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- Public Rulings in the Self-Assessment Regime
- Judicial Review as an Alternative Remedy to the Customs Appeal Tribunal
- Memorandum on 2010 Budget Proposals: "Together Building Resilience, Revitalising Growth"

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Continuing Professional Development (CPD)
CALENDAR OF EVENTS 4TH QUARTER 2009

october

Date	Training Programme		Venue	Fee (RM) Member	Member's Firm Staff	Non-member	Speaker
20 Oct 2009 9.00am - 5.00pm	Workshop: Withholding Tax & Cross Border Transactions	8	Kota Kinabalu	315	365	415	Chow Chee Yen
21 Oct 2009 9.00am - 5.00pm	Workshop: Withholding Tax & Cross Border Transactions	8	Kuching	315	365	415	Chow Chee Yen
26 Oct 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Petaling Jaya	330	380	440	Chow Chee Yen
27 Oct 2009 2.00pm - 5.00pm	2010 Budget Seminar: Hi-Tea with MOF and IRB	10	Kuala Lumpur	200	230	250	MOF & IRB
29 Oct 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Kuantan	315	365	415	Chow Chee Yen
29 Oct 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Kota Kinabalu	315	365	415	Sivaram Nagappan
30 Oct 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Kuching	315	365	415	Sivaram Nagappan
30 Oct 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Johor Bahru	315	365	415	Chow Chee Yen

november

Date	Training Programme		Venue	Fee (RM) Member	Member's Firm Staff	Non-member	Speaker
1 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Alor Setar	280	NA	500	Sivaram Nagappan
3 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Ipoh	315	365	415	Chow Chee Yen
5 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Labuan	280	NA	500	Sivaram Nagappan
5 Nov 2009 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles - Module 4 (in collaboration with MAICSA)	8	Kuala Lumpur	330	380	440	Harvindar Singh
5 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Johor Bahru	315	365	415	Chow Chee Yen
6 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Seremban	315	365	415	Chow Chee Yen
6 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Sandakan	280	NA	500	Sivaram Nagappan
8 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Kuala Terengganu	280	NA	500	Sivaram Nagappan
9 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Kota Kinabalu	280	NA	500	Sivaram Nagappan
9 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Miri	280	NA	500	Harvindar Singh
9 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Penang	315	365	415	Chow Chee Yen
10 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Bintulu	280	NA	500	Harvindar Singh
13 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar (in joint collaboration with ACCA)	10	Sibu	280	NA	500	Harvindar Singh
17 Nov 2009 9.00am - 5.00pm	2010 Budget Seminar	10	Kuala Lumpur	330	380	440	Various Speakers
23 Nov 2009 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles - Module 5 (in collaboration with MAICSA)	8	Kuala Lumpur	330	380	440	Harvindar Singh

december

Date	Training Programme		Venue	Fee (RM) Member	Member's Firm Staff	Non-member	Speaker
1 Dec 2009 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles - Module 6 (in collaboration with MAICSA)	8	Kuala Lumpur	330	380	440	Harvindar Singh

DISCLAIMER: CTIM 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, Ms Ally or Ms Nur at 03-2162 8989 ext 108, 113 and 106 respectively or refer to CTIM's website www.ctim.org.my for more information on the CPD programmes.

NATIONAL TAX CONFERENCE

4 & 5 August 2009 Kuala Lumpur Convention Centre

A BIG THANK YOU



The Chartered Tax Institute of Malaysia would like to express its appreciation to the following persons in making the National Tax Conference a success.

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Madam Siti Rosnah bt Md Hashim
Madam Esther A.P. Koisin

Madam Nor Azirah Mohd Said
Ms Ranjeet Kaur
Ms Vijaya Suppiah

Mr Shokri Yahaya and the Multimedia/ICT Team
Mr Mazlan Wan Chik and the Public Relations Officers

Speakers/Chairmen/Panelists of the Conference

YBhg Dato' Hasmah binti Abdullah
Chief Executive Officer/Director General of Inland Revenue, Lembaga Hasil Dalam Negeri Malaysia

Dr Veerinderjeet Singh
President, Chartered Tax Institute of Malaysia

YBhg Datuk Dr Zainal Aznam bin Mohd Yusoff
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CHARTERED TAX INSTITUTE OF MALAYSIA

The Chartered Tax Institute of Malaysia ("CTIM") is a company limited by guarantee incorporated on 1 October 1991 under Section 16(4) of the *Companies Act 1965*. The Institute's mission is to be the premier body providing effective institutional support to members and promoting convergence of 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 an effective secretariat.

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Editorial Note

Editorial Note

It is often said that times of crisis reveal much about one's character based on the choice of response and action, and is also an indicator of one's future. The same can be said of organisations, corporate or otherwise, and nations, whose future is shaped by the choices of its people, particularly its leaders.

Malaysia has joined many other countries in putting together an ambitious and unprecedented stimulus package to sustain it through the current economic and financial crisis, and this issue of the Tax Guardian provides a comprehensive summary of the Chartered Institute of Taxation (CTIM)'s submission of fiscal proposals for the 2010 Malaysian Budget to the Ministry of Finance.

Our cover story gives you a play-by-play look at Malaysia's premier tax event of the year! For the ninth consecutive year, the CTIM and the Inland Revenue Board of Malaysia successfully organised National Tax Conference (NTC) with the theme "Surviving Challenges Seizing Opportunities" on the 4th and 5th of August 2009 at the Kuala Lumpur Convention Centre. Have a read at what the delegates have to say about the event.

Providing timely insight in responding to the downturn is the article "Managing people through a recession: pitfalls and smart moves". In addition to this, we have a very informative article on public rulings (PRs) in the self-assessment regime. It delves into the discussion on the relevancy of PRs and how it will continue to be an important feature in the Malaysian tax landscape.

Our regular features of the Learning Curve, recent tax case notes, international tax news, technical updates will prove to be interesting reading.

Enjoy your issue of the Tax Guardian, and I leave you with a thought.

"Every day you may make progress. Every step may be fruitful. Yet there will stretch out before you an ever-lengthening, ever-ascending, ever-improving path. You know you will never get to the end of the journey. ***But this, so far from discouraging, only adds to the joy and glory of the climb.****" (Sir Winston Churchill, British politician, 1874–1965. Emphasis mine.)*

Francis LK Tan
Chairman
Editorial Committee

Table of Contents

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 size 10 in Microsoft Word via email.

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

Contributions may be sent to:

The Chairman, Editorial Committee
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CPD / Institute News

Media Luncheon

Media luncheon and discussion on various topics on tax matters.

The CTIM Executive Committee (EXCO) and PR Committee Members organised a media luncheon on 28 July 2009 at the Eastin Hotel, Kuala Lumpur. The luncheon provided an opportunity for the CTIM EXCO and PR Committee Members to meet members of the media and to keep them abreast with the various upcoming events for the year.

Visit by Associate Professor Dr Margaret McKerchar (Head of Australian School of Taxation)

Dr Margaret McKerchar, Head of the Australian School of Taxation at the University of New South Wales, Australia, paid a courtesy visit to the Institute on 25 July 2009. She was accompanied by Associate Professor Dr Loo Ern Chen who is a member of the Institute's Education Committee. During the visit, CTIM represented by the President and some Council members as well as the Executive Director discussed various modes of possible cooperation that could be undertaken with local as well as foreign academics on tax research activities. They also discussed the proposal by CTIM to work towards setting up the Malaysian Tax Research Foundation to spearhead various research and educational activities in the field of taxation. Dr McKerchar also shared information on developments in Australia in the area of tax research and collaboration among various organisations.

Workshop on Public Rulings in Kuching

The Institute successfully conducted a workshop on "The Practical Implications of New Public Rulings" at the Holiday Inn, Kuching, Sarawak on 9 July 2009. Many participants were happy with the workshop as they felt that it had achieved its objectives and provided them with a deeper understanding of the issues discussed.

Workshop on Basic Tax Practice and Principles

As the result of a collaborative effort with the Malaysian Institute of Chartered Secretaries and Administrators ("MAICSA"), the Institute conducted a workshop on "Basic Tax Practice and Principles – Module 1" on 22 July 2009 at MAICSA .

Workshop on Cross Border Transactions & Withholding Tax

The Institute held a one-day workshop on "Cross Border Transactions & Withholding Tax" on 8 July 2009 at the Le-Meridien Hotel, Kuala Lumpur. About 65 participants attended the workshop. Participants at the workshop also attended the official launch of the Direct Access/CTIM Credit Card which was held immediately after the workshop.

Career Talk at University Science Islam Malaysia (USIM)


Assoc Professor Pn Faridah Ahmad speaking at the USIM career talk.


USIM students listening intently to the talk.

On 12 August 2009, a career talk organised by the Faculty of Economics and Muamalat, University Science Islam Malaysia (USIM) was held for students at the University.

The talk was delivered by Associate Professor Faridah Ahmad, Chairman of the CTIM Education Committee, who spoke on pursuing a career in taxation and encouraged students to take up the CTIM professional Examinations towards achieving this goal. Approximately 150 students currently pursuing their Bachelor of Accounting degrees attended the talk.

Career & Motivational Talk, Sixth Formers of Province Wellesley District

On 2 July 2009, Northern Branch Chairman, Andrew Ewe was invited by the State Education Department and the headmasters' association of Penang to speak at a motivational workshop attended by some 200 upper six students from the district of Province Wellesley, Penang.

The talk was to create awareness among students regarding the field of taxation. The talk covered topics such as A Career in Taxation, Student Motivation and a Question and Answer Session regarding the field of taxation.


Creating an early CTIM-awareness among Upper Six students of Province Wellesley District.


Northern Branch Chairman, Andrew Ewe taking his slot at the motivational workshop jointly organised by the Penang State Education Department and the Penang Form Six School Principals Council.


Headmasters, School Counselors, teachers and officers from the District Education Department participating at the workshop.


Committee and branch chairmen in discussing issues at the branch affairs meeting.

Branch Affairs Meeting

The first Branch Affairs meeting for the 2009/10 term was held on 4 August 2009 at the Kuala Lumpur Convention Center. The meeting, which was chaired by Dr Veerinderjeet Singh, the CTIM President, discussed strategic initiatives, issues and challenges related to branches. It was also an opportunity for the branch chairmen to present updates on their respective annual plans and activities.

Career talk conducted in Universiti Kebangsaan Malaysia

On 30 July 2009, a career talk for students was held at the University Kebangsaan Malaysia. The talk was organised as part of the University's Career Week. The Chairman of the Education Committee, Assoc Professor Faridah Ahmad was invited to speak on "A Career in Taxation" where she encouraged students to take up the CTIM Professional Examinations in order to achieve this goal.

Meeting with the Tax Management Association of the Philippines

Dr Veerinderjeet Singh, President of the CTIM, had met with members of the Tax Management Association of the Philippines (TMAP) on 17 August 2009 at Zuni Restaurant, Greenbelt, Makati Commercial Center in Manila. TMAP is also a member of the Asia-Oceanic Tax Consultants Association (AOTCA).

The meeting discussed the activities of the AOTCA and the forthcoming Mumbai meeting in November 2009 as well as ways in which CTIM and TMAP could work together. The possibility of a seminar or conference on tax administration and policy issues was also discussed.

Fom the top and clockwise): Dr Veerinderjeet Singh, Joel Tan Torres (Past President & Senior Deputy Commissioner of the Bureau of Internal Revenue), Charo Bernardo (Partner, Salvador & Associates), Euney Perez (Partner, Salvador & Associates), Vicky Villaluz (Vice President of TMAP), Rina Manuel Treasurer of TMAP), Jun Salvador (Past President and Managing Partner, Salvador & Associates), Cris Guhit (President of TMAP)

Meeting with the Philippine Institute of Certified Public Accountants (PICPA)

Dr Veerinderjeet Singh, Jun Salvador (Managing Partner, Salvador & Associates), Euney Perez (Partner, Salvador & Associates), Eddie de Guia (Consultant & Past President of PICPA), Protacio Tacandong (Immediate Past President of PICPA), Francisco Gonzalez (Executive Director, PICPA), Dr Antonio Tecson (President of PICPA)

Dr Veerinderjeet Singh had a breakfast meeting with members of the Philippine Institute of Certified Public Accountants (PICPA) on 18 August 2009 at Italiani's Restaurant, Greenbelt,Makati Commercial Center in Manila.

The meeting discussed tax developments in the Philippines and Malaysia. Dr Veerinder explained the objectives of CTIM and some of its achievements. There was also a discussion on possible ways in which CTIM and PICPA could collaborate including in some comparative tax research initiatives once the proposed Tax Research Foundation is set up by CTIM. In addition, it was agreed that both the institutes should exchange news on tax developments which could be of benefit in suggesting improvements to the tax system in each country. The Executive Director indicated he will report to the Tax Committee of PICPA on this and then see how the relationship could be progressed further.

CTIM Exhibition Booth at National Tax Conference

CTIM set up an exhibition booth at the National Tax Conference (NTC) which was held at the KLCC Convention Centre on 4–5 August 2009. The guest of honour, YAB Datuk Ahmad Husni Mohamad Hanadzlah, Second Finance Minister and YBhg Datuk Hasmah Abdullah, CEO and Director General of the Inland Revenue Board (IRB), visited the booth on 4 August 2009. The other exhibitors at the conference were the IRB, PLUS, Puncak Niaga, Syabas, Brasstax, AXP Solutions, Bank Rakyat, Bizztax, Direct Access, Superior Professional Consultancy, LTAT, OCBC Bank, YGL Multimedia Resources, Labuan IBFC, I & P Group Sdn Bhd , CCH Malaysia, IBFD, Pos Malaysia and Equity Trust.

National Tax Conference 2009

Welcoming Speech
by Dr Veerinderjeet Singh
President, Chartered Tax Institute of Malaysia
National Tax Conference 2009 –
"Surviving Challenges, Seizing Opportunities"
4 & 5 August 2009
Kuala Lumpur Convention Centre

YAB Dato' Sri Mohd Najib Tun Haji Abdul Razak
Perdana Menteri / Menteri Kewangan Malaysia
Y Bhg Dato Hasmah bt Abdullah
Ketua Pegawai Eksekutif/Ketua Pengarah LHDN
Tan Sri-Tan Sri, Dato-Dato
Mr Khoo Chin Guan, Deputy President of CTIM & Fellow Council Members
Honoured Guests
Ladies & Gentlemen

It gives me great pleasure to wish all of you a very good morning and a warm welcome to the National Tax Conference (NTC) 2009 which is jointly organised by the Malaysian Inland Revenue Board (IRB) and the Chartered Tax Institute of Malaysia (CTIM). I am most pleased that the NTC has grown from strength to strength over the years. In addition, this is the third and final year that I address all of you as President of the Chartered Tax institute of Malaysia.

We are indeed honoured and grateful to the Prime Minister, YAB Dato' Sri Mohd Najib Tun Haji Abdul Razak for accepting our invitation to officiate at this Conference.

Please allow me to provide a brief introduction regarding the Chartered Tax Institute of Malaysia or CTIM for the benefit of non-members, international delegates and panelists present here today. CTIM was established 18 years ago in 1991. Presently, we have a membership base of over 2,500 members comprising accountants, licensed tax agents, lawyers and others who have an interest in the field of taxation. Since its inception, CTIM has strived to promote the tax profession as well as to contribute towards improving and enhancing the Malaysian tax system.

The Institute has effected a change in its name and logo as a part of its rebranding exercise. The new name "Chartered Tax Institute of Malaysia" is intended to reflect the role of the Institute as the premier tax body in the country. With the rebranding, members can expect continued enhancement of the Institute's stature as the premier tax organisation in Malaysia. There is truly only one body in Malaysia which represents the tax profession and that is CTIM.

As a professional tax institute, CTIM participates in numerous dialogues and meetings organised by the relevant authorities namely the Malaysian Inland Revenue Board, Royal Customs Malaysia, the Ministry of Finance, the Malaysian Industrial Development Authority and the Ministry of International Trade and Industry.

Welcoming Speech by Dr Veerinderjeet Singh

On the international front, CTIM participates in the activities of the Asia-Oceania Tax Consultants Association (AOTCA) and collaborates with other professional tax institutes in a number of countries. Memorandums of Understanding (MoU) were signed with two foreign tax bodies, namely, the Taxation Institute of Australia and the Chinese Certified Tax Agents Association. The objectives of the MoU are to promote the exchange of information regarding the tax legislation in each jurisdiction and to conduct training and continuing professional development events which will mutually benefit both parties. An MoU currently exists with the Malaysian Institute of Chartered Secretaries and Administrators (MAICSA) to collaborate in organising taxation workshops for the mutual benefit of members of both organisations. Recently on 1 April 2009, another MoU was signed with ACCA Malaysia to collaborate in organising continuous professional development courses on taxation for the benefit of members of both organisations. It is expected that more collaborations will be developed in the coming months with other professional bodies.

In connection with the Institute's strategic plan and initiatives which were adopted in 2007, CTIM has introduced various changes in the past two years. For this year and 2010, the Institute is looking into the following matters:

- Developing a corporate video for the Institute which we hope to have ready by October this year
- Issuance of practising certificates to members who are tax practitioners. This move will facilitate the Institute's objective to better regulate its members who are in practice.
- The Council of the Institute will also grant suitably qualified and experienced members the right to use certain descriptions.
- Reviewing the professional examination syllabus with the view of updating it and keeping it fresh. In this regard, we have also received the assistance of the Taxation Institute of Australia.
- Finalising a position paper on the setting up of a Tax Research Foundation which will focus on suitable industry wide and national research in taxation as well as assist in educating the public on its tax obligations. This Foundation is also CTIM's platform to bring the profession and the academic institutions together to support relevant tax research. We hope that the Government will also assist in the initial funding of the Foundation.

With regard to improving our services to the members, the Institute has recently launched the Direct Access/CTIM credit card, a partnership which marks the beginning of a wide range of banking privileges for our members. Members are strongly encouraged to sign up for the card to enjoy the benefits offered to them.

Guest of Honour on stage

For the ninth consecutive year, the CTIM is proud to be co-organising together with the IRB this premier tax event which is also incidentally the largest tax conference in the country. The speakers and 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 on how to face the on-going economic challenges and to seize upon the existing opportunities.

We, at the CTIM, 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 CTIM, 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 generally the 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 CTIM will continue to follow up in the interest of having a clear, fair and transparent framework to regulate tax practitioners.

Corporate governance has been in the forefront over the past few years. This becomes even more crucial during economic downturns. Tax services, accounting services and secretarial services are all a part of a proper governance framework. It is in this context that CTIM hopes that the Government will allow a tax deduction for all such expenses / costs incurred by companies and businesses.

Going forward, the CTIM 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.

Co-design is a process of involving the user in the design of solutions so that the output best meets their needs, is user friendly, reduces costs and achieves the desired outcomes. The current environment presents a strong case for sharing experiences so that we can understand what is going on in the market place and build stronger links to support and assist taxpayers and tax professionals. In fact, the profession felt that some of the proposals in last year's 2009 Budget could have been better crafted if there had been more and effective consultations such that everything could have been clarified and elaborated upon on a more timely basis. CTIM is there to assist.

In this context, I would like to announce that the CTIM is proceeding to discuss with the Royal Customs Department the organising of a National Indirect tax Forum or Conference which will focus on customs duties, sales tax ,service tax and related matters as indirect taxes form a significant component of the tax revenue of the country. Once this is finalised, we will then have conferences on both direct taxes and indirect taxes. Please visit our website to find out more on this development.

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. Further, no conference can succeed without speakers, presenters, chairmen and panelists. To each and every one of you than k you.

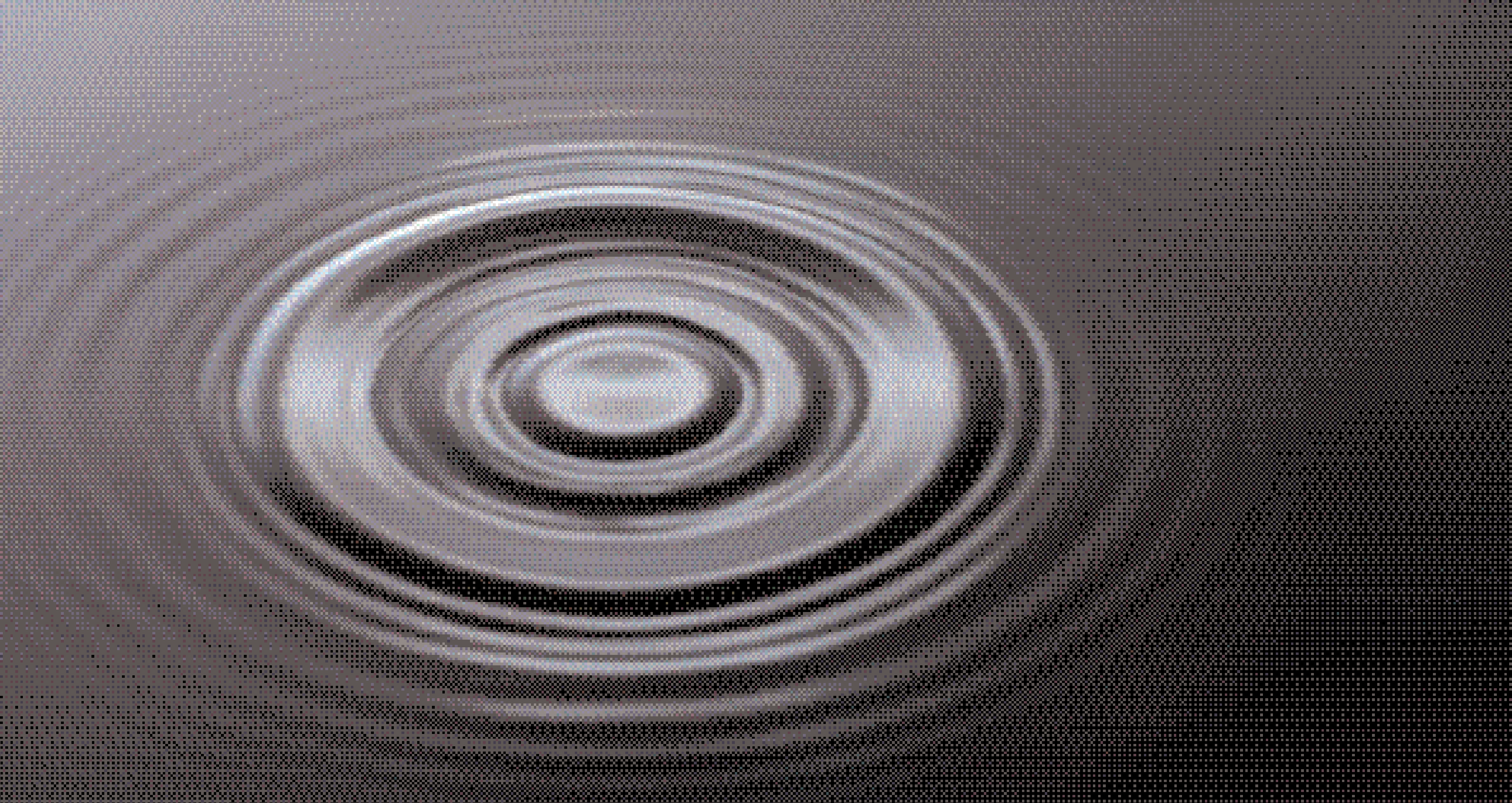
I must also not forget the main sponsors for this conference namely PUNCAK NIAGA (M) SDN BHD (our Diamond Sponsor), PETRONAS (our Platinum Sponsor), POS MALAYSIA BERHAD (our Gold Sponsor), EQUITY TRUST (LABUAN) LIMITED and PLUS EXPRESSWAY BERHAD (our Bronze Sponsors) to whom we are most grateful for the support. Our thanks also goes to the rest of the sponsors i.e. YGL Multimedia Resources Sdn Bhd, Bizztax Alliance Sdn Bhd, Labuan IBFC Inc. Sdn Bhd, I & P Group Sdn Berhad, AXP Solutions Sdn Bhd, Commerce Clearing House (M) Sdn Bhd, Bank Kerjasama Rakyat Malaysia Berhad, International Bureau of Fiscal Documentation, Sime Darby Berhad, Lembaga Tabung Angkatan Tentera as well as Proton (our supporting sponsors).

My thanks as well to all the professional bodies i.e. MICPA, ACCA, CIMA, CPA Australia, and MAICSA, 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 En Mohd Nizom Sairi from the Malaysian Tax Academy and Mr Thanneermalai from the CTIM, 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 your presence and being part of this national conference.

Once again, I thank Yang Berhormat Dato' Sri Mohd Najib Tun Haji Abdul Razak for his gracious presence here today.

I wish all of you a fruitful and beneficial conference.

Thank you.



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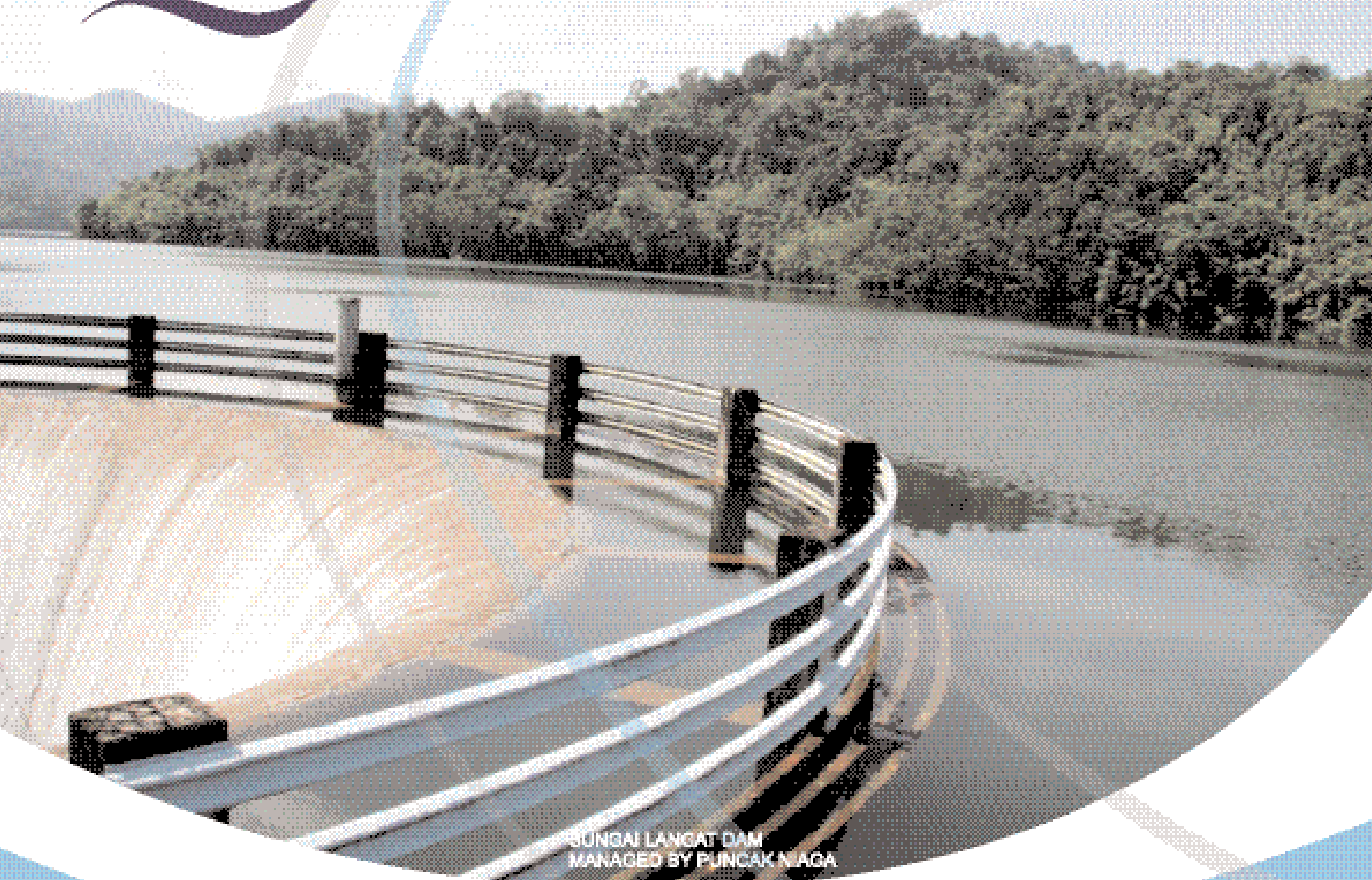

NATIONAL TAX CONFERENCE 2009

For the ninth consecutive year, the **Chartered Tax Institute of Malaysia** (CTIM) and Malaysia's **Inland Revenue Board** (IRB) jointly organised the country's biggest tax conference – National Tax Conference (NTC) with the theme " ***Surviving Challenges Seizing Opportunities***" from the 4th – 5th August 2009 at the Kuala Lumpur Convention Centre (KLCC).

The event attracted more than 1,500 delegates comprising tax agents, tax consultants, accountants, auditors, academician and senior officers from the various government agencies.

The Conference was officiated by the Minister of Finance II, Y.B Dato' Haji Ahmad Husni bin Mohamad Hanadzlah on behalf of the Prime Minister of Malaysia, Y.A.B Dato' Sri Mohd Najib bin Tun Haji Abdul Razak. In his keynote address, the Prime Minister said that the Government had amended the income tax laws to provide relief to taxpayers to help individuals and businesses tide through the economic storm. The Government is offering, among others, incentives for companies employing local retrenched workers, tax exemption on compensation received for loss of employment and incentives for banks to defer repayment of housing loans. The Government is also offering incentives for renovation and refurbishment of business premises, and allow accelerated capital allowance on all plants and machinery between 10 March 2009 until 31 December 2010. In addition, he said that tax payers can also enjoy tax deduction on housing loan interest.

This was then followed by a warm welcome speech by Dr Veerinderjeet Singh, President of CTIM.
The opening address was then delivered by the Chief Executive Officer/Director General of IRB, YBhg Dato' Hasmah binti Abdullah, where she highlighted that the IRB would assist the Government to formulate policies that

Mr Lim Heng How is chairing Dato' Hasmah's session.

Datuk Johan Raslan and Dato' Seri Nazir Razak at the session

Invited Guests at the Conference


Opening Address by Dato' Hasmah Abdullah


Dato' Haji Ahmad Husni is reading the text message from the Prime Minister


Professor Dr Michael Walpole at his session

would help businesses to not only weather the economic storm but also position them to grab opportunities when the economic recovers.

A team of experienced speakers and practitioners from the government and private sectors were invited to speak on the major tax areas as well to provide recent updates on tax developments in Malaysia. The topics that were discussed were:

- Reflecting on the Government Stimulus Package
- Facilitating Business Through Tax Initiatives
- Ethics And Integrity In Tax Administration
- How To Survive the Economic “Tsunami”
- Legal Issues: Analysis Of Recent Tax Cases
- The Tax Firm Of The Future
- Managing Uncertainties
- Opportunities From The Mini Budget
- Corporate Tax
- Indirect Tax

Delegates took the opportunity to mingle with the distinguished speakers, chairmen, panelists and IRB officers and raised various tax-related questions during the ‘Questions and Answers’ sessions.

Overall the participants found the various sessions to be relevant and enlightening. Plus, it was an excellent platform to network and build business relationships. Here are some quotes from the delegates.


During the question & answer session


Minister with Mr Khoo Chin Guan, Mr Shahmin Ta and Mr Lim Kah Fan

"From a sponsor's point of view, I think the quality of the audience was excellent! As a jurisdiction that's becoming more popular for tax structuring reasons, we were able to get the message across to the right people. Overall, I felt that the investment made in sponsoring the conference was very worthwhile."

Martin Crawford
Chief Executive Officer, Labuan International Business and Financial Centre, Malaysia

"It is encouraging to see the Inland Revenue Board is amiable to participating in constructive dialogues with the delegates. I was also impressed by the Chief Executive Officer/Director General, Datuk Hasmah Abdullah on her openness in engaging with the taxpayers and tax professionals at the event."

Audrey Quah
Associate, Wong & Partners

"It was overall a good event. In general, I found the sessions to be very enlightening and the topics were relevant and timely."

Irene Wee
Tax Manager, IOI Corporation Berhad

Standing left to right: Mr Lim Heng How (Council Member of CTIM), Mr SM Thanneermalai (Council Member of CTIM & Co-Organising Chairperson of NTC), Dr Veerinderjeet Singh (President of CTIM), YAB Datuk Ahmad Husni Mohamad Hanadzlah (Second Finance Minister), YBhg Dato' Hasmah Abdullah (CEO & Director General of IRB), Mr Lim Kah Fan (Council Member of CTIM), Dato' Raymond Liew (Chairman of the Public Relations Committee of CTIM), En Mohd Nizom Sairi (Director of IRB & Co-Organising Chairperson of NTC).

"I thought it was a well-organised conference! This is my second time attending as a delegate and compared to events I had attended in 2005, this year's event was very structured. The panelists were indeed a value-added feature at the event. There were some interesting discussions and the speakers are thought leaders I would like to listen to. I'd like to add that on an on-going basis, if CTIM could cater to in-house tax professionals by having a one or two day seminars on best practices for in-house tax functions, that would be preferable."

Surin Segar
Vice President & Head of Tax Advisory
Finance & Treasury Operations, Malayan Banking Berhad

From left: Co-organising Chairman – SM Thannermalai, IRB Director General – Dato' Hasmah binti Abdullah, The Finance Minister II – Y. B Dato' Haji Ahmad Husni bin Mohamad Hanadzlah; CTIM President – Dr Veerinderjeet Singh; Co-organising Chairman Mohd Nizom bin Sairi


Members of the Forum Discussion


Some of the CTIM Secretariat Staff


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Public Rulings in the Self–Assessment Regime

By Shalini Chandrarajah & Sharon Yong

The Malaysian Income Tax Act 1967 (MITA) provides the backbone for the income tax regime in Malaysia, setting out the broad rules on the taxation of income, taxpayer obligations and the tax administration framework. Compared to the income tax laws of more developed nations such as the United Kingdom and Australia, the MITA is a relatively simple piece of legislation prescribing the general tax rules and principles, which leave much room for interpretation.

Increasing complexities in doing business necessitate a more systematic and uniform interpretation of MITA provisions as taxpayers apply the rules to their specific circumstances. With the introduction of self–assessment system in 2001, this became even more important as the onus is now on the taxpayers to "get things right".

To provide certainty and assistance to taxpayers in interpreting and applying tax provisions, the Inland Revenue Board (IRB) continuously issues a host of pronouncements, including public rulings (PR), technical and operational guidelines and minutes of its dialogues with the professional bodies.

Legal effect of public rulings – are they binding?

Technically, the PRs themselves are not tax laws, though the issuance of such rulings is prescribed by law, specifically s 138A of the MITA. Section 138A bestows the authority to the Director General of Inland Revenue (DGIR) to issue rulings on the application of any provision of the MITA in relation to any person or class of persons, or any type of arrangement. Further, s 27 of the Finance Act 2006 provides that PRs issued prior to the introduction of the s 138A is deemed to have been made under that section and have effect for the year of assessment (YA) 2007 and subsequent years of assessment. Meanwhile, s 138A(3), MITA states:

> *"Notwithstanding any other provision of [MITA], where a [PR] in subsection (1) applies to any person in relation to an arrangement and the person applies the provision in the manner stated in the ruling, the [DGIR] shall apply the provision in relation to the person and the arrangement in accordance with the ruling."* (emphasis ours)

The construction of s 138A(3) suggests that the DGIR shall apply the rulings or interpretation made in the PR if the taxpayer follows such rulings or interpretation in managing his tax affairs. The DGIR would therefore be bound by the PR even if it involves an incorrect interpretation of the tax laws until and unless the PR (or part thereof) is withdrawn.

The need for PRs

PRs generally deal with issues of interpretation of the MITA provisions, providing taxpayers with clarity on the IRB's position on such provisions. Some PRs provided much needed guidance in areas which are/were not specifically addressed in the MITA whilst some others may also be regarded as concessionary in nature.

Consider PR 3/2006 on Property Development and Construction Contracts (now superseded) for example. Prior to the Regulations on Property Development issued in 2007, the PR addressed various tax issues in relation to businesses of property development, including the timing of recognition and computation of income (eg allowing the recognition of income on a progress billings method).

Whilst the PRs are not laws in themselves, they provide a basis for consistent application of the relevant laws, and may perhaps help in reducing tax litigation, where taxpayers' challenges are focused on the technical merits of the cases with the IRB's position clear in their minds. The PRs can only interpret and apply MITA provisions, but should not take positions that are clearly contradictory to the MITA.

Potential contentious positions

In some instances, some may disagree with the IRB's position as enunciated in certain PRs.

For example, in PR 4/2005 on Withholding Tax on Special Classes of Income, disbursements or out–of–pocket expenses is regarded to form part of the value of services provided by the non-residents and hence subject to withholding tax (if such services are performed in Malaysia), even in respect of expenses which were directly borne/paid by the service recipient. Curiously, in last year's Budget announcement, (only) hotel accommodation expenses are specifically excluded from the withholding tax requirements.

In PR 2/2008 on Reinvestment Allowance (RA) (which may be amended to reflect changes to Sch 7A, MITA), the IRB included their interpretation of what constitutes a "factory" for RA purposes (which was not defined in Sch 7A). Note that there is a definition of "factory" under Sch 3, MITA for purposes of the industrial building allowance (IBA) claim. Surprisingly, the IRB decided to adopt a more restrictive meaning of "factory" for RA purposes, eg by excluding from the definition, a building or part of building used for staff welfare, eg canteen, nursery, living accommodation, sports, recreation, etc (such items are specifically included as industrial building for IBA purposes).

Where the taxpayer disagrees with the IRB's position in a PR which affects his tax return, the taxpayer must consider his options in dealing with the contentious matter.

Disagreeing with the PR – what can the taxpayer do?

As highlighted earlier, s 138A(3) provides that the PRs are binding on the DGIR. The question is – Are the PRs binding on the taxpayer? Reading s 138A, the answer appears to be that they are not. If the tax laws are silent on this, the ultimate determination of the technical issue should still be through the tax courts.

However, one must also consider the potential consequential penalties from taking a position different to that of the PR, particularly in respect of s 113, 114 and 114A, MITA.

It would be unfair for the IRB to impose such penalties on *bona fide* cases and require the taxpayer to go through the rigours of the tax courts to reclaim the penalties.

Matters are further complicated by an inconspicuous box in the tax return form, where taxpayers are required to declare whether or not they have complied with all the relevant PRs. Many questions have been asked on this matter – What is the effect of this declaration? Does it have any impact on the imposition of penalties? Or does it serve as a red flag to the IRB to conduct tax audits on those who dutifully declare that they did not fully comply with the PRs? One must also take note that in order to confirm whether one is compliant with the PRs, one is required to be up–to–date with the PRs, and the pronouncements in those which apply.

So what can a taxpayer do if he disagrees with the IRB's position in the PR and instead would like to take a more favourable position?

1. Follow the PR and appeal against assessment

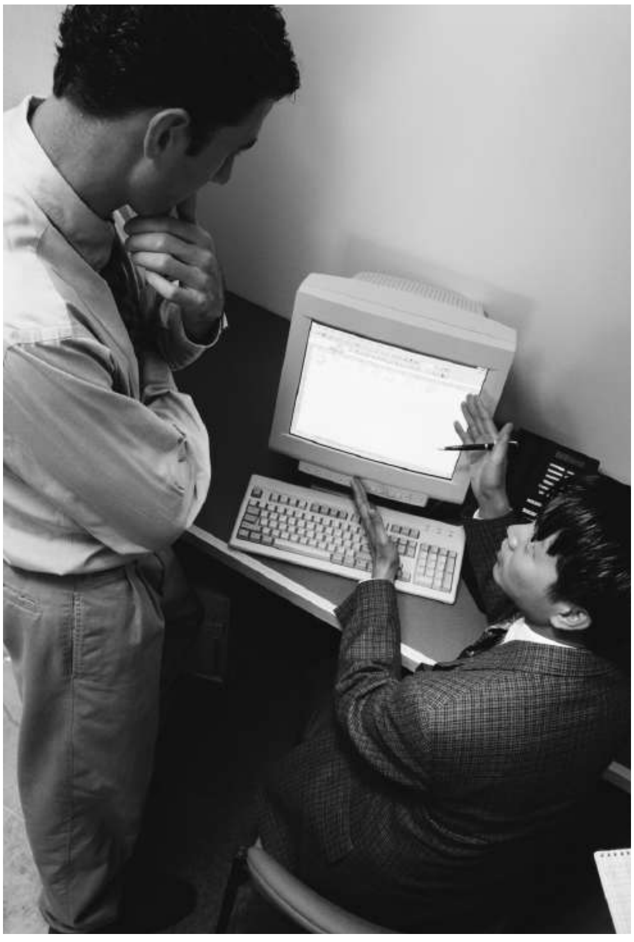
   The most prudent route the taxpayer can take is to follow the treatment prescribed in the PR and upon filing the tax return, appeal against the deemed assessment. This would likely involve the taxpayer paying a larger amount of tax up–front and having to go through the motions of appeal in order to obtain a refund on the tax overpaid. There is no consequential penalty in this regard as the more prudent position was adopted. Note however, the IRB has said in an earlier dialogue (see (2) below) that the taxpayer may compute its taxes based on the more favourable position but must disclose the matter and amount involved.

2. Take the more favourable position and disclose non-compliance with the PR in the Form C

   Under this scenario, the taxpayer would have disclosed in its tax return that it did not comply with the PRs and computed tax based on the more favourable position for purposes of its tax return. During the Operations Dialogue on 16 February 2005, the IRB has clarified that a Notice of Additional Assessment would be raised but without penalties, if the taxpayer informed the IRB on the issue and pronouncement not complied with and the amount of income involved. In the event the taxpayer did not inform the IRB of the non–compliance and is subsequently subject to tax audit and has additional tax payable, a Notice of Additional Assessment will be raised and with penalties for incorrect return.

3. Seek an advance ruling or a "private ruling"/confirmation from the IRB prior to submission of tax return

   The taxpayer may also request for an advance ruling from the IRB in respect of the specific arrangement, in order to obtain more certainty. Advance rulings are provided for in s 138B of the MITA and are similarly binding on the DGIR. However, advance rulings can only be sought for proposed arrangements and thus may have limited application in this case. Further, the advance ruling is binding on the taxpayer if the provision is expressly referred to in the ruling and for the specified basis period (unless specific exceptions apply). The rules and procedures for obtaining an advance ruling are contained in the IRB's Guidelines for Advance Rulings.



The taxpayer may also write to the IRB's Technical Division to seek a "private ruling" or confirmation of their application/interpretation of the relevant MITA provision. Response from the IRB would provide more certainty to the taxpayer on the IRB's position, however it should also be noted that strictly speaking, this is not covered by the tax legislation and case precedents (as highlighted earlier) support the notion that the IRB cannot be bound legally by estoppel. In addition, the taxpayer may not obtain a response from the IRB prior to the due date for the filing of tax returns, and therefore may need to make a choice between Option 1 and Option 2 above.

Disclosing wrongly

The taxpayer is required to confirm in the tax return whether or not he has complied with the PRs. What would the consequences be if the disclosure is wrongly made, ie either by pure error or intentional act by the taxpayer?

Firstly would the disclosure be regarded as a statutory declaration? Under the Statutory Declaration Act, 1960 (SDA), a wrongful statutory declaration is punishable under the Penal Code. Given that the disclosure in the tax return is not made pursuant to the SDA, the authors are of the view that the disclosure would not be regarded as statutory declaration.

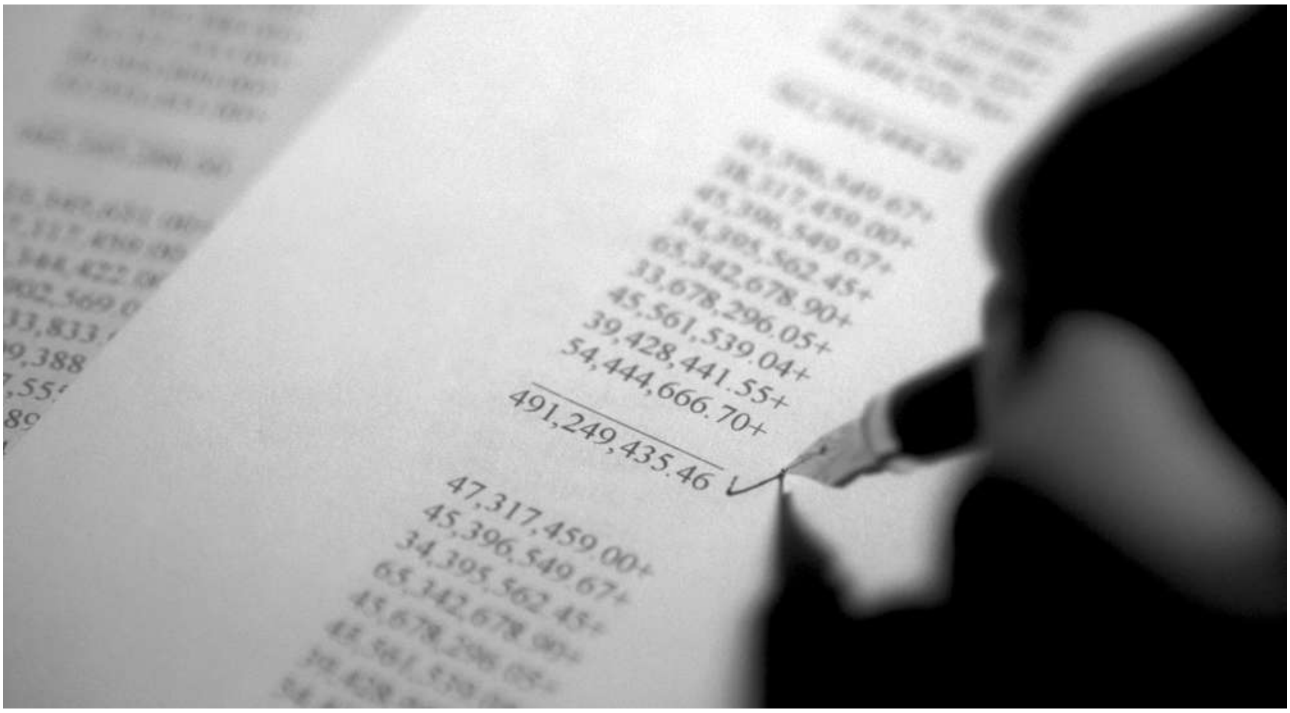
In the event that the taxpayer did not comply with a PR and computed (and paid) tax based on a more favourable tax position, s 113 may apply if the treatment adopted in the tax return resulted in an omission or understatement of income or affect the chargeability to tax. However, s 113 should not apply if the incorrect disclosure (of non–compliance with PRs), ie the checking of the box, itself did not result in an incorrect return which results in omission or understatement of income or affect the chargeability to tax.

One may also consider the wording of s 114(1) which deals with willful evasion, particularly the following:–

"Any person who willfully and with intent to evade or assist any other person to evade tax–

(a) ……
(b) makes a false statement or entry in a return made under this Act;
(b) gives a false answer (orally or in writing) to a question asked or request for information made in pursuance of this Act….
(b) ……"

Reading the above, it would be rather alarming if the incorrect disclosure itself in the Form C is taken as falling within s 114(1). It should also be noted that s 114(1) requires court proceedings and a conviction.
For tax practitioners, s 114(1A) springs to mind, and hence



one should always be mindful of exercising reasonable care in giving assistance and advice, which would include advising on the implications of making the correct disclosures.

Improving the Public Ruling System

It is evident that PRs are and will continue to be an important feature in the Malaysian tax landscape. In developing a robust PR framework, perhaps the IRB can consider the following:-

(i) There are numerous areas to be covered by PRs
– The IRB has issued more than 50 PRs to date (including addendums). At the same time, new tax laws/incentives have also been introduced in new areas, such as asset-backed securitisation, Islamic financing, real estate investment trusts (REITs), single–tier system, new withholding tax on "other income" under s 109F and transfer pricing. It will be tremendously helpful if the IRB can issue relevant PRs on such new areas (and others), on a timely basis.

In addition, PRs would also be greatly helpful in respect of various existing MITA provisions, including the question of determining source of an income (ie whether or not foreign–sourced), the timing of taxation (particularly the application of s 28 and 29 (obtainable on demand)), deductibility of expenses in respect of discounts or premiums under s 34C, etc.

(ii) Enhancing the quality of the analysis
– It is also important to ensure the PRs issued are of high quality and based on robust technical analysis. In this regard, it would be greatly helpful if the PRs refer, where applicable, to the relevant case law relied on by the IRB in arriving at a conclusion.

(iii) Consultative process
– The consultative process in finalising the draft PRs can also be improved. Currently, drafts are circulated to various professional bodies for comments. Perhaps the IRB can consider providing exposure drafts of new PRs on the IRB's website for public comments, combined with a fixed deadline to ensure progress of each draft. Further, PRs should also encapsulate relevant comments made by the IRB as recorded in dialogues with professional bodies.

It is hoped that the IRB can continue to improve its PR network, which will greatly help to develop a maturing tax community in Malaysia. TG

*This article is written by **Shalini Chandrarajah** (Senior Manager) and **Sharon Yong** (Manager) of Ernst & Young Tax Consultants Sdn. Bhd.The views expressed above are the personal views of the writers and do not necessarily represent the views of Ernst & Young.*

MEMORANDUM ON 2010 BUDGET PROPOSALS: "Together Building Resilience, Revitalising Growth"

Presented below is a summary of the CTIM's submission of fiscal proposals for the 2010 Malaysian Budget to the Ministry of Finance on 2 June 2009.

INTRODUCTION

The Malaysian Government recently revised downwards the economic growth forecast for 2009. The economic crisis requires policies to be focused on productivity-enhancing reforms in order to support growth beyond the short term. They should also include incentives for environment-friendly investments, developing cleaner energy and production processes.

The Chartered Tax Institute of Malaysia (CTIM) has submitted, on 2 June 2009, a memorandum relating to fiscal proposals for consideration of the Ministry of Finance (MOF) in the forthcoming 2010 National Budget. The proposals have been broadly placed under the following categories:

- facilitating growth in the services sector
- stimulating the business environment
- improving the efficiency of tax administration
- continuous review in ensuring an equitable and business-friendly taxation system
- maintaining a competitive fiscal environment
- promoting a caring society.

A. FACILITATING GROWTH IN THE SERVICES SECTOR

The services sector is becoming the engine of our economic growth. The initiatives by the Government to accelerate the liberalisation process have been well received. The task ahead is to build a sound governance and regulatory framework that will align incentives, while maintaining a healthy balance between markets on the one hand, and policy interventions on the other.

(a) *Capacity building of services sectors*

Capacity development involves the development of the local market for services and human capital, which in turn is tied to our educational policy and measures. Free flow of skilled labour is a phenomenon of the borderless world. The reduction of the marginal tax rates for individuals may be used to attract the high income group and talented individuals to reside in Malaysia, thereby strengthening Malaysia's position as a services hub. The geographical location and cultural diversity may also be used to position our country as an alternative capacity development centre for the emerging economies. However, care should be taken to assess both the demand and supply sides of the knowledge economy as well as the fact that a sizeable number of our professionals are working overseas. The retention of such skills may be difficult. Nevertheless, there is a need to look into ways of ensuring that the country's need for such skills is met.

1. **Widening the recognition of professional services**
   Currently, only services whose professional status has been legislated into Malaysian law are recognised as professional services. However, new types of services are emerging without relevant statutory regulation and recognition. Further, support for the services sector is enjoyed by a few sub-sectors which are recognised by the law.

   The Institute proposes that a law be enacted to set up a Professional Services Board whereby all professional bodies must be registered with the Board and the framework of a professional body is set out as a minimum requirement to be registered with the Board.

   In addition, the scope of recognition should be widened to allow all those in the services sector to enjoy the incentives/deductions available.

2. **Restriction on recognition of professional courses under s 46(1)(f)**
   Fees expended for any course of study up to tertiary level undertaken for the purpose of acquiring law, accounting, Islamic financing, technical, vocational, industrial, scientific or technological skills or qualifications in any institution or professional body in Malaysia recognised by the Government or approved by the Minister, is allowed as a personal deduction subject to a maximum of RM5,000.

   In line with promoting a knowledge economy, individuals should be encouraged to pursue more diverse courses of interest and be allowed deductions for expenses incurred. The Institute proposes that the deduction for educational expenses be granted to a course/professional examination taken from a local educational/professional institution, unless such a course/professional examination is not available locally. In addition, the local professional institutions recognised in the list should be increased accordingly.

(b) *Aligning incentives available for all services sectors*

3. Income Tax (Deduction for Allowances under the Capital Market Unemployed Graduates Training Scheme) Rules 2006; and Income Tax (Deduction for Allowances under the Capital Market Graduates Training Scheme) Rules 2007.

   Currently, both incentives have expired and the scope is limited to Capital Market Graduate Training Schemes certified by the Securities Commission.

   The Institute proposes that the incentives be extended indefinitely and the scope of training be widened to include all professional services as suggested above.

4. **Double deductions for approved training**
   The Institute proposes that the double deductions for approved training be extended to cover:
   i) all resident service providers
   ii) a wider variety of courses, including education and training programmes conducted by professional bodies which lead to the attainment of a professional qualification
   iii) more training institutions, including professional bodies.

5. **(i) Acquisition of foreign-owned companies**
   The Income Tax (Deduction for Cost on Acquisition of a Foreign Owned Companies) Rules 2003 provide that a locally owned company involved in manufacturing, trading or marketing activities of local products, is eligible for a deduction on the costs of acquisition of a foreign-owned company located outside Malaysia for the purpose of acquiring high technology for production within the country, or for acquiring new export markets for local products. The incentive expired on 31 December 2008.

   The Institute proposes that the incentive be extended:
   - to all resident service providers
   - to a wider variety of targeted foreign companies, including service providers
   - to companies with the objectives of acquiring intellectual property or acquiring new export markets, or enlarging existing export markets indefinitely.

(ii) Promotion of health tourism

Health tourism requires heavy investment in healthcare and medical training, specialised and advanced medical equipment, and on obtaining accreditation status.

The Institute proposes that the following incentives be given to alleviate the heavy capital outlay:

- double deductions on expenses incurred on
  - the training of medical personnel
  - obtaining accreditation status
  - the promotion of wellness programmes offered to the public for free or subsidised rates
- accelerated capital allowances for expenditure incurred on acquiring advanced medical equipment
- reinvestment allowance for investment in high-end and niche services.

(c) *Facilitating the growth of the services sectors*

6. Promotion and recognition of the contribution of professional bodies

A professional body should not be taxed as a trade association because it is a non-profit making body whose primary objective is to advance the interests of the profession rather than the members. It assists the development of the profession and hence the standard of services by providing training and disciplining its members.

7. Deduction for CPE course fees

A professional body often imposes on its members the requirement to complete a stipulated number of CPE hours within a specific time frame in order to sustain the quality and continual development of professionals' skills, competence and professional values in providing services.

In view of the fact that such expenses incurred would have the effect of capacity building on both the educational sector and the relevant professional services sector, the Institute proposes that costs incurred by an individual in attending CPE courses be deductible against his/her employment/business income.

8. Premium on Professional Indemnity Insurance (PII)

The Inland Revenue Board (IRB) has taken the view that PII is a policy taken to protect the personal assets of the insured against personal liability and thus is not an expense wholly and exclusively incurred in the production of income. Only members of professions whose professional status are legislated into Malaysian law are allowed to deduct premium on PII.

The Institute proposes that all service providers, as extended in proposal (1) above, be allowed to set off the premium on PII against such income.

9. Deduction of compliance expenditure

Currently, legal and professional expenses incurred on compliance matters are disallowed, thereby increasing the costs of doing business in Malaysia.

The Institute proposes that all expenses incurred for compliance with various laws and regulations, such as professional fees incurred on special audits, verification exercises, tax agent's fees, secretarial fees, annual listing fees etc, be allowed a tax deduction to reflect business realities and create a healthy demand for local services.

10. Removal of tax resident status for specific services sector

One of the conditions for an individual to qualify for resident status for purposes of income tax is that the individual is required to be in Malaysia for at least 182 days in a basis year for a year of assessment.

To attract foreign experts and talent coming to Malaysia, thereby building the service hub, the Institute proposes that the distinction between residents and non–residents be removed for specific service sectors.

11. Review of income tax rates

Developed nations have sophisticated infrastructure and facilities to retain skilled labour. Malaysia may look into providing low individual tax burden to attract and retain skilled labour.

Currently, Malaysian individual tax rates are not competitive and the marginal tax rate for individuals is not streamlined with the corporate tax rate. The Institute proposes that the authorities review the tax brackets for individuals with the objective of having larger income bands and aligning these to the corporate tax rates so as to improve its competitiveness and ease the financial burden of individuals.

B. STIMULATING THE BUSINESS ENVIRONMENT

12. Revitalising growth in the local construction sector

To steer our economy out of the recession, comprehensive measures must be taken to stimulate the key sectors of our economy. In line with the Government's effort to revitalise the property sector, the Institute proposes some fiscal measures with the objective of stimulating property transactions, harmonising the tax treatment and lowering the cost of doing business in Malaysia.

(i) Carry forward of unabsorbed rental losses

The landlord has to incur maintenance expenses to keep the premises in rentable conditions during the initial stage and the change of tenancy. For practical reasons, repairs and major maintenance work are also generally performed prior to the commencement of a new tenancy. Rental loss suffered during this period cannot be carried forward.

To encourage investment in property, the Institute proposes that the rental losses be allowed to be carried forward for set-off against future income from the rental source.

(ii) Assessment on income from letting of real property
Income from the letting of real property can only be treated as a business source if the owner has actively provided maintenance services, support services or ancillary facilities to the tenant. Rental income from investments in high–rise buildings such as shopping malls, office buildings, apartments and condominiums maintained by the management companies will be considered as income from a non-business source.

Property investors are administratively burdened to segregate properties belonging to business source and rental source. Separate accounts need to be prepared to reflect the relevant income and expenses. The situation may be further complicated where due to changes in tenants for some of the units, the maintenance services for some of the properties are provided for some of the months rather the whole year.

The Institute is of the view that the quantitative and qualitative criteria as adopted in Public Ruling No. 1/2004 should be restored for the determination of income from letting of real property as a business source. Alternatively, if the properties of a person are managed and maintenance services, support services or ancillary facilities are provided in a systematic or organised manner, then the person should be regarded as carrying on a business of letting real properties and all the rental income derived should be treated as income from a business source.

In addition, it is proposed that once it is established that the principal activity of a person is carrying on the business of letting of real property, then all the properties of the person be considered to be part of the business source.

(iii) Building allowances for non-industrial buildings
Currently, only buildings used in specific sectors qualify for building allowances. There is no relief accorded to capital expenditure incurred on commercial buildings, office complexes, private medical clinics, private dental clinics and other healthcare facilities etc.

Alteration or renovation of business premises is often necessary to make it suitable for the business operation. Under the Second Economic Stimulus package, renovation or refurbishment expenditure incurred on premises between 10 March 2009 and 31 December 2010 will be given accelerated capital allowance of 50% with effect from the year of assessment 2009, subject to a maximum of RM100,000, 000.

Under FRS 116: Property, Plant and Equipment, buildings have a limited useful life and are depreciable assets. To simplify our tax system, and in line with the convergence with FRS, the Institute proposes that:

- building allowances be accorded to capital expenditure expended on or after 1 January 2010 on all buildings used for the purpose of a business
- eligibility to claim building allowances be extended to the owners or lessors of non–industrial buildings
- building allowances are allowed on the cost of renovation and alteration on all business premises incurred after 1 January 2011 with no cap on the amount of capital expenditure.

(iv) Loan interest incurred on acquisition/construction of premises prior to commencement of business
interest expense incurred on construction of factory or plant prior to commencement of business, nor a claim for capital allowance on the grounds that the interest is not part of the cost of construction.

To facilitate purchase of properties and encourage ownership of business premises, it is proposed that interest incurred on the acquisition/construction of business premises prior to the commencement of business be allowed as part of the qualifying building expenditure on which building allowances can be claimed.

(v) Basis of assessment for property developer
A development project or phase is deemed completed upon either the date on which the Temporary Certificate of Fitness for Occupation (TCFO) or the date on which the Certificate of Fitness for Occupation (CFO) is issued. The property developer must then determine the actual profit for the project and prepare a final account up to that date. Hence, costs incurred after the issuance of TCFO or CFO are not taken into account.

For township development, the finalisation of accounts would hinge on a number of factors eg changes in regulatory/government specifications needed for infrastructure facilities like road widths and drain sizes, cost variations in the components of infrastructure costs and land–related costs. Therefore, the actual profit for the project is normally determined upon finalisation of billings issued by contractors and/or subcontractors, a few months/years after handing over vacant possession of a property unit to a buyer.

The Institute proposes that the date of completion be set at 18 months from the date of handover of vacant possession, which is in line with the Housing Development Act requirements on Defect Liability Period. Alternatively, a possible/reasonable period could be 12 months after the issuance of the CFO or TCFO.

13. Promoting the development of local conglomerates

(i) Interest–free loans among group of companies
The IRB has recently imputed interest income on all

interest–free loans provided by a company to its related companies. This is a departure from the past practice of accepting interest–free loans as a common way of doing business by groups of companies. There may be genuine commercial reasons for not charging interest on loans or advances particularly among companies within a group.

The Institute is of the view that an administrative concession should be granted to allow companies time to rearrange their financial structures. The new practice should only apply to all new loans/advances made or entered into from 1 January 2009. Where the DGIR has imputed interest income on a taxpayer, such an adjustment should be brought into the formula for computing the s 33(2) interest restriction and the treatment of compensating adjustments under s 140A should also be clearly spelt out.

(ii) Interest expense subjected to s 140A adjustments (ie thin capitalisation or transfer pricing adjustments)
Many countries which have implemented thin capitalisation rules do not have an interest restriction provision as in Malaysia. The Institute is of the view that s 33(2) interest restriction, when taken together with the thin capitalisation rules under s 140A, can lead to a double restriction on the deductibility of interest, which may have a negative impact on the competitiveness of Malaysia in attracting direct foreign investments.

The Institute is of the opinion that the s 33(2) interest restriction provision should be removed. Alternatively, some mechanisms should be introduced to avoid the double disallowance. A public ruling should be issued to show how the two provisions will apply and clear examples should be given to illustrate the application of the rules under various scenarios.

(iii) Group relief

- Restriction on eligibility
  A company may surrender not more than 70% of its adjusted loss in the basis period for a year of assessment to one or more related companies resident and incorporated in Malaysia. The shareholding of the claimant and surrendering companies in the group, whether direct or indirect, must not be less than 70%.
- Payment in consideration of losses surrendered
- A claimant company may make payment to the surrendering company in consideration for the amount of losses surrendered. This would be good corporate governance where there are minority shareholders in a company. However, there is no legislation as to the tax treatment of such payment.
- Extension of group relief to SMEs
  The *Finance Act 2009* has excluded many companies within a group of companies from enjoying preferential tax rate under Sch 1, para 2A.

The Institute proposes the following:

- Group relief be eligible to a related company as defined under the *Companies Act 1965*. The losses to be surrendered should be restricted only by the aggregate income of the claimant company
- Payment in consideration of losses surrendered would not be assessed on the surrendering company and consequently the payment will also not be allowable on the claimant company as the amount represents a capital payment.
- Section 44A(2)(ii) of the Act should be amended to allow a member of a group of companies to claim group relief.

(iv) Employer's own goods or services provided to employees
Goods and services provided free or at a discounted rate by employers to employees are tax–exempt provided that the total value of the discount of goods does not exceed RM1,000, 000; or the benefits of services are not transferable.

This exemption is not extended to other companies in the group.

To promote the development of local conglomerates and to cultivate a strong group culture, the Institute is of the view that the exemption on goods and services provided by employer to the employees should be extended to goods and services provided by companies within the same group.

(v) **Scope of controlled transfer**
With regard to cross-border controlled transfer, the IRB appears to hold the view that the controlled transfer provisions under Sch 3 of the Income Tax Act will not apply, even though in the case of *SEOD S.A. vs Ketua Pengarah Hasil Dalam Negeri,* both the Special Commissioners and the High Court decided that there is no requirement under the Act for the acquirer to be a Malaysian resident for a controlled transfer to apply.

It is proposed that the controlled transfer provisions under para 38–40, Sch 3 of the Income Tax Act be clarified so as to avoid ambiguity. The decision of the Courts must be applied and not restricted in its application.

14. **E-Commerce**
Currently, there are no specific provisions in the Act that deal with e-commerce and transactions conducted electronically. Taxpayers are uncertain of the tax treatment resulting from e-commerce transactions — the basis of taxation, double taxation issues as well as the withholding tax implications on payments for internet services, electronic transactions, software payments etc.

The Institute is of the view that specific provisions/guidelines should be introduced to provide clarity as soon as possible. We need to maintain a competitive business environment.

15. **Investment Holding Company (IHC)**
Section 60F(1A) provides that income from holding of investments by an IHC is treated as non-business source, whereas other income (including income from a business source) are treated as gains or profits under s 4(f) income. A proportion of permitted expenses as determined in accordance with the prescribed formula are allowed as a deduction from the aggregate income of the IHC.

Income from holding of investments by a listed IHC is treated as business income. All sources of income have to be assessed as separate sources of business income. However, unabsorbed tax losses and unutilised capital allowances are not allowed to be carried forward to the future years.

(i) **Treatment of non-investment income**
It is uncertain whether indirect expenses are allowable deductions although they are incurred in the production of gross income. The Institute is of the view that indirect expenses, excluding the permitted expenses, should be allowed as a deduction against the non-investment income and since the maximum permitted expenses deductible against investment income is restricted to 25%, the balance of the permitted expenses should be deductible against non-investment income.

Further, compliance expenses such as tax fees, EPF and SOCSO contributions as well as bank charges should be included in the permitted expenses as these are expenses necessarily incurred in the business of holding investments.

(ii) **Treatment of investment income**
The Institute proposes that the tax treatment of investment income should be based on the classes of income in accordance with s 4 of the ITA. All dividend income should be treated as one source of income, as would also be the case of rental and interest income, regardless of whether they are income or non-income producing. Where it is established that a rental source is a business source, all the rental income should be treated as a business source.

C. IMPROVING THE EFFICIENCY OF TAX ADMINISTRATION

(a) *Promoting transparency and timely dissemination of information*

16. **Public Rulings/Guidelines/Legislative Amendments/Tax Cases**

(i) **Prospective implementation**
The effective date for laws or any guidelines/public rulings should commence from the date on or after such announcements, legislation or amendments to the legislation are made and announced to the public. It should be prospective instead of retrospective.

(ii) **Timely dissemination of information**
Appropriate lead-time should be given to taxpayers to comprehend and understand the legislation or amendments made thereto. Specific guidelines/rulings should be issued on a timely basis to provide clarity on the tax treatment of new and emerging issues.

(iii) **Publication of advance rulings**
The rulings should be published for general reference with the confidentiality of the taxpayers maintained. .

(iv) **Disclosure on compliance with public rulings**
The requirement to disclose compliance with public rulings by a taxpayer in the tax return form should be removed.

(iv) **Publication of decided tax cases**
Tax cases decided by the Special Commissioners of Income Tax (SCIT), Customs Appeal Tribunal (CAT) and courts should be made available to the public for better transparency through timely dissemination via the IRB's and Customs websites or other means.

(iv) **Application of decided tax cases**
In preparing their tax computations, taxpayers should be allowed to adopt the decisions passed by the courts (irrespective of the stage of appeal of the case) in respect of the interpretation of the legislation. There should be no penalty imposed on the taxpayer for following such court decisions.

(b) *Enhancing tax administration efficiency*

17. **Withholding tax on reimbursements/ disbursements**
The Institute proposes that withholding tax should not be imposed on <u>all</u> types of reimbursements / disbursements as these are incidental costs for providing the services rather than fees/income earned from the services provided.

18. **Consolidation of personal reliefs**
It is proposed that personal reliefs be consolidated into a few broad categories (for example, single individual and married individual) and the global personal relief amount will then be automatically granted to the taxpayer. This will simplify the completion of tax returns and reduce errors and over-claims.

19. **Enhancing tax administration**
(i) With the introduction of the self-assessment regime, the IRB and MOF are facing challenges with various aspects and the limited internal resources are stretched. The Institute proposes that the authorities outsource some of the technical work.

(ii) A consultative panel should be established to provide a permanent consultative mechanism between the public sector and private sector on tax issues.

The IRB/MOF should also appoint advisers from prominent and experienced practitioners so as to be able to appreciate the business realities and adapt the system, as and when they are necessary. They can also serve as additional avenues for feedback so that timely changes can be implemented.

(c) *Enhancing taxpayers rights*

20. **Tax audits and investigations**
With the self-assessment system, the IRB is placing emphasis on enforcing compliance via tax audits and investigations. Civil and criminal investigations are measures of enforcement. Penalties imposed, however, should commensurate with the degree of culpability of the offence.

(i) **Appeal against tax audit/investigation**
A clear mechanism must be set in place for any appeal against the manner in which an audit/investigation is carried out. Such appeals should be settled on a timely basis by an independent party, for example, an Administrative Appeals Tribunal (AAT).

(ii) **Penalty on longer instalment payment scheme**
The Institute proposes that para 12.6 of the Tax Investigation Framework be deleted as a taxpayer should not be penalised merely because he has applied for a longer payment scheme.

(iii) **Criminal proceedings**
This should only be initiated on repetitive or recalcitrant offenders and not as a first course of action.

21. **Appeals**
Currently, the IRB and the taxpayer may appeal on a question of law against the decision of the Special Commissioners of Income Tax to the High Court. Further appeals may be made to the higher courts, subject to the provisions of the *Courts of Judicature Act 1964*. There are some limitations in allowing an appeal to be heard beyond the Court of Appeal.

To improve the appeal process, the Institute proposes that:

(i) the Courts of Judicature Act be amended to allow cases first heard by the SCIT to be eventually heard at the Federal Court.
(ii) the time frame for disposal of appeals by the Director General of Inland Revenue be reviewed.
(iii) the setting up of an Administrative Appeals Tribunal (AAT) for taxpayers aggrieved by decisions of an administrative nature, including the imposition of penalties, be considered.

iv) an avenue for appeals against penalties which are imposed through the exercise of the discretionary power of the IRB be provided. This could be through the AAT stated above.

22. **Taxpayers' rights**
It is important that taxpayers are fully aware of their rights and obligations under the self–assessment regime. The tax system should be clear, transparent and equitable.

The following suggestions are proposed:
(i) the introduction of the office of a Taxation Ombudsman as an avenue for taxpayers to forward complaints in relation to non-technical matters.
(ii) the introduction of an Administrative Appeals Tribunal (proposed in item (20) and (21) above) for taxpayers aggrieved by decisions of an administrative nature (including the imposition of penalties).
(iii) the establishment of a more effective Taxpayer's Charter or Client's Charter which not only sets out the rights and obligations of taxpayers and certain timelines for the IRB to follow but is also effectively monitored as far as adherence to the Charter is concerned.
(iv) criminal proceedings should only be initiated on repetitive or recalcitrant offenders.

D. ENSURING AN EQUITABLE & BUSINESS–FRIENDLY TAXATION SYSTEM

23. **Improving effectiveness of self–amendment**
It is proposed that the time period for self–amendment be increased from six months to one year and no penalty should be imposed if the tax paid exceeds the assessment under self–amendment.

24. **Restructuring of employer's and employee's returns**
The Institute proposes that e–returns and the tax treatment of perquisites and benefits–in–kind are simplified so that employees who have been subject to Schedular Tax Deductions (STD) are waived from submission of their annual tax returns.

25. **Simplifying deductibility of entertainment expenditure**
The Institute proposes that any expenses incurred in the provision of entertainment should be partially allowed (50%) while expenses which fall under s 39(1)(*l*)(i) to (vii) of the Act should be allowed in full.

26. **Preparation for Goods and Services Tax (GST)**
The Institute hopes that the minimum time frame of one year as recommended by the International Monetary Fund for the implementation of GST be adhered to and guidelines/rulings on specific arrangements/administrative practices be issued to the public on a timely basis to ensure transparency and clarity. It is proposed that expenditure incurred for the purpose of enhancing or improving taxpayers' operating systems, training of the workforce etc to prepare for GST be specifically allowed by legislation.

27. **Capital allowances on small value assets**
To simplify the tax treatment, the Institute proposes that small value assets be given an outright revenue deduction instead of a 100% capital allowance claim. Further, the cap (RM10,000) on the aggregate value of small value assets should be removed for non–SMEs to avoid having two different treatments for small value assets, thereby complicating the tax treatment on disposals.

28. **Removal of formula-based provisions**
To simplify tax compliance, the Institute proposes that formula–based provisions such as para 2(1)(b) and 66 of Sch 3 of the ITA be removed.

29. **Extension to eligibility of forest allowances**
Currently, the IRB holds the view that forest allowance can only be claimed by a person who has been given the right to extract timber by the Government. In practice, a concession holder often engages a logging contractor to extract timber. The contractor will incur the capital expenditure on roads and relevant buildings. Both parties are not eligible to claim forest allowances.

The Institute proposes that the law be amended to expressly allow logging contractors to claim forest allowances.

30. **Agriculture allowances in a controlled transfer**
The Institute proposes that the Income Tax (Capital Allowances and Charges) Rules 1969 be updated to ensure that an agriculture charge does not arise under a controlled transfer situation, and that the word "plantation expenditure" wherever it appears with "agriculture expenditure" should be replaced.

31. **Disparity in expectations between budget announcement and implementation**
We note that there were occasions where well-conceived Budget proposals were subsequently watered down after the actual rules and regulations are spelt out, thereby creating a disparity in expectations between Budget announcement and implementation.

The Institute is of the view that such a situation may not enhance the credibility of the policy–makers as the public will develop a "wait–and–see" attitude towards Government announcements.

E. MAINTAINING A COMPETITIVE FISCAL ENVIRONMENT

32. **Issues relating to reinvestment allowances (RA)**

(i) **Backward integration**
The existing Public Ruling on RA excludes any capital expenditure with regard to expansion by backward integration. With the cost of raw materials constantly on the rise, many businesses seek to control prices by backward integration to keep the final product cost down (ie being produced internally compared to importing materials etc). The Institute is of the view that there are strong commercial arguments for backward integration projects to qualify for RA.

(ii) **Claw-back for disposal of assets within five years**
The Institute is of the view that the five–year period is too long as the asset may become technologically obsolete before the end of five years. The move will restrain the company from investing in new technology and hence affect the overall economic positioning of Malaysia. The Institute would suggest that the two–year period is the norm that is used in the various provisions in the law affecting controlled transfers.

(iii) **Assets transferred under a scheme of reconstruction and amalgamation**
In a controlled transfer or transfer under a scheme of reconstruction and amalgamation, where a qualifying asset is purchased and disposed by the disposer within five years, the RA claimed is then clawed back. However, the acquirer would not be eligible to claim RA on that asset although no RA has effectively been claimed by the disposer. The provision discourages reconstruction and rationalisation of groups of companies in Malaysia. The Institute proposes that where RA on a qualifying asset has been clawed back from the disposer, the acquirer should be allowed to claim RA on that asset.

(iv) **Extension of the scope of qualifying expenditure**
To encourage reinvestment, RA should be allowed on capital expenditure incurred on peripheral activities such as the installation of plant and machinery to process waste disposal, construction of additional storage capacity and staff accommodation as well as accommodation for management staff in remote areas where the business operates etc.

(v) **Mutual exclusion with other incentives**
The Institute is of the view that mutual exclusion for RA with other incentives should be at the products level rather than at the company level. A company which enjoys pioneer status on Product A should be allowed to claim RA in relation to Product B where the RA criteria are met. Further, steps should be taken to widen the scope of RA for the agriculture sector.

33. **Accelerated Capital Allowances (ACA) on Information and Communication (ICT) Equipment**
Contrary to the intention stated in the 2009 Budget proposal to encourage the private sector to invest in the latest ICT equipment and in line with the development in ICT, the

Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2008 (PU(A) No. 358/2008) has introduced a claw–back provision for assets disposed of within two years and excludes companies enjoying incentives under the *Promotion of Investments Act 1986* and reinvestment allowance from claiming the ACA.

34. **Capital allowances and rental claims on private motor vehicles**
Currently the limit of capital allowances and rental claims on private motor vehicles is RM100,000 per vehicle provided that the cost of the vehicle is less than RM150,000. If the cost is more than RM150,000, the limit is RM50,000.

It is proposed that the limit on qualifying expenditure for capital allowances and lease rental claims on private motor vehicles be removed. Alternatively, the cap could be increased to reflect the current economic environment. It may be considered based on its cylinder capacity. For example, motor vehicles with a cylinder capacity of less than 2,000cc should have no restriction on capital allowances claimed while those with a cylinder capacity greater than 2,000cc could have a limit on the capital allowances claimed.

35. **Promoting the franchising industry**
It is proposed that lump sum payment of the franchise fee by the franchisee be allowed a tax deduction over a five–year period, similar to the deduction for cost of acquisition of proprietary rights which is available to the manufacturing sector.

39. **Foreign associations**
The Government should consider providing favourable tax treatment for foreign organisations which decide to set up their office or secretariat in Malaysia. The applicable law should be amended to allow easier registration of associations with large numbers of foreign members. This would encourage more activities such as publishing, seminars and conferences etc being conducted in Malaysia. These international activities could then translate into economic benefits to the country and promote tourism as well.

40. **Small and Medium Size Enterprises (SMEs) Restriction on assets acquired under hire–purchase arrangements**
The Institute notes that the Income Tax (ACA) (Plant and Machinery) Rules 2008 (PU (A) No. 357/2008) stipulates that only the capital portion of a hire–purchase asset incurred during the effective period of the Rules will be eligible for ACA. The longer term of hire–purchase reflects the stronger need for financial assistance. Such a practice will also complicate the calculation of balancing allowances/charges on disposal as the claim for allowances are at different rates for different years of assessment. The Institute suggests that the full capital expenditure on the assets acquired in years of assessment 2009 and 2010 should qualify for the ACA.

F. PROMOTING A CARING SOCIETY

41. **Allowing basis year business loss to set off against income of the spouse**
In view of the adverse economic scenario, the Institute proposes that s 45 of the ITA be amended to allow a husband/wife to utilise the basis year business loss of one spouse to be offset against the income of the other. This will strengthen the social support net and is in line with developing a caring society.

42. **Donations to approved institutions**
The Institute would suggest that the law be amended to stipulate the lower of 10% of aggregate income or RM25,000 (or some other practical threshold). In addition, the Institute wishes to point out that the provision should apply to all taxpayers, including individuals, instead of only companies.

43. **Tax on interest income earned by associations**
Many associations (including trade associations) raise scholarships and medical funds to provide assistance to its members. These are positive signs of contribution to assist individuals to enhance the quality of life. These funds are usually kept in fixed deposits at local banks and the interest income derived will be subject to tax at the relevant tax rates applicable to the association.

To encourage these associations to continue to play a pro–active role, it is proposed that the scope of s 109C of the Act be extended to include associations ie interest income earned would be subject to a 5% final tax instead of subjecting the interest income to tax at the relevant rates applicable to such associations.

Conclusion

In summary, the 2010 Budget should help facilitate economic recovery through stimulation of growth in the business environment and in the services sector. It should focus on improvement of efficiency in the administration of tax to ensure an equitable and business–friendly taxation system. While promoting a caring society, the Budget should ensure that the fiscal environment of the country is also maintained at a competitive level.

Judicial Review as an Alternative Remedy to the Customs Appeal Tribunal

By Datuk D.P. Naban & S. Saravana Kumar

1. Introduction

The Customs Appeal Tribunal was introduced in 2007 through an amendment to the *Customs Act 1967* (CA 1967). Section 141B of the CA 1967[1] establishes the Customs Appeal Tribunal (the Tribunal) to hear appeals from taxpayers who are aggrieved by the decision of the Director General of Customs. Prior to the establishment of the Tribunal, such appeals were heard by the Minister of Finance[2]. If taxpayers are dissatisfied with the Minister's decision, they may then appeal to the High Court by way of judicial review.

This article examines whether taxpayers may proceed directly to the High Court by way judicial review if they are dissatisfied with the Director General of Customs' decision. In other words, can taxpayers proceed directly to the High Court despite the existence of the Tribunal or is the Tribunal the first avenue of appeal in respect of any appeal against the Director General of Customs' decision?

2. Facts

In a recent case between a taxpayer and the Director General of Customs, Malaysia[3], the taxpayer applied for leave from the High Court to quash the Director General of Customs' decision by way of judicial review. The Director General of Customs had imposed additional customs duty and sales tax on the taxpayer by way of adjustment of royalty pursuant to Reg 5(1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999[4]. The taxpayer applied for a *certiorari* order to quash the decision and pending that application, the taxpayer sought to stay the enforcement of the decision.

The Attorney General however, raised a preliminary objection to the taxpayer's application on the premise that the taxpayer's application was pre-matured and misconceived. The Attorney General took the position that the taxpayer should have filed its appeal before the Tribunal and not the High Court. The taxpayer disagreed with that position and both parties were instructed by the High Court to file in their written submissions. However, at the eleventh hour before the hearing, the Attorney General withdrew the objection. Consequent to that, the High Court granted leave to the taxpayer to apply for judicial review and stayed the enforcement of the decision pending the determination of the application.

The crux of the taxpayer's submission was that the availability of an alternative remedy (ie the Tribunal) does not exclude judicial review. The following grounds, which are discussed below, were raised by the taxpayer in support of its application for judicial review:

(a) the *Sungai Gelugor* case
(b) that the Tribunal is not a specialised tribunal
(c) that the Tribunal is a domestic tribunal
(d) s 141N of the CA 1967, and
(e) that the Court's powers are not restricted under the CA 1967.

3. The *Sungai Gelugor* case

Justice Edgar Joseph Jr in the Federal Court case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*[5] (*Sungai Gelugor*) examined in detail the alternative remedy argument

1 Inserted by s 6 of the *Customs (Amendment) Act 2007*.
2 Section 143 of the *Customs Act 1967* prior to the amendment by s 8 of the *Customs (Amendment) Act 2007*.
3 *L Sdn Bhd v Ketua Pengarah Kastam, Malaysia*, a matter before the High Court, Kuala Lumpur. The authors appeared on behalf of the taxpayer in this matter.
4 PU(A) 507/1999.

after studying various local and English authorities on this point. His Lordship concluded that where genuine grounds for judicial review are alleged, it is the refusal rather than grant of relief which is the exceptional course. He further stated that "*the reason for this is that whilst in theory the courts, there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to Judicial Review, in practice***, *the courts are often much kinder to the applicant with a good case on the most probably entertain his application as an exception*****" (emphasis added).

The above clearly establishes that if taxpayers choose not to exercise the statutory appeal remedy, namely the Tribunal, the High Court's jurisdiction to hear such applications is not excluded. In fact, as a matter of practice the Courts are often inclined to grant judicial review to applications that have merit. This approach is also consistent with the position observed by Lord Denning in *R V Chief Immigration Officer Gatwick Airport, ex parte Kharrazi*[6], where his Lordship stated that "*on countless occasions the* ***availability of appeal does not debar the court from quashing an order by certiorari and that everything depends upon the facts of the case"*** (emphasis added). This observation was unanimously endorsed by in *Sungai Gelugor*.

Even if there is some conflict in the United Kingdom with regard to Lord Denning's approach, it is notable that the Federal Court in *Sungai Gelugor* had unanimously endorsed and adopted the position articulated by Professor Wade**,** an eminent Constitutional law scholar, that when "***genuine grounds for Judicial Review are alleged, it is the refusal rather than the grant of relief which is the exceptional course."***

The judicial pronouncements cited above illustrate that it is **the refusal to grant judicial review which is an exception** rather than the granting of judicial review in cases where there is an alternative remedy.

4. The Tribunal is not a specialised tribunal

Among the specialised tribunals mentioned by Justice Edgar Joseph Jr. in *Sungai Gelugor* are the Special Commissioners of Income Tax, Industrial Court and Appeal Board under the *Town & Country Planning Act 1976*. These tribunals share the following characteristics:

(a) the hearing is heard by at least one person who is legally qualified, and
(b) the appellants can be represented by advocates and solicitors.

Given that those tribunals have the above characteristics, they are able to consider both issues of fact and law. However, the Customs Appeal Tribunal does not enjoy those characteristics. Although, s 141C of the CA 1967 states that the members of the Tribunal shall be a Chairman and a Deputy Chairman appointed from the Judicial and Legal Service, s 141J of the CA 1967 allows the jurisdiction of the Tribunal to be exercised by any member of the Tribunal sitting alone. It must be noted that other members of the Tribunal need not be legally qualified. Unlike the specialised tribunals mentioned above, a hearing before the Tribunal can be presided by a person who has no legal training or background.

Further, the fact that the Chairman or the Deputy Chairman may preside over an appeal by sitting alone, clearly illustrates that the appeal before the Tribunal may not necessarily be heard by a person with special knowledge and experience in Customs matters as well. This is because the Chairman or the Deputy Chairman need not have any background in Customs matters.

Unlike the Tribunal which excludes legal representation, the structure of the Special Commissioners of Income Tax, Industrial Court and Appeal Board under the Town & Country Planning Act 1976 allows the appellant to be represented by an advocate and solicitor[7]. In this regard, the Tribunal is not a specialised tribunal and at most, is only a domestic tribunal.

5. The Tribunal is a domestic tribunal

The authors opine that the Tribunal is envisaged to handle domestic issues in an informal fashion. This can be illustrated from the exclusion of advocates and solicitors from appearing before the Tribunal as per s 141Q of the CA 1967[8]. It appears that the Tribunal had been created to allow taxpayers to resolve general and factual issues in an informal fashion without the need for legal representation. Legislature must have intended for s 141N of the CA 1967[9] to be utilised in circumstances where taxpayers with disputes that are technical in nature and involving questions of law to proceed directly to the High Court. If the taxpayer elects the latter, then he may have legal representation.

In *L Sdn Bhd*, the application involved the construction of Reg 5(l)(a)(iv), which is pertaining to the adjustment of customs value by including royalty and license fees for the purposes of customs valuation. It is also difficult to envisage how the Tribunal would apply the canons of construction to interpret the operation and application of Reg 5(l)(iv) (a) if the appeal is neither heard by a member who has no legal

5 [1999] 3 CLJ 65.
6 [1980] 3 All ER 373.
7 For example see para 14(b) of Sch 5 of the Income Tax Act 1967.
8 Section 141Q reads:
(1) An advocate and solicitor shall not be allowed to represent an appellant at the hearing of an appeal before the Tribunal.
(2) Notwithstanding subsection (1) and s 37 of the Legal Profession Act 1976 [Act 166]-
(a) a corporation or an unincorporated body of persons may be represented by a full-time paid employee of the corporation or body; or
(b) a minor or any other person under a disability may be represented by his next friend or guardian ad litem.
9 Section 141N reads:
(1) Where an appeal is lodged with the Tribunal and the appeal is within the jurisdiction of the Tribunal, the issues in dispute in such appeal, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless-
(a) the proceedings before the court were commenced before the appeal was lodged with the Tribunal; or
(b the appeal before the Tribunal is withdrawn, abandoned or struck out.
(2) Where para (1)(a) applies, the issues in dispute in the appeal to which those proceedings relate, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the appeal before the court is withdrawn, abandoned or struck out.

training and qualification nor assisted by legal counsel. The exclusion of legal representation would certainly create a problem when it comes to issues pertaining to evidential matters and interpretation of legislation and case law. It must be appreciated that the matter in *L Sdn Bhd* was essentially on the construction of Reg 5(l)(a)(iv), which traces its origin to the WTO Customs Valuation Code.

In such cases, the appeal procedure provided in s 143 of the CA 1967, namely the appeal to the Tribunal, is unsuitable and inadequate. Further, if the Tribunal was to be the sole appeal forum for all appeals relating to indirect tax matters, the authors are positive that Parliament would have allowed taxpayers to have legal representation before the Tribunal, just like the other specialised tribunals mentioned above.

6. Section 141N of the Customs Act 1967

Further, the authors submit that the wording of s 141N of CA 1967 clearly provides taxpayers the option of either addressing their grievances before the Tribunal or the High Court. This illustrates that an appeal before the High Court is not discounted at all by Parliament. If taxpayers opt to file their appeals before the High Court, then the taxpayers are excluded from appealing to the Tribunal. Likewise, if taxpayers choose to file their appeals before the Tribunal, then they are excluded from concurrently appealing before the High Court. Any other construction of this section would make it superfluous or redundant.

Hence, the wording of s 141N clearly illustrates that Parliament did not intend to grant exclusivity to the Tribunal to hear all appeals pertaining to the decisions of the Director General of Customs. The relevant part of s 141N states that when an appeal is lodged with the Tribunal, that appeal should not be subject of another proceedings between the parties in Court.

7. The Court's powers are not restricted under the Customs Act 1967

Unlike the Income Tax Act 1967 (ITA 1967), there is no provision in the CA 1967 that restricts the powers of the High Court to hear any matters including judicial review application. For instance, s 106(3) of the ITA states that "*In any proceedings under this section* ***the court shall not entertain any plea*** *that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(1A),(3),(4),(5),(6),(7) or (8).*"

Section 106(3) states that if the Government initiates civil actions to recover taxes due and payable, the taxpayers' plea that the taxes sought to be recovered are excessive, incorrectly assessed, under appeal or incorrectly increased cannot be entertained by the High Court. If the taxpayers want to dispute the taxes raised, then they must appeal to the Special Commissioners of Income Tax. Clearly, s 106(3) restricts the powers of the High Court to hear such matters[10].

However, if the legislation, for example the Customs Act 1967, **does not expressly restrict the powers** of the High Court, then the High Court may hear the matter. This point was succinctly explained by Justice Azmel Maamor in *Ketua Pengarah Hasil Dalam Negeri v Rheem (Far East) Pte Ltd*[11]**,** where his Lordship commented, ***"****As to the issue of the extent of the jurisdiction of the Special Commissioners under the said Act it cannot be disputed that their powers are limited unlike the powers of the High Court. They are creatures of statute and as such their jurisdiction has to be clearly spelt out by statute and in this case the said Act. In the case of the High Court which has unlimited jurisdiction, its powers may be taken away if it is specifically so stated in any statute.* ***In other words if the statute is silent the High Court will have the jurisdiction****. This principle cannot be applied in the case of the Special Commissioners" (*(emphasis added)*).*

Given that the CA 1967 neither has a provision equivalent to s 106(3) of the ITA 1967, nor a provision to restrict the powers of the High Court, the authors are of the view that taxpayers' appeals can be heard directly by the High Court.

8. Conclusion

In *L Sdn Bhd*, despite the existence of the Tribunal, the taxpayer succeeded in obtaining leave from the High Court to purse its judicial review application. In addition to that, the taxpayer successfully stayed the enforcement of the decision pending the determination of the application. This case illustrates that the mere existence of the Tribunal does not preclude taxpayers from applying for judicial review.

If an appeal is necessitated on the premise that the Director General of Customs had abused his authority by applying the law erroneously and had acted beyond the powers conferred to him, then judicial review appears to be a better legal remedy to the taxpayers. This is because unlike the Tribunal, the High Court has the jurisdiction to stay the enforcement of the decision. Further, by pursuing the appeal to the High Court, taxpayers have the opportunity to be represented by legal counsel, a fundamental right which is denied before the Tribunal. In *Kim Thye Co. v Ketua Pengarah Hasil Dalam Negeri*[12], despite the existence of the Special Commissioners of Income Tax, the Director General of Income Tax accepted as "*a matter of law that he is not immune from the process of judicial review and made no procedural objection"* to the taxpayer's application in that case. In conclusion, the Director General of Customs' authority is not absolute and is open to judicial review. TG

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10 This received judicial recognition in Su Man Tobacco v Government of Malaysia [1973] 2 MLJ 163.
11 [1998] 2 CLJ Supp 351.
12 [1991] 3 CLJ 2507.

TECHNICAL UPDATES

These technical updates are summarised from selected Government Gazettes published between 19 May 2009 and 15 August 2009; Public Rulings and guidelines issued by the Inland Revenue Board (IRB), the Malaysian Industrial Development Authority (MIDA) and other regulatory authorities.

Income Tax (Exemption) (Amendment) Order 2009 (PU(A) 159/2009)

The Income Tax (Exemption) (Amendment) Order 2009 amends para 3(1) and 4(a) of the Income Tax (Exemption) (No. 11) Order 2005 (PU(A) 75/2005) (the 2005 Order). Where an exemption is granted to a venture capital company under the 2005 Order, such exemption shall (subject to the provisions of the 2005 Order) continue to remain in full force and effect.

Pursuant to the 2009 Order, a venture capital company is exempted from income tax on statutory income from all sources, other than interest income arising from savings or fixed deposits and profits from *syariah*–based deposits, from the year of assessment 2008 or the year of assessment in which the venture capital company commences business, whichever is the later. The venture capital company shall, for each year of assessment (YA) during the period of exemption, obtain a certification from the Securities Commission (SC) confirming the level of its investment in the venture company and seed capital.

The exemption is for a period of 10 years or the years of assessment equivalent to the life of the fund established for the purpose of investing in a venture company, whichever is the lesser; provided that it has invested at least 70% of its invested funds in venture companies, or at least 50% of its invested funds in the form of seed capital, at the point of the first investment.

The exemption is reduced to a period of five years or the years of assessment equivalent to the life of the fund established for the purpose of investing in a venture company, whichever is the lesser; provided that it has invested at least 30% of its invested funds in the form of seed capital, start–up financing, early stage financing or its combination in venture companies at the point of the first investment and it has made the application for exemption to the SC between 30 August 2008 and 31 December 2013.

Income Tax (Exemption) (No. 7) (Amendment) Order 2009 (PU(A) 211/2009)

Pursuant to the Income Tax (Exemption) (No. 7) Order 2008 (PU(A) 351/2008), as amended by the Income Tax (Exemption) (No. 7) (Amendment) Order 2009 (PU(A) 211/2009), the exemptions below apply with effect from 30 August 2008.

(1) A non-resident is exempted from payment of income tax on interest paid or credited in the basis year for a YA by Bank Kerjasama Rakyat Malaysia Berhad.

(2) An individual resident in Malaysia is exempted from payment of income tax on interest received from negotiable certificates of deposit or rediscounting of banker's acceptance on repurchase agreement or any similar instrument of trade financing which is traded in the money market fund.

(3) An individual resident in Malaysia is exempted from payment of income tax on gains or profit, interest or bonus received from money deposited with the following institutions:
- a bank or finance company licensed or deemed to be licensed under the *Banking and Financial Institutions Act 1989*
- a bank licensed under the *Islamic Bank Act 1983*
- a development financial institution prescribed under the *Development Financial Institutions Act 2002*
- the Lembaga Tabung Haji established under the *Tabung Haji Act 1995*
- the Malaysian Building Society Berhad incorporated under the *Companies Act 1965*
- the Borneo Housing Mortgage Finance Berhad incorporated under the Companies Act 1965, or
- a co-operative society registered under the *Co–operative Societies Act 1993*.

The money must be deposited in any savings, current, fixed or investment deposit; or in any savings, current or investment deposit under the Islamic banking scheme.

Income Tax (Exemption) (No. 3) Order 2009 (PU(A) 262/2009)

The Income Tax (Exemption) (No. 3) Order 2009 (PU(A) 262/2009) exempts a non–resident person from payment of withholding tax for income received under s 4A(ii) of the *Income Tax Act 1967* in relation to technical training conducted by that person for the purpose of upgrading and developing the technical skills of any employee of a person resident in Malaysia.

"Training" is defined as training under the programme of: (a) post–graduate course in information technology and communication, electronics or life sciences; (b) post–basic course in nursing or allied healthcare; or (c) aircraft maintenance engineering course.

The Order is effective from 30 August 2008 until 31 December 2012.

Income Tax (Deduction for Cost of Training for Employees) Rules 2009 (PU(A) 261/2009)

The Income Tax (Deduction for Cost of Training for Employees) Rules 2009 (PU(A) 261/2009) allow a deduction against the adjusted income from a resident person's business source for the cost of training incurred for upgrading and developing the technical skills of its employees. The deduction is only applicable to "training" as defined in the rules, ie training under the programme of post–graduate course in information technology and communication, electronics or life sciences; post–basic course in nursing or allied healthcare; or aircraft maintenance engineering.

The deduction allowed is in addition to that allowable under s 33 of the *Income Tax Act 1967*. The rules are effective from the YA 2009 until the YA 2012.

Tax Audit Framework
Issued: January 2009. Effective: 1 January 2009 onwards.

The IRB has issued a new tax audit framework in January 2009, which takes effect from 1 January 2009. This 2009 framework replaces that issued in 2007. The new framework is not applicable to audit cases involving transfer pricing, thin capitalisation and advance pricing arrangements. Issues covered by the framework include case selection, how tax audits are carried out, the rights and responsibilities of the parties involved, confidentiality of information, offences and penalties and appeals.

Addendum to Public Ruling No. 3/2005 — Living Accommodation Benefit Provided for the Employee by the Employer
Issued: 5 February 2009. Effective: YA 2009 onwards.

An addendum has been issued by the IRB to provide clarification regarding the determination of the value of living accommodation benefits provided by employers to employees. The Ruling is effective for YA 2009 and subsequent years of assessment, and relates to s 13, 32(1A), 32(2)(a) and (b), 32(3)(c), and 32(4) of the *Income Tax Act 1967*.

Addendum to Public Ruling No. 3/2001 — Appeal Against an Assessment Issued: 18 May 2009. Effective: 1 January 2009 onwards.

The IRB issued an addendum to Public Ruling No. 3/2001 on 18 May 2009 to provide clarification on appeals against a notification of non–chargeability, in relation to s 97A of the Income Tax Act 1967. Effective from 1 January 2009, the right to appeal to the Special Commissioners of Taxation (SCIT) is available to cases which are not liable to tax. A notification of non–chargeability will be issued where specified conditions are fulfilled, and this notification is deemed to be a notice of assessment and will form the basis of an appeal to the SCIT. The usual rules and timelines governing appeals continue to apply.

Public Ruling No. 1/2009 — Property Development
Public Ruling No. 2/2009 — Construction Contracts
Issued: 22 May 2009. Effective: YA 2006 onwards.

Prior to 22 May 2009, guidance for the tax treatment of property development and construction contracts were dealt with in the same public ruling issued by the IRB, Public Ruling No 3/2006 —*Property development and* *construction contracts*. This 2006 Ruling was issued on 13 March 2006 and was effective for the YA 2006 and subsequent years of assessment.

On 22 May 2009, Public Ruling No. 1/2009 — *Property development* and Public Ruling No. 2/2009 — *Construction contracts* were issued by the IRB to supersede Public Ruling No 3/2006, with each area covered separately. The 2009 Rulings are effective for the YA 2006 and subsequent years of assessment.

The Rulings explain the basis of determining gross income for the purpose of computing adjusted income derived from the businesses of property development and construction contracts, respectively. Related provisions of the Income Tax Act 1967 are s 4(a), 23(a), 24, 33(1) and (2), 35, 36(1), 39 and 91.

The rulings may be obtained from the IRB's website, www.hasil.gov.my/lhdnv3e, under "Laws and Regulations" — "Public Rulings".

Addendum to Public Ruling No. 6/2005 — Trade Association
Issued: 1 July 2009. Effective: YA 2009 onwards.

The IRB has issued an addendum to Public Ruling No. 6/2005 to provide clarification in relation to the change in definition of a trade association and the tax treatment of adjusted loss and unabsorbed capital allowance from members' subscriptions. Related provisions of the *Income Tax Act 1967* are s 53(3) and (4).

A copy of the Public Ruling may be obtained from the IRB's website, www.hasil.gov.my/lhdnv3e, under "Laws and Regulations" — "Public Rulings".

Public Ruling No. 3/2009 — Professional Indemnity Insurance
Issued: 30 July 2009. Effective: YA 2008 onwards.

The IRB issued Public Ruling No. 3/2009 on 30 July 2009 to provide guidance on: (1) the deductibility of premium expenses paid for professional indemnity insurance policies, and (2) the taxability of insurance proceeds received in relation to professional indemnity insurance. The Ruling supersedes Public Ruling No. 5/2006 — *Professional Indemnity Insurance*, issued on 31 May 2006.

From the YA 2008 onwards, the deduction for professional indemnity insurance premiums is available to all practicing professionals if the professional carries on the business of his/her profession, regardless of whether the purchase of the policy is a requirement under the profession's by-laws or statute. The Ruling defines a "professional" to be a person who belongs to a profession and is a member of a professional body which represents the profession or registered with a body which governs the profession.

A copy of the Public Ruling may be obtained from the IRB's website, www.hasil.gov.my/lhdnv3e, under "Laws and Regulations" — "Public Rulings".

Other Guidelines

1. *Guidelines for application of pioneer status by software development company (issued 10 March 2009 by MIDA)*
2. *Guidelines for application of pioneer status or investment tax allowance by medical device testing laboratory (issued 10 March 2009 by MIDA)*
3. *Guidelines for application of pioneer status or investment tax allowance by forest plantation company (issued 10 March 2009 by MIDA)*
4. *Guidance on exempted perquisites and benefits-in-kind (issued 28 April 2009 by the IRB)*
5. *Guidelines on facilities provided to contract or toll manufacturers under s 9 of the Sales Tax Act 1972 (issued 13 December 2008 by the Royal Malaysian Customs)*
6. *Guidelines on refund of sales tax and service tax in respect of bad and doubtful debts (issued 2 July 2009 by the Royal Malaysian Customs)*
7. *Guidelines on refund of excise duty for return of locally manufactured goods (issued 2 July 2009 by the Royal Malaysian Customs)*
8. *Guidelines on procedures for re-export of imported goods (letter dated 11 May 2009, issued by the Royal Malaysian Customs)*

The abovementioned guidelines have been issued by the relevant authorities, and are available on the IRB's website (www.hasil.gov.my), MIDA's website (www.mida.gov.my), Royal Malaysian Customs' website (www.customs.gov.my) and CTIM's website (www.ctim.org.my). TG

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Malaysian GAAP provides the user a comprehensive overview of the various financial reporting standards for non-private entities as issued by the Malaysian Accounting Standards Board (MASB). The resource also provides commentary review on the IC Interpretations as well as the remaining International Financial Reporting Standards (IFRS) which have yet to be adopted by MASB.

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5. Malaysian Tax Reporter

Product Code: WMTR/MTR **ISBN:** 978-981-4180-04-7/978-981-00-2765-0
Author: Dr Jeyapalan Kasipillai (Commentary originally prepared by Arjunan Subramaniam)

The Reporter contains in-depth analysis of the principles of the Malaysian tax laws with the inclusion of commentary reviews on relevant developments in legislation, case law (Malaysian and International) and guidelines by the Inland Revenue Board (IRB). The comprehensive analysis helps users of this resource understand the rationale of the principles and their application in the system.

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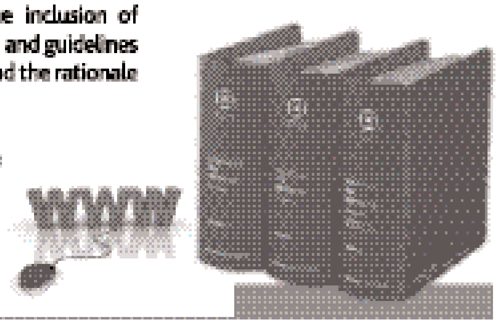

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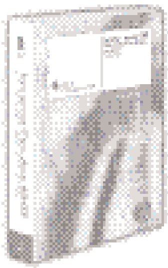

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Case Commentaries

By Francis LK Tan and Janice Kon

KTSM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2008) MSTC 3,793
Special Commissioners of Income Tax.
Appeal No. PKCP (R) 55/2006.
Case stated on 28 January 2008.

The principal activities of the taxpayer company were investment holding and management, as well as acting as a charitable organisation rendering financial assistance to the needy. In 2002, the taxpayer invested in its associate company and this yielded dividend income, which was the only source of income of the taxpayer, and which was used for charitable activities.

The taxpayer computed its income as a company carrying on a business (and not as an investment holding company) pursuant to s 60F of the *Income Tax Act 1967* (ITA). However, the Director General found that the taxpayer should be regarded as an investment holding company as a result of a tax audit and penalty was accordingly imposed on the taxpayer. The taxpayer then appealed on the basis that it had only acted as a charitable organisation and that its activities did not consist wholly in the making of investments.

When the matter came before the Special Commissioners of Income Tax (SCIT), they had to decide whether the taxpayer was an investment holding company under s 60F(2) of the ITA and whether the Director General's imposition of the penalty was justified. The SCIT held that there was no doubt that the taxpayer carried on the activity of investment holding and that charitable activities by themselves did not fall under the definition of "business" as defined under s 2 of the ITA. As the taxpayer only had one source of income, ie dividends from investing in its associate company which were paid in the relevant year of assessment, it fell within the ambit of s 60F of the ITA and the taxpayer's income was rightly assessed as that of an investment holding company.

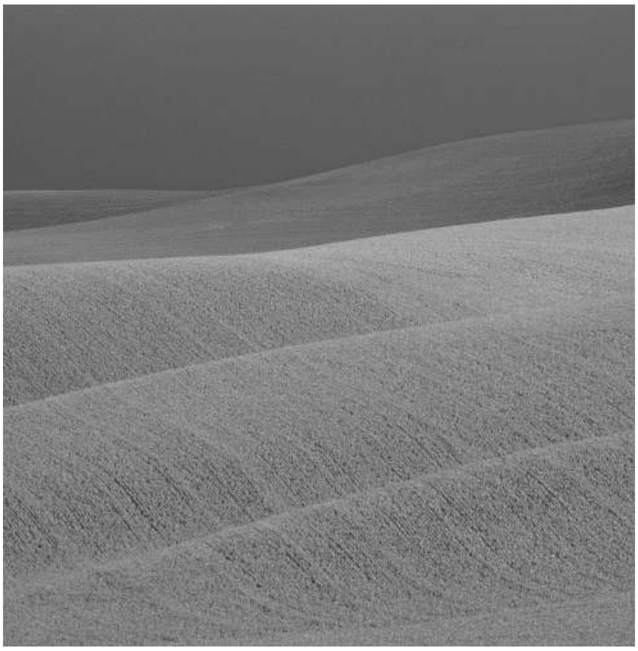
It would appear that the taxpayer company had failed to appreciate the difference between object and power. The object of the company was investment holding. Charitable activities were one of the powers the taxpayer company had. However, it was not a business object.

TPGR Bhd v Ketua Pengarah Hasil Dalam Negeri (2008) MSTC 3,797
Special Commissioners of Income Tax.
Appeal No. PKCP (R) 10/2006.
Case stated delivered on 10 September 2008.

On 1 December 1990, the taxpayer company entered into an agreement with its holding company to lease its lands for the purposes of operating a golf club. Sales of club memberships were based on Licence Agreements.

However, sometime in 1992, the directors resolved that all future sales of memberships must be by way of subscription to shares in the taxpayer company and that all existing Licence Agreements be converted into shares in the taxpayer company.

For the years of assessment 1991 and 1992 and prior to the said directors' resolutions, the Licence Fees collected were



recognised in the taxpayer's financial statements as revenue and taxed accordingly. However, the Warranty Deposits were recognised in the accounts as "sundry creditors and accruals". After the resolutions, the Licence Fees were also reflected as "sundry creditors and accruals". The Director General disagreed and issued additional tax assessments, bringing all the Licence Fees and Warranty Deposits to tax.

The SCIT held that in determining whether the sums received by the taxpayer for Licence Fees and Warranty Deposits under the Licence Agreements were revenue or capital receipts, one had to look to the nature and quality of the payment *at the time it was accrued*. It was provided that such payments were revenue in nature as they were payment for services that would be provided by the taxpayer. The SCIT found that events that occur subsequent to the point of accrual should not affect the nature of the said payment.

**PP Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3,815
Special Commissioners of Income Tax.
Appeal No. PKCP (R) 15/2003.
Case stated delivered on 14 August 2008.**

The issue of determination in this instance was whether the Director General's disallowance of deductions in relation to amounts incurred for temporary road construction and camp building construction was rightful.

The SCIT decided that under s 33 of the ITA, revenue expenditure, rather than capital expenditure, counts as an allowable deduction. The amounts in issue were made with a view to bring into existence an asset or an advantage for the benefit of the logging business and consisted of capital expenditure which does not qualify as a deduction.

Nonetheless, the SCIT held that the expenses incurred by the taxpayer qualified as forest expenditure. In spite of the fact that the taxpayer was only a contractor and was not a licensee of the forest licence, the SCIT held that the taxpayer was entitled to an allowance under para 8 of Sch 3 of the ITA. The SCIT adopted a purposive approach to the interpretation of the said provision and determined that forest allowance could be given to both the beneficial as well as the legal owner of the forest licence.

The principle of law that a purposive approach in the interpretation of law, including tax law, is laid down by the Federal Court in the case of ***Palm Oil Research and Development Board v. Premium Vegetable Oils Sdn Bhd [2005] MLJ 97***.

**OPD Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3,846
Special Commissioners of Income Tax.
Appeal No. PKCP (R) 53/2006.
Case stated delivered on 7 March 2008.**

On 4 March 1998, the taxpayer and purchaser entered into a sales and purchase agreement in relation to Building A. One of the conditions of the transaction was that the purchaser should obtain approval from the Foreign Investment Committee (FIC) and this was subsequently fulfilled on 9 May 1998. Then on 15 May 1998, the purchaser requested the taxpayer for an extension of the completion date until 30 April 1999. The taxpayer agreed on the basis that it would continue to collect rental until 30 April 1999 and that the purchaser would be charged interest of 5% until 30 April 1999.

The Director General raised assessments on the said income in the year of assessment 1999 since it was considered that the sales and purchase agreement became unconditional and income arising from it had accrued in the year ending 1998 when the relevant condition of obtaining the FIC approval had been met. However, the taxpayer was of the view that the assessment should only be raised in the year 2000 as the sale had only been completed on 30 April 1999. The Director General then imposed a penalty under s 113(2) of the *Income Tax Act 1967* (ITA) on the taxpayer for the YA 1999.

Furthermore, the taxpayer also bought golf memberships and had sold these on to purchasers of bungalows developed by the taxpayer. The taxpayer argued that the expenses for the golf membership did not constitute entertainment expenses and hence were tax deductible.

The SCIT determined that s 24 of the ITA suggested that "debt" shall be treated as gross income of a person for the relevant period and that the issue of whether the sum assessed on Building A was due or due and payable did not arise as long as the amount was ascertained. As the condition of the transaction (ie the FIC approval) was fulfilled on 9 May 1998, the relevant YA in relation to Building A was the YA 1999.

As regards the penalty issue, the SCIT waived the penalty on the taxpayer, as they regarded that the incorrect return or incorrect information had been made in good faith. It is

to be stressed that such waiver would only be given insofar as the actions of the taxpayer in submitting the returns or information was *bona fide*.

The SCIT further held that the expenses incurred to purchase the golf memberships were deductible under s 33(1) of the ITA as these memberships were not given *gratis* and the purchasers had the option of not purchasing the same.

Concerning the issue as to the date income is deemed to have accrued, this case is to be contrasted against the case of ***SS Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3862***.

SPM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3,881
Special Commissioners of Income Tax.
Appeal No. PKCP (R) 47/2006.
Case stated delivered on 24 March 2008.

The appellant, SPM Sdn Bhd, entered into a franchise agreement with S Corporation on 6 August 1996. Under the said agreement, the appellant was to pay S Corporation franchise fees equal to 8% of its gross turnover on a monthly basis. The appellant had accordingly paid franchise fees to S Corporation during the years of assessment 2000 (preceding year as well as current year bases), 2001 and 2002; and withholding tax thereon under s 109B of the *Income tax Act 1967* (ITA). The Inland Revenue Board (IRB) disallowed deductions claimed for the franchise fees and imposed penalties on the appellant.

The appellant appealed against the IRB's disallowance and the issue which fell to be determined before the SCIT was whether the franchise fees paid to S Corporation for all of the aforesaid years qualified for a deduction under s 33(1) of the ITA.

The SCIT allowed the appeal and held that as the franchise fees were revenue expenditure, such fees were allowed deductions under s 33(1) of the ITA. The SCIT agreed with the appellant's argument that the franchise fees were a necessary part of the appellant's earning process and directly connected to its business in that its function was to generate sales income.

ELM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2009) MSTC 3,887
Special Commissioners of Income Tax.
Appeal No. PKCP (R) 60/2006.
Case stated delivered on 19 January 2009.

The appellant was a Malaysian company in the business of trading in human pharmaceutical and animal health products and had from time to time sponsored the attendance of healthcare professionals at congresses for the dissemination of knowledge and experience. The appellant's congress expenses were allowed as a deduction by the IRB for the YA 2000 as well as previous years. However, congress expenses were disallowed as a deduction for the years of assessment 2001 and 2002.

The appellant appealed and argued that the congress expenses did not fall under the definition of "entertainment" under s 18 of the Income Tax Act 1967 (ITA).

The appellant's appeal was allowed as the whole object of the sponsorship of healthcare professionals was to promote the appellant's business, specifically to increase sales of the appellant's products. As such, the sponsorship expenditure was not held to be "entertainment". Furthermore, there was consideration moving from both the appellant and sponsored professionals. The appellant had the opportunity to promote its products to the healthcare professionals and these professionals obtained a practical advantage of new developments in the appellant's drugs.

The propensity by the IRB to treat expenses like those incurred by the appellant as entertainment and therefore not allowable as a deduction is regrettable. Business people normally do not go around spending money on entertainment. A holistic approach must be adopted in examining whether an item of expenditure has been incurred in the production of income. In the Singapore case of ***Pinetree Resort Pte Ltd v. Comptroller of Income Tax [2000] 4 SLR 1***, Chief Justice Yong Pang How held that:

> *"Section 14(1) of the Income Tax Act provides that in ascertaining the income of a taxpayer for any period, there shall be deducted all outgoings and expenses wholly and*

exclusively incurred during that period by the taxpayer in the production of income as long as these are not expressly prohibited by other sections in the Income Tax Act. The important feature of when deductions may be made for the purposes of this case is the fact that s14 requires a nexus between the incurrence of the expense and the production of income. In determining whether this nexus is present, the business has to be looked at as a whole set of operations directed toward producing income, in which case an expenditure which is not capital expenditure is usually considered as having been incurred in gaining or producing income."

Section 14(1) of the Singapore Act is in *pari materia* with our s 33(1).

Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor (2009) MSTC 4,399; [2009] 3 AMR 569
Court of Appeal, Malaysia.
Judgment delivered on 10 April 2009.

This is a case concerning the deduction of approved donations pursuant to s 44(6) of the *Income Tax Act 1967* (ITA).

The taxpayer was exempted from payment of income tax in respect of all income other than dividend income and development tax for (among other years) the years of assessment 1991 and 1992.

During the relevant years, the taxpayer derived income from trading activities as well as dividend income. During the period in question the taxpayer made approved donations which were deductible against its aggregate income pursuant to s 44(6) of the ITA.

The IRB took the view that notwithstanding the wording of s 127(5) of the ITA, which says that any income which is exempt from tax shall be disregarded for the purpose of the ITA, the business income of the taxpayer should nevertheless be taken into account in computing the aggregate income of the taxpayer. The amount of donation allowable for deduction is then apportioned as follows:

$$\frac{\text{Gross dividend}}{\text{Aggregate income}} \quad \text{X} \quad \text{Donation}$$

The SCIT, in an extremely well–reasoned case stated, held that no part of the business income should go into the calculation of the aggregate income and the formula on apportionment of the amount of donation eligible for deduction was wrong. The determination of the SCIT was upheld by the High Court. On appeal to the Court of Appeal, the order of the High Court was reversed. In so doing, the Court of Appeal dealt with the meaning of the word "income" and came to the conclusion that "income" in the context of the case means chargeable income. The Court of Appeal then went on to deal with deduction of expenses by making reference to s 33(1) of the ITA and then equated the making of donations with deduction of expenditure incurred in the production of income.

It is submitted that even if income in the context of the case means chargeable income, the amount should be disregarded by virtue of s 127(5). Also, there is a vast difference between expenditure incurred in the production of income and approved donations. Deduction of donations is covered by s 44(6).

Donation is allowed as a deduction notwithstanding that it produces no income. To qualify for deduction under s 33(1), there ought to be a nexus between outgoings and income — hence, the need for apportionment of expenditure under certain situations. Apportionment can hardly be applied to donations. It is either allowed or disallowed.

Mengawarti Sdn Bhd v. KPHDN
Rayuan Sivil No. W.01-83-97

The decision of the Court of Appeal that land alienation cost incurred by a housing developer is capital in nature seems to go against established principles of law. One would have thought that the issue is one of timing: when should the amount be deductible and not deductibility as such. TG

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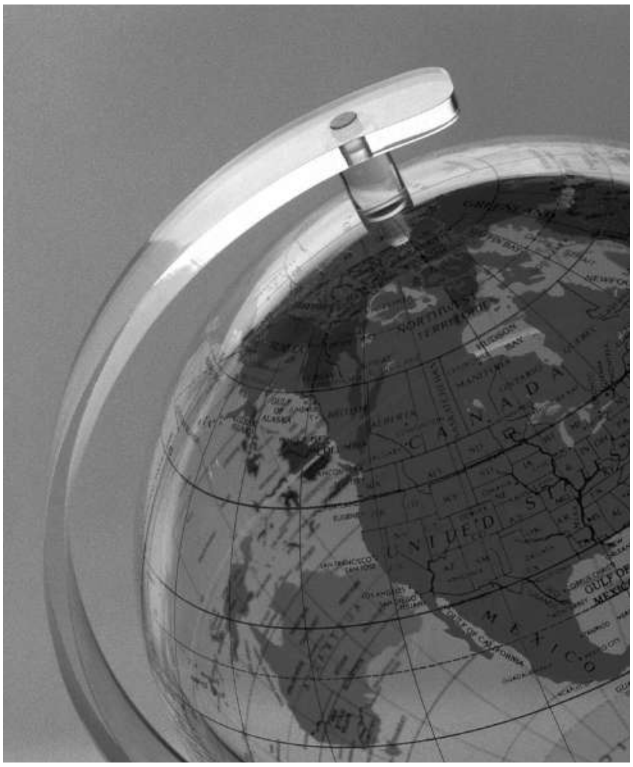
International News

By Rachel Saw

The column only covers selected developments from countries identified by the CTIM and relates to the period 11 May 2009 to 10 August 2009.



China (People's Republic)

Tax rules on enterprise reorganisation published
The Ministry of Finance (MOF) and the State Administration of Taxation (SAT) published on 7 May 2009 the Notice "Certain issues regarding the enterprise income tax treatment of enterprise reorganization" (Notice [2009] No.59). The Notice applies retrospectively from 1 January 2008.

(a) General tax treatment
The general tax treatment applies except where the special tax treatment as per the Notice is applicable. The Notice describes the general tax treatment where there is a simple change (such as the conversion from a legal person into an unincorporated organisation such as a sole proprietorship enterprise, partnership etc) or the relocation of the enterprise's registration to outside China. It also goes into great detail on the tax treatment to be adopted relating to: (i) debt restructuring; (ii) acquisition of shares or assets; (iii) mergers; and (iv) divisions.

(b) Special tax treatment
The special tax treatment applies to reorganisation if certain conditions are satisfied. If so, the enterprise is able to apply special tax treatments to the portion of the transaction which is carried out by way of payments in shares. For example, if the amount of taxable income arising from a debt restructuring accounts for more than 50% of the taxable income of the current year, it may be allocated over a maximum of five tax years.

Specific cross-border acquisitions of shares or assets (including from Hong Kong, Macau and Taiwan) may also qualify for the special tax treatment if they also meet the conditions contained in Art 5 of the Notice; so may resident enterprises which invest via shares/assets in a 100% directly-owned non-resident enterprise.

The Notice also provides guidance on tax incentives post-reorganisation, transactions pre- and post-reorganisation, and the documentation requirements.

Deduction for contributions to supplementary old age pension and medical insurance
Notice [2009] No. 27 was issued on 2 June 2009 stating that contributions to supplementary old age pension insurance and medical insurance for all employees are deductible, provided the contributions do not exceed 75% of the total wages of employees. Amounts in excess are not deductible. The ruling applies retroactively from 1 January 2008.

Limitation on deduction of interest on loans
Notice [2009] No. 68 was issued on 4 June 2009 stating that a portion of interest on loans taken out by an enterprise is not deductible for the purposes of enterprise income tax if the investors of the enterprise have not paid up the full amount of the capital contribution.

The portion of interest which is not deductible is the amount of interest that attributable to the difference between the capital amount actually paid up and the amount of the capital contribution which should have been paid, , but has not have been paid within the prescribed time limit.

Statute of limitations on tax debts clarified
Guo Shui Han [2009] No. 326 was issued on 15 June 2009 clarifying that there is no statute of limitations on tax debts in the case of tax evasion, and refusal of tax payment or fraud pursuant to Art 52 of the Tax Collection Law (TCL). In these cases, the tax authority has the power to reclaim the unpaid taxes, fines or deceptive receipt of tax refunds for an indefinite period.

A further Notice reiterates that the failure to file a tax return does not fall within the scope of tax evasion, refusal of tax payment or fraud; therefore, the statute of limitation in this case is generally three years, which can be extended to five years under special circumstances (although the Notice does not elaborate what the "special circumstances" are).

Deduction on fee charges and commissions clarified
Cai Shui [2009] No. 29 was issued on 19 March 2009 limiting the deduction of fee charges and commissions paid by enterprises in conducting businesses. The Notice applies from the date of issuance and also applies to the fee charges and commissions incurred between the enactment of the New Enterprise Income Tax Law (ie 1 January 2008) and the date of issuance of the Notice (ie 19 March 2009).

Fees and commissions paid in connection with business operations are only allowable for deduction within the following limits:
– Insurance enterprises: 15% of the total premiums of asset insurances and 10% of the total premiums of life insurances. Refunds of the withdrawn insurances can be deducted in determining the total premiums.
– Other enterprises: 5% of the income agreed in the contract or service agreement concluded with a lawfully established agency or individual.

The Notice requires enterprises to conclude agency agreements or contracts with a lawfully established agency or individual, and pay fee charges and commissions pursuant to the relevant government regulations. Fee charges and commissions are not deductible if: (i) paid in cash; (ii) not paid via bank transfers; (iii) paid to security agencies for the sale of equity securities issued by an enterprise; (iv) paid as a bribe.

Fee charges and commissions included in the fixed assets or intangibles may be depreciated or amortised, but may not be deducted in the current accounting period.

APA developments
It has been reported that:

- the Beijing State Tax Bureau has signed the first unilateral advance pricing agreement (APA) in respect of China with a semi-conductor manufacturer after nearly two and a half years of negotiation; and
- China (People's Rep.) and Denmark have concluded a first bilateral APA..Negotiations between the two countries started in August 2008.

Hong Kong

Tax authorities issue explanation on relief from double taxation due to transfer pricing or profit reallocation adjustments
The Hong Kong Inland Revenue Department (HKIRD) issued in April 2009, the Departmental Interpretation and Practice Notes No. 45 (DIPN 45) on Relief from Double Taxation due to Transfer Pricing or Profit Reallocation Adjustments. DIPN 45 provides greater certainty and clarity regarding procedural matters to those who seek relief under a tax treaty, especially with regard to double taxation arising from transfer pricing or profit reallocation adjustments. The following are the key features of DIPN 45:

- DIPN 45 recognizes both economic double taxation and juridical double taxation.
- In the absence of a tax treaty, there is no relief given in Hong Kong.
- The Mutual Agreement Procedure (MAP) is to enable the taxpayer to initiate procedures where it is considered that the actions of the competent authority of one or both of the treaty partner states, results or will result in taxation which is not in accordance with the provisions of the treaty.
- The time limit for presenting a MAP to the competent authority is within three years from the first notification (usually the issuance of the relevant notice of assessment or loss computation by the HKIRD or the equivalent notification from a treaty partner state) of the action resulting in the taxation which was not in accordance with the provisions of the treaty.
- The HKIRD assures that they will demonstrate, on request, to the competent authority of the treaty partner state that the adjustments made are in accordance with the relevant treaty provisions, so as to facilitate a relief from double taxation claim by a taxpayer. In addition, the HKIRD will, on request, exchange information about any adjustment with the competent authority of a treaty partner state in accordance with the provisions of the "Exchange of Information" article.

Additional stimulus measures proposed
On 26 May 2009, the Financial Secretary announced an additional stimulus package which includes the following new tax measures (subject to the approval of the Legislative Council):

- waiver of the business registration fee for one year
- increase in the one-off reduction of salaries tax and tax under personal assessment for the 2008/09 tax year, from 50% to 100%, and an increase in the exemption ceiling from HKD6,000 to HKD8,000; and
- extension of the waiver of property rates for the first two quarters of 2009/10, subject to a ceiling of HKD1,500 per quarter for each rateable tenement, for the last two quarters.

Revised DIPN on Service Company "Type II" Arrangements
The HKIRD issued, in July 2009, the revised DIPN No. 24 on Service Company "Type II" Arrangements.

Type II service company arrangements usually involve an agreement under which management fees are paid by a firm to a service company directly or indirectly controlled by the proprietor or partners of the firm. DIPN No. 24 sets out the HKIRD's stand on the deductibility of the management fees, including t he options open to the HKIRD to challenge service company arrangements that are not on a proper commercial basis. It also sets out the minimum requirements to be satisfied to support a claim for deduction and the basis on which the quantum of the deductible amount can generally be determined.

India

Circular concerning taxability of foreign companies (power projects) withdrawn
The Central Board of Direct Taxes (CBDT) withdrew by its earlier instruction No. 1829 dated 21 September 1989 (Circular), which dealt with the taxability of income of foreign companies from execution of power projects in India. The Circular had provided the following:

- foreign companies forming part of a consortium will not constitute an Association of Person (AOP) under the Income Tax Act, 1961
- profits arising out of supply of equipment outside India will not be deemed to accrue or arise in India, and hence would not be liable to tax in India even if the supplier's employees take part in the final erection or commissioning of the equipment supplied
- the profits of civil works contracts and contracts for erection, testing and commissioning of the machineries would be taxable on a presumptive basis for a sum equal to 10% of the gross amount payable for the work, and
- the payments made for planning, designing and engineering services would be technical services, and would not be taxable as "royalty income".

Budget for 2009/10 — details

The Budget for 2009/10, was presented by the government on 6 July 2009. The direct tax proposals take effect when ratified by the Parliament, while the indirect tax proposals are to have immediate effect. Significant key tax proposals are as follows:

Direct taxes

- The corporate income tax rates are to remain unchanged.
- The exemption threshold for individual income tax will be raised by INR10,000 to INR 160,000.
- The surcharge on personal income tax and Fringe Benefits Tax on the value of fringe benefits provided by employers to employees will be abolished.
- The Minimum Alternate Tax (MAT) will be increased to 15% of book profits (currently, 10%). Further, the period allowed to carry forward the tax credit under MAT is to be extended to 10 years (currently, 7 years).
- The Commodities Transaction Tax will be abolished.
- The option of presumptive taxation (ie declaration of income at 8% of turnover) will be extended to all businesses with a turnover of INR4 million. Further, such businesses are exempt from the payment of advance tax.
- The tax holiday in respect of export profits under will be extended by one more year ie till the financial year 2010/11.
- A weighted deduction of 150% on expenditure incurred on in-house research and development will be extended to all manufacturing businesses, subject to certain exceptions.
- The tax holiday available in respect of profits arising from the commercial production or refining of mineral oil, will be extended to natural gas.
- Investment-linked tax exemptions will be introduced for (i) establishing and operating "cold chain" warehousing facilities for storing agricultural produce, and (ii) laying and operating cross country natural gas or crude or petroleum
- m oil pipeline network for distribution on common carrier principle.

Indirect taxes

- There are no changes to the top rate of customs duty or excise duty.
- Customs duty was reduced on a number of items but also imposed on set-top boxes for television broadcasting (5%).
- Customs duty has been increased on: (i) serially numbered gold bars (other than tola bars) and gold coins from INR100 per 10 grams to INR200; (ii) other forms of gold from INR250 per 10 grams to INR500; (iii) on silver from INR500 per kilogram to INR1,000.
- The list of specified raw materials/inputs imported by manufacturer-exporters of sports goods, leather goods, textile products and footwear which are exempt from customs duty has been expanded.
- Full exemption from 4% special Countervailing Duty (CVD) on parts for manufacture of mobile phones and accessories has been re-introduced, and the CVD exemption on "Aerial Passenger Ropeway Projects" withdrawn.
- The CVD exemption has been provided on the portion of the value of the packaged/canned software which represents the consideration for transfer of the right to use such software, subject to specified conditions.
- The excise duty rate has been increased to 8% from 4% for various items.
- The excise duty on petrol driven trucks/lorries has been reduced from 20% to 8%.
- The excise duty paid "High Speed Diesel" blended with up to 20% bio-diesel has been fully exempted.
- Service tax has been imposed on: (i) services provided in relation to transport of goods by rail; (ii) services provided in relation to transport of coastal cargo, and goods through inland water including National

Waterways; (iii) advice, consultancy or technical assistance provided in the field of law (this tax would not be applicable in case the service provider or service receiver is an individual); and (iv) cosmetic and plastic surgery service.
- Taxable services namely the "transport of goods through road" and "commission paid to foreign agents" have been exempted from the levy of service tax, if the exporter is liable to pay service tax on reverse charge basis.

Minimum USD1 million contribution for FVCI registration
From 3 July 2009, any foreign investor intending to register with Securities and Exchange Board of India (SEBI) as a Foreign Venture Capital Investor (FVCI) must have obtained a firm commitment from their offshore investors for a minimum contribution of USD1 million at the time of submitting the application.

Indonesia

Tax treatment of *syariah*-based business activities
Pursuant to Regulation No. 25/2009 issued on 3 March 2009, effective 1 January 2009, income arising from business activities conducted according to *syariah* principles such as banking, insurance (*takaful*), pawning and other financial services are taxed in the same manner as income arising from conventional financial activities.

Separate tax office for high net worth individuals
A special tax office to serve high net worth individuals has been established in Jakarta, which commences operations in May 2009. High net worth individuals are taxpayers who:
- hold company shares, controlling/founder shares, or who are professionals while simultaneously holding shares and reporting passive income of IDR1 billion or more annually in their tax returns; or
- have net assets of more than IDR100 billion, which originate from more than one type of property, or are in the form of financial assets and property.

Withholding tax on non-residents upon disposal of luxury assets
Pursuant to Decree No. 82/PMK.03/2009, effective 22 April 2009, a final withholding tax of 20% on a deemed taxable gain of 25% of the transaction value applies to non-residents on capital gains derived from the disposal of grand decorative items, jewellery (including gold, luxury watches and precious stones such as diamonds), antique goods, paintings and vehicles such as cars, motorcycles, cruise vessels and light aircrafts.

The withholding tax does not apply where the value of each transaction is not more than IDR10 million and where an applicable tax treaty grants the non-resident seller's country the exclusive right to tax capital gains.

Extension of "free trade zone" status to Bintan and Karimun Islands
The free trade zone status to Bintan and Karimun Islands, which was due to expire on 31 December 2008, is extended beginning 1 January 2009. All goods and services delivered or provided to these islands continue to be exempt from

import duties, customs duties, value added tax and Art 22 income tax on imports and luxury goods.

Elucidation on definition of "beneficial owner" in income tax law
Elucidation on Art 26(1a) of Law No. 36 of 2008, provides that the definition of "beneficial owner" is as follows: "The country of domicile of the foreign taxpayer, other than those carrying on business or conducting business activity through a permanent establishment in Indonesia that receives income from Indonesia, shall be determined based on the residence or domicile of the taxpayer that actually receives the benefit of the income (beneficial owner). Accordingly, the country of domicile shall not only be determined based on the Certificate of Domicile, but also the residence or domicile of the beneficial owner of the said income. In the event that the beneficial owner is an individual, his/her country of domicile shall be the country where the individual resides or lives, whereas if the beneficial owner is a corporate entity, the country of domicile shall be the country where the owner of more than fifty percent (50%) shares both individually or jointly domiciled or where the effective management is located."

Withholding tax on royalties from cinematographic productions
Pursuant to regulation PER-33/PJ/2009 and circular letter SE-58/PJ/2009, effective 4 June 2009, withholding tax of 15% (for payments to residents) and 20% (for payments to non-residents and subject to treaty relief) is applicable on:

- income received or obtained by copyright holders from rights granted to third parties for public showing and/or reproduction of (i) the copyrighted material, or (ii) material subjected to similar rights and specific requirements; and
- 10% of shared revenue in the case of revenue-sharing agreements between copyright holders and third-party cinema owners to use copyrighted material.

The withholding tax does not apply to the following:
- the assignment of the entire copyright production without special conditions; and
- the granting of rights to use copyrighted material to a third party without the right to publish or reproduce the material.

Income tax exemption on transfer of land and buildings
The tax office issued regulation PER-30/PJ/2009 on 27 April 2009, exempting certain individuals on the transfer of rights to land and buildings, which generally has an income tax of 5% of the selling price. A reduced rate of 1% applies to corporate taxpayers whose main business is the transfer of modest houses or modest flats.

Decree on deductibility of bad debts
Decree No. 105/PMK.03/2009 was issued on 10 June 2009 on the deductibility of bad debts for tax purposes. Retrospectively from 1 January 2009, a tax deduction is available for bad debts where:
- the debt has been charged in the books for the year in question
- the taxpayer has attached with its annual tax return a record of bad debts containing the debtors' names, addresses, tax numbers, and corresponding bad debt amounts; and
- the case has been filed with the relevant court or government agency and (i) there is a written agreement on the discharge of indebtedness between the debtor and creditor; or (ii) the discharge of indebtedness has been published in the media; or (iii) the debtor has acknowledged in writing the extinguishment of a specific debt.

The Decree states that bad debts between affiliated parties are not allowed as deductible expenses.

Middle East

Iraq: Corporate tax rate on foreign oil companies increased
The Iraqi government has reportedly approved a Bill increasing the corporate tax rate on foreign oil companies' profits from 15% to 35%.

Oman: New Income Tax Law enacted
Oman enacted, on 24 May 2009, a new Income Tax Law ("new ITL"). The main features of the new ITL, which applies as of 1 January 2010, are summarised below.

Scope of taxation: The current tax laws provide that only income arising or deemed to arise in Oman are subject to tax. The new ITL imposes tax on any (taxable) income

without geographic restriction. Taxable entities include Omani companies, establishments and permanent establishments (PEs) of foreign persons in Oman. Foreign persons with no PE in Oman are subject to tax by way of a final withholding tax on certain items of income.

Exemptions: Distributions made by Omani companies and capital gains on securities listed on the Muscat Stock Market are exempt from tax under the new ITL. Also exempt are income derived by certain entities from air and maritime traffic activities and income of Omani establishments and companies (for a five-year period and renewable once) from certain industries such as mining, exportation of locally manufactured products, operation of hotels and tourist villages, agricultural, education and private hospitals.

Taxable income: Income is defined as "any type of income", whether in cash or in kind, including profits from any activities, consideration for Research and Development (R&D), consideration for the lease or usufruct of movable or immovable property, dividends, interest, royalties and management fees. Deductible expenses include costs incurred prior to the beginning of activities, sponsorship fees (in accordance with the executive regulations) and gifts and donations to approved bodies up to 5% of the gross income. Generally, losses may be carried forward for five years.

Tax rates: The new ITL has standardised the tax rate to 12% in all cases except for taxable entities in the oil sector which are subject to a 55% tax rate. In addition, the new ITL imposes a final withholding tax at the rate of 10% on the following items of income in so far as they are not attributed to a PE in Oman on: (i) royalties (as defined); (ii) consideration for R&D; (iii) consideration for the use or the

right to use computer programs; and (iv) management fees.

Anti-avoidance: The new ITL contains anti-avoidance provisions allowing the Secretariat General of Taxation to apply the arm's length value to the transaction and to counteract any tax benefit obtained by the taxpayer.

Avoidance of double taxation: The new ITL provides that the credit method will apply to avoid double taxation under tax treaties. In the absence of a tax treaty, a credit may be applied for with the Secretariat General of Taxation.

Singapore; OECD

Draft bill on OECD's information exchange standard — details

The Singaporean government issued a draft Income Tax (Amendment) (Exchange of Information) Bill on 29 June 2009, which proposes amendments to the domestic tax legislation, so as to allow Singapore to enter into tax treaties that incorporate the OECD's internationally agreed standard on the exchange of information (EOI) for tax purposes.

Tax treatment of limited partnerships

The Inland Revenue Authority of Singapore (IRAS) issued an e-tax guide on 30 June 2009, which covers the income tax treatment of limited partnerships (LPs). Pursuant to the e-tax guide, an LP comprises one or more general partners who have unlimited liability, and one or more limited partners which enjoy limited liability. LPs enjoy tax transparency like limited liability partnerships (LLPs) and general partnerships. LPs are generally taxed in the same way as LLPs, apart from certain specified situations. The guide also contains information on the appointment of managers and the dissolution of LPs.

Thailand

Royal Decrees on tax exemptions and reductions issued

The Government recently issued the following Royal Decrees on tax exemptions and reductions in a move to stimulate and improve economic growth:

- *Royal Decree No. 481:* From 19 May 2009, qualifying venture capital companies or juristic partnerships are exempt from tax on gains from the transfer of shares in small-medium enterprises (SMEs). Conditions apply.
- *Royal Decree No. 482:* Corporate taxpayers may claim a temporary double deduction for expenses incurred in training staff. The expenses are limited to the cost of function rooms and accommodation located in Thailand. Further details are expected to be issued shortly.
- *Royal Decree No. 483:* Two exemptions for debt restructuring that fall within the framework set by the Bank of Thailand are provided:
  - Debtors will be exempt from income tax on the waiver of debt granted by their creditors. The creditors in turn will be able to deduct the debt waived (this is provided separately); and
  - The transfer of goods, provision of services, sale of immovable property and execution of documents resulting from a debt restructuring will be exempt from VAT, specific business tax and stamp duty.
- *Royal Decree No. 484:* Partial transfers of a business that take place in calendar year 2009 are entitled to an exemption on VAT, specific business tax and stamp duty. Notification dated 3 July 2009 prescribing the criteria to be met and methods of exemption has been issued.
- *Royal Decree No. 487:* An additional 25% deduction is granted on energy-saving assets (other than vehicles) acquired between 19 May 2009 and 31 December 2010. This may not be claimed in conjunction with any other benefits/incentives otherwise available. Other conditions apply and guidelines are expected to be issued shortly.
- *Royal Decree No. 488:* The specific business tax rate on the sale of immovable property is reduced from 3% to 0.1% in respect of property sold between 29 March 2009 and 28 March 2010.

Vietnam

National Assembly approves PIT exemptions and reductions

The deferral of Personal Income Tax (PIT) from January to June 2009, has been approved by the National Assembly on 19 June 2009 for the exemption of PIT on employment income for that period for resident taxpayers. However, the PIT exemption applicable to irregular income (eg certain capital gains, royalties, etc) is reportedly extended until 31 December 2009.

Malaysia — treaty developments

- **FTA between Malaysia and New Zealand agreed**
  On 2 June 2009, New Zealand agreed to a free trade agreement (FTA) with Malaysia which is expected to be signed later on in 2009.
- **Treaty between Malaysia and Brunei signed**
  Malaysia and Brunei signed an income tax treaty on 5 August 2009. TG

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MANAGING PEOPLE THROUGH A RECESSION: PITFALLS AND SMART MOVES

This article, adapted from the journal "Developing HR Strategy", thoughtfully presents sound measures in managing human resources during an economic downturn while planning for the future.

Managing people in a recession is notoriously difficult. As revenues decrease, costs must come down and managers are forced to revise their recruitment and staffing plans. Managing people through the current recession is especially hard, however, because this downturn is very different from previous ones in many important ways. Most significantly, unemployment is growing more steeply than during the previous two recessions.

News headlines screamed that 26 January was "Black Monday" for jobs, after firms such as Caterpillar, Corus, Home Depot, ING, Pfizer and Sprint Nextel announced cuts of several thousand jobs each, and signs are that the job-cutting is far from over. Compounding the problem, people, companies and countries are more deeply in debt than ever, an immediate concern for companies that depend on a constant flow of credit to carry them through the ups and downs of business fluctuations. The near freezing of credit is something else again. Even companies able to pay higher interest rates may find that credit is not available from the usual sources at any price. In addition, one key factor making this recession unique above all is its sheer global interconnected complexity. As Colvin (2009) points out, exciting as it is to be living through an historic economic period, one can conduct pretty fancy scenario planning and still not be ready for the rippling cross-border effects of a global recession in an information-based, truly international economy. So what can organisations do to manage people throughout the recession? For HR managers, as well as for line managers, across the global economy one of today's great questions is: what do we do now to manage and protect our human resources? Considering that so much of today's turmoil is unprecedented, it is impossible to provide guidance purely by looking into the past. Yet, insights and reflections from our work with senior HR executives suggest several steps organisations can take or avoid in order to cope with current social and economic realities. Our interviews, discussions and workshops with managers from a wide range of companies suggest that no matter what business a company is in, it will benefit from following the following recommendations.

Face the new reality

When economic circumstances change and a company no longer has the means to support its ambitious growth aspirations, a major shift in mindset is often required. In good times, increments in headcount and other expenditure can be absorbed by revenue growth, and small deviations from planned increases will not usually create serious problems. The new realities require a very different mindset as managers have to be more frugal, think carefully about every expense and scrutinise every capital investment. This shift in mindset can be traumatic, especially when the change in financial circumstances and direction is drastic. According to Fortune magazine, Jamie Dimon, CEO of J P Morgan Chase, one of the nation's few remaining strong major banks, recently told a group of Harvard MBAs, "I am shocked at the number of people who are watching that train coming down the track, and they're still worrying about their strategic plan for 2009. We cancelled all that stuff, all of it, meetings, travel, you name it, to focus on the fact that we're in the middle of a real crisis." Facing the new reality is crucial because without it, little or no adaptation will occur. As Gratton (2009) points out, "while many managers are adept at innovating products and services, few have been adept at innovating the practice of management itself. As a consequence, businesses are often cluttered with increasingly outdated ways of managing people and potential innovations such as virtual team technology are left unheeded."

Do not rush into cutting training and development

In a turbulent and ever-changing business world, replacing the skills and competences that have provided people with jobs and careers is quickly becoming a necessity, not an option. Although there will continue to be places for all types of career models (from the traditional "linear" model to the more recent "roller coaster" model), in some industries and organisations only those emphasising continuous development and adaptation will survive. As one HR manager puts it: "More than ever the world is in flux. And organisations and their managers must recognise the necessity of developing the mindsets, skills and abilities that will allow them and their people to cope with this flux". These qualities include visioning and planning skills, team-working, negotiating skills and having a self-reliance orientation. Increasingly, people will need to become used to life-long learning, effectively using the vast range of sources and information that have become available with the Internet, and learn to live with complexity and ambiguity of unstable organisations. If these skills are crucial for the future, then cutting training and development will not help companies cope with current social and economic conditions. On the contrary, setting tough goals and sustaining an ambitious vision, while not giving people the necessary skill and knowledge to achieve it, will quickly become counterproductive in an organisation where success and survival depend on people's ability to process vast quantities of information, negotiate with customers and suppliers, and work in multifunctional teams to deliver high-quality products and services. Reducing the overall cost of training and development is probably essential, especially in a long and deep recession. But the dangers of cutting skill development and training are greater than most may realise.

Do not rush into cutting staff and recruitment

People are often described as "our most important asset" in annual reports and company value statements. For some organisations, those words are not translated into practice. Other companies, however, have a culture that clearly makes people the most important asset of the organisation. They do this primarily by informing people about the things that affect their work ing life, creating real teamwork and, in some cases, allowing employees to share in the financial results, through profit sharing, stock ownership or both. In a severe recession, these principles and practices are put under great strain, and employees will naturally want to see a high degree of consistency between what is said and done. Consistency is critical to create a culture of mutual trust. This is true at every level. Yet, sustaining consistency and trust is hard, because if the organisation needs to lay people off, the message that people are our most important assets, can easily be undermined or diluted. According to Hay Group, the World's Most Admired Companies take extra care to retain their most driven and focused employees, the ones who are it is most important to keep. Instead of spreading the pain equally across the board, they treat their best workers well, even in a recession. And they scout for competitors that are sharing the misery equally and steal their best performers. So it is critical that management choose wisely when, how and who to lay off. A blanket freeze on recruitment can have a catastrophic effect. As Rickard and Boroughs (2009) point out, the current leadership shortage in the oil industry is a direct result of the recruitment bans put in place during the recession in the late 1980s.

Maintain a good balance between managing people and managing costs

A recent article in the Harvard Business Review states that managing the tension between performance and people is at the heart of every CEO's job (Eisenstat et al, 2008). The Ffact is that firms are essentially economic organisations whose survival and prosperity depends on the delivery of superior value in an unforgiving global marketplace and, at the same time, have a key role in society as social institutions that profoundly shape the lives of their employees. As the article suggests, there is a real danger for many leaders in times of crisis to view their organisations primarily through one lens or the other. As the article points out, under fierce pressure from capital markets, the focus is entirely on the shareholder, with a single-mindedness that can lead to employee disenchantment and loss of capacity to deliver long-term value. Kaplan and Norton (2008) also make this point in their article on "Unconventional Wisdom in a Downturn".

As they put it, "many executives react instinctively during economic slowdowns by cutting discretionary spending across the organisation. But such an indiscriminate slash-and-burn response is a big mistake because it fails to distinguish between short-term operational and long-term strategic programmes. Unless the downturn threatens a company's existence, executives should focus on rooting out operational slack and inefficiency, not on modifying or sacrificing strategic initiatives, which build capabilities for long-term competitive advantage." Some companies, however, are able to resolve the tension and keep a reasonable balance between people and costs without sacrificing either. According to Eisenstat et al (2008), they succeed in "harnessing the energy and commitment of their people to implement change that may be wrenching and dramatic but which creates a platform for future success". The example given is the diesel engine manufacturer Cummins. To ensure the company's survival, the CEO and his team decided to close the company's original manufacturing plant, restructure its truck engine business, and lay off a significant portion of its workforce. But because the management team had created energy around the company's mission and values, employees were prepared to invest in learning new skills and leading the development of new products and services even as the lay-offs took place. They also capitalised on Cummins's long-standing commitment to the environment and its resulting expertise in pollution-control devices to build a distinctive source of competitive advantage. As a result, by the end of 2007 Cummins had more than doubled its sales, and its net earnings and stock price had increased more than fivefold. Total employment had increased by more than a third, and the workforce was strongly committed to the new strategy. The authors looked at other examples of companies in Europe and the US that have managed to sustain the balance between managing costs and people. This produced a shortlist of 22 so-called high-commitment and high-performance (HCHP) firms.

What are the implications of these recommendations?

1. ***Managing people in a downturn is always risky and uncomfortable.***
   This is common sense. Yet, research shows that when confronted with deep and painful crises, even the most rational people can get stuck in denial, a state of mind in which "the gap between the world as it is and the world as you want it to be is simply too great, and you freeze in your tracks" (Tedlow, 2008). Sigmund Freud saw denial as "a state of rational apprehension that does not result in appropriate action". History has lessons to teach about the role of denial in the decline of companies. The apparent refusal of the US automobile industry to admit the changeability of consumer demand may be one of the best examples. On average, more than

10% of all companies in the top 100 disappear each year. According to some economists, denial is a major reason for this failure rate.

2. *It is essential to provide adequate training and development to help people cope with the difficult economic situation.*
The need for training and development throughout the downturn has already been identified as crucial. When revenues decline, training and development is often the first target for cost reduction. Yet, one could argue that a downturn presents the perfect opportunity to improve the skills and competencies people really need to excel. As Krishnamurthy (2008) points out, during a downturn, employees at all levels can be sent for training to improve their team–building, collaboration and other skills which will be needed when growth returns. One example is Infosys. During the economic downturn of 2000–2002, this Indian software company started conducting annual teambuilding exercises at the local business school. The training focused on completing joint tasks, clarifying group values and improving team processes. Since the programme started, teams have been 50% more productive, on average, than untrained teams. According to Krishnamurthy, similar initiatives have been taken at a major aerospace company and a large European engineering conglomerate.

Conclusion

The ultimate goal is not only to survive the downturn but also to plan and prepare for the future. As Rickard and Boroughs (2009) put it, for organisations that are not prepared for the eventual upturn, it will be a struggle to recover. They will have tough problems to tackle, such as demoralized workforce and a talent or skills shortage. For organisations that have planned for the upturn and managed their HR strategy proactively and professionally, there will be a great opportunity to leap ahead of the competition. TG

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This article is an excerpt from Developing HR Strategy, a journal published by Croner, a Wolters Kluwer business. The article has been adapted for publication for this issue of the Tax Guardian.

Business Deductions

By Siva Subramaniam Nair

This article, the second in the series, examines the general principles of deductibility based on the Income Tax Act 1967 and relevant case law.

In this article we continue our analysis of the facets of s 33(1) of the *Income Tax Act 1967* (as amended) which is reproduced below for easy reference.

> *Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings & expenses wholly & exclusively incurred during that period by that person in the production of gross income from that source ...*

Just to recap, we had looked at the following facets in the last article:

- subject to this Act, the adjusted income of a person from a source
- outgoings and expenses
- wholly
- exclusively.

In this article we shall look at the word "incurred".

Incurred

The simplest form of incurring an expenditure is by paying for it. For example, when a person pays rental for his office, he will effect the following transaction in his books:

Dr Rental
Cr Bank

The payment of rental is deductible since it is paid for and therefore, incurred.

However, the word incurred extends further than the word "paid." In *New Zealand Flax Investments Ltd. v FC of T (1938) 61 CLR 179*, the judge said that the word "incurred [includes expenditure that is]…defrayed,discharged… borne….encountered, run into or fallen upon [but excludes expenditure which is] impending, threatened or expected".

Therefore, it encompasses not only money actually laid out but also an expenditure for which a legal liability to pay has arisen ie it extends to expenditure that is payable and becoming payable.

For example Jermaine Sdn Bhd accrues RM1,000 as electricity expenses for the month of December because he

has not received the bill when closing his accounts for the year ended 31 December 2009:

Dr Utility expenses	RM 1,000
Cr Accrued payable	RM 1,000

The full amount of RM1,000 is deductible for the year of assessment (YA) 2009 because the company has already enjoyed the benefits (ie the electricity) for which a legal liability to pay has arisen.

Similarly amount that are becoming payable ie where there is a clear liability to pay at the end of the year, the expenditure is deductible although actual payment is only due much later as illustrated in the case of ***CIR (Hong Kong) v Lo & Lo (1984) STC 366***. A legal firm operated a system of retirement benefits payable to long service employees whereby when an employee who has been with the firm for at least 10 years retires, he will be entitled to a lump sum payment. For the year ended 31 December 1977, the amount actually paid was held to be deductible but the Revenue disallowed a deduction for a "provision for staff retirement benefits" amounting to $770,000 which related to employees who had completed 10 years' service, but were not retiring in that year. The Privy Council held that the $770,000 represented the aggregate amount of long service awards which could have been demanded by the employees retiring on 31 December 1977 and in allowing a deduction for it, held that a claim could be made for "not only sums actually paid … but also the taxpayers' accrued liabilities which were undischarged."

A similar situation arose in the Malaysian case of ***Exxon Chemical (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2006) MSTC 4,204.*** The taxpayer set up a retirement and resignation benefit plan to provide benefits for its employees upon retirement, resignation or termination and charged the provisions of its accrued benefits to the profit and loss account for the relevant years, claiming a deduction for tax purposes**.** The Court of Appeal, in reversing the decision of the High Court and the Special Commissioners of Income Tax, held that the monies set aside to meet the amounts required to be paid when the staff retire or resign were accrued liabilities and should be allowed a deduction in the year of accrual and not the year of payment.

One important item in the profit and loss account which deserves mention is "depreciation". Students should note that depreciation is merely an allocation of the cost of an enduring asset to the different accounting periods in which it facilitates the production of income, in line with the concepts of matching and periodicity in accounting. Therefore, it is **not** incurred and, in consequence, does not rank for a deduction in ascertaining the adjusted income from a business source. In preparing a tax computation commencing from profit before tax, adding back elements of depreciation included in the profit and loss account is so obvious that very rarely marks are allocated to this adjustment.

Equally important is the fact that anticipatory or contingent expenses, reserves, and provisions are excluded from the concept of being incurred because it refers to a sum set aside to meet a liability which may crystallise in subsequent years.

In ***Owen v Southern Railway of Peru Ltd (36 TC 602)***, a company trading in Peru was required by law to make compensation payments to its employees on the termination of their services with the company. The company made a provision annually for the amount calculated to have accrued to each employee as deferred remuneration and sought to claim a tax deduction for it. The House of Lords, in denying the taxpayer a tax deduction for the provision, indicated that the eventual liability cannot be ascertained with certainty because some employees may forfeit their right to receive the benefit or the form and scale of benefit may change.

Provisions are generally created in accounting in line with its principles of matching as well as conservatism or prudence. However, in taxation it is not an expenditure which is incurred and in consequence does not rank for a deduction. There is a distinct exception to this rule: a specific provision for doubtful debts is an allowable deduction because it is specifically provided for in s 34(2) of *Income Tax Act 1967*.

In addition, in the insurance industry, when computing the adjusted income of a general insurance business (students should note that this includes inward re–insurance and offshore insurance), a deduction is available for claims incurred but not reported (generally referred to as IBNR claims). This is actually a provision for the occurrence of an "insured event" (eg accident, fire etc) which occurs in a particular financial year but is reported much later.

EXAMINATION STYLE QUESTIONS

a) In many cases students are given direct provision accounts. For example in MIT December 2007 Tax III Question 1, the cost of sales includes:

Provision for the damaged stocks of RM120,000.

The whole amount is added back to profit before tax.

b) Sometimes the question provides the movements during the year in the provision accounts. For example in MIT December 2006 Tax II Question 1:

Note 11 Provision for retirement benefits: RM65,000.

	RM
Balance as at 1 April 2005	550,000
Add: Provision for the year	65,000
Less: Retirement benefits paid	(55,000)
Balance as at 31 March 2006	560,000

Note:
The retirement benefits fund is not an approved fund.

In computing the adjusted income, the provision for the year of RM65,000 is added back to the profit before tax. No other adjustment is necessary since it is not an approved fund.

However, note that if it was an approved fund then the amount paid during the year should be deductible. So what would our adjustment be to profit before tax?

Firstly the accounting entry for the payment would have been

Dr Provision for retirement benefits (balance sheet)	*55,000*
Cr Bank	*55,000*

Therefore, since the transaction is not reflected in the profit and loss account, we should deduct the amount (ie RM55,000) from the profit before tax.

c) Another style adopted by examiners is by showing the provision for the year in the profit and loss account and reflecting the opening and closing balances for the Balance sheet provision account separately by way of a note.

Example

Profit and loss account
for the year ended 30 June 2009

—	
—	
—	
Provision for stock obsolescence	RM 2,500

Notes to the accounts

	30/6/2008	30/6/2009
Provision for stock obsolescence	RM 12,000	RM 13,800

The obvious adjustment is to add back the 2,500 to the profit before tax figure.

However when we work out the movement in the Provision for stock obsolescence account we will notice that by adding the provision for the year to the opening balance we do not arrive at the closing balance. Therefore, there must have been a write–off of obsolete stocks during the year. This is illustrated as follows:

Provision for stock obsolescence account	RM
Opening balance as at 1/7/2008	12,000
Add: Provision for the year	2,500
	14,500
Less: Obsolete stocks written–off	*700*
Closing balance as at 30/06/2009	13,800

Just as in (c) above, the amount written–off should be deducted from the profit before tax figure.

d) Some questions will show a provision account in the profit and loss account that also includes amounts paid during the year.

Example The profit and loss account may include an item "Provision for warranty payments of RM 150,000" analysed as follows:

Provision for warranty payments – RM 150,000

	RM
Warranty payments during the year	87,000
Provision for warranty payments	63,000
	150,000

Students should realise that the RM87,000 is actual payment for warranty expenses incurred during the year and is deductible. In consequence there is no adjustment to the profit before tax figure. However, the provision of RM63,000 is not deductible and therefore should be added back to the profit before tax.

I shall discuss the other facets of s 33(1) of the Income Tax Act 1967 in the next article. TG

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Notice Board

Medical expenses for parents (relief under s 46(1)(c) of the Income Tax Act 1967)

The Institute has received clarification from the Inland Revenue Board (IRB) in respect of the personal relief available for medical expenses incurred on parents granted to individuals under s 46(1)(c) of the *Income Tax Act 1967* (ITA). The relief, up to a maximum of RM5,000, is granted on condition that a receipt from a medical practitioner is provided as evidence that the medical treatment was provided to the individual's parents. Paragraph 6.1.2 of Public Ruling 2/2005 — *Computation of Income Tax Payable by a Resident Individual* offers guidance.

In this regard, "medical practitioner" means a doctor registered with the Malaysian Medical Council. Thus, the costs of health products and health supplements incurred on parents does not fall within the definition of "medical expenses" for the purposes of s 46(1)(c) of the ITA and are not eligible for personal relief to the individual.

Issuance of tax clearance letter for dormant companies in liquidation

The IRB's letter dated 15 June 2009 sets out the conditions and procedure for applications for tax clearance letters by directors of dormant companies in liquidation during the moratorium period from 1 April 2009 to 30 September 2009. All applications for tax clearance letters must be in writing, and sent to the relevant IRB branch where the tax files of the companies are handled.

For companies which have not commenced operations since incorporation, the latest tax return form and Form CP7 (Notice to Obtain Information under Section 81 of the Income Tax Act 1967 — Statement to Liquidate Dormant Company) are to be furnished.

For companies which had carried on operations or business but had ceased, besides providing the documents mentioned above, the director of the company must ensure that the assessments for all the years during which the company was in operation or carried on business are settled and the company does not have any outstanding tax liabilities (including monthly deductions) due to the IRB.

Organisation chart and directory of the IRB

Due to recent changes in staff appointments, the IRB has issued an updated organisation chart and directory listing for the various heads of departments and divisions. Among other changes, the Technical Department has been renamed the Tax Policy Department and the Multinational Tax Department has been established.

New Tax Audit Framework

A new Tax Audit Framework, effective from 1 January 2009, was issued in January 2009. The new framework replaces that issued in January 2007 and takes into account changes introduced by the *Finance Act 2009* (Act 693), particularly the new penalty structure arising from self–amendment of the tax return. The framework is not applicable to audit cases involving transfer pricing, thin capitalisation and advance pricing arrangements.

Second Addendum to Public Ruling No. 1/2006 — Perquisites from Employment

Following an appeal by the Institute, the IRB has issued a letter dated 23 June 2009 stating that the Ministry of Finance has extended the income tax exemption to meal allowance and daily allowance for overtime and outstation/overseas assignments from the year of assessment (YA) 2008. Such allowances are meant to defray meal expenses and can only be exempted on the condition that they are given at rates prescribed in a written circular or internal directive.

IRB's notice on taxation of benefits–in–kind

The IRB has issued a notice on the taxation of benefits–in–kind following its dialogue with the professional bodies on 8 May 2009.

Benefits of free petrol

Employees can elect to: (1) be taxed at prescribed values under Appendix 2 of the Public Ruling No. 2/2004 — *Benefits-In-Kind*; or (2) claim an exemption of RM2,400 on petrol used from/to home to/from working place and RM6,000 for official travels. Where the employer is unable to segregate between petrol used from/to home to/from working place and for official travels, then only an exemption of RM6,000 will be given.

Benefits of telephone and payment of telephone bills

A concession is given to employers who had reported in the Form EA for the YA 2008 the value of benefit enjoyed by employees on telephone (hardware) at RM300 and telephone bills paid by employer at RM300 (based on Appendix 2 of the Public Ruling No. 2/2004). These employers do not have to revise the Form EA.

Indirect tax legislation updates

The Technical Services Division of the Royal Malaysian Customs Department has issued a list comprising indirect tax legislation updates issued between January 2009 and April 2009.