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GST
THE TECHNICAL ASPECTS

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CHARTERED TAX INSTITUTE OF MALAYSIA

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Inside:
- Managing the Current Challenges of Employers Tax Obligations
- Malaysian Takaful Industry and the Ensuing Tax Issues
- Green Taxation to Curb Environmental Abuse
- Thin Capitalisation

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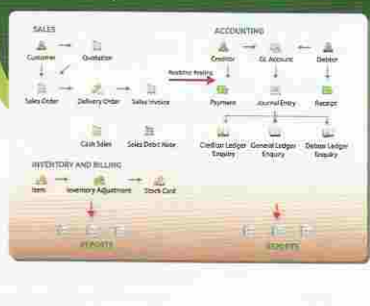

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Editorial Note

Coming together is a beginning, staying together is progress, and working together is success.

– Henry Ford

Welcome to the year's first issue of *Tax Guardian*! The quote above aptly describes the camaraderie of our tax practitioners in Malaysia. May the year 2010 continue to foster talented professionals in the industry as well as ignite the passion for tax amongst our students.

In this issue, we put the spotlight on the Goods & Services Tax (GST). According to the Finance Ministry last year, Malaysia is set to introduce a new GST in mid-2011. The reason for such a move is to broaden its revenue base and to help reduce a budget deficit that is currently running at its biggest in over 20 years. To gain a further understanding on this indirect tax, we feature our cover story on the technical aspects of GST.

One of the many issues highlighted in the Budget 2010 was on eco–tax issues. Green taxation can take a variety of forms. It can be used as a measure to widen Malaysia's tax base and to provide environmental benefits by raising the funding created from sources which negatively impact our Earth. "Green Taxation to Curb Environmental abuse" explores further on this topic.

In addition, with tax–filing season looming ahead, the challenges relating to an employer's obligations can be rather daunting – having to deal with inadequate tax knowledge, processes and resources as well as people issues. The article on "Managing the Current Challenges of an Employer's Obligations" shows you how you can tackle these issues.

Finally, Malaysia is gearing itself to become a financial services hub, particularly for Islamic finance. We delve deeper on the development of the Takaful industry and the ensuing tax issues surrounding it.

We are confident our readers will enjoy this issue of *Tax Guardian*.

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 APRIL - JUNE 2010

april

Date	Training Programme	CDP points	Venue	Fee (RM) Member	Member's Firm Staff	Non-member	Speaker
1 April 2010 9.00am - 5.00pm	Workshop: Analysis of Recent Tax Cases, Construing Court Decisions & Managing Tax Appeals Efficiently	8	Ipoh	315	365	415	Saravana Kumar
6 April 2010 9.00am - 5.00pm	Workshop: Construction and Property Developers	8	Kuala Lumpur	330	380	440	Christopher Low
8 April 2010 4.00am - 6.00pm	Evening Talk: To be advised	2	Kuala Lumpur	95	110	130	Sakaya Rani
13 April 2010 9.00am - 5.00pm	Workshop: Analysis of Recent Tax Cases, Construing Court Decisions & Managing Tax Appeals Efficiently	8	Malacca	315	365	415	Saravana Kumar
14 April 2010 9.00am - 5.00pm	2010 Budget Seminar (Re-Run)	10	Johor Bahru	315	365	415	Chow Chee Yen
14 April 2010 9.00am - 5.00pm	Workshop: The Goods and Services Tax - Mechanism and Compliance	8	Kuala Lumpur	330	380	440	Thomas Selva Doss
20 April 2010 9.00am - 5.00pm	Workshop: Investment Incentives	8	Kuala Lumpur	330	380	440	Sivaram Nagappan
21 April 2010 9.00am - 5.00pm	Workshop: The Goods and Services Tax - Mechanism and Compliance	8	Malacca	315	365	415	Thomas Selva Doss
22 April 2010 9.00am - 5.00pm	Workshop: Making the Most of Double Tax Agreements	8	Kuala Lumpur	330	380	440	Tan Hooi Beng
28 April 2010 9.00am - 5.00pm	Workshop: Analysis of Recent Tax Cases, Construing Court Decisions & Managing Tax Appeals Efficiently	8	Kota Kinabalu	315	365	415	Saravana Kumar
29 April 2010 9.00am - 5.00pm	Workshop: Analysis of Recent Tax Cases, Construing Court Decisions & Managing Tax Appeals Efficiently	8	Kuching	315	365	415	Saravana Kumar

may

Date	Training Programme	CDP points	Venue	Fee (RM) Member	Member's Firm Staff	Non-member	Speaker
3 May 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Johor Bahru	315	365	415	Chow Chee Yen
10 May 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Kuala Lumpur	330	380	440	Chow Chee Yen
12 May 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Malacca	315	365	415	Chow Chee Yen
12 May 2010 9.00am - 5.00pm	Workshop: The Goods and Services Tax - Mechanism and Compliance	8	Ipoh	315	365	415	Thomas Selva Doss
18 May 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Kota Kinabalu	315	365	415	Chow Chee Yen
19 May 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Kuching	315	365	415	Chow Chee Yen
20 May 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Penang	315	365	415	Chow Chee Yen

june

Date	Training Programme	CDP points	Venue	Fee (RM) Member	Member's Firm Staff	Non-member	Speaker
1 June 2010 9.00am - 5.00pm	Workshop: New Public Rulings in 2009 and 2010	8	Ipoh	315	365	415	Chow Chee Yen
10 June 2010 9.00am - 5.00pm	Workshop: The Goods and Services Tax - Mechanism and Compliance	8	Penang	315	365	415	Thomas Selva Doss
14 June 2010 9.00am - 5.00pm	Workshop: The Goods and Services Tax - Mechanism and Compliance	8	Petaling Jaya	330	380	440	Thomas Selva Doss
17 June 2010 9.00am - 5.00pm	Workshop: The Goods and Services Tax - Mechanism and Compliance	8	Johor Bahru	315	365	415	Thomas Selva Doss
June 2010 4pm - 6pm	Evening Talk	2	Kuala Lumpur	95	110	130	To be advised

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

2010 NATIONAL TAX CONFERENCE

"DRIVING TOWARDS A HIGH INCOME ECONOMY"

6 & 7 July 2010
(Tuesday & Wednesday)
Kuala Lumpur Convention Centre

Official Opening by
YAB Dato' Sri Mohd Najib bin Tun Haji Abdul Razak
Prime Minister/Finance Minister of Malaysia (invited)

2010 NATIONAL TAX CONFERENCE

The 2010 National Tax Conference, jointly organised by the Lembaga Hasil Dalam Negeri Malaysia (LHDNM) and the Chartered Tax Institute of Malaysia (CTIM) for the 10th successive year, is an important event in the calendar of chief executive officers, tax leaders and practitioners, finance professionals, academicians and business leaders. With an extensive team of speakers comprising tax professionals and top leaders in various industries, the 2010 NTC is indeed the pre-eminent tax conference in Malaysia. The conference provides excellent opportunities for participants to network with LHDNM officials, tax professionals and business leaders.

Objectives

- Get updates on the Malaysian economic situation
- Understand the impact of GST
- Get information on the latest tax cases
- Learn from the OECD's experience on thin capitalisation issues

Who Should Attend?

- CEOs/CFOs
- Tax Directors/Professionals/Consultants/Managers/Agents
- Financial Controllers/Finance Directors/Finance Managers
- Academicians
- Business Leaders

25 CPD Points

LHDN MALAYSIA

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Visit to the Universiti Tun Abdul Razak (UNIRAZAK)

(L to R) Safrizal Mohd Said, Dr Dewi Sapuan, Professor Dr Barjoyai Bardai, Dato Raymond Liew, Dr Veerinderjeet Singh, Prof. Datuk Dr. Md Zabid Haji Abdul Rashid, Professor Dato Dr. Mahyuddin Dahan, Ann Vong, Adrian Yeo, Assoc. Prof. Dr. Noor Raihan Ab Hamid

On 19 January 2010, the CTIM President and some Council members visited UNIRAZAK. The purpose of the visit was to explore the possibility of a collaboration between CTIM and UNIRAZAK in areas that are mutually beneficial. The meeting discussed how both parties could work together in the area of tax education and it was agreed that a Memorandum of Understanding (MoU) outlining each party's responsibilities in this collaboration will be signed between the two parties. CTIM was represented by Dr Veerinderjeet Singh (President), Dato' Raymond Liew (Chairman of the Public Relations Committee), Mr Adrian Yeo (Chairman of the Examinations Committee), En Safrizal Mohd Said (Member of the Education Committee), Ms Ann Vong (Executive Director) and Ms Nancy Kaaur (Examinations Manager). Those present from UNIRAZAK were Prof Datuk Dr Md Zabid Abdul Rashid (President and Vice Chancellor), Prof Datuk Dr M Mahyuddin Dahan (Deputy President, Academic and Research), Prof Barjoyai Bardai, Assistant Prof Dr Dewi Amat Sapuan and Assoc Prof Dr Noor Raihan (Dean, Faculty of Business Administration).

Dr Veerinderjeet Singh & Prof. Datuk Dr. Md Zabid Haji Abdul Rashid

Visit to the Special Commissioners of Income Tax

Discussion between the representatives of CTIM and the Special Commissioners of Income Tax

On 22 January 2010, CTIM visited the Special Commissioners of Income Tax to explore various options of disseminating the decisions of the Special Commissioners in a more effective manner.The discussion was a fruitful one as the Chairman of the Special Commissioners, Dato' Ahmad Zaki Haji Husin shared the view of CTIM in that all decisions should be speedily published so that everyone is aware of the decisions made in tax appeal cases heard by the Special Commissioners. The representatives from CTIM were Dr Veerinderjeet Singh (President), Mr Khoo Chin Guan (Deputy President), Council members Mr Francis Tan , Dr Ahmad Faisal , En Mokhtar Mahmud , Ms Ann Vong (Executive Director) and Mr Lim Kok Seng (Technical Manager). Representing the Special Commissioners of Income Tax were Dato' Ahmad Zaki Haji Husin, Datuk Sahari bin Hj Mahadi, Dato' Abu Hasan bin Md Akhir, and Tuan Haji Mohd Nor bin Lamsa as well as the Secretary to the Special Commissioners, En Othman Buang.

Asia Oceania Tax Consultants' Association (AOTCA) – Meetings and International Tax Conference

The AOTCA 17th General Council Meeting and Extraordinary General Meeting as well as the International Tax Conference (ITC) were held in Mumbai, India from 19 – 21 November 2009. The host organisation was the All India Federation of Tax Practitioners. The meetings were attended by representatives of member bodies from 11 countries namely Australia, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, Mongolia, Philippines, Taiwan and Vietnam. The ITC event was attended by about 100 participants.

The Chartered Tax Institute of Malaysia (CTIM) was represented at the meetings by its Deputy President, Mr Khoo Chin Guan, who also spoke on the topic "Transfer Pricing – The Malaysian Experience" at the event.

Mr Khoo Chin Guan delivering the topic on Transfer Pricing


Meeting in session


Group photo of representatives of AOTCA member bodies

Visit to the Royal Customs Malaysia

L to R: En Mohamad Daud bin Othman, Datuk Zainul Abidin bin Taib, Ms Ann Vong, En Mokhtar Mahmud, Dr Veerinderjeet Singh, Dato' Hajjah Mardina bt Hj Alwi, Dato' Hj Ismail Hj Ibrahim, Dato' Azizah Idrus, En Paddy bin Abdul Halim, Ms Amarjit Kaur, En Zubaidi Mat Ali and Mr Lim Kok Seng.

Budget Commentary and Tax Information – Appreciation Dinner

Dr Veerinderjeet Singh presenting a momento to Dato' Hajjah Mardina

Representatives from CTIM visited the Royal Customs Malaysia (RCM) on 23 February 2010. The purpose of the visit was to enhance CTIM's relationship with the RCM and to discuss possible ways for the two organisations to work together. CTIM was represented by Dr Veerinderjeet Singh (President), En Mokhtar Mahmud (Council Member and Chairman of the CTIM Indirect Tax Working Group), Ms Ann Vong (Executive Director), Mr Lim Kok Seng (Technical and Public Practice Manager) and Cik Nursalmi (Continuing Professional Development Manager). Those representing the RCM were Dato' Hajjah Mardina bt Hj Alwi (Deputy Director General), Dato' Hj Ismail Hj Ibrahim, Dato' Azizah Idrus, Dato' Hj Zainul Abidin Taib, En Paddy bin Abdul Halim, Ms Amarjit Kaur, En Mohamed Daud bin Othman and En Zubaidi Mat Ali.

A dinner was held on 8 January 2010 in Royale Chulan Hotel in appreciation of the contributions of the Editorial Board of the 2010 Budget Commentary and Tax Information (BB10). There were lucky draws during the dinner with prizes jointly sponsored by the three professional bodies namely the CTIM, MICPA, MIA as well as CCH. The 2010 Budget Commentary and Tax Information is a joint publication by the CTIM, MICPA and MIA in association with several major accounting firms.

CTIM Perak Branch News

Career talk at Kolej Matrikulasi Perak, Gopeng

At the request of Kolej Matrikulasi Perak, CTIM Perak Deputy Branch Chairman, Lam Weng Keat delivered a career talk to 200 students pursuing accountancy and finance courses on its "Minggu Bicara Kewangan" on 8 December 2009. The Deputy Branch Chairman gave an overview of the role and function of CTIM, the various routes to become a CTIM member, types of membership and the benefits of CTIM membership among others. The speaker also shared his experience, knowledge and views on the taxation profession and stressed the importance of maintaining their professional values when they are CTIM members. Finally, the students were strongly encouraged to pursue their career in taxation and to apply for CTIM membership upon fulfilling the necessary requirements.

Professional Examination

The Chartered Tax Institute of Malaysia(CTIM) held its weeek-long professional examinations for candidates in Kuala Lumpur and at various branch offices throughout Malaysia. The examination centers were in Kuala Lumpur, Pulau Pinang, Johor, Melaka, Perak, Kelantan,Kuantan, Sabah and Sarawak.

A total of 237 candidates sat for the examinations which were conducted from 14-21 December 2009 in nine centers nationwide. The Institute organised its first examination in 1995 and it is the only professional taxation examination in Malaysia. The objective of the examinatons is to build a pool of a qualified taxation personnel as well as to maintain the highest standard of professional ethics and competency among members.

Special Ceremony at the IRB in conjunction with the National Tax Conference

L to R: Puan Nor Azirah Mohd Said, En. Mohd Nizom Sairi, Mr Khoo Chin Guan, Dato' Che Omar A.Rahaman, Dato' Hasmah binti Abdullah, Dr Veerinderjeet Singh, Mr SM Thanneermalai, Ms Ann Vong and Puan Siti Rosnah bt Md Hashim.

The representatives from CTIM attended a special ceremony at the Inland Revenue Board of Malaysia (IRB) on 3 March 2010. The purpose of the event was to present a cheque to the IRB in respect of the joint collaboration between CTIM and IRB in organising the National Tax Conference in 2009. The representatives also exchanged views on the draft programme of the National Tax Conference 2010 which is scheduled to be held on 6 to 7 July 2010 at the Kuala Lumpur Convention Centre.

CPD News

Evening Talk on Withholding Tax on Section 4(f) Income – Practical and Legal Perspectives

(L to R) Mr Tang Chin Fook, Dr Veerinderjeet Singh, Mr Anand Raj and Mr SM Thanneermalai

On 25 January 2010, the Institute conducted an evening talk on "Withholding Tax on Section 4(f) – Practical and Legal Perspectives" at the Equatorial Hotel, Kuala Lumpur. The speakers, Mr Tang Chin Fook and Mr Anand Raj spoke on topics which included the scope of s 4(f) income, derivation, withholding tax rate and compliance, case law dealing with s 4(f) income and s 4(f) versus Double Tax Agreement. Numerous questions were raised by the participants during the Q & A session which was chaired by Dr Veerinderjeet Singh, President of CTIM. Mr SM Thanneermalai, Council Member of CTIM also contributed his views during the session.

Half-day Workshop on Entertainment Expenses and Benefits–In–Kind

Ms Lim Gim Kim, Manager of the Technical and Public Practice Department in CTIM conducted a half-day workshop on "Entertainment Expenses and Benefits-In-Kind" on 26 January 2010 at the Equatorial Hotel, Kuala Lumpur. The workshop which benefited more than 100 participants was very interesting and covered real-life examples.

Evening Talk on Real Property Gains Tax

(L to R) Mr Yee Wing Peng, Ms Seah Siew Yun and Datuk Ng Seiong Liong

Participants enjoying the talk

The Institute conducted an evening talk on "Real Property Gains Tax" (RPGT) in collaboration with ACCA Malaysia on 18 January 2010 at the Park Royal Hotel, Kuala Lumpur. The speakers, Mr Yee Wing Peng and Datuk Ng Seing Liong spoke on the latest updates on RPGT and the impact of the 5% RPGT on Property Market in Malaysia. The talk was chaired by Ms Seah Siew Yun, a Council Member of CTIM.

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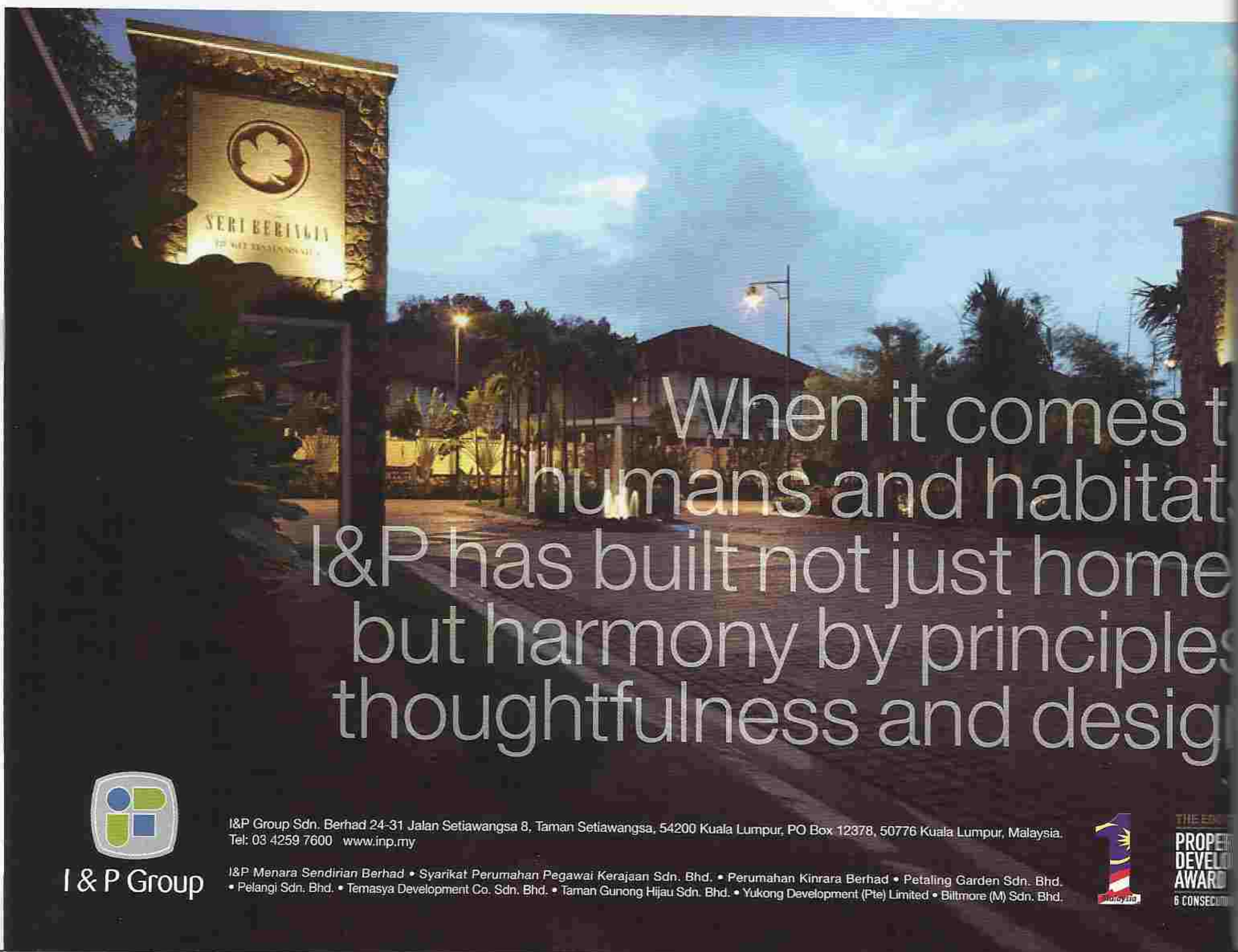

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EXPLOITING A NICHE OF THE UNISEL – MBA

Unisel Graduate School of Management (UGSM) is one of the Centers of Excellence of UNISEL offering the best part-time education programmes to working professional people and also a customized training development program to potential organizations aimed at ensuring their competitiveness in the global environment. UGSM was established in 2004 with the mission to "***be a leading regional management education centre with a special focus on Supply Chain & Logistic Studies in Asia.***"

The Dean / Director of UGSM, Prof. Dr. Khalifah Othman says, "We offer a comprehensive diverse post graduate qualifications in the form of ***Master of Business Administration*** (MBA) by coursework, ***Master of Management*** (MM) by research and ***Ph.D in Management*** by research. Our MBA programme is fully accredited by Malaysian Qualification Agency (MQ) while the MM and Ph.D are the new programmes that have been approved by MOHE. All of our programmes are widely accepted in the industry."

Noting that there are many MBA programmes in the market today, Prof Khalifah says that UGSM's programmes are different as it has identified a niche area of study that makes it stand out from the rest of the competition. According to Prof. Dr. Khalifah, for the purpose of fulfilling the industrial's needs, the UNISEL- MBA programmes have been offered in different areas of specialization. It was firstly started with the ***MBA in General Management*** and followed by another two more specializations namely ***MBA in Logistics Management*** and ***MBA in Shipping Management***, after realizing a remarkable lack of professional courses that aimed at developing a technical, strategic and management expertise required for policy development in these both sectors.

Besides Logistics and Shipping, UGSM is also value adding its programme by offering the other areas of customized course of MBA specializations through close industrial collaboration such as ***MBA in Local Government*** with Institut Latihan Pihak Berkuasa Tempatan Selangor (ILPBT), ***MBA in Islamic Finance*** with The International Centre for Education in Islamic Finance (INCEIF) and ***MBA in Project Management, MBA in Facility Management*** and ***MBA in Occupational Safety & Health*** with KLIA Training Centre Sdn Bhd.

The Dean added that, the UNISEL-MBA is opened to all graduates of any discipline and give experienced managers the opportunity to obtain a specialist professional qualification, which are highly sought after in both private and public sectors. The MBA programmes are conducted during weekends and full time student takes about one and half years, while a part time student takes about two years to complete. Almost 99% of the students are experienced professionals from various sectors of industries and many of them hold senior positions in their organizations. The average age of students is between 30 to 40 years of age.

Other distinguish factors of UGSM is that teaching methods are based on Real Project Based Learning where a number of students are grouped together as a team to facilitate learning by replicating actual task environment. UGSM offers a conducive and interactive learning environment to encourage participation and intelligent decision discussion amongst students drawing ideas from the diverse perspectives of each student. This is important as students need to be taught not only the fundamentals but also the real life practical knowledge. The combination of teaching expertise from both academicians and industrial practitioners would definitely enhance the quality of UNISEL-MBA programme.

GST
The Technical Aspects

By Chew Theam Hock and Tan Eng Yew

Introduction
The Goods and Services Tax (GST) Bill was tabled in Parliament on 16 December 2009. If the billed is passed in the next Parliament sitting, indications are that GST, which will replace the current sales tax and service tax, will be implemented in the later half of 2011.

GST, or Value Added Tax (VAT) as it is known in other countries, is not new from the international perspective. This form of indirect consumption tax has been implemented in other countries since the 1950's. In fact, as can be seen from Table 1 below, Malaysia is one of the last few countries in the ASEAN region to impose GST.

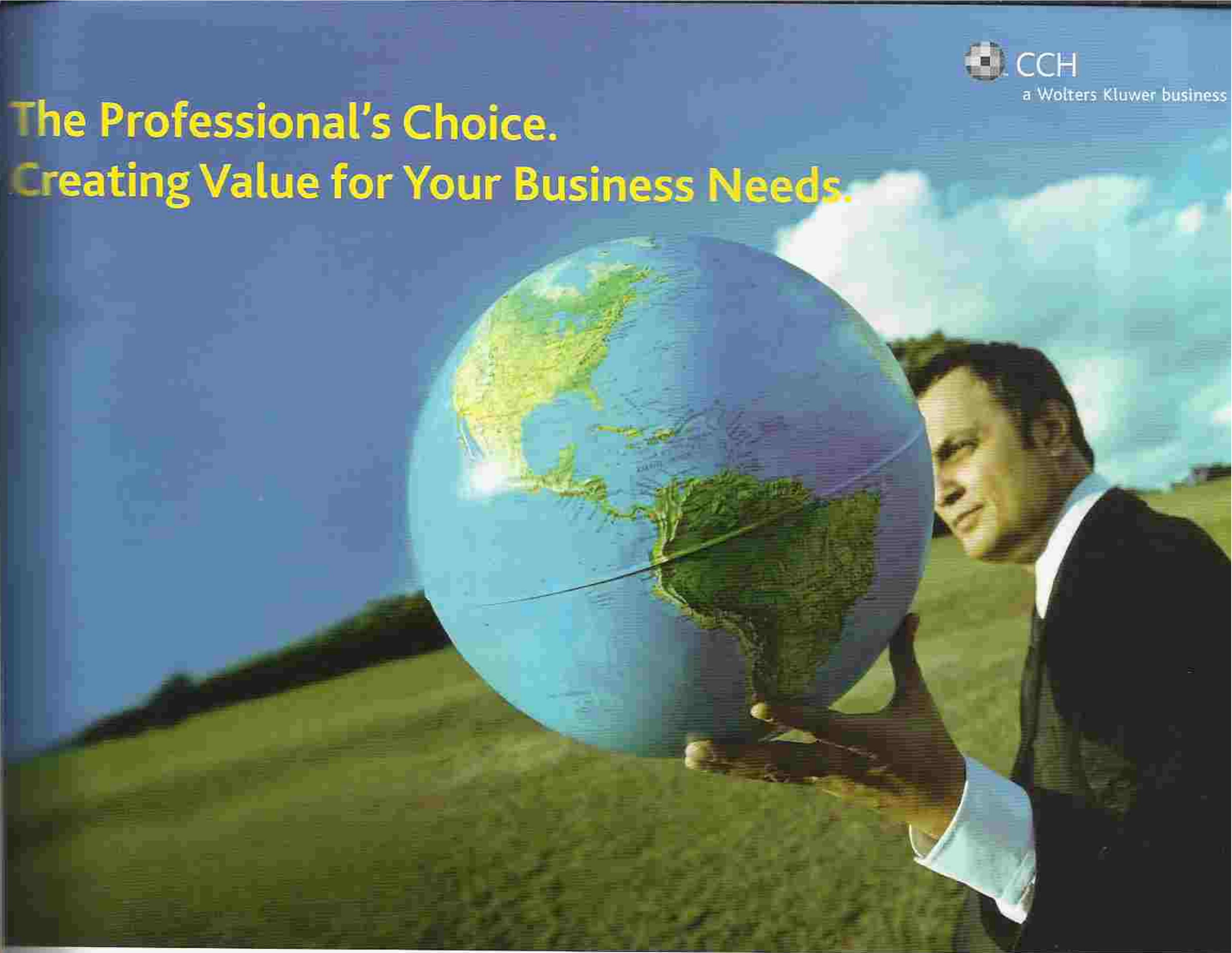
Table 1: List of countries in ASEAN and their GST implementation dates

Country in ASEAN	Date of Implementation
Indonesia	1 January 1984
Philippines	1 January 1988
Thailand	1 January 1992
Singapore	1 April 1994
Cambodia	1 January 1999
Vietnam	1 January 1999
Laos	1 January 2009

Nonetheless, the introduction of GST will be a major reform for the Malaysian tax regime. It would therefore be appropriate to familiarise oneself with some of the pertinent provisions contained in the GST Bill. Let's consider some of the technical aspects of GST below.

Tax Rate
The Government has indicated that GST is proposed to be charged on a broad range of taxable supplies at a standard rate of 4% (such rate will be Gazetted separately) although some supplies may be zero–rated (0%).

Scope of Tax
GST is charged on:
- any taxable supply of goods or services made by a taxable person in the course or furtherance of any business carried on by him in Malaysia; and
- on the importation of goods or services.



Our aspiration

To provide ***strategic*** information services, workflow tools and solutions to help professionals make critical decisions effectively and improve on productivity.

Our mission

To continuously deliver superior products and services with a focus on ***CREATING VALUE*** with our "Accurate, Authoritative and Relevant" content, information and solutions that meet customers' business needs.

Our drive

To work ***synergistically*** with our customers, partners and stakeholders in maximising value-creation opportunities to allow greater focus on innovation and improve on end-to-end solutions.

Our range of products:

Content / Information
Tax & Accounting
Financial Services
Legal & Business
Corporate Services
HR and Employment

CCH Executive Events
Workshops & Seminars
Conferences

Workflow Tools & Software
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From the above, it is apparent that the introduction of GST will see various new terms introduced into the indirect tax regime. A number of the key terms in the GST Bill are elaborated below:

Supply – means all forms of supply (unless specifically treated as neither a supply of goods nor a supply of services by the Bill), including a supply of imported services, done for a consideration. Anything which is not a supply of goods but is done for a consideration is a supply of service.

Business – business includes any trade, commerce, profession, vocation or any other similar activity, whether or not it is for a pecuniary profit but excludes employment under a contract of service and hobbies.

Taxable supply – a supply of goods or services, other than an exempt supply but includes a zero-rated supply. It follows that all supplies of goods or services are taxable unless specifically exempted or are defined as being outside the scope of GST. Input tax credit will be claimable on the making of taxable supplies. Zero rated supplies would generally include international services and exports of goods and services.

Exempt supply – a supply of goods or services which is exempt from tax. An exempt supply will not attract output tax and any input tax incurred in making the exempt supply is not claimable as a credit. Examples of exempt supplies indicated by the Government include private health, residential property and financial services.

Place of supply – the Bill contains provisions for determining the place where a supply is made, as GST can only be imposed on supplies made (or deemed to be made) in Malaysia. Generally, the place of supply for goods would be treated as Malaysia if the goods are in Malaysia and moved within Malaysia and where goods are removed from Malaysia to a place outside of Malaysia. For services, the place of supply shall be deemed to be Malaysia if the supplier belongs in Malaysia.

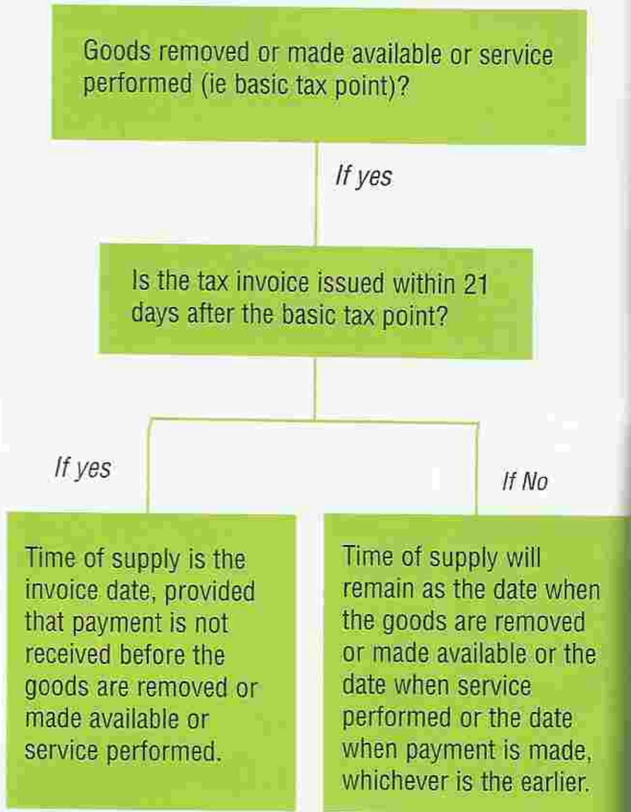
Time of supply – It is important to determine when the taxable person should account for GST on the supply made. The supply is treated as taking place on the earliest of the following events:

- the date when the goods are removed or made available, or when the services are performed (basic tax point); or
- the date when a tax invoice is issued; or
- the date when payment is received.

However, the time of supply can be taken to be the date the invoice is issued (actual tax point) if the invoice is issued within 21 days of the basic tax point.

See Flowchart 1 below:

<u>Flowchart 1: Time of Supply in General</u>



Value of supply – GST will be charged by reference to the value of the supply. The amount of GST due will be the value of the supply multiplied by the rate of GST:

- If the supply was for a consideration in money, the value of the supply shall be calculated as follows:

Consideration = Value + GST

Input tax credit – arises from tax on the taxable supply of goods or services made to a taxable person or tax paid or to be paid by the taxable person on the importation of any goods. A supplier of taxable goods or services is eligible to claim an input tax credit for any GST paid in the course of making the supply. To claim an input tax credit the following conditions must be met:–

- the claimant must be a taxable person
- the goods and services are acquired for the purpose of making a taxable supply
- there must be a valid tax invoice
- the invoice must be issued under the name of the claimant
- the goods and services acquired must not subject to any input tax restriction eg motorcars

If a taxable person uses goods and services for both business and non–business purposes or for making taxable and non–taxable supplies, the input tax will have to be apportioned to determine the credit available.

Based on Public Consultations by the Ministry of Finance (MoF), a claim using a simplified tax invoice may also be allowed where the amount payable (GST inclusive) is less than RM500.

Output tax – means tax on any taxable supply of goods or services made by a taxable person in the course or furtherance of his business in Malaysia.

Reverse charge mechanism – For imported services, GST will be charged through the reverse charge mechanism. Under the reverse charge mechanism, the recipient of the services is treated to have made the supply to himself and accounts for the output tax. A GST registered recipient is allowed to claim the corresponding input tax credit.

Tax Invoice

A GST registered person must issue a tax invoice which must meet the conditions below:–

- contain the prescribed particulars in respect of the supply (eg description to identify the goods/services supplied, name, address and identification number of the supplier).
- state the amount payable, excluding tax, the rate of tax and the total tax chargeable shown separately, except as the Director General of Customs may otherwise allow and subject to such conditions as he deems fit to impose.

Threshold for Registration

It is proposed that businesses will need to register for GST with the Royal Malaysian Customs (Customs) where the annual sales turnover of taxable supplies exceeds the specified threshold. The indicative threshold is RM500,000. The threshold will be published in the Gazette at a future date.

Voluntary registration is permitted where the business has not achieved the mandatory threshold for licensing.

Taxable Periods

The Director General shall assign each taxable person to one of the following categories for the purposes of determining their taxable period:

- *Category A* – the category of taxable persons whose taxable period is a period of one month ending on the last day of any month of any calendar year;
- *Category B* – the category of taxable persons whose taxable period is a period of three months ending on the last day of any month of any calendar year; or
- *Category C* – the category of taxable persons whose taxable period is a period of six months ending on the last day of any month of any calendar year.

It has been indicated that Category A is for a person with turnover in excess of RM5 million as well as export–based entities and Category B is for a person with turnover of less than RM5 million.

Notwithstanding the above, a taxable person may, after being assigned to any category above, apply in writing to the Director General to be assigned to another category.

Furnishing of Returns and Payment of Tax

Every taxable person shall, in respect of its taxable period, account for tax in a prescribed return which shall be furnished to the Director General of Customs in the prescribed manner not later than the last day of the month following after the end of the taxable period to which the return relates. The prescribed return and the manner for furnishing it have yet to be indicated.

Record Keeping

All businesses and accounting records relating to GST are to be kept in Bahasa Malaysia or the English language for a period of seven years. If proper records are not maintained, penalties could be imposed.

Penalties

Failure to comply with the provisions in the GST Bill would result in penalties being imposed.

The penalties for late payment under GST are as follows:–

Table 2: Penalties for late GST payment

Period after the Payment Deadline	Penalty Rate (%)
$\leq$30 days	5
> 30 days but < 60 days	Additional 5
Every subsequent 30 days or part thereof	Additional 3 up to a maximum of 25

The penalties for making an incorrect return can carry a fine of not more than RM50,000 or to imprisonment of not more than three years or to both. On top of that, there will be a penalty of an amount equal to the tax that has been undercharged or would have been undercharged if the return had been accepted as correct.

The penalties for other offences such as evasion of tax, fraud and improperly obtaining refunds are more severe.

Transitional Issues

To facilitate the changeover from the current sales tax and service tax regime to GST, transitional measures are included in the GST Bill. The transitional measures address amongst others:–

- *contracts with no opportunity to review* – subject to conditions, a supply made pursuant to a contract with no opportunity to review and made within five years after GST was implemented shall be treated as a zero–rated supply.
- *progressive or periodic supplies* – where a supply is made under an agreement for a period or progressively over a period whether or not at regular intervals and that period begins before the implementation date and ends on or after the implementation date, the proportion of the supply which is attributed to the part of the period on or after the implementation date shall be chargeable to tax.
- *refund of sales tax for goods held on hand* – a person is entitled to a special refund equal to the amount of sales tax in respect of the goods held on hand although this will be subject to various conditions.
- sales tax and service tax are to be repealed.

Notwithstanding the above, the Minister of Finance may by Regulations make further transitional provisions as he may consider necessary and expedient. While these Regulations have yet to be issued, it is likely that these will have a significant impact on the operations of the GST.

The GST Bill also contains a general anti avoidance provision.

Other Considerations

Knowing the technical aspects of GST is the first step to be GST compliant. Next, businesses need to review the impact of GST and the actions required to be compliant. For starters, businesses need to:

- evaluate the key features of GST
- conduct a strategic review of the impact of GST on businesses, transactions, employees and suppliers
- identify the potential GST cost and additional resources required in the transition and where appropriate, opportunities to restructure business arrangements
- consider the impact of additional record keeping and compliance requirements

Conclusion

Although globally, GST or VAT is an established tax system, GST is undoubtedly a new tax regime in Malaysia and most businesses will be affected. Hence, businesses would need to be pro–active so that the transition to GST is smooth and successful.

Since GST will affect most businesses and its proposed implementation from mid 2011 is less than 18 months away, businesses should start reviewing the impact of GST on them and the actions required to be compliant. TG

***Chew Theam Hock and Tan Eng Yew** are Executive Directors and members of KPMG's Strategic GST Team. Comments and opinions presented in this article are personal viewpoints of the authors and are not necessarily reflective of KPMG Tax Services Sdn Bhd's perspective on the subject matter. The authors can be contacted at theamhockchew@kpmg.com.my or engyewtan@kpmg.com.my respectively.*

Managing the Current Challenges of An Employer's Tax Obligations

By Tan Lay Keng and Christopher Lim

It's that time of year again – tax filing season. This annual ritual never ceases to be a period of anxiety and stress for many – employers begin scrambling about trying to identify and collate the relevant information on what they have paid and provided to their employees in order to issue the Form EA (and complete their Form E), and employees delay the preparation and filing of their individual tax returns until the last minute.

Similar to other years, it is expected that employees will be required to file their 2009 tax returns by 30 April 2010. Many, no doubt, will again procrastinate and attempt to lay the blame for the last-minute filing rush squarely on the shoulders of their employers who issued their Form EA "late" or "only at the end of March".

However, these are no longer expected to be valid excuses. With effect from this year, employers are now required to issue their Form EA "*on or before the last day of February*" under s 83(1A) of the Malaysian Income Tax Act, 1967 (MITA), which was introduced via the Finance Act, 2010 and gazetted on 14 January 2010. This amendment to the law, while providing employees with more time to prepare and file their tax returns, imposes a tight deadline on employers, many of whom are used to issuing the Form EA in March and who may still not be aware of the change in deadline.

As most executives generally spend most of their time focused on high–priority strategic and business issues, compliance with an employer's obligations generally may receive less attention. However, what many executives fail to realise is that many unnecessary and sometimes intangible costs frequently occur in moderate risk areas such as non–compliance with an employer's obligations.

The preparation and issuance of the Form EA and the submission of the Form E are just two of many obligations which are required of employers under the MITA. These obligations include:

- The notification of commencement of employment for new employees
- Adherence to the monthly Schedular Tax Deductions (STD) scheme

- The notification of cessation of employment and withholding of any amounts due to the employee (if the employee is leaving Malaysia permanently with no intention of returning)

Failure to meet these employer's obligations can result in:

- Penalties of between RM200 and RM2,000 per offence; or
- Imprisonment for a period not exceeding six months; or
- Both the penalties and imprisonment terms above.

Given that the penalties that can be imposed are on a per offence basis, this can amount to quite a significant amount depending on how many offences an employer commits. Furthermore, this does not take into account the additional unwanted attention that the employer may receive from the Malaysian Inland Revenue Board (MIRB) in the form of tax audits (not just on STD but could potentially include corporate income tax and withholding taxes), not to mention the adverse publicity and reputational damage that may result.

While it is clear that compliance with the above obligations is a must, it should also be acknowledged that there are significant challenges for employers to ensure that they are able to comply with all their obligations without compromising their focus on key business activities.

The challenges
The challenges relating to an employer's obligations can generally be divided into three broad categories:

- Inadequate tax knowledge
- Inadequate processes and resources
- People issues

People issues are probably the most difficult to manage from an employer's perspective, whilst inadequate knowledge of tax laws and recent changes to legislation are probably the most common reasons for non–compliance among employers.

In the context of the preparation of the Form EA, many employers frequently cite the difficulty in collating the necessary information on perquisites, as required in Public Ruling [No. 1/2006] on "Perquisites from Employment", as a major hindrance. The relatively small value of tax that arises from some of these perquisites is often considered to be worth significantly less than the time and trouble incurred to collate such information.

Another area of concern for many Form EA preparers has to do with the technical tax treatment for benefits–in–kind (BIKs) and living accommodation benefits provided. Despite the issuance of public rulings on BIKs and the value of living accommodation (VOLA) many years ago, some employers remain unsure of the tax treatment to be adopted in relation to such benefits, particularly in instances where an item may be considered either a perquisite or a BIK.

For example, it is quite common for employers to provide some form of mobile telephone benefit to their employees, particularly in instances where the employees are required to be easily contactable given the nature of their jobs (eg travelling salesmen, shift workers etc). This benefit can be delivered to the employee by:

- Providing a mobile telephone and a telephone line registered under the name of the employer to the employee for his/ her use;
- Providing a fixed mobile telephone allowance to employees to subsidise their mobile telephone bills; or
- Allowing employees to claim reimbursement for mobile telephone bills (either full/ partial reimbursement or for business calls only).

Prior to the year of assessment 2008, this benefit would have been taxable and would have had to be reported in the Form EA either as an additional perquisite or a BIK to the employee depending on how the benefit was delivered / provided to the employee. If it was a perquisite, the employer would be required to report the actual amount paid in the Form EA whilst the employee would need to make a claim for abatement in his / her tax return and substantiate the portion of the bills that was incurred for business purposes. Alternatively, if it was a BIK, the employer would need to report the BIK based on the prescribed value provided in the BIK public ruling.

Many employers viewed this as a time–consuming exercise given that most, if not all, employers would not provide such benefits to the employees if it did not see it as a necessity, especially since most businesses need to manage operating costs which ultimately impact the bottom line. Also, the relatively small quantum of amounts paid is perceived to result in minimal additional tax revenue.

In response, the Government announced in the 2009 Budget a number of tax exemptions pertaining to a whole variety of perquisites and benefits–in–kind (BIKs). While this announcement was received positively by many quarters, particularly employees, employers were still obliged to report these tax exempt benefits. This increased the challenge for employers as they were now required to collect the information necessary for reporting in the Form EA and to segregate between taxable and exempt employment income. Also, the acceleration of the timeline to issue the Form EA to employees is probably causing further anxiety for many employers given the volume of information that is required to be collected and disclosed in the Form EA.

Another challenging technical area involves cross–border employees. As a result of globalisation, Malaysian companies are becoming larger and more complex. Many have also expanded geographically and frequently send or "second" employees for a period of time on assignments in other countries.

In many instances, the preparers of the Form EA are not made aware of the individual's cessation of employment in Malaysia and continue to report his / her income as if he / she were employed in Malaysia. The two outcomes of this scenario may be the failure of the employer to notify the MIRB of the individual's cessation and departure from

Malaysia and the possible exposure to double taxation of income if the individual is also required to pay tax in the host (foreign) location. The penalties for the employer's failure to notify the MIRB of the cessation and departure may be limited, but the financial impact resulting from exposure to double taxation may be very significant for employees. Further, in cases where the employer has agreed to bear the employee's taxes, the employer would also be financially impacted.

Conversely, foreign companies with operations in Malaysia frequently send their employees for assignments in Malaysia as well. In such instances, there are cases where these employees are not included in the Malaysian payroll (or included only in a limited way), since they continue to receive all or a significant portion of their remuneration in their home country. In such cases, the Malaysian employer may be unaware of all the remuneration received by the individuals, particularly if such items are not reflected in the Malaysian payroll and are of a private and confidential nature (eg share/equity plan benefits). This raises the possibility of incorrect reporting of income by the Malaysian employer.

The increased use of shared service centres by many companies may also increase the risk of not meeting an employer's obligations. Many companies use shared service centres to administer payroll and benefits, and many of the employees responsible for the administration of payroll and benefits in these centres may only be aware of the general requirements for a variety of countries, but not sufficiently well– versed in the specific application of the tax laws and requirements in any one country. Coupled with the fact that shared service centres generally use standard platforms and systems to administer payroll for a variety of countries, it is possible that some reporting and disclosure requirements may be overlooked.

In all the above instances, inadequate tax knowledge poses a significant challenge and risk to employers in meeting their obligations.

Inadequate processes (eg internal controls) and resources (eg technology, manpower and time) can also pose a significant challenge to meeting an employer's obligations. For instance, as companies grow and continue the war for talent, many organisations regularly introduce ad–hoc benefits and allowances to attract key talents, in some cases without the involvement of the appropriate Human Resource (HR) personnel. In the absence of adequate internal controls or approval processes, the introduction of such ad–hoc benefits can give rise to situations where the individuals responsible for fulfilling the employer's obligations may be unaware of such benefits, thereby omitting them for STD and income reporting purposes.

In some cases, the absence of appropriate processes and communication channels between the Finance and HR functions can also result in inadvertent non–compliance. In many organisations, the administration of payroll and claims are separated, where payroll and issuance of the Form EA are the responsibility of HR while Finance is responsible for verifying and processing claims made by the employees. The lack of communication between the two functions can result in cases where reimbursements of taxable benefits or perquisites by Finance are not communicated to HR for reporting purposes.

The lack of internal controls and processes also has an impact on situations involving cross border employees. For example, where foreign employees are engaged by business unit leaders without the involvement of HR, HR may be unaware of the presence of these foreign employees and thereby fail to comply with the notification of new employees to the MIRB.

Additionally, there may be some employers who continue to rely on payroll systems which have not been updated for the significant changes to tax legislation mentioned earlier, resulting in difficulties to meet their obligations relating to the calculation of monthly STDs and the reporting of income. The use of such systems adds significantly to the burden of complying with the new law as resources are then required to validate outputs (eg STD calculations or Form EA) generated to ensure that they are in order.

Inadequate resources including manpower and time can also impact on an employer's ability to fulfill its obligations. For example, employers with limited resources may often limit the manpower and time that are allocated to preparing the

Forms and meeting their other obligations. This poses a significant risk to these employers as inadequate manpower and time may result in the taking of shortcuts and inadequate research for tax law updates by those who are given the responsibility for ensuring the preparation of the Form EA.

Lastly, and as mentioned, probably the most difficult to manage, are the challenges posed by the people within the organisation. Many employees have set expectations and may be unaware of their employer's obligations especially when dealing with the disclosure and reporting of certain taxable benefits.

Employees often cite the practices of their previous employers when questioning HR on the reporting of certain benefits in the Form EA. These employees fail to realise that the MIRB has, over the last few years, been clarifying and issuing public rulings on many "grey areas" which were previously open to interpretation, thereby making it clearer when and how an item should be subject to tax. With the issuance of public rulings, and subsequent addendums, employers are now provided with clear guidance on the tax treatment to be adopted for various remuneration items and are only doing what is right. Nevertheless, this continues to pose a challenge for many employers who have a difficult task managing the expectations of their employees.

Movement of key HR personnel away from an organisation could also impact an employer's ability to meet its obligations. HR practitioners are as mobile and highly sought after as any other professionals and there are employers who lose and replace such personnel on a regular basis. These employers may run the risk of not meeting their obligations due to the loss of background knowledge relating to tax positions previously adopted by the employer and the time incurred as the new personnel learn the ropes. This issue could be particularly acute where processes and decisions have not been adequately documented.

Managing the challenges

As indicated at the beginning of this article, while there are significant challenges in complying with the employer's obligations, there are also ways to manage and mitigate some of these challenges.

Firstly, employers should include tax obligations as part of their routine responsibilities and put in place the appropriate internal controls and processes to ensure that new and departing employees are recorded accordingly, and all income is accurately reported and captured within the human resource information systems. This would also include putting in place controls, approval processes and documentation relating to the introduction of ad–hoc benefits and perquisites, and the tracking of cross border employees (eg access to time sheets, requirement for employees to complete travel calendars etc).

Another initiative that can increase the employer's capability of complying with its tax obligations is making the right investment in a good payroll system – one which is robust enough to capture all manner of cash, benefits and

perquisites that may be provided to the employees. The system should also be flexible enough to allow the addition of employees who may either not be included in the payroll as their payroll is administered in a different country or additional income which may be paid overseas but derived from the exercise of employment in Malaysia. However, do make sure that the payroll system is certified by the MIRB as being compliant.

Thirdly, employers need to take the necessary steps to ensure that the individuals who are responsible for meeting the employer's obligations are kept up to date with changes to the tax law and public rulings. These steps range from subscriptions to magazines and alerts issued by accounting firms or professional bodies to sending such individuals for regular training on changes to the tax laws and public rulings, to obtaining professional help from tax advisors. Requirements to regularly visit the MIRB's website to check for updates may also be imposed. This not only enables these individuals to ensure that the appropriate obligations are met but also equips them with the relevant knowledge to handle employee expectations relating to such obligations.

Lastly, there is no substitute for time! Employers need to make the necessary time available to ensure compliance with the relevant employer's obligations. This may include allowing the relevant personnel adequate time to familiarise themselves with the relevant law, attending training and collating the necessary information required to meet the obligations. In relation to the issuance of the Form EA, employers should start the data collation process as early as possible and allocate sufficient resources to ensure the timely completion and distribution of the forms.

Meanwhile, we can only wait and see whether the recent change in deadline to issue the Form EA will alleviate the last–minute rush by taxpayers to file their tax returns on 30 April. TG

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Malaysian Takaful Industry and the Ensuing Tax Issues

By Azura Othaman

Islamic financial market is racing to catch up with the more established conventional financial market. For every conventional financial product in the market, one can almost certainly find an Islamic equivalent. The financial market now has Islamic financial products that cover the whole spectrum of the banking, capital market and insurance industries.

Takaful is an alternative to conventional insurance. Before the introduction of *takaful*, insurance has been the only means of protection available against unexpected risks and unforeseen misfortunes. Conventional insurance is not acceptable in Islam because some of the elements, activities and procedures involved in conventional insurance are considered unethical and are held to be in non-conformance with the rules and requirements of *Shariah* by the majority of Islamic scholars. Elements such as uncertainty and ambiguity *(gharar)* in contract, gambling *(maisir)* or a consequence created by the presence of uncertainty and interest *(riba)* in the investment are the major prohibitions that discourage Muslims from benefiting from insurance coverage. In order to similarly benefit from insurance coverage whilst at the same time be in conformance with the religious needs of Muslims, Islamic scholars introduced the concept and legal basis for an "Islamic insurance" contract or *takaful*.

Even though the *takaful* industry is still a small segment of the global insurance market, its growth has been quite phenomenal. One of the driving factors is the growth of Islamic finance and demand for *Shariah* compliant business solutions as the economy of the Muslim countries prosper. Malaysia is one of the countries in the world which has successfully developed a sizeable *takaful* market and is the largest *takaful* player in South East Asia. Whilst conventional insurance and *takaful* share the same objective, ie to provide coverage to policyholders in the event of unforeseen contingencies, the mechanics to arrive at that same aim is different. Therefore, when conventional tax

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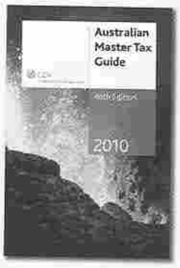

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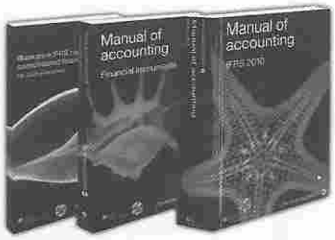

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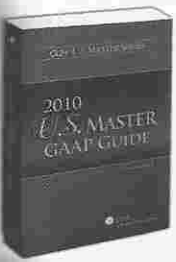

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rules and principles are applied to the taxation of *takaful*, issues would inevitably arise.

In order to understand the tax issues faced by *takaful* operators, the differences between conventional insurance and *takaful* need to be appreciated.

Concept of *takaful*

Takaful operates on the concept of solidarity and mutual help whereby a group of participants agree to jointly guarantee each other against a defined loss. Instead of transferring of risks from one party to another as in conventional insurance, the aim of *takaful* is to spread the risks and losses among a large number of participants. *Takaful* reinforces the idea of shared responsibilities, joint indemnity, common interest and solidarity. The presence of moral values and ethics whereby business is conducted openly with utmost good faith, honesty, full disclosure, truthfulness and fairness in all dealings is another feature that forms the basis of the *takaful* framework.

Differences between conventional insurance and *takaful*

The key differences between conventional insurance and *takaful* can be summarised as follows:

- ***Buying and selling (bilateral) contract vs contract of tabarru' (unilateral)***
  Conventional insurance involves a contract of exchange (sale and purchase) between insurer and insured as opposed to a unilateral undertaking of contribution from individual participants in *takaful*
- ***Guarantee given by insurer vs participants guaranteeing each other***
  Under conventional insurance, in return for the payment of a premium, the insurer will guarantee the insured with compensation in the event of a misfortune as opposed to *takaful* where the participants will agree to guarantee each other in the event a misfortune befalls one of them.
- ***Insurance is risk transfer whereas takaful is risk sharing***
  In conventional insurance, the insured is transferring the risks of misfortune to the insurer whilst in *takaful*, the risks of the insured are shared amongst all participants.
- ***Claims paid from insurer's fund vs claims paid from tabarru' fund***
  In conventional insurance, claims made by the insured is paid out of the insurer's fund whereas the claims in *takaful* is paid out of the *tabarru'* fund.
- ***Risk taker vs fund manager***
  The conventional insurer will manage the premium collected to earn maximum profits from underwriting and as such bears any risk of loss whereas a *takaful* operator is merely the manager of the contributions made by the participants.
- ***Profit motive, maximising returns to shareholders vs community well-being***
  The conventional insurer manages its business to maximise profits to its shareholders whereas in *takaful*, the focus is on optimising operations for affordable risk protection to participants as well as fair profits for the operator.
- ***Shariah compliant vs non-shariah compliant***
  Investments made by *takaful* operators must comply with Shariah principles.
- ***Premiums belong to the insurer vs contributions belong to the takaful fund (participants)***
  In conventional insurance, premiums received are treated as income to the insurer and used to discharge its duty to provide cover for policyholders with any surpluses from underwriting belonging to the insurer. In *takaful*, any surpluses from underwriting and profits from investment will be returned to the participants and in some cases profits from investment are shared with the *takaful* operator.
- ***Discretionary distribution vs predetermined distribution***
  In conventional insurance, the profits and/or bonus units to be returned to policyholders are determined by the management and Board of Directors of the insurer. In *takaful*, the *takaful* contract specifies in advance how and when profits/surplus and/or bonus units will be distributed.

There are two most widely used business models in *takaful*, the *Mudarabah* (profit sharing) and *Wakalah* (agency) model.

***Mudharabah* model**

In a *Mudharabah* model, the participants who are the capital providers *(rabbul-mal)* to the *takaful* fund will collectively make contributions to the *takaful* fund. The contribution will be partly invested for purposes of gaining investment return and partly "donated" *(tabarru')* into a *takaful* fund from which claims are paid to needy participants. The *takaful* operator acts as a *Mudarib* (entrepreneur) and manages the fund for the participants under the contract of *mudharabah* where the participants will contribute the capital and the operator will provide expertise to manage the funds for a share of the profits made. Profits of the funds are shared between the participants and *takaful* operator on a pre-agreed ratio (eg 50/50 for General *Takaful* or 70/30 for Family *Takaful*, etc). All acquisition costs and management expenses incurred by the *takaful* funds will be borne by the funds before arriving at profits to be shared between participants and *takaful* operators. Losses of the *takaful* funds are solely borne by the participants as capital providers (except in cases of negligence of the manager) even though in practice the *takaful* operator will provide a benevolent loan *(qardhul hassan)* to the *takaful* fund in the event of deficiency. An illustration of the flow of funds for the *Mudharabah* model is as follows:

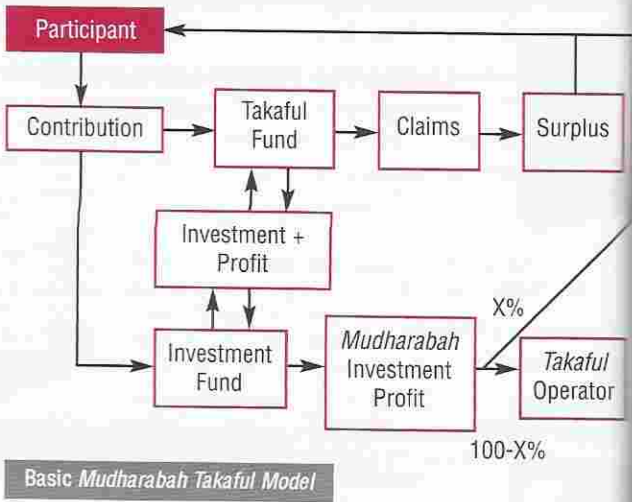


Figure 1: Flow of funds for *Mudharabah takaful* model

Wakalah model
In a *Wakalah* model, the *takaful* operator acts as the agent on behalf of the participants. The operator is paid a pre-agreed management fee termed as *wakalah* fee which is usually a percentage of the contributions paid by the participants, for the services rendered in respect of underwriting, management and investment of the fund. This is normally deducted upfront from the contributions.

In underwriting, the *takaful* operator acts as an agent on behalf of the participants to manage the *takaful* fund. Any liabilities for risks underwritten are borne by the fund and any surplus arising from it belongs exclusively to the participants. The operator is not liable for any deficit of the fund. In some *Wakalah* models, the operator shares in the underwriting surplus. As for the management of the investment activities of the fund, the operator may also be paid a performance fee based on an agreed percentage.

Commercialisation of *takaful* has produced several hybrids of these models, each reflecting a different experience, environment and perhaps a different school of thought. Variations to the above features may be in the form of allocation of contribution and manner of profit or surplus sharing. From the above process flow it can be seen that the most important factor that distinguishes a *takaful* scheme from conventional insurance is the donation or *tabarru'* feature. In *takaful*, the contributions made are earmarked for certain purposes and part of the contribution is donated for the benefit of the participants who have encountered difficulty or hardship.

Taxation of *takaful* operators
Malaysia operates a dual financial system where conventional and Islamic financial system operates along side each other. Even though there are separate legislation governing the conventional and Islamic financial institutions, there is only one Act governing taxation of income from business transactions in Malaysia, that is the Income Tax Act, 1967 (ITA). In order to spearhead the growth of Islamic finance, tax neutrality was provided in order to set a level playing field between conventional and Islamic financial players. With the tax neutrality, Islamic financial transaction is accorded the same tax treatment as a conventional financial transaction.

In the past, *takaful* operators were taxed in the same manner as conventional insurers although the concept of *takaful* clearly differs from the conventional insurance in some respects. The laws governing taxation of insurance companies is provided under s 60 of ITA. Up to the Year of Assessment (YA) 2007, *takaful* companies were taxed similar to conventional insurance by virtue of specific s 60AA (1) and (2) of ITA relating to *takaful* business. Section 60AA(1) of the Act states that:

> "The provisions of s 60 and s 60A shall apply, *mutatis mutandis*, to a *takaful* business carried on pursuant to the Takaful Act, 1984".

Despite, the above provisions in the income tax legislation, *takaful* companies had still faced the following tax issues

- Participants' share of income was taxed on the *takaful* operator.
- The *takaful* operator operating under the *wakalah* model is taxed on the *wakalah* fee income without any deduction of expenses.

The lack of understanding of the differences between conventional insurance and *takaful* had posed difficulties for the taxation of *takaful* operators in Malaysia. In recognising these differences, the tax legislation has since been amended to address those issues and to ensure that the industry does not suffer any tax impediments compared to its conventional counterpart. A new s 60AA for *takaful* business was enacted through Finance Act 2007 (Act No.683) which in many aspects mirrors s 60 for the conventional insurers except for additional sub-sections which address the peculiarity of the *takaful* business. However, some ambiguities still remain under the new legislation and there is a need for further clarification.

Capital allowance claim
The change in tax legislation did not address the issue of capital allowance (CA) claim for *takaful* operators. Similar to the tax provision for conventional insurance, the tax legislation for *takaful* does not provide a claim for CA to be made under the Shareholders' Fund. However, unlike conventional insurance, *takaful* operators will own fixed assets employed in their business of managing the *takaful* funds as opposed to the *takaful* funds owning the assets. Therefore, the tax legislation as it stands puts the *takaful* operators in a disadvantageous position as they are taxed on the income they receive from managing the *takaful* funds but are not able to claim any CA on the fixed assets that they own and use to generate that income. Notwithstanding the legislation, the current practice adopted by most of the *takaful* operators with regard to CA under the Shareholders' Fund is to allocate the CA between Family Fund and General Fund based on gross contributions.

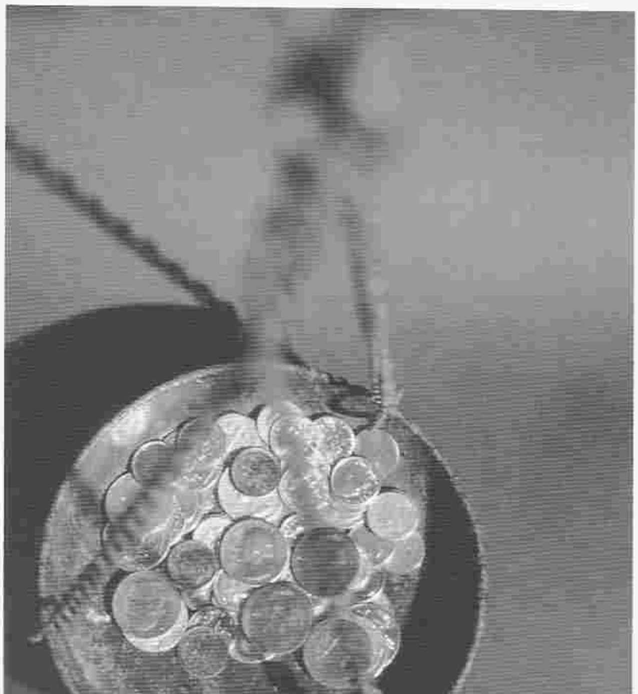
Definition of profits distributed/credited
The tax legislation was also amended with regard to the tax treatment of the participants' share of profits in a *takaful* scheme. Previously, as there was no provision in the tax legislation to address this item, all the income of the *takaful* funds including the portion of profit share due to participants ended up being taxed under the *takaful* operators' business. The tax legislation was amended to allow the proportion of profits distributed and credited to the participants out of the Family and General *Takaful* Funds to be given a tax deduction. However, in the absence of a clear definition of what constitute "amount distributed or credited" specified in the legislation ie whether it is the tax adjusted amount or amount determined by actuary, different *takaful* operators may end up applying different interpretations and tax treatments with regard to the deduction claimed. The different treatments taken give rise to different tax implications and potentially put the *takaful* operators in an uncertain situation in the event that their tax computation is audited by the tax authorities.

Withholding tax on profits distributed to participants
A tax deduction is given in arriving at the *takaful* operator's

adjusted income. Correspondingly, the tax legislation under s 109E of the Act requires the *takaful* operator to deduct tax from the distributions made to the participants within one month and the rate of tax applicable depends on the profile of the respective participants.

This requirement to monitor distributions and deduct the relevant withholding tax will pose an administrative challenge to the *takaful* operator. A distribution of profits to participants could take place every month, and in the case of the General Fund the distribution could be upon maturity of each policy. Considering the volume of the policies written, the frequency of distribution of profits is likely to be very high in any particular year. As such, compliance with the new withholding tax provision for *takaful* distributions would require procedures to be put in place to ensure withholding tax is accounted for correctly at each point of distribution or crediting the participants their share of profits. Any failure to comply with this withholding tax requirement could subject the *takaful* operator to penalties. The penalty for failure to comply with this withholding tax requirement is a hefty 10% of the amount liable for deduction instead of the withholding tax unpaid as is usually the case for other contravention in withholding tax provisions.

In addition, guidelines issued on the deduction of withholding tax on the distributions to participants prescribed a formula in calculating the withholding tax amount and there are ambiguities in terms of how the formula should be applied in determining the amount of tax to be withheld. The same question of what is meant by the "amount distributed or credited" to participants used in the formula would similarly apply.



Timing of deduction of profits distributed

The amount to be distributed or credited to participants out of the *takaful* funds which will be determined by the actuary at the end of the financial year may not be immediately disbursed and the eventual amount distributed may also differ. This raises the question of the timing of deduction and remittance of the withholding tax to the tax authorities whether at the point of crediting the participant's account or upon actual distribution when the amounts in both situations may differ.

Deduction of expenses

The new s 60AA seems to have excluded certain expenses which are borne by some takaful operators. For instance, the general *takaful* fund operated under the *Mudharabah* model incur management expenses under the *takaful* fund but the provision of s 60AA(5)(b) does not seem to provide for a tax deduction on management expenses as what is being provided under s 60(5)(b)(iv) for conventional insurers. As for the shareholder's fund, even though the new s 60AA provides specific tax deduction for management expenses which otherwise would not be tax deductible under conventional insurance, the *takaful* operators are being challenged on their claim of deduction for commission expenses incurred in earning *wakalah* fee income on the basis that it does not form part of management expenses.

As *takaful* is an evolving industry, different *takaful* models will operate differently, for example in terms of who will bear what expenses and how the expenses are reflected in the accounts. Ideally, all scenarios and business framework of takaful operators should be considered so that the tax legislation can cater to the peculiarity of the different business framework so that no income is left untaxed and no legitimate expense is denied tax deduction. To cater for each and every complexity of *takaful* model is by no means an easy task. However, the fact that a specific tax legislation has been done for *takaful* industry shows a commendable effort has been taken by the authorities to recognise the difference between *takaful* and conventional insurance.

Remedies needed

As outlined above, there remain ambiguous tax issues that need to be clarified by the *takaful* industry in Malaysia. These issues have been taken up with the relevant authorities on a consolidated basis by the Malaysian Takaful Association. As Malaysia is positioning itself to be a significant world player in *takaful*, having clear taxation rules is an important element to spearhead further the development of its *takaful* industry. TG

Azura Othman is the Executive Director of PricewaterhouseCoopers Taxation Services Sdn Bhd. The content of this article represents the author's personal views and not that of PricewaterhouseCoopers Taxation Services Sdn Bhd. The author can be contacted at azura.othman@my.pwc.com.

Green Taxation to Curb Environmental Abuse

By Jeyapalan Kasipillai and Kamani Kamalagaran

Introduction

Generally, governments consider introducing "green taxation" to incorporate some of the costs arising from human actions that cause air, land and water pollution that damage the environment. Green taxation can take a variety of forms and they include carbon tax and emission trading schemes. In some European countries, carbon tax is also known as fuel tax.

Pollution is a result of a reckless industrial economic activity in any economy, whether developing or advanced. It implies a social cost which is never directly borne by the producer or the consumer of the product. An important rationale for the use of green taxes is its ability to provide environmental benefits by raising the prices of environmentally damaging activities thereby contributing to the implementation of the polluter-pays–principal and consequently reducing levels of pollution–prone activities.

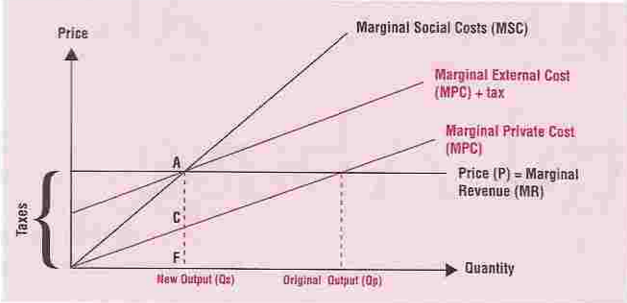
External or social cost

Revenues collected from environmental taxation can be used to pay for the external or social cost of industrialisation. Presently, the external cost of industrial operation is actually borne by the society rather than the enterprise or users of the product. For instance, when a rubber glove factory belches out smoke from the plant, the air surrounding the area is polluted. A linked–effect is the cost to the residents in the neighbourhood in terms of increased medical costs and expenses incurred in purchasing air and water purifier equipments for which no claim is ascertainable and payable directly to the residents by the factory. This, in economic jargon, such an undesirable activity is referred to as negative externality or external cost of industrial operation which is actually borne by the society rather than the enterprise or users of the product (Kasipillai, 2002).

Pigovian tax and negative externality

A Pigovian tax is equal to the "negative externality" that is suppose to correct the market outcome. As mentioned earlier, in the presence of negative externalities; the 'social cost' of a market activity is not covered by the private cost of the activity. In such a case, the market outcome is not efficient and the result may lead to over consumption of the product. On a theoretical plane, Figure 1 illustrates the underlying principle of the Pigovian tax.

Figure 1: Rationale for Pigovian Tax



The marginal social cost (MSC) is derived by adding marginal external cost (MEC) to the marginal private cost (MPC) of production. It follows that market price (P) does not cover the MEC. Hence, MEC is neither borne by the consumer nor accounted for by the producer. Environmental abuse would, therefore, imply the social cost of production involving exploitation of natural resources surpassing the social benefits it generates (Kasipillai, 2002).

Profit–maximising organisations such as hand gloves and pharmaceutical product companies will set output at Qp where marginal private costs (MPC) is equal to marginal revenue (MR). In this illustration, a perfect competition is assumed, under which price (P) equals to (MR). This will yield profit shown by the triangular area 0, C, F. But if externalities are present, the attainment of social optimality requires that the full social costs must be considered. The socially optimum level of output is Qs where a marginal social cost (MSC) is equal to marginal revenue (MR). The amount of output, Qp minus Qs, indicates the excess output due to "externality". Profits will decrease also from 0, A, F to 0, C, F. In the illustration, it is clearly profitable for the firm to pollute, since "internalising the externality" hurts profits. As the MSC curve is above the MPC curve, this example highlights the case of "negative externality". On the contrary, if the MSC curve was below the MPC curve, it would be then be a case of positive eternality. Under such circumstances, social optimality would require a greater output than Qp rather than a reduction of output.

Table 1 highlights some of the merits and demerits when implementing Green Taxes.

Table 1: Merits and Demerits Implementing of GreenTaxes Note

Merits	Demerits
1. Reduction in cost will occur in correlation with the increase in innovation technology to control pollution levels. 2. Represents the most cost-effective method if the tax is set where all covered firms "Marginal Abatement Costs" is equalised (see note).	1. Tedious process involved in ascertaining and implementing the tax. 2. High administrative costs for implementing the green tax. 3. Extensive research and development needed.

According to Econport (2006), Marginal Abatement Cost (MAC) reflects the cost of one additional unit or ton of pollution that is abated, or not emitted. Abatement is the total reduction in toxic emissions.

Criteria for efficient green tax

The 1992 Rio Declaration stated that an efficient green tax should meet the following criteria, namely: environmental efficiency; economic efficiency or low marginal cost; administrative efficiency; and trade efficiency, that is, the tax should have minimal impact on international competitiveness (UNCED, 1992). It is, however, difficult to fulfil these criterions. Environmental problems occur at different stages in the production chain and it can also be of different geographical character. The problem can be of local national, regional or global character. The differences will affect approaches and choice of solutions. The approaches made will also have its effect on location of production, trade and international competition.

Carrot approach

Many of the tax proposals designed to preserve or take care of the environment use the "carrot approach" such as awarding tax credit to encourage certain desirable actions. On the contrary, a "stick" or punitive approach is used by governments to increase taxes or impose fines on actions that harm the environment. Determining whether it is best to change behaviour with an incentive versus a tax (or fine) can be problematic. According to Nellen (2008), an incentive approach is preferred as they generate fewer outcries relative to a new tax or a lost deduction (Nellen, 2008).
In practice, punitive regulations alone will be less effective than when combined with collaboration with the public sector actively setting standards and guidelines, monitoring themselves and establishing fair and efficient enforcement systems.

Carbon Tax

A carbon tax is a form of environmental tax on emissions of carbon dioxide. Carbon dioxide is considered to be a heat–trapping "greenhouse" gas, and the principal aim of carbon tax is to protect the environment by penalising emissions of carbon dioxide, which is one of the causes of global warming. The first country to introduce carbon tax was Finland in 1990 and several other countries in Western Europe later introduced it. In 2008, the state of British Columbia in Canada introduced carbon tax.

During the last two decades ending 31 December 2010, there has been much debate about global warming and climate change. Subsequently, it was realised that placing a price tag on 'carbon emission' is not only essential but a necessity.

Emission Trading Schemes

In the European Union, Phase I of Emission Trading Schemes commenced in 2005 and closed by the end of 2007. Phase 1 of the European Union ETS that commenced in January 2005 applied to some 12,000 installations for the monitoring and control of carbon emissions only and the issuing of free permits was a significant factor. This phase covered production and processing of ferrous metals, the mineral industry as well as the pulp, paper and board activities. It is succeeded by the five–year Phase II covering January 1, 2008 to December 31, 2012 (Kasipillai & Lee, 2009).

Emission reduction credits are derived from allowance based (cap and trade) and project based transactions. In a cap and trade scheme, a government or an authority sets a cap, that is, the maximum allowable aggregate of total quantity of emissions. Subsequently, it sells or allocates the corresponding number of units through a complex allocation process to emitting entities, with the mandate that they subsequently manage their overall emissions against these initial allocations. Companies emitting more than their allotted amounts must now either purchase additional allowances through the Emission Trading Scheme, or pay a fine, whilst companies emitting less may sell their excessive allowances. This provides companies with a direct financial incentive to curtail emission levels (Mackenzie, 2009).

Malaysia's Green Initiatives

The Malaysian government provides 'green tax' incentives to curb environmental abuse. Some of these 'green initiatives include:

(a) Tax exemptions on income from trading in certified emission reduction certificates;
(b) Enhanced pioneer status or investment tax allowances for companies that generate energy from renewable sources and expenditure on energy conservation;
(c) Indirect tax exemptions/reductions for high efficiency motors/insulation materials and hybrid cars;
(d) Buses using natural gases can be tax depreciated over a period of two years (accelerated capital allowances); and
(e) The 2010 Budget provided tax incentives to promote the construction of green buildings whereby a 100 percent tax deduction can be claimed on additional expenses incurred for Green Building Index (GBI) certification. A green building is one that is built with the intention of ensuring efficient use of resources. The GBI certificate is developed and issued by the Board of Architects and the Association of Consulting Engineers Malaysia to promote sustainability in the built environment. A person is exempted from the payment of income tax on the statutory income for a year of assessment equal to the amount of qualifying expenditure incurred for the purpose of obtaining a green building index certificate. Furthermore, the amount of cost which constitutes part of the cost of a purchased property which has been issued with a green building index certificate by the Board of Architects Malaysia is exempted from stamp duty on the instrument of transfer.

Numerous countries have commenced implementing Green Taxation while others have it in the pipeline (see Table 2).

Table 2: Green Taxes

	Country	Nature of Item Tax
(i)	United States	Pigovian taxes on cigarettes, alcohol, and other goods that are frowned upon by society.
(ii)	Norway	Eco–tax on sulphur dioxide in 1971.
(iii)	Sweden	Introduced carbon tax in 1991 to spur innovation of industries.
(iv)	Canada	Waste permit fees introduced in 1992 on large emitters based on their permitted waste.
(v)	Demark	Introduced carbon tax in 1993
(vi)	Netherlands	Introduced fuel tax in 1998
(vii)	Japan	Voluntary Emission Trading Scheme – Launched in 2005 covering CO2 combustion from participating companies.
(viii)	South Korea	Looking at implementing carbon emission trading in late 2009 (2008, Bernama.com).

Conclusion

Malaysia's readiness to lower carbon emissions from 187 million tonnes in 2005 to 74.8 million tonnes in 2020, a 40 percent reduction, highlights the nation's earnestness in combating the climate change issue which is closely linked with palm oil, rubber plantations and timber related issues. Malaysia's voluntary pledge will soften critics who have adversely commented on how Malaysia has handled its commodity sector, particularly palm oil and timber logging particularly in East Malaysia.

One other area of concern is the ability by Malaysian firms to convert 'waste' to productive use. More research is needed to promote greater use of 'waste' in line with the government's new policy on "creation of wealth from waste". Since Malaysia is a major producer of commodity products, it has to ensure green practices are continually promoted by the government. One way of promoting it is by way of providing more generous green tax incentives. TG

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Thin Capitalisation – Can it be ignored?

By SM Thanneermalai

Introduction

Thin Capitalisation legislation was incorporated into the Malaysian income tax legislation (Income Tax Act 1967 (ITA)) with effect from 1 January 2009 by way of a new s 140A (4). This formed part of the broader provision in the new s 140A dealing with the application of the arm's-length standard to transactions relating to property and services. This article will not look at the implications of the latter but will be confined to the discussions and views to the matters pertaining to Thin Capitalisation.

The relevant parts of s 140A are reproduced below for ease of reference;

> (4) Where the Director General, having regard to the circumstances of the case, is of the opinion that in the basis period for a year of assessment the value or aggregate of all financial assistance granted by a person to an associated person who is a resident, is excessive in relation to the fixed capital of such person, any interest, finance charge, other consideration payable for or losses suffered in respect of the financial assistance shall, to the extent to which it relates to the amount which is excessive, be disallowed as a deduction for the purposes of this Act.
>
> (5) The transactions or the financial assistance referred to in subsection (2) or (4) respectively, shall be construed as a transaction or financial assistance between—
>
> (a) persons one of whom has control over the other;
>
> (b) individuals who are relatives of each other; or
>
> (c) persons both of whom are controlled by some other person.
>
> (6) In this section, "relative" and "transaction" have the same meanings assigned to them under subsection 140(8).

Current status

It is confirmed that the effective date of implementation of the Thin Capitalisation legislation has been deferred until further notice and the rules thereon will be issued separately at a later date when the legislation becomes effective again. One should note that this has been effected through correspondence to the relevant professional bodies such as the Chartered Institute of Taxation (CTIM). There is no formal notification to the general public and taxpayers of such deferral via the legislation or a gazette order which would have been the preferred route. Strictly speaking as it stands today, Thin Capitalisation legislation is still applicable as there is no formal suspension via primary or secondary legislation (gazette order). The extreme consequence of the official reinstatement of the Thin Capitalisation legislation would be a retrospective application from the effective date of the new legislation, ie 1 January 2009. However, based on past experience and dealings with the Authorities, this is highly unlikely as any such action will be viewed negatively by the local and international business community.

Since Thin Capitalisation is deferred...Why is it still a concern to taxpayers?

There are a number of pressing reasons why any taxpayer involved in inter-company financing agreements need to be concerned despite the deferral of the Thin Capitalisation:

1. Inter-company financing is commonly found within group enterprises and until now the issue of Thin Capitalisation has not been on the radar screen of both local and foreign enterprises in Malaysia as this has not been a subject raised by the tax authorities in the past. Furthermore, there was no specific legislation, rules or guidelines dealing with Thin Capitalisation. However now that it is part of the Malaysian Tax legislation, albeit temporarily deferred, this would suggest an effective date which may not be too far away.

2. If the reinstatement occurs in the near future, the question one needs to address is whether companies will be able to reorganise their existing financing arrangements within short time frame to meet any potential safe harbour rules or comply with the arm's-

length standard to avoid any additional tax liabilities which may arise from failing to meet the tests or conditions imposed by the thin capitalisation legislation and rules.

3. In many cases, this may not possible as the inter–company financing may be tied to other financing or other transactions with third parties which cannot be unwound within a short time frame. Therefore any enterprise currently with inter–company financing ought to be aware at least broadly of the implications of the Thin capitalisation legislation affecting them and start their preparation to minimise the possible adverse impact by reorganising its group financing arrangements based on certain international norms adopted by countries which have implemented thin capitalisation laws and rules. The key features of thin capitalisation rules in selected countries are outlined in the following sections of this article.

4. The Malaysian authorities are currently studying ways to implement the legislation and rules in the best manner possible and certainly the hope is that they will pick the most practical and cost effective approach. Based on past experience, the authorities are likely to be looking for guidance from countries where such legislation and rules have been implemented and some of the countries where guidance could be found would include European countries such as the United Kingdom, France, Germany and Italy. Closer to home, in the Asia Pacific region, the list is currently confined to Japan, Korea, China and Australia. In view of such actions by the authorities, it is only a matter of time when the Thin Capitalisation legislation is reinstated and the rules thereon issued.

5. The purpose of such laws is to counter any abusive financing structures which might lead to the transfer of profits by multinationals to a foreign jurisdiction or to another domestic entity which might be taxed at a lower rate or exempt from tax. The aim is to curb any loss of tax revenue to Malaysia and to protect the country's tax base. Since the Government is currently looking at ways to reduce the budget deficit, Thin Capitalisation appears to fit the Government's objective of preventing tax leakage especially to foreign jurisdictions and to enhance the revenue base.

6. Although the Thin Capitalisation legislation could become effective at a future date, the financing costs relating to inter–company financing that is already in place today could be disallowed in the tax years following the implementation of Thin Capitalisation if such group financing is seen to be excessive under the thin capitalisation regime as such financing is likely to carry on into the future.

7. Unless the legislation (and related rules) whenever it is reinstated takes the above factors into account and attempt to only bring into the tax net, the financing transactions that are initiated in the post reinstatement period, the taxpayers could face additional tax liabilities and possible penalties thereon when they are audited in the future.

What is Thin Capitalisation?

Thin Capitalisation in simple terms refers to situations where the level of debt is excessive in relation to equity. It is intended to prevent enterprises from extracting profits through the use of abusive financing structures. Profits referred here could be extracted by means of charging interest on such excessive financing which generally would be tax deductible. However, if the same financing had been replaced with equity, any profits distributed via dividends would represent a distribution of post tax profits which will not be tax deductible.

Discussion on thin capitalisation will not be confined to interest cost but is likely to be extended in most cases to all forms of financing costs such as guarantee fees, factoring fees, leasing charges, discounts on bills, bond discounts, interest on back to back loans from related parties involving third parties, loans from third parties with collateral provided by related parties etc.

On the capital or equity side of the equation here, it could include, depending on how the thin capitalisation rules are introduced, all forms of equity and hybrid equity (eg participating loans where interest payable is linked to the profits of the borrowing entity or convertible loans which at some stage could be converted to equity)

The objective of the thin capitalisation laws and rules internationally wherever it has been introduced has been to ensure that a group company, especially in a multinational group, does not allocate excessive debt to the local operations where such high gearing arrangements generally would allow the entity to benefit from the deduction of interest. The general assumption is entities with high gearing take advantage of the favourable tax treatment on interest ie a tax deduction versus a dividend which is a non deductible profit distribution. However, there may be exceptions to the norm where there may be instances it is cheaper to raise debt financing rather than equity or where a company has just begun its operations and there may have difficulty in raising equity.

It should also be noted that generally thin capitalisation rules in many countries have not only been targeted to curb excessive financing debt to the local entities but also to prevent excessive payments of interest where the interest charged is higher than the arm's–length rate. Here the issue is one of preventing the transfer of profits through the charging of excessive interest.

There have been many instances where thin capitalisation has been used by enterprises to transfer profits to foreign jurisdictions or to another domestic entity which might be taxed at a lower rate or exempt from tax.

This may be deemed to be perfectly legitimate since there were no provisions in the Malaysian tax laws to counteract such payments and therefore it is the legitimate right of the investor to use this avenue to capitalise its enterprises in a manner it see best fits its purpose. This is not tax avoidance or tax evasion but merely organising one's tax affairs in a most tax beneficial manner.

A simple example to illustrate this point would be where a foreign enterprise thinly capitalises its Malaysian subsidiary with a significant shareholder loan and a small equity capital. Interest paid to the parent would be subject to withholding tax at 15% and if the recipient is located in a tax haven or a jurisdiction with a lower corporate tax than Malaysia, the foreign enterprise would have transferred its profits at a lower rate of tax to extent of the interest paid.

Overview of the key features in selected countries
China
In China, there are safe harbour rules of 5:1 for financial institutions and 2:1 for non–financial institutions. Interest expenses pertaining to the excess of the safe harbour ratio is not tax deductible unless specific conditions are met, ie documentary evidence to support that the inter–company financing arrangements comply with the arm's–length principle or if the debt is sourced from domestic related party and the effective tax rate of the borrowing enterprise is not higher than that of the domestic lending enterprise.

United Kingdom
There are no prescribed safe harbour rules in the United Kingdom. Thin capitalisation rules are based on the arm's–length principle. Based on the non binding guidance on the generally accepted ratios, the debt to equity ratio of 1:1 and interest coverage ratio of 3:1 (interest compared to earnings before interest and tax) are acceptable. The ratios to be judged by reference to the arm's–length standard for the borrower, eg lending covenants agreed with third party lenders.

Thin capitalisation applies to both domestic and foreign borrowings and third party debt guaranteed by a related entity. Other than that, third party debt is generally excluded from thin capitalisation restriction. However, especially in acquisitions, thin capitalisation is typically assessed looking at the totality of the debt, including third party debt, but the disallowances will fall on the more junior intra–group or connected party debt.

There is no de minimis threshold applicable for thin capitalisation. As to the hierarchy of application of thin capitalisation, it generally applies after the application of the specific tax provisions.

Germany
There are new interest capping rules that have replaced thin capitalisation rules in Germany with effect from financial year 2008. The interest capping rules only applies to German companies being part of a German or international consolidated group (eg MNCs). It applies to all interest expenses (ie interest expenses on domestic and foreign loans, inter–company and third party loans). Arm's–length interest expenses are deductible up to the amount of the company's interest income. Any exceeding interest expense (net interest expense) is only tax deductible up to a maximum of 30% of the taxable income before interest, taxes, depreciation and amortization (taxable EBITDA). Unused taxable EBITDA can be carried forward over a period of five years.

Japan
Japan has a safe harbour related party debt to equity ratio of 3:1. However, if a comparable company can be found that has a higher debt to equity ratio, a deduction on related party debt up to the debt to equity ratio of the comparable company may be claimed if support for this is provided at the time of filing of the tax return. For the purposes of calculating the debt to equity ratio, total interest bearing debt and total net equity of the Japanese company is considered.

Particular points to consider are that third party debt that is guaranteed by a related party should be included in the debt to equity ratio for thin capitalisation purposes and interest on such debt will be disallowed to the extent that this is over the appropriate related party debt to equity ratio. There is no de minimis threshold in Japan.
Australia
The safe harbour rule is present and it is based on 75% of adjusted net assets. This applies to both inward and outwards entities. Both third party as well as related party debt is taken into account for thin capitalisation purposes. Entities that are excluded from thin capitalisation are those which do not claim interest deductions or where the total interest deductions do not exceed A$250,000. Thin capitalisation also applies to consolidated groups.

The arm's–length principle within the thin capitalisation rules states that despite meeting thin capitalisation safe harbour limit, interest can be disallowed if the arm's–length principle is breached. The carry forward of disallowed interest is not allowed. External debt and domestic debt whether from third party or related party is not excluded. Thin capitalisation will only operate after the application of the other provisions relevant to deductibility of interest.

Key issues of concern to taxpayers and suggestions on the way forward

1. Will Thin Capitalisation operate in tandem or precede or will be applied only after the other income tax provisions relating to deductibility of interest are applied?
   Suggestion: It will be only equitable and fair to the taxpayers to apply the other provisions in the Income Tax Act such Sections 33(1), 33(2) etc before applying the Thin Capitalisation rules to restrict the interest. Australia and United Kingdom has adopted this approach to avoid any double taxation of the same income.

2. Will the same interest expense be subjected to the overlapping provisions in the Income Tax Act?
   Suggestion: It should not be the case as Malaysia follows the universal principle that the same income should not be taxed twice especially under the same Income Tax Act.

3. What happens to the loan structures in place prior to the introduction of Thin Capitalisation?
   Suggestion: Since these loan structures in many cases cannot be unwound within a short period and may even take many years to unwind as the cost of unwinding such financing may be very expensive involving prepayment penalties or advance payments of future payments and in some extreme cases may even be impossible to do so due to the effect it might have on the rest of the group, the best approach would be to

apply Thin Capitalisation rules to financing raised after the reinstatement of Thin Capitalisation. Alternatively, a time frame of say five years from the date of implementation could be given to companies with existing financing structures to comply before the Thin Capitalisation restrictions are applied on existing inter–company financing arrangements.

4. Should Thin Capitalisation apply only to related party debt and all external debt be excluded?
Suggestion: Yes, because Thin Capitalisation is only intended to prevent the leakage of tax due to the financing not undertaken at arm's–length ie not only the interest rates but also the quantum and the terms of the financing arrangement.

5. In some countries Thin Capitalisation is restricted to foreign financial assistance. Should a similar approach be adopted in Malaysia?
Suggestion: Yes it should be the case as the key concern here is the tax leakage from Malaysia to a foreign tax jurisdiction although there may be situations where domestic related party financing arrangement may have been organised solely objective of gaining a tax advantage without any commercial substance.

6. Will definitions of the various terms or words mentioned in the legislation such as fixed capital, financing assistance, associated person and other terms and words mentioned in the rules be clearly defined?
Suggestion: Yes it should be done otherwise the taxpayers will not know what to do and it should not be left to develop over time. If needed, guidance should be given by means of clarification statements from the Tax Authorities to assist taxpayers with the compliance

7. Is there a need for Safe Harbour rules?
Suggestion: Yes and different debt equity ratios should be prescribed for the financial sector and for the non financial sector but flexibility should be accorded to taxpayers to explain their rationale for doing so in case they exceed the safe harbour ratios.

8. Is there a need to prepare Thin Capitalisation documentation?
Suggestion: If any taxpayers fall within the Safe Harbour rules then the Thin Capitalisation documentation should not required. Thin Capitalisation documentation should only be mandatory for enterprises that exceed such ratios.

9. Is there a need to have any de minimis rule?
Suggestion: Yes to minimise not only the work load of the Tax Authorities and to avoid burdening the small businesses from additional cost of tax compliance. Most countries tend to have such rules.

10. Is guidance needed on the treatment of hybrid financial instruments?
Suggestion: As more and more of these financial instruments are introduced guidance needs to be given as they develop over time by the authorities and it will be unreasonable for the taxpayers to expect the authorities to anticipate and deal with such matters upfront and furthermore each instrument can have different characteristics. It is best a channel be made available by the tax authorities for the taxpayers to obtain clarification before they use such instruments in their financing arrangements.

11. Should penalties be applied on Thin Capitalisation adjustments found during tax audits?
Suggestion: Penalties should only be applied where a person has set out knowingly and with full understanding of the knowledge of the laws and rules thereon to understate or provide incorrect information in his or her annual tax return. In a circumstances where an issue is subject to different interpretation due to the nature of the subject matter such as Thin Capitalisation which will take both the taxpayers and the tax authorities time to understand the intricacies of this complex subject, it is only fair that the tax authorities apply penalties as a matter of exception rather than as a routine add on to any tax adjustment. Unless clear instructions of this nature is given to the tax officials on the ground level who will conduct the tax audits, penalties could routinely be imposed and such actions will be viewed by the business communities both locally and overseas negatively and will adversely affect Malaysia's international image.

Conclusion

Thin Capitalisation is likely to be reinstated in due course and therefore it is in the interest of the taxpayers to reorganise their financing structures in accordance with the international norms and practices adopted by other countries.

It is also imperative for the authorities to recognise that this is a subject matter that will have an impact on existing financing structures and therefore time has to be given to the taxpayers to transition themselves into complying with Thin Capitalisation. Sudden introduction without any warning would not be welcomed by the business community.

It is also necessary to introduce Thin Capitalisation since many countries we trade with such as the European countries, The United States of America ,China, Japan, Korea, Australia etc already have comprehensive Thin Capitalisation laws and rules, any movement of profits offshore via Thin Capitalisation would be detrimental to Malaysia. In addition, the introduction of Thin Capitalisation also fits in with the Government's need to prevent tax revenue leakages thus helping it to reduce the budget deficit. TG

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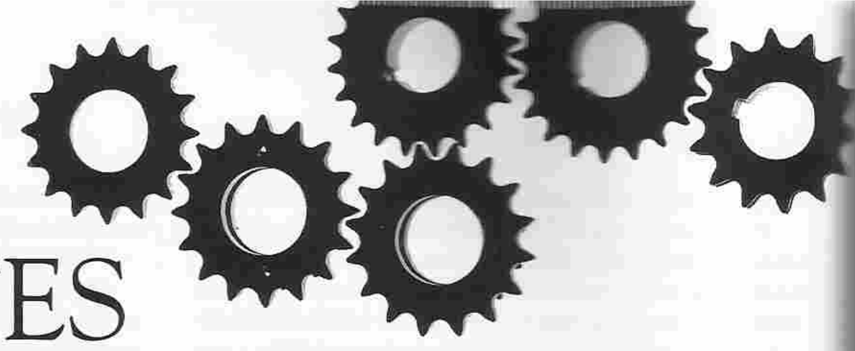


TECHNICAL UPDATES

The Technical Updates published here are summarised from the selected Government Gazettes published between 12 November 2009 and 8 February 2010.

Finance Act 2010

The Finance Act 2010 was gazetted on 14 January 2010 to give effect to some of the proposals announced during the 2010 Budget.

INCOME TAX

- **Income Tax (Deduction for Contribution to Retirement Fund) Rules 2010 (PU (A) 31/2010)**

The Rules allow a resident company to claim tax deduction for contribution made to a retirement fund established under the Retirement Fund Act 2007 in relation to a member of the public service who has been conferred with pensionable status and seconded to serve in the company.

The tax deduction has been capped at 19% of the last drawn monthly salary of the member of the public service before his/her employment in the company.

The Rules are deemed to be effective from the year of assessment 2003.

- **Income Tax (Renovation or Refurbishment Expenditure) Rules 2010 (PU(A) 20/2010)**

The Rules set out the types of renovation or refurbishment expenditure incurred during the period from 10 March 2009 to 31 December 2010 that would qualify for Accelerated Renovation or Refurbishment Allowances (ARA). The ARA is to be claimed within two years of assessment, ie 50% for each year of assessment. Further, the rules specifically provide that designer fees, professional fees and the purchase of antiques will not qualify for the ARA.

The Rules have effect for the years of assessment 2009, 2010 and 2011.

- **Income Tax (Deduction from Remuneration) (Amendment) Rules 2009 (PU (A) 485/2009)**

The Rules were gazetted to substitute the Schedule in the Income Tax (Deduction from Remuneration) Rules 1994 (PU (A) 507/1994) in light of the recent reduction in tax rates for individuals. The new Schedule serves as a guide for employers to ascertain the amount of Schedular Tax Deduction (STD) to be deducted from the employees' remuneration.

The Rules are effective from 1 January 2010.

- **Income Tax (Deduction for Investment in an Approved Forest Plantation Project) Rules 2009 (PU (A) 475/2009)**

The Rules provide that a resident investor company which invests (either in the form of cash or paid–up ordinary share capital) in an investee company which is resident in Malaysia and undertakes approved forest plantation project shall be allowed a tax deduction equivalent to the amount invested, subject to the following conditions:–

i) the investee company is exempted under the Income Tax (Exemption) (No.11) Order 2009;
ii) the investor company owns 100% (prior to 11 September 2004) or 70% (11 September 2004 onwards) of the paid–up ordinary share capital of the investee company;
iii) the investment must be made for a period and up to the amount as approved by the Minister in charge of forest plantation project;
iv) the investment should be for the sole purpose of financing the forest plantation project; and
v) the investment in the form of paid–up ordinary share capital should not be disposed of within five years from the date of the last investment, failing which the sales consideration received (not exceeding the tax deduction allowed in prior years in relation to the investment) will be treated as taxable income in the year of receipt.

The tax deduction under these Rules will cease to apply to the investor company in the year of assessment upon which the investee company has its first statutory income.

The Rules are deemed to be effective from 21 May 2003.

- **Income Tax (Deduction for Promotion of Malaysia International Islamic Financial Centre) Rules 2009 (PU (A) 416/2009)**

The Rules allow a resident person to claim a double deduction on expenditure incurred in promoting Malaysia as an international Islamic financial centre. The Rules specify the types of expenditure that would qualify for a double deduction.

The Rules are effective from years of assessment 2011 to 2015.

- **Income Tax (Deduction for Investment in an Approved Consolidation of Management of Smallholding and Idle Land Project) Rules 2009 (PU (A) 417/2009)**

Pursuant to the Rules, a resident individual, partnership, co–operative society or company that invests in an approved consolidation of management of smallholding and idle land project is allowed to claim a tax deduction equivalent to the amount of investment made. The application for approval must be made on or after 21 October 2002 but not later than 31 December 2011.

"Investment" refers to an investment in the form of cash or holding of shares solely for the purpose of the approved consolidation project.

The Rules are deemed to have effect from the year of assessment 2002.

- **Income Tax (Deduction for Expenditure on Registration of Patent and Trade Mark) Rules 2009 (PU (A) 418/2009)**

The Rules allow a qualifying person to claim a tax deduction on qualifying expenditure incurred on the registration of trade mark or patent in Malaysia. The Rules define the terms "qualifying person" and "qualifying expenditure".

The Rules are effective from the years of assessment 2010 to 2014.

- **Income Tax (Deduction for Cost of Preparation of Corporate Knowledge–Based Master Plan) Rules 2009 (PU (A) 419/2009)**

The Rules allow a tax deduction for the cost incurred in the preparation of corporate knowledge–based master plan as verified by the Malaysian Industrial Development Authority (MIDA). The incentive is for a Malaysian resident company which has been approved by the Minister of Finance to participate in a strategic knowledge–intensive activity and where the application for participation is made to the Minister of Finance on or after 21 September 2002 but not later than 31 December 2011. The corporate knowledge–based master plan must be implemented within two years from the date of verification by MIDA.

The Rules are deemed to have effective from the year of assessment 2003.

- **Income Tax (Deduction for Expenditure on Issuance of Islamic Securities) Rules 2009 (PU (A) 420/2009)**

The Rules allow a resident company to claim a tax deduction on the expenditure incurred on the issuance of Islamic securities approved by the Securities Commission or Labuan Offshore Financial Services Authority (LOFSA) pursuant to the principle of *mudharabah, musyarakah, ijarah or istisna'* or any other Syariah principle approved by the Minister of Finance.

The Rules are effective from the years of assessment 2011 to 2015 in respect of Islamic securities approved by Securities Commission whilst the Islamic securities approved by LOFSA are effective from the years of assessment 2010 to 2015.

- **Income Tax (Exemption) (No. 5) Order 2009 (PU (A) 411/2009)**
  Tax exemption on income derived from overseas branch/investee company of an insurer/takaful operator

The Order was recently gazetted to give effect to 2010 Budget proposal. The Order exempts a resident insurer licensed under the Insurance Act 1996 and a takaful operator registered under the Takaful Act 1984 from the payment of income tax for 5 consecutive years of assessment (exempt period) in respect of statutory income derived from:–

i) a branch; or
ii) an investee company where at least 20% of the issued share capital is directly owned by the insurer or takaful operator

carrying on insurance or takaful business outside Malaysia.

The commencement of the 5–year exempt period can be determined by the insurer or takaful operator but should not be later than the third year of assessment the branch or investee company commences insurance or takaful business.

This exemption is subject to the following conditions:–

i) an application for such exemption is made by the insurer/takaful operator to Minister of Finance;
ii) the application for approval to carry out insurance or takaful business by the overseas branch or investee company is received by the Central Bank of Malaysia on or after 24 October 2009 but not later than 31 December 2015; and
iii) the overseas branch or investee company must commence insurance or takaful business within two years from the date of approval issued by the Central Bank of Malaysia.

- **Income Tax (Exemption) (No. 6) Order 2009 (PU (A) 412/2009)**
  Tax exemption on value of increased services for healthcare service providers

This Order was recently gazetted to give effect to 2010 Budget proposal. Under the Order, a resident person is exempt from tax on income derived from the provision of healthcare services to foreign clients. The income exempted is equivalent to 100% of the value of increased services (ie the difference of the value of the healthcare services provided in Malaysia in the current year of assessment and immediate preceding year of assessment) but limited to 70% of the statutory income. Any unutilised value of increased services can be carried forward to future years until it is fully utilised.

The term "foreign client" is defined as a company/partnership/organisation/co–operative society which is incorporated or registered outside Malaysia or a non–Malaysian citizen individual but excludes:

(i) a non–Malaysian citizen who participates in the Malaysia My Second Home programme and his dependents;
(ii) a non–Malaysian citizen holding a Malaysian student pass and his dependents;
(iii) a non–Malaysian citizen holding a Malaysian work permit and his dependents; and

(iv) a non–resident Malaysian citizen living abroad and his dependents.

However, this incentive is not applicable to taxpayers enjoying certain other tax incentives.

The Order is effective from the years of assessment 2010 to 2014.

- **Income Tax (Exemption) (No. 7) Order 2009 (PU (A) 413/2009)**
  Tax exemption on income derived from overseas branch/investee company of a banking institution

Pursuant to this Order, a resident bank licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983 is exempt from tax in respect of statutory income derived from an overseas branch or investee company (in which it directly owns at least 20% of the issued share capital) for five consecutive years of assessment ("exempt period"). The overseas branch/investee company must carry on or will carry on banking / Islamic banking.

The commencement of the 5–year exempt period will be determined by the company but it must not be later than the third year of assessment in which the overseas branch/investee company commences its banking/Islamic banking business.

The exemption will be available if the application for such exemption is received by the Central Bank between 24 October 2009 and 31 December 2015 (both days inclusive), and the overseas branch / investee company commences the banking/Islamic banking business within two years from the date of approval issued by the Central Bank

- **Income Tax (Exemption) (No. 8) Order 2009 (PU (A) 414/2009)**
  Tax incentive for obtaining a Green Building Index Certificate

Pursuant to this Order a resident person who has obtained a green building index (GBI) certificate issued by the Board of Architects Malaysia from 24 October 2009 until 31 December 2014 is exempt from income tax on statutory income which is equal to the amount of qualifying expenditure incurred by that person for the purpose of obtaining a GBI certificate. Any unutilised expenditure can be carried forward to future years until it is fully utilised.

"Qualifying expenditure" refers to an additional expenditure incurred in relation to the construction of a building, alteration, renovation, extension or improvement of an existing building.

This incentive does not apply to a person who has been granted an investment tax allowance or pioneer status under the Promotion of Investments Act 1986, in respect of qualifying expenditure incurred on activity for the generation of renewable energy or for conservation of energy.

This Order is effective from the year of assessment 2009.

- **Income Tax (Exemption) (No. 9) Order 2009 (PU (A) 415/2009)**
  Tax incentive for consolidation of management of smallholding and idle land projects

Pursuant to this Order, a resident person is exempt from tax in respect of statutory income derived from a consolidation of management of smallholding and idle land project

The exemption is for a period of five consecutive years of assessment commencing from the basis period for a year of assessment in which the project commences. The exemption is subject to the following conditions:–

(i) an application for approval to carry out the project must be made by the resident person to the Minister in charge of the project on or after 21 September 2002 but not later than 31 December 2011 and be approved by the said Minister; and
(ii) an application for exemption must be made to the Minister of Finance.

The Order is deemed to have effect from the year of assessment 2003.

- **Income Tax (Exemption) (No. 10) Order 2009 (PU (A) 473/2009)**
  Tax exemption for a new forest plantation project or an expansion forest plantation project

Subject to certain exclusions, the Order exempts a resident company from the payment of income tax in relation to:–

i) a new forest plantation project for 10 consecutive years of assessment in respect of the statutory income from that new forest plantation project, commencing from the first year of assessment in which the company derives statutory income; or
ii) an expansion forest plantation project for 5 consecutive years of assessment in respect of the statutory income from its existing approved project and expansion project, commencing from the first year of assessment in which the company derives statutory income.

In order to qualify for this exemption, an application has to be made to the Minister in charge of the project on or after 21 May 2003 but not later than 31 December 2011.

The Order is effective from 21 May 2003.

- **Income Tax (Exemption) (No. 11) Order 2009 (P.U.(A) 474/2009)**
  Tax exemption for forest plantation project undertaken by a company that has surrendered its adjusted loss to related companies

Subject to certain exclusions, the Order provides that a resident company will qualify for an income tax exemption under this Order in respect of statutory income from a forest plantation project notwithstanding that the company has surrendered its adjusted loss (in full or in part) in respect of a forest plantation project to one or more of its related companies resident in Malaysia prior to the exempt years of assessment. The exemption is for a period of 10 consecutive years of assessment, commencing from the first year of assessment in which the company derived statutory income from the project.

In order to qualify for the exemption, an application has to be made to the Minister in charge of the project on or after 21 May 2003 but not later than 31 December 2011.

The Order is effective from 21 May 2003.

REAL PROPERTY GAINS TAX

- **Real Property Gains Tax (Exemption) (No.2) Order 2009 (PU(A) 486/2009)**

The Order exempts any person from the payment of Real Property Gains Tax (RPGT) on the chargeable gain in respect of any disposal of a chargeable asset on or after 1 January 2010 where the disposal is made after five years from the date of acquisition of that chargeable asset.

Where the disposal of a chargeable asset is made within five years from the date of acquisition of the chargeable asset, the Order sets out a formula to exempt a portion of the chargeable gain such that the gain is taxed at an effective rate of 5%. The formula is the same as that provided in the Real Property Gains Tax Act (Exemption) Order 2009 (PU (A) 376/2009), which is now revoked.

The Order is effective from 1 January 2010.

STAMP DUTY

- **Stamp Duty (Remission)(No.2) Order 2009 (PU (A) 409/2009)**
  Stamp duty remission on principal / primary instrument of Islamic financing

The Order was recently gazetted to give effect to 2010 Budget proposal to extend the period to 31 December 2015 in respect of the 20% stamp duty remission on the principal or primary instrument of financing made in accordance with Syariah principles. The remission is subject to the condition that the instrument is approved by the Syariah Advisory Council of either Bank Negara or the Securities Commission.

The Order is effective from 1 January 2010 until 31 December 2015.

- **Stamp Duty (Exemption) Order 2009 (PU (A) 410/2009)**
  Stamp duty exemption for purchase of property with Green Building Index Certificate

The Order provides for stamp duty exemption on an instrument of transfer of property which has been issued a Green Building Index ("GBI") certificate by the Board of Architect Malaysia. However, the exemption is only applicable to additional costs incurred for the purpose of obtaining a GBI certificate such as cost to design and construct the property and other costs as certified by the Board of Architect Malaysia.

The exemption is only applicable to sale and purchase agreements executed between the first owner of the property with a property developer on or after 24 October 2009 but not later than 31 December 2014.

SERVICE TAX

- **Service Tax (Amendment) (No. 2) Regulations 2009 (PU(A) 469/2009)**
  Service tax on charge cards and credit cards

The regulations made several amendments to the Service Tax Regulations 1975 (PU (A) 52/1975) (the principal regulations) to give effect to the 2010 Budget proposal on the imposition of service tax on credit cards and charge cards effective from 1 January 2010.

- **Service Tax (Rate of Tax) Order 2009 (PU(A) 468/2009)**
  Service tax rate on charge cards and credit cards

The Order stipulates that service tax shall be levied on taxable service relating to credit card or charge card services at RM50.00 for each principal credit card / charge card and RM25.00 for each supplementary card on the date of issuance or renewal and every 12 months thereafter or part thereof after the issuance or renewal of the card.

The Order came into operation on 1 January 2010.

LABUAN

- **Labuan Offshore Financial Services Authority (Annual Fee for Management and Operation Office of Labuan Holding Company in Kuala Lumpur) Order 2009 (PU (A) 481/2009)**

Pursuant to this Order, a Labuan holding company (ie a Labuan company incorporated under the Offshore Companies Act 1990 that carries on permitted activities as specified in the Guideline on Co–location of Labuan Holding Company issued by Labuan Offshore Financial Services Authority (LOFSA) on 29 May 2009) which has been approved by LOFSA to set up a management and operation office in Kuala Lumpur is required to pay an annual fee of RM7,000 to LOFSA on or before 15 January of each year.

- **Offshore Companies (Exemption) Order 2009 (PU (A) 482/2009)**

The Order permits a Labuan holding company to carry on permitted activities as specified in the Guideline on Co–location of Labuan Holding Company issued by LOFSA, through its management and operation office in Kuala Lumpur.

Case Commentaries

Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri[1]

In this article, Cynthia Lain considers the recent high court decision in **Syarikat Kion Hoong Cooking Mills Sdn Bhd V Ketua Pengarah Hasil Dalam Negeri** in relation to reinvestment allowance claims under Sch 7A of the Income Tax Act 1967.

The recent High Court decision in **Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd v KPHDN** has brought into focus the controversial area of reinvestment allowance claims (RA claims) under Sch 7A of the Income Tax Act 1967 (Sch 7A). The controversy in this area stems from the Inland Revenue Board's (Revenue) restrictive interpretation of the provisions of Sch 7A, in particular paragraphs 1 and 7 thereof.

Facts of the case

The taxpayer is a company incorporated in Malaysia with its principal activities consisting of manufacture and marketing of cooking oil, distribution of animal and poultry feed and rubber milling.

The taxpayer was granted a pioneer certificate under the Promotion of Investment Act 1986 (PIA) in respect of "shortening and margarine (the promoted products) on 6 November 2000 for a period of five years. Due to the grant of pioneer status to the taxpayer, 85% of the statutory income in respect of the taxpayer's promoted products was exempted from income tax for Year of Assessment (YA) 2000 Current Year Basis.

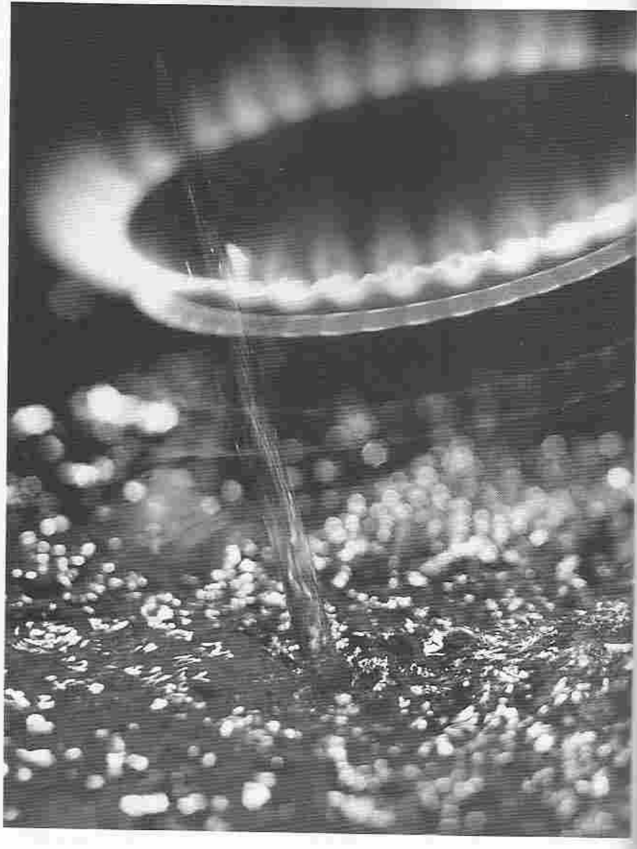
The taxpayer also made RA claims under para 1 of Sch 7A on the qualifying capital expenditure incurred on its non–promoted products.

However, the taxpayer's RA claims were disallowed by the Revenue on the basis that a company that manufactures both promoted products as well as non–promoted products and has been granted a pioneer certificate under the PIA is precluded by para 7(a)(ii) of Sch 7A (para 7(a)(ii)) from claiming reinvestment allowance (RA) on qualifying capital expenditure incurred on another non–promoted product.

The question for the determination of the Special Commissioners of Income Tax (SCIT) was whether para 7(a)(ii) precluded a company from being entitled to RA claims in relation to its non–promoted products.

Paragraph 7 of Sch 7A

Paragraph 7 of Sch 7A contains certain restrictions on RA claims. Following numerous amendments, para 7 at the material time provides:



"7. This Schedule shall not apply to a company–
(a) for the period during which the company–

(i) has been granted pioneer status under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and which is applying or intends to apply for the grant of a pioneer certificate; or
(ii) has been granted pioneer certificate under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and whose tax relief period has not ended or ceased;"
xxx"

The foregoing provision of para 7 of Sch 7A was introduced vide Finance Act 328 which was gazetted on 31 December 1986 and took effect from YA 1987.

The Decision of the Special Commissioners of Income Tax

The SCIT dismissed the taxpayer's appeal on the basis that a company granted pioneer status for any product or activity, was excluded from claiming RA under Sch 7A[2]. The SCIT considered that the exemption provision was in relation to the status of the company and not to the promoted activities or products[3].

1 [TA.14-01-2005-I]
2 Syarikat KHCOM Sdn Bhd v KPHDN (2006) MSTC 3,626 at page 3630
3 Syarikat KHCOM Sdn Bhd v KPHDN (2006) MSTC 3,626 at page 3626

The Decision of the High Court

The High Court on 19 January 2009 allowed the taxpayer's appeal and set aside the decision of the SCIT on the ground that the SCIT erred in law in their interpretation of para 7(a)(ii) of Sch 7A.

Principles of Statutory Interpretation

The Revenue contended that relief for RA claims was directed at companies and not the status of its products (promoted and non–promoted) on the basis of the words "a company" or "the company" appearing in para 7 of Sch 7A.

The High Court disagreed and highlighted the trite principle of statutory construction that the actual words used in an Act must be considered and the statute must be read as a whole and in the context in which they appear. If the words are plain and unambiguous, they must be applied. The court held that the words "a company" or "the company" do not appear in isolation, as such it would be inappropriate to interpret para 7 by merely reading one or two words in the paragraph and interpreting the rest of the paragraph according to those words.

Are the provisions of para 1 of Sch 7A and para 7(a)(ii) mutually exclusive?

The Revenue contended that para 1 of Sch 7A (the provision granting RA) and para 7(a)(ii) are mutually exclusive provisions, that is para 7 seeks to restrict a company from enjoying both RA and tax deduction at the same time.

The court disagreed and held that the two paragraphs of Sch 7A are not to be read as exclusive of each other. The court observed that the nature and character of the relief or incentive available to the taxpayer under the two paragraphs are very different.

Whilst the RA incentive granted pursuant to para 1 serves to increase or promote productivity through the reinvestment in new or modern efficient plant and machinery by giving RA on capital expenditure, the relief granted pursuant to para 7 of Sch 7A seeks to promote a particular activity, trade or product by granting tax relief on statutory income from a particular promoted activity or product. The court held that the two paragraphs are aimed at promoting two different but mutually beneficial purposes.

Legislative history of Sch 7A

The High Court held that the fact that the two paragraphs of Sch 7A are not mutually exclusive of each other can be gathered from a reading of the legislative history of Sch 7A and its provisions.

A new Sch 7A was inserted[4] after Sch 7 effective for YA 1979 and subsequent YAs. However, in May 1986, that para 7 of Sch 7A was substituted by a new para 7[5] which reads as follows:

"7. This Schedule shall not apply–

> *(a) to a pioneer company under the Promotion of Investments Act 1986;*
> *(b) to a company which has been granted pioneer status under the Promotion of Investments Act 1986;"*

Pursuant to the new paragraph, a company was excluded altogether from claiming RA by the mere fact of the status of the company, that is, it was a pioneer company or had been granted pioneer status.

Subsequently, the position changed again in December 1986 and para 7 was amended and substituted by the present para 7 set out above.[6]

The High Court held that the words "in respect of a promoted activity or promoted product" should be given effect and highlighted the canon of construction that all the words found in a statute should be given meaning. The High Court found no ambiguity in the words "in respect of a promoted activity or promoted product." In light of that, it would be wrong to read into para 7 the words "non–promoted activities or products" which are clearly not there.

Company should not be prejudiced or disadvantaged by Revenue's interpretation

The High Court held that the court should not adopt an interpretation that produces injustice or absurdity and further held that there is no good reason to preclude a company from claiming RA where it engages in the manufacture of both promoted and non–promoted products.

Conclusion

In light of the principle of interpretation that Sch 7A should be read as a whole and resort should be had to the history of the provisions to ascertain the legislative intention behind para 7 of Sch 7A, the High Court held that para 7(a)(ii) does not preclude the taxpayer company from claiming RA for its non–promoted products under para 1 of Sch 7A.

The Director–General of Inland Revenue has lodged an appeal to the Court of Appeal against the decision of the High Court. TG

4 amended vide Section 18 of the Income Tax (Amendment) Act 1979 (Act 451), gazetted on 1st March 1979
5 amended vide Section 9(b) of the Income Tax (Amendment) Act 1986 (Act A643), gazetted on 15th May 1986
6 amended vide Section 20 of Finance Act 1986 (Act 328), gazetted on 31st December 1986

International News

By Rachel Saw

International News

The column only covers selected developments from countries identified by the CTIM and relates to the period 11 November 2009 to 10 February 2010.

China (People's Republic)

Tax reduction for low–profit enterprises

The Ministry of Finance (MoF) and the SAT jointly issued a Notice on 2 December 2009 (Cai Shui [2009] No. 133) announcing a tax reduction for low–profit enterprises in 2010. Enterprises with an annual taxable income less than CNY 30,000 may deduct 50% of their taxable income in arriving at the taxable income for 2010. The tax rate for a *resident* low–profit enterprise is 20%.

Foreign Tax Credit (FTC) regime clarified

The MoF and SAT jointly issued a Notice on 25 December 2009 (Cai Shui [2009] No. 125) clarifying the FTC regime. The Notice retroactively applies from 1 January 2008.

Scope

The Notice applies to resident and non–resident enterprises which are entitled to FTC as provided under Arts 23 and 24 of the Enterprise Income Tax Law (EITL). Taxes imposed by Hong Kong and Macao are considered to be foreign taxes. An enterprise is required to calculate for the current period:

- the amount of the Chinese taxable income and foreign taxable income by using per country method;
- the amount of creditable foreign income taxes per country or region; and
- the amount of FTC per country or region.

Enterprises which are not able to calculate the amounts mentioned above are not entitled to FTC for the current period, and are not allowed to carry over the credit to the following years.

Creditable foreign taxes

Creditable foreign taxes are defined as taxes due and actually paid on foreign sourced income in accordance with foreign tax laws and regulations, but do not include payments such as (i) foreign income taxes paid or imposed incorrectly or unlawfully pursuant to foreign tax laws and regulations; (ii) interest, late payment fees and penalties on the foreign taxes due; (iii) foreign income taxes on foreign income which has been exempted from income tax in accordance with the EITL and its Implementation Rules; and (iv) foreign income taxes which have been deducted from foreign taxable income in accordance with the relevant regulations of the tax authorities or government department.

Determination of foreign taxable income
Broadly, foreign taxable income derived by a foreign (which is not independent of the Chinese resident enterprise) establishment of a resident enterprise is defined as the total foreign income minus reasonable expenditures relating to that income, and the income and expenses must be

determined in accordance with the EITL and its Implementation Rules. The Notice goes further to detail the parameters by which foreign income is to be recognised, as well as the proportionate deductible expenses.

The Notice provides for a formula based on which the indirect tax credit has to be calculated:
Tax of a foreign enterprise borne by a higher tier enterprise = (A + B) x C ÷ D
where:
A = taxes actually paid on profits and dividend income of a foreign enterprise
B = taxes indirectly borne by this foreign enterprise according to the Notice
C = dividends distributed by the foreign enterprise to the higher–tier enterprise
D = after–tax profits of the foreign enterprise

Tax sparing credit
The Notice provides that where there is a tax sparing credit treaty provision, the relevant foreign taxes of a resident enterprise which are exempt or reduced in a contracting state according to the tax laws of that state, should be treated as having been paid and can be credited against the Chinese income taxes.

Limitation of FTC
The limitation of FTC must be calculated on a country–by–country (or region) basis by using the following formula:

The limit of FTC of a certain country (or region) = A x B ÷ C
where:
A = total tax on the worldwide income calculated according to the EITL and its Implementation Rules
B = taxable income of the foreign country (or region) concerned
C = aggregate amount of Chinese and foreign taxable income
The unused FTC can be carried forward to the following five tax years.

(a) Foreign business income and qualified foreign dividend income
Subject to approval of the competent tax authority, the limitation of FTC of foreign business income and qualified foreign dividend income may be set at 12.5% of foreign taxable income if the true and accurate amount of foreign tax cannot be determined due to "uncontrollable reasons" despite some evidence from the source country. The exception being where the effective tax rate of the foreign country is *less* than 50% of the Chinese enterprise income tax rate of 25%.

(b) Dividends, interest, rental income, royalties, capital gains and other investment income
Other relevant provisions of the Notice prescribe the limitation of FTC on the above–mentioned income.

Deduction of interest on loans granted by enterprise clarified
The SAT issued a ruling on 31 December 2009 (*Cai Shui* [2009] No. 777) clarifying deduction of interest on loans for the purposes of enterprise income tax.

The deduction of the interest is determined by Art 46 of the EITL, which forbids the deduction of interest on loans from related parties which exceed the ratio of equity investment, and the earlier issued Notice (*Cai Shui* [2008] No. 121).

Cai Shui [2009] No. 777 clarifies that the interest on loans granted to employees and persons other than shareholders and related individuals is deductible if (i) the borrowing and lending are genuine, lawful and valid, and (ii) the enterprise and individual have concluded a loan contract. The deductible interest is limited to the interest rate charged by an independent financial institution for the same kind of loan, and for the same period.

Gains on transfer of restricted shares subject to individual income tax
The MoF, SAT and the Security Regulatory Committee jointly issued a Notice on 31 December 2009 (Cai Shui [2009] No. 167) imposing individual income tax on gains arising from the disposal of restricted shares. The Notice applies from 1 January 2010.

Restricted shares are (i) shares which were previously non–tradable and have become tradable due to share reform; and (ii) those issued to the founders of the companies with a requisite non–tradable period. As from 1 January 2010, gains on disposal of restricted shares are subject to individual income tax as "income from transfer of property" at a rate of 20%. The taxable amount is equal to the sale proceeds minus the acquisition price plus reasonable costs such as stamp duties, commissions and transfer fees. In cases where the acquisition price of restricted shares cannot be accurately determined, 15% of the sale proceeds are deemed to be the cost price (acquisition price + reasonable costs). The security agencies holding the security accounts of restricted shares are required to withhold the taxes. Gains derived by individuals on disposal of shares of Chinese listed companies remain exempt from individual income tax.

Technology transfer – treaty treatment clarified
The SAT issued a ruling on implementation of treaty articles on 26 January 2010 (Gui Shui Han [2010] No. 46). The ruling supplements a previous ruling regarding the article on royalties (Guo Shui Han [2009] No. 507).

As a general rule, technical services related to the transfer of the right to use proprietary technology constitutes part of the technology transfer; hence, the income arising from these services is to be classified as royalties for the purposes of the treaty. However, if the beneficial owner of the royalties carries on business through a permanent establishment (PE) in the state in which the royalties arise and the royalties received are effectively connected with that PE, and if the transferor of the technology seconds personnel to the user of the technology to provide technical services which due to the duration of the services constitute a PE according to the tax treaty, Art 7 (business profits) of the relevant treaty shall apply to that income and Art 15 (employment income) shall apply to the personnel providing the services. Where there is no PE and the income arising from such services cannot be attributed to a PE, such income remains subject to Art 12 (royalties).

In cases where the fees for technical services are paid by the user immediately after the conclusion of the contract on the technology transfer, and it cannot be established in advance whether the provision of services will continue long enough to constitute a PE, Art 12 shall apply.

For contracts entered into before 1 October 2009 which are still being executed, this Ruling and the Ruling (Guo Shui Han [2009] No.507) will apply as long as the tax treatment of income from the contract has not been determined.

Hong Kong

HKIRD issues transfer pricing guidelines – details
Further to the release of Departmental Interpretation and Practice Note (DIPN) No. 45 dealing with double taxation relief of transfer pricing adjustment, the Hong Kong Inland Revenue Department (HKIRD) has released DIPN No. 46 setting out guidelines on transfer pricing

DIPN No. 46 clarifies that the HKIRD would generally apply the principles in the OECD Transfer Pricing Guidelines, except where they are incompatible with the express provisions of the Hong Kong Inland Revenue Ordinance (IRO).

Associated enterprises
In defining associated enterprises, DIPN No. 46 refers to the "Associated Enterprises" article of tax treaties, which permits the upward adjustment of profits of an enterprise subject to certain conditions. DIPN No. 46 clarifies that the existence of a tax treaty is, however, not a perquisite for making transfer pricing adjustments, ie where circumstances warrant, adjustments will be made to transactions, domestic or otherwise, under the provision of the IRO. No threshold (eg percentage ownership criteria) has been described to define an associated enterprise from a Hong Kong transfer pricing perspective.

Elimination of double taxation – correlative adjustment
DIPN No. 46 recognises that situations may arise whereby a corresponding *downward* adjustment has to be made to profits where a tax treaty partner state has made an *upward* adjustment. This downward adjustment will not be automatic, and the authorities must be satisfied that the upward adjustment in the other state was justified.
Statutory provisions and case laws
DIPN No. 46 also lists statutory provisions and case laws which it deems relevant to transfer pricing.

Permanent establishments
With regard to the attribution of income and expenditure of PEs, DIPN No. 46 refers to both Rule 5 of the Inland Revenue Rules and the "Business Profits" article of tax treaties, whereby the PE is to be treated as a functionally separate entity that is operating at an arm's–length. Profits will be attributed to the PE if economically significant activities or responsibilities are undertaken in Hong Kong. Additionally, the HKIRD will also consider significant people functions and key entrepreneurial risk–taking functions when attributing profits to the PE in Hong Kong.

Arm's–length principle
DIPN No. 46 uses the OECD's standard and accepts that the arm's–length principle (ALP) uses independent transactions as the benchmark to determine how profits and expenses should be allocated for transactions between associated enterprises.

Determining comparability
DIPN No. 46 adopts the factors identified by the OECD in determining comparability and making adjustments, ie (i) characteristics of the property or services; (ii) functions performed, assets or resources contributed and risks assumed; (iii) contractual terms; (iv) economic and market circumstances; and (v) business strategies

DIPN No. 46 goes on to elaborate on the above as well as provides a number of practical examples on how to apply the abovementioned factors. It also provides detailed guidance on the use of global price lists and how to establish the reliability of data.

Transfer pricing methodologies
DIPN No. 46 utilises the transfer pricing methods specified in the OECD Transfer Pricing Guidelines, ie (i) the comparable uncontrolled price (CUP) method; (ii) the resale price method; (iii) the cost–plus method; (iv) the profit–split method; and (v) the transactional net margin method (TNMM).

The traditional transaction methods (ie the CUP, resale price and cost–plus) are preferred to the transactional profit methods (ie the profit–split and TNMM) when both can be applied in an equally reliable manner.

Source of profits
If a profit is derived from Hong Kong, the profit shall be fully charged to profit tax, and will not be reduced unless the Commissioner is obliged to make an appropriate adjustment under the "Associated Enterprises" article of a tax treaty. An enterprise carrying on a trade or business in Hong Kong cannot unilaterally apply any transfer pricing methodology to reduce profits arising in or derived from Hong Kong. In deciding the source of a profit, the broad guiding principle is to see what the enterprise has done to earn the profits in question and where the operations have been performed.

Documentation
DIPN No. 46 contains certain guidelines in relation to transfer pricing documentation and encourages taxpayer to prepare such documentation. DIPN No. 46 also lists the type of information that would be required during a transfer pricing inquiry/audit or investigation. DIPN No. 46 also refers the documentation requirements provided in the OECD Transfer Pricing Guidelines as guidance on the type of information that would be useful.

Intra–group service
DIPN No. 46 also provides guidance on intra–group service arrangements using the principles defined by in the OECD Transfer Pricing Guidelines, including on shareholder costs, the basis on which recharges should be calculated, comments on allocation keys, the allocation of service costs to a PE, etc.

It is noted that DIPN No. 46 does not provide for Advance Pricing Arrangements nor does it prescribe any penalties.

India

Government of India relaxes policy of foreign technology collaboration agreements

The Government of India (GOI) has approved a proposal to give all royalty payments, lump–sum fees for transfer of technology and payments for use of trademarks and brand names, automatic approval without any restrictions.

Previously, automatic approval was permitted for foreign technology transfer agreements involving payment of a lump–sum fee of up to USD 2 million and royalty of 5% on domestic sales and 8% on exports. Under the policy, payment of royalty for use of brand name/trademark/technology transfer could be made, in the following situations, automatically:

- without technology transfer, ie pure use of trademark/brand of the foreign collaborator – royalty up to 1% of domestic sales and 2% of exports;
- with technology transfer – royalty up to 5% of domestic sales and 8% of exports plus lump sum one time payment up to USD 2 million. These limits subsume payment of royalty for use of trademark and brand name of the foreign collaborator; and
- any payments over and above the above mentioned limits, under the erstwhile policy, required specific approval from the Project Approval Board, part of the Ministry of Commerce. Further, separate norms were prescribed for the hotel sector under the historical policy.

Under the new guidelines issued by the DIPP, the above–mentioned ceilings on payment of royalty have been completely dispensed with. Nonetheless, all such payments would be subject to Foreign Exchange Management (Current Account Transaction) Rules, 2000, which are the governing regulations for such payments.

Goods and services tax proposed

On 10 November 2009, the empowered committee of state finance ministers released the first discussion paper on the proposed goods and services tax (GST):

- all goods and services would be subject to dual GST; a Central GST (CGST) and a State GST (SGST) concurrently to be implemented through multiple statutes; one for CGST and SGST for every state;
- uniform provisions concerning chargeability, taxable event, taxable person, valuation, classification, etc between CGST and SGST as far as is practical;
- Integrated GST (IGST) would govern taxability of inter–state sales of goods and services, which shall be CGST plus SGST;
- as CGST and SGST are to be treated separately, credit of CGST and SGST would be allowed against respective taxes only;

- cross–utilisation of input tax credit is permissible only in case of inter–state supply of goods and services;
- SGST would have a threshold limit of INR 10 lakhs both for goods and services;
- CGST would have a threshold limit of INR 150 lakhs for goods;
- a higher threshold limit may be considered for CGST on services;
- a composition scheme with special floor rate of 0.5% across the states would be available to tax payers having a gross annual turnover not exceeding INR 50 lakhs;
- each tax payer would be allotted a permanent account number linked to the taxpayer identification number with a total of 13 or 15 digits;
- existing central levies like central excise duty, additional excise duties, excise duty levied under the Medicinal and Toiletries Preparation Act, service tax, additional customs duty levied on imports in lieu of central excise duty at the time of imports, special additional duty of customs levied in lieu of VAT payable, at the time of imports and surcharges and cesses shall be subsumed into CGST; and
- existing state levies like value added tax, sales tax, luxury tax, taxes on lottery, betting and gambling, state cesses and surcharges, entertainment tax not levied by local bodies and entry tax not in lieu of octroi, shall be subsumed into SGST.

Income–tax (Dispute Resolution Panel) Rules, 2009 released

The Central Board of Direct Taxes (CBDT) has released the Income–tax (Dispute Resolution Panel) Rules, 2009 (Rules) regarding the operation of the Dispute Resolution Panel (DRP). The Rules deal with functioning of the DRP, such as the places where DRPs would be set up, its jurisdiction, constitution, manner of approaching it, procedure relating to the hearings, etc. The Rules will be effective from the date of their publication in the Official Gazette.

The Government had introduced the concept of DRP as a means for ensuring faster resolutions of Transfer Pricing (TP) and other international tax disputes. The Rules state that if there was any variation proposed to the income or loss reported – either due to a TP adjustment or a return filed by a foreign company – the relevant Revenue Officer would be required to provide a draft assessment order to the taxpayer, who would then have the option of referring the draft order to the DRP or go through the normal appellate channel. The DRP would then review the draft order and direct the Revenue Officer to complete the assessment as per its orders. The orders of the DRP are binding on the Revenue, but the taxpayer may appeal against the order of assessment directly to the Income Tax Appellate Tribunal (ITAT).

Indonesia

Clarification on tax treaty benefits

On 5 November 2009, the tax office issued tax regulations PER–61/PJ/2009 and PER–62/PJ/2009 on the availability and claim for tax treaty benefits, effective 1 January 2010. PER–62/PJ/2009 introduces anti–abuse provisions in relation to tax treaties and stipulates that treaty relief is not available in the following situations:

- where transactions lack economic substance and which are structured solely for the purpose of gaining treaty benefits;
- where the legal form of transactions differs from the economic substance, for the sole purpose of obtaining treaty benefits; and
- where the recipient of the income is not the "beneficial owner".

The regulation provides clarification on the term "beneficial owner" and revokes circular letters SE–17/PJ./2005 dated 1 June 2005 and SE–03/PJ.03/2008 dated 22 August 2008 on the same matter.

Pursuant to the regulation, beneficial owners do not include agents, nominees or conduit companies. In addition, foreign companies must fulfil the following conditions in order to be considered the beneficial owner:

- the company must be established and be resident in a contracting state or the transaction cannot be performed solely for the purpose of obtaining treaty benefits;
- the business operations must be managed by the company's own management, which has sufficient authority to undertake the transaction;
- the company must have employees and there must be an active business;
- the company is subject to tax on the Indonesian–sourced income in its country of residence; and
- 50% or more of the income received is not used to satisfy an obligation to another party, in the form of interest, royalty or a similar payment.

New VAT and Luxury Goods Sales Tax Law – effective date and details

The VAT and LST Bill were passed into law on 16 September 2009 and come into effect on 1 April 2010. Amongst others, the new law provides for the following:

VAT

- The VAT rate is maintained at 10%.
- Zero–rated goods include exports of intangible goods and taxable services.
- VAT–exempt goods and services include basic foods, medical services, social, mail, insurance, religion and education related services, art and entertainment services (excluding advertising), domestic transportation services, government manpower services and financial services. Non–taxable financial services include both traditional banking and *sharia*–based financing.

- Certain designated goods which are already subjected to local government taxes are also exempt from VAT, so as to avoid double taxation. These include certain extractive minerals, food establishments, hospitality and catering services.
- Transfers of taxable goods in *sharia* transactions are deemed to take place from the supplier directly to the party in need of the taxable goods (the buyer), thus bypassing the intermediary financing vehicle.
- Transfers of taxable goods as part of a business merger, consolidation, expansion, business split and acquisition are treated as non–taxable events for VAT purposes.

LST

- LST is imposed on imports of luxury goods or deliveries of such goods at rates from 10% to 200% (currently 75%).
- Exports of luxury goods are not subject to LST.
- "Luxury goods" are defined as goods that are not staple necessities, and implementing regulations will be issued
- Sin products such as alcoholic beverages are no longer categorised as luxury goods and instead are termed as goods subject to excise duties.

Singapore

Abolishment of withholding tax on management fees
Reportedly, withholding tax will no longer apply on management services rendered by non–residents entirely outside of Singapore on or after 29 December 2009, even if the service fees contain a mark–up element. Previously, the withholding tax did not apply only where the service fees represented a reimbursement of costs incurred by non–residents without any profit mark–up.

Tax treatment of corporate amalgamations
The Inland Revenue Authority of Singapore (IRAS) issued a Circular on 20 January 2010, which details the new tax framework for corporate amalgamations. The Circular applies to voluntary statutory amalgamations, which involve only one company remaining or being formed upon completion of the amalgamation process.

Currently, amalgamating companies are treated as having ceased businesses and disposed of their assets and liabilities, and the amalgamated company as having acquired or commenced a new business. Under the new framework, qualifying amalgamations will be treated as a continuation of the existing businesses of the amalgamating company by the amalgamated company. The Circular details the treatment of the following specific items (i) Cancellation of shares; (ii) Capital assets; (iii) Revenue assets; (iv) Reclassification of asset; and (v) Unabsorbed losses, capital allowances and donations.

The Circular also contains Goods and Services Tax (GST) and stamp duty implications, and administrative procedures, in relation to the new framework.

Vietnam

Taxation of equity based remuneration
On 7 October 2009, the Ministry of Finance issued Official Letter No. 14169/BTC–TCT (OL 14169) on the taxation of remuneration in the form of shares or stock options as follows:

Employment income

	Share award	Stock option
taxable income	employer's book value	employer's book value
tax rate	5%–35% (progressive)	5%–35% (progressive)
taxing point	upon disposal	upon disposal
administration	tax declaration and andpayment on finalisation	tax declaration payment on finalisation

*Assignment of shares**

	Share award	Stock option
taxable income and tax rate	01% of transfer price or 20% of the gain (sales proceeds less par/book value)**	01% of transfer price or 20% of the gain (sales proceeds less par/ non-prefenrential purchase price)
taxing point	upon disposal	upon disposal
administration	upon disposal***	upon disposal***

* Shares assigned in 2009 are exempt from PIT liability (Circular 161/2009/TT–BTC dated 12 August 2009).

** This differs from Circular 84/TT–BTC dated 30 September 2008 (Circular 84), where the taxable gain is computed as the difference between assigned price and par/book value less assignment costs.

*** This is per Circular 84 as OL14169 is silent as to the declaration and payment timing for assigned shares.

Malaysia – treaty developments

- **The following amending protocols to existing tax treaties were signed**
  - France and Malaysia on 12 November 2009
  - Netherlands and Malaysia on 4 December 2009
  - Ireland and Malaysia on 16 December 2009
  - Seychelles and Malaysia on 22 December 2009 TG

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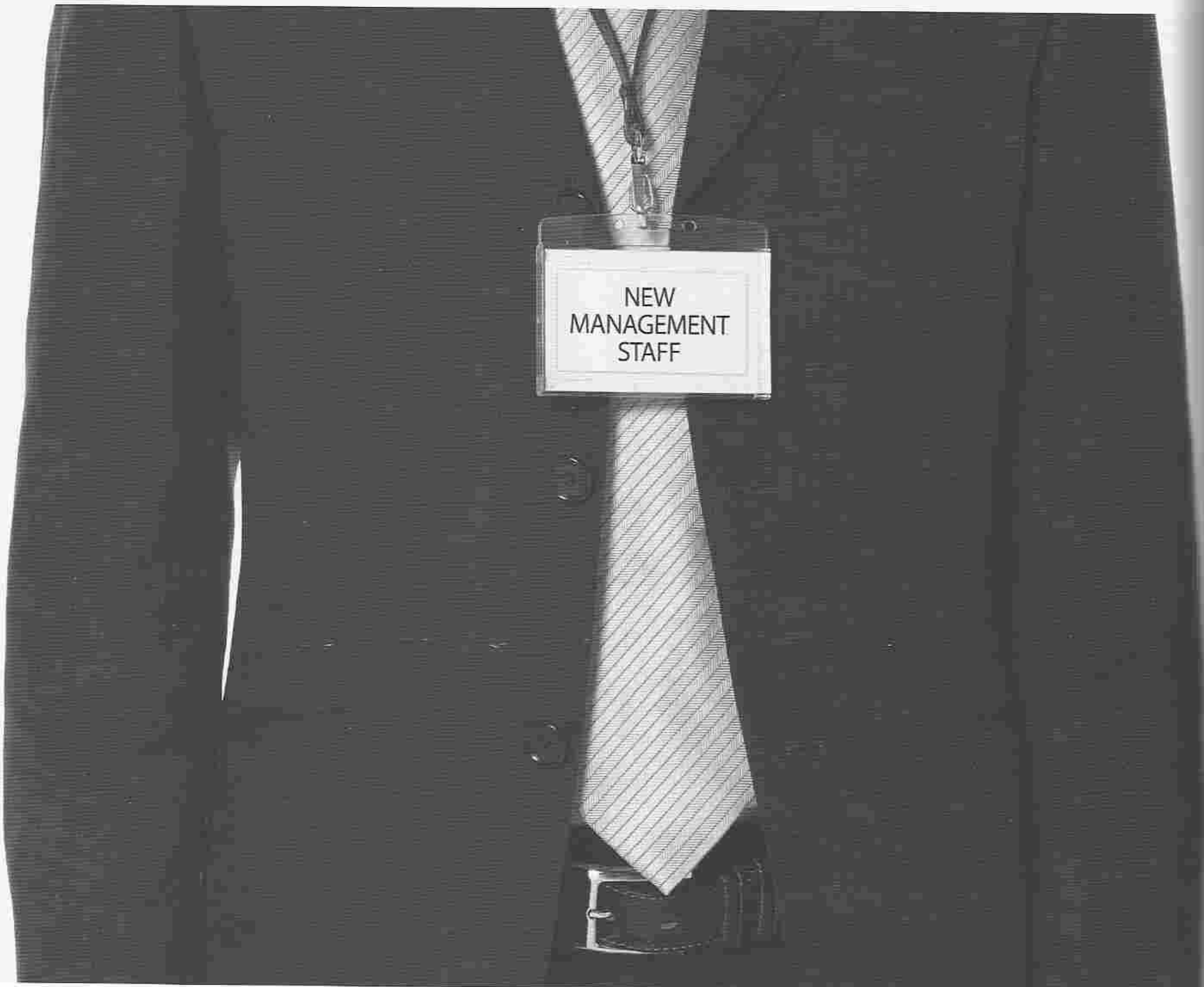
Change Management

By Chandran Kasi



Change Management is the process of planning change within organisations. It has been seen from the days of Frederick Taylor's '***Scientific Management***' in the 19th Century. It is a term used by management to describe the movement of an organisation from an existing phase to something new. Change is inevitable if organisations and people are to adapt to rapid advances in technology, increasing competitiveness, globalisation and the effects of an ageing society.

Nature & Need for Organisational Change

Change can be caused by a need (***eg Government Legislation, as for instance the impending GST in 2011***) or desire (***to meet competition etc).*** The business environment is constantly changing and CTIM practitioners in like disciplines must respond if they are to survive, if not prosper. External change *per se* drives internal change.

In retrospect to environmental changes, organisations must respond by instituting their own internal changes. This can include:

- New or developed services eg developing consulting products and packaged service lines.
  Customer retention strategies and adding customer value to existing viable clients could besides be beneficial, in the instances.
- Changed working practices/creating methodologies, contemporary for this new millennium.
- Penetration into new markets or withdrawal from saturated clientele – firms could consider new communication media eg e-mail and websites to fill the communication process gap.

- New organisational structures (***entrepreneurial economics ie its eventual financial effects***).

> *"'Change occurs everyday. It seems inescapable and inexorable, with one key word 'Competition'!"*

In the face of enhanced competition, a near practitioner response is the desire to take out cost through a whole spectrum of changes, including:

- Downsizing – changes can occur in current economical circumstances eg present downsizing norms of some unproductive practitioner firms (***compliance eg with Voluntary Separation Schemes/VSS etc nevertheless, remain as requirements; per se)***.
- Delayering (***ie Tall and Flat organisational structures***).
- Outsourcing – 'the trick is to outsource everything you can; what is left is your core competence'.
- Business Process Re-engineering (BPR) – there have been quotes from HRM wags (who emphasise on '***PEOPLE***' management), that 'no company embarks on BPR in the hope of employing more people'.

Alternatively, by adopting more meritocratic remuneration in these trying competitive times, taxation firms can help to keep staff it wants in the face of widespread poaching.

The rate of change may be fast or slow, depending on the organisation's circumstances and the environment in which it operates. Organisations which are providing services in a rapidly changing competitive environment need to be highly innovative and responsive to change, if they are to survive and grow.

Major case studies of lost opportunities point to the fact that tax practitioners etc in related practice or as part of managerial teams, ought to become increasingly interested in issues of change.

Figure 1: Examples of Environmental changes

- **Changes in the market** – these encompass competitors' responses, changes in tax practitioner skills and changes in promotional services.
- **Technological Change** – these can introduce new product possibilities for our members (eg latest IT providing company tax data for compliance practice) and more efficient and effective ways of working. In fact, there are 'Online Tax Application System' products available in the market which enable practitioners to input, analyse and manage their clientele services engagements – including project profitability, employee utilisation, and time and expense metrics; all in ***Real-Time.*** Significant savings in time formerly consumed by such tasks as re-entering and reconciling data has thus been seen.
- **Social, legal and political developments** – which can extend or constraint the acceptability of current practitioner services eg the grave importance of corporate governance; reflective of recent corporate scandals.

Effects

Tax practitioners specialised in current compliance issues should take heed that Change in their organisations may affect individuals as follows:

- ***Physiologically*** - there may be physiological changes due to change in the pattern of working odd hours to meet clientele demands/statutory deadlines eg the work hour implications for the individual's body based on eating, walking and sleeping routine.
- ***Circumstantially*** - circumstantial changes eg working in a new location, establishing new relationships and working to new deadlines; which effectually will involve relinquishing old knowledge, and learning new ways of doing things. This may particularly affect tax staff involved in outstation duties for a period of time, especially in distant industrial enterprises.
- ***Psychologically*** –
  (a) it may create feelings of disorientation before new circumstances have been assimilated eg performing a familiar task in an unfamiliar setting;
  (b) uncertainty may lead to insecurity, especially acute changes involving work, where there can be great pressures for continuity to achieving one's goal in relation to the desired hierarchy of Maslow's famous ***'Theory of Human Needs'***; and
  (c) the thought of established on-going relationship being up-rooted and the business of forging new relationships can be fraught with dismay (***the feeling of being an outsider, risk of rejection etc).*** This may be particularly so in mergers, restructuring, acquisitions, turnarounds etc.

Difference between Change and Innovation

Change is an alteration of status quo, whereas Innovation is a specialised kind of change involving a certain degree of uncertainty eg the ***Volvo Experiment*** where new ideas were successfully applied to produce a sturdy car, far from low price but of better value; changing the fortunes of the Swedish Company. This brilliant fore-thought, which tapped an American market, culminated decades ago but is still worthy of mention.

All innovations imply a certain degree of change, but not all changes are innovations ie changes could take place because of a need or just to be on par with competitors eg providing tax services through e-commerce.

Tax practitioners should take note that Change causes more difficulties for management than innovation generally. The scope of change should thus be carefully reviewed if it involves a desire. Total desired transformation usually creates greater insecurity – but also greater excitement, since it is more effective than ***'moderate'*** innovation.

Change Factors

The following three factors have an impact on the desire for change:

- Growth Conditions – eg if a tax accountant of a manufacturing company sees profits as good and sustainable, Computer Aided Design, Computer Assisted Manufacture (CADCAM) systems of considerable cost could be installed.

- **Contraction conditions** – eg when a tax organisation's fortunes are going down, it may be wise to diversify on products, especially if existing ones are on the *'Growth'* stage of the Product Life Cycle.
- **Niche conditions** – if a company's financial figures do not show any significant profit or loss, it may be advisable for tax practitioners to advise on/or do **'moderate'** innovation.

The Japanese *'Kaizen'* expresses one of the most powerful ideas a leader can transform. The notion of *'1000 things, one per cent better'* is the lynch-pin. As a '*cell*' leader, adapting to an environment of evolvement is more about identifying the small changes on a constant and regular basis than looking for the big fix. The latter, will undeniably commensurate with the macro environment of organisations. Effective leaders are ones constantly looking for small issues which can optimise and so gradually make things better for growth. It all adds up to transformation on a large scale!

Resistances to Change and Strategies for dealing with Resistances

According to researches, the peculiar difficulties of introducing change are resultant human factors. When implementing change, tax practitioners must never therefore lose sight of the fact that their success depends on people.

It is sometimes difficult implementing change in organisations. This is especially so to introverts in employed tax positions. The following are some of the reasons:

- **Contradictory assessment** - employees as *'stakeholders'* may feel that change may be expensive, denying them of their *'fair share of the cake'.*
- **Lack of understanding of the desire/need for change** - eg this usually culminates from elderly non-professional administrative tax personnel.
- **Uncertainties - eg being comfortable with the way things are** and fear for the unknown.
- **Self Interest** - eg supervisory etc staff exercising autocratic management styles having fear of losing control when change takes place.
- **Existing Group/Fellow feeling eg** Elton Mayo's famous Hawthorne Experiments and the importance of ***esprit de corps***, etc.

Here-in-under are strategies that tax practitioners can apply when dealing with Resistances –

- **Planning** - this should commence with a definition of the objective to be achieved by the proposed change. In principle, all change should be planned as it minimizes risk and uncertainties. It is besides better to have alternative plans, also financially quantified, to meet exigencies of occasion. When major changes are proposed, this is obviously all the more important and a substantial time span may be needed to be allocated for planning.
- **Consultation** - all involved parties should be democratically invited to express their views on the need for the proposed change and on deploying systematic methods of implementing it eg ***brainstorming*** sessions can be encouraged. At the least, the process of consultation should help to minimise resistance to change: this will ensure that people will not complain that the change is being ***'forced down their throats'*** if they had been given the opportunity to suggest alternative approaches.
- **Communication** - this is important before, during and also after the change. Before the change occurs, dissemination of information to all concerned employees seems to be a must. Efforts should be made to minimise resistances eg by explaining that change will not lead to problems as adequate advise/training will be given to those affected, besides the arising benefits for employees from the change. This can be especially so when eg a new and sophisticated computerised taxation system is to be installed to replace an existing one. Progress of the change when taking place, should also be effectively communicated as '***teething problems***' can arise. Any sort of transitional arrangements should be carefully explained.
- **Monitoring and review** - at all stages, the progress of the change should be monitored and employee reactions recorded and attended to. Comparison with the original plan will indicate where progress is smooth and alternatively, where ***'hiccups'*** are occurring. Finally, review of the entire process after it is complete will

"Be a Leader of Change!"

indicate where follow-up action is required to facilitate future endeavours etc.

Figure 2: Steps to successful change management:

- Determine need or desire for change in a particular area.
- Work out a realistic budget and keep to it.
- Brainstorm possible strategies.
- Analyse possible reactions to the change and apply group problem-solving.
- Establish a timetable for change – speed of implementation will depend on the likely
- reactions of the people affected *(all in favour, half in favour, all against etc).*
- Communicate the plan for change.
- Implement the change and review it.

Figure 3: Case Examples of successful change management:

- Pepsi Cola company being a giant soft drink company diversified into the fast food industries by acquiring (*taking over*) Kentucky Fried Chicken (KFC), Shakey's Pizza and Pizza Hut.
- Nestle Company, one of the largest Swiss food companies in the world acquired the Rowntree company in Britain which produces some of the most famous chocolate products - (*Kit Kat, Smarties and Mars*).

Overview:
Whilst substantial benefits accrue for successfully managed '*Changes*', the same cannot be said of unsuccessful ones, due to the following defalcations:

- Failure to identify the need to change (*typically a failure to pay attention to change in a micro and macro environment).*
- Failure to identify the objectives of change; wherein wrong areas are addressed.
- Failure to identify the strategy required to achieve the objectives. The result is that change takes place, but not in the relevant direction. New technology (eg for qualitative tax practice), is sometimes regarded as a universal solution to process problems; but it will not necessarily improve productivity or profitability if the service strategy or the workforce is the real problem.
- Failure to ensure unselective info sharing – being bias in communication.
- Failure to adhere to the '*Decision Making Process*' eg not following the Maximax, Average and Minimax rules of decision making.
- Failure to commit sufficient resources to the strategy – eg having an under-run on the budget.
- Failure to identify the appropriate method of implementing change, for the situation and people involved (*ie failing to anticipate resistance to change especially from introverts or 'failure of not allowing the few to decide for the many'*).
- Failure to implement the change in a way that secures acceptance, because of the leadership style of the person managing the change (*eg failure to consult and involve employees as requisite per Schmidt & Tannenbaum's 'Continuum of Leadership Styles' maxim).*

One needs to understand why, despite the conscientious attention to details by inculcated tax practitioners, their best intentions on change efforts often end up disengaging the very people they are designed to engage. Liberating leadership styles of top management seems to be the key answer to reconciling diverse stakeholder interests in '*work stations'*. Leaders succumbing to change must therefore communicate with and motivate others. In finale, financial forethought needs to have its place and business cultures need to change to support them!

USE OF THE QUESTIONING TECHNIQUE (*QT*) TO MOVE OUR THINKING FORWARD ABOUT 'CHANGE'

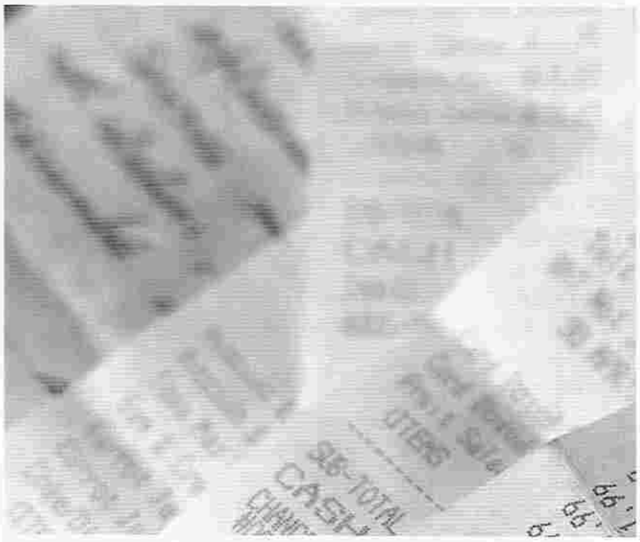
- Why the need for change?
- Which in particular is the most compelling reason for change?
- Who are the top management personnel committed to the change and others involved, or that we could enfold?
- What are the resources for the current change and time implications?
- Has the senior management staff been inculcated with facts and figures, proving without doubt that change is financially worth-while implementing?
- Does the cost of change include time and effort it takes, as well as money cost?
- Has a cost benefit analysis been done to justify the change?
- What will be the measures of success in financial terms?
- Have all other options been considered and why were they rejected?
- What are the implications of doing nothing?
- How do staff perceive the planning and implementation of change and has it been made known that when a change is implemented, some things end?
- Where do we start and have communication channels been clearly defined?
- What do we do and by when?
- How committed are the staff and how do we enhance participation?
- Has there been communication of the problems change causes with a plan to cajole the process of change implementation?
- How do we review progress, especially in end monetary terms?
- Finally, how are we going to demonstrate financially that the change had been planned and implemented effectively? TG

'The pessimist sees difficulty in every opportunity; the optimist sees opportunity in every difficulty'.

This is an original contribution from CTIM member, ***Chandran Kasi****, who has been an educationist for over 2 decades – Senior Management Lecturer. He is a Senior Post Graduate Fellow of Commerce (UK), Fellow International Accountant (UK), Fellow Socio Economist (UK), Certified Management Consultant (M'sia - International), etc He can be contacted at chandran_kasi@yahoo.com.*

Deduction for Interest Expense

By Siva Subramaniam Nair



In the last three articles, we analysed the general deduction rule in s 33(1) of the Income Tax Act 1967 (as amended). Now we shall look at specific rules governing the deductibility of expenses starting with interest expense.

Section 33(1)(a) reads

> Subject to subsection (2), any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and –
>
> i. employed in that period in the production of gross income from that source; or
> ii. laid out on assets used or held in that period for the production of gross income from that source is deductible.

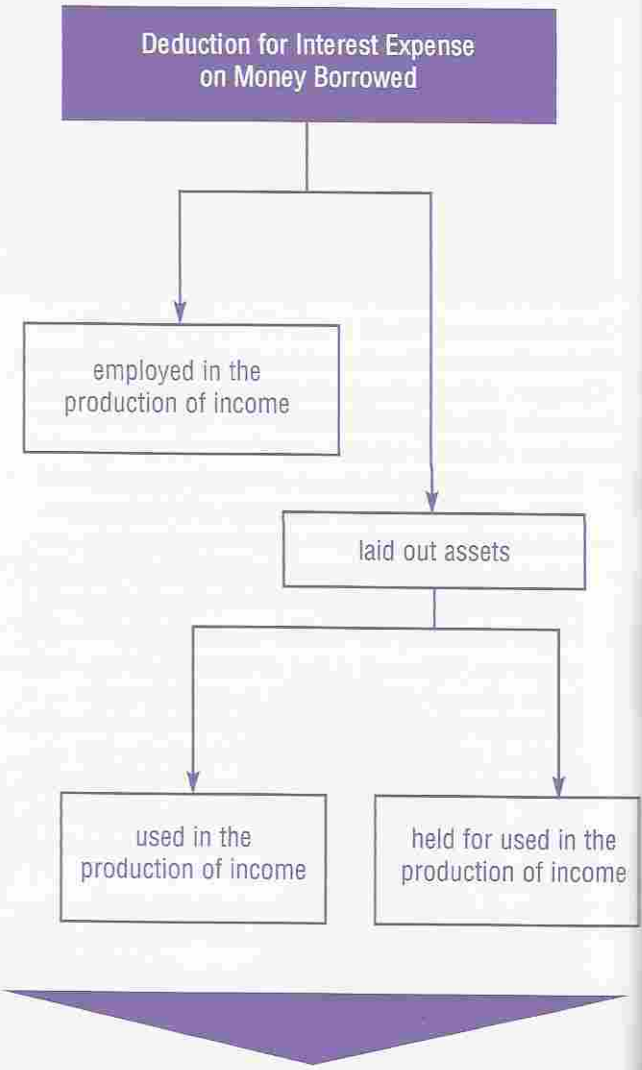
Basically, this section provides that interest expense on any borrowings is deductible if the money borrowed is used as working capital (eg payment of rental, settlement of salaries etc) or for the purpose of purchasing current assets (eg stocks) or fixed assets (eg plant and machinery, building etc).

Section 33(2) provides that where a person borrows money for business purposes but the money is partly used to finance non–business operations (eg for purchase of investments, for onward lending to its related or associated companies or for purchasing properties with a view to generate rental income etc) then, only the portion used for business is allowable against gross business income. However interest which has been disallowed for business purposes can be deducted against income from each of the non–business investments. This is also in line with our previous discussions where we saw that any expense must be "wholly and exclusively incurred for the production of gross income from that source."

Obviously, if the money borrowed was exclusively for the purchase of the non–business investment then the whole amount is disallowed for business purposes but allowed as a deduction against the gross income generated from the investment.

In line with this the Inland Revenue Board (Revenue) has issued a guideline on the application of interest restriction and the deductibility of interest expense.

This is summarised below:



SUBJECT TO RESTRICTION UNDER s 33 (2)
As a concession however, the Revenue has agreed that no restriction would be applicable if the interest expense **DOES NOT EXCEED** RM 6,000 for individuals and RM 10,000 for companies.

EXAMPLE 1:
Wan MalAsia S/B a trading company resident in Malaysia with a share capital of RM 2 million takes a term loan of RM 1 million (interest expense of RM 60,000) to facilitate the purchase of fixed assets.

Its Balance Sheet will show:

Term Loan	1 million	Fixed Assets	2 million
Share capital	2 million	Bank	1 million
	3 million		3 million

Since the whole borrowing is used purely for business purposes the full interest expense of RM 60,000 is deductible in ascertaining the adjusted income from its business source.

EXAMPLE 2:
Following from Example 1, let's assume that Wan MalAsia S/B also purchased shares in a listed company amounting to RM 0.6 million.

Its Balance Sheet will show:

Term Loan	1 million	Fixed Assets	2 million
Share capital	2 million	Shares	0.6 million
		Bank	0.4 million
	3 million		3 million

Now since part of the borrowing is used for the purchase of the shares, only part of the interest expense is deductible in ascertaining the adjusted income from business. Therefore, in this case the amount of interest to be disallowed against business income is computed as follows:

$$\frac{0.6 \text{ million}}{1 \text{ million}} \times \text{RM } 60{,}000$$

= RM 36,000

However, if the non–business investment exceeds the amount of borrowing, then the whole amount of the interest expense is disallowed in ascertaining the adjusted income from its business source.

EXAMPLE 3:
Following from Example 1, what if Wan MalAsia S/B purchased properties amounting to RM 1.6 million?

Its Balance Sheet will show:

Term Loan	1 million	Fixed Assets	1.4 million
Share capital	2 million	Shares	1.6 million
	3 million		3 million

The assumption here would be that the whole borrowing of RM 1 million and part of the share capital was used to acquire the properties and accordingly the whole amount of the interest expense is disallowed against business income. Therefore, the whole RM 60,000 is added back to the profit before tax in determining the adjusted income from business as illustrated below:

Wan MalAsia S/B
Tax computation for year of assessment 2009

	RM
Profit before tax	xxx
Add: Interest restricted	60,000
Adjusted income	xxx

Once there is an element of borrowing, the assumption is that it is first used for the acquisition of the non–business investment and only the balance is used for business purposes, unless the borrowing was obtained subsequent to the purchase of the investment, then obviously it could not have been used to finance the acquisition of the investment.

A summary of the formulas is reproduced below:

BORROWINGS > INVESTMENT ➤ PARTIAL RESTRICTION:

$$\text{INTERST RESTRICTED} = \frac{\text{INVESTMENT}}{\text{BORROWING}} \times \text{INTEREST EXPENSE}$$

BORROWINGS < INVESTMENT ➤ FULL RESTRICTION:
INTERST RESTRICTED = INTEREST EXPENSE

Where total non–business investment (loan, shares, properties) does not exceed RM 500,000, at the end of the basis period, year–end balances can be used in determining the amount of interest to be restricted. However, where the total non–business investment exceeds RM 500,000 at the end of the basis period then the amount restricted should be computed on a monthly basis.

EXAMPLE 4:
Following from Example 2, since Wan MalAsia S/B's non–business investments exceed 0.5 million at the end of the basis period therefore a monthly restriction should be computed. Using assumed balances for the months of January and February, we will illustrate how the restriction is computed.

	Borrowing (RM)	Investment (RM) (RM)	Interest expense (RM)	Interest restricted
January	1 million	0.8 million	60,000	0.8/1X 60,000 = 48,000
February	1 million	1.2 million	60,000	60,000

Since in January the borrowing exceeds the investment therefore, a partial restriction is computed whereas for February the whole interest expense is restricted because the investment exceeds the borrowings.

Let's look at CTIM Tax II 2007 Question 1.
In Note 6 to the question we are shown "Finance charges of RM310,000" comprising:

	RM
Interest on banker's acceptance	27,000
Interest on bank overdraft	230,000
Interest on bank loan for shophouse	18,000
Bank charges	3,000
Letters of credit charges	17,200
Commitment fee	14,800
	310,000

Further in Note 16 we are provided with the investments and borrowings as reflected in the Balance Sheet

	RM
Investment in shares	350,000
Fixed deposit with licensed bank	200,000
Bank overdraft	3,000,000
Bank loan for shop house	300,000
Banker's acceptance	500,000

From note 6 it is obvious that the banker's acceptance, bank charges, letters of credit and the commitment fee are purely used for business purposes and could not have been used to acquire investments. The "interest on bank loan for shophouse" also is directly attributable to the rental income generated from the shophouse and should be added back since it is not a business expense. Therefore the only interest that should be subject to restriction is the interest on the bank overdraft of RM 230,000.

Since the total non–business investment RM 550,000 (ie shares of RM 350,000 and fixed deposit of RM 200,000) does not exceed the overdraft of RM 3 million therefore a partial restriction is computed as follows:

$$\frac{550{,}000}{3{,}000{,}000} \quad X \quad \text{RM } 230{,}000 = \text{RM } 34{,}500$$

I shall continue my discussion on the deductibility of interest expense in my next article. TG

FURTHER READING

- Choong, K.F. Malaysian Taxation Principles and Practice, (Latest Edition)Infoworld.
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- Singh, Veerinderjeet; Veerinder on Taxation (latest edition) Arah Pendidikan Sdn Bhd.
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- Yeo, Miow Cheng Alan. Malaysian Taxation, (Latest Edition), YSB Management Sdn Bhd.

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Notice Board

Goods and Services Tax Bill 2009
Please be informed that the Goods and Services Tax Bill has been tabled for first reading in Parliament. A copy of the Bill may be available for download at the Parliamentary website at http://www.parlimen.gov.my/billindexbi/pdf/DR372009E.pdf.

Members are encouraged to give their comments and proposals, together with the rationale, to the Institute for deliberation and onward submission to the MOF where appropriate. Please submit your proposals to kslim@ctim.org.my or fax to the Institute at 03-2162 8990.

Service tax on exported taxable services
The RMC has recently announced at its website that with effect from 1 January, 2010, service tax will be levied on all taxable services, subject to specific exclusions as prescribed in Group G, Second Schedule to the Service Tax Regulations 1975. Service tax will be levied on consultancy and management services rendered in connection with goods or land situated in Malaysia or other matters relating to Malaysia, including services rendered to foreigners outside Malaysia. The announcement can be viewed at the website of the RMC at http://www.customs.gov.my/index.php/en/component/content/article/187–berita–terkini/288–qexported–taxable–serviceq–perkhidmatan–yang–kena–dibayar–cukai–yang–dieksportkan.

Manual filing of return forms C and R for companies with financial year ending 30 June 2009 – Grace period of 14 days.
CTIM has received a verbal confirmation from the Inland Revenue Board Malaysia (IRB) that a grace period of 14 days has been granted for the manual filing of the Forms C and R for companies with financial year ending 30 June 2009.

Second addendum to Public Ruling on withholding tax on special classes of income
The Institute would like to inform that the Second Addendum to Public Ruling No. 4/2005 on withholding tax on special classes of income has been issued on 4 January 2010. The addendum gives clarification on the change in the tax treatment of specific matters, including derivation of special classes of income; reimbursements or disbursements on hotel accommodation; and income or fees received by providing technical advice or training in specific fields.

Members may view the addendum on the IRB's website at http://www.hasil.gov.my/lhdnv3e/documents/KetetapanUmum/2005/Second%20Addendum%20PR4–2005%204.1.2010.pdf or at the Institute's website at http://www.ctim.org.my/technical_techdev_direct.asp.

Clarification provided in the Finance Act 2010 (Act 702)

Clarification on scope of chargeability, and the rebate in respect of the chargeable income, of a knowledge worker in Iskandar Malaysia
Part XIV (1) and 2(b) of Sch 1 has been amended to clarify the scope/source pertaining to the chargeable income, while s 6A(2)(c) has been amended to state that the thirty five thousand ringgit shall consist of chargeable income from all sources.

Amendment of s 60I
a) The definition of "Islamic securities" has been extended to include securities approved by LOFSA. Previously, it applied only to securities approved by the SC.

b) The definition of "special purpose vehicle" has been extended to a company incorporated under the Labuan Offshore Companies Act, 1990 which has made an election under s 3A of the Labuan Offshore Business Activity Act 1990; and the exclusion also takes into account asset–backed securities approved by LOFSA.

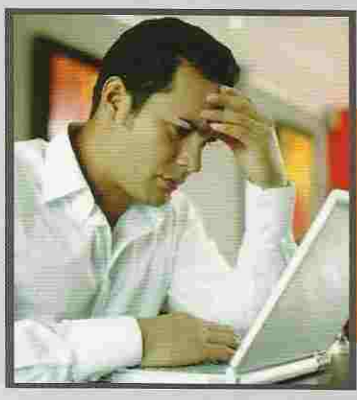
Procedures for application of certificate of tax residence status
The IRB has uploaded the above on its website at http://www.hasil.gov.my/lhdnv3e/documents/sorotan/CERTIFICATE OF RESIDENCE.pdf . Members may also view the document on the Institute's website at http://www.ctim.org.my/technical_techdev_direct.asp.

Minutes of Filing Programme Working Group Meeting (DESIRE) 05–2009
The minutes of the meeting which was held on 16 December 2009 are available on the Institute's website at http://www.ctim.org.my/technical_techdev_direct.asp.

Membership Services – Minutes of the 17th AGM
We are pleased to inform you that the minutes of the 17th AGM held on 13 June 2009 have been uploaded onto CTIM's website at http://www.ctim.org.my/PDF/membership/general/17th%20AGM%20minutes%2013Jun09FINAL.pdf

Aiyah!!! My junior deleted my spreadsheet formulas

Aiyoh!!! Forgot to update formulas for new LHDNM compliance...



Alamak!!!

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