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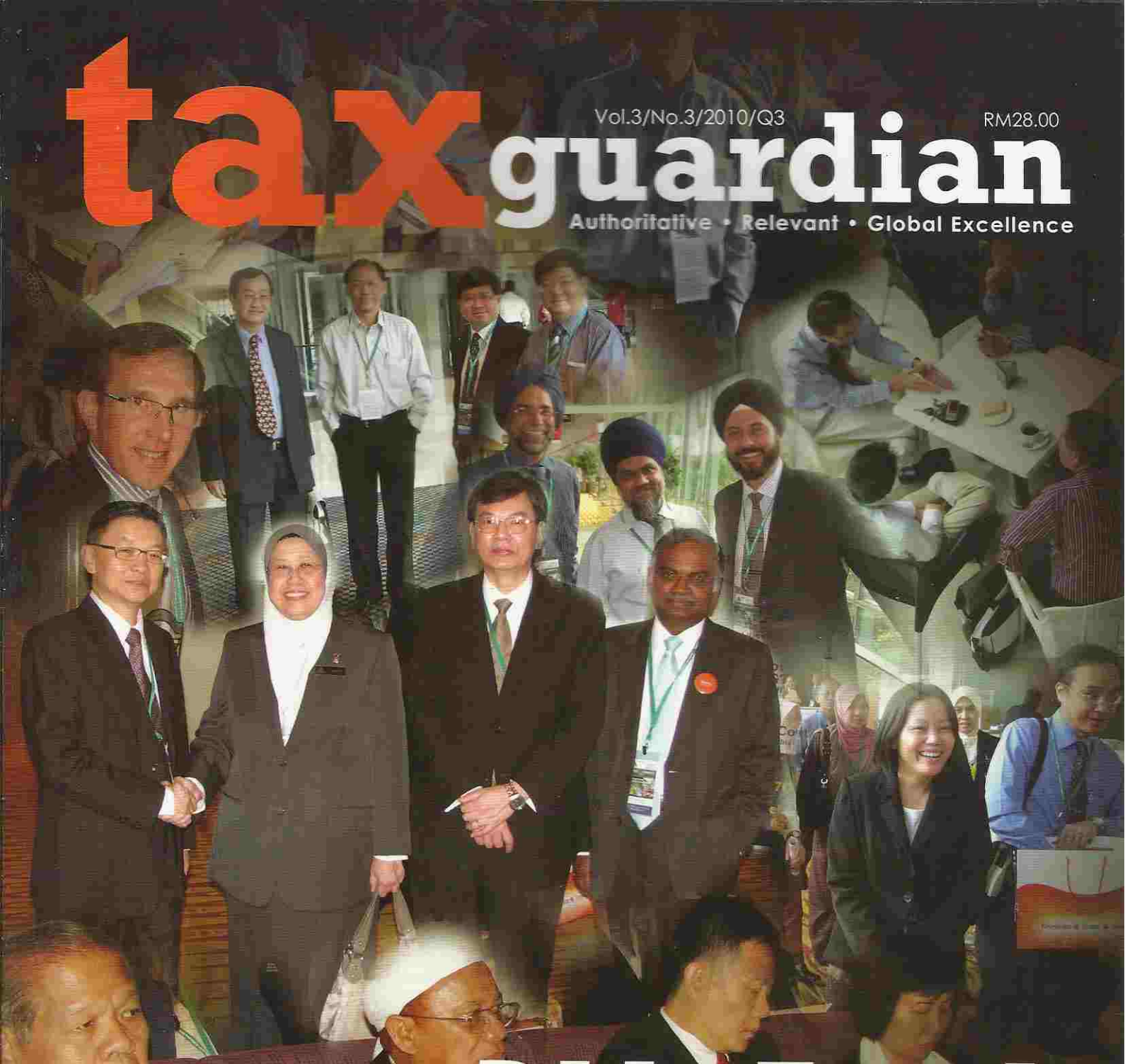

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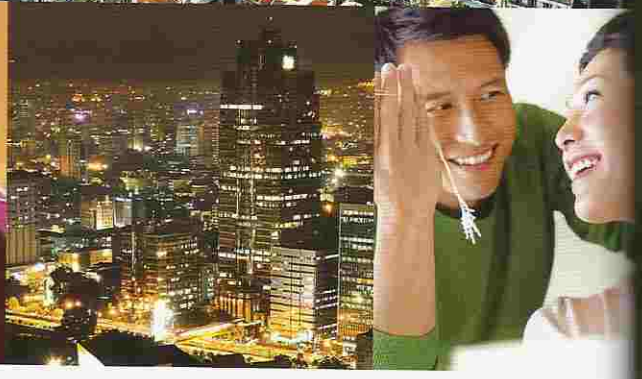

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- **Overall Best Private Bank in Malaysia as voted by HNWI's with US$1mil – US$5mil**
  – Asiamoney Private Banking Polls 2009 & 2010
- **Overall Best Private Bank in Malaysia as voted by HNWI's with US$5.01mil – US$25mil**
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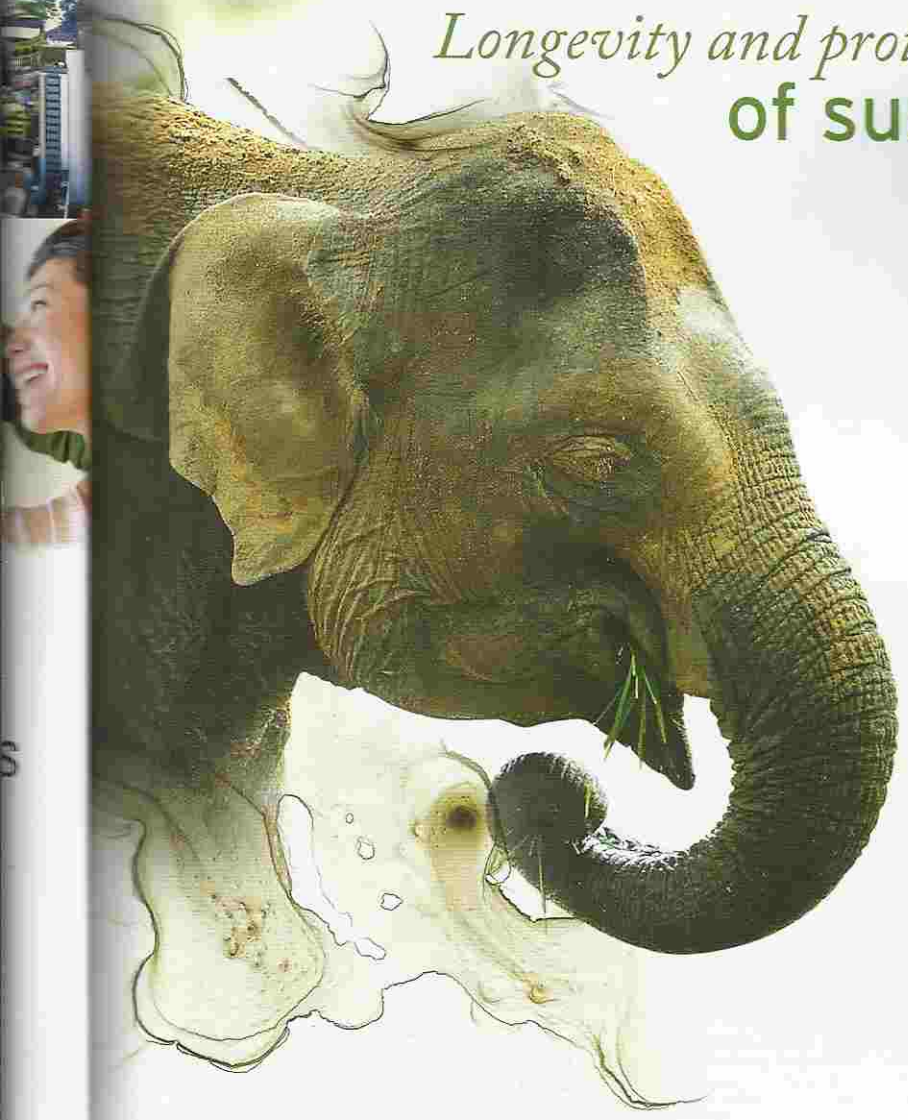

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Continuing Professional Development (CPD)

CALENDAR OF EVENTS

OCTOBER - DECEMBER 2010

october

Date	Training Programme	CDP points	Venue	Fee (RM)			Speaker
				Member	Member's Firm Staff	Non-member	
1 Oct 2010 9.00am - 5.00pm	Workshop: Minimising Withholding Tax Exposure & Maximising The Benefits of Double Taxation Agreements In Cross Border Transactions	8	Ipoh	315	365	415	Sivaram Nagappa
4 Oct 2010 9.00am - 5.00pm	Workshop: Essential Tax Planning For Companies in 2010	8	Johor Bahru	315	365	415	Chow Chee Yen
4 Oct 2010 9.00am - 5.00pm	Workshop: Making the Most of Double Tax Agreements	8	Penang	315	365	415	Tan Hooi Beng
7 Oct 2010 9.00am - 5.00pm	Workshop: Minimising Withholding Tax Exposure & Maximising The Benefits of Double Taxation Agreements In Cross Border Transactions	8	Malacca	315	365	415	Sivaram Nagappa
18 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Subang Jaya	297	380	440	Chow Chee Yen
19 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Penang	284	365	415	Sivaram Nagappa
20 Oct 2010 2.00 pm - 5.00pm	2011 Budget talk with Ministry of Finance Malaysia	10	Kuala Lumpur	180	230	250	MOF, IRB
21 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Seremban	284	365	415	Harvindar Singh
21 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Kuching	284	365	415	Sivaram Nagappa
23 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Kuala Lumpur	297	380	440	Various Speaker
26 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Ipoh	284	365	415	Harvindar Singh
27 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Kota Kinabalu	284	365	415	Sivaram Nagappa
27 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Johor Bahru	284	365	415	Chow Chee Yen
28 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Kuantan	284	365	415	Chow Chee Yen
28 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar ***(Joint collaboration with ACCA)***	10	Labuan	280	NA	500	Sivaram Nagappa
29 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar	10	Malacca	284	365	415	Chow Chee Yen
29 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar ***(Joint collaboration with ACCA)***	10	Miri	280	NA	500	Sivaram Nagappa
30 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar ***(Joint collaboration with ACCA)***	10	Kota Bharu	280	NA	500	Sivaram Nagappa
31 Oct 2010 9.00am - 5.00pm	2011 Post-Budget Seminar ***(Joint collaboration with ACCA)***	10	Kuala Terengganu	280	NA	500	Sivaram Nagappa
2 Nov 2010 9.00am - 5.00pm	2011 Post-Budget Seminar ***(Joint collaboration with ACCA)***	10	Sibu	280	NA	500	Sivaram Nagappa
3 Nov 2010 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles – Module 1 ***(joint collaboration with MAICSA)***	8	Kuala Lumpur	330	NA	440	Vincent Josef
4 Nov 2010 9.00am - 5.00pm	Workshop: Customs Facilities, Exemptions Free Trade Agreements and The GST	8	Malacca	315	365	415	Thomas Selva Do
11 Nov 2010 9.00am - 5.00pm	Workshop: Customs Facilities, Exemptions Free Trade Agreements and The GST	8	Kuala Lumpur	330	365	415	Thomas Selva Do
11 Nov 2010 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles – Module 2 ***(joint collaboration with MAICSA)***	8	Kuala Lumpur	330	NA	440	Vincent Josef
23 Nov 2010 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles – Module 3 ***(joint collaboration with MAICSA)***	8	Kuala Lumpur	330	NA	440	Vincent Josef
30 Nov 2010 9.00am - 5.00pm	Workshop: Minimising Withholding Tax Exposure & Maximising The Benefits of Double Taxation Agreements In Cross Border Transactions	8	Penang	315	365	415	Sivaram Nagappa
30 Nov 2010 9.00am - 5.00pm	Islamic Finance Seminar: Tax & Business Issues	8	Kuala Lumpur	Early bird 375 Normal 425	Early bird 425 Normal 495	Early bird 495 Normal 545	Various Speakers

november

2 Dec 2010 9.00am - 5.00pm	Workshop: Investment Incentives (postponed from 17 March 2010)	8	Kuching	315	365	415	Sivaram Nagappa
3 Dec 2010 9.00am - 5.00pm	Workshop: Investment Incentives (postponed from 16 March 2010)	8	Kota Kinabalu	315	365	415	Sivaram Nagappa
3 Dec 2010 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles – Module 4 ***(joint collaboration with MAICSA)***	8	Kota Kinabalu	315	NA	440	Vincent Josef
8 Dec 2010 9.00am - 5.00pm	Workshop: Customs Facilities, Exemptions Free Trade Agreements and The GST	8	Penang	315	365	415	Thomas Selva Do
9 Dec 2010 9.00am - 5.00pm	Workshop: Personal Tax	8	Kuala Lumpur	330	380	440	Sivaram Nagappa
14 Dec 2010 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles – Module 5 ***(joint collaboration with MAICSA)***	8	Kuala Lumpur	330	NA	440	Vincent Josef
16 Dec 2010 9.00am - 5.00pm	Workshop: Customs Facilities, Exemptions Free Trade Agreements and The GST	8	Petaling Jaya	330	380	440	Thomas Selva Do
16 Dec 2010 9.00am - 5.00pm	Workshop: Minimising Withholding Tax Exposure & Maximising The Benefits of Double Taxation Agreements In Cross Border Transactions	8	Johor Bahru	315	365	415	Sivaram Nagappa
17 Dec 2010 9.00am - 5.00pm	Workshop: Basic Tax Practice & Principles – Module 5 ***(joint collaboration with MAICSA)***	8	Kuala Lumpur	330	NA	440	Vincent Josef

december

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

NATIONAL TAX CONFERENCE 2010

6 & 7 July 2010
Kuala Lumpur Convention Centre

A BIG THANK YOU

The Chartered Tax Institute of Malaysia (CTIM) would like to express its appreciation to the following persons in making the National Tax Conference 2010 a success.

Co-Organising Partner from the Malaysian Tax Academy

Mr Mohd Nizom bin Sairi
(Co-Organising Chairman, NTC 2010)

Madam Siti Rosnah Md Hashim	Madam Esther A.P. Koisin	Madam Nor Azizah Mohd Said
Ms Ranjeet Kaur	Ms Vijaya Suppiah	Mr Hapiz Abdullah Sani
Mr Saiful Anuar Ismail	Mr Shokri Yahaya and the Multimedia/ICT Team	Mr Madan Wan Chik & the Public Relations Officers

Speakers

Dr Michael Kobetsky
Organisation for Economic Co-operation and Development (OECD)

Mr Anand Raj
Partner
Shearn Delamore & Co

YBhg Tan Sri Hasmah binti Abdullah
Chief Executive Officer/Director General
Lembaga Hasil Dalam Negeri Malaysia

Mr Mustafa bin Mohd Nor
Senior Vice President, Research Division
Permodalan Nasional Berhad

Mr Azran Osman-Rani
Chief Executive Officer
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Ms Tan Jek Swan
Director of GST Division
Inland Revenue Authority Singapore

YBhg Dato' Noriyah binti Ahmad
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YBhg Dato' Yusli Mohamed Yusoff
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YM Tengku Dato' Azmil Zahruddin bin Raja Abdul Aziz
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Deputy Director General (Compliance)
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YBhg Datuk Siti Zainab Omar
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Mr Khoo Chin Guan
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Dr Veerinderjeet Singh
Council Member
Chartered Tax Institute of Malaysia

YBhg Dato' Kamariah bt Hussain
Chairman, Tax Review Panel
Ministry of Finance Malaysia

YBhg Datuk Dr. Zainal Aznam Mohd Yusoff
Council Member
National Economic Advisory Council

Professor Tan Sri Dato' Dr. Lin See-Yan
Pro Chancellor
Universiti Sains Malaysia

Panelist

Mr SM Thanneermalai
Deputy President, Chartered Tax Institute of Malaysia
Co-Organising Chairman, NTC 2010

Mr Abu Tariq bin Jamaluddin
Director, Tax Appeal Division, Legal Department
Lembaga Hasil Dalam Negeri Malaysia

Mr Khairussaleh Ramli
Chief Financial Officer
Maybank Group

Mr Subromaniam Tholasy
Deputy Director of Customs, GST Unit
Royal Malaysian Customs

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The Chartered Tax Institute of Malaysia ("CTIM") is a company limited by guarantee incorporated on 1 October 1991 under Section 16(4) of the *Companies Act 1965*. The Institute's mission is to be the premier body providing effective institutional support to members and promoting convergence of interests with government, using taxation as a tool for the nation's economic advancement and to attain the highest standard of technical and professional competency in revenue law and practice supported by an effective secretariat.

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Editorial Note

The Malaysian 2011 Budget which is set to take place on 15 October 2010 will set the pace to transform Malaysia into a developed and high–income economy by 2020, said Prime Minister Dato Seri Najib Tun Razak. He added that this will be achieved through the four pillars of national transformation agenda of 1Malaysia concept, the Government Transformation Programme, the New Economic Model and the 10th Malaysia Plan (10MP). This issue of Tax Guardian provides a comprehensive summary of the Chartered Tax Institute of Malaysia (CTIM)'s submission of fiscal proposals for the 2011 Malaysian Budget to the Ministry of Finance.

Our cover story provides a recap of what transpired at the Malaysia's premier tax event of the year! For the tenth consecutive year, the CTIM in collaboration with the Inland Revenue Board of Malaysia successfully organised the National Tax Conference (NTC) with the theme "Driving Towards A High Income Economy" on the 6 - 7 July 2010 at the Kuala Lumpur Convention Centre. Enjoy the read of what the sponsors, speakers and delegates had to say about this annual event.

The article, "The Fundamentals of Double Tax Agreements", by Tan Hooi Beng discusses several issues surrounding a double tax agreement based on the author's years of experience in practising international tax and the present international thinking.

In addition, the article on "Investing into India–Structures and Caution Points" explores investment strategies for Malaysian investors venturing into India from an Indian tax and regulatory perspective and emphasises the challenges that they may encounter from the Indian tax authorities.

The regular features of the technical updates, international news and learning curve will prove to be an interesting read.

Finally, I'll leave you with a thought that I feel we should adopt in our daily lives.

"Success is the sum of small efforts, repeated day in and day out." – *Robert Collier*

Dato Raymond Liew Lee Leong
Chairman
Editorial Committee

Table of Contents

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

INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers and academicians. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 2,500 to 5,000 words submitted in a typed single spaced format using font size 10 in Microsoft Word via email.

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

Contributions may be sent to:

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Chartered Tax Institute of Malaysia
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Memorandum of Understanding with Universiti Teknologi Mara (UiTM)

Chartered Tax Institute of Malaysia (CTIM) signed a Memorandum of Understanding (MOU) with Universiti Teknologi Mara (UiTM) on 14 July 2010 in which both parties expressed their desire to developed stronger ties and a closer working relationship. The MOU was signed by Prof. Dr. Azni Zain Ahmed Deputy Vice-Chancellor (Academic and International) and Mr Khoo Chin Guan, President of CTIM, at the UiTM's campus in Shah Alam. The signing ceremony was witnessed by Prof. Dr Ibrahim Kamal Abdul Rahman, Dean, Faculty of Accountancy and Mr SM Thaneermalai, Deputy President of CTIM. By signing the MoU, both UiTM and CTIM are committing themselves to work together in the area of tax education. Both parties will share information relating to updates on tax matters and tax related courses conducted in their respective organisations.

CTIM Exhibition Booth at National Tax Conference (NTC)(6–7 July 2010)

CTIM set up an exhibition booth at the NTC which was held at the KL Convention Centre on 6–7 July 2010. The guest of Honour, YAB Dato Seri Ahmad Husni bin Mohamad Hanadzlah (second Finance Minister) and YBhg Tan Sri Hasmah Abdullah (CEO and Director–General of IRB) visited the booth on 7 July 2010.The other exhibitors at the conference were AXP Solutions Sdn Bhd, Bank Islam, Bank Rakyat, Brasstax, Bizztax Alliance Sdn Bhd, CCH Malaysia, IBFD, I & P Group Sdn Bhd, Lembaga Hasil Dalam Negeri Malaysia, Maybank, Percetakan National Malaysia Berhad, Permodalan Nasional Berhad, Public Bank Berhad, Public Mutual Berhad, Puncak Niaga Holdings Berhad, Superior Professional Consultancy Sdn Bhd, The Edge, Universiti Tun Abdul Razak and YGL Multimedia Resources Sdn Bhd.

Membership Drive at Crowe Horwath KL Tax Sdn Bhd

On 24 May 2010, Mr Adrian Yeo (member of the CTIM Membership Services Committee) presented a membership promotion talk at Crowe Horwath KL Tax Sdn Bhd. The informative session was well attended by 45 staff.

Career Talk at MMU Melaka

On 13 August 2010, Melaka Branch Chairman, Mr Varan together with CTIM members En Halim, Mr Gabriel Kua, Mr Ramadas and Dr Loo Ern Chen delivered a career talk on taxation for the students of Multimedia University, Melaka. Almost 100 students attended the talk. The talk was on a career in taxation and the role of CTIM.

CPD News

A Series of Workshops on "New Public Rulings in 2009 and 2010"

The Institute conducted a series of workshops on "New Public Rulings in 2009 and 2010" from 3 May 2010 till 1 June 2010 in Johor Bharu, Malacca, Kota Kinabalu, Kuching, Penang and Ipoh. The speaker, Mr Chow Chee Yen conducted these workshops successfully. He focused on the new Public Rulings on property development & construction contracts.

A Series of Workshops on "The Goods and Services Tax (GST) – Mechanism and Compliance"

A series of workshops on "The Goods and Services Tax – Mechanism and Compliance" were organised in various locations throughout Peninsular Malaysia. The speaker, Mr Thomas Selva Doss highlighted three main GST issues during the workshops, namely, the concept and definitions of GST, mechanism of the GST and compliance of GST. The participants participated actively during the "question and answer" session.

Seminar On Tax Planning & Latest Tax Developments

On 2 June 2010, the Institute conducted a seminar on "Tax Planning & Latest Tax Developments" at the Hotel Istana, Kuala Lumpur. The morning session was chaired by Mr Safrizal Mohd Said (former Council Member of CTIM) and Mr SM Thanneermalai chaired the afternoon session. The distinguished speakers were Mr Fan Kah Seong, Mr Amarjeet Singh, Mr Vijey M Krishnan and Mr Chow Chee Yen. Numerous questions were raised by the participants during the question and answer session. A total of 100 participants attended and benefited from the seminar.

National Tax Conference 2010

Welcoming Speech by Mr Khoo Chin Guan
President, Chartered Tax Institute of Malaysia
National Tax Conference 2010 –
"Driving Towards A High Income Economy"
6 & 7 July 2010
Kuala Lumpur Convention Centre

YB Dato Seri Ahmad Husni bin Mohamad Hanadzlah, Minister of Finance II
YBhg Tan Sri Hasmah binti Abdullah, Chief Executive Officer/Director General of Inland Revenue Board
Mr Mohd Nizom Sairi and Mr SM Thanneermalai, Co–organising Chairpersons of the National Tax Conference 2010
Distinguished Guests and delegates
Members of the media
Ladies & Gentlemen,

It gives me great pleasure to wish all of you a good morning and a warm welcome to the National Tax Conference 2010 which is jointly organised by the Inland Revenue Board and the Chartered Tax Institute of Malaysia.

We are indeed honoured and grateful to YB Dato Seri Ahmad Husni bin Mohamad Hanadzlah for his presence this morning and for officiating our conference today.

This is the tenth consecutive year in which the Chartered Tax Institute of Malaysia or CTIM has co-organised together with the Inland Revenue Board or IRB this premier tax event, the National Tax Conference which is incidentally the largest tax conference in the country.

The co–organising of the National Tax Conference is also a reflection of the strong relationship that CTIM has with the IRB in addition to that with the other relevant Government agencies.

The theme for this year's conference "Driving towards a High Income Economy" is clearly in line with the Government's initiative to propel our country into a High Income Economy. Three sessions directed at this theme have been lined up for the conference. I am confident that the speakers and panelists for these sessions who comprise senior representatives from relevant government agencies and captains of industries will provide us with food for thought and ideas on how we could complement our Government's efforts towards achieving a high income economy in Malaysia. I am sure you would have found that the speakers and panelists for Day One's sessions have generated much discussion and the positive feedback that I have received is a testimony to this.

Since its inception in 1991, CTIM has grown from strength to strength. Today, it has a membership base of over 2,600 members comprising practising members who are also licensed tax agents and members who are in commerce and industry. We also have members who are lawyers as well as academicians and others who have an interest in the field of taxation.

CTIM's mandate has been that of promoting the tax profession as well as contributing towards improving and enhancing the Malaysian tax system.

As a professional tax institute, CTIM participates in numerous dialogues and meetings organised by the relevant authorities including the IRB, the Royal Malaysian Customs Department, the Ministry of Finance particularly the Tax Analysis Division and the Tax Review Panel, the Malaysian Industrial Development Authority and the Ministry of International Trade and Industry to discuss topical tax issues and seek clarification on relevant issues raised by members.

We are committed to working at enhancing the mutual trust between CTIM and the relevant authorities in our journey towards a simpler, clearer, fairer and transparent tax regime.

The Joint Public Rulings Working Group continues to submit comments on draft public rulings to the IRB. A separate Joint Tax Working Group on Financial Reporting Standards comprising CTIM, the Malaysian Institute of Accountants and the Malaysian Institute of Certified Public Accountants has been set up to study the tax impact of the adoption of the various financial reporting standards in Malaysia. To date, this Working Group has submitted eight discussion papers on the tax implications related to the implementation of the various FRSs to the Ministry of Finance and a dialogue was recently held to discuss the tax issues involved.

CTIM has also been invited by the Malaysian Accounting Standards Board (MASB) to participate in a series of meetings with the Convergence Task Force of the MASB with the objective of coordinating efforts in the transition to the International Financing Reporting Standards.

An Indirect Tax Working Group has been set up to provide effective representation at dialogues with Government authorities on indirect tax issues faced by members, in particular, on the proposal for the introduction of Goods and Services Tax (GST) in Malaysia. CTIM welcomes the opportunity to assist the Government in its proposal to implement GST in Malaysia in whatever ways it can.

The Institute has also met with the Special Commissioners of Income Tax and the various publishers to agree on a timely and effective manner of reporting tax appeal cases heard by the Special Commissioners.

On the international front, CTIM is a member of the Asia–Oceania Tax Consultants Association and collaborates with other professional tax institutes in a number of countries. Recently, CTIM signed a Memorandum of Understanding (MoU) with the Indonesian Tax Consultants' Association bringing the number of MoUs signed todate to three; the first two being with the Taxation Institute of Australia and the Chinese Certified Tax Agents Association.

The objectives of the MoU are to promote the exchange of information relating to the tax legislation in each jurisdiction and to conduct training and continuing professional development events which will be mutually beneficial to both parties.

In the area of education, a MoU was signed with Universiti Tun Abdul Razak to collaborate in the area of tax education. A MoU will also be signed with Universiti Teknolgi MARA shortly with the same objective. CTIM is also working on collaboration with CPA Australia to develop a Malaysian tax variant paper for the CPA Australia professional programme.

CTIM's revised professional examination syllabus is in the final stage of review and we continue to promote the CTIM qualification at career talks and forums at universities as well as to professional firms.

CTIM continues to update members with the latest information through CPD events conducted in major towns in the country. The Budget seminars organised nationwide following the tabling of the annual national Budget, for example have benefited participants across the country. Regional tax forums have also been organised for the benefit of members residing outside the Klang Valley. In April of this year, the Perak Branch successfully organised the Northern Region Tax Forum which was well attended by members and non–members alike.

The Council of CTIM has previously formulated a 5 year strategic initiatives and action plan. Amongst the focus this year are the following initiatives:

- Firstly, supporting the advancement of taxation in Malaysia through the bridging of the knowledge gap between research and practice in the field of taxation. In this connection, CTIM has started the process of setting up a Tax Research Foundation in Malaysia to encourage, promote and advance the field of taxation research in the country.

- This Foundation is also a platform for CTIM to bring the profession and the academic institutions together to support relevant tax research. We are hopeful that the Government will support the Foundation by granting it tax exempt status as well as assisting in the initial funding of the Foundation at the appropriate time.

- In the interim, a Research Committee within CTIM has been set up to review proposals for tax research which are beneficial to the tax profession and the country and to recommend supplemental funding for the research projects. I am pleased to announce that CTIM has agreed to sponsor the prize for the best research paper presentation for the Third Malaysian Outstanding Research Paper on Accounting Awards organised by the Malaysian Accountancy Research and Education Foundation.

- Secondly, looking into the issuance of practising certificates to members who are tax practitioners. This move will facilitate the Institute's objective of better regulating its members who are in practice. Related to this, CTIM is of the view that it should be in involved in the tax licensing process of tax agents particularly through the interview stage. We are ready to assist the Ministry of Finance in this respect.

- Thirdly, the Council of CTIM is looking into granting suitably qualified and experienced members the right to use the description "Chartered Tax Practitioner"; and

- Finally, reviewing the professional examination syllabus with the view of updating it and keeping it relevant.

CTIM strongly believes that tax professionals play an integral part in the effective functioning of the nation's tax system. As such, I wish to reiterate that CTIM, as the premier professional organisation representing tax professionals across




the country, is committed towards enhancing the status, prestige and performance as well as raising the overall standards of the profession in line with ensuring that tax professionals exhibit the highest integrity in discharging their responsibilities.

CTIM continues to promote better governance particularly in the area of taxation. Our members in practice act as a bridge between the IRB and taxpayers to facilitate compliance with the tax legislation. Tax services provided by tax practitioners together with that of secretarial services are part and parcel of a proper governance framework. In this respect, CTIM would humbly request YB Dato Seri Ahmad Husni bin Mohamad Hanadzlah to support our proposal for a tax deduction for expenses incurred by companies and businesses on tax and secretarial services in the upcoming Budget 2011 which will be delivered in October this year.

I am hopeful that all of you have found and will find the various sessions at this conference rewarding. A conference of this nature is also a great place to network and build on business relationships.

In conclusion, on behalf of CTIM, I would like to extend my sincere thanks and appreciation to our joint organiser, the IRB for having made this conference possible. Further, no conference can succeed without chairpersons, speakers and panelists and of course, the delegates. To each and every one of you thank you.

I must also not forget the main sponsors for this conference whom we are grateful for their support:

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Various professional bodies should also be acknowledged for their support of this conference. They are ACCA, CIMA, CPA Australia, MIA, MICPA, MAICSA, AMCHAM Malaysia, MICCI, MFPC, IIAM, PSDC, MII and IBBM. Thank you for the great co–operative spirit that you have demonstrated.

My thanks also go to The EDGE for agreeing to be our Media Partner and for giving us a special advertisement package in their Business and Investment Weekly and for supplying complimentary copies of the Edge Financial Daily. Mention must also be made of the Sun and the Malaysian Reserve for their generosity in supplying complimentary copies of their newspapers over the two days of the conference.

Last but not least, my thanks to the Co–organising Chairpersons of the Conference, namely Mr Mohd Nizom Sairi from the Malaysian Tax Academy and Mr SM Thanneermalai from CTIM, the Secretariat staff, conference assistants and CTIM Council members for their untiring efforts to make this conference a success. To all of you present here today, thank you for your presence and for being part of this prestigious national tax conference.

Once again, I thank YB Dato Seri Ahmad Husni bin Mohamad Hanadzlah for his gracious presence here today.

I wish all of you a fruitful and beneficial conference.
Thank you.

National Tax Conference 2010

For the tenth consecutive year, the Chartered Tax Institute of Malaysia (CTIM) and Malaysian Inland Revenue Board (IRB) jointly organised the country's biggest tax conference – National Tax Conference (NTC) with the theme ***"Driving Towards A High Income Economy"***. The NTC was successfully held on the 6th and 7th of July 2010 at the Kuala Lumpur Convention Centre.

The event attracted more than 2,000 delegates comprising of tax agents, tax consultants, accountants, auditors, academicians and senior officers from various government agencies. This year's attendance was a third more than last year's.

The Conference was officiated by the Minister of Finance II, YB Dato Seri Ahmad Husni bin Mohamad Hanadzlah on behalf of the Prime Minister of Malaysia, YAB Dato Seri Mohd Najib bin Tun Haji Abdul Razak. In his keynote address, the Minister announced that a series of focus group meetings were being held by the Ministry of Finance (MOF) to gather inputs for Budget 2011, which will be tabled on 15 October 2010 by the Prime Minister.

YB Dato Seri Ahmad Husni added that the meetings provide a forum for selected group of industries, associations, professional bodies and non-governmental organisations to provide suggestions for the Government's consideration. On the topic of Goods and Services Tax (GST) implementation, the Minister said that the Government's has yet to set a definite timeframe to impose the said tax. The Minister explained that the GST is not a new taxation system and when the GST comes into force at the rate of 4%, the present sales tax and services tax which are respectively at 5% and 10% will be abolished.

Before the Minister's keynote address, the participants and dignitaries were welcomed by Mr Khoo Chin Guan, the President of CTIM. In his speech, Mr Khoo mentioned that the Institute is looking at setting up a tax research institute that would consider ways to enhance the tax system for the benefit of the country. Meanwhile, in her address, YBhg Tan Sri Hasmah binti Abdullah, the Chief Executive Officer of IRB and Director–General of Inland Revenue, highlighted that the tax collection for the calendar year 2010 is expected to remain at RM81 billion, which is within the target set by the MOF. However, Tan Sri Hasmah stressed that of the total RM81 billion to be collected, RM10 billion represented overpaid taxes.

This year's NTC featured a team of experienced speakers and practitioners from the Government and private sectors. They spoke on major tax areas as well as provided recent updates on tax developments in Malaysia. Among the topics that were discussed were:

- Thin Capitalisation: The OECD's Experience
- Recent Tax Cases
- Cross Border Exchange Of Information
- Driving The Economy Through Private Investment
- Nurturing Human Capital: Air Asia's Experience
- GST: What To Expect
- The Malaysian Economy: Where Are We Today And Where Are We Heading
- Driving Towards A High Income Economy

It was encouraging to note that the participants took the opportunity to mingle with the distinguished speakers, chairmen, panellists and IRB officers and raised various tax-related questions during the "Questions and Answers" sessions.

Overall, the participants found the various sessions to be informative and insightful. In addition, it was agreed by most participants that the NTC was an excellent platform to network and forge business relationships. This is evident from some of the quotes and anecdotes from the speakers, participants and sponsors:

"CTIM has received support in terms of funding from the Government for the initial setting up of a tax research foundation"

Mr Khoo Chin Guan
President, CTIM

"This year, CCH Asia celebrated the launch of our Malaysian Withholding Tax Guide at the NTC event, having so many loyal customers there to witness this milestone made the occasion all the more memorable!"

Mr Bas Kniphorst
Publishing Director, South Asia
CCH South Asia

"The tax topics were current and aroused a lot of interest."

Mr K. Sandra Segaran
Executive Director, Transfer Pricing,
Deloitte KassimChan Tax Services Sdn Bhd

"After Dato Kamariah's session on "GST: What To Expect", I congratulated her on promising to put into law the requirement for GST refunds to be given within a stipulated period. I then asked her if she would kindly recommend putting it into law that income tax refunds should also be given just as quickly. She smiled."

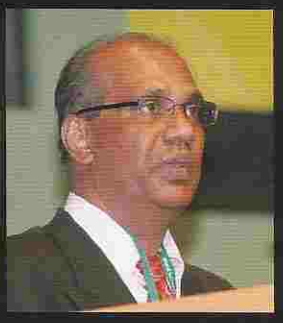
Mr Anand Raj
Partner, Shearn Delamore & Co.

"The topics presented at this year's National Tax Conference presented a very good platform to discuss current tax issues which are of concern to many. The speakers were thorough and some speakers like Tengku Dato Azmil Zahruddin of Malaysia Airlines and Azran Osman–Rani of AirAsia were passionate about what they presented!"

Siti Fatimah Mohd Shahrom
Advocate & Solicitor,
Taxation & Private Clients Practice Group
Lee Hishammuddin Allen & Gledhill





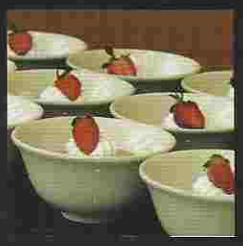












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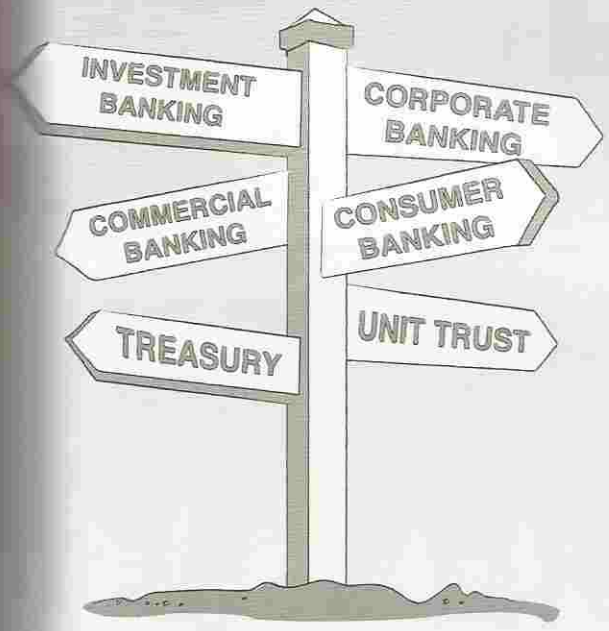

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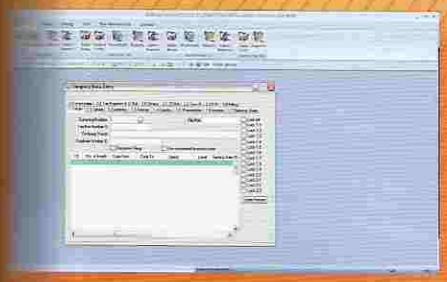
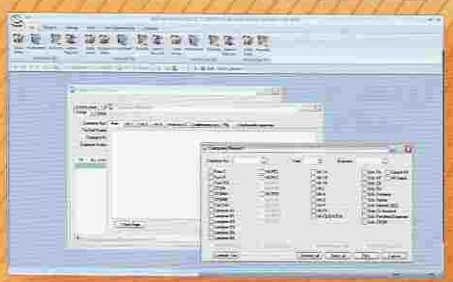
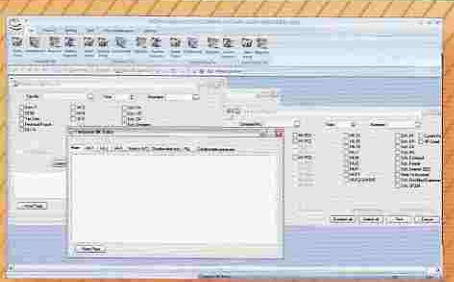

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Investing into India – Structures and Caution Points

By Kamesh Susarla

1. Introduction

With the emergence of India as a top investment destination, there has been a recent surge of Malaysian companies investing into India. According to a recent report released by the Government of India[2], Malaysia is ranked 25th among the foreign investors in India with cumulative investments valued at USD 252.97 million excluding Malaysian investments into India through Mauritius and Singapore. These investments have primarily been in the areas of power, oil refineries, telecommunication and electrical equipment industries, besides highway and other infrastructure development projects.

This article analyses investment strategies for Malaysian investors venturing into India from an Indian tax and regulatory perspective and highlights the challenges that they may encounter from the Indian tax authorities.

2. Choice of business entity and investment regulations

2.1. Choice of business entity

Investors intending to invest in India have following primary options in relation to the choice of the business entity:

- **Liaison office (LO)**: A LO acts as a channel of communication between the principal place of business or Head Office and businesses in India. It cannot undertake any commercial activity in India. It does not make any profits in India and is not taxable in India;
- **Branch office (BO)**: A BO is treated as an extension of the foreign company in India and is treated as a foreign company for Indian tax purposes. A BO is permitted to undertake activities that are approved by the Reserve Bank of India and is taxed at the rate of 42.23%[3];
- **Project office (PO)**: A PO can be opened in India by a foreign company, which has secured a contract from an Indian company to execute a project in India. The PO is treated as a foreign company in India and is taxed the rate of 42.23%[4]; and
- **Wholly owned subsidiary (WOS)**: A WOS can be opened in India by a foreign company. A WOS is treated as a domestic company and is considered a separate legal entity in India taxable at the rate of 33.2175%[5].

In summary, the choice of the business entity depends on a range of factors like ease of establishment, flexibility,

regulatory compliance, legal liability etc. Investors need to take into account the above tax and non–tax considerations before embarking on Indian operations.

This articles highlights investment strategies principally from the perspective of a WOS in India.

2.2. Investment regulation in India

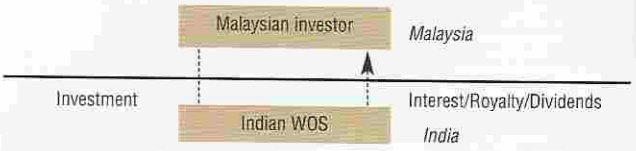
Indian Foreign Direct Investment policy has been liberalised to a larger extent and it permits foreign companies to set up operations in India to undertake a wide spectrum of activities except in certain specified sectors for which a specific approval is required from the Indian Foreign Investment Promotion Board[6].

Further, Indian Government specifically prohibits investments into few sectors which are sensitive and of national importance.

3. Investment Structures

3.1. Direct investments into India

Under the direct investment structure, Malaysian investors would invest directly into India by setting up a WOS in India. Various streams of income from the WOS would be taxed under the Indian tax regulation or the India–Malaysia tax treaty whichever is more beneficial to the Malaysian investor.



2 Fact on Foreign Direct Investment August 1991 to March 2010 - http://dipp.nic.in/fdi_statistics/india_FDI_March2010.pdf.
3 The rate of tax is 40% plus a surcharge (2.5% of 40% income tax) and education cesses (3% of 41%, ie income tax and surcharge) resulting in an effective tax rate of 42.23%.
4 Idem
5 The rate of tax is 30% plus a surcharge (7.5% of 30% income tax) and education cesses (3% of 32.25%, ie income tax and surcharge) resulting in an effective tax rate of 33.2175%.
6 http://www.fipbindia.com/

3.1.1 Tax implications of the structure

The following is a brief snapshot of tax implications of the above structure.

At India level

Interest and Royalties[7]: The Malaysian investor would be subject to tax at 10% on the interest/royalties income received from the Indian WOS. However, as the Indian WOS needs to withhold tax at the rate of 10% under the Indian Income Tax Act 1961 (IITA), there would not be any additional tax liability in India on the Malaysian investor.

Dividends: The Malaysian investor would not be taxable on the dividend income received from the Indian WOS. However, the Indian WOS would be liable to pay a dividend distribution tax (DDT) of 16.609%[8] before the payment of dividends to the Malaysian investor.

Capital Gains[9]: If the Malaysian investor disposes the shares of the Indian WOS, the same shall be taxable at the rate of 0/10/15/20/30%[10] accordingly.

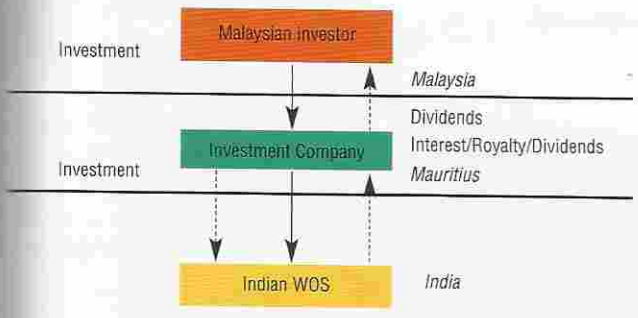
At Malaysia level

The interest/royalty/capital gains received by the Malaysian investor would be taxable according to the Malaysian tax laws.

3.2. Investment via intermediary jurisdictions

Under these structures, the Malaysian investor would invest into India through an investment company located in an intermediary jurisdiction, e.g. Mauritius/Singapore/Cyprus. Various streams of income from the WOS would be taxed under the IITA or the India Mauritius/Singapore/Cyprus tax treaties whichever is more beneficial to the investing company.

3.2.1 Investment via Mauritius



3.2.1.1 Tax implications of the structure

At India level

Interest: The Mauritian investment company would be subject to tax at 21.115%[11] on the interest income received from the Indian WOS.

Dividend: The Mauritian investment company would not be taxable on the dividend income received from the Indian WOS. However, the Indian WOS would be liable to pay a DDT of 16.609%[12] before the payment of dividends the Mauritian investment company.

Capital gains[13]: If the Mauritian investment company disposes the shares of the Indian WOS, no tax shall be levied on the Mauritian investment company on such sale of shares.

At Mauritius level

Dividends/royalties: Dividends/royalties received by the investment company are taxable in Mauritius is 15%. An underlying tax and tax sparing credit is available for Indian taxes or in the alternative presumed foreign tax credit at 80% available in the Mauritius.

Capital gains: There is no capital gains tax in Mauritius on sale of shares of Indian WOS.

Additionally, Mauritius imposes no withholding tax obligations on dividends declared to the Malaysian investor.

At Malaysia level

Dividends received by the Malaysian investor would be taxable according to the applicable Malaysian tax laws.

3.2.2 Other jurisdictions

As illustrated above in the case of Mauritius, India also has favourable tax treaties with Cyprus, Singapore, etc where the respective treaties provide for a tax free exit for the Malaysian investor through the sale of shares of the Indian company.

The favourable tax treaties have made Mauritius, Cyprus and Singapore preferred locations for entities providing foreign direct investment in India.

4. Recent developments

While the use of intermediary jurisdiction provides investors with an apparent flexibility in relation to tax free exit from India, the Government of India is currently gearing up to plug loopholes in such tax treaties to prevent treaty shopping and to curb tax avoidance. The following are some the steps initiated by the Indian Government to curb tax avoidance:

Limitation of Benefit Clauses (LOB)

LOB provisions exclude companies registered in an intermediary jurisdiction from tax treaty benefits unless they have a sufficiently strong nexus to the contracting state where they claim residence. India currently has inserted LOB clauses in tax treaties with

7 Article 11 and 12 of the India-Malaysia tax treaty.

8 The DDT is a tax on distributed profits. DDT is payable by domestic companies on the amount declared, distributed or paid by way of dividends out of their current or accumulated profits, even if the company has no tax payable. A deduction is available to a corporate shareholder in respect of DDT paid, ie a parent company was allowed to deduct dividends received from a subsidiary against dividends distributed by the parent company, subject to certain conditions. The rate of tax is 15% plus a surcharge (7.5% of 15% tax) and education cesses (3% of 16.125%, ie tax and surcharge) resulting in an effective tax rate of 16.609%. In some jurisdictions, the DDT is not recognised as a tax on the recipient and therefore not eligible for credits.

9 The India-Malaysia tax treaty does not provide for the taxation of capital gains. However, the same may be taxed under Art 22 relating to other income which gives the taxing rights to the source state. Since, the gains arise in India, they could be taxed under the applicable tax rates under the IITA.

10 The IITA provides for different rates for taxing different kinds of capital gains. Various factors such a period of holding, nature of the shares (whether listed or not) are taken into consideration for determining the rate of taxation.

11 Article 11 of India–Mauritius tax treaty provides for taxation of interest paid to a Mauritian company in India.

12 See footnote 8 above.

13 Article 13 of the India–Mauritius tax treaty provides for taxation of gains received on sale of Indian shares by a Mauritian resident in Mauritius. Mauritius does not levy any capital gains tax.

Singapore, the United Arab Emirates, Namibia, Iceland, Luxembourg, Kuwait and a host of other countries.

In the case of Singapore, a protocol to the tax treaty was signed on 29 June 2005 that introduced a LOB provision to prevent its abuse. A tax resident would not be entitled to the capital gains tax exemption under the tax treaty if its affairs are arranged primarily to take advantage of this benefit. Furthermore, a shell/conduit company, which has been defined as one with negligible (the threshold limits being defined) or no business operations or with no real and continuous business activities in the resident state would not be eligible for the capital gains tax exemption.

It is therefore essential that Malaysian investors would need to pay attention to LOB clauses in India's tax treaties. Further, it is imperative that the use of intermediary jurisdiction should be embedded with the required substance and business rationale.

General Anti Avoidance Rule (GAAR) in the Direct Taxes Code

The Government of India had released a draft Direct Taxes Code Bill, 2009 (DTC), which sought to replace the existing IITA. A revised discussion paper had been released on 15 June 2010 setting out changes that the Government is considering to the DTC, based on the feedback that it received from the public consultation process. Public comments were invited on the revised discussion paper till 30 June 2010. The DTC is expected to come into effect from 1 April 2011.

The revised discussion paper seeks to introduce a GAAR in the DTC. The proposed GAAR seeks to prevent tax abuse by disregarding any arrangement entered or carried on in a manner which is not normally employed for bona–fide business purposes or which is not at arm's length prices or which abuses the provisions of the DTC or which lacks economic substance.

The Government of India intends to use this GAAR rule to prevent treaty abuse and to prevent the use of conduit companies to gain unfair tax advantage.

Recent judicial pronouncements

The Indian judiciary has often upheld the taxpayer's right to legitimate tax planning by use of tax treaties e.g. the *Azadi Bachao Andolan* case[14], wherein the Indian Supreme Court (SC) has held that "if a resident of a third country seeks to take advantage of the tax relief and economic benefits under any tax treaty through a conduit entity, the legal transactions entered into by that conduit entity cannot be declared invalid".

Another recent case which has been decided in favour of the taxpayer was the *E*Trade*[15] case wherein Authority for Advance Rulings (AAR)[16] dispelled all the contentions made by tax authorities for denying treaty benefit. The AAR observed that upheld the right of the taxpayer to claim treaty benefits under the India–Mauritius tax treaty upholding the principles laid down by the SC in *Azadi Bachao Andolan* case.

In spite of the above rulings in favour of the taxpayer, the past year has seen unprecedented focus by the Indian tax authorities on investments into India through use of intermediary jurisdictions like Mauritius, Cyprus etc.

The tax authorities have often adopted a range of measures like piercing of the corporate veil, disregarding the tax residency certificate issued by the overseas tax authorities and questioning the right to claim the treaty benefits for capital gains, etc. It has also been reported that Indian companies involved in cross–border deals involving low tax jurisdictions have been issued notices requiring them to substantiate the transaction.

In this context, it is worthy to mention the case involving Vodafone Intenational B.V[17], which is currently being litigated by the Indian tax authorities.

As per the facts of the case, Hutchison Telecommunications International Limited sold shares of its wholly–owned subsidiary CGP Investments, a Cayman Islands Company, which in turn held a controlling stake in Hutch Essar Limited (Vodafone India) through various Mauritian entities, to Vodafone International Holdings BV (Vodafone), a Dutch company, for a consideration of USD 11.2 billion.

The Indian tax authorities issued show cause notices to both Vodafone and Vodafone India., Vodafone was alleged to be a taxpayer in default, for its failure to withhold taxes at source and Vodafone India was issued the notice as a representative taxpayer. The upcoming judicial ruling in this case is expected to provide a guiding light on the legality of various tax structures for investment into India.

5. Summary

The past few years have seen unprecedented growth in India and India has been the centre stage for large deals. While this trend is expected to continue for the near foreseeable future, investors should exercise abundant caution to avoid the numerous pitfalls that they may encounter with regard to Indian investments.

The next one year which shall usher in a new DTC and GAAR is expected to provide clarity on various uncertain positions currently being adopted by the Indian tax authorities and bring the much needed respite to foreign investors. TG

Kamesh Susarla *is a Senior Research Associate in the IBFD's Asia–Pacific Knowledge Centre and may be contacted at K.Susarla@ibfd.org. The views expressed in this article are those of the author and should not be attributed to IBFD.*

14 263 ITR 706 (SC)

15 AAR/826/2009

16 Non–residents can apply for an advance ruling which is available on an existing or a proposed transaction, on questions of law or facts. These rulings are binding upon the applicant and the tax authorities, in respect of that applicant.

17 311 ITR 46 (Bom)

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

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

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

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

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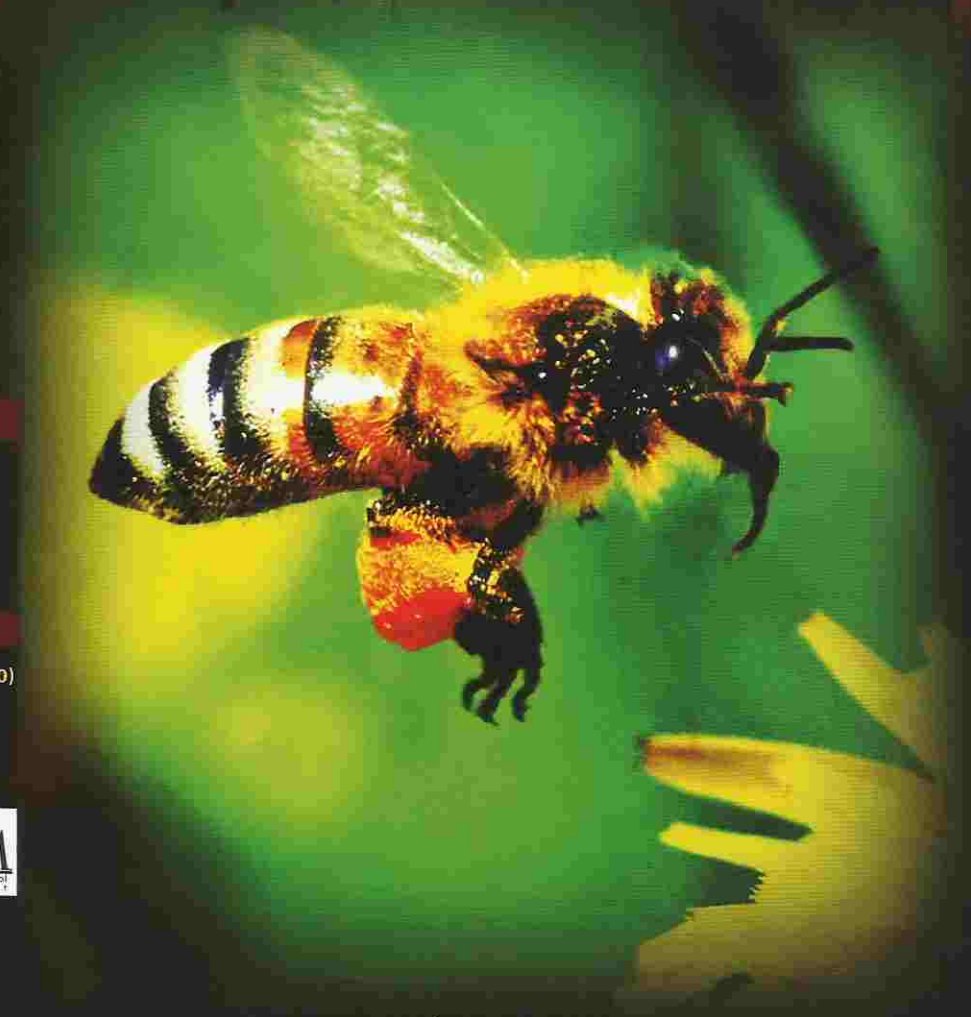

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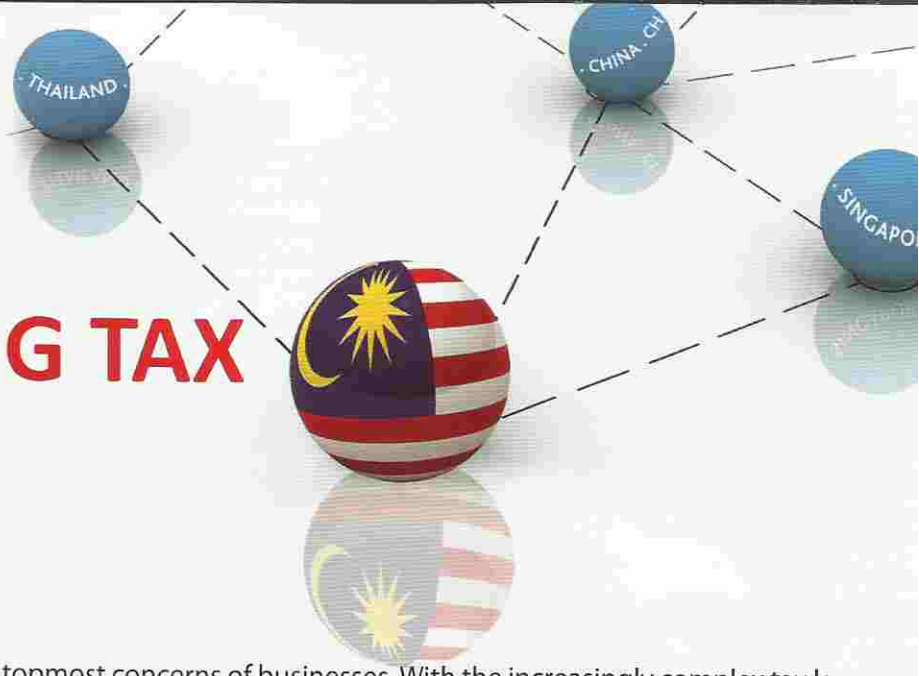

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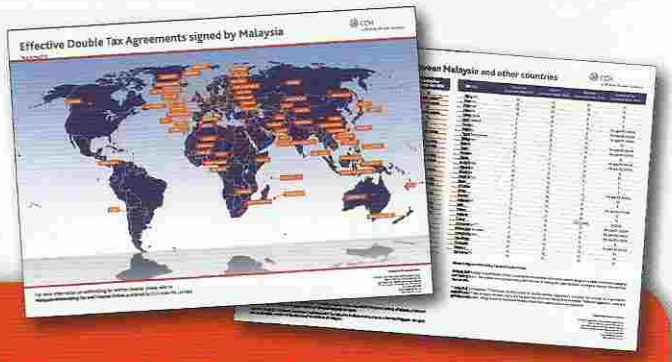

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Special Report – 2011 National Budget Memorandum

(Theme: "Together, Striving Towards a High–Income Economy")

Introduction

The future of our economy lies in the increased productivity, improved innovation and competency of its workforce. The comprehensive measures and concerted efforts taken by the Malaysian Government on the national economy are beginning to gain momentum. The Malaysian economy registered a strong growth of 10.1% in the first quarter of 2010, and both gross exports and imports grew by 30.8% and 35.1% respectively during the same period.[1] Although domestic economic recovery is firmly established, there are still uncertainties arising from the international financial and economic environment.

The Chartered Tax Institute of Malaysia (CTIM or the Institute) submitted, on 3 June 2010, a memorandum relating to fiscal proposals for consideration by the Ministry of Finance (MOF) in the forthcoming 2011 National Budget. CTIM has focused its proposals mainly on taxation matters covering the following broad categories:

- stimulating the business environment;
- creating a competitive investment environment;
- strengthening growth in the services sector;
- facilitating the development of local industries;
- enhancing the efficiency of tax administration;
- promoting an equitable and business–friendly taxation system; and
- extending the social safety net and promoting a caring society.

1. Stimulating the Business Environment

To achieve this, the Institute proposes the following measures to improve the clarity and transparency of the tax system.

(i) Public Rulings/Guidelines/Legislative amendments

Many public rulings/guidelines/legislative amendments have been issued and are applicable retrospectively. The Institute is of the view that these should be prospective instead of retrospective, and appropriate lead–time should be given to taxpayers to comprehend and appreciate the implications of the legislation or amendments made thereto.

In addition, CTIM suggests that the requirement to disclose compliance with the Public Rulings by a taxpayer in the tax return form should be dispensed with.

The tax cases decided by the Special Commissioners of Income Tax (SCIT), Customs Appeal Tribunal (CAT) and Courts should be made available to the public for better transparency through timely dissemination via the websites of the Inland Revenue Board (IRB), the Royal Malaysian Customs (RMC), or other means.

1 Bank Negara Malaysia media release dated 13 May 2010 *[Economic and Financial Developments in Malaysia in the first quarter of 2010].*

(ii) **Enhancing carry–back of current year losses**

In an effort to mitigate the impact of the economic contraction resulting from the global meltdown in the financial sector on the domestic economy, the Government has, in the Second Stimulus Package 2009, allowed a taxpayer to irrevocably elect to carry back its current year business losses of up to RM100,000 to the immediately preceding year of assessment (YA) to reduce its tax liability for the said YA.

It is proposed that the cap of current year losses eligible for the carry-back be increased to a higher amount, that the loss carry–back period be extended from one year to at least three preceding years, and the qualifying period for the carry–back loss relief be further extended after the YA 2010, or to retain the said relief as a permanent feature in the Malaysian taxation system.

2. **Creating a Competitive Investment Environment**

The Government's commitment to accelerating the liberalisation process has been well received. In line with this, convergence with international norms will help to reduce reliance on a few specific industries, businesses and taxpayers. In pursuing our quest towards a developed nation status, we need to adopt international practices in various sectors. In this respect, the Institute would like to emphasise that the MOF should consider aligning the tax treatment of groups of companies with international practice.

(i) **Investment holding company**

With regard to the treatment of income from an investment [s 60F(1A) of the Income Tax Act 1967 (ITA)] of an investment holding company, the Institute is of the view that the indirect expenses, other than the permitted expenses, should be allowed a deduction against the non–investment income. Section 60F should be amended to include tax fees and other similar compliance expenses, Employment Provident Fund (EPF) and Social Security Organisation (SOCSO) contributions, as well as bank charges, as part of the permitted expenses.

(ii) **Withholding tax on reimbursements / disbursements**

The Institute would like to stress that withholding tax should not be imposed on ALL reimbursements/ disbursements as these are incidental costs for providing the service rather than fees/income earned from the services provided. Reimbursements/ disbursements are not consideration for services rendered.

(iii) **Convergence of tax practice with the International Financial Reporting Standards (FRSs)**

The Institute, together with the Malaysian Institute of Accountants and the Malaysian Institute of Certified Public Accountants, has set up a Joint Tax Working Group on FRSs (JTWG–FRS) to study the tax implications on the implementation of FRSs. The JTWG–FRS has completed a study of eight FRSs and recommended the appropriate tax treatment for each FRS. In connection with this, the relevant Discussion Papers have been submitted to the authorities on 27 January 2010.

The Institute suggests that as a guiding principle, where the difference between the accounting treatment of an item/transaction under FRS and the tax treatment is a matter of timing difference, the tax treatment shall converge with the accounting treatment so as to reduce the cost of doing business, and increase the efficiency of the tax administration.

(iv) **Interest–free loans among groups of companies**

The IRB has recently imputed interest on all interest–free loans provided by a company to its related companies within the group. To facilitate multinational operations, it is of national interest to align local revenue practices with international norms on groups of companies. In this connection, the Institute suggests that since this is a departure from past practice, an administrative concession should be granted to allow companies a transitional period to rearrange their financial structure. The Institute suggests that the new practice be applied to all new loans/advances made or entered into from 1 January 2011.

(v) **Interest expense subjected to s 140A, ITA, 1967 (thin capitalisation or transfer pricing) adjustments**

To remove the undue burden to domestic companies (which are covered by s 140 of the ITA), the Institute proposes that s 140A of the ITA be applicable only to loans/advances given to or taken from foreign companies. The Institute suggests that where interest–free advances given are imputed with interest income, such balances should not be included for computing interest restriction under s 33(2) of the ITA. The treatment of compensating adjustments under s 140A should also be clearly spelt out.

3. **Strengthening Growth in the Services Sector**

To transform Malaysia into a high–income economy, there must be a pool of skilled labour and a substantial number of skilled jobs available. Hence, strengthening the development of the services sector is the key to achieving the objective. Globalisation has created a fierce competition for talent. By building a highly skilled workforce, where productivity and competitiveness drive growth, the cost of doing business will be competitive. There is a need to look into ways of ensuring that the country's need for such skills is met. In this regard, CTIM is of the view that Malaysia should be more market–oriented and it would be less costly for the Government to provide a suitable infrastructure for the knowledge sectors to flourish. The proposals are aimed at widening the recognition of professional services and promoting the development of professional services.

(i) **Widening the recognition of professional services**

Currently, only certain services, the professional status of which has been determined by way of Malaysian statutes/legislation, are recognised as professional services. However, it is noted that:

- "New" services have "emerged" without relevant statutory regulation and recognition, including services provided by foreigners (who have not been prevented from providing services due to the lack of regulation).

- Incentives for the services sector are enjoyed by a few sub–sectors which have been "recognised" by way of statutory order.
- With the move towards liberalisation of the services sector, the definition/meaning of "professional services" deserves a re–look to extend the scope so that measures taken to promote development in the services sector and in developing human capital can be more effective. This is to be in line with the definition adopted in the Framework on Mutual Recognition Arrangements.

If statutory recognition is required to accord a professional status, the Institute suggests that, in view of the time constraint to liberalise trade and services, legislation be enacted to set up an umbrella body that controls/regulates the activities of the various services, etc, including the traditional professional groups. The umbrella body will determine the entry qualification and other characteristics of a professional body. All members of the umbrella body offering professional services will then be accorded a professional status and therefore are eligible for any incentive applicable to professional bodies. This will bring about regulation of the services sector.

(ii) Restriction on recognition of professional courses

In line with the promotion of a knowledge–based economy, individuals should be encouraged to pursue more diverse courses of interest and be allowed deductions (by way of reliefs) for expenses incurred.

By allowing a deduction for educational expenses incurred in pursuing a course/professional examination taken from a local educational/professional institution, unless such a course/professional examination is not available locally, the measure will assist in establishing and strengthening the local demand for our education services.

Following the expansion of the scope of professionals mentioned above, the number of local professional institutions recognised in the list should be increased accordingly.

(iii) Promotion and recognition of the contribution of professional bodies

A professional body should not be taxed as a trade association because it is a non–profit making body whose primary objective is to advance the interests of the profession rather than the members. CTIM proposes that:

- Professional bodies should be taxed as "mutual clubs".
- The income from conducting Continuing Professional Education (CPE) courses/seminars/ workshops etc should be exempted from income tax because this is mainly from members and the income from non–members is incidental in nature.

(iv) Tax treatment of premium for, and proceeds from professional indemnity insurance (PII)

Service providers need to take up professional indemnity insurance (PII) to cover their business risks for the same reason that a manufacturer takes up a product liability insurance. In view of the firm stand taken by IRB vide the Public Ruling, it is hoped that the MOF could consider a change in the law to give justice to the matter. The Institute proposes the following:

- All professional service providers be allowed to claim a tax deduction on premium paid on PII to a local insurer. This will allow them to hedge their business risks and promote the services sector. At the same time, this will facilitate the growth of the local insurance industry.
- Income of a professional from the stand–in duties, including that of a locum, be treated as business income from carrying out his profession and the premium on PII be allowed as a deduction against such income.
- Proceeds from PII be taxable and the payment (out of the proceeds received) to the claimant be deductible.

(v) Double deduction of expenses for approved training

A double deduction is given for training conducted by approved institutions. There are only a few approved training institutions and the courses offered are limited. Currently, expenses on in–house training will need to be approved before being eligible for a double deduction.

- The Institute proposes that double deduction be extended to cover:
- all resident service providers;
- a wider variety of courses including education and training programmes conducted by professional bodies which would lead to the attainment of a professional qualification; and
- more approved training institutions, including professional bodies.

(vi) Incentives for service providers

a) Acquisition of foreign owned companies

Under the Income Tax (Deduction for Cost on Acquisition of a Foreign Owned Company) Rules 2003, a locally owned company involved in manufacturing, trading or marketing activities of local products, is eligible for a deduction in arriving at its adjusted income from a business equivalent to 20% of the cost of acquisition of a foreign owned company in the YA in which the cost is incurred and the following four YAs.

"Acquisition of foreign owned company" means acquisition of a foreign owned company located outside Malaysia for the purpose of acquiring high technology for production within the country or for acquiring new export markets for local products as approved by the Malaysian Industrial Development Authority (MIDA). The incentive expired on 31 December 2008.

To promote the services sector, the incentive should be extended indefinitely and should be modified to include companies in the services sector, such as banking, finance, insurance, stock broking, telecommunications, professional services, construction, outsourcing industries, etc. This can be justified by the services sector being the engine of growth in recent years. This will encourage Malaysian service providers to participate in providing services to foreign markets and promote

Malaysia as the centre of excellence in providing these services to the ASEAN region and Asia as a whole.

b) Promotion of health tourism

To facilitate the growth of health tourism, the Institute proposes that the following be considered in order to alleviate the heavy capital outlay involved:

- double deduction on expenses incurred on
  - specialised training of medical personnel;
  - obtaining accreditation of health institutions/ organisations and health programmes;
  - promotion of wellness programmes offered to the public for free or at subsidised rates;
- accelerated capital allowances for expenditure incurred on acquiring advanced medical equipment; and
- reinvestment allowance for investment in equipment used in high–end and niche services.

4. Facilitating the Development of Local Industries

To enhance the stability of our economy, measures must be taken to stimulate the key sectors. Policies should be oriented towards productivity–enhancing reforms to support growth beyond the short term. In line with the Government's effort to revitalise the property sector, the following measures are proposed with the objective of stimulating property transactions, harmonising the tax treatment and lowering the cost of doing business in Malaysia.

(i) Strengthening growth in the local property sector

The construction industry has been an important sector for economic growth. In this respect, the Institute proposes the following measures for the consideration of the Ministry.

a) Assessment on owners/purchasers

- **Carry forward of unabsorbed rental loss**

  Currently, losses from a rental source are not allowed to be carried forward to be set off against future rental income. A rental loss may occur during the initial stage or during a change of tenancy when the landlord is looking for a tenant or a replacement tenant. This would make investment in property very unattractive as the landlord has to incur maintenance expenses to keep the premises in rentable condition during the period. The expenses incurred could be large and the "vacant" period could be long. Further, for practical reasons, repairs and major maintenance work are generally performed prior to the commencement of a new tenancy. The landlord would not be able to claim the full amount of such repair expenses since there may be insufficient rental income.

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

- **Assessment on income from letting of real property**

  Unlike the earlier practice, where the quantitative and qualitative criteria as found in Public Ruling No.1/2004 were used, currently, income from the letting of real property can only be treated as a business source if the owner actively provides maintenance services, support services or ancillary facilities to the tenant, ie irrespective of the number or types of property one has invested in.

  The Institute is of the view that the policy does not recognise the reality of doing a business. Undoubtedly, businessmen enter into a business or trade to maximise returns. In the case of the property–letting business, it is the potential return, in the form of rental income that can be generated from the real property that determines whether a property should be acquired. In the course of selecting real properties to invest in or to lease, one may end up deriving income from properties which do not meet the test as a business source. For example, in Malaysia, shop houses are commonly maintained by tenants who may also renovate the premises to suit their requirements. The policy does not enhance growth in the property sector.

  Since most of the high–rise buildings such as shopping malls, office buildings, condominiums and apartments are maintained by property management companies, the owners do not have a choice about providing maintenance services. In such instances, the rental income derived from these properties will generally be treated as non–business source.

  Property investors will be burdened with the task of determining whether a property is a business source or a non–business rental source for tax purposes. Separate accounts will have to be maintained to reflect the income and expenses relating to the business and non–business sources. For example, an owner may have a row of shop houses, say, 10 units of three–storey shop houses for rent. Maintenance services, support services or ancillary facilities are offered to prospective tenants. Although all the units are let out, only some of the tenants have engaged the owner to provide these services. The situation may be further complicated where, due to changes in tenants for some of the units, the maintenance services for some of the properties are provided for only some months rather than the whole year.

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

- **Building allowances on non–industrial buildings**

  Under FRS 116: Property, Plant and Equipment, buildings have a limited useful life and are depreciable assets. To simplify our tax system and to

be convergent with FRS, the Institute proposes that:
- the scope of Sch 3 para 63 of the ITA be extended so that building allowances are given to capital expenditure expended on or after 1 Jan 2010, on all buildings which are used solely for the purpose of a business;
- the eligibility for building allowances be extended to the owners or lessors of non–industrial buildings; and
- building allowances be allowed on expenditure on renovation and alteration of all business premises incurred on or after 1 January 2011 without any limit on the amount of capital expenditure incurred.

- **Loan interest incurred on acquisition/construction of premises prior to commencement of business**
  Currently, the IRB does not allow a deduction on interest expenses incurred on the construction of a factory or plant prior to the commencement of a business. Such interest expenses are also not eligible for capital allowances on the grounds that interest expenses do not constitute cost of construction.

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

b) **Streamlining the tax treatment of property developers**
- **Reducing compliance costs**
  The adoption of IFRIC 15 "Agreements for the Construction of Real Estate" by subsidiaries and affiliates of public listed companies in Malaysia, with effect from 1 July 2010 brings about the need to maintain additional records for the purpose of ascertaining the gross income from property development projects for income tax purposes.

  The income recognition for tax purposes should be in line with the accounting method of income recognition so as to reduce compliance costs of Malaysian property development companies which have adopted IFRIC 15.

  The scope of the Income Tax (Property Development) Regulations 2007 should be aligned with FRS 111; ie the Regulations would only be applicable to "construction contracts" which fall within the ambit of FRS 111.

  It is proposed that the IRB accepts for tax purposes the commencement of recognition of income when a development project has reached a certain stage of completion for accounting purposes so long as the stage of completion adopted by the developer is reasonable and is acceptable for accounting purposes.

  The amount of liquidated ascertained damages provided in the accounts is to be deductible for tax purposes provided the amount is calculated on a project by project basis using the percentage prescribed in the sale and purchase agreement with purchasers.
  Guarantee fees incurred on loans/facilities for a property development project satisfy the deductibility test under s 33(1) of the ITA. However, the IRB has taken the position that guarantee fees are not deductible for tax purposes. Hence, it is proposed that a deduction be allowed based on the percentage of completion of a development project.

- **Preparation of final accounts**
  Under the Income Tax (Property Development) Regulations 2007, a development project or phase is deemed completed upon either the date on which the Temporary Certificate of Fitness for Occupation (TCFO) or the date on which the Certificate of Fitness for Occupation (CFO) is issued. The property developer must then determine the actual profit for the project and prepare the final accounts.

  The requirement to prepare the final accounts on the date of the TCFO or CFO does not take into consideration many other costs incurred after the issuance of the TCFO/CFO, particularly for large development projects. For township developments, the finalisation of accounts would depend on a number of factors such as changes in regulatory requirements, Government specifications needed for infrastructure facilities like road widths and drain sizes, cost variations in the components of infrastructure costs and land related costs. Therefore, the actual profit for the development project is normally determined upon finalisation of billings issued by contractors and/or subcontractors, and this can take place many months or years after the handing over of the vacant possession of developed units to purchasers.

  It is proposed that the date of completion be set at 18 months from the date of delivery of vacant possession, which is in line with the Housing Development Act requirements on defects liability period. Alternatively, a reasonable period may be set at 12 months after the issuance of the TCFO or CFO.

- **Allocation of land costs**
  Under the Income Tax (Property Development) Regulations 2007, the Director General may allow a property developer to apply a formula for the purpose of ascertaining the estimated gross profit in accordance with the accounting standard or practice applicable during the basis period that relates to the project as long as the developer ensures that it uses fair and reasonable estimates as required.

  In this regard, a common method adopted by most major township developers in Malaysia is to allocate the land costs based on the gross development value (GDV) of the project which is in accordance with the Malaysian accounting standards. However, this is not acceptable by the IRB. The Public Ruling No. 1/2009 on Property Development prescribes that

land costs be allocated between the various projects based on acreage. Such a basis of allocation disregards the fact that land value varies depending on the location of the project and the development that takes place in the surrounding areas.

It is proposed that property developers be allowed to adopt any method of allocation of land costs as long as the method adopted is applied consistently and the method used is in accordance with the accounting standards and practices prevailing at that time.

c) **Real Property Gains Tax**

- **Property development companies being deemed real property companies (RPCs)**

The Real Property Gains Tax Act 1976 (Act 169) (RPGTA) was introduced to curb speculative activities on properties. The provisions on real property companies were introduced on 21 October 1988 as an anti–avoidance measure with regard to the RPGTA.

In the Binastra Holdings case, the IRB has taken the position that a company is considered a RPC even if the company holds land as stock–in–trade, and the Court of Appeal ruled in favour of the IRB recently. Although the exact grounds of the judgement are not known, suffice it to say that the case will have far reaching implications, not just on the property developers but on the business community in the country as a whole.

The decision is inconsistent with the original intention of the RPC provisions. It affects all companies which hold substantial real properties whether they are held as fixed assets or as stock–in–trade, as they are deemed to be real property speculators.

The original intention of introducing the RPGTA should not be compromised. It seems illogical and inequitable for a company to be subject to income tax on gains on disposal of real property which forms part of its stock–in–trade, and yet at the same time be subject to RPGT on the gain on sale of its shares.

Now that the case has been decided, a reasonable inference is that the law has been improperly drafted and may need to be amended. Perhaps, it should be clear that only real properties not forming part of stock–in–trade and shares of real property companies should be taken into account for the purpose of determining whether a company is an RPC.

The Institute suggests that property developers and companies which hold real properties to generate business income (eg plantation companies, real property investment trusts, hotel owners and companies in the business of letting of real properties, etc) be excluded from falling within the ambit of RPCs.

The rationale is that the gains on the disposal of real properties which form part of stock–in–trade would have already been subjected to income tax. Further, it will encourage investment activities as a whole as the capital gain on disposal of shares of RPCs will not be subjected to RPGT.

- **Cost of financing acquisition of real property**

With the recent amendment to the RPGTA, the interest costs incurred for the acquisition of real property are no longer allowed as a deduction in arriving at the chargeable gain upon disposal.

The Institute suggests that interest expenses paid to finance the acquisition of real properties be reinstated as part of the incidental cost of the acquisition price for computing RPGT. This is because in reality, the increase in value of properties is partly due to the interest costs in acquiring the properties.

(ii) **Promoting the automobile industry**

a) **Tax treatment of cars used for demonstration by motor vehicle retailers**

Currently, as a general practice in the automobile industry, motor vehicles used by the retailers as demonstration cars for customer test–drive purposes are treated as stock–in–trade in their books, and tax deductions are claimed on the diminution in value of the said vehicles for the relevant years of assessment pursuant to s 35(2) of the ITA.

The IRB generally deems the demonstration cars as fixed assets of the retailers and treat the diminution in stock value as depreciation, thereby disallowing a claim for such expenses for tax purposes.

As the demonstration cars are essentially stock–in–trade of the car retailers, ie they will be sold whenever there is a demand, the accounting treatment of demonstration cars as stock–in–trade should be accepted by the IRB and the Public Ruling 4/2006 on Valuation of Stock–in–Trade and Work–In–Progress – Part 1 should be amended to specifically allow a tax deduction on the diminution in value of demonstration cars by the motor vehicle retailers pursuant to s 35(2) of the ITA. Alternatively, the cap on qualifying capital expenditure and the claw back on disposals within two years should be withdrawn.

b) **Review of excise duty on motor vehicles**

With the implementation of the Asean Free Trade Area (AFTA), Malaysia has correspondingly reduced the import duties on all types and variants of vehicles imported from the ASEAN countries to five percent to be in line with the spirit of regionalisation under the AFTA agreement. However, the excise duties applicable on motor vehicles still remain high at the rates ranging from 60% to 105% (depending on the engine capacity), which makes the motorcar prices in Malaysia one of the highest in the world.

As an initiative to reduce the carbon footprint by encouraging the Rakyat to replace their existing aging

cars with brand new cars with lower carbon dioxide emission, it is proposed that the current excise duty rates on motor vehicles be reduced.

(iii) Capital allowances and rental claims on private motor vehicles

Currently, the limit of capital allowances and rental claims on the private motor vehicles is RM100,000 for each vehicle provided that the cost of the vehicle does not exceed RM150,000. If the cost is more than RM150,000, the limit is RM50,000.

It is proposed that the limit on qualifying expenditure for capital allowances and lease rental claims on private motor vehicles be removed.

Alternatively, the cap should be increased to reflect the current economic environment. It may be considered based on its cylinder capacity. For example, motor vehicles with cylinder capacity not exceeding 2,000 cc should have no restriction on the amount of capital allowances claimed while those with cylinder capacity greater than 2,000 cc could have a limit on the amount of capital allowances claimed.

(iv) Small and medium size enterprises (SME)

a) Confusion over the definition of "SME"

There is a different definition for SME used by the Small and Medium Industries Development Corporation (SMIDEC) and Bank Negara Malaysia (BNM) for the purpose of granting financial assistance.

The difference in definition causes confusion to the businessmen. As an example, a person may be eligible for the SME financing package but not qualify for the SME tax incentive due to the structure of their paid–up capital. The definition of "SME" should be streamlined to reduce unnecessary misunderstanding and confusion as this will hinder the efforts to strengthen the SME sector in our economy.

b) Restriction on assets acquired under hire–purchase arrangement

The Income Tax (Accelerated Capital Allowance) (Plant and Machinery) Rules 2008 [P.U. (A) No. 357/2008] stipulates that only the capital portion of a hire–purchase asset incurred during the effective period of the Rules will be considered as qualifying expenditure. This is not consistent with the objective of the incentive ie to give financial assistance to the SME. In addition, such a practice will complicate the calculation of balancing allowances/charges on disposal, as the claim for allowances are at different rates for different tears of assessment.

It is suggested that the full capital expenditure of the assets acquired in years of assessment (YAs) 2009 and 2010 should qualify for accelerated capital allowance (ACA). For assets acquired under hire–purchase in YA 2009 and/or 2010, capital expenditure incurred after YA 2010 should be eligible for ACA when it is incurred.

5. Enhancing the Efficiency of Tax Administration

(i) Appeals

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

To improve the appeal process, it is proposed that:–

- The Courts of Judicature Act should be amended to allow cases first heard by the SCIT to be eventually heard at the Federal Court.
- The time frame for disposal of appeals by the DGIR should be reviewed. (The current maximum period of 18 months is too long and does not encourage efficient handling of appeals).
- An Administrative Appeals Tribunal (AAT) should be set up to hear appeals by taxpayers aggrieved by decisions of an administrative nature including the imposition of penalties.
- An avenue be provided for appeals against penalties which are imposed through the exercise of the discretionary powers of the DGIR. This could be through the AAT.
- Since all SCIT cases are decided by a panel of three Commissioners, all of whom are persons with expertise in tax law, it is therefore appropriate that appeals against the SCIT decisions be reviewed by a panel of judges. CTIM therefore suggests that the status of SCIT be elevated to be equivalent to that of the High Court, and any further appeals be made to the Court of Appeal, which is also sat by a panel of judges.

(ii) Simplifying the tax system

The Institute strongly suggests that personal reliefs should be consolidated into a few broad categories (for example, single individual and married individual) and the total amount of personal reliefs should be automatically granted to the taxpayer. This will simplify the completion of tax returns and reduce errors and potential overclaim.

(iii) Review of current personal reliefs

In view of the rising cost of living, it is proposed that the Government adjusts the relief available with regard to costs of maintaining a child, costs of education and healthcare maintenance.

(iv) Restructuring of Employer's and Employee's Returns

a) Due date for EA Form

Section 83(1A) of the ITA stipulates that every employer must render to his employee a statement of his remuneration in the immediately preceding year (Form EA) on or before 28 February. It is a fact that there are many festive holidays in the beginning of the year. Besides, employers have to wait for the year–end financial statements to be finalised before deciding whether a bonus should be paid.

In view of the circumstances above, the Institute proposes that the due date for completion of Form EA be amended to 15th of March to allow more time for employers to compile the necessary details.

b) Disclosure of exempt benefits

Currently, the information required for Form E and Form EA is too onerous and administratively burdensome. The valuation of various categories of benefits–in–kind and perquisites are subject to different methods of determination.

The E–returns and the treatment of perquisites and benefits–in–kind should be simplified so that an employee whose remuneration had been subjected to the Monthly Tax Deductions (MTD) can be exempted from the submission of annual tax returns.

c) Requirement for manual sign–off after submission

There is a statutory requirement for a manual sign–off after submission of returns by e–filing.

This requirement should be dispensed with considering the fact that the Form CP55A itself is a safeguard. Besides, the practitioners have in place their own procedures for their clients to confirm the submission of tax computations/returns/forms by e–filing.

(v) Enhancing tax administration

a) Resolving operational bottlenecks

With the introduction of the self–assessment regime, the IRB and MOF are facing challenges in various aspects of tax administration, and the limited internal resources have been stretched, thereby causing efficiency and delivery issues.

CTIM proposes the following:

- Out–sourcing of some of the technical research work to professional services firms.
- Establishment of a Consultative Panel to provide a permanent avenue for consultation between the public sector and private sector on tax issues.
- Appointment of prominent and experienced practitioners as advisers who appreciate the business realities and can adapt the system as and where necessary. They can also serve as avenues to provide feedback to enable changes to be implemented on a timely basis.

b) Access to IRB's records by taxpayers

Currently, taxpayers may only know their tax status if they personally make a visit to the relevant IRB branches.

A facility should be provided to taxpayers via an online system to enable taxpayers to access their tax records with IRB such as status of tax payment, issuance of *assessments, imposition of penalties, etc.*

c) Self–amendment of tax computation

Although Malaysia has changed the basis of assessment for income tax to the current year basis and introduced self–assessment, only piecemeal amendments have been made to the ITA.

The Institute is of the view that specific sections of the ITA should be reviewed in view of the self–assessment system of taxation. Essentially, in a case where there is no tax payable, in a deemed assessment, where there is a need to self–amend the tax return, relief (for error or mistake) should be allowed.

(vi) Tax Licensing

CTIM has made suggestions to the MOF regarding issues concerning tax administration including the following issues:

a) Eligibility

- **Qualifications recognised for tax licensing purposes**
  The Institute suggested that there should be clear criteria established in a transparent manner for any qualification to be recognised for tax licensing purposes. An applicant for a tax licence should be a member of a recognised professional body, preferably a tax professional body.
- **Accreditation of professional bodies for tax licensing purposes**
  The Institute would like to emphasise that any organisation recognised by the MOF as a professional body, should have a full set of rules to govern its members, conduct Continuing Professional Development (CPD) courses and events, conduct professional examinations, have membership criteria for admission of members, publish journals/magazines regularly to update members, etc.

b) Licensing mechanism

The following matters are proposed:

- **National Supervisory Body to administer licensing of tax agents**
  A National Supervisory Body (NSB) should be established by appointing an existing professional body to undertake this process or setting up a separate entity through legislation requiring all tax agents to be a member of the NSB.

In the immediate term, it is more pragmatic for the MOF to accredit a tax professional body to regulate tax agents. A tax agent's licence will then only be issued to an individual who has obtained membership of the accredited professional body and met all other requirements.

- **Participation by professional bodies in licensing interviews**
  The Institute is of the view that in enforcing quality and ethical standards in any profession, self–regulation is the key. The participation of the professional body in the licensing process will strengthen communication and co–operation between tax practitioners and the MOF. It enhances confidence as well as improves the quality of selection. It will also act as a check and balance to prevent any deviation from the selection policy and curtail any abuse of power. The Institute looks forward to its participation in the licensing interview.

c) **Awarding of CPD points**
The following are proposed:

- **Widening the recognition of tax seminars/courses**
  The MOF may specifically recognise the events organised by other persons (ie by including the organisations in the tax licence guidelines which would mean that the guidelines have to be amended regularly to incorporate new organisations) or to grant others the freedom to organise such events and award (CPD) points in accordance with broad guidelines issued by MOF. The Institute could also assist in vetting, accrediting and awarding CPD points for these courses.

  The MOF could state the general criteria that such seminars/courses should meet or comply with and then leave it to the profession. There may be a need to do a review or an audit of some of the events from time to time to ensure that these are in compliance with the set criteria.

- **CTIM as the approving body for awarding CPD points**
  The Institute feels that the MOF should not be burdened with evaluating any submission for accreditation of events for CPD points. If there are sufficient guidelines, then these would suffice to guide anyone.

  The Institute, having been in existence for more than 18 years, being well–recognised locally and internationally, as well as being a representative of the tax profession in Malaysia (made up of tax agents, academics, lawyers and personnel in commerce and industry) is prepared to offer its assistance in being the evaluating/approving body for the awarding of CPD points to other organisations, if necessary.

(vii) **Implementation of Goods and Services Tax (GST)**

a) **Preparation for GST Regime**
The Institute urges the RMC to engage the private sector, in particular, the tax agents and the relevant industry stakeholders, in prior consultation on the proposed guidelines/rulings on specific arrangements /administrative practices. Drafts of the documents should be issued to the relevant stakeholders for effective feedback and the final documents should be issued to the public on a timely basis to ensure transparency and clarity.

CTIM hopes that the RMC will continue to educate the public on the new tax regime to ensure a smooth implementation.

b) **GST Implementation Costs**
It is proposed that the expenses incurred for the implementation of GST should be specifically deductible for tax purposes by legislation.

c) **GST Licensing**
Clause 174 of the GST Bill 2009 stipulates that no person shall be permitted to act *on behalf of any person* for any matter under the GST Act unless he is a tax agent.

The Institute welcomes the licensing of tax agents as this will enhance the standard of professional services rendered. Considering that GST has already been tabled for first reading, the Institute proposes the following:

To relieve the MOF/RMC from the administrative burden of evaluating and screening of applications for the licence, the Institute suggests that tax agents licensed under s 153 of the ITA, who are members of CTIM and who have knowledge of customs matters including sales tax and service tax, and members of the Institute, should be automatically allowed to be tax agents for GST purposes. Any complaints against the tax agents may be brought to the attention of the MOF or the Institute for disciplinary action.

The Institute is of the view that tax agents should be members of a professional body so that the members may be disciplined and regulated through the professional body, thereby enhancing the standard of professional services.

6. **Promoting an Equitable and Business–friendly Taxation System**

(a) **Taxpayers' rights**
With the implementation of the self–assessment system, the IRB is able to place emphasis on enforcing compliance via tax audits and investigations.
The following are proposed:

- introduction of the office of a Taxation Ombudsman as an avenue for taxpayers to forward complaints in relation to non–technical matters;
- introduction of an Administrative Appeals Tribunal for taxpayers aggrieved by decisions of an administrative nature (including the imposition of penalties);
- establishment of a more effective Taxpayer's Charter or Client's Charter which not only sets out the rights and obligations of taxpayers and certain timelines for the IRB to follow but also effectively monitors the adherence to the Charter; and
- criminal proceedings should only be initiated on repetitive or recalcitrant offenders and not as a first course of action.

(b) Self–assessment regime

i) Improving effectiveness of self–amendment

The period eligible for self–amendment should be increased from six months to one year and no penalty should be imposed if the tax already paid exceeds the final tax after the self–amendment.

ii) Penalty imposed on technical adjustments

Section 77B of the ITA should be amended by using similar wordings found in s 107B(6) which empowers the DGIR to remit the increased sum.

This is because the amendment could be due to appeals to Courts which result in decisions which are not favourable to the taxpayers, or the amendment could be due to errors/mistakes made in good faith and without any element of culpability. Thus, the penalties of up to 15.5% are not equitable and would discourage voluntary disclosure done in good faith.

Appropriate legislation should be introduced to the effect that no penalties would be imposed if tax adjustments are done due to technical issues or in good faith.

(c) Tax audit and investigation

a) Appeal against tax audit/investigation

CTIM suggests that a clear mechanism should be set for appeals against the manner in which an audit/investigation is carried out. Such appeals should be settled on a timely basis by an independent party such as AAT.

b) Penalty on longer instalment payment scheme

Paragraph 12.6 of the Framework should be deleted. A taxpayer should not be penalised merely because he has applied for a longer payment scheme. Instead, taxpayers should be encouraged to make full payment upon finalisation of the investigation and the merits of each case should be considered in granting a longer instalment payment scheme.

(d) Foreign associations

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

(e) Compensation on refund of tax overpaid

Currently, the IRB does not pay interest on the tax overpaid or over–deducted. Instead, there will be a penalty imposed on the late payment of tax.

For the purpose of equity, the IRB should consider paying a fixed rate of compensation based on the duration of delay in making refunds.

(f) Simplifying deductibility of entertainment expenditure

CTIM proposes that any expense incurred in the provision of entertainment be partially allowed (50%) while those which fall under s 39(1)(l)(i) to (vii) of the ITA be allowed in full. This will ease the administrative work in preparing tax computations and enhance simplicity in tax compliance under the self–assessment regime.

(g) Extension of eligibility for forest allowances

CTIM is of the view that the law should be amended to expressly allow logging contractors to claim forest allowances.

7. Extending the Social Safety Net and Promoting a Caring Society

(a) Allowing basis year business loss to be set–off against income of the spouse

To enhance family ties in times of crisis, the Institute proposes that s 45 of the ITA be amended to allow a husband and wife to utilise the basis year business loss of one spouse to be set–off against the income of the other. This will strengthen the social support net and is in line with developing a caring society.

(b) Donations to approved institutions

The Institute is of the view that, consistent with the objective of developing a caring society, there should be no restriction on donations made to charitable organisations. The law should be amended to stipulate the higher of 10% of aggregate income or RM25,000 (or some other practical threshold). In addition, the provision should apply to all taxpayers, including individuals, instead of only companies.

(c) Tax on interest income earned by associations/ charitable bodies

To assist and maintain these social safety net programmes and to promote the spirit of a caring society, the Institute suggests that the scope of s 109C of the ITA be extended to include associations ie interest income earned would be subject to a 5% final tax instead of subjecting the interest income to tax at the relevant rates applicable to such associations.

(d) Promotion of ecologically sustainable activities

Timber levy

A timber levy could be imposed on every tree that is felled whether for development purposes or otherwise. This will increase the awareness of, and enhance the preservation of, the green lung, particularly in the city.

Conclusion

In short, the objectives of the 2011 Budget should ensure that the needs of the rakyat are met through a consultative approach, and the policy is environment–friendly, has a social agenda and is business–sensitive. From the administrative aspect, the Budget should show efforts to strive towards simplifying procedures and practices, providing greater transparency and clarity as well as developing effective feedback channels, thereby increasing administrative efficiency. It should also garner greater participation of the private sector so as to be more responsive to the changes in the local and international environment.

Once again, the Institute wishes to thank the MOF for giving us the opportunity to present our views and proposals for the 2011 Budget. TG

The Fundamentals of Double Tax Agreements

By Tan Hooi Beng

Background

In the borderless world, cross-border transactions are imminent. As the saying goes, nothing is certain in life except for death and taxes. With various international deals taking place every minute, comes various tax issues, be it a simple one or otherwise. One of the most important aspects of international taxation is the taxing rights of the jurisdictions involved, namely the source country and the resident country. In a triangular case, a third jurisdiction could also be in the picture. Along the way, there would be an overlapping area that gives rise to double taxation. Against this background, whilst it is not possible to deal with each aspect of the double tax agreement (DTA), my article discusses several fundamental issues surrounding a DTA. Discussions are based on my years of experience in practising international tax and the present international thinking. Where relevant, the Malaysian aspects are included to give the readers a better perspective.

Objectives of DTAs

In the simplest manner, I always believe that A. McKie has aptly summarised the purposes of a DTA at the 22nd Tax Conference of the Canadian Tax Foundation where he said:

"The taxpayer hopes that the treaty will prevent double taxation of his income, the tax gatherer hopes the treaty will prevent fiscal evasion and the politician just hopes"

Paragraph 16 of the Introduction to the Organisation for Economic and Co–operation Development (OECD) Model Tax Convention on Income and on Capital (OECD MTC) states that:

> *"In both the 1963 Draft Convention and the 1977 Model Convention, the title of the Model Convention included a reference to the elimination of double taxation. In recognition of the fact that the Model Convention does not deal exclusively with the elimination of double taxation but also addresses other issues, such as the prevention of tax evasion and non–discrimination, it was subsequently decided to use a shorter title which did not include this reference. This change has been made both on the cover page of this publication and in the Model Convention itself. However, it is understood that the practice of many Member countries is still to include in the title a reference to either the elimination of double taxation or to both the elimination of double taxation and the prevention of fiscal evasion".*

Malaysian treaties generally follow the present practices of the OECD member countries. Let's look at the title and preamble to the DTA concluded between the Malaysia and Singapore as follows:

"AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME"

"The Government of Malaysia and the Government of the Republic of Singapore desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows:.."

Broadly speaking, the DTA is meant to achieve the following objectives:

- avoiding double taxation of the same income;
- facilitating cross–border/international trade and investment;
- providing fair treatment to residents of different jurisdictions; and
- preventing tax evasion and fiscal fraud.

Does DTA override domestic tax law?

From the international perspective, generally this is the case. From the Malaysian perspective, to begin with, there must first be a tax liability under the Malaysian Income Tax Act, 1967 (ITA). Once this is established, then one has to check the provisions in the DTA to see whether a reduction of tax rate or total elimination is available. If so, the DTA must be respected. This is clearly provided in the ITA, namely s 132(1) which states that:

(1) If the Minister by statutory order declares that–

(a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view of affording relief from double taxation in relation to tax under this Act and any foreign tax of that territory; and
(b) it is expedient that those arrangements should have effect,

then, so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act ***notwithstanding anything in any written law (emphasis added).***

Whilst the above law is quite clear, there have been litigations on this aspect. And, as expected, it has been established that due respect should always be given to the DTAs that the Malaysian Government has entered into. Cases like *DGIR v Euromedical Industries Ltd (1983) 2 MLJ 57* and *SGSS (Pte) Ltd v KPHDN (2000) 7 MLJ 229* remain to be celebrated ones until today.

Is DTA a taxing statute?

As mentioned above, DTA prevails over the domestic tax law. It is interesting to ask whether a DTA can impose a higher tax burden tax under domestic law. In other words, can DTA act as a taxing statute (ie taxing right is provided in the DTA but no taxation is imposed by the local law)? Over the years, different jurisdictions have adopted different approaches but by and large, majority of the jurisdictions adopt the view that the DTAs are meant to relieve and not impose a higher than under the domestic law.

From the Malaysian perspective, the majority view is adopted and supported by the *ratio diciendi* laid down in *Walter Wright (Singapore) Pte Ltd v DGIR)1990 (2 MTC 115)*.

Let us look at the practical application of this principle. Article 13 of the Malaysia–UK DTA reads as follows:

1. *Technical fees derived from one of the Contracting States by a resident of the other Contracting State who is the beneficial owner thereof and is subject to tax in that other State in respect thereof may be taxed in the first–mentioned Contracting State* ***at a rate not exceeding 8 per cent*** *of the gross amount of the technical fees (emphasis added).*
2. ....
3. ....
4. *Technical fees shall be deemed to arise in a Contracting State* ***when the payer is*** *that State itself, a statutory body thereof, a political subdivision, a local authority or* ***a resident of that State*** *(emphasis added). Where..*

In a case where a Malaysia resident company makes a payment for services to a UK resident company for technical services that are rendered outside Malaysia, the issue is whether the Malaysian resident company is required to deduct and remit Malaysian withholding tax (WHT) under s 109B of the ITA given the Malaysia's taxing right (in the form of WHT which is capped at 8%) which is clearly stated in Art 13.

The answer to the above is "no" since the Malaysian domestic tax law, namely the provisio to s 15A itself excludes offshore service fee as special class of income that is deemed to be derived from Malaysia. Once this is ascertained, it does not matter anymore whether Art 13(1) and (4) gives Malaysia the taxing right to impose WHT at the rate of 8%. There is no Malaysian WHT as the DTA is not a taxing statute!

I always regard the Malaysia–Singapore DTA as a modern treaty that takes into account the development of the Malaysian tax regime. Let us compare Art 13(4) of the Malaysian–Singapore DTA with that of the Malaysian–UK DTA. Art 13 of the Malaysia–Singapore DTA reads as follows:

1. *Technical fees derived from one of the Contracting States by a resident of the other Contracting State who is the beneficial owner thereof may be taxed in the first–mentioned Contracting State. However, the tax so charged shall not exceed 5 percent of the gross amount of the technical fees.*
2. ....
3. ....
4. *Technical fees shall be deemed to arise in a Contracting State when the* ***payer is a resident of that State*** *and the* ***services are performed in that State (emphasis added).***

Article 13(4) of the Malaysia–Singapore DTA is very much in sync with the provisio to s 15A of the ITA which was introduced in 2002.

The Structure of the DTA

Broadly speaking, in any DTA, articles can be categorised as follows:

Article	Title	Category
1	Personal scope	Scope
2	Taxes covered	Scope
3	General definitions	Definition
4	Resident	Definition
5	Permanent establishment	Definition
6	Income from immovable property	Operative
7	Business profits	Operative
8	Shipping, inland waterways transport and air transport	Operative
9	Associated enterprises	Anti–avoidance
10	Dividends	Operative
11	Interest	Operative
12	Royalties	Operative
13	Capital Gains	Operative
14	Independent personal services (deleted from OECD model but the Malaysian treaties still maintain this)	Operative
15	Income from employment	Operative
16	Directors' fees	Operative
17	Artistes and sportsmen	Operative
18	Pensions	Operative
19	Government service	Operative
20	Students	Operative
21	Other income	Operative
22	Capital	Operative
23A	Exemption method	Elimination of double taxation
23B	Credit method	Elimination of double taxation
24	Non–discrimination	Miscellaneous
25	Mutual agreement procedure	Elimination of double taxation
26	Exchange of information	Anti–avoidance/ anti–evasion
27	Assistance in the collection of taxes	Anti–evasion
28	Members of diplomatic missions and consular posts	Miscellaneous
29	Territorial extension	Miscellaneous
30	Entry into force	Scope
31	Termination	Scope

The Models That Malaysia Follows

Generally, the treaty negotiators around the world rely on the following model tax conventions when negotiating treaties:

- Organisation of Economic Co–operation and Development (OECD)
- United Nations (UN) Model

Countries like US and Netherlands have their own treaties, but basically are also modeled after the OECD Model. Suffice to say that the OECD Model is more dominant and indeed, Malaysian treaties are predominantly based on this model coupled with some modifications to follow UN Model.

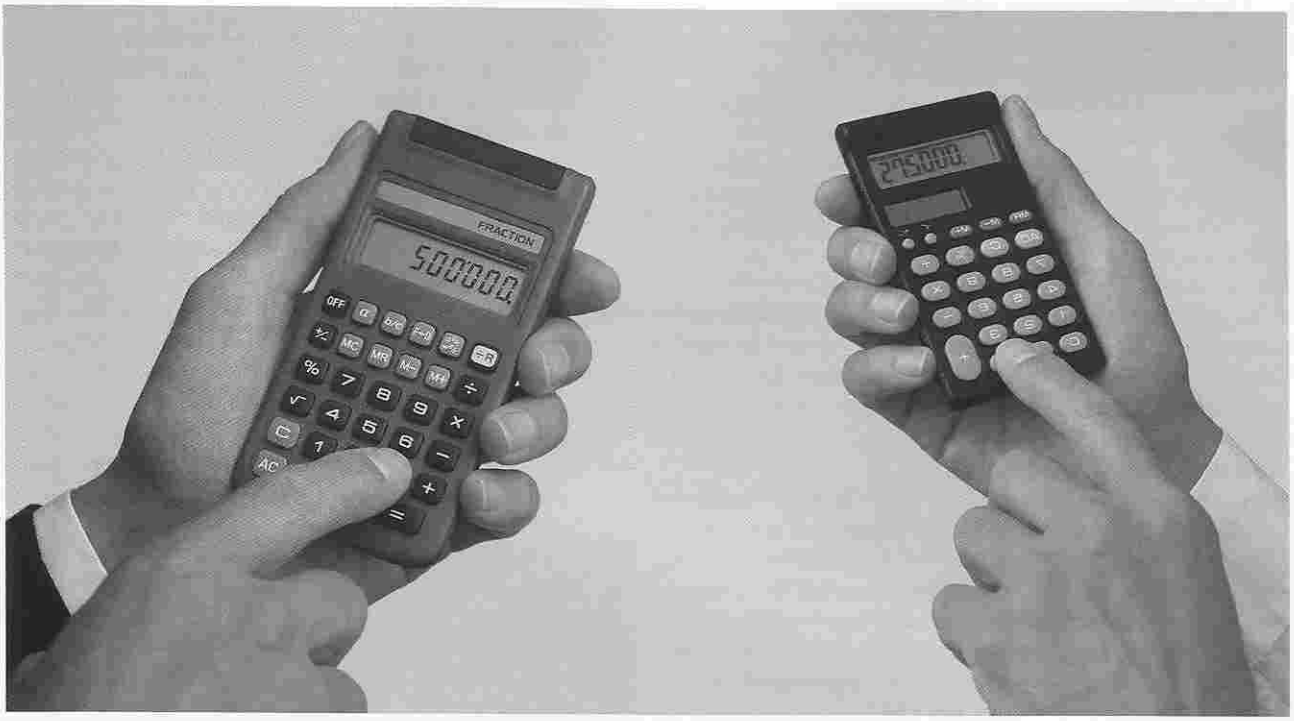
The first example is concerning the taxing right on the royalty income. Article 12(1) of the OECD MTC provides that *"Royalties arising in a Contracting States and beneficially owned by a resident of the other Contracting State* ***shall be only taxable in the other State (emphasis added)"***. In other words, a residence country has the sole taxing right on the royalty and the source country is not permitted to impose royalty WHT, even though if there is a WHT regime in the source country's domestic tax law.

On the other hand, Art 12(1) of the UN MTC provides that *"Royalties arising in a Contracting State and paid to a resident of the other Contracting State may* ***be taxed in that other State (emphasis added)".*** Article 12(2) provides that *"However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation"*. In essence, the UN MTC also provides certain taxing right to the source country, ie to impose royalty withholding. As far as royalty in concerned, generally Malaysia follows the UN Model for a simple reason, ie it is not willing to surrender the right to impose Malaysian WHT under s 109 of the ITA.

A second example is on theservice permanent establishment (PE). Prior to 2008, Art 5 (Permanent Establishment) of the OECD MTC does not deal specifically with the provision of services. In this regard, some of the Malaysian treaties include provision which is based on the Art 5(3)(b) of the UN MTC which reads as follows"– *The term "permanent establishment" also encompasses the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any12 month period"*. For example, the Malaysia–China and Malaysia–Indonesia treaties incorporate this feature.

Of course, there are certain aspects in the Malaysian treaties that are neither modeled after the OECD nor UN Model. Some of them are as follows:

- The inclusion of technical fee article.
- The inclusion of technical services in the royalty article – For example, Art XII of the Malaysia–Denmark DTA defines "royalties" as *"payments of any kind received as a consideration for (a) …(b)… (c) the supply of scientific, technical, industrial or commercial knowledge or information; (d)* ***the rendering of any services or assistance of a technical, managerial or consultancy nature (emphasis added).***
- The combination of royalty and fees for technical fee into a single article. See Art 12 of the recent gazetted DTA between Malaysia–Germany (yet to be ratified).
- Substantial equipment PE. For example, Art 5(4)(b) of the Malaysia–Australia DTA provides that *"an enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State and to carry on business through that permanent establishment if substantial equipment is in that other State being used or installed by, for or under contract with, the enterprise"*.
- Toll manufacturing activities PE – For example, Art 5(5)(b) of the Malaysia–Indonesia DTA provides that "A *person (other than a broker, general commission agent or any other agent of an independent status to whom para 6 applies) acting in a Contracting State on behalf of an enterprise of the other Contracting State shall be deemed to be a PE in the first–mentioned State, if he manufactures or processes in the*



first–mentioned State for the enterprise goods or merchandise belonging to the enterprise". .

Commentaries to the OECD MTC – Are they legally binding?

It is interesting to note that although Malaysian DTAs are mainly modeled after the OECD MTC, Malaysia is not a member of OECD. Presently, The 32 member countries of OECD are Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

However, it just makes practical sense for Malaysian negotiators to use the OECD MTC as a starting point coupled with some modifications (eg incorporating some features in the UN Model). Otherwise, one could imagine the need to draft a new model. For each article in, either the OECD MTC or UN MTC, there is a detailed Commentary that is intended to illustrate or interpret its provisions. In many countries like Australia, Belgium, Germany, UK etc the commentaries have been relied on as an aid to the interpretation of the MTC. Whilst the DTA itself is a tax law from the Malaysian tax perspective, the commentaries are not. Nevertheless, in practice, the Malaysian tax authorities do make reference to them when interpreting the treaties.

One thing for sure is that the tax authorities, be it in Malaysia or elsewhere, are not obliged to adhere fully to the commentaries. Indeed, even certain OECD member counties have reservations to certain commentaries.

From the Malaysian perspective, being a non–OECD country, it has also made known of its reservation in certain commentaries. For example, para 14.2 of the OECD Commentary on Art 12 (Royalty) states that:

14.2 The ease of reproducing computer programs has resulted in distribution arrangements in which the transferee obtains rights to make multiple copies of the program for operation only within its own business. Such arrangements are commonly referred to as "site licences", "enterprise licenses", or "network licences". Although these arrangements permit the making of multiple copies of the program, such rights are generally limited to those necessary for the purpose of enabling the operation of the program on the licensee's computers or network, and reproduction for any other purpose is not permitted under the license. Payments under such arrangements will in most cases be dealt with as business profits in accordance with Art 7.

In this regard, para 19 of the Non–Member Countries' Positions on the OECD MTC (Art 12 and its commentaries) states that:

19. Malaysia does not adhere to the interpretation in para 14.2 because Malaysia is of the view that licence fees for rights to distribute software constitute royalties.

In any case, the author is of the view that a reference should be made to para 14.4 of the OECD Commentary on Art 12 instead as far as software distribution is concerned. Para 14.4 states that:

14.4 Arrangements between a software copyright holder and a distribution intermediary frequently will grant to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program. In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Thus, in a transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of

distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits in accordance with Article 7. This would be the case regardless of whether the copies being distributed are delivered on tangible media or are distributed electronically (without the distributor having the right to reproduce the software), or whether the software is subject to minor customisation for the purposes of its installation.

The fact that Malaysia has made certain reservations on certain articles and their commentaries, it could be implied that Malaysia does indeed make reference to those articles and commentaries that it does not have any reservations on.

Practical Steps in using a DTA

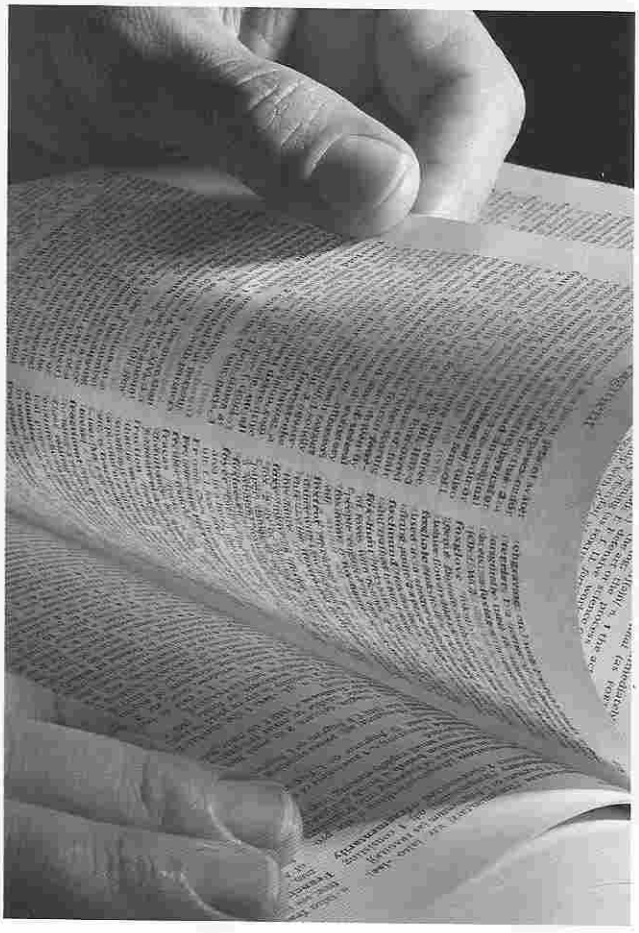
Based on my experience, at least from the Malaysian point of view, one tends to take a short cut way of applying the DTA. This can best illustrated by the following example. Say there is an interest payment from a company incorporated in Malaysia to another company incorporated in Singapore, a quick way is to apply the reduced treaty rate of 10% found in the Malaysian tax authorities' website (15% is the WHT rate under the ITA).

Whilst the information provided in the said website can be used a quick guide, the proper way of applying the DTA is certainly by applying the six steps as follows to the above example:

- **Step 1** – Ascertain whether the subject matter is within the scope of the DTA. In this respect, the person who is to suffer the Malaysian WHT must be a person who is a tax resident in Singapore and the country imposing the WHT should be Malaysia. Also, the person paying the interest should either be a tax resident in Malaysia or having a PE or fixed base in Malaysia which bears the interest. Article 3 deals with general definitions and Art 3(1)(d) of the Malaysia–Singapore DTA defines the term "person" to include as an individual, a company and any other body of persons which is treated as a person for tax purposes whilst Art 4 (1) defines "resident of a Contracting State" to mean:
  (a) in the case of Malaysia, a person who is resident in Malaysia for the purposes of Malaysian tax; and
  (b) in the case of Singapore, a person who is resident in Singapore for the purposes of Singapore tax.
- **Step 2** – Check whether the tax imposed by Malaysia (in this case, in the form of WHT) on the payment of interest is covered in the DTA. In this regard, one should refer to Art 2 (Taxes Covered). In this respect, Art 2(2) states that the Malaysian taxes which are the subject of this Agreement are the income tax and petroleum income tax. WHT is part of income tax.
- **Step 3** – Make sure that the DTA indeed applies to the relevant taxable period and also the DTA has not been terminated. One should refer to Art 28(Entry into Force) and Art 29(Termination) of the Malaysia–Singapore DTA.
- **Step 4** – Apply the relevant definitions found in the treaty.
- **Step 5** – Apply the appropriate substantive provision. In this regard, Art 11 (Interest) is the appropriate one (unless the Singaporean company has a PE in Malaysia and the debt–claim in respect of which the interest is paid is effectively connected with such PE. In such case, the provisions of Art 7 (Business Profits) shall apply. In this regard, Malaysia can impose WHT, but capped at 10% as opposed to 15% as provided under the ITA. The reduced rate is only applicable if the recipient of interest is the beneficial owner of the income. Over the last few years, the issue of beneficial ownership has become one of the most controversial issues in international taxation. There have been various court litigations on this matter (eg the case of Indofood, Prevost etc). One of the main reasons for this controversy is because the term "beneficial ownership" is not defined in the DTA and most of the local domestic tax laws. The "beneficial ownership" requirement is certainly an anti–abusive provision and of late, countries like China and Indonesia have tighten their domestic tax laws and regulations in this respect with a view to counteracting abusive treaty–shopping.
- **Step 6** – Where relevant, apply the article in respect of elimination of double taxation. This is to be used by the state of residence of the taxpayer.

Limitation of Benefit (LOB)

The LOB articles can be mainly found in the certain tax treaties, in particular those concluded by the US. This article is intended to counter treaty–shopping. From the Malaysian perspective, an element of LOB article can also be found in certain treaties, for example in the Malaysia–UK DTA.

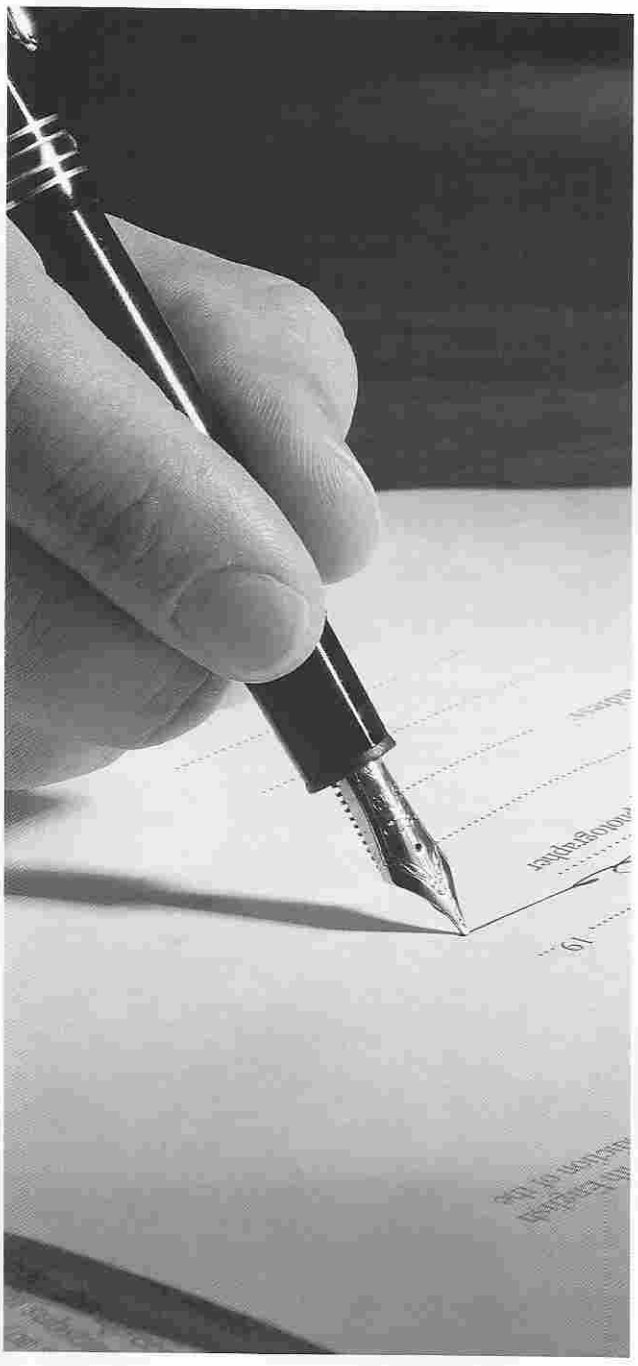


Protocols

It is common for a DTA be accompanied by one or more exchanges of notes and/or protocols, which provide further explanation to the application of the main treaty. Hence, a seasoned international tax practitioner will not miss out the protocol when applying the DTA.

Let us look at the Art 5(5) of the Malaysia–Singapore DTA in relation to agency PE:

> 5. *Where a person (other than a broker, general commission agent or any other agent of an independent status to whom para 6 applies) is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first mentioned State if that person:*
>
> *(a) has, and habitually exercises in the first–mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or*
> *(b) maintains in the first–mentioned State a stock of goods or merchandise belonging to the enterprise from* ***which he regularly fills orders on behalf of the enterprise (emphasis added)***.



By just reading Art 5(5)(b) of the main treaty, one would take the position that an agency PE would be created in Malaysia or Singapore, as the case may be if there are maintenance and order–filing activities. However, if one goes on to read para 2 of the protocol to the Malaysia–Singapore, then the conclusion would be different as para 2 provides that:

> 2 *For the purposes of Article 5 paragraph 5(b), the enterprise of a Contracting State will be deemed to have a permanent establishment in the other Contracting State* ***only if*** *the agent acting on behalf of the enterprise* ***also takes orders from customers in addition to regularly filling*** *of the orders out of the stock of goods or merchandise belonging to the enterprise (emphasis added)*

The above example clear demonstrates the importance of reading the protocol alongside the main DTA.

Non–treaty situation – What is the yardstick?

So far, Malaysia has more than 60 effective DTA with various countries and many more are in the pipeline. It is noteworthy that US is one of Malaysia's largest trading partners. Having said this, to–date, Malaysia has only entered into a navigational treaty with the US. The issue is when will Malaysia ever have a comprehensive tax treaty with its important trading partner? This is crucial as absent a DTA, several adverse implications may arise, amongst others, are that there will be no reduced WHT, a great difficulty in ascertaining whether the non–residents have a taxable presence in another country etc. There is a school of thought that the concept of PE, in particular, the six months rule of thumb can also be used in a non–treaty case. The author is of the view that this rule of thumb can merely be used as a general guide as there is nothing that precludes the tax authorities of adopting other approach since there is no treaty protection to begin with.

The Way Forward

DTA is crucial in any of the international tax planning strategies. Obviously, if applied appropriately, a DTA can give rise to various benefits to the parties involved in cross–border transactions. Whilst most of the DTAs are modeled after the OECD MTC coupled with some modifications, one DTA varies from another. Hence, it is crucial to analyse each DTA carefully. TG

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TECHNICAL UPDATES

These technical updates are summarised from selected Government Gazettes published between 19 May and 30 August 2010 as well as Public Rulings and guidelines issued by the Inland Revenue Board (IRB) during the same period.

Income Tax (Special Treatment on Interest on Housing Loan) (Amendment) Regulations 2010 [P.U.(A) 288/2010]

The 2010 Regulations amends the Income Tax (Special Treatment on Interest on Housing Loan) Regulations 2009 and is effective from the year of assessment 2009. The conditions to qualify for the incentive have been amended to include the following:-

- where the individual is carrying on a business, that he is a sole proprietor or a partner in a partnership and that the housing loan was granted before 10 March 2009.

- in the case of an individual under an employment, that his monthly income has been reduced on or after 1 July 2008 due to a salary cut or shortened working days in a month.

- in case of a joint loan, the employment of the individual's spouse has been terminated pursuant to a separation scheme or retrenchment on or after 1 July 2008 and that the termination is registered with the Director General of Labour, Ministry of Human Resources.

- relating to an individual who is a guarantor under a housing loan and who is the primary source for the repayment of such housing loan and the guarantor is under an employment, that his employment has been terminated pursuant to a separation scheme or retrenchment on or after 1 July 2008 and that the termination is registered with the Director General of Labour, Ministry of Human Resources.

Income Tax (Exemption) (No 10) Order 2009 — Corrigendum [P.U. (A) 246/2010]

This Corrigendum was issued to insert the words "forest plantation" before the word "project" in respect of the terms "new project" and "expansion project" wherever these appear in the Income Tax (Exemption) (No 10) Order 2009 [P.U. (A) 473/2009].

Income Tax (Exemption) Order 2010 [P.U.(A) 169/2010]

The Order is effective from the year of assessment 2010. The Order exempts any person from the payment of income tax in relation to any income derived from sukuk ijarah, other than convertible loan stock, issued in any currency by 1Malaysia

Sukuk Global Berhad. Further, withholding tax under section 109 or 109B of the Income Tax Act 1967, is not required to be deducted and remitted to the IRB when the income exempted under this Order is paid or credited to a non-resident person.

Public Ruling No. 2/2010 – Allowable pre-operational and pre-commencement business expenses

The Public Ruling No. 2/2010 was issued on 3 June 2010 and is effective from the year of assessment 2010. This Public Ruling supersedes the earlier Public Ruling No. 2/2002 issued on 8 July 2002.

Some of the changes observed are as follows:

- The maximum authorised share capital that a company may have in order to be eligible to claim a deduction for incorporation expenses has been increased from RM250,000 to RM2,500,000 (applicable to companies incorporated in Malaysia on or after 13.09.2003). A sole proprietorship or partnership which is converted into a private limited company with an authorised share capital of not more than RM2,500,000 is also eligible for the aforementioned deduction.

- Certain establishment expenditure incurred by the following entities may qualify for a deduction against the gross income in ascertaining the adjusted income of the business:-

    - Real Estate Investment Trust (REIT);
    - Property Trust Fund (PTF); and
    - Islamic stock broking company

With effect from the year of assessment 2009, a person may claim a deduction on expenses incurred in respect of recruitment of employees prior to the commencement of his business. The allowable recruitment expenses include expenses incurred in participation in job fairs as well as payments to employment agencies and head-hunters. The recruitment expenses must be incurred within one year prior to the commencement of his business and shall be deemed to have been incurred on the day the business commences.

The Public Ruling may be downloaded from the website of IRB at:

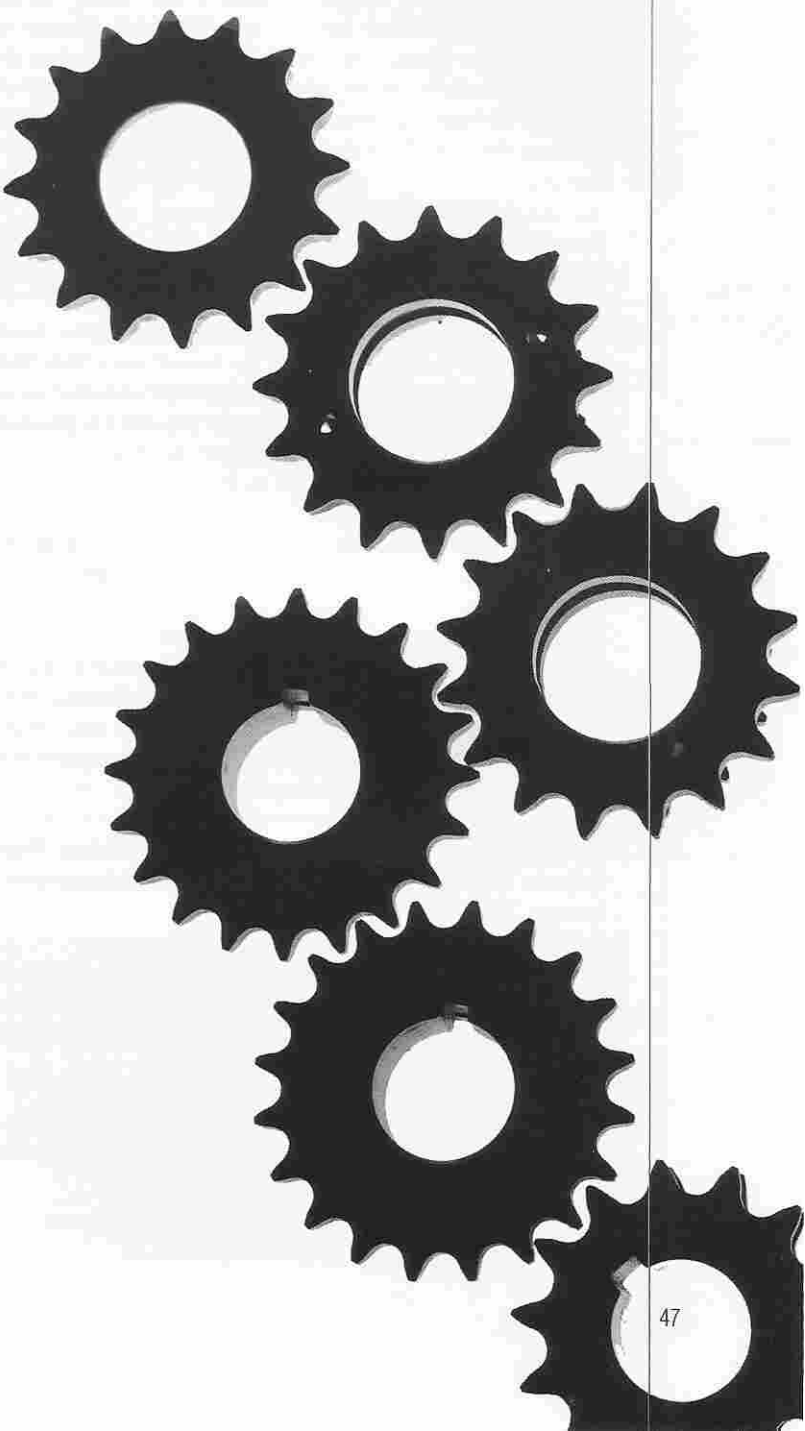
http://www.hasil.gov.my/lhdnv3e/documents/maklumat_terkini/Allowable%20pre-op%20%20business%20expenses%203%206%202010.pdf

Guidelines on Petroleum Income Tax (PITA)

Effective from the year of assessment 2010, upstream petroleum companies which are subject to tax under the Petroleum (Income Tax) Act 1967 (PITA) will be placed under the self-assessment system and assessed to tax on a current year basis.

In view of the above, the IRB has issued a set of guidelines (available only in the Bahasa Malaysia language) on 03 June 2010 to explain the amendments made to the PITA.

Members may download the guidelines from the website of the IRB at http://www.hasil.gov.my/lhdnv3/documents/GarisPanduanTeknikal/Garis_Panduan_PITA.pdf or view the guidelines on the Institute's website at http://www.ctim.org.my/technical_techdev_direct.asp



Case Commentaries

By S. Saravana Kumar & Siti Fatimah Mohd Shahrom

M.P. Sdn Bhd v Kerajaan Malaysia
Mahkamah Tinggi Shah Alam (Rayuan Sivil)

Income tax–Civil suit by IRB for non-payment of tax– Stay of proceedings by taxpayer

Facts
The taxpayer was a property developer, who disposed of a large parcel of land and made substantial gains. As the land was the taxpayer's fixed asset, the taxpayer subjected the gains to real property gains tax (RPGT) and submitted the RPGT return. The Inland Revenue Board (IRB) rejected the RPGT return and subjected the gains to income tax amounting to RM12,628,225.62. The IRB contended that all gains made by the taxpayer including gains from the disposal of fixed asset are subject to income tax as the taxpayer was a property developer. The taxpayer appealed to the Special Commissioners of Income Tax (SCIT). When the taxpayer failed to settle the disputed tax within the prescribed time, the IRB commenced civil suit against the taxpayer under s 106(1) of the Income Tax Act 1967 (ITA).

The taxpayer applied for a stay of proceedings stating special circumstances for the civil suit be stayed until the SCIT determines the taxpayer's appeal. The IRB objected to the stay application by contending that s 103 of ITA precludes the taxpayer from applying for a stay.

Issue
Whether the taxpayer is entitled to apply for a stay of proceedings in a civil suit commenced by the IRB?

Decision
The High Court allowed the taxpayer's application to stay the proceedings of the civil suit until the final disposal of the taxpayer's appeal before the SCIT. This decision signifies that the existence of s 103 does not preclude the taxpayer from applying for a stay of proceedings.

SE&TM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri
Rayuan No. PKCP(R) 14/2008 (Special Commissioners of Income Tax)

Income tax– Notice of additional assessment– Reinvestment allowance– Meaning of factory– Restricted to "production area"– Whether the Revenue's internal ruling has any legal effect?

Income tax– Penalty under s 113(2) – Taxpayer acting in good faith– Technical issue– Full disclosure– Reasonable care

Facts
The taxpayer was a manufacturer of electronic and electrical products, whose factory was located in Subang Jaya, Selangor (Factory A). In 1996, the taxpayer expanded its business and moved to a factory in Sungai Buloh (Factory B).

Between the years of assessment (YA) 1996 and 1998, the taxpayer claimed and obtained reinvestment allowance on the capital expenditure incurred on Factory B. There was no dispute with regard to the reinvestment allowance claimed in respect of Factory B.

In 2001, the taxpayer decided to build another factory known as Factory C, which was adjacent to Factory B. Factory C started operations in July 2002. The taxpayer claimed reinvestment allowance in YA 2002 on the sum of RM12,271,088.61, of which RM11,458,177.11 was incurred on the factory building and the balance of RM812,911.50 was incurred on the plant and machinery.

Among others, the IRB restricted the reinvestment allowance claimed on Factory C for the following reasons:

- Factory B was used as a warehouse; and
- areas such as staircases, toilets, surau, lift lobby, the "void" area for the overhead crane, office spaces and meeting rooms were not part of the production area.

The IRB also disallowed the reinvestment allowance claimed on the capital expenditure incurred by the taxpayer for the plant and machinery located in the aforementioned areas. Consequent to its decision, the IRB raised a notice of additional assessment with penalty against the taxpayer. The taxpayer, being aggrieved by the IRB's decision, appealed to the SCIT.

The crux of the taxpayer's submission was that the IRB had acted ultra vires by restricting reinvestment allowance to the "production area" only. The taxpayer argued that Sch 7A of the ITA does not provide for such restriction and that the words in paragraphs 1 and 8(a) of Sch 7A must be given their ordinary meaning.

The IRB contended that para 8(a) restricted the meaning of "factory" in para 1 to "manufacturing and processing only". According to the IRB, the words "in respect of manufacturing and processing" in para 8(a) allow for the restrictive meaning of "factory". The IRB added that strict interpretation must be adopted for the purposes of reinvestment allowance as it was an additional incentive.

Issues

(a) Whether the IRB may restrict the reinvestment allowance claimed by the taxpayer?; and
(b) Notwithstanding issue (a), can the IRB impose penalty on the taxpayer?

Decision

The SCIT allowed the taxpayer's appeal and set aside the notice of additional assessment. The SCIT held that:

- since the word "factory" was not defined for the purposes of reinvestment allowance, the ordinary and usual meaning of the word was to be applied;
- reference can be made to Ellerker (HM Inspector of Taxes) v Union Cold Storage Co Ltd [1939] 1 All ER 23, which held the ordinary meaning of "factory" as "... a building used for the manufacture of goods and equipped with machinery, and that the word is generally understood in that sense... ";
- a factory is a building that is used to manufacture goods may contain areas for production and non–production;
- the restriction imposed by the IRB, which was based on its internal ruling, was without any legal authority and had no force of law;
- applying the entirety test, the staircases, toilets, surau, lift lobby, "void" area for the overhead crane, office spaces, meeting rooms and the warehouse in Factory B were an integral part of the factory;
- since the areas described above were part of the factory, reinvestment allowance was available on the capital expenditure incurred on the plant and machinery placed in those areas and the installation of air–conditioning, electrical fittings, partition rooms and lighting;
- re reinvestment allowance was available on the capitalised interest expenses incurred on the loan that was raised to construct Factory C; and
- no penalty should have been imposed as the taxpayer had acted in good faith, made full disclosure and obtained professional advice.

The taxpayer's appeal was allowed and the IRB has appealed to the High Court.

Kerajaan Malaysia v Neraca Untung Sdn Bhd
(No. W–01–1–2005) (Court of Appeal)

Civil Procedure– Summary judgement– Unpaid taxes– Debt owed to Government

Income Tax– Service of notices of assessment– Recovery of taxes due and payable under s 106– Production of s 142 certificate

Facts

The taxpayer was issued with notices of assessment and additional assessment for the YA 1997. The notice of additional assessment was issued four days after the notice of assessment. The taxpayer did not settle the taxes raised via the notices. The Government commenced civil proceedings and applied for summary judgment against the taxpayer to recover the taxes due. Although they were addressed to the same address, the taxpayer contended that it only received the notice of assessment but not the notice of additional assessment. The taxpayer argued that the summary judgment application must be dismissed as there was a triable issue in relation to the service of the notice of additional assessment.

The High Court held that the Government failed to establish that the notice of additional assessment was served on the taxpayer as the taxpayer's tax agent had only acknowledged the receipt of the notice of assessment and not the notice of additional assessment. The High Court dismissed the summary judgment application and the Government appealed to the Court of Appeal.

Before the Court of Appeal, the Government argued that since the notice of assessment was received by the taxpayer's tax agent, the notice of additional assessment was deemed to have been served on the taxpayer as it was sent to same address. The Government also added that the notice of additional assessment was not returned undelivered. The taxpayer maintained its contention that the notice of additional assessment was not served.

Issue

Was the notice of additional assessment served or deemed served on the taxpayer?

Decision

The Court of Appeal held that the notice of additional assessment was served on the taxpayer. The Court held that for the following reasons, it was convinced that the said notice had been served or deemed served:

- the notice of additional assessment was sent to the same address where the notice of assessment was sent; and
- the notice of additional assessment was sent to the taxpayer's last known address.

The Court held that as the taxpayer had yet to settle the taxes raised via the notices, pursuant to s 106 of the ITA, the Government may initiate civil proceedings against the taxpayer. For the purposes of such proceedings, the production of a certification under s 142 of the ITA would be sufficient evidence of the taxes due and the Court could give judgment for that amount. TG

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International News

By Rachel Saw

The column only covers selected developments from countries identified by the CTIM and relates to the period 2 May 2010 to 10 August 2010.

China (People's Rep.)

New high technology enterprises: further clarification on treatment of tax incentives in transitional period

The State Administration of Taxation (SAT) issued on 21 April 2010 a ruling clarifying the treatment of tax incentives for a qualified High-New Technology Enterprise (HNTE) in the transitional period (Guo Shui Han [2010] No 157).

A qualified HNTE is entitled to (i) tax exemption in the first two years plus 50% reduction in the following three years, or (ii) tax exemption in the first five years plus 50% reduction in the following five years. Further to the Notice (Guo Fa [2007] No.37), a qualified HNTE in the transitional period may, elect to apply either (i) 50% of transitional tax rate until the period of incentives expires, or (ii) 15% (tax rate for qualified HNTEs). It is not allowed to reduce the 15% tax rate (for qualified HNTEs) by 50%.

A qualified HNTE, which is also eligible for the 50% tax reduction granted to software and integrated circuit industries, may elect to apply either (i) 15% tax rate (for qualified HNTEs), or (ii) 50% of the normal tax rate of 25%. It is not allowed to reduce the 15% tax rate (for qualified HNTEs) by 50%.

Income derived by a resident enterprise, which is eligible for 50% reduction as referred in Art. 86, Art 87, Art 88 and Art 90 of the Implementation Rule of the Enterprise Income Tax Law, must be construed as income calculated separately for the purposes of the incentive, and taxed at the normal rate of 25%.

A HNTE which no longer qualifies for HNTE tax incentives (due to the change of requirements for HNTEs after 2008) may apply neither (i) the 15% tax rate, nor (ii) the transitional tax rates prescribed in Guo Fa [2007] No.37. As from 1 January 2008, the normal tax rate of 25% applies to these disqualified HNTEs.

Branch enterprises of a resident enterprise enjoying different tax incentives separately in the different regions according to the Notice on the Application of Tax Rates of Branch Enterprises of Foreign Investment Enterprise (Guo Shui Fa [1997] No.49) may continue to apply the transitional tax rates separately within the transitional period. After that the branch enterprises will be assessed on the basis of Art 16 of the Notice on Consolidation of Tax Returns of Branch Enterprises (cross regions) (Guo Shui Fa [2008] No.28).

International transport service exempt from business tax

The Ministry of Finance (MoF) and the SAT issued a Notice on 23 April 2010 (Cai Shui [2010] No.8) stating that international transport service is exempt from business tax. The Notice applies from 1 January 2010, and for the purposes of this Notice, "international transport service" is referred to as:

–	Transport of passengers or goods from China to abroad;
–	Transport of passengers or goods from abroad to China; and
–	Transport of passengers or goods which takes place abroad.

The business tax paid between 1 January 2010 and the issuance date of this Notice can be:

–	credited against the business tax due; or
–	refunded if the business tax should have been exempted.

New property tax envisaged

Reportedly, a new tax on the holding of real properties will be introduced in major cities on a trial basis. The tax is expected to be 0.8% of the market value, and will be imposed on real properties owned by an individual in addition to his own dwellings.

Land appreciation tax (LAT): administration and collection enhanced

The SAT issued a Notice on 25 May 2010 (Guo Shui Fa [2010] No. 53) enhancing the administration and collection of land appreciation tax (LAT) as follows:

According to the Notice, provisional assessment constitutes the basis of the administration of LAT. The provisional assessment must be coupled with the administration of real property and business tax, and the rate of provisional assessment must commensurate with the "price development of real property" (as defined) and the final tax due. Except for welfare housing, the rate of provisional assessment may not be less than 2% of (advance) sales of real property for the Eastern provinces of China, 1.5% for the Middle and North–Eastern provinces, and 1% for the Western provinces.

Further, the Notice constrains the tax assessment on a deemed basis to cases prescribed by tax laws and regulations. If an assessment on a deemed basis is legal and appropriate, the deemed rate may (in principle) not be lower than 5%. (An assessment on a deemed basis is inappropriate if made simply to meet work targets).

All the local tax authorities are ordered to submit the plan for LAT to determine, amongst others, concrete measures, audit targets and revenue targets for 2010 by the end of June 2010.

Taxation on interest derived by foreign branches of Chinese financial institutions – treaty treatment clarified

The SAT issued a ruling on 2 June 2010 (Guo Shui Han [2010] No. 266) clarifying the taxation on interest derived by foreign branches of Chinese financial institutions.

A branch established in a third country by a foreign financial institution, which is exempt from income tax under the tax treaty concluded between China and the country of the foreign financial institution, may receive the same treaty benefit (exemption) unless the treaty expressly states that only the head office is entitled to the exemption. The exemption is subject to the administrative rules on the approval procedure in respect of granting treaty benefits (Guo Shui Fa [2009] No.124).

A foreign branch (non–legal entity) established by a Chinese resident bank is treated as a Chinese resident. The tax treaty between China and the country where the branch is located does not apply to the interest derived from Chinese source by such a branch. The interest must be taxed under the Chinese domestic laws and regulations, by reference to the ruling on the taxation of interest derived by non–residents (Guo Shui Han [2008] No. 955), regardless of whether the interest is paid by a Chinese resident or a Chinese branch of a non–resident.

Resource taxation in Xinjiang changed

The MoF and the SAT issued a Notice on 1 June 2010 (Cai Shui [2010] No. 54) launching a trial project for the reform of resource taxation in the autonomic region of Xinjiang. The Notice applies from 1 June 2010.

- The Notice only applies to resource tax taxpayers exploiting oil and gas in Xinjiang.
- Resource tax is calculated on the basis of sale proceeds of oil and gas, as determined by reference to the relevant provisions of the VAT law. The tax rate is set at 5%.
- Oil and gas for self–use by the oil companies and oil and gas used for transportation of thickened oil are exempt.
- Taxpayers eligible for both reductions below can only opt for one treatment:

–	thickened oil, high pour–point oil and high–sulphur gas: reduced by 40%; or
–	tertiary oil recovery: reduced by 30%.

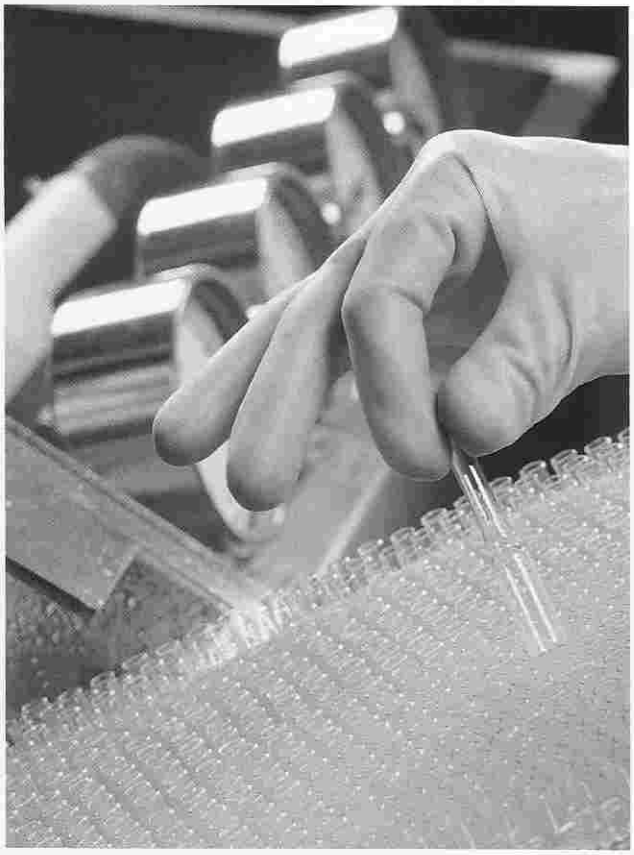
VAT refund for export of 406 products terminated

The MoF and the SAT jointly issued a Circular (Cai Shui [2010] No. 57) on 22 June 2010 terminating the VAT refund for export of 406 products as from 15 July 2010. The categories of products concerned are (i) certain steel products; (ii) certain non–ferrous processed materials; (iii) aluminium powder; (iv) ethyl alcohol and corn starch; (v) certain fertilizers, medicine and chemical products; and (vi) certain plastic products, rubber goods and glassware.

Business tax – exemptions on specified international telecommunications

The SAT issued a Ruling on 28 June 2010 (Guo Shui Han [2010] No. 300) stating that the following is not subject to business tax in China:

–	Sales proceeds derived by an enterprise or individual from letting out overseas immovable resources of telecommunication network, including overseas electric circuits, submarine communication cable and satellite transponder.
–	Sales proceeds derived from the international communication service provided by a foreign enterprise or an individual outside China to the Chinese enterprises or individuals in China. "International communication service" includes international phone calls, international mobile phone calls, international SMS service, international mobile internet connection and international MMS service.



Circular of import taxation policy for major science and technology programs published

On 24 July 2010, the MoF, Ministry of Science and Technology, National Development and Reform Commission, General Administration of Customs as well as the SAT jointly issued the Circular of Import Taxation Policy on Major Science and Technology Programs (Cai Guan Shui [2010] No. 28) in order to support the research and development of products with national strategic significance, key industrial generic technology and critical projects, and encourage independent innovation. The Circular came into force from 15 July 2010.

Under the Circular, enterprises and public institutions, such as universities and colleges, and research institutions with major science and technology projects, which import (i) key equipment (including software tools and technology) that cannot be produced domestically, (ii) components and (iii) raw materials, through financial allocations from the central Government, funds from local finance, self–collection and other channels, are exempted from import tariffs and VAT.

The major science and technology projects prescribed in the Circular refer to civilian major science and technology programmes listed in the National Program for Medium– to Long–Term Scientific and Technological Development (2006–2020), including: (i) core electronic devices, high–end general chips and infrastructure software products; (ii) manufacturing equipment and process for large scale integrated circuits; (iii) wireless broadband communication network of new generation; (iv) high–grade digit control machine and infrastructure manufacturing facilities; (v) exploitation of large–scale oil and gas field and coalbed methane; (vi) large nuclear power plant with advanced pressurised water reactor and high temperature gas cooled reactor; (vii) water pollution control and treatment; (viii) incubation of new species from transgenic organism; (ix) development of major new medicine; and (x) control and prevention of major infectious disease like AIDS and hepatitis.

Enterprises and institutions must meet the certain requirements in order to enjoy the exemption. Equipment, components and raw materials qualify for exemption if: (i) they are directly applied in projects of scientific research, the development and application of technology, and the import quantities are reasonable; (ii) they cannot be produced domestically or the domestic products fail to meet the prescribed requirements, and with high value; and (iii) the key technical parameters for the equipment are generally better than the equipment in the List of Non–duty–free Import Commodities in Domestic Investment Projects.

Charity donations: deductions – Supplementary Notice of relevant issues released

The MoF, SAT as well as Ministry of Civil Affairs jointly issued a Supplementary Notice of Relevant Issues Regarding the Income Tax Deduction of Charity Donation on 21 July 2010 (Caishui [2010] No. 45). It is stipulated in the Notice that enterprises or individuals making charity donations through public welfare organisations, or people's Government (above county level) as well as its component organs and departments, may enjoy income tax deduction according to the relevant regulations.

The Civil Administration Department is responsible for the initial examination of public welfare organization qualification. Subsequently, the Public Financial and Taxation Departments, together with Civil Departments, are jointly in charge of further examination and verification. The list of public welfare organisations will be jointly published annually by all concerned Ministries. Only charitable donations made to any of the organisations in the list published that year, which are supported by documentation, will be entitled to enjoy income tax deduction.

For foundations established after 1 January 2008, donors of "original funds" are entitled to enjoy income tax deduction according to the relevant regulations in the income tax settlement for the year the foundation is granted the qualification for income tax deduction of charity donation.

Hong Kong

Inland Revenue (Amendment) Bill 2010 gazetted

Further to the Budget 2010/2011 announcement on 24 February 2010, the Inland Revenue (Amendment) Bill 2010 was gazetted on 30 April 2010. The Bill amends the Inland Revenue Ordinance to implement the following two concessionary revenue measures:

–	a one–off reduction of 75% of the 2009/10 final tax liability in respect of salaries tax and tax under personal assessment, subject to a ceiling of HKD 6,000.
–	a 100% profits tax deduction for capital expenditure on environment–friendly vehicles in the year of purchase, with effect from year of assessment 2010/2011.

India

Budget for 2010/11 – Finance Act, 2010 enacted

The Budget for 2010/11 presented on 16 February 2010 received the assent of the President on 8 May 2010, and it has become Finance Act, 2010 (Act No. 14 of 2010).

Direct Taxes Code Bill, 2009 – Government revises certain key aspects

In August 2009, the Government released the first draft of Direct Tax Code Bill, 2009 (DTC) along with a discussion paper for public comments. Consequently, the Government recently released a discussion paper revising certain key aspects of the DTC. These issues were identified by the Government for a detailed review and reconsideration after receipt of the public comments.

Some of the key propositions of the revised DTC are summarised below. The DTC, if implemented, will be effective from 1 April 2011.

- ***Minimum alternate tax***. The DTC provided for Minimum Alternate Tax (MAT) to be calculated with reference to "value of gross assets" of the companies. After revision, the Government agreed to levy MAT only on "book profit" of the companies as is the present regime in India. The rates are yet to be announced.
- ***Capital gains***. The DTC provided that capital gains will be treated as "ordinary income" and will be taxed accordingly. The revised DTC discussion paper provides that long–term capital gains on sale of listed shares or equity oriented funds will be computed after deducting a certain percentage of the capital gains and only the balance will be subject to tax. The specified percentage will be subsequently notified by the Government. With regard to Foreign Institutional Investors (FIIs), however, the income from buying and selling of shares will be treated as "capital gain" and not "business income", and will be taxed accordingly.
- ***Residence of foreign company***. The DTC provided that a company incorporated outside India (foreign company) will be treated as a resident in India, if "the control and management of its affairs is situated wholly or partially in India". The revised DTC replaces this test with "place of effective management is situated in India".
- **CFCs**. The revised DTC proposes to introduce the concept of "Controlled Foreign Corporation" (CFC) regulations in India. It seeks to tax "passive income" of foreign companies controlled directly or indirectly by Indian residents. However, the framework and the modalities of the CFC regulations will be subsequently notified.
- **GAAR**. The DTC had proposed detailed and widely defined General Anti–Avoidance Rules (GAAR) which had raised lots of concerns and apprehensions by the stakeholders. Appreciating the concerns and difficulties involved in the GAAR provisions as originally proposed, the revised DTC clarified that GAAR provisions do not envisage that every arrangement for tax mitigation would be liable to be classified as an impermissible avoidance agreement. It is only in the case where the arrangement, besides obtaining a tax benefit for the assessee, is *also*

covered by one of the four conditions (ie (i) it is not at arm's–length, or (ii) it represents misuse or abuse of the provisions of the DTC, or (iii) it lacks commercial substance, or (iv) it is entered or carried on in a manner not normally employed for *bona fide* business purposes), that the GAAR provisions would come into effect. Additionally, the Central Board of Direct Taxes, MoF will issue detailed guidelines providing for the circumstances under which GAAR could be invoked by the Commissioners of Income Tax. Further, GAAR provisions will be invoked only where tax avoidance is beyond a particular threshold limit. The forum of Dispute Resolution Panel consisting of a college of three Commissioners of Income Tax would preside over cases where GAAR provisions are applied.
- ***Treaty override***. The DTC provided that neither the applicable tax treaty nor the DTC will have a preferential status, and in case of conflict, the one that is later in point of time will prevail. Having regard for the concerns and apprehensions of the foreign investors, the revised DTC provides that a treaty will have a "limited" overriding effect subject to the provisions of GAAR, CFC regulations and branch profits tax.
- ***Treatment of savings***. The DTC provided for a regime of the "Exempt–Exempt–Taxation" (EET) method for saving instruments which the revised DTC has revised. Under the EET method, the contributions towards certain savings are deductible from income, the accumulation or accretions are exempt for such time as they remain invested, and all withdrawals at any time are subject to tax at the applicable marginal rate of tax. The revision to the DTC provides the "Exempt–Exempt–Exempt" (EEE) method of taxation for certain permitted saving intermediaries. However, the EEE regime is restricted to certain specified saving instruments only.

Indonesia

Claiming tax treaty benefits – further clarification

The tax authorities issued regulations PER–24/PJ/2010 and PER–25/PJ/2010 on 30 April 2010, to provide further clarification on the claim for treaty benefits. Both of the new regulations apply retrospectively from 1 January 2010.

PER–25/PJ/2010 provides the following clarification to the issue of "beneficial owner":

–	The "beneficial owner" requirement is only imposed on non–residents where the tax treaty in question makes reference to the term.
–	The phrase "active operations or business" shall be interpreted based on the taxpayer's actual situation, and factors such as costs incurred and efforts directly undertaken to acquire revenue, including costs taken to maintain the taxpayer's going concern, are to be taken into account.
–	Indonesian–sourced income earned by the non–resident shall be interpreted as being subject to tax in its country of residence, if the recipient is a tax subject in that country and the Indonesian–sourced income is taxable there. The fact that the taxpayer may eventually not pay any taxes in the residence country due to reasons such as the income (i) is subject to a 0% tax rate; (ii) is exempted from tax; (iii) is economically not subject to tax; (iv) is suspended; or (vi) is otherwise not collected, is irrelevant.
–	The condition that no more than 50% of the taxpayer's income is used to satisfy an obligation to another party in the form of interest, royalty or similar payment does not include (i) reasonable benefits provided to employees in the context of their employment; (ii) other expenses commonly incurred by the taxpayer in operating its business; and (iii) profit sharing in the forms of dividends to shareholders.

PER–24/PJ/2010 provides that non–residents may furnish certificates of domicile issued by their country of residence provided the certificate: (i) is written in English; (ii) is issued on or after 1 January 2010; (iii) is in the form of originals or photocopies of documents that have been legalised by the tax office where the tax agent (withholder of tax) is registered; (iv) includes, at the very least, the name of the taxpayer; and (v) has been signed by an authorised officer or representative of the competent authority of the treaty partner country, or equivalent.

Deductibility of bad debts – amendment

The MoF has revised one of the conditions for claiming bad debts as tax deduction

Pursuant to Regulation No. 57/PMK.03/2010 dated 9 March 2010, bad debts are deductible provided that, amongst other conditions, they have been recognised as an expense in the commercial profit and loss statement of the creditor. The creditor no longer has to prove that the debt was recorded as taxable income of the debtor.

Specific types of income defined

The Tax Office issued Circular Letter No. 35/PJ/2010 on 9 March 2010, which provides clarification on the definition of income from rent, technical services, management services and consulting services, as follows:

–	"Rental and other income in connection with the use of property" is income received or accrued in connection with an agreement granting the right to use the property for a certain period of time.
–	"Technical services" refers to the provision of information regarding experience in a particular industry, trade or science, which may include the provision for information in the implementation of specific projects. Examples include the provision of (i) mapping/searches using seismic waves and product development information such as drawings, instructions, calculations etc; and (ii) management experience information through training, seminars and other similar material.
–	"Management services" means the provision of services by participating directly in the management or implementation processes of the company.
–	"Consulting services" refers to professional advice provided in a field of business and work performed by experts or a group of experts, which is not accompanied by the direct involvement of such experts during implementation.

Saudi Arabia

New procedure of withholding tax refund
The Department of Zakat and Income Tax (DZIT) issued on 23 May 2010 Circular No. 3228/19 to clarify the procedure of claiming withholding tax refund where a tax treaty applies.

Under the procedure, which applies to resident companies and to permanent establishments in Saudi Arabia of non–resident companies, where a payment is made to a non–resident with no PE in Saudi Arabia, the payer must withhold tax at the rates provided for in the Income Tax Regulations.

Such rates apply even if an effective tax treaty provides for lower rates (or for an exemption). In such a case, the payer is required, under the procedure, to submit a letter to the DZIT requesting the refund of the overpaid tax. The letter must be accompanied with the following:

–	a letter from the non–resident recipient requesting the refund of the overpaid tax;
–	a certificate of residence issued by the competent authorities of the country of residence of the recipient proving that the latter is a resident of that country under the treaty and that the amount paid is subject to tax in that country; and
–	a copy of the withholding tax form submitted to DZIT by the payer, together with the receipt of payment of the tax.

The Circular does not specify an effective date, but it may reasonably be expected that it applies to payments made after its date of issuance (ie 23 May 2010). The Circular also does leave a number of other questions unanswered particularly with respect to the consequences of non application of the procedure (ie direct application of treaty rates by the payer), the time frame of refund, etc.

Further details will be published as soon as they become available.

Singapore

CPF – changes to employer's contribution rates
It has been reported that the Government will raise the employer's Central Provident Fund (CPF) contribution rate by 1% for all employees, except for workers aged above 35 years and earning less than SGD 1,500 per month.
The increase will be implemented in two phases:

–	a 0.5% increase will be implemented on 1 September 2010, and will be made into the Medisave Account (MA); and
–	the remaining 0.5% increase will be implemented on 1 March 2011, and will be made to the Special Account.

Self–employed persons who are required to contribute to the MA will also have to increase their contribution by 0.5% with effect from 1 September 2010.

Thailand

Incentives for RHQs announced
The Deputy Finance Minister has announced the Government's intention to provide substantial tax incentives from 1 June 2010 to domestic and foreign companies that establish regional headquarters (RHQs) in the country.

Amongst the proposed incentives are:

–	0% tax on income earned by RHQs on services provided outside Thailand for 15 years;
–	10% flat rate on income sourced in Thailand for 15 years; and
–	15% flat tax for foreign nationals employed by RHQs for eight years (if at least 50% of the RHQ's earnings are from overseas services).

Qualifying services would include research and development, business administration, marketing and sales promotion, and other advisory services.

Extension of 7% VAT rate to 2012
On 3 August 2010, the Cabinet approved the extension of the reduced 7% VAT rate until 30 September 2012. The reduced VAT rate (the original rate being 10%) was set to expire on 30 September 2010.

Vietnam

Transfer pricing regulations amended
The MoF has issued Circular 66/2010/TT–BTC, which amends

the current transfer pricing regulation Circular 117/2005/TT–BTC. Circular 66 will take effect on 6 June 2010.

Scope
Circular 66 limits the application to transactions between enterprises and their affiliated parties and, unlike Circular 117, does not cover individuals.

Related parties
Under Circular 66, the definition of "related parties" includes limited liability companies.
Under Circular 117, there was a test of affiliation whereby a 20% ownership of "total assets" in another company will render the parties as being related. Circular 66 has replaced this test with these criteria in determining related party relationships, ie two companies are related if:

–	one provides the other with a guarantee or grants a loan which constitutes at least 20% of the owner's equity of the guaranteed party/borrower, and that loan accounts for more than 50% of the total value of long and medium term loans of the guaranteed party/borrower; or
–	they both hold, either directly or indirectly, at least 20% of the owner's equity of a third party.

Material difference
Under Circular 66, any factor that triggers at least a 1% increase/decrease in the unit price of transacted products, or 0.5% increase/decrease on the gross profit ratio or profitability ratio, is considered as a "material difference", for which appropriate adjustments in the financial information of the comparable transactions should be made.

Comparative analysis
Circular 66 emphasises that, for aggregated transactions:

–	the sale price is the highest price; and
–	the purchase price is the lowest price.

Arm's–length price
Circular 66 provides guidance on how to determine arm's–length prices in unique sale and purchase transactions. An adjustment of the transfer price shall be made as follows:

–	Sales transaction: if the price, gross profit ratio or profitability ratio is lower than the median of the inter quartile range, the arm's–length value is a value equal to or higher than the median of the range. This aims to ensure that the Vietnamese seller charges the highest possible price within the arm's–length range with respect to cross–border controlled transactions.
–	Purchase transactions: if the price is higher than the median of the inter–quartile range, the arm's–length value is a value equal to or lower than the median of the range. This limits the purchase price that the Vietnamese purchaser can purchase goods or services to a value equal to or lower than the median of the arm's length range with respect to cross–border controlled transactions.

CIT finalisation for 2009 – MoF issued Official Letter
The MoF has recently issued Official Letter No. 7250/BTC–TCT (OL 7250) dated 7 June 2010 to provide further guidance on the finalisation of corporate income tax for the year 2009. The key points are summarised as follows:

Interest income
Interest income received in respect of bank deposits or lending are deductible against interest expenses. The surplus is recognised as other income and taxed at 25%, whereas the shortfall is included in the deductible expenses (to determine the taxable income).

Forex gains/losses
Similarly, forex gains derived from revaluation of payables denominated in foreign currencies at the end of the fiscal year are offset against forex losses derived from similar revaluation of payables denominated at the end of the fiscal year. The net gain is treated as other income and taxed at 25%, whereas the net loss is included in the deductible expenses.

Carry forward of losses
OL 7250 requires losses incurred from 2009 onwards to be carried forward in full until totally absorbed (subject to a maximum of five years). The treatment of losses incurred prior to 2009 remains unchanged. Two issues arise in that:

–	there is no guidance as to whether the losses incurred in the year 2009 are to be absorbed before or after losses incurred prior to 2009; and
–	the mandatory carry forward of losses does not seem to take into account variables such as tax holidays and incentives.

Tuition fees for children of foreign employees
Tuition fees (up to high school level) paid in respect of foreign employees' children, are deductible if the benefit is stated in the labour contract and if there is supporting documentation

Malaysia – treaty developments

- **The following amending protocols to existing tax treaties were signed**
  - France and Malaysia on 31 January 1991
  - Belgium and Malaysia on 25 July 1979
  - Ireland and Malaysia on 28 November 1998
  - Netherlands and Malaysia on 4 December 1996

The following treaty/protocol have been ratified

- Brunei and Malaysia treaty on 17 June 2010
- Indonesia and Malaysia protocol on 15 July 2010 and will enter into force on 1 September 2010 TG

Rachel Saw *is a Senior Research Associate at the International Bureau of Fiscal Documentation (IBFD). The International News reports have been sourced from the IBFD's Tax New Service. For further details, kindly contact the IBFD at ibfdasia@ibfd.org.*

Negotiations in Asia

By Declan O'Sullivan

Conducting successful negotiations even in one's home country is a challenging task. Bearing in mind the cultural diversity within Asia Pacific, it is extraordinarily difficult for a regional business executive (irrespective of country of origin) to be effective across an area stretching from Japan to Singapore and encompassing Australia, China, India and a host of other culturally diverse nations.

Most of the "management literature" on "Negotiations" is written in the West and while offering significant insights, applied in their entirety without reference to local cultural norms can reasonably be expected to produce suboptimal outcomes at best and disasters at worst.

Unfortunately, negotiations tend to have an adversarial dimension and in as much as this can generate stress for both parties, it often results in people "reverting to type" within their own cultural norms. Thus we can find a "straight talking", "direct", "contract oriented" western executive having entirely unproductive and indeed unpleasant encounters with "face loving", "relationship oriented", often more strategic (in a long run sense) and less direct, Asian executives. This, too often unrecognised culture clash, can cause havoc.

Even those individuals who are intellectually aware of the differences in view point that cultures can beget, often forget more or less all about such matters when the pressure comes on.

What to do?

Well one can begin by reminding oneself of some fundamentals.

(1) When in Rome, do as the Romans do....

> Whether you are British or Singaporean, if you find yourself in Indonesia or Japan, you need to realise that people operate differently, business is done differently and negotiations are conducted differently, in "foreign" countries.

As such, you should prepare yourself for this "foreignness" and not just at a superficial level.

(2) Specifically, you might wish to look at the environment under a number of headings.

a. At a macro level, what is the basic underlying societal philosophy? As an example, East Asian Confucius influenced societies, to greater or lesser degrees tend to exhibit traits which are quite different from Western Aristotelian, Judeo Christian societies. These basic cultural norms clearly influence people's "day-to-day" thinking and behaviour and are ignored at one's peril.

b. Seniority and gender as factors

Again views on the importance of such matters vary from society to society. One might want to factor such matters into one's considerations when selecting members of a negotiation team.

c. "Face"

Again more or less of an issue across the region.

d. Silence and non-verbal cues

Typically more important in Asia than in the West.

e. Agreement

What does "Yes" mean? Actually, depending on the country, the answer is "Just about anything". This can be enormously difficult to digest. It can lead to doubts about the "honour" of the participants followed by anger, aggression and a breakdown in communication.

f. Relationship V Contract based

Again the relatively black and white, linear, sequential approach of Western trained executives needs serious tweaking to cope with environments where relationships and trust comes first and contracts are often viewed as little more than "expressions of <general!> intentions"

g. Calm

The Western approach of readily displaying one's emotions particularly anger sits badly in Asian cultures in general and especially so in more traditional environments.

Having said all that, when one is operating off one's "home turf", one must also be cognisant of the possibility that a wily local negotiator will play on one's fears of upsetting local sensibilities. At the end of the day, "business is business" in any language and the age old and cross culturally effective admonitions to:

- Fully research the topic
- Know what outcomes are essential, desirable etc
- Know what you are prepared to give away
- Actively think about what you bring to the table, the interests of the other party, possible third party involvement and so forth
- Understand the necessity of playing "one's cards close to one's chest"
- Recognise the absolute necessity of remaining outwardly calm at all times
- Ensure that one is actually negotiating with the decision-maker rather than engaging in shadow boxing with subordinates
- Be willing to engage in protracted discussions where necessary. No rush!
- Ensure "buy in" from one's own managers prior to engaging in the negotiation thus ensuring that one is not "out flanked"
- Be willing to walk away if necessary

.....should not be overlooked.

In summary, being an effective cross-cultural negotiator requires one to:

(1) Take the time to understand the cultural setting in which one will be operating. (This in itself is an enormous task as when the heat comes on, people tend to revert to type)

while not

(2) Ignoring all the basics of negotiations that really apply to all environments.

All very well but practically what can an executive do to prepare him or herself for serious business discussions in a 'foreign' country.

Really it starts with a mindset and this is that one needs not just to recognise differences between one's own cultural mindmap and that of another but also to actively decide to respect these differences. If tens of millions of nationals in whatever country daily go about their business, quite successfully, operating within their own cultural paradigm, you need to accept, respect and adjust to this environment as you are the foreigner. To fail to do so will certainly be counterproductive and depending on the history of your two countries, may even serve to conjure up unpleasant memories of colonisation or what not ....matters that are certainly better kept at a distance.

So you've mentally decided to adjust to the environment in which you'll be operating. Congratulations! Now what?

Now is the time to thoroughly familiarise yourself with the operating environment. This can and ideally should involve a multifaceted approach. Starting with the obvious, read widely. Drop into your company library, local bookstore/Amazon or whatever and pick three or four relevant titles such as

- how to do business in XYZ…
- history of XYZ…
- dos and don'ts in XYZ…

Try to find titles that are relevant to the level at which you will be operating. Backpacker tomes, while no doubt interesting, may not be super useful for this purpose.

If you have the luxury of time, you should try to ensure that you have actually spent as much time in the country as possible prior to commencing any serious negotiations. Even family holidays can help here. If your company already has an "on the ground" presence, you should spend time with them and ideally not just with expatriate staff. Speaking to senior people within your

- company
- network
- embassy

that have significant insight into the local scene can be enormously helpful. Remember that in many parts of Asia, access to very senior people can be arranged relatively easily, if you take the time to ensure that you join the dots. Think three degrees of separation!

Start small: Once again try to grant yourself the luxury of time. You will almost certainly not be as effective in your first serious business meeting in a new country as in your twentieth. It's a great idea to work up to things, do the groundwork both professional and social and then engage.

Learn to listen: Developing the basic discipline of "listening a lot and speaking a little" is a real help. Obviously this cannot be so obvious as to be noticeable. Lots of small talk initially but the aim should be to produce a level of warmth and relaxation in what ultimately remains a conversation. People in general love to talk and faced with a good listener, whom they respect, most people like to chat a bit. If you find yourself in this highly desirable situation, learn to gently steer the conversation, while maintaining, indeed increasing the momentum. Definitely do NOT interrupt. You will learn much more by leaving things flow and knowledge really is power.

Remind yourself that networks and referrals are absolutely vital in some countries in the region. Again pre work, positioning and other times some socializing can be hugely beneficial. This emphasis on "the personal" is actually often a form of "risk management". Who am I dealing with here? What level is he/she? Will an association reflect well on me? Really the thought process is similar but not identical to the western question "Is this a good use of my time?"

Gifts: Something of a vexed topic in Asia but one must be aware of cultural norms and within the constraints of your own organisational setting, ensure that you know what is appropriate and when. Really it's all a matter of being able to operate fluently in the "foreign" country or more accurately it's about converting this "foreignness" to "familiarity" as quickly as possible.

To sum up: To conduct negotiations successfully in countries whose cultures are markedly different from your own is a hugely challenging task. It is also extremely likely to be a task with which you will be faced if you are in a senior regional role.

All too often jet lagged, underprepared, culturally insensitive executives find themselves lost and out of their depth in business negotiations across Asia. It pays to avoid this scenario.

Preparation begins with you… yourself. You must first of all accept that "your culture" is just one of many and that you will be the "outsider" in this instance. Actually, this can sometimes even be turned to your advantage but not without first of all really, deeply trying to appreciate, understand and respect local cultural and business norms.

The tools and knowledge you need are readily available on bookshelves, within your own regional management teams and embassies but you must learn to utilise them.

Everything new is necessarily a trifle tentative. One needs to build confidence over time so in the ideal world you will spend as much time as possible, soaking up like the local "scene" and engaging in low risk negotiations before doing anything really serious.

The great thing about this process is that the more effective one becomes in one "foreign" setting, the easier adapting to the next becomes. Ultimately this process becomes more than just a tool of international business…. it actually becomes a real route to personal growth. TG

Enjoy and good luck!

Declan O'Sullivan is the founder and principal of Kerry Consulting which is one of Singapore's leading financial recruiters. He has lived/worked in Europe, the US, Australia, Japan and Singapore and first arrived in the region in 1992. He can be contacted at declan@kerryconsulting.com.

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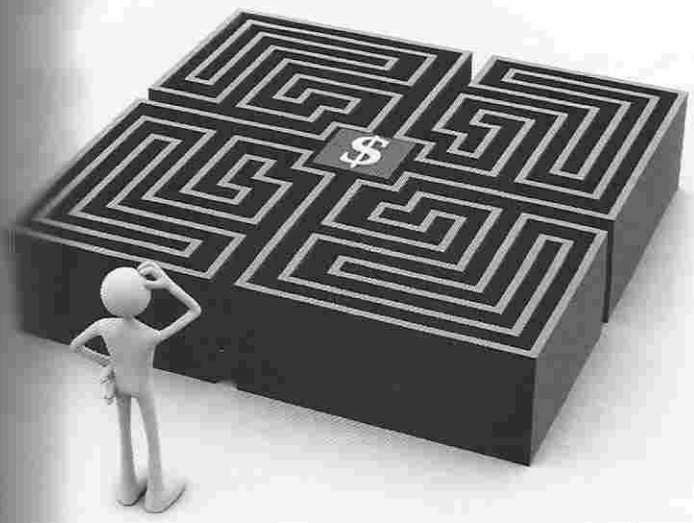

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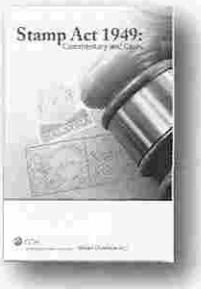

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Deduction for Rental Expense

By Siva Subramaniam Nair

We concluded our discussion on the deductibility of interest expense under s 33(1)(a) in the last article and shall now proceed on to rental expenses. The deductibility of rental income is given in s 33(1)(b) of the Income Tax Act 1967 (ITA) (as amended) which reads:

"rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of producing gross income from that source;"

Obviously, only expenditure that is revenue in nature will rank for a deduction; thus excluding capital expenditure such as premiums paid for the grant, assignment or surrender of a lease. In *MacTaggart v B & E Strump* [10 TC 17], a premium paid to obtain a five-year renewal of a lease of a business premises was held to be capital.

The expense here is confined to any land or building and does not include, for instance, rental on the use of plant and machinery. These however, would rank for a deduction under s 33(1) because the rental would constitute an expense wholly and exclusively incurred in the production of income.

Another point to be aware of is that the rental must be incurred "for the purpose of producing gross income from that source." Therefore, amounts paid on assets already rented but yet to be used for the business would not qualify for a deduction.

Example 1
Venezuela S/B obtained a 50 year lease on a commercial plot on 1/1/2010 paying a monthly rental of RM 12,000. It constructed a factory and commenced the business of manufacturing form 1/9/2010.

Only the rental paid from the date of commencement will rank for a deduction in ascertaining its adjusted income from the manufacturing business.

Generally, examination questions on this topic are quite straight forward but we shall look at some examples of how questions on rental expenses can be phrased. One area where candidates will need to do adjustments is where the rental expense is claimed by a business in its accounts which have not been prepared on an accrual basis. For tax purposes, business income and expenses are taxed and deducted respectively on an accrual basis.

Example 2
Brazil S/B is involved in a trading business and closes its accounts to 31 October each year. In December 2009 the company entered into a contract for the rental of a building to be used as its business premises at RM15,000 per month, and made a 1–year advance payment of RM180,000 for the period 1 January 2010 to 31 December 2010. The whole amount was expensed to its Statement of Comprehensive Income for the period ended 31 October 2010. For the following year the monthly rental was increased to RM16,000.

Since the company's year-end is 31 October, the rental paid in respect of November and December 2010 represents a prepayment ie the accounting entry for year-ended 31 October 2010 should have been as follows:

Dr	*Rental paid*	*RM 150,000*
Dr	*Prepaid rental*	*RM 30,000*
Cr	*Bank*	*RM 180,000*

Accordingly since business income and expenditure are accounted for on an accrual basis for tax purposes, the prepayment should be disallowed for the year of assessment 2010 (YA 2010) and in

consequence added back to the profit before tax figure when computing the adjusted income of the company for year of assessment 2010 as reflected below.

Brazil S/B
Tax Computation for YA 2010

	RM
Profit before tax	*xxx*
Add: Prepaid rental	*30,000*

However, it should be claimed as an expense in the tax computation for the following year of assessment (ie YA 2011) because it is actually incurred during the year-ending 31 October 2011 which constitutes the basis period for YA 2011 as follows:

Brazil S/B
Tax Computation for YA 2011

	RM
Profit before tax	*xxx*
Add: Prepaid rental for November & December 2011	*32,000*
Less: Rental for YA 2011 paid in 2010	*(30,000)*

Another style of questioning involves grouping more than one type of expenditure into a particular account and testing to ascertain if the candidate is able to segregate the different facets correctly and in consequence make the necessary adjustments in arriving at the adjusted income in the tax computation.

Example 3
Argentina S/B a manufacturing company, rented a double storey building, whereby the ground floor was used as a factory and the first floor, as accommodation for its workers. The company paid a rental of RM200,000 for the building which was expensed to its Statement of Comprehensive Income for the year-ended 31st December 2010. The floor area of both floors is the same.

In this case, technically 50% of the rental should be classified as staff amenities. However, since both rentals for business premises and staff amenities qualify for a deduction in ascertaining the adjusted income from a business, no adjustment is needed in the tax computation of the company for YA 2010.

Yet another complication applies to investment holding companies where the company pays rental on its business premises but sub-lets part of it to another person because under s 60F(1) the numerator "A" in the formula for computing the permitted expenses is defined as:

"... the total of the permitted expenses incurred for that basis period reduced by any receipt of a similar kind;"

Therefore, in computing the permitted expenses under s 60F, the amount of rental received is not recognised as a source of rental income but instead set-off against the rental expenses paid in the determining the amount of permitted expenses.

Example 4
We shall introduce a small change to Tax III December 2003 Question 5(a) which is reproduced below and use it to explain the above concept.

Omkara Sdn Bhd is an investment holding company and the results of its operations for the year ended 31 July 2003 are as follows:

	RM '000
Dividend income (gross)	410
Exempt dividends	40
Interest from deposits placed overseas	300
Rental income	30
Gains from realisation of investments	20
Income	800
Less:	
Directors fees	10
Wages, salaries and allowances	150
Depreciation	30
Management expenses	50
Rental	50
Postage and courier	5
Stationery	5
Audit and accounting fees	90
Secretarial	60
Interest expense	200
Expenses	650
Profit before tax	150

Compute the deduction of permitted expenses available to Omkara Sdn Bhd for the year of assessment 2003

Candidates would know that the deduction of permitted expenses is computed by using the following formula:

$$A \times \frac{B}{4C}$$

Let us vary the question by assuming that the breakdown of the rental income is as follows:

	RM
Rental from an adjacent shoplot	20,000
Sublet of office space in the currently rented premises	10,000

In computing the permitted expenses the amount of rental expense to be included under "A" in the formula is RM30,000 less RM10,000 ie RM 20,000 only. Therefore the amount of taxable rental income to be included in computing the figure for "B" is only RM20,000.

There is also case law relating to the deductibility of rental expense in certain particular situations.

The first case is *Allied Newspapers Ltd. V Hindsley [21, TC 422].*

Facts of the Case

The company, which was carrying on the business of newspaper proprietors, required the narrow lane [Mark Lane] which ran alongside their premises, for loading and unloading the newspapers. Therefore, the company bought the site on the other side of the lane, erected a block of offices [Chronicle Building], sold them to another company, leased it back, used part of it for their own business and sublet the remaining space! There was a clause in the lease agreements with all subtenants providing for Allied Newspapers to have full control of the lane. The company claimed a deduction for the rental paid (net of rent received from subletting).

Decision of the Court

The learned judge in allowing the deduction stated:
"In order that the appellant company's newspapers ...might be quickly distributed, unimpeded transport in Mark Lane was essential. It was, therefore, necessary that the appellant company should be able to control traffic as far as possible in Mark Lane.... This was the reason for the acquisition of the said site, the erection of Chronicle Building and the taking of the subsequent lease thereof."

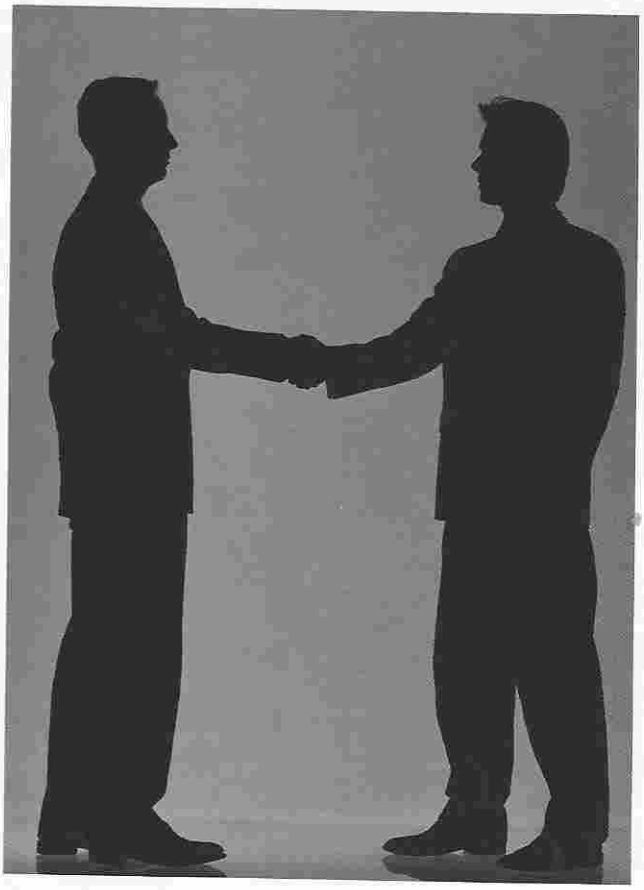
Another case of interest is *CIR v Falkirk Iron Co. Ltd. [17, TC 625]*

Facts of the Case

The company carried out its business through many rented premises. At one of the premises, business activities ceased but the company continued to pay the rental for the remaining term of the lease and sublet the premises. It then claimed a deduction for the rent paid less the amounts received from the tenants.

Decision of the Court

In allowing the claim for the deduction, the judge opined that the law only requires that "an outlay may be made wholly and exclusively for the purpose of a trade" and that it would be a mistake to assume that it "must also be profitably laid out." Based on the assumption that "when the directors took the lease of these premises, they took it in the reasonable expectation that the warehouse would help in making profits. The rental should be allowed because it did not differ from the rental paid for the other warehouses "which continued to be profitably used."



The case of *Hyett v Lennard [23, TC 346]* also illustrates the principle that rental paid on premises which are sublet subsequent to the closure of a business which was previously conducted at that premises, would be deductible.

With this topic, we conclude our discussion on the deductibility of rental expense. In the next article I shall discuss repairs and renewals under s 33(1)(c). TG

Further Reading

- Choong, K.F. Malaysian Taxation Principles and Practice, (Latest Edition) Infoworld,
- Kasipillai, J. (2009) "A Comprehensive Guide to Malaysian Taxation under Self Assessment", (Fourth Edition), McGraw Hill.
- Malaysian Master Tax Guide, (2010) CCH Asia Pte. Ltd
- Singh, Veerinderjeet;: Veerinder on Taxation (2009) Arah Pendidikan Sdn Bhd
- Thornton, Richard. Thornton's Malaysian Tax Commentaries, (2010) Sweet & Maxwell, Asia.
- Thornton, Richard. Richard Thornton: 100 Ways to Save Tax in Malaysia for Small Businesses (2010) Sweet & Maxwell Asia
- Yeo, Miow Cheng Alan. Malaysian Taxation, (2010), YSB Management Sdn Bhd

Siva Subramanian Nair *holds an honours degree in accounting and a MBA (Accountancy) from University of Malaya, where he is currently pursuing his doctorate. He is a Chartered Accountant (Malaysia) and a Fellow of the Chartered Tax Institute of Malaysia. He acquired extensive experience in taxation whilst being employed in the tax department of one of the Big Four (formerly Five) accounting firms and again as a senior finance and tax executive with an established property development company. Currently he is a freelance lecturer preparing students for the professional examinations of the ACCA, ICSA, MICPA and AIA and undergraduates of degree programmes in both local and foreign universities He is an examiner for one of the professional bodies in Malaysia and a member of the marking team for another professional examination. He writes a tax guide series for students in the Tax Guardian, the official magazine of the Chartered Tax Institute of Malaysia, and contributes articles to the ACCA student newsletter. In addition he also prepares course materials in taxation for other non-accounting based professional bodies.*

Notice Board

Membership Renewal for the Year 2010
We wish to thank members who have renewed their 2010 membership subscription. For those who have yet to renew, we urge you to settle your dues as soon as possible together with the payment advice to enjoy uninterrupted membership services. If your payment is on the way, we thank you for your support and would appreciate if you could kindly inform the Secretariat duly. If you need assistance on your renewal, please contact Iza (ext 114) or e–mail us at membership@ctim.org.my.

Chartered Tax Institute of Malaysia is Recruiting an Assistant Manager/Technical Manager
The Chartered Tax Institute of Malaysia is inviting suitably qualified candidates to apply for the position in the premier body for tax professionals. Interested applicants, please click on http://www.ctim.org.my/ectim/Advert_techmgr_Jul10.pdf.

Professional Conduct & Ethical Behaviour
Members are reminded that they must, at all times, bear in mind the Rules & Regulations (on professional conduct and ethics) of the Institute in providing tax services to the public and in working together with other members and the relevant Government agencies. As a general reminder, some extracts are listed below from the Rules & Regulations of the Institute:

- In accepting or continuing a professional assignment or occupation, a member should always have regard to any factors which might reflect adversely upon his integrity and objectivity in relation to that assignment or occupation.
- A member should follow the ethical guidance of the Institute and, in circumstances not provided for by that guidance, should conduct himself in a manner consistent with the good reputation of the profession and the Institute.
- A member should not undertake within his professional practice business activities which are not compatible with those normally undertaken by tax practitioners.
- No member shall give any assistance or his services by the use of his name or in any other manner to advance or promote any illegal activity of a client.
- No member shall mislead his clients or the public by charging an unrealistically low professional fee which may result in the lowering or compromise of professional standards.
- Fees should not be charged on a contingency, percentage or similar basis, save where that course is authorised by statute or is generally accepted practice for certain specialist work.

Form CP 204 – penalty on non–payment of instalments
The Inland Revenue Board (IRB) has confirmed that any increase in tax under s 107C(9) of the Income Tax Act 1967 is restricted to the amount of tax payable. Hence, where there is no tax to be paid for a year of assessment, no penalty will be imposed.

Late submission of Form CKHT 1A – penalty imposed for inability to provide acquirer's income tax reference number.
The Institute had sought clarification from the IRB in cases where a penalty had been imposed on the disposer for late submission of Form CKHT 1A and the delay in submission

was caused by the inability to provide the acquirer's income tax reference number. The response from the IRB, with reference to para 8.1 (on page 36) of the Garis Panduan CKHT, was that the Form CKHT 1A will not be rejected if the acquirer's tax reference number is the only information that has not been completed. In this instance, if the reason for the rejection of the Form CKHT 1A had genuinely been due to the non–completion of the acquirer's tax reference number, the taxpayer may appeal against the penalty to the relevant IRB Branch.

E–mail scam – Tax refund

The Inland Revenue Board (IRB) has issued a Press Release dated 21 July 2010 to caution the public against a new e–mail scam purportedly issued by the IRB and requesting taxpayers to take immediate action to claim his/her tax credit amounting to RM700. The Press Release may be viewed at the website of IRB at

http://www.hasil.gov.my/lhdnv3e/documents/maklumat_terkini/Kenyataan%20Media%20e–mel%20Bayaran%20Balik%20PALSU.pdf

Price Control and Anti–Profiteering Bill 2010

The Price Control and Anti–Profiteering Bill 2010 has been tabled for first reading in the Parliament. The purpose of the Bill is to enable the Government to determine the prices of selected goods or charges for services and to curb profiteering activities in the interest of consumers.

When it comes into force, the proposed Act will revoke the Price Control Act 1946. A copy of the Bill can be downloaded at the Parliament of Malaysia's website at http://www.parlimen.gov.my/eng–index.php.

e–SPC system and User Manual

The Inland Revenue Board (IRB) has launched the e–SPC (*Sijil Penyelesaian Cukai* / Tax Clearance Certificate) system which allows the online submission of notifications of cessation of employment (ie, Forms CP22A, CP22B or CP21) by employers for the purpose of obtaining tax clearance for their employees.

The system also provides for the updating of employees' information, the online checking of the status of application(s) made and the printing of the Tax Clearance Certificate. You may access the e–SPC system and/or view the user manual at the IRB's website at:
https://ekls.hasil.gov.my/espc/.

Members may also view the user manual at the Institute's website at:
http://www.ctim.org.my/technical_techdev_direct.asp.

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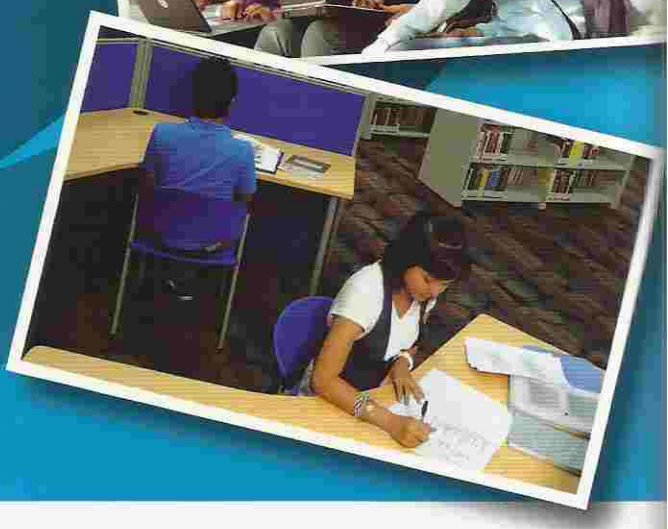

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