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The Malaysian BUDGET 2010

PETRONAS

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CHARTERED TAX INSTITUTE OF MALAYSIA

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Inside:

- Exercising Discretion in Imposing Penalties: Is Good Faith A Relevant Factor?
- Employment of Roving Expatriates
- The Spectre of GST
- Embracing True Leadership During Troubled Times

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

Patience and perseverance have a magical effect before which difficulties disappear and obstacles vanish. A little knowledge that acts is worth infinitely more than much knowledge that is idle.
- John Quincy Adams

Welcome to the final issue of *Tax Guardian* for the year 2009! Whilst the road to global recovery appears to be sluggish and uneven, facing many daunting challenges along the way; there are glimmer signs that the global downturn has stabilised somewhat. The healing from the current crisis will be difficult compared to previous ones because of the synchronised nature of the downturn. It will take time and huge resources to revive the deeply entangled US financial sector. However, in a recent report, Prime Minister Datuk Najib Tun Razak is hopeful and said that "the Government's stimulus measures have helped the economy through a global recession and generated much-needed economic activity to make up for a slowdown in the private sector demand." Our Cover story delves into a timely discussion on the Malaysian Budget 2010 analysing the focus and approach of Budget 2010; thus echoing the sentiments of the Prime Minister.

In line with the theme on Malaysia's economy, have we ever paused to consider that one of the contributing factors to the economic turbulence could possibly be due to poor leadership? Let us help you find your leadership balance in our regular series called Practice Management.

We are positive that our readers will find this issue of *Tax Guardian* to be an interesting read. The article on "Good Faith as a Defence to s 113(2) Penalties" explores scenarios where taxpayers may raise the defence of good faith in the context of s 113(2) as well as highlights on the circumstances that would give rise to such defence. This begs the question, should the Inland Revenue Board (IRB) impose penalty under s 113(2) in the event an adjustment is made to the assessments made by the taxpayers? Read on and make your opinion.

As well, presented as a featured article, Understanding Malaysia's Advance Ruling Guidelines is a well-written piece. In depth analysis has been given from considering the general facets of the Advance Ruling procedure to investigating several circumstances in which the IRB will not issue or can decline to issue an Advance ruling.

And on a lighter note, on behalf of the editorial committee at Chartered Tax Institute of Malaysia, I'd like to wish all our readers a Merry Christmas and a very Happy New Year!

Francis LK Tan
Chairman
Editorial Committee

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

INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers and academicians. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 2,500 to 5,000 words submitted in a typed single spaced format using font 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:

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Continuing Professional Development (CPD)
CALENDAR OF EVENTS 1ST QUARTER 2010

january

Date	Training Programme	CPD points	Venue	Fee (RM) Member	Fee (RM) Member's Firm Staff	Fee (RM) Non-member	Speaker
5 Jan 2010 9.00am - 5.00pm	Workshop: Real Property Gains Tax - current updates	8	Kuala Lumpur	330	380	440	Harvindar Singh
13 Jan 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Ipoh	315	365	415	Sivaram Nagappan
18 Jan 2010 4.00pm - 7.00pm	Evening Talk: Real Property Gains Tax (In collaboration with ACCA)	3	Kuala Lumpur	120	NA	220	Yee Wing Peng and Datuk Ng Seing Liong
25 Jan 2010 9.00am - 1.00pm	Evening Talk	2	Kuala Lumpur	95	110	130	
26 Jan 2010 9.00am - 1.00pm	Half-day Workshop: Entertainment Expenses and Benefits-In-Kind	4	Kuala Lumpur	150	200	250	Lim Gim Kim
27 Jan 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Malacca	315	365	415	Sivaram Nagappan

february

Date	Training Programme	CPD points	Venue	Fee (RM) Member	Fee (RM) Member's Firm Staff	Fee (RM) Non-member	Speaker
3 Feb 2010 9.00am - 5.00pm	Workshop: Real Property Gains Tax - current updates	8	Kota Kinabalu	315	365	415	Harvindar Singh
4 Feb 2010 9.00am - 5.00pm	Workshop: Real Property Gains Tax - current updates	8	Kuching	315	365	415	Harvindar Singh
8 Feb 2010 5.00pm - 7.00 pm	Evening Talk	2	Petaling Jaya	95	110	130	
9 Feb 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Johor Bahru	315	365	415	Sivaram Nagappan
24 Feb 2010 9.00am - 5.00pm	Seminar: Understanding the Tax Issues on Islamic Financing	8	Kuala Lumpur	Early bird 375 Normal 425	Early bird 425 Normal 495	Early bird 495 Normal 545	Various Speakers

march

Date	Training Programme	CPD points	Venue	Fee (RM) Member	Fee (RM) Member's Firm Staff	Fee (RM) Non-member	Speaker
3 Mar 2010 5.00pm - 7.00pm	Evening Talk	2	Kuala Lumpur	95	110	130	
3 Mar 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Penang	315	365	415	Sivaram Nagappan
9 Mar 2010 9.00am - 5.00pm	Workshop: Real Property Gains Tax - current updates	8	Ipoh	315	365	415	Harvindar Singh
16 Mar 2010 9.00am - 5.00pm	Workshop: Real Property Gains Tax - current updates	8	Malacca	315	365	415	Harvindar Singh
16 Mar 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Kota Kinabalu	315	365	415	Sivaram Nagappan
17 Mar 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Kuching	315	365	415	Sivaram Nagappan
24 Mar 2010 9.00am - 5.00pm	Seminar: Case Law Developments	8	Kuala Lumpur	Early bird 375 Normal 425	Early bird 425 Normal 495	Early bird 495 Normal 545	Various Speakers

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 Aily 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.

Signing of a Memorandum of Understanding with the Indonesian Tax Consultants Association or Ikatan Konsultan Pajak Indonesia

L to R: Mr Prijohandojo Kristanto (Chairman of the Advisory Board of ITCA), Dr Veerinderjeet Singh, Mr Sukiatto Oyong (President of ITCA) and Mrs Sri Wahyuni Sujono (VP–International Affairs)

Group photo of the CTIM President with the office bearers of ITCA

A Memorandum of Understanding (MoU) was signed between the Institute and the Indonesian Tax Consultants Association (ITCA) in Jakarta, Indonesia on 25 September 2009.

Dr Veerinderjeet Singh, President of CTIM, and Mr Sukiatto Oyong, President of ITCA, both signed the MoU on behalf of their respective organisations. 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. After the signing ceremony, Dr Veerinderjeet held a dialogue with office bearers of the ICTA on the objectives of CTIM and how CTIM operates. It was agreed that there was a lot that each organisation could learn from each other and more meetings would be held in the future.

The ITCA was formed on 27 August 1965. The honorary chairman was Hidayat Saleh, who was then Regional Development Director for the Directorate General of Taxation. The name "Ikatan Konsultan Pajak Indonesia" (IKPI) was formally adopted during the congress held on 21 November 1987 in Bandung.

The vision of the ITCA is to become the sole institution for professional Indonesian tax consultants that is reliable and possesses a strong commitment to continuously support the country's national development. Their mission is to unify tax consultants in Indonesia, increase the tax consultants' role in the implementation of the government's taxation programmes, enhance the knowledge of tax consultants, support the members' interest in performing their duties as tax consultants, nurture the members in fulfilling their duty to the country and help taxpayers in complying with tax regulations.

The tax consultant certification is fully conducted by the ITCA. It currently conducts two examinations per year. ITCA has three categories of members, namely Regular members, Extraordinary members and Honorary members. The ITCA currently has 1,400 members from all over Indonesia.

Courtesy Visit to the Malaysian Institute of Accountants

L to R : En Rosli Abdullah, Mr Thanneermalai, Dato' Raymond Liew, Ms Christina Foo, Dr Veerinderjeet Singh, Mr Khoo Chin Guan, Ms Ann Vong

On 12 November 2009, CTIM paid a courtesy call to the Malaysian Institute of Accountants (MIA). The CTIM delegation was led by Dr Veerinderjeet Singh (President), and the other representatives were Mr Khoo Chin Guan (Deputy President), Dato' Raymond Liew (Chairman of Public Relations Committee), Mr Thanneermalai (Chairman of the CPD Committee) and Ms Ann Vong (Executive Director). Ms Christina Foo (Vice President of MIA), and En Rosli bin Abdullah (Chief Executive Officer), welcomed the CTIM delegation at the MIA. There were discussions on how CTIM and MIA could jointly collaborate in the running of budget seminars for members. Such a collaboration will enable the two organisations to pull together resources in order to avoid duplication so as to effectively service their members. Both organisations look forward to a separate meeting for further discussions in this area.

Members' Dialogues

Members' dialogues were held with Dr Veerinderjeet Singh, President of CTIM on 28 October 2009 and 30 October 2009 in Kota Kinabalu and Kuching respectively.

The President briefed the members on the Institute's new name, new logo, corporate video, activities as well as its future direction. Members actively participated in the dialogues and raised questions on various issues.

CTIM President and Branch Chairman at the Members' Dialogue in Kuching.

Members at the Members' Dialogue in Kuching.

CTIM Members' Dialogue in Kota Kinabalu

CTIM President addressing questions at Members' Dialouge in Kota Kinabalu

CTIM 2010 Budget Seminar & Members' Dialogue in Kota Kinabalu

Courtesy Visit to CTIM by the Indonesian Tax Consultants Association (ITCA)

Mr Prijohandojo Kristanto receiving a souvenir from Dato' Raymond Liew

L to R : Ms Ann Wong, Mr Lew Nee Fook, Mr Prijohandojo, Dato' Raymond Liew and Mr Aruljothi

On 3 November 2009, Mr Prijohandojo Kristanto who is the Chairman of the Advisory Board of the Indonesian Tax Consultants Association (ITCA), paid a courtesy visit to CTIM. CTIM had signed a Memorandum of Understanding with ITCA on 25 September 2009. Dato' Raymond Liew (Chairman of the Public Relations Committee), Mr Aruljothi (Chairman of the Membership Services Committee), Mr Lew Nee Fook (Council member), Ms Ann Vong (Executive Director), and Cik Nursalmi (CPD manager) welcomed Mr Prijohandojo to CTIM. Mr Prijohandojo gave a presentation on the ITCA and how it operates. He also shared information on the ITCA's membership certification as well as the requirements to obtain a tax consultant's license in Indonesia.

Budget Night: Preparation of the 2010 Budget Commentary &Tax Information

On 23 October 2009, members from various tax, accounting and auditing firms gathered together for an all–night session at the CCH's office in Kuala Lumpur to produce the 2010 Budget Commentary and Tax Information booklet which was published jointly by the Chartered Tax Institute of Malaysia, the Malaysian Institute of Accountants and The Malaysian Institute of Chartered Certified Public Accountants. A lot of work and effort was put in by all involved and the Institute would like to express its sincere appreciation to everyone involved in the successful production of the booklet. Seeing how much work went before and during the weekend, the Institute would like to thank all who were involved in the production of the booklet.

Budget Day Activities at CTIM

At CTIM, a few of the CTIM Council Members and practitioners gathered at the Institute to view the televised screening of the Budget and prepared a press statement stating the CTIM's views on the 2010 Budget.

Pre–budget briefing for the Media on 15 September 2009 held at CTIM

On 15 September 2009, a Pre–budget briefing for the Media was held at CTIM.

Members of the media who attended the briefing were: Norshafawati Wahid (TV3), Adeline (Business Times), FY Leong (Sin Chew Daily) and Loong Tse Min (The Edge).

CTIM was represented by Mr Khoo Chin Guan (Deputy President), Dr Veerinderjeet Singh (President), Dato Raymond Liew (Chairman of PR Committee), Mr. Lim Kah Fan (Council Member), Karen Yeong (Membership & Administration Manager) & Ann Vong (Executive Director)

CTIM's participation at Sin Chew Daily's Budget Seminar

Council Members of CTIM, Mr Adrian Yeo and Mr Chow Kee Kan participated in the Budget seminar organised by Sin Chew Daily. The seminar themed "Tax Measures to Stimulate Economy" was attended by 200 people.

Budget 2010 Coverage on RTM1

Dr Veerinderjeet Singh, President of CTIM, participated in the Dialog Khas Pra Bajet 2010 on 21 October 2009 hosted by RTM1.

Budget Coverage via Bernama Radio
Dr Veerinderjeet Singh was interviewed for the **"All Angles"** Programme on Bernama Radio on CTIM's outlook for the 2010 budget. Mr Lim Kah Fan's (Council Member of CTIM) views were sought after the budget announcement.

Dr Veerinderjeet Singh participated in the **"All Angles"** talk show on 9 November 2009 to share his views on the budget.

Budget Hotline Jointly Operated by the Chartered Tax Institute of Malaysia (CTIM) and the Malaysian Institute of Accountants (MIA)


MIA Budget 2010 hotline

CTIM in collaboration with MIA hosted the 2010 Budget Hotline service on Saturday, 24 October 2009, from 9.00 am to noon at the MIA premises. The hotline was conducted by a panel of tax consultants drawn from major accounting firms. The objective of the hotline was to provide a convenient channel for dissemination and clarification of changes and proposals introduced by the 2010 Budget as well as their fiscal implications to members and the general public. The hotline number was 03-2274 5055. The response was very encouraging.

BRANCH NEWS

CTIM East Coast Branch Meeting for Members

On 4 November 2009, Mr Wong Seng Chong, East Coast Branch Chairman, chaired the meeting for the Kota Bharu CTIM members and tax practitioners at the Royal Golf Country Club, Kota Bharu, Kelantan. Various local tax issues were brought up for discussion. Members were updated on the CTIM activities.

CTIM Northern Branch Networking Dinner & Launch of CTIM Perak Branch Information Board


Group photo at the Dinner


Some attendees took time off to view the information blog as dinner progresses

On 1 October 2009, CTIM Perak Branch organised an informal networking dinner at a local restaurant in Ipoh. Branch representatives/Committee members of ACCA, CIMA, CPA Australia, MACS and MIA attended the dinner as well. The attendees mingled amongst themselves, exchanged business cards and shared views. In conjunction with the occasion, CTIM Perak Branch also took the opportunity to officiate its CTIM Perak Branch INFORMATION BOARD on blogspot. Members may logon to http://www.ctimperak.blogspot.com/ to view the activities of Perak Branch.

CPD / Institute News

2010 Budget Talk

On 27 October 2009, the Chartered Tax Institute of Malaysia (CTIM) conducted its annual Budget Talk at the Crowne Plaza Mutiara Hotel, Kuala Lumpur.

Puan Khodijah binti Abdullah, Deputy Under-Secretary of the Tax Analysis Division, Ministry of Finance Malaysia gave an in-depth analysis of the latest budget proposals.

Cik Halijah binti Bulat, Director of Tax Policy Department represented the Inland Revenue Board as a panelist in the forum discussion session which was chaired by Dr Veerinderjeet Singh, President of CTIM.

The talk which was attended by over 600 participants comprised of the tax practitioners and members from commerce and industry.

2010 Post–Budget Seminars

CTIM organised a series of 2010 Post–Budget Seminars at various towns namely Kuala Lumpur, Petaling Jaya, Ipoh, Malacca, Seremban, Johor Bahru, Penang, Kuantan, Kuching and Kota Kinabalu.

The speakers shared their views with the participants of the seminars on the recent developments in tax, the implications of the Budget proposals and the various opportunities offered by the budget incentives. This year, the Institute has jointly collaborated with ACCA Malaysia to organise budget seminars at smaller towns namely Kuala Terengganu, Kota Bharu, Labuan, Sibu and Miri.

Members of both organisations benefited from the seminars in terms of knowledge as well as meeting licensing requirements.

Evening Talk

On 16 November 2009, the CTIM organised an evening talk on "Financial Reporting Standards (FRS) 139 – Financial Instruments: Recognition and Measurement" at the Istana Hotel, Kuala Lumpur. The speaker, Ms Phan Wai Kuan of PricewaterhouseCoopers shared her extensive experience in FRS with the participants during the talk. The session was chaired by Mr Khoo Chin Guan, Deputy President of CTIM.

Exploring New Islamic Finance Education with UNISEL

The Unisel Graduate School of Management (UGSM) is widely recognized for its industry-driven courses specially designed for working professionals. UGSM's Masters of Business Administration (MBA) programme helps working professionals arm themselves with the necessary skills and knowledge in the world of business.

The programme offers prospective students a choice within 8 areas of specializations and one of the specializations is ***MBA in Islamic Finance***. The MBA in Islamic Finance is a new UGSM's program in **collaboration with "The International Centre for Education in Islamic Finance (INCEIF)"**, an Islamic Finance University set up by Bank Negara Malaysia. Our central bank is encouraging bank officers to take up this programme given the fact that Malaysia has been recognized as the cradle of modern Islamic Finance and there is huge demand for Islamic Finance Professionals.

UGSM's Associate Director, Halid Hasbullah Boestamam added that, "with the introduction of newly Islamic Banking license with the paid up capital of more than USD2 billion will create new job opportunities with Islamic banking qualifications,"

In this MBA program, besides 11 core courses, candidates are required to take four compulsory Islamic Finance's elective subjects – Shariah Rules in Financial Transactions, Deposit and Financing Operations of Islamic Banks, Islamic Financial Institutions & Markets and Managing Islamic Financial Institution.

As an adding value to this collaborative MBA program, after completing the UGSM's MBA in Islamic Finance,

candidate can also apply for a **credit transfer** of four (4) modules to a **"Chartered Islamic Financial Professional (CIFP)"** from INCEIF. Through this credit transfer's facility, candidates could complete their study faster since they need to take only 10 modules out of 14 modules in order to be qualified as a CIFP.

"We hope to get a minimum of 25 students for our December 2009 intake. Most of the student existing who signs up with us do so by word of mouth, especially from our existing pool of foreign students," says Prof.Dr. Khalifah Othman, Dean of UGSM adding that to attract more students, UGSM will continue to organize more previews to introduce this new MBA course of specialization to the public. Online application is also available for those who are interested to enroll in this course.

The minimum entry requirement for this MBA programme is a Bachelor's degree or professional qualification from a recognized educational institution. Candidates are also required to have a basic proficiency in English Language.

Prof. Dr. Khalifah said the range of specializations offered by UGSM is a plus point for students who wish to have added edge in the MBA program. This is in line with modern organizations in various sectors of industry which require skilled managers and at the same time, in order to be a global player we need to adopt a world standard so as to reflect the world accepted quality.

INVITATION to...

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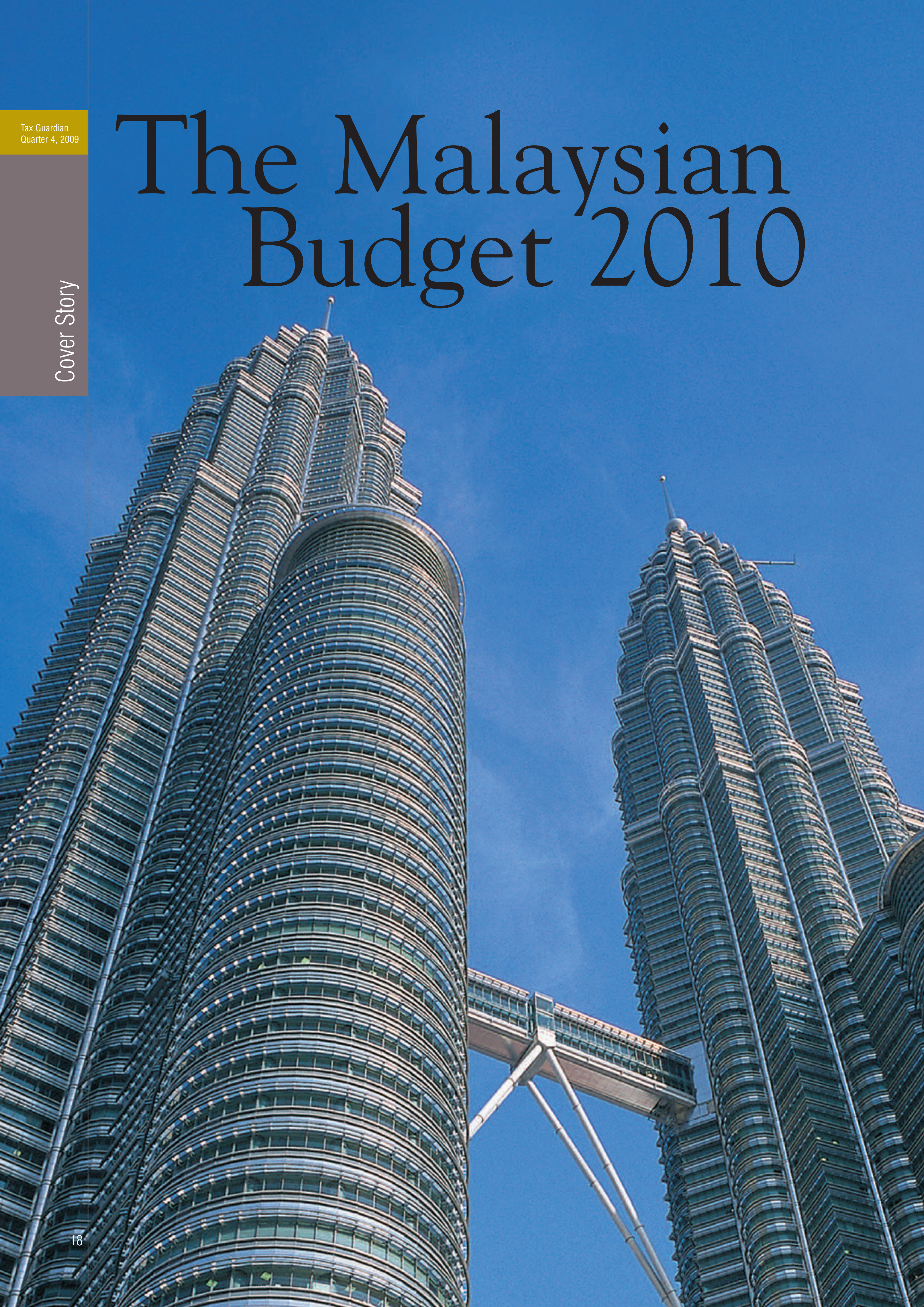


The 2008-2009 global financial crisis has seriously impacted the global economy. Advanced economies, in particular, have experienced a significant decline in real Growth Domestic Product (GDP) during the fourth quarter of 2008 as well as a good part of 2009. Although the US suffered most severely in the wake of the collapse of its financial and housing sector, countries that rely heavily on trade exports were also hit by the crisis via trade and financial avenues.

Like other developing economies, Malaysia was not spared from the effects of the global financial crisis due to the sharp decline in demand for exports, which had a knock-on effect on many other sectors of the economy. This resulted in the GDP contracting a sharp 6.2% in the first quarter of 2009[1].

Datuk Sri Mohd Najib Tun Abdul Razak tabled the 2010 Budget at a time when the global economy is showing signs of recovery, albeit at a very slow pace and still surrounded by many uncertainties. As such, the focus on Budget 2010 is to complement the RM 67 billion economic stimulus package announced earlier as well as taking a longer term view in propelling the country to a high-income economy, bearing in mind the limited resources available.

Budget deficit – limited options available

A quick look at the Government's finances indicates the limited options available in balancing the budget.

Malaysia has been running a budget deficit for a number of years now. Although the projected budget deficit for 2009 was initially expected to be no more than 4% of GDP, the need to spend additional resources to stimulate the economy resulted in the number increasing to 7.4% of GDP.

Malaysia - Key data and forecasts

	2008		2009 (forecast)		2010 (forecast)	
	RM mil	% growth	RM mil	% growth	RM mil	% growth
FEDERAL GOVERNMENT FINANCE						
Revenue	159,793	14.2	162,100	1.4	148,446	- 8.4
Operating expenditure	153,499	24.7	160,170	4.3	138,279	- 13.7
Current account surplus	6,294		1,930		10,167	
Development expenditure (net)	41,889	11.8	53,045	26.6	50,649	- 4.5
Overall deficit	- 35,594		- 51,115		- 40,428	
% to GDP		- 4.8		- 7.4		- 5.6

Source: Malaysia Economic Report 2009/2010

Whilst the revenue side of the equation is expected to stay steady in 2009, a fall in revenues in 2010 is inevitable due to a lower take from taxes in the oil and gas industry and businesses generally. Given the expected level of decline, the Government will have to think of new and innovative ways to grow revenues rather than focusing on the conventional thinking of squeezing that extra bit by increasing tax enforcement.

At the same time, the Government expenditure has increased in 2008 and 2009, particularly to support the two economic stimulus packages announced in the last 12 months. This was inevitable to ensure appropriate pump priming in order to avoid a slump in the economy. Looking ahead, the expenditure is expected to reduce to more prudent levels in order to avoid running an even greater deficit.

On an overall basis, Malaysia has been running a budget deficit for more than 10 years with the deficit for 2009 expected to come out at the highest rate since 1987. In comparison to our neighbours, our budget deficit in percentage terms to GDP is greater. The following table illustrates this difference in comparing a 4–year overview of the fiscal position of Malaysia and its neighbouring South–East Asian countries.

Country	2006	2007	2007	2009
	%	%	%	%
Thailand	1.1	-1.7	-1.1	-4.2
Singapore*	-0.6	2.6	-0.8	-3.5
Indonesia*	-0.8	-1.3	-0.1	-2.6
Malaysia*	-3.3	-3.2	-4.8	-7.6

Source: PwC estimates from national data sources (*), World Bank, EIU, November 2009

One possible explanation is that many of our neighbours have over the years broadened their tax base with an increasing emphasis on consumption tax. The table below shows many of the countries in the region have implemented Goods and Services Tax (GST) and over the years have been successful in increasing the rates of tax.

Country	Standard / nominal tax rates	Year of Implementation
China	17%	1984
Indonesia	10%	1985
New Zealand	12.50%	1986
Thailand	7%	1992
Singapore	7%	1994
Philippines	12%	1996
Vietnam	10%	1999
Australia	10%	2000
Malaysia	?	?

Although the announcement of GST was made back in 2005 and implementation was scheduled for 1 January 2007,

1 Malaysian Economic Report 2009/2010, Ministry of Finance, Malaysia

due to several reasons GST has not been implemented. The Prime Minister has come up with a strong indication that GST is in the final stages of evaluation in the 2010 Budget speech. However, no date has been set for the introduction of GST as the Government is focusing on the potential impact of GST on the *rakyat*.

Whilst this is important to ensure that GST is not seen as an additional burden to taxpayers, especially to the lower income group, awareness programmes need to start early to manage the potential negative perception among the general public. Similarly, businesses should have adequate time to prepare themselves and put the necessary systems in place in order to smoothly transition them into a GST regime.

Real Property Gains Tax Returns

Budget 2010 also introduced a number of measures to increase the Government revenues. Amongst these, the two measures that have drawn significant public interest is the introduction of the Real Property Gains Tax (RPGT) as well as service tax on credit and charge cards.

Many of us would recall that the announcement on the exemption of RPGT in April 2007 was very well received by all quarters. After all, it was understood that the RPGT collected by the Government was not significant compared to the overall tax collection as shown in the following table:

	2003	2004	2005	2006
RPGT (in mil)	266.12	152.62	216.44	233.76
Total tax revenue	42,819.57	48,633.71	56,854.56	65,738.28
% of RPGT/total tax	0.62%	0.31%	0.38%	0.34%

Source: Malaysia Inland Revenue Board (IRB)
Note: RPGT was exempted from 1 June 2003 until 31 May 2004.

Prior to the exemption, RPGT was imposed on gains on a progressive basis from 30% to 0% depending on the person and the holding period of the property. The intention was to impose higher rates on sales made within short periods which would lean more toward speculative transactions and a 0% rate applying to sales made in the sixth year onward. However, the reintroduction of RPGT at a flat rate of 5% is seen as a means to shore up Government coffers which effectively disregards the holding period of the property.

The reimposition of RPGT at 5% was gazetted in the RPGT Exemption Order 2009 dated 26 October 2009 and the calculation of the chargeable gain is based on the following formula:

C – (A/B x C)

where A is the amount of tax charged on the chargeable gain on the person at the appropriate tax rate reduced by the amount of tax charged on such chargeable gain at the rate of five percent

B is the amount of tax charged on such chargeable gain at the appropriate tax rate

C is the amount of such chargeable gain

The above formula can be illustrated as follows (chargeable gain of RM100,000 made on an asset disposed of within two years of acquisition ie 30% rate applies):

Chargeable gain	100,000
A/B x C = $\frac{(100{,}000 \times 30\%) - (100{,}000 \times 5\%)}{(100{,}000 \times 30\%)}$ x 100,000	83,333
Chargeable gain to be taxed	16,667
Tax payable: 16,667 x 30%	5,000

This is a roundabout approach in arriving at the desired result of 5% tax on disposals under RPGT and rather complex at first sight to the ordinary person who is not a tax specialist.

The proposals provide that the allowable losses are deductible against chargeable gains. Previously, the ultimate allowable losses were calculated based on the period of the ownership. An allowable loss arising from the sale of property held for say two years (relevant tax rate 30%) is of equal value to an allowable loss arising from a property held for five years or more (relevant tax rate 5%). Therefore, the proposals ignore the tax relief due as a result of the period of ownership of property. It is understood that the proposal seeks to even-out any losses since a flat tax rate is being applied.

Under both the current and proposed provisions, the amount of tax relief and allowable losses respectively available for carry forward for offset against future tax assessed or future chargeable income is indefinite until such amounts have been fully utilised.

There is an obligation created on the acquirer to retain an amount equal to 2% of total consideration and for such amounts to be remitted to the IRB. This effectively discharges the acquirer from any further obligation imposed as provided for in the past. A late remission to the IRB will attract a penalty of 10% of the amount if paid after 60 days.

In the Post Budget announcement period, there have been negative reactions to this proposal. Recently, certain property indices had fallen due to this introduction, and it is understood that the property market is not happy with the introduction. In light of the current perceived recovery of the economy this introduction may have an undesired impact.

Islamic Finance System

The Malaysian Islamic financial sector is seen as one of the most progressive and attractive in the world given the numerous incentives planned and further liberalisation in the coming years.

Many commendable efforts have been taken to strengthen Malaysia as an international Islamic financial centre. The industry is also expected to see further stimulus following the liberalisation of the financial sector, which allows for an increase in foreign equity ownership of up to 70% in Islamic banks, investment banks and insurance companies.

Malaysia's Islamic banking assets total approximately RM113.5 billion, including Takaful assets of RM6.2 billion. It also boasts the world's largest Islamic private debt securities (IPDS) market, which comprises 45.5% or RM125 billion of domestic corporate bonds.

Malaysia targets its Islamic banking assets to garner a 20% market share of the banking industry in the coming year. To ensure that Malaysia advances in the development of Islamic financial services, Budget 2010 has proposed measures to further promote Islamic financing such as:

- Incentives given in the form of a deduction on expenses incurred in the issuance of Islamic securities be extended until YA 2015.
- The double deduction incentive given on expenses to promote Malaysia as Malaysia International Islamic Financial Centre (MIFC) be extended until the Year of Assessment 2015.
- Additional stamp duty exemption of 20% given on instruments used in Islamic financing be extended until 31 December 2015.
- Stamp duty exemption for Syariah-based financing scheme be extended to an instrument executed pursuant to a scheme of financing approved by the Labuan Offshore Financial Services Authority in addition to the Central Bank and Securities Commission.

Credit is due to the Government and relevant agencies in their unyielding passion to develop the Islamic Financial industry in Malaysia as well as globally.

Small and Medium Enterprises (SME)

The global financial crisis has not spared SMEs despite their domestically oriented operations. Nevertheless, the economic downturn provided opportunities for SMEs to re-tool their business models and to position themselves for the ensuing recovery as well as to sustain their business over the long term in a more competitive environment.

The National SME Development Council (NSDC), the highest authority that charts the overall policy direction on SME development in the country, targets to increase the contribution of SMEs to GDP from 32% in 2005 to 37% in 2010, exports from 19% to 22% and employment to 57% in 2010.

For tax purposes, SME is defined as a company resident in Malaysia with a paid-up capital of ordinary shares of RM2.5 million or less at the beginning of the basis period of a year of assessment. With effect from YA 2009, the definition of SME has been narrowed where it excludes a company that controls or is being controlled directly or indirectly by another company which has a paid-up capital of more than RM2.5 million.

For the manufacturing, manufacturing-related services, and agro-based industries, an SME is defined as an enterprise with full-time employees not exceeding 150 persons, or with annual sales turnover not exceeding RM25 million.
For the service, primary agriculture and Information and Communication Technology (ICT) industries, the definition refers to enterprise with full time employees not exceeding 50 persons, or with annual sales not exceeding RM5 million.
The Government has allocated significant funds in providing continuous support to assist SMEs, including funding for soft loans, ensuring speedier approvals of loan applications, capacity enhancement, and branding and promotion. Prior

to Budget 2010, a number of incentives/compliance exemptions have already been granted to SMEs:

1. Tax rate of 20% of chargeable income on the first RM100,000 in YA 2003 and RM500,000 from YA 2004 onward.
2. Exemption from filing estimates of tax payable or making instalment payments for a period of two years beginning from the year of assessment in which the SME commences operations (YA 2008).
3. Pioneer status and Investment Tax Allowance for SME that supply components, technology or R&D.
4. Pioneer status and Investment Tax Allowance for SME capable of achieving world class standard in terms or pricing, quality and capacity.
5. Accelerated Capital Allowances on expenditure incurred on small value assets.
6. Accelerated Capital Allowances for security control equipment and ICT equipment.

For the purposes of promoting innovation and intellectual property development among SMEs, these companies are now allowed a tax deduction for expenses incurred in the registration of patents and trademarks.

To further encourage development of SMEs, other initiatives that can be considered may include in the future:
1. Increases in the exemption threshold from RM500,000 to RM1m.
2. Incentives for acquisition of patents and trademarks to encourage inorganic growth.
3. R&D incentives for start ups.

Given the importance of SMEs to the economy, continuous focus and assistance should be directed to this group.

Green Initiatives
With increasing global awareness on environmental issues, Malaysia is not to be left behind in designing an environmentally sustainable plan of development. Initial measures were taken to diversify energy resources in the Eighth Malaysia Plan, and under the Tenth Malaysia Plan a feed-in tariff mechanism will be introduced to further promote the use of renewable energy resources.
In terms of tax breaks, a number of incentives have been granted in previous years for specific activities in relation to energy conservation, generation of renewable energy and pollution reduction.

Budget 2010 now grants a tax exemption of 100% of the additional capital expenditure incurred in obtaining the Green Building Index (GBI) certificate is allowed as a set-off against 100% of statutory income for each year of assessment. The incentive is applicable to new buildings and upgrading of existing buildings and is given only for the first GBI certificate issued in respect of the building.

Buildings will be awarded the GB Malaysia rating based on six key criteria ie energy efficiency, indoor environmental quality, sustainable site planning and management, materials and resources, water efficiency as well as innovation.

Malaysia's move to 'going green' is laudable, however, it is still very restrictive and the additional costs involved in obtaining the appropriate paper may outweigh the tax

benefits. The Government should use Budget 2010 as a kick-start to further promoting green technology, and consider providing further incentives for green initiatives in the future. Australia, for instance, has allocated AUD200m for the 2009/2010 fiscal year for its Climate Change Action Fund, AUD100m for its National Energy Efficiency Initiative and AUD400m for its Clean Energy Initiative, which was predicted to have a fiscal impact of AUD3.5 billion. Hong Kong, on the hand, has earmarked HKD450m to install energy-efficient systems in government buildings, with a further HKD450m for private buildings to conduct improvement works.

Human Capital

The huge allocation of funds to the education sector is further evidence of the Government's dedication to driving the nation towards a high-income economy. To return Malaysia to its former place among the highest echelons of the Asian countries, the focus on people is highly desirable, as a shift from trade in commodities and low-level manufacturing to the provision of services and high-level research and development is an eventual move to transform Malaysia into a high-income economy.

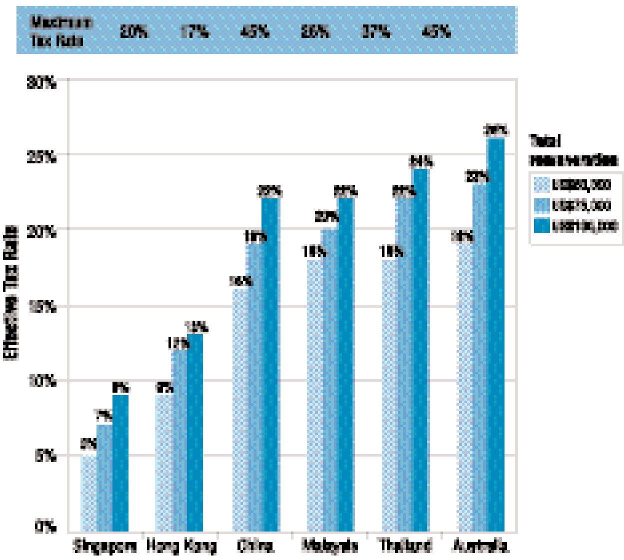
The Federal Government's proposal that individual taxpayers be given tax relief on broadband subscription fess for up to RM500 a year from 2010 to 2012 is also a step forward to bringing the nation into the advanced world of information technology and communication. However, it is hoped that the procedures to obtain such a deduction should not be restrictive. The ability to interact with the world is the key factor placing the nation at a position to compete with other rapidly-developing countries in the region and to promote the speedy transfer of knowledge and information.

To attract local and foreign talent, the Government will reduce the maximum individual income tax rate from 27% to 26% effective from the 2010 year of assessment. This will be the second consecutive reduction in the personal income tax rate following the 1% reduction in the 2009 year of assessment.

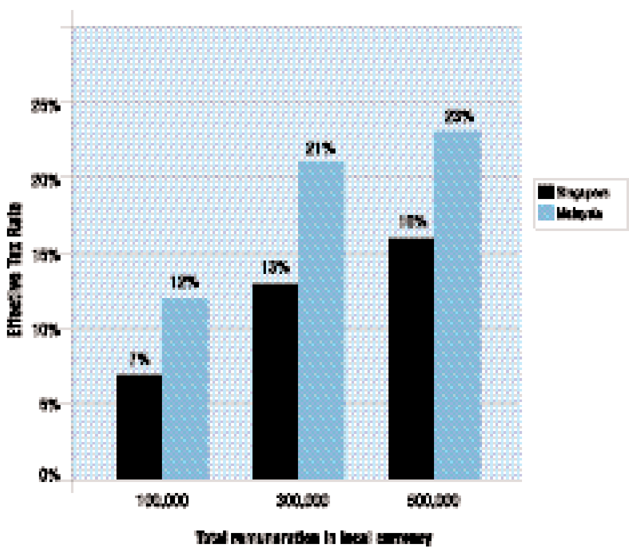
The fixed tax rate for non-residents will also be reduced to 26%.

Personal relief is also to be increased from RM8,000 to RM9,000 effective from the year of assessment 2010.

The figures below show a comparison of Asia Pacific's individual tax rates and a further comparison of the effective tax rates for resident taxpayers in Singapore and Malaysia. The statistics show that there is still a gap in the competitiveness of tax rates between Malaysia and the region's financial hubs, Singapore and Hong Kong, although Malaysia is gradually closing in on the difference.



Effective tax rates in the Asia-Pacific region



Comparison of effective tax rates for resident individuals in Singapore and Malaysia (for income year 2010)

Iskandar Development Region (IDR) – fine tuning of tax incentives
Although there are criticisms that there are too many economic regions in Malaysia, one must bear in mind that each region has a different niche area of focus as well as development attributes, and working out individual incentives for each specialised region is a good strategy. The strategy to set up the economic regions not only helps in bringing development to the different parts of the country but also helps the government focus its efforts and channel resources better.

Furthermore, after the success experienced by China, the pioneer of economic zones, the concept has been taken up by many countries around the world, including Poland and South Korea.

Over the past few years many direct and indirect tax incentives have been put in place for each of the economic regions. As these regions develop further, specific additional incentives may be required not only to attract investors but also ensure availability of knowledge workers. Toward this end, it is proposed in Budget 2010 that the income of a Malaysian and foreign knowledge workers residing in IDR and working in qualifying activities be taxed at 15%. The qualifying activities are green technology, biotechnology, educational services, healthcare services, creative industries, financial advisory and consulting services, logistics services and tourism.

Upstream Oil Companies
As part of the Government's efforts in standardising the Malaysian income tax system and to ensure that the stability of Government's cash flows, it was proposed that the upstream petroleum companies taxed under the Petroleum Income Tax Act 1967, to move into self assessment system where the petroleum taxes will be assessed on current year basis. This will take effect from the year of assessment 2010 (for the financial year 2010) onwards.

Presently, income of upstream petroleum companies are taxed on a preceding year basis which results in a lag in respect of tax collection. Apart from that, under the previous official assessment system the tax authorities needed to verify the tax returns and issue notice of assessments.

With the proposed move to a self assessment system, upstream petroleum companies are expected to pay their petroleum taxes on "pay as you earn" basis. Similar to the current income tax system, upstream petroleum companies are allowed to settle their petroleum taxes in the form of instalments in the same year. However, only 10 instalments are allowed for the upstream petroleum companies to settle their current year taxes.

As a consideration to reduce the cash burden of the upstream petroleum companies for paying two years taxes in the year 2010 (ie for financial years 2009 and 2010),

upstream petroleum companies are allowed to settle their taxes for financial year 2009 in instalments spread out over a period of five years. This means that upstream petroleum companies could opt up to a maximum of 60 instalments to settle the said taxes. This is a departure from the earlier adoption of the current year system for other taxpayers which effectively waived the requirement for payment of taxes for the overlapping year which was 1999.
Apart from tax payments, upstream petroleum companies are also required to submit tax estimates including revisions which are comparable to the current system under the Income Tax Act, 1967. The various deadlines and penalties under the Income Tax Act, 1967 have been adopted for the upstream petroleum companies. The volatile nature of oil prices have a significant bearing on profits earned by these companies and therefore such proposals to move to a current year system could result in significant tax overpayment in certain years and will add to the administrative burden of the upstream petroleum companies to comply with new requirements.

There is a proposal in the Bill that introduces a duty of every chargeable person (in this case the partnership) to make up accounts of expenditure/profit or losses arising from petroleum operations and such accounts need to be audited by a professional accountant together with a report made by that accountant under s 174(1) & (2) of the Companies Act 1965. This requirement essentially results in a multitude of issues that needs to be considered in light of the Production Sharing environment in Malaysia such as different accounting policies, contiguous areas, confidentiality issues, etc. The burden to develop such a set of accounts would be tremendous.

Conclusion

The focus of Budget 2010 is to put the economy on a much stronger footing and concurrently move towards a high-income economy. This approach does allow for a more sustainable growth of the economy whilst addressing the future needs and expectations of the people. Towards this end, Government expenditure has been focused on areas such as education, health and development of highly skilled human resources.

Having the vision and executing such a move will be a mammoth task. The "test of pudding" is in implementing the vision of bringing Malaysia to become a developed nation by 2020 despite the budget deficit and current slowing down of the Malaysian economy. TG

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Exercising Discretion in Imposing Penalties: Is Good Faith A Relevant Factor?

By S. Saravana Kumar and Siti Fatimah Mohd Shahrom

Introduction

Recently, the Special Commissioners of Income Tax (Special Commissioners) in recent tax appeals such as *OPD Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[1], *ELM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[2], *SPMSB v Ketua Pengarah Hasil Dalam Negeri*[3], *SETM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[4] and *SM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[5] have consistently held that penalty under s 113(2) of the Income Tax Act 1967[6] (ITA) should not be imposed in instances where the taxpayer had acted in good faith.

This article intends to explore whether the Inland Revenue Board (IRB) should consider the element good faith in exercising its discretion to impose penalty and highlight the circumstances that would give rise to good faith.

Section 113(2) & the IRB's Position

Section 113(2) reads as follows:

> *"Where a person-*
>
> *(a) makes any incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or*
>
> *(b) gives an incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,*
>
> *then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under s 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1)."*

The Indian High Court[7] defined good faith as an orientation of honest intention and want of any deliberate attempt to mislead. The Court also added that it would include an act done with a *bona fide* belief, even if such belief is a mistaken belief. However, the IRB's has been that s 113(2) does not provide for the element of good faith unlike s 113(1) of the ITA. In this regard, the question essentially is whether the IRB has discretion to impose penalty and in exercising that discretion, is good faith a relevant factor that the IRB take into account?

In the recent case of *SETM*, the IRB put forward two arguments in contending that good faith is not a factor to be considered for s 113(2).

First, the IRB argued that the principle of strict interpretation must be applied to construe s 113(2). However, this argument did not find favour with the Special Commissioners. The authors welcome the stand taken by the Special Commissioners in light of the Court of Appeal's decision *Exxon Chemical (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*[8], which ruled that the principle that a provision in a taxing statute must be read strictly is one that is to be applied against the IRB and not in its favour. In delivering the unanimous decision of the Court of Appeal, Justice Gopal Sri Ram in *Exxon Chemical* enunciated that:

> *"…the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and* ***not in its favour****. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour… The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally.* ***What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.*** *"*

With due respect, the authors are of the view that there is no good basis for the IRB to contend that good faith is not a relevant factor as the wordings of s 113(1) and s 113(2) are the same as both provisions target a taxpayer that:

1 (2009) MSTC 3,846
2 (2009) MSTC 3,887
3 [2009] AMTC 1,188
4 (Rayuan PKCP No. 14/2008)
5 (Rayuan No. PKCP (R) 26/2008)
6 Act 53
7 *Public Carriers Truck Owners' Association* v. *CIT* 210 ITR 36 (Raj.)
8 [2005] 4 CLJ 810

"(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person."

The only difference between the two provisions is that unlike s 113(2), which attracts civil sanction, s 113(1) attracts criminal sanction. Further, the IRB's argument is not something new as this had been unsuccessfully raised before. For instance, the IRB's contention that good faith is not relevant to s 113(2) had been raised before the Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co*[9], which is discussed in greater detail below.

The other ground raised by the IRB was the decision of the Special Commissioners in *KT Co. v Ketua Pengarah Hasil Dalam Negeri*[10]. The Special Commissioners in *KT* held that:

"The Appellant also claimed good faith as a defence. They argued that since it is provided as a defence under s 113(1) of the Act, it should apply with equal force under s 113(2) as well. The short answer to the argument is that it is not applicable under s 113(2) for the simple reason that no provision has been made for it therein…"

The facts in *KT & Co* can be clearly distinguished from *OPD*, *ELM, SPMSB, SETM* and *SM* as the taxpayers in those cases did not attempt to expand the defence of good faith available under s 113(1) to s 113(2). Instead, the taxpayers argued that the IRB should have taken into account the fact that the taxpayers had acted in good faith before considering whether a penalty under s 113(2) should be imposed. It must be observed that s 113(2) is not a mandatory provision as it clearly confers discretion on the IRB as to whether penalty should be imposed or not[11]. In exercising its discretion, the authors are of the view that the IRB must take into account all factors and circumstances of the case and should not act mechanically. Professor MP Jain in his authoritative work entitled "Administrative Law of Malaysia and Singapore (3rd Edition)" viewed that:

"When discretion is conferred on an authority, it must personally exercise the same; ***it must apply its own mind to the facts and circumstances of each case and come to its own decision. If authority acts without applying its mind to the case before it, then the action or decision taken by it will be bad because the authority has not exercised its discretion.****"*

It is notable that the above view of Professor Jain was endorsed and applied by Justice Richard Malanjum (as His Lordship was then) in *Awang Tengah Ag Amin v Sabah Public Service Commission & Anor*[12].

9 [1992] 1 CLJ (Rep) 135
10 (1996) MSTC 2,594
11 The authors find support for this view from the decision of the High Court in *Kim Thye & Co v Ketua Pengarah Hasil Dalam Negeri* [1991] 3 CLJ 2507, where Justice Richard Talalla commented: *"As I see it subsection 1 of s 113 is couched in mandatory terms but conditioned whereas subs 2 is expressed in terms which are discretionary…".*
12 [1998] 2 CLJ Supp 409

The decisions of the Special Commissions *OPD*, *ELM*, *SPMSB*, *SETM* and *SM* are in accordance with the decision of the Supreme Court in *Kim Thye & Co*. In a well articulated judgment, Justice Peh Swee Chin firmly rejected the IRB's argument that it need not be satisfied whether the taxpayer had acted in good faith for the purposes of s 113(2). Justice Peh Swee Chin observed the following:

> *"It was argued to the effect, that on a comparison of ss 113(1) and 113(2) of the Act, the Revenue, when imposing the penalty, need not be satisfied that the incorrect return or information was given in good faith whereas such good faith would preclude a conviction by the Court in respect of s 113(1). The learned Judge found from s 113(2) a discretion vested in the Revenue, as to whether to impose or not, a penalty thereunder. His Lordship said:*
>
> > *… **He is given discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances**…"*

Justice Peh Swee Chin held that the IRB has no unfettered discretion in imposing penalty under s 113(2). His Lordship's decision is evident from the following passage:

> *"The Revenue seemed to have harked back to the discarded theme of unfettered discretion, and if they did, and we have little doubt that they did, it would be of salutary effect to remind ourselves of the inspiring words of Raja Azlan Shah, Ag. CJ (as he then was) in Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. in which, while dealing with a claim for unfettered discretion, his Lordship said:*
>
> > *I cannot subscribe to this proposition for a moment. **Unfettered discretion is a contradiction in terms**… **Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint: where it is wrongly exercised, it becomes the duty of the courts to intervene**... In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law…"*

The authors would also like to draw reference to the High Court's decision in *Kim Thye*, where Justice Richard Talalla made the following comments:

> *"…The Director General may require payment of the penalty. He is not bound to require such payment. **He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances. It seems to me that the Director General would have to consider whether the incorrect return or incorrect information was respectively made or given dishonestly with intention to evade payment of tax or possibly even negligently and then, and only then, mete out the punishment which under subsection 2**…"*

Following the High Court and Supreme Court's decision in *Kim Thye*, the authors are of the view that there is no basis for the IRB to argue that good faith is not a relevant factor in exercising its discretion to impose penalty under s 113(2).

Circumstances Giving Rise to Good Faith

It must be appreciated that the burden of proof is on the taxpayers to establish they have acted in good faith[13].
In *SETM*, the Special Commissioners in ruling that the taxpayer was entitled to claim reinvestment allowance on the capital expenditure incurred to construct toilets, warehouse, office rooms, meetings rooms, staircase, lift lobby and *surau*, held that "*…the facts of this case shows [that] the Appellant has acted in good faith, made full disclosure and obtained professional advice; and therefore we order the penalty imposed be waived accordingly*".
Among others, the taxpayer in *SETM* established that:

(a) It had made full disclosure in the forms that it submitted to the IRB;

(b) The IRB agreed that information disclosed in the forms were correct and the audit team did not discover anything contrary to the information disclosed in the forms;

(c) It had kept all the relevant documents and invoices in order and was able to produce them to the IRB as and when the requested;

(d) It had consulted its tax agent for professional advice in preparing and submitting the forms; and

(e) No guidelines or public rulings were issued by the IRB at the time when the forms were prepared and submitted.

Further, the taxpayer in *SETM* also contended that the issues in the appeal were technical matters as it revolved around the meaning of "factory" and "manufacturing", which were not defined for the purposes of reinvestment allowance. The taxpayer referred to the minutes of the dialogue sessions held between the IRB and professional bodies during which the IRB had announced that penalty will not be imposed in instances of technical adjustment as such does not involve an intention to evade tax by the taxpayer.

In light of the above circumstances, the Special Commissioners in *SETM* set aside the penalty imposed by the IRB. In challenging the IRB's decision to impose penalty under s 113(2), the authors are of the view that taxpayers must be able to establish some of the circumstances raised by the taxpayer in *SETM*.

Conclusion

In instances where taxpayers have acted in good faith, ie whereby the taxpayers demonstrate that they had no intention to evade tax and had exercised reasonable care by obtaining professional advice, the authors opine that the IRB should not impose penalty under s 113(2) in the event an adjustment is made to the assessments made by the taxpayers. TG

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13 See para 13 of Sch 5 of the ITA.

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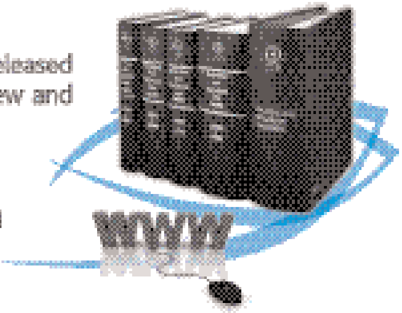

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Product Code: WMRL/MRL **ISBN:** 978-981-4180-54-2/978-981-4180-44-3 **Authors:** CCH Tax Editors

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Product Code: WHOMTC/HOMTC **ISBN:** 978-981-4197-30-4/978-981-04-1143-5 **Authors:** Teoh Boon Kee (2007 – present); Poon Yew Hoe (1999-2005)

The Guide is a useful reference which takes the user on a step-by-step basis through the nitty gritty procedures of completing the annual income tax forms. The authoritative referencing ensures that all income taxpayers are fully equipped with the proper knowledge and procedure in dealing with administrative and compliance matters under the Income Tax Act.

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Employment of Roving Expatriates

By Tony Chan

This article is about the employment of offshore construction crews working in waters of Malaysia and its taxing affairs. A lot of the current procedures are geared towards those expatriates who may exercise employment in Malaysia for a longer period.

What if these expatriates work for a few companies in a year and work for a very short stint in each of the companies?

My journey begins here…….

Whenever an offshore construction company in Malaysia receives an award of project or time charter of vessel in Malaysia, it inadvertently sets in motion the hiring process to fill the vacancies that had been created on the vessel especially the above deck crews.

Generally, a crew works on a vessel for a period of 60 days (plus 30 days off), which is their usual routine and earns a lucrative salary, probably due to the risk undertaken. Although their benefits are almost next to nothing, long working hours and risking their life to say the least, such benefits (including insurance, door to door salary etc) are generally incorporated into the base salary. Their base salary are generally quoted in terms of US$/day or US$/hour.

With all things being constant, the Malaysian personnel income tax of such category of employees will tend to be high.

In order to be competitive and attract the best talents in certain specialised fields such as diving or welding to work for them, some companies may adopt the strategy to pay the Malaysian personnel income taxes of their crews on their behalf, all the crews or part of the crews, for the duration of the project.

Such benefit is generally accorded to non Malaysians and not to the Malaysians. Partially, it is due to the fact that such crews may be subject to tax on a worldwide basis. Although I am aware that there are still companies which accord it to their Malaysian crews, the number had dwindled.

Taxes and Employment income

Section 4 of the Malaysian Income Tax Act (MITA) stipulates the types of income that is subject to tax under the MITA and one of them is the gains or profits from an employment (s 4 (b) of the MITA).

There is no doubt that such income is subject to tax under the MITA. However, as Malaysia practices the territorial system, is this income sourced in Malaysia? We need to check s 13 of the MITA to find out if this income is sourced in Malaysia so that the income can be taxed in Malaysia under the MITA.

Under s 13 (2) (a) of the MITA deems that an employment income is derived from Malaysia and is subjected to Malaysian tax if the place of employment is in Malaysia.

Section 13 (2) (e) of the MITA stipulates that if an individual derived income from employment onboard a ship which is operated by a Malaysian tax resident, such income will be deemed to be derived from Malaysia.

Reading from the wordings of the Act and applying to our case, indeed the employment income of such expatriate is deemed to be derived from Malaysia and subject to tax in Malaysia.

Responsibility as an employer

Whether the tax is borne by the Company or otherwise, the responsibility as an employer does not change.

As an employer, it is important to inform the Malaysian Inland Revenue Board (IRB) of the arrival of the new expatriates in the country by filing Form CP22 within one month before arrival. This is required under s 83(2) of the MITA. You may wish to note that the expatriates do not arrive at the same time and hence there may be some Form CP22 to be filed with the IRB.

Further, s 107 of the MITA provides that an employer is required by law to deduct from the monthly remuneration of its employees a certain amount on the account of tax of the employee before paying the employee balance of their salaries (net of tax).

To ease the burden of calculation, the IRB had issued a schedule of deduction to every employer in accordance with the Rule 3, Income Tax (Deduction from Remuneration) Rules, 1994; the latest is the 2009 revision. This schedule serves as a guide to the employer on the amount of personnel income tax to be deducted from the employee's salary. Such amount so deducted will have to be paid over to the authorities before the due date.

Failure to do so will entail penalties and court action, if applicable.

What if the liability to pay falls on the employer? As an employer, there is a need to look for ways to reduce the tax burden.

Availability of exemption in Malaysia

Generally, there are two sources of exemptions for such short stint employees.

Malaysia had concluded 64 Double Taxation Agreements (DTA) with countries around the world. The agreements may provide some exemptions for employment income from being taxed in Malaysia. Generally, the exemption from Malaysian personnel income tax on the expatriates is available provided that the expatriate does not work beyond six months in a calendar year in Malaysia, Art 15 – Dependent Services. Please note that the conditions may vary from DTA to DTA.

Understandingly, the IRB does not wish to lose any revenue on this method. As such, the IRB is very vigilant before granting exemption using this method by requesting the employer to provide documentation to the IRB to prove amongst others the tax resident status of the expatriate, proof of tax payment in the home country etc. It is difficult to obtain such documentation from the expatriates as they may not even qualify to be a tax resident in certain countries. Some of the expatriates just want to work and get their monies lest be bothered about their tax affairs.

However, Sch 6 para 21 and 22 of the MITA does provide what is commonly termed as a 60 day exemption rule. Such exemption is available to non resident employee who does not work in Malaysia cumulatively 60 days in one tax year.

As the onus of proof is on the Company, the Company will need to maintain a complete record of passport stamps of the expatriate showing that he/she was indeed in the country for a period or periods of less than 60 days in a tax year.

Despite the above……

Despite the availability of the DTA exemption and the 60 day exemption rule, the domestic rules as stipulated above generally will prevail. Firstly, the Company may not have the entire tax history of the expatriates hired for it to be comfortable that either of the exemptions does apply. Even if they are available, the IRB may not be able to review the case fast enough so that the exemption can be accorded to the expatriate. We may end up in a situation whereby the individual will be ready to go home but his application had yet to be reviewed.

Should the Company choose the "wrong" path leading to late payments of taxes to the IRB, penalties and possibly court actions will be taken against the Company. As such, it will be better for the Company to comply with the domestic rule but make sure that the documentation on the passport stamps of the expatriates (certified true copy) are available to support the 60 days exemptions.

Proper stamping of the passport of the roving expatriates showing that the expatriates came into the country and left the country is very important.

Based on my experience, it is usually easy for them to obtain the stamp showing entrance into the country as their passports are held by the agents but not when he/she leaves the country. This is because the immigration in the exit checkpoint is generally beyond the limits for persons who do not have any business to be in the country. As such, good working relationship with expatriates and the logistic manager are generally required to obtain both stamps.

Again at this juncture, there is also a need to inform the IRB of the departure of the expatriate from Malaysia. The Form CP21 will need to be filed one month before the departure of the expatriates. It is not possible to know if the expatriates are going to leave Malaysia or not as this is generally dependent on the project circumstance. However, the IRB will insist that the Form must be submitted on time or else penalties will be imposed.

It should be noted that the process does not end here. There is a need to file the annual employer returns, Form E to the IRB and to provide the Form EA to the expatriates and employees within the stipulated time frame. Once done, the expatriates will need to file their tax returns and then seek for tax clearance for the year. This may again takes up to two years to clear.

Employment contract
Another pertinent is the contract of the employee.

a. The letterhead of the Company hiring the employee;

   If your Company is a multi-national company, it is possible that your human resources managing the employment contracts are done outside Malaysia. They may not know the implication of the letterhead.

   If the expatriate is employed under a Company outside Malaysia, there may be a risk that the foreign employer may have a deemed permanent establishment in Malaysia.

b. Date of commencement and date of cessation; and

   Generally, there will be a start date to everything. However, the date of cessation of work is not there and hence this may pose as a problem since these expatriates are generally in Malaysia for a short period of time.

c. Who is to bear the personnel income tax and the extent of the definition of the word "tax"?

   This is an interesting question as I generally find that the definition of tax in such employment contract either loosely written or not even there at all. This may cause problems later if the IRB finds out that this particular expatriate earns more than just employment income from the Company.

It is also crucial to obtain from the expatriates their tax reference number (if any) and any other previous employer in Malaysia.

Non tax matters – Entry visa, Employee Provident Fund (EPF) and Social Security System (SSS)

It may not sound very important from a tax perspective but the fact is that the types of visa may have some bearing on the taxability of the employees.

As such, it will be good to speak to the person in charge of the immigration matters of your Company to ensure that the type of visa is in sync with the taxation of the employees.

Further, there may also be implications from the EPF and SSS point of view on hiring such expatriates.

Internal resources needed
Coordination with the vessel administrator and the human resource department for the movement of the expatriates is very essential. The human resource department will generally provide you with the information required on the new expatriate that will be hired for the project. The vessel administrator will provide information on when the expatriate will be demobilised from the vessel. Poor coordination will mean that the IRB will not be notified on a timely basis.
This is where the hard part is……

If the expatriate leaves the country immediately after the notification had been given the IRB, I believe that there will not be an issue. The filing of the notification to the IRB together with supporting documentation and subsequently paying the differences or obtaining the refund on the excess of tax paid on behalf of the expatriate.

However, it is common for the expatriate to come and go as and when the project requires them. Some of them may return within the same year to work on a second or possibility a third 60/30 days cycle.

This makes it hard for the determination of the 60 days exemption. Question also arises if we need to notify the IRB of the cessation of the employment of the expatriate.

Some companies take the stance to submit the yearly income tax returns of the expatriates so that they can determine the taxability of the expatriates on a yearly basis. Once the whole year is over and the Form EA had been issued to the expatriate, the tax returns will need to be prepared and submitted to the IRB before the due date. Others choose to submit on each and every exit of the expatriate.

In doing so, the Company is exposing itself to questions by the IRB which may or may not be relevant to the submission. As you may be aware, the yearly tax returns will have to incorporate the whole year's income and from all sources of income in Malaysia. If the information provided by the expatriate is not correct, the Company will run into problems with the IRB on things they are not sure about.

Some companies may choose to get letter of indemnity from the expatriate itself to absolve the company of liability relating to their non declaration of other sources of income in Malaysia if the IRB found out about their mischief.

Even though, as an employer, we opt not to avail ourselves to the exemptions, the IRB is still insisting that the expatriate will need to file their tax returns. The danger of this is that the Company may not be able to hire them in future should they be found guilty of not submitting their tax returns in the future. Future entry into the country will be jeopardised. Even though the Company wishes to comply with the rules, where are we going to find the expatriates?

Comparison

Our neighbour, Indonesia imposes personnel income tax on the foreign expatriates the moment they work in the country. It is governed under Art 26 of the Indonesian tax law. Under this Article, the expatriate will be subject to tax at the rate of 20% on their income received in Indonesia from the Company. Further, if the expatriate does not have any tax ID, the tax withholding will then be increased by 20% on the tax amount.

Similarly, in Vietnam, such individuals will be subject to tax at the rate of 25%. As an employer, we will need to bear the taxes at 25% and pay to the tax authorities.

Please note that both countries do not have a window exemption period like Malaysia. However, once the taxes had been paid, there is no further painstaking compliance work like those highlighted above.

Conclusion

As an employer, the cost of following through the whole process is very high. Hiring of tax consultants will obviously be the way to remind ourselves of these obligations and for them to assist in getting the monies back from the authorities if the amount had been overpaid. However, the tax fees will not be tax deductible.

Further, from a tax audit angle, we may be hit with the issues of deductibility of expenses and compliance with the tax laws.

A few suggestions:-

a. Upon entry of the country, at the checkpoint or even upon application of work visa, the information inputted by the immigration will be fed through to the IRB. With this, I believe the need for the Company to inform the IRB of the incoming expatriate in the country will then be reduced.

   I had seen it work wonders in countries like Singapore.

b. Simplify the process by working with the industry on the appropriate tax withholding on such salary paid to the roving expatriates. I believe this will work as the industry will want lesser paperwork and exposure of the tax audits by the IRB.

In this industry, fluidity is the key and the number is the game. Currently, too much compliance work is done to bring the income to the hands of the Government. We surely hope that the simplification to just tax withholding will be coming soon.

> *"Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings to the treasury of the state."*
>
> *Adam Smith (The Wealth of Nations, 1776)* TG

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The Spectre of GST

By Raja Kumaran

Introduction

The recent announcements[1] by the Government on Goods and Services Tax (GST) have generated much buzz and debate surrounding the implications of this new indirect tax[2]. This is indeed good for a maturing and developing country like ours, which, if all goes as planned, will finally join most of the rest of the world in implementing a value added model of consumption tax.

Each country's implementation of GST or Value Added Tax (VAT), as it is commonly known also, has its fair share of peculiar issues and concerns due to local circumstances. In the Malaysian context, these circumstances would include the existing consumption taxes of sales tax and service tax, which are proposed to be abolished and replaced with GST.

This article examines the basic mechanics of GST in contrast with the existing framework of sales tax and service tax with the focus on businesses preparing for the tax.

Sales Tax and Service Tax

The current sales tax and service tax are governed under the Sales Tax Act 1972 and Service Tax Act 1975 respectively. Sales tax was introduced in Malaysia on 29 February 1972, whilst service tax was introduced on 1 March 1975. Both sales tax and service tax are single–stage taxes imposed on the domestic consumption of certain goods and services.

Sales tax is charged on certain locally manufactured goods, and on similar goods imported. All goods manufactured in Malaysia (except in Labuan, Langkawi and Tioman) or imported are taxable unless they are specifically exempted by order of the Minister of Finance (the order will specify the customs tariff code and description of the goods exempted from sales tax). In general, sales tax is an ad valorem tax with rates of 10% or 5%, with the exception of certain classes of petroleum and petroleum products where sales tax is imposed at specific rates.

Service tax on the other hand, is levied and charged on any taxable service provided by any taxable person, as prescribed under the service tax law. Taxable persons include certain hotel operators, providers of certain professional services, management service-providers, telecommunication companies, private agencies and restaurants having sales of more than RM3 million per annum; the corresponding taxable services include the provision of rooms for lodging/sleeping accommodation, certain professional services, management services, certain telecommunication services, security services, the sale or provision of food, drinks and tobacco products. The rate of service tax is generally 5% ad valorem.

1 Based on latest developments, the Government has made known that it:
(i) is in the final stages of a social impact study on GST to ensure that, if GST is implemented to stabilise Government finance, it will not burden the Rakyat;
(ii) may impose the GST at a rate of 4%, which is lower than the current service tax of 5% and sales tax of 10%/5%; and
(iii) will table the GST Bill in the Dewan Rakyat by 17 December 2009, with the 2nd reading of the Bill slated for March 2010 and implementation of the tax 18 months after the 2nd reading ie around September or October 2011.

2 The term "indirect tax" as used in reference to GST and sales tax and service tax, denotes that the tax burden is borne by someone other than the persons registered or licensed to charge or collect these taxes.

How GST differs from the existing sales tax and service tax

In its essence, GST is a broad-based tax on consumption of goods and services. There are notable differences and similarities in the tax structure of GST and the existing sales tax and service tax, as follows:

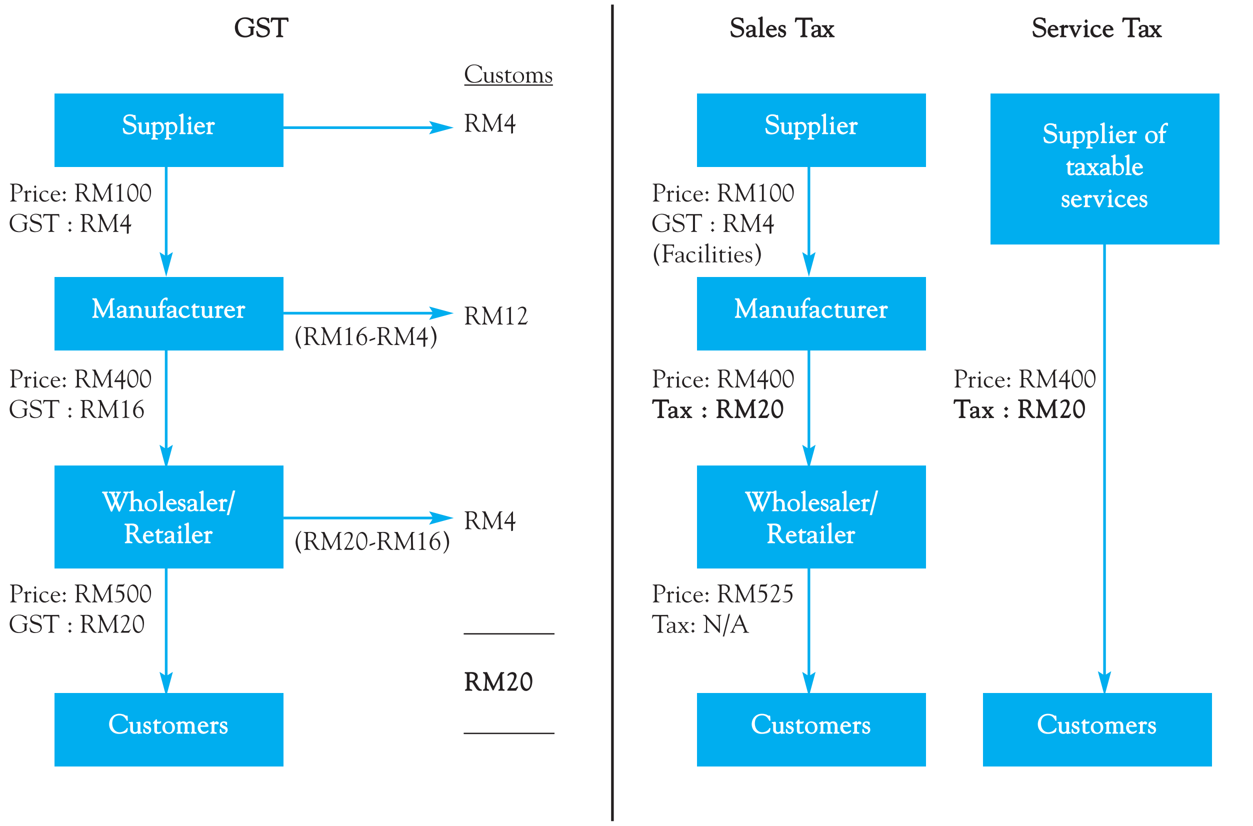
i. **Tax base and stages of imposition**
Unlike the existing sales tax and service tax, GST is generally charged on the consumption of ALL goods and services, with limited exemptions, at every stage of the supply chain, with the tax burden ultimately borne by the final consumer. The broad-based and 'multi-stage' features of GST clearly distinguish the tax from the present narrow-based, single-stage sales tax and service tax, which are levied on a relatively limited scope of goods and services[3], and at only one stage of the supply chain.

ii. **Input tax credit mechanism**
Assuming that all parties involved in the supply chain are registered for GST (ie making taxable supplies more than the registration threshold), each supplier levies GST on the price charged to customers (output tax), which is equal to the value of taxable supplies multiplied by the prevailing GST rate. To ensure that there is no tax cascading effect, there is an input tax credit mechanism in GST, whereby each GST-registered person in the supply chain is allowed to claim a full credit of the GST that has been paid on the inputs supplied to his business (input tax). As a result, each GST registered person would only remit to the Customs authorities the GST imposed on his share of the added value in connection with the supply of the goods and services. Since the final consumer gets no credit of the GST paid, he bears the ultimate burden of the tax.

The cornerstone of GST is the input tax credit mechanism, which is absent from the sales tax and service tax systems.

It should be noted, however, that under the existing sales tax regime, a licensed manufacturer would enjoy an upfront sales tax-free facility for the purchase of taxable raw materials and components (including packaging materials) free of sales tax, for use directly in the manufacture of taxable finished goods. At the end of a taxable period, the licensed manufacturer will remit to the Customs authorities the sales tax charged and collected from his customers. In that sense, the licensed manufacturer would have charged his customers an 'output tax' but does not incur an 'input tax' cost on these materials. But this scenario does not preclude sales tax and service tax from creeping into the cost base of the licensed manufacturer, as he would have other business inputs that could have been subjected to sales tax (eg his office furniture) or service tax (eg professional fees).

A simple illustration of the differences between GST and the existing sales tax and service tax, in terms of the stages of imposition and input tax credit mechanism, is set out below:



3 Sales tax operates on the same 'negative' concept as GST ie all goods are subject to sales tax unless exempt, save that sales tax is on a narrower range of goods since there is a fairly broad class of goods that are exempt, unlike in GST. Service tax, however, operates on a 'positive' concept whereby only services that are specifically ('positively') identified are taxable.

Assumptions:
Rate of GST: 4%
Rate of sales tax/service tax: 5%
Profit margin of wholesaler/retailer: 25%

The illustration highlights that, under a GST regime, the input tax credit mechanism operates to avoid inefficiencies in the distribution of the tax, unlike in a sales tax system, where the wholesaler/retailer would make a profit on the sales tax (and service tax) embedded in his cost of goods purchased from the licensed manufacturer.

iii. Accounting for tax

The rules for accounting for the tax involve the determination of what supplies are made in a GST accounting or taxable period and the computation of the net tax (output less input) for the taxable period.

Time of supply is an important feature under the GST regime as it determines when one should account for GST in the GST returns. There are complex rules to determine when the time of supply occurs but, broadly speaking, it is often reduced to the earlier of two events ie the issuance of a tax invoice or the time when payment is received by the supplier.

The net tax payable (or refundable) is worked out by deducting GST credits on business purchases (input tax) from GST levied on supplies made (output tax), in the GST return.

On the other hand, sales tax becomes due and payable generally when a “sale” is made, which, in practice, is taken as the date of issuance of the sales invoice. Service tax is only due when payment is received for taxable services, and where payment is not received, the tax is accounted for at the end of the 12-month period from the date of invoice issued.

In terms of computing the taxes, the simplistic sales tax and service tax systems require only focus on the output side of the equation, due to the absence of the input tax credit mechanism. This serves to highlight the more sophisticated and complicated compliance feature of GST vis–à–vis sales tax and service tax, which existing licensees should be clearly educated on, so that there is no cascading of the

GST. The relative complexity of GST compliance is compounded where a business makes both taxable supplies (which are eligible for input tax credit) and exempt supplies (which are not eligible for input tax credit) and such a business would need to have systems and procedures in place to quantify the correct input tax claimable.

iv. Imported services

Presently, imported taxable services (eg consultancy services from overseas service-providers to Malaysian companies) are not subject to service tax, as there is no provision in the service tax law to tax imported taxable services. In a GST regime, imported services will be subjected to GST under what is commonly referred to as the “reverse charge” mechanism. This mechanism operates to treat a supply received from overseas as if it had been made by the business–recipient of the service to himself rather than by the overseas service-provider. The business–recipient of the supply is obliged to account for the output GST on the imported services and report the amount in the GST return submitted to the Customs authorities.

Provided that the imported services are used by the business–recipient in the provision of a taxable supply, he would also claim an equivalent amount as input tax credit.

Therefore, there is a net zero effect if the imported services are used to make taxable supplies. But, the GST on imported services would be effectively paid if these services are used by the business–recipient to make exempt supplies, since no input tax credit can be claimed for making exempt supplies.

v. **Group registration**
Under most GST regimes, group registration is an option available to companies to file a consolidated GST return for themselves and other related companies who are registered as a group for GST purposes. The objective is to reduce their GST filing administration costs since only one GST return is required for the GST group instead of individual returns for each company. The ancillary benefit of GST group registration is that supplies within the GST group would be disregarded and hence not subject to GST. This facility can result in better cash flow management for the group if goods and services are regularly supplied between group companies.

The existing sales tax and service tax structures do not allow consolidated tax filings. In service tax, 'group relief' is available for certain taxable professional services, so that no service tax is chargeable when such services are provided to companies within the same group and subject to certain conditions.

Conclusion

The implementation of GST in Malaysia would involve a transformation on two fronts for businesses preparing for the tax, ie:

(i) For existing sales tax and service tax licensees, who would have to make that paradigm shift to the more sophisticated and complex GST compliance regime.

(ii) For businesses without any existing sales tax or service tax compliance, who would need to be educated nonetheless (or even more so), since they would be starting from zero base in terms of indirect tax compliance.

Overall, businesses can expect a one–time increase in their administrative cost because they will need to improve their accounting processes and systems, update invoices, train/hire extra staff to ensure compliance with GST, upgrade computers and cash registers. Under the sales tax/service tax regime, businesses accounts for 'output tax' only, but with the GST regime, they will have to look into ensuring that the correct input tax credits are recovered, so as to avoid the tax cascading effect.

Businesses which are currently enjoying sales tax–free facilities on raw materials and components (including packaging materials) will have to better manage their cash flow because GST would be payable upfront for such purchases. Companies may have to strategise and improve their overall production process efficiency from purchasing to manufacturing, logistics and warehousing such as implementing JIT (Just–In–Time) for better overall cash flow management.

There will no doubt be transitional issues arising from the shift from the present sales tax and service tax regimes to the GST regime, such as sales tax and service tax suffered on inputs and contractual arrangements signed prior to the implementation of GST.

In short, businesses will have to understand and implement the mechanics of GST well within their organisations, in order to ensure that GST works for them! TG

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TECHNICAL UPDATES

The Technical Updates published here are summarised from the selected Government Gazettes published between 15 September and 12 November 2009.

INCOME TAX

- **Income Tax (Exemption) (No. 4) Order 2009 [P.U. (A) 389/2009]**

Exemption
Income Tax (Exemption) (No.4) Order 2009 exempts from tax any gains or profit falling under
para 4(f) of the Income Tax Act 1967 (the Act) received by a non-resident from an offshore company. For the purposes of this paragraph, "offshore company" has the same meaning assigned to it in the Labuan Offshore Business Activity Tax Act 1990 [Act 445].

Non-application
The provisions of s 109F of the Act shall not apply to the income exempted under this Order.

The Order is deemed to have come into operation from 1 January 2009.

- **Income Tax (Deduction on Expenditure for Establishment of an Islamic Stock Broking Business) (Amendment) Rules 2009 [P.U. (A) 401/2009]**

Subrule 4(1) condition to qualify for the Income Tax (Deduction on Expenditure for Establishment of an Islamic Stock Broking Business) Rules 2007 [P.U. (A) 65/2007] where an application for approval for the Islamic stock broking business shall be made to the Bursa Malaysia from 2 September 2006 until 31 December 2009. The Rules are amended by substituting the words "31 December 2009" to "31 December 2015".

The Rules are deemed to come into operation on 1 January 2010.

PROMOTIONS OF INVESTMENTS

- Promotion of Investments (Promoted Activities and Promoted Products) (Amendment) Order 2009 — the Promotion of Investments (Promoted Activities and Promoted Products) Order 1995 is amended in the First Schedule.

REAL PROPERTY GAINS TAX

- Real Property Gains Tax (Exemption) Order 2009 exempts any person from Schedule 5 for disposal on or after 1 January 2010, subject to conditions.

STAMP DUTY

- **Stamp Duty (Remission) Order 2009 [P.U. (A) 391/2009]**

Remission
The amount of duty which is chargeable under subsubitem 22(1)(b) of the First Schedule of the Act that is in excess of fifty (50) ringgit is remitted relating to any instrument of service agreement executed between 15 September 2009 until 31 December 2010.

The Order is deemed to have come into operation on 15 September 2009.

CUSTOMS AND EXCISE

- **Sales Tax (Amendment) Regulations 2009 [P.U. (A) 361/2009]**

The Sales Tax Regulations 1972 is amended in the Second Schedule.
(a) in relation to the state of Perak by deleting for the words "Cameron Highlands" appearing in the column "Districts Served" under the heading D. PERAK relating to the item Teluk Intan; and
(b) in relation to the state of Pahang by substituting for the particulars relating to the item "Bentong" appearing under the heading J. PAHANG.

The Regulations come into operation on 8 October 2009.

- **Sales Tax (Exemption) (Amendment) (No. 3) Order 2009 Sales Tax Act 1972 [P.U. (A) 387/2009]**

The Sales Tax (Exemption) Order 2008 [P.U. (A) 91/2008] is amended in Schedule B.

The Order comes into operation on 5 November 2009.

- **Service Tax (Amendment) Regulations 2009 [P.U. (A) 363/2009]**

The Service Tax Regulations 1975 [P.U. (A) 52/1975] are amended in the Third Schedule.
(a) in relation to the state Perak by deleting for the words "Cameron Highlands" appearing in the column "District Served" under the heading D. Perak relating to the item Teluk Intan; and
(b) in relation to the state of Pahang by substituting for the particulars relating to the item "Bentong" appearing under the heading J. Pahang.

The Regulations come into operation on 8 October 2009.

Case Commentaries

By Francis LK Tan and Janice Kon

1. In KT & Co. v Ketua Pengarah Hasil Dalam Negeri (1991) MSTC 2594 the Special Commissioners of Income Tax (SCIT) determined that good faith as a defense is not applicable under s 113(2) of the Income Tax Act 1967 on the ground that there is nothing in s 113(2), unlike s 113(1) which says that good faith is a defense. This determination is however not followed in subsequent determinations by the SCIT. For example, in OPD Sdn Bhd v KPHDN (2009) MSTC 3846 the SCIT ruled that since the incorrect return or information was made in good faith the penalty imposed was to be waived. Similarly, in NVA Sdn Bhd v KPHDN (2009) MSTC 3897 the SCIT also determined that if a deduction of an expenditure is claimed in good faith any penalty imposed is wrong in law.

   Although good faith is not provided for in s 113(2), the section if interpreted literally could lead to taxpayers acting on professional advice which the Inland Revenue Board (IRB) does not accept as correctly being liable to penalty. It should be noted that s 113(2) talks about submitting incorrect return or giving false information. It is submitted that difference of opinion cannot be the basis of falsehood, particularly where a taxpayer acts on professional advice.

   The 2009 determinations are under appeal and it is hoped that the superior courts will provide some guiding principles in this area.

2. In KPHDN v Casio Computer Co. Ltd R 3(R1)14-07-06, the High Court allowed the appeal of the IRB. The SCIT held that a purposive approach must be adopted in the interpretation of a tax statute and by adopting such an approach, the disposal of shares by the taxpayer in a manufacturing company which "unintentionally" becomes a real property company cannot be said to have disposed of a chargeable asset. This is because para 34 A(1) of the Second Schedule to the Real Property Gains Tax Act 1976 was enacted for the purpose of bringing to tax individuals who make use of companies to avoid paying real property gains tax. The High Court however ruled that it was bound by the recent Court of Appeal decision in KPHDN v Binastra Holding Sdn Bhd Rayuan Sivil W-01-80-05, the facts of which are similar to those of the *Casio* case. There is no written judgment by the Court of Appeal (CA) and as such, the basis of the CA's decision is not known. However, at the High Court, the principle of adopting a purposive approach in the interpretation of statutes including tax statutes was referred to. If the rationale for the CA's decision was that a purposive approach was inapplicable, this would be in conflict with the Federal Court decision of Palm Oil Research and Development Board Malaysia and Another v Premium Vegetable Oil Sdn Bhd [2004] 2 CLJ 265.

3. In KPHDN v Aneka Jasaramai Express Sdn Bhd Rayuan Sivil No. W-01-47-03 the CA dismissed the appeal by the IRB. The decision of Raus Sharif J (as his lordship then was) in KPHDN v Aneka Jasaramai Express Sdn Bhd (2005) MSTC 4095 was therefore affirmed. The crux of the decision is that income derived from the sale of bus tickets in Singapore for journeys which emanate from the Singapore bus stretch into Malaysia is not income derived from Malaysia. TG

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International News

By Rachel Saw

The column only covers selected developments from countries identified by the Chartered Tax Institute of Malaysia (CTIM) and relates to the period 11 August 2009 to 10 November 2009.

People's Republic of China (PRC)

Related transactions under closer scrutiny
The State Administration of Taxation (SAT) issued a Notice on 6 July 2009 (Guo Shui Han [2009] No.363) to enhance the monitoring and scrutiny of related transactions. The Notice intends to prevent multinational enterprises (MNE) from shifting their offshore losses into China, especially in times of financial crisis.

The Notice provides that MNEs in China whose functions are restricted to mere manufacture (toll manufacturing or import processing), distribution, or research and development under an arrangement, must maintain a reasonable profit margin on the basis of the transfer pricing principle that the functions and risks must be commensurate with the profit.

In cases where an MNE (with restricted functions and risks, as described above) reports losses, the contemporary documentation and other related materials for the year of losses must be prepared and the documentation submitted to the competent tax authority before 20th June of the following tax year, regardless of whether the MNE has reached the threshold for the preparation of contemporary documentation.

Deduction of advertising and promotion expenses clarified
The Ministry of Finance (MOF) and the SAT jointly issued a notice on 31 July 2009 (Cai Shui [2009] No. 72) stating that the expenses on advertising and promotion for cosmetic, pharmacy and beverage (alcohol excluded) manufacturing industries are deductible up to 30% of the sale proceeds of the current year. Any excess may be carried forward to the following tax years. The tobacco industry is excluded.

The 30% deduction also applies to brand users in the beverage manufacturing industry which employ the franchise business model. However, these brand users may elect to allocate a portion (or all) of the advertising and promotion expenses to the brand holder or administrator, who can then deduct the allocated expenses as sale costs on an "actual basis".

Several individual income tax issues clarified
The SAT issued a notice on 17 August 2009 (Guo Shui Fa [2009] No.121) clarifying several individual income tax issues.

- *"Extra month salary"*

  Art 1 of the Guo Shui Han 2002 No. 629 provided that the extra monthly salary must be added to the normal employment income and taxed fully without the additional monthly personal allowance. This tax treatment of "double salaries" (extra month salary) ceases to apply.

- *Director's fees*

  Director's fee must be included in the employment income if an individual is employed by a company (including associated company) and holds the post of board member (BM) or supervisor. Where the individual holds the post of BM or supervisor without any employment relationship with the company, the director's fee received is taxed as labour service fee.

- *"Overseas Chinese"*

  An "overseas Chinese" is defined as a Chinese citizen who is settled overseas according to the Circular of the Administration of Overseas Chinese (Guo Qiao Fa [2009] No. 5), meaning a Chinese citizen who has acquired a foreign permanent resident permit and has resided overseas for more than two years and for at least 18 aggregated months within the last two years. Those who have not acquired a foreign permanent resident permit but who have legally resided abroad for more than five years (inclusive) may be considered an overseas Chinese for tax purposes. Students studying abroad, and persons seconded abroad for business and work, are excluded. Once an individual is recognised as an overseas Chinese, the additional deduction for foreign workers will apply to the employment income arising from the work performed in China.

- *Transfer of real property due to divorce*

  Transfer of the real property from one ex-spouse to another due to divorce is not subject to individual income tax. However, proceeds from *subsequent disposal* of the property are taxed at the applicable tax rates, unless the property was the family residence for more than five years and the individual income tax exemption can be applied.

Treaty benefits for non-residents – administrative rules
The SAT issued a notice on 24 August 2009 (Guo Shui Fa [2009] No. 124) setting out the administrative rules on treaty benefits granted to non-residents (NRs). NRs are referred to as those who are not classed as resident under the Chinese domestic tax laws and regulations or applicable tax treaties (both NR enterprises and NR individuals included). The Notice applies retroactively from 1 January 2009.

Treaty benefits referred to in the Notice are those provided by articles on dividends, interest, royalties and capital gains. A NR taxpayer or its withholding agent must notify the competent tax authority (before the tax liability arises or on the registration of the tax liability) as to the treaty treatment of the following tax issues: (i) permanent establishment and business profits;(ii) independent personal services; (iii) dependent personal services; and (iv) all other relevant articles except articles on dividends, interest, royalties and capital gains.

To apply for these benefits, the taxpayer is required to file and submit documents such as the application form, details of the NR applicant, resident certificate, ownership certificate, contracts and agreements, etc. If the documents are already in possession of the tax authority, the taxpayer needs to provide details of the submission to the tax authority. Taxpayers who have fulfilled the above are exempted from submitting documents as required by Art 13 of the SAT Order No. 19 which deals with construction projects and services performed by a NR.

Subsequent applications need only be made within three years of the first filing. A NR taxpayer may assign an agent to settle the tax issues covered by the Notice, and the agent must be given the power of attorney in writing.

Depending on the level (state, provincial, etc) of the competent tax authority, a decision on the application must be made within or up to 40 days (50 if extended) of the application. If a decision is not made within the prescribed time limit, it is assumed that the application is approved.

Taxpayers who are entitled to treaty benefits, but who have over-paid taxes, may reclaim the taxes within three years of the first tax settlement. However, no interest will be refunded. Taxpayers who have applied for a mutual agreement procedure are not subject to the 3-year time limit. The outcome of a mutual agreement procedure shall prevail over the Notice.

Tax treatment of stock appreciation rights and restricted stock clarified
The SAT issued a Ruling on 24 August 2009 (Guo Shui Han [2009] No. 461) clarifying the individual income tax treatment of stock appreciation rights, stock options and restricted stock. The Ruling is effective immediately.

Income derived from stock appreciation rights and restricted stocks granted by listed companies to their employees are to be classified as employment income and therefore subject to individual income tax. The listed companies or domestic institutions are required to withhold the applicable taxes.

The income derived from stock appreciation rights is calculated as follows:

(X – Y) x Z

Where: X = stock price at grant, Y = stock price at exercise and Z = number of stocks

Income derived from restricted stocks must be recognised at the time that the ownership of the underlying stocks is transferred to the recipient, as follows:

(A + B) ÷ [2 x (C – D) x (E ÷ F)]
where:
A = market price of the stocks of the date of stock registration with a security company
B = stock price of the releasing date of the same stocks when the terms and conditions are satisfied
C = number of released stocks
D = the amount paid by the employees for these stocks
E = number of released stocks
F = the total number of restricted stocks received

Where an individual receives stock options, stock appreciation rights or restricted stocks for the first time in a certain tax year, the listed company granting the stock plans should calculate the individual income tax in accordance with Art 4 Para 1 of the Notice [2005] No. 35 which provides that the income from the stock plan is allowed to be calculated separately from the monthly employment income. If an individual receives stock options, stock appreciation rights or restricted stocks more than once within a tax year (either from the same or different stock plans), the income from such plans must be aggregated and taxed in accordance with Articles 7 and 8 of the Notice [2006] No. 902.

The tax liability for stock appreciation rights arises at the time the listed companies pay out the rights whereas that for restricted stocks arises at the time that the terms and conditions are fulfilled and the stock are released.

Treaty treatment of royalties clarified

On 14 September 2009, the SAT issued Guo Shui Han (2009) No. 07 (the Circular) to clarify the tax treaty treatment of royalties. The Circular takes effect on 1 October 2009.

–	"Payment received for the use of industrial, commercial or scientific equipment" defined under the royalty article of the applicable tax treaty will be treated as royalties and tax treaty rate will be applicable if it is lower than domestic tax rate. Income derived from use of immovable properties is not governed under the royalty article of the applicable tax treaty.
–	"Information concerning industrial, commercial or scientific experience" refers to proprietary technologies. Service fees for providing guidance, etc for use of proprietary technologies under transfer or licensing of such technologies will be regarded as royalties if the provision of services do not give rise to a permanent establishment; otherwise, income from these services will be treated as business profits.
–	The following types of service fees will be treated as business profits rather than royalties, ie (i) pure after-sales services for goods, (ii) services provided by sellers to buyers during a warranty period, (iii) professional services render by an institution or individual, such as engineering, management or consultancy services, and (iv) other similar remuneration as designated by the SAT.

Instructions on determination of "beneficial owner" under tax treaties

The SAT issued a ruling on 27 October 2009 (Cai Shui Han [2009] No. 601) on how a "beneficial owner" is determined for the purposes of treaty articles on dividends, interest and royalties.

A "Beneficial owner" is referred to as a person who is in possession of and who has the power to dispose of the income or the right to income and assets. A beneficial owner is generally supposed to carry on substantial business and could be an individual, a company or any other organisation. An agent or a conduit company may not be regarded as a beneficial owner and are referred to as companies that are established with the aim of avoiding, reducing taxes, shifting or retaining profits.

In determining the "beneficial owner", the purposes of the tax treaty must serve as the starting point and the principal of "substance over form" must be followed by analysing the facts of the specific case. An approach using solely a technical and domestic tax law perspective is insufficient. The notice lists factors which may have an adverse effect on the application of "beneficial owner" such as an obligation for the applicant to pay or distribute the whole or a large proportion of its income to a resident of a third country within a prescribed time or if the applicant has little business operations beyond the assets and rights stemming from the income received.

Indirect tax incentives for Research and Development (R&D)

The MOF and SAT jointly issued a notice on 10 October 2009 (Cai Shui [2009] No.115), applicable from 1 July 2009 to 31 December 2010, stating that:

–	the import of scientific and technological equipment and materials by foreign-invested R&D centres is exempt from import duties; and
–	the investment in Chinese equipment purchased by R&D centres is eligible for the full VAT input tax credit.

Foreign-invested R&D centres established before and after 30 September 2009 are distinguished and are required to fulfil different conditions before they are exempt from import duties.

The R&D centres entitlement to the full VAT input tax credit falls under scientific, technology development institutions and centres as per Order 44 and Order 45 jointly issued by the MOF General Administration of Customs and SAT, and includes foreign-invested R&D centres, which are exempt from import duties as described above.

India

Central Board of Direct Taxes withdraws beneficial circular concerning taxation of NR companies in India
The Central Board of Direct Taxes (CBDT) has issued Circular No. 7 dated 22 October 2009, thereby withdrawing its Circular No. 23 dated 23 July 1969 and its two related circulars. The withdrawn Circular No. 23 laid out instances when income does not accrue or arise to NRs in India under s 9 of the Income Tax Act (ITA).

The ramification of the withdrawal of the Circular is that foreign companies/NR entities will have to independently evaluate the tax implications of such or similar transactions in light of the statutory provisions of the ITA and the relevant Court rulings on the subject. Basically, the taxability of a foreign company, which is based in a jurisdiction with which India does not have a tax treaty, will have to be examined independently of the Circular No. 23 and therefore, may lead to some amount of uncertainly as well as litigation with the Indian Tax Authorities. The provision of s 9 of the ITA is very wide in its ambit and application, and there is no precise definition of the term “business connection”.

Direct Taxes Code Bill, 2009 – key amendments
The Direct Taxes Code Bill, 2009 (DTC) released by the MOF on 12 August 2009 contains proposed amendments to the direct tax regime. If enacted, the DTC will come into force from 1 April 2011.

Corporate tax

–	corporate income tax will be reduced to 25%;
–	branches of foreign companies in India will be liable to an additional branch tax of 15% on the after-tax total income, which together with the reduced rate of tax for foreign companies of 25%, results in an effective tax rate of 36.25%;
–	Minimum Alternate Tax (MAT) will be levied at the rate of 0.25% on the gross assets of banking companies and 2% of other companies, instead of the current 15% on book profits;
–	new blocks of assets will be introduced for depreciation, and an allowance for depreciation will be provided even when all the assets in the block are demolished, destroyed or discarded;
–	the scope of “royalty” will be widened to include the consideration for the use of, right to use, transmission by satellite, cable, optical fibre, ship or aircraft or live coverage of any event;
–	the scope of “fees for technical services” (FTS) will be widened to include development and transfer of design, drawing, plan and software or similar services;
–	the allowance for head office expenditure of NRs will be restricted to 1.5% of the total sales, turnover or gross receipts;
–	the scope of income from the shipping business carried on by NR shipping companies will be widened to include income from the arrangements of slot charter, space charter or joint charter. Further, the income of the foreign shipping companies will be taxed at the normal rates as above;
–	the profit-linked tax incentives and incentives not covered in the DTC are to be grandfathered;
–	a mechanism for Advance Pricing Agreements (APAs) will be introduced;
–	definition of “associated enterprises” will be more stringent but thresholds will be lowered (e.g. to 10%);
–	the withholding tax rates on payments of royalties and FTS to a NR will be increased to 20%;
–	the withholding tax rates on payment of capital gains to a NR will be fixed at 30% for both long-term and short-term capital gains;
–	securities transaction tax will be abolished; and
–	the due date for filing the corporate tax return will be fixed to 31 August of the year following the financial year.

Personal income tax

– the revised personal income tax rates will be:

Annual taxable income (INR)			Marginal tax rate (%)
first 160,000			0
160,000	–	10,000,000	10
10,000,000	–	25,000,000	20
over 25,000,000			30

Further, the basic exemption limit in the case of resident women taxpayers is INR 190,000, while for resident taxpayers (both men and women) over the age of 65, the basic exemption limit is INR 240,000;

–	the aggregate deduction for long-term eligible savings, along with tuition fees, will be increased to INR 300,000;
–	the DTC proposes to change the definition of residence. The DTC recognises only two categories ie “Resident” and “NR”. The concept of “Not Ordinarily Resident” will be abolished; and
–	exemptions such as house rent allowance, leave travel concession, leave encashment, medical reimbursements, etc will be abolished.

Anti-abuse provisions

–	detailed anti-abuse provisions will be introduced under "General Anti-Avoidance Rules" (GAAR) in order to curb the increasing use of tax avoidance mechanisms and abuse of tax treaties. The GAAR will override treaty provisions;
–	tax residence certificates will be mandatory for claiming tax credit under the applicable tax treaty; and
–	tax due from NRs will be recoverable from any assets situated outside India or from any amount payable by any person to a NR.

Wealth tax

–	wealth tax will be taxable at 0.25% of net wealth with an increased basic exemption limit of INR 500 million; and
–	the concept of "wealth" will include all assets except for a few exceptions.

Indonesia

Deductibility of sales and promotional costs

The MOF issued regulation No. 104/PMK.03/2009 on 10 June 2009, on the deductibility of sales and promotional costs from gross income. The regulation applies retrospectively from 1 January 2009.

Pursuant to the regulation, sales and promotion expenses (which can take the form of money, goods, services or facilities) are generally deductible provided they are : (i) incurred for the purpose of maintaining and/or increasing sales; (ii) reasonable and in line with normal and proper business practice; and (iii) received by other parties.

The deduction for promotional expenses is limited in the case of cigarette and pharmaceutical industries. For both these industries, the promotional expenses may only be deducted if they are incurred by producers, principal distributors or sole importers but may only be deducted once. Where the promotion consists of the distribution of sample products, the costs that may deducted from gross income are equivalent to the value of the cigarettes/pharmaceutical products. Detailed records of promotional expenses paid to third parties are required to be maintained, failing which the costs may be disallowed.

Singapore

Temporary liberalisation of foreign-sourced income exemption (dividends) – additional details (extension to holdings of 50% or less in foreign subsidiaries)

On 7 August 2009, the Inland Revenue Authority of Singapore revised its circular on the temporary liberalisation for foreign-sourced income exemption in relation to dividend income.

Current treatment

A 1-year tax exemption is granted to all resident taxpayers on all foreign-source income accrued on or before 21 January 2009 and received in Singapore between 22 January 2009 and 21 January 2010 (both dates inclusive).

Revised treatment

In addition to the current treatment above, specified resident taxpayers who directly own 50% or less of the ordinary shares of NR companies as at 21 January 2009 may apply for tax exemption on dividends which they have yet to receive in Singapore. The exemption is provided pursuant to s 13(12) of the ITA, and an applicant must be able to substantiate that the foreign dividends to be received in Singapore during the 1-year exemption period are paid out of profits already accruing to the dividend-paying company on or before 21 January 2009.

Goods and Services Tax (Amendment) Act 2009

The Government passed the Goods and Services Tax (Amendment) Bill 2009 on 18 August 2009. Other than the Goods and Services Tax (GST) changes announced in Budget 2009 in January, the Act provides for the following:

–	trusts can be registered in the name of the trust, instead of the current treatment of registration in the name of its trustees. However, the trustee continues to be liable for the GST matters of the trust (e.g. GST reporting requirements, tax payment liabilities, etc) since trusts are not legal entities;
–	GST on electronic vouchers that are redeemed for goods and services will be accounted for at the point of redemption, as is the current treatment for physical vouchers; and
–	appellants applying for a review and revision of certain decisions made by the Comptroller of GST must state the precise grounds of objection in his application.

Income Tax (Amendment) Act 2009

The Government passed the Income Tax (Amendment) Bill 2009 on 14 September 2009. Further to the income tax changes announced in Budget 2009 in January, the Act provides for three other changes: (i) review of tax treatment of certain management fees; (ii) application of the arm's-length principle; and (iii) tax framework for public private partnerships.

Property tax deferral to expire in 2011

On 14 September 2009, the Government announced that in order to stabilise the property market, the concession announced in Budget 2009 which allows for the deferral of property taxes due on land under development will expire on 21 January 2011.

Vietnam

Further guidance on PIT exemptions, deductions and filing

Circular 160 was issued by the MOF on 12 August 2009 to provide further guidance and clarification on the personal income tax (PIT) exemptions for 2009 announced earlier.

Employment income

Circular 160 clarifies that tax residents are fully exempt on the following employment income:

Income	Paid (date)
for year 2008	between January 2009 and June 2009
for January to June 2009	by 31 December 2009
bonus for quarter I/2009 and II/2009*	by 31 December 2009
ad hoc income (ie leave passage, vacation leave and other benefits)	between January 2009 and June 2009

* Bonus for 2009 (the whole year) qualifies for a 50% exemption if it is paid by 31 March 2010.

Irregular income

Income from capital investment, capital transfers (including securities transfers), royalties and franchising, is exempt if it is derived in 2009 and paid by 30 June 2010. Income derived in 2009 but paid out thereafter, will be taxed as usual.

PIT finalisation and filing

Deductions

–	PIT finalization is not required for entities paying income from investment, capital transfers, royalties and franchising.
–	Employers only need to finalise PIT based on income arising from 1 July 2009. PIT exempt income does not need to be reported.
–	Resident individual taxpayers are only required to finalise their PIT if they either have a balance of tax payable (ie the tax due is greater than the PIT withheld) or a tax credit.

Circular 160 also provides guidance on tax deductions.

Hybrid method for paying foreign contractor tax

Circular No. 197/TT-BTC dated 9 October 2009, which is effective 45 days from the date of signing, allows foreign contractors to apply the so-called Hybrid Method to pay Foreign Contractor Tax (FCT) in Vietnam. The Hybrid Method allows for VAT to be paid under the deduction method and CIT to be paid under the deemed method.

Circular 197 supplements Circular 134/2008/TT-BTC dated 31 December 2008, which only permitted foreign contractors to adopt either (i) the deemed payment method for both VAT and CIT; or (ii) pay CIT at the standard rate and VAT under the deduction method (ie pay output VAT and claim credits on the local input VAT incurred). Only foreign contractors using the Hybrid Method for contracts signed prior to 1 January 2009 were allowed to continue its application. This represents significant savings for foreign contractors and investors, as they are now allowed to file VAT returns to claim back the input VAT incurred when using local sub-contractors and pay CIT at relatively low deemed rates.

Eligible foreign contractors and investors are required to register and inform, in writing, the local tax authorities within 20 days of the contract date. Additionally, foreign contractors applying the Hybrid Method are required to follow accounting requirements provided by the MOF. Further guidance is expected to be issued on this matter.

Malaysia – treaty developments

- **Treaty between Malaysia and Venezuela enters into force**
  Confirmation has been received that the income tax treaty and protocol between Malaysia and Venezuela, signed on 28 August 2008, entered into force on 8 January 2008. The treaty generally applies in Malaysia from 1 January 2009 for income/withholding taxes and 1 January 2010 for petroleum income tax. In Venezuela, it applies from 1 January 2009.

- **Free trade agreement between Malaysia and New Zealand signed**
  The Malaysia – New Zealand Free Trade Agreement (FTA) was signed in Kuala Lumpur on 26 October 2009.

- **Protocol to the treaty between United Kingdom and Malaysia signed**
  On 22 September 2009, the United Kingdom and Malaysia signed an amending protocol to the income tax treaty of 10 December 1996. TG

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Embracing True Leadership during "Troubled" Times - Finding your Leadership Balance

By Anand Kumar

It has been a long time since the world has faced economic conditions like what we are currently experiencing. Whether it's the nightly news or the newspapers, all you get are the dire conditions of the global downturn – firms downsizing, loss of jobs, repossession of houses, companies going bust and the dreaded R word, *Recession*! When we look at how some of the world's strongest economies — the United States, the United Kingdom, economic superpowers —Germany, France, Asian giants — Japan, China, South Korea, Hong Kong and Singapore, are reeling from the economic crisis, it's unprecedented.

But is this *really* the true picture? Have we been manipulated to think that conditions are much worse than they actually are? Media hype definitely hasn't helped. There's so much said and written about what has gone wrong with the various economies, yet rarely a mention of any positives. *Sensational news sells!* Have we ever paused for thought that one of the contributing factors to the economic turbulence is due to poor leadership? Surely there were signs of impending economic challenges? We also seem to have forgotten that the global economy goes through its cyclical trends of upward growth and downward spirals. That's the nature of economics and history has shown us these trends on many occasions. It's nothing new at all. So why are we putting blame on economic conditions and not looking at ourselves as a cause of this turbulence?

Just look at the financial sectors in countries like the UK and US. Short-term quick fixes and exorbitant reward payment packages have raised serious questions about leadership capabilities within these industries. Unfortunately, the impact of their mismanagement has led to a negative chain reaction across other sectors impacting global economies.

Is it therefore possible that we can see and embrace leadership opportunities during such "tough" times?

I believe we certainly can! Human beings have faced disasters of monumental proportions throughout history and yet lived through them and progressed to even greater heights. We have various examples of true leadership in the most difficult of circumstances - post war reconstruction of Japan and Germany after World War II; the determination of the Americans and the British people after the atrocities of 9/11 and 7/7 respectively, Asian economies bouncing back even stronger after the financial crisis, just to name a few.

Industries that continue to boom during tough economic times

Not only are there some industries producing products or services that are always in need and demand, regardless of the economy, but also some that are actually enjoying strong growth during difficult times. Manufacturers of daily essentials, cleaning services, printing companies, staffing agencies, financial service providers, computer repair and IT professionals all fall into this category. Retail chain TESCO has proven that growth is achievable even in these tough times, raking in an annual profit of £3 billion. With business downsizing, service providers actually enjoy a boom as business owners are likely to outsource the services once performed by full-time employees. Therefore, regardless of the state of the economy, businesses and individuals can find opportunities during even the most difficult times and succeed.

So what differentiates the men from the boys during these "difficult" economic times?

A. **Successful leaders find their defining moments during troubled times**
During times of progression and growth, when economic conditions are positive and manageable, leadership is rarely tested. True leadership comes during difficult moments. Recognising this is critical as it allows leaders to re-evaluate their business, i.e. its values, business architecture and what it stands for. It involves delving into the organisation's business culture and structure to truly understand what it is all about, where it is heading and what can be done to move ahead. Leaders should see this as an opportunity to redefine their organisation and reflect on its current status. It is not about making hasty decisions such as laying off staff and cutting costs unnecessarily. It is about consolidating what made it successful so far and contemplating how it can further be developed.

B. **Successful leaders understand human nature**
"A leader is a person who has the ability to get people to do what they don't want to do and like it."

C. **Successful leaders keep lines of communication open**
Communication is the key to making a difficult process more effective. In a crisis, managers are often inclined to stop communicating with their employees. In an effort to avoid any panic, some leaders believe that saying nothing is the best approach. However, acknowledging the difficult circumstances is important to maintain trust. It also shows that management is aware of the problems and working on ways to address them. Communication from the leader thus needs to be positive, proactive and motivating, and it needs to be authentic.

D. **Successful leaders listen to other people's views**
Be ready to hear different views, listen to what your employees are saying, and surround yourself with a team of strong challenging thinkers, willing to be your sanity check and offering views that may go against your usual thinking. Having "yes men" around you can often be a recipe for disaster, and creates mistrust between management and staff. Leadership is about listening to all views, including opposing views, and then having the courage to make decisions that are right for the business.

A good example of a strong leader in the current troubled times is President Obama of the US. His ability to infuse confidence, credibility and authenticity in his leadership style has been largely credited to his team of

strong and highly experienced staff who are capable of challenging him to make tough and informed decisions.

E. **Successful leaders make time for personal development**
When faced with tighter budgets, companies often try to squeeze as much work as possible out of their employees. However, encouraging round-the-clock availability and excessive overtime leads to frustration, burnout and ultimately, poor performance for managers and employees alike. Employees should be allowed to take leave when necessary to rejuvenate tired bodies and emotions.

If a business can sense and respond to a new opportunity with ingenuity and speed, it is more likely to survive and grow. To do so, the company must create a learning culture. Very often, companies try to cut costs in the one area that can help them progress in difficult times — people development. Visionary leaders are those who see development of their human resources as the key to coming out of the difficult situation their company may be facing. By doing so, they get loyalty, motivation and desire to progress.

F. **Successful leaders know how to have fun and deal with leadership stress**
Leaders are human, too. They need an outlet to vent and express their feelings. They need to have their own support groups to whom they can air their concerns — family, friends or peers. For a leader to be strong during these times, he/she needs to be emotionally and physically fit. Make time to be healthy – exercise, play sports, eat well, meditate and breathe fresh air. Leaders need to be at their best during these times, so as not to make stress driven decisions.

Conclusion

By adopting a more positive outlook, not only for yourself but also for your team and employees, you gain credibility, trust and loyalty from the company's staff, as well as the strength to steer the organisation through difficult moments.

Your choice is to make the experience either daunting or one of opportunity for all. TG

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Hong Kong Master Tax Guide 2009/10 (18th Edition)

Reviewed by: Deloitte Touche Tohmatsu ISBN: 978-988-17946-8-7 Product Code: 1838H (English)

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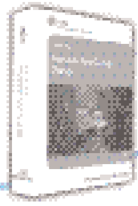

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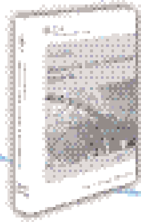

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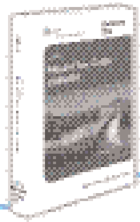

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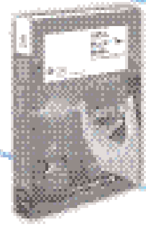

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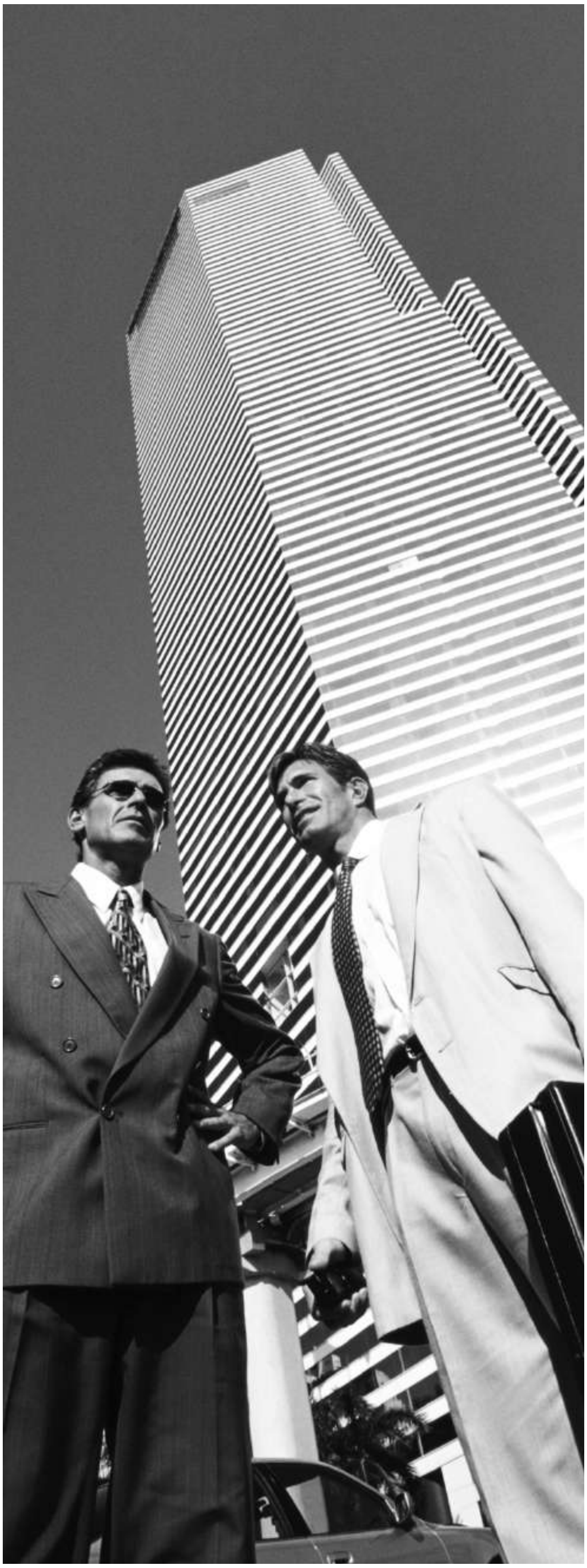
Business Deductions (Part III)

By Siva Subramaniam Nair



Having examined the word "incurred" in the last article, we shall now proceed to conclude our analysis of the facets of section 33(1) of the Income Tax Act 1967 (as amended) which is reproduced for easy reference, I quote:

> ***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.***

The last phrase that we would be investigating is "during that period by that person in the production of gross income".

During That Period

In accounting, we are familiar with the concept of matching whereby the expense incurred is claimed in the period in which the related income is generated. However, this principle is not present in tax literature. In taxation, we claim the expenditure in the period in which it is incurred provided it is linked to the production of income **but** the income does have to arise in the same period ie it could have been generated in an earlier basis period or will be subsequently produced in a later period. It is sufficient for the taxpayer to demonstrate that an outlay or expense was incurred for the purpose of producing gross income, whether in the period under review or in future. This is clearly illustrated in many cases.

In **Hughes v Bank of New Zealand 21 T.C.472 (H.L.),** the judge pointed out that "[E]xpenditure in the course of the trade which is not remunerative is none the less a proper deduction, if wholly and exclusively made for the purpose of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense."

Viscount Cave L.C. in **Ward & Co. Ltd. v Commissioner of Taxation 1923 A.C. 145,** states:

"Their Lordships put aside the circumstance that the expenditure was not of such a nature as to produce income in the actual tax year in which it was incurred. In every trade, much of the expenditure in each year – such as expenditure in the purchase of raw materials, in the repair of plant or the advertisement of goods for sale - is designed to produce results wholly or partly in subsequent years but, nevertheless such expenditure is constantly allowed as deduction for the year in which it is incurred."

Amalgamated Zinc (deBavay's) Ltd v FC of T (1935) 54 CLR 295 follows suit with Dixon J. opining that "it is not the practice to institute an inquiry into the exact time at which it is hoped that expenditure made within the accounting period will have an effect upon the production of assessable income and to refuse to allow it, as a deduction if that time is found to lie beyond the period."

Although accounting treatment is at times persuasive in determining the taxability of an income or the deductibility of an expenditure, it is **not conclusive!!** Sometimes, certain expenditure for accounting purposes are capitalised and amortised over a period of time to match the resultant income in line with accounting principles of matching and periodicity, but in taxation we are governed only by the Income Tax Act 1967 (as amended). Therefore, although certain expenditure may not be charged to the profit and loss account (P&L A/c), it would still rank for a tax deduction.

Example:

Beverly Sdn Bhd (year-end 31/12) incurred RM 1 million on an advertisement campaign in 2009 and the benefits are expected to be reaped in the years 2009 to 2013. The company capitalised the expenditure and amortised over four years.

This is to account for the charge to Profit and Loss Accounts in the years 2010 to 2013 already claimed for tax purposes in year of assessment 2009.

Facts of the Case

A rubber company owned a newly planted rubber estate of which only 1/7 had reached the production stage (ie where the trees can be tapped for latex). Expenditure on superintendence, weeding and pest destruction was incurred each year for the whole estate while only 1/7 of the estate yielded income. The Revenue argued that 6/7 of the expenditure "was not referable to the profit earned within the year" and in consequence not deductible.

Decision of the Court

An interesting analogy was used by the judge in explaining his rejection of this view:

> *"Suppose a man conducted a milk business, it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year…..that cow was not in milk and, therefore, the profit he was going to get from the cow would be outside the year of assessment…".*

In the same light, expenditure incurred is also deductible even if the related income has already been produced in an earlier period. This is common especially in the case of newspapers and magazines being sued for libel. The income for the publisher is when the newspapers and magazines are sold. However, if they are sued for libel and subsequently lose the case or settle out-of-court, the compensatory payment would be deductible in the year of assessment of payment.

Accounting

For year-ended 31st December 2009, the company will effect the following transaction.

	RM '000	RM '000
Dr Advertising expenditure (P & L A/c)	250	
Dr Deferred expenditure	750	
Cr Bank		1,000

Tax

In the tax computation of Beverly Sdn Bhd for year of assessment 2009, the following adjustment would be made.

	RM '000
Profit before tax	*xxx*
Less: Advertising expenditure capitalised	*[750]*

Therefore, effectively we are claiming RM 1 million in full in the year of incurrence.

Subsequently, for year-ended 31st December 2010 to 2013, the company will effect the following transaction EACH YEAR

	RM '000	RM '000
Dr Advertising expenditure (P & L A/c)	250	
Cr Deferred expenditure		250

The tax computation of Beverly Sdn. Bhd. for year of assessment 2010 to 2013 will reflect the following adjustment. FOR EACH YEAR OF ASSESSMENT (YA)

	RM '000
Profit before tax	*xxx*
Add: Advertising expenditure already claimed in YA 2009	*250*

The principle that expenditure does not have to be immediately productive to be deductible was illustrated in the case of **Vallambrosa Rubber Company Ltd. v Farmer.**

This was the case in **Herald and Weekly Times Ltd. v FC of T [1932] 48 CLR 113,** where a newspaper publishing company claimed a deduction for damages paid in respect of libels published by it in previous years. The judge stated:

"..When it appears that the inclusion in the newspapers of matters alleged by claimants to be defamatory is a regular and almost unavoidable incident of publishing it, so that the claims directly flow for acts, done for no other purpose than earning revenue, acts forming the essence of the business, no valid reason remains for denying that the money was wholly and exclusively expended for the production of assessable income."

In the Production of Gross Income

The intention here is to ensure that there is a relationship, connection or nexus between the incurrence of the expenditure and the generation of the income. This is similar to the rule governing the deductibility of expenses against gross income from employment in ascertaining the adjusted income [which was discussed in Tax Nasional 4th Quarter / 2002]. Let's look at some cases.

Port Elizabeth Electric Tramway Co. Ltd v CIR [1935] 8 SATC 13

Facts of the Case

The company was involved in the transportation business. When one of its drivers was killed in an accident, it was compelled to pay compensation to the deceased's representative. In contesting the claim, legal costs were incurred.

Decision of the Court

It was held that the compensation was deductible as it was incurred in the production of income, but the legal costs were not deductible.

This was because the need to make the compensation arose from the employment of drivers to run the company's vehicles which was so closely linked with the income-earning operation. On the other hand, the legal costs were incurred in resisting the demand for payment of compensation and therefore, were held to be not so closely linked with the income-earning operation.

The judge in this case opined that:

> *"If [purpose of the act entailing the expenditure] was performed for the purpose of earning income, then the expenditure … is deductible………[I]n my opinion, all expenses attached to the performance of a business operation bona fide performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are bona fide incurred for the more efficient performance of such operation provided that they are so closely connected with it that they may be regarded as part of the cost of performing it."*

Students should also note that expenditure incurred in preserving a source of income has the effect of ensuring the continuous flow of income and is considered as expenditure incurred in the production of income.

In **W Nevill & Company. Ltd v FC of T [1937] 56 CLR 290,** a company which was previously managed by one managing director, introduced a joint management system and under an agreement appointed an additional managing director for five years at a salary of GBP 1,500 per annum. The system did not work out satisfactorily and tended to impair the efficient management of the business. In the belief that its abolition would lead to increased efficiency, the additional managing director resigned, and the company agreed to pay him a sum of GBP 2,500 in consideration of him cancelling his agreement.

Latham C.J. stated that "the payments in question were actually made bona fide in the course of business in the interest of the efficiency of the business … the expenditure was made for the purposes of increasing the efficiency of the company and therefore, increasing its income producing capacity… [and therefore,] should be deducted in ascertaining the taxable income of the taxpayer."

However, expenditure incurred for the protection of income was already earned and the purpose of the expenditure is merely to preserve it at the same level is not regarded as having been incurred in the production of income. An example of this would be expenditure incurred for the purpose of resisting a demand to reduce prices of goods sold by the taxpayer.

That concludes our discussion of the facets of s 33(1). In my next article, I shall move on to the specific sub-sections of s 33(1). Good luck to all students for your year end examinations! TG

FURTHER READING

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

Notice Board

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2009 [P.U. (A) No. 196/2009]

With effect from 15 May 2009, any income tax payable shall be remitted in full in respect of any money payable under any agreement, note, instrument and document in relation to the issue of Islamic Medium Term Notes of five billion ringgit, issued by the Terengganu Investment Authority Berhad, including but not limited to any agreement, instrument and document in relation to the guarantee provided or to be provided by the Government, by-

(a) Terengganu Investment Authority Berhad;
(b) the Government of Malaysia;
(c) any holder of the Islamic Medium Term Note;
(d) any other party to any agreement, note, instrument or document in relation to the issue of Islamic Medium Term Note, including any party to whom such agreement, note, instrument and document is transferred or assigned; and
(e) any other party to any agreement, instrument and document in relation to the guarantee, including any party to whom such agreement, instrument and document is transferred or assigned.

Any stamp duty payable in respect of any agreement, note, instrument and document, as the case may be, in relation to the issue of Islamic Medium Term Note or the guarantee shall also be remitted in full.

Income Tax (Exemption) (No. 7) (Amendment) Order 2009 [P.U. (A) 211/2009]

This Order is to amend the original Income Tax (Exemption) (No. 7) Order 2009 [P.U. (A) 351/2008] and is effective from 30 August 2008.

Pursuant to the above Order, the following persons are exempted from payment of income tax:

a) For non-residents, on interest paid or credited by Bank Kerjasama Rakyat Malaysia Berhad;
b) For Malaysian resident individuals, on interest received from:
   (i) negotiable certificate of deposit; or
   (ii) rediscounting of banker's acceptance on repurchase agreement or any similar instrument of trade financing which is traded in money market fund;
c) For Malaysian resident individuals, on gains or profit, interest or bonus received from money deposited in any savings deposit, current deposit, fixed deposit or investment deposit with the following institutions:
   (i) a bank or a finance company licensed or deemed to be licensed under the Banking and Financial Institutions Act 1989;
   (ii) a bank licensed under the Islamic Banking Act 1983;
   (iii) a development financial institution prescribed under the Development Financial Institutions Act 2002;
   (iv) the Lembaga Tabung Haji established under the Tabung Haji Act 1995;
   (v) the Malaysian Building Society Berhad incorporated under the Companies Act 1965;
   (vi) the Borneo Housing Mortgage Finance Berhad incorporated under the Companies Act 1965; or
   (vii) a co-operative society registered under the Co-operative Societies Act 1993.

Double Taxation Relief (The Government of Turkmenistan) Order 2009 [P.U. (A) 218/2009]

The DTA between Malaysia and Turkmenistan has been gazetted but has yet to come into force. It shall have effect from the year of assessment beginning on or after 1 January in the calendar year following the year in which this agreement enters into force; except that in respect of petroleum tax, it will be effective from the year of assessment beginning on or after 1 January of the second calendar year following the year in which the agreement enters into force.

Medical Expenses for Parents [Section 46(1) (c) of Income Tax Act, 1967]

The Institute has recently received a clarification from the IRB in respect of personal relief for medical expenses incurred on parents (maximum RM5,000) granted to individuals under s 46(1) (c) of the Income Tax Act, 1967 (ITA). The relief 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. (Please refer to Paragraph 6.1.2 of Public Ruling 2/2005 on Computation of Income Tax Payable by a Resident Individual.) Medical practitioner means a doctor registered with the Malaysia Medical Council. In this respect, the costs of health products/health supplements incurred on parents does not fall within the ambit of medical expenses within the meaning of s 46(1)(c) of the ITA and therefore are not eligible for personal relief to the individual.

Issuance of tax clearance letter for dormant companies in liquidation

The IRB has issued a letter dated 15 June 2009 setting out the conditions and procedures for issuing tax clearance letters to applications 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 are to be sent to the relevant. IRB branches 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 s 81 of the ITA – Statement to Liquidate Dormant Company] are to be furnished.

For companies which had carried on operations or business but had ceased operations or business, 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.

New Tax Audit Framework

A new Tax Audit Framework (TAF), effective from 1 January 2009, was issued in January 2009 but was uploaded to IRB's website on 25 June 2009. The new TAF replaces the tax audit framework 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.

Addendum to Public Ruling on Trade Association (PR No. 6/2005)

The IRB has issued the above Addendum to Public Ruling No. 6/2005 on 1 July 2009. This Addendum is issued in accordance to the amendment to s 53 of the ITA, as introduced by the Finance Act 2009 (Act 693), to include professional bodies as trade association. The addendum also provides illustration on tax treatment of adjusted loss and unabsorbed capital allowance from the members' subscription. The Addendum is effective from YA 2009.

IRB's Notice on Taxation of Benefits-In-Kind

The above Notice has been issued as a result of the dialogue between professional bodies and the IRB on 8 May 2009. The IRB has informed of the following:

a) Benefits of free petrol
   Employees can elect the tax treatment of the benefit of free petrol to be as follows:
   (i) be taxed at prescribed values under Appendix 2 of the Public Ruling No. 2/2004; or
   (ii) 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.

b) Benefits of telephone and payment of telephone bills.
   A concession is given to employers who had reported in the Form EA for 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), ie, they do not have to revise the Form EA.

Guidelines on refund of excise duty on returned damaged goods

Section 28 of the Excise Act 1976 stipulates that no dutiable goods shall be consumed or made use of in, or removed from, a place licensed under s 20 or from a public excise warehouse or a licensed warehouse or excise control except upon payment of duty thereon or under bond for deposit in another public excise or licensed warehouse or for export to outside Malaysia. Where dutiable goods are damaged, destroyed or, by unavoidable accident, lost at any time before removal from excise control, the Director General may, pursuant to s 14(1) of the EA, remit the whole or any part of the excise duty payable thereon. Locally manufactured goods on which excise duty has been fully settled and these goods have left the customs area cannot claim refund on excise duty paid when they are returned to the factory later due to damage or inferior quality. Pursuant to s 11(2)(b), the Minister is empowered to consider or approve a refund of excise duty levied on local manufactured goods and impose such conditions as he may deem fit. The guidelines set out the procedures and conditions for application of such refund. Applicants for refund should submit two sets of applications; one to the

Tax Analysis Division of Treasury, and another to the Internal Tax Division of the RMC.

Guidelines on refund of bad and doubtful debts under Service Tax Act 1975 and Sales Tax Act 1972

Section 31C of Sales Tax Act 1972 stipulates that a person may claim a refund of the sales tax paid in respect of taxable goods if the sales tax has been paid by him on or after 1 January 2003 and the sales tax payable to him has been provided in his accounts as doubtful debt or has been written off in his accounts as bad debt. In addition, the Director General of RMC must be satisfied that all reasonable efforts have been made by such person to recover the sales tax. The refund must be claimed within six years from the year in which the sales tax was paid. The Act defines "bad debts" as the outstanding amount of the payment in respect of the sale of taxable goods including the sales tax which is due to the person but has not been paid to, and is irrecoverable by the person; and "doubtful debts" as a provision made with respect to the outstanding amount in the person's accounts consistent with the generally accepted accounting principles. Regulation 19D of the Sales Tax Regulations 1972 further stipulates that a payment is deemed to be irrecoverable if the whole or any part of it has been written off in the seller's accounts as bad debt and the purchaser:

a) has been filed for bankruptcy or is an adjudged bankrupt;
b) has been placed under receivership;
c) has voluntarily wound up or has been ordered by the court to wound up;
d) has been filed a claim in court by the seller to recover the payment; or
e) has not paid for the whole or any part of the payment after 6 months from the date such sales tax was paid.

Section 21B of the Service Tax Act 1975 and Regulation 16A of the Service Tax Regulations 1975 have similar provisions as the above.

The guidelines clarify the following:

i) Refund is available to person who has ceased to be a taxable person under the following circumstances:
   a) that the person has ceased to manufacture taxable goods/provide taxable services, or the person has been granted exemption from licensing or the annual sales turnover is below the threshold; and
   b) that the person has manufactured taxable goods/provided taxable services without licence and has paid the tax but was unable to claim back from his clients.
ii) Proof of reasonable efforts taken to recover the debts:
   a) for tax owed below RM500, at least 2 registered reminder letters were sent to the debtors;
   b) for tax owed between RM500 – RM10,000, notice of claims was sent to debtor through a law firm; and
   c) for tax owed above RM10,000, statement of claims against the debtor was filed in the court.
iii) Documents required to facilitate the claim of refund:
   a) letter of application for refund;
   b) prescribed form for claim of service tax/sales tax refund (Form JKED 2);
   c) statement of claims;
   d) copy of sales invoices;
   e) form CJP 1 and any documentary evidence that the applicant has paid the relevant tax, such as copy of ledgers, bank statements, receipts, etc;
   f) records or documents that substantiate reasonable efforts have been taken to recover the debts;
   g) records to show that the uncollectable tax has been written off in the accounts;
   h) declaration by a registered accountant that the amount has been debited as bad debt for claims of refund amounting to RM10,000 and below. For claims of refunds above RM10,000, such a declaration should be made by a certified /chartered accountant; and
   i) other relevant documentary evidence that the debts are irrecoverable, such as court order that the debtor is declared bankrupt or is under receivership or liquidation, court paper for applicant who has filed a notice claim in the court, board of directors resolution for voluntary winding up, etc.
iv) An application for refund should be made for each debtor. In view that the number of customers is huge for the telecommunications industry but the amount of each debt is small, the applicant may apply to the Director General of RMC for special treatment in respect of individual accounts.
v) Where the application for special treatment is approved, the following actions are considered as reasonable efforts taken to recover these debts:
   a) sending reminder letters;
   b) reminding the customer through Interactive Voice Reminder;
   c) suspending the service to customer temporarily (Temporary Out-of-Service);
   d) calling or meeting the customer to recover the debts; and
   e) terminating the service to the customer and send the final bill.

Stamp duty on construction contract instruments

With effect from 1 January 2009, service agreement instruments including construction contracts are subject to stamp duty at the ad valorem rate of RM5 for every RM1,000 or part thereof. In view that construction projects generally involve multiple tiers multiple levels of stamp duty at ad valorem rate are levied on the same project. The MOF has reviewed the situation and in exercising his powers under s 80(2) of the Stamp Act 1949 has agreed and issued the following guidelines:

i) for contracts awarded by the Government where the agreement is signed between the Government and the principal contractor, the contract is exempted from stamp duty. Stamp duty at ad valorem rate will be levied on second level contracts (ie contracts between the principal contractor and the sub-contractors). Stamp duty for contracts at the third and subsequent levels will be fixed at RM50.00, and any stamp duty paid in excess will be remitted.
ii) for contracts awarded by any party other than the Government; stamp duty at ad valorem rate will be levied on the contract between such party and principal

contractor. Stamp duty for contracts at the second and subsequent levels will be fixed at RM50.00, and any stamp duty paid in excess will be remitted.

iii) for projects that are cancelled by the parties who had offered the contracts, and stamp duty for all such contract had been paid, only the stamp duty at the ad valorem rate will be refunded. Stamp duty at the fixed rate of RM50.00 will not be refunded. The remission of stamp duty is effective from 15 July 2009. In view that the remission order cannot be gazetted immediately, approval of remission stamp duty meanwhile will be given under s 80(1A) of Stamp Act 1949 on a case by case basis.

Income Tax (Deduction for Cost of Training for Employees) Rules 2009 [P.U. (A) 261/2009]

Effective from YA 2009 until YA 2012, the cost of the following training incurred by a person for the purposes of upgrading and developing the technical skills of his employees shall be allowed a deduction in addition to any deduction allowable under s 33 of the ITA.
The eligible training are training approved by the Minister and 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 Rules shall not apply to person who has made a claim to HRDF.

Income Tax (Exemption) (No.3) Order 2009 [P.U. (A) 262/2009]

Effective from 30 August 2008 until 31 December 2012, income received by a non-resident person under s 4A (ii) of the Act in relation to the following training conducted by him for the purpose of upgrading and developing the technical skills of any employee of a person resident in Malaysia, shall be exempt and s 109B of the Act shall not apply.

The eligible training are training approved by the Minister and 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.

Real Property Gains Tax (Exemption) Order 2009 [P.U. (A) 376]

i. Following the 2010 Budget Proposals relating to real property gains tax, the Minister of Finance in exercising his powers conferred by subsection 9(3) of the Real Property Gains Tax Act 1976 (RPGTA) has made the Real Property Gains Tax (Exemption) Order 2009 (the Order). The Order, gazetted on 27 October 2009, will come into operation on 1 January 2010.
ii. The Order exempts any person from the application of Sch 5 of the RPGTA on the payment of tax on the chargeable gain (CG) arising from any disposal of assets on or after 1 January 2010, subject to the condition that the amount of CG shall be determined in accordance with the formula:

A/B x C
where A = Tax on CG at the appropriate tax rate reduced by the Tax on CG at 5%
B = Tax on CG at the appropriate tax rate
C = Amount of CG

iii. The Real Property Gains Tax (Exemption) (No. 2) Order 2007 [P.U. (A) 146/2007] is revoked.

Income Tax (Exemption) (No. 4) Order 2009 [P.U. (A) 389/2009]

With effect from 1 January 2009, any gains or profits falling under s 4(f) of the ITA received by a non-resident from an offshore company shall be exempted from tax.
Consequently, Section 109F of ITA shall not apply to the income exempted. "Offshore company" means an offshore company incorporated under the Offshore Companies Act 1990, and includes a foreign offshore company registered under that Act, a licensed Malaysian offshore bank, an offshore limited partnership and an offshore trust.

Stamp Duty (Remission) Order 2009 [P.U. (A) 391/2009]

The Ministry of Finance (MOF) has issued a circular dated 10 November 2009 informing that the above Order has been gazetted. The Order was issued pursuant to the notification by MOF that the stamp duty to be levied on service agreements executed from15 September 2009 to 31 December 2010 will be up to RM50 only, and any stamp duty in excess of that amount shall be remitted. In line with this, service agreements executed between 15 September 2009 and 31 December 2010 may be stamped at any branch of the Stamp Duty Office, IRB, (at a rate) up to a maximum of RM50.00, without having to apply to the MOF for a letter of approval.