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## BUDGET 2020 – "DRIVING GROWTH AND EQUITABLE OUTCOMES TOWARDS SHARED PROSPERITY"

- Is The Tax Profession Being Disrupted By Technology?
- Indirect Tax – Constant Change Is The Rule Of The Game
- Business Deductions: Qualifying Expenditure I

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CHARTERED TAX INSTITUTE OF MALAYSIA

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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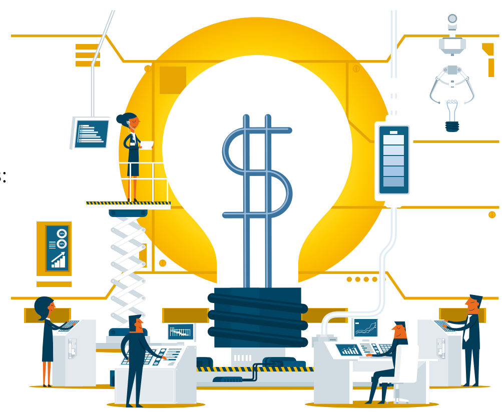


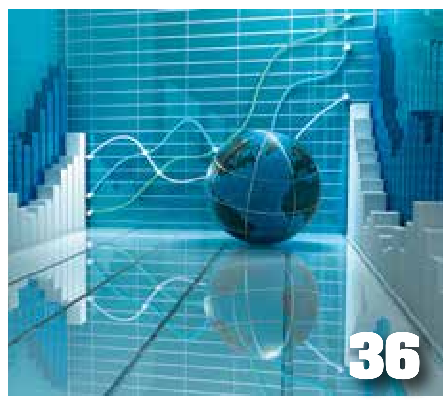




**INVITATION TO WRITE**

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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FARAH ROSLEY

# S.153 OF THE INCOME TAX ACT 1967 AMENDMENTS TO THE FINANCE BILL 2019

Happy New Year! A wonderful new year and lovely wishes for a great year ahead.

The recent amendments to S.153 of the Finance Bill 2019 created consternation among members of the tax agent community of whom a substantial number are CTIM members.

In essence, the amendments seek to transfer the responsibility of the approval of the new and renewal of S.153 income tax agent licence from the Ministry of Finance to the Inland Revenue Board of Malaysia (IRBM).

In reviewing the amendments, the Council was of the opinion that the proposed change will adversely impact the basic rights of the tax agents and taxpayer community. Fundamentally, there would be infringement of independence between the tax agent regulator, tax collector and taxpayer arising from clearly defined conflicts of interest situations which consequently lead to a deterioration in the rights of the taxpayer.

CTIM has written to the Minister of Finance to reconsider these amendments. A joint letter signed by the Presidents of CTIM and other professional bodies was also subsequently sent to the Minister of Finance.

The Institute is pleased to inform that the proposed amendments have been withdrawn and were effected via the amended Finance Bill 2019 which was passed at the Dewan Rakyat on 2 December 2019. The Institute has also received a letter from the Ministry of Finance dated 5 December 2019 in response to the Institute's request for the said withdrawal. An e-CTIM has been issued to notify members of this update.

CTIM has been regularly and actively involved in engaging the authorities and made key submissions in Q4, among others as follows: -

- **Joint Memorandum to the IRBM on Post-Budget 2020 Issues**
CTIM, together with other professional bodies had submitted a Joint Memorandum to the Director General of the IRBM, Dato' Sri Dr. Sabin Samitah on 22 November 2019 on direct tax issues arising from the Budget 2020 Speech and the Finance Bill 2019 in relation to proposed amendments to tax legislations.
- **Memorandums to the RMCD**
The Institute had submitted a Memorandum to the Director General of the Royal Malaysian Customs Department (RMCD), Dato' Seri Paddy Abdul Halim on 26 November 2019 on indirect tax issues arising from the Budget 2020 Speech and the Finance Bill 2019 such as improvement on group relief facility under the Service Tax Act 2018 and the introduction of Approved Major Exporter Scheme under the Sales Tax Act 2018.
The Institute also submitted Memorandums on issues arising from the Sales Tax (Amendment) Act 2019, Service Tax (Amendment) Act 2019, Free Zone (Amendment) Act 2019, Customs (Amendment) Act 2019 and Excise (Amendment) Act 2019 gazetted on 9 July 2019 and the Guide on Digital Services dated 20 August 2019.
- **Memorandum to MIDA on Investment Incentives**
The Malaysian Investment Development Authority (MIDA)

engaged with CTIM and other stakeholders in October 2019 to discuss on investments and incentives in connection with the Ministry of International Trade and Industry's (MITI) initiative to formulate the New Industrial Master Plan (IMP) for the period 2021 to 2030. Further to this engagement, the Institute had submitted feedback on the review of Promotion of Investments Act 1986 and issues relating to the administration of incentives, amongst others to MIDA. The Institute also participated in a workshop hosted by MITI in October 2019 to brainstorm on the issues and recommendation for investments and incentives for the new IMP. The new IMP is expected to be ready in 2020.

## Transfer Pricing Seminar 2020

I am pleased to inform that CTIM is organising a Transfer Pricing Seminar 2020 on 21 January 2020, consisting of many distinguished speakers from the CTIM Transfer Pricing Technical Committee, the tax fraternity and government authorities. Members can look forward to this event as there will be many transfer pricing (TP) issues such as Earning Stripping Rules, TP dispute resolution, TP cases and TP documentation and practical issues that will be discussed during the seminar. Please mark this date in your diary as a 'must attend' seminar.

## CPD Events

CTIM successfully held a series of Budget 2020 Seminars from 24 October 2019 to 5 December 2019 in Kuala Lumpur and various locations nationwide. Most of the locations had almost full capacity of participants. Members can look up our CPD Event Calendar for Quarter 1 of 2020 (January 2020 to March 2020) in this issue of *Tax Guardian* and the CPD events listed in the Institute's website (www.ctim.org.my) for more details on upcoming CPD events.


## CTIM Branch Activities

A Post-Budget 2020 Tax Seminar was jointly organised by CTIM East Coast Branch and the Kuantan Chinese Chamber of Commerce and Industry on 20 October 2019. A Networking Event with Tax Practitioners was also organised by CTIM East Coast Branch on 10 December 2019 where various issues had been discussed such as post-voluntary disclosure, automatic exchange of information, transfer pricing, digital tax and services, imported services and withholding tax.

A sharing by Industry Leaders event was jointly organised by CTIM Sabah Branch and MIA Kota Kinabalu on 16 November 2019.

The CTIM Perak Branch will be organising the Perak Tax Forum cum Annual Dinner on 13 March 2020 at the Weil Hotel, Ipoh.

I would like to sincerely thank the various Branch Chairmen and their Committees who had contributed their precious time and resources in successfully organising the branch activities for the benefit of our members.

## Examinations

CTIM had successfully conducted the 24th CTIM Graduation and Prize Giving Ceremony that was held on 16 November 2019 at the Renaissance Kuala Lumpur Hotel. The event was officiated by YBhg Datuk Noor Azian Abdul Hamid, the Deputy Chief Executive Officer (Policy) of the IRBM. Kudos to all the 21 graduates and the prize winners for the best performance in various tax examination papers. I would like to thank the various tax professional firms who had sponsored the prizes for this graduation ceremony.

The Institute had successfully conducted the CTIM Professional Examinations - Intensive Revision Course for the Revenue Law & Advanced Taxation 2 examination paper from 25 November – 29 November 2019 to assist students in preparing well for this examination paper for the December 2019 sitting. I would like to express my appreciation and sincere thanks to En. Abdul Salam Chandran who volunteered to conduct this revision course for our registered students.

## Membership

I am pleased to inform you that the CTIM membership has grown to 3,606 members from about 3,500 members a year ago. I welcome this as a healthy indication that the Institute continues to be relevant to its members as the premier body for tax professionals.

# Editor'sNote

YEO ENG PING

Happy New Year 2020, welcome to a new decade! The last few months has been focused on Budget 2020 which was announced on 11 October 2019, which I thought provided fresh optimism and sent a strong message on encouraging investments, both new foreign investments and also retaining investments that are currently in Malaysia.

The Inland Revenue Board of Malaysia (IRBM) has also announced that its 2020 target collection for direct taxes is RM154.7b, compared to the 2019 estimated tax collection of RM145b, representing about 6.6% growth (which exceeds the 2020 GDP expected growth of 4.3%.) It was also revealed that the 2019 Special Voluntary Disclosure Programme that was closed on 30 September 2019 yielded RM7.87b, believed to have fallen short of the target of approximately RM10b.

We have yet to hear on the progress of the tax incentives review by the authorities, but the budget announcement is timely as the competition for investments especially in the high-value, technology and innovation related spaces, is ever increasing, with other countries in the region also polishing up their incentive packages for investors. It was proposed that for multinational corporations, there will be an allocation of RM1b per year allocation for customised incentive packages for five years, to attract Fortune 500 companies and global unicorns in high technology, manufacturing, creative, and new economic sectors to Malaysia. A 'Special Channel' under InvestKL will be established to facilitate investors from China. For Malaysian export-oriented businesses, there will also be a RM1b per year allocation for customised incentive packages for five years, for companies that can prove their ability to grow and export their products and services globally. The reinvestment allowance incentive, which over the last decade has been reduced, surprisingly saw a proposal for expansion – an extension of the incentive for five years albeit at 50% of the reinvested expenditure.

Contrary to some pre-Budget expectations, no new taxes were introduced and the Minister clarified that the Goods and Services Tax will not be brought back. There will be an increase to the personal income tax rate, raising Malaysia's top personal rate from 26% to 28%, which is expected to affect about 2,000 taxpayers.

From 1 January 2020, foreign service providers are subject to 6% service tax on digital services provided to a consumer in Malaysia. The Customs has revealed that 126 foreign digital service providers including household names, had registered, as of 20 December 2019.

There are a number of important proposed changes to the Labuan tax regime, one of which included the proposal for Labuan entities to be taxed under the LBATA at 24% (of chargeable profits) if the entity does not meet substance requirements, such as number of full time employee and annual operating expenditure. This change could attract tax consequences which are more detrimental that under the Income Tax Act 1967 "domestic" regime, for example foreign income and dividend income would be taxable, and there have been voices speaking out on this. To date, the relevant laws have not yet been gazetted.

The Minister of Finance also made a couple of interesting remarks at the Budget Speech relating to the tax administration:-

- that the tax to GDP ratio of Malaysia is comparatively low
- that a Taxpayer Identification Number (TIN) scheme will be introduced in 2021 for business or individual income earners aged 18 and above.

Just a few days later, YB Lim Guan Eng alluded again to the shadow economy which is estimated to be 21% of GDP, and called for the IRBM to tap into the shadow economy for taxes, and use big data technology to combat evasion. He reiterated that the IRBM's Revenue Transformation Plan was aimed at enhancing compliance, plugging loopholes and checking losses, and that the TIN scheme will be introduced to expand and enhance tax collection, though so far, there has been no further details.

It is worth mentioning that tax administrations around the world are transforming, leveraging technology in the way they interact with taxpayers and operate. The OECD has also published papers including "Technologies for Better Tax Administration – A Practical Guide For Revenue Bodies", 2016, and "Tax Administration 2017 – Comparative Information on OECD and Other Advanced and Emerging Economies". No doubt, it will not be surprising to see the IRBM embark on further investments and improvements to their technology capability in the immediate term.

Recently, there was also a release of three audit framework revisions i.e. for the Tax Audit Framework, the Transfer Pricing (TP) Audit Framework and also the Petroleum Tax Audit Framework effective 15 December 2019. There were some positive aspects, including the removal of the Monitoring Deliberate Tax Defaulters programme, and a pull back from the earlier position of visiting premises without notification; however, under the revised framework, "repeated offences" will be subject to higher penalties at 55%. It was high time for the TP and Petroleum Tax updates as the earlier versions were issued back in 2013. There was also a revision to the Tax Investigation Framework, which in similar positive vein, states that investigation procedures will include request for documents and information before site visits, and it removes the previous practice of imposing higher penalties depending on the instalment period.

Overall, these changes bode well for taxpayers, as the direction is one of more balanced audits and investigation procedures and outcomes, and a focus on tax evaders. I was also personally pleased to see common sense and good judgement prevail when the proposal to change the tax agent licensing body from the Minister of Finance to the IRBM, was finally removed, after an arduous campaign by tax agents and professional bodies proudly led by CTIM. Much has been said on this topic but the most important principle is the need to avoid conflicts and uphold not only actual fairness and justice, but also the perception of the same. This is the foundation of a fair and progressive tax system.



# CPD EVENTS

The Institute successfully conducted the following workshops / seminars in the 4th quarter of 2019

- Tax issues and law relating to property developers, Joint Management Bodies (JMB) / Management Corporations (MC) and investors
- Public Rulings 2018 & 2019
- Learn to develop, build upon and/ or appreciate the importance of the capital statement in tax audits
- The effects of digital tax in Malaysia
- Tax treatment on interest – a practical approach & latest updates
- Employment income tax practicalities and complexities
- Seminar on Taxation of land transactions – insights & strategies
- 2020 Post-Budget seminars

The workshop on "Tax issues and law relating to property developers, JMC/MC and investors" was conducted by Dr. Tan Tai Soon in Kuala Lumpur on 2 October 2019 and 9 October 2019 (re-run session). The speaker covered the Real Property Gains Tax, tax treatment for land owner under joint venture, accounting, tax planning, tax issues and tax audit for property developers in this 1-day workshop.

Mr. Kularaj conducted a workshop on "Public Rulings 2018 & 2019" on 8 October 2019 and 5 November 2019 in Johor Bahru and Penang respectively. The speaker covered all 14 Public Rulings issued by the Inland Revenue Board of Malaysia (IRBM) for 2018 and 2019.

Ms. Karen Koh Sai Tian, who is a retired Senior IRBM officer conducted two workshops for the Institute; namely "Learn to develop, build upon and/ or appreciate the importance of the capital statement in tax audits" on 8 October, 16 October (re-run session) and "Tax treatment on interest – a practical approach & latest updates" on 5 November 2019. All workshops were conducted in the Klang Valley and attended by participants from various states.

A one-day seminar entitled "Taxation of land transactions – insights & strategies" was conducted on 12 December 2019 in Kuala Lumpur. There were several topics presented by the speakers i.e "Tax audit and Investigation on land transactions" by Ms. Farah Rosley, "Common Income Tax and RPGT issues on land transactions" by Mr. Chow Chee Yen and "Tax Cases on land transactions" by Mr. S Saravana Kumar.

### 2019 BUDGET SEMINARS

On 24 October 2019, the Institute successfully conducted its annual Budget Seminar at the Berjaya Times Square Hotel, Kuala Lumpur. The first session of the seminar was on the "Summary of 2020 Budget Proposals" presented by Ms. Masyita Ismail (MoF).

The second session which was on "Forum discussion on 2019 Budget Proposals – Its Changes & Impact to Taxpayers" was dealt by the panel members such as Mr. Ezleezan Othman (MoF), Mr. Ahmad Khairuddin Abdullah, (IRBM) and Ms. Yeo Eng Ping. The session was moderated by

Ms. Phan Wai Kuan.

The third session on "Effective tax system in meeting sustainable development goals and inclusive economic growth" was moderated by Ms. Farah Rosley together with two speakers cum panel members i.e YBhg Dato' Chua Tia Guan (PEMUDAH) and Mr. Ahmad Khairuddin Abdullah (MIDA).

The seminar was attended by over 850 participants comprising of tax practitioners and members from commerce and industry.

CTIM also successfully organised a series of 2020 Budget Seminars (approximately 2,000 participants attended the seminars) in November and December 2019 at the following locations namely Kuala Lumpur & Melaka (20 November 2019), Penang and Johor Bahru (21 November 2019), Ipoh & Kuching (25 November 2019), Kota Kinabalu (26 November 2019), Subang (27 November 2019) and Kuala Lumpur (5 December 2019).

## SEMINAR PERCUKAIAN KEBANGSAAN (SPK) 2019

CTIM Council Members and Branch Chairmen were invited for the 2nd year by the Inland Revenue Board of Malaysia to participate in their Seminar Percukaian Kebangsaan (SPK) 2019 as Panellist for the session "2020 Budget Proposals" at various locations across the country between 15 October 2019 and 19 November 2019. The representatives from CTIM for the IRBM SPK 2019 were Ms. Farah Rosley (Kuala Lumpur & Kuala Terengganu), Mr. Chow Chee Yen (Penang & Shah Alam), Mr. Soh Lian Seng (Kota Kinabalu & Miri), Mr. Alan Chung (Ipoh & Kota Bharu), Mr. Thenesh Kannaa (Melaka), Ms. Stefanie Low (Seremban), Ms. Phan Wai Kuan (Bintulu), Mr. Zen Chow (Kluang), Mr. Jesu Dason (Johor Bahru), Ms. Kellee Khoo (Bukit Mertajam), Mr. Wong Seng Chong (Kuantan), Mr. Lam Weng Keat (Taiping) and Ms. Viviana Lim (Keningau).


## THE 24TH CTIM GRADUATION AND PRIZE GIVING CEREMONY

The 24th CTIM Graduation and Prize Giving Ceremony held on 16 November 2019 at the Renaissance Kuala Lumpur Hotel was officiated by YBhg Datuk Noor Azian Abdul Hamid, Deputy Chief Executive Officer for policy, IRBM. 21 graduates received their scrolls on completion of the CTIM Professional Examinations and 7 other students received awards for their best performance in the various tax papers for the December 2018 and June 2019 examinations.


# BUDGET 2020
## "DRIVING GROWTH AND EQUITABLE OUTCOMES TOWARDS SHARED PROSPERITY"

ON FRIDAY 11 OCTOBER 2019 THE MINISTER OF FINANCE, YB TUAN LIM GUAN ENG, DELIVERED THE BUDGET 2020 PROPOSALS. AGAINST AN UNCERTAIN GLOBAL ECONOMY AND SLOWING GROWTH RATES, THE PROPOSALS ARE GENERALLY TARGETTED AT SPECIFIC AREAS, PARTICULARLY SMALL AND MEDIUM ENTERPRISES RATHER THAN REFLECTING MAJOR POLICY REWRITES.

Nicholas Anthony Crist

The theme of the Budget 2020 is "Driving Growth and Equitable Outcomes Towards Shared Prosperity". The government is committed to bringing stability to the country's finances and achieving the goal of Vision 2020 with a new growth trajectory under the foundation of "Shared Prosperity Vision 2030". To achieve its commitments, Budget 2020 contains four thrusts:

**First:**
**Driving Economic Growth in the New Economy and Digital Era**

**Second:**
**Investing in Malaysians – Levelling up Human Capital**

**Third:**
**Creating a United, Inclusive and Equitable Society**

**Fourth:**
**Revitalisation of Public Institutions and Finances**

The four thrusts are sub-divided into various strategies. This article looks at a number of the Budget 2020 proposals in the light of these thrusts.

## FIRST THRUST – DRIVING ECONOMIC GROWTH IN THE NEW ECONOMY AND DIGITAL ERA

### *STRATEGY 1: MAKING MALAYSIA THE PREFERRED DESTINATION FOR INVESTMENT*

Historically, Foreign Direct Investment has been attracted to Malaysia, at least in part, through the tax incentives on offer. The number of incentives available has grown significantly with the result that the scope of some of these overlaps. The government has therefore, embarked on a comprehensive review and revamp of the existing incentive framework, comprising the Promotion of Investments Act 1986, the Special Incentive Package and incentives under the Income Tax Act 1967 (ITA). The new framework is expected to be ready by 1 January 2021.

Many tax incentives when awarded, come with qualifying conditions. In this respect, it has been announced that the Ministry of International Trade and Industry (MITI) will give additional focus on post approval investment monitoring and realisation. The proposed involvement of MITI, would appear to be in addition to any review by the Inland Revenue Board of Malaysia (IRBM) of adherence to the conditions under which tax incentives are awarded. It is therefore, becoming increasingly important for companies to maintain records to evidence compliance with the conditions on which a tax incentive has been awarded. Record retention is paramount given that incentives can often involve a period of 10 years.

It is proposed that tax incentives will be given to promote high value-added activities in the Electrical and Electronics(E&E) industry. The proposals include:

- An income tax exemption of up to 10 years to E&E companies investing in selected knowledge-based services, and
- A special investment tax allowance to encourage companies in the E&E sector that have exhausted the Reinvestment Allowance to invest further in Malaysia. The incentive will be for five years and at the rate of 50% of qualifying capital expenditure to be set off against 50% of statutory income. This incentive will be available where applications are made to the Malaysian Investment Development Authority (MIDA) from 1 January 2020 to 31 December 2021. While the introduction of a special investment allowance where the period for claiming RA has expired is welcome, it should be noted that this is limited to companies in the E&E sector.


Further details will no doubt be provided in the enabling Orders. In order to encourage investment, it is hoped that the enabling Orders will be issued early on as any delay may complicate the investment decision.

To encourage automation and the expected increase in productivity, it is proposed that the existing Accelerated Capital Allowances (ACAs) and Automation Equipment Capital Allowances (AECA) for the manufacturing sector be continued to include applications received by MIDA from 1 January 2020 until 31 December 2023. The allowances will be limited to the first RM2 million of qualifying capital expenditure. The incentive will be expanded to include the service sector for qualifying capital expenditure incurred from YA 2020 to 2023. Details of how the service sector will qualify for the incentive are not yet available.

It has also been proposed that the ACAs and AECAs currently given to labour intensive industries i.e. rubber, plastic, wood, furniture and textiles, for capital expenditure on automation equipment, be extended. The extension will apply for applications received by MIDA until 31 December 2023. The RM4 million limit on qualifying capital expenditure will continue to apply.

### STRATEGY 2: ACCELERATING THE DIGITAL ECONOMY

Underlining commitment towards the digital transformation of Malaysia, the government will, amongst other things, introduce the concept of Digital Social Responsibility (DSR). Contributions by companies towards DSR will be given tax deductions. The scope of allowable DSR contributions has yet to be defined and it remains to be seen whether the deduction will be limited to corporates or will include all taxpayers.

### STRATEGY 3: STRENGTHENING ACCESS TO FINANCING FOR BUSINESS

This strategy is aimed at giving SMEs in priority segments, access to financing. In this respect, it

is proposed that the existing tax incentives given to venture capital and angel investors, be extended for applications received up to 31 December 2023. In addition, the current tax deductions (and double deductions) on the cost of issuance of *Sukuk* under the principle of *Wakalah*, will be extended for five years to YA 2025. The tax deduction on the cost of issuing Sustainable and Responsible Investment (SRI) *Sukuk* and the tax exemption for fund management companies managing *Shariah* compliant as well as SRI funds will be extended until YA 2023.

To assist SMEs as well as technology based companies in raising capital, it is proposed that a tax deduction of up to, in total, RM1.5 million be given on (i) fees to authorities, (ii) professional fees, (iii) underwriting, placement and brokerage fees, in respect of listings in the ACE Market or LEAP Market.

This proposal is effective from YA 2020 to YA 2022.

### STRATEGY 4: STRENGTHENING ECONOMIC DIVERSITY

This strategy reflects measures directed at the green economy, agriculture, research and development (R&D) and tourism.

In relation to the green economy, it is proposed that the Green Investment Tax Allowance and Green Income Tax Exemption incentives will be extended to applications received by MIDA until 31 December 2023. In addition, a 70% income tax exemption will be given for up to 10 years for companies undertaking solar leasing activities.

On the R&D front, income from patents and copyright software will qualify for a 100% tax exemption for up to 10 years. In line with the Base Erosion and Profit Shifting initiatives the exemption will reflect a modified nexus approach. The use of the modified nexus approach is to ensure that only income derived from intellectual property developed in Malaysia qualifies for the tax exemption.

2020 is Visit Malaysia Year. In line with this, Budget 2020 has proposed the following:

- An income tax exemption be given to a company that organises approved arts and cultural activities, approved

international sports and recreational competitions. The exemption will apply from YA 2020 to YA 2022.

- New investments in international theme park projects will be given an income tax exemption of 100% of statutory income for five years or investment tax allowance of 100%, to be set off against 70% of statutory income, for five years. This proposal will be effective for applications received by MIDA from 1 January 2020.
- Increasing the tax deduction given to companies sponsoring arts, cultural and heritage activities in Malaysia from RM700,000 to RM1,000,000. This is effective from YA 2020.
- Accelerated capital allowances to be given to licensed tour operators over two years on the purchase of locally assembled excursion buses. This will apply from YA 2020 to YA 2021. These ACAs will be limited to purchases of new excursion buses and will not apply to reconditioned vehicles.
- A 50% excise duty exemption to be given to tour operators on the purchase of locally assembled qualifying new tourism vehicles, where applications are received by the Ministry of Finance (MoF) on or before 31 December 2021.

Included within the Appendices to the Budget speech is a proposal to increase the capital allowances available on small value assets (SVA). Under this proposal:

(i) The value of assets eligible to be treated as SVA's will be increased from RM1,300 to RM2,000.

(ii) For non-small and medium enterprises (SMEs) the cumulative limit on SVA's will be increased from RM13,000 to RM20,000 for each YA.

This proposal is effective from YA 2020.

To support further the growth of SMEs, the chargeable income subject to the reduced rate of 17% will be increased from RM500,000 to RM600,000. There will be an additional requirement that annual sales must not exceed RM50 million. The RM50 million limit is also relevant in determining whether a Company is an SME for SVA purposes above. These proposals, which will apply to qualifying companies and limited liability partnerships, will be effective from YA 2020. It is unclear how the RM50 million limit will apply where sales fluctuate above and below this limit from one year to the next.

It is also proposed that the current maximum tax deductions for secretarial fees (RM5,000) and tax filing fees (RM10,000) be combined into a total tax deductible amount of RM15,000. This proposal is effective from YA 2020.

## SECOND THRUST – INVESTING IN MALAYSIANS – LEVELLING UP HUMAN CAPITAL

### *STRATEGY 5: ENHANCING JOB OPPORTUNITIES FOR MALAYSIANS*

The government proposes to launch the "Malaysians@Work" initiative which is aimed at creating better employment opportunities for youth and women, and reducing over-dependence on low skilled foreign workers. The tax proposals associated with this initiative include:

- Extending the income tax exemption for women who return to work after a career break for another four years until 2023. The exemption will apply to applications received by Talent Corporation Malaysia Berhad (TalentCorp) on or before 31 December 2023.
- Extending the double tax deduction on Skim Latihan Dual Nasional for another two years for programmes approved by the Ministry of Human Resources from 1 January 2020 to 31 December 2021. In addition, the double tax deduction currently given to companies undertaking the Structured Internship Programme approved by TalentCorp will be extended to YA 2021 and expanded

to include Bachelor degrees, diplomas, vocational Diploma Kemahiran Malaysia level 4 and 5, and Sijil Kemahiran Malaysia level 3 in all academic fields and not just engineering and technology.

- To reduce the financial burden of parents in providing childcare and early childhood education, it is proposed that the existing tax deduction of RM1,000 be increased from RM1,000 to RM2,000. This will be effective from YA 2020.

### THIRD THRUST – CREATING A UNITED, INCLUSIVE AND EQUITABLE SOCIETY

The third thrust is centered on inclusive economic development regardless of race, religion, geographical location and background.

Tax proposals include increasing the limit on tax deductions for donations to charitable and sports activities, and projects of national interest by taxpayers, other than companies, from 7% of aggregate income to 10% of aggregate income. The limit for companies is already at 10% of aggregate income. The scope of qualifying deductions will be expanded to include:

(i) Cash *wakaf* contributions to state religious authorities or bodies established by the state religious authority to administer *wakaf*;
(ii) Cash *wakaf* contributions to a public university approved by the state religious authority to receive *wakaf*; and
(iii) Cash endowment contributions to a public university.

These changes will be effective from YA 2020.

> **"To support further the growth of SMEs, the chargeable income subject to the reduced rate of 17% will be increased from RM500,000 to RM600,000. There will be an additional requirement that annual sales must not exceed RM50 million. The RM50 million limit is also relevant in determining whether a Company is an SME for SVA purposes above."**

It has also been proposed that with effect from YA 2020 the existing income tax relief of up to RM6,000 for expenses on medical treatment for serious illnesses, be expanded to include expenses on fertility treatment.

Currently, individuals who make withdrawals from a private retirement scheme before the age of 55 are taxed at 8%. However, the amount withdrawn would be exempted from tax if the withdrawal is due to permanent and total disablement, serious disease, mental disability, death or leaving Malaysia permanently. It is proposed that the exemption on the amount withdrawn be extended to withdrawal for healthcare and housing (subject to conditions).

The above proposal comes into operation on 1 January 2020.

For Real Property Gains Tax purposes, there will be a 'rebasing' of acquisition cost for disposals of real properties. Under this proposal for assets acquired prior to January 2013, market value at 1 January 2013 will be adopted as the acquisition cost. This rebasing will

be limited to Malaysian citizens and permanent residents and will apply to disposals from 12 October 2019. It appears that rebasing to the 1 January 2013 market value may apply automatically, rather than taxpayers having the option to use original cost where higher. It is hoped that valuation issues will not result in

> **"While the proposed amendments are welcome, perhaps from a more general perspective it is time for a rewrite of the Stamp Act. The Stamp Act 1949 is one of Malaysia's oldest pieces of tax law. A rewrite at this stage could help to align stamp duty with the digital economy."**

undue delays in obtaining clearance in respect of RPGT returns.

An amendment has been made with the result that the 1 January 2013 rebasing does not apply to a disposal of shares in a Real Property Company.

To make home ownership more affordable, the government will collaborate with financial institutions in introducing Rent To Own (RTO) financing schemes. The RTO scheme is intended for the purchase of first homes up to RM500,000. Under the RTO scheme an applicant will rent the property for up to five years and after the first year, will have the option to purchase the home based on the price fixed at the time the tenancy agreement is signed. The government proposes to provide stamp duty exemptions. Between property developers and financial institutions, the stamp duty exemption will apply for sale and purchase agreements executed from 1 January 2020 to 31 December 2022. A further stamp duty exemption will apply on the transfer of homes from financial institutions to buyers where rental agreements are executed between 1 January 2020 and 31 December 2022.

Other proposed stamp duty changes detailed in the Appendices to the 2020 Budget Speech are:

(i) Increasing the *ad valorem* rate of stamp duty on foreign currency loans from a maximum of RM500 to a maximum of RM2,000, equivalent to a foreign currency loan of RM400,000, effective from 1 January 2020, and

(ii) Restricting the existing stamp duty remission of 50% on transfers of real property between parents and children and vice versa, for love and affection, to Malaysian citizens. This will apply to transfers of real property executed from 1 January 2020.

While the proposed amendments are welcome, perhaps from a more general perspective it is time for a rewrite of the Stamp Act. The Stamp Act 1949 is one of Malaysia's oldest pieces of tax law. A rewrite at this stage could help to align stamp duty with the digital economy.

## FOURTH THRUST – REVITALISATION OF PUBLIC INSTITUTIONS AND FINANCES

It was noted in the Finance Minister's speech that Malaysia collects significantly lower taxes than some other countries. For 2017, Malaysia's tax revenue was only 13.1% of GDP. While for Vietnam, South Korea, Poland and Chile tax is 19.0%, 15.4%, 16.8% and 17.4% respectively of GDP.

With regard to personal income tax, it is proposed that a new band for taxable income in excess of RM2 million, will be introduced. Income falling in this new band, will attract income tax at 30%. In line with this, the fixed income tax rate for non-resident individuals will also be increased to 30%. The 30% band will be effective from YA 2020.

To improve the efficiency of the appeals process, the government proposes to merge the Special Commissioners of Income Tax with the Customs Appeal Tribunal into the Tax Appeal Tribunal (TAT). The TAT will be operational from 2021.

## FINANCE BILL 2019

The Finance Bill 2019 (the Bill) was released in the days following the Budget 2020 speech. Proposals contained in the Bill but which were not mentioned in the Finance Minister's speech include the following: -

### *1. WITHHOLDING TAX RATES*

It is proposed that the reduced withholding tax rate of 10% for foreign institutional investors and non-corporate investors (including resident and non-resident individuals) investing in Real Estate Investment Trusts (REITs) be extended as follows: -

| REIT Investors * | Withholding Tax Rate (%) | YA (Current) | YA (Proposed) |
|---|---|---|---|
| Foreign institutional investors | 10 | Up to 2019 | Up to 2025 |
| Non-corporate investors including resident and non-resident individuals | 10 | Up to 2019 | Up to 2025 |

* REIT investors who receive profit distributions out of the tax exempt total income, from a REIT listed on Bursa Malaysia.

The above proposal is effective from YA 2020 to YA 2025.

### *2. INCREASE IN TAX CHARGED (PENALTY) FOR AMENDMENT OF RETURN*

It is proposed that the tax payable be increased by a flat rate of 10% for an Amended Return furnished within six months from the statutory submission deadline; the further increase of 5% is to be removed.

| Submission of Amended Return Form | Increase in Tax Charged (%) (Current) | Increase in Tax Charged (%) (Proposed) |
|---|---|---|
| Within 60 days from the submission due date | 10 | 10 |
| After 60 days but not later than six months from the due date | 10 + 5 | 10 |

The above proposal comes into operation on 1 January 2020, although it is unclear whether this date is a reference to the amended return or a basis period.

As part of the self-assessment system, there has to be a recognition that taxpayers who voluntarily amend their tax returns should not be unduly penalised. The removal of the 5% penalty will be well received and this move to a more reasonable level of penalty should be applauded.

### *3. PENALTY FOR UNPAID TAX AFTER DUE DATE*

It is proposed that the penalty to be imposed for tax paid after the due date is set at a flat rate of 10%; the further increase of 5% is to be removed.

| Payment of Unpaid Tax | Penalty (Current) (%) | Penalty (Proposed) (%) |
|---|---|---|
| After due date | 10 + 5 | 10 |

The above proposal comes into operation on 1 January 2020.

### *4. LABUAN TAX*

The current commencement date for the removal of the election to be taxed at RM20,000 under the Labuan Business Activity Tax Act 1990 is 1 January 2019. However, confusion has arisen as to whether the removal of the election is effective for tax filing from YA 2020 onwards or if an apportionment is required for the affected Labuan entities with basis periods straddling 1 January 2019.

It is proposed that the commencement date for the said removal and consequential changes, be YA 2020 and subsequent YAs.

The above proposal is deemed to have come into operation on 1 January 2019.

Further developments are expected in relation to Labuan and are outside the scope of this article.

### *5. ADMINISTRATIVE MATTERS*

i. **Assessments and Additional**

**Assessments**
It is proposed that there would be no time limit for the Director General of Inland Revenue (DGIR) to raise assessments or additional assessments under the ITA or the Petroleum (Income Tax) Act 1967 (PITA) where an assessment or an additional assessment are raised as a result of the mutual agreement procedure in double taxation agreements.
The above proposal is effective on the coming into operation of the Finance Act 2019.

ii. **Extension of Time for Appeal**
Currently, taxpayers seeking to appeal against an assessment under the ITA or the PITA after the expiration of the period to make an appeal, may at any time make a written application in the prescribed form to the DGIR for an extension of time. It is proposed that a time limit of seven years after the expiration of the period to make an appeal be introduced. This will introduce some certainty to the time limits for late appeals.
The above proposal is effective from YA 2020.

iii. **Recovery from Persons Leaving Malaysia**
It is proposed that a person (including the director of a company) could be prevented from leaving Malaysia where a penalty has been imposed but is unpaid for the failure by the company to submit an estimated tax payable.
The above proposal is effective on the coming into operation of the Finance Act 2019. It is hoped that this power to detain will only be exercised in clear cases of abuse.

“Currently, taxpayers seeking to appeal against an assessment under the ITA or the PITA after the expiration of the period to make an appeal, may at any time make a written application in the prescribed form to the DGIR for an extension of time.”

## 6. REAL PROPERTY GAINS TAX (RPGT)

i. **Retention Sums**
Currently, the purchaser of Malaysian real property or shares in a Real Property Company, is required to retain part of the purchase consideration and pay it to the IRBM. The retention sum is the lower of the whole amount of the money received or 3% of the total value of the purchase consideration or 7% of the total value of the purchase consideration if the disposer is not a citizen and not a permanent resident.
It is proposed that the 7% retention be extended to where the disposer is not a company incorporated in Malaysia. This proposal is effective on the coming into operation of the Finance Act 2019.

ii. **Review of RPGT Treatment**
Currently, gains from disposal of real property as well as gains from the disposal of shares in Real Property Companies are subject to RPGT at rates of 5% to 30%, depending on the category of the disposer and the period of ownership.

It is proposed that the categories of disposers be revised as follows: -

a) Part II is to be amended to apply to a company incorporated in Malaysia and will be extended to include a trustee of a trust; and
b) Part III will be extended to include a company not incorporated in Malaysia.

The above proposal is effective on the coming into operation of the Finance Act 2019.

## *7. INDIRECT TAX*

i. **Approved Major Exporter Scheme (AMES)**
The Sales Tax Act 2018 will be amended to provide for AMES where qualifying export oriented businesses will be exempted from the payment of Sales Tax on acquisition or importation of taxable goods for export or for use in the manufacture of exempted goods for export. Based on the Budget 2020 announcement, to qualify, (amongst others) the trader or manufacturer must export not less than 80% of their annual sales. The AMES will allow a qualifying trader or manufacturer to be exempted from the payment of Sales Tax on taxable goods imported, transported from designated areas (DA) or special areas (SA) or purchased from a registered manufacturer provided that-

a) The taxable goods shall be exported, or transported to a DA or a SA; or
b) The taxable goods are used as raw materials, packing and packaging materials or components to be manufactured, which subsequently shall be exported or transported to DA or SA as goods exempted from Sales Tax.

Any person who has been granted the AMES is required to keep a record of the Sales Tax exempted in a form and manner to be determined.

Where the approved person fails to comply with any prescribed conditions, the Sales Tax that has been exempted shall become due and payable from the date of the non-compliance with the conditions.

The introduction of the AMES will reduce the administrative and cash flow burdens faced by traders who are currently required to pay Sales Tax on taxable goods upfront and apply for drawback when the goods are subsequently exported.

More details on the conditions to be met to qualify for the AMES should follow by way of subsidiary legislation.

In summary, Budget 2020 while introducing no new taxes, contains a number of measures aimed at ensuring that Malaysia is on the right track. A number of the Budget proposals are very much forward looking with the focus on Vision 2030.

| Disposal | RPGT Rates | | |
|---|---|---|---|
| | Part I | Part II | Part III |
| | Individual – Citizen and Permanent Resident | Company | Individual – Non-Citizen and Non-Permanent Resident |
| Within 3 years | 30% | 30% | 30% |
| In the 4th year | 20% | 20% | 30% |
| In the 5th year | 15% | 15% | 30% |
| In the 6th and subsequent years | 5% | 10% | 10% |

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# IS THE TAX PROFESSION BEING DISRUPTED BY TECHNOLOGY?

Chong Mun Yew

**QUOTES:**
*"THE RELENTLESS ADVANCE OF ROBOTICS HAS HAD AN IMPACT LARGELY ON MANUAL LABOUR. THE GROWING CAPACITY OF MACHINE LEARNING SOFTWARE MEANS THAT SOME WHITE-COLLAR JOBS COULD BE SWEPT AWAY BY DIGITAL CHANGE" ROBERT WRIGHT REPORTED IN FINANCIAL TIMES ON 30 SEPTEMBER 2019.*

Furthermore, a professor of international economics at the Graduate Institute Geneva, Richard Baldwin, was quoted in *The Globotics Upheaval* to predict that white-collar jobs will be swept away faster by digital change than in any previous economic transformation[1].

## INTRODUCTION

Traditionally, the work of a professional is often accompanied by a steady income, a promise of job security and a steady career progression. Some professions have seen the most highly remunerated individuals in society. These jobs have always been known as a "job of a lifetime". Many people have this mindset that "Professionals will never be out of a job". However, will technology change this mindset? Will professionals be replaced by artificial intelligence in the future?

Professionals who have specialist knowledge and are accredited by professional qualifications are often regarded as performing white-collar jobs. Typical white-collar jobs include doctors, architects, lawyers, accountants, financial and insurance agents, consultants, computer programmers, and many others.

The technology revolution is entirely different from the previous industrial revolution. As Stanford University academic Jerry Kaplan writes in Humans Need Not Apply, *"Today, automation is blind to the colour of your collar. It does not matter whether you are a factory worker, a financial advisor or a professional flute-player: automation is coming for you."*

## WHAT IS TECHNOLOGY TRANSFORMATION?

Briefly, technology transformation can happen in two important modes, namely automation and innovation:

(i) Automation

Most professionals often associate the relevance of technology to their jobs with automation. Automation is mostly focused on routine, repetitive and mundane tasks which can be replaced by more efficient machines. Clayton Christensen refers to this automation as "sustaining" technologies which support and enhance traditional ways of operating in an organisation or an industry[2].

Perhaps someday in the future, we will have a super Google search that can search the most relevant result to any tax query. Perhaps, an even more sophisticated artificial intelligence (AI) engine can advise on the best way to solve a tax problem. Tax consultants may only be needed then for very complex tax challenges[3]. Having said that, automation does

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*1 Baldwin, R. (2019). The Globotics Upheaval : Globalization, Robotics, and the Future of Work. Oxford University Press. ISBN 978-0190901769; Also being reported in Financial Times on 29 September 2019 where it says that "Workplace Automation: How AI is coming for your job. Advances in machine learning software means some white-collar jobs could be swept away by digital change".*

*2 See Clayton Christensen, The Innovator's Dilemma (1997).*

not necessarily replace jobs, rather, jobs will be redefined.

(ii) Innovation

On the other hand, Christensen[4] refers innovation as "disruptive" technologies which are those that fundamentally challenge and change working practices. Globally, the "disruptive" technologies have been instrumental in displacing traditional ways of working. Examples of the "disruptive" technologies are robotics in factory and digital cameras.

According to Susskind (2015), "If you are required to perform a job three (3) times repeatedly, that job function can be disrupted[5]." Robotics process automation (RPA), blockchain, AI, the Internet of Things (IoT) and smart contracts are among the many disruptive technologies which will reshape the existing business models of many businesses.

The most crucial question to ask is - will the jobs of tax professionals be redefined or replaced? Before we answer this question, let us examine some of the key features of a professional, in particular, in the context of a tax professional.

## WHAT ARE THE FEATURES OF A TAX PROFESSION?

By way of definition, "professionals" are human specialists, whilst "the professions" refer to the occupational groups and institutions to which professionals currently belong.

Generally, the four (4) key features[6] of a tax profession are:

**(1) Expert knowledge**

All professions have specialised technical knowledge that lay people do not have. They are called "experts" in a particular field. In the context of the tax profession, the knowledge of the professional is acquired by way of formal education. Formal education entails graduating from university with an accounting or a taxation degree, masters or even a Doctor of Philosophy (PhD). Alternatively or additionally, as the case may be, professional examinations[7] may also be undertaken to qualify aspirants as a member of certain professional bodies.

**(2) Credentials**

Before aspirants are recognised as full-fledged practitioners who can work independently, professionals are generally required to undergo


extensive education and training, are able to demonstrate that they have gained sufficient knowledge and practical experience along the way, and that they have received adequate supervision. Traditionally, this may be called "apprenticeship" or "pupillage" working under a master to learn a particular trade.

**(3) Regulated**

Broadly, tax practitioners can be summarised into two (2) categories: tax agents and tax lawyers.

As for tax agents, they are specifically mentioned in the Income Tax Act 1967. In particular, Section 153(1) of the Income Tax Act 1967 states that *"no person holding himself out as a tax agent, a tax consultant or a tax adviser (or under any other like description) shall be permitted to act in Malaysia on behalf of any person for any of the purposes of this Income Tax Act unless he is a tax agent as defined in this section".*

Contrastingly, lawyers are bound by the Legal Profession Act 1976. For the purposes of a tax appeal to the Special Commissioners of Income Tax (SCIT), Paragraph 14(b) of Schedule 5 of the Income Tax Act 1967 states that *"the appellant may be represented by an advocate or a tax agent or by both an advocate and a tax agent".*

From the above, it is noted that the tax professions are strictly regulated by either the Income Tax Act 1967 or the Legal Profession Act 1976, as the case may be.

**(4) Bound by a common set of values**

Finally, the tax professions are bound by a common set of values or ethics over and above any formal regulations that apply to them. All professionals are expected to display the highest form of professionalism; honesty, trustworthiness and commitment in serving and reassuring others that they are at the heart of their work. Any misconduct or malpractice will be dealt with accordingly via the respective professional institute's Disciplinary Committee.

## TAX PROFESSION – WHAT DO WE DO?

Tax is an unavoidable fact of life, like the famous saying "nothing is certain but death and taxes[8]".

Although "taxes" are certain, how certain are we that the tax profession will not be disrupted by the disruptive technologies? Historically, tax collectors were found to have existed during the Roman Empire (27BC – 476AD) where the famous phrase was coined *"Render*


*therefore unto Caesar the things which are Caesar's…".*

Inevitably, tax affects every individual, company and organisation. However, due to constant changes in the tax law, not every lay person is conversant or updated with the latest tax requirements. A tax professional is therefore sought after by everyone who wants to save money on his tax bill within the legal limit of the law.

Basically, tax professionals have three (3) main roles: compliance, consultancy and tax dispute resolution.

**(i) Compliance**

Generally, tax compliance involves progressing forward through rules driven by the facts and the law[9]. In simple terms, tax compliance involves completing the income tax returns based on the latest tax regulations and filing them on time. It is often referred to as the nitty-gritty of tax because it involves a lot of paperwork.

**(ii) Consultancy**

Next, tax consulting entails reasoning backwards through the rules in search of legal and factual premises that can justify a target tax liability. In simple terms, tax consultancy is the problem-solving side of the tax profession.

**(iii) Tax dispute resolution**

Lastly, tax dispute resolution involves the resolving of any contention by the Inland Revenue Board that a liability to tax may arise or that a relief may not be available. Generally, a tax dispute will arise during a tax audit, an investigation or a tax appeal to the Courts.

How will these tax functions be affected by technological changes?

## WILL THE TAX PROFESSION BE DISRUPTED?

Tim Steel, UK and Ireland tax markets leader at EY in his article[10] "How technology is transforming tax" said that, "*Digital technology* transformation is the single biggest disruptor in the tax profession." The tax profession, just like all the other professions, will have to accept the fact that technology will disrupt their jobs. However, there is no reason to worry about it. The tax profession has embraced change from the days where taxes were computed manually after consolidating pages of ledgers and accounts to online computerised tax preparation software.

In the 1980s, an enormous amount of manpower was needed to prepare a set of tax computations. Later on, the computers came along and nothing was done by hand anymore. So, all those jobs became extinct instantly. Computers destroyed all these jobs but we still need more tax professionals. But now, their job description is redefined. Tax professionals will no longer be required to perform the manual, redundant processes in a tax reporting framework. This will enable them to focus on the more value added kinds of job, while leaving the computers to do the more time consuming roles like collecting data.

As many tasks become computerised, the daily work of tax professionals is changing. In the case of Brazil, the original accounts (and not completed tax returns) are submitted. This has reframed what leading Brazilian tax advisers now do. They no longer help clients prepare tax returns, instead they help clients prepare their original accounts. In doing so, they use software that is similar to that which the tax

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3 *Alvin Toffler, Future Shock (1970) said "There is an unending scare around AI, cognitive, and other advanced systems taking away jobs from human beings. In the case of virtual reality, people are entranced by engaging with virtual objects as if they are real. It's fun, until they realize the negative impacts it can have on their day-to-day lives. And, instead of assuaging such fears, the technology industry continues to create use cases to replace human tasks with robots".*

4 *See Clayton Christensen, The Innovator's Dilemma (1997).*

5 *The Future of the Professions, Richard Susskind & Daniel Susskind, 2015, Pg. 257; Isaac Asimov, Robot Visions (1990), 341 says that "any job that is so simple and repetitive that a robot can do it as well as, if not better than, a person is beneath the dignity of the human brain". "The tasks that are least threatened by computerization, and so are likely to compose the majority of tomorrow's jobs, are the non-mundane tasks".*

6 *See Richard Susskind & Daniel Susskind, The Future of the Professions (2015).*

authority will eventually use to calculate the tax due. The advisers then test what tax will be due for a given set of original accounts, and make appropriate changes to the accounts where possible.[11]

## HUMAN TOUCH IS STILL REQUIRED

Although AI may be disrupting many jobs, certain elements of a human touch are irreplaceable which are further discussed below.

*(i) Accountability and ethics*

These technologies can never replace the accountability element that is required when a job is done. Only a human can provide the accountability and ethics aspect of a job. A machine is unable to determine what is right and wrong in a morally and socially responsible manner. This is also where humans are more valued as compared to machines.

*(ii) Judgements and relationships with clients*

Further as reported in the *Financial Times* on 30 September 2019 on "AI eyes your job", Ben Allgrove, head of global research and development for Baker McKenzie, the law firm, acknowledges that lawyers increasingly rely on machine-learning systems capable of scanning huge numbers of relevant legal cases to assess their chances of a success in a given case. But he insists the best lawyers' judgements and their relationships with clients still trump such software.

In the context of a tax dispute (i.e., a tax audit, a tax investigation or a tax dispute resolution) with the Inland Revenue Board, a natural person (either a tax agent or a tax lawyer, as the case may be) is required to be present physically to handle or conduct the matter.

*(iii) Professional Indemnity Insurance*

Professional indemnity insurance is generally encouraged to be undertaken by the professional(s) to carry out his practice. This is because providing a tax service may have certain implications to the client(s). In the event of a wrong or an inaccurate advice, the professional(s) may be sued for negligence. Any actual loss suffered by the client(s) may be recovered by the client(s) from the professional indemnity insurance of the professional(s). The pertinent question to ask is if an AI tax adviser provides a tax advice and due to certain reasons (e.g., software bug, viruses, etc.) which result in the advice being provided to the client(s) to be inaccurate and the client suffers a loss by relying on that advice, is there recourse by the client(s) against the AI tax adviser? Will this type of AI tax adviser be insured under the professional indemnity insurance?

## HOW SHOULD THE TAX PROFESSIONAL ADAPT?

The automation of routine and repetitive jobs will eventually lead to an increased need for tax professionals who possess information technology (IT) and data analytic skills. For example, the RPA, a machine learning system which can streamline routine and error-prone task may be useless if there is no element of analysis embedded in it. Here is where a human element is needed because the value of the job is, extracting the meaning from all the data. With artificial intelligence doing the number-crunching part of the job, tax professionals will have more time to focus on the more "value creation" aspect of the job such as consulting, data analysis and problem solving. Based on this, tax professionals of the future should have both tax technical and technology skills.

Furthermore, tax professionals cannot always wear the "Tax hat". With their roles evolving, tax professionals should be aware of the business strategy of an organisation and build the tax strategy from there. There will be a need for the tax function to interact more closely with other functions in the organisation. For this, a key component of future tax professionals is communication skills. A tax professional should be able to explain tax related issues to their non-tax counterparts and collectively the team can help an organisation's business strategy.

The education model should also be updated to satisfy the changing needs of skills and qualifications in the workplace. Universities and colleges must look at incorporating technology and data science learning into the tax curriculum. Traditional business schools should also explore new teaching models,


such as online teaching and consider offering new course modules, such as cybersecurity, blockchain, RPA, IoT and data analytics.

## TAX AUTHORITIES ARE USING DATA ANALYTICS, TOO

Tax authorities around the world are employing technology in all their systems. Quoting an example from the *Financial Times* article, *"The Taxman's Digital Dream" published on 30 July 2019, "The future of tax administration is digital, real-time and with no tax returns."* Governments are investing heavily in software and technology to digitalise their tax processes as an effort to combat fraud. With all transaction being real-time, tax authorities are able to monitor each and every movement of the cash flow. Tax authorities are using various digital tools like e-assessment and e-audits to move in line with these technological changes.

In the Malaysian context, the Inland Revenue Board of Malaysia introduced the submission of Tax Computation Working Sheets using the XBRL submission system named as Malaysian Income Tax Reporting System (MITRS). XBRL is the acronym for 'eXtensible Business Reporting Language', which is a language for digital business reporting. This is following the adoption XBRL for the annual and financial filings by the Companies Commission of Malaysia through the introduction of the Malaysian Business Reporting System (MBRS). So, is Malaysia moving in the same direction whereby in the future, instead of taxpayers filing a tax return and estimating their tax liability, the government will dictate what the tax liability is? If that is the case, this has just opened up an opportunity to the tax profession to move upstream instead of currently focusing on the tail end of the downstream tax work.

## CONCLUSION

As a positive response to technological advancement, the tax professionals must reposition themselves and realise that "change" is inevitable[12]. Clearly, the tax world is going through a daunting revolution stage. "If you don't like changes, you will hate extinction[13]." The entire profession and firms of all sizes must adapt innovation or risk being left behind. With the existence of these technologies, the profile and job description of people working in the tax department is expected to change. Tax professionals should utilise the technologies and other tools available to be better at their jobs. This is the time to obtain all the IT and database management skills needed to advance into the future. With changes, a range of new opportunities will emerge. As we look forward to the future, the tax profession will find new and better ways to share their expertise in the society. The tax professionals should accept the existence of technology as an enabler, not a disruptor[14].

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*[7] These may include, amongst others, Chartered Accountants, Certified Chartered Accountants, Certified Public Accountants, Chartered Tax Institute of Malaysia, etc.*

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

*[9] See Page 89 on "From the Vanguard" in the Future of the Professions by Richard Susskind & Daniel Susskind 2015.*

*[10] The Telegraph on 18 August 2017.*

*[11] See Page 88 of The Future of the Professions, Richard Susskind & Daniel Susskind (2015)*

*[12] Heraclitus, a Greek Philosopher has been quoted as saying "Change is the only constant in life".*

*[13] Ross Shafer, Author of "Nobody Moved Your Cheese" 2003*

*[14] World Economic Forum on 15 July 2019 regarding "Is AI going to be jobs killer?" says that "automation will displace 75 million jobs but generate 133 million new ones worldwide by 2022."*

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

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# INDIRECT TAX
## CONSTANT CHANGE IS THE RULE OF THE GAME

Jalbir Singh Riar

Indirect taxes such as sales tax and service tax, goods and services tax (GST), value added tax (VAT), as well as customs duties and excise duties are indispensable sources of revenue for governments. These are primarily consumption-based taxes which provide governments a steady stream of revenue.

It is apparent that indirect taxes have become increasingly more popular compared to direct taxes (e.g., corporate taxes and personal income tax). This may be due to the fact that governments find it relatively easier to collect indirect taxes as the responsibility to charge the same to consumers and subsequently remit the collected indirect taxes to the tax authorities, primarily falls on suppliers and service providers. Such taxes also promote tax transparency in business transactions due to the presence of external factors such as the customers within the supply chain, and the availability of certain indirect tax incentives, like the input tax credit mechanism, offered by governments to registered taxpayers. Even tourists visiting a country, though not paying any direct tax, pay indirect taxes on their holiday spending, which further contribute to the revenue of the government.

Indirect taxes also have no disincentive effect on better earnings, unlike direct taxes where higher direct tax rates will be imposed on higher revenue/income earnings. Being a tax primarily on consumption, indirect tax can also be used by governments as a means to further increase tax revenue by imposing indirect tax on highly in-demand goods or services, or even as a means to discourage certain consumption, such as imposing excise duties on liquor to deter drinking habits. As such, it is no surprise that governments are intently directing their efforts toward widening the scope of indirect tax.

## THE SHIFTING LANDSCAPE OF INDIRECT TAX IN MALAYSIA

In Malaysia, the indirect tax landscape has gone through significant changes, particularly in the past few years, where GST was implemented in April 2015, replacing the previous sales tax and service tax regime, and subsequently GST was abolished to give way to the reintroduction of the sales tax and service tax in September 2018. With the GST regime coming to a halt and the revival of the sales tax and service tax, the overall indirect tax revenue for Malaysia has decreased considerably due to the more limited scope of the current indirect tax regime. The three-month "tax holiday" period from June 2018 to August 2018 had also adversely affected tax collection as no indirect tax (i.e., GST) was imposed on consumption of goods and services in the country. The following diagram summarises the indirect tax revenue collected by the government in previous years.

Given the significant reduction in indirect tax revenue due to the abolition of GST, the Malaysian government has naturally been looking at other means, still

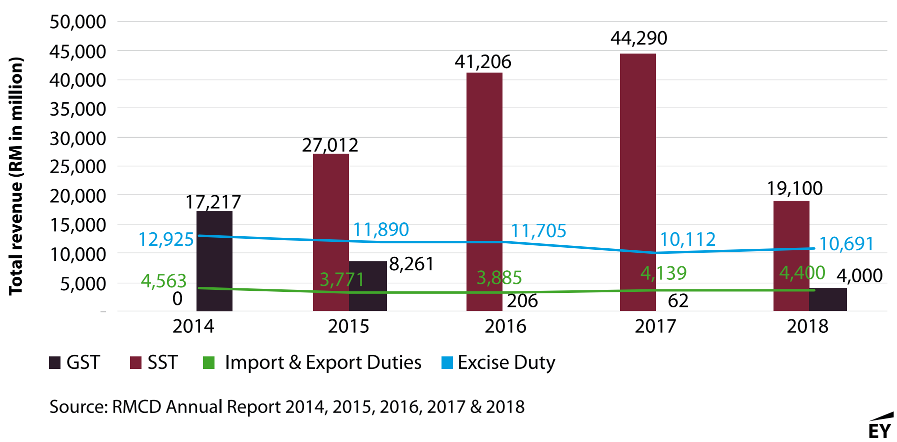


**Diagram 1:** Indirect tax revenue collected by the Royal Malaysian Customs Department (Customs) from 2014 to 2018

primarily indirect tax-based, to compensate the loss in revenue. The government has been refining its indirect tax framework by enacting new laws, issuing or revising new tax guidelines with a view to widening the coverage of indirect tax, reducing tax leakages, strengthening enforcement and encouraging compliance.

In line with the government's aim to boost revenue through tax collection, one aspect that has been extensively considered is the expansion of the scope of service tax. In this connection, with effect from 1 January 2019 the government prescribed four (4) new taxable services – i.e., training and coaching services, brokerage and underwriting services, cleaning services, and amusement park services (the last since removed from the service tax law, effective 1 September 2019). Concurrently, the government introduced the imposition of service tax on imported taxable services i.e. taxable services acquired by businesses in Malaysia from outside Malaysia, as a way of levelling the playing field between local and foreign taxable services. Furthermore, amendments were passed in July 2019 to the Service Tax Act 2018 in respect of the imposition of service tax on digital services provided by foreign service providers to individual and business consumers in Malaysia, with effect from 1 January 2020.

Other measures taken by the government to increase indirect tax revenue collection in Malaysia include the imposition of a 'sugar tax' (excise duty), with effect from 1 July 2019, on importers and manufacturers of certain sweetened beverages, and the implementation of the Departure Levy Act 2019 to impose a departure levy on outbound air travellers. The sugar tax (excise duty) is RM0.40 per litre on two (2) categories of ready-to-drink packaged sweetened beverages. On the other hand, the departure levy is collected by aircraft operators at rates of RM8 (for economy class) or RM50 (for other than economy class) for air travel to ASEAN countries, and RM20 (for economy class) or RM150 (for other than economy class) for air travel to non-ASEAN countries.

Further to the above, Customs has ramped-up its audit activities such as GST closure audits on businesses which were previously registered under the GST Act 2014, with a view to ensuring that all the GST due and payable to Customs during the period the GST was in place, has been duly remitted by taxpayers. This would serve to increase indirect tax collection in the short-term. The GST audits are expected to continue until the end of year 2020 and may be subject to further extension. According to the Customs Annual Reports, the number of Customs audit cases has increased significantly over the years, from 3,912 cases in 2016, to 8,519 cases in 2018. This has resulted in a rise in the number of Bills of Demand (BODs) issued, from 3,040 in 2016 to 6,829 in 2018, which goes hand-in-hand with a proportional increase in the total value of the BODs issued. This goes to show that Customs has been exerting effort, is willing to focus its resources and has been improving its indirect tax audit framework, to step up its audit activities to enhance indirect tax revenue collection.

In view of the infancy of the new sales tax and service tax regime, Customs has also been conducting "friendly" audits to detect potential errors or overly aggressive positions taken by taxpayers. Such exercises provide Customs an avenue to meet with and educate affected businesses on complying with the new legislation. As the new sales tax and service tax regime has been implemented for more than a year now, sales tax and service tax audits are also expected to commence soon. Thus, taxpayers are advised to be prepared and are encouraged to perform self-reviews on their sales tax and service tax treatments, documentation and utilisation of exemption facilities, to ensure compliance.

Currently, Customs is focusing its efforts on the impending implementation of service tax on digital services which, as mentioned

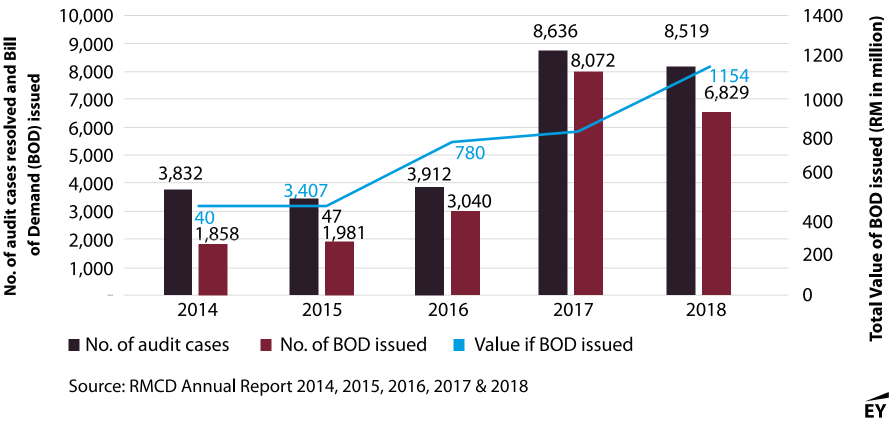


**Diagram 2:** Enforcement activities by Customs from 2014 to 2018 (Indirect Tax Audits)

above, will take effect on 1 January 2020. Customs has conducted several roadshows and seminars to create awareness, released guidelines and other public notices to disseminate relevant information, as well as organised hand-holding programmes to address the concerns and queries of stakeholders. The implementation of service tax on digital services, commonly abbreviated to "SToDS", is Malaysia's response to the challenges brought about by the rise of digitalisation, in terms of the taxation of transactions that have been transformed by the digital era.

## INDIRECT TAX - A CONTROVERSY IN THE DIGITAL ERA?

In today's fast-paced economy, competition in the marketplace is getting increasingly intense. As businesses struggle to keep up with the ever-changing demands of consumers, only the more adaptable and versatile businesses stand a chance to compete to become market leaders. In order to stay versatile, businesses will need to easily adapt and change their business models, as and when required, due to the economic factors of market or industry demands. These have brought about the advent and exponential development of the digital economy.

Nowadays, conducting transactions over the Internet has become the new norm – from purchasing of goods via online platforms to the delivery of services and other products over the cloud. With the increasing use of the Internet and smart devices, consumers are now able to access a wider variety of goods and services, at their fingertips.

With such rapid advancement in digitalisation, government authorities will inevitably encounter tax revenue leakages, if they do not adapt to the changing business landscape. The relationship between the ever-changing digital economy and seemingly stagnant tax laws is already a major controversy. It has proven to be extremely difficult for tax laws to keep up with the pace at which business transactions are evolving; and when cross-border trades are factored into the mix, imposing tax on digital transactions gets even more complicated.

As a counteraction to such rapid development in the digital era, certain countries such as the USA, as well as countries in Asia-Pacific and Europe, are already starting to impose taxes on digital products and services to alleviate tax leakages. For example, many states in the USA have now adopted new tax laws to collect taxes from online vendors, who are liable to collect and pay sales tax if the online vendor's in-state revenues exceed certain thresholds, regardless of whether the said vendor has physical operations in such particular state or not.

With certain countries already making a stand to impose a tax on digital services, businesses will also need to strike a fine balance between seizing business opportunities, as well as understanding and complying with complex tax legislation. Businesses always have to take a

step back to interpret tax legislation appropriately and determine the implications to their business transactions from a tax perspective. There may be instances when businesses will find it difficult to adapt to the new tax legislation and may be left in a state of confusion. However, compliance is crucial as failure to comply may result in adverse financial and reputational implications.

## MALAYSIA'S SERVICE TAX ON DIGITAL SERVICES

Digital tax is necessary to level the playing field between foreign and local businesses within the digital space. Currently, businesses that offer digital services and operate at a multi-country scale enjoy massive profits without being taxed in Malaysia, as they do not have a physical presence in the country. As such, with the implementation of service tax on digital services with effect from 1 January 2020, foreign service providers that provide digital services to Malaysian consumers (whether businesses or individuals) and have an annual revenue that exceeds the registration threshold of RM500,000 (approximately USD125,000), will have to register for SToDS in Malaysia and charge service tax accordingly.

Examples of digital services include the provision of intangible things online, such as software or applications, video games, music, e-books, films, advertising services, database and hosting, search engines and social network, Internet-based telecommunications and even training courses. It is expected that the big players in the digital industry such as Google, Amazon, Facebook, Spotify and Netflix Inc. will be registered for service tax in Malaysia.

With the implementation of service tax on digital services, there is an underlying question, which is, *"Why should foreign service providers be required to register?"*. Generally, the foreign service providers serve consumers by allowing them to download / access digital services, with minimal human intervention on the part of the foreign service providers. Many countries around the world are starting to adopt the "destination-based" principle of indirect taxation, where indirect tax is levied in the jurisdiction in which the consumer is located, as opposed to the jurisdiction of the supplier. As such, what Malaysia is doing is certainly not unusual and is in line with international norms.

Whilst SToDS may be a newly implemented indirect tax in Malaysia, it is not a new type / form of indirect taxation, and Malaysia is in fact not the first country to implement the same. In Asia, Japan was among the first few countries to implement digital tax at the rate of 8% in October 2015 (which was increased to 10% in October 2019). Following in Japan's footsteps were Taiwan and Australia at the rate of 5% (May 2017) and 10% (July 2017) respectively. Digital tax in Australia was first imposed on Business-to-Consumers (B2C) transactions, and subsequently on Business-to-Business (B2B) transactions in July 2019 at the same rate of 10%. Following suit with the anticipated implementation of digital tax in 2020 are Singapore and Thailand at the rate of 7%, Vietnam at the rate of 10%, and Malaysia at the rate of 6% - the lowest in the region.

Another thought that some stakeholders may have is *"Would foreign service providers continue to provide services into Malaysia, if digital tax is implemented?"*. Given that it is now an international norm to impose indirect tax in the jurisdiction where the consumer is located, it is expected that foreign service providers of digital services would accept such indirect tax compliance as the norm for providing services into Malaysia. Another factor that is generally overlooked is that, comparatively, the proposed 6% service tax rate to be imposed on the provision of digital services into Malaysia is considerably lower than the rates applied by most other countries. For example, in Russia and Norway, the tax is up to 20% and 25% respectively.

Furthermore, consumers of these services are generally from the middle-class and above, and hence the added 6% service tax (assuming this is passed on to customers and not absorbed by the foreign service providers) may not deter these consumers from continuing to buy such services.

The other thought-provoking question frequently asked is – *"What measures will the Malaysian tax authorities implement or execute in the event the foreign service providers refuse to register for SToDS?* How will the tax authorities identify the foreign service providers who are non-compliant?". In such instances, tax authorities will need to work together with the relevant government bodies and share information with one another to identify the foreign service providers who are not registered or compliant. Generally, the large multinational foreign service providers who provide digital services to consumers located in Malaysia are expected to register for SToDS as their brand and reputation would be at stake in the event that they are identified as being non-compliant.

Based on the awareness that tax collection could potentially be reduced as a result of large tech giants with no physical presence in Malaysia avoiding tax payments, the government needs to persuade the tech players to do what is morally right. Government enforcement will also play a key role in mitigating tax evasion and ensuring that foreign digital players will register for service tax. There should also be more engagement between Customs authorities and digital players (e.g., through forums with industry players and roadshows) to encourage registration and compliance with the related service tax legislation.

On a positive note, the implementation of SToDS will


help the government to finance infrastructure development and other government expenditure. Given that SToDS is digital in nature, the government may even consider earmarking the increased indirect tax collection for specific technological purposes such as the new high-speed 5G network. Based on the Statistics Department's survey of Malaysia's e-commerce income, SToDS at 6% may potentially yield RM2.4 billion in tax revenue (The Edge Financial Daily, 10 April 2019). With better technological infrastructure in the country, consumers may be more willing to pay for their ongoing subscriptions. In the long run, with faster networks, the number of consumers may even increase, bringing in even more revenue for the foreign service providers and ultimately an increase in tax revenue for the government.

Given the recent efforts of the Malaysian government, it is evident that more attention is being given to develop an effective indirect tax legislation, and it shows that the government recognises the importance of indirect tax. This is consistent with the recognition by governments around the world that have realised the significance of indirect taxes, especially with the advent of the digital era.

The efforts invested in implementing new tax laws and regulations to keep up with the different forms of consumption and consumer behaviour as well as new business models, are just the start in addressing complications and controversies arising from indirect tax – which means the engagement between and involvement of government authorities and corporate players are more important now than ever.

The abolition of GST did not see the decline in indirect taxation as the means for the government to collect revenue. To the contrary, constant change is becoming the rule of the game for now and the foreseeable future in the Malaysian indirect tax landscape.

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# ARE DIRECTORS PERSONALLY LIABLE TO CORPORATE TAX

## NON-COMPLIANCE UNDER THE INCOME TAX ACT1967?

Krishnan Dorairaju

A PERSON HOLDING THE CAPACITY AS DIRECTOR OF A COMPANY HAS NUMEROUS FIDUCIARY RESPONSIBILITIES TO DISCHARGE TOWARDS THE COMPANY AND ALSO ITS STAKEHOLDERS. ONE OF THE KEY RESPONSIBILITIES OF DIRECTORS IS TO ENSURE THAT THE LAWS AND REGULATIONS IMPACTING THE OPERATIONS OF THE COMPANY ARE DULY COMPLIED WITH. FAILURE TO DO SO MAY RESULT IN ADVERSE LEGAL CONSEQUENCES FOR THE COMPANY AND/OR THE DIRECTORS.

As a general principle, directors are not personally responsible or liable for their company's actions. There is a corporate veil protecting the persons running the company (i.e. directors) which prevents them from being held personally liable for the company's liabilities. The company and the company alone is responsible for its actions. Nonetheless, in some instances specific provisions embedded in legislation by Parliament may expressly lift/pierce the corporate veil to hold the directors personally liable for actions of the company. One such legislation that imposes personal liability on directors is the Income Tax Act (ITA) 1967 and the main objective of this is to prevent directors from deliberately abusing the tax system by hiding behind the fictional veil or limited liability status. After all the directors are the mind and soul of a company and hence, making them responsible for non-compliance is only fair from the tax authority's perspective. It also ensures that the Inland Revenue Board of Malaysia (IRBM) is paid in preference to other creditors which would essentially prevent/minimize loss in revenue for the Malaysian government.

Directors, regardless of the role assumed or degree of participation in a company, must be aware and understand the tax responsibilities and liabilities involved when taking the position. Ignorance or passive involvement will not absolve the directors of their tax responsibilities and liabilities.

Several pertinent questions in relation to director's liability will be addressed throughout this article including:

- What type of tax offences can a director be held responsible for under the ITA 1967?
- Which director is liable for corporate tax non-compliance?
- Is a new director liable for past tax liabilities of a company?
- Is a director liable for the company's tax liabilities after resigning?
- Is a director liable upon commencement of winding up process?

The IRBM issued a new Public Ruling (2/2019) on Director's Liability dated 14 March 2019. The stated objective of the Public Ruling is to explain the liabilities of a director in respect of the company's tax payable pursuant to Section 75A of the ITA 1967. Reference is made to the abovementioned Public Ruling in this Article where relevant.

## ARE DIRECTORS LIABLE FOR NON-COMPLIANCE BY THE COMPANY?

The company generally has numerous tax compliance obligations such as filing of tax return, furnishing of tax estimate, monthly tax deduction from employee salary, notify on change of accounting period, account withholding tax on payment to non-resident and reporting of certain information to the IRBM. Failure to do so is an offence and the company can be penalised. However, the question in this instance is whether the directors of the company can be held liable for any non-compliance by the company. The simple answer is, yes. The relevant provision that empowers the IRBM to hold directors liable is Section 75 of the ITA 1967 which reads as follows:

> *"The responsibility for doing **all acts and things** required to be done by or on behalf of a company.....for the purposes of this Act shall lie **jointly and severally**—*

*(a) in the case of a company, with—*

*(i) the manager or other principal officer in Malaysia;*

*(ii)* ***the directors;***
*(iii) the secretary; and*
*(iv)* ***any person (however styled)*** *exercising the functions of any of the persons mentioned in the foregoing subparagraphs……."*

It should be noted that the above provision is wide enough to impose responsibility on any person who exercises the roles similar to that of a director in a company. This means that although not formally occupying the position as a director, a person could still be held liable for the company's tax affairs if he/she exercises significant influence over the company activities or performs responsibilities of a director.

The above provision also clearly stipulates that directors are jointly and severally liable for the tax affairs of the company. In event of non-compliance, the IRBM will generally attempt to impose penalties or compound on the company. However, in some instances where the offences are deemed to be serious, prosecution may be initiated against the company and any of the directors may be cited by the IRBM as defendants in the case. For example, if there are four directors in a company, the IRBM can cite any one of the directors in the prosecution as all four are jointly and severally responsible. Where the IRBM is successful in the suit, the directors may face fines and in exceptional cases, imprisonment

In the context of Section 75, it is crucial to understand who is considered to be a 'director' that may be liable for 'all acts and things' of the company. Pursuant to Section 2 of the ITA 1967, a director includes:

(a) any person occupying the position of director (by whatever name called); *[i.e. Any person given the title or expressly referred to as a director notwithstanding whether the person actually plays any active role in the company.]*
(b) any person in accordance to whose directions/ instructions the directors are accustomed to act; and *[i.e. Exercising the powers of a director to run the business although the person may not be conferred the title of a director.]*
(c) any person who is a manager or otherwise concerned in the management of the company's business, who is remunerated out of the funds of that business and directly or indirectly owns 20% or more of the ordinary share capital of the company. *[i.e. Anyone with shareholding of 20% or more (directly or indirectly), paid by the company and managing/controlling the business notwithstanding that the person may not be officially referred to as a director nor have the typical powers of a director.]*


Based on the above definition, it is interesting to note that there is no exclusion of liability for independent directors. As **independent directors** occupy the position of director, they are equally responsible for the company's tax affairs pursuant to Section 75 even though generally they are not directly involved in the management of the company. As such, in advocating good governance and to safeguard personal liability, independent directors must closely scrutinise the executive directors to ensure that tax responsibilities are discharged as required by the ITA 1967. If in the unlikely event an independent director is hauled up to court by the IRBM, lack of knowledge or involvement in the operations of the company may not be a good defence. The above discussion also applies to nominee directors.

**Service or working directors** with no or nominal shareholding in the company they are employed are also equally exposed as they are "occupying the position of director". The fact that nominal shareholding is held does not reduce or extinguish the tax compliance responsibilities.

Another important point to note about the above definition is that it may possibly include **shadow directors**. For example, a major shareholder who is not appointed or given official role in the company but whose instructions the appointed directors of the company dutifully or loyally follow may be deemed a director for tax purposes pursuant to the definition of director in Section 2. In this instance, the major shareholder may be held liable for 'all acts and things' of the company under Section 75. Similarly, a director of a holding company may also be deemed as director of its subsidiary and be held responsible for the subsidiaries tax affairs if he/she wields influence over the activities of the subsidiaries and its appointed directors.

Please note that the Public Ruling 2/2019 mentioned above does not cover director's liability in relation to Section 75 but rather the focus is on liability under Section 75A of the ITA 1967 which is explained below.

## ARE DIRECTORS LIABLE TO PAY COMPANY'S OUTSTANDING TAXES?

Section 75A of the ITA 1967 stipulates that a director during the period in which the tax or debt is liable to be paid by the company, shall be jointly and severally liable for such tax or debt and it shall be recoverable from the director. In simple terms, it means the director may be personally liable to pay their company's taxes and tax-related debts (e.g. monthly tax deduction). However, this personal liability exposure is limited to directors that:

(a) occupy the **position of director** (by whatever name called), including any person who is **concerned in the management** of the company's business; **and**

(b) own/control directly or indirectly together with one or more associates** or through a medium of companies of not **less than 20%** of ordinary share capital of the company.

***spouse, child, parents, siblings, partner etc.*

The above definition of director is found in Section 75A itself and reference should not be made to the general definition of 'director' in Section 2 of the ITA 1967.

In the case of unpaid taxes, the IRBM will usually initiate civil proceedings against the company and if it fails to settle such taxes, a winding up petition may be submitted. If the IRBM is still unable to recover such taxes, or concurrent to taking action against the company, the IRBM may also pursue the directors to recover the company's tax debt.

Hence, if you are a director with 20% or more shareholding in the company, any tax liability of the company is also considered your personal liability. Prior to 2014, the shareholding criteria to make directors personally liable was 50%. It was reduced to 20% to give the IRBM the ability to prosecute a larger pool of directors. This is particularly useful in cases where the majority shareholder is residing in a foreign country and it would be legally easier and more expeditious for the IRBM to bring action against any local director with minimum 20% shareholding to recover any outstanding taxes.

It is also worth noting that directors are jointly and severally liable for the company's taxes. Thus, where there are a few directors with 20% or more shareholding, the IRBM can initiate proceedings against any one of the directors to recover the tax debt. Generally, if given a choice, the IRBM will go after the director with the highest net worth/assets. In the event the IRBM obtains a court judgement against the director for the company's taxes and the director does not pay up, the IRBM will then seek to initiate bankruptcy proceedings which can be detrimental to the financial position/status of the director.

Prior to initiating action against a director, the IRBM must ascertain and be sure of the shareholding of the director in the company as the threshold is 20% whether directly and/or indirectly. Direct shareholding information can be easily obtained by the IRBM from a company's tax return (Form C) and Companies Commission of Malaysia (SSM) records. To ascertain indirect shareholding can be challenging for the IRBM especially if there is a complex shareholding structure.

Section 75A also does not include any exception for independent or nominee directors. As such, in the event an independent or nominee director holds 20% or more shareholding in a company, they run the risk of being personally liable for the company's taxes. Independent directors usually may not hold more than 20% shareholding but careful

planning is needed to ensure that through associates or indirectly the shareholding threshold is not exceeded.

Another important issue to understand is whether newly appointed directors can be held liable for taxes relating to past years of assessment even though they were not directors of the company at that point of time. The key factor is to look at the time the assessment is raised/served by the IRBM because only at that point the liability to pay the tax or debt arises. In case of tax returns submitted by the due date, the assessment is deemed to have been served on the date of submission meanwhile for tax audit or late submission of tax return it is the date the


assessment (Forms J or JA) is issued by the IRBM. For monthly tax deduction (MTD), directors during the period in which the MTD was due and payable are liable for the debt if not paid.

Hence, directors (with 20% shareholding) may be liable for past taxes if the assessment is only raised by the IRBM after their appointment notwithstanding that there is no culpability on their part.

Vice versa, a director that has resigned from the company or reduced shareholding to below 20% may still be liable for outstanding dues on the basis that he/ she was a director as defined in Section 75A at the time the tax liability originally arose.

**Illustration 01**

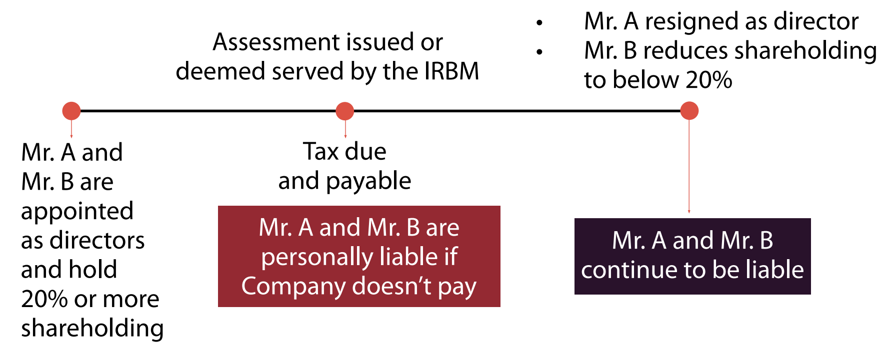



**Illustration 02**

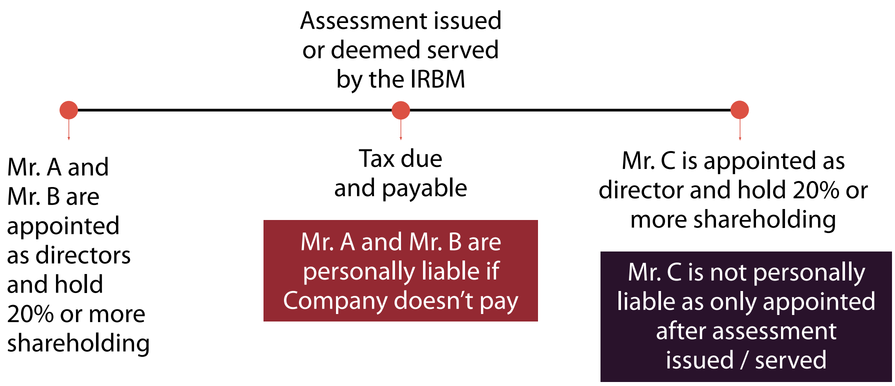
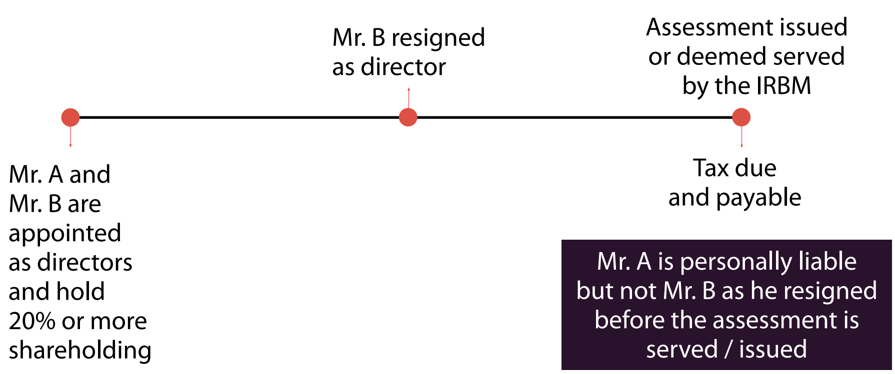
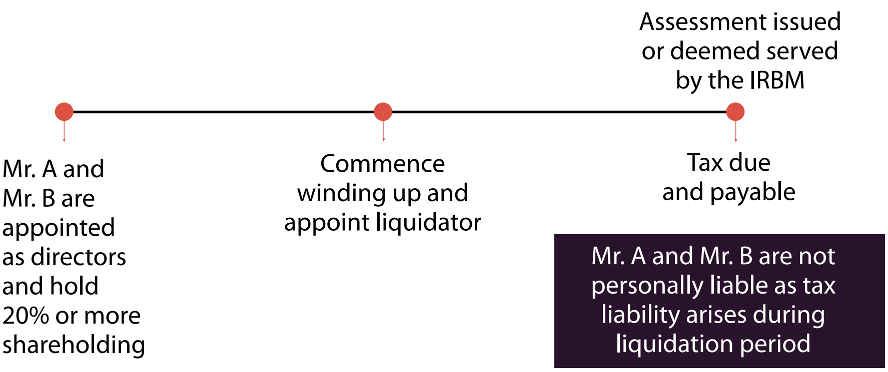



**Illustration 03**




In the case of a company under liquidation (e.g. members voluntary or creditors winding up), are the directors still personally liable? In Paragraph 8(c) and Example 11 of the PR 2/2019, it is clarified that action **cannot** be taken by the IRBM against a company's directors to collect tax or debt which arise **after the company has commenced winding up process**. During winding up process, the tax compliance burden is on the liquidator (e.g. submission of tax return, payment of MTD etc.). In this instance, if there is a tax assessment issued/served during the winding up period, the appointed liquidator is required to pay or realise the assets of the company to settle the tax debt first as the IRBM is a secured creditor. If there are insufficient assets to pay the outstanding taxes, the irrecoverable amount will be a bad debt for the IRBM and the liquidator or directors are not personally liable for the unpaid amounts.

**Illustration 04**




Apart from civil suit against the company and directors, the directors may also be barred by the IRBM from leaving the country if there are any outstanding dues. The IRBM will issue a travel restriction certificate/order pursuant to Section 104 of the ITA 1967 and directors will be duly notified. Full payment must be made in order for the restriction to be cancelled. However, upon application to the IRBM, the ban may be temporarily lifted to allow directors to travel provided certain requirements/conditions are fulfilled. Generally, the IRBM will require the director to pay at least 50% of the outstanding amount to temporarily suspend the travel ban.

## REAL PROPERTY GAINS TAX (RPGT)

Apart from income tax, RPGT is also a common tax issue faced by companies. As such, it is important for directors to also be aware of their liability under the RPGT Act 1976. In this regard, the provisions on director's liability in the RPGT Act mirrors that in the ITA 1967. Therefore, all the issues discussed above are equally applicable to situation concerning disposal and acquisition of real property and real property company shares subject to RPGT and the directors are personally liable for all compliance matters and also RPGT payable.

## CONCLUSION

In a nutshell, directors must always ensure adequate due diligence is undertaken particularly in assuming a directorial position and performing their duties as otherwise, there could be exposure to unforeseen liabilities including tax liabilities. The potential penalties and legal consequences arising from such personal liability can be extremely harsh and lead to adverse impact on the reputation of the director.

Directors should also keep a close eye on tax matters at the board level to make sure that tax matters are addressed on a timely basis in accordance with the tax law by the company's accountants/ financial officers. Open and effective communication between directors and the personnel responsible for company's taxes should always be maintained to reduce the risk of personal liability for the directors.

Tax due diligence on a target company prior to a merger and acquisition exercise is crucial to assess the tax risks that may exist. Past non-compliance of previous owners or managers could come to haunt the new directors and shareholders personally in the future although there is no culpability on their part. The law will not accept lack of knowledge or resources as a reason to absolve the liability.

Further, we are now in the post-SVDP (Special Voluntary Disclosure Programme) era and with higher revenue collection pressure on the IRBM, it is expected that the IRBM will up the ante and adopt stricter and efficient enforcement and collection actions against companies and its directors. One clear evidence of the IRBM's intention to speed up recovery actions moving forward can be noted from the proposal in Finance Bill 2019 to abolish the further 5% late payment penalty under Section 103 of the ITA 1967 in the event of non-payment of outstanding taxes after 60 days from the due date. Currently, a 10% penalty is imposed when payment is not made by the due date and a further 5% is imposed on outstanding amount if it remains unpaid after 60 days from the due date. Hence, the IRBM needs to wait patiently for the 60 days to lapse for the 5% penalty to kick in before taking recovery action to collect the overdue taxes (including penalties). Although the proposed move to abolish the further penalty is a welcomed move from taxpayers' perspective, the catch is that effective 1 January 2020 the IRBM would no longer need to wait for the 60 days to take recovery action. The moment payment is not made by the due date, automatic penalty of 10% will apply and civil proceedings as well as travel restrictions on companies and directors can be initiated immediately by the IRBM.

To this end, directors need to take careful note of the abovementioned issues and be proactive in managing the tax affairs of their companies.

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# THE AUTOMATIC EXCHANGE PROCESS OF COUNTRY -BY-COUNTRY REPORTING

## INCULCATING TAXPAYER AWARENESS

Mohd Khairul Huozaine Mohd Zaki

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

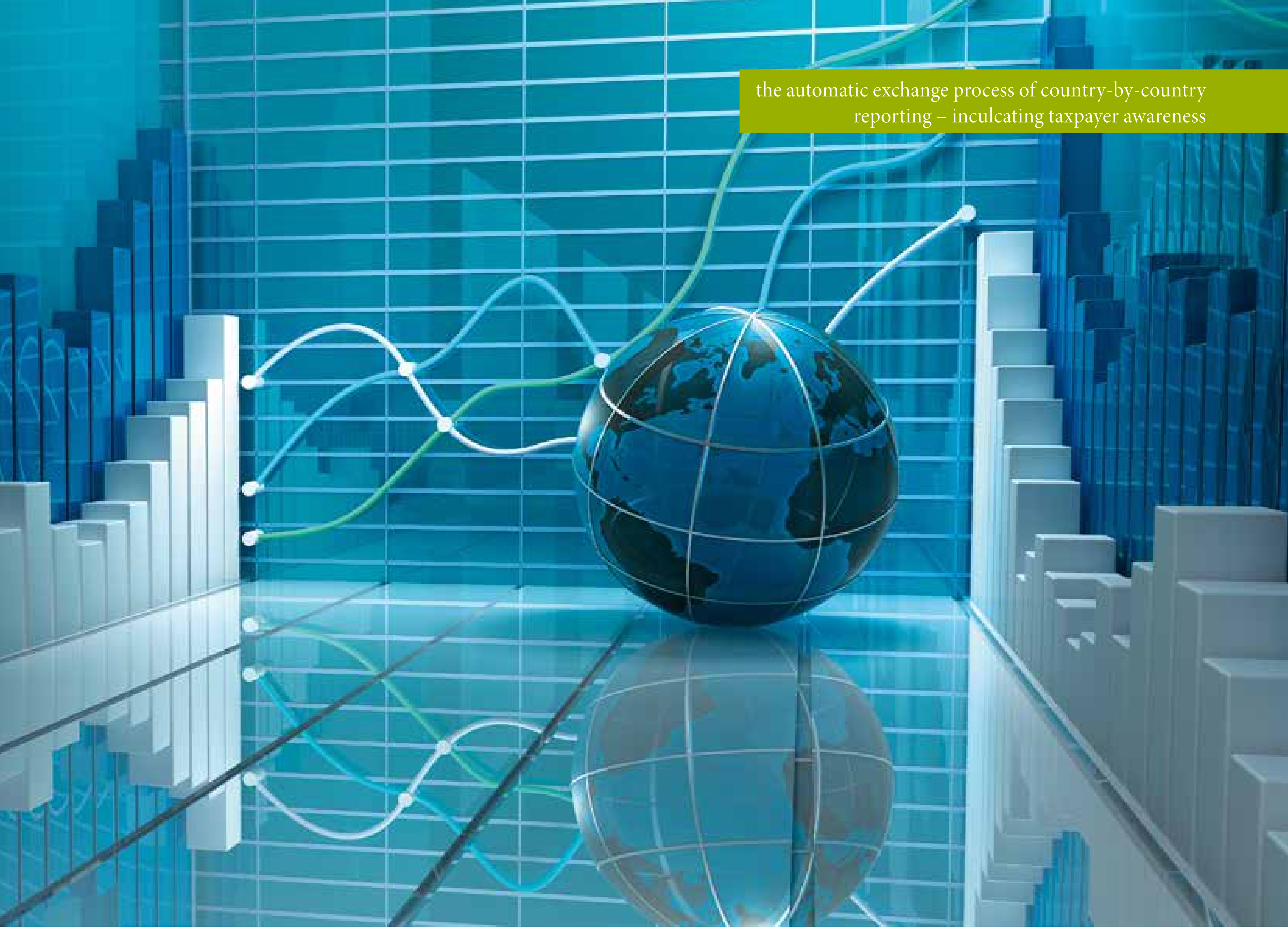
The objectives of the transfer pricing documents are to ensure that taxpayers give appropriate consideration to transfer pricing requirements, providing tax administrations with information in conducting transfer pricing risk assessment and exercising an appropriately thorough audit of transfer pricing practices of entities that are subject to tax in their jurisdiction. However, the documentation and information gathered should be supplemented with additional information as the audit process progresses. A three-tiered approach is introduced in achieving these objectives: master file, local file and Country-by-Country Report (CbCR).

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

Many tax jurisdictions are now faced with low percentage of quality data on corporate taxation. This has been a major limitation in measuring the fiscal and economic effects of tax avoidance, making it difficult for tax authorities to exercise transfer pricing assessments.

In increasing the transparency of MNEs operating in Malaysia, the Inland Revenue Board of Malaysia (IRBM), is adopting the CbCR, a template for MNEs to report annually their financial information; the revenue, profit before tax, income tax paid and accrued, number of employees, stated capital, accumulated earnings and also tangible assets. Apart from that, MNEs are also required to identify each entity within the group and provide an indication of the business activities of each of its entity.

The CbCR is a new reporting standard MNEs have to follow in order to comply with the minimum standard set by the OECD. This article will look into the course of action taken by the IRBM in the aspects of instilling tax



awareness among local MNEs on the obligation to file a CbCR.

The implementation of the CbCR in Malaysia has now entered its fourth year. The earlier stage covered more on the preparation of the domestic legislations, the guidelines, the administrative and operational aspects of the CbCR, just to name a few.

Malaysia has completed the work of the four main components in implementing the CbCR:

- Domestic legislation framework - Income Tax (Country-by-Country Reporting) Rules 2016, Income Tax (Country-by-Country Reporting) (Amendment) Rules 2017 and Labuan Business Activity (Country-by-Country Reporting) Regulations 2017 – gazetted on 26 December 2017
- Competent Authority Agreements - Convention on Mutual Administrative Assistance In Tax Matters (CMAA) & Multilateral Competent Authority Agreement (MCAA), DTA / Tax Information Exchange Agreement (TIEA) + Bilateral MCAA
- Administrative & Information Technology Capacity
- Confidentiality, Data Safeguard & Appropriate Use

The next step that the IRBM has to look into is to provide training in order to support effective implementation of the CbCR by ensuring that the employees are properly prepared to convey the intended information relating to the CbCR, such as the basic elements of the CbC reports and also the filing requirements of a CbCR to the targeted MNEs who are considered to be the Reporting Entity.

Training or engagements between the IRBM and the reporting entities will also be conducted from time to time to ensure that the CbCR process flows smoothly as planned.

## THE EXCHANGE PROCESS OF CbCR BETWEEN TAX JURISDICTIONS

Where the Ultimate Holding Entity or Surrogate Holding Entity of an MNE group files or submits a CbCR to its tax authority in its residence jurisdictions, this report must be exchanged with other tax jurisdictions where constituent entities in that group are either resident for tax purposes or subject to tax with resp ect to a business carried out through a permanent establishment.

Bear in mind that both jurisdictions need to have in place both an international agreement that permits automatic exchange of taxpayers' information and a Competent Authority Agreement (CAA) that underlines the terms for exchange. The elements for the exchange of the CbCR as listed in the CAA consists of the following;

i. A commitment to exchange the CbCR
ii. The timing of exchange
iii. The use of a common schema Extensible Markup Language (XML)
iv. The manner of transmission
v. Notification of non-compliance by a reporting entity
vi. A domestic obligation for the filing of the CbCR
vii. Confidentiality and appropriate use
viii. Notification of non-compliance with the conditions of confidentiality and appropriate use
ix. Consultations between competent authorities whenever an issue has been raised
x. Suspension of exchange of the CbCR
xi. Coming-into-effect
xii. Termination

### 1. NOTIFICATION

Before a filing and exchange of a CbCR by MNEs can be done, a constituent entity must first complete the notification process. A constituent entity of an MNE Group that is resident in Malaysia shall notify the IRBM on the ultimate holding entity or surrogate holding entity that will be doing the reporting of the CbCR. The notification should be submitted to the IRBM before or on the last date of the financial year end. Two (2) samples of notification have been uploaded on the IRBM's website which are the notification of reporting entity and the notification of non-reporting entity.

As of December 2018, the IRBM have received a total of 2,495 notifications of which 64 notifications are from local reporting entities and 2,431 are from non-reporting entities. The numbers can be compared with 2017 as shown below:

| Financial Year | Notification Subrule 6(1) (Reporting Entity) | Notification Subrule 6(2) (Non-Reporting Entity) |
| --- | --- | --- |
| 2017 | 36 | 770 |
| 2018 | 64 | 2,431 |

There is a significant increase in the number of notifications received from our local MNEs which indirectly indicates that the information with regard to the implementation of the CbCR has been well-delivered to them. The IRBM has been updating the websites with the latest information pertaining to the implementation guidance of the CbCR, the data preparation guide, the XML User Manual, the sample letter for notifications, in order to help the MNEs familiarise with the scope of the CbCR.

### 2. SUBMISSION, DATA PACKAGING & ENCRYPTION

Once the notification process has been completed, the reporting entity will then submit the CbCR. The IRBM will sort and aggregate the CbCR in Hasil International Data Exchange Facility (HiDEF) before encrypting it for transmission through a platform, the Common Transmission System (CTS).

The CTS was developed to facilitate the automatic exchange of information, which will also cover the exchange of financial information of the Common Reporting Standard (CRS) and also the exchange of information on tax rulings (ETR).

The first batch of the CbCR required to be filed were of those MNEs having fiscal year beginning on or after 1 January 2016. This applies to jurisdictions that implemented the CbCR in 2016. MNEs were allowed one year from the last day of the fiscal year of the ultimate parent entity to which the CbCR relates to prepare and file the CbCR, which would be by 31st December 2017.

As for Malaysia, the domestic legislations for the CbCR came into effect starting 1 January 2017, in which the IRBM received 34 CbCR from local MNE for financial year ending 31 December 2017. All the CbCR were well received before 31

December 2018. The CbCR were then sent to the CTS for exchange within 18 months of the end of an MNE group financial year, which was before 30 June 2019. However, for subsequent exchanges, the CbCR are to be exchanged within a period of 15 months of the end of the MNE group's financial year.

On the other hand, as of September 2019, Malaysia has received the CbCR from 30 jurisdictions, consisting of CbCR's for financial year ending 2016, 2017 and 2018.

With the inbound and outbound of CbCR's via the CTS, jurisdictions are now having their hands full with CbCR's for their next upcoming obstacle, the risk assessment process. Will the data be in a good and understandable format? Will there be any misinterpretations on the reports received? The next paragraph will discuss on the challenges faced by jurisdictions, the IRBM in particular, and how overcoming it will ensure better quality of data being presented and exchanged by the MNEs and tax authorities respectively.

## CHALLENGES

The first step in implementing the CbCR is having a legal and administrative framework in place that requires certain MNE groups to file the CbCR in accordance with the Action 13 minimum standard and ensures the confidentiality, consistency and appropriate use of the information contained in those reports. The IRBM faces few challenges in implementing the CbCR in Malaysia, right from the drafting of the domestic legislations up to the exchange of CbCR's between jurisdictions.

To assist jurisdictions on this matter, an Implementation Package that contains model legislation that jurisdictions may use, was produced by the OECD. There is no obligation on jurisdictions to use the model legislation, but adopting the basic provisions found therein should ensure that the main elements are covered. Customising it to suit with the current and existing legislation that the IRBM has seemed to be the way to introduce the CbCR in Malaysia.

On the other hand, MNEs are facing difficulties in understanding


these new reporting standards. Newly defined columns in the CbCR templates, new information that might not be stated in their financial reports are few cases in point that requires the MNEs to dig deep into their database in order to complete the report. It is said to be time consuming and indirectly increases the burden of MNEs in preparing the report.

MNEs are also facing difficulties from the information technology perspective. Preparing a CbCR in an XML schema seems to be a huge burden for some MNEs. Many software developers came up with a template for the reporting entity to use but somehow or rather it does not suit the ones that the IRBM is using which follows the XML user guide produced by the OECD.

With different jurisdictions having different ways of interpreting the columns of the CbCR, there is no standardisation in the content of the report, thus making it difficult to engage in a risk assessment exercise. This contributes to the lack of quality data received by all jurisdictions including the IRBM.

## TAX AWARENESS INITIATIVES AND OVERCOMING THE CHALLENGES

The IRBM has created initiatives in promoting voluntary compliance and building relationships between tax authorities and their stakeholders. With respect to stakeholders, core elements of a strategy supporting the implementation of the CbCR should include providing technical guidance on the application of the CbCR requirements and engaging in ongoing discussions and consultations relating to the challenges of compliance, the nature of the information being sought on the CbCR and how the that information can best be used by the tax authorities.

The IRBM has also developed technical guidance to ensure that the CbCR requirements are known and understood, which, in turn, should positively impact the level of compliance by MNE groups. It also serves to demonstrate a commitment on behalf of the tax authority to effectively implement the CbCR. Technical guidance explaining the filing requirements for the CbCR are principally targeting the tax consultants and also MNEs that are required to file a CbCR.

In 2018, the IRBM conducted two dialogue sessions, participated by the local MNEs who were the reporting entity as well as the tax consultants. It provided an opportunity for the IRBM to share its views on the challenges of administering the

CbCR, introducing the platform for the submission of the reports and to address concerns raised by these stakeholders on the interpretations used in the report, and also on the maintenance of confidentiality and the appropriate use of the information being provided. It led to the improvements in the quality and consistency of the information provided to the IRBM through the CbCR.

The IRBM is looking to have more dialogue sessions in the coming years since there is a possibility additional changes are to be made especially on the interpretation issues with respect to the content of the CbCR. Changes to the content would result in the changes to the CbCR tables, thus resulting in the alterations of the XML schema.

In addition, the IRBM also conducted a few one-to-one sessions with MNEs that are having difficulties in understanding how to prepare the CbCR in a XML format. Sessions conducted between IT personnel of both the IRBM and the MNEs serve as a platform to explain the steps and the requirements that are needed to complete the submission of a CbCR using an XML schema.

Apart from the initiatives stated above, the IRBM is also looking at the compliance perspective where taxpayers that fail to adhere to their CbCR obligations will be exposed to administrative penalties as stated in the Malaysia Income Tax Act 1967. The IRBM has introduced new sections in the form of Section 112A; Failure to Furnish Country-by-Country Report, Section 113A; Incorrect Returns, Information Returns or Reports, and also Section 119B; Failure to Comply with Rules Made Under Paragraph 154(1)(c) on Mutual Administrative Assistance, as well as The Labuan Business Activity (Country-by-Country

Reporting) Regulations 2017. With the introduction of the new sections, it is also hoped that MNEs prepare the CbCR in the most appropriate manner and with high accuracy.

## CONCLUSION

A better understanding of how the BEPS recommendations work and is being implemented could reduce confusion among MNEs as well as between tax jurisdictions. Information with regards to the implementation, the concept and methods of the CbCR must be at its highest accuracy before an exchange of the CbCR can take place. Proposed improvements to data and analysis as shared by jurisdictions during the CbCR Group meetings might be worth looking at as it will help support ongoing evaluation of the quantitative impact of BEPS, as well as evaluating the impact of the countermeasures developed under the BEPS Project.

The Organisation for Economic Co-operation and Development (OECD) is taking the necessary measures to ensure a uniformed method of implementation is practiced by jurisdictions. In addition, the IRBM is looking to have more dialogue sessions and engagements between Tax Administrations and MNEs in the future, making sure that everybody is well aware of the current development of the CbCR, particularly in Malaysia. These measures are hoped to increase the level of disclosure by Malaysia's multinationals and change the way international dealings are taxed.

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

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# InternationalNews

The column only covers selected developments from countries identified by the CTIM and relates to the period 16 August 2019 to 15 November 2019.

## CHINA (PEOPLE'S REP.)

### Enterprise income tax incentive in Hengqin New Area extended to tourism industry

The Ministry of Finance (MoF) and State Taxation Administration (SAT) jointly issued Circular [2019] 63 (the circular) which extends the tax incentives granted to Hengqin New Area to the tourism industry. The circular applies from 1 January 2019 to 31 December 2020. Its contents are as follows:

(i) the tourism industry is added to the Catalogue of Industries for Enterprise Income Tax Incentives in Hengqin New Area of 2019, benefiting from the reduced enterprise income tax rate of 15% (the enterprise income tax statutory rate being 25%); and (ii) enterprise income tax incentives for other industries that are regarded as encouraged and taxed at a reduced rate of 15% in Hengqin New Area will continue to be implemented in accordance with Circular [2014] No. 26 which stipulates the preferential tax policies in Shenzhen Qianhai, Shenzhen-Hong Kong Modern Service Cooperation Zone, Fujian Pingtan Comprehensive Experimental Area and Hengqin New Area.

### Enterprises engaged in export of retail products through Cross-Border E-Commerce Pilot Zone taxed on deemed profit basis

The SAT has published a notice concerning the enterprise income tax treatment of enterprises engaged in export of retail products (SAT Public Notice [2019] No. 36). According to the notice, from 1 January 2020, ecommerce enterprises engaged in cross-border business located within the Cross-Border E-Commerce Pilot Zone will be taxed on a deemed profit basis provided that the enterprises fulfil the following requirements:

(i) the enterprise is registered in the Pilot Zone and with the Cross-Border E-Commerce Online Service Platform in respect of the date of export, name, quantity unit, quantity, unit price and amount of export; (ii) exported goods are declared through the local Customs Service; and (iii) exported goods are exempt from value added tax and consumption tax even if the enterprises have not yet received the official receipt of purchases.

The deemed taxable profit rate is set at 4% of revenue. An enterprise eligible for tax incentives granted to small and medium-sized enterprises may continue to enjoy those incentives. Similarly, those that are eligible for tax exemption as prescribed under article 26 of the Enterprise Income Tax Law (interest from treasury bonds, dividends, income of non-profit organisation) will be exempt from tax on such income.

## HONG KONG

### Package of measures to support enterprises and residents announced and passed

On 15 August 2019, the Financial Secretary of Hong Kong announced a package of measures to counter the challenging external and local economic environments. The proposed measures aim to support enterprises, in particular small and medium-sized enterprises (SMEs), in safeguarding jobs and relieving people's financial burdens.

The tax-related measures are summarised below:

(i) Twenty-seven (27) groups of government fees and charges will be waived for a period of 12 months, which will benefit a wide range of sectors, including maritime, logistics, retail, catering, tourism, construction, agriculture and fisheries. (ii) Further to the Budget for 2019/2020, a one-off reduction of salaries tax, tax under personal assessment and profits tax will be increased from 75% to 100% for the year of assessment 2018/2019, subject to a maximum of HKD 20,000 per case. (iii) An additional 1-month allowance is provided to social security recipients based on the standard rates of comprehensive social security assistance (CSSA) payments, old age allowances, old age living allowances and disability allowances, respectively.

Subsequently, on 6 November 2019, the Legislative Council passed the Inland Revenue (Amendment) (Tax Concessions) Bill 2019 that gave effect to the concessionary tax measures proposed above.

## INDIA

### Sabka Vishwas (Legacy Dispute Resolution) Scheme – entry into force date announced

On 21 August 2019, the Central Board of Indirect Taxes and Customs (CBIC) announced that the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (the Scheme) will enter into force on 1 September 2019 and will remain in force until 31 December 2019. The Scheme was introduced in the Union Budget 2019/20 to provide relief in dispute resolution and amnesty to taxpayers for closing their pending tax disputes relating to legacy Service Tax and Central Excise cases that are now subsumed under Goods and Services Tax (GST). The Scheme provides substantial relief in the tax dues for all categories of cases as well as full waiver of interest, fines and penalties, and complete amnesty from prosecution.

The salient features of the relief under the Scheme are set out below:

(i) for all cases pending in adjudication or appeal in any forum, the Scheme offers a relief of 70% from the duty demand if it is INR 5 million or less, and 50% if it is more than INR5 million; (ii) for cases under investigation and audit where the duty involved is quantified and communicated to the party or admitted by him in a statement on or before 30 June 2019, the Scheme offers a relief of 70% from the duty demand if it is INR5 million or less, and 50% if it is more than INR5 million; (iii) for cases of confirmed duty demand, where there is no appeal pending, the relief offered is 60% of the confirmed duty amount if it is INR5 million or less, and 40% if it is more than INR5 million; and (iv) for cases of voluntary disclosure, the person availing of the Scheme will be required to pay the full amount of disclosed duty.

Further details and conditions to avail of the Scheme are contained in Sections 120 to 125 of Finance (No.2) Act, 2019. The CBIC also notified the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 (the Rules) vide Notification No. 5/2019 Central Excise-NT dated 21 August 2019, which provides the procedural aspects of the Scheme.

### Finance Minister's economic booster announcement – highlights

On 23 August 2019, the Finance Minister announced several measures in order to encourage some sectors to boost the Indian economy.

The tax-related key highlights of the announcement are set out below.

*Surcharge on foreign portfolio investors (FPIs)*

- The enhanced surcharge levied, in accordance with the Finance (No. 2) Act 2019, on long- and short-term capital gains arising from the transfer of equity shares and/or units by FPIs has been withdrawn. The pre-budget position is restored. However, the above withdrawal has not been extended to other securities such as debt securities, etc.

*Relief for start-ups*

- To mitigate genuine difficulties faced by start-ups and their investors, angel tax paid by the start-ups on the funding received from investors in excess of its fair market value, will be withdrawn for start-ups registered with the Department for Promotion of Industry and Internal Trade.

*Measures to accelerate the automotive market*

- An additional 15% depreciation allowance is claimable on vehicles acquired from 23 August 2019 until March 2020, increasing the total depreciation claimable to 30%.

*Faceless assessment*

- On or after 1 October 2019, all tax notices, summons, orders, etc. will be issued from a centralised system

with a computer-generated unique document identification number.

- All old tax notices will be decided by 1 October 2019 or will be uploaded again through the centralised system.
- From 1 October 2019, all tax notices will be disposed of within three months from the date of reply.

*GST refunds*

- All pending GST refunds due to micro, small and medium-sized enterprises (MSMEs) will be paid within 30 days.
- In the future, GST refunds on new applications will be paid within 60 days from the date of application.

## New direct tax law – recommendations made

In November 2017, the government appointed a task force to review and redraft the Income-tax Act, 1961 (the Act), taking into account the direct tax systems prevalent in various countries, international best practices and the economic needs of the country.

The task force recently submitted a report to the Finance Minister recommending certain changes to be made to the Act.

The government is expected to release the report of the eight-member panel in the public domain for consultations after examining all the recommendations, with the same being likely to be presented to Parliament as part of the Union Budget 2020/21 in February 2020. Although the report and the recommendations therein have not been made public yet, some of the major announcements likely to be made under the new law for income tax are as follows:

*Relief for individual taxpayers*

Currently, the personal income tax structure includes three categories: people below the age of 60; people above the age of 60 but below 80; and people aged 80 years and above.

The first category contains four brackets: zero tax on income up to INR250,000; 5% tax on income between INR250,000 and INR500,000; 20% on income between INR500,000 and INR1 million; and 30% on income above INR1 million.

The second category also contains four tax brackets but with the first bracket of zero tax on income up to INR300,000. The third category contains three brackets with the first bracket of zero tax on income up to INR500,000.


The task force has suggested a modification on the current brackets and an introduction of a new rate between 5% and 20%.

*Common corporate tax rate for foreign companies and domestic companies*

Currently, domestic companies with turnover of up to INR4 billion pay income tax at a lower rate of 25%, while larger companies, which account for the lion's share of the government's tax revenue, pay income tax at a rate of 30%. In addition, unlike domestic firms, foreign companies pay a higher corporate tax rate of 40%, but do not have to pay dividend distribution tax that is applicable to domestic companies.

The task force has recommended a common corporate tax rate of 25% for both domestic and foreign companies.

*Abolishment of dividend distribution tax*

Currently, dividend distribution tax is imposed on domestic companies at a gross rate of 15% plus applicable surcharge and cess. In addition, in the case of dividends exceeding INR1 million paid by a domestic company, shareholders receiving the dividends are required to pay tax at a rate of 10% on those dividends. This results in taxation of the same income at various stages.

The task force has suggested that dividend distribution tax be abolished, and that dividends be taxed in the hands of the shareholders.

*Repatriation tax*

In the case of foreign companies, a "branch profits tax" is recommended to be levied on the amount repatriated to their foreign headquarters. (As a result, the rates of taxation of domestic and foreign companies may still be different to some extent.)


***Change in tax assessment procedure***

The task force has recommended that the concept of "assessing officer" be replaced by "assessment unit"; also, scrutiny cases are expected to be allotted centrally by the IT system on a random basis ("faceless assessment scheme").The task force also recommended that transfer pricing assessments be carried out by a separate functional unit which will be set up for a period of four years.

***Litigation management unit***

The task force has recommended a separate litigation management unit to be set up to manage the entire litigation process, i.e. from deciding which cases the appeals ought to be filed to devising the strategy for defending a case.

Further, the officer raising the tax demand will be unable to file for litigation in the same case.

***Highlights of other recommendations***

(i) Introduction of the concept of mediation and settlement of litigation through negotiation. (ii) Individuals earning up to INR5.5 million may obtain major tax relief. (iii) Various incentives for start-ups are recommended. (iv) The proposed direct tax code will have fewer sections than the current ITA.

## Tax deduction at source on cash withdrawals – clarification issued

On 30 August 2019, the Central Board of Direct Taxes (CBDT) issued a press release to clarify the applicability of tax deduction at source (TDS) on cash withdrawals.

The Finance (No. 2) Act, 2019 has inserted a new Section 194N in the Income-tax Act, 1961 (the Act) to provide for the levy of TDS at 2% on cash payments in excess of INR 10 million in aggregate made during the year by a banking company or cooperative bank or post office to any recipient holding one or more accounts with the above-mentioned organizations. This section came into effect from 1 September 2019.

In this regard, it is clarified that any cash withdrawal prior to 1 September 2019 will not be subject to the TDS under Section 194N of the Act. However, as the threshold of INR10 million is with respect to the previous year, the calculation of the amount of cash withdrawal for triggering TDS under Section 194N of the Act shall be counted from 1 April 2019 onwards.

As such, if a person has already withdrawn INR10 million or more in cash up to 31 August 2019 from one or more accounts held with a banking company or a cooperative bank or a post office, the 2% TDS shall apply on all subsequent cash withdrawals.

## Taxation Laws (Amendment) Ordinance 2019 – announced

During a press conference on 20 September 2019, the Finance Minister announced that the Taxation Laws (Amendment) Ordinance 2019 (the ordinance) has been brought in to make certain amendments in the Income-tax Act, 1961 (the Act) and the Finance (No. 2) Act 2019 (the Finance Act).

The main amendments made are set out below.

- With effect from fiscal year (FY) 2019-20, domestic companies are provided with an option to pay income tax at 22% provided that they will not avail any exemption/incentive. The effective tax rate is 25.17% inclusive of surcharge and cess. Further, such companies are not required to pay the minimum alternate tax (MAT).
- With effect from FY 2019-20, a new domestic manufacturing company which is incorporated on or after 1 October 2019 is provided with an option to pay income tax at 15%. This benefit is available to companies that do not avail any exemption/incentive and commence their production on or before 31 March 2023. The effective tax rate is 17.01% inclusive of the surcharge and cess. Further, such companies are not required to pay MAT.
- A company which does not opt for the concessional tax regime and avails the tax exemption/incentive will continue to pay tax at the pre-amended rate. However, they can opt for the concessional tax regime after

the expiry of their tax holiday/ exemption period. After the exercise of the option they will be liable to pay tax at 22% and the option once exercised cannot be subsequently withdrawn. Further, the rate of MAT has been reduced from the existing 18.5% to 15%.

- The enhanced surcharge introduced by the Finance Act will not apply on capital gains arising on the sale of equity share in a company or a unit of an equity-oriented fund or a unit of a business trust liable for securities transaction tax, in the hands of an individual, Hindu Undivided Family (HUF), Association of Persons (AOP), Body of Individuals (BOI) and Artificial Juridical Person (AJP). The enhanced surcharge will also not apply to capital gains arising on the sale of any security including derivatives, in the hands of FPIs.
- Listed companies which have already made a public announcement of buy-back before 5 July 2019 will not be subject to the tax on the buy-back of shares.

### TDS exemption on cash withdrawal by authorised dealer & FFMC – notification issued

On 15 October 2019, the CBDT issued Notification No. 80/2019 (the Notification) which exempts cash withdrawal from TDS under section 194N of the Act for a withdrawal made by the following “qualified person”:

(i) authorised dealer (i.e. a person that is an authorised dealer under the Foreign Exchange Management Act, 1999) and its franchise agent and sub-agent; and (ii) full-fledged money changer (FFMC) licensed by the Reserve Bank of India and its franchise agent.

To qualify for exemption, the following requirements must be met:

- The withdrawal will be made only for the purpose of:
- (i) purchase of foreign currency from foreign tourists or non-residents visiting India or from resident Indians on their return to India, in cash as per the directions or guidelines issued by the Reserve Bank of India; or (ii) payment of inward remittances to the recipient beneficiaries in India in cash under the Money Transfer Service Scheme (MTSS) of the Reserve Bank of India.
- A certificate must be furnished by the qualified person to the bank mentioning that the withdrawal is only for the purposes specified above and the directions or guidelines issued by the Reserve Bank of India have been followed.

The Notification shall be deemed to have come into force with effect from 1 September 2019 onwards.

### Reduced corporate tax rate – carry forward of losses and MAT credits

On 2 October 2019, the CBDT issued Circular No. 29/2019 (the Circular) which clarifies the option available under Section 115BAA of the Act and the secondary legislation, The Taxation Laws (Amendment) Ordinance, 2019 (the Ordinance) .

The Circular clarifies that:

- a domestic company opting for the benefit of a lower tax rate under Section 115BAA of the Act is not allowed to claim any losses carried forward on account of additional depreciation. This applies for the Assessment Year during which the option was exercised and for any subsequent Assessment Years; and
- no timeline exists within which the option under Section 115BAA must be exercised. Hence, a domestic company, having carried forward losses on account of additional depreciation, may exercise the option after setting off the losses thereby accumulated.

The Circular also clarifies the situation regarding the carried forward MAT credit under Section 115JB of the Act as follows:

- the provisions of Section 115JB shall not be applicable to the domestic company that exercises the option under Section 115BAA. Hence, the MAT credit of the domestic company that exercised the option under Section 115BAA shall not be available subsequent to the exercise of such option; and
- no timeline exists within which the

option under Section 115BAA must be exercised. Hence, a domestic company with MAT credits may exercise the option after utilizing the said credit against the regular tax payable under the taxation regime existing prior to promulgation of the Ordinance.

## INDONESIA

### Reduction of tax on bond interest payments – regulation issued

On 12 August 2019, Government Regulation (PP) No. 55/2019 (the regulation), which reduces the withholding tax rate on bond interest payments, was issued by the government. The regulation is the second amendment to PP No. 16/2009 concerning withholding tax on interest from bonds. The regulation entered into force on 12 August 2019.

The salient features of the regulation are set out below:

(i) Bonds are defined as debt securities, state debentures and regional bonds with a maturity of more than 12 months. Bond interest is received or obtained in the form of interest/ discount by the holder of the bond. (ii) The withholding tax rate on interest on bonds / difference between the selling price or nominal value and the acquisition price (in the case of discounts on coupon bearing bonds and zero interest bonds) received or obtained by qualified taxpayers as provided under the regulation is reduced to 5% up to and including 2020 and 10% from 2021 onwards.

### Tax incentives for upstream oil and gas sector – regulation issued

On 27 August 2019, the government issued Regulation of the MoF (PMK) No. 122/PMK.03/2019 (the regulation). The salient features of the regulation are set out below:

(i) VAT or VAT and sales tax on luxury goods will not be collected for the acquisition of certain taxable goods or services that are used or utilised in the context of petroleum operations. (ii) A reduction of 100% will be introduced for outstanding land and building tax related to oil and gas projects as stated in the tax notification letter. (iii) Incentives are granted to contractors in certain work areas that do not achieve a certain internal rate of return. (iv) The provision of taxable services in the upstream oil and gas sectors will be exempt from VAT if certain criteria are met. (v) The expenditure of indirect head office cost allocations from contractors that fulfil certain conditions is exempt from VAT.


The regulation will be in force 30 days from its promulgation on 27 August 2019.

### Tax reform plan – announced

On 3 September 2019, the Cabinet Secretariat announced the proposed tax reform plan of the government which includes changes to corporate income tax, individual income tax, VAT and other general tax provisions. The draft bill of the tax reform plan is currently being prepared by the government.

The main points of the plan are as follows:

- corporate income tax will be reduced from 25% to 20%;
- a further 3% reduction of corporate tax is available for publicly listed companies (i.e. the reduced corporate income tax rate will be 17% when the standard corporate income tax rate is reduced to 20%);
- the introduction of income tax exemption for dividends received from both domestic and foreign companies if the recipient of the dividends holds at least 25% of the share capital of such company. Further, exemptions are available for dividends that are re-invested in Indonesia;
- the tax basis for individuals will be changed from a worldwide basis to a territorial basis. An individual will be deemed to be a tax resident of Indonesia if the individual is present in Indonesia for 183 days or more in a 12-month period;
- tax compliance penalties such as those for underpaid tax and the late issuance of a tax invoice will be reduced;
- rights to claim the input tax credit will be eased;
- tax incentives facilities (such as tax holidays, super deduction, etc.) will be harmonised under a single section of law;
- the introduction of requirements for international digital companies (such as Amazon, Google, and others) to collect, deposit and report 10% VAT with regard to supplies made in Indonesia; and
- the definition of a permanent establishment will be amended and digital companies may be deemed to have a permanent establishment in Indonesia without any physical presence.

### Implementing regulation concerning super deduction for certain expenses – issued

On 9 September 2019, the MoF issued Regulation No. 128/ PMK.010/2019 (the Regulation) on the 200% super deduction (the deduction) for apprenticeship, internship and teaching activities conducted by a taxpayer's employees. The Regulation came into effect on 9 September 2019.

The salient features of the Regulation are set out below:

- In order to qualify for the deduction, the taxpayer must satisfy the following requirements:
- (i) the taxpayer's employees have conducted apprenticeship, internship and teaching activities in certain competency sectors as provided under the Regulation; (ii) the taxpayer has entered into a Perjanjian Kerja Sama (cooperation agreement) with the relevant institution; (iii) the taxpayer has not incurred a tax loss in the tax year in which the said deduction arises; and (iv) the taxpayer has submitted Surat Keterangan Fiskal (Fiscal Statements) accordingly for the purpose of the deduction.
- The deduction applies to the following costs:
- (i) provision of premises and supporting facilities such as electricity, water, fuel, maintenance fee, and any other related expenses for the purpose of carrying on the activities; (ii) provision of instructors or educators; (iii) provision of goods or materials for the purpose of the activities; (iv) fees or cash incentives paid to the participants; and (v) certificates granted to the participants.
- The deduction is not available for any incurred expenses that are attributable to participants with special relationships with the taxpayer.
- The 100% additional deduction element will be capped if the additional deduction results in a loss.
- The deduction is not available if certain other incentives have already been granted to the taxpayer.
- The taxpayer is required to submit a notification, the cooperation agreement and a fiscal statement before commencing a training programme.
- An annual report must be submitted by the taxpayer together with its corporate income tax return for the purpose of claiming the deduction.
- The Director General of Tax may deny the deduction if:
  (i) no cooperation agreement was entered into by the taxpayer; (ii) the activities performed are not in line with the cooperation agreement; (iii) the notification is not submitted accordingly; and (iv) the annual report is not submitted timely, or inadequate information is provided.

## SINGAPORE

### Budget for 2019 – public consultation on draft Income Tax (Amendment) Bill 2019: responses

In a press release of 15 August 2019, the MoF issued a summary of responses to the public consultation on the draft Income Tax (Amendment) Bill 2019 (the draft Bill).

The MoF invited the public to provide feedback on the draft Bill from 19 June to 10 July 2019. The draft Bill proposes legislative amendments to effect tax changes announced in Budget 2019 and changes arising from the periodic review of the income tax system, including the following key changes:

(i) the tax incentive schemes for funds managed by Singapore-based fund managers will be extended and refined;

(ii) a personal income tax rebate of 50% of income tax payable capped at SGD200 will be granted to all tax resident individuals for the year of assessment (YA) 2019; (iii) the not ordinarily resident (NOR) scheme will lapse after YA 2020, which means that the last NOR status will be granted in YA 2020 and will expire in YA 2024; and (iv) a prescribed deemed expense ratio, set at 25% of gross commission income, for tax resident individuals who are self-employed commission agents (i.e. general commission agents, insurance agents, real estate agents and remisiers) earning gross annual commission income of up to SGD 50,000 in respect of which there are deductible outgoings or expenses, will be introduced.

The key feedback received pertained to the following tax changes:

(i) increasing the prescribed deemed expense ratio, and increasing or removing the revenue threshold, for self- employed commission agents; (ii) clarifying the revocation of tax incentive awards when the conditions of a tax incentive are not met by an incentive recipient; (iii) clarifying that the amendment of the definition of qualifying debt securities under Section 13(16) of the Income Tax Act will allow alternative set of qualifying conditions for insurance-linked securities; and (iv) clarifying the amendment relating to the lapsing of the Approved Unit Trust scheme.

The MoF received 46 suggestions, 28 of which were accepted and led to revisions being made to the draft Bill. The proposed legislative changes would be incorporated into the Income Tax (Amendment) Bill 2019 to be presented to Parliament in the last quarter of 2019.

### Public consultation on draft GST (Amendment) Bill 2019 – responses

In a press release of 30 September 2019, the MoF issued a summary of responses to the public consultation on the draft GST (Amendment) Bill 2019 (draft Bill). The MoF had invited the public to provide feedback on the draft Bill from 5 to 26 July 2019.

The key feedback received pertained to the following changes:

(i) refining the design parameters for GST on imported services; (ii) updating the GST treatment of digital payment tokens; (iii) introducing definitions of "accountant" and "advocate and solicitor" for purposes of appeals to the GST Board of Review; and (iv) introducing an offence for misrepresentation of information.

The MoF received 31 suggestions, 13 of which were accepted and led to revisions being made to the draft Bill where applicable. The proposed legislative changes will be incorporated into the GST (Amendment) Bill 2019 to be presented to the Parliament during the last quarter of 2019.

## THAILAND

### VAT on foreign e-commerce operators to be introduced in 2020

It has been reported that the previously drafted bill on VAT on foreign e-commerce operators will be introduced in 2020. The tax bill is expected to be presented to the parliament for approval later this year. Further details will be reported as they occur.

### New relocation package incentive – proposed

According to a press release of 9 September 2019 issued by the Board of Investment (BoI), the Cabinet recently approved a proposed relocation package incentive referred to as "Thailand Plus" with a view to attracting more foreign investment into the country, particularly expediting investments from companies seeking to relocate as a result of the ongoing trade war.

The salient features of the proposed Thailand Plus package are set out below.

- Companies with investment projects amounting to at least THB 1 billion in the identified activities will be entitled to a reduction of 50% of the corporate tax rate for a period of five years provided that the application is submitted to BoI by the end of year 2020 and the actual investment is made by December 2021.
- Employers will be entitled to a special deduction for training expenses relating to advanced technology endorsed by the Ministry of Higher Education, Science, Research and Innovation. Expenses incurred in hiring new highly skilled manpower in the fields of science and technology will also be eligible for special deduction. Moreover, the BoI will also upgrade its incentives scheme with a view to encouraging the industry to be actively engaged in science, technology, engineering and mathematics (STEM) training.
- Investments in automation systems will be eligible for double deduction.
- An investment steering committee will be set up to coordinate the consideration and facilitation of the investment projects, especially those involving large investments.

In addition, the government aims to reduce constraints faced by foreign investors, especially in the targeted industries. Further facilitation measures will be taken such as the extension of "smart visa" to enhance the pool of foreign talents in Thailand.

### Repeal of existing ROH, IHQ and ITC tax benefits – decrees issued

On 1 November 2019, the Thai Official Gazette published Royal Decrees No. 685, No. 686 and No. 687 (the Royal Decrees) providing details of the repeal of tax benefits granted under the previous BoI incentive programmes: Regional Operating Headquarters (ROH), International Headquarters (IHQ) and International Trading Centres (ITC). The Royal Decrees entered into force on 2 November 2019.

The salient features of the Royal

Decrees are set out below:

- The preferential corporate income tax rate and exemptions provided under ROH 1 (original scheme) for income derived from borrowing and onlending activities will be applicable only until the accounting period commencing on or after 1 January 2020 but not later than 31 December 2020.
- The exemptions for service income and the preferential corporate income tax rate for income derived from borrowing and onlending activities provided for under ROH 2 (new scheme) was terminated with effect from 31 May 2019.
- The preferential corporate income tax rate and exemptions provided for under IHQ for royalty income was terminated with effect from 31 May 2019.
- The specific business tax exemption provided for under IHQ on income derived from treasury management services was terminated on 31 May 2019.
- The tax rate for certain income arising from domestic R&D operations under IHQ will be reduced. Further, certain income arising from domestic R&D operations under IHQ will be exempt from income tax provided that certain requirements have been fulfilled.

Withholding tax will be imposed on dividends distributed under ROH 2, IHQ and ITC to overseas shareholders with effect from 1 January 2021.

## VIETNAM

### Guidance on provisions – issued

On 8 August 2019, the MoF issued Circular No. 48/2019 (the circular) providing guidance on several types of provisions. The circular will enter into force on 10 October 2019 and apply from fiscal year 2019 onwards. It replaces

Circular 228/2009/TT-BTC and its amendments.

Some of the salient features of the circular are set out below.

- The guidance on provisions is the basis for determining deductible expenses when determining income subject to corporate income tax according to the regulations. The provisions for purposes of preparing financial statements are made in accordance with accounting regulations.
- The circular applies to enterprises that are established, conducting production and business activities, under the provisions of Vietnamese law (including foreign credit institutions and bank branches established in Vietnam, with the exception of provisions for credit risks).
- The subject of provisioning and the formula for the level of provisioning for the following items:
- (i) provision for devaluation of inventories (including raw materials, materials, tools, devices, goods and goods purchased on transit, goods sent for sale, goods of tax-guarantee warehouses and finished products); (ii) provision for loss of investments (including listed and traded on domestic stock markets and unlisted domestic securities); (iii) provisions for bad debts (amounts receivable including the debts lent by the enterprises and the bonds owned by the enterprises which is not registered for trading on the securities market yet). Separate provisioning levels are provided for enterprises engaged in telecommunications services and retailing; and (iv) provision for warranty of products, goods, services and construction works.
- Enterprises are not allowed to make provisions for foreign investments. Provisions carried forward will be reversed and recorded as a decrease in expenses at the time of preparing the financial statements 2019.
- Other specialised industries, such as insurance, securities, capital investment, debt trading or retail are also covered in the circular, but may also be subject to separate guidance issued by the MoF.

***Janice Loke*** *and* ***James Cheang*** *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 17 August 2019 and 16 November 2019 including Public Rulings (PRs) and guidelines issued by the Inland Revenue Board of Malaysia (IRBM), the Royal Customs Department and other regulatory authorities.*

## INCOME TAX

### Tax incentive for women returning to work after a career break (Effective: YA 2018 until YA 2020)

The Income Tax (Exemption) (No. 9) Order 2019 [P.U.(A) 226], gazetted on 23 August 2019, provides that women returning to the workforce after being on a career break (i.e. the approved individuals as per the Gazette Order) are exempted from the payment of income tax in respect of their gross income from employment, for a period not exceeding 12 consecutive months. The exemption period will commence from the basis period for a year of assessment (YA) the option is made, and the option shall be made in the YA or the following YA in which the approved individuals re-commence their employment.

Applications for the exemption must be submitted to Talent Corporation Malaysia Berhad between 1 January 2018 and 31 December 2019. Any exemption granted thereafter is subject to the approved individual complying with all the conditions imposed by the Minister in relation to the exemption.

The Order also provides that the exemption granted does not absolve an approved individual from any requirement to submit any return, statement of accounts or any information, where required to do so under the Income Tax Act 1967 (ITA).

### Capital allowance for the development of customised software (Effective: YA 2018 onwards)

The Income Tax (Capital Allowance) (Development Cost for Customised Computer Software) Rules 2019 [P.U.(A) 274], gazetted on 3 October 2019, provide that a Malaysian resident who has incurred development cost for customised computer software (i.e. consultation fee, payment for rights of software ownership and incidental fee relating to the development of customised computer software) in the basis period for a YA would qualify for capital allowance claims at the rate of 20% initial allowance (IA) and 20% annual allowance (AA).

The Rules also stipulate that the development cost for customised computer software shall be deemed to be incurred by the person in the basis period for a YA in which the customised computer software is capable of being used for the purpose of his business.

With this, the Income Tax (Deduction for Information Technology-Related Expenditure) Rules 2000 [P.U.(A) 51] are revoked with effect from YA 2018.

### Public Ruling No. 4/2019 – Tax Treatment of Wholly & Partly Irrecoverable Debts and Debt Recoveries

The IRBM has issued Public Ruling (PR) No. 4/2019: Tax Treatment of Wholly & Partly Irrecoverable Debts and Debt Recoveries, dated 24 September 2019. This new PR replaces PR No. 1/2002, which was published on 2 April 2002.

Similar to the earlier PR, the new PR explains the tax treatment of:

a. Wholly and partly irrecoverable debts as a deduction against gross income of a person from a business; and
b. Recoveries of wholly and partly irrecoverable debts where a deduction has been made in ascertaining the adjusted income for an earlier YA


The new PR is broadly similar to the earlier PR, with some minor changes, including updates to the definitions of words used in the PR.

### Updated guidelines for submission of amended tax return

The IRBM has published on its website Operational Guidelines No. 4/2019 – Procedure on Submission of Amended Return Form to replace the earlier Operational Guidelines No. 3/2019 dated 22 April 2019.

The updated Guidelines are broadly similar to the earlier Guidelines, with some minor changes. The updated Guidelines include the procedure for the submission of an amended return form under the Petroleum (Income Tax) Act 1967 (PITA). It also provides examples to demonstrate the computation of tax payable (e.g. tax / additional tax, including increase in tax) under various scenarios.

### Updated guidelines on IRBM approval under Subsection 44(6) of the ITA

The IRBM has published on its website the Guidelines for approval of Director General of Inland Revenue under Subsection 44(6) of the Income Tax Act 1967) (Guidelines) dated 5 September 2019 to replace the earlier Guidelines issued on 15 May 2019.

The new Guidelines are broadly similar to the earlier Guidelines, with some minor changes as outlined below:

a. The donation threshold above which a donor needs to be included on the list of donors provided to the IRBM has been increased from RM1,000 to RM10,000.
b. The checklist of documents and information required for the application (as outlined vide appendices) has been updated.
c. The examples on the tabulation of the requirement to spend, in the following year, at least 50% of the income earned in the previous year, have been updated.

### Guidelines for Principal Hub incentive 2.0

In the 2015 Budget, the Government proposed the Principal Hub (PH) incentive to encourage multinational companies to establish regional or global operational centres in Malaysia. A PH is a locally incorporated company that uses Malaysia as a base to conduct its regional and global businesses and operations, and to manage, control and support its key functions, including management of risks, decision-making, strategic business activities, trading, finance, management and human resource.

Further to the evaluation of the PH incentive by the Forum of Harmful Tax Practices (FHTP) of the Organisation for Economic Cooperation and Development (OECD), three Exemption Orders (EOs) pertaining to the PH incentive were gazetted on 31 December 2018. These three EOs were, however, subsequently amended by Amendment Orders issued on 19 January 2019.

Following the above, the Malaysian Investment Development Authority (MIDA) has recently issued the Guidelines for Principal Hub Incentive 2.0 (PH 2.0 Guidelines), which are effective 1 January 2019. The PH 2.0 Guidelines similarly set out a description of the incentive and the criteria for the following types of companies to enjoy the PH incentive:

- New company – manufacturing / services company
- Existing company – manufacturing / services company
- Existing company – previously approved as an operational headquarters (OHQ), international procurement centre (IPC) or a regional distribution centre (RDC)

Multiple changes have been made to the PH 2.0 Guidelines as compared to the earlier Guidelines, including the enhancement of tax incentives for existing companies, duration of incentive period, tightening of the definition of non-related network companies, stricter compliance of commitments to annual operational expenditure and high-value jobs, etc. The Guidelines on PH 2.0 are available in the following link:

*https://www.mida.gov.my/home/administrator/system_files/modules/photo/uploads/20191008161305_GD%20PH2.0.pdf*

### Guidelines on the imposition of penalties under Section 112(3) of the ITA, Section 51(3) of the PITA and Section 29(3) of the Real Property Gains Tax Act 1976 (RPGTA) (Effective: 1 October 2019 onwards)

The IRBM has issued on its website operational guidelines in Bahasa Malaysia, titled "Pengenaan Penalti Di Bawah Subseksyen 112(3) Akta Cukai

Pendapatan 1967, Subseksyen 51(3) Akta Petroleum (Cukai Pendapatan) 1967 Dan Subseksyen 29(3) Akta Cukai Keuntungan Harta Tanah 1976”, dated 16 October 2019. The new Guidelines replace GPHDN 1/2015, which was published on 16 October 2019.

Similar to the earlier Guidelines, the new Guidelines explain the penalties that will be imposed under Section 112(3) of the ITA when a taxpayer fails to furnish his tax return by the stipulated deadlines. In addition, the Guidelines have been updated to include the penalties that will be imposed under Section 51(3) of the PITA and Section 29(3) of the RPGTA for a similar offence under the respective legislations.

Based on the new Guidelines, the penalty rates for the late submission of return forms are as follows:

In the case where a person has not furnished the necessary returns,

| Late filing period (months) | Section 112(3) of the ITA / Section 51(3) of the PITA | Section 29(3) of the RPGTA |
|---|---|---|
| ≤ 12 | 15% | 15% |
| > 12 - 24 | 30% | 20% |
| > 24 | 45% | 25% |

the penalty rates for estimated assessments raised pursuant to Section 90(3) of the ITA, Section 38(3) of the PITA or Section 14(2) of the RPGTA are as follows:

In line with the introduction

| Legislation | Penalty imposed pursuant to | Penalty rate |
|---|---|---|
| ITA | Section 112(3) | 45% |
| PITA | Section 51(3) | 45% |
| RPGTA | Section 29(3) | 25% |


of Section 21A(3A) and Section 112(3A) of the ITA via the Finance (No. 2) Act 2017, the new Guidelines reiterate that with effect from YA 2019, where a company, limited liability partnership (LLP), trust body or co-operative society fails to notify the IRBM about a change in its accounting period in accordance with Section 21A(3A) of the ITA, any penalty imposed for the failure to furnish a return that is based on the original accounting period will be recoverable as tax due and payable to the government.

### Guidelines on the application for a tax clearance letter for a company, limited liability partnership and Labuan entities

The IRBM has issued on its website Operational Guidelines No. 2/2019 in Bahasa Malaysia, titled “Permohonan Surat Penyelesaian Cukai Bagi Syarikat, Perkongsian Liabiliti Terhad Dan Entiti Labuan”. The Guidelines are dated 12 November 2019 and replace GPHDN 3/2016, which was published on 31 July 2016.

Similar to the earlier Guidelines, the new Guidelines explain the procedures for the application of tax clearance letters and provide guidance on the documents which need to be submitted together with the application, for companies, LLPs and Labuan entities.

The key changes are as outlined below:

- The new Guidelines provide an updated list of documents which needs to be submitted together with the application for tax clearance letters. The documents required will depend on how the entity is being dissolved.
- The statements for the application of a tax clearance letter for a company, LLP, Labuan entity and defunct company are provided (the earlier Guidelines only provided the statements to strike off a defunct company and to wind up an LLP).
- The new Guidelines also outline the documents which are to be submitted for the purpose of closure of a tax file number after receipt of the tax clearance letter (this was not stipulated in the earlier Guidelines).

## CUSTOMS DUTIES

### Customs (Prohibition of Imports) (Amendment) (No. 3) Order 2019

The Customs (Prohibition of Imports) (Amendment) (No. 3) Order 2019 [P.U.(A) 228] was gazetted on 26 August 2019 and came into operation on 1 November 2019. This Order provides for amendments to the Second and Fourth Schedules under the Customs (Prohibition of Imports) Order 2017 [P.U.(A) 103/2017].

### Customs (Anti-Dumping Duties) Order 2019 Corrigendum

The Customs (Anti-Dumping Duties) Order 2019 Corrigendum [P.U.(A) 245] was gazetted on 10 September 2019. This Order provides for the substitution of the words "Shandong Huijin Color Steel Co., Ltd" with the words "Shandong Huijin Color Co., Ltd" in the Customs (Anti-Dumping Duties) Order 2019 [P.U.(A) 69].

### Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2019

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2019 [P.U.(A) 249] was gazetted on 13 September 2019 and came into operation on 17 September 2019. This Order provides for amendments to the Second Schedule under the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2017 [P.U.(A) 100/2017].

### Customs (Anti-Dumping Duties) (Administrative Review) (No. 2) Order 2019

The Customs (Anti-Dumping Duties) (Administrative Review) (No. 2) Order 2019 [P.U.(A) 263] was gazetted on 23 September 2019 and this Order is effective from 24 September 2019 to 23 September 2024. The anti-dumping duties shall be levied on and paid by importers in respect of certain goods exported to Malaysia from the Kingdom of Thailand by the exporters or producers. The rates of duties range from NIL to 31.14%, depending on the tariff code, description of goods, country and the exporter/producer, as specified in the Schedule.

### Customs (Provisional Anti-Dumping Duties) Order 2019

The Customs (Provisional Anti-Dumping Duties) Order 2019 [P.U.(A) 265] was gazetted on 23 September 2019 and this Order is effective from 24 September 2019 to 21 January 2020. The provisional anti-dumping duties shall be levied on and paid by importers in respect of certain goods exported to Malaysia from the Republic of Singapore and the Republic of Turkey by the exporters or producers. The rates of duties range from NIL to 20.09%, depending on the tariff code, description of goods, country and the exporter/producer, as specified in the Schedule.

### Customs Duties (Goods Under the Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area) Order 2019

The Customs Duties (Goods Under the Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area) Order 2019 [P.U.(A) 266] was gazetted on 27 September 2019 and came into operation on 1 October 2019. Subject to the provisions of the First Schedule, an import duty, at the rate specified in the Second Schedule, shall be levied on and paid by the importer, in respect of goods specified in the Second Schedule, originating from ASEAN Member States, Australia or New Zealand and imported into Malaysia.

In relation to goods not specified in the Second Schedule, an import duty shall be levied on such goods at the full rates specified in the Customs Duties Order 2017.

### Customs Duties (Exemption) (Amendment) (No. 2) Order 2019

The Customs Cuties (Exemption) (Amendment) (No. 2) Order 2019 [P.U.(A) 275] was gazetted on 4 October 2019 and came into operation on 7 October 2019. This Order provides for amendments to

Part I of the Schedule in relation to item 67 under the Customs Duties (Exemption) Order 2017 [P.U.(A) 445/2017].

### Customs Duties (Goods Under the Agreement Establishing the ASEAN – Hong Kong, China Free Trade Area) (No. 2) Order 2019

The Customs Duties (Goods Under the Agreement Establishing the ASEAN – Hong Kong, China Free Trade Area) (No. 2) Order 2019 [P.U.(A) 279] was gazetted on 11 October 2019 and came into operation on 13 October 2019. Subject to the provisions of the First Schedule, an import duty, at the rate specified in the Second Schedule, shall be levied on and paid by the importer, in respect of goods specified in the Second Schedule, originating from ASEAN Member States or Hong Kong, China and imported into Malaysia.

In relation to goods not specified in the Second Schedule, an import duty shall be levied on such goods at the full rates specified in the Customs Duties Order 2017.

## EXCISE DUTIES

### Excise Duties (Exemption) (Amendment) (No.3) Order 2019

The Excise Duties (Exemption) (Amendment) (No.3) Order 2019 [P.U.(A) 316] was gazetted on 15 November 2019 and came into operation on 1 December 2019. This Order provides for an amendment in the Schedule, Part I in relation to item 38 under the Excise Duties (Exemption) Order 2017 [P.U.(A) 444/2017].

## SALES TAX

### Sales Tax (Amendment) Regulations 2018 Corrigendum

The Sales Tax (Amendment) Regulations 2018 Corrigendum [P.U.(A) 230] was gazetted on 30 August 2019. This Corrigendum provides for an amendment in Regulation 5 under the P.U.(A) 399 published on 31 December 2018, by substituting the words "Third Schedule" with "Second Schedule".


### Service Tax (Amendment) Regulations 2019

The Service Tax (Amendment) Regulations 2019 [P.U.(A) 232] were gazetted on 30 August 2019 and came into operation on 1 September 2019. These Regulations provide for amendments to Regulations 2, 8, 10, 14 and 16, the First Schedule and the Third Schedule, and for the insertion of a new Part IIIA under the Service Tax Regulations 2018 [P.U.(A) 214/2018].

### Service Tax (Compounding of Offences) (Amendment) Regulations 2019

The Service Tax (Compounding of Offences) (Amendment) Regulations 2019 [P.U.(A) 233] were gazetted on 30 August 2019 and came into operation on 1 September 2019. These Regulations provide for amendments to Regulations 4 and 5, the First Schedule and the Second Schedule under the Service Tax (Compounding of Offences) Regulations 2018 [P.U.(A) 218/2018].

### Service Tax (Digital Services) Regulations 2019

The Service Tax (Digital Services) Regulations 2019 [P.U.(A) 269] were gazetted on 30 September 2019. Parts II and V, Regulation 17 and 18 of these Regulations came into operation on 1 October 2019. Parts III, IV and VI, except for Regulations 17 and 18, of these Regulations come into operation on 1 January 2020. The following are included in the Regulations:

- Registration
- Invoice
- Return, payment and refund
- Electronic services
- Miscellaneous

### Service Tax (Rate of Digital Services Tax) Order 2019

The Service Tax (Rate of Digital Services Tax) Order 2019 [P.U.(A) 271] was gazetted on 30 September 2019 and comes into operation on 1 January 2020. This Order provides that the service tax shall be charged and levied on digital services at the rate of six percent of the value of the digital services charged by a foreign registered person.

*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

### SPSA V KETUA PENGARAH HASIL DALAM NEGERI

## BRIEF FACTS

The taxpayer is a company within one of the biggest multinationals in the world. It is a party to a contractual arrangement for the sharing of services and resources within the scope of a Cost Contribution Arrangement (CCA) within its group. The CCA allows the main service companies to render management services to its affiliates within the group. As a participant of the CCA, the taxpayer derives mutual and proportionate benefits by having access to, and receiving services from, other participants of the CCA.

The Director General of Inland Revenue (DGIR) took a different view and invoked Section 140A of the Income Tax Act 1967 (ITA), raising additional assessments against the taxpayer. The additional assessments were as a result of the DGIR's refusal to recognise the CCA. Instead, the DGIR recharacterised the CCA as an intra-group services arrangement and contended that the services provided by the taxpayer should have been subjected to a mark-up. Aggrieved by the DGIR's decision, the taxpayer sought to commence judicial review proceedings together with an order for stay of proceedings. The taxpayer's key argument was that Section 140A does not empower the DGIR to recharacterise a transaction from that of a CCA to intra-group services.

The High Court did not grant leave for judicial review on the basis that the question of law raised by the taxpayer was best determined before the Special Commissioners of Income Tax. The court, however, granted an interim stay to enable the taxpayer to appeal to the Court of Appeal.

### *THE ISSUE BEFORE THE COURT*

Whether the DGIR is entitled in law to invoke Section 140A of the ITA to disregard and recharacterise the taxpayer's transaction?

### *TAXPAYER'S CONTENTIONS*

In recharacterising the taxpayer's CCA into an Intra-group services arrangement, the DGIR failed to invoke Section 140(1) of the ITA. In doing so, the DGIR had disregarded the decisions of the Supreme Court in **Director-General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd [1985] CLJ (Rep) 107** and the Federal Court in **Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 CLJ (Rep) 108** which have held that where the DGIR is of the view that the transaction had been entered into for the purposes of evading or avoiding taxes, the DGIR should invoke Section 140 of the ITA to make an adjustment. It must be noted that Section 140(1) is worded such that the Respondent is empowered to **disregard or vary** a transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any direct or indirect effect of the transaction as listed in Sections 140(1)(a) to (d).

Secondly, the DGIR had failed to fulfil the requirements in Section 140 of the ITA which provides that the DGIR must state which subsection under Section 140 it is relying on. Besides, the DGIR had also fail to provide the particulars of adjustment together with the additional assessments as required under Section 140(5).

Thirdly, Section 140A only allows the DGIR to substitute the price in respect of the transaction to reflect an arm's length price for the transaction. Instead the DGIR recharacterise the CCA into an Intra-group services arrangement.


Accordingly, the taxpayer sought an interim stay order pending the disposal of the appeal pursuant to Section 44 of the Courts of Judicature Act 1964. The taxpayer submitted that the Court of Appeal has the jurisdiction to grant an interim stay pending appeal, and that the legal test to grant a stay under Section 44 is lower than the special circumstances test.

The purpose of a stay under Section 44 is to preserve the integrity of the statutory appeal and, as such, an interim stay should be granted pending the outcome of the appeal. An interim order would prevent the pending appeal from being rendered nugatory — this is because the purpose of the judicial review proceedings sought is to challenge the DGIR's assessments. Thus, the refusal to grant a stay and to allow the DGIR to enforce payment by the taxpayer would be detrimental to the effectiveness of the pending appeal.

### *DGIR'S RESPONSE*

The DGIR submitted that the taxpayer had attempted to delay the enforcement of the assessments by filing the judicial review application alongside a certificate of urgency within 30 days of the additional assessments. This had resulted in the initial High Court hearing to be heard which resulted in an interim stay of 30 days. The DGIR asserted that the taxpayer has the financial capability to pay the additional assessments as it had applied for an instalment payment scheme.

### *COURT OF APPEAL'S DECISION*

The Court of Appeal agreed with the arguments advanced on behalf of the taxpayer and unanimously granted the interim stay application pending the disposal of the appeal against the High Court's decision. The Court of Appeal found that the taxpayer's pending appeal would be rendered nugatory if the stay order sought is not granted.

***Counsel for the Appellant:***
**DATUK D.P. NABAN, JHULIANN NASSHVIND AND WONG EU CA MATTHEW (PUPIL IN CHAMBERS)**

***Counsel for the DGIR:***
**MUHAMMAD FARID JAAFAR AND RIDZUAN OTHMAN**

## CASE 2

## IBM V DIRECTOR GENERAL OF INLAND REVENUE

## BRIEF FACTS

The taxpayer, a Malaysian resident, is in the business of purchasing and distributing products owned by other companies. The taxpayer contemplated executing a distribution agreement (Distribution Agreement) with a developer based in Europe for the right to distribute certain products developed by the latter (Products). Pursuant to the terms of the Distribution Agreement, the taxpayer is required to make payment (Distribution Fee) to the developer for each copy of the Products purchased and distributed in Malaysia. The taxpayer applied for an advance ruling for a determination that the Distribution Fee is not a form of "royalty" under the Malaysia-Netherlands DTA and, thus, not subject to withholding tax under Section 109(1) of the ITA.

The IRBM issued an advance ruling (Advance Ruling) stipulating that the Distribution Fee is "royalty" under Section 2(1) of the ITA and, therefore, should be subject to withholding tax. The taxpayer submitted that the Advance Ruling is erroneous as it runs contrary to the definition of "royalty" under the DTA. Pursuant to the definition under the DTA, the Distribution Fee is not "royalty" as it was not paid in exchange for the copyright or know-how of the Products.

### *ISSUES BEFORE THE FEDERAL COURT*

In order for a taxpayer to appeal its matter before the Federal Court, he must first make an application for leave to appeal at the Federal Court. Hence, the taxpayer made an application for leave to appeal before the Federal Court. The issues brought forward were:

### ISSUE 1

Whether an advance ruling issued under Section 138B of the Income Tax Act 1967 (ITA) is a decision that could adversely affect the applicant within the meaning of Order 53 Rule 2(4) of the Rules of Court 2012; and

### ISSUE 2

In the event of a conflict, whether the definition of "royalty" in a double taxation agreement (DTA) shall prevail over that in Section 2(1) of the ITA.

### JUDICIAL PROCESS

The taxpayer commenced a judicial review application at the High Court to set aside the Advance Ruling. The High Court held that the taxpayer had been adversely affected by the Advance Ruling and allowed the taxpayer's application on the basis that the definition of "royalty" under the DTA shall prevail over that in the ITA.

Subsequently, the Court of Appeal reversed the High Court's decision on, among other things, the ground that the application filed by the taxpayer was premature. The Court of Appeal took the view that the taxpayer had not been adversely affected by the Advance Ruling as the ruling has no tax implication on the taxpayer. The Court of Appeal also held that coming to the courts is an abuse of process because that the proper forum to ventilate the issue at hand is before the Special Commissioners of Income Tax. Despite its ruling, the Court of Appeal granted an order to stay the Advance Ruling pending the taxpayer's leave application before the Federal Court.

### TAXPAYER'S ARGUMENTS BEFORE THE FEDERAL COURT

The taxpayer has clearly been adversely affected by the Advance Ruling (AR) as the issuance of the AR has effectively altered the taxpayer's rights even though the Applicant has not filed its tax return

at the material time.

The explanatory note to Clause 26 of the Finance Bill 2006 and Rule 16 of the Income Tax (Advance Ruling) Rules 2008 (ITR) has stated that, the Advance Ruling is final and binding on the taxpayer. Given this, if the judicial review application was not filed immediately, the Applicant would have been forced by the Advance Ruling to subject the Distribution Fee to withholding tax.

As for the second issue, the Court of Appeal in the cases of **Ketua Pengarah Hasil Dalam Negeri v Damco Logistics Malaysia Sdn Bhd (Rayuan Sivil: W-01-424-011)** and **Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources (Rayuan Sivil: W-01(A)-70-03/2016)** applied the definition of "royalty" under the DTA and not the definition under the ITA. Hence, it I evident that when there is a conflict between the DTA and the ITA, the DTA should prevail.

### DGIR'S ARGUMENTS

The Judicial Review application made by the Taxpayer is premature because the taxpayer has failed to comply with the procedures for the application for Advance Ruling as provided under the ITA and ITR. The DGIR averred that the Taxpayer has not proved that he has applied the Advance Ruling by disclosing it in a return pursuant to Paragraph 15 of the ITR.The DGIR has also contended that there is an appeal remedy under the Income Tax Act made available to the Taxpayer, i.e. an appeal before the Special Commissioners of the Income Tax. Besides, the DGIR averred that the Advance Ruling issued by them is not a "decision" that is amendable by Judicial Review, as it is a mere opinion given out by them. Lastly, they averred that the Advance Ruling has not affected the Taxpayer, as they have a choice whether to opt to be bound by the Judicial Review or otherwise. Besides, the DGIR has not issued any notices of additional assessments to the Taxpayer

### THE FEDERAL COURT'S DECISION

The Federal Court agreed with our arguments that the Court of Appeal's decision gave rise to novel points of law which are of public importance and granted leave to the taxpayer to challenge the decision of the Court of Appeal. The Federal Court also granted an order to stay the effect of the Court of Appeal's decision and the Advance Ruling pending the disposal of the substantive appeal at the Federal Court.

***Counsel for the Appellant:***
**S. SARAVANA KUMAR, ROSLI DAHLAN AND EDMUND YEE CHUNG HOONG**

***Counsel for the DGIR:***
**MUHAMMAD FARID JAAFAR AND RIDZUAN OTHMAN**

## CASE 3

### CMK V KETUA PENGARAH HASIL DALAM NEGERI

## BRIEF FACTS

In 2015, the taxpayer acquired shares in A Sdn Bhd and subsequently disposed of them in 2017. In early 2018, the Director General of Inland Revenue (DGIR) raised an assessment for Real Gain Property Tax (RPGT) amounting to approximately RM2.2 million on the gains arising from the disposal. The DGIR took the view that A Sdn Bhd was a real property company.

Being aggrieved by the notice of assessment the taxpayer filed an appeal to the Special Commissioners of Income Tax (SCIT) and proceeded to pay the disputed RPGT. In mid-2018, the taxpayer once again received a notice of additional assessment amounting to approximately RM3.3 million for RPGT on the same transaction. In doing this the DGIR have appeared to effectively imposed RPGT at the rate of more than 70% on the taxpayer's disposal of shares. The taxpayer immediately filed a Judicial Review against the DGIR for the second assessment received.

The High Court granted leave for the taxpayer to commence judicial review. However, the judge subsequently dismissed the application at the substantive stage on the basis that the question raised by the taxpayer should be determined by the SCIT. The taxpayer's application for a stay to the High Court pending his appeal to the Court of Appeal was dismissed. Accordingly, the taxpayer filed an application for stay to the Court of Appeal.

### *TAXPAYER'S CONTENTIONS*

The taxpayer submitted that the Court of Appeal has the jurisdiction to grant an interim stay pending appeal. The purpose of a stay is to preserve the integrity of the statutory appeal and, as such, an interim stay should be granted pending the outcome of the appeal. An interim order would prevent prejudice to the taxpayer who would be likely to face the threat of civil action and bankruptcy as the amount of taxes raised was substantial. Further, the DGIR had alleged that the additional assessment was necessary due to a mistake in the original assessment.

Ultimately, the taxpayer argued there are merits in the taxpayer's case. Firstly, the DGIR has assessed the gains arising from the disposal of shares when it had raised the first notice of assessment, and the DGIR did not provide any basis in law as to why it issued the second notice of assessment. Furthermore, the amount in the notices of assessment were erroneous. DGIR imposed the rate of 70% for RPGT on the taxpayer's disposal. The taxpayer also highlighted that in the case of **National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339** the supreme court held that a subject should not be taxed without clear words.

In the circumstances, as the accuracy of the additional assessment cannot be guaranteed, a stay should be granted for the integrity of the appeal to be preserved. Finally, the taxpayer is also not a recalcitrant taxpayer as he had settled the disputed taxes under the original assessment, notwithstanding the appeal to the SCIT.

### *DGIR'S ARGUMENT*

The DGIR submitted that there was no threat of civil action against the taxpayer. Further, the granting of a stay would also have the effect of interrupting the operation of the provisions of the Real Property Gains Tax Act 1976 (Act), which allows such action to be taken. The taxpayer had also not presented evidence of his financial position before the court to show that he would not be able to pay the amount of taxes imposed. Finally, the Act allows for additional assessments to be raised as mistakes are unavoidable in the raising of assessments by the DGIR.

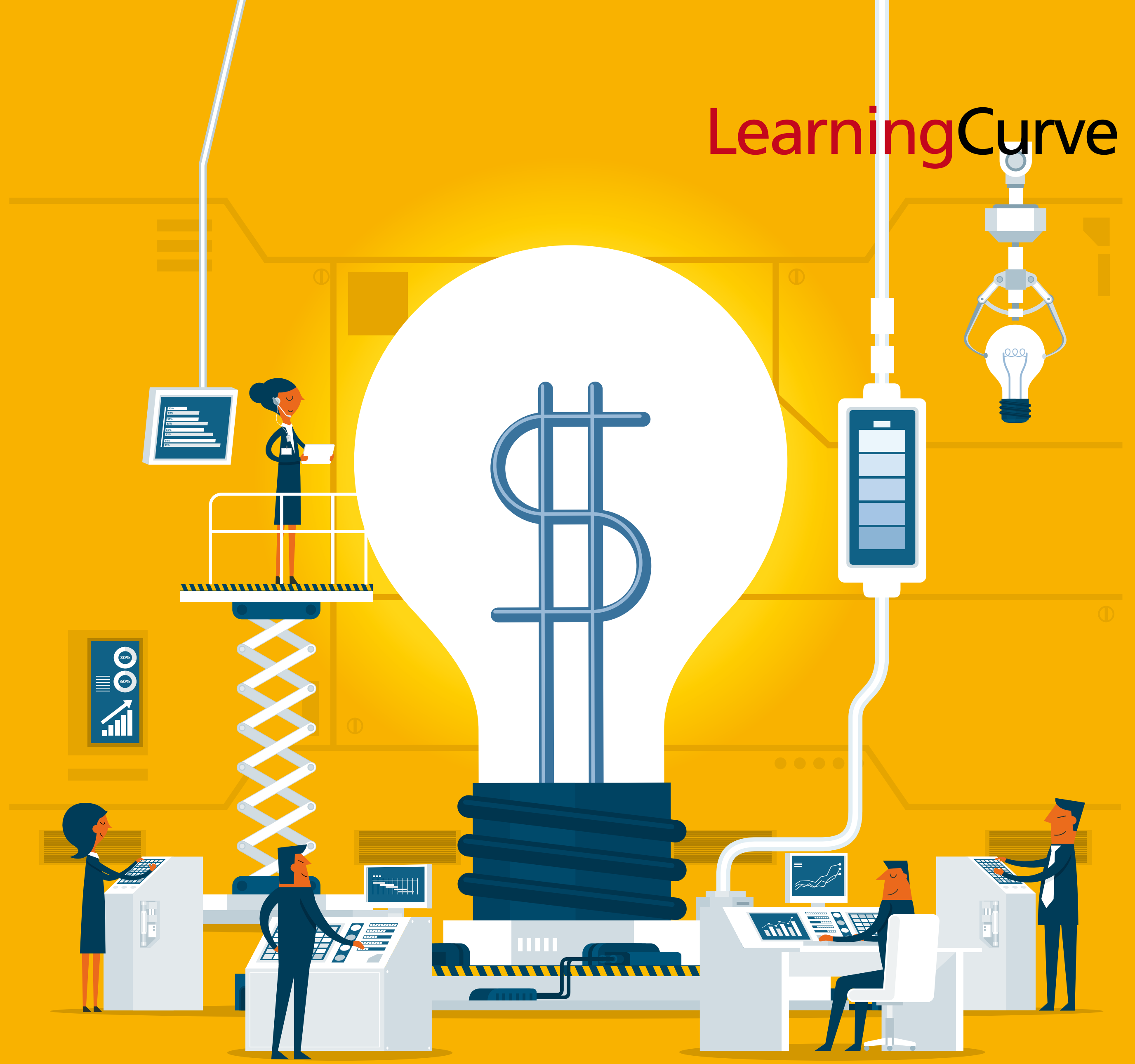
### *COURT OF APPEAL'S DECISION*

The Court of Appeal agreed with the arguments advanced by our tax lawyers, and unanimously granted the interim stay application pending the disposal of the appeal against the High Court's decision.

***Counsel for the Appellant:***
**BAHARI YEOW AND CHRIS TOH PEI ROO**

***for the DGIR:***
**NORMAREZA REJAB, NORSYAMIMI BUKHARI AND NORDIANA SYAM**

***Keith Lim Boon Loong** and **Nur Amira Ahmad Azhar** are associates with the Tax, SST & Customs Practice of Lee Hishammuddin Allen & Gledhill (LHAG)*



# BUSINESS DEDUCTIONS
## QUALIFYING EXPENDITURE I

Siva Subramanian Nair

**The last two articles provided an insight into what constitutes plant. Now we shall move on to the fundamentals of computing Schedule 3 allowances. We shall start with a comparison of contextual terminology used in accounting versus taxation as tabulated below.**

| Accounting | Taxation |
|---|---|
| Cost | Qualifying Expenditure |
| Accumulated Depreciation | Capital Allowances |
| Net Book Value | Residual Expenditure / Tax Written Down Value |
| Selling Price | Selling Price |
| Loss / (Gain) on Disposal | Balancing Allowance / Charge |

We will be discussing the various concepts detailed above in the forthcoming articles commencing with the concept of qualifying expenditure in this article.

## WHAT IS QUALIFYING EXPENDITURE [QE]?

As illustrated in the table above, QE is (in its simplest form) is the tax equivalent of the cost of the asset for accounting purposes. Aside from the Income Tax Act 1967 (as amended) [hereinafter referred to as the Act] candidates can also make reference to Public Ruling 6/2015 [PR6/15] in determining the different facets of QE.

QE itself is defined in PR6/15 as "capital expenditure incurred on the provision, construction or purchase of plant and machinery used for the purpose of a business other than assets that have an expected life span of less than two years". Candidates will remember that assets with an expected life span of less than two years can be claimed as a deduction in arriving at the adjusted income from a business source on a replacement basis. *[Tax Guardian Vol. 4/No. 1/ 2011/Q1]*

## INCIDENTAL COSTS

The Public Ruling goes on to state that apart from the cost of plant or machinery being taken as QE, incidental expenditure incurred on the provision of the plant and machinery is also included as QE for capital allowance claims [BUT] incidental expenditure does not include revenue expenditure which is deductible under subsection 33(1) of the Act. Therefore, cost of delivering the plant [including freight charges & other indirect taxes such as import duties and sales tax] to and installing it at, the customer's premises will also qualify.

## INTEREST EXPENSE

The case of **Ben-Odeco Ltd v Powlson [52 TC 459]** in the House of Lords involved an appeal by the Appellant Company which was formed to acquire and let out on hire an oil drilling rig.

## FACTS OF THE CASE

In 1969, to finance the construction of the oil rig, the company negotiated five loans and paid commitment fees and interest in connection with the loans. These sums were charged to capital in the Company's accounts. It was completed in 1971 and the total cost of the completed oil drilling rig, shown in the Company's balance sheet at 31 December 1971 was £5,691,123, including commitment fees of £59,002 and capitalised interest payments of £494,990. The Revenue refused the Company's claim for capital allowances in respect of commitment fees and the interest payments.

In the House of Lords, the Company contended;

(1) that the interest and commitment fees were part of the cost of the rig or part of the cost to the Company of the rig and so were expenditure 'on the provision of…plant';
(2) that cost and what is capital expenditure had to be treated according to accepted methods of commercial accounting and since the interest and commitment fees had been treated as capital expenditure in accordance with those methods, the expenditure was 'expenditure on the provision of…plant'.

The House of Lords (by a majority, Lord Salmon dissenting), in dismissing the appeal held that

(1) the words 'expenditure on the provision of…plant' did not include the expenditure on commitment fees and interest since that was expenditure on the provision of the money used in the acquisition of the rig;
(2) the principles of commercial accounting adopted by a particular company (and other companies might treat similar expenditure differently) could not determine the construction of the statutory words.

In Malaysia candidates will recall from the article on business deductions published in *Tax Guardian Vol.3/No.1/2010/Q1*, that

Section 33(1) provides for "…any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and …. laid out on assets used or held in that period for the production of gross income from that source" is deductible. Therefore, a full deduction can be claimed for the interest portion on borrowings obtained to purchase an asset for the business in ascertaining its adjusted income, which is much better than claiming capital allowances on it since the latter is a staggered deduction over a number of years.

## COST OF ALTERATION OF BUILDING TO INSTALL THE ASSET.

Paragraph 3 of Schedule 3 of the Act provides that "expenditure incurred on the alteration of an existing building for the purpose of installing that machinery or plant and other expenditure incurred incidentally to the installation thereof" qualifies as part of the QE. Therefore, there is no restriction with regards to incurrence of such costs.

As a tutorial note, candidates for Advanced Taxation 1 paper should note that for unit trust, there is a "75% restriction rule" for costs of alteration of buildings. This will be discussed in a later article.

## COST OF PREPARATION OF SITE TO INSTALL THE ASSET.

The same paragraph also states in the second leg that "expenditure incurred on preparing, cutting, tunnelling or levelling land in order to prepare a site for the installation of that machinery or plant," qualifies as QE.

This leads us to the 10% restriction rule because the paragraph continues "but if the expenditure exceeds ten per cent

of the aggregate of itself and any other expenditure (being qualifying plant expenditure) incurred for the purposes of the business" then the cost of preparation of site will not qualify as QE.

**BUSINESS TAXATION JUNE 2018 Q34(c)(i)** provides an example of this.

On 1 June 2014, HM S/B purchased and installed a heavy machine in its factory for a total cost of RM2 million. The cost of installation was ascertained to be 1/5 of the total cost.

*Solution:*
*Total cost of machine and installation: RM2 million*
*Cost of installation: 1/5 of total cost, i.e. RM400,000 = 20% (>10%)*
*Therefore, qualifying plant expenditure is RM1.6 million.*

Aside from this, there is a "75% restriction rule" in relating to the cost of preparation of site and this is found in paragraph 67 of Schedule 3 of the Act which states that "where capital expenditure is incurred on preparing, cutting, tunnelling or levelling land in order to prepare a site for the installation of machinery or plant" and "that expenditure amounts to more than seventy-five per cent of the aggregate of that expenditure and the capital expenditure incurred on that machinery or plant" then "that aggregate expenditure [shall] be treated for the purposes of this Schedule as a building". Therefore, if the building on which the plant or machinery is installed qualifies as an industrial building then the aggregate cost qualifies for industrial building allowances, which will be discussed in a later article.

**TAXATION II DECEMBER 2011 Q3(C)(i)** reads

Zee Sdn Bhd a manufacturing company with a financial year end 31 December purchased a machine on 1 May 2011 at a cost of RM50,000. The company incurred RM200,000 on site preparation for the installation of the machine in the factory

*Solution*

| | |
|---|---|
| | *RM* |
| *Cost of plant* | *50,000* |
| *Site preparation* | *200,000* |
| *Aggregate cost* | *250,000* |

*Ration of site preparation: 200,000 / 250,000 = 80% i.e. > 75%*
*Therefore the whole aggregate cost of RM 250,000 becomes the cost of building.*

**Table 01**

| | COST RM 100,000 | | |
|---|---|---|---|
| COST OF PREPARATION OF SITE | a) RM10,000 | b) RM20,000 | c) RM400,000 |
| AGGREGATE COST OF PLANT + PREPARATION OF SITE | RM110,000 | RM120,000 | RM500,000 |
| QE | RM110,000 | RM100,000 | NIL [the whole cost becomes cost of building] |

Let's use a comprehensive example which encompasses both of the above rules.

*Example 1*

X S/B purchase a plant for RM 100,000. Its cost of preparation of site under three different scenarios was as **Table 01:**

a) RM10,000
b) RM20,000
c) RM400,000

In summary, where the ratio of the cost of preparation of site to the aggregate cost is

a) NOT > than 10%, therefore, the aggregate cost qualifies as QE
b) > 10% to NOT > 75%, therefore, only the cost of plant qualifies as QE
c) > than 75%, therefore, the aggregate cost becomes cost of building.

Another common error in exams is the determination of the base for computing the ratio of the cost of preparation of site. Candidates should note that the paragraph states "…and any other expenditure (being qualifying plant expenditure)…" so the denominator in the ratio is the cost of preparation of site plus not only the cost of the assets **but also other costs incurred which qualifies as QE** as illustrated in Example 2

*Example 2*

| | RM |
|---|---|
| Cost of asset | 52,800 |
| Installation cost | 20,000 |
| Cost of preparation of site | 7,200 |

The ratio should be 7.2 / (7.2 + 52.8 + 20) i.e. 9% and NOT 7.2 / (7.2 + 52.8) i.e. 12%. Therefore, the QE in this case should be RM80,000 and NOT RM 72,800.

## FOREIGN EXCHANGE GAINS / LOSSES

Generally a foreign exchange gains [as discussed in *Tax Guardian Vol.15/2006/Q1*or losses [as discussed in *Tax Guardian Vol.6/No.2/2013/ Q2]* arising from the purchase of fixed assets which is included in the income statement of a business entity will require an adjustment in the tax computation as the item is not taxable or deductible respectively in determining the adjusted income from a business source of that entity.

However, in computing the QE of the asset (assuming it qualifies for Schedule 3 allowances), any foreign exchange gain is deducted and any foreign exchange loss is added on, to the cost of the asset in determining its QE.

An example of this is seen in **BUSINESS TAXATION DECEMBER 2016 Q2(c)** which reads:

In the year 2013, A S/B purchased a new machine from Japan for JPY2.5 million which was equivalent to RM100,000. However, due to the devaluation of the Japanese currency, A S/B only had to pay RM90,000 and made a foreign exchange gain of RM10,000

*Solution*

*In determining the QE, the foreign exchange gain of RM 10,000 is deducted from the cost of the machine i.e. RM 100,000 less RM 10,000 = RM 90,000*

We shall continue our discussion on the facets of QE in the next article. Wishing all Chinese candidates a Happy New Year!!!

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

***FURTHER READING***

*Choong, K.F. Malaysian Taxation Principles and Practice, Infoworld,*
*Kasipillai, J. A Guide to Malaysian Taxation, McGraw Hill.*
*Malaysian Master Tax Guide, CCH Asia Pte. Ltd*
*Singh, V. Veerinder on Taxation, CCH Asia Pte. Ltd*
*Thornton, R. Thornton's Malaysian Tax Commentaries, CCH Asia Pte. Ltd.*
*Thornton, Richard. 100 Ways to Save Tax in Malaysia for Partners and Sole Proprietors, Thomson Reuters Sweet & Maxwell Asia*
*Thornton, R. 100 Ways to Save Tax in Malaysia for SMEs, Sweet & Maxwell Asia*
*Thornton, R.& Kannaa T. Manual of Capital Allowances and Charges*
*Yeo, M.C., Alan. Malaysian Taxation, YSB Management Sdn Bhd*

# CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

## CPD Events: JANUARY – MARCH 2020

| Month /Event | Details | | | | Registration Fee (RM) (excluding GST) | | | CPD Points/ Event Code |
|---|---|---|---|---|---|---|---|---|
| | Date | Time | Venue | Speaker | Member | Member's Firm Staff | Non - Member | |
| **JANUARY 2020** | | | | | | | | |
| Workshop: Employer's Tax Reporting and Compliance Responsibilities in 2020 | 9 Jan | 9a.m. - 5p.m. | Ipoh | Sivaram Nagappan | 350 | 450 | 500 | WS/008 |
| Workshop: Tax Issues and Law Relating to Property Developers, JMB/MC and Investors | 13 Jan | 9a.m. - 5p.m. | Melaka | Dr. Tan Thai Soon | 350 | 450 | 500 | WS/001 |
| Workshop: Employer's Tax Reporting and Compliance Responsibilities in 2020 | 14 Jan | 9a.m. - 5p.m. | Johor Bahru | Sivaram Nagappan | 350 | 450 | 500 | WS/009 |
| Workshop: Employment Income Tax Practicalities and Complexities | 16 Jan | 9a.m. - 5p.m | Kota Kinabalu | Yong Mei Sim | 350 | 450 | 500 | WS/012 |
| Workshop: Employment Income Tax Practicalities and Complexities | 17 Jan | 9a.m. - 5p.m | Kuching | Yong Mei Sim | 350 | 450 | 500 | WS/013 |
| Seminar: Transfer Pricing 2020 | 21 Jan | 9a.m. - 5p.m | Kuala Lumpur | Various | 450 | 500 | 650 | SE/001 |
| **Public Holiday** ***(New Year: 1 Jan, Chinese New Year: 25 & 26)*** | | | | | | | | |
| **FEBRUARY 2020** | | | | | | | | |
| Workshop: Tax Audit and Investigation | 18 Feb | 9a.m. - 5p.m | Kota Kinabalu | Yong Mei Sim | 350 | 450 | 500 | WS/014 |
| Workshop: Tax Audit and Investigation | 19 Feb | 9a.m. - 5p.m. | Kuching | Yong Mei Sim | 350 | 450 | 500 | WS/015 |
| Workshop: Employer's Tax Reporting and Compliance Responsibilities in 2020 | 21 Feb | 9a.m. - 5p.m. | Kuala Lumpur | Sivaram Nagappan | 400 | 500 | 600 | WS/010 |
| Workshop: Tax Audit and Investigation | 24 Feb | 9a.m. - 5p.m. | Johor Bahru | Yong Mei Sim | 350 | 450 | 500 | WS/016 |
| Workshop: Tax Audit and Investigation | 28 Feb | 9a.m. - 5p.m | Penang | Yong Mei Sim | 350 | 450 | 500 | WS/017 |
| **Public Holiday** ***(Federal Territory Day: 1 Feb, Thaipusam: 8 Feb)*** | | | | | | | | |
| **MARCH 2020** | | | | | | | | |
| Workshop: Tax Issues and Law Relating to Property Developers, JMB/MC and Investors | 2 Mar | 9a.m. - 5p.m | Kota Kinabalu | Dr. Tan Thai Soon | 350 | 450 | 500 | WS/002 |
| Workshop: Tax Audit and Investigation | 2 Mar | 9a.m. - 5p.m | Melaka | Yong Mei Sim | 350 | 450 | 500 | WS/018 |
| Workshop: Tax Audit and Investigation | 3 Mar | 9a.m. - 5p.m | Kuala Lumpur | Yong Mei Sim | 400 | 500 | 600 | WS/019 |
| Workshop: Employer's Tax Reporting and Compliance Responsibilities in 2020 | 5 Mar | 9a.m. - 5p.m | Penang | Sivaram Nagappan | 350 | 450 | 500 | WS/011 |
| Workshop: Tax Issues and Law Relating to Property Developers, JMB/MC and Investors | 9 Mar | 9a.m. - 5p.m | Johor Bahru | Dr. Tan Thai Soon | 350 | 450 | 500 | WS/003 |
| Perak Tax Forum 2020 | 13 Mar | 9a.m. - 5p.m | Ipoh | Various | TBA | TBA | TBA | PT/001 |
| Workshop: Tax Issues and Law Relating to Property Developers, JMB/MC and Investors | 16 Mar | 9a.m. - 5p.m | Kuching | Dr. Tan Thai Soon | 350 | 450 | 500 | WS/004 |
| Seminar: International Women's Day - Women in Taxation | 17 Mar | 9a.m. - 5p.m | Kuala Lumpur | Various | 450 | 550 | 650 | SE/002 |
| Workshop: Tax Issues and Law Relating to Property Developers, JMB/MC and Investors | 23 Mar | 9a.m. - 5p.m | Penang | Dr. Tan Thai Soon | 350 | 550 | 500 | WS/005 |

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, Ms Jas and Ms Zaimah at 03-2162 8989 ext 121, 131 and 119 respectively or refer to CTIM's website **www.ctim.org.my** for more information on the CPD events.

CHARTERED TAX INSTITUTE OF MALAYSIA

# SAVE THE DATE

## Seminar
# QUARTERLY TAX UPDATES 2020

| Date | Venue | Time |
|---|---|---|
| 6 April 2020 | Kuala Lumpur | 9.00 am – 5.00 pm |
| 13 April 2020 | Kota Kinabalu | 9.00 am – 5.00 pm |
| 14 April 2020 | Kuching | 9.00 am – 5.00 pm |
| 16 April 2020 | Johor Bahru | 9.00 am – 5.00 pm |
| 20 April 2020 | Penang | 9.00 am – 5.00 pm |
| 20 April 2020 | Ipoh | 9.00 am – 5.00 pm |
| 22 April 2020 | Melaka | 9.00 am – 5.00 pm |

## COURSE CONTENTS

### TOPIC 1: 2020 POST-BUDGET UPDATES

- Latest updates from MOF & IRB
- Highlights of issues arising from the Budget 2020 Dialogue
- Recent gazette orders

### TOPIC 2: LATEST PUBLIC RULINGS, PRACTICE NOTES & GUIDELINES

Brochure and registration form will be available in CTIM'S website soon.

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Ms Jaslina /Ext 131 / jaslina@ctim.org.my

*Please note that the CPD Points awarded qualifies for the purpose of application and renewal of tax agent licence under Section 153, Income Tax Act 1967.*

8 CPD POINTS

HRDF CLAIMABLE
*(based on the merit of each applicant)*