1 January 2018, tax penalties will be increased to 100% for evasion and under-declaration of income. In March, we also saw a joint statement by Bank Negara, Malaysian Anti-Corruption Commission and the IRBM stating their agreement to strengthen their strategic cooperation in combating financial crimes, corruption and tax evasion. All this is consistent with the announcement that one of the priorities of the IRBM for 2017 is to combat tax evasion, as part of its plan to meet the RM127 billion tax collection target. The message is clear, that businesses need to be compliant and to be prepared for more controversies. In this issue of the *Tax Guardian,* we have some good articles around this topic – the article Transfer Pricing and the Bright Line Test gives us an example of a transfer pricing dispute around trademark valuation, and the article Why Question of Law examines the income tax appeal process to the High Court. Do not miss our regular update on Tax Cases which cover issues on interest deductions, pioneer incentive, and procedural matters. While we are on the topic of appeals, The Anatomy of a Persuasive Written Tax Appeal is a must read as we sharpen our written submission for appeals. Also, do catch the second part of the article on Tax Treatment of Inventories as it highlights some tricky issues around inventories.

Certainly it is well within the mandate of the tax authorities both the IRBM and the RMCD to enforce the law and ensure compliance, but real success in my view is the ability to execute tax audits in an orderly manner, with mutual respect for due process and business realities, and providing an experience and outcome that reinforces confidence not only in the tax system but also the investment climate in Malaysia. Here, we include two articles that provide the tax authorities' perspectives on increasing compliance and enforcement – firstly, the article Cultivating Good GST Compliance Culture via CBOS 3.0 takes us through the RMCD's strategy to increase GST compliance; and secondly, under the leadership of the newly appointed Chief Executive Officer, YBhg. Datuk Sabin Samitah, the IRBM shares its strategies in the article IRBM's 2017 Strategic Direction.

On the legislative front, we have seen moves to increase the tax base, but not without resistance. For example, while the amendment to expand withholding tax to cover services performed outside Malaysia became effective January 2017, till today we continue to see vocal appeals by the business community to reconsider this move or at least, to provide relief from its effect. Also, the proposed Stamp Bill 2016 that was making its way through Parliament has very recently been abruptly withdrawn. The proposed amendments would have among others, had the effect of increasing and accelerating the stamping of documents (and adding to the costs of doing business), so there was relief when the Bill was pulled from the current Parliamentary sitting. Another expansionary area being considered by the IRBM is the taxation of digital or online businesses - so we should expect to see developments on this front, soon. One interesting development that took place early April, is the passing of the Tourism Tax Bill 2017, which will effectively allow an "occupancy tax" to be imposed on tourists staying in certain accommodation. It was reported that this could raise about RM654m in tax based on a 60% occupancy of the available "room nights" in Malaysia.

In seeking new sources of tax revenue in the current challenging economic environment, it is hoped that we can have greater exchange and dialogue (among policy-makers, tax authorities, tax advisors and taxpayers) before laws are proposed, to boost the level of buy-in, promote confidence in the system, and smoothen the passage of new rules.

CAREER TALK AT UTAR, KAMPAR

CTIM Perak Branch Chairman, Mr. Lam Weng Keat delivered a career talk to 250 students pursuing accountancy and finance courses at Universiti Tunku Abdul Rahman(UTAR) in Kampar on 20 February 2017. The Branch Chairman gave an overview of the role and function of CTIM, the various routes to become a CTIM member, types of membership and the benefits of CTIM membership amongst others. The speaker also shared his experience, knowledge and his view of the tax profession. He further added that as a CTIM member, a lot of value is placed on the importance of maintaining professionalism and being relevant in the marketplace. Finally, the students were strongly encouraged to pursue a career in taxation and to apply for CTIM membership upon fulfilling the necessary requirements.

On 22 March 2017 CTIM Perak Branch members were invited to attend and man the CTIM booth at the UTAR Kampar Information Day event. Mr. Ong Hing Huat, CTIM Examination and Education Committee member from Kuala Lumpur, Mr. Lam Weng Keat Chairman and his Deputy Mr. Chak Kong Keong of Perak Branch attended. They shared useful information and their working experiences in Taxation with students.

MEMBERS' DIALOGUES AT CTIM BRANCHES

Members' Dialogues were initiated by the Public Practice Committee (PPC) and organised by CTIM Branches in Ipoh (16 February 2017), Penang (9 March 2017), Kuantan (23 March 2017) and Johor Bahru (10 April 2017). Several Council Members were invited to engage with members on tax developments and issues on operational and technical matters. The Council Members who attended included Mr. Aruljothi Kanagaretnam (CTIM President), Datuk Harjit Singh Sidhu (PPC Chairman), Mr. Chow Chee Yen, Mr. David Lai, Ms. Theresa Goh, Mr. K. Sandra Segaran, Mr. Nicholas Crist, and Ms. Yeo Eng Ping. The dialogues were well attended and received.

COURTESY VISIT TO YBHG DATUK SABIN SAMITAH

2016 NTC CHEQUE PRESENTATION TO DATUK NOOR AZIAN ABDUL HAMID

CPD EVENTS

A series of events were conducted in the 1st quarter 2017 as listed below:

- Employers' Statutory Requirements in 2017
- International Taxation: Malaysian Perspective
- GST Practical Issues on Import & Export of Goods on Cross Border Services
- GST & Customs Health Check from Legal & Operational Perspective
- Tax Planning and Issues for Property Developers and Property Investors
- Tax Planning for Individuals (MAICSA)

The workshop on 'Employers' Statutory Requirements in 2017' was conducted by Mr. Sivaram Nagappan on 5 January 2017 in Kuala Lumpur & 14 March 2017 in Penang. The speaker shared his knowledge with the participants on tax planning initiatives from the latest tax updates

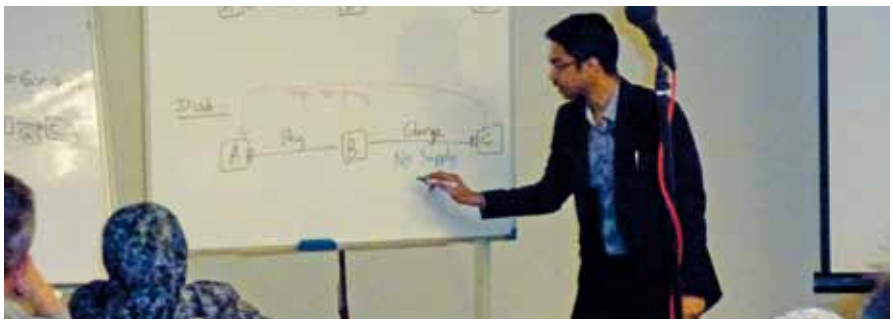
and developments, the implications of Goods and Services Tax (GST) and the recent changes on employee benefits provided by employers. He also spoke on the highlights of the recent tax developments (including proposals from Budget 2017) and Public Rulings.

Various workshops were conducted by Mr. Thenesh Kannaa during the months of January & February 2017 on the following topics:

- International Taxation: Malaysian Perspective
- GST Practical Issues on Import & Export of Goods on Cross Border Services

The two-day workshop on 'International Taxation: Malaysian Perspective' was an unparalleled effort to approach international taxation principles from the Malaysian perspective.

Ms. Annie Thomas from the GST Division of the Royal Malaysian



Customs Department & Mr. S. Saravana Kumar with his fellow colleagues from Lee Hishammuddin Allen & Gledhill conducted several Seminars entitled GST & Customs Health Check from Legal & Operational Perspective, Insight into Customs Practice & Strategies to Manage GST & Customs Audit. The highly experienced speakers touched on various legal and operational aspects of GST and Customs law in Malaysia.

CTIM in collaboration with MAICSA organised a workshop on "Tax Planning for Individuals" on 15 February 2017 at MAICSA's Auditorium, Kuala Lumpur. Mr. Vincent Josef discussed the latest amendments to the Income Tax Act effective from year of assessment 2017 and answered many questions asked by the participants during the workshop.

TRANSFER PRICING AND THE BRIGHT LINE TEST

A CURIOUS BEAM OF MISDIRECTED LIGHT

Venkataraman Ganesan

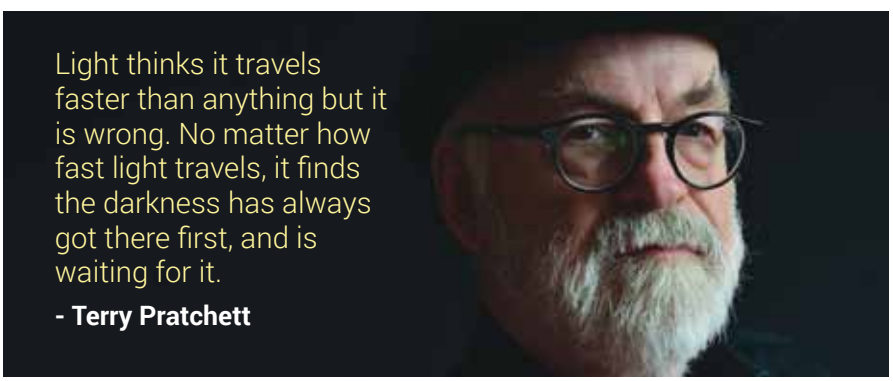
THE WEX LEGAL DICTIONARY (SCHOOL, 2017) DEFINES A 'BRIGHT LINE RULE TO MEAN:

"An objective rule that resolves a legal issue in a straightforward, predictable manner. A bright-line rule is easy to administer and produces certain, though, arguably, not always equitable result".

The employ of the Bright Line Rule/Bright Line Test ("BLT") in the sphere of Taxation has been demonstrated in various legislations enacted by Tax regimes spanning geographies. A couple of notable examples being:

A. Taxation (Bright-line Test for Residential Land) Act 2015 (Revenue, 2016) introduced by the New Zealand Tax Authority with an objective of supplementing the existing "intention" test in Section CB 6 of the Income Tax Act 2007, which makes gains from the sale of land taxable if the land was bought with an intention to resell;

B. Final Regulations (T.D.9720) (Service, 2015) issued by the US Internal Revenue Service ("IRS") for determining when an expanded affiliated group ("EAG") will be considered to have substantial business activities in a foreign country, which allows a foreign corporation to escape application of the inversion rules under Sec. 7874(a)(2)(B), if, after an acquisition, the EAG has substantial business activities in the foreign country. The regulations the bright-line test for determining substantial business activities; The application of the BLT principle to Transfer Pricing was unveiled for the first time when the United States Court of Appeals for the Ninth Circuit decided on an



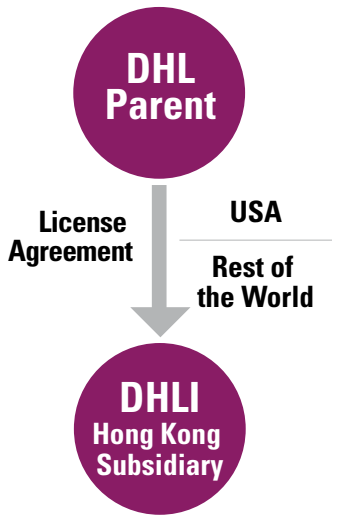
Light thinks it travels faster than anything but it is wrong. No matter how fast light travels, it finds the darkness has always got there first, and is waiting for it.

- Terry Pratchett

appeal filed by DHL Corporation (LLC, 2001). In a landmark, albeit fateful ruling, the Court dwelling at length on the 'Developer-Assister Rules as contained within the Transfer Pricing Regulations of the United States of America, introduced to the Transfer Pricing domain, the concept of the Bright Line Test. The basic contours of this article span three sections. Section A provides a genesis of the BLT principle by significantly drawing on the DHL ruling. Section B illuminates the rapid rise in litigation associated with the BLT principle. This article predominantly derives its shape from a slew of judicial precedents littering the Indian taxation landscape. Section C concludes with a few key documentation pointers from a taxpayer perspective.

A. GENESIS UNDERLYING THE BRIGHT LINE TEST

The BLT permeated the realms of Transfer Pricing for the first time when the United States Court of Appeals for the Ninth Circuit decided on an appeal filed by DHL Corporation. In a path breaking and seminal decision, the US court, ruled that no royalty would be due to DHL US from its Associated Enterprise ("AE") DHL International, on the justification that for items of intangible property, the party which assumed the economic burden of the investment should commensurately enjoy the economic rewards. Here, the trial judge invoked the 'bright-line' test which notes that, while every licensee or distributor is expected to incur a certain amount of cost to exploit the items of intangible property to which it has a nexus, it is when the investment crosses the bright line of routine expenditures into the realm of non-routine that economic ownership, probably in the form of a marketing intangible, is created.



Facts of the Case

DHL, a global overnight package delivery company was incorporated in the United States of America ("USA") in 1969. In 1972, DHL established a subsidiary company in Hong Kong DHLI for the purposes of managing DHLs international operations. In tandem with Middletown NV ("MNV"), a Netherlands Antilles company incorporated in 1979, DHLI was vested with the responsibility for DHL's international operations, while DHL operated in the US market. DHL also had a set of independent agents who agreed to function within the DHL network. These agents were compulsorily required to use the DHL trademark. In 1983, DHLI commenced registering the DHL name in countries outside the USA. The name was registered in the name of DHLI without reference to the fact that DHLI was a licensee of DHL. DHLI incurred the cost of trademark registration, guarded the trademark against infringement outside USA, and also managed disputes concerning the usage of trademark in relation to the agents who were terminated from the

DHL network. Finally, DHLI bore the cost of advertising the DHL network outside the United States.

In December 1988, an investor group comprising Japan Airlines Company ("JAL"), Nissho Iwai Corp. ("NIC") and Deutshce Lufthansa Aktiengesellschaft ("DLA"), began negotiations to acquire a controlling interest in DHLI. On 7 December 1990, the investors acquired a partial interest in DHLs international operations (DHLI and MNV). They also obtained an option to purchase controlling interest in DHLs international operations. On 18 August 1992, they exercised their stock purchase option thereby becoming majority owners of DHLI and MNV. Consequent to these acquisitions, the acquirers agreed on a price for the entire transaction. While conducting the due diligence activity, reservations were expressed that the IRS might seek to impute a royalty for DHLI's use of the DHL trademark. The acquirers agreed that DHLI should purchase the DHL trademark as a vehicle for capitalising DHL.

Independent unrelated advisors valued the DHL brand between USD20 million and USD200 million. Ultimately, a USD20 million valuation was finalised, and the sale was consummated in 1992. Post this decision, Bain Consulting was asked to prepare a valuation of the DHL trademark. Bain presented a draft letter stating that the value of the DHL trademark was USD20 million.

Issue

A central issue in DHL, was the ownership of the DHL trademark. The ownership of the US rights to the trademark was not at issue- both sides agreed that DHL owned those rights. Since DHL was, at the very outset, a US company, it is evident that the non-US rights to the DHL trademark were initially US property. However from this point onwards, things get a bit murky. A 1974 memorandum of understanding ("MoU") appointed DHLI as a foreign pickup and delivery agent for DHL, and DHL licensed the use of the DHL name to DHLI for no compensation. The MoU, although amended on six occasions, never included a royalty for use of the DHL name.

Verdict

The Tax Court rejected both DHL's and the IRS determination of the value of the DHL name of USD600 million. The Court concluded that the value of the worldwide rights was worth USD150 million, before reducing the same to USD100 million due to imperfections in DHL's ownership of the non-US rights. In addition, the Court also imposed a transfer pricing penalty because DHL's documentation was prepared by a consultant (Bain) who was doing work for DHL and hence was construed to be not independent. The IRS contended that the trademark's value was more than USD600 million. At the trial, the IRS valuation fell to USD300 million. DHL on the other hand argued that the USD20 million value was an arm's length value because DHL did not own the international rights, in part DHLI had incurred the advertising costs outside the United States and had registered the name outside the United States.

However the genesis behind the application of the BLT stems from the 1968 US Regulations which incorporated within its confines an important theory relating to 'Developer-Assister rules'. These Rules laid down the tenet that, for transfer pricing purposes, intangible property in general would be regarded as being owned by the taxpayer that bore the greatest share of the costs of development of the intangible. The following four factors were deemed to be quintessential in determining the ownership of an intangible:

- the relative costs and risks borne by each controlled entity;
- geographical location of the activity/(ies) to which the development of the intangible could be attributed;
- ability of an entity to independently conduct the development of an intangible; and
- the degree of control exercised by each entity

The primary focus in the DHL case bordered on the equitable ownership of intangibles based on economic expenditures and risk. Legal ownership is not identified as a factor to be considered in determining which party is the developer of the intangible property, although its exclusion is not specific. However, the developer-assister rule were amended in 1994, to include, among other things, consideration of 'legal' ownership within its ambit, for ascertaining the developer/owner of the intangible property, and for providing that in the event intangible property is not legally protected then the developer of the intangible will be considered the owner.

The ruling in the case of DHL coined the concept of a BLT by clearly differentiating routine marketing expenses and non-routine marketing expenses. In brief, it provided that for the determination of the economic ownership of an intangible, there must be a determination of the non-routine (i.e. brand building) expenses as opposed to the routine expenses normally incurred by a distributor in promoting its product.

A quintessential principle originating from the DHL ruling is that the Advertising, Marketing and Promotional ("AMP") expenditure should first be examined to determine routine and non-routine expenditure and accordingly, (if at all), compensation may be sought possibly for the non-routine expenditure.

B.BLT REDUX – THE INDIAN EXPERIENCE

The controversy surrounding marketing intangibles and the BLT assumed prominence in a proliferation of high profile transfer pricing cases in India. The following paragraphs illustrate a couple of materially significant rulings:

- *Sony Ericsson Mobile Communications India Pvt. Ltd. vs Commissioner of Income Tax* (ITAT, 2015)

In the captioned case, the Delhi High Court was called on to provide a ruling on whether upon application of the ALP a related entity of a Multi-National Enterprise ("MNE") merited compensation/remuneration for its promotional efforts that purportedly embellished the value of a trademark or brand name legally owned by another member of the MNE. The promotional efforts typically entailed the marketing affiliate incurring Advertising, Marketing and Promotional (AMP) expenses. The marketing affiliate may be a trademark licensee or a distributor of trademark products, while the legal owner of the trademark is the licensor or the supplier of the trademark products.

SALIENT POINTS OF THE COURT RULING

a) AMP expense as a related party transaction

- The High Court did not accept the taxpayers' contention that activities leading to incurring AMP expense do not result in related party transactions;
- The High Court observed that in most cases the taxpayers have submitted that the declared price of the international transaction of import of goods from a foreign associated enterprise included an element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed;
- However, the High Court also observed that AMP is a function/ expense related to distribution and under a "bundled approach" it would be illogical to treat AMP expense as a separate "related party transaction."

b) Aggregation of transactions

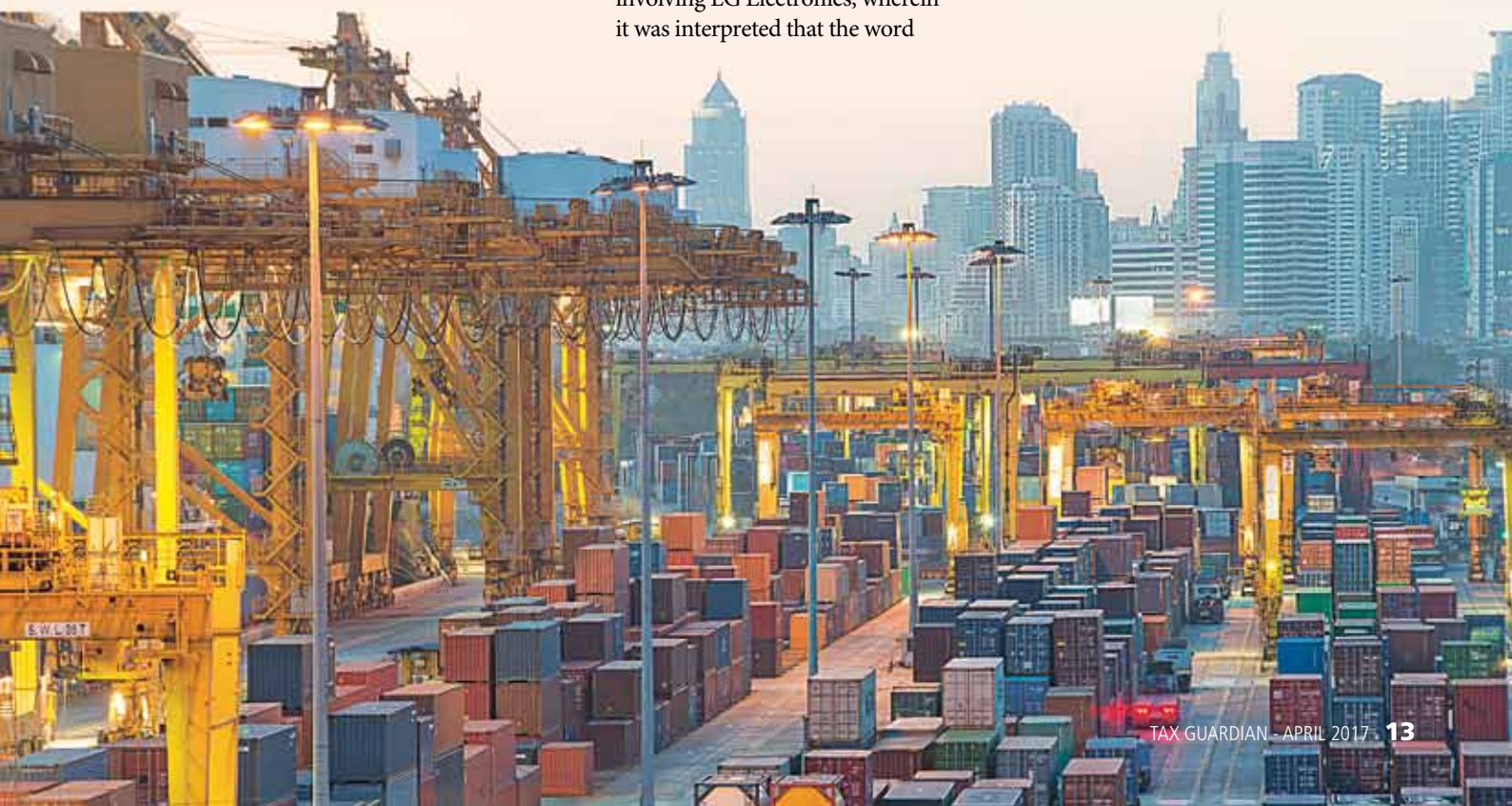
- The High Court did not concur with an earlier ruling passed by a Special Bench in a case involving LG Electronics, wherein it was interpreted that the word "transaction" refers to a single independent transaction and not a bundle of transactions;
- The High Court also opined that one of the primary rules of statutory construction is that singular includes plural and *vice versa* and that no presumptions should be made to the contrary;

c) AMP expenses and brand building

- On the vexed and contentious issue of whether incurring AMP expenses necessarily leads to enrichment or development of brand value, the High Court stated that it would be inappropriate to emphasise that AMP forms a material part of a brand. A "brand" reflects the reputation the brand owner has earned over a period of time due to the nature and quality of goods and services. Hence, it would be inappropriate to contend that AMP expenses are a substantial reason for brand building.

d) Bright line test

- The High Court refused to accept the Revenue's assertion that excess AMP expense enriched solely the foreign affiliate and observed that



enhanced sales also confer benefits on the Indian taxpayer;
- The High Court has also observed that it was arduous to bifurcate between promotion of product/ promotion of brand expenses and consequently record them as separate from one another;
- The High Court rejected the employ of the BLT as a measure of identifying a related party transaction and held that the use of the BLT on the basis of the comparability analysis was unwarranted.
- *Maruti Suzuki India Limited v Assistant Commissioner of Income Tax* (Tribunal, 2010)

The taxpayer, Maruti Suzuki India Limited ("MSIL"), entered into a licensing arrangement with Suzuki Motor Corporation ("SMC") for the manufacture and sale of automotive vehicles which included manufacturing new models. According to the agreement, MSIL agreed to pay a lump sum amount in addition to a running royalty to SMC as consideration for technical assistance and license. MSIL commenced using the logo of SMC on the cars manufactured by it with the word "Suzuki" alongside the brand name 'Maruti'. MSIL also incurred significant AMP spends for promoting its products.

Upon reference by the Assessing Officer ("AO") for determination of arm's length price ("ALP"), the Transfer Pricing Officer ("TPO") benchmarked the of AMP expenses incurred by resorting to the BLT wherein the proportion of AMP expenses incurred by MSIL was compared with similar expenses incurred by independent unrelated third party automobile manufacturers.

The TPO observed that while MSIL incurred AMP expenses to the extent of 1.87% of its turnover, the average AMP expenses incurred by comparable companies as a percentage of total turnover was 0.60%. The TPO inferred the need for a transfer pricing adjustment for the differential percentages in AMP spending alleging that the excess AMP spends by MSIL were attributable to promoting the brand "Suzuki" owned by SMC, the foreign parent.

Upon subsequent appeals, the Delhi High Court laid down the following tenets:

- The very concept of the BLT was negated by the Delhi High Court itself in an earlier case of Sony Ericsson Mobile Communications India (P.) Ltd. both for determining if there is an international transaction and secondly for the purpose of determining the ALP;
- The tax authorities had to establish the existence of related party transactions without employing the BLT;
- The Court ruled that the existence of related party transactions was assumed by the revenue merely from the fact that the taxpayer had excess AMP spend after applying the BLT;
- An analysis of Sections 92B to 92F of the Income Tax Act relating to Transfer Pricing reveal no machinery provisions that provide recourse to evaluate the existence of related party transactions purely on an examination of AMP spends;
- The so called 'excessive' AMP expenditure could not be used as a basis for pointing to the existence of an international transaction;
- Under the Income Tax Act, 'international transaction' means, *inter alia,* a transaction "having a bearing on the profits, incomes or losses of such enterprises" and includes "a mutual agreement or arrangement" for allocation of any costs or expenses. Thus an 'agreement' or 'arrangement' or 'understanding' between the two entities must exist whereby one entity is obliged to incur AMP expenses to promote the brand of the other;
- Revenue was unsuccessful in demonstrating any such 'arrangement' or 'understanding' between the two transacting related parties;
- The Court concluded while the taxpayer's AMP spending was

only 1.87% of its sale whereas the parent's AMP expense worldwide was 7.5% of sales and therefore this negated the possibility of any 'arrangement' or 'understanding' between the taxpayer and the foreign parent.

An analysis of the aforementioned cases enables an inference that while taking recourse to the BLT for the purposes of determining the existence or presence of a related party transaction, and consequently trying to ascertain the ALP of such a transaction, might be an exercise that is bad in law, there is no doubt that activities leading to incurring AMP expense might result in related party transactions.

C. TAXPAYER PREPAREDNESS AND DOCUMENTATION REQUIREMENTS

With the Organisation for Economic Cooperation and Development ("OECD")'s initiative of Base Erosion and Profit Shifting ("BEPS") enjoying uniform acceptance from and enthusiastic implementation by a multitude of tax jurisdictions, the compliance requirements necessitated have become rigorous and stringent. Hence with a view to mitigating the risk of potential Transfer Pricing exposure as a result of the BLT application, taxpayers would serve their cause better by adhering to the following tenets:

- Develop a clear comprehension of the risk continuum prior to establishing, incorporating or setting up a distribution/trading entity. While a full-fledged risk assuming distributor can engage in a range of AMP activities with a view to penetrating, enhancing and/or broadening the market share, a low or no risk assuming distributor would be facing a potential risk if the said entity was to engage in broad categories of AMP activities and incur substantial expenditure;
- Conduct a comprehensive Function, Assets and Risks analysis to ascertain the functions performed, assets deployed and risks assumed by the entity. This is a vital exercise to ascertain the characterisation of the entity;
- Ensure that there is no misalignment between the contractual obligations and the actual conduct. For e.g. while a contract specifically mentions that an entity is to function as a low risk distributor (bearing no inventory risks and deriving an arm's length fee) for its parent which is responsible for setting out the global advertisement and brand promotion strategies, whereas the entity incurs huge expenses on AMP consistently, there is an apparent dichotomy between the supposed characterisation of the entity and the actual responsibilities. In this case the tax authority in the distributing entity's jurisdiction might contend that the parent is 'piggybacking' on the efforts of the distributor, thereby promoting its own products without compensating the distributor for the additional AMP efforts;
- Clearly document the roles and responsibilities of all the concerned entities in the value chain in the Transfer Pricing documentation;
- Review the pricing mechanism adopted and in the event of a material change in the facts and circumstances of the business or in the relevant Transfer Pricing Regulations, revise the existing pricing mechanism to reflect the changed circumstances and/or to comply with the regulatory requirements and consequently amend the Transfer Pricing documentation.

Whilst the objective of a BLT in any statutory provision is to provide clarity and to obliterate confusion, the use of the BLT to determine the existence of a marketing intangible, only seems to accentuate and embellish an already contentious sphere of taxation. It is likely to be quite some time before this bumpy road finally gets smoothened.

Meanwhile, these curious beams of misdirected light keep up their relentless barrage…….

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CULTIVATING GOOD GST

COMPLIANCE CULTURE VIA CBOS 3.0

Annie Thomas & S. Saravana Kumar

When we ordinarily refer to compliance in Goods and Services Tax (GST), what strikes our mind is the filing of GST return and settling the GST due within the stipulated taxable period. It has been more than two years now since the implementation of GST in Malaysia. The compliance rate for GST filing thus far has been high with an average rating of above 95%[1]. However, when it comes to the settlement of GST dues, the compliance rate is not as high as the GST filing rate. About one third of the companies audited by the RMCD have submitted incorrect return by omitting information, understating output tax or overstating input tax.[2]. This kind of non-compliance undermines the government's revenue, distorts competition as it gives the non-compliant business an advantage in the form of cash flow and compromises equity as this may encourage further non-compliance in other aspects of GST. This article[3] aims to highlight the other aspects of compliance requirement under the GST Act 2014 and the sanctions that the Royal Malaysian Customs Department (RMCD) may impose in such circumstances.

RMCD'S EXPERIENCE

GST or Value Added Tax (VAT) as it is known in some countries, is regarded by economists as a fair and efficient tax system[4]. It is a very effective tax as it places all businesses on the same level playing field. The popularity of this tax is evident from its implementation in over 150 countries worldwide with even the income tax free Gulf countries are planning to implement GST soon[5]. In Malaysia, GST has been credited to have enabled the government's coffer remained sufficient during this challenging economic period with a projection of RM42 billion in collection this year[6].

The RMCD's recent experiences show that the non-compliance culture is prevalent amongst the smaller businesses as this segment has a rate of 40% when it comes to errors in GST returns. This phenomenon is not peculiar in Malaysia as it is also prevalent in other advanced economies as well. Not only there is a prevalence of incorrect returns, the RMCD has also noticed that the non-compliance by small businesses commonly spans all spectrum of GST obligations. Some small businesses are completely outside the GST system, some only register to illicitly claim a refund, many have poor recordkeeping culture which then leads to poor filing and payment compliance. This is compounded further by businesses who are ignorant of deadlines. 94% of the GST registered persons in Malaysia are from the Small Medium Enterprise (SME) segment

and inevitably, GST compliance cost is a challenge for many SMEs. Meeting their GST obligations means additional costs for them especially in obtaining proper professional advice, employing competent finance staff and investing in a reliable GST software and ensuring proper GST compliance return.

WHY CBOS 3.0?

Some businesses regard that the compliance costs are high and in some instances, even outweighs the net amount input credit remitted, which potentially leads to the failure to comply or register, thus allowing the vicious shadow economy to prosper. This needs to be addressed as tax laws and its implementation must be fair. This sense of awareness had led the RMCD to recently launch the Customs Blue Ocean Strategy (CBOS) Operation 3.0. The objective of this operation is not merely detect issues for further GST audit or investigation but to also encourage taxpayers to comply with the law. The approach for this operation is "Informed Compliance" rather than "Enforced Compliance" with the aim of assisting taxpayers especially SMEs. Informed compliance focuses on educating taxpayers by making friendly visits

[1] *Statistic from RMCD based on the GST-03 return submission*

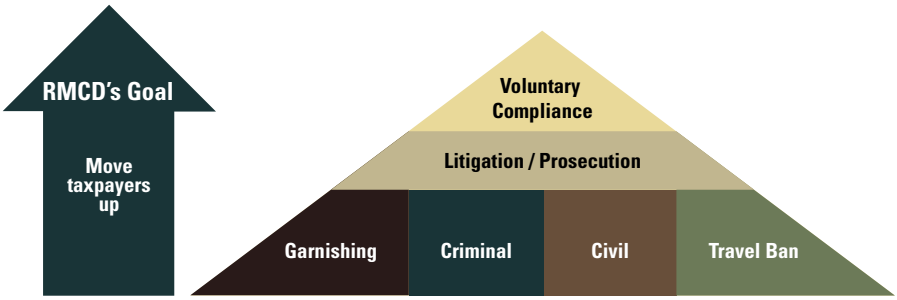
[2] *"See "Press Digest - One third of GST-registered firms have problems with new tax regime" The Sun Daily, 13.09.2016*

[3] *This article is based on the recently conducted GST & Customs Health Check From Legal & Operational Perspective workshops by the authors for CTIM.*

[4] *See "GST is fair taxation system: experts", The Sun newspaper, 27.10.2013*

[5] *See "Gulf states prep tax laws ahead of 2018 rollout", Reuters, 14.1.2016*

[6] *See "Government to collect RM42bil in GST this year", The Star newspaper, 9.1.2017*



to traders to explain and assist them to comply with GST obligations and provide channels for taxpayers to share their grievances and enable taxpayers to provide feedback. The RMCD conducts handholding programmes and consultation sessions to achieve this. On the other hand, the enforced compliance focuses on litigation where errand taxpayers will be prosecuted.

The core principle of the GST compliance model is to make compliance as easy as possible. Having said that, taxpayers found to be wilfully abusing or seeking to abuse the system, will have to incur the wrath of the full force of the law. In this context, the on-going CBOS operation has three levels:

i. Verification
ii. 30 days to comply
iii. Enforcement action

Via the verification exercise, the RMCD will examine the GST treatment adopted by businesses and the corresponding business documentations. If any non-compliance is detected, then the affected taxpayer will be advised to amend the GST-03 return and settle the amount of GST due within 30 days. If the taxpayer fail to amend the GST-03 return and / or settle the amount due within 30 days, then a full GST audit will be conducted on them and enforcement actions such as prosecution, civil proceedings to recover the amount due, garnishing of assets, imposition of travel restriction and recovery proceedings against directors will be employed. Hence, the RMCD encourages voluntary compliance with taxpayers coming forward to correct their previous mistakes. From the RMCD's past experience, voluntary compliance could only be encouraged when taxpayers are aware that non-compliance would be detected and sanctioned accordingly. Studies have shown that taxpayers' behaviour is strongly linked to the GONE THEORY – Greed, Opportunity, Need and Expectation of getting caught. Greed refers to excessive desirous of wealth or profit, Opportunity refers to being in the right position to commit the offence, Need refers to a condition in which something necessary is required or wanted and finally, the Expectation of getting caught refers to the degree of enforcement. Below is the voluntary compliance model:

It is notable from past experiences that CBOS operations not only collect additional GST revenue from non-compliant taxpayers but also leads to a higher declaration from taxpayers who are not audited.

AREAS OF RISK DETECTED IN CBOS OPERATION

Based on the RMCD's experience from previous CBOS operations, the following are the key issues that are usually detected:

- Incorrect treatment of standard-rated supplies as zero-rated supplies
- Failure to account for GST on non-trade income and fixed asset disposals (sale or trade-in)
- Reimbursement / disbursement
- Deemed supplies e.g. provision of gifts
- Fringe benefits
- Claiming of input tax on "blocked" expenses
- Incorrect use of GST codes
- Incorrect decisions in setting up codes e.g. zero-rating based on billing address
- Incorrect entering of data
- Transposition or formula errors
- Failure to identify and take account of legislative or policy changes

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- Poor communication of business changes (e.g. restructuring) to the RMCD's audit team

The above results in the RMCD assessing each audit case on a case to case basis in evaluating the type of action and sanction to be taken. The common provisions of the GST Act 2014 usually applied by the RMCD in charting its course of action are:

SECTION 9

Determine whether there is a supply of goods or services in Malaysia including deemed supply and any importation of goods into Malaysia.

SECTION 33

Ensure that a proper tax invoice is issued by all suppliers.

SECTION 36

Duty to keep full and true records in respect of all goods and services supplied, all goods imported and any other records required under the GST Act 2014.

SECTION 41

Furnishing return in the manner prescribed by law according to the time frame prescribed.

SECTION 88

Imposition of penalty for incorrect return which carries a fine not exceeding RM50,000, imprisonment not exceeding three years or both. There is also a penalty equal to the amount of GST undercharged.

SECTION 89

Imposition of penalty for GST evasion and fraud which carries for the first offence, a fine not less than 10 times and not more than 20 times of the GST amount evaded or defrauded, imprisonment not exceeding five years or both. For the second and subsequent offences, a fine not less than 20 times and not more than 40 times of the GST amount evaded or defrauded, imprisonment not exceeding seven years or both.

SECTION 90

Imposition of penalty for causing improper GST refund or entitlement to relief which carries a fine not exceeding RM50,000, imprisonment not exceeding three years or both. There is also a penalty equal to two times of the amount improperly refunded or entitled as a relief.

RECOVERY MECHANISMS

Despite best efforts, there will be a segment of taxpayers who will continue to flaunt the law. Whilst the RMCD may not be able to immediately detect all non-compliance behaviours, sooner or later, with the concerted GST audit initiatives, taxpayers should act now before the long arm of the law catches up with them. The following are some of the recovery mechanism that the RMCD may apply on recalcitrant taxpayers:

(a) Offsetting unpaid tax against refund[7]

In cases where a taxpayer has failed to pay any amount of GST due and payable, the Director General of RMCD may offset against the unpaid GST any amount GST refundable. The amount offset will be treated as payment or part payment for the GST due.

(b) Recovery of GST as a civil debt[8]

Notwithstanding any appeal before the GST Appeal Tribunal, the Minister of Finance may recover the unpaid GST as a civil debt due to the government. In this type of proceedings, the production of a certificate signed by the Director General of RMCD of the sum due shall be conclusive evidence and authority for the court to give judgement for that amount.

(c) Seizure of goods for the recovery of tax[9]

Any goods in excise control or customs control or at the taxpayer's place of business may be seized until the GST due is settled. The Director General of RMCD is also empowered to seize or sell any goods belonging to the person liable.

(d) Power to collect tax from person owing money to taxable person[10]

In instances where there is GST due, the Director General of RMCD may by notice in writing require any person from whom any money is due, accruing or may become due and payable to a taxable person who owes the GST, to pay to the Director General of RMCD the said money which will be used to pay the GST

due. This power can also be used on any person who holds or may subsequently hold money for or on account of the person who owes GST.

(e) Travel restriction[11]

Where the Director General of RMCD has reason to believe that a person is about or is likely to leave Malaysia without paying the GST due, that person could be prevented from leaving Malaysia unless and until the sum owed is settled.

(f) Power to require security[12]

For the due compliance of the law and protection of revenue, the Director General of RMCD may require any person to give security for the payment of any GST which may become due and payable from him.

(g) Imported goods not to be released until tax paid[13]

Any imported goods can be withheld in the customs control until the GST on those goods has been paid in full.

(h) Liability of directors[14]

In relation to a company that is being wound up, where any GST is due, the directors shall together with the company be jointly and severally liable for the sum due. The directors shall only be liable where the assets of the company are insufficient to meet the amount due.

[7] *Section 45 of the GST Act 2014*
[8] *Section 46 of the GST Act 2014*
[9] *Section 47 of the GST Act 2014*
[10] *Section 48 of the GST Act 2014*
[11] *Section 49 of the GST Act 2014*
[12] *Section 50 of the GST Act 2014*
[13] *Section 52 of the GST Act 2014*
[14] *Section 53 of the GST Act 2014*
[15] *See "Customs Dept issues 37,556 GST-related compounds", The Star newspaper, 8.3.2017*

CONCLUSION

Hence, it is essential that businesses invest in their workforce by ensuring their employees are provided regular training, which in return will enable the employees to familiarise with the GST law and the updates. There should also be an internal training or knowledge sharing sessions to enable the transfer of GST knowledge and awareness within the business.

Good training is hoped to result in good recordkeeping culture. Businesses have been reminded on many occasions to maintain complete records and documents supporting GST documents. Transactions must also be recorded on timely basis and GST worksheets/computations should be kept. This must be supplemented with a reliable accounting system that enables accurate GST calculation.

Businesses must also adopt effective internal practices that allows the management to identify exceptional transactions and identify the appropriate GST treatment. It is a good practice to implement a second level of review and a periodic review of the above.

As much as the RMCD is committed via the Informed Compliance initiative to provide further assistance to businesses to ensure GST compliance, the leniency will not be extended to GST evaders[15]. An estimated RM3 billion in GST arrears will be collected from the CBOS 3.0 operation by ensuring businesses achieve greater compliance. In the previous year, about RM1.5 billion was collected through the CBOS 2.0 operation. The RMCD aims to inspect about 200,000 of the 433,000 GST registered companies in the CBOS 3.0 operation this year. As much as taxpayers who practice good GST compliance culture should not face any concerns, taxpayers who have been dodging GST or not complying with the timeline prescribed by law should come clean and make a voluntary disclosure to the RMCD in order to avoid hefty sanction.

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IRBM'S 2017 STRATEGIC DIRECTION

Communications Division CEO's Office,
Inland Revenue Board Malaysia

IMPORTANCE OF TAX

The Inland Revenue Board Malaysia (IRBM) will continue to play its role as the main revenue-collecting agency under the Ministry of Finance. The revenue collected by the IRBM has been essential to the financing of national development agenda and ensure the sustainability of Malaysia, as a sovereign nation, well into the future.

For the past 21 years since its rebirth as a statutory body, IRBM has consistently contributed more than 50% of total government revenue. 2016 was no exception to this, where a total of RM114 billion in direct taxes was collected by the IRBM, making up 52.5% of the total federal revenue for that year. This year, 2017 poses a slight challenge for the IRBM at the face of global geopolitical and economic uncertainty which may impact the national revenue collection. The IRBM has outlined strategies that is hoped to soften this impact towards meeting the collection target as set by the government as well as to achieve at least a 2% increase in percentage of tax collection to Gross Domestic Product (GDP) from last year. To this end, our intended outcome is to make it easy for taxpayers to comply and make it difficult to not comply.

2017 STRATEGIES

Focus on Enforcement

Rising to this challenge, the IRBM has identified fundamental segments that need to be further strengthened for the upcoming year. One of the biggest challenges for the IRBM has been to tackle non-compliance and underground economies which have contributed to tax leakages. Thus, tax enforcement activities become a critical factor in the IRBM's business model and is given top priority this year.

One such enforcement strategy for 2017 is the setting up of a special enforcement team known as Task Force 2 Billion (TF2B), a team comprising of 272 intelligence and investigation officers who will focus on compliance within the industries of goldsmiths, licensed moneylenders, lawyers, sportsmen as well as the medical sector, including pharmacies, nurses and doctors.

The IRBM's commitment in tackling tax evaders and defaulters is further expressed by the establishment of new structures within the organisation. One such structure is the Special Operations Department, which works directly with the National Revenue Recovery Enforcement Team (NRRET), primarily to focus on cases

of special interest and underground economy.

With aggressive tax planning being one of the identified areas of risk, the IRBM has set-up the Aggressive Tax Planning Division under the Special Task Department to work closely with the Multinational Tax Branch, Large Taxpayer Branch, Special Industries Branch and Non-Residence Branch to tackle tax erosion caused by aggressive tax planning by individuals and multinational companies. Smaller scale businesses such as the ever-growing SMEs have also been found to pose a tax risk where cash transactions are involved. To address this risk, the Duta Investigation Branch was set-up early this year, which will focus on the cash economy involving sole-proprietors and SMEs.

To further streamline the enforcement programme, special industries cases namely banking and insurance, which were previously handled by the Large Taxpayer Branch, are now handled by the newly rebranded Special Industries Branch (previously known as Petroleum Branch).

The organisational restructuring is a necessary step toward enhancing the effectiveness and efficiency of IRBM's operations. The restructuring is expected to result in improved performance, increased accountability and more effective and better quality decision-making. The strategy will ultimately benefit the taxpayers by way of reduced cost of compliance, enhanced service delivery quality and faster decision-making by the IRBM.

Emphasising on the effective audit programme, comprehensive audit will continue to be the main approach for the year. With such audit programme, it aims for better quality audit and enhanced tax compliance among taxpayers and the public in general. Audit activities will also target domestic companies engaging in transfer pricing and blatant tax planning, in order to reduce and eliminate significant losses in total revenue to the government.

Continuous engagement and cooperation with other main government agencies such as the Malaysian Anti-Corruption Commission (MACC), the National Revenue Recovery Enforcement Team (NRRET), the Royal Malaysian Police and Bank Negara Malaysia will help the IRBM in taking the bull by its horn with regard to tax evasion issues as well as enhancing tax compliance level in the public.

The IRBM will also carry on its efforts in recovering tax arrears through the designated toll free number 1800-88-4726(IRBM) which came into operation on 10 October 2016, and is under the purview of the Hasil Recovery Call Centre, Tax Collections Department.

FORMING STRATEGIC ALLIANCE

In order to achieve the desired outcome from the enforcement strategies laid out for 2017, the IRBM recognises the need for support and cooperation of various agencies and organisations. One of the main strategic alliances is none other than with fellow revenue collecting agency, the Royal Malaysian Customs Department (RMCD), an alliance that will lead to better understanding and cooperation benefiting both parties in performing their respective duties.

The establishment of the Collection Intelligence Arrangement (CIA) which comprises the Ministry of Finance, the IRBM, the RMCD and the Companies Commission of Malaysia (CCM) is set to enhance the effectiveness and efficiency in tax collection and compliance by way of exchange of relevant information among its members.

Continuous engagement and cooperation with other main government agencies such as the Malaysian Anti-Corruption Commission (MACC), the National Revenue Recovery Enforcement Team (NRRET), the Royal Malaysian Police and Bank Negara Malaysia will help the IRBM in taking the bull by its horn with regard to tax evasion issues as well as enhancing tax compliance level in the public.

The IRBM will also continue to honour its long established

relationship with the tax community. This is important in order to ensure that taxpayers benefit from the mutual understanding between the two parties.

INTERNAL STRENGTHENING MEASURES

In support of Malaysia becoming a highly competitive developed country as outlined under the National Transformation 2050 (TN50) blueprint, the IRBM has identified measures to adapt to changes and to strengthen itself internally as a sound organisation. To this end, continuous leadership programmes have become an all-important agenda in creating an excellent leadership DNA within the organisation. The creation of excellent leadership DNA is vital to ensure the sustainability and survival of the IRBM, as well as in working towards making the IRBM a high performance organisation in the future.

One of the key focuses for the IRBM in attaining the status of a high performing organisation is by instilling a culture of lifelong learning. As a learning organisation, skills and knowledge transfer among Hasilians become critical in ensuring that the organisation has ample qualified outstanding successors at the Key Leadership Positions and Key Critical Positions. Embedding a learning culture and environment across the organisation provides a good platform in nurturing and unearthing future leaders as well as safeguarding the skills and knowledge for the younger generation.

STATEMENT OF INTENT

With a new management team at the helm led by the newly appointed Chief Executive Officer, YBhg. Datuk Sabin Samitah, the IRBM will move forward with enhanced ideas and strategies in executing an efficient tax enforcement and collection system in promoting tax compliance among the public, as well as delivering beyond the expectations set by its stakeholders.

The IRBM will execute the responsibilities bestowed upon it, without fear or favour, with the sole objective of making taxes an asset for the community, and at the same time creating a level playing field amongst the taxpaying population.

The desire to excel, fuelled by strong commitment and determination, with integrity as its backbone, strengthened with continuous support from the key players in the tax arena shall drive the IRBM to reach its potential towards becoming a world class tax administrator in the future, while meeting goals set in 2017.

WHY QUESTION OF LAW?

Sudharsanan R. Thillainathan
& Tania K. Edward

Sch. 5, para. 23 of the Income Tax Act 1967 ("ITA") states that the deciding order of the Special Commissioners of Income Tax ("SCIT") is final.

However, the deciding order of the SCIT is susceptible to an appeal on a question of law pursuant to Sch. 5, para. 34 of the ITA. Sch. 5, para. 34 of the ITA states that:-

> *Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to subparagraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal. (emphasis added)*

Simply put, statutory appeals are available to answer questions of law arising from or correct errors of law in a decision of the SCIT.[1] This is also known as the Case Stated procedure in which the taxpayer requires the SCIT to state a case for an appeal to or opinion of the High Court.

The essence of the Case Stated procedure was captured in *UHG v Director-General of Inland Revenue (1950–1985) MSTC 145 at pp 146* by Raja Azlan Shah (as he then was):

> *The question for the Court of Appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.*

Therein lies the relevance of questions of law in the Case Stated procedure – appeals from the SCIT to the High Court are limited to question of law arising from the case stated and not on any other grievance. Hence, it is necessary to identify the SCIT's decision on a question of law, that decision then constituting the subject matter of the appeal.

The basis for the limited scope of appeal from the SCIT to the High Court was explained in *Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 4 MLJ 487* where the Court of Appeal attributed it to the SCIT's role as a specialist tribunal. The Court of Appeal further explained that the SCIT's dealings with terms and practices of the business and the business community enable it to have special insight,

understanding and appreciation of the evidence and facts, and to make findings based on that. While a finding of fact often touches upon the law, the determining factor in the finding is the SCIT's special insight and appreciation of the facts. Accordingly, unless it is demonstrated that the SCIT has erred on a question of law, resulting in a manifest error in the deciding order, the Court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT.

Hence, any error of construction of a taxing statute will result in the SCIT asking itself the "wrong question". In those circumstances, the misinterpretation of a question of law will cause the SCIT to commit an error of law.

WHAT, THEN, IS A QUESTION OF LAW?

A question or issue of law is that which points to or demonstrates an error of law.

There is prevalent inconsistency and conflict as to what constitutes a question of law. This predicament was recognised in Judicial Review of Administrative Action[2], which reads as follows:-

> *Secondary literature abounds with derision and scorn for those who attempt to find objective criteria for distinguishing between errors of fact and law. The distinction certainly admits of a degree of manipulability. At the same time as saying that the distinction is "vital" in many legal contexts, the High Court has acknowledged that "no satisfactory test of universal application has yet been formulated".*
> …
> *It is not therefore surprising to find statements of despair or even cynicism littered through the law reports. Professor Endicott asserts that "Lord Denning … followed an unswerving rule of calling a question a 'question of law' when he wanted to." … the distinction between error of law and fact has been called slippery, elusive, too easily manipulated, "sterile and technical", and something which can generate "artificial, if not illusory" distinctions.*

The first point of reference in defining "question of law" is *Edwards v Bairstow and Harrison [1955] 3 All ER 48,* where Lord Radcliffe divided errors of law in two categories. The first category arises in a case which contains anything ex facie which is bad law and which bears upon the determination. The second category arises in a case where the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.

In *Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235,* Lord Diplock, delivering the judgment of the Privy Council referred to the observations of Lord Radcliffe in Edwards, undertook a similar categorisation of errors of law into two limbs, where a decision is plainly wrong in law ("the first limb"); or the decision is a conclusion of mixed fact and law that no reasonable SCIT could have reached if they had correctly directed themselves in law ("the second limb").

This position was reaffirmed by our Federal Court in *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248.* The Federal Court observed that the first limb involves the correctness of pure statements of law (e.g. as to the correct interpretation of a statutory provision) and the second limb involves the correctness of an inference or a conclusion from the primary facts (where the inference involves assumptions as to the legal effect or consequences of the primary facts).

(1) THE FIRST LIMB

The first limb is fairly straightforward.

In *Collector of Customs v Agfa-Gavaert Ltd (1996) 186 CLR 389 at 396,* the High Court of Australia set out five general propositions in relation to the distinction between law and fact in a statutory context. These were later summarised by the full Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 at 287*:-

1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law…;
2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact…;
3. The meaning of a technical legal term is a question of law…;
4. The effect or construction of a term whose meaning or interpretation is established is a question of law…; and
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law … [however] when a statute uses words according to

[1] *Timothy A.O. Endicott, Questions of Law L.Q.R. 1998, 114(Apr), 292-321*

their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question whether they do or not is one of fact.

Generally, questions of law in the first limb are limited to questions of pure statutory construction and/or interpretation.

(2) THE SECOND LIMB

At the outset, it should be stated that it is established that pure findings of fact may not be challenged on an appeal. The second limb as a basis for the case stated procedure is premised upon the principle that the findings of the SCIT must be made upon a full appreciation of the facts. Accordingly, where there is a misdirection by the SCIT in considering a question of fact, it then becomes 'a conclusion of law' : *American Leaf Blending Sdn Bhd v Director-General of Inland Revenue [1979] AC 676.*

This was further expounded in the *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713* by Edgar Joseph Jr SCJ, delivering the judgment of the court. His Lordship categorically stated that where the SCIT have misdirected themselves by reaching conclusions inconsistent with the primary facts found by them, this could lead to a reversal of their decision.

This inconsistency arises when the SCIT misdirect themselves and draw conclusions from facts having no probative value. Simply put, this occurs when:-

1. there is no evidence to support the SCIT's determination : Lower Perak, supra, and *Mamor Sdn Bhd v Director-General of Inland Revenue [1981] 1 MLJ 117, at 118;*
2. the evidence is inconsistent with and contradictory of the SCIT's determination : *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue [1986] 2 MLJ 161 and M.Y. v The Comptroller-General of Inland Revenue [1972] 2 MLJ 110 at 114;* or
3. the true and only reasonable conclusion contradicts the SCIT's determination : Mamor, supra.

In those circumstances, the resultant finding of facts and/or inferences of secondary fact made by the SCIT will therefore be open to Court intervention as observed by Lord Oliver delivering the judgment of the Privy Council in Lim Foo Yong, supra.

DIFFICULTIES / ISSUES

There has been criticism of the tendency of the Courts to treat questions as 'pure questions of fact', so as to exclude review in cases stated under the second limb[3]. In this connection, it bears emphasis that the duty of the Court is no more than to examine the facts with a decent respect for the SCIT and if the Courts think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

While pure questions of law and pure questions of fact are often fairly straightforward, issues tend to arise from questions of mixed fact and law. An example of a question of mixed fact and law can be seen from the interpretation of Section 4(a) of the ITA, which concerns whether tax is chargeable on income in respect of gains or profits from a business. The word "business" is defined in Section 2 of the ITA to include a "profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment". The Supreme Court in *Director-General of Inland Revenue v. KEA Sdn Bhd*,[4] held that the question whether an adventure in the nature of trade was being carried on was a question of mixed fact and law. The question of law was the broad question as to the meaning of adventure in the nature of trade. The question of fact involved SCIT's consideration of the circumstances of the case and the SCIT's finding thereupon.

Another question of mixed fact and law is whether a taxpayer was in business during a basis period.[5] The question of law here is what constitutes a business, the answer to which is found in Section 2 of the ITA. The questions of fact to be ascertained from the evidence are whether the taxpayer was in business at the relevant time and whether the nature of the business is one satisfies the definition of "business" in Section 2 of the ITA.

It should be pointed out too, that the meaning of an ordinary word of the English language is not a question of law and will be treated by the courts as a question of fact.[6]

CONCLUSION

Ultimately, however, a question of fact in one case, may be a question of law in another, and vice versa. In the meantime, we learn to live with a degree of uncertainty and to figure out as best we can whether a particular question should be given the narrower scope indicated by a contextual reading, or the broader scope indicated by its categorical language.[7] Consequently, great care needs to be taken to draft the question of law that will be central to the decision, with precision, so that the Case Stated may be heard and determined.

The SCIT is an expert appellate tribunal and is peculiarly fitted to determine appeals against assessments raised by the Revenue. As so aptly put by Hale LJ (as she then was)[8], it is arguable such a tribunal, although its jurisdiction is limited to errors of law, should be permitted some degree of freedom, at least, to venture into the grey area separating fact from law. Accordingly, questions of law in this context could be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. This is consistent with the requirements of expediency, in that since Parliament has established the SCIT in the field of taxation, the SCIT's expertise should be used to best effect, shape and direct the development of law and practice in taxation.

[2] *Aronson, Dyer and Groves Judicial Review of Administrative Action 3rd Ed. Lawbook Co 2004, 184 (citations omitted).*

[3] *Edwards, supra.*

[4] *(1990) 1 MSTC 3155*

[5] *MSI Pte Ltd v. Comptroller of Income Tax (1997) MSTC 5221*

[6] *J. Bell and G. Engle, Cross, Statutory Interpretation (3rd edn, 2004), at p.59.*

[7] *John M. Evans, Questions of Law and the Standard of Review: A Crisis of Confidence? A Case Comment on Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration) 18 Can. J. Admin. L. & Prac. 297*

[8] *Cooke v Secretary of State for Social Security [2002] 3 All ER 279 paras 5-17*

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THE ANATOMY OF A PERSUASIVE WRITTEN TAX APPEAL

Dr. Benjamin Poh

This article presents the readers with the key elements of a persuasive written tax appeal. To write a persuasive tax appeal, an effective advocate should begin to prepare his case with an end in mind, deliberately strategising the structure (Statement of Fact, Issue, Argument and Order) and substances of the tax appeal to the needs of his audiences.

Preparation of a tax appeal can be challenging as you have to firstly analyse and comprehend the whole factual situation of your client, secondly identify the key tax issues in dispute, thirdly thoroughly research the relevant tax legislation and case laws applicable to the factual situation of your client. Finally, write your legal comment on the admitted evidence and your legal argument why the relevant tax legislation and case laws are applicable to your client's case. With these four elements in mind, you will be in a better position to persuade the Revenue Authority or the Court as to why your client should win his appeal.

As an advocate, our principal role is to persuade the Revenue Authority or the Court to accept our legal comment and argument. To be persuasive, you have to guide and offer assistance to your audiences to make their decisions just and reasonable so that they can discharge their statutory duties and responsibilities. Nothing is more frustrating to your audiences, especially to the Court which has limited time allocated for each case, if you were to give a misleading or an incorrect factual situation ("Statement of Fact"). Failure to identify the critical tax issues in dispute ("Statement of Issue") for your audience to answer. Misquote or omit relevant facts, tax laws and authorities both for and against your legal argument and comment ("Statement of Argument"). Asking the Court for an order which is inconsistent with your legal argument or is not legally allowable under the relevant legislations and case laws ("Statement of Order").

How do you set about making your tax appeal persuasive to the Revenue Authority or the Court in making their decisions just and reasonable? To quote what the Honourable Justice K.M.Hayne, AC (Australia High Court Judge) said in his paper "Written Advocacy," a paper delivered as part of the continuing legal education programme of the Victoria bar:-

> "A written argument must be prepared in a way that makes it valuable at three radically different stages in the disposition of an appeal. It must be useful to each judge preparing the case. It must be useful to each judge during oral argument. It must be useful to each judge preparing reasons for judgement."

At every one of those stages, the utility of written argument is diminished, even destroyed, if it is not clear, concise, accurate and comprehensive. If it is not clear, when do you propose to clarify the point? You cannot depend upon your audiences not noticing obfuscation. If it is not concise, why would you expect your audience's attention to remain focused through the diffusion? If it is not accurate, why would the audiences not be minded to put your document aside in favour of your opponent's? If it is not comprehensive, when do you propose to fill in the gaps?[i]

In summary, an anatomy of an appeal is not more than conveying your Statements of Fact, Issue, Argument and Order to the Revenue Authority or the Court persuasively. And to be persuasive and useful to the Court, these statements should deliver the quality of clearness, conciseness, accuracy and comprehensiveness.

Case Preparation

When preparing for a tax appeal, it is effective if you were to begin to write with the end in mind. Which means you should start to identify the critical tax issues in dispute with the Revenue Authority and write your preliminary legal argument why your client should win the appeal after your preliminary conference with the client. Writing your preliminary legal argument at the beginning will force you to think critically what are the relevant facts and evidence you require from your client to succeed with the appeal. After writing your preliminary draft of legal argument you will become more effective in obtaining relevant facts and evidence in a more focussed and detailed client conference and interview. In an ideal case, your client has all the required documents and evidence to meet your legal argument. But in practice, you may encounter some practical issues in obtaining evidence to meet your legal argument, such as missing documents, documents misplaced, witnesses unwilling to testify or unable to be traced, accounting errors etc. Such practical issues require you to continually refine your preliminary legal argument to be consistent with the relevant facts and evidence you can obtain from your client. If the facts and evidence you obtained are insufficient to meet the threshold of your legal argument to win the case, then it would be better for your client to negotiate an amicable settlement with the Revenue Authority than wasting unnecessary time and cost in litigating the case in Court.

Iain Morley, QC one of the prominent English barristers offers his key case preparation technique for every advocate who want to be seriously good in Court as follows:-

> "Essentially, that closing speech is your MAP. It tells you where you are going, what you have to do, where you have been, and where you have to get to. It tells you everything you will want to do at trial. So, from your closing speech, you identify the comment you want to make. From the comment you want to make, you identify the facts you want to hear. From the facts you want to hear, you identify the questions you want to ask and of whom It's that way round, it is not, not, not from what the witnesses say, you then identify what the facts are; and from what the facts are, you then identify what the comments are you want to make; and from the comments you want to make, you then craft your closing speech. IT'S THE OTHER WAY ROUND![ii]"

The closing speech in a trial is similar to your preliminary legal argument in a tax appeal. If it is prepared earlier in time, it will enable an advocate to foresee any major obstacle in obtaining the relevant facts and evidence to support his legal comment and argument to win the appeal. Having said about the fundamental of a case preparation, we can now consider the following basic key principles when composing your statements of fact, issue, argument and order.

Statement of Fact

In writing the statement of fact, the key principle is balance. The following principle is well summarised by Justice Ruggero J. Aldisert, Senior United States Circuit Judge:-

> "In selecting the facts, the brief writer walks on a very tight rope. The job requires consummate skill, because the writer must constantly seek balance on several levels-the balance between being scrupulously accurate and putting the most favourable emphasis on your version of what happened; the balance between furnishing the relevant facts favouring your client and protecting yourself from a possible charge by your opponent that you have withheld vital facts from the Court; and the balance between putting your best evidence before the appellate Court and adhering to the actual findings in the trial Court. The exceptional advocate balances these conflicting duties and still convey the impression that his or her client deserves to win."[iii]

In other words, your client's facts is the foundation of your case theory which is your version of facts of what happened in your client's case. You should include facts that are relevant and favourable to your legal comment and argument or closing written submission to the Revenue Authority or the Court. Facts that are relevant but not favourable to your client should be included too but neutralised and reasonably explained before your adversary do so. You should deliberately plan the order of your facts so that your reader can comprehend the entire story that lead to the current situation. And write your facts concisely and comprehensively to keep the interest of your readers alive without being argumentative.

Statement of Issue

The statement of issue is a series of questions you identify and deliberately frame to the Court to answer. Garner says that:-

> "Any piece of persuasive or analytical writing must deliver three things: the question, the answer and the reasons for that answer. The better the writing, the more clearly and quickly those things are delivered."[iv]

Your identification of tax issues involved in a case is significant to direct the Court's attention and interest in answering the right question in a tax dispute. The Court normally does not have the luxury of time to guess what are the tax issues involved.

Framing tax issues clearly and sufficiently is significant for you to later answer the questions for the Court's deliberations without having the Court formulate their own issues or questions you do not want. Your answer to the issues identified should provide reasons for the Court to find in your client's favour.

Following are few basic key principles on how to frame a persuasive legal issue[v]:-

1. Put it up front.
2. Break it into separate sentences using a format based on asserting a fact, stating a premise that flows from the fact, then raising the legal issue to be decided by the Court.
3. Weave in enough facts so that the reader can truly understand the problem, but summarise- don't over particularise.
4. Present each issue in a way that suggests that there is only one possible answer: the one you want.
5. Phrase the issues in separate sentences.
6. Use a maximum sentence length of no more than 15-20 words.
7. Do not start with "Whether" or any other interrogative word ('why, 'where', 'how', or 'what'. (as that indicates you are not sure of your answer to the issue unless you know the factual merits are not with you[vi]).
8. Wherever possible use 'Can', 'Is', 'Should', 'Must', and 'Was' since these tend to push the reader towards the desired answer.
9. Limit the total of the issues to a maximum of about 75 words, or five sentences. If you cannot do so you do not have a sufficient understanding to be able to convey the issues clearly to the reader.

Now, let's take a real practice example of a tax issue framing by utilising the above points. Your client who is involved in a logistics business incurred substantial traffic compounds and had claimed tax deductions but were subsequently disallowed by the Revenue.

The tax issue can be framed in the following two alternative ways:-

Example 1

"Whether the Revenue was wrong to disallow the taxpayer to claim tax deduction for the traffic compounds incurred?" or

Example 2

"Income tax law provides that all outgoings and expenses wholly and exclusively incurred during the period are deductible in the production of gross income of that period unless specifically prohibited. Traffic compounds are generally incurred in the course of any logistics business. Can the taxpayer claim traffic compounds for its logistics business?"

Example 1 provides no information to the reader why traffic compounds should be given tax deduction other

than stating the Revenue was wrong in not allowing the taxpayer to claim tax deduction on traffic compounds. The word "whether" is used and may project an impression that the advocate is uncertain on whether tax deduction should be allowable.

Compared to **Example 1**, **Example 2** in 52 words provides much useful information to inform the reader what is the principle of income tax law ('the legal premise') on tax deduction and prohibition on deductions of all outgoings and expenses incurred. It also provides the reader with a general idea that traffic compounds are generally incurred in the course of operating a logistics business ('the factual premise'). Lastly, the reader is informed that the taxpayer is involved in a logistics business claiming traffic compounds for his logistics business which is the key tax dispute of the case ('fact specific'). **Example 2** put in enough specific facts so that the reader can truly understand the problem, but not over particularise. The reader can find further details of the facts if he wants from the statement of fact.

The legal issue framing, Bryan A. Garner, named it as "deep issue" method where the deep issue is cast loosely as a syllogism, with the legal premise first, then the factual premises, followed by a short, punchy question is the best method for achieving clarity, speed and power in legal writing[vii].

Nevertheless, you should remember the following critical point on legal issue framing by the Honourable Justice K.M.Hayne, AC (Australia High Court Judge):-

> "The key to framing issue lies in the way the premises (legal or factual or the combination) for the question are stated. The issue you frame will be discarded by the Court as irrelevant if you base it on disputed premises. Especially so if you base it on disputed factual premises. So, to take a very simple example, if you framed the issue in a shipping collision case upon the premise that the defendant's ship was travelling too fast, and argument subsequently showed that this premise was false, your whole statement of the issue would be falsified. So beware of the disputed and disputable premise[viii]."

Statement of Argument

In writing your statement of argument, you should cite the relevant evidence from the statement of fact and the relevant tax legislation and case authorities that are applicable to your client's factual situation. Citing the relevant evidence, tax legislation and case authorities are still not sufficient to succeed with your client's appeal. The key principle here is to present your legal analysis and comments on the relevant evidence, tax legislation and case authorities to persuade the Revenue Authority or the Court why all these are applicable to your client's case. These analytical and synthesis skills are what make the advocate worth to their clients in any Court appeal and argument.

From statement of fact, you derive your statement of issue in dispute that enable you to transition to your statement of argument smoothly. For the relationship between statement of issue and argument, the Honourable Justice K.M.Hayne, AC (Australia High Court Judge) commented:-

> "If the statement of issue is useful, it will tend to impose an order upon the statement of argument. If the premises for the issue are undisputed, a short restatement coupled with some cross-references to the summary of facts (if the premises are factual) or to the relevant statements of principle or applicable law (if the premises are legal) my well suffice. Then you may plunge into answering the question that has been posed in the statement of issue[ix]."

Most of the time, the tax issues in dispute revolve around the interpretation of tax statute or question of law or question of law and fact rather than purely question of fact. If the specific provisions of tax law has been properly interpreted and settled by the Court in a decided case, and you believe it is applicable to your client's factual situation, then cite it and present it to the Revenue Authority or the Court. If your adversary offers a counterargument, you should think seriously why the counterargument is not applicable to your client's case. Remember in practice, less is more. Citing one leading precedent for interpretation of a specific

provision of tax law is usually sufficient to the Revenue Authority or the Court unless your client's factual situation is substantially different from the leading precedent and there are no general principles of tax law that can be derived from the leading precedent to support your client's case.

If your client's case does not have any similar case precedent to support your legal argument, you will usually need to resort to general principles of statutory interpretation to search for legislative intention of the specific provision of the tax law. There are internal aids and external aids you need to assist you in interpretation of the tax provision. You will usually need to employ textual (construe the plain meaning of words used), contextual (construe the whole Act or provision in its proper context) and purposive (discover the purpose of the new provision or amended provision of the Act) interpretation of the tax provisions.

You may search for general legal principles from local case law decided by the superior Courts, proposals made by members of the Parliament, explanatory notes to the Bill, tax cases decided by superior Courts from common law countries such as UK, Australia, New Zealand, Singapore which had interpreted substantially similar tax provisions as ours, authoritative textbooks or journal articles written by local and foreign tax experts and lawyers.

With your legal analysis and comments on these internal and external aids, you sum up your legal proposition to the interpretation of the specific tax provision in dispute. You may need your

peers or colleagues to play the role of devil's advocate to think of an alternative interpretation to the tax provisions unless you know your adversary's legal proposition. You should think of a counterargument to the alternative interpretation or your adversary's legal proposition, to finally persuade the Revenue Authority or the Court why your interpretation is consistent with the legislative intention of the Parliament and applicable to the statement of fact of your client.

Statement of Order

After presenting your statements of fact, issue and argument to the Court, you will normally ask for an order from the Court. It could be a simple order such as asking the Court to dismiss your adversary's case with cost, asking the Court to set aside the order of the Court below, asking the Court to declare illegality of an administrative decision, etc. Whatever order you seek from the Court, you should remember the key principle is that the order you seek is justified by the legal argument and comment you advanced to the Court and is also legally allowable under the relevant legislations and case laws.

REFERENCE

i *The Hon. Justice K.M.HAYNE, AC, Written Advocacy, A Paper Delivered As Part of The Continuing Legal Education Program of The Victoria Bar, (2007) at page 5.*

ii *Iain Morley QC, The Devil's Advocate: A Short Polemic On How To Be Seriously Good In Court, Sweet & Maxwell (Reprinted 2013), at page 92-93.*

iii *Ruggero J.Aldisert, Winning On Appeal-Better Briefs And Oral Argument, NITA, Second Edition, at page 164.*

iv *Garner, A Dictionary of Modern Legal Usage, 2nd ed (1995) at 471.*

v *Andrew Goodman, Effective Written Advocacy In Practice-Influencing The Judicial Mind, Universal Law Publishing Co., (2009) at page 48.*

vi *Garner, Legal Writing in Plain English, The University of Chicago Press (2001) at page 58.*

vii *Ibid at page 61.*

viii *The Hon. Justice K.M.HAYNE, AC, Written Advocacy, A Paper Delivered As Part of The Continuing Legal Education Program of The Victoria Bar, (2007) at page 14.*

ix *Ibid at page 24.*

CONCLUSION

Writing your tax appeal persuasively in practice is not more than following some basic key principles of composing your statements of fact, issue, argument and order in a logical, coherent and consistent manner with the quality of clearness, conciseness, accuracy and comprehensiveness. Nevertheless, it still requires years of practice, experience and reflection as an advocate to be truly master the art of written advocacy.

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International Issues

The column only covers selected developments from countries identified by the CTIM and relates to the period 16 November 2016 to 15 February 2017.

BRUNEI

Ministry of Finance establishes Income Tax Board of Review

On 14 February 2017, the Ministry of Finance announced the establishment of the Income Tax Board of Review (ITBOR). The establishment of ITBOR is intended to facilitate the administration and operation of taxation in Brunei Darussalam. It will form a transparent and fair system of corporate tax administration, as objection cases will be reviewed by an independent body.

The ITBOR introduces a new process of hearing, examining and settlement for objection cases filed by companies against the assessment made by the Collector of Income Tax. The filing fee for each appeal filed by companies to ITBOR is BND200.

CHINA (PEOPLE'S REP.)

Tax incentives on imports announced

The Ministry of Finance (MoF), the General Administration of Customs and the State Administration of Taxation (SAT) jointly issued Cai Guan Shui [2016] No. 70 supporting technological innovations and scientific research.

According to the notice, items for scientific research, technological development and education (which either can't be produced domestically or produced to the requisite standards) may be imported by related institutions and entities free of duties, value-added taxes and consumption taxes on import. The VAT exemption at the import stage also applies to imports of books and literature materials by research institutions and universities for research and teaching purposes.

Adjustment to motor vehicle purchase tax for small engine cars announced

On 13 December 2016, the MoF and the SAT jointly issued Cai Shui [2016] No. 136 stipulating that from 1 January to 31 December 2017, the applicable motor vehicle tax for passenger vehicles with engine capacities of 1.6 litres and below will be increased to 7.5%. Currently, the rate applicable to this category of motor vehicles is 5%. Effective 1 January 2018, normal rate of 10% will be re-instated.

Tax incentives for advanced technology service enterprises in pilot service innovation development zones

On 10 November 2016, the MoF, the SAT, the Ministry of Commerce and the National Development and Reform Commission jointly issued Cai Shui [2016] No. 122, introducing tax incentives for advanced technology service enterprises that are located in pilot service innovation development zones. The designated zones include Tianjin, Shanghai, Hainan, Shenzhen, Hanzhou, Wuhan, Guangzhou, Chengdu, Suzhou, Weihai, Harbin New Area, Jiangbei New Area, Liangjiang New Area, Guian New Area and Xixian New Area. The tax incentives apply from 1 January 2016 to 31 December 2017.

Under the tax incentives, an advanced technology service enterprise located in the zone is subject to enterprise income tax at 15% and the employee education expenditure is deductible up to 8% of the total salary and wages in determining the taxable income (the excess of the expenditure can be carried forward in the following tax years) provided that certain requirements are satisfied.

An advanced technology service enterprise is required to observe the relevant provisions of Cai Shui [2014] No. 59 when applying for the tax incentive. The services eligible for the incentive include computer and information services, research and development technical services, culture technical services, and medical services of traditional Chinese Medicine etc. A list of services is attached to the notice.

VAT on disposal of immovable property clarified

The SAT issued SAT Gong Gao [2016] No. 73 on 24 November 2016, which was effective immediately, clarifying the VAT treatment on the disposal of immovable property.

According to the announcement, a taxpayer is subject to VAT on the difference between the sale proceeds and acquisition price when an immovable property is disposed off.

Should the taxpayer be unable to provide the original invoice of the immovable property indicating the acquisition price, other documents such as the payment certificate of deed tax, which states the taxable amount of deed tax on the transaction, may be used to rectify the acquisition price.

Additional consumption tax on super luxury cars introduced

The MoF and the SAT jointly issued Cai Shui [2016] No. 129 introducing additional consumption tax on super luxury cars on 30 November 2016. Under the notice, which effective from 1 December 2016, consumption tax of 10% is imposed on super luxury cars on the retail price, excluding value added tax that is higher than CNY1.3 million, in addition to the consumption tax already paid on the production or importation of the car. The additional tax must be paid by retailers (whether by enterprises or individuals).

On the same date, the MoF issued Cai Guang Shui [2016] No. 63 introducing the same tax for importation of super luxury cars by overseas seconded Chinese and foreign diplomats for private use. Furthermore, the SAT issued SAT Gong Gao [2016] No. 74 explaining the introduction of the tax and its implementation rules.

Enterprises engaged in production and sale of articles for person with disabilities are exempt from enterprise income tax

On 24 October 2016, the MoF, the SAT and the Ministry of Civil Affairs jointly issued Cai Shui [2016] No. 111 stating that qualifying resident enterprises are exempt from enterprise income tax on the production, assembly or sale of articles used by person with disabilities. To be eligible for the exemption, qualifying enterprises must file an exemption with the competent tax authority by reference to the Announcement on the Measures for Handling Corporate Income Tax Preferences (SAT Gong Gao [2015] No. 76).

VAT refund rates increased for export of certain products

The MoF and the SAT jointly issued Cai Shui [2016] No. 113 on 4 November 2016, increasing the VAT refund rates for the export of certain products. From 1 November 2016, the VAT refund rates for cameras, video recorders, internal-combustion engines, petroleum, aviation kerosene, diesel oil, etc. are increased to 17%. A list of the products and their applicable VAT refund rates is attached to the notice.

HONG KONG

Announcement on country-by-country reporting released

On 22 December 2016, the Inland Revenue Department (IRD) made an announcement on country-by-country (CbC) reporting on its website. The announcement provides information on the objective of CbC reporting; the reporting entities; the filing deadline and the transitional arrangement.

In respect of the transitional arrangement, it states that since CbC reporting has been introduced in some tax jurisdictions from 1 January 2016, and in order to assist multinational enterprise (MNE) groups (with ultimate parent entities which are tax residents in Hong Kong) to fulfil their CbC reporting obligations in those jurisdictions, the IRD is prepared to accommodate parent surrogate filing as a transitional arrangement.

Under this transitional arrangement, a Hong Kong MNE Group will be allowed to file its CbC reports for the accounting periods commencing between 1 January 2016 and 31 December 2017 to the IRD for exchange with other tax jurisdictions. Parent surrogate filing is entirely voluntary and may relieve the group's constituent entities from local filing obligations provided that:

- the required legal framework will have been put in place in Hong Kong by 31 December 2017;
- the qualifying competent authority agreements will have come into effect between Hong Kong and the tax jurisdictions concerned by 31 December 2017;
- the IRD has been notified that the CbC reports will be filed by the deadline which is to be provided under the legal framework; and
- the competent authorities of the tax jurisdictions in which the constituent entities are resident, if required, have been notified that the CbC reports will be filed to the IRD by the deadline prescribed under the domestic legislation of the jurisdictions.

Meanwhile, the ultimate parent entity of Hong Kong MNE Group seeking parent surrogate filing in Hong Kong should submit a notification,

duly signed by its director, secretary or responsible officer, to the IRD containing the following information:

- the name of the ultimate parent entity;
- the Hong Kong business registration number of the ultimate parent entity;
- the accounting period(s) for which the group's CbC report(s) will be filed to the IRD;
- a list showing the name, tax identification number and jurisdiction of tax residence (relevant jurisdiction) of each of the constituent entities to be included in the CbC report; and
- a consent given to the IRD to inform the relevant jurisdictions of the ultimate parent entity's agreement to perform parent surrogate filing in Hong Kong.

Hong Kong MNE Groups should be aware that the transitional arrangement may not relieve their obligations in all jurisdictions since local filing requirements could vary in different jurisdictions.

Amendment to Stamp Duty Bill 2017 gazetted

On 27 January 2017, the amendment to the Stamp Duty Bill 2017 was gazetted. The Bill introduces a new flat rate of 15% for the ad valorem stamp duty (AVD) chargeable on residential property transactions concluded after 5 November 2016, in lieu of the existing AVD rates at Scale 1 (i.e. the "doubled *ad valorem* stamp duty" (DSD) rates).

A government spokesman stated that except for specified exemptions, the new rate of 15% would apply to all transactions for residential property acquired by individuals or companies. The existing arrangement of applying DSD rates to non-residential property transactions is not affected. Moreover, a Hong Kong permanent resident (HKPR) buyer who does not own any other residential property in Hong Kong at the time of acquiring residential property will continue to pay AVD under the lower rates at Scale 2.

To cater for the situation where a HKPR acquires a new residential property before disposing of his single residential property, the bill proposes to maintain the existing refund mechanism under the DSD regime for a HKPR-buyer who replaces his single residential property.

The Bill will be introduced into the Legislative Council on 8 February 2017.

INDIA

Budget 2017-18 – summary

On 1 February 2017, the Finance Minister presented the Budget for 2017-18. Some of the salient points are as follow:

Corporate taxation

Tax rate

- The corporate tax rate is reduced to 25% for enterprises with annual turnover up to INR500 million.

Business income

- A presumptive tax is imposed on businesses having turnover of less than INR20 million, with the exception of those in the business of plying, hiring and leasing goods (Section 44AD of the Income Tax Act 1967 (ITA)). If the turnover is received in full through a bank account, a presumptive tax rate of 6% will apply. However, if the turnover is received through any other means, the presumptive tax rate will be set at 8%.
- The disallowance for cash expenses exceeding the INR20,000 threshold applicable to a person on a per-day basis is reduced to INR10,000.
- A new section will be introduced to restrict interest deduction up to 30% of earnings before interest, tax, depreciation and amortisation (EBITDA) if the amount of interest paid to non-resident associated enterprises (AEs) exceeds INR10 million. Banks and insurance companies will be excluded from this ambit.

Capital gains

- The holding period for categorising immovable property as long-term capital assets is reduced from 3 to 2 years.
- Foreign portfolio investors (Categories 1 and 2) will be exempt from tax under provisions relating to the indirect transfer of capital assets.
- The base year for calculating capital gains will be changed from 1981 to 2001.

Deduction and credits

- Income from the transfer of carbon credit will be taxed at 10% on the gross consideration.
- Cash donations to political parties and charitable organisations will be restricted to INR2,000.
- The carry-forward of minimum alternate tax credit will be extended from 10 to 15 years.
- Loss carry-forward subject to 51% shareholding restriction (under Section 79 of the ITA) for eligible start-up companies will be relaxed.

Individual taxation and other matters

Tax on dividend received

- Taxation of dividend income exceeding INR1 million will be extended to include all resident persons, with the exception of domestic companies, funds or charitable trusts.

Cash donations

- Cash donations made to political parties and charitable organisations will be restricted to INR2,000.

Other matters

- The tax authority will rectify an assessment order to provide for foreign tax credit within six months after a dispute has been settled.
- A penalty of INR10,000 will be imposed on professionals for including incorrect information in statutory reports or certificates; however, immunity from penalty will be granted if there was a reasonable cause for providing such information.
- No cash receipts are allowed for amounts exceeding INR300,000 so as to curb black money.

International taxation

Transfer pricing

- It is proposed to restrict the scope of domestic transfer pricing compliance requirements to entities which enjoy specific profit-linked deductions and are involved in related party transactions.
- A new section will be introduced to provide for secondary adjustments similar to OECD Transfer Pricing Guidelines.

Guiding principles for determining place of effective management issued

Further to the draft guidelines issued for comments and suggestions previously, the Central Board of Direct Taxes (CBDT) issued Circular No. 06/2017 dated 24 January 2017, the Guiding Principles for Determination of Place of Effective Management (POEM) of a company under the Income Tax Act 1961.

In summary, effective from 1 April 2016 (i.e. assessment year 2017-18), a company is regarded as an Indian resident under Section 6(3) of the Income Tax Act 1961 if:

- it is a company incorporated in India; or
- it is a company incorporated outside India but its POEM in that year is situated in India.

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.

Currently, purchases of digital goods and services (such as online storage, films, games and music downloads) from a registered domestic provider in India, as well as foreign suppliers engaged in business-to-business (B2B) transactions with a service recipient who is resident in India, are subject to service tax.

However, 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.

INDONESIA

Transfer pricing documentation regulation released

The Minister of Finance recently released Regulation 213/PMK.03/2016 on transfer pricing documentation. The Regulation took effect on 30 December 2016, providing guidance on when a taxpayer has to prepare a master file, local file and country-by-country (CbC) report.

Master and local files

Essentially, a taxpayer must prepare master and local files in the following cases:

- if the gross income for a tax year is more than IDR50 billion;
- if the value of related-party transactions involving tangible goods for a tax year exceeds IDR20 billion;
- if the value of other related-party transactions (e.g. service fees, interests, income from intangible assets) for a tax year exceeds IDR5 billion; or
- if related parties are located in a lower-income tax jurisdiction.

Master and local files and CbC reporting

A parent company reporting consolidated gross income of IDR 11 trillion must prepare a master file, local file and CbC report. If the parent company of a taxpayer is not a tax resident in Indonesia, the taxpayer must prepare the CbC report if the country of residence of the parent company:

- does not require a CbC report;
- has not entered into a Tax Information Exchange Agreement with Indonesia; or
- has entered into a Tax Information Exchange Agreement with Indonesia, but the tax authorities of Indonesia have not been able to obtain the CbC report from the country of residence of the parent company.

Timelines

The master and local files must be prepared within four months of the end of the relevant tax year. The CbC report must be prepared within 12 months of the end of the relevant tax year.

Information required

The master file must include the following information:

- the organisational structure of the group and the tax residence of each company in the group;
- the business activities, intangible assets, financial activities and source of funds of each company in the group; and
- the consolidated financial report of the parent company and the related party transactions.

The local file must include at least the following information:

- the identity, business activities and financial information of the

taxpayer;
- related party transactions and non-related party transactions entered into and the application of the arm's length principle; and
- non-financial factors which affect the pricing and the profit margin.

Samples of the CbC report which have to be prepared by the taxpayer are attached as appendices to the Regulation for reference. Details of the companies within the group that must be included in the reports are, inter alia, allocated income, paid and unpaid taxes, business activities, gross income, profit or loss before tax, capital, accumulated retained earnings, number of employees and non-cash tangible assets.

SINGAPORE

Income tax treatment of real estate investment trusts and approved sub-trusts

On 6 January 2017, the Inland Revenue Authority of Singapore (IRAS) issued e-Tax guide on the income tax treatment of real estate investment trusts (REITs) and approved sub-trusts. This e-Tax guide replaces the e-Tax guides on Income tax treatment of REITs published on 3 November 2015; and Income tax treatment of approved sub-trust of a REIT published on 14 May 2008.

The e-Tax guide provides details on the tax transparency treatment (where the trust is treated as transparent and the beneficiary is the taxable party) on certain types of income derived and distributed by the trustee of a REIT and

an approved sub-trust of a REIT as well as the administrative procedures relating to the tax treatment. The following information is available in the e-Tax guide:
- tax transparency treatment;
- tax treatment of the trustee;
- withholding tax applicable to REIT distributions;
- tax treatment of the unit holder; and
- administrative procedures relating to the tax treatment as follows:

Income Tax (International Tax Compliance Agreements) (Common Reporting Standard) Regulations 2016 enacted

The Income Tax (International Tax Compliance Agreements) (Common Reporting Standard) Regulations 2016 (CRS Regulations) was enacted on 8 December 2016. The CRS regulations incorporate the requirements of the CRS into Singapore's domestic legislative framework. The CRS Regulations will enter into force on 1 January 2017.

The CRS Regulations require and empower all financial institutions (FIs) to put in place the necessary processes and systems to collect financial account information from 1 January 2017. Singapore has adopted the "wider approach", which means that FIs will need to collect and retain the CRS information for all non-Singapore tax residents in the case of new accounts, instead of just tax residents of Singapore's Competent Authority Agreement (CAA) partners. For CRS reporting purposes, Singapore-based FIs will need to transmit to IRAS the financial account information relating to tax residents of Singapore's CAA partners from the year 2018. IRAS will subsequently exchange the reported information with Singapore's CAA partners.

The IRAS also issued on the same date guidance comprising frequently asked questions including basic guides on CRS which were prepared to help financial institutions, service providers and account holders to understand the key requirements of the CRS and how they will be affected by its

implementation.

Productivity and innovation credit scheme e-Tax Guide updated

On 22 November 2016, IRAS issued an updated e-Tax Guide on the Productivity and Innovation Credit (PIC) scheme to incorporate the changes introduced in Budget 2016 as follows:

- expiry of the PIC scheme in the year of assessment 2018;
- the PIC cash payout rate is reduced from 60% to 40% for qualifying expenditure incurred on or after 1 August 2016;
- compulsory e-filing of PIC cash payout applications, which has taken effect from 1 August 2016;
- removal of information on the PIC bonus, which expired after the year of assessment 2015; and
- information in Annex B regarding enhancement of the Writing-Down Allowance (WDA) and deduction for Intellectual Property Rights (IPRs) that allow companies to make an irrevocable election to claim the WDA over a 5, 10 or 15-year period (on a straight line basis) on capital expenditure incurred in acquiring the IPR with effect from the year of assessment 2017.

THAILAND

Deduction for depreciable assets – Royal Decree amended

On 24 January 2017, the Thai government resolved to amend Royal Decree No. 604. The amendment allows for an additional corporate tax deduction of 50% of the expenditure incurred on additions, alterations, extensions and/or improvements of property, plant and equipment which qualify as a deduction under Section 65 Bis (2) of the Revenue Code. Taxpayers who meet the conditions prescribed in Royal Decree No. 604 would be able to claim 150% of the qualifying expenditures as a deduction effective from 1 January 2017 to 31 December 2017.

Prior the amendment, eligible taxpayers were able to claim a corporate tax deduction of 200% of the qualifying expenditures for the period from 3 November 2015 to 31 December 2016.

Global Forum on Transparency and Exchange of Information – joined by Thailand

According to the OECD, Thailand has become the 139th member of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

The Global Forum's aim is to ensure that all jurisdictions adhere to the same high standard of international cooperation in tax matters and that governments come together to fight and prevent tax evasion. Thailand has committed to implement the international standards on transparency and exchange of financial account information with other members of the organisation, upon request and on automatic basis.

Amendment to personal income tax laws

On 27 January 2017, the Revenue Code Amendment Act (No. 44) and Royal Decree (No. 629) were gazetted to revise some of the income tax brackets, tax deductions and tax allowances affecting personal income tax. The changes to the legislation are as follows:

	Prior to 2017	From 2017
Income tax brackets	THB2 million to 4 million taxed at 30%. Exceeding THB4 million taxed at 35%.	– for taxpayer
Tax deductions		
for employment income	40% of assessable income (capped at THB60,000)	50% of assessable income (capped at THB100,000)
for income from services rendered	40% of assessable income (capped at THB60,000)	50% of assessable income (capped at THB100,000)
for construction income	70% of assessable income	60% of assessable income
for business, commerce, agriculture, industry, transport and other income	65%-85% of assessable income	60% of assessable income
Tax allowances		
for taxpayer	THB30,000	THB60,000
for spouse	THB30,000	THB60,000
for children under 25 years old and receiving full time education	THB15,000 per child (capped at three children)	THB30,000 per child (capped at three children)
for child education	THB2,000 per child (capped at three children)	repealed

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.*

TechnicalUpdates

The technical updates published here are summarised from selected government gazette notifications published between 16 November 2016 and 15 February 2017 including Public Rulings and guidelines issued by the Inland Revenue Board Malaysia (IRBM), the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Income Tax (Deduction for Expenses in relation to National Greenhouse Gas Reporting Programme) Rules 2016

Income Tax (Deduction for Expenses in relation to National Greenhouse Gas Reporting Programme) Rules 2016 [P.U.(A) 295], gazetted on 17 November 2016, provide a deduction to a Malaysian incorporated resident company on qualifying expenditure incurred from the year of assessment (YA) 2015 to YA 2017 to prepare the Greenhouse Gases Report for the implementation of the National Greenhouse Gas Reporting Programme.

The tax deduction is based on three reporting classes, namely platinum, gold and silver, and the maximum deductions allowed can be summarised as follows:

Level of report	Scope of reporting	Maximum amount of deduction (RM)		
		Fee for consultancy services	Cost for preparation of report internally	Service fee for verification of Greenhouse Gases Report
Platinum	1, 2 and 3	150,000	70,000	150,000
Gold	1, 2 and 3	100,000	50,000	Not applicable
Silver	1 and 2	50,000	30,000	100,000

Note: Scope of reporting	
Scope 1:	All greenhouse gases directly discharged that include sources from tools or vehicles owned or controlled by the reporting entity party
Scope 2:	Greenhouse gases indirectly discharged that include sources from energy, steam, thermal and refrigeration supplied by third party
Scope 3:	Greenhouse gases indirectly discharged other than from the sources specified in Scope 2

Income Tax (Deduction for Investment in a BioNexus Status Company) Rules 2016

Income Tax (Deduction for Investment in a BioNexus Status Company) Rules 2016 [P.U.(A) 306], gazetted on 7 December 2016, revoke the Income Tax (Deduction for Investment in a BioNexus Status Company) Rules 2007 [P.U.(A) 373]. The previous 2007 Rules shall, however, continue to apply for any deduction which has already been approved under the 2007 Rules. The new Rules are broadly similar to the previous 2007 Rules and shall have effect from YA 2016. A qualifying person will be given a tax deduction equivalent to the actual value of investment made in a BioNexus status company. The qualifying investment should be made between 1 January 2016 and 31 December 2020 and must be for the sole purpose of financing activities at the initiation stage of the commercialisation phase of a new business approved by the Minister.

Income Tax (Exemption) (No. 11) Order 2016

Income Tax (Exemption) (No. 11) Order 2016 [P.U.(A) 345], gazetted on 22 December 2016, provides an income tax exemption on the statutory income derived from a tour operating business providing tour packages to Malaysia participated by not fewer than 750 tourists from outside Malaysia for a YA.

Income Tax (Exemption) (No. 12) Order 2016

Income Tax (Exemption) (No. 12) Order 2016 [P.U.(A) 346], gazetted on 22 December 2016, provides an income tax exemption on the statutory income derived from a tour operating business which provides domestic tour packages for travel within Malaysia participated by not fewer than 1,500 local tourists for a YA.

Income Tax (Deduction for Expenditure on Issuance of Retail Debenture and Retail Sukuk) Rules 2016

Income Tax (Deduction for Expenditure on Issuance of Retail Debenture and Retail Sukuk) Rules 2016 [P.U.(A) 347], gazetted on 22 December 2016, take effect from the YA 2016 until YA 2018. The Rules provide that the "additional expenses" incurred on the issuance of retail debenture and retail sukuk shall be allowed as a single or double deduction (subject to the category specified in the Rules) to ascertain the adjusted income of a company resident in Malaysia. The "additional expenses" incurred on the issuance of the retail debenture and retail sukuk that qualify for the deductions above include:

- Professional fees relating to due diligence, drafting and preparation of prospectus
- Printing cost of prospectus
- Advertisement cost of prospectus

- SC prospectus registration fee
- Bursa Malaysia processing fee and initial listing fee
- Bursa Malaysia new issue crediting fee
- Primary distribution fee

Income Tax (Convention on Mutual Administrative Assistance in Tax Matters) Order 2016

Income Tax (Convention on Mutual Administrative Assistance in Tax Matters) Order 2016 [P.U.(A) 353], gazetted on 23 December 2016, sets out the arrangements made by the government of Malaysia and the governments which have signed the Convention on Mutual Administrative Assistance in Tax Matters (the Convention) to foster all forms of administrative assistance in matters concerning taxes of any kind.

- Income Tax (Country-by-Country Reporting) Rules 2016
- Income Tax (Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports) Order 2016
- Income Tax (Automatic Exchange of Financial Account Information) Rules 2016
- Income Tax (Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information) Order 2016

In line with Action 13 of the OECD's Base Erosion and Profit Shifting (BEPS) project, the following were gazetted on 23 December 2016:

- Income Tax (Country-by-Country Reporting) Rules 2016 [P.U.(A) 357] (CbCR Rules); and
- Income Tax (Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports) Order 2016 [P.U.(A) 358] (Malaysian MCAA)

In addition, the following were also gazetted on 23 December 2016:

- Income Tax (Automatic Exchange of Financial Account Information) Rules 2016 [P.U.(A) 355]
- Income Tax (Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information) Order 2016 [P.U.(A) 356]

The Rules came into operation on 1 January 2017 and shall apply to a Financial Institution as defined under Section VIII of the Standard approved by the Council of the OECD on 15 July 2014 (as amended from time to time).

Public Ruling No. 8/2016 – Industrial buildings (Part I)

Public Ruling (PR) No. 8/2016 - Industrial buildings (Part I), published on 23 November 2016, explains the types of buildings that qualify as industrial buildings under Schedule 3 of the ITA.

Public Ruling No. 9/2016 – Gratuity

PR No. 9/2016 - Gratuity, published on 22 August 2016, explains the method used to characterise lump sum payments received by employees upon the termination of their employment as gratuity and the tax treatment of gratuity. The new PR replaces the PR No. 8/2013 issued on 25 June 2013 to take into account new provisions introduced since then.

Public Ruling No. 10/2016 – Industrial buildings (Part II)

PR No. 10/2016 - Industrial buildings (Part II), published on 5 December 2016, explains the types of buildings that qualify as industrial buildings under paragraph 80 of Schedule 3 of the ITA. Paragraph 80 of Schedule 3 of the ITA empowers the Minister of Finance to prescribe the types of buildings that qualify as industrial buildings and the relevant rates of Industrial Building Allowances.

Public Ruling No. 11/2016 – Tax borne by employers

PR No. 11/2016 - Tax borne by employers, published on 8 December 2016, explains the computation of perquisite relating to income tax of an employee borne by an employer; and tax payable by the employee entitled to such perquisite. The new PR replaces the PR No. 2/2006 issued on 17 January 2016 to take into account the amendment to Section 25 of the ITA which provides that effective from YA 2016, employment income receivable in respect of a relevant period is treated as gross income of the employee in the period it is received.

Public Ruling No. 12/2016 – Taxation of income from employment on board a ship

PR No. 12/2016 - Taxation of income from employment on board a ship, published on 9 December 2016, explains the tax treatment of income of an individual derived from an employment exercised on board a ship.

Guidelines on tax exemption for wholesale money market funds

Pursuant to the Finance Act 2017, for interest income of a wholesale fund which is a money market fund, the income tax exemption under paragraph 35A of Schedule 6 of the ITA shall only apply to a wholesale fund which complies with the relevant guidelines of the Securities Commission of Malaysia (SC). In this regard, the SC has issued "Guidelines on Tax Exemption for Wholesale Money Market Funds" dated 23 December 2016 [under Section 377 of the Capital Markets and Services Act 2007 (CMSA)]. Based on the Guidelines, the money market fund must obtain a SC certification to qualify for the tax exemption and the Guidelines set out the qualifying criteria and the procedures for making an application to obtain the SC approval/certification.

Amendment to Public Ruling No. 6/2011 - Residence Status of Individuals

On 23 January 2017, Paragraph 6.2.3 (iii) of PR No. 6/2011 - Residence Status of Individuals, was amended to clarify that the allowed temporary absences of social visits not exceeding 14 days include vacation to home country. Although the amendment has been the IRBM's practice, this clarification was perhaps necessary as the previous Paragraph 6.2.3 (iii) may appear to have suggested otherwise:

FINANCE ACT 2017

The Finance Act 2017, incorporating changes proposed in Budget 2017, was gazetted on 16 January 2017. This Act essentially adopts all the changes proposed in the Finance Bill 2016, including the additional amendments made when the Finance Bill 2016 was passed at the Dewan Rakyat. Certain key proposals are effective from 17 January 2017, i.e. the date the Finance Act 2017 comes into operation. These are as follows:

- The widened scope of withholding tax that now also applies to amounts paid or credited for services rendered outside Malaysia. Hence, amounts paid or credited to non-residents for services performed on or after 17 January 2017 will now be subject to withholding tax irrespective of where the services are performed. It is, however, important to consider whether protection is available under a Double Tax Agreement.
- The extended definition of "royalty" now includes sums paid as consideration for the use of or the right to use software; the reception of or the right to receive visual images or sounds transmitted to the public by satellite, cable, fibre optic or similar technology; the use of or the right to use visual images or sounds in connection with television or radio broadcasting; the use of or the right to use radio frequency spectrums; and certain forbearance payments.
- New penalty provisions for failure to comply with Country-by-Country (CbC) reporting in line with Action 13 of the Organisation for Economic Co-operation and Development (OECD)'s Base Erosion and Profit Shifting (BEPS) action plans and other exchange-of-information requirements

Filing programme for Income Tax Return Forms in the year 2017

The IRBM has made available on its website the 2017 income tax return filing programme (2017 filing programme) titled "Filing programme for Income Tax Return Forms (ITRF) in the year 2017". The

2017 filing programme is broadly similar to the position laid out in the 2016 filing programme. Where a grace period is given, submissions shall be deemed to have been received by the stipulated due date if received within the grace period. The grace period also applies to the settlement of balance of tax payable under Section 103(1) of the ITA. Where the income tax return / balance of tax payable is not furnished within the grace period, the original due date will be taken for the purpose of calculating the penalties.

"Criteria on incomplete ITRF which is unacceptable"

The IRBM has issued a document entitled "Criteria on incomplete tax return form (ITRF) which is unacceptable". The IRBM has stated within the document that such a return will not be processed and a notification letter will be issued by the IRBM. A penalty under Section 112(3) of the ITA will also be imposed in case of late resubmission of the ITRF to the IRBM.

Exchange of Notes to the DTA between Malaysia and China signed

On 1 November 2016 in Beijing, Malaysia and the People's Republic of China signed an Exchange of Notes to the Double Taxation Avoidance Agreement (DTA) between the government of Malaysia and the government of the People's Republic of China. The purpose of the Exchange of Notes is to list the institutions that are eligible for tax exemption under paragraph (4) of Article 11 (Interest) of the said DTA.

STAMP DUTY

Stamp (Amendment) Bill 2016 (first reading)

Stamp (Amendment) Bill 2016 was tabled on 23 November 2016 at the Dewan Rakyat. We understand that the second reading of the Bill is scheduled to take place in March 2017. The Bill aims to update the current Stamp Act 1949 to reflect policy changes.

Stamp Duty (Remission) Order 2016 Stamp Duty (Remission) (No. 2) Order 2016

Stamp Duty (Remission) Order 2016 [P.U.(A) 365] and Stamp Duty (Remission) (No. 2) Order 2016 [P.U,(A) 366], gazetted on 27 December 2016, came into effect on 1 January 2017 and provide a stamp duty remission on the stamp duty chargeable on a loan agreement and instrument of transfer for the purchase of the first residential property costing not more than RM500,000 by a Malaysian citizen, where the sale and purchase agreement is executed between 1 January 2017 and 31 December 2018. Based on the Schedule of the Remission Orders, the amount of stamp duty to be remitted is as follows:

	Value (RM)	Stamp duty remitted
Residential property / loan	RM300,000 or less	100%
Residential property	RM300,001 – RM500,000	RM5,000 from the total amount of stamp duty payable
Loan	RM300,001 – RM500,000	RM1,500 from the total amount of stamp duty payable

These Orders effectively extend the Stamp Duty (Remission) Order 2014 [P.U.(A) 360] and Stamp Duty (Remission) (No. 2) Order 2014 [P.U,(A) 361], that apply on loan agreements and instruments of transfer executed between 1 January 2015 and 31 December 2016, for

another two years.

Stamp Duty (Exemption) (No. 3) Order 2016

Stamp Duty (Exemption) (No. 3) Order 2016 [P.U.(A) 367], gazetted on 27 December 2016, provides a stamp duty exemption on the following instruments relating to Islamic banking, takaful activities and Islamic capital market to promote the Malaysia International Islamic Financial Centre:

- Instruments on transactions in currencies other than ringgit relating to Islamic banking or takaful activities executed between the approved International Currency Business Unit and a resident or non-resident customer from 1 January 2017 to 31 December 2020
- Instruments relating to the issuance of Islamic bonds in ringgit or foreign currencies approved by the SC from 1 January 2017 to 31 December 2020

Stamp Duty (Exemption) Order 2017

Stamp Duty (Exemption) Order 2017 [P.U.(A) 40], gazetted on 27 January 2017, provides a stamp duty exemption on all instruments executed in relation to home financing facility (whether under conventional or *Syariah* principles) granted under the Public Sector Home Financing Board Act 2015. The Order came into operation on 1 January 2017. Note that the Order revokes the Stamp Duty (Exemption) (No 7) Order 1994 [P.U.(A) 144] and the Stamp Duty (Exemption) (No 16) Order 1994 [P.U.(A) 338].

CUSTOMS DUTIES

Customs (Amendment) (No. 5) Regulations 2016

The Customs (Amendment) (No.5) Regulations 2016 [P.U. (A) 294] were gazetted on 16 November 2016 and came into operation on 17 November 2016. The Regulations amend Customs Regulations 1977 [P.U. (A) 162/1977] by inserting Regulation 15A after Regulation 15. As per the amendment, no cigarette or intoxicating liquor on which duty has not been paid shall be exported by sea or road unless the specified conditions are satisfied under Section 15A(1) and (2) of the Regulation.

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 4) Order 2016

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 4) Order 2016 [P.U. (A) 305] was gazetted on 1 December 2016 and came into operation on 2 December 2016. This Order provides for an amendment in the First Schedule by substituting for Annexure 8 another annexure.

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

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 4) Order 2016 The Customs Duties (Amendment) (No.3) Order 2016 [P.U. (A) 332] was gazetted on 20 December 2016 and amended the Customs Duties Order 2012 [P.U. (A) 275/2012] with effect from 1 January 2017. This Order provides for an amendment in subparagraph 2(3) by substituting for the word "30" the word "10".

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 5) Order 2016

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement)

(Amendment) (No. 5) Order 2016 [P.U. (A) 333], was gazetted on 20 December 2016 and came into operation on 1 January 2017. This Order provides for an amendment in subparagraph 3(4) Customs Duties Order 2012 by substituting for the word "30%" the word "10%".

Customs (Import Licence Fee for Motor Vehicle) Regulations 2016

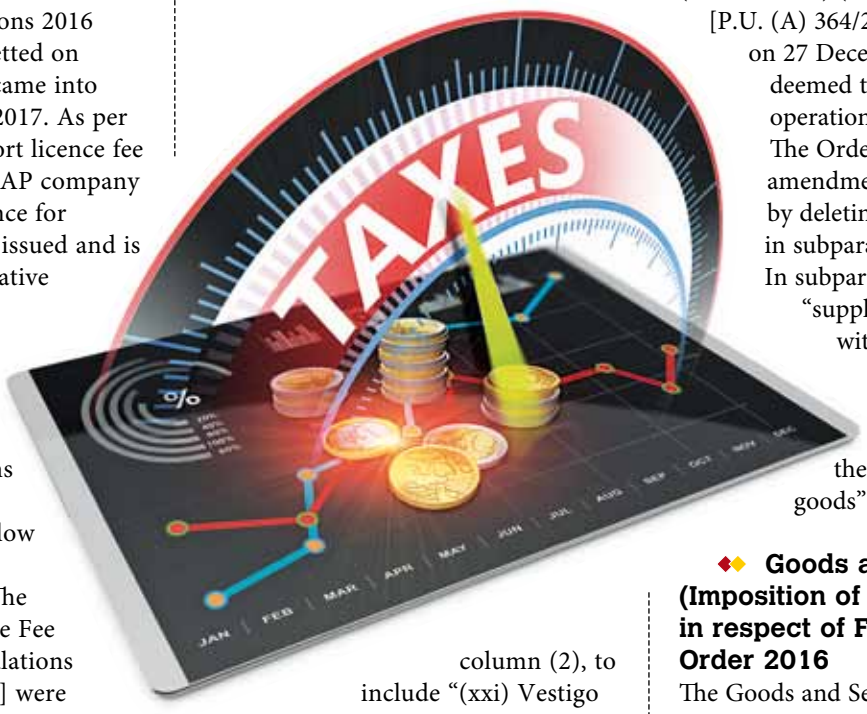
Customs (Import Licence Fee for Motor Vehicle) Regulations 2016 [P.U. (A) 370] were gazetted on 28 December 2016 and came into operation on 1 January 2017. As per the Regulations, an import licence fee is imposed on any open AP company to whom an import licence for motor vehicles has been issued and is subject to the Administrative Guidelines on Import Licence issued by the authorised officer of the Ministry of International Trade and Industry. The Regulations further provide that the Director General may allow the import licence fee to be paid in instalments. The Customs (Import Licence Fee for Motor Vehicle) Regulations 2009 [P.U. (A) 491/2009] were revoked. Any import licence holder listed in the Schedule to the Customs (Import Licence Fee for Motor Vehicle) Regulations 2009 shall continue to be subjected to the provisions of that regulations until 30 June 2017.

Customs Duties Order 2017

The Customs Duties Order 2017 [P.U. (A) 5] was gazetted on 3 January 2017 and will come into operation on 1 April 2017. The Order not only specifies the rate of import duty on different classes of goods but also prescribes the rules for classification of goods. The previous Customs Duties Order 2012 [P.U.(A) 275/2012] is revoked.

Customs Duties (Exemption) (Amendment) Order 2017

The Customs Duties (Exemption) (Amendment) Order 2017 [P.U. (A) 16] was gazetted on 17 January 2017 and came into operation on 31 January 2017. This Order provides for an amendment in Part I of the Schedule in relation to item 66, in column (2), to include "(xxi) Vestigo Petroleum Sdn. Bhd."



GOODS AND SERVICES TAX

Goods and Services Tax (Application to Government) (Amendment) Order 2016

The Goods and Services Tax (Application to Government) (Amendment) Order 2016 [P.U. (A) 352/2016] was gazetted on 23 December 2016 and came into operation on 1 January 2017. The Order provides for an amendment in the Schedule in relation to item 1 by deleting paragraph (a), and in paragraph (b), by substituting for the words "Public Works Department, Sarawak" the words "Rural Water Supply Department, Sarawak".

Goods and Services Tax (Imposition of Tax for Supplies in respect of Designated Areas) (Amendment) (No. 2) Order 2016

The Goods and Services Tax (Imposition of Tax for Supplies in respect of Designated Areas) (Amendment) (No. 2) Order 2016 [P.U. (A) 364/2016] was gazetted on 27 December 2016 and deemed to have come into operation on 1 January 2017. The Order provides for an amendment in paragraph 2 by deleting the words "to or" in subparagraphs (a) and (e). In subparagraph (f), the word "supply" is substituted with the word "importation" and the words "to the designated areas or the importation of such goods" are deleted.

Goods and Services Tax (Imposition of Tax for Supplies in respect of Free Zones) Order 2016

The Goods and Services Tax (Imposition of Tax for Supplies in respect of Free Zones) Order 2016 [P.U. (A) 373] was gazetted on 28 December 2016 and came into operation on 1 January 2017. The Order provides that tax shall be imposed at the rate fixed under Section 10 of the Act on the supply of wine, spirit, beer, malt liquor, tobacco and tobacco products within or between the free zones.

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No. 3) Order 2016

The Goods and Services Tax (Zero-

Rated Supply) (Amendment) (No. 3) Order 2016 [P.U. (A) 376] was gazetted on 29 December 2016 and came into operation on 1 January 2017. The Order provides amendments to the First Schedule. In Items 4 and 5, the words "or from" have been deleted. Item 6(1), dealing with supply of treated water to domestic consumers, has been substituted by a new sub-item. Further, the Appendix of this Order has also been amended.

Goods and Services Tax (Relief) (Amendment) (No. 2) Order 2016

The Goods and Services Tax (Relief) (Amendment) (No. 2) Order 2016 [P.U. (A) 369/2016] was gazetted on 27 December 2016 and came into operation on 1 January 2017. Significant changes have been made to items 2, 7, 14 and 15 of Schedule 1. Item 2, which earlier provided relief to supply of land by the developer or land owner to the government, local authority or any other person for providing public amenities and public utilities for no consideration or nominal value, has been omitted. A transitional provision for claiming input tax credit has however been incorporated. Item 7 has been substituted by new contents to state that relief on purchase of goods used by persons with disabilities is available to any person who holds a valid Kad OKU. In item 14, an additional condition has been added i.e. "(aa) that the goods are returned within six months from the date the goods were sent to the designated areas". With respect to item 15, a new condition has been added i.e. "(ba) that the goods are re-exported within six months from the date of import".

Goods and Services Tax (Exempt Supply) (Amendment) Order 2016

The Goods and Services Tax (Exempt Supply) (Amendment) Order 2016. [P.U. (A) 377/2016] was gazetted on 29 December 2016 and came into operation on 1 January 2017. As regard amendments to the First Schedule, item 3 has been deleted. Further, in sub-item 4(1), the words "the investment precious metals are as follows" have been substituted with the words "Any supply of the following investment precious metal for the purpose of investment". With respect to the amendments in the Second Schedule, Item 20 has been amended by inserting after the word "maintenance" the words "including recovery of group insurance cost, assessment tax and quit rent".

Goods and Services Tax (Amendment) Regulations 2016

The Goods and Services Tax (Amendment) Regulations 2016 [P.U. (A) 368] were gazetted on 27 December 2016 and came into operation on 1 January 2017. The important amendments are:

(a) Sub-regulation 40(2) is amended by substituting paragraph (e) with the following; "(e) the provision of any loan, advance or similar facility financing to his employees or between connected persons".
(b) Regulation 42 has been omitted.
(c) Sub-regulation 46(1) has been amended by substituting for the words "he was or was required to be registered" the words "he was registered". Further Sub-regulation (2) has been amended by substituting for the words "such person was, or was required to be, registered" the words "he was registered".
(d) Regulation 62 has been amended by inserting after sub-regulation (2) the following sub-regulation "(3) This regulation shall not apply to the person referred to in paragraph 72(1)(b)".

Certain other amendments have also been made in the Schedules to the Regulations.

*Contributed by **Ernst & Young Tax Consultants Sdn. Bhd.***

CASE 1

FEDERAL FURNITURE HOLDINGS SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2016) MSTC ¶30-120 (HIGH COURT)

BRIEF FACTS

The Appellant took short-term loans from financial institutions to finance the business activities of the Appellant and its subsidiaries. The Appellant incurred interest expenses for those loans taken. In the Years of Assessment ("YAs") 2002 and 2003, the Appellant lent or advanced money to its subsidiaries some of which were dormant and some had even ceased operations. The Appellant classified the loans given to its subsidiaries into two types, i.e. interest bearing loans and non-interest bearing loans. But no details were provided as to which subsidiary received what type of loan. The non-interest bearing loans were thus not employed in the production of the Appellant's gross income.

The Respondent took the stand that as opposed to interest bearing loans, the interest free loans given to the Appellant's subsidiaries did not generate income. They were not a source of income and would never be so long as they were interest free.

The Appellant contended that both interest bearing and non-interest bearing loans constituted a single source of income and that the same principle as applied to dividend was equally applicable to interest income. Section 4(c) of the Income Tax Act 1967 (**"ITA"**) provided for "dividends, interest or discounts" to be grouped under one category.

ISSUES

Whether the interest expenses for YA2002 and YA2003 arising from the giving of interest free loans by the Appellant to its subsidiaries are wholly and exclusively incurred in the production of gross income within the meaning of Section 33 of the ITA?

DECISION

The Court held that liability to pay income tax is dependent on whether such income is chargeable to tax. The classes of income chargeable to tax are specified under Section 4 of the ITA. Hence Section 4 provides that 'interest' is a class of income upon which tax is chargeable under Section 3 of the ITA. To determine whether tax is chargeable upon such 'interest', reference must be made to Section 33 of the ITA.

The Court agreed with the Respondent and the Special Commissioners of Income Tax ("SCIT") that to allow the interest expenses incurred in respect of the loans taken by the Appellant from which interest free loans were given by the Appellant to its subsidiaries would be contrary to the ITA. The Court is of the opinion that for the purpose of Section 33, it is necessary for the Respondent to distinguish between the interest bearing loans from the non-interest bearing loans.

With regard to the submissions by counsel for the Appellant that since Section 4(c) of the ITA grouped "dividends, interest and discounts" under one category therefore the principle as applied to dividend is equally applicable to interest income, the Court agreed with the SCIT that on the basis that there are separate provisions pertaining to dividend income (Section 14) and to interest and royalty income (Section 15), principles that apply to dividend income would not necessarily apply to interest and royalty income merely because dividend, interest and royalty income are grouped under one class.

With regard to the case of ***Ketua Pengarah Hasil Dalam Negeri v Multi Purpose Holdings Bhd (2001) MSTC 3880*** cited by the Respondent, the Court held that the facts in that case show that all the loans made to the related companies by the taxpayer were interest bearing loans. Therefore the High Court in that case found that to further subdivide the source of income is to disintegrate the groupings or categories further than what is authorised by the ITA. The loans in Multi Purpose (supra) are unlike the loans in the present appeal. The Court is of the view that the facts in the Multi Purpose (supra) case is distinguishable from the present case.

In this case the subdivision of the

interest bearing loans from the non-interest bearing loans was necessary for the purpose of Section 33.

CONCLUSION

The interest expenses incurred upon loans which were utilised to give interest free loans to its subsidiaries were not interest expenses incurred in the production of the appellant's gross income as the interest expenses did not fulfil Section 33(1) of the ITA. Hence, for the purpose of Section 33, it is necessary to distinguish the interest bearing loans from the non-interest bearing loans. This is unlike the case of Multi Purpose (supra) as the facts in that case show that all the loans made to the related companies by the taxpayer were interest bearing loans.

CASE 2

KETUA PENGARAH HASIL DALAM NEGERI V LATEX MANUFACTURING SDN BHD (2016) MSTC ¶30-125 (HIGH COURT)

BRIEF FACTS

The Respondent had been granted Pioneer Status and Pioneer Certificate for the production of examination gloves. A 100% exemption had been granted to the respondent by the government through the Minister of International Trade and Industry ("MITI"). Under Condition (j) of the Pioneer Certificate, the Respondent shall export all its products. Pursuant to an audit conducted by the Appellant, it was discovered that the Respondent did not export all its products but the export was also undertaken by its holding company. In view of this, the Appellant contended that the Respondent had breached Condition (j) of the Pioneer Certificate. Therefore, it was not entitled to the tax exemption granted to it by MITI. The Appellant then informed MITI vide its letter dated 17 July 2009 of the alleged non-compliance and suggested to MITI to cancel the Pioneer Certificate granted to the respondent pursuant to Section 9 of the Promotion of Investments Act 1986. The Special Commissioners of the Income Tax **("SCIT")** found that the Appellant had failed to seek clarification with the Respondent relating to the reasons the sale was made through the holding company before writing to MITI. There was no show cause letter issued to the Respondent by MITI to afford the opportunity to the Respondent to state its version against that of the Appellant. Further, the Appellant was not the proper authority to decide if the export through the Respondent's holding company satisfied the requirement of Condition (j) of the Pioneer Certificate. This fell within the purview of MITI. SCIT was of the view that the Appellant exceeded its authority. The Appellant appealed.

ISSUES

(i) Whether the Appellant is vested with the authority to disregard the Pioneer Certificate and Pioneer Status of the Respondent for any year of assessment, in which a condition in the Pioneer Certificate is allegedly not complied with;
(ii) Whether there is non-compliance of the mandatory requirement under Section 9 of the PIA;
(iii) Whether there is breach of natural justice by the Respondent;
(iv) Whether there is breach of conditions stated under the Pioneer Certificate; and
(v) Whether the Appellant is the rightful authority to decide on whether indirect export amounts to non-compliance of the Pioneer Certificate

DECISIONS

ISSUE 1

The Court held that Section 24 of the PIA provides that the Appellant may only raise additional tax if there is a direction under Section 17 of the PIA or if the Pioneer Certificate has been cancelled. As none of those situations had occurred, the Appellant did not have the authority to raise additional assessment. Section 24 being a specific law overrides the provision of Section 91 of the ITA.

The SCIT observed that MITI's position pertaining to the Appellant's Pioneer Certificate was merely based on the Appellant's representation with

certain relevant information being withheld from the Respondent.

The Court is satisfied that there was nothing wrong with the deciding order made by the SCIT to merit curial intervention. The SCIT was justified in coming to that decision as the mandatory procedure under Section 24 of the PIA had not been complied with and there was no cancellation of the Respondent's Pioneer Certificate by MITI. The Respondent can therefore continue to enjoy its Pioneer Status. Therefore the Appellant was wrong in issuing additional assessment.

ISSUE 2

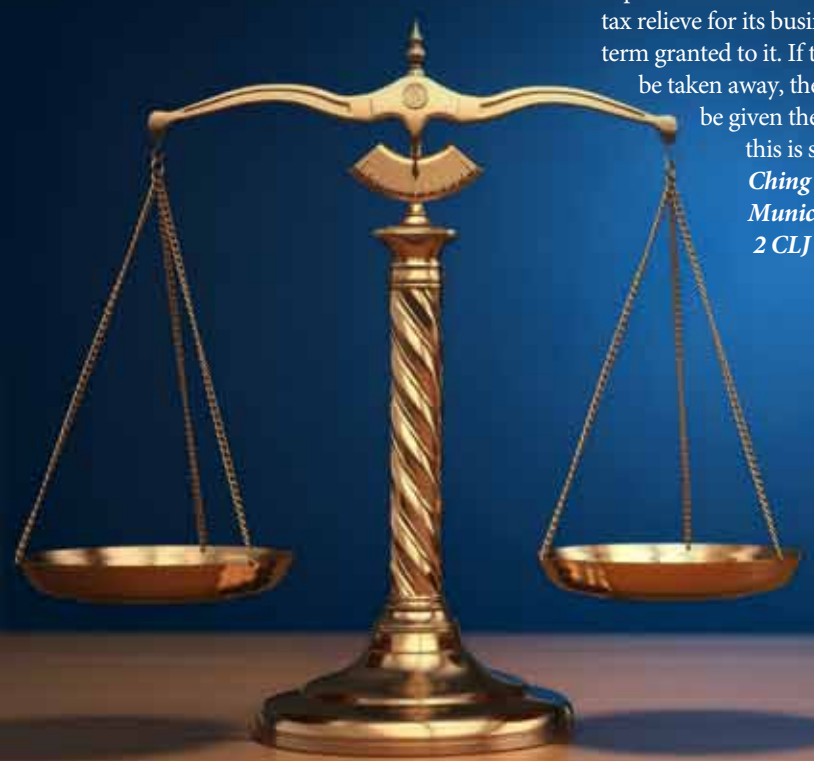
A perusal of Section 9 of the PIA clearly shows that the section imposes a mandatory requirement for a notice in writing to be issued to the holder of the Pioneer Certificate if there were claims that the conditions stated in the Pioneer Certificate had not been complied with, before any action is taken to cancel the Pioneer Certificate.

Section 9(1) of the PIA is couched in a mandatory nature, unless there is a notice to show cause issued under Section 9 of the PIA for the Respondent to show cause as to why its Pioneer Certificate ought not to be cancelled and its tax incentives ought not to be revoked, the Respondent is entitled to continue to enjoy the tax incentives under the Pioneer Certificate. As this is a crucial protection given by the law to the Respondent, justice would demand that there be strict compliance with the said procedure before any adverse action is taken against the Respondent. As the Respondent's Pioneer Certificate had not been cancelled under Section 9(1) of the PIA, the Respondent had rightfully claimed for the tax incentive as was done in this case.

ISSUE 3

From the facts found by the SCIT, there is no doubt that the Respondent was not accorded with the opportunity to present its case to MITI on an issue which is so crucial affecting the Respondent's right to the tax incentives pursuant to the Pioneer Certificate granted to it. It is also not disputed that the decision by MITI was unilaterally done without strict adherence to the well set procedure under Section 9 of the PIA.

The Respondent has a legitimate expectation that it is entitled to enjoy the tax relieve for its business for the entire term granted to it. If these benefits are to be taken away, the Respondent must be given the right to be heard, this is stated in ***Law Pang Ching & Ors v Tawau Municipal Council [2010] 2 CLJ 281 at 838.***



ISSUE 4

There was no steps taken by MITI to cancel the Pioneer Certificate and/or revoke the tax incentives under the mechanism provided by the PIA. Despite the fact that there is a set of procedure to be complied with by MITI under Section 9 of the PIA, it had not resorted to the procedure sanctioned by the PIA. Instead, MITI had resorted to a procedure which is flawed as found by the SCIT.

ISSUE 5

The SCIT found that the Appellant was not the proper or rightful authority to decide on whether indirect export amounts to non-compliance of the Pioneer Certificate. The power lies with MITI pursuant to Section 9 of the PIA.

Based on the letter written to MITI, it is obvious that the Appellant had exceeded the authority granted to it by the ITA and had encroached into the jurisdiction of MITI.

The Appellant had acted *ultra vires* in disallowing the Respondent's claim for the tax incentives under the Pioneer Certificate. The SCIT was correct to hold that MITI's letter dated 17 July 2009 is fatally and legally flawed and of no consequences due to non-compliance of the provision of Section 9 of the PIA, as found by the SCIT.

CONCLUSION

i) The Inland Revenue Board Malaysia has no power to interfere and was not the proper or rightful authority to decide on whether indirect export amounts to non-compliance of the Pioneer Certificate.

ii) As long as the taxpayer's Pioneer Certificate had not been cancelled under Section 9(1) of the PIA, the taxpayer is entitled to continue to enjoy the tax incentives under the Pioneer Certificate.

CASE 3

SUNCHEN PTY LTD V FEDERAL COMMISSIONER OF TAXATION [2010] FCAFC 138 (FEDERAL COURT, AUSTRALIA)

BRIEF FACTS

The taxpayer (Sunchen) contracted to purchase a property in 2006 on which a single-storey house with carport was built and leased as a residential tenancy. The property included a development approval for the purpose of the construction of a five-storey residential building, which was assigned to the taxpayer.

The taxpayer claimed GST on the purchase price as an input tax credit for that amount in its business activity statement for the relevant quarter. This was on the basis that the taxpayer had no intention to use the premises for residential accommodation but rather intended to develop the property into units for sale in the future. However, the claim was disallowed by the Commissioner on the basis that the property was input taxed (exempt supply) residential premises.

The taxpayer then applied to the Administrative Appeals Tribunal for review of that decision. The tribunal upheld the Commissioner's decision, holding that it was the future intended use of the property which should be examined. Following that, the taxpayer appealed to the Federal Court. Dismissing the appeal, the Federal Court held that the intention on the part of the taxpayer at the time of supply had not been proven. The taxpayer appealed to the full Federal Court.

ISSUE

The issue before the full Federal Court was whether the property, at the time of its supply, was residential premises "to be used predominantly for residential accommodations" within Sections 40-65 of the A New Tax System (Goods and Services Tax) Act 1999, and therefore input taxed. In determining whether a property is 'residential premises to be used predominantly for residential accommodation', the Court restricted the use of any subjective test, noting that there was nothing in the provisions that requires a prediction as to the future use to which premises will be put by an actual purchaser. Accordingly, the intention of the future owner is irrelevant.

The 2 elements of Sections 40-65 are said to be 1) whether the property is residential premises; and 2) whether property is to be used predominantly for residential accommodation. The first limb looks to an existing state of fact, whereas the relevant test for the second limb looks to the characteristics or nature of the property rather than intention of any person. Having said that, this did not mean that the actual use of the property will necessarily be irrelevant as "the use to which an item is actually put will ordinarily be illustrative of at least some aspects of its character". In addition, the Court took the opportunity to clarify that the approach adopted in the decision in ***Toyama Pty Ltd v. Landmark Building Developments Pty Ltd [2006] NSWSC 83***, which involved a prediction as to future use which could include consideration of subjective intention, was incorrect.

DECISION

The full Federal Court dismissed the taxpayer's appeal. It was held that the words "to be used predominantly for residential accommodation" in the GST Act is not a reference to use by any particular person, but to describe the attributes of the property to which its use is suited. The property was to be used predominantly for residential accommodation. Therefore, the taxpayer is not entitled to deduct input tax credit. Whilst the majority of the full Federal Court (Edmonds and Gilmour JJ) held that the objective view represented the current law, Jessup J took the view that "the intention of the future owner or lessee will usually be an ingredient in the mix of facts" by reference to which a prediction was made as to the use to which the property was put.

The Federal Court's decision confirms the long-held Australian Tax Office view, in which subsection 40-65(1) of the GST Act requires an objective assessment of the nature of the premises rather than a prediction of future use or consideration of the subjective intention of the future owner.

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CASE 4

KETUA PENGARAH HASIL DALAM NEGERI V ALCATEL-LUCENT MALAYSIA SDN BHD & ANOR [CIVIL APPEAL NO. 01(F)-18-08-2012(W)]

BRIEF FACTS

The first Respondent, a resident company, and the second Respondent, a non-resident company, entered into a service agreement, under which, the second Respondent was to provide services to the first Respondent from outside Malaysia. The first Respondent did not make any provision for withholding tax under Section 109 of the Income Tax Act 1967 (**"ITA"**) when making payments (**"the said payments"**) to the second Respondent for the services.

The Appellant was of the view that the said payments were royalty payments subject to withholding tax and issued a letter dated 31 October 2007 informing the first Respondent of its omission to pay withholding tax for YA2001-2005 totalling RM 4.5mil. This amount was reduced to RM1.5mil (**"the said sum"**) after negotiations, which was confirmed in the Appellant's letter dated 14 April 2008 (**"the 14 April 2008 letter"**) to the first respondent's tax agent, in which Sections 109 and 109B of the ITA were referred to (**"the said decision"**). The first Respondent paid the said sum under protest, holding the view that the services were not royalty as they were performed outside Malaysia.

The Respondents did not file an appeal to the Special Commissioners of Income Tax (**"SCIT"**), but filed an application for judicial review pursuant to O. 53 of the Rules of the High Court 1980 (**"RHC"**) for, amongst others, an order of certiorari to quash the Appellant's decision in the 14 April 2008 letter, a declaration that the Appellant's decision was erroneous in law and for a refund of the withholding tax already paid. The High Court allowed the application for judicial review and the decision was affirmed by the Court of Appeal.

The questions before the Federal Court were:-

(1) whether the 14 April 2008 letter referring to both Sections 109 and 109B of the ITA was bad in law; and
(2) if question (1) was answered in the negative, whether the payments for the services as referred in the agreement were royalties under Section 109 of the ITA.

HELD BY THE FEDERAL COURT ALLOWING THE APPEAL WITH COSTS:-

Question 1 - whether the 14 April 2008 letter referring to both Sections 109 and 109B of the ITA was bad in law

The Respondents submitted that the Appellant was unreasonable in applying both Sections 109 and 109B of the ITA to the said payments in that the Appellant was unsure which section applied to the said payments. The Federal Court observed that the contested income to be taxed was alleged to have been derived from royalties (Section 4(d) of the ITA) and that the income of a person not resident in Malaysia but derived from Malaysia is chargeable to tax (Section 4A(i), (ii) or (iii) of the ITA). The duty to withhold tax on Section 4(d) income falls under Section 109 of the ITA whilst the duty to withhold tax on Section 4A income falls under Section 109B of the ITA. Since Sections 109 and 109B of the ITA are both withholding provisions and the Respondents were informed that the income was from royalty payment, the respondents could not have been misled by something so obvious.

The Federal Court found that despite being aware of and aggrieved by the impugned decision, the Respondents did not file an appeal to the SCIT pursuant to Section 99 of the ITA. If the Respondents had, they would have been accorded every opportunity to show where the Appellant went wrong and would have been able appeal on a question of law against the SCIT's deciding order, or request the SCIT to state a case for the opinion of the High Court. By

circumventing the SCIT from resolving the issues, and unwittingly leaving the deeming provisions unrebutted, the said payments were thus income derived from Malaysia. Therefore, the requirements of Section 4(d) read together with Section 109 and Section 4A read together with Section 109B of the ITA had been satisfied. Sections 109 and 109B of the ITA would be triggered and the first Respondent was statutorily bound to withhold a portion of the payments as tax.

An assessment is the official administrative act of the Appellant in determining the amount of tax to be paid by a taxpayer, after taking into account all the relevant circumstances. Notices of assessments will be sent out only after the ascertainment is complete : **The King v. The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper [1926] 37 CLR 368/373; A.B.C v. The Comptroller of Income Tax, Singapore [1959] 1 LNS 1.** The Federal Court found that the Appellant did carry out an official administrative act in ordering the first Respondent to make payments of the withholding tax, which constitutes an assessment, which in turn, is subject to appeal to the SCIT pursuant to Section 99 of the ITA.

The decision of an inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" : **R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147.** The grounds in the Respondents' application for judicial review were founded on error of law or acting in excess of powers conferred by the ITA and/or without jurisdiction, which fell squarely within 'illegality'. However, there was (1) no flaw detectable in the decision-making process; and (2) no illegality or irrationality in the said decision. Therefore, the said decision must stand.

On a finding of fact, the Respondent's application was out of time as it was not made within the 40 days when grounds for the application first arose, or when the decision was first communicated (O. 53 r. 3(6) of the RHC) and no application to extend time was ever filed. The judicial review application was flawed, out of time and consequently incompetent.

Question 2 – if question (1) was answered in the negative, whether the payments for the services as referred in the agreement were royalties under Section 109 of the ITA

The first question was answered in the negative and the court refrained from answering the second question.

CASE 5

KETUA PENGARAH HASIL DALAM NEGERI V MUDAH.MY SDN BHD CIVIL APPEAL NO. W-01(A)-342-10 OF 2015

BRIEF FACTS

Pursuant to O. 53 of the Rules of Court 2012 (**"ROC"**) the taxpayer, sought, amongst others, to be granted an Order of Certiorari to remove into the High Court for the purpose of it being quashed, the decisions allegedly made by the Appellant in a letter dated 10 July 2014 (**"the 10 July 2014 letter"**) that—

(a) no or no sufficient withholding taxes have been paid by the respondent for YA 2010, 2011 and 2012 and for penalties to be imposed under the Income Tax Act ("ITA"); and

(b) various payments to non-residents are subject to withholding tax under Section 109B of, and for penalties to be imposed under the ITA on the premise that it is ultra vires, null and void.

The High Court allowed the taxpayer's application for judicial review although the ITA provided for an alternative remedy in the form of an appeal to the Special Commissioners of Income Tax (**"SCIT"**), finding, amongst others, that:-

(a) the judicial review application was not prematurely filed in Court;
(b) the 10 July 2014 letter could be termed as a decision ("the decision") which had adversely affected the respondent within the context of O. 53 r 2(4) of the ROC;
(c) the decision is flawed on the ground of illegality and/or *ultra vires* Section 109B of the ITA
(d) the decision suffered from infirmities of illegality, irrationality and/or procedural impropriety which merit curial intervention;
(e) the Revenue had committed errors of law and fact by considering irrelevant matters and/or had ignored crucial matters in arriving at the decision; and
(f) there were manifest errors of law and facts which merit curial intervention.

The issues before the Court of Appeal were:-

(1) whether the 10 July 2014 letter was tantamount to a decision; and
(2) if the answer was (i) in the negative, whether the application for judicial review was prematurely filed; or (ii) in the positive, whether the application for judicial review was the appropriate route of appeal.

HELD BY THE COURT OF APPEAL ALLOWING THE APPEAL WITH COSTS:-

Issue (1) - whether the 10 July 2014 letter was tantamout to a decision

For a decision to be quashed on judicial review or susceptible to the Court's reviewing powers, there must first be a decision by a decision-maker that affects the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy : **Members of the Commission … [2011] 6 MLJ 490; Council of Civil Service Union v Minister for the Civil Service [1984] 3 AII ER 935.**

The 10 July 2014 letter, amongst others, (1) informed the taxpayer of the initial audit findings and issues of the field audit conducted based on documentation furnished by the Revenue at the material time; and

(2) afforded the opportunity to the taxpayer to discuss with the Revenue the findings and issues of the audit apart from informing the taxpayer the consequences of a failure to attend the said discussion. It did not contain an assessment and did not, expressly or impliedly, constitute or form any decision of the Revenue.

Since no decision was made by the Revenue, the appeal did not come within the ambit of O. 53 ROC. It was manifestly impossible and indeed legally incorrect to allow judicial review of the audit findings when it was neither a decision, conclusive nor finalised. Thus, the taxpayer's application was prematurely filed.

Issue 2 – whether judicial review was the appropriate route of appeal[1]

Although certiorari is always at the discretion of the Court, where there is an appeal procedure available to the applicant, certiorari should not be issued unless there is shown a clear lack of jurisdiction, a blatant failure to perform some statutory duty or a serious breach of principles of natural justice : **Government of Malaysia & Anor v Jagdis Singh [1987] CLJ (Rep) 110; Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Another [2009] 1 MLJ 555.**

The taxpayer had failed to show in clear term how or which part of the 10 July 2014 letter was tantamount to a serious breach of the principle of natural justice, an illegality or manifest error of law. This argument in essence clearly boiled down to the question whether the taxpayer had successfully shown that there were exceptional circumstances to justify their action in applying for judicial review as an appropriate route to ventilate their grievances.

The Court of Appeal found that there were no special or exceptional circumstances that would bring the instant application to be within the **Jagdis Singh**'s exception. The taxpayer therefore was not justified in choosing the Court as a forum whilst there was in existence the specific remedy of appeal before the SCIT – the salient issues involved under the application were made up of questions of facts and law which were plainly within the competence and power of the SCIT. If the taxpayer had appealed to the SCIT, the taxpayer would have had the opportunity to challenge the decision of the Revenue as to whether the payments which it had made were indeed subject to withholding taxes under Sections 109(1) and 109B of the ITA. In those circumstances, the taxpayer could have thereafter appealed on a question of law against a deciding order by requiring the SCIT to state a case for the opinion of the High Court pursuant to Section 34 of Schedule 5 to the ITA : **Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1.**

[1] *The Federal Court's decision on this issue was based on the assumption that the 10 July 2014 letter contained a decision by the Appellant on the audit findings.*

Sudharsanan R. Thillainathan *and* ***Tania K. Edward*** *are tax lawyers with Messrs Shook Lin & Bok.*

BUSINESS DEDUCTIONS

TAX TREATMENT OF INVENTORIES [PART II]

Siva Subramanian Nair

IN THE LAST ARTICLE WE ILLUSTRATED THAT THE VALUATION OF INVENTORY HAS AN IMPACT ON INCOME TAX AND IN CONSEQUENCE LOOKED AT WHAT CONSTITUTES INVENTORY, DISCUSSED THE DIFFERENT METHODS OF INVENTORY VALUATION PRESCRIBED IN THE INCOME TAX ACT 1967 AND EXPLORED THE TAX TREATMENT OF CHANGING THE METHOD OF INVENTORY VALUATION.

In this article we shall touch on valuation of stocks on cessation of business and other inventory related topics.

VALUATION OF INVENTORY ON CESSATION OF BUSINESS - SECTION 35(5)

Where a business is about to cease, the law provides specific rules for the valuation of inventory in Section 35(5) of the Income Tax Act 1967 which are detailed below.

Where … the relevant person permanently ceases to carry on the business, then

(a) if:

(i) at or about the time he so ceases any of what was the stock in trade of the business is sold or transferred for valuable consideration by that person to another person and that other person intends to use that transferred stock in the business or in another business of his; and

(ii) the cost of that transferred stock to that other person is deductible as an expense in computing that other person's adjusted income for the basis period for a year of assessment from the business or from that other business of his,

the value of that transferred stock at the time he so ceases shall be taken to be an amount equal to the price paid on the sale or to the value of the consideration, as the case may be, and shall be taken to be the value of that stock at the end of the relevant period;

(b) the value of any of what was at the time he so ceases the stock in trade of the business to which paragraph (a) does not apply shall be taken to be an amount equal to its market value at the time he so ceases and shall be taken to be the value thereof at the end of the relevant period;

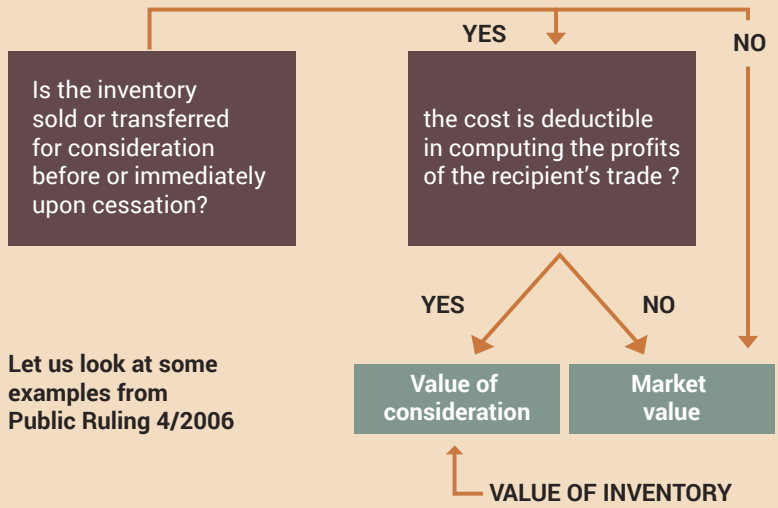
Therefore the question to ask would be are the inventories sold at or about the time of cessation and if so, does the buyer also use it as inventory. Where the answer to both questions is "yes" then the selling price is accepted as the value of that stock. Otherwise [i.e. the answer is "no" for either one or both questions then the market value is taken to be the value of that stock. This is diagrammatically represented as **Table 01.**

LET US LOOK AT SOME EXAMPLES FROM PUBLIC RULING 4/2006

EXAMPLE A

Syarikat A Sdn Bhd ceases its

Table 01



Let us look at some examples from Public Ruling 4/2006

furniture retail business on 31 July 2016. On 10 August 2016 it sold all its remaining stock in trade to Syarikat C Sdn Bhd for RM80,000 although the original cost of the stock in trade was RM120,000.

In the accounts of Syarikat A Sdn Bhd for the period ending on 31 July 2016, Syarikat A Sdn. Bhd. should value its stock in trade at RM80,000.

EXAMPLE B

Syarikat B Restoran Sdn Bhd ceases its business on 30 September 2016. On 10 October 2016, it transferred all its remaining stock in trade valued at RM50,000 to Syarikat C Restoran Sdn Bhd in settlement of a debt of RM60,000.

As the value of the consideration received is RM60,000, Syarikat B Restoran Sdn Bhd should value its stock in trade at RM60,000 as at 30 September 2016.

Further part (c) of Section 35(5) goes on to explain that if all the assets of the business are disposed for a global value then a just and reasonable value should be used for ascertaining the value attributable to the inventory.

EXAMPLE C

Syarikat D Sdn Bhd carries on a business of dealing in used cars. It operates in an open parking lot situated on leased land. A building erected by the company in one corner of the lot is used as an office. As business is slack, the company decides to cease operations. At the end of the accounting period ending on 31 August 2016, the company decides to sell all its assets, including the stock in trade, for RM700,000. The sum of RM700,000 should be apportioned between all the assets disposed of, such as the stock in trade, building and office equipment. Any method of apportionment is acceptable provided that it is just and reasonable.

Section 35(5) (d) provides that

where… paragraph (a) applies, the cost to that other person of that stock in trade shall …be taken to be an amount equal to its value as ascertained under that paragraph. [i.e. the sales (or purchase) consideration]

OTHER ISSUES RELATING TO INVENTORIES

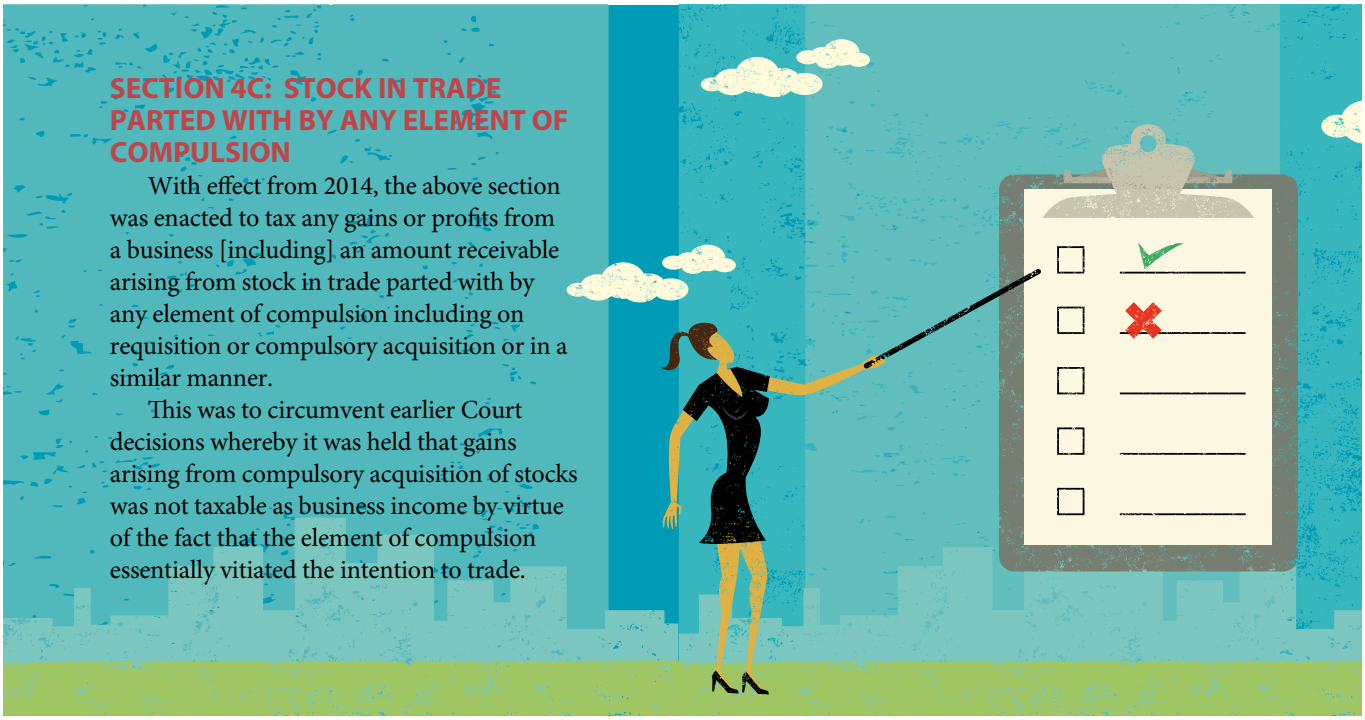
DRAWINGS OF INVENTORIES

This has been discussed in detail in an earlier article [Tax Guardian 2008 Quarter 4] so suffice to state here that Section 24(2) provides that the market value is taken to be the gross income of the drawer. This also includes transfer of inventories to fixed assets.

TRANSFER OF FIXED ASSETS TO STOCKS

Generally this does not have income tax implications unless capital allowances were claimed on that fixed assets in which case balancing adjustments must be done.

However if it involves real property, then the transfer will attract Real Property Gains Tax [RPGT] under Para 17A of Schedule 2 of the RPGT Act whereby a disposal is deemed to have occurred with the market value of the inventories as disposal price and the cost of the fixed



SECTION 4C: STOCK IN TRADE PARTED WITH BY ANY ELEMENT OF COMPULSION

With effect from 2014, the above section was enacted to tax any gains or profits from a business [including] an amount receivable arising from stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner.

This was to circumvent earlier Court decisions whereby it was held that gains arising from compulsory acquisition of stocks was not taxable as business income by virtue of the fact that the element of compulsion essentially vitiated the intention to trade.

asset as the acquisition price.

Also where the real property was originally acquired through a deemed no gain or no loss situation, [under Para 3(b) or Para 17(1)(a)] the disposal price is still the market value BUT the acquisition price is the original acquisition price for the transferor plus any permitted expenses incurred by him.

Obviously, subsequent sale of the inventories will attract income tax.

ALLOWANCE [PROVISION] FOR STOCK OBSOLESCENCE

As with most provisions, they are not incurred and as such do not rank for a tax deduction. However candidates should note that such an allowance or provision if it relates to the closing inventories, should be added on to the profit before tax figure but in the case of opening inventories, it should be deducted, in arriving at the adjusted income.

EXAMPLE D

X Sdn Bhd has a policy of providing an allowance of 10% for obsolete inventories and the figures [net of allowances] are as follows for year of assessment 2017.

	RM'000
Opening inventories	63
Closing inventories	72

In computing the adjusted income of the company, we should add back RM8,000 [i.e. 72 / 90 X 10] for closing inventories and deduct RM7,000 [63 / 90 X 10] for opening inventories.

However, if the question states that the company commenced a policy of providing an allowance of 10% for obsolete inventories in 2017, then the adjustment for opening inventories is not necessary.

That concludes our discussion on the tax implications of dealing with inventories.

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

FURTHER READING

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

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: APRIL – JUNE 2017

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
APRIL 2017								
Workshop: New Tax Implications on Cross Border Transaction in 2017	3 Apr	9a.m. - 5p.m.	Kuala Lumpur	Sivaram Nagappan	400	500	600	8 WS/008
Workshop: Transfer Pricing & BEPS	6 Apr	9a.m. - 5p.m.	Kota Kinabalu	Harvindar Singh	350	450	500	8 WS/019
Seminar: GST & Customs Health Check from Legal & Operational Perspective	12 Apr	9a.m. - 5p.m	Kuala Lumpur	Saravana Kumar & Annie Thomas	450	550	650	8 SE/007
Workshop: Employer's Statutory Requirement in 2017	12 Apr	9a.m. - 5p.m	Johor Bahru	Sivaram Nagappan	350	450	500	8 WS/006
Workshop: GST Impact on Accounting and Tax Issues for Property Developers, JMB/MC & Property Investors	17 Apr	9a.m. - 5p.m	Melaka	Dr. Tan Thai Soon	350	450	500	8 WS/012
Workshop: Transfer Pricing & BEPS	20 Apr	9a.m. - 5p.m	Kuching	Harvindar Singh	350	450	500	8 WS/020
Workshop: GST Impact on Accounting and Tax Issues for Property Developers, JMB/MC & Property Investors	24 Apr	9a.m. - 5p.m	Ipoh	Dr. Tan Thai Soon	350	450	500	8 WS/013
Workshop: Transfer Pricing & BEPS	27 Apr	9a.m. - 5p.m	Penang	Harvindar Singh	350	450	500	8 WS/021
Public Holiday								
MAY 2017								
Workshop: Tax Audits & Investigations	4 May	9a.m. - 5p.m	Ipoh	Harvindar Singh	350	450	500	8 WS/026
Workshop: Transfer Pricing & BEPS	8 May	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/022
Workshop: GST Impact on Accounting and Tax Issues for Property Developers, JMB/MC & Property Investors	8 May	9a.m. - 5p.m	Kota Kinabalu	Dr. Tan Thai Soon	350	450	500	8 WS/014
Workshop: Tax Audits & Investigations	18 May	9a.m. - 5p.m	Johor Bahru	Harvindar Singh	350	450	500	8 WS/027
Workshop: GST Impact on Accounting and Tax Issues for Property Developers, JMB/MC & Property Investors	22 May	9a.m. - 5p.m	Kuching	Dr. Tan Thai Soon	350	450	500	8 WS/015
Workshop: New Tax Implications on Cross Border Transaction in 2017	24 May	9a.m. - 5p.m	Penang	Sivaram Nagappan	350	450	500	8 WS/009
Workshop: Tax Audits & Investigations	25 May	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/028
Workshop: Transfer Pricing & BEPS	30 May	9a.m. - 5p.m	Melaka	Harvindar Singh	350	450	500	8 WS/023
Public Holiday ***(Labour Day: 1 May, Hari Raya Aidilfitri: 25 & 26 June)***								
JUNE 2017								
Workshop: New Tax Implications on Cross Border Transaction in 2017	7 June	9a.m. - 5p.m	Ipoh	Sivaram Nagappan	350	400	500	8 WS/010
Workshop: GST Latest Development & Its Practical Implications	7 June	9a.m. - 5p.m	Kuala Lumpur	Thenesh Kannaa	400	500	600	8 WS/033
Workshop: Tax Audits & Investigations	8 June	9a.m. - 5p.m	Penang	Harvindar Singh	350	450	500	8 WS/029
Workshop: Tax Audits & Investigations	14 June	9a.m. - 5p.m	Melaka	Harvindar Singh	350	450	500	8 WS/030
Workshop: Tax Audits & Investigations	19 June	9a.m. - 5p.m	Kota Kinabalu	Harvindar Singh	350	450	500	8 WS/031
Workshop: Tax Audits & Investigations	20 June	9a.m. - 5p.m	Kuching	Harvindar Singh	350	450	500	8 WS/032
Workshop: GST Impact on Accounting and Tax Issues for Property Developers, JMB/MC & Property Investors	20 June	9a.m. - 5p.m	Kuala Lumpur	Dr. Tan Thai Soon	400	500	600	8 WS/016
Workshop: New Tax Implications on Cross Border Transaction in 2017	20 June	9a.m. - 5p.m	Johor Bahru	Sivaram Nagappan	350	450	500	8 WS/011

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Kindly contact the following Conference Secretariat for more information.

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

   Contact Person
   Ms Yus / Ms Ramya / Ms Jaslina / Mr Jason
   Tel : 03-2162 8989 Ext 121 / 119 / 131 / 108
   Fax : 03-2161 3207 / 2162 8990
   E-mail : ntc@ctim.org.my, cpd@ctim.org.my
   Website : www.ctim.org.my

2. **Akademi Percukaian Malaysia, LHDNM**
   Persiaran Wawasan
   43650 Bandar Baru Bangi
   Selangor, MALAYSIA

   Contact Person
   Mr Zura Zuwan / Mr Khairul Asyraf
   Tel : 03-8924 3600 Ext 132192 / 132155
   Fax : 03-8925 7005
   E-mail : ntc@hasil.gov.my
   Website : www.hasil.gov.my

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

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

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

Recording
Video / Sound recording is strictly prohibited.

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DAY 1

25 JULY 2017
TUESDAY

7:30 – 9:00 am	**Registration & Arrival of Guests**
9:00 – 9:10 am	**Arrival of Guest of Honour** Prime Minister *(invited)*
9:10 – 9:20 am	**Welcoming Speech** President Chartered Tax Institute of Malaysia
9:20 – 9:30 am	**Opening Address** **YBhg Datuk Sabin Samitah** Chief Executive Officer Lembaga Hasil Dalam Negeri Malaysia
9:30 – 10:00 am	**Keynote Address by Guest of Honour**
10:00 – 11:00 am	**Morning Refreshments / Tour of Exhibition Booths / Press Conference**
11:00 – 12:15 pm	**TOPIC 1: Forum: Economic Outlook for 2017 & 2018** Moderator: **Mr Richard Stern** Lead Tax Specialist, Global Tax Team World Bank Group Panel Members: 1. **YBhg Tan Sri Dr Mohd Irwan Serigar Abdullah** *(invited)* Secretary General of Treasury Ministry of Finance 2. **YBhg Tan Sri Dato Dr Lin See Yan** Chief Executive Officer Zeta Advisory
12:15 – 12:30 pm	**Question & Answer Session**
12:30 – 2:00 pm	**Networking Lunch & Tour of Exhibition Booths**
2:00 – 3:00 pm	**TOPIC 2: LHDNM: Strategies & Initiatives** Moderator: **Ms Yeo Eng Ping** Council Member Chartered Tax Institute of Malaysia Speaker: **YBhg Datuk Noor Azian Abdul Hamid** Deputy Director General (Policy) Lembaga Hasil Dalam Negeri Malaysia
3:00 – 3:15 pm	**Question & Answer Session**
3:15 – 4:30 pm	**TOPIC 3: Tax Incentives – Issues and Challenges** Moderator: **YBhg Tan Sri Yong Poh Kon** Managing Director Royal Selangor International Sdn Bhd Speaker: **Ms Nor'aini Ja'afar** Director, Tax Policy Department Lembaga Hasil Dalam Negeri Malaysia Panel Member: **Mr Nicholas Crist** Council Member Chartered Tax Institute of Malaysia
4:30 – 4:45 pm	**Question & Answer Session**
4:45 – 5:30 pm	**End of Day 1 & Refreshments**

DAY 2

26 JULY 2017
WEDNESDAY

8:50 – 9:00 am	**Overview of Day 1** **Mr Poon Yew Hoe** Co-Organising Chairman of NTC 2017
9:00 – 10:15 am	**TOPIC 4: Taxation of Royalties and Services & Withholding Tax Issues - Different Perspectives** Moderator: **Ms Renuka Bhupalan** Council Member Chartered Tax Institute of Malaysia Speaker: **Ms Hazlina Hussain** Director, Dispute Resolution and Board Secretariat Department Lembaga Hasil Dalam Negeri Malaysia Panel Member: **Mr Tan Hooi Beng** Executive Director Deloitte Malaysia
10:15 – 10:30 am	**Question & Answer Session**
10:30 – 11:00 am	**Morning Refreshments / Tour of Exhibition Booths**
11:00 – 12:30 pm	**TOPIC 5: Trending International Tax Issues** Moderator: **Ms Salamatunnajan Besah** Director, Department of International Taxation Lembaga Hasil Dalam Negeri Malaysia Speaker: **Ms Rachel Saw** Head of Asia and Pacific International Bureau of Fiscal Documentation (IBFD) Panel Member: **Mr Vijey M Krishnan** Partner Raja, Darryl & Loh
12:30 – 12:45 pm	**Question & Answer Session**
12:45 – 2:15 pm	**Networking Lunch & Tour of Exhibition Booths**
2:15 – 3:45 pm	**TOPIC 6: Tax Cases Update** Moderator: **Mr K Sandra Segaran** Council Member Chartered Tax Institute of Malaysia Speaker: **Ms Zaleha Adam** Director, Tax Litigation Division Lembaga Hasil Dalam Negeri Malaysia Panel Member: **Mr Saravana Kumar** Partner Lee Hishammuddin Allen & Gledhill
3:45 – 4:00 pm	**Question & Answer Session**
4:00 – 5:00 pm	**TOPIC 7: Tax – Current Concerns & Conflicts** Moderator: **Mr Poon Yew Hoe** Co-Organising Chairman of NTC 2017 Panel Members: 1. **Mr Abu Tariq Jamaluddin** Director, Legal Department Lembaga Hasil Dalam Negeri Malaysia 2. **Mr Mohammed Noor Ahmad** Director, Tax Operations Department Lembaga Hasil Dalam Negeri Malaysia 3. **Ms Phan Wai Kuan** Council Member Chartered Tax Institute of Malaysia
5:00 – 5:30 pm	**End of Conference & Refreshments**

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