Malaysian Institute Of Taxation

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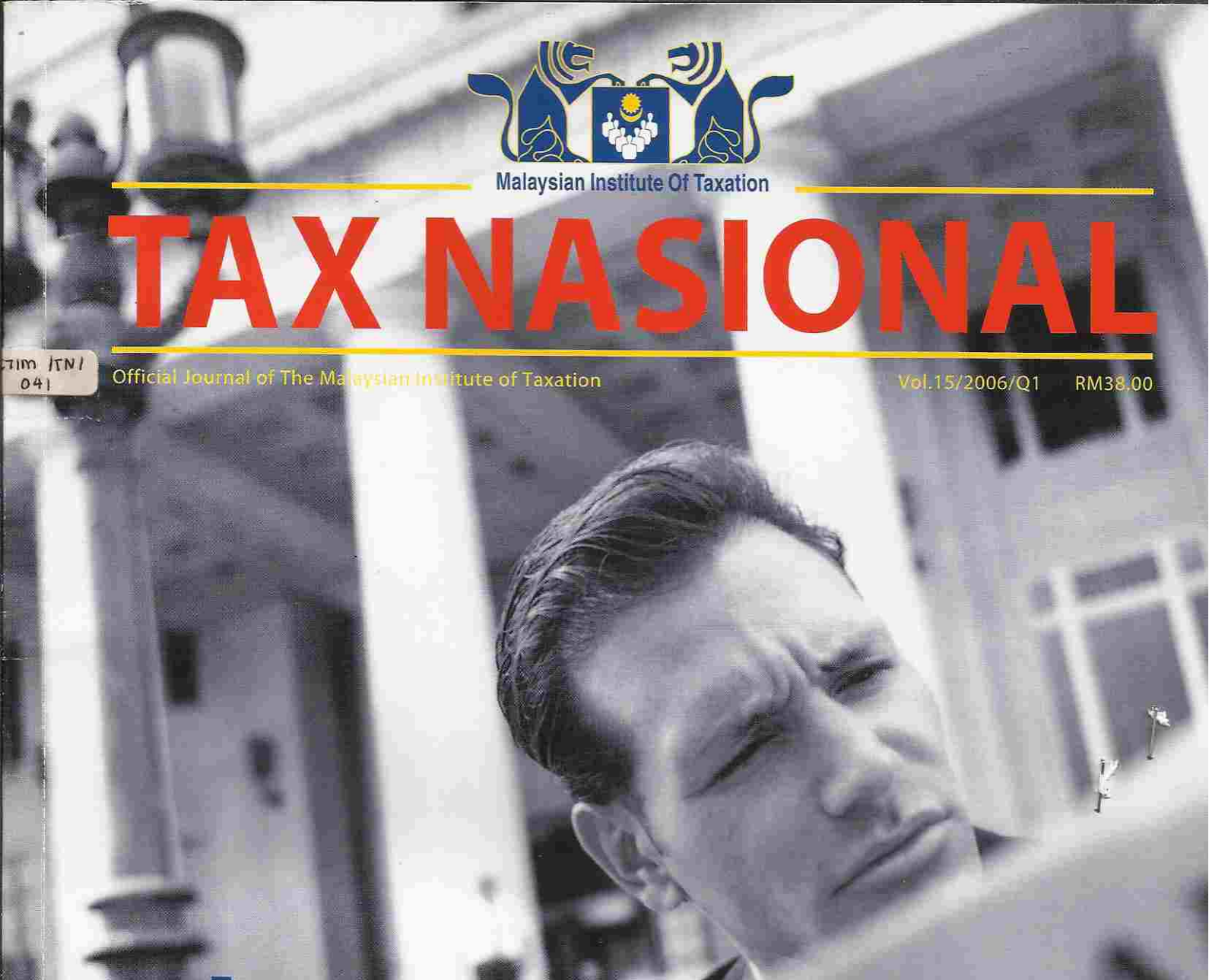

What Do We Know about FRS and Tax?

Tax Audits and Statutory Audits - What's the Difference?

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Malaysian Institute Of Taxation

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

TRAINING PROGRAMMES/EVENTS - 2nd Quarter 2006

Date	Training Programme	Time	Venue	Speaker	Target
April 2006					
3	Recent Tax Development	9 am - 5 pm	Kota Kinabalu	Harpal Singh Dhillon	Members
4	Workshop: Form B/BE Filing and E-Filling	9 am - 1 pm	MIT Training Room	Chow Chee Yen/LHDNM	Junior/Senior level
5	Recent Tax Development	9 am - 5 pm	Sibu	Harpal Singh Dhillon	Members
6	Workshop: Interpretation of Tax Statutes Through Case Law	9 am - 12:30 pm	MIT Training Room	Renuka Bhupalan	Semi-senior
6	Workshop: Application of Tax Cases for Appeals and Tax Advice	2 pm - 5 pm	MIT Training Room	Renuka Bhupalan	Semi-senior
7	Recent Tax Development	9 am - 5 pm	Kuching	Harpal Singh Dhillon	Members
12	Workshop: Investment Incentives	9 am - 5 pm	Kuching	Chow Chee Yen	Junior/Senior level
17	Seminar: Section 153 - The New Tax Agent Licence	9 am - 12:30 pm	Pan Pacific, KL	Various Speakers	Mgmt level
18	Workshop: Investment Incentives	9 am - 5 pm	Kota Kinabalu	Chow Chee Yen	Junior/Senior level
May 2006					
4	Workshop: Basic Corporate Tax Planning	9 am - 5 pm	MIT Training Room	Chow Chee Yen	Junior/Senior level
29	Workshop: Advanced Corporate Tax Planning	9 am - 5 pm	MIT Training Room	Chow Chee Yen	Junior/Senior level
31	Seminar: Tax Cases	9 am - 5 pm	KL	Various Speakers	Junior/Senior level
June 2006					
2	Workshop: Taxation for Property Developers and Investment Holding Companies	9 am - 1 pm	MIT Training Room	Chow Chee Yen	Junior/Senior level
2	Workshop: Taxation for Unit Trusts, REITs and Trade Associations	2 pm - 5 pm	MIT Training Room	Chow Chee Yen	Junior/Senior level
6	Workshop: Investment Incentives	9 am - 5 pm	Ipoh	Chow Chee Yen	Junior/Senior level
12	Workshop: Tax Planning for Real Property Gains Tax and RPC Shares	9 am - 5 pm	MIT Training Room	Chow Chee Yen	Junior/Senior level
16	Workshop: Investment Incentives	9 am - 5 pm	Melaka	Chow Chee Yen	Junior/Senior level
17	Workshop: Investment Incentives	9 am - 5 pm	Johor Bahru	Chow Chee Yen	Junior/Senior level

The President's Note

There were many changes in the local tax scene that took place in the first quarter of 2006. First, the new year was greeted rather unfavourably by the tax practitioners as well as auditors when the Ministry of Finance (MOF) issued the new Guidelines for the Application of License under Sec 153 of *Income Tax Act 1967*.

The Malaysian Institute of Taxation (MIT) quickly collated the views of our members and submitted a memorandum to MOF outlining some of our comment and suggestions. We are currently waiting for the responses from MOF and we hope that the issues raised in the memorandum would be considered favourably by MOF.

Secondly, with effect from 1 January 2006, Malaysia has adopted the Financial Reporting Standards (FRSs), issued by the Malaysian Accounting Standards Board (MASB), which will see Malaysia a step closer towards the worldwide convergence of financial reporting. The adoption of FRSs is likely to have an impact on the users from taxation point of view, which needs to be addressed urgently. The urgency arises from the fact that currently tax estimates provided by the taxpayers for the year of assessment 2006 may need to be amended 6 months after the commencement of the financial year (e.g. companies with year ends of 31 December 2005 can amend their tax estimate in June 2006) and the tax year of 2006 has already commenced together with the fact that the tax returns for 2006 need to be submitted in due course. In addition to the above issues, any lack of clarity of tax treatment of the tax issues arising from the FRSs could affect the current pricing of commercial transactions taking place in the Malaysian economy.

In view of the above, MIT is recommending to establish a working group consisting of Lembaga Hasil Dalam Negeri Malaysia (LHDNM), MOF, MASB and MIT. The objective of the working group is to identify the tax issues and the relevant tax treatment relating to the changes brought about by each of the FRSs that is adopted. We are also of the view that it is important to create an awareness of the implications to users including the tax agents, MOF and LHDNM officers, etc. through an education awareness process. These recommendations have been forwarded to the relevant parties and we are currently awaiting for the response.

On 22 February 2006, MOF issued a press release informing of its decision to postpone the implementation of the Goods and Services Tax (GST) to a later date. Originally GST was to take effect on 1 January 2007. MIT supports the Government's decision to defer the implementation and feels that the Government has reacted positively to the industry feedback received during its extensive consultations with the public and business community across the country. In the meantime, the draft GST legislation could be exposed for public comment as that would enable an even more effective consultation process. To ensure a smooth transition to GST when the new implementation date is announced and takes effect, the Government should look into the administration issues that concern GST and the additional time will be utilised to enhance the capabilities of the Customs Department.

In February, I had been invited to attend the "Majlis Pelancaran Bulan Perkhidmatan Pembayar Cukai dan e-Filing" at the headquarters of LHDNM in Jalan Duta. At the function, the LHDNM launched e-Filing, the smarter way of submitting your income tax return forms online. The LHDNM will embark on a nationwide roadshow to educate taxpayers on how to use this new system. MIT has pledged our support in assisting the LHDNM in its initiatives.

Working closely with LHDNM, the Institute will again collaborate with LHDNM to bring you the premier tax event of the year, National Tax Conference 2006. The conference is to be held on 22 & 23 August 2006 at Putra World Trade Centre, KL. As the year has seen many changes, the organisers have aptly identified the conference theme as "Moving Forward, Managing Changes".

So please do support the conference as you have in the past years.

Haji Abdul Hamid bin Mohd Hassan
President

The Editor's Note

The announcement by the Ministry of Finance (MOF) on 23 February 2006 to defer the implementation of Goods and Services Tax (GST) had received positive feedback from all sectors. This move will definitely give the business sectors, especially the small and medium enterprises (SMEs), extended time to prepare for the GST system as well as to train their personnel of the various functional departments involved in the whole supply chain to be GST-ready.

In this issue, we have two articles discussing the impact of the implementation of GST in Malaysia. Ely Raziah Abdul Rashid and Faridah Ahmad present an interesting analysis on SMEs awareness of GST in their article "Exploring the Level of Awareness of SMEs Towards GST Implementation in Malaysia" while Chan Kee Hong discusses the impact of GST on property developers in his article "Malaysian Property Developers – What is the GST Impact and How Will the Deferment Help?".

Besides the MOF announcement on GST deferment, implementation of the new Financial Reporting Standards (FRS), released by the Malaysian Accounting Standards Board (MASB), for companies with financial year-ends beginning on or after 1 January 2006 also creates significant impact on the tax treatment of specific transactions. In this aspect, Eow Siew Lee provides some insights on the implications of taxation as a result of the implementation of the new FRS in her article "What Do We Know about FRS and Tax?".

For recent events held by the Institute, please browse through the pages under the Institute News.

Other articles of interest include:

Can Feng Shui Expenditure Qualify for Capital Allowances?
In this article, SG Toh provides an interest analysis on the principles and tax cases to identify whether a Pa Kua can qualify as plant for the purpose of claiming capital allowances.

Tax Audits and Statutory Audits - What's the Difference?
In this article, Kenneth Yong provides an overview of the major differences between tax audits and statutory audits, and discusses how these differences can create confusion among corporate taxpayers, especially those in the SMEs segment.

Customs Considerations Concerning the Import and Export of Plants and Animals
In this article, Thomas Selva Doss explains the stringent procedures on the cross border movement of plants and animals in order to govern the entry as well as to prevent the spread of disease and to protect endangered species.

Taxability of Business Receipts
Siva Nair discusses the taxability of business receipts in the areas of timing, recognition in tax computation and valuation. He also refers to many tax cases to provide a greater understanding on the principles explained in his article.

Harpal S. Dhillon
Editor of Tax Nasional

Tax Nasional

Official Journal of the Malaysian Institute of Taxation

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Contents

1st Quarter 2006

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.

Heartiest Congratulations

The Council Members together with the staff and members of the Malaysian Institute of Taxation express their heartiest congratulations

to

Y.Bhg Dato' Liew Lee Leong, Raymond,
Council Member of Malaysian Institute of Taxation.

High Tea Fellowship MIT/MIA/LHDNM/MATA

Dr Sivamoorthy presenting a souvenir to Mdm Ng Oi Leng

This event was organised by the Malaysian Institute of Taxation (MIT) Johor Branch at M Suite Hotel, Johor Bahru. It was well received by members and representatives from MIT, Malaysian Institute of Accountants (MIA), Lembaga Hasil Dalam Negeri Malaysia (LHDNM) and Malaysian Association of Tax Accountants (MATA).

Dr S Sivamoorthy of MIT gave the opening address followed by Mr Sam Soh of MIA, En Azman bin Md Taib of MATA and Mdm Ng Oi Leng of the LHDNM. With the transfer of Mdm Ng's posting to Kuala Lumpur, the organisers, as a gesture of goodwill, gave a farewell gift. It was during her tenure in Johor Bahru that the tax consultants and accountants felt that the relationship and practical understanding with LHDNM was strengthened. The dialogues and training programmes with LHDNM captured the attention and promotes advance cooperation for all members at large.

It was a wonderful evening fellowship for all.

PROMOTING MIT PROFESSIONAL EXAMINATIONS AT THE LOCAL UNIVERSITIES

A series of career talks were held in various local universities as part of the programme initiated by the Institute's Education & Student Affairs Committee to create awareness and promote its professional examinations.

Universiti Teknologi Malaysia
Dr. Sivamoorthy recently presented a career talk at Universiti Teknologi Mara (UTM), Johor Bahru. Sixty five undergraduates from the Faculty of Human Resource Management attended the talk.

Universiti Tenaga Nasional
MIT East Coast Branch Chairman, Mr. Wong Seng Chong, represented the Institute to deliver a talk to accounting undergraduates and lecturers attached to the College of Business Management and Accounting on 11 January 2006. The talk provided an overview on MIT Examinations and the tax implication announced under 2006 Budget. The talk was well received as over three hundreds participants attended the event.

Undergraduates from UTM listening to a point highlighted by Dr Sivamoorthy

Universiti Malaya
During the accounting club's career week, Mr Adrian Yeo conducted a talk to the undergraduates from the Faculty of Business and Accountancy.

Universiti Malaysia Sarawak
Mr Lau Yaw Joo addressed over eighty undergraduates at Dewan Unimas on 25 February 2006. He presented an informative guide on MIT Professional Examinations as well as highlighting the benefits in pursuing a career in taxation to the undergraduates.

University Putra Malaysia
Mr Adrian Yeo shared some of his personal experiences while delivering a talk promoting MIT Professional Examinations to the undergraduates from the Faculty of Economics and Management on 27 February 2006.

REITs – Challenges in the 21st Century

Various parties' expectations, perspective and experiences with Real Estate Investment Trusts (REITs) in Malaysia were recently discussed at a seminar organised by MIT and the Malaysian Institute of Chartered Secretaries and Administrators (MAICSA).

Mr Stewart Labrooy, who was behind the successful listing of AXIS-REIT on Bursa Malaysia, was present at the seminar and shared his experience as a property owner and his listing experience of AXIS-REIT. He provided insights as to why the AXIS Group decided to form a REIT which the participants found very informative.

Mr Shahrin Shaikh Mohd, the Assistant Head, Trusts and Investment Management Department of the Securities Commission of Malaysia provided an update on the developments of REITs in Malaysia. He shared the regulator's expectation and discussed the issues affecting the developments of the REITs market.

Participants found the presentations by the experts from various fields, like investment banking and legal, useful and educational.

During the seminar, a forum was held to discuss the future of Malaysian REITs.

Teach-in session at REHDA

MIT conducted a teach-in session on taxation for property development companies. It was organised by the Real Estate and Housing Developers' Association Malaysia (REHDA). The speakers from PricewaterhouseCoopers provided the industry players with an insight into the areas focused upon by the LHDNM on property companies.

Technical Updates

(1st Quarter - as at 15 March 2006) **BY MIT TECHNICAL DEPARTMENT**

Public Ruling

The Lembaga Hasil Dalam Negeri Malaysia (LHDNM) released the following public rulings:-

- ***Public Ruling 4/2005*** on ***Withholding Tax on Special Classes of Income.*** This Ruling was issued on 12 September 2005. This Ruling explains the tax implications on the Special Classes of Income chargeable to tax under Sec 4A of the *Income Tax Act 1967*.
- ***Public Ruling 5/2005 on Deduction for Loss of Cash & Treatment of Recoveries***. This Ruling was issued on 14 November 2005. This Ruling explains the deductibility of loss of cash in the course of business and the treatment of the recoveries of such loss.
- ***Public Ruling 6/2005 on Trade Associations***. This Ruling was issued on 8 December 2005. This Ruling explains the tax treatment accorded to trade associations.
- ***Public Ruling 1/2006 on Perquisites from Employment***. This Ruling was issued on 17 January 2006. This Ruling explains the tax treatment of perquisites in relation to an employment.
- ***Public Ruling 2/2006 on Tax Borne By Employers***. This Ruling was issued on 17 January 2006. This Ruling explains the computation of the perquisite relating to income tax of the employee borne by the employer as well as the computation of tax payable by the employee who is entitled to such perquisite.
- ***Second Addendum to Public Ruling 2/2004*** which elaborates further on the treatment for goods and services offered at discount prices.

Legislation

Parliamentary Acts

The *Finance Act 2005 (Act 644)* was gazetted on 31 December 2005. A copy of the Act is available at www.mit.org.my.

The Ministry of Finance has announced on 22 February 2006 that the implementation of the Goods & Services Tax (GST) will be deferred to provide sufficient time to resolve issues raised by the private sector. It was earlier announced in the 2005 Budget that GST would be implemented on 1 January 2007.

Gazette Orders

The following Orders and Rules have been gazetted. The key features are highlighted below.

- ***Income Tax (Deduction for Incorporation Expenses) (Amendment) Rules 2005 [P.U. (A) 472]***
  - with effect from year of assessment 2004, a company which is incorporated in Malaysia -
    a) on or after 13 September 2003 and having authorised capital of not more than RM2,500,000; or
    b) on or after 1 January 1973 but prior to 13 September 2003 and having authorised capital of not more than RM250,000.

    shall be allowed deduction on the expenditure incurred by the company in relation to its incorporation.
  - in view of the above, the *Income Tax (Deduction for Incorporation Expenses) Rules 2003 [P.U. (A) 475/2003]* is amended accordingly.
- ***Promotion of Investments (Promoted Activities and Promoted Products for High Technology Companies) (Amendment) (No.3) Order 2005 [P.U. (A) 482]***
  - this Order seek to include the following items as promoted products:-

Industry	Products/Activities	Effective Date
Advanced electronics	Design, development and manufacture of printer mechanism	7 April 2004
	Development and production of surface mount components	25 November 2004
Advanced materials	Nano particles and their formulations thereof	14 October 2004
Engineering support industries/services	Moulds, tools and dies for automotive industry	27 February 2004

- ***Promotion of Investments (Promoted Activities and Promoted Products for Small Scale Companies) (Amendment) (No.3) Order 2005 [P.U. (A) 483]***
  - this Order seek to include the following items as promoted products:-

Industry	Products/Activities	Effective Date
Manufacture of palm oil and palm kernel oil products and their derivatives	Oleochemicals or oleochemical derivatives or preparations	5 August 2004
Manufacture of chemicals and pharmaceuticals	Bio-resin (biopolymer)	30 January 2004
	Inkjet inks	5 August 2004
Assembly & manufacture of electrical & electronic products and components and parts thereof	Measurement or scale instrument	30 January 2004
	Security equipment, components and part thereof	21 October 2004
Miscellaneous	Microbials and probiotics	28 October 2004
Manufacture of plastic products	Epoxy encapsulation moulding compound	1 April 2004

- ***Stamp Duty (Exemption) (No.27) Order 2005 [P.U. (A) 484]***
  - all instruments of deed of assignment between a Real Estate Investment Trust or a Property Trust Fund approved by the Securities Commission and the disposer relating to the purchase of real property are exempted from stamp duty.
  - the exemption is effective from 26 October 2005.
- ***Income Tax (Returns by Employers) Order 2006 [P.U. (A) 14]***
  - every employer shall prepare and deliver the Form E to the Director General within thirty days following the date of the publication of this Order which will include the required information.
  - every employer shall prepare and deliver to the employee on or before 30 March 2006, the salary statement in Form CP 8A or 8C containing the required information.
  - the Form E shall be delivered to the Director General at the address specified in the said Form.

- the Form E may be obtained at any branch of the Inland Revenue Board of Malaysia or by downloading from the website at www.hasil.org.my.

- ***Income Tax (Exemption)(No.9) Order 2006 [P.U. (A) 50]***
  - this exemption is effective from year of assessment 2001.
  - a Malaysian resident company is exempted from tax on its statutory income in relation to a new project for a period of 10 consecutive years of assessment.
  - Schedule 4C shall apply to the adjusted loss from the new project for any year of assessment.
  - "new project" is defined to mean the first project carried out by a company for the purpose of undertaking an approved food production project which is approved by the Minister.
  - paragraphs 5 and 6 of Schedule 7A shall apply to the amount exempted.
  - this Order shall not apply where the company has been granted incentives under the Promotion of Investments Act 1986, reinvestment allowance under Schedule 7A, deduction under the *Income Tax (Deduction for Investment in an Approved Food Production Project) Rules 2006*, etc.

- ***Income Tax (Exemption)(No.10) Order 2006 [P.U. (A) 51]***
  - this exemption is effective from year of assessment 2001 and 2002 for new project and expansion projects respectively.
  - a Malaysian resident company is exempted from tax on its statutory income in relation to a new project for a period of 10 consecutive years of assessment or in relation to an expansion project for a period of 5 consecutive years of assessment.
  - losses incurred prior and during the exempt years of exemption are allowed to be carried forward to post-exempt years of assessment.
  - "new project" is defined to mean the first project carried out by a company for the purpose of undertaking an approved food production project which is approved by the Minister.
  - "expansion project" is defined to mean a project carried out by a company for the purpose of expanding its existing approved food production project where the project has not been granted an exemption under this Order, involves a new area of land and is approved by the Minister.
  - paragraphs 5 and 6 of Schedule 7A shall apply to the amount exempted.
  - this Order shall not apply where the company has been granted incentives under the *Promotion of Investments Act 1986*, reinvestment allowance under Schedule 7A, *deduction under the Income Tax (Deduction for Investment in an Approved Food Production Project) Rules 2006*, etc.

- ***Income Tax (Deduction for Investment in an Approved Food Production Project) Rules 2006 [P.U. (A) 55]***
  - these Rules are effective from year of assessment 2001 and revokes the *Income Tax (Deduction for Investment in an Approved Food Production Project) Rules 2001 [P.U. (A) 81/2001]*.
  - a deduction equivalent to the value of investment made in the project approved by the Minister for the sole purpose of financing an approved food production project.
  - "investment" is defined to mean investment in the form of cash or holding of shares in a related company.
  - "related company" is defined to mean a company, on or after 11 September 2004 (prior to 11 September 2004), with at least 70% (100%) of its issued share capital directly owned by a company that made the investment for the purpose of an approved food project.
  - these Rules shall not apply where a company has been granted exemption for an approved food production project under the *Income Tax (Exemption)(No.9) Order 2006* and *Income Tax (Exemption)(No.10) Order 2006* or to an application for approval for the approved food production project made after 30 September 2005.

- ***Income Tax (Accelerated Capital Allowance)(Conservation of Energy) (Revocation) Rules 2006 [P.U.(A) 64]***
  - the *Income Tax (Accelerated Capital Allowance) (Conservation of Energy) Rules 2003 [P.U. (A) 349/2003]* is revoked with effect from 1 October 2005.
  - where a company has incurred qualifying plant expenditure on or before 30 September 2005 and has been allowed the accelerated claim under the revoked Rules is entitled to claim until the allowance is fully absorbed.

Dialogues

A Technical Dialogue was held by the LHDNM with the professional bodies on 15 March 2006.

Guidelines

Ministry of Finance

The Ministry of Finance has issued the following guidelines:-

- Guidelines on the application and renewal of a tax agent; and
- Procedures for the application and renewal of an auditor/company liquidator.

The above guidelines detail the new requirements and procedures to be complied with in applying for the tax agents' license as well as its renewal. These guidelines and procedures shall be effective from 1 January 2006.

Copies of the guidelines, procedures and relevant application forms are available at www.mit.org under the Technical Section – Circulars.

Securities Commission

The Securities Commission (SC) released the first global Islamic financial sector's Guidelines for Real Estate Investment Trusts (REITs) on 21 November 2005. The use of Islamic REITs is expected to further develop the Islamic capital market. Syariah compliance criteria are provided in the Guidelines to guide management companies in their activities relating to Islamic REITs, including the types of Syariah permissible and non-permissible rental and investment activities of such a fund. The Islamic REITs Guidelines have been approved by the SC's Syariah Advisory Council. A copy of the Guidelines is available at www.sc.com.my.

National TAX CONFERENCE 2006

Premier Tax Event of the Year

22 & 23 August

Putra World Trade Centre (PWTC), Kuala Lumpur

Moving Forward, Managing Changes

Highlights

- Impact of FRS on Taxation
- LHDNM's Perspective
- E-Services in Tax Administration
- Legal Issues
- New Sector Focus - Biotechnology
- Real Estate Investment Trusts (REITs)
- Supply Chain Management
- Investment in Emerging Markets
- Recent Developments on Transfer Pricing

A full programme will be available soon.

For further information on the Conference please contact:

Malaysian Tax Academy LHDNM
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NATIONAL TAX CONFERENCE 2006

Closing Date: 1 August 2006

Conference Fee

	Early Bird Fee *(on or before 7 July 2006)*	Normal Fee *(after 7 July 2006)*
LHDNM Officer / MIT Member	RM 700	RM 900
Member Firm's Staff / Member of Supporting Body / Member of Sponsor	RM 800	RM 1000
Non-Member	RM 900	RM 1200
Premier Plus	10 participants registered from the same organisation get 1 FREE seat	

Note: All fees are inclusive of conference notes, refreshments and lunch.
For Malaysian outstation cheque, a surcharge of RM0.50 is required to be included in the total cheque amount.

IMPORTANT NOTES

Reservation can be made by facsimile /post but will only be confirmed upon receipt of registration form and payment. Please cross cheque made payable to MIT-NTC and mail payment together with registration form to:

Conference Secretariat:

Malaysian Institute of Taxation
Unit B-13-2, Block B, 13th Floor, Megan Avenue II, No.12, Jalan Yap Kwan Seng, 50450 Kuala Lumpur, MALAYSIA

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Email: esther@hasil.org.my Website: www.hasil.org.my

Conference fees are non-refundable once reservation has been confirmed. If you are unable to attend, a substitute delegate is welcomed when advised in writing prior to the conference. No refund is given for cancellations or withdrawals. Cancelled unpaid registrations will also be liable for full payment of the conference fees.

The organisers reserve the right to change the speaker, date and / or to cancel the programme should unavoidable circumstances arise.

All delegates will be presented with a Certificate of Attendance upon successful completion of the conference for use in registering CPD hours.

This registration form serves as our official invoice. No further invoice will be issued.

Member Firm's Staff / Member of Supporting Body / Member of Sponsor.
Member Firm's Staff, is the staff of a MIT member within the same firm. Member of Supporting Body or Sponsor, kindly indicate which body you are associated with in the registration form below.

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Full Name *(As per IC)* Mr/Ms/Mrs/Madam/Dr _____

Designation _____

Organisation _____

Address _____

_____

Tel _____ Fax _____ Email _____

Personal Assistant *(if applicable)* _____

Dietary requirements: ☐ Normal ☐ Vegetarian ☐ Others, please specify _____

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Please indicate which body you are associated with and your membership number:

☐ MIT ☐ ACCA ☐ CIMA ☐ CPA Australia ☐ MAICSA ☐ MIA ☐ MICPA

☐ Others, please specify _____ Membership number _____

PAYMENT DETAILS *(Please write NTC 2006, your name and contact number at the reverse of the cheque)*

I/We hereby enclose ☐ Cash (RM) _____

☐ Personal Cheque/Banker's Order _____ for (RM) _____

☐ Company Cheque _____ for (RM) _____

FOR OFFICE USE

Date Received

Amount (RM)

OR Number

Docket Number

Please cross cheque made payable to MIT-NTC and mail payment together with registration form to the above address. Admission will only be permitted and a confirmation letter will only be issued upon receipt of full payment.

Registration can be made via fax.

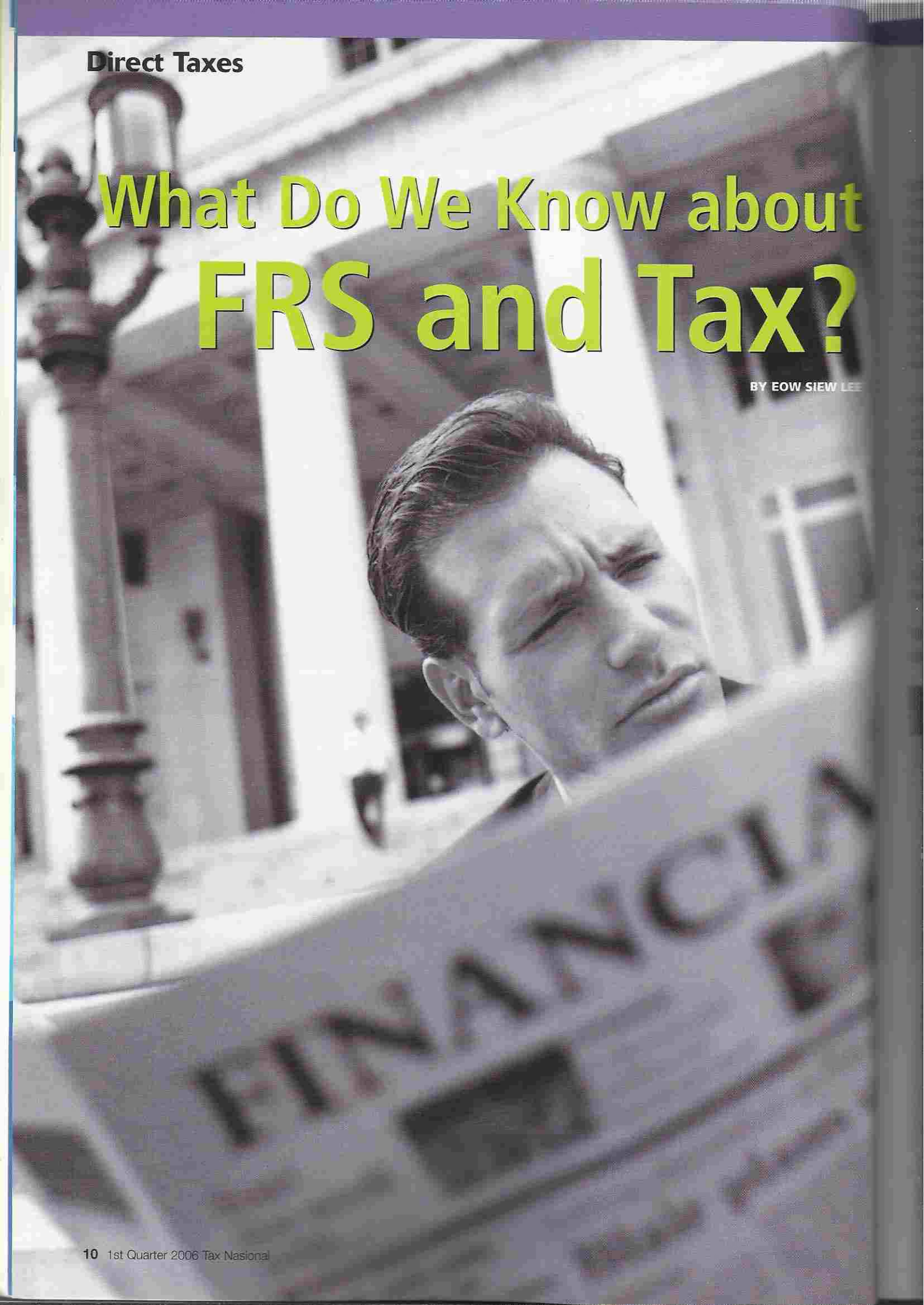
HOTEL ACCOMODATION

The Pan Pacific Hotel, Kuala Lumpur is the official hotel for the NTC 2006. Accommodation room rates are quoted on a per room per night basis. Please contact the hotel directly for reservation and other details. Hotel bills are to be settled by delegates directly with the hotel.

Contact Person: **Ms Alicia J Herrera**
Tel: 03-4043 4440 Fax: 03-4043 5253 Email: ajherrera@panpacific.com

What Do We Know about FRS and Tax?

BY EOW SIEW LEE



What is so special about Financial Reporting Standards (FRS)? For one, all companies with financial year-ends beginning on or after 1 January 2006 must comply with the Malaysian equivalent of the International Financial Reporting Standards (IFRS). This may seem like we have a fair bit of time as the earliest audited report will only be out next year. However, bear in mind that companies, particularly public listed companies would need to publish quarterly reports to their shareholders. Therefore, what is FRS; how will it affect the bottom line; and its tax implications must be understood now.

Fortunately, Malaysia is not the first country to adopt the FRS as Singapore and Australia have adopted it since 1 January 2005. Ample literature has been published on why the IFRS is being adopted worldwide; but what is lacking is the understanding of the tax implications arising from the adoption of the FRS.

This article will attempt to provide some initial insight to the far-reaching implications on taxation.

Table 1 summarises the list of revised or new FRSs released by the Malaysian Accounting Standards Board (MASB).

Table 1: Summary of Revised/New FRSs released by MASB

Standard	Title	Standard Superceded
Revised by Exposure Drafts		
FRS 3	Business Combinations	FRS 122 2004
FRS 5	Non-Current Assets Held for Sale & Discontinued Operations	FRS 135 2004
FRS 101	Presentation of Financial Statements	FRS 101 2004
FRS 102	Inventories	FRS 102 2004
FRS 108	Accounting Policies, Changes in Accounting Estimates and Errors	FRS 108 2004
FRS 110	Events After the Balance Sheet Date	FRS 110 2004
FRS 116	Property, Plant and Equipment	FRS 116 2004
FRS 117	Leases	FRS 117 2004
FRS 121	The Effects of Changes in Foreign Exchange Rates	FRS 121 2004
FRS 124	Related Party Disclosures	FRS 124 2004
FRS 132	Financial Instruments: Disclosure & Presentation	FRS 132 2004
FRS 133	Earnings Per Share	FRS 133 2004
FRS 136	Impairment of Assets	FRS 136 2004
FRS 127	Consolidated Financial Statements and Investments in Subsidiaries	FRS 127 2004
FRS 128	Investments in Associates	FRS 128 2004
FRS 131	Financial Reporting of Interests in Joint Venture	FRS 131 2004
New MASB Standards		
FRS 1	First-time Adoption of Financial Reporting Standards	
FRS 2	Share-based Payment	
FRS 138	Intangible Assets	FRS 109 2004
FRS 139	Financial Instruments: Recognition & Measurement	
FRS 140	Investment Property	FRS 125 2004

The Link between Accounting and Taxation

Before we look into the changes brought about by these FRSs, let us look at why the FRS will affect tax. Although accounting and taxation are governed by separate principles and standards, the link between accounting and taxation exists. The first step by businesses to determine its tax liability is normally from the profit and loss account or to be specific, the profit before taxation figure. So, it is not surprising that any changes to the manner in which the profit figure is determined would affect tax.

Certain income tax definitions may have a direct link to the balance sheet of a company. For example in Australia, the "safe harbour" test of the thin capitalisation rules, in very broad terms, allows a debt to equity ratio of 3:1. However, this may not be achieved by many companies as the thin capitalisation provisions in the tax legislation are directly linked to the standards in identifying and valuing assets. What about Malaysia? For example, the definition of a real property company depends on the value of the total tangible assets i.e. the aggregate of the market value of the real property or shares or both and the value of other tangible assets. Hence, with FRS moving towards fair value accounting, would it cause companies to fall outside the definition of a real property company?

Currently, the following three methods are used to determine the amount of stamp duty payable on the transfer of non-listed shares of a company, i.e. the (i) value of the consideration; (ii) net tangible assets; and (iii) Price Earning multiple. The question now: Is it necessary for the relevant authorites to review these methods?

Transition period

The adoption of FRS creates, to a certain extent, a level of uncertainty in tax. This then brings us to the issue of preparedness – how prepared are we? Different practitioners may have differing views on the implications caused by a particular change in the FRS. Professor Dr Jeyapalan Kasipillai of Universiti Utara Malaysia's Faculty of Accountancy is of the view that tax practitioners, especially those in the small and medium-size practice, would face difficulties in complying with the FRSs. Even those small business companies (including smaller non-listed companies) may find it cumbersome or impractical to adopt the FRSs. Professor Dr Jeya also added that the accounting academia has to familiarise itself with the new FRSs as they will be grooming future accountants. At Universiti Utara Malaysia, most of the academicians attached to the Faculty of Accountancy are aware of the changes but what is needed is greater practical exposure.

Therefore, it is pertinent that immediate action be taken to manage the transitional period. For example, a working group could be formed by the relevant parties, that is, the tax authorities and the tax practitioners, to determine what course of action should be taken to address the tax issues arising from the FRSs to avoid inconsistencies in the interpretation of the rules that are to be applied.

To manage the transitional period effectively, clear and specific tasks should be identified and allocated to relevant parties. For the benefit of taxpayers, findings of the working group may be distributed to taxpayers for their knowledge as in most instances taxpayers need to know, with a certain degree of confidence, what the tax changes are and the authorities' stand on a particular matter. In the event transitional provisions are necessary to address some of these issues, the Ministry of Finance could consider introducing specific Rulings.

Now would be the best time to look at what steps other countries have taken to face the FRS challenge. In Australia, the FRSs were gazetted in July 2004 and were operational from 1 January 2005. The Head of the National Tax Liaison Group (NTLG) endorsed the establishment of the NTLG International Financial Reporting Standards sub-committee to provide a forum for the Tax Office, Treasury and professional associations to raise and discuss issues associated with the IFRS adoption. The first meeting was held on 2 December 2004. The focus of the sub-committee was as listed below (but not restricted to):

- Raising priority issues and working with the Tax Office to reach co-designed solutions.
- Identifying and addressing assurance, administrative and interpretative issues as the IFRS regime unfolds over time.
- Other matters that may be referred to it by the NTLG.

The Australian Tax Office also planned to maintain an updated webpage of the IFRS-tax impact as well as developing publications for taxpayers.

Changes in the FRSs and possible tax impact

To kick start the thinking process, the author has selected certain changes from the FRSs with an indication of its possible tax impact.

FRS 108 Accounting Policies, Changes in Accounting Estimates and Errors	
Selected Changes	**Possible Tax Implications**
Retrospective application of voluntary changes in accounting policies and retrospective restatement to correct prior period errors.	Are taxpayers required to restate previous tax computations or treat it as current year adjustments?

FRS 116 Property, Plant and Equipment	
Selected Changes	**Possible Tax Implications**
Depreciation charge to be determined separately for each significant part of an item of property, plant and equipment.	Will the segregated components be treated as qualifying capital expenditure?
An item of property, plant and equipment is required to be depreciated when it is available for use and to continue until it is derecognised, even if during that period the item is idle.	Generally, items which are not in use for business do not qualify for capital allowances. This would result in a permanent difference between accounting and tax.
Costs of its dismantlement, removal or restoration included as costs of property, plant and equipment.	Would these costs be treated as qualifying capital expenditure?

FRS 121 The Effects of Changes in Foreign Exchange Rates	
Selected Changes	**Possible Tax Implications**
Exchange differences arising from a severe devaluation or depreciation of a currency against which there is no means of hedging to be recognised in profit and loss (previously allowed to be capitalised).	Are exchange differences recognised to be treated as tax deductible?
Preparation of financial reports in functional currency (i.e. the currency of the primary economic environment in which the entity operates).	Financial statements may need to be translated to Malaysian Ringgit (RM) if the functional currency is not in RM. Therefore, there seems to be no requirement for financial statements to be in RM.

FRS 138 Intangible Assets	
Selected Changes	**Possible Tax Implications**
An intangible asset shall be recognised provided it meets the definition/recognition criteria and its fair value can be measured reliably.	Currently, only selected expenditure* qualify for deduction. Would expenditure on internet domain names, copyrights, franchise agreements, etc be accorded the same treatment? Or would they be eligible for capital allowances?

* *Cost of acquisition of proprietary rights (patents, industrial design or trademarks) is allowed a deduction over a period of 5 years. This is applicable only to manufacturing companies which are at least 70% Malaysian owned [Income Tax (Deduction for Cost of Acquisition of Proprietary Rights) Rules 2002].*

Cost of developing a website which is electronic commerce enabled is allowed a deduction over a period of 5 years [Income Tax (Deduction for Cost of Developing Website) Rules 2003].

FRS 139 Financial Instruments: Recognition and Measurement	
Selected Changes	**Possible Tax Implications**
Financial assets classified as "fair value through profit or loss" are measured at fair value and any movement in that fair value at each balance sheet date is taken directly to the income statement.	Are such differences in valuations deductible/taxable when charged to the income statement or when realised?
Financial instruments, on initial recognition, are recognised at fair value plus in some cases, transaction costs i.e. transaction costs are to be capitalised and amortised over the expected repayment period. (Transaction costs are incremental costs that are directly attributable to the acquisition or issue of the financial instrument.)	Would the transaction costs be fully deductible when incurred?

CONCLUSION

The issues raised above are only the tip of the iceberg. More review and analysis of the FRSs need to be done to evaluate the full impact of FRS on taxation. Considering that we are already in the first quarter of 2006, no time should be lost. It is hoped that the tax authorities realise the urgency in addressing the FRS challenge. More so with self-assessment, a consistent understanding and application should be made available so that taxpayers do not resort to applying their own interpretation; or allowing – yet again – another audit officers field day.

Based on an announcement by the MASB on 23 February 2006, compliance with the FRS is mandatory for all entities other than private entities. A private entity is defined as a private company, incorporated under the Companies Act 1965, that –

- is not itself required to prepare or lodge any financial statements under any law administered by the Securities Commission or Bank Negara Malaysia; and
- is not a subsidiary or associate of, or jointly controlled by, an entity which is required to prepare or lodge any financial statements under any law administered by the Securities Commission or Bank Negara Malaysia.

It is further highlighted that FRS 117 Leases, FRS 124 Related Party Disclosures and FRS 139 Financial Instruments: Recognition and Measurement shall apply to annual periods beginning on or after 1 October 2006.

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Australian CPA, July 2004 edition.

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The KPMG Guide: FRS 139 Financial Instruments: Recognition and Measurement, 2005 edition.

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Acknowledgement
The author wishes to acknowledge the contribution and comments provided by Professor Dr Jeyapalan Kasipillai in preparing this article.

The Author

Eow Siew Lee was previously attached to the tax practice of one of the Big 4 firms. She is currently with the Malaysian Institute of Taxation as their Senior Manager, Technical and Public Practice Department. The views expressed are the personal views of the author.

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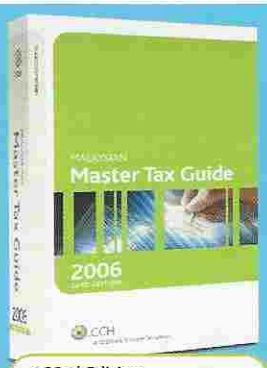

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9:10 am	Importance of Being a Licensed Tax Agent
9:40 am	Procedures in Applying for a Tax Agent's License
10:30 am	Morning Refreshments
10:50 am	The Interview Process
11:45 am	The Future of Tax Profession in Malaysia
12:30 pm	End of Programme

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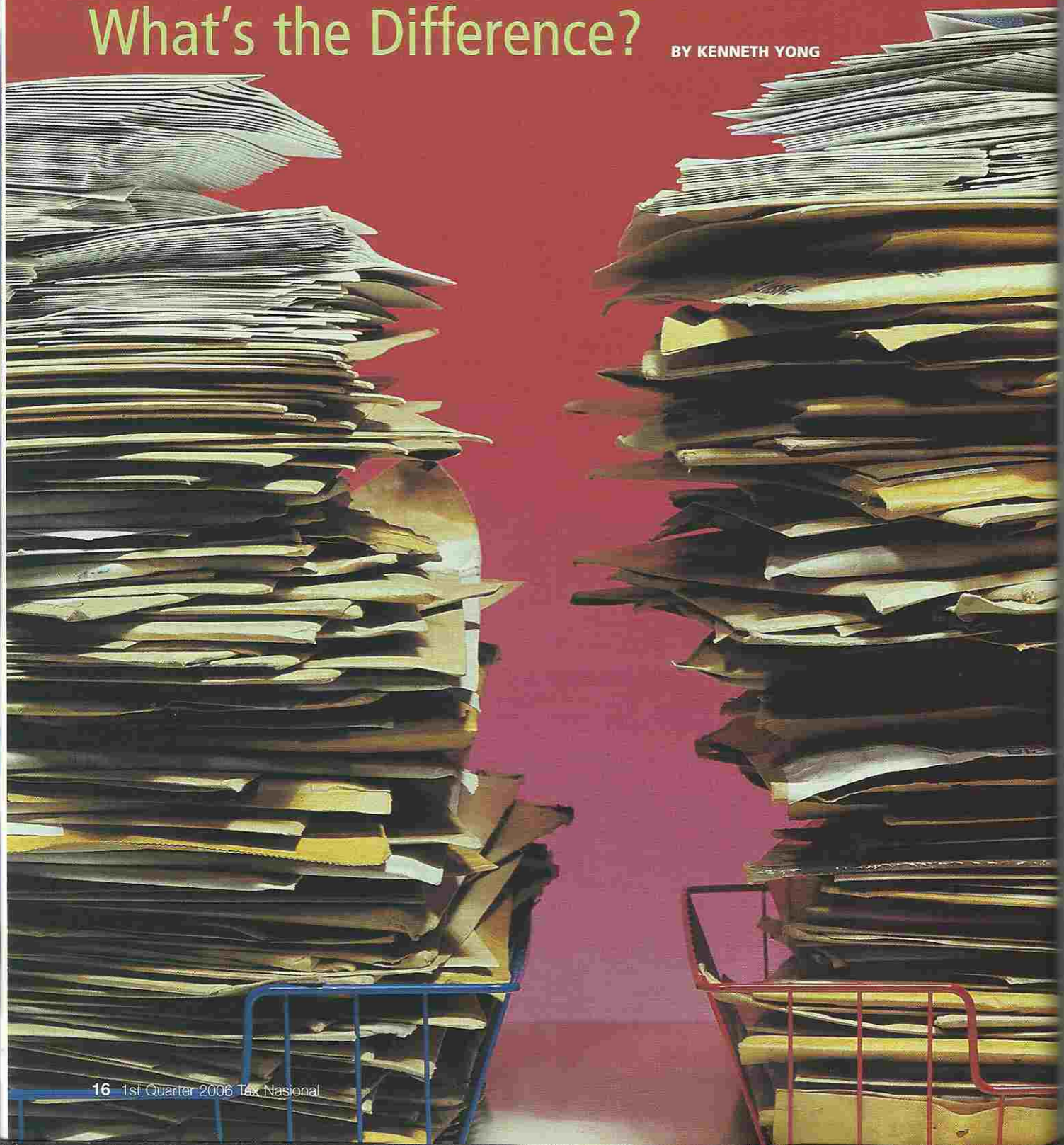
TAX AUDITS AND STATUTORY AUDITS - What's the Difference?

BY KENNETH YONG



Introduction

For all but the last five years of Malaysian corporate history, the word "audit" has been the exclusive province of the accounting profession, being associated with directors summoning the auditors in to perform *the* year-end financial audit of the company.

But in 2001, the accounting profession's long-standing monopoly on the term "audit" was shattered. The introduction of the corporate self-assessment system in 2001 led the Inland Revenue Board (IRB) to roll out the latest weapon in its armoury - "tax audits".

Thus, the terms tax audit and statutory audits became crucial distinctions in separating the two similar, yet very different, types of audit.

This article provides an overview of the major differences between tax audits and statutory audits, and discusses how these differences can create confusion among corporate taxpayers, especially those in the Small and Medium Enterprises (SMEs) segment.

Governing Act

The law relating to statutory audits is laid out in Sec 169(4) of the *Companies Act 1965* which provides that:

> *"The profit and loss account and the balance sheet of a company shall be duly audited before they are laid before the company at its annual general meeting..."*

There is no specific equivalent in the *Income Tax Act 1967* that specifies that a company's records must be tax-audited. However, there are sufficient provisions to empower the IRB to conduct tax audits.

Objective

Quite understandably, the objectives of statutory audits and tax audits are different. Nonetheless, convincing taxpayers of these differences can be challenging.

The purpose of statutory audits is mainly to provide assurance that:

a) the accounts give a true and fair view of the matters required by Sec 169 of the *Companies Act 1965*;

b) the accounts are drawn up in accordance with the provisions of the *Companies Act 1965*;

c) the accounts are in accordance with applicable approved accounting standards; and

d) the accounting and other records and registers are properly kept.

The *Companies Act 1965* does not prescribe any tax compliance issues.

The objective of tax audits is two-fold:

a) prevent loss of revenue to the government; and

b) create awareness of the importance of reporting correct income and pay the right amount of income tax.

Hopefully through tax audits, the IRB will also measure the degree of tax compliance and identify complex issues facing taxpayers and tax agents.

Timing and Frequency

Statutory audits are normally performed once a year, more times if there are special circumstances (e.g. change in accounting year-end that results in closing the books twice within the same calendar year).

Tax audits on the other hand, do not have a fixed timetable. The stated claim is that all taxpayers will be audited within a 5-year cycle. Furthermore, the tax audit could cover 2 or 3 basis periods in one go. The timing is entirely outside the hands of taxpayers.

Selection for Audit

Following the prevailing provisions of the *Companies Act 1965*, all companies regardless of size, are required to be audited.

While the IRB has indicated that *all* taxpayers will be tax-audited, it remains to be seen just how this feat will be accomplished, given that tax audit covers not just the large number of corporate taxpayers but also those thousands of individuals with businesses and partnerships.

Invitation to Audit

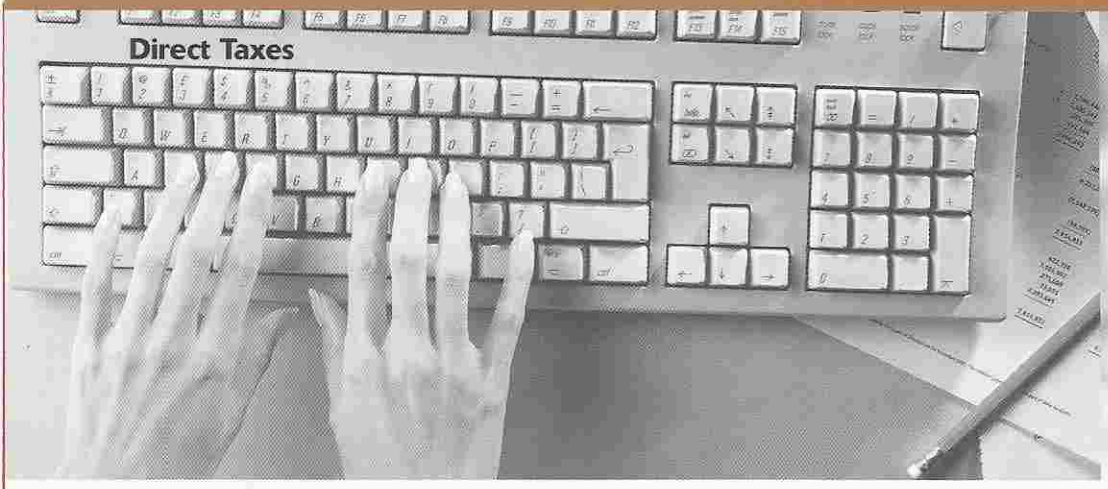
For statutory audits, the invitation to audit is normally issued by the client (and for smaller (SMEs), usually after reminders from the company secretary or auditor).

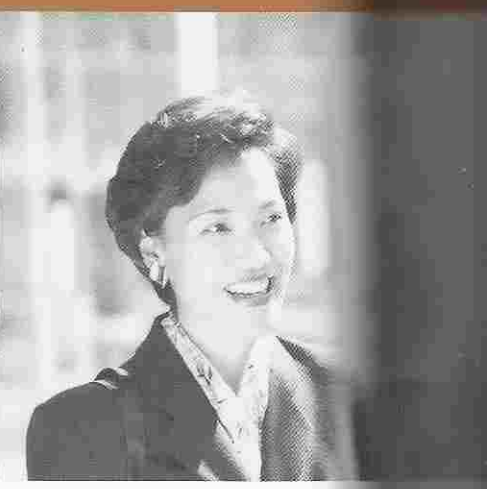
Under normal circumstances, it is difficult to fathom a corporate taxpayer inviting the IRB to perform a tax audit on their company. Much to the dismay of taxpayers, the IRB invites itself.

However, a notable exception is where the liquidator invites the IRB for a tax audit to expedite tax clearance of a company under liquidation.

Focus

A statutory audit is heavily driven by accounting standards. The true-and-fair-view requisite necessitates compliance with accounting standards in most circumstances. Therefore, the statutory audit places heavy emphasis on testing the application of accounting standards in the financial statements.





A tax audit focuses on the following in order to determine any understatement of taxable income via the following:

a) under-declaration of income;

b) over-claiming of expenses;

c) claiming incentives where conditions are not met; and

d) preparing an incorrect tax computation, resulting in tax undercharged.

Interestingly, there are two variants to tax audits:

(1) general compliance audit, which takes an overall view of the tax computation and records; and

(2) issue-based audit, where special issues or special industries are scrutinised. Some examples are presented below:

(a) Investment holding companies – proper treatment of interest restriction.

(b) Property developers and contractors – using percentage-completion-method instead of receipt basis when recognising revenue

(c) Investment dealing companies applying the lower-of-cost or market value on individual asset basis etc.

(d) Manufacturing – eligibility to claim reinvestment allowance.

Treatment of Audit Staff

During a tax audit, taxpayers are required by Sec 80(1A) of the *Income Tax Act 1967* to provide "an authorised officer with all reasonable facilities and assistance for the exercise of his powers...".

This safeguard ensures that the IRB audit-team is treated cordially and reasonably.

Alas, there is no such equivalent protection in the *Companies Act 1965*. The amount of "comfort" that the statutory audit team can expect from the audit client rests heavily upon their public relations skills.

Access to Documents

Sec 174(4) of the *Companies Act 1965* stipulates that "*An auditor of a company has a right of access at all reasonable times to the accounting and other records of the company ... and is entitled to require from any officer ... such information and explanations ... for the purposes of audit.*"

Similarly, Sec 80(1) of the *Income Tax Act 1967* provides that "*the Director General shall at all times have full and free access to all lands, buildings and places and to all books and other documents and may search such lands, buildings and places and may inspect, copy or make extracts from any such books or documents without making any payment by way of fee or reward.*"

Note the interesting distinction. Auditors only have access at all <u>reasonable</u> times, while the DGIR has right of access at <u>all</u> times. Whether the distinction is due to accidental inconsistency or deliberate is a matter for conjecture.

Non Co-operation

In any audit, the necessary ingredient for a swift conclusion is co-operation between parties, even if the co-operation is forced upon.

Both the *Companies Act 1965* and the *Income Tax Act 1967* have provisions to promote co-operation.

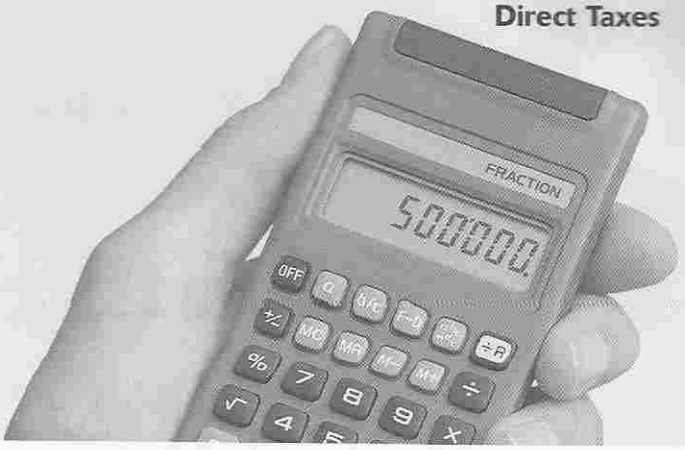
Under the *Companies Act 1965*, officers who refuse to allow auditors access to information can be imprisoned for 2 years or fined up to RM30,000.

Similarly, the *Income Tax Act 1967* stipulates that obstruction of IRB officers can attract a 1-year imprisonment or a fine between RM1,000 to RM10,000.

Fee

The statutory audit is a service provided by the auditor to the client at a negotiated fee.

Fortunately, there is no fee payable for a tax audit. It would be difficult to imagine how taxpayers would react if the government were to impose a fee for carrying out a tax audit on a taxpayer. In fairness, if the tax audit manages to uncover additional taxes, then that's the fee in itself as the IRB will no doubt be more than compensated for its efforts.



In a tax audit, Sec 80(1) of the *Income Tax Act 1967* empowers IRB officers to make copies of documents *without* charge.

While companies often extend photocopying services to the statutory audit team, there have been cases where clients request financial auditors to bring their own photocopying paper.

Outcome

The conclusion of a statutory audit is an audit report, which may either be clean or qualified. Depending on the size or type of company, the effects of a qualified audit report can range from having no consequential effect (e.g. owner-managed company with no bank borrowings) to being devastating to the financial standing or reputation of the reporting entity (e.g. listed companies, or large charitable foundations whose reputations are at stake).

Similarly, the conclusion of a tax audit can also come in the form of a clean report or a report on the understatement of tax payable; it is envisaged that the latter is more likely, given the ever-increasing target of revenue collection set by the IRB.

Depending on the issues discovered or addressed during the tax audit, closure can be a painful jab to the pockets of the taxpayer. In addition to incremental taxes arising from the tax audit, taxpayers also come face-on with that which they so despise - tax penalties. Tax penalties arising from tax audits start from 60% on the additional taxes and can go up to 100% on additional taxes, thus representing hefty transfers of wealth from taxpayer to the IRB.

Implications to Taxpayers

The differences highlighted above may have a major effect on the expectations of taxpayers towards a year-end financial audit, especially those in the SMEs segment.

Taxpayers who do not fully appreciate the objective and scope of a statutory audit and a tax audit can easily be puzzled as they query: "The auditors have already performed their year end audit, and have issued a clean report; why then does the *tax* audit point to additional taxes and penalties relating to the same year. What were the auditors who came at year end doing?"

A naive remark perhaps, coming from an unaware taxpayer who fails to see the distinction. Nonetheless, this is a remark that can strain the audit-client relationship.

Directors of smaller companies, in particular, are more vulnerable to such misinterpretations, seeing that all audits are the same, with the only difference being the faces of the audit team.

But different audits are bound by different covenants. Despite efforts to align accounting standards and tax laws, there is still disparity between the two. It is in these differences that a tax audit can bring out complications.

Furthermore, accounting standards have one feature that overrides all other requirements: *materiality*. Accounting standards do not apply to immaterial items. However, tax law does not provide room for a notion as subjective as materiality. Items are either taxable or exempted, deductible or added back.

These lingering issues will mean that a clean audit report is no assurance that the taxpayer is fully tax compliant - a concept that the layman may find difficult to fathom.

CONCLUSION

IRB has introduced tax audits in a conscious effort to enforce the self-assessment regime. Statutory audits, on the other hand, provide assurance to shareholders of company accounts prepared by the directors.

Given the different objectives and scope of tax audits and statutory audits, it is important to educate taxpayers of these differences in order to close the expectation gap of what a statutory audit covers, and what a tax audit entails.

But even as taxpayers learn to cope with both tax audits and statutory audits, the possibility of eventual small-audit-exemption suggests that, in five years time perhaps, tax audits could be the only type of audit taxpayers face.

The Author

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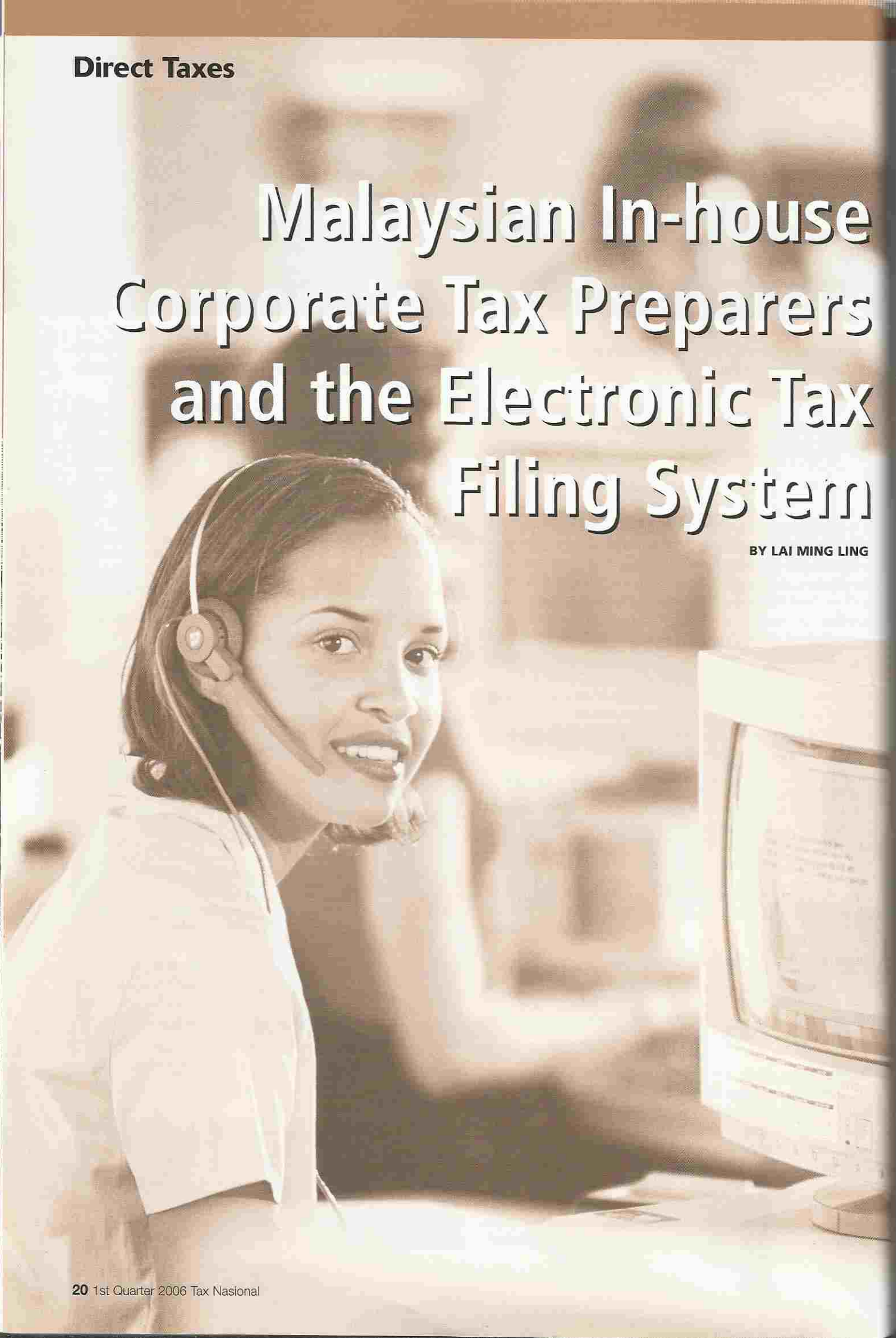
Malaysian In-house Corporate Tax Preparers and the Electronic Tax Filing System

BY LAI MING LING



ABSTRACT

This paper examines the usage intentions, attitudes, perceptions and compliance considerations of in-house corporate tax preparers towards the electronic tax-filing system (e-filing). It also evaluates the importance of various incentives that would motivate take-up of the e-filing system. A mail survey was posted to 656 in-house corporate tax preparers who worked in the public listed companies in Malaysia. One hundred and nine usable questionnaires were received. The survey findings showed that the respondents have strong usage intentions, positive attitudes and perceptions of the e-filing system; nonetheless, they were wary of the security of the e-filing system. In addition, the results indicated that the quest for 'speedy tax refund' and 'priority service' ranked as the two most important incentives that would motivate usage. Collectively, lack of perceived business benefits, unwillingness to pay e-filing service fees and lack of confidence in the electronic administrative capabilities of the tax agency appeared to discourage take-up. The survey findings in this paper provide useful insight for the Malaysian tax authorities in implementing the e-filing system successfully.

INTRODUCTION

Globally, in harnessing the power of information and communication technology (ICT), several tax authorities, particularly those from the developed countries and European Union have progressively embraced an e-filing system. In the Asia-Pacific region, there are encouraging signs of the widespread adoption of e-filing system. Countries such as China, Korea, Hong Kong, Japan, Taiwan, the Philippines, and Singapore have opted to embrace the e-filing system progressively (NTRC, 2003; SGATAR, 2003). The Malaysian Inland Revenue Board (IRB) launched the e-filing system to corporate taxpayers on 17 May 2004 (Chong, 2004) and to individual taxpayers on 10 February 2006.

With e-filing system, tax users (taxpayers and their tax preparers) can file the tax returns and information electronically via Internet. Empirical evidence showed that e-filing is an effective, easy to use, and a more accurate and speedy method than traditional paper filing (ETAAC, 2002). Predominantly, the use of e-filing could reduce time consuming visits and phone calls to the tax office and also minimise possible postal lost.

Although an e-filing system offers the tax authorities, taxpayers and the tax practitioners a number of benefits over filing paper returns, the inherent weaknesses and insecurity of the e-filing system overrode the benefits. Experience of overseas tax authorities have shown that the move to embrace an e-filing system is not hassle free and not well accepted by all parties. Even taxpayers and tax practitioners in the developed countries, such as the United States (US) and the United Kingdom (UK) are still wary of the e-filing system (ACCA, 2002; ETAAC, 2002). Notably, tax users' resistances were, among others, mainly due to misconception of the e-filing system; lack of understanding on the benefits and ease of use; perceived insecurity of the e-filing system; and the cost of compliance.

The real life phenomenon in various tax settings around the world warrants the importance of conducting empirical research to find out the potential tax users' response towards the e-filing system.

The Internal Revenue Service (IRS) of the US commissioned Russell Marketing Research (RMR) to conduct the 'Practitioners Attitudinal Tracking Study' and the 'e-file Taxpayer and Preparer Satisfaction Research' (e.g. RMR, 2003a, b). In the Asia-Pacific region, Wang (2002) and Lai, et al. (2004) attempted to study the responses of Taiwanese taxpayers and Malaysian tax practitioners' acceptance of the e-filing technology respectively. However, there had been little published scholarly tax researches conducted to study the reactions of corporate taxpayers (via the in-house tax preparers or paid tax preparers) towards the e-filing system.

Considering that electronic filing initiative is the direction that tax authorities is taking, the intention of this paper is to find out the response of in-house corporate tax preparers in a developing nation towards e-filing.

The aims of this paper are to:

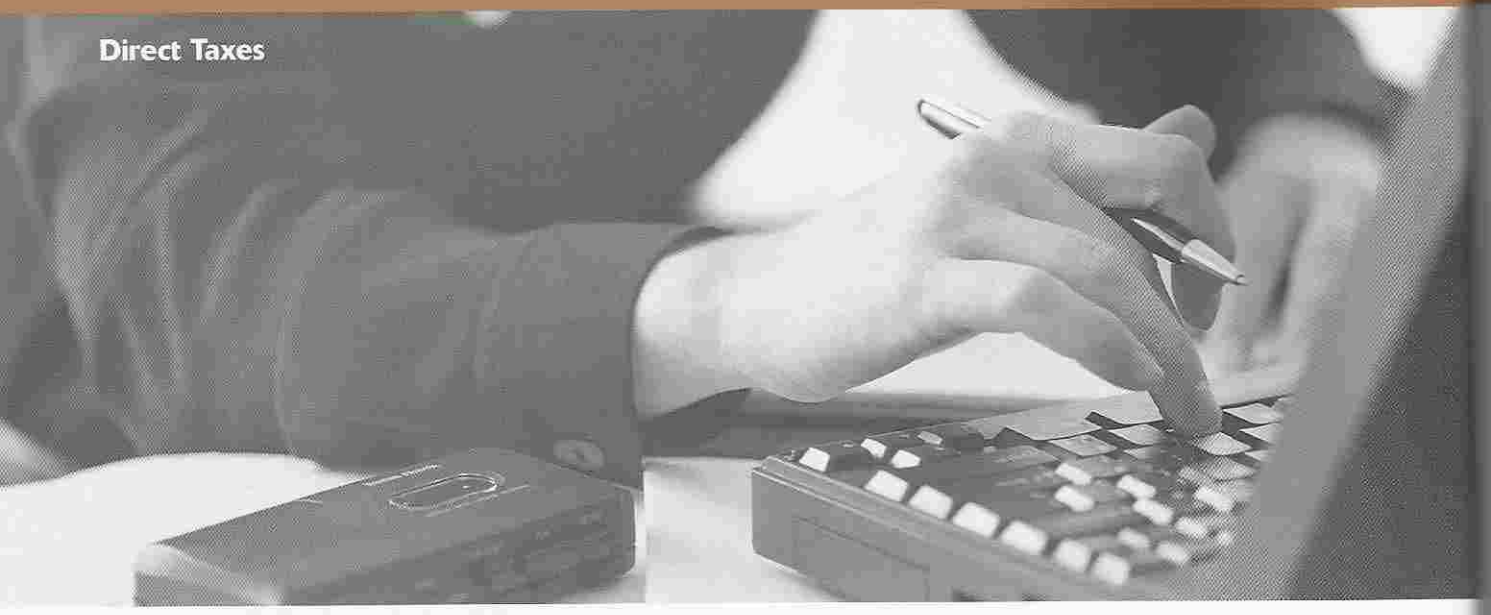
(i) assess the usage intentions, attitudes and perceptions of Malaysian in-house corporate tax preparers towards the e-filing system;
(ii) explore in-house corporate tax preparers' compliance considerations towards the e-filing system; and
(iii) examine the forms of incentives that will motivate them to use e-filing system.

DATA AND RESEARCH METHOD

Gardner and Stewart (1993) asserted that in relation to tax research techniques, if field study involves attitudinal and/or preferential studies, a questionnaire survey based on carefully selected statistical samples is deemed appropriate.

In an attempt to study the responses of Malaysian in-house corporate tax preparers, a mail survey method was used.

Multiple-item statements were used in the questionnaire to measure usage intention, attitude and perceived usefulness, ease of use and insecurity of the e-filing system. To ensure content validity, most of the statements were developed and adapted from previous studies. For example, four statements used to measure perceived usefulness and perceived ease of use were adapted from Davis (1989). Six statements were adapted from Chau and Hu (2001) but subsequently modified in order to capture more precise behavioral intention (two statements) and attitude (four statements) associated with the e-filling technology. Four statements adapted from Parasuraman (2000) were developed to measure perceived insecurity. Overall, these statements were modified to capture the use of the e-filing system. Single item questions were used to ascertain respondents' general perceptions towards e-filing; their opinions of the e-filing system, in terms of whether e-filing should be mandatory; their willingness to pay service fees in exchange for



the e-filing service; and confidence in the electronic administrative capabilities of the tax authorities.

The questionnaire was pre-tested before administering it on the target respondents. Considering that the public listed companies would have better resources (in terms of economic and technical capacities) over the smaller companies, it was thus assumed that they are more likely to respond to the government's e-filing initiative. As a result, questionnaires were mailed to 656 group accountants or in-house corporate tax preparers who were working for the public listed companies registered on the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia). Three weeks after the initial mailing, a reminder letter was sent to the respondent to fill out and return the questionnaire.

One hundred and nine usable questionnaires were received; hence the response rate was 15.8% (109/656). Although the response rate was rather low, it compares well with other mail surveys conducted in Malaysia, which generally report a response rate of between 10-25 percent (cited in Singh, 2003). Since non-response bias might affect the validity and general representation of the result, the approach to test for the potential non-response bias, as recommended by Armstrong and Overton (1977), was used. In this approach, the mean scores for the research variables for the first 30 early respondents and the last 30 respondents were compared. The t-test result showed that no significant differences and it was therefore concluded that non-response bias is not a serious problem in this study.

DATA ANALYSIS AND DISCUSSION

The Respondent's Profiles

The predominant education level of the respondents was professional qualification and university degree. About 72% of the respondents were members of local professional bodies, such as the Malaysian Institute of Accountants (MIA), Malaysian Institute of Certified Public Accountants (MICPA) and the Malaysian Institute of Chartered Secretaries and Administrators (MAICSA). Approximately 34% of the respondents were members of foreign professional accounting bodies in the UK, Canada, Australia and New Zealand. A majority of the respondents have established positions in the accounting and tax professions. The breakdown of respondents is based on industry classification and is presented in Table 1.

TABLE 1

Respondent's Breakdown by Industry Classification

Industry	Frequency	Percentage (%)
Industrial product	24	22.0
Consumer product	20	18.4
Trading and services	14	12.8
Property	13	11.9
Construction	12	11.0
Finance	11	10.1
Plantation	9	8.3
Technology	4	3.7
Hotel	1	0.9
Other	1	0.9
Total	109	100.0

Usage Intentions, Attitudes and Perceptions of the E-filing System

Overall, the survey findings indicate that the majority of the respondents have strong usage intentions, positive attitudes and high perceptions about the usefulness and ease of use of e-filing technology. Nonetheless, the results also show that respondents are wary of the security of Internet technology. It is worth noting that these are self-reported measures. Hence, the results may not be a precise measure and could be over-reported. Legris et al. (2003) pointed that at best, self-report measures should serve as relative indicators.

Organisational Support

More than 97% of the respondents indicated that their organisations have the provision of Internet access and about 84% indicated that they have automated the accounting services. However, only 7.3% of the respondents indicated that their organisations used specialised tax preparation software.

It is worth noting here that at the time of study, there was no tax preparation software that Malaysian taxpayers and tax practitioners could purchase off the shelf in the marketplace or download from the Internet.

Perceived Business Benefits and General Perceptions of the E-filing System

Of the survey respondents, 75.2% believed that using the e-filing system would save costs, and 82.6% of them believed it would save time in the long run. About 72% of the respondents believed that using the e-filing system would facilitate tax compliance and communication. Nonetheless, only 42% believed that using the e-filing system would reduce errors in tax preparation.

In addition, only 23% of the respondents are of the opinion that the e-filing system should be mandatory. This result provides insight that mandating e-filing too early in the Malaysian tax compliance setting may attract great resistance and criticism from businesses and tax practitioners. Pragmatically, the e-filing system should be an 'add on' to the existing traditional tax service; it should not totally replace it, on the grounds of the inequality of citizens in terms of the digital divide and the need for human contact etc. Only 21% of the respondents indicated that their willingness to pay a small fee in exchange for e-filing services. More than half of them indicated that they are not willing to pay any fee for using the e-filing service. The survey found that majority of the respondents believed that the e-filing service should be provided free of charge by the tax agency, because they do not see the rationale for paying a fee in using the e-filing service, in addition to the cost of the hardware and software needed for compliance.

Only 17% of the respondents indicated that they have the confidence in the electronic administrative capability of the tax agency in managing the electronic filing system successfully. About 43% indicated that they have no confidence in the electronic administrative capability of the tax agency. The results could be attributed to the current tax administration and compliance settings, the use of electronic communication is not widespread between Malaysian tax officers and the tax paying public as compared to overseas counterparts, such as the Inland Revenue Authority of Singapore, Canada, and New Zealand. Notably, the Malaysian Tax Assessment and Collection Officers do not even have an email address for the tax paying public to communicate with them for official tax correspondence purposes. It is worth noting here that Bird and Oldman (2000) asserted that the success of e-filing system in Singapore was partly due to the fact that the Singaporeans trusted the electronic administrative capabilities of the government and tax agency.

Incentives to Embrace the Electronic Filing System

Learning from the experience of overseas tax agencies, some forms of incentives are needed to 'kick start' or promote take-up of electronic filing. Hence, the respondents were asked to rank the importance of five types of incentives that will motivate them to embrace the e-filing system. The quest for 'speedy tax refund' appears to be the most important incentive that would motivate the use of the e-filing system (see Table 2).

TABLE 2

Types of Incentives, Mean, Standard Deviation and Ranking

Incentives	Mean#	Standard Deviation	Rank
Speedy tax refund	4.87**	0.39	1
Priority service for tax practitioner who use e-filing	4.43**	0.88	2
Extension of tax filing deadline for those who opt for e-filing	3.96**	1.22	3
Cash rebate	4.07*	1.24	4
Incentive in kind	3.47*	1.42	5

#Base on 5-point scale, anchored on 1 (not important) to 5 (important)
*significant at p<0.01,
** significant at p<0.001.

Generally, the Malaysian tax authorities take three months or more to refund excess tax payment, and no interest will be paid on late tax refund. Hence, it is not surprising that 'speedy tax refund' is the most desired benefit that in-house corporate tax preparers sought to get out of the e-filing system for cash flow benefits.

Providing 'priority service for tax practitioners who use e-filing' ranked second. The findings indicate that if those who opted to file tax returns electronically would subsequently enjoy priority treatment over non-users, using the e-fling system would be seen as possessing a competitive advantage, having more value added and being more rewarding than traditional paper filing.

The survey found that 'extension of tax filing deadline for those who opt for e-filing' ranked in third place as the most important incentive to embrace the e-filing system. Understandably, based on the provision in Sec 77(1) of the Malaysian *Income Tax Act 1967*, time pressure is an important feature in tax practice as late filing of tax return will attract penalties. In practice, it is evident that several overseas tax agencies such as in the US and the UK extend the tax-filing deadlines to promote e-filing system.

IMPLICATIONS TO TAX POLICY MAKERS AND TAX PRACTICE

The findings provide some implications to tax policy makers and tax practice. In a nutshell, the findings report that in-house corporate tax preparers have strong inclinations to use the e-filing system and they also perceived that an e-filing system is useful and easy to use. Nonetheless, they are concerned over the security of an e-filing system. The findings indicate that the tax authorities ought to acknowledge that concerns over security of online tax transactions constitute a tremendous barrier to technology adoption. The fundamental risks and uncertainty associated with an e-filing system need to be properly addressed

first. Experience from the UK showed that if using e-filing system could not help tax users to have peace of mind and is not able to help tax practitioners to enhance tax service quality, they are unlikely to use it. Essentially, tax authorities and the e-filing partners need to develop an extra level of protection.

The survey found that a substantial majority of the in-house corporate tax preparers had no confidence in the electronic administrative capabilities of tax authorities. This result lends support to the study by Lai et al. (2005) that Malaysian tax practitioners/licensed tax agents had little confidence in the technological competency of the tax authorities. This indicates that there is a practical need for tax administrators to develop skills in using electronic technology effectively. They should consider adopting electronic communication (such as e-mail, e-tax enquiry) with the tax paying public as soon as possible, in order to secure public confidence and trust, before implementing the e-filing project nationwide.

The survey reported that a substantial majority of the respondents were not willing to pay a fee for e-filing service. The result is consistent with ETAAC (2002) that taxpayers and tax practitioners are of the opinion that e-filing saves the government money by shifting costs to taxpayers and tax practitioners; consequentially, the cost of e-filing deters intended tax users in the US to file online. The results provide insights that if the tax authorities aimed to impose an access fee or to charge a small service fee for using the e-filing system, many intended tax users may not want access.

In addition, the survey found that the quest for 'speedy tax refund' and 'priority service for tax practitioner who use e-filing' ranked as the two most important incentives that may motivate tax users to embrace e-filing technology. The findings also suggest that early adopters of e-filing system should be rewarded. Therefore, it is imperative for the tax authorities to design 'creative incentives' to attract early adopters; and to devise business and marketing strategies to capture the early adopters among the taxpayer groups and use them as a channel to advocate and promote the e-filing system. Pragmatically, the Malaysian IRB should exploit members of the MIA and the Malaysian Institute of Taxation (MIT) to accelerate the diffusion of e-filing system in Malaysia.

Also, pragmatically, it is important that the tax authorities conduct tax user acceptance testing and field survey. The tax authorities must study the response of the corporate and individual taxpayers towards embracing e-filing and find out what are their needs and predicament. By just announcing that the e-filing system is secure, useful and easy to use is insufficient to motivate take-up. The tax authorities need to ensure that the e-filing system is truly useful, easy to use and beneficial to taxpayers in order to encourage take up. Hence, insincere or patronising communication about the security, usefulness and ease of use of the e-filing system should be avoided. If possible, the IRB should enlist some tax practitioners/preparers and taxpayers' involvement in the development and installation of the e-filing system. In particular, the tax practitioners/preparers who are experienced in the operation of the tax law and tax technology might assist in providing valuable input and feedback. In essence, proper consultations with the intended tax practitioners/preparers and taxpayers are the surest way to build a more 'user-accepted' e-filing system. Lucas (1975) asserted that any information system that is not used is a failure.

CONCLUSION

The study carries the merits of conducting a survey in a real world, i.e. the pragmatic tax compliance setting and it is a response to the call for more user-oriented research in the electronic tax administration system. The results provide some insights that in-house corporate tax preparers were not only concerned about the technological aspect of the e-filing system, but also the people and implementation process of the e-filing system. Overall, this study provides useful data for Malaysian tax authorities on how in-house tax preparers respond to e-filing system; it also provides important insights for the tax authorities in building a better "user accepted" e-filing system. Although the study was conducted before the official launch of e-filing system on corporate taxpayers, it provides a snapshot of the empirical evidence collected from one major segment of the intended tax users of the e-filing technology.

The limitations of the study are: firstly, it was a cross-sectional study, hence the usage intention, attitude, and opinions of the respondents might change over time; and secondly, self-report measures were used for data analysis, as such they could be over stated. Hence, care should be taken in interpreting and generalising the results. Future research could be conducted on other intended tax user populations (such as individual taxpayers) to provide further insights on tax users' adoption and compliance considerations of the e-filing system. Future studies and comparative studies could also be conducted to examine the reactions and adoption behavior of tax practitioners/preparers and taxpayers within the Asia-Pacific regions and throughout the world.

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ERRATA

We refer to the article "Advance Tax Ruling in the Context of Self Assessment" which was published in Tax Nasional Vol.14/2005/Q3.

We regret to inform that the coverage on Hong Kong was inaccurate and should be as follows:

- Hong Kong introduced the formal system of advance rulings for taxpayers on 1 April 1998. This followed the enactment of legislative amendment to the tax law (Inland Revenue Ordinance) in that year. The system is in parallel to the various Departmental Interpretation & Practice Notes, which are issued by the Hong Kong Inland Revenue Department from time to time for information and guidance of taxpayers and tax representatives.

- Hong Kong operates a level-playing field for residents and non-residents. Non-residents can carry on a trade, profession or business in Hong Kong, and as a general rule, are subject to the same tax treatments as residents. In other words, there is no "ring-fencing regime" or "privileged tax regime" in Hong Kong for non-residents in general, which is commonly found in a typical tax haven. Hong Kong's profits tax rates for business are currently 17.5% for corporations and 16% for unincorporated businesses. These rates are not particularly low by world standard especially in the context of the current worldwide trend for jurisdictions to lower their tax rates. These tax rates are the result of implementing prudent fiscal management measures over the years: first, Hong Kong adopts the policy to raise no more revenue than is necessary to cover spending commitments; secondly, Hong Kong is able to supplement its tax revenue by non-tax related revenue sources; and thirdly, Hong Kong adheres to the "user-pays" principle for funding the majority of government services.

- As for Double Tax Treaties, Hong Kong does recognise the merits in concluding double taxation agreements (DTAs) with its trading partners. A DTA provides certainty to investors on the taxing rights of the contracting parties; helps investors to better assess their potential tax liabilities on economic activities; and provides an added incentive for overseas companies to do business in Hong Kong, and likewise, for Hong Kong companies to do business overseas.

For more information on Hong Kong, please refer to the website www.ird.gov.hk

The Malaysian Institute of Taxation wishes to thank the Hong Kong Inland Revenue Department for highlighting the above facts.

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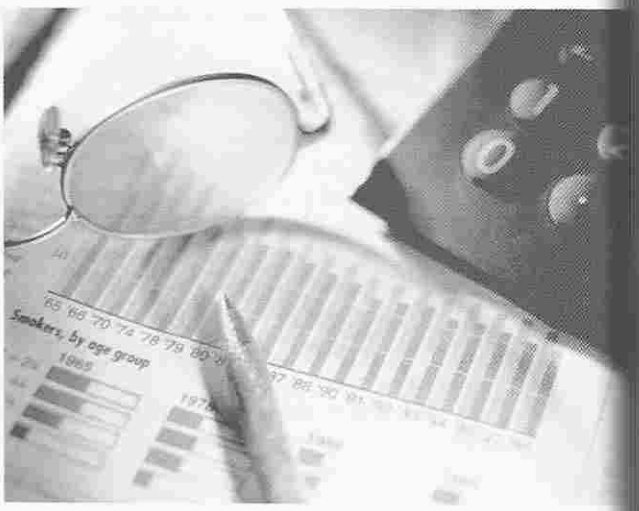

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The Trainer

Chee Yen is a Fellow Member of the Chartered Association of Certified Accountants (FCCA), a Fellow Member of the Malaysian Institute of Taxation (FTII) and a Chartered Accountant of the Malaysian Institute of Accountants (CA).

He is also a graduate of the Malaysian Institute Certified Public Accountants (MICPA) Examinations a successfully completed the Certified Financial Plan (CFP) conversion programme.

He is currently managing his own tax practice and was Associate Director at Deloitte KassimChan Tax Servi Sdn Bhd. Prior to joining Deloitte, he was attached w PricewaterhouseCoopers and Arthur Andersen Ku Lumpur, specialising in corporate taxation. He has m than 14 years of tax experience and was involved in engagements concerning cross border transactions, tax diligence review, restructuring schemes, corporate planning, group tax review and inbound investments.

Chee Yen's expertise is in high demand and he is a pro trainer/facilitator for tax workshops and semin organised for tax professionals, firms & corporations.

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Can Feng Shui Expenditure Qualify for Capital Allowances?

BY SG TOH

"...I was required to buy a **Pa Kua** and place it in the **Eight Quadrant, Facing North West**, so that my company's Chi is maximised. Can I claim a deduction?..." is not something that you, a tax agent, would hear on any particular day, but especially on the day while you are trying to complete a tax computation.

It is wonderful living in a multiracial society like Malaysia as we are exposed to a number of cross cultural beliefs and influences that has, and will always play an integral part of our social and business dealings. Even "*...Feng Shui has gained widespread popularity in the United States and around the world. Originating in China more than 2,000 years ago, it has quickly become a favored living skill that has been incorporated seamlessly into architecture, interior décor, building development and home living...*" *verbatim from Science or Superstition, Feng Shui World* magazine, Sep/Oct edition 2005.

To date, there is no provision in the *Income Tax Act 1967* (the Act) which allows or specifically disallows the providence of Feng Shui expenses as non allowable tax deductible or as a qualifying capital expenditure under Schedule 3 of the Act.

The closest restriction being Sec 39(1)(a) of the Act whereby "domestic or private" expenses are statutorily disallowed a tax deduction for income tax purposes. We do concede for the purposes of this article, that it is somewhat remote to suggest that such expenses can be allowed a tax deduction under Sec 33(1) unless there is a "methodology" invented to correlate such expenditure with an increase/decrease in the revenue generation activities of the company.

On the other hand, we do wish to propound that it may be possible to contend that Feng Shui expenses of tangible nature may, to a certain extent, be entitled to a capital allowance claim under Schedule 3 of the Act on the basis of being part of an apparatus used in the business, i.e. a *plant*.

Before we delve further into the details of the article, it would be prudent for us to highlight that a person will be entitled to capital allowance (i.e. tax depreciation allowance) claim in respect of capital expenditure incurred on the provision of qualifying assets, e.g. *plant* and *machinery* etc. used for the purposes of a business, provided that such expenditure is defined as "asset" employed in the business of the acquirer.

So, the question is whether a **Pa Kua** is a *plant* for the purposes of Sec 3 of the Act?

1. No statutory definition of plant

Firstly, there is no statutory definition of *plant* under the Act (per *J Lyons & Co Ltd vs Attorney-General* (1944) Ch 281) and therefore, the determination of what constitutes a *plant* falls on existing case law. There is however the *Public Ruling No 2/2001: Computation of Initial & Annual Allowances In Respect of Plant and Machinery* (issued by the Inland Revenue Board on 18th January 2001) which did delve into a very interesting and limited definition of a *plant*. In paragraph 3.1.4. of the *Public Ruling No 2/2001*, a *plant* is defined as "Plant and Machinery include general plant and machinery not falling under the category "heavy machinery, motor vehicles" [Examples: air conditioners; compressors; elevators; medical and laboratory equipment; ovens; etc.]... "

Case law has thus far provided the necessary guidance as to the possible meanings of a *plant* but from a historical reading of past legal precedence, it appears that the determination of what is a "*plant*" remains quite open ended and much interpretation has been left to the creative musings of the judge proceeding over each case.

a) The preeminent case for any serious discussion on what constitutes a *plant*, is *Yarmouth vs. France* (1887) 19 QBD 64, where it was first propounded by Lindley L J...: "*...There is no definition of plant in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business, not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business...*".

b) The ratio decidendi of *Yarmouth vs. France* (1887) 19 QBD 647 can be broken down as follows:

   i. A *plant* is not stock-in-trade; and
   ii. A *plant* is whatever "apparatus" used in a business.

   The above of course is a question of fact depending on the specifics of each case.

   The strange thing about *Yarmouth vs. France* (1887) 19 QBD 647, which is generally used as the starting point for any deliberation on the definition of a *plant*, is that it was a case about the classification vice of a "horse" as a defect in the condition of *plant* within the meaning of the *Employers' Liability Act 1880* (United Kingdom). Nevertheless, the salient facts of this "hundreds years" decision, has not negated its full impact and usefulness on the judicial definition of what constitutes a *plant* for income tax purposes.

   Hence, the acquisition of a **Pa Kua**, if not forming part of the stock-in-trade of a company, will not (pursuant to the above principles of *Yarmouth vs. France* (1887) 19 QBD 647) fall outside the definition of a plant, if the **Pa Kua** was an acceptable "apparatus" used in the business of the company.

2. Functionality

Point "ii" of the ratio decidendi in the above *Yarmouth vs. France* (1887) 19 QBD 647 case is crucial as it was the first time that an "article/apparatus" will be considered to be a *plant* if the said article/apparatus was capable of being *used* (in a likewise function) in the business. The key word "being **used**" connotes that the issue does not revolve around the metaphysical attributes of the said asset but would depend predominately on its *usage or functionality* in the overall business context of the acquirer.

Moving on, there are two recent cases which further expanded this concept of "functionality" in respect of "decorative" expenditure (which may be applied to our **Pa Kua**), they are:

i. *Commissioners of Inland Revenue Board vs. Scottish & Newcastle Breweries Ltd.* (1981) STC 50 (hereby referred to as the *Newcastle* case).
ii. *Wimpy International Ltd vs. Warland (Inspector of Taxes)* 1988 STC 149 (hereby referred to as the *Wimpy* case).

Both cases were in relation to a claim for capital allowances on certain decorative fittings and fixtures such as electrical wiring and light fittings on wall décor including murals, tapestries and plaques, etc. The former was decided in favour of the taxpayer on the basis that décor was part of the sale process. Whereas, the latter case was decided in favour of the Inland Revenue Department on the basis that the décor had become part of the premises upon which the business was conducted.

We can breakdown the salient principles established in the above two cases as follows:

a. Business activity of the acquirer, and
b. Intention of the acquisition.

Therefore, taking cognizance of the above two principles, we will proceed to explain the principles raised and attempt to apply them to our claim that **Pa Kua** has a "function" sufficient enough for a capital allowance claim as a plant under Schedule 3 of the Act.

a. Business Activity of the Claimant

   The first factor in determining whether the **Pa Kua** has a functional applicability would depend largely on the

nature of the trade/business undertaken by the acquirer. As aptly affirmed by Lord Cameron in the *Newcastle* case, "...the question of what is properly to be regarded as a "plant" can only be answered in the context of the particular industry concerned and, possibly in light also of the particular circumstances of the individual taxpayers' own trade...".

This was further expanded in the *Wimpy* case, where it was stated that the courts should not shrink the definition of a *plant*, if the expenditure is one that a trader will normally undertake to achieve a particular business purpose as it was the intention of parliament to encourage the acquisition of certain articles, by the introduction of capital allowances. A good example (mentioned in the *Wimpy* case) might be a private clinic or hospital where quiet and seclusion are provided, and charged for accordingly...

Hence, the acquisition of a **Pa Kua** can be deemed to be a qualifying capital expenditure if it is established that such expenditure is regarded as a "norm" in the acquirer's business environment. For instance, a Chinese Astrologer providing "heavenly business counseling" would be expected to provide a certain ambience at his premises, and the acquisition of a **Pa Kua** would be, to a certain extent, normal décor for such a business.

In short, this is a question of fact as there is no comprehensive listing capable of identifying what can and cannot be deemed as an appropriate "apparatus" in a person's business. It simply revolves on the uniqueness of each trading adventure undertaken which is dependent on existing business norms and values.

b. Intention/Purpose of the Acquisition

Next, it must be established that it possesses the characteristic functions of a *plant* as an intention to merely beautify a business premise is insufficient to qualify for a capital allowance claim. The **Pa Kua** must not only be acquired and used to "adorn" the setting in which the business is carried on, but it must also be seen to have been acquired and used as an integral part of the trading/selling activity carried out in the business.

If the purpose of the **capital expenditure** is merely to adorn/beautify the atmosphere of the acquirer's premises, it is not a *plant* as this is looked upon as merely a capital expenditure on the premises in which the trade is conducted (*Commissioners of Inland Revenue vs. Barclay, Curle & Co. Ltd. (1969) SC (HL) 3*). On the other hand, if the capital acquisition is instead used as part of the trading/selling activity in the acquirer's business, it may well qualify as a *plant* on the rationale that the acquirer is providing an ambience that forms a definable element in the service provided and for which his customers are prepared to pay for.

The issue thus pivots on the **Pa Kua**'s actual functionality or usefulness, in relation to bringing in the business as compared to merely looking good on the wall. As codified by Emslie LJ in the *Newcastle* case, "...that the distinction between what serves merely to provide the setting and that which may be used as part of the setting but which is also a plant is a functional one...".

This is crucial. In both *Newcastle* and *Wimpy* cases, the decorative expenditure were generally found to be qualifying capital expenditure on the basis that:

	Action	
i.	The special feature of the trade/business undertaken by the respondent ; and	**The Trade undertaken**
ii.	The respondents trade requires the marketing of the premises/setting, including the atmosphere, as part of the sales ; and	**The Action within the business**
iii.	The decorative assets were specifically acquired/used to create a planned character and atmosphere, for that particular business	**The Intention of the purchase**

Whether or not the purchase of a **Pa Kua** will be deemed as a qualifying capital expenditure (i.e. a *plant*) will depend primarily on its intended usage (in the overall context of the business/trade by the acquirer) and where such usage was necessary for concluding a sale.

Hence, a **Pa Kua** will be deemed a *plant* if it was acquired in order to placate clients by marketing a confident ambience necessary for such a trade. However, it is interesting to note that it is in the eyes of the purchaser that will determine the actual degree of applicability of the apparatus in the business. As stated by Lord Wilberforce, "...No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant–yet each of these has been held to be so: so why not such equally improbable items as murals, or tapestries, or chandeliers?...", in the *Newcastle* case.

On a practical stance, it is common knowledge that the acquisition of Feng Shui related articles goes beyond the purchase of a mere decorative item as there is indeed a "functional purpose" (in the mind of the acquirer) for such a purchase. Such purchases are normally undertaken to specifically suit the special features/needs of the business. *"...The important thing to understand is that the objective of feng shui remedies is to return a natural balance of chi (or life energy) to a building..." (Feng Shui World*, Sep/Oct edition 2005).

In short, **Pa Kua** can be deemed as a *plant* if the ambience or setting created by the **Pa Kua** is intended to form part of the "sales-pitch" in the eyes of the acquirer.

3. Business Premises

Lastly, numerous case laws have considered this usage or functionality approach towards the question what

constitutes a *plant* but have nevertheless disregarded a claim for capital allowance on the basis that the apparatus had actually become part of the structure/setting of the business. Pearson LJ stated "...whether the articles are part of the premises or setting in which the business is carried on or part of the plant which it is carried on..." in *Jarrold vs. John Good & Sons Ltd* (1963) 1 WLR 214.

Hence, an apparatus may contain all the above characteristics (i.e. functions) of a *plant* but will nevertheless fall outside its definition if it constitutes the premises or place upon which the business is conducted. "....*something which becomes part of the premises, instead of merely embellishing them, is not plant, except in the rare case where the premises are themselves plant, like the Dry Dock in Barclay Curle* or the Grain Silo in *Schofield (Inspector of Taxes) R & H Hall*...", per Lord Lowry in the *Newcastle* case.

Therefore, the final condition in any claim for capital allowance revolves on whether or not the **Pak Kua** has been assimilated as part of the premises upon which the business is carried out?

This is a question of fact and will, in part, depends somewhat on the following factors:

i. Does the apparatus retain a separate identity?;
ii. The degree/level of it is physical attachment to the premises;
iii. The completeness of the premises with/without the apparatus attached; and
iv. The duration/lifespan of the apparatus.

The issue can be summarised as such that an embellishment for the purposes of trade may pass the "business use-functionality test" but a claim for capital allowance will still be dependant on a "premises test" and something which become part of the premises fails that test unless the premises itself is a *plant*.

This final test was the reason that the courts dismissed an appeal of the taxpayer in the *Wimpy* case, as the entire décor (except the light fittings) was held to have become part of the premises upon which the restaurant business was carried out and fell outside the ambit of a *plant*.

Our **Pa Kua**, does however retain its separate identity and should pass the premises test.

CONCLUSION

Before we conclude, it is interesting to note that we have concentrated the above discussion on the point that a "tangible asset" was acquired for Feng Shui purposes and we have not considered the non-tangible aspect of Feng Shui, being in the form of the geomancer services required for "appropriate" placement of the asset. Suffice to explain in brief, that it is current acceptable practice to hold that professional fees that forms part of the capital expenditure incurred in the installation (ie to bringing into existence) of a qualifying plant cost can, to a certain extent, be included in the claim for an allowance (under Sec 3 of the Act), subject to the question of identification.

To end, the issue whether an apparatus is a qualifying plant under Schedule 3 of the Act will depend on:

i. The type of business;
ii. Its function and usage (in the eyes of the acquirer) in relation to that business; and
iii. Did it become part of the premises, where the business is carried out.

It must be emphasised that the above principles can be applied to more than just the issue of capital allowance claim on a **Pa Kua**. The principles raised in the article embody the general test that is to be used in ascertaining whether an asset/apparatus can be qualified as a plant for the purposes of Schedule 3 of the Act. Too many times we have discounted a possible capital allowance claim due to our own perception that such assets are just too remote/extraordinary to qualify for a capital allowance claim under Schedule 3 of the Act.

In the end, the question of whether a **Pa Kua** can be eligible for capital allowance will be dependant on the facts of each case and how the **Pa Kua** "affects" the business of the acquirer...

REFERENCES:

Income Tax Act 1967.

"Pa Kua" also refers to a wooden hexagram containing the eight trigrams with a mirrored center, which are hung over doorways as a protective charm. This device is popular with practitioners of Feng Shui.

Wimpy International Ltd vs. Warland (Inspector of Taxes) 1988 STC 149

J Lyons & Co vs. Attorney-General (1944) Ch 281

PR No 2/2001: Computation of Initial & Annual Allowances In Respect of Plant and Machinery (issued by the Inland Revenue Board on 18th January 2001)

Yarmouth vs. France (1887) 19 QBD 647

Commissioners of Inland Revenue Board vs. Scottish & Newcastle Breweries Ltd. (1981) STC 50

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The Author

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Transfer Pricing Guidance Issued by IRAS

BY BAKER & MCKENZIE TAX PRACTICE GROUP

Tax authorities around the world are increasing their efforts to audit cross-border related party transactions. In Asia Pacific, many jurisdictions have introduced either general or specific transfer pricing rules (whether as legislation, regulations or non-binding guidelines) that require taxpayers to develop and maintain transfer pricing documentation to demonstrate they have complied with the arm's length principle. As a result, taxpayers are faced with a growing risk of double-taxation in jurisdictions where adjustments arise.

In recognition of the increased attention tax authorities around the world are placing on transfer pricing, the Inland Revenue Authority of Singapore ("**IRAS**") issued a "Transfer Pricing Guidelines" circular (the "**Circular**") to provide Singapore taxpayers with guidance on the application of the arm's length principle.

The principal findings of this analysis are as follows:

(1) IRAS has stipulated that they abide by the arm's length principle and has detailed the recommended documentation and analyses to assert arm's length dealings.

(2) The recommended documentation components and analyses are similar to those under the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("**OECD Guidelines**").

(3) Penalties for lack of or insufficient transfer pricing documentation do not apply. However, IRAS may assert penalties relating to document retention.

(4) Mutual Agreement Procedures ("**MAPs**") are provided for under Singapore's comprehensive double tax treaties in order to offer taxpayers an avenue of recourse for relief against double taxation. The Circular introduces a formalised procedure for MAPs.

(5) The Circular further acknowledges a formal Advance Pricing Agreement ("**APA**") programme to provide taxpayers a mechanism to obtain certainty around the transfer pricing for their transactions. The Circular provides the necessary procedures to apply for an APA.

I. Application of the Arm's Length Principle

The Arm's Length Principle

The Circular states that IRAS endorses the arm's length principle in the OECD Model Tax Convention. It also deals with the key concepts and guiding principles applicable to the arm's length principle. In particular, the Circular states that taxpayers should exert reasonable efforts to undertake a sound transfer pricing analysis in order to ascertain the arm's length price as well as to demonstrate that such analysis has been performed. It is worthwhile to note that when reasonable efforts have been exercised to ensure that the arm's length principle is complied with, a rebuttable presumption that the transfer prices determined are at arm's length will be created.

Transfer Pricing Methodologies

The Circular goes further to explain the following transfer pricing methodologies:

(1) Traditional Transaction Methods such as the Comparable Uncontrolled Price Method, the Resale Price Method, and the Cost Plus Method; and

(2) Transactional Profits Methods such as the Profit Split Method and the Transactional Net Margin Method.

While the Circular gives examples of the application of the various methodologies, it is comforting to note that there is no "best method" (i.e. the IRAS does not have any specific preference for any one method nor do they specify a hierarchy of methods). Taxpayers have the flexibility to select any one of the listed five methods, or even a modified version of these methods, so long as the taxpayer maintains and is prepared to provide sufficient documentation to demonstrate that its transfer prices are in accordance with the arm's length principle.

Interaction With Other Aspects of the Singapore Tax Regime

As mentioned above, the Circular unreservedly endorses the arm's length principle. However, this contradicts the Ministry of Finance's ("MOF's") current position on the non-application of withholding tax to payments between related parties in respect of management fees where such payments represents a recharge of costs incurred by non-resident service provider on a pure reimbursement basis. Under the arm's length principle, independent third parties would normally contemplate a profit element in addition to their costs for services rendered. Therefore, the requirement for no mark-up to be applied to the management fees in order to qualify for withholding exemption appears to be inconsistent with the arm's length principle. We look forward to further guidance on these divergent positions.

II. Documentation Preparation and Retention

Purpose of Documentation

The Circular sets out fairly detailed guidelines on the documentation which taxpayers should keep in order to demonstrate that reasonable efforts have been taken to comply with the arm's length principle. The Circular recognises that although Singapore will not impose a penalty for the lack of or insufficient documentation, the maintenance of adequate documentation will serve many purposes:

(1) It will allow the taxpayer to discharge its burden of proof to show that it has complied with the arm's length principle (and therefore assist the taxpayer in defending its transfer pricing policies).

(2) When considering a taxpayer's application for an MAP, IRAS will assess the quality of the taxpayer's documentation. Inadequate documentation may lead to a rejection of the request or may create greater difficulties in the resolution of the issue.

Extent of Documentation

Whilst the Circular notes that adequate documentation is characterised by the sufficiency of details as well as the timeliness of the documentation, it takes into account commercial realities such as the need for taxpayers to balance the need to demonstrate the arm's length principle with the additional administrative costs concerned. Taxpayers should welcome the IRAS' clarification that compliance costs need not be disproportionate to the amount of tax revenue at risk or to the complexity of the transaction.

Retention Periods

Although the Circular indicates that no penalties can be asserted for lack of or insufficient documentation, it does assert that IRAS can apply penalties if the taxpayer violates the record keeping requirements under the Singapore *Income Tax Act*.

In addition, the Circular goes on to suggest that taxpayers may wish to consider aligning the retention period for documentation with the statutory record-retention period in the *Income Tax Act* (which is currently seven years but, as announced in the latest Budget, will be reduced to five years). However, despite this comment, in practice, when considering the appropriate record retention period for documentation, taxpayers would need to take into account various other factors such as the statutory time limits for the relevant tax authorities to raise an additional assessment and whether the taxpayer is involved in an MAP. Therefore, in practice, the record-retention period may be well over five years.

III. MAP and APA Regimes

MAP

Where Singapore has a Double Tax Agreement with another country, a taxpayer can employ the treaty's MAP article to obtain relief from double taxation. This procedure, detailed under Article 25 of the OECD Model Tax Convention, may be used to eliminate double taxation that arises from transfer pricing adjustments. The MAP is a government-to-government negotiation and the taxpayer is typically not present during the meeting(s) between the respective competent authorities.

It should be noted that the MAP does not compel the competent authorities to reach an agreement and resolve the dispute. Further, the Circular does not clarify whether requests for corresponding adjustments can be undertaken separately or must be part of the MAP.

APA

APAs are advance agreements on transfer pricing methodologies, entered into by a multinational taxpayer and at least one government's administration. Although APAs are styled as "advance" agreements, in fact they are often coupled with resolutions of pending transfer pricing issues of prior years (i.e. "roll-backs"). Therefore, APA proceedings can provide the opportunity to resolve transfer pricing issues over the past years, as well as those of future years.

Procedure for Applying for MAP and APA

Who can apply and under what circumstances?

The MAP facility is available to taxpayers who have been subject to transfer pricing adjustments with respect to its transactions with a related party. The Singapore resident taxpayer should then notify the IRAS of its intention to activate the MAP.

The APA facility is available to taxpayers who are engaged in cross-border related party transactions and a taxpayer is free to choose between a bilateral or unilateral APA. The IRAS will only accede to an APA request if the following conditions are satisfied:

(1) There must be a genuine motive to obtain certainty for the avoidance of double taxation.

(2) The request relates to specific current or future transactions that are not hypothetical.

(3) If bilateral or multilateral, the other foreign authorities involved agree to the request.

However, the acceptability of MAP or APA requests remains ultimately within IRAS' discretion. In addition, for both MAP and APA negotiations, the taxpayer would need to provide its full cooperation (by providing swift and accurate clarifications to queries raised by the competent authorities and providing good quality analysis of the issues) and would need to maintain adequate documentation to allow an efficient analysis of the issues.

Formalised procedure for application

Previously, there was no formal procedure in place for MAP and APA requests and the procedures for application were within IRAS' full discretion. The Circular now sets out the procedures which taxpayers would need to follow in order to make an application for a MAP or an APA. It is worthwhile to note that IRAS recognises the commercial need for timely resolution of the transfer pricing issues and commits itself to make its best efforts to achieve timely resolution of MAP and APA cases.

Tax Treaty Countries

As the MAP and APA procedures rely on the MAP article of Singapore's tax treaties, they are available only where the other related party is located in a jurisdiction with which Singapore has a comprehensive double tax treaty. If the foreign related entity operates in a non-treaty jurisdiction (such as the US), the Singapore resident taxpayer will only be able to apply for a unilateral APA (i.e. an APA which applies only to the Singapore resident taxpayer and IRAS).

Roll-back Effect of APAs

The Circular contemplates a roll-back of an APA (i.e. the application of the APA to prior years). However, it does not deal with the effect of a roll-back in the case where the prior years are under a current audit. We are hopeful that the IRAS will clarify this issue.

Use of Information

The Circular does not deal with the parameters for the use of information obtained by the IRAS in considering MAP and APA applications. If the request is subsequently withdrawn by the taxpayer (or if the taxpayer subsequently rejects the concluded APA), it is unclear whether the information disclosed may be used by the IRAS in an audit of previous and future years. This is an issue which many taxpayers will be concerned with and we are hopeful that the IRAS will provide clarification on this point.

CONCLUSION

In recognition of the increased scrutiny of regional and global tax authorities on cross-border related party transactions and the pressures faced by taxpayers, in order to provide guidance to resident taxpayers, the IRAS has issued the Circular to clarify its application of the arm's length principle. As there are no transfer pricing provisions in the Singapore *Income Tax Act*, the Circular will be helpful to Singapore taxpayers in providing guidance on the application of the arm's length principle. The introduction of a formal application process for MAPs and APAs will also be welcome by most multinationals with operations based in Singapore. Most importantly, with the formal endorsement of the arm's length principle, the tax authorities would need to review the existing tax rules and policies to ensure consistent application of the arm's length principle.

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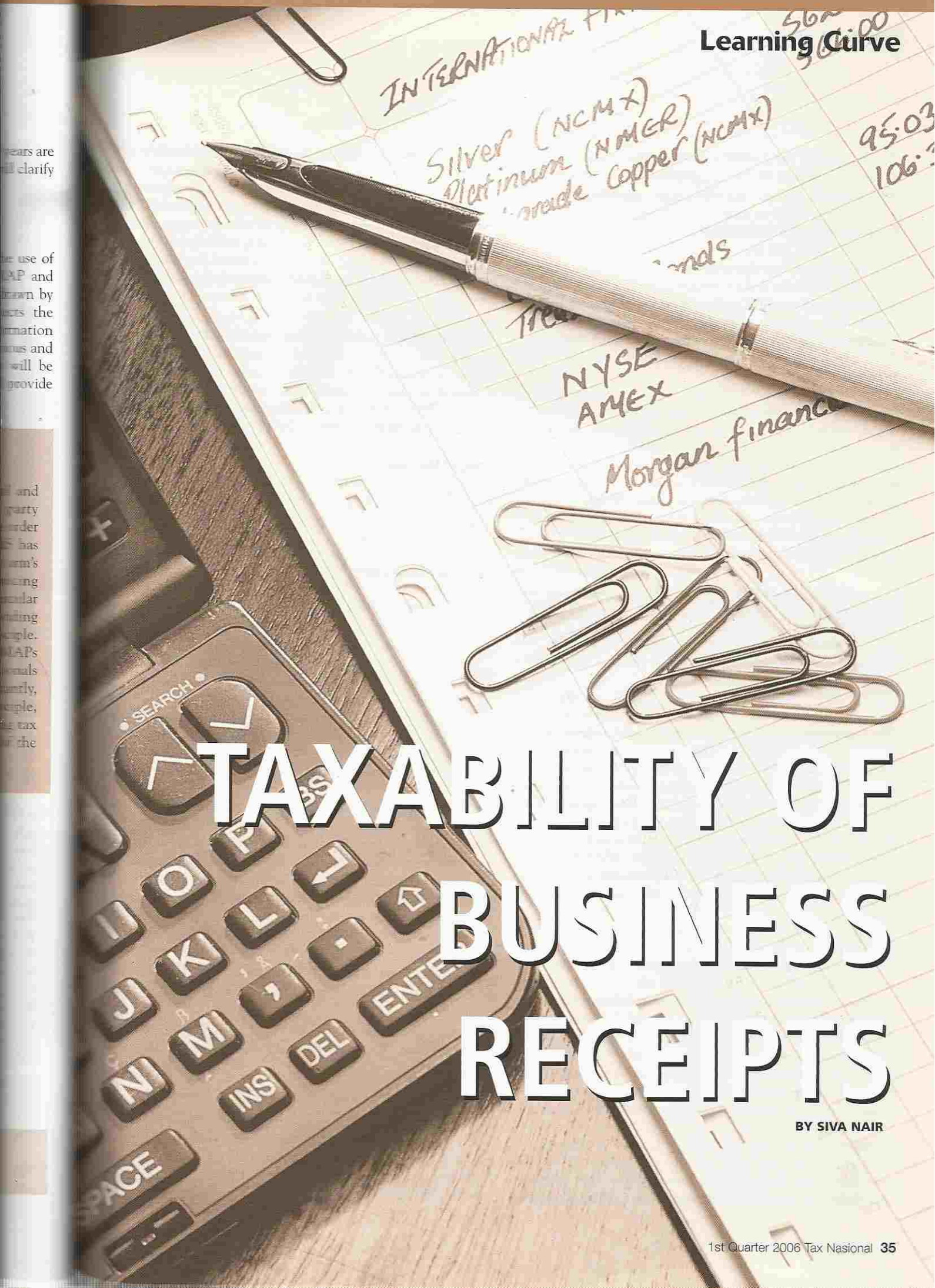

TAXABILITY OF BUSINESS RECEIPTS

BY SIVA NAIR

We continue on our journey in this obviously vast tax terrain, looking now at areas of timing, recognition in tax computation and valuation.

Earned Income Is Taxable

Remember when we discussed on employment income, we realised that we only declare income when it is "received" (*Tax Nasional 2nd Quarter/2002*). However, in the case of business income, it is taxed on an accrual basis i.e. once the income is receivable, it is recognised as a receipt in tax computation.

Example 1

Joel is a freelance management consultant having a portfolio of clients. He is practising a profession which falls within the definition of business. At year end 31/12/2006, he has completed consultancy work amounting to RM10,000 but has not been paid. Therefore, he would definitely recognise the fees receivable on these jobs in his accounts for year ended 31/12/2006 as:

Dr	Amount Receivable	RM10,000	
	Cr Consultancy Income		RM10,000

Hence, in the tax computation for year of assessment 2006, this amount should be taxable.

If he commences his tax computation by determining the gross income from his business, he will have to include the amount of RM10,000 as gross income.

However, as we discussed in the article of Categories of Income (*Tax Nasional 4th Quarter/2001*), in the case of business income (except in certain cases), we usually would commence the tax computation with "Profit Before Tax (PBT)." In that case, Joel will not be required to make any adjustments at all since the amount of RM10,000 is already included in arriving at the PBT.

Example 2

Next year when the amount of RM10,000 is received by Joel, his accounts for year ended 31/12/2007 will reflect the following transaction:

Dr	Bank	RM 10,000	
	Cr Amount Receivable		RM 10,000

However, no adjustments will be needed in the tax computation for year of assessment 2007 because he has already recognised the income in year of assessment 2006.

Sometimes, payment for services entails the fulfilment of certain conditions. In such event, the sums are only deemed to be earned when those conditions have been satisfied.

Example 3

Jason Sdn. Bhd. (financial year end 31st May) sold goods for RM100,000 on 30/5/2006. One condition for the sale is that payment is due and payable upon delivery of the goods to the customer. Therefore, if his despatch driver only delivered the goods on 1/6/2006, Jason Sdn. Bhd. only has to recognise the RM100,000 as taxable income for year of assessment 2007 and NOT year of assessment 2006.

In the event the customer default in payment, Jason can file a deduction for bad debts provided certain conditions are fulfilled. This will be covered in a later article on Business Deductions.

Consideration paid in kind (Non-cash)

Where a taxpayer received remuneration in money's worth instead of cash, he is assessable on the market value of the assets received. To illustrate this point, the case *Gold Coast Selection Trust Ltd. v Humphrey [(1948) ACCOUNTS 459]* is referred.

Facts of the case

In this case, the taxpayer sold a mining concession and in return received the buyer's company shares, at par value, equal to the value of the concession.

Decision of the Court

The House of Lords held that the shares must be valued at market value and not par value. However, they acknowledged the fact that the sale of a large shareholding in any company would depress the value of the shares, and therefore, agreed that the market value could be reduced to take account of the fact.

Therefore, assuming if I am an accountant in a rural area where the residents are mainly farmers. If my fees were paid with farm produce, I would still have to recognise the market value of the products received as assessable income in my tax computation.

Special Formula Used By The Inland Revenue Board

Sometimes the Inland Revenue Board (IRB) would come up with their own formula to determine the amount assessable to tax. A good example of this is the "progressive payment method" which is used by the IRB in assessing the income of housing developers and contractors. However, a detailed discussion on the mechanics of this formula will be dealt with in a later article.

Anticipated or expected income is not deemed to be gross income for tax purposes

Willingale v International Commercial Bank Ltd. [1978] 1 All E 754 is referred here to discuss the taxable issue of anticipated or deemed income.

Facts of the case

The taxpayers held bills of exchange; the value of the bills increased as the maturity date approached. The Revenue Authority sought to include a fractional part of the profit as gross income of the taxpayer.

Decision of the House of Lords (By 3-2 majority)

The House of Lords concluded in the case that the taxpayers did not realise any profit on the bills until they are sold or they matured. Accordingly, the profits are earned only when the bills are sold or matured and at which point the profits can be assessed to tax.

Foreign Exchange Gains/Losses

Similarly, unrealised gains are not taxable. A very common question normally used in examinations is foreign exchange gains. Remember, in accounting, we have the concept of matching and periodicity. Therefore, at year-end, we usually convert the outstanding amounts using the relevant prevailing exchange rates at that point in time. However, for tax purposes, we only recognise the gain (or losses, as we shall see in a later article) when it is realised i.e. the outstanding amounts are settled.

Let me illustrate by way of an example as in Example 4 below.

Example 4

Jessica Wardrobe Sdn. Bhd., a garment manufacturing company, purchases the following assets from a supplier in the United Kingdom during the financial year-ended 30/6/2005 and settled the payment in the current financial year-ended 30/6/2006.

Asset	Cost (£)	← Exchange rate £1 →		
		Purchase date (RM)	At year end 30/6/05 (RM)	Payment date (RM)
Knitting Machine	80,000	6.70	6.50	6.00
Fabrics	30,000	7.20	6.50	5.50

First, let's discuss the accounting and tax implication of the above transactions:

Accounts for the year ended 30/06/2005

On purchase, the company would have effected the following transactions:

At year-end, on 30/6/2005, the gain to the Pound Sterling would be recognised in arriving at profit before tax, i.e. RM37,000 as computed below.

Knitting machine

Dr Machinery	RM536,000
Cr Other Creditors	RM536,000

Fabrics

Dr Stocks	RM 216,000
Cr Trade creditors	RM216,000

Knitting machine	£80,000 X 0.20 = 16,000
Fabrics	£30,000 X 0.70 = 21,000
Total gain	37,000

Tax Computation for YA 2005

However, in the tax computation for year of assessment 2005, this gain constitutes an unrealised gain on foreign exchange and therefore, not taxable. Accordingly, if the tax computation commences with profit before tax, the RM37,000 should be deducted in arriving at the adjusted income.

Subsequently on settlement of the payment for the knitting machine and the fabrics, a further gain on foreign exchange will be recognised in the accounts for the year ended 30 June 2006. This is computed as follows:

Knitting machine	£80,000 X 0.50 = 40,000
Fabrics	£30,000 X 1.00 = 30,000
Total gains	70,000

Now all the gains on foreign exchange are realised because the amount payable has been settled. Instead, we still need to consider whether the gain is arisen from a capital or revenue transaction. Generally, gain on foreign exchange arising from the former (i.e. capital transaction) is **NOT** taxable whereas those from the latter (i.e. revenue transaction) are taxable. Examples of this would be:

CAPITAL	REVENUE
Repayment of loan	Payment of interest
Purchase of fixed assets	Purchased of stocks
Sums for acquisition of rights	Royalties paid for use of rights

Again, adjustments will have to be made in the tax computation for the year of assessment 2006, although now the gain on foreign exchange is realised, the amount relating to the knitting machine is capital in nature and NOT subject to tax. Therefore, where the tax computation commences with profit before tax, the gain of RM40,000 in respect of the knitting machine should be deducted in arriving at the adjusted income. However, the gain of RM30,000 relating to the fabric requires no adjustment since it is a revenue gain by virtue of the fact that fabrics constitutes stocks for a garment manufacturer.

However, this is not the end of the story. We would need to re-address the issue on the unrealised gain which was not taxed previous year. So, is it considered as realised gain or not? The conclusion is that the part relating to the knitting machine can be ignored since it is a capital gain. However, an adjustment has to be made in respect of the gain relating to the fabrics. Therefore, in the tax computation for year of assessment 2006, the gain of RM21,000 has to be added to the profit before tax in arriving at the adjusted income. The narration would be unrealised revenue gain on foreign exchange now realised.

An example of this can be seen in the examination paper in *MIT TAX II DEC 2004 Q1*. The company is principally involved in the manufacture and sale of rubber gloves, rubber mats and rubber hoses. Note 23 (a) of the question states "prior

year unrealised foreign exchange gain on the purchase of rubber threading machine now realised".

SOLUTION

No adjustment is required in the tax computation because although the foreign exchange gain was realised, the gain is related to the purchase of a capital asset.

However, in *MIT TAX II DEC 2000 Q1*, the company was principally involved in the manufacture of rubber mats and rubber related products. Note 14 (e) stated that "prior year unrealised foreign exchange gain on the purchase of rubber sheets" amounted to RM17,000.

SOLUTION

The amount of RM17,000 was added back to the tax computation because the foreign exchange gain realised was in respect of the purchase of rubber sheets which is stocks for this company and therefore, revenue in nature.

The outcome of taxability of gains on foreign exchange can be summarised as follows:

TAXABILITY OF GAINS ON FOREIGN EXCHANGE	CAPITAL	REVENUE
NOT REALISED	Not Taxable	Not Taxable
REALISED	Not Taxable	Taxable

Let's look at some cases involving these principles.

McKinley v H T Jenkins & Sons Ltd. [10TC 372]

Facts of the case

A company was a marble supplier. Its own supplier in Italy required payment in advanced which this company successfully obtained from their customer. However, there was a lapse between the times the company got the funds from the customer (in Pound Sterling) to the time they paid their own suppliers in Italy (in Lira). During this time, the Pound Sterling appreciated against the Lira and the company decided to dispose off the Lira, and obviously made a profit!! Subsequently, the Pound Sterling depreciated against the Lira and the company bought back the amount of Lira they required and paid the supplier.

Decision of the Court

The High Court held that the profit was NOT TAXABLE because

- it was not part of the profit made from the sale of marble but rather an appreciation of a temporary investment; and
- it was a bare exchange transaction in the nature of speculation but not trading profits since the company was not involved in the business of dealing in exchange.

However, in ***Imperial Tobacco Co. Ltd. (of Great Britain and Ireland) v V Kelly [25 TC 292]***, *a different court decision was drawn.*

Facts of the case

The taxpayer purchased American Dollars to buy tobacco leaf in the United States. Following the outbreak of war, the Government intervened and they were required to sell these Dollars to the United Kingdom Treasury. However, at this point the American Dollar had appreciated against the British Pound, and therefore, the taxpayer made a good profit.

Decision of the Court

Since the foreign currency was acquired for an ordinary revenue transaction of the taxpayer's trade or business i.e. to buy tobacco leaf, the gain on realisation is TAXABLE.

It is important for me to draw your attention to the distinctive factors or fundamental facts of this transaction against the earlier transaction in the former case:

- the purchase of the Dollars was the first step in carrying out the intended transaction i.e. they were exclusively for the purchase of tobacco leaf; and
- they were never bought speculatively.

In the former case, the company recognised the opportunity of making a financial gain by "temporarily" dealing in the Pound Sterling that they had. They are not in the business of dealing in currencies, therefore, the gain made by them was held to be capital. Whereas in the latter case, the currency was obtained for the purpose of buying tobacco which is their stocks, therefore, the substance of the transaction was one of revenue although the intended transaction did not materialise because of Government intervention.

The decision in the *Imperial Tobacco* case bears some resemblance to the decision in *CIR v George Thompson & Co. Ltd. [12 TC 1091]* which was discussed in an earlier article (*Tax Nasional 2nd Quarter/2005*).

In the earlier part of this article, we said that repayment of loans would be a capital transaction. Therefore, would any foreign exchange gains arising be considered capital? Case law shows that there can be exceptions, particularly in the case of *Theiss Toyota Pte. Ltd. v FC of T [78 ATC 4463]*.

Facts of the case

The company paid its trading stock using borrowing on a recurrent basis.

Decision of the Court

The court ruled that exchange gains arising from the settlement of the borrowings would be taxable. For any business, this principle would be applicable in respect of short term borrowing such as the use of letters of credit or bankers' acceptance.

However, for banks and other financial institution, the recognitions of capital or revenue gains would be treated differently for gains arising from the payment of loans.

The usage of the borrowings would be a determining factor. The cases in the table below would explain the conclusion of the transactions:

CASES	USE OF BORROWED FUNDS	NATURE
FC of T v AVCO Financial Services LTD. [80 ATC 4603]	for on-lending to customers	Capital
Commercial & General Acceptance Ltd. v FC of T [77 ATC 4375]	Employed as part of the permanent capital structure of the business	Revenue

Transaction Involving Head Office and Branch

The Australian case of *Max Factor & Company v FC of T [84 ATC 4060]* established that foreign exchange gains arising from transaction between an overseas company and its local branch would **not** be taxable. This is because there is only **ONE** entity involved. (Students would remember from their Law papers that a branch is not a separate legal entity from its head office, but a separate business entity.)

Transaction Involving Parent Company and Subsidiary

However, the transaction involving a parent company and its subsidiary will be treated differently because a subsidiary is a separate legal entity. (Remember the legal case of *Salamon v Salamon & Co. Ltd. [1897 A.C. 22].*)

Gains From Speculative Activities

Generally, profits derived from an isolated transaction where a person takes an occasional swipe at a financial opportunity to make some money would be capital gains and not assessable to tax because they are not part of or related to a business. We saw this in the case of *McKinley v H T Jenkins & Sons Ltd. [10TC 372].*

However, when dealing with primary commodities such as rubber, copra and oil palm, where their prices are subject to fluctuations, it is not uncommon for such traders to shield themselves from potential price fluctuations by engaging in hedging activities such as forward contracts, options or swaps. This is part and parcel of their trading activities and any profits would be assessable as business profits.

Remember in *DGIR v Central Sugar BHD. [(1978) 2 MLJ 71]* in the article "Expansion of Business" in (*Tax Nasional 4th Quarter/2004*), where the company, which was involved in the business of sugar refinery also undertook hedging activities to ensure that the supply of raw sugar would be at reasonable prices and the courts held that "the one recognised method of stabilising the price of the required sugar is to hedge on the terminal markets." Therefore, the gains arising from the hedging activity was taxable since there is a close nexus between this activity and the ordinary trading activity of the taxpayer.

The same principle applies in the case of *Cooper v Stubbs [10 TC 29].*

Facts of the case

The partners in a firm of cotton brokers undertook on their own account a series of speculation in cotton futures and claimed that the profits arising from the transaction were not subject to tax by virtue of the fact that they were gambling activities.

Decision of the Court

The court ruled that the profits arose from real contracts for the purchase and sale of the commodity and therefore, were taxable. In the words of a member of the Tax Appeal Board in the case of *Smith, 55 D.T.C. 101* "where what a taxpayer does extra-murally, so to speak, is closely allied to his ordinary occupation, the gain from his additional activity will be treated as though arising from his regular business".

We shall continue our discussion on this matter in the next article.

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Exploring the Level of Awareness of SMEs Towards GST Implementation in Malaysia

BY ELY RAZIAH ABDUL RASHID AND FARIDAH AHMAD

The Prime Minister, Datuk Seri Abdullah Badawi announced the proposed implementation of Goods and Services Tax (GST) in Malaysia with effect from 1st January 2007 during the 2005 Budget speech.

The announcement has since received mixed responses from the public, business community, tax practitioners and experts as well as academicians. One of the much debated issues is the heavy administrative burden GST would have on Small and Medium Enterprises (SMEs). GST compliance will require SMEs to make sure that they have a good accounting system to ensure GST paid and collected are correctly documented. This compliance job is seen as a big issue for SMEs on top of coping with their day-to-day business survival. To business entities, any introduction of a different tax scheme is bound to entail inconveniences, not to mention the possible increase in administrative cost. According to Kassipillai and Liew (2004), "A large proportion of small businesses are cash traders. Many of them do not use computerised accounting, let alone cash registers, to maintain records that are badly needed to compute GST liability".

Without an understanding and high level of awareness as to how GST will affect their businesses, it will lead to apprehensions on the part of the retailing chain, especially the front-liners. Awareness contributes not only towards readiness but also potential support for the new tax system. Businesses are unlikely to accept or support a change in the tax system without being made aware of the implications it has on the businesses. According to one tax practitioner, Beh Tok Koay (2004) "....perhaps this small group lack an understanding of the whole system of GST. It is supposed to be broad-based and will replace the sales and services tax system, and this in turn will help to reduce income tax rates". This is further supported by a tax expert, Veerinderjeet Singh (2004), "We must all bear in mind that using the big stick is not always the appropriate strategy. Education and dissemination of information is very important as are the issuance of clear guidelines and rulings". Another tax expert, Bhupinder Singh of Ernst & Young (2005) said "low awareness of GST implementation especially among SMEs could create havoc when it is first introduced".

While those opinions assume low level of awareness among SMEs, the primary objective of this study is to take these opinions to another level in order to provide hard evidence on the level of awareness on GST among the SMEs. This study seeks to explore the various implications of GST implementation from the point of the business community. For example, how much do they know about GST and its salient features. The finding from this study is expected to be useful to the implementing authority which is duty-bound to assist the business community in understanding the tax and its mechanism of collection, and above most, to make the collection procedure simple, convenient and not burdensome administratively and financially. The idea is to make the business community a willing partner to the proposed tax scheme. The results of data analyses help to identify what needs to be done to ensure the successful implementation of GST.

Research Approach

The four areas being looked into in this study are:

(i) the level of knowledge of the business community (using a sample of SMEs) about the proposed GST;

(ii) the level of awareness on how GST will affect salient areas of business operation;

(iii) the possible or potential business concerns; and

(iv) the business community's views on GST incentives and how to channel its concerns. The study however is exploratory in nature with no hypothesis made on level of awareness.

Data collection was based on questionnaires forwarded individually to business addresses categorised as SMEs around Klang Valley. The data collection took place between April to May 2005.

Findings

An evaluation of the responses presented us with few important findings.

1) Level of Knowledge on GST

A list of fourteen (14) statements representing these elements was used to gauge respondents' level of knowledge. It was found that only about one-thirds (33.6%) of the respondents may be considered knowledgeable about GST: what it is, what are the potential impacts on their business (monetary or otherwise), why and when it is to be implemented, and the government's initiatives to 'educate' them on GST. It is concluded, therefore, that the level of knowledge of the respondents on the general aspects of GST is moderately low.

Nevertheless, out of the 33.6% respondents who claimed to be knowledgeable, the largest proportion (45.1%) knew about the meaning of GST. While the nature of the research is just exploratory, but we expect that this is highly plausible as the meaning of GST is a textbook material, and those individuals responding to the questionnaire on behalf of their organisations who have had a tertiary education in the business fields must have come across the term.

However, a very low level of knowledge (25.4%) for the question "The potential benefits of GST to your business" is indeed an interesting finding. We have said before that the idea is for the government to make the business community a willing partner to the proposed GST regime. This result pointed out that the business community has very low level of knowledge on how GST can benefit them. Indeed, this finding should be a concern to the relevant authority that they have not done enough to sell GST. Along the line to 2007, this must somehow be addressed.

At the extreme end, most of the respondents do not know about the proposed public hearing on GST. This is indeed a concern that the business community does not know about it while it is, the only dialogue channel that exists at the moment. It is a concern because the proposed public hearing forms the basis of hearing the outcry from the public before GST rulings are firmed. Most of the respondents also do not know about the appointment of a Tax Review Panel; when do they start readying themselves for the implementation; what are the potential benefits to their business; the potential income tax reduction after GST; and the mechanics of GST as opposed to that of income tax.

The research confirms that certain quarters of the business community, in this case, the SMEs, are not aware of the more specific features of GST. While a higher knowledge is claimed on general meaning of GST, knowledge on specific impact and implementation in Malaysia is low. There is a definite need from the authority to respond to the outcome of this research.

2) Awareness on How GST Will Affect Some Salient Areas of Business

The level of awareness among the respondents on the possible effect of GST on some areas of business may be considered as moderate, with 52.1% of them claiming either being generally aware or fully aware. This implies that they know more about the elements of GST that affect their businesses than they do about GST in general and actual implementation plan in Malaysia. They collectively place business cash flow as the most likely to be affected by GST, followed by computerised accounting system and repricing of goods and services. It is reasonable to concur with them that the effect on cash flow would be the most critical issue. Next, there is the need to upgrade the accounting system (computerised) to handle higher volume of record keeping and paperwork. The same goes with repricing of goods and services as they know what GST is.

Half of the respondents think that there would be actions from the customers, probably a negative one for the increase in prices, and from their competitors. For the 52.1% respondents who claimed to be aware of how GST would affect their business operation, the least known aspect is the transitional arrangement for inventory of goods brought forward from the period prior to GST.

The other aspects with less than 50% of the respondents claiming to be aware are impact on current sales and services tax (SST), invoicing, and training of staff on GST. It is quite clear that these are aspects of GST implementation that are specific to GST implementation, rather than general feature of any new tax scheme. Again, it complements our finding in the earlier section of a low level of knowledge on GST specific features. Moreover, on the average, the respondents are more concerned, hence the level of awareness, with aspects that are directly affecting their operation with respect to its finance, accounting system and sales. Thus, this

finding will form the basis for recommending actions to be taken by the government to ensure the smooth implementation of GST.

3) Potential Business Concerns of GST

What would be considered as concerns by the business community with the implementation of GST? Some of the statements representing areas of concerns such as "impact on cash flow, change/upgrade accounting system" and "training of employees on GST" are the same as in the preceding section. There are two reasons for this: (i) this section deals with actual concerns, whereas in the earlier section the issue is whether the respondents are aware or not; (ii) to find out whether the respondents' perceptions and views are consistent throughout.

The majority of the respondents consider all the nine statements representing areas of concerns to be important, with the mean scores indicating their relative importance to be in the following order: that GST will have an impact on cash flow; that the government must provide financial and advisory assistance; that they have to change/upgrade their accounting system; that they have to maintain various records to comply with GST; that they require sufficient time to adopt GST; that there would be additional cost during the transition period; that it would increase ongoing operational cost; that employees need to be trained on GST; and whether there would be penalty for non-compliance.

Again, as was the case with the preceding section, business cash flow tops the list of concerns. So is the position of the statements "change/upgrade accounting system vis-a-vis training of employees on GST" in the hierarchy of importance. Training of employees and, especially penalty for non-compliance, appear to be the least of their concerns. This finding supports the study's contention that the perceptions and views of the business community on the implications of GST are highly consistent and rational.

4) Government Incentives/Reducing Cost and Channel for Voicing Concerns/Improving Understanding of GST

Majority of the respondents do feel that administering GST would be burdensome administratively and financially, and they need whatever assistance from the government. Foremost, they would welcome free software packages from the government to help them in administering the voluminous paperwork and computational requirement of GST. Standardised software issued by the government not only offers convenience and eliminates the need to search for suitable software in the market, but it also implies that GST administration can be made more uniform throughout the business community. Perhaps, the idea that everyone is doing the same thing is a comfiture to the members of the business community. The word "free" in the statement may not even be consequential, and they would probably still prefer government-issued software even if they have to pay.

Direct financial assistance from the government is also important in the eye of the respondents. They ranked "Give one-off incentive to companies who register for GST" number two after government-issued software. Thus, "Exempting small SMEs (<RM100,000 annual sale) from GST" and "having lower GST rates for SMEs" occupy the next two positions in order of importance. Next down the list are "exempting SMEs altogether from GST" and "reducing the rates on income tax with GST". It is quite clear, therefore, that respondents have accepted the fact that the implementation of GST is inevitable, but would welcome financial incentive to reduce the expected increase in operational cost.

Free training and seminars by government and a special government website for GST implementation constitute the most preferred avenues for improving the knowledge on GST. Additionally, free leaflets on GST implementation are also considered useful to enhance their understanding of GST. Special help line for GST and public hearing which are more of avenues for voicing concerns, are placed somewhere in the middle of the eight statements, below those representing governmental avenues for understanding GST better.

It was found that respondents do not consider the private sector as a good source of knowledge on GST vis-a vis the government machinery as the statements "seek own consultants or accountants' advise" and "attending private training, seminar and workshop" occupy the third and second last spots in the ranking of preference.

It may be safely interpreted and concluded that in the opinion of the respondents, being able to understand GST better is more important than having avenues to voice their concerns. Moreover, it is quite evident that respondents prefer to learn more about GST from the government sources than from expertise in the private sector. Visits by relevant tax authority is certainly the least preferred avenue for voicing concerns/understanding GST better; a visit by officials of the relevant tax authority may result in a company having problems which have nothing to do with GST.

Recommendations

Based on the summary of results and conclusions, a number of recommendations are suggested and presented as follows:

(1) Dissemination of information

In general, respondents do not know much about salient aspects of the proposed implementation of GST. Except, perhaps, for what GST is, they are not knowledgeable about why it is introduced; the benefits of GST introduction; when it is to be implemented; or the government initiated programmes to enlighten them about GST, let alone its potential impact on business. Moreover, the respondents do not seem to be following new developments of the proposed tax from the news media. It is recommended that the business community be made to understand GST better by the government producing a simple, easy to understand, but

comprehensive pamphlet containing at least the following information: (i) what is GST; (ii) why it is introduced – the benefits to them; (iii) when it is to be implemented; (iv) what is the government agency responsible to implement it; and (v) a contact number to obtain additional information. The most effective way to disseminate this pamphlet is perhaps when companies pay their annual registration fees at the counters of the Companies Commission of Malaysia, or via mail together with the certificates (and receipts) when companies send their renewal fee by post or even distribute the pamphlets at the Income Tax offices.

(2) Addressing the problem

The business community seems to be convinced that GST will have an impact, probably a negative one, on their cash flow. They appear to understand that under GST, they have to pay the tax first when they purchase their supply and collect it back later when they sell to the end consumers, hence the negative impact on their cash flow. Without appropriate data, it would be difficult to support or refute this claim. Nonetheless, it creates an apprehension in the business community. To reduce this apprehension among the business community, it is recommended that the government incorporate this aspect in the pamphlet that was suggested earlier, and undertake to address the problem if it does occur.

(3) Government assistance – Administrative and Financial Cost

The business community appears to welcome assistance from the government administratively and financially, in that order. They specifically welcome government-issued computer software (preferably free of charge) to help with their computer system in implementing the GST. To enhance the cooperation of the business community in the implementation of the proposed GST, as well as to introduce some measure of uniformity in the handling of GST data within the business community, it is recommended that the government develops a suitable computer software and distribute it together with the pamphlet recommended as per item (2). As regards to the financial assistance requested which was mentioned as a one-off financial assistance, there could be several ways to do this. This study takes cognizance of the government's vast experience in providing financial incentives to the business community from time to time. Therefore, this study recommends that the tax authority identify the most suitable way to provide this financial assistance which should purport to reduce the increase in the administrative cost of implementing the GST on the part of the business community

(4) Training and Website

To the average respondents, understanding GST well is more important than voicing their complains; the way to understand GST better, according to them, is for the government to conduct trainings and seminars, as well as set up a government website on all aspects of GST. Considering that conducting trainings and seminars for the whole business community is indeed a surmounting task, it is recommended that the authority give a priority in setting up a comprehensive website on GST information; this is to be complemented with trainings and seminars for the representatives of the business community.

While the research only consists of 122 respondents, we are confident that the sample is indicative of a larger population. This is supported by test of normality which concluded that respective scores for different aspect of GST implementation are normally distributed. Further, correlation tests indicate that the respondents are, on average, consistent in their perceptions of their level of awareness between different aspects of GST implementation.

We are positive that the results of this research can assist the relevant tax authority towards the appropriate direction in enhancing their effectiveness in reaching the business community along the line to 1st January 2007.

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Malaysian Property Developers – What is the GST Impact and How will the Deferment Help?

BY CHAN KEE HOONG

THIS ARTICLE IS CONTRIBUTED BY BDO BINDER TAX SERVICES

On Wednesday, 22 February 2006, the Government decided to postpone the implementation of the Goods and Services Tax (GST), a broad-based consumption tax to replace the current single-stage sales and services tax from 1 January 2007 to a new date to be announced later.

This deferment should be viewed positively as it will provide Malaysian businesses more time to plan for the readiness to implement GST within their organisations. Having limited resources and manpower, such business organisations can now take time to properly initiate the review of their internal business systems as the review process is fairly lengthy and it involves not just the accounts but all other departments as well.

This also means that the final implementation would depend on the law passed and the Royal Malaysian Customs should take at least 18-24 months to fully educate and create further awareness to the public.

In this article, the author, also the Head of BDO GST team shall focus on the possible impact of what GST means to the property developer leading up to the implementation; and sharing with you the experiences from GST implemented countries like Singapore and Australia.

GST on Property Transactions

The introduction of GST will have a significant transitional and ongoing effect on Malaysia's building and construction industry. It will not just affect day to day running of the business but also on the industry and economy as a whole.

In attempting to understand the economic impact of GST on the industry, it is important to look at the GST treatment on property transactions.

The impact of GST to property transactions will depend on a host of circumstances and these include whether:

- the seller and purchaser are registered persons;
- the transactions are of a residential or commercial nature; and
- the property is agriculture land or land for general use, land granted by the State, part of a going concern or otherwise.

GST treatment in relation to the above for Malaysia will depend also on the different models of GST implemented countries being adopted by the Royal Malaysian Customs when the date of implementation is finally announced.

In Australia, for example, GST impacts on almost every property transaction, particularly on residential and commercial developments. Even straightforward arrangements, such as lease incentives provided to commercial tenants and refurbishment of existing buildings often have complex GST consequences.

No GST should be payable by the buyer when the land is sold by private individuals or if an existing family home is disposed of. This makes sense, as most owners will not be selling in the course of an enterprise and accordingly will not be registered, therefore no taxable supply would occur.

In Singapore, residential properties are also exempt from GST, thus no GST will apply but the developer will not be able to claim input tax credits relating to the property, as it is exempt. However, certain exceptions like payment for the supply of design and construction activities including the cost of sub-contractors, sales commissions and property services will be taxable.

In this connection, there is a need for specific industry related concessions and transitional rules to be decided by the Royal Malaysian Customs moving towards the implementation of GST in Malaysia.

Residential and Non – Residential Properties for Developers

Let us look at what happens in a GST environment for the developer.

All transactions involving the sale and lease of non-residential properties will be subjected to GST. When you are registered for GST as a property developer, you have to charge GST on the sale and lease of such properties and account for it as output tax in your GST returns.

For GST purposes in Malaysia, taking Singapore as our model, a residential property may be referred to as:

1. a piece of vacant land considered as a residential land if it is zoned as "Residential" or "Rural Centre and Settlement" in the Master Plan by the Land Authority; or

2. a piece of vacant land sold or leased by a public authority for residential, flat or condominium housing development for example, police or army personnel barracks; or

3. land with a building, flat or dwelling approved by the Land Authority for residential use.

Examples of buildings approved for residential use are:

(a) dwelling house (e.g. terrace house, semi-detached house, bungalow);
(b) residential flat/apartment;
(c) serviced apartment;
(d) upper floors of a shop house if the floors are approved for dwelling purposes;
(e) hall of residence, hostels or boarding school; and
(f) workers' quarters/dormitory.

Examples of buildings not approved for residential purposes are:

(a) hotel;
(b) guest house, boarding house or motel;
(c) chalet; and
(d) holiday bungalow or resort.

All other types of properties that do not fall within the above definition shall be regarded as non-residential properties.

Hence when you are dealing with residential properties, you cannot charge nor collect GST on the sale or lease, as they are exempt from GST. And being GST registered, you are to report this supply as an exempt supply when you make the submission of your GST return.

Claim for GST Input Tax

You can claim GST incurred on the purchase of land and development of non–residential properties as your input tax if the properties are:

a) used for the conduct of your business;
b) let out as rental income for the purpose of business; or
c) developed into non–residential properties for the purpose of sale or lease.

Your input tax claims may include the GST incurred on the purchase of property, legal expenses and fees for sale and purchase agreements, construction and development expenditure, related professional fees and so on.

As mentioned earlier, sale of a residential property is an exempt supply. Hence, you are not entitled to claim any inputs neither can you charge any GST output if you have residential development properties.

If the properties are mixed, there should be a partial credit entitlement. Based on the final model adopted for Malaysia, developers that build mixed residential and commercial use properties may need to apportion their inputs to determine GST recovery.

Depending on the state of the residential property market in Malaysia, exempting residential property is likely to squeeze developers' margins since GST is an unrecoverable cost to them

and put upward pressure on housing prices as developers seek to pass on the unrecoverable GST to buyers.

Managing Maintenance Funds

If you are a developer that is involved in managing the maintenance fund and running of the completed development like condominium or commercial floored factories projects, the provision of estate management and maintenance services is a taxable supply regardless of whether the properties are residential or not.

It is important to know that the maintenance fund account is not a legal entity, hence it cannot be considered separately for GST registration purposes.

Deductions on Progressive Payments

For bulk purchases, you may buy materials like cement or steel and supply them to your contractor for the development. For GST purposes, you may not deduct the value of the materials purchases from the amount of progressive payments due to your contractor.

They are to be separated from the construction works which your contractor supplies you under the development as these supplies were made by you to your contractor.

Reimbursement of Expenses

When you do claim reimbursements from your contractor from time to time, for example for clerk-of-works overtime, loan of workers, use of utilities on site and so on, these will be supplies made by you to your contractor. Hence you will have to charge and account for GST on these reimbursements and you may be able to claim GST on your expenses related to these activities.

Financing Property Transactions

We will need to also consider the impact of financial supply rules with regards to commercial property transactions such as a property trust that conducts a capital raising exercise to finance the construction/purchase of the property. So, even a commercial developer will need to consider the impact of exempt supplies.

CONCLUSION

What we have seen from the above, are just a few examples of the many issues how GST could impact property transactions and a developer.

The implementation of GST for the property industry is indeed complex as most transactions, other than for residential transactions, will be taxable and give rise to input tax credits with GST impacts. For exempt businesses and businesses that make a mix of exempt and taxable supplies, the issue may be the extent to which they can recover GST.

As a developer, there shall be many more issues to be considered including:

1. reviewing the approach to long term contracts to ensure that the GST liability does not arise prior to the receipt of the majority of the contractual consideration;

2. the impact of the transitional rules to be adopted by the Royal Malaysian Customs such as those in relation to property sold before the effective GST cut off date, unsold completed properties as at effective GST cut off date or on unsold semi-completed properties as at the effective GST cut off date;

3. ensuring that the systems are in place to capture the information necessary to claim input tax credits including obtaining tax invoices from all suppliers; and

4. to identify when is the tax point for progress billings, any deductions on progress payments, how to treat payment of retention sum, any impact on rectification of defects and so on.

This list is indeed not exhaustive, therefore even though there is a postponement with the implementation of GST, it will eventually be coming nearer to our shores and it is hoped that the in-bound waves in relation to GST treatments to property transactions and local resident developers in Malaysia shall become very clear and easy to comply with.

Developers, on the other hand, with the tedious task laid before them shall need to be fully prepared and equip themselves internally to pave the way towards a smooth GST implementation ahead taking full advantage of the postponement.

ACKNOWLEDGMENT OF REPRODUCTION
This article was first published in The Star on 13 March 2005 and was entitled "*GST and The Property Developers*".

The Author

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The principal objective of the Malaysian Institute of Taxation (MIT) is to train and build up a pool of qualified tax personnel as well as to foster and maintain the highest standard of professional ethics and competency among its members.

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Entrance Requirements

a) Minimum 17 years old
   - At least 17 years old
   - At least two principal level passes of the HSC/STPM examination (excluding Kertas Am/Pengajian Am) or equivalent
   - Credits in English Language and Mathematics and an ordinary pass in Bahasa Malaysia at MCE/SPM

b) Degrees, diplomas and professional qualifications (local/overseas) recognised by the MIT to supersede minimum requirements in (a)

c) Full Members of local and overseas accounting bodies

Exemption

Exemption from specific papers in the professional examinations is available and the exemptions granted will depend on qualifications attained and course contents as determined by the MIT Council.

Malaysian Institute Of Taxation

Exemption Fees (per paper)	
Foundation	RM 50.00
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Examination Fees (per paper)	
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Examination Structure

The professional examinations are currently held annually and comprises of three levels:

Foundation Level
- Taxation I
- Economics & Business Statistics
- Financial Accounting 1

Intermediate Level
- Taxation II
- Taxation III
- Company & Business Law

Final Level
- Taxation IV
- Taxation V
- Business & Financial Management
- Financial Accounting II

MIT Professional Examinations

CALENDAR FOR YEAR 2006

January 1	Annual Subscription for 2006 payable.
February	Release of the 2005 Examinations results. Students are notified by post. No telephone enquiries will be entertained.
March 31	Last date for payment of annual subscription fee for the year 2006 without penalty (RM50).
April 30	Last date for payment of annual subscription for year 2006 with penalty (RM100).
	Question & Answer Booklets are available for sale.
September 1	Closing date for registration of new students who wish to sit for the December 2006 examination sitting.
September 15	Examination Entry Forms will be posted to all registered students.
October 15	Closing date for submission of Examinations Entry Forms. Students have to return the Examinations Entry Form together with the relevant payments to the Examinations Department.
November 30	Despatch of Examinations Notification Letter.
December 18 - 22	MIT Examinations.

CCH Executive Events
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Managing Employee Non-Performance & Termination

- Protecting Your Rights & Interest

• Date : 30-31 May 2006 • Venue : Berjaya Times Square Hotel & Covention Center, KL

Within all organisations today, the core responsibility of line managers are to ensure that employees perform at optimum efficiency to meet organisational goals and objectives. When employees' work performance do not match the expectations of the employer, termination by contractual notice or termination simpliciter can only be exercised after a performance improvement plan has been put in place to rehabilitate such employees.

Employees have security of tenure of employment as the relevant employment laws and the Federal Constitution of the country give this protection to them. Hence, due care has to be exercised by employers if they want to dismiss or terminate their employees for just cause or excuse. The employment laws have not remained static but are ever evolving due to pronouncements by the Industrial Court as well as the judicial courts.

Are you and your line managers fully equipped with the know-how and expertise to manage non-performance and lawful termination? This workshop is a must for employers who want to protect their rights and interest. Do not miss this opportunity!

Who Should Attend

This workshop is a must for those who deal with employee performance and termination:

- HR Managers, Contract Managers, Personnel Managers & HR Professionals
- Line Managers, General Managers, Directors
- Business owners, MDs, CEOs

Methodology

Learn through lectures, discussions, case studies and role-plays

Workshop Speaker

ALFRED CHARLES has extensive experience in the area of Industrial Relations including Collective Bargaining, Human Resource Management and Safety Management. He has served in various industries, including trading, service and manufacturing. Alfred has served as a panel member of the Industrial Court for two terms, Vice President - Business Advisory of the Malaysian Institute of Human Resource Management, Honorary Secretary of the Malaysian Institute of Personnel Management and as General Manager - Group Human Resources in a public listed company. During the 17 years in the private sector he has handled various types of disciplinary cases and conducted numerous domestic inquires. He has also negotiated collective agreements with national Unions such as NUCW, MIEU and NUPCIW including the Non-Metallic Mineral Products Manufacturing Employees Union. Alfred authored "A-Z Guide to Employment Practices Malaysia", which covers the whole spectrum of HR including the employment laws.

Workshop Outline

1. **Managing Employee Performance**
   - Writing the job description
   - Determining the job competencies
   - Setting goals and job objectives
   - Performance appraisal
   - Appraisal interview
2. **Contract of Service and Contract For Services**
   - The differences or test to be applied
   - Contents of contract of employment
   - Agency contracts
3. **Unlawful Terminations**
   - Dismissal without just cause or excuse
   - Difference between termination of service and dismissal
   - Condonation and its impact on misconduct & dismissal
4. **Circumstances for Lawful Terminations or Termination of Service**
   - Absent without leave
   - Frustration of contract
   - Resignations both voluntary and involuntary
   - Redundancy and retrenchment
   - Taking excessive medical leave
   - Prolonged illness & medical board out
   - Light duty certificate
   - Unsatisfactory work performance
   - Breach of contract
   - Constructive dismissal
   - Failure to inform on medical leave
5. **Current Trends & Developments**
   - Industrial court awards
   - Decisions of judicial courts
6. **Exercises & Case Studies**

Benefits of Attending

Upon completion of this workshop, participants will be able to: -

- ✓ Successfully manage poor performers and implement a performance improvement plan
- ✓ Master and effectively complete the sensitive process of lawful termination
- ✓ Identify the system and processes to be carried out before terminating employees
- ✓ Keep abreast with the current trends and developments in the area of termination of employment due to court pronouncements
- ✓ Benchmark your policies and procedures against industry norms and make necessary improvements where required

In-house corporate training is also available!
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WORKSHOP DETAILS

Managing Employee Non-Performance & Termination - Protecting Your Rights & Interest

DATE : 30-31 May 2006
TIME : 9.00 am - 5.00 pm
VENUE : Berjaya Times Square Hotel & Covention Center, KL

Early Bird Fee (RM) *(by 14 April 2006)*			Regular Fee (RM) *(after 14 April 2006)*		
Corporate Member	CCH Subscriber	Non-Subscriber	Corporate Member	CCH Subscriber	Non-Subscriber
1040	1200	1440	1200	1360	1600

*** Fees include materials, lunch, refreshments and certificate*

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REGISTRATION INFORMATION

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Fax	603.2026.7003
Email	events@cch.com.my
Web Site	www.cch.com.my
Address	Suite 9.3, 9th Floor, Menara Weld, No. 76, Jalan Raja Chulan, 50200 Kuala Lumpur, Malaysia.

Registration and Payment
Reservations may be made by telephone/telefax/email but will only be confirmed upon receipt of the relevant registration form(s) and payment.

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A substitute delegate is welcome at any time at no extra charge if you are unable to attend. Full payment will be imposed if cancellation is made after ***16 May 2006***. This also applies to no show on the day of event. All notices of cancellation or replacements must be made in writing and acknowledged by CCH via email or fax.

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REGISTRATION DETAILS

❑ Please register me for the ***Managing Employee Non-Performance & Termination - Protecting Your Rights & Interest, 30-31 May 2006 (HRE2F/MHRE49)***

CONTACT DETAILS

Contact Person

Company

Address

Postal Code

Tel Fax

E-mail

PARTICIPANT DETAILS

Name

Job Title

Tel Fax

E-mail

PAYMENT MODE

❑ Cheque Bank _____ RM _____

Cheque No _____

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Cardholder's Name: _____

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Industry

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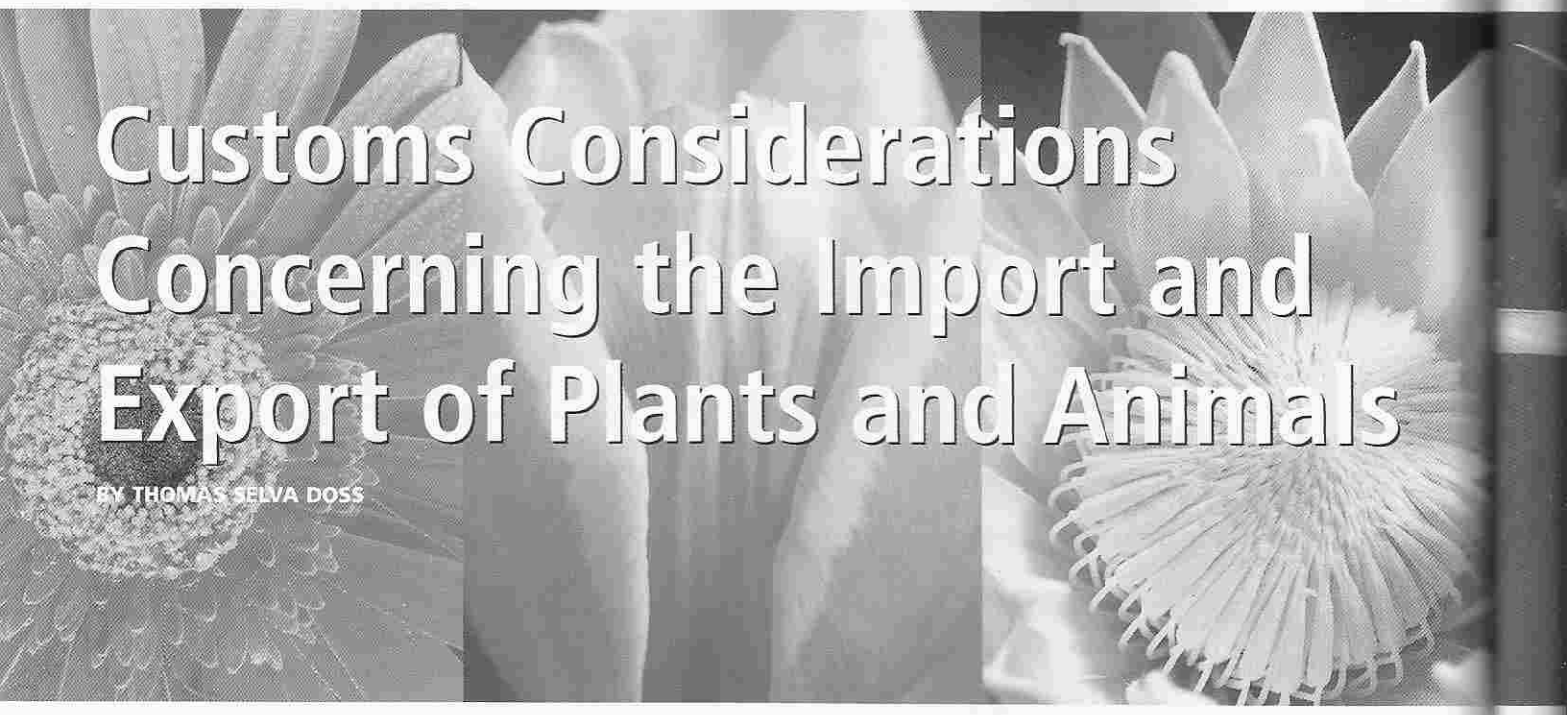


Customs Considerations Concerning the Import and Export of Plants and Animals

BY THOMAS SELVA DOSS

International trade in plants and animals is estimated to be worth billions of dollars every year and affects practically every species of plant and animal. Plants are not only traded for their medicinal and intrinsic values but people have derived pleasure in keeping them. Wild animals or wildlife are traded not only for their meat which can be exotic in nature but also for the parts or their by-products which can be used not only for medicinal purposes but also kept as souvenirs.

The cross border movement of plants and animals is often governed by the legislation of each country to prevent the entry and spread of diseases as well as to protect endangered species. Some estimates suggest that the money obtained from illegal wildlife and plant trade is second only to drug trafficking and it is not only the demand for live animals and plants which drives the trade but also luxury products such as shark's fin and tiger skins. The illicit trade in wildlife and plants, which often originate in developing economies, are collected at relatively little cost and smuggled via a chain of couriers and dealers to the developed world. All along the chain the price increases with each individual player raking off his percentage.

MALAYSIAN CUSTOMS REGULATIONS

Malaysian customs regulations require every importer or exporter to make a declaration in the relevant customs declaration form of the goods imported or exported to the proper officer of customs at such place of import or export. He is also required to produce to that officer, if necessary, any import or export licence governing the import or export of such goods. The import or export of most wildlife or plants in Malaysia is restricted under the *Customs (Prohibition of Imports) Order 1998* and the *Customs (Prohibition of Exports) Order 1998*.

PROHIBITION OF IMPORTS

Part 1 of the Fourth Schedule, Customs (Prohibition of Imports) Order 1998 requires the importer of

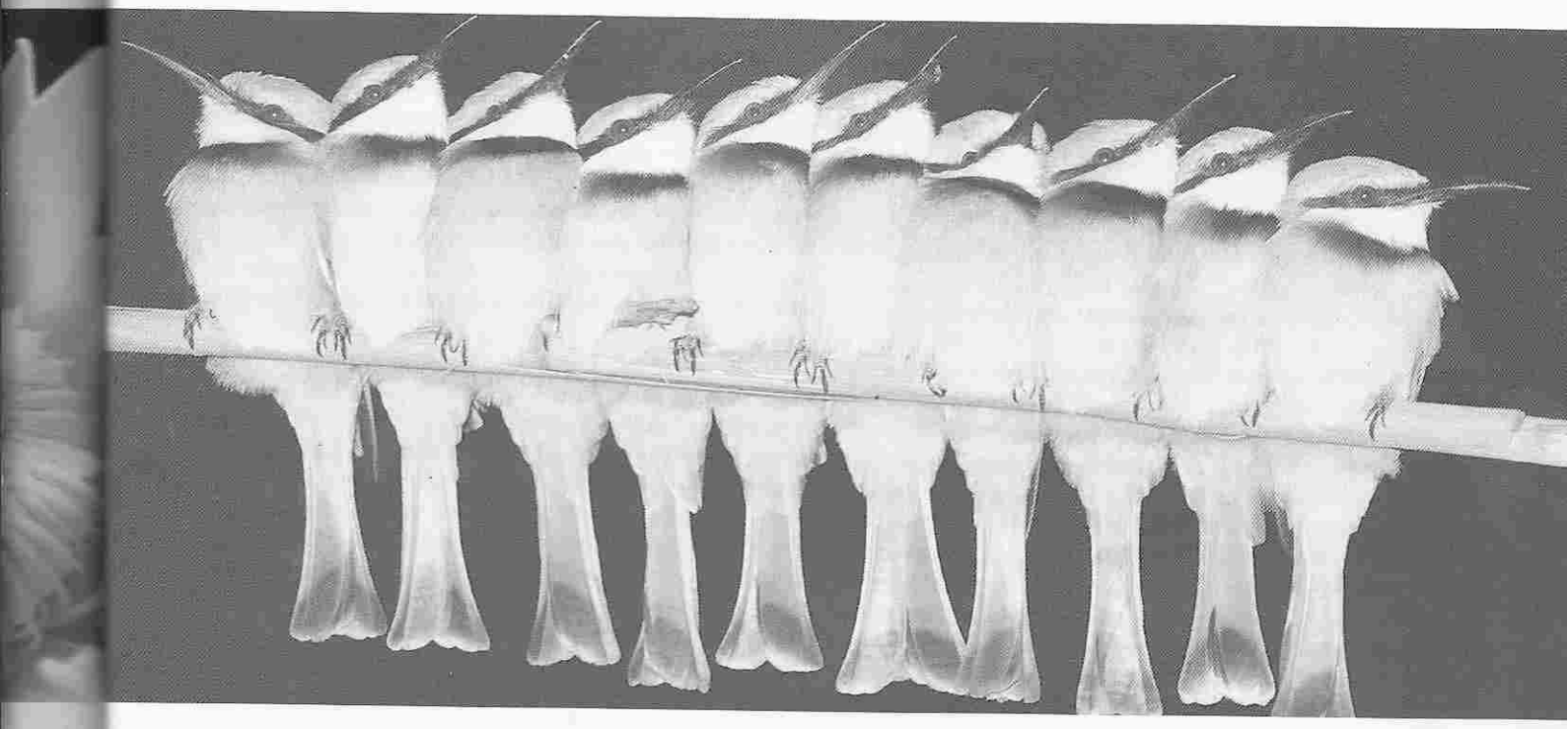
i. any domestic animal or fowl ,alive or dead, or any part thereof;
ii. pests;
iii. any invertebrate animal;
iv. any other animal or bird (other than a domestic animal or fowl);
v. live fish; and
vi. plants, including any species of plant or any part thereof whether living or dead

to obtain an Import Licence (A.P.) from the Director-General of Veterinary Services, the Director-General of Agriculture, the Director-General of Wildlife Department or the Director-General of Fisheries Department as the case may be. All consignments are subject to inspection by the officers from the relevant departments prior to clearance by customs.

PROHIBITION OF EXPORTS

The Second Schedule of the *Customs (Prohibition of Exports) Order 1998* requires the exporter of

i. all domestic animals, alive or dead, and any part thereof;
ii. poultry, alive or dead and any part thereof;
iii cockles;
iv live prawns and shrimps;
v. live fish; and
vi. any species of plant or any part thereof.



to produce an Export Licence (A.P.) from the Department of Veterinary Services, Fisheries Department or the Agriculture Department before exporting these goods.

The Third Schedule of the *Customs (Prohibition of Exports) Order 1998* requires the exporter of

i. any animal or bird, other than a domestic animal or fowl, whether alive or dead or any part thereof; and
ii. skins and other parts of birds

to obtain an Export Licence (A.P.) from the Wildlife Department and the Department of Veterinary Services prior to the clearance by customs for the export of those goods.

IMPORT AND EXPORT PROCEDURES

The importation of plants and animals into Malaysia falls under the jurisdiction of the Ministry of Agriculture mainly the Crop Protection and Plant Quarantine Division which enforces the *Plant Quarantine Act 1976* and the *Plant Quarantine Regulations 1981;* and the Department of Veterinary Services enforces the *Animal Ordinance 1953*. An Import Permit is also required from the Wildlife Department which enforces the *Wildlife Act 1972*.

IMPORT OF ANIMALS

For the importation of animals into Malaysia, the person concerned has to make an application to the Director-General of Veterinary Services for an Import Permit. An Import Permit must also be obtained from the Director-General of the Department of Wildlife, Conservation and National Parks if required under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The consignment of animals shall be accompanied by a veterinary health certificate issued in English and signed by a competent veterinary officer of the veterinary authority of the country of export, containing proper identification of the animals and the names and addresses of the consignor and the consignee. The importer shall provide the Director-General or the officer of the department at the airport or port of arrival, the following information at least 72 hours before arrival of the animals:

i. the number of animals in the consignment,
ii. the expected date of arrival,
iii. the airport or port of disembarkation in Malaysia, and
iv. the farm or establishment where the animals in the consignment will be kept.

Upon arrival in Malaysia, the animals and the accompanying documents shall be surrendered to the officer of the Department of Veterinary Services, Malaysia at the airport or port of disembarkation.

QUARANTINE IN MALAYSIA

The animals must be transported in sealed trucks direct from the airport or port of disembarkation to the designated zoo or establishment. They must be kept in isolation from other animals in the zoo or establishment for a period of 30 days for further observation and/or disease investigation. Should any animal show symptoms or signs of disease or infection, all animals shall be subjected to relevant laboratory tests or any other action deemed fit, at the expense of the importer. Upon confirmation of any disease (infectious, contagious or zoonotic) an appropriate action shall be taken by the Department including destroying the animals at the expense of the importer without compensation.

PETS

In the case of pets imported in Malaysia, especially dogs and cats, the minimum age requirement imposed is that they must be at least three months of age at the time of import. There is no restriction on the number of pets that can be imported by a person. To import an exotic animal or wildlife as a pet you may be required to obtain an approval from the Department of Wildlife, Conservation and National Parks prior to applying for the Import Permit from the Veterinary Department.

Pets can only be imported as manifested cargo and shall be declared to the animal quarantine officer at the point of entry. The consignment must land for entry clearance only at the point of entry specified in the Import Permit. Pets that require quarantine can only enter through KLIA, Penang or Padang Besar where quarantine facilities are available. Transit of the pet to other points of entry is not allowed without clearance by the animal quarantine officer. The original copies of the Import Permit, the health certificate from the veterinary authority of the exporting country and CITES approval shall be submitted to the animal quarantine officer for clearance.

The new Wildlife Protection and Conservation Bill due to be tabled in Parliament in June 2006 will have the provisions to address the influx of exotic pets into the country. Attention would be given to the import of many species of mammals, reptiles and fish. Various pet stores in the country sell numerous animals that have previously not been seen in the country such as the Burmese python, rattlesnakes, cobras, sugar gliders, iguanas and even tarantulas. Local officials realise that there is a danger in not regulating this trade, as the animals introduced as pets could pose a threat to the local species if they escaped or were released into the wild.

EXPORT OF ANIMALS

The *Customs (Prohibition of Export) Order 1998* clearly states that the export of any domestic animal, alive or dead and any animal or bird other than a domestic animal or fowl requires an Export Licence from the relevant authority. The manner of exportation is up to the exporter, but he has to ensure the animals are properly cared for. The Veterinary Department is also to issue a health certificate certifying that the animal is free of any disease for information of the animal quarantine officer in the country of import. The consignment to be exported has to be declared in the Customs No.2 form together with the Export Permit and health certificate to the proper office of customs at the point of exit. The veterinary officer has also to be notified.

IMPORT OF PLANTS

The *Plants Quarantine Regulations 1981* stipulates the requirements which must be met for the importation of plants, plant products, growing media/rooting compost, beneficial organisms, plant pests and carrier of plants pests into Malaysia. An Import Permit is a requirement under the *Plant Quarantine Act 1976* and *Plant Quarantine Regulations 1981* to control the importation of plants. The permit states the conditions that the exporting country should follow to ensure the plant material imported is free from dangerous pests which are harmful to the agricultural industry in Malaysia. Post entry quarantine is a requirement for plants and other regulated items which are of high risk and known to be hosts of quarantine pests or regulated pests. Such screening is necessary to ensure the plant materials do not carry the pests which are harmful to local economic crops. The consignment is to be declared in the Customs No.1 form to the proper officer of customs at the point of entry.

EXPORT OF PLANTS

The *Customs (Prohibition of Exports) Order 1998* states that any species of plants or any part thereof which is alive and can be propagated and includes the stem, branch, tuber, bulb, rhizome, stock, bud wood, cutting, layer, slip, sucker, root, flower, fruit seed or any other part like pollen, spores, meristem, tissue, callus tissues in culture medium or cryogenically preserved are prohibited from export except under a valid Export Licence. Several plants are regulated under this Order and these have been placed under two categories in the Customs List. Plants in Category 1 can be exported only by government agencies and such exports must be solely for research or exhibition purposes. Plants in Category 2 can be exported by anyone but it must only be for research purposes by a government research institution in the importing country.

The Export Licence can be obtained from the plant quarantine offices of the Department of Agriculture in the various states. In addition to the Export Licence, a copy of the Customs No.2 form must be filled in with the correct botanical names. If they are hybrids, their correct hybrid names must be stated. A phytosanitory certificate is also to be obtained from the plant quarantine office for the use of the relevant officers of the importing country. Under the International Plant Protection Convention, it has been agreed that all signatory countries will carry out the required inspection and treatment to ensure that quarantine and other noxious pests are not disseminated along with plants and plant products exported from their respective countries. This certification that the consignment has been inspected and treated according to the importing country's requirements is called the phytosanitary certificate. A CITES permit should also be obtained from the same office if the plants are included in the CITES list of endangered species.

THE CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES, came into force on 1st July 1975 and now has been ratified by more than 132 member countries. These countries act by regulating commercial international trade in an agreed list of endangered species. The CITES seeks to control the trade in species of wild animals and plants that are, or may be, threatened with extinction as a result of international trade. The CITES uses an import/export permit system to regulate trade in species which are classified under the following headings:

i. species which are now threatened with extinction and which may not be traded for primary commercial purposes. 'Trade' for scientific, captive breeding, and other limited uses is permitted under strict conditions;
ii. species that are not currently threatened, but may become so if their trade is not controlled; and
iii. species which individual countries have listed because they are under special management regimes in that country.

ASEAN WILDLIFE LAW ENFORCEMENT NETWORK

The special meeting of the ASEAN Ministers responsible for the implementation of CITES in Bangkok on 1st December 2005 recognised that need for an effective plan of action to strengthen the enforcement of CITES and other legislation for wildlife protection to address serious problems caused by illegal domestic and international trade in wild fauna and flora. Recalling the adoption of the ASEAN Regional Action Plan on Trade in Wild Fauna and Flora (2005 – 2010) at the Special Meeting on 3rd May 2005 in Jakarta, the Ministers once again stressed the importance of involving ASEAN member countries as well as all relevant governmental, inter-governmental and non-governmental organisations to address illegal exploitation and trade in wild fauna and flora. They also reiterated the importance of financial and technical support and assistance from the international community in helping ASEAN member countries to build resources, expertise and capacity to address this illicit trade.

THE ILLICIT WILDLIFE TRADE IN MALAYSIA

International smuggling rings carry on a lucrative wildlife trade in Malaysia. Enforcement officers have often seized consignments of protected animals and wildlife specimens being brought into or taken out of Malaysia. In May 2005, months of probing led enforcement officers to a secluded spot in a border forest in Kuching where they found more than 50 captured protected animals in cages and secluded closures. These included birds and two ceruns unicolor deer from Kalimantan, Indonesia. The other wildlife seized were spotted doves, adjutant storks, white bellied fish eagles and two pheasant species.

In Peninsula Malaysia, the dense vegetation in neighbouring Thailand provide ample opportunities to wildlife smugglers to import/illegally bring in pangolins, iguanas, and other reptiles which are widely sought after for their exotic meat and skins. Lorries laden with agricultural produce inadvertently conceal cages crammed with iguanas suffocated by the load of vegetables and lack of oxygen. The smuggling of these specimens was fuelled by local as well as international demand, especially from collectors, for the aesthetic appeal of the animals. The vibrant colours and unique character of many types of flora and fauna is often highly attractive to domestic and international collectors and encourages poachers and organised crime. The prices of smuggled wildlife on the black market are so lucrative that many people are willing to run the gauntlet at the border in pursuit of cruelly derived profits. If not curbed, smugglers bring the threat of alien species and diseases of flora and fauna which can have potentially devastating consequences to our health, rural industries and native animals and plants. The Wildlife Conservation Society of Malaysia often provides intelligence on poaching activities along the border areas. Information gathering and profiling of suspected perpetrators and their modus operandi assist the enforcement agencies to check the entry of consignments of illicit wildlife.

DETENTION OF IMPORTED GOODS

When imported goods which are subject to CITES controls are brought in without the required permits or certificates, they can be detained under the *Customs (Prohibition of Import) Order 1998* and handed over to the relevant department officials. This normally refers to manifested cargo imported for commercial purposes. However, such goods in the possession of travellers without the proper permits are also liable to forfeiture. Travellers are allowed to import personal effects and souvenirs provided that the articles are imported on or with the person or the baggage of the person. Items such as handbags made from reptile skins, insects encased in glass containers, ivory ornaments, parts of animals attached on to key chains or dried flowers do actually come under the CITES requirements, but customs officers are empowered to release such items without the required permit. However, these exemptions are not extended to items imported for commercial purposes.

CUSTOMS ENFORCEMENT AT PONTS OF ENTRY

Customs officers and other law enforcement officials who are stationed at the point of entry or exit are often not well acquainted with the various species of flora and fauna throughout the world. To identify whether a particular plant or animal would offer the threat of disease or constitute a protected species often requires proper training and education in botany and zoology. Customs officers have witnessed clear demonstrations that criminals are becoming more sophisticated, having greater business organisations and are learning from their mistakes. More often than not, due to the large volume of cargo moving in and out of the country, hidden consignments of plants and small animals escape the stringent scrutiny and inspections of the officials and easily gain entry into or exit Malaysia. The World Customs Organisation has facilitated the sharing of information among member states with a view to combat illegal movement of goods across borders. This cooperation will, in the years to come, prove invaluable to customs officers in preventing the smuggling of illicit goods in particular the booming trade in endangered species of flora and fauna.

The Author

Thomas Selva Doss

is a customs consultant with Dossnett Consulting Sdn. Bhd. providing customs advisory services to clients in Malaysia and Singapore. He was a Senior Officer of Customs in the Royal Malaysian Customs Department for 13 years and is trained in Customs Audit, Custom Investigation and Anti-smuggling procedures. He holds a Bachelor Degree in Economics and Certificate in Customs Procedures from the Malaysian Customs Academy. He can be contacted at e-mail : customs@streamyx.com.

Activities and Intention at Time of Purchase Relevant to Taxability of Income

On 28 March 1980, the taxpayer, a company incorporated in Malaysia, purchased pieces of land for a total sum of RM6,100,000.00. On 20 August 1982, the taxpayer obtained approval from the authorities to build a 31-storey office block on the land.

Sometime between 20 August 1982 and 23 April 1985, a new management took over the taxpayer company. The original plans for the proposed 31-storey office block building were amended (and approved) to that of a 30-storey office block building. Development expenditures incurred amounted to RM1.44 million.

From 1987 to 1990, part of the land was rented out and the income was charged to tax and assessed by the Director-General as rental income under Sec 4(d) of the *Income Tax Act 1967*.

On 26 July 1990, the taxpayer entered into a sale and purchase agreement to sell a portion of the land which was not included in the development plan for a total consideration of RM42,500,000.00. By Notices of Assessment dated 9 July 1992, the Director-General raised additional assessments for years of assessment 1988 to 1991. The taxpayer, being unhappy with the additional assessments, appealed.

The main issued raised by the taxpayer in this case was whether the disposal of a portion of the land was a disposal of a capital asset or was it a disposal of stock-in-trade. Both the Special Commissioners and the High Court had ruled that the income from the sale was trading income and assessable.

The Court of Appeal allowed the appeal by the taxpayer and held that:

1) The objects as stated in the Memorandum and Articles of Association of a company by themselves are not conclusive. It was not safe for the Special Commissioners to come to the conclusion that the taxpayer's activity was dealing in property merely on the ground that it was one of the stated objects as found in the taxpayer's Memorandum and Articles of Association. To come to a safe conclusion, one had to go into the activities of the taxpayer whether in the past or in the present to find out whether the activities were one of the taxpayer's stated objects.

2) In the present case, the taxpayer had two equally important objects of carrying on business in immovable property and investment in property. These two objects were so closely related that one had to examine the whole transaction before one could come to a correct conclusion whether that activity constituted business or dealing in land or whether it was an investment. In order to come to the correct conclusion, the intention of the taxpayer at the time of the purchase of the land was relevant.

3) In the present case, the Special Commissioners arrived at their finding on certain grounds. However, there was nothing in the case stated to support their finding.

4) In respect of the sale of the unused portion, there was no evidence to show that the taxpayer made preparation for the sale such as advertising or that the taxpayer had opened an office just for the purpose of selling the unused portion or other activity pertaining to sale or development of the unused portion. The sale was by chance when a good offer came along, and on the unused portion. The badges of trade

did not exist in this sale. The taxpayer had also kept the land for more than ten years which showed that when the taxpayer purchased it, it was for investment. The sale and profit was therefore nothing more than realisation of a capital asset. There is no evidence of change of intention. It is clear that the subject land was an investment which is one of the objects provided for by the Memorandum and Articles of Association of the appellant. It would not make any difference whether the appellant disposed of the whole subject land or a portion of it. In either case it is a disposal of a capital asset.

5) The Special Commissioners arrived at the finding that the taxpayer was trading also because of the entries in the taxpayer's account (the balance sheet). However, the account was only an aid and not the deciding factor to determine whether a person was trading or otherwise. The accounts of the appellant were messy and not properly kept, but that did not mean that the appellant was trading or having business dealing in land. The transaction which generated the income had to be viewed in entirety.

The Court of Appeal pointed that the appellant had revalued the subject land and entered the revalued amount in the account. This revalued amount and the development expenditure had been entered in the account and the balance sheet of the appellant consistently under the heading of "development properties" which is under the main heading of "fixed assets". Under this main heading is also found the heading of "land and development expenditure". Though the heading of "land for investment" is not used for the heading of "development properties", the Court of Appeal acknowledged that the subject land is to be held for investment and that was the reason why it was placed under the main heading of "fixed assets". The terminology "development properties" was used because the subject was earmarked for development of a 30-storey office complex. The appellant did not put it under the "land held for development and resale" because it was not the intention of the appellant to resell the subject land. The land was to be developed into a 30-storey office block and the subject land and the office block to be held as long-term investment. That was the reason why the entry was made that the subject land came under the main heading "fixed assets" and not "current assets" or "stock-in-trade". It might be the wrong terminology but the fact remained that the subject land was intended and held as investment throughout.

In drawing the conclusion, the Court of Appeal stated there is no doubt the accounts of the appellant have much to be desired but the difficulties in maintaining the accounts in the present appeal have to be appreciated. The appellant have only one piece of land which had been merged from smaller pieces of land. From the time when they bought the land, it was treated as one piece of land. They had sold a portion of the land and not the whole land nor any identifiable part of the land. Obviously there was profit from the sale of the land. It is clear that the disposal has to appear somewhere. Since there was a sale and profit made from the sale, the appellant's accountant had termed them under the heading of "trading, profit and loss account". This is the point that the Special Commissioners stated that the account shows that the appellant was trading. One could not just decide based on what the appellant was trading or business dealing in land. The accounts is only an aid and not the deciding factor to determine whether a person is trading or otherwise.

The Court of Appeal is in entire agreement with the Special Commissioners that the accounts of the appellant were messy and not properly kept, but that does not mean that the appellant was trading or having business dealing in land. The evidence shows that in 1980 the appellant purchased the land as investment to build their multi-storey office block. The intention at the time when it was purchased was to keep it as an investment. The appellant held on to the land as investment until 1990 and a portion of the land which was not required by them for the building was disposed by them when they were offered a good price for it. That is the subject matter of this appeal. There is no evidence to show that the appellant was trading or dealing in land before the transaction or after that transaction. There is also no evidence to show that the appellant was making any preparation to trade in land or to do any development to resell. The transaction was an isolated transaction. It was the intention of the appellant throughout and until today that they purchased the property for investment. There is no evidence of change of intention. It is clear that the subject land was an investment which is one of the objects provided for by the Memorandum and Articles of Association of the appellant. The Court of Appeal states that it would not make any difference whether the appellant disposed of the whole subject land or a portion of it. In either case it is a disposal of a capital asset.

The Court of Appeal finds that the Special Commissioners have erred in their finding and allowed the appeal by the appellant with costs. The decision of the Special Commissioners is therefore set aside and the assessment in respect of the sale of the land is quashed. The deposit is to be refunded to the appellant.

Alf Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri Court of Appeal, Putrajaya, Civil Appeal No W-01-203-97

Judgement delivered on 14 May 2005.

Hazlina Hussain (Normareza Mat Rejab with her) (Legal Officer, Inland Revenue Board) for the respondent.

Goh Ka Im (Elaine Lee Pei Sze with her) (Advocate & Solicitor, Messrs Shearn Delamore & Co) for the taxpayer.

Before: Datuk Haji Mokhtar bin Haji Sidin JCA, Abdul Aziz Mohamad JCA, and Md Raus Sharif J.

(Contributed by CCH *Malaysia* and *Singapore Tax Cases* Editor)

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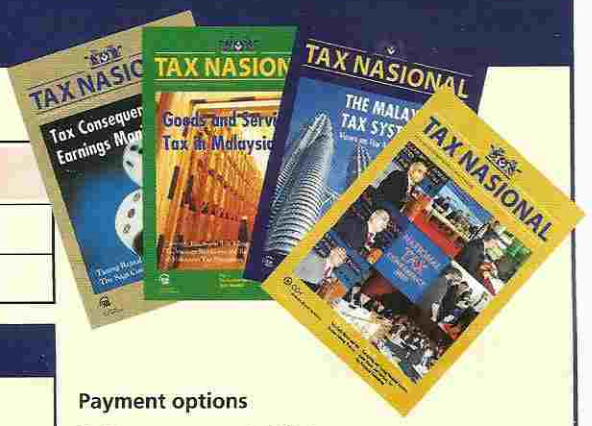

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