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HIGHLIGHTS OF THE NATIONAL GST CONFERENCE 2016

The National GST Conference 2016 was held from 31 May to 1 June 2016 at the Berjaya Times Square Hotel, Kuala Lumpur.

MPERS: Impact on Tax Computation

Kenny Heights Development – A Tale of Two Agreements

The Italian Advance Pricing Agreement Procedure

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

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INVITATION TO WRITE

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

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

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From the President's Desk

ARULJOTHI KANAGARETNAM

STABILISATION

The implementation of the 2016 Budget Recalibration at the end of January 2016 seems to be meeting its objective of stabilising and ensuring strong growth in the national economy to protect and safeguard the welfare and wellbeing of the people. This can be seen in terms of the Kuala Lumpur Composite Index (KLCI) having strong support in the range of 1,600 in spite of the volatility in the index as a result of what is happening in other parts of the world. It has also been helped in no small way by the Malaysian Ringgit (MYR) sustaining at around MYR4.00 to the US dollar; the price of crude oil hovering in the range of around USD50 per barrel; and the price of crude palm oil maintaining within the range of RM2,000 per tonne. Having said that, several sectors of our economy, particularly the oil and gas sector, continue to face challenges externally. Thankfully, although business may be slower than the corresponding period last year, demand for taxation services continues to be stable and sustainable moving forward.

The NGC 2016 brought together various public and private sector experts who spoke on contemporary and relevant issues arising from GST that the taxpaying public need to be aware of and familiar with depending on their respective circumstances.

Since the second half of March 2016, the Institute has been at the forefront of key happenings as follows:-

National GST Conference 2016

The National GST Conference (NGC) 2016 with the theme of **Ensuring Fiscal Sustainability with GST** was jointly organised by the Royal Malaysian Customs Department (RMCD) and the Institute and held over two days from 31 May 2016 to 1 June 2016 at the Berjaya Times Square Hotel, Kuala Lumpur. It was attended by more than 1,100 participants compared to last year's NGC attendance of 900 participants. The 25 CPD points for attending the NGC 2016 provided an avenue for participants to accumulate CPD points to renew their approved GST tax agent licence. I would like to thank the RMCD, NGC Committee, Secretariat, participants, moderators, speakers, panel members and all those involved for their support and contribution in making this event a major success.

The NGC 2016 brought together various public and private sector experts who spoke on contemporary and relevant issues arising from GST that the taxpaying public need to be aware of and familiar with depending on their respective circumstances. Among the areas which were addressed were where we are right now in the GST implementation and where do we go from here, what are the GST issues that concern our fellow taxpayers at large, what are the GST decisions and experiences in other countries which could be relevant to us, how do we appeal against a GST assessment and how does GST interact with Income Tax and Customs. By being better informed and up to date, it is hoped that compliance with GST requirements will be enhanced so as to contribute toward the fiscal sustainability of our country moving forward.

Renewal of approved GST tax agent licence granted by MoF

The first batch of approved GST tax agent licence renewal applications to the MoF begun in March 2016. The Institute has been made aware of issues faced by members in the licence renewal application, particularly applications which have been rejected on the grounds of insufficient CPD points. The Institute shares the concerns of members and brought up the issues with the Deputy Finance Minister I who indicated that he was supportive of the Institute's members at a meeting together with the MoF and the RMCD in April 2016. Following from the meeting, the Institute is engaging with the authorities on the issues.

Improving awareness and understanding of Transfer Pricing

The tax authorities take a very

serious view of transfer pricing (TP) given that Malaysia is largely reliant on corporate income tax. In this respect, the tax authorities have been following the development of the TP issues closely in order to overcome the existing gaps in the tax law, maintain the tax base and reduce leakages in the collection. As such, it is important that members equip themselves on TP matters such as arm's length principles, TP methodology and documentation, audits & appeals, intra-group services, financing etc. To facilitate awareness and understanding of the various aspects of TP, the Institute through the CTIM TP Technical Committee conducted a series of TP seminars in June 2016 at the CTIM office which received overwhelming response.

CPD Events

Members would have been informed by mail and e-Circular regarding the National Tax Conference (NTC) 2016 which will be held at the Kuala Lumpur Convention Centre from 9 to 10 August 2016. Do register early to avoid disappointment. For those who are coming from outstation, I hope you have made your travel and accommodation arrangements. I look forward to seeing you there.

Do also peruse the schedule of upcoming CPD events on Direct Tax and GST from July 2016 to September 2016 at the back of this issue of *Tax Guardian* and on the Institute's website to plan your CPD accordingly. I would like to thank the Institute's CPD Committee and Secretariat for their hard work in putting these events together.

Membership

I am pleased to inform you that the CTIM membership has grown to almost 3,400 members from about 3,260 members a year ago. This is in line with the annual increase in members after taking into consideration cessation of membership. I welcome this as a healthy indication that the Institute continues to be relevant to its members as the premier body for tax professionals.

It is pleasing to note that the Institute's 2015 financials continue to be healthy with profit before tax of RM0.97 million and revenue of RM5.16 million in spite of the challenging economic environment in 2015.

I would like to thank all members, the Council, Committees, Working Groups and the Secretariat for their continuous support of the Institute and efforts to move the tax profession forward.

Editor'sNote

K. SANDRA SEGARAN

MOVING ON WITH GST

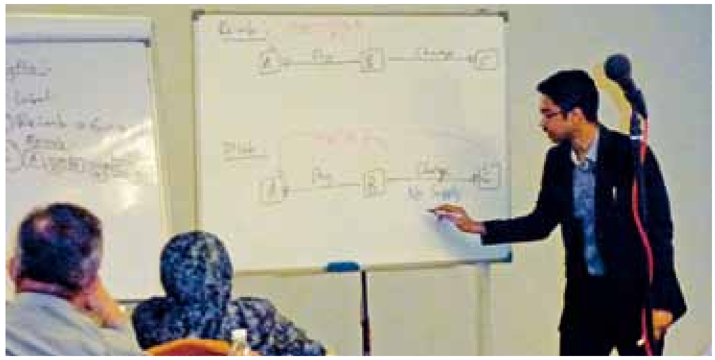
This issue carries a detailed report of the two-day National GST Conference 2016 which was held from 31 May to 1 June 2016. For those who attended, it must have been an eventful experience as they would have benefited from a comprehensive coverage of local and international issues from top officials of the RMCD, including the Director General himself and key officers who worked relentlessly on the successful implementation since 1 April 2015, senior practitioners and overseas speakers. The successful conference which attracted over 1,000 participants was themed, **Ensuring Fiscal Sustainability with GST.** The conference broached aspects on nagging hot issues, direction of the authorities, news roundup of the eventful 14 months since the implementation of GST in Malaysia and regional developments of audits and compliance issues. This detailed coverage will most certainly benefit those who did not get to attend this signature event.

Thenesh Kannaa completes the second part on "Income Tax Implications of GST- The Way Forward". The first part of this article published in the last issue addressed the income tax deductions and allowances in relation to Goods and Services Tax ("GST") borne by businesses. This second part addresses income tax issues arising from two specific GST events, namely late registrations and GST audits. The author acknowledges the unsettled interpretation issues and hopes there will be some written guidance forthcoming from the authorities. The interaction between GST and income tax beckons stakeholders to dissect the issues in greater depth.

Kenneth Yong Voon Ken and Lee Fook Koon share their analysis on the Malaysian Private Entity Reporting Standards (MPERS) impact on tax computations. These standards took effect from 1 January 2016 and this timely article will be welcomed by members who are largely tax practitioners. MPERS affects companies not scoped under the MFRS (Malaysian Financial Reporting Standards) such as many small and medium companies (SMCs). MPERS changes the way accounting information is measured, and can potentially affect the tax computation process – thus, bringing MPERS within the interest of finance personnel, business managers and tax preparers. The authors have also summarised their analysis in a table format. Though the authors modestly claim that the analysis is not exhaustive but it is certainly commendable as it addresses the core aspects.

The anti-avoidance topic has again attracted attention. In this issue, Sudharsanan Thillainathan and Tania Edward reflect on the lessons that the ground breaking judgement in the AQQ case by the Singapore Court of Appeal which has for the first time decided on the general anti-avoidance rule (GAAR) in the Singapore ITA. This article discusses some important lessons that the AQQ case has for the analysis of the Malaysian general anti-avoidance rule housed in Section 140 of the ITA. Any arrangement that is contrived and artificially structured for a tax benefit and without significant commercial benefits is bound to fail. The authors advise, "in entering a transaction, taxpayers should ensure that they maintain proper record-keeping and that there is sufficient documentary evidence to substantiate the commercial rationale behind a tax structure i.e. that the tax structure was carried out for bona fide commercial reasons".

Our regular contributor Dr. Nakha Ratnam analyses the recent Court of Appeal decision in the Kenny Heights Development decision on the subject of conditional agreements under the Real Property Gains Tax Act 1967. On the international front, two foreign writers share the Italian experience on advance pricing agreements. The usefulness and benefits arising from an APA has increased the climate of certainty and confidence for multinational corporations in Italy. In addition, the regular columns on updates and learning curve will prove to be a good read for members.



CPD EVENTS

The following workshops were held by CTIM in the 2nd quarter of 2016:

- GST: Practical Issues & Recent Developments
- Tax Incentives – an overview of incentives available & eligibility criteria and conditions
- Reinvestment Allowances - Understanding Schedule 7A ITA 1967
- Latest Updates on Withholding Tax & Double Taxation Agreements in 2016

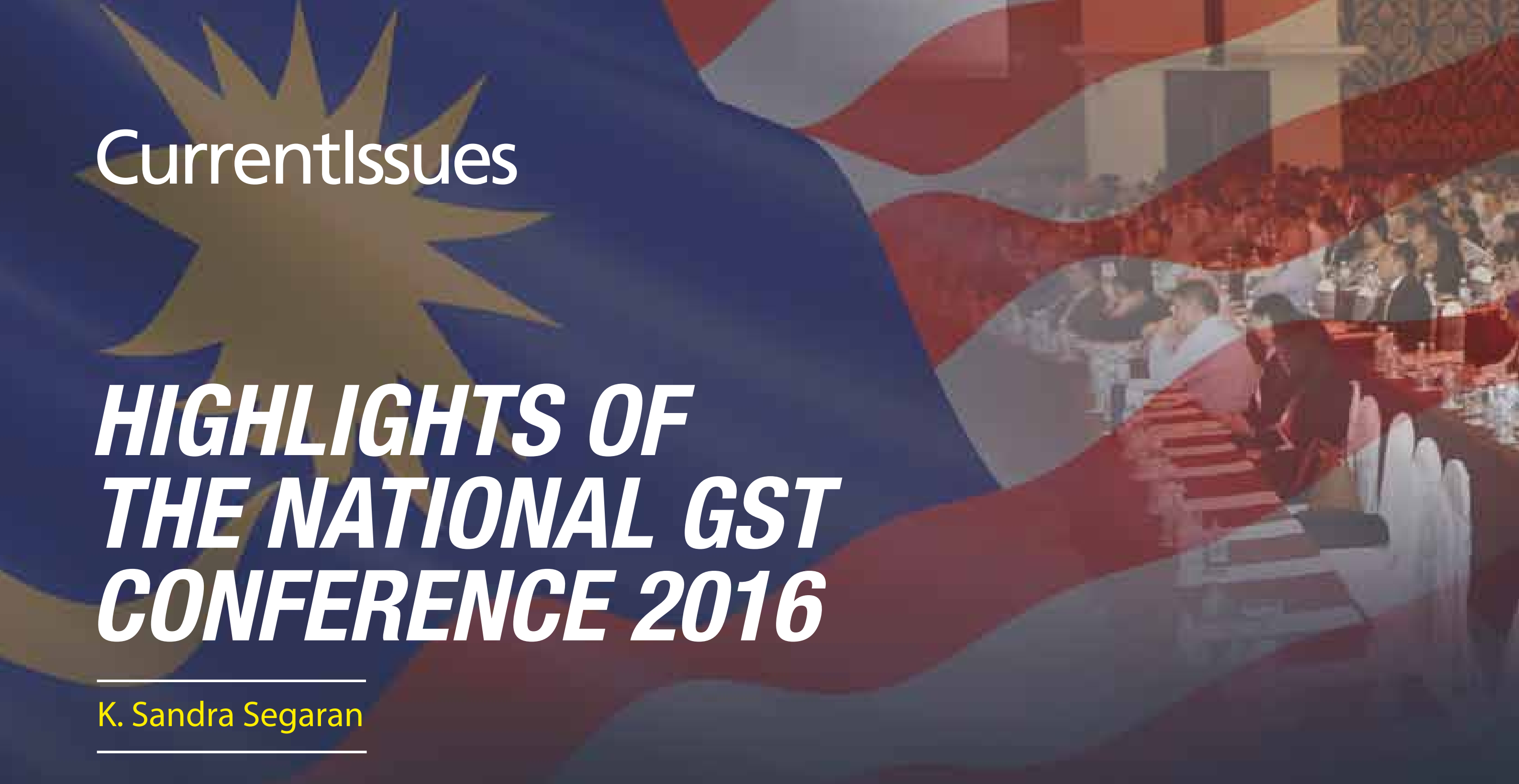
Mr. Thenesh Kannaa presented a series of workshops on "GST: Practical Issues & Recent Developments" at major cities where CTIM branches are located. This workshop focused on the rules and practices that are constantly evolving. Implementing GST and submitting GST returns without knowing the latest rules and practices may result in costly penalties. This course also addressed the recent developments on various practical issues. Due to overwhelming responses, a re-run session was conducted on 25 June 2016 at the Hotel Jen Penang.

The workshop on "Tax Incentives – an overview of incentives available & eligibility criteria and conditions" was conducted at the KLCC on 19 April 2016. Farah Rosley explained the conditions that supported businesses and the importance for the taxpayers to be aware of the types of tax incentives, the conditions and the qualifying criteria. She advised the participants to stay updated and to keep abreast on the available tax incentives and to understand what these incentives entails, especially the qualifying criteria as well as how the incentives will impact and benefit the business.

Mr. Kularaj Kulathungam conducted a workshop on "Reinvestment Allowances – Understanding Schedule 7A ITA 1967" at several venues around the country. This one day training provided an in-depth examination of the legal provisions and practical applications in respect of Reinvestment Allowance. This training also addressed the common pitfalls that taxpayers need to avoid, in minimising potential risks associated with this incentive.

The workshop on "Latest Updates on Withholding Tax & Double Taxation Agreements in 2016" was conducted by Mr. Sivaram Nagappan at several venues in Penang, Kuala Lumpur & Johor Bahru. The speaker shared the latest implications in 2016 arising from payments that were subjected to withholding tax and how to mitigate them while being tax compliant. The effectiveness of using double taxation agreement (DTA) in cross border assignments and its implications in respect to withholding tax, corporate tax and individual tax obligations were also discussed in the event.

The Chairman and several members of the Technical Committee – Transfer Pricing (TC-TP) conducted a series of Transfer Pricing (TP) seminars at the introductory, intermediate and advance levels on 9 June 2016, 16 June 2016 and 23 June 2016 respectively. The TP seminars were conducted at the CTIM Training Room and addressed topics such as TP documentation, TP methodologies, Managing TP controversy, Intragroup Services, Intangible Property, Intragroup Financing and Cost Contribution Arrangement. Each seminar was well attended by more than fifty participants.



HIGHLIGHTS OF THE NATIONAL GST CONFERENCE 2016

K. Sandra Segaran

THE NATIONAL GST CONFERENCE 2016 was held from 31 May to 1 June 2016 at the Berjaya Times Square Hotel, Kuala Lumpur. The second edition of this signature conference was again jointly organised by CTIM and the Royal Malaysian Customs Department (RMCD). The overwhelming response attracted over 1,000 participants with registration closing well in advance. The conference, themed, **Ensuring Fiscal Sustainability with GST**, broached aspects on nagging hot issues, direction of the authorities, news roundup of the eventful year since implementation of the GST in Malaysia and regional developments of audits and compliance issues.

WELCOMING ADDRESS BY CTIM PRESIDENT, MR. ARULJOTHI KANAGARATNAM

The President acknowledged that the overwhelming support received by this conference is ample evidence of the close working relationship and training collaboration with the RMCD which aids GST practitioners to meet their continued professional development and licensing requirements. He thanked the speakers, moderators, sponsors, supporting bodies, the Senior Officers Association of RMCD, media partners, joint organising committee and participants who together made this signature annual event a huge success. He singled out the RMCD for its untiring efforts to educate and inform the public and constant consultation with stakeholders in the evolving landscape of GST legislation and practice. He hoped that the theme of the conference will bring together the authorities, practitioners and the private sector to deliberate critical issues to ensure the smooth implementation of GST. He thanked the guest of honour, the Honourable Minister of Finance II for his gracious presence and wished everyone a fruitful conference.

OPENING ADDRESS BY YBHG DATO' SRI KHAZALI HJ AHMAD

YBhg Dato' Sri Khazali welcomed and thanked the guest of honour, YB Dato' Seri Haji Ahmad Husni Mohd Hanadzlah, Minister of Finance II and the Deputy Finance Minister, Dato' Chua Tee Yong for gracing the occasion and acknowledged the contribution of the joint organising committee, the President of the Senior Officers Association of RMCD, speakers and moderators, sponsors, media and the participants. He traced the economic background and imperatives to the introduction of the GST, "as part of our economic transformation programme, we have introduced economic reforms designed to transform Malaysia to a high income economy by 2020". In wanting to build a developed economy, "it is important that we build a more resilient economy. We must not take our growth and development for granted in an increasingly interconnected world; to do so, we must continue to pursue fiscal consolidation and fiscal sustainability. We must reduce our Budget deficit, spend prudently and invest wisely in our future and we must make our businesses more competitive". In Malaysia, only one out of ten, pay personal income taxes. On the overdependence on the oil and gas sector, a finite resource, "Malaysia cannot sustain its growth on current revenue. It is imperative that we expand and diversify our tax base and implement a more effective and equitable tax system that will allow us to secure our future. The Sales and Services Tax are no longer fit for a rapidly growing economy". GST

is a strategic reform in modernising our tax system, to make it more efficient, effective and business friendly. He went on to emphasise the merits and benefits of the GST and traced the long journey to introduce this replacement tax for the sales and services taxes, "GST is a modern tax system which will overcome weaknesses in the existing system. GST will also make our businesses more competitive in the global marketplace, as it is not imposed on exported goods and services. Taxes will be applied fairly amongst all businesses, hence making it a more just tax. GST is not a new phenomenon. It has been a long journey of about 30 years to get to where we are today. More than 160 countries have preceded us and they can't be wrong. In ASEAN, only Brunei and Myanmar have yet to introduce GST." On the way the government went about implementing it, he pointed out the special effort and careful measures to obtain the buy-in of businesses and the people, "Malaysia's 6% rate is one of the lowest in the world. The government has taken a number of steps to ensure GST is properly implemented. RM100 million was allocated to conduct a nationwide awareness and training programme. That includes an incentive package for a smooth transition of RM150 million for the SMEs. This includes the purchase of software and hardware for GST implementation". He believed that, "GST is the right tax, implemented at the right time for a stronger and more sustainable economy. This new tax will help to drive our national development and secure a prosperous future for our nation.

KEYNOTE ADDRESS BY GUEST OF HONOUR, YB DATO' SERI HAJI AHMAD HUSNI MOHD HANADZLAH, MINISTER OF FINANCE II

The then Honourable Minister acknowledged that this was one of the biggest tax conferences with 1,100 participants and thanked the organisers for the invitation once again. The address was an interesting and enlightening segment interspersed with

video clips on interdependence of the various communities and segments of society, filled with anecdotes and moral lessons to convey the message that – we are one. He thanked CTIM and its members, RMCD, companies and the people of this country for their role in meeting GST registration requirements and the government's revenue collection aspirations. As of 20 May 2016, 412,000 companies and entities have registered for GST. With the uncertainty in the global economy, our wise actions today will benefit posterity as much as we are enjoying the good efforts of our past generations.

He emphasised an innovation culture and ethics that will propel us as a nation to the fore like several other emerging countries like Korea and global brand names like Samsung and Apple which are useful success models to emulate. He highlighted towering personalities like Steve Jobs whose contributions in revolutionising ICT products has invaded every household and the daily lives of individuals and urged the warrior like personality traits to be emulated as a role model.

The role of taxation in the nation's infrastructure development and social wellbeing cannot be denied and it will continue to play a big role. He hoped the people will continue to enhance capacity, emphasising the role of education, societal, family and personal values like harmony, progressiveness and sacrifice that will contribute to a successful and caring society. The impactful speech and presentation was an excellent motivational prelude to the two-day conference.

TOPIC 1 PROGRESS ON GST IMPLEMENTATION & THE FUTURE FOCUS OF RMCD

Moderator

- Dr. Jeyapalan Kasipillai, Council Member, Chartered Tax Institute of Malaysia

Speaker

- YBhg Dato' Sri Khazali Hj Ahmad, Director General of Customs, RMCD

Panel Members

- Ms. Khodijah Abdullah, Undersecretary, Tax Division, Ministry of Finance Malaysia
- YBhg Datuk Wira Dr. Hj Ameer Ali Mydin, Managing Director, Mydin Mohamed Holdings Bhd

After introducing the speaker and panel members, Dr. Jeyapalan recollected the Prime Minister's words on how GST has been our saviour which cushioned the drop in direct tax collections. He also shared the findings of a recent research (supported by a research grant) on "Concealment of Income" and highlighted several sectors that exhibited a high propensity to conceal income.

PRESENTATION BY YBHG DATO' SRI KHAZALI HJ AHMAD

Before commencing his presentation, Dato' Sri Khazali introduced and acknowledged the contributions of two great personalities – they were Datuk Kamariah Hussain, the retired Chairman of the Tax Review Panel of the Ministry of Finance and Datuk Zaleha Hamzah, Customs advisor prior to the implementation of GST.

In recapping the 'sacrifice' principle emphasised by the Minister of Finance II, he recounted and quoted a newspaper columnist, Awang Selamat's positive comments on 2

April 2016, following the one year anniversary of the introduction of GST. Awang Selamat acknowledged the achievements of the RMCD and acceptance by the Rakyat amidst many challenges and objections from various quarters; the consumer price index that rose by only 2.1% against a prediction of a higher inflation rate; the success in obtaining a high rate of registration by businesses and the revenue collection of RM27.01 billion (which is higher than initial forecasts) in the period April to December 2015. Those encouraging comments and appreciation from the *Utusan Malaysia* columnist was a testimony of the sacrifice of Customs officers and the government's political will.

He displayed Compliance Statistics on GST Registration outlining a total of 412,715 registrants as at 23 May 2016, of which 94%, i.e., 389,198 were from Small and Medium Enterprises (SMEs). The figures based on sectors and types of entities were highlighted with the Wholesale and Retail sector comprising of 39% (144,154).

He observed that upon review of the returns, the registrants were well informed and complied satisfactorily as compliance rate was over 95%. Internationally this percentage of compliance is very high. For instance, in UK, in the first year of implementation, the level of compliance was less than 80%. He acknowledged the role of practitioners and advisers in this respect.

AUTO Assessment

Where a taxable person fails to register or fails to furnish returns or do not furnish returns within time, the RMCD will evoke powers under Section 43 of the Goods and Services Tax Act 2014 (the Act) and estimate the income based on best judgement and tax accordingly. This initiative has already commenced in 2015 and will be an ongoing exercise by the RMCD.

Special Refunds

The due date for special refund applications was 30 September 2015. Out of 2,388 applications received as at 25 May 2016, a total of 1,825 (76.4%) have been dealt with, i.e, 1,244 (52%) were approved while 581 (24.3%) were rejected with 563 (23.6%) cases under review. Though the government allocated almost a billion Ringgit for refunds, only less than RM500 million have been utilised. As the reasons were unclear, he invited the panellists to discuss the issue. In order to bring a closure to this issue, the remaining cases will be resolved as soon as possible.

Tourist Refund Scheme

As at 25 May 2016, a total of RM62.48 million on 441,915 refunds were made under this scheme mainly at airport terminals. Of the total amount paid, almost RM44 million involved non-cash payments representing 170,220 cases, given that claims of more than RM300 will not be paid in cash. Global Blue, the agent appointed by the RMCD to handle the refunds will need to appoint more shops that will be eligible under this scheme.

Refunds

Dato' Sri Khazali exhibited monthly statistics on the number of refund cases in 2015 made within 14 days, a duration that is provided in the Law; within 30 days and in excess of 30 days. From April 2015, the number of refunds within 14 days showed an increasing trend starting with 28% of the applications in April 2015 and peaking to 73% in September 2015 and faltering to about 59% in October 2015 in what the DG attributed to:

- Inflated refund claims
- Underreporting sales
- Fictitious traders
- And domestic sales disguised as exports based on fake export documents

In the first six months, the RMCD was cautious in processing refunds. One false claim involving an amount of RM144 million was discovered where the perpetrator will be charged in court, to send a strong message to future fraudsters. If an online claim is made, the RMCD's hope is to refund within 14 days. The average time taken in other countries to refund is 56 days. There will be no amendment to this law although the 14-day target is not met in all cases. The RMCD will take extra efforts to ensure that the promise is fulfilled.

Issuance of Tax Invoice

The *Peraduan Jom Minta Resit* contest was launched on 31 Mar 2016 for the period 1 April 2016 to 30 November 2016.

The overall objective is to create awareness for consumers to insist on receipts. Due to lack of participation, the first prize-giving scheduled for 30 May 2016 has been deferred. There are several businesses that do not issue receipts automatically. In our march to be a developed nation, our consumers must also behave like those in developed countries and inculcate a culture of a right to demand receipts upon spending and help eliminate businesses that collude with consumers.

THE SUCCESS OF GST

On the whole, the implementation of GST, despite many challenges was a great success and it was a pleasant surprise that no major issues arose. Among the factors that contributed to this success are:

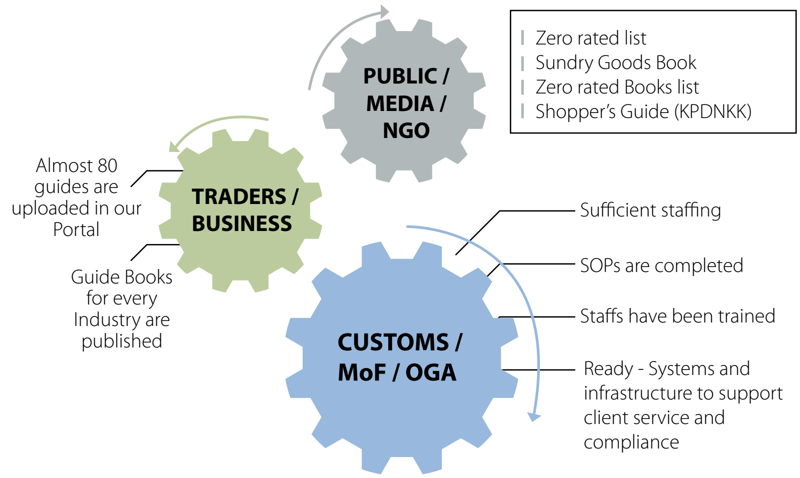
Hand-holding programme for GST registrants

Activities Includes

- Transition from SST to GST
- In-depth training on GST requirements
- Cash flow impact on business
- Information on facilities under GST
- Application for various facilities
- Online training for GST return filing
- Price impact changes
- System requirements and GST Accounting software and tax codes

Target Group

Informed compliance as opposed to forced compliance



Efforts taken in GST Implementation

- Help desk/Call centres – which were stormed with calls in the first month which the RMCD managed to answer more than 90 % of calls, with added staff
- Technical panel unit
- Effective communication and close cooperation with stake-holders
- Clear guides and standard operating procedures were issued
- Awareness programme –the general public were educated through outreach programmes and also through electronic and print media.

Complaints and protests

There was a civil protest by an angry crowd at the Customs premises in Kelana Jaya on 23 March 2015 without untoward incidents. On the first anniversary of the implementation, there was another protest from a group that demanded to know how the revenue collected was spent. Again, Customs officers handled the situation without any hitches. There were no significant first-day issues on 1 April 2015. Senior RMCD officers were send to the ground throughout the country to be on standby to assist and explain to the public and businesses. Instances of price increase cannot be attributed to GST alone and in several instances the price increase was unjustified as the problem relates to unscrupulous traders who took the opportunity to profit unethically. There was an instance where a plate of *nasi kandar* increased from RM8 to RM12 when all ingredients are zero rated. Though the forecast revenue collection was RM23 billion, the actual collection exceeded RM27 billion in the first year for nine months as of December 2015.

The Way Forward

In reminding businesses, Dato' Sri Khazali stated "businesses must get the GST reporting right and top management should address GST issues in their business operations and processes, enhance and involve workforce, be it procurement, human resources, sales or supply-chain personnel".

Evolvement of GST Laws

Commenting on the GST laws "since that GST implementation is relatively new, GST laws will evolve and involve not only the RMCD, but the tribunal, taxpayers and the courts". For instance in a recent change, the Act was amended to include administrative penalties that was initially envisaged but not included.

He reminded those businesses who have RM250,000 and lower turnover who want to exit the system, to approach the RMCD as the system is such that once a GST registrant, one must remain in the system for two years.

PRESENTATION BY PUAN KHODIJAH ABDULLAH

After 14 months of the successful implementation of GST, Puan Khodijah acknowledged that Malaysia has received commendation from international organisations like the OECD. It has been implemented after careful thought and deliberation over two decades. She observed that it is bound to benefit three sectors - for the government, it provides a stable and progressive revenue stream that leads to fiscal sustainability and bring us to a higher economic achievement in the future; for businesses, it leads to price efficiency where traders will benefit from input tax claims incurred in the business as compared to the inefficiency in the previous Sales and

Services Tax regime. As for consumers, it is not burdensome due to the long list of zero rated items. In describing our GST system, she said "our GST is progressive and to some extend generous as well". Internationally it has been acclaimed that though we started late but managed to introduce it at a rather low rate of only 6%. It has a positive impact for the government and the traders due to the input tax mechanism. As for consumers, less spending means less spent on GST.

The late Professor Oliver Oldman, an international tax expert in Harvard once remarked, "GST is the Cinderella of Taxation as it is able to pluck leakages effectively". The tax base under the GST is wider and the system leads to fiscal sustainability. It improves productivity and efficiency for the RMCD while for businesses it does not create a cash flow issue with an effective refund mechanism of overpaid taxes. To ensure the continued success of this system, it would require the full cooperation of businesses to build capacity and file claims in time with proper documentation so that the RMCD can make refunds as promised.

With the *mesra perniagaan* hand holding efforts to teach consumers and businesses to understand the intricacies of the law, and the RMCD's capacity building, the government has left no stone unturned. She further exhorted that, "it is a win-win situation, as with increased revenue collection, and good governance, and prudent spending, the wealth created will help the country grow and share the prosperity with all". This, she said, "can be achieved by spending in areas and sectors that we should be spending - for development, growth and prosperity".

The government is also addressing the cost-of-living issue by involving all the agencies concerned and is also open to input and information from any quarter.

In recapping, the moderator Dr. Jeyapalan pointed out two international developments, ie., in the case of New Zealand, there were 21 amending Acts in five years of implementation of GST in 1986 and also noted that South Africa has an Exempt list which is longer than any other country.

PRESENTATION BY DATUK WIRA DR. HJ AMEER ALI MYDIN

He summed up several key points. The implementation date was not a doomsday as it passed as just another day, though there were many upset customers who claimed to be knowledgeable on the scope of GST. He congratulated the government, that "this is the best thing that the government ever did". The Mydin Group made a media statement on 1 April 2015 to explain that price increases had nothing to do with GST.

As a businessman, he highlighted that he was aware of some of the measures undertaken by businesses to avoid tax.

He acknowledged that as businesses became large, the issue of maintaining more than one set of accounts dissipates and there is a greater level of compliance.

He highlighted several issues on import duty on items like carpets, where the industry was raided by the RMCD, plastic and porcelain and even made a drastic suggestion to remove import tax and replace it with GST. In international dealings he highlighted instances where some disclosure forms were obtainable for a price!

While in the past there was a general reluctance to talk to Customs, but after GST audits, the staff found out that the Customs officers were very helpful and also realised the shortcomings and identified the serious flaws in the internal systems. He urged the RMCD to rethink the imposition of penalties when the non-compliance is in relation to systems error while agreeing that the RMCD can be hard on deliberate non-compliance. He argued that due consideration must be given to operational issues, as "prices change every day and with over 1,000 products, human error is possible even though ICT systems are used".

Response from panelists

On the suggestion to dispense with Customs forms for imports, Dato' Sri Khazali explained that it is needed to establish the country of origin and meet the requirements of the Free Trade Agreement (FTA) between countries so that importers from certain countries can enjoy preferential rates. As for Excise duty, it is only imposed on a narrow range of goods such as imported cars, liquor, cigarettes, cards and mahjong items. As for import duties on certain goods, it is to reflect that goods produced domestically are given a fair treatment. As we are still relying on import duties as a source of revenue and trading in a borderless world to remain competitive, it will be a hard call to abolish it. Comparatively with a population of 30 million, our consumption base is still very small.

Question and Answer

Mr.Kwan from Sarawak: As Sarawak is 20 years behind Peninsular Malaysia (in his opinion), he proposed that whatever GST collected from Sarawak be channeled back to Sarawak. In reply, Puan Khodijah said that the total collection by the RMCD goes to a consolidated fund and funds are channeled to the various states through a budgeting process based on need and requirement of the states in the Federation.

Mr. Thenesh enquired on how the government viewed the role of GST tax agents in the tax ecosystem and suggested Singapore's GST Assisted Compliance Assurance Programme(ACAP) model be emulated. Puan Khodijah responded that "our GST audits indicate that compliance is still not very high and full compliance is not a reality as taxpayers' level of understanding may not be in-depth and the government recognises that there is still a need for GST services by GST agents". She acknowledged that tax agents do add value to the tax ecosystem to improve compliance. However she noted that the government is not ready to adopt the co-funding mechanism in Singapore as yet, but assured that the role of tax agents is being recognised.

Dato' Sri Khazali added that the government has licensed 2,000 GST agents and reckoned that we would need another 3,000 GST agents that the RMCD is prepared to train. In addition, as our system is only over a year old, we need to appreciate the issues in all sectors and stakeholders, the overall business landscape and the 412,000 GST registrants. He assured that the government will engage the professional bodies on the way forward.

Mr. Zen, a CTIM member enquired, as there was assurance from the authorities that in the initial stage of GST implementation, the first two years will be treated as an educational phase, will non-compliance be handled with a softer approach and penalties not imposed? Will it be possible to extend the education phase and perhaps issue a warning for first time offenders? He also requested that the RMCD highlight common mistakes that can be tolerated and those that cannot be tolerated.

Dato' Sri Khazali replied that while it is true that the initial phase is a learning phase, the enforcement of the Law will proceed on a balanced approach but when there is a blatant disregard of the Law, taxpayers must face the full brunt of enforecement. For instance, there are businesses that are yet to register but charge GST. Some have been charged in court. The RMCD's response will depend on a case-to-case basis and it is not true to say no action will be taken on non-compliance in the first two years.

TOPIC 2 DISCUSSION ON GST HOT TOPICS (EG. DISBURSEMENTS / REMBURSEMENTS, PROPERTY, IMPORT/EXPORT SERVICES – INTERACTION BETWEEEN CUSTOMS & GST RULES)

Moderator

- Mr. SM Thanneermalai, Council Member, CTIM

Speaker

- Dato' Subromaniam Tholasy, Deputy Director General, RMCD

Panel Members

- Mr. David Lai, Council Member, CTIM
- Mr. Raja Kumaran, Executive Director, Pricewaterhouse Coopers Taxation Services Sdn Bhd
- Mr. Tan Eng Yew, Executive Director, Deloitte Tax Services Sdn Bhd

The moderator, commented that the RMCD has set the pace and responded speedily on the issues faced and the ongoing changes are dynamic. Prompted by the moderator to rate the performance of the RMCD thus far, by a show of hands, the majority of the audience rated the performance of the RMCD as Average, on a scale of Poor to Above Average.

PRESENTATION BY DATO' SUBROMANIAM THOLASY, DEPUTY DIRECTOR GENERAL, RMCD

Dato' Subromaniam recounted the experience of other countries in the world on the implementation of GST and compared with that of Malaysia's. He revealed that the OECD team that visited Malaysia in December 2014 commended the government's effort and detailed preparation for a seamless introduction and implementation of GST as something that was unprecedented even when compared to some developed economies. He was modestly content with the rating of the audience and hoped that with the government's continued effort to handle GST issues, the rating will improve in the future. He recounted that this is perhaps the

biggest fiscal reform the country has ever undertaken, moving from a narrow system to a broad based consumption tax which was a culmination of the effort of many dedicated stalwarts in the last 10 years.

Engagement with stakeholders

In the run-up to the implementation there was connectivity with the various stakeholders. He recounted the experience of other countries and stated that seven countries withdrew the implementation of GST/VAT in less than six months after implementation. Even countries like Singapore had problems, systems wise but we were able to do much better, having learnt from the experience of others. He acknowledged the efforts of various stakeholders, including the private sector and the professional bodies as well, for the successful implementation.

Approval for Special Refunds – Section 190

Only 2,384 companies out of the 70,000 businesses claimed this refund, out of which that applied, 1,185 were approved and 499 were rejected and 700 applications more were under process. Several reasons were attributed for the low number of applications and the rejection and he invited comments from panellists and the audience.

He highlighted the following issues that were currently faced:

Issue No. 1: Price control and Anti-Profiteering Act (Amendment) 2014

The objective to prevent any price increase was noble, but many traders took advantage of the situation. Many raised the margin even before the three months before the implementation date as the provision is meant to apply three months before and 15 months after the GST implementation date. He acknowledged that this is an experience in enforcement that we should learn for the future so that this is not taken advantage of in the future.

Issue No. 2: GST Guides

Improvements are being made and where new or revised guides are issued, the changes are indicated.

Issue No. 3: Amendment of GST Returns

In the past (in the last 14 months) any number of amendments could be made. Henceforth only one amendment is allowed after the due date and has to be submitted not later than the last day of the submission related to the subsequent taxable period. For instance, an amended return for the month of January, must be made before the submission deadline for the February return, i.e, not later than 31 March. Beyond that date, approval is needed through the system. However where the amendment involves additional output tax, or reduction in input tax, the system will enable the amendment to be done. In other cases, a revision can still be made but there is an approval process through the intervention of the RMCD. He pointed out that there was one instance where a taxpayer made 12 amendments to the same return. As such the new process is to avoid such issues.

Issue No. 4: Penalty for late payment

From 1 January 2016, penalty for late payment is imposed on the amount of tax due and payable and not on the unpaid amount. This interpretation was arrived at after seeking the opinion of the AG's office. For instance, if 50% of the tax is remitted, the penalty imposed is on the total amount of tax due and payable, ie, on the 100% and not on the remaining 50%. However if there is a genuine error, the RMCD is willing to consider the mitigating circumstances and remit the penalty. Unless the law is amended, this interpretation will apply.

Issue No. 5: Disbursement vs Reimbursement

This highly technical issue is best approached by looking first at the definition of 'disbursement'. Where the conditions for disbursement are not met, than it is likely to be a reimbursement. Both are recoverable amounts. For disbursement, if you incur an expense on behalf of the client, which the client authorised, the client knows that the supply is made, the exact amount is claimed from the client, and it is clearly an additional amount to the supply, then it is distinctly a disbursement. If you do not meet any of these criteria, then it is likely to be a reimbursement.

Issue No. 6: Individual Supply of Commercial Property

There has been a lot of queries on this which even attracted media attention. There is a rationale and reason as to why the DG Decision No. 4 of 2014 (with amendments on 28 October 2015) was issued which is also to clarify the numerous queries and complaints on the need to register. This was done after doing a survey and research on this subject.

Any individual who is not a GST registered person is treated as carrying out a business, if at any one time he owns:

(a) More than two commercial properties
(b) More than one acre of commercial land; OR
(c) Commercial property or commercial land worth more than RM2 million at market prices.

This decision also takes into consideration a registered business which may be losing out to an unregistered individual. Spouses and children are treated separately. This is not an arbitrary decision as reference was also made to the case decision of *David Wickens Properties Ltd (1982) VTD 1284* and the practice in several other countries. This case established the principle - where property was concerned, the infrequency of supplies did not necessarily prevent an activity from being treated as a business. There may be issues that arise but since GST is still at its infant stage, the rules

can perhaps be reviewed after two years. Those who take a different interpretation can always resort to the GST Tribunal/ Courts.

Issue No. 7: Importation underdeclared

Where there is underdeclaration, one cannot claim input tax and where there is overdeclaration, there is no provision in the current law to address this. The Customs Act will be amended in due course to provide for amended returns which is lacking in the current legislation. Even then where the RMCD discovers underdeclaration in an audit, and GST is paid, the taxpayer cannot claim input tax. Only in exceptional cases involving errors it will be considered.

Issue No. 8: Exports

Under Section 56(3), goods moved from one LMW to another LMW is given relief to cushion the cash flow impact. However there is no relief when there is a supply to a LMW to an overseas company, but the delivery is made locally, unless the Ministry of Finance reviews the position in future.

Issue No.9: Warranty

Where goods under warranty are exported and reimported after repairs, there is no GST unless there are new parts added which have to be declared and GST accounted.

Issue No 10: GST Expenditure and Income Tax Act 1967 – New paragraph 39(1)(o) and (p)

GST paid or to be paid as input tax is not allowed a deduction if a taxpayer:

- fails to register though liable to register under the GST Act.
- is entitled to input tax credit.

Output tax paid or to be paid is not allowed a deduction if borne by the person registered or by a person who is liable to be registered. The RMCD is also training IRB officers and join audits by Customs and IRB is in the pipeline.

Comments by Panellists:

Special refund

Mr. David Lai opined that under Section 190 of the GST Act, special refund is an entitlement under the Law if the conditions are met. In rejecting refunds the RMCD ought to be mindful of the Law. If refund is denied, companies may have to bear additional cost.

Mr. Raja Kumaran noted that the Price Control and Anti-Profiteering Act does not come within the purview of the RMCD and additional conditions should not be imposed beyond that provided in Section 190. On the 1,185 cases that were approved, he raised doubts as to whether the full amount applied for were refunded as he illustrated an example of a case where the RMCD approved RM80,000 (repaid over four instalments) out of the RM120,000 applied for and no reasons were given. Mr. Tan equated the additional considerations as akin to shifting the goalposts after the game has commenced especially when there is a specific provision in the Act.

Dato' Subromaniam further clarified that in several instances the price increase was unjustified. The government's reason to refund was a concession that should not be abused. Business did not live up to the expectation of the government but increased prices up by 20% to 30%. Mr. Raja raised the question, "shouldn't those who raised prices be punished by the Ministry of Domestic Trade under the Price Control and Anti-Profiteering Act?" Dato' Subromaniam expressed confidence that if the issue goes to Court, the RMCD will be able to rely on Section 191 of the GST Act as those found misleading or misrepresenting will not be entitled for the special refund. He also confirmed that the applications will be processed by September 2016 and if necessary, it may be extended to December 2016.

Mr. Bhupinder Singh from the audience raised concerns that where there is a wide range of products with and without sales tax embedded, it is cumbersome to segregate them and sell the same goods at different prices. He hoped the authorities will understand the realities in business and show genuine understanding of the predicament faced by businesses and the system constraints. He also remarked that it is highly unlikely for the special refund applicants to make false claims. Dato' Subromaniam responded with an illustration to show that GST is not a cost to the businesses; while the cost price and margin remains the same for the trader and there is compliance to the Price Control and Anti-Profiteering Act, and all things being equal, failed to see the need for a price increase unless there are other factors impacting it.

Penalties

The panellists were generally dissatisfied with the way penalty was computed intimating that is should be only based on the short payment of GST and the current approach is a departure from international practice. Mr. Raja suggested the government consider introducing a *de minimis* rule practiced in other countries. He also raised the issue of whether penalties will be imposed where revised returns are summited with the errors corrected in the next period. Mr. David Lai suggested that it be made clear if the penalties were imposed for late payments or incorrect returns as they were distinct issues that are addressed differently. On the issue of relaxation on penalties to be imposed in the two-year education phase, Dato' Subromaniam confirmed that there was no such assurance from the RMCD and requested businesses to be aware. Dato' Subromaniam took note of the suggestions and also highlighted the remission power of the Director General to remit penalties which will be viewed on a case by case basis, especially when they do not involve fraudulent issues.

Supply of commercial property by individuals

Mr. Raja pointed out that the definition of 'business' under Section 3 is very clear and the decision in the Morrison's case established the precedent that the taxpayer must be in business before charging tax and also highlighted the definition in Canada which required regular activity to be termed as a 'business' and suggested an amendment be introduced in the Law to bring this within the purview of the Law. Dato' Subromaniam pointed out that in addition to the business test, a registrant must also fulfill the second test on - threshold, for purposes of registration. There are jurisdictions that tax such supplies and the rationale can be properly attributed to equity and tax neutrality and to date no one has challenged the RMCD and brought the case to the Courts. He pointed out an instance where a foreign embassy which is obviously not engaged in business, wanted a confirmation if there was a 'supply' when a sale was made to another business. The moderator noted that though the GST principles can be different but it should not be a big departure from the general law of the country.

Registration issues

Mr. Tan raised the issue of, "though businesses are helping the government to collect tax, individuals who want to register find it cumbersome". He gave the instance of three trustees owning one shoplot who faced difficulty in registering as they may not have a taxable supply in the first 12 months though there may be renovation expenses, etc., where input tax is incurred. A medium sized project may need more than 12 months before it can realise a sale, face difficulty in registering. The RMCD branches have been advising to defer registration in such cases.

Dato' Subromaniam acknowledged that there are issues at the front line at the RMCD branches and time is needed to train everyone as we are only 14 months into this new and massive regime. Deregistration is not an issue and the RMCD will entertain such requests. He also said that nothing is being done outside the law and mandatory registration must be adhered to when the conditions are met and otherwise voluntary registration will be entertained. He stressed that Malaysia has adopted a watered down model of GST and under a full blown model almost everything is taxable. He cited the case of Ron95 fuel which is given relief where the government forgoes revenue of a few billion Ringgit. He acknowledged that there are businesses such as in the property sector where developers forming a new company may not be in a payable positon for a few years. In the Oil and Gas sector for instance, the government used to collect huge service tax from professional services and due to the input tax claimable there is a huge shortfall on revenue collection. He sought the understanding of stakeholders, that in all fairness, there will be issues in the interim, and given time the fundamental issues will be overcome.

Voluntary disclosure and Client Charter

Mr. Raja suggested to have a mechanism for voluntary disclosure and a Taxpayer Charter to moderate audits with responsibilities of both parties spelled out. He made the point that GST is supposed to be self-compliant whereas sales tax needed interaction with the authorities. Under this system, similar to Corporate income tax, businesses do what they want, and Customs will audit to verify the claims and returns. However under the GST Law, Mr. Raja pointed out that there are 37 parts of the Act and Regulations that need approval. For instance, even for bad debt claims, there is a need to get approval. These need to be reduced as we move on and gain experience.

Dato' Subromaniam responded that an audit framework is currently being developed and true self-policing model is only possible if there is a full blown GST model. Under the current model, with a long exemption list and zero rated products and services, there is a need for control, otherwise by the time the RMCD audits, some business may have disappeared. He quoted one example where there was a refund claim for RM144 million, which could not be processed without verification and approval.

Questions from the audience

A participant raised a question on tax treatment of disbursements in a scenario where a HQ company seconds staff to a subsidiary but continues to pay the remuneration and back-charges the subsidiaries for the remuneration cost. The subsidiary bears the risks and liabilities arising from the employment and meets the conditions for disbursements. In this respect the HQ company first acts as a banker. In reply Mr. Tan said the business must go through the six conditions to apply the disbursement rules. However Mr. Raja pointed out that disbursement only works when there are three parties. Dato' Subromaniam confirmed that a 'negative approach' should be adopted by first applying the six conditions for disbursement, failing which it should be treated as a reimbursement, which is a taxable supply.

Jason Tan from LH-AG raised the question of special refunds and asked "why should it be considered a concession when GST is supposed to replace SST and it should either be SST or GST and by rejecting the refund, there will be double taxation that will unjustly enrich the government". He further commented that rejecting refund applications on the basis of price increases should be within the purview of another Ministry. Considering the fact that this will be a non-appealable matter, he advised taxpayers apply for a judicial review. Dato' Subromaniam in response, stated that many countries that replaced sales tax with GST/VAT did not opt to give a special refund and our government allocated close to RM1 billion, all with a good intent. The main intention was for businesses to remove the sales tax component. With a low GST rate of 6% and special refunds, the way some businesses took advantage and raised prices defeated the good intentions of the government. If the businesses removed the sales tax component and raised prices and yet expect a refund, it is unfair. Some businesses, including big manufacturers took advantage by raising prices well in advance and issued credit notes and upon the introduction of GST, the credit notes disappeared. To a prodding question from the Moderator, Dato' Subromaniam opined that the government is unlikely to increase the GST rate in the near future.

Ms. Anita from the audience raised the issue of disbursement and reimbursement by referring to the old GST Guide where one example illustrated a recharge of house rental to the employee. She sought clarification on the issue of medical expenses where the excess is recharged to the employees especially when the hospital itself does not impose GST. On the issuance of debit and credit notes, she viewed the regulation as onerous and urged the authorities to review the cases, especially in special circumstances. She asked, "am i compelled to issue a credit note on a Business to Business (B to B) transaction when it should have been zero rated but mistakenly imposed the standard rate?"

Dato' Subromaniam clarified the complexity in the Malaysian model unlike in a full version of the GST, where everything will flow through neatly but in the current system, an exempt supply can become standard rated and clarified that in certain circumstances on a case by case basis certain concessions are given by the RMCD. On the credit note issue, he explained that between B to B, there is self-policing but a Business to Consumer (B to C) transaction can be open to abuse and therefore some safeguards were necessary. In the past it was observed that there was also abuse on B to C dealings within the RMCD where action was taken on Customs officers, especially on bad debt relief under the service tax regime. Refund claims were made to the RMCD on account of non-payment but deposits received were not taken into account.

Mr. Tan from JB asked the RMCD's stand in the case of a single commercial or industrial property leased out by an investment holding company receiving lease income, and the property is subsequently sold. There will be a DG's decision issued on this and the RMCD's view is that the moment there is intention to sell, the business must register even if the property is a capital asset and not a trading asset. This would be the case even if the income level of the company is below RM500,000.

A participant raised the issue of a company which purchased a property and applied for voluntary registration and was rejected by the RMCD on the basis that there were no taxable supply. He asked, "is there any avenue to claim the input tax based on the book value of the building and secondly can the building be revalued?" Mr. Tan clarified that a revaluation can be done to be reflected in the accounts and input tax on capital goods can be claimed but not the GST on services. Dato' Subromaniam stated that a new DG's decision is expected to be out soon as a decision on this matter has already been made.

Ms. Cindy raised the issue in the context of GST being a value added tax and when local material sold in a bonded warehouse, GST is imposed in accordance with Section 70 and when the vendor takes it out of the bonded warehouse, GST of another 6% is imposed. Dato' Subromaniam clarified that there is no double taxation as the input tax is claimable on both transactions but only the issue of needing to pay upfront twice as local goods suffer GST and under the Warehousing scheme it is declared again. However the issue is being considered and a decision may be made to resolve it.

Pei Ling from Penang sought clarification on how late payment penalty is computed if a company has a refund due and opted for the amount to be carried forward, "will penalty be imposed on any shortfall?" Dato' Subromaniam clarified that penalty will be imposed unless the credit is approved and no penalty will be imposed to the extent of the credit balance with the RMCD.

A participant asked, "will supply of commercial property valued at RM2 million be subject to GST when gifted to children?" Dato' Subromaniam responded by saying that a decision on this will be made soon together with many other decisions and concessions.

TOPIC 3 ROUND UP OF INTERNATIONAL GST DECISIONS

Moderator

- Mr. Tan Sim Kiat, Director of Customs (GST), RMCD

Speakers

- Mr. Irving Aw, Director, Tax & Private Client Practice, Camford Law Corporation
- Mr. S. Saravana Kumar, Partner, Lee Hishammuddin Allen & Gledhill

The moderator Mr. Tan Sim Kiat, set the tone for the discussion by highlighting key features of Malaysia's GST Law. Malaysia's GST model is unique with some of the best practices from the Commonwealth and many home grown provisions catering for the nuances of the Malaysian economy, notable of which is a long list of exemptions and zero rated supplies. He outlined the organisation of the core GST legislation and the sectors and industries it covered and the types of reliefs available. In shaping some aspects of the Law, the expertise of international consultants such as Mr. Michael Evans were also sought. The Malaysian Law also provides for a GST Tribunal where appeals can be made. Though the Law specifically provides a list of non-appealable matters, yet there are many cases in the non-appealable list that are brought to the Tribunal. The legislation also provides for aggrieved parties to appeal further to the High Court on a question of Law or a mixed question of Law and facts. Mr. Tan also noted that there are many appeals against the DG's decisions.

PRESENTATION BY MR. IRVING AW

Since in Singapore there has not been many civil litigation on GST Law

(as there are only two reported cases in the last 22 years) Mr. Irving focused on EU cases on financial services where the principles established are relevant. Generally financial services are exempt in most jurisdictions as is in Malaysia (as specified in the Second Schedule of the Exempt Supply Order 2014) due to the following reasons:

- Interest represents time value of money, which is not a result of "consumption"
- Practical difficulties in measuring service element on a transaction-by-transaction basis for margin-based transaction or products, as service charge and interest are highly substitutable

This being so, there are direct implications of exempting financial supplies, which Mr. Irving aptly summarised as follows:

- It is irrelevant for registration threshold determination
- Value-add by financial institutions are not taxable, but the resources consumed in rendering financial services are
- Input tax credit cannot be claimed against exempt supplies
    - Tax cascades, as it is passed on to consumers
    - Self-supply bias as opposed to outsourcing , wherein GST expense is not claimable
    - Need for apportionment between taxable and exempt supplies, as financial institutions not only provide exempt supplies

Mr. Irving highlighted six cases mainly in relation to financial transactions such as financial services as exempt supplies, virtual banking, virtual currencies, credit card transactions, debt collection and apportionment of input tax .

Case No. 1: ING Intermediated Holdings Ltd v HMRC [2014] UKFTT 938 (TCC)

Issue: Is there a supply by the Dutch companies to the depositors?

Due to high rentals, two Dutch companies in the ING Banks's VAT group operated on a virtual basis. The UK representative claimed a repayment of input tax credit on the basis that there were no services rendered. The HMRC rejected the claims on grounds that the VAT on the overhead costs incurred to support the deposit-taking activity was attributable to exempt supplies of retail banking business. The Court ruled that the lending by the depositors was a service which was bartered for deposit account services by the Dutch companies. Thus, the supply of banking services was an exempt supply, and therefore input tax incurred in making such supplies were irrecoverable.

The key takeaways from the decision is as follows:

- VAT/GST position for banks operating deposit accounts online or by telephone is no different to traditional banks operated by institutions with a high street presence.
- Consideration need not be in monetary form.

Case No.2: Skatteverket v Hedqvist [2016] STC 372

Issue: Did transactions to exchange currency for units of bitcoin virtual currency in return for payment constitute a supply of services for consideration?

In this Swedish case, Bitcoin and other virtual currencies are recognised as "legal tender" in the EU. There was a supply of services for consideration because the taxpayer was profiting from the difference between the purchase and sale prices.

Singapore treats (administratively) sale of virtual currencies or virtual items online as supply of services, which does not qualify for GST exemption. In Malaysia there is no express reference to the concept of legal tender.

Case No. 3: National Exhibition Centre Ltd v HMRC [2015] UKUT 23

Issue: Was the booking fees paid to the taxpayer by customers purchasing tickets, consideration for a supply of card handling services?

In this tribunal case, the taxpayer sought repayment of VAT which was refused by the HMRC. The taxpayer hired events venues to third-party promoters and sold tickets for the promoter's events through its own box

office. The taxpayer charged booking fees to the ticket-buying public and paid VAT in respect of tickets purchased with debit or credit cards.

It was held that the booking fees were consideration for supplies of card handling services.

This is probably irrelevant in the context of Malaysia since para 12(2) of the GST Exempt Supply Order 2014 specifically excludes from the list of deemed exempt supplies the supply of services that are separately "payable for the usage or provision of facilities, arranging, broking, underwriting, or advising on any of the supplies specified therein".

Case No. 4: HMRC v AXA UK PLC [2010] STC 2825

Issue: Debt collection

A service provided by an agent Denplan, which operated payment plans between dentists and their patients and charged dentists a fee for its services in collecting payments did not constitute financial services within the law but debt collection, and held liable to VAT. However in Malaysia, there is no express exclusions for debt collection.

Case No. 5: Bookit Ltd v HMRC [2014] UKFTT 856 (TC)

Debit/Credit card handling services did not amount to debt collection because the debt collection implied collection on behalf of a creditor, which was not the case in this case.

Case No.6: Volkswagen Financial Services (UK) Ltd v HMRC [2015] EWCA Civ 832

Issue: Apportionment of Input Tax.

The HMRC denied input tax on grounds that none of the general overhead were directly attributable to the taxable supply of vehicles, but were instead attributable to the exempt supply of finance. The Court held that the 50% basis of apportionment proposed and used by the taxpayer was fair and reasonable.

PRESENTATION BY MR. SARAVANA KUMAR

Mr. Saravana enlightened the audience on five VAT/GST seminal decisions on VAT cases from UK and one from Australia that were most relevant to the Malaysian context.

Case No. 1: CIT v Quantas Airways Ltd [2012] HCA

Issue: Is there a supply?

Quantas practiced a scheme of overbooking in anticipation that not all passengers will board the flight. A refund is given if there is no seat but if the passenger does not turn up, no refund is given. Quantas claimed that there is no supply as the passenger didn't board the plane.

In a majority decision, the Australian High Court ruled that there is a supply. Contractual principles did not apply as the Court looked at the relationship between the supply and the consideration.

Case 2: Ian Flockton Development Ltd v C & E Comrs (1987) 3 BVC 23

Issue: Whether the expenditure incurred for business purposes?

The company purchased a race horse to promote its business of manufacturing mouldings and plastic storage tanks. The company appealed against an assessment to VAT disallowing its claim that it was entitled to deduct input tax paid on the purchase and upkeep of the horse as supplies of goods or services for the business. The enquiry and evidence into the purpose of the expenditure must not be substituted for the test, which must remain as a subjective test and not an objective one. The taxpayer succeeded in the appeal to the UK High Court.

Case 3: The Clean Car Co Ltd [1991] BVC 568, VAT Tribunal UK

Issue: Whether the taxpayer company had a reasonable excuse for claiming credit for input tax in the period before the invoice was received.

The UK Law provided that a conduct shall not give rise to liability to a penalty if there is a reasonable excuse for the conduct. The taxpayer company who was in the car wash business, paid VAT for construction costs based on an architect certificate even before he received an invoice. The MD of the company accounted for the VAT in the returns and claimed input tax accordingly. Bearing in mind the personal difficulties he was suffering from, particularly his daughter's illness, his age and his unfamiliarity with building contracts and the special rules, the VAT Tribunal found that he had reasonable excuse for mistakenly including input tax claim in his VAT returns.

Case 4: C & E Commrs v Nomura Properties Management Services Ltd [1994] BVC 126

Issue: Whether a return can be so grossly wrong that it is treated as "null"?

The error in the taxpayer's return (which was picked up by a Customs computer credibility check and query raised) was explained and an amended return was submitted before the issue of a penalty of £55, 773 for an over-claim of refund amounting to £185, 910. The High Court of UK held that there was no class of error which would invalidate the return. Validity was a concept which had no place in the present exercise and to say that a grossly erroneous return was not a valid return was an inapt use of the word 'valid'.

Case 5: Van Boeckel v Customs and Excise Commissioners (1980) I BVC 378

Issue: Whether the Customs had exercised best judgement in raising the impugned assessment?

The taxpayer was a licensee of a public house, which was run by a manager. He prepared his VAT returns on the takings handed to him by his manager. The Customs contended that the taxpayer's returns were incorrect and questioned the value of supplies made. The taxpayer suggested that pilferage was probably the cause of the deficiency. The taxpayer contended that the Customs method of using a period of five weeks to test the takings for a three year period was not sufficiently reflective and argued that the assessment should be quashed as it was in effect made *ultra vires*.

The High Court held that, making reference to a Privy Council decision in an Indian case, Customs need not make exhaustive investigations but only fairly consider all materials made available before them and the assessment was made in the Customs officer's best judgement.

TOPIC 4 INTERNATIONAL SEGMENT: SHARING OF AUDIT & COMPLIANCE EXPERIENCE FROM SINGAPORE & AUSTRALIA

Moderator

- YBhg Dato' Paddy Abd Halim, Director of Customs (Compliance), RMCD

Speakers

- Mr. Yeo Kai Eng, Partner & GST Lead, Ernst & Young, Singapore
- Mr. Andrew Ditchfield, Executive

Director, Australian Taxation Office
- Ms. Lorraine Parkin, Partner and Head of Indirect Tax Services APAC, Grant Thornton

The moderator viewed compliance to be synonymous with audits where under the self-assessment mode, taxpayers' compliance duty is to report the correct amount of tax and Customs will verify the returns in an audit, especially when there are refunds due. This is common in many jurisdictions where audits are done with risk assessment tools.

PRESENTATION BY MR. YEO KAI ENG

Mr. Yeo recounted the Singapore GST experience that was implemented on 1 April 1994 as part of a tax reform system to sustain a lower corporate and income tax rate and facilitate a stable revenue source to meet expenditure in view of a greying population. Many things evolved over the years and in the last six years the system became even better. The GST rate gradually increased from 3% to the current 7%. GST accounted for 24% (S$10.2b) in FY 2014/15 of the total tax collection.

The key features of the Singapore GST regime are as follows:

- Zero-rate applied to export of goods and international services
- Exemption applied to:
  - Sale and lease of residential properties
  - Financial services
  - Supply of investment precious metals
- Importation of goods is subject to 7% import GST

GST audit landscape in Singapore

In FY2014/2015 the total GST registrants in Singapore was 93,000, out of which 3,407 were audited and the tax and penalties collected amounted to S$174 million. The Inland Revenue Authority of Singapore (IRAS) believes that the majority of taxpayers are compliant. The attitude of IRAS in seeking views and consultation with stakeholders and in dissemination and dispensation of advance rulings and e-tax guides are well received and viewed as business friendly. The following are considered as strategic pillars in enhancing voluntary compliance in the Singapore GST regime:

- A Simple tax system
- Informed taxpayers
- Credible tax administration
- Engaging the community

The IRAS has shifted from the traditional Adversarial Approach to one of a Proactive Engagement with stakeholders. Besides carrying out various types of audits, IRAS encourages dialogues, feedback, facilitates ruling applications and meetings. It encourages GST registered businesses to be proactive and introduced Voluntary disclosure programmes and two key Self-review programmes, ie., the Assisted Compliance Assurance Programme (ACAP) and Assisted Self-Help Kit (ASK).

PRESENTATION BY MR. ANDREW DITCHFIELD, ATO

Australian Audit and Compliance Experience

Australia introduced GST on 1 July 2000 and the uniform rate is 10% and now has 2.7million active GST registrants. There is a great deal of transparency in that clients are made aware of what attracts the attention of the ATO through publishing and broad communication of risk areas, like refunds, cash economy, evasion, reporting systems, property, financial supplies, international and overall governance and risk management framework. Clients are also made aware of the source of the risk such as data matching, profiling of the clients activities and third party information. These act as an effective deterrent. The cash outcome annually from GST audits was in the range of AU$1.1 – 1.9 billion in the period 2012 - 2015.

Mechanisms are in place to encourage and support taxpayers to engage early, on complex risk issues with access to specialist advice, practical guidance, and private and public rulings and indicative advice. There is a robust risk governance procedure but nevertheless, any enquiry is answered quickly.

Approximately 2.2 million refund claims are lodged by over 1 million taxpayers each year. When making a claim for refund, clients can expect an enquiry to substantiate the claim and that this may escalate to an audit and prosecution if fraud is suspected. Clients can access published details of common errors to avoid risk of inadvertent mistakes. Behavioural studies show if it is easy to comply, most will in fact comply. When in doubt taxpayers are encouraged to engage with Customs and/or advisers to 'remove any uncertainty'.

PRESENTATION BY MS. LORRAINE PARKIN

Ms. Lorraine made comparisons of the compliance landscape of three jurisdictions, ie., Australia, Singapore and Malaysia which had varied experience and focus in the introduction and development of their GST regimes.

She made a fundamental suggestion to merge the Malaysian IRB and the RMCD as in UK, Australia and Singapore alluding to very strategic revenue collection benefits for the government. She observed the use of technology to a great extend which impacts reporting as well as more sophisticated audits using data interrogation. A case in point is the ATO which utilises Computer Assisted Verification (CAV) and data mining techniques using IDEA software for e-Audits. The software allows for efficient analysis of "big data"(high volume transactions, larger review period) to identify potential GST errors in a fraction of the time it would have previously taken under manual methods. On voluntary disclosure, she said, "don't make it difficult for businesses, but encourage business to come forward, otherwise, it may lead to businesses going underground".

On tax litigation, she observed that Australia had many, while Singapore hardly had any as almost everything is taxable, and predicted Malaysia will have many years of litigation due to the complexity of the Law. On penalties, both Singapore and Australia were lenient in the early years but a stricter regime evolved after a couple of years.

On questions raised with regards to taxing cash transactions, the panel stated the need for taxpayer education and acknowledged that it is not widespread.

TOPIC 5 PREPARING AN APPEAL TO THE GST APPEAL TRIBUNAL

Moderator

- K. Sandra Segaran, Council Member, CTIM

Speaker

- Pn. Aslina Joned, Chairman, GST Appeal Tribunal, Ministry of Finance

The GST Tribunal was established on 1 April 2015. It is an independent quasi-judicial body to hear appeals against the decision of the Director General of Customs pursuant to Part XIII of the Goods and Services Tax Act 2014 (Act 762). Puan Aslina outlined and explained the following significant process and procedures of appeal:

- The constitution and membership of the Tribunal
- Any person aggrieved by the decision of the Director General may appeal against the decision within 30 days from the date of the disputed decision
- Non-appealable matters are listed in the Fourth Schedule of the Act.
- Every appeal lodged with the Tribunal under the Act shall be in Form B (Notice of Appeal) which can be downloaded from the websites: *www.treasury.gov.my* or *gst.customs@gov.my*
- Certified true documents must be attached with the notice of appeal which can also be made online
- The Tribunal can also assist the parties to arrive at a negotiated settlement
- Representation at hearing: the Appellant may conduct his case himself or may be represented by any person whom he may appoint for that purpose
- Language: Tribunal may on application of any party to the proceedings, order the proceedings to be in the national language and partly in the English Language
- Sitting of every appeal shall consist of a panel of three (3) members and the Tribunal shall be presided by the Chairman or Deputy Chairman. The Act also provides for the sitting by a single member.
- Proceedings shall be conducted without regard to formality and technicality
- Closed proceedings: Proceedings before the Tribunal shall be closed unless agreed otherwise by the parties to the appeal
- The Tribunal may authorise the publication of the facts of the case and reasons for the decision without disclosing the identity of the appellant concerned
- The Tribunal shall make its decision without delay and where practicable, within sixty (60) days from the first day of the hearing
- Decision of the Tribunal is binding on all parties to the proceedings and deemed an order of a Sessions Court and enforced accordingly by the parties
- Further appeal: Any party aggrieved by the decision of the Tribunal shall have the right of appeal to the High Court on a question of law or of mixed fact and law
- Frivolous appeals: the Tribunal may order the appellant to pay cost to the Tribunal a sum not exceeding RM10,000 if the Tribunal is of the opinion that the appeal was scandalous, frivolous and vexatious and affirm the decision of the Director General
- Status of appeals as at 30 May 2016 (**Table 01**)

TOPIC 6 ROUND TABLE DISCUSSION: INTERACTION BETWEEEN GST, INCOME TAX & CUSTOMS

Moderator

- Ms. Farah Rosley

Panel Members

- YBhg Kolonel (K) Tan Sri Datuk Wira Dr.Hj.Mohd Shukor Hj Mahfar, CEO IRBM
- YBhg Dato' Sri Khazali Hj Ahmad, Director General of Customs, RMCD
- Ms. Ng Sue Lynn – Executive Director, Indirect Tax, KPMG Tax Services Sdn Bhd

This session served as a roundup of the two-day conference on policy

Table 01: Statistics on Status of Cases as at 30 May 2016

No.	Status	2015	2016
1	Disposal	31	50
2	Hearing / Continued Hearing	-	20
3	Application Rejected	403	154
4	Pending Payment of Fee (RM200)	-	52
5	Appeal Withdrawn	7	15
6	Pending Review	-	16
Total		**441**	**307**

issues on a macro perspective. It was acknowledged that the legal provisions and practice notes and guides are becoming voluminous and tax practitioners need to keep abreast constantly until the law and practice settles down. Between the IRB and the RMCD, although bound by two different laws, there is likely to be constant engagement. As for businesses, being GST registered is the starting point, and the income tax implications will be a natural consequence. The people would expect a gradual reduction in the income tax rates in view of GST but the IRB is prepared to view this as a macro development for strengthening the country's revenue base.

Collaboration of RMCD and MIRB

Dato' Sri Khazali confirmed that the RMCD is working closely with the IRB in several matters and joint audits have been planned since 2013 and it is being undertaken currently and will continue to do so in the future. Such audits will not only contribute to efficiency but will save time for taxpayers. On the merger between the RMCD and the IRB, Tan Sri Shukor stated that though they are under one roof but are governed by different laws.In view of the benefits that the 'marriage' can bring and a similar administrative practice in other jurisdictions like UK, Australia and Singapore, the possibility is not discounted and it will depend on the direction of the government. They hoped in the meantime, taxpayers will pay their taxes conscientiously and religiously and not worry of penalties. It was also hoped that when the merger happens, tax agents perhaps would need only one licence to practice.

Optimum tax rates

The panel also discussed the inter-relationship and possible direction of optimising income tax rates and consumption tax rates. Dato' Sri Khazali observed that the RMCD is already familiar with consumption tax for about 40 years since the introduction of service tax and sales tax in 1975 and 1976 respectively. The introductory rate of 6% was after various simulations and considerations that were considered carefully. The RMCD does not expect the rate to go up in the next two years as various sensitivities must be carefully considered based on the experience in other countries. A case in point is the service tax rate that was increased only once, ie., from 5% to 6% in the last 40 years. The Moderator raised the issue of whether the authorities will consider an increase to the RM10,000 tax deduction given for tax filing expenditure, which includes GST returns. Tan Sri Shukor stated that the income tax rate for companies was reduced from 25% to 24% in YA 2016 in view of the introduction of GST and it is hard to satisfy the requests for continuous increase in deductions and reduction in tax rates. However any request for an increase must be justifiable.

Synchronisation of tax treatment

Ms. Sue Lynn highlighted that among the issues faced by clients on the interaction of GST and Corporate tax, is the deductibility of input tax. She enquired if there will be synchronisation of tax treatment of corporate tax and GST and gave an example of the treatment of non-executive directors who need to register for GST purposes. Dato' Sri Khazali observed that in Malaysia there are many who become directors of various companies and if they meet the criteria, registration is mandatory. He disclosed that over 3,500 individuals have so far registered and advised those who qualify and yet to be registered should do so immediately. The DG of Customs also reminded that the answers to many questions, raised by taxpayers are already provided in the DG's Decisions category and Guides posted on the GST portal and urged everyone to make reference to the portal.

Imported services

On the issue of imported services, Ms. Sue Lynn clarified the Supply Guide distinguished between financial services and other form of services. The Director of Customs (GST) Mr. Tan Sim Kiat, explained the concept of imported services for the purposes of a business and the location where services are consumed with reference to the GST Act. He explained that in respect of most financial services, although the services are apparently provided outside Malaysia there is no one overseas to consume the services, and as such it is deemed consumed in Malaysia as it flows to Malaysia. However he illustrated that where a person attends training overseas, then the consumption is provided overseas.

Questions

To a question by Mr. Thanneermalai on the bullish predictions to collect RM39 billion, in the face of the slowdown in the economy, Dato' Sri Khazali explained that a concerted effort of all the stakeholders is needed to meet the targeted collections. Tan Sri Shukor illustrated a carrot and stick approach by the IRB to meet the revenue targets in income tax collections. From a 'carrot' perspective, the IRB will provide an efficient delivery system, friendly service and quick refunds, to name a few measures and on the 'stick' perspective will carry out enforcement diligently. In addition, taxpayers can write in to discuss their issues and problems and regular dialogues with professional bodies will continue.

Mr. Lim from KL pointed out that unlike income tax rates that are progressive, GST is regressive based on income levels. Ms. Sue Lynn commented that there has been much deliberation and studies undertaken by the government and hence the many schemes, exemption and zero rating, which are meant to reduce the burden of the lower income group. Though these add to the complication of the system, nevertheless it takes the Rakyat's concerns into account. Dato' Sri Khazali explained that several measures were adopted by the government to ensure that this system is not regressive and our system can be differentiated from that of many jurisdictions but admitted that grievances will continue to be expressed by some quarters.

RMCD ANNOUNCEMENTS

Dato' Subromaniam announced that the MoF has consented to allow the RMCD to introduce measures to remit penalties if taxes are paid within 31 December 2016 and to allow instalment of outstanding payments up to 31 December 2016.

PART 2

INCOME TAX IMPLICATIONS OF GST: THE WAY FORWARD

Thenesh Kannaa

The first part of this article published in the last issue addressed the income tax deductions and allowances in relation to Goods and Services Tax ("GST") borne by businesses. This second part addresses income tax issues arising from two specific GST events, namely late registrations and GST audits.

Late registration

Under the Goods and Services Tax Act 2014 ("GSTA"), every taxable person is required to account for output tax on supplies that he makes, and is entitled to claim input tax credit on the taxable acquisitions that he makes. Section 2 of the GSTA defines taxable person to comprise of:

- a person who is GST-registered (regardless of mandatory or voluntary registration); and
- a person who is not registered but liable to be GST-registered

Where the annual value of the taxable supplies that a person makes exceeds RM500,000, he is liable to be GST-registered and thus would be regarded as a taxable person. This applies regardless of whether he actually makes an application to register for GST. If he is liable to be GST-registered but fails to do so, Section 39(1)(o) of the Income Tax Act 1967 ("ITA") expressly prohibits the claiming of a tax deduction in respect of his input taxes. The rationale for this is clear – when he actually makes an application to register for GST retrospectively, he would be entitled to claim input tax credit under the GSTA.

When a person is late in making application to register for GST, he is required to account for output tax for all taxable periods since he was liable to be GST-registered. This is calculated as the tax fraction (i.e. currently 6/106th) of the consideration. Section 39(1)(p) of the ITA expressly prohibits any deduction in respect of output tax borne by a business, but it is unclear whether the output tax borne by a person being registered retrospectively should be regarded as an expense in the first place. It is arguable that the output tax should instead be regarded as a reduction of gross income for the relevant basis period[1]. Similarly, it is also not immediately clear whether the output tax should be regarded as a revenue reduction or as an expense for the purposes of financial accounting.

Example 1

On 1 October 2016, XYZ Sdn Bhd is registered for GST retrospectively effective from 1 April 2015. The total consideration for the supplies made by him from 1 April 2015 to 30 September 2016 is RM530,000. He is required to account for output tax of RM30,000, being 6/106th of RM530,000. Also, he made taxable acquisitions during the period with input tax credit of RM20,000. Thus, GST of RM10,000 is payable to the Royal Malaysian Customs Department ("RMCD"), along with the relevant penalties.

For the purposes of income tax, it is clear that no deduction is available in respect of input tax of RM20,000. It is also clear that no deduction is available in respect of output tax of RM30,000 but it is arguable that, taking into consideration the fact that RM30,000

Table 01

GST Treatment	RM	Income Tax Treatment
Output tax	30,000	No tax deduction available but arguably a gross income reduction
Input tax credit	20,000	No tax deduction available
Net GST payable to RMCD	10,000	

had to be accounted as output tax, only RM500,000 should be regarded as the gross income for the period from 1st April 2015 to 30th September 2016. This is summarised in **Table 01.**

In any case, for the purposes of preparation of tax computation, due regard must be given to the accounting treatment. For example, it has to be known whether the RM20,000 and RM30,000 was reflected entirely in the financial year 2016, or in both the financial years 2015 and 2016.

It must also be noted that if the fact that XYZ Sdn Bhd is a taxable person for the purposes of GST was not recognised at the point where the income tax return for the year of assessment 2015 was furnished, it is probable that tax deduction was claimed for input taxes. Where it is subsequently discovered that the company was a taxable person for such period, it is entitled to claim input tax credit under the GSTA but not for tax deduction. Thus, it has to submit an amended tax return for YA 2015 or disclose the mistake voluntarily. However, if it is agreed that the gross income is also overstated as a result of the amount that has to be accounted for as output tax had been recognised as sales, the net impact of the discovery may be a tax refund, in which case an application under Section 131 of the ITA may be considered.

Interpretation issues akin to the above arise for the purposes of Real Property Gains Tax ("RPGT") in respect of GST late registrations. The unique nature of RPGT only makes the interpretation more difficult. For example, should the term 'not liable to be registered under the GST Act' be taken as referring to the taxpayer's liability to register at the time when the input tax is incurred or at the time when the real property is being disposed?

GST Audit Adjustments

GST audits has been described by the RMCD as a process of examining and verifying on the correctness of GST returns and the taxable person's overall compliance with the GST legislation. There are various types of GST audits such as desk audit, refund audit and compliance audit. Understatement of GST payable, by way of either overstatement of input tax credit or understatement of output tax, may be expected as an outcome of the audit process. The consequential impact on income tax must be considered. Detailed explanation as follows:

Overstatement of input tax:

During a GST audit, the RMCD may disallow input tax claims because the taxpayer fails to meet the GST-specific requirements. Examples of such GST audit findings include the following:

- It is found that credit was claimed in respect of input tax incurred on a blocked acquisition such as repair of passenger motorcar.

Diagram 1: GST Audit Discovery – Over-Declaration of Input Tax due to GST-Specific Findings

GST Audit

▼

RMCD disallow input tax for reasons specific to GST

▼

Additional cost to the business

▼

IRB makes a reduced assessment under Sec 91(6)

[1] *Although the term gross income is used widely across the ITA, there is no exhaustive statutory definition for this term.*

Diagram 2: GST Audit Discovery – Over-Declaration of Input Tax due to Generic Findings

GST Audit

↓

RMCD disallows input tax for generic reasons (e.g. fictitious purchases)

↓

Business cost found to be overstated

↓

IRB raises an additional assessment under Sec 91(6)

Diagram 3: GST Audit Discovery – Under-Declaration of Output Tax on Deemed Supply

GST Audit

↓

RMCD assess output tax for reasons specific to GST - deemed supply

↓

Additional cost to the business

↓

No income tax deduction

Table 02

Issue	Author's perspective
Does the 5-year statutory limit in the ITA apply to Section 91(6)?	The author is of the opinion that the 5-year time limit should not apply to Section 91(6). This is consistent with the view expressed by the IRB in its response to the Professional Bodies' Joint Memorandum on Issues Arising from 2016 Budget.
For the case illustrated in Diagram 1, what is the procedure for the taxpayer to request for the reduced assessment? Put it differently, does the operation of Section 91(6) require an application to be made under Section 131 (Relief in respect of Error or Mistake), or is the operation of Section 91(6) independent from Section 131?	It is best that Section 91(6) is regarded as being independent of Section 131. Otherwise the 5-year statutory time limit would apply for the taxpayer to make the application (although the time-limit would not apply to the assessment itself). A distinct set of procedure should be developed to allow affected businesses to apply for a reduced assessment under Section 91(6). Also, the automation being suggested in the 'Conclusion' below be considered.
For the case illustrated in Diagram 1, given that Section 91(6) uses the word 'may' rather than 'shall', could the IRB refuse to make the reduced assessment?	Arguably the reduced assessment may be refused as the law uses the word 'may', implying discretion being granted to the IRB. However, some may wish to read this law in conjunction with the decision of *Ketua Pengarah Hasil Dalam Negeri v Scania (Malaysia) Sdn Bhd*[2] which states that in some instances the term 'may' is ought to be read as signifying mandatory compliance. It must be noted that if the IRB refuse to make a reduced assessment, there would be economic 'double taxation' in respect of the input tax being disallowed by the RMCD.

- It is found that the input tax incurred is attributable to exempt supplies, and not taxable supplies.
- The supporting document is found to be not a valid tax invoice.

The input tax disallowed increases the cost to the business operator and Section 91(6) of the ITA expressly provides that the IRB may make a reduced assessment to reflect this. This relationship is illustrated in **Diagram 1**.

It is also possible that during a GST audit the RMCD disallows input tax claims due to generic findings (i.e. findings that leads to understatement of GST payable as well as income tax) such as the following:

- It is found that the input tax credit were claimed on non-business costs.
- It is found that the input tax credit has been claimed based on fictitious transactions.

In these cases, it is probable that the findings of the GST audit should lead to additional assessment for the purposes of income tax, as illustrated in **Diagram 2.**

The recent enactment of Section 91(6) has led to several questions in respect of the reduced assessment, as explained in **Table 02.**

Understatement of output tax:

During the GST audit, the RMCD may discover that a person has understated his output tax as a result of overlooking deemed supplies, such as the following:

- It is found the taxable person has failed to account for output tax on deemed supplies prescribed in the First Schedule of the GST

2 *(2003) MSTC 30-055*

Act (for example, gift of goods worth more than RM500).

- It is found that a non-registered business operator or a mixed supplier had overlooked his obligation to perform reverse charge.

It is clear that no deduction is given in respect of these output taxes borne by the business (Section 39(1)(p) of the ITA), as illustrated in **Diagram 3**.

It is also possible that output tax is assessed by the RMCD because the business had incorrectly treated a standard-rated supply as a zero-rated or exempt supply. Technically, the business may be able to recover the cost by issuing a debit note to its customer, and hence the output tax may not be a cost to the business being audited. However, it is not always possible to do so – for example, if a hypermarket had incorrectly zero-rated the sale of a particular product to thousands of its customers, it is impractical to subsequently issue debit note to recover the GST from each customer. In such cases, the output tax has to be paid from the 'pocket' of the business being audited. Certainly, no tax deduction is available in respect of the output tax but it is arguable that the output tax reduces the gross income of the relevant years. If such interpretation is agreed upon, application may be made pursuant to Section 131 of the ITA in cases where the tax return for the relevant year(s) has been submitted prior to the GST audit findings (note that Section 91(6) does not apply in respect of output tax). This is illustrated in **Diagram 4**.

It is also possible that during a GST audit the RMCD assesses output tax due to generic findings such as under-declaration of sales. In these cases, the findings of the GST audit should lead to additional assessment for the purposes of income tax, as illustrated in **Diagram 5**.

CONCLUSION

Given that there is no written guidance from the IRB in the public domain at the time of writing, the article has acknowledged the unsettled interpretation issues and lack of professional consensus. Hope these questions induce the stakeholders in the tax ecosystem to brainstorm and develop a more coherent technical guidance on the interaction between income tax and GST.

From the operational aspect, one could imagine the future with an efficient system whereby any assessment raised by RMCD automatically triggers the IRB to consider making an assessment or reduced assessment (depending on the nature of the RMCD's assessment as explained above). The reverse may be of limited use given that many income tax audit adjustments may not have any implication (for example, if an expense is disallowed for tax purposes for being capital in nature, that does not affect the entitlement of the business to input tax credit). Although there are statutory provisions for mutual exchange of information and a memorandum of understanding between RMCD and the IRB has been signed, it must be acknowledged that an automatic system for recording corresponding assessments for two independently administered tax systems are much easier said than done.

***Thenesh Kannaa** is a partner at Thenesh, Renga & Associates (TraTax Malaysia). He is the author of several books on Malaysian Taxation, including CCH's Master GST Guide (2nd Ed., 2015). He is also a member of CTIM's Technical Committee on Indirect Taxation and the Editorial Committee, and regularly conducts CPD seminars for CTIM and other institutions. He can be contacted at thenesh@tratax.my. Views expressed are his own.*

Diagram 4: GST Audit Discovery – Under-Declaration of Output Tax Due to Incorrect Tax Code

GST Audit

▼

RMCD assess output tax for incorrectly applying zero tax for standard-rated supplies)

▼

Arguably a 'revenue reduction' for the business

▼

Arguably a gross income reduction for tax purposes. Application may be made under Section 131.

Diagram 5: GST Audit Discovery – Under-Declaration of Output Tax Due to Generic Findings

GST Audit

▼

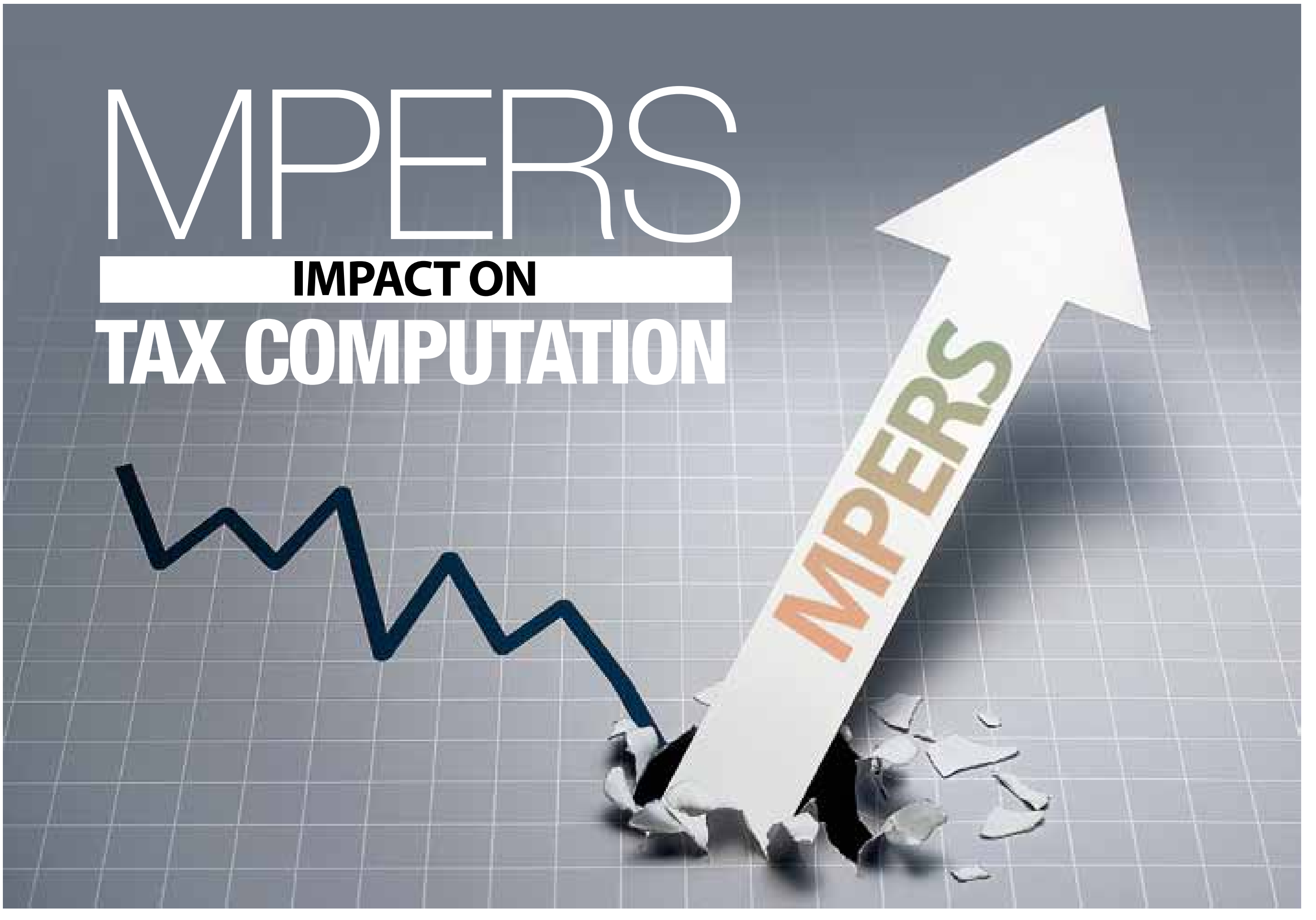
RMCD assess output tax for generic findings - e.g. sales under-declaration

▼

Business income found to be understated

▼

IRB makes an additional assessment under Sec 113 or 114



Kenneth Yong Voon Ken and Lee Fook Koon

With an effective date of 1 January 2016, and with the full thrust of the Malaysian Accounting Standards Board behind it, the Malaysian Private Entity Reporting Standards (MPERS) is now the new accounting framework for private entities, usurping the dated Private Entity Reporting Standards (PERS) which have served as the default reporting framework since 1999.

MPERS affects companies not scoped under the MFRS (Malaysian Financial Reporting Standards) such as many small medium companies (SMCs). MPERS changes the way accounting information is measured, and can potentially affect the tax computation process – thus, bringing MPERS within the interest of business managers and tax preparers serving SMCs.

This article highlights some of the areas where MPERS differs from the older PERS, and discusses the implications on the process of preparing the tax computation. Due to the vastness of this topic, it is not possible to include a complete comparison, and hence only certain areas are discussed.

NEW PRESENTATION

The starting point of all tax computations is usually the "Profit Before Tax". Under PERS, "Profit Before Tax" sits very close to the terminal line of the Income Statement, and thus, is easily spotted. However, under MPERS, the "Statement of Comprehensive Income" can possibly contain many other items above and below the "Profit Before Tax" line, making the statement much more confusing.

Tax preparers – especially those less familiar with the new format of financial statements – may initially be overwhelmed by the Statement of Comprehensive Income and its many 'profit' references such as "Profit from trading operations"; "Profit before tax"; "Profit for the year"; "Other comprehensive income"; "Total comprehensive income". It is conceivable that the wrong 'profit' number may be mistakenly inserted into the tax computation – something very possible during the haste of the peak period.

Strangely, the Income Statement may disappear entirely under certain circumstances. MPERS (Section 3.18 and 6.4) allows the "Statement of Comprehensive Income" and the "Statement of Changes in Equity" to be discarded and merged into a single hybrid statement called "Statement of Income and Retained Earnings". The disappearance of the Income Statement may confound tax preparers unfamiliar with this optional MPERS format.

These 'administrative' matters are best dealt with through MPERS training for tax personnel and updated tax checklists.

TAX COMPUTATION ISSUES

Being reflective of the times, MPERS contains more contemporary accounting treatments compared to the older PERS. This is apparent in the various fair value models and other amendments to measurement bases which may require changes in the way the tax computation is prepared. The following are some areas to consider in the tax preparation process:

(a) Property, plant and equipment
(b) Investment properties
(c) Research and development costs
(d) Quoted shares
(e) Inventories
(f) Interest expense
(g) Property development

Certain new 'measurement' treatment under MPERS may occasionally be more aligned to tax rules compared to PERS (meaning no tax adjustment is needed), and at other times, MPERS will diverge from tax rules and require new adjustments in the tax computation.

PROPERTY, PLANT AND EQUIPMENT

MPERS embraces a 'component' approach in recognising property, plant and equipment (PPE). Accordingly, when asset enhancements are made (e.g. factory renovation or machine upgrades), a 'new' asset is recognised and the 'old' component is derecognised – this may trigger 'disposal' rules for qualifying expenditure under Schedule 3 of the Income Tax Act 1967 (ITA).

Consider the tax definition of "disposal" under Sch. 3 Para 61: "sold, discarded or destroyed or if it ceases to be used…". A practical tax problem that may arise is how to ascertain the cost value of the component being derecognised (being part of a larger asset's cost) as this may generate balancing allowances. By contrast, PERS did not have a clear 'derecognition' provision and thus, sidesteps this "disposal" issue.

MPERS affects companies not scoped under the MFRS (Malaysian Financial Reporting Standards) such as many small medium companies (SMCs). MPERS changes the way accounting information is measured, and can potentially affect the tax computation process – thus, bringing MPERS within the interest of business managers and tax preparers serving SMCs.

In view of MPERS, it is timely that the new Para 61B of the Third Schedule of the ITA provides that the "qualifying expenditure of the part of the asset disposed shall be taken to be the amount as determined in accordance with the generally accepted accounting principles" while the residual expenditure is computed accordingly from such qualifying expenditure.

INVESTMENT PROPERTIES

MPERS prescribes the fair value model to measure the carrying amount of investment properties (MPERS Section 16.7), with changes in fair values reflected in the profit and loss account each year. As these are unrealised gains / losses, the tax computation must adjust away the fair value effects embedded within "Profit

Before Tax". After all, Section 3 of the ITA only subjects "income", and not capital gains, to taxation.

Furthermore, because investment properties are carried in the accounts at fair value (and not at cost), tax preparers must ensure the tax computation holds sufficient records of the original cost. This is important when computing industrial building allowances (IBA) of qualifying buildings as IBA is based on cost of the building alone, and not on fair value of the land and building combined.

However, an investment property by definition is a property held "to earn rentals or for capital appreciation" (MPERS Section 16.2). The new Para 16B of the Third Schedule of the Income Tax Act 1967 may minimise the situations where investment properties can qualify for industrial building allowance since certain specified buildings such as hospitals, maternity home, warehouse, hotel etc. which are rented out can no longer be eligible for IBA.

RESEARCH AND DEVELOPMENT COSTS

PERS allowed certain development costs (in a R&D context) to be capitalised and amortised. However, the tax treatment provides for a deduction if an expense is "wholly and exclusively incurred during the period … in the production of gross income" (Section 33(1), Income Tax Act 1967).

For instance, qualifying 'software development cost' (such as qualifying salaries of programmers) may be amortised under PERS, but the income tax treatment diverges from PERS since the software company may claim tax deduction on eligible salary costs in the year "incurred".

However, unlike PERS, the newer MPERS does not allow for capitalisation and amortisation of research and development costs. Thus, all such costs are to be expensed off under an MPERS-based P&L, bringing greater alignment between

MPERS-profits and taxable income (assuming that the expenses satisfy the test under Section 33). Ironically, MPERS simplifies the treatment of development cost since there would not be any amortisation to adjust away in the tax computation.

QUOTED SHARES

Under PERS, quoted shares are generally carried on the accounts at historical cost subject to impairment. However, under MPERS Section 11.14(c), quoted shares are to be carried at 'fair value' and any changes in fair value between reporting periods are to be charged to the profit and loss account. Thus, the "Profit Before Tax" figure subsumes the fair value changes of quoted shares under MPERS.

Unlike 'Investment Properties' – where the tax treatment is simply to add or deduct the MPERS-mandated fair value changes in the tax computation – quoted shares present an additional tax complication because the Income Tax Act 1967 has differential treatment for quoted shares held as long-term investments and those held for trading.

QUOTED SHARES AS LONG-TERM INVESTMENTS

Where these quoted shares are held as long-term investment, any resultant gain (whether realised or unrealised) are regarded as capital in nature and therefore, not taxable. In preparing the tax computation, the 'fair value changes' must be removed by adding back or deducting as appropriate.

QUOTED SHARES AS TRADING STOCKS

However, where the quoted shares are held as trading stock (e.g. in an investment-trading company), complications can emerge in the tax treatment. Under MPERS, fair values are determined on an aggregate portfolio basis and charged to the profit and loss account. However, the income tax treatment is worded differently. Section 35(3)(a) prescribes that the quoted shares (which in this case are trading stocks) will be measured at "its cost price … or its market value … whichever is the lower". Strict interpretation of Section 35(3)(a) requires this rule to be applied to each share in a portfolio, and not on an aggregate portfolio basis.

The income tax treatment contains two parameters: lower of 'cost' and 'market value'. This dual-parameter approach can give rise to a very different set of numbers, especially if some shares are above cost and others are below cost. Simply extracting the 'fair value' changes from the MPERS P&L and adding it back in the tax computation may give rise to the wrong Adjusted Income figure because it disregards the 'lower of cost and market value' rule under Section 35 of the ITA.

INVENTORIES

Cost formula

PERS allowed three major cost formulas: FIFO (First-In-First-Out), weighted average, and LIFO (Last-In-First-Out). Nonetheless, income tax rules do NOT permit LIFO. Consider para 10.5 of Public Ruling 4/2006: "costing methods such as LIFO … are not acceptable for income tax purposes".

Previously, businesses that used LIFO had to readjust their stock valuation at the tax computation level prior to computing their income taxes.

However, MPERS also does not permit LIFO, thus, aligning the accounting treatment with the tax treatment and reduces the adjustments needed in the tax computation. Admittedly, LIFO is less commonly used compared to the other two cost formulas, so this change is unlikely to have widespread tax relevance.

Being more flexible, the older PERS allowed borrowing costs to be expensed off or alternatively, to be capitalised as part of an asset's cost upon fulfilment of the qualifying criteria where such borrowing costs are directed at a self-constructed asset such as a building.

Deferred settlement amount

MPERS has a provision dealing with deferred settlement terms (MPERS Section 13.7). This is where an inventory item is purchased under an unstated financing arrangement, where the difference between the normal purchase price and the deferred settlement price is recognised as interest expense over the period of financing.

This MPERS provision is similar to the requirements under Para 10 of Public Ruling 2/2011: "The difference between the deferred payment and the cash price is deferred interest that is deductible under Paragraph 33(1)(a) of the ITA."

By contrast, the older PERS is silent on the treatment of unstated financing element embedded within the purchase cost of inventories. This meant that in the past, tax preparers needed to spend additional time probing the PERS-based accounts for deferred payment arrangements, and tax-adjusted them in the tax computation to properly treat the embedded interest element as required by Para 10 of Public Ruling 2/2011.

However, under MPERS, any interest embedded in the selling price would need to be separated out and recognised as an expense – thus, aligning the accounting and the tax treatment at the financial reporting stage; consequently simplifying the tax computation.

INTEREST EXPENSE

Being more flexible, the older PERS allowed borrowing costs to be expensed off or alternatively, to be capitalised as part of an asset's cost upon fulfilment of the qualifying criteria where such borrowing costs are directed at a self-constructed asset such as a building.

This treatment diverges from the tax rules as laid out in the Income Tax Act 1967 or Public Ruling 2/2011. For a self-constructed asset such as a building or a machine, the interest expense is to be claimed as tax deduction in the year incurred following Section 33(1)(a). This is further clarified in LHDN Guideline on Borrowing Cost dated 4 June 2013, Para 3(b)(i): "Interest expense payable for a period … and capitalised with the P&M can be claimed as deduction in the tax computation for a year of assessment in which it is capitalised."

This means under the older PERS, an adjustment needs to be put through in the tax computation to 'decapitalise' the interest and, where conditions are fulfilled, to claim it as a tax deduction under Section 33(1)(a) of the ITA.

By contrast, the newer MPERS does not allow capitalisation of borrowing costs (consider Section 25.2: "An entity shall recognise all borrowing costs as an expense in profit or loss"). The MPERS treatment simplifies the tax computation as tax preparers would no longer need to devote attention searching for capitalised borrowing costs, and then 'decapitalising' the interest appropriately as a deduction in the tax computation.

PROPERTY DEVELOPMENT

For property development activities, revenue and cost are recognised using the Percentage of completion method. This method is applicable under both PERS and MPERS, and is also accepted under income tax rules. However, one aspect of the computation has changed under MPERS with potentially sizeable tax impact: capitalisation of interest expense.

The older PERS allows interest on acquisition of land to be capitalised (an alternative treatment permitted under MASB 27 'Borrowing Costs' and Para 18 of MASB 32 'Property Development Activities'). This accounting treatment of capitalising interest expense is in line with Para 11.15 of Public Ruling 1/2009 'Property Development' which requires that "interest paid on loans taken for financing … land and development works are to be capitalised". This means the accounting treatment under the older PERS and tax treatment under Public Ruling 1/2009 is already aligned in terms of interest deduction.

However, the newer MPERS specifically prohibits capitalisation of borrowing costs. Instead, interest expense associated with property development projects must be charged out as an expense (MPERS Section 34.31 and Section 25.2). The MPERS treatment for interest expense diverges from the income tax treatment.

This will require a major re-work on the part of tax preparers. Firstly, any interest expensed-off needs to be recapitalised in the tax computation, and more importantly, re-allocated in an acceptable manner to respective

For property development activities, revenue and cost are recognised using the Percentage of completion method. This method is applicable under both PERS and MPERS, and is also accepted under income tax rules.

development projects. Secondly, the project profit and project costs (including re-allocated interest) need to be recomputed using the Percentage of completion method. This is a relatively complicated exercise and may be prone to computation errors; opening up the possibility of tax penalties when detected during IRB's tax audits.

Tax practitioners may need to retrain their staff on this potentially complex adjustment (some would even argue, 'risky' adjustment) and allocate sufficiently senior personnel to handle such tax computations. The tax review process may also benefit from giving this area additional attention.

GETTING IT RIGHT FIRST TIME

For tax practitioners, it is not good enough to just be aware that new accounting items (e.g. fair value changes) may be looming somewhere in the new Statement of Comprehensive Income. Beyond superficial awareness, tax practitioners and their tax team must be adept at spotting the required MPERS-induced adjustments before commencing each tax computation.

After all, in the first year of MPERS adoption, there is no previous add-back column to refer to in the tax computation for treating transactions affected by MPERS, meaning a mechanical process of "follow last year" cannot be applied to the first MPERS-based tax computation as all tax adjustments must be reassessed.

More worryingly, the first MPERS-based tax computation (whether done correctly or wrongly) may become the benchmark for guiding the tax computation of future periods. Maiden mistakes made during the crucial switchover year may be repeated as part of the "follow last year" attitude, resulting in tax penalties which can rightfully be avoided. Thus, the maxim 'getting it right first time' takes on a new level of significance.

'FAIR VALUE' VOLATILITY AND TAXABLE INCOME

Compared to MPERS, income tax rules share similarities with the older PERS as both are driven by 'cost' based models of asset measurement.

MPERS, on the other hand, is more 'fair value' inspired. This exacerbates the divergence between accounting profits (fair-value driven) and taxable income as is evident in businesses with quoted shares, investment properties and biological assets.

'Fair value' accounting also creates a disconnect between the business operations and reported profits under MPERS. Intuitively, accounting profits are supposed to report operating performance. However, because MPERS incorporates volatility from financial and property markets into the accounting profits while tax rules do not, MPERS profits can fluctuate year on year, even where there is no change in the underlying business profits on which taxable income is based on.

This divergence between accounting profits and taxable income may itself be problematic in the following instance:

(a) Business managers rely on accounting profits to (wrongly) forecast their tax estimates (CP204);
(b) Business managers are caught off-guard when the actual tax outflow is significantly higher than suggested by the 'accounting profit numbers'; and
(c) Penalties for underestimation of tax under Section 107C(10) are imposed due to tax estimation errors.

Table A - Implications of MPERS on the Tax Computation process

Item	MPERS	Income tax implication
Property, plant and equipment	When a new component replaces an old one, the old component is 'derecognised'.	Need to determine cost of item 'derecognised'. May cause more Balancing Allowance claims.
Investment properties	'Fair Value' model.	Changes in 'Fair Value' must be reversed in tax computation. Tax computation must hold separate cost records for Industrial Building Allowance claim (where applicable) which are based on cost, not on Fair Value.
Research and development cost	Must be expensed off	For costs that qualify for tax deduction, tax and MPERS treatment is aligned. (Previously, PERS treatment of items like capitalised salaries diverged from income tax treatment, which required tax adjustments).
Quoted shares		
Held for long-term investment	'Fair Value' model	Changes in 'Fair Value' must be reversed in tax computation.
Held as trading stock	'Fair Value' model	Changes in 'Fair Value' must be reversed in tax computation; 'Lower of cost and market value' to be applied as per Section 35(3)(a). Tax adjustment is needed.
Inventories		
Cost formula	LIFO is prohibited	LIFO is prohibited. MPERS is aligned to tax treatment.
Deferred settlement amount	Difference between deferred payment and cash price must be charged out as interest expense.	MPERS is aligned to tax treatment. (Previously, PERS diverged from tax treatment, which required tax adjustments).
Interest expense	Must be expensed	MPERS is aligned to tax treatment. (Previously, PERS provided treatment choices; the 'capitalisation' choice diverged from tax treatment, requiring tax adjustments).
Property development	Interest expense related to development must be expensed off.	Interest must be allocated to the development project, capitalised and deducted following 'percentage completion method' over the period(s).
Presentation of the equivalent 'Income Statement'	Statement of Comprehensive Income contains many references to 'profit' or 'income'.	Higher chance of extracting the wrong 'profit' number into the tax computation.

This table is a non-exhaustive list of some of the tax implications of MPERS adoption. Due to the vastness of MPERS treatments, it is not possible to present all tax items impacted by MPERS. Accordingly, only a sample of items is shown.

TAXES AND MPERS PROFITS

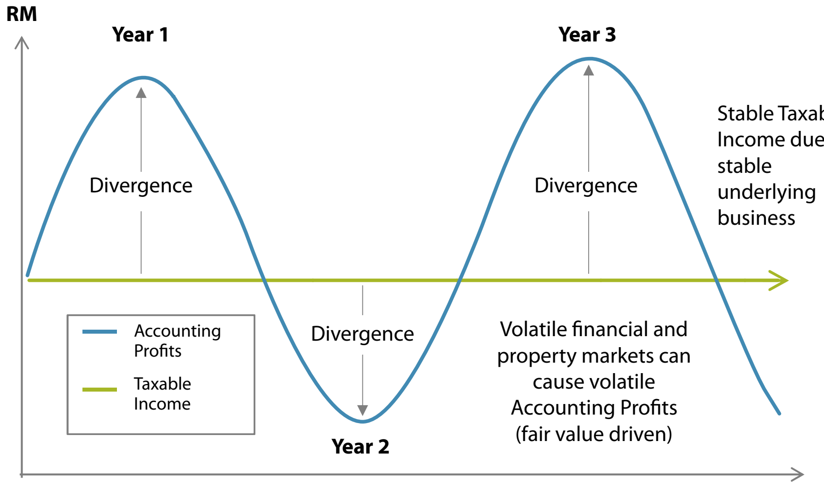
In the past, some business managers have taken the accounting profit multiplied by the statutory tax rate as a convenient approximation for the income tax expense of a given financial year. Such approximation had some practical merit during the PERS-era when accounting profit and taxable income did not diverge as much.

But things are different under the MPERS-era. Because 'fair values' of quoted shares, investment properties and biological assets can fluctuate wildly from year to year, multiplying the accounting profit by the statutory tax rate may yield a less meaningful estimate of the tax expense.

Loss-making companies may sometimes need to pay income taxes if the accounting losses are attributable to the fair value adjustments which are not counted in the tax computation. Similarly, profitable companies may sometimes not be taxable if the accounting profits arose mainly from unrealised gains such as fair value adjustments. See **Figure 1**.

Some of these outcomes are counter-intuitive to the layman, and tax professionals play an important role to explain (at least partially) these MPERS-induced tax results to business managers and business owners.

Figure 1: Accounting Profits vs Taxable Income - when fair-values are volatile



CONCLUSION

This article discusses a sample of items (non-exhaustive) where the treatment is different between MPERS and the older PERS. These differences may have a mixed tax impact on the tax preparation process of small and medium companies which form the core adopters of MPERS. See **Table A**.

For certain transactions, MPERS may actually simplify the tax treatment due to closer alignment with tax rules (e.g. research and development costs; deferred payment price; capitalisation of interest expense).

For other transactions, MPERS introduces more complications that require new tax adjustments (e.g. items under 'fair value' model; treatment of interest expense for property development) or much greater care in the tax preparation process (e.g. extraction of correct 'profit' figure).

Given the above changes, the previous year's tax computation will become a poor guide to the tax adjustments needed to be put through in the first MPERS-based tax computation. Early preparations (including training the tax team and revising tax checklists) are crucial, as tax preparers familiarise with the nuances of MPERS.

But the tax-related disruptions brought about by MPERS extend beyond the tax computation. The greater divergence between accounting numbers and taxable income (caused by 'fair value' and other new adjustments) may confound business managers, who will undoubtedly seek explanations from tax preparers. Thus, familiarity with the tax impact of MPERS could become the new norm for tax professionals serving small and medium sized companies, many of which are MPERS-adopters.

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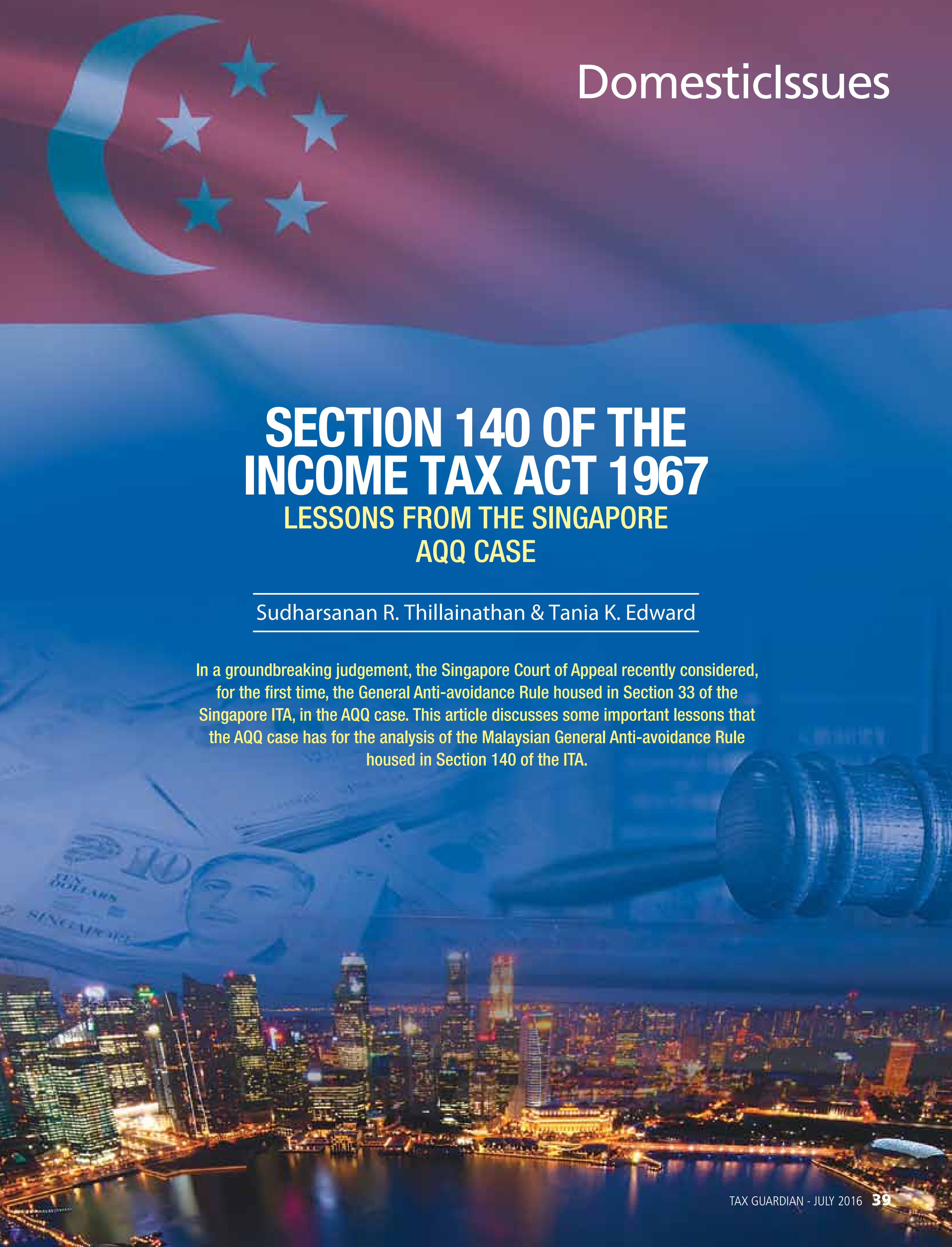

SECTION 140 OF THE INCOME TAX ACT 1967

LESSONS FROM THE SINGAPORE AQQ CASE

Sudharsanan R. Thillainathan & Tania K. Edward

In a groundbreaking judgement, the Singapore Court of Appeal recently considered, for the first time, the General Anti-avoidance Rule housed in Section 33 of the Singapore ITA, in the AQQ case. This article discusses some important lessons that the AQQ case has for the analysis of the Malaysian General Anti-avoidance Rule housed in Section 140 of the ITA.

The leading statement on the right of a taxpayer to arrange his affairs to pay the minimum amount of tax is that by Lord Tomlin in *IRC v Duke of Westminster*[1]:-

> "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

In their attempt to minimise their tax liability, taxpayers sometimes enter into artificial arrangements, which on the one hand, are consistent with the letter of the law, but on the other hand, are inconsistent with the spirit of the law. As a consequence, most income tax legislation contains a general anti-avoidance rule ("GAAR") to combat such arrangements. The object of a GAAR is to enforce the spirit of the law by closing loopholes in the letter of the law. The broad working of a GAAR empowers the revenue authorities and the courts to take a substance over form approach and apply judgement in tackling tax avoidance schemes.

In Malaysia, the GAAR is contained in Section 140 of the Income Tax Act 1967 (the "Malaysian ITA"). Section 140(1) of the Malaysian ITA provides wide and general powers to the Director-General of Inland Revenue ("DGIR") to combat tax avoidance in that, where he has reason to believe that any transaction produces the effect of (1) altering the incidence of tax; (2) relieving from a tax liability; (3) evading or avoiding tax; or (4) hindering or preventing the operation of the Malaysian ITA, he may disregard or vary such a transaction to counteract its direct or indirect effect. The Malaysian legal jurisprudence on tax avoidance generally and Section 140 of the Malaysian ITA, as, compared with other jurisdictions, is less developed. The following are amongst the few cases in which our superior courts have considered Section 140 of the Malaysian ITA.

In *LD Timber Sdn Bhd v DG of IR*[2], an early Malaysian case on tax avoidance, Justice Yosoff laid down the proposition that in determining whether a transaction has the effect of altering the incidence of tax, it must be shown that the transaction is not capable of explanation by reference to ordinary business dealing. Another leading case, *Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri*[3], is authority that Section 140 of the ITA 1967 is a comprehensive provision that enables the Revenue to disregard any transaction which has the effect of avoiding the incidence of tax, whether directly or indirectly. Under Section 140 of the ITA 1967, in the words of Raja Azlan Shah FCJ (as he then was) in *UHG v DG of IR*[4], the DGIR has an unfettered discretion in certain matters of tax evasion and while the powers conferred by it are wide, they are not plenary.

In the case of *Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[5], the Court of Appeal held that Section 140(1)(c) of the Malaysian ITA has the effect of demolishing the distinction between tax avoidance and tax evasion. The Court of Appeal proceeded to qualify the above-quoted statement of Lord Tomlin, by holding that Lord Tomlin's statement is only partially true in the Malaysian context, because whether a man succeeds in ordering his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be, pursuant to Section 140(c) of the Malaysian ITA, depends upon the determination of the DGIR. The Court further observed that the burden is now placed on the taxpayer to demonstrate that the transaction was firstly, preordained by compliance with the requirements of the law or accepted business practices to limit risk exposure, and secondly, that the tax savings were purely incidental.

The Malaysian courts, however, in our view, have yet to deal with Section 140 of the Malaysian ITA exhaustively. As a result, curial guidance on tax avoidance and the interpretation of Section 140 of the Malaysian ITA is still quite limited. It would be helpful, therefore, to look at cases from other jurisdictions to see how they elucidate Section 140 of the Malaysian ITA. In this regard, the Singapore Court of Appeal has recently delivered a comprehensive landmark decision in *Comptroller of Income Tax v AQQ* and another appeal[6] on Section 33 of the Income Tax Act (Cap. 134 of Singapore, 2008 Rev Ed) (the "Singapore ITA"), in the context of a corporate restructuring and financing scheme. This is the first time since that the Singapore Court of Appeal (Singapore's apex court) has considered Section 33 of the Singapore ITA, which is the GAAR in the Singapore ITA.

AQQ, a wholly owned subsidiary of [B] Bhd ("B Group"), was incorporated as part of a corporate restructuring exercise in which four companies D, E, F and G ("the subsidiaries") were consolidated under the ownership of AQQ. This was procured by AQQs purchase of C's and D's respective 50% interests in E, F and G for $75m each, and by AQQs purchase of B Group's 100% interest in D for $75m. An intricate financing arrangement ("the arrangement") for $225 million was entered into with the end result being that AQQ obtained $225 million from a bank, the entirety of which was effectively returned to the bank on the same day, albeit following a circuitous route.

The subsidiaries paid dividends to AQQ, which carried tax credits pursuant to the imputation corporate taxation scheme under Sections 44 and 44A of the Singapore ITA. Under this scheme, corporate profits would be taxed at the corporate level and the amount of tax paid would be credited to the company's "Section 44 account". When dividends (with a tax credit reflecting the sum of tax paid by the company) were issued, the tax credited to the shareholder would be debited from the "Section 44 account" balance.

The overall effect was that dividend income would only be subject to tax once and at the marginal tax rate of the shareholder. On 1 January 2003, this was replaced with a one-tier corporate tax system. Companies were given the option to stay on the imputation system for a transitional period of five years to utilise their Section 44 account balances.

In AQQ's tax returns for YA 2004 to 2007, AQQ declared its' dividend income less the interest expenses of 8.85% per annum on the arrangement.

It is to be noted that the arrangement (which involved two intermediary banks) resulted in 8.75% of the interest payments being paid to C. AQQ would have been entitled to a total of $16,881,375 in tax credits on the dividends, but its tax liability on its dividend income was only $3,305,253.84. AQQ claimed to be entitled to a tax refund of $13,576,121.16 on the dividends. The Comptroller of Income Tax ("CIT") invoked Section 33 of the Singapore ITA to ignore both the dividend income from the subsidiaries and interest expenses, issuing Notices of Additional Assessments.

AQQ appealed to the Income Tax Board of Review, which upheld the CIT's assessment. An appeal was then filed to the High Court. The CIT appealed against the decision of the High Court that the CIT had not acted reasonably and fairly in exercising his powers under Section 33(1) of the Singapore ITA, while AQQ appealed the High Court's decision that the arrangement amounted to an agreement to avoid tax under Section 33(1) of the Singapore ITA. The Singapore Court of Appeal partially allowed the CIT's appeal and dismissed AQQ's appeal. Although Section 33(1) of the Singapore ITA and Section 140(1) of the Malaysian ITA are not identical, the following lessons can be gleaned from the decision in the AQQ case:-

Lesson 1

In our view, the first lesson to be derived from the AQQ case is the three-stage approach taken by the Singapore Court of Appeal to Section 33 of the Singapore ITA:-

(a) whether an arrangement prima facie falls within any of the three threshold limbs of Section 33(1) of the Singapore ITA such that the taxpayer has derived a tax advantage; and if so,

(b) whether the taxpayer may avail himself of the statutory exception under Section 33(3)(b) of the Singapore ITA; and if not,

(c) whether the taxpayer has satisfied the court that the tax advantage obtained arose from the

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1 [1936] 1 A.C. 1
2 (1978) 1 MLJ 203
3 [1999] 3 MLJ 145
4 (1950–1985) MSTC 145
5 [2015] 10 CLJ 114
6 [2014] SGCA 15

use of a specific provision in the Singapore ITA that was within the intended scope and the Parliament's contemplation and purpose, both as a matter of legal form and economic reality within the context of the entire arrangement.

(1) Were the threshold limbs of Section 33(1) of the Singapore ITA satisfied?

Section 33(1) of the Singapore ITA reads as follows:-

(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly —

(a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
(b) to relieve any person from any liability to pay tax or to make a return under this Act; or
(c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,

the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.
(emphasis added)

This provision contemplates a scenario where the purpose or effect of an arrangement is directly or indirectly to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by the Singapore ITA. The first stage involves, *inter alia*, the interpretation of the words "purpose and effect of any arrangement" in Section 33(1)(c) of the Singapore ITA. It was held that the phrase "purpose or effect" is to be "construed conjunctively so as to refer to the objectively ascertained effect of the arrangement in question". This is in line with the predication test enunciated by Lord Denning in *Lauri Joseph Newton v Commissioner of Taxation of the Commonwealth of Australia*[7]. The Singapore Court of Appeal held that the interest expenses were not properly incurred and had the effect of reducing AQQ's tax liability and therefore, were within the scope of Section 33(1)(c) of the Singapore ITA.

(2) Was AQQ entitled to avail itself of the exception under Section 33(3)(b) of the Singapore ITA?

Section 33(3)(b) of the Singapore ITA, a highly fact sensitive provision, provides an exception to Section 33(1) of the Singapore ITA where an arrangement is (1) carried out for bona fide commercial reasons; and (2) none of its main purposes is the avoidance or reduction of tax. The Singapore Court of Appeal found that there were no genuine bona fide commercial reasons for the arrangement and that the subjective purpose and object of the arrangement was to reduce or avoid liability that would otherwise have accrued on the dividend income. Therefore, AQQ could not rely on the exception under Section 33(3)(b) of the Singapore ITA.

(3) Was AQQ entitled to rely on the specific provisions of the Singapore ITA to preclude the application of Section 33 of the Singapore ITA?

In the third stage, the Singapore Court of Appeal adopted a purposive interpretation of Section 33 of the Singapore ITA, holding that a GAAR should not be read as "overriding" any specific provision of the Act. The correct approach was the New Zealand scheme and purpose approach i.e. the taxpayer must satisfy the court that the use of any specific provision of the Singapore ITA (1) was within its intended scope; and (2) viewed in the light of the arrangement as a whole, has altered the incidence of tax in a manner within the contemplation and purpose of Parliament. It was held that there was no basis for AQQ to

rely on the combination of Sections 10(1)(d), 14(1)(a)(i), 44, 44A and 46 of the Singapore ITA as entitling it to the tax advantage that it had obtained. Therefore, the specific provisions did not apply to remove the arrangement from the scope of Section 33(1) of the Singapore ITA.

Application of three-stage approach to Section 140 of the Malaysian ITA

It should be pointed out that Section 140 of the Malaysian ITA, has no equivalent of Section 33(3)(b) of the Singapore ITA. The first implication of this is that any tax advantage obtained would only be legitimate if, like the third limb in Section 33 of the Singapore ITA, it is expressly provided for in another provision of the Act. Consequently, the three-stage approach adopted by the Singapore Court of Appeal translates to a two-stage approach when applied to Section 140 of the Malaysian ITA. Secondly, it would follow that, in Malaysia, notwithstanding that a transaction is carried out for bona fide commercial reasons and none of its main purposes is the avoidance or reduction of tax, this does not legitimise any tax advantages obtained thereof.

The first stage in approaching Section 140 of the Malaysian ITA is whether any of the four (4) threshold limbs of Section 140(1) of the Malaysian ITA are satisfied i.e. whether a transaction did (1) alter the incidence of tax; (2) relieve a liability to pay tax; (3) evade or avoid any duty or liability imposed or would have otherwise been imposed; and (4) hinder or prevent the operation of the Malaysian ITA.

Where a transaction falls within any of the four (4) threshold limbs, the second stage to be considered is whether any specific provisions of the Malaysian ITA would preclude the application of Section 140 of the Malaysian ITA. One such provision is Section 44(6) of the Malaysian ITA. This is illustrated in Sabah Berjaya where it was held that the payment in that case reduced the

taxpayer's income in circumstances in which the Malaysian ITA, by way of Section 44(6), clearly afforded a reduction in tax liability. Therefore, the Court of Appeal concluded that the taxpayer was not engaging in tax avoidance.

Lesson 2

The Singapore Court of Appeal recognised that there is nothing in Section 33 of the Singapore ITA "that mandates the Comptroller to take a particular course or choose a specific mode of exercising his powers, as long as the final object of counteracting the tax advantage is attained". On this basis, the Court of Appeal propounded some practical yardsticks by which the CIT may exercise his discretionary powers under Section 33(1) of the Singapore ITA to counteract the tax advantage. There is, in our view, a lesson to be gleaned from those yardsticks in the interpretation of the phrase "counter-acting the whole or any part of any such direct or indirect effect of the transaction" in Section 140(1) of the Malaysian ITA.

Exercise of Powers of the DGIR under Section 140 of the Malaysian ITA

Section 33(1) of the Singapore ITA empowers the CIT (1) to disregard the arrangement (a voiding provision); (2) to vary or make adjustments to the tax elements of the arrangement (a reconstruction provision); and (3) to impose liability to tax (a charging provision). These three powers would appear to be within the scope of the

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[7] *[1958] 1 AC 450 at 465-466 "They show that the Section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement or arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. In applying the Section you must, by the very words of it, look at the arrangement itself and see which is its effect - which it does - irrespective of the motives of the persons who made it…In order to bring the arrangement within the Section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the Section."*

[8] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue [2009] 2 NZLR 289*

DGIR's powers under Section 140(1) of the Malaysian ITA. Applying AQQ, it would appear that the DGIR's discretionary power under Section 140(1) of the Malaysian ITA would be unfettered so long as the choice of discretionary power has the final object of counter-acting the effect of such a transaction. Therefore, the DGIR may exercise his powers pursuant to Section 140(1) of the Malaysian ITA with reference to the following propositions:-

(i) the tax liability that arises from the inclusion of an income sought to be excluded or the disallowance of a deduction sought to be made (see, for example, Section 177F of the Australian Act and the very recent New Zealand Court of Appeal case of *Alesco New Zealand Ltd v Commissioner of Inland Revenue*[9]);

(ii) the hypothetical tax liability on the economic and commercial basis of what would likely have happened if the taxpayer had not entered into the arrangement constituting tax avoidance (see, for example, Section 99(3)(a) of the 1976 New Zealand Act and *Miller v Commissioner of Inland Revenue*[10], where Lord Hoffmann stated that "[t]he Commissioner's duty is to make an assessment with regard to what in his opinion was likely to have happened if there had been no scheme"); or

(iii) the tax liability if the arrangement simply had not taken place.

[9] [2013] 2 NZLR 175 at [120] and [123] - currently on appeal to the Supreme Court of New Zealand

[10] [2001] 3 NZLR 316 at [22]

CONCLUSION

On the facts of AQQ, it was held that the arrangement had the purpose or effect of tax avoidance, and was contrived or artificially structured to obtain a tax refund. There was no evidence that the arrangement was carried out for bona fide commercial reasons. On the contrary, there was evidence showing that the scheme was undertaken for tax avoidance purposes, *inter alia*:-

(i) the absence of meeting minutes or other discussion records for a loan of this magnitude;

(ii) no evidence of discussion within the B Group or AQQ itself as to the transactions in the arrangement;

(iii) the artificial interposition of the two external entities;

(iv) all transactions in the arrangement took place on the same day which lent an element of artificiality to the scheme; and

(v) no evidence to show how the occurrence of the transactions in the arrangement on the same day would support the objectives of the corporate restructuring and financing scheme.

This case is a recent illustration of the CIT's aggressive stance in challenging tax structures if they are of the view that these structures appear artificial. In this light, in entering a transaction, taxpayers should ensure that they maintain proper recordkeeping and that there is sufficient documentary evidence to substantiate the commercial rationale behind a tax structure i.e. that the tax structure was carried out for bona fide commercial reasons.

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KENNY HEIGHTS DEVELOPMENT
A TALE OF TWO AGREEMENTS

Dr. Nakha Ratnam Somasundaram

This article looks at the issue of conditional agreement made between parties for the disposal and acquisition of real property under the Real Property Gains Tax Act 1976 (as amended) [RPGT Act] with reference to the case of *Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri.*[1]

The RPGT Act was legislated on 7 November 1975 and imposes tax on gains arising from the disposal of real property situated in Malaysia. It is a capital gains tax involving real properties or shares in real property companies and is territorial based i.e. the land must be situated in Malaysia.

As gains from transactions in real property can also fall to be assessed under the Income Tax Act 1967 (as amended) [ITA], the ITA takes precedence over the RPGT. When it comes to the taxability of the gains from the transaction, both laws are mutually exclusive.[2]

'Real property' would include land situated in Malaysia and any interest, option or other right in or over such land. 'Land' itself is extensively defined to include the surface of the earth, the earth below the surface and substances therein, buildings on land, standing timber, trees, crops, vegetation growing on land, and land covered by water.[3]

Disposal and acquisition date of real property

Central to taxation under the RPGT is the date of disposal, and this is dependent on whether there is an agreement - and the type of agreement for the disposal.

If there is a written agreement for the disposal of the real property, then the disposal is deemed to have taken place on the date of the written agreement – it does not matter that the monetary consideration was not received by the disposer from the acquirer[4].

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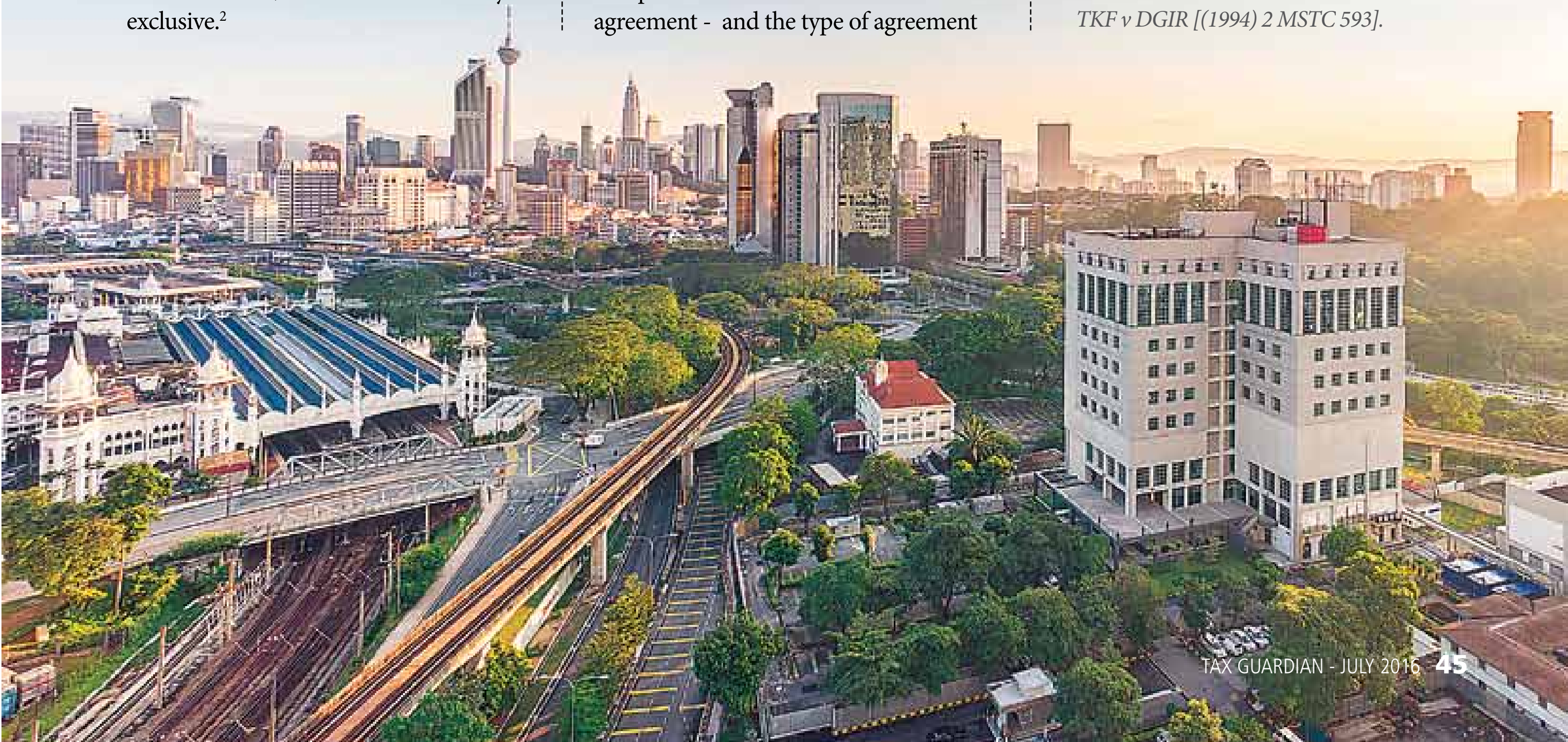
1 *Civil Appeal No. W-01-200-06/2014.*

2 *All reference to the law in this article is to the Real Property Gains Tax Act 1976 (as amended) unless otherwise stated.*

3 *Section 2*

4 *See AM v DGIR [(1993) 2 MSTC 568] and TKF v DGIR [(1994) 2 MSTC 593].*



However if the parties do not have a written agreement, then the disposal date would be the date of completion of the disposal[5]. This 'completion' takes place at the earlier of the following event:

(a) The date the ownership of the disposed asset is transferred by the disposer; or
(b) The date on which the disposer has received the whole amount or the value of the consideration for the transfer.

Disposal and acquisition of a chargeable asset

RPGT arises only when there is a "disposal". 'Disposal' means to sell, convey, transfer, assign, settle or alienate whether by agreement or force of law. Furthermore, every method, scheme or arrangement by which the ownership of a chargeable asset is transferred from one person to another would constitute an acquisition of the chargeable asset by the transferee, and a disposal by the transferor[6].

Under the law, the date of acquisition of an asset by the acquirer would coincide with the date of disposal of that asset by the disposer – in other words the disposal and the acquisition is treated as having taken place on the same day[7].

Conditional Contract

There are instances where contracts are signed but the disposal and acquisition is subject to some conditions to be satisfied either by the disposer or the acquirer, or both the parties before the disposal can effectively take place. This is known as a 'conditional contract'[8].

The Law prior to 2 September 2006

In a conditional contract, there are two aspects governing the date of disposal and acquisition:

(a) In the case of a conditional contract where the conditions are satisfied by the exercise of a right or an option or otherwise, the acquisition and disposal of the asset is deemed to have taken place at the time the contract was made; but
(b) If the amount of the consideration depends wholly or mainly on the value of the asset at the time when the condition is satisfied, the acquisition and disposal is regarded as taking place when that condition is satisfied.

It is important to note that the second aspect in (b) above has the effect of shifting the date of disposal and acquisition to a later date, even if an agreement had been signed earlier; and the value of the disposal will be the value at the date such condition was fulfilled.

Sometimes, the conditions could be satisfied only when certain approval could be obtained from some third parties, particularly government or some enforcement agencies.

The law from 2 September 2006

The law was amended from 2 September 2006, whereby if the contract for the disposal of an asset is conditional because the acquisition and disposal requires the approval by the government, or an authority or committee appointed by the government; or if their approval is conditional, then the date of disposal shall be the date when the last of such condition is satisfied. With effect from the year of assessment 2011, 'State Government' was included in the list of authorities[9].

Kenny Heights Development

What will happen if the parties entered into a conditional agreement for an agreed price; and upon the fulfilment of the conditions stated in a conditional agreement, the consideration is less than that agreed upon price; then a supplemental agreement was signed for the reduced price; and further, the date of the supplemental agreement falls within a period where a special real property gains tax exemption applies?

This was the issue in Kenny

Heights Development case (the 'KHD case').

Facts of the case[10]

The company, KHD, in pursuance of an agreement dated 14 August 2000 (the SPA) agreed to sell certain land to Mycom Berhad and Olympia Industries Berhad. The SPA was subject to the following pre-conditions:

(a) Approval of the Securities Commission for the transfer of 'consideration shares' to KHD;
(b) Approval of the Securities Commission to list the consideration shares;
(c) Approval of the Securities Commission for the acquisition of the land according to the agreements;
(d) Corporate approvals;
(e) Restructuring and Standstill Agreements becoming unconditional;
(f) All approvals in connection with completion of the proposed restructuring scheme being obtained; and
(g) Such other approvals required by third parties or the government, enforcement agency or authority having jurisdiction over the sale of the said land under the respective agreements.

The parties signed a Supplemental Agreement both dated 14 February 2003, and the sale and purchase price was reduced from the earlier agreed price.

The pre-conditions were satisfied by 27 April 2007 and the IRB a raised notice of assessment on KHD for Year of Assessment 2000 and a Notice of Additional Assessment for Year of Assessment 2000 both dated 31 December 2008 in respect of the disposal of the land under the two agreements. KHD being dissatisfied with the assessment then appealed to the Special Commissioners of Income Tax (SCIT) [11].

Issues before the SCIT

At the SCIT, the issues submitted by KHD were as follows:

(a) Whether there was any disposal of the subject land in the year 2000 within the meaning of Para 16 Schedule 2 of the RPGTA;
(b) Whether the disposal of the subject land by KHD is exempted from RPGT under the RPGT (Exemption) (No. 2) Order 2007 which exempted disposal after 31 March 2007 to 31 December 2009 ('the exemption order')
(c) Whether there were any chargeable gain in the year 2000 within the meaning of Section 3 of the RPGT Act

The Director-General of Inland Revenue (DGIR) however set out the following matters:

(a) Whether the disposal dates for lots 21759-21768 took place when the agreement was signed on14 August 2000, or when the conditions were satisfied pursuant to Para 16 of Schedule 2;
(b) Whether the consideration for the disposal of the said lots was determined at the time the agreement was signed, or the consideration was determined only upon the conditions were satisfied;
(c) Whether the Notice of Assessment dated 31 December 2008 is subject to the Statute of Limitations.

The SCIT gave a decision in favour of the taxpayer, KHD.

The DGIR being dissatisfied with the decision, appealed to the High Court. Accordingly the SCIT stated a case for the High Court as follows:

(a) Whether the disposal of the subject lands by KHD should be held as having taken place on the date of two (2) agreements namely – Land Acquisition Agreement dated 14 August 2000 between KHD and Mycom Berhad; and Land Acquisition Agreement dated 14 August 2000 between KHD and Olympia Industries Berhad, were signed on 14 August 2000, or based on the date of the last condition being fulfilled upon listing on Bursa Malaysia on 27 April 2007; and
(b) Whether the date of disposal in the Land Acquisition Agreement dated 14 August 2000 between KHD and Mycom Berhad and the date of disposal in the Land Acquisition Agreement dated 14 August 2000 between KHD and Olympia Industries Berhad is subject to the exception provided in Sub-paragraphs 16(a) and (b), Second Schedule, Real Property Gains Tax Act 1976 (Act 661).

The High Court reversed the decision of the SCIT in favour of the DGIR. KHD then appealed against the High Court decision to the Court of Appeal.

Issues at the Court of Appeal

The parties submitted their issues at the Court of Appeal.

For KHD it was submitted as

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5 *Para 15 Schedule 22*
6 *Para 2 Schedule 2*
7 *Para 15(2) Schedule 2*
8 *Para 16 Schedule 2*
9 *Para 16(a) Schedule 2*
10 *At the time of writing this article, the Special Commissioner's decision was not available. The facts as mentioned in this article are gleaned from the decision of the Court of Appeal.*
11 *Paragraph 2 of the Grounds of Judgement at page 4.*

Figure 1: Timeline of events including assessment and appeals

Year	Events
2000 14/8/2000 31/12/2000	S & P signed between the disposer and the acquirer Assessment raised by the IRB.
2003 14/2/2003	Supplemental Agreement – consideration amended
2006 31/12 2006	This is the last day for raising an assessment or an additional assessment by the DGIR in normal circumstances (i.e. there is no fraud or wilful default).
2007 27/4/2007 1/4/2007	Pre-conditions are satisfied and a Supplemental Agreement is signed. RPGT (Exemption) (No. 2) Order 2007 is gazetted that exempts any person from all provisions of the RPGT for the period 01/04/2007-31/12/2009.
2008 31/12/2008	Assessment raised by the DGIR. RPGT exemption is still in force till 31/12/2009.
2009 2/2/2009	Assessment served on the taxpayer. RPGT exemption is still in force till 31/12/2009.

follows:

(a) Whether there was any disposal of the subject land in year 2000 (additional) within the meaning of Paragraph 16 Schedule 2, Real Property Gains Tax Act 1976;

(b) Whether the disposal of the subject lands by KHD is exempted from Real Property Gains Tax under the Exemption Order;

(c) Whether there were any chargeable gains in the year 2000 within the meaning of Section 3, RPGT Act 1976;

(d) Whether the assessments for YA 2000 raised on 31 December 2008 are statute barred[12].

On behalf of the DGIR it was submitted as follows:

(a) Whether the disposal date of lot no. 21759 to lot no. 21768 was on the date of the Agreement was signed on 14 August 2000 or on the date when the conditions precedents was satisfied under Paragraph 16, Schedule 2 of Real Property Gains Tax Act 1967 [before amendment on 2 September 2006 ("RPGTA")]

(b) Whether the consideration price for the disposal of lot no. 21759 to lot no. 21768 was determined when the agreements was signed on 14 August 2000 or when all conditions precedents to the agreements was satisfied for the purpose of assessment under the RPGTA;

(c) Whether the Notice of Assessment for YA 2000 dated 31 December 2008 is statute barred.

The timeline of the events could be traced as **Figure 1**.

Findings of the Court of Appeal

The Court of Appeal considered three issues:

(a) what are the disposal dates and the consideration price of the Conditional Agreements dated 14 August 2000 subsequently amended by Supplemental Agreements dated 14 February 2003;

(b) whether the Exemption Order applied to exempt the Appellant from real property gains tax; and

(c) whether the Notice of Assessment for YA 2000 dated 31 December 2008 is statute barred by virtue of Section 15(1) of the RPGT Act.

The Court of Appeal reviewed Paragraph 16 Schedule 2 which reads as follows:

Where -

(a) a contract for the disposal of an asset is conditional; and

(b) the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless the amount of the consideration depends wholly or mainly on the value of the asset at the time when the condition is satisfied in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied.

The key or operative words according to the Court of Appeal was: "unless the amount of the consideration depends wholly or mainly on the value of the asset at the time when the condition is satisfied in which case the acquisition and disposal shall be regarded as taking place when the condition is satisfied".

In plain language, it means the amount of consideration is the actual consideration as at the time the conditions were satisfied, and the date of disposal is the date on which the condition was satisfied.

In the KHD case, the amount of the consideration at the time the considerations were satisfied by 27 April 2007 was no longer the consideration price set out in the SPA dated 14 August 2000. The consideration was amended by the supplementary agreement dated 14 February 2003 – and the amount was much lower than that stated in the SPA (another twist in the tale!).

Furthermore, by operation of Paragraph 16, the Court of Appeal held that the date of disposal has shifted to 27 April 2007 and KHD is now entitled to the exemption afforded by the Exemption Order gazetted in 1 April 2007.

The Exemption Order, which exempted any person from all provisions of the RPGT Act in respect of any disposal of chargeable assets after 31 March 2007, remained in force till 31 December 2009.

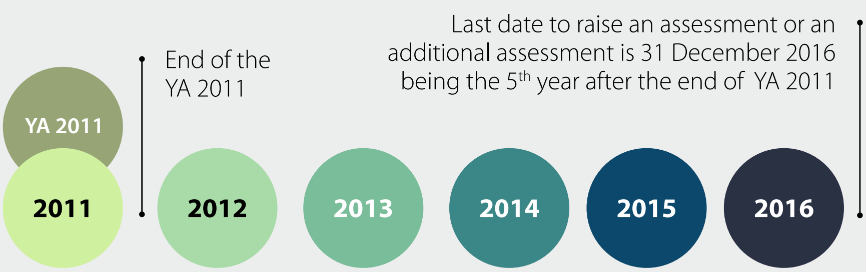
On the issue of whether the assessment was statute barred, the Court of Appeal examined the power of the DGIR to raise an assessment or

an additional assessment under Section 15(1).

The DGIR where in respect of any year of assessment it appears to him that no, or no sufficient assessment has been made on a person chargeable with tax, may within five years of assessment make on that person whatever assessment or additional assessment he considers to be appropriate.

On the other hand, where it appears to the DGIR that a person chargeable with tax has been guilty of any form of fraud or wilful default in connection with or in relation to the tax, may at any time make an assessment in respect of that person for the purposes of making good any loss of the tax attributable to the fraud or wilful default.

Figure 2: Time limit to raise an assessment barring any fraud or wilful default



Thus the DGIR must raise an assessment within six (five with effect from 1 January 2014) years in case there is no fraud, or at any time (i.e. there is no time limit) if there is fraud or wilful default proved.

The current law on time bar to raise an assessment or an additional assessment for a situation where there is no fraud or wilful default as illustrated in **Figure 2**.

The Court of Appeal further noted that the High Court held that both the SPA and the Supplemental Agreement did not authorise the Securities Commission or any other relevant authority to change or amend the considerations (as stated in the SPA). It referred to the submission that the original sale and purchase price had been amended, but held no evidence was adduced to prove that the Securities Commission was influenced by the reduction of the sale and purchase price, and relying on the bundle of documents of the DGIR before the High Court, the approval of the Securities Commission concerns only the number of shares, transfer of shares and the listing of the shares.

For the Court of Appeal, this reasoning failed to appreciate the fact that the number of shares and the value of the shares as determined by the Securities Commission, multiplied together would arrive at the price paid. Although the Securities Commission does not fix the sale and purchase price of the subject lands, it will not approve if the sale and purchase price is too high, or the number of consideration shares, in light of the value of the shares determined as fair by the Securities Commission was too many, resulting in the public-listed companies paying too much for the acquisition.

The Supplemental Agreements were entered into two years four months after the two agreements were entered into on 14 August 2000.

[12] *Section 15(1)*

Final approvals were obtained on 27 April 2007. Accordingly the Court of Appeal found it inconceivable that the parties seeking approval from the Securities Commission did not submit the improved pricing (i.e. the lower price) for the public-listed purchasers to the Securities Commission; or that the Securities Commission acted to approve the sale and purchase by payment of consideration shares on the original price (or higher price) that is less favourable to the public-listed companies.

The protocol in the appeal process

The Court of Appeal also addressed the appeal process in respect of an income tax appeal with particular reference to the KHD case.

The appeal to the High Court is upon a case stated by the SCIT. The law is specific that the High Court is limited to questions of law arising from the case stated[13]. The DGIR is, as other parties are, bound by the law. Examination of the case stated by the SCIT shows a meticulous presentation of the facts, the evidence, the submissions, the relevant law and reasoning by the SCIT. It demonstrated a thorough appreciation and consideration of the facts. It does not betray *ex facie* any error on any question of law as to warrant appellate intervention.

The Court of Appeal upon re-examining the Grounds of Judgement of the High Court, observed that the High Court only had a different view of Paragraph 16, but did not deal with that view and how it was arrived at. But apart from the different view which the High Court held and sought to explain in its Grounds of Judgement, the Grounds of Judgement clearly did not demonstrate with reasoning any error on the part of the SCIT in the case stated.

The Court of Appeal further reiterated that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as the SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law, and not any grievance. It underlines, within the SCIT's jurisdiction, its authority, and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the DGIR or the SCIT.

It went on to say that courts must also bear in mind the SCIT's specialisation. Dealing with terms and practises of the business and the business community enables them to have a special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. Hence, unless it is demonstrated that the SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT.

[13] *Paragraph 39 Schedule 5 of the Income Tax Act 1967 (as amended)*

DECISION

As the findings of the SCIT were made upon a full appreciation of the facts, the findings of fact were not perverse to the evidence. According to the Court of Appeal, there was no reason to interfere with its findings of fact. The SCIT addressed the correct questions of law, and found that the SCIT did not so err on its determination on the questions of law and its application to the facts to warrant intervention by the courts, in this case the High Court.

The DGIR's appeal to the Court of Appeal was accordingly dismissed with cost and the decision of the Special Commissioners of Income Tax was restored.

CONCLUSION

The case illustrates that appeals beyond the SCIT must be on a question of law and not otherwise. And further that the decision made at the Special Commissioners level revolves around facts and the evidence on which those facts are found and the application of the law to those facts. Hence it is of the utmost importance that proper records and documentations are maintained at all times to reflect transactions at the ground level. In respect of conditional contracts, it must be noted that the law has changed significantly since 2 September 2006, as the shifting of the disposal date applies only when it involves government approval as provided in Para 16, Schedule 2 of the Real Property Gains Tax Act 1976.

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THE ITALIAN ADVANCE PRICING AGREEMENT PROCEDURE

Claudio Mazzoleni & Vincenzo Zurzolo

The Advance Pricing Agreement (APA) mechanism was introduced in the Italian legislation in 2003 by means of Article 8 of the Law Decree no. 269/2003, and has been operational since 2005, following the favourable opinion received from the EU Commission[1].

Under an APA procedure a taxpayer (involved in international transactions) can agree in advance with the Italian Tax Administration, the tax consequences of certain transactions, provided that some critical assumptions - expressly indicated in the agreement - are met.

The APA is binding on the taxpayer and the Italian Tax Administration (so-called unilateral APA) but may be extended on a bilateral basis (i.e. also binding on the Tax Administration of the other State involved) through the mutual agreement procedures provided under the double taxation conventions.

In accordance with the Italian tax law, an APA can cover the following issues:

(i) selection of the method to be used to determine the arm's length price in a transaction between the taxpayer and its related parties;

(ii) application of provisions, including treaty provisions, regarding the attribution of income or losses to the Italian permanent establishment of a non-resident enterprise or to the foreign permanent establishment of a resident enterprise;

(iii) determining (in advance) of

whether a non-resident person has a permanent establishment in Italy;

(iv) application of provisions, including treaty provisions, regarding dividends, interest or royalties paid to or by non-residents.

As of 21 March 2016, the scope of the APA has been broadened to also include the determination of the tax value of assets and liabilities in case of inbound or outbound migration of companies and some other minor cases. However, since the main field of application of the APA is by far transfer pricing (refer to i above), this article will exclusively focus on this area.

Similar to many other OECD countries, the APA provisions have been introduced within the Italian tax system with the aim of facilitating a dialogue between the Tax Authority and Multinational Enterprises (“MNEs”).

Since the very beginning, the Advance Pricing Agreement has been represented in Italy, as well as in many countries around the world, as a valuable tool of cooperation between MNEs and the Tax Authority.

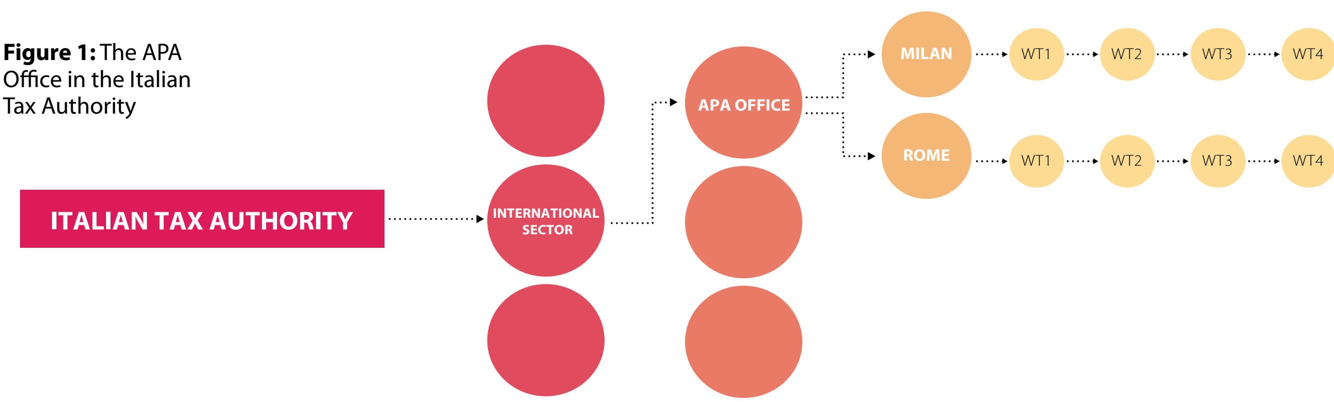
In the next paragraphs, the authors will give a brief description of the APA in Italy (with a focus on transfer pricing), the office in charge of this procedure within the Italian Tax Administration, the main benefits deriving from entering into an APA, and the steps of the procedure (from the filing to the signature).

BRIEF DESCRIPTION OF THE PROCEDURE AND OF THE OFFICE IN CHARGE

The Italian Advance Pricing Agreement is the outcome of the procedure through which a taxpayer can agree in advance with the Italian Tax Authority - (and other Tax Authorities for bilateral and multilateral APAs, as further explained below) -the most appropriate transfer pricing methodology for the cross-border intercompany transaction(s) covered by the agreement.

The procedure is managed by the “Advanced Agreements and International Disputes[2]” office within the International Sector of the Italian Tax Authority – previously known as “Ruling Office” – which is made up of a team of experts in the transfer pricing field (“The APA Office”). See **Figure 1**.

Figure 1: The APA Office in the Italian Tax Authority



The APA Office - which is managed by a Director - has two branches: Rome, which is also the central office of the Italian Tax Authority, and Milan. Each branch is supervised by an office manager and is organised into working teams made up of a team leader and one or more officials.

On the basis of its legal domicile, the taxpayer is assigned to one of the branches and to a dedicated working team within the APA Office.

MAIN BENEFITS FROM ENTERING INTO AN APA

From the taxpayer’s standpoint we have identified the following three main benefits arising out of an APA:

- The first benefit an APA gives the taxpayer is the high degree of certainty as to the most appropriate transfer pricing methodology for the intercompany transaction(s) covered by the agreement. Indeed, all the relevant elements of the transaction(s) under analysis, together with all the facts and circumstances at stake are discussed from a technical point of view, with shared rules in the framework of the OECD Guidelines. As illustrated in **Figure 2**, in examining the specific transaction(s), each comparability factor is singularly analysed with regard to the specific facts that characterise

[1] *As of 21 March 2016, Article 1 of Legislative Decree no. 147/2015 repealed Article 8 of the Law Decree no. 269/2003 and replaced it with Article 31 of the Presidential Decree no. 600/1973.*

[2] *Namely, “Ufficio Accordi Preventivi e Controversie Internazionali”.*

the operations of the MNE, on the basis of official documents and, where needed, by means of interviews with the personnel involved in the relevant functions;

- The second benefit coming from an APA is represented by the favorable, transparent, and collaborative climate in which the discussions are carried out as compared to a tax audit climate. This approach represents indeed a new and forward-looking attitude towards a closer collaboration between the Tax Authority and MNEs;
- Furthermore, the third benefit deriving from an APA is that the Tax Authority is prohibited from auditing the company throughout the term of the agreement – with regard to the transaction(s) covered by it – if the circumstances and conditions on which the agreement is grounded do not change.

All these benefits are particularly relevant for MNEs, and especially for listed taxpayers, since they help to reduce the tax exposure, to avoid long-lasting and aggressive tax assessments (usually ending with relevant claims) and to allow directors to care about their main task: doing business.

- First, the higher the number of MNEs (and the larger their size) involved in APA procedures, the lower the level of resources within the Tax Administration to be employed in long and costly assessments, in order to ascertain the fairness of the transfer pricing policy applied by MNEs and therefore the appropriate level of taxation paid within the country (without considering the length and the cost for the country of the subsequent litigations);
- Second, the higher the number of MNEs (and the larger their size) involved in APA procedures, the higher the level of certainty in tax revenues and the better the reliability of the overall planning for the country's financial statements;
- Third, the higher the number of MNEs involved in APA procedures and the higher the general awareness of the APA's benefits among MNEs, the better the general climate in the economic background.

Figure 2: Benefits of APA

APA BENEFITS	
MNEs	**TAX AUTHORITY**
Technical point of view	**Lower audit costs**
Collaborative climate	**Certainty in fiscal entry**
Prevention from auditing	**Favourable economic climate**

BILATERAL AND MULTILATERAL APA

The conclusion of an APA with the Italian Tax Authority reduces considerably (but does not remove) the risk of double taxation of income deriving from cross-border transaction. Conversely, the conclusion of a Bilateral (or Multilateral) APA ensures that the income realized by the related companies from the operations included in the agreement does not fall under double taxation, since the APA is shared and signed by all the competent Tax Authorities involved.

At the end of December 2012, 19 Bilateral APAs were in place between the APA Office and the competent foreign Tax Authorities as depicted in the following chart. See **Figure 3**.

OPENING THE PROCEDURE: PRE-FILING AND FILING

The procedure starts when the taxpayer files an APA request with the APA Office. If a taxpayer wishes, it can

Figure 3: No. of Bilateral APAs (December 2012)[3]

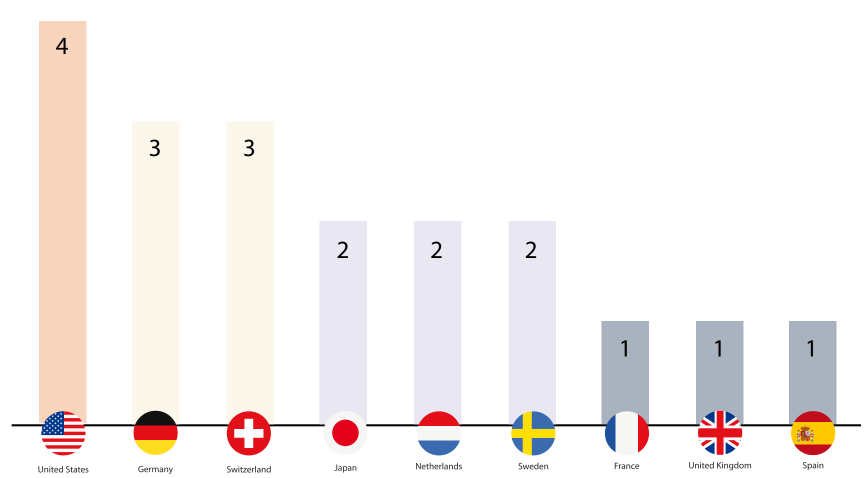
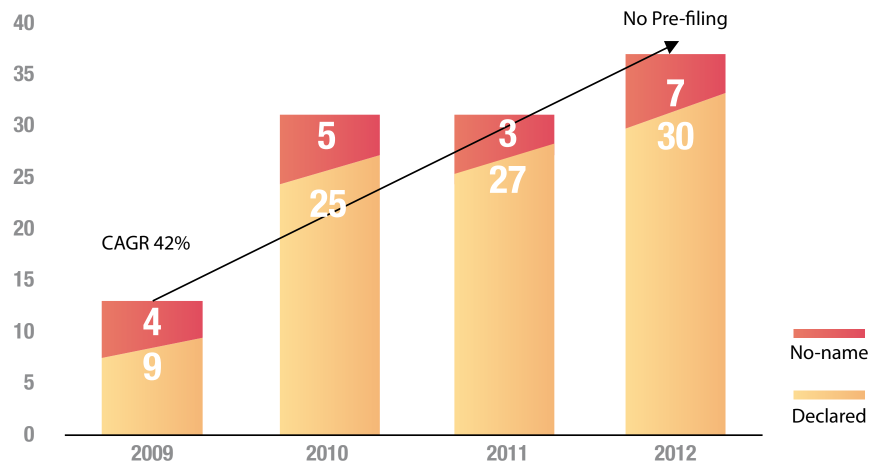


Figure 4: No. of pre-filings (2009-2012)[4]



also schedule a preliminary informal meeting (so-called pre-filing) with the APA Office to discuss the main features of the procedure in very general terms before filing the request and in any case without disclosing the details of the transaction(s). The pre-filing can also take place on a no-name basis.

In the four-year period 2009-2012 the APA Office held overall 110 pre-filing meetings (of which 19 on a no-name basis), with a compound annual growth rate (CAGR) equal to 42%, as depicted in **Figure 4**.

Along with some general information (such as the taxpayer's name, tax number, and registered office), the APA request must include a description of: a) the cross-border transaction(s) for which the APA is requested, inclusive of physical and invoicing flows, b) the functional profile of the parties, inclusive of products transferred or service provided, functions performed, risks assumed and assets employed, and c) the criteria and methods used to determine the arm's length value of the transaction and the reasons why they are considered consistent with the law.

Within thirty days from the filing, the APA Office must verify whether the request meets all the conditions required by the law and, if so, schedules a meeting with the taxpayer to define the next steps of the procedure.

Figure 5: No. of pre-filings (2009-2012)[5]

Transaction	2009	2010	2011	2012
Provision of services	4	8	14	16
Distribution of products	6	10	8	14
Manufacturing activity	3	5	8	5
Dividends, interests, and royalties	3	3	4	6
Income / Loss to permanent establishments	1	3	1	2
Cost sharing agreements	1	3	1	-
Business restructuring	-	-	3	2
Total*	18	32	39	45

** The total number of it by objects is higher than what is reported in Figure 5, since within the same pre-filing meeting is usual to present more transactions.*

OBJECT OF THE APA

In general terms, the object of an APA can deal with the whole range of transactions normally found in MNEs' operations.

In particular, the object of an APA may be the transfer of goods, both tangible and intangible, the provision of services, cost sharing agreements, business restructuring projects, and the attribution of income or loss to permanent establishments. Moreover, the APA may also cover financial transactions, such as payment of interests arising from intercompany loans, cash pooling agreements and payment of dividends.

As to the object, during the period 2009-2012, the highest number of pre-filing dealt with the provision of services (42), followed by the distribution of products (38), and manufacturing activities (21), while the lowest number regarded cost sharing agreements and business restructurings, as shown in **Figure 5**.

BRIEF DESCRIPTION OF THE SUBSEQUENT STAGES IN THE PROCEDURE

The procedure is structured over several meetings with the taxpayer. Over the course of these meetings, the APA Office usually asks for the organisational charts and the parties agree that the assigned tax officers carry out interviews and/or pay one or more

[3] *Source: International Standard Ruling Report ("Bollettino del Ruling di standard internazionale") issued in March 2013.*

[4] *Source: International Standard Ruling Report ("Bollettino del Ruling di standard internazionale") issued in March 2013.*

[5] *Source: International Standard Ruling Report ("Bollettino del Ruling di standard internazionale") issued in March 2013.*

visits to the company's premises. The main purpose of these visits is to gather direct knowledge of the circumstances represented in the APA request and in the additional documentation provided by the taxpayer, often by means of direct interviews with the personnel responsible for the relevant functions.

During the procedure, the APA office may request further details regarding the economics of the transaction(s) under analysis or the method selection (e.g. rejection of potential comparable uncontrolled transactions, CUP).

If the procedure is positively carried out, the taxpayer and the Tax Authority enter into an APA, which sets out the criteria and methods for calculating the arm's length value of the transaction(s) covered by the agreement, together with the potential critical assumptions to be verified over the duration of the agreement.

According to the last International Standard Ruling Report issued in March 2013, the average time to complete the procedure between 2010 and 2012 was around 15 months. This period is clearly only indicative, as the length obviously varies from case to case and ultimately depends on the complexity of the transaction(s) and on the level of the taxpayer's proactivity.

Once signed, the agreement is binding on both the taxpayer and the Italian Tax Authority (a so-called unilateral APA) but may be extended on a bi/multilateral basis (i.e., also binding on the Tax Authorities of the other states involved) through the Mutual Agreement Procedure (MAP), under the applicable double taxation conventions.

PERIOD OF VALIDITY OF THE APA

The agreement is binding for five years unless the circumstances or conditions on which the APA is grounded change.

More specifically, a unilateral APA is binding from the tax period in which it is signed and for the four subsequent ones, whereas a bilateral APA is binding from

the year in which the APA request is filed and for the four subsequent years.

However, the criteria and methods for calculating the arm's length value of the transaction(s) covered by a unilateral APA can be applied retrospectively to the beginning of the year in which the APA request was filed. In this case, obviously, the agreement can be "rolled-back" only if the circumstances and conditions on which the agreement is grounded remained unchanged during the "roll-back" period. The agreement can be "rolled-back" by means of a voluntary correction procedure (so called "ravvedimento") or by amending the relevant tax return(s), with interest (but no penalties) due.

MAINTENANCE OF THE AGREEMENT

Throughout the term of the agreement, the taxpayer must make sure that the terms are complied with. It must also monitor whether any changes occur to the circumstances and conditions on which the agreement is grounded and, if so, promptly inform the APA Office. Indeed, the taxpayer is usually required to report certain data to the APA Office periodically, according to the deadlines set out in the agreement.

Moreover, during the period of validity, the APA Office can pay one or more visit to the company's premises, in order to verify directly whether the terms of the agreement are being applied. In this respect, it is worth noting that the activity of control at stake can be performed only by the APA Office.

If, according to the above mentioned activity, it is ascertained the change of facts and circumstances that underpin the agreement, the APA Office will proceed, subject to discussion with the taxpayer, to amend the existing agreement.

EXTENSION OF THE AGREEMENT

The taxpayer may apply for an extension (for an additional five-year period) at least ninety days before the agreement expires.

CONCLUSION

As described above, the APA in Italy increased in importance over the years, becoming a point of reference in the field of transfer pricing for both the Tax Authority and MNEs. Indeed, from a simple tool available to the Italian Tax Administration, the APA became a relevant macroeconomic lever helping the government to achieve a higher degree of certainty in the tax field and, consequently, to build a favourable climate of confidence among MNEs. Moreover the APA helps the government in preventing tax evasion and reducing the recourse to uncertain tax litigations and the possibility of international double taxation.

On this path of cooperation, the APA represents the bridge-head to other measures promoted by the Italian government, such as the penalty exemption for taxpayers with transfer pricing documentation[6] and the cooperative compliance regime[7].

As for the first measure (i.e. the penalty protection related to the transfer pricing documentation), the Italian tax law provides that, if delivered during a tax audit, a proper TP Documentation allows the taxpayer to avoid the application of penalties deriving from transfer pricing claims, provided that the documentation meets all the conditions required by the law.

[8]As for the cooperative compliance, it is a regime that Italy recently implemented based on the experience gained during a previous pilot project[9].

This regime is now available for very large taxpayers (i.e. with a turnover exceeding Euro 10 billion) - besides those companies who participated to the pilot project - but the Italian Tax Administration already anticipated that this regime will be eligible, in the near future, by smaller taxpayers as well.

Taxpayers admitted to this regime are required by the law to have a system of detection, assessment, management and control of tax-related risks (so called "tax control framework" or "TCF") and to keep a cooperative and transparent behaviour, by promptly communicating to the Tax Administration any tax risks and, in particular, any operations that might be considered aggressive tax planning.

It goes without saying that the Italian government strongly believes in these programmes as means to restore trust and confidence in the relationship with taxpayers and, so far, our perception is that they have raised great interest from the business.

Importance of APAs in Italy is also apparent from the increasing number of requests filed over the years by MNEs, presenting a compound annual growth rate equal to 47% (from 2009 to 2012), that is the same percentage of increase in the number of agreements concluded by the APA Office.

At the same time, the number of procedures dismissed by either the APA Office or the Taxpayers appears to be minimal.

The numbers presented in **Figure 6**, read in connection with the increasing number of pre-filings, reveal clearly the growing interest of MNEs with regard to the APA with the Italian Tax Authority.

Moreover, considering that, up to now, the APA has been mainly used by big enterprises[11], its importance will increase in the following years, as medium and small sized companies get familiar with this valuable procedure.

Figure 6: The Italian APA in figures[10]

	2009	2010	2011	2012
Ruling requests	12	16	29	38
Agreements concluded	6	7	11	19
Procedure dismissed by the APA Office	2	0	1	2
Procedure dismissed by the Taxpayers	1	3	1	0

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[6] *The Italian transfer pricing documentation is currently ruled by Article 1(2-ter), Decree no. 471/1997. Please note that Italy, in accordance with the recommendations of the OECD, recently introduced also Country by Country reporting duties for MNEs with a turnover exceeding a given threshold, as provided by Article 1(145), Law no. 208/2015. For the application of this measure, however, an implementation decree (not yet issued) is needed.*

[7] *The first Italian cooperative compliance regime has been enforced by Articles 3 to 7, Legislative Decree no. 128/2015.*

[8] *It is worth understanding that, besides sheltering from penalties, the preparation of the transfer pricing documentation is very useful to strengthen the transfer pricing policy of a company. This activity, in fact, does not only require paperwork, but also - and above all - the performance of a deep analysis of the conditions of the intragroup transactions undertaken by a company and their compliance to the arm's length principle. Thanks to this activity, thus, a company can spot and remove the weak points of its transfer pricing policy and, consequently, reduce its exposure for the current and the future years.*

[9] *The pilot project was launched on 25 June 2013 by the Italian Revenue Agency, which received 84 requests to join the project (53% Italian groups, 32% EU-based groups and 15% non-EU-based groups).*

[10] *Source: International Standard Ruling Report ("Bollettino del Ruling di standard internazionale") issued in March 2013.*

[11] *According to the last International Standard Ruling Report issued in March 2013, ca. 68% of the companies that have presented an APA request fall in the highest class of revenues (> 100 Million Euros).*

International Issues

The column only covers selected developments from countries identified by the CTIM and relates to the period 16 February 2016 to 15 May 2016.

CHINA (PEOPLE'S REP.)

Tax policy on cross-border retail e-commerce clarified

The Ministry of Finance (MoF), the State Administration of Taxation (SAT) and the General Administration of Customs jointly issued Cai Guang Shui [2016] No. 18 on 24 March 2016, concerning the tax policy on cross-border retail e-commerce. The notice takes effect from 8 April 2016.

According to the notice, the import of retail goods through e-commerce (i.e. business to consumer, B2C) is subject to customs duty, value added tax (VAT) and consumption tax. The price of the transaction, including the price of the goods, freight charges and insurance premiums, forms the tax base. The e-commerce enterprise, platform or logistics enterprise can act as a withholding tax agent. The policy applies to goods listed in the "List of Cross-Border E-commerce Retail Goods" (to be published by the MoF in the short term), which can be traceable through the system verifying the trade, payment and logistics of the goods.

The limit of the trade value per transaction is CNY2,000 (approximately USD280), and the limit of the total trade value for an individual per year is CNY 20,000. Within these limits, the import is temporarily exempt from customs duty, but subject to VAT at the import stage and consumption tax on the basis of 70% of the taxable value. A tax refund is possible if the goods are returned to the seller within 30 days after customs clearance.

VAT rules on cross-region construction services published

On 31 March 2016, the SAT issued Gong Gao [2016] No. 17 on provisional measures of VAT on cross-region construction services. The notice applies from 1 May 2016.

The notice applies to taxpayers (including entities and individual entrepreneurs) providing cross-region (including counties, cities and districts) construction services outside the place of incorporation. Other individuals providing cross-region construction services are not subject to this notice.

Taxpayers providing cross-region construction services are required to make an advance tax payment to the competent national tax authority in the place where the services are rendered, and then file a tax return to the competent national tax authority in the place of incorporation.

A general taxpayer may opt to apply either the general calculation method or the simplified calculation method to make the advance tax payment to the competent national tax authority. However, a small-sized taxpayer is not given the option to use another calculation method other than the simplified method.

For taxpayers subject to the general calculation method, the following formula applies:

> Advance tax payable = (the price paid for services including any additional fees received – payments made to subcontractors) ÷ (1 + 11%) × 2%

For taxpayers subject to the simplified method, the following formula applies:

> Advance tax payable = (the price paid for services including any additional fees received – payments made to subcontractors) ÷ (1 + 3%) × 3%

The advance tax payment may be deducted from the VAT payable for the current tax period. The amount of excess advance tax payment may be carried forward to the following tax period.

Required documents

When making the advance tax payment on the cross-region construction services, taxpayers are required to submit the following documents to the competent national tax authority: (i) VAT advance payment form; (ii) original and copy of the construction contract concluded with the contractee; (iii) original and copy of the subcontract agreement concluded with the subcontractor; and (iv) original and copy of invoices obtained from the subcontractor.

Rates of social security contributions reduced

On 14 April 2016, the Ministry of Human Resources and Social Security and the MoF jointly issued Ren She Bu Fa [2016] No. 36, regulating the rates of social security contributions. The reductions will be effective from 1 May 2016 and apply in the coming 2 years.

Old-age pension insurance

An enterprise is required to contribute approximately 20% of its total wages to an old-age pension fund for employees; however, the actual percentage is left to the discretion of the municipal or provincial governments. The notice provides that the rate of the employer's contribution will be reduced to 20% in cases where the actual percentage exceeds 20%. For employers whose contribution rate is 20%, the rate will be reduced to 19%,

provided that by the end of 2015 the fund balance of the enterprise can cover more than 9 months of the old-age pension insurance payment. Local governments at the provincial and municipal levels must issue detailed rules for implementation.

Unemployment insurance

The total contribution rate of the unemployment insurance shared by an employer and employee was reduced by 1% in 2015. According to the notice, the total contribution rate may be reduced to 1%-1.5%, and the employee's contribution must not exceed 0.5%.

Occupational injury insurance and maternity insurance

Further, local governments are urged to implement the decision of the State Council of 2015, which has reduced the average contribution rates of the occupational injury insurance and maternity insurance by 0.25% and 0.5%, respectively. Relevant regulations on the combined collection of both maternity insurance and basic medical insurance will be issued by the State Council.

Table 1

Allowance	Year of assessment 2015/16 (HKD)	Year of assessment 2016/17 and onward (HKD)
Basic allowance	120,000	132,000
Married person's allowance	240,000	264,000
Single parent allowance	120,000	132,000
Dependent parent/grandparent allowance (per dependant):		
Parent/grandparent aged 60 or above, or eligible to claim an allowance under the goverment's disability allowance scheme	40,000	46,000
Parent/grandparent aged between 55 and 59 - additional dependent parent/ grandparent allowance (per dependant who is residing with the taxpayer continuously throughout the year):	20,000	23,000
Parent/grandparent aged 60 or above, or eligible to claim an allowance under the government's disability allowance scheme	40,000	46,000
Parent/grandparent aged between 55 and 59	20,000	23,000
The deduction ceiling for elderly residential care expenses is proposed be increased from HKD80,000 to HKD92,000 from the year of assessment 2016/17.		

Changes to calculation of tax bases - transformation from business tax to VAT

The MoF and the SAT issued Cai Shui [2016] No. 43 on 25 April 2016 concerning the calculation of the tax bases for deed tax, house property tax, land appreciation tax and individual income tax.

The changes are brought about by the transformation from business tax to value added tax (VAT). Business tax is deductible in computing the tax base of the taxes mentioned above and from 1 May 2016, business tax ceases to apply.

According to the notice, the VAT charged will generally not be included in the tax bases for deed tax, house property tax and land appreciation tax. In the case of land appreciation tax, the VAT that cannot be deducted as input tax of the preceding transactions is deductible in computing the tax base (the proceeds) of land appreciation tax.

Further, the notice clarifies that the taxable income from the disposal of residential property by an individual does not include VAT. The same applies to the taxable rental income derived by an individual.

Finally, the notice provides that the VAT will be included in the tax base (therefore it does not reduce the proceeds or income of the transaction) if the entire transaction for the tax is VAT exempted.

Notice on resource tax reform published

The MoF and the SAT jointly issued Cai Shui 2016 No. 54 on 9 May 2016 concerning the resource tax reform. From 1 July 2016, a new system of resource tax will be introduced.

The notice provides guidance on the tax base, assessment of sale proceeds, the applicable tax rate (which is left to the local governments to determine), the preferential policy, tax administration, place at which the tax should be assessed and paid and other issues related to resource tax. However, the notice does not cover the resource tax on water, which is regulated separately.

HONG KONG

Budget for 2016/17 – details

The Budget for 2016/17 was presented to the Legislative Council by the Financial Secretary on 24 February 2016. The tax-related proposals

require legislative amendments before implementation. Once enacted, the amendments will apply from 1 April 2016. The content of the proposals is summarised below.

Corporate taxation

- A one-off reduction of 75% of the current profits tax for the year of assessment 2015/16 is proposed (subject to a maximum of HKD 20,000 per case).
- The scope of tax deduction for capital expenditure on the purchase of intellectual property rights is proposed be extended to eight categories.

Personal taxation

- A one-off reduction of 75% of the current salaries tax and tax under personal assessment for the year of assessment 2015/16 is proposed, subject to a maximum of HKD 20,000 per case.

The (**Table 1**) allowances are proposed be increased from the year of assessment 2016/17 onwards.

The Inland Revenue (Amendment) (No. 2) Bill 2016 was later gazetted by the government on 4 March 2016. By amending the Inland Revenue Ordinance, the Bill seeks to implement the concessionary revenue measures proposed in the 2016-17 Budget. The Bill does not cover the proposed changes to an extension of the scope of tax deduction for capital expenditure on purchasing intellectual property rights.

INDIA

Budget for 2016/17 – details

On 29 February 2016, the Finance Minister presented Budget 2016-17 to Parliament. The Budget focuses on the following nine important issues: agriculture and farmers' welfare; the rural sector with emphasis on rural employment and infrastructure; the social sector including healthcare; education, skills and job creation to make India a knowledge based and productive society; improvements in infrastructure; financial sector reforms to bring transparency and stability; governance and ease of doing business; fiscal discipline; and tax reforms to reduce the tax compliance burden.

The proposals include measures regarding:

Corporate Tax

- a new corporate tax rate of 29% (instead of 30%) for domestic companies whose total turnover or gross receipts does not exceed INR 50 million;
- a corporate tax rate of 25% (instead of 30%) for domestic companies which are set-up and registered after 1 March 2016 and which do not claim any tax incentives;
- the MAT rate will be reduced from 18.5% to 9% for companies which are a unit of an international financial services centre located in special economic zones and which derive income in foreign currency. Further, dividend distribution tax will not apply to these companies;
- dividend income paid by a domestic company to resident individuals, limited liability partnerships or partnerships in excess of INR1 million will be taxed at 10%; and
- an exemption from dividend distribution tax in respect of dividends declared, distributed or paid out of current profits by special purpose vehicle (SPV) to a business trust, provided the business trust is a 100% shareholder of the SPV.
- in relation to the determination of residence status of a company, the Finance Bill 2016 defers implementation of "Place of Effective Management" to 1 April 2017; and
- in relation to an overseas investment fund, a beneficial provision that exempts the constitution of business connection of said fund in India for fund management activities carried on by an eligible fund manager in India would also be applicable in a case where the said fund is registered in a country notified by the government.
- initial additional depreciation of 20% is extended to the businesses engaged in the transmission of power; and
- it is clarified that the benefit of investment allowance of 15% on purchase and installation of new machinery of more than INR250 million would be allowed even when the installation is completed in a different tax year.
- introducing a deduction for expenditure incurred for acquiring right to use spectrum for telecommunication services in equal instalments over the period the rights remain in force;
- introduces a 100% deduction for profits and gains derived by an undertaking from the business of developing and building affordable housing projects on satisfaction of specified conditions (such as, inter-alia, a plot of land not less than 1,000 square metres in size (Metro cities) or 2,000 square metres (other cities); and residential units not less than 30 square metres (Metro cities) or 60 square metres (Others)). However, such undertaking would be subject to MAT;
- 30% deduction for creating new employment opportunities, subject to tax audit and other conditions; and
- benefit of 5% deduction of total income to Non-Banking Financial Corporations on account of bad and doubtful debts.
- reducing accelerated depreciation (between 80% and 100%) to 40% in respect of specified assets such as renewable energy devices, and air pollution control equipment;
- reducing weighted deduction from 200% to 150% (until 31 March 2020) and thereafter 100% on any sum paid to a national laboratory/university for the purpose of an approved scientific research programme. A similar reduction has been proposed in weighted deduction for companies

engaged in biotechnology/ manufacturing and incurring expenses on scientific research carried out in an approved in-house research and development facility;

- reducing weighted deduction from 175% to 150% (until 31 March 2020) and thereafter 100% for expenditure paid to approved scientific research trust/associations which have the task of undertaking scientific research;
- reducing weighted deduction from 150% to 100% for expenditure on a notified skill development project (from 1 April 2020); expenditure incurred on a notified agricultural extension project (from 1 April 2017); and capital expenditure (other than land, goodwill or financial assets) incurred in the case of a cold chain facility, warehousing facility for storage of agricultural produce (from 1 April 2017);
- no deduction to eligible units set-up in a special economic zone (SEZ) commencing their activity of manufacture or provision of services on or after 1 April 2021; and
- no deduction to eligible business (development, operation and maintenance of an infrastructure facility; SEZ development; and production of mineral oil and natural gas) commencing its activities on or after 1 April 2017.
- in respect of shares of an unlisted company, the period of holding would reduce from three years to two years for it to be regarded as a long-term capital asset..
- the Income Declaration Scheme 2016 was introduced for the purpose of declaring undisclosed income. The tax rate is 30% plus a surcharge of 7.5% and a penalty of 7.5% of undisclosed income. No refund can be availed in case any payment of taxes has been made under this scheme.

In connection with startup companies

- deduction of 100% of profits and gains for eligible startups for a period of three consecutive years out of five years from an eligible business involving innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property;
- the benefit of a tax holiday is subject to the following conditions: it is not formed by splitting up or reconstruction of a business already in existence; and it is not formed by a transfer to a new business of machinery or plant previously used for any purpose;
- an eligible startup is defined as a company incorporated between 1 April 2016 and 1 April 2019; the total turnover of its business does not exceed INR250 million in any previous year beginning on or after 1 April 2016 to 31 March 2021; and it holds a certificate of eligible business from the Inter-Ministerial Board of Certification, as notified by the government; and
- in relation to investors, long-term capital gains arising on the transfer of a residential property will not be charged tax if such capital gains are invested in the subscription of shares of a company that qualifies to be an eligible start-up. This is subject to the condition that the individual or Hindu Undivided Family (HUF) holds more than 50% shares of the company and such company utilises the amount so invested to purchase new assets before the due date of filing of the return by the investor.

International Tax

- Currently, non-residents without a permanent account number are subject to withholding tax at 20% or the domestic rate according to the Income Tax Act, whichever is higher. It is proposed that non-residents may fulfil other conditions (to be prescribed) in order to benefit from lower withholding tax rates.
- An equalisation levy of 6% is introduced, whereby the resident payer or non-resident payer having a permanent establishment in India is obliged to withhold a 6% equalisation levy on payment to a non-resident services provider in respect of specified services, such as online advertisements, provision for digital advertising space, or any other facility or service for the purpose of online advertisements or any other notified services, except where the aggregate consideration for the specified service is less than INR100,000.
- Payments by alternate investment funds (AIF) such as venture capital funds, infrastructure funds, or start-up funds to a non-resident will be subject to withholding tax at a rate applicable under the relevant tax treaty or the Income Tax Act 1961, whichever is more beneficial. Previously, the AIF was obliged to withhold tax at 10% on a gross basis.
- The minimum alternate tax (MAT) will not apply to a foreign company if it is a resident of a country with which India has signed a tax treaty and it does not have a permanent establishment in India. Further, MAT will also not to apply to a foreign company if it is a resident of a country with which India has not signed a tax treaty and it is not required to register under any law applicable to companies.
- An exemption is available to foreign companies in respect of income arising from the sale of crude oil stored in a facility in India where such sale is made to an Indian resident. Further, no income will be deemed to arise or accrue in India from activities limited to the display of uncut and un-assorted diamonds in any special zone notified by the government.
- In respect of Rupee Denominated Bonds, gains arising in the case of appreciation of the Indian rupee (INR) between the date of issue and

Table 2

Finance Bill 2016	Further amendments to Finance Bill 2016
Unlisted shares held for more than 24 months are considered long-term capital assets.	It is further clarified that the holding period threshold will be reduced from 36 months to 24 months.
An employer's contribution to the recognised provident fund in excess of 12%, or INR150,000, is deemed employee's income.	The proposed cap at INR150,000 is withdrawn.
Tax collection at source (TCS) is 1% on the sale of motor cars.	TCS is to be collected at the time of the receipt of the consideration.
Concessional corporate tax at 25% for domestic companies engaged in manufacturing activities was introduced.	This is now extended to include companies engaged in research in relation to, or in the distribution of, any item or good manufactured or produced by it.
Under the Income Declaration Scheme 2016, any undisclosed income in respect of any investment asset will be recognised at its fair market value as at the date of commencement of the Scheme.	It is clarified that the cost of acquisition will be recognised at the fair market value for purposes of the said Scheme.
A 100% deduction for an eligible start-up company applies for three consecutive tax years.	This benefit is extended to include limited liability partnerships.
Additional dividend tax is charged in the hands of a resident individual, Hindu undivided family (HUF) or firm if the dividend received exceeds INR10 Lakhs.	It is clarified that tax will be payable only on the dividend amount exceeding INR10 Lakhs.
Tax benefits are granted in respect of patents developed and registered in India (taxed at a flat rate of 10% on a gross basis).	It is clarified that "developed" will mean at least 75% of the expenses incurred in India by the eligible taxpayer for any invention for which a patent is granted under the Patents Act, 1970. In addition, such benefits will be at the option of the taxpayer. Once the taxpayer opts for these benefits, it must remain in such tax regime; should it fail to declare any tax on such income thereafter, it will not be allowed to enjoy the benefits for five consecutive tax years effective from the year for which it failed to declare such income.
No securities transaction tax or commodities transaction tax is charged on the sale of shares through recognized stock exchanges located in international financial services centres (IFSCs). Consequently, long-term capital gains arising therefrom are tax exempt.	It is clarified that the tax exemption will be extended to include short-term capital gains.
The spectrum fee paid for the auction of airwaves is amortized over the useful life of the spectrum.	Income will be re-calculated if any of the conditions are not satisfied.

the redemption date of such bonds will be exempt from capital gains tax.

- There will be a penalty of INR0.5 million where a reporting entity provides inaccurate information in the report of an international group.
- The Finance Bill 2016 adopts a three-tier documentation approach as prescribed in OECD BEPS Action 13 in place of local documentation requirements in the Income Tax Act, 1961. The Finance Minister will issue detailed rules at a subsequent date.
- The Direct Tax Dispute Resolution Scheme 2016 was introduced for the purpose of reducing disputes arising from retrospective amendments (including indirect transfer provisions). The details of the said Scheme will be provided soon.

Individual tax

- Income tax rates for individuals remain unchanged. However, the surcharge has been increased from 12% to 15% for income exceeding INR10 million.
- Dividend income paid by a domestic company to resident individuals, limited liability partnerships or partnerships in excess of INR1 million will be taxed at 10%.

Indirect tax – service tax

- The service tax increased from 14.5% to 15% due to the introduction of Krishi Kalyan Cess of 0.5% with effect from 1 June 2016.
- Services by way of transportation of goods by an aircraft from a place outside of India to a customs station for clearance have been proposed to be shifted from the Negative List to the Mega Exemption list of services.

Further amendments proposed to Finance Bill 2016

On 5 May 2016, the Lok Sabha (Lower House of Parliament) passed the Finance Bill 2016. The Finance Minister had presented the Union Budget 2016 and tabled it before the Lower House of Parliament on 29 February 2016.

The Lok Sabha has proposed further changes to the Finance Bill 2016. Key amendments are set out in **Table 2**.

SINGAPORE

Budget 2016

The Budget for 2016 was presented to Parliament by the Finance Minister on 24 March 2016. The proposals include measures regarding:

Corporate taxation

- The corporate income tax rebate will be raised from 30% to 50%, with an annual cap of SGD20,000 for years of assessment (YA) 2016 and 2017.
- The cash payout rate under the Productivity and Innovation (PIC) Scheme will be lowered from 60% to 40% for qualifying expenditure incurred from 1 August 2016. All other conditions of the scheme remain unchanged.
- Qualifying projects may be eligible for an investment allowance (IA) of 100% on the amount of approved capital expenditure net grants under the Automation Support Package. This IA is in addition to the existing capital allowance for plant and machinery. The approved capital expenditure is capped at SGD10 million per project.
- The Mergers and Acquisition (M&A) Scheme will be enhanced as follows and will apply to qualifying M&A deals made from 1 April 2016 to 31 March 2020:
- - a tax allowance of 25% will be granted for up to SGD40 million of consideration paid for qualifying M&A deals per YA; and
- - stamp duty relief will be granted for up to SGD40 million of consideration paid for qualifying M&A deals per financial year.
- Non-taxation of companies' gains on disposal of equity investments under Section 13Z of the Income Tax Act (ITA) will be extended until 31 May 2022 (to cover disposal of equity investments from 1 June 2017 to 31 May 2022). All conditions of the scheme remain the same.
- The double tax deduction (DTD) for the Internationalisation Scheme will be extended for another four years from 1 April 2016 to 31 March 2020. The existing automatic DTD on expenses of up to SGD100,000 will also be extended to qualifying expenditure incurred during the same period while all other conditions remain the same. The International Enterprise (IE) Singapore will release further details by June 2016.
- Enhancement of the Land Intensification Allowance (LIA) Scheme:
- - the LIA Scheme will be extended to a building user, or multiple users who are related, for one or multiple qualifying trades or businesses, provided certain conditions are met. The qualifying capital expenditure for which an allowance may be made excludes any expenditure incurred before 25 March 2016; and
- - introduction of a new criteria that requires LIA applicants to be related to qualifying user or users of the building.
- The above will take effect if the application for LIA is made from 25 March 2016 and the application for planning permission or conservation permission for the construction or renovation is made from 25 March 2016.
- Companies or partnerships may elect for their Section 19B of the ITA writing-down allowance (WDA)

Table 2 (Cont.)

Finance Bill 2016	Further amendments to Finance Bill 2016
Payments made to investors of Category I and II Alternative Investment Funds in respect of income other than business income are subject to 10% tax. In the case of a non-resident investor, the income is subject to tax at the current rate.	It is clarified that if the payee is a non-resident, no tax will be deducted at source in respect of any income that is not chargeable to tax.
Tax is charged on the withdrawal of the employee's contribution to the Recognised Provident Fund / Superannuation Fund.	The proposed amendment is withdrawn
A reduced minimum alternate tax (MAT) of 9% applies in the case of a unit located in an IFSC, subject to conditions.	The condition of establishment of a new unit after 1 April 2016 is withdrawn.
A reduced minimum alternate tax (MAT) of 9% applies in the case of a unit located in an IFSC, subject to conditions.	The condition of establishment of a new unit after 1 April 2016 is withdrawn.
Expenditure incurred on the notified agricultural extension project is reduced from 150% to 100% with effect from 1 April 2018.	Applicability is deferred until 1 April 2021
A 100% deduction applies for profits arising from business of developing and building housing projects, subject to certain conditions.	It is further clarified that the distance from municipal limits will be measured aerially; also, the minimum built-up area of a residential unit will be 30 square metres (for Metro cities) or 60 square metres (for other cities).
A penalty is imposed for under-declared income under the introduction of the Income Declaration Scheme 2016.	Additional examples are provided to give taxpayers a clearer understanding.

to be claimed over a writing-down period of five, 10 or 15 years. The election must be made at the point of submitting the tax return of the YA relating to the basis period in which the qualifying cost is first incurred. Once made, the election is irrevocable. This change will apply to qualifying intellectual property rights (IPR) acquisitions made within the basis periods of YA 2017 to YA 2020.

- A pilot Business and IPC Partnership Scheme (BIPS) will be introduced from 1 July 2016 to 31 December 2018. Under BIPS, businesses will enjoy an additional 150% tax deduction on wages and incidental expenses when they send their employees to volunteer and provide services to institutions of a public character (IPC), including secondments, subject to the receiving IPC's agreement, with an annual cap of SGD250,000 per business and SGD50,000 per IPC for the qualifying costs. Further details will be released by the Ministry of Finance and IRAS by June 2016.
- The Finance and Treasury (FTC) Scheme will be extended until 31 March 2021 with several enhancements. These changes will take effect from 25 March 2016. EDB will release further details of the change by June 2016.
- The tax incentive scheme for trustee companies will be subsumed under the Financial Sector Incentive (FSI) Scheme from 1 April 2016. The scope of qualifying activities will be expanded to align with trustee activities covered under the Financial Sector Incentive-Standard Tier (FSI-ST) Scheme from 1 April 2016 for new and current incentive recipients. A concessionary tax rate of 12% will apply to new awards from 1 April 2016.
- The current incentive recipients will continue to enjoy existing benefits until the expiry of their awards, and may apply for renewal of their awards under the FSI Scheme thereafter. This change will take effect from 1 April 2016. The Monetary Authority of Singapore (MAS) will release further details of the change by June 2016.
- Current approved insurers will continue to enjoy benefits under their existing insurance awards until the expiry of their awards, and may apply for renewal under the IBD Scheme thereafter. MAS will release further details of the change by June 2016.
- The Maritime Sector Incentive (MSI) will be enhanced and the changes will take effect from 25 March 2016.
- The Global Trader Programme (Structured Commodity Finance) (GTP (SCF)) Scheme will be enhanced to include consolidation, management and distribution of funds for designated investments; mergers and acquisitions advisory services; and streaming financing activities, and will take effect from 25 March 2016:
- The following changes will take effect for Section 14U of the ITA and pre-commencement expenses under part V of the ITA that are incurred from 25 March 2016:
- Section 14U and pre-commencement expenses that are directly incurred to derive the pre-incentive income or incentive income will be specifically identified and set off against the relevant income; and
- all remaining Section 14U and pre-commencement expenses will be allocated between the pre-incentive and incentive income based on income proportion (e.g. using turnover, gross profit).
- The tax incentive for non-profit organisations under Section 13U of the ITA will be extended until 31 March 2022.

The following incentives will be discontinued:

- the Approved Investment Company Scheme will be withdrawn from YA 2018;
- the tax exemption for non-residents trading in Singapore in specified commodities via consignment arrangements will be withdrawn from YA 2018; and
- the PIC Scheme will not be available from YA 2019.

Individual taxation

- The total amount of personal income tax relief that an individual can claim will be capped at SGD 80,000 per YA; and
- The concession of taxing only 20% of the value of home leave passages for expatriate employees will be removed.

Anti-avoidance

An anti-avoidance mechanism will be introduced for intellectual property rights (IPR) transfers that will be included under Section 19B of the ITA to empower the comptroller to make the following adjustments to the transacted price of the IPR, if the IPR is not transacted at open market value (OMV):

- if the acquisition price of the IPR is higher than the OMV of the IPR, the comptroller may substitute the acquisition price with the OMV of the IPR and restrict the writing-down allowance based on the OMV of the IPR; and
- if the disposal of the IPR is lower than the OMV of the IPR, the comptroller may substitute the disposal price with the OMV of the IPR for the purpose of computing balancing charge.
- This change will apply to acquisitions, sales, transfers or assignments of IPRs that are made from 25 March 2016.

E-filing
Mandatory electronic filing (e-filing) will be introduced for the following: corporate income tax returns (implemented in stages) and PIC cash payment applications (effective from 1 August 2016).

Ministry of Finance announces changes to draft Income Tax Bill 2016 on implementation of Common Reporting Standard

On 12 April 2016, the MoF announced changes to the draft Income Tax Bill 2016 following a public consultation held between 1 March 2016 and 18 March 2016. The draft Income Tax Bill 2016, which proposes amendments to the Income Tax Act, will allow Singapore to implement the Common Reporting Standard (CRS) with effect from 1 January 2017. This is in line with the country's commitment to commence automatic exchange of financial account information in 2018.

The changes made to the draft mainly concern clarification of implementation details, particularly with regard to:

- implementation of the "Wider Approach" taken by financial institutions (i.e. financial institutions collecting and retaining CRS information for all non-residents instead of only tax residents of jurisdictions with which Singapore has a Competent Authority Agreement in place);
- sanctions imposed on account holders for wilfully providing false information on their tax residency; and
- authorisation and audit requirements to be imposed by the Inland Revenue Authority.

The MoF also announced that further details on the implementation will be provided in the draft regulations, which will be object of a public consultation by mid-2016. The regulations will include the list of Non-Reporting Financial Institutions and Excluded Accounts, due diligence and reporting requirements for implementing the CRS.

PHILIPPINES

Act on creation of "green jobs" approved

On 29 April 2016, the President approved Republic Act No. 10771, or the Philippine Green Jobs Act of 2016 (the Act), on promoting the creation of "green jobs" or employment that contributes to preserving or restoring the quality of the environment in the country.

The Act specifies that business enterprises that generate and sustain green jobs as certified by the Climate Change Commission will enjoy the following incentives:

- a 50% special deduction on total expenses incurred on skills training and research development; and
- tax and duty-free importation of capital equipment used directly and exclusively in the promotion of green jobs of the business enterprises.

The tax incentives will be granted to all business enterprises engaged in the production, manufacturing, processing, repackaging, assembling and selling of goods and/or services, including service-oriented enterprises, as well as to self-employed or own-account workers, small to medium-sized enterprises and community-based business enterprises.

The rules and regulations necessary to implement the provisions of the Act will be formulated by the Department of Labour and Employment (DOLE) in tandem with other related government agencies within 180 days from the effective date of the Act. The Act will take effect 15 days after publication in either the Official Gazette or at least two newspapers of general circulation.

__Rachel Saw__ and __Janice Loke__ 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.

TechnicalUpdates

The technical updates published here are summarised from selected government gazette notifications published between 16 February 2016 and 15 May 2016 including Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Royal Malaysian Customs Department and other regulatory authorities.

INCOME TAX

Income Tax (Exemption) Order 2016

Income Tax (Exemption) Order 2016 [P.U.(A) 40/2016], gazetted on 12 February 2016, provides that where the total aggregate income of an individual for the year of assessment (YA) 2015 does not exceed RM96,000, an amount of RM2,000 of the individual's chargeable income will be exempt from tax. The Order shall apply for the YA 2015.

Income Tax (Exemption) (No. 2) Order 2016

Income Tax (Exemption) (No. 2) Order 2016 [P.U.(A) 90/2016], gazetted on 11 April 2016, provides an income tax exemption on gains or profits derived, in lieu of interest, from *Sukuk Wakala* in accordance with the principle of *Wakala*. The Order also provides that Section 109 of the Income Tax Act 1967 (ITA), that imposes a 15% withholding tax on interest derived from Malaysia and paid or credited to a non-resident person, would not apply to the income exempted under this Order. This Order is applicable to *Sukuk Wakala* with a nominal value of up to USD1.5 billion, other than convertible loan stock, issued by Malaysia Sukuk Global Berhad (formerly known as 1Malaysia Sukuk Global Berhad) and has effect from the YA 2016.

Income Tax (Exemption) (Amendment) Order 2016

Income Tax (Exemption) (Amendment) Order 2016 [P.U.(A) 104/2016], gazetted on 20 April 2016, amends the Income Tax (Exemption) (No. 15) Order 2007 [P.U.(A) 199/2007] by extending the incentive from YA 2016 to YA 2020. Paragraph 3(1) of the Income Tax (Exemption) (No. 15) Order 2007 provides a 100% income tax exemption on the statutory income of a qualifying company from the business of providing fund management services to foreign investors in Malaysia, which is managed in accordance with *Syariah* principles and certified by the Securities Commission.

Income Tax (Exemption) (Amendment) (No. 2) Order 2016

Income Tax (Exemption) (Amendment) (No. 3) Order 2016 [P.U.(A) 106/2016], gazetted on 20 April 2016, amends the Income Tax (Exemption) (No. 6) Order 2008 [P.U.(A) 105/2008] by extending the incentive from YA 2016 to YA 2020. Paragraph 3(1) of the Income Tax (Exemption) Order 2008 provides a 100% income tax exemption on the statutory income of a qualifying company from the business of providing fund management services to local investors in Malaysia, which is managed in accordance with *Syariah* principles and certified by the Securities Commission.

Income Tax (Exemption) (Amendment) (No. 3) Order 2016

Income Tax (Exemption) (Amendment) (No. 3) Order 2016 [P.U.(A) 106/2016], gazetted on 20 April 2016, amends the Income Tax (Exemption) Order 2014 [P.U.(A) 150/2014] by extending the incentive from YA 2016 to YA 2020. Paragraph 3(1) of the Income Tax (Exemption) Order 2014 provides a 100% tax exemption on the statutory income derived by a qualifying company from the business of providing fund management services to a Business Trust or REIT in Malaysia, which is managed in accordance with *Syariah* principles and certified by the Securities Commission.

Income Tax (Exemption) (No. 3) Order 2016

Income Tax (Exemption) (No. 3) Order 2016 [P.U.(A) 113/2016], gazetted on 26 April 2016, provides such income tax exemption to a qualified person, i.e. a tax resident individual, on profits from an investment to finance any project/ venture in Malaysia undertaken by a Small Medium Enterprise (SME) within the period of three consecutive years of assessment starting from the first YA the profits are received. The Order is deemed to have come into operation on 1 April 2016.

Public Ruling No. 2/2016 – Venture capital tax incentives

Public Ruling (PR) No. 2/2016: Venture Capital Tax Incentives, which was published on 9 May 2016, explains the tax incentives for the venture capital industry in Malaysia. The tax incentives that are available to the venture capital industry are as follows:

Tax exemption incentive for a venture capital company (VCC) investing in a venture company (VC)

A qualified VCC is exempted from the payment of tax in respect of the statutory income from all sources of income excluding interest income arising from savings or fixed deposits and profits from *Syariah*-based deposits, for a period of 10 years of assessment or the life of the fund established for the purpose of investing in a VC, whichever is the lesser.

Tax deduction incentive for an individual or a company investing in a VC

A qualified investor (i.e. individual or a company, including a VCC) which has not applied for the tax exemption above would be entitled to claim a deduction of an amount equivalent to the value of the investment in shares (cost of investment) in a VC in ascertaining the adjusted income for a basis period for a YA.

Tax incentive for a venture capital management corporation (VCMC)

A VCMC that is registered with the Securities Commission will be exempted from the payment of tax in respect of the statutory income from the share of profits received from a VCC on any investment made by the VCC as stipulated in the agreement entered into between the VCMC and the VCC.

Public Ruling No. 3/2016 – Tax treatment on interest income received by a person carrying on a business

PR No. 3/2016: Tax Treatment on Interest Income Received by a Person Carrying on a Business, which was published on 16 May 2016, explains the tax treatment of interest income received by a person carrying on a business. Effective from the YA 2013, Section 4B of the ITA provides that only interest income that falls under Section 24(5) of the ITA would be assessed as a business source.

Tax amnesty programme extended to 15 December 2016

The IRB has issued a media release dated 10 February 2016, captioned "Reduction of Penalty for Voluntary Disclosure and Waiver of Tax Increase for the Settlement of Tax Arrears" and guidelines captioned "Tawaran Pengurangan Penalti dan Penghapusan Kenaikan Cukai", that are only available in Bahasa Malaysia. The IRB announced that they will consider reducing the penalty rates for taxpayers who opt for voluntary disclosure and the offer for the reduction of penalties is also extended to taxpayers who are already being audited or investigated. The IRB is also willing to consider waiving the imposition of penalties for taxpayers who voluntarily settle outstanding income tax, petroleum income tax, real property gains tax or withholding tax by 15 December 2016. The above concessions are available from 1 March 2016 to 15 December 2016 (for audit and investigation cases, please refer to the above-mentioned guidelines) and are subject to the merits of the respective cases and the relevant conditions imposed by the IRB.

Guidelines on application for tax clearance letter for individuals

The IRB has issued guidelines dated 12 February 2016 captioned "Garis Panduan Operasi Bil. 2 Tahun 2016 – Prosedur Permohonan Surat Penyelesaian Cukai (SPC) Individu". These guidelines provide an explanation on the procedures for the application for tax clearance letters for individuals. The guidelines also provide a checklist of documents that are required to be submitted with the application.

Guidelines on tax incentives for the green industry

The Malaysian Investment Development Authority (MIDA) has issued the following guidelines on the application for tax incentives for the green industry:

- Incentives for renewable energy and energy efficiency activities
- Qualifying activities for green technology projects and services; and purchase of green technology assets listed in MyHijau directory
- Incentives for waste eco parks

Details of the information are available on MIDA's website at http://www.mida.gov.my/home/.

STAMP DUTY

Stamp Duty (Exemption) Order 2016

Stamp Duty (Exemption) Order 2016 [P.U.(A) 68/2016], gazetted on 23 March 2016, provides stamp duty exemption on any loan agreement or financing under *Syariah* principles, which is chargeable with duty under item 27(a)(i) of the First Schedule of the Stamp Act 1949. The instrument must, however, be executed on or after 1 January 2015 but not later than 31 December 2017. Further, the instrument must be executed between a SME which has obtained approval for the "Green Lane Policy" incentive and the specified financial institutions listed in the Exemption Order. It is to be noted that the Exemption Order is an extension to the Stamp Duty (Exemption) Order 2014 [P.U.(A) 16/2014].

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2016

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2016 [P.U. (A) 92/2016] was gazetted on 12 April 2016 and came into operation on the same date. The Order provides that any tax payable under the ITA in respect of any money payable under any agreement, note, instrument and document in relation to the following product, facility, programme or guarantee shall be remitted in full:

- Islamic Medium Term Notes (IMTN) and Islamic Commercial Papers (ICP) issued

- by DanaInfra Nasional Berhad pursuant to the IMTN and ICP Programme in nominal values of up to RM25 billion;
- Syndicated Islamic Revolving Credit (SFF-i) Facility in the aggregate outstanding principal amount not exceeding RM8 billion;
- IMTN and ICP Programme which have been upsized in nominal value from RM21 billion to a maximum aggregate value of up to RM46 billion; and
- Guarantee provided or to be provided by the government of Malaysia relating to the IMTN, ICP and SFF-i Facility

Also remitted is any stamp duty payable under the Stamp Act 1949 in relation to the said instruments.

LABUAN

Deadline for Labuan entities to submit 2016 tax returns

Based on a letter dated 10 March 2016 from the IRB to the Association of Labuan Trust Companies, all Labuan entities have been granted an extension of time up to 27 May 2016 to submit their tax returns for the YA 2016. A further extension of time up to 29 July 2016 is available upon application (by a specified deadline). The extensions are subject to conditions stipulated. Applications for an extension beyond 29 July 2016 must be submitted to the IRB on or before 15 July 2016 and will be considered on a case by case basis.

Labuan Business Activity Tax (Forms) (Revocation) Regulations 2016

Labuan Business Activity Tax (Forms) (Revocation) Regulations 2016 [P.U.(A) 117/2016], gazetted on 3 May 2016, revoke the Labuan Business Activity Tax (Forms) Regulations 2013 [P.U,(A) 224/2013]. As informed at the IRB briefing on 3 November 2015 in Labuan, the 2013 Labuan Business Activity Tax Act 1990 (LBATA) tax forms would be replaced.

CUSTOMS AND EXCISE DUTIES

Customs Duties (Exemption) (Amendment) Order 2016 [P.U. (A) 66/2016]

The Order provides for an amendment in the Customs Duties (Exemption) Order 2013 [P.U. (A) 371/2013] and is deemed to have come into operation on 11 March 2016.

The Order provides for an amendment in Part I of the Schedule, in relation to item 66, in column (2) by substituting paragraphs (x) and (xi) with the paragraphs "(x) Sapurakencana Energy Peninsula Malaysia Inc. and (xi) Sapurakencana Energy Sarawak Inc;"; and by inserting after paragraph (xvii), the paragraph "(xviii) Sapurakencana Energy Sabah Inc".

Please refer to P.U. (A) 371/2013 and P.U. (A) 66/2016.

Customs (Anti-Dumping Duties) (Extension) Order 2016 [P.U. (A) 107/2016]

The Order provides for an extension in the Customs (Anti-Dumping Duties) Order 2011 [P.U. (A) 142/2011] of 20 April 2011 which is extended from 21 April 2016 to 18 October 2016. The Order comes into operation on 21 April 2016.

Please refer to P.U. (A) 142/2011 and P.U. (A) 107/2016.

Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No. 2) Order 2016 [P.U. (A) 114/2016]

The Order provides for an amendment in the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012 [P.U. (A) 277/2012] which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 28 April 2016.

The principal Order is amended in paragraph 3, by inserting after subparagraph (4), the words "(4A) In the case of goods specified as "N.O." in column (7) of the Second Schedule, an import duty shall be levied on such goods at the full rates specified in column (5)".

Paragraph 4 of the principal Order is amended in subparagraph (3), by substituting the words "Appendix C" with the words "Appendix B".

The principal Order is also amended in the Second Schedule in relation to subheadings 0207.14.10 00, 0207.14.20 00, 0207.14.30 00, 0207.14.91 00 and 0207.14.99 00 in column (5), by substituting the words "Appendix C" with the words "Appendix B"; in relation to subheading 3401.20.91 00 in column (3), by substituting the symbol "- -" with the symbol "- - -"; in relation to sub-heading 3401.20.99 00 in column (3), by substituting the symbol "- -" with the symbol "- - -"; in relation to subheading 7226.99.99 10 in column (3), by substituting the symbol "- - - -" with the symbol "- - - - -"; and in relation to subheading 7226.99.99 90, by substituting the symbol ""- - - -" with the symbol "- - - - -".

Please refer to P.U. (A) 277/2012 and P.U. (A) 114/2016.

Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China)(ASEAN Harmonised Tariff Nomenclature) (Amendment) Order 2016 [P.U. (A) 115/2016]

The Order provides for an amendment in the Customs Duties (Goods under the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China) (ASEAN Harmonised Tariff Nomenclature) Order 2014 [P.U. (A) 248/2014] which is referred to as the "principal Order" in this Order and is deemed to have come into operation on 28 April 2016.

The principal Order is amended in paragraph 3 in the shoulder note, by substituting the words "Import Duty" with the words "ACFTA import duty"; in sub-paragraph (1), by substituting the words "column (4)" with the words "column (5)"; in subparagraph (2), by substituting the words "column (4)" with the words "column (5)", and by substituting the words "under the Customs Duties Order 2012 [P.U. (A) 275/2012]" with the words "in respect of the headings, subheadings and goods specified and described in columns (1), (2) and (3) of the Second Schedule to the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012 [P.U. (A) 277/2012] at the rate specified in column (5) of the said Schedule,"; in subparagraph (3), by substituting the words "under the Customs Duties Order 2012" with the words "in respect of the headings, subheadings and goods specified and described in columns (1), (2) and (3) of the Second Schedule to the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012 at the rate specified in column (5) of the said Schedule,"; and by substituting subparagraph (5) with the subparagraph "(5) In the case of goods specified as "N.0." 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 Second Schedule to the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) Order 2012".

Further, the principal Order is amended by inserting after paragraph 3, a new paragraph (i.e. paragraph 3A "Customs duty"), as stated under Para 3 of the Order.

The principal Order is amended in the Second Schedule in relation to the subheading 1603.00.30 10 in column (3), by deleting the words "or fish extracts"; in relation to subheading 1603.00.30 20 in column (3), by substituting the words "Fish juices" with the words "Extracts and juices of fish"; in relation to subheading 1603.00.90 20 in column (3), by substituting the words "Fish juices" with the words "Juices of fish"; in relation to subheadings 3401.20.91 00, 3401.20.99 00, 3404.90.90 10 and 3404.90.90 90 in column (3), by substituting the

symbol "- -" with the symbol "- - -"; by substituting the heading 39.01 and the particulars relating to it with the heading and particulars as per Paragraph 4(e) of the Order; by substituting the words "Chapter 71 – Natural or cultured pearls, precious metals, articles thereof; imitation jewellery; coin" with the words "Chapter 71 – Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal, and articles thereof; imitation jewellery; coin"; by substituting the subheading 72.03 and the particulars relating to it with the heading and particulars as per Paragraph 4(g) of the Order; by substituting the subheading 72.04 and the particulars relating to it with the heading and particulars as per Paragraph 4(h) of the Order; by substituting the subheading 72.05 and the particulars relating to it with the heading and particulars as per Paragraph 4(i) of the Order; by substituting the subheading 72.06 and the particulars relating to it with the heading and particulars as per Paragraph 4(j) of the Order; by substituting the subheading 72.07 and the particulars relating to it with the heading and particulars as per Paragraph 4(k) of the Order; in relation to subheading 7209.18.10 11 in column (3), by substituting the words "Of a thickness of 0.17mm or less" with the words "Of a thickness not exceeding 0.17mm"; in relation to subheading 7226.99.99 in column (3) by substituting the symbol "- - - - - " with the symbol "- - - -"; in relation to subheadings 7226.99.99 10 and 7226.99.99 90 in column (3), by substituting the symbol "- - - -" with the symbol "- - - - -"; by inserting after subheading 7324.29.00 90 and the particulars relating to it the subheading and particulars as per Paragraph 4(o) of the Order; by deleting subheading 7324.90 and the particulars relating to it appearing after subheading 7324.90.30 00; by substituting subheading 74.19 and the particulars relating to it with the heading and particulars as per Paragraph 4(q) of the Order; by substituting the words "Chapter 81 – Other base metals; cements; articles thereof" with the words "Chapter 81 – Other base metals; cements; articles thereof"; by substituting for subheading 84.41 and the particulars relating to it the heading and particulars

as per Paragraph 4(s) of the Order; by substituting the subheading 84.43 and the particulars relating to it with the heading and particulars as per Paragraph 4(t) of the Order; by substituting the subheading 84.62 and the particulars relating to it with the heading and particulars as per Paragraph 4(u) of the Order; by substituting the subheading 84.77 and the particulars relating to it with the heading and particulars as per Paragraph 4(v) of the Order; by substituting the subheading 84.86 and the particulars relating to it with the heading and particulars as per Paragraph 4(w) of the Order; by substituting the subheading 85.01 and the particulars relating to it with the heading and particulars as per Paragraph 4(x) of the Order; by substituting the subheading 90.02 and the particulars relating to it with the heading and particulars as per Paragraph 4(y) of the Order; and in relation to heading 90.21 in column (2), by deleting the words "90.21".

Please refer to P.U. (A) 248/2014 and P.U. (A) 115/2016.

Customs (Prohibition of Imports) (Amendment) Order 2016 [P.U. (A) 124/2016]

The Order provides for an amendment in the First Schedule, Second Schedule and Fourth Schedule of the Customs (Prohibition of Imports) Order 2012 [P.U. (A) 490/2012], which is referred to as the "principal Order" in this Order, and is deemed to have come into operation on 1 June 2016.

The First Schedule is amended in column (2) under the heading "Description of Goods" in relation to sub-item 11(6) by substituting the word "Bromochlorodifluorothane" with the word "Bromochlorodifluoromethane"; and in relation to sub-item 11(7), by substituting the word "Bromotrifluorothane" with the word "Bromotrifluoromethane".

The Second Schedule to the principal Order is amended in Part I, by inserting after item 11 and the particulars relating to it as per Para 3(a) of the Order; and in Part II, in relation to sub-item 20(14) in column (3) under the heading "Chapter/Heading/Subheading", by substituting the numbers "2903.77 630" with the numbers "2903.73 000".

The Fourth Schedule to the principal Order is amended in Part II, column (3) under the heading "Chapter/Heading/Subheading" in relation to sub-item 1(23)(b), by inserting the numbers "7306.21 000"; and in relation to sub-item 12(22), by substituting the numbers "8525.69 000" with the numbers "8528.69 000".

Please refer to P.U. (A) 490/2012 and P.U. (A) 124/2016.

Customs (Prohibition of Exports) (Amendment) Order 2016 [P.U. (A) 125/2016]

The Order provides for an amendment in the Second Schedule of the Customs (Prohibition of Exports) Order 2012 [P.U. (A) 491/2012] and is deemed to have come into operation on 1 June 2016.

The Order provides amendments in relation to sub-item 26(14) in column (3) under the heading "Chapter/Heading/Subheading" by substituting the numbers "2903.77 630" with the numbers "2903.73 000"; and by inserting after item 27 and the particulars relating to it as per Para 2(b) of the Order.

Please refer to P.U. (A) 491/2012 and P.U. (A) 125/2016.

Excise Duties (Amendment) Order 2016 [P.U. (A) 43/2016]

The Order provides for an amendment in the Schedule of the Excise Duties Order 2012 [P.U. (A) 350/2012] and is deemed to have come into operation on 1 March 2016.

The Order provides for amendments in column (4) of the Schedule in relation to subheadings 2203.00 100 and 2203.00

900, by substituting the words “RM7.40 and 15%” with the words “RM175.00 per vol. per litre”; in relation to subheading 2204.10 000, by substituting the words “RM34.00 and 15%” with the words “RM450.00 per 100% vol. per litre”; in relation to subheadings 2204.21 100, 2204.21 200, 2204.29 100, 2204.29 200, 2205.10 000 and 2205.90 000, by substituting the words “RM12.00 and 15%” with the words “RM150.00 per 100% vol. per litre”; in relation to subheading 2204.30 000 by substituting the words “RM12.00” with the words “RM150.00 per 100% vol. per litre”; in relation to subheading 2206.00 100 by substituting the words “RM1.50 and 15%” with the words “RM60.00 per 100% vol. per litre”; in relation to subheadings 2206.00 210, 2206.00 220, and 2208.90 100 by substituting the words “RM22.50 per 100% vol. per litre and 15%” with the words “ RM60.00 per 100% vol. per litre”; in relation to subheading 2206.00 300 by substituting the words “RM4.00 and 15%” with the words “RM40.00 per 100% vol. per litre”; in relation to subheading 2206.00 400 by substituting the words “RM30.00 per 100% vol. per litre and 15%” with the words “RM60.00 per 100% vol. per litre”; in relation to subheadings 2206.00 510 and 2208.90 910, by substituting the words “RM0.10 and 15%” with the words “RM60.00 per 100% vol. per litre”; in relation to subheadings 2206.00 590 and 2208.90 990, by substituting the words “RM35.00 per 100% vol. per litre and 15%” with the words “RM60.00 per 100% vol. per litre”; in relation to subheading 2206.00 610, by substituting the words “RM1.10 and 15%” with the words “RM40.00 per 100% vol. per litre”; in relation to subheadings 2206.00 690 and 2206.00 900, by substituting the words “RM30.00 per 100% vol. per litre and 15%” with the words “RM40.00 per 100% vol. per litre”; in relation to subheadings 2208.20 100, 2208.20 900, 2208.30 000, 2208.40 000, 2208.50 000, and 2208.60 000, by substituting the words “RM30.00 and 15%” with the

words “RM150.00 per 100% vol. per litre”; in relation to subheadings 2208.70 100 and 2208.70 900 by substituting the words “RM42.50 per 100% vol. per litre and 15%” with the words “RM60.00 per 100% vol. per litre”; in relation to subheading 2208.90 200, by substituting the words “RM17.00 and 15%” with the words “RM60.00 per 100% vol. per litre”; and in relation to subheading 2208.90 300, by substituting the words “RM9.00 and 15%” with the words “RM40.00 per 100% vol. per litre”.

Please refer to P.U. (A) 350/2012 and P.U. (A) 43/2016.

GOODS AND SERVICES TAX

◆◆ Goods and Services Tax (Zero-Rated Supply) (Amendment) Order 2016 [P.U. (A) 56/2016]

The Order provides for amendments to the First Schedule, the Second Schedule and the Appendix within the Goods and Services Tax (Zero-Rated Supply) Order 2014 [P.U. (A) 272/2014], which is referred to as the “principal Order” in this Order and is deemed to have commenced on 14 March 2016.

The principal Order is amended in the First Schedule, in the English language text, in item 2, by substituting the words “Medicaments and medical gasses and medical devices” with the words “Medicaments, medical gasses and medical devices”.

The principal Order is also amended in item 24 of the Second Schedule, in the English language text, by substituting the words “the lease or air container” with the words “the lease of air container”.

The principal Order is further amended in the Appendix by substituting the tariff code 07.13 and the particulars relating to it with the tariff code and particulars relating to it as per Para 4(a) of the Order; and by inserting after the tariff code 11.06 and the particulars relating to it, the tariff code and the particulars relating to it as per Para 4(b) of the Order.

Please refer to P.U. (A) 272/2014 and P.U. (A) 56/2016.

*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

IQSB V KETUA PENGARAH HASIL DALAM NEGERI (APPEAL NO.: MT(1)16-NCVC-2-01/2014) (HIGH COURT)

Counsel for the Taxpayer
Datuk D.P. Naban & S. Saravana Kumar of Lee Hishammuddin Allen & Gledhill

Counsel for the Director-General of Inland Revenue
Abu Tariq Jamaluddin

The case is an income tax appeal from the Special Commissioners of Income Tax ("SCIT") to the High Court. On 19.5.2016, the High Court judge decided in favour of the taxpayer and held that telecommunication towers constitute "plant" within the meaning of the Income Tax Act 1967. Accordingly, the taxpayer was entitled to claim capital allowance on the capital expenditure incurred on the towers.

FACTS

The taxpayer is in the business of providing telecommunication towers to telecommunication service providers who will then affix their antennas to the towers. The taxpayer owns 193 telecommunication towers which are installed on rented land. The taxpayer's business income is from the licensing of the telecommunication towers. The taxpayer claimed capital allowance for the capital expenditure incurred for the telecommunication towers. The Inland Revenue Board, however, contended that the towers are not "plant" and thus are not eligible for capital allowance under Schedule 3 of the Income Tax Act 1967.

On appeal the SCIT ruled against the taxpayer and held that the telecommunication towers owned by the taxpayer are not "plant".

On further appeal to the High Court, which is posited upon the premise that the SCIT committed an error of law in ruling that the telecommunication towers owned by the taxpayer are not "plant", His Lordship allowed the taxpayer's appeal.

ARGUMENTS RAISED BEFORE THE HIGH COURT

The taxpayer raised the following points:

(a) *The SCIT had failed to consider relevant evidence*
The SCIT failed to take into account the taxpayer witness' oral evidence, which was not challenged during cross-examination in the course of the hearing before the SCIT. The SCIT also failed to consider the totality of the documentary evidence tendered in court, including the construction proposal, consultancy report and works, rental agreements and technical proposal.
An examination of all evidence tendered, including documentary and oral, in their totality would reveal the taxpayer's business nature and the functions of the towers. They were also sufficient to establish the expenditure incurred for the construction and ownership of the towers.

(b) *The SCIT only applied the "premises test" and failed to apply all relevant tests*
The SCIT did not take a holistic and comprehensive approach as propounded by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd (2013) MSTC 30-054.* The selective application of the premises test led to the erroneous conclusion that the towers are premises.
The SCIT should have applied the "functional test", "business test" and "apparatus test" in coming to its conclusion.
The fundamental question should have been "whether the item concerned is utilised for the purposes of the trade or business as "plant" or as a "building" looking at the intention of the taxpayer in relation to the use and location of the asset.

(c) *The SCIT failed to consider that assets which are premises can also be "plant"*
Even if the towers are setting as the Director-General of the Inland Revenue Board contended, they could still be "plant" since they are the only apparatus and tool used to carry on business. Considering their functions in the trade of the taxpayer, the towers are the means through which the taxpayer generates profits. Without the purpose-built towers, the taxpayer does not have any business tool to carry out its business nor generate any income.

(d) *Speculative reliance on authorities*
The SCIT's reliance on the cases of Resort Poresia Bhd and MSDC Sdn Bhd in applying the premises test was erroneous because no grounds of decision were provided by the Court of

Appeal for its judgements in those two cases.

OUR COMMENTS

In claiming capital allowance, two questions need to be addressed:

(a) Firstly, whether the towers are an apparatus, i.e. does the taxpayer carry on its business **with** the purpose-built telecommunication towers?

(b) Secondly, whether the taxpayer carries on its business **in** the telecommunication towers, i.e. whether the towers are the taxpayer's place of business?

As highlighted in *Tropiland Sdn Bhd* (supra), one must consider the totality of the facts and evidence in respect of the functions of an asset in the business. If the asset is the apparatus used in the course of business, and from which the taxpayer generates income, then it should ordinarily qualify as a 'plant'. Businesses must ensure that these aspects are properly documented.

Further, in response to the second question, it was not disputed that the taxpayer's business income is from the licensing of the telecommunication towers. No staff, desk or office equipment was placed at the towers. No correspondence directed to the taxpayer is posted to the towers. The taxpayer's workers carry out maintenance works like painting and grass-cutting at the towers. All business activities of the taxpayer are carried out from its office.

In short, in determining whether an asset is "plant" for the purposes of the Income Tax Act 1967, it is pertinent to firstly establish that the asset in question is an apparatus with which the taxpayer carries on its business and secondly, establish that the asset in question does not constitute the taxpayer's place of business. The High Court judge took into account all these points raised in allowing the taxpayer's appeal with costs.

CASE 2

KETUA PENGARAH HASIL DALAM NEGERI V BANDAR NUSAJAYA DEVELOPMENT SDN BHD (2016) MSTC 30-117 (COURT OF APPEAL)

Counsel for the Director-General of Inland Revenue
Abu Tariq Jamaluddin & Marina Ibrahim

Counsel for the Taxpayer
Datuk D.P. Naban, S. Saravana Kumar & Siti Fatimah Mohd Shahrom of Lee Hishammuddin Allen & Gledhill

The case is an income tax appeal from the High Court. The facts of the case were as follows:

(i) The taxpayer is in the business of investment holding, property development, land trading and that of an agent to its subsidiaries;

(ii) In 1994, the taxpayer obtained a loan up to the maximum of RM875 million at an interest rate of 12% per annum from Renong Berhad (now known as UEM Land Berhad);

(iii) A year later, the parties agreed to reduce the interest rate to 5% per annum with the taxpayer agreeing to pay a premium up to 7% per annum;

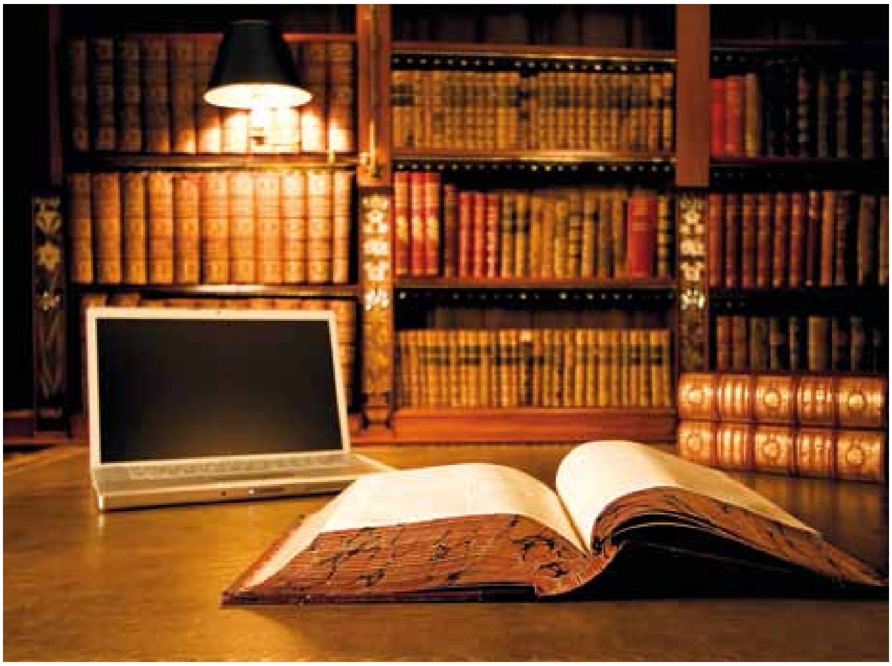
(iv) In 2004, in view of the fact that the taxpayer was facing difficulties in settling the interest on the loan, the parties agreed to fix the interest rate at 7.5% per annum, comprising an interest of 2% per annum and premium of 5.5% per annum;

(v) In the years of assessment 2003 to 2005, the taxpayer claimed a tax deduction on the premium expenses that it has incurred totalling RM222 million against two different sources of income: (i) RM40 million against business income and (ii) RM181 million was deducted against non-business interest income;

(vi) Subsequently, as the taxpayer and its subsidiaries' significant involvement in a new development forecasted serious financial constraints in the immediate future to the group, Renong Berhad waived all accumulated premium payable by the taxpayer;

(vii) The taxpayer subjected the RM40 million to income tax under Section 30(4) of the Income Tax Act 1967 ("the ITA") but the other sum of RM181 million was not brought to income tax deduction by the taxpayer; and

(viii) The Inland Revenue Board ("the IRB") contended that the RM181 million was a release of debt on the premium and is subject to Section 22(2)(a)



of the ITA and an additional assessment was raised with penalty.

The issues were:

(i) Whether the taxpayer may make an application for judicial review against the decision of the IRB in raising the additional assessment notwithstanding the availability of the Special Commissioners of Income Tax ("the SCIT"); and

(ii) Whether a release of debt is an income under Section 22(2)(a) of the ITA.

At the High Court, the taxpayer's judicial review application was allowed on the premise that release of debt was specifically governed by Section 30(4) of the ITA, and it was not disputed by the IRB that the present factual circumstances did not fall within Section 30(4) of the ITA. The High Court judge was of the view that Section 22(2)(a) of the ITA clearly did not operate to include the release of debt as part of a taxpayer's gross income. It was held that in order for Section 22(2)(a) to apply to the sum of RM181 million, it must be a sum receivable or deemed to have been received. The Court cannot appreciate how forgiveness of a past indebtedness in that year can add to profits. Additionally, the High Court followed the Federal Court's decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ* 65 and the recent decision of the Court of Appeal in *Metacorp Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30-024* which laid down that the availability of an alternative internal remedy in the form of an appeal process will not bar an application for judicial review. If a taxpayer could demonstrate illegality or unlawful treatment, then it would be wrong to insist on exhaustion of local remedy.

Dissatisfied with the decision of the High Court, the IRB appealed before the Court of Appeal. The appeal was unanimously dismissed with costs. The Court of Appeal affirmed the decision of the High Court.

The Court of Appeal considered the words "any sums receivable or deemed to have been received" and "otherwise" in Section 22(2)(a) of the ITA and whether they are applicable to the interest under the loan claimed as deductible expense for the calculation of the taxpayer's gross income which was subsequently waived by UEM Land Berhad.

The Court of Appeal was unable to accede to the IRB's submission that the words must be widely interpreted based on the purposive approach to include the release of debt in respect of a non-business source of income. The Court accepted the principle laid down by the Federal Court in *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 3 CLJ 421* that where the words used in a statute are unclear, the purposive approach should be used to discover the intention of Parliament. However, the Court of Appeal went on to highlight that the Federal Court had also made it clear that the purposive approach is only applicable if the intention of Parliament cannot be discerned from the plain and ordinary meanings of the words used in the statute or where the ordinary meanings of the words would lead to absurdity or injustice. The Court of Appeal was of the view that there is no room for adopting the purposive approach to interpret the words in Section 22(2)(a) for to do so would render Section 30(4) of the ITA superfluous and redundant and this could not have been the intention of Parliament as Parliament does not pass law in vain.

It appeared that the Court of Appeal was not inclined to adopt the restricted rule of interpretation of taxing statute and was cautious in determining the rule of interpretation on the words which were not defined anywhere in the ITA. The court finds the action of the IRB rather imperative where the erroneous interpretation on its part resulted in enormous sums being charged on the taxpayer.

The matter is now pending appeal at the Federal Court.

CASE 3

RPT SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (RAYUAN NO. PKCP (R) 48/2010) (SPECIAL COMMISSIONERS OF INCOME TAX)

Counsel for the Director General of Inland Revenue
Puan Duna Mohd Isa & Encik Kevin Hal Lai Keong

Counsel for the Taxpayer
S. Saravana Kumar of Lee Hishammuddin Allen & Gledhill

The facts of the case are as follows:

(i) The taxpayer is in the business of manufacturing and selling air freshener dispensers and plastic parts.

(ii) The taxpayer did not claim reinvestment allowance in respect of certain items, i.e. lobby, administrative office, walkways, canteen, surau, toilets, filling production, injection moulding production, assembly production, warehouse, guard house, utility building consisting of switch room, production waste depot and crushing room (these items are collectively referred to as "Disputed Items") as the taxpayer followed Public Ruling No.2/2008 ("Public Ruling") issued by the Revenue. The Revenue vide the Public Ruling had interpreted Schedule 7A of the Income Tax Act 1967 ("ITA") to exclude reinvestment allowance on non-production areas of the factory.

(iii) Sometime in 2012, the taxpayer learnt through its tax agent of recent judicial developments in respect of reinvestment allowance. The taxpayer consulted its present solicitors who advised the taxpayer that it had misplaced confidence on the Public Ruling.

(iv) Accordingly, the taxpayer decided to claim reinvestment allowance on the Disputed Items. The taxpayer then filed an application under Section 131(1) of the ITA for relief in respect of error or mistake. The application was rejected by the Revenue.

The issue at hand was whether the taxpayer may apply for relief under Section 131(1) of the ITA to claim for reinvestment allowance under Schedule 7A in respect of the Disputed Items and whether the Revenue had any legal basis to reject the taxpayer's application for relief under that section?

In order for the taxpayer to be entitled to the relief under Section 131(1), the taxpayer must establish the following requirements:

(i) The taxpayer had paid excessive tax;

(ii) By reason of an error or mistake in a return;

(iii) Made the application for relief within six years; and

(iv) The application is made in writing to the Revenue.

In this regard, the learned SCIT held that the taxpayer has satisfied the requirements of Section 131(1) of the ITA and was entitled to relief.

The SCIT agreed that "mistake" is not defined under the ITA. Therefore, reference is made to the decision of the SCIT in *J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1999] MSTC 3037,* where the meaning of "mistake" in Section 131(1) was held to also include misplaced confidence under *"some erroneous conviction of law"*.

In this appeal, the taxpayer had placed its reliance and confidence on the Public Ruling at the time of submitting its tax return for the year of assessment 2009. As a result of the reliance and confidence, the taxpayer did not claim reinvestment allowance on the Disputed Items. The SCIT agreed that the taxpayer's reliance on the Public Ruling and not claiming the reinvestment allowance were a mistake.

Following the Court of Appeal decision in *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformers Manufacturer Sdn Bhd (Civil Appeal No. W-01-429-11)* which had been consistently applied by the High Court and the SCIT in their recent decisions such as *Firgos (M) Sdn Bhd v Ketua Hasil Dalam Negeri (2013) MSTC 30-065, Riverstone Resources Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2013) MSTC 10-042, and Ketua Pengarah Hasil Dalam Negeri v Success*

Electronics & Transformers Manufacturer Sdn Bhd (2012) MSTC 30-039, it is clear that the taxpayer is entitled to claim reinvestment allowance on the Disputed Items.

Further, the SCIT held that there was no legal or factual basis for the Revenue's rejection under Section 131(4) of the ITA for the following reasons:

(i) The decisions of the courts in respect reinvestment allowance are binding on the Revenue and the decisions have a retrospective effect.

(ii) The Public Ruling contained the interpretation of the law in respect of Schedule 7A by the Revenue.

(iii) The Public Ruling contained no practice of the Revenue prevailing at the material time.

(iv) Section 131(4) is not applicable in instances where there are matters that will result in violation of explicit provisions of the ITA as in the present case.

(v) Section 131(2) of the ITA) requires the Revenue to "inquire" into the matter and Section 131(3) stipulates that in "determining" the matter the Revenue shall "have regard to all the relevant circumstances of the case". This is to enable the Revenue to grant such relief "as appears to him to be just and reasonable" as stated in section 131(2). This makes it manifestly patent that the Revenue must consider each case on its own merits.

(vi) Our courts have consistently ruled that the Public Ruling was erroneous and the Revenue's decision to restrict reinvestment allowance to production area alone is without any legal basis.

(vii) The Disputed Items play a necessary and integral role in the Taxpayer's business in respect of manufacturing air freshener dispensers and plastic parts; and the Taxpayer incurred the said capital expenditure for the purposes of expansion of its existing manufacturing activity.

***Heng Jia, Ngo Su Ning** and **Cindy Bong Xin Yi** are tax lawyers with Lee Hishammuddin Allen & Gledhill, where they specialise in income tax matters. They have assisted the firm's tax partners, Datuk D.P. Naban and S. Saravana Kumar in major tax appeals ranging from income recognition, business deduction, capital allowance, reinvestment allowance and tax avoidance.*

BUSINESS DEDUCTIONS

GAZETTED RULES

Siva Subramanian Nair

In this article we look at the following Gazetted Rules.

Income Tax (Deduction for Cost of Acquisition of a Foreign Owned Company) Rules 2013 [P.U. (A) No. 218/2013]

Income Tax (Deduction for Audit Expenditure) Rules 2006 [P.U.(A) No. 229/2006]

Income Tax (Deduction for Expenses in Relation to Secretarial Fee and Tax Filing Fee) Rules 2014 [P.U. (A) 336/2014]

INCOME TAX (DEDUCTION FOR COST OF ACQUISITION OF A FOREIGN OWNED COMPANY) RULES 2013

The above incentive was introduced on the 2003 Budget with a view to accelerate the development of Malaysia into a progressive and industralised nation. Basically "acquisition of foreign owned company" means acquisition of a foreign owned company located outside Malaysia for the purpose of acquiring high technology for production within the country or for acquiring new export markets for local products as approved by the Malaysian Industrial Development Authority (MIDA). The proposal was set to encourage local investors to participate in high technology industries and facilitate export market penetration.

Who gets the deduction?

- A local owned company which has incurred cost of acquisition of a foreign owned company in the basis period for a year of assessment

What conditions must be fulfilled?

Investor Company

- The claimant company is resident in Malaysia
- It is incorporated under the

Companies Act 1965 (candidates should be careful to note that the provisions related to tax incentives for a company are also applicable to a Business Trust with effect from year of assessment 2013 **BUT** the incentives do not apply unless it meets the requirement that the company must be registered under the Companies Act 1965 as it is in this case)

- It is involved in carrying on the business of manufacturing of a product or the provision of selected services (excluding financial and utilities)in Malaysia approved by the Minister
- If the company is not listed on the stock exchange
- at least 60% of its equity is directly owned by Malaysian citizens; or
- If the company is listed on the stock exchange
- at least 50% of its equity is directly owned by Malaysian citizens BUT on the first day of listing on the stock exchange at least 60% of its equity is directly owned by the Malaysian citizens
- The company submits an application for deduction for cost of acquisition of foreign owned company on or after 3 July 2012 but not later than 31 December 2016 to the Malaysian Investment Development Authority, and the said application has been approved by the Minister
- The company acquires at least 51% of paid-up capital in respect of ordinary shares of a foreign owned company in the form of cash transaction;
- The company uses the high technology acquired from that foreign company in his business for the purpose of creating or increasing a demand on the product manufactured in Malaysia or services provided in Malaysia, as the case may be and with the objective of using the said technology for:-
- (i) the production or improvement of material, devices, products, produce or processes; or
- (ii) the improvement of processing or quality of the selected services

Investee Company

- The foreign owned company must be a company
- located outside Malaysia
- which is established under any written law relating to the establishment of a company outside Malaysia;
- which is wholly owned, directly or indirectly, by non-Malaysian citizens; and
- which owns and uses high technology in the activity of manufacturing or provision of selected services outside Malaysia.

At what stage is the deduction given?

In arriving at the adjusted income from the business

What are the mechanics of the deduction (including)?

- A deduction of 20% of the acquisition cost is granted over five years
- The acquisition cost, approved by the Minister, is deemed to be made in the basis period for the year of assessment in which the date of the full settlement for the acquisition falls, as verified by MIDA
- The acquisition must be completed within three years from the date of application to MIDA.
- Where the cost of acquisition is paid by a pioneer company, the pioneer company may make an election that the deduction be allowed to its post-pioneer business i.e. the claim for deduction is made after its tax relief period.

Will the incentive be withdrawn?

- Where the shares of the acquired foreign owned company is disposed of within five years from the date of completion of the acquisition, the deduction shall be withdrawn and be treated as gross income of the locally owned company in the year of assessment in which those shares are disposed of in the respective years of assessment where such deduction has been allowed
- The meaning of "disposed of" includes sold, conveyed, transferred or assigned, or alienated with or without consideration;

What other incentives are mutually exclusive with this incentive?

(a) reinvestment allowance under Schedule 7A
(b) investment allowance for service sector under Schedule 7B
(c) exemption under Section 127 of the Act;
(d) claim for a deduction under any Rules made under Section 154 of the Act except for allowance

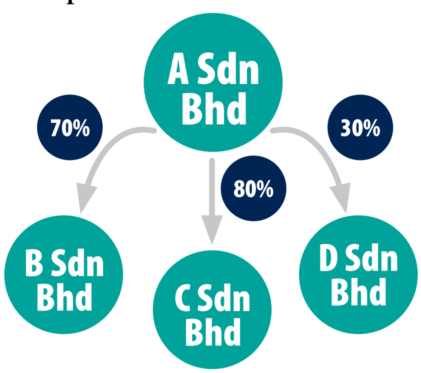
under Schedule 3, or

(e) both companies are "related" i.e.

i. the operations of which are or can be controlled, either directly or indirectly, by the first-mentioned company;

ii. which controls or can control,

Example 1



either directly or indirectly, the operations of the first-mentioned company;

iii. the operations of which are or can be controlled, either directly or indirectly, by a person or persons who control or can control, either directly or indirectly, the operations of the first- mentioned company

iv. at least 20% of its issued share capital is beneficially owned, either directly or indirectly, by that other company

v. at least 20% of the issued share capital of that other company is beneficially owned, either directly or indirectly, by the first-mentioned company;

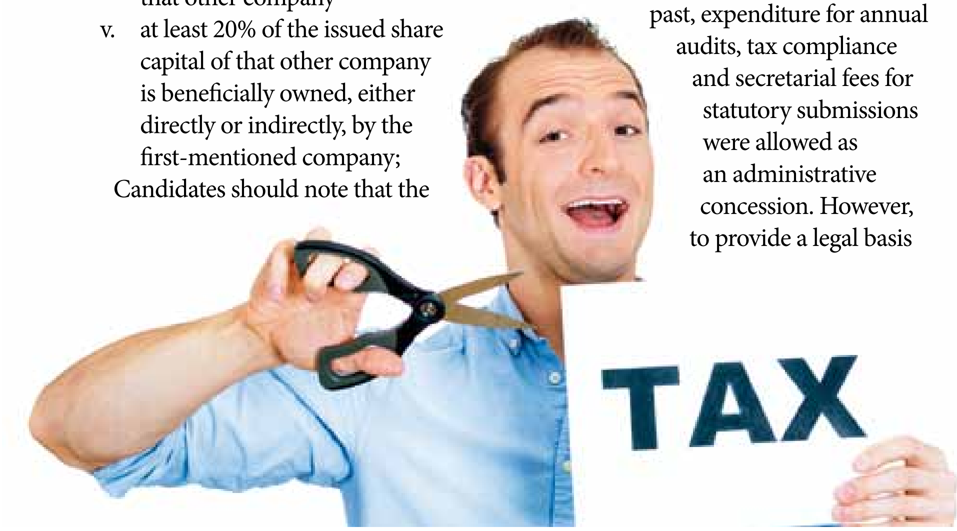
Candidates should note that the

Example 2: Are all the companies related to each other?

A Sdn. Bhd	B Sdn. Bhd	Related because A Sdn. Bhd can control B Sdn. Bhd
A Sdn. Bhd	C Sdn. Bhd	Related because A Sdn. Bhd can control C Sdn. Bhd
A Sdn. Bhd	D Sdn. Bhd	Related because A Sdn. Bhd owns not less than 20% of D Sdn. Bhd
B Sdn. Bhd	C Sdn. Bhd	A Sdn. Bhd controls both B Sdn. Bhd and C Sdn. Bhd
B Sdn. Bhd	D Sdn. Bhd	Not related because B Sdn. Bhd does not own any shares in D Sdn. Bhd
C Sdn. Bhd	D Sdn. Bhd	Not related because C Sdn. Bhd does not own any shares in D Sdn. Bhd

"common control" feature in (e)(iii) above is only for holding and subsidiary companies and not for associated companies as illustrated in the example (see **Example 1**).

The next two gazette orders deal with audit, tax and secretarial fees. These represent expenditure that a company (and other persons as well, in some cases) cannot avoid because it is a requirement under the law to have the accounts of the company audited, to prepare and submit a tax computation to determine the amount of tax payable and to submit the various statutory documents necessitating the assistance of a company secretary.However, these are generally incurred subsequent to year-end and therefore do not pass the "…incurred in the production of income" test. In the past, expenditure for annual audits, tax compliance and secretarial fees for statutory submissions were allowed as an administrative concession. However, to provide a legal basis for the deductibility of these expenses, gazette orders were published to indicate clearly what is deductible.



INCOME TAX (DEDUCTION FOR AUDIT EXPENDITURE) RULES 2006

Who gets the deduction?

- companies

At what stage is the deduction given?

- in arriving at the adjusted income from the business

What is deductible?

- an amount equivalent to the amount of statutory audit fee expenditure

When is the deduction given?

- In the basis period in which it is incurred

INCOME TAX (DEDUCTION FOR EXPENSES IN RELATION TO SECRETARIAL FEE AND TAX FILING FEE) RULES 2014 [P.U. (A) 336/2014]

Who gets the deduction?

- a person resident in Malaysia

At what stage is the deduction given?

- in arriving at the adjusted income from the business

What conditions must be fulfilled?

Secretarial Fee

- the secretarial services must be provided by a company secretary registered under the Companies Act 1965 and

- it must comply with the statutory requirements under that Act

Tax Filing Fee

- it must be charged by a tax agent approved under the Income Tax Act 1967 or the Goods and Services Tax Act 2014
- for the preparation and submission of return in the prescribed form for the purposes of Sections 77, 77A, 77B, 83 and 86 of the Income Tax Act 1967 for the basis period for the immediately preceding year of assessment; and
- the preparation and submission of forms prescribed for the purposes of Section 107C of the Income Tax Act 1967 or a return in the prescribed form for the purposes of Section 41 of the Goods and Services Tax Act 2014 in the basis period for that year of assessment.

What is deductible?

- **Secretarial Fee** - total amount of deduction shall not exceed RM5,000 for a year of assessment
- **Tax Filing Fee** - total amount of deduction shall not exceed RM10,000 for a year of assessment

When is the deduction given?

- In the basis period for that year of assessment which is incurred and paid by the person

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FURTHER READING

Choong, K.F. Malaysian Taxation Principles and Practice, Infoworld,
Kasipillai, J. A Guide to Malaysian Taxation, McGraw Hill.
Malaysian Master Tax Guide, CCH Asia Pte. Ltd
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Yeo, M.C., Alan. Malaysian Taxation, YSB Management Sdn Bhd

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JULY – SEPTEMBER 2016

Month /Event	Details				Registration Fee (RM) (excluding GST)			CPD Points/ Event Code
	Date	Time	Venue	Speaker	Member	Member's Firm Staff	Non - Member	
JULY 2016								
Workshop: Transfer Pricing Documentation	13 July	9a.m. - 5p.m.	Kuala Lumpur	Harvindar Singh	400	450	500	8 WS/047
Workshop: GST: Practical Issues & Recent Developments	14 July	9a.m. - 5p.m.	Kuala Lumpur	Thenesh Kannaa	400	450	500	8 WS/054
Workshop: GST: Practical Issues & Recent Developments	19 July	9a.m. - 5p.m	Johor Bahru	Thenesh Kannaa	350	400	450	8 WS/032
Workshop: Managing Tax Audits	20 July	9a.m. - 5p.m	Kuala Lumpur	Renganathan	400	450	500	8 WS/037
Public Holiday ***(Hari Raya: 6 & 7 July)***								
AUGUST 2016								
NATIONAL TAX CONFERENCE 2016	**9 & 10 Aug**	**9a.m. - 5p.m**	**Kuala Lumpur Convention Centre**	**Local & Foreign**				**25 NTC /001**
Workshop: Managing Tax Audits	24 Aug	9a.m. - 5p.m	Penang	Renganathan	350	400	450	8 WS/038
Workshop: Capital Allowances for Plant & Machinery	24 Aug	9a.m. - 5p.m	Kuala Lumpur	Thenesh Kannaa	400	450	500	WS/042
Workshop: Transfer Pricing Documentation	24 Aug	9a.m. - 5p.m	Kuching	Harvindar Singh	350	400	450	8 WS/048
Workshop: Transfer Pricing Documentation	25 Aug	9a.m. - 5p.m	Kota Kinabalu	Harvindar Singh	350	400	450	8 WS/049
Public Holiday ***(Merdeka Day: 31 Aug)***								
SEPTEMBER 2016								
Workshop: Cross Border Taxation on Withholding Tax	1 Sept	9a.m. - 5p.m	Kuala Lumpur	Harvindar Singh	400	450	500	8 WS/052
Workshop: Transfer Pricing Documentation	2 Sept	9a.m. - 5p.m	Melaka	Harvindar Singh	350	400	450	8 WS/050
Workshop: Transfer Pricing Documentation	8 Sept	9a.m. - 5p.m	Johor Bahru	Harvindar Singh	350	400	450	8 WS/051
Workshop: Capital Allowances for Plant & Machinery	21 Sept	9a.m. - 5p.m	Ipoh	Thenesh Kannaa	350	400	450	8 WS/043
Workshop: Transfer Pricing Documentation	28 Sept	9a.m. - 5p.m	Penang	Harvindar Singh	350	400	450	8 WS/052
Workshop GST: Practical Issues & Recent Developments	29 Sept	9a.m. - 5p.m	Kuala Lumpur	Thenesh Kannaa	400	450	500	8 WS/056
Public Holiday ***(Hari Raya Haji: 12 Sept , Malaysia Day: 16 Sept)***								

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

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