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COVID-19 - TAX IMPLICATIONS ON BUSINESS RESTRUCTURING

- COVID-19 - Donations & Gifts as a Tax Deduction
- COVID-19 and Transfer Pricing - Keeping Both at Arm's Length
- Tax Guidelines on the Place of Business - Understanding the Rule and Its Practical Implications

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CTIM 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.

INSTITUTE ADDRESS

The Secretariat, Unit B-13-1,
Block B, 13th Floor, Megan Avenue II,
No. 12 Jalan Yap Kwan Seng,
50450 Kuala Lumpur
Telephone : 603 2162 8989
Facsimile : 603 2162 8990
E-mail : secretariat@ctim.org.my
Website : www.ctim.org.my

THE SECRETARIAT

Executive Director : Margaret Kok
Technical : Thong Vee Kean
CPD : Nursalmi Haslina Mohd Rusli
Corporate Support Services : Christine Jennifer Sanda
(Finance, Human Resources, Membership)
Education, Examinations & Editorial : Irene Chen Mui Yoon

PUBLISHING CONSULTANT

Executive Mode Sdn Bhd (317453-P)
Tel: +603-7118 3200, 3205, 3230
Fax: +603-7118 3220
e-mail: executivemode@executivemode.com.my
web: www.executivemode.com.my

PRINTER

BHS Book Printing Sdn Bhd (95134-K)
Lot 4, Lorong CJ 1/1B
Kawasan Perindustrian Cheras Jaya
43200 Cheras, Selangor DE
Tel: +603-9076 3399, 9074 7558, 9074 7017
Fax: +603-9074 7573, 9074 5226
e-mail: bhs@bhsbookprint.com

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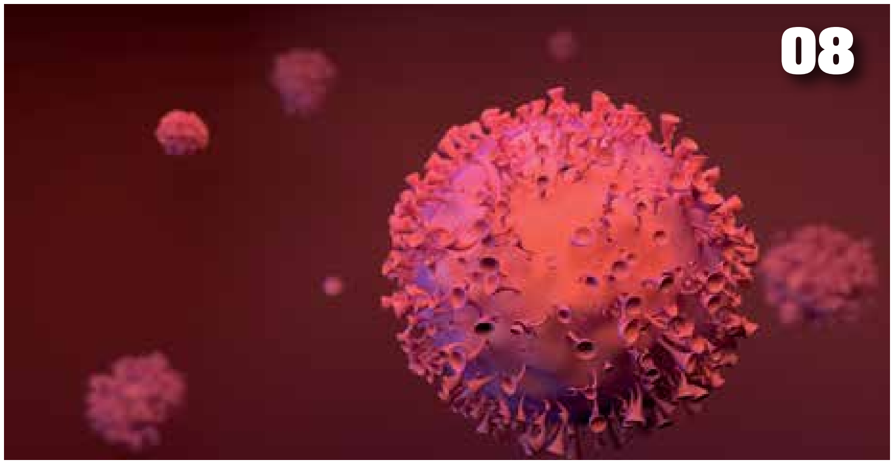

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The Institute welcomes original contributions which are of interest to tax professionals, lawyers, academicians and students. They may cover local or international tax developments. Article contributions should be written in UK English. All articles 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.

Contributions may be sent to:
The Chairman, Editorial Committee
Chartered Tax Institute of Malaysia
Unit B-13-1 Block B, 13th Floor, Megan Avenue II,
No.12, Jalan Yap Kwan Seng, 50450 Kuala Lumpur.
Email: *publications@ctim.org.my*

FARAH ROSLEY

AGILE TAX ENVIRONMENT IN UNPRECEDENTED TIMES

Greetings! The COVID-19 outbreak which was first reported in Wuhan, China in December 2019 has significantly impacted many countries around the world including Malaysia. At the present time, Malaysia has been placed under the Recovery Movement Control Order from 10 June 2020 to 31 August 2020 after enduring the Movement Control Order ("MCO") from 18 March 2020 to 3 May 2020 and the Conditional MCO from 4 May 2020 to 9 June 2020 which succeeded in curbing the spread of the COVID-19 pandemic. This success has come at a great cost to the economy as business premises were negatively impacted, travelling was restricted and gatherings were prohibited which brought many income generating activities to a halt. The Prihatin economic stimulus package and Penjana economic recovery plan implemented by the government to restart the economy are most welcomed as it will facilitate the restoration of businesses and employment which have suffered.

CTIM had to close its office premises for the first time for the duration of the MCO. Due to the office closure, e-Circulars could not be emailed in bulk to members and were posted in the members only section in the CTIM website for access by members. Secretariat staff continued to work from home until the office was allowed to re-open on 4 May 2020. During this period the Council Members and secretariat continued to work closely on the various taxation matters and bringing up-to-date information to everyone. I wish to express special thanks to everyone for their commitment during this unprecedented and challenging times.

CTIM continued to engage with the tax authorities during the MCO and Conditional MCO on matters including the following:

- **Tax Matters during the MCO and Conditional MCO**
  CTIM actively engaged with the Inland Revenue Board of Malaysia ("IRBM") and the Royal Malaysian Customs Department ("RMCD") on the implications of the MCO on businesses raised by members. This included proposing for extension of filing/submission deadlines, extension of time for tax payments and reduction/waiver of tax penalties. Clarification was also sought on the tax deduction for contributions/donations to the COVID-19 Fund and the implementation of the tax measures announced by the government under the Economic Stimulus Packages 2020 ("ESP 2020") such as revision of tax estimate in the third month instalment in the year 2020 and special deduction for rental reduction given to tenants which are small and medium enterprises ("SMEs") from April 2020 to June 2020. The IRBM and the RMCD responded promptly to the matters raised by CTIM and also posted regular updates on their websites throughout the MCO and conditional MCO. We would like to express our thanks to the IRBM and the RMCD.
- **Memorandum to various authorities**
  Besides the above-mentioned matters, CTIM submitted several memorandums to the various authorities as follows:
  - Tax policy inputs for

    SMEs and other affected businesses to the Minister of Finance;
    - Clarification sought on tax proposals announced in the ESP 2020 to the Ministry of Finance ("MoF");
    - Comments on the IRBM's responses on post-2020 Budget issues, Labuan Business Activity Tax (Amendment) Bill 2019 issues, Questions & Answers on post-2020 Budget issues during the IRBM National Tax Seminar 2019 in relation to Labuan, Labuan Financial Services Authority circulars, public rulings and gazette order to the IRBM; and
    - Operational indirect tax issues due to the COVID-19 outbreak and economy slowdown and additional operational indirect tax issues to the RMCD.
- **Proposals for the 2021 Budget**
  CTIM also submitted a memorandum on 2021 Budget proposals (summary) on direct and indirect tax issues to the MoF and the 2021 Budget memorandum on tax issues relating to the capital market to the Securities Commission Malaysia. It has been announced recently in a media release by the Speaker of the House of Representatives that the 2021 Budget will be tabled in Parliament on 6 November 2020.

CPD Events

Continuing professional development ("CPD") events have been cancelled since the beginning of March 2020 due to the COVID-19 situation and the MCO. CTIM has organised three webinars in May 2020 on "MCO & Its Impact: Key Tax Issues for Tax Professionals", "Strategic Tax Considerations During and Post COVID-19" and "Sharing Our Experience of Managing Tax Audits and Investigations" and two webinars in June 2020 on "The Implications of COVID-19 on Economy and Tax Issues on Rental Reduction during MCO" and "Tax Audit and Investigation – Practical Insights".

CTIM has been allowed by the authorities to hold physical CPD events from the end of June 2020 onwards, subject to observing standard operating procedures set by them. Following this, CTIM held its first physical CPD event on 29 June 2020 on "Selected Public Rulings 2020" at Seri Pacific Hotel, Kuala Lumpur.

CTIM has written to the MoF to request for recognition of CPD points for attending webinars and online courses and extension of time for the purpose of renewing the Section 153 tax agent licence. CTIM's requests are being deliberated by the MoF.

Examinations

In line with other professional bodies, CTIM took the decision to cancel the CTIM professional examinations in June 2020. The next CTIM professional examinations will take place in December 2020.

Membership

I would like to thank our members and the IRBM for the support and encouragement to their staff and officers respectively to apply for CTIM membership. This is an indication of CTIM as the premier taxation body and in recognition of CTIM in the Malaysian taxation scene. We hope that more tax practitioners who are eligible will apply for CTIM membership. The eligibility criteria and application procedure are available in the membership section of the CTIM website at *www.ctim.org.my.*

Members are kindly requested to pay up any overdue subscription for 2020 as soon as possible.

CTIM has obtained an extension of time of three months from the Companies Commission of Malaysia to hold its 28th Annual General Meeting ("AGM"). As such, the AGM will be held on 12 September 2020. CTIM will notify members on matters pertaining to the AGM in due course.

Director General of Customs Malaysia

YBhg. Dato' Seri Paddy Abdul Halim has retired as the Director General of Customs Malaysia and YBhg. Dato' Abdul Latif Abdul Kadir has been appointed to the said position on 5 June 2020. On behalf of CTIM, I would like to thank YBhg. Dato' Seri Paddy for the close working relationship between the RMCD and CTIM during his tenure. At the same time, I would like to congratulate YBhg. Dato' Abdul Latif on his appointment and I look forward to CTIM continuing the close working relationship with the RMCD.

Executive Director of the CTIM Secretariat

Mr. P. Thomas Simon who joined CTIM on 15 July 2011 as the Executive Director ("ED") has retired on 30 June 2020. I am pleased to welcome Ms. Margaret Kok as the new ED. The CTIM Council and I would like to express our heartfelt thanks to Mr. Thomas for his invaluable service to CTIM.

In spite of the unprecedented and challenging situation brought about by the COVID-19 pandemic, I am confident that CTIM will continue to move forward to fulfil its mission in taxation with the support of the CTIM Council, members and the various stakeholders. We are grateful for your continuing support of CTIM.

Take care everyone and stay safe.

Editor's Note

YEO ENG PING

It is really encouraging to see attention that pivots towards the re-opening and recovery of the economy, as many countries including Malaysia see improved containment of the COVID-19 pandemic within their borders. No doubt this will need to be measured as many other parts of the world are still wrestling to manage the outbreak, and the overall uncertainty will remain until a vaccine or medical solution is found. Since entering the Recovery Movement Control Order (RMCO) on 10 June, signs of return to "normality" are increasingly apparent as streets and malls fill with more people, schools re-open, social gatherings and larger events are in plan as the 250-person limitation is uplifted from 15 July. On the international front, while most borders remain closed, governments are in discussions on creating "travel bubbles or corridors" that enable travellers to move between countries with little or no restrictions. Malaysia is reported to be in discussion with several countries such as Singapore, Brunei, New Zealand and Australia, while there is news that Japan-Malaysia talks should also start soon.

More broadly, international organisations such as the OECD have called for greater international co-operation to ensure global trade continues to flow as this is "essential to save lives and livelihoods". According to the WTO, Q1 2020 trade had shrunk 3% year - on - year, with an estimated 18.5% drop for Q2, and in its June 2020 statement the IMF predicted global trade to contract 11.9% in 2020. The IMF also forecast a 4.9% contraction for the global economy for 2020, which is 1.9% lower than its April forecast confirming the unexpectedly worse impact that COVID-19 has had on economic activity. In line with the view that global recovery will be slower than previously anticipated, the IMF reduced its global growth projection to 5.4% in 2021. While $10.7 trillion in fiscal measures was announced by governments to support economies, the IMF said more will be needed as many countries are still expected to enter into a recession. As a consequence, the public debt levels are expected to climb to an all-time high, which in itself will have other ramifications.

There are some early positive signs of recovery, based on indicators such as greater activity from global commercial flights carrying international cargo, container port, and new export orders. However governments need to be aligned and cooperate closely to create confidence that promotes sustained activity. To quote a recent OECD report:

"In the midst of significant uncertainty, there are four things we can do:

1) *boost confidence in trade and global markets by improving transparency about trade-related policy actions and intentions;*
2) *keep supply chains flowing, especially for essentials such as health supplies and food;*
3) *avoid making things worse, through unnecessary export restrictions and other trade barriers; and*
4) *even in the midst of the crisis, think beyond the immediate. Government support today needs to be delivered in a way that ensures it serves the public interest, not vested interests, and avoids becoming tomorrow's market distortions."*

Against this backdrop, the 36th ASEAN Summit was held via teleconference on 26 June 2020, where the ASEAN governments covered an extensive agenda. Foremost was the acknowledgement of how the governments have worked together in fighting the pandemic from a public health perspective. There were also a number of announcements and commitments on economic measures including:

- Establishment of the COVID-19 ASEAN Response Fund and commencement of the process to recover via development of a comprehensive recovery framework.
- Reiteration of the commitment to keeping the Asean markets open for trade, free from unnecessary restrictions as well for investment.
- Adopted the Hanoi Plan of Action on Strengthening ASEAN Economic Cooperation and Supply Chain Connectivity in recognition of the importance of strengthening intra-ASEAN trade and investment to regional supply chains.
- Acknowledged the key progress made towards further economic integration including the onboarding of 10 ASEAN Member States in the Live Operation for the exchange of the ASEAN Trade In Goods Agreement (ATIGA) e-form D via the ASEAN Single Window (ASW) with future expansion to other trade-related documents among ready ASEAN Member States this year; the conclusion of the Mutual Recognition Arrangement (MRA) for Type Approval of Automotive Products with its signing planned this year; the development of the ASEAN Peer Review Guidance Document, the Trainers' Guide for Market Studies, the Toolkit for Formulating National Enforcement Strategies, and the research paper on commonalities and differences in competition legislations in ASEAN; and the development of the ASEAN Framework on Cross-Border Cooperation for ASEAN consumer protection authorities, the Capacity Building Roadmap for Consumer Protection 2019-2025, and the ASEAN Guidelines on Cross Border B2C Dispute Resolution.
- Resolved to redouble efforts to build preparedness for the Fourth Industrial Revolution (4IR), including through the development of the ASEAN consolidated strategy on the 4IR, in recognition of the indispensable role of digital technologies in post-pandemic recovery efforts.
- Acknowledged the progress made for the full conclusion of the negotiations

of the Regional Comprehensive Economic Partnership (RCEP) Agreement and looked forward to the signing of this Agreement by the end of this year as part of ASEAN's commitment to upholding an open, inclusive and rules-based multilateral trading system.

Though the future is still fraught with uncertainties, there are good reasons to remain positive as all including governments are working towards putting in place policies that steer us to recovery. As individuals, businesses, communities, and nation we need to be innovative and adaptive to a new normal. Mutual trust and cooperation are key as we experience new ways of working, playing and interacting, and we need more than ever to be open, nimble and agile. A small example springs to mind, and if you recall, our ability as Section 153-approved tax advisors to meet learning requirements imposed by the Ministry of Finance became an issue with the lockdown. Other professional bodies were understood to have received a rejection to request to have online courses approved for similar purpose, and CTIM's own request for the upcoming online National Tax Conference event to be recognised appeared to have stalled. At its heart, there was probably wariness on the perceived vulnerabilities associated with such technology-enabled alternatives compared to a traditional in-person event. The happy ending of this is that the MoF has granted its approval subject to organisers putting in place appropriate mechanisms to ensure attendance by on-line participants.

The OECD, in reference to global trade said that "In the short - term, there are some practical things we can do to keep trade flowing and to increase how trade can support the fight against COVID-19, including: … Making it cheaper and easier for people to stay connected to jobs, markets – and each other – by: reducing tariffs on information and communication technology goods and measures affecting access to digitally enabled services; temporarily increasing de minimis thresholds to cut delays in cross-border e-commerce; and keeping trade moving without physical contact through enacting regulations to enable e-payments, e-signatures and e-contracts.". This decision by the MoF is another step to "keep trade moving", it speaks to trust and agility, and bodes well for other permutations of issues we will encounter in the post-pandemic era.

InstituteNews

CPD EVENTS

The CPD seminars and workshops scheduled for April to June 2020 had to be cancelled due to the Movement Control Order (MCO) w.e.f 18 March 2020. With the objective of providing continuous tax update, CTIM organised a series of webinars as follows:

- 1 May 2020 - **MCO and its impact: Key Tax Issues for Tax Professionals** was presented by Ms. Farah Rosley, CTIM President, Mr. Chow Chee Yen, CTIM Deputy President, Mr. S Saravana Kumar, Tax Lawyer, Rosli Dahlan Saravana (RDS) Partnership
- 14 May 2020 - **Strategic Tax Considerations During & Post COVID-19** was presented by Mr. Chow Chee Yen, Mr. Thenesh Kannaa, CTIM Council Member & Mr. Hisham Rusli, Director of Multinational Tax Branch, Inland Revenue Board of Malaysia
- 20 May 2020 - **Sharing Our Experience of Managing Tax Audits & Investigations** was presented by Mr. SM Thanneermalai, Managing Director, Thannees Tax Consulting Services
- 10 June 2020 - **The Implications of COVID-19 on Economy and Tax Issues** on Rental Reduction During MCO was presented by Dr. Tan Thai Soon, Managing Director, TST Consulting
- 16 June 2020 - **Tax Audit and Investigation – Practical Insights** was presented by Mr. Soh Lian Seng, CTIM Council Member, Mr. Chris Low, Executive Director,Tax, BDO & Mr. S Saravana Kumar.

The Institute would like to thank the presenters for their invaluable contribution in sharing their insights and experiences in these webinar events.

NEW EXECUTIVE DIRECTOR FOR CTIM

Margaret Kok joined the Institute on 12 May 2020 as the Executive Director. She started her career as a tax professional and has more than 12 years of experience focusing on tax incentives for foreign investors as well as tax and immigration issues relating to globally mobile workforce. Her experience also included speaking in seminars and workshops.

From KL, Margaret moved to Beijing as a trailing spouse and began her foray into corporate sector, primarily the education sector in which she continued upon her return to Malaysia. Helming the operations role, she has comprehensive experience in managing Finance, HR, ICT, Facilities and Administration. The key to operations excellence, she deeply believes, is through building a strong and cohesive team.

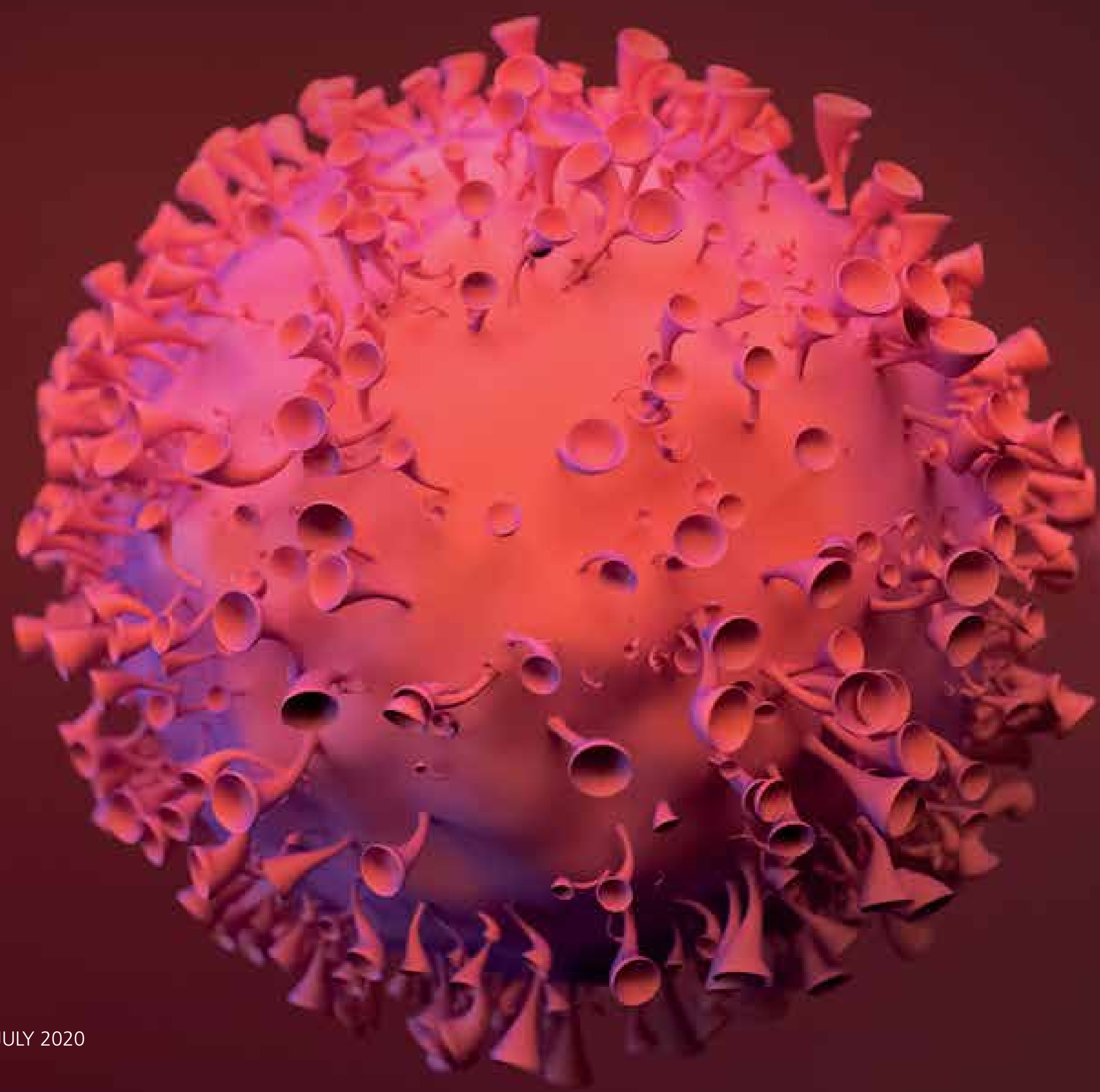
Continuous learning and transformation are of great interest to Margaret. She is excited to be part of the Institute and looks forward to a journey of growth together with the Institute.

On a personal note, Margaret relaxes by enjoying a good cup of tea.

COVID-19 TAX IMPLICATIONS ON BUSINESS RESTRUCTURING

Chong Mun Yew

"THE WORLD HEALTH ORGANISATION (WHO) HAS BEEN ASSESSING THIS OUTBREAK AROUND THE CLOCK AND WE ARE DEEPLY CONCERNED BOTH BY THE ALARMING LEVELS OF SPREAD AND SEVERITY AND BY THE ALARMING LEVELS OF INACTION. WE HAVE THEREFORE MADE THE ASSESSMENT THAT COVID-19 CAN BE CHARACTERISED AS A PANDEMIC".



WHO issued the above statement on 11 March 2020, which officially characterised the COVID-19 outbreak as a pandemic. Following this, many countries around the world went into lockdowns with the hope of curbing the spread of the virus. The lockdowns followed by social distancing have increased the risk of companies going into insolvency, no matter how established they are. Companies are struggling to keep their financial wheels turning, which has created unprecedented business liquidity issues.

The *Financial Times* reported on 25 May 2020 that the "V, U, W, L: are just some of the letter-shaped recoveries that investors have put forward as paths for the US economy once the worst of the crisis is over. The idea of a Nike swoosh recovery has taken hold, implying a rebound in economic activity that is flatter and slower than the drop. The most optimistic forecast – the V-shaped rebound – has been dismissed suggesting a much less robust resurgence after what may well be the worst downturn since the Great Depression."

Given the many tax issues which the pandemic has created, for this article, we will only focus on the tax implications arising from business restructuring.

To weather the impact of the COVID-19 situation, many companies are looking into restructuring and reorganising their businesses.

What businesses should know if they intend to restructure? Are there any tax implications on the methods used to restructure or reorganise their businesses?

INTRODUCTION

A company undertakes a restructuring exercise to modify the financial and operational aspects of the company significantly. This happens when the business is facing financial pressures. Restructuring involves considerably modifying the debt, operations or structure of a company as a way of limiting financial harm and improving the business.[1]

Briefly, business restructuring can happen in the following manner:

(i) *Operational restructuring*
Operational restructuring is a corporate action taken to significantly modify the structure or the operations of the company, which usually happens when a company is facing significant problems and is in financial jeopardy.[2]

(ii) *Debt restructuring*
Debt restructuring is a process wherein a company or an entity experiencing financial distress and liquidity problems refinances its existing debt obligations to gain more flexibility in the short - term and make their debt load more manageable overall.[3]

OPERATIONAL RESTRUCTURING – HOW DOES IT WORK?

Operational restructuring comes in handy when a company is faced with an "out of cash" situation. The relevant company does not have a positive cash flow from its operations because of disruption in its income stream. Globally or locally, the COVID-19 pandemic has forced many companies to experience this kind of situation. So, what are the options available to these companies? In the worst case scenario, a company may be forced to shut down to avoid being in a continuous loss-making situation. In the case of a group of companies, merging businesses could be a step to reduce the operating cost of the group. Selling of assets and properties may also be on the cards to generate cash flow.

Let us look at some of the ways operational restructuring can be done and explore the tax implications of each method:

(i) *Consolidation / Merging of businesses*
Consolidating or merging of businesses could be an option for groups of companies to mitigate the overall operating

[1] *https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on- covid-19---11-march-2020*

[2] *https://efinancemanagement.com/corporate-restructuring*

[3] *https://corporatefinanceinstitute.com/resources/knowledge/finance/debt-restructuring/*

cost. This can be done by transferring assets, undertaking liabilities as well as moving employees from one company into another company. Even though the size of the group will shrink, it will help even out the overall overhead costs. Are there any tax implications on this? Generally, any gain arising from this restructuring exercise will not attract any income tax in the Malaysian tax perspective as this is deemed a capital gain. Conversely, any expenses incurred to transfer the business would not be allowed a tax deduction as they do not satisfy Section 33(1) of the Income Tax Act 1967 as expenses which are wholly and exclusively incurred in the production of income. There should also be no Real Property Gains Tax (RPGT) implications for the transfer of business from one company to another without the transfer of any real properties or shares in a real property company (RPC). However, stamp duty at the *ad valorem* rate ranging from 1% to 4% will be applicable in respect of any instrument to enact the transfer of business.

(ii) *Flattening the group structure*
An option is available for a group of companies to flatten its group structure. This can be done by transferring the shares of any company to be held under a single holding company. This will help in times of cash constraint caused by this COVID-19 pandemic as profitable companies within the group can declare a dividend to the holding company which in turn can flow the cash to other companies that need the cash by way of intercompany loan or direct capital injection. However, it should be noted that a company is prohibited under Section 123 of the Companies Act 2016 from giving financial assistance for acquiring shares in the company or its holding company, or for reducing or discharging a liability incurred for such an acquisition. Nevertheless, if the requirements in Section 126 of the Companies Act 2016 ("whitewash" procedures) are satisfied, a special resolution can be passed in respect of the intercompany loan. Are there any tax implications with regards to the transfer of shares within the group? Generally, any profits gained from the sale of shares would be a capital gain and would not be subject to income tax. There should be no RPGT implications for the transfer of shares from one company to the holding company, unless it is a transfer of shares of an RPC, in which then, RPGT would be applicable at the RPGT rate for companies ranging from 10% to 30% depending on the holding period of the shares being sold. In the case of a share transfer, the instrument to enact the transfer of shares would be subject to stamp duty at the rate of 0.3% of the consideration or market value of the shares, whichever is the higher. Do note however that stamp duty and real property gains tax exemptions may be applicable if the stipulated conditions are satisfied.

(iii) *Selling of properties and assets*
Simon Underwood, a business recovery partner at accountancy firm Menzies said that, companies should watch for "financial red flags", including difficulty paying creditors or employees on time.[4] These red flags could be an indication of a cash flow problem which forces most companies to sell their properties and assets. The cash flow generated from the sales of properties and assets will be a capital gain unless the company is in the business of trading properties. However, in this case RPGT within the range of 10% - 30% (depending on the holding period of the property) will be applicable on the sale of any properties situated in Malaysia. Stamp duty at an *ad valorem* rate ranging from 1% to 4% will also be chargeable on the sale and purchase agreement or the

memorandum of transfer, as the case may be. It should also be noted that under the Companies Act 2016, the company must pass a resolution before the directors of the company can dispose of a substantial portion of the company's business which includes all tangible and intangible assets.

(iv) *Movement of employees*

Jorge Paulo Lemann, co-founder of Banco Garantia once said, "The greatest asset of a company is its people." As companies embark to reorganise their businesses, the welfare of their employees should also be looked into. Businesses will likely need to make some adjustments to their current operations as there is no indication of how long this crisis will last. As a result, businesses may choose to temporarily relocate their staff to other companies within the group for better profit and cash flow management. Relocation expenses such as fees incurred for planning and execution or supervision of the relocation process, transportation cost, and insurance premium to cover the lost or damaged items during the moving process will generally qualify for tax deduction if such relocation results in enhanced business efficiency. However, if the relocation arises from the transfer of business from one company to another company which results in the closing down of a company's operations, such relocation expenses may not qualify for a tax deduction. Besides the temporary relocation of employees, businesses may even need to downsize their operations. Some employers may choose to reduce costs by way of staff retrenchment. Generally, compensation paid to employees for loss of office is tax deductible if such payment results in the company's business operations being more efficient[5]. However, compensation made by the successor company in respect of services rendered by an employee to the previous company in a reorganisation plan may not be tax deductible. Compensation made to an employee in lieu of notice for a period after the business has ceased will also not be tax deductible. In view of the above, any relocation or retrenchment plan by businesses should be given due consideration in order to minimise any adverse tax implications.

(v) *Winding up*

As a last resort, companies will just choose to close their doors to avoid making further losses. What happens when a company is liquidated? All its assets will be sold to settle its debts whilst any excess of cash will be distributed to its owners or shareholders. The capital distribution paid out to the shareholders will be a capital receipt in the hands of the shareholders. The expenses incurred on services for the liquidation exercise would be capital expenditure and not be allowed a tax deduction because it would not satisfy Section 33(1) of the Income Tax Act 1967 as expenses that are wholly and exclusively incurred in the production of income.

DEBT RESTRUCTURING - WHAT DO YOU NEED TO KNOW?

The airline industry, cruise line companies, hoteliers, entertainment parks and small businesses which are being hit the hardest by the pandemic are faced with the unprecedented stress of servicing their debts. As with all the good things happening in the wake of this virus, like the selflessness of our frontliners, debtors may find that their lenders may be willing to work something out. There are several ways to structure a debt workout, namely, reduction of interest rates and deferral of payment period or

[4] *https://www.cips.org/supply-management/news/2020/march/coronavirus-how-to-spot-financial-distress-in-the- supply-chain/*

[5] *DGIR v Kulim Rubber Plantation Ltd (1981) 1 MLJ 214*

extension of maturity date. Certain elements of debt restructuring and the tax treatments in relation to it are further discussed below:

(i) *Bad debts written off*
What is a bad debt? A bad debt expense is recognised when a receivable is no longer collectible because a customer is unable to fulfill its obligation to pay an outstanding debt due to bankruptcy or other financial problems. Typically, it is a situation where an insolvent debtor is unable to settle debts. Further, Public Ruling 4/2019 - Tax Treatment of Wholly and Partly Irrecoverable and Debt Recoveries denotes that a debt can be considered as wholly irrecoverable or bad on the occurrence of any one of the following:
   a) The debtor has died without leaving any assets from which the debt can be recovered;
   b) The debtor is a bankrupt or under liquidation and there are no assets from which the debt can be recovered;
   c) The debt is statute-barred;
   d) The debtor cannot be traced despite various attempts and there are no known assets from which the debt can be recovered;
   e) Attempts at negotiation or arbitration of a disputed debt have failed and the anticipated cost of litigation is prohibitive; or
   f) Any other circumstances where there is no likelihood of cost-effective recovery.

Referring to the list above, companies facing financial difficulties as a result of the COVID-19 pandemic will see their debts falling bad when the amounts are being written off in the creditor's books.

ii) *Deduction of bad debts*
What is the recourse available to the creditors in terms of tax deductions? Section 34(2) of the Income Tax Act 1967 allows a trade debt which is reasonably estimated to be irrecoverable either wholly or partly, to be deducted from gross income in computing the adjusted income of the creditor's business. So, the creditor will be able to enjoy a tax deduction if there are sufficient supporting documents to prove that the debt is bona fide and reasonable steps have been taken to recover the debts.

iii) *Waiver of intercompany loans*
Waiver of intercompany loans will occur more now with the onset of the COVID-19 pandemic. Groups of companies will attempt to restructure their financials to benefit the group as a whole. A point to note is the taxability of waiver of debts as income in the hands of the beneficiary. Section 30(4) of the Income Tax Act 1967 specifically provides for certain receipts to be treated as gross income from a business which includes the release of a debt in respect of expenditure previously allowed as a deduction. This principle is established in the case of *Ketua Pengarah Hasil Dalam Negeri v Bandar Nusajaya Development Sdn Bhd*[6] where only the business income portion of the waived loan is to be brought to tax.

Businesses must ensure that they are aware of all the tax treatments related to debt restructuring before embarking on waiving debts and claiming deduction on bad debts written off. Proper tax advice and consultation should be obtained so that businesses are able to prove their case when the Inland Revenue Board of Malaysia scrutinises the business decision during future tax audits or investigations.

MALAYSIA'S RESCUE APPROACH

With the view of assisting companies and businesses to mitigate the impact of the COVID-19 pandemic, the Malaysian government has implemented various plans and measures. Malaysia announced the first Economic Stimulus Package valued at RM20 billion on 27 February 2020 to ease the financial burden of the people and certain categories of businesses followed by the Prihatin Economic Stimulus Package valued at RM250 billion on 27 March 2020. An Additional Prihatin SME Economic Stimulus Package valued at RM10 billion was announced on 6 April 2020 for the micro, small and medium enterprises. As Malaysia moves into the recovery

phase of the COVID-19 pandemic, the government also unveiled the Short Term Economic Recovery Plan valued at RM35 billion on 5 June 2020. Among the measures introduced by the Malaysian government are a wage subsidy programme to employers for a period of up to six (6) months to retain their employees earning a monthly income of RM4,000 and below, restructuring and rescheduling of employer's contributions for the Employees Provident Fund and suspension of income tax payments for a period of three (3) to six (6) months. In line with the Stimulus Package, the Malaysian banking sector has also stepped up measures to provide financial relief to help its customers affected by the COVID-19 pandemic by, amongst others, rescheduling or restructuring of loans, offering payment moratoriums as well as providing short-term financing to help alleviate short-term cash flow problems. Further, Bank Negara Malaysia has allocated a RM2 billion special relief facility which will be specifically deployed in the form of working capital for small and medium enterprises. Agreements entered into arising from these rescheduling, restructuring, or moratorium exercises will be given a 100% stamp duty exemption. The exemption can be used for agreements entered into between 1 March 2020 and 31 December 2020 on condition that the original loan agreement has been duly stamped. While the suite of the above measures is a welcome balm, such measures without more, may not be sufficient. This is especially so for the small and medium enterprises who may require a more in-depth survival kit to sustain their businesses in the aftermath of this outbreak in order to avoid facing insolvency proceedings by their creditors.

Other options to rehabilitate the business and finances of distressed companies in order to avoid liquidation are also available within the provisions of the Companies Act 2016. There are officially three (3) corporate rescue mechanisms available under the Companies Act 2016, namely, corporate voluntary arrangement, judicial management and scheme of arrangement and reconstruction. Sole proprietors also have an option provided under the Insolvency Act 1967 known as a voluntary arrangement. This is an arrangement for a small business owner before he becomes insolvent, to rearrange his debts with his creditors.

[6] 6 DGIR v Bandar Nusajaya Development Sdn Bhd (2016) MSTC

CONCLUSION

In conclusion, this pandemic has surely affected every business. Even the larger corporations have been impacted by the lockdowns imposed as well as the social distancing practice thereafter. Business strategies should be reassessed in order to survive the short - term and long - term impact of this pandemic. The government, financial institutions, tax authorities and all relevant parties should render their utmost support to businesses to help them out through this struggle. With cooperation from all parties, the country's economy can be revived and shaped back in a faster scale. It should be remembered that each of us are definitely not alone in combating this battle and we will surely overcome this. As the saying goes, "Every cloud has a silver lining, so is this COVID-19's cloud".

Disclaimer: This article does not seek to address all tax issues associated with the Covid-19 pandemic.

***Chong Mun Yew** is an Executive Director, Crowe KL Tax Sdn Bhd. He can be contacted at munyew.chong@crowe.my. The views expressed here are the writer's personal views.*

COVID-19 AND TRANSFER PRICING

KEEPING BOTH AT ARM'S LENGTH

Adeline Wong, Kellie Allison Yap & Ong Syn Joe

As COVID-19 spreads across much of the world, the governments of many jurisdictions have mandated lockdowns and implemented border controls, resulting in economies and markets facing unprecedented challenges. Economic activities are estimated to have decreased at unimaginable levels, causing many to draw bleak comparisons to the Great Depression.

Even as a jurisdiction's number of cases decreases to a manageable level and lockdown and social distancing measures start to lift, the pandemic will continue to exact its toll on vital components of the economy, pausing many projects in their pipelines. Across the globe, even as restrictions ease, there have been resurgences of COVID-19 against a backdrop of continual epidemiological development, foreshadowing much uncertainty in the months ahead.

For many multinational enterprises ("MNEs"), the pandemic is causing significant disruptions to their important supply chains and operations, affecting performances and ultimately profits. In turn, these will have transfer pricing implications. In this article, we will focus on the implications of the pandemic for Malaysian companies and their intercompany transactions, consider issues surrounding the preparation of transfer pricing documentation that may need to be addressed, and identify a few key litigation risks.

IMPACT ON CROSS-BORDER TRANSACTIONS IN MALAYSIA

On 18 March 2020, the Malaysian government imposed a lockdown in response to the local outbreak of the disease, forcing Malaysian companies that were not providing essential services to cease operations. Although restrictions have gradually eased since 4 May 2020, the impact of closures during the initial lockdown still clouds the economic outlook for the foreseeable future. The impact of the coronavirus on businesses varies across industries in breadth and depth. Service providers within an MNE group that are not able to perform services for the group may still be incurring costs. Similar fates have befallen distributors and retailers of group companies, and manufacturers exclusively serving their group face a reduction in demand. Some MNEs have temporarily shifted their supply chain away from Malaysia while others are reorganising, reducing, or relocating their operations.

MALAYSIAN TRANSFER PRICING OBLIGATIONS

In Malaysia, transfer pricing obligations are set out in the income tax legislation and Transfer Pricing Guidelines 2012 issued by the Malaysian Inland Revenue Board ("TP Guidelines"). Section 140A of the Income Tax Act requires companies to price their associated party transactions in accordance with the arm's length principle; transactions between

> **It may be the case that the losses borne by the entity can be supported or justified by conducting a benchmarking analysis based on a detailed consideration of the facts and circumstances, which isolate the financial impact of COVID-19.**

associated parties should be conducted at the price that would have been applied if the transactions were made between independent entities under the same or similar circumstances.

Briefly, companies that are involved in cross-border or domestic transactions for the acquisition or supply of property or services between related parties (known as controlled transactions) are required to prepare transfer pricing documentation to evidence that prices charged on controlled transactions are on an arm's length basis. MNEs may also need to prepare and file a country-by-country report and prepare a master file, all of which are documents that provide information on intercompany transactions undertaken by MNEs.

UNDERSTANDING THE IMPACT ON TRANSFER PRICING POLICY

With the substantial disruptions to supply chains and closure of markets, many MNEs have had to make short term changes and reorganise their intercompany transaction flows. These may include procurement of raw materials from a different related vendor, changing local entity functions to adapt to market conditions, or accelerating the digitalisation of business processes and functions. Such changes may have short to long - term impact on the transfer pricing policies adopted by an MNE, and will require reconsideration of its existing transfer pricing policies to ensure their sustainability.

(A) INCURRING AND MANAGING LOSSES

Where MNEs suffer losses or significant drops in profits, there will be a need to consider whether the losses are legitimate losses caused solely by the economic downturn or may be attributed instead to an unsustainable transfer pricing policy that requires reconsideration.

In the current economic climate, many companies are understandably negatively affected by the pandemic.

Extraordinary expenses, such as termination payments, lease breakage fees and costs of asset impairments, may be incurred under these extraordinary circumstances. In this regard, MNEs have to decide which transacting entity should bear such costs based on their risk profiles. It might be difficult to justify losses in a limited risk entity earning a routine cost plus mark up, given that there is a general expectation that residual profits or losses are taken by the entrepreneurial entity. In such cases, if the limited risk entity books losses, the IRBM may suspect an incorrect characterisation of the entity, possibly triggering a transfer pricing audit.

That said, an entity may be able to book losses if it can prove that unrelated parties in the same or similar circumstances have borne a similar proportion of cost/expenses, and the incurred losses are due to legitimate reasons such as termination of contracts, reduced demand, or operations being impeded by the lockdown. It may be the case that the losses borne by the entity can be supported or justified by conducting a benchmarking analysis based on a detailed consideration of the facts and

circumstances, which isolate the financial impact of COVID-19. After all, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD Guidelines") stipulate that "associated enterprises, like independent enterprises, can sustain genuine losses". In any event, MNEs may wish to reconsider the risk profiles of transacting entities by applying the OECD Guidelines' risk framework to determine the reallocation of losses.

(B) CHANGES TO FUNCTIONS PERFORMED, ASSETS USED AND RISK ASSUMED

Where MNEs undertake business restructurings such as shutting down or relocating business operations or realigning supply chains, the recharacterisation of certain entities, allocation of costs, and revision of transfer pricing should be carefully considered. Generally, MNEs are expected to keep their transfer pricing policies up to date, reflecting contemporaneous factual and economic circumstances.

Once the dust settles on the epidemiological front and the economic consequences are clearer, MNEs should consider the factual basis on which their transfer pricing policies were prepared, the suitability of their existing comparables, as well as their ability to reliably collect data that can be used in the application of such transfer pricing policies. This may involve re-evaluating the functions performed, assets used, and risks assumed ("FAR") by certain business entities within the group, and considering if changes should be made to the existing operating structure in light of the impacts of the pandemic on their businesses. In this regard, the TP Guidelines provide that a reduction of profitability is only acceptable if there is a corresponding reduction of functions performed, assets employed, and risks assumed.

Ultimately, the key is to consider how independent parties will react in the same or similar conditions and, in doing so, all measures taken by MNEs in revising their transfer pricing policies should be contemporaneously documented, detailing all the effects of the pandemic on the business and the decisions that are made in response. Such documentation should reflect that all options realistically available to the transacting parties if they were independent entities have been considered at length before deciding on the final measure.

INTERCOMPANY CONTRACTS

A good starting point for any transfer pricing policy consideration would be the terms of existing intercompany contracts. Companies should consider if the contracts provide any room to adjust transfer pricing policies in light of the unforeseen economic downturn. In this regard, they should consider whether the contracts still hold up commercially and economically, and, if not, whether they are able to invoke a force majeure clause or renegotiate the contract.

Force majeure clauses function to exempt parties from liability where they fail to perform their contractual obligations due to a supervening or unnatural event that occurs beyond their control, which renders such performance impossible or unlawful. Common force majeure events include, amongst others, war, acts of terrorism, acts of God, and natural disasters. Whether the COVID-19 pandemic, its economic impact and consequent government measures will be considered force majeure events depends solely on the specific language of the force majeure clause in the relevant contract read in the context of the particular facts and circumstances. Common reliefs available to parties successfully invoking a force majeure clause include the suspension or deferment of the contractual obligations or the termination of the contract altogether. An in-depth assessment of existing intercompany arrangements may need to be conducted in order to determine which outcome is preferable.

If the contract does not contain a force majeure clause (which is common for most intercompany contracts), a party seeking to terminate the contract may rely on the doctrine of frustration housed under the Malaysian Contracts Act 1950 which voids a contract when a contractual obligation becomes impossible or, by reason of some event which the promisor could not prevent, unlawful.

Companies may also consider renegotiating the contracts or accepting alternative performances in cases where it might be more disruptive to find a reliable alternative business relationship, or in order to create or preserve goodwill and foster future business opportunities with the counterparty. It is not unheard of for unrelated parties to do so in such circumstances. Indeed, in anticipation of similar occurrences in the future, companies may consider specifically incorporating hardship clauses in their intercompany contracts, which give contracting parties the right to renegotiate a contract in case of a change in circumstances that fundamentally alters the equilibrium of the contract and makes its performance more onerous for one of the parties.

Aside from the above options, companies may also consider taking advantage of contracts that provide for the adjustment of prices. An example of such clauses can be found in some distribution agreements between related parties, which include mechanisms to ensure that the profit margin is maintained at a pre-agreed level and the prices reflected are at arm's length. In such cases, where a range of arm's length returns is allowed in the contract, companies may wish to target their prices at the low end of the range in order to reflect depressed profits.

CONSIDERATIONS IN RESPECT OF TRANSFER PRICING DOCUMENTATION

Transfer pricing documentation is of paramount importance. It is the IRBM's starting point in understanding an intragroup transaction as it sets out the circumstances and arrangement between parties. In normal circumstances, companies may roll forward the contents of their transfer pricing documentation every year without substantial changes. However, in light of the COVID-19 pandemic, the content of the transfer pricing documentation may need to be reconsidered and substantially redrafted to reflect material changes to the circumstances.

In preparation for the transfer pricing documentation for the years of assessment affected by the pandemic, companies should start gathering contemporaneous evidence where necessary to support any changes made to transfer pricing policies or intercompany arrangements. These contemporaneous evidence should demonstrate the commercial and economic pressures faced by the company and the transfer pricing analyses made in respect of the same. Essentially, these evidence should materially draw a link between the economic crisis caused by the pandemic and the change in commercial circumstances of the relevant entity.

BENCHMARKING ANALYSES

In view of the different reactions of comparable companies in response to the pandemic, businesses may wish to reconsider their benchmarking approach and revise their screening criteria for comparables. For example, loss-making companies which were historically excluded in benchmarking analyses could now be included if companies are booking losses and companies that did not face or do not have data for similar adverse economic conditions could now be excluded.

Companies should also be mindful of the delay between the point in time when companies file their statutory accounts and the point when the data becomes available in the databases used for benchmarking analyses. The lack of suitable comparable data caused by such delays can make it difficult to evidence initial periods of lower profitability. In addition to revising the screening criteria for comparables, other suggestions to alleviate this concern include using only the most recent data, modifying the multi-year period to capture the full business cycle, or perhaps adjusting the results of the comparable companies to reflect the effects of the economic downturn.

Ultimately, results from these benchmarking analyses should demonstrate to the extent possible that the depressed profits or losses sustained are attributable to economic circumstances rather than being artificially created through transfer pricing, and that the risks are proportionately allocated among the loss-making entities.

TRANSFER PRICING DISPUTES

Transfer pricing audits are common in Malaysia and are usually triggered by various factors, including large outbound transactions, transactions involving low-tax jurisdictions, fluctuating profits, or consistent long-term losses. The IRBM generally adopts a restrictive approach when it comes to transfer pricing, and has, on multiple occasions, deviated from generally accepted technical standards propounded in the OECD Guidelines, such as employing the use of the median as a reference point to make transfer pricing adjustments to the results of comparable transactions as opposed to an interquartile range. The IRBM is also reluctant to accept non-Malaysian tested parties and prefer local comparables.

That said, with the pandemic

impacting the global economy, there should be more room to consider the guidance in the OECD Guidelines in determining transfer pricing issues. In fact, in 2019, the Special Commissioners of Tax issued a landmark decision that clarified, among other things, that no adjustment is necessary if the transfer price of the controlled transaction falls within the interquartile range. It is hopeful that, in light of such case law and the potentially looming global recession, the IRB will align its approach with the principles set out in the OECD Guidelines.

Additionally, companies may wish to review their advance pricing arrangements ("APAs"), given that APAs are premised on critical assumptions, one of which is typically that the transacting entity's functions, assets, and risks would remain materially the same. Briefly, companies may wish to analyse how changes to their transfer pricing policies or transactions or one-time extraordinary expenses may impact the APA, whether any applicable economic stimulus measures introduced by the Malaysian government (such as moratorium on loans, salary subsidies, and low-interest loans) should be factored into the APA, and whether it is ultimately advisable to continue with the APA. In Malaysia, an APA may be revised due to a failure to meet critical assumptions caused by drastic changes in the economic environment provided that the IRBM is informed of the need for such revision within 30 days of the company becoming aware of the same.

CONCLUSION

While the health costs of the COVID-19 pandemic are dire, the economic costs are no less distressing. Governments across the globe are attempting to balance various factors to save as much lives as possible and also to keep their economies afloat. As governments turn to stimulus measures and fiscal reliefs to alleviate the impact of the crisis, MNEs are increasingly having to manage losses and sources of liquidity within their groups. In doing so, companies should be mindful to comply with the arm's length principle whenever applicable. As a rule of thumb, companies should always bear in mind how unrelated parties will react in the same or similar circumstances. Every decision made should be documented and substantiated, and be able to withstand scrutiny in the event of an audit, investigation, or possibly litigation.

Further, while it is important to respond proactively to the current circumstances, MNEs should also proactively look forward to forging a sustainable strategy that can withstand similar crises in the future. In particular, the COVID-19 pandemic has magnified the importance of supply chain resilience and flexibility in intercompany arrangements. It is anticipated that many companies will be introducing flexible contractual terms in their intercompany contracts and adopting measures to increase resilience in their supply chains such as forward hubbing, diversifying operations, and embracing next generation manufacturing technology to reduce fixed costs. As the smoke clears in the wake of the COVID-19 pandemic, one thing is for sure: MNEs will be readier than before to face the next crisis.

Adeline Wong *is a partner and heads the Tax, Trade, and Wealth Management Practice Group of Wong & Partners, a member firm of Baker McKenzie International in Malaysia. She focuses on corporate tax planning and advisory, tax audits, tax controversies, indirect tax and customs, foreign trade and WTO matters, and wealth and trust management, for both local and international clients.*

Kellie Allison Yap *is a senior associate in the Tax, Trade and Wealth Management Practice Group of Wong & Partners, a member firm of Baker McKenzie International in Malaysia. She specialises in tax audits and litigation including transfer pricing related matters before the national courts.*

Ong Syn Joe *is an associate in the Tax, Trade and Wealth Management Practice Group of Wong & Partners, a member firm of Baker McKenzie International in Malaysia. She focuses on transfer pricing matters and regularly advises multinational companies on transfer pricing compliance and defence strategies*

COVID-19 DONATIONS & GIFTS AS A TAX DEDUCTION

Saravana Hanippvya

1.INTRODUCTION

In light of the socio-economic impact of COVID-19, the government has introduced several incentives through the Ministry of Finance (MoF) and the Inland Revenue Board of Malaysia (IRBM) with the aim of aiding Malaysians to effectively combat the pandemic. As the government welcomes contributions and donations made by Malaysians as well as the corporate sector in helping to tackle the COVID-19 outbreak, the MoF has announced and approved tax deductions for donations and donations in cash and goods made to approved community or charitable projects, the COVID-19 Fund, the Ministry of Health (MoH), and other entities in need.

THE RELATED PROVISIONS OF THE INCOME TAX ACT 1967 (ITA 1967) FOR THE INCENTIVES ANNOUNCED ARE AS BELOW:

Subsection 34(6)(h)	There may be deducted from the relevant gross income- (h) an amount equal to the expenditure incurred by the relevant person in the relevant period on the provision of services, public amenities and contributions to a charity or community project pertaining to education, health, housing, conservation or preservation of environment, enhancement of income of the poor, infrastructure and information and communication technology, or maintenance of a building designated as a heritage site by the Commissioner of Heritage under the National Heritage Act 2005 [Act 645] approved by the Minister: Provided that where a deduction has been made under this paragraph, no further deduction of the same amount shall be allowed under subsection 44(6);
Subsection 44(11C)	There shall be deducted from the aggregate income of a relevant person for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to any gift of money or cost of contribution in kind made by the relevant person in the basis period for that year for any project of national interest approved by the Minister: Provided that the amount to be deducted pursuant to this subsection shall not exceed the difference between the amount of ten per cent of the aggregate income of that person in the relevant year and the total amount that has been deducted pursuant to the proviso to subsections (6), (11B), and (D) for that relevant year.
Subsection 44(6)	Subject to subsection (12), there shall be deducted pursuant to this subsection from the aggregate income of a person for the relevant year reduced by any deduction falling to be made for that year in accordance with subsection (1) an amount equal to any gift of money made by him in the basis year for that year to the government, a State government, a local authority or an institution or organisation or a fund, approved for the purposes of this section by the Director General on the application of the institution or organisation concerned: Provided that the amount to be deducted from the aggregate income for the relevant year in respect of any gift of money made to any institution, organisation or fund approved for the purposes of this section by the Director General shall not exceed ten per cent of the aggregate income of that person in the relevant year.
Subsection 44(10)	There shall be deducted pursuant to this subsection from the aggregate income of a relevant person who is an individual for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to any gift of money or the cost or value (as certified by the Ministry of Health) of any gift of medical equipment made by him in the basis year for that year to any healthcare facility approved by that Ministry, and that amount shall not exceed twenty thousand ringgit.

The following paragraphs will explain further on the provisions of the ITA 1967 with regard to the approved tax deductions.

2.PROVISIONS UNDER SUBSECTION 34(6) (H) OF THE ITA 1967

2.1. Here are some of the matters highlighted in the Guidelines published by the MoF for tax deductions under subsection 34(6)(h) of the ITA 1967. The MoF has recognised the initiatives taken to fight the COVID-19 pandemic as a charity or community project approved under this subsection. The donors who make donations to this cause are eligible to apply for tax deductions from the gross business income, an amount equivalent to the amount of contribution made.

2.2. The conditions of the application for this tax deduction are as follows:

2.2.1 Qualifying persons:

i. Companies
ii. Individuals
iii. Partnerships
iv. Trust Bodies
v. Co-operative Societies

All these qualifying entities must have business income.

2.2.2. Criteria of qualifying Charity or Community Projects

Projects to assist the government or Non-Governmental Organisations (NGOs) registered under any written law to fight the COVID-19 pandemic.

2.2.3. Qualifying Donations and Contributions

i. Cash
ii. Equipment such as ventilators, beds for patient use, and air conditioners.
Disposable items such as masks, hand sanitizers, gloves, test kits, and Personal Protection Equipment (PPE)
iii. Services such as disinfection and sanitization costs (roads, buildings, markets, places of worship, etc.), cost of

providing mobile toilets, cost of shipping and delivering supplies, or

iv. Financing the provision of permanent or temporary infrastructure (For example, marquee tents to accommodate additional beds).

2.2.4 Qualifying Recipient Parties

The donations and contributions should be made to any government or private hospital, government departments/agencies, or registered non-governmental agencies which are non-profit oriented and not politically affiliated.

2.3. Procedures to Claim Tax Deduction from the Inland Revenue Board of Malaysia (IRBM)

2.3.1 The claim for the tax deduction on the approved charitable and community projects must be made in the income tax return form for the relevant year of assessment. The following supporting documents must be kept and will be needed for the IRBM's review purposes:

i. The original approval letter by the MoF; and

ii. Original acknowledgement of donation from the government or non-governmental bodies/ organisations (as seen in Appendix 1 of the Guidelines)

The amount of claim for tax deduction claimed under this subsection will not be permitted to be claimed again under subsection 44(6) ITA 1967.

2.4. Effective Date

The effective date for the donations and contributions to qualifying charity or community projects that can be claimed for tax deduction is from February 2020 until the date when the government declares that the COVID-19 pandemic has ended. The tax deduction meanwhile can be claimed from year of assessment 2020.

3.PROVISIONS UNDER SUBSECTION 44(11C) OF THE INCOME TAX ACT 1967

3.1. In line with the government's intention to help ease the burden of the various communities during their efforts to curb the COVID-19 pandemic, the MoF has released the Guidelines for the approval under subsection 44(11C) of the ITA 1967 for the COVID-19 Relief Fund. Under this approval, parties without business income are also qualified to apply. Here are some of the details highlighted in the Guidelines.

3.2. Definition of COVID-19 Relief Fund

3.2.1. COVID-19 Relief Fund is not a society or organisation approved and registered under any authority.

3.2.2. It is a fund approved by the MoF under the subsection 44(11C) of the ITA 1967 and established exclusively for national interest to help fight against the COVID-19 pandemic in Malaysia.

3.2.3. The approved COVID-19 relief funds are allowed to carry out donation drives in order to assist those who are affected medically, socially, or economically by the COVID-19 pandemic.

3.2.4. The representative of the approved COVID-19 Relief Fund can carry out donation drives for approved types of donation and contribution, and redirect the fund collected toward qualified recipients.

3.3. The conditions to apply for the approval under this subsection are as follows:

3.3.1. Eligible Applicants

The eligible applicants applying to obtain an approval for establishing a COVID-19 Relief Fund under the subsection 44(11C) of the ITA 1967 must be established in Malaysia, operating for non-profit, and registered as:

i. A company limited by guarantee incorporated under the Companies Act 2016 (Companies Commission of Malaysia)

ii. A society registered under the Societies Act 1966 (Registrar of Societies)

iii. A trustee incorporated under the Trustee (Incorporation) Act 1952 (Legal Affairs Division (BHEUU) of the Prime Minister's Department)

iv. Institutions/organisations approved under subsection 44(6) of the Income Tax Act 1967 is allowed to apply for the approval to establish COVID-19 Relief Fund, but must keep a separate account of receipts and expenditure.

3.4. Types of Allowable Donations and Contributions to the COVID-19 Relief Fund

These are the types of allowable donations and contributions:

i. Cash
ii. Equipment such as ventilators, beds for patient use, and air conditioners. Disposable Items such as masks, hand sanitizers, gloves, test kits, and Personal Protection Equipment (PPE)
iii. Raw and cooked/prepared food (Example: Rice, cooking oil, soy sauce, sugar, canned food, or ready-to-eat food)
iv. Services such as disinfection and sanitization costs (roads, buildings, markets, places of worship, etc.), cost of providing mobile toilets, cost of shipping and delivering supplies, or
v. Financing the provision of permanent or temporary infrastructure (For example, marquee tents to accommodate additional beds).

3.5. Qualified Recipients

3.5.1. These are the qualified recipients who are allowed to receive the donations and contributions collected by the approved COVID-19 Relief Fund:

i. Government Departments/ Agencies
ii. Non-governmental agencies registered with Companies Commission Malaysia, Registrar of Societies, and BHEUU.
iii. Government/private hospitals
iv. Public universities
v. Orphanage/old folks home/ home for people with disabilities
vi. Homeless /hard-core poor/ refugees and
vii. Zoos and animal shelters

3.5.2. The receipt by these qualified recipients must not be to seek profit or be politically motivated and the recipients must be registered and possess an income tax file number in the IRBM (except for the homeless/ hard core-poor/refugees).

3.6. General Information for COVID-19 Relief Fund

3.6.1. The general information required for the applicants to produce when setting up the COVID-19 Relief Fund are as follows:

i. Period of the donation drive (start and end dates)
ii. List of donors (if available)
iii. Target of donation and contribution (if available)
iv. List of recipients from the Fund and types of receipts (cash/consumables/ equipment/payment/ financing)

3.6.2. A separate bank account must be opened for this Fund and the bank statements must be produced to the MoF for review purposes.

3.7. Appointment of board of directors/committee members/ board of trustees of the COVID-19 Relief Fund

3.7.1. The founder/applicant of the COVID-19 Relief Fund must elect the board of directors/ committee members/board of trustees for the purpose of administering the Relief Fund. Appointed members must follow the rules whereby more than 50% of the board's composition should not be related with the institution/organisation/founder by way of but not limited to:

i. Family relationships such as parents, children, siblings including close family relationships,
ii. Employer-employee relationships,
iii. Directors or employees of the same company or group of companies

3.8. Supporting documents for donors' tax deduction claim purposes

3.8.1. For cash donations, contributions received must be issued with an official receipt that clearly records the following:

i. The name of the COVID-19 Relief Fund
ii. Serial numbers of the official receipts
iii. Date of donation and amount
iv. Donor's name
v. Identification card number/ business registration number

(donor)
vi. MoF's approval file reference number
vii. Effective date of approval

3.8.2.For contributions in kind, the approved Relief Fund must issue acknowledgment receipts with the recipient's official stamp to the donor. The donor must keep the receipt as well as the approval letter from the MoF for tax deduction claim purposes when submitting the income tax return form.

3.9.Performance report on activities

3.9.1. A performance report on the activities of the COVID-19 Relief Fund must be submitted to the MoF and IRBM every three months.

3.10. Tax Benefits

3.10.1. Donors who donated to the COVID-19 Relief Fund approved under subsection 44(11C) can claim a tax deduction in the Year of Assessment 2020 on an amount equal to any gift of money or cost of contribution in kind against the aggregate income. The deduction is capped at 10% of the aggregate income. This 10% cap includes donation made to institutions/organisations approved under subsection 44(6) of the ITA 1967, sports activities under subsection 44(11B) and Wakaf or Endowment under Subsection 44(11D). The period of contribution to the COVID-19 Relief Fund approved under subsection 44(11C) starts from February 2020 until the COVID-19 pandemic is declared to be over by the government

3.11.Dissolution

3.11.1.The COVID-19 Relief Fund has to be dissolved after the expiry of the approval period and the following actions are to be taken:

i. Submit a letter of dissolution to the MoF. If there is still balance in the Relief Fund, the remaining balance is to be transferred to the National Disaster Management Agency (NADMA) or the MoH.
ii. The separate bank account for the Relief Fund must be closed.
iii. Proof of the closure of the bank account after it has been cleared and the fund transfer to NADMA or the MoH must be presented to the MoF for review purposes.

3.12. Breach of conditions

3.12.1. The MoF at any time may withdraw the approval if the approved COVID-19 Relief Fund does not comply with the approval conditions.

3.12.2. If the Relief Fund's approval has been cancelled for breach of conditions and still have remaining balance in the bank account, the following actions are to be taken:

i. The remaining cash or contributions in kind has to be transferred to NADMA or the MoH.
ii. The separate bank account must be cleared and closed.
iii. Proof of the closure of the bank account after it has been cleared and the fund/contribution in kind transfer to NADMA or the MoH must be presented to the MoF for review purposes.

4. PROVISIONS UNDER SUBSECTION 44(6) OF THE INCOME TAX ACT 1967

4.1.Only cash donations are allowed under subsection 44(6) of the ITA 1967.

4.2.The donation under subsection 44(6) of the ITA 1967 can be channelled to:

i. National Disaster Management Agency, Prime Minister's Department; or
ii. Institution or organisation or fund approved under subsection 44(6) of the ITA 1967.

4.3.An institution or organisation or fund that has been approved under subsection 44(6) of the ITA 1967 is eligible for such contribution / donation. There is no need to reapply for approval under this subsection.

4.4.The supporting documents needed for income tax deduction claimed under the subsection 44(6) are as below:

4.4.1.National Disaster Management Agency, Prime Minister's Department.

i. Government Official Receipt (Kew. 38);
ii. Money transfer slip via ATM;
iii. Cheque deposit machine slip;
iv. Deposit slip via bank counter;
v. Online payment slip;
vi. Transfer slip via Interbank Giro (IBG Transfer);
vii. Receipt of Real Time Electronic Transfer of Funds and Securities (RENTAS) System; or
viii. Telegraphic transfer receipt with advice of credit.

4.4.2. Institution or organisation or fund approved under subsection 44(6) of the ITA 1967.

i. Official receipt that has been approved by the IRBM.

Deduction will only be allowed with a legal supporting document

4.5. Eligibility for contribution / donation amount for tax deduction:
4.5.1. National Disaster Management, Prime Minister's Department.
Tax deduction amount is equal to the amount of the contribution.
4.5.2. Institution or organisation or fund approved under subsection 44(6) of the ITA 1967.
Tax deduction amount is restricted to 10% of aggregate income.

4.6. The employers are allowed to collect on behalf of the employees. Information required is:
i. Proof of payment;
ii. Payment amount;
iii. Company / employer registration number;
iv. Company / employer income tax number;
v. Employee name;
vi. Employee identification number;
vii. Employee income tax number;
viii. IRBM branch which handles the employee income tax number; and
ix. Amount of contribution made by the employee.

Tax deductions can be claimed by the employee and not the employer.

4.7. An institution or organisation or fund which is approved under subsection 44(6) of the ITA 1967 is allowed to submit the audited accounts by 30 June 2020. Tax deduction can be claimed in Year of Assessment 2020. The allowed contribution period is from the beginning of February 2020 until the pandemic is declared over by the government.

5. PROVISIONS UNDER SUBSECTION 44(10) OF THE ITA 1967

5.1. Under this subsection:
5.1.1. Donations of cash and medical equipment can be made to any private medical treatment (healthcare facility) approved by the MoH.
5.1.2. Gift of money or the cost or value (as certified by the MoH) of any gift of medical equipment to any healthcare facility approved by the MoH is eligible for tax deduction.
5.1.3. Only individuals are eligible to claim under this subsection. The maximum deduction limit is capped at RM20,000 and can be deducted from the aggregate income.

6. GUIDELINES AND OTHER REFERENCES

6.1. The following Guidelines can be obtained from the official MoF website, under Exemption Guidelines:
i. Garis Panduan Khas Permohonan Potongan Cukai Pendapatan Bagi Projek Komuniti/Amal untuk Menangani Wabak Covid-19
ii. Garis Panduan Permohonan untuk Kelulusan Dibawah Subseksyen 44(11C) Akta Cukai Pendapatan 1967 Bagi Tabung Relief COVID-19

6.2. Other references include:
i. Frequently Asked Questions on Tax Matters during the Movement Control Order and the Conditional Movement Control Order Period – Can be obtained in the IRBM's official website
ii. Income Tax Act 1967

7. CONCLUSION

The fight against the COVID-19 pandemic is vital for the safety of the nation. As a token of appreciation and to encourage Malaysians to contribute to the needy during these trying times, the government through the MoF and the IRBM has announced some new incentives and also highlighted existing incentives. However, one of the most vital things that needs to be emphasised are for donors and recipients to keep proper documentation of all transactions, for example supporting documents such as the list of recipients, the official receipts and the letter of approval. All the supporting documents are important as they will be needed for review purposes by the MoF and the IRBM.

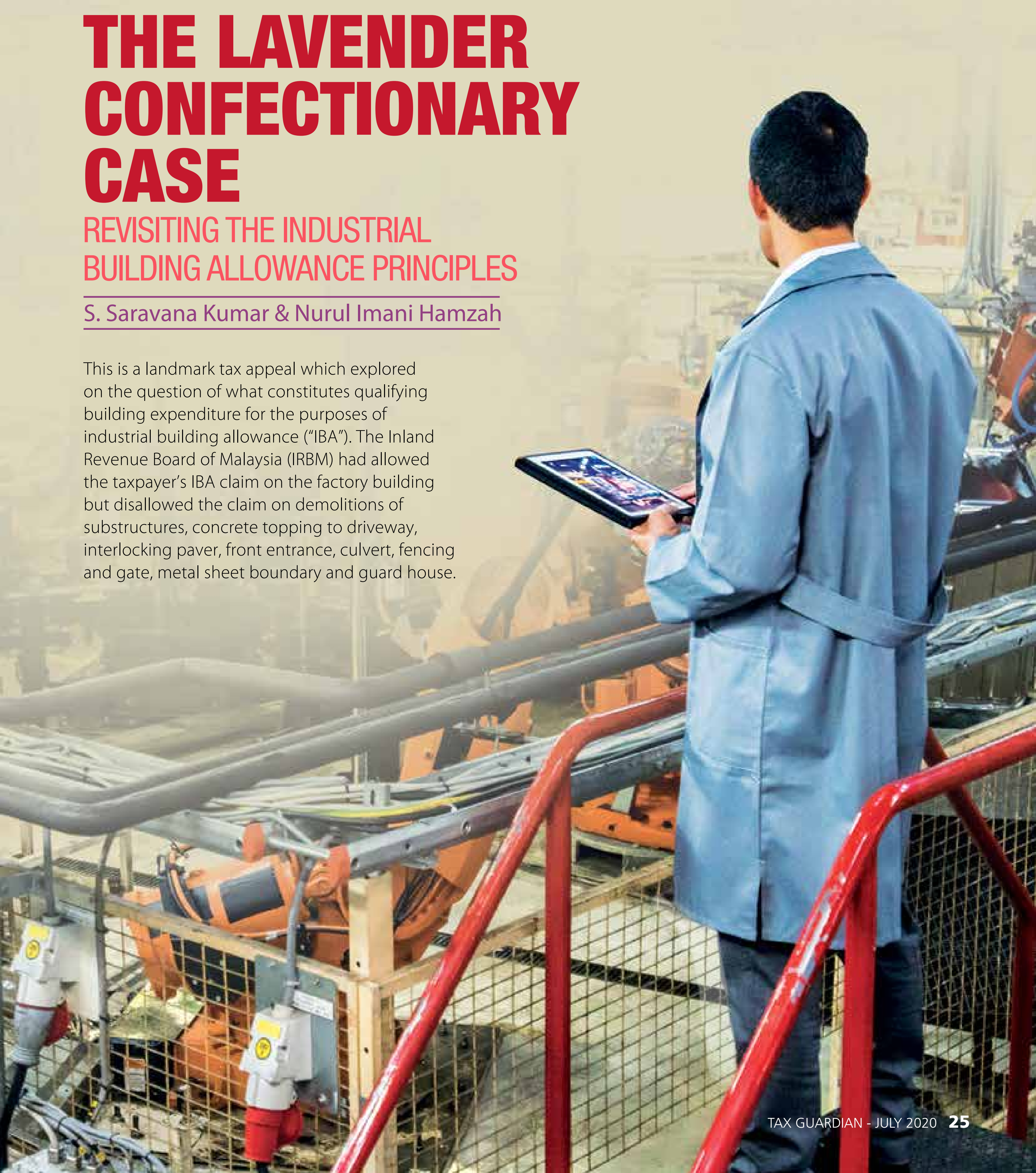
***Saravana Hanippvya** is an executive officer in the Tax Policy Department, Inland Revenue Board of Malaysia,*

THE LAVENDER CONFECTIONARY CASE

REVISITING THE INDUSTRIAL BUILDING ALLOWANCE PRINCIPLES

S. Saravana Kumar & Nurul Imani Hamzah

This is a landmark tax appeal which explored on the question of what constitutes qualifying building expenditure for the purposes of industrial building allowance ("IBA"). The Inland Revenue Board of Malaysia (IRBM) had allowed the taxpayer's IBA claim on the factory building but disallowed the claim on demolitions of substructures, concrete topping to driveway, interlocking paver, front entrance, culvert, fencing and gate, metal sheet boundary and guard house.



The Special Commissioners of Income Tax ("Special Commissioners") affirmed the IRBM's decision. However, on appeal, the High Court ruled in favour of the taxpayer. Recently, the Court of Appeal also unanimously affirmed the High Court's decision by ruling that the Special Commissioners erred in disallowing the taxpayer's appeal.

BRIEF FACTS

The taxpayer is a company incorporated in Malaysia in the business of manufacturer, distributor and dealer in cakes, confectionary, breads and biscuits[1]. The IRBM disallowed the IBA claim on the basis, *inter alia*, that:

- the costs for the demolition of substructures, which was necessary to renovate the taxpayer's factory to meet its needs, do not qualify under the definition of IBA; and
- The rest of the items such as the concrete topping to driveway, interlocking paver, front entrance, culvert, fencing, gate and guard house did not form part of the taxpayer's factory.

The taxpayer's witness testified that the factory purchased was previously used for the manufacturing of chairs. The building was a 2-storey building. The substructures of the existing factory was demolished to get the building ready for food manufacturing activities. In other words, the purpose of renovation was solely done for the production requirement, When the taxpayer purchased the factory, there was already a driveway which was not in good condition. The taxpayer's witness explained that the interlocking pavers are four times stronger than the regular concrete flooring and thus, the driveway was resurfaced using interlocking pavers. During the hearing, the taxpayer produced a brochure stating that interlocking pavers are very durable for heavy usage and are suitable for warehouse and factories. The taxpayer disagreed with the IRBM's suggestion that the renovation work done was for cosmetic reasons.

Meanwhile, it was explained that the fencing and road system within the factory curtilage was not for the cosmetic purposes because the suppliers drive into the factory to unload goods every single day. Before the renovation, 40 foot trucks cannot enter the factory to unload the goods. After the renovation, the driveway was improved to be able to allow these lorries to come into the premise to unload raw materials, which are essential to manufacturing business. The fence was also in bad condition, hence the taxpayer built the fencing. The drainage system was not in existence at that time so the taxpayer had to improve it to prevent any water puddling within the premise. The entire road system is within the fencing area, the factory's curtilage. The witness explained that without the renovation works done, the taxpayer's manufacturing business would still be able to function, however this will restrict the taxpayer's business.

The witness added that there was a guard house in the old building. However, the old guard house was at the left side of the building. The taxpayer then built the guard house on the right side of the building because the property was bigger on the right side and with the old guard house at the left side of the building previously, the lorries could not turn in at the side of the building. Hence, the taxpayer shifted the gate and the guard house to the right side of the building so that the bigger lorries could enter through that entrance. The demolishing work was essential and necessary for the factory to function properly because the land on left side is much smaller than on the right side so that's why the taxpayer needed to shift to the right side in order for the lorries to park and to unload stuffs.

LEGAL POSITION ON IBA

Under the Income Tax Act 1967 ("ITA"), a taxpayer is entitled to claim for IBA when he has qualifying building expenditure under paragraph 3 of Schedule 3 of the ITA which reads:

"3.(1) Subject to paragraph 6, qualifying building expenditure is capital expenditure incurred on the construction or purchase of a building which is used at any time after its construction or purchase, as the case may be, as an industrial building."

The definition of an industrial building is then provided in paragraph 63 of Schedule 3:

"Subject to paragraphs 64 to 66, a building is an industrial building within the meaning of this Schedule if it is used for the purposes of a business and—

(a) it is used as a factory;"

The word factory is further elaborated in paragraph 64 of Schedule 3 to include:

"64. In subparagraph 63(a) "factory" includes—

(a) a building consisting of a mill, workshop (other than a workshop used for the repair or servicing of goods, if the repair or servicing is carried out in conjunction with or incidentally to the business of selling those goods) or other building for the housing of machinery or plant of any description for the manufacture of any product or the subjection of goods or materials to any process or the generating of power used for the purposes of that manufacture or process;"

Hence, in order for the taxpayer to qualify for IBA, the factory must fulfil the following requirements prescribed by paragraphs 63 and 64 of Schedule 3, namely:

- It is a building used for the purposes of a business; and
- The building is used for the housing of machinery or plant of any description for the subjection of goods or materials to any process.

It is clear that the definition of "factory" under paragraph 64 of Schedule 3 is not exhaustive as the word "includes" is used, and this principle has been decided by the Court of Appeal in *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707*. It is a trite and well settled principle that when

an Act of Parliament employs the expression "includes" to define some other word or expression, the intention is to leave the meaning of the expression defined open ended. Therefore, the meaning of "factory" and "building" as enunciated in this case was not plucked out of thin air, but discerned from a thorough and comprehensive consideration of the law.

Meanwhile, the definition of "industrial building" is provided under paragraph 63 of Schedule 3, as a building used for the purposes of a business and it is used as a factory. Under paragraph 64 of Schedule 3, "factory" includes a building consisting of a mill, workshop or other building for the housing of machinery or plant of any description for the manufacture of any product or the subjection of goods or materials to any process or the generating of power used for the purposes of that manufacture or process.

DEMOLITION OF SUBSTRUCTURES

The IRBM contended that the costs for the demolition of substructures are not expenses which would qualify for IBA. On the other hand, the taxpayer argued that the demolition of the substructures was a preparatory measure for the manufacturing works and a necessary step in the construction of the building. The Special Commissioners rightly acknowledged that it is a proved fact that:

"The Appellant demolished the substructure to get the building ready for manufacturing works."

[1] *Lavender Confectionery & Bakery Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 1 LNS 2102*

It is common sense and logical that before any construction work can commence, any existing structure or impediment on the site of construction is to be demolished and removed. This was also rightly testified and accepted by the Special Commissioners that certain parts of the factory had to be demolished before the factory can be constructed. Further, the demolition works were done to allow the taxpayer to construct a driveway for lorries to enter the premise and to transport the finished goods. It would be ludicrous to imagine a factory without a proper driveway to allow the business' lorries to enter the premise and without a doubt, the logistics for the transportation of goods is a crucial and integral aspect in a manufacturing business. Hence, the capital expenditure incurred for the demolition works would qualify as a part of the qualifying building expenditure under Schedule 3 as they form part and parcel of the construction process and as tempting as it may be, a contrary inference by the Respondent would be senseless and untenable.

The Special Commissioners had also committed a gross error in their decision and did not apply their mind to the facts and law at hand in disallowing the Appellant's IBA claim for the demolition of the substructures. This can be seen in the Special Commissioners' rationale or lack thereof in the Case Stated which merely states:

> "RW1 dalam keterangan melibatkan tuntutan additional demolition of substructures", jelas menyatakan bahawa kos merobohkan struktur bangunan asal bukan perbelanjaan modal yang dibenarkan bagi maksud tuntutan EBI di bawah Jadual 3 ACP 1967."

Evidently, the Special Commissioners had failed, either inadvertently or deliberately, to properly consider the matter and had accepted the IRBM witness' personal view as law in coming to their decision. The High Court held that:

(a) The proved facts show that the demolition works done by the taxpayer was a necessary action for the construction of the building for the taxpayer's business activity.
(b) Further, the Special Commissioners in its decision has failed to elaborate the reason for deciding that the expenses for the demolition of substructures are not allowed as capital expenditure under Schedule 3.
(c) Therefore, the expenditure incurred by the taxpayer on the demolition works qualified as part of the qualifying building expenditure under Schedule 3, and is entitled to IBA.
(d) The taxpayer had bought a two-storey factory building which was used by the previous occupant to manufacture chairs and need to demolish parts of the building to suit the taxpayer's business activity.
(e) Certain parts of the building need to be demolished before the factory for the taxpayer's business can be constructed.
(f) The demolition works was also to allow the taxpayer to construct a driveway for the lorries to enter the premises and to transport the finished goods.
(g) The demolition of substructures was done to get the building ready for the taxpayer's manufacturing works.
(h) The demolition and renovation works are not for cosmetic purposes.

THE OTHER DISPUTED IBA CLAIM

The IRBM held these parts i.e. driveway pavers, fencing, gate, metal sheet boundary and guard house etc. do not form part of the taxpayer's factory and should not be allowed for IBA claim on the sole reason that they are located outside of the factory. In this regard, it is pertinent to highlight the legal position in determining a taxpayer's eligibility to claim IBA - the trite and well settled test to determine the nature of the capital expenditure incurred by a taxpayer is the "entirety test" as laid down in the landmark case of *Director General of Inland Revenue v*

C. Company of Malaysia Bhd [1980] 10 M.T.J. 64.

In other words, the test requires the taxpayer's business and factory to be viewed in its entirety and to ascertain whether any items in dispute is necessary and integral to the taxpayer's factory. In the case of C. Company (supra), the Special Commissioners applied the "entirety test" and held that the road system which links up the taxpayer's factory was integrated with the industrial buildings in the factory complex. They added that the road system was something necessarily used in connection with the building and without the road system, the factory would not be able to function adequately. The instructive dicta made in the case of C. Company (supra) is reproduced herein:

> "…one must use good sense to determine whether the construction be it road (the instant case) administrative block (the Laboratories case) or factory embankment (Whieldon Sanitary Potteries case) etc. is what I would call an integrative component if the building i.e. part of its entirety."

The "entirety test" was based on the test adopted by Justice Rowlatt in the English High Court case of *Bullcroft Main Collieries, Ltd v O'Grady 17 TC 93*. Justice Rowlatt stated the following:

> "The critical matter is…what is the entirety? I think it is very largely a question of degree..."

In the case of *Smith v York Race Committee 18 T.C. 541*, it was held that:

> "…all that could be said would be that "building" must cover adjuncts that is to say, a courtyard or something of that sort necessarily used in connection with the building"

At this juncture, it is also germane to highlight the observation of the Special Commissioners in the case of C. Company (supra), i.e. that paragraphs 63 and 64 of Schedule 3 is not exhaustive as the definitions of those paragraphs utilised the word "includes". Moreover, the definition of factory in Schedule 3 is not confined to a "building" *per se* but also includes structures:

> "As per definition in Section 2 of the Act the term 'building' includes any structure erected on land (not being plant or machinery). In view of this definition we are of the view that the term building in paragraphs 63 and 64 includes a structure erected on land. Therefore, a building or a structure which fulfils the conditions spelled out in paragraph 4 is a 'factory' for the purposed of that paragraph."

The taxpayer also emphasised the following paragraph from the C. Company (supra), which was highly instructive in the present appeal in determining whether the IBA Disputed Items form part of the factory:

> "In the instant case we have found that the internal road system linking the various buildings and for the reasons mentioned above, the internal roads therefore form part of the entirety of the industrial buildings and qualify for capital allowances. Without the road system the industrial buildings would not be able to function adequately in the business of the Respondent.
>
> Finally, I would say that the distinction drawn between "building" and "structure" is merely academic…building includes structure but structure does not necessarily mean building… A road regarded in isolation would probably be a mere structure in England or Malaysia because the construction of the road would probably constitute an erection. But it would not be a building

> in either country if viewed in isolation. However, if it is part of the entirety of the building it qualifies for industrial building capital allowance. So whether we consider the problem in England or Malaysia the safest course is to ask ourselves the question – Is it part of the entirety? If it is then it follows that it is an industrial building or rather part of it."

The High Court had also recently applied and upheld the case of C. Company (supra) in *Ryoshindoh Manufacturing Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2014] 10 MLJ 319*. In Ryoshindoh (supra), it was held that "earth chamber" was part of the factory because it ensures the safety of the factory and its workers from destruction of fire due to lightning and is necessary for the factory to function properly.

In essence, these cases elucidate the position of law regarding IBA as follows:

(a) Factory does not only include a physical building but also include other structures erected on the land;
(b) What constitutes a factory must be considered in its entirety, and includes adjuncts or attachments that is used in relation to the building; and
(c) Any structure that is integral and necessary to ensure the adequate functioning of the factory would qualify for IBA.

Premised upon these, the taxpayer successfully argued that the Special Commissioners' rationale in disallowing the IBA claim, i.e. for the sole reason that these items are located outside the factory building, is clearly unsound, erroneous, and amounts to a pure and evident contravention of the law. It was well established that structures located outside the factory building would still be eligible for IBA so long as it is integral and necessarily used in connection with the factory building. The taxpayer also

highlighted that the IRBM's witness had testified and agreed that the IBA Disputed Items are necessary, essential, and forms an integral part of the factory. The exact phrase in the Case Stated is reproduced here in verbatim:

> "RW1 juga bersetuju bahawa setiap Barang Dipertikaikan IBA ("IBA Disputed Items") adalah bahagian yang perlu dan penting dalam kilang Perayu."

At this juncture, it is highlighted that in the case of *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] MSTC 30-024*, the decisions of the Courts are binding on the IRBM which is an arm of the executive. It was further held that the failure of the IRBM to adhere to the decisions of the Superior Courts should render its decision defective.

CONCLUSION

The legal position in respect of the IBA claim is clarified by this landmark decision. Section 42 of the ITA provides that a taxpayer's statutory income shall be reduced by the amount of IBA falling to be made for that year of assessment. Meanwhile, paragraph 3 of Schedule 3 of the ITA stipulates that the taxpayer is entitled to claim IBA if the taxpayer has incurred capital expenditure on the construction or purchase of a building which is then used as an industrial building.

This case has established firmly that particularly, in respect of a purchased building to be used as a factory, the cost of addition al works to that purchased building, including the cost of demolition of any existing sub-structures, should qualify as part of the qualifying building expenditure for industrial building allowance purposes.

***S. Saravana Kumar** is a tax lawyer and heads the **Tax, SST & Customs Practice of Rosli Dahlan Saravana Partnership (RDS)**. He read LL .M(Tax) at the London School of Economics. He can be contacted at sara@rdslawpartners.com*

Nurul Imani Hamzah** is a paralegal with the Tax, SST & Customs Practice of RDS. She holds a **Master of Law from Queen Mary University London

TAX GUIDELINES ON THE PLACE OF BUSINESS

UNDERSTANDING THE RULE AND ITS PRACTICAL IMPLICATIONS

Lee Chong Hoo, Eunice Hoo, Julia Leong & Ong Boon Hui

In the context of inbound operations, we often ask "when would a non-resident's ("NR") business profits be subject to Malaysian income tax?" Regardless of whether the NR is from a treaty country or otherwise, the appropriate starting point is the domestic tax law, namely the Malaysian Income Tax Act 1967 ("MITA"). It is trite law that a double taxation avoidance agreement ("DTAA") is not a taxing statute and therefore, if an income or profit arising from a particular transaction or activity is not within the ambit of MITA, the analysis ends there without a need to refer to the DTAA. Unlike certain jurisdictions such as Australia and the United Kingdom ("UK"), prior to 28 December 2018, the term permanent establishment ("PE") was not contained within the MITA.

If the term PE is defined in the domestic tax law, the analysis becomes less complex as one would be able to compare the meaning of PE found there with that available within the DTAA, in which case where the latter definition would prevail. If a particular country does not have a DTAA with another country, the concept of PE under the domestic tax law will apply and because the term PE under the domestic tax law is, to a certain degree, similar to the one in the Organization for Economic Co-operation and Development ("OECD") Model Tax Convention, the OECD's official commentary would certainly aid in interpreting the PE concept under the local law.

This article is aimed at discussing the relatively new amendment to MITA and the recently issued Guidelines on the determination of a place of business in Malaysia for taxpayers from the non-treaty countries such as the US.

PRIOR TO 28 DECEMBER 2018

The absence of a PE definition in the MITA prior to 28 December 2018 presents a real challenge. For example, in the case of US tax residents operating in Malaysia, the determination of whether there is a source of income from Malaysia will solely be based on the MITA, and in particular, Section 3 which reads as follows:

> "Subject and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or …"

The determination of locality of profit under MITA is thus, a "practical hard matter of facts" and there is no simple legal test to serve as a guide. If the income represents business income to a person, Section 3 must be read together with Section 12:

"(1) Where for the purposes of this Act it is necessary to ascertain any gross income of a person derived from Malaysia from a business of his, then-

(a) subject to subsection (2), so much of the gross income from the business as is not attributable to operations of the business carried on outside Malaysia shall be deemed to be derived from Malaysia;

(b)…"

It is relatively easier to apply Sections 3 and 12 to outbound operations e.g. in determining whether a Malaysian company's profits arising from the provision for services overseas would still be subject to Malaysian tax. This is not necessarily the case for inbound operations.

EFFECTIVE 28 DECEMBER 2018 AND THE GUIDELINES ISSUED ON 21 MAY 2020

The introduction of Sections 12(3) and 12(4), effective 28 December 2018, provides more certainty in assessing whether the business profits of a NR from a non-treaty country would fall within the Malaysian income tax net. However, there are several grey areas in the law itself and as such, the issuance of the Guidelines by the tax authorities on 21 May 2020 are useful as they alleviate several uncertainties. In any case, it is important to note that Section 12(1) must continue to be considered notwithstanding the relatively new Sections 12(3) and 12(4) being in place.

It is delightful to note that the Guidelines which explain the application of Sections 12(3) and 12(4) through some examples, have adopted several key concepts of the OECD and United Nations commentaries, e.g. "geographical and commercial coherence", "at the disposal" test, the PE exception rules (preparatory or auxiliary), delivery and order-filling activities that are tied to sales-related activities, anti-fragmentation rules, and the concept of an independent agent. The reference to the OECD model is vital as there are various literatures for one to refer to and hence, reducing the risk of misinterpretation and misapplication.

PHYSICAL "PLACE OF BUSINESS" ("POB")

A POB may exist where the

person has a certain amount of space at its disposal for carrying on its business, regardless of whether the place is owned or rented by that person. The POB must be fixed. Two critical components would be considered:

- Duration test: a certain degree of permanence at a geographical point; and
- Location test: a specific geographical point. The issue of commercial and geographical coherences would need to be duly considered.

Our Commentary:

Based on the OECD Commentary on Article 5 (PE), the general rule of thumb for the time test for fixed place PE is six months. However, there is no time threshold provided under the Guidelines for physical POB. In this respect, the time test would need to be evaluated on a case to case basis.

PREPARATORY OR AUXILIARY

Where a physical place is maintained solely for the purpose of carrying on an activity which is of preparatory or auxiliary character, such a place may not constitute a POB. Activities that are preparatory or auxiliary in nature embed the following characteristics:

- remote from the actual realisation of profit of the business;
- in itself do not form an essential and significant part of the activity of that business;
- are not identical to the general purpose of the whole business; or
- are usually carried out during a relatively short period.

ANTI-FRAGMENTATION RULES

However, if the overall activity by a person or an associated person resulting from the combination of preparatory or auxiliary activities constitute complementary functions that are part of a cohesive business operation, such activity would not be regarded as preparatory or auxiliary. Whilst the term associated person is not defined in the Guidelines, it is expected that the control test would be one of the factors in determining the relationship.

In Example 5 of the Guidelines, where an NR company which has a warehouse in Malaysia stores and supplies large items of goods that are sold by its subsidiary in Malaysia, the warehouse is regarded as a "place of business" of the NR company. The Inland Revenue Board of Malaysian ("IRBM") takes the position that the storage activities at the warehouse are not regarded as preparatory or auxiliary as the business activities carried on by the NR company and the subsidiary constitute complementary functions that are part of a cohesive business operation.

Our Commentary:

Example 5 is similar to the example provided in the Base Erosion and Profit Shifting ("BEPS")[1] Action Item 7 report on anti-fragmentation rules.

The IRBM has applied the OECD's anti-fragmentation rules in the Guidelines. The anti-fragmentation rule was introduced to circumvent a situation where multinational companies fragment their operations among multiple group entities to qualify for the exceptions.

With this, there are several tests to be fulfilled before one can rely on the PE exceptions. We have summarised the tests (per OECD) as in **Diagram 1:**

BUILDING SITE, CONSTRUCTION, INSTALLATION, ASSEMBLY PROJECT AND SUPERVISORY ACTIVITY

A building site, or construction, installation or assembly project or supervisory activities in connection with such site/ project will be regarded as a POB of a person if the activities at the site or project are for a period or periods exceeding five months in aggregate in any 12-month period. In such a situation, payment for these types of services would be subjected to withholding tax ("WHT") under Section 107A of the MITA (i.e. interim WHT of 10% + 3%).

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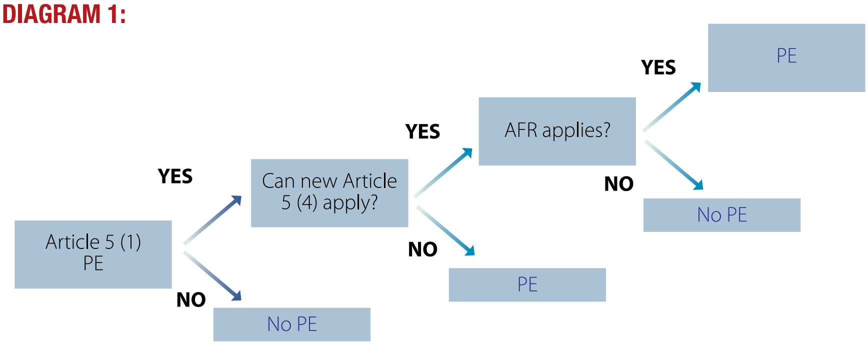
[1] *Under the OECD/G20 Inclusive Framework on BEPS, over 135 countries are collaborating to put an end to tax avoidance strategies that exploit gaps and mismatches in tax rules to avoid paying tax.*

DIAGRAM 1:



Note

- *Article 5(1) - Fixed Place PE*
- *Article 5(4) - PE Exception*
- *New Article 5(4) - each activity is subject to preparatory or auxiliary condition*

**AFR - Anti - fragmentation rule*

The IRBM has also clarified that for services other than those mentioned in paragraph 3.8 of the Guidelines, WHT under Section 109B of the MITA will be applicable i.e. final WHT of 10% or reduced rate as provided in a treaty.

For the purpose of determining the duration of activities, the period of activities carried on by a person and its associated persons in Malaysia shall be aggregated if the activities carried on by associated persons are connected with the activity of that person.

Different activities will be regarded as connected based on the facts and circumstances of each case. These include the following: -

- whether the contracts covering the different activities were concluded with the same person or its associated persons;
- whether the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with the person or its associated persons;
- whether the activities would have been covered by a single contract absent tax planning considerations;
- whether the nature of the work involved under the different contracts is the same or similar;
- whether the same employees are performing the activities under the different contracts

Our Commentary:

It is noteworthy that a 5-month threshold has been introduced for POB in relation to building site, construction, installation, assembly project and related supervisory activities. The threshold is slightly lower than the threshold as provided in most of the Malaysian treaties (i.e. six months). The Guidelines are silent on how to compute the time spent by the NR in Malaysia with regards to related supervisory activities (i.e. based on the number of days that the NR carries out the work physically in Malaysia or based on the project period).

Further clarification would need to be sought from the IRBM.

Whilst Malaysia has opted out of the anti-BEPS measure on contract splitting under Article 14 of the Multilateral Instrument ("MLI"), the IRBM has included some elements on contract splitting in the Guidelines.

AGENT AS "PLACE OF BUSINESS"

A person (principal) may also be deemed to have a POB in Malaysia if the person has another person (agent) acting on his behalf who:

a) habitually concludes contracts; or
b) habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification.

The type of contracts covered include those which are in the name of the principal or which are binding on the principal even if those contracts are not in the name of the principal.

In addition, a person (principal) may also be deemed to have a POB in Malaysia if he has an agent who:

a) habitually maintains a stock of goods or merchandise in that place of business of the person from which such person delivers goods or merchandise; or
b) regularly fills orders on behalf of the person.

The Guidelines provide that the

stock maintenance and delivery or order filling POB may only be created for the NR principal if the agent also conducts sales-related activities in addition to regularly delivering or regularly filling orders out of the stock of goods or merchandise belonging to the principal.

It is worth noting that the IRBM has clarified that independent agents who act for a NR in the ordinary course of their business do not constitute a POB of the NR. However, a person is not an independent agent if he acts exclusively, or almost exclusively, on behalf of one or more associated persons.

Our Commentary:

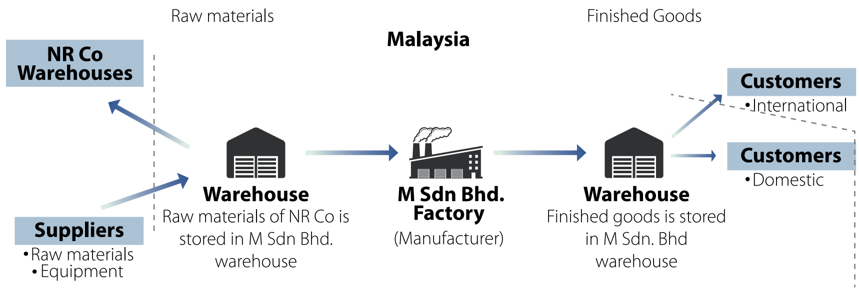
The above is in line with the provisional position of Malaysia in Article 12 of the MLI. With this, a company that carries out sales and marketing activities for its foreign principal in Malaysia may need to assess the risk of a POB for the principal in Malaysia.

In terms of the POB in relation to delivery or order filling agent, it seems that Malaysia has adopted the position in the UN Commentary on Article 5 (i.e. a POB would only be created if the NR also carries out sales related activities). The same position may be adopted by the IRBM in interpreting delivery or order dependent agent PE in the tax treaty which contains such provision (e.g. in the Malaysia-Germany treaty, an agency PE could arise in Malaysia if a dependent agent habitually maintains in Malaysia a stock of goods or merchandise belonging to the German enterprise from which he regularly fills orders on behalf of the enterprise).

The exclusion of agents of independent status is in line with the Commentaries in the OECD/UN Model Tax Convention. This should supersede the IRBM's previous position (i.e. a NR would create a POB in Malaysia even

ILLUSTRATION OF PLACE OF BUSINESS IN MALAYSIA

Business Flow: Malaysia integrated Warehouse



if the NR has an independent agent in Malaysia who maintains a stock of goods or merchandise belonging to the non-resident in Malaysia for delivery purposes). The above chart is extracted from Example 9 of the Guidelines.

Some important facts:-

1. NR Co. in country C, is the principal and ultimate holding company of M Sdn. Bhd. M Sdn. Bhd. acts as a toll manufacturer and also provides warehousing facilities to NR Co. in Malaysia. M Sdn. Bhd. receives fees for toll manufacturing, warehousing, storing and delivery of services from NR Co.
2. NR Co. owns the products throughout the entire manufacturing and distribution process. All marketing, selling and distribution functions are conducted by NR Co. It has a sales representative office in Malaysia; however the activity is limited to marketing to new or existing customers and is not authorised to sign contracts.
3. M Sdn. Bhd. owns and manages two warehouses;
   - a private bonded warehouse for the storage of raw materials belonging to NR Co. The raw materials are also delivered to other manufacturers outside Malaysia from the warehouse.
   - a private bonded warehouse for storage of finished goods belonging to NR Co. The warehouse also stores finished goods received from other toll manufacturers outside Malaysia.
4. Personnel of NR Co. are not involved in all the warehouse operations and do not have unrestricted access to the warehouse.
5. The warehouse executes only the orders at the request from NR Co. Upon receiving an order, the finished goods will be shipped to customers within or outside Malaysia. The warehouse in Malaysia also supports regional returned shipments and warranty replacement program for regional customers.

The IRBM is of the view that the warehouses by themselves do not constitute as POB to NR Co as the warehouses are not at their disposal. However, the overall activities of warehousing and manufacturing by M Sdn Bhd and marketing by NR Co's sales representative office constitute complementary functions that are part of a cohesive business operation of NR Co which results in NR Co having a POB in Malaysia.

Our Commentary:

In Example 9 of the Guidelines, although the warehouses are not at the disposal of the NR, the NR's sales representative office in Malaysia would constitute a place at the NR's disposal.

Some salient points in determining POB/ PE moving forward	
NR from US and other non-treaty countries	• Sole authority: MITA (Section 12) • Certain MLI features have been incorporated in the MITA (principal role test for agent) and the Guidelines (e.g. anti-fragmentation etc.)
NR from treaty countries	**Before the Malaysian MLI is effective** Article 5 of the DTA (DTA prevails over MITA) **Once the Malaysian MLI is effective** • Article 5 of the DTA (DTA prevails over MITA) • MLI impact: the extent to which the MLI modifies an existing tax treaty would depend on - the final MLI positions adopted by Malaysia such as principal role leading to conclusion of contracts for agency PE, tightening of definition of independent agent, specific activity exemption and anti-fragmentation rules; and - MLI positions adopted by the relevant treaty country. • Based on the provisional positions, Malaysia has chosen to adopt all anti-BEPS measures on Action 7 on PE (save for splitting-up of contracts). However, it does not necessarily mean that all existing tax treaties with Malaysia would be modified accordingly to include such measures given that certain countries may not subscribe to the same.

Whilst marketing activity carried on in the sales representative office may qualify as preparatory or auxiliary activity, the anti-fragmentation rule would need to be considered. Hence, the conclusion for Example 9 is that there is a POB in Malaysia.

OUR OVERALL OBSERVATION

The Guidelines have adopted several key concepts of the 2017 OECD and United Nations Model Tax Convention e.g.

- Fixed place of business with "at the disposal" test, geographical and commercial coherence consideration
- Activities which are of preparatory or auxiliary character
- Delivery and order filling activities that are tied to sales-related activities
- Anti-fragmentation rules
- Contract splitting
- Independent agent concept

Credit must be given to the IRBM as these Guidelines shed light on the interpretations of subsections 12(3) and (4). As the Guidelines have no force of law, it is best for the points in the Guidelines to be incorporated into the Act. In any case, there would be a legitimate expectation for these to be respected.

The income of a NR attributable to a POB in Malaysia shall be deemed derived from Malaysia and is subject to Malaysian income tax. The NR would need to file income tax return in Malaysia and is subject to corporate tax compliance requirements such as the filing of tax estimate, record keeping etc. Whilst lodging the Malaysian corporate tax return by the NR may be a routine compliance exercise, the more challenging issue here is the profit attribution for the Malaysian operations, which is complex and often subject to dispute. We expect the IRBM to issue separate Guidelines on profit attribution to the POB in due course.

THE WAY FORWARD

With the latest development, MNCs from the US and other non-treaty countries should revisit their existing and proposed modus operandi in Malaysia with a view to assessing the implications and the way forward. They need to assess their existing and proposed operations in Malaysia. Common business models would include limited risk distribution, full-fledged, contract and toll manufacturing as well as sales and marketing support.

A determination of the risk of creating a POB and profit attribution exercise must be done. A thorough analysis should be performed to ascertain if there is a POB in Malaysia and if necessary, a confirmation could be sought from the IRBM to confirm the position. Once the POB position is ascertained, a profit attribution exercise should be performed.

A careful decision on lodging tax returns must be made. The Malaysian annual corporate tax return is due within seven months after the closing of accounting period. Depending on the result of the profit attribution exercise, taxpayers may approach the IRBM to discuss if there is a need to submit a tax return in Malaysia (i.e. in the case where the profit attributed to the PE is zero). Even if there is a profit attributable to a PE, the taxpayer may consider approaching the IRBM to explore if the profit could be taxed in the hand of the associated company (e.g. dependent agent) where the associated company's activities give rise to the POB (e.g. by making an adjustment to the chargeable profit of the associated company) rather than submitting a separate tax return.

The latest development would also present an opportunity for MNCs to restructure the value chain to develop and implement a business led structure which is scalable and sustainable. If need be, the group transfer pricing documentation would also need to be revised to take into account the changes.

The authors are members of Deloitte Malaysia's international tax services group. The above views are their own.

InternationalNews

The column only covers selected developments from countries identified by the CTIM and relates to the period 16 February 2020 to 15 May 2020.

CHINA (PEOPLE'S REP.)

Reduction of social security contributions announced

At a meeting of the State Council, it was announced that the government had decided to exempt enterprises from, or reduce on their behalf, three social security contributions, i.e. contributions to old-age pension insurance, unemployment insurance and work-related injury insurance. These measures are intended to mitigate the adverse effects of the outbreak of COVID-19.

From February 2020 to June 2020, small and medium-sized enterprises are exempt from the above contributions, while the contributions payable by large enterprises are reduced by 50% during the same period. Enterprises located in the Hubei Province are fully exempt from all social security contributions during the same period. Furthermore, enterprises may apply for a delay in paying contributions to the housing fund.

According to the circular, the bonded delivery of commodity futures is temporarily

exempt from value-added tax (VAT) during the period from 30 November 2018 to 29 November 2023. If the commodity futures actually delivered are imported or exported, the current import and export tax treatment applies. The physical delivery of futures of non-bonded commodities is still subject to rules as prescribed in the Public Notice "Specific measures for the collection of VAT on commodity futures" (SAT Public Notice [1994] No. 244).

Tax measures for sole traders announced

To provide financial support to sole traders during the COVID-19 outbreak, the Ministry of Finance (MoF) and the State Taxation Administration (SAT) jointly issued a circular (Circular [2020] No.13) exempting small-scale taxpayers from VAT in the province Hubei (of which Wuhan is the capital) and reducing the VAT from 3% to 1% for all small-scale VAT taxpayers in other provinces and cities in the period from 1 March to 31 May 2020.

Subsequently, on 29 February 2020, the SAT announced more detailed tax measures for implementation of the special tax reliefs (SAT Public Notice [2020] No.5). According to the Notice, small-scale taxpayers may issue VAT invoices with 1% VAT from 1 March to 31 May 2020.

In the same period, the tax authorities are also urged not to withhold individual income tax from sole traders and partnership enterprises located in the Hubei province when issuing VAT invoices for cargo transportation services (normally, a prepayment of individual income tax would have been collected when VAT invoices on cargo transportation services are issued).

As for export VAT refund, taxpayers who have opted not to apply the VAT exemption for less than 36 months may reserve their decision and apply for the refund/exemption of export VAT.

COVID-19 Pandemic: China Extends VAT Reliefs for Small-Scale Taxpayers

China has extended the relief period for the following to 31 December 2020 (originally applicable from 1 March 2020 to 31 May 2020):

- exemption from VAT for small-scale taxpayers in the Hubei province (of which Wuhan is the capital); and
- reduction of the VAT rate from 3% to 1% for all small-scale VAT taxpayers in other provinces and cities.

The extension was announced in Circular [2020] No. 24 of 30 April 2020. The extension had been announced earlier by the MoF and the State Taxation Administration in joint Circular [2020] No. 13.

INDONESIA

Tax incentives in special economic zones – regulation issued

Government Regulation Number 12 of 2020 (the regulation) regarding the incentives available for special economic zones (SEZ) was promulgated on 24 February 2020 and came into effect on the same date. The regulation aims

to boost investment and accelerate implementation of doing business in the SEZ that can support national economic development in certain regions and for job creation purposes.

Some of the salient features of the regulation are as set out below.

- Businesses that invest in the main business activity as set by the national council may enjoy a reduction in corporate income tax on the income derived from the business activity.
- Value added tax and sales tax on luxury goods will be exempted for the following:
  - provision of certain taxable tangible and/ or intangible goods in the SEZ by the entrepreneurs of other places in the customs areas (TLDDP) (i.e. customs areas other than free areas and bonded collection areas) or other than TLDDP, to businesses in the SEZ;
  - importation of certain taxable goods by businesses in the SEZ;
  - provision of certain taxable goods between businesses in the SEZ;
  - provision of taxable services and/or intangible goods including rental services for lands and/ or buildings for a minimum period of five years in the SEZ by businesses to other businesses in the same SEZ or a different SEZ;
- provision of certain taxable services by businesses from TLDDP or other than TLDDP to businesses in the SEZ; and
- consumption of taxable intangible services and/or taxable goods from outside customs area within the SEZ by businesses.

COVID-19 Pandemic: Government Regulation in Lieu of Law Issued

On 31 March 2020, Government Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang/ Perppu) No.1 Year 2020 (the regulation) was issued regarding the state finance policy and financial system stability in managing the COVID-19 pandemic and/or to safeguard the national economy and/or the stability of the financial system.

The tax policies provided in the regulation are broadly in line with the omnibus bill proposed earlier and the salient features are set out below.

Corporate income tax

- The corporate income tax rate will be reduced to 22% for the fiscal years 2020 and 2021 and further reduced to 20% effective from fiscal year 2022.
- The corporate income tax rate for companies which have at least 40% of their shares publicly listed will be reduced to 19% for the fiscal years 2020 and 2021 and further reduced to 17% effective fiscal year 2022, subject to meeting certain requirements.
- The deadline for the submission of an appeal letter will be extended for six months.
- The payment of the tax refund will be extended for one month.
- The issuance of overpayment tax assessment letters, tax appeal decision letters and certain other administrative matters will be extended for six months.

Tax on e-commerce

- The consumption of foreign intangible goods or services in Indonesia through an e-commerce system will be subject to value added tax (VAT) and the foreign e-commerce services and/or goods provider will be required to collect and declare the VAT accordingly.
- E-commerce activities provided by foreign individuals or digital companies (foreign ecommerce providers) which have a significant economic presence in Indonesia will be deemed to have a permanent establishment under the local law in Indonesia and will be subject to domestic tax.
- If a permanent establishment is not established under the applicable treaty entered into by Indonesia with another contracting state, the foreign e-commerce providers will be subject to an Electronic Transaction Tax (ETT) on the sales by the foreign e-commerce providers. Further details on the ETT will be provided in an implementing regulation.
- Foreign e-commerce providers may appoint a representative in Indonesia to fulfil their tax obligations accordingly.
- A penalty will be imposed on the foreign e-commerce providers

for the failure to comply with the regulation above and the foreign e-commerce providers will be denied access into the Indonesian market.

Custom duty

- The list of goods that are exempted from custom duty or the rates reduced will be amended accordingly.

COVID-19 Pandemic: Emergency Tax Measures – Regulation Expanded to Include More Industries and Introduce Tax Exemption for SMEs

Previously, the MoF issued Regulation No.23/PMK.03/2020 (PMK-23) regarding tax incentives for taxpayers in certain sectors impacted by COVID-19 in addition to the tax measures proposed on 13 March 2020. Subsequently, the MoF has expanded the list of qualifying taxpayers and industries eligible for income tax and VAT incentives that were first introduced PMK-23. The new measures are included in the MoF Regulation No. 44/PMK.03/2020 (PMK-44), which came into effect on 27 April 2020 and revokes PMK-23.

The incentives will now be available to the logistics, education, recreation, health services and retail sectors, among others, in addition to the existing list which mainly comprised manufacturing and processing industries. In addition, small and medium-sized enterprises (SMEs) are eligible for final tax exemptions from April to September 2020.

The salient features of PMK-44 are set out below.

- The following incentives are available from April to September 2020 for qualifying taxpayers:
  - withholding tax exemption (article 21) for employees earning annual income not exceeding IDR200 million (tax will be borne by the government);
  - exemption from tax on import (article 22);
  - reduction of 30% in monthly tax instalment payment (article 25); and
  - preliminary VAT refund automatically granted up to a maximum of IDR5 billion.

Expansion of list of qualifying taxpayers

Taxpayers that may qualify for the incentives under articles 21, 22, 25 and the VAT refund are:

- taxpayers with business classification as listed in the attachments to PMK-44;
- taxpayers declared companies to which the Import Facility for Export Purposes has been granted; or
- taxpayers licensed as businesses in the Bonded Zone area (this is the newly added category introduced under PMK-44).

PMK-44 has also expanded the list of qualifying industries of taxpayers enjoying the incentives under articles 21, 22, 25 and the VAT refund accordingly.

Taxpayers may refer to the list in PMK-44 to confirm their eligibility for the aforesaid tax facilities.

Tax exemption for SMEs

The government will bear the 0.5% final tax on the gross revenue of SMEs for April to September 2020. This is applicable for SMEs with gross annual revenue of not more than IDR4.8 billion. In addition, payments made during April to September 2020 to the qualifying SMEs would not be subject to withholding tax.

SINGAPORE

Budget for 2020 presented – key tax proposals

On 18 February 2020, the Budget for 2020 was presented to Parliament by the Finance Minister. The main tax proposals of the Budget are summarised below.

Direct taxation

(a) Corporate taxation

- To assist companies with their cash flow, a corporate income tax rebate of 25% of tax payable, capped at SGD15,000, will be granted for YA 2020.
- To support wage increases for Singaporean employees, the wage credit scheme will be enhanced: the monthly wage ceiling for qualifying wage increases granted in 2019 and 2020 will be increased from SGD4,000 to SGD5,000, and the government co-funding levels for 2019 and 2020 will be increased by 5% to 20% and 15%, respectively.
- Subject to a number of conditions, a taxpayer that incurs capital expenditure on the acquisition of plant and machinery for YA 2021 may opt to claim accelerated capital allowances over 2 years: 75% in YA 2021 and 25% in YA 2022. The option, if exercised, is irrevocable.
- Subject to a number of conditions, a taxpayer that incurs qualifying expenditure on renovation and refurbishment (R&R) for YA 2021 will have an irrevocable option to claim R&R deduction in one YA.
- To simplify capital allowance claims under section 19 of the Income Tax Act, the prescribed useful life of plant and machinery under the Sixth Schedule will be streamlined for plant and machinery acquired in or after financial year 2022.

(b) Personal taxation

- The withholding tax exemption for non-resident mediators and non-resident arbitrators will be extended to 31 March 2022.
- Concessionary withholding tax of 10% for nonresident public entertainers will be extended to 31 March 2022, and will lapse after that date.

Indirect taxation

(a) GST

- The GST rate increase by 2% to 9% announced in 2018 will not take effect in 2021, i.e. the GST rate will remain unchanged at 7% in 2021.

(b) Tax changes for vehicles

- Road tax revisions will be introduced for electric vehicles, hybrid cars, petrol-electric cars, electric light goods vehicles and electric goods passenger vehicles registered from 1 January 2021.
- For licensing periods from 1 April 2020, the road tax schedule for electric motorcycles will be revised.

COVID-19 Pandemic: additional tax measures announced

On 26 March 2020, in response to the worsening COVID-19 pandemic, the Minister for Finance presented the Supplementary Budget 2020 in Parliament. This follows the presentation of the Budget for 2020 on 18 February 2020 The additional tax measures announced in the Supplementary Budget 2020 to mitigate the economic impact of COVID-19 are summarised below.

- Corporate income tax payments due in April, May and June 2020 will be automatically deferred for three months to July, August and September 2020, respectively.
- Personal income tax payments for self-employed persons due in May, June and July 2020 will be automatically deferred for three months to August, September and October 2020, respectively.

The above measures are in addition to the following tax measures announced in the Budget for 2020 to mitigate the COVID-19 impact:

- a corporate income tax rebate of 25% of tax payable for YA 2020, capped at SGD15,000;
- automatic extension of interest-free installments by two months for payment of corporate income tax on estimated chargeable income (ECI) filed within three months of the companies' financial year-end (subject to conditions);
- enhanced carry-back relief: unutilised capital allowances and trade losses for YA 2020 can be carried back to three YAs (instead of one YA) immediately preceding YA 2020 (i.e. YA 2019, YA 2018 and YA 2017) (capped at SGD100,000 and subject to conditions);
- a taxpayer that incurs capital expenditure on the acquisition of plant and machinery for YA 2021 will have an irrevocable option to claim accelerated capital allowances over 2 years: 75% in YA 2021 and 25% in YA 2022 (subject to conditions);
- a taxpayer that incurs qualifying expenditure on renovation and refurbishment (R&R) for YA 2021 will have an irrevocable option to

claim R&R deduction in one YA (subject to conditions); and
- the GST rate will remain unchanged at 7% in 2021.

THAILAND

Stimulus package in response to COVID-19 outbreak – approved by cabinet

On 10 March 2020, the cabinet approved the stimulus package proposed by the MoF in response to the impact of the recent COVID-19 outbreak. The main tax-related measurements announced in the stimulus package are set out below.

- The domestic corporate withholding tax rate on certain payments will be reduced from 3% to 1.5% from 1 April 2020 to September 2020 provided that the payment is made electronically.
- SMEs will be able to claim a 300% deduction on salary payments made from April 2020 to July 2020.
- SMEs will be able to claim a 150% deduction of interest expenses incurred from April 2020 to December 2020.
- The value added tax refund will be expedited accordingly where online refunds will be made within 15 days and the refund from tax branch offices will be made within 45 days.

Subsequently, on 24 March 2020, the Cabinet approved another stimulus package following the announcement above. The main tax-related measures announced in the new stimulus package are set out below.

Corporate entities

- The corporate tax filing deadline will be extended to either 30 August 2020 or 29 September 2020, which depends on the original filing deadline of either 1 April 2020 or 1 July 2020.
- The filing deadline of other taxes for affected companies will be extended by three months.
- The filing deadline of excise tax by service businesses will be extended by one month.
- The filing deadline of excise tax for oil products companies will be extended to the 15th of the following month for three months.
- The import duty for products related to the prevention and treatment of the COVID-19 pandemic will be exempted.
- The taxes related to the debt restructuring with nonfinancial institution creditors will be exempted.

Individuals

- The personal tax filing deadline will be further extended from 30 June 2020 to 31 August 2020 and the health insurance premiums deduction will be increased to THB25,000 from THB15,000.

Withholding tax reduction for domestic payment – regulation issued

On 30 March 2020, Ministerial Regulation No. 361 /2020 (the Regulation) was issued by the government.The Regulation provides withholding tax reduction on payments of certain assessable income made to corporate entities and individuals carrying on business in Thailand. In this regard, the withholding tax rate will be reduced as follows:

- to 1.5% for payments made from 1 April 2020 to 30 September 2020; and
- to 2% for payments made from 1 October 2020 to 31 December 2021 (only for payments made through the e-withholding tax system).

The reduction of withholding tax is applicable to payments made to corporate entities carrying on business in Thailand (except foundations and associations) of the following assessable income:

- income under Section 40(2) of the Revenue Code, such as hire of work and provision of services and royalty income.

The reduction of withholding tax is also applicable to payments made to individuals and corporate entities carrying on business in Thailand (except foundations and associations) of the following assessable income:

- income under Section 40(6) of the Revenue Code, such as income from professional income;
- income from hire of work under Section 40(7) and Section 40(8) of the Revenue Code;
- income from the provision of services under Section 40(8) of the Revenue Code, excluding remuneration for public actors, advertising, non-life insurance premiums and transportation; and
- prizes, discounts or any benefits given for the purpose of sales promotion.

__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 February and 16 May 2020, including Public Rulings (PRs) and guidelines, if any, issued by the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Updated guidelines on Inland Revenue Board of Malaysia (IRBM) approval under Subsection 44(6) of the Income Tax Act 1967 (ITA)

The "Guidelines for approval of Director General of Inland Revenue under Subsection 44(6) of the ITA" (Guidelines), dated 30 January 2020, replace the earlier Guidelines issued on 5 September 2019. The new Guidelines are broadly similar to the earlier Guidelines, with some minor changes as outlined below:

- One of the criteria to qualify for approval under Subsection 44(6) of the ITA is that more than 50% of the members of the institution's / organisation's Board of Trustees (BOT) / Board of Directors (BOD) / Committee Members (CM) must consist of outsiders who are not related to the institution / organisation and founder.
- The new Guidelines clarify that the above condition applies only to institutions / organisations that are registered with the Companies Commission of Malaysia (SSM) and the Legal Affairs Division of the Prime Minister's Department (BHEUU). For institutions / organisations that are registered with the Malaysian Registration Department, the BOT / BOD / CM should be registered members with voting powers.
- The checklists of documents required for the application outlined in the appendices must be completed and submitted together with the supporting documents. Otherwise, the application will not be processed.
- The donation threshold above which a donor needs to be included in the list of donors provided to the IRBM has been increased from RM10,000 to RM20,000, in line with the Budget 2020 proposal.
- The new Guidelines have been amended to take into account the changes under Section 44(6) of the ITA where the cap on tax deduction for taxpayers other than companies is increased from 7% to 10% of the aggregate income.

Updated guidelines for submission of amended tax return

The Operational Guideline No. 1/2020 – Procedure on Submission of Amended Return Form replaces the earlier Operational Guideline No. 4/2019. The updated guideline is broadly similar to the earlier guidelines. The key changes are outlined below:

- Paragraph 2.2.1 - The new Guideline clarifies that in a case where the original return form submitted for a specific year of assessment (YA) is erroneous, and no amended return form (ARF) has been submitted to rectify the error, the Director General of Inland Revenue (DGIR) may raise an amended assessment under Section 91 of the ITA. Pursuant to Section 77B (6) of the ITA, the taxpayer will not be permitted to furnish an ARF for the said YA thereafter.
- Paragraph 2.2.4 - The earlier Guideline stipulates that in a case where the ARF submitted does not comply with the stipulated conditions under the ITA or Petroleum (Income Tax) Act 1967 (PITA), the submission will be deemed a voluntary disclosure. The new Guideline now states that only an ARF that is submitted in compliance with the stipulated conditions under Section 77B of the ITA or Section 30B of the Petroleum Income Tax Act 1967 (PITA) will be accepted.
- Paragraphs 2.4 and 2.5 – The new Guideline has been amended to take into account the removal of the imposition of a further penalty of 5% on the increased sum (Section 77B(4)) and the balance of unpaid taxes, where any balance remains unpaid after 60 days from the stipulated due date (Section 103(1A).

Practice Note No. 1/2020: Guidelines on treatment of adjusted losses for Islamic banking and takaful activities pursuant to Income Tax (Exemption) (No. 3) Order 2018

The Income Tax (Exemption) (No. 3) Order 2018, effective YA 2017 to YA 2020, extends the income tax exemption granted to Islamic banking and takaful business activities carried out in foreign currency through the International Currency Business Unit (ICBU).

The Practice Note No. 1/2020 (PN) dated 17 February 2020, titled "Penjelasan Berhubung Peruntukan Kerugian Dalam Perintah Cukai Pendapatan (Pengecualian) (No. 3) 2018 [P.U.(A) 251/2018) Bagi Unit Perniagaan Mata Wang Antarabangsa", provides guidance on the treatment of adjusted losses for a qualifying person, for the years prior to and from YA 2017.

Practice Note No. 2/2020: Claiming capital allowance on the development cost for customised computer software under the Income Tax Rules 2019

The Income Tax (Capital Allowance) (Development Cost for Customised Computer Software) Rules 2019 [P.U.(A) 274] ("Rules") 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 CA claims at the rate of 20% initial allowance (IA) and 20% annual allowance (AA), from YA 2018.

The PN No. 2/2020 dated 16 March 2020, titled "Claiming Capital Allowance on the Development Cost for Customised Computer Software under the Income Tax Rules 2019", provides further guidance on the application of the Rules. The PN clarifies that the "development cost for customised computer software" refers to expenditure incurred in the production of new software or the improvement of existing software, used for business purposes.

Income tax exemption on income of religious institutions or organisations registered as a Company Limited by Guarantee

The Income Tax (Exemption) Order 2020 [P.U.(A) 139], gazetted on 4 May 2020, provides 100% income tax exemption on all sources of income of a religious institution or organisation for a specific period, subject to adherence to the conditions imposed by the Minister. Applications for an exemption under the Order can be made on or after 1 January 2020. The Order is effective from YA 2020.

Income tax exemption on medical tourism

The Income Tax (Exemption) (No. 2) Order 2020 [P.U. (A) 141], gazetted on 5 May 2020, provides income tax exemption on the statutory income derived from a qualifying project carried on by private healthcare facilities and services (qualifying companies). The number of health travelers who receive private healthcare services from the qualifying project must be at least 10% (previously 5%) of the total number of patients in the qualifying project for each YA; and at least 10% (previously 5%) of the gross income of the qualifying company from the qualifying project for each YA must be generated from health travelers.

The amount of tax exempted shall be equal to the amount of qualifying capital expenditure incurred by the qualifying company. The exemption is for a period of five consecutive years commencing from the date that the qualifying company first incurs qualifying capital expenditure, as determined by the Malaysian Investment Development Authority (MIDA) and shall not be earlier than 1 January 2018. The Order is deemed to have come into operation from YA 2018, and applies to applications made to MIDA between 1 January 2018 and 31 December 2020.

STAMP DUTY

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2020

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2020 [P.U.(A) 54], gazetted on 12 February 2020, provides that any tax payable under the ITA and any stamp duty payable under the Stamp Act 1949 in relation to the following, shall be remitted in full:

(a) Islamic Medium-Term Notes issued by Malaysia Rail Link Sdn Bhd (i.e. Sukuk Murabahah) pursuant to the Sukuk Murabahah Programme, in nominal values of up to RM9.75 billion, provided that the combined aggregate of the outstanding nominal value of the Sukuk Murabahah and the outstanding principal amount under the Syndicated Islamic Short-Term Revolving Credit-i Facility (i.e. STRC-i Facility, see (b) below) shall not exceed RM9.5 billion;

(b) STRC-i Facility obtained or to be obtained by Malaysia Rail Link Sdn Bhd in the aggregate outstanding principal amount of up to RM3 billion (or such other increased maximum aggregate principal limit of up to RM3.6 billion, as may be approved by the financiers of the STRC-i Facility), subject to the combined aggregate referred to in (a) above; and

(c) Guarantee provided or to be provided by the government of Malaysia in relation to the Sukuk Murabahah and the STRC-i Facility

The Order comes into operation on 13 February 2020.

TAX PROPOSALS FROM THE ECONOMIC STIMULUS PACKAGE 2020 (27 FEBRUARY 2020), PRIHATIN ECONOMIC STIMULUS PACKAGE AND PENJANA SHORT-TERM ECONOMIC RECOVERY PLAN

Tax proposals for individuals	
Reliefs and exemptions	• Tax relief of up to RM1,000 given to resident individuals for qualifying domestic travel expenses incurred from 1 March 2020 to 31 December 2021 • Tax exemption of up to RM5,000 for individual taxpayers who receive handphones, notebooks or tablets from their employers [Effective 1 July 2020] • Special tax relief of up to RM2,500 for purchase of handphones, notebooks or tablets [Effective 1 June 2020] • The tax relief for fees paid to childcare centres and kindergartens will be increased from RM2,000 to RM3,000. [Years of Assessment (YAs) 2020 and 2021]

Real estate	• Real Property Gains Tax (RPGT) exemption for Malaysian citizens on disposal of up to three units of residential property between 1 June 2020 and 31 December 2021
	• Home Ownership Campaign (HOC):
	  • Stamp duty exemption on instruments of transfer and loan agreements for the purchase of residential property priced between RM300,000 and RM2.5 million
	  • The exemption on the instrument of transfer is limited to the stamp duty on the first RM1 million of the property price, whereas a full stamp duty exemption is given on loan agreements.
	  • The above exemptions apply to Sales and Purchase Agreements (SPAs) signed between 1 June 2020 and 31 May 2021 and where the developer gives a discount of at least 10%.

Withdrawal of funds from Private Retirement Scheme (PRS) without penalties	Withdrawals of funds from Sub-Account B of a PRS are permitted up to a maximum amount of RM1,500, without the imposition of the 8% tax penalty. The withdrawals can be made between 30 April 2020 and 31 December 2020. <u>Reference:</u> Income Tax (Exemption) (No. 3) Order 2020 [P.U. (A) 153]
Tax proposals for businesses	
Deferment of instalment tax payments	• Businesses in the tourism sector are allowed to defer their monthly income tax instalment payments due from 1 April 2020 to 31 December 2020. • SMEs are allowed to defer their monthly income tax instalment payments due between 1 April 2020 and 30 June 2020. <u>Reference:</u> • IRBM's Frequently Asked Questions (FAQs) on tax matters during the Movement Control Order (MCO) period • IRBM's FAQs on the deferment of monthly income tax instalment payments for businesses in the tourism sector and SMEs
Revision of estimate of tax payable	Businesses are allowed to revise their estimate of tax payable in the third month of instalments (in addition to the sixth and/or ninth month revisions as prescribed by law), where the third instalment falls in 2020. The application for this revision can be submitted to the IRBM from 1 March 2020. <u>Reference:</u> • IRBM's FAQs on tax matters during the MCO period • IRBM's FAQs on the revision of estimate of tax payable in the month of the third tax instalment, where the third-month tax instalment falls in 2020 • Operational Guidelines No. 2/2020 titled "Pindaan Anggaran Cukai (CP204) Pada Bulan Ke-3 Ansuran Yang Jatuh Dalam Tahun Kalendar 2020 Dan Penangguhan Bayaran Anggaran Cukai (CP204 Dan CP500) Di Bawah Pakej Rangsangan Ekonomi 2020 (PRE)"
Accelerated capital allowance (ACA) for the purchase of machinery and equipment	The ACA (20% IA and 40% AA) will be given on qualifying capital expenditure for the purchase of machinery and equipment (including information and communications technology (ICT) equipment) incurred from 1 March 2020 to 31 December 2021.
Deduction for cost of renovation and refurbishment	Tax deduction of up to RM300,000 given on costs for renovating and refurbishing business premises, where such costs are incurred between 1 March 2020 and 31 December 2021
Double deduction for the establishment of regional operations by international shipping companies	International shipping companies that establish regional operations in Malaysia will be given a double deduction on pre-commencement expenditure. The application for the double deduction must be received by the MIDA not later than 31 December 2021.

Stamp duty exemption on loan restructuring and rescheduling agreements	100% stamp duty exemption will be given on loan agreements arising from loan restructuring and rescheduling between borrowers and financial institutions, provided the original loan agreement has been duly stamped. This is effective for loan restructuring and rescheduling agreements executed from 1 March 2020 to 31 December 2020.
Taxation of banking institutions' interest income	Interest income or profits accrued by banking institutions during the moratorium period will be taxed only when received. Reference: • IRBM's FAQs on Special Tax Treatment to Financial Institutions in relation to Moratorium Granted to Customer
Flexible Work Arrangements (FWAs)	Further tax deduction will be given to employers that implement FWAs or undertake enhancement of their existing FWAs, effective 1 July 2020.

Manufacturing	• To encourage foreign companies to relocate manufacturing operations to Malaysia, the following incentives have been proposed:
	  ◦ 0% tax rate for 10 years for capital investments of between RM300 million and RM500 million
	  ◦ 0% tax rate for 15 years for capital investments of more than RM500 million
	• The company must commence operations in Malaysia within one year of the approval date and the capital investment must be made within three years. Applications must be made between 1 July 2020 and 31 December 2021.
	• Subject to conditions and minimum investment amounts, existing companies in Malaysia which relocate their foreign manufacturing facilities to Malaysia will enjoy a 100% Investment Tax Allowance (ITA) Incentive for a period of five years. Applications must be made between 1 July 2020 and 31 December 2021.
	• Special reinvestment allowance for YA2020 and YA2021 for manufacturing activities and selected agricultural activities

SMEs	• Income tax rebate of up to RM20,000 per YA for three YAs, subject to conditions. This applies to companies which are established and begin operations between 1 July 2020 and 31 December 2021. • Stamp duty exemption for SMEs on any instrument executed for Mergers & Acquisitions (M&As). This applies between 1 July 2020 and 30 June 2021.
Property owners	Special deduction will be given to property owners who provide at least 30% rental discounts to SMEs. The amount of the special deduction is equivalent to the reduction in rental from April 2020 to September 2020. Reference: • IRBM's FAQs on Economic Stimulus Package 3.0 - Rental Reduction for Business Premise

Extended due dates for the submission of return forms

The IRBM has granted additional extensions of time for the submission of income tax return forms due to the MCO that started on 18 March 2020. Please refer to the Return Form Filing Programme for the Year 2020 (Amendment 3/2020), which was updated on 28 April 2020.

Tax deduction for donations and contributions to the COVID-19 Fund

The Ministry of Finance (MoF) and the IRBM issued media releases dated 23 March 2020 and 26 March 2020 respectively to confirm that the following contributions and donations to the COVID-19 Fund, by individuals and corporations, will be allowed as tax deductions.

- COVID-19 Fund (Ministry of Health (MoH))
  Type of contribution: Cash and in-kind
- COVID-19 Fund (National Disaster

  Management Agency, Prime Minister's Department) Type of contribution: Cash only
- Donations to institutions / organisations approved under Section 44(6) of the ITA (note that typically such donations would need to be in cash to qualify for a deduction and is restricted to 10% of aggregate income)

For donations / contributions in-kind (e.g. items such as medicine, medical equipment and personal protective equipment (PPE) to combat the COVID-19 outbreak), donors are required to obtain a letter of acknowledgement from the recipient, with an official stamp which will be

released by the MoF. The application for deduction will need to be addressed to the Tax Division of the MoF. Donors will also be required to retain records of the transactions, as these will need to be produced in the event of an audit by the IRBM.

Other references:

- IRBM's FAQs on Contribution / Donation
- MoF's guidelines titled "Garis Panduan Khas Permohonan Potongan Cukai Pendapatan Bagi Projek Komuniti / Amal Untuk Menangani Wabak COVID-19"
- IRBM's guidelines titled "Garis Panduan Permohonan Untuk Kelulusan Di Bawah Subseksyen 44(11C) Akta Cukai Pendapatan 1967 Bagi Tabung Relif COVID-19"

International tax issues due to COVID-19 travel restrictions

The IRBM has published guidance titled "FAQs on International Tax Issues due to the COVID-19 Travel Restrictions" to address certain international tax issues. Broadly, the FAQs address questions pertaining to the following:

- Residency status for individuals and companies;
- Creation of permanent establishment (PE) for companies; and
- Cross-border employment income for individuals

Stamp duty exemption on the instrument of loan or financing agreement executed between an SME and a financial institution

The Stamp Duty (Exemption) Order 2020 [P.U. (A) 152] was gazetted on 14 May 2020 to provide stamp duty exemption on the instrument of loan or financing agreement relating to certain loans or financing facilities announced in the Stimulus Package. The Exemption Order is applicable to the relevant instruments executed between an SME and a financial institution (FI) between 27 February 2020 and 31 December 2020. This exemption is not automatic and must be applied for. The application for the exemption will have to be accompanied by the letter of offer, stipulating the approval of the loan or financing facility.

INDIRECT TAX

CUSTOMS DUTIES

Customs Duties (Amendment) Order 2020

The Customs Duties (Amendment) Order 2020 [P.U.(A) 65] was gazetted on 26 February 2020 and came into operation on 1 March 2020. This Order provides for amendments in relation to headings "29.03" and "38.24" under the First Schedule of the Customs Duties Order 2017 [P.U.(A) 5/2017].

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2020

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2020 [P.U.(A) 66] was gazetted on 26 February 2020 and came into operation on 1 March 2020. This Order provides for amendments in relation to headings "29.03" and "38.24" under the Second Schedule of 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 Duties (Goods under the Agreement Establishing the ASEAN – Hong Kong, China Free Trade Area) (No. 2) (Amendment) Order 2020

The Customs Duties (Goods under the Agreement Establishing the ASEAN – Hong Kong, China Free Trade Area) (No. 2) (Amendment) Order 2020 [P.U.(A) 67] was gazetted on 26 February 2020 and came into operation on 1 March 2020. This Order provides for amendments in relation to headings "29.03" and "38.24" under the Second Schedule of the Customs Duties (Goods under the Agreement Establishing the ASEAN – Hong Kong, China Free Trade Area) (No. 2) Order 2019 [P.U.(A) 279/2019].

Customs Duties (Goods under the Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area) (Amendment) Order 2020

The Customs Duties (Goods under the Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area) (Amendment) Order 2020 [P.U.(A) 68] was gazetted on 26 February 2020 and came into operation on 1 March 2020. This Order provides for amendments in relation to headings “29.03” and “38.24” under the Second

Schedule of the Customs Duties (Goods under the Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area) Order 2019 [P.U.(A) 266/2019].

Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and China) (Amendment) Order 2020

The Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and China) (Amendment) Order 2020 [P.U.(A) 69] was gazetted on 26 February 2020 and came into operation on 1 March 2020. This Order provides for amendments in relation to headings “29.03” and “38.24” under the Second Schedule of the Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and China) Order 2019 [P.U.(A) 212/2019].

Customs Duties (Exemption) 2017 (Amendment) (No. 2) Order 2020

The Customs Duties (Exemption) 2017 (Amendment) (No. 2) Order 2020 [P.U.(A) 106] was gazetted on 31 March 2020 and came into operation on 1 April 2020. This Order provides for amendments in relation to Items 10, 11, 16, 94, and the insertion of Item 10A in the Schedule, in Part I of the Customs Duties (Exemption) Order 2017 [P.U.(A) 445/2017].

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 2) Order 2020

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 2) Order 2020 [P.U.(A) 110] was gazetted on 1 April 2020 and came into operation on 2 April 2020. This Order provides for amendments in relation to Annexes 3, 4 and 7 in the First Schedule of 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 Duties (Exemption) 2017 (Amendment) (No. 2) Order 2020 Corrigendum

The Customs Duties (Exemption) 2017 (Amendment) (No. 2) Order 2020 Corrigendum [P.U.(A) 138] was gazetted on 4 May 2020. This Order provides for an amendment with the insertion of subitem (v) in column (3), Item 10A, Part I, of the Schedule under the Customs Duties (Exemption) Order 2017 [P.U.(A) 445/2017].

EXCISE DUTIES

Excise Duties (Exemption) 2017 (Amendment) Order 2020

The Excise Duties (Exemption) 2017 (Amendment) Order 2020 [P.U.(A) 105] was gazetted on 31 March 2020 and came into operation on 1 April 2020. This Order provides for amendments in relation to Items 36 and 37 and the insertion of Item 36A in the Schedule, in Part I of the Excise Duties (Exemption) Order 2017 [P.U.(A) 444/2017].

SALES TAX

Sales Tax (Person Exempted from Payment of Tax) (Amendment) Order 2020

The Sales Tax (Person Exempted

from Payment of Tax) (Amendment) Order 2020 [P.U.(A) 104] was gazetted on 31 March 2020 and came into operation 1 April 2020. This Order provides for amendments in relation to Items 16 and 17 under Schedule A of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018 [P.U.(A) 210/2018].

SERVICE TAX

Service Tax (Amendment) Regulations 2020

The Service Tax (Amendment) Regulations 2020 [P.U.(A) 149] were gazetted on 13 May 2020 and came into operation on 14 May 2020. These Regulations provide for amendments to paragraphs 3 and 3A and to column 2 of Group G of the First Schedule of the Service Tax Regulations 2018 [P.U.(A) 214/2018].

Service Tax (Digital Service) (Amendment) Regulations 2020

The Service Tax (Digital Service) (Amendment) Regulations 2020 [P.U.(A) 150] were gazetted on 13 May 2020 and came into operation on 14 May 2020. These Regulations provide for an amendment with the insertion of Section 5A, Part IIA under the Service Tax (Digital Services) Regulations 2019 [P.U.(A) 269/2019].

Service Tax (Person Exempted from Payment of Tax) (Amendment) Order 2020

The Service Tax (Person Exempted from Payment of Tax) (Amendment) Order 2020 [P.U.(A) 151] was gazetted on 13 May 2020 and came into operation on 14 May 2020. This Order provides for an amendment in relation to Item 3, column (4) under the Schedule of the Service Tax (Person Exempted from Payment of Tax) Order 2018 [P.U.(A) 380/2018].

TAX PROPOSALS FROM THE ECONOMIC STIMULUS PACKAGE 2020 (27 FEBRUARY 2020), PRIHATIN ECONOMIC STIMULUS PACKAGE AND PENJANA SHORT-TERM ECONOMIC RECOVERY PLAN

Tax proposals for individuals and businesses	
Incentives for port operators and manufacturers	Import duty and/or sales tax exemption will be granted on the import or domestic purchase of machinery and equipment to be used in port operations. Applications must be received by the Ministry of Finance (MoF) between 1 April 2020 and 31 March 2023. The scope of value-added activities which can be performed within a Licensed Manufacturing Warehouse (LMW) or Free Industrial Zone (FIZ) will be expanded to include Supply Chain Management, Strategic Procurement Operation and Total Support Solutions. The approval process for value-added activities performed by manufacturers with LMW status or located within an FIZ will no longer r equire approval from the MoF/Royal Malaysian Customs Department (RMCD) headquarters. Approvals will be given at the RMCD State/Zone level.
Penalty remissions	50% remission of late payment penalty will be granted for any late payment of sales tax and service tax which is due and payable from 1 July 2020 to 30 September 2020.
Tourism	The exemption from charging service tax on accommodation and other related taxable services, that was previously provided to operators of accommodation premises until 31 August 2020, has been extended until 30 June 2021. Operators of accommodation premises are also exempted from charging tourism tax from 1 July 2020 to 30 June 2021.
Automotive	Sales tax exemption will apply on the purchase or importation of passenger cars from 15 June 2020 to 31 December 2020, as follows: • 100% sales tax exemption on locally assembled cars • 50% sales tax exemption on imported cars
Commodities	Full export duty exemption will apply on the export of the following commodities, with effect from 1 July 2020 to 31 December 2020: • Crude Palm Oil; • Crude Palm Kernel Oil; and • Refined Bleached Deodorized Palm Kernel Oil

*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

PPC SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (SPECIAL COMMISSIONERS OF INCOME TAX, 2020)

Counsel for the Appellant
MR S. SARAVANA KUMAR

Counsel for the Respondent:
MR AHMAD ISYAK MOHD HASSAN

prepared by
NUR AMIRA AZHAR & NURUL IMANI HAMZAH

INTRODUCTION

1. This appeal was heard before the Special Commissioners of Income Tax where the issues revolve around capital expenditure incurred for the construction of a multi-storey car park which was part of its new hospital building qualified for investment tax allowance ("ITA") and industrial building allowance ("IBA").
2. There are no facts in dispute as the Respondent's witness also confirmed during the hearing that the multi-storey car park is an industrial building. Further, the capital expenditure incurred for all the other parts of the hospital building has been allowed for ITA and IBA save for the multi-storey car park.
3. The Respondent's only basis in disallowing the Appellant's claim for ITA and IBA is based on Paragraph 66 of Schedule 3 of the Income Tax Act 1967 ("ITA 1967").
4. The Appellant's arguments were:
(a) It fulfils all the conditions under the Income Tax (Exemption) (No.12) Order 2006 and is allowed to claim ITA for the multi-storey car park;
(b) The multi-storey car park is an industrial building and qualifies for IBA; and
(c) Paragraph 66 of Schedule 3 of the ITA 1967 is not applicable.

ISSUE 1

INVESTMENT TAX ALLOWANCE

5. Based on the provisions of the Exemption Order 2012, it is clear that the Appellant need only satisfy the following to claim ITA on the capital expenditure incurred on the new hospital building:
(a) the new building is of an approved standard which has been licensed by the Ministry of Health and registered with the Malaysian Healthcare Travel Council;
(b) the claim does not include capital expenditure incurred for the construction of living accommodation; and
(c) the project undertaken is for the expansion, modernisation or refurbishment of an existing private healthcare facility business.
6. Paragraph 2 of the Exemption Order in defining "qualifying capital expenditure" has specifically disqualified capital expenditure incurred for living accommodation only, and not car park. In *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd (2012) MSTC 30-039*, the High Court decided that if Parliament had intended for a narrow interpretation of the term 'factory', it would have been specifically provided in Schedule 7A of the ITA 1967.

7. Similarly in this case, if it was intended for car parks to be disqualified from the ITA claim provided under the Exemption Order 2012, it would have been specifically spelt out like how it was done for living accommodation, but this was not done.
8. Thus, it is clear that Parliament had intended for specific items to be disallowed under Schedule 3 of the ITA 1967 but car parks was never mentioned as one of the items. Had the intention of Parliament to exclude car parks, this could be easily spelt out in Paragraph 65(3) of Schedule 3 of the ITA 1967 but this was not done.

ISSUE 2

INDUSTRIAL BUILDING ALLOWANCE

9. The Appellant's claim for IBA is made under Paragraph 37A of Schedule 3 of the ITA 1967 where it was undisputed that the hospital building is an industrial building and the capital expenditure incurred on it has been allowed for IBA claim. The only part in dispute is the multi-storey car park.
10. The High Court in *Lavender Confectionary & Bakery Sdn Bhd v Ketua Pengarah v Ketua Pengarah Hasil Dalam Negeri (2018) MSTC 30-170* observed the following in relation to the definition of the word "building" under the ITA 1967:

> "As per definition in Section 2 of the Act the term 'building' includes any structure erected on land (not being plant and machinery). In view of this definition we are of the view that the term building in paragraphs 63 and 64 includes a structure erected on land. Therefore a building or a structure which fulfils the conditions spelled out in paragraph 64 is a 'factory' for the purposes of that paragraph."

Further, the High Court in Lavender (supra) also confirmed the applicability of the "entirety test" and "functionality test" as laid down in C Company (supra) and Success Electronics (supra) respectively

in determining the nature of the capital expenditure incurred by the taxpayer.

11. The Appellant expanded its business by constructing a new hospital building on a piece of land which was adjunct to its existing hospital building. This new building has 19 storeys comprising a total surface area of 571,484sqft, including 7 storeys of the multi-storey car park with a surface area of 206,100sqft.
12. The multi-storey car park was used in the course of the Appellant's business and integrated with the expanded hospital building. The construction of new hospital's multi-storey car park was necessary to the Appellant's expansion of its existing private healthcare facility business. Taking into the context of the Appellant's business as a whole, i.e. the provision of a complete hospital and healthcare services, the provision of adequate parking spaces to its patient would be necessary and integral to the Appellant's business as it plays a crucial functional role in the hospital industry.

DECISION

13. Upon hearing the submissions, the Special Commissioners of Income Tax allowed the Appellant's appeal.

***Nur Amira Azhar** and **Nurul Imani Hamzah** are associates with Rosli Dahlan Saravana Partnership*

CASE 2

MUHIBBAH ENGINEERING (M) BHD V PEMUNGUT DUTI SETEM [2017] 6 MLJ 564 (COURT OF APPEAL)

BRIEF FACTS

The taxpayer obtained a banking facility which contained a negative pledge. The taxpayer paid stamp duty at an *ad valorem* rate amounting to RM1.98million. The taxpayer applied for a remission pursuant to paragraph 2 of the Stamp Duty (Remission) (No 2) Order 2012 (Remission Order). The Collector of Stamp Duties (Collector) rejected the taxpayer's application for remission.

The taxpayer then appealed to the Courts for the determination on whether a negative pledge in a banking facility agreement is a 'security' within the meaning of paragraph 2 of the Remission Order.

TAXPAYER'S ARGUMENTS

The taxpayer contended that the loan agreement is not the operative instrument for the purpose of the Remission Order. What the Remission Order is concerned with is whether or not the loan agreement or loan instrument is supported by another instrument that creates an obligation 'for any sum or sums of money repayable on demand or in single bullet repayment' and the negative pledge does not constitute 'security' within the meaning of paragraph 2 of the Remission Order. As such, the facility agreement qualifies for the remission.

COURT OF APPEAL'S DECISION

The appeal by the taxpayer was allowed by the Court of Appeal where it was clarified that the 'security' that the court should be concerned with is

not the loan instrument, i.e., the facility agreement itself, but whether there is in existence another instrument that creates an obligation to pay a sum or sums of money on demand or in a single bullet payment.

The Court of Appeal then delved into the meaning of the word 'security' and found that the negative pledge by the taxpayer in the facility agreement does not constitute 'security' for the purposes of the Remission Order as it merely creates an obligation not to encumber or charge assets.

In the taxpayer's case, the negative pledge does not represent any guarantee that the sum or sums of money can be demanded. In the event of a default, Maybank will be considered as an unsecured creditor and will be equal in right of payment.

The facility agreement entered into by the taxpayer is therefore a loan instrument without security and is entitled to the remission under the Remission Order.

ADDITIONAL NOTE

The Collector's subsequent appeal to the Federal Court was dismissed at the leave stage as the requirements of Section 96 of the Courts of Judicature Act were not fulfilled by the Collector. The appeal to the Federal Court did not lie from any judgement or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. The High Court, in this instance, had exercised its appellate jurisdiction instead in deciding the taxpayer's appeal against the decision of the Collector. As such, the final stage for a stamp duty appeal that has been heard by the High Court in its appellate function lies in the Court of Appeal.

Counsel for the taxpayer:
(WONG & PARTNERS)
DATO' MOHD ARIEF EMRAN ARIFIN, JASON LIANG AND KELLIE ALLISON YAP

Counsel for the Collector:
SHAFINI ABDUL SAMAD AND IRFAN MUASHIK JANTAN

CASE 3

WPCS V KETUA PENGARAH HASIL DALAM NEGERI (2020) (SCIT)

BRIEF FACTS

The taxpayer obtained loans from

a related Labuan company ("Labuan company") to finance the acquisition of shares in another company ("Malaysian company").

The loans were made to the taxpayer on the terms that the taxpayer will pay interest at the rate of London Bank Offered Rate (LIBOR) + 3% per annum and the principal sum is repayable to the lender on demand. The Director General of Inland Revenue (DGIR) relied on Section 140A of the Income Tax Act 1967 (ITA) and the Income Tax (Transfer Pricing) Rules 2012 (TP Rules) to disallow deductions claimed by the taxpayer for interest paid on the loans on the ground that the loans were not undertaken in an arm's length manner. This effectively means that the interest rate that the DGIR allowed was 0%. The taxpayer appealed against the DGIR's decision to the Special Commissioners of Income Tax (SCIT).

TAXPAYER'S ARGUMENTS

The taxpayer argued, *inter alia*, that:

(i) the loans were made based on valid commercial grounds;

(ii) the DGIR had disallowed the entire amount of the interest payments without justification;

(iii) the DGIR had failed to make any adjustments and failed to replace the interest rate with an alleged rate or payment amount that would be applicable between independent persons pursuant to Section 140A of the ITA and Rules 8(1), 8(2) and 13 of the TP Rules; and

(iv) the DGIR's position is without substance as he had only looked to the internet for justification and failed to produce an appropriate transfer pricing report, in contrast to the transfer pricing report prepared by the taxpayer.

THE SCIT'S DECISION

The DGIR had misapplied the law by ignoring the taxpayer's transaction in its totality without substituting the alleged price or interest rate pursuant to Section 140A of the ITA and Rules 8(1), 8(2) and 13 of TP Rules. The taxpayer, in contrast, had transfer pricing documentation prepared by its consultant, which explained the arm's length price that would have been undertaken between independent persons and contained a comparability analysis. The transfer pricing documentation also justified the commercial basis for the taxpayer to opt for the loans as opposed to a commercial loan.

Further, the DGIR's attempt to utilise Section 140A of the ITA to disregard the loans by applying a 0% interest rate, as if they were similar to the powers provided for under Section 140 of the ITA, is misapplied in law. These are different provisions under the ITA that must be read and applied separately. The DGIR's failure to substantiate its assessments by undertaking the appropriate function, asset and risk analysis tests in determining what constitutes "an arm's length" rate or transaction was ultimately fatal to his case. The SCIT held that the DGIR's decision to invoke Section 140A was without any legal or factual basis, and allowed the interest payments in respect of the loans to be deducted.

Counsel for the taxpayer:
(WONG & PARTNERS)
DATO' MOHD ARIEF EMRAN ARIFIN, JASON LIANG & KELLIE ALLISON YAP
Counsel for the DGIR:
MUHAMMAD FARID JAAFAR & RIDZUAN OTHMAN

CASE 4

RE: EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY SHELL PEOPLE SERVICES ASIA SDN BHD [2019] MLJU 1898 (HIGH COURT)

BRIEF FACTS

The taxpayer provides shared central function services to related companies within the Shell Group of companies. The Director General of Inland Revenue (DGIR) conducted a transfer pricing audit on the taxpayer, and subsequently imposed a mark-up on services provided by the taxpayer to its related companies.

Dissatisfied with the decision, the taxpayer filed an application for judicial review against the DGIR's decision.

Amongst the questions raised were:

(i) Do Sections 140 and 140A of

the ITA confer 'jurisdiction' on the DGIR, provide a discretionary power to the DGIR, or impose a mandatory duty on the DGIR?

(ii) Whether leave for judicial review can be granted when the DGIR's decision does not come within the three categories laid down in the case of Jagdis Singh?

(iii) Can the Court grant an ad interim stay of the DGIR's decision pending the disposal of an ex parte application for leave for judicial review?

TAXPAYER'S ARGUMENTS

The taxpayer argued, *inter alia*, that:

(i) the DGIR lacks the jurisdiction to make his decision; and

(ii) the DGIR had failed to comply with the "statutory duty" under Sections 140(1) and (5) of the ITA to provide particulars of the adjustment with the notice of assessment.

THE HIGH COURT'S DECISION

If the ITA expressly provides for a taxpayer's right to appeal to the SCIT, the Court can only grant leave for a judicial review in the following three categories of cases as laid down in Jagdis Singh, namely: a clear lack of jurisdiction, a blatant failure to perform some statutory duty, or a serious breach of the principles of natural justice. Given that the taxpayer failed to show that its leave application falls within any of the three categories, it was denied leave for judicial review.

The Court observed that Sections 140 and 140A of the ITA employ the term "power" instead of "jurisdiction", and the DGIR cannot exercise powers in matters which he has no jurisdiction. Conversely, in dealing with matters over which he has jurisdiction, the DGIR cannot exceed his powers. In the present case, there is no clear lack of jurisdiction.

The Court stated that Sections 140 and 140A only confer discretionary powers and do not impose any statutory duty on the DGIR. This finding is premised on the Court's reading of the permissive term "may" and the phrases "as he thinks fit" and "in the opinion" expressed in Sections 140 and 140A. Thus, there is no blatant failure on the DGIR to perform any statutory duty pursuant to Section 140A. The Court found that the exercise of the DGIR's discretionary power under Section 140A is not subject to Sections 140(1) and 140(5), given that the wording of Section 140A clearly shows the intention of the legislature that Section 140A shall prevail over Section 140, and not the converse.

The Court proceeded to give its views on Order 53 rule 3(5) of the RC, stating that a stay can only be granted when there are exceptional circumstances. There were no exceptional circumstances to justify a stay as leave for judicial review was not granted.

Counsel for the taxpayer:
(LEE HISHAMMUDDIN ALLEN AND GLEDHILL)
SARAVANA KUMAR A/L SEGARAN AND KATRYNE CHIA PHEI SHAN

Counsel for the DGIR:
MUAZMIR MOHD YUSOF, NIK NUR HALINA MOHD KASHA AND MOHAMAD DANIAL AHMAD

CASE 5

KETUA PENGARAH HASIL DALAM NEGERI V GOH SOO KWANG [2019] MLJU 1417 (HIGH COURT)

BRIEF FACTS

The taxpayer is a goldsmith carrying on the business of the sale and purchase of gold. There are times when the taxpayer accepts trade-in gold as a form of payment from his customers and at times he makes payments to his supplier in the same form, which is based on the daily trade market value on the day of transaction. Upon audit, the Inland Revenue Board of Malaysia (IRBM) regarded the taxpayer's "payments" to his supplier in the form of traded-in-gold were not payments but sales, and thus an additional unreported sales for purposes of computing the taxpayer's taxable income. Aggrieved by the decision of the Director General of Inland Revenue (DGIR), the taxpayer appealed to the Special Commissioners of Income Tax (SCIT). The SCIT allowed the taxpayer's appeal. The DGIR appealed to the High Court.

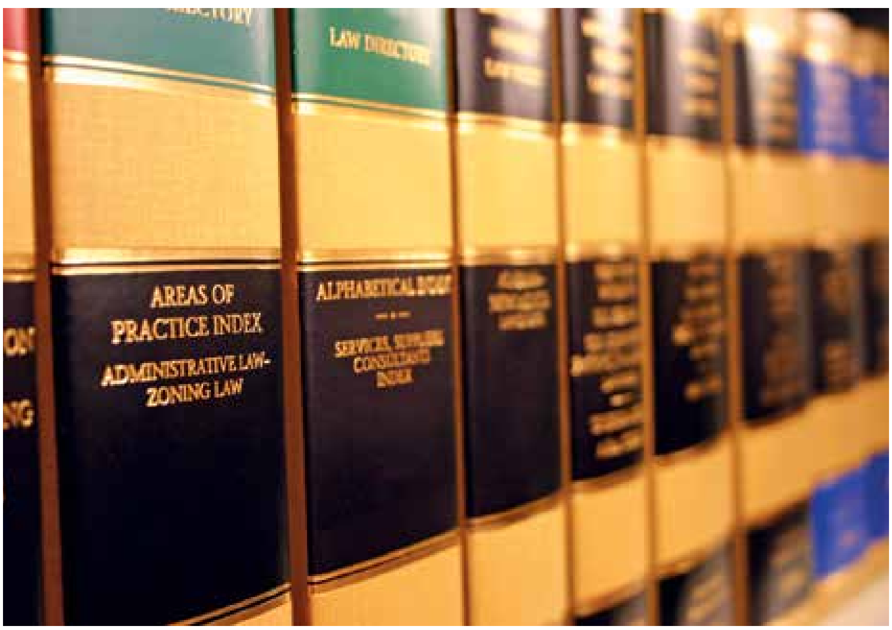
The issues for the High Court's determination were as follows:

(i) Whether the DGIR was correct in adding back the "unreported sales" for the relevant years of assessment; and

(ii) Whether the trade-ins of gold by the customers to the taxpayer constitute "purchases", and the trade-ins of gold by the taxpayer to his supplier constitute "sales".

TAXPAYER'S ARGUMENTS

The taxpayer argued that it was incorrect to treat the trade-in of gold from his customers as purchases because the trade-in values have been taken up in gross sales and reflected in the invoices and receipts.



The taxpayer argued that the traded-in gold "paid" to his supplier had been duly accounted as evidenced by the payment vouchers and receipts.

THE HIGH COURT'S DECISION

The High Court stated that trade-in of gold is unique, given that gold does not depreciate in value with age. Gold, as a precious metal, has an ascertainable daily internationally publicised market price. The High Court drew a distinction between the trade-in of gold and the trade-in of cars, where the car dealer would fix a value for the old car that is well below its perceived market value, so that the dealer can later sell the used car at a profit. The High Court observed that a car dealer controls the trade-in price of the used car. There is no established trade and market practice for used cars, and it is a distinct business or trade by itself. By contrast, storage space for gold is not an issue, the value of gold is determined by international markets, and it is unnecessary to spruce up old gold to improve its intrinsic value. Further, the High Court observed that gold is as close as one can get to a form of currency.

In the circumstances, the High Court held that the dominant purpose of the trade-in of old gold made by the taxpayer to his supplier was to pay in part the purchase of gold, and ought not be accounted for as "sales". The DGIR's appeal was consequently dismissed.

Counsel for the taxpayer:
(K.C. WONG AND ASSOCIATE)
WONG KHO CHING

***Adeline Wong, Jason Liang, Kellie Allison Yap** and **Jeff Sum** are associates with Wong & Partners.*

COMPUTATION OF CAPITAL ALLOWANCES

In the last two articles we looked at what constitutes qualifying expenditure i.e. the base for computing capital allowances. In this and the next article, we shall look at how and when a taxpayer qualifies to claim capital allowances

Siva Subramanian Nair

ELIGIBILITY TO CLAIM CAPITAL ALLOWANCES

Paragraph 15 of Schedule 3 provides that

Subject to this Schedule, where a person has for the purposes of a business of his incurred qualifying plant expenditure in relation to an asset and at the end of the basis period for a year of assessment he was the owner of the asset and it was in use for the purposes of the business, there shall be made to him in relation to the source consisting of that business *for that year an allowance equal to such proportion of that expenditure as may be prescribed.*

Based on the above, we shall now look at the prerequisites to be eligible to claim capital allowances.

1st CONDITION

Obviously this is that the asset must qualify as a plant or machinery, as discussed in the earlier articles. As a quick summary; it's not inventory, it is used as an apparatus and not a setting / premises and has a life span exceeding two years.

2nd CONDITION

The claimant must have incurred the qualifying capital expenditure. We looked at the word "incurred" when discussing the general rule for business deductions under Section 33(1) in ***Tax Guardian Vol.2/No.3/2009/Q3*** which basically included paid or payable. Therefore where an asset is gifted to a business, the eligibility to claim capital allowances on the asset is nullified by virtue of the fact that no cost is incurred.

Similarly when a taxpayer utilises a grant received from the government or State government to purchase an asset, that portion of the cost will not qualify for capital allowances claim as we saw in ***Tax Nasional Vol.16 No.3-2007 Q3***. This is given in ***INCOME TAX (EXEMPTION) (NO. 22) ORDER 2006 P.U.(A) 207/2006*** in paragraph 3 which reads... any allowances to be made or would have been made under the [Income Tax Act 1967] in a basis period for a year of assessment in respect of an expenditure incurred out of [or reimbursed through] the income referred to [i.e. the grant / subsidy] shall be disregarded for that year of assessment and subsequent years of assessment.

There are several circumstances in Schedule 3 of the Income Tax Act 1967 whereby the qualifying capital expenditure is deemed to be incurred. These are elaborated below.

Paragraph 2A states that …*where any person had in use machinery or plant for a non-business purpose, and that machinery or plant is subsequently brought into use for the purposes of a business of his, he is deemed to have incurred qualifying plant expenditure in relation to that machinery or plant and the amount of the qualifying plant expenditure shall be taken to be the market value of the machinery or plant on the day the machinery or plant was so brought into use.*

and

Paragraph 2C states …*where machinery or plant is brought into use for the purposes of a business in Malaysia by any person and prior thereto the machinery or plant had been used for the purposes of a business outside Malaysia, the person shall be deemed to have incurred qualifying plant expenditure and the amount of the qualifying plant expenditure in respect thereof shall be taken to be the market value or the net book value of the machinery or plant, whichever is the lower, on the day the machinery or plant was so brought into use in Malaysia.*

The above circumstances were discussed in the last article.

Another situation arises in Paragraph 40 which reads …*the acquirer shall be deemed to have incurred qualifying expenditure in relation to the asset of an amount equal to the sum ascertained under paragraph 39 in relation to the asset;* …

This relates to controlled sales or control transfers whereby special rules govern what would constitute the deemed qualifying capital expenditure incurred. This will be discussed in a later article.

Yet again in Paragraph 61A(6) …*where an asset deemed ceased to be used …[because it was classified as asset held for sale] is brought into use by the person in a business of his in a basis period for any year of assessment after the basis period the asset is deemed ceased to be used…that person shall be deemed to have incurred qualifying capital expenditure for that asset equal to its market value at the date it is brought into use for the purpose of that business.*

The above provision relates to assets initially classified as held for sale but later brought back into the same business. The intricacies involving assets held for sale will also be discussed in a later article

3rd CONDITION

The claimant must be the owner of the asset. This ownership can be either legal or beneficial. This was established in the case of ***DGIR v Teo Tuan Kwee (1998) MSTC 3648.***

FACTS OF THE CASE

The taxpayer, a proprietor of a lorry transport business, purchased and paid for four motor lorries for his business. Three of the lorries were acquired on hire purchase while the fourth was purchased direct from the seller. He was denied a claim for capital allowances on the lorries on the grounds that the taxpayer was not the legal owner of the lorries since they were registered in the names of third parties who had lent their names in consideration of earning monthly rentals for the haulage permits which were in their respective names.

The Special Commissioners held that the taxpayer was entitled to capital allowances under Sch. 3 of the Act as he had incurred capital expenditure by purchasing the four lorries for his lorry transport business. The Revenue appealed to the High Court. The question for determination was whether paragraphs 15 and 46 of Sch. 3 of the Act referred to legal ownership or could be extended to beneficial ownership.

DECISION OF THE COURT

In dismissing the appeal by the Revenue, the High Court held that the taxpayer was entitled to capital allowances under Sch. 3 of the Income Tax Act 1967 as he had incurred capital expenditure by purchasing the four lorries for his lorry transport business plus he was the beneficial owner of the motor lorries although not their legal owner.

The learned judge at the High Court opined that "it is certainly unfortunate that there is no definition to the word "owner" under the Income Tax Act, 1967" but his research on the definition of the word owner gave rise to "different meanings in different contexts."

He stated that since."…the subject lorries were purchased and used by the taxpayer for purposes of his business [therefore], the registered owners of the subject lorries were mere "dummies" used by the taxpayer to advance his business enterprise. Accordingly "… the taxpayer shall be taken to be the "beneficial owner" of these lorries." In consequence he ruled that:

> "In my judgement the word "owner" should not be confined to legal ownership. It should be extended to cover the situation of the present taxpayer. It should therefore include beneficial ownership."

After deliberating on the judgements expressed in many cases, both tax and non-tax, he also stated that he had subscribed to the view expressed in one case that

> "…when two interpretations are feasible, the Court will prefer that which advances the remedy and suppresses the mischief as the legislature envisaged. The paragraphs to the taxing Act are capable of three interpretations. As I said the word "owner" may mean "legal ownership" or "beneficial ownership" or "registered ownership" and to suppress the mischief it should be read to mean "beneficial ownership" as it falls squarely within the factual matrix of the present case."

With that he concluded that "on the facts, the taxpayer was the beneficial owner of the subject lorries and he should therefore be entitled to the capital allowances under Sch. 3 of the Income Tax Act 1967."

The acceptance of this view by the Revenue is evident in their publication of *Public Ruling No.5/2014 on Ownership and Use of Asset For The Purpose Of Claiming Capital Allowances.*

The Public Ruling commences by explaining that a legal owner is the person whose name is registered or documented as proof of ownership and provides an example to that effect as shown below:

Asset	Legal owner is the person whose name is on the
Landed asset	Land grant
Motor vehicle	Vehicle card.
Machinery	Warranty certificate or insurance policy.

It explains that a beneficial owner is the person who has actually incurred the QE and payment for the asset that can be proved in the books of accounts with supporting documents such as invoices, vouchers and receipts.

A legal owner who incurs the qualifying expenditure is also the beneficial owner. Therefore, if the asset is used in his business, he is entitled to claim capital allowances BUT ineligibility to claim capital allowances arises when:

- a legal owner does not incur the qualifying expenditure even though he uses the asset for the purpose of his business, and
- the qualifying expenditure is incurred by the beneficial owner but the asset is not used for the purposes of his business,

Numerous examples on this are available in the Public Ruling and candidates should make it a point to read through each one of them. Many times we see examination questions on scenarios which are similar (although not identical) to examples given in the Public Rulings.

JUNE 2014 BUSINESS TAXATION QUESTION 3 (A)

Chang, Sudin and Ramesh are partners in a construction business. They bought a motor vehicle and registered the vehicle in Chang's name. The motor vehicle is used in the business and the partnership business pays the instalments for the motor vehicle.

Required: Will the partnership be able to claim capital allowances for the motor vehicle in this case? (5 marks)

Solution

(a) The Public Ruling No.5/2014 on Ownership of plant and machinery for the purpose of claiming capital allowances states that where a person has:

(i) Incurred the qualifying plant expenditure on the asset; and

(ii) That asset is used for the purpose of the business during the basis period;

(iii) And the asset was still in use at the end of the basis period;

The person is the beneficial owner and is entitled to claim both the initial and annual allowances in respect of that asset even though he is not the registered owner of the asset. Thus, the partnership can claim the allowances in this case which will be shared by the individual partners according to their profit sharing ratios.

I will continue the discussion on the conditions for eligibility to claim capital allowances in the next article.

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

FURTHER READING

Choong, K.F. Malaysian Taxation - Principles and Practice, Infoworld,
Kasipillai, J. A Guide to Malaysian Taxation, McGraw Hill.
Malaysian Master Tax Guide, CCH Asia Pte. Ltd
Singh, V. Veerinder on Taxation, CCH Asia Pte. Ltd
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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: JULY – AUGUST 2020

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JULY 2020								
Workshop: Investment and Other Incentives	2 Jul	9a.m. - 5p.m.	Kuala Lumpur	Vincent Josef	400	500	600	WS/033
Workshop: Tax Audit & Investigation	6 Jul	9a.m. - 5p.m.	Penang	Yong Mei Sim	400	500	600	WS/035
Webinar: Tax Audit & Investigation	7 Jul	9.30a.m. -12.30p.m.	Zoom	Yong Mei Sim	135	N/A	180	WE/002
Workshop: Transfer Pricing-Practical Challenges Faced by Taxpayers	8 Jul	9a.m.-1p.m.	Kuala Lumpur	Selvi Permal	300	350	400	WS/037
Seminar: Latest Tax Updates 2020	9 Jul	9a.m. - 5p.m	Kuala Lumpur	Various Speakers	450	550	650	SE/010
Workshop: Tax Incentives	14 Jul	9a.m. - 5p.m	Kuala Lumpur	Ho Yi Hui	400	500	600	WS/036
Webinar: Debts Collection & Director's Liability	15 Jul	2p.m. - 6p.m.	Penang	Yong Mei Sim & John Ung	350	450	500	WE/038
Workshop: Tax Issues and Law Relating To Property Developers, JMB/MC and Investors	20 July	9a.m. - 5p.m.	Kuala Lumpur	Dr. Tan Thai Soon	400	500	600	WS/039
Workshop: Tax Agents Under Section 153(3) of the ITA 1967 – meeting the requirements	23 July	9a.m. - 5p.m.	Subang	Karen Koh	400	500	600	WS/040
Public Holiday ***(Hari Raya Aidiladha: 31 July)***								
AUGUST 2020								
Workshop: Cross Border Transaction & Withholding Tax	4 Aug	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	400	500	600	WS/41
Workshop: Tax Issues and Law Relating to Property Developers, JMB / MC and Investors	10 Aug	9a.m. - 5p.m.	Ipoh	Dr. Tan Thai Soon	350	450	500	WS/42
Workshop: Tax Audits and Investigations	11 Aug	9a.m. - 5p.m.	Kuala Lumpur	Harvindar Singh	400	500	600	WS/43
NATIONAL TAX CONFERENCE 2020	**25-26 Aug**	**9a.m. - 5p.m.**	**KL Convention Centre**	**Various Speakers**	650	-	750	**NTC/001**
Public Holiday ***(Awal Muharram: 20 August, Independence Day: 31 August)***								

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.

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50450 Kuala Lumpur, MALAYSIA

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

AKADEMI PERCUKAIAN MALAYSIA, LHDNM
Persiaran Wawasan
43650 Bandar Baru Bangi
Selangor, MALAYSIA

Contact Person
Ms Suraya / Ms Harmiza / Ms Nurul Nazihah
Tel : 03-8924 3600 Ext 132040 / 132178 / 132261
Fax : 03-8925 7005
E-mail : ntc@hasil.gov.my
Website : www.hasil.gov.my