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Tax Reforms, Simplification and Service Delivery Initiatives

Malaysian Institute Of Taxation

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Official Journal of the Malaysian Institute of Taxation

Inside:

- Operation of Section 106(3) in Civil Suits
- Tax Cases: Summaries, Comments and International Tax Cases

December 2007 Examination Results Are Out!

Continuing Professional Development (CPD)

CALENDAR OF EVENTS 2ND QUARTER 2008

april

Date	Training Programme	CPD Points	Venue	Fee (RM)			Speaker
				Member	Member Firm's Staff	Non Member	
2 April 2008 9.00am - 5.00pm	Seminar: The Impact of New/Revised Financial Reporting Standards (FRSs) on Taxation	8	KL	Early Bird: 375 Normal: 425	Early Bird: 425 Normal: 475	Early Bird: 495 Normal: 454	Various Speakers
7 Apr 2008 9.00am - 5.00pm	Workshop: Significant Developments - Public Rulings & Regulations on Property Development & Construction Contracts	8	KK	315	365	415	Harvindar Singh
8 Apr 2008 9.00am - 5.00pm	Workshop: Significant Developments - Public Rulings & Regulations on Property Development & Construction Contracts	8	Kuching	315	365	415	Harvindar Singh
10 Apr 2008 9.00am - 5.00pm	Workshop: Tax Implications on New/Revised FRSs	8	Ipoh	315	365	415	Chow Chee Yen
14 Apr 2008 9.00am - 5.00pm	Workshop: Tax Planning on Current Tax Issues (2nd session)	8	MIT KL Training Room	295	345	395	Chow Chee Yen
24 Apr 2008 9.00 am - 5.00 pm	Workshop: Dividends and the Single-Tier Tax System	8	MIT KL Training Room	295	345	395	Vincent Josef
28 Apr 2008 9.00am - 5.00pm	Workshop: Tax Implications on New/Revised FRSs	8	Penang	315	365	415	Chow Chee Yen

may

2 May 2008 9.00am - 5.00pm	Workshop: Indirect Tax - Sales Tax & Service Tax Refunds	8	J. Bahru	315	365	415	Thomas Selva Doss & Tan Kok Meng
8 May 2008 9.00am - 5.00pm	Workshop: Financing Corporate Growth	8	KL	295	345	395	Harvindar Singh
8 May 2008 9.00am - 5.00pm	Workshop: Tax Implications on New/Revised FRSs	8	J. Bahru	315	365	415	Chow Chee Yen
10 May 2008 9.00am - 5.00pm	Workshop: Tax Implications on New/Revised FRSs	8	Malacca	315	365	415	Chow Chee Yen
13 May 2008 9.00 am - 5.00 pm	Workshop: To be confirmed	8	MIT KL Training Room	295	345	395	Vincent Josef
13 May 2008 9.00 am - 5.00 pm	Workshop: Introduction to Tax Principles and Procedures	8	Penang	315	365	415	Thomas Selva Doss & Tan Kok Meng
29 May 2008 9.00am - 5.00pm	Workshop: Tax Implications on New/Revised FRSs	8	KK	315	365	415	Chow Chee Yen
30 May 2008 9.00am - 5.00pm	Workshop: Tax Implications on New/Revised FRSs	8	Kuching	315	365	415	Chow Chee Yen

june

10 Jun 2008 9.00am - 5.00pm	Practitioners Update	8	KL	Early Bird: 375 Normal: 425	Early Bird: 425 Normal: 475	Early Bird: 495 Normal: 454	Various Speakers - Tax Practitioners - IRB
14 Jun 2008 9.00am - 5.00pm	Workshop: Tax Planning on Current Tax Issues	8	Ipoh	315	365	415	Chow Chee Yen
21 Jun 2008 9.00am - 5.00pm	Workshop: Tax Planning on Current Tax Issues	8	Malacca	315	365	415	Chow Chee Yen

DISCLAIMER: MIT reserves the right to change the speaker (s)/date (s), venue and/or cancel the events without notice at their discretion.
ENQUIRIES: Please call Ms Latha, Cik Ally or Cik Nur at 03-2162 8989 ext 108, 113 and 106 respectively or refer to MIT's website www.mit.org.my for more information on the CPD programmes.

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The Malaysian Institute of Taxation ("MIT") is a company limited by guarantee incorporated on October 1, 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 interests 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 effective secretariat.

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Editorial Note

Welcome to the first issue of the TAX GUARDIAN for 2008! The change in title is part of the Institute's ongoing endeavour to enhance the prestige and status of the tax profession in Malaysia and to reflect the strong collaboration between the MIT and the tax authorities. Tax Guardian will continue to provide readers with the latest tax developments with greater coverage on the international arena as well as valuable information and insights in other areas such as practice management.

In this inaugural issue of the Tax Guardian, the focus is on global and regional tax developments. In many countries, tax reforms have been carried out as a measure to sustain economic development as well as to introduce a degree of equity. The cover story, "Tax Reforms, Simplification & Service Delivery Initiatives – A South-East Asian Perspective" discusses the need for innovation and providing effective services in tax administration.

From the legal perspective, readers will gain an insight into the operation of Section 106(3) of the Income Tax Act 1967. The Tax Cases section features case summaries of judgments from the Special Commissioners of Income Tax, a commentary on the "Castrol " case as well as recent tax decisions from the international arena.

A regular new section entitled Practice Management has also been introduced to provide information and tips to help busy tax professionals run their practices more efficiently and effectively. In this, we look into the possibility of going paper-"less" and the changing role of leaders as businesses become more globalised.

The Institute has been actively involved in various activities in the first quarter of 2008, kicking off with the MIT Perak Branch Annual Dinner. This was followed by a courtesy call to the Tax Analysis Division, Ministry of Finance at Putrajaya, a meeting with the Malaysian Institute of Accountants on possible collaborative arrangements to benefit the members of both Institutes, a Students get-together and several CPD events which saw very encouraging response. We expect an even busier period in the rest of 2008 and are geared up for the busy months ahead!

Finally, work is underway in organising the National Tax Conference 2008 – the premier tax event of the year. The Institute is working closely with the Inland Revenue Board to bring you an event that will focus on current tax issues. Watch out for more details in the forthcoming issue of the Tax Guardian and do register early to book your place at this "must-attend" event!

Harpal Singh Dhillon
Chairman, Editorial Committee

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Note : The views expressed in the articles contained in this journal are the personal views of the authors. Nothing herein contained should be construed as legal advice on the applicability of any provision of law to a given set of facts.

INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers and academicians. It may cover local or international tax development. Articles contributions should be written in English. All articles should be between 2,500 to 5,000 words submitted in a typed double spaced format. Articles may be submitted in hard-copy but they should also be in a soft-copy in Microsoft Word format via email.

Contributions intended for publication must include the writer's name and address, even if a pseudonym is used in the article. The Editorial Committee reserves the right to edit all contributions based on clarity and accuracy of contents and expressions, as may be required.

Contributions may be sent to:

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CPD Events...

Practitioners Update

The Institute organised a session on "Practitioners Update" on 18 and 21 January 2008 at Kota Kinabalu and Kuching respectively. The speaker was Ms Teoh Boon Kee, a former tax director in one of the major international accounting firms in Malaysia.

Participants in East Malaysia were updated on technical and operational issues published by the Inland Revenue Board for the years 2006/2007. Participants took the opportunity to raise and clarify other technical and/or operational issues with the speaker during the sessions.

Workshop on Indirect Tax & Service Tax Refunds

The workshop was successfully concluded at the Best Western Premier Seri Pacific, Kuala Lumpur on the 30 January 2008. The speakers, Mr Thomas Selva Doss and Mr Tan Kok Meng spoke on the topic and shared their views with participants.
Both speakers discussed sales tax refunds, matters relating to service tax, maintaining proper records for sales tax and service tax and also the new sales tax and service tax returns (JKED No.3).
From the feedback received, attendees gained new knowledge and a clearer understanding from the workshop. Both the speakers being former senior officers of the Royal Malaysian Customs Department were able to provide invaluable insight into the topics.

Seminar on Significant Tax Developments

The Institute successfully conducted its seminar on Significant Tax Developments on 27 February 2008 at the Best Western Premier Seri Pacific, Kuala Lumpur with more than 145 participants.

Both Mr Christopher Low and Mr Chow Kuo Seng spoke in the morning session highlighting how the tax audit & investigation framework was expected to bring greater equity and transparency to tax audit and investigation in Malaysia. Included in the panel session after their presentation were representatives from the Inland Revenue Board namely, Tuan Haji Adzhar bin Sulaiman, Director of Investigation & Intelligence Centre and En Mohd Idris bin Mamat, Director of Compliance Department.

The second half of the seminar included deliberations on Regulations on Property Development & Construction Contracts and Advance Rulings. The papers for this session were presented by Mr Lim Kah Fan and Ms Leanne Koh respectively.

The afternoon session became interesting during the panel session where again two representatives from the Inland Revenue Board formed part of the panel session, namely Cik Halijah bt Bulat, Director of Technical Department and Puan Nik Melini bt Nik Sulaiman, Director of Public Ruling Division. Many interesting and challenging questions were raised during the panel discussion.

Many of the participants felt the seminar had achieved its objectives and cleared their doubts and provided a greater understanding of the topics discussed. Both the chairmen for the morning and afternoon session played an active part in enhancing the seminar and moderating the sessions.

Institute Pays Courtesy Call on Datuk Aziyah

The MIT President, Dr Veerinderjeet Singh, together with some Council members paid a courtesy call on Yang Berbahagia Datuk Aziyah binti Bahauddin, Under-Secretary of the Tax Analysis Division, Ministry of Finance, Putrajaya on 15 January 2008. Y Bhg Datuk Aziyah and her team discussed and addressed issues relating to tax practitioners during the two-hour meeting.

Representing the MIT Council together with the President were Mr Lim Heng How (Deputy President), Mr Khoo Chin Guan (Vice President), Mr Lim Kah Fan (Chairman, CPD Committee) and Ms Kulwant Kaur (Executive Director). The Ministry of Finance was represented by Pn Nor Azian, Mr Koshy Thomas, Pn Kamariah (Operational) and Pn Farah (Policy).

Dr Veerinderjeet Singh, MIT President presents a souvenir to Y Bhg Datuk Aziyah

Meeting on Collaborative Arrangements

MIA President Mr Nik Mohd Hasyudeen Yusoff held a meeting with MIT President Dr Veerinderjeet Singh at the MIA office on 21 January 2008. The purpose of the meeting was to consider how both professional bodies could forge greater links and work together to conduct training events to mutually benefit both institutions.

Also present at the meeting were Mr Sam Soh Siong Hoon (MIA CPE Chairman), Mr Lim Kah Fan (MIT CPE Chairman) and Secretariat staff from both institutions.

Dr Veerinderjeet Singh, Mr Lim Kah Fan and MIT CPD Manager, Cik Nursalmi

MIA CPD Manager Shan and Mr Sam Soh

Mr Lim Kah Fan, Dr Veerinderjeet Singh and Mr Nik Hasyudeen during the meeting

In rapt concentration. From left-right: Mr Khoo Chin Guan, Mr Lim Kah Fan, Mr Lim Heng How, Dr Veerinderjeet Singh and Y Bhg Datuk Aziyah.

During the dialogue, Dr Veerinderjeet outlined the future direction of MIT in line with the Strategic Initiatives and Action Plan developed by the Institute for the next five years. Y Bhg Datuk Aziyah commended the MIT President and Council on developing a long term plan and vision for the Institute. Various matters relating to tax licensing issues were also raised and the Ministry officials agreed to look into certain aspects with the view of creating greater transparency and certainty. Y Bhg Dato Aziyah also sought the assistance of the Institute to submit ideas for consideration in the crafting of the 2009 Budget, including identifying further issues related to the introduction of the single tier tax system as well as matters in connection with tax aspects related to the adoption of FRS.

It was a fruitful meeting with both sides sharing their views in an open and friendly atmosphere.

MIT President Appointed Adjunct Professor

The MIT President has been appointed as an Adjunct Professor at the Faculty of Business & Accountancy, University of Malaya for a one-year term commencing from 4 February 2008. This is part of the University's move to strengthen its linkages with the private sector in propelling the University towards achieving recognition on various fronts.

Dr Veerinderjeet will play an advisory role in commenting on the accounting curriculum as well as giving guest lectures to graduate students and providing input on tax research projects.

Courtesy Visit to Inland Revenue Board Ipoh Branch

MIT and MIA Perak Branch paid a courtesy call on Puan Wan Azni, Branch Director of Inland Revenue Board ("IRB") Ipoh on 7 March 2008. The MIT delegation was led by the Branch Chairman together with 6 other committee members. The MIA delegation was led by Mr Soo Yuit Weng together with 5 other committee members.

Some of the matters / issues discussed were:-

a) E-filing.
b) Stamping guidelines for share transfers of private limited companies.
c) Clarification on what constitutes "repeated offence" under tax audit.

It was a fruitful discussion with both sides exchanging their views.

MIT's Get-Together with Students

Dr Faisal, Dr Veerinderjeet and Mr Venki speaking with students

The Malaysian Institute of Taxation held a "Meet the Students" session on 1 March 2008, Saturday. The event was the first of its kind organised by the Institute. Around 40 students and their lecturers attended the talk.

MIT President Dr Veerinderjeet Singh was present at the talk which commenced with a briefing from Mr Venkiteswaran, the Chairman of the Student Affairs Committee. In his introductory remarks, Mr Venki introduced his panel and welcomed the students and some of their lecturers who attended the session, which was being held for the very first time.

MIT Perak Branch Annual Dinner 2008

The year 2008 started with a bang for the MIT Perak Branch.

The first ever annual dinner, organised by Perak Branch Deputy Chairman Mr Loo Thin Tuck and his committee, was successfully held on 11 January 2008 at Syuen Hotel. The occasion was graced by our MIT President and Vice President, Dr Veerinderjeet Singh and Mr Khoo Chin Guan respectively together with Ms Kulwant Kaur from the MIT Secretariat.

Mr Lam Weng Keat, the MIT Perak Branch Chairman, started the evening with a short welcome speech followed by a speech from the Deputy Speaker of Perak State Assembly, Dato' Yik Phooi Hong. The MIT Perak Branch was also honoured with the presence of the Inland Revenue Board representatives, Encik Mohd Nizom bin Sairi, the IRB Perak State Director and Encik Romli bin Abdul Hamid, the IRB Ipoh Branch Director .

The MIT President Dr Veerinderjeet Singh took the stage midway of the evening and shared his views and thoughts on MIT's short and long term strategies. He also spoke on forthcoming new and exciting initiatives of the MIT. It was indeed a first for members in Perak to obtain first-hand information from the President himself.
Later in the evening, guests were entertained with a session of humour and anecdotes, and there were lucky draws. It was indeed an evening of fun, sharing, learning and networking among the diners.

MIT President Dr Veerinderjeet Singh speaking to members


Left to right (standing): Mr Chew Pete Cheung, Mr Ng Chong Yan, Mr Harbhajan Singh and Mr Soo Yuit Weng. (seated): Mr Khoo Chin Guan, Mr Lam Weng Keat, Dr Veerinderjeet Singh and Mr Loo Thin Tuck

Left to right: Mr Soo Yuit Weng, Mr Ng Chong Yan, Mr Chew Pete Cheung, Mr Lam Weng Keat, En Romli bin Abdul Hamid (IRB Ipoh Branch director), Dr Veerinderjeet Singh, En Nizom bin Saari (IRB Perak State Director), Mr Khoo Chin Guan, Mr Loo Thin Tuck, Mr Yew Teck Huat and Mr Chen Kim Cheng

The following day, the MIT President and Vice President held a members' forum with the members in Perak.

With such encouraging support from the MIT members in Perak, it is hoped that more of such activities will be held in the future.


Members' forum

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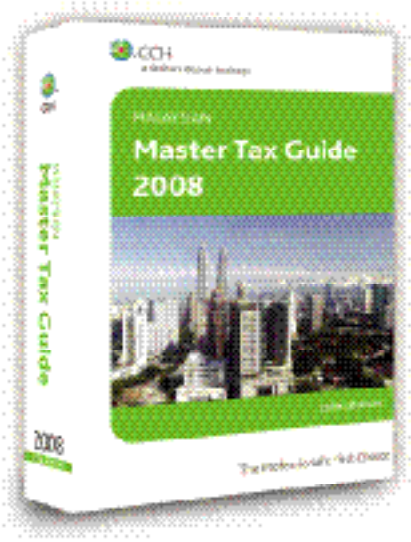

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Tax Reforms, Simplification And Service Delivery Initiatives –

A South-East Asian Perspective

By Dr Veerinderjeet Singh

1. INTRODUCTION

Tax continues to be an important ingredient in attracting investment and encouraging reinvestment in the various developing economies. In the context of globalisation and liberalisation, no country is immune to changes occurring outside its borders. As a result, the tax system in many jurisdictions is subjected to modifications and reform by way of studying and adopting what may have been applied in other jurisdictions. At the same time, the pressure to simplify the system continues unabated together with the need to improve service delivery initiatives as a part of measures to enhance compliance and to make the tax system more efficient. Where relevant, this article will refer to aspects of the tax systems in some of the South-east Asian countries such as Indonesia, the Philippines, Singapore, Thailand and Malaysia.

2. TAX REFORMS

Tax reforms are an on-going process that must be based on regional and worldwide developments as well as the economic/ structural developments and needs of a country. It is impossible for any country to say that it has completed reforming the tax system as the changing dynamics within and outside necessitates suitable responses and action plans.

On most occasions, what normally happens is that there may be a particular focus on aspects of the tax system and specific approaches are identified at a particular point of time. However, things do not remain static. One must always be surveying the landscape to see what else is happening around us and how we should respond to various developments.

In Malaysia, one can say that tax reforms are on-going. In 2001, self-assessment was introduced for companies and this was extended to all other persons in 2004. Towards the end of 2004, the Government announced the setting up of a Tax Review Panel to look into the details of the proposed Goods and Services Tax (GST) as well as to review the relevant tax legislation to ensure that it is in line with international developments and that any archaic provisions are removed. This Panel has focussed on specific aspects rather than adopting a holistic approach towards tax reforms. It has been involved in suggesting the introduction of a Framework for Tax Audits and Tax Investigations where the rights and obligations of all parties are clearly spelt out. It was instrumental in introducing the advance rulings mechanism and recently, it was also involved in the proposal to reform the corporate tax system by moving from the imputation system to the single tier system of taxation. Meanwhile, it has also fine-tuned the draft legislation and regulations for the GST and has held consultations with specific organisations and individuals. It is also looking at the income tax deductibility rules for expenditure to establish whether the current general provision (which states that all expenses wholly and exclusively incurred in the production of income are deductible for tax purposes) needs to be revised. It is also making attempts to look at the impact of some of the international financial reporting standards on the tax treatment of certain transactions.

In the context of some of the other South-east Asian countries, there has been no significant activity over the last few years. In Thailand, the last major tax reform involved the adoption of the value added tax (VAT) in 1992. Singapore's tax system is fairly straight forward and it introduced the single tier or one tier system of corporate taxation over five years ago. It also introduced an advance rulings mechanism within the last two years and continues to focus on fine tuning the legislative provisions and in enhancing the services provided to taxpayers. The Philippines has seen an increase in its VAT rate from 10% to 12% from 1 November 2005. It also has over the years been introducing tax amnesties – from 16 June 2007, a one-time tax amnesty was issued for all National Internal Revenue Taxes for the year 2005 and prior years by way of paying an amnesty tax of 5% of the net worth of the taxpayer as at 31 December 2005 subject to specific minimum levels. Interestingly, it also restored (effective from 23 April 2007) tax incentives to enterprises located in designated economic zones by payment of 25,000 pesos! Indonesia has seen some recently approved amendments to its laws which primarily focus on tax administrative aspects such as allowing a taxpayer who wishes to object to an assessment to pay the amount of tax that the taxpayer agrees with. There is also an amendment which introduces penalties on tax auditors if they issued/made a wrong assessment on a taxpayer compared to the previous provison whereby a tax auditor could be penalised only if he made a wrong assessment which resulted in a loss to the Government. These amendments took effect from 1 January 2008.

Of course, all countries continue to look into ways of attracting foreign direct investment. Investment incentives are being continuously looked at despite the economic distortions such incentives create. The best incentive seems to be that of having a low corporate tax rate and most South-east Asian countries are in a race to lower income tax rates. Overall, it is suggested that there must be a core unit within the Ministry of Finance (or any other agency looking at tax policy) which should keep a finger on the pulse of the nation and also an eye on worldwide tax developments so that one has a dynamic tax system. A number of areas have been suggested by various parties which may need to be looked into so as to improve the tax system and make it efficient, simple and encourage effective compliance. These include the following:

- To assist in making compliance easier, there should be a convergence between accounting profits and taxable profits i.e. follow the accounting treatment of income or expenditure so that less adjustments would need to be made in determining the taxable income of a business/ company;
- All organisations have their own charters, business plans, mission statements and the like. However, it is clear that there are certain critical organisational building blocks that are needed before an organisation can succeed. These organisational building blocks (as suggested by the New Zealand Commissioner of Inland Revenue at an international tax administration conference in Sydney in April 2006) can be categorised as follows:

  – Adaptable systems;
  – Balance in approach;
  – Client knowledge;
  – Determined attitude;
  – Ethical behaviour;
  – Flexibility in thinking; and
  – Gratifying place to work.

All of these must be in place so that the organisations entrusted with implementing the tax system function efficiently at all times;

- Revising the income tax rates downwards while shifting towards consumption taxes such as the GST or VAT;
- Revamping tax incentives to remove those which have not been attractive and have no takers and review the type of incentives as the same type of incentive may not apply equally to different types of industries;
- Review the way individuals with only employment income have to file tax returns. Why not make the deductions from salaries a final tax and avoid more paper circulating in the system? This is the case in a number of countries such as the Philippines;
- Review the time frame for handling appeals by taxpayers with the view of reducing it and resolving appeals faster;
- Compensating taxpayers (in whatever form) for delays in

refunding overpayments of tax. A clear time frame for refunds must be set and monitored;
- Enhance and protect taxpayers' rights by adopting and monitoring a Taxpayer's or a Client Charter; and
- Creating the office of a Taxation Ombudsman to provide an avenue for taxpayers to complain about the action or inaction of tax officials.

3. TAX SIMPLIFICATION

Compliance management is not simply about audits, verification and enforcement. It is also about making it as easy as possible for people to comply. One third of the compliance budget of the Australian Taxation Office (ATO) is directed at the provision of advice and assistance involving marketing and education programmes, advisory visits for new businesses, seminars and responding to telephone and written enquiries.

Effective tax administration requires establishing an environment in which citizens are induced to comply with tax laws voluntarily, while efficient tax administration requires that this task be performed at minimum cost to the community.

An important element in any successful administrative reform is simplicity. This can take two forms i.e. a rewriting of the law so that it is easier to understand and apply or a simplification of procedures so that taxpayers do not face bureaucratic delays. The Government of Thailand feels that there is a need for the Thai Revenue Code to be rewritten so that it is easier to use and it has recently called for bids/proposals from certain parties including universities. Australia and New Zealand are examples of jurisdictions where a Tax Law Rewrite Programme had been undertaken some years ago. It is important to simplify procedures for taxpayers, for example, by eliminating demands for superfluous information in tax return forms. The move is now on in some countries to pre-populate tax returns with information that is already available rather than to require a taxpayer to fill up the whole tax return annually. This is a measure that is being considered by the Malaysian Inland Revenue Board (IRB) though this will take a while to reach fruition as there should be effective linkages with various databases in other agencies so that all relevant information can be collated and then used to pre-populate relevant parts of the tax return. Tax administration requires facilitating compliance, monitoring compliance and dealing with non-compliance. Facilitating compliance involves improving services to taxpayers by providing clear instructions, understandable forms, and assistance and information as necessary. Timeliness is crucial.

Studies on taxpayer behaviour do seem to suggest that services to taxpayers that facilitate reporting, filing and paying taxes or that impart education or information among citizens about their obligations under the tax laws, may in many circumstances constitute a more cost-effective method of securing compliance than measures designed to counter non-compliance. This would involve providing certainty and clarifying legal ambiguities, communicating clearly and assisting in lowering compliance costs to taxpayers.

The prevalent attitude in tax administrations of some countries appears to be that all taxpayers are potential "criminals". No modern tax system can function on fear alone. There is much to be gained from viewing taxpayers more as clients than would-be defaulters.

In facilitating compliance, the underlying philosophy should be that the taxpayer is a 'client' who is not necessarily a willing one but whose needs must be met, and not simply a thief to be caught. Unfortunately, the latter attitude seems to prevail especially if one sees how some tax audits are finalised by tax officers .Threats of higher penalties may be implied if a taxpayer does not agree to a proposed audit adjustment within a short time frame. Tax officers appear to be chasing revenue targets and it could be that in pursuing this, some may adopt an aggressive approach so as to "close" a case. Of course, not all officers behave in this manner but the acts of a few can tarnish the image of the tax agency. There should be more effective monitoring of the way tax audits are carried out as audits are intended to be verification exercises (in a self-assessment tax system) and serve to educate taxpayers on the "right" approach in managing their tax affairs within the law rather than a way of penalising "clients". Of course, taxpayers who blatantly break the law should be treated accordingly but these are only a very small percentage. A proper Code of Conduct may be the solution and professional bodies could take the lead in working with the tax agency to develop a framework for the carrying out of audits or even investigations so that the rights of all parties are respected. This was how the Framework for Tax Audits as well as the Framework for Tax Investigations came into being in Malaysia with effect from 1 January 2007.

Tax authorities are in a unique position to learn from the steps taken in other countries and move ahead in achieving the desire to be a leading authority in tax administration. However, before that can be done, there has to be a mindset change among the staff of the tax authorities so that it becomes a truly service-oriented organisation and technology must be used effectively in carrying out most tasks. The Inland Revenue Authority of Singapore (IRAS) has been cited as one such agency in the region. Outside South-east Asia, the ATO has made tremendous strides and is one agency that is worth looking at.

In order to continue to collect more tax revenue (which is essential in ensuring economic development), the need for effective enforcement by the tax agencies is an important component. We have heard of many cases of tax and duty evasion as well as lapses in enforcement. With technology, we can do a lot to ensure that tax officers are free to concentrate on enforcement, be it via audits, inspections or investigations. There have been a number of instances where we have heard or known of millions being spent on computerisation exercises but we have yet to reap the benefits of such investments. It is time the tax agencies were transformed into truly service-oriented entities which use information technology effectively and efficiently. Existing systems and procedures need to be redesigned and streamlined with the latest technology. There will be a need for the Government to budget for such expenditure. We must move along this road but it requires a holistic

approach, that is, the whole agency must be wired, trained and have a service-oriented mindset. A proper and systematic approach towards implementing technology and having efficient and well-trained staff will lead to a more effective tax agency. This will lead to the registration of more taxpayers, effective recovery action and thus greater tax revenue for the nation.

In addition, there is a need for the tax authorities to be more forthcoming with the issuance of clear guidelines to ensure transparency in the tax system. Speedier and more efficient processing of tax returns and refunds of overpaid taxes would promote confidence in the system. The objective should be to shorten the process of making a refund of overpaid taxes. Again, effective deployment of technology is the answer.

Hence, a holistic technological transformation is absolutely essential, especially since self assessment of income tax is fully operational in many countries. In fact, Indonesia, the Philippines and Thailand all have a self-assessment system of taxation as does Malaysia. The exception is Singapore which despite not having a self assessment system has implemented measures (such as advance rulings) which would normally exist in a self assessment system. With the transformation, it is hoped that the tax authorities will be more proactive/responsive in issuing timely clarifications on relevant areas which will assist taxpayers in making their financial decisions.

Clarity and consistent application of the law is essential so that business is not hindered. The tax system must be business-friendly rather than a bureaucratic system. To be fair, the tax agencies have made some advances in terms of improving efficiency but more needs to be done.

All in, the future trend will be the increasing reliance on tax revenue being generated by the tax authorities through effective implementation and enforcement strategies. This requires capital expenditure to spur the transformation of the relevant agencies. Implemented properly, such expenditure should result in improved tax revenue collection. It must not be forgotten that technology is needed not only to collect taxes but also to educate and assist taxpayers and tax agents in meeting their obligations – a holistic solution for the benefit of all.

There should be more effective use of the website of the tax agencies and more information should be displayed on a timely basis. The ATO and the IRAS have an information service that will issue an email (to anyone who had registered online) on any statement /ruling that is issued by the agency. Thailand has a similar practice called "e-taxinfo" which delivers regulations and rulings via email. In addition, the website could be used to expose drafts of intended public rulings or guidelines for a period of time so that the public has the occasion to provide feedback which can then be considered before the public ruling/guideline is finalised. Timely information can be provided on details of double tax agreements when these are signed. The IRAS and the ATO issue statements whenever a double tax agreement is signed.

Another area that requires improvement is that concerning the issuance of statements to taxpayers on the amount due to or from them. Perhaps, we should look into ways in which taxpayers can check their latest account balance through the internet. All this is possible with proper and effective use of technology especially since e-filing of tax returns is being vigorously encouraged. In fact, Singapore has e-filing for individuals and Thailand allows e-filing of tax returns as well as for VAT and specific business taxes. In the Philippines, the top 10,000 corporations designated as such by the tax authorities can electronically file their income tax returns since 2002. Indonesia introduced e-filing about three years ago whereas Malaysia introduced e-filing for individuals about two years ago and this has been extended to all taxpayers in 2008 with tax agents being allowed to file tax returns for their clients.

4. IMPROVING TAX EFFICIENCY - BEST PRACTICES

We would all agree that Governments must assess and collect sufficient revenue to meet their goals and obligations. However, it is important that the costs of compliance and administration for taxpayers and tax administrations be reduced, wherever possible.

A Policy Statement was issued in mid-2006 by the International Chamber of Commerce (ICC) based in Paris entitled "Improving Tax Efficiency: The Responsibilities of Tax Administrations and Taxpayers" which makes recommendations intended to improve the efficiency in administering and complying with a particular tax system. The ICC's comments are based on the following economic proposition:

"Given a particular targeted level of tax revenue, a tax system that requires fewer resources to administer (monitor, legislate, audit and collect) **and** to comply with (understand, comply, report and transfer tax payments) is better than a tax system that costs more."

This economic proposition is referred to as "efficiency." The ICC makes a number of suggestions or best practices (reproduced below) which can reduce the overall cost of tax compliance and administration for tax administrations and taxpayers, thereby promoting an efficient tax system. It states that a tax administration should view itself similar to a business that provides services to customers and should constantly strive to improve the manner in which they provide such services.

Simplification

Tax administrations should administer the tax system in a manner that is no more complicated than necessary to assess and collect tax.

In general, simplification should result in lower costs for tax administrations and taxpayers because:

- fewer resources are required to apply simple rules than to apply complex ones;
- the time to conduct a tax audit may be shortened and thus reduce the costs typically associated with protracted audits;

- fewer tax controversies/disputes may be expected to arise; and
- simpler rules provide more certainty over tax reporting which thus improves financial reporting.

Tax administrations should accept that they cannot capture absolutely all of the taxable economic activity. The increased costs associated with a complex administrative tax regime may outweigh the additional tax revenue collected - so, there is a need for balance.

Shorter Timeframe for Tax Audits

A reduction in the time for tax administrations to begin and conduct a compliance audit would lead to considerable cost savings.

Tax administrations should strive to begin and conclude a tax audit as soon as possible after a tax return is filed. A taxpayer can more quickly respond to a tax audit when the needed information is readily available to the taxpayer. A taxpayer is more likely to recall and locate relevant information shortly after the filing of a tax return than many years after the filing. The passage of time makes it more difficult to locate documentation responsive to a particular question even if such documentation is available as in a business entity, there would be the usual turnover of staff and new staff may not be fully aware of matters and this thus delays the extraction of information.

Delay in the tax audit also compound the potential impact of an audit adjustment as a taxpayer may have adopted a similar position (which is being challenged by the tax administration) on tax returns for subsequent years that have already been filed. A proposed adjustment by a tax administration is less likely to be resisted if future tax filings are not as heavily impacted, which will be the case if tax returns are reviewed promptly and tax audits concluded quickly.

Transparency

The increased transparency of tax rules should be a continuing goal of every tax administration. Taxpayer's should know the rules of the game under which their economic activities will be taxed.

A useful definition of transparency is provided by the International Monetary Fund (in its Manual on Fiscal Transparency) as follows:

> Tax laws, regulations, and other documents relating to administrative interpretation of tax law should be accessible to the general public. Explanatory materials (e.g., instructions and pamphlets), usually prepared by the tax agency, should also be kept up-to-date. New budget revenue measures should be given sufficient publicity so that taxpayers understand how they might be affected. To this end, the material the tax agency uses in applying the tax laws (e.g., manuals and legal opinions) should be publicly available and there should be mechanisms in place whereby taxpayers can have their queries answered (e.g. by setting up a dedicated office in the tax agency to do so).

Training of Tax Administrators

Both tax administration staff and corporate tax professionals need to be properly trained to perform their duties. The training should permit both parties to operate on approximately the same level of tax knowledge. A tax system can only minimise costs if both "sides" are equally versed in the underlying rules.

Tax authorities should be adequately resourced to attract and retain appropriate personnel with the necessary skills.

Prospective Changes to the Rules

A tax administration that quickly audits tax returns will be able to respond to positions it believes are inappropriate. Such response may include a modification in administrative positions and practices. However, theses changes should be prospective only.

Business Records

The assessment of tax liability depends upon the review of the taxpayer's books and records. Three aspects of record-keeping are particularly relevant to the reduction in the costs of compliance and administration.

First, taxpayers should ensure that books and records appropriate to their economic activities are created and maintained. The cost of administration increases when taxpayer records are inadequate or unavailable.

Second, the books and records reasonably maintained by a taxpayer for the purposes of its enterprise should normally be sufficient for the tax administration. It should not normally be necessary for a taxpayer to create or reformat its books and records to comply with the requirements of tax compliance.

Third, once reasonable business records have been provided, the burden of persuasion should be on the tax administration to demonstrate that a taxpayer has not properly complied with the transparent tax regime.

Confidentiality

Tax administrations must continue to strive to maintain the confidentiality of tax return information they receive. Strict adherence to this standard is in the best interests of tax administrations as it facilitates the willingness of taxpayers to provide the information tax administrations need to carry out their task.

Impartial Appeal Process

Inevitably, reasonable disagreements may arise even under the most transparent tax systems. In such situations, an impartial adjudication process should exist that has as part of its function the publication of its decisions, taking into account privacy concerns of the affected taxpayer. Such a procedure will promote confidence in the system, ultimately increasing voluntary tax compliance. An adjudication system that rarely sustains the position of a taxpayer is unlikely to be viewed by taxpayers as being fair.

Conclusion

The ICC encourages tax administrations to adopt the suggestions made in the Policy Statement so as to improve their tax systems including:

- Implementing rules that are no more complicated than necessary to assess and collect tax;
- Reducing the time to begin and conduct a compliance audit;
- Increasing the transparency of tax rules;
- Increasing the resources of tax administrations in order to perform tax audits in a timely manner and improving the training of tax administration personnel;
- Making only prospective changes to tax practices and policies;
- Using business records created by enterprises;
- Maintaining the confidentiality of taxpayer records; and
- Maintaining an impartial tax appeals process.

The ICC's recommendations provide us with a basic framework within which the tax administration should operate. In reviewing the tax system, this is the approach one needs to take. The basic building blocks must be there and must be enhanced. Service delivery will then function within this broad framework. Then, we can move on to look into the specific micro issues affecting relevant sectors and suggest changes that are in line with the economic aspirations of the Government in terms of enhancing economic growth of the nation.

5. RISK MANAGEMENT

Corporate governance has been the buzzword over the last few years and it is not about to fade away. All of us need to appreciate its relevance – even in the field of taxation. It is simply about being transparent, managing risks effectively, being accountable to all the constituents or stakeholders and therefore behaving ethically. It thus refers to the need to have effective processes and procedures to assist in managing our affairs – and making sure that they function properly. The integrity of corporations is crucial to the overall health of an economy.

Managing the tax risk of a corporation is a governance issue for the board of directors. No corporation would want to be the subject of publicity in terms of non-compliance with the tax law. In a broad context, governance in taxation encompasses various constituents:

- Taxpayers;
- The tax authorities;
- Tax advisers/practitioners; and
- Professional bodies.

For the tax authorities, governance would entail looking at the organisational setup, transparency in decision-making including staff promotions, developing a positive mindset, responsible behaviour towards taxpayers, etc. Tax consultants need to service their clients responsibly, have risk management strategies in place, exercise reasonable care, apply high ethical standards, etc. The professional bodies that deal with taxation need to be accountable to its members, provide effective services, avoid conflicts of interest, ensure transparency in their decision-making process, etc.

In the 2004 and 2006 Global Tax Risk Surveys of tax directors in the corporate world conducted by Ernst & Young, corporate tax directors were surveyed and some of the key findings were:

- managing tax risk is a top corporate governance priority for most corporations;
- many tax functions now have a higher profile within the corporation;
- increased transparency and disclosure has led to increasing workload and this has increased the reputation consequences of tax decisions made by corporate personnel; and
- the majority of the directors viewed the changes in tax law and in the interpretation of tax law by tax authorities to be a key factor contributing to tax risk.

The Board of Directors of a corporation should be made aware of significant tax issues faced by the corporation. Taxation should be on the agenda. The Board should be in a position to ensure that management complies with the tax law. This should play a part in enhancing shareholder value. The independent directors have an important role to play in ensuring that tax risk is minimised.

The ATO in early 2004 issued a letter to the chairmen of listed public companies on how they could deal with tax risks and provided the Board of Directors a list of questions that they could ask their tax advisers. The ATO indicated that it is generally accepted that a fundamental principle of good corporate governance is that a board has the ultimate responsibility to identify corporate risk (including tax risk). The board should identify the tax risks associated with the operations of the corporation, decide which risks are acceptable and have in place a process for the management of those risks.

Of course, the directors are unlikely to be experts on taxation and therefore the role of tax advisers becomes important. The board should concern itself with the management of the tax risk connected with major transactions. Some of the questions that can be put to tax advisers/consultants are:

- How confident are you of the correctness of your advice?
- Has the factual basis for your opinion been properly checked?
- What is the likelihood that the tax authorities will take a different view?
- If the matter goes to Court, what is the risk of the Court deciding in favour of the tax authorities?
- What is the likelihood of the tax authorities being prepared to settle the dispute?
- Is there a likelihood of an increase in the tax profile of a company and a stronger possibility of a tax audit?
- Is it desirable to be upfront with the tax authorities in identifying the issues before or when filing the tax return?

It is quite clear that with self-assessment and tax audits, corporations have to manage the tax risk effectively. They

should have valid grounds for taking specific positions on tax issues as tax audits can result in penalties arising from audit adjustments. So, there is a need to ensure that adequate research is done, proper documentation is maintained and effective strategies are in place. This definitely increases compliance costs. If the board of directors does not take due cognisance of the tax risk, then it may not be discharging its overall role in enhancing shareholder value.

6. SERVICE DELIVERY

A number of areas would need to be looked at so that the tax system becomes efficient, simple and leads to effective compliance. Improving tax administration is part of reforming the tax system and service delivery is part of tax administration. Some areas that should be looked at include the following:

- Review the legislative framework to simplify current provisions and to remove archaic ones. In doing this, the private sector must be consulted to provide its input and assistance.
- Keep tabs on improvements in the tax administration structure in the region and other parts of the world. Make proactive suggestions to reform and enhance the current structure so that we are in step with worldwide developments.
- Where a framework for tax audits and tax investigations is in place, there must be a mechanism to measure the adherence to the framework as well as to see how further improvements can be made. The same applies to the advance rulings system.
- Focus on the educational role so as to be able to disseminate tax information including using the website effectively. Make voluntary compliance a way of life.
- The coverage of e-filing must be done carefully. As stated above, technology must be used such that it interacts with all aspects of the system. It would be better to have pilot or trial runs with tax practitioners being involved so that there is effective feedback.
- Service counters should be manned by experienced personnel with specific decision-making powers, i.e. problem solving is the focus.
- Improve timeliness in responding to queries from taxpayers, appeals, objections, etc and measure adherence to these timelines and benchmarks.
- Collect what is due and penalise intentional non-compliance quickly. Attempt to avoid arrears and avoid chasing for collection of tax liabilities years after these have been established.
- Introduce an effective human resource policy so that technical capabilities are enhanced i.e. get the right personnel. Outsource certain aspects, for example the research into a highly technical area which may be the subject of an advance ruling so that there is an effective understanding of the specific issue and the industry.
- Train officers by getting contributions from the private sector so that we develop staff with a broader mindset and more business knowledge.

Our greatest failing would be that we are contented with what we have done. In service delivery, continuous improvement is the key and who best to suggest improvements if not the public who uses the service. There must be an effective channel to allow the tax policy makers and tax administrators to get feedback from the users and the facilitators (i.e. the tax professionals).

With regard to surveys and obtaining feedback, in the United States, the Internal Revenue Service (IRS) announced last year that it will survey nearly 50,000 people (in a specific month) to help the agency improve the way it provides taxpayer services. An Opinion Survey of Taxpayer Resources and Services was sent to 40,000 taxpayers as part of the Taxpayer Assistance Blueprint, a multi-year effort by the IRS to review its customer service operations and develop plans for continued improvements.

The Media & Publications External Customer Satisfaction Survey of 10,000 taxpayers serves to help the IRS determine the effectiveness of its forms and publications. It measures how satisfied respondents are with the information they get from the IRS and how well it equips them to understand and meet their obligations under federal tax laws. The questions address the content, usefulness, format, graphics and delivery of IRS forms and publications. Customers have the option of taking the survey by telephone or via the internet.

Both these surveys are designed to provide the IRS with greater and more accurate understanding of taxpayer service needs, preferences, and behaviour. Both surveys will be repeated in future years, which will allow the IRS to continually refine and improve taxpayer services based on taxpayer preferences and needs. Such types of surveys would be a truly effective way of seeking feedback and then evaluating ways in which changes could be made to improve processes.

As part of the move to build a tax system that is more efficient, equitable, business- friendly and transparent, we have to seriously consider the need to ensure that taxpayers are given the due respect and provided effective services so that tax compliance is enhanced.

As a start, it would be useful to note what the Australian Taxpayers' Charter states, i.e.:

You can expect us to:
- Treat you fairly and reasonably.
- Treat you as being honest in your tax affairs unless you act otherwise.
- Offer you professional service and assistance to help you understand and meet your obligations.
- Accept you can be represented by a person of your choice and get advice about your tax affairs.
- Respect your privacy.
- Keep the information we hold about you confidential in accordance with the law.
- Give you access to information we hold about you in accordance with the law.
- Give you advice and information you can rely on.
- Explain to you the decisions we make about your tax affairs.
- Respect your right to a review.
- Respect your right to make a complaint.
- Administer the tax system in a way that minimises your costs of compliance.
- Be accountable for what we do.

We expect you to:
- Be truthful in your dealings with us.
- Keep records in accordance with the law.
- Take reasonable care in preparing your tax returns and other documents and in keeping records.
- Lodge tax returns and other required documents or information by the due date.
- Pay your taxes and other amounts by the due date.
- Be cooperative in your dealings with us.

What is stated above are the key aspects of the Australian Charter. There is a 23-page document which explains each of the expectations and obligations in greater detail. There is even a Taxpayers' Charter Team at the ATO to whom feedback can be sent on the Charter. The Charter is on the website and printed copies can be requested. There are a number of separate booklets which cover specific aspects mentioned in the Charter.

The Malaysian IRB does have a Charter but this had never been adequately publicised. However, when one looks at the Australian example, it is clear that the Malaysian Charter lacks the depth of coverage. The Malaysian Charter fundamentally looks at the micro aspects rather than the macro aspects. In addition, there are no other materials to explain further what has been spelt out in the Charter. Nevertheless, the IRB has recently updated its Charter in terms of specifying certain timelines in delivering its services to taxpayers. However, there does not appear to be any mechanism in place to measure how the IRB has performed in implementing the Charter. In Australia, the ATO is accountable to Parliament and reports to Parliament on its performance. The area of accountability is one area in which Government agencies definitely need to do a lot of work.

As for Singapore, there is no such Charter though the IRAS has a mission statement to be the leading tax administrator and are generally said to be efficient and transparent. In fact, the IRAS does carry out a regular review to improve its service level. The IRAS also carries out surveys among a broad cross-section of the public in its efforts to improve its service levels and turnaround time. Thailand does not have a Taxpayer's Charter. In the case of the Philippines, there is also no specific charter but the Bureau of Internal Revenue does publish a document on taxpayer's rights and remedies with regard to tax assessments which is made available to the public. Finally, with regard to Indonesia, there is no Charter but the legislation does stipulate timelines for obtaining refunds, processing objections to assessments and processing appeals. Other than in Singapore, the issue in the South-east Asian countries is the lack of a formal evaluation process or a monitoring mechanism to check on adherence to whatever timelines that are set.

As such, there is much work that has to be done in terms of delivering services efficiently to taxpayers as well as to tax agents.

7. CONCLUSION

The need to recognise that taxpayers have rights has become very important in this current day and age. We should be looking at innovation and introducing cost-savings in providing effective services i.e. reduce the waiting time and have satisfied customers. Introducing a well-crafted Taxpayer's Charter AND monitoring its effectiveness is a significant aspect of the culture of being accountable and receptive to ideas.

In line with improving the overall public delivery system, it is timely that tax agencies (and other Government agencies) adopt best practices, enhance the effective use of technology, cut down timelines, introduce greater clarity and implement friendly and courteous service and recognise that taxpayers' rights must be protected. This thus involves a balancing act in terms of service and enforcement. Finally, there has to be corresponding improvements in terms of taxpayers complying with the relevant rules and regulations as well as timelines so that the tax system works for all. There is much to be done! TG

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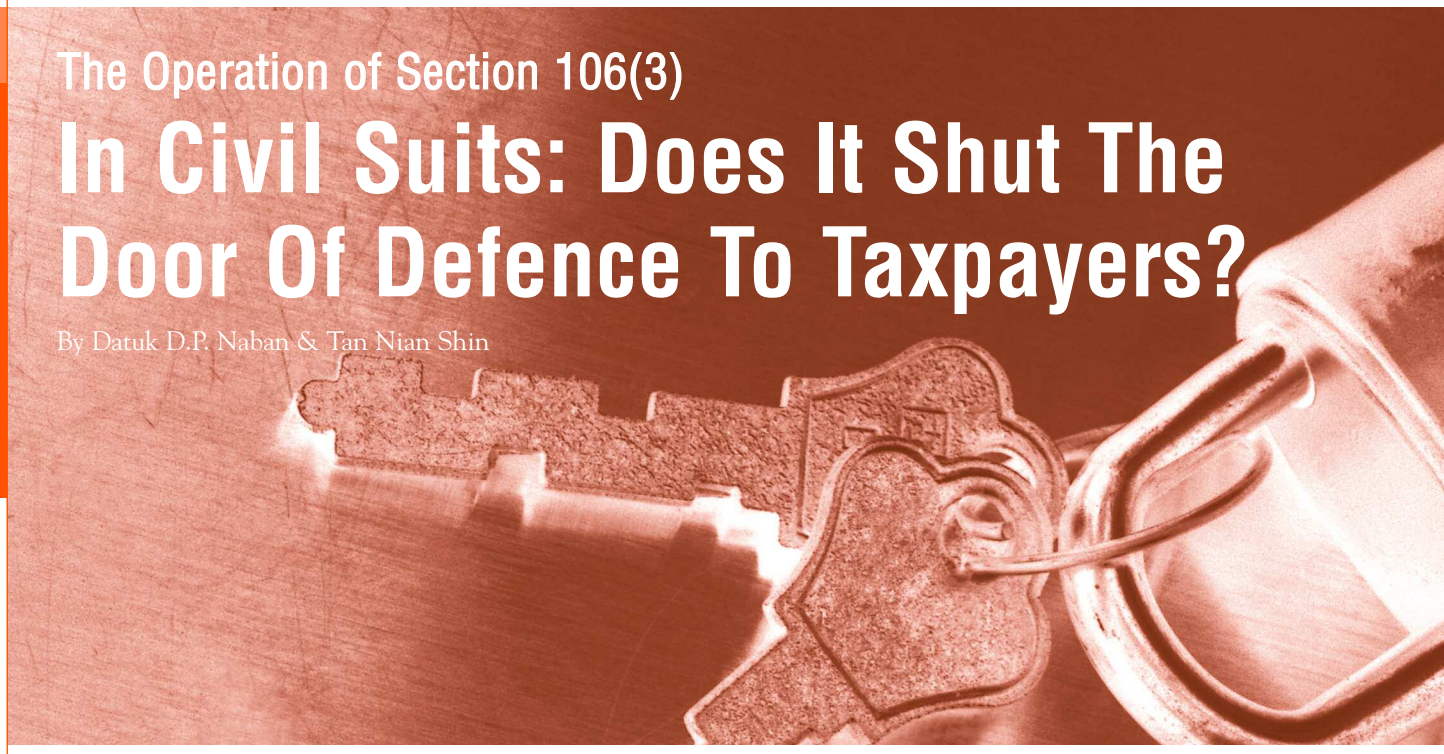
Feature Article

The Operation of Section 106(3)

In Civil Suits: Does It Shut The Door Of Defence To Taxpayers?

By Datuk D.P. Naban & Tan Nian Shin



1. Introduction

In the recent case of *Kerajaan Malaysia v Plaza Rakyat Sdn Bhd*[1], the High Court dismissed the taxpayer's appeal against the summary judgment obtained by the Government of Malaysia. Citing Section 106(3) of the Income Tax Act 1967[2] ("**ITA**"), the court refused to entertain the plea of incorrect assessment put forward by the taxpayer. In light of this decision, this article aims to:

a) examine the operation of Section 106(3); and
b) explore the defences available to the taxpayers despite the presence of Section 106(3).

2. The *Plaza Rakyat* Facts

In delivering his judgment, Justice Tee Ah Sing in *Plaza Rakyat* reiterated the principle that if the taxpayer is dissatisfied with the assessment raised by the Inland Revenue Board ("**IRB**"), the taxpayer should file an appeal to the Special Commissioners of Income Tax ("**SCIT**"). The facts and issue in *Plaza Rakyat* are short and simple. The taxpayer appealed against the summary judgment granted to the Government as the taxpayer disputed the amount of assessment raised by the Inland Revenue Board ("**IRB**")[3]. The taxpayer contended that the amount of assessment was incorrect as it was based on the taxpayer's estimated profit in 1997. According to the taxpayer, the estimated profit was based on the estimated cost of developing a shopping mall. The taxpayer claimed that in the course of developing the shopping mall, it actually incurred losses, thus making the estimated profits redundant.

However, Justice Tee Ah Sing dismissed the taxpayer's appeal on the premise that the court is precluded by Section 106(3) of the ITA from entertaining the plea that the amount of tax sought is incorrectly assessed. His Lordship cited the following passage from the case of *Government of Malaysia v. Dato' Mahindar Singh*[4] in support of this finding:

> *"The law is clear that once an assessment is made, the Inland Revenue Department can invoke sections 103 and 106 of the Act which make the tax payable under the assessment due and payable at the place specified in the notice of assessment upon service on the taxpayer of the notice whether or not the taxpayer appeals against the assessment. The taxes so due and payable may be recovered by the government by civil proceedings as a debt due to the government. Under section 106(3), the court is debarred from entertaining any plea which claims that the amount of taxes sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4), (5) or (5A)."*

The construction of Section 106(3) is such that it effectively precludes our courts from entertaining the plea that the amount of tax sought to be recovered by the IRB pursuant to Section 103 is excessive, incorrectly assessed, under appeal or incorrectly increased. Section 106(3) reads as follows[5]:

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1 [2007] 1 AMR 60.
2 Act 53.
3 In *Plaza Rakyat*, the IRB raised notices of assessment for the sum of RM 2,726,749.00, which included late payment penalties. When the taxpayer failed to pay the said sum, the IRB initiated a civil suit against the taxpayer. On 20th September 2005, the IRB obtained leave for summary judgment from the Senior Assistant Registrar against the taxpayer for the said sum with an 8% interest from the date of judgment.
4 [1996] 5 MLJ 626
5 As amended by Section 18 of the Income Tax (Amendment) Act 2002 [Act A1151]. The amendment took effect from the year of assessment 2004.

> *"In any suits under this section* ***the court shall not entertain*** *any plea that the amount of tax sought to be recovered is* ***excessive, incorrectly assessed, under appeal or incorrectly increased*** *under subsection 103(3), (4), (5), (6), (7) or (8)."*

Interestingly, *Plaza Rakyat* is not the first occasion where our courts have held that it cannot entertain the pleas described above. This principle was judicially recognised sometime ago by the Federal Court in *Sun Man Tobacco Co Ltd v Government of Malaysia*[6]. Lord President Azmi observed:

> *"In my opinion the learned Judge, was right in this instant case where he said that if the taxpayer wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5) he has to do so by way of appeal to the Special Commissioners. That opinion would appear consistent with the scheme of the Income Tax legislation. It is only in relation to any disputes on questions of law at the hearing before the Special Commissioners that the matter can be brought to the High Court by way of a case stated."*

Despite the lucid judgment of Lord President Azmi, taxpayers in a number of occasions have raised the plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased with hope of persuading the courts to allow them to raise these pleas in defending civil suits commenced by the IRB pursuant to Section 103. The question then arises whether the existence of Section 106(3) and the judicial recognition it has received, prevent taxpayers from raising a defence in contesting the civil suits commenced by the IRB for the recovery of taxes. The authors take the view that Section 106(3) only precludes the taxpayers from raising certain pleas as defences.

3. The Purpose Behind Section 106(3)

Before we consider the alternative defences available to the taxpayers, it is worthwhile to first consider the purpose behind the inclusion of Section 106(3) in the ITA. This would provide us with a better understanding of its role and operation. As aptly observed by Justice Syed Ahmad Idid in *Government of the Federation of Malaysia v Lee Tain Tshung*[7], we must appreciate that the ITA is the legislative scheme that deals with taxes. His Lordship explained that the ITA is envisaged as the legislative machinery for the speedy collection, recovery and repayment of tax. In *Lee Tain Tshung* (supra), the taxpayer sought leave to defend against the summary judgment applied by the IRB. After examining the facts before him and the framework of the ITA, Justice Syed Ahmad Idid commented that these provisions act as the answer to the delaying tactics of taxpayers in lodging objections and appeals. Ruling on a similar note, Justice Chang Min Tat in the earlier case of *Comptroller of Inland Revenue v N.P.*[8] commented that:

> *"Part XIII of the Ordinance regarding the collection, recovery and repayment of tax, must be seen to be a legislative provision for the speedy collection and recovery of taxes subject to provisions for repayment of taxes over-collected or not due, and an answer to the delaying tactics of taxpayers in lodging objections and appeals, especially where such tactics are frivolous and vexatious."*

It must be appreciated that Section 106(3) works as an exception to the general principle that one has the constitutional right to seek legal redress by initiating legal action and raising a defence in court. In this respect, our courts have kept the operation of Section 106(3) within its context. This is evident from the fact that our courts have constantly recognised that Section 106(3) only precludes the courts from entertaining certain pleas in a civil suit for the recovery of taxes. Justice Syed Ahmad Idid in *Lee Tain Tshung* (supra) observed that *"it is pertinent to note that s.106(3) as worded did not state that the defendant is precluded from raising a defence at all but s.106(3) confined itself to certain "pleas" which cannot be raised".* This is consistent with the established statutory interpretation rule as clauses that restrict one's rights are to be construed strictly[9].

4. Defences available to taxpayers

Therefore, as much as the Government is entitled to raise taxes, it must act within the four corners of the ITA. In cases where the IRB has acted *ultra vires* by misconstruing the provisions of the ITA and raised an assessment that should not have been raised in the first place, the taxpayer cannot be expected to pay the taxes raised. In such instances, the taxpayer is not contesting the amount of the assessment but the IRB's decision to raise an assessment in the first place. In this regard, our courts in all fairness, have only allowed Section 106(3) to operate within the letters of that provision. This is evident from the number of cases where the taxpayers have successfully contested the civil suits commenced by the IRB. These cases are considered below:

4.1 *Defective Notices of Assessment*

In *Connaught Housing Development Sdn Bhd v Kerajaan Malaysia*[10], the taxpayer sought leave to defend against the summary judgment obtained by the IRB. The taxpayer successfully pointed out that the IRB had failed to comply with Section 96(4)(c) of the ITA, thus making the notices of assessment defective. Section 96(4)(c) requires a notice of assessment served under Sections 96(1) or 96(2) to

6 [1973] 2 MLJ 163
7 [1992] 1 MLJ 629
8 [1973] 1 MLJ 165
9 Maxwell on the Interpretation of Statutes, 12th Edition, 1992.
10 [2003] 8 CLJ 144.

state the place at which the payment is to be made, the increase for late payment and any right of appeal that exist under the ITA. Justice R. K. Nathan agreed with the taxpayer's contention stating that the place at which payment is to be made was not stated, the penalty for late payment imposed by Section 103(4) of the ITA was not stated and the notices did not point out the right of appeal that exist under the ITA. Thus, the summary judgment obtained by the IRB was set aside.

To appreciate the reasoning behind the decision in *Connaught Housing* (supra), it warrants a brief note on the principles governing summary judgment. In applying for a summary judgment, the IRB must satisfy the court that the taxpayer plainly and obviously has no defence to the IRB's claim. If the IRB is able to satisfy the court, then summary judgment will be granted[11]. On the other hand, a summary judgment will be dismissed if the taxpayer is able to establish that there is:

i) a serious conflict of material facts;
ii) a triable issue worthy of judicial investigation in the trial of the action; and
iii) an important and difficult point of law requiring further and mature consideration at the trial.

In *Connaught Housing* (supra), the IRB's claim was premised on the fact that the taxpayer failed to pay the taxes raised via the notices of assessment, which was served on the taxpayer. However, the IRB's failure to comply with Section 96(4)(c) had made the notices of assessment defective, which in turn questions the legality of the suit commenced by the IRB. By raising this issue, the taxpayer had satisfied the court that it had a defence against the IRB's claim. The authors' welcome the decision in *Connaught Housing* as it is in line with the observation of Justice Raja Azlan Shah in the Federal Court case of *Fadzil Mohamed Noor v Universiti Teknologi Malaysia*[12]. His Lordship explained that the courts will scrutinise the plaintiff's summary judgment as such application shuts the door of the court to the defendant. In this regard, his Lordship added that the court will only exercise its jurisdiction to grant summary judgment in proper cases.

It is also encouraging that the decision in *Connaught Housing* was followed recently in *Kerajaan Malaysia v Kemayan Bina Sdn Bhd*[13]. Justice Tee Ah Sing in this case dismissed the IRB's appeal against the refusal of the Senior Assistant Registrar to grant summary judgment in favour of the IRB. Adopting the ratio in *Connaught Housing* , his Lordship held that the IRB had failed to comply with Section 96(4)(c). Justice Tee Ah Sing also added that the compliance of Section 96(4)(c) is mandatory and Section 143 of the ITA cannot be applied to correct the non-compliance.

4.2 *Service of Notice*

Meanwhile, another reason for dismissing the IRB's appeal in *Kemayan Bina* (supra) was due to its failure to explain in its affidavits when and how the notices of assessments were posted. Further, the IRB had also failed to show that the notices of assessments were actually posted. This led to his Lordship to rule that the presumption of service of notice under Section 145(2) of ITA did not apply.

Similarly, in *Kerajaan Malaysia v Sun City Development Sdn Bhd*[14], the IRB contended that the notices of assessment were posted to the taxpayer's address. According to the IRB, as the notices were not returned by postal services, it must the presumed that the notices were received and served on the taxpayer. The IRB relied on Sections 12 and 66 of the Interpretation Acts 1948 and 1967, in addition to Section 145(2) of the ITA in raising these presumptions. Justice James Foong held that before the presumptions can come into play or be effective, there must be some proof that the notice was actually posted. In setting aside the summary judgment obtained by the IRB, Justice James Foong commented that:

"There should be evidence to indicate the procedure adopted by the plaintiff in posting letters for the department and perhaps a record book to indicate that on such a day a letter addressed to the defendant at the address listed on the envelope was among the one of many others being posted in the ordinary course of the plaintiff's business."

5. Stay of Execution of the Summary Judgment

Even if Section 106(3) is construed strictly by the courts, it is in the ordinary language fairly wide. In many cases, the taxpayers have no defence available because of the strict terms of Section 106(3). However, our courts have in certain cases whilst granting summary judgment, have stayed the execution of the judgment. In these type of cases, the authors would recommend the taxpayers to consider obtaining a stay of execution of the judgment. Our courts have come to the assistance of taxpayers where there is a basis to challenge the assessment or an appeal pending before the SCIT. An excellent authority on this would be the Federal Court case of *Kerajaan Malaysia v Jasanusa Sdn Bhd*[15]. In this case, the IRB obtained a summary judgment against the taxpayer from the Senior Assistant Registrar. The taxpayer appealed to the High Court to stay the execution of the judgment. Justice Ian Chin[16] granted the stay and commented that *"the Act does not have any provision curtailing or restricting the inherent jurisdiction of the court to stay an execution."* This was subsequently endorsed by Justice Edgar Joseph Jr when this case went on appeal to the

11 Adapted from the judgment of Justice Mokhtar Sidin in the Court of Appeal case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457.
12 [1981] 2 MLJ 196.
13 [2007] 1 AMR 120.
14 [2007] 1 AMR 589.
15 [1995] 2 MLJ 105.
16 See [1993] 3 MLJ 514 for the High Court judgment, which was reported as *Government Of Malaysia v Datuk Haji Kadir Mohamad Mastan And Another Application.*

Federal Court[17]. In dismissing the IRB's contention that the High Court judge was wrong in law in having granted the stay order in light of Sections 103(1) and 106(3), his Lordship articulated this strong observation, which remains good law until today:

> *"With respect, in our view, neither s 103(1) nor s 106(3) bars a court, in appropriate circumstances, from executing its inherent powers of granting a stay, even if a tax case".*

Like Justice Ian Chin at the High Court, his Lordship referred to the Supreme Court decision in *Chong Woo Yit*. Justice Gunn Chit Tuan in *Chong Woo Yit* stated that *"in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the Special Commissioners of the taxpayer's appeal against the assessments raised against him…".*

Besides this, Justice Ian Chin also acknowledged the need to balance between the rights of the IRB (i.e. the Government) and the taxpayer. His Lordship observed:

> *"…Matters of this nature involve, inter alia, balancing the need of the government to realize the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The court should be ever vigilant against taxpayers who may use the procedure of the court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfill the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment. It should not be much of a difficulty for the court to see the genuineness of an appeal or the willingness of the taxpayer to comply with all reasonable requests of the Director, if they exist, and thus move the court to stay the execution..."*

The above clearly illustrates that our courts are keen to come to the aid of a responsible and co-operative taxpayer, who has a good case against the IRB although the taxpayer may not be able to raise a defence outside the scope of Section 106(3). In *Jasanusa*, the taxpayer had been co-operating with the IRB. In the own words of Justice Ian Chin, the taxpayer had *endeavoured to fulfill the requests of the plaintiff for information and documents.* However, the facts of *Jasanusa* clearly indicate that the IRB had acted unreasonably by seeking a summary judgment and not forwarding the taxpayer's notice of appeal to the SCIT. The facts of *Jasanusa* are reproduced here:

> *"…The defendant filed the Form Q in February 1992, and the plaintiff reacted by a letter of 15 May 1992, saying that the Director intended to review the assessment under s 101 of the Act and asked for particulars of everything that the defendant owned and proof of use and of ownership. Given the mass of information and documents required, quite naturally the defendant, on two occasions, asked for time up to 30 November 1992 for compliance. Instead of acceding to the request for time, the plaintiff took out the writ herein and obtained summary judgment on 2 March 1993; at which time the Director still had not changed his stated intention to review the assessment which he indicated in his letter of 15 May 1992. Quite a substantial amount of information, in the form of documents certifying to the ownership, registration number and capacity of the vehicles, have to date already been supplied by the defendant to the plaintiff … The defendant is still holding on to the hope of a review held out by the said letter of the Director which obviates the necessity of an appeal. Therefore, that the appeal of the defendant is still not heard is not the fault of the defendant…"*

6. Conclusion

Taxpayers in challenging a civil suit initiated by the IRB under Section 103(1) must take into account the effect of Section 106(3). This is necessary to ensure that taxpayers have a proper strategy to their defence. Section 106(3) has only removed the taxpayers' right to certain defences, namely the plea that *the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.* In this regard, it is clear that Section 106(3) does not state that taxpayers are precluded from raising a defence at all. Cases like *Connaught Housing*, *Kemayan Bina* and *Sun City Development* illustrate that it is open to taxpayers to raise technical arguments like defective notices of assessments, defective service and failure to observe the mandatory provisions contained in the ITA as defences. In this regard, the presence of Section 106(3) should not discourage taxpayers from defending the civil suits initiated by the IRB. Likewise, Section 106(3) does not prevent the courts from granting a stay of execution even where judgment has been obtained. TG

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17 Justice Edgar Joseph Jr also maintained the same endorsement in another Federal Court. See *Kerajaan Malaysia v Dato' HajiGhani Gilong*

Technical Updates

CUSTOMS/STAMP DUTY

- **Customs Duties (Goods of ASEAN Countries Origin) (ASEAN HARMONISED TARIFF NOMENCLATURE AND COMMON EFFECTIVE PREFERENTIAL TARIFF) Order 2007 [P.U.(A) 440/2007]**

  The Order prescribes the CEPT rate of import duty, and stipulates the Rules of Origin for goods eligible for the CEPT Scheme for AFTA as well as the General Rules for the Interpretation of the Harmonised System. It came into operation on 1 April 2008.

- **Stamp Duty (Remission) (No.3) Order 2007 [P.U.(A) 402/2007]**

  50% of the stamp duty chargeable on any instrument of transfer executed between 8 September 2007 and 31 December 2010 (both dates inclusive), for the purchase by an individual of one unit of residential property costing not more than RM250,000 per unit, is remitted. The Order is deemed to have come into operation on 8 September 2007.

- **Stamp Duty (Exemption) (No.9) Order 2007 [P.U.(A) 406/2007]**

  All instruments executed between 8 September 2007 and 31 December 2010 (both dates inclusive), pursuant to the Petronas Vendor Merger Scheme, i.e. a merger scheme between companies licensed by Petronas under regulation 3 of the Petroleum Regulations 1974, are exempted from stamp duty. The Order is deemed to come into operation on 8 September 2007.

- **Stamp Duty (Exemption) (No.10) Order 2007 [P.U.(A) 420/2007]**

  With effect from 8 September 2007, all instruments effecting the transfer of any immovable property operating as a voluntary disposition *inter vivos* from husband to wife and vice versa are exempted from stamp duty.

INCENTIVES FOR THE ISKANDAR DEVELOPMENT REGION

A developer is a Malaysian resident company, incorporated under the Companies Act 1965, which purchases or acquires any right or rights over part or the whole of the land to undertake development in an approved node in accordance with the master plan for the node and is approved by the Minister.

A development manager is a Malaysian resident company, incorporated under the Companies Act 1965, which is appointed by a developer to provide management, supervisory or marketing services in relation to the activity of the developer in an approved node and is approved by the Minister.

A node project development company is a Malaysian resident company, incorporated under the Companies Act 1965, which certifies, facilitates and coordinates the development activity undertaken by a developer or services provided by a development manager in any approved node. It is approved by the Iskandar Regional Development Authority.

An IDR-status company means a company incorporated under the Companies Act 1965 and resident in Malaysia which undertakes a qualifying activity (determined by the Minister) in an approved node (a designated area within the Iskandar Development Region) and approved by the Minister.

- **Income Tax (Exemption) (No. 19) Order 2007 [P.U.(A) 417/2007].**

  The Order provides the following income tax exemption for companies which undertake activities as developers or development managers in the approved nodes of the IDR:

Person	Income Exempted	Exempt Period
Developer	Statutory income derived from the disposal of any right or rights over any land in an approved node	Commencing from the first year of assessment statutory income is derived until year of assessment 2015
	Statutory income from rental or disposal of a building located in an approved node	Commencing from the first year of assessment statutory income is derived until year of assessment 2020
Development Manager	Statutory income from the provision of management, supervisory or marketing services to the developer	Commencing from the first year of assessment statutory income is derived until year of assessment 2020

- **Income Tax (Exemption) (No. 20) Order 2007 [P.U.(A) 418/2007].**

  An "IDR-status company" is exempted from income tax in respect of the income derived from a "qualifying activity" provided to persons situated:

  - within an approved node and outside Malaysia; or
  - situated outside Malaysia only.

The exemption is for a period of 10 years commencing from the date of commencement of the "qualifying activity".

In addition, it is provided in both the Orders that any losses incurred:

from the year of assessment in the basis period in which activities referred to in the respective Orders commences to the year of assessment immediately prior to the exempt period; and the losses of the exempt period,

will be allowed to be carried forward to the post-exempt period.

Both Orders are effective from the year of assessment 2007.

- **Income Tax (Exemption) (No. 21) Order 2007 [P.U.(A) 419/2007]**

  With effect from 1 September 2007, a non-resident person is exempt from income tax on
  (a) fees for technical advice, assistance or services under Section 4A(ii) of the Act received from a developer, development manager or IDR-status company;

(b) interest received from a developer; and royalty received from a developer or IDR-status company;

(c) provided that the above payments from a developer or development manager are received on or before 31 December 2015, and payment from an IDR-status company are received on or before the expiry of ten years from the date of commencement of the qualifying activity in Malaysia.

OTHER ORDERS AND RULES

- **Income Tax (Exemption) (No. 22) Order 2007 [P.U.(A) 437/2007]**

With effect from year of assessment 2007, the Minister exempts from income tax

(a) dividends received by an offshore company;
(b) dividends received from an offshore company which are paid, credited or distributed out of income derived from an offshore business activity or, income exempt from tax;
(c) distribution received from an offshore trust by the beneficiaries;
(d) royalties received from an offshore company by a non-resident person or another offshore company;
(e) interest received from an offshore company by a non-resident person (other than interest accruing to a business carried on by a non-resident person who is licensed to carry on a business under the Banking and Financial Institutions Act 1989, Islamic Banking Act 1983, Insurance Act 1996 or Takaful Act 1984) or another offshore company;
(f) interest received from an offshore company by a resident person (other than a resident person licensed to carry on a business under Banking and Financial Institutions Act 1989, Islamic Banking Act 1983, Insurance Act 1996 or Takaful Act 1984) and;
(g) amount received from an offshore company by a non-resident person or another offshore company, in consideration of services, advice or assistance specified in paragraphs 4A(ii) of the Income Tax Act 1967 (ITA).

Section 109, ITA shall not be applicable to income exempted under (d) and (e). Section 109B and 109C, ITA shall not be applicable to income exempted under (f) and (g) respectively. In addition, with regard to the income in (b) above, paragraphs 5 and 6 of Schedule 7a of the ITA shall apply, mutatis mutandis, to the amount of income exempted to a company incorporated under the Companies Act 1965 and resident in Malaysia.

The offshore company and offshore trust referred to in the Order is as defined in the Labuan Offshore Business Activity Act 1990.

This Order revokes the Income Tax (Exemption) (No.16) Order 1991 and the Income Tax (Exemption) (No.10) Order 2000.

- **Income Tax (Deduction for Cost of Spectrum Assignment) Rules 2007 [P.U.(A) 447/2007].**

With effect from year of assessment 2007, cost of spectrum assignment, i.e. fee for the use of spectrum assignment paid to the Malaysian Communications and Multimedia Commission, incurred by a company resident in Malaysia and incorporated under the Companies Act 1965, shall be allowed a deduction in ascertaining its adjusted business income. The deduction shall be allowed equally for a period of 12 years of assessment from the year of assessment 2007 until 2018.

Cost of spectrum assignment incurred prior to the effective year of assessment of these Rules shall be deemed incurred in the year of assessment 2007 and subsequent years of assessment and shall be allowed as a deduction equally for 12 years of assessment.

Spectrum assignment means the rights to use specified frequency bands for the provision of third-generation mobile telecommunication services in Malaysia which are issued by the Malaysian Communications and Multimedia Commission.

- **Income Tax (Exemption) Order 2008 [P.U.(A) 18/2008]**

  With effect from year of assessment 2007, payment received by an individual participating in the Malaysian Technical Co-operation Programme and who is a non-citizen and non-resident of Malaysia is exempt from income tax.

- **Income Tax (Deduction For Cost of Obtaining Chain of Custody Certification From Malaysian Timber Certification Council) Rules 2008 [P.U.(A) 42/2008]**

  These Rules allow a deduction for the cost of obtaining Chain of Custody Certification from the Malaysian Timber Certification Council by a company incorporated and resident in Malaysia, and which engages in the manufacturing of wood-based product. The Rules are deemed to have effect from year of assessment 2007.

- **Income Tax (Advance Ruling) Rules 2008 [P.U.(A) 41/2008]**

  The Rules provide the framework for the advance ruling system to operate. It defines the scope, the application procedures and the status of an advance ruling. It also stipulates the conditions for the non-issuance of an advance ruling. The Rules are deemed to have come into operation on 1 January, 2007.

GUIDELINES FROM MOF AND IRB

- **Guidelines on Advance Rulings**

  Following the gazetting of the Income Tax (Advance Ruling) Rules 2008, the IRB has issued guidelines on Advance Rulings. The guidelines explain the effect and status of an advance ruling, finality of an advance ruling and procedures for application for an advance ruling, application fee structure, etc.

- **Guidelines on Application for Extension of Time to File an Appeal to the Customs Appeal Tribunal**

  Pursuant to Section 143 of the Customs Act 1967, Section 47(1) of the Excise Act 1976, Section 68(2) of the Sales Tax Act 1972 and Section 50(2) of the Service Tax Act 1975, an appeal against the decision of the Director General of Customs must be made within 30 days from the date of notification of that decision. Regulation 3 of the Customs (Appeal Tribunal) Regulations 2007, however, allows an extension of time for filing of the appeal upon application in writing by the appellant. These guidelines issued on 15 February 2008 by the Chairman of the Customs Appeal Tribunal were to assist the appellant to apply for an extension of time to file the appeal. It laid down the procedures for an application for extension of time.

- **Tax Guidelines on Securities Borrowing and Lending (SBL)**

  The Guidelines on Securities Borrowing & Lending (SBL) issued by the IRB provide clarification on an exemption order which is pending gazette notification. The pending exemption order will replace the existing Income Tax (Exemption) (No. 30) Order 1995, which also deals with this matter.

  The pending exemption order will exempt any income (other than dividends, manufactured payments, lending fees and interest earned on collateral) arising from loans of securities listed under Bursa Malaysia Securities Bhd. and the return on the same or equivalent securities and, the corresponding exchange of collateral under an SBL transaction.

  The rationale for exemption of such income is that although the legal and beneficial ownership have been transferred, the economic ownership of the securities, i.e. the entitlement to dividends, rights issues and bonus issues remain with the transferor.

  In addition, the guidelines provide that under the Stamp Duty (Exemption) (No. 28) Order 1995, all instruments of transfer executed in favour of the Borrower and Lender of securities listed on the Bursa Malaysia as well as instruments of transfer of collateral under a SBL transaction will be exempted from the payment of stamp duty.

- **Policy and Guidelines on Utilisation of Accumulated Business Losses and Unabsorbed Capital Allowances [Section 44(5A)-44(5D) and Paragraph 75A-75C, Schedule 3, Income Tax Act 1967]**

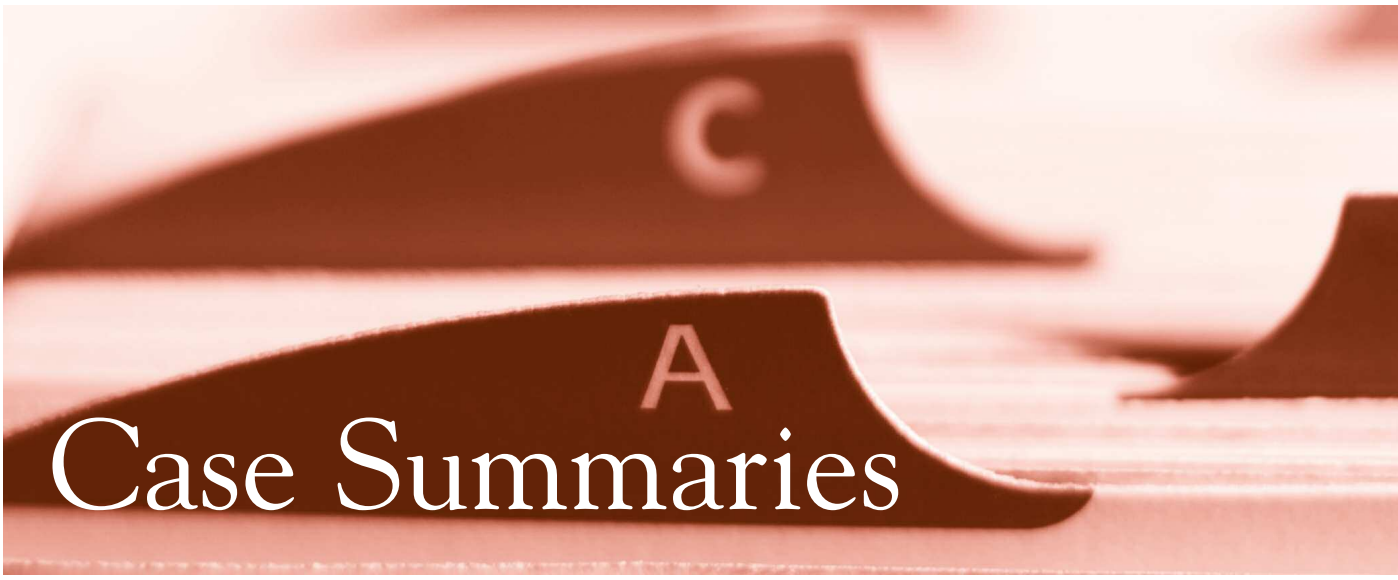
  The Minister of Finance has exercised his discretion to grant a concession to companies with a substantial change in shareholdings. As such, with effect from year of assessment 2006, companies with substantial changes in shareholdings (i.e. 50% or above) will be allowed to carry forward the accumulated business losses and unabsorbed capital allowances to be utilised in future **except** for dormant companies.

- **Addenda to Public Rulings No. 2/2005 and 4/2005**

Addendum to Public Ruling No.	Name of Ruling	Date Issued/ Updated
4/2005	Withholding Tax on Special Classes of Income	30.11.2007
2/2005	Computation of Income Tax Payable by a Resident Individual	03.01.2008

- **Finance Act 2007**

  The Finance Act 2007 (Act 683) which incorporates the 2008 Budget proposals was gazetted on 28 December 2007.



Case Summaries

NR Co Ltd v Ketua Pengarah Hasil Dalam Negeri Malaysia
Special Commissioners of Income Tax
Appeal No. PKCP (R) 17/2003
Judgment delivered on 20 June 2007

Revenue Law – Income Tax – Contract award satisfied by cash and shares – Whether realised value or par value of shares for determining gross income – Whether loss in share price deductible

The taxpayer entered into a joint venture with two other companies which joint venture was awarded the contract to construct and complete a civil engineering project undertaken by Projek Lebuhraya Utara Selatan Bhd (PLUS). A condition of the contract of award dated 14 June 1990 was that the taxpayer take non-cumulative convertible preference shares (par value of RM1.00) in PLUS ("the shares"). These shares represented 13% of the contract value. A Subscription and Options Agreement ("Subscription Agreement") made between the joint venture parties and another company, UEM, was also executed on 14 June 1990. This Subscription Agreement provided that the preference shares would be acquired by UEM at a fixed agreed price of RM0.60 per share.

The Director-General, in determining the taxpayer's income took into account the contract value of the project and did not allow the losses of the sale of the shares. The taxpayer contended against this.

The issue before the Special Commissioners were: (1) in respect of the 13% of the contract value satisfied by the preference shares, whether the realised value or the par value of the preference shares should be adopted in determining the gross income of the taxpayer; or alternatively, (2) if the par value of the preference shares was adopted, whether the loss suffered on the disposal of the shares should be deducted as an expenditure pursuant to section 33(1) of the Income Tax Act 1967.

Held: Appeal dismissed.

1. The taxpayer's loss from the sale of the shares was as a result of their business decision to obtain the cash from UEM before the end of the option period and not an obligation in the contract to dispose of the shares at RM0.60. If the shares were automatically taken up by UEM as per the Subscription Agreement, the purchase price would have been RM1.00. As such, the intention of PLUS was that the total consideration for the 13% of the contract payment should not be below the par value of RM1.00 per unit per share.

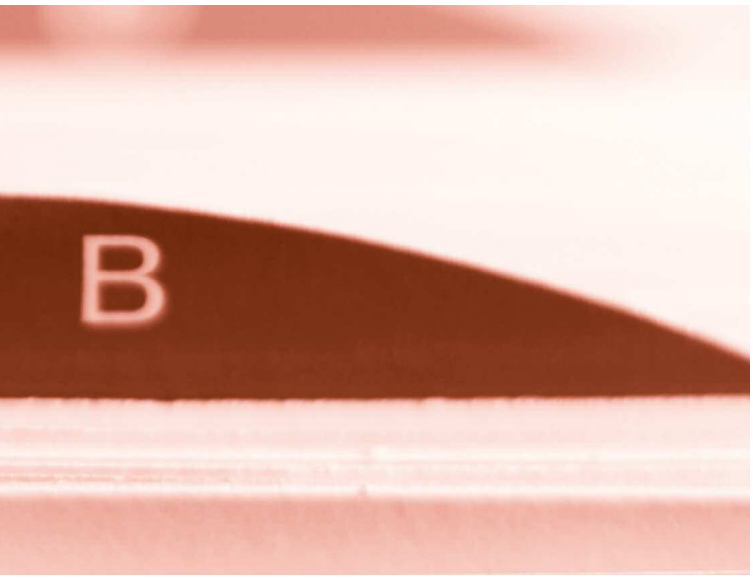
2. The onus of proof is on the taxpayer to show that the loss was incurred wholly and exclusively in the production of the taxpayer's gross income. Upon perusing the contract of award pertaining to the project, it was manifestly patent that the disposal of the shares to UEM at RM0.60 per unit of share was a completely separate and different transaction from the main contract and the disposal of the said shares constituted a disposal of capital assets.

3. The loss suffered by the taxpayer was not outgoings and expenses wholly and exclusively incurred in the production of income. The disposal of the rights to the shares is a disposal of capital asset and the loss suffered is a capital loss and not deductible against the taxpayer's income.

For the taxpayer: Francis Tan and Lucy Chang.

For the Director-General of Inland Revenue: Zaleha binti Adam and Normareza binti Mat Rejab (Legal Officers, Inland Revenue Board).

Before: Hariraman Palaya, Kamarudin Bin Mohd Noor and Ahmad Padzli Bin Mohyiddin.



TPL Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Malaysia
Special Commissioners of Income Tax
Appeal No. PKCP (R) 19/2004
Judgment delivered on 21 May 2007
(2008) MSTC 3,641

Revenue Law – Income Tax – Capital allowance under Schedule 3 of the Income Tax Act 1967 – Capital expenditure on construction of car park – Whether expenditure on car park was "plant" expenditure

The taxpayer is a company whose principal activities consisted of property development, car park operation and letting out premises. In its contract with the landowner, it was agreed that the taxpayer would erect a multi-storey car park on the said land.

Capital expenditure was expended on the construction of the car park. Notices of additional assessment were issued. The taxpayer was aggrieved by the additional assessments and disputed, claiming that the construction of the car park qualified for capital allowance under Schedule 3 of the Act.

The issue was whether the expenditure on the construction of the multi-storey car park building qualified as a plant expenditure for the capital allowance under Schedule 3 of the Income Tax Act 1967.

Held:: appeal dismissed.

1. Since the word "plant" was not defined anywhere in the Act, reference had to be made to the authorities and the decided cases. Applying the fact that the taxpayer had built a multi-storey car park to the tests laid down in decided cases, the taxpayer had failed to prove that the relevant expenditure constituted a "plant" expenditure for purposes under capital allowance under Schedule 3 of the Act.

For the taxpayer: Kenny Kong Seong.

For the Director-General of Inland Revenue: Norzilah binti Abdul Hamid and Mohd Kamaruzaman bin Mohamed Noor (Legal Officers, Inland Revenue Board).

Before: Dato' Ahmad Zaki bin Husin, Datuk Ahmad Padzli bin Mohyiddin, and Datuk Sahari bin Haji Mahadi.

BR Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri
Special Commissioners of Income Tax
Appeal No. PKCP (R) 27/2004
Judgment delivered on 31 July 2007

Revenue Law – Income Tax – Method of recognising income – Progress payments received – Project longer than two years – Penalty – Section 3 and sec 113(2) Income Tax Act 1967

The taxpayer is in the business of property holding and development. In 1996, the taxpayer commenced two housing development projects for which it received progressive payments. It prepared its accounts for the years 1996 to 1999 based on the completed contract method (CCM) and recognised its income based on such. The Director-General therefore made his assessments for years of assessment 1997 up to 2000 on a preceding year basis.

Upon a tax audit carried out by the Director-General, it was discovered that the projects took more than two years to complete. As such, the Director-General required the taxpayer to recognise the income from the projects based on the Progressive Completion Method (PCM) as provided by section 24(1) of the Income Tax Act 1967 ("the Act"). When this was not complied with, a penalty was imposed for making incorrect return by omitting incomes.

The taxpayer appealed against the Notices of Additional Assessment which arose as a result of the Director-General's method of calculation, and against the penalty imposed.

Held: Appeal dismissed.

Whatever method was used to recognise income, it should comply with the provisions of the Act and consistent with normal accounting practice. What might be prudent in accountancy for a company was not necessarily the correct method of ascertaining the proper assessment for income tax.

In accordance with what was provided in section 3 of the Act, the income should consist not only of amount actually received by the taxpayer but also of amounts due and payable in the year of assessment but not actually paid in that year. The PCM therefore complied with the Act. The taxpayer had submitted an incorrect return by omitting income received or receivable in the year ended 31 December 1996, 1997, and 1998. The Director-General therefore had the discretion to impose penalty under section 113(2) of the Act. TG

For the taxpayer: Lam Kam Wing and Chong Mui Vun.

For the Director-General of Inland Revenue: Norhisham bin Ahmad and Mohammad Hafidz bin Ahmad (Legal Officers, Inland Revenue Board).

Before: Dato' Ahmad Zaki bin Husin, Datuk Ahmad Padzli bin Mohyiddin, and Datuk Sahari bin Haji Mahadi.

Source: Malaysian and Singapore Tax Cases published by CCH Asia Pte Limited.

Case Commentary

Aspac Lubricants (Malaysia) Sdn Bhd (formerly know as Castrol (Malaysia) Sdn Bhd ("the Castrol Case")

Entertainment expenses have been a controversial item for tax purposes due to, amongst others, the perceived excesses and abuses of corporate expense accounts. The recent Court of Appeal decision in **Aspac Lubricants (Malaysia) Sdn. Bhd. (formerly known as Castrol (Malaysia) Sdn Bhd)**, sheds light on what entertainment expenses are deductible.

Facts of the Case

The taxpayer was in the business of, amongst others, blending and selling lubricants for motorised vehicles and had given away certain promotional items to its customers and dealers during the years of assessment ("YAs") from 1989 to 1992. Tax deduction was claimed in respect of items given to its customers ("Customer Items") and dealers ("Dealer Items") but was disallowed by the Director General of Inland Revenue ("Revenue"). The Customer Items, which included items such as T-shirts, mugs, umbrellas which carried the taxpayer's logo, were given away to the customer only upon purchase of the taxpayer's products, namely vehicle lubricants.

It was only in respect of the Revenue's disallowance of the Customer Items that the taxpayer appealed, initially to the Special Commissioners of Income Tax ("SCIT"), then to the High Court and finally to the Court of Appeal.

Tax Deductibility under the Income Tax Act 1967

Section 33(1) of the Income Tax Act 1967[1] ("ITA") provides that expenditure wholly and exclusively incurred in the production of gross income ("revenue expenditure") is tax-deductible but, such revenue expenditure must not be disallowed under section 39(1) of the ITA[2].

In this case, the Revenue had sought to rely on the exclusion in section 39(1)(l) of the ITA to disallow the expenditure incurred by the taxpayer in providing the Customer Items.

By way of background, section 39(1)(l) was introduced by the Finance Act 1988 with effect from the YA 1989 and was amended subsequently with effect from the YA 1995. Section 39(1)(l) as it stood for the YAs in question read as follows:

"… no deduction … shall be allowed in respect of –
(l) any expenses incurred in the provision of entertainment including any sums paid to an employee of that person for the purpose of defraying expenses incurred by that employee in the provision of entertainment …"

"Entertainment" as defined in section 18 of the ITA, "includes –

(a) the provision of food, drink, recreation or hospitality of any kind; or

(b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a), by a person or an employee of his in connection with a trade or business carried on by that person."

The crux of the matter therefore was whether the taxpayer was precluded from claiming a tax deduction on the Customer Items by operation of the section 39(1)(l) exclusion. In short, were the promotional items provided to customers "entertainment" within the meaning of the ITA, as contended by the Revenue?

Decision of the Special Commissioners of Income Tax ("SCIT")

The SCIT held that the Customer Items fell within the section 39(1)(l) exclusion and dismissed the taxpayer's appeal. Notably, the SCIT had construed the scope of section 39(1)(l) by reference to the provisos (iii) and (iv) to that section, that is they had treated promotional gifts and promotional samples as items of entertainment purely on the assumption that the said provisos had sought to take them out of the section 39(1)(l) exclusion. As such, it was held that the word "entertainment" would include the Customer Items.

Judgment of the High Court

The High Court affirmed the SCIT's decision.

Judgment of the Court of Appeal

The Court of Appeal unanimously found in favour of the taxpayer on two grounds.

Firstly, the Court held that the provision of the Customer Items by the taxpayer did not, in this case, amount to entertainment within section 39(1)(l) of the ITA. In coming to this conclusion, the Court of Appeal affirmed and adopted Romer LJ's[3] construction of the meaning of "entertainment". Romer LJ in delivering the decision of the English Court of Appeal held that:

"… Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken ***solely*** *for the purpose of business, that is, solely with the object of promoting the business or its profit earning capacity?"* (emphasis added).

In this regard, the Court of Appeal held that the dominant, if not the sole, object or purpose of the Customer Items was to promote the taxpayer's business and could not be described as "entertainment" within section 39(1)(l) ITA.

Secondly, the Court found that there was consideration[4] moving from the taxpayer to the customer in the instant case. In other words, as the customer who purchased the taxpayer's products obtained a practical advantage in the form of the Customer Items received, the transactions in this respect were plainly bargains made by the taxpayer solely for the purpose of business promotion and hence were tax-deductible under section 33(1) ITA and did not constitute "entertainment" expenditure disallowed under section 39(1)(1) ITA.

Conclusion

The Court of Appeal's judgment is final and binding as there is no recourse for further appeal. The Revenue have in recent years construed "entertainment" to cover all manner of sales promotion expenses, advertising, promotion and marketing expenses which were in all likelihood beyond the mischief sought to be remedied by the Finance Act 1988. This decision should serve to impose more reasonable limits to the construction of "entertainment." TG

Footnotes:

1 *Section 33(1) of the Income Tax Act 1967 provides that, "Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including …"*

2 *Syarikat Jasa Bumi (Woods) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2000] 2 MLJ 317*

3 *Bentleys, Stokes & Lowless v Beeson [1952] 2 All ER 82*

4 *Chappell & Co., Ltd v Nestle Co., Ltd & Anor [1960] AC 87*

For the taxpayer: Anand Raj, with Irene Yong and Luke Wang (Messrs Shearn Delamore & Co).

For the Director-General of Inland Revenue: Abu Tariq Jamaluddin, with Hazlina Hussain (Legal Officers, Inland Revenue Board) for the.

Before: Gopal Sri Ram, James Foong Cheng Yuen and Zulkefli bin Ahmad Makinudin JJCA.

International Cases

By S. Saravana Kumar

CD Ltd v Chief Assessor (2007) MSTC 5,598 (Valuation Review Board, Singapore)

Facts

The taxpayer purchased 12 apartment units for S$42 million in November 1999. Permission was obtained to redevelop the property to 37 units. A development charge of S$6,744,390.96 was paid to increase development intensity. In November 2002, the Chief Assessor exercised his discretion under Sec. 2(3)(b) of the Property Tax Act (Cap 254) (PTA). The market value assessment was applied. Prior to 2002, the hypothetical rent value assessment was applied. The units were only let from 2003 onwards. The taxpayer claimed the rent value assessment should continue and the Chief Assessor's decision was *ultra vires*.

Issues

The issues before the Board were whether:

1) the market value assessment applies; and
2) the Chief Assessor was acting validly within Sec. 2(3)(b) of the PTA.

Decision

The market value assessment was to encourage redevelopment and discourage the holding of land. Sec. 2(3)(b) allows the Chief Assessor to apply the market value assessment when the land value may be enhanced by redevelopment but the owner chooses otherwise. The taxpayer had no plan to develop the property until 2006 other than to rent it. The Board held the market value assessment was fair. As the Chief Assessor's decision was within Sec. 2(3)(b), the appeal was dismissed.

RH Pte Ltd v Comptroller of Income Tax (2007) MSTC 5,622 (Income Tax Board of Review, Singapore)

Facts

The taxpayer carried on business at a property rented monthly from the Housing Development Board (HDB). The property consisted two business lots. One was used for furniture retail. The other was a billiard saloon. In July 1993, the HDB offered to sell the remaining lease of 86 years for a discounted price. However, the taxpayer was requested to cease the billiard business. The offer and condition were accepted by the taxpayer. A loan was obtained to finance the purchase. The HDB rejected the taxpayer's proposals to replace the saloon with a fitness centre, family fun park and retail franchise. Eventually, the property was sold in August 1994 for a gain of S$ 4,601,490. The gain was taxed. The taxpayer appealed against it.

Issue

The issue was whether the gain was a trading gain or investment realisation proceeds.

Decision

Following *Simmons v IRC* [1980] STC 350 and the Royal Commission Report of 1954 (UK), the Board applied the "six badges of trade" test. The Board held the property was an investment. The proceeds were not subject to income tax. The taxpayer's appeal was allowed. The following factors influenced the Board:

a) the taxpayer wished to continue operating from the property;
b) the taxpayer was trading from the property for about 8 years at the time of purchase;
c) the lease was purchased to insulate the periodic rent increase;
d) the taxpayer was able to meet its loan obligations;
e) the property was never advertised for sale;
f) the taxpayer submitted alternative business proposals;
g) the billiard business was ceased at the HDB's request; and
h) the taxpayer had only bought and sold property on one occasion.

NP and Another v Comptroller of Income Tax [2007] SGHC 141 (High Court, Singapore)

Facts

The taxpayers bought eight residential properties between 1988 and 1996. They sold seven of the properties. The Respondent subjected the gains from the sale of four properties to income tax. The Respondent contended that the taxpayers were trading in properties. The taxpayers disagreed and appealed to the Income Tax Board of Review (Board). However, they only appealed in respect of the gains made from three of the four properties sold. The three properties were the Waterside unit, Watten Close unit and Jalan Sejarah unit. The taxpayers argued that they were not trading in properties. They claimed the properties were either sold due to bad *feng shui* or dispute with the contractor. The Board only allowed the taxpayers' appeal over the Jalan Sejarah unit. The appeal in regard of the other properties was dismissed. The taxpayer appealed to the High Court.

Issue

Whether the taxpayers were trading in properties?

Decisions

The High Court observed that there is no definition of "trade" in the Singaporean Income Tax Act. Hence, the "badges of trade" were applied to determine whether there were trading activities. The court added that there was no single indicium to determine whether there was trading. The characteristics identified in the 1954 UK Royal Commission Report as approved in *W Holdings Pte Ltd v CIT* [1992] MSTC 5135 were applied. The characteristic are:

a) the taxpayer's motive;
b) the nature of the subject matter;
c) the method of financing;
d) the frequency of the transactions;
e) the ownership duration; and
f) the circumstances for the sale.

The court held the Waterside unit was not sold in the course of business. The following factors influenced the court's decision:

a) The unit was sold due to bad *feng shui*. The taxpayers' believe in *feng shui* was evident from a letter dated 5 April 1997. They had then written to the CIT stating that they had sold one of their properties due to bad *feng shui*. The taxpayers were advised that the unit was bad for their career and unborn child. The taxpayers' evidence that their children had medical complications was not disputed by the respondent;
b) Further, the unit was owned for nearly 2 years. The court noted this was not a short period for property ownership in Singapore; and
c) The proceeds from a property sold earlier were invested in the Waterside unit. The taxpayers intended the unit to be an investment.

Meanwhile, the court dismissed the appeal in regard to the Watten Close unit. The taxpayers claimed the unit was sold due a legal action threat by the contractors. However, the taxpayers were unable to substantiate this claim. The court observed that in any event, the taxpayers' decision to sell the unit was an overreaction. The taxpayers' argument that the unit was investment was rebutted. The unit was only held for 4 months. Further, the taxpayers were unable to establish that the sale proceeds were reinvested.

CMS Peripherals Ltd v Revenue and Customs Commissioners [2007] EWHC 1128 (Ch) (High Court, United Kingdom)

Facts

The appellant (CMS) supplied computer peripherals and electronic products. It had a turnover of £79 million. CMS employed a Financial Controller (FC), a management accountant and seven others in the accounting unit. The FC and another staff, Ms A, were responsible for the Value Added Tax (VAT) returns. Ms A, a part qualified accountant, completed the returns. She entered the figure of £2,213,095.70 in the "Net VAT to be paid to Customs or reclaimed by you" box. She then realised she had made a mistake. She did not despatch the total sum for two reasons. First, she believed CMS had made excess payments of £592,616 earlier. Second, she knew that CMS believed it was entitled to a further deduction of £1,029,536.33 being VAT paid on imports. She deducted these sums from the figure entered in the box. The deductions and calculations were noted on the return. She despatched a cheque for £690,943.37 to the respondent. Later, CMS disclosed to the respondent that the VAT paid on the imports was appropriate but it was subject to correction. The respondent accepted a correction of £559,000 but disputed the balance of £470,000. The parties were negotiating on the balance when the appeal was heard by the VAT Tribunal.

As the total sum declared in the box was not despatched, the respondent imposed surcharges on CMS. CMS appealed against the surcharges. CMS claimed it had a reasonable excuse for the default. Its appeal before the VAT Tribunal was dismissed. The Tribunal found that CMS had no reasonable excuse. It held that CMS, which has large turnover, should have employed competent staff to calculate its VAT liabilities. The Tribunal also rejected the excuse that the non-correction would have led to an overpayment. CMS appealed to the High Court.

Issues

a) whether CMS had a reasonable excuse for the default; and
b) whether the Tribunal had erred in law?

Decision

The court held CMS had a reasonable excuse for not remitting the total sum shown in the box. The following factors influenced the court:

a) CMS paid the sum which it believed to be due;
b) the VAT return and payment were despatched in good time;
c) CMS was not seeking to explain or justify its failure to pay the VAT;
d) the sum of £2,213,095.70 was entered due to a clerical error;
e) the error was immediately recognised; and
f) the deductions and calculations to rectify the error were shown on the return.

Further, the court held the Tribunal had erred in law. The Tribunal averred CMS, which has a large turnover, must employ staff capable of calculating VAT. The court observed this factor was irrelevant to the appeal. CMS did not allege its staff calculated the VAT incorrectly. The default arose not due to incorrect calculation but due to a clerical error in stating the sum in the box. The Tribunal also rejected CMS's excuse that but for the correction, it would have overpaid the VAT. The court opined that the Tribunal had erred here. The £470,000 was still subject to negotiation at that time. Further, it was not disputed that CMS believed it was entitled to deduct £1,029,536.33 at the time the return was despatched.

The High Court set aside the surcharges and Tribunal's decision. Appeal allowed with costs in favour of CMS.

Comptroller of Income Tax v IA [2006] 4 SLR 161, [2006] SGCA 24 (Court of Appeal, Singapore)

Facts

The taxpayer purchased land for a condominium project. The project was funded by a syndicate loan. The taxpayer wanted to withdraw money from the project account to repay the loan. A bank guarantee was required and guarantee fees were incurred. The Comptroller of Income Tax (CIT) disallowed the guarantee fees as business

expenses. The taxpayer contended the fees were revenue expenditure applying the "purpose test". The CIT disagreed and applied the "temporary and fluctuating test".

Issue
Whether the guarantee fees are deductible as business expenses?

Decision
The guarantee fees were deductible expenses if they were revenue expenditure. To establish this, the purpose of the loan must be ascertained by a three step process:

a) Inquire whether there is sufficient relationship between the loan and project. The "purpose test" is applied here;
b) If there is a relationship, then determine the project's nature. The "temporary and fluctuating test" is applied here; and
c) If the project is revenue expenditure, then the loan is a deductible expense.

The court observed the loan was to develop the condominium. As the condominium units were trading stocks, the loan was revenue expenditure. Hence, guarantee fees incurred to refinance the loan were also revenue expenditure. The court analysed and reconciled the two tests. The court also held in cases where the tests conflict, the "purpose test" takes primacy. The CIT's appeal was dismissed.

[Note: The Inland Revenue Authority of Singapore issued a consultation paper in November 2006. It states "other borrowing costs" akin to interest will be treated like interest expenses. This includes prepayment fees, guarantee fees, bank option fees and discount on notes.]

Zeta Estates Ltd v Commissioner of Inland Revenue [2007] 2 HKC 527 (Court of Final Appeal, Hong Kong)

Facts
The taxpayer was a joint venture company. In 1998, dividends worth nearly HK$ 400 million were declared. But, the shareholders were however not paid the dividends. The company was profitable but highly illiquid. It would have had to sell its assets to pay the dividends. To avoid this, the taxpayer treated the dividends as loans from the shareholders. The shareholders were paid commercial rate interest. The company sought to deduct the interest paid as business expense. The Commissioner of Inland Revenue disallowed the deduction.

Issue
Whether the interest paid is deductible as a business expense?

Decision
Working capital is the capital used to produce business profits. The court observed it was irrelevant whether the company required additional capital. It is for the directors' commercial judgment to decide that. Expenses incurred to maintain profit producing assets are deductible. The word 'producing' should not be construed strictly.

To finance the dividends, the taxpayer must sell its profit producing assets or borrow additional funds. But, the shareholders' loans avoided both. The loans were to fund the dividend payments. Hence, the interest expenses were deductible. The court adopted the Australian approach in *Commissioner of Taxation v Roberts* and *Commissioner of Taxation v Smith* (1992) 23 ATR 494. The taxpayer's appeal was allowed.

Kalron Foods Ltd v Revenue and Customs Commissioners [2007] EWHC 695 (Ch); [2007] STC 1100 (High Court, United Kingdom)

Facts
The taxpayer produced and sold a product called 'Zumo Fresh Blend'. The product was made from liquefied fresh fruit and vegetables. The taxpayer described the product as a soft form of food. It contended the product fell under item 1[2] in Group 1 of Schedule 8 of the Value Added Tax (VAT) Act 1994. Products under this category were zero-rated for VAT purposes. The Commissioners disagreed and classified the product as a beverage. The product was standard-rated for VAT purposes. The taxpayer appealed to the VAT & Duties Tribunal (Tribunal). The taxpayer argued the product was distinct from a beverage and was a meal replacement. The product was:

a) a form of food despite its liquid consistency;
b) for eating like cold soup;
c health-giving as it constituted portions of fruit and/or vegetables;
d) suitable for people having difficulty in masticating; and
e) not as a straightforward fruit juice.

The taxpayer added the VAT Notice which described a beverage as "a liquid commonly consumed to increase bodily levels, to slake thirst, to fortify or to give pleasure". The Commissioners contended it was irrelevant whether the product was a meal replacement. The product was a beverage because:

a) it could be food or a beverage because of its ingredients;
b) it had a beverage like appearance and taste;
c) it was presented as a freshly squeezed drink;
d) its physical quality was not a defining factor.

The Commissioners also referred to *Grove Fresh Ltd v Revenue and Customs Commissioners* (2005) (VAT Tribunal Decision 19241). In *Grove Fresh*, certain vegetable juices were held to be a beverage. The juices were packaged and marketed as beverages. The Tribunal dismissed the taxpayer's appeal and held the product was a beverage. The product's ingredients and nutritional effects were not the defining factor. The Tribunal observed the product could constitute both food and beverage. The burden of proof was on the taxpayer to establish that the product was food. The taxpayer failed to satisfy demonstrate that. The taxpayer appealed against this decision.

Issues
a) whether the burden of proof was on the taxpayer; and
b) whether the product was food or a beverage?

Decision
The High Court held it was a question of fact whether the product was a beverage. The burden of proof was on the

taxpayer to establish this. The court referred to the decisions in *Tynewydd Labour Working Men's Club and Institute Ltd v Customs and Excise Commissioners* [1979] STC 570 and *Inspector of Taxes v Group Lotus Car Companies Plc* [1987] STC 184. The High Court agreed with the Tribunal's finding that the product can either constitute food or beverage. The taxpayer failed to establish on the balance of probabilities that:

a) the product was a food; and
b) the Commissioners' classification was wrong.

On the second issue, the taxpayer contended the Tribunal did not take the right approach in determining the appeal. The taxpayer alleged the Tribunal was wrong to view the product's ingredients and nutritional effect as irrelevant. The High Court disagreed. The court found the Tribunal had in fact held the ingredients and nutritional effect as relevant factors but not as the deciding factors. The Tribunal had considered the right factors in determining the product as a beverage. The factors were the product's:

a) ingredients and nutritional value;
b) manufacturing process;
c) place of sale;
d) appearance and texture; and
e) packaging and marketing.

Further, a purchaser could also purchase the product as a beverage and not as a food substitute. The High Court held Tribunal's decision did not fall within the principles of *Edwards v Bairstow* [1956] AC 14. The Tribunal had properly directed itself and acted in accordance with its function. The taxpayer's appeal was dismissed.

UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties [2007] SGHC 173 (High Court, Singapore)

Facts

In 2005, 53 property owners decided to sell their properties en bloc by tender. The sale was by tender to obtain a higher price. The appellant is a property developer. Its offer to purchase the properties for SGD 61 million was accepted. The appellant requested the owners to issue 53 separate letters of acceptance from the owners. Each letter identified a unit, its owner and the purchase price. The appellant claimed there were 53 separate contracts. It presented 53 instruments for stamping. The stamp duty on a contract to purchase property is:

1% for the first SGD 180,000 of the purchase price;
2% for the next SGD 180,000; and
3% of the balance.

The appellant contended each contract had to be stamped separately. This gave the appellant a stamp duty saving of SGD 5,400 per property or SGD 286,200. Alternatively, the appellant contended that even if it was an en bloc sale, the Stamp Duties Act (SDA) entitles it to pay stamp duty on the basis it presented 53 instruments. The Commissioner disagreed and decided there was a single transaction. The properties were sold en bloc for SGD61 million. The Commissioner explained that the stamp duty for SGD 61 million will be reflected on one of the letters. The other letters will be charged a nominal stamp duty of SGD 10. This method did not give the appellant any stamp duty saving. The appellant appealed against this decision.

Issues

a) whether there were 53 separate contracts or a single contract; and
b) whether the appellant may pay stamp duty on the basis it presented 53 instruments.

Decision

The High Court examined the tender of sale and held there was only a single sale. The following influenced the court's decision:

a) the owners intended to sell the properties en bloc;
b) a sale by tender is an invitation to treat and not an offer (see *Spencer v Harding* (1870) LR 5 CP 561;
c) the appellant's offer was submitted on the tender's terms;
d) the appellant's offer was for an en bloc sale;
e) the appellant's offer made no reference to 53 separate contracts;
f) the property owners were unaware the appellant had purchased the properties on the basis of 53 separate contracts;
g) the appellant only asked for 53 separate "acceptances";
h) the owners and their solicitors gave no thought to convert the en bloc sale to 53 separate contracts;
i) there was no meeting of minds between the parties; and
j) the appellant knew it had purchased the properties en bloc.

The appellant's submission was also dismissed. Citing Sections 4, 22(1) and 22(3) of the SDA, the appellant argued it had presented 53 instruments for stamping. The appellant added the title transfer of 53 properties to its name required 53 instruments. Hence, the instruments should be stamped separately at the rate provided. The court referred to the Hansard and commented Section 22(1) was concerned with stamp duty on contract of sale. It did not regulate property conveyance. The court held Sections 22(1) and 22(3) were anti-speculation measures to ensure en bloc sale buyers pay *ad valorem* stamp duty on the global purchase price. The 53 instruments that were presented for stamping disguised the true nature of the en bloc sale. The Court also referred to Section 33A of the SDA. Section 33A allows the Commissioner to disregard certain transactions and dispositions. As the appellant failed to furnish any commercial reason for the 53 separate "acceptances", the Commissioner may invoke Section 33A as well. The appeal was dismissed with costs. TG

S. Saravana Kumar LL.B *(Hons) (London), LL.M (Taxation) (LSE), M.Sc (UCL), Barrister-at-Law, Advocate & Solicitor is a member of Lee Hishammuddin Allen & Gledhill's Tax Practice Group. He has appeared before the Special Commissioners of Income Tax and High Court for various tax matters. Besides tax litigation, he also advises multinational and local enterprises on tax advisory and tax planning matters.*

Australia

Tax Laws Amendment (2008 Measures No. 1) Bill 2008

This Bill implements a number of improvements to Australia's taxation system, including the following:

Superannuation Lump Sums Paid to the Terminally Ill
The Bill will ensure that superannuation lump sum payments that are paid to a persons suffering from a terminal medical condition will be tax free. This will apply to payments made on or after 1 July 2007.

Tax Deductibility for Trees Established in Carbon Sink Forests
This measure is to encourage the establishment of carbon sink forests to address the issue of climate change. Under the changes, the establishment costs will be immediately deductible for trees established in carbon sink forests in the 2007—08 to 2011–12 income years inclusive. After this initial period, establishment costs will be deductible over 14 years and 105 days at a rate of 7 per cent per annum.

Political Donations
The tax deductibility of political donations made on or after 1 July 2008 will be removed. The specific deduction provisions in Division 30 of the *Income Tax Assessment Act 1997*, which currently allow deductions for contributions and gifts to political parties and to independent candidates and independent members up to a maximum of $1,500, will be repealed. In addition, to ensure that a deduction is not available, these amendments also remove general deductions for business taxpayers for contributions and gifts to political parties, members and candidates.

Tobacco Industry Exit Grants
The Bill ensures that tobacco growers who undertake to exit all agricultural enterprises for at least five years will receive grants under the Tobacco Growers Adjustment Assistance Programme tax-free. This measure will apply to payments made in the 2006-07 and later income years.

Farm Management Deposits
This measure will amend the farm management deposit scheme in Schedule 2G to the *Income Tax Assessment Act 1936* to align the tax law with the guidelines for declaring either all primary producers in a geographical area, or specified classes of primary producers within a geographical area, to be in exceptional circumstances.

This will improve the farm management deposit scheme by ensuring that all primary producers, who are eligible for early withdrawal due to exceptional circumstances, will retain the tax benefits available under this scheme.
This measure will commence retrospectively from 1 July 2002.

Tax Laws Amendment (Personal Income Tax Reduction) Bill 2008

Broadly, the *Tax Laws Amendment (Personal Income Tax Reduction) Bill 2008* will increase the threshold at which the 30% marginal tax rate begins to apply and decrease the 40% marginal tax rate to 38% (from 1 July 2009) and to 37% (from 1 July 2010).

Overhaul client legal privilege in federal investigations

The Australian Law Reform Commission (ALRC) tabled its report on *Privilege in Perspective: Client Legal Privilege in Federal Investigations* in Parliament on 13 February 2008 and recommended 45 changes to the handling of claims of client legal privilege over material sought by federal investigatory bodies and royal commissions of inquiry.

The ALRC advocated a single federal statute to make clear that privilege applies unless expressly modified or abrogated by another statute, as well as establishing a system in which regulators and clients would have to operate in a much more open and transparent manner, according to published policies. Other key proposals include:

- extending privilege to advice on tax law provided by accountants, where that advice is sought by the Australian Taxation Office (ATO)–in effect, formalising the ATO 'accountants concession'.
- introducing a model fast-track procedure for resolving disputes about privilege;
- improving lawyers' understanding of their legal and ethical obligations in this complex area, through targeted legal education; and
- clarifying and strengthening the professional disciplinary procedures to apply in cases where the assertion or maintenance of privilege claims may amount to unethical conduct.

The report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* is available electronically from the ALRC website, www.alrc.gov.au.

China

The year 2007 was a year of major tax reforms in China, starting with the *Enterprise Income Tax Law* ("EIT Law") which was passed by the National People's Congress on 16 March 2007 and culminating in the *Implementation Regulation of the Enterprise Income Tax Law* which was passed by the State Council on 28 November 2007. The *Implementation Regulation* covers:

- Definitions of "the place of effective management" and "establishment and place"
- Determination of the source of income
- Withholding tax on dividends
- Deduction caps for expenses
- Exempt interest income
- Certain exempt dividend income derived by a tax resident enterprise
- Preferential treatment for High and New Technology Enterprises
- Exempt income derived by a tax resident enterprise from the transfer of technology
- Preferential treatment for key public infrastructure projects
- Preferential treatment for environmental protection, energy and water saving conservation projects
- Super deduction of R&D expenses
- Preferential treatment for venture capital enterprises

- Anti-tax Avoidance Provisions
- Non-deductibility of management fees
- Disallowance of sponsorship expenses
- Imposition of interest levy on tax avoidance schemes
- Corporate restructuring

Apart from major tax changes, there were also changes to the *Catalogue Guiding Foreign Investments in Industries*. The new 2007 Catalogue is aimed at the optimal utilisation of foreign investment structure, encouraging foreign investment to play an active role in innovation, upgrading of industries, and coordinated development of different regions of China.

Hong Kong

Financial Secretary Mr John Tsang, delivered the 2008/09 Budget Speech on 27 February 2008. The changes in the tax regime as announced in the Budget are:

- A reduction of the standard rate of salaries tax, tax under personal assessment, profits tax of unincorporated businesses and property tax by one percentage point to 15%. This is reversion to the 2002/03 level.
- A one-off reduction of 75% of salaries tax and tax under personal assessment for 2007/08, subject to a ceiling of $25,000. This proposal will benefit 1.4 million taxpayers. After the reduction, about a million taxpayers will pay no more than $5,000 in tax.
- Raising basic allowance and single parent allowance from $100,000 to $108,000 and married person's allowance from $200,000 to $216,000. This is also reversion to the 2002/03 level.
- Widening tax bands from $35,000 to $40,000. The proposed tax bands will be wider than in 2002/03.
- A reduction in profits tax rate by one percentage point from 17.5% to 16.5%.
- A one-off tax reduction of 75% of profits tax for 2007/08, subject to a ceiling of $25,000. The proposal will benefit all 100,000 companies liable to profits tax.

Mr Tsang praised the perseverance of the generations of Hong Kong people who strived for better lives and transformed Hong Kong to a world-renowned financial centre. The convictions of Hong Kong people gradually became their characteristic that could be represented in the slogan "Ready to Face, Dare to Hope". He further pledged to adhere to his three principles – commitment to society, sustainability and pragmatism – in the management of public finances.

Indonesia

The following are highlights of some recent changes in Indonesia:

- The investment of foreign capital in Indonesia is now regulated by *Law No 25 of 2007*. *Law 25/2007* provides that the Government will guarantee the protection of investor rights against nationalisation/expropriation actions.
- Under the new *Presidential Regulation No 77 of 2007*, each business sector is categorised based on the Standard Classification of Indonesian Business Activities ("KBLI").
- *Law 25/2007* specifies that the BKPM has the authority to admit FDIs.
- Establishment of the "under one door" concept on foreign investment licensing – under *Law 25/2007*, it appears that the "one roof policy" has been changed into the "one door policy."
- *Law 25/2007* specifies that any dispute arising between the Indonesian Government and the foreign investor may be settled through arbitration; however, it must be agreed by both parties.

The time frames to complete audits and simple audits are further regulated under *DGT Circular Letter*.

Japan

The fiscal year 2008 tax reform proposals were announced in December 2007. The proposed reforms cover:

- Depreciation deductions
- Research and development ("R&D") tax credits
- Withholding tax in connection with the issuance of interest-bearing bonds and discount bonds issued outside of Japan by foreign corporations, the proceeds of which are attributable to a Japanese business
- Income taxation of dividends from publicly traded companies
- Tax rates applicable to capital gains from publicly traded companies
- Tax rules applicable to offsetting dividend income and capital losses from publicly traded companies
- New deduction and credit rules applicable to individual "angel investors" and the small- and medium-sized enterprises into which they invest
- Elimination of special income exclusions for not-for-profit enterprises that generate business income
- Permanent establishment under domestic law
- Transfer pricing reporting requirements
- Special tax rules for housing loans to promote energy-efficient home improvements
- Inheritance tax rules

There is no proposed increase to the consumption tax and corporate income tax rates; most of the proposed measures are specific technical measures that are designed to amend existing legislation to achieve specific tax policy objectives such as limiting preferential treatment available for dividends and capital gains on listed securities.

Singapore

The Singapore Budget 2008 was announced on 15 February 2008. The proposed changes include:

- Enhanced tax deduction for R&D expenditure
- Removal of "related to existing trade or business requirement

- New R&D tax allowance
- New R&D Incentive for start-up Enterprises (RISE)
- Start-up Tax Exemption Scheme
- Tax incentive for fixtures and fittings
- Foreign tax credit for foreign-sourced income
- Further tax deduction for Overseas Talent Recruitment Scheme
- Employee Remuneration Incentive Scheme (ERIS)
- Not-ordinarily-resident scheme to be refined to include benefits- in-kind
- Personal tax rebate of 20% for resident taxpayers for YA 2008
- Estate duty abolished with effect from 15 February 2008
- Course fee relief
- Measures to boost the financial sector and Islamic finance
- Measures to make Singapore a maritime hub
- Increased tax deduction for companies that provide employees inpatient medical benefits through portable medical shield plans

In essence, the Budget is aimed at developing the capabilities of the people and enterprises to ensure Singapore maintains its competitive edge as a global city; and to hold the people together as a community and providing assurance for Singaporeans as they get older. The Singapore Budget 2008 is at http://www.singaporebudget.gov.sg/

India

India's national budget for 2008–09 was presented by Finance Minister P Chidamabaram on 28 February 2008. Among the proposals were:

- Rs600 bn agricultural debt relief package; complete loan waiver for small and marginal farmers; 4 crore farmers to benefit.
- A national programme to be launched for the elderly.
- A statement on child related scheme introduced in the budget for the first time.
- Income tax exemption limit raised from Rs110,000 to Rs150,000; 10% tax for income between Rs150,000 and Rs300,000; 20% between Rs300,000 and Rs500,000. Income above Rs5,00,000 to attract 30% income tax.
- Exemption limit for women tax payers increased to Rs180,000 and for senior citizens to Rs225,000.
- No change in corporate income tax rates and surcharge.
- No change in the peak rate of customs duty.
- Customs duty on project imports slashed from 7.5% to 5%.
- Duty on steel and aluminnum scrap abolished.
- Excise duty on pharmaceutical sector reduced from 16% to 8%.
- Small cars, two and three wheelers, buses and their chassis to cost less.
- Non filter cigarettes to cost more, excise on non filter cigarettes will be at par with filter cigarettes.
- Four more services brought under service tax net.
- Threshold limit of exemption for small service providers increased from Rs8 lakh to Rs10 lakh.
- Customs duty on crude and unrefined sulphur brought down from 5% to 2%.
- Export duty on chrome ore increased from Rs2000 to Rs3000 per metric ton.
- Cenvat on all goods reduced from 16% to 14%.
- Central sales tax proposed to be reduced to 2% from April 2008.
- Allocation for defence increased by 10% from Rs960 bn to Rs1.06 trillion.
- Revenue deficit estimated at Rs551.84 bn.
- Fiscal deficit pegged at 2.5% of GDP.

The India budget is at http://indiabudget.nic.in/

United Kingdom

The Budget Statement to the House of Commons was delivered by the Rt Hon Alistair Darling MP, Chancellor of the Exchequer on 12 March 2008. Highlights include:

- Corporation tax will fall from 30% to 28% by April this year, with simpler taxes for small companies.
- More help for small businesses, with capital gains tax remaining at 10%.
- From 2009, major reform of the vehicle excise duty. For new cars from 2010, the lowest-polluting cars will pay no road tax in the first year, with the highest-polluting cars paying £950.
- 2p increase in fuel duty is postponed until October this year.
- For environmental reasons, fuel duty will rise by 0.5p per litre in real terms in 2010.
- From April, key workers, such as teachers and nurses, will be able to borrow money from shared equity schemes.
- Stamp duty on shared ownership homes will not be required until people own 80% of their home.
- From April, 2009, child benefit will be increased to £20 a week.
- New measures at Heathrow and other airports, using biometric technology, to speed up the time it takes to get through security checks.
- £17 more a week for poor families with one child.
- A family with two children earning up to £28,000 a year will be £130 a year better off. A further £125m to be spent over the next three years to help families.
- Increase in the amount airlines will have to pay to become "greener" – an extra 10% on plane duty in the second year of the new per-flight tax regime.
- Laws will be introduced by 2009 to tax plastic bags if shops do not do more to charge for their use.
- The government welcomes the contribution made by people from outside the UK. But non domiciled families should pay a "reasonable charge" after seven years.
- The British economy will this year grow from between 1.75% and 2.25%, down from 3% last year.

The core values of the Budget are fairness and opportunity, founded on stability and strength. The Budget may be assessed at http://downloads.bbc.co.uk/news/nol/shared/bsp/hi/pdfs/13_03_08bud08_completereport.pdf TG

Reduce the clutter by going

Going paperless isn't about being free from paper though to a large degree, there will be less paper. So, a "paperless" office might not be the completely accurate terminology, but rather "less paper". In reality, going paperless is more about replacing the paper-based processes that hold the firm back with a method of electronic document management and workflow solution that will carry the firm forward into the future. This article shares the benefits of going paperless, steps to go about implementing one and the pitfalls to avoid.

Many people today, without realising it, have at least made a partial move to a paperless office. If you are a computer user, just take a look at how many messages are stored in your e-mail's In Box. Now imagine how much paper would have been generated if they hadn't come to you from cyberspace.

The concept of a "paperless" office is still relatively new in Malaysia, but some firms are gradually beginning to seriously consider such a move. Some common reasons why firms have not joined the anti-paper campaign (and save a few trees along the way) are:

- Too busy (doing business; other projects) – or in other words, procrastination
- Software and hardware too expensive – this is myopic view that focuses only on the costs and not the benefits!
- Too difficult to implement (a combination of too busy and too expensive) – overwhelmed by the perceived scope of the project
- Too many confusing choices for software (creating inertia)
- Firm members are used to working with paper

The often cited benefits of moving toward a paperless office include less clutter, greater efficiency, less time spent tracking down files, and saving of storage space. But it is also the case that organisations may be placing themselves in jeopardy without the use of proper workflow and document management tools. Lack of documents or proper workflow will cause bottlenecks, and misunderstanding of the process. Knowledge not retained in some type of retrievable form may be lost when turnover or a natural disaster occurs.

The most visible impact of a move to a paperless office is the reduction in the cost of printing, mailing, shipping and storing paper. Over time, other benefits should become apparent: less time spent looking for paper lost in the shuffle and clutter. Time savings in not having to look for bills, receipts and documents. The ability to access all sorts of information from computer files – in a matter of seconds without having to get up and search your office – will become things which you will appreciate.

The Benefits of Going Paperless

Defining the benefits is critical in order that the firm's decision makers understand and agree to it. The benefits of implementing a paperless strategy include:

- Office efficiency – no more time spent searching for documents
- No lost documents
- No office clutter
- Significantly reduced need for office space
- Increased security
- Better disaster recovery protection
- Environmental benefits
- Firm members can work from remote locations since all client documents can be accessed remotely
- The firm is able to have remote employees

Cost savings

One of the biggest benefits of getting rid of your paper files is the cost savings. If it takes five minutes to retrieve and replace a paper file and an employee works with ten paper files per day, that's 216 hours a year – over five weeks' time – spent walking files around. At RM20/hour, that's RM4300 per year. A system that lets employees find and work with those documents without ever leaving their desks can instantly slash those costs.

Besides reduced paper, cost savings can also come in the form of printing and the real estate needed to store document. However, some firms which have gone paperless have claimed that these costs are negligible.

Whatever the case, the cost savings of not having to file paper is a legitimate one. If the firm handles much filing work using administrative staff, the cost savings in staff hours spent on this will be significant. However, you must ensure other work is assigned to the firm members formerly doing this work since it is very easy for work to expand or contract based on the time available to do it in.

Improving efficiency

Efficiency improvement is one of the greatest benefits with the move to a paperless environment. Electronic storage enables faster access to documents. Also, since document management applications completely control the organisation logic used in storing documents, there is less time spent training and overseeing firm members in the storage process.

While it may be difficult to measure efficiency benefits, it is not difficult to understand that the amount of work that a staff can do is directly proportional to the available hours: the more hours, the more we can accomplish.

Subjective benefits

Subjective benefits are more difficult to quantify or see immediately. Improved client service value is among the most important benefit. As a result of hectic work environment arising from difficulty in finding staff resources and handling the myriad of job service opportunities, the firm's ability to perform timely service will be impacted. Though there is some elasticity in this area of timely service, a continual decline in timeliness leads to client dissatisfaction. The efficiencies of an electronic document environment translate to faster service which is of great value to clients. So, you will make money by providing better client service – the payoff for every tax practitioner.

Another benefit of the paperless office is that its high level of organisation and the full-text search features that are part of most document management solutions make it easy to match a service or issue with documents that have been created for another similar situation. Essentially, services will become "products" and their supporting documents and workpapers will be reused over and over again. Thus service efficiency and client satisfaction are improved. This "productization" process can also aid in the selling process since firms can now be more price competitive, while maintaining their profit margins.

It is not easy to get firm members to adequately document their interactions with clients, prospects, and others. This is any area any firm would want to improve in. Although document management tools and paperless office processes will not magically make this happen, they *will* make it easier to create, edit, and retrieve documents. The easier it is to perform some task, more the tasks will be done – and with less oversight and management.

A move to a paperless office will improve efficiency, make clients more satisfied, grow the firm, and provide other benefits. This improved firm will be a better place to work, making it easier to retain and attract new staff.

Calculate the ROI for going paperless

Calculate the return on investment to decide if it is worthwhile for your firm to go paperless. Some of the benefits above may be difficult to measure however it may be may be helpful to document our perception of the benefits (both subjective and objective).

Below is an example:

ROI calculator for going paperless

General		
# Firm Members	.....	
Average Firm Billing Rate ($)	RM.....	
Average Firm Hourly Cost Factor (%)	.....	
Costs		**# Firm Members**
Document Management Software ($)	RM	not applicable
DM Server, Scanners, etc ($)	RM	not applicable
Firm Planning Time (hours)	.....	not applicable
Information Setup	.....	not applicable
Training Time (hours)		
Basic Training (per person)	.....	.....
Administrator Training (total hours)	.....	
.....		
Efficiency Factors	**Estimated Weekly Benefit (Hours)**	**Firm Members**
Saving documents	.....	.....
Retrieving documents	.....	.....
Reusing information on other engagements	.....	.....
Value Factors	**Value**	
Improved Client Service	RM.....	
Improved Selling Effectiveness	RM.....	
Improved Documentation Completeness	RM.....	
Improved Work Environment	RM.....	
Summary		
Year 1 Cost ($)	.....	
Year 1 Benefits ($)	.....	
Return on Investment (ROI)	.....	
Weekly Break-even Efficiency (hours/person)	.....	

Steps to Going Paperless

Of course, any change in established office procedures can be difficult. The importance of going into the process with the right expectations and frame of mind is critical. It will enable your firm to adopt a paperless strategy much faster and efficiently, and you will more quickly achieve the tremendous benefits from going paperless. If you simply scan some paper files but don't change anything else, you will obtain only a fraction of the benefits. Here are some issues that you will face and suggestions to help smoothen the process of going paperless:

Step 1: Total commitment

Once the decision to go paperless is made, commitment from everyone involved is vital to the success the endeavor. Going paperless for your firm doesn't mean doing things exactly as before except for making your paper files electronic. You must also be prepared to change the way things are done and be prepared for changes in your implementation strategy and plans in the event of unforeseen challenges.

Step 2: Analyse your firm's needs, list the critical goals you want accomplish and the features your system must have

Here are some considerations:

- Are you a sole practitioner with no employees and no plan to add any, and just want to scan client files electronically?
- Do you need security for certain files?
- Do you need scanned documents available via the Internet for remote employees or clients?
- Do you want (or need) advanced document management features such as version control of your documents, and check-in and check-out document capabilities?
- Do you need it to integrate with your contact (office) management system? (Your document management system should integrate with your contact management system.)

Tip: Plan ahead and implement a system that can grow with the future direction of your firm. For instance, you may not need security now, but if you plan to hire more employees, you will need a security feature later.

Selecting the available tools in the marketplace can be confusing as there are numerous vendors in the marketplace, so it is important you have fixed in your mind the critical goals you want to achieve.

Step 3: Select a software application and hardware (scanners)

Here are some important considerations for software selection:

- Features of the software – remember the considerations of item 2 above.
- Ease of use and ease of implementation. But be careful – don't select an application because it looks easy to use. Recognize that with some training and practice, you may adopt an application that provides many more features and benefits.
- Cost – but be sure that this is relative to the benefits it provides.
- Does it integrate with your contact management system?

Considerations for selecting a scanner include:

- How much capacity do you need from an industrial scanner?
- How fast a scanner (in pages per minute) do you want?
- Consider the quality of the automatic document feeder – this is very important when scanning a pile of documents that are of different size or thickness.
- Do you need to scan in color?
- Do you need desktop scanners as well?

Once your firm embraces going paperless, you will certainly be scanning more in volume and types of paper than you can possibly imagine. It is important to have a high-quality, high-capability scanner as part of your paperless strategy – so the cheapest scanner in the market may not be cheap in the long haul.

Consider adding several desktop scanners for certain personnel whose work entails working with a lot of documents. You may see significant improvement in the overall efficiency of your firm's scanning efforts.

Tip: Consider working with a consultant. You can work with a consultant earlier in the process, but be careful: many consultants work only with one particular solution, which is important in order for them to be experts. But this does not help you get an objective evaluation of the available alternatives. It may be better to do some investigating on your own first, and then find an expert who works with the particular program you have chosen.

Step 4: Implement the system!

Once your software and electronic filing system is set up, choose a date–i.e. from that point onward, all documents coming into the office or being created must be stored electronically.

Moving into the electronic system
Scanning old paper files and moving existing electronic files into the document management system is probably the first task that you can do. It's a huge task and may take one or two years to complete.

Tips:

- An administrative employee could be set a goal of a certain number of old client files to be scanned (and she earns a bonus for hitting the goal).
- Outs source document scanning under the supervision of an administrative person.

Changing the mindsets of firm members and clients
Firm members especially must be prepared to change their mindset as to how they will do their work from now on, e.g.

it is not easy giving up the "habit" of reading from paper and holding paper in their hand.

CPAs may require more than one computer monitor on their desk since they will be reading all documents from your computer. For instance, two computer screens–one showing the tax software programme and the other screen showing this year's source documents–would be more convenient setup. Some firms provide preparers with three screens, so one can see at a glance, the tax program, the source documents, and last year's completed tax return. Some desks have a fourth screen turned toward the client so he can review his completed return without a printout.

You'd be surprised how many clients may find the idea of reducing the amount of paperwork they have to file away appealing. You may have to educate some clients about the benefits of receiving tax returns on CD. You may have to explain that they can bring the CD back each year to have another annual return added to it, and that they can print out a paper copy of their return anytime. Some tax pros have made the lure of the CD stronger by also including on it copies of all the paperwork, including filled-in organizers and third-party source documents that the client originally brought in to the office.

Unfortunately, someone will have to scan documents and burn them onto a CD and copy documents. Choose a person in your firm with previous experience making copies of returns or who has assembled returns. It will be his or her job to scan documents into the firm's computer system and burn CDs. Client tax packets will still be assembled, but in their new form they may comprise only a couple of pages and a CD.

Take note that going paperless is not just scanning documents. A comprehensive paperless strategy involves a document management system that deals with all documents regardless of their source–scanned, e-mailed, faxed, computer-generated (such as Word documents), and so on.

Decide when you are going to scan in source documents. It's possible, of course, to continue working off of paper documents when preparing tax returns – even if you're going paperless. You can still check off or highlight data as it is being entered into the system, and then scan in those sheets when a return is finished. Or, you can scan documents at the start of the preparation process, and electronically check or highlight information as it is entered into your preparation program.

It is advisable to scan documents into the system when they come in, instead of at the end of the preparation process. This can be a real advantage when dealing with complicated files that might involve input from several people.

Tip: Don't expect instant results. Even with a systematic approach, the process of implementing the system will take several months, while the benefits may take some years to be fully appreciated. Many companies have found that although the process took work on their part and wasn't without some hiccups, the answer to the question, "Was it worth it?" is a resounding yes! TG

Saving the environment

Paper is an office necessity for some essential tasks, but it has an environmental cost. Creating paper from trees requires a lot of natural resources: trees, water, and energy. It takes more than 1? cups of water to make one sheet of paper. (Picture a typical soda can.) Over 40% of wood pulp goes toward the production of paper.

Reducing paper use reduces greenhouse gases: 40 reams of paper is like 1.5 acres of pine forest absorbing carbon dioxide for a year.

Saving paper saves money

Saving costs on buying paper is just the tip of the iceberg. For each sheet of paper used, a firm incurs not only purchasing costs, but also storage, copying, printing, postage, disposal, and recycling–and it adds up. A US study estimates that associated paper costs could be as much as 31 times the purchasing costs (not including labor). So, that ream of paper that you paid RM10 for really could cost up to RM310!

This article is prepared by CCH Asia Pte Limited and was published in the April 2007 issue of Accountant's Today.

Globalisation and the changing role of

In Asia, any consideration of leadership and related organisational themes must take into account the wider importance of Asian cultural norms, in particular the importance of hierarchy and relationships. For a Western observer, who is probably the product of a post-Enlightenment society that aspires to ideals of personal freedom and meritocracy, this can be a difficult mental hurdle. Consider, for example, the impact of Confucian reverence for parental and other authority in China and the Chinese diaspora; the role of the Communist Party in China and Vietnam; the caste system in India; devotion to the Royal Family in Thailand or the Emperor in Japan; intense, self-sacrificial patriotism (*hahn*) in Korea; devout Catholicism in the Philippines; and adherence to the teachings of religious leaders in Muslim cultures such as Malaysia and Indonesia. Some of these attitudes may have softened in recent years, as economics, technology and travel have allowed new ideas to challenge the status quo; but any HR professional coming fresh to Asia would be foolhardy to ignore them.

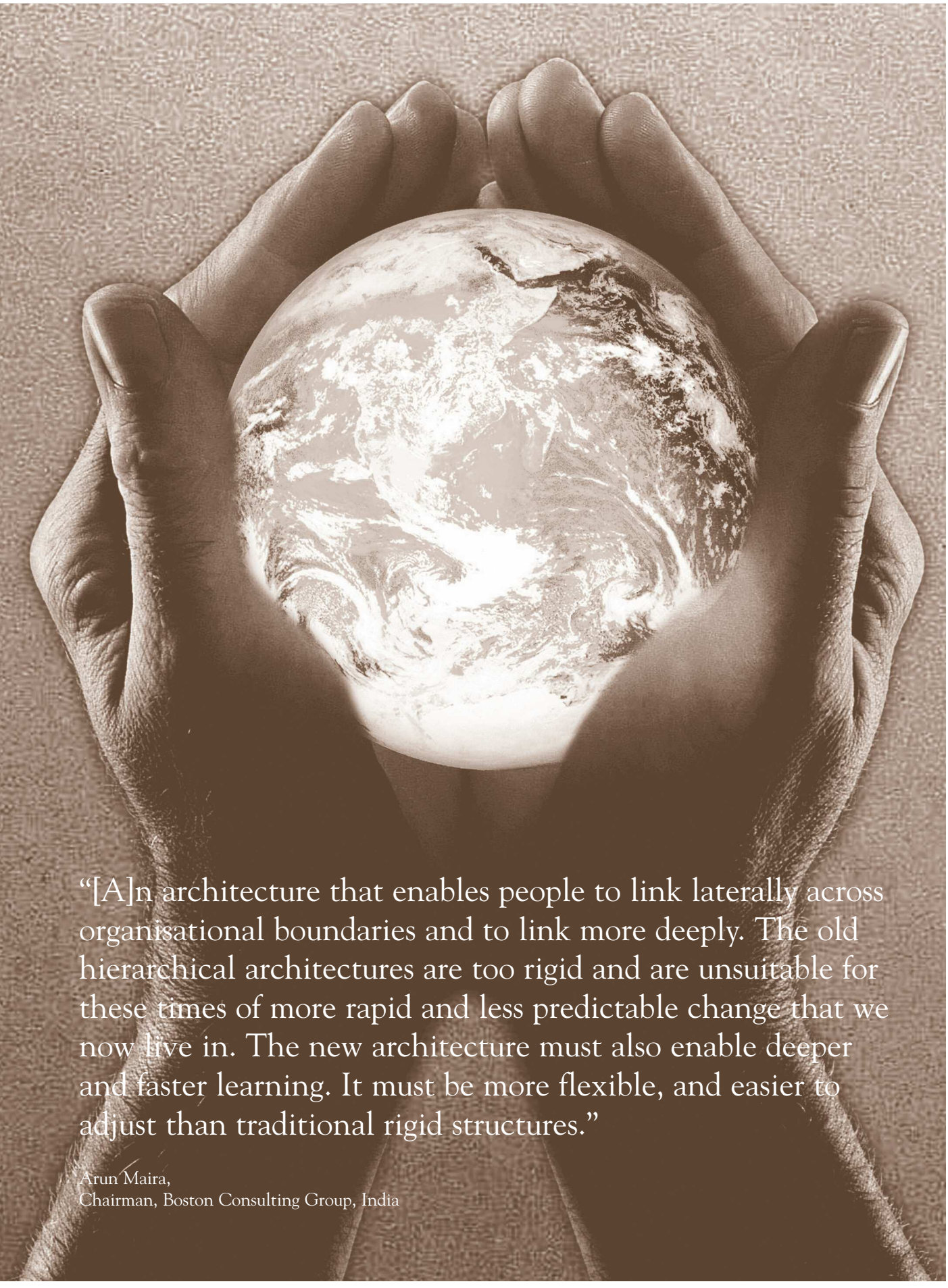
In many cultures, this pyramidal social structure is based on a two-way system of privileges and responsibilities; for example, in Thai society, a junior (*nong*) owes respect and service to a senior (*phi*); but at the same time, the senior is obliged to offer patronage and protection. And in a social situation, it is always the senior party who picks up the tab at the end of the night!

As Asian businesses become more open to Western influences, many managers have perceived the need for a more meritocratic model of appointment and promotion, rather than reliance on family and social links. Many of these companies are family concerns – whether major conglomerates such as the Korean *chaebol* and the Japanese *keiretsu*, or smaller operations – and have traditionally been resistant to taking advice from outside their immediate circles, let alone from other continents. In some Asian companies, the opening up process became inevitable after the economic crisis of 1997 revealed serious structural problems in areas such as auditing, governance and compliance. But the Chinese notion of *guanxi* – literally "relationship", generally used to describe the complex network of mutual favours that makes businesses run smoothly, and which has equivalents in most Asian cultures – has been around too long to be swept aside overnight.

As Arun Maira, Chairman of the Boston Consulting Group in India puts it, many international businesses operating in Asia would like to see: "[A]n architecture that enables people to link laterally across organisational boundaries and to link more deeply. The old hierarchical architectures are too rigid and are unsuitable for these times of more rapid and less predictable change that we now live in. The new architecture must also enable deeper and faster learning. It must be more flexible, and easier to adjust than traditional rigid structures."[1]

Mr Maira is discussing India in particular, but similar patterns can be found in other Asian countries and cultures. Resistance is only to be expected: not only do many senior business figures feel their own economic status threatened by notions of change, but there is a more general feeling that taking on such "Western" ideas as encouraging ordinary workers to voice their opinions, or making shareholders more able to participate in decision-making, is unpatriotic. One Korean academic who suggested a cure for his country's problems might be to introduce a free market on the American model found himself denounced by the editor of a daily newspaper as "a communist" [2]. Such responses may seem irrational, but they are genuine and heartfelt; on a smaller scale, any business appearing to tinker with the established social order must be prepared for negative reactions.

This resistance does not always come from those who feel that their privileged positions might be threatened. Many workers lower down the hierarchy may feel distinctly uncomfortable with the concept of empowerment; their upbringing and education may have impressed on them the desirability for humility, and the need to avoid "rocking the boat". Scouting for potential leaders in the workforce can be frustrating, not because of a lack of ability, but because otherwise talented individuals may lack confidence, or feel uncomfortable at being placed in a supervisory role above their "station".



"[A]n architecture that enables people to link laterally across organisational boundaries and to link more deeply. The old hierarchical architectures are too rigid and are unsuitable for these times of more rapid and less predictable change that we now live in. The new architecture must also enable deeper and faster learning. It must be more flexible, and easier to adjust than traditional rigid structures."

Arun Maira,
Chairman, Boston Consulting Group, India

This cultural respect for hierarchy does, of course, have a number of positive aspects for the manager. In many Asian cultures, unskilled or semi-skilled workers will be prepared to carry out tasks that their Western counterparts might regard as boring, unfulfilling or even demeaning, provided they can be assured of the support and security that the manager and the wider organisation can provide. This is not simply a matter of there being fewer career options available, or the lack of a welfare system meaning that workers must be less choosy, although these factors do of course matter. The fact is that workers will often respond positively to a work structure that offers them stability, leadership and a sense of "belonging". Managers who are perceived to take care of the interests of their staff will be rewarded with loyalty. As the late Bob Kevorkian, Chairman of the Thai construction company K-Tech, and a British national, puts it: "We employ 10,000 people, and 80% have been with me from the start. My driver is the first taxi driver I used in Bangkok; my personal assistant is the first person I spoke to in the business centre in the first hotel I stayed in."[3]

Bearing in mind that the period Mr Kevorkian was discussing included the economic and social upheavals caused by the 1997 crisis, such stability and loyalty is remarkable; yet far more likely in an Asian context than in the West.

The fact is that workers will often respond positively to a work structure that offers them stability, leadership and a sense of "belonging". Managers who are perceived to take care of the interests of their staff will be rewarded with loyalty.

The role of the leader in Asian organisations

In many Asian societies, the traditional role of the leader is to give instructions. Traditions of hierarchy, deference and filial piety (which can be transferred from the revered parent to a revered boss) are deeply ingrained. Consultation, delegation or empowerment can be seen as a weakness by subordinates or by competitors alike. Moreover, in many cultures, the tradition of deference and non-confrontation is such that employees may be unwilling to make specific complaints; a leader is often isolated from the day-to-day activities within the organisation, and profound sensitivity and instinct are required to know that something's wrong.

The general attitude can best be conveyed by the comment from a former executive of the Korean *chaebol* Hyundai, about an environment where board meetings were a practical irrelevance: "The chairman called the presidents of the various units to a meeting at which he conveyed what he wanted. No ifs or buts."[4]

At the same time, Tom Peters, widely regarded as "the Uber-Guru of Management", has written: "The task of the senior executive ... is not to impose an abstract order on an inherently disorderly process but to become adept at the sorts of intervention by which he can nudge it in the desired direction and control its course."[5] Could such an approach work in an Asian context?

Although decisiveness and strength are still valued in Asian leaders, those leaders are also expected to behave responsibly to those who report to them. The sense of collective harmony that lies behind notions such as *guanxi* implies mutual responsibility, albeit not on a level playing field. As the social psychologist Richard Nisbett (2003) puts it: "For Asians, feeling good about themselves is likely to be tied to the sense that they are in harmony with the wishes of the groups to which they belong and are meeting the group's expectations. Equality of treatment is not assumed, nor is it necessarily regarded as desirable."[6] This applies to leaders as much as it does to those who follow them. Nisbett also points out: "In Chinese, there is no word for 'individualism'. The closest one can come is the word for 'selfishness'."[7]

One example of this sense of collective responsibility is the reaction of Asians to the idea of dismissal on the grounds of incompetence. Hampden-Turner & Trompenaars (1993)[8] describe a hypothetical case to a selection of respondents from nine Western and three Asian countries. It dealt with an employee who had provided excellent work for a company for 15 years, but whose work was unsatisfactory for the last year. The researchers found that 75% of Americans and Canadians felt that the worker should be dismissed; only 20% of Koreans and Singaporeans felt the same. Meanwhile, 30% of Japanese respondents believed he should be dismissed, roughly similar to those from France, Germany and Italy; rather less than those from Australia, Belgium, the Netherlands and the United Kingdom. Asians tended to feel that the company had a corporate responsibility for his welfare, and an obligation for his previous good service. They also believed that universally applied rules that might exist with regard to sub-standard performance could and should always be modified or relaxed in specific circumstances.

Therefore the company in Asia, seeking to balance the business/management goals with the needs and aspirations of the managed, needs to be aware of such cultural disconnects. Ignoring them can result in serious upheaval, from a simmering sense of injustice and resentment to full-scale industrial action.

Diversified and global leadership

The practices above apply to a situation with an old-style patrician leader, the sort often to be found in Asian family businesses. However, as businesses across the region become less hierarchical, with more responsibilities devolved to regional and departmental heads, it is likely that roles will need to be redefined.

Leadership types

Bartlett and Ghoshal (1992) defined four archetypes of leadership, with differing combinations of skills, that would become increasingly necessary as globalisation and flatter organisations become the norm. [9] The key points here is that the four skill sets are complementary in a globally oriented organisation, but that no one leader can be expected to combine all the skills in all the sets. In a globalised economy, the all-seeing, all-responsible leader is no longer a viable option.

1. The Business Manager = Strategist + Architect + Coordinator

Bartlett and Ghoshal used the example of the head of the household appliance division for an electric goods company, who simplified the company's brand portfolio across all territories. He also rationalised the development and manufacturing infrastructure on a "one product, one facility" basis matching each unit's competencies and responsibilities. To avoid political ructions, he tried to upgrade old plants rather than to close them. He also set price ranges and limits, but let individual unit managers negotiate within them. Each product line had a discrete board that oversaw relevant strategies. The key people-related aspect of the job here was coordination; the role demanded a combination of administrative and interpersonal skills, so that control could be maintained, without becoming heavy handed and restrictive.

2. The Country Manager = Sensor + Builder + Contributor

A country manager's "sensor" skills require the ability to gather and evaluate information and calculate the implications and possible outcomes. Bartlett and Ghoshal used the example of a country manager for a Japanese electronics and telecoms company who identified that a major product was lacking significant features required in his own home market. His second key role was to convince the Japanese head office of the seriousness of the problem. The manager calculated that he spent about 60% of his time on the former role (customer relations, market research) and 30% on the latter (managing the Tokyo interface). The key skills here were market knowledge/understanding, and persuasive abilities. With this combination, the manager upgraded the role of his division from implementer of a global corporate strategy, to an active contributor in designing that strategy.

3. The Functional Manager = Scanner + Cross-Pollinator + Champion

A regional head of Research & Development overcame the "high-walls" culture of his company and created a single product that satisfied customer needs in numerous different markets (albeit under three different brands). His role was to scan for new trends, cross-pollinate best practice across national boundaries and champion innovations to a conservative hierarchy. As well as being supremely good at his technical function, he demonstrated the market awareness, facility for lateral thinking and persuasive skills that enabled the best products to get to launch and beyond.

4. The Corporate Manager = Leader + Talent Scout + Developer

While global managers can be expected to have specific skills and experience in relevant fields, Bartlett and Ghoshal argue that their key role is to recruit and develop the senior managers that will report to them. The goal is to appoint leaders who can be trusted to fulfil the organisations aims but it is now a trust based on merit and aptitude, not on familial or social connections.

The key here for companies in Asia is to stop thinking of a predetermined set of "leadership skills", and to identify general skills that are needed for specific leadership roles. In a less hierarchical culture, leaders will need enough task-specific knowledge and skills to motivate and inspire those who report to them. It will no longer be enough to be a leader and expect everyone to follow.

These are identifying characteristics for the role of the leader as boss. However, as organisational cultures and structures become less vertical, it will become increasingly vital for leadership skills to be disseminated beyond senior management. Indeed, the whole definition of "leadership" needs to be addressed.

Encouraging leadership throughout the organisation

Despite a gradual shift to more meritocratic models of appointment, promotion in many Asian organisations is still a matter of family ties and personal relationships. When, in early 2005, an English-language newspaper identified Thailand's 100 top executives under 40, half of them were working in their families' businesses; several others had started up operations with major financial assistance from

their families, or on family-owned premises.[10]
Even in structures where key appointments do not automatically go to family members, promotion and preferment may occur as a result of seniority rather than merit. In many Asian cultures, the influence of Confucianism would mean that any precipitous fast tracking of young, talented staff, over the heads of older, long-serving colleagues, would be regarded as an affront to the natural order of things.

One side effect of such working practices is that those employees not in the family might be discouraged from believing that they have the potential to succeed within an organisation. This might result in high staff turnover (with more able workers seeking environments where their skills might be better recognised) or lower productivity (when the workers see little incentive to operate at their fullest potential). Retention and commitment are instead encouraged by:

- enhanced compensation;
- benefits (health care, financial assistance, eg loans, potential to make unofficial income, eg bribes);
- sense of belonging (not simply collective mentality but also practical benefits, support outside the organisation from powerful management, family members of existing employees receiving preferential treatment when applying for jobs, etc).

Even in less hierarchical working cultures, where management attempts to encourage leadership potential within the workforce, social norms might still make employees reticent about putting themselves forward. In Thailand, modesty and humility are among the most desirable social attributes; Malay and Indonesian cultures are often seen as lacking a "work ethic" in the Western or Confucian senses.

According to Jumbhot Chuasai, managing director of LMI (Thailand), a leadership training consultancy, "Leadership isn't simply about being the boss. It's about taking responsibility to achieve a particular goal." He provides some examples:

Examples

1. One lunchtime, a hotel doorman called for a taxi for a customer. While waiting for the taxi to arrive, he asked if the customer had enjoyed his lunch. He mentioned that the restaurant where the customer just had lunch was offering a four-for-the-price-of-two promotion the following week.

2. An engineer with a cellphone company was informed by a client that the online manual contains an error – a digit was missing in a code. Within 20 minutes, the engineer changed the manual.

3. The head of a hospital gastroenterology department was concerned that a valued employee was looking elsewhere for work. He took her to lunch to find out what the problem was. During lunch, she pointed out that the department was often under-utilised in the afternoons, because patients usually have to fast for eight hours before an appointment, and they prefer to come as early in the morning as possible. She suggested a 15% discount for patients making appointments after midday. She also pointed out that the department did not have a female doctor, and as a result, female patients from the Middle East – a lucrative market – would prefer to visit another hospital. The department head not only took up these suggestions, which improved efficiency and revenue, but he was able to reassure the employee that her ideas were valued, and that she would be rewarded appropriately.

This development of leadership at all levels requires certain factors to be in place in an organisation:

- All members of an organisation should be kept appraised of an organisation's goals. The management of the hotel where the doorman worked had told employees that because of a downturn in the tourism sector, room residency would not provide enough revenue. They had to encourage local residents to make use of food and beverage (F&B) and other services of the hotel.
- Members of the organisation must be encouraged to take initiative, and "think outside the box." It was not in the doorman's job description to advertise the restaurant offer; it wasn't the engineer's responsibility to change the manual. But they felt empowered to do so.
- There must not be undue bureaucracy or by-the-book regulations that will stifle this initiative. If the engineer had not been able to access the manual immediately, it would have taken much longer for the mistake to be rectified, and more customers would have been inconvenienced.
- Line managers and others must sometimes be proactive in seeking the opinions of those who report to them. Not only was the department head able to ensure the retention of a valued staff member, he took with him two ideas that helped the department run more efficiently and more profitably.

There are various methods of delivering this kind of empowerment. Coaching is one example. There are also ways to inculcate leadership potential as part of the organisational structure – by subverting hierarchical conventions. Many Asian companies begin the working day with an address from a senior member of management. Kobkarn Wattanavrangkul, the Vice President of Toshiba Thailand, transformed this into what she calls a "people's programme" – a daily, company-wide meeting at which one employee is obliged to comment publicly on any aspect of the organisation that he or she chooses. As Ms Kobkarn puts it, "Everyone from the president to the driver does this ... They were scared at first, but I told them it was a good opportunity to improve their public speaking skills and also to voice their opinions. I discovered many stars like this."[11]

However, it has been argued that the new, flatter organisational models make leadership more accessible, but less attractive[12], as any individual leader has less power. If, as Mr Jumbhot suggests, leadership can be vested not just in the CEO, but also in the man who summons the taxis at the front of the hotel, what is the psychological attraction of becoming a leader? Paradoxically, the very changes that cause these structural changes ensure that such leadership is necessary. So how, in these changing environments, does an HR professional stimulate and encourage leadership?

It should also be remembered that, even in Asia, globalisation is slowly edging out a sense of belonging, in favour of what has been dubbed "the new employment relationship"[13] that offers an employee a competitive salary and a chance to learn marketable skills, rather than a guaranteed job for life. Employees' commitment to hard work and loyalty becomes economic rather than psychological and even if they are being groomed for leadership, they may well feel less inhibited about jumping ship to a competitor, notwithstanding the investment that has been made in them. Preparing people for leadership, and encouraging their advancement, may indeed bring out their leadership potential albeit to the benefit of another organisation. To ensure that retention of skilled staff is maximised, and turnover is kept to reasonable levels, the modern company in Asia needs to be equipped with the ability to offer material compensation, rather than the sense of "belonging" that has been a core motivation to Asian workers for so long. TG

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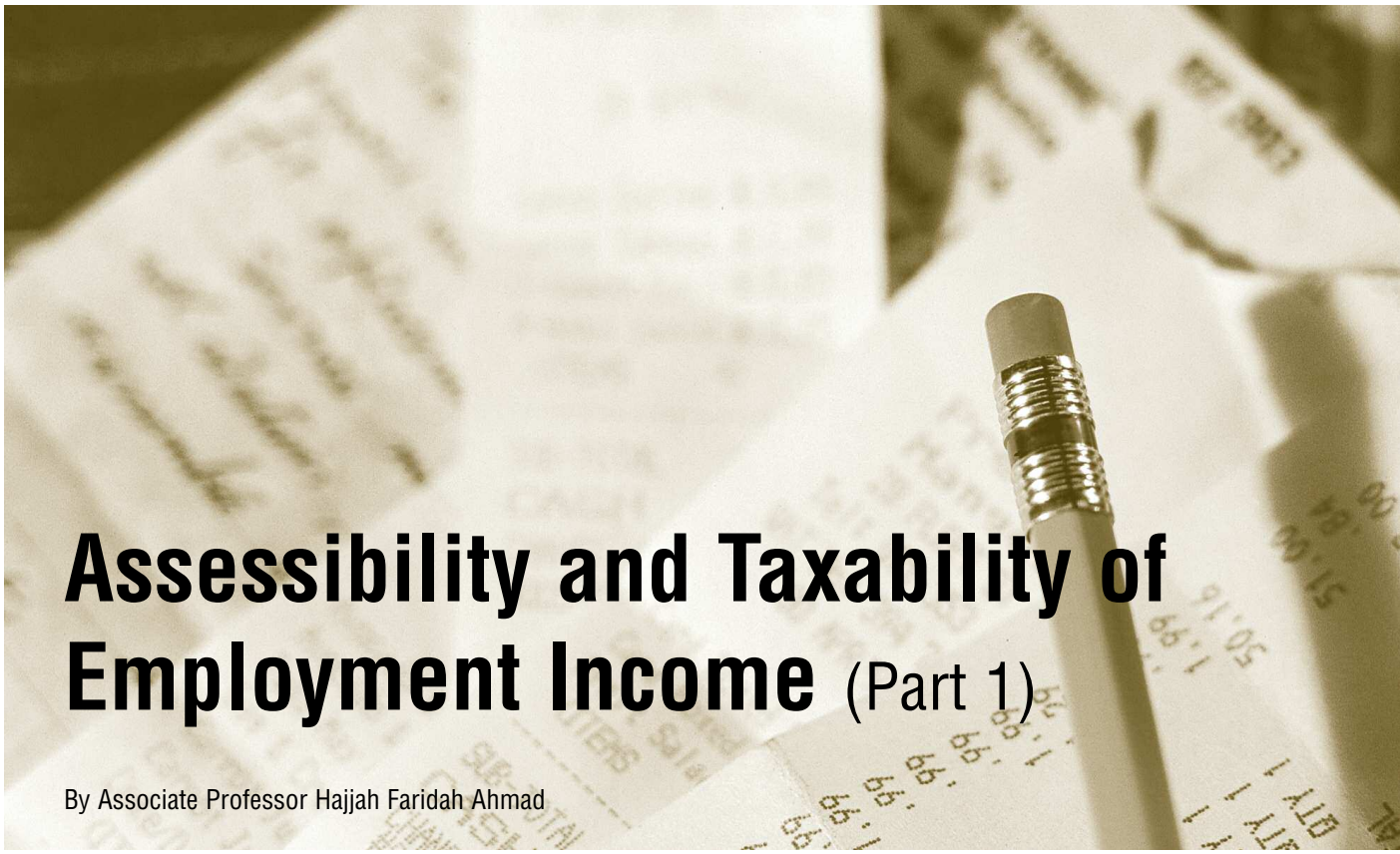


Assessibility and Taxability of Employment Income (Part 1)

By Associate Professor Hajjah Faridah Ahmad

What is employment?

Section 2 of ITA 1967 defines employment to mean:

- where a relationship of master and servant subsists; and
- any appointment of office, whether public or not and whether or not the relationship subsists, for which remuneration is earned.

Thus, there must be a control by the employer in respect of the manner in which the employee is to conduct his work.

(i) Who is an employer?

As defined under Section 2 of ITA 1967

"**Employer** means the master who is employing the employee (where there is a master and servant relationship); or the person who is paying or is responsible for paying any remuneration to the employee who has the employment."

(ii) Who is an employee?

As defined under Section 2 of ITA 1967

"**Employee** means the servant who is being employed by the employer; (where there is a relationship between master and servant); or the holder of the appointment or office which constitutes the employment (where there is no relationship between master and servant), this will include directors, trustee, treasurer of a club or secretary of a club and executor of a deceased person's, estate."

Q1

Mr Joseph is an engineer by profession. He works at Telco Sdn Bhd, an engineering firm located in Sungai Petani, Kedah. He is paid RM7,900 per month as salary in 2008. Comment on the taxability of the above income.

A1

Employment does exist in the above scenario since there is a relationship between a master and a servant.
Mr Joseph is an employee (an engineer) and he would be taxed under section 13(1)a ITA.

Telco Sdn Bhd is the employer (who is responsible to pay salary to Mr Joseph).

Q2

Is there any difference between employment income and business income?

A2

Generally there are five differences between employment and business income namely:

- Employment income is assessable under section 4(b), whereas business is assessable under section 4(a) of ITA 1967.

- Employment income is assessed by reference to a calendar year (e.g. for year of assessment 2008, the basis period will cover from 1 January 2008 to December 2008). However for business income, the basis period will follow the accounting period. With effect 2004, business income will have to be calculated based on the calendar year as the accounting period (e.g. for year of assessment 2008, the basis year is the accounting period which will cover from 1 January 2008 to December 2008). Before 2004, a business was not required to have an accounting period ended 31 December (e.g. for year of assessment 2003, if the business ended its accounting period 31 October annually, then the basis period would have been from 1 November 2002 to 31 October 2003).

- A more flexible deduction of expenses will be allowed for business income when compared to employment income, provided these business expenses are within the scope of section 33 i.e. they are incurred wholly and exclusively in the production of income.

- Losses in business (i.e. when the allowable expenses are more than the gross profit) may be claimed to be set off against other income in the same year of assessment (other income may include employment, investment – dividend, royalty, rental etc.). If there is insufficient income to absorb the current year losses, these losses may be carried forward to future years. This advantage is not given to an employment income. In an employment, there will be no losses available even though an employee spends more than what he earns (e.g. salary RM5,000, expenses RM6,000, the excess RM1,000 is not treated as loss, and is not recognized by tax laws, it is considered as a permanent loss to the employee).

- As for business, depreciation on business fixed assets will be replaced by capital allowances. Capital allowances may be claimed on the qualifying expenditure incurred for the business in the year of assessment. Capital allowance is treated as expense and will be deducted from the business adjusted income in arriving at the statutory income. If it cannot be absorbed in the current year, it can be carried forward to the future years. However this advantage is not available to an employee. Even though employee needs to use fixed asset (such as motor vehicle – car) in doing his employment job, he is not allowed to claim any capital allowance on the asset.

Q3

Under what circumstances are employment income deemed to be derived from Malaysia and subject to Malaysian income tax?

A3

As stated under section 13 of ITA 1967, employment income is deemed to be derived from Malaysia and subject to Malaysian tax under the following circumstances.

(i) Sec 13(2)(a): i.e. where the employment is in Malaysia.
Example: Mr Kumar, an Indian citizen, was employed as a lecturer by a private university in Kuala Lumpur. He was paid RM5,200 as gross salary for the month of March 2008. Thus Mr Kumar's income of RM5,200 is deemed to be derived from Malaysia and subject to Malaysian tax.

(ii) Sec 13(2)(b): i.e. where the leave is attributable to the exercise of employment in Malaysia (such as leave pay earned by the employee during his leave).

Example: After working 10 months as a lawyer in Malaysia, Mr Teh (a Hong Kong citizen) went back to Hong Kong for a month holiday. His employer credited his one month leave pay i.e. RM6,000 to Mr Teh's bank account in Hong Kong. Thus, his one month leave pay (RM6,000) is deemed to be derived from Malaysia since the one month leave is attributable to his employment in Malaysia.

(iii) Sec 13(1)(c): i.e. where for any period during which the employee performs outside Malaysia duties incidental to the exercise of the employment in Malaysia.

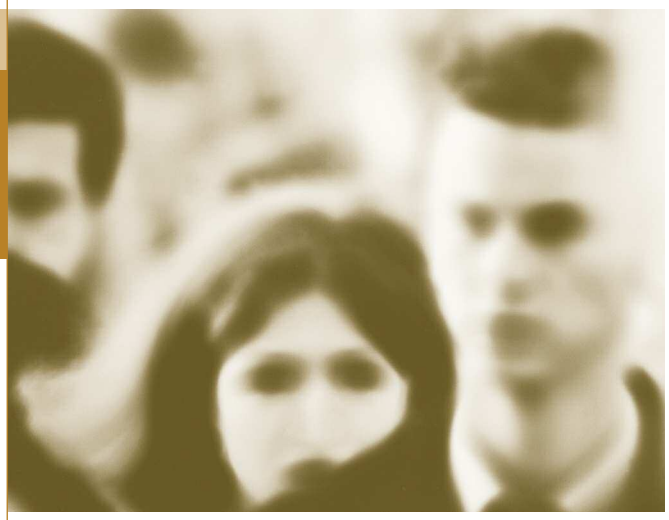
Example: Mr Ali, a Malaysian journalist, spends four months each year in Jakarta and Singapore to report Malaysian citizens activities in those countries. During the four months abroad, his employer credited his salary to his accounts in Singapore and Jakarta. Thus, his four months jobs outside Malaysia is incidental to the employment job in Malaysia, as a result the four months employment income is also subject to Malaysia tax, since they are deemed to be derived from Malaysia.

(iv) Sec 13(2)(d): i.e. where for any period during which an individual is a director of a Malaysian resident company, for the basis year for a year of assessment. The director is not required to be physically exercised any of the duties of his office in Malaysia, yet the employment income that he received will be deemed to be derived from Malaysia and subject to Malaysian tax.

Example: Mr Khoo, a citizen and resident of Taiwan has been appointed as a director of Cool Sdn Bhd, a Malaysia resident company. For the year of assessment 2007, he was paid RM56,000 as director's fees. Thus he will be subject to tax on the director's fees that he earned, since Cool Sdn Bhd is a Malaysian resident company.

(v) Sec 13(2)(e): i.e. where an individual is employed by ships or aircrafts, which are operated by a Malaysian resident person. Thus the income of the individual is deemed to be derived from Malaysian and subject to Malaysian tax.

Example: Mr Brown, a British citizen, was employed as



a pilot by Star Sdn Bhd, an airline company based in Sabah. Star Sdn Bhd is a resident of Malaysia. Mr Brown is a non-resident of Malaysia for Malaysian tax purposes. For the basis year 2007, he was paid RM180,000 as salary. Thus, Mr Brown's income is deemed to be derived from Malaysia and subject to Malaysian tax since the employer is an airline resident of Malaysia. RM180,000 is subject to tax at a flat rate of 27% (since he was not Malaysian resident for the year).

(vi) Sec 13(3): this section deals with employment in the public services and / or statutory authorities. However, for this section to apply, the individual (employee) must be Malaysian citizen.

Example: Mr Hasan, a citizen of Malaysia, was working as accounts executive in Malaysian Embassy, based in London. For the year of assessment 2007, he was paid RM72,000 by Malaysian Government and this amount was credited to his bank account in London. Thus, Mr Hasan is subject to Malaysia tax on the salary that he earned, since he is Malaysian citizen and he is employed by Malaysian Government.

Q4

Will there be any exemptions given if the employment income was credited to an overseas account instead of a Malaysian local bank or the employer is not located in Malaysia?

A4

Once the employment income is established to have derived from Malaysia, such employment income will be subject to Malaysian income tax even if:

(1) the employer is not in Malaysia,
(2) the employer is a non-resident of Malaysia,
(3) the payment of employment income is made outside Malaysia, or
(4) the employment income is not received in Malaysia.

Q5

What is the basis of assessment for employment income?

A5

Effective from year 2002, employment income is assessed based on current year – sec 21(1). Therefore, the basis year and the year of assessment would be the calendar year.

Example: For year of assessment 2008, the basis year is 2008 and the basis period is from 1 January 2008 to 31 December 2008.

Q6

What types of income fall under employment?

A6

Section 13(1) of ITA 1967 categorises the various types of employment income. It is divided into five subsections i.e. sections 13(1)(a) to 13(1)(e). They will include cash, perquisites, benefits in kind, lump sum payments received by employee and also withdrawal of money from approved and unapproved fund or scheme.

Q7

What are the items stated in Public Ruling No. 1/2006 on Perquisites From Employment?

A7

Effective from year of assessment 2005, the following are some of common perquisites that will be subject to tax in the hands of the employee:

- Pecuniary liability of employees paid by the employer, such as income tax payment, electricity bills, water and telephone bills;
- Credit card facilities
- Loan interest
- Recreational club membership
- Tuition or school fees of child
- Life insurance premiums
- Gardener, driver, domestic help or guard
- Waiver of loan or advance
- Scholarship
- Assets given free of charge or sold at a discount
- Gift vouchers
- Gift of personal computer to the employee by the employer
- Excellent public service award
- Professional subscriptions

Q8

What types of employment income fall under section 13(1)(a)?

A8

Section 13(1)(a) will include gross income of an employee in respect of gains or profits from employment such as wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisites or allowance (whether in money or otherwise) in respect of having or exercising the employment.

However, items such as a reward or gift for personal qualities, for example passing an examination, marriage, etc, and payment to meet personal distress such as compensation for house damage or car accident, will not constitute employment income.

e.g. (a) Cik Anis is an assistant auditor at CT Sdn Bhd. In December 2007, she sat for her ACCA final examination and graduated. As a result, she was awarded a cash price of RM5,000 by her employer.

Cik Anis will not be assessable to tax on the RM5,000 that she received since it was paid for her personal achievement. The amount was not paid for services rendered and thus it would not form part of her remuneration.

e.g. (b) Cik Afiqa works as a waitress at the Melor restaurant at Petaling Jaya. Being a pleasant person, she always receives tips from customers. For year 2007, she earns RM4,400 in tips.

She will be assessed on the tips of RM4,400 she earned in year 2007. Tips will be taxed as "perquisites" under Section 13(1)(a) as she received them because of her employment at the restaurant.

- *Salary, wages, bonus and allowances*

(i) Both wages and salary are taxed at gross. If EPF has been deducted, it should be added back.

(ii) Employees do receive bonus from the employer. Bonus payment may be contractual or non-contractual (that is at the employer's discretion). The main purpose bonus is paid to employees is to serve as an incentive for better services and loyalty to the employer in the long term.

(iii) Allowances will be assessed on gross amount. Examples of allowances include entertainment, travelling, clothing and housing.

a. Travelling and entertainment allowances
These allowances are assessed in full. If the employee is required by the employer to spend them in performing his duties, these expenses would then be allowed as deductions in arriving at his adjusted or statutory income from employment.

b. Clothing allowance
This amount is assessed in full. However, if protective uniforms are provided, they are exempt from income tax in the hands of the employee.

c. Housing allowance
This amount is assessed in full. However if the employee is required to use part of house for business purpose (e.g. to entertain company's client or as an office), the expenses related to official duties can be claimed from the gross income in arriving at the adjusted or statutory income from employment.

However in order to get deductions from tax, all claims must evidenced or supported by receipts.

- *Loan to employees*

Loans given by the employer will form part of income assessable on the employees as perquisites from employment. The amount assessable will depend on the source of fund available to the employer. There are basically three types of funds namely: (a) external fund (where the employer needs to borrow from the bank in order to provide the loan to the employee). In this case, the employee will be assessed to tax on the interest expense paid by the employer since an interest-free loan is provided to the employee. (b) When the employer has its own fund to provide loan to the employee, there will be no assessable benefits on the employee since the employer does not incur extra cost in order to provide loan to the employee. (c) Where the employer subsidies part of the interest on loan borrowed by the employee, the subsidised amount will form a taxable perquisite on the employee.

Example:

En Kamal, an account executive with a public listed company, has obtained a staff housing loan in 2006 where he is being charged with interest rate of 5% per annum. The funds for the housing loan are obtained from a loan taken by his company from a commercial bank which charges interest at 8% per annum. In 2007, his employer paid interest of RM4,000 to the bank while he paid RM2,400 to his employer.

The value of perquisite assessable on him for year 2007 will be:

	RM
Amount of interest charged by the bank to the employer for the loan taken	4,000
Less: Amount of interest paid by En Kamal to the company	(2,400)
Amount of perquisites assessable	1,600

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Notice Board

1. Exemption from submitting Statement under Section 45(1)(a)(i) and Extension of time for submitting Statement under Section 45(1)(b), Finance Act 2007

In connection with the changes involving the single tier system, Section 45 of the Finance Act 2007 (Act 683) requires a company to furnish to the DGIR a statement in the prescribed form within 30 days from the date a dividend is paid. In this regard, the Inland Revenue Board (IRB) has, in its letter dated 18 January 2008, announced the following concessions:

(i) for dividends paid during the period between 1 January 2008 to 31 December 2013, companies are exempted from filing such a statement;
(ii) for dividends paid during the period from the first day of the basis period for year of assessment 2008 to 31 December 2007, companies have to submit Borang R31. However, since the Borang R31 is being finalised by the IRB, the deadline for submission of the form has been extended to 30 April 2008.

2. Authority to file tax returns electronically under Section 152A, ITA 1967

The IRB in its letter dated 5 February 2008 announced that Form CP55[1/2008] is the prescribed form that a taxpayer needs to complete so as to give the authority to a tax agent to submit the tax return electronically (on behalf of the taxpayer). The form can be downloaded from the IRB website at www.hasil.org.my

3. Return Forms E, B, BE, M, P, TP, TF and TJ for year of assessment 2007 in PDF format

The IRB announced in a letter dated 5 February 2008, that the above-stated returns can be downloaded in PDF format for filing purposes. However, the following needs to be taken note of:

(a) The return forms must be printed using the following specifications:

(i) Type of paper: Plain A4 (210mm x 297mm)/80gsm (minimum)
(ii) Orientation of paper: Portrait
(iii) Print technology: Laser
(iv) Print Colour: Pure black/Monochrome
(v) Print Quality: Single-sided/1 sheet per page/300 dpi

(b) Failure to comply with the above specifications may lead to failure in data capture. In such a case, the return form will be rejected and treated as not being received by the IRB.

Please note that the IRB has informed that the PDF format of tax returns are only being made available for this year and will not be available next year. Taxpayers and tax agents are therefore encouraged to work towards filing tax returns electronically from 2009 onwards. The IRB is also not issuing the tax returns in Excel Format like what was done last year.

4. Return Forms B & BE for the year of assessment 2007

Tax agents outside the Klang Valley may file tax Return Forms B & BE at the local Assessment Branches on condition that there will no longer be a 14-day grace period (which was allowed for outstation taxpayers to post/deliver tax returns to the Processing Centre at Pandan Indah in Kuala Lumpur). In addition, the tax agents have to adhere to the following procedures to ensure that returns can be processed in a speedy manner:

(a) Categorise the return forms into the following classes/bundles:
  (i) Refund: Section 110 cases
  (ii) Refund: Overpayment of tax
  (iii) Balance of Tax Payable
  (iv) Non-taxable / No Balance of Tax Payable

(b) A list of all return forms submitted for each class or bundle must be prepared. Where the tax agent requires an acknowledgement, then two copies of the list must be prepared and the IRB will acknowledge receipt on a 'without prejudice' basis.

(c) Each bundle shall consist of not more than 25 return forms.

5. Post Budget Dialogue

The IRB has released the minutes of the Post Budget Dialogue between the Technical Department of the IRB and representatives of professional bodies which was held on 14 December 2007 .

6. Technical Issues

The IRB has responded in writing to a few technical issues raised by the professional bodies towards the end of 2007. The technical issues were in respect of the following:
(a) Tax treatment of unabsorbed losses and capital allowances
(b) Permitted expenses of an Investment Holding Company
(c) Standard Guidelines for Stamping of Share Transfer Transactions
(d) Application of the Income Tax (Property Development) Regulations 2007 and Income Tax (Construction Contracts) Regulations 2007

The above notices and minutes are also available at the MIT website at **www. mit.org.my** and is correct as at 14 March 2008.

December 2007 Examination Results Are Out!

The results of the MIT Professional Examinations were released on 6 March 2008.A total number of 250 students sat for the foundations, intermediate and final levels of the examinations. The Institute wishes to congratulate the following students who have successfully completed the final level:

1. Yong Lai Kuan
2. Neoh Guat Hoon
3. Mohd Fauzi Rahmat
4. Chuah Meng Sim
5. Fong Ming Kong
6. Paul Godwin Manthoapil Fernandez
7. Wang Pui Leng
8. Siew Wei Fen
9. Goh Swee Lan
10. Ng Chet Kium
11. Chan Pooi Chin
12. Kok Wai Bih
13. Lim Mei Mei
14. Lim Bee Chin
15. Low Saw Heok
16. Ng Fie Lih
17. Ros Zamrilah Abdullah

Feedback

Share your thoughts and comments on any tax or business issue, or let us know what you think of Tax Guardian. Send your feedback to publications@mit.org.my. Letters should be kept fewer than 250 words, and may be edited for length and style.

Letter of The Month

The writer of the letter of the month receives an exclusive classic pen that comes with thumb drive, thanks to CCH.

In addition, the following information is available at IRB's website – www.hasil.org.my:

Date for Submission of Tax Returns for Year of Assessment 2007

Form	Category	Final date of submission
BE	Individual resident – non-business sources	30 April 2008
B	Individual resident – business sources	30 June 2008
M	Individual non-resident	30 April 2008 (non-business source)
TP	Deceased person's estate	
TF	Association	30 June 2008 (non-business source)
TJ	Hindu Joint Family	
P	Partnerships	30 June 2008
E	Employers	31 March 2008
C1	Co- operative society	Within 7 months from the date following the close of its accounting period
TC	Unit trust / Property trust	
TA	Trust bodies	
TR	Real estate investment trust/ Property trust fund	
C & R	Companies – Close of financial year end: January 2007 - March 2007 April 2007 - June 2007 July 2007 - September 2007 October 2007 - December 2007	Within 7 months from the date following the close of its accounting period

Where to submit your tax returns for Year of Assessment 2007:

BE / E	B / P / M / TP / TF / TJ	C / R / C1 / TA / TC / TR
Lembaga Hasil Dalam Negeri Malaysia Pusat Pemprosesan Aras 10-18, Menara C Persiaran MPAJ, Jalan Pandan Utama Pandan Indah **Karung Berkunci 11054** 50990 Kuala Lumpur, Malaysia	Lembaga Hasil Dalam Negeri Malaysia Pusat Pemprosesan Aras 10-18, Menara C Persiaran MPAJ, Jalan Pandan Utama Pandan Indah **Karung Berkunci 11096** 50990 Kuala Lumpur, Malaysia	Lembaga Hasil Dalam Negeri Malaysia Pusat Pemprosesan Aras 10-18, Menara C Persiaran MPAJ, Jalan Pandan Utama Pandan Indah **Karung Berkunci 11018** 5 0990 Kuala Lumpur, Malaysia

Taxpayers may visit the nearest LHDNM branch for assistance to fill in the return form or contact Customer Service Centre at **1-300-88-3010** for further clarification.

Reminder: Failure to submit the return forms within the stipulated date is an offence and can be liable to a fine not less than RM200 subject to a maximum of RM2,000.

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