Official Journal of the Chartered Tax Institute of Malaysia

tax guardian

Vol.11/No.4/2018/Q4

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CHARTERED TAX INSTITUTE OF MALAYSIA

RM30.00

NATIONAL TAX CONFERENCE 2018

TAXATION IN A CHANGING ECONOMY

- Taxation of the Digital Economy
- The Taxability of Donations
- What are Harmful Tax Practices? The OECD's Perspective

ISSN 0128-7583
9 770128 758008

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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Tax Guardian

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contents

Tax Guardian

VOL.11/NO.4/2018/Q4
October 2018

INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers, academicians and students. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 2,500 to 3,500 words submitted in a typed single spaced format using font size 10 in Microsoft Word via email.

Contributions intended for publication must include the author's name, contact details and short profile of not more than 60 words, even if a pseudonym is used in the article. The Editorial Committee reserves the right to edit all contributions based on clarity and accuracy of contents and expressions, as may be required.

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From the President's Desk

SEAH SIEW YUN

SST: MOVING FORWARD

Dear members, as mentioned in the previous *Tax Guardian*, in supporting the government's implementation of the new Sales and Service Tax (SST), CTIM has formed the GST-SST Transformation Working Group (TWG) that had embarked on various activities and contributed by way of: -

- Publicising SST through road-shows held in Kota Bharu, Ipoh, Kuantan, Kuala Terengganu, Kluang, Melaka, Kuching, Kuala Lumpur, Alor Setar, Penang and Taiping.
- Contributing ten articles on GST-SST that were published by *The Edge* publication from 11 June 2018 to 6 August 2018.
- Organising seminars on Transitional Issues from GST to SST in seven different locations nationwide. The seminars were successful with full capacity in some of the venues at the time of writing of my message.

The Sales Tax Bill 2018 and the Service Tax Bill 2018 were gazetted in August 2018 and came into effect on 1 September 2018.

The Royal Malaysian Customs Department (RMCD) has launched The Malaysian Sales Tax and Service Tax portal (MySST) in August 2018 and it is accessible at *https://mysst.customs.gov.my/*. Businesses are encouraged to visit the MySST website to obtain updates and information on legislations, guides, forms and the SST registration status.

The government expects to collect RM21 billion in SST as opposed to RM44 billion in GST previously. The shortfall in revenue is expected to be mitigated by the cancellation of several large projects and by reducing and managing the government's expenditures.

In summary, the SST covers the following key points: -

Sales Tax Act 2018

- *Scope of charge:* Charged and levied on any taxable goods manufactured in Malaysia and sold, used or disposed of by a registered manufacturer. Includes taxable goods imported into Malaysia by any person.
- *Threshold:* RM500,000
- *Tax rate:* 5%, 10% or a specific rate

Service Tax Act 2018

- *Scope of charge:* Charged and levied on any taxable services provided in Malaysia by a registered person in the course of carrying out a business.
- *Threshold:* RM500,000, RM1,500,000 (food and beverage operators)
- *Tax rate:* 6%, RM25 (credit card and charge card)

All GST registered persons are required to submit the GST-03 return for the final taxable period and make payment for the amount of tax due and payable not later than 120 days from the date the GST Act 2014 is repealed, i.e. by 29 December 2018, pursuant to Clause 6 of the GST (Repeal) Act 2018.

As for non-GST registered persons, the submission of the final GST-04 declaration and payment for the amount of tax due and payable (covering the period from 1 August 2018 to 31 August 2018) shall be due by 30 September 2018.

On GST file closure, the RMCD plans to appoint a number of Public Accounting Firms to assist the government in conducting the audit work on businesses.

Besides SST, I am pleased to inform that the Institute also undertook various engagements with the authorities in the 4th quarter of 2018 on the following matters: -

- **Earning Stripping Rules**

The Institute was informed that the IRBM will revise the draft Earning

Stripping Rules (ESR) based on the feedback gathered from the Institute's ESR Working Group. The ESR is expected to be issued by the end of the year after the Budget 2019 announcement and can only be put into operation via an amendment to the Income Tax Act. The tax authorities have agreed to provide the revised draft ESR to the Institute for further comments.

- **Forum on Harmful Tax Practices**

The Institute's representatives met with the Ministry of Finance on 20 July 2018 on matters pertaining to the Forum on Harmful Tax Practices (FHTP) as set-out in Appendix of the 2018 Budget Speech. The Institute was informed that the FHTP initiative requires tax regimes that have intellectual property incentives embedded to be reviewed so as to be in compliance with the FHTP guidelines or requirements by 31 December 2018. The authorities are currently reviewing incentives such as Principal Hub, MSC status and Bionexus and have also stopped approving MSC tax incentives from 1 July 2018 until a time the FHTP requirements have been complied.

- **Meeting with the IRBM's Tax Operation Division**

The Institute's Compliance and Operation Working Group met with the Deputy Chief Executive Officer of Tax Operation and his team on 4 September 2018 to discuss on tax compliance and operational issues. Key issues discussed were matters concerning *e-Lejar* and *e-Kemaskini* system, business codes, financial particulars in Form C and compensation under Section 111D of the Income Tax Act 1967.

Tax Reform Committee

Recently, the Finance Minister announced the formation of a Tax Reform Committee (TRC) to review the overall Malaysian taxation system with the aim of making it more efficient, neutral and progressive to help spur high-quality and long-term economic growth without burdening the people. The TRC will also study methods to minimise tax leakages and tax evasion.

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NTC 2018

The two days National Tax Conference (NTC) 2018 jointly organised with the Inland Revenue Board Malaysia (IRBM) was successfully held from 16 July 2018 to 17 July 2018 at the Kuala Lumpur Convention Centre. The theme for NTC 2018 was "Taxation in a Changing Economy". The mutual co-operation between the event's co-organisers, i.e. the IRBM and the Institute, have made this annual event successful with overwhelming turnout of participants exceeding 2,000. I would like to thank the Finance Minister for officiating this event and also to thank the NTC Co-organising Chairmen, the NTC Committee, Secretariat, moderators, speakers, panel members, participants and those involved for their support and tremendous contribution in making this event a great success. You can read more on the NTC 2018 in this issue of the *Tax Guardian*.

Upcoming CPD Events

The National Budget 2019 will be announced on 2 November 2018. The Institute plans to conduct its first CTIM 2019 Budget Seminar in Kuala Lumpur on 21 November 2018. I look forward to seeing many of you at this Budget Seminar as this event marks the first Budget that will be tabled by the *Pakatan Harapan* government. Following the first CTIM 2019 Budget Seminar, there will be a series of Budget Seminars which will be conducted in various locations nationwide. Kindly register early for the seminar nearest to you to avoid disappointment. Please look up our CPD Event Calendar for Quarter 4 of 2018 (October 2018 to December 2018) in this *Tax Guardian* and the CPD events listed in the Institute's website (www.ctim.org.my).

Membership

I am pleased to inform the members that the Institute is launching a "Member Get Member campaign". A member who successfully introduces a new member is entitled to a free seat for any CPD seminar or workshop that is solely organised by CTIM. The free seat is subject to availability and members are encouraged to participate in this campaign to take advantage of the offer which will end on 14 March 2019.

Moving forward, the Institute hopes to have greater engagements with the authorities so that we can contribute to a more improved set of tax system that supports our country's fiscal needs.

Editor'sNote

YEO ENG PING

Sales tax and service tax was re-introduced and effective from 1 September 2018, and since then the Royal Malaysian Customs Department (RMCD) creditably, has already released the General guides, a number of Industry Guides and Specific Guides, including Director General's Decisions. In the lead up and immediately following the introduction, Tuan Lim Guan Eng, the Minister of Finance, together with the RMCD has diligently held information and feedback sessions with various groups, and it appears that these have

been fruitful in contributing to some amendments and refinements of the new taxes. There are continuing lobbies and requests but it does seem that one month on, the introduction of these taxes can be said to be relatively smooth.

The other big news was the establishment of the Tax Reform Committee mid-September, to review the overall tax system. It was reported that the Committee will be tasked with broadening and diversifying the tax revenue base, without placing additional burden on the people, and minimising tax leakages. It was also reported that the Minister of Finance said that there was no plan to increase the corporate and individual tax rate and will strengthen enforcement and compliance measures against fraud, tax evasion and smuggling of controlled items. It was also reported that the Committee will study the taxation of the digital economy and review the effectiveness of various tax incentives. The former Inland Revenue Board Chief Executive Officer Tan Sri Hasmah Abdullah has been appointed as the chairperson. It will be interesting to hear how the Committee intends to execute its mandate including the type and level of engagement and consultations it will have with the professional bodies, chambers of commerce and others, and to know what timelines it has set for delivery of its recommendations. In particular, will the Committee's work be ready for the Budget 2019 considerations, keeping in mind that the Budget announcement is scheduled for 2 November?

It seems to me that the kind of issues that the Committee is asked to address requires serious thought and thorough deliberations, especially the impact on Malaysia's cost of doing business and longer term overall attractiveness for investment. I subscribe to the view tax should not be the main driver but should be complementary and supportive of national aspirations and goals on Malaysia's positioning among investors. A measured approach is necessary as any significant changes say in the area of tax incentives, will be taken as a signal to both current and potential investors to (re)consider investment decisions. Having said that, there are probably a number of things that could be done to better streamline our tax regime including tax incentives, and improvements to simplify or clarify will be welcome. We at CTIM eagerly await the opportunity to engage with the Committee and work together to promote a better tax system for the nation.

In this edition of *Tax Guardian*, we have included a detailed write-up of the recent 2018 National Tax Conference, which was very successful in terms of the participant numbers and quality of content, but also made lively by the candid and open speech by the Minister of Finance. He spoke of the need to manage the nation's debt, which has been a consistent message; and while tax is a key contributor of that, it was also heartening that he is supportive of a balanced approach to tax audits and directing strong measures towards fraud, evasion and cases of similar culpability. I also draw your attention to the article on harmful tax practices, which highlights areas of ongoing tax reform - this includes a new tax regime for intellectual property, and Labuan. There are also good articles on the taxability of donations, taxation of the digital economy and on Section 4A of the Income Tax Act. Enjoy!

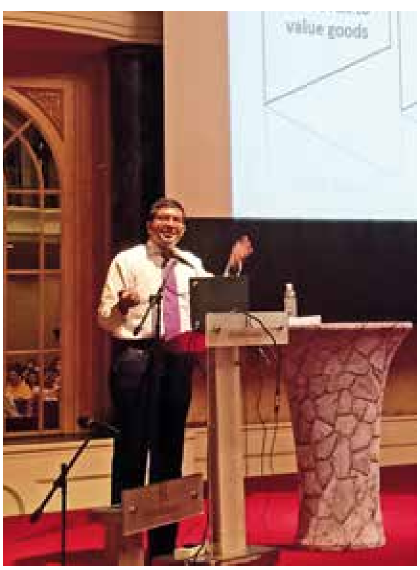
CPD EVENTS

A series of CPD events were conducted in the 3rd quarter 2018 as follows:

- Capital Allowances Maximisation
- Public Ruling 2017 & 2018 – Understanding the Legal & Practical Aspects
- Managing Tax Investigation & Tax Audits
- Seminar: Transitional Issues from GST to SST – Your Questions on SST Answered

The workshops on "Capital Allowances Maximisation" was conducted by Mr. Harvindar Singh at several locations around the regions. The speaker discussed in detail the provisions of the Act as well as the rules, guidelines and Public Rulings issued by the Inland Revenue Board Malaysia (IRBM) to enable the participants to better understand and apply the law and rules in substantiating a claim for capital allowances.

Mr. K. Kularaj conducted a workshop on "Public Ruling 2017 & 2018 – Understanding the Legal & Practical Aspects" at several venues i.e Kuala Lumpur, Melaka, Penang and Johor Bahru. Between June and



December 2017 and up to 1 April 2018, the Director General of Inland Revenue (DGIR) has issued 14 Public Rulings (PR) in total which imposes many compliance requirements on various classes of taxpayers. This one day workshop provided participants with an understanding of income tax laws and regulations pertaining to the issues in the Public Rulings which was discussed together with practical examples from selected tax cases.

The workshops on 'Managing Tax Investigation & Tax Audit' were conducted by Ms. Yong Mei Sim in Melaka, Ipoh, Kuala Lumpur and Penang in the month of August 2018. The objective of the workshop was to assist the taxpayers to be prepared to carry out regular tax health checks before they become the IRBM's targets so that potential risk areas are identified and early actions could be taken. This workshop also focused at the human element which is often overlooked in an audit or investigation.

CTIM has engaged various speakers from the GST-SST Transformation Working Group to speak on the Seminar "Transitional Issues from GST to SST *– your questions on SST answered"* at major locations as follows:

Date	Venue	Speakers
Kuching	5 September 2018	Chow Chee Yen & S. Saravana Kumar
Kuala Lumpur	6 September 2018	Chow Chee Yen, David Lai, S. Saravana Kumar & Tan Eng Yew
Kota Kinabalu	7 September 2018	Alan Chung & Ng Sue Lynn
Johor Bahru	12 September 2018	Alan Chung & S. Saravana Kumar
Penang	20 September 2018	S. Saravana Kumar & Yeoh Cheng Guan
Petaling Jaya	24 September 2018	Chow Chee Yen, Thenesh Kannaa, Vijey M Krishnan & Zen Chow
Melaka	25 September 2018	Chow Chee Yen & Vijey M Krishnan
Ipoh	28 September 2018	Brynner Chiam & Vijey M Krishnan

GST TO SST TRANSFORMATION WITH CTIM

IN CONJUNCTION WITH THE REINTRODUCTION OF SST, CTIM HAS INITIATED THE FORMING OF A NEW WORKING GROUP CALLED THE GST-SST TRANSFORMATION WORKING GROUP (TWG). CTIM ALSO LAUNCHED TWO COLLABORATIONS, ONE BEING WITH ***THE EDGE*** ON CONTRIBUTION OF GST-SST TECHNICAL ARTICLES; AND ONE WITH THE ASSOCIATED CHINESE CHAMBER OF COMMERCE AND INDUSTRY OF MALAYSIA (ACCCIM) & SIN CHEW MEDIA ON NATIONWIDE SST EDUCATIONAL ROADSHOWS TO DISSEMINATE INFORMATION ON CHANGES TO THE TAX REGIME.

COLLABORATION WITH *THE EDGE*: GST–SST ARTICLES

The TWG was formed with the primary objective to bridge the knowledge gap of the members and general public as a result of the abolishment of GST and the reintroduction of SST. This working group is made up of 19 indirect tax specialists drawn from the leading tax firms in the country and they are also active members of CTIM.

The Edge published ten articles from 11 June to 6 August 2018 written by our TWG members. Those articles provide comprehensive overviews on changes taking place and the topics are as follows:

11 June 2018	Taxing Matters by *Seah Siew Yun* In the Limelight Again - The Anti-Profiteering *Law by S. Saravana Kumar*
18 June 2018	Revisiting the Previous SST Regime by *Chow Chee Yen & Joanne Hooi*
25 June 2018	The Hidden Costs of Abolishing GST by *Alan Chung*
2 July 2018	Are We Ready for the Demise of GST by *Yeoh Cheng Guan*
9 July 2018	Sales and Services Tax - A New Beginning by *Tan Eng Yew*
16 July 2018	Preparing for SST - Let's Begin with A Heat Map by *Huang Shi Yang*
23 July 2018	SST - Little Time for Businesses to Set Wheels in Motion by *Brynner Chiam*
30 July 2018	The GST - SST Conundrum by *David Lai*
6 August 2018	Judicial Review as an Appeal Process under SST by *S. Saravana Kumar*

These articles have been uploaded to CTIM's website under "CTIM in the News".

COLLABORATION WITH ACCCIM & SIN CHEW MEDIA: SST EDUCATIONAL ROADSHOWS

A half-day SST talks was organised and held in various locations throughout Malaysia with the objective of educating the businesses on the closure of GST and learning about the new SST.

In this special collaboration, CTIM's professional speakers who are mainly the TWG members developed GST-SST course contents for transitional purposes that are relevant to the businesses:

- SST vs GST: The Differences
- GST Closure
- SST Implementation: Mechanism & Impact on Businesses
- Transitional Issues
- Impact on Price of Goods & Services

Venues for the talks were arranged by the local Chambers whilst media publicities were kindly sponsored by Sin Chew Media.

This collaboration was endorsed by the Royal Malaysian Customs Department (RMCD) and the first Press Conference was officiated by the Director General of the RMCD, Dato' Sri Subromaniam Tholasy on 1 August 2018.

Press Conferences Coverage

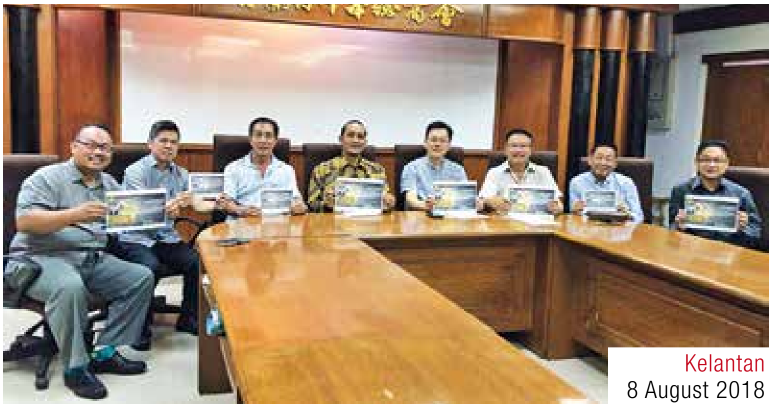
Kuala Lumpur
1 August 2018

Kuantan
8 August 2018

Penang
9 August 2018

Melaka
10 August 2018

Kuching
8 August 2018



Kelantan
8 August 2018

The roadshows were well received and successfully held in 11 locations during the month of August with more than 2,000 participants attending the roadshows.

CTIM is pleased that the above initiatives received overwhelming positive feedbacks and proud to announce its successful mileage in carrying out its objective as a premier tax body providing effective institutional support to promote convergence of interests with the government, using taxation as a tool for the nation's economic advancement.

The Associated Chinese Chamber of Commerce and Industry of Malaysia	**Speakers**
Kelantan	Chow Chee Yen and Seah Siew Yun
Perak	Alan Chung and S. Saravana Kumar
Kuantan	Zen Chow and Wong Seng Chong
Terengganu	Alan Chung and Wong Seng Chong
Kluang	Ng Sue Lynn
Melaka	David Lai and Huang Shi Yang
Kuching	Chow Chee Yen and Jason Tan
Kuala Lumpur & Selangor and Klang	Yeoh Cheng Guan and S. Saravana Kumar
Kedah	Tan Eng Yew
Penang	Brynner Chiam and Jason Tan
North Perak	Tan Eng Yew


Kelantan
17 August 2018


Kelantan
17 August 2018


Terengganu
14 August 2018


Kuantan
19 August 2018


Kuantan
19 August 2018

Kuala Lumpur
25 August 2018

Taiping
27 August 2018

Kuala Lumpur
25 August 2018

Kedah
26 August 2018

MEMBER GET MEMBER CAMPAIGN

The Institute is pleased to inform all members that the Institute has launched the "**Member Get Member Campaign**". The campaign will end on 14 March 2019.

A member who introduces a person who subsequently applies and successfully qualifies to be a new member is entitled to claim a free seat for any CPD seminar or workshop that is solely organized by CTIM. The free seat is subject to availability of seats.

Members are encouraged to participate in this campaign and take advantage of this offer. The MGMC form for information of MGMC Introducer is attached to the Membership application under the Membership Tab on the CTIM website.

Terms and conditions apply.

CHARTERED TAX INSTITUTE OF MALAYSIA

NATIONAL TAX CONFERENCE 2018: TAXATION IN A CHANGING ECONOMY

Majella Gomez

PERHAPS IT WAS THE RECENT CHANGE OF GOVERNMENT, OR THE ENCOURAGEMENT OF THE NEWLY-MINTED FINANCE MINISTER WHO WAS THE GUEST OF HONOUR, BUT THE MOOD OF THE DELEGATES AT THE 18TH EDITION OF THE **NATIONAL TAX CONFERENCE (NTC)** WAS UPBEAT AND RELAXED, AND DISCUSSIONS WERE FRANK AND FRUITFUL. **SEAH SIEW YUN**, PRESIDENT, CTIM, STRESSED THAT THE CONFERENCE WAS TIMELY, BEARING IN MIND ITS THEME – TAXATION IN A CHANGING ECONOMY – AND THE FACT THAT IT HAS LONG BEEN A PLATFORM FOR EXPERTS FROM THE PUBLIC AND PRIVATE SECTORS TO MEET AND DISCUSS VARIOUS TOPICS. AS SUCH, SHE SAID, "THE TAKEAWAYS FROM THE CONFERENCE ARE VERY IMPORTANT."

Dato' Sri Sabin Samitah, CEO, Inland Revenue Board Malaysia (IRBM), added that the topics reflected the change in the global economy which will impact on the local environment. Emphasising the IRBM's thrust for voluntary compliance, he said that the body will continue spreading awareness

of the importance of this through comprehensive programmes including social activities while utilising technology to improve service delivery. “IRBM will evolve,” he promised.

Finance Minister Lim Guan Eng’s keynote address was direct, hard-hitting and brutally frank. With the country’s new government (and new opposition) a new tax regime would be very likely in the near future. Noting the importance of a platform like the NTC which encourages engagement between income tax collectors and payers, he said, “We want a forum where we can engage and interact. Tax is dynamic and should keep abreast of changes so that the country can stay alive.” He said that a loss of RM42 billion in revenue could be expected this year, with the suspension of the GST but the government was instituting the Sales and Service Tax (SST) with effect from 1 September 2018 to partly make up the shortfall.

The SST is expected to bring in only RM21 billion in 2018, leaving a revenue gap of RM21 billion. In view of this, expenditure will be curbed further, as will inefficiencies that have caused leakages. Mega projects will be cancelled, deferred or rationalised. However, the LRT3 will proceed as it has been found to be vital to reducing congestion between Klang and Kelana Jaya, he said, adding that its cost had been decreased by almost 47% by reducing the number of stations. “Unnecessary expenditure will be cut down,” he stated firmly. Despite fiscal pressures, however, he assured the audience that the country’s economic fundamentals were strong.

It was imperative that people pay their taxes because taxes correct inequalities in the economy. Reiterating that the government had no desire to “tax people to death,” he expressed the hope that citizens will continue paying their taxes diligently to help save the country. Rough tactics to enforce tax collection will not be applied because people who don’t pay taxes should not be treated as criminals, he stressed. Rather, the public would be encouraged to negotiate and discuss because the government wanted the public to have confidence in the IRBM, as the government’s tax collector.

The IRBM was conducting internal reviews in its efforts to improve, and new strategies will put the public at the core of policy design. In addition, Malaysia was collaborating with international bodies to curb fraudulent practices. He said that if the focus was on containing costs, targets could still be met. All efforts will be fully transparent so that credibility and public engagement can be maintained. Eventually, new or alternative methods of widening the revenue base will be explored. These will include other “creative centres” like culture and art heritage which are potential economic game-changers and could decrease dependence on traditional industries like oil & gas, primary commodities and agriculture.

TOPIC 1 THE MALAYSIAN ECONOMY – THE WAY FORWARD

Moderated by Dr. Yeah Kim Leng, Professor of Economics, Sunway University Business School, the first session saw Panel Members Dr. Oh Ei Sun, Senior Advisor, International Affairs, Asia Strategy and Leadership Institute (ASLI) and Wan Suhaimie Wan Saidie, Head of Economic Research, Kenanga Investment Bank Berhad, presenting the state of the Malaysian Economy.

Dr. Oh's presentation, "Malaysia & the World: New Opportunities and Challenges" covered six critical areas – new government and policies; domestic socioeconomic outlook; trade scenarios; global economic interactions; Belt and Road Initiative; and future strategic sectors. Describing the post-GE 14 often highlighted by the media as a "mark of democracy," he remarked that the measures taken by the new government were intended for the stabilisation of the market in the shortest time possible.

Having ridden in on a wave of popular support and the perception that it would abolish unpopular taxes like the GST especially, it was now trying to fulfil campaign promises amid controversial debt which appears to be growing. It has become clear that the previous government had taken up a lot of sovereign guarantees, obtaining funds that were not put towards their original purpose. Despite the controversy and ensuing unsettledness however, there has been a real thrust for openness and transparency since GE14. Investigations into previously suppressed scandals have been reopened and were now ongoing, in the hope of attaining a healthier, more sustainable environment for business and politics.

Austerity measures such as ministers' salary cuts have been implemented, along with the suspension of GST to lighten somewhat the people's financial burden. The new government rode in partly on the promise of abolishing GST, a tax which had given rise to opportunistic overpricing, besides creating difficulties primarily for SMEs which found themselves drowning in procedures and documentation, and having to deal with rising prices while waiting for tax refunds that in some instances, never came. These shortcomings led to the burgeoning perception of the revenue derived from GST being used to cover up shortfalls resulting from corruption and financial mismanagement.

Since being voted in on 9 May 2018, the new government has instituted austerity measures including the review or shelving of mega projects like the High Speed Railway between Kuala Lumpur and Singapore, and the East Coast Rail Link. More are in the pipeline – but there is a need to balance popular clamour for swift action and what could be perceived as political revenge, Dr. Oh warned, referring to the ongoing investigations after the search and seizure of luxury items, the reopening of cases related to financial scandals and the unearthing of numerous corrupt practices and hitherto hidden abuses of power.

"The main challenge is to maintain economic growth," he said. "Don't be complacent. There is a bumpy ride ahead." Reliance on government handouts, subsidies and incentives must be reduced because these cause market distortions. The local economic environment must be viewed within the context of the global economy. As is the case with many other countries, Malaysia's largest trading partner is the US – but with Donald Trump's "America First" policies, it is difficult to determine the extent of the impact on local businesses. China may not be able to pick up the slack as it is also experiencing a slowdown in growth.

Amid the increasingly difficult global economic and financial situation, Malaysia is seeing rising debt levels while its traditional exports – electrical/electronic components, commodities – experience declining worldwide demand. Its petroleum output is vulnerable to global price swings, and crude palm oil faces constant challenges. Long-term, sustainable economic growth is very much a concern because of increasing private debt, the depressed Ringgit and high dependence on foreign labour. While stimulating domestic consumption was a good thing, Dr. Oh cautioned against overdoing it. "We are a developing country and our credit limits are real. Overconsumption will land us in trouble," he said.

The US was still our largest FDI provider, he added, but the balance of trade was in its favour, and it still had the power to influence our domestic performance, although it was experiencing troubles of its own. With policy changes at home, some overseas investments may have been retracted, leading to capital flight from many countries. Despite its insistence on other countries toeing the trade line, the US itself has shown that it opposes free trade and globalisation. "It's okay to have an "America First" policy," Dr. Oh said. "But do it in the right way."

The Belt and Road Initiative (BRI), he said, will facilitate trade between Southeast Asia, Central Asia and Russia – not just between state-owned enterprises but for SMEs too. The trickle-down effect will see increases in investments, job creation and technology transfer. Many countries along the BRI route will benefit through the infrastructural development that will parallel this Initiative, supported by the AIIB and the Silk Road Fund. More interaction

between countries along the BRI is expected to happen, as it extends from Southeast Asia to Central Asia, South Asia, the Middle East and East Africa, opening both the Asian interior and more markets along the route, and making connections between communities and cultures.

Dr. Oh also touched on future strategic sectors for Malaysia. The BRI may encourage the opening of more Malaysian educational institutions in China, for instance, and he suggested that sectors which may be experiencing a downturn – like the rubber industry, for example – could "repurpose" their products. There was also great potential for sectors like agro-tourism and ecotourism, he added, as well as upcycling – conserving resources by turning waste into art or recycling it for profit in quantities that make it economically viable.

Wan Suhaimie tackled the outlook for 2H18 and further economic updates in his presentation. All signs point to a peak in global GDP growth, he said, but there was increasing concern that it was likely to taper off sooner than expected. Vulnerable emerging markets will be affected, something he described as the "world economy running out of steam." The looming trade war between China and the US will give rise to tensions that will in turn cause repercussions among the world's largest economies. The Fourth Industrial Revolution – underpinned by the rise of global technology in the past two decades – is slowing.

China is making serious attempts at rebalancing its economy. "It's trying to manage its debt situation," Wan Suhaimie said, adding that rising oil prices still have an impact, but with trade wars on the horizon, the price will come down. Any US trade tariffs against China will see retaliation by China; this will affect Malaysia, as both countries are major export destinations. He opined that the money that was supposed to be invested in emerging markets will be pulled back to the US. However, he felt that a full-blown trade war between the US and China was unlikely. It is the domestic situation that is more a cause for concern.

As at end-May 2018, total equity and bond market outflows stood at RM18.5 billion, falling by another RM11.5 billion in June. This is expected to continue because of external and internal factors: the US Fed's decisions and the transition period of the new government which is dealing with a myriad of issues including fiscal reform measures. It will not be easy to fulfil the "10 Promises in 100 Days" that was a Pakatan election cornerstone. However, Bank Negara will still hold the

OPR at 3.25% for 2018, to ensure capital market stability, ample liquidity and support growth. Inflation will be lower, but so will revenue because of the lost GST revenue; GDP growth for 2018 has been revised downwards, from 5.5% to 5.1%.

With the slowdown in manufacturing and construction, and the current review of megaprojects, growth will come from the services sector. Wan Suhaimie said that domestic spending will be pivotal, particularly in the light of an anticipated global slowdown/recession in 2019. But he was quick to assure the audience that "As long as Malaysia's growth remains at 5% or more, we will be okay" – although Budget 2019 will see more belt-tightening measures put in place, probably with consolidation and restructuring of debt and government machinery, improvements in efficiency, and attempts to make up revenue shortfall from the cessation of GST.

Although public spending is expected to decline, basic necessities like affordable housing and education will continue to be a priority. BRIM will probably continue, while the government addresses the higher cost of living and provides affordable housing for the poor. Malaysians may well see a flexible social protection/healthcare system as many workers opt for self-employment in the growing economy. Educational reforms will include improving the quality of teaching and training, and focus on technical and vocational training to prepare the future workforce for the Fourth Industrial Revolution. The way forward, stressed Wan Suhaimie, must cover recession-proofing the workforce, plugging the leaks and adopting the Digital Economy.

A reformed education system will be imperative to the creation of more jobs, and the people who are skilled enough to handle them. In tandem, the leaks in various systems need to be plugged. "Malaysia is expected to achieve high-income level status in the next two to six years," Wan Suhaimie said. "But this will not happen when we still have high illicit capital outflows. It will happen only if there is enough capitalisation." One way to achieve high-income, developed-country status is to adopt the Digital Economy as it promotes inclusion, expands markets, reduces transaction costs and boosts efficiency.

Wan Suhaimie urged the adoption of a clear national policy on the Digital Economy that will see the improvement of broadband connectivity, among other measures. Although Malaysia is a fast adopter of digital access, it lags behind when applying it effectively to business. A clear national policy on the Digital Economy could potentially be a better substitute or complement the current affirmative action policy. "It could bridge the wealth gap without discriminating between race, religion or social status," he concluded.

TOPIC 2 CRYPTOCURRENCIES IN THE DIGITAL ECONOMY – TAX ISSUES

The agenda covered an introduction to cryptocurrency, common cryptocurrency terms, and the main issue: how to tax it. The session moderator was Dato' Ng Wan Peng, COO, Malaysian Digital Economy Corporation. Anil Kumar Puri, Partner, International Tax Services Leader, Ernst & Young Tax Consultants, explained cryptocurrency while Mohamad Fauzi Saat, Director, International Regulation & Treaty Division, Department of International Taxation, LHDN and Chin Wei Min, Executive Director, Innovation, Digital & Strategy, Securities Commission Malaysia, contributed respective viewpoints.

There are more than 1,600 forms of cryptocurrency, bitcoin being just one of them. Cryptocurrency is payment that exists only in electronic form. It is intangible and accounted for using computers, allowing it to eliminate intermediaries (like banks) and other traditional payment methods. But while it is expedient and can work anytime or anywhere there is computer access, it is prone to hacking and double-spending. In other words, all the bugs of this invention by someone called Satoshi Nakamoto in 2008, haven't been ironed out yet. Cryptocurrency is underpinned by blockchain technology, which is technology that enables shared databases which support multiple writers.

Their entries are verified through consensus validation and form one unified transaction log or "block." This log is a chronology of activity or transactions that cannot be deleted. Blockchain "miners" manage blockchain transactions, compiling

and documenting them, and generally maintaining the "blocks" of information that form a chain. "Mining is unique to the cryptocurrency industry," Anil said. Blockchain miners are paid in cryptocurrency, which is one way of obtaining it. Another way is through Initial Coin Offerings (ICO), where instead of shares, cryptocurrency is issued to investors. Cryptocurrency can be used to buy real things, and the market for it is growing. Also, cryptocurrency can be (virtually) broken into pieces, so it can accommodate any transaction.

As the idea of cryptocurrency gains traction, the value of the respective currencies grows. Bitcoin currently has a market value of US$115 billion while Ethereum is worth US$48 billion; Ripple US$18 billion; Litecoin US$4 billion and Iota, US$2 billion. Almost 30% (29.11%) of total trading volume globally is accounted for by cryptocurrency, and there are 208 exchanges that deal with it. Daily trading volumes can be as high as US$13 billion. Even so, cryptocurrency is not viewed as real currency by many countries. It is considered property and is not legal tender. Any transaction using cryptocurrency is seen as barter. No countries have firm laws governing cryptocurrency at present.

But what happens when cryptocurrency is used to pay for taxable goods? Where can taxes be levied in such cases? Singapore views cryptocurrency as a service for GST purposes while Belarus, which wants to be the Cryptocurrency Hub of the world, has a special zone for this purpose, to attract cryptocurrency traders and miners. Malaysia has no specific rules for the taxation of cryptocurrency or transactions involving it, while China has banned it outright. So how is cryptocurrency accounted for, and is it considered "property" or "currency"? Furthermore, cryptocurrency is typically bought for spending, not speculative, purposes.

How and where can cryptocurrency be taxed? Mohd Fauzi could only confirm that there were no specific guidelines so far but the IRBM was looking at how other countries were dealing with it. There has been no timeframe announced for the development of guidelines etc but for the time being, general tax rules apply. "Record-keeping is important," he stressed. "File properly and you will be taxed accordingly." Chin opined that taxes would apply depending on how the cryptocurrency was used, particularly in cross-border trading, as fundraising or a trading tool, for investment or on a commercial basis. "Investors have been advised what to look out for," he said. "If ICO is a fundraising, it is essentially crowdfunding, and the appropriate rules will apply."

Anil pointed out that tax laws cannot cover everything, and would take time to catch up. He advised being aware that rules change frequently, and staying up to date with tax and legal developments. "Different countries have different rules with different tax implications," he said. "You have to first understand the transaction, then how to treat it." Agreeing with him, Chin cautioned, "Be aware of the pitfalls of investing in cryptocurrency before you buy."

TOPIC 3 IRBM'S STRATEGIES AND CHALLENGES

With a collection target of RM134.2 billion for 2018 to meet, the IRBM was identifying the changes and challenges to come, and formulating appropriate strategies to handle them, said Datuk Noor Azian Abdul Hamid, Deputy CEO, Policy, LHDN. Major challenges were the hidden economy, tax laws and the recent change in government, necessitating a change in approach to strategies and compliance activities, she stated.

The government needs revenue to fund public expenditure, and the IRBM still favoured voluntary tax compliance and fair treatment for all. The problems were compounded by the country's narrow tax base. Of the 1.2 million companies registered with the Companies Commission, only 195,216 or 16.27% were paying tax, and out of a population of 32.4 million, only 7.3 million were registered individual taxpayers. Many of the registered companies were new companies, while many were making losses – hence the low percentage of payments. In the case of individual taxpayers, the threshold of payments was too low. At a tax to GDP ratio of about 15%, Malaysia was still a relatively underdeveloped economy.

Collection can be improved through tightening methods and encouraging compliance but there must be penalties although the IRBM will ensure that the cost of compliance is low. Above all, collections must be seen to be fair to encourage public trust. The IRBM has invested in technology to facilitate high-risk cases. It was also now a member of the Inclusive Framework and which had increased its global data access as the Framework comprises 116 countries. This was part of its commitment to combat Base Erosion and Profit Shifting (BEPS) activities.

She said that a strategy for the registration of cryptocurrency users was necessary. Staff capabilities were also being improved to combat tax avoidance schemes. To combat the hidden economy, the IRBM was collaborating with other agencies like Customs and Companies Commission of Malaysia to identify taxpayers who have failed to make proper declarations. One of the IRBM's biggest challenges was dealing with negative public perception, she added. Efforts were being made to be proactive, emphasise awareness and communication when carrying out enforcement.

The IRBM was also ensuring a more effective audit system and increasing its e-services for public convenience as part of its thrust to expand the taxpayer base, and here, she said, tax practitioners had a role to play – in diminishing negative perceptions about the IRBM as "just a body that collects money." Moderator Poon Yew Hoe, Co-Organising Chairman of NTC 2018, queried on how leakages could be stopped; she identified "a change in policy together with enforcement" as imperative.

Admitting that after 17 years of self-assessment, compliance was still not as good as expected. She stated however that it was not the exclusive province of the IRBM; other bodies were responsible as well. Paying taxes is ultimately about individual mindsets and behaviour, and can only be changed through better communication that strengthens awareness and the desire to contribute – something that everyone needs to work on, regardless of sector or industry.

TOPIC 4 TAX AUDITS AND INVESTIGATIONS – LATEST ISSUES AND FINDINGS

"When it comes to tax, there are many contentious issues," remarked moderator K. Sandra Segaran, Council Member, CTIM. He noted that with the Revised Audit Framework in 2018, response time had been reduced from 21 to 14 days while audit settlement was reduced from four to three months. With this to consider, he queried if all tax cases should be penalised.

In response, Dr. Nik Abdullah Sani Nik Mohamed, Director of LHDN's Multinational Tax Branch, stressed the need for audit investigation; desk and field audits have increased over the past five years. Desk audits of companies have gone from 47,627 files in 2013, to 98,297 in 2017. However, the number of non-companies that were desk-audited fell from 327,578 to 267,235 while desk audits of individuals remained fairly constant, with about 750,000 to 800,000 audited annually. These audits resulted in increased tax and penalties, from RM2.38 billion in 2013 to RM3.12 billion in 2017 for companies; from RM297 million in 2013 to RM1.19 billion in 2017 for non-companies; and RM1.62 billion in 2013 to RM2.19 billion for individuals in 2017.

"The timeframes have been decreased because we want those involved to come forward and discuss matters," said Dr. Nik Abdullah, adding that it was the IRBM's intention to make compliance easy and non-compliance hard. "Compliance is the new tax planning. More efforts are being made to assist the taxpayer with compliance, rather than hunting them down and penalising them."

Transfer pricing (TP) has also been hogging the spotlight. The IRBM's dedicated audit/investigation teams are dealing with increasingly complicated TP issues, resulting in the development of more sophisticated, aggressive approaches as they gain exposure and experience. Considering that TP involves complex, cross-border matters, "Knowing how to manage the audit or investigation according to the specific jurisdiction, is itself an art," he stressed. In addition, aggressive tax planning, advances in technology, the use of nominees and shell companies and misuse of tax havens all further complicate an already complex environment.

Segaran commented that tax audits were a profitable segment for the government, but Soh Lian Seng, Executive Director, KPMG Tax Services, pointed out that proper coordination among the different departments was crucial. "If audit and investigation are mixed, it may produce confusion on the part of the taxpayer," he said, emphasising education of the taxpayer for better understanding of how they are being audited. He urged all parties – taxpayers, the IRBM and policy makers – to recognise that things change quickly but clarity is needed because the law cannot change quickly enough.

TOPIC 5 AGGRESSIVE TAX PLANNING – IS THERE A CLEAR DIVIDING LINE?

"Tax Avoidance" and "Tax Planning": what's the difference? Karen Koh Sai Tian, Director, Large Taxpayer Branch, LHDN, clarified: tax planning involves organising clients' tax affairs in the most effective way within the intent of the law, while tax avoidance involves the deliberate exploitation of the tax system. Also referred to as aggressive tax planning (ATP), tax avoidance bends the rules of the tax system to gain an advantage that was never intended. It ignores the spirit of the law and exploits loopholes in the system, disguising transactions to reduce payment of taxes.

Tax evasion (TE) on the other hand, deliberately misrepresents the true state of affairs through dishonest reporting, declaring less income or profits earned, or overstating deductions. Koh stressed that the courts should decide what constituted TE or ATP. "ATP has been around even from the early days," she said. Some ATP schemes include using, exploiting or abusing a relief; finding gaps/loopholes in the Act; corporate loss utilisation; non-arm's length transfer pricing; mismatched tax treatments between entities on transfers; unnatural assets or transactions, pre-ordained transactions and dodgy offshore schemes.

Panel member Chow Chee Yen, Council Member, CTIM, presented four examples of case law to illustrate instances of tax planning, aggressive tax planning or avoidance. In *Sabah Berjaya Sdn Bhd v KPHDN (1999)*, Sabah Foundation received donations instead of dividend payment; the court ruled that enjoying a permissible tax benefit under the ITA does not amount to tax avoidance. In *Port Dickson Power Bhd v KPHDN (2012)*, the burden of proof to establish that funding by way of loan stock instead of equity from shareholders was a sham, rested with the DGIR.

The decision in the case of *Syarikat Ibraco-Peremba Sdn Bhd v KPHDN (2014)*, where land was transferred to a subsidiary for development, centred on the ability of the taxpayer to demonstrate that the transaction was required by law and the tax savings were purely incidental. In the case of *Ensco Gerudi (M) Sdn Bhd v KPHDN*, the lease rental payment made to a Labuan SPV to mitigate withholding tax was found to be within the meaning and scope of the incentives promoting Labuan as an international trade and financial centre, and that taxpayers have the freedom to structure transactions to their best tax advantage. But does using Labuan constitute tax mitigation or tax avoidance? Koh stressed that any entity doing so needs to be active and have commercial substance.

TOPIC 6 EARNING STRIPPING RULES – WHAT'S IN STORE

Moderator Dr. Veerinderjeet Singh, Chairman, Axcelasia Inc, provided a brief overview of BEPS; Theresa Goh, Executive Director, National Transfer Pricing Leader, Deloitte Tax Services covered Earning Stripping Rules (ESR), and Salamatunnajan Besah, Director, Tax Policy Department, provided LHDN's perspective. ESR is intended primarily for companies which engage extensively in cross-border transactions, and will be effective from 1 January 2019. It will discourage companies from shifting earnings to gain excessive deductions. Goh said that the draft Rules had been prepared and the Rules are expected to be issued towards the end of 2018.

She said the main policy goal was to address BEPS using interest. With the proposed De minimis threshold of RM500,000, entities which pose low BEPS risk will be excluded, but

with review, it was suggested that the proposed threshold be increased to RM1 million. With the fixed ratio rule, an entity's net deductions for interest or payments economically equivalent to interest, will be a percentage of its EBITDA; a corridor of fixed ratios of between 10% to 30% has been recommended – but it was suggested that this be increased, from 20% to 30% instead.

It was suggested that the carrying forward of disallowed interest or unused interest capacity, also allow the disallowed interest and unused capacity to be carried forward and used in future years. While Malaysia currently did not have this, other countries like US, Japan, Germany and India permit the unused capacity to be carried forward for a fixed number of years, while there is no time limit for it in Finland, Belgium and UK.

Explaining the Group Ratio rule, Goh said that some countries like the UK and Netherlands allowed a group ratio rule alongside the fixed ratio rule but with review, it has been suggested that Group Ratio rule be introduced to exempt domestic intra-group interest payments. This was also the premise for the "Equity Escape" rule, which compares an entity's level of equity and assets to those held by its group. Germany and Finland already have this rule.

"ESR is not something new," Dr. Veerinderjeet commented. "Before this, "Thin Capitalisation" had been proposed to address similar circumstances." Stressing that the purpose of ESR was to prevent BEPS through excessive claims of expenses, Salamatunnajan said that it was a fairly straightforward application. The De minimis rule, she added, only affects cross-border, not local transactions, but gave assurances that the proposed increase to the RM1,000,000 (from RM500,000 currently) threshold would be considered.

"The countries which have different methods of ESR are developed countries," she pointed out. "Malaysia has many subsidiary companies. Getting accounts from the parent companies is not easy." Can loss-making companies be subject to ESR? She said that ESR is tied to EBITDA so if EBITDA is zero, ESR cannot be applied. As for the proposals put forward by Goh on the threshold increase, increase in fixed ratio, carrying forward of disallowed interest or unused interest capacity, group ratio and "grandfathering" provisions, she said that guidelines will need to be issued for further clarity.

TOPIC 7 UPDATE OF RECENT TAX CASES

Moderator Yeo Eng Ping, Council Member, CTIM said that although the number of cases had decreased overall, there was still work to be done. The decrease was "a reflection of the confidence of the public in the system," she said, but clarity was still needed in many areas, and trust needed improvement if businesses were expected to continue. Nine case updates were provided by Muhammad Farid Jaafar, Senior Revenue Counsel in LHDN's Legal Department, who announced that as of June 2018, the Courts had instituted a fast track for hearing cases.

Quoting statistics, he said that 746 SCIT cases had been brought forward from the previous period; 174 cases had been received in the new period, and 90 cases had been decided or settled. In the High Court, 58 cases had been brought forward, another 26 were received and 29 were decided or settled. A total of 19 cases were brought forward to the Court of Appeal, 15 were received and 11 were settled. At Federal Court level, three cases were brought forward from the previous period; three were received in the current period and one was settled. In total, the SCIT heard 830 cases; the High Court dealt with 55; the Court of Appeal handled 23; and the Federal Court heard five.

The first case he presented was *Kualiti Alam Sdn Bhd v KPHDN*, concerning Reinvestment Allowance (RA) and Capital Allowance (CA). Kualiti Alam's main business activity was collecting, storing, treating and disposing of scheduled waste. It claimed RA on plant/machinery it purchased for modernisation and automation, including mini-incinerators and additional landfill cells, but the Director General of Inland Revenue (DGIR) disallowed its RA claim. The SCIT allowed the taxpayer's appeal on the grounds that treatment and eventual transformation of hazardous and toxic waste into inert waste amounted to "processing" for YAs 2005 to 2007.

For YA 2011, the activity came within the definition of "manufacturing" and the process applied to schedule waste which resulted in a "product." The High Court decision which allowed the DGIR's appeal stated that capital improvements were not related to any product to enable the claim for RA and that the activity undertaken was a subtractive process whereas the word "product" under the ITA implied an additive process. The taxpayer's appeal was subsequently dismissed by the Court of Appeal.

The second RA/CA case involved Quality Concrete Sdn Bhd, a manufacturer and supplier of ready-mixed concrete (RMC) which set up plants for production and sale of RMC, in support of its batching plant, claiming CA/IBA under Sch 3 of the ITA or alternatively for infrastructure allowance under Section 41B of the Promotion of Investments Act 1986 (PIA). The SCIT disallowed CA on the grounds that the plant set up was preliminary in nature an involved foundation works where the RMC plant would be erected. It was not apparatus used in manufacturing of RMC; the actual apparatus being the batching plant. The expenditure incurred also exceeded 10% of the aggregate of the qualifying plant expenditure.

The SCIT disallowed IBA because the plant was not a structure under the definition of "building" and the expenditure incurred was less than 75% of the aggregate costs of the plant. The infrastructure allowance claim was disallowed because the plant set-up did not fall within the ambit of construction or reconstruction, extension or improvement of any permanent structure, and was not within the definition of "infrastructure" under Section 41A of the PIA.

The SCIT disallowed RA because the asset was acquired under hire purchase in 1998 and 1999 but was claimed for in YA 2001 and 2002, which were not the years of acquisition for RA purposes. Also, the plant set-up cost was related to the cost of shifting or relocation of the plant to a new site and not incurred for its expansion, modernisation or automation. SCIT also ruled that the mixer truck was a medium for maintaining the liquidity of the RMC and its transportation, and not involved in manufacturing RMC for expansion, modernisation or automation of the plant; likewise with the cement store.

In overturning the SCIT's decision, the High Court allowed the taxpayer's CA and RA appeals, saying that the SCIT 's reasoning contradicted the proven facts and that the SCIT was misdirected on the law and its interpretation of the words 'plant,' 'premise' and 'building' in the context of the process of manufacturing RMC. As claims for CA and RA had been allowed, there was no necessity to consider qualification for infrastructure allowance. Where the SCIT further exercised its discretion in imposing a penalty under Section 113(2) of the ITA, the High Court ruled that there had been no finding by the SCIT on submission of incorrect return or giving incorrect information, to warrant the imposition of the penalty. However, the Court of Appeal has allowed the DGIR's appeal.

The update concerning Application for Relief under Section 131 of the ITA involved two companies: Struktur Klasik Sdn Bhd and Rapid Growth Technology Sdn Bhd. Struktur Klasik, a property developer and cultivator of oil palm, acquired a piece of land, recorded as a fixed asset in the balance sheet, which was subsequently reclassified and disposed of. Struktur Klasik then reported it had erred by wrongly declaring the proceeds from the disposal of the land as trading income, instead of capital gains. It had been assessed under ITA when it should have been assessed under RPGT. The SCIT dismissed the taxpayers appeal, ruling that it had failed to prove any error or mistake, and that proceeds from the disposal of the land constituted business income. The High Court upheld the SCIT's ruling, and the taxpayer's appeal was dismissed.

Rapid Growth Technology,

manufacturer of plastic air fresheners and plastic parts, claimed RA on items in the production area of new buildings in compliance with Public Ruling (PR) No 2/2008, and filed an application under Section 131(1) of the ITA for relief to claim RA on certain items, on grounds of error or mistake upon becoming aware of judicial decisions relating to RA. The application was rejected under Section 131(4) of the ITA by the DGIR. The SCIT allowed the taxpayer's appeal on the grounds that the definition of error or mistake was based on ordinary meaning, and was made due to reliance on PR 2/2008; that the DGIR failed to exercise the required discretion under Section 131(2) and (3) of the ITA, and that recent court decisions on similar RA issues should bind the DGIR retrospectively.

However, the High Court disallowed the DGIR's appeal as previous cases had already determined that RA may be claimed for non-production areas of factories, and that the definition of error or mistake was based on the ordinary meaning. In Rapid Growth Technology's case, the error or mistake was made because of misplaced confidence in the law when the tax return was submitted, due to reliance on PR 2/2008. The High Court allowed the DGIR's appeal on "Practice of the DGIR" in Section 131(4) of the ITA that includes PR, as Section 131(4) of the ITA is applicable to the interpretation of the law and not restricted to administrative matters.

Sentimas Sdn Bhd v KPHDN was about deductions. The SCIT found for the DGIR, ruling that there had been no evidence to prove "express custom duty" expenses were payment to "runners". The taxpayer's witnesses' evidence was inconsistent concerning these expenses. The DGIR's witness, on the other hand, had given consistent evidence. The DGIR was found to have correctly imposed penalty. The High Court upheld the SCIT's decision based on the same findings, as did the Court of Appeal.

United Malacca Bhd v KPHDN was a case of Income vs Capital. United Malacca, in the business of oil palm cultivation and investment holding, was awarded additional compensation and late payment charges for land compulsorily acquired by the Land Administrator. It was also reimbursed for retrenchment benefits it paid to its former employees working on the compulsorily-acquired land. These late payment charges and retrenchment benefits were deemed taxable. The issues were whether the late payment charges and retrenchment benefits constituted income or capital, and whether the penalty was valid and reasonable under Section 113(2) of the ITA. The SCIT allowed the taxpayer's appeal. The High Court dismissed the DGIR's appeal.

The SCIT ruled that the late payment charges were capital in nature. The receipt of retrenchment benefits was for payment to retrenched employees out of United Malacca's own funds, on behalf of the Land Administrator. These retrenchment benefits were not taxable; therefore penalty did not apply. The High Court upheld the SCIT's decision that the reimbursement was payment for actual expenditure incurred and no deduction had been claimed in the year the payment had been made. The penalty on payment had therefore been wrongly imposed.

Insaf Tegas Sdn Bhd v KPHDN was about RPGT vs Income Tax. The issue was whether the company's disposal of land was considered stock in trade or capital investment. The SCIT dismissed Insaf's appeal, declaring the land as stock in trade and assessable under the ITA as supporting documents show that

the purpose of the land purchase is for development. The High Court dismissed the taxpayer's appeal, finding that the land had been purchased and sold as stock in trade. The Court of Appeal also dismissed the taxpayer's appeal.

In another RPGT case, Country Heights Holdings Berhad challenged the correctness of the disposal date for YA 1999, and the correctness of the 10% penalty imposition rate among others. The SCIT dismissed the taxpayer's appeal on assessments for YA 1993 and YA 1998 but not for YA 1999, holding that there had been an error in the issuance of the notice of assessment for YA 1999. The High Court allowed the taxpayer's appeal and dismissed the DGIR's appeal although it concurred with the SCIT that the assessment for YA 1999 had been issued in error. The Court of Appeal dismissed the DGIR's appeal.

Continental Choice S/B & Anor v KPHDN, another RPGT-related case, involved determining whether or not Bioford Development Sdn Bhd was a real property company (RPC) and if gains from the disposal of shares in Bioford were subjected to RPGTA. The SCIT allowed the taxpayer's appeal, applying the decision of the High Court in *Binastra Holdings v KPHDN* but the High Court allowed the DGIR's appeal. The matter is still pending in the Court of Appeal.

Panel member Vijey M Krishnan, Partner with Raja, Darryl & Loh, commented that the court process was slow due to the shortage of commissioners and resources. Judges and commissioners have a lot to read up on deciding. "Sometimes disputes take seven years or longer to be heard," he said, hoping to see the backlog being cleared, a better system in place and more commissioners.

TOPIC 8 OPEN DISCUSSION ON CURRENT ISSUES AND CONCERNS

The final session was moderated by CTIM President Seah Siew Yun, while Datuk Mohd Nizom Sairi, Deputy CEO (Tax Operations), represented LHDN and Council Member Phan Wai Kuan spoke for CTIM. Concern was expressed over the IRBM officers bearing arms in the course of work but Nizom clarified that the particular case mentioned involved collaboration with the police, who were armed. "The IRBM focuses on recovering revenues, not intimidation," he stressed. On new compliance policies and enforcement strategies, he said that the new government wanted things done differently but the IRBM will clearly indicate cases to be discussed and where serious intervention will be applied.

Phan remarked that audits are still on but auditors have not been doing field audits lately. How then could pending cases be closed? Seah said that there was still uncertainty about whether Form Q should be retracted after it is lodged if discussions were fruitful but Nizom said retraction was not necessary. Pointing out that system integrity should be maintained, Phan urged that differentiation be made between penalty and compensation, with penalties being aligned to the seriousness of the offence. Nizom said, "Penalties are to protect those who comply. We have to be fair to them because they have complied – as opposed to those who have intentionally not complied. And we have to differentiate between cases of blatant non-compliance and outright evasion."

Commenting on the travel ban on tax defaulters, he explained that this had been implemented because of the multitude of cases with accumulated amounts. "This method of revenue recovery is expedient," he said. "People have money to travel, but they ignore their outstanding taxes. It is the most effective method but it has been suspended for the time being as the new government has asked us to use other (gentler) methods – although there is currently a procedure in place that resolves it at the point of departure, allowing the taxpayer to proceed with the journey." Admittedly, the IRBM wanted taxpayers to pay what they should while tax practitioners wanted to see their clients pay as little as possible, but "We have to find the middle ground," he conceded.

Phan mentioned the time lapse between announcement of tax incentives and gazetting of the law. This causes additional work and revenue loss because businesses could not capitalise effectively on them. The law needed simplification. Rules were complicated; comprehensive consultation was necessary and drafters will have to consider more scenarios.

TAXATION
OF THE DIGITAL ECONOMY

Daniel Woo

DIGITAL ECONOMY AND SOURCE BASED TAXATION

The advent of the digital economy poses great challenges to the international tax arena in applying the permanent establishment (PE) concept, amongst others used in the double tax treaties (DTAs). The current tax rules on PE are based on the geographical nexus of a physical presence between the enterprise and the source state. Basically, a foreign enterprise may be subject to tax in the source state if the foreign enterprise has significant participation in the economy of the source state.

Under the PE concept, if there is a fixed place of business through which the activities are carried out, negotiated or contracts concluded through dependent agents, a PE will crystallise, leading to the source state having the rights to tax the foreign enterprise. However, if there is no geographical nexus established, it would be difficult for the source state to tax the foreign enterprise's profits. These are the challenges that are faced by tax authorities all over the world in dealing with taxing the digital economy.

The response to these challenges posed by the digital economy is not to change the present rules governing the PE, but rather to modify their applications based on the existing principles and adapting it to the current business environment.

> **The rapid development in the digital economy, has resulted in many experts including tax academicians, tax practitioners, legal experts and tax authorities having difficulties in trying to segregate the digital economy from the whole economy.**

From the above, it can be seen that the advent of the digital economy has resulted in profits from these e-transactions not being subjected to taxation since it is "stateless income" or "double non-taxation" that is the focus of the Base Erosion Profit Shifting (BEPS) Project Action Plan Action 1: Addressing the Tax Challenges of the Digital Economy.

The other issue facing the tax authorities are, even if they are able to tax the income arising from the digital economy, the next question is who is entitled to benefit as it needs to be fair and the rights of the countries involved need to be considered.

DEFINITION OF THE DIGITAL ECONOMY

BEPS Project Action Plan: Action 1 does not define the digital economy. OECD is of the view that the income generated through the digital economy should be taxed on the same principle that is currently being used to tax traditional businesses. The OECD has decided not to "ring-fence" the digital economy, meaning the same principle should be applied to the entire economy, and possibly to use some special derivative rule that could apply to the digital economy.

In the absence of a definition, using dictionary-style definition may not be suitable because it may not adequately address the purpose the state is trying to impose tax on the digital economy. The problems that BEPS Project is trying to address is that many countries including Malaysia have uncoordinated domestic law to the same international tax issues. The definition used in the domestic law differs from those adopted in international tax relating to the DTAs.

In 2011, the OECD defined e-ecommerce as ***"An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders"***[1]. This definition is too restrictive as it does not adequately cover digital goods and services. The rapid development in the digital economy, has resulted in many experts including tax academicians, tax practitioners, legal experts and tax authorities having difficulties in trying to segregate the digital economy from the whole economy.

Based on the above difficulties in defining the digital economy, countries including Malaysia have to define it in such a way that it covers its "most important applications" so as to have some meaningful purpose.

BASIS ASSUMPTIONS NEEDED TO GO ABOUT TAXING THE DIGITAL ECONOMY

Looking at the PE concept in the DTAs, we need to examine whether it is possible to make some adjustments to the physical presence rule to the application of tax to the digital economy. One possibility is to lower the PE threshold on the digital economy, a nexus-based approach, i.e. digital PE.

The other approach is to consider using the withholding tax approach as an alternative to the nexus-based approach. We need to understand that the withholding tax approach is not a solution that will completely resolve the issues facing the taxation of the digital economy, but at least it is a practical solution to consider while waiting for future developments by the OECD through the BEPS Project Action Plan.

I will focus in this article, the withholding tax approach.

WITHHOLDING TAX APPROACH

The suggestion of using the withholding tax approach as the alternative solution to the nexus-based approach is that the latter may not be applicable once the physical presence principle is broken. Even if a nexus-based approach is considered, the difficulties arising from it would be how to apply different thresholds to different industries using the PE concept on digital transactions bearing in mind that the OECD has indicated that it will not ring-fence the digital economy.

However, when proposing the withholding tax approach, few assumptions on the mechanism are needed to make it workable, namely;

- The withholding tax should not apply to end-consumers;
- A direct definition of payments for digital goods and services may not be clearly available;
- Simple re-characterisation of all digital payments as "royalties" should be avoided at all costs.

As this may lead to overzealous enforcement by the tax authorities in collecting the taxes on the digital goods and services.

The points that need to be considered when adopting the withholding tax approach is not to set it too high that it may hinder international or cross-border trades which would encourage tax evasion. Setting it too low on the other hand, may be seen as an elective "toll charge" which will defeat the purpose of taxing the digital economy. While the withholding tax approach should be a final tax where possible, option should also be made available for filing for net taxation.

TARGET FOR WITHHOLDING TAX

There should be a defined target or payment that will be subjected to withholding tax otherwise, compliance with the withholding tax rules will be difficult and may lead to sub-optimal results. Withholding tax agents or payers may simply over-withhold to avoid facing the penalties imposed by the tax authorities for incorrect withholding. Such conservative approach by withholding tax agents or payers may hurt foreign business enterprises. This in turn will have a damaging effect on the economy of the state that imposed the withholding tax requirements. This is not what the OECD BEPS Project Action Plan: Action 1 is promoting or aiming at.

TYPES OF THE DIGITAL TRANSACTIONS

Digital transactions may come in different types of business models and the tax applications that are used may also be different. Some of the business models that most of us are familiar with, are as follows:

- Business-to-Business (B2B) model;
- Business-to-Consumers (B2C) model; and
- Consumer-to-Consumer (C2C) model.

There were attempts in the past by many countries both developed and developing to impose withholding tax obligations on the end-consumers relating to the e-commerce activities. This had only achieved limited success using the indirect tax approach such as VAT using the principle of "reverse charge mechanism" (similar to that used in our Malaysia GST legislation).

This VAT approach had also proved not to be effective in the collection of taxes. I will explain and apply the withholding tax approach to the above models and ascertain what would be the likely results if Malaysia were to adopt it for the digital economy.

In Malaysia, a guideline was issued on "taxation of e-commerce" some years ago as a general guide on how the IRBM would tax e-commerce activities. The guideline was too general and of little use in its application to the digital economy.

B2B TRANSACTIONS

B2B transactions form most of the e-transactions in the digital economy. As B2B transactions is concerned with corporate taxation base, the OECD BEPS Project Action Plan: Action 1 main focus would be in this area of taxation. The taxation involving B2B transactions goes beyond just corporate taxation in the digital economy as it also touches on other regulatory control mechanisms such as financial institutions if the collection of withholding taxes were to be introduced. The costs attributable to the collection of withholding tax would be higher per ringgit or dollar collected for any country that wishes to implement it. In order for the state tax authorities to collect the withholding tax, foreign digital businesses having e-transactions would be required to register their tax registration numbers with the source states.

If foreign digital businesses are not required to register for tax registration numbers, then the burden of withholding tax obligations will shift from the payee to the payer. Malaysian companies are familiar with such requirements as this is the practice in Malaysia where payer is required to comply with the withholding tax provisions when making payments to non-resident companies. The problem with our current withholding tax provisions is that, the payer who is the withholding tax agent has to determine whether each payment is subject or not subject to the withholding tax requirement, a judgement call that carries risks if it is wrongly determined. The payer on the other hand, has no control whatsoever over whether the digital transactions are within the ambit of the withholding tax provisions in the source state.

Based on our Malaysian withholding tax experience, most foreign businesses are not concerned whether their e-transactions sales are subject to the withholding tax or not, as they would specifically state that any payments to them would be net of any withholding tax that may be applicable. Hence, the withholding tax instead of being the tax liability of the payee is now being borne by the payer. This action of the payer having to bear the withholding tax of the non-resident payee goes against the purposes of taxing the digital economy as expounded by the BEPS Project Action Plan: Action 1.

B2C TRANSACTIONS

As mentioned earlier in this article, withholding tax should not apply to private consumption, thus, end-consumers should not act as withholding tax agents for the source state when making payments to foreign digital businesses. The reasons being, requesting end-consumers to withhold tax from the logistic standpoint would be difficult to enforce. The BEPS Project Action Plan: Action 1 in this respect states that *"To avoid requiring withholding by individual consumers, one potential option to be considered would be to require withholding by the financial institutions involved with those payments"*[2].

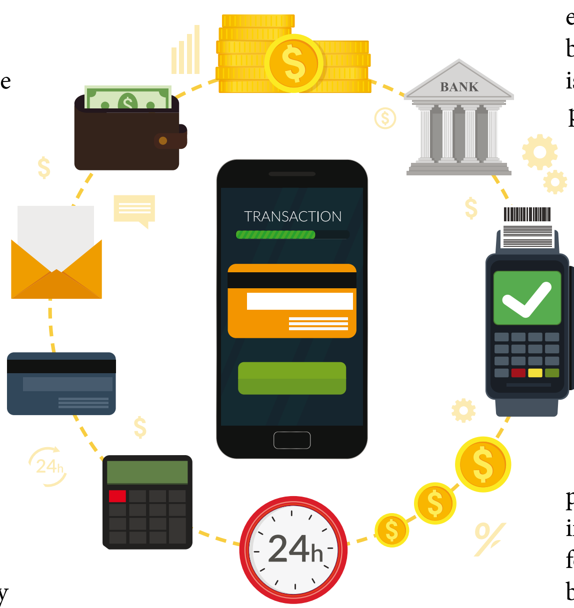
In adopting the above proposed withholding tax approach via the financial institutions, the burden of verification of these e-transactions are then shifted to the financial institutions to verify the various data to ascertain compliance with the withholding tax requirements which they would have difficulties to access notwithstanding that they are qualified intermediaries[3].

To alleviate or avoid such practical difficulties faced by financial institutions, the suggested approach is to exclude B2C transactions from the withholding tax requirements. The shortfall in revenue from B2C transactions would not be very significant to the source state. One must remember that, the intention of the BEPS Project Action Plan: Action 1 is not to raise overall additional revenue for the source state, but rather the intention is to allocate the tax base among the states that are involved in the e-transactions. The tax-exemption gained by the non-resident digital businesses from the transactions performed with the end-consumers at the source state will nevertheless be subject to tax based on the corporate tax rate in their home or resident state as most of these states practise the worldwide scope of taxation.

As far as Malaysia is concerned, it depends on what the government wants at the end of the day,. If the volume of e-transactions between foreign digital businesses and their end-consumers is not that significant, I would suggest perhaps, exemption be provided for compliance with the withholding tax requirements for B2C transactions.

However, if the government wishes to apply the withholding tax requirements on B2C transactions, it should then enlist financial institutions to assist in the withholding tax collections for the end-consumers, which will in turn place great burdens on them to ensure that these transactions are properly carried out. The financial institutions must be able to identify foreign digital businesses who deal in both B2B and B2C transactions that may need to register for tax with the IRBM on a net taxation basis, i.e. having a PE in Malaysia.

Financial institutions will have to shoulder the responsibilities by ensuring or requesting for payment codes and registration codes of both the payee and payer's country of residence. All these can be carried out without much difficulties, but they will create additional administrative burden on financial institutions which the Malaysian government needs to consider carefully. We don't want these onerous requirements imposed by the IRBM



on financial institutions to withhold tax to be translated into as additional bank charges and pass on to the end-consumers.

C2C TRANSACTIONS

As far as C2C transactions are concerned, I am of the view that withholding tax approach should exclude such transactions as they are merely of lower sales values, infrequently transacted compared with B2B transactions and thus the onus of withholding tax compliance should not be placed on the end-consumers. However, if such transactions in terms of sales values and frequencies were to increase in the future, then the sellers would naturally have to register their online businesses and in this case depending on the volume of business generated, it could be either be B2B or B2C transactions or combination of both types of transactions and the withholding tax approach would then apply to them.

INDIRECT TAXES ON THE DIGITAL ECONOMY

As I am writing this article, Malaysia have already voted in a new government to rule the country. The new government under the "Pakatan Harapan" coalition government has decided to replace the existing GST legislation with the proposed Sales and Service Tax (SST) legislation once it is passed by the government and enacted into law.

Hence, I do not wish to comment further on the VAT/GST mechanism, but just to highlight for matter of completeness, certain EU countries have introduced mechanisms that require non-resident suppliers to register, collect and remit VAT on digital goods and services in accordance with the rules of the states where the end-consumers are residing in.

Since the Malaysian government has decided to do away with the GST legislation, it is more crucial now for the government to seriously consider the withholding tax approach on taxation of the digital economy and in this respect engage with all stakeholders on how best to deal with it in the spirit of the BEPS Project Action Plan: Action 1.

CONCLUSION

The proposal to use the withholding tax approach towards the taxation of the digital economy is a practical approach to prevent the leakages of tax revenue. The present tax principles which focused on the nexus-based principle of PE will be difficult to apply to the digital economy as articulated earlier.

The withholding tax approach is obviously not a complete solution to resolve all the challenges facing the digital economy, but at least it is an interim measure to overcome the issue of "double non-taxation" facing Malaysia and many countries worldwide. Up and until then where more researches and studies are carried out by the OECD via BEPS Project Action Plan: Action 1 into the taxation of the digital economy, this is one of the viable alternatives for the Malaysian government to consider.

As mentioned earlier in this article, the proposed withholding tax rate should not be set too high or too low for the reasons stated earlier. Based on the current withholding tax rates applicable on the various payments made to non-residents, a proposed withholding tax rate of 10% would be a good rate to begin with.

Finally, based on our existing experience dealing with the withholding tax rate regime in Malaysia, the withholding tax approach on the digital economy requires careful monitoring and where needed, changes should be allowed to be made and a review mechanism be introduced with inputs from all relevant stakeholders such as the government, business community, CTIM, professional accounting and legal bodies and tax & accounting academicians to formulate what works best for Malaysia.

__Daniel Woo__ is the Executive Director and Head of Tax Advisory & International Tax at Grant Thornton Malaysia. The views expressed are solely that of the author and do not represent either the views or opinions of the firm of which he is part of.

[1] *OECD, Guide to Measuring the Information Society, p. 72 (2011).*

[2] *OECD, Addressing the Tax Challenges of the Digital Economy p. 146(2014).*

[3] *OECD raised that questions stating that if financial institutions were required to withhold the tax in lieu of withholding by individual customers, consideration should be given to how to ensure that those financial institutions could reliably determine which transactions were within the scope (OECD, id., at 154).*

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THE TAXABILITY OF DONATIONS

DR. ARJUNAN SUBRAMANIAM

This article is prompted by the Director General of Inland Revenue's media release on 7 June 2018 to the effect that:

(1) The IRBM is reviewing the merits of taxation of the "donations" (the subject matter of the Media Release); and

(2) A voluntary payment can change in character and be subject to tax if it is given repetitiously, as consideration

for services rendered in return for any benefit of any kind or the amount is used in a business activity in order to sustain business operation.

Whether the donation referred to in the Media Release is taxable or not is not within the scope of this article as the facts and circumstances in respect of that donation have not be properly established. The scope of this article is to set out the principles and boundaries and possibilities of taxation of "donations" received against the provisions of the Income Tax Act 1967.

The specific legislation to be considered are these:

(1) Section 3, Income Tax Act 1967 to the effect that "income tax" shall be charged upon the income accruing in or derived from Malaysia. (Emphasis added).

(2) Section 4, Income Tax Act 1967, "income" must be in respect of:
  (a) gains or profits from a business, for whatever period of time carried on;
  (b) gains or profits from an employment;
  (c) dividends, interest or discounts;
  (d) rents, royalties or premiums;
  (e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
  (f) gains or profits not falling under any of the foregoing paragraphs.

In follows from Section 3, that the basic principle is that any sum received must be "income" in the hands of the recipient to be taxable under Section 3. "Income" has not been defined in the Income Tax Act 1967, but "income" is said to be:

(1) 'Income Tax is a tax on income' (*London County Council v AG* [1901] AC 26). The word 'income' has not been defined in the Income Tax Act 1967. In ***Raja Bahadur Kamakshya Narain Singh v Commissioner of Income-Tax*, *Bihar And Orissa ('43) 30 AIR 1943 PC 153 (Kamakshya Narain Singh v C of IT [1963] ITR 513)***, the word 'income' was described as follows:
Income, it is true, is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation. Income is not necessarily a recurrent return from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts, as it does in the case of professional earnings. The multiplicity of forms which 'income' may assume is beyond enumeration.

(2) In ***The Gloucester Railway Carriage and Wagon Co, Ltd v The Commissioner of Inland Revenue 12 TC 720***, 'income' was described as the 'fruit' from a 'tree' which is capital.
Then, again, under Section 4(a), Income Tax Act 1967, a sum to be taxed must be gains or profits from a "business". It is said "business" imports a wider meaning then "trade". In ***H. Co. Ltd v The Commissioners of Income Tax (1 East African Tax Cases 65)***, Windham, J held "business" to be:

"It is true that the expression "business" pure and simple is more frequently applied to the habitual transaction of trade or commercial or financial transactions having particular features in common according to the nature of the business; but the word is in my view wide enough to embrace such a single trade or commercial or financial transaction, although such a single transaction is more commonly spoken of not as a business simplicitor but as a piece of business or a business transaction."

Basically, there are four tests to determine taxability of "donations", namely:

(1) Donations between friends or parent and child as "gifts", are not taxable. "Donations" are

properties voluntarily transferred from one person to another without any consideration. In the case of ***Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 MLJ 145***, at pages 151 and 152 of Report, the word "gift" is defined as, viz:

> "The ordinary notion of gift and 'gift' in its technical meaning have common features: a transfer of a beneficial interest in property by way of benefaction, and an absence of a pecuniary or proprietary benefit passing to the transferor by way of return. But the relevant circumstances in which these indicia may be found are more narrowly confined when the enquiry is as to a gift in the technical sense than when the enquiry is as to a gift according to ordinary notions. The former enquiry is narrower in scope for it is more confined in its purpose. Its purpose is to ascertain whether a beneficial interest in property has been transferred by a mode which falls within the classification of gift. The intention of the transferor and transferee as to the ownership of the beneficial interest and the form of its transfer exhaust the matters for investigation as to the divesting and investing of the interest, and the absence of consideration passing from the transferee to the transferor serves to distinguish a gift from other modes of transferring property."

Further, Gopal Sri Ram JCA in the same case held:

> "In the context of the law of gifts which, for historical reasons, falls within the scope of equity jurisprudence, when the word 'voluntary' or 'voluntarily' is employed, it is to describe a transaction unsupported by valuable consideration. It is derived from the word 'volunteer', meaning a person who has given no valuable consideration for a trust or settlement. It has no relation whatsoever to do with gifts being made in consequence of illegitimate pressure being brought to bear upon the disponor. Involuntariness in the latter context goes to vitiate free consent." ***(Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri (supra)***, at page 151 of Report.)

(2) Payments in the nature of a subsidy from public funds made to an undertaker to assist in the carrying on the undertaker's trade or business are trading receipts (per Viscount Simon in ***Ostima (HM Inspector of Taxes) v Pontypridd and Rhondda Joint water Board [1946] AC 477***. It is to be noted that "subsidy" means payments by a government or an organisation with an object to reduce the cost of goods and services. Petrol subsidy by the government is an example.

(3) Payments "as a supplement to its trading revenue and in order to preserve its trading stability" have been held as trading receipts. ***(Commissioners of Inland Revenue v Falkirk Ice Rink Ltd, 51 TC 42*** at page 54.

(4) Payments for benevolent purposes are not taxable.

> "Donations" between friends for non-business purposes are not taxable.

In ***Scott v The Commissioner of Taxation of The Commonwealth of Australia [1966] CLR 514***, the facts were:

A solicitor was given a gift of £10,000 by his client. The solicitor had considerable investments and interests in shop and business premises. The solicitor had acted for his client on various matters. His client was Mrs. Freestone, a widow. The solicitor was in his car with Mrs. Freestone on a mission relating to her property and suddenly she told him that she likes to gift him a sum of £10,000. The Solicitor was "speechless". The cheque for £10,000 was written in his car. The solicitor accepted the sum and paid the required gift tax. The sum of £10,000 was used to reduce the taxpayer's overdraft and the construction of a swimming pool. Windeyer J held:

(1) *"In short I think the 10,000 was a gift, in sense that it was gratuitous not made in discharge of an obligation and not taken by the recipient as discharging an obligation"*

(2) *"I respectfully think that a passage in the judgement of Kitto J., to which I have already referred, is a wholly accurate and sufficient statement of the general principle which must govern this case and that I need do no more than quote it and adopt it. His Honour, speaking of the English cases, said; "The distinction those decisions have drawn between taxable and non-taxable gifts is the distinction between, on the one hand, gifts made in relation to some activity or occupation of the donee of an income-producing character … and on the other hand, gifts referable to the attitude of the donor personally to the donee personally.."*

PAYMENTS TO PRESERVE TRADING STABILITY ARE TAXABLE

In ***Commissioners of Inland Revenue v Falkirk Ice Rink Ltd [1975] STC 434***, the facts were:

The taxpayer company owned and operated an ice rink on a commercial basis. Taxpayer provided facilities for curling to members of the public. It also leased rooms to a members' club. The charges made for the curling did not cover the cost of providing the quality of ice surface required. The taxpayer received £1,500 from the club as a donation to cover the additional cost of curling. The payment was not in respect of past services and the taxpayer gave no undertaking in return for the payment. The donor feared if not for the payment to the taxpayer, the company may not be able to provide the curling facilities. The Court held:

(1) *"I am of the opinion that the payment was made in order that the Respondent might use it in their business and that in substance and in form it was a payment made to a trading company artificially to supplement its trading revenue from curling and in order, in the interests of the club and its members to preserve the Respondent's ability to continue to provide curling facilities in the future. In its quality and nature this payment was of a business nature. It was accordingly a trading receipt in the hands of the Respondent and the question of law should be answered in the negative."* (per The Lord President (Emslie) at page 49-50 of Report).

(2) *"In my opinion the Crown are clearly right in their submissions. The phrase "trading receipts" is not one which has received statutory definition, but obviously it implies that there is a trader carrying on a trade or profession and that the payment is received in the course of his trade or profession. There is nothing in the words themselves which by implication require that the payment should be made by one who is at the time of the payment in the course of trading with the trader or that the payment should have to be made in respect of or return for the provision of any particular service or article of commerce. On the other hand, it is obviously more easy to determine that a receipt is a "trading receipt" if the payment is received for such service or article. As was observed by Rowlatt, J in **Chibbett v Joseph Robinson & Sons [1924] 9 TC 48** it is a question of looking at the person who receives and not at the "point of view" of the payer."* (Per Lord Cameron, at page 50-51 of Report).

(3) *"If as Lord Macmillan put it, what is decisive to determine the issue of whether sum received by a trader is a trading receipt is the answer to the question whether the payment was made to the Respondent Company in order*

that the money might be used in their business, then I think there can be no doubt what in this case the answer should be."

PAYMENTS IN THE NATURE OF SUBSIDIES ARE TAXABLE

In ***Smart (HM Inspector of Taxes) v Lincolnshire Sugar Co. Ltd [{KB & CA) 154 LT 167***, the facts were:

(1) The British Sugar Industry (Assistance) Act 1931, provided for weekly advances to the taxpayer. These advances were repayable by deductions from subsidies payable under an Act of 1925.

(2) The advances were treated as trading receipts as the advances were enabling them to meet their "trading obligations" Romer, LJ held the "advances" as additional subsidies and taxable.

(3) The payments were made in order that the money might be used in their business (per Lord MacMillan)

In ***British Commonwealth International Newsfilm Agency, Ltd v Mahany (HM Inspector of Taxes) [1963] 1 All ER 88***, the facts were:

The taxpayer was set up by R Ltd and BBC for the purpose of a newsfilm service. R Ltd and BBC entered into a covenant under which each had to pay the company one half of the amount of trading receipt. R Ltd and BBC paid one-half of the amount of trading deficit. The sum was held taxable as it was for a "trading deficit".

Payments not by way of business but by way of benevolence to support a charity are not within the term "trading income" (per Upjohn, LJ in Newsfilm Agency (supra) at page 576 of Report. Further, the donee must be free to enjoy payments made to him by the donor without any burden imposed on the donee.

This principle was stated in ***Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 MLJ 145*** viz:

> *"Secondly, it is relevant to enquire whether the disponee is, to the knowledge of the disponor,* ***free to enjoy without burden the property disposed of; or whether, to the knowledge of the disponor, the taking of that property*** *under the disposition is the occasion and reason for incurring a liability. If the disponor is aware that the receipt of the property by the disponee will impose a liability upon the latter, the disposition may be seen not to be way of benefaction. And as Dixon J said in* ***Collector of Imposts (Vic) v Cuming Campbell Investments Pty Ltd (1940) 63 CLR 619*** *at page 642 a transfer by way of benefaction is the 'essential idea' of a gift. No doubt much depends upon a comparison between the property taken and the liability incurred. It is of lesser significance that the liability is incurred under an arrangement or understanding with someone other than the disponor, or that it is to be discharged out of assets other than the property received."*

In ***Epping Forest 34 TC 293***, payments made by the corporation of London pursuant to a statute were made without any condition or counter stipulation on the part of the payer and not by way of business but to support a charity and were held not trading receipts. In ***Newsfilm Agency (supra)*** Upjohn, LJ approved of the case of **Epping Forest (supra)**.

In ***Dewan Perniagaan Bumiputra Sabah v Ketua Pengarah Hasil Dalam negeri [1996] MSTC 3569***, the facts were:

(1) The taxpayer was a registered society whose objects were developing, promoting and safeguarding the trading, commercial and industrial interest of Bumiputras.
(2) The taxpayer received sums of money from a levy imposed by the State government on timber exporters.
(3) The taxpayer's income was from member subscriptions.
(4) The payments received by the taxpayer were treated as "grants" from government.

The Court held:

(1) The grant was given for non-trading purposes, that is, for assisting Bumiputra's to achieve the new economic policy,
(2) The sums received are not trading receipts.

In ***D. School Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Rayuan Sivil No. 16-3-2005)***, the facts were:

(1) The school received moneys from Christian and Missionary Alliance in the USA and Canada,
(2) The Director General of Inland Revenue taxed the moneys received as "income"
(3) Some of the students were charged full fees and others were subsidised.

The learned Judge held that the moneys were taxable citing the decisions in ***Smart v Lincolnshire Sugar Co Ltd 20 TC 643 (supra), British Commonwealth International Newsfilm Agency Ltd v Mahany 40 TC 530 (supra)***. But note the decision and facts in **Linconshive Sugar Co. Ltd (supra)** and **Newsfilm Agency (supra)** are far remote from the facts and circumstances in **D School (supra)** namely:

(1) In ***Lincolnshire***, the payments were advances deductible from subsidiaries under an Act of 1925. In **D School**, the payments were from a Sunday collection from the public and the objective was to support children of missionaries.
(2) In **Newsfilm Agency (supra)**, again the payments were to fill a trading deficit. The payments were not for benevolent purposes as in **D School (supra)**. The Court of Appeal in **D School (supra)** gave no grounds for their decision. It is highly unreliable to consider it **as an authority**. See ***Petronas Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (High Court) [2014] MSTC 30-078*** – where the High Court held that a Court of Appeal decision without grounds is not binding precedent.

Conclusion

The decided cases on "donations" conclude the following:

(1) Outright gifts with no expectation of the gift and quite sudden are not trading receipts **(Scott (supra))**. These types of payment must be distinguished from payments which are subsidies.
(2) The purpose of the donations must be established. If the purpose is to support trading stability, then such sums, as subsidies are taxable;
(3) Where sums paid and received are for benevolent purposes, such sums are not on a trading receipt basis;
(4) The voluntary nature is not conclusive of the sums paid as non-trading receipt; and
(5) The question of political donations in the hands of registered political parties have not been addressed by the Courts. But note they are not "trading" entities.

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SPECIAL CLASSES OF INCOME AS IN SECTION 4A OF THE ITA

Faizah Aman

Section 4A was introduced in the Income Tax Act 1967 (ITA) with effect from 21 October 1983. Prior to that, payments to non-residents in respect of managerial fee and rent from movable property were defined as royalty under Section 2 of the ITA. Therefore, by virtue of Section 15 of the ITA, royalty payments that are considered to be derived from Malaysia, will be subject to Malaysian tax.

INTRODUCTION

Based on the case law *Director General of Inland Revenue v. Euromedical Industries Ltd*, it was argued that payments in the form of managerial fees to non-residents should be treated as business income and not as royalty. In this case, the payments were defined as royalty under Section 2 of the ITA but it did not come within the definition of royalty under Article XI in the Double Taxation Agreement (DTA) between Malaysia and the United Kingdom. Since there was a conflict in the definition of 'royalty' between the tax treaty and the definition of 'royalty' in the ITA, the Federal Court with consideration of subsection 132(1) of the ITA, decided that the provisions of the applicable tax treaty should prevail. Therefore, the payment should be treated as business income and since there was no permanent establishment, Malaysian tax should not be imposed.

To ensure tax compliance by non-residents in respect of income derived

in Malaysia from managerial fee and renting of movable property, Section 4A of the ITA and other related sections were introduced beginning 21 October 1983. The mechanism to tax those income is by way of withholding tax.

SCOPE OF SECTION 4A OF THE ITA

(i) Items covered by Section 4A of the ITA are not to be considered as business income. This is clearly provided for under Section 24(8) of the ITA dealing with basis periods to which gross income from a business is related does not apply to Section 4A of the ITA.

(ii) Paragraph 4A(i) of the ITA covers amounts paid in consideration of services rendered by the person who is not resident or his employee in respect of-
  a) The use of property or rights owned by the person who is not resident; or
  b) The installation or operation of any plant, machinery or equipment purchased from non-residents.

(iii) Paragraph 4A(ii) of the ITA covers – “amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme”
The scope of the above provision covers both technical and non-technical assistance and services in connection with scientific, industrial or commercial undertaking, venture, project, or scheme. While technical management envisages the passing over or utilisation of expert or specialised knowledge, skills or expertise, it should be noted that the scope of the above provision is now wider and can in fact cover most forms of payments made for management or administrative services in connection with any industrial, commercial undertaking, venture, project or scheme.

(iv) Paragraph 4A (iii) of the ITA covers rent or other payments made under any agreement or arrangement for the use of any movable property. Any lease of oil rigs, boats, ships, cars, or other equipment is caught by paragraph 4A (iii) of the ITA.

SCOPE OF DERIVATION UNDER SECTION 15A OF THE ITA

Gross income under paragraphs 4A(i), (ii) and (iii) cited above is deemed by virtue of Section 15A of the ITA to be derived from Malaysia-

(i) If responsibility for payment of the above or other payment lies with the government or a State government;

(ii) If responsibility for the payment of the above payments lies with a person who is resident for that basis year; or

(iii) If the payment of the above or other payments is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.

METHOD OF DEDUCTION UNDER SECTION 109B OF THE ITA

Effective 21 October 1983, Section 109B of the ITA was introduced in support of Section 4A of the ITA and Section 15A of the ITA. A payer making payments to a non-resident for services, and rentals under paragraphs 4A (i), (ii) and (iii) must upon paying or crediting the payments, deduct tax at the prescribed rate of the gross payment and within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General of Inland Revenue. Such payment must be made regardless whether the payer has deducted tax or not.

Where a payment is made by a permanent establishment of a Malaysian resident enterprise outside Malaysia, the provisions of the particular DTA may apply to treat the permanent establishment as an independent enterprise. Hence, the withholding tax under Section 109B will not be applicable, but this is on condition that the payment is not charged as outgoing or expense in the accounts of the business carried on in Malaysia.

Whereas, if the payment of paragraphs 4A (i) and (ii) of the ITA is in respect of a contract project carried out through a permanent establishment (where a DTA applies) or where there is an existence of business in Malaysia, the provisions of the applicable withholding tax are under Section 107A of the ITA and not under Section 109B of the ITA.

PENALTY FOR NON-DEDUCTION: PARAGRAPH 39(1) (j) OF THE ITA

Where a payer has failed to deduct tax under Section 109B of the ITA, the sum is a debt due to the government and is payable forthwith to the Director General of Inland Revenue under subsection 109B (2) of the ITA. Consequently, those failing to comply with this provision, payments from which tax should have been deducted must be disallowed in the computation of adjusted income or loss as provided under paragraph 39(1)(j) of the ITA.

TAX RATE: PART V: SCHEDULE 1 OF THE ITA

Paragraph 6(1)(e) of the ITA and Schedule I, Part V of the ITA sets the tax rate applicable to income under

Section 4A of the ITA obtained by a person not resident in Malaysia.

The tax in respect of Section 4A of the ITA, Special classes of income then, was 15% of gross under Schedule 1, Part V of the ITA. With effect from 28 October 1994, the tax rate imposed has been reduced to 10% on the gross amount.

Where a DTA has been entered into by Malaysia with a particular country, special rates in the DTA will prevail. To enjoy this special rate, the recipient must obtain a certificate of residence status from the country's revenue authority as proof of residency.

Although this is a final tax, if the recipient is a non-resident having income from sources other than income under Section 4A of the ITA, which requires the filing of an income tax return (FORM M), income from Section 4A of the ITA can be reported in the form. In this case, when the recipient calculates the tax payable by him for a year of assessment, income under Section 4A of the ITA will be taxed at a rate of 10% (or special tax rate under DTA where DTA applies) on the gross amount and a set-off under Section 110 of the ITA will be allowed.

RELATIONSHIP WITH SECTION 107A OF THE ITA

Section 107A was introduced in the ITA effective from 1 January 1983 to ensure greater compliance by non-resident contractors and non-resident employees. Section 107A authorises the withholding tax of monies by the payer on account of tax which is or to be payable by a non-resident contractor or employees of non-resident contractor.

The rate of withholding tax then was -

(i) 15% of service portion of contract payments on account of tax to non-resident contractor.

(ii) 5% of service portion of contract payments on account of tax which is payable by employees of non-resident contractor.

Effective from 21 September 2002, the rate of withholding tax imposed was reduced from 15% to 10%; and from 5% to 3%.

The introduction of Section 109B came about due to some overlapping between income under Section 4A and Section 107A. Thus, with effect from 21 October 1983 paragraph 107A (5) (a&b) was deleted and a new definition was introduced for contract of services. This removes any overlapping between paragraph 4A (iii) and Section 107A in respect of leasing of movable property.

However, there may arise overlapping between Section 4A (i) and (ii) and Section 107A. The deciding factor would be whether the payment is related to a "contract project" or otherwise. Where there is a contract project in Malaysia (where a DTA applies) and the payment is in relation to that contract project, then Section 107A of the ITA would be applicable. In all other cases of payment, paragraph 4A (i) and (ii) would apply.

INSERTION OF PROVISO TO SECTION 15A OF THE ITA

Section 15A of the ITA was amended as a result of the decision of the case law of the High Court, *SGS Singapore Pte Ltd. v. DGIR (Civil Appeal No. R1-14-2-98)/ (2000) MSTC 3814*. In this case, the High Court decided that the payment made by Petronas Carigali Sdn Bhd (PCSB) to SGS Singapore Pte Ltd., a resident of Singapore for the provision of 'third party inspection and expediting services' for a specific project is not taxable in Malaysia. This was so because the following conditions in Article IV of the Malaysia-Singapore agreement on avoidance of Double Taxation have been met –

(a) The company is a Singapore enterprise;
(b) The company shall not carry on business in Malaysia through a fixed establishment; and
(c) 98% of services are performed outside Malaysia.

Thus, a proviso to Section 15A of the ITA was introduced through the Finance Act of 2002. With effect from 21 September 2002, income under paragraph 4A (i) and (ii) of the ITA is only considered to be derived from Malaysia if the services are performed in Malaysia. Payments made to persons not resident for services executed outside Malaysia are no longer subject to withholding tax.

In cases where the contract requires the performance of services within and also outside of Malaysia, the value of the contract relating to with services in Malaysia shall be determined in a fair and proper manner. Apportionment of contract value shall be based on the value of services performed in Malaysia. It is important that the value of the contract is allocated on a reasonable basis based on the facts of each case as only part of the value of the contract in relation to the services implemented in Malaysia are subject to withholding tax under Section 109B of the ITA.

DELETION OF PROVISO IN SECTION 15A OF THE ITA

With the enactment of the Finance Act 2017 which was gazetted on 16 January 2017, Section 15A of the ITA was amended by removing the proviso stating "provided that in respect of paragraphs (a) and (b), this section shall apply to the amount attributable to services which are performed in Malaysia". This amendment is effective from 17 January 2017.

As a consequence of the abovementioned change, income of non-residents which fall under Special Classes of Income pursuant to Section 4A(i) and (ii) of the ITA are deemed derived in Malaysia under Section 15A irrespective of where the services are performed. Following this, the withholding tax under Section 109B of the ITA on amounts paid to non-resident for services provided regardless of where the services are performed is reintroduced into the Malaysian tax system.

The amendment to impose a tax on payments for any services rendered by non-residents to people doing business in Malaysia is necessary to protect the tax base of the country. It is in line with international tax initiatives, in accordance with developments in the business models of late and in the interest of the country.

special classes of income
as in section 4A of the ITA

In this regard, with the amendments made, the imposition of a withholding tax in respect of the service fees that are subject to the provisions of paragraph 4A of the ITA is clearer and transparent. It ensures that income from services provided by a non-resident person if the services are used by people who do business in Malaysia are subject to tax. It is also believed that this provision would encourage investment in the service industry, which was the main focus for making Malaysia a high-income nation and as a service exporting country. In this regard, there is a need to ensure our competitiveness is improved and in-house talents are nurtured and built. This amendment can also create a level playing field in the service industries in Malaysia and with that of other regions.

The objective of this amendment is in line with the international tax developments relating to issues of tax base erosion and profit shifting (BEPS) that has been highlighted by the Organisation for Economic Co-operation and Development (OECD) and the United Nations and the Committee of Expert on International Cooperation in Tax Matters (UN Tax Committee). The provision of services has been identified as a means of eroding the tax base of countries. It could arise in respect to services rendered by a non-resident company to a company resident in a country where both companies are members of a multinational group. In this case, the group company providing the services is resident in a low-tax country while the payment for the service is deductible against the payer country's tax base at relatively high rates but is taxed at relatively low rates at the payee country, so that the tax saving from the deduction substantially exceeds any tax on the income. Recommendations for these issues include changes to tax treaties and domestic law. In this regard, Malaysia took action by amending Section 15A of the ITA. At the same time, the UN Tax Committee approved the addition of a new Article 12A to the United Nations Model Convention in 2017. The new article allows source countries to tax fees for technical services on a basis similar to the taxation of royalties.

Consequently, effective from 17 January 2017, by virtue of paragraph 4A(i) and (ii) of the ITA and amendment to Section 15A, such payments should be taxed under Malaysian tax in the hands of the non-resident service provider (even if the non-resident has no permanent establishment or no business presence in Malaysia) regardless of where the services are performed. However, certain tax treaties (refer to Practice Note No. 2/2017) would prevent Malaysia from imposing tax for such payments or could only impose tax if the services are performed in Malaysia.

However, on 23 October 2017 the legislation was reviewed and introduced an exemption order - Income Tax (Exemption) (No. 9) Order 2017 [P.U. (A) 323/2017]) to revert to the earlier position that prevailed from 21 September 2002. Based on the exemption order, with effect from 6 September 2017, special classes of income under Section 4A of the ITA are only considered derived from Malaysia if the services are performed in Malaysia. Practice Note No. 3/2017 had been issued to provide guidance on the implementation of the exemption order.

CONCLUSION

Generally, advancement of technology allows service to be rendered rapidly to recipients in Malaysia in a virtual environment from any place outside Malaysia. Therefore, it is necessary to protect the taxation base and national revenue in an era of digital economy. It is also important to remove or reduce the unnecessary use of non-resident service providers to ensure that the interest of local service providers are protected. Therefore, undoubtedly the provision under Section 4A of the ITA is one of the tools to advance this aim.

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WHAT ARE HARMFUL TAX PRACTICES?

THE OECD'S PERSPECTIVE

Thisha Gunasilan

The Action Plan on Base Erosion and Profit Shifting (BEPS) identified 15 actions to tackle the issue of BEPS in an effective manner. The BEPS Action Plan was endorsed by the G20 Finance Ministers in October 2015, including Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance.

The BEPS Action 5 is also one of the four BEPS minimum standards, alongside Action 6: Preventing treaty abuse, Action 13: Country-by-Country Reporting and Action 14: Dispute resolution. Each of the four BEPS minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. The focus of this article is on BEPS Action 5, specifically on harmful tax practices.

The Organisation for Economic Co-operation and Development (OECD) members and G20 countries have developed an Inclusive Framework on BEPS which allows interested countries and jurisdictions to work with OECD and G20 members in developing a monitoring process for the four minimum standards as well as to put in place the review mechanisms for other elements of the BEPS Actions. It is worth noting that Malaysia became a member of the Inclusive Framework in 2017.

On 16 October 2017, the OECD released a document, Harmful Tax Practices – 2017 Progress Report on Preferential Tax Regimes (the Progress Report), approved by the Inclusive Framework. This is to provide an update to the 2015 BEPS Action 5 report as well as to report on the results of the review of all Inclusive Framework members' preferential tax regimes that have been identified. The Inclusive Framework has provided an update to the results of the review on preferential tax regimes on 9 May 2018. Subsequently on 22 July 2018, the OECD released the OECD/G20 Inclusive Framework on BEPS – Progress Report July 2017 to June 2018 to provide an update on the status of implementation of Action 5.

The work on harmful tax practices began in the 1990s. In 1998, the OECD Committee on Fiscal Affairs issued a report: "Harmful Tax Competition: An Emerging Global Issue and at the same time formed a group called the Forum on Harmful Tax Practices (FHTP). The report made the case that tax havens were damaging the economies of the OECD member countries by siphoning off productive capital and facilitating the avoidance and evasion of income and wealth taxes, thereby hurting the OECD countries' public finances. The OECD exhorted member countries to identify 'preferential regimes' which included regimes with:

(1) Nominal or zero taxes on income from foreign investments
(2) No effective exchange of information with other countries
(3) No transparency in how tax is imposed.

Action 5 reflect minimum requirements on preferential tax regimes. The FHTP's review process seeks to identify features of preferential regimes that can facilitate BEPS.

"The report made the case that tax havens were damaging the economies of the OECD member countries by siphoning off productive capital and facilitating the avoidance and evasion of income and wealth taxes, thereby hurting the OECD countries' public finances."

FORUM ON HARMFUL TAX PRACTICES (FHTP)

The FHTP reviewed preferential regimes of all OECD and G20 members. Its thrust was ensuring that regimes provide transparency as a priority and that activities undertaken in them reflect a level of substance.

The regimes have generally been reviewed using a thematic approach, whereby regimes of a similar nature are reviewed together. The categories of regimes used are those that the FHTP has observed in the course of its work. They are presented thematically as:

(1) Intellectual property regimes,
(2) Headquarters regime,
(3) Financing and leasing regimes,
(4) Banking and insurance regimes,

HOW DID MALAYSIA FARE UNDER THE REVIEW?

The position relative to Malaysia is summarised below:

Category	Regime	Status as at 16 October 2017	Status as at 9 May 2018
Intellectual property (IP) regimes of new Inclusive Framework members that are also reviewed as non-IP regimes	Principal hub	In the process of being amended	In the process of being amended
	Biotechnology industry	In the process of being amended	In the process of being amended
	MSC Malaysia	In the process of being amended	In the process of being amended
	Pioneer status	In the process of being amended	In the process of being amended
Headquarters regime	Principal hub	In the process of being amended	In the process of being amended
Financing and leasing regime	Treasury management centre	Abolished	Abolished
	Labuan leasing	In the process of being amended	Amended
	Principal hub	In the process of being amended	In the process of being amended
Banking and insurance regimes	Inward re-insurance and offshore insurance regime	In the process of being amended	In the process of being amended
	Labuan financial services	In the process of being amended	In the process of being amended
	Approved service projects	Out of scope	Out of scope
Distribution centre and service centre regimes	Malaysian international trading company	Out of scope	Out of scope
	Special economic regions	In the process of being amended	In the process of being amended
	Green technology services	Not harmful	Not harmful
Fund management regimes	Foreign fund management	Not harmful	Not harmful
Miscellaneous regimes	Biotechnology industry	In the process of being amended	In the process of being amended
	MSC Malaysia	In the process of being amended	In the process of being amended
	Pioneer status	In the process of being amended	In the process of being amended

Source: OECD (2017), Harmful Tax Practices - 2017 Progress Report on Preferential Regime and Results of Review of Preferential Tax Regimes approved by the Inclusive Framework dated 9 May 2018

(5) Distribution and service centre regimes,
(6) Shipping regimes,
(7) Holding company regimes,
(8) Fund management regimes, and
(9) Miscellaneous regimes.

Where the results indicate the regime is "harmful", it means the regime has harmful features with deleterious economic effects. Where the results indicate a regime is "potentially harmful", the regime is seen to have elements of harmful criteria, though the economic effects have yet to be determined as "harmful".

An outline of how the study was undertaken would be useful. A regime is "preferential", if it offers some form of tax preference over and above what is available in its mainstream tax system. A preference offered by a regime may take a wide range of forms, including a reduction in tax rate or tax base or preferential terms for the payment or repayment of taxes. Even a small amount of preference is sufficient for the regime to be considered preferential. The benchmark is against the relevant country's tax system and not that of another.

A review indicates that four key factors are determinative of a regime being potentially harmful.

These are:

(a) The regime imposes no or low effective tax rates on income from geographically mobile financial and other service activities,
(b) The regime is ring-fenced from the domestic economy,
(c) The regime lacks transparency (for example, the details of the regime or its application are not apparent, or there is inadequate regulatory supervision or financial disclosure),
(d) There is no effective exchange of information with respect to the regime.

In addition, eight subsidiary factors are looked at. These are:

(a) An artificial definition to the tax base,
(b) Failure to adhere to international transfer pricing principles,
(c) Foreign source income exempt from country of residence,
(d) Negotiable tax rate or tax base,
(e) Existence of secrecy provisions,
(f) Access to a wide network of tax treaties,
(g) The regime is promoted as a minimisation vehicle,
(h) The regime encourages operations or arrangements that are purely tax-driven and involve no substantial activities.

A regime that is identified as being potentially harmful based on the above factor analysis may be considered not to be actually harmful if it does not appear to have created harmful economic effects. The following three questions can be helpful in making this assessment:

- Does the tax regime shift activity from one country to the country providing the preferential tax regime, rather than generate significant new activity?
- Is the presence and level of activities in the host country commensurate with the amount of investment or income?
- Is the preferential regime the primary motivation for the location of an activity?

Following consideration of its economic effects, a regime that created harmful effects would be categorised as a harmful preferential regime. The 1998 Report recommended that where a preferential report is found to be actually harmful, the relevant country should be given the opportunity to abolish the regime or remove the features that create the harmful effect.

The OECD emphasised that its initiatives on harmful tax practices is not intended to promote the harmonisation of income taxes or tax structures generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates. Rather, the work is about reducing the distortionary influence of taxation on the location of mobile financial and service activities[1], thereby encouraging an environment in which free and fair tax competition can take place. This essentially underpinned the aim of ensuring a "level playing field" and a continued expansion of global economic growth. The OECD approach may be summed up to embrace the following objectives:

1. Requiring **substantial activity** for any preferential regime; and
2. **Improving transparency**, including compulsory spontaneous exchange on rulings related to preferential regimes.

"Substantial activity" requirement

The substantial activities requirement is satisfied if the benefits are only granted to taxpayers that undertake core income generating activities that produce the type of business income covered by the preferential regimes. These are some of the guiding points:

- **IP regimes**
  One of the approaches that can be considered is the nexus approach. Benefits from IP regimes should be proportional to actual expenditure incurred by the company receiving the benefits. The company that benefits from an IP regime should actually perform the research and development activities and not outsource them to a related company.
- **Headquarter regimes**
  Granting preference treatment to activities such as managing, co-ordinating and controlling business activities for a group or companies in a particular geographic location. The core income generating activities could include key activities giving rise to specific types of service income.
- **Distribution and service centre regimes**
  Providing purchase and re-sell services from/to other group companies with a small percentage profit. The core income generating activities could include transporting and storage of goods, managing

stocks and taking orders and providing consulting or other administrative services.

- **Financing and leasing regimes** Provide preferential treatment that do not raise concerns regarding ring-fencing and artificial definition of the tax base. The core income-generating activities could include agreeing funding terms, identifying and acquiring assets to the lease, monitoring and reviewing agreements and managing risks.
- **Fund management regimes** The substantial activity to the income-generating activities of a fund manager could include taking decisions on holding or selling investments, calculating risks and reserves; taking decisions on currency and interest fluctuations and hedging positions; and preparing relevant regulatory or other reports for government authorities and investors.
- **Banking and insurance regimes** 'Substance' should already be ensured by the regulatory environment ensuring that the business is capable of bearing risks and undertaking activities. Insurance, however, does not necessarily have these safeguards, where the risks are capable of being reinsured. The core income-generating activities for banking depends on the type of banking undertaken, but could include raising of funds, managing risks, taking hedging positions and other financial services to customers; managing regulatory capital and preparing regulatory reports and returns.
- **Holding company regimes** The substantial activity requirement looks at the activities that generate the relevant type of income. Where little activity is required, concerns revolve around transparency and beneficial ownership, treaty shopping and whether ring-fencing should apply. The substantial activity requirement would also require that these companies have activity to manage their investments and satisfy local regulatory requirements (people and premises) that should avoid letter box and brass plate companies from benefiting from these regimes.

"The OECD emphasised that its initiatives on harmful tax practices is not intended to promote the harmonisation of income taxes or tax structures generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates."

THE MALAYSIAN VIEWPOINT

The Ministry of Finance has reiterated its commitment to implementing and adhering to the BEPS minimum standards on many occasions. In the context of Action 5, the government is committed to amending the 'harmful' regimes by 31 December 2018. To date, the Malaysian government has taken a few measures to address Action 5 requirements, namely:

- The introduction of the revised Guidelines on the Establishment and Operations of Labuan Leasing Business - The Revised Guidelines introduced a number of new requirements for Labuan leasing companies. The main amendment introduced in the Revised Guidelines is the new 'substance' requirement, which requires Labuan leasing companies to establish substantial activities and

[1] *Mobile financial and service activities refer to activities that can be shifted from one jurisdiction to another in response to tax planning considerations, as opposed to income from activities such as manufacturing, agriculture, tourism which are typically tied to a specific location.*

perform strategic functions in Labuan. These include (but not limited to):

(a) Physical presence in the form of a fully functional office in Labuan which is used for business purposes only and must be appropriately furnished with office equipment,
(b) The core income generating activities are expected to be carried out in Labuan and these include identifying and acquiring of assets to be leased, negotiating leasing terms, soliciting lessees, management and financing of leased assets,
(c) Employment of full-time employees with the necessary experience and qualification in the fields related to the leasing business,
(d) Adequate business spending in undertaking the leasing business.

- The introduction of Labuan Business Activity Tax (Automatic Exchange of Financial Account Information) Regulations 2018 - These Regulations, which apply to any Labuan entity which is a Financial Institution, came into operation from 1 July 2017 and cover amongst others due diligence obligations, reporting obligations, method of furnishing information, use of information by the Director General, record keeping requirements and consequences for incorrect return and failure to comply with the Regulations.
- Amendments to the MSC Malaysia regime – No approvals are to be granted for applications for the MSC Malaysia status from 1 July 2018, including any applications for extension of income tax exemption period. The Malaysian Digital Economy Corporation together with the government are currently working on a new legislation, which is targeted to come in force by 31 December 2018

As shown in the updated regime results dated 9 May 2018, the amendments to the Labuan leasing regime has been acknowledged by the FHTP. As Malaysia continues to implement and adhere to the BEPS minimum standards over the next few months, it is equally important that Malaysia balances its compliance obligations not to be seen as engaging in harmful tax practices with the need to preserve the competitiveness of the Malaysian economy. This is achievable as long as it ensures that it complies with the OECD's substance requirements.

Note: This article was written based on information available as at 14 August 2018.

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[1] *http://www.oecd.org*

[2] *OECD (2017), Harmful Tax Practices – 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS Action 5, OECD/G20 Base Erosion and Profit Shifting Project*

[3] *OECD (2015), Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance, Action 5 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*

[4] *Guidelines issued by the Labuan Financial Services Authority*

CONCLUSION

The work undertaken by the OECD and FHTP provides a level of clarity as to how preferential regimes are to operate. This work is ongoing and will mean that preferential regimes in their various ways will respond.

In the final analysis, there can be no doubt that the OECD initiatives via their Action plans are timely and completely justifiable. However, the review by the FHTP and the resulting classifications given to regimes give rise to questions as to consistency. In other words, if Malaysia's pioneer status is considered a "harmful" practice how does this compare with the tax preference adopted by another country such as the UK's patent box incentives, which has been categorised as 'not harmful'. It is not clear that the criteria used for determination are transparent and objective.

In the meantime, taxpayers should continue to observe the developments to the regimes that are found to be harmful and are in the process of being amended or eliminated in the respective jurisdictions they operate in.

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

CHINA (PEOPLE'S REP.)

New rules on tax deduction and tax depreciation for enterprises released

On 7 May 2018, the Ministry of Finance (MoF) and the State Administration of Taxation (SAT) jointly issued two circulars announcing new rules in regard to tax deductions and depreciation for purchase of machinery and equipments and expense on employee's education. These new policies are as follows:

Circular (2018) No.51

From 1 January 2018 to 31 December 2020, any expenses incurred during the year on newly purchased machinery or equipment less than CNY5 million will be eligible for tax deduction as outright purchase. If the value of the asset is more than CNY5 million, such assets will be categorised as fixed assets, but entitled to accelerated depreciation rates stipulated under the previous Circular (2014) No.75 and Circular (2015) No.106 for industries that upgraded their machinery and equipment. Further, the Circular clarifies that buildings and constructions do not fall within the scope of such rules.

Circular (2018) No. 54

Effective from 1 January 2018, expenses incurred on employees' education are deductible up to 8% of the total amount of salaries and wages of an enterprise. Prior to 1 January 2018, the tax deduction rate was 2.5%, with the deduction rate of 8% only being applicable to high-tech enterprises. With the announcement of Circular (2018) No. 54, the application of 8% has been extended to all enterprises.

Investment deductions for venture capital enterprises and individual angel investors extended nationwide

On 14 May 2018, the MoF and the SAT jointly issued Circular (2018) No. 55 announcing tax incentives for venture capital enterprises and individual angel investors investing in technology start-ups. The circular applies from 1 January 2018 in respect of enterprise income tax and from 1 July 2018 in respect of individual income tax. Salient points of the content of the circular are summarised as follows:

Deductions

- A venture capital enterprise or a limited partnership investment enterprise that invests and holds a direct equity investment in qualifying technology start-ups for at least two years will be granted a tax deduction of 70% of the investment amount from its taxable income once the two years holding period expires. If the allowable deduction is not fully utilised in a tax year, the balance amount may be carried forward to the following tax years.
- The same tax policy applies to individual angel investors for the purposes of individual income tax.

Qualifying conditions

(a) Technology start-ups

- The start-ups must be resident enterprises located in China which are audited for the purpose of income tax (as opposed to verification collection).
- Have fewer than 200 employees (at least 30% of whom must have a university degree. In addition, their assets and annual revenue may not exceed CNY30 million at the time of investment.
- Have been in business for no more than five years (i.e. 60 months) at the time of investment.
- Not listed in the year in which the investment is made or in the following two years.
- The ratio of total R&D expenditure to costs is no less than 20% in the year in which the investment is accepted and the subsequent tax year.

(b) Venture investment enterprises

- Must be resident enterprises located in China which are

audited for the purpose of income tax (as opposed to verification collection) and does not belong to the founder of technology start-ups described above.

- Registered and operate in compliance with the provisions stipulated in the Administrative Measures on Venture Investment Enterprises (Order No. 39 of the Development and Reform Committee) or the "Provisional Regulations on the Supervision and Management of Private Equity Funds" (Order No. 105 of China Securities Regulatory Commission).
- The total equity proportion of technology start-ups held by venture capital investment enterprises and their associated enterprises must be less than 50%.

(c) Individual investors

- The investors cannot be founders or employees of the technology start-ups as described above. The same restriction applies to family members of individual investors.
- No labour dispatch relations with technology start-ups.
- Within two years after the investment, the total equity proportion of the technology start-ups held by themselves and their relatives must be less than 50%.

Expansion of tax incentive to advanced technology service enterprises nationwide

On 19 May 2018, the MoF, SAT, the Ministry of Commerce (MOFCOM), the Ministry of Science and Technology (MOST) and the National Development and Reform Commission (NDRC) jointly issued Circular (2018) No. 44 expanding the existing tax incentive to advanced

technology service enterprises nationwide. The Circular applies retroactively from 1 January 2018.

The advanced technology service enterprises will be subject to enterprise income tax (EIT) at a rate of 15% (the standard tax rate for enterprise is 25%).

The services that are eligible for the incentive include:

- computer and information services such as information system integration services and data services;
- research & development and technical services such as research and experimental development services, industrial design services, cross-border licensing and transfer of intellectual property;
- culture technical services such as digital production of cultural products and related services, translation, dubbing and production services for cultural products; and
- medical services of traditional Chinese medicine such as traditional Chinese medicine health care and related services.

Previously, the tax incentive was applicable only to 15 designated zones, including Tianjin, Shanghai, Hainan, Shenzhen, Hangzhou, Wuhan, Guangzhou, Chengdu, Suzhou, Weihai, Harbin New Area, Jiangbei New Area, Liangjiang New Area, Guian New Area and Xixian New Area.

Retaliation tariffs imposed on US products

On 16 June 2018, the Customs Tariff Commission of the State Council issued Shui Wei Hui Public Notice (2018) No.5 imposing import tariffs on US products from 6 July 2018.

As a response to the US government's decision to impose 25% tariffs on USD50 billion worth of Chinese goods, China decided to impose similar tariffs on US products of the same value. As a result, 545 products amounting to USD 34 billion, including agricultural products, automobiles and aquatic products, will be subject to additional tariffs from 6 July 2018. Also, the implementation date for additional tariffs on another 114 items of US goods, including chemicals, medical equipment and energy products, will be announced separately.

In regards to the above US products, the 25% tariff will be imposed on top of the current tariffs and on the valuation method. The current policy on bonded and tax exemption will remain unchanged; however, the preferential treatment does not apply to the additional tariffs.

In total, 659 products are affected and two lists of the tariff changes are published together with the Notice.

Super-deduction for R&D expenses incurred by foreign organisations

On 25 June 2018, the MoF, SAT and MOST jointly issued Circular (2018) No.64 announcing new rules in regards to super-deduction for research and development (R&D) expenses incurred by foreign organisations. The Circular applies retroactively from 1 January 2018.

According to the Circular, 80% of the actual expenses incurred by an enterprise for engaging a foreign organisation to conduct R&D activities may be accounted for as foreign R&D expenses (super-deduction). These foreign R&D expenses are deductible for enterprise income tax purposes, as long as they do not exceed two thirds of the total qualifying R&D expenses of that enterprise.

The actual amount incurred must be determined at arm's length. If the enterprise assigning the R&D activities is associated to the foreign organisation, the latter must provide the former with the breakdown of the expenses for such R&D project.

The expenses incurred by an enterprise in respect of assigning foreign individuals to conduct R&D activities will not be eligible for super-deduction.

Tax incentive for small low-profit enterprises extended

On 11 July 2018, the MoF and SAT jointly issued Circular (2018) No. 77, extending the tax incentive for small low-profit enterprises. The Circular retroactively applies from 1 January 2018.

A small low-profit enterprise is subject to enterprise income tax on 50% of its taxable income at a reduced rate of 20% between 1 January 2018 and 31 December 2020. As a result, the effective tax rate for these enterprises is 10%.

A small low-profit enterprise is defined as such if the following criteria are met:

Industrial enterprises:

- annual taxable income is less than CNY1 million;
- number of employees is less than 100; and
- value of total assets does not exceed CNY30 million.

Other enterprises:

- annual taxable income is less than CNY1 million;
- number of employees is less than 80; and
- value of total assets does not exceed CNY10 million.

For implementation purposes, the SAT issued SAT Public Notice (2018) No. 40, stating that the aforementioned incentive applies to both enterprises taxed on actual profits and enterprises taxed on deemed profits. Eligible enterprises are required to make advance enterprise income tax every quarter. Furthermore, the Notice provides detailed rules on determining an enterprise as a small low-profit enterprise and therefore may enjoy the incentive when it makes the advance payment of enterprise income tax, either by reference to the situation of the preceding year or by reference to the estimation of the current situation.

Upon the final settlement of enterprise income tax, an enterprise may have to pay additional tax should if it doesn't fulfil the criteria for the incentive or may be entitled to a credit to offset against the tax liability of the following quarter if it has met the criteria but has yet to enjoy the incentive.

Carry forward of losses for high and new technology enterprises and scientific technology SMEs extended

On 11 July 2018, the MoF and the SAT jointly issued Circular (2018) No. 76 providing extension on the number of years for carry forward of losses. According to the circular, high and new technology enterprises, as well as small to medium-sized scientific technology enterprises, which have not offset their losses within the statutory period of five years, may carry forward these losses for another five years. As a result, the loss carry-forward period for these enterprises has been extended from five to 10 years. The circular applies from 1 January 2018.

HONG KONG

Subsidiary legislation for open-ended fund companies gazetted

On 18 May 2018, the government and the Securities and Futures Commission published three gazetted subsidiary legislation enabling the implementation of the open-ended fund company (OFC) regime. The three legislations are:

- the Securities and Futures (Amendment) Ordinance 2016 (Commencement) Notice (the Commencement Notice);
- the Securities and Futures (Open-ended Fund Companies) Rules (the OFC Rules); and
- the Securities and Futures (Open-ended Fund Companies) (Fees) Regulation (the Fees Regulation).

The Commencement Notice will bring into effect all provisions of the Securities and Futures (Amendment) Ordinance 2016 from 30 July 2018 onwards, with the OFC regime taking effect on the same day. In addition, extension of profits tax exemption to onshore privately offered OFCs will also take effect from 30 July 2018.

Amendment bill implementing three concessionary tax measures – gazetted

The Inland Revenue (Amendment) (No. 5) Bill 2018 (Amendment Bill) was gazetted on 8 June 2018, to implement three tax concession measures as proposed in the 2018-19 Budget. These measures include the following:

- allowing the husband and wife the option of electing for personal assessment separately;
- allowing enterprises to claim a 100% tax deduction for capital expenditure incurred for procuring environmental protection installations in one year instead of over five years; and
- extending the scope of the tax exemption for debt instruments under the Qualifying Debt Instrument Scheme.

The Amendment Bill was introduced into the Legislative Council on 13 June 2018. Subject to the approval by the Legislative Council, the three tax measures will be implemented retroactively from the year of assessment 2018/19.

Tax deduction scope expanded for capital expenditure incurred for purchase of intellectual property rights

On 29 June 2018, Inland Revenue (Amendment) (No. 5) Ordinance 2018 was gazetted, to expand the scope of profits tax deductions for capital expenditure incurred by enterprises for the purchase of intellectual property (IP) rights from five to eight types with effect from the year of tax assessment 2018/19.

With the expansion in scope of tax deductions provided therein, the eight types of IP rights eligible for profits tax deductions are patents; know-how; copyrights; registered designs; registered trademarks; rights in layout design (topography) of integrated circuits; rights in plant varieties; and rights in performances.

The Ordinance also expands the scope of tax deductions originally provided for registration expenses related to trademarks, designs and patents to include plant variety rights.

Inland Revenue (Convention on Mutual Administrative assistance in Tax Matters) Order gazetted

The Inland Revenue (Convention on Mutual Administrative Assistance in Tax Matters) Order was gazetted and came into operation on 13 July 2018, and the Convention on Mutual Administrative Assistance in Tax Matters entered into force in Hong Kong on 1 September 2018 to allow Hong Kong to effectively implement the automatic exchange of financial account information in tax matters (AEOI) and the Base Erosion and Profit Shifting (BEPS) package promulgated by the OECD.

Hong Kong will also follow the Convention to take forward the automatic exchange of country-by-country reports and spontaneous exchange of information on tax rulings under the BEPS package. Pursuant to the reservations made under the Convention, Hong Kong will not render assistance to other tax authorities in terms of recovery of tax claims or fines or the service of documents.

Rules on implementation of BEPS minimum standards and codifying the transfer pricing principles – gazetted

On 13 July 2018, the Inland Revenue (Amendment) (No. 6) Ordinance 2018 was gazette to implement the minimum standards of the BEPS package promulgated by the OECD and codifies the transfer pricing principles into the Inland Revenue Ordinance (Cap. 112) (IRO).

Under the Amendment Ordinance, the ultimate parent entity of a multinational enterprise (MNE) group that is a tax resident in Hong Kong is required to file country-by-country (CbC) reports to the Inland Revenue Department (IRD) if their annual consolidated group revenue is more than HKD6.8 billion.

The Amendment Ordinance also requires taxpayers to prepare master and local files as part of the transfer pricing documentation, subject to certain exemptions. In addition, the Amendment Ordinance gives a statutory basis to the cross-border dispute resolution mechanism (i.e. mutual agreement procedure and arbitration) and advance pricing arrangement, which were previously implemented based on the IRD's administrative rules.

The key elements of the Amendment Ordinance are summarised as **Table 01:**

Table 01

Key Element	Effective Date
Enhancements to double taxation relief provisions	Applicable to tax payable for year of assessment beginning on or after 1 April 2018
Transfer pricing rules and related provisions	– applies to a year of assessment beginning on or after 1 April 2018 for arm's length principle, advance pricing arrangement and changes in trading stock; – applies to a year of assessment beginning on or 1 April 2019 for separate enterprise principle and taxation of income from intellectual property accrued to non-Hong Kong resident associates; and – grandfathering of transactions effected or income accrued before13 July 2018.
TP documentation requirements relating to master file, local file and CbC reporting	– applies to an accounting period beginning on or after 1 January 2018 for CbC reporting; – applies to an accounting period beginning on or after 1 April 2018 for master file and local file; and – voluntary filing of CbC reporting allowed for an accounting period beginning in 2016 or 2017.
Amendments to preferential regimes, including extension of tax concession to domestic transactions and prescription of thresholds for substantial activities requirements	– applies to tax payable for a year of assessment beginning on or after 1 April 2018; and – threshold requirements will be prescribed after consulting the relevant stakeholders.

The IRD will promulgate guidance to facilitate taxpayer's understanding of the requirements under the Amendment Ordinance in due course.

INDIA

Angel tax exemption for start-ups

As part of the "Start-up India" initiative, the Department of Industrial Policy and Promotion (DIPP) issued Notification No. 364(E) on 11 April 2018 constituting a broad-based Inter-Ministerial Board (IMB) to consider applications of start-ups for claiming the following incentives:

- a 100% deduction of the profits and gains from income for "eligible start-ups" for three out of seven consecutive assessment years; and
- an exemption from the levy of income tax ("angel tax exemption") on share premium received by start-up companies, subject to prescribed conditions.

To be considered an "eligible start-up", an entity must be a private limited company or a limited liability partnership with turnover not exceeding INR250 million and incorporated on or after 1 April 2016 but before 1 April 2021. Furthermore, the entity must work towards innovation, development or improvement of products or processes or services, or, if it is a scalable business model, must have a high potential of employment generation or wealth creation. An entity can be an eligible start-up for up to a period of seven years from the date of incorporation (10 years for start-ups in the biotechnology sector).

The key conditions to avail the angel tax exemption are as follows:

- the aggregate amount of paid-up share capital and share premium of the start-up after the proposed issue of shares cannot exceed INR100 million; and
- the start-up is required to obtain a report from a merchant banker specifying the fair market value of shares being issued as per the income tax rules stipulated.

Subsequent to the aforesaid notification, the Central Board of Direct Taxes (CBDT) issued Notification No. 24/2018 dated 24 May 2018 to exempt start-ups from the levy of income tax on share premium received in excess of the face value of the shares. Such exemption will be available if the consideration has been received for issue of shares from an investor in accordance with the approval granted by the IMB. This notification aligns with the earlier notification issued by the DIPP, which had introduced conditions for start-up companies and investors seeking approval from the IMB to avail tax exemptions, and is hence, applicable retrospectively from 11 April 2018.

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

The technical updates published here are summarised from selected government gazette notifications published between 16 May 2018 and 15 August 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

Accelerated Capital Allowance (ACA) for Information and Communication Technology (ICT) equipment

In Budget 2018, it was proposed that expenditure incurred on the purchase of ICT equipment be allowed an initial allowance (IA) of 20% and an annual allowance (AA) of 20%, effective from the year of assessment (YA) 2017. To legislate this, the Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2018 [P.U.(A) 156] were gazetted on 5 July 2018. The list of qualifying equipment is specified in the Schedule to the Rules.

It is noted, however, that the proposal for expenditure incurred on consultation fees, licensing and incidental fees for the development of customised software be allowed capital allowance claims at the rate of IA: 20% and AA: 20% with effect from YA 2018, has not been legislated as yet.

Amendments to Public Ruling No. 1/2014 – Withholding Tax on Special Classes of Income

The IRBM has recently published on its website an amended Public Ruling (PR) No. 4/2014: Withholding Tax on Special Classes of Income. The PR provides guidance on the special classes of income that are chargeable to tax under Section 4A of the Income Tax Act 1967 (ITA), deduction of withholding tax (WHT) on these special classes of income and the consequences of non-compliance. The salient changes are outlined below.

Paragraph 8.5(f) – Example 12

The Example provided in the earlier PR clarified that fees received by a model from a photo-shoot are considered a special class of income and do not fall under the scope of income of a "public entertainer". This Example has now been removed from the PR.

The position on such a situation will now be guided by Example 5 of PR No. 6/2017 – Withholding Tax on Income of a Non-resident Public Entertainer, which stipulates that a super model who has participated in a fashion show, a commercial or a photo-shoot is considered a public entertainer, and as such, is subject to WHT pursuant to Section 109A of the ITA.

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Paragraph 14.1(a) – Example 24

The Example has been amended to reflect that where technical service fees are settled on 15 April 2012, the WHT deducted should be remitted to the IRBM by 15 May 2012, i.e. within one month after paying or crediting the payment to the non-resident (instead of "on or before 14 May 2012" as stipulated in the earlier PR).

Paragraph 14.1(b) – Example 25

The PR No. 1/2014 which was issued on 23 January 2014 clarified that payments must be re-grossed where the tax is borne by the payer. This was outlined in a paragraph titled "Tax Rate" that provides as follows: "In the case where withholding tax on the payments made to non-resident persons are paid and borne by the payer, that payment is considered net of tax. In such situations, the payment that is received by the non-resident has to be re-grossed to determine the amount of income on which income tax should be charged. The withholding tax should be computed on the re-grossed income." This position, however, was not adopted in Example 25 of the same PR, as the technical service fee payment in the said example was not re-grossed.

Accordingly, Example 25 has now been amended in the updated PR to reflect the IRBM's position that the payment must be re-grossed.

Paragraph 16.4 – Example 30

With effect from 1 January 2011, if a payer claims a deduction for expenses that are subject to WHT, and the WHT law has not been complied with by the time the tax return is submitted, the Director General of Inland Revenue (DGIR) is empowered to impose a penalty for incorrect return under Section 113(2) of the ITA.

Example 30, which explains the above, has been amended in the updated PR to more accurately reflect the calculation and imposition of penalty.

Paragraph 16.4 – Example 31

In the earlier Example 31 (prior to the amendment), the IRBM indicated an unusual position where the late payment interest to a non-resident was not tax-deductible on the basis that the expense was not wholly and exclusively incurred in the production of gross income. The Example also provided that no WHT was to be imposed on the late payment interest. However, as the late payment interest is a business cost to the taxpayer, the payment should qualify for a tax deduction under Section 33(1), and the basis of the IRBM's position on deductibility and WHT was unclear.

In the amended Example 31, the IRBM changed the description of late payment interest to "penalty for late payment". The Example now indicates that the payer is disallowed a tax deduction on the late payment penalty (instead of late payment interest) to a non-resident on the basis that the WHT had not been deducted and remitted to the DGIR accordingly, pursuant to section 39(1)(j) of the ITA. However, the Example also states that "No withholding tax is imposed on the 5% late payment penalty". The amended PR does not provide clarity on the IRBM's position on this matter and is somewhat contradictory.

Paragraph 19 – Clarification on due date of payment

Withholding tax is due to be paid to the IRBM within one month after paying or crediting the relevant payment to the non-resident. The PR stipulates that if the last day of the period for remitting payment falls on a weekly holiday or a public holiday in Malaysia, the due date will be extended to the next working day.

The PR has been amended to clarify that "weekly holiday" only refers to Saturday and Sunday (instead of "Saturday and Sunday in Kuala Lumpur, or Friday and Saturday in Terengganu" per the earlier PR).

Amendments to Public Ruling No. 7/2017 – Disposal of Plant or Machinery Part I – Other than Controlled Sales

PR No. 7/2017, captioned "Disposal of Plant or Machinery Part I – Other than Controlled Sales", was published by the IRBM on 12 December 2017. The PR explains the tax treatment of the disposal of plant or machinery in circumstances other than a controlled sale. Broadly, the PR discusses the determination of the disposal value of an asset in different scenarios, pursuant to Paragraph 62 of Schedule 3 of the ITA.

The PR was updated on 7 June 2018 to include a new Example 9 in Paragraph 7.4. This new example illustrates the

determination of the disposal value of a non-commercial motor vehicle, in the case where the cost of the car is less than RM150,000 and the instalment payments [i.e. total qualifying expenditure (QE)] incurred on the car had not exceeded RM100,000 when the car was disposed. The purpose of the new example is to illustrate that the disposal price in such an instance does not need to be adjusted/restricted as was done in Example 8, where the instalment payments on the car had exceeded RM100,000.

Practice Note No. 2/2018: Guidelines on the Non-application Provision in Income Tax Orders and Income Tax Rules

The IRBM has issued Practice Note No. 2/2018 (PN) dated 1 June 2018, in Bahasa Malaysia, titled "Penjelasan Berhubung Dengan Pemakaian Peruntukan Ketidakpakaian Yang Dinyatakan Dalam Perintah Cukai Pendapatan Dan Kaedah-kaedah Cukai Pendapatan Di Bawah Akta Cukai Pendapatan 1967", to provide guidance on the non-application proviso stipulated in the Income Tax Orders (ITO) and Income Tax Rules (ITR).

The PN explains the IRBM's interpretation of a situation where the non-application proviso of an ITO/ITR stipulates that such ITO/ITR would not apply to a person who has been granted an exemption under Section 127 of the ITA.

The PN clarifies that where reference is made to Section 127 of the ITA under the non-application proviso in an ITO or ITR, it would apply only to exemptions granted under Section 127(3)(b) and Section 127(3A) of the ITA, as these exemptions are granted based on specific facts and merits of each case. Exemptions granted under Section 127(1) of the ITA are not included therein, as these are general exemptions granted pursuant to Schedule 6 of the ITA.

Malaysia's participation in the Forum on Harmful Tax Practices (FHTP)

The Budget 2018 Speech delivered on 27 October 2017 highlighted the government's commitment to the implementation of the Organisation for Economic Cooperation and Development (OECD)'s Base Erosion and Profit Shifting (BEPS) initiative, as well as the exchange of information between jurisdictions. The BEPS initiative was formulated by the OECD to address perceived aggressive cross-border tax planning.

Amongst the initiatives undertaken by Malaysia is its participation as a member of the Forum on Harmful Tax Practices (FHTP). The Ministry of Finance (MoF) has recently published on its website the details regarding Malaysia's participation in the FHTP, as outlined below.

Incentives identified for FHTP evaluation

Intellectual Property (IP) incentives	Non-IP incentives
• Principal Hub	• Biotechnology Industry (BioNexus)
• Pioneer Status (High Technology)	• MSC Malaysia
• Biotechnology Industry (BioNexus)	• Principal Hub
• MSC Malaysia	• Pioneer Status (Contract R&D)
	• Treasury Management Centre
	• Economic Development Regions
	• Approved Services Project
	• Green Technology Services
	• Labuan Leasing Services
	• Foreign Fund Management
	• Inward re-insurance and Offshore insurance
	• Malaysian International Trading Company

Tax incentives are evaluated based on the following criteria:

IP incentives	Non-IP incentives
1. Nexus Approach Only R&D expenditure incurred in Malaysia is eligible for income tax exemption.	**1. Ring fencing** No distinction on tax treatment including transactions and currency restrictions between residents and non-residents
2. Transparency Incentives that comply with FHTP's requirements must be gazetted by 31 December 2018.	**2. Transparency** Incentives that comply with the FHTP's requirements must be gazetted by 31 December 2018.
	3. Substantial activities Substantial activities requirements under FHTP are as follows: i. Adequate investment amount or annual business operating expenses incurred in Malaysia; and ii. Adequate number of full-time job employment in Malaysia

Timeline for implementing tax incentives gazetted under FHTP:

IP incentives	Non-IP incentives
1. Legislation process to amend existing IP incentives To be gazetted latest by 31 December 2018	**1. Legislation process to amend existing non-IP incentives** To be gazetted latest by 31 December 2018
2. Cut-off date for new entrants to an existing IP incentive Effective 1 July 2018, IP incentives are subject to the Nexus Approach criteria. No new approval will be granted for existing IP incentives that do not comply with the Nexus Approach criteria.	**2. Grandfathering will be allowed to existing companies which currently enjoy non-IP incentives** **i. Incentives approved on or before 16 October 2017** Grandfathering period is up to 30 June 2021; or **ii. Incentive approved after 16 October 2017** Grandfathering period is up to the date of gazette or 31 December 2018, whichever earlier.
3. Cut-off date to enjoy benefits from the existing IP incentives approved on or before 30 June 2018 that do not comply with FHTP criteria (grandfathering) Grandfathering will be allowed until 30 June 2021, to existing companies which currently enjoy the existing IP incentives.	

Changes to MSC Malaysia Bill of Guarantee No. 5 – Financial incentives, to comply with BEPS Action 5

The government is committed to the OECD's BEPS initiatives. In this regard, the financial incentives under the MSC Malaysia Bill of Guarantee No. 5 (BOG 5) are being reviewed and will be amended to adhere to the minimum standards under BEPS Action 5. Further information on the new criteria/conditions will be released in due course.

In the meantime, in order to adhere to the timelines under the aforesaid international standards and to ease the transition into the new regime, the following has been announced:

1. No new approvals will be granted for applications for MSC Malaysia status starting from 1 July 2018, including applications for extension of income tax exemption period or applications to add new MSC Malaysia Qualifying Activities.
2. Existing MSC Malaysia status companies with tax incentives will be given the option:
   a. To grandfather, i.e. to continue to enjoy, the income tax exemption granted for IP income and/or non-IP income under their existing MSC Malaysia Status Conditions of Grant until 30 June 2021; or
   b. Subject to the new legislation and guidelines coming into force, to move into the new regime and to be subjected to the new criteria / conditions However, for MSC Malaysia status companies which have been granted approval on or after 17 October 2017 for non-IP income, if these companies would like to opt for grandfathering, the grandfathering period will end on 31 December 2018.
3. New approvals and extensions

of the income tax exemption period for current MSC-status companies will only be considered once the new legislation and guidelines come into force, which is targeted to be by 31 December 2018.

Extension of Common Reporting Standard (CRS) submission deadline

Following the enactment of the relevant rules for the Automatic Exchange of Information by the Malaysian government under the Common Reporting Standard (CRS), Malaysian Financial Institutions (MYFIs) are required to collect and report to the IRBM the financial account information of non-residents. The IRBM will exchange this information with the participating foreign tax authorities of those non-residents from 2018. The IRBM has recently announced on its website that the due date of the first CRS report filing, which was originally due by 31 July 2018, has been extended to 15 August 2018.

REAL PROPERTY GAINS TAX

Updated Real Property Gains Tax (RPGT) Guidelines

The IRBM has recently published on its website the RPGT Guidelines dated 13 June 2018 (2018 Guidelines) in Bahasa Malaysia, titled "Garis Panduan Cukai Keuntungan Harta Tanah". This new 61-page 2018 Guidelines document replaces the earlier Guidelines dated 18 June 2013.

The 2018 Guidelines introduce several new Sections that explain and restate various key provisions from the RPGT Act. The 2018 Guidelines also incorporate the changes introduced to the RPGT Act since the previous 2013 Guidelines.

For example, Section 10 of the 2018 Guidelines provides guidance

on the changes to Paragraph 2 of Schedule 4 of the RPGT Act, which were proposed during Budget 2016 and which took effect from 31 December 2015. Another example of an update is in Section 24.1 of the Guidelines, which has now incorporated the following changes on the withholding obligations of the acquirer of the chargeable assets:

- Pursuant to the Finance (No. 2) Act 2014, with effect from 1 January 2015, Section 21B(1) of the RPGT Act was amended to provide that an acquirer is required to withhold either the whole amount of money received or 3% (previously 2%) of the total value of the consideration, whichever is lower. The sum withheld must be remitted to the IRBM within 60 days from the date thereof.
- Pursuant to Finance (No. 2) Act 2017, a new Section 21B(1A) was introduced, which stipulates that where a disposer is not a Malaysian citizen or a permanent resident, the acquirer shall retain the whole amount of money received or 7% (previously 3%) of the total value of the consideration, whichever is lower. The amount withheld is to be remitted to the IRBM within 60 days from the date of disposal. This is effective from 1 January 2018.

Notwithstanding the above, Section 5 of the 2018 Guidelines, which provides guidance on the dates of disposal and acquisition, does not elaborate on conditional contracts or explain the change in law with effect from 1 January 2018. Further to this change, approval required from an "authority or committee appointed by the government" would no longer impact the RPGT disposal date (unlike, for example, State government approvals).

The procedure to obtain a RPGT refund has also been updated. Where the refund is to be remitted to the acquirer, an "agreement letter" as provided in the Appendix to the Guidelines will need to be completed and submitted accordingly.

STAMP DUTY

New stamping application process through Digital Franking System 2.0

The IRBM has recently implemented a new process of stamping applications through the Digital Franking System (DFS) 2.0, which will replace DFS 1.0 which has been in place since 2011.

The application for stamping under DFS 2.0 can be done via three methods, as outlined below:

i. Computer applications (Windows)
ii. Mobile applications (Mobile apps)
iii. Self-service counter at the IRBM offices

The guidelines for each method are available in the link below:

http://lampiran1.hasil.gov.mypdf/pdfam/IRBMMedia_28062018_NEWSTAMPINGAPPLICATION-PROCE SSDIGITALFRANKINGS YSTEMS.pdf

With the new system, the PDS 1 Form (i.e. the form which is to be completed when filing for stamp duty in Malaysia) no longer needs to be completed manually, as the form is now made available online. The PDS 1 Form which has been completed online will be processed, and a digital output of the Quick Response Code (QR Code) will be generated by the system. The QR Code can then be printed and handed together with the instrument to the duty officer at the counter to be reviewed and to determine the amount of stamp duty payable.

This new process was implemented on 29 June 2018 at the IRBM stamp duty counter located at the Cyberjaya Satellite Office, and is expected to be extended to all the IRBM stamp offices nationwide by 30 August 2018.

CUSTOMS DUTIES

Customs (Prohibition of Removal) (Amendment) Order 2018

The Customs (Prohibition of Removal) (Amendment) Order 2018 [P.U. (A) 146], gazetted on 29 June 2018 and that came into operation on 2 July 2018, provides for amendments in the First Schedule under the Customs (Prohibition of Removal) Order 2014 [P.U. (A) 20/2014].

Customs Duties (Exemption) (Amendment) (No.2) Order 2018

The Customs Duties (Exemption) (Amendment) (No.2) Order 2018 [P.U. (A) 166], gazetted on 17 July 2018 and that came into operation on 18 July 2018, provides for amendments in Part I of the Schedule in relation to item 67 under the Customs Duties (Exemption) Order 2017 [P.U. (A) 445/2017].

Customs (Anti-Dumping Duties) (Expedited Review) (No.2) Order 2018

The Customs (Anti-Dumping Duties) (Expedited Review) (No.2) Order 2018 [P.U. (A) 169] was gazetted on 25 July 2018 and came into operation on 26 July 2018. Anti-dumping duties shall be imposed on the import of electrolytic tinplate (HS Code 7210.12.90 00) from the People's Republic of China into Malaysia. The rate of duty to be imposed is 7.38% as specified in the Schedule. The Order is effective for the period 26 July 2018 to 15 November 2018.

GOODS AND SERVICES TAX

Goods and Services Tax (Rate of Tax) (Amendment) Order 2018

The Goods and Services Tax (Rate of Tax) (Amendment) Order 2018 [P.U. (A) 118] was gazetted on 16 May 2018 and came into operation on 1 June 2018. The Order provides for an amendment by substituting the words "six per cent" with the words "zero per cent" in Paragraph 2 of the Goods and Services Tax (Rate of Tax) Order 2014 [P.U. (A) 184/2014].

Goods and Services Tax (Zero-Rated Supply) (Revocation) Order 2018

The Goods and Services Tax (Zero-Rated Supply) (Revocation) Order 2018 [P.U. (A) 119] was gazetted on 16 May 2018 and came into operation on 1 June 2018. The Order provides for the revocation of the Goods and Services Tax (Zero-Rated Supply) Order 2014 [P.U. (A) 272/2014].

Goods and Services Tax (Relief) (Revocation) Order 2018

The Goods and Services Tax (Relief) (Revocation) Order 2018 [P.U. (A) 120] was gazetted on 16 May 2018 and came into operation on 1 June 2018. The Order provides for the revocation of the Goods and Services Tax (Relief) Order 2014 [P.U. (A) 273/2014].

Goods and Services Tax (Imposition of Tax for Supplies in respect of Free Zones) (Revocation) Order 2018

The Goods and Services Tax (Imposition of Tax for Supplies in respect of Free Zones) (Revocation) Order 2018 [P.U. (A) 121] was gazetted on 16 May 2018 and came into operation on 1 June 2018. The Order provides for the revocation of the Goods and Services Tax (Imposition of Tax for Supplies in respect of Free Zones) Order 2016 [P.U. (A) 373/2016].

Goods and Services Tax (Application to Government) (Revocation) Order 2018

The Goods and Services Tax (Application to Government) (Revocation) Order 2018 [P.U. (A) 122] was gazetted on 16 May 2018 and came into operation on 1 June 2018. This Order provides for the revocation of the Goods and Services Tax (Application to Government) Order 2014 [P.U. (A) 185/2014].

Goods and Services Tax (Imposition of Tax for Supplies in respect of Designated Areas) (Revocation) Order 2018

The Goods and Services Tax (Imposition of Tax for Supplies in respect of Designated Areas) (Revocation) Order 2018 [P.U. (A) 123] was gazetted on 16 May 2018 and came into operation on 1 June 2018. The Order provides for the revocation of the Goods and Services Tax (Imposition of Tax for Supplies in respect of Designated Areas) Order 2014 [P.U. (A) 187/2014].

SALES TAX AND SERVICE TAX

With the planned introduction of the new Sales Tax and Service Tax ("SST") on 1 September 2018, the following Bills have been passed in the Dewan Rakyat in the second week of August 2018:

- **Sales Tax Bill 2018**
  The Sales Tax Bill 2018 provides for the charging, levying and collecting of Sales Tax, and for matters connected therewith.
- **Service Tax Bill 2018**
  The Service Tax Bill 2018 provides for the charging, levying and collecting of Service Tax, and for matters connected therewith.
- **Goods and Services Tax (Repeal) Bill 2018**
  The Goods and Services Tax (Repeal) Bill 2018 seeks to repeal the Goods and Services Tax Act 2014. This is due to the implementation of the new tax system, namely the Sales Tax and Service Tax, as proposed under the Sales Tax Bill 2018 and Service Tax Bill 2018 which will replace the Goods and Services Tax imposed under the Goods and Services Tax Act 2014.
- **Customs (Amendment) Bill 2018**
  The Bill seeks to amend the Customs Act 1967 in relation to the implementation of the new Sales Tax and Service Tax. The main amendments under the Bill relate to certain requirements for persons who intend to be customs agents, and the membership of the Customs Appeal Tribunal and its proceedings.
- **Free Zones (Amendment) Bill 2018**
  The Bill seeks to amend the Free Zones Act 1990 in respect of the reference to the Sales Tax Act 1972 and the Service Tax Act 1975. With the proposed Sales Tax Bill 2018 and Service Tax Bill 2018, the enforcement powers relating to Sales Tax and Service Tax in the Free Zones have been provided for under those proposed Bills, respectively. To avoid the overlap of enforcement powers in the Free Zones, the references to the "Sales Tax Act 1972" and the "Service Tax Act 1975" in the Free Zones Act 1990 are deleted.

The abovementioned Bills have been tabled in the Dewan Negara.

*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

IDAMAN PELITA SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (FEDERAL COURT, 2018)

BRIEF FACTS

The taxpayer is a property developer and is in the midst of appealing against the notice of assessment raised by the DGIR. The taxpayer's appeal went before the High Court and the taxpayer applied under paragraph 40, Schedule 5 of the Income Tax Act 1967 ("**ITA**") for the Special Commissioners of Income Tax ("**SCIT**") to find further facts and state a supplementary case. The appeal was made on the basis that the case stated prepared by the SCIT did not incorporate the taxpayer's comments and the undisputed evidence. Although the High Court did not grant the taxpayer's application, the High Court nevertheless ordered the production of Notes of Evidence ("**NOE**") from the SCIT for the hearing of the taxpayer's appeal. Instead of relying on paragraph 40, Schedule 5 of the ITA above, the High Court exercised its discretionary power as contained in paragraph 39(c), Schedule 5 of the ITA which allows the High Court to hear and determine any question of law arising on a case stated under paragraph 34 and may in accordance with its determination thereof make such order as it thinks just and appropriate.

The circumstances where the court's intervention in respect of the SCIT's fact-finding function is justified were held as follows:

1) When the SCIT have made a finding of fact which is perverse or which is not supported by evidence;
2) When the SCIT took into account of irrelevant factors; and
3) When the SCIT draw an inference or reach a conclusion which is not supported or which is contrary to evidence.

The High Court held that because the SCIT had omitted certain evidence including the Undisputed Evidence in the case stated, there was a possibility that all three of the above justifications were satisfied. The High Court emphasised that the case before it was *sui generis* (exceptional) simply because of the existence of the undisputed evidence at the SCIT. Dissatisfied with the High Court's order to produce the NOE, the IRBM appealed to the Court of Appeal ("**COA**").

TAXPAYER'S ARGUMENTS ON APPEAL

On appeal to the COA, the taxpayer raised a preliminary objection on the basis that the High Court's order to produce the NOE is not appealable for the following reasons:

1) Firstly, the taxpayer submitted that the order to produce the NOE does not amount to a decision of the High Court on a question of law in its appellate civil jurisdiction within the meaning of paragraph 41, Schedule 5 of the ITA upon which the learned High Court's jurisdiction to make the order is premised
2) Further or in the alternative, the taxpayer submitted that the order to produce the NOE does not amount to either:
   a) A "judgment" or "order" within the meaning of Section 67(1) of the Courts of Judicature Act 1964 ("**CJA**"). It is an interlocutory ruling made in the course of a trial or hearing that have been specifically excluded by Section 3 of the CJA; or
   b) A decision within the meaning of paragraph 41, Schedule 5 of the ITA which governs rights of appeals under the ITA.

DECISION

The COA agreed with the preliminary order raised by the taxpayer and dismissed the IRBM's appeal on the basis that the High Court's order does not amount to a 'decision' or a 'question of law' that is appealable under paragraph 41, Schedule 5 of the ITA.

The IRBM's subsequent motion for leave to appeal to the Federal Court was dismissed on the basis that the conditions of appeal under Section 96 of the CJA were not satisfied.

Counsel for taxpayer:
DATUK D.P. NABAN, S. SARAVANA KUMAR & JASON TAN

Counsel for the IRBM:
ENCIK ABU TARIQ JAMALAUDDIN & ENCIK WAN HAMDANIE WAN MOHAMED

CASE 2

GLOCOMP SYSTEMS (M) SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (HIGH COURT, 2017)

BRIEF FACTS

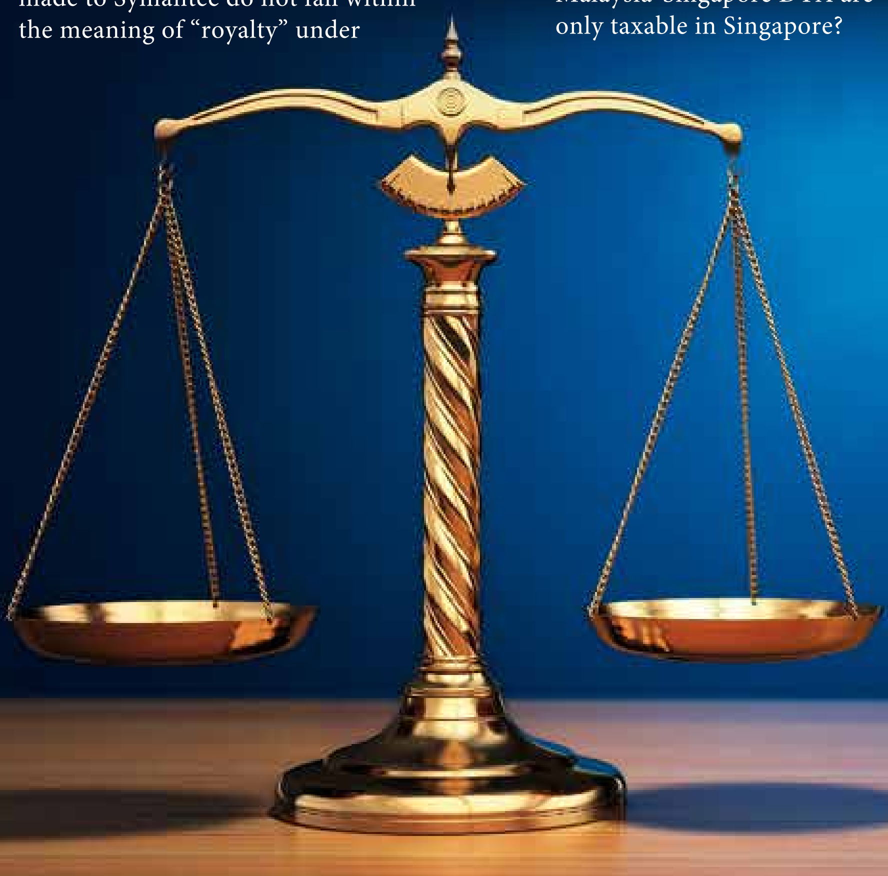
Glocomp Systems (M) Sdn Bhd ("**Glocomp**") is in the business of distributing ICT infrastructure where amongst others, Glocomp purchases, distributes, and markets various computer software and hardware products manufactured by Symantec (a company incorporated in Singapore).

Glocomp has been purchasing, distributing, and marketing Symantec products in Malaysia since 1 April 2010 and the payments made to Symantec were never subjected to any withholding tax in Malaysia. On 28 May 2015, the IRBM issued its audit finding letter to Glocomp where amongst others, the IRBM informed Glocomp that the payments made to Symantec in the year of assessment ("**YA**") 2010 should have been subjected to withholding tax.

On 26 June 2015, Glocomp responded to the IRBM and amongst others, explained that the payments made to Symantec do not fall within the meaning of "royalty" under Section 2 of the Income Tax Act 1967 ("**ITA**"). Despite numerous attempts to explain our position, the IRBM was still adamant on their stand and proceeded to raise a notice of additional assessment dated 3 December 2015 ("**the Decision**") for the YA 2010 against Glocomp. On 11 December 2015, Glocomp then filed a judicial review application to the High Court against the Decision.

ISSUES

a. The main issue is the treatment of the payments made by Glocomp to Symantec:
   i. Whether the payments are royalty under Article 12 of Malaysia-Singapore Double Taxation Agreement (which is gazetted vide P.U.(A) 200/2005) ("Malaysia-Singapore DTA")?
   ii. In any event, whether the payments are the business profit of Symantec and thus, pursuant to Article 7 of the Malaysia-Singapore DTA are only taxable in Singapore?



MERITS OF THE APPLICATION

*Double Taxation Agreement ("**DTA**") prevails over the Income Tax Act 1967*

a. The law is settled that in the event that there is a conflict between the DTA and the ITA, the provisions of the DTA shall prevail over the ITA. Hence, if there is a conflict over the definition of royalty between the DTA and the ITA, the definition of the DTA must apply.
b. This principle of law is trite and is codified in **Section 132(1) of the ITA**. Further, it has been reiterated by our Malaysian Courts in numerous cases:
   i. ***Damco Logistics Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*** (2011) MSTC 30-033;
   ii. ***Director General of Inland Revenue v Euromedical Industries Ltd [1983] CLJ (Rep) 128;*** and
   iii. ***Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources*** (2016) MSTC 30-124.

DEFINITION OF 'ROYALTY' UNDER THE DTA

c. Article 12(3) of the Malaysia-Singapore DTA provides for the definition of 'royalty'. Since the Malaysia-Singapore DTA is modelled after the Organisation for Economic Co-operation and Development ("**OECD**") Model Convention, the OECD Commentary determines the construction of Article 12 of the DTA.
d. Paragraph 11 of the OECD Commentary on Article 12 explains that royalties alludes to the concept of "**know-how**". In such an arrangement, one party agrees to impart to another party his special knowledge and experience which remains unrevealed to the public and differs from contracts for the provision of services. In the latter, one party undertakes to use his

own customary skills to execute a specific work by himself for the other party.

e. Examples given of payments which should **not** be considered to include "know-how" include payments for after sale service, services rendered under guarantee, technical assistance, professional opinion by engineers, advocates, or accountants, payments for advice provided electronically, for accessing computer networks and others.

f. Paragraph 14 of the OECD Commentary went on further to clarify that if rights acquired in relation to a copyright are limited to those necessary to enable the user to operate the programme by acquiring a programme copy to enable the effective operation of the programme by the user, payments in such transactions would be dealt with as **commercial income and not royalty**.

DECISION

The issue at hand is the treatment of payments made to Symantec by Glocomp. The IRBM took the position that the payments are royalty, whereas we took the position that the payments are business profits and pursuant to Article 7 of the DTA and are only taxable in Singapore.

After a careful perusal of the legal authorities and the circumstances at hand, the High Court found that the IRBM is merely relying on the Addendum of an Authorized Distributor Agreement to claim that the payments to Symantec are royalty. However, through a letter dated 30 November 2015, Symantec confirmed that it did not transfer any copyright to Glocomp in any manner and the sale of products in Malaysia is treated as sale of Symantec's products. Symantec also confirmed that it has no permanent establishment in Malaysia, and that payment is treated as business profits in Singapore.

In following the established legal principles decided in the cases of ***Damco*** (supra) and ***Thomson Reuters*** (supra), the High Court ruled that in determining whether the payments to Symantec are royalty, one has to resort to the definition of the DTA and not the ITA. By virtue of Article 12 of the DTA supplemented by the OECD Commentary, the payments to Symantec cannot be "royalty" and therefore not subject to withholding tax.

Counsel for taxpayer:
DATUK D.P. NABAN & S. SARAVANA KUMAR

Counsel for the IRBM:
ENCIK ABDUL AZIZ & PUAN FARAH AFIQAH NORDIN

CASE 3

RAPID GROWTH TECHNOLOGY SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (COURT OF APPEAL, 2018)

BRIEF FACTS

The taxpayer has claimed reinvestment allowance ("**RA**") for capital expenditure incurred in the construction of a new factory. In compliance with the Inland Revenue Board Malaysia's (**IRBM's**) Public Ruling No. 2/2008 and in order to avoid being penalised, the taxpayer had only claimed RA on expenditure relating to the factory's production areas only.

Subsequently, the taxpayer learnt that the IRBM's stance as stated in its Public Ruling was erroneous as held by the Malaysian courts in ***Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformers Manufacturer Sdn Bhd (2012) MSTC 30-039*** and ***Firgos (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (MSTC) 30-065***. Accordingly, the taxpayer made an application under Section 131 of the Income Tax Act 1967 ("**ITA**") in order to claim RA for the capital expenditure outside of the factory's production areas that it had not claimed previously.

The taxpayer's claim was dismissed by the Director General of Inland Revenue ("**DGIR**") and an appeal was filed to the Special Commissioners of Income Tax ("**SCIT**"). The taxpayer's appeal was allowed by the SCIT, but the decision was reversed by the High Court. In particular, Section 131(4) of the ITA states that:

> "No relief shall be given under this section in respect of an error or mistake as to the basis on which the chargeability of the applicant ought to have been computed if the return or statement containing the error or mistake was in fact made on the basis of, or in accordance with, the practice of the Director General generally prevailing at the time when the return or statement was made."

It was held that the Public Ruling represented the practice of the DGIR generally prevailing at the time the RA claims were made, and accordingly the taxpayer is now precluded from being afforded relief. Dissatisfied with the High Court's decision, the taxpayer appealed to the Court of Appeal.

TAXPAYER'S ARGUMENTS ON APPEAL

The three issues in this case were:

(i) Public rulings are only the DGIR's interpretation of law which serve as a guideline to the public. If Parliament had intended for the practice of the Director General prevailing at the time to include public rulings, this would have been stipulated explicitly in the ITA and also in the public ruling itself.

(ii) The distinction between Public Rulings and practice of the DGIR generally prevailing is made clear in Section 99(4) itself where it is stated that:

> "This section shall not apply to an assessment made under subsection 90(1) or section 91A, except where a person in respect of such assessment is aggrieved by the public ruling made under section 138A or any practice of the Director General generally prevailing at the time when the assessment is made."

(iii) The DGIR itself has also distinguished public rulings from practice of the DGIR generally prevailing vide its own Public Ruling No. 7/2015 where paragraph 4.8.2(b) states that:

> "If a person who has submitted ITRF for a year of assessment is not liable to tax or is liable to tax on other income such as interest but has no statutory income from a business source and intends to appeal against a tax treatment mentioned in any PR or any known stand, rules and practices made by the DGIR, the person has to apply to the IRBM in writing for a NONC."

DECISION

The taxpayer's appeal was unanimously allowed by the Court of Appeal and the High Court's judgement was reversed upon full argument by both parties during the hearing. This landmark decision by the Court of Appeal (the highest court in tax appeals originating from the SCIT) is helpful in providing timely clarification on the extent and scope to which taxpayers may be afforded relief under Section 131, as well as the general principle that Public Rulings are merely the DGIR's own interpretations of the law that are not binding on the public.

Counsel for taxpayer:
DATUK D.P. NABAN & S. SARAVANA KUMAR

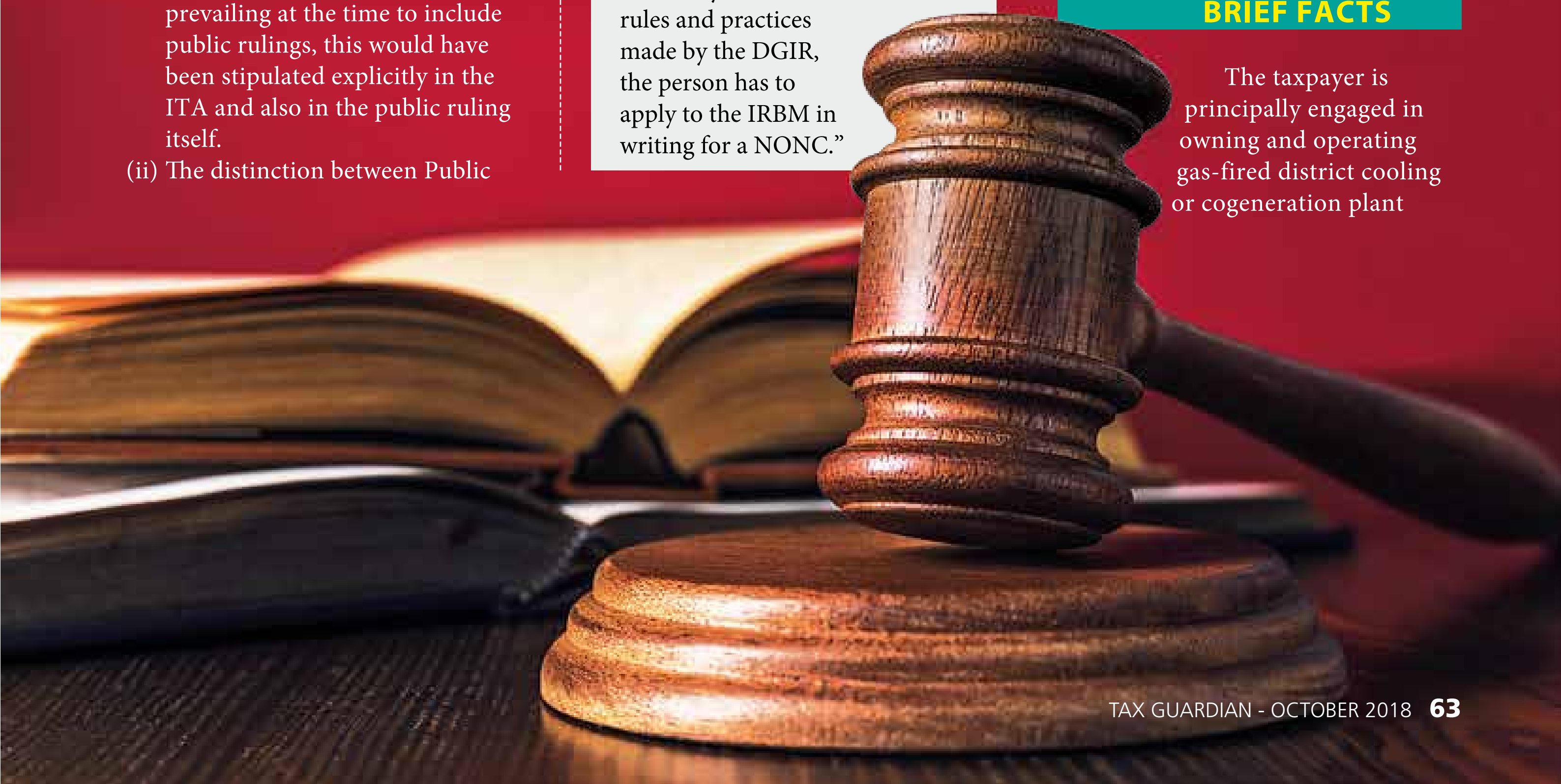
Counsel for the IRBM:
PUAN DUNA MOHD ISA

CASE 4

GDC V KETUA PENGARAH HASIL DALAM NEGERI (SPECIAL COMMISSIONERS OF INCOME TAX, 2017)

BRIEF FACTS

The taxpayer is principally engaged in owning and operating gas-fired district cooling or cogeneration plant



("**Plant**") for generation and sale of chilled water and electricity. The taxpayer and the government entered into a Sale and Purchase Agreement to construct and operate the Plant and to supply chilled water to designated facilities at a Malaysian airport.

Pursuant to the agreement, the taxpayer incurred the following expenses:

(a) Concession Fee;
(b) Service Fee;
(c) License Fee; and
(d) Activity Fee.

However, only Activity Fee is disputed in this case. Under the Agreement, the taxpayer shall pay a monthly payment of Activity Fee calculated at certain percentage of the gross turnover of all sales of chilled water to the Private Sector Facilities. However, the Agreement did not state the purpose of the Activity Fee. The IRBM argued that the expenses incurred on Activity Fees are capital in nature and not expenses incurred in the production of income and the Activity Fee incurred is to acquire right to supply chilled water. The IRBM based its argument on fact that the taxpayer's financial statement stated that the Activity Fee is related to the payment made for the privilege given to the taxpayer to operate and sell the chilled water.

ISSUE

Whether the taxpayer is entitled to claim deduction for the Activity Fees incurred by the taxpayer under Section 33(1) of the Income Tax Act 1967 ("**ITA**")?

THE TAXPAYER'S ARGUMENT

The Activity Fee is closely connected to the taxpayer's business and is incurred wholly and exclusively incurred in the production of gross income. Thus, it should be deductible under Section 33(1) of the ITA. This is evident from the following:

(a) In examining whether the Activity Fee is deductible, one must look at the taxpayer's business as a whole set of operations directed towards producing income;
(b) The taxpayer is in the business of generating and selling chilled water and electricity to the facilities at the Malaysian Airport;
(c) Activity Fee is an expenditure;
(d) The taxpayer incurred the Activity Fee;
(e) The taxpayer is contractually obligated to pay the Activity Fee in the performance of its business operation. It is not acquiring a right;
(f) Without the payment of the Activity Fee, the taxpayer would not be able to perform its business of supplying chilled water and will not be able to generate income for its business.

DECISION

The Special Commissioners of Income Tax allowed the taxpayer's appeal. The Activity Fee is calculated at a certain percentage of the gross turnover of all sales of chilled water to the Private Sector Facilities. It is based on sales of the chilled water. If there is no sale then there is no Activity Fee payable. Although the purpose of the activity fee was not explicitly stated in the Sale and Purchase Agreement, one have to look at all the documents as a whole in order to determine the nature of a payment. It is unfair for the Respondent to rely on one small print in one year of tax computation to conclude that the deduction of the Activity Fee should be disallowed.

Thus, the Activity Fee was incurred wholly and exclusively in the production of income as the basis of calculating the Activity Fee was based on the sales revenue of the Taxpayer's business. The expenses on Activity Fee were recurring in nature.

Counsel for taxpayer:
DATUK D.P. NABAN & S. SARAVANA KUMAR

Counsel for the IRBM:
CIK ASHRINA RAMZAN ALI & PUAN KWAN HUEY SHIN

The above tax cases were provided by the following writers from Lee Hishammuddin Allen & Gledhill; ***Steward Lee Wai Foong, Nur Amira bt Ahmad Azhar (Pupil in Chambers), Chris Toh Pei Roo & Keith Lim Boon Long***

BUSINESS DEDUCTIONS:
PROHIBITED EXPENSES (PART III)

WE CONTINUE OUR DISCUSSION ON SECTION 39(1) AND THIS ARTICLE WILL LOOK AT SUBSECTIONS (D) TO (F), (I) & (J) AND (Q).

Siva Subramanian Nair

In (d) *any amount in respect of any payment to any pension, provident, savings, widows, widowers and orphans or other similar fund or society which is not an approved scheme* is denied a deduction in ascertaining the adjusted income of a business.

Candidates will remember our discussion on contributions to approved funds in *Tax Guardian Vol.4/ No.2/2011/Q2* where the employer could enjoy a deduction

up to 19% of total remuneration paid, under Section 34(2) of Income Tax Act 1967 . This subsection under Section 39(1) is the negative complement of Section 34(2) i.e. contributions to unapproved funds are prohibited from ranking for a deduction.

This arises because many companies seek to establish additional pension or retirement schemes so that their employees will have more funds saved up for retirement in addition to their statutory contributions to EPF. Upon establishment, they can apply to the Director-General of Inland Revenue (DGIR) for approval under Section 150 of the Income Tax Act 1967 which states that

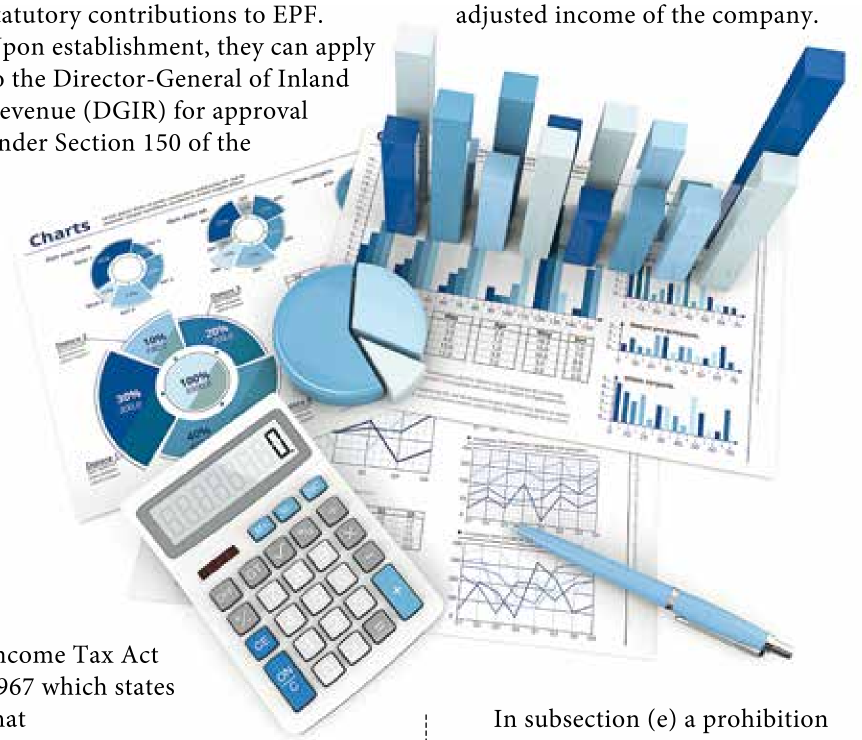
"The Director General may, subject to such conditions as he may think fit to impose, approve any pension or provident fund, scheme or society for the purposes of this Act."

However, in order to be approved the DGIR may impose conditions with regard to where the funds can be invested and this may not be agreeable to the employers who may want to invest elsewhere with a view of maximising returns for their employees. Therefore, they may decide not to seek approval for these funds thus making them unapproved funds.

In June 2013 Taxation II paper in Q1 in note 13 (v) it was stated that the item "Remuneration" in the income statement included "Contribution to Marvel Link Provident Fund (unapproved) [of RM] 14,600.

SOLUTION

Therefore since the contribution is to an unapproved fund candidates are expected to add the whole amount back in arriving at the adjusted income of the company.



In subsection (e) a prohibition for deduction is accorded to any expenditure incurred in relation to a business which is:

(i) qualifying mining expenditure for the purposes of Schedule 2;
(ii) qualifying expenditure, qualifying agriculture expenditure or qualifying forest expenditure for the purposes of Schedule 3; or
(iii) qualifying prospecting expenditure for the purposes of Schedule 4.

and which but for this paragraph would be deductible in ascertaining the adjusted income from the business.

Basically this is to avoid a business from receiving a "double deduction" for such expenditure. For qualifying mining expenditure, candidates will remember that a claim for deduction can be in respect of mining allowances under Section 34(6)(c) *[refer Tax Guardian Vol.4/ No.3/2011/Q3]*. For (ii) above, a claim for capital allowances / industrial building allowances / agricultural allowances / forest allowances can be claimed [subject to conditions] in arriving at the statutory income of the business. In the case of qualifying prospecting expenditure, it can be deducted in ascertaining the total income of the company.

However, an interesting point to note is that since qualifying agricultural expenditure does not qualify as a deduction in arriving at the adjusted income of the entity, it can be considered as an enhancement cost in computing the disposal price for RPGT purposes.

Sub-sections (f), (i), (j) and (q) in respect of payment of interest / royalties, of contract payments, of special classes of income & other income under Section 4(f) and to public entertainers respectively are in essence similar.

Essentially it is stating that a deduction is not available for the gross payment in respect of the above expenditure until and unless the associated withholding tax is settled. In addition if the settlement is late i.e. not within one month from the date of payment or crediting of the amount, then, until and unless BOTH withholding tax and related penalties (i.e. 10% of the gross payment) are settled.

Further if the payer makes a deduction for expenses related to such payment in the return form furnished or it is claimed in the

information given to the DGIR in arriving at the adjusted income of the payer in spite of the fact that he has not paid the withholding tax and related penalties, then, penalties under Section 113(2) will be imposed. This can amount to 100% i.e. the amount of tax undercharged due to the allowance of the payment as a deductible expense but the DGIR has a discretion to impose a lower penalty.

THE PUBLIC RULING NO. 1/2014 ON WITHHOLDING TAX ON SPECIAL CLASSES OF INCOME WHICH WAS AMENDED ON 27 JUNE 2018 EXPLAINS THIS AS FOLLOWS:

Under the self-assessment system if a payer claims a deduction in the return form for expenses that are subject to withholding tax (where the return form has been filed within the due date for submission for the relevant year of assessment) whereas the withholding tax has not been paid or remitted, the DGIR is empowered to impose a penalty under subsection 113(2) of the ITA 1967 for incorrect returns.

Similarly, if a payer makes a claim for expenses that are subject to withholding tax (return form has been filed after the due date for submission for the relevant year of assessment) whereas the withholding tax has not been paid or remitted, the DGIR is empowered to impose a penalty under subsection 113(2) of the ITA 1967 for incorrect information.

A good example is provided in the Public Ruling which is updated and reproduced below.

Powerplant Pte Ltd, a company resident in India, rendered technical service to Tokoh Sdn Bhd (accounting period ends on 31 December annually) worth RM50,000, whereby Powerplant Pte Ltd had performed the services in Malaysia in January 2018. Tokoh Sdn Bhd made the payment of RM50,000 to Powerplant Pte Ltd on 30 August 2018 but did not comply with the withholding tax provisions pertaining to the above-mentioned services. The return form for year of assessment 2018 is submitted to the IRBM on 1 July 2019 with a chargeable income of RM1,200,000 and the tax payable is RM300,000. Tokoh Sdn Bhd claimed a deduction for the technical fee.

During a tax audit in October 2019, the findings showed that Tokoh Sdn Bhd claimed a deduction in the return form filed although no withholding tax was deducted and remitted to the DGIR. The IRBM informed Tokoh Sdn Bhd to remit the withholding tax of RM5,000 (10% of RM50,000) but Tokoh Sdn Bhd failed to do so.

The total technical fee expenses of RM50,000 will be disallowed as a deduction for tax purposes for the relevant year of assessment pursuant to paragraph 39(1)(j) of the ITA 1967. An additional assessment is issued on 30 October 2019 and a penalty under subsection 113(2) of the ITA 1967 is imposed for incorrect returns.

Year Of Assessment 2018	
Deemed Assessment Tax payable (RM1,200,000 x 24%)	RM 288,000
Additional Assessment (after audit by IRBM)	
Chargeable income	1,200,000
Add:	
Technical fee	50,000
Adjusted chargeable income	1,250,000
Tax charged (RM1,250,000 X 24%)	300,000
Less:	
Original tax payable	288,000
Tax underdeclared	12,000
Penalty under subsection 113(2) of the ITA 1967 (100%)	12,000
Additional tax payable	24,000

However once the withholding tax and penalty is paid, a deduction is available for the RM50,000 technical fees BUT the penalty under subsection 113(2) will be maintained, as an incorrect return was filed on 1 July 2019.

Candidates should also note that Section 39(3) states that in Section 39(1), paragraphs (f), (i) and (j) [i.e. excluding paragraph (q) for public entertainers] shall not apply if for a year of assessment a person is exempt under paragraph 127(3)(b) or subsection 127(3A) or the Promotion of Investments Act 1986, in respect of all income of that person from all sources not being exemption on income equal to capital expenditure incurred BUT is still applicable to the payers who enjoy tax exemption on income equal to capital expenditure incurred or payers who have no chargeable income (i.e. incurs losses).

This is a logical stand since if a company is enjoying a full exemption then by disallowing an expense the IRBM is increasing their adjusted income and in consequence all other levels of income. This translates into a higher amount being credited to the exempt account of the company and literally accords it a tax advantage in spite of committing an offence (i.e. not settling the withholding tax and penalties if applicable).

Again the Public Ruling 1/2004 provides a good comparative example which has been updated and appended below. The example also illustrates how the application of the prohibition of deduction will give the company an increased exempt account (which is shown in italics)

Co. A made an application for a tax exemption on income under subsection 127(3A) of the ITA 1967 to the Minister of Finance. A tax exemption on the statutory income of the company was approved by the Minister of Finance under subsection 127(3A) of the ITA 1967 in 2018 for a period of five years with effect from year of assessment 2018. Co. A paid technical service fees

amounting to RM50,000 to Co. B in Indonesia on 30 June 2018 without deducting and remitting any withholding tax payment. Co. A claimed deductions for the technical service fees in the profit and loss account for the year ended 31 December 2018.

Therefore by not allowing the company a deduction we would actually be doing them a favour by enhancing their exempt account.

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

Computation Of Exempt Income Year of Assessment 2018	Current law	If Section 39(1) was effected (for comparison purposes only)
Adjusted income (after audit) Add:	RM 500,000	RM 500,000
Technical service fees Adjusted income Less:	Nil 500,000	50,000 550,000
Capital allowance	100,000	100,000
Statutory income	400,000	450,000
Amount credited to the Exempt Account	400,000	450,000

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

FURTHER READING

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Kasipillai, J. A Guide to Malaysian Taxation, McGraw Hill.
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CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: OCTOBER – DECEMBER 2018

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
OCT 2018								
Workshop: Managing Tax Investigation & Tax Audits	1 Oct	9a.m. - 5p.m.	Kota Kinabalu	Yong Mei Sim	350	450	500	8 WS/053
Workshop: Managing Tax Investigation & Tax Audits	2 Oct	9a.m. - 5p.m.	Kuching	Yong Mei Sim	350	450	500	8 WS/054
Seminar: Topical Tax Issues Facing SMEs	2 Oct	9a.m. - 5p.m.	Kuala Lumpur	Various	450 *subsidised fee RM315	550	650	8 SE/014
Seminar: Topical Tax Issues Facing SMEs	4 Oct	9am-1pm	Melaka	Various	450 *subsidised fee RM315	550	650	8 SE/015
Seminar: Topical Tax Issues Facing SMEs	8 Oct	9a.m. - 5p.m	Ipoh	Various	450 *subsidised fee RM315	550	650	8 SE/016
Seminar: Topical Tax Issues Facing SMEs	17 Oct	9a.m. - 5p.m	Johor Bahru	Various	450 *subsidised fee RM315	550	650	8 SE/017
Seminar: Topical Tax Issues Facing SMEs	18 Oct	9a.m. - 5p.m	Penang	Various	450 *subsidised fee RM315	550	650	8 SE/018
Seminar: Recent Tax Cases	18 Oct	9a.m. - 5p.m	Kuala Lumpur	Saravana Kumar & Others	450	550	650	8 SE/
Seminar: Topical Tax Issues Facing SMEs	22 Oct	9a.m. - 5p.m	Kota Kinabalu	Various	450 *subsidised fee RM315	550	650	8 SE/020
Seminar: Topical Tax Issues Facing SMEs	23 Oct	9a.m. - 5p.m	Kuching	Various	450 *subsidised fee RM315	550	650	8 SE/019
NOV 2018								
2019 Budget Seminar	21 Nov	9a.m. - 5p.m	Kuala Lumpur	Various Speakers	350	500	600	10 BS/001
2019 Budget Seminar	TBA	9a.m. - 5p.m	Subang Jaya	Various Speakers	350	500	600	10 BS/002
2019 Budget Seminar	TBA	9a.m. - 5p.m	Penang	Various Speakers	350	500	600	10 BS/003
2019 Budget Seminar	TBA	9a.m. - 5p.m	Johor Bahru	Various Speakers	350	500	600	10 BS/004
2019 Budget Seminar	TBA	9a.m. - 5p.m	Kuching	Various Speakers	350	500	600	10 BS/005
2019 Budget Seminar	TBA	9a.m. - 5p.m	Kota Kinabalu	Various Speakers	350	500	600	10 BS/006
2019 Budget Seminar	TBA	9a.m. - 5p.m	Melaka	Various Speakers	350	500	600	10 BS/007
2019 Budget Seminar	TBA	9a.m. - 5p.m	Ipoh	Various Speakers	350	500	600	10 BS/008

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: OCTOBER – DECEMBER 2018

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
Public Holiday *(Deepavali: 6 November, Prophet Muhammad's Birthday: 20 November)*								
DEC 2018								
2019 Budget Seminar	4 Dec	9a.m. - 5p.m	Petaling Jaya	Various Speakers	350	500	600	10 BS/009
2019 Budget Seminar	12 Dec	9a.m. - 5p.m	Kuala Lumpur	Various Speakers	350	500	600	10 BS/010
Seminar: Recent Tax Cases	3 Dec	9a.m. - 5p.m	Johor Bahru	Saravana Kumar & Others	450	550	650	8 SE/
Seminar: Recent Tax Cases	5 Dec	9a.m. - 5p.m	Ipoh	Saravana Kumar & Others	450	550	650	8 SE/
Seminar: Recent Tax Cases	6 Dec	9a.m. - 5p.m	Penang	Saravana Kumar & Others	450	550	650	8 SE/
Workshop – Dealing with the Complexities of Withholding Tax	13 Dec	9a.m. - 5p.m	Kuala Lumpur	Thannee	400	500	600	8 WS/037
Public Holiday *(Christmas : 25 December)*								

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 is insufficient number of participants. A minimum of 3 days notice will be given.

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

Cessation of Membership

The following members have been excluded from the Membership Register on 30 June 2018 in accordance with Article 28 of the Articles of Association of the Institute:-

CHEAH KIN YIN @ CHEAH KIN YOON
MEM.NO 0062

TAN CHIEW HEE
MEM.NO 0117

LEONG CHOOI MAY
MEM.NO 0119

HJ HASSAN BIN HJ TAIB
MEM.NO 0175

LEONG KHAI WAH
MEM.NO 0274

LIM HON CHEW
MEM.NO 0276

LIANG MUI YIN
MEM.NO 0389

RAW KOON BENG
MEM.NO 0918

IDRIS BIN ABD RAHMAN
MEM.NO 0996

WAN HENG CHOON
MEM.NO 1146

NIHAL PETER MONERASINGHE
MEM.NO 1201

CHUA PIAH KWANG
MEM.NO 1783

ROGER MARC JOSEPH
MEM.NO 1800

PANG CHONG SENG
MEM.NO 1858

LEAN TZE YUNG
MEM.NO 1925

NG SOO HAR@NG SEET KOW
MEM.NO 1977

WONG HUNG CHEW
MEM.NO 2022

CHANDRAN A/L KASI
MEM.NO 2060

NG SHO SEE
MEM.NO 2215

MOHAMAD ZUHRI MOHAMAD TAHA
MEM.NO 2265

WONG CHUI HUA
MEM.NO 2280

WONG YEE LI
MEM.NO 2554

SIVAKUHAN A/L SIVALINGAM
MEM.NO 2666

TUNG SIEW FOON
MEM.NO 2749

YEAN CHIN SIANT
MEM.NO 3201

WENDY TAN EE MAY
MEM.NO 3440

NORA AIDA BINTI SULAIMAN
MEM.NO 3489

HO SOW KIN
MEM.NO 3546

NG KWEE CHING
MEM.NO 3618

SHARIZAH BINTI YUSOFF
MEM.NO 3653

WAN FAZIATUL AMIRA BINTI WAN MOHD SALLEH
MEM.NO 3658

NICOLAOS GIANNOPOULOS
MEM.NO 3747

WILSON SIGAU MERANG
MEM.NO 3806

SHIRLEY SIA SIE MEI
MEM.NO 3841

MUDA BIN IDRIS
MEM.NO 3924

2019 BUDGET SEMINARS

CTIM
CHARTERED TAX INSTITUTE OF MALAYSIA

The 2019 Malaysian Budget Proposals will be announced and tabled in Parliament on the Friday, 2 November 2018 by the Minister of Finance, YB Tuan Lim Guan Eng. The theme for this year's Budget Proposals "*Improving Public Finances: Revenue Enhancement and Structural Reforms*" is in line with the Government's focus on strengthening the country's economy. Join us at this year's CTIM Budget Seminars which will provide participants with a practical understanding of the key tax changes presented in the 2019 Budget Proposals.

The series of 2019 Budget Seminars will be held as follows:

Date : **21 November 2018**
Time : **9.00am – 5.00pm**
Venue : **Renaissance Hotel Kuala Lumpur**

Subsequent 2019 Budget Seminars will be held at various locations namely:

- Subang Jaya
- Petaling Jaya
- Ipoh
- Penang
- Melaka
- Johor Bahru
- Kota Kinabalu
- Kuching

Please refer to subsequent announcements and CTIM website for full details.

Benefits to participants:

- Obtain information and clarification from the Ministry of Finance (MOF) and Inland Revenue Board of Malaysia (IRBM) on the latest changes and impact to taxpayers with regard to the 2019 Budget Proposals.
- Get to know the key issues arising from the major Budget changes in 2019 and their impact on your business.
- Gain knowledge on IRBM's significant current practices and processes.
- Receive 10 CPD points recognised by MOF as one of the mandatory Budget Seminars for the purposes of Section 153, Income Tax Act 1967.
- Receive a complimentary copy of the 2019 Budget Commentary & Tax Information booklet. (**subject to availability*)

Who should attend:

- Tax Agents
- Tax Advisors and Consultants
- Corporate Accountants
- Corporate Tax Executives / Managers
- Public Accountants

BE INFORMED AND BE PREPARED

CPD Department
Chartered Tax Institute of Malaysia
13th Floor, Megan Avenue II
No.12, Jalan Yap Kwan Seng
50450 Kuala Lumpur

Contact Person :
Mr Jason / Ms Yus / Ms Zaimah / Ms Ally
Tel: +603 2162 8989 ext: 108 / 121 / 119 / 123
Fax: +603 2162 8990 Email: cpd@ctim.org.my
Website: www.ctim.org.my

10 CPD points

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