Malaysian Institute Of Taxation

The premier body for tax professionals

TAX NASIONAL

Official Journal of the Malaysian Institute of Taxation

Vol.15/2006/Q4 RM38.00

Interview with Puan Hasmah bt Abdullah CEO/Director General of LHDNM

page 22

KDN PP 7829/2/2007

Malaysian Institute Of Taxation

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Continuing Professional Development (CPD)

TRAINING PROGRAMME / EVENTS - 1st QUARTER 2007

Date	Training Programme	CPD	Venue	Speaker
JANUARY 2007				
8 Jan 2007 9.00am - 5.00pm	Workshop: Witholding Tax - Road Show	8	Kuala Lumpur	Harvindar Singh
13Jan 2007 9.00am - 5.00pm	Workshop: Practitioners Update - Road Show	8	Kota Kinabalu	Harvindar Singh
15 Jan 2007 9.00am - 5.00pm	Workshop: Practitioners Update - Road Show	8	Kuching	Harvindar Singh
19 Jan 2007 9.00am - 5.00pm	Workshop: Witholding Tax - Road Show	8	Johor Bahru	Harvindar Singh
22 Jan 2007 9.00am - 5.00pm	Workshop: Witholding Tax - Road Show	8	Penang	Harvindar Singh
FEBRUARY 2007				
9 Feb 2007 9.00am - 5.00pm	Workshop: Tax Cases & Legistrations	8	Kuala Lumpur	Dr Nakharatnam Somasundaram
13 Feb 2007 9.00am - 5.00pm	An Evening Dialogue on Section 153	3	Kuala Lumpur	Dr Veerinderjeet Singh
MARCH 2007				
8 Mar 2007 9.00am - 5.00pm	Workshop: Tax Planning and Exemption for Malaysian Individuals	8	Kuala Lumpur	Chow Chee Yen
14 Mar 2007 9.00am - 5.00pm	Workshop: Tax Investigation for Property Developers and Contractors	8	Ipoh	Quah Sin Hor
16 Mar 2007 9.00am - 5.00pm	Workshop: Tax Investigation for Property Developers and Contractors	8	Penang	Quah Sin Hor
20 Mar 2007 9.00am - 5.00pm	Workshop: Tax Planning and Exemption for Malaysian Individuals	8	Kota Kinabalu	Chow Chee Yen
21 Mar 2007 9.00am - 5.00pm	Seminar : Advance Rulings, Public Rulings and Regulations on Property Development and Construction Contracts, Tax Audits & Investigation Framework & Sec 153	8	Kota Kinabalu	Renuka Bhupalan
21 Mar 2007 9.00am - 5.00pm	Workshop: Tax Planning and Exemption for Malaysian Individuals	8	Kuching	Chow Chee Yen
22 Mar 2007 9.00am - 5.00pm	Seminar : Advance Rulings, Public Rulings and Regulations on Property Development and Construction Contracts, Tax Audits & Investigation Framework & Sec 153	8	Kuching	Renuka Bhupalan
23 Mar 2007 9.00am - 5.00pm	Workshop: Tax Investigation for Property Developers and Contractors	8	Johor Bahru	Quah Sin Hor

DISCLAIMER

The Malaysian Institute of Taxation reserves the right to change the speaker (s)/ date (s), venue and / or cancel the workshop/events without notice at their discretion.

ENQUIRIES

Please call **Nur / Latha at 03-2162 8989 ext 106 / 108** or refer to MIT s **website at www.mit.org.my** for more information on the CPD programmes

The President's Note

Well we have reached the end of 2006 and are beginning 2007..... a new year, new horizons and dreams. We have had a rough start but now let bygones be bygones and start afresh!

Firstly, on behalf of MIT, I would like to congratulate Puan Hasmah on being appointed the new Director General / CEO of LHDNM. We wish her all success and categorically state that she can count on MIT's to support and co-operation in her endeavors towards transparent and accountable tax practices in Malaysia.

Another event of significance this last Quarter is that MIT had its first Council meeting and the Office bearers have been duly elected. I would personally like to thank all members of the Council for their support and unity in coming together with hope and determination to take MIT further towards being the premier body for tax professionals in Malaysia.

Among the things we have in the pipeline is better representation for our members. We aim to maintain and enhance the co-operative and balanced relationship that we at MIT have with LHDNM and MOF and go on to foster relationships with Customs, MITI and so on. We have also established relationships with overseas taxation bodies with whom members can now network. Please liaise with the Secretariat for the contacts.

Apart from that, generally around the country MIT's workshops and seminars were well attended. The Seminar on Ingredients for Efficient Tax Planning was a great success. The various speakers and trainers for MIT are doing an excellent job and MIT thanks them and hopes that the new year 2007 will bringer greater cooperation and success.

I forsee great and rapid changes in the profession as a whole. I urge you, members of MIT and those other tax professionals, to join us and work with us at MIT for the growth of the profession in Malaysia.

MIT looks forward to your continued support and encouragement as we begin a new year. God Bless and Happy New Year 2007!

Haji Abdul Hamid bin Mohd Hassan
President, MIT

THE EDITOR'S NOTE

THE EDITOR'S NOTE

As usual this quarter has also been an eventful quarter for MIT. As you will see, this issue is filled with diverse articles. We hope you enjoy the issue and look forward to your enjoyment and continued support of Tax Nasional.

You will notice that this second issue of Tax Nasional has a slightly different look from the last issue. We hope you like it.

I would like to say that I am somewhat sad to see that there is no "Letter(s) to the Editor". Please do realise that we do look forward to your comments and feedback to help us improve and expand Tax Nasional. Just as MIT aims to be the premier body representing tax professionals in Malaysia, Tax Nasional hopes to keep up to that responsibility by being the premier journal for tax in Malaysia. We need your support and feedback to do so. So please do not hesitate to write in/fax in to MIT's Kuala Lumpur office or e-mail us at publications@mit.org.my

I would also like to Congratulate Puan Hasmah on her appointment as Director General / CEO of LHDNM. As you can see she has graciously consented to give Tax Nasional an exclusive interview. From her responses and statements, I think it is obvious that LHDNM is in capable hands. I echo our President in saying that MIT and the tax profession look forward to a greater confluence of cooperation and transparency.

Last but not least I wish all readers and subscribers of Tax Nasional a very Happy New Year 2007!!

Harpal Singh Dhillon
Editor

Malaysian Institute Of Taxation

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

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Tax Nasional

Official Journal of the Malaysian Institute of Taxation

Printer: Libraprint & Advertising Sdn Bhd
33 Jalan Hang Tuah 2, Taman Salak Selatan, 57100 Kuala Lumpur.

Malaysian Institute Of Taxation

INVITATION TO WRITE

Tax Nasional welcomes original and unpublished contributions which are of interest to tax professionals, lawyers and academicians. It may cover local or international tax development. Articles contributed can be written in English or Bahasa Malaysia. It should be between 2,500 and 5,000 words (doubled-spaced, typed pages). They should be submitted in hardcopy and diskette (3.5 inches) from Microsoft Word.

Contributions intended for publication must include the writer's name and address, even if a pseudonym is used. The Editor reserves the right to edit all contributions based on clarity and accuracy of expressions required.

Contributions may be sent to :
THE EDITOR of TAX NASIONAL
Malaysian Institute of Taxation
Kuala Lumpur office

e-mail: publications@mit.org.my

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Institute News

Election of Office Bearers

The MIT Council held its first meeting on 1/11/2006 wherein the office bearers were elected as stated below:

President	**:Tuan Haji Abdul Hamid bin Mohd Hassan**
Deputy President	**:Mr. Lim Heng How**
Vice Presidents	**:(i) En. Nujumudin Bin Mydin**
	(ii) Mr. Khoo Chin Guan

From the East Coast

The MIT jointly with MIA members and tax practitioners from the state of Pahang Darul Makmur held a lively and fruitful dialogue with LHDNM, Cawangan Kuantan on 13 July 2006. Various tax issues were raised, discussed and settled by the State Director, En Saibun Bin Salam. Pengarah Cawangan Raub & Temerloh, Encik Azizul Bin Ahmad and Encik Chakuguri @ Yusof Bin Daud respectively were also in attendance. Pengarah Pusat Penyiasatan dan Perisikan, Kuantan, Encik Mohd Termizi Bin Embong, also joined in the dialogue and gave his opinion on certain issues raised. At the end of the dialogue, members were treated to a delicious high tea.

Courtesy call on State Director, En Saibun bin Salam, LHDNM Cawangan Kuantan on 25 April 2006

A set of FRS Standards was presented to the State Director, En Saibun bin Salam, LHDNM Cawangan Kuantan on 25 April 2006 on behalf of MIT by Mr Wong Seng Chong, Chairman MIT East Coast branch

On 2 October 2006, MIT members and practising tax agents from the state of Pahang Darul Makmur made a courtesy call on the LHDNM Cawangan Raub, new head of the branch, Encik Azizul Bin Ahmad. Various tax issues pertaining to the Raub Region were raised and taken note of by both LHDNM, Cawangan Raub and the tax practitioners.

MIT members and tax practitioners posed with LHDNM Cawangan Raub Branch Head, En Azizul Ahmad and his Deputy En Roslan bin Ismail

AOTCA Meetings in Hong Kong

The Taxation Institute of Hong Kong hosted the 14th General Council Meeting and the 7th General Meeting of Asia-Oceania Tax Consultants' Association (AOTCA) on 23 and 24 November 2006. AOTCA was founded in 1992 by 10 tax professionals' bodies located in Asian and Oceania regions. It has

expanded to embrace 20 leading organisations from 16 countries. Among AOTCA's main purposes are to provide forums for exchanges of information, knowledge and experiences among member bodies, to promote studies on taxation, and move towards expansion and development of the tax profession.

Ms Mohana and the Philipine delegates

MIT's President Tuan Haji Abdul Hamid led a delegation comprising En Ahmad Mustapha Ghazali (Honorary Advisor), Mr Khoo Chin Guan (Vice President), Mr Harpal Singh (Council Member) and Ms Mohana Devi (Secretariat) to the meetings held in Hong Kong.

These meetings are the most regular function of AOTCA.

This organisation is currently headed by President Kinjiro Mori from the Japan Federation of Certified Public Tax Accountants Association. Under the leadership of President Mori, AOTCA has seen significant increase in the membership. The latest addition is the membership of National Institute of Australia the application whose which was approved at this meeting.

MIT Representatives at the Meeting

Over the years, AOTCA has establised an on-going working relationship with both Study Group on Asian Tax Administration and Research (SGATAR) and the Confederation of Fiscale Europeene (CFE). 2 representatives from SGATAR and the President of CFE, Mr Paul Morton, attended the meetings as observers and presented some technical papers.

We had the privilege of listening to experts from Hong Kong talk on investing in Hong Kong and China. In the afternoon, the presentations covered topics relating to fiscal, economic, taxation policies and issues affecting the Asia-Oceania region and the world.

At the 2005 AOTCA meetings in Manila, Malaysia was chosen to host the 15th meeting and the 2nd AOTCA International Convention in 2007.

MIT Delegates and AOTCA Office Bearers

A Bit of Fun after the 2 full days of meetings

The 1st AOTCA International Convention was held in Kyoto Japan in November 2002. At the Hong Kong Meeting our COC Chairman briefed delegates on the preparations so far.

According to plan, the 15th AOTCA Meetings and 2nd International Convention will be held from 21 – 23 November 2007 at the Kuala Lumpur Convention Centre. This international event will provide an excellent opportunity for tax consultants from all over the world to share and exchange knowledge and experience with Malaysian and foreign tax consultants.

By Ms Mohana Devi Sukalingam

Technical Updates

(4th Quarter – as at 15 November 2006)

Legislation

Gazette Orders

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

~ **Income Tax (Exemption) (No. 24) Order 2006 [P.U.(A) 363]**

~ this exemption is effective from year of assessment 2006.

~ a non-resident depositor is exempted from the payment of income tax on interest received from the Kuwait Finance House (Malaysia) Bhd

Dialogue

A 2007 Post Budget Technical Dialogue was held by the Lembaga Hasil Dalam Negeri Malaysia (LHDNM) with the professional bodies on 5 October 2006. A copy of the minutes can be downloaded at www.mit.org.my.

Guidelines

Bank Negara Malaysia

Bank Negara Malaysia has issued the following guidelines:-

- Guidelines on the establishment of International Islamic Bank
- Guidelines on the establishment of International Takaful Operator
- Guidelines on the establishment of International Currency Business Unit; and
- Guidelines on the establishment of International Currency Business Unit (Takaful Operator).

The above guidelines set out the eligibility criteria, scope of business as well as the submission requirements for the establishment of new entities in the Malaysian International Islamic Financial Centre. The attractive tax incentives proposed in the 2007 Budget are part of the Government's initiative to promote and strengthen Malaysia's position as a centre of origination, distribution and trading of Islamic capital market and treasury instruments, Islamic fund and wealth management, international currency financial services and takaful and re-takaful business.

Copies of the guidelines are available at **www.bnm.gov.my.**

Technical Clarification

The Institute sought further clarification from the LHDNM on the application of Section 75A of the Income Tax Act, 1967. The LHDNM clarified the following:-

- that directors of a company shall only be liable for taxes due and payable which arose during the period in which they were directors; and
- "taxes due and payable" refers to those taxes due and payable after 26 December 2002.

A copy of the LHDNM's letter can be downloaded at **www.mit.org.my.**

Advance Rulings - What to Expect

Ms Eow Siew Lee

The 2007 Budget proposed that Malaysia would have an advance ruling system in place by 1 January 2007. This move is greatly welcomed by the profession after having lobbied for its introduction in light of the self-assessment regime. An advance ruling – provides a certain degree of clarity and certainty to taxpayers as well as consistency in the application of the tax law by both the taxpayer and Inland Revenue Board (IRB).

Advance rulings are generally the written interpretation by tax authorities on how a provision in the tax law applies to the taxpayer or proposed arrangement. Advance rulings are not new in tax administration especially for those under the self-assessment system.

Hong Kong introduced it in April 1998 whilst Singapore introduced it more recently in June 2005. Let us look at some of the parameters set by other countries in anticipation of our own set of advance rulings guidelines. For the purpose of this article, we will look at the system adopted in Singapore, Hong Kong, Canada and Australia.

Legal Requirements

All the above-stated countries excluding Canada have the force of law in the issuance of advance rulings. For Malaysia, a new Section 138B in the Income Tax Act 1967 was proposed in the 2007 Budget which specifically empowers the Director-General of the Inland Revenue to issue advance rulings upon receipt of an application.

Scope of Advance Rulings

What type of transactions should taxpayers seek rulings on? The main scope, which is common in these countries, is that rulings should only be sought on seriously contemplated arrangements or transactions. Arrangements or transactions which are hypothetical in nature would not qualify. Singapore defines "arrangement" as any contract, agreement, plan or understanding (whether enforceable or unenforceable) including all the steps and transactions that carry it into effect. The scope in Australia is very wide as it allows rulings to be sought on how a relevant provision would apply to an entity or specific scheme. The term "scheme" is widely defined to mean any arrangement or any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. "Relevant provisions" are provisions of the various acts and regulations administered by the Commissioner. As a result of the broad net, issues concerning the administration, procedure and collection are also part of the scope in Australia.

In Singapore, the request for an advance ruling has to be a query regarding an interpretation of the law and not queries regarding what the law already clearly provides for.

Will a request for an Advance Ruling be declined?

Generally, the circumstances in which rulings may or shall be declined are fairly similar in these countries. Depending on the circumstances,

certain authorities may view certain circumstances more seriously than others. For example, the Hong Kong tax authorities may or may not decline to rule where it involves the interpretation of foreign law but the Singapore Inland Revenue will definitely not issue a ruling on that matter.

As a summary, instances where the authorities *may* decline to provide a ruling include matters which relate to a question of fact or are the subject of an appeal or objection or are the subject of a return which has been lodged. The authorities may also not rule if the correctness of the ruling would require the making of assumptions. Canada may not rule where the taxpayer declines to provide consent to release the ruling (sanitised version) to the public.

Instances where rulings *shall* not be provided include circumstances where the arrangement is not seriously contemplated or is frivolous or vexatious or where an audit or investigation is currently being undertaken on the taxpayer or similar arrangement. Where insufficient information is provided, rulings shall also not be provided.

Of course, where the arrangement or transaction is materially different from that stated in the ruling, then the ruling shall cease to apply. Where there is material omission or misrepresentation or assumption made which is proved incorrect, the ruling would also not apply.

Binding Effect

The advance rulings issued by these authorities are binding on the tax authorities and taxpayers only where the taxpayers rely on the said rulings. In Malaysia, the same approach is also proposed whereby the rulings are binding on the IRB and the taxpayer only if the taxpayer applies the ruling and the circumstances are the same as the application.

Disagreement with an Advance Ruling

In Singapore, rulings issued are final. Taxpayers need not follow rulings if they disagree with it but they are required to disclose that a ruling has been obtained and whether or not complied with. Any assessment raised based on a ruling can be appealed under the normal appeal provisions. Similarly in Hong Kong, the rulings issued are final, whether advantageous or not to the taxpayer.

Interestingly, in Canada, the applicant is given an opportunity to withdraw the ruling request where an unfavourable ruling is to be issued.

In Australia, taxpayers are allowed to object to unfavourable rulings unless an assessment has already been issued or relates to withholding tax or mining withholding tax that has become due and payable. If an objection is disallowed, the taxpayer may seek a review of the decision by the Federal Court or Administrative Appeals Tribunal.

Withdrawal of Advance Rulings

The general practice adopted is that the rulings can be withdrawn by notice in writing with reasons provided. Canada also allows representations to be made before the decision to withdraw is made.

Fees Charged on a request for an Advance Ruling

Generally, the fees charged consist of a non-refundable application fee and a time-based processing fee. Costs incurred are reimbursed by the taxpayers.

The Hong Kong Inland Revenue Department charges HK$30,000 for rulings concerning whether or not profits are to be treated as chargeable to profits tax and HK$10,000 for rulings on the chargeability of remuneration to salaries tax and for any other rulings. Additional fees will be charged if the time taken exceeds the time specified.

An application fee of S$525 (inclusive of GST) is payable in Singapore plus a further time-based fee of S$131.25 (inclusive of GST) per hour for each hour or part-hour subsequent to the first four hours taken. If the taxpayer requests for the Commissioner to give priority to his application, an additional fee of up to two times is payable.

The current fees in Canada are $100 (plus GST) for each of the first 10 hours or part of an hour and $155 (plus GST) for each subsequent hour or part thereof. An advance payment of $535 (plus GST) which is equivalent to 5 hours is required. This amount will be applied against the final amount charged.

In Australia, there is no fee payable to seek a private ruling except where third party valuation charges are incurred which the taxpayer must reimburse the authorities.

Processing Time

Processing time ranges between 6 weeks in Hong Kong to 8 weeks in Singapore or 60 days in Canada and Australia. The authorities in Hong Kong and Canada allow meetings with the taxpayers to clarify certain facts or to provide information after the submission of the application. It is hoped that the IRB adopts this approach.

Publication of Rulings

All the countries except Singapore allow the publication of the rulings but in a sanitised version with all the confidential information removed. However, the situation may arise that with the removal of the confidential information, the substance of the arrangement is lost and the ruling may lose its meaning. Singapore, on the other hand, does not release the rulings to public on the grounds that they are private and confidential documents.

It remains to be seen what the Malaysian context will be. However, it is not expected to deviate significantly from what is already in practice in various countries. One crucial element, however, is the issuance of unfavourable rulings and what recourse does the taxpayer have under such instances. Would the authorities allow meetings/discussions with the taxpayer prior to its issuance? Would the authorities allow the taxpayer requesting the ruling to withdraw his application if it appears that an unfavourable ruling may be issued? What are the circumstances in which a taxpayer may withdraw his application for an Advance Ruling? As for withdrawal, such withdrawals should be prospective and sufficient notice should be given to the taxpayers. Another salient consideration is the scope of the ruling – should it be broad or narrow?

References

1. IRAS Circular - Advance Ruling System, Inland Revenue Authority of Singapore, 30 December 2005

2. Departmental Interpretation and Practice Notes No. 31 – Advance Ruling, Inland Revenue Department Hong Kong, April 1998

3. Advance Income Tax Rulings Circular (70-6R5), Canada Customs and Revenue Agency, 17 May 2002

4. TR 2006/D7 -Private Rulings, Australia Tax Office, 2006 (draft)

Author's Profile

Ms. Eow Siew Lee, Senior Manager Technical Department, MIT. She can be contacted at **siewlee@mit.org.my**

Deductibility of Tax Agent Fees

- An Australian Perspective-

Mr David Russell, QC

In relation to the deductibility of costs of tax return preparation, there is an important structural difference between the legislation of Australia and Malaysia which needs to be kept in mind.

Australia brings to tax gross receipts (business income, wages and salaries, dividends, interest etc) ("assessable income" - Income TaxAssessment Act 1977 ("the 1997 Act") section 6-5) and allows against these gross receipts a deduction for expenses incurred in gaining or producing assessable income or necessarily incurred in the carrying on of a business for that purpose, other than expenses of a capital, private or domestic nature ("allowable deductions" - 1997 Act section 8-1). In addition to the general allowable deduction provision, there is specific provision (section 25-5) for a deduction for the cost of obtaining tax advice from a recognised tax professional.

For non-business taxpayers, the cost of tax return preparation would normally not be regarded as an expense incurred in gaining or producing assessable income, so reliance needs to be placed on section. Business taxpayers, on the other hand, would normally be able to rely on the general deduction provision.

The Malaysian tax system, on the other hand, has more in common with the schedular systems of Singapore, Hong Kong and the United Kingdom. It brings to tax, in the context of a business, net income ("profits or gains") and, separately, wages and salaries). The result, in principle, will be the same: business profits would normally be computed on the basis that the cost of compliance with taxation laws was part of the cost of doing business, but absent a specific concession wage and salary earners would not be entitled to a deduction for such expenses.

In a practical sense this can be argued to be unfair to wage and salary earners, although it is unlikely their compliance costs would approach those of most businesses (even small ones).

Malaysia, of course, does not have a capital gains tax and its legislation is much less complex than ours (which is 10,000 pages long). So a Malaysian taxpayer whose affairs were relatively uncomplicated might well be able to comply with his or her taxation obligations without recourse to professional advice. That would rarely be the case in Australia, which may explain why the concession has never been questioned here. One advantage to the Revenue which flows from our system is that the deduction is only available if a registered tax professional performs the service. This gives them an incentive to register and in turn gives the Australian Taxation Office access to a system of enforcement of professional standards through the threat of deregistration for unprofessional conduct.

The reality is that the Australian tax system could not operate without widespread recourse by taxpayers to the services of tax professionals, and provided that an effective system of professional standards enforcement is in place this provides to the Revenue a real assurance that taxpayers comply with their obligations.

That having been said, there is much to be said for the view that if there is to be deductibility for tax compliance expenses, it should be made available by way of legislative provision rather than extra-statutory concession.

We shall attempt to look at some other jurisdictions in the next issue of Tax Nasional. The Editor welcomes any feedback and or comments by readers at ***publications@mit.org.my.***

*** Cost of filing of tax returns and tax computations are not deductible according to Public Ruling No.6/2006**

An Introduction to the Transfer Pricing Policy in Malaysia (Part I)

Datuk D.P. Naban * & Mr S. Saravana Kumar**

1.0 Introduction

In July 2003, the Inland Revenue Board of Malaysia (IRB) issued the Transfer Pricing Guidelines (the Guidelines), which aimed at providing multinational enterprises (MNEs) with all the necessary information pertaining to the transfer pricing policy in this country. By doing so, Malaysia has joined other developed countries and many newly industrialised nations in having a policy that basically explains the essence of transfer pricing concept and practice in examining the price charged in a transaction between related parties (Easson, 2003). The Guidelines also elucidate on the application of the arm's length principle and the recommended preparation and documentation in line with the arm's length principle (IRB Malaysia, 2003).

The term transfer pricing refers to the determination of prices at which goods and services are transacted between related parties, especially between related companies in different tax jurisdictions (Ault, 2004). The Guidelines make it very clear that the transfer pricing between entities in a group of MNEs should not differ from the prevailing market price. Generally, when independent enterprises deal with one and another, their commercial conditions and financial relations are determined by market forces. However, when associated enterprises deal with each other, they may not be directly affected by external market forces. This results in the distortion of tax liabilities of the associated enterprises and tax revenues of the host nations.

Like other competent tax authorities, the IRB hopes the Guidelines would ensure the transfer pricing methodologies used by the MNEs are reasonable. The IRB also aims to ensure the Guidelines apply not only to transactions between associated enterprises, but also to transactions between a permanent establishment and its head office or other related IRB branches.

2.0 The Arm's Length Principle

The arm's length principle is the internationally accepted and adopted principle that determines the transfer pricing standard between related parties (Tiley, 2006). Following the Organisation for Economic Co-operation and Development's (OECD) recommendation, the Guidelines expressly acknowledge the arm's length principle as the governing standard for transfer pricing in Malaysia. The arm's length principle is defined in paragraph 1 of Article 9 of the OECD Model Tax Convention 2003 as follows:

"(When) conditions are made or imposed between the two enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

Meanwhile, paragraph 2 of Article 7 of the OECD Model Tax Convention 2003 states:

"Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."

Paragraph 2 of Article 7 basically corresponds with the application of the arm's length principle and perhaps explains the IRB's stand to extend the application of the Guidelines to transactions between a permanent establishment and its head office or other related branches.

The arm's length principle has gained universal acceptance as it provides broad parity of tax treatment for MNEs and independent enterprises. The principle also avoids any possible distortion of relative competitive positions of associated enterprises as it puts the former and independent enterprises on an equal footing (OECD, 2000). The IRB's stand to accept this principle should be welcomed as it is an internationally recognised concept in many tax jurisdictions, both in OECD member and non-member countries. As the Guidelines point out, section 140(1) of the Income Tax Act 1967 **(the Act)** will be applied in the adjustment of transfer prices and the Director-General of Inland Revenue (DGIR) may disregard transactions that are not made at arm's length and make the necessary adjustments.

3.0 Comparability analysis

The arm's length principle is based on a comparison of the conditions in a controlled transaction with the conditions in transactions between independent enterprises. The Guidelines explain that the transactions are deemed comparable if there are no material differences between the compared transactions or if it only requires minor adjustments. The OECD Transfer Pricing Guidelines further add that an understanding of how transactions between unrelated enterprises work is required to determine the degree of comparability (OECD).

There are a few characteristics outlined in the Guidelines that should be taken into consideration in determining comparability:

(a) characteristics of property or services:

Similarity in the characteristics of the property or services transferred plays a vital role in determining their values in the open market, this including:

- the physical features, quality and the volume of supply of property,
- the nature and extent of services, and
- the form of transaction and type of property.

(b) function performed:

The Guidelines also stress that a functional analysis must be carried out in order to ensure the controllable and uncontrollable transactions are comparable. The function alanalysis seeks to identify and compare the

economically significant activities undertaken by the independent and associated enterprises. Among the functions that would be taken into account by the IRB are product design, manufacturing, marketing, advertising and research & development.

- the degree of actual comparability when making comparisons with transactions between independent parties;
- the completeness and accuracy of data in respect of the uncontrolled transaction;
- the reliability of any assumptions made; and
- the degree at which the adjustments are affected if the data is inaccurate or the assumptions are incorrect.

A quick glance of the comparability factors drawn up by the Australian tax authority show similar factors are also taken into consideration by them (ATO, 2005):

- the nature of the activities being examined
- the availability, coverage and reliability of the data;
- the degree of comparability that exists between the controlled and uncontrolled dealings or between enterprises undertaking the dealings, including all the circumstances in which the dealings took place, and
- the nature and extent of any assumptions.

Meanwhile, the five transfer pricing methods are:

- comparable uncontrolled price method
- resale price method
- cost plus method
- profit split method
- transactional net margin method

The comparable uncontrolled price method, resale price method and cost plus method are all known as the traditional transactional methods. The remainder two are known as the transactional profit methods. The Guidelines have adopted all the five methods introduced by the OECD.

Having said that, the IRB has clearly expressed that the traditional methods should be attempted first before the transactional profits methods are considered. It appears that the latter is regarded as the 'last resort' option.

There is no reason expressed by the IRB in preferring the traditional methods to the transactional profits methods as other tax authorities in Asia Pacific (namely, Singapore, Australia and New Zealand) do not impose such requirement. Nevertheless, the willingness of the IRB to consider the transactional profits methods as an alternative is welcomed as the complexities of the real life business scenarios may impose practical constraints in applying the traditional methods (OECD, 2003).

5.0 The Comparable Uncontrolled Price Method (CUP)

This method focuses directly on the price of the property or services transferred in a controlled transaction to the price charged for the property or services in a comparable independent transaction. Provided both transactions are in comparable circumstances, any price difference between the two may indicate the transfer pricing of the associated enterprises (i.e. in the controlled transaction) is not at arm's length (ATO, 2005 and OECD, 2003). The Guidelines state that the CUP method is appropriate where there is comparability between the transactions and circumstances, and more importantly, it allows the IRB to make reasonable adjustments in the event of some differences.

In undertaking the comparability analysis, the Guidelines emphasise on the need to consider among others, the product characteristics, whether goods sold are compared at the same points in the production chain, costs of transport and whether the products are sold in places where the economic conditions are the same.

Example 5.1

Dynamic Multinational Ltd, which is based in Ireland, manufactures and sells computer chips to Cepat Distribution Sdn Bhd for RM 125 a unit. Cepat Distribution, which is based in Penang, is a subsidiary of Dynamic Multinational. The computer chips are also sold to an independent company, Tangkas Distribution for RM 150 a unit.

It is obvious that there is a difference between the pricing charged by Dynamic Multinational, whereby the computer chips sold at a lower price to the associate company. This may not necessarily reflect an arm's length price as the same product is sold at a higher price to Tangkas Distribution in an uncontrolled transaction.

Provided a functional analysis has been carried out and there is no material difference between the two transactions, the Inland Revenue Board would adjust the transfer price in the transaction between Dynamic Multinational and Cepat Distribution.

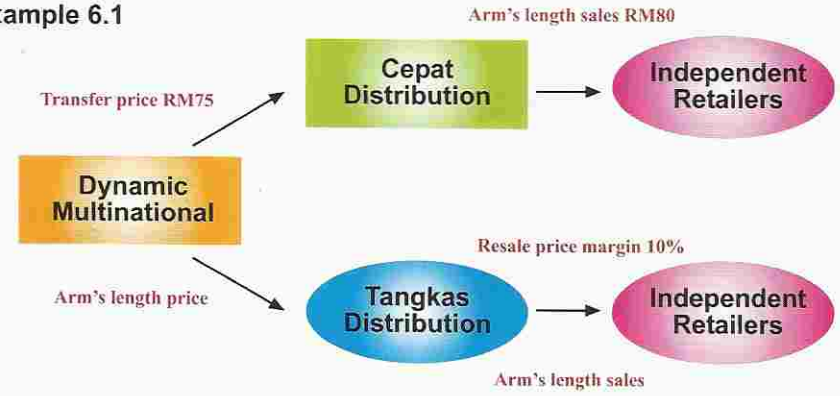
It is probable that the arm's length price is RM 150 (as that is the price in an uncontrolled transaction) and as such, the transfer price in the transaction between Dynamic Multinational and Cepat Distribution will be adjusted to reflect this.

6.0 The Resale Price Method

The resale price method focuses on the gross margin obtained by the distributor (Ault). As stated in the Guidelines, the resale price method is appropriate where the final transaction is with an independent distributor. The efficiency of this method depends on the value added or alteration made by the reseller on the product before it is resold. The margin of resale price would be derived from comparable transactions between the reseller and other independent parties (OECD).

The Guidelines detailed a list of factors that may influence the resale price margin. This includes the functions of activities performed by the reseller and the risks undertaken, employment of similar assets in controlled and uncontrolled transactions, and the time lapse between original purchase and resale of the product as a longer time lapse may give rise to changes in the market.

Example 6.1



Dynamic Multinational is a multinational entity based in Japan and manufactures high quality computer chips. These computer chips are distributed in Malaysia by Cepat Distribution Sdn. Bhd., a subsidiary Dynamic Multinational. Cepat buys these computer chips for RM 75 per unit and sells it to independent retailers for RM 80 a unit.

Dynamic Multinational also sells the same product to an independent company, Syarikat Tangkas, which distributes the computer chips in Malaysia.

A functional analysis was carried out and both Cepat and Tangkas appear to be carrying out similar functions except that Cepat also performs marketing and promotional functions for Dynamic Multinational.

It appears that the gross profit made by Tangkas is at 10%. As the focus of this method is on margins, the difference between the functions performed by Cepat and Tangkas is immaterial. Dynamic's transaction with Tangkas will be used as a benchmark to determine the arm's length price of the transaction between Dynamic Multinational and Cepat Distribution.

As such, the resale price margin of 10% will be used to determine the arm's length price for the original purchase by Cepat from Dynamic.

Therefore, the arm's length price of the product purchased by Cepat Distribution is:

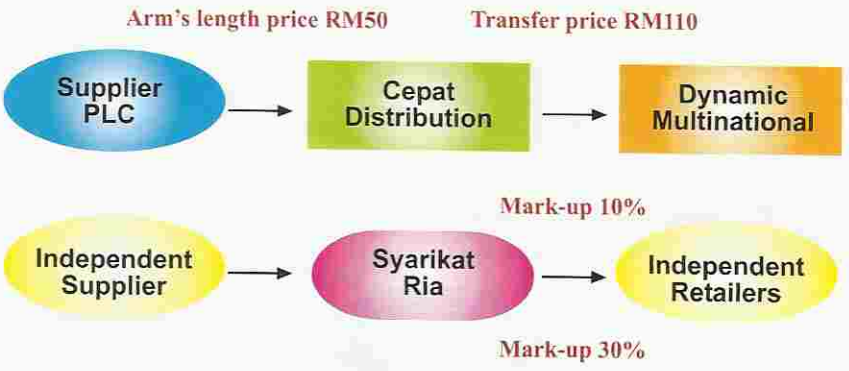
RM 80 – (RM 80 X 10%) = RM 72

Cepat Distribution is advised that the original purchase price of the semiconductors will be adjusted from RM 75 to RM 72 per unit.

7.0 The Cost Plus Method

The cost method plus is appropriate where semi-finished goods are sold between associated parties as the parties could have concluded joint facility agreements or long-term buy and supply arrangements. This method basically looks at the costs incurred by the supplier of property in a controlled transaction for property transferred to a related party (OECD). The Guidelines explain that an appropriate mark-up is added to this cost to find the price the supplier ought to be charging the buyer. The mark-up is established by reference to the mark-up earned by the same supplier from comparable uncontrolled sales to independent parties. Again, the Guidelines stress that in considering comparability, factors like similarity of functions, risks assumed, contractual terms, business strategies and market conditions must be taken into account.

Example 7.1



Cepat Distribution was established in Malaysia by Dynamic Multinational to manufacture specialised semiconductor components. Cepat Distribution obtains the materials used to manufacture this product from Supplier PLC, an independent company based in the United Kingdom, for RM 50 a unit. It costs Cepat Distribution RM 50 to manufacture each unit of the semiconductors and they are sold to Dynamic Multinational for RM 110 a unit.

Meanwhile, an unrelated company, Syarikat Ria, undertakes a similar function like Cepat Distribution, charges an average mark-up of 30% in manufacturing and selling similar product to independent companies. Assuming the functional analysis shows both Syarikat Ria and Cepat Distribution are carrying out a similar function, the average mark-up of 30% by Syarikat Ria, can used to determine the arm's length price.

As such the adjusted price would be as the following:

= RM 100 + (RM 100 X 30%)
= RM 130

Cepat Distribution is advised that the original selling price of the semiconductors to Dynamic Multinational will be adjusted from RM 110 to RM 130 per unit.

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Footnote

The authors acknowledge that examples 5.1, 6.1 and are adapted from the examples contained in the Transfer Pricing Guidelines published by the Inland Revenue Board of Malaysia and Inland Revenue Authority of Singapore.

Author's Profile

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The authors are grateful to Professor Dr Jeyapalan Kasipillai for having reviewed the paper.

Interview with Puan Hasmah bt Abdullah CEO/Director General of LHDNM

Part I - About Yourself

1. Could you please tell us a bit about your family and education background?

I am married to En. Ibrahim bin Karim, a former government servant, retired from the Malaysian Civil Service in 2001. We have 4 children - 1 boy (the eldest) and 3 girls.

I started my early education in Ayer Tawar and Slim River in Perak, and then continue my upper primary and secondary education at Treacher Methodist Girls School and King Edward V11 Secondary School in Taiping. I graduated from University of Malaya with an upper honours degree in Arts in 1973.

2. We understand that you began your career with the LHDNM. Is that true? When did you join the LHDNM?

I joined the Department of Inland Revenue (IRD) as it known then on 9th March 1973 as an Attachment Officer and subsequently was appointed on 2nd April, 1973. With the corporatisation of Inland Revenue Department (IRD) in 1996, I retired from the IRD and joined the Lembaga Hasil Dalam Negeri Malaysia (LHDNM) in 1996.

Part II - Your plans and vision for LHDNM and the tax environment in Malaysia.

3. Comparing the LHDNM now and a decade ago (or when you first started) what are the significant changes? What would you see as the main challenges ahead?

One significant change is definitely in the area of customer service. I remember in the 1970s and 1980s, our approach to the taxpayer was to emphasise the law. We were seen as unfriendly and authoritative in dealing with taxpayers problems. In those days, if some one mentioned an organisation being "public enemy number one", immediately the response would be the tax department. However this was not only common in Malaysia but tax jurisdictions elsewhere, too. Then in early 1990s the government implemented Total Quality Management (TQM) service – wide and there was a clear paradigm shift to customer focus. The emphasis was to look at customers needs instead of just looking into the needs of the organisation. We embarked on various taxpayer education programmes and improved taxpayer service by introducing one stop counters and

creating an awareness among the public on their responsibilities as taxpayers, educating them on how tax collected is spent i.e. for development and maintainence of public facilities such as hospitals, schools, defence, public safety and security and many others, and how these benefits go back to them.

The other notable change is in the work processes wherein we moved from manual operations to computerisation. When I first joined IRD, one of our duties was to manually write the names and addresses of taxpayers on thousands of tax return forms for the general issue, then fold, enclose and seal them in self-addressed envelopes before they were posted. This exercise generally took the whole month. With computerisation, names and addresses on return forms are all computer generated and enclosure of the forms in envelopes mechanised. Now they are digitally printed. Since the early years of computerisation when we computerised our manual functions, we have since moved and advanced to IT-enabled processes with the implementation of INTACTSG and now STS.

I see our main challenges ahead being to continue our record breaking revenue collection, to educate businessmen on the importance of keeping and maintaining proper records of their businesses for purposes of audit, to motivate voluntary compliance in true reporting of income and expenditure and paying the due tax and to reverse any negative perception the public may have about our officers and the way we conduct our tax audit and investigation.

4. What are the major revamps/changes you have brought or intend to bring to the administration/policy aspects of the LHDNM in the next 2 years?

There are policy changes that have brought about desired results and those that have the opposite effect. A case in point is the recent recruitment exercise for executive officers (previously assessment officers) whereby the new policy requires trainees to undergo a 6-months intensive course at a fixed allowance. This new recruitment policy did not bring about the desired results of attracting qualified as well as working accountants and auditors into LHDNM. At the same time anomalies and issues began to surface from the training programme. After engaging in discussions with both the technical and non technical departments, we have reviewed both the recruitment and training policies to align with the needs and requirements of the whole organisation. This is but one such change I have done. There are some others, and however unpleasa nt the task is, they have to be reviewed or adjusted taking into account our core activity and mission statement and also with the view of maintaining unity and industrial harmony within the organisation.

I have always had pride in the integrity of the organisation and I am concerned over the negative perception the public has of LHDNM officers of late. Without prejudice, how do I know that names of LHDNM officers are not being conveniently used by irresponsible people to take advantage of our current system of taxation. For this reason, I hope to introduce a mechanism whereby the public can report of any wrongdoing or unprofessional or even unethical conduct of LHDNM officers and staff so that appropriate action can be taken against them. This also applies to wrongdoing or unethical conduct of tax agents, whereby LHDNM will have no hesitation to recommend to the Minister of Finance to revoke their Section 153 licences.

Again, arising from the misconception that LHDNM officers are burdening taxpayers, plans are underway to upgrade and increase professionalism at all levels of officers so that technical issues are dealt with professionally before taxpayers are requested to proceed further with their objections. Eventually, my mission is to see that LHDNM officers are recognised and respected for their decisions and to restore public faith and confidence in the tax administration.

5. The current mindset of some taxpayers is that "tax is a burden". How do you plan to change the mindset of the taxpayers and what are the initiatives taken by the LHDNM to overcome this issue?

No matter how you look at it, taxpayers will always look at tax as a burden. However the pinch is a lot less if public is constantly made aware that the tax monies collected goes back to them and their future generations through the provision of better public amenities. Tax education programmes are on-going, but our approach now will be more proactive. LHDNM will approach trade organisations and similar bodies and conduct talks at times and places most convenient to their members, rather than calling them over to the LHDNM officers at appointed dates.

Also, apart from branches in all states, our outreach programmes include the setting up of Revenue Service Centres in smaller towns to provide service and education, both in stamp duty and income tax, to taxpayers.

6. In your opinion, what is the role of MIT in the tax profession? How could MIT play a more proactive role to assist LHDNM?

I consider MIT as our partner in educating taxpayers on the requirements of the tax laws. It is also imperative that taxpayers are given proper understanding of the objective of tax audit and investigation to negate any perceived notion of wrongdoing by LHDNM officers.

I would also like to see MIT play a more aggressive role in promoting e-filing to their clients and their staff. With improvements to the e-filing system, taxpayers need not go to LHDNM offices next year to register their digital signature. They can now access the e-filing system at the website anywhere using the access pin number provided in the return forms which will still be issued to taxpayers (except to those who e-filed last year). As such, MIT members are greatly encouraged to install PCs at their offices to assist their clients and staff to e-file.

7. In the long term, what are your plans and aspirations for the longer time frame in terms of the LHDNM, taxpayer and tax agents?

Being an important revenue collecting agency for the government, I hope to see that LHDNM continues to be an efficient and effective organisation. To do this, I am looking into a 2-pronged plan, i.e. to continuously improve our service to taxpayers and to create value for our officers so that they are recognised and respected for their professionalism. In terms of service delivery, I will continue to give priority to the development and enhancement of our IT systems. The two areas I am seriously looking into is the enhancement of our e-filing system to generate refunds instantly on the current assessment and e-stamping.

As taxpayers are generally aware, LHDNM had introduced e-filing in 2006 to enable taxpayers to file their return forms electronically with the objective of making filing of returns easier, faster and more accurate. The concept of electronic filing of tax returns was also introduced to reduce the highly laborious process of data entry. The e-filing system has now been successfully integrated into our new Self Assessment system for individuals. I am confident that taxpayers who file in electronically through the e-filing system in 2007 will be assured of a faster refund as the information in the e-return is immediately accessible to our officers for processing. Improvements have also been made

to the current e-filing system, after taking note of comments and suggestions from the public, and filing requirements made easier with certain pre-populated data of the taxpayer. We hope to proceed to the next stage of enhancement. It is time that LHDNM takes the bold step to start a system of real time refunds, by phases, given the complexity of the system of assessments, additional assessments and reduced assessments which have to be taken into account before a refund can be issued. Thus, real time refunds will be feasible for clear-cut cases where adjustment to assessments need not be taken into account.

E-stamping entails a major overhaul of the present system and a study on some of the best practices in other tax jurisdictions will be underway. Presently, LHDNM has developed in-house the STPH system which is widely used now by the legal profession for stamping of documents in the transfer of property transactions. The system is interfaced with that of the Department of Property Valuation and assists in expediting the process of valuation.

These are but two of the projects that I am looking into immediately to improve our service delivery system to taxpayers.

My second mission and vision is to see that LHDNM is highly recognised not only as an effective revenue collecting agency but also as a highly respected professional organisation. Tax laws are known not only to the layman but also to the legal profession as one of the most complex laws of the land. Being directly involved in the administration of tax laws, LHDNM officers must therefore exhibit the professionalism they have been trained for, as they are the first level of officers to interpret and explain the law to the taxpayers. Therefore plans and strategies are being implemented to continuously strengthen our technical capabilities so that our officers display the professionalism expected of them.

Tax agents must play a more responsible role of educating taxpayers in complying the tax laws and assist LHDNM in emphasising the maintenance of proper records and accounts, adherence to rulings issued by LHDNM, and correct reporting of incomes and expenditure. This will greatly help in facilitating audit review and avoid being penalised for non compliance. If every tax agent plays his/her role in disseminating proper and correct advice and abide by the tax agents code of ethics, then taxpayers are not induced or encouraged to underreport their income.

As is the vision of every tax authority, we would like to see every liable individual and corporate citizen comply and pay their due tax. As Malaysia moves forward towards developed status nation by 2020, we hope that every Malaysian will be fully aware of his/her responsibility as a taxpayer and his/her contribution/share to nation building through the taxes they pay.

Part III - Personal Tidbits

8. Describe the most memorable incidence of your career in LHDNM.

Being appointed the Chief Executive Officer and the Director General of LHDNM is my most memorable incidence in my career at LHDNM. I am grateful and wish to place on record my sincere thanks to the Government of Malaysia for giving me the trust to manage such an important organisation.

9. Describe the least memorable incidence of your career in LHDNM.

My least memorable incidence in my career occurred when during one restructuring exercise of

LHDNM, I suddenly found myself no longer a Deputy Director General as the post no longer existed on the organisation chart. Despite that, I still enjoy my work and never for a moment regretted joining the Income Tax Department.

10. What are your favourite past times and what do you do away from office to relieve stress?

I enjoy listening to music and reading, when not watching my favourite TV programme, CSI. I have never felt really stressful to the point that I need to relieve the stress. Perhaps commitments at home takes away the stress in the office. Occasionally, I would take a few days off to rest but end up doing some errand or other.

There was, however, one stressful moment back in the mid 1980s, when I was transferred to head the petroleum upstream division. Without any practical exposure to corporate assessment, there were quarters who were concerned if I could manage the division, being one of the major contributors to revenue, as well as handle international players. But I persevered, its all a question of learning the new job and the determination to prove that nothing is insurmountable. That experience, to say the least, has further built up my confidence to meet other challenges with less stress.

11. Whom do you consider as your role model or idol?

I do not have any person in particular but I have always looked up to successful women who have the substance and confidence to hold themselves up in public.

12. How do you divide your busy schedule between career and family? How does your family respond to your busy schedule?

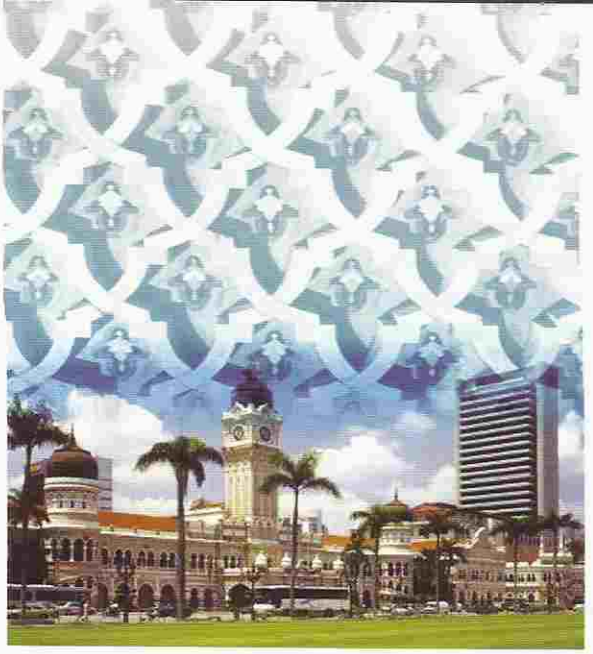
If you are referring to my present schedule as CEO/DG, the last 2 months had been hectic as I was practically away from home most of the weekdays and weekends due to the year-end program of family days and annual dinners in many branches. As the new CEO/DG, I took this opportunity to meet my officers and staff at the branches and to inform them of my mission and expectations. My family is fully aware of my new responsibilities and have accepted my position, even involving my husband in a number of official functions.

13. In your illustrious career, whom do you consider to be the person who has been supportive and the driving force behind your success?

My family, i.e. my husband and children. They have been very supportive through thick and thin and during the low period in my career. It was at their insistence and that of some close friends who encouraged me to stay on with LHDNM despite all odds.

Acknowledgement

MIT and Tax Nasional wish to record their gratitute to Puan Hasmah bt Abdullah, CEO/DG of LHDNM for taking the time to respond to us. We also thank her special officer Puan Norfaizah for liasing with MIT.



Tax Incentives for International Islamic Financial Institutions

Mr Baldev Singh* and Ms Lynette Ng**

The changing Islamic financial landscape

The Malaysian financial landscape is gradually changing with the participation of new international players. Foreign equity participation in Islamic subsidiaries, takaful operators and investment banks has been liberalized to 49%. The liberalization of the financial sector is consistent with the objective of the Financial Sector Masterplan in creating a robust and forward-looking financial system to support and contribute positively to the growth of the Malaysian economy in an increasingly seamless and borderless world.

Over the last year or so, Bank Negara Malaysia (BNM) has issued three new Islamic banking licences to international financial institutions to operate in Malaysia. In the takaful sector, four new takaful licences have been granted to takaful operators in January, 2006.

It is obvious from the participation of new international players that Malaysia is gaining recognition globally for being an international Islamic financial centre.

Malaysia International Financial Centre (MIFC)

Aside from the liberalization measures, the Government has launched the Malaysia International Islamic Financial Centre at the Malaysian Islamic Finance Issuers and Investors Forum 2006 held in August 2006.

The MIFC is a collaboration between the financial and market regulators, including Bank Negara Malaysia, Securities Commission, Labuan Offshore Financial Services Authority (LOFSA) and Bursa Malaysia and industry players representing banking, takaful and the capital markets in Malaysia. The MIFC reflects the Government's commitment to strengthen Malaysia's position as an international Islamic financial hub.

The MIFC will entail the following:-

1. Malaysian Islamic banks and takaful operators that are offering Islamic financialservices will be given an approval under their existing licences to set up an International Currency Business Units within these institutions.

2. BNM will issue new conditional licences under the Islamic Banking Act to foreign and local financial institutions to conduct a full range of Islamic banking business in international currencies. These new entities will be referred to as licenced International Islamic banks.
3. BNM will issue new conditional registrations under the Takaful Act to foreign and local insurance companies to conduct a full range of takaful business in international currencies.

4. The Labuan offshore Islamic banks and Islamic divisions of the offshore banks and takaful operators will be allowed to open operational offices anywhere in Malaysia with no restrictions on staffing.

5. There will be incentives to attract the best foreign talents and market players to MIFC to encourage innovation and development of Islamic financial instruments. These incentives are also aimed towards the development of the existing talent pool in Malaysia. It is expected that further incentives will be announced to develop Malaysia as a centre of education in Islamic finance to complement the MIFC.

6. An Executive MIFC Committee consisting of the heads of the relevant Ministries, agencies and industry representatives has been set up to co-ordinate and implement recommendations. This Committee will provide direction, review existing policies and align the roles of Government agencies and the industry to promote and develop MIFC. BNM will play the role of the secretariat whereby it will act on behalf of the Committee as a one-stop body to achieve its goals.

The Exchange Control Notices (ECM) issued by BNM provide guidance on foreign currency transactions. Broadly, restrictions apply to resident companies and individuals (as defined under the ECM) in their ability to borrow and maintain foreign currency accounts. In this regard, licenced banks are restricted in their ability to *inter alia*, lend and take deposits in foreign currency from residents to those permitted under the ECMs unless approval from BNM is sought. In the case of Labuan offshore entities, the restrictions in foreign currencies are more relaxed. For example, Labuan offshore banks may conduct a wider range of transactions in foreign currencies, including being able to extend foreign currency credit facilities of any amount to both residents and non-residents.

Following on from the MIFC initiative, Islamic financial products and services that are transacted in international business currencies can now be conducted from anywhere in Malaysia rather than conducted through Labuan offshore. This would be a significant relaxation from the exchange control restrictions that currently apply to foreign currency transactions.

BNM has released the guidelines on the establishment of International Islamic Bank (IIB), International *Takaful* Operator, International Currency Business Unit of an Islamic Bank (ICBU) and *Takaful* Operator in September, 2006. The prompt release of guidelines shows that the Government is committed to spur the growth of Islamic financing in Malaysia.

In line with the MIFC, the Budget 2007 has proposed tax incentives for the Islamic banking and takaful industries. These incentives are positive measures which are welcomed by the banking and takaful industries and demonstrate that the Government is committed to provide a holistic approach to spearhead the MIFC initiative.

This article looks at the tax incentives announced the recent Budget for the Islamic banking sector andthe some of the pertinent factors to be considered to ensure that investors would fully benefit from the incentives announced.

Tax incentives

In the recent Budget, the Government has proposed tax exemptions for the banking and takaful sectors which are as follows:-

1. Islamic banks and Islamic banking units licenced under the Islamic Banking Act on income derived from Islamic banking business conducted in international currencies including transactions with Malaysian residents; and

2. *Takaful* companies and takaful units licenced under the *Takaful* Act on income derived from takaful business conducted in international currencies including transactions with Malaysian residents.

The above tax exemption will be for a period of 10 years, and is proposed to be effective from the years of assessment 2007 to 2016.

Under Section 127 of the Income Tax Act, the Minister of Finance is empowered to provide tax exemption by way of a statutory order. At this juncture, the legislation for the tax exemption for Islamic banks or Islamic banking units carrying out business in international currencies has not been released. It may be likely that the tax exemption be gazetted by way of a statutory order within the powers of the Minister under Section 127 of the Income Tax Act.

Considerations

By way of background, an Islamic bank which is licenced under the Islamic Banking Act would be eligible to establish an ICBU to carry out a wide range of Islamic banking business with non-residents in international currencies. In the case of an IIB, it is allowed to deal in international currencies, take deposits, provide financing facilities, provide investment banking services and invest in securities and properties. Based on the above guidelines issued by BNM, an IIB will primarily conduct its business in international currencies with certain permissible transactions to be conducted in Ringgit.

Prime facie, tax exemptions seem easy to administer. However, there are considerations to be taken into account from a practical perspective so that the IIBs or ICBUs of Islamic banks would fully benefit from the tax exemption. To the extent that an IIB would primarily conduct transactions in international currencies, the issues below may not be that pronounced as compared to ICBUs within existing Islamic banks.

Where the Islamic banks carry on business in local and international currencies through ICBUs, the more pertinent issues would be as follows:-

1. Banking business conducted in international currencies

   Under the guidelines issued by BNM on the establishment of ICBU of Islamic banks, the scope of Islamic banking business in international currencies includes –

   a. Commercial banking business;
   b. Investment banking business; and
   c. Other banking businesses in Malaysia, as may be specified by BNM.

   Based on the above, there is a wide range of banking businesses that may be carried out by the ICBUs of Islamic banks.

   As the Islamic banks would carry out businesses in both local and international currencies, there will be a need for the legislative framework to clearly define the scope of "banking business conducted in international currencies." This would be key in ascertaining the type of income of the taxpayer that would be exempt.

   At this juncture, plain vanilla financial transactions such as banking transactions in local currency, the provision of loans in local currency and the exchange of local currency for international currencies would not be exempt.

   However, financial transactions and products evolve over time to meet to the changing needs of the population. Therefore, the challenge would be for a clear legislation that would cater

for the innovation of financial transactions and products over time. As mentioned above, the innovation and development of Islamic financial products is one of the objectives of the MIFC.

Where there is no clear legislation and/ or guidelines on the above, there would be room for contention which may lead to long drawn disputes with the tax authorities.

2. Common expenses and assets

The ICBUs of Islamic banks would likely share common resources and assets with business activities of the Islamic banks carried out in local currencies. This leads to the issue of allocation of common expenses and capital allowances to the businesses carried out in local and international currencies. Cost of funds, salaries, administrative type expenses and capital allowances arising from common IT systems and fixed assets need to be attributed accordingly to arrive at income which is exempt.

Attribution may be complicated where the ICBU carries out leasing business (under the *Al-Ijarah* principle) in international currencies, which the Islamic bank may also be conducting in local currency. For tax purposes, leasing business is treated as a separate business source. Where an Islamic bank carries out leasing business in local and international currencies (through its ICBU) and other banking businesses in local and international currencies, the Islamic bank would have attribute common expenses and capital allowances to each of these businesses in order to ascertain the income that would be exempt.

It would appear that the more diversified the business that can be carried by the ICBUs, the more difficult it would be to find an appropriate basis of allocation of common expenses and capital allowances. As we have seen in the past, taxpayers in the leasing business have lead to disputes with the tax authorities over the allocation of common expenses. This has added to the cost of doing business, as taxpayers have had to pay taxes upfront pending resolution of the issue at court. Therefore, with the benefit of hindsight, issues relating to allocation of common expenses and capital allowances should be ironed out at the time when legislative framework is drafted. These issues should not hinder the growth of the Islamic banking sector.

3. Losses and capital allowances

The legislative framework for the above exemption should address loss situations. If the business in international currencies were in a loss, could such losses be utilized to offset income from the other business, and vice versa? In addition, would the losses be entitled to be carried forward to offset future income of the bank after the expiry of the 10-year period?

In the case where there are unutilized capital allowances due to the absence or insufficient adjusted income from one business, could the unutilized capital allowances be utilized to offset adjusted income from the other business (given that both businesses are of the same source)?

4. Repatriation of profits

The exempt income derived by the Islamic banks or ICBU may be distributed to shareholders tax-free if the legislative framework provides for it. Perhaps, the exempt income could be distributed by the IIB or Islamic bank to its shareholders as tax-exempt dividends.

Strictly, based on the above proposals, the Islamic unit of a bank licenced under the Banking and Financial Institutions Act 1989 (BAFIA), would not qualify for the above exemption even if it

carried on business in international currencies. Therefore, banks licenced under BAFIA would have to set up a new bank to carry out Islamic business in international currencies if they wish to enjoy the tax exemption. Under the BNM's guidelines for IIB, an IIB may an incorporated entity or a branch. In the case of an incorporated entity, it would require a minimum paid up capital of RM10 million and in the case of a branch, it would require a minimum net working fund of RM10 million. Although the above issues may not be so pronounced compared to an Islamic bank with an ICBU, a well-thought out tax framework could boost investor's confidence in Malaysia.

Perhaps, the authorities could invite participation from the industry to iron out issues when drafting a legislative framework for the above proposals. The consultation process should commence early so that a clear legislative framework could be released expeditiously. Early release of a clear legislative framework would enable investors to plan ahead as setting up an ICBU or IIB would involve additional costs and capital. In addition, the investor would be able to enjoy the entire 10-year exemption period.

There is an uphill task that lies ahead for the authorities. The challenge would be for the authorities to come up with a clear and administratively simple legislative framework within a short span of time and simultaneously, ensure that the framework achieves the Government's intention of spurring the growth of the Islamic banking in Malaysia.

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The article reflects the personal views of the authors and does not represent the views of the industry. We welcome feedback from the readers (**lynetteng@hsbc.com.my**).

Taxation and the Concept of *Fiscal Space*

Dr Jeyapalan Kasipillai* & Ms Payal H Bhatt**

Introduction

Tax is an important source of national revenue raised through fiscal means. It has been duly acknowledged that taxation is a significant tool used for the mobilisation of domestic resources. However, well-defined tax policies alone cannot raise the desired tax to be collected for development and social needs of the country. The existence of an efficient and effective tax administration to implement the envisaged tax policies is equally vital. There is always a need for ways to bolster the tax base as well as strengthen the tax machinery and hence the need for greater "fiscal space".

Concept of "*fiscal space*"

The concept of "*fiscal space*" is often used in current policy debates but without clarity to its actual meaning. According to Heller (2004), "*fiscal space*" is defined as the availability of budgetary room that allows a Government to provide resources for a desired aim without undermining the sustainability of its financial position or the stability of the economy. This definition suggests the Government's desire and ability to carry out specific projects such as constructing a causeway or building a highway but the availability of "*fiscal space*" could lower the tax burden of the larger tax-paying community. Calderon and Serven (2003) support the view that the provision of infrastructure may strongly enhance the returns to private investment, both in terms of growth and subsequently enhance poverty reduction

Studies on the manner in which to create additional "*fiscal space*" can commence from a taxation policy that focuses on the rationalisation of the tax regime to remove distortions in the economy thereby improving revenue collection. Fiscal space can be created by achieving efficiency gains in the manner in which expenditure programs are implemented effectively. Important aspects that need to be mentioned even emphasised are policies that lower corruption and improve governance which indirectly creates fiscal space.

One other aspect of expenditure policy decisions affecting fiscal space relates to the spending pattern. For example, not setting aside an adequate amount for sectors such as health care and education may be detrimental in the long run as it may be time consuming and costly to overcome weaknesses plaguing these particular sectors.

Sourcing "fiscal space"

According to Pradhan (2006), a Government has four options for sourcing new "*fiscal space*", *namely, (i) generating more revenue, (ii)* seeking extra aid, (iii) expenditure rationalisation and (iv) additional borrowing (see Figure 1).

From an analytical point of view, sourcing new "*fiscal space*" opportunities would vary from one country to another and there are no tailored-made rules to implement them. The underlying structure of the economy is an important factor, productivity patterns are vital and existing level of external borrowings is a significant determinant. Sourcing external borrowing is an option and has its limitations. A prudent approach would be to mobilise domestic funds by using taxation as a tool, encourage savings and implement practical investment decisions. In ensuring fiscal sustainability, it is important to consider issues of prompt debt repayment as well as exposure to fiscal risks such as maintaining Government guarantee.

Government's borrowing from the banking system should be driven by monetary policy objectives, namely, creation of sufficient liquidity to support an economy's actual growth and even if Government relies on money creation to facilitate higher government expenditure, there are clear limits,given the possible inflationary fear.

The desired level of tax that needs to be collected as a proportion to the nation's gross domestic income is unclear. Existing studies on fiscal theories provide little clue on how to determine the optimal level of tax that is to be collected (Tanzi (1992); Tait and Eichengreen (1978).

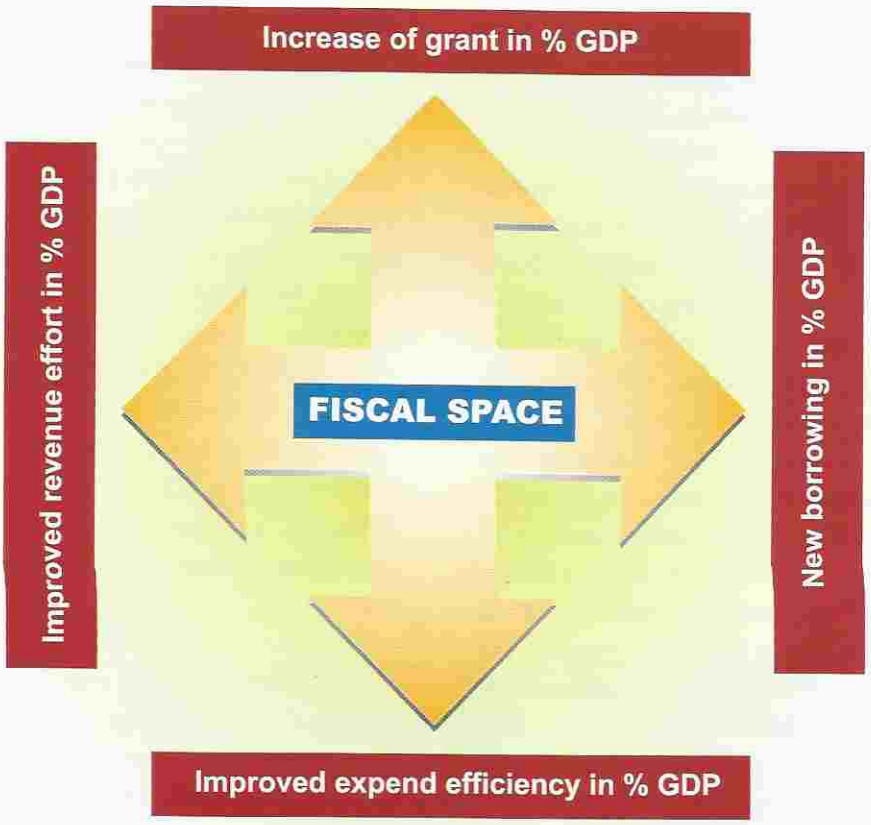


Figure 1

Source: Pradhan (2006) (Adapted)

Global overview

In a study conducted by Rachel Gesami (2006), the researcher addressed how much extra fiscal space there might be to source extra revenue in African countries such as Malawi, Tanzania and Zambia. In her study, she found Tanzania to have room for higher taxes since **tax-GDP** ratio is relatively low when compared to the other two African countries. The **tax-GDP** ratios are relatively high by regional standards in Malawi and Zambia. Tanzania can, therefore, reprioritize spending but Malawi and Zambia would be embarrassed to do so due to their high share of wages and interest payments. Available data also suggest that taxes account for over 75% of Government revenue in countries such as Fiji, Philippines, Sri Lanka and Thailand. However, in Singapore and Myanmar taxes account for less than 50% of Government revenue. During the last two decades the share of direct taxes in proportion to total revenue in Asian countries is reasonably high: for example, in Indonesia the figure is (60%), Philippines (48%), Singapore (54%) and Malaysia (75%). In Malaysia tax revenue is expected to contribute 72.8 % (RM87.9 billion) of the total revenue generated in 2006. Furthermore, by the end of 2006, both the Federal Government and the national debt as a percentage to Gross Domestic Product are projected at 44.6% and 35.2% respectively (Economic Report 2006/07).

Types of Taxes

In the early stages of development, indirect taxes were a traditional source of revenue to most countries (Musgrave, 1987). However, the significance of customs duties as a proportion to total tax revenue has declined in almost all countries in recent decades. Governments encourage export so '*export duties*' have been lowered or even greatly eliminated in some countries. Regional treaties such as ASEAN Free Trade Area (AFTA) and arrangements fostered under the World Trade Agreement have compelled nations to scale down import duties.

Many emerging taxes have, hence, demonstrated a need to expand revenue through non-trade taxes such as income taxes and more importantly Good and Services Tax (GST).

The generic term 'GST' covers a set of broad-based *ad-valorem* taxes that share two common features, namely the tax is collected at every stage of the production process, and the amount collected at each stage is based on the value added at that stage. Despite a GST being a multiple stage household consumption tax, ultimately its base is similar to that of a single stage sales tax. While sales tax is a single stage collected from those businesses selling directly to household final consumers, a GST is a multi-stage sales tax collected from all businesses in such a manner that any purchases embedded with GST entitles the purchasing businesses to a credit for this GST against the GST on their outputs. As a result, for each business, the GST is effectively collected on the value added at each stage in the production and distribution process–which explains why the GST in most countries is called a Value Added Tax. A comprehensive GST maximizes economic efficiency and minimizes compliance and administrative costs for the Government (Pope, 1999).

Most Governments' also seek new sources of revenues that are badly needed for building infrastructure and undertaking investment opportunities. In this regard, Governments started participating in economic activities involving production of goods and services by managing public enterprises. Some examples of public enterprises are national railways, electricity and water boards as well as telecommunications which later became corporatized bodies. In Malaysia, these enterprises are often referred to as Government Linked Companies (GLCs). Profits of public enterprises that were incorporated were a source of government revenue.

Governments too started to collect royalty payments from firms for the right to extract oil and gas or to exploit other minerals; collect

charges such as driving licence fees, passport fees and licensing fees. Essentially, the receipts from all these sources form the Federal Government's revenue and the income can be classified as direct taxes, indirect taxes and non-tax revenue.

Sources of Revenue for Malaysia

Tax revenue (including non-tax revenue) will undoubtedly continue to be the main source of income for the Government of Malaysia as the country experiences rapid economic growth (Kasipillai, 2006). In 2005, 45.5% of the federal government revenue was from direct taxes and the remainder was from indirect taxes (26.3%) and non-tax revenue (28.2%) (see Table 1/Chart 2). Examples of non-tax revenues include investment income, licenses, permits, registration fees, service fees, petroleum royalties and gas payments. It also includes proceeds from sale of goods, rentals, interest and returns on investments locally and from foreign countries, fines and forfeitures and contributions as well as compensations from foreign Governments and international agencies.

Proceeds and returns from sales of goods are receipts from physical assets owned by the Government including land, buildings, store facilities and miscellaneous goods for the public. Interest income and returns on investments include those earned on Government investment in bonds , stock, or on loans by the Government, bank interest, profits from the sale of Government bonds and net profits of Bank Negara and royalty derived from petroleum and gas.

In 2007, the proportion of taxes to be collected

Table 1
Federal Tax Revenue (2005)

Sources of Revenue	RM (Million)
Direct Taxes	45,100
Indirect Taxes	26,042
Non Tax Revenue	27,888
Total Revenue	**99,030**

Source : IRB sources

Chart 1

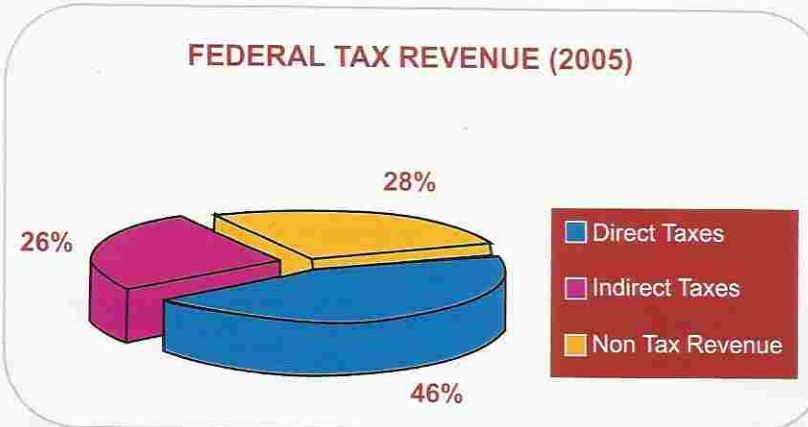
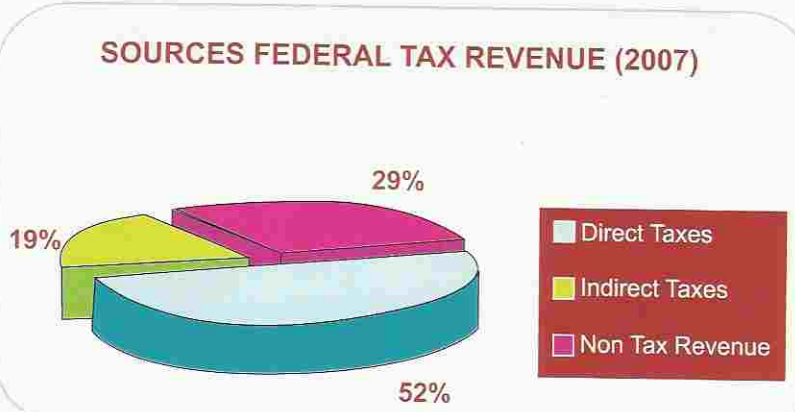


Table 2
Sources of Federal Tax Revenue (2007)

Sources of Revenue	RM (Million)
Direct Taxes	70,116
Indirect Taxes	25,678
Non Tax Revenue	39,021
Total Revenue	**134,815**

Source : Economic Report

Chart 2

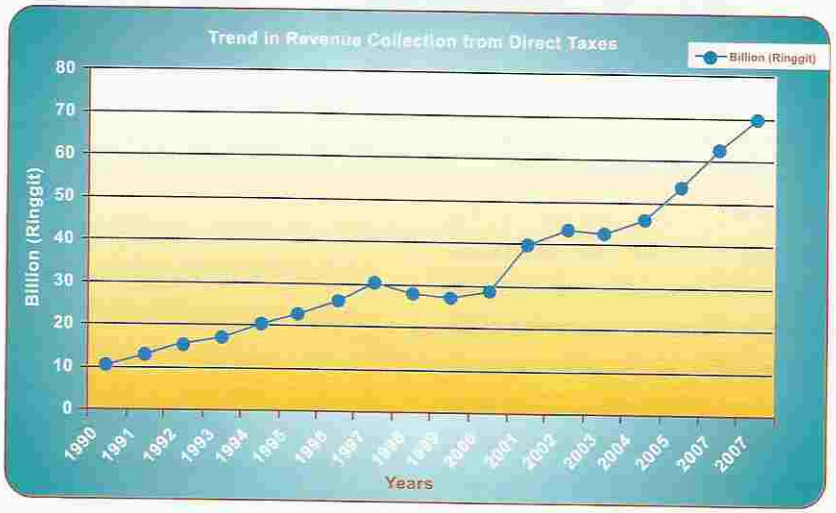


is expected to be in favour of direct taxes (52%) and the remainder would be from indirect taxes (19%) and non-tax revenue (29%) (see Table 2/Chart 2).

Direct taxes collected in 2005 comprised of corporate taxes (47.1%), personal income taxes (19.5%), petroleum income taxes (25%), and other direct taxes (8.4%) (See Chart).

Direct taxes, in nominal values, collected in 2005 amounted to RM45.1 billion compared to RM46.4 billion in 2004, a marginal decrease of 2.9% (Chart 3).

Chart 3



Source: Economic Reports (1990 to 2006/7) and miscellaneous sources.
*Direct taxes includes other income such as stamp duty and real property gains tax.

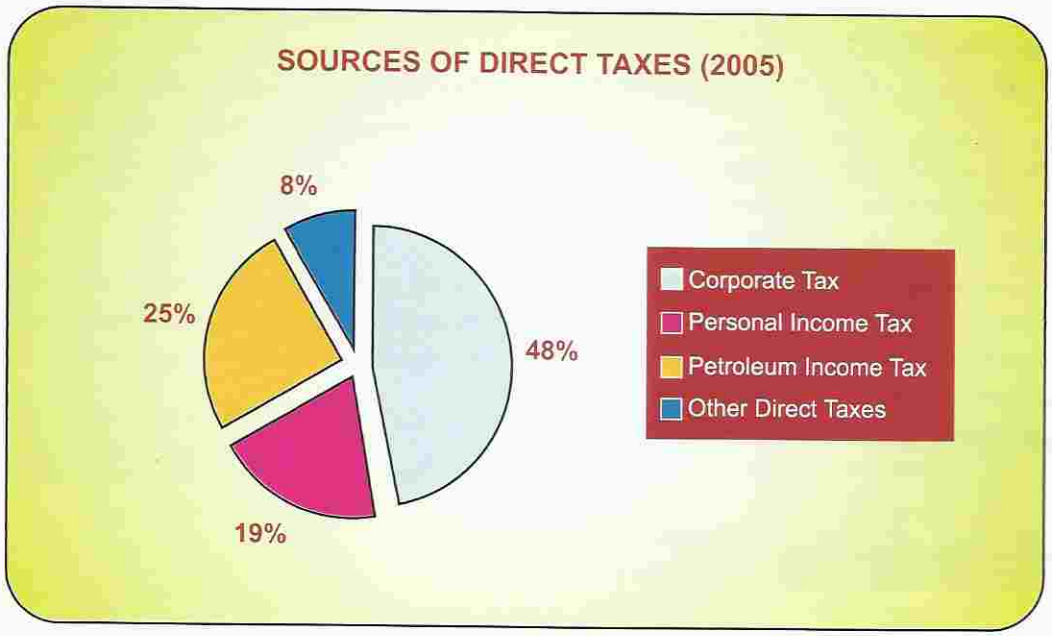
The figures for 2006/07 are estimated figures.

Such figures show again the importance of direct taxes to the Government. Moreover, personal income tax produces much more than other direct taxes except, of course, corporate taxes. Personal income tax in Malaysia is imposed on individuals employed in their personal capacities, and on individuals operating business as sole-proprietors or as partners in any partnership. Under the ITA, income that is subject to tax not only includes business and employment income but other income such as rent, dividends, interest and royalties.

(i) the scope for increased public saving through tax reform as well as expenditure rationalization; and

(ii) The additional resources that can be mobilized from borrowings and receiving grants is consistent with maintaining macroeconomic stability and debt sustainability. Broadly speaking, these two spheres ascertain the true measure of potentially available fiscal space.

Chart 4



Source: IRB Sources

Conclusion

Fiscal space is seen as the availability of budgetary scope allowing a Government to provide resources for a specific aim without any prejudice to the sustainability of a nation's financial position.

The challenge of determining whether aGovernment has scope to raise additional resources for prudent spending is one that has confronted the International Monetary Fund for numerous years. An important aim of the IMF's work on fiscal policy is two fold;

Economists argue that public spending has a vital role in encouraging economic growth, however, it is the quality rather than the quantity of spending that is a significant determining factor. One point that is to be emphasised even stressed is the removal of waste from the Government's annual budget and tackling corruption in Government procurement which can assist to create venue for more *fiscal space*. This argument is well supported by Hurley (2006) in his paper on '*Fiscal space* and national development strategies" prepared for the US Treasury Department.

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Real Estate Investment Trusts (REITs) Part II Malaysia: Tax Aspects

Dr Veerinderjeet Singh* & Ms Renuka Bhupalan**

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5. CONCLUSION

1.Introduction

The concept of a property trust fund (PTF) was introduced in Malaysia in the 1990s, following the start of the unit trust industry. The legal framework of PTFs was unclear, and in 2002, the Securities Commission (SC) published a set of guidelines for PTFs. However, the PTF industry was slow to grow and, until recently, there were only three PTFs in Malaysia. The slow pace of growth was partly due to the lack of any special tax concessions for PTFs.

However, the last three years have seen a significant revival in this sector, with the introduction of the real estate investment trust (REIT) and tax concessions to spur its development. The issuance of new guidelines by the SC in January 2005 on the structure and operation of REITs, as well as guidelines by the Inland Revenue Board in June 2005 on the tax treatment of REITs, have also provided a regulatory framework for REITs. Additionally, the SC, working with its Syariah Advisory Council, issued guidelines earlier this year on Islamic REITs (I REITS).

The recent 2007 Budget proposals have relaxed the REITs tax rules further. As to whether the tax incentives with respect to REITs are sufficient to spur the competitiveness of the Malaysian REITs industry vis a vis that of REITs in Singapore is questionable.

Substantial interest in the local REITs industry has been generated primarily by several prominent Malaysian groups of companies with significant real estate assets looking to unlock the value of these assets. Axis REIT became the first REIT to be listed (on 3 August 2005) on the main board of Bursa Malaysia since the new guidelines were issued by the SC. Thereafter, several other REITs have been listed, including the Starhill REIT, the Tower Estate REIT and the UOA REIT. In addition, the first Islamic REIT in the country, the *Al Aqar* KPJ REIT was launched recently. There are a few more applications currently with the SC.

The SC is responsible for all regulatory matters affecting the unit trust industry, which encompasses both REITs (including I-REITS) and PTFs (collectively referred to as REITs). The authority of the SC is granted by the Securities Commission Act 1993, pursuant to

which the SC issued the "Guidelines on Real Estate Investment Trusts" ("the Guidelines") in January 2005, to regulate the REITs industry. The Guidelines, which supersede the 2002 PTF guidelines, are fairly comprehensive and provide regulations concerning the structure and operation of a REIT, including regulations with respect to the following:

- *the management company;*
- *the trustee;*
- *offering of units, including public offerings and listing on Bursa Malaysia;*
- *pricing and dealings;*
- *permitted investments;*
- *valuation;*
- *permitted fees and expenses of a REIT;*
- *reporting and auditing requirements; and requirement for meetings.*

The Malaysian Government does appear to be aggressively promoting the REIT industry. Nevertheless, as pointed out later in the article, there are a few areas that may need to be addressed if the Malaysian market is to be competitive with certain other markets in the region.

2. Key Features of a REIT

2.1. What is a REIT?

At the outset, it would be useful to understand what a REIT is in the Malaysian context. REITs are structured as unit trusts. The Guidelines define a REIT as "an investment vehicle that invests or proposes to invest at least 50% of its total assets in real estate". The definition of a REIT further clarifies that "an investment in real estate may be by way of direct ownership or a shareholding in a single-purpose company whose principal assets comprise real estate".

An I-REIT is a REIT which invests in real estate, where the tenants operate activities in accordance with *Syariah* principles.

Currently, there are eight REITs (including one I-REIT) in Malaysia which hold investments in a wide range of real property including shopping malls, commercial complexes, office buildings, hotels, hospitals, etc. REITS in Malaysia are primarily equity-based at present, although it is expected that there is scope in the future for hybrids combining equity and mortgage REITs, i.e. the REIT would invest in both real property and mortgages, subject to the Guidelines.

In order to obtain listing status, a REIT is required to comply with the listing requirements with respect to unit spreads, continuing obligations, disclosure requirements, etc. Further, at least 25% of the units in a listed REIT must be held by public unitholders.

2.2. Minimum size

The initial minimum size of a REIT is set at RM 100 million while the size of ensuing funds is set at RM 25 million.

2.3. Management company

A REIT must be managed and administered by a management company (MC) in accordance with the trust deed of the fund. The MC is subject to several regulations, including the following:

- it must be licensed and approved by the SC;
- it must be a subsidiary of one of the following:
  - a financial services company (in this regard, several permutations are permitted in determining whether the MC is a subsidiary of a financial services company);
  - a property development company;
  - a property investment holding company; or
  - any other institution approved by the SC;
- effective Bumiputera equity participation must be at least 30%;
- foreign equity participation cannot exceed 49%;
- shareholders' funds must be at least RM1 million; and
- it must have appropriate human resources, systems and processes, etc. to undertake the business in an efficient manner.

2.4. Trustee

The trustee acts as a custodian of the trust's assets and safeguards the interest of the unit-

holders in return for a fee. The trustee is required to comply with various criteria, including the following:

- it must have a minimum issued and paid-up capital of RM 500,000;
- it must be completely independent of the fund and the MC;
- it must have appropriate human resources, systems and processes, etc.; and
- it must be a trust company registered under appropriate legislation and with the SC.

2.5. Permitted investments

2.5.1 REITs

As prescribed by the Guidelines, a REIT is permitted to invest in the following:

- real estate, i.e. landed property and buildings, etc.;
- single-purpose companies, which are defined as "unlisted companies whose principal assets comprise real estate";
- real estate-related assets, which include "units of other REITs, listed securities of and issued by property companies, listed or unlisted debt securities of and issued by property companies, and mortgage-backed securities";
- liquid assets, i.e. cash and deposits;
- non-real estate-related assets, i.e. listed shares in non- property companies; and
- asset-backed securities.

The requisite percentage ratio of permitted investments depends on whether the REIT is listed or unlisted. The following sets out the rules in this regard:

Listed REITs

At least 50% of the total assets of a listed REIT must be in real estate or single-purpose companies and a further 25% in real estate-related assets or liquid assets. The balance may be invested in other assets (i.e. real estate-related assets, non-real estate-related assets or asset-backed securities).

Unlisted REITs

At least 50% of the total assets of an unlisted REIT must be in real estate or single-purpose companies with a further 20% in real estate-related assets. Of the remaining 30%, 20% must comprise liquid assets and the residual 10% may be invested in other assets (i.e. real estate-related assets, non-real estate-related assets or asset-backed securities).

In a welcome move, REITs are now permitted to invest in foreign real estate related and non-real estate related assets, provided the SC's prior approval is obtained. The approval will depend on the foreign market's regulatory environment and corporate governance rules, the availability and completeness of information in connection with the proposed investment and other factors relevant to safeguarding the interests of investors.

Investments may be funded by debt, subject to a gearing ratio whereby total borrowings of the fund cannot exceed 35% of the fund's total asset value at the time the borrowings are incurred. However, it appears that the ratio does not have to be maintained throughout the term of the borrowing.

2.5.2 I-REITs

As mentioned above, an I-REIT is required to invest in properties, the tenants of which comply with *Syariah* permitted activities. At least 80% of an I-REIT's turnover must be derived from such properties. The remaining 20% of turnover may therefore be derived from rental of buildings in which tenants undertake non-permitted activities. However, notwithstanding the 20% test, an I-REIT is not permitted to own real estate in which all the tenants operate non-permissible activities. Non-permissible activities include the following:

- financial services based on *R'iba*
- gambling/gaming
- manufacture or sale of non-halal products
- conventional insurance
- entertainment activities that are not syariah compliant
- manufacture or sale of tobacco-based products

stock-broking or share trading in non-syariah compliant securities
hotels and resorts

Further, an I-REIT must ensure that all its investments, deposits and financing instruments are Syariah compliant.

3. Taxation

As mentioned above, recent changes to the tax law, namely income tax concessions, together with real property gains tax and stamp duty exemptions, have been instrumental in spurring increased interest in REITs.

3.1. Income tax

3.1.1. Taxation of a REIT

Changes were made to the Income Tax Act, 1967 (ITA) via the Finance Act 2004 (gazetted on 30 December 2004) as a result of which REITs now enjoy income tax concessions. Further changes have been proposed in the 2007 Budget, which are expected to be enacted as law by the end of this year.

Based on the current tax law (section 61A, ITA), a REIT is exempt from tax on income distributed to tax-resident unitholders, provided the distribution is made not later than two months after the close of the REIT's financial year (per the Inland Revenue Board's guidelines of 29 June 2005). Undistributed income is taxed at the corporate tax rate (of 28% for year of assessment 2006). The 2007 Budget proposals have introduced a further concession which provides that where a REIT distributes at least 90% of its total income, the REIT will be exempt from tax. Where a REIT does not meet this 90% distribution test, then the exemption will only apply in respect of the income distributed.

The rental income of a REIT is treated as a business source (rather than a passive source) of income (pursuant to section 63C, ITA). As such, all expenses which meet the test of being wholly and exclusively incurred in the production of rental income are deductible for tax purposes.

However, any expenditure exceeding the rental income of a REIT is disregarded, i.e. losses cannot be carried forward for deduction in subsequent years.This generally differs from the treatment of a business source for all other taxable persons. Similarly, capital allowances (tax depreciation) are claimable by a REIT on any qualifying capital expenditure incurred and used in the rental 'business'. As with the treatment for losses, unutilised capital allowances also cannot be carried forward. (The 2007 Budget proposals do not relax these rules).

REITs are also given a tax deduction for consultancy, legal and valuation services incurred in the course of establishing the REIT pursuant to the Income Tax (Deduction for Establishment Expenditure of Real Estate Investment Trust or Property Trust Fund) Rules 2006.

3.1.2. Taxation of unitholders

The taxation of unit-holders will change following the enactment of the 2007 Budget proposals. The current and proposed treatment is set out below:

Current

Tax-resident unitholders receiving distributions from a REIT will be taxable at their respective income tax rates (i.e. corporate unitholders are currently taxed at 28% while progressive tax rates varying from 0% to 28% apply to resident individuals). In the case of accumulated income that has been subjected to tax on the REIT and is subsequently distributed, unitholders will be entitled to a tax credit.

Distributions to non-resident unitholders will attract a 28% withholding tax (Section 109D, ITA 1967), which has to be paid by the REIT to the Inland Revenue Board (IRB) within one month after the distribution. This is a final tax unless the non-resident has other sources of income from Malaysia for which he is required to file a tax return, in which case the tax withheld is creditable against his final tax liability.

Proposed tax regime for unit-holders

A withholding tax (WHT) regime will be introduced for distributions by REITs as follows with effect from year of assessment 2007:

	WHT Rate
- Non-resident companies	At the prevailing tax rate
- Foreign institutional investors	20% for 5 years
- Non-corporate investors (e.g. individuals including non-resident individuals)	15% for 5 years

Resident companies will not be subject to WHT on distributions from REITs, but will be subject to tax at the prevailing corporate tax rate on the distributions received.

3.2. Real property gains tax (RPGT)

RPGT is a tax imposed on gains arising from the disposal of real property or shares in a real property company (RPC). An exemption from RPGT is available in respect of transfers of property into REITs approved by the SC. The exemption is in respect of "chargeable assets" which would include real property as well as shares in RPCs.

RPGT would previously have been a significant cost for a disposer of such property (with rates ranging from 30% to 5% of the gain, depending on the period of ownership of the property) and was clearly detrimental to the growth of the REIT industry. The RPGT exemption was introduced in 2003 via the RPGT (Exemption) (No. 4) Order 2003 and took effect on 13 September 2003.

3.3. Stamp duty

Stamp duty is a tax imposed on instruments of transfer at a maximum rate of 3% on the higher of the consideration or market value of properties transferred. Stamp duty is imposed on the acquirer. A stamp duty exemption is available on acquisitions of real property by REITs approved by the SC, which again results in significant savings in transaction taxes. This exemption was introduced via the Stamp Duty (Exemption) (No. 4) Order 2004 and took effect on 13 September 2003. Following representations, another exemption order was gazetted i.e. the Stamp Duty (Exemption) (No. 27) Order 2005 which states that all instruments of deed of assignment executed between a REIT or a PTF approved by the SC and the disposer relating to the purchase of real property is exempt from stamp duty.

However, it should be noted that the stamp duty exemption does not apply to the transfer of shares in a real property company. Therefore, where a REIT acquires such shares, it will still be subject to stamp duty at 0.3% of the higher of the market value or consideration for the shares.

4. Outlook for REITs

As discussed above, the tax concessions in terms of treating a REIT as a flow-through vehicle for income tax purposes, the exemption from RPGT for the transferor of real property, and the stamp duty exemption for a REIT acquiring real property, offer opportunities to unlock the value of real estate currently held by various companies. This has led to the listing of the REITs mentioned above in the last two years. REITs are therefore a useful means of freeing the value of real estate without suffering tax, for companies which have significant real estate assets.

The success of REITs from an investor's perspective would depend on the yields from the investment, as well as capital appreciation. This in turn will depend largely on the portfolio of properties held by the REIT and the streams of rental income and management of the REIT.

The performance of Malaysian REITs to date has been encouraging with yields averaging 6% - 7%.

The other factor which affects investors is the tax treatment of their investment income. As indicated above, at present dividend income from REITs is subject to tax based on existing tax rates, and will be subject to WHT following the enactment of the 2007 Budget proposals. Whilst the Government is clearly promoting

REITs in terms of tax concessions and implementation of guidelines, etc., it is questionable as to whether the steps taken are sufficient to encourage investment in Malaysian REITs. As compared with Singapore, where non-residents are subject to 10% WHT on distributions from REITs, the proposed Malaysian 20% rate for foreign institutional investors and 15% for non-resident individuals are considerably higher. All things being equal, Singapore is likely to be the preferred choice for non-residents. With respect to Malaysian investors, companies will not benefit from the 2007 Budget proposals, but individual taxpayers, who currently pay tax at the top bracket of 28% are likely to benefit from the 15% WHT rate.

While the tax changes are welcome, there are still hurdles in the implementation of these changes. For instance, the proposed varying rates of WHT on distributions to different classes of investors create an administrative challenge and compliance burden for the Trustees of REITs. Overall, although the tax treatment of REITs has been made clearer in the last three years, arguably, the tax concessions are not competitive enough to significantly promote regional and local investment in the Malaysian REITs industry. No doubt there are reasons for the policy decisions taken by the Ministry of Finance. However, being more generous for a specific time period of say 5 years may just give REITs the additional push!

5. Conclusion

Overall, the tax treatment of REITs in Malaysia is clear and favourable compared to other investment vehicles such as asset-backed securities. However, while the tax concessions will have an impact on the choice of REITs as an investment vehicle, the concessions are unlikely to be a significant catalyst in the growth of the industry. Other key factors affecting the success of Malaysian REITs include the expertise of the respective management companies to manage and grow the REITs' property portfolios, permitted gearing ratios and interest costs.

It will be interesting to observe the performance of the existing REITs over the next five years and to watch for upcoming REITs with bigger market capitalisation.

Acknowledgement

We thank the International Bureau of Fiscal Documentation and the respective authors for their consent to reprint the above article on REIT(s) and acknowledge that they were originally published in the "Asia-Pacific Tax Bulletin" Volume II, No.6. This article has been updated for Tax Nasional.

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Tax Law and Case Law

Dr Nakha Ratnam Somasundaram

This article looks at legislation in the context of the Income Tax Act 1967 (as amended) [ITA], its interpretation and the relevance of case laws in assessments. This article was developed from the exposure of the author when interacting with tax practitioners during a recent road show for MIT on tax legislation and case law.

What is Tax?

Section 3 of the ITA reads as follows:

'Subject to an in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person...'

The word 'Tax' is defined in section 2 as follows:

'Tax means the tax as imposed by this Act'.

On the other hand, according to the Oxford Dictionary, the word 'tax' means:

'a contribution levied on property or business for the support of government'

One wonders whether the contribution is voluntary or is exacted!

But over the years the issue of what is tax had worked the minds of eminent judges and they had occasionally pronounced their thoughts in the course of their judgments. For example in *Matthews v The Chicory Marketing Board* [1] the word 'tax' was taken to mean:

'A compulsory exaction of money by a public authority for public purposes enforceable by law...'

Another definition was attempted in *R v Barger* [2] as follows:

'...a process of raising money for the purpose of government by means of contribution from individual persons...'

While the 'definitions' attempted do not give a complete picture of what is 'tax', one could surmise that it has the following badges:

1. It is a compulsory payment
2. It is collected by the government
3. It is not paid for any specific services
4. It is not penalty
5. It is not imposed arbitrarily
6. It is not incontestable (i.e. it can be challenged or appealed against)

Type of Taxes

Economists classify tax into two broad types:

- Direct taxes; and
- Indirect taxes

Direct taxes are imposed on a person directly. Income taxes for example on employment income, business income or investment income and real property gains tax on disposal of a chargeable asset are good examples.

Indirect taxes include *ad valorem* as well as specific rates on, for example, goods and services purchased.

Tax incidence

The tax burden can fall on the taxpayer in different ways. It could be progressive, proportional or regressive. Progressive incidence occurs when the tax imposed is higher as the income increases. Proportional incidence would arise when the taxes imposed are in proportion to the income. Regressive taxes arise when the taxes decrease as the income increases.

Tax system

Whether the tax system administered by a nation is a

good system or not is always a matter for debate. More than 230 years ago, a classical framework that is often used to define a good tax administration system was laid down by Adam Smith in his famous work *'The Wealth of Nations'*[3]

Among the features that should be present in a good tax system as envisaged by Adam Smith are:

- Equity and fairness
- Certainty of taxability
- Simplicity
- Neutrality
- Transparency
- Revenue predictability

Equity and fairness

Equity and fairness incorporate the principles of horizontal equity and vertical equity, implying that two different taxpayers with equal income abilities should pay the same amount of tax, while person with varying capacities pay differently. The concept of vertical equity is often achieved with the graduating tax scale rates.

Certainty

Certainty of taxes implies that there is no ambiguity in the application of a tax law to income or deductions. The taxpayer should be able to determine with reasonable certainty whether a particular income is taxable or a particular expenditure is deductible. But this objective appears to be quite difficult to achieve. As there is a need for objectivity in its determination, the law should be clear and simple, and its implementation should never be dependent on the subjective evaluation of the Revenue officers.

Simplicity

This is important for both the taxpayer and the tax administrators as simple laws and simple procedures have the attraction of encouraging tax compliance. In a self-assessment environment this is critical.

Neutrality

Neutrality implies that the tax law should never be a consideration in any commercial transaction. However with taxes taking away between 20 and 28 per cent of a company's chargeable income,[4] it is difficult to overlook its impact on a taxpayer's commercial transaction decisions. The emergence of advance rulings for example, are further indicators of such concerns.[5]

Fig 1
A good tax system

Transparency

Transparency is a key factor in tax compliance - and with self-assessment this is very much so. The issue of public rulings by the Director-General of Inland Revenue (DGIR) is an indicator of attempts by the Revenue authorities at transparency.[6] The annual budget presented in Parliament is another indicator of transparency – in this instance of how the tax monies collected are allocated and spent by the government.

Predictability

At the macro economic level, a good tax system should predict, with sufficient certainty, the amount of taxes that would be collected. The system should preferably be devoid of impacts from cyclical fluctuations in the economy. This objective could be achieved with a good mix of direct and indirect taxes that would provide the government with a reliable and stable base for a predictable revenue collection.

Sources of tax law

Sources of law, generally speaking, have several meanings. For example it could refer to historical sources, places where the law can be found like in law reports or the statutes. But usually, it is the legal rules which make up the law that is usually taken as the source of law and understood in that context. Sources in the context of legal rules which make up the law can, in the Malaysian context, be classified for purposes of convenient reference,

into written [for example, the Income Tax Act 1967 (as amended)] and unwritten law (for example, the case law decisions).

In the context of the income tax, there are three sources of law:

- Statute law
- Case law
- Administrative law

"Statute or Statutory law" are laws enacted by Parliament. The Income Tax Act 1967 (as amended) and the Real Property Gains Tax Act 1976 (as amended) are examples of statute law.

"Case law" are the accumulated decisions of the courts and are valuable for the decisions as well as the reasoning and the opinions expressed by the judges in the course of arriving at the decision. In this context, the Privy Council decisions are highly regarded on account of the quality of its decisions.[7]

"Administrative law" comes about from the practice of the Revenue, which in the course of time are accepted as the 'norm' and adhered to by the taxpayers and the tax practitioners. For example in the days of the formal assessment, it was a common practice for the Revenue officers to disallow one-third of such expenditures like traveling, entertainment and food/drink as being not 'incurred wholly and exclusively in the production to gross income...'[8]

The tax practitioners accordingly accepted this practice and would submit their client's tax computation, adjusting the net income in the profit and loss account by adding back one-third of such expenses mentioned earlier.

The administrative practice in the self-assessment system is now made more transparent with the issuance of a public ruling that sets out the practice of the Director-General of Inland Revenue (DGIR). While it does help the taxpayer and the tax practitioners to some extent, there is the danger of the public ruling becoming the reference point for any dispute in taxation.[9] In several tax workshop sessions conducted by the author, it was observed that the participants, given a tax problem dealing with the issue of deductibility for example, which incidentally was covered by a particular public ruling, were very focused on the statements made in the ruling to the point that the ITA and the relevant applicable case laws were completely ignored when pursuing their arguments for a deduction.

Tax Legislation

Tax laws as enacted by Parliament come with severe constraints. The laws have to satisfy the need for accuracy, cover all possible circumstances and most important, must be unambiguous. This is not an easy demand given the strict interpretation demanded by the courts.

It comes as no surprise that many cases land up in court for an authoritative interpretation.

Do judges make law?

In theory the Parliament makes the law and the judges interpret and apply them. In other words judges are not lawmakers.

Nevertheless in interpreting and applying the law to a new set of circumstances, they are in effect making laws that are caught in the precedence net and carried down the judicial stream to the lower courts which are bound by the decisions of the superior court.

Lord Reid for example acknowledged the law-making role of judges when he said:[10]

'there was a time when it was thought almost indecent to suggest that judges make law – they only declare it....'

Lord Radcliff too had asserted that judges do make laws:[11]

'(there) was never a more sterile controversy than upon the question whether a judge makes law ... of course he does. How can he help it?'

Interpretation of tax laws

Legislation is an attempt by the legislature to formulate a comprehensive law to deal with a particular situation, income or deduction. Sometimes the law so formulated has a tendency to be academic or predictive. The parliamentary draftsperson tries to provide for all the possible contingencies using his experience and skill. But the courts in trying to construe the meaning of a particular section may on occasion experience difficulties in applying the specific provision of a statute to a particular situation. Sometimes

the drafting may have given rise to a lacuna and thus unintended consequences may follow from a judicial interpretation of the statute.

The courts have, over the course of more than a century, developed tools for the interpretation of the meaning of particular word or section in such difficult situations.

The literal rule for example, requires that a particular word be assigned an ordinary meaning as generally understood. In other words the meaning should not be a strained meaning. An interpretation should also avoid any absurdity if interpreted literally, and above all avoid the mischief that it was designed to prevent.

If the words have attained a technical meaning, then it should be given a technical meaning.

For example the word 'income' can be given its ordinary meaning, or it could be interpreted as a technical word depending on the circumstances, as could be seen in the provision of subsection 2(2):

'...reference in this Act to income shall if the income is not described as being income of a particular kind, be construed as a reference to income generally or to gross, adjusted, statutory, aggregate, total or chargeable income as the context and circumstances require'

The courts sometimes apply the class rule for the interpretation of a particular word or words. In this rule, the general word or words that follow a particular or specific words of the same nature takes on its meaning from those words that precede it; in other words the specific words are molded and aligned in its meaning by the words preceding it. For example in section 48(1) (b) (i), in respect of child relief, the law reads as follows:

'...receiving full time instruction at any university, collage, school or other similar educational establishment...'

While the words '*other educational establishment*' is not specifically defined, the courts have shown that in such instances, one could interpret the words to mean '*an educational institution similar to that of a university, college or school...*'[12]

Fig 2
The court hierarchy in tax cases

Generally the courts have tended to interpret the tax laws strictly because it imposes a burden on the taxpayer. This strict approach has support from Rowlatt, J's dicta in *Cape Brandy Syndicate*:[13]

'...in a taxing statute, one has to look merely at what is said. There is no room for intendment...nothing is to be read in, nothing is to be implied...only look fairly at the language used...'

As a result where the law is not clear, the courts are more than happy to give a decision in favor of the taxpayer.[14]

Case laws

Case laws are valuable for the decision made by the judges on contentious issues brought to the courts. These decisions are made more valuable by the practice of precedence i.e. following the legal principle of an earlier case, and also for the judicial reasoning given or considered in reaching particular decisions. In this context, the opinions expressed by some eminent judges in the course of arriving at a decision are highly valued as a guide to the interpretations of the legislation.

The Doctrine of Precedence

For the proper working of the doctrine of precedence, it is essential that the system of court hierarchy be observed. The general rule is that the decision of the higher court binds the lower courts and some courts are bound by their own decisions. The decision of subordinate court does not create binding decisions but they are bound to follow the decision of the superior courts.

Thus case law authority is closely linked to the court hierarchy.

Application of case laws

Tax practitioners must be careful in applying decided case law to a particular situation or transaction. It would be prudent to consider the particular facts of the case, the evidence used to support the facts, the nature of the transaction, and the intention of the parties etc and ensure that these are exactly, or very similar with no distinguishing factors, to the client's situation before arranging the tax affairs to fall in line with the decision in a particular case.

Furthermore, in applying decided cases, one should note the question of law involved.

Even where the situation is on "all fours" with the case at hand, there is no guarantee that the case chosen to support the situation or transaction would be accepted by the Revenue.[15]

Concluding remarks

Interpretation of the tax statute requires a sharp legal mind and the acumen of a shrewd businessman for its application to a particular commercial transaction. One could therefore choose to play safe and tread the beaten path (it is very safe to follow the public ruling!) or alternatively where one is seeking an adventure into the unknown, it would be advisable to secure the services of a qualified tax accountant and a tax lawyer to act as guides to take you through the treacherous legal jungle and technical swamp that abound the murky tax laws.

Such adventures do not guarantee that the taxpayer would come out financially unscathed.

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1. [1963] 60 CLR 263
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3. See *'The Wealth of Nations'* edited by Edwin Cannan, New York, 1994 pp. 887-890
4. Under Schedule 1 of the ITA the tax imposed on the chargeable income of a company with a paid up capital of RM 2.5m and below at the beginning of the basis period on the first RM 500,000 of the chargeable income is 20% and on the subsequent chargeable income is 28%. Companies with a paid up capital exceeding RM 2.5 at the beginning of the basis period is 28%, effective from the year of assessment 2006. For the year of assessment 2007, the rate of 28% would be reduced to 27% and in the year of assessment 2008, it would be further reduced to 26% (Section 30 of the Finance Act 2006)
5. The Finance Act of 2006 for example provides under Section 138B in Chapter 1A that *'on the application made by an y person, the Director General shall make an advance ruling on the application of any provision of this Act…'*
6. It is the purported intention of the Director General of the Inland Revenue that a Public Ruling is issued to provide guidance for the public and officers of the Inland Revenue Board. It sets out the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the policy and procedures that are to be applied.
7. See Nakha Ratnam Somasundaram, *'Ranting and Raving…about Rent'* Chartered Secretary Malaysia, Dec. 2004, for a discussion of the impact of the Privy Council decision in the case of American Leaf Blending v DGIR [(1979) 1 MLJ 1] which upset the view held by the Inland Revenue Board on the tax treatment of rental income for nearly 25 years.
8. Section 33 and section 39 of the Income Tax Act 1967 (as amended).
9. Section 26 of the Finance Act of 2006 now introduces a new section 138A, which provides for *'the Director General …at any time to make a public ruling on the application of any provision of this Act in relation to any person …'*.
10. See 'The Judge as Lawmaker' (1972) 12 JSPTL 22, p. 25.
11. 'Law and Order', (1964) 61 Law Society's Gazette, p. 821
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The Compounding of Customs Offences

Mr Thomas Selva Doss

When a customs offence has been established, the Customs Department is empowered to take the necessary precautionary measures and in particular, to detain the goods and the mode of transport. The penalties applied in respect of customs offences vary according to the seriousness of the offence. Certain customs offences which are regarded as particularly serious may have severe consequences whereas other offences which are regarded as being less importance, a compound is usually offered.

The Customs Act 1967 (hereafter referred to as "the Act ")empowers a senior officer of customs when exercising his discretion, to compound any offence which is prescribed to be a compoundable offence by offering a fine not exceeding five thousand ringgit. In like manner, a junior officer of customs may also compound a compoundable offence by offering a fine of not exceeding one hundred ringgit. In both cases, the fine shall not be more than twenty times the amount of customs duty payable on those goods.

Further powers are given to the Director-General (DG) in the 2007 Budget amendments under section 131(2A) of the Act where the DG may compound any offence under section 135(1)of the Act by accepting from the person reasonably suspected of having committed such offence –

a. in the case of dutiable goods, a sum of money which shall be a sum not more than ten times the customs duty; and

b. in the case of prohibited goods, a sum of money which shall be a sum not more than ten times the value of the goods.

The compounding of customs offences, is governed by section 131 of the Customs Act 1967 which is to be read together with Regulation 67 of the Customs Regulations 1977 (hereafter referred to "the Regulations"). Regulation 67 states that the compoundable offences are stated under section 133(1), 135(1) and 138 of the Act and includes any offence under the Customs Regulations 1977 in accordance with section 131(1) of the Act.

Let us examine these various offences under sections 133(1), 135(1), 138 of the Act and offences under the Customs Regulations 1977. Section 133(1) imposes a penalty on making incorrect declarations and on falsifying documents. Anyone who makes orally or in writing untrue or incorrect declarations, certificates or other documents is deemed to have committed an offence. The declarations, certificates and documents referred to here are those required by the Act. One need not have an intention or 'mens rea' to falsify. The mere ignorance or inadvertence on the part of the person is sufficient to constitute an offence.

Amongst all the customs forms the most common of all declaration forms will be the import declaration forms Customs No. 1 and 1A and the export declaration form Customs No. 2. Apart from this, Customs No. 8 and 9 also fare prominently under this group. These are the ones most likely to be falsified. As for the documents, common

documents constitute invoices, bills of lading, certificates of origin or analysis, manifests and port clearances. As to why one would make an incorrect declaration or falsify documents depends on the situation. Most of the time, importers and exporters make an incorrect declaration in two ways –either it is a wrongful declaration or an under-declaration.

Wrongful declaration refers to providing the wrong description of goods, or wrong tariff code. An importer of textile fabrics coated with plastic which falls under tariff code 5903.10.000 attracts an import duty of 30% . Therefore a sales tax of 10% would incorrectly describe and classify it under 5901.10.000 which describes textile fabrics coated with gum that has no import duty and attracts only a 10% sales tax. As to why one would under-declare the value is anyone's guess,; Of course, lower the value, the lower the import duty and sales tax. Para (f) of section 131 (1) of the Act also relates to anyone who fails or refuses to produce to a proper officer of customs any document required to be produced under section 100 of the Act such as invoices, bills of lading, certificates of origin or of analysis and any other documents which may test the accuracy of any declaration made by that person. Failure to produce that particular document would constitute an offence whether or not it is in the power of that person to produce that document. Customs officers invoke this section in most cases. For example in a post importation audit, the investigating officer uses section 100 of the Act to request for a number of documents related to the importation of goods, such as the supplier's invoices, any agreements between the supplier and the importer including e-mails and faxes, bank statements, telegraphic transfers and so on. In a preventive investigation, section 100 of the Act is often invoked to request for a host of documents to assist in the investigation. The term 'any other documents .....to test the accuracy of any declaration made' provides wide powers to the investigating officer.

Section 135(1) of the Act provides the penalty for various smuggling offences. Anyone who imports or exports any uncustomed goods or prohibited goods or knowingly harbours or conceals such goods is deemed to have committed an offence. **Uncustomed goods** refers to goods in respect of a breach of the provisions of this Act or any related subsidiary legislations. Basically it refers to dutiable goods which are illegally brought into the country or taken out without payment of customs duty. It includes goods illegally removed from duty-free shops, licenced manufacturing warehouses, bonded warehouses as well as free zones.

Prohibited goods are those specifically mentioned under the First , Second, Third and Fourth Schedules of the Customs (Prohibition of Imports) Orders 1998 and the First, Second and Third Schedule of the Customs (Prohibition of Exports) Order 1998. Persons involved in smuggling and other modus operandi of imports and violation of prohibitions with the intent to evade customs duties or fraudulently claim import exemptions are liable to serious penal action under the Customs Act. In the case of prohibited goods, the offending goods can be confiscated and heavy fines imposed. There are also provisions for arrests and prosecution to deter smuggling and commercial frauds which seriously affect the economy.

Para (c) of Section 135(1) of the Act refers to anyone who illegally removes any goods from customs control. Section 2 of the Act states that goods shall be deemed to be under customs control whilst they are deposited or held in any customs or licenced warehouse, post office, or in any vessel, train, conveyance, aircraft, pipeline or place from which they may not be removed, except with the permission of the proper officer of customs. Thus, goods in a licensed manufacturing warehouse are under customs control as are containers stored in the container yard within a port or goods stored in a duty free shop. The act of illegally removing any goods from customs control is usually with the intention of evading customs duty or not being able to produce an import license. Legally removing the goods would normally require the person concerned to produce the relevant customs declaration forms or documents and pay the customs duty concerned. The proper officer of customs would in most

instances provide a written approval to remove the goods.

Para (f) of section 135(1) of the Act refers to a passenger arriving by air, sea or road/rail who has dutiable or prohibited goods in his baggage or upon his person or otherwise in his possession and has denied that he has any knowledge of these goods with him has committed an offence under this section. The passenger needs to have knowledge of what is dutiable or prohibited. Most passengers arriving at a customs check point or a customs bay have little knowledge of customs procedures. Most of them have no intention of paying any taxes or duties on the goods they are carrying. The procedures at the customs checkpoint or bay is simple. Upon reaching the checkpoint, one is required to:

a) in the case of arrival by road, to stop the vehicle, open the booth or other compartments and declare the dutiable or prohibited goods to the customs officer on duty; or

b) in the case of arrival by air, one is required to retrieve one's luggage from the luggage counter and proceed to the customs examination bay and declare the goods in his possession, or

c) in the case of arrival by sea, just proceed to the customs examination bay and declare your goods.

Section 103 of the Act, requires the person in charge of the baggage to produce, open, unpack and repack such baggage. The customs officer on duty is not, in any way, required to open or repack the baggage. The simple act of denying that one is not in possession of dutiable or prohibited goods already constitutes an offence. In daily practice, the whole process of declaration by a passenger and examination by a customs officer takes only a few minutes. In many cases, due to the huge number of people arriving at an airport or port, the customs officers selectively allow passengers with small luggage bags to pass through without any examination. The cabin crew and the pilot or co-pilot often use the green lane and do not declare their baggage at the customs examination bay. It is assumed that since they are on duty and are constantly shuttling from airport to airport, that they carry only the basic goods – clothing and other sanitary requirements. Legally, they are not exempted from any taxes or duties and should not be always using the green lane.

Section 138 of the Act states 'Every omission or neglect to comply with, and every act done or attempted to be done contrary to, the provisions of this Act, or any breach of the conditions and restrictions subject to, or upon which, any licence or permit is issued or any exemption is granted under this Act, shall be an offence against this Act....'

Anything that is done that is contrary to the provisions of the Act is deemed to be an offence. The mere aspect of withholding information or relevant documents from the customs officers and even cloning of A.P. proves to be an offence under this Act. The breach of conditions and restrictions of any license or permit issued by Customs or other authorities exercising the powers under the Customs Act constitutes an offence.

A person who has applied for a "Temporary Import" license or permit is subject to a number of conditions, one of which is that he must re-export the goods within the time stipulated in the approval, as is an owner of a duty free shop who sells duty free goods to travelers. As for exemptions granted under this Act, and there are many, the most common one is the import duty exemption on imported raw materials, being granted by the Minister of Finance exercising his powers under section 14(2) of the Customs Act. This exemption commonly known as the "treasury exemption" is given subject to a number of conditions. Most companies, delighted with the aspect of the exemption given, often fail to realize that if any one of the conditions is breached, it will be tantamount to an offence under the Act and could render the entire exemption invalid. For example, the condition most often breached by the companies enjoying the exemption is the failure to submit regular returns of stock movements to the customs or the failure to keep proper records of stock movements for the inspection of customs. Customs officers from the Exemption Unit of the Industry Division which monitors such exemptions often notice that a number

of companies enjoying such exemptions are not even aware of this requirement. They can recommend to Treasury that because a particular company has breached one or several conditions, that no more such exemptions be given to that company in the future. The result of such an action could prove disastrous for the company as it would unnecessarily increase its operating costs. So far this discretion is rarely exercised by customs as they realise that such an action would prove to be too punitive.

Offences under the Customs Regulations 1977 can be numerous. For example, not complying with the layout plan approved for a Licensed Manufacturing Warehouse or even not displaying the various plans approved by customs in a LMW could prove to be troublesome. The use of the wrong documentation for the transport of goods within Malaysian or the landing of goods at an unauthorised jetty is also an offence.

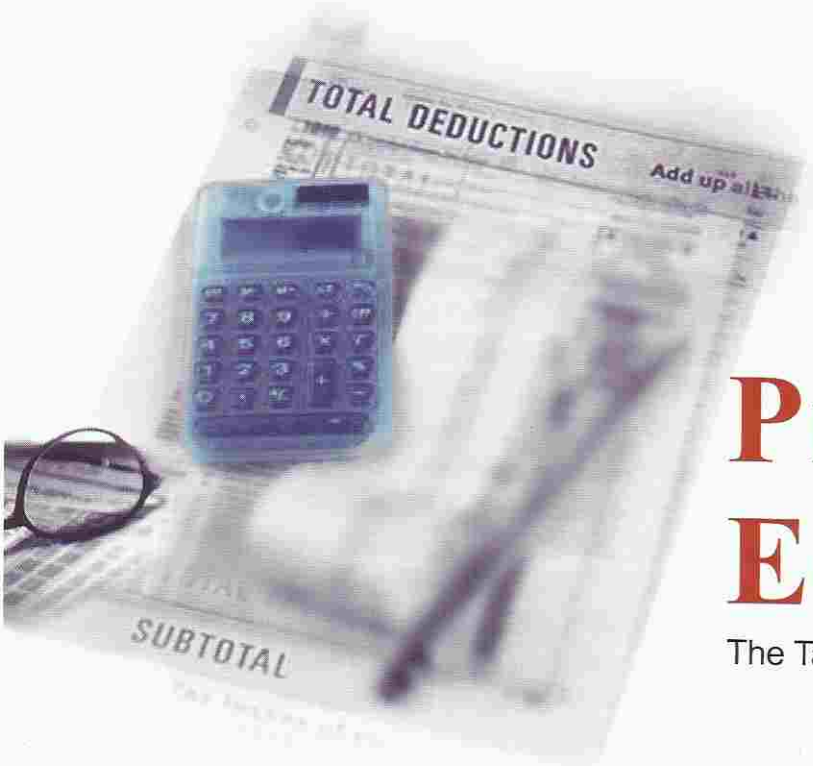
The exercise of discretion in the compounding of offences

Going back to section 131(1) of the Act, any senior officer of customs may compound any offence, which is prescribed to be a compoundable offence by accepting from the person, a sum of money not exceeding five thousand ringgit or a junior officer of customs can compound a person up to one hundred ringgit. Customs practice has shown that in most cases, the compound is offered by the senior officer of customs. Most customs officers will testify to the fact that they are simply not compelled to compound anyone. In many instances where 'simple offences' are committed, such as non submission of returns for stock movement of raw materials given exemption by the Minister of Finance, the inability to produce certain documents in a post-importation audit, non-compliance with the plans for an LMW or passengers arriving at an airport, seaport or a customs checkpoint simply denying that they have any dutiable or prohibited goods in their possession, customs officers are not likely to offer a compound.

Also in compounding offences, the quantum offered by the officer varies from individual to individual. For example, in a case of wrongful declaration of imported goods, a senior officer of customs in Port Klang may compound a forwarding agent RM2,000 whereas for the same offence committed in Butterworth Port, the senior officer in charge may compound a forwarding agent only RM1,000. The perception of the seriousness of the offence by the customs officer who offers the compound is based on subjectivity. Often the individual who is compounded has a profound influence on the decision of the officer. If the individual seems to have an offensive demeanor, the compound offered will be higher compared to a pleasant individual who seems pleasing to the officer. This discretion is often not properly exercised as in some cases the quantum is not based on the severity of the offence but on the person's character. There have been times when individuals have successfully bargained with the officer to reduce the compound offered. This reduction or 'discount' is normally given after the individual has proved to the customs officer that that particular offence was a result of a simple mistake rather than having an intention to cheat. Whatever it is, an offer of a compound is normally accepted by a person to whom it is offered as a refusal to accept the compound could render the person liable to prosecution in a court of law. Once compounded, these persons who are reasonably suspected of having committed the offence, if in custody, will be released, any properties seized will be returned, and no further proceedings shall be taken against such persons or property unless the property is prohibited goods, in which case it will be forfeited.

Author's Profile

Mr Thomas Selva Doss has served as a Senior Officer of Customs in the Royal Malaysian Customs Department for 13 years. He is trained in Customs Audits and Investigation at the Royal Customs Academy. Currently, Thomas runs his own firm Dossnett Consulting Sdn. Bhd. which provides customs advisory services to clients in Malaysia and Singapore. He can be contacted at **customs@streamyx.com**



Practical Education

The Tax Position Of A "Resident" Of Malaysia

Q1. **What is meant by the term "resident" as relates to an individual from a tax perspective?**

A1. "Resident" refers to a situation (position) of an individual as determined on a calendar year basis. For example, when an individual is resident for the year of assessment 2006, the period reviewed or involved will be the calendar year 2006, which has a basis period from 1 January 2006 to 31 December 2006.

Q2. **Why the residence status of an individual is important for income tax purposes?**

A2. The "Residence" status of an individual is vital for income tax purposes since the status will help the individual taxpayer to claim various benefits accord to him. The tax treatments between a resident and a non-resident will be different in determining the chargeable income and tax liability.

Q3. **What are advantages given to an individual taxpayer if he is a resident of Malaysia for a basis year?**

A3. Some of the advantages that he is entitled to claim will include:

(a) An individual is entitled to claim personal relief. The types of personal relief will depend on his personal background such as whether he is single or married, having children or not.

Example (1) : Mr. Jotty is an accountant working with E-Express Sdn. Bhd. For basis year 2006 he is earning RM60,000 from employment (EPF contribution is at 11% per annum). Mr. Jotty is married and his wife is not earning any income. The couple is blessed with 3 children, all below 18 years old and still studying. What will be Mr. Jotty's chargeable income for year of assessment 2006?

		RM
Total Income (from employment)		60,000
(-) Personal relief:		
Self	8,000	
Wife	3,000	
Child (3 x 1000)	3,000	
EPF (max)	6,000	(20,000)
Chargeable Income		40,000

(b) Being a resident, an individual will be taxed using scaled (graduated) rates from 0 percent to 27 percent. On the other hand if the taxpayer is not a resident, he will be taxed using a flat rate of 28 percent.

Example (1) : Mr. Kumar who is a bachelor is a resident of Malaysia and for basis year 2006, his chargeable income was RM65,000. What will be the amount of tax payable by him?

			RM
Ans :	Chargeable Income		65,000
	Tax on the 1st 50,000	=	3,475
	Tax on the balance 15,000 @19%	=	2,850
	Tax Payable		6,325

Example (2) : Mr. John, a bachelor, not resident of Malaysia and for basis year 2006 his chargeable income was RM65,000. What will be the amount of income tax payable by him?

			RM
Ans :	Chargeable Income		65,000
	Tax @28% on 65,000	=	18,200
	Tax Payable		18,200

(c) A "Resident" individual is entitled to claim a rebate of RM350 if his chargeable income is not more than RM35,000 for a basis year. If he is married and having a joint (combined) assessment with the wife, he (being a taxpayer in the family) is entitled to claim RM350 for himself and RM350 for his wife if the total family's chargeable income is not more than RM35,000.

Example (1) : Mr. Chin, a bachelor is working as an auditor with Expert Sdn. Bhd. His employment income for basis year 2006 is RM54,600 (EPF contribution is 11% per annum). Mr. Chin incurred RM6,200 for medical expenses on his father and RM800 for buying reading materials (books and professional journals). What will be Mr. Chin's tax liability for year of assessment 2006?

					RM
Ans :	Total income (from employment)				54,600
	(-) Personal relief:				
	Self	8,000			
	Medical expenses	5,000	(mx)		
	Books & Journals	700	(mx)		
	EPF (11%)	6,000	(mx)		(19,700)
	Chargeable Income				34,900
	Tax on the 1st 20,000			=	475
	Tax on the balance 14,900 @7%			=	1,043
					1,518
	(-) Rebate				(350)
	Tax Payable				1,168

Example (2) : Mr. Chan, married, is having an employment income of RM60,000. His wife Mrs. Anne is not having any income of her own, and has applied for a joint assessment. Mr. Chan claimed the following:

- EPF @11% per annum
- Medical expenses for his mother RM6,300
- Reading materials (excluding newspaper) RM780
- Child relief (4 children below 18 years)
- Wife relief

What will be Mr. Chan's tax liability for year of assessment 2006?

				RM
Ans :	Total Income (from employment)			60,000
	(-) Personal relief:			
	Self	8,000		
	Wife	3,000		
	Child (4 x 1000)	4,000		
	Medical expenses	5,000	(max)	
	EPF (11%)	6,000	(max)	
	Books	700	(max)	(26,700)
	Chargeable Income			33,300
	Tax on the 1st RM20,000	=	475	
	Tax on the balance 13,300 @7%	=	931	
				1,406
	(-) Rebate - self	350		
	- wife	350		(700)
	Tax Payable			706

Q4. Other than relief and rebate, what are the other benefits given to a resident individual taxpayer?

A4. If the individual taxpayer is earning royalty income, there will be some exemptions given to him such as:

(a) Royalty from recording discs or tapes – Sch 6 Para 32, an amount of RM10,000 will be exempt.

(b) Royalty from publication of, or the use of or the right to use, any artistic work – Sch 6 Para 32, an amount of RM10,000 will be exempt.

(c) Royalty from publication of, or the use of or the right to use any literary work or any original painting – Sch 6 Para 32B, an amount of RM20,000 will be exempt .

(d) Royalty from translation of books or literary work at the specific request of any agency of the Ministry of Education or the Attorney General's Chambers – Sch 6 Para 32A, an amount of RM12,000 will be exempt.

(e) Royalty from musical composition – Sch 6 Para 32D, an amount of RM20,000 will be exempt from tax.

Q5. Is income earned by an individual resident in Malaysia derived from his performances in cultural performance subject to income tax?

A5. This is another advantage given to individual who is resident of Malaysia. If he is earning

some income from performing in cultural activities approved by the Minister, the amount will be fully exempt from tax – Sch 6 Para 32C, provided that his emoluments is not from his official duties (example : employees who are working with Ministry of Cultural Arts and Tourism)

Q6. Is there any disadvantage being a resident taxpayer from tax perspective?

A6. The only disadvantage from being a resident is that employment income will not be tax exempt even if the individual satisfies the 60-day test. This exemption – Sch 6 Para 21 is only given to non-resident individual taxpayer. Therefore, for resident individual who derived income from employment in Malaysia, will be subject to tax regardless of the number of days working in Malaysia.

Q7. Is income received by a resident individual from outside Malaysia subject to income tax?

A7. With effect from year of assessment 2004, income received in Malaysia from outside Malaysia by a resident individual will be exempt from income tax – Sch 6 Para 28.

Example (1) Mr. Hassan, resident of Malaysia, derives income form both Malaysia and overseas, as follows, for year of assessment 2006.

			RM
Malaysia	:	Statutory income from sole proprietorship business	120,000
	:	Dividend (net)	7,200
	:	Adjusted rental income	12,000
Singapore	:	Dividend (gross)	3,600
Thailand	:	Rental (net)	24,000

What will Mr. Hassan's total income for year of assessment 2006?

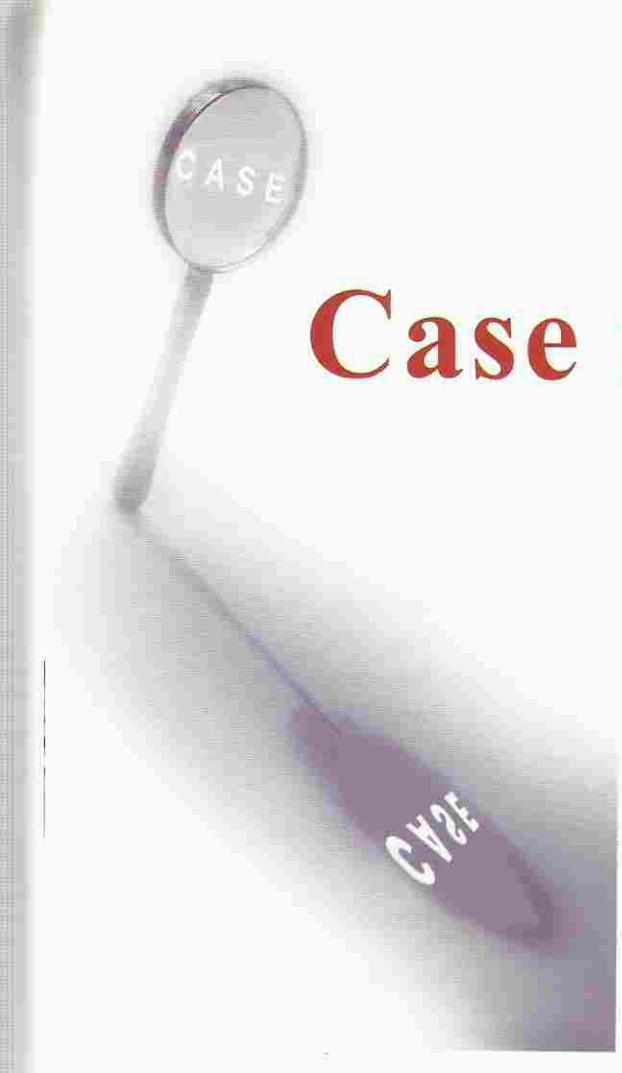
		RM
Sec 4(a):	Business	120,000
Sec 4(c):	Dividend (M'sia) (7200 x 100/72)	10,000
	Dividend (S'pore – exempt)	NIL
Sec 4(d):	Rental (M'sia)	12,000
	Rental (Thailand – exempt)	NIL
	Aggregate/Total Income	142,000

If Mr. Hassan is not resident, his aggregate and total income will be the same ie. RM142,000. The difference will be at the computation of chargeable income and tax payable ie. if Mr. Hassan is resident, he is entitled to claim personal relief and will be taxed at scaled rates, where as if he is not resident, he cannot claim personal relief and the tax rate applied is a flat rate of 28 percent.

Author's Profile

A academician of repute, **Puan Faridah Ahmad** is an Associate Professor at the Faculty of Accountancy, UiTM specialising in Malaysian Taxation. She has also taught the various levels of professional courses of ACCA, MICPA and ICSA.

She is a Fellow Member of the Chartered Certified Accountants (FCCA, UK), a Fellow of the Malaysian Institute of Taxation (FTII) and a Chartered Accountant of the Malaysian Institute of Accountants (CA). She also holds a diploma in Accountancy (DIA) from the University Teknologi MARA (UiTM). Besides teaching, she is involved in providing consulting services for taxation and cash flow management to small and medium enterprises (SME) and has also conducted various workshops and seminars organized jointly by ACCA Malaysia, SMEDEC, JELITA and FELDA.



Case Summaries

Ms Lucy Chang

Index of Cases

1. BH Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] AMTC 1098
2. MP Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] AMTC 1001

1 BH Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] AMTC 1098

Special Commissioners of Income Tax – Appeal No PKCP (R) 65/1999

Noor Azian bte Shaari (Chairman), KP Ramachandran, Kamarudin b Mohd Noor July 6, 2000

Real property gains tax – sale of shares in property development company –

Appellant, an investment holding company, acquired shares in a property development company. The appellant together with other shareholders, were forced to sell all their shares to another company which owned the neighbouring piece of land when access could not be obtained from that company for development.

Whether the gains made by the appellant from the disposal of shares in the property development company is within the ambit of the Real Property Gains Tax Act 1976 (RPGTA), para 34A(a) Sch 2.

Held, dismissing the appeal

1. The appellant who acquired shares in a real property company is deemed to have acquired a chargeable asset and when those shares were disposed of, for whatever reason, it is deemed to be a disposal of a chargeable asset under para 34A(1) Sch 2 of the RPGTA.

2. The appellant's submission that the RPGTA is not applicable but the Income Tax Act 1967 (the ITA) is, would have been a viable argument with merits if the property development company were to be the appellant. Unfortunately, the appellant's arguments do not hold water in this case where a shareholder disposed of its shares in a real property company. While the gains, if any, of the company may come under the ITA, the appellant's gains in the disposal of shares in the company do not.

3. The appellant's contention that the gains from the disposal of shares do not fall within the ambit of the RPGTA, tantamount to saying that all disposal of shares in real property companies are free of tax under the RPGTA. This defeats the very purpose of the introduction of paragraph 34A of Schedule 2 of RPGTA with the repeal of the Share (Land Based Company) Transfer Tax Act 1984.

2 MP Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] AMTC 1001

Special Commissioners of Income Tax – Appeal No PKR 614

S Augustine Paul (Chairman), Kamarudin b Mohd Noor, Mohd Ghazali b Mohd Hanafiah
July 8, 1995

See also High Court decision at [2006] AMTC 1; Court of Appeal decision at [2006] AMTC 64

Income tax – cost of property -

The Appellant company purchased land in 1971. In 1972 the appellant submitted layout plans to construct on the property a hotel complex and theatre club. Application for licence to operate casino rejected. In 1979, alternate plans for commercial and housing development approved. The Respondent issued additional assessments based on the original cost of the said property as at 1971 when the property was acquired.

Whether the cost of the property should be the market value of the property in 1978 when it was appropriated to stock-in-trade in the year 1979 in accordance with s 35(3)(a)(i) of the Income Tax Act 1967 (the Act) or whether the property was stock in trade in 1971, in which case the historical cost of the property as at 1971.

Held, dismissing the appeal

1. To decide on whether the property was acquired for investment, the intention of the taxpayer at the time when he acquired the asset, has to be determined by inferences from proved facts. The appellant has only inadmissible hearsay evidence in support of its submission that the property was acquired for investment. Therefore other features have to be looked at to consider the status of the property at the time of its acquisition.

2. According to the evidence submitted, the appellant has had four other dealings in properties in addition to the property which is the subject matter in this case. Habitual dealing in property by a person is a factor that goes to show that the dealings were made in the course of trade thereby becoming trading stock. The appellant's frequent dealings in properties assumes special significance in the light of the fact that it, being a limited company, is authorised by its memorandum of association to deal in land. This raises a prima facie inference that the appellant was carrying on a business of land dealing either as a land developer or as a real estate merchant. This presumption that arises against the appellant is further strengthened by the fact that its memorandum of association does not authorise it to purchase land for purposes of investment except with surplus funds which it did not have.

3. Furthermore, the fact that the appellant submitted layout plans to construct on the property a year after the purchase of the property brings the purchase of the property within the meaning of trade. This is particularly so in the case of developers like the appellant.

4. The intention of obtaining a casino licence cannot amount to an intention in law. Therefore, it follows that the intention of operating a casino can be of no assistance in determining the status of the property.

5. The only evidence in support of the appellant's case is its treatment of the said property as fixed assets in its accounts when it was acquired. Judged in the totality of the evidence adduced, the classification of the property in the audited accounts as fixed assets is not a proper description of the actual nature of the

transaction. In the light of the considered factors the property was acquired by the appellant as trading stock in 1971. As the property was acquired as trading stock and used as trading stock the question of appropriating it from fixed asset to current asset does not arise for the simple reason that it was already a current asset when approval for its development was given. As there was no appropriation of the property from fixed asset to current asset the question of valuation of the property at market value when approval for its development was given does not arise.

6. Even if the property was acquired as a fixed asset, the appellant has failed to show that the assessments were wrong or erroneous as required by paragraph 13 of Schedule 5 of the Act.

7. In conclusion the cost of the said property should be the original cost as at 1971 when it was acquired.

Acknowledgement

We gratefully acknowledge Thomson*Sweet & Maxwell, Asia for their gracious contribution in providing us with these updates from their All Malaysia Law Reports. Please note that we have shortened the facts/details due to space constraints. Please refer to the full case as cited for a detailed and accurate reading of the case(s).

Author's Profile

Ms Lucy Chang, an advocate & solicitor may be contacted at **changlucy@gmail.com**

Disclaimer

Please take note that neither Tax Nasional, MIT, Ms Lucy Chang nor Thomson*Sweet & Maxwell, Asia shall be held responsible for any error, mistake or oversight. Please refer to the full case for a comprehensive reading of the cases.

News on Tax

- A chronological update of the tax news you may have missed!

(Disclaimer – Please note that these news items are on a piecemeal basis. MIT is not responsible for any news previously printed in any newspaper/publication but which is not mentioned here. MIT is also not responsible for any error/omission/inaccuracies contained herein. Please take note that the news stated herein is only a brief outline. For detailed news please refer to the relevant edition of the particular newspaper/publication).

In Malaysia

Date	Newspaper/Pages	News
19/10/2006	The STAR online	New LHDNM Head makes tax audits & investigations framework a priority. The rights and responsibilities of taxpayers, tax agents, LHDNM tax audit & investigation officers will be outlined under a framework which will come into effect next year. And which is aimed at gaining public confidence through transparency by clarifying why LHDNM does tax audits and investifations.
30/10/2006	the STAR B10	Transfer Pricing Stormy seas for transfer pricing – MNC's are face stormy seas in the boat of transfer pricing wherein the rate of change of transfer pricing in Asia much faster than in the rest of the world. MNC's including our own home grown MNC's must dedicate resources to transfer pricing related risk assessment to ensure that they were not unnecessarily exposed to tax adjustments and penalties.
11/11/2006	the STAR online	IFRS
13/11/2006	THE EDGE MALAYSIA	IAS 12 compliance or IFRS 112
13/11/ 2006	the STAR B10	REITs Healthcare REITs. REIT Specialist in hospital management. What are these? Read about a group that takes "sick" hospitals and turns them around to package them for real estates investment trusts.
22/11/2006	the STAR B2	Newly launched independent tax advisory firm Taxand Malaysia Sdn Bhd is a member of the TAXAND Global Alliance, the first international network of tax services firms independent of any accounting or legal network. Dr. Veerinderjeet Singh, Taxand Malaysia's managing director said that Taxand Malaysia aims to focus on more trans-national issues as well as provide its services to high end corporate clients and help Malaysian Companies tap foreign expertise and enable multinational corporations to invest in Malaysia.

News on Tax...cont'd

- A chronological update of the tax news you may have missed!

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27/11/2006	the STAR B11	REITs Bigger M-REIT fund sought – Malaysia's real estate investment trusts must expand their size and liquidity to attract greater participation from both local and foreign investors fund. Industry players are hoping for enabling legislation for the industry to be on amore competitive footing with other established and emerging markets.

International

United Kingdom

20/11/2006	the Sun page 14	UK needs to tax "throw-away" culture – Britain needs to tax disposable and hard-to-recycle products to encourage manufacturers to change what they make and use. The report by the Institute for Public Policy Research (IPPR) calls for tax on items such as disposable razors, non-rechargeable batteries, etc.

Netherlands

27/10/2006	the Sun	The Netherlands is inviting Malaysian companies to set up operations in the country and capitalize on its position as the port of entry into the European Union market. Among incentives to foreign investors, the Netherlands would be lowering its corporate income tax from the present 29.6% to 25.5% starting 27/1/2007. Dividend tax would also go down from the present 25% to 15% while capital gains tax had already been abolished this year. The Netherlands Foreign Investment Agency (NFIA) would meditate on behalf of foreign investors in the Netherlands to obtain a more favorable tax ruling below standard rate for up to 10 years.

United States of America

11/12/06	the Edge pg 53	"Conservation Eastments " - a landowner still controls the land while agreeing to conserve it and prevent it from being developed - purchase or donation of such land can "write off" as much as 50% of adjusted gross income for that donation. Qualified farmers & ranchers can deduct 100% of their eastment contribution.

News on Tax...cont'd

- A chronological update of the tax news you may have missed!

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Australia

Australia has come up with an innovative new compliance process called the "forward compliance arrangement" . Read about it below.....

The Tax Office and BP Australia sign forward compliance arrangement

Media release 2006/50

The Tax Office and BP Australia have signed a forward compliance arrangement, an innovative new compliance process designed to promote best tax practice and reduce tax compliance costs for both business and the Tax Office.

The forward compliance arrangement covers BP Australia's GST obligations, as well as excise and the recently introduced fuel tax credit system.

These arrangements are designed primarily for large corporates. They provide an alternative to traditional Tax Office audit activities and are viewed as an open and transparent forward- looking approach to tax compliance. They require high standards of taxation self examination and require a significant investment from both signing parties.

Tax Commissioner, Michael D'Ascenzo said he was pleased to be signing an arrangement of this kind with BP Australia.

"This is the first time we have entered into a forward compliance arrangement which covers multiple tax types," Mr D'Ascenzo said.

"It is another step in developing an innovative way forward to effectively manage tax risks for BP Australia, the large business sector, and the community more broadly."

The forward compliance arrangement between BP Australia and the Tax Office is effective immediately.

Date Issued: Wednesday, 15 November 2006

ACKNOWLEDGEMENT

Book Review by

Kalisewaran Sinniah
LLB Hons University of Wolverhampton, CLP

ALL MALAYSIA TAX CASES

Dr. Choong Kwai Fatt

Dr. Choong Kwai Fatt is a respected educator, practitioner and consultant of the Malaysian tax profession. He has authored numerous texts and publications on tax. This present publication is a compilation of tax cases. In fact it is the first time that a case arrangement has been compiled from 1937 – this makes it the oldest case arrangement in Malaysia specializing solely in tax cases.

The All Malaysian Tax Cases ("AMTC") is in fact a tax case(s) reporter and documents each case beginning from the Special Commissioners level and goes on the current level of adjudication be it High Court, Court of Appeal or Federal Court. The AMTC provides the reader with convenient cross referencing which is invaluable when and if a particular case goes on appeal to a superior court.

This ensures that readers are fully aware of the current standing of the law relating to a specific case. The AMTC is updated twice a year. According to the publisher, each update bears a separate charge of approximately RM450.00.

The AMTC itself is in hardcover and comprises of 4 Volumes. Easy and practical accessing in the form of arrangement of cases alphabetically, chronologically and also in accordance to a particular subject matter is much appreciated by the reader. And very much appreciated researchers of Malaysian tax cases!

As stated in its advertising blurb the AMTC is a must for tax practitioners, tax analysts, legal counsel, tax officers and financial consultants in understanding the technical complexities of local tax laws. Academicians and students will also benefit when conducting research and sourcing of relevant tax precedents. Being the oldest such record of tax cases, the history of taxation law in Malaysia can be traced and understood – and together with the updates it may, perhaps, even help to provide a glimpse into the trend that the courts may take in the future!

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entertainment tax

A very large bank has expanded their operations and specialized so much, that they even have a special window for holdups.

"My wife goes through my cheque book like a bestseller. She will not put it down until she finishes it."

All Malaysia Tax Cases

Choong Kwai Fatt

About the author Choong Kwai Fatt

Dr Choong Kwai Fatt is an Associate Professor in taxation at the Faculty of Business and Accountancy of the University of Malaya (UM). He is a prolific author and has written a number of taxation law titles under the *Sweet & Maxwell Asia: Taxation Series* banner, i.e. *Leading Cases on Income Tax*, *Tax Planning For Malaysian Employees*, *Tax Planning on Business Income* as well as *Istilah Percukaian*. Drawing on his vast experience as a tax consultant, Dr Choong has painstakingly compiled the cases and has thoroughly examined the issues therein.

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Book Review by

Kalisewaran Sinniah
LLB Hons University of Wolverhampton, CLP

"in the FOUR CHAMBERS of MY HEART"

by Dr. Arjunan Subramaniam

".....You do not have to live long, but live well while you live.
Be a sum total at any point in time"

Thus begins the beautiful book of poetry, beauty in words, in meaning and in pictures...indeed a feast for the soul. That opening phrase on the inside cover of the book is a summation of the author who is a practicing advocate & solicitor in Malaysia, an educator (presently an adjunct professor, School of Accounting, UUM and previously an Adjunct Professor of Law, The Northern territory University, Darwin Australia), an expert on tax laws and last but not least a poet! A completeness of using both sides of the brain – the left being the rational lawyer and educator and the emotional right as a poet. That is after all the balance a human being endeavors towards.

The book itself is a compilation of poems previously published and unpublished which are paired with beautiful pictures in glossy art paper. To take a few words from the foreword "For thousands of years poetry has touched the heart and soul of the human condition.....Poetry can be a special pathway to the spiritual core of our lives; there are great methods of meditating with poems to experience how it can engage, illuminate and delight our souls on our spiritual journey". Need I say more?

This book is an intensely personal sharing of Dr. Arjunan's personality and a very different and surprising look at someone well versed in tax. So not everyone in tax is dry and boring. Hidden human depths wait to be discovered !

A good book to keep at your side for some solace during a weary day at the office or at home to gently calm the mind before going to sleep. Or even perchance to woo a beloved?!

Being a offering of love, this book is not for sale. However readers may obtain a copy from Dr. Arjunan Subramaniam at RM64.00 per copy which will be sent as a contribution to the "Divine Life Society Orphanage" in Kuala Lumpur.

Disclaimer : The views and opinions expressed in this review are those of the reviewer personally made in good faith. They are not necessarily views expressed or endorsed by MIT.

entertainment tax

Doctor: I am sorry to say the cheque you gave me last week has come back.
Patient: So has the fever, doc.

Two strawberries met in a jar. One said to the ,"You know, if only we had not met, we would not be in this jam."

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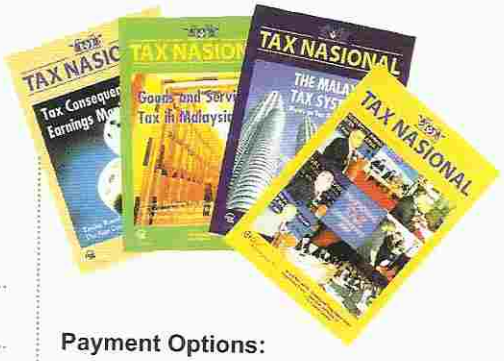

Payment Options:

Cheque amount of RM .....
payable to Malaysian Institute of Taxation.

Please invoice me .....

Malaysian Institute of Taxation (225750-T)
(Institute Percukaian Malaysia)
Unit B-13-2, Block B, 13th Floor,
Megan Avenue II, No.12, Jalan Yap Kwan Seng,
50450 Kuala Lumpur, Malaysia

Tel:+6 03 2162 8989
Fax:+6 03 2162 8990
Website :www.mit.org.my

Malaysian Institute Of Taxation

To :
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

Pilot Papers, December 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 & 2004 Examinations Question and Answers Booklet Order Form

Mr./Mrs/Ms: _____

Address: _____

_____

Student Registration No : _____

Tel No: _____

MIT REGISTERED STUDENTS & MIT MEMBERS ONLY

Year	Cost / Level		
	Level I	Level II	Level III
2005 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
2004 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
2003 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
2002 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
2001 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
2000 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
1999 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
1998 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
1997 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
1996 Examinations Booklet	RM 10.00	RM 12.00	RM 15.00
1995 Examinations Booklet	RM 10.00	RM 12.00	RM 9.00
Pilot Paper Booklet	RM 10.00	RM 12.00	RM 15.00

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Year	Cost / Level		
	Level I	Level II	Level III
2005 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
2004 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
2003 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
2002 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
2001 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
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1998 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
1997 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
1996 Examinations Booklet	RM 14.00	RM 15.00	RM 22.00
1995 Examinations Booklet	RM 14.00	RM 9.00	RM 16.00
Pilot Paper Booklet	RM 14.00	RM 15.00	RM 22.00

I enclosed a Cheque / PO / MO no :_____ for RM _____ payable to **Malaysian Institute of Taxation.**

Student s Signature :_____ Date : _____ Please note a postage fee of RM0.70 will be charged for every booklet

Malaysian Institute Of Taxation

Benefits & Privileges
OF MIT MEMBERSHIP

The Principal benefits to be derived from membership are :

- The status attaching to membership of a professional body dealing solely with the subject of taxation;
- Access to up to date circulars, guidelines and public rulings from LHDNM and MOF via our web site and through a members only access to information through our IT Portal;
- Access to technical articles, current tax notes and news from the MIT through our publications including, among others, our quarterly journal Tax Nasional and the annual Budget Booklet;
- Entitlement to participate in the election process of MIT;
- Membership rates for the technical and social activities organized by the MIT;

Qualification required for Associate Membership :

1. Any Registered Student who has passed the examinations prescribed (unless the Council shall have granted exemptions from such examinations or parts thereof) and who has not less than five (5) years of practical experience or employment relating to taxation matters and approved by the Council.
2. Any person who is in practice or in employment who is an advocate and solicitor of the High Court of Malaya, Sabah and Sarawak and who has had not less than three (3) years practical experience in practice or employment relating to taxation matters approved by the Council.
3. Any person who has passed the Advanced Course examination conducted by LHDNM and who has not less than five (5) years of practical experience or employment relating to taxation matters and approved by the Council.
4. Any person who is registered with MIA as a Chartered Accountant and who holds a Practising Certificate and an audit license issued pursuant to the Section 8 of the Companies Act, 1965.
5. Any person who is registered with MIA as a Chartered Accountant with a Practising Certificate only and has not less than two (2) years practical experience in practice or employment relating to taxation matters approved by the Council.
6. Any person who is registered with MIA as a Chartered Accountant without a Practising Certificate only and has not less than three (3) years practical experience in practice or employment relating to taxation matters approved by the Council.
7. Any person who is registered with MIA as a Licensed Accountant and who has not less than five (5) years practical in practice relating to taxation mattersapproved by the Council after admission as a licensed accountant of the MIA under the Accountants Act, 1967.
8. Any person who is an approved Tax Agent under Section 153 of the Income Tax Act, 1967.
9. Any officer or ex-officer from the Royal Customs Department.
10. Full member of ACCA, CIMA, CPA (with 3 years practical experience in taxation matters)

Classes of Membership :

There are two classes of members. Associate Members and Fellows. The class to which a member belongs to is herein referred to as his status. Any member of MIT so long as he remains a member may use, after his name in the case of a Fellow, the letters Fellow of Taxation Institute, Incorporated (F.T.T.I) and in the case of an Associate, the letters Associate of Taxation Institute, Incorporated (A.T.T.I.).

Fellow Membership :

A Fellow may be elected by the Council provided the applicant has been an Associate Member for not less than five (5) years and in the opinion of the Council he is a fit and proper person to be admitted as a Fellow.

Application for Membership

Every applicant shall apply in a prescribed form and pay prescribed fees. The completed transaction. The completed application form should be returned together with:

1. Certified copies of :
   a. MyKad;
   b. All educational and professional certificates in support of the application;
2. Two passport sized phographs (non-returnable).
3. Fees:FELLOW

a. Upgrading Fee	RM300-00
b. Annual Subscription	RM250-00

ASSOCIATE

a.Admission Fee	RM200-00
b.Annual Subscription	RM200-00

Every member granted a change in status shall thereupon pay such additional fee for the year then current, as may be prescribed.

The Council may at its discretion and without being required to assign any reason reject any application for admission to membership of the Institute or for a change in the status of a member.

Admission fees shall be payable together with the application admission as members. Such fees will be refunded if the application is not approved by the Council.

Annual subscription shall be payable in advance on admission and thereafter annually before January 31 of each year.