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A PERFORMANCE DRIVEN CEO DATO' SRI SABIN SAMITAH OF IRBM

Unravelling Best Judgement Assessment Under: Section 43(1) of the GST Act 2014

Earning Stripping Rules: Heralding a New Regime, Ending the Deferment of Thin Capitalisation

Total Tax Transparency: Steering Through the New World

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

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INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers, 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

TAXING THE TAXPAYER

Greetings and a Happy New Year 2018! As I write this, the Inland Revenue Board (IRB) has just concluded its "Operasi Mega" in its efforts to reach a higher tax collection of RM134.7 billion in 2018. It involved more than 4,000 IRB staff with the intention of enhancing tax awareness and bridging the shortfall in taxes through tax collection, civil lawsuits and convictions, tax audits and investigations and focusing on big cases in specific industry sectors. We hope such operations in the coming year will be supplemented with matching and laudable efforts in education programmes to enhance compliance. In addition, it was reported that the IRB and the Royal Malaysian Customs Department (RMCD) have signed a memorandum of understanding in November 2017 to share information which will assist in the data matching and analysis process to identify potential taxpayers, select audit cases and investigations as well as to improve tax collection.

Recent Tax Developments

Besides the above, there were other income tax as well as a goods and services tax (GST) developments in the final months of 2017. Firstly, the Guidelines on Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee was amended on 25 September 2017 to allow the cost of preparing the tax computation to be included in the deductible tax filing fee. Next, the exemption of withholding tax on services performed offshore was gazetted on 24 October 2017 and takes effect from 6 September 2017 onwards. The Institute has written to the IRB to seek confirmation on an earlier written clarification given by the IRB on the tax treatment of the tax filing fee and on the transitional treatment for the withholding tax exemption. Members will be notified by e-Circular on any developments received in writing from the IRB. On the GST front, the RMCD has commenced issuing GST Public Rulings (PR) on 1 November 2017 in respect of the Imposition of Penalty and Supply by Healthcare Professional followed by two more PRs in December 2017 in respect of Gift Rules and Issuance and Holding of Securities. Members may email the Institute if they have any concerns on the GST PRs.

The 2018 Budget Speech

There were a number of substantial proposals on taxation matters in the Appendices to the 2018 Budget Speech which was delivered on 27 October 2017. One of these proposals touched on the review of tax incentives/regimes to ensure adherence to the criteria of the Organisation for Economic Co-operation and Development's (OECD) Forum on Harmful Tax Practices. The local tax incentives/regimes identified for review are Principal Hub, Biotechnology Industry, Multimedia Super Corridor Malaysia, Pioneer Status, Labuan Leasing, Inward Re-insurance and Offshore Insurance Regime, Labuan Financial Services and Special Economic Regions. Any changes to these incentives/regimes will be circulated to members when they are announced or issued by the authorities.

Another noteworthy proposal is the replacement of Thin Capitalisation Rules with Earnings Stripping Rules (ESR). The objective of the ESR is to impose restrictions on the quantum of interest which is allowed a deduction based on a percentage of the Earnings before Interest and Tax (EBIT) or the Earnings before Interest, Tax, Depreciation and Amortisation

(EBITDA) for a year of assessment, in line with the OECD's BEPS Action Plan 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments. Given that the ESR is proposed to be implemented from 1 January 2019 onwards, there is a critical need for the tax authorities, tax practitioners, industry/sector representatives and other stakeholders to work together in fleshing out the ESR and Guidelines so that affected businesses have sufficient time to understand them and to prepare for the implications. Areas such as the scope of the ESR, whether restricted interest is allowed to be carried forward, ratio for the restriction, interaction with existing interest restriction and deductibility provisions and transfer pricing provisions, transitional provisions/grandfathering rules etc., need to be carefully studied and thought through to ensure that any negative impact on businesses is minimised in an effort to protect the revenue collection base. Do read up on the ESR Article found in this Tax Guardian.

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CPD Events

A series of 2018 Budget Seminars from 9 November 2017 to 5 December 2017 were successfully held by the Institute in Kuala Lumpur and various cities around Malaysia. It is pleasing to note that there is an upward trend in the attendance of our budget seminars year by year. 2017 was no exception with almost 2,200 participants in total (2016: 2,000 total participants). The growth in the number of participants was largely attributable to the record number of 800 participants for the first budget seminar conducted at the Berjaya Times Square, Kuala Lumpur on 9 November 2017 compared to more than 600 participants in 2016. This record turnout was partly due to the inclusion of an unprecedented session with the Heads of the Malaysian Tax Practices from the Big Four accounting firms at the event. I would like to thank them for setting aside their busy schedule to share with us their insights on rejuvenating tax incentives, managing the erosion of the local tax base, taxing the globalised economy and compliance via tax audit and investigation which I am sure many in the audience found very informative. I would also like to thank the chairpersons, speakers and panellists from CTIM, the Ministry of Finance (MOF), the IRB, and the RMCD for giving their time and effort in making the Seminars a success.

The Institute, in collaboration with the RMCD, will be holding the National GST Conference (NGC) 2018 which will take place on 27 and 28 February 2018 at the Kuala Lumpur Convention Centre. Details on the NGC 2018 are available in this Tax Guardian. The programme outline includes issues and findings arising from enhancing GST compliance through GST audits, GST impact on inflation and profiteering, Malaysia under the Digital Economy, etc. I am pleased to note that this is the fourth consecutive year that we are holding the NGC together with the RMCD.

Membership

I am pleased to inform that we have approximately 3,500 associate members and fellow members currently as opposed to approximately 3,400 in 2016. This continuous growth is an indicator of the support that the Institute is getting in moving the tax profession forward.

We would like to acknowledge and thank everyone for their involvement in the Institute for the year 2017 which has played a major role in advancing the Institute as the premier body for tax professionals in Malaysia.

Editor'sNote

YEO ENG PING

Warm New Year greetings to all readers! As we look forward to 2018, let me first share my thoughts on the highlights of tax developments in the year that had passed. Overall, 2017 was most eventful and peppered with surprises – from the controversial reversion to include "onshore services" for withholding tax under section 4A of the Income Tax Act 1967, from 17 January 2017 to 5 September 2017 (short-lived as it may have been), to the unexpected introduction of a tourism tax, which finally became effective on 1 September 2017. But mostly, 2017 marked the advent of "big audits" by the Inland Revenue Board, by this I mean a barrage of high profile, high stakes tax audits and investigations, for at least "30 large taxpayers" as reported in the news. This does not show any signs of abating as even up to year-end, there was an announcement late in November that the IRB will carry out comprehensive audits on 15 local and foreign banks operating in Labuan. It was also interesting that while the issues raised include the troublesome and long-standing debate around "RPGT vs income tax", there was definitely a spike of concern by the IRB, around what I would generally categorise as "payments to non-residents". For example, there was the legislative expansion of the definitions of "public entertainer" and "royalty" (to specifically include "software"); also several court cases where subscription payments for information services, voice data and video communication services and payments to online platforms were contended by the IRB as being "royalties" and therefore subject to Malaysian withholding tax. For large multinational taxpayer groups whose aggregate revenue was at least RM3 billion (Euro 750 million) in the 2016 year, it is likely that 2017 would have been the first year of filing under the country-by-country reporting requirements, and of preparing transfer pricing master file documentation. Malaysia (including Labuan) has also issued its own requirements on CbC reporting and notification. It would seem that 2017 was the year where tax transparency came to life as various governments moved to implement the CbCR filing rules.

No doubt, 2018 will continue with active legislative and court case developments, and unrelenting enforcement action by the tax authorities.

More specifically, my expectations for 2018 include:-

- E-commerce – potentially, the release of new rules to tax e-commerce transactions. Such special purpose rules may provide a more effective mechanism to tax these transactions.
- Earnings Stripping rules – hopefully, there will be lively debate and open dialogue with policy makers, as the detailed law is crafted.
- Stamp Bill – potentially, there will be a third attempt at introducing the Stamp Bill in the 2018 Parliament sitting.
- Real Property Gains Tax – potentially, the implementation of "self-assessment". However, in my view this can and should only be done in tandem with a robust programme of public rulings to clarify ambiguous provisions, and quite possibly, a thorough review and refresh of the Act particularly to weed out any unfair or archaic provisions.
- Labuan – there will be continued scrutiny of the Labuan tax regime, and the way forward, as it was reported in the media that a review of Labuan was being undertaken.
- Tax appeal cases – there should be a continued upward trend in contested cases, following strong enforcement activities. I expect the areas of contention would generally continue to revolve around "RPGT vs income tax", and also interest deductions, particularly touching on the principle established in the Multi-Purpose case.
- Tax enforcement – IRB enforcement activities are unlikely to slow down, and Customs will step up its efforts on the Goods and Services Tax, and Customs duties fronts. In December, the DG of Customs stated that there was on leakage of duties up to RM2.5 billion over the last three years, connected with actions of freight forwarders. We should also see more joint audits where IRB and Customs work together, and where required, using the powerful provisions in the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act.

There should be no shortage of activities for taxpayers and tax practitioners for 2018! The hope as always, is that the policy makers, IRB and Customs, work together with tax practitioners and professional institutions, especially CTIM, to arrive at well-thought out initiatives and reasonable positions. We wish for another great year towards the advancement of the tax profession!

2018 BUDGET SEMINARS

On 9 November 2017, CTIM conducted its annual Budget Seminar at the Berjaya Times Square Hotel, Kuala Lumpur. The first session of the seminar was on the "Summary of 2018 Budget Proposals" presented by Ms Mahfuzah binti Baharin, Section Head, Direct Tax Policy, Tax Division, Ministry of Finance Malaysia. The second session which is on "Forum discussion on 2018 Budget Proposals – Its Changes & Impact to Taxpayers" was dealt by the panel members namely Mr Hanafi bin Sakri, Deputy Undersecretary, Tax Division (MOF), Ms. Annie Thomas (RMCD), Ms Nor'aini Ja'afar (LHDNM) and Ms Phan Wai Kuan (CTIM) and chaired by Mr Chow Chee Yen (CTIM). The last session of the seminar was on the "Evolution of Malaysian Tax Landscape: Where Are We Heading" moderated by CTIM's President, Ms Seah Siew Yun. It was the first time that all Big-4 Head of Tax were invited to share their knowledge and experience on various tax issues on the same platform. The speakers presented the following topics:

Rejuvenating Tax Incentives to Boost Economic Growth
By Mr Amarjeet Singh, Malaysia Tax Leader, Ernst & Young Tax Consultants Sdn Bhd

Managing the Erosion of Local Tax Base Through BEPs and TP
By Mr Jagdev Singh, Senior Executive Director, PricewaterhouseCoopers Taxation Services Sdn Bhd

Challenges in Taxing the Globalised Economy
By Mr Yee Wing Peng, Managing Director, Deloitte Tax Services Sdn Bhd

Whipping Compliance via Tax Audit and Investigation
Mr Tai Lai Kok, Executive Director, KPMG Tax Services Sdn Bhd

The seminar which was attended by over 815 participants comprise of tax practitioners and members from commerce and industry.

CTIM also successfully organised a series of 2018 Budget Seminars at various locations namely Subang (21 November 2017), Petaling Jaya (28 November 2017), Malacca (22 November 2017), Kota Kinabalu (22 November 2017), Kuching (23 November 2017), Johor Bahru (23 November 2017), Penang (27 November 2017), Ipoh (30 November 2017) and Kuala Lumpur (5 December 2017).

CPD EVENTS

The following CPD events were conducted in the last few months:

- Recent Tax Cases 2017
- Tax & Your Property Transaction
- Cross Border Transactions & Withholding Tax
- Understanding the Legal and Practical Aspects on Deductibility of Expenses Based on Public Rulings
- GST – Practical Issues & Recent Developments
- Withholding Tax and Double Tax Agreements
- 2018 Budget Seminars
- Practical Guide 2017: Taxation Principles & Procedures (in collaboration with MAICSA)

The Seminar on "Recent Tax Cases 2017" was conducted by Mr Saravana Kumar & Ms Ivy Ling of Lee Hishammuddin Allen & Gledhill at various major towns. The speakers presented the various key landmark GST and income tax cases decided by the courts in 2017. These cases analysed many questions of law arising from the interpretation and application of GST and tax laws in Malaysia.

Ms Yong Mei Sim conducted a workshop on "Tax & Your Property Transaction" at two locations namely Ipoh and Penang on 13 October 2017 and 16 October 2017 respectively. Due to overwhelming responses, a re-run was conducted on 24 October 2017 in Penang. The Institute will organise similar workshops in other locations i.e Johor Bahru (8 January 2018), Kuala Lumpur (17 January 2018), Melaka (29 January 2018) and Miri (2 February 2018).

The Institute also organised a series of workshops on "Practical Guide 2017: Taxation Principles and Procedures" in collaboration with the Malaysian Institute of Chartered Secretaries and Administrators (MAICSA). This popular compact 4-workshop course offered an in-depth introduction into the many facets of taxation, covering the relevant laws as well as the procedures necessary to comply with the requirements of the Inland Revenue Board and include recent changes in compliance and highlights of the 2018 Budget. These workshops also catered to beginners as well as to more advanced students.

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Chartered Tax Institute of Malaysia
Perak Branch
Presents

PERAK TAX FORUM 2018

"CHALLENGES AND OPPORTUNITIES - A TAX PERSPECTIVE"

PROGRAMME DETAILS

Date	: 16 March 2018 (Friday)
Venue	: Weil Hotel 292, Jalan Sultan Idris Shah 30000 Ipoh, Perak.
CPD	: 8 Points
Event Code	: PR/001
Forum Time	: 9.00 am – 5.00 pm (Registration starts at 8.00 am)
Gala Dinner Time	: 7.30 pm – 10.30 pm

TOPICS & PANEL OF SPEAKERS

- **Critical Corporate Tax Issues**
  Mr. Thenesh Kannaa, Partner, TraTax
- **How will the recent changes to the Transfer Pricing (TP) guidelines affect the preparation of the TP documentation?**
  Mr. Thanneermalai Somasundaram, Managing Director, Thannees Tax Consulting Services Sdn Bhd
- **Tax Audits and Investigations**
  Mr. Chow Chee Yen, CTIM Council Member and CPD Chairman
- **Insights Into Recent Income Tax Cases**
  Mr. S. Saravana Kumar, Partner, Lee Hishammuddin Allen & Gledhill

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A PERFORMANCE DRIVEN CEO DATO' SRI SABIN SAMITAH OF IRBM

YEP *Good afternoon Dato' Sri, thank you for your time, I am Eng Ping, the Chairman of CTIM Editorial Committee. This afternoon we have a few questions that we like to ask you. The main purpose to this interview is to see how CTIM can work with you on technical issues and tax administration in Malaysia. Dato' Sri, you came on board in December 2016; it is not yet a full year and we are already seeing a number of changes coming through.*

Dato' Sri, what are some of your greatest challenges that you are facing and what are your aspirations?

DS Thank you. Firstly, I would like to record my appreciation to CTIM, and to you, Eng Ping, for coming all the way today. I will start off with stating the challenges I have faced since assuming office, and they include increasing the level of [tax] awareness among the public, cross border transactions, aggressive tax planning, retirement of senior/expert officers and complexity in the taxing provisions. Once these challenges are addressed, it would be much easier for us in Inland Revenue and CTIM to do our respective parts.

Our (IRBM) duty is to collect the right amount of tax from taxpayers, and the tax revenue collected is needed by the government to carry out the administration and development projects of the country. Therefore, we at IRBM will live up to the government's expectation of IRBM, which is to manage an efficient and effective direct tax system for the country.

YEP *We touched briefly on the targets and I appreciated your comments that the target in itself is not the challenge, but it is more about how it is achieved. I understand the collection target for 2017 is RM127 billion, and that represents about 10% of the national GDP. Yet you mentioned that one of your aspirations is to achieve approximately 14% of national GDP.*

My question is, how are we tracking in terms of the collections to date, and how are we looking toward achieving this target?

DS Before I answer that question, let's look at the growth of our GDP for the past few years, including

what is projected this year. The GDP for the last 2 years and the target set by the government, for this year, is quite a big jump from the previous year, that is from RM115 billion last year, to RM127.7 billion this year. This target is made known to all through the tabling of the country's annual budget, therefore we at IRBM will put in place strategies that would move towards achieving this target. As to where we are now compared to the corresponding period last year, there is an increase of almost 3% on the collection figure. [If you recall] the government reduced the corporate tax rate by 1% for YA2016, which translates into a big portion of corporate tax collection figure. The reduction of 1% will cost us around RM2 billion in tax loss and the collection from petroleum tax is still very much lower compared to that of last year. And I am sure you have heard and seen in the newspapers that the government has been giving out a lot of new incentives this year. Although these types of incentives impact our tax base in the short run, in the long run they are good for the country in terms of the value it creates through new investments, new job creation and emergence of new businesses.

Nevertheless, since the beginning of this year, we have been focusing on four pillars, which form the basis of our 2017 strategies:

- Improving work culture
- Improving work processes
- Reviewing organisational structure
- Leadership and empowerment, starting from the top.

The main element I touched under improving work culture was to put in place a rigorous performance management system. I emphasised from the beginning to all my Hasilian, to streamline their time management

by focusing on their core functions. In other words, a level of high quality and increased productivity can only be achieved through persistent, diligent and earnest efforts. Simply put, nothing substitutes hard work!

I continued on with IRBM's long term projects, as stipulated under IRBMs 5 year Strategic Plan, by ensuring that IRBM moved towards becoming a digitalised organisation. Improving work processes under this move required us to focus on data management, which proved successful throughout 2017, by managing and using data in a more efficient manner through data matching, which led to more cases being audited and settled in a shorter period of time.

The same principles applied to streamlining the organisational structure of IRBM. What I did was to reorganise departments which were, before this, under the purview of the CEO, to be under the care of my Deputies. This move allowed me to focus more on other strategic and major issues, at the same time ensuring "attention to details" was not overlooked.

As the leader of the organisation, I took the initiative to delegate and empower more powers to my Deputies, as well as Department and State heads. The main reason for this delegation and empowerment is to provide the necessary supervisory exposure to these Directors (they have the power based on certain thresholds), as opposed to only being directors, and to be more responsible for their decisions.

As for my Deputies, they have been given clear instructions through structured circulars, therefore, whatever decisions they make, reflect my decisions.

These changes are hoped to act as motivation to the staff. I am certain they see this entrustment of power as an honour; however that power comes with its set of responsibilities.

Besides that, I have also encouraged them (staff) to enhance their competencies. As you can see, Eng Ping, this year, we have taken several big cases involving technical issues, and very soon we are going to audit big corporations on certain issues of Transfer Pricing, where we have not been deliberating too much in that area and industry before.

YEP *Dato' Sri, I am impressed by your move to increase delegation of your powers; I can see how that can reduce some bottle neck and when people are empowered, they will step up and actually go out to do more. At the same time, Dato' Sri you will always be available to ensure competent behaviour and consistent treatment and ultimately you are still the decision maker.*

On the subject of transfer pricing, from my own personal experience as a practitioner, this is an area of focus for virtually every government or revenue authority. I think we should play a fair part in this international tax trend.

On the topic of development of your officers and technical people, may I ask what programmes are in place?

DS We have a "mentor-mentee" or on-the-job training programme where the more experienced and knowledgeable officers will mentor a few officers. This is a structured and systematic programme at the branch level and is monitored by Datuk Noor Azian, and we are also beefing up our specialised courses at the Malaysian Tax Academy (MTA).

We are amid discussions with one of the local public universities for our advanced course, and some of our professional courses such as transfer pricing and taxation on international transactions and double tax agreements, to be aligned with the university. Ultimately at the end of the programme, the university will award our officers with a Master in Taxation qualification. This will give them further motivation to study these

specialised courses. Under the current system, our officers who have passed the advanced course at MTA will receive a certificate of completion of the course.

YEP *Yes, your officers were always very proud of that certificate, as it was a difficult course and it was an achievement to pass it.*

DS Once the proposal is in place, the Master's Degree will be given by the public university, and is akin to what the Australian Taxation Office is offering to motivate staff to further their studies and to enhance their technical knowledge.

YEP *Since this course will be run by a university, will this be available for non-IRBM students as well?*

DS We hope so. Taking an example of the programme in Australia, even a lawyer or an accountant, or anyone outside these fields, can actually enrol and join the programme. If one does not want to pursue with the Master's programme, they can just take a single subject; on any subject where they would like to enhance their knowledge, for example in transfer pricing, double tax agreement, comparative tax problems, etc.

YEP *That is very good, it is certainly another way in which we can promote understanding between IRBM, practitioners and others, and allow opportunities for interactions that can positively lift standards of competence. It is wonderful to see these types of developments because Tax is a young profession, and these programmes form part of the building blocks to lift the profession to grow and mature.*

Coming back to the four pillars Dato' Sri, we talked about the culture, the process, the structure, and about building up competencies. Are there any other messages you would like to share?

DS Yes, especially how our work processes will change with capabilities provided by robots and developments in IT. Let me elaborate. Nowadays, we receive a lot of third party information and you know very well that starting next year, the Automatic Exchange of Information (AEOI) will be implemented and we will receive information not only from within the country but also from outside the country. We will be expanding and making sure we have the necessary IT infrastructure, so that all the information received will be stored systematically; we must process and make sure that the data is structured and secured, to comply to international standards. We must also have mechanism in place so that only certain people have the right of access.

We are also beefing up our capability on how to manage and use the data. In some of the cases we took up this year, we found that we can settle the case faster; and we can choose high-risk cases because of the tools we have in IT.

You may be surprised that we are quite advanced in our IT system. I have also cautioned my IT department that, I do not want them to simply suggest or to have a system where it is only nice to have; if the usage is below certain threshold, I told them that we are going to get rid of the system. It is very expensive to maintain the system; we must pay for the license, so we must make sure the return on investment is very good.

YEP *Dato' Sri, Malaysia is quite well respected as one of the early adopters of IT in the administration of Tax. We are considered to be in the forefront, so it is good to continue to build on that. There is so much information, and I dare say a decade ago, we did not have the capability to really use it but now, that it is changing.*

DS Technological capability is not only changing business models outside this organisation but also changing our working environment, changing the way we do audits, investigations and even collection. Therefore, I have been pushing for the changes so that we are not left behind by the changes in the business models because if we do not invest in this fast-changing IT environment, we may not be able to cope with the number of cases we are going to audit in the future. In the future, I expect taxpayers to be more litigious, they won't simply accept the adjustments we are proposing, so we need more time to make sure taxpayers are doing the right thing - we will use technology to assist in our work processes and free up the time needed for the officers to perform audit.

YEP *CTIM is the premier organisation for tax agents and part of our role is to bring up the quality and knowledge of our members. So if we have a better understanding of what is to come whether by way of policy and by way of implementation of rules, I believe we will be in a better position to help our members to understand and work alongside IRBM in improving taxpayer compliance.*

Dato' Sri what is your perspective on this, for example having early collaboration between IRBM and professional bodies, before the introduction or implementation of new tax rules or practices?

DS I am totally agreeable with your suggestion. Currently, we have in place a committee called DESIRE, but if we want to achieve a better outcome, maybe we should have smaller scale discussions so that everybody can participate in the discussion. We can still maintain the committee and the number of people attending the DESIRE meetings, but to discuss on very important policy matters, or any changes, we could opt to have a smaller group to discuss on a specific matter and both parties should discuss openly.

I notice that if we have to many people in attendance, some opt to not share their ideas or intentionally keep it to themselves.

It is very basic actually, Eng Ping. You can bring up the suggestion to CTIM, we can have more regular meetings; not just meetings, maybe discussions on certain issues. It's the same for the Inland Revenue, before we embark on certain projects or when we want to introduce certain regulations and even make changes in the tax return forms, we discuss them openly in meetings.

YEP *Yes, the idea is to get a small group which is prepared to share openly and brainstorm, followed by a more formal meeting. Actually, we also want to have discussions to share with IRBM or policy-makers and explain where we are coming from and understand where IRBM and policy-makers are coming from; and if we have some protocols surrounding it, for example 'a rule to say nothing from this meeting can be quoted by either side', then maybe people can be open and that will be the basis for greater understanding.*

DS Yes.

YEP *Dato' Sri, I think you are right, it is more difficult to have authentic discussions in a formal meeting. I really like this idea.*

DS Even in this organisation, I have smaller discussions regularly; I would call a few of my senior officers so that they can take part in the discussion rather than I call all of them and then it could turn out to become a total waste of time.

YEP *Dato' Sri, a pressing question I would like to ask is on penalty and audits. One of the concerns is that seemingly, the "same few" good taxpayers are being audited multiple times, and whether, some of the IRBM's focus should also be spent at looking for the tax evaders, perhaps the group that are not even on the tax radar.*

How do we get a balance between focusing on tax payers who are already submitting returns and complying (albeit not perfect) versus those who need to be brought into the tax net; or the habitual offenders versus those taxpayers who are working towards improving their compliance.

DS The way we select our [audit] cases are based on risk analysis, I do not say our system is perfect, we are improving our system from time to time to select the riskiest cases. It is very unfortunate if the same tax payer keeps coming up. As I have announced before this, beginning next year we will be imposing a 100% penalty on those we consider as habitual tax evaders. If they have not been in our net for many years, they will also be slapped with the 100% penalty. It is really a tough job to balance it. The decision to waive or remit penalty depends on the facts and circumstances that are relevant to the case. In the self-assessment system, any audit or investigation finding will generally attract imposition of penalty. Genuine mistake or technical adjustment can be a basis, however, it is not an absolute defence for the tax payer. All appeal by the tax payer will be considered based on its own merits.

YEP *That is really good, I think for me as a practitioner and as a member of CTIM, it is good to know there is an opening to have a discussion for deserving cases. I think that is very comforting and it provides the opportunity to have a balanced outcome.*

DS As I mentioned earlier, it has been made clear to my Deputies as well as Department and State heads, that decisions need to be made at their level. If the case in hand has a merit, they should and can waive the penalty. I don't want them to submit the case to me as I don't want the CEO's Office to become "another branch". I have repeatedly advised and directed them to exercise their function and power within the ambit of the law and fully observe the guide that has been given to them. It is a common practice that our conduct and decisions may be subject to review by Jabatan Audit Negara, in spite of that, it is important for the Directors to have the courage to

make a decision. To me, if they follow the law and the guidelines, there is no reason to be wary of the outcome of the review.

YEP *to come up with sensible decisions.*

DS and do not simply push the decisions to the headquarters.

YEP *This is quite a significant shift if I may say, this "re-empowerment" of the officers at the branch level. Otherwise you will be involved in too many things that is not strategic.*

DS Yes. In addition to that, we have put in place a rigorous performance management exercise this year. This exercise will bring about many incentives for the staff, such as promotion and the opportunity to partake in attachment/courses overseas.

YEP *My next question is about how do you connect and motivate your people and the measures you have taken. Is this new performance measurement, well received at the moment?*

DS Initially there were a few who were not happy with it, but I am quite pleased that this is now accepted, and we have also managed to explain to the union even though they had some initial reservations. Having a good relationship with the union is also very important. I told them I do not want to waste time managing too much conflict because it is a waste of their time and my time, as we should put our time in focusing on our core business.

I also encourage my staff to undertake attachment programmes, where we send our officers to OECD, IBFD and other tax bodies, for a one year attachment programme. This kind of programmes serve as a very good motivation for the staff. It is also good for their CV. This year, I have started sending a few of my officers to Harvard University for short courses,

and next year I will be sending more.

Other than that, those who performed very well in examinations especially in their advanced course, the best students will be a given promotion. Last year the best student was Ms Lau, we promoted her even though she is quite junior. Currently she is in Tokyo studying Master's in Taxation, on a scholarship awarded by the university.

YEP *I can see you are building a group of strong, well-rounded, international and technically competent officers, which is a good move forward.*

Pivoting to another current topic, that is taxation for the digital economy... I would like to ask whether you have some views on the approach for taxing the online businesses and where do you see the direction it is going. Is it going down the corporate income tax mechanism or the Goods and Services Tax mechanism? Please share…as we understand there is a lot of work going on in the background at the level of the Ministry of Finance.

DS The taxation of the digital economy is not only a Malaysian problem, it is a worldwide problem and we hope that OECD will come up with certain measures on how to address this issue, because in most developing countries, the digital economy is really eroding our tax base.

In IRBM we have started auditing a few cases involving the digital economy. I have sent my officers to a few countries to discuss with the tax authorities on how to address these issues, as well as attend working party group discussions in Paris, United Kingdom and Oslo. Countries like Australia and United Kingdom (HMRC), they have tested a few cases involved in the internet business. In Malaysia, we are going to use the transfer pricing method until OECD comes up with another method. The issues involved are the allocation of cost and the allocation of profits.

OECD has to have a relook at the BEPS 15 action plan. Some of the action plans address the Digital Economy provided they can get the agreement from most of the developed countries, so for the time being, we will use the transfer pricing method.

As to the mechanism of taxing the Digital Economy, most developing countries are inclined for that sector to be taxed under corporate taxation, which translates to taxing the profits of the business itself, as opposed to taxing

the consumers through the indirect taxation mechanism. The bottom line is to safeguard the nation's tax base.

YEP *This is a complex area and the perspectives can be very different depending on whether one is a developed country or developing country. There can be totally opposite views. I suppose we in Malaysia just has to come-up with what is fair and right.*

My last question would be, Dato' Sri, what are some of the things that you do to get away to relax, refresh and basically get up the next day to be energetic to do your job?

DS I like reading and that is why my predecessor Tan Sri Shukor encouraged me to further my studies. I am more than half way through my PhD programme. This kind of personal project gives me some motivation and energy. In addition, I am keen on watching sports programmes on the television and make it a point to go to the gym.

YEP *I did not know that you are doing a PhD, I am amazed as to how you find the time.*

DS I am doing it in UUM, which has a programme that can be tailored according to your job. We started with 32 senior officers attending this programme. We have a lot of data which is researchable, and it is beneficial for the organisation and for the country.

YEP *I look forward to reading your paper because you have access to a lot of data. When do you expect to be completing your PhD?*

DS Next year

YEP *So, we have to add another title to your name then!*

I would like to thank you Dato' Sri for your time. I think we have a lot of good materials. I am encouraged to hear about the changes you are making in the IRBM for example, the re-empowerment of branch officers, and the way you develop and motivate your people. The effects of these measures will be felt for decades to come.
You also gave us your views on the perennial question around penalties on "technical" errors, which we appreciate very much. This was a very candid interview and we really appreciate your time.

DS Thank You

VACANCY

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UNRAVELLING BEST JUDGEMENT ASSESSMENT UNDER SECTION 43(1) OF THE GST ACT 2014

S. Saravana Kumar

Best judgement assessment is a prominent feature of tax legislations in the Commonwealth including Malaysia. The idea behind best judgment assessment provision is that it should be invoked by tax authorities when dealing with uncooperative and recalcitrant taxpayers. This article examines Section 43(1) of the Goods and Services Tax Act 2014 ("**GST Act**") by discussing the circumstances in which the Customs may raise a best judgement assessment based on a few landmark cases from the United Kingdom.

Section 43(1) of the GST Act

Section 43(1) essentially provides that the Director General of Customs ("**DGC**") may issue a best judgement assessment where a taxpayer:

(a) fails to apply for registration under Section 21 of the GST Act;
(b) fails to furnish a return under Section 41 of the GST Act; or
(c) furnishes a return which to the DGC appears incomplete or incorrect.

Additionally, the DGC may also impose penalty under Section 41(8) of the GST Act. It must be noted that the best judgement assessment must be notified in writing to the taxpayer.

Very clearly, in order for the DGC to invoke Section 43(1), the first requirement must be that the taxpayer must either:

(a) failed to apply for registration

under Section 21 of the GST Act;

(b) failed to furnish a return under Section 41 of the GST Act; OR

(c) furnished a return which to the DGC appears incomplete or incorrect.

Once this has been establishment, the second requirement is whether the assessment raised is to the best of the DGC's judgement. Presently, there is no Malaysian case law on this point and hence, the reference to the United Kingdom cases.

The United Kingdom's position

The United Kingdom has similar best judgement assessment provisions under Section 73(1) of the Value Added Tax Act 1994 and the then Section 31(1) of the Finance Act 1972. Firstly, this article will analyse the classic case of *Van Boeckel v Customs and Excise Commissioners*[1] which provides that an assessing officer will have made an assessment to the best of his judgement so long as it was honest, bona fide, reasonable and not arbitrary. Secondly, this article will discuss the decision of *Rahman (trading as Khayam Restaurant) v Customs and Excise Commissioners (No 2)*[2] and the adoption of the two-stage approach. This article will lastly consider the principles enunciated in *Customs and Excise Commissioners v Pegasus Birds Ltd*,[3] particularly in relation to the role of a tribunal in determining an appeal against a best judgement assessment.

Van Boeckel case

In the Van Boeckel case, the taxpayer relied on a manager to run a public house and based his VAT returns on the takings handed to him by the manager. Customs officers visited the taxpayer's premises, inspected the relevant documents, and it appeared that the taxpayer's VAT returns were incorrect as he had failed to declare or fully account for the full value of the supplies made to him. The taxpayer suggested pilferage as a possible cause of the discrepancy. The officers did not speak to the manager or visit the premises during office hours. They noted the takings of the business over a five week period and on that basis, the Commissioners assessed the amount of tax due.

The issue that arose in the case was whether the Commissioners had complied with the requirement that the assessment must be for the amount of tax which to the best of the commissioner's judgement is due from the taxpayer. The taxpayer argued that firstly, the commissioners made no sufficient attempt to investigate the possibility of pilferage of stock and that secondly, the assessment was based on an insufficiently long and representative period of the taxpayer's business. The frequently cited judgment of Woolf J in this case forms the starting authority as to what constitutes best judgement and to identify what obligations are placed on the Commissioners in assessing the amount of tax due.

Duty to investigate

In making an assessment to the best of their judgement, the Commissioners must make a value judgement on the material before them. Naturally, there must be at least some material before the Commissioners on which they can base their judgement as observed by Woolf J:

> *"What the words 'best of their judgement' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."*[4]

On this basis, Woolf J rejected the taxpayer's argument that there had been no real investigation into the manner in which the business was run as the officers had neither interviewed the managers nor visited the premises when it was open. While this may seem unfair from the perspective of the taxpayer, Woolf J reasoned that assessing officers are not required to carry out exhaustive investigations to determine the amount of tax due as the primary obligation under the law of making accurate returns is on the taxpayer.

Honest and Bona Fide

Besides making a value judgement on material before them, 'best judgement' also necessarily requires the Commissioners to act honestly and bona fide:

> *"Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment."*[5]

An assessment is honest and bona fide when it is not made "dishonestly, or vindictively or capriciously",[6] and when it is not "some spurious estimate or guess in which all elements of judgement are missing",[7] or "wholly unreasonable".[8]

Thus, it appears that the focus of best judgement is not on the objective correctness of the assessment of tax due, but on whether the assessment has been made honestly with at least some basis for it. Woolf J highlights in his judgment that it was perfectly acceptable for the Commissioners to base their assessment on only a five week test period, indicating that a disagreement by the taxpayer as to the method of assessment or the existence of alternative calculation methodologies did not immediately lead

to the conclusion that the assessment was not made to best judgement.

The fact that the tribunal made a reduction in relation to the amount of assessment also does not mean that the validity of the assessment was called into question. In other words, the fact that there are different conclusions that can be drawn by different individuals from the same set of facts and circumstances does not mean that the Commissioners did not make the assessment to the best of their judgement.

Rahman (No 2) case

In the subsequent cases after *Van Boeckel*, it has become the practice for tribunals to adopt a two-stage approach in addressing best judgement appeals by clearly distinguishing between the validity of the assessment and the amount of the assessment.

Two-stage approach

This distinction appears to arise out of the interpretation of Section 83(p) of the VAT Act 1994 which provides for an appeal *'with respect to… an assessment under section 73(1)' and 'with respect to… the amount of such an assessment'. Chadwick LJ in the Rahman (No. 2)* case explained that there are two considerations arising out of this: firstly, whether the assessment has been made under the power conferred by the section and secondly, whether the amount of the assessment is the correct amount of tax payable by the taxpayer.

The first consideration itself involves two further elements, that is, whether the pre-condition to the exercise of the power is satisfied (e.g. in relation to Section 43(1), whether a taxable person fails to register for GST or to furnish a return, or furnishes a return which to the Director General appears incomplete or incorrect) and whether the assessment was made to the best of their judgement. As the first element is rarely in dispute, the two-stage approach essentially requires the tribunal to first consider whether, on the material available to the Commissioners at the time the assessment was made, the assessment satisfies the best judgement test. If the test is satisfied, the tribunal will then consider as a second stage in the appeal, whether the amount of the assessment should be varied.

Best judgement

Chadwick LJ provided further guidance on the principles expounded by Woolf J in Van Boeckel. He highlighted that the adoption of a different calculation methodology, one that was 'rough and ready', does not lead to the conclusion that the Commissioner's judgement was flawed or outside the margin of discretion given to the Commissioners. It also does not follow that when the tribunal has reached a figure for the payable VAT that differs from what the commissioners have assessed, the assessment was not made to the best of the commissioners' judgement although he held that the discrepancy does require some explanation. Chadwick LJ sets out three possible explanations as follows:

> *[1] The explanation may be that the tribunal, applying its own judgement to the same underlying material at the second, or 'quantum', stage of the appeal, has made different assumptions…from those made by the commissioners. As Woolf J pointed out in Van Boeckel… that does not lead to the conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgement in these cases.*
>
> *[2] Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake-that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. In such cases…the relevant question is whether the mistake is consistent with an honest and genuine*

[1] *[1981] STC 290 ('Van Boeckel').*
[2] *[2003] STC 150 ('Rahman (No 2)').*
[3] *[2004] STC 262 ('Pegasus Birds').*

attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgement could have made it.

[3] Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary.[9]

Hence, it is clear that there is substantial discretion for the Commissioners to make an assessment to the best of their judgement and that the validity of the assessment will rarely be affected as long as there has been some basis or explanation for making the assessment, even if that explanation is one of miscalculation, misinterpretation, or mistake.

Amount of tax

Given the Commissioner's considerable discretion in making an assessment, Chadwick LJ cautions against "an over-rigid two-stage approach" by citing with approval the following passage by Carnwath J from Rahman (No 1) [1998] STC 826 at 840:

> *"I do not wish to diminish in any way from the importance of guidance given by Woolf J [in the Van Boeckel case] to Customs officers as to how to exercise their best judgement when making assessments. However, when the matter comes to the tribunal, it will be rare that the assessment can justifiably be rejected altogether on the ground of a failure to follow that guidance. The principal concern of the tribunal should be to ensure that the amount of the assessment is fair, taking account not only the commissioners' judgement but any points raised before them by the appellant."*

Instead of focusing solely on determining whether an assessment has been made to best judgement, the tribunal should instead concentrate on the question of what amount of tax is properly due from the taxpayer on the material before it. Chadwick LJ goes as far as to say that even in cases where it may be proper to discharge the assessment (i.e. where the assessment not made to best judgement), the tribunal may choose to instead give a direction specifying the correct amount of tax payable with the consequence that the assessment would have effect as an assessment of

the amount specified in the direction. He justifies this by referring to the intention of the legislature, as the "underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax."[10]

It is worth noting that the powers of the tribunal to give a direction specifying the correct amount of tax on appeal against an assessment were prescribed by legislation, specifically Section 84(5) of the VAT Act 1994. The Malaysian GST Act contains a broader provision as to the powers of the GST Appeal Tribunal. Section 144(2) of the GST Act provides that the Tribunal shall have the power to affirm or vary the decision of the DGC or to set aside the decision and substitute for it a new decision. Hence, it appears that the Malaysian GST Tribunal is suitably vested with powers by the legislature and is able to adopt the approach taken in *Rahman* (No 2) in relation to appeals against best judgement assessments.

Pegasus Birds

The case of *Pegasus Birds* reinforces Chadwick LJ's position in *Rahman* (No 2) in holding that an assessment will not be set aside in all but very exceptional cases and that the tribunal's primary task is to find the correct amount of tax, so far as possible on the material properly available to it. Chadwick LJ stresses that the tribunal should not automatically regard an appeal against a best judgement assessment as an appeal against the assessment as such, rather than against the amount. The court set a high threshold in relation to the validity of the assessment in that the assessment can only be set aside if the justice of the case demands it:

> *[E]ven if the process of assessment was found defective*

> *in some respect applying the established test, the question remained whether the defect was so fundamental that justice required the whole assessment to be set aside, or whether justice could be done simply by correcting the amount to what the tribunal found to be a fair figure on the evidence before it.*[11]

Hence, it appears that only an assessment tinged with dishonesty or some element of fraud will not have been made to best judgement. The approach adopted in Pegasus Birds in effect, widens the interpretation of 'to the best of their judgement' in *Van Boeckel*. Even if the assessment as viewed objectively, was 'wholly unreasonable' or there had been a failure to consider all the relevant material, the relevant question in determining whether an assessment has been made to best judgement remains whether there has been an 'honest and genuine' attempt at the time of assessment:

> *"It is open to a tribunal to find that it is so unlikely that an experienced officer of Customs and Excise, seeking to make a proper assessment of the VAT properly due, would have made an assessment in the amount that he did that the proper inference to draw is that, in making that assessment, he could not have been doing his honest best. But that is an evidential inference from the facts; it is not a finding that because (although doing his honest best) his assessment fell below an objective standard of reasonableness, he failed to exercise the power to assess to the best of his judgement as a matter of law.*[12]

Pegasus Birds makes it clear that given this high threshold and the difficulty of surpassing it, the tribunal's primary task is to find the correct amount of tax, so far as possible on the material properly available to it, reiterating the approach suggested in *Rahman* (No 2).

Conclusion

The cases above demonstrate the wide powers that the DGC like the Commissioner has in relation to determining an assessment. As long as there has been an honest and genuine attempt at evaluating the amount of tax due, the cases indicate that a mistake or the application of an unsuitable calculation methodology by the assessing officer will not render the assessment invalid. However, these cases clearly illustrate that the Tribunal is vested with sufficient authority to vary the amount of assessment or tax demanded based on the information available either before the Commissioners during the course of tax audit or before the Tribunal during the course of the hearing. This is evident from the recent United Kingdom case of Matthew Hodges[13] where the Commissioner's concluded that the taxpayer had suppressed £4 million in sales made by his one-man scaffolding business. Regardless of this implausibility, the Tribunal reduced the amount of the assessment rather than set it aside for invalidity. Accordingly, the authors are of the view that taxpayers stand a better chance of reducing the amount of a best judgement assessment rather than setting aside the said assessment on the basis that it was arbitrarily or erroneously raised.

At the first glance, the best judgement assessment provision may appear to grant wide reaching powers to the DGC. However, there are sufficient check and balance available to ensure that such provision is not abused. First, if the taxpayer can establish that the DGC acted in bad faith or capriciously in raising the best judgement assessment, then the entire assessment can be set aside on the basis that the DGC failed to exercise his best judgement. Second, if there is no such element present but the taxpayer can establish that the amount of tax demanded through the best judgement assessment is incorrect because the DGC failed to consider the material information provided or the taxpayer had failed to provide such information during the course of the tax audit, then the taxpayer may move the Tribunal to make the necessary adjustment to ensure that he pays the correct amount of tax. In concluding, the authors would like to stress that taxpayers must maintain a high standard of document keeping, ensure that GST returns are filed promptly and correctly, and provide all the necessary documents and information to the Customs during the course of tax audit. In circumstances where taxpayers are doubtful of their GST treatment or interpretation of the law, they should take proper professional advice be it from a reputable GST agent, tax lawyers or both.

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[4] *Van Boeckel 292.*
[5] *Ibid.*
[6] *Van Boeckel citing Commissioner of Income Tax, United and Central Provinces v Badridas Ramrai Shop (1937) 64 LR Ind App 102.*
[7] *Van Boeckel citing Argosy Co Ltd v Inland Revenue Commissioner [1971] 1 WLR 514.*
[8] *Van Boeckel 297.*
[9] *Rahman (No 2) 165.*
[10] *Rahman (No 2) 152 to 153.*
[11] *Pegasus Birds per Carnwath LJ 1518 to 1519.*
[12] *Pegasus Birds per Chadwick LJ 1530.*
[13] *[2015] UKFTT 227 (TC).*

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EARNING STRIPPING RULES

HERALDING A NEW REGIME, ENDING THE DEFERMENT OF THIN CAPITALISATION

Nicholas Anthony Crist

It has been proposed in Budget 2018 that Earning Stripping Rules ("ESR") will be introduced in Malaysia from 1 January 2019. ESR will replace the existing thin capitalisation rules which have been in abeyance since 2009. Once introduced these ESR will have a significant impact on the tax treatment of interest expenses.

A number of countries have already introduced ESR in various forms including Japan, the United Kingdom and the United States of America.

WHY INTRODUCE ESR?

There have been concerns on the international front that some taxpayers may be adopting harmful tax practices. As such, the Organisation for Economic Co-operation and Development ("OECD") established the Base Erosion Profit Shifting ("BEPS") project which comprises 15 Action Plans. Of these Action Plans, BEPS Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, was launched to tackle an area identified by the OECD as being prone to abuse – i.e. excessive interest deductions. As the OECD notes the influence of tax rules on the location of debt within multinational tax groups has been established through studies and it is known that groups can easily multiply the level of debt at the level of individual group entities through intra group financing. Financial instruments can also be used to make payments which are economically equivalent to the interest but have a different legal form, therefore escaping restrictions in the deductibility of interest.

The UK introduced its version of ESR, called Corporate Interest Restriction ("CIR") rules, effective April 2017. In the UK Her Majesty's Revenue and Customs noted, when introducing the CIR rules, that risks to the tax base from interest deductions may arise in three basic scenarios:

(i) Groups placing higher levels of third party debt in high tax countries.

(ii) Groups using intra group loans to generate interest deductions in excess of the group's actual third party interest expense.

(iii) Groups using third party or intra group financing to fund the generation of tax exempt income.

ESR VS THIN CAPITALISATION

ESR has similarities with thin capitalisation, as the objective of both rules is to determine whether the amount of debt and related interest expense are excessive. The key difference lies in the method of determining what would constitute excessiveness. Thin capitalisation uses a debt to equity ratio (Section 140A(4) of the Income Tax Act, 1967 used the expressions "financial assistance" and "fixed capital" in place of debt and equity), whereas ESR are based on the quantum of a company's interest expense over its Earnings Before Interest and Tax ("EBIT") or Earnings Before Interest, Tax, Depreciation and Amorisation ("EBITDA"). In this respect, ESR may be easier to implement than thin capitalisation given there is no requirement to define 'debt' or 'equity'. Thin capitalisation has particular definitional difficulties with hybrids; for instance, are redeemable preference shares, debt or equity?

Both ESR and thin capitalisation are in contrast to transfer pricing, which focuses on whether the rate of the interest is excessive by reference to the arm's length principle instead of whether the quantum of the interest expense is excessive.

WHAT WILL ESR APPLY TO?

In principle, ESR are targetted at interest expenses. It would therefore be necessary to determine what should fall within the ambit of "interest" and this may include amounts economically similar to interest (e.g. interest element of a finance lease). ESR would be expected to apply to both conventional and Islamic financing arrangements. As an illustration, Japanese ESR, which were introduced in 2012, as well as applying to interest, include discounts on bills/notes, guarantee fees and other payments whose economic characteristics are equivalent to interest.

Generally, regard is had to interest expenses net of interest income. Using a net amount provides some measure of relief for group finance companies, which on a gross basis might have significant interest expenses and only modest earnings. The Japanese and UK ESR both work on a net interest expense basis. The use of net interest expense can also mitigate against the issue of double taxation where tax relief for an interest expense would otherwise be disallowed in one group company while the interest income is fully taxable in the recipient group company.

The OECD suggests that where an interest expense is below a pre-determined threshold, that amount should be excluded from the application of

ESR. The rationale for this is that in the case of a relatively small interest expense, the risk of abuse is reduced. The UK ESR applies a de minimis limit of £2 million of net tax interest expense. As the UK's ESR operate on a group basis, the £2 million limit is applied on a group basis. The Japanese ESR, which work on a company by company basis, contain a two-limb de minimis rule. This rule applies where net interest payments to related parties do not exceed either (i) JPY10 million or (ii) 50% of total interest payments.

Although the Budget 2018 announcement makes reference to interest expense on loans between related parties, it should not - based on international experience - be assumed that ESR will be limited solely to related party interest.

HOW DOES THE FIXED RATIO RULE WORK?

Broadly, the amount of interest to be denied a tax deduction is ascertained by reference to a percentage of a company's EBIT or EBITDA. Budget 2018 indicates a percentage range of 10% to 30% although it is likely that a specific percentage will be used in the ESR rather than a range. Interest in excess of the prescribed ratio will not be deductible in the year it is incurred.

Whatever ratio is used, attention will need to be given to the meaning of EBIT or EBITDA as these are not defined under the Income Tax Act, 1967.

In Japan and the UK, the ESR are centered around what could be described as a "tax based EBITDA". In essence, this involves starting with adjusted income as disclosed in the tax computation before capital allowances, given that accounting depreciation and amortization are disallowed, and making further adjustments. The Japanese ESR use the term "Adjusted Taxable Income", rather than EBITDA, which means taxable income (calculated by not applying the provisions described in (i) below and treating all donations paid as tax deductible expenses) with an add back of items described in (ii) below. Note that while 'taxable income' can be negative, 'Adjusted Taxable Income' cannot.

(i) Main provisions not applied in calculating Adjusted Taxable Income:
- deduction for domestic dividends received
- foreign dividends exclusion
- certain valuation losses
- disallowance of deductions for income tax/foreign tax credited against corporation tax
- deduction of carried-forward tax losses
- deduction of dividends paid by tax qualified special purpose companies
- thin capitalisation regime
- earnings stripping regime

(ii) Items to be added back in calculating Adjusted Taxable Income:
- net interest payments to related persons
- tax deductible depreciation
- tax deductible bad debt losses

The UK's ESR adopt a not dissimilar approach.

What Do ESR Entail?

The OECD report contains a framework for ESR which can be shown as below:

Fixed Ratio Rule
Allows an entity to deduct net interest to a benchmark net interest / EBITDA ratio

Group Ratio Rule
Allows an entity to deduct net interest expense up to its group's net interest / EBITDA ratio

Optional
Carry forward disallowed interest / unused interest capacity and / or carry back of disallowed interest

Targetted Rules
General interest limitation rules to address specific risk

Specific Rules
To address issues raised by the banking and insurance sectors

This is just a framework and the Malaysian tax authorities will need to put the "flesh on the bones" in drafting the ESR.

WHEN WOULD THE GROUP RATIO RULE APPLY?

The OECD suggests the use of a Group Ratio Rule in addition to the Fixed Ratio Rule. A Group Ratio Rule is based on a ratio of group net interest expense to group EBITDA. This is an attempt to recognize that some groups, perhaps because of the nature of their particular industry, may be able to borrow larger amounts from third parties than would be allowed an interest deduction under the Fixed Ratio Rule. A Group Ratio Rule would therefore provide an alternative cap on interest expense which may allow group members to claim a higher interest expense than permitted under the Fixed Ratio Rule.

The issue of defining "group EBITDA" would need to be addressed if a Group Ratio Rule is intended. In addition, there should be a specific meaning assigned to a "group" and the extent to which this will be based on shareholding or extended to other forms of control.

WHAT HAPPENS TO INTEREST EXPENSES DISALLOWED UNDER ESR?

As business profits fluctuate, the OECD approach suggests that where a portion of an interest expense is disallowed under the ESR in a year,

this could be carried forward or carried back and a deduction given in years where there is capacity. This would be the case where the interest expense for a year is lower than the capped amount under the Fixed Ratio Rule or the Group Ratio Rule. A company in its early years of operation may have a relatively high interest expense compared to its earnings. The ability to carry forward disallowed interest expense should mean the ESR would fit more readily with investment decisions which recognize that profitability takes time to achieve. The UK's ESR provide for a carry forward of disallowed interest expense. The Japanese ESR also allow for a carry forward although this is limited to seven years.

The OECD report indicates that a carry forward or carry back is optional. This will need particular attention in the Malaysian context given the tax legislation has traditionally only allowed the carry forward and not back of unutilised reliefs. The issue of the timing of incurrence of an expense would also need to be considered where an expense from one year is to be claimed as a tax deduction in another.

HOW WOULD ESR INTERACT WITH TARGETTED RULES AIMED AT DISALLOWING INTEREST EXPENSES?

The OECD recognises that in addition to ESR, a jurisdiction may have separate Targetted Rules which restrict deductions for interest expenses in specific cases. In this respect, Malaysia already has interest restriction rules as well as withholding tax on interest and the interaction with these will need to be considered in the formulation of Malaysia's ESR.

WHAT IS THE POSITION OF THE BANKING AND INSURANCE SECTORS?

Due to the interest-centric nature of their businesses, the OECD recommends that specific rules be implemented for the banking and insurance sectors. In Malaysia, separate attention may be given to the banking sector as tax deductions on interest expenses are typically unavailable for the insurance sector.

WILL ESR APPLY TO EXISTING FINANCING ARRANGEMENTS?

As part of the proposed introduction of ESR on 1 January 2019, the Malaysian tax authorities will need to consider whether there should be transitional provisions for existing financing arrangements and if so, to what extent. If considered appropriate, transitional provisions could include the grandfathering of existing loans subject to certain parameters. The UK, on the introduction of its ESR, provided grandfathering for existing finance leases as well as guarantees.

Consultation will undoubtedly be important. ESR have the tendency to become complex and affected businesses will need time to understand the proposals and to prepare for the implications. As the tax authorities will need to draft rules to implement ESR it is hoped there will be a consultation phase prior to implementation.

Entities who close their accounts on a date other than 31 December may have the added challenge of the ESR coming into force part way through their basis period. It is hoped that the ESR will include transitional provisions to ease in their introduction.

MOVING TOWARDS ESR – WHAT SHOULD TAXPAYERS DO?

Given that ESR would be effective in less than 12 months, it is appropriate for entities to start looking at ratios of their interest expense to their tax based EBIT or EBITDA.

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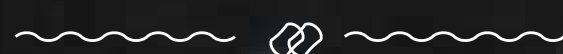
UNDERSTANDING JUDICIAL DOCTRINE OF GAAR

(PART II)

Dr. Benjamin Poh Chee Seng

In Part I of this article, the author has reviewed the earlier common law judicial doctrine of GAAR (General Anti-Avoidance Rules) developed in the US and UK, continue with Part II of this article, two recent hallmark Court of Appeal cases on Malaysia GAAR are cited for further discussion on the application of judicial doctrine of GAAR by the Court and the issues arise when interpreting Malaysia statutory GAAR. Armed with the knowledge and understanding of judicial doctrine of GAAR will enable any aspired tax accountant or lawyer to argue its cases persuasively before the Inland Revenue Board and the Court in genuine tax planning case with commercial justifications and economic substances.



In Part I of this article which was published in this journal where the author has reviewed the earlier common law judicial doctrine of GAAR (General Anti-Avoidance Rules) developed in the US and UK. Continue with Part II of this article, the two recent hallmark Court of Appeal cases *Sabah Berjaya Sdn Bhd* and *Syarikat Ibraco-Peremba* on Malaysia GAAR are cited for further discussion on the application of judicial doctrine of GAAR by the Court and the issues arise when interpreting Malaysia statutory GAAR.

Application of Judicial Doctrine of GAAR In Malaysia Tax Cases

Sabah Berjaya case

GAAR was invoked by the Revenue in a hallmark case *Sabah Berjaya Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri. (2000) MSTC 3771*. The case concerned with the substantial donation of its profit from Sabah Berjaya Sdn Bhd to Sabah Foundation an

approved institution by Inland Revenue Board to receive donations tax free from its donators. At the time there was no limit on tax deductibility of the amount of donation a company could donate to any approved institution, Sabah Berjaya therefore obtained full tax deductions against its taxable profit on the amount donated to Sabah Foundation.

Few legal issues were raised concerning the issue of burden of proof and of arm's length basis under Section 140 (1) and (6) respectively (the first issue). And the distinction between tax avoidance and tax mitigation (the second issue). The first issue was deliberated by the Special Commissioner of Income Tax whereas the second issue was further deliberated by the Court of Appeal. The taxpayer lost their argument in the Special Commissioner of Income Tax and the High Court, but the judgements were subsequently overruled by the Court of Appeal.

The Court of Appeal went directly to the issue of whether the transaction undertaken by Sabah Berjaya was considered as tax avoidance or tax mitigation plan. The New Zealand old tax provision Section 99 was considered by the Court of Appeal as pari materia to Section 140 and the case *Commissioner of Inland Revenue v Challenge Corp Ltd [1986] STC 548* was cited as a relevant case in analysing the distinction between tax avoidance and mitigation. Lord Templeman when delivering the majority opinion of the Board at Challenge Corp Ltd, drew a distinction between tax evasion, tax avoidance and tax mitigation. It is only the first two that fall within the purview of the statute, the last does not. In the course of delivering the advice of the Board on behalf of the majority, his Lordship said (at p 554 of the report):

> "Tax evasion also can be dismissed. Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead, to a reassessment. Fraudulent evasion may lead to a criminal prosecution as well as reassessment. In the present case Challenge fulfilled their duty to inform the commissioner of all the relevant facts.
>
> The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words of Lord Tomlin in IRC v. Duke of Westminster (1936) AC 1 at p 19: 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be'. In that case however the distinction between tax mitigation and tax avoidance was neither considered nor implied.
>
> Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an arrangement but from the reduction of income which he accepts or the expenditure which he incurs. Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant......."
>
> Ultimately the Court of Appeal in Sabah Berjaya Sdn Bhd held that "on whether there was tax avoidance, the taxpayer did not pretend to donate its entire profit to the Foundation. There was an actual donation, so no question of tax evasion actually arises. The payments made reduced the taxpayer's income in circumstances in which the Act by way of sec. 44(6) clearly afforded a reduction in tax liability. Accordingly, this was not a case to which sec. 140 applied."

Critical comments on Sabah Berjaya case

A number of important principles emerged from the decision of the Court of Appeal in *Sabah Berjaya*

case. Firstly, the legal substance and economic substance doctrine was employed by the Court of Appeal in analysing the transactions, when the Lordship stated that the donation was actually made out which was not a pretence. This was consistent with the doctrine that financial position of the taxpayer was affected or suffered as a result of the transactions. Secondly, on the issue of conflict between GAAR and specific provision of ITA, 1967, the specific provision shall prevail the GAAR is consistent with the judicial decisions of the leading commonwealth countries such as the UK, Australia, New Zealand and Singapore which has long recognized the choice ("Choice Principle") given to a taxpayer to plan his tax affairs so as to attract the minimum tax consequences in common law tax jurisprudence.

Nevertheless, there are certain critical issues that have still not been properly addressed, such as whether the substantial amount of donation made in comparison with the profit available for distribution was "abnormal" contravene the well-known principle of predication test formulated by Lord Denning in the often cited Privy Council's case Newton v. Commissioner of Taxation (1958) A.C. 450 (e.g transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax). Also whether the donation made out from the subsidiary to the parent Foundation ("in substance both could be considered as an economic entity") which was still within the control of the group has economically altered the financial position of the group as a whole? Economic substance doctrine was recently applied by Singapore Court of Appeal in *Comptroller of Income Tax v AQQ [2014] MSTC 70-030* where the Singapore Court of Appeal held that in applying the economic substance doctrine on the tax avoidance plan involved a group of companies, the whole group was treated as one economic entity than a separate entity by itself.

Syarikat Ibraco-Peremba case

A much recent decision on GAAR was raised again in *Syarikat Ibraco-Peremba Sdn Bhd (SPS) v DGIR (2014) MSTC 30-084*. The case concerned with a disposal of land by the Appellant to its subsidiary company for property development in year 1994. After the land was developed into shophouses and a

shopping complex ("the properties"), these properties were rented out for long term investment purpose. Subsequently, in year 2003 a corporate restructuring exercise was undertaken to sell the shares in the subsidiary company by the Appellant to another company related to the Appellant. The subsidiary company sold the properties after the restructuring exercise to realize a real property gain tax substantially lower than the income tax if the properties were to be developed and sold by the Appellant itself. The Inland Revenue disregarded the whole transactions by invoking Section 140 of Income Tax Act, 1967 and raised penalty under Section 113 (2) of the Act.

The case went from Special Commissioner of Income Tax (SCIT) to the High Court where the taxpayer lost its argument, and finally up to the Court of Appeal which reaffirmed the judgements made in SCIT and the High Court. The High Court had referred to *W T Ramsay Ltd v Inland Revenue Commissioners [1981] 1 All E.R.865, [1982] AC 300 H.L.* for the principle that in looking at tax avoidance scheme which comprised a number of specific transactions to avoid tax, the genuineness or otherwise of each individual step or transaction need not be looked at from each individual step or transaction but it is to be looked at as a whole. As such the High Court found there was no error committed by the SCIT to warrant intervention as there were evidence and facts to support the findings of the SCIT in arriving at the decision they did and hence justifying a case under section 140 of the Income Tax Act, 1967. The Court of Appeal agreed with the High Court's reasoning and conclusion.

Even though the Appellant's submission that the second and third

transactions could not be said to be "preordained" particularly when these transactions were separated in time by nine years, based on the principle enunciated in *Furniss (Inspectors of Taxes) v Dawson [1984] A.C. 474* and endorsed by *Ensign Tankers (Leasing) Ltd. v Stokes [1992] BTC 110*, the Court of Appeal accepted the SCIT's findings of facts that the so-called second and third transactions were in discharge of the scheme advanced as a way of avoiding tax by the Appellant, the long passage of time notwithstanding. The passage of time is of little consequence in the scheme of things for the Appellant when taking into account the findings of facts by the SCIT. The Court of Appeal also agreed with the SCIT findings that the Appellant's consultation with its tax agemt Arthur Andersen before implementing the plan as a primary purpose of ordering the transactions in a manner to minimise tax. On the issue of tax penalty imposed, the Court of Appeal dismissed the Appellant's submission on "good faith" as a defence to the plan implementation under Section 113 (2).

The Court of Appeal finally held that:-

"The distinction between what is accepted and what is not in the way of reducing the amount of tax to be paid used to be conveniently described by the terms tax avoidance and tax evasion respectively. Section 140 (c) of the Act in particular, has the effect of demolishing that convenient description. The Act now empowers the Director General, without prejudice to such validity as it may have in any other respect or for any other purpose, where he has reason to believe that any transaction has the direct or indirect effect of evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by the Act, to disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction. Thus the oft quoted words of Lord Tomlin in IRC v Duke of Westminster [1936] AC 1 and quoted by Lord Templeman in Commissioner of Inland Revenue v Challenge Corporation Ltd [1986] STC 548 that every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be is now only partially true, for whether he succeeds or not, according to section 140 (c), depends upon the determination of the Director General. We make the observation that it is for the taxpayer to demonstrate that the transaction or the arrangement by which the income was produced was so preordained by compliance with the requirements of law or accepted business practices to limit risk exposure, and that the tax savings were purely incidental."......

The decision of Court of Appeal in *Syarikat Ibraco-Peremba Sdn Bhd (SPS)* has affirmed a number of important principles. Firstly, even though the sale of land was at market value (e.g. arm's length basis) with legal substance, the transactions could still fall under the purview of GAAR. Secondly, tax saving purpose shall be purely incidental to the main business purpose of the transactions ("Business Purpose Doctrine"). Thirdly, series of transactions even though there were separated in time by nine years, could still be considered as "preordained" transactions or as a whole composite transaction ("Step Transaction Doctrine"). The Court of Appeal has also decided that tax penalty imposed under Section 113 (2) precludes the defence of "good faith" as oppose to Section 113 (1) of the Income Tax Act, 1967.

Critical comments on Syarikat Ibraco-Peremba case

In analysing the facts of the case and decision of the Court of Appeal, with respect, the author does not

agree with the Court's views that the transaction was mainly for tax purpose just because the taxpayer had consulted Arthur Andersen for tax advice on the whole transaction. As it is quite normal in practice for a reasonable man to consult his tax adviser to understand the tax implications of any major transactions to be undertaken. As identified in the discussion of the Step Transaction Doctrine above, one of the necessary test namely "binding commitment test" was not mentioned and discussed persuasively in the facts of the case as the taxpayer argued that the transactions could not be considered preordained by looking them on a hindsight basis.

Furthermore, the burden of proof that the transactions were preordained with the purpose and effect of tax avoidance was on the DGIR than the taxpayer according to Section 140 (1), but the Court of Appeal made the observation that it is for the taxpayer to demonstrate that the transaction or the arrangement by which the income was produced was so preordained by compliance with the requirements of law or accepted business practices to limit risk exposure, and that the tax savings were purely incidental. This statement was inconsistent with the decision on burden of proof made by the High Court in *Port Dickson Power Bhd v DGIR [2012] MSTC 30-045*, where the High Court held that if the Revenue considered the financing structure in this case was a sham, the burden of proof would rest with the Revenue to prove his belief under Section 140 (1), failure of the Revenue to prove the transaction was sham was fatal to his case.

On the final issue of tax penalty imposed under Section 113 (2), the author is of the view that though the Supreme Court case *Ketua Pengarah Hasil Dalam Negeri v Kim Thye and Co [1992] 1 CLJ (Rep)135* was cited on the issue of good faith as a defence against imposing of tax penalty under this case, the Court of Appeal did not further its discussion on whether in the circumstance of the case, the discretion was exercised in "good faith" by the Revenue and whether the taxpayer has exercised "good faith" in implementing its tax planning scheme. Considerations should be given to what His Lordship Peh Swee Chin SCJ said in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye and Co:* "… He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances…".

Furthermore, in High Court's decision in *Kim Thye and Co*, Richard Talalla J made the following comments (at p 2510): "The Director General may require payment of the penalty. He is not bound to require such payment. He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances. It seems to me that the Director General would have to consider whether the incorrect return or incorrect information was respectively made or given dishonestly with intention to evade payment of tax or possibly even negligently and then, and only then, mete out the punishment…". The facts of the case was that the Appellant has acted in "good faith" by consulting a reputable accounting firms Arthur Andersen before implementing the tax planning scheme. All the transactions and arrangements were implemented according to the tax planning scheme and had been properly disclosed to the Revenue without any dishonesty or negligence in complying with the tax law and regulation. It is inconceivable that before implementing the plan a proper consultation with a reputable tax agent be inferred by the Court of Appeal as a "primary purpose of ordering the transactions in a manner to minimise tax". It is also absurd that whenever the taxpayer implements its tax minimization plan which was not specifically addressed or prohibited by

the Revenue in the public rulings or which may differ from the Revenue's stand, be construed by the Court as giving incorrect return or incorrect information.

Conclusion

Statutory GAAR under Section 140 has been there for more than 40 years without making any significant amendments. Our court's interpretation of GAAR is still based primarily on common law judicial doctrine of GAAR which may not be in line with the parliamentary intention of enacting a statutory GAAR. A number of interpretation issues still unsettle the judiciary and the tax practitioners as follows:-

1) Uncertainty on whether Section 140 may be applied to a series of transactions where some of them with real economic and commercial substances with third parties. Whether transactions with real economic and commercial substances should be recognized and artificial transactions be discarded?
2) Section 140 did not state clearly whether the extent of tax purpose predominant in a transaction is required to invoke GAAR and whether that purpose is subjectively or objectively measured, though the test was confirmed as objectively measured as per Newton v. Commissioner of Taxation (1958) A.C. 450
3) Is abnormality a requirement to prove that the transaction is not ordinary business or family dealing? How is the abnormality be measured though the test was confirmed as objectively measured as per Newton v. Commissioner of Taxation (1958) A.C. 450? Similar issue related to arm's length basis, is it subjectively measured by the Revenue or objectively measured before it could be fell under the four limbs of Section 140?
4) Whether doctrine of economic substance was ever intended by the Parliament? How could the judiciary apply the economic substance doctrine to determine whether taxpayer's financial position has been altered under Section 140?
5) To what extent and details the particulars of the tax adjustments should be furnished by the Revenue to the taxpayer to constitute a valid "particulars of adjustment" under Section 140?
6) Whether "good faith" is necessary in Section 113 (2) before a tax penalty could be imposed for tax avoidance plan in view of conflicting decisions from our courts? Whether different tax penalty regime should be imposed on those with tax avoidance without proper disclosure and advice versus those with proper disclosure and advice, so as not to deter responsible tax planning?

It is time that Malaysia government should seriously study the weaknesses and issues of our statutory GAAR so that to align with the international tax jurisprudence and trends especially in the post implementation of the OECD BEPS (Base-Erosion and Profit-shifting) project that international tax avoidance has significantly erode government tax revenue at the same time tax competitiveness has prompt countries to compete with each other in attracting sufficient foreign and private investments for economic growth.

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SECTION 4A
THE SAGA CONTINUES

Tan Hooi Beng

Effective 17 January 2017, Section 4A withholding tax ("WHT") at 10% is re-imposed on payments to non-residents for certain offshore services. Section 4A of the Income Tax Act, 1967 ("ITA") reads as follows:

Notwithstanding the provisions of section 4 and subject to this Act*, the income of a person not resident in Malaysia for the basis year for a year of assessment in respect of-*

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

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

(iii) rent or other payments made under any agreement or arrangement for the use of any moveable property, which is derived from Malaysia is chargeable to tax under this Act. (Emphasis added)

The tax authority, via its Practice Note 1/2007, has confirmed that 17 January 2017 refers to the date when services were rendered. Prior to 17 January 2017, only onshore services are subject to WHT as Section 4A income.

Is the new regime[1] a shocker?

I am not surprised because tax authorities around the world are broadening their tax bases. In fact, the United Nations' Committee of Experts on International Cooperation in Tax Matters is inclined to include a special Technical Fee Article ("TFA") in the UN Model Tax Convention which invariably gives the taxing right to the source country on technical, managerial and consultancy services as long as the payer is a tax resident in the source country. Location where the services are performed is irrelevant. The need to preserve the taxing right of the source country is, in a way, in line with the OECD/G20 Base Erosion and Profit Shifting ("BEPS") Action No 1 (The Digital Economy) that recognizes that in this era, most services could be rendered offshore without the need to have a physical presence in the source country. In this regard, all countries are free to include in their domestic tax law/ negotiate treaties to safeguard against BEPS.

Having mentioned the above, the UN's proposal simply means that any sovereign nation may now have some justification in implementing a WHT regime on offshore services in its domestic tax legislation if it has not done so. Whether there is a political will to have this in place would really depend on various factors from the business and economy standpoints. After all, surely each country would seek to remain competitive. At times, an overly robust WHT regime would affect a country's competitiveness.

What is the big fuss with the new regime?

I will not discuss on the pros and cons of this new regime from the economic and business standpoint. All I am interested in is the technical aspect of Category 5 (see below) where the service recipient is a company tax resident in a treaty country but the treaty does not contain a TFA. Malaysian trading partners that are in this situation include China, Japan, South Korea, Indonesia and Thailand, to name a few. The core issue is whether Section 4A prevails over the tax treaties that Malaysia has entered into. This is my key focus.

It is mandatory to respect the tax treaty?

It is trite law that Malaysian tax treaties prevail over the local law, namely the ITA[2]. Section 132 of the ITA reads as follows:

[1] *Covering the period from 17 January 2017 to 5 September 2017. Effective 6 September 2017, a blanket exemption via Income Tax (Exemption) (No. 9) Order 2017 applies to offshore services.*

> *(1) If the Minister by statutory order declares that-*
>
> *a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view of affording relief from double taxation in relation to tax under this Act or other taxes of every kind under any written law and any foreign tax of that territory; and*
>
> *b) it is expedient that **those arrangements should have effect, then, so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act notwithstanding anything in any written law** (Emphasis added)*

This would be the case, at least during the period before the Federal Court decision in the case of *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim (M) Sdn. Bhd. (Federal Court 01(f)-23-09/2012(W))"* ("Alam Maritim case"). The case shall be discussed at a later stage of this paper. For now, all I am saying is that one should not jump the gun to say that the principles laid down in *Alam Maritim* constitutes the tax authorities' "weapon for all seasons" as the facts of the case were peculiar coupled with complexity of the old Malaysia-Singapore tax treaty.

Section 132, in my view, is abundantly clear that the tax treaty, not only prevails over the ITA, but also any written law. That is how significant a treaty is and rightfully so. Malaysia and its treaty partner, are both sovereign nations, coming together to sign a pact with a view to avoiding double taxation, preventing fiscal evasion and facilitating cross-border trade.

It is noteworthy that Malaysia is a party to the Vienna Convention on the Law of Treaties ("VCLT") which applies to all treaties. It provides that a treaty is an international agreement (in one or more instruments, whatever called) concluded between States and governed by international law. Some of these rules of international customary law are included in the VCLT which deals, inter alia, with the interpretation of treaties. Treaties are to be interpreted in good faith in accordance with the ordinary meaning of the terms in their "context" and in the light of the treaty object and purpose (*pacta sunt servanda principle*). If Malaysia has the tendency of not respecting its tax treaties, other countries may have no interest in entering into tax treaties with it.

Can ITA override the tax treaty?

As an international rule of thumb[3] coupled with Section 132 of the ITA, a tax treaty should prevail if there is a conflict between the treaty and the ITA. Moreover, the wordings of Section 4A – *"Notwithstanding the provisions of section 4 and **subject to this Act,…**"* support this position. Whilst Section 4A is special, so much so, that it is no longer an ordinary business income under Section 4(a) of the ITA, one must not overlook the phrase of "subject to this Act" which will bring us back to Section 132 which is the basis of a tax pact between two sovereign nations.

5 broad categories[4]

It appears to me that there would be 5 categories as follows:

[3] Certain domestic tax legislation in UK and Australia do override tax treaties but these take place only when there is an element of anti-avoidance. Otherwise, the tax treaty would always prevail. From the Malaysian context, 4 crucial points are to be noted:

- Section 132 is supreme and prevails over anything in any written law.
- Section 4A became effective from 21 October 1983 and the tax authorities have been consistent from the outset, i.e. Section 4A is not specifically covered in the tax treaty (unless there is a TFA) and hence the application of the article on Other Income which generally grants Malaysia the WHT right. In other words, Malaysia did not surrender its taxing right on Section 4A income. Having said all these, it is important to ask what the intention of the Parliament was. In the Explanatory Statement to the Finance Bill which brought section 4A into existence, it was

provided that:

- "Clause 5 introduces a new section 4A to the Act which provides that certain classes of income derived "from Malaysia by a non-resident person will henceforth be charged to tax under the new section 4A. This includes rent or other payments made under any agreement or arrangement for the use of any moveable property, payments for certain services rendered by the non-resident or his employee, and ***the amounts paid for technical advice or assistance.*** The rate of tax on income charged under 4A will be 15 per cent (Clauses 6 and 23). The income classified under section 4A will be deemed to be derived from Malaysia if, inter alia, the payments are charged as an outgoing or expenses in the accounts of a business carried out in Malaysia (Clause 9), while Clause 19 introduces a new section 109B to provide machinery for withholding tax payable by non-resident persons in respect of such payments received by them. Clauses 5, 6, 9, 19 and 23 will come into force on the 21 October 1983."
- From the aforesaid Explanatory Statement, nothing is mentioned that Section 4A overrides the tax treaty. Indeed, Section 4A is subject to other sections in the ITA, and in this instance Section 132.
- The authority for tax treaties is Section 132 and any order made under this section shall be laid before the Dewan Rakyat. Whist I agree that legislative supremacy is a fundamental rule of law in many parliamentary democracies, many courts have held that the legislature must explicitly indicates its intention to override a treaty if that is the intention in the event of a conflict. In this regard, Section 4A does not override Section 132.
- ***Category 1*** – Where there is no tax treaty between Malaysia and the country of residence of the service provider (e.g. the United States), the domestic WHT tax rate of 10% would apply.
- ***Category 2*** - Where there is TFA in the tax treaty or the meaning of royalty in the Royalty Article is expanded to include certain services, Malaysian WHT right is preserved. A reduced WHT rate may be accorded by certain treaties e.g. the UK, Netherlands, South Africa etc.
- ***Category 3*** - Where there is a TFA but the technical fee is only deemed to arise in Malaysia if the services are performed in Malaysia (e.g. the Singapore and Spain tax treaties), Malaysia is precluded from imposing WHT on offshores services that are technical, managerial or consultancy in nature (as confirmed in the IRB's Practice Note 2/2017).
- ***Category 4*** - Malaysia-Australia treaty where Article 5 of the Malaysia-Australia treaty provides that an enterprise shall be deemed to have a permanent establishment ("PE") in Malaysia if it furnishes services, including consultancy services, in Malaysia through employees or other personnel engaged by the enterprise for such purpose, but only where those activities continue (for the same or a connected project) within Malaysia for a period or periods aggregating more than 3 months within any 12 month period. It appears that the Malaysia-Australia treaty is the only one that the Malaysian tax authorities accept the fact that service fee represents a business income to the Australian resident company. In the absence of a service PE in Malaysia, Section 4A WHT would not apply. This is also confirmed by the IRB's Practice Note 2/2017. It is very interesting to note that the "3 out

[2] *See Director General of Inland Revenue v. EIL. (1950-1985) MSTC 256 ("Euromedical case").*

[4] *The focus is on a non-resident company providing services under Section 4A of the ITA. Where the service provider is a freelance individual, separate consideration needs to be given to the Article on Independent Personal Services.*

of the 12 months" could also be found in the Malaysia -Indonesia treaty but we are certainly not aware of the same Australian position being adopted.

- ***Category 5*** - Where there is no TFA in the treaty, herein lies the controversial issue. Would total elimination of WHT be possible (e.g. in the Malaysia-Indonesia, Malaysia-China treaties)? In other words, could we rely on the international tax principle of "no PE, no tax on business profits" rule? This seems to be possible as noted in the case of *SGSS (Pte) Ltd v. Ketua Pengarah Hasil Dalam Negeri. (2000) MSTC 3814 ("SGSS") and Alam Maritim* (High Court and Court of Appeal levels).

A knee-jerk reaction to Category 5 is that 10% WHT would apply and many would say that this is a prudent position and at the same time, endorsed by the Federal court's decision in Alam Maritim case (which is against the judgement in the case of SGSS where the judge of the High Court ruled in favor to the taxpayer by applying the "no PE no tax" principle). I am not keen on prudence but prefer to explore the technical aspect. In the end, Alam Maritim is a Federal Court case which is the highest court and the final appellate court in Malaysia. Hence, to many, Alam Maritim may be the law of the land after all.

Does Alam Maritime change the international law?

In *Alam Maritim*, there are 2 key points made by the Federal Court. In my view, **both must be read together and not in isolation**. Firstly, applying the purposive approach in interpreting the ITA, the Judges held that it is Parliament's intention to tax the non-resident on income falling under Section 4A of the ITA. Income falling under Section 4A would become "Special Classes of Income" and no longer a business profit under Section 4(a) of the ITA. As such, the IRB's view is that the non-resident could no longer claim the treaty benefit under the business profits article of the tax treaty (hereinafter referred to as "**First Point**"). In other words, the ITA will have the paramount force over a tax treaty on such income.

Secondly, the Federal Court took a position that Articles II and VI of the Old Malaysian-Singapore Double Taxation Agreement ("Old Treaty") had given the taxing right to Malaysia to tax the time charter income (hereinafter referred to as "**Second Point**").

The term "income or profits" has been defined under Article II (l) which states the following:-

(l) ***The terms "income or profits of a Malaysian enterprise" and "income or profits of a Singapore enterprise" do not include*** *rents or royalties in respect of literacy or artistic copyrights, motions picture films or of tapes for television or broadcasting or of mines, oil wells, quarries or other places of extraction of natural resources or of timber or forest produce, or income in the form of dividend, interest, rents, royalties or fees or other remuneration derived from the management, control or supervision of the trade, business or other activity of another enterprise or concern or remuneration for labour or personal services* or ***income derived from the operation of ships or aircraft*** *(emphasis is ours).*

Based on the above, the income derived from the chartering of ships by the non-resident would be excluded from Article IV which deals with the business profits article. The said income should instead fall under Article VI of the Old Treaty which read as follows where Malaysia has the taxing right:

"1. Notwithstanding the provisions of Article IV of this Agreement the income or profits of an enterprise of one of the Contracting States from ***the operation of ships or aircraft in international traffic*** *may be taxed in the other Contracting State only if such income or profits are derived from that other Contracting State…(emphasis is ours)"*

One area that I an grappling with is how the non-resident could be regarded as deriving income from the operation of a ship or aircraft in international traffic. This was not elaborated. Whilst Point 2 on Article II is sensible as this

is explicitly provided for in the Old Treaty, it is unlikely to be relevant for Category 5 that involves modern treaties. Most of the modern Malaysian tax treaties would not include a definition of business profits which specifically excludes certain income. Instead, the business profits article would include the following to exclude items of income which are dealt with separately:-

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

Therefore, in the absence of a TFA, the service income could still viewed as business profits[5] and this bring us to the principle of "no PE, no tax on business profits".

The tricky part is on Point 1 where it seems that Section 4A prevails over the tax treaty or alternatively, Section 4A income could not be a business income under the tax treaty. In my view, Section 132 of the ITA cannot be brushed away just like that. It should prevail over any other provisions in the ITA. Section 132 is the basis of tax treaty. On the treaty front, one may contend that business income is not defined. Hence, business income under the domestic tax law of the source country, namely ITA, which excludes Section 4A income from business income, should kick in.

This view would be over simplistic and is a one that does not take into account the objective of the tax treaty. There would be situations where the context otherwise requires for an international meaning to be used, rather than domestic tax law, when defining a term. Many courts have recognized the existence and the application of an international tax meaning that is not derived from the domestic law of the contracting states, but that is obtained by referring to alternative sources. These are some of the trends over the years:

- Courts in Australia, Canada, Denmark, France, India, Indonesia and the United Kingdom have expressly referred to such international meanings.
- Several Australian courts have referred to the "four corners of the text for interpretation". which are the context, the object and purpose, the liberal interpretation of a tax treaty and the consideration that the treaties should not be applied with too much precision (McDermott Industries (Aust) Ltd v. Commissioner of Taxation (2005) [2005] FCAFC 67 and Deutsche Asia Pacific Finance Inc v. Commissioner of Taxation (2008)).[2008] FCA 1570.
- The Canadian courts[6] opined that, in order to ascertain the meaning of the words in the tax treaties, it was critical to examine the language used and the intention of the parties. Generally, the Canadian judges concluded that

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[5] *I am of the view that Article on Other Income should not apply to Section 4A income. Paragraph 1 of the OECD Commentary on Article 21 states that Article 21 provides the general rule relating to income not dealt with in the foregoing Articles of the Convention. The income concerned is not only income of a class not expressly dealt with but also income from sources not expressly mentioned. In our opinion, if a consulting fee derived by a non-resident engineering firm is not a business income to the firm, what is it then? One could not expect that a special article in the tax treaty expressly mentions "Consulting Fee from Engineering Firm, could he?*

the interpretation required the implementation of the intention of the parties. A literal interpretation was rejected if, by applying such an interpretation, the basic object of the tax treaty could not be met.

In reality, most advanced countries construe a tax treaty liberally. If a narrow interpretation is adopted, this would give a result at odds with the intention of the treaty. Hence, in such cases a broader interpretation will usually be allowed and after all, this is consistent with Article 31 of the VCLT as mentioned above[7].

I am fully aware Article 31(4) of the VCLT provides a special meaning shall be given to a term if it is established that the parties so intended. In this regard, I would reiterate the tax treaty provides that there would situations where the context requires for an international meaning to be used as opposed to the meaning under the ITA. The crux is that the treaties are international agreements which are entered in good faith, as endorsed by the VCLT, and unlike the domestic law, do not warrant a literal interpretation. Therefore, while interpreting a treaty, a broader interpretation should be applied.

Other relevant points are as follows:

- In the context of a tax treaty, it is generally accepted that service income is business income to a service company. If the Malaysian Parliament intends to exercise paramount forces over the tax treaty on this income, this should have been explicitly stated in the Explanatory Statement to the Finance Bill which brought section 4A into existence.

- It is not uncommon for Malaysia to initiate changes to a treaty e.g. via protocols. Recently, China and Malaysia have agreed to amend the treaty on WHT exemption on certain interest. The Exchange of Notes was signed on 1 November 2016 and takes effect on the same date. The Exchange of Notes lists out the institutions wholly owned by the respective Governments under paragraph 5(a)(iv) and 5(b)(iii) of Article 11 (Interest) of the DTA which are eligible for tax exemption under paragraph 4 of Article 11 of the said DTA. Both governments did not attempt to include a TFA where there was every opportunity to do that. This could only imply one thing – a service fee is a still a business income.
- I am aware the UK courts have taken the position that if a Contracting State changes its domestic law after the conclusion of a tax treaty in such a way as to reallocate income from one article to another – in other words, to change the effect of the distributive rules of a treaty with respect to the particular type of income – that could contravene the requirements of good faith imposed by Article 31(1) of the VCLT and by international law generally ("pacta sunt servanda"). In this regard, the "context" of the treaty would require a meaning different from that supplied by domestic tax law. I fully subscribe to this dictum[8].
- Where the provision of domestic law which re-characterises the type of income was already in existence at the date the relevant treaty was concluded – I am of the view that the responsibility lies with the treaty negotiators to insert a TFA. In the absence of a TFA, this implies that the two sovereign nations accept that service income is a business income.
- Each Malaysian treaty is signed pursuant to Section 132 of the ITA and thus must be tabled before the Parliament. Parliament is also the one who has enacted Section 4A. Therefore, whilst it is Parliament's intention to tax the non-resident on income falling under Section 4A of the ITA, I am of the view that the Parliament had every intention for the Malaysian government to meet its treaty obligations. After all, Malaysia is a signatory to VCLT.
- There is a possibility of the foreign

tax authorities in Category 5 denying a claim for a foreign tax credit if they take the position that Malaysia does not apply the treaty in accordance with the treaty's object and purpose.

- I am fully aware the UK courts have taken the position that the phrase "unless the context otherwise requires" means that the context must make it "necessary, rather than merely sensible or reasonable" In this instance, we are not dealing with logic or sense. By not regarding the technical fee as a business income to a consulting firm, the entire object and purpose of a treaty will be defeated.

Other controversies surrounding Section 4A

Other complex issues include:

- Does Section 4A cover non-technical assistance and non-technical services?
- Is the second limb of Section 4A in regard to the phrase "in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme" still relevant? In my view, the second limb cannot be ignored and surely Parliament would not enact this without a purpose.
- Since the TFA in the tax treaties covers fees for services that are technical, managerial or consultancy in nature, what is the WHT position if the payment is non-technical, non-managerial and non-consultancy in nature? Should we apply the Business Profits Article or Other Income?
- Does a foreign branch of a Malaysian company need to comply with the WHT requirement[9]?
- Do we apply the treaty rates/ exemption when a non-resident regional company cross-charges various services payments to it related companies (including Malaysian companies)?. In this case, the regional company is not the actual service provider but merely an intermediary. Which point in time the Malaysian WHT should be deducted and remitted given the fact that the regional company is not the service provider?
- Would Section 109B/Section 4A(ii) apply to the offshore portion of one single contract that is within the ambit of Section 107A? In other words, could Section 107A and Section 109B apply to the very same contract?
- Does Section 4A(ii) apply to the payment of sales commission to a non-resident?

Income Tax (Exemption) (No. 9) Order 2017 – A silver lining to the dark clouds?

Following various feedback sessions and consultations with industry, the Minister of Finance (MoF) has agreed to grant a WHT exemption on payments to non-residents that fall within Section 4A(i)/(ii) in respect of offshore services via the Income Tax (Exemption) (No. 9) Order 2017 (the PU Order). The PU Order is deemed to have come into operation on 6 September 2017. The tax authority is expected to provide clarification as to what 6 September 2017 means, whether it refers to when the services were rendered or payments were made. The former is likely to be the case.

Moving Forward

To many, the dicta in the case of *Alam Maritim* causes concerns and this is amplified with the new WHT regime which took effect on 17 January 2017

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[6] *Cheek v. Her Majesty the Queen (2002) 1999-113-IT-G, Gaudreau v. Her Majesty the Queen (2004) 2004TCC840, Yoon v.. Her Majesty the Queen(2005) 2005 TCC 366.*

[7] *In Anson (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2015] UKSC 44 (Lord Reed delivering the judgment of the Court) summarized the provisions of Article 31 of Vienna Convention as follows at [56]: "Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable". In Gladden Estate vs. the Queen (1985) DTC 5188, the Canadian Federal Court said "Contrary to an ordinary taxing statute a tax treaty must be given a liberal interpretation with a view of implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned."*
Other cases that supports VCLT for interpretation of treaties include Chong vs. FCT [2000] ATC 4315 (Australia),James Mackintosh & Co. Pvt. Ltd. vs. ACIT [2005] 93 ITD 466 (Mumbai Tax Tribunal) Crown Forest Industries Ltd. vs. the Queen [1992] 95 DTC (Canada Federal Court) Thiel vs. FCT [1990] ATC 4717 (Australia), FCT vs. Lamesa Holdings BV [1997] ATC 4752 (Australia).

[8] *We are fully aware that some may not concur with this position. The only way to test this is either through another test case (question is who is willing to initiate it) or Mutual Agreement Procedures, or round table between the treaty negotiators.*

which fortunately was nullified by the aforesaid PU order. Post 5 September 2017, taxpayers are required to maintain sufficient records (information and documents) to substantiate that the services, advice and assistance specified in Section 4A(i) and (ii) were performed overseas and that the exemption applies to them. Moreover, with the expanded definition of royalty which includes the payment for the use software etc., one could expect a greater scrutiny on income characterization especially on the services that do not involve human intervention. More often than not, Malaysian payers face a dilemma as the consequences of non-withholding the tax are severe. From the non-resident's perspective, there is a real risk of being denied a foreign tax credit resulting in double taxation. Even with the restoration of the pre-17 January 2017 regime, the issue of WHT on payments to non-residents for short-term services rendered in Malaysia without a PE under Category 5 would remain. I remain hopeful that there would be another test case on Category 5 that would go to the highest court for tax cases. To put this saga to rest once and for all, the inclusion of a TFA in each treaty may be necessary. In closing, we should be mindful of *Salomon v Customs & Excise Commissioners [1967] 2 QB 116* where it was held that in case of doubt, there is a prima facie presumption that Parliament does not intend to act in breach of international obligations. In this regard, I would like to believe that the Malaysian Parliament did not have such intention in 1983.

__Tan Hooi Beng__ is the international tax partner of Deloitte Malaysia. The above views are his own.

[9] WHT applies given Section 15A(ii) but in the context of a treaty, this is a complex area which requires further analysis. Interesting, point (e) of the MICPA Circular N0. 7/84 shed some light on this. It is reproduced as follows:
A Malaysian resident company has a PE in Singapore for the purpose of its business. The PE pays rental for an equipment it uses for the purposes of its business in Singapore and the rental is expensed in the accounts of the PE. The Committee is of the view that no tax is deductible from the rental under Section 109B since the rental is not expenses in the accounts of a business carried on in Malaysia.
The DGIR confirms that the view of the Committee is correct except in the case of banks whose income is subject to Malaysian tax from wherever derived.

VACANCY

SENIOR EXECUTIVE / MANAGER COMMUNICATIONS AND MARKETING

The Chartered Tax Institute of Malaysia (CTIM) is an organisation for tax professionals and persons in commerce interested in or concerned with taxation matters in Malaysia. CTIM is a premier body that provides effective institutional support to members and has the highest standard of technical and professional competency in practice of taxation in Malaysia.

The Institute is seeking a suitable candidate to fill the Senior Executive / Manager vacancy:-

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Kindly submit your detailed resume by email or post, in confidence, to:

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Chartered Tax Institute of Malaysia
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50450 Kuala Lumpur
Email: secretariat@ctim.org.my

TOTAL TAX TRANSPARENCY

STEERING THROUGH THE NEW WORLD

Vince Tropiano, Mark Griffiths, Gaurav Mittal and Martin Lambert

Tax affairs used to be a largely private matter between company and tax authority, with very little public disclosure beyond what was available in the report and accounts. Today, the veil of confidentiality is being stripped away. Mandatory public disclosures over tax strategy are increasing and tax authorities are exchanging more and more data. Tax authorities are also looking to assess tax liabilities straight from the ledger rather than waiting for returns.

GAME-CHANGING TAX RISKS

The future of tax transparency opens your business to game-changing risks. These include the glare of public scrutiny and sensitivities over tax planning that go with this. You also need to make sure that strategies are consistently applied throughout your organisation, and that your systems are up to speed with the demands of real-time tax assessment. But with these risks comes opportunity. It gives opportunity to highlight your

commitment to doing the 'right thing' and the contribution you make to society through the tax you pay.

So how will your business steer through the risks of total tax transparency? And how can you take advantage of the opportunities?

If one word defines today's new and unfamiliar tax landscape it would most likely be 'transparency'. Another possible candidate would be the closely related, largely subjective and often highly emotive notion of 'fair'. Your business doesn't just need to do the right thing, it needs to be seen to be doing the right thing, though there are no firm guard rails on what is 'right'.

DRIVERS OF A TRANSPARENT TAX LANDSCAPE

If we look at the drivers for this more transparent and sensitive tax landscape, the need to rethink not only tax planning, but also tax systems and governance becomes clear.

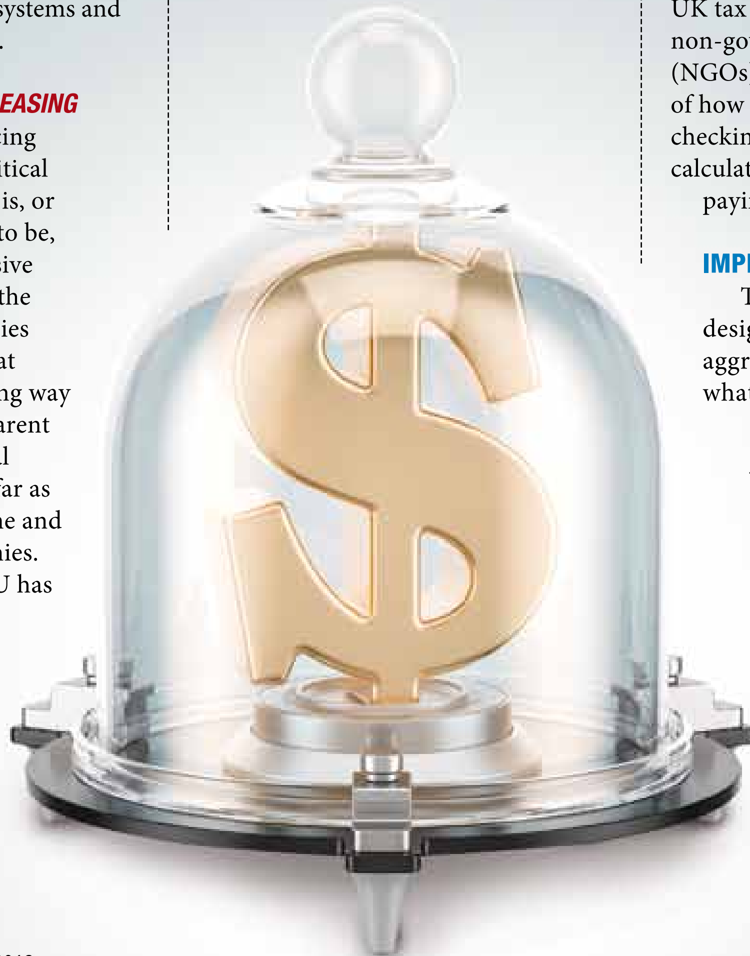
1.DISCLOSURES ARE INCREASING

Tax authorities are facing increasing public and political pressure to root out what is, or at least what is perceived to be, tax avoidance and aggressive tax planning. As a result, the relationship with companies and the confidentiality that underpinned this are giving way to a more publicly transparent and potentially adversarial approach. This can go as far as seeking to publically 'name and shame' particular companies.

Internationally, the EU has opened up the possibility of making Country-by-Country (CbC) reporting publically available.[1] This would give stakeholders information about how much tax is paid in different tax jurisdictions, and whether this matches up with turnover and staff numbers. Businesses that declare a high proportion of their taxable income in countries where they have limited operations could face awkward questions. Other countries and regional groupings could follow the EU's lead. There is also the risk that CbC information could be leaked.

Within individual territories, India, Australia and the UK provide telling examples of the direction of travel.

In India, the rapid removal of high value notes formed part of the continuing crackdown on the black economy. The Indian tax authorities have been monitoring bank deposits and checking them against tax records to look out for signs of possible tax evasion.[2] "This data mining will help us immensely in expanding the tax net as well as increasing the revenues, which was one of the objectives of demonetisation" said Arun Jaitley, India's Finance Minister.[3]



Australia requires companies (public companies with turnover of over AUS$100 million and private firms with turnover of over AUS $200 million) to publicly disclose their turnover, taxable income and tax paid. The potential for 'naming and shaming' is heightened by the Australian Taxation Office's (ATO) annual tax transparency report,[4] which has become a source of front page headlines. Examples include a feature that gave readers the opportunity to find out which companies pay less tax than they do.[5]

The UK has gone further by requiring large businesses to publish their tax strategies and governance around this on the Internet.[6] The spotlight isn't just coming from the UK tax authority, but also dedicated non-governmental organisations (NGOs). These are building databases of how much tax is paid where, and checking this against what they calculate the business should be paying in the UK.

IMPLICATIONS

The tax authorities' moves are designed as a deterrent against aggressive tax planning. Beyond what is legal and legitimate, your

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[1] *www.europarl.europa.eu – Public country-by-country reporting by multinational enterprises – 12 January 2017.*

[2] *The Times of India – Deposits above Rs 2.5 lakh to face tax, 200% penalty on income mismatch – 9 November 2016.*

[3] *www.livemint.com – Demonetisation effect: 9.1 million new taxpayers – 12 May 2017.*

business now has to judge whether tax strategies and tax paid stand up to public scrutiny.

ACTIONS

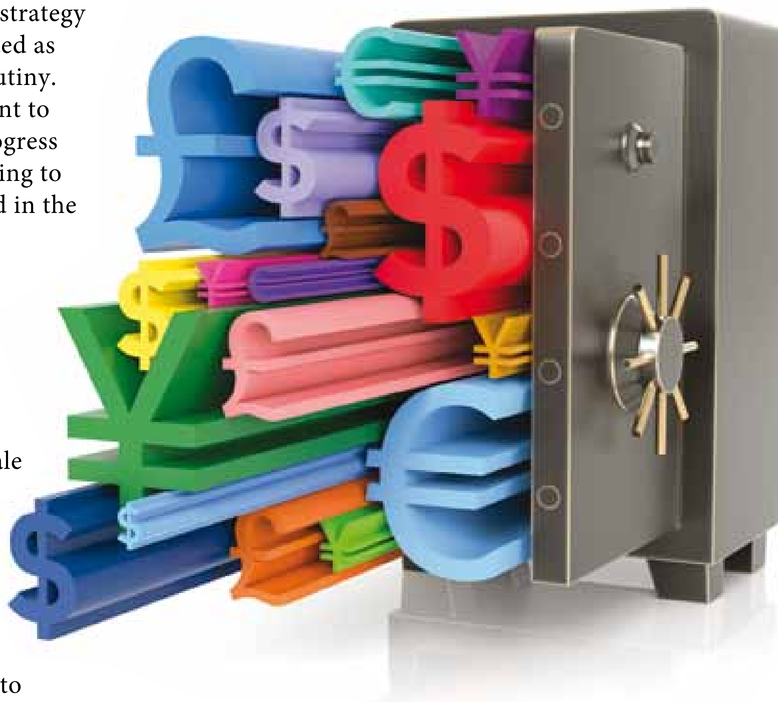
It's important to think about how your business' tax affairs might come across and whether this reflects the true nature of your approach to tax. One of the big risks is being unfairly labelled as a tax avoider. Some aspects of your strategy may need to be adjusted as a result of greater scrutiny. It's therefore important to get the changes in progress now, rather than waiting to be named and shamed in the future.

You can get on the front foot by setting out your full tax contribution (including payroll and sales taxes), explaining the rationale behind your strategy and how this fits into wider corporate social responsibility. To get your message across, it's important to engage with stakeholders – not just tax authorities, but the media and pressure groups as well.

Tax disclosures aren't just a matter for investor or public relations teams. Tax should be managed as a reputational risk, and the communications and underlying strategies should be steered and cleared by the board. The first step is gauging your tax risk appetite – weighing opportunities for tax limitation against the potential public reaction. To manage the risks, it's important to ensure that tax strategy is clearly understood and consistently applied through the organisation. This in turn requires a more centralised and proactive approach to tax management. It also has implications for systems (discussed further in point 3).

2.TAX AUTHORITIES ARE SHARING INFORMATION EVER MORE FREELY

The OECD's Base Erosion Profit Sharing (BEPS) Action Plan expands the exchange of information through CbC reporting.



It also develops the mandatory exchange of information between tax authorities on rulings that could give rise to BEPS concerns[7]

Individual tax authorities are also building stronger mechanisms for information exchange into new and updated bi-lateral treaties. The updated treaties between India and Singapore and India and Mauritius provide clear examples of this.

IMPLICATIONS

Tax authorities can take the information from the CbC reports, along with other sources such as Common Reporting Standard (OECD CRS) and Foreign Account Tax Compliance Act (FATCA), to check how much tax is being paid and where. This would then be checked to see if it tallies with their own expectations, and if not, they would seek to put it right.

ACTIONS

The spotlight on how much tax is paid and where it is paid requires a review and possible rethink of international tax strategy and management. At the very least, you would need to do your own tally of turnover, staff numbers and tax paid by country to identify any anomalies that tax authorities might question. You'll then need to determine how this can be explained and justified.

If the allocation of tax is difficult to justify, it will be necessary to review and possibly rethink transfer pricing, intra-company debt, location of intellectual property rights and other areas that influence how much tax is paid where.

3.TAX AUTHORITIES ARE ASSESSING IN REAL-TIME

Tax authorities want more information, sooner. This puts intense pressure on tax function output and verification. Tax authorities are also using electronic information for faster and more effective tagging, risk analysis and targeting of companies for investigation and audit.

You used to be able to prepare a return after the other financials were finalised. Tax authorities are now beginning to drill into the numbers at source. In the UK, for example, there is a clear ambition for tax to be

assessed straight from the ledger. And, as of 1 July 2017, Spain will become the first European country to implement real-time reporting of tax data.[8]

IMPLICATIONS

This is an environment with a low tolerance for delays and mistakes. A tax function that still primarily relies on manual and low-tech capabilities will struggle to keep up.

ACTIONS

The pressure on data makes it important to build verification and operational capabilities into the wider rethink of tax risk management. To assure integrity of information, you would need to ensure that processes are sufficiently robust, appropriate and properly maintained. This is likely to require both a bottom-up evaluation of the numbers and top-down assessment of the systems and governance. Underlying governance would include:

1. Defined ownership of the 'tax universe' and accountability gaps eliminated
2. Documentation of tax risks and controls
3. Robust controls: tested, operated, documented and shared with tax authorities

Many of you are likely to require a significant systems upgrade to keep pace with these demands. Widespread automation and deployment of artificial intelligence may eventually be the only feasible way to respond with the speed and accuracy that are required.

As a business, you already face the pincer of more tax data in the public domain and more public focus on it. Looking at the future, we expect greater public appetite for tax transparency, more information required to be disclosed and tougher questions. These challenges are heightened by the speed with which you have to extract and disclose the data on the one side, and the growing need to justify your strategy on the other.

It's therefore vital to determine whether you're reporting the correct information and portraying your organisation in the right light across the globe. What are the resulting risks? What are the potential opportunities? Total tax transparency may require a different strategy, governance and systems, so it's important to assess and address the new reality now.

This article was produced collaboratively by Tax partners from Grant Thornton International. The authors are: ***Vince Tropiano, Mark Griffiths, Gaurav Mittal and Martin Lambert.***

[4] *www.ato.gov.au – Australian Taxation Office's (ATO) annual tax transparency report.*

[5] *www.theguardian.com – Do you pay more tax than Australia's biggest private companies?*

[6] *www.gov.uk – Large businesses: publish your tax strategy – 24 June 2016.*

[7] *www.oecd.org – OECD releases standardised IT-format for the exchange on tax rulings under BEPS Action 5.*

[8] *www.meridianglobalservices.com – Spain to introduce real-time reporting of tax data – 4 May 2017*

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

BRUNEI

Legislation on Common Reporting Standard

On 29 June 2017, the Income Tax (International Tax Compliance Agreements) (Common Reporting Standard) Regulations 2017 and Income Tax Act (Amendment) (No. 3) Order 2017 governing the Automatic Exchange of Information (AEOI) in Brunei entered into force.

These legislations incorporate the Common Reporting Standard (CRS) into the domestic legislative framework, which facilitates the implementation of AEOI in the country. They include the requirements for registration and the obligations of qualifying financial institutions. For the purpose of CRS reporting that is effective from 2017, financial institutions are required to collect all information in relation to every reportable account within a calendar year and report it to the Collector of Income Tax no later than 30 June of the following calendar year.

Mutual Agreement Procedure guidelines published

On 14 November 2017, the Ministry of Finance (MoF) issued Notice No. 5/2017 in relation to the Mutual Agreement Procedure (MAP) guidelines. The salient points of the guidelines are summarised as follows:

Competent authority

The competent authority (CA) of Brunei is the Ministry of Finance (MoF).

Qualifying persons

MAP is available to:

- Resident taxpayers in Brunei; and
- Non-resident taxpayers that has a subsidiary or branch in Brunei. However, the MAP application must be made by the taxpayer in the jurisdiction in which it is a tax resident and with which Brunei has concluded a tax treaty.

When to apply for MAP

- Taxpayers consider that an action of one or both the contracting states (i.e. Brunei and/or the treaty partner) results or will result in taxation that is not in accordance with the provisions of the treaty signed by both countries.
- Taxpayers may only initiate a MAP when double taxation has occurred or it is certain that double taxation will occur. Double taxation may not be just a possibility, such as the mere occurrence of audits or examinations.
- Taxpayers may seek resolution on double taxation issues that recur over multiple years of assessment. However, this is subject to the time limits provided in the relevant treaty.
- A MAP must be initiated within the time limit specified in the MAP article of the relevant treaty. Failure to do so may result in rejection of the MAP request by the CAs. If the time limit is not specified in the relevant treaty, the CA will follow the time limits specified in article 25 of the OECD Model (i.e. within 3 years from the first notification of the action resulting in taxation not in accordance with the provisions of the treaty).

MAP process

The four-step MAP process is as follows:

Step 1: MAP application

Taxpayers are required to submit the MAP application to the MoF within the time limit specified in the MAP article of the relevant treaty. The application can be submitted manually or electronically.

Step 2: Evaluation

The MoF evaluates the MAP application and may contact the taxpayer for more information. Where the application is accepted, the MoF will issue a MAP application acceptance letter to the taxpayer within a month from the date of receipt of all the required information.

Step 3: Review and negotiation

The MoF informs the taxpayer of the MAP outcome within a month of reaching agreement with the CAs.

Step 4: Implementation

The MoF and the taxpayer implements the agreed MAP outcome.

Information for submission

- Taxpayers requesting a MAP have to provide specific information to the MoF as detailed in the guidelines. They are responsible for the completeness and accuracy of the information provided.
- The MoF may deny a MAP application should the taxpayer fails to provide complete and accurate information or made any misrepresentation.
- All information obtained or generated during the MAP process is protected by the confidentiality provisions of the Income Tax Act and the provisions of the relevant treaty.

Acceptance of a MAP application

The acceptance of a MAP application is at the discretion of the CAs. The MoF will consider the MAP application based on the merits of the case. The criteria for MAP application acceptance are as follows:

- the issue or transaction relates to a foreign country with which Brunei has a tax treaty;
- it is evident that actions of one or both countries resulted or will result in taxation not in accordance with the treaty;
- the taxpayer notifies the MoF within the acceptable time after an action has resulted in taxation not in accordance with the provisions of the applicable treaty; and
- the issue is not one that Brunei's and/or the treaty partner's CA have decided not to consider as a matter of policy.

MAP and domestic tax laws

Taxpayers are not deprived of other remedies available under the domestic tax law. Nevertheless, taxpayers are required to inform the MoF and the relevant foreign CA if the matter is adjudicated through any legal or judicial proceedings while the MAP process is still ongoing. The CAs will discuss and decide if the MAP should continue, cease or be suspended.

It is worth noting that the MoF is unlikely to depart from a decision of the tribunal and courts of Brunei where the relevant matter has been subjected to their litigation and determination.

Termination of a MAP case

The MoF reserves the right to propose to the CA of the treaty partner to terminate any MAP cases. Some of the circumstances where a termination may be appropriate are detailed in the guidelines, e.g. lack of or incorrect information, or where it is recognised that no agreement will be reached.

Withdrawal of a MAP request

Taxpayers may withdraw their MAP request at any time during the MAP process and before an agreement is reached. The MAP withdrawal request must be made in writing to the MoF and must include reason for withdrawal.

Implementation of the MAP agreement

- The MoF will contact and inform the taxpayer in writing within a month of reaching the MAP agreement (between the MoF and the relevant foreign CA) to discuss the details and implementation of the agreement.
- The taxpayer is not obliged to accept the outcome agreed between the CAs.
- The agreement may address whether any refund of interest or penalties (imposed in a jurisdiction in connection with the taxation that is the subject of the MAP) will be made appropriately.
- The MoF will take the necessary action to put into effect the results as required by the agreement and in accordance with the applicable treaty.

CHINA (PEOPLE'S REP.)

Withholding tax rules for non-residents amended

On 17 October 2017, the State Administration of Taxation (SAT) issued SAT Gong Gao (2017) No. 37 amending and clarifying the withholding tax rules for non-residents. The announcement applies from 1 December 2017. Its principal provisions are summarised as follows:

Determination of the gains on share transfers

In determining the gains on share transfers, the actual acquisition or purchase price must be taken into

account. The price may be adjusted as a result of value fluctuations during the holding period of the shares in accordance with relevant regulations, with the undistributed profits of the aquiree not being allowed to be deducted from the gains.

In cases where share investments are made or the disposal of shares takes place at multiple stages, the cost of each share transfer must be calculated on the basis of the proportion of the transfer to the total shareholding.

Foreign currency issues

If the underlying payments are made in foreign currency, the foreign currency must be converted into Chinese Yuan depending on the way in which withholding tax is collected. The withholding tax is primarily collected through designated withholding agents. However, in cases where a withholding agent fails to collect the tax due to various reasons, the non-resident enterprise may make a self-assessment and pay tax to the tax authority, or the tax authority may coerce the non-resident enterprise to pay the tax (for example, through an enterprise in China which owes money to the non-resident enterprise).

If the tax is withheld by a withholding agent, the foreign currency must be converted at the average exchange rate as at the date of the actual payment or due date of the payment. If the non-resident enterprise files the return and makes the payment itself, the conversion must be made at the average exchange rate as at the date preceding the issuing of the tax payment certificate. If the non-resident is coerced by the tax authority to pay the tax, the date preceding the decision on coercing is the date of conversion. The same rules on the conversion dates apply in calculating the gains of share transfers nominated in foreign currency.

Calculation of taxable amount

If it is agreed in a contract that the taxes are borne by the payer, the amount of the payment must be grossed up in determining the amount to be withheld.

Timing of liability to withholding taxes

Liability to withholding tax on dividends arises as at the date of the actual payment of dividends (not the date of the decision on distribution as previously provided).

As regards the payments on the transfer of properties in instalments, the liability to withholding tax only arises at the time the (first) payments exceed the acquisition costs.

Competent tax authorities

At the place where the income arises, different items of income may fall within the competence of different tax authorities. In principle, the state tax bureau of the place where the property is located is responsible for withholding tax on the gains from the transfer of immovable properties; the competent tax authority of the invested enterprise is responsible for withholding tax on the gains on the equity transfer; the competent tax authority of the distributing enterprise is responsible for withholding tax on dividends; and the competent tax authority of the payer (enterprise or individual) is responsible for withholding taxes on interest, royalties and rental income.

Administrative changes

A withholding tax agent is no longer required to file the contracts which induce payments to non-residents with the tax authorities.

Also, a withholding tax agent need not provide the tax authority with an overview of the payments agreed in the contracts, taxes withheld, etc.

Other matters

The announcement does not apply to withholding taxes on income from construction projects and services.

Following the publication of the announcement, the following notices or provisions of announcements cease to apply effective from 1 December 2017:

- Guo Shui Fa [2009] No. 3;
- Guo Shui Han [2009] No. 698;
- paragraph 3 of article 2 of Guo Shui Fa [2009] No. 32;
- item 3 of paragraph 2 of article 4 of Guo Shui Fa [2009] No. 85;
- article 9 of Guo Shui Fa [2010] No. 119;
- article 36 of SAT Gong Gao [2010] No. 4;
- articles 5 and 6 of SAT Gong Gao [2011] No. 24;
- paragraph 3 of article 2 of SAT Gong Gao [2014] No. 37; and
- paragraph 2 of article 8 of SAT Gong Gao [2015] No. 7.

The announcement also states that provisions of an applicable tax treaty will prevail in case of a conflict between the provisions of the announcement and those of a tax treaty.

State Council decisions concerning business tax abolishment and VAT amendments

On 30 October 2017, the State Council decided to officially abolish business tax effective from 1 December 2017. Since 1 May 2016, all services that were subject to business tax have been converted as taxable items for value added tax (VAT) purposes. As a result, the Regulations on Business Tax ceased to apply.

In addition, the State Council stated that the amendments to the tax laws and regulations must be made by the Ministry of Finance (MoF) and the SAT where it concerns making enterprises and individuals that supply services, intangibles and immovable properties taxpayers for VAT purposes. Furthermore, the State Council announced that the VAT rate of 13% had been reduced to 11% for taxable items such as agricultural products, natural gas, petroleum, fertilizer, books and newspapers.

It is expected that the MoF and the SAT will follow up on this with a formal announcement stating that the Regulations on Business Tax and related notices will be abolished.

Tax measures supporting small and low profit enterprises published

The MoF and SAT jointly issued Cai Shui (2017) No.76 on 20 October 2017, extending the VAT exemption for small and low profit enterprises. According to the Notice, the current VAT exemption for a small and low profit enterprise with a monthly turnover between CNY 20,000 and CNY 30,000 will be extended to 31 December 2020.

In another joint notice (Cai Shui [2017] No.77), the MoF and the SAT announced that the interest on loans valued at less than CNY 1 million to small and low profit enterprises and sole traders will not be subject to VAT for the period between 1 December 2017 and 31 December 2019. Any loan contracts concluded by financial institutions in respect of loans to small and low profit enterprises will also enjoy a stamp duty exemption for the period between 1 January 2018 and 31 December 2020.

Expansion of tax incentive for advanced technology service enterprises nationwide

On 2 November 2017, the MoF, SAT, the Ministry of Commerce (MOFCOM), the Ministry of Technology and the Committee of Development jointly issued Cai Shui (2017) No.79 expanding the existing tax incentive for advanced technology service enterprises nationwide. The incentive is effective retroactively from 1 January 2017.

The incentive includes the following:

- advanced technology service enterprises are subject to enterprise income tax (EIT) at a rate of 15% (the statutory rate being 25%); and
- a deduction applies to employees' education expenditure (up to 8%

of the total salary and wages), provided that certain requirements are met.

- The services that are eligible for the incentive include:
- information technology outsourcing (ITO): software development, information technology development services, information systems operation and maintenance;
- technical business process outsourcing (BPO): business process design services, business operations management, operation services, supply chain management services; and
- knowledge process outsourcing (KPO): research on intellectual property, research and development and testing of pharmaceutical and biotechnological products, product research and development, industrial design, analytics and data mining, design and development of animation and online games, education development course, engineering design, etc.

Previously, the tax incentive was applicable only to certain designated cities, such as Beijing, Tianjin, Dalian, Harbin, Daqing, Shanghai, Nanjing, Suzhou, Wuxi, Hangzhou, Hefei, Nanchang, Xiamen, Jinan, Wuhan, Changsha, Guangzhou, Shenzhen, Chongqing, Chengdu and Xian.

HONG KONG

Inland Revenue Ordinance to be amended to facilitate international tax co-operation

On 6 October 2017, the Inland Revenue (Amendment) (No.5) Bill 2017 was gazetted. The Amendment Bill seeks to pave the way for Hong Kong's participation in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and align the Inland Revenue Ordinance (IRO) with the Common Reporting Standard (CRS) promulgated by the OECD.

Departmental interpretation and practice notes on taxation of aircraft leasing released

The Hong Kong Inland Revenue Department (HKIRD) issued the Departmental Interpretation and Practice Notes No. 54 (DIPN 54) on taxation of aircraft leasing activities on 27 October 2017. The DIPN 54 sets out the Inland Revenue Department's interpretation and practice in relation to the relevant provisions under the Inland Revenue (Amendment) (No. 3) Ordinance 2017 which provides profits tax concessions for qualifying aircraft lessors and aircraft leasing managers. Some of the main highlights of DIPN 54 are stated as follows:

A qualifying aircraft lessor/manager is entitled to have its qualifying profits taxed at one-half of the corporate profits tax rate (i.e. 8.25%). In addition, a qualifying aircraft lessor is eligible for a 20% tax base concession as a compensation for loss of depreciation allowances. To qualify, the aircraft lessor/manager has to make an irrevocable election in writing and meet the following conditions in that year of assessment:

- its central management and control of the corporation is exercised in Hong Kong;
- the activities that produce its qualifying profits in that year are carried out in Hong Kong by the corporation or arranged by the corporation to be carried out in Hong Kong; and
- those activities are not carried out by a permanent establishment outside Hong Kong.
- A corporation is a qualifying aircraft lessor for a year of assessment if, in the basis period for that year of assessment:
- it is not an aircraft operator;
- it has carried out in Hong Kong one or more qualifying aircraft leasing activities; and
- it has not carried out in Hong Kong any activity other than that of a qualifying aircraft leasing activity.
- A corporation is a qualifying aircraft leasing manager for a year of assessment if:
- in the basis period for that year of assessment, it is not an aircraft operator; and
- for that year of assessment:
- it is a dedicated aircraft leasing manager that has satisfied the standalone corporation requirement;
- it is an aircraft leasing manager that has satisfied the "1-year safe harbour" rule or the "multiple-year safe harbour" rule though it has carried out in Hong Kong activities other than a qualifying aircraft leasing management activity; or
- it is an aircraft leasing manager

that has been determined by the Commissioner.

Note: additionally, an anti-tax arbitrage provision is incorporated to prevent tax arbitrage through aircraft leasing transactions between connected persons.

INDIA

Clarification on POEM rules for regional headquarters issued

The concept of "place of effective management" (POEM) for determining the residential status of a company other than an Indian company was introduced effective 1 April 2017.

The Central Board of Direct Taxes (CBDT) had previously issued the guiding principles for constitution of a POEM for a company in India through Circular No. 6/2017 of 24 January 2017. Further, Circular No. 8/2017 of 23 February 2017 was issued to clarify the turnover threshold of a company for POEM purposes.

To provide further clarification on POEM, the CBDT issued Circular No. 25/2017 of 23 October 2017. The salient features of the circular are as follows:

- Paragraph 7 of the guiding principles (which was issued under Circular No. 6/2017) states that the POEM of a company engaged in active business outside India is presumed to be outside India if the majority of Board of Directors (the Board) meetings are held outside India. However, if it is established that the Board is standing aside, not exercising its powers and such powers of management are exercised either by the holding company or persons resident in India, then the POEM is considered to be in India.
- The circular clarifies that just because the Board follows global policies in relation to various activities (i.e. payroll, accounting, human resources, information technology functions, networks, supply chain, routine banking and operating procedures) this would not indicate that the Board has stepped aside.
- Further, it has been specified that the establishment of regional headquarters in India where the global policies in relation to various activities are framed and the adhering to such policies by the Board would not by themselves constitute a POEM for subsidiaries and group companies in India.
- The circular specifies that the General Anti-Avoidance Rule may be triggered in case the above is used for aggressive tax planning.

CBDT announces rules for CbC reporting and master file

On 1 November 2017, the CBDT issued a press release setting out the rules for submitting the country-by-country (CbC) report and master file after examining the comments and suggestions it received. The salient features of the CbC report and master file rules are as follows:

- the parent company of a multinational group of companies resident in India with total consolidated group revenue of at least INR 55 billion will be required to file a CbC report;
- the threshold for submitting the master file is:
- total consolidated group revenue of more than INR 5 billion; and either:
- an aggregate value of international transactions of more than INR 500 million; or
- an aggregate value of international transactions in respect of intangible assets of more than INR 100 million;
- a multinational group which has multiple constituent entities in India may appoint one of the entities to file the master file on its behalf.

The due date for the first year of CbC reporting is extended to 31 March 2018 under Circular No. 26/2017. Similarly, the deadline for submitting the master file for financial year 2016-17 has also been extended to 31 March 2018.

SINGAPORE

Income Tax (Amendment) Bill 2017 passed

On 2 October 2017, the Income Tax (Amendment) Bill 2017 was passed. The amendments to the Income Tax Act include tax changes announced

in the 2017 Budget. They also include an introduction to transfer pricing documentation requirements and other refinements to existing tax policies and tax administration. The highlights of these other non-Budget amendments are summarised below.

Medisave contributions

With effect from 1 January 2018, the maximum amount that an employer can contribute to his employee's Medisave account (not treated as income of the employee) under the Additional Medisave Contribution Scheme will be raised from SGD 1,500 to SGD 2,730 per year. Accordingly, the maximum deduction allowable to the employer for these contributions is also increased to the same amount.

With effect from 1 January 2018, the maximum tax exemption that a self-employed person can receive on contributions to his Medisave account by an eligible company that he works with will be increased from SGD 1,500 to SGD 2,730 per year. The maximum deduction allowable to the eligible company for its contribution to the self-employed person's Medisave account will be also increased to SGD 2,730 per year.

Transfer pricing

- Where an action is taken by the tax authority to increase a person's income or to reduce a person's deduction or loss, a surcharge of 5% of the amount increased or reduced is recoverable from the person as a debt due to the government beginning from the year of assessment 2019. The surcharge must be paid within 1 month starting from the date a written notice of the surcharge is served on the person.
- A mandatory transfer pricing documentation requirement is effective from the year of assessment 2019. However, it is only applicable to businesses with gross revenue exceeding SGD 10 million and significant related party transactions. The transfer pricing documentation must be prepared no later than the due date for filing the tax return and must contain the details required in the rules.
- A relevant business must prepare and keep the transfer pricing documentation for at least 5 years from the end of the basis period in which the transaction took place. Additionally, the same business must furnish any transfer pricing documentation to the tax authority within 30 days from the date of request (without false or misleading information). Otherwise, the business will be guilty of an offence and will be liable on conviction to a fine not exceeding SGD 10,000.

Avoidance of double taxation arrangements

- An amendment is made to empower the Minister of Finance to implement Singapore's obligation under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument), signed on 7 June 2017.

International tax compliance agreements

- The Minister of Finance may by order declare a competent authority agreement or Country-by-Country Reporting (CbCR) exchange agreement between the competent authority of Singapore and the corresponding competent authority of another country as an international tax compliance agreement, and not just a competent authority agreement or CbCR

exchange agreement between governments.

- The Minister of Finance may also declare any other agreement or arrangement between the competent authority of Singapore and the corresponding competent authority of another country (not just between governments) that makes provisions that are corresponding or substantially similar to any agreement above as an international tax compliance agreement.
- An order declaring an agreement or arrangement as an international tax compliance agreement takes effect only on or after that agreement or arrangement enters into force for Singapore. Where an order covers more than one agreement or arrangement, then the order does not take effect on or after a single date, but takes effect for each agreement or arrangement on or after the date that it has entered into force for Singapore. This is intended to enable Singapore to make a single order to cover agreements or arrangements with different countries or competent authorities, e.g. the multilateral agreement on exchange of country-by-country reports which enters into force between Singapore and different signatories on different dates.

E-tax guide on tax treaties published

On 11 October 2017, the Inland Revenue Authority of Singapore (IRAS) published an e-tax guide on tax treaties to provide guidance on the interpretation and application of Singapore's tax treaties and the mutual agreement procedure (MAP) applicable under Singapore's tax treaties.

The e-tax guide provides guidance to taxpayers on the objective of tax treaties, as well as on how to interpret and apply provisions that are commonly found in Singapore's tax treaties. It also provides practical guidance to taxpayers on how to access treaty benefits, and avoid or resolve treaty-related disputes under a MAP, with a guide on minimum information required when filing a MAP application.

The e-tax guide also includes a section on the Multilateral Convention to Implement the Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), which was signed by Singapore on 7 June 2017. It explains the implications of the MLI on Singapore's tax treaties. The treaties to be amended by the MLI are listed on the IRAS website; in addition, the specific textual changes that will be made to these treaties will be provided through subsidiary legislation made under the Income Tax Act and will also be published on the IRAS website.

THAILAND

Corporate tax deduction – Royal decree gazetted

On 31 October 2017, Royal Decree No. 647 was gazetted. It allows small and medium-sized enterprises (SMEs) to claim double deduction on expenses incurred on purchases or hiring of computer software programs registered with the Digital Economy Promotion Agency from 1 January 2017 to 31 December 2019. SMEs are companies with annual gross revenue not exceeding THB 30 million and paid up capital of not more than THB 5 million as at the end of the financial year.

Personal tax deduction – ministerial regulation gazetted

On 10 November 2017, Ministerial Regulation No. 333 was gazetted to provide resident individuals to claim shopping personal tax allowance of not more than THB 15,000 for purchases made during the period from 11 November 2017 to 3 December 2017. The purchases must be used or consumed in Thailand, and the claim has to be supported by tax invoices. However, the allowance does not apply to purchases of alcoholic drinks, tobacco, cars, motorcycles, boats, oil or petrol for vehicles, tour services and hotel accommodation.

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 August 2017 and 15 November 2017 including Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Royal Customs Department and other regulatory authorities.

INCOME TAX

TAX INCENTIVES FOR WASTE ECO PARKS

In 2016, the Malaysian Investment Development Authority (MIDA) announced tax incentives for companies involved in the green technology industry, which included "Waste Eco Park" (WEP) tax incentives. The WEP tax incentives are available to companies incorporated and resident in Malaysia that submit applications to MIDA between 1 January 2016 and 31 December 2020. The incentives are divided into three categories: operator, manager and developer. These incentives have now been legislated via the following Exemption Orders that were gazetted on 15 August 2017:

CATEGORY 1 **Incentives for the Operator (Effective from YA 2016)**

Income Tax (Exemption) (No. 4) Order 2017

Income Tax (Exemption) (No. 4) Order 2017 [P.U.(A) 235], gazetted on 15 August 2017, exempts an operator from payment of income tax in respect of the statutory income derived from a qualifying activity for a period of five consecutive years. The amount exempted will be equivalent to 100% of the qualifying capital expenditure incurred by the operator, to be set off against 70% of the statutory income for each year of assessment.

Income Tax (Exemption) (No. 5) Order 2017

Income Tax (Exemption) (No. 5) Order 2017 [P.U.(A) 236], gazetted on 15 August 2017, exempts an operator from payment of income tax in respect of 100% of the statutory income derived from a qualifying activity for a period of five consecutive years.

CATEGORY 2 **Incentives for the Manager (Effective from YA 2016 to YA 2025)**

Income Tax (Exemption) (No. 6) Order 2017

Income Tax (Exemption) (No. 6) Order 2017 [P.U.(A) 237], gazetted on 15 August 2017, exempts a manager from payment of income tax in respect of 70% of the statutory income derived from a qualifying activity.

CATEGORY 3 **Category: Incentives for the Developer (Effective from YA 2016 to YA 2025)**

Income Tax (Exemption) (No. 7) Order 2017

Income Tax (Exemption) (No. 7) Order 2017 [P.U.(A) 238], gazetted on 15 August 2017, exempts a developer from payment of income tax in respect of 70% of the statutory income derived from a qualifying activity. The summary of the automation capital allowance incentive is as follows:

	Type A	Type B
Type of industry	Qualifying project relating to rubber, plastic, wood, furniture and textile	Other than Type A
Effective year of assessment (YA)	YA 2015 – YA 2017	YA 2015 – YA 2020
Application to MIDA	1 January 2015 – 31 December 2017	1 January 2015 – 31 December 2020
Income Tax (Accelerated Capital Allowance) (Automation Equipment) Rules 2017 [P.U.(A) 252] (gazetted on 30 August 2017)		
Incentive available – accelerated capital allowance	Initial allowance 20% of the first RM4 million qualifying capital expenditure incurred Annual allowance 80% of the first RM4 million qualifying capital expenditure incurred	Initial allowance 20% of the first RM2 million qualifying capital expenditure incurred Annual allowance 80% of the first RM2 million qualifying capital expenditure incurred
Income Tax (Exemption) (No. 8) Order 2017 [P.U.(A) 253] (gazetted on 30 August 2017)		
Incentive available – income tax exemption	A qualifying company will be exempted from payment of income tax in respect of the statutory income derived from a qualifying project for the respective effective YAs. The amount exempted will be equivalent to 100% of the accelerated capital allowance given under P.U.(A) 252/2017, to be set off against 70% of the statutory income for each year of assessment.	

Please refer to the Rules/Order for the definitions of "qualifying capital expenditure", "qualifying project" and "qualifying company". These definitions are the same in both Rules/Order.

AUTOMATION CAPITAL ALLOWANCE INCENTIVE

During the 2015 Budget, the Government proposed an incentive (automation capital allowance) to encourage manufacturing companies to automate their operations. The incentive is given in the form of:

- Accelerated capital allowance
- Income tax exemption

Public Ruling No. 5/2017: Taxation of Real Estate Investment Trust or Property Trust Fund

Public Ruling (PR) No. 5/2017, published on 8 September 2017, replaces PR No. 2/2015 issued on 19 June 2015, to reflect the legislative changes in the Finance Act 2017. The PR explains the tax treatment accorded to an approved real estate investment trust (REIT) or a property trust fund (PTF) in Malaysia. The new PR also explains the tax treatment of a REIT/PTF that establishes a special purpose vehicle.

Public Ruling No. 6/2017: Withholding tax on income of a non-resident public entertainer

PR No. 6/2017, published on 12 October 2017, discusses the following:

- Income received by a non-resident public entertainer in Malaysia;
- Deduction of tax from income received by a non-resident public entertainer; and
- Consequence of not remitting tax deducted from income received by a non-resident public entertainer

The PR provides guidance in determining whether a non-resident individual who carries out the following activities can be classified as a public entertainer or not:

Public entertainer (Note)	Not a public entertainer
• In a solo or group performance as an actor, model, circus performer, compere, dancer, entertainer, musician, singer, other artiste, or the exercise of any profession, vocation or employment of a similar nature for cultural, educational, entertainment, religious or any other purposes • The use of the non-resident individual's intellectual, artistic, musical, personal or physical skill or character for cultural, educational, entertainment, religious or any other purposes • Lecture, speech, or talk for any purpose • A sporting event or sporting competition of any nature	• Individuals working behind the scenes in an arts-related activity such as cinematographers, directors, producers, choreographers and technical personnel do not qualify as public entertainers. • Individuals working behind the scenes in a sports-related activity such as horse trainers, coaches and personal trainers do not fall within the definition of public entertainers.

Note: *The medium of public entertainment could be live, through print, electronic, satellite, cable, fibre optic or other medium, for film or tape, or for television or radio broadcast. Other medium includes any other transmission medium that is used.*

Amended guidelines on deductions for secretarial fees and tax filing fees

The IRB has recently issued amended Guidelines dated 25 September 2017. A summary of the amended Guidelines is set out below:

1. Qualifying tax filing fees (Paragraph 4.3.3 of the Guidelines)

The amended Guidelines state that the fees for the preparation of the income tax computation and/or tax advice that relates to the tax filing would also qualify for an income tax deduction under the Income Tax (Deduction for Expenses in Relation to Secretarial Fee and Tax Filing Fee) Rules 2014 (Rules). However, reimbursements and out-of-pocket expenses connected with tax filing fees remain non-deductible.

2. Clarification on the reason for the disallowance of the tax filing fee in Example No. 4 of the original Guidelines dated 8 February 2017

Previously, in Example No. 4 of the original Guidelines, the tax filing fee for the year of assessment (YA) 2015 that was paid on 1 January 2017 was not tax deductible as only fees relating to the tax filing fee for YA 2016 onwards were permitted. In the example, the tax filing fee for YA 2015 was incurred in YA 2016 but only paid in YA 2017. In the amended Guidelines, the IRB has clarified that the tax filing fee for YA 2015 in Example No. 4 is not tax deductible because the fee was not incurred and paid in the basis period immediately following that YA i.e. YA 2016 (refer to subparagraph 2(1)(b)(i) of the Rules). Presumably, if the fees had been incurred and paid in YA2016 (the year immediately following YA2015), a deduction would have been allowed.

STAMP DUTY

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 3) Order 2017

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 3) Order 2017 [P.U.(A) 258] was gazetted on 12 September 2017 and came into operation on 13 September 2017. The Order provides that any tax payable under the Income Tax Act 1967(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 Prasarana Malaysia Berhad pursuant to the Islamic Medium Term Notes Issuance Programme in nominal values of up to RM10 billion, provided that the combined aggregate of the outstanding nominal value of the Sukuk Murabahah and the outstanding principal amount under the Revolving Credit-i Facility (RC-i Facility – see below) shall not exceed RM10 billion;
- RC-i Facility obtained or to be obtained by Prasarana Malaysia Berhad in the aggregate principal amount not exceeding RM3 billion, 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 RC-i Facility.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 4) Order 2017

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 4) Order 2017 [P.U.(A) 263] was gazetted on 15 September 2017 and came into operation on 18 September 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:

- Commodity Murabahah Term Financing-i Facility obtained by Syarikat Perumahan Negara Berhad, provided that the outstanding principal amount under the financing facility shall not exceed RM530,300,000; and
- Guarantee provided or to be provided by the Government of Malaysia relating to the financing facility above.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 5) Order 2017

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 5) Order 2017 [P.U.(A) 265] was gazetted on 18 September 2017 and came into operation on 19 September 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 MKD Kencana Sdn Bhd pursuant to the Islamic Medium Term Notes Programme, in nominal values up to RM3.4 billion; and
- Guarantee provided or to be provided by the Government of Malaysia relating to the Sukuk Murabahah above.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 6) Order 2017

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 6) Order 2017 [P.U.(A) 268] was gazetted on 25 September 2017 and came into operation on 26 September 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 Perumahan Rakyat 1Malaysia Corporation pursuant to the Islamic Medium Term Notes Issuance Programme in nominal values of up to RM5 billion, provided that the combined aggregate of the outstanding nominal value of the Sukuk Murabahah and the outstanding principal amount under the Islamic Revolving Credit Facility (GGRC-i Facility – see below) shall not exceed RM5 billion;
- GGRC-i Facility obtained or to be obtained by Perumahan Rakyat 1Malaysia Corporation in the aggregate principal amount not exceeding RM2.5 billion, 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 GGRC-i Facility.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 7) Order 2017

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 7) Order 2017 [P.U.(A) 293] was gazetted on 29 September 2017 and came into operation on 2 October 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:

- Islamic Commercial Papers and the Islamic Medium Term Notes issued or to be issued by DanaInfra Nasional Berhad pursuant to the Islamic Medium Term Notes Issuance Programme in nominal values of up to RM13 billion, provided that the combined aggregate of the outstanding nominal value of the Islamic Commercial Papers and the Islamic Medium Term Notes and the outstanding principal amount under the Syndicated Islamic Revolving Credit Facility (RC-i Facility – see below) shall not exceed RM13 billion;
- RC-i Facility obtained or to be obtained by DanaInfra Nasional Berhad in the aggregate principal amount not exceeding RM4 billion, 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 Islamic Commercial Papers and the Islamic Medium Term Notes and the RC-i Facility.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 8) Order 2017

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 8) Order 2017) [P.U.(A) 328] was gazetted on 25 October 2017 and came into operation on 26 October 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 Pelabuhan Tanjung Pelepas Sdn Bhd pursuant to the Sukuk Murabahah Programme in nominal values of up to RM600 million; and
- Guarantee provided or to be provided by the Government of Malaysia relating to the Sukuk Murabahah above.

CUSTOMS DUTIES

Customs (Provisional Anti-Dumping Duties) Order 2017

The Customs (Provisional Anti-Dumping Duties) Order 2017 [P.U. (A) 310], gazetted on 11 October 2017 is effective for the period 12 October 2017 to 8 February 2018. The provisional anti-dumping duties shall be levied on and paid by the importers in respect of the importation of specific goods into Malaysia, as enumerated in the corresponding Schedule. The rate of duties imposed ranges from Nil to 52.17% depending on the tariff code, country of origin, and the producers/exporters, as specified in the Schedule.

Customs (Prohibition of Exports) (Amendment) Order 2017

The Customs (Prohibition of Exports) (Amendment) Order 2017 [P.U. (A) 321] was gazetted on 20 October 2017 and came into operation on 23 October 2017. This Order provides for amendments in paragraph 7, subparagraph (c) of the Customs (Prohibition of Exports) Order 2017 [P.U. (A) 102/2017] which is referred to as the "principal Order" in this Order, by substituting the words "sub-items 37(2) and 37(3)" with the words "sub-items 36(2) and 36(3)". Amendments were also made to the Second and Third Schedules, respectively.

EXCISE DUTIES

Excise Duties (Amendment) (No.2) Order 2017

The Excise Duties (Amendment) (No.2) Order 2017 [P.U. (A) 250], gazetted on 29 August 2017, came into operation on 30 August 2017. This Order provides for amendments in the Schedule of the Excise Duties Order 2017 [P.U. (A) 92/2017].

GOODS AND SERVICES TAX (GST)

Goods and Services Tax (Exempt Supply) (Amendment) Order 2017

The Goods and Services Tax (Exempt Supply) (Amendment) Order 2017 [P.U. (A) 244] was gazetted on 23 August 2017 and came into operation on 1 September 2017. This Order amended certain provisions under item 18 of the Second Schedule of the Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014].

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

CASE 1

D.A (M) SDN BHD V DIRECTOR GENERAL OF CUSTOMS, CASE NO. TRCBP(R)-7/2015, GST APPEAL TRIBUNAL

BRIEF FACTS

Before 14.4.2015, the Company's taxable turnover was below the mandatory registration threshold. Accordingly, the Company did not apply for GST registration when GST came into operation in Malaysia.

However, on 16.4.2015, it applied for registration under Section 21 of the GST Act when it signed a contract worth RM 600,000. Although the contract was dated 31.3.2015, the Company contended that it only signed the contract on 14.4.2015.

The Company applied for GST registration under Section 21 of the GST Act on 16.4.2015 anda late registration penalty of RM 1,500 was imposed without being given any reason by the Customs.

The Company appealed on the penalty to the Tribunal.

ISSUES

Whether late registration penalty should have been imposed by the Customs.

DECISION

The Tribunal held that:

(a) If the contract was signed on 14.4.2015, the last day for the Company to apply for registration is on or before 28.5.2015. Therefore, assuming the contract was signed on the day the contract was dated, i.e. on 31.3.2015, the last day for the Company to apply for GST registration under Section 21 is on or before 28.4.2015.

(b) The Company applied for registration on 16.4.2015. Therefore, it did not matter whether the contract was dated 31.3.2015 or signed on 14.4.2015. Either way, the company has applied for registration within the prescribed time under Section 21 of the GST Act. The penalty should not have been imposed by the Customs in the first place.

Accordingly, the appeal made by the Company was allowed.

CASE 2

P.K V KETUA PENGARAH KASTAM, CASE NO. TRCBP(R)-57/2015, GST APPEAL TRIBUNAL

BRIEF FACTS

First GST registration application

On 4.3.2015, the Company applied for registration through TAP and declared annual turnover of RM 200,000. The application was rejected on the basis that the value declared was unreasonable. Subsequently, the Company lodged a review application on 21.5.2015, against the decision to reject the registration application. Customs reviewed the said decision and approved the registration application.

Second GST registration application

On 11.10.2015, the Company applied for registration for a second time through TAP by declaring a turnover value of RM 2,882,880.00 which was attained on 22.3.2015. Customs approved the said registration under Section 21 of the GST Act.

In a letter dated 29.10.2015, Customs took the view that application for registration should have been made on 1.4.2015. Given that the Company registered on 11.10.2015 and not on 1.4.2015, Customs imposed a late registration penalty of RM 10,500.00.

Mistake in declaration

The Company explained that in its first registration application, it has mistakenly declared RM 200,000 as its turnover.

This was due to the fact that the Company is a Class E construction contractor who is registered with the Contractor Service Centre and obtains various projects from the state government of Johor. The business model of the Company includes renting the company's licence to other contractors who are interested to participate in the bidding and tendering process.

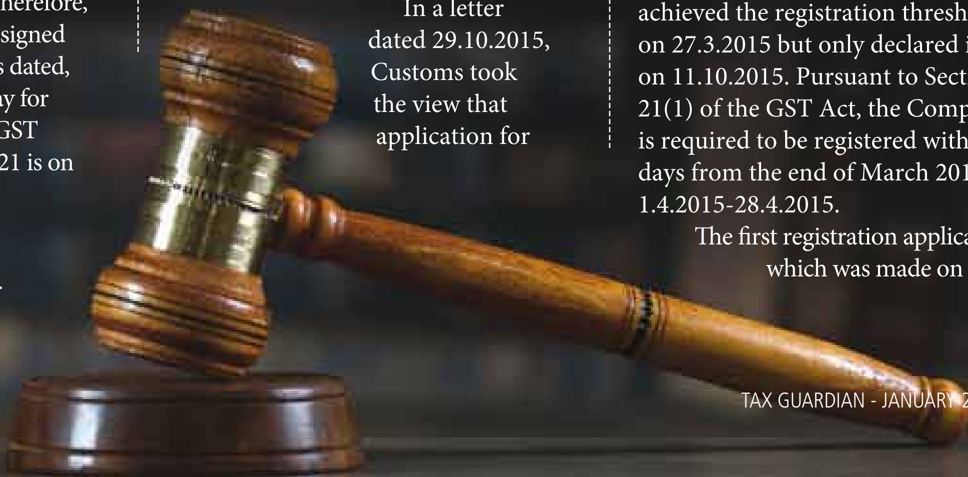
If the Company's bid / tender is chosen, the Company will be given 5% of the value of the bid/tender. Thus, the Company declared a turnover value which was computed based on 5% of the value of contracts obtained 12 months before 4.3.2015. The actual value of the contracts, however, was RM 2,882,880.00.

The Company argued that application for registration had been made since 4.3.2015 and not 11.10.2015. Although the earlier application made on 4.3.2015 was rejected, the subsequent review application was allowed.

Customs' arguments

Customs argued that penalty was imposed because the Company had achieved the registration threshold on 27.3.2015 but only declared it on 11.10.2015. Pursuant to Section 21(1) of the GST Act, the Company is required to be registered within 28 days from the end of March 2015, i.e. 1.4.2015-28.4.2015.

The first registration application which was made on



4.3.2015 should not be considered as the application was made under Section 24 of the GST Act (voluntarily registration). The registration date should be taken to be 11.10.2015, when the registration application was made under the mandatory registration provision by declaring a turnover above the threshold.

Further, the Customs' counsel contended that the Tribunal has no jurisdiction to hear the appeal as the matter falls under Item (k), Fourth Schedule of the GST Act, i.e. any refusal to remit any penalty or surcharge under Subsection 62(2) of the GST Act.

ISSUES

(i) Whether the Tribunal has the jurisdiction to hear the appeal; and
(ii) Whether the first GST application registration made on 4.3.2015 can be taken into account given that the Company has declared turnover value of RM 200,00 and consequently it was a voluntary registration application under Section 24 of the GST Act.

DECISION

The Tribunal held that:

(a) Given the Company was appealing against late registration penalty imposed under Section 21 and not appealing against a decision to reject an application for remission under Section 62(2) of the GST Act, the Tribunal has the jurisdiction to hear the appeal;
(b) The first GST registration application made by the Company on 4.3.2015 should be considered as the date the Company applied for registration under the GST Act. The application was made through TAP and it wasn't stated anywhere in the application whether the application for registration was made under the voluntary registration provision or the mandatory registration provision. Thus, the Customs' argument has to be rejected as there is no basis to say that an application under voluntary registration has been made by the Company.
(c) Further, given that the Customs allowed the review application for the first registration, the first registration application made on 4.3.2015 was successful. Accordingly, late registration penalty should not have been imposed.

Based on the reasons above, the appeal made by the Company was allowed and the penalty imposed by the Customs was set aside.

CASE 3

T.Y.C V KETUA PENGARAH KASTAM, CASE NO. TRCBP(R)-71/2016, GST APPEAL TRIBUNAL

BRIEF FACTS

The Appellant is a sole proprietor and is in the business of wholesale of foodstuffs.

The Appellant registered for GST on 18.5.2015 after reaching a turnover of RM 3.6 million.

On 27.5.2016, the Appellant applied for de-registration on the basis that it has ceased business - the Appellant has decided to retire and cancelled its registration with SSM.

The application was rejected on the basis that the Appellant failed to furnish information to the verification officer within the required time period.

ISSUES

Whether the DG of Customs was right in rejecting the application de-registration.

DECISION

The Tribunal dismissed the appeal of the Appellant, contending that the DG of Customs was right in rejecting the application for cancellation due to the following reasons:

(a) The DG of Customs had no knowledge of the cessation of business as the Appellant failed to furnish supporting documents to the satisfaction of the DG that he had indeed ceased business;
(b) The Appellant conceded that although he has cancelled his business registration with SSM, he had not yet furnished the relevant documents to Customs; and
(c) The Customs 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 Appellant and affirmed the decision of the DG of Customs.

__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 III)

Siva Subramanian Nair

THE DISCUSSION ON BUSINESS EXPENSES THAT RANK FOR A DOUBLE DEDUCTION CONTINUES IN THIS ARTICLE ON THE FOLLOWING FIVE GAZETTE ORDERS:

INCOME TAX (DEDUCTION FOR PROMOTION OF INTERNATIONAL OR PRIVATE SCHOOL) RULES 2012

INCOME TAX (DEDUCTION FOR PARTICIPATION IN AN APPROVED CAREER FAIR) RULES 2012

INCOME TAX (DEDUCTION FOR THE PROVISION OF CHILD CARE CENTRE) RULES 2013

INCOME TAX (DEDUCTION FOR TRAINING COSTS UNDER SKIM LATIHAN 1MALAYSIA FOR UNEMPLOYED GRADUATES) (AMENDMENT) RULES 2015 PU (A) 53/2015 EFFECTIVE UNTIL 2020

INCOME TAX (DEDUCTION FOR EXPENDITURE IN RELATION TO VENDOR DEVELOPMENT PROGRAMME) RULES 2014 PU

Students always complain that there are too many rules to know; so let us categorise them into specific headings so that it is easier to remember. I shall group them based on each gazette order but candidates can further summarise them into a table form (using your own short forms which only you will understand) to facilitate preparation for an examination. Note that all the expenses are deductible in arriving at the adjusted income in the tax computation of the qualifying person

INTERNATIONAL OR PRIVATE SCHOOLS

WHO GETS THE INCENTIVE?

- a company incorporated under the Companies Act 1965 [Act 125] [or of course the current Companies Act 2016 Act 777]; or a society which is established and registered

under the Societies Act 1966 [Act 335];

- must be resident in Malaysia and registered with the Ministry of Education Malaysia and has complied with the conditions and regulations as determined by that Ministry under the Education Act 1996 [Act 550]
- which carries on a business of providing education in a school located in Malaysia in the basis period for a year of assessment

WHAT EXPENSES QUALIFY FOR DOUBLE DEDUCTION?

They must be outgoings and expenses incurred with respect to that business and primarily and principally for the purpose of promoting its international or private school operated and located in Malaysia. These expenses include

a) market research for international or private school education;
b) preparation of technical information to a person outside Malaysia relating to the services provided by that school in Malaysia;
c) travelling to a country outside Malaysia by a representative of that school (not more than three representatives) for the purpose of participating in education fairs which are held outside Malaysia and approved by the Ministry of Education Malaysia and the actual expenses are subject to-
   a) i. economy class air fare;
   ii. a maximum of RM 300 per day for accommodation; and
   iii. a maximum of RM 150 per day for sustenance, for the whole period commencing from the date of the representative's departure from Malaysia and ending on the date of his return to Malaysia;
   b) participating in education fairs which are held outside Malaysia and approved by the Ministry of Education Malaysia other than those expenses mentioned above; or
   c) publicity and advertisement in any media outside Malaysia for the promotion of international or private school in Malaysia.

LIMIT OF CLAIM?

Maximum RM 100,000 for each year of assessment

WHAT CANNOT CLAIM?

- expenses prohibited under section 39(1)
- expenses were incurred by the school in the country in which it has a place of business and is subject to tax there.
- expenses which the Director General opines is excessive

MUTUALLY EXCLUSIVE

The school is already enjoying a deduction under Income Tax (Deductions for Promotion of Export of Services) Rules 1999 [P.U. (A) 193/1999].

PARTICIPATION IN AN APPROVED CAREER FAIR

WHO GETS THE INCENTIVE?

- any person resident in Malaysia who participates in an approved career fair [which is defined as]
- a career fair held outside Malaysia approved by the Minister and organized or endorsed by Talent Corporation Malaysia Berhad [which is defined as]
- a company limited by guarantee incorporated under the Companies Act 1965 [or 2016] [Act 125/777] established under the Prime Minister's Department to initiate and facilitate initiatives to address the talent needs in Malaysia.

WHAT EXPENSES QUALIFY FOR DOUBLE DEDUCTION?

They must be outgoings and expenses incurred by that person during that basis period with respect to his business; and primarily or principally for the purpose of participating in an approved career fair and the person claiming the deduction shall produce a letter from the Talent Corporation Malaysia Berhad confirming that the career fair is an approved career fair These expenses include

a) travelling to a country outside Malaysia by that person or

representative of that person (not more than 3 including that person) for the purpose of participating in an approved career fair and the actual expenses are subject to-
(i) economy class air fare;
(ii) a maximum of RM 300 per day for accommodation; and
(iii) a maximum of RM 150 per day for sustenance, for the whole period commencing from that person or his representative's departure from Malaysia and ending with his return to Malaysia;
(b) marketing and promotional materials including but not limited to pamphlets, prints or banners which contain specific information relating to the approved career fair;
(c) payment made to the organizer of an approved career fair; and
(d) participating in the career fair other than those specified in paragraphs (a), (b) and (c).

LIMIT OF CLAIM?

No limit of claim

WHAT CANNOT CLAIM?

- expenses prohibited under section 39(1)
- expenses were incurred by the person in the country in which he has a place of business and is subject to tax there.
- expenses which the Director General opines is excessive

PROVISION OF CHILD CARE CENTRE

WHO GETS THE INCENTIVE?

Any person resident in Malaysia who, for the purpose of a business of his, provides a child care centre registered with the Department of Social Welfare under the Child Care Centre Act 1984 for the benefit of persons employed by him in his business

WHAT EXPENSES QUALIFY FOR DOUBLE DEDUCTION?

These expenses include
(a) expenditure on the provision and maintenance of a child care centre; and
(b) expenses in respect of child care allowance to the persons employed by him in his business.

LIMIT OF CLAIM?

No limit of claim

WHAT CANNOT CLAIM?

- expenses which the Director General opines is excessive

NOTE: Students should not confuse this with the deduction available for expenditure incurred for the provision and maintenance of a child care centre under Section 34(6)(i) which is a single deduction. To qualify for this double deduction the child care centre must registered with the Department of Social Welfare under the Child Care Centre Act 1984.

TRAINING COSTS UNDER SKIM LATIHAN 1MALAYSIA FOR UNEMPLOYED GRADUATES

WHO GETS THE INCENTIVE?

A "qualifying company" i.e. a company
(a) incorporated in Malaysia under the Companies Act 1965/2016 [Act 125/777]; and
(b) approved by the Economic Planning Unit under the Prime Minister's Department of Malaysia to participate in the training scheme

The company must produce a letter from the Economic Planning Unit under the Prime Minister's Department of Malaysia specifying that
(a) the training scheme i.e. the Skim Latihan 1Malaysia programme of 8 to 12 continuous months for the unemployed graduates who are Malaysian citizens, has been approved by Economic Planning Unit under the Prime Minister's Department of Malaysia where the date of approval begins from 1 June 2012 until 31 December 2020; and
(b) the implementation of the training scheme shall commence within 12 months from the date of approval by the Economic Planning Unit under the Prime Minister's Department of Malaysia.

WHAT EXPENSES QUALIFY FOR DOUBLE DEDUCTION?

They must be expenses incurred in conducting the training scheme. These expenses include
(a) monthly training allowance of not

less than RM 1,000 paid to the trainees for a maximum period of 12 months;
(b) expenditure incurred for the training provided to the trainees;
(c) expenditure incurred for food, travelling and accommodation allowances of the trainees during the training scheme; and
(d) fees paid to a person who has been appointed to conduct soft-skills training under the training scheme

LIMIT OF CLAIM?

Maximum RM 5,000 deduction allowable under (b), (c) and (d) for each trainee for each year of assessment

VENDOR DEVELOPMENT PROGRAMME

The Vendor Development Programme is a programme approved by the Minister of International Trade and Industry, to be implemented by an anchor company in developing a new vendor company or strengthening the development of existing vendor company, at domestic and international level.

WHO GETS THE INCENTIVE?

An anchor company i.e. one which

- is incorporated under the Companies Act 1965 /2016 [Act 125 /777];
- is resident in Malaysia;
- participates in the Vendor Development Programme; and
- signs a memorandum of understanding with the Ministry of International Trade and Industry, under the Vendor Development Programme from 1 January 2014 until 31 December 2020

WHAT EXPENSES QUALIFY FOR DOUBLE DEDUCTION?

They must be expenditure (which shall be verified by the Minister of International Trade and Industry) incurred by that anchor company to carry out the following activities in relation to the Vendor Development Programme for a year of assessment.

(a) activities in relation to product development namely product quality development, product innovation or research and development;
(b) activities in relation to capability improvement namely certification programme, assessment programme or business process re-engineering; or
(c) activities in relation to human capital namely hard for each year of assessment

WHAT CANNOT CLAIM?

Capital expenditure incurred on plant, machinery, fixtures, land, premises, buildings, structures or works of a permanent nature or on alterations, additions or extensions thereof or in the acquisition of any rights in or over any property, incurred by the anchor company

LIMIT OF CLAIM?

- Maximum RM 300,000 for each year of assessment
- The deduction shall be for a period of 3 consecutive years of assessment commencing from the year of assessment in the basis period in which the first expenditure is incurred.

This concludes our discussion on the double deduction of expenditure incurred in respect of the above five areas.

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

FURTHER READING

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

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JANUARY - MARCH 2018

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JANUARY 2018								
Workshop: Withholding Tax: Clearing the Myths- *(Re-Run Session)*	5 Jan	9a.m. - 5p.m.	Kuala Lumpur	Thenesh Kannaa	400	500	600	8 WS/019
Workshop: Tax & Your Property Transaction	8 Jan	9a.m. - 5p.m.	Johor Bahru	Yong Mei Sim	350	450	500	8 WS/001
Workshop: Tax & Your Property Transaction	9 Jan	9a.m. - 5p.m	Kuala Lumpur	Yong Mei Sim	400	500	600	8 WS/020
Workshop: Tax & Your Property Transaction	17 Jan	9a.m. - 5p.m	Kuala Lumpur	Yong Mei Sim	400	500	600	8 WS/002
Workshop: Cross Border Transaction & Withholding Tax	17 Jan	9a.m. - 5p.m	Kuching	Harvindar Singh	350	450	500	8 WS/012
Workshop: Tax Issues & Implications for Property Developers & Investors	22 Jan	9a.m. - 5p.m	Ipoh	Dr Tan Thai Soon	350	450	500	8 WS/005
Seminar: Tax Audits & Investigations: Issues, Strategies & Appeals	25 Jan	9a.m. - 5p.m	Kuala Lumpur	Farah Rosley & Saravana Kumar	450	550	650	8 SE/001
Workshop: Cross Border Transaction & Withholding Tax	25 Jan	9a.m. - 5p.m	Penang	Harvindar Singh	350	450	500	8 WS/013
Workshop: Tax & Your Property Transaction	29 Jan	9a.m. - 5p.m	Melaka	Yong Mei Sim	350	450	500	8 WS/003
Public Holiday ***(New Year: 1 Jan, Thaipusam: 31 Jan)***								
FEBRUARY 2018								
Workshop: Tax & Your Property Transaction	2 Feb	9a.m. - 5p.m	Miri	Yong Mei Sim	350	450	500	8 WS/004
Workshop: Cross Border Transaction & Withholding Tax	8 Feb	9a.m. - 5p.m	Melaka	Harvindar Singh	350	450	500	8 WS/014
Workshop: Tax Issues & Implications for Property Developers & Investors	8 Feb	9a.m. - 5p.m	Kuala Lumpur	Dr Tan Thai Soon	400	500	600	8 WS/006
Workshop: Tax Issues & Implications for Property Developers & Investors	12 Feb	9a.m. - 5p.m	Penang	Dr Tan Thai Soon	350	450	500	8 WS/007
Seminar: Tax Audits & Investigations: Issues, Strategies & Appeals	13 Feb	9a.m. - 5p.m	Johor Bahru	Farah Rosley & Saravana Kumar	450	550	650	8 SE/002
NATIONAL GST CONFERENCE 2018	**27 – 28 Feb**	**9a.m. - 5p.m**	**Kuala Lumpur Convention Centre**	**Local & Foreign Speakers**	**Early Bird 1400** **Normal Fee 1600**	**Early Bird 1500** **Normal Fee 1700**	**Early Bird 1600** **Normal Fee 1900**	**25 GST/001**
Public Holiday ***(Federal Territory Day: 1 Feb, Chinese New Year 16 – 17 Feb)***								
MARCH 2018								
Seminar: Transfer Pricing: Issues & Developments	7 Mar	9a.m. - 5p.m	Kuala Lumpur	Various Speakers	450	550	650	8 SE/004
Workshop: Tax Planning for Individuals *(in collaboration with MAICSA)*	8 Mar	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/001
Seminar: Tax Audits & Investigations: Issues, Strategies & Appeals	12 Mar	9a.m. - 5p.m	Penang	Farah Rosley & Saravana Kumar	450	550	650	8 SE/003
Workshop: Tax Issues & Implications for Property Developers & Investors	12 Mar	9a.m. - 5p.m	Malacca	Dr Tan Thai Soon	350	450	500	8 WS/008

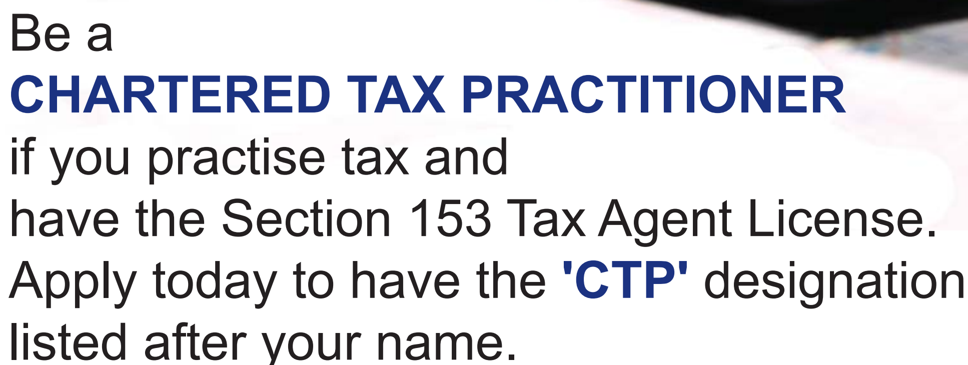
CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JANUARY - MARCH 2018

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
MARCH 2018								
Workshop: Cross Border Transaction & Withholding Tax	12 Mar	9a.m. - 5p.m	Johor Bahru	Harvindar Singh	350	450	500	8 WS/017
Workshop: Tax Planning for Companies *(in collaboration with MAICSA)*	14 Mar	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/002
Workshop: Cross Border Transaction & Withholding Tax	15 Mar	9a.m. - 5p.m	Kota Kinabalu	Harvindar Singh	350	450	500	8 WS/018
Workshop: Cross Border Transaction & Withholding Tax	19 Mar	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/016
Workshop: Tax Issues & Implications for Property Developers & Investors	26 Mar	9a.m. - 5p.m	Kuching	Dr Tan Thai Soon	350	450	500	8 WS/009
Workshop: Tax Planning for Companies (re-run) *(in collaboration with MAICSA)*	28 Mar	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/003

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.



Please contact:
Khalijah Maasap | Tel:- +603 2162 8989 ext. 114 | Email:- khalijah@ctim.org.my

ctim
CHARTERED TAX INSTITUTE OF MALAYSIA

NATIONAL GST CONFERENCE 2018

Future Challenges of GST Administration

REGISTRATION FORM

Please ☑ the appropriate checkboxes.

EVENT CODE: NGC2018

PARTICIPANTS' DETAILS

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

Designation: ______ I/C No: ______

Email ______ Membership No.: ______

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

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

Designation: ______ I/C No: ______

Email ______ Membership No.: ______

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

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

Designation: ______ I/C No: ______

Email ______ Membership No.: ______

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

ORGANISATION'S DETAILS

Organisation: ______

Industry: ______ Contact Person: ______

Address: ______

Email: ______ Tel: ______ Fax: ______

TAX INVOICE to be issued under:

☐ Company

☐ Individual

Signature & Company Stamp:

CONFERENCE FEES*

Category	Early bird fee (with payment before or on 30 Jan 2018)	Normal fee (after 30 Jan 2018)
CTIM member/ RMCD officer	RM1,484	RM1,696
Member's firm staff/ Member of Supporting Body	RM1,590	RM1,802
Non-Member	RM1,696	RM2,014
Overseas participant	Not Applicable	RM3,074

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

Closing Date : 13 February 2018

Conference Secretariat:

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

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

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

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

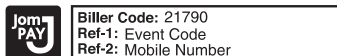
PAYMENT METHOD

I / we hereby enclose

☐ **Cash** for Amount of RM ______

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

☐ **Online Payment** via JomPAY



JomPAY online at Internet and Mobile Banking with your Current, Savings or Credit Card account

☐ **Credit Card**
For amount of RM ______
Please complete the credit card details

Credit Card details

Card No ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ Expiry Date ______

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

______

Cardholder's Signature

Date

Company Stamp & Signature

TERMS & CONDITIONS

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

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

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

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

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

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

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

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

DAY 1 TUESDAY 27 FEBRUARY 2018

Programme Outline

NATIONAL GST CONFERENCE 2018

7:30 am	**Registration & Arrival of Guests**
9:00 am	**Arrival of Guest of Honour** **Y.A.B Dato' Sri Mohd Najib bin Tun Hj. Abdul Razak** (*invited*) Prime Minister/Finance Minister
9:05 am	**Welcoming Speech** **Ms Seah Siew Yun** President Chartered Tax Institute of Malaysia
9:10 am	**Opening Address** **YBhg Dato' Sri Subromaniam Tholasy** Director General of Customs Royal Malaysian Customs Department
9:15 am	**Keynote Address by Guest of Honour** **Y.A.B Dato' Sri Mohd Najib bin Tun Hj. Abdul Razak** (*invited*) Prime Minister/Finance Minister
10:00 am	**Morning Refreshments/ Tour of Exhibition Booths/ Press Conference**
10:30 am	**Topic 1: Challenges & Future Direction of GST Administration** ***Moderator:*** **Mr Mohammad Sabri bin Saad** Deputy Director of Customs, GST Division Royal Malaysian Customs Department ***Panel Members:*** **Mr MA Sivanesan** Deputy Under-Secretary (Indirect Tax & GST Policy Sector), Tax Division Ministry of Finance Malaysia ***Mr David Lai*** Council Member Chartered Tax Institute of Malaysia Representative from Australia / New Zealand *(to be advised)*
11:45 am	**Question & Answer Session**
12:00 pm	**Networking Lunch/Tour of Exhibition Booths**
2:00 pm	**Topic 2: In Conversation with the DG of RMCD & CEO of IRBM** ***Moderator:*** **Mr SM Thanneermalai** Managing Director Crowe Horwath KL Tax Sdn Bhd ***Panel Members:*** **YBhg Dato' Sri Subromaniam Tholasy** Director General of Customs Royal Malaysian Customs Department **YBhg Dato' Sri Sabin bin Samitah** (*invited*) Chief Executive Officer Inland Revenue Board of Malaysia
3:00 pm	**Question & Answer Session**
3:15 pm	**Topic 3: GST Audits: Enhancing GST Compliance – Issues & Findings** ***Moderator:*** **Mr Chow Chee Yen** Council Member Chartered Tax Institute of Malaysia ***Speaker:*** **Ms Zaizah binti Zainuddin** Deputy Director of Customs, Compliance Division Royal Malaysian Customs Department ***Panel Members:*** **Mr Brynner Chiam** Associate Director Axcelasia Taxand Sdn Bhd **Mr Thenesh Kannaa** Partner TraTax
4:30 pm	**Question & Answer Session**
4:45 pm	**Afternoon Tea Break & End of Day 1**

DAY 2 WEDNESDAY 28 FEBRUARY 2018

Programme Outline

NATIONAL GST CONFERENCE 2018

8:50 am **Overview of Day 1 Conference**
Ms Farah Rosley
Co-Organising Chairman of NGC 2018

9:00 am **Topic 4: International Experience on GST – Common Issues & Application**

Moderator:
Mr Yeoh Cheng Guan
Partner - Malaysia Indirect Tax Leader
Ernst & Young Tax Consultants Sdn Bhd

Speaker:
Mr. Shri Upender Gupta
Commissioner, GST Policy Wing, Central Board of Excise and Customs(CBEC)
Ministry of Finance, Government of India

Panel Members:
Mr Bhupinder Singh
Vice President, Group Tax
PETRONAS

Ms Annie Thomas
Senior Assistant Director of Customs II, Enforcement Division, GST Fraud Investigation Unit,
Royal Malaysian Customs Department

10:15 am **Question & Answer Session**

10:30 am **Morning Refreshments/Tour of Exhibition Booths**

11:00 am **Topic 5: GST Impact on Inflation and Profiteering**

Moderator:
Ms Ng Sue Lynn
Executive Director – Indirect Tax
KPMG Tax Services Sdn Bhd

Speaker:
Ms Low Swee Hon (*invited*)
Senior Principal Assistant Director, Anti Profiteering Unit,
Enforcement Division
Ministry of Domestic Trade
Co-Operatives & Consumerism

Panel Members:
YBhg Dato' Abdul Latif bin Abdul Kadir
Assistant Director General of Customs (GST)
Royal Malaysian Customs Department

Mr Raja Kumaran
Executive Director
PricewaterhouseCoopers Taxation Services Sdn Bhd

12:15 pm **Question & Answer Session**

12:30 pm **Networking Lunch & Tour of Exhibition Booths**

2:00 pm **Topic 6: Malaysian Cross Border GST Cases**

Moderator:
Mr Koong Lin Loong
Council Member
Chartered Tax Institute of Malaysia

Speakers:
Ms Nur Hanisah Duke binti Abdullah
Deputy Director of Customs, GST Division
Royal Malaysian Customs Department

Mr S Saravana Kumar
Partner
Lee Hishamuddin Allen & Gledhill

3:00 pm **Question & Aswer Sesion**

3:15 pm **Topic 7: Malaysia Under the Digital Economy**

Moderator:
Mr Alan Chung
Executive Director – Indirect Tax & GST
SJ Grant Thornton

Speakers:
YBhg Dato' Paddy bin Abdul Halim
Deputy Director General of Customs (GST/Customs)
Royal Malaysian Customs Department

Mr Tan Eng Yew
GST Executive Director
Deloitte KassimChan Tax Services Sdn Bhd

4:30 pm **Question & Answer Session**

4:45 pm **Refreshments & End of Conference**

Jointly Organised by:

Future Challenges of GST Administration

NATIONAL GST CONFERENCE 2018

25 CPD points
(For purposes of Section 170 GST Act 2014)

Based on the merit of each applicant.

Officiated by	**Prime Minister/Finance Minister of Malaysia** ***(invited)***
Conference Date	**27 & 28 February 2018**
Conference Venue	**Kuala Lumpur Convention Centre**

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