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2009 Budget

Roundtable Discussion

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Official Journal of the Malaysian Institute of Taxation

Inside:

- Reinvestment Allowance – Impact of the 2009 Budget Proposals
- Section 140 of the Income Tax Act 1967 and the Choice Principle

Continuing Professional Development (CPD)
CALENDAR OF EVENTS 4TH QUARTER 2008

october

Date	Training Programme	CPD Points	Venue	Fee (RM)			Speaker
				Member	Member Firm's Staff	Non Member	
13 Oct 2008 9.00am - 5.00pm	Workshop: Understanding Deferred Tax for Tax Practitioners	8	Kuala Lumpur	330	380	440	Danny Tan
16 Oct 2008 9.00am - 5.00pm	Seminar: Tax Planning	8	Kuala Lumpur	Early bird: 375 Normal: 425	Early bird: 425 Normal: 475	Early bird: 495 Normal: 545	Various Speakers
17 Oct 2008 9.00am - 5.00pm	Workshop: Understanding Deferred Tax for Tax Practitioners	8	Penang	315	365	415	Danny Tan
17-18 Oct 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Penang	630	730	830	Chow Chee Yen
22 Oct 2008 9.00am - 5.00pm	Workshop: Cross Border	8	Novotel Hydro Majestic, KL	330	380	440	Harvindar Singh
24-25 Oct 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Malacca	630	730	830	Chow Chee Yen
30 Oct 2008 9.00am - 5.00pm	Workshop: Cross Border	8	Johor Bahru	315	365	415	Harvindar Singh

november

3 Nov 2008 9.00am - 5.00pm	Practitioners Update	8	Ipoh	315	345	415	Harvindar Singh
3-4 Nov 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Kota Kinabalu	630	730	830	Chow Chee Yen
5 Nov 2008 9.00am - 5.00pm	Practitioners Update	8	Penang	315	345	415	Harvindar Singh
6 Nov 2008 9.00am - 5.00pm	Workshop: Cross Border	8	Penang	315	345	415	Harvindar Singh
11-12 Nov 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Johor Bahru	630	730	830	Chow Chee Yen
12 Nov 2008 9.00am - 5.00pm	Workshop: Understanding Deferred Tax for Tax Practitioners	8	Johor Bahru	315	345	415	Danny Tan
18-19 Nov 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Kuching	630	730	830	Chow Chee Yen

december

1 Dec 2008 9.00am - 5.00pm	Practitioners Update	8	Kota Kinabalu	315	345	415	Vincent Josef
2 Dec 2008 9.00am - 5.00pm	Practitioners Update	8	Kuching	315	345	415	Vincent Josef
2 Dec 2008 9.00am - 5.00pm	Seminar: Indirect Tax • GST • Sales & Service Tax	8	Kuala Lumpur	Early bird: 375 Normal: 425	Early bird: 425 Normal: 475	Early bird: 495 Normal: 545	Various Speakers - Big 4 Firms
5-6 Dec 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Malacca	630	730	830	Chow Chee Yen
8 Dec 2008 9.00am - 5.00pm	Practitioners Update	8	Malacca	Early bird: 315 Normal: 425	Early bird: 345 Normal: 475	Early bird: 415 Normal: 545	Harvindar Singh
10 Dec 2008 9.00am - 5.00pm	Practitioners Update	8	Johor Bahru	315	345	415	Harvindar Singh
10-11 Dec 2008 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles	16	Ipoh	630	730	830	Chow Chee Yen
17 Dec 2008 9.00am - 5.00pm	Workshop: Audit & Investigations	8	Ipoh	315	345	415	Vincent Josef
19 Dec 2008 9.00am - 5.00pm	Workshop: Audit & Investigations	8	Kuala Lumpur	330	380	440	Vincent Josef

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 Aily or Cik Nur at 03-2162 8580 ext 108, 113 and 106 respectively or refer to MIT's website www.mit.org.my for more information on the CPD programmes.

NATIONAL TAX CONFERENCE 2008 – A Big Thank You



For the eighth consecutive year, the Malaysian Institute of Taxation and the Inland Revenue Board of Malaysia successfully organised the National Tax Conference (NTC) with the theme "Together Towards an Excellent Delivery System" on 19 and 20 August 2008 at the Kuala Lumpur Convention Centre.

The conference brought together approximately 2,000 participants comprising tax practitioners, tax accountants, financial planners, company directors, academicians and representative from the various government agencies.

The keynote address was delivered by YBhg Datuk Hasmah Abdullah, Chief Executive Officer/Director General of Inland Revenue Board on behalf of YB Datuk Hj Ahmad Husni Mohamad Hanadzlah, Deputy Finance Minister I. This was followed by the welcome speech which was delivered by Dr Veerinderjeet Singh, President of Malaysian Institute of Taxation and the opening address by Puan Noor Azian Abdul Hamid, Director of Malaysian Tax Academy on behalf of the Director General of Inland Revenue Board.

Distinguished speakers and panelists from both local and international tax professionals were invited to share their knowledge as well as to provide the recent updates on tax developments. Participants took the opportunity to participate in the forum discussion session which was moderated by Mr Ho Kay Tat. The panelists involved in the forum discussion were YBhg Datuk Hasmah Abdullah, Mr Chua Tia Guan and Mr Stewart Forbes.

We would like to thank the speakers, panelists, chairpersons and moderator for volunteering time out from their busy schedules to put in the effort and energy into sharing their knowledge and experiences with the participants.

Therefore, our heartfelt thanks to the following persons:

Mr Ho Kay Tat
Managing Director/Editor-in-Chief
The Edge Communications Sdn Bhd

Datuk Hasmah Abdullah
Chief Executive Officer/Director General
Inland Revenue Board Malaysia

Mr Chua Tia Guan
Executive Director, Great Vision Wealth Management Sdn Bhd

Mr Stewart Forbes
Executive Director, Malaysian International Chamber of Commerce and Industry

Datuk Dr Mohd Shukor Hj Mahfar
Deputy Director General (Operations)
Inland Revenue Board Malaysia

Mr Jeffrey Owens
Director, Center of Tax Policy and Administration Organisation for Economic Cooperation and Development (OECD)

Mr David Russell QC
Sir Harry Gibbs Chambers

Dr Veerinderjeet Singh
President, Malaysian Institute of Taxation

Mr Chew Theam Hock
Executive Director, KPMG Tax Services Sdn Bhd

Ms Halijah Bulat
Director, Technical Department,
Inland Revenue Board Malaysia

Mr Lim Kah Fan
Vice President, Malaysian Institute of Taxation

Ms Phan Wai Kuan
Executive Director, PricewaterhouseCoopers Taxation Services Sdn Bhd

Ms Balbir Kaur
Senior Tax Specialist (Accredited), Tax Policy & International Tax Division, Inland Revenue Authority of Singapore

Mr Mahmood Daud
Director, Corporate Branch, Inland Revenue Board Malaysia

Ms Renuka Bhupalan
Director, TAXAND Malaysia Sdn Bhd

Ms Chang Lock Sin
Vice President, Flextronics Technology Sdn Bhd

Mr Mansor Hassan
Director, International Tax Department
Inland Revenue Board Malaysia

Datuk Azizan Abdul Rahman
Director-General, Labuan Offshore Financial Services Authority Malaysia (LOFSA)

Mr Aurobindo Ponniah
Head, Asia Pacific, International Bureau of Fiscal Documentation (IBFD)

Ms Asriah Shaari
State Director, Selangor, Inland Revenue Board Malaysia

Mr Douglas Rankin
Senior Policy Advisor, Her Majesty's Revenue and Customs, United Kingdom

Mr Lim Heng How
Deputy President, Malaysian Institute of Taxation

Mr Mohd Zaki Bin Abdul Wahab
Deputy Chairman, Customs Appeal Tribunal

Ms Goh Ka Im
Partner, Shearn Delamore & Co

The conference sponsors were honoured at the opening ceremony where they received a token of appreciation from the organisers. We would also like to thank our sponsors for participating in the conference:

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Last but not least, a special thanks to the Co-Organising Chairpersons of the NTC 2008 i.e. Puan Noor Azian Abdul Hamid, Director, Malaysian Tax Academy, Inland Revenue Board Malaysia and Mr Khoo Chin Guan, Vice President, Malaysian Institute of Taxation who sacrificed much of their time to make this conference a success.

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

The event that is at the forefront at the moment for all practitioners of tax is the 2009 Budget which addressed key areas of concern to the individuals, industry and the country. They included assistance given to cope with the recent increases in the cost of living faced by Malaysians. Secondly, measures were proposed to assist the development of human capital in Malaysia to face the changing environment where exploitation of knowledge is critical to the growth of the country. Thirdly, in order for Malaysia to be competitive against our fast growing neighbours such as China and India, the Government has allocated additional funds and provided incentives to selected industries such as maritime, tourism etc. and business sectors such as SME's etc. Overall it was a budget that should help the people and the nation face the current volatile world economic situation.

As the focus on this issue is the 2009 Budget, the Editorial Committee organised a post-Budget Roundtable Discussion comprising corporate members of the Institute and the Director General of Inland Revenue Board to address and clarify issues of concern. Topics raised at the Roundtable included the forthcoming thin capitalisation rules, the Advance Pricing Arrangement mechanism and the tightening of the criteria to claim Reinvestment Allowance. This event is an evidence of the Inland Revenue Board's willingness to discuss issues of concern to the taxpayers and to receive feedback. We hope such feedback will be increasingly taken into account before any new tax measures in the form of legislation, public rulings, guidelines etc. are introduced and effected because introducing new tax measures together with the support of the taxpayers will improve the rate of tax compliance.

The article "Reinvestment Allowance – Impact of the 2009 Budget Proposals" examines the intent and possible repercussions of the amendments to the reinvestment allowance as proposed in the 2009 Budget.

In order to provide readers with some background information on the MIT Council Members, a two-part series entitled "Know Your Council Members" is introduced in this issue.

I will close this editorial note with a positive proverb we should adopt in our daily lives.

" One who does not look ahead remains behind."

SM Thanneermalai
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. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 2,500 to 5,000 words submitted in a typed single spaced format using font 10 in Microsoft Word via email.

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

Contributions may be sent to:

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Know Your Council Members

Dr Veerinderjeet Singh
President

Dr Veerinder has an accounting degree from University of Malaya and a doctorate from Universiti Putra Malaysia. He is a member of various professional bodies. He is a member of the Canadian Tax Foundation and the Australian Tax Research Foundation. He is also a member of the Advisory Council of the International Bureau of Fiscal Documentation in the Netherlands. He is also the Chairman of the International Fiscal Association (IFA) – Malaysia Branch.

He has had extensive experience in tax matters over the past 28 years having worked in Government, in international accounting firms and at the University of Malaya. He has also been a Visiting Scholar at the Harvard International Tax Programme. He is currently an Adjunct Professor at the University of Malaya. He is the Managing Director of TAXAND MALAYSIA Sdn Bhd which is a member firm of the TAXAND Global network, an alliance of tax firms worldwide offering independent tax advice.

He has over 100 publications including books as well as articles in local and international tax, law and accounting journals and in local newspapers. He has spoken at numerous workshops, seminars and conferences held locally and internationally.

As a Council Member, his priority is to assist the MIT in enhancing its technical services to members as well as maintaining its status as the premier body in the field of taxation.

Mr Lim Heng How
Deputy President

Mr Lim Heng How graduated with a B. Econs (Hons.) degree from University of Malaya in 1969 and had served in the Inland Revenue Department/Inland Revenue Board for 33 1/2 years. He retired in 2002. During his service he rose to the rank of Deputy Director General (Technical & Legal) and had also headed Investigations nationwide. He was involved in implementing the current year and the self assessment system of taxation and started the tax and transfer pricing audits.

He had led Malaysian delegations to many SGATAR and CATA tax conferences in various countries as well as OECD seminars in Paris. He was a member of the OECD Technical Advisory Group (TAG) on Business Profits. In 2006 and 2007, he was listed in the Legal Media Group Guide (Euromoney Guide) to the World's Leading Transfer Pricing Advisors as Malaysia's leading Transfer Pricing Advisor. He is currently an Executive Director in Deloitte Touche Tohmatsu Malaysia.

For his services he was awarded the JSM and KMN by His Majesty the Yang DiPertuan Agong.

As a Council Member responsible for the financial affairs of the MIT, his primary focus is to ensure that the Institute's funds are properly used to advance members' interests and needs.

Mr Lim Kah Fan
Vice President

Mr Lim Kah Fan is an Executive Director of Ernst & Young Tax Consultants Sdn Bhd with extensive experience in tax advisory and tax planning schemes. He has advised a large number of telecommunications companies in relation to their rationalisation of business operations, and other exercises to achieve a tax efficient global group corporate structure, including the use of special purpose vehicles to achieve tax efficiency.

Mr Lim is a regular speaker in various tax conferences. He is the Chairman of the CPD Committee of the Institute. He also sits on the Technical and Public Practice Committee and Membership Services Committee of the Institute. He is a Practising Accountant of the Malaysian Institute of Accountants, and an Approved Tax Agent by the Minister of Finance. He is also the Chief Examiner in Advanced Taxation paper for the Malaysian Institute of Certified Public Accountants.

As a Council Member, he hopes to contribute significantly towards the development of the Institute, particularly in the area of continuing professional education for the members and tax practitioners. He also hopes to strengthen MIT's working relationship with the Ministry of Finance and Inland Revenue Board officials so that operational and technical issues can be resolved expediently.

Part 1

Assoc Prof Faridah Ahmad
Council Member

Faridah Ahmad is a fellow member of Malaysian Institute of Taxation (FTII), a fellow member of the Association of Chartered Certified Accountants (FCCA, UK) and a Chartered Accountant of the Malaysian Institute of Accountants (CA). She also holds a Diploma in Accountancy (DIA) from Universiti Teknologi MARA (UiTM).

She is currently an Associate Professor at the Faculty of Accountancy, UiTM, specialising in Malaysian Taxation. Since joining UiTM in 1980, Faridah has been teaching the diploma, undergradute and various professional courses of ACCA, MICPA and ICSA.

Besides teaching, Faridah is also involved in consultancy work to SME Entrepreneurs in the areas of tax planning and financial management. She is currently a member of the ACCA Malaysia SME committee. She has been conducting seminars and workshops organised jointly by ACCA Malaysia, SMIDEC, JELITA and FELDA. Faridah is the author of over 10 tax publications.

As a Council Member Faridah will work closely with the MIT Secretariat and her fellow council members to meet the objectives of the Institute and the professional needs of its members.

Professor Dr Jeyapalan Kasipillai
Council Member

Prof Dr Jeyapalan Kasipillai is the Chair of Malaysian Business at Monash University Sunway campus and in 2007, he was appointed as Deputy Head of its School of Business. He completed his doctoral thesis at the University of New England, Australia and masters degree at the University of Stirling, Scotland. Jeyapalan is a fellow member of both the Malaysian Institute of Taxation and the UK Chartered Institute of Secretaries.

After graduating from University of Malaya in 1974, he joined the New Straits Times Group as a journalist and later served the Inland Revenue Board for 15 years. He held the post of Assistant Director (Tax Investigations), prior to joining Universiti Utara Malaysia as a lecturer in 1991. Jeyapalan serves the Malaysian Institute of Taxation as a Council Member as well as Chairman of its Examinations Committee. Amongst others, he serves as a member of the Editorial Committees of Tax Guardian, e-Journal of Tax Research, Australia and was appointed by Tax Notes International, USA in 2004 to be its official correspondent for Malaysia. In August 2008, Jeyapalan was conferred the Monash Pro-Vice Chancellor Award for excellence in research.

Mr Lew Nee Fook
Council Member

Mr Lew Nee Fook joined the Parliament office after his secondary education. He was with Kwong Yik Bank for a short spell before joining the Klang Port Authority for more than 23 years. During his tenure with the Government services, he obtained his diplomas in Accounting from MAP/Curtin University Australia in 1987. He obtained his UK Professional Accounting degree at the age of 42. He came out to practise full time when the Port Klang Authority was privatised.

Mr Lew has over 26 years' experience in both direct and indirect tax. He has also conducted tax audit and investigation cases. He has served in associations, clubs and cooperatives in various capacities and has been involved in organising local and international events.

With his vast exposure serving the various associations, he hopes to assist the Malaysian Institute of Taxation to grow to a renowned premier tax body in Malaysia for tax practitioners. In addition, he hopes to see the MIT obtain international recognition and he hopes the present team spirit in MIT will bring the Institute to a higher level.

Datuk Raymond Liew
Council Member

Datuk Raymond Liew is both the Managing Partner of Parker Randall Asia Pacific region and the Deputy President of Parker Randall International of which the global Head Office is based in London, United Kingdom. He is also the pioneer initiator for the growth of Parker Randall International within the Asia and The Pacific region of which Malaysia is the regional Head Office.

Datuk Raymond holds a Master degree in Business Administration (MBA) from Henley Management College, UK which is affiliated to Brunei University. He is a fellow member of both The Association of Chartered Certified Accountants (ACCA) and the Malaysian Institute of Certified Public Accountants (MICPA). He is a Trustee of the Malaysian Accountancy Research & Education Foundation and is also a council member of the Malaysian Institute of Accountants (MIA). With his extensive work knowledge, Datuk Raymond is also a regular writer of technical articles and a regular speaker at various seminars and workshops.

As a Council Member of MIT, Datuk Raymond inspires to impart his knowledge by contributing positively and endlessly his time by taking various active roles to help improve and enhance the quality functions of the institute in particular his passion for editorial and public relation works. At the same time with his 20 years of working professional experience in multinational companies in the UK, he actively takes part in representing the institute in various tax dialogues and discussions with the Inland Revenue Board and the Ministry of Finance on a regular basis.

Mr Safrizal Mohd Said
Council Member

Mr Safrizal is the Group Tax Manager of the F&N Group where he conducts tax reviews and planning to ensure that companies in the F&N Group operate in the most tax efficient manner. He also implements and maintains systems and tax policies to ensure compliance, reviews the adequacy of tax provisions in statutory accounts, prepares board papers for distribution of dividends, and assists companies in the Group in the event of a tax audit.

Safrizal has experience working in both the consulting as well as the commercial fields. He has work experience in two of the Big Five Accounting Firms, with his last position being as a Tax Director. His experience in the field of taxation amounts to 20 years.

Safrizal has also conducted in-house training programmes and has spoken at public seminars on various tax matters. He holds a Bachelor of Commerce degree from the University of New South Wales. He is a member of the Australian Society of Certified Public Accountants.

As a Council Member of MIT, Safrizal hopes to share his knowledge in tax through various MIT seminars and conferences.

Mr SM Thanneermalai
Council Member

A Senior Executive Director and head of the Transfer Pricing, Audit and Investigation Practice and India Desk in PwC Malaysia, SM Thanneermalai has been in professional practice for over 30 years dealing with large conglomerates and multinational companies.

Thanneermalai is a frequent presenter at local and foreign seminars and conferences and is the author of several technical articles.

He is a member of the Institute of Chartered Accountants in England and Wales, a member of the Malaysia Institute of Accountants and has been a council member of the Malaysian Institute of Taxation for many years.

As a Council Member, Thanneermalai's goal is to help promote MIT as a premier tax body through his involvement in the various sub-committees and lending assistance wherever possible to share at MIT seminars and conferences for the benefit of all MIT members.

Welcoming the New Executive Director - Ann Vong

The Malaysian Institute of Taxation's new Executive Director Ann Vong has extensive experience in academia, continuing professional education, programme development, administration and strategic planning.

Ann began her career in education with the Ministry of Education in Malaysia. After serving the Ministry of Education, she joined the Institute of Bankers, Malaysia (IBBM) which is a professional and educational body for the banking and financial services industry in Malaysia. IBBM is also the leading provider of quality programmes in banking and finance education in Malaysia.

At IBBM, Ann held diverse portfolios. Her responsibilities and achievements include spearheading membership recruitment activities, the promotion of the Institute's certifications and the development and sale of in-house training programmes to the financial institutions in Malaysia and South East Asia.

When not on field duties, Ann participated in the development and organisation of qualification-related study programmes for candidates writing IBBM examinations. She also managed the administration of IBBM's examinations that are offered throughout the country.

While in the Learning, Education and Development department at IBBM, Ann headed the Banking Industry Training Scheme for unemployed graduates which was organised by the Association of Banks in Malaysia, Association of Finance Companies in Malaysia and the Malaysian Investment Banking Association. In addition to this training scheme she also spearheaded the Master of Science (Banking) programme which came about from a collaborative effort between IBBM and Universiti Utara Malaysia.

Ann and her team were instrumental in organising over 1,500 learning programmes annually for financial institutions locally and regionally.

In IBBM's strategic alliances with other training providers, institutes of higher learning and regulators, Ann established and maintained goodwill with her counterparts.

Always an educator at heart, Ann subscribes to the philosophy that learning is never static and that one must keep moving forward in search of new knowledge.

Ann has a Teacher's Certificate specialising in Mathematics from the Malayan Teacher's College in Penang, a Bachelor of Laws from the University of London and a Master's degree in Business Administration from Universiti Tun Abdul Razak.

From left: Adrian Yeo, Tan Lay Beng, Ann Vong, Assoc Prof Faridah Binti Ahmad, Wong Seng Chong, Datuk Raymond Liew, Dr Veerinderjeet, Andrew Ewe, Michael Tong, Lew Nee Fook, Lim Kah Fan, Viknesvaran s/o Arumugam, Lam Weng Keat, Fan Kah Seong

Branch Affairs Meeting

The first Branch Affairs meeting was held on 19 August 2008 at the Kuala Lumpur Convention Center. The meeting, chaired by Dr Veerinderjeet, MIT President, discussed strategic initiatives, issues and challenges related to branches, and updates by the respective chairmen.

The 16th Annual General Meeting of the Malaysian Institute of Taxation

The Malaysian Institute of Taxation (MIT) held its 16th Annual General Meeting (AGM) on 14 June 2008 at the Prince Hotel and Residence, Kuala Lumpur. Subsequent to the AGM, the council meeting was convened and the following office bearers were elected for the 2008/2009 term:

President : Dr Veerinderjeet Singh
Deputy President : Mr Lim Heng How
Vice President(s) : Mr Khoo Chin Guan
Mr Lim Kah Fan

Dr Veerinderjeet Singh is a leading tax consultant in the country. He is currently the Managing Director of TAXAND MALAYSIA Sdn Bhd and has been actively involved in the Government, academia and in the private sector.

Lim Heng How has served in the Malaysian Inland Revenue Board (IRB) where he retired as the Deputy Director General. He is currently an Executive Director of Deloitte Touche Tohmatsu Tax Services Sdn Bhd.

Khoo Chin Guan is the Head of Tax Practice of KPMG while Lim Kah Fan is an Executive Director with Ernst & Young Tax Consultants Sdn Bhd.

The new leadership and other members of the council will carry on the tradition of enhancing the professionalism of tax practitioners as well as contribute towards improving the tax system through various dialogue sessions and submissions to tax agencies and the Ministry of Finance.

In his first official speech as president of MIT at the National Tax Conference 2007 on 16 July 2007, Dr Veerinderjeet announced the Strategic Initiatives of the MIT. He emphasised that MIT would aggressively promote its professional examinations in line with its commitment towards developing competent tax practitioners.

Dr Veerinderjeet highlighted certain initiatives to enhance MIT's research capabilities which would facilitate MIT's proactivity in the tax reform domain and tax administration. MIT will also focus on working cohesively with all the relevant professional bodies to ensure effective representation to the tax authorities on all taxation related matters.

The new council will continue with the implementation of the Strategic Initiatives announced in July 2007 as part of a five-year plan to enhance the MIT and its role.

NTC 2008 Press Conference

From left: Dr Veerinderjeet Singh, President of MIT, Datuk Hasmah Abdullah, Chief Executive Officer/Director General of Inland Revenue Board, Puan Noor Azian Abdul Hamid and Mr Khoo Chin Guan (both Co-Organising Chairpersons of the NTC 2008)

At the National Tax Conference (NTC) 2008, a press conference was held after the official opening on 19 August 2008 followed by an open floor session with the MIT President. The media raised issues and developments pertinent to the tax system to the panel comprising Datuk Hasmah Abdullah, Chief Executive Officer/Director General of Inland Revenue Board, Dr Veerinderjeet Singh, President of MIT, Puan Noor Azian Abdul Hamid and Mr Khoo Chin Guan (both Co-Organising Chairpersons of the NTC 2008). During the open floor session, the media interviewed Dr Veerinderjeet on the role and developments of the Institute, and also budget matters.

Members of the media and IRB representatives at the press conference

The open floor session between the media and MIT President

Malaysian Institute of Taxation's Prize Giving Ceremony

Datuk Hasmah Abdullah, CEO/Director General of Inland Revenue Board Malaysia congratulating the graduates

The Malaysian Institute of Taxation (MIT) held its Prize Giving Ceremony on 14 June 2008 at the Prince Hotel & Residence, Kuala Lumpur. Datuk Hasmah Abdullah, CEO/Director General of Inland Revenue Board Malaysia was the Guest of Honour at the event. Graduates who have successfully completed MIT's Professional Examinations received certificates and three prize winners obtained medals.

In his address, the Chairman of the Examinations Committee, Professor Dr Jeyapalan Kasipillai, congratulated the new graduates and reminded them that their knowledge, skills, character and integrity would be tested in the competitive and challenging work environment. He added that graduates should strive to contribute to the tax profession upon their graduation.

Datuk Hasmah commended the Institute on the regularly and well updated examination syllabus. In developing and conducting professional examinations in the field of taxation, MIT has played a vital role in producing competent and knowledgeable tax practitioners to meet the current shortage in the country. Datuk Hasmah congratulated the graduates on their achievement. She advised them to discharge their duties efficiently to ensure that taxpayers are fully compliant with the law.

Also present at the Prize Giving Ceremony were representatives from various educational institutions, professional bodies, MIT council members, families and friends of the graduates.

All graduates with MIT's personnel

National Tax Conference 2008

Welcoming Speech by Dr Veerinderjeet Singh
President, Malaysian Institute of Taxation
National Tax Conference 2008 –
"Together towards an excellent delivery system"
19 & 20 August 2008
Kuala Lumpur Convention Centre

It gives me great pleasure to wish all of you a very good morning and a warm welcome to the National Tax Conference (NTC) 2008 which is jointly organised by the Malaysian Inland Revenue Board (IRB) and the Malaysian Institute of Taxation (MIT).

Please allow me to provide a brief introduction regarding the Malaysian Institute of Taxation or MIT for the benefit of non-members, international delegates and panelists present here today. MIT was established 17 years ago in 1991. Presently, we have a membership base of over 2,700 members comprising accountants, licensed tax agents, lawyers and others who have an interest in the field of taxation. Since its inception, MIT has strived to promote the tax profession as well as to contribute towards improving and enhancing the Malaysian tax system. As a professional tax institute, MIT participates in numerous dialogues and meetings organised by the relevant authorities namely the Malaysian IRB, Royal Customs Malaysia and the Ministry of Finance. On the international front, MIT participates in the activities of the Asia-Oceania Tax Consultants Association (AOTCA) and collaborates with other professional tax institutes in a number of countries. In fact this year, MIT is planning to sign two Memorandums of Understanding with the Chinese Certified Tax Agents Association as well as the Taxation Institute of Australia which will enable the organizations to share knowledge and expertise as well as best practices in serving its members.

For the eighth consecutive year, the MIT is proud to be co-organising together with the IRB this premier tax event which is also incidentally the biggest tax conference in the country. This year we have registered almost 1,800 participants. The international speakers together with the local panelists are a testament to the quality of this conference and I am confident that their combined experience and knowledge will provide us with adequate food for thought and ideas for further enhancing tax services. Our primary focus on the conference has consistently been centred on providing educational and knowledge based programs and to help our tax professionals as well as taxpayers to keep abreast of current issues.
The theme for the 2008 NTC is "Together Towards an Excellent Delivery System". Our opening session is a forum discussion on the theme of the conference which I believe will be highly informative and pertinent considering the Government's push for substantive improvements in the delivery system. I certainly hope that participants will also raise questions and share their views as we must listen to all sides so that we can ensure that a comprehensive solution is developed for the future well-being of our nation. We will also have the opportunity to hear about certain trends in international tax reforms, taxation and corporate social responsibility, the single tier system, financial reporting standards and the effect on taxation, tax compliance and audit issues, Labuan as an International Business Financial Centre as well as certain aspects on indirect taxes. All in, the organizers have taken great pain in trying to come up with a programme which will interest the various categories of participants attending this conference.

We, at the MIT, strongly believe that tax professionals play an integral part in the effective functioning of the nation's tax system. As such, I wish to reiterate that MIT, as the premier professional organisation representing tax professionals across the country, is committed towards enhancing the status, prestige and performance as well as raising the overall standards of the profession in line with ensuring that tax professionals exhibit the highest integrity in discharging their responsibilities. In this respect, it is the overall view of our members that the tax licensing process of tax agents needs to be reviewed and revamped as the profession should be involved in self-regulating itself. The issue of compulsory CPD requirements must be imposed and monitored by the profession and not by the regulators. The current system has led to administrative constraints as well as to certain undesirable consequences. The MIT is willing to meet the Ministry of Finance to discuss this matter in the interest of having a clear, fair and transparent framework to regulate tax practitioners.

In the past year, the Council has launched a new name for the professional journal of the Institute – *Tax Guardian*.
It has also developed the necessary Investigative and Disciplinary Rules which are expected to be approved at next months' Council meeting. Some of the initiatives that the Council of the Institute is looking into in this year include the following:

- Undertaking a rebranding exercise for the Institute with a possible new name, a new logo and a new description for members reflective of the good standing that the Institute has attained over the last 17 years as well as promoting technical excellence as one of its core values;

- In line with our commitment towards providing competent and professional tax practitioners for the future, MIT has started a review of the syllabus of its professional examinations;

- Enhancing our research capabilities and facilities to be more proactive in the area of tax reform and tax administration which will consider the feasibility of setting up a Malaysian Tax Research Foundation; and

- Working cohesively with all relevant parties so that effective representation is made to the tax authorities on all matters relating to taxation.

Going forward, the MIT believes that it can play a role in assisting the IRB as well as the Customs authorities in further enhancing mutual trust between practitioners and agencies in our journey towards achieving a simple, clear, fair and transparent tax regime. We believe in greater consultation, in effective collaboration as well as in co-designing legislative changes. The current leaders of the tax agencies and the Ministry of Finance have shown their willingness to listen and together, we should be able to enhance the tax system for the mutual benefit of all parties.

I am hopeful that all of you will find the various sessions at this conference most useful and enlightening. In addition, such events are a great place to network and build on business relationships. Finally, I must with the utmost gratitude thank our joint organiser for having made all this possible. No conference can succeed without speakers, presenters, chairmen and panelists. To each and every one of you thank you. I must also not forget the main sponsors for this conference namely PETRONAS (our Diamond Sponsor), AXP Solutions Sdn Bhd (our Bronze Sponsor) to whom we are most grateful for the support. Our thanks also goes to the rest of the sponsors i.e. Lim Kok Wing University, the International Bureau of Fiscal Documentation, CCH, BRASSTAX and MYOB Asia Sdn Bhd (our supporting sponsors). My thanks as well to all the professional bodies i.e. MICPA, ACCA, CIMA, CPA Australia, MAICSA, MIA and the Bar Council for the great co-operative spirit that you have shown. Last but not least, our thanks to the Co-Organising Chairpersons of the Conference, namely Puan Noor Azian bt Abdul Hamid from the Malaysian Tax Academy and Mr Khoo Chin Guan from the MIT, the Secretariat staff (especially Cik Nursalmi and her team), conference assistants and council members for their untiring efforts to make this conference a success. To all of you present here today, thank you for having made this conference a success.

I wish all of you a fruitful and beneficial Conference.

Thank you.

Budget Night: Preparation of the 2009 Budget Commentary & Tax Information

From left: Ong Gim Yan (UTAR), Prof Dr Jeyapalan (Monash University Sunway Campus), Jonathan Seifman (CCH), Belinda Chew (CCH), Chow May Kuan (CCH) and Jacy Rani Paloosamy (CCH)

On 29 August 2008, members from various tax, accounting and auditing firms gathered together for an all night session at CCH's office in Kuala Lumpur to produce the annual **Budget Commentary & Tax Information** booklet which is published jointly by The Malaysian Institute of Taxation, Malaysian Institute of Accountants and The Malaysian Institute of Chartered Public Accountants. Seeing how much work went before and during the weekend, the Institute would like to thank and congratulate all who were involved in the successful production of the booklet. Well done!

Writers and technical reviewers at work in MIT office

Writers at work in CCH's office

Technical reviewers at work in CCH's office

MIT-MIA 2009 Budget Hotline

The Malaysian Institute of Taxation in collaboration with the Malaysian Institute of Accountants (MIA) hosted the 2009 Budget Hotline service on Saturday, 30 August 2008 at the MIA training room from 9.00am to 12.00pm. The purpose of the hotline service was to provide clarification and information to our members and to the general public on the 2009 Budget changes and its fiscal implications.

Farewell to Ms Kulwant Kaur, Executive Director

The Malaysian Institute of Taxation bids farewell to Ms Kulwant Kaur as she moves on to greener pastures and we wish her all the best.

Career Talk, University Kebangsaan Malaysia

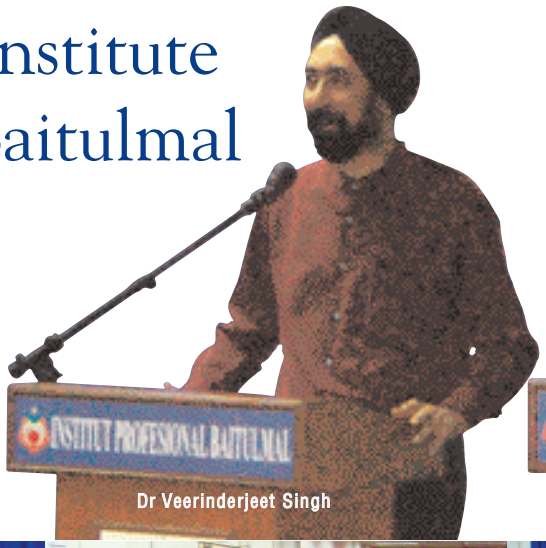
On 15 August 2008, a career talk was held at University Kebangsaan Malaysia during their Accountancy Week celebration. The Chairman of the Education Committee, Assoc Prof Faridah Ahmad, gave a talk on pursuing a career in Taxation and encouraged students to take up the MIT Professional Examinations in achieving their career goals. The event was attended by 87 students from the Faculty of Economy and Business.

Assoc Prof Faridah Ahmad giving her talk

Students listening attentively

Career Talk, Institute Professional Baitulmal

A career talk was held at Institute Professional Baitulmal on the 30 July 2008 for students pursuing accountancy and business studies courses at the Institute. The President of MIT Dr Veerinderjeet Singh and Mr Safrizal Mohd Said, a council member spoke to on "A Career in Taxation" which was attended by more than 250 students.



Dr Veerinderjeet Singh

Mr Safrizal Mohd Said

Students at the Career Talk

CPD Events...

2009 Budget Seminars

For the benefit of its members, MIT organised a series of Budget Seminars at various locations namely Kuala Lumpur, Petaling Jaya, Ipoh, Malacca, Seremban, Johor Bahru, Penang, Kuantan, Kuching, Sibu and Kota Kinabalu.

The speakers provided an analysis of the changes and impact of the 2009 Budget as well as a comparative analysis of the 2008 and 2009 Budgets.

2009 Budget Talk by Datuk Aziyah

Datuk Aziyah delivering her presentation

Once again, MIT successfully concluded its annual Budget Talk with Datuk Aziyah Bahauddin, Under-Secretary of the Tax Analysis Division, Ministry of Finance on 2 September 2008 at the Best Western Premier Seri Pacific Hotel, Kuala Lumpur.

Datuk Hasmah Abdullah, Chief Executive Officer/Director General of Inland Revenue Board participated in the forum discussion which was chaired by Dr Veerinderjeet Singh, President of MIT. The over 600 participants attended the talk comprised the tax practitioners and members from commerce and industry.

MIT would like to record its sincere gratitude to Datuk Aziyah and Datuk Hasmah for sharing their views on the impact and effects of the 2009 Budget.

Attendees in rapt attention

From left to right: Mr Khoo Chin Guan, Mr Lim Kah Fan, Datuk Hasmah Abdullah, Mr Harpal Singh, Datuk Aziyah Bahauddin, Mr Thanneermalai and Dr Veerinderjeet Singh

Mr Thanneermalai posing a question

2009 Budget Talk by MIT and KCCCI

From left to right: Mr Peck Boon Soon, Mr Chua Tia Guan and Dr Leong Kai Hin

On 2 September 2008, MIT jointly organised the 2009 Budget Talk with the Klang Chinese Chamber of Commerce and Industry (KCCCI) at Klang, Selangor.

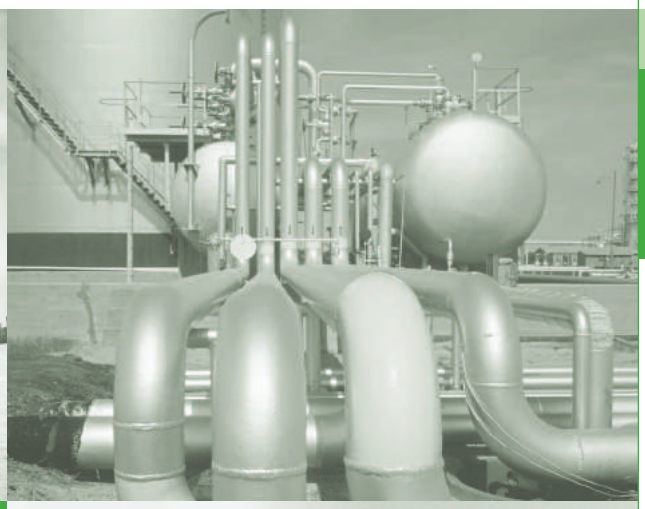
About 100 people attended the talk.

2009 Budget Roundtable Discussion

with
Datuk Hasmah Abdullah
CEO/Director General
Inland Revenue Board Malaysia

Pursuant to the announcement of the 2009 Budget by the Honourable Prime Minister and Minister of Finance YAB Datuk Seri Abdullah Ahmad Badawi on 29 August 2008, the Malaysian Institute of Taxation organised a roundtable discussion on the 2009 Budget with the Director General of the Inland Revenue Board, Datuk Hasmah Abdullah.

The roundtable discussion was held on 3 September 2008 at the Legend Hotel, Kuala Lumpur and moderated by Datuk Raymond Liew together with MIT President, Dr Veerinderjeet Singh and the following participants:



Datuk DP Naban
Senior Partner
Lee Hishammuddin Allen & Gledhill

Mr Harvindar Singh
Managing Partner
Harvey and Associates

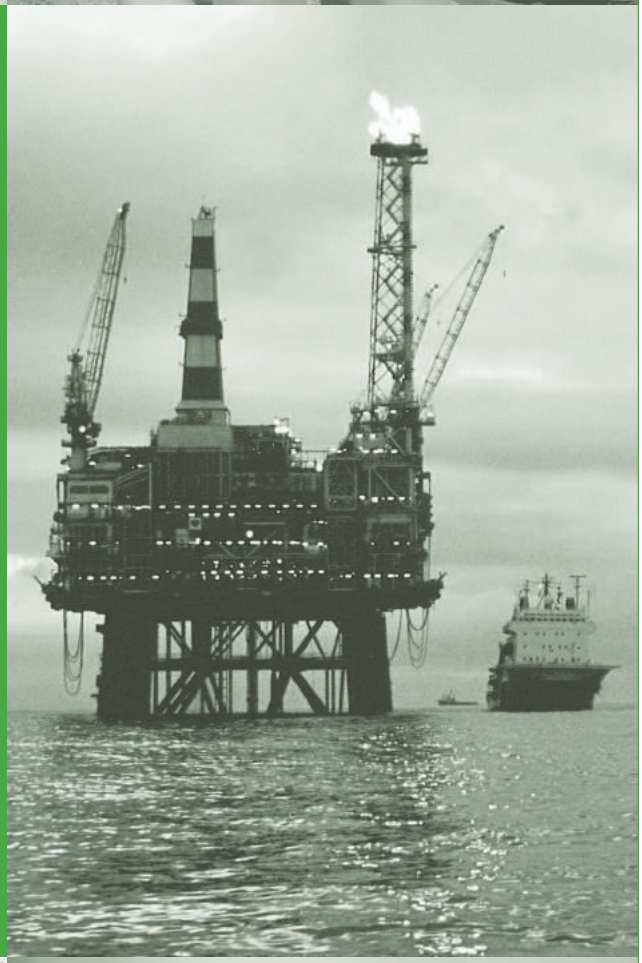
Mr Leou Thiam Lai
Managing Partner
Leou & Associates

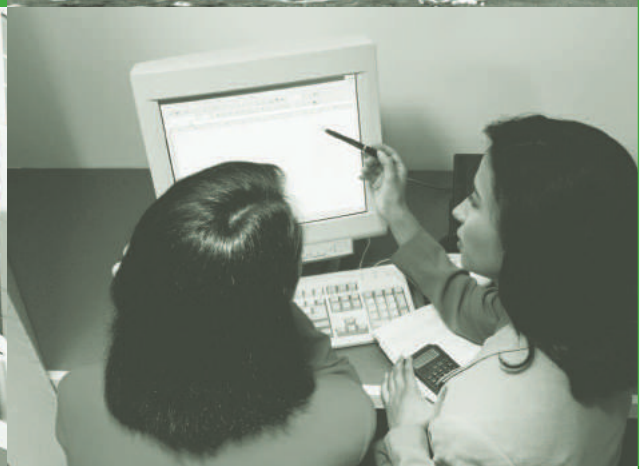
Ms Nancy Yeoh
Group Tax Senior Vice President
Sime Darby Berhad

Mr Safrizal Mohd Said
Group Tax Manager
F&N Coca Cola (M) Sdn Bhd

Mr Toh Hong Peir
Group Tax Manager
Hong Leong Management Company

Ms Woon Yoke Lee
Executive Director
BDO Binder Tax Services Sdn Bhd





Datuk Hasmah Abdullah elaborating her views to the participants

Thin Capitalisation

A company is said to be thinly capitalised when its capital is made up of a greater proportion of debt to equity. In the context of taxation, thin capitalisation involves the deductibility of interest expense by reference to the debt equity ratio. In general, when the ratio of debt to equity exceeds the stipulated ratio, the interest expense in relation to the excess debt will be disallowed tax deduction. The roundtable discussion focused on how the IRB would apply the new provision and whether the interest restriction under section 33(2) would be eventually removed upon the implementation of the thin capitalisation rules or guidelines.

Datuk Hasmah informed that although there is an internal directive in the IRB on thin capitalisation, it does not have a legal status. The move to legislate thin capitalisation rules is to allow for greater transparency, particularly to the non-resident multinational companies (MNCs).

The issuance of the thin capitalisation rules would be benchmarked against that applied in most countries. The general debt equity ratio is currently 3:1 in most countries. Malaysia *may* apply this ratio but it would depend on the situation and circumstances. There would also be a provision to give the DGIR the discretion to consider the facts and merits of each case so as to apply a higher ratio. Under these circumstances, there would be leeway to look at specific industries or a particular case to determine a reasonable ratio for that particular industry or case. Although domestic companies also have thin capitalisation and transfer pricing issues, due to the fact that the majority of such cases involve MNCs and that resources at the IRB are limited, the focus would initially be on related party transactions between resident and non-resident companies.

Regarding the possibility of the interest restriction provision under section 33(2) being abolished due to the thin capitalisation rules, Datuk Hasmah replied, "It is unlikely not for the time being. We have yet to see the impact and the relevancy – or irrelevancy – of section 33(2) to thin capitalisation rules. Thin capitalisation more often than not, concerns gearing where one party is in Malaysia and the other party is outside Malaysia. Interest restriction, on the other hand, can also apply domestically."

As to whether intercompany loans within a group of local companies would still be allowed upon the issuance of the thin capitalisation rules, the DGIR replied that such loans may still be allowed but it would depend on the facts and circumstances of the case. It was the consensus among the participants that interest-free loans within companies operating in Malaysia have no tax effect because it is a situation where one company receives the deduction and the other company is taxed. It is only of concern when money flows out of the country, e.g. where the non-resident company provides a loan to the local company and charges a high interest rate. In such a case, the local company receives the deduction (and interest flows out at an unreasonable rate, which is not at an arm's length).

Although the main purpose of the thin capitalisation rules is to address cross-border transactions, there is a possibility that local companies may be affected, for instance in a situation where some companies are enjoying the incentives while others are not entitled to them.

Datuk Hasmah gave an assurance that the IRB would look into the facts of a particular case before applying the thin

Datuk Raymond Liew, moderating the roundtable discussion

capitalisation rules, and that due consideration would be given regarding the application of thin capitalisation in the context of Malaysian companies.

Advance Pricing Arrangements

The Advance Pricing Arrangement (APA) is basically a mechanism to predetermine prices of goods and services to be transacted in the future between a company and its related companies for a specified period. With an APA in place, companies will be able to mitigate, if not eliminate, adjustment in prices by the IRB and hence plan their pricing policies and management transfer pricing exposures proactively. Would it be right to say that it is never the intention of transfer pricing to cover transactions within Malaysia and therefore an APA only covers cross-border transactions?

Reference was made to the new section 138C of the Finance Bill 2008, where unilateral, bilateral and multilateral agreements are broadly mentioned. As with thin capitalisation rules, an APA would normally be very relevant in the context of bilateral trade. Although APAs would also be relevant to Malaysian holding and subsidiary companies dealing with each other, as a start the IRB would be looking at bilateral APAs where the foreign company and the locally-owned subsidiary company work out the pricing.

"I have to admit that the IRB is 'thinly' resourced at the moment and APA is something new, so the timeline to meet the request of companies asking for APA may be long. But despite the challenges, we have to start somewhere, and we hope to see things happening next year," reiterated Datuk Hasmah.

Datuk Naban voiced a concern that while the transfer pricing guidelines and legislation covered everything, it would seem that APAs cover only cross-border transactions and not domestic companies within a group, and as such domestic companies may be put at a disadvantage. Dr Veerinderjeet also added that Malaysian companies could not apply for "certainty of pricing" through the Advance Rulings as the IRB had stated that Advance Rulings would not apply to transfer pricing issues.

"It's really a matter of public policy. For the time being, it is unlikely that an APA will cover transfer pricing involving domestic companies. But this could be looked into at a later date," Datuk Hasmah further explained. "I understand that the wordings in section 138C(1) are clear in stating that an APA covers cross-border transactions. In any event in the drafting of the rules, the IRB will invite the MIT and the industry for their views," she assured participants.

It was agreed by all present that despite the concerns raised, the introduction of APA is a progressive measure and a step in the right direction.

"It's really a matter of public policy. For the time being, it is unlikely APA will cover transfer pricing involving domestic companies. But this could be looked into at a later date."

Datuk Hasmah Abdullah, CEO/Director General
Inland Revenue Board of Malaysia

Panel participants

Reinvestment Allowance

The criteria for the Reinvestment Allowance (RA) incentive have been tightened in the 2009 Budget as follows:

- *the claw back of RA for assets to be disposed off within a period of two years from the date of purchase of the assets has been extended to five years;*
- *in terms of assets from a related company, the transferee can only claim RA provided the transferor has not claimed RA on these assets; and*
- *the condition that a company must be in operation for at least 12 months to be eligible to claim RA has been extended to at least 36 months.*

Datuk Hasmah informed that the RA incentive had been subjected to abuse, wherein RA claims were made when no assets were purchased for reinvestment. As a precaution, therefore, the IRB will normally audit companies which made RA claims. The IRB is also doubtful that a company would be able to make a claim for RA in just 12 months, as it generally takes a few years for a company to break-even. Hence the IRB holds the view that the proposed extension to 36 months is reasonable.

Some of the participants, however, felt that the manner in which the RA has been tightened seems to be punishing genuine cases where a company could not use the assets of the newly acquired company and had to reinvest in its own assets. In such a case, 36 months would be too long a period. Certain plant and machinery may need to be replaced within three years due to developments in technology which will render these plant and machinery obsolete. Therefore, the claw back of RA for assets disposed within five years is too long.

Dr Veerinderjeet felt that this was basically a situation of whether to remove or to maintain the RA incentive. "Maintaining it would be the logical approach as it is a good incentive. There may be abuses in some cases but conducting an audit would address the issue. The 36 months operation period to be eligible for RA is acceptable as I feel that 12 months' operations to qualify for RA claim is too short. So the main issue regarding the tightening of the RA rules is on the extension of the claw back of the RA for assets disposed off to five years, which many feel is far too long. Perhaps a discretionary provision could be introduced to address the RA issues in special circumstances though it must be noted that the introduction of discretionary provisions may lead to complexities."

On the concern that companies may defer their investment plans because of the 36 months operation period criterion, Dr Veerinderjeet pointed out that existing companies which have been in operation for more than 36 months would not be affected by this criterion. Only the new set-ups would be affected by the extension period.

The Accelerated Capital Allowance (ACA) incentive was also compared with the RA incentive where it was observed that the ACA seems to encourage companies to invest; but the claw back provision of disposal within five years of acquisition seems to be in conflict with the policy since companies may need to dispose of assets in order to make new purchases. Datuk Hasmah pointed out that the purpose

Panel participants

of ACA is to encourage companies to invest in plant and machineries while RA is given for reinvestment for expansion and modernisation.

"This is basically a situation of whether to remove or to maintain the RA incentive. Maintaining it would be the logical approach as it is a good incentive. There may be abuses in some cases but conducting an audit would address the issue. The 36 months operation period to be eligible for RA is acceptable as I feel that 12 months' operations to qualify for RA claim is too short. So the main issue regarding the tightening of the RA rules is on the extension of the claw back of the RA for assets disposed off to five years, which many feel is far too long. Perhaps a discretionary provision could be introduced to address the RA issues in special circumstances though it must be noted that the introduction of discretionary provisions may lead to complexities."

Dr Veerinderjeet Singh, MIT President

Exclusion of reimbursement for hotel accommodation from technical fees

The proposal to exclude reimbursements related to hotel accommodation in Malaysia from the computation of withholding tax on gross technical fees is a much-awaited exemption on out-of-pocket expenses paid to non-residents. The issue was raised as to why the exemption was confined to hotel accommodation and not other items such as air fares and other costs incurred by non-residents in providing technical services. Local companies pay for the reimbursements and this represents a cost of doing business. It would help local companies if reimbursements were distinguished from technical fees.

From the IRB's position, reimbursements and technical fees are collectively aggregated as one and the same and therefore subjected to withholding tax (as a total fee). This inclusion of reimbursements into the technical fees has been practised for many years and the IRB's stand is to maintain it as such. If reimbursements are exempted from withholding tax, the IRB foresees a bloating up of reimbursements and it would be difficult, if not impossible, for the IRB to verify such claims, especially claims from foreign consultants. Furthermore, it will need a lot more manpower for the IRB to do such verification of disbursements.

Dr Veerinderjeet stated that although he appreciated the IRB's reasoning for adding reimbursements to a non-resident's technical fees, the position of the profession remains that reimbursements should not be subject to withholding tax. "In my view, in a tax audit the IRB could ask the consultants for invoices and documentation to

Group photograph of the participants at the roundtable discussion

support such disbursements. If the supporting documentation can be produced, then there is no element of artificially increasing disbursements and thereby increasing the overall fees. But if there is no documentation, then the IRB can make the necessary adjustments." However, he observed that the exemption of hotel accommodation from withholding tax is a step in the right direction. "It may be a small step but we should be positive. Perhaps in future, there would be greater consideration on the part of the IRB and the policy makers to review this aspect," he said.

Datuk Naban added, "It becomes the responsibility of the local resident who pays the overall fees to these non-residents to ensure compliance, otherwise, he takes on a liability for his failure to deduct withholding tax."

Mr Toh noted that the Finance Bill 2008 mentions "reimbursement" but not "disbursement", and that under the Public Ruling, both the terms "reimbursement" and "disbursement" are included. He hoped that the IRB would clarify this when the law is gazetted.

> "It becomes the responsibility of the local resident who pays the overall fees to these non-residents to ensure compliance, otherwise, he takes on a liability for his failure to deduct withholding tax."
>
> *Datuk DP Naban, Senior Partner, Lee Hishammuddin Allen & Gledhill*

Expansion of the scope of withholding tax

The scope of withholding tax has been extended to cover the income of non-residents falling under section 4(f) of the Income Tax Act 1967, which according to the authorities could include commissions, guarantee fees and introducer's fees, etc. It is arguable that such income should not attract withholding tax in Malaysia if the non-resident receiving such income does not carry out the business in Malaysia. The introduction of a 10% withholding tax on such payment to the non-resident would invariably lead to an increase in the cost of doing business for companies operating in Malaysia.

Mr Toh pointed out that there could also be some overlapping and uncertainties arising with the other sections such as section 4(a), especially if the non-resident does not have a permanent establishment in Malaysia.

Dr Veerinderjeet said that the IRB had indicated that a Public Ruling will be issued on the matter. He then mentioned several issues of concern which he hoped the authorities would take cognisance of in the issuance of this new Public Ruling on withholding tax:

- The Public Ruling on section 4A of the Income Tax Act 1967 has excluded certain payments from the scope of withholding tax and these are in the nature of concessions. If there is a move now to bring these payments under 4(f), then it is not appropriate. If the income is a section 4A item and concessions have been given, then section 4(f) should not be used to remove a "concession" given under the Public Ruling for section 4A.
- On the issue of Double Taxation Agreements (DTA), one also needs to look at how the treaty partner will treat the tax suffered in the other Contracting State. This would depend on the DTA which indicates which country has

the right to tax. However, sometimes the "Other Income" article is vague and this issue becomes a grey area, which should be addressed in the new Public Ruling.

- There will hopefully not be a recurrence of what happened when section 4A was first introduced. In that instance, issues such as double taxation relief were raised and subsequently the scope of section 4A was reduced to income derived in Malaysia. It should be noted that section 4(f) is a catch-all provision; this being the case, other provisions such as section 4(a)–(e) and section 4A should be applied first before section 4(f) is applied. The new Public Ruling should take these issues into consideration.

Datuk Hasmah took note of the concerns raised.

The terminology used in section 4(f), i.e. "gains or profits …" was raised. "Some have interpreted it as referring to the net amount. It would not be practical for the IRB to expect the Malaysian taxpayer to know the expenses of the foreign party. So, the IRB's stand appears to be to take the amount the local company paid to the non-resident and subject that to the 10% withholding tax," Dr Veerinderjeet said.

Mr Toh then asked if from the legal perspective, "gains or profits" should be taken as the "gross" amount which is to be subjected to tax.

Datuk Hasmah replied that in the absence of information from the local taxpayer, the IRB would take it as the gross amount, and in the event of a contention, an appeal could be filed.

> "There could also be some overlapping and uncertainties arising with the other sections such as section 4(a), especially if the non-resident does not have a permanent establishment in Malaysia."
>
> ***Toh Hong Peir, Group Tax Manager, Hong Leong Management Company***

REITs

Although reduction of the final withholding tax on income received from a REIT has been announced in the 2009 Budget, Malaysia is still not competitive as compared to Singapore. More should be done to make Malaysia more competitive in terms of encouraging investments in REITs..

Malaysia has to adjust to our own environment which is different from that of Singapore. The Ministry of Finance (MOF) recognises the need to put the country on par and be competitive regionally. The issue to bear in mind is that the reduction in withholding tax for REITs was unexpected, so it comes as a pleasant surprise. The point to note is that there had been some complexity in the withholding tax rates, and the downward trend in the rates as seen in recent years is a positive move by the MOF (after having resisted for a long time) and it is hoped that further reductions will be introduced in the future.

Withholding tax on the placement of deposits

On the exemption of the 5% withholding tax on placement of deposits by individuals, the definition of "deposits" is unclear. Does it cover instruments like REPO (repurchase agreements), structured finance products, etc.? Does it cover ***all*** *interest payments?*

It was generally felt that since the exemption is meant to benefit the man-in-the-street, it could be for deposits from savings, current savings and fixed deposits, i.e. the financial instruments familiar to the ordinary Malaysian. We will have to wait for the actual exemption order to clarify the definition of "deposits".

Lack of Foreign Direct Investment (FDI) incentives

It was observed that the 2009 Budget did not contain any new FDI incentives.

Dr Veerinderjeet remarked that there are so many incentives already available in Malaysia. "I think we may be in a situation where it is now a challenge to see what else we can offer in terms of incentives, apart from extending the current incentives," he said.

Excise duty on cigarettes

The excise duty on cigarettes has been increased by 20% in the 2009 Budget. This, together with the high inflationary pressure, may cause consumers to turn to illegal cigarettes. If this is the case, then such increase in excise duty on sin tax may not be wise as illegal cigarettes are likely to contain higher levels of nicotine and tar, as well as lead to increased smuggling activities.

Out of curiosity, why is increased excise duty on cigarettes and not alcohol?

The increase in excise duty was seen as a revenue generating measure because of the limited options available to the Government to raise revenue. Unlike alcohol, cigarette is neutral in that it is not specific or limited to any particular community, sex or age. The Malaysian Customs will have to step up their enforcement activities to curtail smuggling activities.

Conclusion

The 2009 Budget introduced a number of tax administrative measures which can give rise to concern in terms of adding to the cost of doing business. There is a need to issue the appropriate guidelines or public rulings as soon as possible. It is noteworthy that the tax authorities are keen in obtaining feedback on the proposed changes so that the issues raised can be adequately considered.

Overall, these are certainly a number of positive measures announced in the 2009 Budget. Undoubtedly, this emphasis is placed on improving the well-being of the *Rakyat* and the importance placed on Corporate Social Responsibility amongst others, underlining the theme of "A Caring Government". TG

Prepared and consolidated by CCH Tax Editors

PREVENTION IS THE KEY!

Just as we expected the much publicised accounting-related irregularities in the corporate arena has put some business in a tighter regulatory control. A recent report in *the Star* highlighted that the IRB has collected **RM716.1mil in penalties** last year from personal and corporate taxpayers who committed tax evasion which is one of the main offences.

As the saying goes, prevention is better than cure. Corporations rely on tax advisors and auditors to be vigilant in controlling weaknesses and inadequacies in record keeping to prevent errors and unusual transactions that could indicate fraud, a lack of probity or corruption from occuring.

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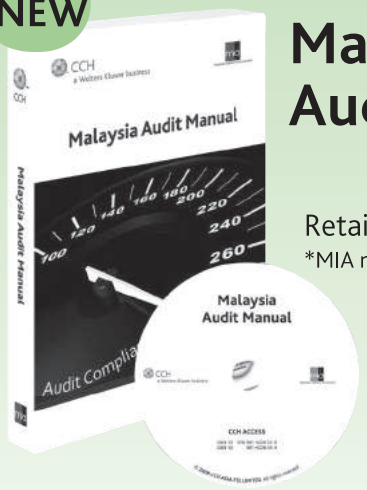

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Author

Malaysian Institute of Accountants &
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Author

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REINVESTMENT ALLOWANCE – Impact of the 2009 Budget Proposals

By Margaret Lee Seet Cheng

The reinvestment allowance (RA) incentive was first introduced by the Honorable Malaysian Minister of Finance in his 1978 Budget Speech. At that material time, there was a host of tax incentives available for companies undertaking promoted activities but none to encourage existing businesses to reinvest and expand resulting in national development.

RA in that initial form was open to manufacturing and processing industries undertaking expansion approved by the Ministry of Trade and Industry. The RA rate was 25 percent of qualifying expenditure and was deducted from adjusted income.

In this article, Margaret Lee examines the impact of the 2009 Budget Proposals on RA to the business community.

The existing RA incentive and legislation

The coverage and complexity of RA has substantially increased since then. The salient features of the existing RA incentive, before the 2009 Budget proposal, are as follows:

- Eligible companies are companies resident in Malaysia that have been in operation for at least 12 months;
- The qualifying capital expenditure is incurred on factory, plant or machinery used in Malaysia for purposes of a **qualifying project** to expand, modernise or automate its existing business in respect of manufacturing or processing of a product or any related product within the same industry or diversifies its existing business into any related products within the same industry. Such qualifying capital expenditure incurred on a qualifying project would be eligible for RA;
- The transformation of a business of rearing chicken and ducks from an opened house system to a closed house system as verified by the Minister of Agriculture is also considered as a qualifying project;
- The RA is given at the rate of 60 percent on the qualifying capital expenditure incurred by the company on a qualifying project and is offset against 70 percent of its statutory income for the year of assessment. Any unutilised allowance can be carried forward to subsequent years of assessment until fully utilised;
- The RA will be enhanced whereby a deduction against 100 percent of statutory income will be granted if a company's process efficiency ratio achieves the level of productivity as prescribed by the Minister of Finance or if the qualifying project is located within the promoted areas of Sabah, Sarawak, Eastern Corridor of Peninsular Malaysia, Labuan & Perlis;

The RA incentive ranks high on the popularity stake amongst manufacturers largely due to the clear and transparent qualifying criteria and ease of claim as it does not involve submission of applications to the regulatory authorities for prior approval. Therefore, notwithstanding that on a cursory glance, the "popularity" of RA results in a direct loss of corporate income tax revenue collected, on a macro basis, the country as a whole would have gained both directly and indirectly from the reinvestment undertaken and its cascading effect on Malaysian subcontractors, suppliers etc. The incentive can thus be said to have achieved the Malaysian Government's two-prong objectives of retaining foreign investments in Malaysia and enabling local companies to expand and/or modernising its processes to compete in the global market.

Proposed amendments to the RA legislation

The Honourable Minister of Finance delivered the 2009 Budget Speech on 29 August 2008. His Budget Speech included proposals made to tighten the qualifying criteria and conditions of RA and the highlights of this are as follows:

i) Manufacturing activity be given a more specific and clear definition under Schedule 7A. Under this new definition which is explored in greater depth below, "simple manufacturing" as well as processing activities are no longer eligible for RA;

ii) The "moratorium period" that a company must be in operations for not less than 12 months is extended to 36 months;

iii) A company purchasing an asset from a related company within the same group is not eligible for RA on the asset if the transfer or company had claimed an allowance on that said asset;

iv) The "claw back" provision for assets disposed within a period of two years from the date of purchase of the asset is now extended to five years;

Effective date

The proposal is effective from the YA 2009 and subsequent years of assessment

Impact of changes

Definition of "manufacturing"

The proposal defined "manufacturing" for RA purposes to mean –

(a) Conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the size, shape, composition, nature or quality of such materials;
(b) Assembly of parts into a piece of machinery or products; or
(c) Mixing of materials by a chemical reaction process including biochemical process that changes the structure of a molecule by the breaking of the intra molecular bonds or by altering the spatial arrangement of atom in the molecule,

The term "manufacture" under the proposed definition would not include:

(i) the installation of machinery or equipment for the purpose of construction;
(ii) a simple packaging operations such as bottling, placing in boxes, bags and cases;
(iii) a simple fixing;
(iv) a simple mixing of any products;
(v) a simple assembly of parts;
(vi) any activity to ensure the preservation of products in good condition during transportation and storage;
(vii) any activity to facilitate shipment and transportation;
(viii) any activity of packaging or presenting goods for sale; or
(ix) any activity that may be prescribed by the Minister, notwithstanding the above interpretation.

However, the Industrial Coordination Act 1975 (ICA) which governs the licensing of manufacturing companies also has its own definition of "manufacturing" albeit less involved. Section 2 of the ICA defines "manufacturing activity" to mean the making, altering, blending, ornamenting, finishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal and includes the assembly of parts and ship repairing but shall not include any activity normally associated with retail or wholesale trade.

It is also noted that the Sales Tax Act 1972 provides another variation of the definition of "manufacturing". It differs from both the ICA's and Schedule 7A's definitions. These differing definitions of "manufacturing" only serve to increase the complexity of compliance by manufacturing companies. The manufacturing sector would greatly benefit from one definition of "manufacturing" adopted consistently across the various legislations to achieve the objectives of these statutes.

The term "simple" generally describes an activity which does not need special skills, machines, apparatus or equipment especially produced or installed for carrying out the activity.

The proposed definition of "manufacturing" specifically excludes "simple" activities such as simple packaging, simple fixing, simple mixing of products and simple assembly. The definition of "simple" is not conclusive as in most cases such activities require machines, apparatus or equipment which if not produced are at least especially installed for carrying out the activity. For example: the mixing of products say fertilisers would involve the use of machines, apparatus or equipment specially installed for this activity. In such a case, it would appear that the company would be eligible for the RA if it undertook an expansion project.

The proposed amendments will inevitably require judgment by the taxpayers in determining whether its "manufacturing" activity qualifies for RA. With the Self Assessment System, there should be clarity and transparency in the tax system minimising the need for taxpayers to exercise onerous

judgment as this may result in imposition of penalties on the taxpayers for submission of incorrect returns. Where taxpayers wish to be on the "safe side", it is envisaged that prudent taxpayers would seek written confirmation from the Inland Revenue Board on their manufacturing activities status to qualify for RA. This will cause voluminous work both for the taxpayer and the Inland Revenue Board.

With the exclusion of "processing" from the manufacturing definition, companies which carry out processing activities are no longer eligible for RA incentive. This is a setback for companies which may have made reinvestment decisions at the time their processing activity qualifies for RA. However the stand taken by the Inland Revenue Board in allowing companies which had previously carried out "processing" activities prior to YA 2009 to continue to qualify for RA is much welcomed.

One of the thrusts of the Ninth Malaysia Plan is to "Move the Economy Up the Value Chain" whereby the focus will be on transforming industrial businesses and complementary services, especially SMEs, into strong knowledge-intensive and value-creating entities. The RA incentive will greatly assist the SMEs in providing them with tax break when they undertake projects qualifying for RA purposes. With the tightening of the definition of "manufacturing", the SMEs which commence in a small scale with low technology undertaking simple manufacturing or processes may now no longer enjoy RA and this will have adverse impact on them and the economy.

The proposed amendment would potentially exclude SME manufacturing companies from enjoying RA incentive. Is the Government's intention to preclude RA claim from the SME manufacturers?

Proposed extension to the 12-month moratorium period

There is currently a proposal to extend the 12 month moratorium period to 36 months. The question is who are the taxpayers impacted by this proposal? It would be largely manufacturers whose products do not qualify for pioneer status/investment tax allowance and are facing an uncertain market which necessitates them in deferring their capital investment. This leads to the second question: is it the intention of the Government to hold back the granting of incentives to this sector of manufacturers?

Transfer of businesses in group restructuring

The current legislation permits group companies to effectively claim RA twice on the same assets under certain circumstances. The proposed changes will close this avenue. Whilst this reflects the current policy and intention of the Government, it should be noted that coupled with the extension of the claw back period from two to five years, companies within a group undertaking a rationalisation of its business to enhance operational efficiency would be in a "lose-lose" position. It is hoped that the Government would review its position to ensure that taxpayers are not put in a worse off position having claimed the incentive when it subsequently has to restructure its business to meet its business demands.

What if a group in Malaysia would like to rationalise its manufacturing capabilities to its related companies within Malaysia? The proposed amendments would preclude a claim for RA.

Would the Government therefore reconsider not introducing this proposed change since the impact of this proposed amendment to Section 7A could potentially deny RA claim to companies in a group?

If the proposal is implemented, there is a possibility that such companies may choose to accept the incentives offered by overseas tax jurisdictions' and may as a result transfer their operations to a jurisdiction outside Malaysia.

> Is this…the intention of the Government not to encourage companies to replace their technological outdated assets with assets equipped with the state-of-the-art technology features?

Claw back of RA

Whilst it is recognised that there is a need for a clawback provision, the extension of the claw back period from the current two years to the proposed five years seems to be excessive. The decision to dispose a plant or machinery is often predicated by business needs. The current technological rate of change may result in the RA incentive to be clawed back where the proposed clawback period is extended to five years. Is this therefore the intention of the Government not to encourage companies to replace their technological outdated assets with assets equipped with the state-of-the-art technology features?

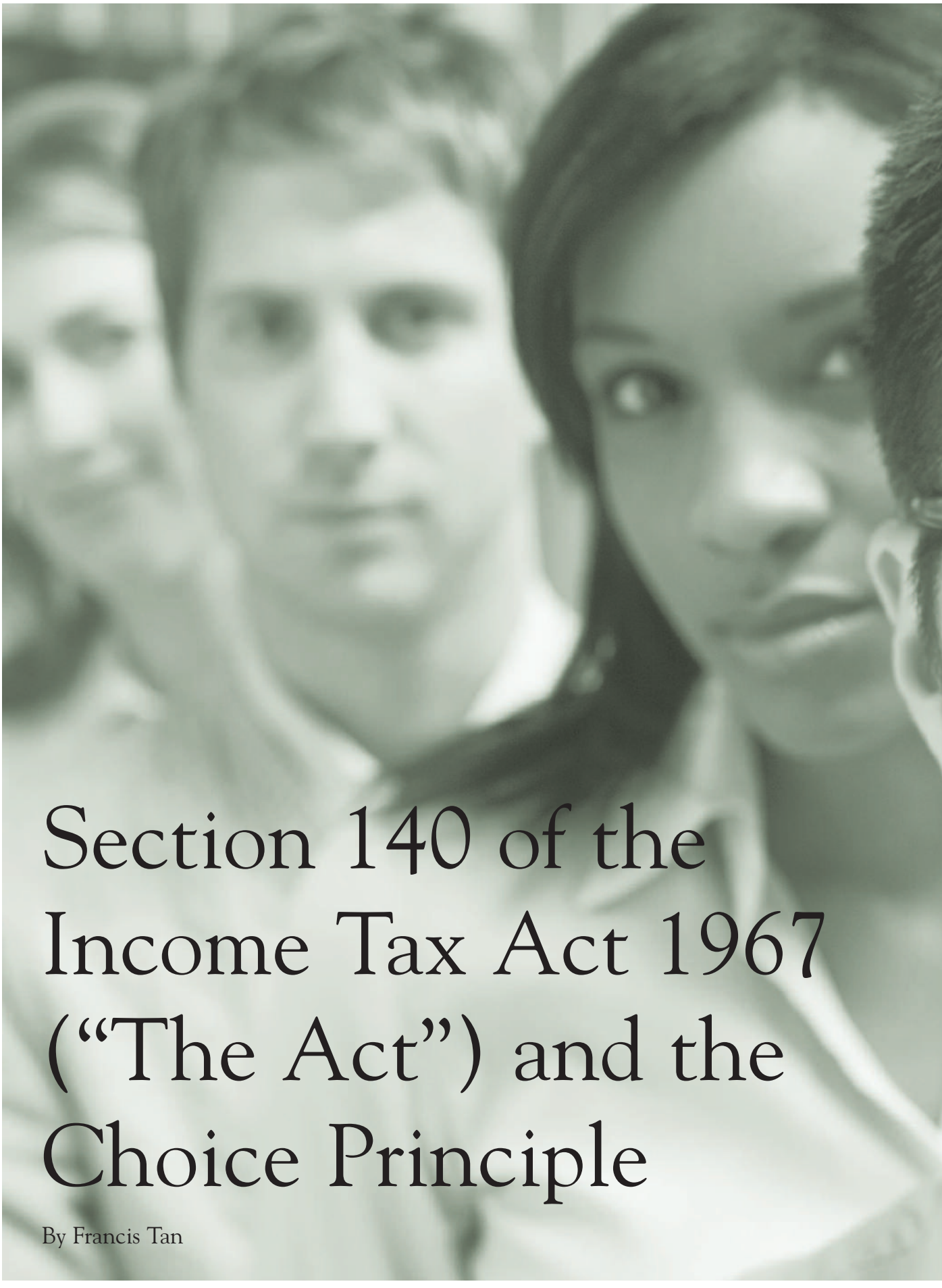
Conclusion

Despite the competition from the region, Malaysia still presents an attractive location for Foreign Direct Investments. In a way, the existing RA incentive contributes to enhancing the attractiveness of Malaysia as an investment site for Multinational Companies which are considering long term investments in the country beyond the initial incentives offered.

With the Budget proposals, the qualifying criteria for RA incentive are made more restrictive. In current times where there is stiff competition in Asean to attract and retain foreign investments and encourage local manufacturing companies in Malaysia to reinvest their funds in qualifying projects, it is likely that the proposed RA amendments may diminish the Government's efforts to attract and retain foreign direct investments in Malaysia.

It is hoped that the Malaysian Government will reconsider the proposed amendments to Schedule 7A prior to their legislation. TG

Margaret Lee *is the Senior Executive Director of PricewaterhouseCoopers, she specialises in corporate tax and stamp duty. She can be reached at margaret.lee.seet.cheng@my.pwc.com*



Section 140 of the Income Tax Act 1967 ("The Act") and the Choice Principle

By Francis Tan

The article "*Tax Avoidance and Section 140, Income Tax Act 1967*" published in *Tax Guardian* Vol. 1/No. 1/2008/Q2 is a profound treatise on the subject. However, towards the end of the article, the author quoted a paragraph of the Deciding Order of the Special Commissioners of Income Tax in the case of *SB* v *Ketua Pengarah Jabatan Hasil Dalam Negeri* (1995) 2 MSTC 2417 which reads as follows:

> "The 'choice principle' conflicts with the unambiguous language of section 140 and, if adopted, would render the existence of the section nugatory. In our opinion section 140 must be nursed and nurtured in its original form without being adulterated by any alien interpretation. The doctrine's entry into the smooth working of our fiscal system would undermine the purpose of the creation of section 140 as a provision designed to combat tax avoidance."

This passage of the Case Stated, if read in isolation may well give rise to the view that the "choice principle" is to be disregarded in the interpretation of our revenue legislation. As pointed out below, this is not the position. The taxpayer appealed to the High Court where it failed but it succeeded at the Court of Appeal. At both the High Court and the Court of Appeal, the choice principle was not expressly referred to but the judgment of *Gopal Sri Ram* JCA in *Sabah Berjaya Sdn Bhd* v *KPHDN* [1999] 3 MLJ 145 did in a way albeit indirectly, held that the choice principle is part of the law of the land. The Court of Appeal allowed the appeal on the following two grounds:

(a) that the donation by the appellant of its entire profit to Sabah Foundation, a body approved under section 44(6) of the Act was voluntary. In other words, there was a donation on the part of the appellant.

(b) there was a payment that reduces the appellant's income in circumstances in which the Act by way of section 44(6) clearly affords a reduction in liability. The appellant was not engaging in tax avoidance and section 140 of the Act has no application.

It can be clearly seen that there is a choice here for the appellant to pass its fund represented by its income and profit to its holding company, Sabah Foundation (SF). One way is for the appellant to pay tax on its profit thereby creating a section 108 credit which could then be used to frank dividend payment to Sabah Foundation. However, since SF is a body approved under section 44(6) of the Act it is clearly more efficient to make a donation to SF provided that the donation could be deducted from the appellant's aggregate income to arrive at its total income.

It may be useful to recap what the choice principle is all about. It is developed principally by the courts in Australia and New Zealand. In this brief article, it is proposed to only refer to the following authorities:

(i) In *Mangin v IRC* (1971) AC 739 at 751 which is an appeal to the Privy Council from the New Zealand Court of Appeal, Lord *Donovan* said as follows:

> "if a bona fide business transaction can be carried through in two ways, one involving less liability to tax than the other, their lordships do not think S.108 can properly be invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen. Indeed, in the case of a company it may be the duty of the directors *vis a vis* the shareholders so to act"

(ii) In *Europa Oil v IRC* (1976) 1 WLR 464 at 475 which is also an appeal to the Privy Council from the New Zealand Court of Appeal, Lord *Diplock* said as follows:

> "business or commercial transactions] will not be struck down if the method chosen for carrying them out involves the payment of less tax than would be payable if another method was followed. In such cases the avoidance of tax will be incidental and not the main purpose of the transaction or transactions which will be the achievement of some business or commercial object."

(iii) In *Mullens v CIT* (1975 – 6) 135 CLR 290 which is an appeal to the High Court of Australia, *Barwick* CJ said as follows:

> "It was indeed evident that the taxpayer entered into the transaction to obtain the advantages under section 77A which payment to Vamgas of money on the shares was thought to give. If the transaction, being effective and not in breach of the Act, reduced the amount of tax which the taxpayer otherwise would pay, it did not alter in any relevant sense the incidence of tax. Any intention to enter such a transaction so as to obtain the statutory benefit would not relevantly be an intention to alter the incidence of tax. The Court has made it quite plain in several decisions that a taxpayer is entitled to create a situation to which the Act attaches taxation advantages for the taxpayer. Equally, the taxpayer may cast a transaction into which he intends to enter in a form which is financially advantageous to him under the Act."

and per *Stephen* J at p. 318

> "Section 260 is concerned with instances in which there exists a purpose or effect of altering the incidence of tax, of relieving from liability to pay tax, of defeating, evading or avoiding liability imposed by the Act or of in any respect preventing its operation. The transaction here in question does not supply any such instance unless indeed purposefully to take advantage of a deduction offered by the legislation is enough to attract the section. That it is not is now well established. The principle in *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (31) is not to be confined to cases where the Act offers

> to the taxpayer a choice of alternative tax consequences either of which he is free to choose; it was there held that merely because the taxpayer chose, quite deliberately, the alternative most advantageous to it from a tax standpoint it did not thereby attract section 260. So, too, if no question arises of a choice between two courses of conduct, but, instead, the Act offers certain tax benefits to taxpayers who adopt a particular course of conduct; the adoption of that course does not establish any purpose or effect such as is described in section 260. Instead, an assessment which reflects the tax consequences of the course of conduct which the taxpayer has in fact adopted will then represent a due and proper incidence of tax, there will be no relief from, or defeating of, liability to tax and the Act will have the very operation which the legislature intended."

(iv) In *Slutzkin v FC of T* (1977) ATC 4076 (Full High Court of Australia), *Barwick* CJ said at p. 4177 said as follows:

> "But the choice of the form of transaction by which a taxpayer obtains the benefit of his assets is a matter for him: he is quite entitled to choose that form of transaction which will not subject him to less tax than some other form of transaction might do."

(v) In *FC of Taxation v Gulland* (1985) 85 ATC 4765 (Full High Court of Australia), *Gibbs* CJ at p. 4774 said as follows:

> "… there will be no relevant alteration of the incidence of tax if the transaction, being the actual transaction between the parties, conforms to and satisfies a provision of the Act even if it has taken the form in which it was entered into by the parties in order to obtain the benefit of that provision of the Act. It would be otherwise if there had been some antecedent transaction between the parties, for which the transaction under attach was substituted in order to obtain the benefit of the particular provision of the Act. Section 260 is not directed to tax on income to which the taxpayer is entitled only by reason of the actual transaction into which the parties have entered."

and per *Brennan* J, p. 4779:

> "The true reconciliation between the choice principle and the Newton test of purpose is to limit the former to cases depending upon a specific provision of the Act. It is not necessary now to consider the boundary between the two classes, but in principle only those arrangements or parts of arrangements which depend upon specific provisions fall outside the scope of section 260."

(vi) In *C of IR v Challenge Corporation Ltd* (1986) STC 548 which is an appeal to the Privy Council from the New Zealand Court of Appeal, Lord *Templeman* at page pp. 554, 555 said as follows:

> "The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words of Lord *Tomlin* in *IRC v Duke of Westminster* [1936] AC 1 at 91, 19 TC 490 at 520 '"Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be."' In that case however, the distinction between tax mitigation and tax avoidance was neither considered nor implied.
>
> Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an 'arrangement' but from the reduction of income which he accepts or the expenditure which he incurs.
>
> Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.
>
> When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income. If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income.
>
> Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitled the taxpayer to reduction of tax liability. The tax advantage results from the expenditure on the premium.
>
> A taxpayer may incur expenses on export business or incur capital or other expenditure which by statute entitles the taxpayer to a reduction of his tax liability. The tax advantages result from the expenditure for which Parliament grants specific tax relief.
>
> When a member of a specified group of companies sustains a loss, section 191 allows the loss to reduce the assessable income of other members of the group. The tax advantage results from the loss sustained by one member of the group and suffered by the whole group.
>
> Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.
>
> Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had."

Basically, the choice principle supplements another principle of law that a taxpayer is entitled to conduct its business in such a way as to pay the minimum amount of tax. One does not have to go as far back as 1934, the year *CIR v Duke of Westminster* TC 19 490 was decided. In the Supreme Court case of *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 *Lee Hun Hoe* CJ (Borneo) said as follows:

> "Since the event of income tax everyone is trying his best within the law to pay as little tax as possible. All kinds of schemes are thought of. No commercial person in his right sense is going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved. There is nothing wrong at all for a company to organise their affairs in such a way as to minimize minimise tax."

The principle of law so laid down by the highest court of the land does not seem to go down well with the Inland Revenue Board. The IRB has in many instances adopted the stand that a taxpayer has to conduct its business in such a way that some tax has to be paid, purportedly by invoking section 140 of the Act. It was recently reported in the news that the IRB had ruled a holding company which had given interest free loans to its subsidiaries should be charged to tax on deemed interest income. It is not clear whether the IRB has sought to rely on section 140. If so, it is submitted that the reliance has no legal basis. The granting of an interest free loan does not give rise to any tax liability so there cannot be any alterations in the incidence of tax.
In fact, in *Rakyat Berjaya* the payment of interest by a subsidiary to its holding company on an outstanding debt was challenged by the IRB, but failed at the Supreme Court.

In conclusion, it is the view of the writer that the views of the Special Commissioners of Income Tax in *SB Sdn Bhd* that the choice principle conflicts with section 140 of the Act is wholly wrong. Section 140 deals with tax avoidance and is applicable to a situation where a taxpayer does not incur an expenditure or suffer a loss and yet gain a tax advantage. The choice principle is the foundation of tax mitigation and effective tax planning. TG

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TECHNICAL UPDATES

The Technical Updates published here are summarised from the selected Government Gazettes published between 13 June 2008 and 15 September 2008.

INCOME TAX

- **Income Tax (Exemption) (No. 4) Order 2008 [P.U.(A) 191/2008]**
- **Income Tax (Deduction for Gifts of New Personal Computer and Monthly Broadband Subscription Fee to Employees) Rules 2008 [P.U.(A) 192/2008]**

The 2008 Budget announced that employees will be exempted from the payment of income tax for gifts of computers received from employers and payment of broadband subscription fees by employers on behalf of employees. The announcement has been effected as follows:

Exemption
Income Tax (Exemption) (No. 4) Order 2008 exempts an employee from the payment of income tax in relation to the value of benefit which is received by the employee as a gift from his employer in ascertaining the gross income from his employment in the basis period for a year of assessment.

Deduction
Income Tax (Deduction for Gifts of New Personal Computer and Monthly Broadband Subscription Fee to Employees) Rules 2008 states that in ascertaining the adjusted income of a person resident in Malaysia from its business in the basis period for a year of assessment, a deduction shall be allowed for a gift given by that person to its employees.

Such "value of benefit" or "deduction" (as the case may be) shall be:
(a) the cost for one unit of new personal computer; or
(b) the monthly broadband subscription fee registered in the name of that person.

"Personal computer" means a desktop computer, laptop computer and handheld computer but does not include a hand phone with computer facilities.

This aforementioned Exemption Order and Rules are effective from the year of assessment 2008 until the year of assessment of 2010.

- **Income Tax (Accelerated Agriculture Allowance) (Plantation of Rubber Wood Tree) Rules 2008 [P.U.(A) 193/2008]**

The Rules gives effect to the 2003 Budget proposal to provide accelerated agriculture allowance to non-rubber plantation companies.

Under the Rules, a company which qualifies will be eligible to claim 100 per cent of the qualifiying agriculture expenditure incurred in the year.

"Qualifying agriculture expenditure" is defined as the clearing and preparation of land for purposes of agriculture and the planting (but not replanting) of crops on land cleared for planting.

The deduction of allowances shall only apply to a company whose agricultural project of forest plantation project is planted with species other than rubber wood tree and at least 10 per cent of the total area of the those projects are now planted with rubber wood tree as verified by the Ministry of Plantation Industries and Commodities.

The Rules shall not apply to a company in the basis period for a year of assessment where the company has been granted–

(a) any incentive under the Promotion of Investments Act 1986
(b) reinvestment allowance under Schedule 7A of the ITA;
(c) exemption under the Income Tax (Exemption) (No. 9) Order 2006 [P.U.(A) 50/2006] or Income Tax (Exemption) (No. 10) Order 2006 [P.U.(A) 51/2006]; or
(d) deduction for capital expenditure on approved agriculture project under Schedule 4A of the ITA.

These Rules are effective from the year of assessment 2003 until the year of assessment 2010.

- **Income Tax (Accelerated Capital Allowance) (Security Control Equipment or Monitor Equipment) Rules 2008 [P.U.(A) 205/2008]**

Companies resident in Malaysia that incur capital expenditure on the:
– installation of security control equipment for a factory, provided that the company is a company approved under the Industrial Co-ordination Act 1975; and
– installation of any monitor equipment for a container lorry bearing Carrier Licence A and general cargo lorry bearing Carrier Licence A or C used for the business purposes of the company, will be given accelerated capital allowance to be fully written off within a period of one year. The security control equipment and monitor equipment will qualify for an initial allowance of 20% and annual allowance of 80% in the year the expenditure is incurred.

However, companies that have been granted incentives under the *Promotion of Investments Act 1986* or the reinvestment allowance under Schedule 7A of the ITA, will not qualify for the accelerated capital allowance.

The accelerated capital allowance will be withdrawn where the security control equipment and monitor equipment are disposed within two years of acquisition.

Security control equipment and monitor equipment specified in the Schedule to the Rules are: anti-theft alarm system; infra-red motion detection system; siren; access control system; closed-circuit television; video surveillance system; security camera; wireless camera transmitter; time lapse recording and video motion detection equipment; and GPS vehicle tracking system.

The Rules are effective from the year of assessment 2008 until the year of assessment 2012.

- **Income Tax (Exemption) (No. 5) Order 2008 [P.U.(A) 247/2008]**

Under this Order, any qualifying body of persons, trust body or a company limited by guarantee that establishes and manages non-profit oriented schools, whether they are government-assisted or private, will be given income exemption on the income received from the management of such schools.

Such non-profit schools must be registered under the Education Act 1996 and be approved and recognised by the Ministry of Education of Malaysia.

This Order is not applicable to schools approved as charitable organisations or institutions under section 44(6) of the ITA.

This Order shall have effect from the year of assessment 2008.

Income Tax (Exemption) (No. 6) Order 2008 [P.U.(A) 255/2008]

This Order exempts a fund management company resident in Malaysia from the payment of income tax on the statutory income derived from the business of providing fund management services to local investors. To qualify for the exemption, the fund must be managed in accordance to the *Syariah* principles and certified by the Securities Commission for each year of assessment.

For the purpose of this exemption, the fund management company must maintain a separate account for the income derived from the business of providing fund management services to local investors.

This Order is not applicable to foreign fund management companies under section 60G of the ITA.

This Order shall have effect from the year of assessment 2008 until the year of assessment 2016.

- **Income Tax (Deduction for Promotion of Malaysia International Islamic Financial Centre) Rules 2008 [P.U.(A) 307/2008]**

Under the Rules, a deduction shall be allowed for the following outgoings and expenses incurred in the basis period relating to the business for promoting Malaysia as an International Islamic financial centre:

(a) expenses incurred in respect of market research and feasibility study;
(b) the cost of preparing technical information to a person outside Malaysia relating to type of services offered excluding expenses for giving technical information to that person after purchase;
(c) expenses directly incurred for participating in an event other than expenses specified in paragraph (d);
(d) expenses by way of fares in respect of travel to a country outside Malaysia by a representative of a person for the purpose of any event and the actual expenses are subject to –
    (i) a maximum of three hundred ringgit per day for accommodation; and
    (ii) a maximum of one hundred and fifty ringgit per day for sustenance, for the whole period commencing with the representative's departure from Malaysia and ending with his return to Malaysia for participating in the event;
    (iii) expenses incurred for the cost of maintaining sales office overseas provided that the sales office has been approved by the Malaysia International Islamic Financial Centre Secretariat;
    (iv) expenses verified by the Malaysia International Islamic Financial Centre Secretariat which is incurred for participating in an event other than those specified in paragraphs (c) and (d); and
    (v) expenses incurred in respect of publicity and advertisement in any media outside Malaysia.

Such deductions allowed shall be in addition to any deduction under section 33 of the ITA.

The Rules shall have effect from the year of assessment 2008 until the year of assessment 2010.

STAMP DUTY

Stamp Duty (Remission) Order 2008 [P.U.(A) 211/2008]

Fifty (50) per cent of the stamp duty is remitted for the purchase of one unit only of residential property by an individual costing not more than RM250,000 in relation to a Sale and Purchase Agreement executed on or after 8 September 2007 but not later than 31 December 2010.

"Residential property" means a house, condominium unit, apartment or flat built as a dwelling house.

This Order revokes Stamp Duty (Remission) (No. 3) Order 2007 [P.U.(A) 402/2007] and is deemed to have come into operation on 8 September 2007.

SERVICE TAX

- **Service Tax (Amendment) Regulations 2008 [P.U.(A) 216/2008]**

The Regulations amend the Second Schedule to the Service Tax Regulations 1975 [P.U.(A) 52/1975], where the heading "Group C: Restaurants Located Outside Hotel" in the column "Taxable Person" the words "RM300,000" are substituted by "RM3,000,000".

The Regulations come into operation on 1 July 2008.

LABUAN OFFSHORE

Labuan Offshore Business Activity Tax (Forms) (Amendment) Regulations 2008 [P.U.(A) 248/2008]

The Labuan Offshore Business Activity Tax (Forms) Regulations 1991 [P.U.(A) 157/1991], is amended in the Schedule by inserting a new Form 8 ("Election by an Offshore Company") pursuant to section 8A of the Labuan Offshore Business Activity Tax Act 1990.

GUIDELINES

Guideline for Labuan Offshore Companies Opting to be Taxed under the Income Tax Act 1967

Following announcements in the 2008 Budget and changes to the tax legislation, Labuan offshore companies (LOCs) have now the option to be taxed under the Income Tax Act 1967 (ITA). The changes are expected to remove some of the impediments faced by LOCs and together with the features listed below, Malaysia is positioned to be a premier holding company jurisdiction in the region.

The Inland Revenue Board (IRB) recently released a guideline which sets out the election procedures and compliance requirements of LOCs electing to be taxed under the ITA. The guideline sets out the tax treatment of the LOC that has made the election and covers the following areas:

- Scope of taxation of an LOC charged to tax under the ITA
- Residence status of an LOC
- Determination of source of income
- Exemption from tax under the ITA
- Repatriation of profits
- Application for Advance Rulings

The guideline is available at the IRB's website: www.hasil.org.my

Case Summaries

Pertubuhan BKBS v Ketua Pengarah Hasil Dalam Negeri
Special Commissioners of Income Tax
Appeal No. PKCP (R) 10/2003
Judgment delivered on 12 November 2007
(2008) MSTC 3,662

Revenue Law – Income Tax – Non-profit organisation – Rented out properties to finance its activities – Whether the activities were "vocation" and constituted a business or trading – Cogent evidence necessary to discharge onus of proof – Income Tax Act 1967, section 2 and section 11

The taxpayer was a non-profit youth organisation registered with the Registrar of Societies. It rented out premises to finance its activities to promote, *inter alia*, friendship and to encourage youth to be socially responsible, etc. There was no monetary gains from these activities. The members were not charged for participating in its activities which were financed by annual government grants and income received from rental of its premises.

It was contended by the taxpayer that its activities were a vocation which constituted business under section 2 of the *Income Tax Act 1967* ("ITA"). As its business of letting its premises to generate income to finance the execution of its objects, it therefore fell within the proviso to section 11(1) of the ITA. These were refuted by the Director General who proceeded to assess the taxpayer under the provision on deemed income.

Held: Appeal dismissed.

1. Referring to the dictionary meanings on the word "vocation" and applying the principles in the case authorities, the activities carried out by the taxpayer were merely community or social activities which did not involve any trading. As the definition of "business" in the Act provided that "vocation" be read with the words "and trade", the taxpayer must therefore show that their activities involved trading as well. However, they were not able to, in view of their objectives and activities; they received financial assistance and their activities were non-profit making.

2. Onus was on the taxpayer to show that the assessments were wrong, excessive or erroneous. This onus could not be discharged without cogent evidence to substantiate the claim.

For the taxpayer: Jennifer Chen.

For the Director General of Inland Revenue: Liz Ellyna binti Mohd Zaid and Ashrina Ramzan Ali.

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

Ketua Pengarah Hasil Dalam Negeri v Hock Lee Holdings Sdn Bhd

High Court of Sabah and Sarawak (Kuching)
Suit No. 14-3 of 2006-I
Judgment delivered on 29 October 2007
(2008) MSTC 4,298

Revenue Law – Income Tax – Gains from disposal of land – Whether taxable as adventure in the nature of trade or to be treated as a capital realisation – Considerations in dealing with an appeal – Income Tax Act 1967, section 4(a).

The taxpayer company acquired nine parcels of land in 1975 and 1979. In 1983, the taxpayer and other land owners signed an agreement with its wholly owned subsidiary company, Hock Lee Construction Sdn Bhd ("HLC"), to develop the land into residential homes and commercial and industrial shophouses. In 1994, the taxpayer, the other land owners, and HLC entered into a supplementary agreement for the allocation of unit under the proposed development.

In 1997 to 1999, the taxpayer disposed of its 94 units. The gains from the disposals were treated as business income from an adventure in the nature of trade and so taxed under section 4(a) of the *Income Tax Act 1967* (ITA). The assessments raised on the taxpayer related to the years of assessment 1996 to 1998 and 2000 (preceding year and current year basis).

At the hearing before the Special Commissioners, the findings were that the taxpayer acquired the property for long term investment and not for trade, and that the gains from the sale of the properties were not subject to tax, being capital realisation. The Director-General appealed against this decision.

The issue for determination was therefore whether the taxpayer was carrying on a business of trade in respect of the lands and so the assessments were justifiably raised.

Held: appeal dismissed.

1. Some principles of law in dealing with an appeal and which must be observed included the following: (a) whoever appealed against the Special Commissioners' decision bore the burden of proof to show that the same was wrong; (b) to discharge that burden, the appellant must show that the decision was one which no person properly instructed and acting judicially could have come to; (c) the appellant challenging the findings of fact must ask for a Case Stated to state a question whether a particular finding of fact was unjustified in view of the evidence adduced; (d) findings of primary facts by the Special Commissioners could not be questioned by the court as it did not sit as a review court of facts. The court was only to determine whether the conclusion reached was consistent to the primary facts.
2. The Special Commissioners' conclusions that the proceeds from the sale of the houses were not taxable were consistent with their findings of fact and should not be faulted.

For the taxpayer: Chew Peng Hui.

For the Director General of Inland Revenue: Hazlina Hussain.

Before: David Wong J.

DD Dev Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

Special Commissioner of Income Tax
Appeal No. PKCP (R) 14/2005
Case stated delivered on 9 August 2007
(2008) MSTC 3,726

Revenue Law – Income Tax – Development project for mixed properties – Progressive payment formula for calculating profits – Adherence to Director-General's guidelines – Change in method of calculating profit – Additional assessment issued – Treatment of the project as three projects instead of one – Whether reopening of assessments correct and valid – Exceptions under the guideline – Limitation period for raising additional assessments.

The taxpayer was a housing developer company. By virtue of two sale and purchase agreements, both dated 7 January 1995, the taxpayer acquired two contiguous pieces of land. The taxpayer intended to build residential and commercial building units thereon, namely, shop-office, shopping mall/plaza and condominium ("the Project"). To implement the Project, in its applications to the relevant government agencies such as the land office, etc, a single application was made.

In computing the profit for income tax purposes, the taxpayer followed the Director-General's guidelines ("the Guidelines") of using the progressive payment formula to estimate the annual profits and tax. This was calculated and accepted by the Director-General. Notices of assessment were then issued. Subsequently, however, the Director-General proposed to use the final actual realised sales and profit figures (instead of estimates of the value of the development and gross profit of the Project as stipulated in the Guidelines) in the progress payment formula and to apply this retrospectively from 1995 to 1999 (the "Spreading Back Proposal"). The taxpayer was then served with additional assessment on this basis. Subsequently also, the Director-General treated the Project as three instead of one project. Additional assessments were again issued. The taxpayer did not agree with the changes and hence, the present appeal.

The issue that had to be decided was therefore whether under the circumstances, the additional assessment in respect of years of assessment 1996 to 1999 was correct and validly made on the taxpayer. If it was incorrect, what method of computation should have been adopted by the taxpayer.

Held: appeal allowed.

1. The reopening of the assessments was unauthorised and contrary to the Director-General's own Guidelines when there was no loss or the actual profit did not exceed the estimated profit, as per paras 7, 9.2 and 11 of the Guidelines.
2. There was no justification for raising the additional assessments. The taxpayer's tax computations for the years of assessment 1996 to 1999 had been accepted by the Director-General and notices of assessment accordingly issued and the tax paid. These assessments were now final and conclusive pursuant to section 97(1) of the *Income Tax Act 1967* ("the Act").
3. The additional assessment for year of assessment 1997 was also statute-barred as it was not made within six years after 1997 and it was not proven that there was negligence on the taxpayer's part under section 91(3) of the Act.
4. The Project was to be considered as just one project and not three projects.

For the taxpayer: Nik Saghir bin Mohd Noor.

For the Director General of Inland Revenue: Liz Ellyna Mohd Zaid and Mohd Harris Hanafi

Before: Dato' Ahmad Zaki Husin, Othman Abdullah and Mohd Nor Lamsah.

VKM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

Special Commissioners of Income Tax
Appeal No PKCP (R) 31/2003
Judgment delivered on 18 May 2007
(2008) MSTC 3,669

Revenue Law – Income Tax – Valuation and provision of obsolete stocks – How calculable – Market value of the obsolete stock – Best estimate sufficient

The taxpayer is in the business of manufacturing liquid display crystal and electronic components. Both the finished products and the raw materials ("the stock") needed for manufacturing the finished goods were highly tailored for their respective purposes. The finished products were, in turn, components for the customers' end-products. Due to the high degree of specificity therefore, the stock could not be recycled for other purposes or dismantled into its parts to be used. Given their then becoming non-functional and obsolete, the taxpayer valued the stock at zero market value, and made provisions for obsolete stock. The Director General objected to this method and valued the stock at cost and added the provisions of obsolete stock back to arrive at the taxpayer's adjusted income.

Held: Appeal allowed.

1. Reading section 35(1) and the definition of market value in section 2 of the ITA, it would be reasonable that stock in trade should be valued at cost price at the relevant period. As a concession to the taxpayer, though, where the market value is less than the cost price, the lower figure may be taken for the purpose of valuation. Hence, market value would denote the price of the stock in trade if it was marketed. A best estimate would suffice for this purpose.
2. As the stock could not be re-used or re-sold, its market value would be zero. The provisions of obsolete stocks in the accounts were therefore also allowable. TG

For the taxpayer: Yeo Eng Ping.

For the Director General of Inland Revenue: Hazlina Hussain and Normareza Mat Rezab.

Before: Dato' Ahmad Zaki Husin, Hariraman Palaya and Datuk Sahari Mahadi.

International News

By Rachel Saw

The section only covers selected developments from the South-East-Asia Region and relates to the period June to August 2008.

Brunei

The government has introduced various changes to Brunei's tax regime effective 1 January 2008 via the issuance of two gazette orders, namely Income Tax (Amendment) Order, 2008 and Income Tax (Amendment) (No. 2) Order 2008. Some of the more significant changes are:

- The corporate income tax rate is reduced to 27.5% for 2008, and 25.5% from 2009 onwards;
- A new income tax threshold applies to small and medium-size enterprises whereby the first BND 50,000 of chargeable income is taxed at 25% of the applicable tax rate, the next BND 50,000 is taxed at 50% of the applicable tax rate, and the balance is taxed at the prevailing tax rate;
- Newly incorporated companies are exempt from tax on the first BND 100,000 of chargeable income during the first three consecutive years of assessment falling in or after 2008. The balance is taxed at the prevailing tax rate;
- Payments of Islamic religious dues such as *zakat* and *fitrah* are now tax-deductible expenses;
- Expenses incurred in maintaining motor vehicles including fuel and repairs are tax-deductible. However, where the cost of the vehicle exceeds BND 50,000, the deduction is limited to the proportion that BND 50,000 bears to the actual cost of the vehicle;
- The qualifying capital expenditure of a motor vehicle which is constructed or adapted to carry a maximum seven passengers (excluding the driver) and weighing 3,000 kg and below is limited to BND 50,000;
- Capital allowance claims for industrial building and structures has been increased to 20% for initial allowances, and to 4% for annual allowances. "Industrial buildings and structures" has also been redefined to include hotel-occupied buildings or structures;
- Withholding Tax (WHT) is now levied on the following gross payments to Non-Residents (NRs) made on or after 1 January 2008: (i) 15% on interest, commissions, fees, and other payments relating to loans and rent for the use of movable property; (ii) 10% on royalties or other lump-sum payments for the use of immovable property, and know-how payments for the use of scientific, technical, industrial or commercial knowledge or information; and (iii) 20% on management fees, technical assistance and service fees, and remuneration of a NR director;
- The WHT is due within 14 days of the payment, and a penalty ranging from 5% to 15% of the tax payable is imposed on late payments of WHT; and
- The definition of "resident" has been amended to include a person who is physically present or who exercises an employment (other than a director) in Brunei for 183 days or more in the preceding year of assessment.

Hong Kong

Tax waiver for first Islamic bond

Following the signing of the Memorandum of Understanding (MOU) on Islamic financial products with Dubai, the Hong

Kong Airport Authority plans to raise up to USD 1 billion by issuing Hong Kong's first Islamic bond. The Secretary for Financial Services and Treasury is reported to have said that the government will waive certain taxes for the city's first Islamic bond and that this will boost the development of Islamic finance in Hong Kong.

India

Clarification issued on tax impact of securities lending arrangements

The Central Board of Direct Taxes (CBDT) issued Circular No. 2/2008 in early 2008 with regard to the tax treatment of securities lending arrangements. By way of background, the Securities and Exchange Board of India (SEBI) in December 2007 issued a circular permitting all classes of investors (i.e. individuals, institutions, etc.) to short sell; additionally, in order to provide a mechanism to enable the settlement of such securities sold short, it introduced a Securities Lending and Borrowing Scheme. As a result, the following taxation issues arose:

- Would the lending/borrowing of securities amount to a "transfer" of a capital asset by the lender for the purposes of the Income Tax Act 1961 (ITA); and
- Would the lending/borrowing of securities be subject to the Securities Transaction Tax.

The CBDT in Circular No. 2/2008 confirms that:

- the transaction would not be regarded as a "transfer" as section 47(xv) of the ITA provides the lending of securities under guidelines issued by the SEBI would not be regarded as a transfer; and
- the Securities Transaction Tax would not be applicable.

Indonesia

WHT on income from construction services

The government has issued Government Regulation (GR) Number 51 of 2008, which provides the final income tax rates for construction services. Contracts paid after 31 December 2008 will be subject to the provisions of GR 51 of 2008, as follows:

- Engineering construction services are taxed at 2% where they are provided by small-scale businesses, 4% where the service provider is not classified as a business, and 3% in all other cases;
- Construction planning and supervision services are taxed at 4% where the service provider is classified as a business and 6% if otherwise;
- The tax is to be withheld by recipients of the construction services, or remitted by service providers if it is not withheld;
- Permanent establishments (PEs) carrying on construction services are subject to tax at the above-mentioned rates, which is separate from the 20% branch profits tax imposed pursuant to Art. 26 of the Income Tax Law 17/2000 (subject to tax treaty relief);
- Business losses arising from the provision of construction services can only be used up to the 2008 tax period and cannot be carried forward to subsequent periods; and
- Construction service providers are required to maintain separate records in relation to income arising from construction services and other business activities.

GR 51 of 2008 also provides definitions for construction-related activities such as planning, engineering and supervision.

Amendment to WHT rules for discounts of state debentures

The government has issued Government Regulation 27 of 2008, which amends the rules for WHT on *discounts* (or interest) of state debentures. The WHT rate on bond discounts remains at 20% (subject to tax treaty relief). However, the following changes are introduced under the new regulation:

- The definition of "state debentures" is expanded to mean state treasury notes and state bonds in IDR and foreign currencies whereby the interest and principal amounts are guaranteed by the Republic of Indonesia;
- The meaning of "discounts" of state treasury notes has been changed to the excess of (i) the nominal value of the bonds upon maturity over the price paid on the primary or secondary market, or (ii) the selling price of the bonds on the secondary market over the price paid on the primary or secondary market;
- The party responsible for withholding the tax on the discount of the state treasury notes has been changed to (i) the issuer of the bonds or custodians that act as payers, where the discount is received by the bondholders upon maturity of the bonds, or (ii) securities companies (brokers) or banks acting as intermediary traders or purchasers, where the discount is received by bondholders from secondary market trading; and
- The following parties are exempt from the WHT: (i) banks incorporated in Indonesia and branches of foreign banks in Indonesia, (ii) pension funds that have been approved by the Minister of Finance, and (iii) for the first five years from their incorporation, mutual funds that are listed on the capital market and registered with the Financial Institution Supervisory Board.

"Business purpose" test for transfer of assets in business merger, consolidation or expansion

The tax authorities released the Regulation of the Director General of Taxation No. PER-28/PJ./2008 dated 19 June 2008 setting out details of the "business purpose" test which must be met by taxpayers who wish to apply the book value of assets that are transferred as part of a business merger, consolidation or expansion. An application for the use of the assets' book values must be submitted to the Director General, who would refer to the following criteria in deciding whether or not the "business purpose" test is met:

- The objective of the business merger or expansion;
- The continuity of the liquidating company's business activities;

- The surviving entity continues its business activities and the business activities of the liquidating entity for at least five years from the effective date of the merger or expansion; and
- Assets owned by the surviving entity are not transferred within two years after the effective date of the merger or expansion. However, where it can be evidenced that the sale of the company's assets is beneficial, an application can be submitted to the Director General to waiver this requirement.

The Regulation is effective 19 June 2008, and failure to comply would result in the recalculation of the transfer value of assets based on their market.

Introduction of an Islamic banking law

The House of Representatives has passed a new Islamic banking law (*Rancangan Undang-Undang Perbankan Syariah*), so as to increase the growth of this expanding industry.

Prior to the introduction of the new law, Islamic banking in Indonesia was governed by regulations issued by Bank Indonesia. The new law provides a stronger legal framework for Islamic banking and finance and stipulates various measures to boost the development of Islamic banks. It is also understood that foreigners would be allowed to establish sharia banks in partnership with Indonesian citizens or local entities.

The government has yet to address taxation issues related to Islamic banking transactions.

Singapore

Changes in tax treatment of employee stock options and ownership plans

The Inland Revenue Authority of Singapore (IRAS) issued a circular on 5 August 2008, which revises the tax treatment of employee stock option (ESOP) and other forms of employee share ownership (ESOW) plans. The circular introduces four main changes in respect of ESOPs granted on or after 1 January 2003:

Basis of taxation of ESOP and ESOW gains realised by individuals exercising employment in or outside Singapore

Currently, gains from ESOP plans are taxable when exercised in Singapore or where the holder has a Singapore employment. The place where the ESOP is granted is irrelevant. Under the new treatment, there is an additional requirement that the ESOP plan must have been granted while the individual has a Singapore employment.

Currently, gains from ESOW plans are taxable on the beneficial ownership vesting date (for plans without vesting - in the year of grant). Therefore, where beneficial ownership vests after an individual has left his Singapore employment, he will generally not be assessed to tax on any gains derived by him in respect of such shares.

Under the new treatment, an individual, who is granted shares under an ESOW plan while exercising a Singapore employment, will be taxable on the gains derived from the shares regardless of whether or not he is in Singapore at the date of vesting.

Timing of the taxation of gains from ESOP and ESOW plans with moratoriums

The gains derived from such plans are taxable only on the date the moratorium is lifted. This treatment does not apply to an individual who is neither a Singapore citizen nor a permanent resident, and who ceases employment with the company for which he is exercising employment when he is granted such ESOPs or shares.

Expansion of incentives schemes to include ESOW plans

Currently equity-based remuneration (EEBR) schemes are now available in respect of ESOW plans, provided that in addition to meeting existing qualifying criteria for the incentives, the ESOW plans also meet a prescribed minimum holding period as follows:

Acquisition price ≥ market value of sharesn at grant	6 months
Acquisition price < market value of shares at grant	1 year

"Deemed exercise" rule for non-Singapore citizens and permanent residents

Employees who are neither Singapore citizens nor permanent residents, or who are leaving Singapore permanently, are subject to a "deemed exercise rule". The individual is deemed to have made a gain on the date they cease employment with the company for which they are exercising employment when they are granted the ESOPs. The rule also applies in the following circumstances:

- restricted ESOPs and ESOWs where the moratorium has not been lifted on the date the individual ceases employment; and
- shares granted under an ESOW Plan with vesting imposed where the beneficial interest has not yet vested at the date the individual ceases employment.

The amount of the gain is computed as follows:

A – B, where:

A = the open market price of the shares as at 1 month before the employment cessation date or the date of grant of the plans, whichever is the later;

B = the exercise price of the shares under an unexercised ESOP or a restricted ESOP, or the price paid for shares acquired under an ESOW Plan with vesting imposed (with no moratorium), or for restricted shares acquired under an ESOW Plan, as the case may be.

Equity Remuneration Incentive Scheme for start-ups

IRAS has issued a circular which details the Equity Remuneration Incentive Scheme (ERIS) for employees of

start-up companies for the period 16 February 2008 to 15 February 2013, as announced in the 2008 Budget.

Under the ERIS for start-ups, a "qualifying employee" of a "qualifying company" can enjoy a tax exemption of 75% of up to SGD 10 million of gains from employee stock option (ESOP) or employee share ownership (ESOW) plans over a 10-year period, provided the following criteria are met:

- The ESOP plan meets the minimum vesting period as prescribed by the Singapore Exchange, regardless of whether the company is listed on the Exchange as follows:-

  Vesting period
  1 year where the exercise price ≥ the market value of shares at grant
  2 years where the exercise price < market value of shares at grant
  The market value of the shares is to be substituted by their net asset value in the case of unlisted companies.

- The ESOW plan meets a prescribed minimum holding period:

  6 months where acquisition price ≥ market value at grant
  1 year where acquisition price < market value at grant.

- A "qualifying employee" is an employee (excluding a non-executive director) who has been granted share options under ESOP plans or shares under ESOW plans, by a qualifying company. At the time of grant, the employee must be exercising employment for the qualifying company and also (i) be working for at least 30 hours per week for the qualifying company, and (ii) not have effective control of the qualifying company (i.e. not owning shares with voting power of 25% and more in the company).

- A "qualifying company" is a company that grants share options under ESOP plans and shares under ESOW plans to its employees within the first 3 years of its incorporation. At the time of grant, the company must be incorporated and carrying on business in Singapore and have a total share capital which is beneficially held directly by maximum 20 shareholders: (i) all of whom are individuals, or (ii) at least 1 of whom is an individual with 10% or more of the company's issued ordinary share capital. In addition, the aggregate market value of the company's gross assets at the time the options or shares are granted must not exceed SGD 100 million.

It is noted that the ERIS is available only in respect of ordinary shares and excludes Group ESOP or ESOW plans operated by the parent company of a qualifying company. In addition, the ERIS schemes for start-ups, small and medium sized enterprises and all other corporations are mutually exclusive such that a company may, at any one time, avail itself to only *one* of the schemes in respect of their ESOP or ESOW plans.

The Circular provides rules and examples for determining the market value of shares and gross assets of a company as well as the administrative and documentary requirements for qualifying companies and qualifying employees that are eligible for the tax exemption.

Thailand

Clarification on deductible investment losses

On 8 August 2008, Departmental Instruction No. Paw. 135/2551 (2008) was issued to clarify the deductibility of investment losses where a parent company, which is also the creditor of its subsidiary, subscribed for new shares issued by its loss-making subsidiary in the course of a business turnaround. Paw. 135/2551 (2008) explains that the amount

of subscription for new shares which is not refunded to the parent company will be deductible as a tax expense, so long as it does not exceed the amount of debts owed to the parent company, and provided:

- the subsidiary is dissolved and liquidated within the accounting year that follows the accounting year in which the new shares are issued;
- the parent company holds at least 25% of the subsidiary's shares with voting power from the time of its incorporation until the issuance of the new shares;
- the debts owed are not prohibited as a deduction if they become bad debts; and
- there are no means available for the parent company to recover the losses incurred from the subscription in the new shares.

The parent company is allowed to realise a tax expense in the accounting year that the subsidiary's liquidation is completed.

The above however, does not clarify a long-standing controversial issue regarding the deductibility of investment losses incurred by a parent company from the sale of new shares in a loss-making subsidiary that does not undergo a liquidation process.

Incentives for listed companies

On 29 July 2008, Royal Decree (Vol. 474) was issued to extend the deadline during which a company newly listed on the Stock Exchange of Thailand (SET) or the Market for Alternative Investment (MAI) may qualify for a reduction of the normal corporate income tax rate from 30% to the following rates for the first three accounting years commencing on or after the listing as per Royal Decree (Vol. 467):

- 20% for a company newly listed on the MAI; and
- 25% for a company newly listed on the SET.

With effect from 7 August 2008 onwards, the deadlines have been extended to 31 December 2008 for submission of the application to the SET and to 31 December 2009 for the completion of listing.

In addition, the Royal Decree (Vol. 475) was issued in respect of companies listed before 7 August 2008, to reduce the corporate income tax rate as follows, for 3 accounting years beginning 1 January 2008:

- 20% on the first THB 20 million of net profits for companies listed on the MAI; and
- 25% on the first THB 300 million of net profits for companies listed on the SET.

In order to be eligible for the above incentive, the listed company must not have applied the incentive under the Royal Decree (Vol. 467) or tax incentives under the Royal Decree (Vol. 460), which provides an exemption for:

- 25% of the expenditures spent in the expansion or improvement of assets utilized in a project with minimum value of THB 5 million; and

- the proceeds from sale of machinery spent in purchasing the replacement machinery.

Where a company listed on the SET has previously applied a reduced tax rate of 25% on the first THB 300 million of net profits for five accounting years, and which has already expired, it will only be eligible for the incentive in 2010.

Vietnam

National Assembly adopts New Enterprise Income Tax and VAT Laws

On 3 June 2008, the National Assembly of Vietnam adopted the new Enterprise Income Tax Law (new EIT Law) and the Value Added Tax Law (new VAT Law), which will be applied from 1 January 2009.

The important features of the new EIT Law are summarised below:

- The basic tax rate will be reduced to 25%;
- The exploration of mineral resources and oil and gas will be subject to rates ranging from 32% to 50%; and
- The current surtax on income from the transfer of land use rights and the transfer of the right to lease land will be abolished.
- Business sectors entitled to tax incentives will be limited to high-tech industries, scientific research and technological development, infrastructure development, software production, education and training, medical services, sports and cultural activities, and environmental activities;
- The preferential tax rates will be amended to 10% and 20%
- Tax incentives are not granted for capital gains;

- Based on the current law, the tax exemption and subsequent tax reduction periods commence from the first year in which taxable income arises. In addition, the first year of having taxable income is deemed to start by the fourth year the company generates revenue. This rule will continue to apply to companies which have been granted tax incentives under the current law, but have not yet generated taxable income when the new EIT Law comes into effect;
- Companies which have been granted tax incentives in accordance with the current law may continue to enjoy the incentives after the new EIT Law takes effect, with the option of applying for more favourable incentives under the new EIT Law;
- The deductibility of advertising and promotion expenses will remain restricted to 10% of total deductible expenses. However, the restriction is relaxed to 15% for newly established companies in the first three years of establishment;
- From 1 January 2009, companies which have production branches located in provinces different from where the head office is located are required to pay taxes in both localities based on the proportion of expenses between the head office and production branch;
- The loss carry forward period of five years remains. Losses from the sale of immovable property can only be offset against income derived from the same activity; and
- Enterprises established in accordance with the laws of Vietnam would be permitted to allocate up to 10% of their taxable income to establish a development fund for science and technology research activities. However, if less than 70% of the fund has been utilised within a five-year period, the enterprise is required to pay back taxes and interest.

The important features of the new VAT Law are summarised below:

- Tax exempt supplies include the importation of equipment, machinery, specialised means of transport and construction materials not yet produced locally, unless used for scientific research and technological development or for oil and gas exploration. In addition, derivative financial transactions will also be treated as tax-exempt supplies.
- International transportation services (currently tax exempt) will be subject to 0% VAT when the new VAT Law enters into force;
- A number of supplies which are currently subject to the 5% VAT rate will be shifted to the 10% category;
- Errors made in the declaration and deduction of input VAT can be corrected within a 6-month period; and
- Eligibility for input VAT deductions on purchases of more than VND 20 million would require a payment for the purchase being made via a bank.

Tax Treaty Developments

The following tax treaty developments were reported:

- Austria and Vietnam: A first-time income and capital tax treaty was signed on 2 June 2008;
- India and Luxembourg: A first-time income and capital tax treaty was signed on 2 June 2008;
- Indonesia and Morocco: A first-time income tax treaty was signed on 8 June 2008;
- South Korea and Latvia: A first-time income tax treaty was signed on 15 June 2008;
- India and Syria: A first-time income tax treaty was signed on 18 June 2008;
- Kazakhstan and Luxembourg: A first-time income and capital tax treaty was signed on 26 June 2008;
- Malaysia and Qatar: A first-time income tax treaty was signed on 3 July 2008;
- Turkmenistan and Romania: A first-time income and capital tax treaty was signed on 16 July 2008;
- Singapore and Uzbekistan: A first-time income tax treaty was signed on 24 July 2008;
- China and Tajikistan: A first-time income and capital tax treaty was signed on 27 August 2008;
- The Protocol to the tax treaty between New Zealand and the United Kingdom was ratified. The amendments to the treaty are expected to enter into force in late August or early September 2008; and
- The second protocol to the income tax arrangement between China and Hong Kong entered and generally applies retroactively from 11 June 2008. TG

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The Role of Coaching in the Asian Business

Coaching in the modern business sense is a relatively new phenomenon. As businesses became flatter and less hierarchical, less of an emphasis has been placed on top-down instruction, and more on empowerment, encouragement and facilitation.

The Driving Forces for Coaching

The increased use of coaching can be summarised by the following driving forces:[1]

- globalisation of business, extending to vendors, resources, markets and competition;
- flatter, leaner, more rapidly changing organisations, with the inevitable result that bosses have a harder time developing or even knowing their direct reports;
- more teamwork and greater emphasis on lateral rather than vertical relationships;
- greater integration of the world economy and its attendant knowledge requirements;
- reliance on technology and focus on e-business, plus the task of keeping up with the speed of obsolescence in the IT industry;
- a fiercely competitive marketplace, with its premium on speed, savvy and flexibility;
- increasing pressure to produce short-term financial results;
- the need to optimise the talents of domestic and international multi-cultural workforces;
- expanded personal work demands placed on leaders related to global relationships and travel, business complexity and faster organisational change;
- the proliferation of alliances, acquisitions, partnerships and joint ventures;
- shifts in values and priorities associated with younger generations, dual-career marriages, and both positive and not-so-positive changes in the larger worldwide society.

The Role of the Coach

A coach's role is to suggest, assist, even to provoke, in an effort to make someone else better able to do his or her job. The concept of coaching, of course, comes from the world of sport. Coaching in both sport and in the workplace is based on the idea that the coach can offer encouragement, but that it is ultimately up to the coachee (the person being coached) to perform "in the real world".

In terms of a working relationship with the coachee, the coach might be a line manager or other leader. However, the coach may just as easily be from a another department (such as HR) or may be contracted in from a separate company. What is most important is not the relationship between the coach and coachee in any overall hierarchy, but the relationship between them in the coaching process.

What is Coaching?

A precise definition of coaching that covers all scenarios is difficult, as, by its nature, the coaching process is reactive and responsive to the needs of individuals being coached. It has been called "the art of facilitating the unleashing of people's potential to reach meaningful, important objectives"[2] and, more specifically, "a one-on-one development process formally contracted between a coach and a management-level client to help achieve goals related to professional development and/or business performance."[3] "Objectives" and "goals" are key words here; as we discovered in the discussion of leadership, prior goals are needed to judge whether the coaching is working.

Coaching Methods

Informal coaching

One person within an organisation can take on an informal coaching role towards another, simply by asking questions

and providing an environment that encourages intellectual, emotional, technical or other development, and the increased confidence that such development brings. The disadvantage of this from an HRM point of view is that there is no "quality control" as to the nature of such development, and focus may be missing. A key part of Rosinski's definition above, the "meaningful, important objectives" may be missing. While such a coaching relationship can often be valuable, especially in a smaller organisation, it might be regarded as complacent to rely on it as a means of staff development.

"Much of Asian culture is founded on relationships, and this is the cornerstone of coaching; establishing a rapport, openness, not being judgmental."

Coaching by a leader
Here, a manager or some other leader acts as a coach to a person who reports to him or her. While this can ensure quality control, it compromises a key component of coaching practice, namely confidentiality.[4] A coachee may be unwilling to offer honest responses to a coach's questions, especially if they might be interpreted as being negatively critical of the organisation, or, indeed, of the leader personally. Coaching has quickly become a core competence for executives at many global companies. For example, IBM leaders are expected to act as coaches by:

- expressing pride in others' accomplishments;
- seeing subordinates grow and move on, even at a cost to the leader or the team;
- providing coaching and inspiring the long-term development of others; and
- having a substantial positive impact on others' professional growth and development.[5]

Note that coaching here is a role that all senior staff are expected to take on in addition to other duties; it is not simply the responsibility of HR, Training or similar departments.

Coaching by HR
If the HR department or equivalent takes on the coaching role, there is likely to be less reticence on the part of coaches to open up about particular problems. Also, a HR professional is more likely to have been trained in coaching techniques than managers in other areas. (This is often the case in more modern companies, in which HR has a more proactive role. Where HR is simply the new name for the old administrative personnel function, as may still be the case in some Asian organisations, there is less likely to be an advantage.) However, a HR professional may have less knowledge and/or expertise in the particular work that the coachee performs. (This is especially the case in a larger organisation.)

Coaching by consultant/outsider
The organisation, or even the potential coachee as an individual, may decide to engage an external company that offers professional coaching services. A coach in such an environment should be trained and experienced in coaching techniques. Accreditation and references should always be checked. Also, the coach's "outsider" status should make the two-way process easier and less inhibited, especially if the coachee has negative responses to the work environment. However, the external coach may not always be aware of the organisational culture in which the coachee works, or indeed of any specific aspects of the coachee's work.

None of these should be regarded as a universal "best practice". Decision-makers have to take into account the requirements and resources of their own organisations. In practice, coaching is often a combination of two or more of the above.

Mentoring and Consulting

Elements of certain other learning practices can also be incorporated into coaching, but they should be distinguished:

Mentoring
This is a long-term process of career development, almost exclusively within an organisation. The usual pattern is for a senior member of staff to monitor the progress of a new employee, and to offer advice and guidance from his or her experience. A more recent development is for employees from groups under-represented in the workforce (women, people from ethnic minorities, people with disabilities, etc) to be paired with senior staff members from the same groups.

Consulting
Although external coaches can often define themselves as consultants, the consulting progress usually focuses on groups, organisations and practices rather than individuals (group coaching exists, but is less common). Also, consulting

tends to focus on specific problems (and how to solve them) rather than on specific goals (and how to achieve them).

The Asian Business Environment

So, how do these concepts translate into a specifically Asian business environment? As we have seen, the growing popularity of coaching, as a tool in personal and professional development, is to a great extent the result of flatter, more egalitarian workplace environments. In the last few decades, Western organisations have tended to give their employees more autonomy and responsibility. Coaching, which encourages people to find solutions themselves, and to implement them accordingly, is perceived to be a more appropriate learning method than by-the-book instruction. However, Asian cultures, and the businesses that operate within them, are more likely to follow hierarchical or consensual models. What is the place for coaching in such an environment?

> "Coaching is not about helping with the 'results' aspect of the job; it is about the 'management' aspect of the job."

The key is to prepare the potential coachees, as much as to train the coaches, according to George Hanna, Vice President of HR and Organisational Development at DKSH (Bangkok), a services group, focusing on sourcing, marketing, logistics and distribution in Asia. "There isn't usually cultural resistance to it when it's brought into an Asian workforce, once you've overcome the novelty and provided it's properly explained," he says. "Much of Asian culture is founded on relationships, and this is the cornerstone of coaching; establishing a rapport, openness, not being judgmental. Add to this: the increasing openness to new ideas thanks to younger executives studying and working abroad, and the key principles and best practices of business coaching can easily translate from West to East." Indeed, coaching can be perceived as a step back from the relentless focus on profits and targets that might be seen to distinguish Western from Asian business cultures. As Valerio and Lee put it, "Coaching is not about helping with the 'results' aspect of the job; it is about the 'management' aspect of the job."[6]

The key here is explanation. Many managers have tried to bring a consultative model of problem solving into Asian organisations, and asked general questions along the lines of "What do you think we should do?" Unless this is explained clearly, those reporting to them might see this strategy as a sign of weakness. A common response to such a consultative response is: "If you're asking us what to do, does that mean you don't know?"

Because asking questions is a key component of coaching, the danger that the coachee will see the coach as being weak is very real. If the coachee simply feels that a coach/leader is shirking his or her leadership responsibilities by transferring the burden of expectation, the relationship will not prosper. A coach must explain that the routes of communication are always open, and that the coachee

should always feel free to ask for guidance or advice from leaders, even when the coaching process is at an end.

Coaches should be sensitive to coachees who are hesitant about responding to their questions. Many Asian cultures favour a "right answer" model for education, involving repetition and rote learning. Not only are people wary of offering a "wrong" answer, they will be unused to situations in which there are no "right" or "wrong" answers, simply honest ones. Again, it is crucial that the difference between coaching and didactic training is explained thoroughly before the process begins.

Although Asian organisations traditionally follow a more hierarchical model than their Western counterparts, many are making moves to alter this, and to make their employees more autonomous. Whereas in the West, coaching is a response to increasingly horizontal organisations, in Asia, the reverse is often true – coaching can be a means to encourage employees to take charge of their work, and to move beyond the hierarchical model. Best practice here would be to harness coaching policies to the overall structural and cultural aims of management.

The Role of HR

Even though the HR professional is not directly involved in the coaching process, he or she still performs a key role, acting as a "bridge" between the boss, the coachee and the coach.[7] The HR function is to maintain communication,

and to ensure that the defined goals are being met. Presuming the coach is sourced from outside the organisation, some key roles for HR, and the relevant questions that need to be asked, are as follows:

- *Strategy clarification*
  What is the purpose of coaching for our organisation? How does it link with the organisation's overall strategy?
- *Connection to other development processes*
  How does coaching tie-in with training, mentoring, consultancy and similar processes?
- *Developing a coaching pool*
  If coaching is of value, where can we access appropriate coaching for our future needs?
- *The gatekeeper*
  What criteria do we have for deciding when coaching is appropriate? Who initiates discussion about whether coaching should start (HR; the potential coachee; the coachee's boss)?
- *The buzz*
  What effect is coaching having on the wider workforce? Do people perceive it to be useful? A waste of time? An excuse for the coachee to take some time out?
- *The coachee as client*
  Although all parts of the organisation have a vested interest in the coaching process, how can it be ensured that the coachee is, perceives him or herself to be, and is perceived to be, the central client?
- *Orientation for the coach*
  Presuming the coach understands the goals of the coaching process, does the coach also understand the overall goals/culture/structure of the organisation?

Cultural Coaching

One area that is particularly relevant to Asia is cultural coaching. This form of coaching, as the name suggests, prepares people for the experience of working with people whose culture is not their own. "Culture" here can cover a wide range of concepts – nationality, language, religion, ethnicity. On a smaller scale, it can refer to the difference between two working environments, even if the people who work in those places would otherwise regard themselves as culturally similar.

A cultural coach in Asia has a more didactic role than that used in the coaching methods previously covered. For example, a coach who is engaged to train English-speaking teachers to work in Japan would cover elements of language, history, economics and more specific social rules: for example, the intricacies of bowing; when and how to offer business cards; dining etiquette; the circumstances in which one should remove one's shoes. However, the more intuitive, relationship-driven coaching techniques are also useful, in combination with knowledge-based learning. Memorising all the important customs and taboos of a culture is important; but more intuitive coaching techniques can help the coachee to reach a goal whereby responding to these customs is instinctive and natural. Such coaching is a particularly useful component of the relocation packages that are necessary to source the best talent available in the global marketplace.

It should go without saying that such coaching is just as useful for Asian employees, whether working in another country; working in an organisational culture that takes its lead from another country; or simply working in the presence of people from different cultures, whether as managers, colleagues or clients. Also, remember that this is not simply a matter of East versus West. Asia includes a multiplicity of cultures and a Malaysian secretary, for example, might need intensive cultural coaching before beginning work with a Japanese boss.

There may even be a call for cultural coaching if someone transfers to an organisation with a radically different internal culture, even if the ambient culture is the same. TG

References:
1 Valerio, AM & Lee, RJ 2005,*Executive coaching*, Pfeiffer, San Francisco, CA.
2 Rosinski, P 2003, *Coaching across cultures*, Nicholas Brealey, London & Boston, MA.
3 Valerio, AM & Lee RJ 2005, *Executive coaching*, Pfeiffer, San Francisco, CA.
4 Rosinski, P 2003, *Coaching across cultures*, Nicholas Brealey, London & Boston, MA.
5 Rosinski, P 2003, *Coaching across cultures*, Nicholas Brealey, London & Boston, MA.
6 Valerio, AM & Lee RJ 2005, *Executive coaching*, Pfeiffer, San Francisco, CA.
7 Valerio, AM & Lee RJ 2005, *Executive coaching*, Pfeiffer, San Francisco, CA.

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Taxability of Business Receipts

Readers will recall that in my last article (in Vol. 17/2007/Q4) we looked at the deduction for bad debts and provision for doubtful debts. We shall continue now by discussing the tax treatment of recovery of bad debts and the write-back or write-off of provision for doubtful debts which in essence is a receipt and discuss the various ways in which this topic can be tested in an examination.

LEGISLATION

Section 22(2)(a) of the Income Tax Act 1967 (as amended), provides that:

"….the gross income of a person from a source of his for the basis period for a year of assessment shall include ***any sums receivable or deemed to be have been received*** *for that basis period in relation to that source of income by way of insurance, indemnity, recoupment,* ***recovery****, reimbursement or otherwise where such sums are in respect of the kind of outgoings and expenses deductible in ascertaining the adjusted income of that person from that source…":*

In addition, ***Section 30(1) of the Income Tax Act 1967 (as amended),*** provides that
Where a deduction has been made under Section 34(2) in ascertaining the adjusted income …prior to the relevant period, then –

a) *if the deduction has been made in respect of a debt estimated to have become wholly irrecoverable, any amount recovered on account of the debt…shall be treated as gross income for the relevant period*

a) *if the deduction has been made in respect of a debt estimated to have become partly irrecoverable and there has been received …a sum in excess of the amount of that part of the debt not estimated to have become irrecoverable, so much of that excess as is recovered …shall be treated as gross income for the relevant period*

Inland Revenue Board public ruling on the "Deduction for Bad & Doubtful Debts and Treatment Of Recoveries" [Public Ruling 1/2002] states under the heading of Recoveries:

Specific and general provisions do not alter the amount owing in the debtors accounts; on the other hand, a bad debt written off reduces the balance in the relevant debtor's account. Therefore, any recovery of a trade debt previously written off as bad should be shown in the profit and loss account for the period in which it is received. If the recovery is not entered into the profit & loss account but is instead entered into a reserve or other account, an adjustment is required in the tax computation. It provides an example which is reproduced below:

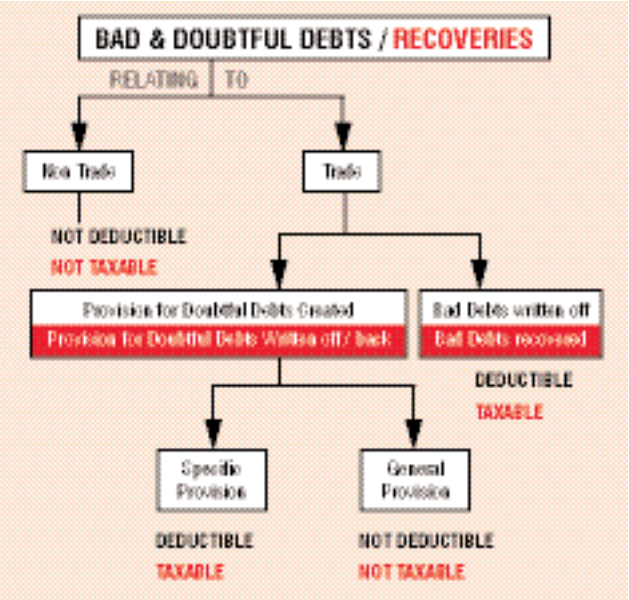
Syarikat P Sdn Bhd writes off RM2,700 being the trade debt of Encik Q (who has passed away) for the year ending 30.09.2002. During the same financial year, the company receives RM2,000 from Encik R, whose trade debt had been written off and allowed for tax purposes 3 years ago because he could not then be contacted.

The RM2,700 written off as a bad debt is allowable as a deduction and the recovery of RM2,000 is taxable. If both these amounts are shown in the profit & loss account for the year ending 30.09.2002, no adjustment is required in the tax computation.

If the recovery of RM2,000 is not entered into the profit & loss account, an adjustment for that amount should be made in the tax computation.

Therefore, we can conclude that for tax purposes recoveries in relation to non-trade debts are not taxable. In the case of trade debts, bad debts recovered are taxable and so are specific provisions for doubtful debts written off or written back. However, general provisions for doubtful debts written off or written back are not taxable.

A combined tax effect of bad debts written off and recovered and provision for doubtful debts created, written-off or written-back can be summarised in the following diagram.



ACCOUNTING TREATMENT AND TAX ADJUSTMENTS

Generally, candidates in an examination are given the profit and loss account accompanied with notes and are required, commencing from profit before tax, to make the necessary

adjustments to ascertain the adjusted income of the business. Therefore, candidates should be well versed with the accounting treatments for bad debts and provision for doubtful debts.

Provision for Doubtful Debt

The accounting entries on the creation of the provision are as follows:

Dr Provision for doubtful debt (P & L Account)
Cr Provision for doubtful debt (Balance sheet)

Therefore, where the question requires the computation of the adjusted income commencing from profit before tax (PBT) , the following adjustments must be done.

Provision	Adjustment
Relating to non–trade	*Not deductible, therefore add back*
General provision	*Not deductible, therefore add back*
Specific provision	*Deductible, therefore no adjustment is required. "Nil" in the 'add back' column**

* Some examinations require the candidates to indicate 'nil' in the appropriate column for every item that does not require adjustment.

Provision for Doubtful Debt Written Back / Written Off

A provision account is debited (reduced) in two circumstances as indicated below:

(i) Provision no longer required is written back,

The accounting entries would be
Dr Provision for doubtful debt (Balance sheet)
Cr P & L Account (either as provision no longer required or as other income)

Commencing from PBT (which contains the figure), the following adjustments must be done.

Provision written back	Adjustment
Relating to non–trade	*Since earlier the provision was not deductible, a write back will not be taxable, therefore less*
General provision	*Since earlier the provision was not deductible, a write back will not be taxable, therefore less*
Specific provision	*Since earlier the provision was deductible, a write back will be taxable, therefore no adjustment is required "Nil" in the 'less' column**

(ii) Bad debt is written off against a provision created earlier in respect of that debt. The entries would be:
Dr Provision for doubtful debt (Balance sheet)
Cr Debtor (Balance sheet)

Commencing from PBT (which does not contain this figure), the following adjustments must be done.

Provision written off	Adjustment
Relating to non–trade	*Although the debt has become bad, it is non-trade and therefore, not deductible. Therefore, no adjustment is required "Nil" in the 'less' column**
General provision	*Earlier the provision was disallowed but now since the debt has become bad, and it is trade in nature therefore, it is deductible. Therefore, since the P & L Account does not reflect it, we have to less*
Specific provision	*Earlier the provision was deductible therefore, no adjustment is required. "Nil" in the 'less' column**

Bad Debts Written Off Directly To P & L Account.

The accounting entries would be:
Dr P & L Account (as bad debts)
Cr Debtor (Balance sheet)

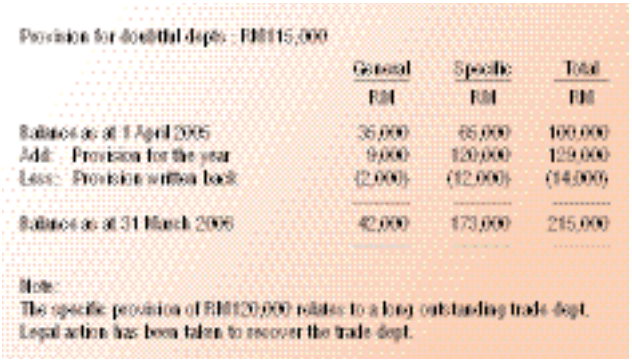
Commencing from PBT, the following adjustments must be done.

Provision	Adjustment
Relating to non–trade	*Not deductible, therefore add back*
Trade related	*Deductible, therefore no adjustment is required. "Nil" in the 'add back' column**

Equipped with this knowledge, we can now proceed to analyse the different ways in which this topic can be tested in examinations.

Let's look at some sample questions.

EXAMPLE 1
MIT DEC 2006 TAX II Q1



Provision for doubtful debts : RM115,000

	General RM	Specific RM	Total RM
Balance as at 1 April 2005	36,000	65,000	100,000
Add: Provision for the year	9,000	120,000	129,000
Less: Provision written back	(2,000)	(12,000)	(14,000)
Balance as at 31 March 2006	42,000	173,000	215,000

Note:
The specific provision of RM120,000 relates to a long outstanding trade dept. Legal action has been taken to recover the trade dept.

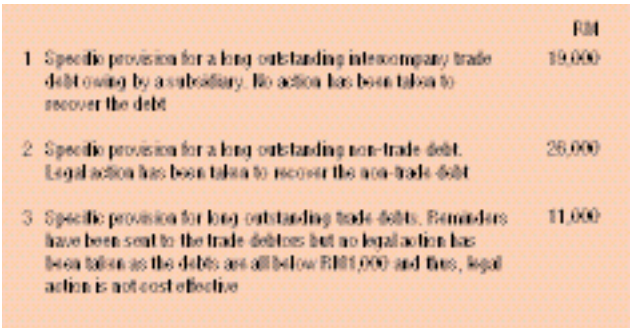
SOLUTION

	Add back / (Claim)
1. The specific provision of RM 120,000 is deductible	Nil
2. The general provision of RM 9,000 is not deductible	9,000
3. The specific provision written back of RM 12,000 is taxable	Nil
4. The general provision written back of RM 2,000 is not taxable	(2,000)
Net adjustment	7,000

Sometimes candidates are tested to see if the they are aware of the conditions stipulated in the Public Ruling 1/2002

EXAMPLE 2

In ***MIT DEC 2005 TAX II Q1***, an analysis of the specific provision for doubtful debts is given as follows:



	RM
1 Specific provision for a long outstanding intercompany trade debt owing by a subsidiary. No action has been taken to recover the debt	19,000
2 Specific provision for a long outstanding non-trade debt. Legal action has been taken to recover the non-trade debt	26,000
3 Specific provision for long outstanding trade debts. Reminders have been sent to the trade debtors but no legal action has been taken as the debts are all below RM1,000 and thus, legal action is not cost effective	11,000

SOLUTION

1 Although a specific provision, it is added back to the PBT since *no action has been taken to recover the debt*
2 It is added back to the PBT because although *legal action has been taken,* it is in respect of a *non-trade debt*
3 No adjustment is needed here because it is a deductible expense since *reminders have been sent to the trade debtors* and the reason why *legal action has* NOT *been taken* was because *the debts are all below RM1,000 and thus, legal action is not cost effective*

Also in ***MIT DEC 2003 TAX II Q1***, an analysis of the specific provision for doubtful debts is given as follows:

Debtor	Reason for provision	Action taken to recover debt	Amount
			RM
Perfect S/B Bhd	Trade debt long outstanding	Letter of demand issued	100,000
Encik Johan	Staff advance long outstanding - staff has resigned	Reminders sent	10,000
Grande Manufacturing S/B Bhd	Trade debt long outstanding	No action taken	30,000
			140,000

SOLUTION

Since a letter of demand has been sent to Perfect S/B, the provision would rank for a deduction. However, the other two provisions are not deductible and therefore added back because in the case of Encik Johan, it is a non trade debt (i.e. staff advance) and for Grande Manufacturing S/B, no action has been taken .

Sometimes examiners provide the whole T-account for the provision for bad and doubtful debts and require candidates to work out the adjustments to be made to the profit before tax figure.

EXAMPLE 3

Bad and doubtful debts account

DR	RM	CR	RM
Bad debts written off	432,000	Balance as at 1-1-07:	
Balance as at 31-12-08		General	159,000
General	247,000	Specific	458,000
Specific	834,000	Recoveries	222,000
		P/L	674,000
	1,513,000		1,513,000

All items relate to trade debts except for the following:

- bad debts written off includes a staff loan amounting to RM 65,000
- RM 115,000 of recoveries is in respect of an amount embezzled by a finance director in the last year:

SOLUTION

	+	–
Profit before tax	xxx	
Bad debts written off		65,000
General provision (247,000 – 159,000)	88,000	
Specific provision	Nil	
Recoveries		115,000

Sometimes the details of the bad and doubtful debts account is portrayed in a statement form as in the example below:

EXAMPLE 4

Bad & doubtful debts (all trade) are as follows:

	RM0000
Bad debts written off during the year	120
General provision at year end 31.12.08	500
Specific provision at year end 31.12.08	460
Bad debts recovered during the year	(90)
General provision at 31.12.07	(160)
Specific provision at 31.12.07	(175)
	655

Bad debts written off includes RM18,000 due from the financial director who passed away. The financial director was found to have passed through the company's books several private transactions of his own and recoveries include RM 12,000 paid by a former staff in respect of a staff loan.

SOLUTION

	RM000	
	+	–
Profit before tax	xxx	
Bad debts written off	18	
General provision – opening balance		160
General provision – closing balance	500	
Specific provision – opening balance		Nil
Specific provision – closing balance	Nil	
Recoveries		12

Students should also be careful when dealing with debts taken over when the business is acquired. These though trade in nature, are trade debts of the former vendor and not that of the current owner and therefore, should be treated as non-trade by the current owner. The tax treatment would be as follows:

Former vendor's trade debts	Adjustment
When they become bad	*It is not deductible, therefore add back*
If recovered	*It will not be taxable, therefore less*

EXAMPLE 5

Assuming the provision for bad and doubtful debts includes the following:

- Bad debts written off of which RM 7,450 is in respect of debts taken over from the vendor when the business was acquired years ago
- Recovery of debts written off by the vendor of RM 3,450

SOLUTION

	RM	
	+	–
Profit before tax	xxx	
Bad debts written off	7,450	
Recoveries		3,450

Questions can also be set in narrative form as illustrated below:

EXAMPLE 6

Provision for bad debts comprises (all figures in RM000's)

Bad debts written off of 103 of which 30 are in respect of a loan to an ex-director. The specific provision for doubtful debts had an opening and closing balance of 1680 and 1971 respectively. Similarly, the general provision for doubtful debts had an opening and closing balance of 950 and 1320 respectively. However 53 & 25 of specific and general provisions respectively relate to non trade debts. The company recovered 80 of its bad debts. The charge to P & L account was RM 684.

SOLUTION

	RM000	
	+	–
Profit before tax	xxx	
Bad debts written off	30	
General provision – opening balance		950
General provision – closing balance	1,320	
Specific provision – opening balance		Nil
Specific provision – closing balance	53	
Recoveries		80

Even in a narrative form, the question is sometimes incomplete and candidates would be required to fit in the balancing figure as shown in Example 7.

EXAMPLE 7

Provision for Bad Debts

The net increase in specific provision for doubtful debts in the financial year was RM30,000. An amount of RM70,000 was written off as bad debts, out of which RM20,000 was on account of a loan made to a former employee. Recoveries of trade debts written off previously amounted to RM30,000. The charge to P & L account was RM 120,000.

By drawing up the T-account, we can see that the account will not balance until we insert the balancing figure of RM 50,000 which would probably be the general provision, as shown below.

Bad and doubtful debts account

DR	RM	CR	RM
Bad debts written off	70,000	Recoveries	30,000
General provision	50,000	P/L	120,000
Specific provision	30,000		
	150,000		150,000

SOLUTION

	RM000	
	+	–
Profit before tax	xxx	
Bad debts written off	20	
General provision	50	
Specific provision	Nil	
Recoveries		Nil

Finally, some questions will reflected other deductible expenses included in the provision for bad and doubtful debts.

EXAMPLE 8

Provision for Bad And Doubtful Debts.

Bad debts include defalcation of cash by a subordinate staff amounting to RM 25,000 and recoveries include a gain on foreign exchange arising from the settlement of a trade creditor for purchase of stocks.

SOLUTION

The defalcation of cash by a subordinate staff is not a trade debt but it is a deductible outgoing therefore, no adjustment is needed to be made to the PBT figure. Similarly, a gain on foreign exchange arising from the settlement of a trade creditor for purchase of stocks is taxable since it is a realised gain and it is revenue in nature therefore, again no adjustment is needed to be made to the PBT figure.

So that concludes my discussion on the tax adjustments in respect of bad debts, recoveries and provision for doubtful debts. All the best to candidates taking the Malaysian tax paper for the November /December examinations. TG

FURTHER READING

- Choong, K F: Malaysian Taxation Principles and Practice, (Latest Edition), Infoworld
- Kasipillai, J: A Comprehensive Guide to Malaysian Taxation under Self Assessment, (Latest Edition), McGraw Hill.
- Malaysian Master Tax Guide, (2008), CCH Asia Pte. Ltd
- Singh, Veerinderjeet: Veerinder on Taxation, Arah Pendidikan Sdn Bhd
- Thornton, Richard: Thornton's Malaysian Tax Commentaries, (Latest Edition) Sweet & Maxwell, Asia.
- Thornton, Richard: 100 Ways to Save Tax in Malaysia for Small Businesses (latest edition), Sweet & Maxwell Asia
- Yeo, Miow Cheng Alan: Malaysian Taxation, (Latest Edition), PAAC Sdn Bhd

Siva Subramanian Nair *is a freelance lecturer preparing students for the professional examinations of the ACCA, MICPA and AIA and undergraduates of degree programmes in both local and foreign universities He is an examiner for one of the professional bodies in Malaysia and a member of the marking team for the Advanced Taxation paper for the ACCA examination. He can be contacted at sivanair@tm.net.my.*

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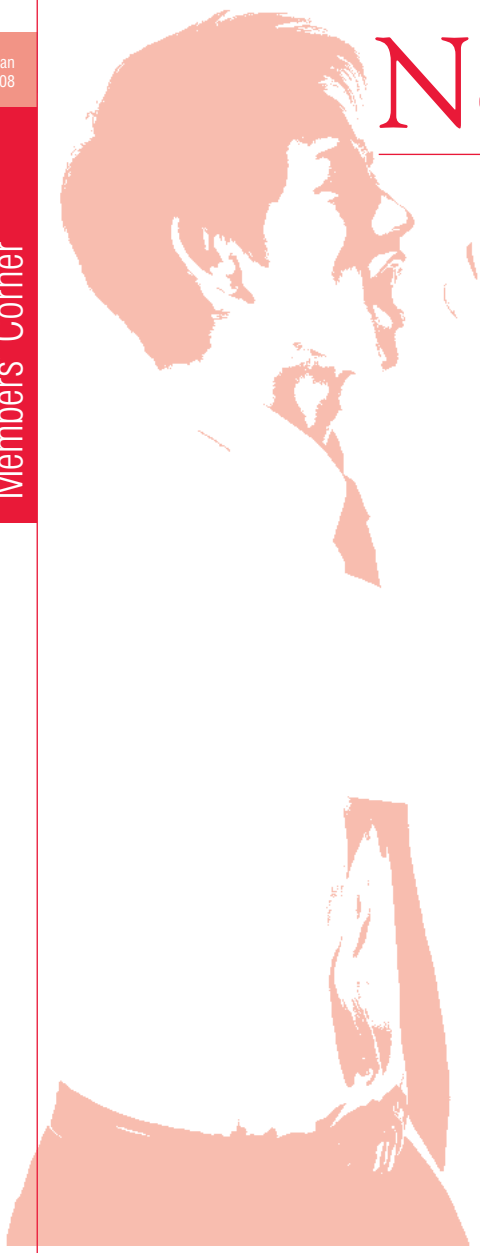

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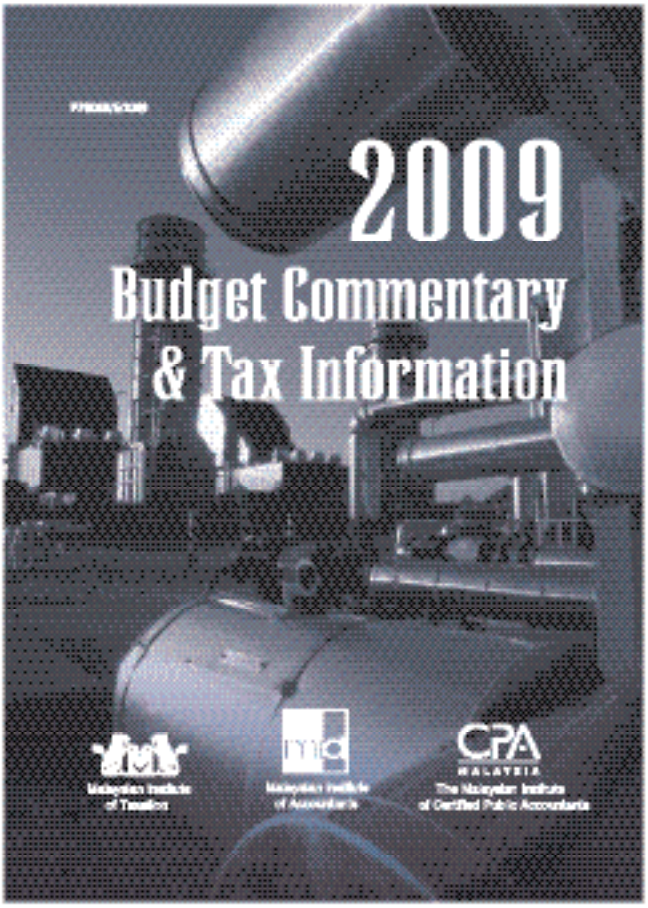
Malaysian Institute Of Taxation

MIT Examination

TIMETABLE | 15 - 19 DECEMBER 2008

DATE / TIME	9.00 AM - 12.10 PM *	2.00 PM - 5.10 PM *
MONDAY (15 / 12 / 2008)	Taxation I	Company & Business Law
TUESDAY (16 / 12 / 2008)	Taxation II	Business & Financial Management
WEDNESDAY (17 / 12 / 2008)	Taxation III	Financial Accounting II
THURSDAY (18 / 12 / 2008)	Taxation IV	Economics & Business Statistics
FRIDAY (19 / 12 / 2008)	Taxation V	Financial Accounting I

* Includes 10 minutes of reading time.



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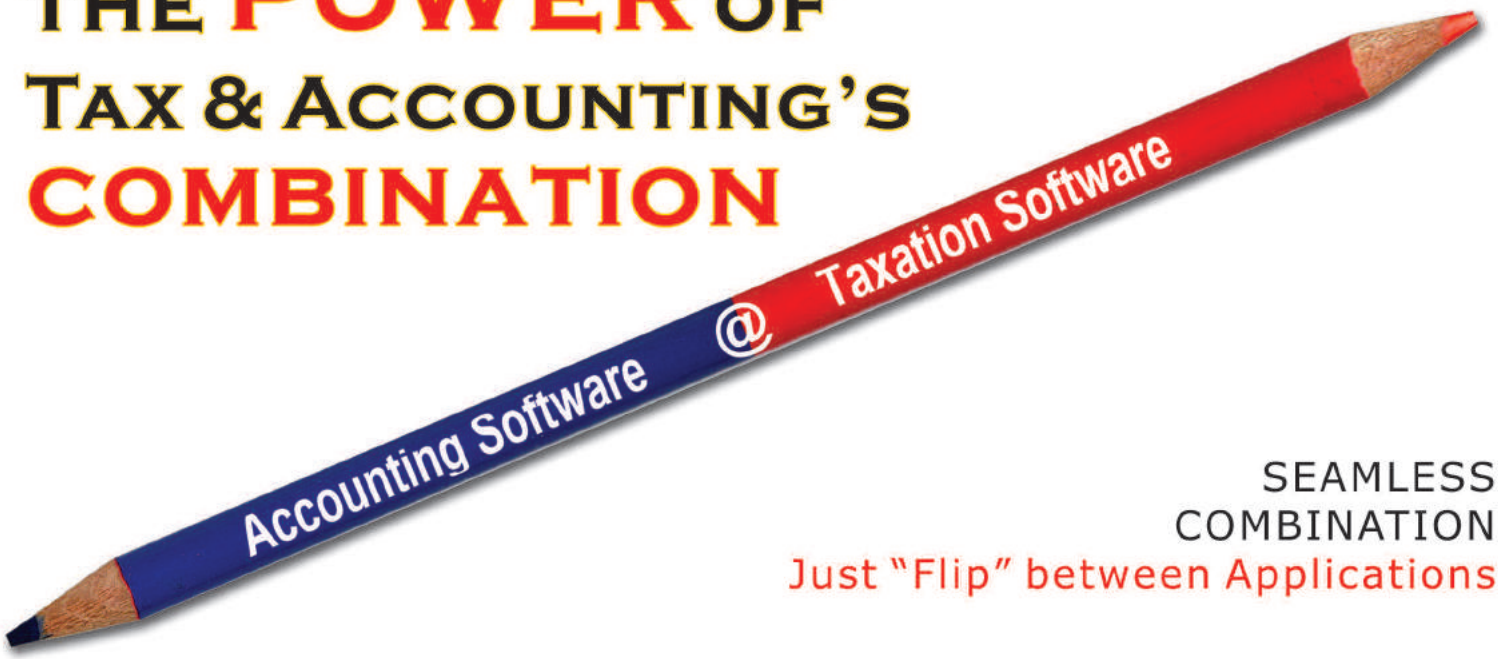

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