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CHARTERED TAX INSTITUTE OF MALAYSIA

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NATIONAL TAX CONFERENCE 2020: NAVIGATING TAX THROUGH CHALLENGING TIMES

For the first time ever, the National Tax Conference, flagship event of the CTIM and the IRBM, was held online this year, with seven sessions based on the theme "Navigating Tax Through Challenging Times."

Tax Impact of Divestment of Upstream Assets in Malaysia

Taxation in Labuan – Then and Now!

Computation of Capital Allowances (II)

ISSN 0128-7583

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

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contents

Tax Guardian

VOL.13/NO.4/2020/Q4
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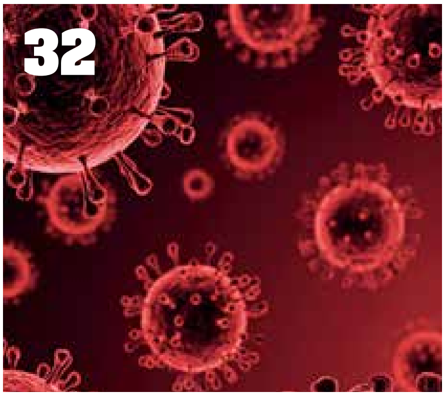

INVITATION TO WRITE

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

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

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FARAH ROSLEY

TAXATION DURING UNPRECEDENTED TIMES

Welcome to Q4 edition of the *Tax Guardian!* Despite the COVID-19 disruption, I am proud that the Institute has kept up with the timely issuance of the quarterly tax journals for 2020.

I am thankful that everyone has been keeping safe as Malaysia is now under the Recovery Movement Control Order (RMCO) phase until 31 December 2020. It is a great relief that businesses in Malaysia have started picking up and together let us hope for a speedy recovery of the world economy. At the same time, we must also ensure that we keep safe as the COVID-19 situation is not fully under control and continue to focus on economic recovery. Due to the current economic situation, some businesses are negatively impacted whilst others in certain economic sectors are performing exceptionally well. As the Inland Revenue Board of Malaysia (IRBM) is still carrying out tax audits during the Recovery MCO period, a gentle reminder that tax compliance obligations and managing tax risks is not to be neglected.

Council Members 2020/2021 and Sabah Branch Chairman

The 28th CTIM Annual General Meeting (AGM) was concluded on 12 September 2020. It is a great honour for me to be entrusted to continue as CTIM President for the 2020/2021 term. My sincere thanks to the Council, Branches, Secretariat, Committees, Working Groups and CTIM members for their continual support.

Phan Wai Kuan has retired from the Council following the AGM having served out her terms. I would like to express my heartfelt thanks to Wai Kuan for her tremendous contribution to the Institute during her tenure. I would also like to take this opportunity to congratulate and welcome Chow Chee Yen, Mohd Noor Abu Bakar, Zen Chow and Steve Chia as Council Members pursuant to the AGM. I am pleased that Chee Yen will continue as Deputy President for the 2020/2021 term.

The Institute also bid farewell to Viviana Lim, the Sabah Branch Chairman who has contributed immensely to CTIM during her tenure. She is succeeded by Datuk Alexandra Chin as the new Sabah Branch Chairman. Thank you Viviana and welcome on board Datuk Alexandra. I am confident with her experience and knowledge, Datuk Alexandra will continue to lead the Sabah Branch to greater heights.

Building Tax Knowledge

The Ministry of Finance (MoF) has launched the "MoF Tax Capacity Building Programme" for its officers. CTIM is priviledged to be invited by the MoF to conduct the tax training programme. Six sessions have been completed to-date with more to go. I would like to thank the Council Members who were involved and have dedicated their time for this programme. The Institute is dedicated in building tax knowledge and looks forward to converging this interest with the MoF and other regulatory bodies and institutions.

The Institute was also invited to speak in a webinar on "The New Normal for Professional Services Firms" to discuss the impact of the MCO and COVID-19 pandemic to professional services in the country. In addition the Institute was involved as panellist on "Cukai Aset Komuniti" which was jointly organised by Dewan Bahasa dan Pustaka (DBP) and the IRBM. The talk was moderated by Dr. Hazami Jahari, Director of Language & Literature Development Division of DBP and the other panellist from the IRBM was YBhg Datuk Mohd Nizom Sairi, the Deputy CEO of IRBM.

Engaging Tax Authorities

The Insititute's effective support to members is through its constant engagement with the IRBM. In upholding this, the key interactions and submissions between the Institute and the tax authorities in the 3rd quarter of 2020 are listed below: -

- Clarification sought from the IRBM on issues arising from the claiming of capital allowance on development cost for customised computer software, IRBM's Practice Note No. 2/2020, IRBM frequently asked questions (FAQ) on special deduction for corporate taxpayers and other taxpayers on rental reduction offered to small and medium enterprise tenant and on IRBM's response on mutual exclusion provision of income tax exemption in respect of the increase in chargeable income from business;
- Comments on the IRBM's FAQ on Advance Pricing Arrangement treatment due to COVID-19 pandemic;
- Clarification sought on update of the IRBM system with the amount of instalment payment on the revision of estimate tax payable in the 3rd month instalment;
- Requesting for extension of grace period for ITRF to be submitted under Section 77A for those with financial year end 1 January 2020 to 31 March 2020;
- Comments on the Royal Malaysian Customs Department's Guides; and
- Appeal to IRBM for further extension of time up to 31 December 2020 to be given automatically for all Labuan entities to submit their tax returns under the Labuan Business Activity Tax Act 1990 for the year of assessment 2020.

CPD Points for Section 153 Tax Agent Licence

Recognising the challenges faced in the renewal of tax agent licence due to the MCO, CTIM has submitted a joint letter with other professional bodies to the MoF to appeal for an extension of time to accumulate CPD points for renewal of tax agent licence and recognition of CPD points for tax webinars.

I am pleased to report that we have received a positive response from the MoF. The MoF has given a concession for tax agent licence renewal to tax agents who were affected during the MCO period from 18 March 2020 until 31 August 2020 as follows:-

For tax agent licence renewal submitted from 18 March 2020 until 31 August 2020:-

- Reduction of CPD points from 90 points to 75 points is granted to tax agents below the age of 60; and
- Reduction of CPD points from 45 points to 37 points is granted to tax agents age 60 and above.

The MoF has also awarded one CPD point for every one hour of tax webinars or online tax courses organised by approved professional bodies including CTIM from 18 March 2020 until 31 December 2020.

To enable members to capitalise on this concession, CTIM will be organising webinars on an array of latest tax topics from October 2020 to December 2020. Stay tuned for the update.

National Tax Conference (NTC) 2020

The NTC 2020 was successfully concluded via live streaming on 26 August 2020 after two days of discussions on topical and current issues from the Kuala Lumpur Convention Centre. The success of this first ever NTC conducted via webinar was made possible through the mutual co-operation between the IRBM and the Institute. I would like to express my heartfelt thanks to the CEO of IRBM, YBhg Dato' Sri Dr. Sabin Samitah for making this partnership and event possible despite the Recovery MCO challenges. In addition, appreciation and thank you to the MoF for approving the 20 CPD points for participants who attended this online event. I would also like to thank the participants for their support by tuning in online and the chairpersons, speakers, moderators and panellists for each session for their tremendous contributions. I would also like to acknowledge and applaud the efforts of the NTC Co-Chairpersons, Committee and the Secretariat for ensuring the smooth running of this event.

Upcoming Budget Seminar

The Finance Minister will be announcing the Budget 2021 on 6 November 2020. Following from this, the Institute will hold its CTIM 2021 Budget Seminar followed by 2021 Budget webinars. Do look up our CPD Events Calendar for Quarter 4 of 2020 (October 2020 to December 2020) in this *Tax Guardian* and the CPD events listed in the Institute's website (www.ctim.org.my) for more information. I would encourage you to register early for the CTIM 2021 Budget Seminar to avoid disappointment.

The last quarter of the year is crucial as we look forward to the tabling of the Budget 2021. Following the Budget announcement, there will be a hive of activities involving tax professionals and the relevant stakeholders who will seek to study and understand the implications of the proposed changes in the tax legislations. It is hoped that due consideration will be given to all the parties affected by the proposed changes and that the issues and concerns are heard and addressed before the proposed changes are gazetted and become effective.

In Closing

The Institute will always continue to partner and collaborate with the authorities to allow tax professionals to collectively contribute in the quest for an improved tax system that supports our country's fiscal needs. Together, we build the nation.

My good wishes and the very best to everyone. Please stay safe and well and take care.

Editor'sNote

YEO ENG PING

The next several weeks leading to Budget 2021 on 6 November will be a crucial period as policy makers weigh-up various options and formulate the policy response that Malaysia will adopt to safeguard the economy and boost recovery. The biggest policy question for governments around the world centres on how the extraordinarily large government expenditure, probably the largest in modern history, which was used to counter the negative effects of COVID-19 will be paid. Malaysia has introduced COVID-19 related stimulus packages totaling RM305 billion, and we are expecting a fiscal deficit of 5.8% to 6% for 2020. Incidentally the fiscal deficit was 6.7% in 2009, in the aftermath of the global financial crisis. There is also the further question of what more should (and can) the government do to continue to protect and stimulate the economy, not least to move at pace towards achieving our Shared Prosperity Vision 2030. Will we see an increase in taxes to fund these policies?

The Malaysian tax revenue collection has been impacted as businesses were forced to close for almost three months under the Movement Control Order, with the exception of certain industries which were allowed to operate during the Conditional Movement Order period. The IRBM has even mentioned recently that a new collection target has been submitted to the Finance Ministry, with a significant reduction from the RM154 billion projected back in January 2020. And while businesses have re-opened, demand has dampened and we continue to close our borders; there have also been closures of businesses and job losses. The unemployment rate in Malaysia surged to 5.3% in May 2020 (May 2019: 3.3%), which is the highest rate in 30 years since 5.7% in 1989. The overall confidence in the Malaysian economy is still uncertain at best, and this will continue to put pressure on business revenues and correspondingly tax revenues for the government. We are also finding that economic impact from the COVID-19 pandemic is affecting sectors differently and wealth inequality is increasing.

In the face of these realities, there has been discussion on whether it is time to increase taxes including introducing new taxes. In Malaysia, a number of potential areas being talked about are the introduction of a broad-based capital gains tax, extending beyond our territorial system of taxation, new carbon tax, wealth and inheritance taxes. Other levers could be to expand the scope of the current sales and service tax, or to bring back the broader goods and services tax. For example, in a recent interview the Minister of Finance said the government is considering an increase of the sales and service tax. So there are quite a number of options, and with the fiscal deficit position, it might be tempting to consider this route. But the question remains whether it is good time to make such a move? And if yes, to what extent should taxes be raised?

It is said that government should adopt policies that build confidence and invigorate demand. This translates into greater public spending, preserving jobs and having initiatives that increase cash flow for people and businesses. From this standpoint, the introduction of new taxes, or increasing taxes will not be helpful as it adds to costs of doing business and inhibits investments and spending. There is a view that as economies start to recover, it would be better to fund fiscal deficits through long-term debt rather than through raising taxes – the primary focus should be to get the economy back on track and humming by encouraging demand and supporting investments, and to deal with the debt later. With a current debt level to GDP of 55%, the recent approval to increase Malaysia's debt ceiling from 55% to 60% provides the avenue to take on more debt. Some economists have likened COVID-19 expenditures to war expenditures, which is to be funded and paid over long period through government debt issuances. Having said that there are views that taxes targeted at the ultra-wealthy or those who have unusually benefited from the COVID-19 situation should not be too detrimental.

Continuing along this line of thought, we should also be considering the approach to tax enforcement in Malaysia. We hear audit activity has spiked in the last few months, and no doubt the IRBM should continue to run a robust tax audit programme, particularly targeting evasions and non-compliance. However, this may not be the best time for the IRBM to challenge with hitherto new and unconventional tax positions, or to re-open cases settled under the SVDP – this does not build public-private trust, and adds to the fatigue that most businesses are experiencing as they fight to keep their businesses afloat. Also, the issuance of mega-sized assessments prior to a fuller examination of the circumstances with the taxpayer, while expecting strict adherence to the "pay now, appeal later" rule, can cause severe hardship on taxpayers which in this climate could threaten their very viability or stunt investment or turnaround plans, all of which are needed for a healthy recovery.

Some positive ideas on how the government can use tax to help include allowing tax payment instalment schemes, increasing reliefs and exemptions on intra-group transactions, reducing tax penalties in cases of genuine mistakes or technical errors, waiving the underestimation penalties for the years impacted by COVID-19, and increasing (or removing the restriction on) the carry-forward period for the utilisation of unabsorbed business losses to name a few. Consideration can also be given to provide more leeway to taxpayers on the submission of estimates of tax payable (e.g. allowing initial tax estimates of lower than 85% of the immediate-preceding year of assessment's tax estimate, or allowing revisions of tax estimates in the 12th month of the basis period) as this would potentially ease the cash flow of businesses on a more immediate basis. Apart from these administrative concessions, a judicious use of targeted and specific tax incentives would also help the recovery of certain sectors.

It does look like the road to recovery will continue to be bumpy and longer than expected. The IMF Managing Director Kristalina Georgieva said recently that the global economy is coming back from the depths of this crisis… "But this calamity is far from over. All countries are now facing what I would call 'the long ascent' — a difficult climb that will be long, uneven, and uncertain. And prone to setbacks,…"

It is therefore all-important for every stakeholder to stay connected, to set the direction, adjust course as necessary and move in tandem towards the shared vision and goals. To this end, the overall approach by the IRBM should ideally be aligned with the thinking and direction from the policy makers, so the achievement of "collection targets" and the means by which the IRBM employ is consistent with the ultimate economic goals. The Budget 2021 planning and discussions will hopefully provide the platform to create the consistency and alignment of approach on how to nurse and spur our economy forward.

InstituteNews

CTIM PRESIDENT AS PANELLIST IN WEBINAR EVENTS

The New Normal for Professional Services Firms

CTIM President, Ms. Farah Rosley was invited as a panellist in a webinar on **"The New Normal for Professional Services Firms"** on 8 July 2020 organised by Exabytes Network Sdn Bhd. Farah provided insight on the impact of the MCO and COVID-19 pandemic to the tax profession and the taxation environment as a whole. Tax professionals, according to Farah, have proven to be able to embrace the challenges under the new normal. CTIM members were given free admission to the webinar.

Taxation as a Community Asset *Cukai Aset Komuniti*

On 11 August 2020, Dewan Bahasa dan Pustaka (DBP) in collaboration with the IRBM organised a live telecast event on *"Cukai Aset Komuniti"*. As CTIM President, Ms. Farah Rosley was invited to participate as a panellist together with YBhg Datuk Mohd Nizom Sairi, Deputy CEO of the Inland Revenue Board of Malaysia. The talk was moderated by Dr. Hazami Jahari, Director of Language & Literature Development Division of DBP. The event was telecasted live on the DBP's Facebook.

28TH ANNUAL GENERAL MEETING OF THE INSTITUTE

The Chartered Tax Institute of Malaysia held its 28th Annual General Meeting (AGM) on 12 September 2020 at the Kuala Lumpur Convention Centre. A total of 80 members attended the AGM.

ELECTION OF COUNCIL MEMBERS

Mr. Chow Chee Yen, Encik Mohd Noor Bin Abu Bakar, and Mr. Chow Tuck Him were re-elected to the Council. Mr. Steve Chia Siang Hai was elected as a new member of the Council.

ELECTION OF PRESIDENT & DEPUTY PRESIDENT

The first Council meeting for the 2020/2021 term was held on the same day. The Council elected from amongst the Council Members for the term 2020/2021, Ms. Farah Rosley as the President and Mr. Chow Chee Yen as the Deputy President.

President
Farah Rosley

Deputy President
Chow Chee Yen

Koong Lin Loong

Lai Shin Fah @ David Lai

Soh Lian Seng

Yeo Eng Ping

Nicholas Anthony Crist

Mohd Noor Bin Abu Bakar

Chow Tuck Him

Leow Mui Lee

Thenesh Kannaa A/L Kannan @ Renganathan Kannan

Low Geok Ping

Alan Chung Ch'ung Yit

Chong Mun Yew

K. Sandra Segaran A/L Karuppiah

Steve Chia Siang Hai

ADOPTION OF NEW CONSTITUTION

The Special Resolution for the Proposed Adoption of a New Constitution of the Institute was passed with a majority of more than 75%. Adoption of the New Constitution is subject to the approval of the Registrar of Companies.

CPD EVENTS

The Institute has conducted the following CPD events for the 3rd quarter 2020:

Topic	Date	Venue	Speaker/(s)
Workshop: Investment and Other Incentives	2 July 23 September	Kuala Lumpur Melaka	Mr. Vincent Josef
Workshop: Tax Audits & Investigations	6 July 7 July	Penang Webinar	Ms. Yong Mei Sim
Workshop: Transfer Pricing: Practical Challenges Faced by the Taxpayers	8 July	Kuala Lumpur	Ms. Selvi Perumal
Seminar: Latest Tax Updates 2020	9 July	Kuala Lumpur	Dr. Zainal Abidin Md Yassin, Tax Compliance Department, LHDNM. Mr. Chow Chee Yen, CTIM Deputy President. Mr. Soh Lian Seng, CTIM Council Member.
Workshop: Introduction to Tax Incentives in Malaysia	14 July	Kuala Lumpur	Ms. Ho Yi Hui
Workshop: Director's Liability & Debt Recovery Action Post COVID-19	15 July	Penang	Ms. Yong Mei Sim & Mr. John Ung Soong Hock
Workshop: Arms Length Principle Explained	17 July	Webinar	Mr. SM Thanneermalai
Workshop: Tax Issues and Law Relating To Property Developers, JMB/MC and Investors	20 July 6 August (re-run) 10 August 14 September	Kuala Lumpur Kuala Lumpur Ipoh Penang	Dr. Tan Thai Soon
Workshop: Tax Agents Under Section 153(3) of the ITA 1967 – meeting the requirements	23 July & 4 September (re-run)	Subang	Ms. Karen Koh
Workshop: Cross Border Transaction & Withholding Tax	4 August	Kuala Lumpur	Mr. Harvindar Singh
Workshop: Tax Audit & Investigations	11 August	Kuala Lumpur	Mr. Harvindar Singh
National Tax Conference 2020	**25 & 26 August**	**Live Streaming**	**Various Speakers**
Workshop: Corporate Tax Planning	7 September	Kuala Lumpur	Mr. Harvindar Singh
Workshop: Transfer Pricing – Getting the Art Right	8 September	Kuala Lumpur	Mr. Anil Gupta, Mr. Vrushang Sheth, Ms. Foong Theng, Mr. Laurent Varlet, Ms. Michelle Chin Kit Mun, Ms. Justine Ying Chin Fan & Mr. Tamas Adorjan
Workshop: Transfer Pricing Documentation and Managing Transfer Pricing Audits	28 September	Kuala Lumpur	Mr. Harvindar Singh

MoF: Tax Capacity Building Programme

The "Tax Capacity Building Programme" was organised by the Tax Division, Ministry of Finance (MoF) for their internal tax officials. The Institute was invited to conduct the training programmes that started from 23 June 2020. The following Council Members are involved as speakers:

Topic	Speaker
Basic Income Tax Principles	Mr. Chow Chee Yen, Mr. Thenesh Kannaa and Mr. Chong Mun Yew.
Tax Deductible Expenses	Mr. Chow Chee Yen & Ms. Farah Rosley
Capital Allowances	Mr. Soh Lian Seng & Mr. Thenesh Kannaa
Industrial Building Allowance	Mr. Chow Chee Yen
Reinvestment Allowance	Ms. Farah Rosley & Mr. Soh Lian Seng
Preparation of Corporate Tax Computation	Ms. Phan Wai Kuan
Basic of Transfer Pricing	Ms. Leow Mui Lee
Stamp Duty	Ms. Stefanie Low
Real Property Gains Tax	Ms. Phan Wai Kuan

The Institute is proud to play a contributory role towards advancing tax knowledge in the public sector.

NATIONAL TAX CONFERENCE 2020 NAVIGATING TAX THROUGH CHALLENGING TIMES

Majella Gomes

FOR THE FIRST TIME EVER, THE NATIONAL TAX CONFERENCE, FLAGSHIP EVENT OF THE CTIM AND THE IRBM, WAS HELD ONLINE THIS YEAR, WITH SEVEN SESSIONS BASED ON THE THEME "NAVIGATING TAX THROUGH CHALLENGING TIMES."

Despite the formidable challenges of coordinating this signature event, it garnered very encouraging response, with over 2,000 participants logging on over the two-day conference. Very much at the forefront of the discussion was the Covid-19 Pandemic, and its implications for tax professionals and their work as a whole. Throughout the conference, the reality emphasised was one of economic disruption that would inevitably impact global conditions for at least the next two years.

Governments have rolled out rafts of economic measures to help cushion the blow, but the worldwide situation was still fluid, and many nations are in fact struggling to get the virus under control. The number of countries trying to get their respective economies back on track grows by the day. Meanwhile, commerce is suffering, and uncertainty rules the business environment. Can tax professionals and authorities play a meaningful, constructive role at this time, and how can they support their clients when hard decisions have to be made – these were the major questions that underpinned many presentations in the course of the conference.

TOPIC 1 CHALLENGES AND STRATEGIES OF THE IRBM

Moderated by CTIM President Farah Rosley, this session saw the IRBM CEO YBhg Dato' Sri Dr. Sabin Samitah giving insights into how the tax landscape was changing in the wake of tightening controls domestically and abroad, and how Covid-19 has drastically complicated the work of the revenue collection body. Acknowledging that the IRBM, like most other bodies, has also felt the impact of the virus, Dato' Sri Sabin said that it had impacted primarily on the collection of tax revenue. Many businesses had their operations curtailed during the initial implementation of the Movement Control Order (MCO); commercial activity – and revenues – had thus been reduced since mid-March 2020.

"Decline in revenue has been our biggest challenge," he admitted. "We had to support taxpayers during the pandemic, but we also had to ensure that revenue was collected. We had to take a step back from some of our activities during the MCO. The MCO itself was challenging for the IRBM staff because while some activities could be done remotely, having to coordinate alternative arrangements for more than 11,000 staff who had to work from home, was hard!" Some staff also found it difficult to work from home; additionally, there was the implementation of strict Standard Operating Procedures (SOPs) to deal with, when they returned to work at IRBM's 145 premises nationwide.

While the human factor figured largely in the IRBM's response to the pandemic, there were also technology-related issues to deal with. Its dependence on technology spiked sharply; many staff who had not had to deal with matters online found themselves on a steep learning curve out of necessity. The government's economic mitigation measures, especially programmes like Bantuan Prihatin Nasional had to be managed on top of the regular Bantuan Sara Hidup disbursements, and needed to be managed differently. He said that the government had so far rolled out a stimulus package worth RM260 billion.

Online use – and its attendant challenges – increased as the IRBM sought to make it easier for people to access its system. "Having shared data meant that there didn't have to be multiple entries done on multiple systems," Dato' Sri Sabin explained. The upside to this was that the IRBM became more sophisticated in a shorter time, in its efforts to support tax payers during difficult times. The difficulties were compounded, he added, because the nationwide lockdown was announced just as the IRBM geared up to deal with the annual tax-filing season.

The IRBM's own business continuity plan kicked in with the lockdown, and it became evident that the nation was in for the long haul – and the plan included staff upskilling as well as other contingency measures to ensure operations were not completely disrupted in the event of an occurrence like the pandemic. "the IRBM officers had to be in the office for these preparations," he said. "It was all done using internal resources, and the system was deployed within a week to service 22 million users." The IRBM has been using big data analysis for some time now, to increase tax compliance and revenue collection; this has minimised errors and saved on operations costs.

Big data analytics is currently used for case selection, to improve performance and in decision-making, but managing it for effective utilisation has been challenging. Capacity-building, including improving skills of data scientists, is ongoing because human resources can be deployed more effectively when machines take over mundane, repetitive tasks. With all this on the IRBM's plate, he conceded that the target for revenue collection for 2020 – a hefty RM154.676 billion – will be an uphill challenge all the way. The current economic situation, both domestically and externally, is uncertain and unsettled. "There is no sugar-coating the problems we face with collections this year," he said.

Tax revenues will take a beating worldwide; despite this – and to a certain extent, because of it – taxes still need to be collected as efficiently as possible, so as to be able to defray the costs of overcoming the pandemic and restarting the economy, which has taken a battering in the last six months. The IRBM has increased its efforts in audit, collection and civil litigation; officers' caseloads have increased. The pandemic has had a negative impact on the economy overall, but some essential sectors like F&B and Health – especially glove and PPE manufacturing have been doing well. He confirmed that the IRBM will also be keeping a close eye on existing government contracts, and on high net worth individuals.

Other areas where the IRBM will be watchful include the digital media and

entertainment sectors. Commenting on how CTIM could support the IRBM, he said that agents should ensure their clients' tax compliance and provide feedback on government initiatives. Legislation can sometimes be complex; tax payers often refer to tax professionals for guidance. "The IRBM expects tax professionals to advise clients to comply with tax laws, so tax professionals need to be proficient in the laws themselves," he advised, citing instances where tax professionals manipulated information to their clients' advantage.

Stressing the importance of tax education programmes in expanding literacy among tax professionals, he urged all citizens to comply with tax requirements. "Taxes will continue to be a hot topic but they are crucial to nation-building," he said. "The country cannot survive without taxes; the nation depends on us as taxpayers, to get over the pandemic."

TOPIC 2 ECONOMIC OUTLOOK AND CHALLENGES – A MALAYSIA PERSPECTIVE

The hard reality continued with the second session, moderated by Dr. Yeah Kim Leng, Professor of Economics at Sunway University's Business School. Presenters for this session were economists Dr. Mohd Afzanizam Abdul Rashid, Chief Economist of Bank Islam, and Prof. Dr. Edmund Terence Gomez, Professor of Political Economy at the Faculty of Economics & Administration, University of Malaya. Setting the stage for discussion, Dr. Yeah remarked that Malaysia had suffered its worst quarterly contraction (-17.1%) ever in Q2 2020, although a rebound was expected in 2021. Recovery, he said was expected to be V-shaped, but this was dependent on five key factors.

Still a lot of uncertainty for the remainder of 2020 because the situation in many countries had yet to peak as governments grappled with the pandemic and falling productivity levels. Dr. Afzanizam agreed, likening the shocks currently reverberating in the global financial sector today, to those that similarly affected economies worldwide during the last economic crisis. "Economies and markets have been volatile," he said. "But this has been the worst shock in 100 years. The volatility index went up by 80.6 points during the 2008-2009 economic crisis, but when lockdown was instituted on 18 March 2020, it went up to 82.69 points."

However, with the easing of restrictions, economic activity has gradually resumed but there is no certainty that it will continue on this recovery trajectory. A great deal depends on the availability of a vaccine; until then, economies can generally be expected to be in recession. Although the government has made several policy responses to mitigate the impact of the pandemic on the economy, pain cannot be avoided. One policy response has been to reduce bank rates; a second has been to pump cash into the system. This quantitative easing has been a standard response in most countries around the world.

"There is a lot of liquidity in the world at the moment," remarked Dr. Afzanizam, adding that money had a way of finding emerging markets because these were likely to provide higher returns on investment. Amid the stuttering projections and generally gloomy markets, however, there have been distinct signs of recovery in certain industrial sectors, such as, surprisingly, the automotive industry. He confirmed that the number of vehicles sold increased in July, from 45,000 to almost 50,000; there was a resumption of economic activity, albeit not at previous levels quarter-on-quarter.

Market observers and analysts always considered trade wars as a more likely recession scenario for most countries, so when the pandemic hit, companies were gobsmacked, and had to scramble to put mitigative measures in place. As a result, self-employment has seen an increase, and many more people are now depending on passive income such as rent. But "People are not depending solely on the government," he affirmed. "The assistance programmes like Bantuan Prihatin Nasional (BPN) has been helpful but people really need capital to do business and survive in a sustainable way. Society is responding to the environment, which is a good thing."

What was required now, he added, was clear policy to facilitate the transition from one industry or career to another. He was optimistic that things will improve, particularly with the efforts being made to find a vaccine, but cautioned, "There will be pain ahead." Going forward, there is a need for reforms, especially with the possibility of more shocks ahead. Remarking that the worst seemed to be over for the time being, Dr. Yeah said that recovery could probably proceed apace provided there was no resurgence of infections and national lockdown was avoided. Recovery has also been uneven because the pandemic has had different effects on different economic sectors.

So far, government injections into the economy amount to almost 20% of GDP, he added, which was a lot. "It's usually only about 4%," he said. However, it was a matter of having no choice but to intervene or risk more severe economic damage. Businesses are failing; bankruptcies are increasing and unemployment is on the rise. "We are now technically in recession," said Dr. Gomez. "We need responsive stimulus policies and effective public sector intervention, and help for the SMEs." The Government Ecosystem, he said, needs to kick in.

Ministries like the Ministry of Finance, Ministry of Science & Technology and the Ministry of Rural & Regional Development are some of the ministries with the largest number of tools to make this happen, through listed and unlisted Government-Linked Companies (GLCs) where they have interests. The Ministry of Rural & Regional Development, for instance, is responsible for food security, and the production of food in the rural areas through bodies like KEJORA and KETENGAH. The Ministry of Science & Technology was set up to promote scientific and technological advancement primarily of SMEs.

GLCs were established to eradicate poverty but their basic concepts have been abused and they have instead become political tools. There is a further disconnect between the public sector, industry and academia. Skills and training institutes abound but there is no coordination between them, and no synchronisation between their programmes, so the talent required for competitive growth is not being adequately developed. There has been a Government Ecosystem – including Development Financial Institutions (DFIs) like Exim Bank and SME Development Bank – in place since the 1970s, but the government could utilise it more effectively through better management of GLCs.

Better coordination is needed between ministries, and the industrial-financial system needs to be effective, as does the public service delivery system. A lot of thinking will be required to formulate effective policy and carry out the necessary reforms. The country cannot depend on the private sector to drive economic growth, emphasised Dr. Gomez. "The government has the tools to do it," he said. Agreeing with him on this point, Dr. Yeah added that there was a lot of stimulus but a better delivery system was necessary for it to benefit more people.

The stock market, always an indicator of how well or badly a country was doing, was recovering, said Dr. Afzanizam, although it was yet to recover to pre-pandemic levels. Overall, its rebound appears to be driven primarily by glove manufacturers; major components like banks, for instance, were still sluggish, he said. Responding to the idea of the private sector being able to run the economy more efficiently, Dr. Gomez said that the economies that could be said to be performing well were actually interventionist states like China, Vietnam and Singapore. "In reality, (capitalist state economies) the UK and US have fallen behind," he said. "They cannot compete."

Citing Germany and Scandinavian countries as examples of better economic models, he pointed out that the pandemic was not necessarily a bad thing in that it could jump-start economic reform, in the same way that the Great Depression of 1929 brought about reform in the UK and US. New models are needed, he said; government intervention is needed with SMEs as this is the largest sector of the economy. "The government needs to rethink how it intervenes," he advised. "Think through policy intervention. There cannot be standard policy because of the pandemic. There cannot be dependence on the private sector. We have to look at the context of the situation we are in."

The model also needs to be able to change as the country slowly overcomes the pandemic situation it is currently in; adjustments will need to be made as the situation progresses. There have been major reforms of SMEs under the previous Industrial and Master Plans but there are SMEs in agriculture and the tech sector especially that need help. Foreign investments from China have come in, in a big way and government-to-government interaction has been strong but these investments are not always in the right areas. "China is taking over the supply chains," he said. "We have to ask ourselves if there will be place for us."

TOPIC 3 TAXING THE SHADOW ECONOMY

What is the Shadow Economy, and why does taxing something that is unobservable and imprecise matter? These were among the many questions that presenters grappled with, during this session. Moderator and CTIM Council Member K. Sandra Segaran described it as a hidden, parallel or informal economy that is illegal and unregulated and therefore unlawful. It can be detrimental to the economic cycle. India's recent move to demonetise large rupee notes was in part a response to its long-standing problem of a Shadow Economy that was increasingly disruptive to its legal, taxable economy.

Matters become more complicated as economies become more digitalised, said speaker Dr. Richard Record, the World Bank's Lead Economist for Malaysia. "Malaysia's challenge is that its revenue collection has been declining since 2012," he said, although he stressed that there was no "right" or "wrong" rate to be at. However, declining revenue collection has long-term implications. The Shadow Economy matters because it is lost revenue, and undermines the trust in the tax system. This has the effect of driving up the cost of regulation, and can distort competition, which can put consumers at risk. The Shadow Economy is also associated with crime and illegal activity, which has social impacts.

The OECD has its own definition, he said, but generally the Shadow Economy consists of unreported income which may have been legally or illegally obtained, which cannot be captured through the usual techniques. It is fundamentally unobservable so it is difficult to be precise about how large a Shadow Economy may be. "Different approaches may be used but most will be only an estimate at best," he continued. "Different methods will give different numbers. We won't know for sure because even the numbers will be different at different times."

As an example, he said Malaysia's Shadow Economy was estimated to be about one-third the size of the country's real economy in 1995, but it was now about 25%. The decline in size was due to the growing use of technology and increasing prosperity, he added. What makes the Shadow Economy difficult to deal with is that it is time-consuming to quantify unreported income as large numbers of participants with small amounts of tax are involved. It may not be worth the time and resources expended when little tax can be collected from people who are earning at subsistence level on the margins of society.

New collection methods and strategies have to evolve, to tackle the Shadow Economy. Traditional tools have to adapt to the changing business environment, and a shift in mindset has to develop in parallel. One such strategy may be to move away from cash or have capped cash transactions. Tools that enhance compliance such as cash registers connected to the tax administrative system, and mandatory electronic invoicing could be introduced. Pre-filled tax returns and distributed ledgers (blockchain) are also an option.

Citing examples of successful systems, Dr. Record said that in Norway, the onus was on the purchaser to report tax, and in Denmark, tax compliance was automated. The pandemic has actually spurred a shift from paper to digital. "It has encouraged people to use less cash, and go digital," he said. The increase in online transactions has seen the cost of compliance go down; SMEs especially will have it easier. But even with all these measures in place, it is difficult to ascertain how successful they have been in managing the Shadow Economy – although one proxy indicator could be an increase in the number of users of the established tax system.

Reducing the Shadow Economy will lead to higher tax revenue; tax revenue is a major contributor of federal government revenue. In 2019, tax revenue totalled RM264.4 billion. "Currently, the Shadow Economy is about 21% of GDP, or about RM300 billion," said panellist Mohd Shahfizan Md Salleh, Director, Special Operations Dept, IRBM. "Typically, activities in a Shadow Economy are unreported, and thus go untaxed." He cited illegal transactions (such as on the Dark Web), illegal gambling and the use of "mule" bank accounts as some examples of money laundering usually connected with the Shadow Economy.

The government has put several efforts in place to combat it; among the measures have been the institution of tax identity numbers, the Special Voluntary Disclosure Programme (SVDP), and the establishment of the Tax Reform Committee and the National Anti-Financial Crime Centre. Stressing that the way forward in combatting the Shadow Economy was for tax professionals to play a more concerted role as gatekeepers, he said that his would strengthen the preventive measures already in place. As an example of the effectiveness of these measures, he said that the SVDP netted RM7.9 billion for the IRBM. However, Malaysian tax laws could still be improved upon.

Dr. Record pointed out that when it came to the Shadow Economy, revenue was only one part of the equation. "There is a question of societal issues as well," he said. For instance, the problem of illegal online gambling persists, aided by technology. "People will do illegal things anyway," he said. While larger firms may have risk assessment methods to identify if their clients are operating in the Shadow Economy, smaller firms may lack the resources to do this, remarked CTIM Deputy President and second panellist Chow Chee Yen. "They should encourage their clients to come forward and declare or disclose all transactions," he said.

However, it is not just human behaviour that keeps the Shadow Economy going. Social, environmental and economic factors contribute to its growth, in addition to a high tax burden, a complex tax system and economic recession. A response to this may be for policy makers to be sensitive to changes, ensure compliance costs are reasonable, and provide positive incentives, suggested Dr. Record. Another factor may be the credibility of the government of the day; tax payers may be of the opinion that the government is not managing taxes as it should. Good governance was imperative to decreasing the Shadow Economy; taxpayers need to be convinced that taxes were being appropriately utilised.

High levels of corruption tend to lead to a trust deficit, with people complying only if they needed to, Dr. Record opined, although implementation of taxes like the GST would probably be able to reduce the Shadow Economy, as taxpayers were more likely to comply. The perception of more transparency and fairness also affected tax collection. Taxation, however, remains a complex matter for the average person; more education about it is needed. There are plans, said Mohd Shahfizan, to introduce it in secondary schools so that young people become aware from a young age that taxes need to be paid. "We are engaging with schools and the Education

Minister on this," he said.

While it is unlikely that another SVDP will be offered for the Shadow Economy, there are various methods of measuring and managing it. There are many elements that the authorities can consider when dealing with the challenges of the Shadow Economy. For efforts to be effective, however, the panel generally held the view that the authorities need to subscribe to one model and use it to gauge if the Shadow Economy is increasing or decreasing in Malaysia, and determine how to manage it in the long term.

TOPIC 4 BEPS AND MULTILATERAL INSTRUMENTS (MLI)

Moderator and CTIM Council Member Phan Wai Kuan gave a brief overview of Multilateral Instrument (MLI) before introducing Speaker Shahruddy Othman, Director of IRBM's International Taxation Department, and Panellist Tan Hooi Beng, Deputy Tax Leader with Deloitte. A recent arrival in Malaysia, MLI has only just been gazetted. With this, it has become easier for countries to harmonise taxes internationally she said, as with MLI, countries need not be in constant negotiation or constantly updating their tax treaties with each other. However, MLI can be complex, and questions remain about whether parties can opt in or out, and what it means to their clients.

Addressing what MLI means within the context of BEPS, Shahruddy said that current tax loopholes in various jurisdictions may allow tax profits to "disappear" for tax purposes. MLI is part of the BEPS Action Plan, an inclusive global framework which Malaysia joined in 2017. Under this framework, there are minimum standards which require treaty changes to which all parties must agree. "There are almost 3,000 such treaties worldwide," he said. "MLI modifies treaties quickly. It is a versatile way to address BEPS concerns. All treaty partners will be able to see each other's positions as MLI touches on international tax laws and treaties."

He covered various articles in the MLI, many of which correspond directly with BEPS laws, adding that these articles have to match with those of other countries. Although it was gazetted on 4 August 2020, countries will have to wait until July 2021 for it to take effect. Bilateral negotiations have been held on mismatch provisions, he said. Despite MLI modifying more than 3,000 treaties, interpretation issues remain, and guidance is needed on how to read DTAs. He added that the IRBM will be publishing the synthesised text to help users.

Remarking that "Everyone treaty-shops," Tan said that (even

with treaties in place) different jurisdictions dealt with taxes in their respective ways. It was the abuse of treaties that should be prevented. On how the IRBM intends to apply MLI domestically, Shahruddy said that treaties were drafted to be very general, and "It all boils down to interpretation. Its object and purpose is to facilitate the trade of goods and services, and reduce or eliminate double taxation and tax avoidance. We will consult with practitioners to find solutions," he added. He stressed that there were no conflicts in the provisions, and anti-abuse rules were reinforced, making it particularly useful for treaty partners who did not have specific anti-abuse rules.

TOPIC 5 TRANSFER PRICING NOT IMMUNE TO COVID-19

Covid-19 has brought on a worldwide economic situation like nothing the world has ever seen before. Industry in some countries has come to a standstill; governments have imposed restrictions; supply chain disruptions are rife; and the ensuing economic turmoil created by the virus has caused a relook of business plans, strategies and pricing, including Advance Pricing Arrangements (APAs). Acknowledging that no industry has escaped unscathed, speaker Anushia Soosaipillai, Partner at PwC Tax Services, stressed that transfer pricing documentation was crucial during the period of disruption.

There will be short, mid and long-term impact on businesses and transfer pricing, she said, and many changes in the way things are done, including heavier reliance on technology – which posed its own challenges. "Sometimes it works, sometimes it hiccups," she remarked, pointing out that all these ultimately have an impact on the bottom line. "The company's profitability will be affected. We may ask ourselves if the business is earning enough." Illustrating her presentation with examples of the extent of business disruption, she said that with the aerospace industry, for instance a one-day shutdown would require a recovery period of 13 days.

"A two-month shutdown will need two years to recover," she said. "In these two years, the business needs to pick up and break even. There will need to be a relook of pricing in the value chain." Citing the shutdown of the automotive industry during the MCO as another example, she said that this had a ripple effect on other industries which supplied it as well. The Oil & Gas industry is reeling from spiralling oil prices, and the Construction industry has been hit by a property slowdown as people tighten their belts. The E&E sector is operating but well below capacity. "New capital investment and FDI have been almost non-existent in the last few months," she said. "Investors are hesitant."

Some companies have decided to consolidate production in one location, leading to a significant loss of jobs across the industrial board. The Hotel and Tourism industries have had no revenue to defray costs. Only glovemakers have grown more than anticipated, but even they have had to deal with never-before-experienced challenges brought on by the virus. Globally, most companies have been impacted by a slump in demand, but this decline in demand reaches back through the value chain, which has also experienced disruptions, breaks and lags that have negatively affected volumes and profitability.

Employment issues have arisen. There will be significant long-term costs associated with maintaining human resources over an extended period. But how can organisations carry on, especially after the MCO, without these necessary resources? Operations have been disrupted; working from home (WFH) has become the norm. Financial disruption is further exacerbated by companies which cannot service their debts because they are unable to carry on business as usual. "The severity of the pandemic has been bad for transfer pricing policy," Anushia said. "The policy cannot tolerate it because it depends on business activity. Different industries have been impacted in different ways."

Because all industries have experienced some kind of disruption at different intensities, the value chain itself has been adversely impacted. Profitability has been badly affected but how do businesses address all this in their documentation? Under normal conditions, anything outside arm's length range cannot be supported but these are unconventional times, so perhaps some flexibility should be considered. What options do businesses have? They could negotiate based on different conditions as 2020 is a completely unprecedented situation. Documentation can be undertaken based on segmentalisation of results.

She suggested dividing information into quarters and providing comprehensive explanations. This will enable internal stakeholders to make good decisions, and help the tax authorities to better understand the business and its environment. Documentation and disclosure will have to be more comprehensive and explanations will have to be more detailed. Comparisons with multiple year analysis could be made, to identify periods of uncertainty, and the variable set could be expanded to include loss makers. To this end, communication with the IRBM is imperative; it will have to look proactively at transfer pricing-related areas.

With some industries, like Tourism, having lost as much as RM45 billion in revenue, the IRBM will have to consider whether the business was deemed essential or non-essential during the MCO, stated Hisham Rusli, Director of IRBM's Multinational Tax Branch. "All things will be considered. Companies should show how things were different for them," he advised, adding that auditing of this particular period is likely to be done about four years on. "It will be clearer what the company was experiencing then." However, he cautioned companies to document comprehensively during the pandemic period, and comply with arm's length requirements.

Companies can also make voluntary disclosure (at later stages) as the IRBM will look at historical data. Suggesting that comparable data from 2017 to 2019 could also be used, Moderator Leow Mui Lee, CTIM Council Member, stressed that companies will need to clarify their positions but documents for transfer pricing could be updated later. What is of paramount importance is that there is enough evidence that the market was willing to accept a particular price during the disruption period. To avoid any ambiguity in the future, there needs to be comprehensive documentation throughout the pandemic. With transfer pricing, documentation is key.

TOPIC 6 UPDATES OF TAX CASES

Always a much-anticipated segment of the Conference, this topic was moderated by Dr. Arjunan Subramaniam, Partner, Shanker, Arjunan & Chua. He introduced the two panel members, Abu Tariq Jamaluddin, Director, Legal Department, IRBM and Vijey M Krishnan, Partner, Raja, Darryl & Loh.

As with other areas, Covid-19 had an effect on the number of cases disposed by the Court, said Abu Tariq. There had been no hearings since mid-March but he presented nevertheless updates on 13 cases covering Deductibility, Judicial Review, Stay of Proceedings, Advance Rulings, Income Tax v Real Property Gains Tax, and Stamp Duty.

Deductibility

In the matter of Deductibility, the cases involved deductions claimed by Developers Prima Nova Harta Development Sdn Bhd, STSB, EASB, TESB and MKDSB.

The issue in the Prima Nova Harta Development case was whether the sum paid to the State Authority of Selangor to procure the approval of the state to sell units of development reserved for bumiputra to non-bumiputra buyers, was deductible pursuant to Section 33(1) of the ITA. The SCIT dismissed the taxpayer's appeal but the High Court allowed it. The matter is now pending before the Court of Appeal.

With *STSB v DGIR*, the issue was whether the payment of 10% of the purchase price made to the State government for each bumiputra unit was deductible under Section 33(1) of ITA. The SCIT dismissed the taxpayer's appeal but it is now pending before the High Court.

In the case of *EASB v DGIR PKCP*, the issue was whether contribution payment to the state agency in connection with the exemption from the requirement to build low cost apartments, was deductible under Section 33(1) of the ITA. SCIT dismissed EASB's appeal; the matter is now pending appeal before the High Court.

The TESB case involved an application by the taxpayer to Pejabat Tanah dan Galian Selangor (PTGS) for the release of the 30% bumiputra quota; the reason being that the sales for the bumiputra lots did not receive favourable and satisfactory responses. PTGS approved the taxpayer's application provided the taxpayer paid the refund of 10% for the bumiputra quota to the State government plus a penalty of 5% for violating the terms of the quota. The SCIT dismissed the taxpayer's appeal, and the matter is now pending appeal before the High Court.

The issue in the MKDSB case was whether payment made to the State Authority of Selangor to procure its approval to sell units of development reserved for bumiputra to non-bumiputra, was deductible under Section 33(1) of ITA. The SCIT ruled that there had been a clear breach of condition imposed by the state government, and that penal liability could not be regarded as a loss in connection with and arising from trade. In this case, the payment was to release the taxpayer from an obligation initially imposed by the authority and to acquire rights to build and sell new types of houses or buildings; it was not wholly and exclusively incurred in the production of income.

JUDICIAL REVIEW

The three cases updated here were *Chai Meng Kui v Ketua Pengarah Hasil Dalam Negeri; Shell Timur Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri;* and *Shell People Services Asia Sdn Bhd.*

In the case of Chai Meng Kui, the issue was whether the Court could grant leave for a judicial review of the DGIR's decision to raise additional assessment under the Real Property Gains Tax Act 1976. The High Court dismissed the taxpayer's application; as did the Court of Appeal. The High Court dismissed the taxpayer's application on the grounds that the taxpayer had not discharged the burden of establishing exceptional circumstances. Exceptional circumstances include lack of jurisdiction, failure to perform some statutory duty or serious breach of natural justice. The High Court also noted that issues of facts or mixed issues of fact and law are best ventilated before Special Commissioners.

The issue with the Shell Timur case was whether the Court could grant leave for a judicial review of DGIR's decision to raise additional assessment against the taxpayer by invoking Section 91(3) of the ITA. Shell Timur sold its economic rights in certain intellectual property to Shell Brands International AG for RM257 million. The taxpayer treated the sum as capital receipt and did not bring it to tax. Pursuant to an audit, the amount was brought to tax by the DGIR as a revenue gain. The taxpayer failed to state the amount arising from the disposal in the return furnished to the DGIR. The assessment was raised after the statutory time bar.

The High Court dismissed the taxpayer's application; the Court of Appeal dismissed the taxpayer's appeal. The dismissal by the High Court was on the grounds that the applicant had not discharged the burden of establishing exceptional circumstances; exceptional circumstances being the lack of jurisdiction, failure to perform some statutory duty or serious breach of natural justice. The High Court also ruled that the plea of time bar could be best determined by the Special Commissioners.

In the case of Shell People Services Asia, the issue was whether the Court could grant leave for a judicial review of DGIR's decision under Section 140A of the ITA. The taxpayer's principal activity is to provide shared central function services to affiliated companies within the Shell Group. The taxpayer is a party to the contractual arrangement for the sharing of services and resources within the Shell Group as provided in a Cost Contribution Arrangement (CCA).

The DGIR conducted a transfer pricing audit under Section 140A of the ITA. Pursuant to this audit, the DGIR proposed a mark-up on the services provided by the taxpayer, and requested the taxpayer to provide feedback on the audit findings. The High Court dismissed the taxpayer's application but the Court of Appeal allowed the taxpayer's appeal. The High Court's grounds for dismissal were that there was no clear lack of jurisdiction; the DGIR has power under Section 140A of the ITA. There was also no blatant failure to perform any statutory duty, and the DGIR had not contravened the two rules of natural justice, namely the rule against biasness and right to be heard.

Besides these three cases, Abu Tariq also mentioned that for 2020, the

High Court had dismissed another 13 applications but had allowed three.

Stay of Proceedings

In this matter, the case involved Shell People Services Asia again. This time, the issue was whether the Court could grant ad interim stay pending disposal of leave application for Judicial Review. The application for leave for Judicial Review was postponed to enable the DGIR's reply submission. The tax payer applied for ad interim stay pending the disposal of the leave application. The High Court granted ad interim stay on the grounds that the Court had the inherent power to grant ad interim stay to prevent injustice or to prevent leave application from being rendered redundant. The delay in the disposal of the leave application may cause irreparable harm to the taxpayer and render the leave application academic. No prejudice would be caused to the DGIR by the ad interim stay.

Shell People Services also filed an application for leave for Judicial Review, requesting for all proceedings to be stayed until the final determination of the substantive application. The High Court did not grant stay on the grounds that there was no evidence that the substantive application would be rendered academic, or that the taxpayer would face a severe cash flow problem, commercial insolvency or winding up proceedings. It ruled that the merits of the case, the law-abiding person and the huge amount of tax involved did not amount to special circumstances. Other reported cases on stay of proceedings could be distinguished as those cases did not concern assessment of income tax.

Advance Ruling

The three issues in the *IBM Malaysia v DGIR* were whether the advance ruling was a decision binding upon the taxpayer; whether the application for judicial review was premature; and whether the domestic appeal remedy under the ITA was available to the tax payer. In this case, an application for an Advance Ruling (AR) was made relating to a proposed software distribution agreement. The DGIR issued the AR that payment made to IBM Ireland (non-resident) pursuant to the agreement was royalty and thus was subject to withholding tax. The taxpayer filed a Judicial Review application to quash the AR. The High Court allowed the taxpayer's application for Judicial Review.

DGIR appealed to the Court of Appeal against the High Court's decision. The Court of Appeal decided in favour of DGIR on the grounds that the AR would not adversely affect the taxpayer until returns were filed and tax was assessed. The AR is binding but the taxpayer had the option not to proceed with the arrangement. If the taxpayer proceeded with the proposed business transaction, the taxpayer had to comply with the AR, and could then file an appeal against the assessment. The application to quash the AR was premature and remedy by way of Judicial Review was not available where an alternative remedy existed, except in exceptional circumstances.

The issue of whether the payment was a royalty payment was a matter of interpretation of law which is not special circumstances for a Judicial Review application. The proper forum to ventilate the issue would be the SCIT. By coming to Court to address its grievances, the taxpayer was using a back door to appeal against the AR and circumventing the function of the SCIT. This is an abuse of the court process. A further appeal was filed in the Federal Court by the taxpayer; the Federal Court dismissed the appeal.

Income Tax v Real Property Gains Tax

Abu Tariq presented two cases under this section: *Natasri Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* and *TGSB Sdn Bhd v DGIR*.

The issue in the Natasri case was whether the gains from the disposal of properties were subject to income tax as gains and profit from a business. Natasri's principal activity is property holding. On 21 January 1984, the company purchased land and in 2001, entered into a Joint Venture with a developer to develop the land as a housing project. Power of attorney was granted to the developer. The taxpayer then subdivided the land into 34 parcels and converted the category of land to commercial use. The taxpayer also requested a change to the layout of plans. The Joint Venture was not implemented and subsequently aborted. In 2010, the taxpayer sold the land.

The SCIT dismissed Natasri's appeal: the firm subsequently appealed to the High Court but the High Court dismissed the appeal on the grounds that the Memorandum of Association empowered the taxpayer to carry out land investment, land development, purchase and sale of land and other commercial properties. Merely declaring the land as a fixed asset and not trading stock was not conclusive evidence. The taxpayer played an active role in the Joint Venture, including in the conversion of agricultural to commercial land; thus constituting an adventure in the nature of trade. The initial intention of the taxpayer was to hold the land for investment but this changed when it acted in an adventure in the nature of trade.

In the case of TGSB, the issue was one of whether the gains from the disposal of properties were subject to income tax as gains and profit from a business, and whether the assessment raised was time barred. A civil and building contractor, TGSB builds and maintains roads, drainage, sewerage and various types of civil works. It purchased properties and categorised them as "Investment Properties" in its audited accounts. After being audited, six properties which were disposed of between 2010 and 2012 were treated as gains and profits from the business, and subject to ITA.

The SCIT dismissed TGSB's appeal

on the grounds that it was the intention of the taxpayer at the time the asset was acquired, to dispose of it at a profit. The contention that the asset was rented out, was not supported by documents. There were several transactions of the same kind of properties. The property was held for a short period after its acquisition. The taxpayer was negligent in failing to declare the disposal under the ITA. The taxpayer had a duty to obtain clarification for the tax treatment either from the DGIR or its tax agent. The matter is currently pending appeal before the High Court.

Stamp Duty

The case presented in this category was *Brownwood Sdn Bhd v Inland Revenue Board of Malaysia & Another*. Brownwood had entered into a Sale and Purchase Agreement with vendor MKSB for a piece of land on 23 August 2012. Form 14A was executed by Brownwood and MKSB on 17 October 2012. On 6 December 2012, another company, RADSB, entered a caveat on the piece of land on the grounds that RADSB had paid a deposit for the land. RADSB later withdrew its caveat on 16 January 2013. A search conducted by Brownwood with the Land Office on 30 January 2013 confirmed that Brownwood was the registered owner of the land.

However, subsequent title searches made on 28 October 2013, 20 August 2014 and 18 February 2015 confirmed that the land had been transferred to RADSB by the vendor, MKSB. Brownwood later sued MKSB and the legal firm for fraud in the sale of the land. A consent judgement was entered between parties on 12 February 2018 where one of the terms was that the SPA between Brownwood and MKSB dated 23 August 2012 was void and of no legal effect. Brownwood then requested a refund from the IRBM on 31 May 2018 but was rejected on 31 October 2018. Brownwood then filed an application to review and quash the decision.

The High Court dismissed Brownwood's application for Judicial Review on the grounds that the SPA and Form 14A were not void from the beginning but void from the date of consent judgement, 23 August 2012. Also, no refund was allowed if the application for refund was made after twelve months from the date of execution of Form 14A. No refund would be allowed if legal proceedings had commenced and the instrument was offered in evidence. The Court of Appeal dismissed the applicant's appeal.

Panel member Vijey M Krishnan looked at cases from a different perspective, providing alternatives to Court, and analysing the direction the authorities like SCIT were taking, based on recent cases. The areas covered were: suing the Minister of Finance in tax matters; deductibility of payments or contributions made by developers and fines and penalties; civil recovery of taxes; Advance Ruling; Tax Authority and duty of care to taxpayer; and international cases based on the Section 140A conundrum of what constitutes a loan. Besides the DGIR, he said, there were other bodies that the taxpayer could take to Court.

He also offered interesting counter arguments based on the same cases presented by Abu Tariq, sometimes filling in background information that clarified the reasons which brought about the applications in the first place. One of particular interest was the case of *Government of Malaysia v Mohd Najib bin Haji Abdul Razak*, where the Defendant had filed an appeal to the SCIT but the plaintiff argued that a summary judgment had to be entered against the Defendant as it was clear that the Defendant had failed to pay the outstanding sum within the prescribed time, resulting in penalties under Sections 106(5) and 106(6) of the ITA.

The High Court held that the case should be heard by the SCIT as it involved several issues including whether the income received by the Defendant was a donation or the Defendant's own income. The taxpayer's rights are protected under Section 99 of the ITA which allows the taxpayer to appeal before the SCIT. If the taxpayer is dissatisfied, then he may appeal to the Court against the decision of the SCIT. Vijey also made comparisons between local cases and those in other jurisdictions that follow similar laws, like the UK and Canada, to illustrate how basic principle worked across the board, provided the law was justly and prudently applied.

TOPIC 7 ROUNDTABLE DISCUSSION ON CURRENT ISSUES AND CONCERNS

Moderated by CTIM Council Member Soh Lian Seng, the Speakers for this session were Wan Ramiza Wan Ghazali, Director of IRBM's Special Industry Branch, and Christopher Low, Executive Director, Tax, BDO Malaysia. Noting that with the pandemic, dispute resolution cases had been put on hold in most countries, not just Malaysia, Soh remarked that there were still trends that needed to be identified and managed. What should tax professionals be wary of, as business and industry move forward into the New Normal?

Wan Ramiza recommended working towards higher tax compliance and an environment that was fairer and more equitable, with reduced gaps and leakages. "IRBM's role is to support government initiatives," she said. "Tax leakage can be reduced through tighter auditing." She pointed out that tax payers or companies have been given many incentives through the years but these may not have had the desired effect on business. Tax collection needs to be streamlined, and there was a need for taxpayers to better understand the IRBM perspective. Revenue targets are based on projections by the government. However, the pandemic and subsequent MCO have impacted negatively on resources and revenue.

Tax revenues are necessary to carry out the economic stimulus programmes like PRIHATIN, PRIHATIN TAMBAHAN and PENJANA that total RM295 billion. In support of tax matters, the IRBM has instituted several measures including extension of deadlines for filing of tax returns; revision of tax estimates and deferral of payments; debt repayment plans; suspending debt recovery for two months; and quicker refunds. It has also made changes to its audit policy. Although audit activities will be carried on as usual, extension of time will be given for the submission of documents. It will also enhance its communication efforts through regular press releases to update the public and more engagement with tax professionals.

Efforts to promote higher compliance will be intensified through tax education programmes. She added that the workforce will also be increased to strengthen enforcement and announced that the Special Voluntary Disclosure Programme brought in

RM7.9 billion in 2019. To a query on whether the increase in tax collection reflected an increase in compliance, she conceded that this was possible but could also be due to the extension of audit coverage. "Higher competency has led to higher collection," she said, adding that increased enforcement will reduce tax leakages and ultimately, the tax gap. "The revenue collected is for the rakyat. It goes back in the form of facilities and services."

Commenting that the keywords in the current situation remained compliance, enforcement and documentation, Christopher Low said that taxpayers would be more encouraged to comply if there were incentives. This was apparent in the fact that the IRBM collected RM145.1 billion in direct taxes in 2019, and that 286,428 taxpayers paid RM7.9 billion under the Special Voluntary Declaration Programme. "IRBM enforcement has changed," he said. "It has become more courteous and efficient." However, current issues remained, such as record-keeping, reconciliation of accounts, related party transactions, compliance with tax incentives and exemptions, to name a few.

There were also concerns over the review of high net worth individuals, and the interpretation of laws and regulations, as well as the availability of records with regards to transfer pricing, particularly in the current economic environment. "We have to change the way we work," he said, noting that full enforcement may not be the way forward, as evidenced by the SVDP, which was actually an incentive for tax payers to come forward and comply easily (where they may have been hesitant or fearful before). Soh added that every taxpayer should pay the right amount of tax but from the taxpayer's perspective, this needed to be balanced and pragmatic policies.

"Taxpayers may want to comply but they may not know how," he pointed out. "There should be more education on this. They also view desk audits as not such a serious matter. Perhaps there should be tighter enforcement in this area." Noting that another SVDP was unlikely, Wan Ramiza stressed that this may lead to the development of the wrong perceptions, and be unfair to those who have already come forward, adding, "There are still programmes for taxpayers who want to come forward and disclose." She confirmed that there will be no reduction in the revenue target for 2020. "We need to aim high," she said. Audits will still proceed despite Covid-19 but the IRBM will be considerate and take into account the current situation as well as data from previous years.

TAXATION IN LABUAN THEN AND NOW!

Nicholas Anthony Crist

The Federal Territory of Labuan is a group of seven islands located off the coast of Sabah. While part of Malaysia, Labuan provides a separate tax regime for qualifying entities. This article seeks to outline the separate tax regime together with recent changes.

THEN

LABUAN BUSINESS ACTIVITY TAX ACT 1990 (LBATA)

The LBATA was originally named the Labuan Offshore Business Activity Tax Act 1990 (LOBATA). However, during 2008 with Labuan's move to that of an intermediate jurisdiction, the word "offshore" was deleted and LOBATA became LBATA. Notwithstanding this change, the systems of taxation under the LOBATA and LBATA were until recently substantially the same, with tax being either nil or 3%, but with an option to elect to pay tax of RM20,000.

Section 3 of LBATA is the main charging provision and provides that "…. a Labuan entity carrying on a Labuan business activity shall be charged to tax in accordance with this Act for each year of assessment in respect of that Labuan business activity". Particular regard must be had to the underlined words.

LABUAN ENTITY

A "Labuan entity" is defined in Section 2B and the Schedule to the LBATA. The definition of "Labuan entity" in the LBATA is not exhaustive as regard may need to be had to the associated provisions/legislation. For instance, a Labuan company includes not only companies incorporated under the Labuan Companies Act 1990 (LCA), but also foreign incorporated companies registered under the LCA.

The Minister of Finance is empowered to amend the Schedule for the purposes of declaring any other person to be a Labuan entity.

LABUAN BUSINESS ACTIVITY

A key concept is that of a "Labuan business activity" which until recently was defined as:

"… a Labuan trading or a Labuan non-trading activity carried on in, from or through Labuan in a currency other than Malaysian currency, by a Labuan entity with non-resident or with another Labuan entity…" (Section 2(1) of the LBATA).

A Labuan trading activity includes banking, insurance, trading, management, licensing, shipping operations or any other activity which is not a Labuan non-trading activity. In turn, a Labuan non-trading activity is defined to mean an activity relating to the holding of investments in securities, stocks, shares, loans, deposits or any other properties situated in Labuan by a

Labuan entity on its own behalf.

YEAR OF ASSESSMENT (YA)

The LBATA adopts a similar definition of YA to that used in the Income Tax Act 1967 (ITA), namely the calendar year. However, it is important to note that the LBATA uses a preceding year basis period. Therefore, for YA 2020 the basis period is the financial year ending in the 2019 calendar year.

CHARGED TO TAX

The distinction between a Labuan trading and a Labuan non-trading activity is important as this determines the tax rate. A Labuan trading activity is taxed at 3% of the net profits as reflected in the audited accounts. There was an option to pay a fixed amount of tax of RM20,000 for a YA but this has been abolished with effect from 1 January 2019. A Labuan entity carrying on a Labuan non-trading activity is not charged to tax for that YA. The position, pre-2019 amendments, can be summarised in the diagram below:

As will be discussed later in this article, significant changes to the rates of tax as well as the introduction of substance requirements are effective from 1 January 2019.

The LBATA also provides Labuan entities with an irrevocable election to be taxed under the ITA. This election was introduced primarily with the intention of enabling Labuan entities holding overseas investments to access treaty benefits as some countries have specifically excluded Labuan entities from accessing treaty benefits in their double tax agreements with Malaysia.

RING-FENCING

To enjoy the favourable rates of tax under the LBATA, there was a general requirement that the Labuan entity must be dealing with either a non-resident or another Labuan entity. To this extent the activities of a Labuan entity were ring-fenced.

There are a number of relaxations to this general requirement whereby businesses can be undertaken by a Labuan entity with a Malaysian resident and in the Malaysian currency including:

- a Labuan entity carrying on business under Parts VI and VII of the Labuan Financial Services and Securities Act 2010 and parts VI and VII of the Labuan Islamic Financial Services and Securities Act 2010 [e.g. banking, insurance and leasing];
- a Labuan entity may hold investments in domestic companies;
- subject to approval, a Labuan entity may hold debt obligations in a domestic company; and
- such transactions as may be approved by the Minister of Finance.

As a result of the above concessions, a number of activities were transacted between Labuan entities and domestic businesses. Of particular note was the growth of leasing transactions where approved Labuan leasing companies undertook leasing arrangements between overseas lessors and domestic lessees. Such leasing structures are complemented by the Income Tax (Exemption) (No. 2) Order 1998 [PU(A) 69/1998] which provides an exemption from the 10% withholding tax that would otherwise be due on equipment lease rentals paid to a non-resident lessor.

SUBSTANCE

Over the years, questions have been raised as to what substance is required in Labuan. The LBATA requires that the Labuan Business Activity must be "… carried on in, from or through Labuan…". These terms are not further defined. However, they are capable of wide interpretation and appear not to be difficult to satisfy in practice.

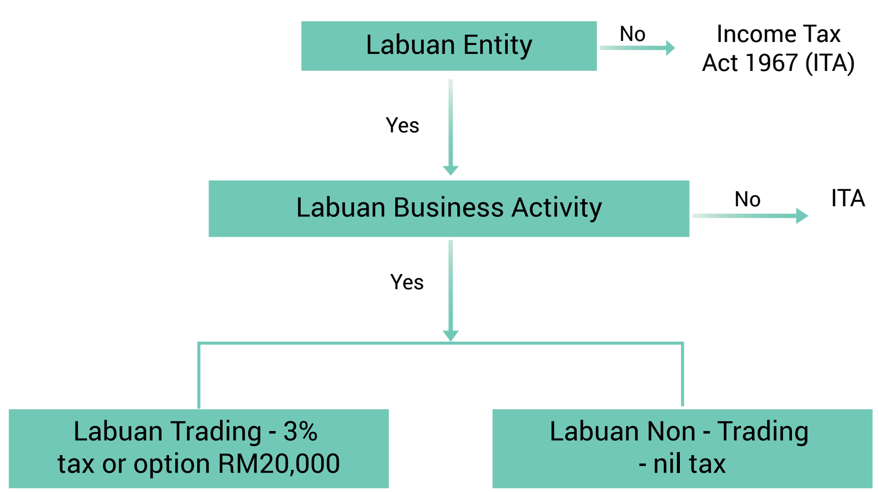
2019 AND NOW

With the introduction of the Base Erosion and Profit Shifting (BEPS) initiative, the work of the Forum on Harmful Tax Practice (FHTP) has gained prominence in relation to preferential tax regimes. The work of the FHTP comprises three main areas:

1. The assessment of preferential tax regimes to identify features of such regimes that can facilitate base erosion and profit shifting.
2. Review substantial activities requirements in no or nominal tax jurisdictions.
3. Peer reviews and monitoring of tax transparency frameworks.

In line with the FHTP practices, with effect from 1 January 2019, the following

THE POSITION, PRE-2019 AMENDMENTS, CAN BE SUMMARISED AS FOLLOWS:



notable amendments have been made to the LBATA.

1. Introducing substantial activity requirements.
2. Introduction of 24% rate of tax under the LBATA.
3. Removing the option to pay tax of RM20,000.
4. Removing the ring-fenced features namely, the restrictions on dealing with residents and in the Malaysian currency, in order to introduce a level playing field.
5. Excluding income from an "intellectual property right" from the LBATA and instead taxing such income under the ITA. This change is to combat transactions in what are sometimes referred to as "patent box" companies.

A complementary amendment was made to the ITA to limit the tax deductions that can be claimed by persons taxable under the ITA in respect of payments to Labuan entities.

The IRBM has also introduced a requirement for a Labuan entity to apportion its income if it carries out more than one approved Labuan business activity (i.e. if there is more than one business activity code).

The amendments introducing the substantial activity requirements and the changes to the tax rates have attracted the most attention.

SUBSTANTIAL ACTIVITY REQUIREMENTS

The Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 ("the Regulations"), read with Section 2B of the LBATA, introduced substance requirements in terms of the minimum number of full-time employees and annual operating expenditure, that a Labuan entity must have. The substance requirements, as amended by subsequent orders and proposals, depend on the particular Labuan business activity in the table in the next column.

*Depends on the number of

No.	Labuan entity carrying on a Labuan Business Activity	Minimum number of full time employees in Labuan	Minimum amount of annual operating expenditure in Labuan (RM)
1. ^	Labuan insurer or Labuan takaful operator	3	200,000
2. ^	Labuan reinsurer or Labuan retakaful operator	3	200,000
3. ^	Labuan underwriting manager or Labuan underwriting takaful manager	4	100,000
4. ^	Labuan insurance manager or Labuan takaful manager	4	100,000
5. ^	Labuan insurance broker or Labuan takaful broker	2	100,000
6. ^	Labuan captive insurer or Labuan captive takaful		
	(i) 1st party captive	2	100,000
	(ii) 3rd party captive	3	100,000
7. ~	Labuan International Commodity Trading Company (LITC)		
	(i) 5 or less related LITC companies	2 per group	3,000,000 per entity in Malaysia (including minimum of RM100,000 in Labuan)
	(ii) Every incremental of 5 related LITC companies	Increase of 1 employee for every additional 5 LITC companies	
8. ^	Labuan bank, Labuan investment bank, Labuan Islamic bank or Labuan Islamic Investment bank	3	200,000
9.	Labuan trust company	3	120,000
10. ^	Labuan leasing company or Labuan Islamic leasing company	2 + *	100,000 per entity
11.	Labuan credit token company or Labuan Islamic credit token company	2	100,000
12.	Labuan development finance company or Labuan Islamic development finance company	2	100,000
13.	Labuan building credit company or Labuan Islamic building credit company	2	100,000

No.	Labuan entity carrying on a Labuan Business Activity	Minimum number of full time employees in Labuan	Minimum amount of annual operating expenditure in Labuan (RM)
14.	Labuan factoring company or Labuan Islamic factoring company	2	100,000
15.	Labuan money broker or Labuan Islamic money broker	2	100,000
16.	Labuan fund manager	2	100,000
17.	Labuan securities licensee or Labuan Islamic securities licensee	2	100,000
18.	Labuan fund administrator	2	100,000
19.	Labuan company management	2	100,000
20.	Labuan International Financial Exchange	2	120,000
21.	Self-regulatory organisation or Islamic self-regulatory organisation	2	120,000
22. ^	Holding company:		
	• Labuan entity that undertakes other than pure equity holding activities	1	20,000
	• Labuan entity that undertakes pure equity holding activities	Not required, instead to comply with management and control requirements	20,000
23. #	Other trading entity Labuan entity that carries out administrative, accounting and legal services including backroom processing, payroll services, talent management, agency services, insolvency related services and management services	2	50,000

related leasing companies.

^ The above has been proposed in the Labuan Financial Services Authority (LFSA)'s Clarification to Labuan Investment Committee (LIC) Pronouncement 2-2019 dated 20 December 2019. The order has yet to be gazetted.

The above has been proposed in the LFSA's Addition to the Revised Substance Regulations dated 21 January 2020. The order has yet to be gazetted.

~ The above has been proposed in the LFSA's Revision to Substantial Activity Requirements for LITC under the Global Incentives for Trading (GIFT) Programme dated 29 April 2020. The order has yet to be gazetted.

For the purpose of the Regulations, the LFSA has clarified that "full time employees" shall include:

(a) At least an officer of a managerial capacity; and
(b) Other employees dedicated to serve the Labuan entities whom may be employed either on a permanent or contract basis by the Labuan entities which include non-managerial and clerical staff.

The view of the Inland Revenue appears to be that an activity which does not fall within the activities in the Regulations is not a Labuan business activity and will therefore, by default, fall under the ITA.

It is important to note that effective YA 2020, a Labuan entity carrying on a Labuan business activity

24% RATE

When initially proposed, there was some concern that the 24% rate was a reference to the ITA. However, the Finance Act 2020 introduced a 24% rate of tax in the LBATA. The option to pay tax at the fixed amount of RM20,000 is abolished with effect from 1 January 2019. The relevant tax rates can be summarised as follows:

Although both the ITA and the LBATA now impose tax at 24%, there is a key difference between the two. The 24% rate under the ITA is levied on chargeable income, while the 24% rate under the LBATA is on "… the

Labuan Business Activity carried on by a Labuan entity	Substance Requirements	LBATA Rate %
Trading	✓	3%
Trading	✗	24%
Non-trading	✓	Nil
Non-trading	✗	24%

net profits as reflected in the audited accounts". The use of accounting profits as the base to which the 24% tax rate is applied, while simplistic, does not allow for any adjustments. This apparently simplistic approach can result in anomalies as accounting profits do not distinguish between capital and income gains nor between realised and unrealised amounts. Of particular note is that the exemptions contained in Schedule 6 of the ITA are not incorporated into the LBATA.

HOLDING COMPANIES

There has been considerable debate about the substance requirement for holding companies. The Regulations initially required holding companies to have a minimum of two full time employees and annual operating expenditure of at least RM50,000. A distinction has now been drawn between a holding company which undertakes "pure equity holding activities" and a holding company which undertakes "other than pure equity holding activities".

The holding company dichotomy is based on the distinction drawn in the Organisation for Economic Co-operation and Development (OECD)'s BEPS Report on Action 5 ("Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance"). The OECD's BEPS Report on Action 5 identifies "companies that hold equity participations and earn only dividends and capital gains" and for the purpose of the Regulations, these companies are viewed to be undertaking "pure equity holding activities". In contrast, companies identified in the OECD's Report that "hold a variety of assets and earn different types of income e.g. interest, rents and royalties" are viewed for the Regulations to be undertaking "other than pure equity holding activities".

Pure equity holding entities do not require any full time employees but local management and control requirements apply and annual operating expenditure must be at least RM20,000. Given the significance between the two different types of holding activity, the definitions of "pure equity holding activities" and "other than pure equity holding activities" could be usefully included within the LBATA or at least the Regulations.

CONCLUDING REMARKS

The recent changes to the basis of taxation for Labuan entities are undoubtedly significant. The essence of the changes is the requirement to locate the economic activities which generate income in Labuan. This requirement for substance, as prescribed by the Regulation, to be in Labuan is a direct response to the "new normal" of international taxation. On the assumption that businesses adopt these requirements, this can only be good news for Malaysia.

It is submitted that further 'fine tuning' of the LBATA is required. The consequences of the apparently simplistic approach of using net accounting profits as the taxable base, may be unintended. Accounting profits may include capital gains both realised and unrealised, as well as dividends. The subjection of these profits/gains to tax is anathema to many tax professionals but appears to be the logical conclusion. The writer hopes that the authorities will relook at this, as failing which, more Labuan entities may need to explore exiting LBATA through the irrevocable election to be taxed under the ITA.

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[1] *"Management and control" is not defined in the LBATA but the LFSA has uploaded the 'Directive on management and control requirements for Labuan entities that undertake pure equity holding activities (dated 10 August 2020)' on its website.*

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TAX IMPACT OF DIVESTMENT OF UPSTREAM ASSETS IN MALAYSIA

Fara Sunita Ramli

INTRODUCTION

What is the tax impact for divesting Upstream Assets in Malaysia?

This article will discuss the tax implication of the divestment of upstream assets in Malaysia in a divestiture, purely from the main Petroleum Income Tax Act 1967 (PITA) perspective. However, this article will only discuss in general and does not elaborate or perform an exhaustive analysis from Corporate Income Tax Act 1967 (CITA) or Real Property Gain Tax 1976 (RPGT) perspective.

Divestment or divestiture is the process of selling or transfer of asset for financial, ethical, or political objectives or sale of an existing business by a firm. A divestment is the opposite of an investment, whereas upstream assets referred to in this article, from the Malaysian perspective, are the Participating Interest (PI) in a Malaysian Production Sharing Contract (PSC) which is awarded to any oil and gas company, i.e. PSC Contractors. Hence, the divestment of upstream assets is the act of selling or transfer of a PSC Contractor's PI in a PSC with a selling consideration.

With the aim to provide guidance on the analysis and review of the divestment of upstream asset in Malaysia, this current literature should contribute to the consistency in the application of relevant sections in the PITA. The foregoing discussion on the respective relevant sections of the PITA would help in determining the tax impact from a seller's perspective especially on the consideration received from the selling of the upstream assets.

First and foremost, let us understand the arrangement of upstream assets in Malaysia. By virtue of Section 2 of the Petroleum Development Act 1974[1] (PDA), all rights and ownership of upstream assets in Malaysia are vested in PETRONAS, according to which, Section 2(1) states *"The entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia shall be vested in a Corporation to be incorporated under the Companies Act 1965 or under the law relating to incorporation of companies."* This resonates with the subsequent Section 3(1) of the PDA that stipulates the Corporation as Petroliam Nasional Berhad i.e. PETRONAS.

Hence, PETRONAS has the rights to award the Production Sharing Contract (PSC) to oil and gas companies i.e. PSC Contractors for exploring, exploiting, winning and obtaining of petroleum in Malaysia. PSC awarded to the PSC Contractors would stipulate the sharing of petroleum production between PETRONAS and PSC Contractors. It also provides contractual obligation which include the risk, responsibilities and obligation of PSC contractors in performing the petroleum operations as well as financial, training commitments, etc. In addition, any divestment of upstream assets under the PSC would require the approval of PETRONAS which is also stipulated in the PSC.

OVERVIEW

Considering the current unprecedented environment triggered by the COVID-19 pandemic, as well as the general market environment preceding the same occurrence, major players in the Oil and Gas as well as energy sectors are embarking on strategic decisions as far as the overseas investments in their portfolios are concerned. Over the past two years, published headlines and/ or announcements made by International Oil Companies have provided insights into their decision to divest their investments and slashing budgets for capital expenses as well as operating expenses.

In addition, ExxonMobil, on 7 April 2020[2] announced its plan to reduce 2020 capital spending by 30% and lower its cash operating expenses by 15% in response to the low commodity price resulting from the oversupply and weak demand as a result of the COVID-19 pandemic. Earlier, in 2019, ExxonMobil also decided to divest $15 billion of its non-strategic investments including its participating interest in the Malaysian Production Sharing Contract (PSC) for its upstream offshore assets. The Edge Malaysia reported on 22 October 2019[3]

> "EXXONMOBIL Corp has confirmed that it is testing market interest in its upstream offshore assets in Malaysia as part of an ongoing evaluation and its plan to divest US$15 billion of its non-strategic properties by 2021."

However, to date, there is no announcement by ExxonMobil on any potential or interested buyer on the divestment.

Murphy Oil Corporation on the other hand met with greater success with its divestiture, as it had divested its investment in the Malaysian upstream assets to PTT Exploration and Production (a national petroleum exploration and production company based in Thailand) and the deal was sealed in the year 2019 before the COVID-19 pandemic and the oil price crisis. In the news published on 10 July 2020[4].

> "Murphy Oil Corporation (NYSE: MUR) ("Murphy") announced its subsidiary closed the sale to divest the fully issued share capital of the entities primarily conducting Murphy's operations in Malaysia to a subsidiary of PTT Exploration and Production Public Company Limited ("PTTEP")."

Based on its global operations in its official website[5], Murphy currently only has upstream investments in Brunei and Vietnam

[1] *Petroleum Development Act 1967*

under its South East Asian portfolio.

Another global international oil company that had also announced its intention to divest its Malaysian upstream assets is Repsol. Early this year, Repsol was also exploring the possibility to sell its Malaysian upstream assets, as the Spanish company asserted that it was reviewing its global upstream portfolio. As reported by *Bloomberg* on 10 Jan 2020[6],

> "The Malaysian assets could attract interest from other energy companies in the region, the people said, asking not to be identified because the matter is private. The asset review comes as Repsol is working on a new strategic plan, which is expected to be presented in the first half of the year."

THE TAX IMPLICATION

A very important aspect attached to the divestitures in the Oil and Gas sector, is the attendant tax implications. In this section, we look at the tax legislations prevalent in Malaysia that are applicable to divestitures, and also the underlying tax impact of the divestment of the assets in Malaysia. This is upon the consideration that the divestment relates to upstream assets where the main tax legislation governing Malaysian upstream business is the Petroleum Income Tax Act 1967 ("PITA"), it is crucial to refer to determine whether or not the consideration received or obtained from the divestment activities is subject to tax in Malaysia from a seller's perspective.

The charging section to determine or ascertain whether the income would be taxed under the PITA[7] is Section 3. Section 3 stipulates, "Subject to and in accordance with this Act, a tax to be known as petroleum income tax shall be charged for each year of assessment on the income of every chargeable person, being income derived by such chargeable person from petroleum operations."

1. Petroleum Income Tax Act 1967

A) *Section 3 of the PITA and definition of Petroleum Operations*

The charging section to determine or ascertain whether the income would be taxed under the PITA[7] is Section 3. Section 3 stipulates, "Subject to and in accordance with this Act, a tax to be known as petroleum income tax shall be charged for each year of assessment on the income of every chargeable person, being income derived by such chargeable person from petroleum operations."

In this regard, it is crucial to determine whether the consideration received from the divestment is the income derived from petroleum operations. In order to ascertain whether the income falls under the petroleum operations, we need to examine the definition of the term **petroleum operations** under the PITA. Pursuant to Section 2(1) of the PITA, petroleum operations have been defined as

> *"(a) searching for and winning or obtaining of petroleum in Malaysia by or on behalf of any person for his own account or on a joint account with any other person by any drilling, mining, extracting or other like operations or process, in the course of a business carried on by that person engaged in such operations, and all operations incidental thereto, and any sale or disposal by or on behalf of that person of petroleum so won or obtained, and includes the transportation within Malaysia by or on behalf of that person of petroleum so won or obtained to any point of sale or delivery or export, but does not include –*
>
> (i) any transportation of petroleum outside Malaysia;
>
> (ii) any process of refining or liquefying petroleum;
>
> (iii) any dealings with `products so refined or liquefied; or
>
> (iv) services involving the supply and use of rigs, derricks, ocean tankers and barges; and
>
> *(b) any sale or disposal by Petroliam Nasional Berhad within Malaysia of petroleum obtained from outside of Malaysia and includes the transportation within Malaysia by, or on behalf of, Petroliam Nasional Berhad of such petroleum to any point of sale or delivery within Malaysia."*

Based on the above, we could ascertain whether the consideration received from the divestment is taxable under PITA once it falls under the definition of PO and Section 3 of PITA.

B) *Section 13(1) of the PITA*

In addition to the above, if the consideration receipt is subject to tax under Section 3 of the PITA, further analysis would need to be performed to determine whether the consideration receipt would fall under which Sections of the

PITA. Section 13(1) of the PITA relating to miscellaneous receipts is one such Section that warrants analysis. This Section states:

> *"(1) Where in the relevant period of the relevant chargeable person derives receipts of a revenue in nature incidental to and arising from any one or more of his petroleum operation…. Shall be treated as gross income of that chargeable person for that period."*

The important terms for the purposes of this analysis are "revenue in nature" and "incidental to". In order to be able to determine whether the consideration is considered revenue in nature or otherwise, the nature of the transaction has to be examined by using the badges of trade. The 'badges of trade' tests, are often used to help /act as a guide in differentiate gains arising from the disposal of an investment and gains from trading or from an adventure or concern in the nature of trade to determine the taxability of such gains.

Among the badges of trade that can be looked into include:

(i) Intention of taxpayer/ profit seeking motive
Is the main intention to seek profit on the divestment or merely the subsequent event. We may argue that the objective for an oil company is to explore and exploit the hydrocarbon and not the divestment of the upstream assets/participating interest in the Production Sharing Contract. An oil and gas company is not set up to be in the business of selling and buying participating interest.

(ii) Subject matter
If a transaction is in line with the ordinary course of a business of a taxpayer, then the transaction will be construed as a trade transaction. Is the divestment part of ordinary course of business for the seller?

(iii) Length of period of ownership
The interval between the purchase and sale also indicates whether the subject matter is disposed for trading purposes or long term investment purposes. Generally, the longer the period of ownership of the subject matter before its disposal, the less likely that such disposal would be considered to be part of a trade.

Upon examining the above, we would be able to form a reasonably informed opinion as to whether any consideration arising out of a divestment would be subject to tax under Section 13(1) of the PITA, and consequently, if it meets the requirement of being characterised as "revenue in nature".

C) *Section 14 of the PITA*

Once Section 13(1) has been attended to, our attention would now shift to Section 14(3) of the First Schedule of the PITA. This is pertinent to evaluate whether a consideration arising out of a divestiture would be considered as recovered expenditure and hence treated as the gross income of the Seller. Section 14 (3) stipulates

"Where during the relevant period – (a) recovered expenditure is recovered by or on behalf of the relevant person and (b) the total recovered expenditure exceeds residual expenditure and QEE incurred – the amount excess shall be treated as gross income…"

The critical issue here would be to ascertain whether the consideration had rested on the past expenses that the seller had incurred, and where Qualifying Exploration Expenses were incurred in any prior year/s. If this is indeed the case, then any excess sum received for the said past expenses will be treated as the gross income of the Seller and subject to tax.

2. Income Tax Act 1967

Once we have analysed and determined the nature of the consideration received subsequent to the divestiture, under the PITA,

The 'badges of trade' tests, are often used to help /act as a guide in differentiate gains arising from the disposal of an investment and gains from trading or from an adventure or concern in the nature of trade to determine the taxability of such gains.

[2] *ExxonMobile Newsroom – ExxonMobil reduces 2020 capex by 30%, cash opex by 15%; maintains long-term outlook dated 7 April 2020*

[3] *The Edge Malaysia – ExxonMobil exiting Malaysia to focus on Permian Basin dated 22 October 2019*

[4] *Murphy Oil Corporation news release – Murphy Oil Corporation announces close of Malaysia portfolio, executes $300 million share repurchase program dated 10 July 2019.*

[5] *https://www.murphyoilcorp.com/Global-Operations/Southeast-Asia/*

[6] *Bloomberg – Repsol weighs sales of Malaysian Assets as part of review dated 10 January 2020.*

[7] *Petroleum Income Tax Act, 1967*

and reasonably, if not conclusively, satisfied ourselves that the said consideration is not subject to tax, we would need to examine whether the consideration received will be subject to tax under Corporate Income Tax Act 1967 ("CITA"). However, as mentioned earlier, this article does not elaborate or perform an exhaustive analysis on CITA.

The Sections of importance under CITA[8] would be the charging sections i.e Section 3, and also Section 4 of CITA concerning the income that is chargeable to tax. The consideration must represent gains or profits incidental to the principal activities and must be of revenue in nature to fall within the ambit of CITA.

3. Real Property Gains Tax Act 1976 (Act 169)

We would also need to analyse whether the settlement receipts are subject to RPGT. Pursuant to Section 3(1) of RPGT Act[9], a real property gains tax shall be charged on the income accruing from a disposal of a real property. However, as mentioned earlier, this article does not elaborate or perform an exhaustive analysis on CITA.

The term <u>real property</u> is defined in RPGT Act as:-

> "any **land** situated in Malaysia and any interest, option or other right in or over such land".

Furthermore, the term **land** in RPGT Act includes the following: -

- i) *the surface of the earth and all substances therein;*
- ii) *the earth below the surface and substances therein;*
- iii) *buildings on land and anything attached to land or permanently fastened to anything attached to land (whether on or below the surface);*
- iv) *standing timber, trees, crops and other vegetation growing on land; and*
- v) *land covered by water;*

In addition, a **participating interest** for a PSC contractor is not a right in, or over, such land but represents the proportion of exploration and production costs that each party will bear and the proportion of production revenue each party will receive as set out in a PSC. Hence, divestment of participating interest in a PSC would not fall under the RPGT Act.

> **In *Hughes v The British Burmah Petroleum Co Ltd*[10], the company's business consisted of oil refining. For some years the company had purchased oil from a subsidiary production company. In 1928 the British Burmah Petroleum Co (British Burmah) took over the subsidiary's business at a purchase price which included a sum payable in shares and calculated at a fixed rate per barrel of oil by reference to the estimated future production by the subsidiary's wells.**

4. Case laws

The following judicial precedents also provide an invaluable guidepost in understanding the nature of a consideration arising out of any divestiture:

United Kingdom's tax authority, HM Revenue and Customs through its official website *www.hmrc.gov.uk* provides a distinction between a capital and revenue income. It argues that the cost of trading stock is revenue whereas the cost of gaining access to minerals that are to be sold in the course of trade is capital in nature.

In **Hughes v The British Burmah Petroleum Co Ltd**[10], the company's business consisted of oil refining. For some years the company had purchased oil from a subsidiary production company. In 1928 the British Burmah Petroleum Co (British Burmah) took over the subsidiary's business at a purchase price which included a sum payable in shares and calculated at a fixed rate per barrel of oil by reference to the estimated future production by the subsidiary's wells.

British Burmah contended that this transaction was merely the purchase of stock and claimed a deduction against the price obtained from oil produced by the wells in subsequent periods.

The Revenue later concluded that the British Burmah case illustrates that the cost of a natural asset yielding saleable material is capital expenditure on the right to win stock and not the cost of the stock itself.

The arrangements in **H.J. Rorke Ltd v CIR [1960] 39TC194**, took a different form. A coal mining company entered into arrangements with various owners of a suitable land under which the company undertook making two lump sum payments to each owner; the first for the right to enter upon the land, and the second as the compensation for the diminution in the value of the land by the mining operations.

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[8] *Income Tax Act, 1967.*

[9] *Real Property Gain Tax Act, 1976.*

[10] *Hughes (H.M. Inspector of Taxes) v The British Burmah Petroleum Co., Ltd. [1932] 17TC286*

The Special Commissioners held that the *right of entry payments was capital* and could not be allowed as deductions, but that the payments for the diminution in value were of a revenue nature and thus, were allowable.

The company argued that:

- no asset or advantage had been brought into existence for the enduring benefit of the trade, and
- the transient and recurrent character of the operation stamped the payments as being revenue in nature.

Cross J rejected both arguments and said that the expenditure was capital:

> "If once you accept - as I must - the distinction between buying circulating capital and acquiring rights which enable you to get circulating capital, it seems to me that these payments are marked as being of a capital nature, and, if once you find that, the fact that the trader is conducting many transactions of a similar kind cannot really make any difference."

In addition to the discussion made in this article from the PITA, CITA & RPGT perspective, both case laws also prove that the cost of gaining access to minerals is capital in nature. Likewise, the cost that a buyer has to incur to gain access to the oil and gas resources i.e transfer of participating interest in Malaysian Production Sharing Contract is capital in nature, making the consideration paid as capital income.

CONCLUSION

The analysis in determining the tax implication on the divestment of upstream assets in Malaysia can be summarised as follows:-

1. Whether the consideration received from the divestment of the upstream assets falls under the definition of "petroleum operations" pursuant to Section 2(1) and Section 3 of Petroleum Income Tax Act 1967;
2. Whether the consideration received is part of Section 13(1) of PITA thereby meeting the two-pronged requirement of being "revenue in nature" and also incidental to the petroleum operations;
3. Whether the excess amount of the expenses incurred would be treated as "recovered expenditure" pursuant to Section 14(3) of PITA under the meaning of First Schedule which relates to the consideration being the compensation to the historical/ past cost incurred by the Seller.
4. Whether the consideration received relates to a receipt of money from the sale of ordinary trading stocks and hence may be deemed revenue in nature, thereby rendering it subject to tax under the Income Tax Act 1967;
5. Whether the consideration received is a consideration for the disposal of real property within the ambit of Real Property Gain Tax.
6. Whether the transaction is similar to any case laws precedence to support the position on the taxability for the consideration received.

[11] *H.J. Rocke, Ltd. v Commissioners of Inland Revenue [1960] 39TC194*

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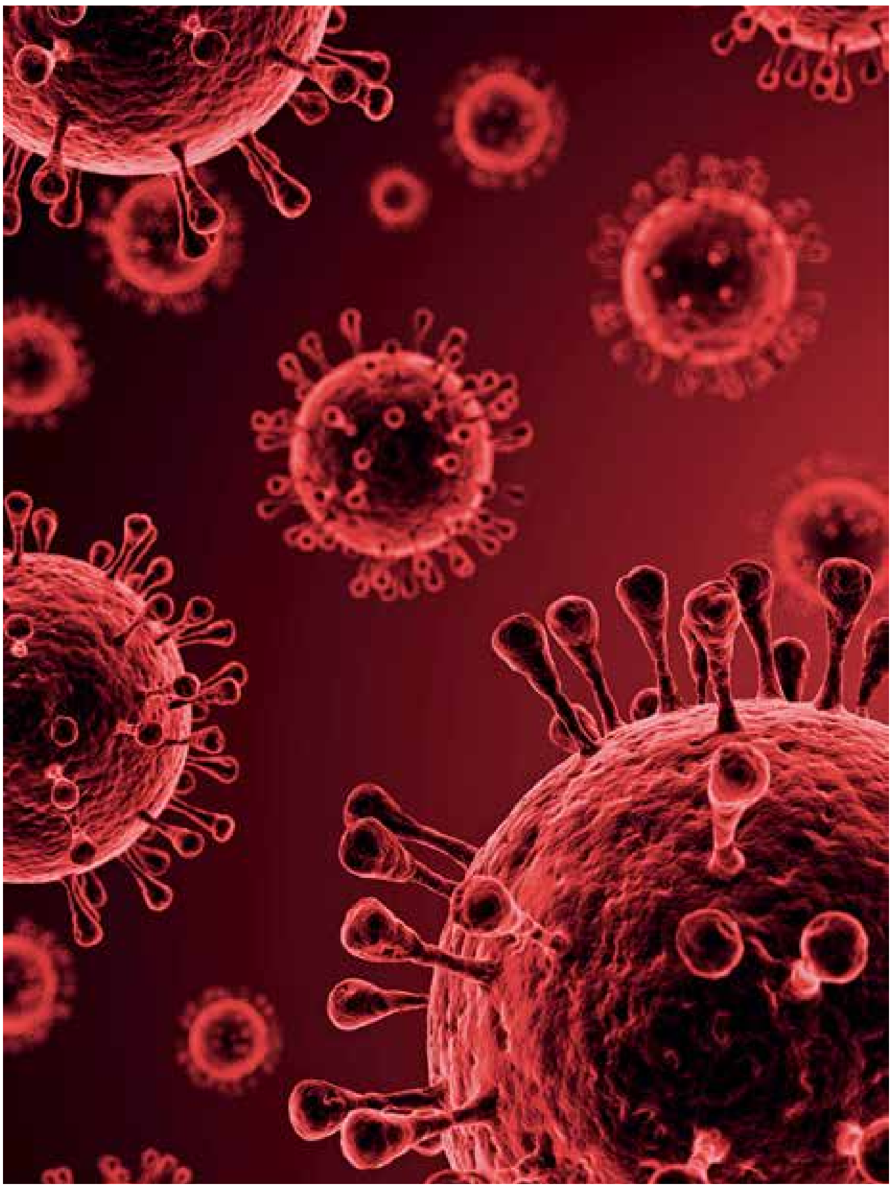
SECURING A STAY ORDER IN TAX DISPUTES

AN ANALYSIS OF THE HHD CASE

S. Saravana Kumar



The COVID-19 pandemic has affected many businesses in Malaysia in many ways including from financial aspects. The restriction in economic and social activities has largely affected the manner in which taxpayers conduct their businesses. This compounded further with sluggish global economy resulting in poorer consumer demand. All these factors and many more have resulted in taxpayers facing tight cash flow position.

In this judicial review proceedings, the taxpayer, a property developer, applied for an order to stay all further proceedings and effect in relation to the disputed tax assessments raised by the Inland Revenue Board of Malaysia ("IRBM") pending the disposal of the judicial review proceedings.

FACTS

The taxpayer entered into agreements with the Johor State government whereby the taxpayer agreed to sell a stipulated number of its property units to Bumiputera purchasers at a discount. However, in the event the taxpayer is unable to sell the Bumiputera property units, they can be made available to non-Bumiputera purchasers provided that the conditions in the agreements with the Johor State government are complied with. Pursuant to the agreements, the taxpayer applied to the Johor State government to release the Bumiputera units to the non-Bumiputera buyers. In return, the taxpayer was asked to make contributions to the Johor State government in order to obtain the release. The taxpayer deducted the contributions made to the Johor State government as a deductible expense under Section 33(1) of the Income Tax Act 1967.

In March 2020, subsequent to a tax audit, the IRBM issued its tax audit findings letter to the taxpayer.

Among others, the IRBM alleged that the contributions are not allowed for tax deduction as it is capital in nature. The taxpayer responded with detailed explanation stating why the contributions are deductible by emphasising the nexus between the contributions and production of income. In June 2020, the IRBM maintained its position and raised tax assessments for the years of assessment 2015, 2016, 2017 and 2018 for nearly RM9 million.

On 27.8.2020, the High Court heard the taxpayer's leave application for judicial review and also the objections from the Attorney General's Chambers and the IRBM. Being satisfied that there were exceptional circumstances in the present matter, the High Court granted the taxpayer leave to commence judicial review proceedings against the IRBM. Consequently, the taxpayer sought for a stay order against the payment of the disputed taxes. The taxpayer submitted that the High Court had the jurisdiction to grant a stay order even in a tax matter.

JURISDICTION TO GRANT STAY IN TAX MATTERS

The first question to be determined is whether a stay of further proceedings should be granted until the full and final determination of the judicial review application pursuant to the court's inherent jurisdiction. In ***Government of Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105***, the Supreme Court clearly stated that:

> *"With respect, in our view, neither Section 103 (l) nor Section 106 (3), bars a Court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case. (See Supreme Court decision in Chong Woo Yit v. Government of Malaysia [1989] 1 MLJ 473 at p. 475 Col. 2, last para, per Gunn Chit Tuan CJ)."*

In ***Kerajaan Malaysia v Ekran Bhd [2006] 5 CLJ 92***, the High Court held that:

> *"…It is not disputed that the power to grant stay of proceedings or execution pending appeal is a discretionary exercise of power premised on Section 73 of the Courts of Judicature Act 1964".*

In fact, in ***Kerajaan Malaysia v Margaret Au Nyat Fah [2008] 3 CLJ 424***, the High Court took the view that some of the IRBM's powers to take civil action against taxpayers appear to be amongst the harshest amongst all civil laws, and that some of the measures taken to collect taxes may be seen to be oppressive. Accordingly, the court would not be restricted from granting a stay if the facts warrant it:

> *"Section 106 (3) of the ITA 1967 states: "In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under Section 103 (4), (5) or (5A)." This section, to some extent in my view, is in breach of natural justice and violates the spirit of the Federal Constitution. A judgment obtained on an erroneous assessment which the defendant cannot honour may lead him to be made a bankrupt and/or to financial ruin. **AMONG ALL CIVIL LAWS, THIS APPEAR TO BE THE HARSHEST and SOME OF THE MEASURES TAKEN TO COLLECT TAXES** as on the facts of this case **ARE PRIMA FACIE SEEN TO BE OPPRESIVE**. For example, in this case, the administratrix was deprived from travelling overseas when the tax due and owing was not personal to her. **WHEN THERE IS AN ABUSE SUCH AS THIS, THE COURT MUST READILY ACT TO PROVIDE THE REMEDY TO THE VICTIM**. In this instance, the court is obliged to grant the judgment, as per the law. However, **THE COURT IS NOT RESTRICTED FROM GRANTING A STAY** of the judgment, if the facts of the case warrant so."*

In March 2020, subsequent to a tax audit, the IRBM issued its tax audit findings letter to the taxpayer. Among others, the IRBM alleged that the contributions are not allowed for tax deduction as it is capital in nature. The taxpayer responded with detailed explanation stating why the contributions are deductible by emphasising the nexus between the contributions and production of income. In June 2020, the IRBM maintained its position and raised tax assessments for the years of assessment 2015, 2016, 2017 and 2018 for nearly RM9 million.

PRESERVING STATUS QUO

It is trite that the High Court has the power to grant such a stay against public authorities such as the IRBM as held in ***Islamic Financial Services Board v Marlin Fairol Mohd Faroque & Anor [2010] 8 CLJ 173***. A judicial review stay is not the same as stay of execution after judgment in judicial proceedings. It should be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. This means preserving the status quo by suspending the Decision under challenge pending the determination of the judicial review application, which as a result, will not deny the taxpayer the full benefit of a successful challenge.

In the HHD case, the taxpayer urged the High Court to preserve the status quo of the taxpayer prior to the IRBM's decision to raise the disputed tax assessments. The taxpayer's argument was that the implementation of the Decision will result in a large and burdensome amount of taxes being wrongfully and unfairly imposed on the taxpayer. As the amount of the disputed tax is rather high, it will result in a financial crisis and cash flow problems for the taxpayer.

SPECIAL CIRCUMSTANCES AS TEST FOR STAY

The paramount consideration for the courts in allowing or refusing a stay is whether or not special circumstances exist as held in ***Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausha Makmur Bhd [2003] 4 CLJ 1***. It must be noted that the courts have recognised that the categories of 'special circumstances' are 'infinite' and will 'grow with time' depending on the facts of each case. It was observed in ***The Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another case [1993] 4 CLJ 98:***

> *"I respectfully agree with those views of the learned V.C. George J. An attempt was made to define special circumstances by Raja Azlan Shah J. (as His Majesty then was) in the case of Leong Poh Shee V. Ng Kat Chong [1965] 1 LNS 90 , viz:*
>
> *Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.*
>
> *The definition only serves to emphasise the fact that **there are myriad circumstances that could constitute special circumstances with each case depending on its own facts**. I am of the opinion that the **list of factors constituting special circumstances is infinite and could grow with time.** Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the Court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.*
>
> ***AS LONG AS ONE DOES NOT STRAY BEYOND THE PERIMETER SET BY THE JUDICIAL PRINCIPLES, THE DISCRETION CAN BE EXERCISED."***

The High Court has also provided further guidance on the type of special circumstances that could warrant the granting of a stay in the following cases:

(a) ***Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493***

> *"What factors would constitute as special circumstances may vary according to the circumstances of each particular case. Three essential ingredients constituting special circumstances has been propounded as follows: (i) where the balance of convenience is in favour of the applicant; (ii) where it is apparent that unless a stay is granted an appeal will be*

rendered nugatory; and (iii) that the applicant has an arguable appeal".

(b) *Mohamad Mustafa v Kandasami (No 2) [1979] 2 MLJ 126*

> *"One of the determining factors that call for consideration is whether by not making an order for stay of execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case."*

In essence, the High Court succinctly laid down four factors that ought to be considered in an application for a stay of proceedings:

(i) Whether the applicant can show special circumstances – an order for stay will be granted if an applicant can demonstrate special circumstances when his or her appeal to the Court of Appeal will be rendered academic if the proceedings in the High Court are not stayed;

(ii) The balance of convenience (now popularly known as balance of justice) – namely a comparison of the existence, nature and extent of prejudice which may be suffered by the parties if proceedings are stayed or otherwise;

(iii) If an application to stay proceedings is an abuse of court process, such an application will be refused; and

(iv) Whether there is an explained delay in applying for a stay of proceedings.

STAY IN TAX MATTERS

In the authors' view, the exercise of the discretion to grant a stay order would be well within the perimeter set by the judicial principles highlighted above as various special circumstances exist:

a) Balance of convenience favours the granting of the Stay;

b) The history as a law-abiding, responsible corporate taxpayer;

c) Harshness of the threat of civil action should the Stay be refused; and

d) The IRBM's failure to exercise its powers accordingly.

In Jasanusa (supra), the Supreme Court had then reminded that:

> *"…Matters of this nature involve, inter alia, balancing the need of the government to realise the taxes and **THE NEED OF THE TAXPAYER TO BE PROTECTED AGAINST ARBITRARY OR INCORRECT ASSESSMENTS**… The Court should also bear in mind **THE POSSIBILITY OF ARBITRARY OR INCORRECT ASSESSMENTS, BROUGHT ABOUT BY FALLIBLE OFFICERS WHO HAVE TO FULFILL THE COLLECTION OF A CERTAIN PUBLICLY DECLARED TARGETED AMOUNT OF TAXES** and whose assessments, as a result, **may be influenced by the target to be achieved rather than the correctness of the assessment."***

It is trite that the High Court has the power to grant such a stay against public authorities such as the IRBM as held in *Islamic Financial Services Board v Marlin Fairol Mohd Faroque & Anor [2010] 8 CLJ 173*. A judicial review stay is not the same as stay of execution after judgment in judicial proceedings. It should be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction.

CONCLUSION

In the HHD case, upon hearing the parties, the High Court granted a stay order to the taxpayer until the determination of its judicial review application. For the authors, consideration of the public interest as a whole and the comparative effects of the granting and refusal of a stay, play a key role in arriving at the conclusion that the balance of convenience being heavily in the favour of the granting of stay for the taxpayer. The granting of a stay as sought for by the taxpayer would ensure that the status quo presently prevailing to be preserved and would also be in line with our courts' constitutional role as the 'bulwark' against 'unlawful action' as reaffirmed by the Federal Court in ***Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and others [2018] 1 MLJ 545.***

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

CHINA (PEOPLE'S REP.)

China Allows Deferral of Tax Payments for Small and Low-Profit Enterprises and Sole Traders

From 1 May to 31 December 2020, small and low profit enterprises and sole traders may, after filing the scheduled tax returns of enterprise income tax and individual income tax respectively, defer their tax payments until the first tax filing and payment period of 2021. Those who have already paid the taxes that would have been eligible for the deferral may claim a refund and add back the refunded taxes in the first tax filing and payment period of 2021.

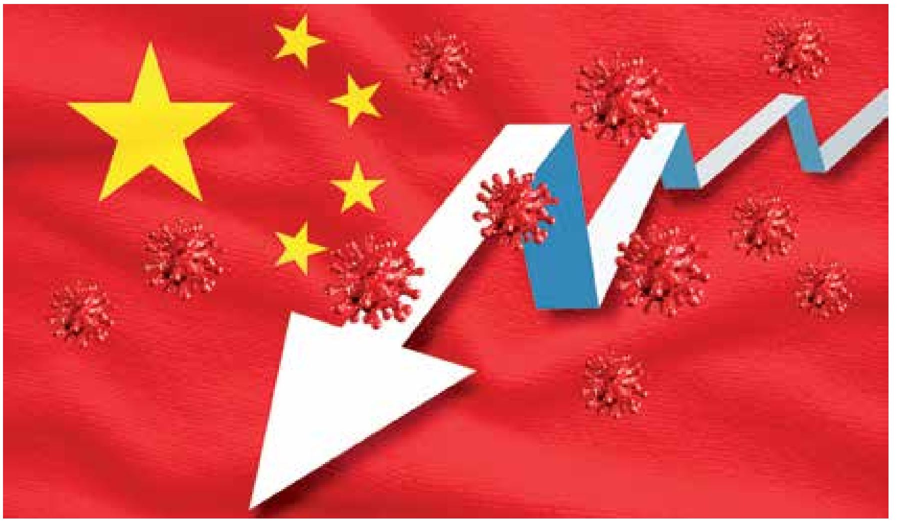
A small and low-profit enterprise is defined in SAT Public Notice [2019] No. 2, and refers to an enterprise that satisfies all three conditions of: (a) annual turnover is less than CNY3 million, (b) total assets are less than CNY50 million and (c) total number of employees is less than 300.

The State Taxation Administration announced this deferral of tax payments in SAT Public Notice [2020] No.10 to lessen the impact of COVID-19 on these enterprises and sole traders.

China Extends Exemption and Reduction of Employer Contributions to Social Security Insurances

On 22 June 2020, the Ministry of Human Resource and Social Security extended the period of exemption and reduction of employers' contributions for three social security insurances, i.e. employer's contribution to oldage pension insurance, unemployment insurance and work-related injury insurance.

Under Public Notice [2020] No. 49, the period of exemption of social security contributions for small and medium-sized enterprises will be extended to the end of December 2020 and the period of 50% reduction of social security contributions for large enterprises will be extended to the end of June 2020. The exemption for contributions payable by large enterprises that are located in the Hubei Province will remain until the end of June 2020.



Furthermore, other enterprises that are adversely affected by COVID-19 may defer the contributions payable to social security insurances to the end of December 2020 without penalty. It is also provided that the lower limit of the individual payment base of social security insurance in the year 2019 can be used for the year 2020.

HONG KONG

Hong Kong Updates Guidance on Tax Treatment of Royalties and IP-Related Income

The Inland Revenue Department (IRD) has updated the administrative guidelines on the tax treatment of royalties and other income derived from intellectual property (IP).

The guidelines set out in detail the deeming provisions for IP-related income, guiding principles used in determining the source of royalty income, use of the appropriate deemed profit rates and the application of treaty tax rates.

The latest guidelines as provided in the DIPN No. 22 (revised) which replaces the previous DIPN issued in January 2005 are summarised below.

- The latest changes to the relevant legislative provisions deem certain sums derived from IP to be sourced from Hong Kong and subject to profits tax (i.e. the deeming provisions), such as sums for the use of intellectual property outside Hong Kong and for the assignment of a performer's right in relation to a performance in Hong Kong, as well as the introduction of a new provision on the taxation of sums attributable to value creation contributions in Hong Kong.
- The broad guiding principle used to determine the source of royalty income is to see what the person has done to earn the profits in question and where the person has done it. The following situations are analysed when applying the principle: (a) totality of facts; (b) licensing of IP created or developed by licensor; (c) licensing of IP purchased by licensor; and (d)

sublicensing of IP.

- The following scenarios are analysed when applying the deeming provisions: (a) exhibition or use of cinematograph films, etc. in Hong Kong; (b) use or right to the use of patents, trademarks, etc. in/outside Hong Kong; (c) use or right to the use of IP generated from research and development activities in Hong Kong; (d) use or right to the use of IP with value creation contributions in Hong Kong; and (d) assignment of performer's right.
- The application of the 30% and 100% deemed profits rate when computing the assessable profits are explained accordingly. Briefly, the assessable profits are deemed to be 30% of the sum received or accrued except where the IP was previously "owned" by a person carrying on a trade, profession or business in Hong Kong and the sum is paid or accrues to an "associate". In the latter case, 100% of the sum paid or accrued is taken as the assessable profits. The purpose of deeming 100% of the sum as assessable profits is to counter avoidance schemes that involve arrangements with overseas associates.
- The rate specified in the royalties article of the relevant tax treaty will apply where the recipient is the beneficial owner of the royalty income, unless the business profits article applies. However, treaty benefits will not be applicable if the general anti-avoidance or specific anti-avoidance provisions are invoked.

Hong Kong Updates Guidance on Tax Deductions for IP-Related Capital Expenditure

The IRD has updated the administrative guidelines on the deduction of capital expenditure incurred on the purchase of different types of intellectual property rights (IPRs).

The revised Departmental Interpretation and Practice Note (DIPN) No. 49 reflects the legislative changes made by the Inland Revenue (Amendment) (No. 5) Ordinance 2018 and the expanded scope of the deductions. DIPN No. 49 (revised) replaces the previous DIPN issued in July 2012.

The main contents of DIPN No. 49 (revised) are summarized below.

- The scope of deductions was expanded in 2018 to cover a performer's economic rights, protected layout design (topography) rights and protected plant variety rights.
- A one-off deduction in the year of purchase is available for patent rights or rights to know-how. For copyrights, performer's economic rights, protected layout design (topography) rights, protected plant variety rights, registered designs or registered trademarks (collectively referred to as specified intellectual property rights, or SIPRs), the deduction of capital expenditures is allowed in five equal amounts over five consecutive years.
- Qualifying expenditure includes legal expenses and valuation fees incurred in connection with the purchase; however, no deductions will be allowable for any patent right, right to know-how or SIPR generated from the research and development activities of a person as such rights are not purchased by the person.
- The conditions for deduction of the capital expenditure (including registration, ownership, use, production of chargeable profits requirements) are provided accordingly.
- The tax treatment for a disposal of IPRs is set out accordingly.
- Non-deduction of expenditure under certain circumstances is provided accordingly, including purchase with early termination of licence, purchase from associates, sale and license back arrangements, use of the IPR wholly or principally outside Hong Kong by other persons, and leveraged licensing arrangements.

Inland Revenue Department Provides Tax Exemption for Anti-epidemic Fund

The IRD has announced the implementation of profits tax and salaries tax exemption for Anti-epidemic Fund provided to businesses or individuals from the year of assessment 2019/2020. This move will enable businesses and individuals to fully benefit from the financial assistance under the Anti-epidemic Fund.

The beneficiaries shall be exempted from the payment of profits tax and salaries tax in respect of the assistance unless the sums are paid for general business activities and are not paid in a matching arrangement. The Exemption from Salaries Tax and Profits Tax (Anti-epidemic Fund) Order will be gazetted and take effect on 29 May 2020.

INDONESIA

Indonesia Issues Guidelines for VAT on Import of Digital Goods and Services

On 15 May 2020, the Directorate General of Taxation (DGT) announced the issuance of guidelines regarding the procedure for the collection, deposit and reporting of value added tax (VAT) to be imposed on the consumption of digital products from abroad. From 1 July 2020, the import of digital products in the form of intangible goods and services by domestic consumers will be subject to

VAT at the rate of 10%.

The imposition of VAT on imported digital goods and services such as streaming music subscriptions, streaming films, digital applications and games, and online services, is expected to provide additional tax revenue for the government to cope with the economic impact as a result of the COVID-19 outbreak and is also a part of the government's effort to create a level playing field for all businesses.

The guidelines are included in Ministry of Finance (MoF) Regulation No. 48/PMK.03/2020 of 5 May 2020. The salient features of the regulation are set out below.

- Digital goods are any intangible goods in electronic form including but not limited to software, multimedia and electronic data. Digital services are services provided through the Internet or electronic network, automated or with little human intervention and with the use of information technology including but not limited to software-based services.
- A representative who meets certain criteria as provided in the regulation will be responsible for collecting and remitting the VAT on the sale of taxable digital goods and the provision of taxable digital services to the consumers in Indonesia.
- Consumers in Indonesia include: (a) a person who resides in Indonesia; (b) a person who makes payment by using the payment facility provided by an institution in Indonesia; or (c) a person who transacts by using the Internet protocol address in Indonesia or using the telephone code in Indonesia.
- VAT must be collected at the time of payment made by the consumers and the tax invoice issued must fulfil the prescribed formats.
- The taxable period is 3 months and the VAT collected must be remitted by the end of the following month after the taxable period in a prescribed form.

Tax Incentives Available for Certain Activities Involved in Handling the Pandemic

On 10 June 2020, the government issued Regulation No. 29/2020 (GR 29/2020) that stipulates the tax incentives available for certain companies and individuals involved in the handling of the COVID-19 pandemic. The incentives include an additional reduction in net income for manufacturers of healthcare equipment, tax deductions for approved donations and final withholding tax of 0% for income or compensation received from the government. GR 29/2020 came into effect on 10 June 2020.

GR 29/2020 also provides that companies are allowed to buy back shares traded on the stock exchange and still qualify for the reduced income tax rate.

The salient features of the regulation are set out below.

- Domestic taxpayers who produce healthcare equipment including N95 masks, personal protective equipment, gloves, ventilators, reagents for diagnostic tests of COVID-19, hand sanitizer and disinfectants as specified in GR 29/2020 are entitled to an additional reduction in net income of 30% from the cost incurred for the production of the healthcare equipment from 1 March 2020 to 30 September 2020.
- Approved donations or contributions in money or in kind made to selected bodies for COVID-19 purposes from 1 March 2020 to 30 September 2020 may be deductible from gross income.
- Additional income received by individual taxpayers such as state officials, civil servants, members of the Indonesian National Army and the Indonesian National Police, and retirees from the government in relation to the provision of services to handle COVID-19 will be subject to final withholding tax at 0% from 1 March 2020 to 30 September 2020.
- Income received from the government from 1 March 2020 to 30 September 2020 in relation to the rental of buildings or real property as prescribed in GR 29/2020 for COVID-19 purposes will be subject to final withholding tax at 0%.
- Listed companies that carry out buybacks of public shares on the stock exchange from 1 March 2020 to 30 September 2020 can still qualify for the reduced income tax rate of 19% for fiscal years 2020 and 2021 and 17% for fiscal year 2022 under Law No. 2 Year 2020, subject to conditions.

Indonesia Sets VAT Collection Threshold for E-commerce Transactions

The DGT issued a regulation that stipulates the details regarding the registration thresholds for VAT collections, appointment of VAT collectors and other compliance requirements for the further implementation of the MOF Regulation No. 48/ PMK.03/2020 (PMK-48) of 5 May 2020.

PMK-48 sets out the procedure regarding the collection, depositing and reporting of VAT to be imposed on the import of digital products in the form of intangible goods and services by domestic consumers.

The above measures are included in DGT Regulation No.PER-12/PJ/2020 of 25 June 2020 which came into effect on 1 July 2020 and the salient features are set out below.

- Foreign sellers and foreign service providers, foreign e-commerce marketplaces and domestic ecommerce marketplaces that conduct e-commerce transactions in Indonesia will be appointed as VAT collectors and be required to register for VAT collection purposes if they meet the following criteria: (a) the value of transactions with Indonesian customers exceeds IDR 600 million annually or IDR 50 million monthly; and/ or (b) the amount of traffic or access in Indonesia exceeds 12,000 users annually or 1,000 users monthly.
- The appointment as a VAT collector will be made officially by the DGT or by self-notification to the DGT. Once appointed, the VAT collector will be provided with a VAT collector ID, tax registration letter and the appointment becomes effective from the beginning of the following month.

Appointed VAT collectors are required to comply with the following procedures: (a) activate their account in the DGT system prior to the effective date of their appointment; (b) collect 10% VAT from the sales value from the Indonesian customers and issue commercial invoices, billings, order receipts, or similar documents as proof of VAT collection; (c) remit the VAT collected to the DGT electronically or by other means determined by the DGT by the end of the month following the month where the transaction was undertaken; and (d) file a quarterly report via the DGT's designated tax filing system on the VAT collection and payment with details of the number of users in Indonesia, amount of payment excluding VAT, and amount of VAT collected and remitted not later than the end of the month following the end of the quarterly tax period. A detailed VAT report for each calendar year may also be requested by the DGT.

Where the VAT collectors have imposed the VAT and the customers have also paid VAT on a self-assessment basis, the self-assessed VAT can be converted to other tax payments, refunded to customers, regarded as input tax credit or claimed as a deductible expense in the income tax calculation of the customers.

Conditions for Tax Rate Reduction of Public Companies

On 27 June 2020, the DGT announced additional conditions that must be met to be eligible for the reduced corporate tax rate from fiscal year 2020 by public companies with at least 40% of their total paid-up capital traded on the Indonesia Stock Exchange.

The standard tax rate will be reduced by 3% if the conditions specified under Government Regulation No. 30 of 2020 (GR 30/2020) are met, and the rates applicable will be 19% in fiscal years 2020 and 2021, and 17% in fiscal year 2022.

The additional conditions stipulated under GR 30/2020 are: (a) 40% of the total issued and fully paid-up shares listed on the Indonesia Stock Exchange must be owned by at least 300 shareholders (excluding the issuers and controlling shareholders/ major shareholders); (b) total ownership by each shareholder must be less than 5% of the total issued and fully paid-up shares; and (c) the above requirements must be fulfilled for a minimum of 183 calendar days within a fiscal year.

The above provisions do not apply in the case of companies conducting share buybacks under a government policy or regulated by the Financial Services Authority according to Government Regulation No. 29 of 2020 (GR 29/2020). GR 29/2020 stipulates that public companies that conduct share buybacks and, as a result, do not fulfil the requirements above, will be given exceptions until 30 September 2020 so that they can continue to qualify for the lower income tax rate.

Indonesia Extends the Tax Incentives Period and Further Expands the List of Eligible Business Sectors

The MoF has extended the incentives period previously provided under the MoF Regulation No.44/PMK.03/2020 (PMK-44) up to December 2020 and further expanded the list of business sectors that may qualify for the tax incentives available to taxpayers that are affected by the COVID-19 pandemic in the country.

In this regard, the MoF has issued Regulation No.86/ PMK.03/2020 (PMK-86) and the salient features of PMK-86 are set out below.

Extension of tax incentives period

The following incentives may be availed by qualifying taxpayers up to December 2020 (previously available from April to September 2020): (a) withholding tax on employment income (article 21 of the Income Tax Law (ITL)) borne by the government for employees earning annual income not exceeding IDR200 million; (b) exemption from tax on import (article 22 of the ITL); (c) reduction of 30% in monthly tax instalment payment (article 25 of the ITL); and (d) preliminary VAT refund automatically granted up to a maximum of IDR5 billion.

The qualifying taxpayers are: (a) companies engaged in specific industries as listed in the attachments to PMK-86; (b) companies granted the Import Facility for Export Purposes; or (c) companies licensed as businesses in the Bonded Zone area.

The 0.5% final tax on the gross revenue of qualifying small to medium enterprises (SMEs) borne by the government incentive will also be extended until December 2020.

Expansion of list of qualifying business sectors

PMK-86 also further expanded the list of industries that are eligible for the incentives applicable to articles 21, 22 and 25 of the ITL and the VAT refund accordingly.

Other administrative details

Taxpayers that are eligible for the incentives applicable to articles 21, 22 and 25 of the ITL and the SME final tax incentive will be required to prepare and submit a monthly realisation report in the prescribed format by the 20th day of the following month.

Taxpayers who have submitted the notification or application under the previous regulations are not required to re-submit the application while taxpayers already granted with the said incentives earlier will still qualify for the incentives under PMK-86.

PMK-86 also includes examples for the calculation of withholding taxes borne by the government, notification procedures, the reporting format for the utilisation of tax incentives and other administrative details. PMK-86 came into force on 16 July 2020 and PMK-44 is revoked accordingly.

SINGAPORE

Singapore Announces Proposed Amendments to Income Tax Act

The MoF has proposed to legislate the tax measures announced in Budget 2020, enhancing the power of tax authority, clarifying the tax measures announced in response to COVID-19 pandemic and enhancing the tax administration of the country. In this regard, the MoF published the draft Income Tax (Amendment) Bill 2020 for public consultation. Its main amendments are set out below.

Measures in response to the COVID-19 Pandemic

- A 25% corporate income tax rebate of the tax payable for the year of assessment (YA) 2020, capped at SGD15,000
- An increase in the carry-back period for unutilized capital allowances and trade losses from one year to three years.
- An income tax exemption of payouts received by individuals and businesses in 2020 for YA 2021 and/or YA2022.
- An income tax exemption of benefits-in-kind received by qualifying employees in 2020 for accommodation, food, transport and other necessities, subject to conditions and caps.
- The option to accelerate the write-off of the cost of acquiring plant and machinery in financial year (FY) 2020 for YA 2021.
- The option to accelerate the deduction of expenses incurred in renovation and refurbishment in FY 2020 for YA 2021.
- A withholding tax exemption for non-resident mediators and non-resident arbitrators until 31 March 2022.

Other measures

- A 50% surcharge on additional income tax will be imposed by the Comptroller as a result of adjustments made to counteract tax avoidance arrangements (see Note below).
- Tax refunds will be made electronically mandatorily.
- The tax deduction cap for provisions for doubtful debts and debt securities will be lifted for banks and qualifying companies for YAs 2021 and 2022.
- The Comptroller will be allowed to provide information that is necessary for the purpose of administering any public scheme.
- The double tax deduction internalisation scheme, mergers and acquisitions scheme, finance and treasury scheme, and tax incentives for venture capital fund will be extended.
- Non-taxation of companies' gains on the disposal of ordinary shares will apply from 1 June 2022 until 31 December 2027. The scheme will not apply to certain disposals in property-related businesses.
- Tax incentive schemes for insurance businesses will be streamlined.

Before formal amendments are made, the draft bill is available for public consultation from 20 July to 7 August 2020.

Note: With regard to the surcharge, a 50% surcharge of the amount of additional stamp duties will be introduced in the Stamp Duties Act, and a similar amendment will be proposed for the draft Goods and Services Tax (Amendment) Bill 2020.

THAILAND

Government Approves Draft VAT Bill on Foreign Digital Services

On 9 June 2020, the government approved the draft VAT bill which imposes 7% VAT on the digital services provided by foreign service providers (FSPs).

The definitions of "digital services" and "electronic platforms" are defined as follows: (a) digital services: services that are delivered through the Internet or electronic platforms that require the use of technology; and (b) electronic platform: electronic marketplace, channels, processes and others used by a service provider for the provision of digital services to a recipient.

A FSP that provides digital services directly to a non-VAT registered recipient in Thailand must account for VAT accordingly without any deduction for input VAT. If a FSP provides digital services through an electronic platform for processing services and other related activities, the electronic platform operator must account for VAT. VAT registration can be done electronically by the FSP.

The draft VAT bill is expected to level the playing field between local and foreign digital businesses and contribute to the government's revenue in the coming period. The draft VAT bill will subsequently be presented to parliament for approval.

Thailand Allows Deduction and VAT Exemption for Donations Made by Taxpayers

The government will allow deductions on donations by companies and individuals that are made through the e-donation system of the Revenue Department from 5 March 2020 to 5 March 2021. In addition, approved donations in kind made by VAT operators will be exempt from VAT accordingly.

For companies, approved donations in cash or in kind up to 2% of the net taxable profit will be deductible for corporate income tax purposes. For individuals, approved cash donations up to 10% of the total income after deducting other allowable expenses will be deductible for personal income tax purposes.

The details are gazetted in the Royal Decree No. 701 (RD-701) dated 22 June 2020 which came into effect on the day following its publication. The enactment of RD-701 is expected to motivate the public to support the prevention and suppression of the COVID-19 outbreak in the country.

Thailand Gazettes Additional Deductions for Certain Payments by SMEs

The government has gazetted the following additional deductions for salary payments and interest costs incurred by SMEs: (a) an additional 200% deduction based on actual salary payments made from 1 April 2020 to 31 July 2020; and (b) an additional 50% deduction on interest on loans obtained from the government's low-interest loan initiative incurred or accruing from 1 April 2020 to 31 December 2020.

The SME may avail of the incentives, provided that the following conditions are met: (a) the business income of the SMEs for the past financial year ended on or before 30 September 2019 does not exceed THB500 million; (b) the number of employees of the SMEs during the same period does not exceed 200; and (c) the SME must comply with the other rules, procedures and conditions specified by the Director General.

Additional conditions apply to the salary payments incentive as follows: (a) the additional deduction is only applicable to salaries paid to employees with a monthly salary of not more than THB15,000 and insured under the Social Security Act; (b) the number of insured employees on the last day of April, May, June and July 2020 is not less than the number of insured employees on the last day of March 2020; and (c) the SME does not claim other tax exemptions for the said salary under other royal decrees.

The incentives were previously announced in the stimulus package approved by the cabinet to mitigate the impact of the COVID-19 outbreak on businesses. The details of the incentives are gazetted in Royal Decree No. 707 (interest) and Royal Decree No. 708 (salary payments) both dated 12 July 2020 that came into effect on the day following the publication date of the gazettes.

VIETNAM

Vietnam Approves 30% Corporate Income Tax Rate Reduction for 2020

On 19 June 2020, the National Assembly approved the 30% reduction in the corporate income tax (CIT) payable for the fiscal year 2020. This tax reduction will be applicable to entities with annual revenues up to VND200 billion.

This is in line with the proposal reported earlier. However, the conditions that were previously proposed (such as minimum reduction in revenue and the numbers of employees) are removed under the approved resolution.

The approved reduction in CIT

payable aims to provide support for small and medium-sized enterprises that are adversely impacted by the COVID-19 pandemic in the country. The removal of other conditions is expected to ease the compliance requirements for small and medium-sized enterprises. The official resolution is expected to take effect 45 days after the approval. The above reduction in CIT payable may be further extended by the government in the future.

Vietnam Issues New Draft TP Decree for Public Consultation

A new draft transfer pricing decree with amendments made to the current Decree 20/2017/ND-CP was issued by the MoF for public consultation.

The salient features of the new draft transfer pricing decree are set out below.

Use of commercial database as comparables for benchmarking purposes

- The commercial database is proposed to be used for benchmarking studies purposes. The commercial database is defined as a verified source of comparables for both taxpayers and tax authorities.

Limitation on deduction for interest expenses

- It is proposed that the cap on interest expense deduction will be increased from 20% to 30% of the earnings before interest, tax, depreciation and amortisation (EBITDA). The interest expense to be used for comparison purposes is the net interest expense.
- The unutilized interest expenses can be carried forward for five years.

Revision of arm's length range

- It is proposed that the arm's length range will be amended accordingly.

Vietnam Increases Cap on Deductibility of Interest Expense to 30% of EBITDA

The government has increased the cap on the deductibility of interest expense to 30% (from 20%) of earnings before interest, tax, depreciation and amortisation (EBITDA) for entities under the revised transfer pricing framework.

To this end, the government issued Decree 68/2020/ ND-CP with guidelines congruent to the draft transfer pricing decree issued earlier. The salient features of the decree are set out below.

- In line with the draft decree, an entity may deduct the net interest expense at a maximum of 30% (increased from the previous limit of 20%) of its EBITDA for income tax purposes. The entity may carry forward the unutilised interest expenses in excess of the 30% cap for a maximum of five years.
- Certain types of financing such as official development assistance loans, preferential loans from the government and loans made for the purpose of implementing national programme and social benefit policies do not fall under the aforementioned limitation of deduction for interest expenses.

The decree came into effect on 24 June 2020 and applies from the tax year 2019 onwards. In addition, the new interest deduction cap of 30% can be applied retrospectively for the tax years 2017 and 2018. As such, taxpayers opting to use the revised cap for the tax years 2017 and 2018 must submit the amended 2017 and 2018 corporate income tax returns by 1 January 2021. The retrospective application is seen to benefit the entities with substantial debt financing in the prior tax years.

Vietnam Extends Suspension of Social Insurance Contributions for Qualified Employers

On 10 August 2020, the Vietnam Social Security announced the extension of the temporary suspension of social insurance contributions for qualified employers facing difficulties due to the COVID-19 pandemic up to December 2020 (from 30 June 2020).

Employers in the business of passenger transport services, tourism, accommodation, restaurant and other special industries who meet any of the following conditions may avail of the suspension of payment to the retirement and survivorship funds without penalty and interest: (a) an employer adversely affected by the COVID-19 pandemic who has to temporarily suspend work for 50% or more of the total number of employees subject to social insurance contribution before the business suspension; or (b) an employer who suffers losses of more than 50% of the total property value, except land, due to the COVID-19 pandemic.

Administrative requirements

- Employers are required to submit a written request with the required attachments as specified in Official Dispatch No. 1511/L#TBXH-BHXH to the relevant social insurance office.
- After the suspension period, employers and employees must pay the contributions due for the suspension period with no penalty being imposed.

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

INCOME TAX

Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020

The Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020 [P.U.(A) 162], gazetted on 19 May 2020, provide a deduction, capped at RM15,000 per year of assessment (YA), to a resident person who has incurred and paid the following fees in the basis period for that YA:

a) Secretarial fee charged in respect of secretarial services provided by a company secretary registered under the Companies Act 2016 (CA), to comply with the statutory requirements under the CA; and

(b) Tax filing fee charged by:
  - (i) A tax agent approved under the Income Tax Act 1967 (ITA) in respect of services provided for the:
    - Preparation and submission of income tax returns in the prescribed form for the purposes of Sections 77, 77A, 77B, 83 and 86 of the ITA for the basis period for the immediate-preceding YA; and
    - Preparation and submission of forms prescribed for the purpose of the estimate of tax payable under Section 107C of the ITA
  - (ii) A person in respect of services provided for the preparation and submission of returns in the prescribed form for the purposes of:
    - Section 26 of the Sales Tax Act 2018;
    - Section 26 of the Service Tax Act 2018;
    - Section 19 of the Departure Levy Act 2019; or
    - Section 19 of the Tourism Tax Act 2017

With this, the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2014 [P.U. (A) 336] are revoked. The new 2020 Rules are effective from YA 2020.

Automation incentives extended

Pursuant to the Income Tax (Accelerated Capital Allowance) (Automation Equipment) Rules 2017 [P.U.(A) 252] and Income Tax (Exemption) (No. 8) Order 2017 [P.U.(A) 253], a manufacturing company is eligible for Automation Capital Allowance (Automation CA) on amounts incurred for the purchase of automation equipment, as follows in **Table 01:**

In Budget 2018, to further encourage automation in the manufacturing sector, particularly in enhancing productivity and efficiency in the labour-intensive industries, it was proposed that the incentive period for Category 1 be extended for another three years. This applies to applications received by MIDA from 1 January 2018 to 31 December 2020.

In Budget 2020, it was proposed that the period for the incentive in both categories be extended until YA

TABLE 01:

	Category 1	Category 2
Type of industry	Qualifying project relating to rubber, plastic, wood, furniture and textile	Other than Category 1
Effective YAs	YA 2015 to YA 2017	YA 2015 to YA 2020
Application to the Malaysian Investment Development Authority (MIDA)	1 January 2015 to 31 December 2017	1 January 2015 to 31 December 2020
Income Tax (Accelerated Capital Allowance) (Automation Equipment) Rules 2017		
Incentive available: Accelerated Capital Allowance (ACA)	**Initial allowance:** 20% of the first RM4 million qualifying capital expenditure incurred **Annual allowance:** 80% of the first RM4 million qualifying capital expenditure incurred	**Initial allowance:** 20% of the first RM2 million qualifying capital expenditure incurred **Annual allowance:** 80% of the first RM2 million qualifying capital expenditure incurred
Income Tax (Exemption) (No. 8) Order 2017		
Incentive available: Income tax exemption	A qualifying company will be exempted from payment of income tax in respect of the statutory income derived from a qualifying project for the respective effective YAs. The amount exempted will be equivalent to 100% of the ACA given under P.U.(A) 252/2017, to be set off against 70% of the statutory income for each YA.	

2023. This applies to applications received by MIDA until 31 December 2023.

To legislate the above-mentioned proposals, the following were gazetted on 28 May 2020 and are deemed to be effective from YA 2018.

- Income Tax (Accelerated Capital Allowance) (Automation Equipment) 2017 (Amendment) Rules 2020 [P.U.(A) 173]
- Income Tax (Exemption) (No. 8) 2017 (Amendment) Order 2020 [P.U.(A) 172]

The Amendment Rules and Amendment Order provide that:

- To be a qualifying company eligible for the incentives, one of the conditions is that the company must have been in operations for 36 months. Previously, the company must have carried on a qualifying project for at least 36 months.
- The incentive period is from YA 2015 to YA 2023.
- The incentive will apply to applications received by MIDA from 1 January 2015 to 31 December 2023.
- The reference to "Section 127" of the Income Tax Act 1967 (ITA) under the non-application proviso is to be replaced with "Paragraph 127(3)(b) and Section 127(3A)" of the ITA. This is in line with Practice Note No. 2/2018 dated 1 June 2018, issued by the Inland Revenue Board of Malaysia (IRBM) to provide guidance on the non-application proviso stipulated in the Income Tax Orders (ITO) and Income Tax Rules (ITR)

It is noted, however, that the Budget 2020 proposal for the scope of the Category 2 incentive to be expanded to the services sector for applications received by MIDA between 1 January 2020 and 31 December 2023, has not yet been legislated.

Practice Note 3/2020: Clarification on Determining the Gross Income from Business Sources of not more than RM50 million, for a Company or Limited Liability Partnership

Further to the legislative changes via the Finance Act 2019, with effect from YA 2020, Small and Medium Enterprises (SMEs) will only be entitled to the following preferential tax treatment if their gross income from a source or sources consisting of a business is not more than RM50 million for the relevant YA:

- Preferential tax rate, where the corporate income tax rate on the first RM600,000 of chargeable income of an SME[1] is taxed at 17%, with the balance taxed at 24%; and
- Unlimited special capital allowance claim of 100% on assets valued at RM2,000 or less per asset (i.e. full capital allowance can be claimed in the year of acquisition, assuming the asset has been put into use)

The IRBM has now issued a three-page Practice Note No. 3/2020 (PN) dated 18 May 2020, titled "Clarification on Determining the Gross Income from Business Sources of not more than RM50 million of a Company or Limited Liability Partnership", to provide further guidance on this additional requirement. The PN clarifies that the determination of gross business income is subject to:

(a) For companies or LLPs engaged in manufacturing, trading or services activities
- Section 22 of the ITA – Gross income generally
- Section 24 of the ITA – Basis period to which gross income from a business is related
- Section 30 of the ITA – Special provisions applicable to cross income from a business

or

(b) For companies or LLPs carrying out activities such as banking or insurance, developers or contractors
- Specific provisions under the ITA or specific regulations for certain industries

In addition, the PN explains the mechanism of determining the gross business income of companies or LLPs in the following situations:

i. The company is an investment holding company (IHC);
ii. Company or LLP without gross business income, but with other income such as rent and interest (including entities which have temporarily ceased business operations)
iii. Company or LLP with foreign-sourced gross business income
iv. Company or LLP enjoying certain incentives or tax incentives (e.g. pioneer status or investment tax allowance)

Public Ruling No. 1/2020 – Tax Incentives for BioNexus Status Companies

PR No. 1/2020: Tax Incentives for BioNexus Status Companies, dated 22 May 2020, was issued to explain the tax treatment of tax incentives for a BioNexus Status Company (BNX) in Malaysia. This new PR replaces PR No. 8/2018 which was published on 9 October 2018. The PR has been updated to reflect the legislative changes enacted via the following Amendment Orders which were gazetted on 31 December 2018 to adhere to requirements of the Forum of Harmful Tax Practices (FHTP) of the Organisation of Economic Co-operation and Development (OECD):

- Income Tax (Exemption) (No. 2) 2009 (Amendment) Order 2018 [P.U.(A) 381]
- Income Tax (Exemption) (No. 17) 2007 (Amendment) Order 2018 [P.U.(A) 395]

Public Ruling No. 2/2020 – Tax Treatment of Stock in Trade Part I – Valuation of Stock

PR No. 2/2020: Tax Treatment of Stock in Trade Part I – Valuation of Stock, dated 3 June 2020, was issued to provide guidance on the valuation of stock in trade. This new PR replaces PR No. 4/2006 which was published on 31 May 2006. The IRBM has also advised that PR No. 2/2020 and 3/2020 should be read together with PR No. 3/2020: Tax Treatment of Stock in Trade Part II – Withdrawal of Stock.

Some of the key changes in PR No. 2/2020 are as follows:

- **Paragraphs 4 and 5.1**
  The new PR explains that stock in trade is anything a business acquires, produces or manufactures, for the purpose of manufacturing, selling at a profit or exchanging. The PR also elaborates on the definition of stock in trade and reiterates that whether an item is stock in trade or otherwise would depend on the nature of the business, as an asset may be stock in trade for one business but capital asset to another.
- **Paragraph 5.2**
  The new PR explains the timing of the transfer of ownership of goods under various scenarios.
- **Paragraph 6.3**
  The new PR clarifies the acceptable and unacceptable methods of determining "market value" for stock in trade.
- **Paragraph 6.4(a)**
  The PR indicates that where stock in trade is valued at cost, the acquisition cost would include:

- Direct expenditure on the purchase of goods bought for resale and of materials and components used in the manufacture of finished goods;
- Other direct expenditure which can be identified specifically as having been incurred in acquiring stock or bringing it to its existing condition and location (e.g. customs duties, direct labour, transport and packaging); and
- Such part of any overhead expenditure as is properly attributable to the manufacture of the goods (e.g. rental of office, utilities charges, stationery and maintenance services)

The earlier PR outlines the expenditure to be included as part of the "acquisition cost" for manufacturing and retail businesses separately.

- **Paragraphs 7.2 and 7.3**
  The new PR explains the accounting standards applicable to stock in trade. However, as the basis of valuation of stock in trade for accounting purposes may not always be acceptable for income tax purposes, the new PR goes on to elaborate on the interaction between valuation for accounting purposes and tax purposes, as well as what should (or should not) be included in the valuation of stock in trade for tax purposes.
- **Paragraph 8.4**
  The new PR explains the methodology for the valuation of stock in trade of a ceased business in the hands of the purchaser of the stock. An example is also provided to demonstrate the treatment for both seller and purchaser of the stock, where the stock purchased does not constitute stock in trade of the purchaser.

Public Ruling No. 3/2020 – Tax Treatment of Stock in Trade Part II – Withdrawal of Stock

PR No. 3/2020: Tax Treatment of Stock in Trade Part II – Withdrawal of Stock, dated 3 June 2020, was issued to explain the tax treatment of withdrawal

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[1] *Resident companies incorporated in Malaysia which have paid-up capital in respect of ordinary shares of RM2.5 million or less at the beginning of the basis period and that satisfy other specified conditions; or an LLP with a total capital contribution of RM2.5 million or less*

of stock in trade in ascertaining the adjusted income of a business carried on by a person in Malaysia, pursuant to Sections 24(2) and 24(3) of the ITA. As mentioned before, the IRBM has also advised that PR No. 3/2020 and 3/2020 should be read together with PR No. 2/2020: Tax Treatment of Stock in Trade Part I – Valuation of Stock.

In addition, the PR also highlights the tax treatment pursuant to Section 4C of the ITA (which is effective YA 2014), where gains or profits from a business would include amounts receivable arising from stock in trade parted by an element of compulsion. The amount receivable would constitute gross income of the business in the year when the stock in trade was compulsorily acquired.

Public Ruling No. 4/2020 – Tax Treatment of Any Sum Received and a Debt Owing that arises in respect of Services to be Rendered

PR No. 4/2020: Tax Treatment of Any Sum Received and a Debt Owing that arises in respect of Services to be Rendered, dated 16 June 2020, was issued to explain that where in the relevant period:

a) Any sum received by a person, notwithstanding that no debt is owing to the person; or
b) A debt is owing to a person

that arises in respect of services to be rendered, is to be treated as gross income of the person from a business for the relevant period. The PR explains the legislative changes that were enacted via the Finance Act 2015 effective YA 2016, as follows:

- The amendment of Section 24(1)(b) of the ITA to stipulate that where a debt arises in a basis period in respect of services rendered or "to be rendered", the amount of the debt is to be treated as gross income for that basis period. In other words, as long as a debt has arisen in respect of services (even if such services have not yet been rendered), the amount of the debt shall be treated as gross business income. The PR reiterates that a debt will arise when the liability to pay exists, whether due, or due and payable.
- The introduction of Section 24(1A) of the ITA to stipulate that where any sum is received in the course of the carrying on of a business in respect of rendering services, the sum received shall be treated as gross income even if the debt has not yet arisen. This effectively means that advance receipts from such business activities will be brought to tax when received.
- The PR also clarifies that prior to YA 2016, advance payments would only be treated as gross income when the services have been rendered.
- The introduction of Section 34(7A) of the ITA to stipulate that where the advance sums received are subsequently refunded by the taxpayer, the taxpayer can claim a tax deduction on the refunded amounts in the basis period when the refund is made.

Guidelines on application for approval under Section 44(6) of the ITA in relation to funds established for the acquisition or construction of a building used as a house of worship

The IRBM has published on its website the following technical guidelines dated 8 June 2020, to provide guidance on the application for approval under Section 44(6) of the ITA in relation to funds established for the purpose of acquisition or construction of a building to be used as a house of worship:

- Garis Panduan Permohonan Untuk Kelulusan Ketua Pengarah Hasil Dalam Negeri Malaysia Di Bawah Subseksyen 44(6) Akta Cukai Pendapatan 1967 Bagi Tabung Pembelian Rumah Ibadat
- Garis Panduan Permohonan Untuk Kelulusan Ketua Pengarah Hasil Dalam Negeri Di Bawah Subseksyen 44(6) Akta Cukai Pendapatan 1967 Bagi Tabung Pembinaan Rumah Ibadat

These Guidelines replace the earlier guidance provided in relation to building funds for mosques, temples and churches outlined in the "Guidelines for application of approval under Subsection 44(6) of the ITA" issued in April 2005 (which have been replaced by the latest "Guidelines for approval of Director General of Inland Revenue under Subsection 44(6) of the ITA" dated 30 January 2020, which do not discuss applications related to houses of religious worship and schools).

Guidelines on application for approval under Section 44(6) of the Income Tax Act 1967 in relation to welfare and education funds, as well as religious worship management funds

The Inland Revenue Board of Malaysia (IRBM) has published on its website the following technical guidelines dated 15 July 2020:

- Garis Panduan Permohonan Untuk Kelulusan Ketua Pengarah Hasil Dalam Negeri Di Bawah Subseksyen 44(6) Akta Cukai Pendapatan 1967 Bagi Tabung Kebajikan Dan Pendidikan
- Garis Panduan Permohonan Untuk Kelulusan Ketua Pengarah Hasil Dalam Negeri Malaysia Di Bawah Subseksyen 44(6), Akta Cukai Pendapatan 1967 Bagi Tabung Pengurusan Rumah Ibadat

The Guidelines provide guidance on the application for approval under Section 44(6) of the Income Tax Act

1967 (ITA) in relation to welfare and education funds, as well as religious worship management funds.

Audit framework for compliance with conditions of approvals under Sections 44(6), 44(6B), 44(11D) and P.U.(A) 139/2020 of the Income Tax Act 1967

A new Audit Framework (Framework) dated 15 June 2020, titled "Rangka Kerja Audit Pematuhan Di Bawah Subseksyen 44(6), 44(6B), 44(11D) Dan P.U.(A) 139/2020", was issued to provide guidance on the IRBM's procedures and practices in conducting audits on institutions, organisations, funds, religious authorities, bodies, public universities or companies limited by guarantee that operate places of worship (hereafter referred to as "approved bodies"), pertaining to compliance with conditions that have been approved under Sections 44(6), 44(6B), 44(11D) or Income Tax (Exemption) Order 2020 [P.U.(A) 139/2020] of the Income Tax Act 1967 (ITA). The Framework also outlines the rights and responsibilities of the IRBM, the representatives of the approved bodies and tax agents during an audit.

Ratification of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

On 24 January 2018, in line with Malaysia's commitment to adopt internationally agreed tax standards and implement certain Base Erosion Profit Shifting (BEPS) Action Plans, Malaysia signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The signing ceremony took place at the Organisation for Economic Co-operation and Development (OECD)'s Headquarters in Paris. Briefly, the MLI would allow the Malaysian government to effectively implement the anti-BEPS tax treaty measures by modifying existing tax treaties in a synchronized and efficient manner, without the need to renegotiate each treaty separately.

To ratify the MLI under the Income Tax Act 1967 and Petroleum (Income Tax) Act 1967, the Double Taxation Relief (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) Order 2020 [P.U.(A) 224] was gazetted on 4 August 2020.

Guidelines on the imposition of penalties for failure to furnish tax returns

The IRBM has issued on its website an operational guidance document titled "Pengenaan Penalti Di Bawah Subseksyen 112(3) Akta Cukai Pendapatan 1967, Subseksyen 51(3) Akta Petroleum (Cukai Pendapatan) 1967 Dan Subseksyen 29(3) Akta Cukai Keuntungan Harta Tanah 1976", dated 13 August 2020. This new guidance document replaces GPHDN 5/2019 which was published on 16 October 2019. The new guidelines explain the penalties that will be imposed under Section 112(3) of the ITA, Section 51(3) of the Petroleum (Income Tax) Act 1967 (PITA) and Section 29(3) of the Real Property Gains Tax Act 1976 (RPGTA) when a taxpayer fails to furnish a tax return within the stipulated deadlines.

The key update is that the new guidelines also explain the additional penalties that can be imposed under Section 112(4) of the ITA, Section 51(4) of the PITA and Section 29(5) of the RPGTA. The new guidelines stipulate that in cases where a taxpayer furnishes a tax return after the stipulated deadline, and the actual amount of income tax payable exceeds the estimated assessment raised by the Director General under the respective legislations, an additional penalty can be imposed on the difference, at the following rates:

Legislation	Penalty imposed pursuant to	Penalty rate (%)
ITA	Section 112(4)	45
PITA	Section 51(4)	45
RPGTA	Section 29(5)	25

REAL PROPERTY GAINS TAX

Real property gains tax exemption on the disposal of residential property

Under PENJANA, the government proposed that real property gains tax (RPGT) exemption be given to Malaysian citizens on disposals of up to three units of residential property between 1 June 2020 and 31 December 2021. To legislate this, the Real Property

Gains Tax (Exemption) Order 2020 [P.U.(A) 218] was gazetted on 28 July 2020. The Exemption Order provides that an individual who is a citizen, is exempted from RPGT on the chargeable gain derived from the disposal of a residential property between 1 June 2020 and 31 December 2021.

The exemption will only apply if:

a) The number of residential properties disposed of has not exceeded three (3) units;
b) The residential property disposed of was not acquired between 1 June 2020 and 31 December 2021 by way of a:
   i) Transfer between spouses; or
   ii) Gift between spouses, parent and child, or grandparent and grandchild where the donor is a citizen; and
c) The SPA or instrument of transfer (in cases where there is no SPA) for the disposal of the residential property is executed between 1 June 2020 and 31 December 2021 and is stamped by 31 January 2022.

In cases where the disposer has disposed of more than three (3) residential properties, the disposer may elect for the exemption to apply to any three (3) properties. The elections are irrevocable.

STAMP DUTY

Stamp duty exemption on transfer of real property to a trustee of a Real Estate Investment Trust or a Property Trust Fund

Currently, an exemption from stamp duty is granted on the instrument of transfer of real property to a Real Estate Investment Trust (REIT) or Property Trust Fund (PTF) which is approved by the Securities Commission. This exemption is provided by way of the Stamp Duty (Exemption) (No. 4) Order 2004 [P.U. (A) 21]. This Order is effective from 13 September 2003.

The above-mentioned Order was amended via the Stamp Duty (Exemption) (No. 4) Order 2004) (Amendment) Order 2020 [P.U. (A) 154] which was gazetted on 19 May 2020. The following paragraph was introduced to replace Paragraph 2 of the earlier Order:

> "All instruments of transfer of real property to a trustee, of a REIT or a PTF approved by the Securities Commission Malaysia, are exempted from stamp duty."

The new paragraph now specifically refers to the "trustee of a REIT or a PTF", as the trustee would be the registered legal owner of the properties of the REIT or PTF. The Amendment Order is deemed to be effective retrospectively from 13 September 2003 (i.e. the effective date of the original Order).

Stamp duty exemption on the purchase of residential property under the National Home Ownership Campaign 2020 / 2021

Under the Short-term Economic Recovery Plan (PENJANA) announced on 5 June 2020, the government proposed to waive the stamp duty on the instruments of transfer and loan agreements for the purchase of residential property priced from RM300,001 to RM2.5 million as part of the Home Ownership Campaign (HOC), under which developers would also offer a discount of at least 10%. To legislate this proposal, the following Exemption Orders were gazetted on 28 July 2020:

- Stamp Duty (Exemption) (No. 3) Order 2020 [P.U.(A) 216]
  The Order provides that any loan agreement to finance the purchase of a residential property valued from RM300,001 to RM2.5 million under the HOC 2020 / 2021 will be exempted from stamp duty.
- Stamp Duty (Exemption) (No. 4) Order 2020 [P.U.(A) 217]
  The Order provides that all instruments of transfer for the purchase of a residential property valued from RM300,001 to RM2.5 million (based on market value) under the HOC 2020 / 2021 will be exempted from stamp duty in respect of up to RM1 million of the market value of the residential property. Stamp duty of 3% is to be charged on the remaining value of the residential property which is in excess of RM1 million.

The Exemption Orders will only apply if:

a) The sale and purchase agreement (SPA) for the purchase of the

residential property is between an individual and a property developer;
b) The purchase price in the SPA is a price after a discount of at least 10% from the original price offered by the property developer, except for a residential property which is subject to controlled pricing; and
c) The SPA is executed between 1 June 2020 and 31 May 2021 and is stamped at any branch of the IRB.

A HOC 2020 / 2021 Certification issued by the Real Estate and Housing Developers' Association (REHDA) Malaysia, Sabah Housing and Real Estate Developers Association (SHAREDA) or Sarawak Housing and Real Estate Developers' Associate (SHEDA) will need to be submitted by the individuals to the IRBM in order to obtain the exemptions. The Exemption Orders are effective 1 June 2020.

Guidelines on stamp duty on the instruments of transfer of shares that are not quoted on the Kuala Lumpur Stock Exchange

The IRBM has published on its website the following technical guidelines to provide guidance on the calculation of stamp duty on instruments of transfer of shares, in cases where the shares are not quoted on the Kuala Lumpur Stock Exchange (KLSE):

- Garis Panduan Mengenai Duti Setem Ke Atas Suratcara Pindah Milik Saham Yang Tidak Tersenarai Di Bursa Malaysia Berhad (2019 Guidelines)
- Garis Panduan Mengenai Duti Setem Ke Atas Suratcara Pindah Milik Saham Dalam Syarikat Yang Tidak Tersenarai Di Bursa Malaysia Berhad (2020 Guidelines)

The 2019 Guidelines replaced the earlier "Guidelines on the Stamping of Share Transfer Instruments for Shares that are not quoted on the Kuala Lumpur Stock Exchange" (2001 Guidelines) and were effective from 1 June 2019 until 29 February 2020. The 2020 Guidelines, which are effective from 1 March 2020, replace and cancel the 2019 Guidelines. Some of the key changes from the earlier Guidelines are as follow

- The basis for the valuation of the shares has been updated, including the removal of the following bases of valuation:
  a) Par value, in line with the provisions in the Companies Act 2016 (CA 2016)
  b) Price Earning Ratio (PER), as the Price Earning Multiple value (issued by the Capital Issues Committee (CIC)) which was used for the purpose of computing the PER is no longer valid
- Both the 2019 and 2020 Guidelines stipulate that during the application for adjudication, the audited accounts of the company must be submitted together with the Form of Transfer of Securities. However, companies that satisfy the qualifying criterion of not appointing an auditor in a financial year, pursuant to the Practice Directive No. 3/2017 (Qualifying Criteria for Audit Exemption for Certain Categories of Private Companies) issued by the Companies Commission of Malaysia (CCM), are exempted from this requirement.
- Both the 2019 and 2020 Guidelines reiterate that pursuant to Section 102 of the CA 2016, the company secretary is responsible for ensuring that all the particulars pertaining to the issuance and transfer of shares are entered into the register of members.

NTC 2020

LABUAN

Pure equity holding Labuan entity exempted from minimum employee number requirement

The Labuan Business Activity Tax (Exemption) Order 2020 [P.U.(A) 177], gazetted on 2 June 2020, legislates one of the clarifications. The Order provides that a pure equity holding Labuan entity is exempted from the application of Section 2B(1)(b)(i) of the Labuan Business Activity Tax Act 1990 (LBATA) - i.e. such an entity would not require full-time employees in

Labuan. The Order is deemed to be effective from 1 January 2019.

Management and control requirement for pure equity holding Labuan entities

The Labuan Investment Committee (LIC) has released several documents containing clarifications on the substance requirements for Labuan entities, including the updated list of substantial activity requirements as approved by the Minister of Finance (MoF). LIC Pronouncement 2-2019 stipulates that pure equity holding Labuan entities are required to comply with management and control in Labuan and minimum operating expenditure requirements.

The Labuan Financial Services Authority (LFSA) has issued a Directive on Management and Control Requirements for Labuan Entities that Undertake Pure Equity Holding Activities ("Directive"). The Directive is applicable to all Labuan entities which are incorporated, registered or established under the Labuan legislations and which undertake pure equity holding activities, and is effective from 10 August 2020. The Directive stipulates that such Labuan entities will be required to adhere to the following in order to comply with the management and control requirements:

a) Comply with Paragraph 5.5 of PR No. 5/2011 dated 16 May 2011;
b) Have their registered office in Labuan;
c) Appoint a Labuan trust company as their resident secretary in Labuan; and
d) Keep their accounting and business records (including minutes of meeting) in Labuan

INDIRECT TAX

CUSTOMS DUTIES

Customs Duties (Goods under the Agreement on Comprehensive Economic Partnership among the Government of the Member States of the ASEAN and Japan) Order 2020

The Customs Duties (Goods under the Agreement on Comprehensive Economic Partnership among the Government of the Member States of the ASEAN and Japan) Order 2020 [P.U.(A) 191] was gazetted on 29 June 2020 and came into operation on 1 July 2020. Subject to the provisions of the First Schedule, an import duty shall be levied on and paid by the importer, at the rate of import duty specified in column (5) of the Second Schedule, in respect of goods specified in the Second Schedule, originating from ASEAN Member States or Japan and imported into Malaysia .

In the case of goods subject to import duty rate "N.O." in column (5) of the Second Schedule to this Order, import duty shall be levied on such goods at the full rate as specified in column (5) of the First Schedule to the Customs Duties Order 2017.

Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-Operation among the Government of the Member States of the ASEAN and the Republic of Korea) Order 2020

The Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-Operation among the Government of the Member States of the ASEAN and the Republic of Korea) Order 2020 [P.U.(A) 202] was gazetted on 13 July 2020 and came into operation on 1 August 2020. Subject to the provisions of the First Schedule, an import duty shall be levied on and paid by the importer, at the rate of import duty specified in column (5) of the Second Schedule, in respect of goods specified in the Second Schedule, originating from ASEAN Member States or Korea and imported into Malaysia.

In the case of goods subject to import duty rate "N.O." in column (5) of the Second Schedule to this Order, an import duty shall be levied on such goods at the full rate as specified in column (5) of the First Schedule to the Customs Duties Order 2017.

In the case of goods which are subject to tariff rate quota as specified in column (5) of the Second Schedule, import duty shall be levied on such goods at the rate specified in column (4) of Appendix "A", subject to the quota determined by the agency specified in column (5) of Appendix "A".

SALES TAX

Sales Tax (Amendment) Regulations 2020

The Sales Tax (Amendment) Regulations 2020 [P.U.(A) 196] were gazetted on 30 June 2020 and came into operation on 1 July 2020. These Regulations provide for the amendment by insertion of Sections 26A – 26G, Part IXA under the Sales Tax Regulations 2018 [P.U.(A) 203/2018].

*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

SFSB V MENTERI KEWANGAN & ANOR (2020)
KUALA LUMPUR HIGH COURT

Landmark GST Ruling – Agricultural Land Is Exempted From GST

FACTS

On 11 September 2020, the High Court allowed the application for judicial review by SFSB to quash the Minister of Finance's (Minister) decision (which was made by the Director General of Customs (Director General) on his behalf). The Director General had erroneously determined that parts of the land that are intended to be used for commercial development by SFSB should be subjected to goods and services tax (GST).

SFSB is an established property development and investment holding company. In December 2016, SFSB had entered into a sale and purchase agreement to purchase five adjoining parcels of freehold land (the Land). The Land was being used for oil palm plantations and was zoned as agricultural land. In March 2017, SFSB made a rezoning application to convert the zoning of the Land from agricultural to mixed development. Although SFSB's rezoning application had been acknowledged, the rezoning application was subject to the fulfilment of certain conditions, including payment of the rezoning premium. The legal titles of the Land were transferred to SFSB in September 2017. At the material time, the Land had not been rezoned from agricultural to mixed development as SFSB had appealed on the conditions imposed. Further, the rezoning premium payable had not been made known to SFSB.

The vendor of the Land subsequently issued a letter to the Director General to seek a written confirmation that no GST is chargeable for the supply of the Land. In response, the Director General held that while the sale of the Land, which was estate land used for oil palm plantations was an exempt supply, if it is found that the Land is intended to be used for commercial purposes, the Land or parts of the Land used for commercial purposes is subject to GST. On this basis, the vendor had informed SFSB that the sale of the Land is subject to GST. Consequently, SFSB made an application pursuant to paragraph 2(2) of the Goods and Services Tax (Exempt Supply) Order 2014 (Exempt Supply Order) to the Minister.

However, the Minister referred SFSB's application to the Director General and requested the Director General to provide a response on behalf of the Minister. As a result, the Director General maintained that GST should be imposed on parts of the Land intended to be used for commercial purposes. Being aggrieved by the decision, SFSB applied for judicial review to set aside the said decision.

HIGH COURT'S ORAL DECISION

The High Court allowed SFSB's application for judicial review on the following grounds:

GST treatment of the Land

- Under item 1(1) of the Exempt Supply Order, a piece of land qualifies to be exempted from GST if the land is a land used (First Limb), or intended to be used and to the extent of it being used (Second Limb), or intended to be used (Third Limb), for residential, agricultural or general use purposes.
- By employing the word "or", it is clear that a supply of land qualifies as an exempt supply if either one of the above three limbs is fulfilled. In other words, if the Land falls under any one of the limbs specified, the Land would be an exempt supply.

- Based on the wording of the First Limb, a supply of land would qualify as an exempt supply if the land is used for agricultural purposes. The Land in the present matter was estate land used for oil palm plantations. On the premise that the existing usage of the Land was for agricultural purposes, the Land would be land used for agricultural purposes and thus qualifies as an exempt supply under the First Limb.
- By claiming that the Land is taxable based on SFSB's future intention to develop the Land for mixed development, the Minister and the Director General are essentially invoking the Second Limb and the Third Limb to impose tax on a subject that is already an exempt supply. This would defeat the intention of Parliament in empowering the Minister to gazette the Exempt Supply Order, which is to exempt a taxable supply and not to impose tax on a subject.

This decision further demonstrates that once a supply is already an exempt supply, the Minister and Director General are not allowed to wilfully disregard the exemption and look to a taxpayer's future intention to impose tax on a subject that is already an exempt supply. Such an interpretation of item 1(1) of the Exempt Supply Order is not only arbitrary, but it also raises a further question as to when this intention should be determined. Additionally, this case also serves as a reminder that a public authority has no jurisdiction to commit an error of law or act in a manner that is procedurally improper or in breach of the principles of natural justice.

Delegation of decision-making power

- In the event there is a dispute as to whether a supply falls within the ambit of the Exempt Supply Order, paragraph 2(2) of the Exempt Supply Order provides that such question shall be decided by the Minister whose decision shall be final.
- Paragraph 2(2) of the Exempt Supply Order is clear and unambiguous. Without any express provision to empower the Minister's delegation, the Minister must exercise that power personally and the Minister is not empowered to delegate such authority to the Director General.

COMMENTARY

This recent decision dealt with a novel point of law in a GST case as to whether a supply of land used for agricultural purposes qualifies as an exempt supply under item 1(1) of the Exempt Supply Order. In making its decision, the High Court expressed the view that it is essential to identify the status of the land at the time of supply. In the present matter, the time of supply is at the time when the Land is transferred or disposed of. At the material time, the Land was being used for oil palm plantations and was zoned as agricultural land. Accordingly, the Land is an exempt supply.

This decision further demonstrates that once a supply is already an exempt supply, the Minister and Director General are not allowed to wilfully disregard the exemption and look to a taxpayer's future intention to impose tax on a subject that is already an exempt supply. Such an interpretation of item 1(1) of the Exempt Supply Order is not only arbitrary, but it also raises a further question as to when this intention should be determined

determined. Additionally, this case also serves as a reminder that a public authority has no jurisdiction to commit an error of law or act in a manner that is procedurally improper or in breach of the principles of natural justice. Such an error or procedural impropriety would render the decision susceptible to judicial review.

TAXPAYER'S COUNSEL:

DATUK D.P. NABAN, S. SARAVANA KUMAR & NG KAR NGAI, (ROSLI DAHLAN SARAVANA PARTNERSHIP (RDS))

CASE 2

HHD SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2020) KUALA LUMPUR HIGH COURT

Judicial Review: Leave & Stay To Challenge The IRBM

On 27 August 2020, the High Court allowed a leave application to commence judicial review proceedings against the decision of the Director General of Inland Revenue (DGIR). Despite the DGIR attempting to rely on the recent Bintulu Lumber Development case, the High Court was persuaded that there were exceptional circumstances for the taxpayer to challenge the DGIR's assessments by way of judicial review.

BRIEF FACTS

The taxpayer, a property developer based in Johor, is mainly involved in property development business. The taxpayer had entered into agreements with the Johor State government, whereby the taxpayer must sell the Bumiputera lots to Bumiputera purchasers. However, in the event the taxpayer is unable to sell the Bumiputera lots to

NTC 2020

Bumiputera purchasers, the Johor State government will allow the taxpayer to release the Bumiputera lots. The release is subject to a cash contribution to the Johor State government. In the present matter, the taxpayer made the cash contribution to the Johor State government to obtain the release and deducted the cash contribution as a tax-deductible expense.

Consequent to a tax audit, the DGIR disagreed with the taxpayer and claimed that the Contribution amount is capital in nature. The DGIR disregarded the taxpayer's explanation that the cash contribution is a business expense payment under Section 33(1) of the Income Tax Act 1967 (ITA) which in return allows the taxpayer to sell the unsold Bumiputera lots to non-Bumiputera buyers. Alternatively, the taxpayer submitted that the cash contribution is deductible under Section 44(6) of the ITA as it is cash payment to a State government.

Consequent to a tax audit, the DGIR disagreed with the taxpayer and claimed that the Contribution amount is capital in nature. The DGIR disregarded the taxpayer's explanation that the cash contribution is a business expense payment under Section 33(1) of the Income Tax Act 1967 (ITA) which in return allows the taxpayer to sell the unsold Bumiputera lots to non-Bumiputera buyers. Alternatively, the taxpayer submitted that the cash contribution is deductible under Section 44(6) of the ITA as it is cash payment to a State government. The DGIR rejected the taxpayer's explanation and proceeded to raise tax assessments for a large sum of money against the taxpayer.

Being aggrieved by the DGIR's decision, the taxpayer filed an application for judicial review to challenge the legality of the disputed tax assessments. The taxpayer also applied for a stay order against the payment of the disputed taxes which were in the millions of ringgits.

CONTENTIONS

Taxpayer's counsel successfully submitted on behalf of the taxpayer that:

- Judicial review is available notwithstanding the availability of domestic remedy if there are exceptional circumstances. In the present matter, the taxpayer argued that the tax assessments raised by the DGIR is unlawful because the DGIR is bound by the Prima Nova case which ruled in favour of the taxpayer where it was held that cash contribution to obtain the release of the Bumiputera lots quota is a deductible expense.
- Even if the taxpayer had exhausted the domestic remedy under Section 99(1) of the ITA, the Prima Nova case is still binding on the DGIR. The fact remains that by not following the decision in the Prima Nova case, the DGIR had acted illegally in raising the disputed tax assessments.
- Judicial review is the quicker, more convenient route as compared to the domestic remedy available.

Meanwhile, the DGIR's counsel argued that due to the existence of domestic remedy, the taxpayer's judicial review application is frivolous and vexatious. It was also submitted that the taxpayer has not shown that there are exceptional circumstances in the present matter.

In delivering the decision immediately after the hearing, the High Court, held that judicial review is the appropriate forum to determine whether the cash contribution can be deducted under Section 33(1) or Section 44(6) of the ITA. On this basis, the High Court granted leave to the taxpayer to commence judicial review proceedings to challenge the legality of the DGIR's decision in raising the disputed tax assessments. The High Court also granted interim stay against the payment of the disputed taxes.

HIGH COURT'S ORAL DECISION

In delivering the decision immediately after the hearing, the High Court, held that judicial review is the appropriate forum to determine whether the cash contribution can be deducted under Section 33(1) or Section 44(6) of the ITA. On this basis, the High Court granted leave to the taxpayer to commence judicial review proceedings to challenge the legality of the DGIR's decision in raising the disputed tax assessments. The High Court also granted interim stay against the payment of the disputed taxes.

COMMENTARY

The Federal Court's ruling in the Bintulu Lumber Development case does not change the fact that in exceptional circumstances, a taxpayer in entitled to seek recourse by way of judicial review instead of going through the Special Commissioners of Income Tax route. Additionally, the High Court is also empowered to grant a stay order even in a tax matter.

TAXPAYER'S COUNSEL:

S. SARAVANA KUMAR & NUR HANINA MOHD AZHAM (ROSLI DAHLAN SARAVANA PARTNERSHIP (RDS))

Ng Kar Ngai & Nur Hanina Mohd Azham *are associates with Rosli Dahlan Saravana Partnership*

COMPUTATION OF CAPITAL ALLOWANCES (II)

THE LAST ARTICLE DISCUSSED THE FIRST THREE CONDITIONS FOR CLAIMING CAPITAL AND INDUSTRIAL BUILDING ALLOWANCES. THE REMAINING TWO CONDITIONS ARE DELIBERATED ON IN THIS ARTICLE.

Siva Subramanian Nair

4TH CONDITION

The claimant must have a business source. Candidates will remember from the article in *Tax Nasional Vol.13 No.1 2001 Q1* that business is defined in the Income Tax Act 1967 *as any profession, vocation & trade and any manufacture, adventure or concern in the nature of trade but excludes employment*.

Note that business is a category of income and the type of entity undertaking the activity is irrelevant. Certain misconceptions are prevalent amongst candidates relating to this fact. Firstly, many associate business with companies and hold the view that individuals are ineligible to claim capital allowances. Individuals undertaking a business such as sole-proprietors or partners in a partnership will qualify to claim capital allowances on the assets used in that business. Therefore a doctor operating his own clinic can claim capital allowances on his car, computer etc. whereas if he leaves his practice and is employed by a medical centre as a medical officer then he cannot claim capital allowances anymore.

On the reverse side, not all companies qualify to claim capital allowances such as unlisted investment holding company, which are absolutely devoid of a business source of income.

Another point is that the sub-sections in Section 4 of the Income Tax Act 1967 are not mutually exclusive as established by the Privy Council in ***American Leaf Blending Company Sdn. Bhd. v DGIR [(1979) 1 MLJ1***]. Therefore even sources of income consisting of rental, interest etc. can be treated as a business source under certain circumstances. A tax manager employed in an accounting firm will be receiving employment income but once he is promoted to be partner in the firm his income will be from a business source, although the work done by him might be exactly the same.

5TH CONDITION

The plant & machinery must be used in the business of the claimant. A word of caution; many candidates only state this condition and omit the 4th condition thinking that it becomes redundant when the 5th condition is stated when answering a question on eligibility for claiming capital allowances. This is NOT the view of some examiners and I have seen cases where the candidate is denied the mark allocated for the 4th condition!

This condition also gives rise to certain interesting conditions. Advanced Taxation 1 candidates will know that for leasing transactions (not deemed to be a sale transaction) the lessor will claim capital allowances. Many candidates frequently argue that the asset is used by the lessee and therefore, the lessor should be prohibited from claiming the capital allowances on the leased asset. What they forget is that the activity of leasing out an asset itself is a business venture and therefore, the lessor is using the asset in his business.

Another interesting point is that the asset need not be specifically operated by the claimant who has incurred qualifying expenditure and is the owner of the asset, but can be used by another person as long as it is for the business of the claimant. This was established in ***KPHDN v OKA Concrete Industries Sdn Bhd (2015)MSTC 30-091***

FACTS OF THE CASE

The claim by the taxpayer for capital allowance on the capital expenditure incurred to acquire mixer trucks and batching plant were disallowed by the appellant on the premise that those items were used by the respondent through its subsidiary, OKA Engineering Trading ("OET") and thus not physically operated by the taxpayer. OET operates the batching

The principal activity of the taxpayer consists of the manufacture and sale of pre-cast concrete products. The products are made by pouring ready-mixed, concrete into moulds and curing them at the factory site. OET manufactures the ready- mix concrete in the batching plant according to a set recipe and then delivered to the worksite by mixer trucks. Both the batching plant and the mixer trucks are owned by the taxpayer Therefore the taxpayer argued that the batching plant and mixer trucks are part and parcel of production process of the taxpayer and that OET is merely the subcontractor of the taxpayer involved in the operation of the batching plant. In essence they are labour contractors for whose labour a consideration is paid.

Another contention for disallowing the claim for capital allowances by the Revenue was that a portion of the ready-mixed concrete produced was sold to third parties by OET. However, the taxpayer reiterated that mixed concrete will only be sold to third parties if there is any excess after their production needs are met. Further they explained that the sale of ready-mixed concrete to third parties was merely to allow the batching plant to be operated at an optimal level of production for efficiency purpose. Higher production output would reduce the cost per unit of production as the fixed production overhead would be spread over higher volume company (units) of production output. Consequently, total average cost of production would be lowered.

DECISION OF THE COURTS

The High Court, in dismissing the appeal by the Revenue, held that:

1. the appellant failed to note that OET were merely labour contractors whose labour, a consideration was paid. The labour contractors used all the respondent's plant and machinery including mixer trucks and batching plant in the respondent's factory for the preparation of reading mix concrete. OET's labour was at all material times under the respondent's instruction and supervision.
2. The law only required mixer trucks and batching plant to be used for the purposes of the respondent's business. The law did not require the respondent to physically operate the mixer trucks and batching plant.
3. As long as the respondent had incurred capital expenditure on the mixer trucks and batching plant, remained the owner of the items and used the items for the purposes of its business of manufacturing pre-cast concrete, the respondent was entitled to claim capital allowance.

A similar scenario arose in **DECEMBER 2012 TAX IV QUESTION 3** as detailed below.

As long as the respondent had incurred capital expenditure on the mixer trucks and batching plant, remained the owner of the items and used the items for the purposes of its business of manufacturing pre-cast concrete, the respondent was entitled to claim capital allowance.

Ascon Sdn Bhd (Ascon) is in the business of manufacturing and selling pre-cast concrete products. It has 4 factories located in Shah Alam, Senai, Kuala Terengganu and Ipoh.

Ascon Sdn Bhd incurred capital expenditure on mixer trucks and batching plant and claimed capital on these allowances. The mixer trucks and batching plant were located in Ascon's factory but were operated by Boxxmat Sdn Bhd (Boxxmat), a subsidiary company of Ascon which supplied the required labour. Ascon paid Boxxmat a monthly fee for these services. Boxxmat's labour was at all times under Ascon's instruction and supervision. The products were made in accordance with Ascon Sdn Bhd's specifications.

Following an audit, the Revenue disallowed the capital allowance claimed on the basis that Ascon did not physically operate or use the mixer trucks and batching plant on their own.

Required:
Advise Carmen, the finance manager, on the following:

(a) Whether the capital expenditure incurred on the mixer trucks and batching plant qualify for capital allowances under the Income Tax Act 1967? (10 marks)

(b) Whether the Revenue has the authority to dictate for tax purposes how Ascon should conduct its business, seeing how Ascon employed the services of Boxxmat for better management purposes? (4 marks)

SOLUTION

For Part (a) the answer is basically what is stated as the decision of the court in the OAK Concrete case.

For Part (b)

1. *The Revenue has no authority to dictate how a taxpayer should conduct its business* ***(O Sdn Bhd v KPHDN, Tweddle v Federal Commissioner of Taxation (1942) 180 CLR 1).***
2. *The Revenue failed to look at the whole transaction holistically, particularly on the purpose why such an arrangement between Ascon and Boxxmat was carried out. For income tax purposes, it is necessary to look at a business as a whole set of operations directed towards producing income* ***(W Nevill & Co Ltd v FCT [1937] 56 CLR 290).***

There is an exception to this rule, whereby sometimes industrial building allowances can be claimed against adjusted income from a rental source, but I'll save that discussion for a later article.

Now we shall look at how this "eligibility issue" has been examined in other CTIM past year questions. Numerous questions have been raised on this topic, some of which are detailed below.

DECEMBER 2006 TAX IV

QUESTION 6

(a) Briefly state the conditions that have to be fulfilled for a claim of capital allowances in respect of a business. (8 marks)

The second part, although examining on entitlement to claim capital allowances, is actually anchored on definition of plant

(b) James Lee, a lawyer commenced legal practice in January 2004. After commencement of his legal practice, Lee acquired a full set of reference books amounting to RM40,000. To optimise the working space in the office Lee purchased movable office partitions amounting to RM12,000. He also installed a permanent false ceiling to the office amounting to RM8,000.

Required:
Advise James Lee, by reference to case law, as to the capital allowances he is entitled to claim under the ITA 1967 and any statutory provision (12 marks)

SOLUTION

(a) Candidates should be able to state briefly the conditions as follows :

1. *The claimant must be carrying on a business during the basis period.*
2. *The capital expenditure on the qualifying asset must have been incurred.*
3. *The claimant must be the owner of the asset at the end of the relevant basis period.*
4. *The asset must be in use for the purpose of the relevant business. Candidates should be familiar with legal and beneficial ownership.*

(b)

- *No deduction allowed for capital expenditure*
- *Schedule 3 of the ITA provides*

capital allowances for plant and machinery
- *Plant and machinery not defined in the ITA*

Candidates are expected to display an understanding of what is plant

- *Legal reference books (plant)*
  - ***Munby v Furlong [50 TC 491]***
  - *Matter of construction*
  - *Books do represent apparatus used by a barrister for carrying on his profession be confined to things, which are used physical but could extend to the intellectual storehouse*
- *Movable office partitions (plant)*
  - ***Jarrold v John Good & Sons Ltd 40 TC 681***
  - *Provided the flexibility of accommodation*
  - *Commercial necessity*
  - *Not relevant that only played passive role*
- *Permanent false ceiling (not plant)*
  - ***Hampton v Forte Autogrill Ltd 53 TC 691***
  - *Permanent ceiling was part of the premises*
  - *Not necessary for the functioning of any apparatus used for purpose of the business*

The adventure to seek relevant questions meanders through **DECEMBER 2007 TAX II QUESTION 4A,** where 2 marks were awarded to "[l]ist the conditions required to qualify for a claim of annual allowances.", 4 marks allocated in **JUNE 2013 BUSINESS TAXATION QUESTION 3** (C) for **"[l]ist[ing] the conditions that must be fulfilled before a claim for capital allowance can be made by a company;"** and finally harbours in **JUNE 2018 BUSINESS TAXATION QUESTION 3** requiring candidates to **"state the conditions that must be fulfilled by a person to be entitled to capital allowances and industrial building allowance"** for 4 marks.

That concludes our discussion on eligibility to claim capital and industrial building allowances.

Wishing all candidates attempting the December CTIM examinations all the best and may the Good Lord be your constant companion throughout the paper. Wishing all readers a Merry Christmas & a Happy New Year.

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

FURTHER READING

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

December 2020 Examination Timetable

SUBJECTS	DETAILS	
	Date	Time
Company & Business Law	14 Dec 2020	9 a.m. – 12.15 p.m.
Personal Taxation	14 Dec 2020	2 p.m. – 5.15 p.m.
Revenue Law	15 Dec 2020	9 a.m. – 12.15 p.m.
Business Taxation	15 Dec 2020	2 p.m. – 5.15 p.m.
Advanced Taxation 1	16 Dec 2020	9 a.m. – 12.15 p.m.
Financial Accounting	16 Dec 2020	2 p.m. – 5.15 p.m.
Advanced Taxation 2	17 Dec 2020	9 a.m. – 12.15 p.m.
Economics	17 Dec 2020	2 p.m.. – 5.15 p.m.

DISCLAIMER : The above timetable is correct and accurate at the time of printing. CTIM reserves the right to re-schedule the examination session if there is any disruption due to the COVID-19 pandemic.

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: OCTOBER– DECEMBER 2020

Month /Event	Details				Registration Fee (RM) (excluding SST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
OCTOBER 2020								
Workshop: Latest Tax Updates and Case laws	2 Oct	9 a.m. - 5 p.m.	Penang	Yong Mei Sim	350	450	500	8 WS/057
Workshop: Taxation of Property Developers and Contractors	8 Oct	9 a.m. - 5 p.m.	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/048
Tax Audit & Investigations	13 Oct	10 a.m. - 12 p.m.	Webinar	Soh Lian Seng & Stefanie Low	90	-	120	2 WE/004
e-Commerce/Digital Service Tax	16 Oct	10 a.m. - 12 p.m.	Webinar	Alan Chung, Chong Mun Yew & Thenesh Kannaa	90	-	120	2 WE/005
Workshop: Real Property Gains Tax (RPGT)	20 Oct	9 a.m. - 5 p.m	Kuala Lumpur	Ho Yi Hui	400	500	600	8 WS/055
Tax Agent License & MyCukai – Get Your Questions Answered	22 Oct	10 a.m. - 12 p.m.	Webinar	Zen Chow, MOF & LHDNM	90	-	120	2 WE/006
Workshop: Malaysia Property Taxes – Practical Issues and Insights	23 Oct	9 a.m. - 5 p.m.	Penang	Yong Mei Sim	350	450	500	8 WS/060
Workshop: Capital Allowances Maximisation	26 Oct	9 a.m. - 5 p.m.	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/049
Workshop: Corporate Tax Planning (Re-Run Session)	27 Oct	9 a.m. - 5 p.m.	Kuala Lumpur	Harvindar Singh	400	500	600	8 WS/056
Public Holiday ***Maulidur Rasul: 29 October)***								
NOVEMBER 2020								
Place of Doing Business – S.12	3 Nov	10 a.m. – 12 p.m.	Webinar	Chong Mun Yew & Steve Chia	90	-	120	2 WE/007
Workshop: Taxation Opportunities in the Economic Recovery Plan (PENJANA)	9 Nov	9 a.m. - 5 p.m.	Kuala Lumpur	Vincent Josef	400	500	600	8 WS/050
2021 Post-Budget Seminar	19 Nov	9 a.m. - 5 p.m.	Kuala Lumpur	MoF, LHDNM & Others	350	350	600	10 BS/001
Workshop: Taxation Benefits in Specialised Industries	25 Nov	9 a.m. - 5 p.m.	Kuala Lumpur	Vincent Josef	400	500	600	8 WS/051
2021 Post-Budget Seminar	26 Nov	9.30 a.m. – 4.30p.m.	Webinar	Various Speakers	280	-	480	7 BS/002
2021 Post-Budget Seminar	27 Nov	9.30 a.m. – 4.30 p.m.	Webinar	Various Speakers	280	-	480	7 BS/003
2021 Post-Budget Seminar	30 Nov	9.30 a.m. – 4.30 p.m.	Webinar	Various Speakers	280	-	480	7 BS/004
Public Holiday ***(Deepavali: 14 November)***								
DECEMBER 2020								
2021 Post-Budget Seminar	3 Dec	9 a.m. - 5 p.m.	Kuala Lumpur	LHDNM & Others	350	350	600	10 BS/005
Workshop: Latest Public Rulings and Selected Guidelines	8 Dec	9 a.m. - 5 p.m.	Kuala Lumpur	Vincent Josef	400	500	600	8 WS/061
Workshop: Latest Public Rulings and Selected Guidelines	11 Dec	9 a.m. - 5 p.m.	Melaka	Vincent Josef	350	450	500	8 WS/062
Workshop: The Current Development of Digital Economy and Implications on Tax, Economy & Business Enterprises	14 Dec	9 a.m. - 5 p.m.	Kuala Lumpur	Dr. Tan Thai Soon	400	500	600	8 WS/063
Public Holiday ***(Christmas: 25 December)***								

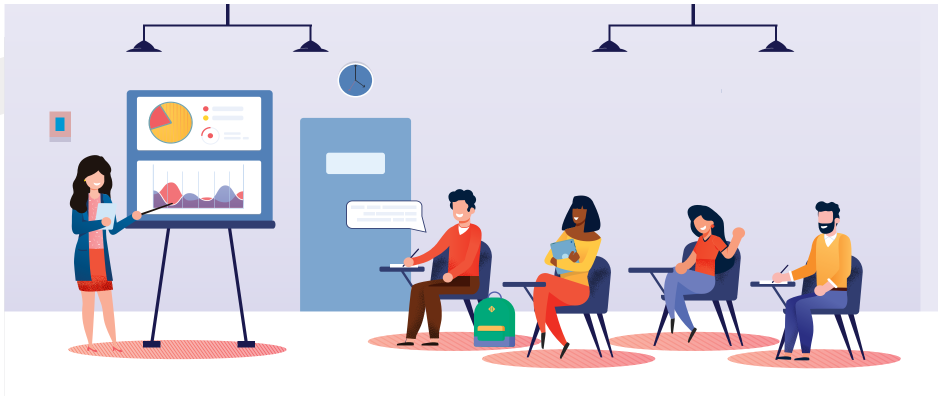
DISCLAIMER : The above information is correct and accurate at the time of printing. CTIM reserves the right to change the speaker (s)/date (s), venue and/or cancel the events if there is insufficient number of participants. A minimum of 3 days notice will be given.

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

CHARTERED TAX INSTITUTE OF MALAYSIA

SAVE THE DATE

2021 Budget Seminar



PHYSICAL / FACE-TO-FACE

DATE: 19 November 2020
3 December 2020
Venue: Kuala Lumpur Convention Centre

10 CPD POINTS

WEBINAR

DATE: 26 November 2020
27 November 2020
30 November 2020

7 CPD POINTS

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

CONTACT DETAILS

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