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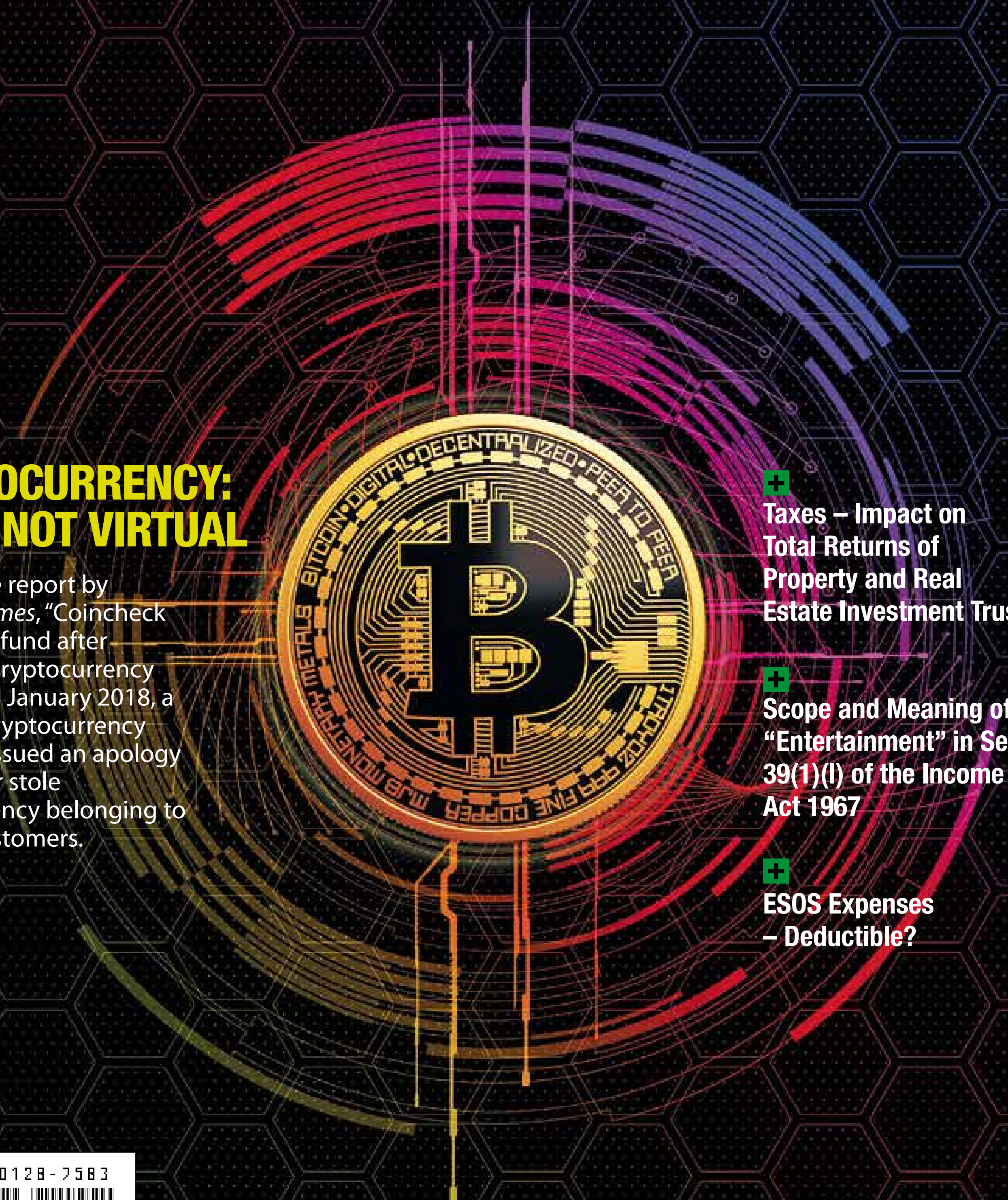

CRYPTOCURRENCY: TAX IS NOT VIRTUAL

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+ Taxes – Impact on Total Returns of Property and Real Estate Investment Trusts

+ Scope and Meaning of "Entertainment" in Section 39(1)(l) of the Income Tax Act 1967

+ ESOS Expenses – Deductible?

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

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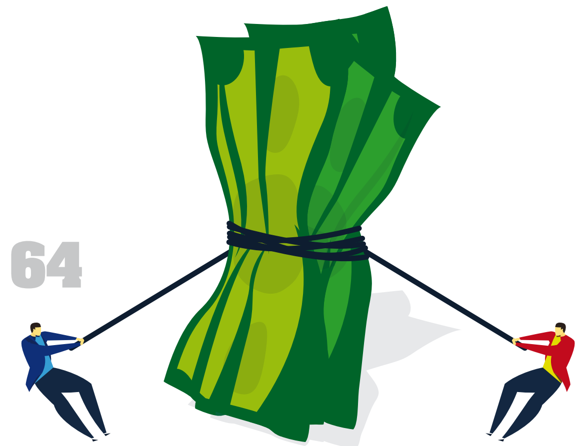

Note: The views expressed in the articles contained in this journal are the personal views of the authors. Nothing herein contained should be construed as legal advice on the applicability of any provision of law to a given set of facts.

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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SEAH SIEW YUN

VOLUNTARY DISCLOSURE

At a dialogue in February 2018, the Inland Revenue Board Malaysia (IRBM) presented a preliminary proposal to the Institute and other professional bodies on the imposition of penalty of 100% of the tax undercharged under certain circumstances relating to tax audit, with effect from 1 April 2018. The Institute has submitted a joint feedback to the IRBM's proposal together with other professional bodies. I have been informed by the IRBM that the said proposal is now put on hold until further notice. Meanwhile, the IRBM will continue to engage with the Institute on this matter as the proposal may still be pushed forward whenever it is ready. The IRBM also acknowledged that the 100% penalty based on the proposal should not be practised by their officers at the moment except for specific cases involving repeated offences.

As members are aware, the penalty imposed on incorrect returns is not more than 35% of the tax undercharged if it is voluntarily disclosed, according to the IRBM's Tax Audit Framework 2017. Voluntary disclosure may mitigate the consequences of the negative impact of audit and investigation enforcements. With the above-mentioned deferment of the 100% penalty for the time being, I would encourage members to take up this window of opportunity to engage with their clients to do tax health checks and assess their tax risks so that a timely decision can be taken on whether voluntary disclosure is needed for prior years of assessment.

I am pleased to highlight several key happenings from the Institute's engagements with various authorities in the first quarter of 2018 as follows:-

2018 National GST Conference

The Institute in collaboration with the Royal Malaysian Customs Department (RMCD) successfully organised the fourth National GST Conference (NGC 2018) at the Kuala Lumpur Convention Centre from 27 - 28 February 2018. Up to 1,300 participants attended the NGC 2018 which was on the theme of "Future Challenges of GST Administration". I would like to thank the RMCD, NGC Committee, Secretariat, participants, moderators, speakers, panellists and all those involved in making the NGC 2018 a success.

Dato' Sri Subromaniam Tholasy, Director General of Customs, announced at the NGC 2018 that the Malaysian Goods and Services Tax Compliance Assurance Programme (MyGCAP) will be rolled out in the second quarter of 2018. MyGCAP will involve the training of professionals to be able to conduct GST compliance reviews for GST registrants which for a start, involve the public-listed companies, government linked companies or companies with revenue of at least RM100 million. One of the objectives of MyGCAP is to facilitate faster GST refunds. Also, companies which are in the MyGCAP can obtain automatic approval for applications for special schemes in relation to GST. The RMCD has identified the Institute as one of the professional bodies to organise the training course for MyGCAP. The Institute commenced the registration for the training course at the NGC 2018 and I am pleased to inform that the response has been very encouraging with more than 200 registrations. Registration for the training course is still open. Members may contact the Institute's CPD department for registration and enquiries on the training course.

Dialogue with the tax authorities on issues arising from the 2018 Budget and Finance Bill (No. 2) 2017

The IRBM chaired a dialogue on 12 January 2018 with the Institute, other professional bodies and the Ministry of Finance (MoF) on the Institutes' joint memorandum on issues arising from the 2018 Budget and Finance Bill (No. 2) 2017. The minutes of the dialogue will be circulated to members when it is made available by the IRBM.

The Institute is also engaging with the MoF and the IRBM in relation to the earning stripping rules and the capital allowance on software development expenditure which were proposed in the 2018 Budget.

Second time renewal of Section 170 GST tax agent licence

On 20 February 2018, the Institute and other professional bodies met with the MoF and the RMCD to discuss on issues arising from the difficulties which would be faced by the GST licensed practitioners in the second renewal of their GST tax agent licence. The principal issue amongst others that was discussed is the requirement for 20 clients for the 2-year approval period which should be widened to include services such as GST review, GST advisory, GST audit, assistance on appeals/refunds, other non-GST filing services instead of being restricted to GST tax filing services only. The Institute is waiting for a written response from the MoF and will update members as soon as the written response is received.

CPD Events

In my President's message in the previous issue of the *Tax Guardian*, I expressed a hope that the operations undertaken by the IRBM to enhance tax awareness and bridge the shortfall in taxes through tax collection, civil lawsuits and convictions, tax audits and investigations and focus on big cases in specific industry sectors, would be supplemented with matching and laudable efforts in education programmes to enhance compliance. Therefore, it gives me great pleasure to inform that the IRBM and the Institute jointly organised the "Morning Talk: Your Business and Tax" which was held on 5 April 2018 at the IRBM's headquarters in Cyberjaya for the general public. Details of the talk have been circulated to members.

The Institute recently paid a visit to Dato' Sri Sabin Samitah, Director General of Inland Revenue, at his office in Cyberjaya to present the National Tax Conference (NTC) 2017 cheque and discuss on matters pertaining to the coming NTC 2018 which is co-organised by the Institute and the IRBM. The NTC 2018 will be held at the Kuala Lumpur Convention Centre from 16 - 17 July 2018 on the theme of "Taxation in a Changing Economy – Towards TN50". The details of the conference are available in this issue of *Tax Guardian* and have also been circulated to the members. I look forward to seeing many of you at the conference.

Membership

I would strongly encourage tax practitioners who are not CTIM members to apply for membership with the Institute. Also, CTIM members who are engaged in public practice and possess a valid tax licence issued by the Ministry of Finance under Section 153 of the Income Tax Act 1967 should consider applying for the CTIM Practising Certificate, if you have not already done so. The eligibility criteria and application procedure for CTIM membership and the CTIM Practising Certificate are listed in the membership section of the Institute's website at *www.ctim.org.my*.

The CTIM Council and I would like to thank all members for their continuous support of the Institute.

Editor'sNote

YEO ENG PING

In this edition of *Tax Guardian*, our contributors examine the deductibility of Employee Share Option Scheme expenses, and the classic issue of what constitutes "entertainment" for which a limitation on deduction applies. There is also an article that helpfully walks us through the various taxes that apply for property investments via Real Estate Investment Trusts (REITs). I am especially pleased to see a contribution from the Inland Revenue Board Malaysia (IRBM), which is titled Updates on International Tax Matters. This article systematically recounts the various actions taken in Malaysia to implement a number of the 15-point Base Erosion and Profit Shifting Plan. It concludes by saying that Malaysia is working on other areas of the Action Plan including the taxation of the digital economy, earning stripping rules, review of incentives, and updating of the Transfer Pricing and Mutual Agreement Procedure Guidelines.

Which brings me to share with you a few updates. Since the start of 2018 there has been more media coverage on the taxation of the digital economy. Early March, our Finance Minister II, Datuk Seri Johari Abdul Ghani said that Malaysia is looking towards introducing new rules to tax "new industries" referring to the digital economy, acknowledging it is complex. If you search for "digital economy" in the IRBM website, you will see quite a detailed articulation of what constitutes "digital economy", examples of such business, and the income tax treatment. Practice Note No. 1/2018 "Tax Treatment On Digital Advertising Provided By A Non-Resident" was also issued on 16 March 2018 and is quite a short and instructive document on how the IRBM thinks Sections 109 and 109B of the Income Tax Act 1967 could apply. It appears that so far there has not yet been official pronouncements around the tax treatment of cryptocurrencies, but these are early days. The policy and technical debates on this have just only begun and I expect there will be no shortage of intellectual deliberations and pondering in these areas for years to come.

Back to the pressing matters around tax audits – the Audit Framework was amended and issued in March 2018, taking effect on 1 April 2018. A few interesting observations:-

- Removal of the clause that the IRBM will not examine or call for documents for years of assessment that are time-barred. This indicates that the IRBM will as a matter of procedure ask for documents for time-barred years.
- The CEO of the IRBM had previously clarified in the media that a 100% penalty will be imposed under several circumstances i.e. this is not to be applied on all cases. It would have been a lot more comforting for taxpayers if such direction was formally incorporated into the amended Audit Framework, but unfortunately this was not included.
- New, shortened "start to finish" timelines for audits i.e. from four months to three months, and taxpayers to have 18 days instead of 21 days to respond to the IRBM's audit queries. In principle, this is a good development, in that the level of efficiency on both sides of a tax audit should improve over time, but in practice I believe it will still be important for audit officers to know they may/should exercise their discretion to extend timelines in a reasonable manner.

At an event this April, the CEO of the IRBM mentioned that enforcement activities are proceeding strongly (there are more audit cases for the first three months than against the same period in 2017), though there is less media coverage since the start of 2018. This is propelled by much improved IT systems allowing quick and accurate data matching from various sources of information from Goods and Services Tax returns, Bank Negara, to third party information. The IRBM has a RM134.7 billion tax collection target for 2018, having achieved **RM123 billion** in 2017. So, in short, no rest for taxpayers and tax practitioners, it is important to stay vigilant, technical and professional.

CPD EVENTS

A series of events were conducted in the 1st quarter 2018 as follows:

- Cross Border Transaction & Withholding Tax
- Tax Issues & Implications for Property Developers & Investors
- Tax Audits & Investigations: Issues, Strategies & Appeals
- Tax & Your Property Transaction
- Withholding Tax: Clearing the Myths
- Transfer Pricing – Issues & Developments

The workshop on 'Cross Border Transaction & Withholding Tax' was conducted by Mr. Harvindar Singh at various major towns. The speaker shared his vast experience and knowledge of the factors that needed to be considered in ascertaining the Malaysian taxation implications arising as a result of engaging in cross border transactions.

Dr. Tan Thai Soon presented a series of workshops on "Tax Issues & Implications for Property Developers & Investors" at several venues i.e Kuala Lumpur, Penang, Ipoh, Johor Bahru, Kota Kinabalu & Kuching. This workshop covered many aspects of Malaysian tax law, regulations and public ruling. In particular, it covered the Real Property Gains Tax, tax treatment for land owner under joint venture, accounting, tax planning, tax issues and GST implications and tax audit for property developers.

For the first time, the workshop on "Tax & Your Property Transaction" was offered to CTIM members in Miri. This popular workshop was conducted by Ms. Yong Mei Sim on 2 February 2018 and received full house attendance.

Ms. Farah Rosley, Deputy President of CTIM & Mr. Saravana Kumar from Lee Hishammuddin Allen & Gledhill conducted a seminar entitled 'Tax Audit & Investigations – Issues, Strategies & Appeals' at several major cities namely Kuala Lumpur, Johor Bahru and Penang.

CTIM organised a Seminar on "Transfer Pricing: Issues & Developments" on 7 March 2018 at Sheraton Imperial Hotel, Kuala Lumpur. Experts on Transfer Pricing discussed and shared various aspects and issues on the latest developments.

CRYPTOCURRENCY: TAX IS NOT VIRTUAL

Chong Mun Yew

IN AN ONLINE REPORT BY ***FINANCIAL TIMES***, "COINCHECK PROMISES REFUND AFTER USD500M CRYPTOCURRENCY HEIST" ON 28 JANUARY 2018, A JAPANESE CRYPTOCURRENCY EXCHANGE ISSUED AN APOLOGY AFTER HACKER STOLE CRYPTOCURRENCY[1] BELONGING TO 260,000 CUSTOMERS. JAPANESE CRYPTOCURRENCY EXCHANGE **COINCHECK** SAID IT WOULD REPAY CUSTOMERS AFTER FALLING VICTIM TO ONE OF THE WORLD'S BIGGEST HEISTS[2].

Given the size of the heist and the fact that it was committed digitally, this is worrying especially in today's digital age! We are all familiar with the saying: There are only two things certain in life i.e. death and taxes[3], but can cryptocurrency escape taxes? Cryptocurrency creates many new headaches for regulators in respect of the legality and taxation of this new asset class.

This article seeks to examine the premise of Bitcoin[4], the very first widely accepted digital currency and its potential effect on the taxation industry.

THE RISE OF DIGITAL CURRENCY

Prior to 2009, no one seriously foresaw the rise of digital currency. After the financial crisis highlighted the oversight by the central banks and financial institutions which lead to losses in monetary reserves, people start looking for a more secure replacement to traditional fractional reserve banking.

On 3 January 2009, Bitcoin, the very first decentralised digital currency utilising the blockchain[5], was launched by a mysterious person known only by the pseudonym Satoshi Nakamoto, whose true identity remains unknown[6]. Since then, the value of Bitcoin has steadily appreciated as the demand for the digital currency grew despite a few small dips in its short 10 year history.[7] At the same time, the increase in the demand for digital currencies has spawned more new cryptocurrencies like Ethereum and Ripple. With the introduction of more new cryptocurrencies, it increases the market capitalisation of digital currency.

WHAT IS BITCOIN?

Bitcoin is a decentralised digital currency where Bitcoins are registered with a Bitcoin address. This makes the entire system pseudonymous with transactions being recorded under pseudonyms so that the identities of the parties are kept private. Bitcoins are stored in a Bitcoin wallet. The Bitcoin wallet is basically just a collection of Bitcoin addresses. Each of the Bitcoin addresses was created with a valid private key.

Bitcoin has the characteristic of a Fiat currency which means that it is not backed by a physical commodity like gold or government guarantees. Currently, most nations utilise fiat currency to drive their economies. The biggest fiat currency would be the United States Dollar which has been a fiat currency since 1971.[8] The thing that gives a fiat currency value is its scarcity, guarantee of value from the issuing state and the laws of supply and demand.

For example, assuming the supply and demand of Bitcoin remains stable but the community was to lose faith in the value of Bitcoin, the community would then start to sell their Bitcoin bringing down the price of Bitcoin due to oversupply of Bitcoin in the market.

WHAT CAN BITCOIN BE USED FOR?

Bitcoin can be spent just like any conventional currency at any merchants that accept it. It can also be sold to people who wish to purchase Bitcoin for whatever purpose.

HOW CAN YOU OWN BITCOIN?

There are two ways in which you can own Bitcoin, the easiest way is to purchase it at one of the many new cryptocurrency exchanges. This is also the more expensive option considering the price of a Bitcoin as at 2 March 2018 is almost USD10,980.[9]

The alternative is to mine Bitcoin. Mining Bitcoin involves adding Bitcoin transaction data to the Bitcoin's global public ledger of past transactions. Each group of transactions is called a block. Blocks are secured by Bitcoin miners and built on top of each other to form the blockchain. The blockchain confirms the transactions as having taken place to the rest of the network. Bitcoin nodes running the Bitcoin programme use the blockchain to distinguish legitimate Bitcoin transactions from those transactions that attempt to re-spend coins that have

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1 *Wikipedia, Cryptocurrency, on 12 April 2013, https://en.wikipedia.org/wiki/Cryptocurrency.*

2 *Financial Times, Coincheck promises refund after $500m cryptocurrency heist, on 28 January 2018 https://www.ft.com/content/7b0d7660-03ea-11e8-9650-9c0ad2d7c5b5.*

3 *Benjamin Franklin, in a letter to Jean-Baptiste Leroy, 1789 stated "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes."*

4 *Wikipedia, Bitcoin, on 12 April 2013, https://en.wikipedia.org/wiki/Bitcoin.*

already been spent elsewhere.

Bitcoin mining is getting more expensive as more and more processing power is required to compute the hash functions required to secure a block to the blockchain. This has led to many Bitcoin mining pools being set up to share in the costs of mining Bitcoin. This is akin to a joint venture with many miners from all over the world to contribute to a mining pool.

HOW DO YOU MINE BITCOIN?

To mine Bitcoins, miners must find a hash value that includes a list of all of the most recent transactions that need to be verified. Once a miner finds such a value, he or she broadcasts it to the Bitcoin network. The set of transactions are now verified, and that set becomes the next block in the Bitcoin blockchain. The miners then receive their reward for contributing their computational power to operate the Bitcoin protocol.[10] The hash rate is the number of times a hash function can be computed per second. The Bitcoin miner's expected profit is directly proportional to the hash rate of his Bitcoin mining machines.

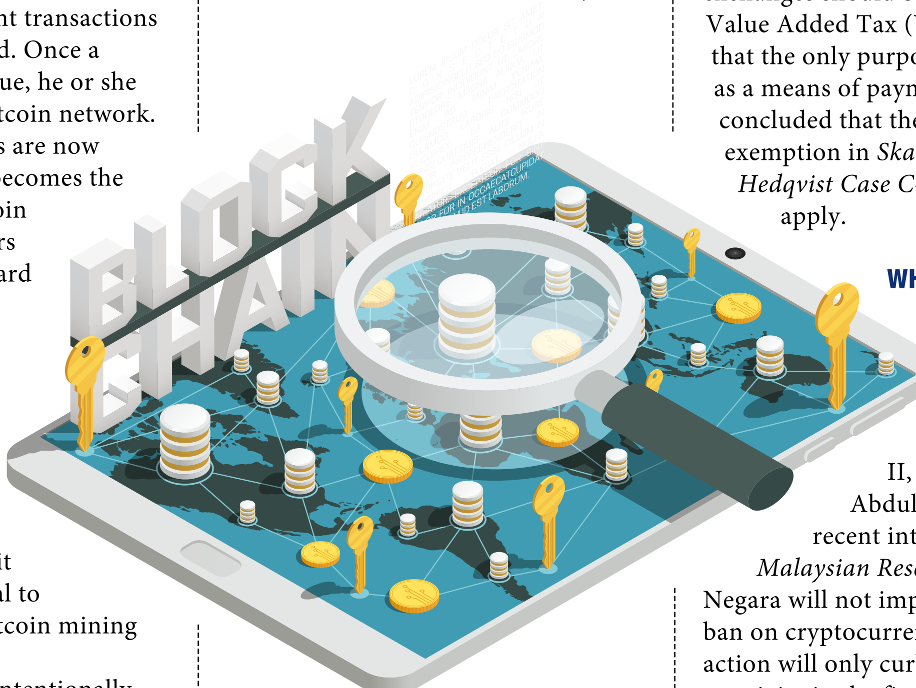
Bitcoin mining is intentionally designed to be resource-intensive and difficult, so that the number of blocks found each day by miners remains steady over time, producing a controlled finite monetary supply. The amount of computing power required to mine Bitcoin depends on the Bitcoin network's hash rate which is the measurement unit of the processing power of the Bitcoin network. The Bitcoin network must make intensive mathematical and cryptography related operations for security purposes. For example, if the Bitcoin network reaches a hash rate of 20 Th/s, it means that the network can make 20 trillion calculations per second.[11]

IS CRYPTOCURRENCY THE NEXT TAX FRONTIER?

Different jurisdictions across the world have taken a different approach in respect of the taxation of cryptocurrency. We will examine a few of the approaches below.

UNITED STATES

The United States Inland Revenue Service classifies virtual currency as property for United States Federal tax purposes.[12] Therefore, capital gains taxes are applicable for gains on the value of virtual currency in the United States.



SINGAPORE

In Singapore, the Inland Revenue Authority of Singapore has held that businesses that buy and sell virtual currencies in the ordinary course of their business will be taxed on the profits derived from trading in the virtual currency. Profits derived by businesses which mine and trade virtual currencies in exchange for money are also subject to tax.

However, like Malaysia, there is no capital gains tax in Singapore. Hence, long-term investment in Bitcoin would not be subjected to tax.[13]

EUROPE

In Europe, there is no consensus on whether Bitcoin is a currency. However, the European Court of Justice has held that Bitcoin exchanges should be exempted from Value Added Tax (VAT) on the basis that the only purpose of Bitcoin is as a means of payment, the court concluded that the 'currency' exemption in *Skatteverket v David Hedqvist Case C-264/14* should apply.

WHAT IS THE MALAYSIAN STANCE ON BITCOIN?

Malaysia's Finance Minister II, Datuk Seri Johari Abdul Ghani said in a recent interview with the *Malaysian Reserve* that Bank Negara will not impose a blanket ban on cryptocurrencies as such action will only curb innovation and creativity in the financial sector, particularly in financial technology.[14]

On 9 January 2018, a land deal was sealed using Bitcoin in Sabah between Alexander Yee and Polycarp Chin. The land was still subject to the Real Property Gains Tax. On 27 February 2018, Bank Negara issued a policy document on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) of Digital Currencies.[15] In the policy document, Bank Negara reiterates its stance that digital currencies are not legal tender in Malaysia. The policy paper sets out new reporting requirements for a person who provides cryptocurrency exchange services such as the exchange digital currency for money or vice versa regardless of whether they have a physical presence in Malaysia.

IS CRYPTOCURRENCY SUBJECT TO MALAYSIAN INCOME TAX?

Currently, the Inland Revenue Board Malaysia (IRBM) has yet to issue definitive guidelines on how to subject the cryptocurrency transactions to tax. However, on 19 January 2018, the chief executive officer Dato' Sri Sabin Samitah said that even if cryptocurrency businesses are not regulated in Malaysia, the businesses are still subject to Malaysian income tax pursuant to Section 3 of the Income Tax Act 1967 (ITA), where tax shall be charged upon the income any person accruing in or derived from Malaysia.[16] He said that the current provisions of the ITA are applicable to all cryptocurrency traders.

He further added that the cryptocurrency company would need to keep proper books of accounting and business records in Malaysia for the purpose of being audited by the relevant law enforcement agencies.

There are a few arguments that taxpayers can argue against the imposition of tax on their gains from cryptocurrency. A few of these arguments will be discussed below.

1. ***Foreign source income***
   Taxpayers can argue that the income gained from the cryptocurrency transaction is foreign sourced income[17] and not subject to tax, being derived from outside of Malaysia.
   This argument will likely be challenged by the IRBM as the taxpayer would be unable to prove that the transaction came from overseas.
   As discussed, the nature of Bitcoin transaction is that the address of the receiver and the sender are masked. The taxpayer would have a hard time proving that the transaction took place overseas without revealing the identity of the sender or the receiver.
2. ***Legality of cryptocurrency business***
   Although the cryptocurrency business is not regulated in Malaysia, in the tax case of *Lindsay, Woodward and Hiscox v IR Commrs (1932) 18 TC 43*, it was held that profits made from illegal trades are subject to tax. In this regard, the non-regulation of cryptocurrency does not prevent the profits from such businesses

[5] Wikipedia, Blockchain, on 12 April 2013, https://en.wikipedia.org/wiki/Blockchain. A blockchain, originally block chain, is a continuously growing list of records, called blocks, which are linked and secured using cryptography. Each block typically contains a cryptographic hash of the previous block, a timestamp and transaction data. By design, a blockchain is inherently resistant to modification of the data. It is "an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way". For use as a distributed ledger, a blockchain is typically managed by a peer-to-peer network collectively adhering to a protocol for validating new blocks. Once recorded, the data in any given block cannot be altered retroactively without the alteration of all subsequent blocks, which requires collusion of the network majority.

[6] The Economist explains, How Does Bitcoin Work?, on 12 April 2013, https://www.economist.com/bitcoinexplained.

[7] Buy Bitcoin Worldwide, Bitcoin Price History Chart, on 2 March 2018, https://www.buybitcoinworldwide.com/price.

[8] American Monetary Association, How American became a fiat currency, 2 March 2018, http://americanmonetaryassociation.org/how-the-us-dollar-came-to-be-a-fiat-currency/.

[9] Coindesk, Bitcoin (USD) Price, 2 March 2018, https://www.coindesk.com/price.

[10] Quora, What does Bitcoin hash rate mean?, 2 March 2018, https://www.quora.com/What-does-Bitcoin-hash-rate-mean.

[11] Bitcoin, What is Bitcoin mining, 2 March 2018, https://www.bitcoin.com/bitcoin-mining.

[12] Inland Revenue Service, IRS Virtual Currency Guidance : Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply, on 2 March 2018, https://www.irs.gov/newsroom/irs-virtual-currency-guidance.

from being taxed.

3. ***Tax Residency***
   The taxpayer can move around the world to avoid being classified as a tax resident in Malaysia. Given the global nature of the cryptocurrency in general, and Bitcoin in particular, these Malaysian taxpayers can sell their Bitcoins from anywhere without the hefty cross border transaction fees. These taxpayers could run the argument that they are not tax residents of Malaysia and therefore are not subject to Malaysian income tax. However, to note on the recent case of *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Others* where a taxpayer claimed that he was not a tax resident of Australia and the Australian Tax Office should not be able to extend its taxation hand overseas to tax a Malaysian taxpayer. Unfortunately, the taxpayer lost the case at this juncture.
   The other issue to consider is who is actually making profits. In the age of Virtual Private Networks it would be possible that the identity of the person making those gains may not be who it seems. Of course, bringing the money back for utilisation is a different issue altogether.
4. ***Income from hobby or from investment***
   The taxpayers can argue that they bought cryptocurrency merely as a hobby or as a long-term investment.
   However, if a business arises as a by-product of a hobby or other non-commercial activities, its profits could also be subjected to tax.
   This is seen in the tax case of *Hawes v Gardiner (37 TC 671)* where a taxpayer bred and trained dogs as his hobby. The General Commissioners found that the selling of puppies for substantial prices by the taxpayer was in the nature of trade and subjected the profits from the sale of puppies to tax.
   In the current circumstances, the trading of cryptocurrency may be subjected to tax. The taxable transactions occur every time the cryptocurrency is traded in virtual exchanges. The blockchain ledger will have records on the transacted prices and time of transfer. The taxpayers have to subtract the cost of the cryptocurrencies against the selling price to determine the gain or loss. In this regard, the taxpayers must keep track of their cryptocurrency transactions continuously to report the gain or loss on each cryptocurrency transaction properly.
   The application of the 40 year old principles of the badges of trade from *NYF Realty Sdn. Bhd. v Controller of Inland Revenue* could still be applicable in determining whether there is an intention to trade:

(1) ***Subject matter of the transaction***
   Unlike enterprises, Bitcoin has no business, no intrinsic value, no cash flows and no balance sheet. It is a speculative instrument[18] and which is normally the subject of investment.
   This is seen in the tax case of *Dr. Zanariah Binti Ramli v Ketua Pengarah Hasil Dalam Negeri,* where the Court of Appeal held that the gains made from the bond market is subject to income

tax based on the grounds that the appellant had in fact been actively trading in bonds during the period.

Numerous or repetitive acts done by the appellant would suggest the action was in the nature of a trade.

In view of the above, holding cryptocurrency would likely have the characteristic of an asset held for trading in the eyes of the IRBM.

(2) ***Period of ownership***

The period of ownership of the cryptocurrency can be controlled by the taxpayer. The benefit of holding cryptocurrency is that there are no holding costs unless the taxpayer has borrowed money to purchase this cryptocurrency. Arguably if a taxpayer has held Bitcoin since 2009, he could argue that he is a long-term investor for the currency. However, for all recent transactions, it would likely be considered an adventure in the nature of a trade and be subjected to tax.

(3) ***Frequency of transactions***

This is the easiest way to identify speculators of cryptocurrency. There will be multiple cryptocurrency transactions to and from the same address or wallet within a short period of time. All Bitcoin transactions are public, traceable and stored in the Bitcoin network. In the present case, if the IRBM is able to look behind the Bitcoin pseudonyms and identify the owner of the cryptocurrency wallet, the IRBM can further investigate the owner of cryptocurrency and tax accordingly.

(4) ***Alteration of property to render it more saleable***

Due to the nature of cryptocurrency, the taxpayer is unlikely to be able to alter the cryptocurrency to make it more saleable.

(5) ***Methods employed in disposing of property***

If special exertion was made to find or attract purchasers for the cryptocurrency, it might indicate an intention to sell it for profit. However, in the current circumstances, it is easy for the taxpayer to buy and sell cryptocurrency with the cryptocurrency exchanges. Further, cryptocurrency is currently a very liquid asset that can be spent on goods and services just like conventional currency. Arguably, this badge

of trade may not paint a clear picture of the intention of the taxpayer.

(6) ***Circumstances responsible for sale***
The principle here is that if the sale of cryptocurrency is occasioned by a sudden emergency or unanticipated need for funds, such facts will tend to indicate that the cryptocurrency was not acquired for the purpose of resale at a profit and that the sale was not pursuant to a profit making undertaking or scheme. This principle involves a subjective study into the surrounding circumstances relating to the sale of cryptocurrency and will be determined according to the merits of each individual case.
Based on the analysis of badges of trade above, the cryptocurrency speculators may be considered as engaging in an adventure in the nature of a trade and their gains will be taxable.

IS THERE AN UPSIDE?

On the bright side, if the taxpayer is held to be engaging in an adventure in the nature of a trade, all expenses wholly and exclusively incurred in earning that income will be deductible under Section 33(1) of the ITA provided that they are not specifically disallowed under Section 39 of the ITA. However, it is difficult to draw the line between capital versus revenue in an actual situation where a person may initially purchase cryptocurrency for investment purposes but subsequently uses it to settle debts. The question that arises would be, is this still a capital transaction? If not, which value to be used for tax purposes?

For speculators, they might even be able to claim their interests costs paid to hold the cryptocurrency.

On the other hand, for Bitcoin miners, expenses such as electricity and salary may be eligible for tax deductions and the Bitcoin mining computers may be eligible for capital allowances pursuant to Schedule 3 of the ITA.

SO WHAT'S NEXT?

The IRBM has fired the first salvo in opening an investigation into Luno, it remains to be seen whether their enforcement actions would be limited to cryptocurrency exchanges or will it be expanded to the numerous merchants that have started accepting cryptocurrencies in their businesses.

How to tax a decentralised currency powered by blockchain technology is the question on every government regulator's mind. It is clear that the tax laws have to play catch up or potentially lose out on a digital gold mine of tax revenue.

Disclaimer: This article does not seek to address all tax issues associated with cryptocurrency and all views expressed are purely the personal opinion of the author.

[13] *Inland Revenue Authority of Singapore, Income Tax Treatment of Virtual Currencies, on 2 March 2018, https://www.iras.gov.sg/irashome/Businesses/Companies/Working-out-Corporate-Income-Taxes/Specific-topics/Income-Tax-Treatment-of-Virtual-Currencies/.*

[14] *The Malaysia Reserve, No ban on cryptocurrency tradings, says Johari, on 2 March 2018, https://themalaysianreserve.com/2018/01/02/no-ban-cryptocurrency-tradings-says-johari/.*

[15] *Bank Negara Malaysia, Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6), on 2 March 2018, http://www.bnm.gov.my/index.php?ch=57&pg=538&ac=680&bb=file.*

[16] *The Star Online, IRB: Cryptocurrency not regulated but traders are still subject to Malaysian income tax law, on 2 March 2018, https://www.thestar.com.my/tech/tech-news/2018/01/19/irb-cryptocurrency-not-regulated-but-traders-still-subject-to-malaysian-income-tax/.*

[17] *Paragraph 28 Schedule 6 of the Income Tax Act 1967.*

[18] *Starbizweek, Bitcoin: Utter pipedream, on 10 February 2018, https://www.thestar.com.my/business/business-news/2018/02/10/bitcoin-utter-pipedream/.*

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TAXES

IMPACT ON TOTAL RETURNS OF PROPERTY AND REAL ESTATE INVESTMENT TRUSTS

Kenneth Yong Voon Ken and Lee Fook Koon

ASK ANY INVESTOR WHAT ARE THE TOP THREE SUCCESS FACTORS IN PROPERTY INVESTING, AND THE LIKELY REPLY IS: LOCATION, LOCATION, LOCATION.

UNDOUBTEDLY, THIS AGE-OLD MANTRA HAS PROVEN INVALUABLE IN GENERATING HANDSOME RETURNS FOR PROPERTY PUNTERS OF PAST DECADES. BUT CURRENT GOVERNMENT POLICIES HAVE THRUSTED FORWARD A FOURTH FACTOR – TAXATION – WHOSE IMPORTANCE IN ENHANCING OR ENCUMBERING TOTAL INVESTMENT RETURNS MAY NOT BE FULLY APPARENT TO PROPERTY INVESTORS.

Taking the perspective of an individual investor (natural person), this article explores the various taxes that chip away returns from property investing, and some tax incentives that sweeten the deal for investors.

MODES OF PROPERTY-RELATED INVESTMENTS

Past decades saw 'purist' property investors who patiently held onto land and buildings – sometimes for a lifetime – to derive investment returns in the form of rental income and (hopefully) huge sales proceeds from an eventual windfall disposal.

However, capital markets of today provide an alternative means to gain exposure to property-type returns: Real Estate Investment Trusts (REITs).

Malaysian REITs are a specialised type of unit trust that predominantly hold non-residential property and derive rental income therefrom. Investors buy units in REITs (which may or may not be traded on the Bursa Malaysia stock exchange), and in so doing, own a piece of the underlying properties and their income stream, without themselves being weighed down by a chunky illiquid asset purchase.

As such, Malaysian investors can gain access to property returns by holding properties directly, or by investing in REITs. But the return characteristics of holding properties versus investing via REITs is somewhat different, partly due to the numerous tax-friendly policies accorded to REITs.

TOTAL RETURNS

For all forms of property-related investments (be it direct property holding or through REITs), the investment return is computed using the formula in **Diagram 1**.

Diagram 1

$$\text{Total Return \%} = \frac{\text{Cumulative Net Rental (or distribution from REIT) Income after tax} + \text{Net Gain on Disposal after tax}}{\text{Total Acquisition Cost after tax}}$$

(as a percentage)

This formula breaks down the Total Return percentage into its constituent parts, each of which is impacted by different taxes, namely Income Tax, GST, Stamp Duty and Real Property Gains Tax. Seldom will a taxpayer face so many different taxes on essentially the same investment over its life-cycle – which makes property investing rather unique.

Investment gains and taxes sit on opposite ends of the return spectrum, with taxes placing a drag on the Total Return percentage. Given that property investments go head-on with four different types of taxes, the impact of tax weighs heavily on property return outcomes. In short, tax is important to property returns.

INCOME TAX ON RENTAL STREAM

In Malaysia, rental income is taxable under Section 4(a) and Section 4(d) of the Income Tax Act 1967. Income taxes reduce the 'Income' portion of Total Returns.

For a tax resident individual investor who holds property directly, income tax is levied on the rental income at scale rates ranging from 0% to 28% (chargeable income exceeding RM1m is taxed at 28%).

Interestingly, 2018 Budget introduced a novel measure of 50% income tax exemption on rental income received by Malaysian resident individuals where:

(a) The rental income received does not exceed RM2,000 per month for each residential home property;

(b) The residential home must be rented under a legal tenancy agreement between the owner and the tenant; and

The tax exemption is given for a maximum period of three (3) consecutive years of assessment.

This first-time incentive has twin objectives: encourage landlords to lease out their residential properties at affordable rates; and stimulate investments in the residential property market. What's more, landlords can enjoy this exemption for more than one property, making the potential tax savings scalable and sizeable.

However, only residential assets are scoped under this exemption; rental income from commercial, retail, hospitality and industrial properties are still taxable as usual.

INCOME TAX ON REIT PROFITS

Meanwhile, REITs are given special exemption on their income. Section 61A of the Malaysian Income Tax Act 1967 provides that REITs which distribute no less than 90% of their total income for a year of assessment, enjoy "Tax Flow Through" status, effectively granting REITs tax exemption on REIT-level profits.

However, an unexpected change was introduced from Year of Assessment 2017 onwards. Pursuant to Public Ruling 5/2017, a REIT that is not listed on Bursa Malaysia "would not enjoy any exemption from tax … even if it distributes 90% or more of its total income".

This is a departure from the previous rule which granted indiscriminate exemption to both listed and unlisted REITs, but the new rule still preserves the tax-friendly quality of listed REITs which have garnered much interest among smaller and yield-seeking investors over the past decade.

Taking a real world view, the audited gross rental income of six prominent shopping mall REITs alone exceeded a staggering RM 2.7 billion for financial year 2016, all of which has been exempted, representing huge annual tax savings at the REIT level. See **Table 1**.

Table 1: Annual Gross Rental Income of selected "Mall" REITs

"Mall" REIT	Iconic properties under this REIT	Annual Rental
CapitaLand Malaysia Mall Trust	Sungei Wang Plaza, Tropicana Mall, The Mines, East Coast Mall and Gurney Plaza.	RM292m
Hektar REIT	Subang Parade, Mahkota Parade, Wetex Parade, Capital Square and Landmark Central.	RM124m
IGB REIT	Midvalley Megamall and The Gardens.	RM395m

KLCCP Stapled Group	Suria KLCC Mall and Petronas Twin Towers.	RM1,066m
Pavilion REIT	Pavilion Mall, Pavilion Tower, Intermark Mall and Da Men Mall.	RM388m
Sunway REIT	Sunway Pyramid Mall and Hotel, Sunway Putra Mall and Hotel, Sunway Resort Hotel, Sunway Carnival Mall and other hospitality buildings	RM507m
Sub Total		RM2,772m

INCOME TAX ON REIT DIVIDENDS

Even though REIT profits generally do not suffer any tax, REIT distributions are taxable in the hands of the REIT unitholders (individual investors).

Section 109D and Schedule 1 of the Income Tax Act 1967 further provides that the distributions distributed by REIT to the REIT unitholders are only taxed at 10% in the hands of individual investors (natural persons). Recall that resident taxpayers would normally suffer income tax of up to 28% on their chargeable income. This preferential tax treatment grants a meaningful boost to the 'Net Rental Income' portion of Total Returns, especially for investors at tax brackets significantly above 10%.

Unfortunately, this preferential tax rate of 10% for individual investors in REITs is only applicable until year of assessment 2019. It is hoped that this incentive (which was last extended in 2016) would again be renewed beyond 2019.

Malaysian REITs have acquisitions in an array of property types, such as properties in plantation, commercial, retail, hospitality, hospitals, industrial space and even education, but none in the residential space.

This creates an interesting dichotomy of tax-favoured investment paths: individual investors can enjoy 50% exemption on certain residential-rents but not on other property types; while investors seeking non-residential properties may be drawn to listed REITs as they potentially enjoy 100% tax exemption on (non-residential) rents pursuant to Section 61A.

STAMP DUTY ON ACQUISITION

When an individual investor or a company acquires property, there is stamp duty on the transfer of title. The stamp duty rate is shown in **Table 2**.

Table 2: Stamp duty rate for property transfers

Property value	Stamp duty rate
On first RM100,000	1%
On next RM400,000	2%
Portion exceeding RM500,000	3%
Budget 2017 initially proposed stamp duty of 4% for the portion exceeding RM1m. However, the Ministry of Finance announced on 20 December 2017 that the stamp duty would remain at 3% for this band.	

In commercial practice, stamp duty is usually borne by the purchaser (investor) of the property; thus, adding to the cost of acquisition of the property and reducing future capital gain. Furthermore, Total Returns are diluted because of a larger denominator in the Total Return equation.

STAMP DUTY EXEMPTION FOR REITs

By contrast, when a REIT acquires a property, the transfer is exempted from stamp duty pursuant to Stamp Duty (Exemption) (No. 4) Order 2004 and Stamp Duty (Exemption) (No. 27) Order 2005. This translates into a sizeable savings of close to 3% on the acquisition price of the property investment, adding to the future capital gain and enhancing the Total Return equation.

Recent real world examples of mega acquisitions announced by certain Malaysian REITs are shown in **Table 3.**

Looking at things in isolation, a stamp duty of 3% does not seem

Table 3: Recent mega acquisitions announced by certain Malaysian REITs

REIT	Property	Acquisition value
Amanahraya REIT	Intermark Vista Tower in Kuala Lumpur (2017)	RM455m
Al'Aqar REIT	KPJ Selangor Specialist Hospital Car Park Building (2017)	RM13m
Al-Salam REIT	21 KFC/Pizza Hut restaurant properties and 1 warehouse/office property in Johor (2017)	RM155m
Al-Salam REIT	Mydin Hypermarket Gong Badak	RM155m
Axis REIT	Building and industrial land near Kuantan Port (2017)	RM155m
Alpha REIT (unlisted)	International School @ Park-City and land in Desa Park City (2017)	RM140m
Hektar REIT	1Segamat Shopping Centre in Johor (2017)	RM100m
Sunway REIT	Sunway Clio (2017)	RM340m
Sunway REIT	Industrial property in Shah Alam (2017)	RM91m
YTL Hospitality REIT	Majestic Hotel in Kuala Lumpur (2017)	RM380m
Sub Total		RM1,984m

very significant. But as revealed by the sheer size of real world acquisition transactions (2017: RM1.9 billion), the stamp duty involved would have piled up to approximately RM59m, which by any account, is a colossal sum.

REITs aside, when individual investors buy REIT units, they are exempted from stamp duty pursuant to Paragraph (c) of Exemptions under Item 32, First Schedule of the Stamp Act 1949, versus up to 3% stamp duty for individuals buying a property directly. Clearly, investments in REIT units provides sizeable savings in stamp duty.

GST ON ACQUISITION

Following Goods and Services Tax (Exempt Supply) Order 2014, residential and agricultural land are exempted from GST. Therefore, when individual investors or REITs acquire residential or agricultural properties, there is no GST on acquisition, and investors are indifferent between either investment path.

However, other property types (e.g. industrial and commercial land) are subject to GST – adding a 6% GST on to the cost of acquisition of the property. Here, a reprieve of sorts is available for GST registrants.

Section 38 of the Goods and Services Tax Act 2014 allows a GST-registered person who incurs any GST Input Tax to claim back Input Tax Credits. Effectively, for the GST-registrant, GST does NOT add to the cost of acquiring a supply such as a property.

But what about an individual investor who is not GST-registered? Being a non-registrant, such individual would not be able to claim back GST on acquisition of a commercial or industrial property. The GST of 6% will add to the cost of acquisition of the property – raising the cost of the property by a significant amount. This has three effects: making the acquisition more costly; reducing future capital gain; and lowering the Total Return percentage through a higher denominator.

By contrast, when an individual investor invests in REIT units, the transfer and ownership of securities are exempt supplies, allowing investors to side-step some of the GST involved in direct acquisition of non-exempt properties.

At the very least, GST forces upon individual investors a rethink, or a recalculation, of the acquisition cost of a non-exempt property, making

such investments more expensive (after including GST) to embark on for non GST-registrants as compared to investing in REIT units

TAXES ON DISPOSAL OF INVESTMENT

From the perspective of the individual investor, realisation of investment can take two forms:

(a) The disposal of the property directly held by the investor; or
(b) The disposal of the units held by the investor in a REIT.

Where individual investors dispose of an investment property, any gain on disposal is subject to Real Property Gains Tax (RPGT) at rates ranging from 0% to 30% depending on holding period as shown in Table 4. Similarly, when REITs dispose of property, the RPGT rates are as per **Table 4**.

However, even if the REIT had not disposed of any property, the individual investor can sell his units in the REIT to realise a gain on investment. In this case, the disposal of units in a listed REIT are not subject to RPGT as a listed REIT is, by technical definition, not a

Table 4: RPGT rates

Date of disposal	RPGT rate – disposal by Malaysian individual	RPGT rate – disposal by REIT
Disposal within 3 years	30%	30%
Disposal within 4 years	20%	20%
Disposal within 5 years	15%	15%
Disposal in the 6th year or after	NIL	5%

real property company. Since REIT investors do not suffer any RPGT on realisation of their investments, thus, enhancing their 'capital gain' portion of the Total Returns.

In the month of January 2018 alone, the shares of KLCCP Stapled Group (owner of the iconic KLCC Twin Towers) that were sold on the Bursa Malaysia stock exchange was valued at approximately RM66m.

If disposal of REIT units had been subjected to RPGT, the quantum of RPGT in just one single month alone could have been sizeable.

IMPORTANCE OF PROPERTY-TYPE EXPOSURES

Recent moves by major fund managers hint at the prevailing mood towards exposure to property-related returns. The Employees Provident Fund (EPF) had been diverting more investments into property-type assets since 2009 to hedge against inflation. Tan Sri Abdul Wahid Omar, chairman of Permodalan National Berhad – Malaysia's largest fund manager – had cited that PNB would "reduce cash and invest more in private investments, into real estate, and fixed income" (source: The Edge, August 2017).

In short, returns drawn from property-related investments are seen as an important component towards a diversified asset allocation strategy. As property investments gain prominence, tax policies that enhance Total Returns of property-related assets can only increase in importance.

CONCLUSION

Arguably, property investors face the most varied number of taxes: Income Tax, Stamp Duty, GST and RPGT. Taxes generally dilute the Total Return percentage from property investments. However, listed REITs carry a handful of tax-friendly characteristics that allow them to deliver enhanced Total Returns through partial/full exemption of Income Tax and Stamp Duty, flow-through of GST, and no RPGT on gains from realisation of REIT units at the investor level.

These tax advantages may have contributed to the tremendous growth of the REIT market in Malaysia as an alternative to direct property investing. In fact, the market capitalisation of the Malaysian REIT sector has seen an explosive 10-fold increase in the last decade (market capitalisation of RM44 billion as at September 2017 versus RM5 billion in 2007).

But tax savings alone do not guarantee the success of property investing. With the prevalent oversupply in many property segments, with rising interest rates and with cautious bank lending (all of which dampen the near term outlook), property investors seeking an edge on their returns probably still need to fall back on the age-old wisdom of "location, location, location".

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SCOPE AND MEANING OF "ENTERTAINMENT" IN SECTION 39(1)(l) OF THE INCOME TAX ACT 1967

Dr. Arjunan Subramaniam

By virtue of Section 39(1)(l), Income Tax Act 1967, only 50% of any expenses incurred in the provision of "entertainment" including any sums paid to an employee of that person for the purposes of defraying expenses incurred by that employee in the provision of entertainment, is allowed as a deduction for tax purposes. Prior to year of assessment 2004 (Act 631 of 2003), all "entertainment" expenditure was disallowed with the exception of those provided in the proviso to Section 39(1)(l).

SECTION 18, INCOME TAX ACT 1967, DEFINES "ENTERTAINMENT" AS FOLLOWS:

"ENTERTAINMENT" INCLUDES:

(a) the provision of food, drink, recreation or hospitality of any kind; or
(b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a), by a person or an employee of his, with or without any consideration paid whether in cash or in kind, in promoting or in connection with a trade or business carried on by that person;

The scope and meaning of "entertainment" is still relevant to taxpayers. This article examines with decided cases the parameters of "entertainment".

The leading case on this subject is ***Aspac Lubricants (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2007] 6 MLJ 65***. This case set the guiding light for subsequent cases. The facts in brief were:

"The appellant was a private limited company, blending and selling lubricants for motorised vehicles. For years of assessment 1989, 1990, 1991 and 1992 the appellant gave away certain promotional items to its customers and dealers. There were two categories of promotional items, viz:

(i) First, those given to dealers ('the dealers' items') who marketed the appellant's products to members of the public.
(ii) Those given away to customers ('the customers' items') who purchased the appellant's products. These items were mugs, 'T' shirts and umbrellas which carried the appellant's logo."

The issue before the court was whether the monies incurred by the Appellant in providing the customers' items were - "expenses wholly and exclusively incurred during that period by that person in the production of gross income?" or were **they "expenses incurred in the provision of the entertainment" as contended by the Revenue.**

The Court of Appeal cited Romer LJ's judgement in ***Bentleys, Stokes & Lowless v Beeson (1952) 2 All ER 82,*** thus:

> "Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purpose for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purpose of business, that is, solely with the object of promoting the business or its profit earning capacity? It is, as we have said, a question of fact.
>
> And it is quite clear that the purpose must be the sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes; ..."

AND, THE COURT OF APPEAL HELD:

> "Turning now to this appeal, I think that the proper approach in determining whether the expenses in respect of the customers' items were incurred in the production of income, is to examine the

true nature of the transaction between the appellant and its customers. In my judgement the expenses incurred in respect of the customers' items did not amount to entertainment within Section 39(1)(l). In arriving at my conclusion on this point, I find it unnecessary to go further than Romer LJ's judgement in ***Bentleys, Stokes & Lowless v Beeson [1952] 2 All ER 82*** where he said this:

Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity?"

Thus, the Court of Appeal ruled that customers' items were not "entertainment" and fully deductible under Section 33(1) of the Income Tax Act 1967.

Aspac (supra) was cited in the case of ***Eli Lily (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Rayuan Sivil NO: W-01-138-10)***. The facts in brief were as follows:

(i) The Appellant was in the business of trading in human pharmaceutical and animal health products.

(ii) The Appellant incurred the following expenses for the respective years of assessments shown below as **Table 01**:

THE ISSUE WAS:

"Whether the Congress Expenses of RM776,282.00 for year of assessment 2001 and RM1, 131,419.00 for year of assessment 2002 incurred under Section 33 (1) of the Income Tax Act 1967 should be disallowed as entertainment expenses under Section 39 (1)(l), Income Tax Act 1967."

Upon the above facts, the learned Special Commissioners agreed that the expenses under dispute were not "entertainment" and fully deductible. However, the High Court overturned

the decision of the learned Special Commissioners. The case went up to the Court of Appeal and the High Court decision was overruled upon the authority of ***Aspac*** (supra) and ***Amway*** (infra).

The scope of "entertainment" was even prior to ***Aspac*** (2007)(supra) examined in ***United Detergent Industries Sdn Bhd v Director General of Inland Revenue(1999) 1 AMR 462***. The facts in brief were:

(i) the Appellant was a manufacturer of detergents. And to boost sales, the Appellant offered consumer premium items to customers. The consumer items were purchased by the Appellant together with the detergents.

(ii) The Director General of Inland Revenue ruled that the cost of the consumer items given to the customers were "entertainment". The learned Special Commissioners agreed with the Director General of Inland Revenue. The High Court overruled the Special Commissioners and held the consumer items were not "entertainment", viz:

Table 01

Year of Assessment	Amount and Nature of Expense	Amount of Tax in Dispute
2001	776,282.00 – Congress Expenses	419,521.08
2002	1,131,419.00 – Congress Expenses	667,975.16

"The Special Commissioners had ignored the fact that the said items were not given to the Appellant's customers gratuitously and without consideration, and that they were given only upon the option made by concerned customers. For the reason that the consumer premium items were given away by the Appellant to its customers who were wholesalers and retailers, not as a free gift but subject to the payment of the cost incurred by the Appellant in the purchasing of the items from its suppliers, and also that upon the wishes of the Appellant's customers only in respect of the items, it can no longer be considered as a form of entertainment upon its customers by the Appellant. This is so because there is no hospitality of any kind on the part of the Appellant being extended to its customers by charging them the cost incurred in the purchase of the items on their behalf. The customers on their part are free to decide for themselves whether they need those items or not."

The scope and meaning of "entertainment" was also considered in the tax jurisdiction of Australia in the case of ***Commissioners of Taxation v Amway of Australian Limited (2004) FCAFC 273:***

(i) In the case of ***Amway*** (Supra), the facts in brief were :
Each year Amway organised exclusive conferences or seminars for its direct distributors known as the Australian Leadership Seminars. These seminars were held in good quality hotels at a holiday destination. The seminars were held overseas, although two were held in Australia. To be eligible for an invitation to attend, distributors had to qualify by achieving a specified number of points based on the distributor's performance during the previous year.

(ii) The legislation considered in ***Amway*** (Supra) reads as follows:
"[Non-deductible losses and outgoings] A deduction is not allowable under Section 51 in respect of losses or outgoings incurred after 19 September 1985 to the extent to which they are in respect of the provision of entertainment".
"A reference in this section to the provision of entertainment is a reference to the provision (whether to the taxpayer or to another person and whether gratuitously, pursuant to an agreement or otherwise).
(a) entertainment by way of food, drink or recreation; or
(b) accommodation or travel in connection with, or for the purpose of facilitating entertainment to which paragraph (a) applies (whether or not the accommodation or travel is also in connection with something else or for another purpose),
whether or not -
(c) business discussions or business transactions occur;
(d) in connection with the working of overtime or otherwise in connection with the performance of the duties of any office or employment;
(e) for the purposes of promotion or advertising; or
(f) at or in connection with a seminar."

(iii) The court held the air travel, and hotel expenses were not "entertainment" but incurred in the production of income. Only the expense of a gala dinner was disallowed as entertainment.

(iv) The court further held:
"It follows therefore, our view, that the whole of the amount expended for meals (which

include drink) other than the gala dinner expenditure conceded not to be deductible, and the amounts expended for accommodation or travel in respect of the seminar will continue to be deductible to Amway under the provisions of Section 51 (1) and not precluded from deductibility under Section 51AE(4).

Amway (supra) was cited in ***Eli Lily*** (supra) and in the case of ***Societe*** (infra).

In the case of ***Societe Francaise De Cosmetiques Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (R2-14-02-05)***, the scope of "entertainment" was also considered. The facts were:

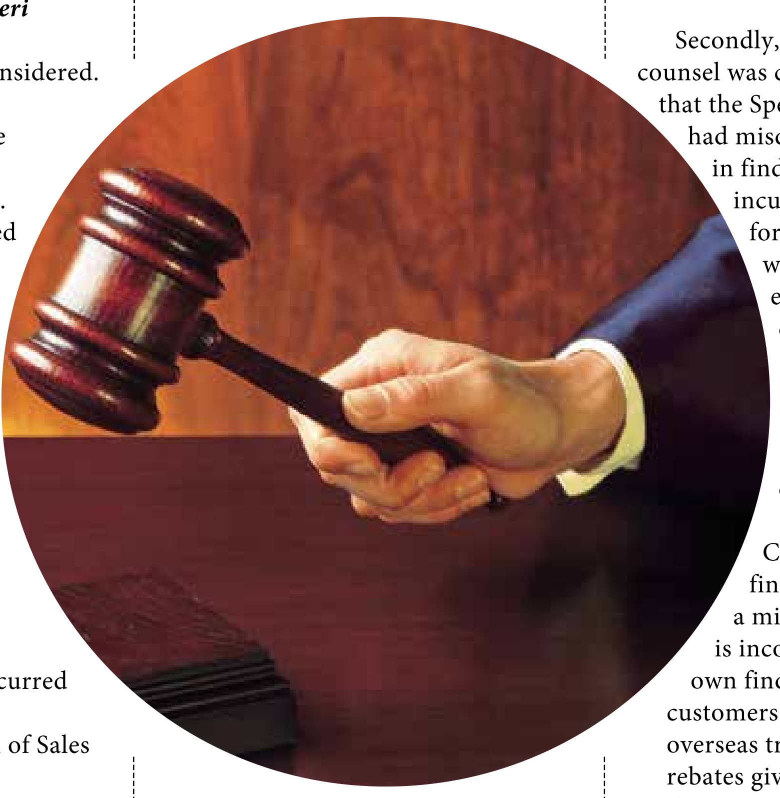
(i) The Appellant was in the business of marketing dermatological products.
(ii) The Appellant introduced several incentive schemes to its Salon Owners (the customers) namely, products rebates given by the Appellant to the customers who meet sales targets to go on their overseas trips organised by the Appellant.

THE ISSUES WERE:

"1. Whether expenses incurred in respect of:

(i) overseas travelling claim of Sales Staff of the Appellant,
(ii) cash rebates given to customers of the Appellant who met target purchases from the Appellant and used by the customers to go on an overseas trip paid by the customers but organised by the Appellant,
(iii)(a) cash rebates given to Appellant's customers who met target purchases of Appellant's products from Appellant,
(b) other benefits also arising from cash rebates, given to Appellant's customers who met target purchases of products from Appellant,
(iv) costs of promoting sales by way of training Appellant's customers in products under the caption "professional work" in the following categories:
  (a) products launches,
  (b) product training of customers, and
  (c) specialised training of customers.

are wholly and exclusively



incurred in production of income, within the meaning of Section 33 of the Income Tax Act 1967.

2.Whether the expenses incurred by the Appellant for the aforesaid activities amounting to entertainment's expenses within the ambit of ***Section 39(1)(I)*** of the Income Tax Act 1967"

The High Court held all the expenses were not "entertainment" and allowable deduction.

"Thus on the facts as found by the Special Commissioners I find that the Special Commissioners had misdirected themselves when they found that the "main objective of the scheme of overseas trips was for sightseeing and therefore it is not entertainment", (Page 12 of the Case Stated) because "at the end of the day" the dominant if not the sole purpose of the trips was to promote the business of the Appellant's (amongst the customers or Salon Owners).

Secondly, the Appellant's counsel was correct in suggesting that the Special Commissioners had misdirected themselves in finding that the expense incurred by the sales staff for travelling overseas was incidental to the entertainment of the customers and therefore falls within the exception to proviso (i) of Section 39(1)(l) of the Act and hence not deductible.

The Special Commissioners finding constituted a misdirection as it is inconsistent with its own finding of fact that the customers paid for their own overseas trip from the cash rebates given to them or out of their own pocket. (Pg. 13 of the Case Stated).

In relation to issue (ii) i.e. cash rebates given to customers of the Appellant who met target purchases, I have to agree with the learned counsel for the Appellant that applying the principle propounded by the Court of Appeal in Aspac, the cash rebates cannot be entertainment because:

(i) there was consideration in the form of sales targets that must be met by the customers to qualify for the cash rebates;
(ii) the sole object of the cash rebates was to promote the Appellant's business. This is based on the finding of fact of the Special Commissioners who stated at Pg. 13 of the Case Stated:

"From the facts and evidence presented, it is manifestly patent that the overseas trip was paid by the customers in that they utilised the cash rebates received on reaching the target purchases of the Appellant's goods.

The cash rebates are given as an incentive to increase the sale of the Appellant's products and promote the image of the Appellant."

In the light of the above finding I find that the Special Commissioners had committed an error of law in concluding that the cash rebates is a form of entertainment within the meaning of Section 39(1)(l) and hence do not qualify as deductible expenses under Section 33 (1) of the Act."

The Court of Appeal upheld the judgement of the High Court (2015) MSTC ¶30-099.

Further the concept of "entertainment" was also examined in ***NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (In the Court of Appeal of Malaysia (Appellate Jurisdiction) Civil Appeal No. W-01-149-2010)***. The facts were:

(i) "The appellant is in the business of marketing of burial plots, urn compartments and funeral packages. In the course of its business the appellant needs the services of marketing personnel; and so it appoints agents to undertake the marketing functions. The agents are paid commissions for their work. But with the aim of motivating agents to increase sales, the appellant introduced incentive schemes. Under the incentive schemes, the agents on achieving certain set sales targets are paid various types of incentives. One type of incentive is cash incentive."
(ii) The Court of Appeal overturned the decision of the High Court and restored the decision of the Special Commissioners to the effect that the cash rebate were not "entertainment", viz:
"With respect, on our part, we are unable to agree with the decision and reasoning of the learned High Court Judge. In our judgement, the cash incentive payments are not 'hospitality' expenses, and, hence, are not entertainment expenses. In other words, the cash incentive payments do not come under item (l) of subsection (1) of Section 39 of the Act. It follows then that the appellant is entitled to the deductions claimed in respect of the cash incentive payments.

CONCLUSION

The importance of the above cases for taxpayers is to categorise expenses with two different classes, viz:
(i) Those expenses which are promotional expenses and fully deductible under Section 33(1) of the Income Tax Act 1967, and
(ii) "entertainment" expenses which are 50% deductible under Section 33(1) of the Income Tax Act 1967.

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ESOS EXPENSES DEDUCTIBLE?

Vijey M Krishnan & Chang Ee Leen

DEDUCTIONS. A PERENNIAL ISSUE FOR TAXPAYERS. TAKE A DEDUCTION AND RISK HEFTY PENALTIES. DON'T TAKE A DEDUCTION AND YOU END UP PAYING TAX ON INCOME YOU NEVER HAD. IS THE EXPENSE "WHOLLY AND EXCLUSIVELY INCURRED IN THE PRODUCTION OF GROSS INCOME?"

In the recent case of ***PKCP(R) 72/2014, 73/2014 & 74/2014***, the issue before the Special Commissioners of Income Tax (SCIT) was whether charges levied on the employer by its ultimate holding company with respect to employee share option benefits given to its employees are deductible under Section 33(1) of the Income Tax Act 1967 (the Act).

Employee share option schemes (ESOS) are common. They can go by many names and are essentially a form of perquisite (perk) given to employees. Employees are either given shares for free or offered the option to purchase shares at a discounted price. These shares may be shares of the employer itself or that of its holding company. More commonly, it will be shares of the listed holding company since these shares will be tradeable.

A benefit of this nature can be taxable under Section 13(1) of the Act as a perquisite in respect of having or exercising an employment subject to various requirements. Whether it is taxable in the hands of the employee and if yes, how it is so taxable has been the subject matter of dispute before the courts.

But this case is not about the regular run of the mill aspect of taxability of perks received. This is about the flip side. Is the employer company allowed to take a deduction for expenses incurred in providing ESOS to its employees? The present case, was about the amount charged by the ultimate holding company to the employer, being the cost or value of the share or share option granted to the employees. From the outset we would highlight that the charges were actually paid by the employer. They were not

mere accounting entries.

Is it necessarily so that if the employee brings the benefit to tax, the employer must at the same time get a deduction for the relevant expenses incurred? This seems to be something that the Inland Revenue Board Malaysia (IRBM) was considering when it asked for an adjournment on the first hearing date itself.

Documents were requested to show that the employees had brought the benefits to tax. It appeared that this could be a handy way to reach an out of court settlement. Clear supporting evidence was provided to the IRBM but the IRBM came to the view that it was not relevant to the issue of deduction.

NEGOTIATIONS ARE OVER. IT IS NOW UP TO THE COURTS.

Back to the facts. The taxpayer company provides management services to its group companies. The group companies are involved in the oil and gas industry. The ultimate holding company is listed in the United States of America. As part of the group's global human resource policy, stock based compensation was introduced for employees in its group, forming part of each group company's' overall remuneration package. The purpose of offering this was to incentivise and provide reward opportunities to employees in the group. The stocks offered were stocks in its listed ultimate holding company.

The employees are offered various types of stock based compensation such as stock options, where employee are given a right or option to purchase stocks at a pre-established price; or stock awards, whereby employees are rewarded with stock ownership in the holding company; and employee stock purchase plan, whereby employees are entitled to purchase shares at a discount to the market price. For convenience, we will refer to all these stock based compensation as ESOS. The main purpose of offering ESOS to their employees is to *"attract, motivate and retain highly competent employees and to provide a means whereby selected employees can acquire and maintain stock ownership and receive cash awards, thereby strengthening their concern for the long-term welfare of the Company."*

ESOS are granted at the company's discretion. It all largely depends on the employee's performance and thereafter the management's recommendation. The employee stock purchase plan nevertheless is offered across the board.

Technically, how the ESOS worked in the current case is that ESOS were offered to the employee. Thereafter, depending on the type of ESOS, the employee would either be entitled to the ESOS free of charge or he/she will have to pay a certain fixed price or discounted price for the stock. The taxpayer company will then be charged by the holding company for either the stock price or the value of the stock option (which is calculated based on an internationally recognised model for the calculation of the value of an option), depending on the type of ESOS offered or granted to its employees. Basically, the taxpayer is giving perks to its employees. It needs to pay its holding company for the value of the perks which are given at its behest to its own employees. All these would be necessary to meet with the arm's length requirement.

The taxpayer company should bear the cost of the benefits given to its employees. The costs should not be borne by the holding company.

Based on professional advice, the taxpayer had taken a deduction under Section 33(1) of the Act for the ESOS expenses in the years of assessments 2007 to 2009. This is on the basis that the ESOS expenses were incurred wholly and exclusively in the production of the taxpayer's gross income. The ESOS expenses are part of the employees' overall remuneration package which is the staff cost of the taxpayer. These are ordinary and recurrent human resource expenses and are therefore a fully deductible expense.

ARE ESOS EXPENSES WHOLLY AND EXCLUSIVELY INCURRED IN THE PRODUCTION OF GROSS INCOME?

The main issue in this case is of course whether the ESOS expenses qualify as a deduction under Section 33(1) of the Act.

Where sums of money are incurred for the purpose of enabling the conduct of a business on a profitable basis, then the expenditure is expenditure incurred in producing income and is hence deductible. The expenditure may not be necessary but if it was incurred for commercial expediency and to facilitate the carrying on of the business, it is considered as wholly and exclusively incurred in the production of income (see ***W Nevill and Company Limited v The Federal Commissioner of Taxation 56 CLR 290***).

The IRBM however took the view that the ESOS expenses are not deductible on the basis that the expenses are not wholly and exclusively incurred in the production of the taxpayer's gross income. The IRBM also tried to argue that the ESOS expenses are capital in nature and hence not deductible.

The Special Commissioners nevertheless disagreed with the IRBM's point of view and decided that the ESOS expenses are deductible.

In this connection, it is well-established that an employee's reward/compensation for services rendered is a deductible expense to the employer as the employees' services are rendered to produce income for the company. The courts have always accepted that whether the compensation is in cash or in kind, both are equally deductible as they are both employment payments. The reward/compensation is deductible under Section 33(1) of the Act in the same way as salaries and other perks are deductible (see ***KHK Advertising Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2001] 5 MLJ 177***).

Further, ESOS is recognised by both the Act and the IRBM to be a form of non-monetary compensation, in particular, a perquisite. The IRBM's Public Ruling No. 2/2013 on Perquisites From Employment (***"PR 2/2013"***) actually recognises that ESOS are perquisites and that perquisites are tax deductible expenses for the employer. As the IRBM are bound by their Public Rulings by virtue of Section 138A of the Act, clearly the IRBM's view regarding the company's ESOS expenses are contrary to its own views.

This point was in fact impressed upon by the Special Commissioners in deciding this case.

It was an undeniable fact of this case that in offering the ESOS, the taxpayer company paid its holding company for the stocks or stock options given to its employees. As the stocks and stock options are issued by a separate entity, there is a legal liability to pay such charges. There is a cost and value to such stocks and stock options. It cannot be given for free. Parties dealt with each other on an arm's length basis.

The fact that there is cost attached to the share or share options and that this cost is incurred by the company offering them has been confirmed by the courts. In particular, the Canadian courts in the case of ***Alcatel Canada Inc. v. Canada [2005] T.C.J. No. 98***, in deciding that the stock option benefits is an expenditure incurred, held that "… ***a very real expenditure is accomplished when shares having an established market value are sold for less than that value in the context of a scheme for the compensation of the employees who buy them. … The expenditure consists of the consideration which the Appellant foregoes when it issues its shares for less than market value…"***

Although the granting of ESOS to employees is not uncommon, the issue of deductibility of the costs incurred by the employer has not been thoroughly considered by the Malaysian courts. There are however various foreign case law authorities which have been decided in favour of the taxpayer companies. These authorities were instrumental in the determination of this case.

One highly persuasive authority is the English Court of Appeal case of ***Heather (H M Inspector of Taxes) v P-E Consulting Group Ltd [1973] 1 All ER 8***. In this case, the taxpayer company carried on a management consultancy business and had a number of professional staff. There was upheaval in the management causing the senior professional staff to be disgruntled and the taxpayer risked losing their senior professional staff. As such, the taxpayer introduced a scheme to enable the employees to obtain control of the taxpayer company. A trust fund was set up to enable the trustee to acquire shares of the taxpayer's company or its holding company which will then be held on trust for the benefit of the employees. The taxpayer made annual payments to the trustee to enable the trustee to purchase the shares.

One of the issues which arose was whether the payments made to the trustee was wholly and exclusively incurred for the purposes of the taxpayer's trade. In deciding that it was and hence deductible, the Court of Appeal held that because the company is dependent on their professional men and that the object of the scheme is to keep their goodwill, the moneys were therefore wholly and exclusively incurred for the purposes of the taxpayer company's trade.

Clearly, the Court of Appeal was of the view that where a company pays to enable its employees to obtain shares in the company and the purpose of such payment is to keep the employee's goodwill, the payment is wholly and exclusively incurred for the purposes of the taxpayer's trade. It is hence deductible.

The decision in the above case was followed by the First Tier Tribunal (Tax) in the case of ***J T Dove Limited TC00893***. In this case, the Tribunal was considering, amongst others, the issue of whether a £3 million payment, which was made by the taxpayer to the trustee of an employee benefit scheme to enable it to purchase the

taxpayer's shares, was made wholly and exclusively for the purposes of the taxpayer's trade. The taxpayer's shares held by the trustee was for the benefit of the taxpayer's former and present employees and defined family members.

In deciding that the payment made was made wholly and exclusively for purposes of the taxpayer's trade, the First Tier Tribunal similarly held that the purpose when the taxpayer made the £3 million payment was to "secure a contented and loyal workforce, and the underlying reason for that was in order to earn profits in its trade". For the purposes of its trade, it had made the payment to preserve the goodwill of the workforce as a whole, irrespective of rank and status.

In an even more recent case, ***NCL Investments Limited; Smith & Williamson Corporate Services Limited [2017] UKFTT 495 (TC)***, again a similar issue was raised i.e. whether certain expenses relating to the grant of share options to the taxpayer's employees are expenses incurred wholly and exclusively for the purposes of the taxpayer's trade and hence deductible.

The First-Tier Tribunal agreed that the expenses are wholly and exclusively incurred for the purposes of the taxpayer's trade and took a similar view that the taxpayer company's business' success depends on the availability of skilled and motivated professionals and the grant of share options to those employees is part of their remuneration package. Further, the Tribunal acknowledged that the taxpayer company was obtaining a benefit from the grant of options to their employees and hence was willing to pay an amount equal to the fair value of those options to the holding company. Such payments were therefore incurred wholly and exclusively for purposes of its trade.

The above cases highlighted that the whole purpose of making payments to provide ESOS to employees is always to ensure that the employees are contented and are willing to continue working for the employer. Having a loyal and dedicated workforce is directly related to the profitability of a company. As such, expenses incurred on employee share schemes would be expenditure wholly and exclusively incurred in the production of the taxpayer's gross income.

DO ESOS EXPENSES CREATE AN ASSET FOR THE COMPANIES?

In many of the above cases, the tax authorities tried to argue that the payments made by the companies for purposes of granting ESOS to their employees created an asset for the companies as well. The IRBM in this case similarly raised this argument.

In determining whether or not an expense is capital or revenue in nature, one would usually see if the payment was a one off payment or of a recurrent nature and also, if it was a one off payment, whether it brought into an existence an asset or an advantage for the enduring benefit of the trade (see ***British Insulated and Helsby Cables, Limited v Atherton [1926] A.C. 205***).

It is acknowledged that stocks or shares are assets and an expenditure to acquire stocks or shares may be capital in nature. However, in the current case, we must not lose sight of the fact that although payments were made for the stocks or stock options, the stocks or stock options were never acquired by the taxpayer company nor was the taxpayer company ever the owner of the stock or stock options. In this case, this fact was acknowledged by the IRBM themselves. The payment therefore does not bring into existence an asset for the taxpayer.

The taxpayer company's employees were the ones to acquire an asset while the taxpayer company is merely the payer. In the circumstances, arguments that a taxpayer company is acquiring any capital asset in return for the ESOS payment is unsupportable.

In ***J T Dove Limited,*** supra, the Tribunal had decided that the expenditure incurred to enable a trust fund to acquire shares for its employees would not create an asset or advantage of an enduring benefit to the company. An asset may have been acquired by the trustee but it was not an asset of the taxpayer. The advantage which the taxpayer had obtained for its payment was to ensure the welfare of its employees which is directly related to the facilitation of its day-to-day operations and as such is revenue in nature.

Similarly, the ESOS expenses paid by the taxpayer company in the current case is to ensure its employees' welfare and that is directly connected to its day-to-day operations. Any such expenses are revenue in nature.

As the English Court of Appeal in ***P-E Consulting Group Ltd***, supra, had held, the purpose of such payments are to "provide an incentive for the staff, to make them more contented and ready to remain in the service of the company, and also to help in the recruitment of new staff". Such expenses are not capital in nature.

A different approach was also taken by the IRBM regarding this creation of asset argument. It was argued that the employees are the companies' asset and hence, any payment incurred on retaining them is capital in nature. It's hard not to be cynical about this.

If the IRBM is correct, any expenditure the taxpayer company incurs to remunerate or reward its employees would be a capital expenditure. This would include bonuses and even ordinary wages and salaries. This point does not warrant further commentary.

ARE ESOS A FORM OF EQUITY CONTRIBUTION?

Bearing in mind that in this case, the ESOS being offered are stocks or stock options of the holding company, this question was more easily answered.

"Equity" is defined to mean "the value of the shares issued by a company" while "equity contribution" generally means cash or assets given to a company in exchange for an equity interest. As such, generally equity contribution would be made by a shareholder or a potential shareholder of a company and no others.

In this case, the taxpayer company is a subsidiary company. It was confirmed during the hearing that the taxpayer company does not acquire any stock of the holding company although it pays the ESOS expenses. As such, it cannot be an equity contribution. It is naturally not a capital expenditure.

As these are not shares or stocks in the taxpayer company, there is also no change in the taxpayer company's share capital by virtue of offering the ESOS.

PUBLIC RULINGS ON ESOS

The IRBM has issued Public Rulings with regard to ESOS, the latest one being Public Ruling No. 11/2012 on Employee Share Scheme Benefit (PR 11/2012). PR 11/2012 provides that a company that offers newly issued shares of its own / holding / subsidiary company to its employees under an employee share scheme will not be allowed deductions for the cost related to such new shares.

Public Rulings are however not law and cannot lawfully form the basis for the disallowance of the ESOS expenses. The issue of deductibility depends on the law. Public Rulings are mere interpretations of the IRBM. Case laws have decided as such.

There are various potential issues regarding PR 11/2012. Firstly, the disallowance talks only about newly issued shares. This in itself is misconceived as what is the basis for contending that there is no cost involved when issuing new shares as compared to shares already issued? Case laws have established that there is cost attached to any share or share options offered.

Secondly, why should there be no cost incurred by a company when it offers shares of its holding or subsidiary company to its employees? A company would have to pay its holding or subsidiary company for the shares offered to its employees. No reasoning was given in PR 11/2012. In fact, isn't the charge by the holding company to the employer company in line with Section 140A of the Act which requires dealings to be at arm's length basis?

In the current case, PR 11/2012 does not even apply. The appeal was in relation to years of assessments 2007 to 2009. If any, the prior Public Ruling No. 4/2004 on Employee Share Option Scheme Benefit (PR 4/2004) would apply. However, in PR 4/2004, there is no provision regarding the non-deductibility of expenses incurred for the issuance of ESOS to employees. Clearly, the IRBM itself had no particular view on the deductibility of ESOS expenses at that point of time.

THE APPLICATION OF PUBLIC RULINGS SHOULD THEREFORE BE TREATED WITH CAUTION.

In so far as this case is concerned, the SCIT acknowledges that under the relevant Public Rulings, ESOS is recognised as a type of perquisite and that under PR 2/2013, "employers are eligible to claim deduction for expenses in respect of employment of its employees, including all types of perquisites paid to the employees as provided under Section 33(1) of the ITA 1967".

CONCLUSION

On 21 November 2017, the SCIT allowed the appeal by the taxpayer company. The ESOS expenses incurred by the taxpayer are therefore fully deductible. The IRBM has filed an appeal against the decision. The appeal has not been heard. As at the date of writing this article, the Case Stated has not been prepared and therefore, the exact grounds of the SCIT's decision are not fully known. We would however add that the decision of the SCIT is in line with foreign authorities cited before the SCIT, some of which have been referred to above.

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UPDATES ON INTERNATIONAL TAX MATTERS

DEPARTMENT OF INTERNATIONAL TAXATION, INLAND REVENUE BOARD MALAYSIA

Nooriah Mohd Mainuri, Katerina Maria Abu Bakar, Mohd Khairul Huozaine Mohd Zaki, Lisa Islani & Noor Dianna Salleh

Weaknesses in current international tax rules have created opportunities for base erosion and profit shifting (BEPS). This in turn has triggered policymakers to restore confidence in the system by ensuring that profits are taxed where economic activities take place and where value is created.

To overcome these issues, the Organisation for Economic Co-operation and Development (OECD) created a 15-point BEPS Action Plan underlying three key pillars: introducing coherence in domestic rules affecting cross-border activities, reinforcing substance requirements in existing international standards, as well as improving transparency and certainty.

In addition to the BEPS Action Plans, there has been a growing emphasis by tax authorities around the world on the effective exchange of information and tax transparency both of which have proven to be important tools in the fight against tax evasion and avoidance.

This article will look into the course of action taken by Malaysia with regard to the Common Reporting Standard (CRS) on Automatic Exchange of Information (AEOI); Action 13 of the BEPS Action Plan on Transfer Pricing Documentation and Country-by-Country Reporting; and Action 15 of the BEPS Action Plan on the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

1. COMMON REPORTING STANDARD

The Organisation for Economic Co-operation and Development (OECD) has introduced the Common Reporting Standard (CRS) on Automatic Exchange of Information (AEOI) as part of a coordinated global initiative to tackle tax evasion and improve tax compliance.

It is a new standard for AEOI that governs how tax authorities in participating jurisdictions reciprocally exchange data in relation to the financial information of taxpayers on an annual basis. More than 100 jurisdictions have committed to implementing and enforcing CRS; the first exchange commencing in 2017 and the second exchange in 2018 which includes Malaysia.

A. OVERVIEW OF CRS IN MALAYSIA

In order for the exchange to take place, The government of Malaysia signed the Multilateral Competent Authority Agreement (MCAA) on 27 January 2016, which details the rules on exchange of information between participating jurisdictions, confirming the government's commitment to implement the automatic exchange of financial account information. This was followed by the signing of the Convention on Mutual Administrative Assistance in Tax Matters (MAC) to foster all forms of administrative assistance in matters concerning tax with other signatories of the Convention.

Since then, new legislations have been introduced by the government of Malaysia to ensure that every Financial Institution in Malaysia identifies reportable accounts from financial accounts maintained by Malaysian Financial Institutions (MYFI), by applying the due diligence procedures contained in the Standard for Automatic Exchange of Financial Account Information in Tax Matters (Standard) issued by the OECD. The legislations introduced are as follows:

a. Income Tax (Automatic Exchange of Financial Account Information) Rules 2016 (CRS Rules);
b. Income Tax (Automatic Exchange of Financial Account Information) (Amendment Rules) 2017 (CRS Amendment Rules); and
c. Labuan Business Activity Tax (Automatic Exchange of Financial Account Information) Regulations 2018 (CRS Regulations).

For the effective implementation of the CRS, the MYFIs must apply the CRS Rules or CRS Regulations in force at the time with reference to the Standard itself and the OECD's guidance contained in the Commentaries and the CRS Implementation Handbook. In addition, earlier this year, the Inland Revenue Board Malaysia (IRBM) issued the Common Reporting Standard Guidance Notes.

In a nutshell, the concept of CRS is for MYFIs that are covered under the scope of CRS to identify reportable accounts by applying relevant due diligence procedures as prescribed under the Standard, and report relevant information on account holders that are tax residents of reportable jurisdictions. Financial institutions that are required to report under the CRS are depository institutions, custodial institutions, investment entities, and specified insurance companies.

B. IMPLEMENTATION TIMELINE

The following are the general provision timelines which must be adhered to by MYFIs with respect to different types of accounts opened and maintained in the table below:

Subject	Timeline
Pre-existing accounts cut-off date	30 June 2017
New Account	Opened on or after 1 July 2017
Date for determining whether pre-existing Individual Account meets the high value threshold (USD1,000,000)	30 June 2017, 31 December 2017 and 31 December of subsequent calendar years
Date for determining whether pre-existing Entity Account meets the threshold for review (USD250,000)	30 June 2017, 31 December 2017 and 31 December of subsequent calendar years
Review of pre-existing High Value Individual Account must be completed by	30 June 2018
Review of pre-existing Lower Value Account must be completed by	30 June 2019
Review of pre-existing Entity Accounts must be completed by	30 June 2019
Reporting to IRBM	31 July 2018* 31 July 2019* 30 June 2020 and 30 June of subsequent years *Reporting for 2018 and 2019 for all accounts extended to 31 July to be in line with the special provision for pre-existing Individual Accounts reporting requirement

The general deadline for reporting to the IRBM for CRS in respect of calendar year 2017 and every subsequent calendar year is 30 June of the following year. However, CRS Amendment Rules - Rule 13 was introduced as a special requirement to report pre-existing individual accounts by 31 July in 2018 and 2019. The same provision is available in the CRS Regulations. This is to ensure that MYFIs complete their due diligence on pre-existing high value individual accounts within one year (covering the period from 1 July 2017 to 30 June 2018) and within two years for pre-existing lower value individual account (1 July 2017 to 30 June 2019).

Since reporting for pre-existing individual accounts is only to be made by 31 July 2018 and 31 July 2019, for the purpose of ease of administration for both the reporting MYFIs and the IRBM, the IRBM has administratively allowed MYFIs to also report all other accounts by 31 July 2018 for reporting year 2018 and 31 July 2019 for reporting year 2019. The reporting deadline for year 2020 and subsequent years for all accounts will revert to 30 June each year.

C. DUE DILIGENCE

The due diligence procedures in CRS are designed to identify accounts which are held by residents of jurisdictions with which the implementing jurisdiction exchanges information under the standard. It is expected that these jurisdictions will increase over time. In view of this, the approach taken for due diligence obligations under the CRS Rules and CRS Regulations is the wider approach.

Under the wider approach, MYFIs are required to identify and maintain a record of all jurisdictions in which an Account Holder or Controlling Person is resident for income tax purposes, regardless of whether Malaysia has a CRS agreement with that jurisdiction. This approach is taken to minimise the need to perform the due diligence process when a new jurisdiction commits to CRS.

D. SELF-CERTIFICATION

Beginning from 1 July 2017, MYFIs are required to obtain a self-certification from their new account holders as part of the due diligence process. A "self-certification" is a certification by the account holder that provides the account holder's status and any other information that may be reasonably requested by the Reporting Financial Institution to fulfil its reporting and due diligence obligations, such as whether the account holder is resident for tax purposes in a reportable jurisdiction.

E. REPORTABLE JURISDICTIONS

Reportable jurisdictions are jurisdictions where the CRS exchange agreement between Malaysia and these jurisdictions are in place. MYFIs are required to report to the IRBM information relating to Reportable Jurisdictions only. As the list of jurisdictions may vary from time to time and to ensure that MYFIs are ready to submit the information relating to reportable jurisdictions within the timeline, MYFIs are advised to prepare the report of all participating jurisdictions and not only the reportable jurisdictions.

The List of Reportable Jurisdictions is published in the IRBM website and will be updated by 30 June 2018 as a final list of reportable jurisdictions for reporting to the IRBM in 2018. This list will be updated again on 15 January 2019 and 30 June 2019 for reporting to the IRBM in 2019. The list will be updated on 15 January and 31 May each year for reporting in 2020 and subsequent years.

F. REPORTING OBLIGATIONS

MYFIs must ensure that the information to be reported for each reportable account comprises details of: the name, address, jurisdiction(s) of residence where the information is reportable, date of birth (in the case of individual), tax identification number(s) (TINs) of the account holders, the account number or the functional equivalent of an account number where applicable, and the account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the cash value or surrender value) as at the end of the calendar year.

In addition to the above, the following information for the calendar year must also be reported:

a. In the case of any Custodial Account, (i) total gross amount of interest paid or credited to the account; (ii) total gross amount of dividends paid or credited to the account; (iii) total gross amount of other income paid or credited to the account; and (iv) total gross proceeds from the sale or redemption of Financial Assets paid or credited to the account.

b. In the case of any Depository Account, the total gross amount of interest paid or credited to the account.

c. In the case of any account other than a Custodial Account or a Depository Account, the total gross amount paid or credited to the account including the aggregate amount of any redemption payments made to the account holder.

G. HASIL INTERNATIONAL DATA EXCHANGE FACILITY (HIDEF)

Reporting of CRS Information will be in the OECD's CRS Extensible Mark-up Language (XML) Schema and reported to the IRBM through the IRBM's IT HiDEF. MYFIs are required to submit reportable account information in this format electronically and to develop their own application system to collate the required data in accordance to the schema.

HiDEF serves as a portal for the MYFIs to send their CRS reporting to the IRBM. MYFIs will need to register with the IRBM through the HiDEF portal in order to be able to report to the IRBM financial account information from all non-residents which are reportable according to the reportable jurisdictions.

This platform will enable the government of Malaysia to make reciprocal exchanges as described in the MCAA, CRS Rules, and CRS Regulations. The process flows of how the CRS data from the MYFIs are transmitted and exchanged from HiDEF to the OECD's CTS are shown in **Figure 1** and **Figure 2**.

H. IMPLICATION OF CRS

The outcome of CRS will significantly increase transparency and will be a common methodology to counter tax evasion among different countries. Taxpayers are therefore encouraged to comply with their tax obligations.

2. COUNTRY-BY-COUNTRY REPORTING

Action 13 of the Action Plan on Base Erosion and Profit Shifting on Transfer Pricing Documentation and Country-by-Country Reporting requires the development of "rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNEs provide all relevant governments with needed information on their global allocation of income, economic activity and taxes paid among countries according to a common template".

***Figure 1**: CRS Process Flow*

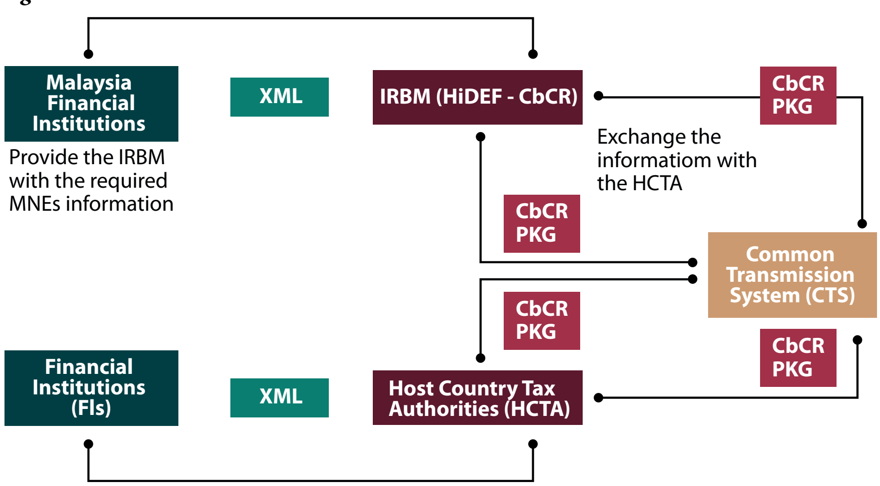
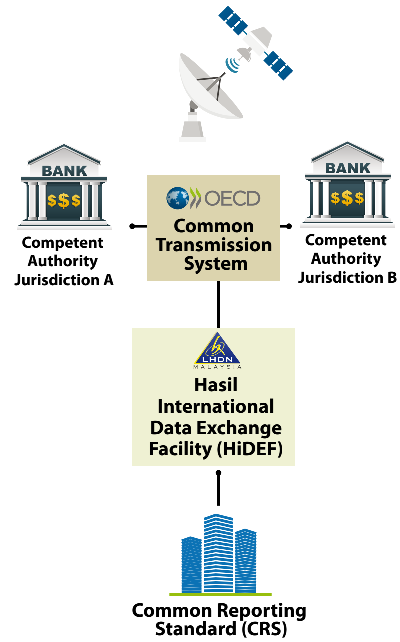


***Figure 2**: How data is exchanged with other Jurisdictions via the Common Transmission System*



The objectives of transfer pricing documentation are to ensure that taxpayers give appropriate consideration to transfer pricing requirements, providing tax administrations with information in conducting transfer pricing risk assessment and exercise an appropriately thorough audit of transfer pricing practices of entities that are subject to tax in their jurisdiction. However, the documentation and information gathered should be supplemented with additional information as the audit process progresses.

A three-tiered approach is introduced to achieve these objectives: master file, local file and Country-by-Country Report (CbCR).

Apart from listing financial information, tax jurisdiction of incorporation and nature of main business activities of all Constituent Entities, CbCR also provides high level information about the jurisdictional allocation of revenue, profit (loss) before tax, income tax paid (on a cash basis), income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets.

CbCR is a high level transfer pricing assessment tool which can be used to evaluate other BEPS related risks and for economic and statistical analysis. However, one has to keep in mind that CbCR cannot be used as a substitute for a detailed transfer pricing analysis. The information contained in the CbCR does not constitute conclusive evidence of any transfer pricing issues.

A. COMPONENTS OF IMPLEMENTING CBCR IN MALAYSIA

The four aspects that Malaysia needs to consider in implementing CbCR are:

i. Domestic legislation framework
ii. Competent Authority Agreements - Convention on Mutual Administrative Assistance In Tax Matters (CMAA) & Multilateral Competent Authority Agreement (MCAA), DTA / Tax Information Exchange Agreement (TIEA) + Bilateral MCAA
iii. Administrative & Information Technology Capacity
iv. Confidentiality, Data Safeguard & Appropriate Use

To show its commitment in implementing CbCR, Malaysia signed the CMAA and MCAA on 25 August 2016 and 27 January 2016 respectively, followed by the introduction of three new domestic legislations:

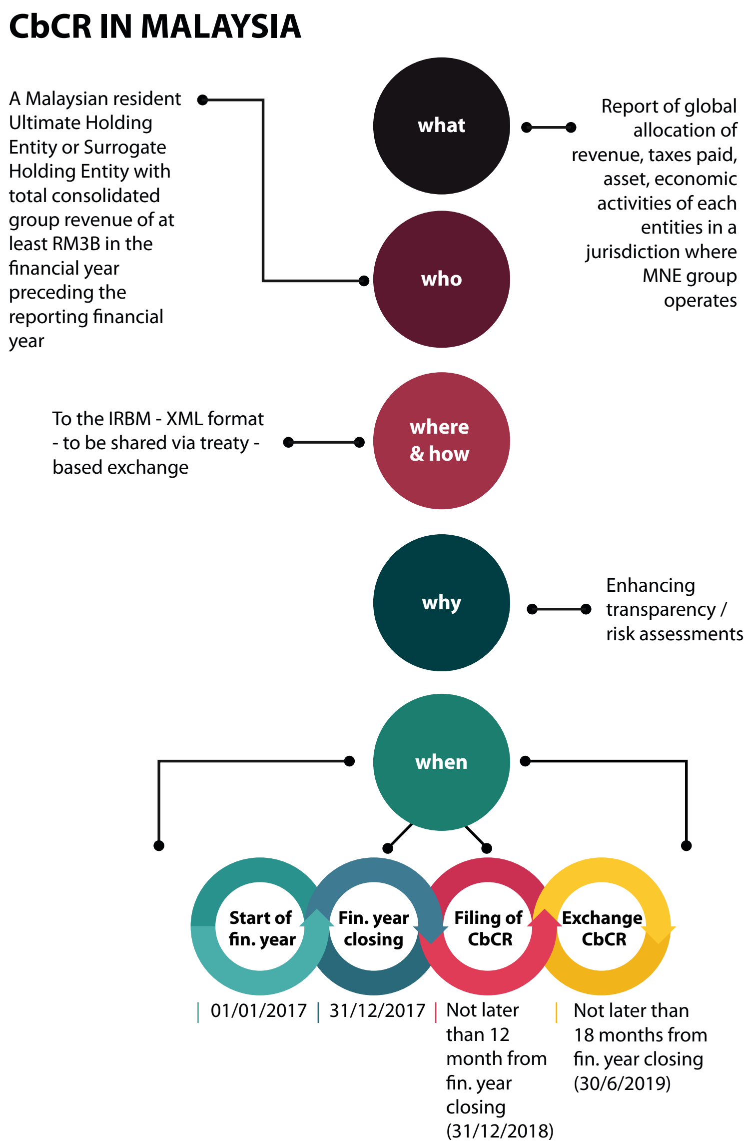
- Income Tax (Country-by-Country Reporting) Rules 2016 (CRS Rules) – gazetted on 23 December 2016;
- Income Tax (Country-by-Country Reporting) (Amendment) Rules 2017 - gazetted on 27 December 2017; and
- Labuan Business Activity (Country-by-Country Reporting) Regulations 2017 – gazetted on 26 December 2017.

The hard work did not stop there. It continues with the preparation of an Information Technology (IT) platform to ensure the smooth submission of CbCR to the IRBM, using a standard schema called Extensible Markup Language (XML) before submitting the report to other tax jurisdictions concerned through Common Transmission System (CTS).

All information exchanged is subject to confidentiality rules as stated in the Convention, with the inclusion of limiting the use of the said information. In cases where there is non-compliance with the confidentiality aspects of the data exchanged and inappropriate use of data, the Competent Authority will need to notify the Coordinating Body Secretariat of such acts.

B. CBCR IN MALAYSIA

CbCR in Malaysia is illustrated in the diagram below;



C. THE PROCESS

i. **Notification**

Before filing of CbCR can be done, any constituent entity of an MNE Group that is resident in Malaysia shall notify the IRBM the ultimate holding entity or surrogate holding entity that will be doing the reporting of CbCR. The notification should be submitted to the IRBM before or on the last date of the financial year end. Two (2) samples of notification have been uploaded in the IRBM's website which are notification as a reporting entity and notification as a non-reporting entity. As of 31 January 2018, the IRBM has received a total of 1,049 notifications from non-reporting entities and about 32 notifications from reporting entities.

ii. **Registration**

- MNEs should then undergo a web-based registration and verification process with the IRBM before the submission of CbCR can be done.

iii. **Submission**

- Once it is done, the reporting entity can submit the CbCR to the IRBM. The CbCR consists of 3 tables: Table 1 – Overview of allocation of income, taxes and business activities by tax jurisdiction, Table 2 – List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction and Table 3 – Additional Information. All the tables can be easily accessible from the IRBM's website as well as the OECD's website. However, the information should be submitted using the XML Schema.

iv. **Data Packaging & Encryption**

- The IRBM will then sort and aggregate the CbCR data in HiDEF before encrypting it for transmission through CTS.

v. **Transmission**

- CTS is also used to transmit CRS data and data on tax rulings.

vi. **Decryption**

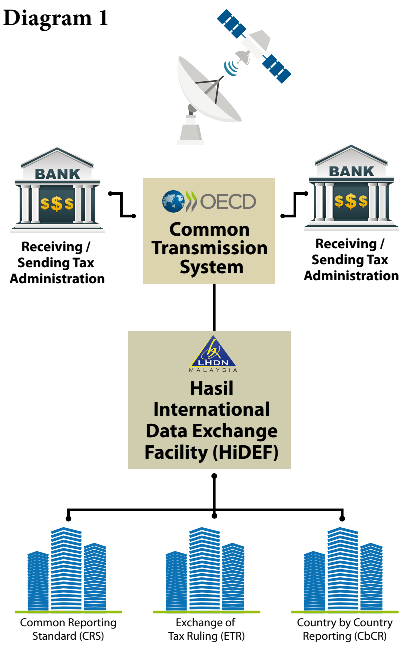
- The receiving jurisdiction will then decrypt the CbCR data and use it in the manner that the CbCR is intended to.

The process flow is illustrated in **Diagram 1** and **Diagram 2** on the right;

D. IRBM'S EXPECTATIONS IN 2018

IRBM is expected to receive the CbCR for financial year ending 31 December in the third and fourth quarter of 2018. From there on, the IRBM would have until 30 June 2019 to exchange the CbCR with other tax jurisdictions. Since Malaysia is providing the service of having Parent Surrogate Filing/ Voluntary filing for financial year 2016, there is a possibility that the IRBM may receive the CbCR earlier than expected. The Local Reporting Entity should hand in a formal application to the IRBM if they wish to do voluntary filing.

Diagram 1



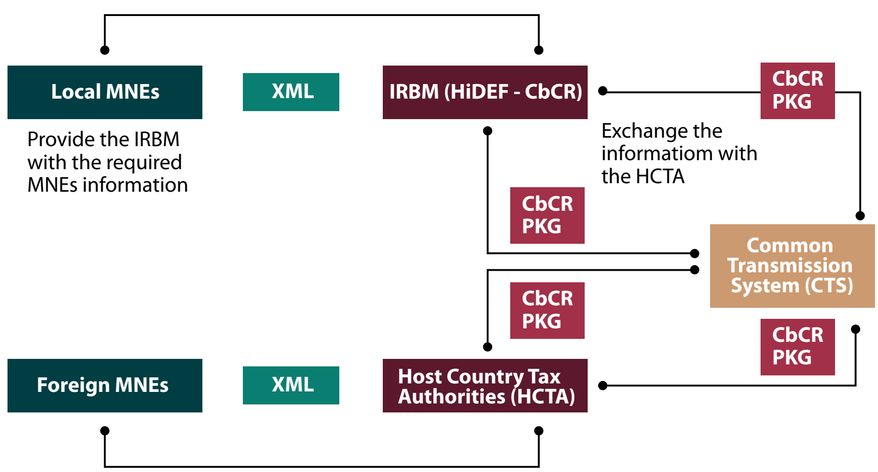
More notifications are also expected to arrive from constituent entities having year ends other than 31 December. Furthermore, the IRBM will continuously update its website with the latest information pertaining to CbCR, be it from the IRBM's perspective or even changes and updates from the OECD.

The IRBM is optimistic that if CbCR is implemented comprehensively, it would increase tax transparency among MNEs. It will also contribute to ensuring that taxes are paid where they are due, thus providing adequate revenue for critical public services. It is also increasingly being recognised by the business community and investors as a necessary tool that can benefit the wider economy.

3. THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY-RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING (MLI)

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) is one of the outcomes of the OECD/G20 Project to tackle Base Erosion and Profit Shifting

Diagram 2



(the BEPS Project). It is an agreement negotiated under Action 15 of the BEPS Project. Implementation of the Final BEPS Package will require changes to model tax conventions, as well as to the bilateral tax treaties based on those model conventions.

Bilateral updates to the treaty network would be a very burdensome and time-consuming exercise, thus the MLI is seen as the solution as it allows jurisdictions to swiftly amend their tax treaties to implement tax treaty related BEPS recommendations.

Malaysia was involved in the development of the MLI with more than 100 jurisdictions in the Ad Hoc Group. The negotiation of the MLI text was concluded on 24 November 2016 in Paris. The first signing ceremony was held on the 7th of June 2017 whereby 67 countries and jurisdictions signed the MLI, covering 68 jurisdictions (including Hong Kong).

A. SIGNING OF MLI BY MALAYSIA

In line with Malaysia's commitment to meet internationally agreed tax standards and the implementation of BEPS Action Plan, Malaysia, represented by the Honourable Deputy Finance Minister I, YB Dato' Wira Othman Aziz signed the MLI at the OECD headquarters in Paris on 24 January 2018 along with Barbados, Cote d'Ivoire, Jamaica, Panama and Tunisia. At the time of signing, a list of expected reservations and notifications pursuant to Articles 28(7) and 29(4) of the Convention was deposited. The signing brings to total 78 signatories of the MLI.

The MLI requires ratification by five countries before it comes into force. As of January 2018, there are four signatories that have ratified the MLI consisting of Austria, Isle of Man, Jersey and Poland. The MLI will come into force on the first day of the first month following the expiration of a period of three calendar months beginning on the date of deposit of the fifth instrument of ratification, acceptance or approval.

B. LIST OF COVERED TAX AGREEMENTS

In its provisional reservations and notifications, Malaysia listed its Double Taxation Avoidance Agreements (DTAs) with 73 countries as Covered Tax Agreements under the MLI, as in **Table 01.**

The MLI will come into effect after ratification by at least five countries which have signed on to the MLI.

In respect of Malaysia's DTAs, the MLI will come into effect after ratification of the MLI by Malaysia and the respective DTA partner.

C. PROVISIONS ADOPTED

The MLI contains both minimum standard and optional provisions. Malaysia provided its positions as follows:

a) Minimum standard provisions:

(i) Article 6 (Purpose of a covered tax agreement) – To include a statement

Table 01

No	Country	No	Country	No	Country	No	Country
1	Albania	19	Germany	38	Morocco	56	South Africa
2	Australia	20	Hong Kong	39	Myanmar	57	South Korea
3	Austria	21	Hungary	40	Namibia	58	Spain
4	Bahrain	22	India	41	Netherlands	59	Sri Lanka
5	Bangladesh	23	Indonesia	42	New Zealand	60	Sudan
6	Belgium	24	Iran	43	Norway	61	Sweden
7	Bosnia Herzegovina	25	Ireland	44	Pakistan	62	Syria
8	Brunei	26	Italy	45	Papua New Guinea	63	Switzerland
9	Canada	27	Japan	46	Philippines	64	Thailand
10	Chile	28	Jordan	47	Poland (New Agreement gazetted)	65	Turkey
11	China	29	Kazakhstan	48	Qatar	66	Turkmenistan
12	Croatia	30	Kyrgyz Republic	49	Romania	67	United Arab Emirates
13	Czech Republic	31	Kuwait	50	Russia	68	United Kingdom
14	Denmark	32	Laos	51	San Marino	69	Uzbekistan
15	Egypt	33	Lebanon	52	Saudi Arabia	70	Venezuela
16	Fiji	34	Luxembourg	53	Seychelles	71	Vietnam
17	Finland	35	Malta	54	Singapore	72	Zimbabwe
18	France	36	Mauritius	55	Slovak Republic	73	Senegal (New Agreement - Gazetted)
		37	Mongolia				

of intent in the preamble of the covered tax agreement that the purpose of the DTA is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance;

(ii) Article 7 (Preventing treaty abuse) – To include a general anti-abuse rule in the covered tax agreement, commonly known as the Principal Purpose Test (PPT);

(iii) Article 16 (Mutual agreement procedure) – To update the Mutual Agreement Procedure in the DTA for new resolution of disputes procedures which among others, allows the aggrieved party to present his case to the competent authority of either Contracting State, sets the duration of three years for MAP application, no time limit to implement agreements reached and the resolution of disputes regarding interpretation or application of double tax agreement and cases of elimination of double taxation.

b) Optional provisions:

(i) Article 3(1) (Transparent entity) – Treaty benefits will be granted for income derived through fiscally transparent entities, such as partnerships or trusts, where one of the two countries treats the income as income of one of its residents under its domestic law. These rules will not prevent either country from taxing its own residents.

(ii) Article 12 (Artificial avoidance of permanent establishment status through commissionaire arrangements and similar strategies) – If an agent or intermediary plays the principal role in concluding substantively finalised business contracts in a country on behalf of a foreign enterprise, that arrangement will constitute a 'permanent establishment' of the foreign enterprise in that country.

(iii) Article 13 (Artificial avoidance of permanent establishment status through the specific activity exemptions) – Only genuine preparatory or auxiliary activities will be excluded from the definition of permanent establishment. In addition, related entities will be prevented from fragmenting their activities in order to qualify for this exclusion.

(iv) Article 15 (Definition of a person closely related to an enterprise) – Definition of a 'person closely related to an enterprise' for the purpose of the permanent establishment Articles.

(v) Article 17 (Corresponding adjustments) – This provision is a best practice provision and is subject to peer review under Action 14. It requires a country to make a corresponding adjustment to the profits of a resident entity, as a result of an adjustment by the other country to the profits of an associated entity which is a resident of that other country if the adjustment is justified, in order to alleviate double taxation.

The MLI will modify Malaysia's Covered Tax Agreements if both treaty partners share the same position on the provisions of the MLI. The reservations and notifications provided at the time of signing are provisional and the extent to which MLI provisions are incorporated into Malaysia's Covered Tax Agreements will depend on the final positions at the time of ratification of MLI of both countries. Guidance will be issued to assist in the interpretation and implementation of the MLI provision.

D. FUTURE ACTIONS

The next step for Malaysia is to proceed with its domestic ratification process. Once the ratification process is completed, Malaysia will deposit the instrument of ratification and its final reservations and notifications with the Depositary. Generally, the provisions will take effect after the expiration of a period of six calendar months from the latest dates on which the MLI enters into force for each of the Contracting States of the DTAs.

Malaysia's provisional positions on the MLI provisions can be found at the OECD website at *http://www.oecd.org/tax/treaties/beps-mli-position-malaysia.pdf.* Further information on MLI can be obtained from the OECD website at *http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.*

CONCLUSION

Malaysia is closely following the rapidly changing international tax policies and regulations to ensure that domestic provisions are aligned with international standards and remain relevant. Apart from the three items discussed above, Malaysia is working on other areas of the BEPS Action Plan as well, among others, the taxation of digital economy, Earning Stripping Rules, reviewing incentives, updating of Transfer Pricing Guidelines and MAP Guidelines. In doing so, engagement and consultation with the relevant parties are conducted from time to time.

REFERENCE

1. *Action 13 of the Action Plan on BEPS – the Transfer Pricing Documentations and Country-by-Country Reporting*
2. *Common Reporting Standard (CRS) Guidance Notes*
3. *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent B Base Erosion and Profit Shifting*
4. *Income Tax (Automatic Exchange of Financial Account Information) Rules 2016*
5. *Income Tax (Country-by-Country Reporting)(Amendment) Rules 2017*
6. *Income Tax (Automatic Exchange of Financial Account Information) (Amendment Rules) 2017 CRS Amendment Rules)*
7. *Labuan Business Tax (Automatic Exchange of Financial Account Information) Regulations 2018 (CRS Regulations). Base Erosion and Profit Shifting*
8. *Labuan Business Activity Tax (Country-by-Country Reporting) Regulations 2017*
9. *Standard for Automatic Exchange of Financial Account Information in Tax Matters*
10. *The Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting.*

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International News

The column only covers selected developments from countries identified by the CTIM and relates to the period 16 November 2017 to 15 February 2018.

CHINA (PEOPLE'S REP.)

Income tax exemption for gains on transfer of shares traded through Shanghai-Hong Kong stock exchanges extended

On 1 November 2017, The Ministry of Finance (MoF), the State Administration of Taxation (SAT) and China Securities Regulatory Commission jointly issued Cai Shui (2017) No.78, extending the income tax exemption on gains derived by Chinese resident individuals from the transfer of shares in companies listed in the Hong Kong stock exchange. The transfer has to be transacted via the interconnection mechanism of the Shanghai-Hong Kong stock exchange for the period between 17 November 2017 and 4 December 2019.

The exemption previously provided under Cai Shui (2014) No.81, would be terminated on 16 November 2017.

Application scope of super-deduction for R&D clarified

Further to the implementation rules of Cai Shui (2015) No. 119 and SAT Gong Gao (2015) No. 97 on super-deduction for research and development (R&D) expenses, the SAT issued SAT Gong Gao (2017) No. 40 clarifying R&D expenses that qualify for super-deduction purposes on 8 November 2017. Highlights of the announcement are as follows:

Payments made to internal and external staff directly involved in the R&D activities

- Wages and salaries of external staff paid by enterprises through a labour dispatching company (whereby the employment contract is directly made between the labour dispatching company and the staff) are included in the scope of the super-deduction; and
- Expenses on equity incentives made to R&D staff are eligible for the super-deduction.

Direct input expense

In relation to costs of materials included in the R&D expenses in prior tax years, the corresponding material costs incurred in the current sales year must be set off against the R&D expenses in the same year. Any excess may be carried forward.

Depreciation/amortisation of expenditure

If tangible or intangible fixed assets used for the R&D activities are depreciated/amortised on an accelerated basis, such depreciation/amortisation expenses calculated in accordance with the tax law may be deemed to be part of the total expenses for the purpose of the super-deduction.

Other expenses in relation to R&D activities

Other expenses incurred on R&D activities that are eligible for the super-deduction include employee welfare expenses, supplementary pension insurance premiums and supplementary medical insurance premiums.

Treatment of special situations

- R&D expenses incurred on failed R&D activities are also eligible for the super-deduction.
- Expenses incurred by external institutions or individuals to whom R&D activities are assigned are considered to be actual expenses paid to the commissioned party by the commissioning party.
- The super-deduction incentive rights enjoyed by the commissioning party are not allowed to be transferred to the commissioned party.
- The commissioned party is required to provide the commissioning party with the statement of actual expenses.

The rules contained in the announcement apply from tax year 2017 and subsequent tax years.

Deferral of withholding tax on dividends/profits re-invested by foreign investors announced

On 21 December 2017, the MoF, SAT, the National Development and Reform Committee and the Ministry of Commerce (MOFCOM) jointly issued Cai Shui (2017) No. 88 temporarily exempting withholding tax dividends and profits distributed to foreign investors and re-invested in China. The circular retroactively applies from 1 January 2017. The main detail of the circular are summarised below.

Exemption

Dividends/profits distributed by resident enterprises to, and re-invested by, foreign investors in China are temporarily exempt from withholding tax, provided that the re-investment is an encouraged foreign investment that meets certain conditions. The exemption is applicable to dividends distributed on or after 1 January 2017; should the withholding tax that has been paid on the distribution of dividends on or after 1 January 2017, such tax may be refunded.

Requirements

To be eligible for the exemption, the following conditions must be satisfied:

- investments made by using distributed profits must be direct investments. The forms of investment include increasing the capital or capital reserve of the existing resident company, the establishment of a new enterprise, and the acquisition of the shares of a Chinese enterprise from a non-related party; and
- profits must has to be actually distributed to investors and recognised as dividends and profits from equity investment for foreign investors; and
- the investment (contribution to the capital) must be made directly from the foreign investor's bank account into the invested enterprise's bank account in cases where the contribution is made in cash, or directly from the distributing enterprise to the invested enterprise in cases where the contribution is made in kind (assets or securities). Investments made in a diverted way or via other enterprises will be excluded from the exemption; and
- the re-investment must fall within the scope of the encouraged categories of "Catalogue for Guidance of Foreign Investment Industries" or "Industrial Catalogue of Foreign Investment in the Middle and Western Regions".

Other procedural matters

The resident enterprise distributing dividends/profits may refrain from withholding the tax after having received and examined the request and supporting documents from foreign investors applying for the exemption. The resident enterprise must file the exemption with the competent tax authority.

Foreign investors that are entitled to the exemption, but have not used this exemption and paid the withholding tax, may re-claim the taxes within three years from the date of the tax payment.

With the exception of an approved merger, foreign investors must still pay the withholding tax within seven days in the event of the withdrawal of the investment that has benefited from the exemption, such as a share transfer; share buy-back, or liquidation of a business. In that case, the temporary exemption is a tax deferral.

Rules on foreign tax credit amended

On 28 December 2017, the MoF and the SAT jointly issued Circular (2017) No.84 on foreign tax credit which retroactively applies from 1 January 2017. Under the tax credit system of China, the deduction allowed is restricted to the amount of Chinese income tax payable on the foreign income. According to the Circular, in determining the foreign income for tax credit purposes, enterprises may elect to calculate foreign income per tax jurisdiction (per jurisdiction and not per item of income) or to calculate foreign income on the basis of the total of foreign income (aggregation of all kinds of foreign income from all the jurisdictions). As a result the Circular offers enterprises, in addition to the current calculation per jurisdiction but not per item of income, also the choice to adopt the "overall credit" system. Once the election is made, it may not be altered for five years.

Under this Circular, the indirect tax credit may be claimed up to the fifth tier of foreign subsidiaries (previously three tiers) if the resident enterprise has a direct or indirect shareholding of at least 20% in the foreign subsidiaries (up to the fifth tier).

Further, the Circular clarifies that any unused foreign tax credits from previous years calculated according to Circular (2009) No. 125, may be carried forward for five years. For other matters related to foreign tax credit, the previous Circular [2009] No. 125 remains applicable.

Implementation rules on deferral of withholding tax on dividends/profit re-invested by foreign investors – released

On 2 January 2018, the SAT issued SAT Public Notice (2018) No. 3, providing implementation rules in respect of SAT Public Notice (2017) No. 88 regarding the deferral of withholding tax on dividends/profit

re-invested by foreign investors. The Public Notice retroactively applies from 1 January 2017. Its main provisions are set out below.

Business activities of the invested enterprise

To be eligible for the withholding tax deferral, the enterprise in which foreign investors re-invest using their profits is required to carry on business activities encouraged by the government. According to the Public Notice, the encouraged activities include:

- product manufacturing or provision of services;
- research and development activities;
- investment in construction projects or purchase of machinery or equipment; and
- other (designated) business activities.

The invested enterprise must carry one or more of these activities during the period of the re-investment.

Foreign investors must submit the evidence of transactions and accounting materials to the enterprise distributing dividends/profit. Submission must be done before foreign investors withdraw the investments or before the tax authority recovers the withholding tax at the time the tax deferral expires.

Responsibilities of the enterprise distributing dividends /profit

The enterprise distributing dividends/profit is required to verify the information provided by foreign investors and refrain from withholding tax on dividends/profit re-invested. Furthermore, the enterprise distributing dividends/profit must submit both the Reporting form on withholding enterprise income tax and Reporting form on the information concerning the withholding tax deferral of non-resident enterprise to the relevant competent tax authority within seven days of the dividends/profit distribution.

Responsibilities of foreign investors applying for the withholding tax deferral

Foreign investors must provide the enterprise distributing dividends/profit with a reporting form on the information concerning the withholding tax deferral of non-resident enterprise, related contracts, payment evidence and information on the encouraged investment, etc.

Treaty benefits for withholding tax on dividends/profit recovered

In cases where the withholding tax must be recovered for various reasons, for example where the re-investment is withdrawn or the requirements for the tax deferral are not satisfied, the withholding tax rate under the tax treaty applicable at the time of the dividend/profit distribution may apply unless a "later-in-time" tax treaty provides otherwise.

Agent

Foreign investors and the enterprise distributing dividends/profit may commission an agent to handle the tax affairs regulated in the Public Notice. However, a Letter of Power of Attorney must be signed in writing and filed with the competent tax authority for that purpose.

New notice on beneficial ownership published

On 3 February 2018, the SAT issued SAT Public Notice (2018) No.9 updating the rules on beneficial ownership referred to in tax treaty provisions on dividends, interest and royalties. The Notice will also be applicable to the tax arrangements with Hong Kong and Macau. The main points of the Notice are summarised below.

Negative factors

"Beneficial ownership" must be determined on the basis of factors and factual circumstances. However, the following factors may generally have an adverse effect in determining beneficial ownership status:

- The recipient has the obligation to pass on more than 50% of the received payments to a resident of a third country (or region) within 12 months. "Obligation" means contractual obligation and de facto obligation.
- Activities conducted by the recipient do not constitute substantial business activities. Substantial business activities include substantial manufacture, sales and management activities. Substance must be determined by reference to functions performed and risks assumed. As an example, equity holding activity could be regarded as a substantial business activity.
- The income of the recipient is not subject to tax, is exempt from tax or is taxed at a very low effective tax rate in the jurisdiction in which the recipient resides.
- In addition to the loan agreement from which the interest income is derived, there are other similar (in terms of amount, interest rate and time) loan or deposit agreements with a third party.
- In addition to the contracts on copyright, patent and know-how where royalties arise, there are other contracts on copyright, patents and know-how with a third party.

Safe harbour rules

The following recipients are considered to be the "beneficial owner" without any test required:

- the government of the recipient's country jurisdiction;
- a resident company listed in the recipient's jurisdiction;
- an individual resident of the recipient's country; and
- a direct or indirect 100% owned subsidiary of the above mentioned (in the case of indirect shareholding, the intermediate company must be a resident of China or the recipient's jurisdiction).

Additionally, if a recipient of dividend income is not a qualified beneficial owner, but its direct or indirect 100% owned shareholder is a qualified beneficial owner, the recipient will still be able to receive the beneficial owner status if:

- the qualified shareholder is a resident of the recipient's jurisdiction; or
- in the case of an indirect shareholding, both that shareholder and the intermediate holding company must satisfy the conditions for beneficial owner as described in the Notice.

A 100% shareholding is required at any time within a 12-month period.

Agent and nominee

According to the Notice, agents and nominees are not beneficial owners. The fact that an agent receiving and passing on the payments may be a resident of the recipient's jurisdiction will not play a role in determining the beneficial owner status. The Notice further clarifies that the following are not pass-through transactions:

- shareholders who receive dividends based on shareholding;
- creditors who receive interest on loans; and
- licensors who receive royalties on intellectual properties.

Application of anti-abuse rules to beneficial owners

The principal purpose test (PPT) and general anti-avoidance rules may apply even though a recipient is the beneficial owner.

Others

In determining whether any adverse factors are present, the tax authority will make its analysis on the basis of documents (depending on the type of income), such as articles of association, financial reports, cash-flow statements, minutes and resolutions of board meetings, allocation of goods and resources, expenditures, functions and risks, loan contracts, contracts on granting rights of intellectual properties, registration certificate of patents, certificates of asset ownership and so on. In determining the pass-through payments, agency agreements or agreements on the appointment of a recipient must be examined.

The taxpayer who enjoys treaty benefits must also provide the tax

authority with a certificate of residence. The certificates of residence for direct or indirect 100% shareholders or an intermediate company will also be required.

This Notice takes effect from 1 April 2018 and the previous Notices on beneficial owners, i.e. SAT Letter (2009) No. 601 and SAT Public Notice (2012) No. 30 will be abolished.

Several issues concerning implementation of treaty provisions clarified

On 9 February 2018, the State Administration of Taxation (SAT) issued a public notice (SAT Public Notice [2018] No. 11) clarifying several issues concerning the implementation of tax treaty provisions on permanent establishment, shipping and air transport income, entertainers and sportspersons, and the application of tax treaties to partnerships. The Notice applies from 1 April 2018.

Permanent establishment

Unincorporated Sino-foreign educational institutes, or sites used for Sino-foreign educational projects constitute a permanent establishment of the foreign partner in China.

The statement stating "for a period or periods aggregating more than six months within any twelve-month period" as referred to in the relevant provision on (service) permanent establishment must be construed and implemented as meaning "for a period or periods aggregating more than 183 days within any twelve-month period".

Shipping and air transport

If a provision on shipping and aircraft transport fully corresponds to the provision on shipping and air transport under the tax treaty between China and Singapore, the application of such provisions must observe the following rules:

- income of an enterprise of a contracting state from the operation of ships or aircraft in international traffic will be taxable only in that state. Income from international transport includes income from voyage charter or time charter of ships, or wet lease of aircraft;
- the same rule also applies to income derived by a pool, joint business or participation in an international operating agency. The participant or partner enterprise will be taxed in their respective residence state;
- the provision on interest does not apply to interest derived by an enterprise of a contracting state from its deposits of funds incidental to and connected with its operations of ships or aircraft in international traffic and such interest must be regarded as profits derived from the operation of such ships or aircraft and not taxed in the source state; and
- generally, rental income from the rental on a bareboat basis of ships or wet lease of aircraft or the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) does not fall within the scope of the shipping and air transport income. However, if such income is incidental to the operation of ships or aircraft in international traffic, it will be regarded as income from shipping and air transport. This rule also applies to tax treaties which do not contain the paragraph dealing with the income from incidental activity.

The term "incidental" means supporting or auxiliary in nature and must satisfy the following conditions:

- the core business of the enterprise is international transport;
- the incidental activity contributes to a little extent, but is closely connected to the core business and cannot be regarded as independent business activity or source of income; and
- the revenue from the auxiliary activity does not, in principle, exceed 10% of the total revenue of international transport within an accounting year.

The following income that is closely connected with international transport must be regarded as parts of income from international transport:

- sales of tickets on behalf of other international transport enterprises;
- income from passenger transport from city centre to airport;
- income from cargo transport from warehouse to airport or docks or customers; and
- income from hotel for transit passengers.

Income from international transport includes income derived from international transport using ships and aircraft from enterprises not exclusively engaged in international transport business.

Entertainers and sportspersons

If a provision on entertainers and sportspersons corresponds to the provision on entertainers and sportspersons under the tax treaty between China and Singapore, the following rules will apply:

- the activities of entertainers include stage art performances in film and television, and in music. They also include other activities conducted by entertainers or sportspersons in their capacity as artists or sportspersons in a film, television commercial, at an annual party or opening ceremony of an enterprise, political, social, religious or charitable activities with entertaining characters. However, the delivery of a speech (with the exception of the speech of an entertaining nature at a commercial event) or activities conducted as a management member or facility worker (for example as a photographer, producer or director, choreographer or technician) are excluded from the scope of the activities covered by the treaty provision on entertainers and sportspersons. The activities of a sportsperson include participation in a digital game;
- gains from the sale of audio or video products of the performance or other copyright are subject to the provision on royalties.

In cases in which the income is wholly or partially received by a nominee or agent, the tax authority may make an assessment and tax, as the case may be, the entertainer, nominee or agent without restrictions by provisions on independent services or employment income.

Application of the tax treaty to partnerships

A foreign partner of a partnership established under Chinese law may receive treaty benefits in China if his/her income is taxable in China and recognized by his/her residence state.

A partnership is a non-resident taxpayer if it is established under foreign laws that its place of effective management is not in China, or that it does not have a place or site in China, but derives income from China. Unless the tax treaty provides otherwise, the Chinese taxable income of the partnership may only enjoy treaty benefits if the partnership is a resident of the contracting state. The partnership must provide evidence that it is subject to tax in its residence state according to the laws of the contracting state on the grounds of residence, domicile, place of incorporation, place of effective management or other criteria.

"The tax treaty provides otherwise" refers to the situation where the partnership is treated by the contracting state as a transparent entity and the income of the partnership is attributed to its partners. In that case, the partners who are residents of the contracting state may receive treaty benefits in respect of the income attributed to them.

Others

The Notice also applies to the tax arrangements with Hong Kong and Macao. With the publication of this Notice, articles 8 and 17 of Circular [2010] No. 75 on the Interpretation of Articles and Protocol of the Tax Treaty between China and Singapore will be abolished.

HONG KONG

Two-tiered profits tax rates regime to be introduced

On 29 December 2017, the Inland Revenue (Amendment) (No.7) Bill 2017 was gazetted by the government. The Amendment Bill seeks to implement a two-tiered profits tax rates regime that was announced in the 2017 Policy Address.

Under the proposed regime, the profits tax rate for the first HKD2 million of profits of corporations will be reduced to 8.25%, while the standard profits tax rate of 16.5% will remain unchanged for profits beyond HKD2 million. For unincorporated businesses, which mostly consist of partnerships and sole proprietorships, the two-tiered tax rates will be set at 7.5% and 15%, respectively.

The proposed two-tiered profits tax rates regime will benefit all eligible enterprises with assessable profits, irrespective of their size. To ensure that the tax benefits are enjoyed by small and medium-sized enterprises (SMEs), restrictions will be introduced.

Amendment ordinance on ad valorem stamp duty gazetted

The Stamp Duty (Amendment) Ordinance 2018 was gazetted by the Inland Revenue Department on 19 January 2018. Under the 2018 Amendment Ordinance, *ad valorem* stamp duty (AVD) at Scale 1 is divided into Part 1 (a flat rate of 15%) and Part 2 [original Scale 1 rates under the 2014 (No. 2) Amendment Ordinance], which have been effective since 5 November 2016. Part 1 applies to instruments of residential property, while Part 2 applies to instruments of non-residential property.

The 2018 Amendment Ordinance provides that any instruments of residential property executed on or after 5 November 2016, for the sale and purchase or transfer of residential property, unless they are exempt or unless specifically provided otherwise, will be subject to AVD at the rate applicable under Part 1, i.e. a flat rate of 15% of the consideration or value of the residential property, whichever is higher. Under the 2018 Amendment Ordinance, Hong Kong permanent residents (HKPRs) disposing of their original property within 12 months (previously six months) after the date of conveyance of the new property acquired on or after 5 November 2016 will be allowed to claim partial refund of the AVD paid on acquisition of the new property.

INDIA

CBDT clarifies position on acceptance of MAP and bilateral APA under tax treaties

In a press release dated 27 November 2017, the Central Board of Direct Taxes (CBDT) clarified its position on the acceptance of applications for a transfer pricing mutual agreement procedure (MAP) and bilateral advance pricing agreement (APA) in cases where the associated enterprise of the Indian entity is resident of a country with which India has concluded a treaty that is effective. In such cases, India will accept the applications, whether or not the treaty contains article 9 (2) of the OECD Model (or the relevant equivalent article) relating to corresponding adjustments.

Budget 2018-19 – Key proposals

In a press release dated 27 November 2017, the Central Board of Direct Taxes (CBDT) clarified its position on the acceptance of applications for a transfer pricing mutual agreement procedure (MAP) and bilateral advance pricing agreement (APA) in cases where the associated enterprise of the Indian entity is resident of a country with which India has concluded a treaty that is effective. In such cases, India will accept the applications, whether or not the treaty contains article 9 (2) of the OECD Model (or the relevant equivalent article) relating to corresponding adjustments.

Corporate tax

- concessional rate of tax for companies with turnover of less than INR2.5 billion in FY 2016-17;
- 100% deduction for companies registered as farmer produce companies, subject to certain conditions;
- transfer of immovable property - where variation between sale consideration and stamp duty value is 5% or less, no deemed income taxation in the hands of the transferor and transferee;
- reduced minimum period from 240 days to 150 days for eligibility of claiming deduction in respect of additional employment cost for new employee for the manufacturing of footwear or leather products industry;
- incentives to "start-ups" on income from "eligible business", subject to certain conditions;
- tax at the rate of 10% to be levied on income distributed by equity oriented mutual funds;
- long-term capital gains on transfer of listed equity shares: equity oriented funds – proposed to be taxed at 10% (without indexation) if gains exceed INR100,000. Gains received up to 31 January 2018 will be grandfathered subject to certain conditions;
- article 12 of multilateral instrument incorporated in domestic law. "business connection" definition expanded to include "significant economic presence"; and
- revision of time limit for filing country-by-country report (CbCR) by a parent or alternative reporting entity (ARE) resident in India.

that an overseas parent entity has no obligation to file CbCR and parent entity has not nominated ARE.

Personal tax

- no changes in individual tax rates, salaried taxpayers are entitled to a standard deduction of INR40,000 for transport reimbursements and medical allowances;
- senior citizens entitled to exemption of interest income up to INR50,000, higher mediclaim allowance/critical illness allowance; and
- cess – increased from existing 3% to a consolidated 4% health and education Cess. Peak tax rate enhanced to 35.88% from 35.535%.

Indirect tax

- no GST related amendments in the Budget; typically, decision on GST related amendments will be taken by GST Council;
- scope of Customs Act expanded to include offences committed outside India;
- specific provision incorporated for exchange of information with other countries;
- social welfare surcharge (welfare Cess) levied at 10% on customs duty to finance education, health and social security measures; and
- changes in customs duty rates for certain products viz. perfumes, mobile phones, LCD/LED panels on television and petrol.

Typically, the above proposals are effective from Indian fiscal year 2018-19, unless otherwise specified therein.

SINGAPORE

Budget for 2018 presented to Parliament

The Budget for 2018 was presented to Parliament on 19 February 2018. Some of the Budget provisions are as follows:

Corporate taxation – Tax Rebate

- For the year of assessment (YA) 2018, the corporate income tax (CIT) rebate will be increased from 20% to 40% of tax payable, capped at an increased amount of SGD 15,000 (formerly SGD10,000).
- The CIT rebate will be extended for another year to YA 2019, but will revert to 20% of tax payable with a cap of SGD10,000.

Corporate taxation – Tax Incentives

- the 250% tax deduction for qualifying donations will be extended for donations made on or before 31 December 2021. All other conditions of the scheme remain the same;
- from YA 2019 to YA 2025, the tax deduction for staff costs and consumables incurred on qualifying research and development projects carried out in Singapore will be increased from 150% to 250%. All other conditions of the scheme remain the same;
- the tax deduction for qualifying intellectual property (IP) registration costs will be extended from YA 2020 to YA 2025; and the deduction rate will be increased from 100% to 200% on up to SGD100,000 of qualifying IP registration costs incurred for every YA from YA 2019 to YA 2025; a 100% deduction will continue to be allowable on qualifying IP registration costs incurred in excess of SGD100,000 for every YA within the same period;
- the tax deduction for qualifying IP licensing costs will be amended as follows with effect from YA 2019 to YA 2025:
- the deduction rate will be increased from 100% to 200% on the first SGD100,000 of qualifying IP licensing costs incurred by a company for every YA; a 100% deduction will continue to be allowable on qualifying IP licensing costs incurred in excess of SGD 100,000 for every YA within the same period; and
- qualifying IP licensing costs include payments made by a qualifying person to publicly funded research performers or other businesses, but exclude related party licensing

payments or payments for IP where any allowance was previously made to the person;
- the tax exemption scheme for new start-up companies will be adjusted from YA 2020 as follows:
- a 75% tax exemption on the first SGD100,000 of normal chargeable income; and
- a further 50% tax exemption on the next SGD100,000 of normal chargeable income.
- the partial tax exemption scheme for all companies (excluding those qualified for the new start-up tax exemption scheme) and bodies of persons will be adjusted from YA 2020 as follows:
- 75% tax exemption on the first SGD10,000 of normal chargeable income; and
- a further 50% tax exemption on the next SGD190,000 of normal chargeable income.
- the Wage Credit Scheme (WCS) will be extended for three more years, from 2018 to 2020. The government co-funding of qualifying wage increases for Singapore employees up to a gross monthly wage of SGD4,000 will be maintained at 20% in 2018. In 2019 and 2020, the co-funding percentage will be 15% and 10% of qualifying wage increases, respectively.

Individual taxation – Tax Incentives
- The 250% tax deduction for qualifying donations will be extended for donations made on or before 31 December 2021. All other conditions of the scheme remain the same.

Goods and services tax
- The standard goods and services tax (GST) rate will be increased from 7% to 9%. This is proposed to be implemented sometime during calendar years 2021 to 2025.
- GST on imported services will be introduced. The following tax regimes will be implemented from 1 January 2020 for imported services:
- the reverse charge regime for business-to-business (B2B) supplies (supplies made to GST-registered persons) of imported services; and
- the overseas vendor registration (OVR) regime for business-to-consumer (B2C) supplies (supplies made to non-GST registered persons) of imported digital services.

Other provisions
- Carbon taxation of SGD5 per tonne of greenhouse gas emission will be imposed on facilities producing 25,000 tonnes or more of greenhouse gas emissions a year from 2019 to 2023. The rate will be increased to between SGD10 and SGD15 per tonne by 2030.
- The top marginal buyer's stamp duty rate for residential properties will be increased from 3% to 4% on the portion in excess of SGD 1 million with effect from 20 February 2018.
- Tobacco excise duty will be increased by 10% for all tobacco products with effect from 19 February 2018.

THAILAND

Second draft bill on VAT on foreign e-commerce operators issued

On 17 January 2018, the Thai Revenue Department (TRD) issued the second draft bill aimed at bringing international e-commerce transactions with non-VAT-registered persons in Thailand (recipients) under the scope of value added tax (VAT) (see Thailand-1, News 7 July 2017 for the first draft bill). The proposed law will take effect 180 days after it is published in the Royal Gazette.

The key proposals for tax legislative amendments are set out below.

VAT registration

Foreign operators that are required to register for VAT purposes in Thailand and are subject to VAT in Thailand, provided that the annual service income derived by them exceeds THB1.8 million and the services rendered are consumed in Thailand, include:
- foreign e-commerce operators providing services to recipients by means of electronic media or through foreign digital platform operators;
- foreign digital platform operators whose platforms are used by the above foreign e-commerce operators that provide services to recipients. However, VAT registration and VAT taxability of service income is re-allocated to the foreign e-commerce operators if all of the following criteria are met:
- the foreign digital platform operator is not the person determining the terms and conditions of the service provision, approving the delivery of services to the recipient, or approving the service fee collection from the recipient;
  - an agreement stating that the foreign e-commerce operator,

instead of the foreign digital platform operator, is responsible for administering and registering for VAT purposes in Thailand is made between both parties; and

- a document is issued to the recipient stating that the service is provided by the foreign e-commerce operator.

The recipients making payment to the aforementioned foreign operators are not required to administer VAT through self-assessment.

VAT rate

The reduced VAT rate of 7% is applied to the service income received from recipients.

VAT administration

- Foreign operators may register for VAT electronically via the TRD's website.
- Foreign operators are not allowed to issue VAT invoices to the recipients.
- Foreign operators are not allowed to collect VAT from recipients.
- Foreign operators are required to prepare output VAT reports and submit electronic VAT returns together with the VAT payments.
- Foreign operators are not allowed to apply for input VAT deductions or obtain VAT refunds.
- Foreign operators are subject to VAT liabilities, penalties, surcharges and fines for failure to comply with the VAT rules.
- Foreign operators may request for their customers' VAT number to confirm whether they are VAT-registered persons in Thailand.
- Where a customer is a VAT-registered person in Thailand, the customer will not be able to claim the self-assessed VAT as input VAT or apply for a VAT deduction, if the foreign operator does not comply with the proposed e-commerce law.

The final two proposed measures reported on 7 July 2017 (i.e. taxable presence subject to corporate income taxation and withholding tax) have been removed from the bill.

__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.

Technical Updates

The technical updates published here are summarised from selected government gazette notifications published between 16 November 2017 and 15 February 2018 including Public Rulings and guidelines issued by the Inland Revenue Board Malaysia (IRBM), the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Budget 2018 Bills gazetted

The following Bills released during Budget 2018 were gazetted on 29 December 2017. All the changes proposed in the Bills were accepted. (see **Table 01**)

Country-by-Country Reporting (CbCR) Rules updated and extended to Labuan entities

The following rules and regulations have been issued:

- The Income Tax (Country-by-Country Reporting) (Amendment) Rules 2017 [P.U.(A) 416]; and
- The Labuan Business Activity Tax (Country-by-Country Reporting) Regulations 2017 [P.U.(A) 409]

The Income Tax (Country-by-Country Reporting) (Amendment) Rules 2017 [P.U.(A) 416] gazetted on 27 December 2017 introduce some minor amendments to the Income Tax (Country-by-Country Reporting) Rules 2016 [P.U.(A) 357]. Further, the CbCR obligations have now also been extended to Labuan entities by way of the Labuan Business Activity Tax (Country-by-Country Reporting) Regulations 2017 [P.U.(A) 409] gazetted on 26 December 2017. Prior to this, a Labuan entity taxed under the Labuan Business Activity Tax Act 1990 was technically not required to make the relevant CbCR notifications. This is because the previous Rules were issued under the ITA.

Table 01

Bill	Act
• Finance (No. 2) Bill 2017-in corporating changes proposed in Budget 2018	Finance (No. 2) Act 2017
• Income Tax (Amendment) Bill 2017 – to extend offences relating to the Mutual Administrative Assistance Arrangements (MAAAs), to include offences relating to Double Tax Arrangements (DTAs) and Tax Information Exchange Agreements (TIEAs)	Income Tax (Amendment) Act 2017
• Labuan Business Activity Tax (Amendment) (No. 2) Bill 2017 – to empower the Minister to not only make regulations relating to MAAAs but to also make regulations relating to DTAs and TIEAs	Labuan Business Activity Tax (Amendment) (No. 2) Act 2017

Income Tax Automatic Exchange of Financial Account Information Rules

The Income Tax (Automatic Exchange of Financial Account Information) Rules 2016 [P.U.(A) 355], gazetted on 23 December 2016, discuss some of the matters relating to the due diligence obligations of a Reporting Financial Institution, allowable modifications to the due diligence procedures, reporting obligations of a Reporting Financial Institution, record-keeping requirements, appointment of a third party to carry out the obligations, powers of the Director General as well as anti-avoidance provisions. The Rules were amended by the Income Tax (Automatic Exchange of Financial Account Information) (Amendment) Rules 2017 [P.U.(A) 403], gazetted on 22 December 2017, as follows:

- Rule 3 — Amendment to the definition of "Standard"
- Rule 3A — New rule added on the application of the Standard
- Rule 4 — Amendment to the due diligence obligations
- Rule 7 — Amendment to the reporting obligations
- Rule 13 — New rule added on special provision for reporting of pre-existing individual accounts
- Schedule 2 — New schedule added relating to "Excluded Accounts"

Tax exemption for angel investors extended to 31 December 2020

During Budget 2018, it was proposed that the application period for tax exemption for angel investors be extended for another three years, until 31 December 2020. To provide for the extension, the Income Tax (Exemption) (No. 3) 2014 (Amendment) Order 2017, gazetted on 27 December 2017, amends the Income Tax (Exemption) (No. 3) Order 2014 [P.U.(A) 167].

Tax exemption on statutory income for tour operating businesses extended to the YA 2020

During Budget 2018, it was proposed that the tax exemption on statutory income for tour operating businesses be extended for a further two years of assessment (YAs), to YA 2020. To legislate this, the following amendment orders were gazetted on 27 December 2017:

Income Tax (Exemption) (No. 11) 2016 (Amendment) Order 2017 [P.U.(A) 412]

- The Order amends the Income Tax (Exemption) (No. 11) Order 2016 [P.U.(A) 345], by providing an income tax exemption on the statutory income derived from a tour operating business which provides inbound tour packages to Malaysia. The tour packages must be participated by not fewer than 750 tourists from outside Malaysia in a YA.

Income Tax (Exemption) (No. 12) 2016 (Amendment) Order 2017 [P.U.(A) 413]

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

Amendments to deduction from remuneration rules

The Income Tax (Deduction from Remuneration) (Amendment) Rules 2017 [P.U.(A) 420], gazetted on 27 December 2017, amend the Income Tax (Deduction from Remuneration) Rules 1994. The new Rules take effect from 1 January 2018.

The Income Tax (Deduction from Remuneration) Rules 1994 provide that the employer must determine and make monthly tax deductions (MTD) from employees' salaries based on either the Schedule of MTD or the computerised calculation method. The Schedule is issued for employers who do not use a computerised payroll software. However, employers using the Schedule are advised to use the computerised calculation method if the employee receives a salary adjustment, elects for optional deductions or commences employment other than in January.

The amendments are to take into account the revised tax rates with effect from YA 2018 wherein the tax rates on three chargeable income bands between RM20,001 to RM70,000 will be reduced by two percentage points.

Advance pricing arrangement rules amended

The Income Tax (Advance Pricing Arrangement) (Amendment) Rules 2017 [P.U.(A) 449], gazetted on 29 December 2017, amend the Income Tax (Advance Pricing Arrangement) Rules 2012 [P.U.(A) 133]. The original Rules prescribe the application process and the timelines from the pre-filing meeting with the IRBM to the issuance of the Advance Pricing Arrangement (APA) for cross-border transactions. A new Rule 23 has been inserted to introduce a fee for the APA application. An application for an APA or for the renewal of an existing APA would be subject to a non-refundable application fee of RM5,000 and any expenses as the Director General may determine.

Labuan Business Activity Tax (Automatic Exchange of Financial Account Information) Regulations 2018

The Labuan Business Activity Tax (Automatic Exchange of Financial Account Information) Regulations 2018 [P.U.(A) 20] were gazetted on 5 February 2018. The Regulations came into operation on 1 July 2017 and shall apply to any Labuan entity which is a "Financial Institution" as defined in Section VIII of the Common Reporting Standard set out in the Standard for Automatic Exchange of Financial Account Information in Tax Matters approved by the Council of the Organisation for Economic Co-Operation and Development (OECD) as amended from time to time.

The Regulations cover, among others, the due diligence obligation, reporting obligation, method of furnishing information return, use of

information by the Director General, record-keeping requirements and consequences for incorrect return and failure to comply with the Regulations.

100% statutory income exemption on shipping profits for YAs 2014 to 2020: Gazette Orders released

The Finance Act 2012 (Act 742), gazetted on 9 February 2012, amended Section 54A of the Income Tax Act 1967 (ITA) to reduce the income tax exemption in respect of statutory income derived from the operation of Malaysian ships from 100% to 70%. Following discussions with the Malaysian Shipowners' Association (MASA), the Ministry of Finance (MoF) agreed to defer the reduction in tax exemption and the introduction of the new rules. The Income Tax (Exemption) (No. 2) Order 2012 [P.U.(A) 167], gazetted on 4 June 2012, exempts any person resident in Malaysia from the provisions of Sections 54A(1) and (2) and from the payment of income tax in respect of statutory income derived from the business of transporting passengers or cargo by sea on a Malaysian ship; or letting out on charter a Malaysian ship owned by him on a voyage or time charter basis for YAs 2012 and 2013 only.

In this regard, the following Exemption Orders have now been issued to maintain the 100% exemption on statutory income derived from the operation of Malaysian ships for YAs 2014 to 2020:

- Income Tax (Exemption) Order 2018 [P.U.(A) 38] gazetted on 14 February 2018 for YAs 2014 and 2015
- Income Tax (Exemption) (No. 2) Order 2018 [P.U.(A) 48] gazetted on 21 February 2018 for YAs 2016 to 2020

Public Ruling No. 7/2017: Disposal of plant or machinery Part I – other than controlled sales

Public Ruling (PR) No. 7/2017, published on 12 December 2017, explains the tax treatment on the disposal of plant or machinery which is not subject to controlled

sales. The PR also explains the application of Paragraph 61B, Schedule 3 of the ITA, which took effect from YA 2016. Paragraph 61B provides that where a significant part of an asset is replaced in a particular basis period with a new part which is depreciated separately in accordance with generally accepted accounting principles, the old part is deemed to have been disposed of in that basis period.

PR No. 8/2017: Professional indemnity insurance

PR No. 8/2017, published on 19 December 2017, replaces PR No. 3/2009 which was issued on 30 July 2009. The PR discusses the following:

a. The tax deductibility of premiums paid for professional indemnity insurance (PII); and
b. The tax treatment of insurance proceeds received and compensation paid in relation to a PII policy

An important difference in the new PR is that the new PR provides that any compensation paid by the taxpayer to a claimant will be allowed a tax deduction. The compensation to the claimant can be made in the following manner:

- Insurance company pays the proceeds to the taxpayer and the taxpayer pays that amount to the claimant; or
- Insurance company pays directly to the claimant

This is a change from the position outlined in the earlier PR No. 3/2009, and is a welcomed change.

PRs No. 9/2017 and 10/2017: Reinvestment allowance

PR No. 9/2017 and 10/2017, published on 22 December 2017, provide guidance to Malaysian resident companies engaged in manufacturing and agricultural activities in determining their eligibility to claim reinvestment allowance (RA). The IRBM has stated in both PRs that the earlier PR No. 6/2012 on RA that was issued on 12 October 2012, has been re-written, arranged and updated. The IRBM has also advised that PR No. 10/2017 should be read together with PR No. 9/2017.

PR No. 9/2017: RA Part I - Manufacturing Activity

The PR provides clarification in relation to projects that qualify for RA, expenditure that qualifies for RA, period of eligibility of RA and computation of RA. It has been updated to incorporate and explain the legislative changes from 2012.

PR No. 10/2017: RA Part II - Agricultural and Integrated Activities

The PR explains the tax treatment and provides guidance for a company which carries on both agricultural activity and manufacturing activity as an integrated project which constitutes one business source.

PR No. 11/2017: Residence status of individuals

PR No. 11/2017, published on 22 December 2017, replaces PR No. 6/2011 which was issued on 16 May 2011. The PR explains the determination of residence status for individuals, as provided in Section 7 of the ITA. The new PR includes an additional clarification and example of Section 7(1)(c) of the ITA, which provides that where an individual is in Malaysia in the basis year for a particular YA for 90 days or more, the individual will be a resident for that particular YA if the individual was either a resident or present in Malaysia for 90 days or more in three out of four YAs preceding that particular YA.

In addition, the new PR also highlights the exemption for individuals resident in Malaysia from the payment of income tax on interest, as provided vide Income Tax (Exemption) (No.7) (Amendment) Order 2009 [P.U.(A) 211].

PR No. 12/2017: Appeal against an assessment and application for relief

PR No. 12/2017, published on 29 December 2017, replaces PR No. 7/2015, which was published on 22 October 2015. The PR explains the

procedures for a taxpayer to appeal against an assessment and apply for relief.

The key highlights of the new PR are the discussions on the amendments to Section 97A of the ITA and the introduction of the new Section 131A, which were proposed in Budget 2017 and which took effect from 1 January 2017. One of the important changes arising from these legislative updates is that an application for relief is now allowed for reasons other than in respect of an error or mistake. Such applications for relief, which are now legislatively provided for, were previously made based on the concession given in PR No. 7/2015.

Practice Note No. 3/2017 in relation to the withholding tax position for services performed outside Malaysia (w.e.f. 6 September 2017)

The IRBM has issued Practice Note No. 3/2017 dated 7 December 2017, to provide guidance on the implementation of the Income Tax (Exemption) (No. 9) Order 2017 [P.U.(A) 323]. The Exemption Order exempts a non-resident person from income tax in respect of income falling under Section 4A(i) and (ii) of the ITA, where services are rendered and performed outside Malaysia. Such amounts are also not subject to withholding tax. Practice Note No. 3/2017 provides practical guidance relating to the withholding tax treatment of services performed outside Malaysia before and after the Exemption Order came into operation on 6 September 2017. The IRBM clarified that the 6 September 2017 date refers to the date that the services are rendered/performed by the non-resident.

2018 income tax return filing programme issued

The IRBM has recently made available on its website the 2018 income tax return filing programme (2018 filing programme) titled “Income Tax Return Form (ITRF) Filing Programme For The Year 2018”. The 2018 filing programme is broadly similar to the position laid out in the 2017 filing programme. Where a grace period is given, submissions shall be deemed to have been received by the stipulated due date if received within the grace period. The grace period also applies to the settlement of balance of tax payable under Section 103(1) of the ITA. Where the ITRF/balance of

tax payable is not furnished within the grace period, the original due date will be taken for the purpose of calculating the penalties. Some of the notable inclusions in the 2018 filing programme are:

- The 2018 filing programme indicates that it is mandatory for Labuan companies to e-file their Forms E and C (previously, this was communicated separately to the Labuan companies).
- E-filing of the return by co-operatives and societies (Form C1) is available from YA 2018 (previously, only manual filing was available).
- The 2018 filing programme also includes the filing details for Petroleum ITRF.

Amendments to the IRBM's guidelines for income tax treatment of assets held for sale

The IRBM had previously issued on its website guidelines dated 4 June 2013 captioned "Guidelines for Income Tax Treatment of Malaysian Financial Reporting Standards (MFRS) 5: Non-Current Assets Held for Sale and Discontinued Operations", to determine the timing for the calculation of the balancing charge (BC) and balancing allowance (BA) for a non-current asset which is classified as held-for-sale (HFS) under MFRS 5.

Pursuant to the Finance (No. 2) Act 2017, Paragraph 61A (5), Schedule 3 of the ITA was amended to revise the definition of residual expenditure (RE) to be consistent with Paragraph 68. As such, the IRBM has recently issued amended guidelines dated 22 January 2018 to clarify the definition of RE in respect of assets HFS.

Malaysia signs Multilateral Convention to implement tax treaty related measures to prevent BEPS

On 24 January 2018, Malaysia signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) (MLI) at a signing ceremony which took place at the OECD Headquarters in Paris, in conjunction with a plenary session on the Inclusive Framework of BEPS.

With this signing, Malaysia has taken a proactive position in executing the best tax practices under international standards, including the implementation of BEPS Action Plans.

Deferment of deadline for Foreign Account Tax Compliance Act (FATCA) reporting

The US FATCA aims to reduce tax evasion by US persons and affects Financial Institutions (FIs) worldwide. FIs outside the US are required to provide information regarding their clients who are US persons, to the US Inland Revenue Service (US IRS). The US has developed Inter-Governmental Agreement (IGA) models as tools to facilitate FIs' compliance with FATCA. Malaysia reached an agreement with the US on a Model 1 IGA, where reporting Malaysia-based Financial Institutions (MYFIs) will provide the IRBM with account information of US persons.

The IRBM has recently announced on its website that the date for submitting the 2014 to 2017 reportable information has been further deferred to 30 June 2019 (from the earlier scheduled date of 30 June 2018), as the Malaysia-US IGA is still in the process of being finalised. The due date for submitting the 2018 reportable information is also on 30 June 2019.

STAMP DUTY

Stamp duty exemption for sale and purchase transaction of a structured warrant or exchange-traded fund

The Stamp Duty (Exemption) (No. 2) Order 2017 [P.U.(A) 408], gazetted on 26 December 2017, provides a stamp duty exemption on a contract note executed for the sale and purchase transaction of a structured warrant or exchange-traded fund approved by the Securities Commission Malaysia under the Capital Markets and Services Act 2007 [Act 671].

The Order came into operation

on 1 January 2018, and will apply to contract notes executed between 1 January 2018 and 31 December 2020.

Stamp duty exemptions to revive abandoned housing projects extended to 31 December 2020

In Budget 2018, it was proposed that the stamp duty exemption provided on the relevant instruments executed by the original house purchaser and the approved rescuing contractor or developer be extended to 31 December 2020. To legislate this, the following amendment orders were gazetted on 27 December 2017:

Stamp Duty (Exemption) (No. 5) 2013 (Amendment) Order 2017 [P.U.(A) 414]

- The Order amends the Stamp Duty (Exemption) (No. 5) Order 2013 [P.U.(A) 91] that provides stamp duty exemption on the relevant instruments executed by the original house purchaser.

Stamp Duty (Exemption) (No. 6) 2013 (Amendment) Order 2017 [P.U.(A) 415]

- The Order amends the Stamp Duty (Exemption) (No. 6) Order 2013 [P.U.(A) 92] that provides stamp duty exemption on the relevant instruments executed by a rescuing contractor or developer approved by the Minister of Housing and Local Government (MHLG).

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 9) Order 2017

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 9) Order 2017 [P.U.(A) 378] was gazetted on 7 December 2017 and came into operation on 8 December 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:

- Short Term Revolving Credit Facility obtained or to be obtained by Prasarana Malaysia Berhad (formerly known as Syarikat Prasarana Negara Berhad), in the aggregate principal amount not exceeding RM1,914,000,000; and
- Guarantee provided or to be provided by the government of Malaysia relating to the Short Term Revolving Credit Facility above

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 10) Order 2017

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 10) Order 2017 [P.U.(A) 382] was gazetted on 12 December 2017 and came into operation on 13 December 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 Prasarana Malaysia Berhad pursuant to the *Sukuk Murabahah* Programme in nominal values of up to RM6 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) Order 2018

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2018 [P.U.(A) 5] was gazetted on 12 January 2018. 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 Medium Term Notes issued or to be issued by Suria Strategic Energy Resources Sdn Bhd pursuant to the Islamic Medium Term Notes Programme in nominal values of up to RM4,530,000,000 provided that the combined aggregate of the outstanding nominal value of the Islamic Medium Term Notes and the outstanding principal amount under the Islamic Revolving Credit Facility (RC-I Facility – see (b) below), shall not exceed RM4,530,000,000;

- RC-i Facility obtained or to be obtained by Suria Strategic Energy Resources Sdn Bhd in the aggregate principal amount not exceeding RM1,600,000,000, subject to the combined aggregate referred to in (a) above; and
- Guarantee provided or to be provided by the government of Malaysia in relation to the Islamic Medium Term Notes and the RC-i Facility

CUSTOMS DUTIES

Customs Duties (Exemption) (Amendment) (No.5) 2017

The Customs Duties (Exemption) (Amendment) (No.5) Order 2017 [P.U. (A) 353], gazetted on 16 November 2017 and that came into operation on 17 November 2017, provides for amendments in Part I of the Schedule in relation to item 66 under the Customs Duties (Exemption) Order 2013 [P.U. (A) 371/2013].

Customs (Anti-Dumping Duties) (Administrative Review) (Amendment) Order 2017

The Customs (Anti-Dumping Duties) (Administrative Review) (Amendment) Order 2017 [P.U. (A) 404] was gazetted on 22 December 2017 and came into operation on 1 August 2017. This Order provides for an amendment to the Schedule of the Customs (Anti-Dumping Duties) (Administrative Review) Order 2016 [P.U. (A) 239/2016] by substituting the words "Mahaphant Fibre-Cement Public Company Limited" with the words "Shera Public Company Limited (formerly known as Mahaphant Fibre-Cement Public Company Limited)".

Customs Duties (Exemption) Order 2017

The Customs Duties (Exemption) Order 2017 [P.U. (A) 445] was gazetted on 29 December 2017 and came into operation on 3 January 2018. This Order provides a list (Schedule Part 1) of persons exempted from payment of customs duties on specific goods, subject to certain conditions. The Order further provides for the revocation of the Customs Duties (Exemption) Order 2013 [P.U. (A) 371/2013].

Customs (Anti-Dumping Duties) Order 2018

The Customs (Anti-Dumping Duties) Order 2018 [P.U. (A) 23], gazetted on 7 February 2018 is effective for the period of five years from 8 February 2018 to 7 February 2023. The anti-dumping duties shall be levied on and paid by the importers in respect of the importation of the goods into Malaysia, as enumerated in the corresponding Schedule. The rate of duties imposed ranges from NIL to 111.61% depending on the tariff code, country of origin, and the exporter/producers, as specified in the Schedule.

EXCISE DUTIES

Excise Duties (Exemption) Order 2017

The Excise Duties (Exemption) Order 2017 [P.U. (A) 444] was gazetted on 29 December 2017 and came into operation on 3 January 2018. The Order provides a list (Schedule Part 1) of persons exempted from payment of excise duties on specific goods, subject to certain conditions. The Order further provides for the revocation of the Excise Duties (Exemption) Order 2013 [P.U. (A) 379/2013].

GOODS AND SERVICES TAX (GST)

Goods and Services Tax (Exempt Supply) (Amendment) (No.2) Order 2017

The Goods and Services Tax (Exempt Supply) (Amendment) (No.2) Order 2017 [P.U. (A) 421] was gazetted on 28 December 2017 and came into operation on 1 January 2018. The Order provides for an amendment to item 20 of the Second Schedule of the Goods and Services Tax (Exempt Supply) Order 2014 [P.U. (A) 271/2014] by substituting the words "joint management body and management corporation" with the words "developer, joint management body or management corporation."

Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.3) Order 2017

The Goods and Services Tax (Zero-Rated Supply) (Amendment) (No.3) Order 2017 [P.U. (A) 422] was gazetted on 28 December 2017 and came into operation on 1 January 2018. This Order provides for an amendment to item 27 of the Goods and Services Tax (Zero-Rated Supply) Order 2014 [P.U.(A) 272/2014], herein referred to as the "principal Order", by substituting in item 27 the supply of online services for reading materials under tariff codes 49.01, 49.02, 4905.91.00 00 and 4911.99.90 00. The principal Order is further amended by deleting certain tariff codes listed in the Appendix and the descriptions relating to them.

Goods and Services Tax (Amendment) Regulations 2017

The Goods and Services Tax (Amendment) Regulations 2017 [P.U. (A) 446], were gazetted on 29 December 2017 and came into operation on 1 January 2018, except for Regulation 4 which comes into operation on 1 October 2018. The Regulations amended certain provisions under Regulations 39, 41, 49 and 68, the Fourth Schedule, and the Fifth Schedule of the Goods and Services Tax Regulations 2014 [P/U. (A) 190/2014].

Goods and Services Tax (Relief) (Amendment) Order 2017

The Goods and Services Tax (Relief) (Amendment) Order 2017 [P.U. (A) 447] was gazetted on 29 December 2017. Paragraph 2 and subparagraphs 3(a) and 3(c) of the Order came into operation on 1 January 2017 while subparagraph 3(b) of the Order comes into operation on 1 October 2018.

The Order amended certain provisions under paragraph 6 and the First Schedule of the Goods and Services Tax (Relief) Order 2014 [P.U. (A) 273/2014].

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

CASE 1

GST-SARVIZ AG GERMANIA V DIREKTOR NA DIREKTSIA 'OBZAHALVANE I DANACHNO-OSIGURITELNA PRAKTIKA' (CASE C-111/14) [2015] BVC 23 (EUROPEAN COURT OF JUSTICE, 6TH CHAMBER)

BRIEF FACTS

1) From 15 February to 29 December 2010, GST-Sarviz (established in Germany) provided technical and consultancy services to GST Skafolding (established in Bulgaria).
2) GST-Sarviz lacked a fixed establishment in Bulgaria during the period it provided its services. Thus, GST Skafolding paid the VAT due on the supply, i.e. under the reverse charge procedure pursuant to Article 82(2) of the Bulgarian law on VAT.
3) However, the Bulgarian tax authorities later found that GST-Sarviz had a fixed establishment in Bulgaria and was liable to pay VAT for the services provided.
4) GST Sarviz duly paid the sum claimed by the tax authorities on 26.2.2012 and subsequently applied for the tax paid to be offset or refunded as the VAT had already been paid by GST Skafolding.
5) This was refused by the tax authorities and GST-Sarviz appealed against the decision up to the Supreme Administrative Court.
6) As there was no interpretation of Article 193 and Article 194 of the VAT Directive which might be useful in the circumstances of the present case, the Supreme Administrative Court stayed the proceedings to refer several questions to the European Court of Justice for a preliminary ruling.

Article 193 of the VAT Directive:

"VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202."

Article 194 of the VAT Directive:

"1. Where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied."

ISSUES

7) Whether Article 193 is to be interpreted as meaning that in cases where the supplier is not established in the Member State where the VAT is payable, either the supplier of the goods or services, or the recipient of the goods or services, is exclusively liable to VAT, but not that both persons are simultaneously liable for that tax.
8) If only one person is liable for VAT, whether Article 194 is applicable to cases in which the recipient of the services wrongly applied the reverse charge procedure by assuming the supplier had not created a fixed establishment in Bulgaria.

DECISION

First Question

9) In accordance with Article 193, VAT is payable by any taxable person carrying out a taxable supply of services, except where it is payable by another person, e.g. in cases referred to such as Article 194.
10) Pursuant to Article 194, if the taxable supply is carried out by a taxable person who is not established in the Member State in which the VAT is due, the recipient of the taxable service shall be liable for the payment of the VAT.
11) In this case, since GST-Sarviz had a fixed establishment in Bulgaria from which the services were supplied, it alone shall be liable to pay VAT to the Bulgarian tax authorities.

General rule:

12) VAT is payable by a taxable person supplying the taxable service, even in cases of imported services if the supplier has a fixed establishment in the territory in which the VAT is due.

Exception:

13) If it is expressly provided that

VAT shall be payable by another person, e.g. the recipient of an imported service whereby the supplier has no fixed establishment in the territory in which the VAT is due [reverse charge procedure]. (Malaysian context: Section 13(1) of the GST Act 2014).

Second Question

14) In essence, the question is whether Article 194 allows a Member State to impose liability to pay VAT on a recipient of services supplied from a fixed establishment of the supplier (where both of them are established in the same Member State).
15) It was held that the application of the reverse charge procedure is limited solely to situations in which the supplier of the service is not established in the Member State in which the VAT is due.
16) Hence, the recipient of services supplied from a fixed establishment of the supplier cannot be liable for payment of the VAT.
17) In this present case, even if the recipient had already paid the VAT on the mistaken assumption that the supplier did not have a fixed establishment in Bulgaria, the tax authorities cannot derogate from the rule by finding that the person liable to pay the VAT is the recipient of the service and not the supplier.

CASE 2

GLENHARROW LTD V COMMISSIONER OF INLAND REVENUE, [2009] 2 NZLR, (SUPREME COURT, NEW ZEALAND)

BRIEF FACTS

1) This case concerned a mining licence that was issued in 1990, had a term of ten years, and permitted the extraction of greenstone from a block of land in the South Island. The licence changed hands in 1993 (for $5,000), again in 1994 (for $100) and again in 1996 (for $10,000).
2) In 1997, the then licensee sold the licence to the taxpayer, Glenharrow Ltd, for $45 million. Glenharrow maintained that that was what the licence was worth.
3) However, in reality, the full payment would have never been made. Artificiality was evidenced by the fact that the taxpayer undertook a liability of $44,920,000, even though it was a shell company with a share capital of just $100.
4) The GST Act provides that a registered person who buys second-hand goods from an unregistered person is entitled to an input tax credit. The licence came within the definition of second-hand goods and the Taxpayer claimed an input tax credit of one-ninth of the amount paid for the licence.
5) Since it was not liable for any output tax, it also claimed a "refund" of that amount.
6) The Inland Revenue paid this refund. Glenharrow then claimed a further refund of one-ninth of the other $44,920,000 — that is, $4,991,111. This the Revenue declined to pay. They maintained that Section 76 of the GST Act applied, and that the taxpayer was therefore not entitled to any further refund. The taxpayer objected to this.

ISSUES

7) Whether, notwithstanding taxpayer compliance with specific provisions of the Act, the Commissioner may set a particular arrangement aside and reconstruct it because the arrangement constituted tax avoidance.

DECISION

8) The Supreme Court held that the effect of the transaction was to produce a GST refund totally disproportionate to the economic burden undertaken by the taxpayer or the economic benefit obtained by the vendor.
9) The Supreme Court reasoned that the intention of the GST Act will be defeated if an arrangement has been structured to enable the avoidance of output tax, or the obtaining of an input deduction in circumstances which are outside the purpose and contemplation of

the relevant statutory provisions.

10) It could also not be said that the tax advantage was merely incidental to the commercial decisions of the parties to the arrangement.
11) Accordingly, the court held the arrangement to be a distortion that defeated the intent and application of the GST Act.
12) The Supreme Court held that there is a two-stage process before the Commissioner can carry out a reconstruction as follows:
13) The Commissioner must have been justified in coming to the view that there was an "arrangement" entered into between at least two persons; and
14) The Commissioner must have been properly satisfied that the arrangement was entered into between the parties to it to defeat the intent and application of the GST Act or any provision of the Act

CASE 3

SKATTERVERKET V HEDQVIST, (CASE C-264/14) [2015] BVC 34, (EUROPEAN COURT OF JUSTICE, FIFTH CHAMBER)

BRIEF FACTS

1) The Respondent wished to provide services consisting of the exchange of traditional currency (such as the Swedish Crown) for the bitcoin virtual currency and vice versa.
2) Bitcoins (a virtual currency) was used for payments made between private individuals via the internet and in certain online shops that accepted the 'currency'.
3) Before embarking on its business, the Respondent requested a preliminary decision from the Revenue Law Commission (RLC) on whether VAT should be payable on the sale and purchase of bitcoins.
4) The RLC's decision:
5) The Applicant would be supplying an exchange service for consideration.
6) The exchange service was exempted under Article 135(1)(e) of the VAT Directive.
7) The Swedish Tax Authority then appealed against the RLC's decision to the Supreme Administrative Court .
8) The Supreme Administrative Court stayed the proceedings to refer two questions to the European Court of Justice for a preliminary ruling.

ISSUES

9) Whether a transaction involving an exchange of virtual currency for traditional currency and vice versa, which is effected for consideration added by the supplier when the exchange rates are determined constitutes the supply of a service effected for consideration; and
10) If so, whether the abovementioned exchange transaction is tax exempt under Article 135(1) of the VAT Directive.

DECISION

First Question

11) First, the 'bitcoin' virtual currency with bidirectional flow, which would be exchanged for traditional currencies in the context of exchange transactions, could not be characterised as 'tangible property' within the meaning of Article 14 of the VAT Directive, given that virtual currency had no purpose other than to be a means of payment. (Not Goods)
12) This is the same for traditional currencies as it involves money which is a legal tender.
13) A supply of service would be subject to VAT if there is a direct link between the services supplied and the consideration received by the taxable person.
14) Such direct link would be established if there was a legal relationship between the provider of the service and the recipient pursuant to which there was reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration given in return for the service supplied to the recipient.
15) In the present case, there is a legal relationship between the Respondent's company and the other party to the contract in which the parties to the transaction would agree, reciprocally, to transfer amounts of a certain currency and receive the corresponding value in a virtual currency with bidirectional flow, or vice versa.

16) Hence, the exchange of traditional currency for units of bitcoin virtual currency, in return for payment of a sum equal to the difference between the value of the two, would constitute the supply of services for consideration subject to VAT unless otherwise exempted.

Second Question (Exempted)

17) Article 135(1)(e) of the VAT Directive:

"Member States shall exempt the following transactions:

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest"

18) Due to the structure of the EU itself, there are various language versions of the VAT Directive and Article 135(1) must be applied uniformly in the light of the versions in all the languages of the EU.

19) The ECJ took a purposive approach in ruling that when there are linguistic differences, the expression cannot be determined on the basis of an interpretation which is exclusively textual and must be interpreted in light of the context in which it is used and the aims and scheme of the VAT Directive.

20) Hence, the interpretation of these terms must be consistent with the objectives pursued by the exemptions laid down in Article 135(1) and it is clear from their case-laws that Article 135(1)(d) to (f) is aimed, amongst others, to alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible which arise in the context of the taxation of financial transactions.

21) Therefore, from the perspective of the ECJ, transactions involving non-traditional currencies (currencies other than those that are legal tender in one or more countries), in so far as those "currencies" have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions.

22) The ECJ took a purposive approach in ruling that when there are linguistic differences, the expression cannot be determined on the basis of an interpretation which is exclusively textual and must be interpreted in light of the context in which it is used and the aims and scheme of the VAT Directive.

23) Hence, the interpretation of these terms must be consistent with the objectives pursued by the exemptions laid down in Article 135(1) and it is clear from their case-laws that Article 135(1)(d) to (f) is aimed, amongst others, to alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible which arise in the context of the taxation of financial transactions.

24) Therefore, from the perspective of the ECJ, transactions involving non-traditional currencies (currencies other than those that are legal tender in one or more countries), in so far as those "currencies" have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions.

25) The ECJ concluded that exchange services involving bitcoins are financial transactions which are exempted under Article 135(1)(e) of the VAT Directive.

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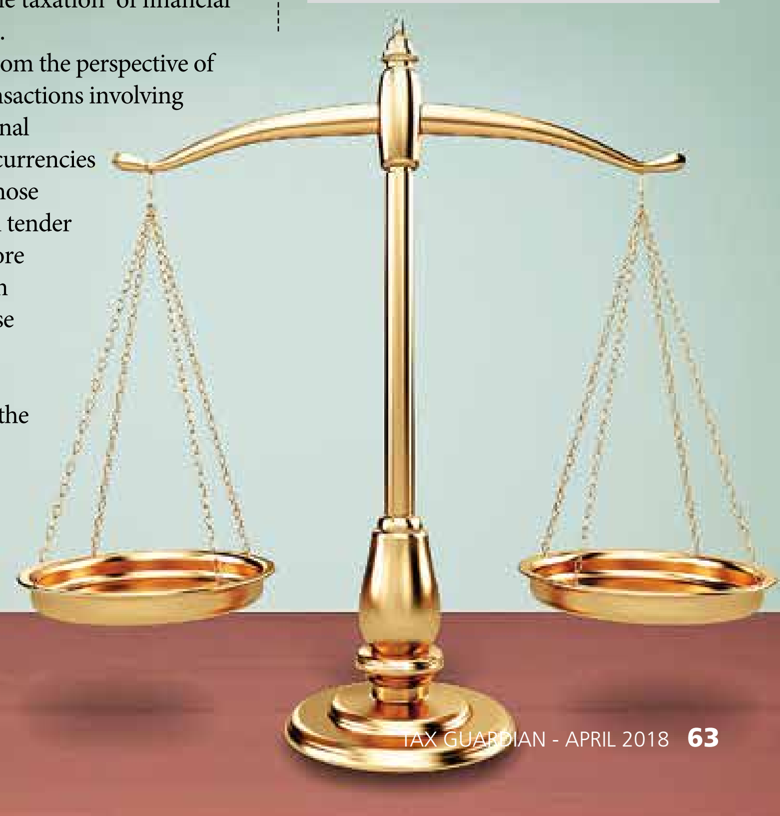
He is presently assisting the firm's tax partners, __Datuk D.P. Naban__ and __S. Saravana Kumar__ in major income tax appeals ranging from income recognition, business deduction, capital allowance, reinvestment allowance and transfer pricing.



BUSINESS DEDUCTIONS
PROHIBITED EXPENSES

Siva Subramanian Nair

In the past articles we have covered extensively on the types of expenses that qualify for a deduction in ascertaining the adjusted income. In this article we shall commence our journey of identifying expenses that are clearly not deductible! In the Income Tax Act 1967, such expenses are classified under Section 39. Therefore the general rule in determining the deductibility of an expense is enunciated by the judge in ***DGIR v RB Sdn Bhd [1984] 1 MLJ 248*** as

"To be deductible, a payment must be authorised as a deduction by Section 33(1) and not be disallowed by Section 39."

Before we detail the expenses that do not rank for a deduction let us first look at an overriding provision in Section 39(1A). Here the deduction for any expense will not be allowed if the Director General [DG] had requested for any information, which concerns wholly or in part to the deduction claimed by that person and this is not provided to the DG within the time specified or such extended time allowed,

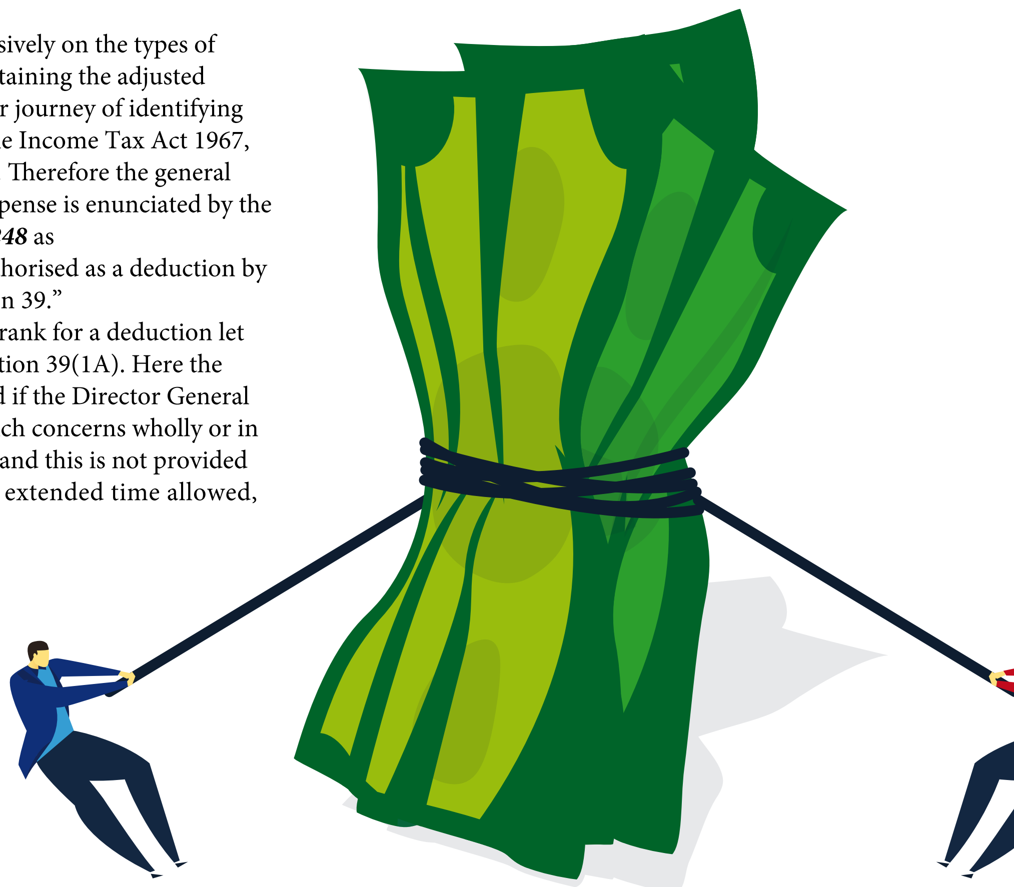
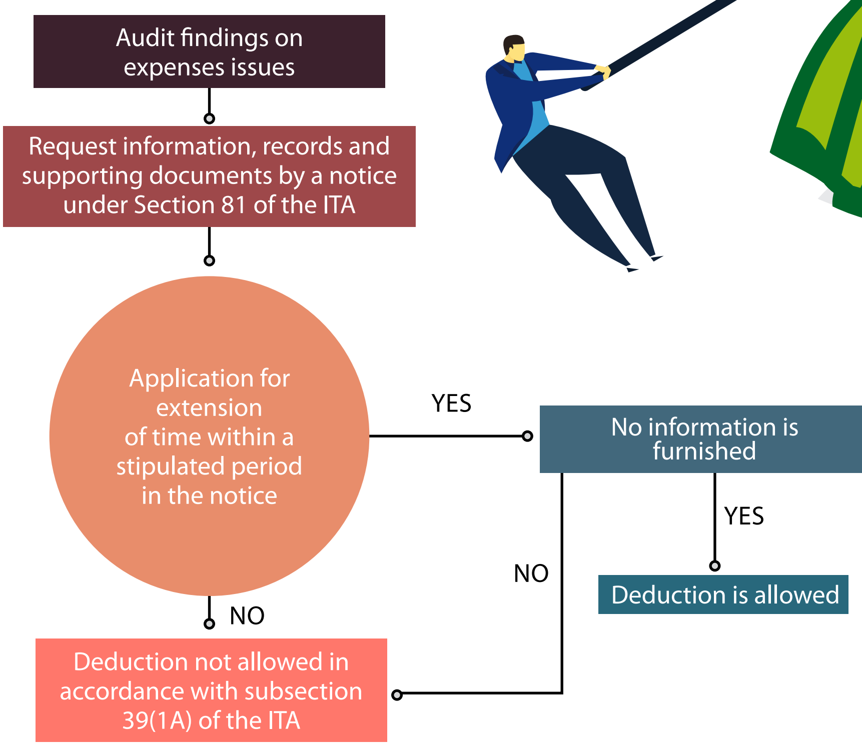


Table 01:



by him. The flow of events is clearly illustrated in the Public Ruling [PR] 3/2015 as **Table 01**:

Candidates can view clear examples on the procedures shown in the flowchart.

The PR also explains that for circumstances beyond the control of the taxpayer i.e. if the records and documents cannot be furnished because they are lost or destroyed as a result of natural disasters from fire and flood, theft, embezzlement of cash and so on, the taxpayer must prove the occurrence of circumstances beyond his control by submitting the following records or documents:

(a) newspaper clippings, photographs and police reports;
(b) other proofs that are appropriate and reasonable; or
(c) records or documents from third parties.

The DG may give due consideration to allow a deduction of expenses if the taxpayer has made every endeavour to submit one of the records or documents as mentioned above.

However, the submission of the above records or documents is subject to approval by the DG who must be satisfied that there is no other avenue for the company to obtain the requested records or documents.

If the taxpayer is able to submit the supporting evidence and reasonable grounds for his inability to produce the records or documents as requested, the DG will give consideration to allow the deduction of expenses claimed.

THE PROHIBITED EXPENSES – SECTION 39(1)

The list starts with domestic or private expenses in subsection (a). There is no definition in the Income Tax Act 1967 as to what constitutes "domestic or private expenses" but case law has illustrated that once there is a "personal" element in the expenditure then it will be caught within this subsection.

This is particularly important when dealing with sole proprietors and partnerships where many of the personal expenses of the proprietor or partner or expenses which are only partially related to the business [i.e. dual purpose expenditure] are included in ascertaining the net profit of the business.

Candidates can note numerous examples in the past CTIM questions. For example in ***Business Taxation December 2016 Question 3*** a partnership account includes "...payment of private expenses for Encik Rany of RM54,400 and cost of renovations of Cik Ranita's house of RM42,600..." where Rany and Ranita are partners in the partnership. Therefore these items should be added back to the net profit figure [i.e. it is not allowable] before ascertaining the provisional adjusted income for the partnership.

A good example for students would be the case of ***Dato' Yap Pak Leong v KPHDN [2014] 10 MLJ 255***

FACTS OF THE CASE

The taxpayer, a sole proprietor who owns a plantation in Sandakan had employed his son as the general manager of the plantation. The son is not paid any remuneration for his work but was provided employment perquisites in the form of staff quarters belonging to the taxpayer and two maids and he had declared these perquisites in his tax returns.

Following an audit conducted by the IRBM, they disallowed the taxpayer's claim for deductions for staff quarters upkeep, maid expenses, purchase of furniture and gadget expenses. Amongst others, an issue raised for the consideration of the court was whether these expenses claimed by the taxpayer were deductible?

DECISION OF THE COURT

The High Court held that those expenses were disallowed under Section 39(1) as they were domestic or private expenses because

- They relate to a luxury home owned and occupied by the taxpayer
- The expenses for the "upkeep" of the "staff quarters" were more in the nature of renovation or renewal of the private residence of the taxpayer and it should not be considered as maintenance expenditure.
- The "staff quarters" is located in Kota Kinabalu which is five to six hours drive away from the plantation in Sandakan.
- The provision of the luxury quarters was not wholly incurred in the production of income.
- The maid expense was not wholly and exclusively incurred in the production of income under Section 33(1) because

the "staff quarters" was also the private residence of the taxpayer and his wife besides the general manager and hence the taxpayer also obtained benefit out of the services provided by the two maids.

Another interesting case is that of ***MALLALIEU V DRUMMOND STC 665 [1983]***

FACTS OF THE CASE

A barrister tried to claim the cost of a black dress, a suit, shoes and a white blouse that was required when making court appearances. The costs or replacement and laundering was included. The barrister claimed that the expense was only in relation to the Bar Councils dress code and contended that these clothes would not normally be purchased. She argued that she did not wear this clothing out of personal preference, she preferred bright colours, and incurred the expenditure because it was a requirement of her profession, and so only wore the clothes when appearing in court, or when she was required to be ready to attend court at short notice. Preserving her warmth and personal decency was not a consideration which crossed her mind when she incurred the expenditure.

DECISION OF THE COURT

The House of Lords held that the expense had a dual purpose because although her primary objective or subjective intention was to buy clothes for work, clothes were needed as a human being for warmth and decency. The elements were inextricably linked.

This principle is also illustrated in ***Taxation IV December 2003 Question 6(c) where the solution states***

Travelling expenses incurred by Mr. Sambu for travel between his home and office is not deductible since such expenses are prohibited by Section 39(1) being private and domestic in nature. In ***Burton v Rendall 35 TC 435*** travelling expenses between home and office was held to be not deductible on the grounds the travel was not undertaken in the performance of the employees's duties.

Again in the answer for ***Advance Taxation 2 June 2016 Question 4*** where candidates were required to state the following for 4 marks:

> Traveling expenses between the client meeting places and from the office to the client meeting place are deductible - satisfies Section 33(1). The traveling expenses from his home (in Subang Jaya) to his office (in Puchong Jaya) are not deductible - it is private / domestic expenditure.

- *Norman v Golder ; Section 39(1) (a)*
- *Bowden v Russell & Russell –*

> And the fact that he also worked from home does not make it deductible - duality of purpose.

In the next article we will discuss further on other prohibited expenditure.

"For all candidates sitting for the June 2018 examinations; all the best and God bless!"

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FURTHER READING

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

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: APRIL - JUNE 2018

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
APRIL 2018								
Workshop: Recent Updates of Tax Audits and Enforcement Actions by the IRBM	3 Apr	9a.m. - 5p.m.	Kuala Lumpur	Renga	400	500	600	8 WS/028
Workshop: Cross Border Transaction & Withholding Tax	5 Apr	9a.m. - 5p.m.	Ipoh	Harvindar Singh	350	450	500	8 WS/015
Morning Talk: Your Business and Tax	5 Apr	9a.m. - 12p.m	IRBM Cyberjaya	IRBM & CTIM	FOC			N/A
Workshop: Tax Issues & Implications for Property Developers & Investors	9 Apr	9a.m. - 5p.m	Johor Bahru	Dr. Tan Thai Soon	350	450	500	8 WS/010
Workshop: Tax Issues & Implications for Property Developers & Investors	16 Apr	9a.m. - 5p.m	Kota Kinabalu	Dr. Tan Thai Soon	350	450	500	8 WS/011
Seminar: Current Tax Developments	25 Apr	9a.m. - 5p.m	Kuala Lumpur	Various Speakers	450	550	650	8 SE/005
Workshop: Managing GST Audits	27 Apr	9a.m. - 5p.m	Melaka	Thenesh Kannaa	350	450	500	8 WS/021
GST Training Course Examination Day	18, 19, 25, 26 Apr & 2,3 May 12 May	9a.m. - 5p.m	Kuala Lumpur	Royal Malaysian Customs Dept.	2,200 *(fee for 6 days course)*	2,700 *(fee for 6 days course)*	3,000 *(fee for 6 days course)*	JV/004
MyGCAP Reviewers Course Examination Day Interview Session	20, 21 & 22 Apr 28 Apr 28, 29 & 30 Apr	9a.m. - 5p.m	Kuala Lumpur	Royal Malaysian Customs Dept.	1,800 (fee for 3 days course)	N/A	2,500 (fee for 3 days course)	JV/005
MAY 2018								
Workshop: Managing GST Audits	4 May	9a.m. - 5p.m	Kuala Lumpur	Thenesh Kannaa	400	500	600	8 WS/022
Workshop: Managing GST Audits	8 May	9a.m. - 5p.m	Ipoh	Thenesh Kannaa	350	450	500	8 WS/023
Workshop: Recent Updates of Tax Audits and Enforcement Actions by the IRBM	10 May	9a.m. - 5p.m	Johor Bahru	Renga	350	450	500	8 WS/029
Workshop: Voluntary Disclosure	10 May	9a.m. - 5p.m	Kuala Lumpur	Thannee	400	500	600	8 WS/036
Workshop: Tax Planning for Companies (in collaboration with MAICSA)	14 May	9a.m. - 5p.m	MAICSA Training Room, KL	Vincent Josef	400	500	600	8 JV/002
Workshop: Recent Updates of Tax Audits and Enforcement Actions by the IRBM	17 May	9a.m. - 5p.m	Ipoh	Renga	350	450	500	8 WS/055
Workshop: Transfer Pricing Documentation	23 May	9a.m. - 5p.m	Penang	Harvindar Singh	350	450	500	8 WS/033
Workshop: Managing GST Audits	24 May	9a.m. - 5p.m	Johor Bahru	Thenesh Kannaa	350	450	500	8 WS/024
Workshop: Malaysian Customs Procedures 2018 -Integrating with GST requirements	23-24 May	9a.m. - 5p.m	Kuala Lumpur	Thomas Selva Doss	800	1,000	1,200	18 WS/039
Public Holiday ***(Labour Day: 1 May, Wesak Day 29 May)***								
JUNE 2018								
Workshop: Recent Updates of Tax Audits and Enforcement Actions by the IRBM	1 June	9a.m. - 5p.m	Penang	Renga	350	450	500	8 WS/030

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: APRIL - JUNE 2018

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
Workshop: Bracing for the new GST – Import Audits	4 June	9a.m. - 5p.m	Kuala Lumpur	Thomas Selva Doss	400	500	600	8 WS/040
Workshop: Withholding Tax	6 June	9a.m. - 5p.m	Kuala Lumpur	Thannee	400	500	600	8 WS/037
Workshop: Managing GST Audits	7 June	9a.m. - 5p.m	Penang	Thenesh Kannaa	350	450	500	8 WS/025
Workshop: Managing GST Audits	21 June	9a.m. - 5p.m	Kota Kinabalu	Thenesh Kannaa	350	450	500	8 WS/026
Workshop: Managing GST Audits	22 June	9a.m. - 5p.m	Kuching	Thenesh Kannaa	350	450	500	8 WS/027
Workshop: Transfer Pricing Documentation	26 June	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/034
Workshop: Transfer Pricing Documentation	28 June	9a.m. - 5p.m	Johor Bahru	Harvindar Singh	350	450	500	8 WS/035
Workshop: Public Rulings	28 June	9a.m. - 5p.m	Kuala Lumpur	Kularaj	400	500	600	8 WS/039
Public Holiday ***(Hari Raya Aidilfitri: 15 & 16 June)***								

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

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

NATIONAL TAX CONFERENCE 2018

Closing Date : 2 July 2018

Conference Fees

* Registration of participants will be confirmed upon receipt of full payment or an acceptable employer's guarantee and settlement of previous outstanding dues.
* Walk–in participant registration is subject to availability of seats and full payment.
* Certificate of Attendance will be issued upon full attendance and receipt of full payment.
* Normal rate will be applicable for unpaid early bird registrations after 18 June 2018.

Registration Fee	Early Bird Fee *(with payment before or on 18 June 2018)*	Normal Fee *(after 18 June 2018)*
LHDNM officer / CTIM member	RM1,484	RM1,696
Member's Firm Staff Member of Supporting Body Member / Staff of Sponsor	RM1,590	RM1,802
Non-Member	RM1,696	RM2,014

**Fee is inclusive of 6% GST*

PARTICIPANTS' DETAILS

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

Designation: ________ I/C No: ________

Email ________ Mobile No. ________

Membership Affiliation

Please indicate which body you are associated with and your membership number:

☐ CTIM ☐ ACCA ☐ CIMA ☐ CPA Australia ☐ IIAM ☐ MAICSA ☐ MFPC ☐ MIA ☐ MICPA

☐ Member's Firm Staff

Membership number ________

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

Designation: ________ I/C No: ________

Email ________ Mobile No. ________

Membership Affiliation

Please indicate which body you are associated with and your membership number:

☐ CTIM ☐ ACCA ☐ CIMA ☐ CPA Australia ☐ IIAM ☐ MAICSA ☐ MFPC ☐ MIA ☐ MICPA

☐ Member's Firm Staff

Membership number ________

ORGANISATION'S DETAILS

Organisation: ________

Industry: ________ Contact Person: ________

Address: ________

Email: ________ Tel: ________ Fax: ________

TAX INVOICE to be issued under:

☐ Company

☐ Individual

Authorised Signature & Company Stamp:

PAYMENT DETAILS

I / We hereby enclose*

☐ **Online Payment** via JomPAY

Biller Code: 78659
Ref-1: NTC2018
Ref-2: Mobile Number

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

☐ **Master Card / Visa Card** for amount of RM ________

Card Number ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐

Cardholder's Name ________ Cardholder's Signature
as per credit card

Expiry Date: ________

☐ **Cash** for amount of RM ________

☐ **Cheque** No. ________ for amount of RM ________

*(non-refundable) and made payable to "**CTIM-NTC**". Please write NTC 2018, your name, contact number at the back of the cheque and mail together with registration form to the Conference Secretariat.*

Authorised Signature & Name ________ Date ________

TERMS & CONDITIONS

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

Kindly contact the following Conference Secretariat for more information.

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

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

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

   Contact Person
   Ms Harmiza / Mr Khairul Asyraf / Mr Zura Zuwan
   Tel : 03-8924 3600 Ext 132178 / 132155 / 132192
   Fax : 03-8925 7005
   E-mail : ntc@hasil.gov.my
   Website : www.hasil.gov.my

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 note registrations for the event are not interchangeable but replacements are acceptable. 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 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 Sponsor, kindly indicate which body you are associated with in the registration form.

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

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

Recording
Video / Sound recording is strictly prohibited.

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

Sponsorship and Exhibition Opportunities
For more information, kindly contact Ms Jaslina / Ms Ally at 03-2162 8989 ext 131 / 123 or email to ntc@ctim.org.my

DAY 1

16 JULY 2018 | MONDAY

TIME	PROGRAMME
7:30 am - 9:00 am	**Registration & Arrival of Guests**
9:00 am - 9:10 am	**Arrival of Guest of Honour** *Prime Minister/Minister of Finance (invited)*
9:10 am - 9:20 am	**Welcoming Speech** **Ms Seah Siew Yun** *President* *Chartered Tax Institute of Malaysia*
9:20 am - 9:30 am	**Opening Address** **YBhg Dato' Sri Sabin Samitah** *Chief Executive Officer* *Lembaga Hasil Dalam Negeri Malaysia*
9:30 am - 10:00 am	**Keynote Address by Guest of Honour** *Prime Minister/Minister of Finance (invited)*
10:00 am - 10:30 am	**Morning Refreshments / Press Conference**
10:30 am - 11:45 am	**TOPIC 1: The Malaysian Economy – Where Now After US Tax Reform** Moderator: **Professor Dr Yeah Kim Leng** *Professor of Economics* *Sunway University Business School* Panel Members: **YBhg Datuk Noor Azian Abdul Hamid** *Deputy Chief Executive Officer (Policy)* *Lembaga Hasil Dalam Negeri Malaysia* **Dr Oh Ei Sun** *Senior Adviser - International Affairs* *Asia Strategy and Leadership Institute (ASLI)*
11:45 am - 12:00 pm	**Question & Answer Session**
12:00 pm - 12:45 pm	**TOPIC 2: LHDNM's Strategies & Challenges** Moderator: **Mr Poon Yew Hoe** *Co-Organising Chairman NTC 2018* Speaker: **YBhg Dato' Sri Sabin Samitah** *Chief Executive Officer* *Lembaga Hasil Dalam Negeri Malaysia*
12:45 pm - 1:00 pm	**Question & Answer Session**
1:00 pm - 2:00 pm	**Networking Lunch**
2:00 pm - 3:15 pm	**TOPIC 3: Cryptocurrencies in the Digital Economy – Tax Issues** Moderator: **YBhg Dato' Ng Wan Peng** *(invited)* *Chief Operating Officer* *Malaysia Digital Economy Corporation (MDEC)* Speaker: ***Mr Anil Kumar Puri*** *Partner, International Tax Services Leader* *Ernst & Young Tax Consultants Sdn Bhd* Panel Members: **Mr Mohamad Fauzi Saat** *Director, International Regulation & Treaty Division* *Department of International Taxation* *Lembaga Hasil Dalam Negeri Malaysia* **Representative from Bank Negara Malaysia (BNM)**
3:15 pm - 3:30 pm	**Question & Answer Session**
3:30 pm - 4:45 pm	**TOPIC 4: Tax Audits & Investigations – Latest Issues & Findings** Moderator: **Mr K. Sandra Segaran** *Council Member* *Chartered Tax Institute of Malaysia* Speaker: **Dr Nik Abdullah Sani Nik Mohamed** *Director, Multinational Tax Branch* *Lembaga Hasil Dalam Negeri Malaysia* Panel Member: **Mr Soh Lian Seng** *Executive Director* *KPMG Tax Services Sdn Bhd*
4:45 pm - 5:00 pm	**Question & Answer Session**
5:00 pm	**End of Day 1 & Refreshments**

DAY 2

17 JULY 2018 | TUESDAY

TIME	PROGRAMME
9:00 am - 9:15 am	**Overview of Day 1** **Dr Sotimin Muhalip** *Co-Organising Chairman of NTC 2018*
9:15 am - 10:45 am	**TOPIC 5: Aggressive Tax Planning – Is There a Clear Dividing Line** Moderator: **Mr S. Saravana Kumar** *Partner* *Lee Hishammuddin Allen & Gledhill* Speaker: **Ms Karen Koh Sai Tian** *Director, Special Unit, Large Taxpayer Branch* *Lembaga Hasil Dalam Negeri Malaysia* Panel Member: **Mr Chow Chee Yen** *Council Member* *Chartered Tax Institute of Malaysia*
10:45 am - 11:00 am	**Question & Answer Session**
11:00 am - 11:30 am	**Morning Refreshments**
11:30 am - 12:30 pm	**TOPIC 6: Earnings Stripping Rules – What Are In Store** Moderator: **Dr Veerinderjeet Singh** *Chairman* *Axcelasia Inc* Speaker: **Ms Theresa Goh** *Council Member* *Chartered Tax Institute of Malaysia* Panel Member: **Ms Salamatunnajan Besah** *Director, Tax Policy Department* *Lembaga Hasil Dalam Negeri Malaysia*
12:30 pm - 12:45 pm	**Question & Answer Session**
12:45 pm - 2:00 pm	**Networking Lunch**
2:00 pm - 3:45 pm	**TOPIC 7: Update of Recent Tax Cases** Moderator: **Ms Yeo Eng Ping** *Council Member* *Chartered Tax Institute of Malaysia* Speaker: **Mr Muhammad Farid Jaafar** *Senior Revenue Counsel, Legal Department* *Lembaga Hasil Dalam Negeri Malaysia* Panel Member: **Mr Vijey M. Krishnan** *Partner* *Raja, Darryl & Loh*
3:45 pm - 4:00 pm	**Question & Answer Session**
4:00 pm - 5:00 pm	**TOPIC 8: Open Discussion on Current Issues & Concerns** Moderator: **Ms Seah Siew Yun** *President* *Chartered Tax Institute of Malaysia* Panel Members: **Mr Abdul Manap Dim** *Deputy Chief Executive Officer (Compliance)* *Lembaga Hasil Dalam Negeri Malaysia* **Ms Phan Wai Kuan** *Council Member* *Chartered Tax Institute of Malaysia*
5:00 pm	**End of Conference & Refreshments**

ORGANISED BY

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P R E M I E R   T A X   E V E N T   O F   T H E   Y E A R

NATIONAL TAX CONFERENCE 2018

16 & 17 JULY 2018 | MONDAY & TUESDAY
KUALA LUMPUR CONVENTION CENTRE

Taxation in a Changing Economy - Towards TN50

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

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

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