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- MANAGING TAX ISSUES FOR GROWTH AND NATION-BUILDING

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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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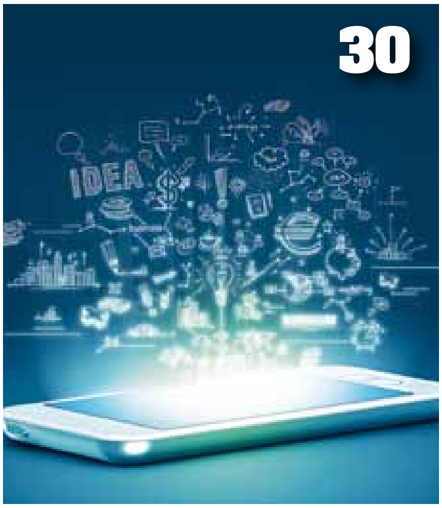
contents

Tax Guardian

VOL.10/NO.4/2017/Q4
OCTOBER 2017



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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**

SEAH SIEW YUN

ENHANCING CTIM'S PROFILE

It has been almost three months since our 2017 Annual General Meeting on 17 June 2017. The Council has made it an immediate priority to enhance the Institute's image and branding. The following activities have been undertaken:

- Media coverage of the National Tax Conference (NTC) 2017.
- Interview by Focus Malaysia in connection with the NTC 2017.
- Introducing CTIM lapel pins which were given free to members who signed up at the CTIM booth at the NTC 2017.
- Printing of CTIM Corporate Brochures.
- Engaging in events organised by other professional bodies i.e. Association of Chartered Certified Accountants Malaysia's Annual Conference 2017, The Malaysian Institute of Certified Public Accountants' Annual Dinner 2017 and The Malaysian Institute of Chartered Secretaries and Administrators' Annual Conference 2017.
- Interaction with Universiti Tun Abdul Razak to enhance our existing partnership and engagements with various other institutions of higher learning.
- Speaking engagements at the Ministry of International Trade and Industry's Workshop on Tax Incentives and the Real Estate and Housing Developers' Association's Seminar on Tax and GST Issues.

Courtesy Visits

On 16 August 2017, my fellow Council Members and I paid a courtesy visit to YBhg Datuk Sabin Samitah [Chief Executive Officer/Director General of Inland Revenue, Inland Revenue Board Malaysia (IRBM)] at his office in Menara Hasil, Cyberjaya. We were warmly welcomed by Datuk Sabin and his senior officers. Datuk Sabin briefed us on the developments in the audits currently being conducted on taxpayers in the food industry and clarified on the penalty rate for voluntary disclosure of unpaid taxes. He considers the Institute as an important partner in the dissemination of tax information and agreed to our request to have joint tax forums. On the issue of the deductibility of tax filing fees, he informed us that the matter is being studied by the IRBM. Please see below for an update on the issue.

Subsequently, on 23 August 2017, we also paid a courtesy visit to YBhg Dato' Sri Subromaniam Tholasy [Director General of Customs, Royal Malaysian Customs Department (RMCD)] at his office in the Customs Headquarters, Putrajaya where we also received a warm welcome. During the visit, we took the opportunity to discuss with Dato' Sri Subromaniam on matters pertaining to GST agent licence, voluntary disclosures, voluntary registrations, technical meetings and public rulings. The Institute will be following up with the RMCD on several of the matters discussed and we will keep you posted on the developments.

NTC 2017

NTC 2017 with the theme of "Managing Tax Issues for Growth and Nation-Building" was successfully concluded on 26 July 2017 after two days of discussions on topical and current matters at the Kuala Lumpur Convention Centre. The success of this premier event was made possible through the mutual co-operation between the IRBM and the Institute. I would like to thank Datuk Sabin for making this partnership possible. I would also like to thank the participants for their support by turning up in large numbers and the chairpersons, speakers, moderators and panellists for each session for their tremendous contributions. I would also like to acknowledge the efforts of the NTC Co-Chairpersons, Committee and the Secretariat for ensuring the smooth running of this event. Finally, I would like to thank YB Datuk Seri Johari Abdul Ghani, Minister of Finance II for officiating this event. I would encourage you to read the article on the NTC 2017 in this issue of the *Tax Guardian*.

Tourism Tax

Tourism Tax which has received wide news coverage in the past few months was implemented recently and different sections or parts of the Tourism Tax Act 2017 (TTA) came into operation effective from 1 August 2017 and 1 September 2017. According to a recent gazette order, Tourism Tax is fixed at RM10 per room per night for a tourist who is not a Malaysian national or a permanent resident in Malaysia. Certain operators are also exempted from collecting Tourism Tax, and from the requirement to register under the TTA. The Tourism Tax is administered by the RMCD that has launched an official website for the Malaysian Tourism Tax System (https://myttx.customs.gov.my) to facilitate online submission and payment. (Note: The Institute had posted updates pertaining to Tourism Tax to its members via our e-CTIM TECH-IT 17/2017 dated 28 June 2017, TECH-IT 24/2017 dated 8 August 2017, TECH-IT 28/2017 dated 18 August 2017 and TECH-IT 30/2017 dated 11 September 2017).

Transfer Pricing Guidelines 2012 (Updated Version)

Members involved in transfer pricing (TP) would be aware that the IRBM has updated the TP Guidelines 2012 in relation to the arm's length principle, intangibles, documentations and commodity transactions, which are effective from 15 July 2017. The Institute has submitted a paper on the CTIM Technical Committee on TP (TC-TP)'s comments on the TP Guidelines 2012 (Updated Version) to the IRBM in August 2017 for their consideration and requested for a dialogue between the TC-TP and the IRBM to discuss it. Please note that the Institute had posted updates pertaining to the TP Guidelines 2012 (Updated Version) to its members via our e-CTIM TECH-DT 49/2017 dated 17 July 2017, TECH-DT 54/2017 dated 3 August 2017 and TECH-DT 62/2017 dated 25 August 2017.

Stamp (Amendment) Bill 2017

The Institute has re-established the Stamp Duty Working Group (SDWG) which comprises of specialists in stamp duties to look into the Stamp (Amendment) Bill 2017 (2017 Bill) which was tabled in Parliament for its first reading in August 2017. The SDWG had previously looked into the Stamp (Amendment) Bill 2016 (2016 Bill) which was tabled in Parliament in November 2016 and was subsequently withdrawn. The 2017 Bill proposed several additional changes in addition to the 2016 Bill and they include additional proposed changes to Sections 15 and 15A, omits the proposed changes to Section 21 and amends the proposed savings and transitional provisions amongst others (the sections referred to are in respect of the Stamp Act 1949). A Paper on the 2017 Bill is being prepared by the SDWG and will be submitted to the authorities for their consideration. (Note: The 2017 Bill was reported in our e-CTIM TECH-IT 29/2017 dated 25 August 2017).

Deductibility of Tax Filing Fees

Many members had raised their concerns to the Institute on the tax treatment set-out in the IRBM's Guidelines on Deduction for Expenses in relation to Secretarial Fees and Tax Filing Fees. The Institute received the IRBM's letter in July 2017 in response to its Paper submitted in March 2017 which sets-out the issues raised by members on the Guidelines. In that reply, the IRBM maintained their position on the tax treatment set-out in the Guidelines. The Institute together with other professional bodies subsequently submitted a joint letter to the Director General of Inland Revenue in relation to tax filing fees. Members will be updated on the developments via our e-CTIM. (Note: The Institute had posted updates pertaining to the issues arising from the Guidelines to its members in our e-CTIM TECH-DT 21/2017 dated 7 March 2017 and TECH-DT 52/2017 dated 31 July 2017).

Upcoming Events

The Honourable Prime Minister/ Finance Minister will be announcing the National Budget 2018 on 27 October 2017. Following from this, the Institute will hold its first CTIM 2018 Budget Seminar on 9 November 2017 at the Berjaya Times Square, Kuala Lumpur. The Kuala Lumpur edition of this series of budget seminars on 9 November 2017 will be special as it will include an unprecedented session with the Heads of the Malaysian Tax Practices from the Big Four accounting firms as one of its highlights (please note that this session will not be available in the budget seminars for other dates/ venues). The CTIM 2018 Budget Seminar will then move on to the other Malaysian cities from 21 November 2017 to 30 November 2017 before coming back to Kuala Lumpur on 5 December 2017. I would encourage you to register early for the CTIM 2018 Budget Seminar nearest to you to avoid disappointment. Do also look up our CPD Events Calendar for Quarter 4 of 2017 (October 2017 to December 2017) in this *Tax Guardian* and the CPD events listed in the Institute's website (www.ctim.org.my).

The last quarter of the year is crucial as we look forward to the tabling of the National Budget 2018. No doubt, there will be a hive of activities following the Budget announcement as the relevant stakeholders will seek to analyse the impact and understand the implications of the proposed changes in the tax legislations. It is hoped that due consideration will be given to all the parties affected by the proposed changes and that the issues and concerns are heard and addressed before the proposed changes are gazetted and become effective.

Editor'sNote

YEO ENG PING

I was reading some interesting media reports about a tax case in the Philippines, involving a dispute between the Bureau of Internal Revenue of Philippines (BIR) and a taxpayer, which appears to be a subsidiary of a large multinational group operating in the Philippines. What caught my eye was the fact that there is currently an ongoing Congressional enquiry, into why the BIR had accepted Peso 65.4 million (approximately USD1.3 million) in additional taxes compared to the preliminary assessment of Peso 8.7 billion (approximately USD169.1 million). The media reports indicate there were questions on the BIR's process and one report quotes the Committee chairman as saying "There is no [BIR revenue memorandum circular] placing accountability on the personnel who assess. They can make any assessments, because there is no accountability. The taxpayer is at a disadvantage."

In fairness, the media reports are scant on technical details and has not been verified. It is not my intention to technically critique this case, it is only to highlight the point that in Philippines, such a large discrepancy is sufficient to initiate a formal inquiry where questions about the process and procedures of the BIR and the responsibilities of the BIR officers are aired. While we in Malaysia do not have an equivalent body for such an inquiry, it is probable there are other avenues of raising such concerns where warranted, as part of the usual check and balance of powers conferred by the law and legislature. It is a nice reminder for all to act accountably, with due care and in a reasonable manner.

As we turn to the upcoming Budget 2018, scheduled to be unveiled at the end of this October, the usual consultations are taking place to ensure the right policies are introduced to support growth of the economy. There are many competing priorities, but one theme I would be intently following is how the government will continue to help our small medium enterprises embrace technology and be part of industrial revolution 4.0. SMEs contributed 37% to Malaysia's gross domestic product (GDP) in 2016 (2015: 36%). The SMEs' GDP grew by 5.2%, which is faster than 4.2% growth of Malaysia's GDP in 2016. Technology is an enabler for productivity, efficiency and ultimately competitiveness – global competitiveness, therefore it would be strategic for policy makers to incentivise a broad-based adoption of technology. However, studies showed that there is lack of SME participation in the adoption of innovation and technology due to reasons like manpower, funding, etc. Most of the SMEs do not invest in new technologies as the productivity gains may not compensate the high cost in the acquisition of the new technologies. SMEs need to quickly increase their market size. Therefore, the announcement of the Digital Free Trade Zone (DFTZ) plan last year is part of the jigsaw, to help smaller businesses increase their market reach globally. Other than the collaboration with Alibaba, not a lot of detail has been disclosed so far. However, there should be some ground-building taking place behind the scenes, and it would be good to see a roll-out of the implementation plan as soon as possible. Time is of the essence and we must move quickly as a nation, or risk being left behind.

From a revenue protection front, I expect to see more on Malaysia's stance on the taxation of e-commerce. This is being fiercely debated by governments around the world, and each is looking for a way to capture their fair share of tax. Will Malaysia go down the "virtual permanent establishment" route? Or would it be via the Goods and Services Tax? Or would it be a new transaction tax being introduced? On the point of new taxes, it is a relief that the Minister of Finance II had put to bed the rumour that inheritance tax will be reintroduced – it is nice to know that death and taxes while certain, will not befall at the same time. But that still leaves the question open on other ways of broadening and protecting our revenue base.

Let's see what's in store for us this year at Budget 2018, it is after all going to be an "election Budget".

"As we turn to the upcoming Budget 2018, scheduled to be unveiled at the end of this October, the usual consultations are taking place to ensure the right policies are introduced to support growth of the economy. There are many competing priorities, but one theme I would be intently following is how the government will continue to help our small medium enterprises embrace technology and be part of industrial revolution 4.0."

CPD EVENTS

The following events were presented by CTIM in the 3rd quarter of 2017:

- GST – Practical Issues & Recent Developments
- Withholding Tax and Double Tax Agreements
- Customs Audits, GST Audits and Investigations 2017 - Surging Ahead in Uncertain Times
- Half-Day Workshop: A Critical Legal Review of Section 4A(II) Withholding Tax on Services and Other Emerging Front-Page Issues
- Understanding the Legal and Practical Aspects on Deductibility of Expenses Based on Public Rulings
- GST & Tax Issues Under RMCD'S Ops CBOS 3.0 & IRB'S Ops Gegar Bersepadu 127B

Mr. Thomas Selva Doss conducted a 2 days workshops on 'Customs Audits, GST Audits and Investigations 2017 - Surging Ahead in Uncertain Times from 16 to 17 August 2017 at the Renaissance Hotel, Kuala Lumpur.

Mr. Vijey M Krishnan conducted a Half-Day Workshop on A Critical Legal Review of Section 4A(II) Withholding Tax on Services and Other Emerging Front-Page Issues on 13 September 2017 at the Renaissance Hotel, Kuala Lumpur.

Workshops on the following topics were conducted by Mr. Thenesh Kannaa:

- GST – Practical Issues & Recent Developments
- Withholding Tax and Double Tax Agreements

The workshop on "GST – Practical Issues & Recent Developments" covered on Goods and Services Tax (GST) rules and practices that are constantly evolving. Also on Implementing GST and submitting GST returns without knowing the up-to-date rules and practices may result in costly penalties. This course also addresses the recent developments and practical issues. This course was timely as the Royal Malaysian Customs Department has sent notices to 60,000 businesses to correct the GST returns.

Mr. Kularaj Kulathungam conducted the workshop on "Understanding the Legal and Practical Aspects on Deductibility of Expenses Based on Public Rulings" at all the major cities where CTIM branches are located. This one day workshop provided participants with a sound knowledge and understanding of income tax laws and regulations pertaining to the various tax regulations on deductibility of expenses. Participants were exposed to Public Rulings, common compliance related provisions provided in the Income Tax Act 1967 (as amended) together with practical examples from selected tax cases.

The Seminar on "GST & Tax Issues Under RMCD'S Ops CBOS 3.0 & IRB'S Ops Gegar Bersepadu 127B" was conducted by Ms. Annie Thomas & Mr. Saravana Kumar at various major cities i.e Penang, Kuala Lumpur & Johor Bahru. The speakers discussed on the ongoing audits and investigations under these new operations by the Royal Malaysian Customs Department and the Inland Revenue Board Malaysia that have exposed a number of GST and income tax issues including fraudulent practices by taxpayers.

GST TRAINING COURSES FOR THE GST TAX AGENT

CTIM & the Royal Malaysian Customs Department (RMCD) successfully organised the 6-day modular GST Training Courses and 1-day examination in the month of August. Various issues on the GST were discussed by the speakers from the GST Implementation Unit of the RMCD.

Courtesy visit to the IRBM by CTIM's Council Members.

Courtesy visit to the RMCD by CTIM's Council Members.

Branch Chairmen's Meeting with CTIM's Council Members.

CESSATION OF MEMBERSHIP

The following members have been excluded from the Membership Register on 30 June 2017 in accordance with Article 28 of the Articles of Association of the Institute:-

NAMES	MEM.NO
Ung Peng Joo	234
Chin Pak Weng @ Yan Chye	335
Somaskanthan S/O Sevanthy Nathan	382
Koay Seng Leong	467
Loo Chor Sin	675
Subramaniam A/L Paidathally	888
Khoo Chuan Keat	964
Chan Mun Wah	965
Ronnie Chia Siang Hee	1047
Kwan Cheong Kaw @ Kuan Yeek Chieu	1054
Loh Sook Kin	1235
Wong Shih Li	1246
Hoy Akam @ Hoy Ah Kam	1364
Teoh Boon Kee	1367
Harry Anak Entebang	1444
Tan Kim Guan	1593
Loh Meng Sin	2284
Indra A/P Thangavelu	2316
Lee Siew Ping	2411

NAMES	MEM.NO
Sin Peng Ann	2556
Lee Say Chyuan	2639
Gunalan A/L Appalasamy	2778
Wong Lee Ken	2807
Fauziah Binti Abdullah	3096
Atmaram A/L M P Kunhi Raman	3189
Ahmad Hezri Bin Sardi	32002
Lim Chin How	3256
Tan Ming Hui	3282
Khaw Mui Sim	3289
Raden Hidya Ayu Binti Raden Ismail	3316
Voon Chet Shen	3420
Azrina Binti Md Nordin	3436
Heng Mui Wai	3560
Angela Cheung-Chin Yin Kwok	3589
Chan Ming Choo	3601
Elizabeth Mathews	3603
Lau Kok Chim	3613

NAMES	MEM.NO
Nur Afizah Binti Mohd Adnan	3630
Valencia Vani A/P Rajen	3657
Lim Sin @ Lim Mock Sam	3710
Maya Saphira Binti Amir Hamzah	3762
Muhammad Faiza Bin Azmi	3813
Daniel Lim Aik Heng	3832
Sukhdev A/L P L Seoni	3889
Edie Norhisyam Bin Abdul Kadir	3917
Ramli Bin Mohamed Ruskor	3923
Rosnah Binti Kasah	3942
Faizah Binti Aman	3949
Ahmad Suazzri Bin Sannusi	3959
Thanamalar A/P Rajoo	3984
Rus Faizan Bin Muhamad	3992

NATIONAL TAX CONFERENCE 2017

MANAGING TAX ISSUES FOR GROWTH AND NATION-BUILDING

Majella Gomes

"We have restructured LHDN to improve services," he confirmed, adding that the use of technology was being intensified in staff training and enforcement, primarily to ensure the integrity of tax collection, disclosure and transparency, and that the correct amount of taxes was collected, because "Some people tend to interpret laws to their own advantage." LHDN's main aim, however, was to help SMEs to comply better. Among measures recently taken was the setting up of LHDN's KL Litigation branch to help improve operations. He said that LHDN has always prioritised collaboration with partners, and will continue to do so.

Guest of Honour Datuk Seri Johari Abdul Ghani, Minister of Finance II, in his keynote address, divulged that Budget 2018 was currently being formulated; the NTC was a good avenue of information as it provided a platform for discussion and feedback that was integral to the formulation of effective national policies. Noting that the theme of the 2017 Conference was an extension of the 2016 theme, he said Malaysia had experienced seven years of consecutive

growth, indicating its resilience and flexibility, and the ability to rebound from economic hardship affecting the rest of the world. "But there is no room for complacency," he warned. "Growth needs to be underpinned by diversity."

He stressed that while the need for fiscal prudence was paramount, it could not come at the expense of social disharmony. "Distribution of resources has to be sustainable," he said. "All strata of society must be cared for. There should be greater inclusiveness and diversity, and infrastructural programmes should focus on reducing regional differences. Taxation needs to be sustainable, more do-able and not detrimental to the economy." He urged all concerned to foster a culture of positivity towards tax, a strategy already in the pipeline at LHDN, where related issues were being studied, and guidelines were being developed particularly for Withholding Tax.

"Withholding Tax protects local industry and helps develop the domestic services sector," he explained. "Many companies have approached us for tax exemptions but these are provided on a case by case basis." Commenting on increasing compliance by firms on a voluntary basis, he said that while it sent a positive message that all sectors were doing their bit for the country and economy, there was still a need to change the culture and attitude towards taxes in general. The keynote address also touched on other issues facing the industry and profession, such as the rise of the digital economy, widely considered as the 4th Industrial Age.

"All strata of society must be cared for. There should be greater inclusiveness and diversity, and infrastructural programmes should focus on reducing regional differences. Taxation needs to be sustainable, more do-able and not detrimental to the economy."

"Today, we have new business models powered by digital technology," he said. "Business is being done faster than ever before, but it is complex and will impact on tax matters which are becoming borderless and complicated." Tax planning strategies were imperative, and more efficient collection of data could improve tax compliance across jurisdictions. Auditing will have to include new elements like data analytics and other related services, to be more effective. "It is crucial that tax professionals embrace technology," he stressed. "They need to equip themselves with the necessary skillsets. They could adopt new technologies like Blockchain, for instance, to increase their tax capabilities and widen the services they currently offer."

He cautioned however, that although a thorough understanding of how to apply technology was necessary, technology on its own was only a tool that enabled and improved work methods. "Technology helps us to do work better but we need ethics to discharge our responsibilities well, and do our duty to the best of our abilities,"

he advised. "Tax planning is acceptable but aggressive tax planning wahich prioritises tax avoidance is definitely not encouraged. We are looking at tighter enforcement and more stringent compliance. The tax ecosystem should be structured to benefit both taxpayers and the government." He reiterated that it was not LHDN's (and by extension the government's) intention to penalise anyone but to facilitate business and encourage commerce.

He urged tax consultants to discuss matters with LHDN more thoroughly before advising their clients so that better understanding of all parties concerned could be derived, before satisfactory solutions could be found for everyone. Above all, he said good corporate governance should be what ultimately drives operations. "We must continue to enhance our own collaboration in order to drive the development process; in doing so, we will be able to achieve a fair and effective system for all," he concluded.

TOPIC 1 LHDN – STRATEGIES AND INITIATIVES

Moderator Yeo Eng Ping, a CTIM Council Member, opened the first session with questions for Speaker Datuk Noor Azian Abdul Hamid, Deputy Director General (Policy), LHDN, which included key changes in LHDN since Datuk Sabin Samitah took over as CEO in December 2016; changes in strategy; LHDN's focus on audits and investigations; the balance between enforcement and taxpayer education; LHDN's policy on taking issues to court vs settling out-of-court; its latest investment in technology and expected outcomes; Malaysia's policy on taxation of e-commerce transactions; latest position on withholding taxes for income from services performed in Malaysia; LHDN's views on the tax incentive regime in Malaysia; management of non-compliance issues; key focus areas of LHDN, new laws to be introduced, areas of scrutiny and other LHDN priority areas.

On LHDN's focus areas for investigations, Datuk Noor Azian said these were based on risk analysis. "We look at trends, information received and behaviour patterns," she said. "If it appears as if we are targeting a particular profession, it may be because their services are being abused. Again, it is important to be able to spot patterns – and this is triggered by the risk analysis process." Asked if LHDN was comfortable with the balance between the right amount of enforcement and taxpayers' education (on compliance and other tax-related issues), she pointed out that the public usually hears about LHDN's activities only when these are publicised.

"But there are other things we do, that are not publicised," she continued. "A specific division within LHDN handles talks and education programmes but we are cognisant of the need to maintain a balance between expending resources to achieve our aims and outcomes, and keep compliance costs low." In the wake of the increase in the number of tax cases being filed in court, Yeo asked Datuk Noor Azian what LHDN's policy was on out-of-court settlements. "Cases are referred to the Special Commissioners (SCIT) when there has been no public ruling, or there are questions of fact, inadequate documentation or penalties," Noor Azian explained. "In the event that a case does go to court, it is because of the nature of the case."

She also mentioned that the LHDN had been reorganised, and the KL Litigation and Dispute Resolution Branch had been established. On LHDN's use of technology, she said that it had been using technology extensively since 2000. "In 2008, e-filing was enabled," she pointed out. "E-filing for companies has been compulsory since the year of assessment 2014. We also use the Debt Management System, DMAS, to analyse payment histories. This enables us to project the taxpayer's ability to pay, and helps us predict who is likely to default, and who to pursue." She divulged that from 2017 onwards, LHDN would be applying big data and advanced analytics, and that concrete action plans were already in the pipeline regarding digital economy-related issues at international level.

"Recommendations by the OECD and G20 on BEPS, and re-evaluation of traditional Significant Economic Presence Tax as well as the imposition of withholding tax on digital transactions and equalisation levy are being seriously considered," she said. "All these mechanisms capture the appropriate taxes domestically and internationally. They are all related." Yeo said that a number of submissions had been made to reconsider the position on taxation and withholding taxes and their impact on DTAs like Singapore, asking what LHDN's position on this was.

Datuk Noor Azian said that a new

UN Model Tax Treaty Article on fees for technical services was due to be launched in October 2017, to enable the imposition of taxes where services are provided without physical presence, which will be good for BEPS mitigation. Yeo asked what LHDN's position was on the request by professional bodies for drafts to be exposed for discussion before being mandated into laws, to which Datuk Noor Azian replied that LHDN was generally open to this but so far discussions had been one-sided, with most people wanting to discuss incentives, reduction of fees and tax reliefs more than anything else. "Unfortunately, they rarely want to talk about ways of generating revenue for the country," she remarked.

TOPIC 2 *FORUM – ECONOMIC OUTLOOK FOR 2017 AND 2018*

"We are in an interesting period; there is growth all over the world," stated session moderator Richard Stern, Lead Tax Specialist, Global Tax Team, World Bank Group. "The drive towards global economic integration is getting stronger, particularly in Europe and Asia but there are elements which may cause instability, like Brexit, and the developments in the US economic decision-making is becoming more difficult, compounded by the growth of the digital economy and dogged by international tax issues. In addition, MNCs are more adamant about taking profits for themselves, than they are about being good corporate citizens. Globalisation has taken hold, and there are more challenges to come."

Commenting that Malaysia's economic performance had been good overall, panel member Tan Sri Dr. Mohd Irwan Serigar Abdullah, Secretary General of Treasury, Ministry of Finance conceded that the private sector was imperative to drive growth. "More private sector activity means more tax," he said. "The GST which was implemented in 2015, for instance, was timely because of the decline in oil prices. We needed the money. The fiscal deficit is currently 3.1% and we hope to have it down to 3% in 2017 – so that we need to borrow less to finance development expenditure. We do not borrow to cover operating expenditure." He gave a quick overview of the country's economy, quoting 5.6% GDP growth for Q1 2017; inflation at 3.6% as at June 2017; and current reserves of USD99.1 million.

Describing Malaysia as an open economy where anybody could invest, he said that with a lot of investment coming from Saudi Arabia and India, the country was not totally dependent on China. As such, Malaysia's main strength was still in manufacturing and commodity exports. However, he stated that imports were increasing although efforts were being made to minimise this as "We do not want to fall into deficit." Among the major challenges he identified were volatile commodity prices, geopolitical tension, competitiveness, protectionist policies, the volatility of financial markets and policy uncertainty in advanced economies. There was an urgent need to find other markets, he said. "We have ample liquidity," he confirmed. "But we need stability."

Admitting that Malaysian regulators were a bit slow in transforming, he cited the example of taxing businesses online, which was not yet possible locally. "We need to embrace technology and find mechanisms to do this," he stressed. While many challenges exist, there are opportunities to be had as well. He singled out Malaysia's political stability as a major element in attracting domestic and foreign investment, and predicted that the country will experience improved trade and bilateral ties with China and India, particularly through the Belt & Road Initiative and higher tourist arrivals. Stronger global semiconductor sales, and domestic infrastructure and transport projects like the MRT and RapidKL were also expected to spur the economy.

Commenting briefly on the National Transformation Programme, TN50, he described it as long-term vision but cautioned that "We all have to work together to move forward. We need ideas on how to increase tax revenue. For this to happen, the tax system needs to have enough flexibility to accommodate an increasingly dynamic economy." While agreeing with the Secretary General on the rapidly synchronising world economy, Tan Sri Dato' Dr. Lin See Yan, CEO, Zeta Advisory, pointed out some factors to consider when analysing the current situation: disconnects, consumption, manufacturing and insufficient competition.

Explaining the use of these metrics, he said, "In 60 years of growth, the

world has only seen three instances where unemployment fell below 4.5%, but this situation has rarely lasted long, and has always been succeeded by economic turbulence. The long-term trend indicates that something is going to happen. The three major stock exchanges in the world have not come down more than five per cent for the first time ever; something is going to happen, but we don't know what," he said, quoting examples from different continents to underscore his assertion.

"In Asia, individual countries are doing okay but there is a lack of cohesion. ASEAN is largely ineffective. And is the Malaysian economy fundamentally strong? Frankly, I am not too sure. There are signs of fatigue; the focus is on short-term growth, and its current drivers of growth are not robust," he said. "There is a disconnect between the financial market and the fundamentals. How reliable is the driving force of consumption? Consumption is technically a weak driver, and increased consumption ultimately becomes a drag on the economy. We should be relying on investment, which is a better, more reliable driver. We are also suffering from low productivity, compounded by government-supported enterprises crowding out the private sector."

He stated that manufacturing had declined, and while construction could still be considered a driver, it was unsustainable as it was mostly infrastructural. Government-supported enterprises were causing low productivity levels due to insufficient competition. "Seven out of the top ten companies listed on Bursa Malaysia are government-supported enterprises," he said. "Together, they make up 75% of market value." The statistics on unemployment, particularly youth unemployment, were even more alarming. While the national rate of unemployment was 3.5%, youth unemployment was three times that – 10.7%. Additionally, 24% of recent graduates were unemployed, and of those who had jobs, 54% were earning less than RM2,000 per month.

This indicates a labour mismatch, and limited job creation, Dr. Lin pointed out. "The labour supply is not industry-ready and no jobs are being created that are able to push earnings higher," he said. There was also the impact of the variable US Dollar to consider, although there were other reasons for a greatly weakened Ringgit. The Ringgit, he said, had depreciated against all currencies. "There would not be any reason for the Ringgit to depreciate in the way it has, if our fundamentals were strong," he stressed. "This is vital because we are talking about the purchasing power of our own currency. A weak Ringgit, although it will allow the purchase of Malaysian goods abroad at lower prices, is not the answer."

Instead, he was of the opinion that serious structural reforms were necessary for the country to stave off the spectre of a stagnating economy. "Labour, for instance, needs an overhaul," he said. "We are still using legislation from the 1950s and 60s. People are being paid bonuses without any increase in productivity, and taxes are being paid mostly by the middle class, who are also the spenders. Economies grow because of population and productivity growth – but our population is not replacing itself, nor is it becoming more productive." Reforms, he said, would set the stage for the private sector to capitalise on opportunities. "But most of all, people need to feel invested in the country," he concluded. "They must feel they belong, and have confidence in the system."

TOPIC 3 TAX INCENTIVES – ISSUES AND CHALLENGES

In his quick overview of investment promotion in the country, moderator Tan Sri Yong Poh Kon, Chairman, Royal Selangor International Sdn Bhd, covered the Promotion of Investment Act (PIA) 1968 and the wave of investments that saw the starting up of Free Trade Zones and the electronics industry, and the developments that led to the layoffs and retrenchment a decade later, followed by the shortage of labour in the country. "We should ensure that incentives are effective," he cautioned. "If they have outlived their usefulness, we need to rethink them." Tax incentives are defined as anything – such as a reinvestment allowance – that reduces the tax burden of enterprises in order to induce them to invest more, both locally and internationally.

Quantifying the amount of incentives offered as a percentage of LHDN's collection of RM121.2 billion in taxes for 2015, Nor'aini Ja'afar, Director, Tax Policy Department, LHDN, stated that by

LHDN's (conservative) estimate, about 10% of this amount had been forgone due to tax incentives, over the last four years. "Without aggressive tax incentives, more can be collected," she said. "But there are challenges. Incentives are not an effective tool; they create inequalities and inefficiencies." Some incentives – like exemption allowances and deductions – are automatically granted under the terms of the PIA. Incentives used to be given mainly to the manufacturing sector but were now also provided for services such as Islamic banking.

Each economic region in the country – East Coast Economic Region, Sarawak Corridor, Sabah Development Corridor, Northern Corridor Economic Region, Iskandar Economic Region – currently has its own incentives, so LHDN faces growing challenges, she admitted. "We are responsible for honouring these incentives," she said. "The policies are under the Ministry of Finance; LHDN has to ensure the policies are not abused." Ironically, there may be too many incentives currently on offer, and their respective intentions, policy and interpretation may be unclear. This could complicate compliance matters, making the incentive structure and framework difficult to manage, and even opening them to abuse. But, although incentives existed in many forms, their outcomes tended to be similar.

"This could lead to 'incentive shopping' (on the part of potential applicants) and ultimately defeat the purpose of having incentives, which is mainly to spur investment," she pointed out. Incentives are often not tailored to the application; they may lack clarity or be misinterpreted. Subsequent changes or amendments to the incentives often cast LHDN in a bad light, she said, although the ruling would have been made in good faith. Quoting the example of the Reinvestment Allowance (RA) that is carried forward every year, she said that about RM30 billion could be lost in the future. "The government needs to get back as much as it gives," she concluded. "It cannot keep giving out incentives without seeing returns."

Thanking her for giving a regulator's perspective, panel speaker Nicholas Crist, CTIM Council Member, agreed in principle that in keeping with the terms of a bargain, "If the government gives you, you should give back." Due to the large number of tax incentives, he remarked that tax agents needed to guide their clients carefully through the application processes for the respective incentives. "You should establish how reasonable or robust their business plan is," he advised. "There is a case for giving deductions in tax incentive applications but there is also a need for specific situations under which tax incentives are given."

Commenting on tax avoidance – sometimes called "aggressive tax planning – and BEPS, he said that while tax incentives were frequently used to attract FDI, the tax burden would ultimately shift to another country. Legislation should therefore be clear. China, for example, has a taxpayer clause in agreements where dividends accumulated in low-tax jurisdictions are given back; Australia has had massive rewrites of its legislation to improve clarity. "Things should be simplified and consolidated," Crist continued. "Provisions put in (to govern, regulate and manage tax incentives) should protect against avoidance." He also addressed the possibility of alternatives to tax incentives, suggesting that the corporate tax rate could be reduced, and tax credits could be used to offset future tax bills.

However, these will need further research and feedback before appropriate policy can be formulated. In the meantime, it looks like the current tax incentives are here to stay. From the perspective of business, tax incentives and other business support like subsidies were viewed as profits, and decreasing them in any way would mean a curtailment in profitability; the government perspective however, varies considerably on this point. "While individual businesses see incentives as adding to their bottom line, the government's perspective takes a wider view. Tax incentives (when correctly applied) could translate into new jobs, improvement of skills in the labour market and the transfer of technology, among other things," he concluded.

TOPIC 4 *TAXATION OF ROYALTIES AND SERVICES & WITHHOLDING TAX ISSUES – DIFFERENT PERSPECTIVES*

The moderator for this session was Renuka Bhupalan, Council Member, CTIM. Hazlina Hussain, Director, Dispute Resolution and Board Secretariat Department, LHDN, was the speaker and Tan Hooi Beng, Executive Director, Deloitte Malaysia, was the panel member. In her overview, Bhupalan talked about the changes to Section 15A of the Income Tax Act that covered taxation of income derived from services not performed locally, and for software. Hazlina's presentation detailed the taxation of royalties, taxation of services, withholding tax issues, how public rulings and guidelines will be affected, and talked about the Alam Maritim Federal Court case.

"With effect from 17 January 2017, the definition of royalty in Section 2 of the Income Tax Act (ITA) 1967 included software," Hazlina said. "And copyright will include software, which is also protected under the Copyright Act 1987, where it is protected as a literary work. Tax practitioners should be aware that royalties on software will be taxed." The amendment to Section 15A, she said, was a derivation provision from Section 4A, which was introduced in 1983 as a result of the Euromedical Industries Ltd case, where management fee was considered 'royalty' under one provision but not another, under the Double Taxation Agreement (DTA). The company was not resident in Malaysia; therefore no tax could be imposed on income earned.

However, with the amendment, all offshore and onshore services are now subject to withholding tax with effect from 17 January 2017. The rationale behind the amendment is that the location of the business is not integral to taxation; it is not necessary for it to be physically present in a jurisdiction, for the source country to impose tax. Some enterprises do not have a physical entity where they operate. This is also part of the BEPS Action Plan in response to the need to address the growing challenge of profit shifting. "The position taken by LHDN has always been consistent," said Tan Hooi Beng, commending them on this. "But the issues surrounding Section 4A have to be viewed from the technical and business aspects. Do not use Section 4A to tax everything!"

He said that some Acts have not been thoroughly tested, and their scope could actually be too wide. For instance, should all charges – bank, printing, insurance etc – be subject to tax? From the business aspect, the cost of doing business, the possibility of foreign investors exiting (after they no longer qualify for pioneer status, for instance) or relocating their businesses, knowledge transfer and the competitiveness of local markets were also factors to consider. Opining that Section 4A should be aligned with Article 13, he urged more clarity on this matter so that Malaysia could maintain its position as an attractive investment destination.

TOPIC 5 *TRENDING INTERNATIONAL TAX ISSUES*

Moderated by Salamatunnajan Besah, Director, Department of International Taxation, LHDN, this session's speaker was Rachel Saw, Head of Asia and Pacific, International Bureau of Fiscal Documentation (IBFD); Vijey M Krishnan, Partner, Raja, Darryl & Loh, was the panel member. "We can no longer keep our heads in the sand and think that international happenings will not affect us," Saw said. "GST or VAT is one of the international trends right now. India is the latest to implement it – at both state and federal levels. China converted business/corporate taxes to GST in 2016. Nine countries, including Malaysia, have implemented GST in the past five years, and at least ten more are considering it."

Indonesia, New Zealand and Thailand, which already have GST, are proposing to expand its scope, but GST/VAT is not the only international tax issue that is trending. There is e-Commerce, Saw added, as well as Country-by-Country Reporting (CbCR), Common Reporting Standard (CRS) and Automatic Exchange of Financial Information (AEOI), Foreign Account Tax Compliance Act (FATCA), Multilateral Instruments (MLI) and Base Erosion Profit Shifting (BEPS). "It is good to expand the tax base or scope but extra care has to be taken when introducing new taxes," she cautioned. "Most taxpayers do want to comply but they are unsure of what the actual requirements are, so they need help to do this."

Saw presented some important statistics concerning the trending issues; a case in point being the increasing transparency required by all jurisdictions. "At least 50 jurisdictions now require CbCR, and 500,000 businesses are listed under the Exchange of Information on Request (EOIR)," she said. "About €85 billion has been tracked by these disclosures that request specific information." Stressing that there was currently a strong push to gather data, she explained that this was becoming a more desirable way to ascertain how individuals or corporations should be taxed. Tax authorities the world over are gearing up to use the information they have collected over the years, she cautioned. "With all this information available, there will be greater scrutiny," she added.

Not only will there be scrutiny – there will be joint (and closer) scrutiny as different authorities tighten their procedures and start collaborating with each other, making taxation completely unavoidable in the future. Countries will still have their own taxes, she said but more ways to implement taxes better and faster will be developed in parallel with increased information about compliance and its requirements. Incentives are likely to be taken off the table, although there is currently a lot of uncertainty about this for both taxpayers and tax authorities. Identifying the OECD as the driver behind this global move, she said that countries will ultimately bow to peer pressure and implement similar taxes worldwide, a move that will impinge on sovereignty.

Remarking that taxes cannot be discussed independently of the law because taxes are created by law, Vijey M Krishnan questioned the benefits of taxes created by bodies like OECD saying, "BEPS (for instance) is being marketed on the concept that everyone should pay a fair amount of tax but this is a moot point. When is tax ever fair?" He also pointed out that many instances of tax application had led to treaty abuse and incentive-shopping, as in the case of investing in India through Mauritius to avoid certain taxes. The Indian authorities did not like it but the courts

had a wider, more purposive perspective. "Laws are expressed in language and can be interpreted," he said. "But double taxation for example, is the effect of treaties; so change the treaty."

Speaking on the rise of e-commerce, he described it as the biggest driver of laws that have come up, but these laws were simultaneously complex and difficult to apply because e-commerce dealt primarily with cross-border issues or transactions and all their attendant complications. He quoted Uber as an example, saying that every credit card transaction was actually being paid to a foreign entity. There is very little the credit card user can do to stop this foreign entity collecting information, which could be confidential, through the transaction. He also cautioned that once Multilateral Instruments (MLIs) were signed, there will very likely be new provisions in existing Double Taxation Agreements which could change the way DTAs are applied. "Things will become more complicated," he warned.

Another issue arising from the implementation of new provisions is the worry that there will be a retroactive effect, or other implications that will not become obvious until the implementation is already under way. With so many possibilities of tax increases and their accompanying complications, the dynamic tax landscape of the future does not seem to be a comforting or encouraging one. Even company directors, seemingly, are under tremendous pressure to comply and their duties grow more onerous by the day. "Underpayment is a breach of law; overpayment is a breach of fiduciary duty to shareholders," he said. "It is easy to construe a lot of actions as not acting in the best interests of the company. Things are just getting harder!"

Salamatunnajan concurred on this point, adding that Malaysia had just signed the Inclusion Framework in February 2017, which meant that it will have to follow the Framework's guidelines and regulations from now on. "This will incur more costs," she said. "It will mean that more people will have to be employed to ensure that we are in compliance with the rules."

TOPIC 6 TAX CASES UPDATE

Updates were given on 12 cases involving the following: Labuan Offshore activities; Withholding Tax issues on royalties; Waiving of interest; Capital allowance; DGIR's Audit Finding Letter; Exemption of income; Revenue Receipt v Capital Receipt; Subsidy payment; and Income Tax Act 1967 v Real Property Gains Tax 1976. Moderator K Sandra Segaran, Council Member, CTIM, remarked that judicial review cases were on the rise although these required leave of the High Court to proceed. "The taxpayer has to show evidence that the case cannot go before the SCIT," he said. "Taxpayers seem to prefer this route, although it is not clear why."

Session Speaker Zaleha Adam, Director, Tax Litigation Division, LHDN, said that a total of 724 cases had gone before the SCIT between 2015 and June 2017. In 2015, there were 271 cases; in 2016, 356 and 290 as of 30 June 2017. Detailing the updates on cases before the courts, she started with Positive Vision Labuan Limited. In YA 2011, Positive Vision Labuan Limited, GA Investment Limited and Avenues Zone Inc, all offshore investment holding companies, received dividends and made irrevocable elections under Section 3A of the Labuan Business Activities Tax Act (LBATA) 1990.

The issues were if the MoF could declare the cessation of an Exemption Order from a stipulated date without revoking it; whether a Labuan Offshore Company which elects to be taxed under Section 3B of the ITA is entitled to exemption under the Exemption Order; and whether a Labuan Offshore Company which elects under Section 3A LBATA to be taxed under ITA is entitled to tax exemption under the Exemption Order. The High Court and the Court of Appeal dismissed the taxpayers' judicial review applications, and at the Federal Court, the taxpayers' appeals were dismissed. It was decided that the Exemption Order had to be read in harmony with Sections 3A and 2(3) LBATA and 3B LBATA.

On the matter of Withholding Tax Issues on Royalties, three cases were presented: Mudah.my Sdn Bhd, Thomson Reuters Global Resources and Alcatel Lucent Malaysia Sdn Bhd. The issues pertaining to Mudah.my were whether the DGIR's letter to the taxpayer was a "decision" and thus amenable to judicial review; or whether the DGIR's letter merely notified the taxpayer of initial findings of the DGIR's field audit; or whether the taxpayer's move to file for judicial review was premature and abused the court's process. The High Court agreed with the taxpayer and granted the reliefs it sought. The court further decided that a payment for the right to use or operate a copyrighted software or programme is not a royalty payment and thus not subject to withholding tax.

Subsequently however, the Court of Appeal allowed the DGIR's appeal, holding that the letter of finding was not a decision; that domestic remedy was preferable to judicial review; and that payment of the use of software does fall within the scope of royalty.

The case of Thomson Reuters Global Resources involved the issues of whether the distribution fee was royalty under Article 12(4) of the Malaysia-Swiss Federal Council Double Taxation Agreement (DTA) 1974; and whether the distribution fee was considered as the taxpayer's business profit and thus taxable only in Switzerland. The SCIT allowed the taxpayer's appeal and the decision was affirmed by the High Court. The Court of Appeal dismissed the DGIR's further appeal on the grounds that distribution payment was not subject to withholding tax; payment for services rendered was not a royalty; the payment was not related to special commercial knowledge; there was no transfer or grant of knowhow or property rights; there was no permanent establishment in Malaysia – tax was thus not applicable; and that the definition of 'royalty' in DTA prevails over ITA.

In the Alcatel case, having paid withholding tax under protest, Alcatel Lucent argued that the DGIR seemed uncertain which section should be applied, and failed to provide reasons for the decision, whereas the DGIR argued that he was not bound to give reasons under the ITA; furthermore, the taxpayer knew about the withholding tax issues as they had been raised during negotiation meetings. Payments were royalties for the use of software. However, the High Court and Court of Appeal allowed the taxpayer's judicial review application on the grounds that the demand letter was illegal, the DGIR was not sure which sections applied and did not give reasons for the demand; payment was not royalty under the ITA, and it was wrong to rely on the draft agreement.

The Federal Court, however, allowed the DGIR's appeal, saying that the letter referred to both Sections 109 and 109B of the ITA, and was not bad in law; also, there was no provision demanding that the DGIR provide reasons. The court noted that no appeal had been filed under Section 99 of the ITA; such an appeal would have given the taxpayer the opportunity to rebut that the payments were royalty, and to rebut Section 15A of the ITA. Failure to appeal established that the payments were royalty and income derived from Malaysia.

The waiving of interest case involved Bandar Nusajaya Development Sdn

Bhd; the DGIR took the stand that the interest waived by the taxpayer's holding company (amounting to RM181,863,826) should have been brought to tax under Section 22(2)(a)(i) of the ITA. The High Court and Court of Appeal allowed the taxpayer to bring the matter before judicial review but the Federal Court allowed the DGIR's appeal with costs, setting aside the decision of the lower courts. Its decision was that misinterpretation of paragraph 22(2)(a)(i) of the ITA was not an error of law that amounts to the lack of jurisdiction, and therefore judicial review was not the correct procedure for the taxpayer to challenge the assessment. The proper process here would have been to file an appeal with the SCIT.

Infra Quest Sdn Bhd was the firm involved in the capital allowance matter, where the issues were whether notices of assessment for YA 2003 and 2004 were time-barred, and whether the taxpayer was entitled to claim capital allowances on capital expenditure incurred to build telecommunication towers. The taxpayer's appeal was dismissed by the SCIT but the High Court allowed the taxpayer's appeal on the grounds that negligence on the part of the taxpayer had not been proven, and that the taxpayer had satisfied the requirement that the telecommunication towers it had provided were for business purposes. The DGIR then appealed against the High Court's decision in the Court of Appeal but the Court of Appeal upheld the High Court's decision.

On 10 December 2014, the DGIR issued a letter to Flextronics Shah Alam Sdn Bhd, stating that notices of assessment for YA 2000-2006 would be issued. The taxpayer filed for judicial review to quash the DGIR's letter on the grounds of illegality, irrationality and procedural impropriety. The issue here was whether the DGIR's letter of 10 December 2014 amounted to a decision. The High Court dismissed the taxpayer's application, and subsequent appeal to the Court of Appeal was also dismissed.

The issue of Exemption of Income involves the Society of La Salle Brothers, a charitable institution with tax exemption status from the Comptroller of Inland Revenue Malaysia since 1970. In 1995, the DGIR notified the taxpayer about the requirement to re-apply for tax exemption status. Subsequently, notices of assessment for YAs 2004, 2006, 2007, 2011, 2012 and 2013 were issued. The taxpayer requested that payment be made in 28 monthly instalments but then filed application for judicial review to quash the notices of assessment. The issue was whether the taxpayer was still entitled to tax exemption under Income Tax Ordinance 1947 which had undergone numerous amendments. The High Court dismissed the taxpayer's appeal but the Court of Appeal allowed it. The DGIR has filed application for leave to appeal to the Federal Court.

Updating on the Revenue Receipt v Capital Receipt case involving Toxicol Sdn Bhd, Zaleha said that the issues here were whether the sum of RM23 million received by the taxpayer for the sale of contact should have been treated as income or revenue receipt, or as capital receipt; and whether there was a forced sale of the taxpayer's business. The SCIT found that tax was chargeable under Section 4(a) of the ITA and there was never a forced sale; the taxpayer voluntarily sold the contract. The High Court allowed the taxpayer's appeal but on appeal by the DGIR to the Court of Appeal, the taxpayer's appeal was dismissed.

The Payment of Subsidy case involved Chantika Kilang Beras Sdn Bhd, the issues being whether the taxpayer had mistakenly declared subsidy payments as business income; whether subsidy payments were correctly brought to tax as business income; and whether Exemption Order No 22/2006 could be applied to the taxpayer. The SCIT found that the subsidy was for padi farmers, not rice millers (which was Chantika's principal activity), and that the payments received by the taxpayer were compensation, not subsidy. The High Court upheld the SCIT's findings but the Court of Appeal found for the taxpayer, and overturned the decisions of the High Court and SCIT.

The ITA 1967 v RPGT 1967 case involved property investment company Insaf Tegas Sdn Bhd. In 2010, after a field audit on the taxpayer, the DGIR issued a Notice of Assessment with penalty on the disposal of 50 acres of land that had been sold in 2004. The issues here were whether the disposal was subject to tax under ITA or RPGT, and whether penalty was rightly imposed under Section 113 of the ITA. Both the SCIT and High Court dismissed the taxpayer's appeal as the disposal of the land was treated as disposal of stock in trade; the taxpayer had appointed the buyer as the developer, with all documentation and company resolutions confirming this. The taxpayer's appeal to the Court of Appeal was dismissed with costs.

TOPIC 7 TAX – CURRENT CONCERNS & CONFLICTS

The moderator for the final session was Poon Yew Hoe, Co-Organising Chairman of NTC 2017; panel members were Abu Tariq Jamaluddin, Director, Legal Department, LHDN; Mohammed Noor Ahmad, Director, Tax Operations Department, LHDN; and Phan Wai Kuan, Council Member, CTIM. Explaining that this final session would try to cover issues that were not covered in the other sessions, such as SMEs and tax fees, Poon queried on the seriousness of current LHDN tax investigation efforts. Abu Tariq addressed this in the light of Section 104 that applies to expatriates leaving Malaysia and permission to appeal tax decisions, saying that there was no need to inform the taxpayer before issuing the certificate that allows them to appeal.

Mohammed Noor Ahmad added that Section 22 under the RPGT and Section 104 are "last resort" measures. "It's not that we want to penalise – but we do need to enforce," he explained.

"Those leaving Malaysia should check the LHDN/Immigration website before leaving, to see if they are on the list, especially if they are undertaking the Haj, for instance."

Phan Wai Kuan clarified that in a public ruling, the LHDN had stated that the payment for developing software did not qualify as plant. Abu Tariq remarked that this was a policy decision and declined to comment further on it. To a query by Poon on whether there have been changes in the law regarding interest restriction or interest deduction during certain periods, Phan said that it was currently a focus area for tax audit. "The issue is the allocation of common expenses," she said. What is the correct method of apportionment?"

She pointed out that clarity was needed urgently on public rulings. Abu Tariq explained that the move to a single-tier tax system began in 2007 and during the transitional period from 2008 to 2013, there were two kinds of systems in place. "There is a need to restrict interest, especially where taxpayers have moved to the single-tier system, as it involves a substantial amount of tax," he said. "The public ruling is binding on LHDN. If the public ruling is not applicable, the taxpayer must convince LHDN of this."

On CP204 and revised tax payable estimates, Mohammed Noor stressed the importance of compliance with this, saying that the estimate could be revised but reapplication must be made with complete documentation that must include all income, rents, restructuring, reduction in income due to natural disasters etc. Speaking on finalisation of assessment in the course of auditing and time bars, Phan brought up the matter of audits of years which were statute-barred. "When conducting the audit, the auditor looks at time-barred years up to the year of assessment," she said. "Taxpayers have to expend resources answering questions on time-barred years. Clarity is needed on this."

Abu Tariq said that time-barred cases could be raised by auditors, although auditing usually looks at three years of assessment only. "But there can be cases where auditors have reason to go into time-barred years – but they must have a strong basis for checking these periods," he added. The session wrapped with a short discussion of the new audit framework; there were indications that audits could now be conducted without prior notice to taxpayers. Are surprise audits on the way? "No, there will be no surprise audits," confirmed Mohammed Noor. "But from 2017, there will be full audits, and if we find in the course of auditing, that other parties need auditing, they will be audited too, including directors."

INCOME TAX TREATMENT OF GOODS AND SERVICES TAX

Christine Baptist

Three Public Rulings have been published by the Inland Revenue Board Malaysia (IRBM) recently to address the income tax treatment of goods and services tax (GST). The Rulings are:

i. Public Ruling No. 1/2017 on Income Tax Treatment of Goods and Services Tax, Part I – Expenses;
ii. Public Ruling No. 2/2017 on Income Tax Treatment of Goods and Services Tax, Part II – Qualifying Expenditure for Purposes of Claiming Allowances; and
iii. Public Ruling No. 3/2017 on Income Tax Treatment of Goods and Services Tax, Part III – Employee Benefits: GST Borne by an Employer.

This article aims to provide some insights on some of the common issues raised in relation to the tax treatment of GST (which is input tax to a GST-registered person) under the Income Tax Act 1967 (ITA).

DEDUCTIBILITY OF GST UNDER THE ITA

While a person who is liable to register for GST is awaiting approval of his application to be registered as a GST-registered person from the Royal Malaysian Customs Department (RMCD), would the GST paid or to be paid on purchases or acquisitions of goods and services on taxable supply be deductible under the ITA? In other words, would the input tax incurred from the date a person is liable to register to the effective date he is GST-registered be deductible under the ITA?

In this scenario, any GST incurred from the date a person is liable to register to the effective date he is GST-registered would not be deductible as it is prohibited by paragraph 39(1)(o) of the ITA. If the person requires the effective date as a GST-registered person to commence earlier, he should consider submitting his case to the RMCD for consideration.

The GST incurred from the effective date a person is GST-registered would be deductible under subsection 33(1) of the ITA if the cost of the acquisition to which GST is attributable is wholly and exclusively incurred in the production of gross income and is not prohibited by any provision under subsection 39(1) of the ITA.

SIMPLIFIED TAX INVOICE

A common situation that a person encounters is on expenses for meals incurred in the course of entertaining customers where the receipt for such an expense is not a full tax invoice but only a simplified tax invoice. Would a GST-registered person be able to claim a deduction under the ITA for the GST paid which is in excess of the RM30 that is claimable from the RMCD?

Lets say the simplified tax invoice is for RM636 (ie. cost of meal is RM600 and GST is RM36). What would be the amount of deduction for the entertainment expense and the GST under the ITA?

Reference should be made to the General Guide dated 24 August 2017 published by the RMCD. Paragraph 120 in the General Guide states that if the GST amount in the simplified tax invoice is more than RM30 and the recipient wants to claim the full amount, he has to request for his name and address to be inserted in the invoice

In this scenario, if the entertainment provided to a customer is as described in paragraph 193 in the General Guide, the GST on the entertainment expense would probably not fall under the blocked input tax. This would mean that the company would be entitled to credit the full GST paid of RM36 as input tax credit under the Goods and Services Tax Act 2014 (GSTA).

In other words, the RM36 is claimable from the RMCD. If the company fails to request for the company's name and address to be inserted into the tax invoice, then the company is only entitled to credit RM30 of the GST paid as input tax credit. The balance of RM6 is to be borne by the company. No deduction would be allowed for the GST of RM6 as it is prohibited by paragraph 39(1)(o) of the ITA. If the GST of RM6 is debited to the Profit and Loss Account, an adjustment has to be made in the income tax computation.

The GST-registered person may decide not to obtain a full tax invoice for the sum of RM636 and does not add back in tax computation the GST of RM6 charged to the accounts as an expense. If this is the case, the GST claimed would be disallowed and a penalty may be imposed under Section 113 or 114 of the ITA upon an audit by the IRBM.
In respect of the entertainment expense of RM600, reference should be made to Public Ruling No. 4/2015 entitled "Entertainment Expense" to determine whether the company qualifies for a 100% or 50% deduction for income tax purposes.

INSUFFICIENT DOCUMENTATION

One of the most frequently asked questions received by the IRBM is with regard to the absence of the relevant documents which resulted in the conditions under the GSTA are not fulfilled to entitle a GST-registered person to credit the GST paid or to be paid as input tax credit.

Where a GST-registered person is not entitled to credit GST paid or to be paid as input tax credit under the GSTA because he does not have the necessary documentation to substantiate his claim as the requirements under the GSTA are not fulfilled, the GST is not deductible as it is prohibited by paragraph 39(1)(o) of the ITA. A deduction under the ITA is not automatically available if a GST-registered person is not entitled to credit the GST paid or to be paid as input tax credit under the GSTA.

GST RELATING TO UTILITY BILLS

A GST-registered person who rents a business premise may be unable to credit the GST paid as input tax credit as all the utility bills are registered in the name of the landlord. Would GST on the utility bills be deductible under subsection 33(1) of the ITA?

Reference should be made to the Guide on Input Tax Credit dated 4 January 2017 published by the RMCD. Paragraphs 73 and 74 of the Guide states that in the case of a rented property where electricity or water bills are in the name of the property owner, the tenant who is a GST-registered person is not allowed to use such bills for claiming input tax unless the name in the bills has been changed to his name.

In this scenario, the company would only be entitled to credit the GST paid or to be paid as input tax credit if the name in the utility bills is changed to the company's name. The company should make arrangement to make the necessary change it wants to claim the GST from the RMCD.

In this case, the GST paid for the utilities would not be allowed as a deduction as it is prohibited by paragraph 39(1)(o) of the ITA. The payment (excluding GST) for the utilities would be allowed as a deduction under subsection 33(1) of the ITA if the expense is incurred wholly and exclusively in the production of income.

GST INCURRED ON THE MAINTENANCE OF AN EMPLOYEE'S CAR

Another often asked question is whether the GST in respect of the maintenance expenses of an employee's car is 100% disallowed or only a portion of the GST is disallowed if it is also used for non-business purposes.

This question is vague in the sense that the IRBM needs to confirm whether an employee's car means a passenger motor car purchased by the company in the company's name for use by one or a few staff or a car purchased and used by the staff himself but the company pays for the maintenance of the car.

Reference is made to paragraph 10 in the Guide on Input Tax Credit. Assuming that the passenger motor car is purchased by a GST-registered person. A confirmation from the RMCD, or an approval as to whether the car is excluded from any credit under GST (i.e. subject to blocked input tax) as mentioned in the Guide is applicable to the company, has to be obtained.

If the car concerned is not excluded from any credit under the GSTA, this would mean that the GST in relation to the acquisition of the car, would not fall under the blocked input tax. Thus, the company would be entitled to credit the GST paid or to be paid as input tax credit. Likewise, the same person would be entitled to credit the GST paid or to be paid for repairs and maintenance of the car as input tax credit.

If the car concerned is excluded from any credit under the GSTA, it would mean that the company would not be entitled to credit the GST paid or to be paid in relation to the acquisition of the car, and the repairs and maintenance of the car as input tax credits. The GST incurred on maintenance and repairs would be allowed as a deduction under subsection 33(1) of the ITA if the repairs and maintenance expense to which GST is attributable is wholly and exclusively incurred in the production of gross income and is not prohibited by any provision under subsection 39(1) of the ITA.

As for a car registered in the name of an employee and the company pays for the maintenance of the employee's car, it is necessary to establish the nature of the company's business and the job specification of the employee who is making a claim for the maintenance of his car. Assuming that the car is used for purposes of the business, the maintenance and repair expense would be allowed as a deduction under subsection 33(1) of the ITA if the expense is incurred wholly and exclusively in the production of income and is not specifically prohibited by any provision under subsection 39(1) of the ITA. In this scenario, if the employee is reimbursed by the company for the maintenance expenses of his car and the tax invoice for the maintenance is not in the business's name, the company would not be entitled to credit the GST paid as input tax credit under the GSTA. The GST paid on the maintenance expense for the employee's car would be allowed as a deduction under subsection 33(1) of the ITA if the car is used wholly in the business.

However, if the car is also used partly for non-business purpose, a portion of the repairs and maintenance expenses and the related amount of GST would be disallowed as a deduction.

Reference should be made to the Guide on Input Tax Credit dated 4 January 2017 where reimbursements for employee expenses and entitlement to input tax credit is explained in paragraphs 75 to 79. If there is a predetermined amount of allowance for the purpose of maintaining an employee's car (subject to the conditions and policy stipulated by the company), paragraphs 80 to 83 explains a company's entitlement to input tax credit.

GST ON A NEW CAR PROVIDED TO AN EMPLOYEE AS A BENEFIT

A company may purchase a new passenger car and provide it to an employee solely to be used for business purposes i.e. used in providing technical assistance to the company's clients such as maintenance services, breakdown services and repair services. What would be the cost of the car for purposes of determining the benefit-in-kind in respect of the car which is taxable as part of the employee's gross income?

The company pays RM73,800 for the car and details are as **Table 1.**

The GST of RM128.09 for car insurance is claimable by the company under the GSTA whereas the GST of RM3 for the number plate is not claimable (blocked input tax) under the GSTA.

If the GST incurred by the company on the car provided to the employee is excluded from any credit under the GSTA (not claimable from the RMCD), i.e. where the car is not

Table 1

Details	RM
Price (cost)	67.164.12
GST 6%	4,029.85
Selling Price	71,193.97
Number Plate (inclusive of GST RM3)	53.00
Road tax (1 year)	90.00
Registration fee	150.00
Ownership endorsement fee	50.00
Retail price without insurance	71,536.97
Insurance (inclusive of GST RM128.09)	2,263.03
On the road price	73,800.00

solely used for business purposes, the value of the car for purposes of computing the benefit-in-kind to the employee would include the GST of RM4,029.85 incurred on the car. If the GST incurred by the company on the car provided to the employee is not excluded from any credit under the GSTA (claimable from the RMCD), the value of the car for purposes of computing the benefit-in-kind to the employee would not include the GST of RM4,029.85 incurred on the car. In this scenario, no benefit-in-kind would be computed as the car is solely used for business purposes.

The insurance premium (excluding GST) and road tax may be claimed as a deduction by the company under subsection 33(1) of the ITA if it is not prohibited by any provision under subsection 39(1) of the ITA.

To determine the benefit-in-kind of the car that is received by an employee (i.e. where there is private usage of the car), either the formula method or the prescribed value method can be used. For more information, please refer to Public Ruling No.3/2013 entitled "Benefits in Kind".

QUALIFYING EXPENDITURE OF A CAR FOR PURPOSES OF CAPITAL ALLOWANCE

In the above scenario, if the GST incurred by the company on the car provided to the employee is excluded from any credit under the GSTA, the GST incurred of RM4,029.85 would be part of the qualifying expenditure of the car. On the other hand, if the input tax incurred by the company on the car provided to the employee is not excluded from any credit under the GSTA, the GST incurred of RM4,029.85 would not be part of the qualifying expenditure of the car.

RELIEF FROM PAYMENT OF GST

Private education institutions are relieved from payment of GST on the acquisition and importation of certain items listed by the RMCD. Would these private education institutions be able to claim a deduction under subsection 33(1) of the ITA for the GST incurred?

The private education institutions are eligible for a relief from payment of GST on certain items used for the purposes of education by making an application to the RMCD. If the private education institutions choose not to apply for such a relief from the RMCD, the GST paid would not be claimable from the RMCD.

In this scenario, the GST incurred would not be allowed as a deduction as it is prohibited by paragraph 39(1)(o) of the ITA.

CONCLUSION

In conclusion, the income tax treatment of GST under the ITA would depend on the GST treatment under the GSTA. The misconception that a GST-registered person who is not entitled to credit the GST paid or to be paid as input tax credit would be automatically allowed a deduction under subsection 33(1) of the ITA has to be corrected. There is no option available to a GST-registered person. If he is entitled to credit the GST paid or to be paid as input tax credit under the GSTA, he cannot choose to claim the GST under the ITA if he does not make the claim from the RMCD.

The issues discussed in this article are not exhaustive. The GST treatment stated in the scenarios in this article are merely illustrations intended as a reference for the purpose of explaining the income tax treatment on GST. It is the prerogative of the RMCD to determine the GST treatment under the GSTA.

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DIGITAL DISRUPTION AND MALAYSIA'S GST

It would seem that a discussion about GST and digital disruption is not just that GST applies differently to digital products from conventional ones; rather, it highlights that the GST itself as a tax (of which Malaysia's is no exception) faces its own disruption and these challenges call for a re-invention to enable it to remain relevant as a consumption tax in today's digital world.

Chan Wai Choong[1]

Recent media statements by both the Royal Malaysian Customs Department (RMCD) and the Inland Revenue Board Malaysia about the impact of the digital economy on Malaysia's taxation revenues suggests that responding to these challenges is well on their agenda. Certainly in the GST context, RMCD is hoping to introduce some measures by the end of this year or the middle of next year.

Malaysia's young GST is amongst the newest born in a long line of sibling VAT and GST regimes around the world. Coming late to the world, it has the advantage of learning from those before it and scholars would note the distinctive OECD, Singaporean, Australian, New Zealand and South African elements in its heritage. And yet for all its advantages, at its heart, Malaysia's GST heritage derives from a fundamental value added tax (VAT) system introduced in France some 63 years ago; that system being a broad based consumption tax which is targeted at final consumption by households (i.e. individuals, not businesses), but whose central design feature is to collect the tax through businesses who supply goods and services to such individuals.

At that time (1954), the mobile phone was not even a brick[2] nor the Internet a twinkle in anyone's eye other than the military.[3] In fact, at that time, the VAT system did not fully appreciate that someone in one country could purchase a book from a bookstore half way around the planet and have it conveniently delivered to their doorstep[4]. Less so, that someone else could have that same book scrambled somehow into electronic form – again, half a world away – and re-created, unscrambled, as fully formed text in the palm of his hand, in the time it takes to click a (digital) button.

That was then. Today, however, we live in an age where that is not only possible, it is expected. In this context, how the traditional VAT systems of yesterday attempt to tax this new economy is the struggle of VAT administrations around the world. In fact, those traditional VAT systems are looking decidedly old and antiquated, struggling to impose themselves onto an upstart, digitally-enabled, global consumer whose consumption through global e-commerce environments is quickly leaving them behind. The thoughts knife and gunfight come to mind[5].

How did we get here?

Back in 1954, and for several decades thereafter, it would be fair to say that international or cross border sales of goods and services for personal consumption were quite limited. In those days, the VAT regime - which relied on a fundamental principle (the "destination principle") that the tax was to be collected in the country of consumption - worked quite well, as most B2C consumption took place in the same country (destination) where the supplier was also located. The principle also implied it was for that country to decide how best to collect the tax on imported goods and on imported services.

The challenge for taxing globally imported goods

In most cases, the destination principle worked very well for taxing globally imported goods. Irrespective of whether the goods were imported for business or private purposes, the principle simply meant that the destination country into which the goods were imported (say Malaysia), was entitled to collect the GST from the person who was the importer of the goods. Payment of the GST was difficult to avoid as the goods had to be cleared physically through a border protection or customs check point.

Nonetheless, in most countries a low value threshold (LVT) of some description would typically be implemented to overcome the disproportionate costs to the administration (e.g. RMCD in Malaysia's case) of actually policing every shipment into the country. The costs of collecting the tax on items below the LVT was considered to outweigh the actual revenue generated from the tax itself. Malaysia has an LVT of RM500[6] although there is talk of extending it to RM1,200 in the newly announced digital free trade zone (DFTZ).

In today's digital age, and with e-commerce in particular, the difficulty for Malaysia's GST regime (and for others around the world too) is that many goods can now be purchased by Malaysian consumers through e-commerce platforms for an amount below the LVT. Consequently, these imported goods are not subject to the GST. Think Amazon, eBay, AliBaba and Lazada. What this means is that unless the LVT – or the GST law itself – is amended, this e-commerce trend will lead to a gradual erosion of the base on which the tax is premised. And all indications are that this is an ever-growing trend, which left unchecked, will translate into a systematic and predictable loss of GST revenues to the government over the longer term.

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1 The author gratefully acknowledges the assistance and feedback of Rebecca Millar (Professor, The University of Sydney Law School) who reviewed an earlier version of this article. Nonetheless, any errors are the author's alone.

2 Motorola's DynaTAC 8000x (the first commercially available handheld phone) appeared in 1984.

3 The World Wide Web came about in 1989.

4 Mail order catalogues certainly existed before this time although almost all of the trade concerned domestic transactions only, since the distribution of the products relied, initially, on the rail networks and only much later, via air. Global air cargo did not truly take off, pardon the pun, until several decades after World War II, when the express parcel couriers carved out their niche in the 80's and 90's.

5 A Linsen (Producer), & B de Palma (Director). (1987). The Untouchables [Motion Picture].

6 A table showing comparable LVTs worldwide can be found in Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project.

The challenge for taxing globally sourced services

The GST story is slightly different for globally sourced services. In this case, to properly apply the destination principle, practicality would require that the GST is collected by the RMCD from the Malaysian consumers – simply because the global supplier is not in Malaysia, and would typically be outside Malaysia's/ RMCD's jurisdiction for any enforcement action. As such, Malaysia's GST law, like its forefathers, is designed with a "reverse charge rule" which shifts the GST liability onto the consumer.

That notwithstanding, and as one would readily appreciate, it is administratively impractical and financially prohibitive for the RMCD to enforce individual (non-business) consumers to comply. As such, most GST regimes quite sensibly only apply the reverse charge rule in cases where the globally sourced service is acquired by a business – as it is more feasible to track these businesses and compliance enforced against them by the authorities. The individual, non-business, consumer was therefore not subjected to the GST by design.[7] It is possible at the time, in the eyes of the Old World VAT regime, this was an acceptable position as the market for such globally sourced services by private consumers was not significant[8], i.e. any forgone tax on privately consumed global services, it was thought, would be minimal.

Enter Google, Apple, Spotify, Netflix, Angry Birds and Uber. All of these represent a growing trend of consumption behaviour which the traditional GST law had not, and in all fairness could not have, anticipated. As currently drafted, the Malaysian GST law does not tax this consumption by choice, i.e. its reverse charge rule does not extend to private consumers, intentionally. Left unchanged, the Malaysian GST law would be conceding, in the same way for goods if the LVT is not changed, that the consumption by Malaysians of these movies, music, games, apps – and not forgetting our e-book from before – would forever more not be subject to the GST[9]. Not only does this distort price competition in the local economy, it speaks to a greater issue of an ever eroding GST revenue base for the government, as consumption patterns shift away from Malaysian-based sellers to international ones.

Options for change

The OECD recognised these new age risks as early as 1998[10]. Through extensive study and experience[11], it appears, at this time, that the model most likely to produce efficient and effective results is a non-resident vendor-registration model with a simplified registration/compliance option for such non-resident registrants. In a Malaysian context, this would mean:

- any global supplier selling into Malaysia would need to register for GST if its turnover of supplies to Malaysian consumers (not businesses) exceeds the GST registration threshold (currently RM500,000).
- it would have a simplified registration process, presumably requiring less proofs of identity, say.
- it would have simplified compliance obligations, presumably a simplified GST-03 return (i.e. only a few fields to be completed), a quarterly lodgment cycle and relief from issuing tax invoices.
- it would not be entitled to claim any input tax credits for GST incurred on Malaysian costs (although it would be expected that these would be negligible).
- GST audits by the authorities may be less, as there will be a need to balance the costs and effort of collection (from a non-resident) with the potential revenue raised from such activities.

The efficacy of this approach depends largely on voluntary compliance by these global businesses, and a wholesale belief in the proverbial 80-20 rule[12].

As an enhancement, this model may be supplemented with an intermediary collection model where an intermediary (such as a courier/freight forwarder in the case of goods, or an electronic distribution platform in the case of digital services) is levied with the obligation to collect the tax, instead of the overseas vendor.

In **Australia**, plans are afoot for these to come into play. With effect from 1 July 2017, a vendor registration model came into force and all non-resident suppliers to Australian customers will need to register if their annual turnover from supplies with a relevant connection to Australia are expected to exceed the AUD75,000 threshold. An intermediary collection model also applies, so electronic distribution platforms and potentially "goods forwarders" face an increased burden from 1 July 2017.[13].

In **New Zealand**, non-resident

vendor registration has been in effect since 1 October 2016 for offshore suppliers of digital services whose turnover to NZ residents exceed the NZD60,000 registration threshold. However, the GST concession remains for offshore suppliers of goods below the LVT.

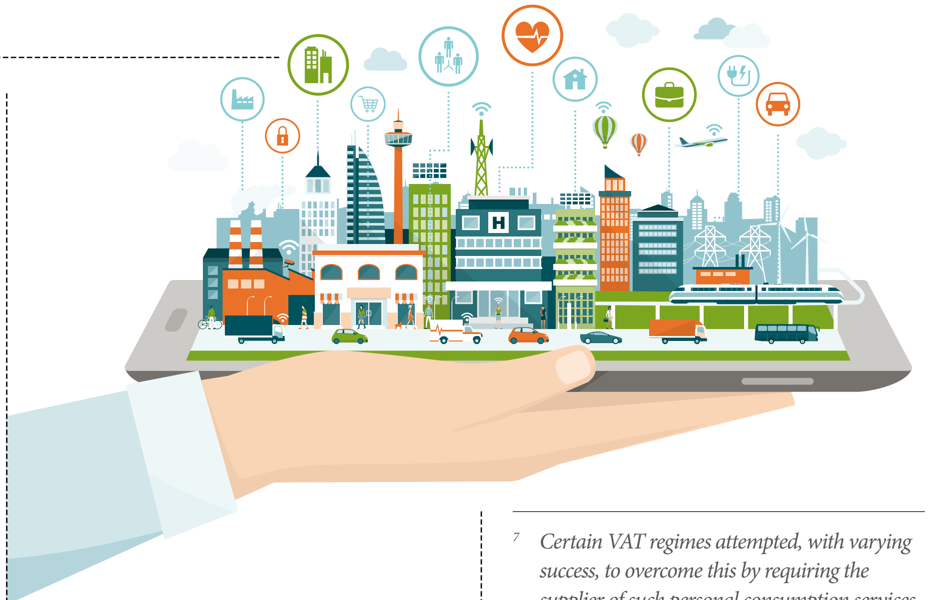
In **Singapore**, the government has said that it will be studying how it can adjust its GST system to tackle these challenges of the digital economy. Notably, Singapore is somewhat unique among VAT regimes in not invoking its GST reverse charge rule for imported services, even for businesses. So, arguably it starts even further behind in this challenge. This would change if Singapore introduces the reverse charge for cross-border B2B services and a vendor registration model for B2C digital supplies.

Where to from here for Malaysia?

From the foregoing, it would seem that a discussion about GST and digital disruption is not just that GST applies differently to digital products from conventional ones; rather, it highlights that the GST itself (of which Malaysia's is no exception) as a tax faces its own disruption and these challenges call for a re-invention to enable it to remain relevant as a consumption tax in today's digital world.

This re-invention is happening for VAT regimes all around the world and no doubt Malaysia will need to embrace it soon.

In short, the Malaysian GST law currently lacks the complete framework to deal effectively with this e-commerce trend, and more importantly, is presently ill-equipped to extract the GST revenues arising from this sector of consumption in the future. Its custodians (the RMCD and the Ministry of Finance) need to move quickly to address this, lest the country misses out on these significant



GST revenues. No doubt other players, such as the courts, the RMCD, lawyers and consultants, will have a role to play in guiding the development and maturing of our young Malaysian GST law, and particularly in its application to other digital businesses – Bitcoin, Cloud, Artificial Intelligence, 3D-printing, Sharing Economy, to name a few. But that is a topic for another time.

For now, as the threat of erosion to the GST base is clear and present, the government must, and should, act to change the law to secure the country's future participation in these e-commerce revenues. As noted earlier, recent media statements by both the RMCD and the IRBM about the impact of the digital economy on Malaysia's taxation revenues suggests this is well on their agenda and changes to the relevant laws are not far off. Certainly in the GST context, the RMCD is hoping to introduce some measures by the end of this year or the middle of next year aimed at payment gateway providers, credit card issuers and other financial institutions. In that case, businesses in the digital and e-commerce space will need to adapt. Business owners therefore would do well to take note now that GST change is in the air and prepare themselves and their businesses for these changes.

[7] *Certain VAT regimes attempted, with varying success, to overcome this by requiring the supplier of such personal consumption services to account for VAT in their home country.*

[8] *The most prevalent globally sourced service for private individuals at the time would have been licenses to use computer software on personal computers. Ironically, these were usually taxed as goods, as they were typically sold then in the form of shrink-wrapped boxes containing physical CDs on which the software was loaded.*

[9] *In fact, the consumption is potentially not taxed anywhere since the destination principle of VAT regimes has given the right to tax that consumption to the country that has willingly decided to forgo it.*

[10] *Electronic Commerce: Taxation Framework Conditions (1998) Committee for Fiscal Affairs Report - Ottawa Ministerial Conference on Electronic Commerce*

[11] *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project.*

[12] *It is not generally clear what this means and speculation is that it is either (i) that 80% of the GST revenues will come from the 20% who voluntarily comply or (ii) that 80% of businesses will voluntarily comply and 20% will not.*

[13] *Although the Senate Economics Legislation committee has recommended deferring implementation till 1 July 2018.* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/GSTLowValueGoods/~/media/Committees/economics_ctte/GSTlowvaluegoods/report.pdf

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TOURISM TAX

THE GOOD, THE BAD AND THE UGLY

Senthuran Elalingam

The introduction of a tourism tax (TTx) in Malaysia has been a hotly debated topic ever since the tourism tax bill was introduced into Parliament a few months ago. In the ensuing months we saw not only a postponement of the start date to 1 September 2017 but also key changes to the rate and exemptions. Now that the tax is in place, in this article, we will explore in detail how the tax will operate and some of the key challenges that participants will face.

WHAT EXACTLY IS A TOURISM TAX?

A TTx, like other forms of indirect tax, is aimed at taxing consumption as opposed to income. The Goods and Services Tax (GST), or Value Added Tax (VAT) as it is also known, is perhaps the most common form of indirect tax, and for the purposes of this article, I will highlight some of the key differences between our existing GST and the now implemented TTx.

The most obvious difference between the two is that whilst the GST looks to tax all forms of consumption, the TTx is more focused in that it seeks to tax tourism, or more accurately, occupancy. The tax is intended to tax consumers who rent accommodation within Malaysia, and it is for this reason these taxes have also been called 'occupancy taxes.'

The concept of a TTx is not a new one, and similar taxes are collected by various cities across the United States, Europe and Asia, including Malaysia. At present, Penang, Langkawi, Melaka and Kota Bahru have city-based tourism or heritage taxes. The TTx implemented at the federal level will co-exist with the existing state based tourism taxes, meaning that both would apply to tourists from 1 September 2017. As is the case with the GST, the TTx would be administered by the Royal Malaysian Customs Department (RMCD).

THE SCOPE AND RATE

Subsection 6(1) of the Tourism Tax Act 2017 (TTx Act) provides that the tax shall be charged and levied on a 'tourist' staying at any 'accommodation premises' made available by any operator. The obligation to pay the tax is on the tourist but there is equally a responsibility imposed on every operator to collect the tax (read Sections 6(2) and 7(1) together).

Unlike the GST, there is no requirement for a payment or some form of consideration to be payable for the tax to apply, which means that the tax can be collected on complimentary rooms if the room guest is classified as a tourist.

Importantly, where there is more than one tourist staying in the same accommodation at the same time and one of the tourists has paid the tax, then the other tourists are not required to pay the tax. However, the Law is a little unclear when you share housing, such as dormitories, where you have multiple guests' bookings but essentially only one room that is being rented.

Section 8 requires that the Minister of Finance set the rate of tax, and this has been addressed through the gazettal of the Tourism Tax (Rate of Tax) Order 2017 which has set a fixed rate of RM10 per night.

In order to understand the scope more clearly, we need to examine some of the key terms more closely.

In conjunction with the release of the Law and Regulations, the RMCD have also released its 'General Guide on Tourism Tax' (General Guide), and where appropriate, we would also seek to reference RMCD's views on the matter.

The General Guide has proven useful in addressing some of the unclear points about the scope of taxation. For one, complementary early check-ins and check-outs would not attract additional tax. This was proposed in an earlier draft of the Guide but was later clarified as not being subject to tax, refer to FAQ Q6, 34,35 and 44.

Tourist

The definition of tourist is taken from subsection 2(1) of the Tourism Industry Act 1992 (TIA), which provides a very broad definition of tourist:

"Tourist" means any person, whether he is a Malaysian national or otherwise, visiting any place in Malaysia for any of the following purposes, namely:

a) pleasure, recreation or holiday;
b) culture;
c) religion;
d) visiting friends or relatives;
e) sports;
f) business;
g) meetings, conferences, seminars or conventions;
h) studies or research;
i) any other purpose which is not related to an occupation that is remunerated from the place visited.

As a consequence, any person with the exception of persons who are "remunerated from the place visited" are in scope. At first reading, it was thought the exclusion would apply to those employed by the place they are staying in i.e. the employees of the hotel, however, this has since been interpreted more broadly by the RMCD. In particular in FAQ 89 of the General Guide, it provides that a foreigner on a work permit who travels to a place that is in the vicinity of the location covered by the work permit would also be exempted. Based on our discussions with the RMCD we understand that 'vicinity' is in reference to the district and that the postcode is a useful reference point for determining whether a location is in within vicinity.

'Accommodation premises'

The definition of accommodation premises is also taken from subsection 2(1) of the TIA and is equally broad. It is taken to mean any building, including hostels, hotels, inns, boarding houses, rest houses and lodging houses, held out by the proprietor, owner or manager, either wholly or partly, as offering lodging or sleeping accommodation to tourists for hire or any other form of reward, whether or not food or drink is also offered.

In keeping the definitions quite wide, the legislators have given considerable scope for the TTx to apply. Unlike the GST, there is no exclusion for accommodation providers operating in Labuan, Langkawi and Tioman and these providers are within the scope of the tax.

In balancing the impact of the tax and to ensure it is not overly burdensome, the inclusion of exemptions becomes quite critical.

EXEMPTIONS

Under Section 9 of the TTx Act, the Minister of Finance has the power to exempt a tourist from paying the tax, an operator from collecting the tax or from needing to register for TTx.

The exemptions are contained in the Tourism Tax (Exemption) Order 2017, and the following parties have been exempted:

Tourists who are exempt from payment of the tax

a) Malaysian National; or
b) A Permanent Resident of Malaysia

This effectively exempts all locals from the tax and limits the tax to non-Malaysians. In order to qualify for the exemption, the presumption is that guests would need to provide their identity card or passport to verify their nationality or PR status. Interestingly, there is no exemption provided to those residing in Malaysia on working permits or long-term visas, and these 'tourists' would still need to pay the tax.

Another interesting outcome is where accommodation is shared between Malaysians and non-Malaysians. The exemption does not appear to apply to those scenarios and the tax would need to be paid. Aside from posing a rather interesting discussion amongst the guests on how the hotel bill should be split, it does pose a challenge for both an operator and an authority in ensuring compliance with the rules. It is not always the case that identity information is obtained for all the guests in an accommodation and even if a rule was set, it can be difficult to enforce.

The RMCD have sought to clarify this point in their General Guide FAQs, in particular FAQ 2, 3, 4 and 5 (Guide dated 31 August) In the RMCD's view, if the accommodation is either booked by or paid by the foreigner, then the TTx would be applicable, however, if the reverse should apply i.e. booked or paid by the local, then there would be no TTx. This interpretation seems inconsistent with the Law, but may also prove to be problematic for operators to properly enforce and for the RMCD to enforce.

Another category of 'tourist' that may feel somewhat hard done by is the business traveller and the long-term resident, i.e., those tourists who may choose to stay in an accommodation for more than a week and perhaps months. In a number of foreign jurisdictions, these types of travellers have qualified for exemption but that won't be the case in Malaysia.

Operators who are exempted from registration

a) An operator operating a homestay under the Pengalaman Homestay Malaysia Programme as determined by the Minister of Tourism and is registered with the Ministry of Tourism and Culture (MOTAC);
b) An operator who operates kampungstay determined by

the Ministry of Tourism and Culture Malaysia under the Visit My Kampung Kampungstay Programme and is registered with MOTAC;

c) The Federal Government, State Government, statutory body, local authority or private higher educational institutions registered under Private Higher Educational Institutions Act 1996 operating accommodation premises as a facility to any person for educational, training or welfare purposes;

d) An employer who operates accommodation premises for accommodation purpose as a facility to his employees;

e) Religious or welfare body who fully operates accommodation premises for the purpose of religious or welfare activities not for commercial purpose and registered with the Registrar of Societies Malaysia or under the written law and approved by the Minister responsible for religious or welfare matters; and

f) An operator of accommodation premises having four or less than four rooms

The exclusion of homestays ensures that low cost accommodation is kept out of the ambit of the tax, which is a welcome move as it removes the administrative burden of needing to comply with the tax for these small providers. This would also be the intention of excluding those premises with four rooms or less. However, in providing this exemption, it also excludes those providers who operate through digital platforms such as Airbnb. Whilst such providers neither own accommodation nor operate them, much like Uber and Grab have shaken up the taxi industry globally, Airbnb and its competitors represent a significant disruption to the hotel industry. In acknowledgment of this fact, it is now understood that the government intends to widen the scope of the tax to allow for Airbnb to collect the tax on behalf of its operators. This treatment has been followed in a number of the countries that operate a TTx and ensures greater parity between these providers and the more conventional providers.

The exclusion of employer-operated accommodation will also be welcomed by the many businesses in Malaysia that need to provide employee housing as a function of their business. However, one challenge that exists is to define how widely or narrowly this provision should be interpreted. If read narrowly, it would require the company who operates the accommodation and who employs the employee to be one and the same. This interpretation would pose significant challenges for employers as many of them operate in a group structure with employees sitting across a number of entities. The writer hopes a more pragmatic approach consistent with the intention of the exemption to exclude employer- operated housing can be taken.

One exemption that has been announced publicly and included in the latest General Guide on Tourism Tax but that is not specifically reflected in the order is the exemption provided to contract group tours that had bookings prior to the announcement of the tax. In order to access this exemption, tour operators are required to first apply individually to MOTAC to obtain a supporting letter to seek the exemption. Once this letter is received, an application would need to be made to the Minister of Finance with the supporting letter to seek exemption under Section 9(2) of the TTx Act. If the exemption is granted, then certified copies of the documents issued need to be sent to the operators in order for them to not charge TTx.

A further exemption is contained in the Guide, which relates to the issue of dormitories. It is contained in FAQ Q67 and exempts "backpacker accommodation" that have accommodation that is designed to be occupied by 2, 4 or 6 people that is charged on a per room basis and that can be occupied at different times. It is unclear under what provision of the Law this exemption is provided, and appears to be more in the nature of an administrative concession provided by the RMCD. However, the exemption itself does not clearly mention dormitories, nor does it address how they should be taxed, which is still relevant for providers who have both dorms and individual rooms in the building as they would not qualify for exemption.

ADMINISTRATION AND PAYMENT OF THE TAX

From an administrative point of view, many of the requirements for TTx mirror that of the GST as providers need to register, issue invoices and file returns periodically. It is unclear given the similar requirements, why the authorities didn't perhaps combine the registration and filing requirements for GST and TTx as that would reduce the amount of paperwork involved. It is possible that the authorities were perhaps keen to keep both taxes separate, but from an efficiency perspective, it is hoped that this could be explored in the future.

Registration

The responsibility for registration sits with the operator, who is defined in Section (2) of the TTx Act as simply being any person operating the accommodation premises. Operators who had been operating an accommodation premises prior to 1 September 2017 were required to apply within 30 days of 1 August 2017 (the date the particular provisions of the TTx Act came into operation) to be registered. For any operators who commence post-1 September 2017, the 30-day requirement applies on a prospective basis, i.e., operators need to submit an application within 30 days of commencing operation.

The Director General of the RMCD also has the power to register accommodation premises that are currently registered with MOTAC as "tourism accommodation premises." Our understanding is that for pre-1 September 2017 registrations, this process was followed with operators being automatically registered by the RMCD. Operators who are not registered with MOTAC have an obligation to notify the Director General and become registered, and a failure to do so can give rise to a penalty – upon conviction - of up to RM30,000, two years imprisonment or both. The registration process is completed electronically through the MyTTx portal that has been set up by the RMCD.

Once registered, operators are assigned a 'tourism tax identification number' and a certificate of registration. The former needs to be included on all invoices issued and the latter displayed in a conspicuous place at the accommodation premises.

Invoicing

As is the case with the GST, a

compliant invoice is required to be issued to each tourist. The key new pieces of information that need to be included on an invoice are the TTx identification number and the rate and the amount of tax payable.

Although the obligation to pay the tax is on the tourist, in the scenario where an invoice has been issued and remains unpaid after a period of 12 months, the obligation shifts to the Operator who must then pay the tax. Also, if the tax was originally charged in advance, the guest does not show up and the TTx is not refunded to the tourist, the operator would be required to account for TTx.

Credit and Debit Notes can also be used when there is a change in the TTx rate or an adjustment needs to be made in the course of the business. The most common scenario would be where there is a cancellation and no accommodation is provided. In the case TTx is paid, then a credit note would be issued to enable a credit of the TTx. Similar to the GST, the TTx amount should then be adjusted in the corresponding return.

Payment of the Tax

The TTx amounts collected are to be paid to the RMCD at the end of the month following the end of the taxable period, which coincides with the filing of the return, the TTx-03. A copy of the TTx-03 can be found in the Regulations. It requires, amongst other things, a total figure for the number of rooms per night rented in the period and the total tax paid.

Operators who are registered for GST are required to file TTx-03 returns based on the same taxable period which applies for GST purposes (monthly, quarterly or variable). All other operators are required to file quarterly.

Bad debt relief

As is the case with GST, there is bad debt relief available for the TTx. However, it is far more limited in scope. Firstly, the relief is only available to an operator "who ceases or has ceased to operate accommodation premises", secondly where the operator has received any part payment, this part payment is to be first applied towards settling the TTx. As a consequence, it would prove quite difficult for an operator to recover any debtors that have gone bad. It is unclear why the bad debt provisions are quite limited in comparison to the GST, and perhaps this is an area that can be further expanded over time.

IN CONCLUSION

The introduction of the tourism tax highlights the trend that we see regionally and globally towards indirect taxes. As governments are under significant pressure to encourage capital inflows and increase the competitiveness of business, we are likely to see this trend only increase in the future. As indirect taxes focus on taxing consumption and not income, the steps taken to implement such taxes can be a positive step towards achieving growth.

However, as we accept the 'new normal', care must also be taken to ensure that such taxes are 'tax neutral' and do not discourage the consumption of one good or service over another (unless specifically intended like 'sin taxes'), and importantly we should look to ensure that there is efficiency in the administration of those taxes so that it does not unfairly burden businesses who are already facing constraints on costs including resourcing. In cases where an indirect tax is neither neutral nor efficient, we risk encouraging businesses to operate outside the system in the 'grey economy'.

This writer hopes once things are bedded down with the tourism tax, it can prove to be an equitable and efficient method of tax collection that furthers the interest of our tourism industry and economy.

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EXPLORING THE NEW MALAYSIAN CORPORATE TAX RATES FOR 2017 AND 2018 (PART 2)

Kenneth Yong Voon Ken & Lee Fook Koon

This is an update to the earlier article "Exploring the New Malaysian Corporate Tax Rates for 2017 and 2018" which was first featured in *Tax Guardian* Q1/2017. With specific rules on this matter being issued recently, this article examines the new details that have emerged since the Budget announcement.

INTRODUCTION

Budget 2017 announced a reduction in corporate tax rate for companies that showed an increase in income from the previous years. This incentive would be given for years of assessment 2017 and 2018. Understandably, the corporate world viewed this as a 'situational' tax rate reduction (a term coined by the authors) whose impact would manifest at the tail-end of the tax computation process.

But contrary to common expectation, a special row to reflect the 'situational' reduced tax rate is totally absent from the corporate income tax form of YA 2017. The only tax rates evident are a "24% row" for normal companies and "18% /24% rows" for small-medium companies. So where do the 'situational' tax rates of 23%, 22%, 21% and 20% make an appearance?

The answer: they don't. And the reason for this is the Income Tax (Exemption) (No. 2) Order 2017 (herein known as "the Order").

THE EXEMPTION ORDER

Rolled out on 10 April 2017, the Order provides the mechanism to implement the 'situational' tax rates of 23%, 22%, 21% and 20% for companies demonstrating an increase in chargeable income from the previous year of assessment.

True to its name, the Order provides an 'exemption' to chargeable income whose numerical effect equates to (or closely approaches) the tax savings that would have been enjoyed had a qualifying company applied the 'situational' tax rates.

This means the 'situational' tax rates are not imputed into the tax computation

at the tax-rate level, but instead, are given as an 'exemption' above the chargeable income line higher up in the tax computation.

However, translating the workings of a mathematical formula into a descriptive legislature is never an easy task. And it shows. Readers of the Order would agree that at first glance, the Order – with its wordy equations – is confusing. Only an effortful second or third read provides meaningful understanding of the exemption mechanism.

WHO QUALIFIES?

On paper, the 'situational' tax rate incentive applies to a wide group of "qualifying persons" namely:

a. a company incorporated under the Companies Act 2016;
b. a limited liability partnership;
c. a trust body;
d. an executor of an estate of a deceased individual who was domiciled outside Malaysia at time of death; and
e. a receiver under Section 68(4) of the Income Tax Act 1967 (ITA).

These "qualifying persons" above must be resident in Malaysia. For a company, this means the management and control must be carried out in Malaysia.

Absent from the above list are sole proprietors and partnerships whose tax rates follow those of personal income tax for the individual / partners.

Unlike the original Budget 2017 announcement (which pointed towards a very generalised group of companies enjoying the situational tax rates), the Order has a more specific scope: it only applies to the above qualifying persons where:

a. the business of the qualifying person has been operating for not less than twenty four months; and
b. the business source has chargeable income in the current and immediate preceding years of assessment where the accounting periods must be made up to twelve months ending on the same date.

The key word above is "business", something that was wholly absent in the original Budget 2017 announcement.

Following the above conditions, investment holding companies, which surely make up a measureable portion of all companies, will not be enjoying the 'situational' tax rate as they are not regarded as "business". Furthermore,

companies that changed accounting year end in the current or preceding year would also disqualify themselves from this incentive.

WHO DOES NOT QUALIFY?

As with most exemption orders, this particular Order has indicated that the exemption will NOT be given to any qualifying persons who, during the year of the claim:

a. has claimed reinvestment allowance under Schedule 7A of the ITA;
b. has claimed investment allowance for service sector under Schedule 7B of the ITA;
c. has been granted any incentive under the Promotion of Investments Act 1986 (PIA);
d. has been granted an exemption under Section 127 of the ITA;
e. has claimed group relief
f. is an investment holding company under Sections 60F or 60FA of the ITA;
g. is a unit trust; and
h. has a debt that has been released under Section 30(4) of the ITA

It can be conjectured that qualifying persons under items (a) to (e) already enjoy an exemption on income by virtue of their incentive claim, and are thus, to be excluded from this 'situational' tax rate reduction.

Ordinarily, investment holding companies under Section 60FA (as opposed to Section 60F) are deemed to derive a business source under the ITA. Interestingly, for purposes of this Order, such investment holding companies under Section 60FA are excluded nonetheless.

Item (h) is an unusual inclusion into the above list of exclusions. Qualifying persons who have previously claimed a deduction on an expense and now enjoy a 'release of a debt' (i.e. the former expense no longer needs to be settled, and thus, gets reversed into becoming an income) are not allowed to benefit from the 'situational' tax rates. Perhaps policy setters have introduced this to prevent sudden increase in chargeable income of one year compared to the preceding year in the interest of fair play.

EXEMPTION VS TAX RATE REDUCTION

In effect, the Order synthetically replicates the impact of a reduced tax rate to qualifying persons who demonstrate an increase in Chargeable Income from Business in 2017 compared to 2016, or in 2018 compared to 2017. The reduced rates are presented in **Table 1**.

More specifically, the Order works, not by actually reducing the tax rate, but by granting an 'exemption' of income. This has interesting implications. A tax rate reduction would have to apply to all income without discrimination between business and non-business sources.

On the other hand, the Order has been worded as an 'exemption' of income, and this gives policy setters more latitude to only exempt certain types of income (chargeable income from business source, in this case).

This also implies that all forms of non-business income (e.g. rental income from Section 4(d) sources or interest income from Section 4(c) sources) would not enjoy the situational tax rates, but instead, would be subject to the normal rates of tax; thus, reducing the situations in which the lower tax rates would be invoked.

HOW IS THE EXEMPTION CALCULATED?

The approach adopted by the Order is generally as follows:

A. Determine the amount of 'Chargeable Income from Business'

Interestingly, this first step is NOT directly stated in the Order, but is inferred through references to the words "chargeable income … derived from the carrying on of a business" as stated in Para 4(1) of the Order.

This is achieved by the formula in **Equation 1** which essentially takes Statutory Business Income as a proportion of Aggregate Income and multiplies this ratio to Chargeable Income. As a result, any approved donations are also proportionately factored into 'Chargeable Income from Business'.

Chargeable Income from Business is computed for the current Year of Assessment as well as for the immediate preceding Year of Assessment.

B. Determine the percentage of "incremental amount of chargeable income"

The incremental amount of chargeable income is the difference between the 'Chargeable Income from Business' of the current year (computed in (A) above) compared to that of the previous year. The percentage of increase is computed by comparing the current year Chargeable Income from Business with that of the previous year, using the previous year's Chargeable Income from Business as the denominator. The formula is shown in **Equation 2**.

C. Determine the situational tax rate

Based on the amount of increase in Chargeable Income achieved as shown in percentage (B) above, determine the situational tax rate as per **Table 1**. The higher the increase in income, the lower the situational tax rate.

D. Determine the tax savings and the equivalent quantum of income to be exempted

The formula in **Equation 3** computes the tax savings from the situational tax rates and converts this tax savings into an equivalent amount of income to be exempted. The exemption is given just above the Chargeable Income line.

Unusually, the situational tax rate is granted in numerical value expressed as an 'income exemption' which sits between the 'Total Income' line and the 'Chargeable Income' line on the tax computation. Nonetheless, it has the equivalent effect of providing a preferential tax rate to qualifying companies, while at the same time, selectively excluding non-business income from enjoying the situational tax rates.

SMALL MEDIUM COMPANIES

However, for SMCs (Small-Medium Companies with ordinary share capital not exceeding RM2.5 million at the start of the basis period), they already enjoy a tax rate of 18% for YA 2017 on the first RM500,000 of their chargeable income – which is even lower than the situational tax rates.

Understandably, the Order does NOT apply to SMCs (i.e. SMCs get to enjoy the even lower 18% tax rate) if the incremental amount of chargeable income is part of the first RM500,000 of chargeable income.

Nonetheless, if the incremental amount of chargeable income is part of the amount which exceeds the first RM500,000 of chargeable income, then the amount exempted is to be computed by applying the formula only to "any incremental amount of chargeable income which is not part of the amount of the first five hundred thousand ringgit of the chargeable income in the basis period…" (Para 4(3) of the Order).

EXCLUDED VARIABLES

One interesting aspect of the exemption computation is that in calculating the incremental amount of chargeable income, the following unabsorbed losses or unabsorbed allowances are not taken into account:

a. Unabsorbed losses brought forward
b. Reinvestment allowances brought forward
c. Incentives under various sections of the Promotion of Investments Act 1986
d. Exemption orders / special deduction orders granted under Sections 127 and 154 of the ITA

As a result, the incremental amount of chargeable income is not distorted by the above – a point that is particularly important when a company is exiting from its pioneer holiday period or incentive period or emerging from a string of loss-years and other one-off factors.

However, it appears that any accelerated capital allowances (such as Information Communication Technology equipment) are to be taken into account when determining the incremental chargeable income amount, as suggested by para 4(4)(d) of the Order.

Table 1

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

Equation 1

Formula to determine 'Chargeable Income from Business'

$$\text{Chargeable Income from Business} = \frac{\text{Statutory Business Income}}{\text{Aggregate Income}} \times \text{Chargeable Income}$$

Equation 2

Formula to determine Percentage Increase in 'Chargeable Income from Business'

$$\frac{\text{Chargeable Income from Business (Year 1)} - \text{Chargeable Income from Business (Year 0)}}{\text{Chargeable Income from Business (Year 0)}} \times 100\%$$

Equation 3

Formula to determine income exemption equivalent to situational tax rates

$$\text{Income exemption} = \frac{\text{Increase in Chargeable Income from Business} \times (24\% - \text{Situational Tax Rate from Table 1})}{24\%}$$

24% represents the corporate tax rate for Year of Assessment 2017

CONCLUSION

During times of economic uncertainty and corporate conservatism, any tax rate reduction is a welcome sight. Malaysia's introduction of the situational tax rates based on the percentage of increase in income is a novel policy.

However, the wording of the Order has subtle, yet profound, implications.

Firstly, it is rolled out as an "exemption" (instead of an outright tax rate reduction) and this exemption only applies to business income. Investment holding companies are excluded from enjoying it. As for normal companies, the exemption does not extend to their non-business income such as investment rental and investment interest income – thus, limiting the scope of the exemption.

Secondly, companies with a former expense that has been released during the year of assessment pursuant to Section 30(4) of the ITA will also be excluded from enjoying the synthetic tax rate reduction under the Order.

Thirdly, the 'exemption' computation with its multistage process can be error-prone. Tax preparers would need to carefully examine the intricacies of the computation mechanism to ensure correct application of the Order.

Error-prone or not, with global economic uncertainties looming, the opportunity for a reduced tax exposure is one that many companies cannot afford to miss.

This article is based on the recently issued Income Tax (Exemption) (No. 2) Order 2017 and does not incorporate any further details or announcements that may subsequently be released by the tax authorities.

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A NEW CORPORATE ATMOSPHERE UNDER THE COMPANIES ACT 2016

Dr. Loganathan Krishnan

The aim of this article is to provide an insight to the changes made to the Companies Act 2016 (CA 2016). Thus, comparison is made on the previous position under the Companies Act 1965. All provisions hereby refers to the CA 2016 unless stated otherwise.

The CA 2016 (Act 777) and the Companies Regulation 2017 replaces the Companies Act 1965 (CA 1965). The CA 2016 was passed by the Dewan Rakyat on 4 April 2016 and at the Dewan Negara on 28 April 2016 and received the Royal Assent on 31 August 2016. The CA 2016 was gazetted on 15 September 2016. The Companies Commission of Malaysia (CCM) announced on 13 January 2016 that the CA 2016 will come into force on 31 January 2017, except Section 241 (requirement of secretary to register with Registrar) and Division 8 of Part III (corporate rescue mechanism). The CA 1965 comprises 12 parts, 374 sections and 10 Schedules, whereas the CA 2016 comprises five parts, 620 sections and 13 Schedules. According to the Domestic Trade, Cooperatives and Consumerism Minister Datuk Seri Hamzah Zainuddin, during the launch of the CA 2016 Awareness Programme, the implementation of the CA 2016 is timely due to the number of companies which are registered in Malaysia. The CA 2016 will have a major impact on companies and businesses registered in Malaysia due to the significant changes made.

As of 31 July 2017, there were 1,226,273 companies registered in Malaysia which includes foreign companies. As for businesses registered as sole trader and partnerships, there were 5,420,793 of them, whereelse there were 12,052 limited liability partnerships. Since the objective of the CA 2016 is to simplify the registration of new companies, sole traders and partnership firms may be attracted to register their businesses as a limited company. Michael Chai, who is the Legal Affairs Committee Chairman of the Associated Chinese Chambers of Commerce and Industry of Malaysia (ACCCIM) during the preview for an ACCCIM seminar, is of the opinion that many business-friendly policies have come into effect as a result of the CA 2016. In fact a total of 19,207 companies have been registered since the coming into effect of the CA 2016.

BACKGROUND

The CA 1965 has been in existence for 52 years and there have been 35 amendments so far. The amendments were piecemeal in nature and are not in tandem with the legal developments in other countries. Thus, the government realised that the CA 1965 is in need of a major reform following the developments in the United Kingdom (UK), Australia and Singapore. The reforms made to CA 2016 have been tested are tried in those countries. The Companies Commission of Malaysia (CCM) CEO, Datuk Zahrah Abd Wahab stated that the changes in the CA 2016 were necessary if companies wanted to remain relevant and competitive. Reforms were necessary to ensure Malaysia continues to be an attractive business hub for businesspersons locally, regionally and globally. Thus, in 2003, the government formed the Corporate Law Reform Committee (CLRC) to study the CA 1965 and propose reforms. Finally, the CLRC issued 12 consultative documents for public views, comments and feedback. The CLRC then published a report titled "Review of the Companies Act 1965 – Final Report of the CLRC". The CLRC made a total of 188 recommendations out of which 183 were accepted. It was subsequently issued as 19 policy statements. The government gave its approval on 18 June 2010. In 2014 the CCM released an Exposure Draft (comprising 631 sections) for public consultation. The CA 2016 that took 13 years to materialise only came into force this year.

EFFECT OF INCORPORATION

A corporation is defined and it includes a limited liability partnership (LLP) [Section 3(1)]. This is because the characteristics of an LLP is similar to a limited company [Section 3, LLP Act 2012]. Once a corporation is registered, notice of registration is conclusive evidence that the requirements of the CA 2016 in respect of registration have been complied with and that the company is duly registered under the CA 2016 [Section

19]. There is no longer a requirement to complete Form 6 and 48A as only a super-form is required to be duly completed. Thus, while previously there were nine procedures to be completed, that took up to11 days with a cost of approximately RM3000 to form a company, now the procedure is done online if one wishes to form a company.

A company is now a body corporate with a legal personality separate from its members [Section 20]. It has the full capacity to undertake any business activity [Section 21]. It has the right to buy property unlike the CA 1965, which provides a company can only buy land [Section 21(1)(b)]. Companies have the rights, powers and privileges to enter into transactions or perform activities. Thus, the doctrine of *ultra vires* no longer applies. However, if a company adopts its own constitution and restricts its' object clause, it seems as if the doctrine of *ultra vires* is revived. However, a person dealing with a company takes no notice of the restriction in the objects clause. Thus the act is valid since the doctrine of constructive notice has been abolished [Section 39].

PROMOTERS AND PRE-INCORPORATION CONTRACT

The requirement for a statutory declaration by promoters and directors is replaced with a requirement for a statement of compliance [Section 14(4)]. In a pre-incorporation contract, if a company does not ratify, the person acting on behalf of the company which is yet to be formed, is bound by the contract [Section 65(1)]. Thus, it is no longer possible for such a person to avoid liability as in Section 35(2) CA 1965.

SINGLE MEMBER AND DIRECTOR COMPANY

Only one member is required to form a company [Section 9(a)]. The sole member can also be the sole director of the company only if it is a private company. This will indirectly reduce the cost of doing business. Additionally, this will attract sole traders and partnership firms to form a limited company. This is because in a limited liability company, the member and director will not be personally liable as the liability is on the company.

COMPANY SEAL

This is no longer mandatory [Section 61]. However, the execution of documents must comply with the procedures outlined under Division 9 of Part II including situations when a company decides to have a common seal. Thus documents may be executed by authorised officers.

CONSTITUTION

Memorandum of Association and Articles of Association is now known as the constitution. A company may or may not have a constitution [Section 31(1)]. There is no longer a set of regulations which a company may adopt as in the CA 1965 which provides for Table A. If it prepares its own constitution, its constitution must not be in breach of the CA 2016 [Section 31(2) & Section 32(2)]. Thus, existing companies have to amend their current rules, if they contravene the CA 2016. If it is not practicable to alter as per the constitution, an application by a director or a member can be made to the court to alter on such terms and conditions it thinks fit [Section 37]. As for a company limited by guarantee, it is required to have its own constitution [Section 31(1) & Section 38(1)].

SHARE CAPITAL

A company limited by shares is no longer required to state its authorised share capital in its constitution. Instead, a company is required to notify its issued share capital and paid up capital and the related changes through the return of allotments. However, if a limited company wishes to alter its share capital, a special resolution is required [Section 84(1)]. Furthermore, preemptive rights as to new shares is expressly provided [Section 85].

There is no longer par/nominal value attached to shares [Section 74]. Hence, a company need not maintain a share premium account and capital redemption reserve as they will be merged with the company's share capital. The share price will be determined by the current market value of the company and this will be decided by the directors. The rights attached to ordinary shares are not expressly provided [Section 71]. Redeemable preference shares can now be redeemed out of capital [Section 72(4)(c)]. As for


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variation of class rights, the procedure as found in Article 4 Table A, CA 1965 is now given a statutory footing [Section 91(1) & (2)]. Share certificates will now be issued only if a member requests and the person named in the register of members is prima facie evidence of legal ownership [Section 97 & 101].

The CA 2016 has introduced the solvency statement which is prepared by the directors [Section 113]. Thus, the company has to comply with the solvency test [Section 112]. It is required for reduction of share capital (all directors), preference share redemption (all directors), financial assistance (majority directors) and share buybacks (majority directors). In preparing the statement, the directors have to form an opinion on a company's balance-sheet solvency and cash-flow solvency and the impact of the corporate exercise. Thus, the statement provides an assurance to stakeholders of the company's solvency state. If directors issue a statement without reasonable grounds, they will be personally liable and may be subject to a maximum fine of RM500,000; and/or an imprisonment for a term not exceeding five years. Therefore they have to inquire into the company's state of affairs, prospects and financial position before undertaking the above transactions.

It is now easier for a company to provide financial assistance for the acquisition of its shares if certain requirements are met, namely the company must obtain at least 75% approval from its members, approval from the majority of its directors and the company must receive a fair value for giving the financial assistance [Section 126]. A significant change is made to share buyback whereby Section 127(3) allows a public-listed company to carry out an off-market purchase of its shares. There are also new rules for reduction of capital. Thus, reduction of capital may either be done by passing a special resolution and obtaining a confirmation order from the court or passing a special resolution supported by a solvency statement [Section 115].

Before a distribution of dividends is made, the distribution must be authorised by the directors [Section 132(1)]. Dividends can only be paid out of profits due to the solvency test [Section 132(2)]. If after the distribution is authorised, the directors cease to be satisfied on reasonable grounds that the company will be solvent, the directors are required to take all necessary steps to prevent a distribution from being made [Section 132(4)]. If dividends were improperly paid, companies can claim back from the shareholder unless the dividends were paid in good faith and the shareholder was not aware of the solvency assessment failure [Section 133]. In such a case the directors are subject to both civil and criminal action.

DIRECTORS

The definition of a director now includes a person in accordance with whose directions or instructions the majority of directors of a corporation are accustomed to act [Section 2(1)]. Thus, as long as directions or instructions of majority directors are given, it is sufficient. The minimum age to be a director is 18 years [Section 196(2)] unlike the previous position which states the director must be of full age. However, there is no longer a maximum age limit for directors. In order to appoint a person as a director, his consent in writing is required [Section 201]. A person is disqualified from becoming a director or taking part directly or indirectly in the management of the company if he has been convicted of an offence involving bribery [Section 198(1)(c)]. In a public company, a minimum of two directors is required [Section 196] and the minimum number shall not include an alternate or substitute director [Section 196(4)(b)]. Only the minimum number of directors shall ordinarily reside in Malaysia [Section 196(4)]. Previously this was not made clear. A director is not permitted to resign or vacate if the number of

directors will fall below the minimum [Section 196(3)]. Where a company has only 1 director or the last remaining director, that director shall not resign office until he has called a meeting of members to receive his resignation notice and appoint one or more new directors [Section 209]. In a public company, the appointment of two or more persons as directors by a single resolution shall not be made unless the members agree there is no such rule [Section 203(1)], which is now an ordinary resolution. If a company wishes to remove a nominee director, the removal is ineffective until a successor is appointed [Section 206(4)].

As regards to transactions with directors, substantial shareholders or connected persons, non-cash asset is of the requisite value if its value does not exceed RM250,000 but exceeds 10% of the company's net asset value, provided it is not less than RM50,000 [Section 228(8)(c)]. Previously, the amount was RM10,000. As regards to the meaning of persons connected with a director, a body corporate is associated with a director if that director, or persons connected with that director or that director and persons connected with him are entitled to exercise not less than 20% of the votes attached to voting shares in the body corporate [Section 197(2)(b)(iii)] where else previously, it was 15%. As for directors' report, it may now include a business review report, the content of which is as provided in the 5th Schedule of the CA 2016 [Section 253(3)].

The remuneration or any benefits to be given to directors of public companies or listed companies and its subsidiaries must be approved by the members [Section 230(1)]. As regards to private companies, it may be approved by the Board of Directors (BOD) but a mandatory record and shareholder notification is required [Section 230(2)(3)]. However, shareholders of a private company holding at least 10% of the voting rights of the company may request that a director's remuneration be subject to shareholders' approval if they view the remuneration determined by the Board as being unfair [Section 230(4)]. Public companies are also required to keep a copy of every director's service contract, including those of its subsidiaries for inspection at the registered office of the company [Section 232(1)]. These service contracts can now be scrutinised by members of the company holding at least 5% of the total paid-up capital of the company [Section 233(1)].

No indemnity can be given and no insurance can be effected by a company in favour of its directors in respect of any civil or criminal liability in respect of a breach of the general duty of directors to exercise their powers in accordance with the new Act for a proper purpose and in good faith and in the best interests of the company [Section 289(1)]. Nonetheless, the CA 2016 now regulates which losses incurred by the directors are insurable and which are not [Section 289(3)(4)(5)]. Thus, companies can only effect insurance for a director with the prior approval of the BOD in specific instances. Such instances include civil liability for any act or omission in his capacity as director and costs incurred in defending a civil claim or criminal claim (provided that the director is acquitted in the criminal claim, the director is granted relief under the new Act or where proceedings are discontinued). Where insurance is effected without complying with the provisions, the director will be personally liable to the company for the cost of such insurance, unless the court finds otherwise [Section 289(8)]. Subject to the constitution of a company, the provisions set out in the Third Schedule of the CA 2016, govern the proceedings of the Board of Directors [Section 212].

COMPANY SECRETARY

A company need not appoint a company secretary at the time it is incorporated. It can do so within 30 days from the date of its incorporation. A company secretary shall be at least 18 years of age [Section 235(1)(b)]. The CA 1965 stated that the person must be of full age. Furthermore, a company secretary must now be a citizen or permanent resident of Malaysia [Section 235(1)(c)] unlike previously which only requires residency in Malaysia.

AUDITORS

The Registrar reserves the right to exempt certain private companies from appointing an auditor for the financial year [Section 267(2)]. Since private companies are no longer required to hold annual general meeting (AGM), they may circulate its audited accounts to the members. As for public companies, audited accounts must still be presented at the AGM [Section

340(1)(a)]. As for newly formed private companies, the BOD shall appoint an auditor within 30 days before the end of the period for the submission of the first financial statements to the Registrar [Section 267(3)(a)]. The CA 1965 is unclear as to when an appointment should be made. If a person is indebted to a company or its related company in an amount exceeding RM25,000, the person is disqualified from being appointed as an auditor [Section 264(1)(c)(ii)]. The amount in the CA 1965 was RM2,500. A register of firms of auditors is kept by the Registrar [Section 265(1)].

The resignation of an auditor will take effect 21 days after a written notice has been deposited at the company's office [Section 281]. This is so regardless of whether a new auditor has been appointed. Furthermore, an auditor has the right to require directors of a public-listed company to convene a general meeting [Section 283(2)]. The purpose of the meeting is to explain the circumstances of his resignation. The auditor can also require the company to circulate a written statement which sets out the reasons for his resignation [Section 283(3)]. This is to ensure that auditors do not continue serving a company against his will. It also resolves the issue of having to wait for the company to appoint an auditor and call for a meeting.

There is now a mandatory auditor attendance at public company AGMs [Section 285(1)]. In a private company, if due notice is given by the company to the auditor, he shall attend to respond to any questions that will be raised on the audit [Section 285(2)]. If the auditor fails to do so, he commits an offence. However, there are certain defences available to the auditor [Section 285(3)] namely the auditor is prevented by circumstance beyond his control from attending; the auditor arranges for another auditor to attend and carry out the duties of an auditor; if the auditor is a partner of a firm, the person attending is a partner of that firm; or the auditor arranges for an agent to attend and carry out the duties of an auditor. If a company removes an auditor before the expiration of his term of office, he may bring an action for compensation or damages [Section 276(2)]. This will address issues of removal that occurred in Oil Corp Bhd (2008), Axis Inc Bhd (2008), Emico Holdings Bhd (2009) and REDtone International Bhd (2009). As regards to indemnity and auditors, the legal position is similar to directors as discussed in the previous section.

to circulate a resolution accompanied by a statement on the subject matter of the resolution prior to the passing of the written resolution [Section 302].

AGMs are only required in a public company and are no longer required in private companies [S.340]. The first AGM must be held within six months of the company's financial year end [Section 340(2)(a)]. Under the CA 1965, it was within 18 months of the company's incorporation. Therefore a private company may make its decisions by a written resolution which is circulated among its members [Section 297].

COMPANY MEETINGS

Written resolution is only available for private companies [Section 290(1)(a)]. It can either be proposed by the BOD or any member [Section 297(1)]. However, they are no longer required to obtain an unanimous approval to pass a resolution. The percentage required will depend on the type of resolution required by the CA 2016 [Section 305(4)]. Nevertheless, this procedure cannot be used for removal of a director or auditor before their term expires [Section 279(2)]. An additional safeguard is any shareholder holding 5% or more of the total voting rights of the company may require the company

However, their annual return needs to be lodged with CCM within 30 days from each anniversary of the company's incorporation date [Section 68(1)]. It is now expressly stated as to what will be transacted at a public company's AGM [Section 340(1)] namely laying of audited financial statements, directors report, auditors' report, election of directors to replace those retiring, appointment of directors, fixing directors' fee. As regards to meetings convened by the BOD upon the requisition of members under Section 311, if it is a private company and more than 12 months has elapsed since the date of the last meeting was convened, members representing at least 5% of the paid up capital may require a meeting [Section 311(4)]. As regards to requisition of resolution or statement, Section 323(2)(a) gives the right to members representing at least 2.5% of the paid up capital of the company carrying the right of voting or at least 50 members who have a relevant right to vote. Under CA 1965, the members must be holding 5% of the voting rights or there must be at least 100 members. Section 317 provides that the contents of a company notice should state the place, date, time and nature of the business of the meeting.

The CA 2016 facilitates the use of technology that will allow members reasonable opportunity to participate in meetings. Thus, meeting at multiple venues is allowed but the main meeting venue shall be in Malaysia where the chairperson is present [Section 327(2)]. Notice of a meeting of members which shall be in writing and may also be given by electronic form [Section 319(1)(b)]. As regards to joint holders of shares, their voting is not valid if they do not exercise their vote in the same way [Section 295].

A proxy can be the chairperson of a meeting of members if there is a resolution to appoint the proxy and the company's constitution permits [Section 336] it. Furthermore, a proxy can vote by show of hands provided he is the only proxy [Section 294(1)]. A member can appoint any person as a proxy [Section 334] unlike the CA 1965. Furthermore, termination of a proxy will have no effect on quorum, validity of proxy's act if he is the chairperson, validity of a poll demanded by him and validity of his exercise of voting rights unless the termination was received before the commencement of meeting [Section 338]. Ordinary resolution is expressly explained in the CA 2016 as a simple majority of more than half of such members [Section 291].

MEMBERS' RIGHTS

The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated [Section 347(3)]. This is due to the fact that there is an overlap between the common law derivative action and Section 347. If they co-exist, it will be confusing in terms of proceedings. Furthermore, members' have the right to review the company's management [Section 195(1)]. Thus, the chairperson of a meeting of members of a company shall allow a reasonable opportunity for members to question, discuss, comment or make recommendations on the management of the company.

WINDING UP

One of the grounds for compulsory winding up is, if the company defaults in lodging the statutory declaration under Section 190(3) which is only applicable to public companies [Section 256(1)(b)].Section 465(1)(d) provides that a company can be compulsorily wound up if there is no member. As regards to the meaning of "unable to pay debts" under Section 466(1), the amount is not prescribed by the Minister unlike the previous provision which is RM500. Section 467(2) provides that compulsory winding up is deemed to have commenced when a winding up order is made unlike previously where it is at the time petition is made. If a person is indebted to a company or its related corporation in an amount exceeding RM25,000 he shall not be qualified to be appointed as an interim liquidator or liquidator of a company [Section 433(1)]. Furthermore, any person who is a member of a recognised professional body may apply to be approved as a liquidator unlike previously where only a company auditor may apply. The wages payable to an employee when a company is being wound up is increased to RM15,000 [Section 527(1)(b). In relation to the protection against dissipation of assets during the period leading to winding up, the law is now clarified as it provides certainty on the time-frame of six months to enable the liquidator to set aside the transaction as undue preference [Section 528]. Section 493 now empowers the court to terminate winding up proceedings to provide clarity to the law in ascertaining the status of the company.

CONCLUSION

It can be observed that much effort has been taken by the policymakers to make the Companies Act 2016 as attractive as possible to the corporate world. Various measures have been taken to simplify the process of forming and doing business in Malaysia. The policymakers must be applauded for making various comparative studies on the legal developments in Singapore, Australia and the United Kingdom and tailor suit it to the local corporate atmosphere. It is now left to the business players to fully take advantage of the ease of doing business in Malaysia under the Companies Act 2016.

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

BRUNEI

Amendments to Companies Act and Stamp Act

On 15 May 2017, the Ministry of Finance (MoF) announced the Companies Act (Amendment) Order 2017, Stamp Act (Amendment) Order 2017 and other initiatives with the objective of catering and adapting to the changing business needs and creating an environment conducive for business and investment. These Orders took effect on 4 May 2017.

The Companies Act (Amendment) Order 2017 removes submission of Notice of Situation of Registered Office form and the Returns of Allotment of Shares form during the incorporation of a company. In line with this amendment, the fee to incorporate a company is now BND300.

The details provided in the Stamp Act (Amendment) Order 2017 include the removal of the requirement for Memorandum and Articles of Association and Share Certificates to be stamped for the purpose of incorporation.

Details provided in the other initiatives include the MoF cooperating with other government agencies and members of the public sector to eliminate the requirement of having Certified True Copy of documents to verify company and business names. Instead, verification can be made directly from Registry of Companies and Business Names Division.

Companies Act amended to improve ease of doing business

On 16 May 2017, the MoF announced the introduction of

Companies Act (Amendment) (No. 2) Order 2017, with the objective of improving the ease of doing business by strengthening the rights of minority shareholders. The details provided in this Order include:

- a requirement to call for a meeting to pass a special resolution by way of notice in writing, and given not less than 21 days prior to the meeting;
- giving members the right to attend any general meeting of the company and to speak about any resolution before the meeting; and
- a requirement for every director to disclose their interest in transactions of property, offices etc.

The Order took effect from 6 May 2017.

CHINA (PEOPLE'S REP.)

Administrative measures on due diligence investigation into financial accounts of non-residents published

On 9 May 2017, the "Administrative Measures on the Due Diligence Investigation into Financial Accounts of Non-Residents" was issued by six government departments, including the State Administration of Taxation (SAT), Ministry of Finance (MoF), Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission and China Insurance Regulatory Commission. The measures will take effect from 1 July 2017, and the required information collected by financial institutions must be submitted to the competent authorities by 31 December 2018.

The measures correspond with the discussion draft released for public comments in October 2016, containing seven chapters and 44 articles that have been drafted in accordance with the OECD's Common Reporting Standard, and three appendices which include the Individual Tax Residence Statement Form, the Entity Tax Residence Statement Form and the Tax Residence Statement of Controlling Persons Form. The measures provide rules in respect of the scope of financial information to be reported, the scope of account holders subject to reporting, the scope of financial institutions required to report, definitions of terms used, rules relating to confidentiality, accounts or financial institutions exempt from investigation and rules relating to new and existing accounts for both individuals and entities.

The information that financial institutions are required to submit includes name, address, jurisdiction of tax residence of non-residents, tax identification number, date and place of birth, place of incorporation, name and identification number of the financial institution and other relevant information.

With respect to new financial accounts of individuals, if the account balance exceeds USD1 million before or on 30 June 2017, the financial institution is required to complete the due diligence investigation before 31 December 2017. Where the account balance is less than USD1 million, the due diligence investigation must be completed before 31 December 2018. With regard to entities, the due diligence investigation into bank accounts with a balance exceeding USD250,000 before or on 30 June 2017 must be completed before 31 December 2018. Bank accounts with a balance less than that amount are not subject to investigation.

Financial institutions are required to register with the SAT before 31 December 2017 and submit the information required by 31 May each year, and the information submitted must be retained for at least five years from the submission date.

The measure is aimed to fulfil the international obligations derived from the BEPS Project. As a G20 country, China is a party to the Council of Europe - OECD Mutual Assistance Treaty (1988) (as amended through 2010) and has signed the OECD Multilateral Convention (MLI). With the publication of these measures, the implementation of the Common Reporting Standard in China becomes a fact.

Deductibility of expenses on advertisement and business promotion clarified

The MoF and the SAT jointly issued Cai Shui (2017) No. 41 on 27 May 2017 clarifying the deductibility of expenses on advertisement and business promotion. The Notice applies from 1 January 2016 to 31 December 2020.

According to the notice, advertisement and business promotion expenses incurred by the cosmetic industry (including manufacturing and sales), pharmacy or beverage manufacturing industries are deductible for enterprise income tax purposes for up to 30% of the revenue of the current year. Any excess may be carried forward and similarly deducted.

Preferential tax policies for small and low-profit enterprises clarified

On 6 June 2017, the MoF and the SAT jointly issued Cai Shui (2017) No. 43 clarifying the preferential policies for small and low-profit enterprises. The notice applies retrospectively from 1 January 2017 until 31 December 2019.

The notice clarifies that the threshold of the annual turnover for small and low profit enterprise is increased from CNY300,000 to CNY 500,000 and that the applicable tax rate remains at 20% on 50% of their taxable income.

The Notice further defines an industrial low profit enterprise as an enterprise with annual turnover less than CNY500,000 with less than 100 employees and the value of total assets does not exceed CNY30 million. As for other enterprises, it is defined as an enterprise with an annual turnover less than CNY500,000 with less than 80 employees and the value of total assets does not exceed CNY10 million.

Preferential tax policies for small and low-profit enterprises clarified

On 19 June 2017, the SAT issued SAT Gong Gao (2017) No. 24 clarifying the administrative rules for high and new technology enterprises (HNTE). The announcement applies to the final settlement and payment of the annual enterprise income tax for 2017 and subsequent years. The main contents are summarised follows:

- A qualifying HNTE may enjoy the tax incentive starting from the year in which the certificate of HNTE is issued and the filing procedure with the competent tax authorities is completed;
- A HNTE is required to make a prepayment of enterprise income tax at a rate of 15% in the year that the certificate of HNTE expires; and
- If the enterprise fails to renew the certificate by the end of that year, it must pay enterprise income tax at the full tax rate by making a supplement to the prepayment.

Further to the above, the following documentation must be maintained by a HNTE:

- the certificate of the HNTE status;
- the documents supporting the HNTE status;

- the documents related to intellectual property rights;
- the documentation stating that the key technology used in the main products of the enterprise is within the scope of the "State Supported High and New Technologies" and the relationship between the key technology and the revenue generated by such key technology;
- the documentation on personnel and the scientific and technology employees;
- the documentation on the proportions of R&D expenses to the revenue of the current and two previous years, the administration, accounts and specification of R&D expenses; and
- other relevant documents required by the tax authorities at the provincial level.

VAT on asset management services clarified

On 30 June 2017, the MoF and the SAT jointly issued Cai Shui (2017) No. 56 clarifying VAT payable on asset management services. Asset management services were previously exempt from business tax, however following the transition from business tax to VAT on 1 May 2016, such services are subject to VAT. The Notice seeks to clarify on how these services will be taxed.

According to the Notice, the taxable asset management services are subject to 3% VAT on the basis of the simplified method, meaning no input VAT is available for deduction. The taxable products covered by the Notice include, *inter alia,* asset management products, trust products, special or collective asset management plans, open security investment funds, composite insurance asset management products and old-age pension products. Other taxable asset management services that are not covered by the Notice will be subject to VAT based on the current standard VAT rules.

The said Notice is effective from 1 January 2018 to allow asset management agents time to prepare for the said implementation. Asset management agents is defined as banks, trust companies, securities companies, private investment funds, insurance asset management companies, special insurance asset management institutions and pension funds.

HONG KONG

Concessionary revenue measures proposed in 2017/18 Budget – passed

On 25 May 2017, the Inland Revenue (Amendment) Bill 2017 was passed by the Hong Kong Legislative Council. The legislative amendment enables Hong Kong to implement the major concessionary revenue measures proposed in the 2017-18 Budget. The measures include:

- a 75% one-off reduction in profits tax, salaries tax and tax under personal assessment for the year of assessment 2016/17, subject to a maximum of HKD20,000 per case;
- increase in allowance for disabled dependant from HKD66,000 to HKD75,000 and dependant brother or sister from HKD33,000 to HKD37,500 for the year of assessment 2017/18;
- the deduction ceiling for self-education expense is increased from HKD80,000 to HKD100,000 for the year of assessment 2017/18;
- the entitlement period for home loan interest deduction is extended from 15 to 20 years of assessment as from the year of assessment 2017/18; and
- widening of the marginal tax bands from HKD40,000 to HKD45,000 for year of assessment 2017/18.

Inland Revenue (Amendment) (No. 2) Ordinance 2017 gazetted – implementation of automatic exchange of financial account information in tax matters more effective

On 16 June 2017, the Inland Revenue (Amendment) (No.2) Ordinance 2017 was gazetted by the government. The Ordinance enables Hong Kong to implement automatic exchange of financial account information in tax matters (AEOI) more effectively.

To implement AEOI from 1 July 2017, the list of "reportable jurisdictions" under the Ordinance will be expanded to cover 75 jurisdictions, comprising 13 confirmed AEOI partners and 62 prospective AEOI partners. The 62 prospective AEOI partners include the following three categories:

- jurisdictions which have expressed an interest in conducting AEOI with Hong Kong to the OECD or jurisdictions suggested by the OECD;

- Hong Kong's tax treaty partners which have committed to AEOI; and
- all member states of the European Union.

Inland Revenue (Amendment) (No.4) Bill 2017 gazetted – profits tax exemption on privately offered open-ended fund companies proposed

On 23 June 2017, the Inland Revenue (Amendment) (No.4) Bill 2017 was gazetted by the government. The Bill seeks to implement the 2017-18 Budget initiative of extending profits tax exemption to privately offered open-ended fund companies (OFCs) with their central management and control exercised in Hong Kong.

According to the Bill, the exemption conditions are to ensure that the OFC is non-closely held and that transactions are carried on through, or arranged by, a qualified person in permissible asset classes. Meanwhile, certain flexibility, in the form of a 10% de minimis limit for investing in non-permissible asset classes and a gear-up period to meet the non-closely-held condition, will be allowed. There are also safe harbour arrangements to cater for the actual operational circumstances that an OFC may encounter.

The Bill was introduced into the Legislative Council on 28 June 2017.

INDIA

CBDT announces new Safe Harbour Regime

In a press release dated 8 June 2017, the Central Board of Direct Taxes (CBDT) announced a new safe harbour regime. The new regime is aimed at reducing transfer pricing disputes, providing certainty to taxpayers, aligning safe harbour margins with industry standards and enlarging the scope of safe harbour transactions.

The new regime comes into effect from 1 April 2017 and will remain in force up to the year of assessment (YA) 2019-2020. Taxpayers eligible under the current safe harbour regime up to YA 2017-2018 can choose the safe harbour option most beneficial to them. The safe harbour regime is optional to taxpayers.

The new regime is available for transactions up to INR2 billion for the following categories of transactions:

- provision of software development services (reduction of safe harbour margin to peak rate of 18% from 22% in the previous regime);
- provision of information technology-enabled services (reduction of safe harbour margin to peak rate of 18% from 22% in the previous regime);
- provision of knowledge process outsourcing services (a graded structure of 3 different rates - 24%, 21% and 18% – replaces the single rate of 25% in the previous regime);
- provision of contract research and development (R&D) services wholly or partly relating to software development (reduction of safe harbour margin to 24% from 30% in the previous regime); and
- provision of contract R&D services wholly or partly relating to generic

pharmaceutical drugs (reduction of safe harbour margin to 24% from 29% in the previous regime).

A new category of transactions entitled "Receipt of Low Value-Adding Intra-Group Services" has been introduced. Risks spread on intra-group loans denominated in foreign currency will be benchmarked to the 6-month London Inter-Bank Offer Rate

(LIBOR) as from 30 September of the relevant year, and on loans denominated in Indian Rupees to the 1-year SBI MCLR as from 1 April of the relevant year.

CBDT notification on secondary adjustments – issued

In February 2017, the Finance Bill 2017 introduced the concept of secondary adjustments under the Indian tax law. In line with the provisions introduced, the CBDT issued Rule 10CB (Notification No. 52/2017 dated 15 June 2017) wherein it specified the time limit for the receipt of remittances in the case of secondary adjustments and also the interest to be charged in the case of delay in receipt. Under the notification, a time limit of 90 days has been specified for the receipt of remittances for the following:

- from the due date of filing a return, where primary adjustments to the transfer price have been made:
- suo-moto by the taxpayer in his return of income; or
- in accordance with an advance pricing agreement (APA); or
- in the case of an option exercised by the taxpayer as per the safe harbour rules; or
- in the case of an agreement entered into by the taxpayer under the Mutual Agreement Procedure (MAP);
- from the date of the order of the tax authority, if the primary adjustments to the transfer price as determined in the aforesaid order have been accepted by the taxpayer.

The imputed per annum interest income on excess money which is not repatriated within the time limit will be computed as follows:

- at the 1-year marginal cost of funds lending rate of the State Bank of India as at 1 April of the relevant previous year plus 325 basis points in cases where the international transaction is denominated in the Indian rupee; or
- at the 6-month London Interbank Offered Rate as at 30 September of the relevant previous year plus 300 basis points in cases where the international transaction is denominated in a foreign currency.

Highlights of new GST system

From 1 July 2017, a comprehensive Goods and Services Tax (GST) has replaced the multitude of indirect taxes prevailing in India.

The Constitution Amendment Bill enabling GST was ratified by the parliament on 8 August 2016 followed by a notification of The Constitution (One Hundred and First Amendment) Act, 2016 on 8 September 2016. The following Acts were provided for the President's assent on 12 April 2017:

- The Central Goods and Services Tax (CGST) Act, 2017;
- The Integrated Goods and Services Tax Act, 2017;
- The Union Territory Goods and Services Tax Act, 2017; and
- The Goods and Services Tax (compensation to states) Act, 2017.

The CGST Rules 2017 and the related notifications relating to the above Acts were released in the months of June and July 2017. GST in India is governed by the GST Council, with the Finance Minister as its Chairman. The GST Council will make recommendations to the Union and states on the taxes, cesses and surcharges levied by the Centre, the states and the local bodies which may be subsumed in the GST.

Alcohol for human consumption and five petroleum products viz. petroleum crude, motor spirit (petrol), high speed diesel, natural gas and aviation turbine fuel have temporarily excluded from GST and the GST Council will decide the date from which they are to be included. Furthermore, electricity has also been excluded from the purview of GST.

The salient features of GST introduced in India are as follows:

- GST is a destination based tax on consumption of goods and services and is proposed to be levied at all stages right from manufacture up to final consumption with credit of taxes paid at previous stages available as setoff.
- Taxable event for GST is the

supply of goods or services or both. The term "supply" is wide in its import and covers all forms of supply of goods or services or both. This includes sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. It also includes import of service.

- The value of taxable supply of goods and services will ordinarily be "the transaction value" which is the price paid or payable, when the parties are not related and price is the sole consideration.
- The turnover threshold for payment of GST by a taxpayer is INR2 million (INR1 million for north east and special categories).
- A dual GST model has been adopted in India whereby the taxes will be levied by the central and state governments. This is in line with the Indian constitutional requirement of fiscal federalism between central and state governments.
- Transactions made within a state will be levied with Central GST (CGST) by the central government and state GST (SGST) by the government of that state on a common taxable base. On inter-state transactions and imported goods or services, an Integrated GST (IGST) is levied by the central government. Therefore, CGST and IGST shall be levied and administered by the central government and the respective states will administer the SGST.
- A Harmonised System of Nomenclature (HSN) code shall be used for classifying the goods under the GST regime.
- A Special Purpose Vehicle called the Goods and Services Tax Network (GSTN) has been set up to cater to the needs of GST. The GSTN will provide a shared IT infrastructure and services to central and state governments, tax payers and other stakeholders for the implementation of GST.
- Under the CGST/SGST Act, every registered person shall be assigned a compliance rating based on the record of compliance in respect of specified parameters.
- Under the CGST/SGST Act, any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit will be passed on to the recipient by way of commensurate reduction in prices. An authority will be constituted by the government to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.
- A five tier rate structure has been adopted for the purposes of GST, the rates being 0%, 5%, 12%, 18% and 28%, and 28%+cess on certain goods. Most goods and services have been classified at 12% or 18%, with certain essential goods and services at either 5% or 0%. The GST rate on pearls, precious or semi-precious stones, diamonds (other than rough diamonds), precious metals (like gold and silver), imitation jewellery is 3% and on rough diamonds it is 0.25%

INDONESIA

New technical guidelines on access to financial information for tax purposes

The Minister of Finance (MoF) issued Government Regulation in lieu of Law (Perppu) No. 1/2017 on 8 May 2017, which enables the Director General of Tax (DGT) to obtain information from financial institutions to meet their obligations under the international tax agreements Indonesia has

entered into for the automatic exchange of information (AEOI) to combat tax evasion. Pursuant to article 9 of Perppu 1/2017, the MoF issued Regulation No. 70/PMK.03/2017 (PMK 70/2017) of 31 May 2017 to provide guidance on the implementation of the regulations set out in Perppu 1/2017.

Some of the salient provisions in the PMK 70/2017 include:

- definition of reporting financial institutions (FI) and non-reporting FIs;
- requirements to be met by both reporting and non-reporting FIs to register with the DGT;
- identification of financial accounts that have to be reported and those that are excluded;
- obligations of the reporting FIs in identifying the reportable financial accounts and the documentation requirements;
- reporting FIs are not allowed to create new financial accounts or enter into certain transactions with individuals or entities that do not comply with the disclosure requirements;
- deadlines and the minimum content of the various reports to be furnished; and
- sanctions and fines for non-compliance with Perppu 1/2017

PMK 70/2017 revokes article 6 of MoF Regulation No. 39/PMK.03/2017 and article 1(3)(b) of MoF Regulation No. 87/PMK.03/2013 (PMK 87/2013). Requests for information from the DGT based on PMK 87/2013 that are pending approval from the Head of Financial Services Authority would be subject to the provisions in PMK 70/2017.

Amendment to technical guidelines on automatic exchange of financial information

The MoF issued Regulation No. 73/PMK.03/2017 (PMK 73/2017) to amend the guidelines on access to financial information [MoF Regulation No. 70/PMK.03/2017 (PMK 70/2017) of 31 May 2017], that took effect on 13 June 2017.

PMK 73/2017 revises the thresholds for financial accounts that have to be reported automatically pursuant to article 17 of PMK 70/2017 as follows:

- banking financial accounts owned by individuals with balances amounting to at least IDR1 billion as at 31 December of a reporting year;
- insurance policies of individuals and entities with a sum insured of at least IDR1 billion as at 31 December of a reporting year; and
- cooperative financial accounts owned by individuals and entities with balances amounting to at least IDR1 billion as at 31 December of a reporting year.

It is clarified in PMK 73/2017 that the existing financial accounts as at 30 June 2017 with balances not exceeding USD250,000 on 30 June 2017, 31 December 2017 and 31 December of subsequent years would not be subject to the reporting requirements. PMK 70/2017 is also amended to ensure that requests and exchange of information could be done electronically.

Based on PMK 73/2017, the DGT is expected to issue regulations relating to registration procedures for reporting and non-reporting financial institutions; and procedures for electronic requests and furnishing of information.

Procedure to apply for tax treaty benefits

The DGT released Regulation PER-10/PJ/2017 (PER-10) of 19 June 2017 on the procedure to apply for tax treaty benefits. Based on the PER-10, non-residents must provide Certificate of Domicile (Form DGT-1 or DGT-2) to avail them of treaty benefits. Copies of the forms and guidelines to complete the forms are provided in the PER-10. The forms can be submitted electronically. Non-residents are also allowed to apply for the Mutual Agreement Procedure.

To avail of the treaty benefits, non-residents entities must have economic substance, independent management teams authorised to conduct business activities, sufficient assets and headcount and must be the beneficial owners of the income derived from Indonesia. Beneficial owners are defined as not agents, nominees or conduits, that is:

- they have control over the capital, assets or rights used to derive income;
- not more than 50% of the income is used to satisfy claims by other parties;
- they bear the risk associated with the capitals or assets owned; and
- they are not obliged to transfer their income to a resident of a third country.

Deemed dividends from CFCs – regulations issued

The MoF issued Regulation 107/ PMK.03/2017 (PMK 107) of 27 July 2017 regulating the taxability of deemed dividends from controlled foreign corporations (CFCs). PMK 107, which is effective from tax year 2017, replaces MoF Regulation 256/ PMK.03/2008 of 31 December 2008.

A CFC is defined as a foreign corporation, other than a listed corporation, in which Indonesian resident shareholders (individuals or companies), individually or collectively, hold(directly or indirectly) 50% or more of its total paid-up capital or paid-up capital with voting rights as at the end of the tax year of the Indonesian shareholders. Capital held by trusts or similar entities is deemed to be held by investors in such entities.

Dividends are deemed to be distributed four months after the due date for submission of the annual tax return by the CFC, or seven months from the end of the tax year of the CFC if the CFC is not obliged to file a tax return or where the tax filing deadline is not stipulated. Indonesian shareholders must declare the deemed dividends in the tax return for the tax year in which the dividends are deemed to have been distributed.

The deemed dividends are computed by multiplying the effective shareholding in the CFC by the CFC's after-tax profit as per the financial statements. Actual dividends received from CFCs are also taxable. However, taxes may be reduced by the deemed dividends taxed in the current and past four years. If the actual dividends received exceed the deemed dividends, the excess is taxable in the year in which the actual dividends are received.

Foreign tax paid on actual dividends received can be credited against the tax payable of the Indonesian shareholder in the tax year in which the dividends are received. The tax credit is the lesser of

- foreign income tax on the actual dividends received based on tax treaties;
- foreign income tax on the actual dividends received which has been paid or payable; and
- the portion of Indonesian tax payable on the actual dividends which is calculated based on the proportion of actual dividends received to the total taxable income.

Tax credit arising from dividends received from a country can only be credited against Indonesian tax payable on the income from the same country.

The Indonesian shareholders must submit the computation of the foreign tax credit in a prescribed form together with the annual tax return and the following documents of the CFC:

- the financial statements;
- a copy of the income tax return, provided that the CFC is required to file tax returns;
- a computation of profit after tax for the past five years; and
- proof of foreign tax paid on the actual dividends received.

SINGAPORE

Rules for filing of estimates of chargeable income

On 21 July 2017, the Income Tax (Filing of Estimates of Chargeable Income) Rules 2017 (the Rules) were gazetted. Salient points of the Rules are discussed as follows:

- For the purpose of the Rules, revenue in a year of assessment (YA) is the gross amount of income derived from principal activities in the accounting period relating to that YA.
- The criteria for a waiver of the requirement to file estimates of chargeable income (ECI) with regard to a company, as reported earlier this year, are deemed to have come into operation on 29 December 2016.
- Effective 29 December 2016, the criteria for a waiver of the requirement to file a person's estimated income and other information with regard to a partnership for a YA pursuant to Section 71(3) of the Income Tax Act is the accounting period relating to that YA ends in the month of October, November or December; or the revenue of the partnership in the YA immediately before the relevant YA does not exceed SGD 500,000.
- Effective 21 July 2017, the Income Tax (Electronic Filing of Estimates of Chargeable Income) Rules 2017 are revoked.
- Effective 21 July 2017, the effective YA or YAs to which a class of companies must furnish the ECI using the electronic service provided by the Inland Revenue Authority of Singapore are as follows:
- YA 2018 for companies with revenues exceeding SGD10 million in YA 2017
- YA 2019 for companies with revenues exceeding SGD1 million in YA 2018; and
- YA 2020 and subsequent YAs for all other companies

THAILAND

New Customs Act gazetted

The Customs Act B.E. 2560 (CA) was gazetted on 17 May 2017 and will be effective from 13 November 2017. The CA replaces the Customs Act B.E. 2469 (1926). Some of the salient changes are listed as follows:

- Persons evading customs duties are subject to a reduced penalty ranging from 0.5% to 4% of duty shortfall, imprisonment not exceeding 10 years, or both. Sanctions for failure to comply with rules on restricted or prohibited goods are penalty of less than THB500,000, imprisonment of less than 10 years, or both. Goods of persons penalised may be confiscated and smuggled goods will be forfeited.

- A penalty not exceeding THB 500,000 will be imposed for providing false documents/ declarations. If false information is provided, or if fake customs documents, stamps, signatures and labels are used, the sanctions are a penalty of less than THB 500,000, imprisonment of less than six months, or both.
- Monthly duty surcharge is capped at the amount of duty payable, and may be reduced or waived.
- Duty refund may be claimed within three years (previously two years) from the date of importation or exportation.
- Commissions payable to customs officers and whistleblowers are reduced and capped at THB5 million per case.
- Post-clearance audits must be conducted within five years from the date of importation or exportation.
- The Appeals Commission must issue a decision within 180 days from the date of receipt of an appeal. The deadline may be extended by a period not exceeding 90 days.

VIETNAM

Law on support for small and medium-sized enterprises (SMEs)

On 12 June 2017, the National Assembly passed the Law on Support for SMEs (the Law), which will be effective on 1 January 2018. The Law defines an SME as an enterprise with not more than 200 employees making social insurance contributions and with capital not exceeding VND 100 billion, or with the preceding year's revenue not exceeding VND 300 billion. SMEs will be taxed at a lower rate compared to the prevailing corporate income tax rate. SMEs will also enjoy other non-tax incentives, such as reduced land rents and land use fees, access to credits and professional services support.

The government will issue guidelines regarding the Law at a later date.

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

The technical updates published here are summarised from selected government gazette notifications published between 16 May 2017 and 15 August 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 (Exemption) (No. 12) Order 2016 (Amendment) Order 2017

Income Tax (Exemption) (No. 12) Order 2016 (Amendment) Order 2017 [P.U.(A) 144], gazetted on 23 May 2017, amends Paragraph 5 of the Income Tax (Exemption) (No. 12) Order 2016 [P.U.(A) 346] to replace the words "tourists from outside Malaysia" with the words "local tourists". The exemption order was amended because it was meant to provide 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 year of assessment.

Income tax exemption on medical tourism

A company that provides private healthcare facilities services to a "healthcare traveller" was previously given a tax exemption on its income. Such exemption would be equivalent to an investment tax allowance of 100% of qualifying capital expenditure incurred for a period of five years. This incentive applied to applications received by the Malaysian Investment Development Authority (MIDA) from 1 January 2010 to 31 December 2014 and was given to new companies as well as existing companies engaged in expansion, modernization or refurbishment. The 2015 Budget proposed that the above incentive be extended, with additional conditions imposed.

Income Tax (Exemption) (No. 3) Order 2017 [P.U.(A) 203], gazetted on 21 July 2017, gives effect to the above proposal and is deemed to have come into operation from the year of assessment 2015. The Exemption Order applies to applications made to MIDA from 1 January 2015 to 31 December 2017.

The Exemption Order provides an income tax exemption on the statutory income derived from a qualifying project carried on by a qualifying company. The amount of tax exempted shall be equal to the amount of qualifying capital expenditure incurred by the qualifying company, for a period of five consecutive years commencing from the date of the first qualifying capital expenditure incurred by the qualifying company, as determined by MIDA. The commencement date shall not be earlier than three years immediately preceding the date the application for exemption is received by MIDA, and shall not be earlier than 1 January 2015. The additional conditions to be satisfied are:

The number of health travellers who receive private healthcare services from the qualifying project must be at least 5% of the total number of patients from the qualifying project for each year of assessment; and

At least 5% of the gross income of the qualifying company from the qualifying project for each year of assessment must be generated from the health travellers.

Income Tax (Deduction for Expenditure on Issuance or Offering of Sustainable and Responsible Investment Sukuk) Rules 2017

Income Tax (Deduction for Expenditure on Issuance or Offering of Sustainable and Responsible Investment Sukuk) Rules 2017 [P.U.(A) 221], gazetted on 28 July 2017, provide deduction for expenditure incurred by the company on the issuance or offering of Sustainable and Responsible Investment Sukuk approved or authorised by, or lodged with, the Securities Commission Malaysia under the Capital Markets and Services Act 2007.

To qualify for the deduction, 90% of the proceeds raised from the issuance or offering of such *sukuk* must be used solely for the purpose of funding the Sustainable and Responsible Investment Project specified in the guidelines relating to *sukuk* issued by the Securities Commission Malaysia under the Capital Markets and Services Act 2007.

These Rules shall be deemed to have effect from YA 2016 to YA 2020.

2017 tax audit framework

The IRBM has issued on its website the 2017 tax audit framework in Bahasa Malaysia, titled "Rangka Kerja Audit Cukai (Pindaan 1/2017)". The 22-page 2017 tax audit framework took effect from 1 May 2017 and replaces the previous 2015 Tax Audit Framework that was effective 1 February 2015. The content of the new tax audit framework is broadly similar to that of the earlier audit framework but with significant clarifications. Some of the important updates are as follows:

Period covered is extended from one year of assessment (YA) to three YAs.

Full tax audit will be undertaken, covering all aspects of tax.

A field audit commences from the date of the letter requesting for documents or on the first day of the visit to the taxpayer's premises (in the case where a letter requesting for documents is not provided). A desk audit is deemed to commence from the date of the letter requesting for documents (Form CP800/ CP 800A).

The audit may also be extended to companies/businesses connected with the same Director, without prior notice to the taxpayer.

The IRBM can visit the taxpayer's premises or related companies or businesses with the same director without any prior notice to the taxpayer.

A taxpayer no longer qualifies for voluntary disclosure once the audit commences. The following are the revised concessionary penalty rates ***(see Table 1 & 2)***.

Public rulings to clarify the income tax treatment of GST input and output tax

PR No. 1/2017: Income Tax Treatment of Goods and Services Tax Part I – Expenses

PR No. 1/2017, published on 8 June 2017, explains the tax treatment accorded to a person in respect of Goods and Services Tax (GST) paid or to be paid:

Input tax on the purchase or acquisition of goods and services other than capital assets by a person if he is registered or liable to be registered under the Goods and Services Tax Act 2014 (GSTA); and

Output tax on the sale of goods and services which is borne by a person if he is registered or liable to be registered under the GSTA

Generally, a deduction would be disallowed on input tax if the taxpayer is liable to be registered under the GSTA and he has failed to do so, or if the taxpayer is entitled to an input tax credit under the GSTA. A taxpayer would also be denied a deduction in respect of any output tax which he decides to bear for his customer.

PR No. 2/2017: Income Tax Treatment of Goods and Services Tax Part II – Qualifying Expenditure for Purposes of Claiming Allowances

PR No. 2/2017, published on 8 June 2017, explains:

Whether the qualifying expenditure (QE) incurred by a person on the purchase or acquisition of capital assets for the purpose of claiming allowances, includes the GST paid or to be paid;

- The income tax adjustment to be made to the QE of a capital asset, if the asset is subject to GST adjustments under the GSTA;
- The income tax adjustment to be made to the QE of a capital asset, if the asset that is subject to GST adjustments is disposed of; and
- The income tax adjustment to be made to the QE of a capital asset that is subject to GST adjustments where the asset is transferred between related parties

Generally, a taxpayer may not include an input tax amount as QE for the purposes of capital allowance claims if the taxpayer is liable to be registered under the GSTA and he has failed to do so, or if the taxpayer is entitled to an input tax credit for that amount under the GSTA. Also, where there is an

Table 1

	Rate
Within 60 days from the due date for furnishing the return form	10%
More than 60 days but not later than six months from the due date for furnishing the return form	15.5%

Table 2

	Rate
Voluntary disclosure before case is selected for audit – up to six months	Table 1 applies
Voluntary disclosure before case is selected for audit – more than six months	35% (Note)
Field Audit Voluntary disclosure after taxpayer has been informed but before commencement of examination of documents during audit visit	N/A

Note: *Previously, the rate ranged from 20% to 30%.*

adjustment under the GSTA in respect of the input tax claimable on a qualifying asset, a corresponding adjustment will need to be made for capital allowance purposes.

PR No. 3/2017: Income tax treatment of Goods and Services Tax Part III – Employee benefits: GST borne by an employer

PR No. 3/2017, published on 17 July 2017, explains the income tax treatment of the GST output tax accounted for and borne by the employer on goods or services given free to its employees as a benefit.

Any employee benefit provided by an employer who is registered or liable to be registered under the GSTA may be regarded as a taxable supply. In general, a GST-registered employer is required to account for output tax on goods or services given or provided as employee benefits, which are regarded as used for the purpose of the employer's business.

Effective from the year of assessment 2015, gross income from employment includes output tax borne by the employer (Section 13(1A) of the ITA). Therefore, any benefit-in-kind provided by an employer to an employee includes any GST output tax that the employer has to bear.

GST paid or to be paid as output tax which is borne by a person who is registered or liable to be registered under the GSTA is not deductible (Section 39(1)(p) of the ITA).

Public Ruling No. 4/2017: Basis period for a business source for persons other than a company, limited liability partnership, trust body and co-operative society

PR No. 4/2017, published on 20 July 2017, replaces PR No. 6/2001, captioned "Basis Period for a Business Source (Individuals & Persons other than Companies / Co-Operatives)" to reflect the changes in Section 21 of the ITA. The PR explains the determination of the basis period relating to a business source of a person other than a company, limited liability partnership, trust body and co-operative society in relation to:

- Commencing a new operation
- Changing the accounting date of the existing business
- An individual joining a partnership

Effective from YA 2004 onwards, Section 21 was amended to provide that the calendar year is the basis period for a year of assessment in relation to the source of income of a person other than a company, limited liability partnership, trust body and co-operative society (previously, PR No. 6/2001 allows the basis period of a person to be determined based on the accounting period of that person). This means that for any person other than a company, limited liability partnership, trust body and co-operative society, the basis period for a year of assessment for each source of income is the year ended 31 December.

Amendments to Public Rulings

Public Ruling No. 6/2012 – Reinvestment allowance

On 17 May 2017, Paragraph 6.1.4 (b) of Public Ruling (PR) No. 6/2012, "Reinvestment Allowance", was amended to clarify that the transformation and expansion projects in the business of rearing chickens and ducks have to be verified (not approved) by the Minister of Agriculture and Agro-Based Industry. Previously, the Minister of Agriculture and Agro-Based Industry had to approve the projects. Note, however, that the reinvestment allowance incentive for the qualifying project of the business of rearing chickens and ducks expired in YA 2011, and Paragraph 8(d) of Schedule 7A of the Income Tax Act 1967, in respect of such projects, has since been deleted.

Public Ruling No. 11/2012 - Employee share scheme benefit

On 14 February 2017, Appendices A and C of PR No. 11/2012, captioned "Employee Share Scheme Benefit ", were amended to amend some typo errors in the prescribed form. Appendix A refers to the "Form BT/MSSP/ 2012 – Notification by Employer under Section 83 of the ITA, in respect of benefits received by employees from employee share scheme" and Appendix C refers to the "List of names of employees who have exercised the offer under the employee share scheme". One of the amendments made was to correct the formula to compute the total benefit for employees who have exercised the offer under the employee share scheme

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Public Ruling No. 2/2017 - Income Tax Treatment of Goods and Services Tax Part II – Qualifying Expenditure for Purposes of Claiming Allowances

On 12 July 2017, Example 8 of PR No. 2/2017, captioned "Income Tax Treatment Of Goods And Services Tax Part II – Qualifying Expenditure For Purposes Of Claiming Allowances", was amended to clarify that the additional qualifying expenditure of the computer (RM3,600), resulting from the capital goods adjustment at the end of the fifth year (YA 2020), also qualifies for initial allowance. Previously, the PR suggested that only annual allowance is available.

Practice Notes on withholding tax position for services performed outside Malaysia

The IRBM has recently issued two Practice Notes to clarify some of the practical issues that had arisen from the amendment of Section 15A of the ITA effective from 17 January 2017, including with respect to the interpretation of certain tax treaties. The Section 15A amendment effectively provides that special classes of income under Section 4A(i) and (ii) of the ITA shall be deemed derived from Malaysia (and hence subject to Malaysian withholding tax) irrespective of where the services are rendered. As the Practice Notes are brief and do not provide comprehensive guidance, the facts of each transaction must be carefully analysed, to determine the withholding tax treatment.

Practice Note No. 1/2017: Amendment of Section 15A of the Income Tax Act 1967 – Issues on effective date

This Practice Note provides general guidance on when withholding tax should be imposed in various scenarios, as summarized **(Table 3)**.

Table 3

For contracts signed and performed after 17 January 2017

Contract period / Service performance period	Payments subject to withholding tax?
01.02.2017 – 31.01.2019	Yes

For contracts signed before 17 January 2017 and the services are performed outside of Malaysia before and after 17 January 2017

Service performance period	Payments subject to withholding tax?
01.12.2016 – 16.01.2017	No
17.01.2017 – 28.02.2017	Yes

For contracts signed and services performed outside of Malaysia before 17 January 2017, but the payments made after 17 January 2017

Service performance period	Payment date	Payments subject to withholding tax?
01.12.2016 – 16.01.2017	28.01.2017	No

For contracts signed and payment made before 17 January 2017, but services performed outside Malaysia after 17 January 2017

Service performance period	Payment date	Payments subject to withholding tax?
17.01.2017 – 28.02.2017	01.12.2016	No

Practice Note No. 2/2017: Amendment of Section 15A of the Income Tax Act 1967 – Issues on existing double taxation avoidance agreement (DTAA)

The Practice Note clarifies Malaysia's right to tax the services rendered irrespective of whether the services are performed in Malaysia or outside Malaysia. However, under the following DTAAs, Malaysia's right to tax the services rendered may be restricted **(See Table 4)**.

Updates on 2012 Transfer Pricing Guidelines

In line with the Base Erosion and Profit Shifting project (BEPS) Actions 8-10 and 13 issued by the Organisation for Economic Co-operation and Development (OECD), the IRBM released supplementary updates to the existing 2012 Malaysian Transfer Pricing Guidelines (IRBM Guidelines) in respect of the following chapters:

- Chapter II – The Arm's Length Principle (updated on 7 July 2017);
- Chapter VIII – Intangibles (updated 11 July 2017);
- Chapter X – Commodity Transactions (updated 3 July 2017); and
- Chapter XI – Documentation (updated 4 July 2017).

Table 4

Contracting states	Implication
Singapore	Payment for services performed outside Malaysia are not subject to withholding tax.
Spain	
Australia	Payments for services are not subject to withholding tax.

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A new chapter, i.e. Chapter X - Commodity Transactions, is introduced to discuss the method for deciding the appropriate arm's length price for the transfer of commodities between associated enterprises and the relevant documentation required. The updated chapters are effective from 15 July 2017.

STAMP DUTY

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2017

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2017 [P.U.(A) 186] was gazetted on 21 June 2017 and came into operation on 22 June 2017. The Order provides that any tax payable under the ITA and any stamp duty payable under the Stamp Act 1949 in relation to the following, shall be remitted in full:

Sukuk Murabahah issued or to be issued by Malaysia Debt Ventures Berhad pursuant to the GG Sukuk Programme in nominal values of up to RM1 billion, provided that the combined aggregate of the outstanding nominal value of the *Sukuk Murabahah* and the outstanding principal amount under the Syndicated Revolving Credit-i Facility (SRC-i Facility) shall not exceed RM1 billion;

SRC-i Facility obtained or to be obtained by Malaysia Debt Ventures Berhad in the aggregate principal amount not exceeding RM500 million subject to the combined aggregate referred to in the point above; and

Guarantee provided or to be provided by the government of Malaysia relating to the *Sukuk Murabahah* and the SRC-i Facility

LABUAN

Labuan Business Activity Tax (Amendment) Act 2017

Labuan Business Activity Tax (Amendment) Act 2017, gazetted on 18 May 2017, adopts all the changes proposed in the Labuan Business Activity Tax (Amendments) 2017 Bill. Section 21 of the Labuan Business Activity Tax Act 1990 (LBATA) is amended to specifically provide for a fine not exceeding RM1 million or imprisonment for a term not exceeding two years or both, for any contravention or failure to comply with any regulations made under the LBATA.

Amendments to Labuan Business Activity Tax Act 1990 exemption orders relating to Labuan International Commodity Trading companies

Labuan Business Activity Tax (Exemption) Order 2013 [P.U.(A) 99] and Labuan Business Activity Tax (Exemption) (No. 2) Order 2013 [P.U.(A) 100], gazetted on 21 March 2013, provide tax exemption to a Labuan International Commodity Trading Company (LICTC) on its income derived from a qualifying activity under the Global Incentives for Trading (GIFT) programme. A LICTC is also exempt from the provisions of Section 7(1) of the Labuan Business Activity Tax Act 1990 (LBATA) in relation to its qualifying activity. These two exemption orders have been amended to reflect the changes in the definition of "qualifying activity" as described further below:

Labuan Business Activity Tax (Exemption) 2013 (Amendment) Order 2017 [P.U.(A) 156]

Labuan Business Activity Tax (Exemption) Order 2013 [P.U.(A) 99] provides a 100% income tax exemption to a LICTC on income derived from the trading of physical and related derivative instruments of LNG in any currency other than Ringgit under the GIFT programme, for the first three years of operation. The amendment order, gazetted on 30 May 2017, amends Paragraph 2 of P.U.(A) 99/2013, by substituting the definition of qualifying activity with the following:

"A qualifying activity means the trading with non-resident companies in currency other than Malaysian currency of physical products and related derivative instruments in relation to liquefied natural gas." (previously – "A qualifying activity means the trading of physical and related derivatives instruments of liquefied natural gas in any currency other than Malaysian ringgit").

Labuan Business Activity Tax (Exemption) (No. 2) 2013

(Amendment) Order 2017 [P.U.(A) 157]

Labuan Business Activity Tax (Exemption) (No. 2) Order 2013 [P.U.(A) 100] exempts a LICTC from the election to pay a fixed tax of RM20,000 as provided in Section 7(1) of the LOBATA on income derived from the trading of physical and related derivative instruments of petroleum and petroleum-related products including liquefied natural gas, minerals, agriculture products, refined raw materials, chemicals and base minerals in any currency other than the Ringgit.

- The amendment order, gazetted on 30 May 2017, amends Paragraph 2 of P.U.(A) 100/2013 on the definition of "qualifying activity", to provide as follows:
- The trading with non-resident companies in a currency other than the Malaysian currency of physical products and related derivative instruments in relation to petroleum and petroleum-related products, including liquefied natural gas, minerals, agriculture products, refined raw materials, chemicals and base minerals; or
- The trading with resident companies in a currency other than the Malaysian currency of physical products and related derivative instruments in relation to petroleum and petroleum-related products, including liquefied natural gas and coal
- The non-application paragraph (Paragraph 5) of the exemption order is also amended to provide that the exemption order [P.U.(A) 100/2013] shall not apply to:

"The LICTC which carries on solely the trading of physical products and related derivative instruments in relation to liquefied natural gas, for the first three years of its operation" (previously – "The LICTC which carries on solely the trading of physical and related derivative instruments of liquefied natural gas, for the first three years of its operation").

Tourism Tax Act 2017 [Act 1971]

The Tourism Tax Regulations 2017 [P.U.(A) 228] was gazetted and came into operation on 1 August 2017.

As announced in the Appointment of Date of Coming Into Operation, the Second Minister of Finance has determined the following dates for the commencement of specific Parts or Sections of the Tourism Tax Act 2017 [Act 791].

1 August 2017 is the date on which the following Parts of the Tourism Tax Act 2017 come into operation:

- Part I – Preliminary
- Part II - Administration
- Part III (Sections 8 and 9 only) – Rate of tourism tax and Power of Minister to exempt
- Part IV - Registration
- Part X - Miscellaneous

1 September 2017 is the date on which the following Parts of the Tourism tax Act 2017 come into operation:

- Part III (Sections 6 and 7 only) – Imposition of tourism tax and duty of operator to collect tourism tax and pay tourism tax collected to Director General
- Part V – Invoices, Records, Returns and Assessment
- Part VI – Remission, Refund and Recovery
- Part VII - Enforcement
- Part VIII – Offences and Penalties
- Part IX – Trials and proceedings

On 8 August, a General Guide on Tourism Tax was published. Also, effective 8 August 2017, operators of accommodation premises can register online for tourism tax via the Malaysian Tourism Tax website before the due date of 31 August 2017. When tourism tax takes effect on 1 September 2017, all operators as defined under the Act will have to charge tourism tax at a fixed rate of RM10 per room per night. Malaysian nationals and permanent residents who hold a Malaysian Permanent Resident card will be exempted from the payment of tourism tax. According to the General Guide on Tourism Tax, there are several types of operators which are exempted from the registration and collection of tourism tax. Operators of accommodation premises would have to submit their tourism tax returns either on a quarterly basis or if they are GST-registered, in accordance with the taxable period assigned to them for GST purposes.

Guidance with respect to the Rate of Tax as well as the Exemption Order is expected to be released in early September 2017.

CUSTOMS DUTIES

Customs Duties (Exemption) (Amendment) (No.4) Order 2017

The Customs Duties (Exemption) (Amendment) (No.4) Order 2017 [P.U. (A) 146] was gazetted on 24 May 2017 and came into operation on 25 May 2017. This Order provides for an amendment in Part I of the Schedule in relation to item 66, in column (2), to include "(xxiv) Ophir Production Sdn Bhd and (xxv) Coastal Energy Malaysia Sdn Bhd."

Customs (Definitive Safeguards Duties) (Amendment) Order 2017

The Customs (Definitive Safeguards Duties) (Amendment) Order 2017 [P.U. (A) 155] was gazetted on 30 May 2017 and is effective for the period from 14 April 2017 until 13 April 2020. The new Order provides for amendments in the Schedule to the Customs (Definitive Safeguards Duties) Order 2017 [P.U. (A) 122/2017] by substituting the subheading "7214.30.00 10 and 7214.30.00 90", with the subheading "7214.30.10.00 and 7214.30.90 00" respectively.

Customs Duties (Amendment) (No.3) Order 2017

The Customs Duties (Amendment) (No.3) Order 2017 [P.U. (A) 196] was gazetted on 14 July 2017 and came into operation on 15 July 2017. This Order provides for amendments in the First Schedule to the Customs Duties Order 2017 [P.U. (A) 5/2017].

Customs (Prohibition of Imports) (Amendment) Order 2017

The Customs (Prohibition of Imports) (Amendment) Order 2017 [P.U. (A) 225] was gazetted on 28 July 2017 and came into operation on 1 August 2017. This Order provides for amendments to the Customs (Prohibition of Imports) Order 2017 [P.U. (A) 103/2017] in the Second Schedule for Part I, Part II and Part III. Amendments were also made to Fourth Schedule in Part II respectively.

GOODS AND SERVICES TAX (GST)

Goods and Services Tax (Zero-Rated Supply) (Amendment) Order 2017

The Goods and Services Tax (Zero-Rated Supply) (Amendment) Order 2017 [P.U. (A) 159] was gazetted on 31 May 2017 and the Order was deemed to have come into operation on 1 April 2017. This Order provides for amendments to the Goods and Services Tax (Zero-Rated Supply) 2014 [P.U. (A) 272/2014] in paragraph 4.

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) Order 2017

The Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) Order 2017 [P.U. (A) 162] was gazetted on 6 June 2017 and the Order came into operation on 1 July 2017. This Order provides for amendments to the Goods and Services Tax (Zero-Rated Supply) 2014 [P.U. (A) 272/2014] in the Appendix to the First Schedule.

Goods and Services Tax (Provision of Information) Regulations 2017

The Goods and Services Tax

(Provision of Information) Regulations 2017 were gazetted on 15 June 2017 and came into operation on 1 July 2017. These Regulations define the meaning of "device" and "electronic machine". These Regulations also stipulate that a registered person shall provide information to the Director General (DG) under Section 34A of the Act through the device installed on the electronic machine. Further to the above, these Regulations require the registered person to enter information into the electronic machine and issue a tax invoice from the same electronic machine. Paragraph 5 of the Regulations specifies that the registered person shall provide particulars such as the address of the business premises of the registered person (including branches), description of the electronic device and any other information required by the DG. The registered person shall immediately notify the DG in writing if there are any changes to the business operation. In the circumstances that the registered person decides to remove, transfer or install an additional device, he should apply to the DG for the approval not later than seven days before the removal, transfer or installation of the device. The registered person is obliged to notify the DG if the device fails to function, or is lost or the registered person ceases to use the device. The installation of the device focuses on three main industries i.e. food and beverage, retail and entertainment industries.

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) (Revocation) Order 2017

The Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) (Revocation) Order 2017 was gazetted on 21 June 2017 and this Order came into operation on 1 July 2017. This Order revokes the Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.2) Order 2017 [P.U. (A) 162/2017]

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

CASE 1

BPCL V DIRECTOR GENERAL OF THE ROYAL MALAYSIAN CUSTOMS DEPARTMENT, CASE NO.14 OF 2015, GST APPEAL TRIBUNAL

BACKGROUND FACTS

The Company is engaged in supplying engine oil to its independent distributor, who in turn supplies it to the customers. In order to promote business, the Company also undertakes various types of promotions:

(a) Tied-in promotion; and
(b) Ad-hoc promotion/ Non tied-in promotion.

Under both promotion schemes, the Company gives BP branded free gifts to its customers through participating distributors. This appeal concerns the GST treatment of the free gifts handed over to the distributors for ad-hoc/ non tied-in promotions. The cost for the free gifts is borne solely by the Company.

Under the ad-hoc promotion, the Company will fix a promotion period and deliver the BP branded gifts such as umbrellas and T-shirts for the distributors to give them to any customers who purchase its products such as engine oil. However, the gifts are not given to the distributors at the same time as the principal goods as the principal goods would have been supplied earlier.

The Company appealed against the decision of the DG of the RMCD which decided that the gift rule applies to the situation above and accordingly, output tax is accountable by the Company.

The Company took the view that there is no deemed supply made by the Company to the distributor and by the distributor to the customers. Hence, there is no requirement to account for output tax.

The Company further argued that it is unlikely to breach the threshold of RM500 per person per year, and given that there is no tracking requirement under Paragraphs 5(1) and 5(2), First Schedule of the GST Act, tracking records are not required.

The Customs on the other hand, argued that the free gifts given by the Company to the distributors is a supply under Paragraphs 5(1) and 5(2), First Schedule of the GST Act and that the Company had failed to explain what would happen to the remaining branded goods after the promotion period had ended.

ISSUES

(i) Whether there is a "deemed supply" made by the Company in respect of the free gifts under Para 5, First Schedule of the GST Act;
(ii) Whether output tax needs to be accounted for by the Company; and
(iii) Whether the DG's decision in applying the gift rule was correct.

DECISION

The Tribunal held that:

(a) The gifts were business assets of the Company which were transferred to the Distributors to be disposed to the customers when they buy the products.
(b) The gifts were given without consideration and no longer formed business assets of the Company when they were given away under instruction. In the absence of a tracking system, the Company is not able to monitor the movement of the free gifts.
(c) Given that there is no consideration given in return for these gifts, it is a deemed supply under Para 5(1) and Para 5(3), First Schedule of the GST Act and the Company must account for output tax based on the value of the goods. The Company is in turn entitled to claim input tax credit against its output, such as the GST incurred to purchase the goods, rental and utilities.
(d) It is insufficient for the Company to say that that the value of the gifts is unlikely to be more than RM500 per person per year.
The Company had failed on the balance of probabilities to prove that the RMCD had made a wrong decision in deciding that the gift rule applies.

Accordingly, the appeal made by the Company was dismissed.

CASE 2

GEOWSSB V THE DIRECTOR GENERAL OF THE ROYAL MALAYSIAN CUSTOMS DEPARTMENT, CASE NO.18 OF 2016, GST APPEAL TRIBUNAL

FACTS

The Company is in the business of providing diagnostic, rapid response rectification, maintenance and overhaul of commercial aircraft engines. The Company's sister company, GEESM carries out repair, maintenance and installation services for aircrafts.

The Company secured a 20 year contract with AirAsia to repair and maintain its aircrafts. As the Company did not hold the requisite Department of Civil Aviation (DCA) Certification, the actual work for repair, maintenance and installation is subcontracted to GEESM.

The Company took the view that the supply it makes under the contract with AirAsia qualifies for zero-rating under Paragraph 3, Item 1 (d) Second Schedule of GST (Zero-Rated Supply) Order 2014. On 7 July 2015, the DG of the RMCD issued a DG's Decision indicating an unclear position in the case where the contracted supplier of the service outsources the work to a third party who holds the requisite DCA certification.

The Company's tax representative wrote a letter to the RMCD to clarify their position. The DG of the RMCD responded on 15 January 2016 confirming that the supply made was subjected to GST at 6%.

The Company appealed against the decision dated 15 January 2016.

ISSUES

(i) Is the Company a taxable person making a supply within the GST Act?
(ii) Was the supply made by the Company a taxable supply which qualifies for zero-rating?
(iii) Was the DG's Decision dated 15 January 2016 correct?

DECISION

The Tribunal held that:

(a) There is no dispute that the Company is indeed a GST registrant making taxable supplies under the GST Act.

(b) The Zero-Rated Order 2014 does not require the Company to hold a DCA Certification. The DG does not have the power to make decisions pertaining to zero-rated supplies. Subsections 17(4) and 17(5) of the Act confer power to the Minister (and not the DG) to determine any supply to be zero-rated supply.

(c) However, the GST Act does empower the DG to make a decision or directive in respect of a provision under the GST Act. The DG's Decision 6/2015 is a directive in nature and does not add a further category of supply.

(d) Whilst it was not wrong for the DG to impose a requirement of DCA Certificate Approval, it was incorrect to decide that the Company was not entitled to zero-rate GST on the basis that it does not hold a DCA Certificate. The Tribunal found that the DG's letter in invoking the DG's Decision 6/2015 was erroneous as DCA Certification was not a requirement under the law.

The Tribunal further held that the DG had failed to take into consideration the legitimate business arrangements entered into between the Company and the service provider, GEESM, which holds a DCA Certificate of Approval.

Accordingly, the appeal made by the Company was allowed and the supplies made by the Company qualified for zero-rating under the Zero-Rated Supply Order 2014.

CASE 3

H.T.E V KETUA PENGARAH KASTAM, CASE NO. TRCBP(R)-70/2016, GST APPEAL TRIBUNAL

FACTS

The Company is in the business of raising, breeding and production of chicken and broiler.

The Company made an application for GST registration on 12 April 2016 after achieving a taxable turnover of RM6 million. The registration application was subsequently approved with effect from 1 June 2016.

On 6 May 2016, the Company made an application to be exempted from registration under Section 32 of the GST Act on the basis that supply of broiler chicken is a zero-rated supply under Item 1, First Schedule of the GST Act 2014.

On 5 August 2016, the Company's application was rejected on the basis that the Company failed to respond to the Customs' enquiry email within the prescribed time period.

ISSUE

Whether the DG of the RMCD is right in rejecting the application for exemption under Section 32 on the basis that the Company did not revert with sufficient information within the prescribed time period.

DECISION

The Tribunal held that:

(a) The Company made a manual application for registration exemption under Section 32. However, it did not provide sufficient supporting documents to satisfy the DG that the supplies it makes are zero-rated supplies under the GST Act.

(b) Given that the RMCD had no knowledge on the type of supplies made by the Company, the RMCD had rightfully rejected the application made by the Company.

(c) The RMCD was right to conduct a verification process via TAP. The Company acknowledged that it had overlooked the email request for further information.

Accordingly, the Tribunal dismissed the appeal made by the Company and affirmed the decision of the DG of the RMCD.

Keith Lim Boon Long *and* ***Ivy Ling*** *are tax lawyers with Lee Hishammuddin Allen & Gledhill, where they specialise in income tax matters. They have assisted the firm's tax partners, Datuk D.P. Naban and S. Saravana Kumar in major tax appeals ranging from income recognition, business deduction, capital allowance, reinvestment allowance and tax avoidance.*

BUSINESS DEDUCTIONS

EXPENSES RANKING FOR A DOUBLE DEDUCTION *(PART II)*

IN THE PREVIOUS ARTICLE WE HAD LOOKED AT SOME OF THE EXPENSES THAT RANK A DOUBLE DEDUCTION. THIS IS CONTINUED IN THIS ARTICLE WHERE WE SHALL ANALYSE THE PREREQUISITES FOR CLAIMING THE FOLLOWING DEDUCTIONS.

Expenses incurred in international trade fairs held in Malaysia for the promotion of exports

Conditions

- the trade fair must be an international trade fair approved by the Minister of International Trade and Industry;
- the company must be approved by the Minister of International Trade and Industry to participate in the international trade fair; and
- the expenditure incurred in participating in the international trade fair must be of a kind allowable under Section 33 of the Act but excludes the cost of exhibits.

LAW

INCOME TAX (DEDUCTIONS FOR PARTICIPATION IN AN APPROVED INTERNATIONAL TRADE FAIR) RULES 1991 PU (A) 361/91

For example if the question states that a company incurred an expenditure of RM329,000 for the year ended 31 December 2017 on participating in an international trade fair with details as follows:

- It is held in Kuala Lumpur
- Both the trade fair and the company's participation were approved by the Minister of International Trade and Industry.
- The aim of the trade fair was to promote exports.
- Included in the expenditure is the cost of exhibits of RM8,000.

Assuming this amount is included in determining the profit before tax figure for the company in its income statement for the year ended 31 December 2017, then candidates should explain that the expenditure that was incurred on participation in an approved international trade fair (with the exception of the cost of the exhibits) will qualify for a double deduction as the trade fair was held in Kuala Lumpur; the aim was to promote exports and the company's participation was approved by the Minister of International Trade and Industry.

Therefore, an amount of RM321,000 (329,000 - 8,000) can be deducted from the profit before tax figure in ascertaining the adjusted income of the company in the tax computation of the company for the year of assessment 2017.

ADVERTISING EXPENDITURE ON MALAYSIAN BRAND NAME GOODS

Conditions

- the company is a company incorporated in Malaysia and at least 70 per cent of the issued share capital of the company is Malaysian owned;
- the company is the registered proprietor or related to the registered proprietor of the Malaysian brand name used in the advertisement;

So when is the company related to the registered proprietor of the Malaysian brand name used in the advertisement?

Where more than fifty per cent of the paid-up capital in respect of ordinary shares of

(a) the company is directly or indirectly (through the medium of other companies resident and incorporated in Malaysia) owned by the registered proprietor of the Malaysian brand name used in the advertisement;

(b) the registered proprietor of the Malaysian brand name used in the advertisement are directly or indirectly (through the medium of other companies resident and incorporated in Malaysia) owned by that company; or

(c) that company and the registered proprietor of the Malaysian brand name used in the advertisement are directly or indirectly owned by another company resident and incorporated in Malaysia;

Provided that only one of the related company shall be eligible for the deduction under these Rules in the basis period for each year of assessment.

- the Malaysian brand name goods are of export quality; i.e. at least 20 per cent of the total sales of the Malaysian brand name goods in the relevant year of assessment is exported;
- the expenditure incurred in advertising the Malaysian brand name goods must be incurred within Malaysia;

"Malaysian brand name" means a brand name that is registered as a trade mark in Malaysia or in any country outside Malaysia under the law relating to trade marks to a registered proprietor that is a company incorporated in Malaysia where at least 70 per cent of the issued share capital of the company is Malaysian owned;

WHAT EXPENDITURE QUALIFIES FOR A DOUBLE DEDUCTION?

(i) advertisements on the Internet where the host website is located in Malaysia;

(ii) advertisements in magazines and newspapers where the magazines and newspapers are printed in Malaysia;

(iii) advertisements on local licensed television stations;

(iv) advertisements approved by the relevant local authority on advertisement hoardings located in Malaysia;

(v) advertisements in trade publications where the trade publications are printed in Malaysia;

(vi) advertisements in any form in the course of sponsoring an approved international sporting event (international sporting event approved by the Minister charged with the responsibility for sports) held in Malaysia; and

(vii) advertisements in any form in the course of sponsoring an approved international trade conference or an approved international trade exhibition (international trade exhibition approved by the Malaysian External Trade Development Corporation) held in Malaysia

- the expenditure incurred on professional fees must be incurred within Malaysia; and

Professional fees made to a company resident in Malaysia for advertising or promoting Malaysian brand name goods on behalf of the company which is the registered proprietor of the Malaysian brand name

- the expenditure incurred in advertising the Malaysian brand name goods or on professional fees must be of a kind allowable under Section 33 of the Act.

In dealing with this expenditure, candidates should note firstly, the equity requirements (i.e. 70 per cent Malaysian-owned), secondly the fact that the registered proprietor of the Malaysian brand name can be with the holding company, a subsidiary or a fellow subsidiary BUT they must be resident and incorporated in Malaysia and finally, a minimum of 20 per cent of sales should be exports i.e. local sales does not exceed 80 per cent.

LAW

INCOME TAX (DEDUCTION FOR ADVERTISING EXPENDITURE ON MALAYSIAN BRAND NAME

GOODS) RULES 2002 PU (A) 62/2002

Freight Charges from Sabah or Sarawak to Peninsular Malaysia

Conditions

In ascertaining the adjusted income of a person from his business for the basis period for a year of assessment a double deduction is available for

- ship freight charges
- incurred by manufacturers
- for the shipment of their manufactured goods
- from Sabah or Sarawak to any port in Peninsular Malaysia.

LAW

INCOME TAX (DEDUCTION FOR FREIGHT CHARGES FROM SABAH OR SARAWAK TO PENINSULAR MALAYSIA) RULES 2000 P.U. (A) 50/2000

This rule was examined in an old CTIM question phrased as follows:

A manufacturing company in Sabah incurred freight charges of RM270,000 detailed as follows;

	RM
Shipment of manufactured goods to Osaka, Japan	40,000
Shipment of manufactured goods to Port of Tanjung Pelepas, Johor	20,000
Shipment of machinery (fixed asset) to Port Klang, Selangor	145,000
Air freight - delivery of manufactured goods to KLIA, Sepang	65,000
	270,000

In the tax computation commencing with profit before tax, candidates were required to add

back the first item of RM40,000 because the destination was not in Peninsular Malaysia, the third item of RM145,000 since it does not relate to manufactured goods of the company and the fourth item as it was not for ship freight charges but for air freight charges. For the second item no adjustment was needed since it was ship freight charges incurred for the shipment of their manufactured goods from Sabah to a port in Johor i.e. in Peninsular Malaysia.

REGISTRATION OF PATENTS, TRADEMARKS AND PRODUCT LICENSING OVERSEAS

Generally expenditure ranks for a deduction only if it is incurred in Malaysia. Therefore when the government wants to give a deduction for expenses incurred outside Malaysia it is done through a gazette order.

Conditions

- Resident company
- expenses incurred primarily and principally for promoting the export of services in respect of registration of patents, trademarks and product licensing overseas.

LAW

INCOME TAX (DEDUCTION FOR PROMOTION OF EXPORTS) RULES 2007 P.U. (A) 14/2007.

In the next article we shall look at other deductions that qualify for a double deduction.

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

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Yeo, M.C., Alan. Malaysian Taxation, YSB Management Sdn Bhd

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: OCTOBER – DECEMBER 2017

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
OCTOBER 2017								
Workshop: Tax Optimization on Capital & Industrial Building Allowances	4 Oct *(Postponed from 1 Aug)*	9a.m. - 5p.m.	Penang	Sivaram Nagappan	350	450	500	WS/036
Seminar: GST & Tax Issues Under RMCD'S OPS CBOS 3.0 & IRB'S OPS Gegar Bersepadu 127B	5 Oct	9a.m. - 5p.m.	Johor Bahru	Saravana Kumar & Annie Thomas	450	550	650	8 SE/010
Workshop: Tax Optimization on Capital & Industrial Building Allowances	12 Oct *(Postponed from 9 Aug)*	9a.m. - 5p.m	Kota Kinabalu	Sivaram Nagappan	350	450	500	8 WS/037
Workshop: Malaysian Taxation Principles & Procedures – Module 1: Business & Employment *(in collaboration with MAICSA)*	12 Oct	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/005
Workshop: Tax & Your Property Transaction	13 Oct	9a.m. - 5p.m	Ipoh	Yong Mei Sim	350	450	500	8 WS/054
Workshop: Tax Optimization on Capital & Industrial Building Allowances	13 Oct *(Postponed from 14 Aug)*	9a.m. - 5p.m	Kuching	Sivaram Nagappan	350	350	350	8 WS/050
Workshop: Tax & Your Property Transaction	16 Oct	9a.m. - 5p.m	Penang	Yong Mei Sim	350	350	350	8 WS/055
Workshop: Cross Border Transactions and Withholding Tax	26 Oct	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	350	350	350	8 WS/058
Seminar: Recent Tax Cases 2017	30 Oct	9a.m. - 5p.m	Penang	Saravana Kumar & Ivy Ling	350	350	350	8 SE/011
Workshop: Malaysian Taxation Principles & Procedures – Module 2: Allowances & Deduction *(in collaboration with MAICSA)*	31 Oct	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/006
Public Holiday ***(Deepavali: 18 Oct)***								
NOVEMBER 2017								
Seminar: Recent Tax Cases 2017	6 Nov	9a.m. - 5p.m	Kuala Lumpur	Saravana Kumar & Ivy Ling	450	550	650	8 SE/012
Workshop: Malaysian Taxation Principles & Procedures – Module 3: Advanced Subjects - 1 *(in collaboration with MAICSA)*	17 Nov	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/007
Workshop: Malaysian Taxation Principles & Procedures – Module 3: Advanced Subjects - 2 *(in collaboration with MAICSA)*	30 Nov	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/008
2018 BUDGET SEMINAR								
2018 Budget Seminar	9 Nov	9a.m. - 5p.m	Kuala Lumpur	MoF, LHDNM, RMCD, CTIM	350	500	600	10 BS/001
2018 Budget Seminar	21 Nov	9a.m. - 5p.m	Subang	LHDNM, RMCD, CTIM	350	500	600	10 BS/002
2018 Budget Seminar	22 Nov	9a.m. - 5p.m	Melaka	LHDNM, CTIM	350	500	600	10 BS/003
2018 Budget Seminar	22 Nov	9a.m. - 5p.m	Kota Kinabalu	LHDNM, CTIM	350	500	600	10 BS/004
2018 Budget Seminar	23 Nov	9a.m. - 5p.m	Kuching	LHDNM, CTIM	350	500	600	10 BS/005
2018 Budget Seminar	23 Nov	9a.m. - 5p.m	Johor Bahru	LHDNM, CTIM	350	500	600	10 BS/006
2018 Budget Seminar	27 Nov	9a.m. - 5p.m	Penang	LHDNM, CTIM	350	500	600	10 BS/007
2018 Budget Seminar	28 Nov	9a.m. - 5p.m	Petaling Jaya	LHDNM, CTIM	350	500	600	10 BS/008
2018 Budget Seminar	30 Nov	9a.m. - 5p.m	Ipoh	LHDNM, CTIM	350	500	600	10 BS/009
2018 Budget Seminar	5 Dec	9a.m. - 5p.m	Kuala Lumpur	LHDNM, RMCD, CTIM	350	500	600	10 BS/010
Public Holiday ***(Prophet Muhammad's Birthday: 1 Dec, Christmas: 25 dec)***								

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: OCTOBER – DECEMBER 2017

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
DECEMBER 2017								
Workshop: Understanding the Legal and Practical Aspects on Deductibility of Expenses Based on Public Rulings	4 Dec	9a.m. - 5p.m	Johor Bahru	Kularaj	350	450	500	8 WS/049
Seminar: Recent Tax Cases 2017	7 Dec	9a.m. - 5p.m	Melaka	Saravana Kumar & Ivy Ling	350	450	500	8 SE/013
Workshop: GST – Practical Issues & Recent Developments	8 Dec	9a.m. - 5p.m	Penang	Thenesh Kannaa	350	450	500	8 SE/042
Seminar: Recent Tax Cases 2017	11 Dec	9a.m. - 5p.m	Ipoh	Saravana Kumar & Ivy Ling	350	450	500	8 SE/014
Seminar: Recent Tax Cases 2017	14 Dec	9a.m. - 5p.m	Johor Bahru	Saravana Kumar & Ivy Ling	350	450	500	8 SE/015
Seminar: Recent Tax Cases 2017	18 Dec	9a.m. - 5p.m	Kota Kinabalu	Saravana Kumar & Ivy Ling	350	450	500	8 SE/016
Seminar: Recent Tax Cases 2017	20 Dec	9a.m. - 5p.m	Kuching	Saravana Kumar & Ivy Ling	350	450	500	8 SE/017

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

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

2018 BUDGET SEMINAR

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CHARTERED TAX INSTITUTE OF MALAYSIA

i) KUALA LUMPUR

DATE / Event Code	VENUE	Session 1: 9:00 am – 10:15 am **Summary of 2018 Budget Proposals**	Session 2: 11:00 am – 12:15 pm **Forum Discussion on 2018 Budget Proposals – Its Changes & Impact to Taxpayers**	Session 3: 2:00 pm – 4:00 pm **The Evolution of Malaysian Tax Landscape: Where Are We Heading**
9 Nov 2017 (Thursday) BS/001	Berjaya Times Square Hotel, Kuala Lumpur	Chairman : Mr Chow Chee Yen Speaker : Representative from MOF	Chairman : Mr Chow Chee Yen Panelists : Representative from IRBM, Representative from RMCD, Ms Phan Wai Kuan	Chairman : Ms Seah Siew Yun Speakers : Mr Amarjeet Singh, Mr Jagdev Singh, Mr Yee Wing Peng, Mr Tai Lai Kok

ii) KLANG VALLEY

DATE / Event Code	VENUE	Session 1: 9:00 am – 10:15 am **Summary of 2018 Budget Proposals**	Session 2: 11:00 am – 12:15 pm **Forum Discussion on 2018 Budget Proposals – Its Changes & Impact to Taxpayers**	Session 3: 2:00 pm – 4:00 pm **Tax Updates & Latest Developments**
21 Nov 2017 (Tuesday) BS/002	The Saujana Hotel, Subang Jaya	Chairman : Ms Seah Siew Yun Speaker : Representative from IRBM	Chairman : Ms Seah Siew Yun Panelists : Representative from IRBM, Representative from RMCD, Ms Theresa Goh	Chairman : Mr Lim Kah Fan Speakers : Mr Chris Low, Mr Vijey M. Krishnan
28 Nov 2017 (Tuesday) BS/008	Royale Chulan Damansara, Petaling Jaya	Chairman : Mr Poon Yew Hoe Speaker : Representative from IRBM	Chairman : Mr Poon Yew Hoe Panelists : Representative from IRBM, Representative from RMCD, Mr K. Sandra Segaran	Chairman : Dr Zulfahmy Ibrahim Speakers : Ms Farah Rosley, Mr S. Saravana Kumar
5 Dec 2017 (Tuesday) BS/010	Renaissance Hotel, Kuala Lumpur	Chairman : Datuk Harjit Singh Speaker : Representative from IRBM	Chairman : Datuk Harjit Singh Panelists : Representative from IRBM, Representative from RMCD, Mr David Lai	Chairman : Mr Mohd Noor Abu Bakar Speakers : Mr Chow Chee Yen, Mr S. Saravana Kumar

iii) OUTSTATION

DATE / Event Code	VENUE	Session 1: 9:00 am – 10:15 am **Summary of 2018 Budget Proposals**	Session 2: 11:00 am – 12:15 pm **Forum Discussion on 2018 Budget Proposals – Its Changes & Impact to Taxpayers**	Session 3: 2:00 pm – 4:00 pm **Tax Updates & Latest Developments**
22 Nov 2017 (Wednesday) BS/003	Ramada Plaza, Malacca	Chairman : Mr Choo Ah Kow Speaker : Representative from IRBM	Chairman : Mr Choo Ah Kow Panelists : Representative from IRBM, Ms Leow Mui Lee	Chairman : Mr AV Varan Speakers : Mr Thenesh Kannaa, Datuk Harjit Singh
22 Nov 2017 (Wednesday) BS/004	Sutera Harbour Resort, Kota Kinabalu	Chairman : Ms Viviana Lim Speaker : Representative from IRBM	Chairman : Ms Viviana Lim Panelists : Representative from IRBM, Datuk Goh Chee San	Chairman : Branch Committee Member Speakers : Mr Chow Chee Yen, Mr S. Saravana Kumar
23 Nov 2017 (Thursday) BS/005	Pullman Hotel, Kuching	Chairman : Mr Kenny Chong Speaker : Representative from IRBM	Chairman : Mr Kenny Chong Panelists : Representative from IRBM, Ms Regina Lau	Chairman : Branch Committee Member Speakers : Mr Chow Chee Yen, Mr S. Saravana Kumar
23 Nov 2017 (Thursday) BS/006	Holiday Villa, Johor Bahru	Chairman : Mr Jesu Dason Speaker : Representative from IRBM	Chairman : Mr Jesu Dason Panelists : Representative from IRBM, Ms Farah Rosley	Chairman : Branch Committee Member Speakers : Mr Nicholas Crist, Mr K. Sandra Segaran
27 Nov 2017 (Monday) BS/007	Jen Hotel, Penang	Chairman : Ms Kellee Khoo Speaker : Representative from IRBM	Chairman : Ms Kellee Khoo Panelists : Representative from IRBM, Ms Yeo Eng Ping	Chairman : Ms Evelyn Lee Speakers : Mr Soh Lian Seng, Mr Vijey M. Krishnan
30 Nov 2017 (Thursday) BS/009	Weil Hotel, Ipoh	Chairman : Mr Lam Weng Keat Speaker : Representative from IRBM	Chairman : Mr Lam Weng Keat Panelists : Representative from IRBM, Ms Phan Wai Kuan	Chairman : Mr Chak Kong Keong Speakers : Mr David Lai, Mr Zen Chow

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10 CPD points

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