Malaysian Institute Of Taxation

The premier body for tax professionals

TAX NASIONAL

Official Journal of the Malaysian Institute of Taxation Vol.16/2007/Q3 RM38.00

2008 Budget:
Building and Sharing
by Dr Nakha Ratnam Somasundaram

Customs Exemptions Raw Materials, Machinery and Equipment
by Mr Thomas Selva Doss

Legal Professional Privilege
A Fundamental Taxpayer's Right
by Mr Sudhar Thillainathan

KDN PP 7829/3/2008

Malaysian Institute Of Taxation

http://www.mit.org.my

The premier body for tax professionals

Continuing Professional Development (CPD)

TRAINING PROGRAMMES 3rd QUARTER 2007

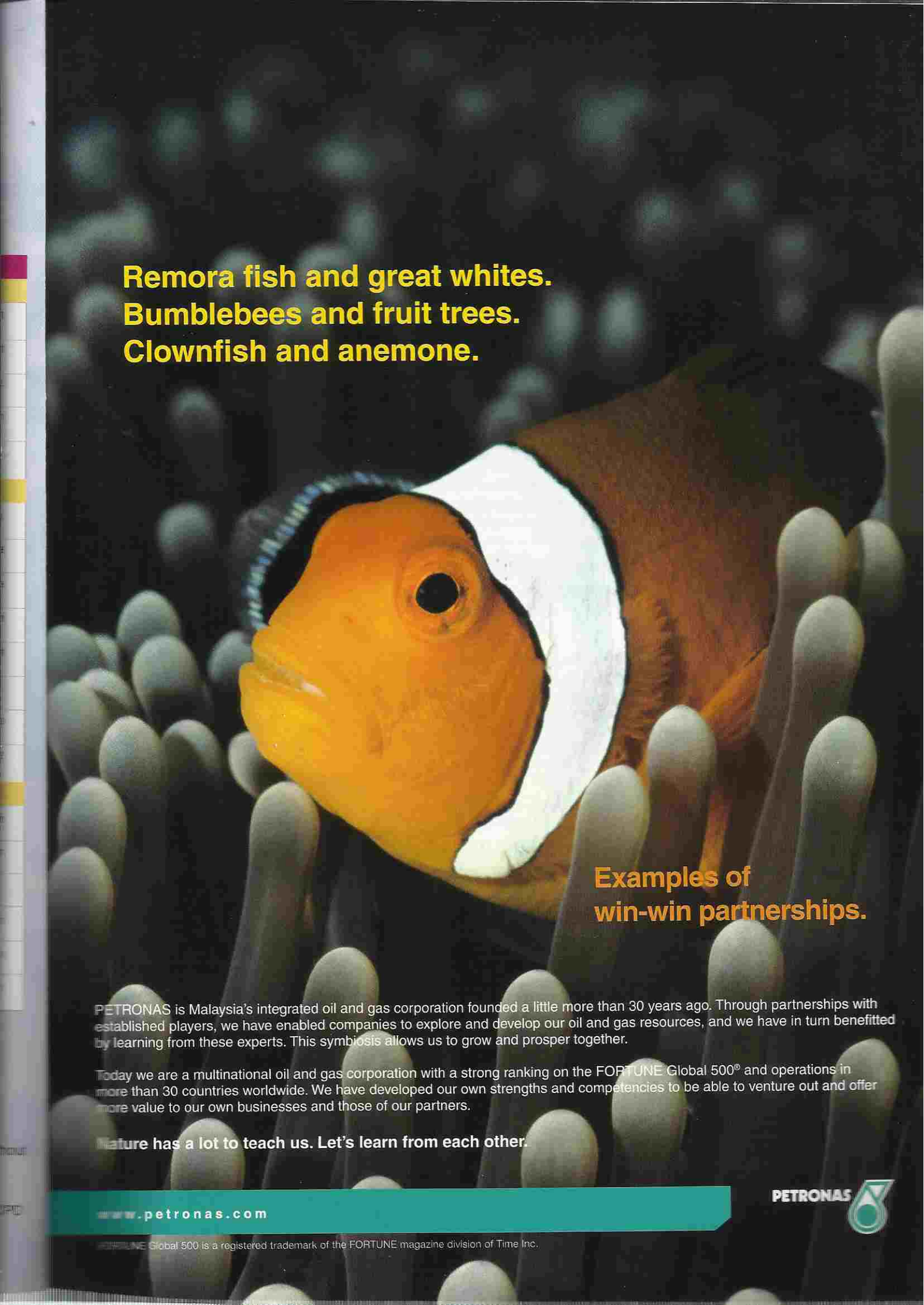
Date	Training Programme	CPD	Venue	Speaker
OCTOBER 2007 (13th & 14th Hari Raya Puasa)				
3 October 2007 9.00am - 5.00pm	Practitioner's Updates	8	Kuantan	Mr Harvinder Singh
18 October 2007 9.00am - 5.00pm	Practitioner's Updates	8	Malacca	Mr Harvinder Singh
19 October 2007 9.00am - 5.00pm	Practitioner's Updates		JB	Ms Teoh Boon Kee
24 October 2007 9.00am - 5.00pm	Workshop: Cross Border Transactions: A Practical Workshop with Case Studies	8	KL	Mr Harvinder Singh
30 October 2007 4.00pm - 7.00pm	Evening Talk: Deferred Tax - A Tax Practitioner's Fundamental's	2.5	KL	Mr Danny Tan
NOVEMBER 2007 (8th Deepavali)				
5 November 2007 9.00am - 5.00pm	Withholding Tax	8	KL	Mr Soh Lian Seng
5 November 2007 9.00am - 5.00pm	Practitioner's Update	8	Penang	Ms Teoh Boon Kee
6 November 2007 9.00am - 5.00pm	Practitioner's Update	8	Ipoh	Ms Teoh Boon Kee
13 November 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	Malacca	Mr Harvinder Singh
14 November 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	JB	Mr Harvinder Singh
22-23 November 2007 9.00am - 5.00pm	AOTCA 2nd International Convention	8	KL	Various Speakers
23 November 2007 9.00am - 5.00pm	Practitioner's Update	8	Kuching	Ms Teoh Boon Kee
27 November 2007 9.00am - 5.00pm	Practitioner's Update	8	Kota Kinabalu	Ms Teoh Boon Kee
DECEMBER 2007 (20th Hari Raya Qurban / 25th Christmas)				
10 December 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	Penang	Mr Harvinder Singh
11 December 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	Ipoh	Mr Harvinder Singh
12 December 2007 9.00am - 5.00pm	Seminar: Tax Compliance - Complexities facing a Tax Practitioner: Roles & Practices	8	KL	Various Speakers
17 December 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	Kota Kinabalu	Mr Harvinder Singh
18 December 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	Kuching	Mr Harvinder Singh
19 December 2007 9.00am - 5.00pm	Transfer Pricing: As A Planning Tool & Indirect Tax Implications	8	Sibu	Mr Harvinder Singh

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


Remora fish and great whites.
Bumblebees and fruit trees.
Clownfish and anemone.
Examples of
win-win partnerships.
PETRONAS is Malaysia's integrated oil and gas corporation founded a little more than 30 years ago. Through partnerships with established players, we have enabled companies to explore and develop our oil and gas resources, and we have in turn benefitted by learning from these experts. This symbiosis allows us to grow and prosper together.
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Editor's Note

Dear Readers,

This issue, our lead article, is the commentary by Dr Nakha Ratnam Somasundaram on the 2008 Budget as announced on 7 September 2007.

This appears to be quite a mild budget with a few goodies mainly for the corporate sector. The introduction of the Single Tier Tax System will benefit the Corporate sector as companies will then be able to time the dividends to the cash flow. Dividends may also be paid out of all company profits. This also benefits the Government as it will be able to take all corporate tax paid as revenue without worrying about the repayment to recipients.

The reduction of the corporate tax rate to 25% in 2009 is also welcomed although this widens the disparity between the corporate tax rate and the top marginal personal tax rate.

The budget increase for the education and re-training should bring about a positive long term impact on the skilled labour supply in the country.

Apart from that, we have an article touching on the issue of a taxpayer's privacy entitled **Legal Professional Privilege: A Taxpayer's Fundamental Right** by Sudharsanan Thillainathan who is a fresh face and I hope that more people will begin to contribute.

Associate Professor Hajjah Faridah and Mr Thomas Selva Doss are with us bringing aspects of practical education and indirect taxation for your reading.

The Technical Update by the MIT Technical Department is up to date with a lot of pertinent information. Institute News also brings you all the current happenings at MIT.

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.

COUNCIL MEMBERS

President : **Dr. Veerinderjeet Singh**
Deputy President : **Mr. Lim Heng How**
Vice Presidents : **En. Nujumudin bin Mydin**
: **Mr. Khoo Chin Guan**
Council Members : **Dr. Ahmad Faisal bin Zakaria**
Mr. Arujothi Kanagaretnam
Mr. Chow Kee Kan
Mr. Harpal Singh Dhillon
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Mr. Venkiteswaran Sankar
Mr. Yeo Eng Hui, Adrian

Institute Address : The Secretariat
Unit B-13-2, Block B, 13th Floor, Megan Avenue II,
No. 12 Jalan Yap Kwan Seng,
50450 Kuala Lumpur

Institute Telephone : 03-2162 8989

Institute Facsimile : 03-2162 8990

Institute E-mail : secretariat@mit.org.my
Website : www.mit.org.my

MIT BRANCH OFFICES / CHAIRMAN

East Coast Branch
Chairman : **Mr Wong Seng Chong**
Address : Messrs Lau, Wong & Yeo
1, 2nd Flr, Lorong Pasar Baru 1, 25000 Kuantan, Pahang

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Cantonment, 10250 Pulau Tikus, Pulau Pinang

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Greentown Business Centre, 30450 Ipoh, Perak

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Damai Plaza 3rd Flr, C11 South Wing, Jalan Damai,
PO Box 11003, 88811 Kota Kinabalu, Sabah

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Technical	: **Ms Lim Jiew Yan**	Ext.103
Operations (Examinations & Membership)	: **Ms Mariah Tasbi bt Abd Wahid**	Ext.104
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Tax Nasional

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Malaysian Institute Of Taxation

CONTENTS

INVITATION TO WRITE

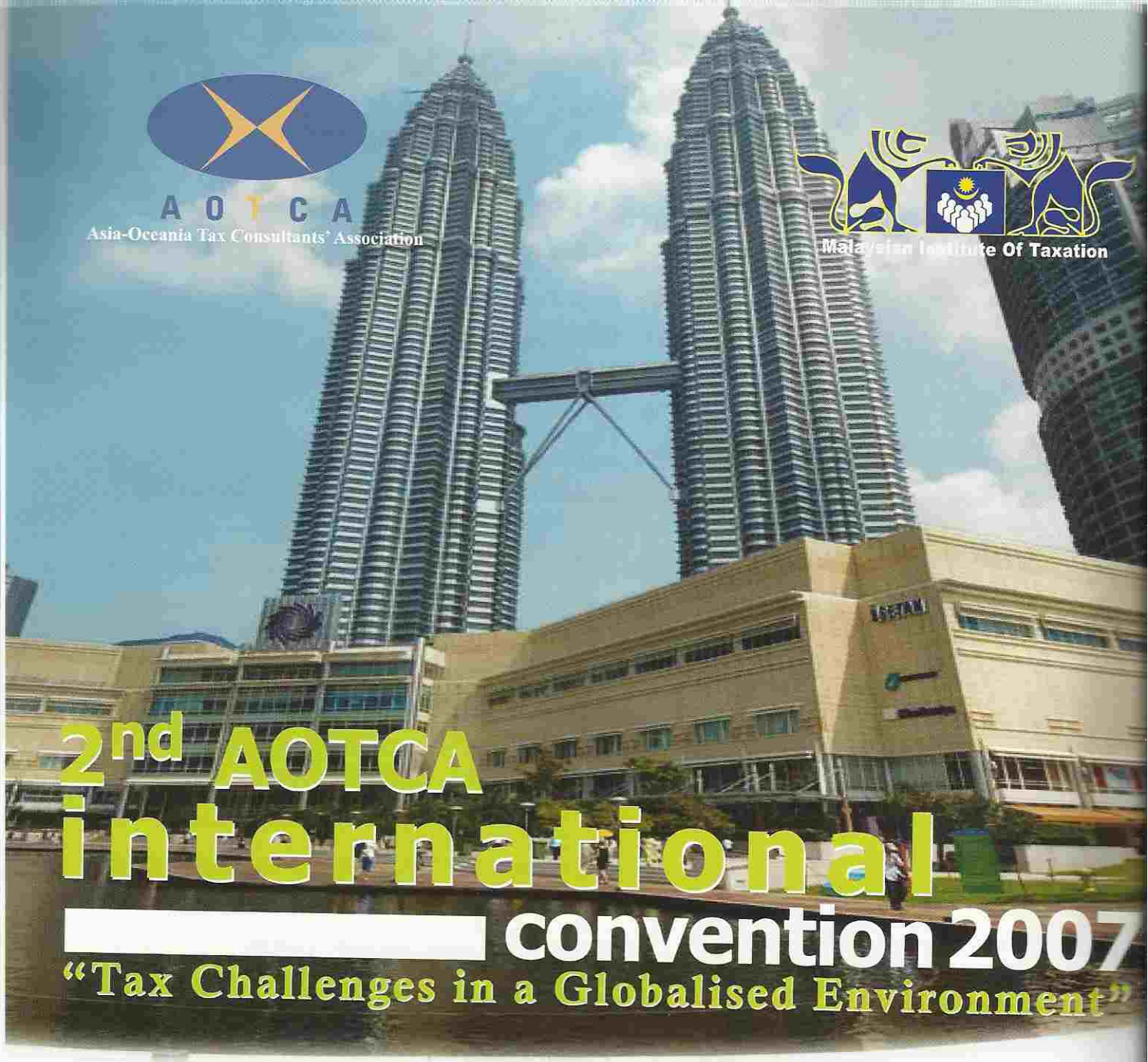
Tax Nasional welcomes original and unpublished contributions which are of interest to tax professionals, lawyers and academicians. It may cover local or international tax development. Articles contributed can be written in English or Bahasa Malaysia. It should be between 2,500 and 5,000 words (doubled-spaced,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



The Malaysian Institute of Taxation (MIT) will be hosting the 2nd AOTCA International Convention from 22-23 November 2007 at the Kuala Lumpur Convention Centre.

The Asia Oceania Tax Consultants' Association is a professional body representing 20 member organizations from 16 countries. AOTCA's main objectives are to provide a forum for the exchange of information, knowledge and experiences among member bodies, to promote studies on taxation, and to exert for the expansion and development of the tax profession primarily in this region.

This convention is expected to attract tax professionals from countries in the Asia Oceania region such as Japan, Australia, Hong Kong, Korea, Pakistan, Singapore, Thailand and China as well as from Malaysia. During the convention, several papers on various aspects of tax and current interest will be presented and discussed by a host of internationally and locally renowned tax professionals and business leaders. There will also be panel discussions, some of which will be chaired by prominent Malaysian business leaders.

Topics that would be presented and discussed at this convention are as follows:

- The Trend of Investment Flows in Asia Pacific and the Impact on Tax Advisors
- Tax Challenges in a Globalised Business World
- Investment in Asia Pacific Region (with emphasis on China, India and Vietnam) – Tax and Regulatory Issues
- Tax in the Boardroom

It is anticipated that the 2nd AOTCA International Convention will attract some 200-300 foreign delegates. It is therefore a good opportunity for members to network with tax consultants from the Asia Oceania region. The convention fee is kept at a competitive rate of RM600 for Malaysian participants which will also entitle them to participate in the Gala Dinner.

For enquiries please contact **Cik Nur** or **Ms Anusha at 03-2162 8989 ext 106 / 109** or email them at **nur@mit.org.my** or **publications@mit.org.my** should you require any further information or clarification. You can also access the brochure at www@mit.org.my.

2nd AOTCA international convention

Tax Challenges in a Globalised Environment

12 CPD HOURS

22 - 23 November 2007

Kuala Lumpur Convention Centre (KLCC)
Kuala Lumpur, Malaysia



Brought to you by AOTCA — Asia Oceania Tax Consultants Association

Hosted by Malaysian Institute Of Taxation — The Premier Body for Tax Professionals

PROGRAMME

DAY 1 THURSDAY, 22 NOVEMBER 2007

8.00 am	Registration
9.00 am	**OPENING** Welcome Address **Mr. Khoo Chin Guan** Chairman of the AOTCA Organising Committee Opening Address **Mr. Kinjiro Mori** President, Asia-Oceania Tax Consultants' Association Keynote Address **Y.B. Dato' Seri Rafidah Aziz** Minister of International Trade & Industry, Malaysia
10.00 am	Networking & Morning Refreshments
10.30 am	**PLENARY SESSION 1** The Trend of Investment Flows in Asia Pacific and the Impact on Tax Advisors Chairperson: **Dr. Veerinderjeet Singh** President, Malaysian Institute of Taxation Speaker/Panelists: 1. **Dr. Foong Kee Kuan** Senior Research Fellow, Malaysian Institute of Economic Research 2. **Mr. Beh Tok Koay** Executive Director, PFA Tax Services Sdn Bhd / Senior Tax Advisor, BDO Binder Tax Services Sdn Bhd
11.30 am	**PLENARY SESSION 2** Tax Challenges in a Globalised Business World Chairperson: Y Bhg **Datuk Aziyah Binti Bahauddin** (invited) Under Secretary, Tax Analysis Division, Ministry of Finance, Malaysia Speakers: 1. **Ms. Maria Lourdes Perez-Luque** Vice President of Confederation Fiscale Europeenne 2. **Mr. Mike Spelman** Representative from Study Group on Asian Tax Administration and Research (SGATAR) 3. **Mr. Hayato Furukawa** Representative from National Tax Agency (NTA) of Japan
12.30 pm	Convention Luncheon
2.30 pm	**PLENARY SESSION 3** Investment in Asia Pacific Region (with emphasis on India, China and Vietnam) – Tax & Regulatory Issues Chairperson: Y Bhg **Tan Sri Datuk Yong Poh Kon** President, Federation of Malaysian Manufacturers Speakers : 1. **Dr. K. Shivaram** Representative from All India Federation of Tax Practitioners 2. **Mr. Marcellus Wong** Representative from Taxation Institute of Hong Kong 3. **Representative from Tax Profession**
4.30 pm	End of Convention Day 1 & Evening Refreshments
7.00 pm	Gala Dinner "The Malaysian Experience"

DAY 2 FRIDAY, 23 NOVEMBER 2007

8.30 am	Networking & Morning Refreshments
9.30 am	**PLENARY SESSION 4** Tax in the Boardroom Chairperson: **Mr. David Russell QC** Sir Harry Gibbs Chambers, Australia Speakers: 1. **Mr. Loughlin Hickey** KPMG Global Head of Tax 2. **Representative from multinational corporation** 3. **Y Bhg Dato' Shahran Laili Bin Hj Abdul Munid** CEO / Executive Director Malaysian Institute of Corporate Governance
12.15 pm	Closing
12.30 pm	End of Convention & Luncheon

REGISTRATIONFORM

Delegate Information

Name (Mr/Mrs/Ms/Miss/Dr) _____

Organisation _____

Address _____

_____ Country _____

Telephone _____ Mobile _____

Fax _____ Email _____

Dietary Requirement ❑ Normal ❑ Vegetarian

Convention Registration Fee (RM)

	Registration
Convention Fee	RM 600

Payment Details

Cheque / Bank Draft no _____

for amount of RM _____ made payable to **"MIT-AOTCA"**. Please write your name and contact telephone number at the back of the cheque/bank draft.

AOTCA

The Asia-Oceania Tax Consultants' Association (AOTCA) is the first international body for tax professionals in the Asia-Oceania region. AOTCA functions with the objectives of promoting mutual understanding and co-operation among the organizations whose memberships include tax consultants in the Asia Oceania region, to contribute to the expansion of the component members' businesses related to taxation and its related areas, and to promote friendship among the members.

MIT

MIT was incorporated on October 1, 1991 as a company limited by guarantee. Currently, MIT is governed by its Council of 16 elected representatives, which delegates much of its detailed work to working committees and is the premier body for tax professionals in Malaysia.

Its mission is to be the premier body for providing effective institutional support to members and promoting convergence of interests with government, using taxation as a tool for the nation's economic advancement; and to attain the highest standard of technical and professional competency in revenue law and practice supported by an effective secretariat.

GENERALINFORMATION

Official Language

The official language of the Convention will be English. Simultaneous interpretation facilities for delegates can be arranged upon request.

Venue

The Convention will be held at Kuala Lumpur Convention Centre (KLCC), Kuala Lumpur City Centre, 50088 Kuala Lumpur, Malaysia. Tel: +(603) 2333 2888 Fax: +(603) 2333 2882

How to Register

By Fax	+(603) 2162 8990
By Email	publications@mit.org.my
By Mail	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
Website	www.mit.org.my

The number of places is limited. Therefore, it is highly recommended that you send in your registration form as soon as possible. The closing date is **9 November 2007.**

IMPORTANT NOTICE: *Payment is required with registration and must be received to guarantee your place.*

Convention Fee

Convention fee covers conference documentation, refreshments, two lunches, Gala Dinner and a certificate of participation. All registration forms must be submitted with full payment. A confirmation letter will only be issued upon receipt of full payment before the event.

Cancellation Policy

There will be no refund for cancellation. Substitution is welcomed, and must be in writing. Please provide details of susbstitute delegate by **12 November 2007.**

Accommodation

Special accommodation rates have been negotiated with the following hotels:

Mandarin Oriental Hotel
RM579++ per room per night – Deluxe City Room
(not inclusive of breakfast)
Contact: Ms. Lee Fang
Tel: +(603) 2179 8636
email: leefangl@mohg.com
Location: 5 minute-walk to Convention Venue

Nikko Hotel
RM380++ per room per night – Deluxe City Room
(not inclusive of breakfast)
Contact: Ms. Hafiza
Tel: +(603) 2161 1111
email: hafiza.husin@hotelnikko.com.my
Location: 10 minute-walk to Convention Venue

Traders Hotel
RM335++ per room per night – Single Deluxe Park View
(inclusive of breakfast)
Contact: Ms. Marianne
Tel: +(603) 2332 9888
email: marianne.tsen@shangri-la.com
Location: 5 minute-walk to Convention Venue

Impiana KLCC Hotel
RM310++ per room per night – Superior Queen Room
(inclusive of breakfast)
Contact: Ms. Suhaila
Tel: +(603) 2147 1111
email: suhailaimpianaklcc@impiana.com
Location: 10 minute-walk to Convention Venue

To take advantage of this rate, please contact the relevant persons indicated above.

NOTE: *Please note that all accommodation bookings have to be guaranteed by payment. The above room tariffs are valid until 12 October 2007. Bookings made after this date is subject to availability and will be at the prevailing rate.*

For enquiries, please contact:

Ms Anusha Ratnam
Tel: +(603) 2162 8989 ext.109
Fax: +(603) 2162 8990
Email: publications@mit.org.my
Website: www.mit.org.my

Cik Nur
Tel: +(603) 2162 8989 ext.106
Fax: +(603) 2162 8990
Email: nur@mit.org.my
Website: www.mit.org.my

DISCLAIMER: *All information contained in this programme is correct and accurate at time of printing. The Conference organiser reserves the right to cancel, make any amendments and/or changes to the programme if warranted by circumstances beyond its control. The Convention organiser also reserves the right to make alternative arrangements without prior notice should it be necessary to do so. Upon signing the registration form, you are deemed to have read and accepted the terms and conditions.*

Tear along here

Malaysian Institute of Taxation's Strategic Initiatives & Action Plans

The Council of the Malaysian Institute of Taxation held a Strategic Review on 21 July 2007 to discuss and outline the various initiatives and action plans that are needed over the next few years to enable the Institute to further enhance its standing among its various stakeholders.

The Council agreed on the following **Strategic Initiatives:**

1. **To enhance the image of the institute so that it continues to be the premier body representing the tax profession**
2. **To enhance technical competency and professionalism of members**
3. **To promote awareness and understanding of tax matters.**

Each Initiative has a series of actions plans which will be looked at and developed by each of the individual committees.

In essence, the first strategic initiative refers to **developing a brand and promoting it.** Among the action plans under this initiative are the following:

- to ensure that the Institute works with the Government towards ensuring that those who apply for tax licences are members of the Institute
- to maintain close collaboration with all relevant Government agencies
- establishing closer links between the Council and the various branches,
- working cohesively with all other professional bodies so as to effectively lead the tax profession
- to enhance the use of technology through the improviement of the website and usage of other software applications
- considering a new description for members
- establishing a new name for the Journal with the intention of making it more current and contemporary together with improving its design and layout
- developing a new logo for the Institute.

All of the above-mentioned action plans will involve the review of the practices adopted in various other local/foreign professional bodies/institutes with the intention of adopting best practices in carrying out the role/objectives of the Institute.

The second strategic initiative involves the following broad aims i.e.

- Creating an educational and ethical framework of the highest standard aimed at producing tax advisers of the best quality
- Understanding the needs of taxpayers and being able to advocate simple and effective tax delivery methods for the benefit of all sectors of society
- Being available for consultation by legislators, regulators and administrators of tax laws and producing high quality representations and responses.

Among the action plans to be worked on in connection with this initiative are:

- Looking into the feasibility of setting up a Malaysian Tax Research Foundation so that tax research can be carried out, research position papers developed and forwarded to the relevant Government agencies and other stakeholders. This will involve studying how other local and overseas professional institutes developed their research entities. Collaborative arrangements could be developed so that tax research is done via the Malaysian Tax Research Foundation.

Malaysian Institute of Taxation's Strategic Initiatives & Action Plans

- An update of the Memorandum and Articles of Association of the Institute will be carried out so that there is effective corporate governance and the self-regulatory processes of the Institute would be enhanced by way of reviewing and revising the rules & regulations of the Institute to make it more current and by developing procedures/by-laws for the effective functioning of the Investigations Committee as well as the Disciplinary Committee.

The continuing process of updating and enhancing the Institute's system of internal controls, implementing risk assessment measures, and considering an internal audit role in respect of both finance and non-financial activities of the Institute is also one of the action plans under this initiative.

One significant action plan is with regard to deploying CPD courses around the country and to continue to develop appropriate courses for members as well as to ensure that the quality of such courses is maintained and to consider ways of cooperating with other organisers so as to deliver courses to members all over the country including events for members in the Commerce & Industry Sector. There will also be a study into the possibility of instituting compulsory CPD for members.

A major action plan includes working towards achieving representation for the Institute in the tax licensing interview process and improving the process and transparency of granting a tax licence. The other action plan to note is that which involves studying the possibility of issuing practising certificates (PC) to members and establishing the criteria for issuing a PC by reviewing the position in both local and overseas professional bodies.

The third strategic initiative is geared towards action plans to enhance the role of MIT with regards to the general public via organising forums/avenues for disseminating relevant information to the public in collaboration with the tax authorities so that these will assist in inculcating a greater appreciation of taxation. This will assist in promoting greater awareness of the Institute via careers talks in schools/universities and will develop linkages with young practitioners in tax firms and with universities. The Institute will work towards getting more colleges to conduct courses for students undertaking its professional examinations. Additionally, the Institute will continue to regularly review the Professional Examination structure in order to develop an effective approach which is more closely aligned to the needs of employers and students via a review of the examinations and a regular updating of the examination syllabus.

To conclude, all the action plans stated above will take a period of three to five years to be completed. The action plans can only be successfully carried out with the active participation and support of the various committees that have been instituted by the Council. With a cohesive approach and strong commitment from my fellow Council members, it is my hope that the various initiatives and action plans will be looked into and developed as soon as possible so that the Institute reinvents itself into a proactive organisation providing adequate services to all its members and the various other stakeholders.

Dr Veerinderjeet Singh
President
Malaysian Institute of Taxation

Institute News

15th Annual General Meeting of MIT

The Malaysian Institute of Taxation (MIT) held its 15th Annual General Meeting (AGM) on 30 June 2007 at the Best Western Premier Seri Pacific Hotel (formerly the Pan Pacific Hotel).

The 15th AGM also witnessed the retirement of the outgoing president Tuan Haji Abdul Hamid bin Mohd Hassan. Dr Veerinderjeet Singh, Mr. Lim Heng How and Dr Jeyapalan Kasipillai were re-elected to the Council. Mr Lew Nee Fook was also elected to the Council.

At the Council Meeting held soon after the AGM, the following were elected to Council:

President : **Dr. Veerinderjeet Singh**

Deputy President : **Mr. Lim Heng How**

Vice President (s) : **En. Nujumudin Bin Mydin**
Mr. Khoo Chin Guan

Dr. Veerinderjeet Singh is a leading tax consultant in the country and has previously served MIT as a Vice President. He has been the Chairman of the Technical & Public Practice Committee of MIT. He is currently Managing Director of TAXAND MALAYSIA Sdn Bhd and has been actively involved in the field of taxation in various capacities in Government, academia and in the private sector.

Mr. Lim Heng How has served in the Malaysian Inland Revenue Board (IRB) and retired as the Deputy Director General. He is currently an Executive Director of Deloitte Touche Tohmatsu Tax Services Sdn Bhd.

En Nujumudin bin Mydin and Mr. Khoo Chin Guan have both served MIT as Vice President(s) in the previous term. En Nujumudin had also previously served in the IRB as a Deputy Director General. He currently heads his own tax practice firm known as Pantai Tax Specialists while Mr Khoo is the Head of the tax practice of KPMG.

The new leadership together with the rest of the members of the Council will carry on the tradition of enhancing the professionalism of tax practitioners as well as contributing towards improving the tax system through various dialogue sessions and submissions to the relevant tax agencies and the Ministry of Finance.

In his first official speech as president of MIT at the National Tax Conference 2007 on 16 July 2007, Dr Veerinderjeet emphasised that in line with MIT's commitment towards developing competent and professional tax practitioners for the future, MIT would be aggressively promoting its professional examinations.

Dr. Veerinderjeet also announced certain initiatives, among others, enhancing MIT's research capabilities and facilities so as to be more proactive in the area of tax reform and tax administration, and working cohesively with all relevant professional bodies so that effective representation is made to the tax authorities on all matters relating to taxation.

Following the National Tax Conference, MIT held a "Strategic Review Session" on 21 July 2007 wherein these and other initiatives were formalised in a five year plan. The various committees have been strengthened and implementation of these initiatives will be the focus over the next few years.

The other MIT Council members are:

Council Member(s) : Dr. Ahmad Faisal Bin Zakaria
: Mr. Aruljothi Kanagaretnam
: Mr. Chow Kee Kan
: Mr. Harpal Singh Dhillon
: Prof. Dr. Jeyapalan Kasipillai
: Mr. Lew Nee Fook
: Dato' Liew Lee Leong @ Raymond Liew
: Mr. Lim Kah Fan
: Mr. Peter Lim Thiam Kee
: Mr. Neoh Chin Wah
: Mr. Venkiteswaran Sankar
: Mr. Yeo Eng Hui, Adrian

Malaysian Institute Of Taxation

The premier body for tax professionals

MIT Committees

Following the recent AGM of the Institute, the following Committee have been set up to carry out the various activities of the Institute. The following Council Members have been appointed as Chairmen & Deputy Chairmen for the 2007/2008 term:

No	Committee	Chairman	Deputy Chairman
1.	Executive Committee	Dr. Veerinderjeet Singh	Mr. Lim Heng How
2.	International Affairs	Mr. Lim Heng How	En.Nujumuddin bin Mydin
3.	Conference Organising	Mr.Khoo Chin Guan	Mr. Lim Heng How
4.	Technical & Public Practice	Dr. Veerinderjeet Singh	Mr.Khoo Chin Guan
5.	Government Affairs	En.Nujumuddin bin Mydin	Dr. Ahmad Faisal bin Zakaria
6.	Continuing Professional Education	Mr. Lim Kah Fan	Mr.Lim Thiam Kee, Peter
7.	Examinations	Prof Dr.Jeyapalan Kasipillai	Mr. Venkiteswaran Sankar
8.	Student Affairs	Mr. Venkiteswaran Sankar	Prof Dr.Jeyapalan Kasipillai
9.	Public Relations	Dato' Raymond Liew	Mr. Adrian Yeoh
10.	Membership Services Committee	Mr. Adrian Yeoh	Mr. Lim Kah Fan
11.	Editorial	Mr. Harpal Singh Dhillon	Dato' Raymond Liew
12.	Disciplinary	Mr. Chow Kee Kan	Dr. Ahmad Faisal bin Zakaria

MIT visits to the LHDNM, 8 August and 13 September 2007

Seated from left to right

Ms. Anusha Ratnam (MIT's AOTCA event executive),
Puan Hasmah bt Abdullah, Chief Executive Officer/Director General of Inland Revenue Mr Khoo Chin Guan, Vice President & Chairman of the Conference Organising Committee of MIT

Seated from left to right

Puan Hasmah bt Abdullah,
Chief Executive Officer/Director General of Inland Revenue
Mr Khoo Chin Guan, Vice President & Chairman of the Conference Organising Committee of MIT, Puan Noorfaizah

Seated from left to right

Dr Veerinderjeet Singh, President of MIT and
Puan Hasmah bt Abdullah,
Chief Executive Officer/Director General of Inland Revenue

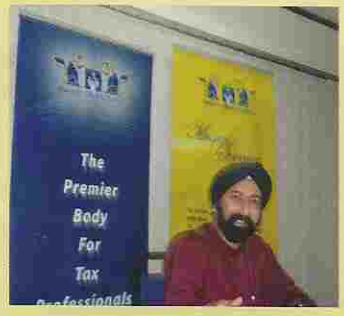
Seated from left to right

Puan Hasmah bt Abdullah,
Chief Executive Officer/Director General of Inland Revenue
and Mr Lim Heng How, Deputy President of MIT

Pre-Budget Press Interviews

New Straits Times (NSTP)

Ms Rupa Damodaran from NSTP interviewed Dr Veerinderjeet Singh, President of MIT for their Pre-Budget news on 27 August 2007.



Dr Veerinderjeet Singh,
President of MIT

(from left to right)
Ms Rupa Damodaran,
Journalist NSTP;
En Zuno, photographer
NSTP

Sin Chew Jit Poh (SCJP)

Sin Chew Jit Poh sent Ms FY Leong to interview MIT Council members of the Public Relations Committee for their Pre-Budget news on 27 August 2007.

(seated from left to right)
Dato' Raymond Liew, Chairman of the Public Relations Committee;
Dr Veerinderjeet Singh, President of MIT; Mr. Adrian Yeo,
Deputy Chairman of the Public Relations Committee.

(standing from left to right)
Dato' Raymond Liew, Chairman of the Public Relations Committee;
Ms FY Leong, Journalist form SCJP, Dr Veerinderjeet Singh,
President of MIT; Mr. Adrian Yeo, Deputy Chairman of the Public Relations
Committee.

MIT BUDGET DAY

Budget Day, 7 September 2007

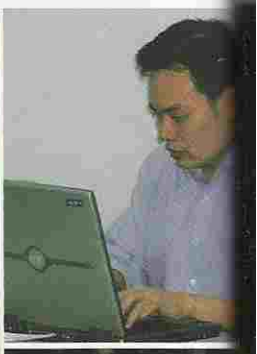
At MIT, a few of the MIT Council Members and practitioners gathered at the office of MIT to view the televised screening of the Budget. They also attended to phone-in interviews by The STAR and The News Straits Times and Sin Chew Jit Poh and together prepared a press statement stating MIT's views on the 2008 Budget.

They were Dato' Raymond Liew, Mr Venkiteswaran Sankar, Mr Chow Kee Kan, Mr Adrian Yeo, Mr. Chow Chee Yen, Mr Anderson Ng and Mr Harvindar Singh.

Budget Night at CCH

On the same evening, members from various tax, accounting & auditing firms gathered at Commerce Clearing House, in Menara Weld , Jalan Raja Chulan for an all night session to produce the annual 2008 Budget Booklet which is published jointly by the Malaysian Institute of Taxation, Malaysian Institute of Accountants and The Malaysian Institute of Certified Public Accountants















Post Budget

On 8 September 2007, Mr Chow Chee Yen started off the MIT Budget Seminar Roadshow at the Armada Hotel in Petaling Jaya, Selangor Darul Ehsan. He provided an analysis of the changes and impact of the 2008 Budget to both tax practitioners and members of the general public together with a comparative analysis of the 2007 & 2008 Budgets.

On 10 September 2007, Datuk Aziyah Bahauddin, Under Secretary of the Tax Analysis Division, Ministry of Finance spoke on the 2008 Budget to a record audience of over 500 persons comprising tax practitioners and members from commerce & industry. MIT would like to record its deepest gratitude to Datuk Aziyah for providing us with her analysis and insights into the 2008 Budget.

Farewell to Ms Sunita Nathan, Executive Director

MIT bid Ms Sunita Nathan farewell as she moved on to greener pastures and we wish her all the best!

Branch News

The East Coast Branch held a dialogue with Lembaga Hasil Dalam Negeri, Malaysia Cawangan Kuantan (LHDNM) on Tuesday 24 July 2007. Altogether 52 participants attended this lively dialogue with some coming from as far away as Bentong, Raub and Mentakab.

The State Director of Pahang, Kelantan & Terengganu, Encik Mat Lazim together with Pengarah Cawangan Kuantan, Raub and Temerloh were also in attendance. Various tax issues were raised by the tax agents and some issues pertaining to the local branches were also put forward by the respective Pengarah Cawangan. The interaction and mutual flow of information was lively and beneficial to all who attended. At the end of the dialogue, all participants were treated to a generous hi-tea session by LHDNM. MIT would like to thank the LHDNM for their generosity, co-operation and goodwill.

Immediately after the hi-tea, MIT's East Coast Branch Committee members paid a courtesy call on the new Pengarah Cawangan Kelantan, Puan Wan Fauziah.

Malaysian Institute Of Taxation

MIT Welcomes Its New Executive Director

The Council of the MIT had mandated the Executive Committee to search for a suitable replacement for the previous Executive Director. Subsequently, a few Council members together with some of the members of the Executive Committee had conducted interviews and had recommended Ms Kulwant Kaur to be appointed as the next Executive Director of the MIT. Ms Kulwant's appointment takes effect from 16 October 2007.

Ms Kulwant Kaur is a Fellow member of the Malaysian Institute of Chartered Secretaries and Administrators and has over twenty years experience as a company secretary and administrator having worked in various organisations including legal and secretarial firms and a local professional institute.

Ms Kulwant's most recent appointment was as the Chief Technical Officer at MAICSA, the professional body for chartered secretaries and administrators in Malaysia. She was with MAICSA for over seven years having been the technical director and then the operations director before being promoted to chief technical officer. During her tenure in MAICSA, she played a key role in cementing the Institute's profile as a professional body and regulatory authority on corporate secretarial and administrative matters. Her other contributions included conducting training, carrying out research, contribution of articles, reviewing and editing publications and writing reports.

Her analytical and problem solving skills played a contributory role in council meetings as well as in committee and task force meetings within the Institute which included preparing the agenda and verifying papers for deliberation and writing up minutes of the meetings. In her relentless pursuit of quality management, she closely monitored follow up work from decisions taken during various Committee and task force meetings. Her consultancy skills were regularly relied upon for matters relating to queries from members on various aspects of company law and regulations and on matters relating to Bank Negara Malaysia, Bursa Malaysia, Securities Commission, MITI, LHDN, Customs, Immigration, Ministry of Finance amongst others.

Ms Kulwant also finds the time to do the thing that is close to her heart-- charity work. She has planned suitable corporate communication events and activities for members of MAICSA including blood donation drives, charity visits and has also organised staff activities and events such as luncheons, Family Day, farewell events, etc.

Her concern for the development of the young led her to be instrumental in the formation of the MAICSA Toastmasters Club where she served as the charter president and participated actively in meetings with the Court of Fellows, Young MAICSA Group and Practicsing Certificate holders.

Her strength in public speaking and communication led her to be the key person responsible for preparing speeches. She is a competent trainer, having obtained her certification from Human Resource Development Bhd and she has not only organised but has also conducted training events for MAICSA as part of the Continuing Professional Education training programme of the Institute.

Prior to joining MAICSA, Kulwant headed the secretarial department of a firm in the Northern region covering, Penang, Kedah and Perlis and served as the named company secretary in over 300 companies including listed companies and multinational corporations.

Technical Updates

(3rd Quarter – as at 31st August 2007)

Legislation

Gazette Orders

Income Tax (Exemption) (No. 15) Order 2007 [P.U. (A) 199]

Exemption of income tax on statutory income for a resident company deriving income from a business providing fund management services to foreign investors in Malaysia provided the following conditions are complied with:

(i) The fund is managed in accordance to Syariah principle and certified by the Securities Commission for each year of assessment during the exempt period
(ii) Submission of any return or statement of accounts or other information required under the Act
(iii) Maintaining a separate account for the business income

The above is effective from years of assessment 2007 to 2016.

Customs (Appeal Tribunal) Regulations 2007 [P.U. (A) 210]

The following are the salient points relevant to the Regulations:

(i) Form A shall be used for appeal
(ii) 4 copies of Form A and RM100 should be filed in the Tribunal's Registry
(iii) Extension of time for filing of appeal may be granted upon receiving the appellant's written application
(iv) All declarations or returns must be submitted and all duties and taxes, includes penalty, surcharge or any other money, must be paid, pending appeal
(v) Form B, a notice of hearing, will be served, not less than 14 days before the date of hearing
(vi) Decision of tribunal shall be served to the parties to the proceedings
(vii) Written reasons of the decision could be requested within 28 days from the date when the decision is served and it should be furnished within 30 days after the request is received
(viii) Bahasa Malaysia should be used for the proceedings before the Tribunal but English may also be allowed upon request
(ix) Each party to the proceeding should bear its own cost
(x) Appellant may be ordered to pay a sum of up to RM10,000 if the appeal is found to be scandalous, frivolous and vexatious

The above is effective from 1 June 2007.

Customs (Additional Jurisdiction of Customs Appeal Tribunal) Order 2007 [P.U. (A) 211]

The cost and expenses relating to any matter before the Tribunal can be determined by the Tribunal.

The above is effective from 1 June 2007.

Stamp Duty (Exemption) (No. 7) Order 2007 [P.U. (A) 247]

Exemption of stamp duty for all instruments executed pursuant to an approved merger or acquisition scheme between a BioNexus status company, i.e., a company engaged in approved life sciences business, and a biotechnology company, i.e., a company engaged in an activity of producing life science-based product or produce.

The above is effective from 2 September 2006 until 31 December 2011

Customs Duties (Goods Under The Early Harvest Programme) (Free Trade Agreement Between Malaysia And Islamic Republic Of Pakistan) (Amendment) Order 2007 [P.U. (A) 257]

The expiry date for the rate of import duty under the Early Harvest Programme has been extended from 31 March 2007 to 31 December 2007.

The above is effective from 31 March 2007

Income Tax (Exemption) (No. 40) (Amendment) Order 2007 [P.U. (A) 260]

This is to remove the prohibition for the application of tax exemption for an operational headquarters company in the basis period for the year of assessment where it has been granted any incentives under the Promotion of Investments Act 1986 or any exemption or allowances or deductions given under the Income Tax Act 1967 in respect of its non-qualifying income.

The above is effective from year of assessment 2003

Income Tax (Exemption) (No. 41) (Amendment) Order 2007 [P.U. (A) 261]

This is to remove the prohibition for the application of tax exemption for a regional distribution centre company in the basis period for the year of assessment where it has been granted any incentives under the Promotion of Investments Act 1986 or any exemption or allowances or deductions given under the Income Tax Act 1967 in respect of its non-qualifying income.

The above is effective from year of assessment 2003

Income Tax (Exemption) (No. 42) (Amendment) Order 2007 [P.U. (A) 262]

This is to remove the prohibition for the application of tax exemption for an international procurement centre company in the basis period for the year of assessment where it has been granted any incentives under the Promotion of Investments Act 1986 or any exemption or allowances or deductions given under the Income Tax Act 1967 in respect of its non-qualifying income.

The above is effective from year of assessment 2003

Income Tax (Exemption) (No. 16) Order 2007 [P.U. (A) 278]

Exemption of income tax on statutory income for five years for a resident company (i.e. a licensed bank or an Islamic bank within the meaning of the Banking and Financial Institutions Act 1989 and the Islamic Banking Act 1983 respectively) in respect of the source of income derived from its branch or investee company (i.e. a company where at least 20% of its issued share capital is directly owned by another company) which:

(i) carries or will carry on banking, Islamic banking or any part of the foregoing business; and
(ii) is located outside Malaysia.

The exemption of income tax starts from the year the branch or investee company commences the banking business.

The following are the qualifying criteria for the exemption:

(i) an application for such exemption is to be made by the company;
(ii) the application is received by the Central Bank of Malaysia between 2 September 2006 and 31 December 2009; and
(iii) the branch or investee company shall commence the banking business within 2 years from the date of approval issued by the Central Bank of Malaysia.

Notwithstanding the above, the company shall comply with the requirement to submit any return or statement of accounts or to furnish any other information under the provisions of the Act.

The above is effective from 2 September 2006.

Income Tax (Construction Contracts) Regulations 2007 [P.U. (A) 276]

Some salient points include:

Separate sources of income

Each construction contract shall be treated as a separate and distinct source of income of the contractor in respect of the business. Where a contract is in respect of more than one asset and

- a separate proposal is submitted for each asset;
- each asset is subject to a separate negotiation; and
- the costs and revenues of each asset may be identified,

the construction of each asset shall be treated as a separate construction contract of the contractor.

Gross Income

The gross income of a construction contractor for the basis period for a year of assessment in respect of each construction contract shall be the estimated gross profit of the construction contractor for that period.

Estimated gross profit

The estimated gross profit of a construction contractor shall be an amount ascertained using fair and reasonable estimates in accordance with the following formula:

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

Where A is the sum of progress billings received and receivable in that basis period;
B is the total contract price or amount;
C is the total estimated gross profit from the contract.

Adoption of a formula other than the formula provided is allowable if it uses fair and reasonable estimates in accordance with the accounting standard or practice applicable.

The estimated gross profit may be revised for a basis period for a year of assessment or the immediately following basis periods based on the following circumstances:

- there is a variation in construction cost in respect of the contract;
- there is a variation in the contract price or amount; or
- any other commercial reasons as may be approved by the DG.

The contractor shall apply the formula consistently throughout the period of its contract and the result shall reflect a fair spread of the estimated profit for the applicable periods.

Estimated loss

Where an estimated loss from one or more projects is anticipated for that basis period, the estimated loss or aggregate of estimated loss from those projects shall be allowed to be set off against the aggregate of the estimated gross profit from the other construction contracts of the contractor for that basis period.

Adjusted Income

The adjusted income of a construction contractor shall be an amount ascertained by deducting from the aggregate amount of gross income of the contractor from each of its

sources from that business for that period all expenses incurred during that period by the contractor.

Date of commencement of business

A construction contract business shall commence:

- on a date when the contract is secured, a letter of award is offered, or possession of a construction site is obtained;
- on the commencement of an activity carried out in the course of a construction contract business;
- on any date as the DG considers appropriate and reasonable.

Date of completion of a construction contract business

A construction contract shall be deemed to have been completed on the date the certificate of practical completion is issued or on the date upon which the contract is substantially completed.

Deductibility of expenses incurred in respect of warranty or defects liability

Where a construction contract is deemed to have been completed, any expenses in respect of warranty or defects liability of that project which are incurred in that basis periods:

- shall be allowed as a deduction against the gross income of a construction contractor from that contract for that basis period or that following basis period;
- where, by reason of an absence or insufficient gross income from that contract for that basis period or the following basis period, effect cannot be given or cannot be given in full to any expenses falling to be deducted, the expenses (which have not been so deducted) shall be allowed as a deduction against:

(i) the aggregate amount of gross income from the other construction contracts of the contractor for that basis period or that following basis period,

(ii) the gross income from that contract or the basis period preceding the basis period in which the expenses are incurred and where, by reason of an absence or insufficiency of gross income from that contract for the preceding basis period, effect cannot be given or cannot be given in full to any expenses falling to be deducted pursuant to this subparagraph, the expenses which have not been so deducted shall be allowed as a deduction against the gross income from that contract for the next preceding basis period and so on for the duration of the contract:

Provided that the construction contractor shall make an irrevocable election to claim such expenses in the basis period in which the expenses are incurred or in the immediately following basis period.

Actual gross profit or loss

Where a construction contract is deemed to have been completed, the actual gross profit or loss from the project shall be ascertained in the event that:

- the actual gross profit from the contract is more than the total estimated gross profit which has been taken as gross income of the contractor, the difference shall be treated as part of the gross income of the contractor for that basis period; or
- the actual gross profit of the contract is less than the total estimated gross profit which has been taken as gross income of the contractor or if there is an actual loss, the actual gross profit or loss may be apportioned in accordance with the formula provided.

Provided that in applying the formula, the developer shall use the actual cost, profit or loss, as the case may be, from that contract.

The above is effective from the year of assessment 2006

Income Tax (Property Development) Regulations 2007 [P.U. (A) 277]

Some salient points include:

Separate sources of income

Each property development project shall be treated as a separate and distinct source of income of the developer in respect of the business.

Gross Income

The gross income of a property developer for the basis period for a year of assessment in respect of each property development shall be the estimated gross profit of the property developer for that period.

Estimated gross profit

The estimated gross profit of a property developer for the basis period for the year of assessment in shall be an amount ascertained in accordance with the following formula:

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

Where A is the sum of progress billings received and receivable in that basis period;
B is the total estimated sale value of the project;
C is the total estimated gross profit from the project.

Provided that the developer shall ensure that it uses fair and reasonable estimates as required.

The estimated gross profit may be revised for a basis period for a year of assessment or the immediately following basis periods based on the following circumstances:

- there is a variation in the development of the project;
- there is a variation in the selling price of the development unit of the project; or
- any commercial reasons as may be approved by the DG.

Where the estimated gross profit or revised estimated gross profit has been ascertained based on the above-mentioned formula, the developer shall apply the formula throughout the period of its project whereby the result shall reflect a fair spread of the estimated profit for the applicable periods.

Estimated loss

Where a property developer anticipates that for that basis period there will be an estimated loss from one or more of its projects, the estimated loss or aggregate of estimated loss from those projects for that basis period shall be allowed to be set off against the aggregate of the estimated gross profit from the other property development projects of the property developer for that basis period.

Adjusted income

The adjusted income of a property developer shall be an amount ascertained by deducting from the aggregate amount of gross income of the developer from each of its sources from that business for that period all expenses incurred during that period by the developer.

Date of commencement of property development business

A property development business shall commence on a date when some significant activities or essential preliminaries to the normal operations of property development are undertaken or any other date the DG considers appropriate and reasonable.

Date of completion of property development project

A project shall be deemed to have been completed on a date the temporary certificate or the certificate of fitness for occupation or (any) other similar certification, which ever is earlier.

Deductibility of expenses incurred in respect of warranty or defects liability

Where a project is deemed to have been completed, any expenses in respect of warranty or defects liability of that project which are incurred in that basis periods:

- shall be allowed as a deduction against the gross income of a property developer from that project for that basis period or that following basis period;
- where, by reason of an absence or insufficient gross income from that project for that basis period or the following basis period, effect cannot be given or cannot be given in full to any expenses falling to be deducted, the expenses (which have not been so deducted) shall be allowed as a deduction against:

(i) the aggregate amount of gross income from the other property development projects of the property developer for that basis period or that following basis period,

(ii) the gross income from that project or the basis period preceding the basis period in which the expenses are incurred and where, by reason of an absence or insufficiency of gross income from that project for the preceding basis period, effect cannot be given or cannot be given in full to any expenses falling to be deducted pursuant to this subparagraph, the expenses which have not been so deducted shall be allowed as a deduction against the gross income.

Provided that the property developer shall make an irrevocable election to claim such expenses in the basis period in which the expenses are incurred or in the immediately following basis period.

Actual gross profit or loss

Where a project is deemed to have been completed, the actual gross profit or loss from the project shall be ascertained in the event that:

- the actual gross profit from the project is more than the total estimated gross profit which has been taken as gross income of the developer, the difference shall be treated as part of the gross income of the developer for that basis period; or
- the actual gross profit of the project is less than the total estimated gross profit which has been taken as gross income of the developer or there is an actual loss, the actual gross profit or loss may be apportioned in accordance with the formula provided.

Provided that in applying the formula, the developer shall use the actual sales, cost, profit or loss, as the case may be, from that project.

The above is effective from the year of assessment 2006

Double Taxation Relief (The Government of The Syrian Arab Republic) Order 2007 [P.U. (A) 197]

Some salient points include:

Permanent Establishment (PE) (Article 5)

PE includes:

- a building site, a construction, installation or assembly project or supervisory activities if it lasts more than 9 months;
- premises used as sales outlets

Withholding Tax Rates

Dividends (Article 10)	– 5% (if the beneficial owner is a company which has a direct shareholding of at least 25%); or - 10% (for all other cases)
Interest (Article 11)	– 10%
Royalties (Article 12)	- 12%
Fees for Technical Services (Article 13)	- 10%

Double Taxation Relief (The Government of The Republic of Kazakhstan) Order 2007 [P.U. (A) 228]

Some salient points include:

Permanent Establishment (PE) (Article 5)

PE includes:

- a building site, a construction, installation or assembly project if it lasts more than 6 months;
- an installation, structure, a drilling rig or a ship used for the exploration of natural resources if it is used more than 6 months;
- a farm or plantation

Withholding Tax Rates

Dividends (Article 10)	- 10%
Interest (Article 11)	- 10%
Royalties (Article 12)	- 10%
Fees for Technical Services (Article 13)	- 10%

Double Taxation Relief (The Government of The Kingdom of Spain) Order 2007 [P.U. (A) 258]

Some salient points include:

Permanent Establishment (PE) (Article 5)

PE includes:

- a building site, a construction, installation or assembly project if it lasts more than 12 months;
- supervisory activities for the above-mentioned activities if it is more than 6 months

Withholding Tax Rates

Dividends (Article 10) – NIL (if the beneficial owner is a company which has a direct shareholding of at least 5%); or

- 5% (for all other cases)

Interest (Article 11) - 10%

Royalties (Article 12) - 7%

Fees for Technical Services (Article 12) - 5%

Parliamentary Act

Promotion of Investments (Amendment) Act 2007

The following are the salient points relevant to the amendments:

Pioneer Status:

- Definition of new promoted activities and promoted products that were proposed in the 2001 to 2006 Budgets and the Economic Stimulus Package 2003 as follows:
- ~ Small company
- ~ Strategic knowledge-intensive activity
- ~ Specialised machinery & equipment
- ~ Machinery & equipment industry (new and reinvestment)
- ~ Utilisation of oil palm biomass (new and reinvestment)
- ~ Generation of renewable energy
- ~ Automotive component modules industry
- ~ Reinvestment for resource-based industries, integrated logistic services, integrated market support services, integrated central utility facilities, food processing, contract research &development (R&D), R&D company, in-house R&D, utilisation of oil palm biomass to produce value-added products, hotel & tourist projects, heavy machinery, cold chain facilities & services for perishable agricultural produce
- ~ Relocation of existing promoted activity/ product relating to a manufacturing activity from a non-promoted area to a promoted area
- ~ Commercialisation of R&D findings
- ~ Information and communication technology and multimedia activities
- ~ Extension of tax relief period for another 5 years for companies undertaking reinvestment for the purposes of producing value-added products utilising oil palm biomass
- ~ Where pioneer period ceases on or after 1 October 2005, unabsorbed capital allowances and unabsorbed losses are allowed to be carried forward to post pioneer period or any subsequent year of assessment
- ~ Increased tax exemption for pioneer status companies undertaking strategic knowledge-intensive activity, automotive component modules activity, commercializing research and development findings activity, etc.

Investment Tax Allowance:

- ~ Definition of capital expenditure for manufacturing related services
- ~ Computation of investment tax allowance for the following companies:
- ~ Small company
- ~ Private higher education institutions
- ~ Strategic knowledge-intensive activity
- ~ Specialised machinery & equipment
- ~ Machinery & equipment industry (new and reinvestment)
- ~ Utilisation of oil palm biomass (new and reinvestment)
- ~ Generation of renewable energy
- ~ Automotive component modules industry
- ~ Reinvestment for resource-based industries, integrated logistic services, integrated market support services, intergrated central utility facilities, food processing, contract R&D, R&D company, in-house R&D, hotel & tourist projects, heavy machinery, cold chain facilities & services for perishable agricultural produce
- ~ Relocation of existing promoted activity/ product relating to a manufacturing activity from a non-promoted area to a promoted area production of halal food
- ~Conservation of energy for own consumption
- ~ Information and communication technology and multimedia activities
- ~ Provision for a company to surrender the investment tax allowance to apply for the reinvestment allowance
- ~ Provision for withdrawal of investment tax allowance if an asset is disposed within 2 years from the date of acquisition.

Others:

- ~ Streamlining of time bar provisions from 12 to 6 years

IMPORTANT NOTE: MIT Technical Helpdesk Queries

Dear MIT Members,

While every reasonable effort is made to respond to Member's queries to the help desk, please bear in mind that ***the Institute does not respond to technical queries which are advisory in nature.*** *Members must appreciate that such queries would require a degree of technical expertise and judicial interpretations which may be subjective and peculiar to the circumstances of a particular case. MIT is a not-for profit professional body representing tax practitioners. MIT is not involved in tax consultanting. At best the help desk can help guide practitioners towards sources of information related or relevant to their queries. But practitioners have to draw their own conclusions in advising their clients.*

For technical queries which are non advisory in nature*, we would like to state that opinions given by MIT may not be shared by the Inland Revenue Board or the Ministry of Finance. Furthermore, any queries answered by MIT shall not be construed as advisory in nature and MIT is not responsible for any direct or indirect consequences resulting from this.*

Any members who wishes to raise a question is required to state his/her full name and membership number and send the queries to "technical@mit.org.my"

MIT Technical Helpdesk

NATIONAL TAX CONFERENCE

Malaysian Institute Of Taxatio

The National Tax Conference 2007 (NTC 2007) is the largest and most visible annual tax event in Malaysia. For the seventh consecutive year, the Malaysian Institute of Taxation and the Lembaga Hasil Dalam Negeri Malaysia successfully organised the NTC 2007 on 17 and 18 July 2007 at the Kuala Lumpur Convention Centre.

The keynote address was delivered by YB Tan Sri Nor Mohamed Yakcop, Finance Minister II whilst the welcoming speech was delivered by Dr Veerinderjeet Singh, President of MIT. Puan Hasmah bt Abdullah, Chief Executive Officer/Director General of Inland Revenue delivered the opening address of the Conference.

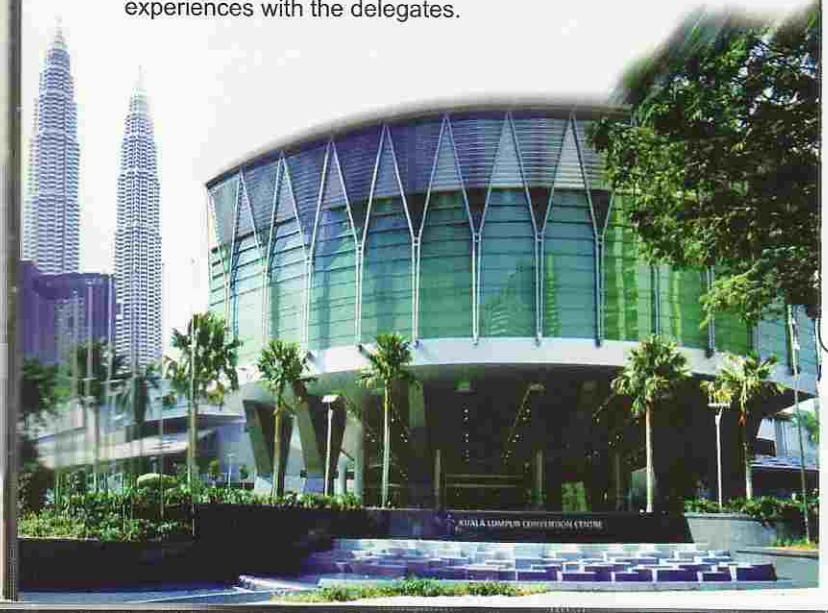
Over the years, the National Tax Conference has garnered the reputation of being the much anticipated tax event of the year. It has been the avenue for tax authorities as well as tax professionals to discuss various issues affecting the tax profession. The NTC 2007 brought together both international tax professionals worldwide and local professionals to discuss a broad range of tax issues and developments. Delegates were given the opportunity to participate in open discussions as well as to network with the tax authorities and leading tax specialists.

This year's Conference recorded the highest participation with 1,800 delegates in attendance.

MIT and the Conference Organising Committee in particular, would like to thank our co-organisers the Akademi Percukaian Malaysia & LHDNM for their invaluable contribution and assistance.

A special Note of Gratitude to YB Tan Sri Nor Mohamed Yakcop, Finance Minister II and Puan Hasmah bt Abdullah, Chief Executive Officer/Director General of Inland Revenue for officiating the Conference.

However, this Conference will not succeed without the participation of the moderators, chairpersons, speakers and panelists who volunteered time out from their busy schedules to put in the effort and energy into sharing their knowledge and experiences with the delegates.



Therefore, we would like to take this opportunity to express our heartfelt thanks to the following persons:

- ~ YBhg Tan Sri Datuk Clifford F. Herbert
- ~ YBhg Datuk Aziyah bt Bahauddin
- ~ Dr Veerinderjeet Singh
- ~ YBhg Dato' Dr R. Thillainathan
- ~ Dr Victor van Kommer
- ~ Puan Hasmah bt Abdullah
- ~ Mr Ronnie Lim
- ~ Mr Michael Smith
- ~ Dr Siti Mariam bt Che Ayub
- ~ Ms Goh Ka Im
- ~ Mr Tony Mulveney
- ~ Mr Wong Kuen-fai
- ~ En Sabin bin Samitah
- ~ En Mohd Idris bin Mamat
- ~ Puan Noor Azian bt Abdul Hamid
- ~ Prof Dr Jeyapalan Kasipillai
- ~ Mr Nitin Nadkarni
- ~ En Abu Tariq bin Jamaluddin
- ~ Mr Ng Seing Liong
- ~ En Bakaruddin Ishak
- ~ Ms Jennifer Chang
- ~ Cik Halijah bt Bulat
- ~ En Shamsun Anwar Hussain
- ~ Mr Kenneth Lim
- ~ Mr Bhupinder Singh
- ~ En Abdul Manap bin Dim
- ~ Mr Narendran Yahambaram
- ~ En Borhan bin Sidik
- ~ YBhg Datuk Paul Low Seng Kuan
- ~ YBhg Dato' Kaziah Abd Kadir
- ~ Mr Robert Teo
- ~ Mr Khoo Chin Guan
- ~ Mr Nicholas Crist
- ~ Puan Asriah Shaari
- ~ YBhg Dato' Yeo How
- ~ Mr Lim Heng How
- ~ Mr Mitsuhiro Honda
- ~ Mr Mukesh Butani
- ~ En Che Omar A.Rahaman

Last but not least we thank all delegates without whom there would be no conference.

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NATIONAL TAX CONFERENCE

Malaysian Institute Of Taxation

WELCOME SPEECH
BY DR VEERINDERJEET SINGH PRESIDENT, MALAYSIAN INSTITUTE OF TAXATION
NATIONAL TAX CONFERENCE 2007 – "Progressing with the Nation"
17 & 18 July 2007
KUALA LUMPUR CONVENTION CENTRE

It gives me great pleasure to wish all of you a very good morning and a warm welcome to the National Tax Conference (NTC) 2007 which is jointly organised by the Malaysian Inland Revenue Board (IRB) and the Malaysian Institute of Taxation (MIT).

We are indeed honoured and grateful to the Second Minister of Finance Yang Berhormat Tan Sri Nor Mohamed Yakcop for accepting our invitation to be the Guest of Honour for this year's conference and to officiate this Conference.

Please allow me to provide a brief introduction regarding the Malaysian Institute of Taxation or MIT for the benefit of non-members, international delegates and panelists present here today. MIT was established 16 years ago in 1991. Presently we have a membership base of over 2,500 members comprising of accountants, licensed tax agents, lawyers and others who have an interest in the field of taxation. Since its inception, MIT has strived to promote the tax profession as well as to contribute towards improving and enhancing the Malaysian tax system. As a professional tax institute, MIT participates in numerous dialogues and meetings organised by the relevant authorities namely the Malaysian IRB, Royal Customs Malaysia and the Ministry of Finance. On the international front, MIT participates in the World Tax Conference as well as in the activities of the Asia-Oceania Tax Consultants Association (AOTCA). In fact this year, MIT is hosting the AOTCA's Annual General Meeting and also the AOTCA's 2nd International Convention in November. Although MIT has grown since its inception, there is still a lot that has to be done .

For the seventh consecutive year, the MIT is proud to be co-organising together with the IRB this premier tax event which is also incidentally the biggest tax conference in the country. This year we have registered a record breaking 1,800 participants. The international speakers together with the local panelists are a testament to the quality of this conference and I am confident that their combined experience and knowledge will provide us with adequate food for thought and ideas for further enhancing tax services. Our primary focus for the conference has consistently been centred on providing educational and knowledge based programs and to help our tax professionals as well as tax payers to keep abreast of current issues.

The theme for the 2007 NTC is "Progressing with the Nation". This is a timely theme bearing in mind that globalisation has a tremendous impact on the way business is done all over the world. Our opening session is a forum discussion entitled "Malaysia's Taxation System in the Context of the Current Global Economic Environment" which I believe will be highly informative and pertinent considering the Government's push for increased investment and the launch of the Iskandar Development Region to be followed by other growth corridors later on. The forum will address various issues with regard to the current tax system such as its viability and competitiveness, tax reforms and tax administration. Moderated by Tan Sir Clifford Herbert (who is the former Secretary General of the Malaysian Ministry of Finance), delegates can expect a lively and stimulating forum.

Advance Rulings have been introduced in Malaysia early this year and this is a necessary component of the self assessment system of taxation that was implemented in 2001. The session on advance rulings will assist in providing clarity and will also delve into the issues with regard to obtaining Advance Rulings and the potential constraints that a taxpayer may face after obtaining such a ruling. The session will look into Australia's successful treatment and handling of Advance Rulings as a case study. This will definitely be very fruitful in charting Malaysia's own direction in successfully implementing such a process. Similarly, there are various other sessions on the second day of the conference which I am sure will interest all of you.

We, at the MIT, strongly believe that tax professionals play an integral part in the effective functioning of the nation's tax system. As such, I wish to reiterate that MIT as the premier professional organisation representing tax professionals across the country is committed in enhancing the status, prestige and performance as well as raising the overall standards of the profession in line with ensuring that tax professionals exhibit the highest integrity in discharging their responsibilities. Some of the initiatives that the Council of the Institute will be looking into include the following:

- Enhancing our research capabilities and facilities to be more proactive in the area of tax reform and tax administration;
- Working cohesively with all relevant professional bodies so that effective representation is made to the tax authorities on all matters relating to taxation;
- In line with our commitment towards providing competent and professional tax practitioners for the future, MIT will be working with the other professional bodies to enhance and promote its professional examinations;
- Considering a rebranding exercise for the Institute with a possible new logo and new descriptions for members reflective of the good standing that the Institute has attained over the last 16 years;
- Considering the viability of issuing practising certificates to those members who wish to practice as well as considering the introduction of a compulsory continuing professional development programme as currently exists for accountants;and
- Enhancing the quality of the journal of the Institute so that we attract articles of the highest quality and promote intellectual discourse in the field of taxation;

The Council will soon be deliberating on developing the necessary action plans so that these can be realised in due course.

Going forward, the MIT believes that it can play a role in assisting the IRB as well as the Customs authorities in further enhancing mutual trust between practitioners and agencies in our journey towards achieving a simple, clear, fair and transparent tax regime. We believe in greater consultation, in effective collaboration as well as in co-designing legislative changes. The current leaders of the tax agencies and the Ministry of Finance have shown their willingness to listen and together, we should be able to enhance the tax system for the mutual benefit of all parties.

I am hopeful that all of you will find the various sessions at this conference most useful and enlightening.In addition, such events are a great place to network and build on business relationships. Finally, I must with the utmost gratitude thank our joint organiser for having made all this possible. No conference can succeed without speakers, presenters, chairmen and panelists. To each and every one of you thank you. I must also not forget the main sponsors for this conference namely PETRONAS (our Diamond Sponsor), AXP Solutions Sdn Bhd, Fuji Xerox Asia Pacific Pte Ltd & Valentine Stewart International (our Bronze Sponsors) to whom we are most grateful. Our thanks also to the rest of the sponsors i.e. Direct Access, Telekom Malaysia Berhad, BRASSTAX™ & CCH (our supporting sponsors). My thanks as well to all the professional bodies i.e. MIA, MICPA, ACCA, CIMA, CPA Australia , MAICSA and the Bar Council for the great co-operative spirit that you have shown. Last but not least, our thanks to the Co-Organising Chairpersons of the Conference, namely Puan Noor Azian bt Abdul Hamid from the Malaysian Tax Academy and Mr Khoo Chin Guan from the MIT, the Secretariat staff (especially Cik Nursalmi and her team), conference assistants and council members for their untiring efforts to make this conference a success. To all of you present here today thank you for having made this conference a success.

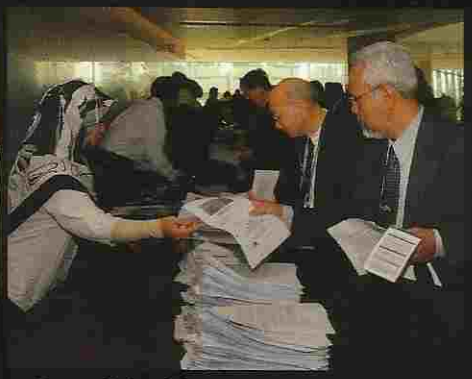
Once again, I thank Yang Berhormat Tan Sri Nor Mohamed Yakcop for your gracious presence here today.

I wish all of you a fruitful and beneficial Conference.

Thank you.

ATIONAL TAX CONFERENCE

Registration on-going



Some of the delegates collecting late papers

Dr Veerinderjeet Singh, MIT President gree
YBhg Dato' Dr Wan Abdul Aziz bin Wan Abdu
Secretary-General of Treasury.

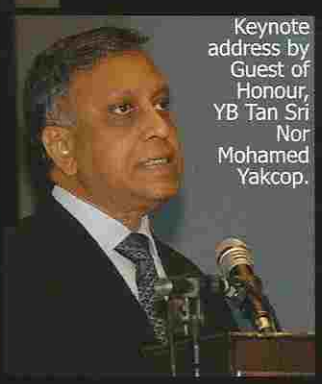
smah bt Abdullah, Chief Executive Officer/Director General of
evenue welcomed YB Tan Sri Nor Mohamed Yakcop, Minister of
Finance II to the Conference.

From the left: Mr Khoo Chin Guan, Co-Organising Chairperson of the NTC 2007, Puan Hasmah bt Abdullah, Chief Executive Officer/Director General of Inland Revenue, YB Tan Sri Nor Mohamed Yakcop, Minister of Finance II, Dr Veerinderjeet Singh, MIT president and Puan Noor Azian bt Abdul Hamid, Co-Organising Chairperson of the NTC 2007.

The VVIPs' delegation...

Welcoming speech by Dr Veerinderjeet Singh.

Opening address by Puan Hasmah.



Keynote address by Guest of Honour, YB Tan Sri Nor Mohamed Yakcop.

The speakers and guests...

Some of the guests...

Thanks to our main sponsors.
From the right: Puan Wan Noor Aini Mohd Noor from PETRONAS, Mr Teh Chee Ming from Fuji Xerox Asia Pacific Pte Ltd, Mr Ken Lai from AXP Solutions Sdn Bhd and Ms Caroline Anderson from Valentine Stewart International.

PETRONAS, our Platinum Sponsor received a token of appreciation from the Minister

NATIONAL TAX CONFERENCE

Fuji Xerox Asia Pacific Pte Ltd received a token of appreciation as a Bronze Conference Sponsor.

AXP Solutions Sdn Bhd - one of the Bronze Conference Sponsor.

Valentine Stewart International - another Bronze Conference Sponsor for the NTC 2007.

Puan Hasmah mingles with some of the speakers.

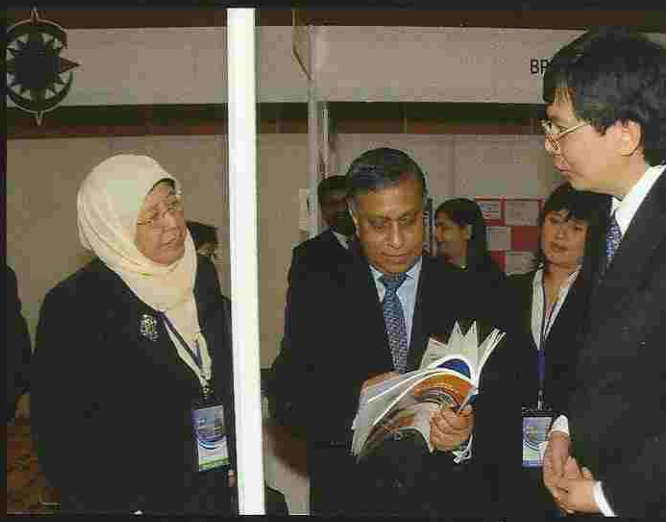
The place was crowded with 1800 delegates!

Delegates at MIT's booth

ATIONAL TAX CONFERENCE

er Bronze
2007.

YB Tan Sri Nor Mohamed Yakcop at one of the sponsor's booth.



"This is MIT's official journal," Mr Khoo told Puan Hasmah and YB Tan Sri Nor Mohamed Yakcop.

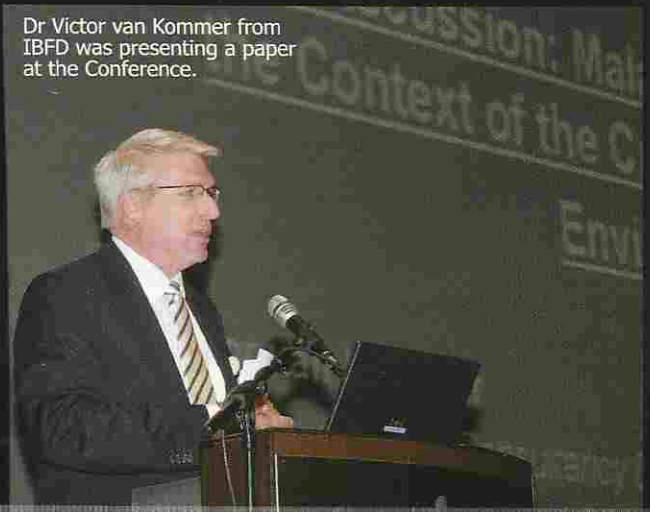
"Thank you for visiting MIT's booth.
This is a small token of appreciation to you, Tan Sri."

Forum discussion - one of the interesting sessions at the NTC 2007.
From the left: YBhg Dato' Dr R Thillainathan, YBhg Datuk Aziyah bt Bahaud and moderator of the session, YBhg Tan Sri Datuk Clifford F.Herbert.

booth

Delegates listening to the presentation by the speakers.

Datuk Aziyah was one of panelists at the forum session.



Dr Victor van Kommer from IBFD was presenting a paper at the Conference.

A token of appreciation was presented by De President of MIT, Mr Lim Heng How to one of panelists.

Budget 2008 : Building and Sharing

Dr Nakha Ratnam Somasundaram

Abstract

The recent Budget 2008, presented by the Prime Minister YAB Dato'Seri Abdullah bin Hj. Hj. Ahmad Badawi on 7th September 2007 amid great expectations introduced some fundamental changes to the tax laws, including the introduction of the single tier system, treatment of the insurance industry and major changes to the stamp duty processing.

These changes, including other selected significant changes, will be reviewed briefly in this article.

The 2008 Budget Theme

Budget Theme was 'Together Building the Nation and Sharing Prosperity'. The theme was supported by the National mission as follows:

1) To move the economy up the value chain;
2) To raise the capacity for knowledge and innovation and nurture first class mentality;
3) To address the persistent socio-economic inequalities constructively and productively;
4) To improve the standard and sustainability of quality of life; and
5) To strengthen the institutional and implementation capacity.

Budget strategies

Three strategies were formulated as follows:

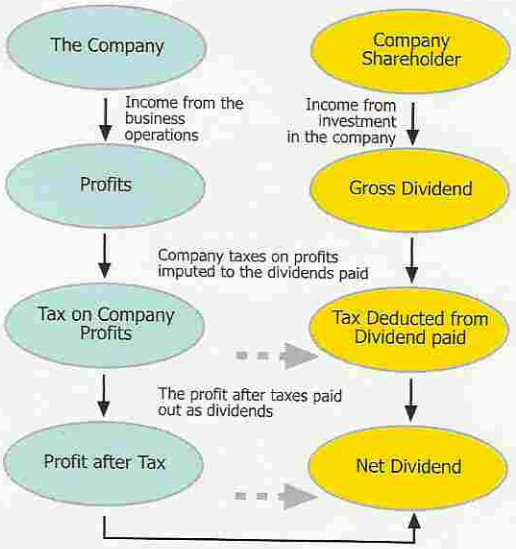
1) Enhancing the nation's competitiveness;
2) Strengthening the human capital development; and
3) Ensuring the well being of all Malaysians.

Enhancing the nation's competitiveness

Private investment is expected to grow at 7.1% this year and continue to be the catalyst for the nation's economic growth. In line with this trend, attractive investment climate and a competitive tax regime needs to be created for the private sector. One approach was to dismantle the imputation system which has been in the books for almost six decades.

The current tax regime, based on the imputation system requires the imposition of tax on the profits at the company level and again at the shareholder's level, and taking into account the taxes already paid by the company. The imputation system involves significant administrative cost to ensure compliance by keeping track of the tax paid and the amount of the dividends to be distributed. Additionally, the dividends can only be distributed if the tax had been paid by the company.

Chart 1
The Imputation System



To simplify the tax administration, the budget proposes a single tier company income tax system to be introduced at the rate of 26%. Under this single tier company income tax system, tax on the company's profits is a final tax and dividends distributed to shareholders will be exempted from tax at the recipient stage.

Companies which have no credit balance of section 108 accounts (i.e. having a nil balance) as at 1 January 2008 would automatically move to the single tax system and be taxed at the rate of 26%. Companies with credit balance in the section 108 account will be given an option to elect for the single tier company tax system.

Companies with credit balance of section 108 account which do not elect to switch over to the single tier company income tax system are allowed to use the credit balance for purposes of dividend distribution during the transitional period of six years until 31 December 2013.

The credit in the section 108 account can be utilised under the following terms and conditions:

1) The credit balance of section 108 account allowed for purposes of dividends distribution to the shareholders is the balance as at 31 December 2007;
2) The credit balance of section 108 account will be adjusted only for tax reductions;
3) A company that has fully utilised the credit balance of section 108 account at any time during the transitional period will automatically move to the single tier tax system;
4) All companies will automatically move to the single tier tax system on 1 January 2014 even though these companies may still have a section 108 credit balance in their account as at 31 December 2013;
5) Maintaining the current provision of disallowing companies which take over other companies to acquire the credit balance of section 108 account;

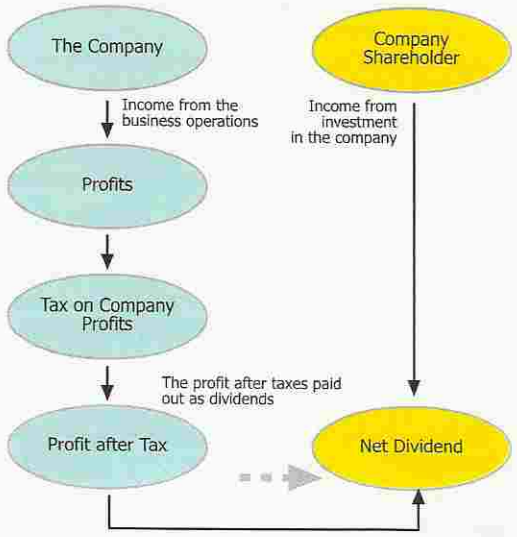
6) Companies are only be allowed to pay cash dividends; and
7) For small and medium companies, tax on dividends paid to shareholders is deducted from the credit balance of section 108 account based on the highest current tax rate.

Conditions for shareholders to claim tax credit are as follows:

1) Only direct expenses related to dividend income are allowed to be deducted in arriving at adjusted dividend income;
2) The claim for tax credit is only allowed for shares held continuously for 90 days or more from the date of purchase of shares (excluding public listed companies);
3) Only dividend distributed from ordinary shares are eligible for tax credit; and
4) Dividend income of shareholders of a company which is not from business source is not allowed to be aggregated with other income in the computation of chargeable income. This condition is not applicable to entities other than a company.

The single tier company income tax system, when fully implemented, will be administratively uncomplicated, but will affect taxpayers with no liability, or with tax liability arising from a rate lower than that of the corporate tax rate. They will suffer tax on their investment in companies at the current corporate rate without any recourse for relief, either by way of direct expenses (since the amount is exempted) or by way of a tax set off (since the tax at the corporate stage is effectively a final tax).

Chart 2
The Single Tier Company Income Tax System



Reduction in company tax rates

The company tax rate would be reduced to 25% with effect from year of assessment 2009. For small and medium companies, under the single tier company income tax system, tax rate for chargeable income up to RM500,000 is still maintained at 20%.

The tax rate changes are effective from year of assessment 2008.

The lower company tax rate is considered competitive and is in line with the regional rates (see table below).

Table 1
Comparison of corporate tax rates in the Asia-Pacific Region

Country	Year 2007	Year 2008	Proposed changes in 2009
Malaysia	27	26	25
Singapore	20	18	18
Hong Kong	17.5	17.5	17.5
China	30	25	25
Thailand	30	30	25
Indonesia	30	30	25-28*
Vietnam	28	28	25

*For listed firms with public ownership of 30% - 40%

Tax Agents and e-Filing

The Inland Revenue Board had introduced the electronic filing system with some fanfare sometime back, with taxpayers, especially those filing at the last moment, experiencing lots of teething problems. This included tax payers who use tax agents to prepare their income tax return forms but still have to file on their own if they want to file electronically. The reason being there was no legal provision for tax agents to file their clients' tax returns through e-filling.

To overcome this contradictory situation, it is proposed that the tax agents be allowed to file the income tax returns of their clients using Personal Identification Number (PIN) assigned to the tax agents. The proposal is effective from year of assessment 2008.

At the moment it is not known how this PIN will be issued to the tax agents, when it will be issued, and for how long such PIN would be valid. It is also not known whether it will be issued in the name of the accountant or the firm. More important given the tight deadlines for submissions, and the Malaysian way of submitting tax returns on the last possible day, one wonders whether the new system can cope with the sudden surge of e-filing. It will be an interesting event to watch.

Deduction for Professional Indemnity Insurance

Professional indemnity insurance is to protect a professional against risk of claims made on his personal assets in the event of negligence while performing his duties. The insurance premiums paid for such a cover is generally not allowed as a deduction for income tax purposes.

The IRB had issued a Public Ruling No. 5 of 2006 on 31 May 2006 highlighting the salient features of indemnity insurance and instances when such deductions would be allowed. However the IRB had made certain exceptions for such insurances to be allowable - for example, where it is a requirement of the professional body under which the particular professional carries on his practice.[1]

To inculcate professionalism and to protect consumers in cases of negligence, the 2008 Budget proposes that, effective from year of assessment 2008, professional indemnity insurance premiums be allowed as a deduction for income tax purposes. However as the Finance Bill 2007 has no indication of any legislative changes allowing such deduction, it is understood that a statutory order will be issued to authorize the deduction.

The terms and conditions for such a deduction are presently not known.

Tax Treatment On Transfer of Buildings to Real Estate Investment Trust

Presently, a company that disposes buildings that had qualified for Industrial Building Allowance (IBA) is subject to a balancing charge when the disposal value exceeds the residual expenditure. This includes the disposal to Real Estate Investment Trusts (REITs). However, no balancing charge is imposed on disposals of buildings that fulfill the provision of 'control sales' between companies in the same group.

To encourage the growth of REITs in Malaysia, it is proposed that the disposal of buildings from companies to REITs be not subject to balancing charge. As such, REITs are eligible to claim the balance of unclaimed IBA of the disposer.

This proposal, effective from year of assessment 2008 is expected to give an impetus to the property sector and the further development of REIT.

Incentive for Islamic Finance and Insurance

Local and foreign companies managing approved Islamic funds of foreign investors have been granted income tax exemption on management fees for the year of assessment 2007 until the year of assessment 2016.

To promote the Islamic fund activities further, the Budget 2008 had proposed that local and foreign companies managing Islamic funds for local and foreign investors to given income tax exemptions on all fees received from managing the funds. The Islamic fund must be approved by the Securities Commission.

The proposal is effective from year of assessment 2008 until the year of assessment 2016.

Review of Tax Treatment for Life Insurance Business

For life insurance business, the investment income and profit from realization of investments of the life fund are taxed at the rate of 8%, whereas income of the shareholders' fund is currently taxed at the rate of 27%.

A portion of the investment income and profit from realization of investments which has been taxed at 8% is transferred to the shareholders' fund as an actuarial surplus. This actuarial surplus is also taxed at the rate of 27%. The distribution of the actuarial surplus is made based on the proportion of income of the participating fund and the non-participating fund of the life fund.

As a measure to further improve tax treatment for life insurance business, it is proposed that a tax set-off from the total tax charged on the shareholders' fund be given to overcome the incidence of double taxation. The amount of the tax set-off is calculated as follows:

$$[A \times \frac{B}{C}] \times D$$

Where

A: is the actuarial surplus transferred;

B: is the net investment income and net proceeds from realisation of investments of the life fund;

C: is the net investment income and net proceeds from realisation of investments and surplus arising from premiums (if any) of the life fund; and

D: is the rate of tax applicable to the life fund for that year of assessment.

The above computation is applicable wholly in ascertaining the tax set-off relating to the non-participating fund. For the participating fund, the computation for B and C will only take into account income and premium attributable to shareholders' fund. The tax set-off is applicable only where there is chargeable income for the shareholders' fund.

The proposal is effective from year of assessment 2008.

Incentives for Enhancing Security Control of Goods

The use of security control equipment in factory premises and vehicle surveillance equipment will reduce the risk of theft and loss of goods. Security control and surveillance equipment includes equipment for electronic security systems such as anti-theft alarm system, access control system, closed circuit television and vehicle tracking system.

To encourage companies to install security and surveillance equipment, it is proposed that Accelerated Capital Allowance be given on the expenses incurred for:

1) Security control equipment installed in the factory premises of companies approved under the Industrial Coordination Act 1975; and
2) Vehicle surveillance equipment installed in the container lorries bearing Carrier License A and general cargo lorries bearing Carrier License A and C.

The Accelerated Capital Allowance is to be fully written off within a period of 1 year and the eligible security and surveillance equipment to be approved by the Minister of Finance. The proposal is effective from year of assessment 2008 to year of assessment 2012.

It is not known what equipments would qualify for this allowance. As the Finance Bill 2007 does not have any provision for this allowance it is expected to be issued by way of a statutory order.

Incentives for Medical Devices Testing Laboratory

Medical devices testing laboratories have been identified as an important support service in ensuring the locally manufactured medical devices are of high quality and of international standards. Due to insufficient laboratory facilities in the country, most medical devices are sent abroad for testing.

To encourage private sector investment in medical devices testing laboratories of international standards, it is proposed that companies investing in setting up a new laboratory or upgrading existing labotory be given the following incentives:

A. Company investing in a new testing laboratory for testing medical devices

1) Pioneer Status with income tax exemption of 100% of statutory income for a period of 5 years; or
2) Investment Tax Allowance of 60% on the qualifying capital expenditure incurred within a period of 5 years. The allowance can be set-off against 100% of the statutory income for each year of assessment.

B. Company upgrading an existing testing laboratory for testing medical devices

Investment Tax Allowance of 60% on the qualifying capital expenditure incurred within a period of 5 years. The allowance can be set-off against 100% of the statutory income for each year of assessment.

Enhancing Tax Incentives for the Generation of Renewable Energy

Tax incentives for companies generating renewable energy (RE) are as follow:

A. Companies generating renewable energy

1) Pioneer Status with income tax exemption of 100% of statutory income for 10 years; or
2) Investment Tax Allowance of 100% on the qualifying capital expenditure incurred within a period of 5 years. The allowance can be set-off against 100% of statutory income for each year of assessment; and
3) Import duty and sales tax exemption on equipment used to generate energy that is not produced locally and sales tax exemption on equipment purchased from local manufacturers.
4) If any one of the companies from the same group has been granted the incentive in (1) or (2) above, other companies in the same group undertaking the same activities are not eligible for those incentives.

B. Companies generating renewable energy for own consumption

Accelerated Capital Allowance will be fully written off within a period of 1 year on equipment to generate energy.

To further encourage the generation of renewable energy, it is proposed that the existing tax incentives be enhanced as follows:

A. Companies generating renewable energy

Other companies in the same group be given the same incentives as (1) or (2) above even though one company in the same group has been granted the incentive.

B. Companies generating renewable energy for own consumption

Accelerated Capital Allowance is replaced with Investment Tax Allowance of 100% on the qualifying capital expenditure incurred within a period of 5 years. The allowance is to be set-off against 100% of statutory income for each year of assessment.

The proposal is effective for applications received by the Malaysian Industrial Development Authority (MIDA) from 8 September 2007 until 31 December 2010.

Enhancing Tax Incentive for Energy Conservation

Tax incentives for energy conservation (Energy Efficiency – EE) activities are as follow:

A. Companies providing energy conservation services

1) Pioneer Status with income tax exemption of 70% of statutory income for 5 years; or
2) Investment Tax Allowance of 60% on the qualifying capital expenditure incurred within a period of 5 years. The allowance to be set- off against 70% of the statutory income for each year of assessment; and
3) Import duty and sales tax exemption on energy conservation equipment that are not produced locally and sales tax exemption on the purchase of locally produced equipment.

B. Companies which incur capital expenditure for energy conservation for own consumption

Investment Tax Allowance of 60% on the qualifying capital expenditure incurred within a period of 5 years. The allowance to be set-off against 70% of statutory income for each year of assessment.

To further enhance the tax incentives for conservation of energy, it is proposed:

A. Companies providing energy conservation services

1) The level and period of Pioneer Status incentives be increased to 100% for 10 years; or
2) Investment Tax Allowance be increased to 100% of qualifying capital expenditure incurred within 5 years. The allowance would to be set-off against 100% of statutory income for each year of assessment.

B. Companies which incur capital expenditure for energy conservation for own consumption

Investment Tax Allowance be increased to 100% of the qualifying capital expenditure incurred within 5 years. The allowance would be set-off against 100% of statutory income for each year of assessment.

The proposal is effective for applications received by the Malaysian Industrial Development Authority (MIDA) from 8 September 2007 until 31 December 2010.

Tax incentive for Reduction of Greenhouse Gas Emission

Greenhouse gases (GHG) contribute towards global warming – a fact highlighted by the recent smelting ices in the North Atlantic opening up the famous frozen North West Passage, for which many explorers had given their lives to discover. Companies which successfully reduce the emission of GHG are given a Certified Emission Reductions (CERs) certificate that can be traded. Income derived from the trading of the CERs certificate is subject to tax.

To encourage companies to invest in GHG emission reduction projects, in line with the effort to overcome global warming, it is proposed that income derived from trading of CERs certificates be given tax exemption.

The proposal is effective from year of assessment 2008 until year of assessment 2010.

Tax Deduction for Community Projects

The Budget 2008 mentioned that to encourage companies to provide more infrastructure facilities for community, it is proposed that expenses incurred in the provision of infrastructure that significantly benefit the public be allowed as deduction for income tax purposes. The facilities provided must be free of charge and must be approved by the Minister of Finance. This deduction

is given only if it does not give any benefit to the business of the company. The proposal is effective from year of assessment 2008.

Expenses incurred by companies for community projects will now be allowed in full. To facilitate the deduction the Finance Bill 2007 now introduces a new paragraph to section 34(6) that reads as follows:

"(ha) an amount equal to the expenditure incurred by a company on the provision of infrastructure in relation to its business which is available for public use, subject to the prior approval of the Minister:

Provided that where a deduction has been made under this paragraph, no further deduction of the same amount shall be allowed under subsection 44(6);"

Tax Accountants are wondering what infrastructure the law is talking about and how it is alternatively connected to section 44(6). What types of infrastructure can a company construct that is in relation to its business and at the same time it is available for public use – without any charge. Will car parks in shopping complex qualify...if no parking charges are made? What if you don't charge for parking but buying an item from the shopping complex is a condition for a free parking at the 'infrastructure'?

As the infrastructure needs the prior approval of the Minister it is not clear at the moment as to how this is to be done – what is clear though is that the infrastructure issue is very shaky, not to mention blur.

Tax Incentive for Renovation of Workplace for Disabled Workers

Most buildings do not have adequate facilities for disabled workers. The renovation cost incurred by the employer to provide facilities for the disabled workers is not allowed as deduction for income tax purposes.

To ensure a safe and conducive working environment for disabled workers and in line with the Government's aspiration to create a caring society, it is proposed that cost of the work place by the employer 'alteration or renovation of premises' be allowed as deduction for income tax purposes. The proposal is effective from year of assessment 2008. The deduction will augment a loss and it is not known whether the Inland Revenue Board will take a strict or lenient view of the expenditure.

As the words 'alteration' and 'renovation' is not defined, one can expect some hassle in the claim for a deduction.[2]

Tax Treatment on Private Retirement Benefit

Retirement benefit of the private sector employees who retire at the compulsory retirement age of 55 and above or on health reason is fully exempted from income tax. Retirement benefit for those that retire at the compulsory retirement age of 50 and up to less than 55 is given tax exemption of up to RM6,000 for each completed year of service.

To provide equal tax treatment especially for female employees in certain sectors who are required to retire earlier, it is proposed that the retirement benefit for private sector employees who retire at the compulsory retirement age of 50 and above be given full income tax exemption. This exemption is given on the condition that the compulsory retirement age is provided for in the employment contract or collective agreement between employer and employee.

The proposal is effective from year of assessment 2007.

Gift of New Computer and Broadband Subscription Fee from Employers to Employees

Gift of computer or payment of broadband subscription fee from employers to employees are treated as benefit-in-kind to the employees and subject to income tax. Expenditures incurred by employers for providing such benefits are also not allowed as deduction.

In line with the Government's aspiration to increase broadband penetration rate, it is proposed that:

1) Benefit-in-kind in the form of new computers or payment of broadband subscription fees is not subject to income tax in the hands of employees; and
2) Expenses incurred by the employers on such computers or broadband subscription fees are allowed as deduction.

The proposal is effective from year of assessment 2008 until year of assessment 2010.

It is understood that employers are at a loss as to whether to declare this as a benefit in kind or not since it is not taxable in the hands of the employee; but on the other hand it is a deductible item in the determination of the company's profit.

Tax Relief on Purchase of Sports Equipment

Individual tax payers have been given tax relief especially for the purpose of healthcare on the following:

1) Health insurance premiums of up to RM3,000; and
2) Medical expenses for serious illnesses for himself, spouse, children and parents of up to RM5,000 including the medical examination for himself, spouse and children of up to RM500.

To create a healthy society through sports activities, it is proposed that effective from year of assessment 2008 individual tax relief up to a maximum of RM300 a year be given on purchase of sports and exercise equipment.

The nature of the sports and exercise equipment is not mentioned other than to say that it is '...sports equipment for any sports activity as defined under the Sports Development Act 1997'.

It looks like taxpayers will have to buy the Sports Development Act 1977 – to find out what is sports equipment and what is sports activity - before they buy the sports and exercise equipment – and then claim the expenditure on the purchase of the said Act [relief allowed under Section 46(1)(i)]and then the cost of the equipment under the new legislation [Section 46(1)(l)].

Abolishing Service Tax Threshold

Currently professional, consultancy and management service providers that have reached the threshold i.e. sales turnover of RM150,000 within a period of 12 months or part thereof, are required to be licensed under the Service Tax Act 1975

and collect 5% service tax. The sales turnover of such service providers is generally uncertain and making it difficult for them to ascertain whether they have reached the threshold. This exposes them to the risk of being penalized for failure to get the license and collect service tax. Professional services that are subject to service tax include legal, engineering, architecture, survey, valuation, appraisal and estate agency.

In order to facilitate providers of professional, consultancy and management services to collect service tax as well as to create healthy competition among the same service providers, it is proposed, effective from 1 January 2008 that the threshold for professional, consultancy and management services be abolished.

Stamp Duty Payment Using Private Valuation

Currently, assessment of the amount of stamp duty payable is only based on the official valuation by the Valuation and Property Services Department (JPPH) in respect of all instruments of transfer of real property.

However, as can be expected in a bureaucratic government system, there will be inordinate delays occasionally. Thus to facilitate urgent transfer of real property before the official valuation from JPPH is available, it is proposed that the private valuation be accepted as an alternative for the purpose of stamp duty payment. The payment must be made together with a bank guarantee that has a validity period of not less than 6 months and is computed based on the difference in stamp duties between JPPH valuation and the private valuation. JPPH valuation is deemed to be 35% higher than the private valuation for the purpose of determining the amount of bank guarantee.

The amount of bank guaranteed is determined based on the formula below:

$$C = A - B$$

Where
A: is the amount of stamp duty levied based on the value of the property as determined by the following formula:

$$Y \times \frac{100}{65}$$

Where
Y: is the value of the property based on private valuation.
B: is the amount of stamp duty levied based on private valuation.
C: is the amount of bank guarantee.

The actual amount of stamp duty will be assessed once the official valuation from JPPH is available. If the actual assessment is higher than the amount of stamp duty paid based on private valuation, additional duty has to be paid within 30 days from the date of notice. The bank guarantee will be claimed if additional duty has not been paid.

The proposal is effective from 1 January 2008.

Stamp Duty Exemption for Mergers and Acquisitions of Listed Companies

Stamp duty and real property gains tax exemptions are given to companies listed on Bursa Malaysia that undertake mergers and acquisitions approved by the Securities Commission from 1 October 2005 until 31 December 2007.

To encourage more companies listed on Bursa Malaysia to undertake mergers and acquisitions, it is proposed that stamp duty exemption on all instruments pertaining to mergers and acquisitions be extended for another 3 years.

The proposal is effective for mergers and acquisitions approved by the Securities Commission until 31 December 2010 and such mergers and acquisitions must be completed not later than 31 December 2011.

Stamp Duty Exemption for Mergers of Petronas Vendors

There are more than 1,000 vendors licensed with Petronas carrying out services related to the oil and gas industry. Most of them operate mainly for the domestic market.

To encourage vendors licensed with Petronas to merge and be competitive globally, it is proposed that stamp duty exemption be given on all instruments relating to mergers of such vendors involved in upstream activities.

The proposal is for mergers completed not later than 31 December 2010.

Stamp Duty Exemption on Purchase of Residential Property

The current Stamp duty rate on instruments for transfer of property including residential property is as follows:

Value of Property	Duty Rate For Every RM100 or Part Thereof
First RM100,000	RM1.00
RM100,000 < RM500,000	RM2.00
> RM500,000	RM3.00

To encourage ownership of a residential property, it is proposed that instruments of transfer for purchase of a house not exceeding RM250,000 be given 50% stamp duty exemption. This exemption is granted to only one house per individual.

The proposal is effective for sale and purchase agreement executed from 8 September 2007 to 31 December 2010.

Review of Income Tax Treatment for Labuan Offshore Companies

Income of Labuan offshore company from offshore activities is taxed under the Labuan Offshore Business Activity Tax Act 1990, whereas income from non-offshore activities is taxed under the Income Tax Act 1967.

Income from offshore activities is taxed as follows:

1) Income from offshore trading such as offshore banking and insurance is taxed at 3% of net profit or at a flat rate of RM20,000, on election; and
2) Income from offshore non-trading such as dividend, interest and royalty is exempted from tax.

Income from non-offshore activities is taxed at the current companies' tax rate.

To provide a responsive tax treatment for Labuan Offshore

companies in an effort to sustain their competitiveness, it is proposed that Labuan offshore companies be given an option to be taxed under the Income Tax Act 1967, in addition to the existing option under Labuan Offshore Business Activity Tax Act 1990. This new option is final and irrevocable.

The proposal is effective from year of assessment 2008.

What Was Not In the Budget?

There was the expectation that the Goods and Services Tax would be introduced but nothing was mentioned. It would have been a good move, especially if combined with an income tax rate deduction. Its attraction, according Dr. Veerinderjeet Singh, the President of the Malaysian Institute of Taxation, 'is a more effective and a stable source of revenue as it is based on consumption, not revenue.'

There was also the expectation of substantial tax perks in the individual category. However there were none to shout about, including the much anticipated personal rate cuts.

Nevertheless there is truly nothing to mourn about since from a macro angle, the revenue from personal taxation is low – it is estimated that out of the eleven million workers in the Malaysian workforce, only about one million are paying taxes. As a result, according to Dr. Veerinderjeet Singh, there were not many changes in the rates as '...the number of individuals who pay income tax is so small that a reduction will not have widespread effect'.[3]

Individual taxpayers however have to realize that the Income Tax Act 1967 (as amended) has a line up of about fourteen personal relief that add up together to a whopping RM 64,200 that are deductible against the taxpayer's total income to arrive at the chargeable income.[4] Of course the catch is you must first be able to claim all the relief – and that includes preconditions like being disabled, having a sick family (pardon the pun), and maybe even divorced – not a happy prospect altogether, I should think.

There were other perks in the Budget 2008 that affect the individuals directly and this includes Textbook Loan Scheme and the abolition of school fees and examination fees, as well as entitlement of free school uniform to join a uniformed body like the St John's Ambulance (for families with a monthly income of less than RM 1,000). Then there are the allowance for special education teachers *(RM 250 from RM 100) and for graduate* substitute teachers (RM 85 to RM 150).

Tax reform for the individual taxation

One would have thought that the individual tax system should have gone under the surgeon's knife as well, just like that of the corporate taxation (in respect of the dismantling of the tax imputation system).

There are too many nitty gritty provisions, rules and regulation, not to mention several Public Rulings on matters ranging from ESOS, benefits- in- kind and accommodation for the individual taxpayer to abide by in their declaration or claim (not to mention the horrendous issue of compliance for the employer). And in the area of personal relief it has almost reached a nightmarish situation with a host of 'can and cannot rules' for individual deductions for such relief.

It would be great relief if relief for the individuals are made more user friendly by allowing a standard claim (good example: personal relief that takes care of dependent relief without any hassle of identifying who the dependents are and how they are dependent etc); instead of for example inserting a medical check up cost into the medical insurance deduction and capping the cost at both ends [see section 46(1) (h).

Conclusion

The Budget 2008 is a well rounded plan for the nation. For the man on the street, however, implementing the 'free' schemes announced in the Budget like free books has to done in a transparent way, and taxpayer's money spent prudently and wisely if the Budget is to have any meaning at all.

These allocations and perks for the ordinary folks are good only if they reach the deserving recipients. For example newspapers recently carried a report of a housewife whose husband earns only RM 900 per month and of her four children in secondary school who never received any help or 'free books' because there was 'no stock of free books'.

On the other hand too, 'free books' are good only if the children are going to school – it will not help when the children, owing to poverty, do not have any access to a schooling facility in the first place.

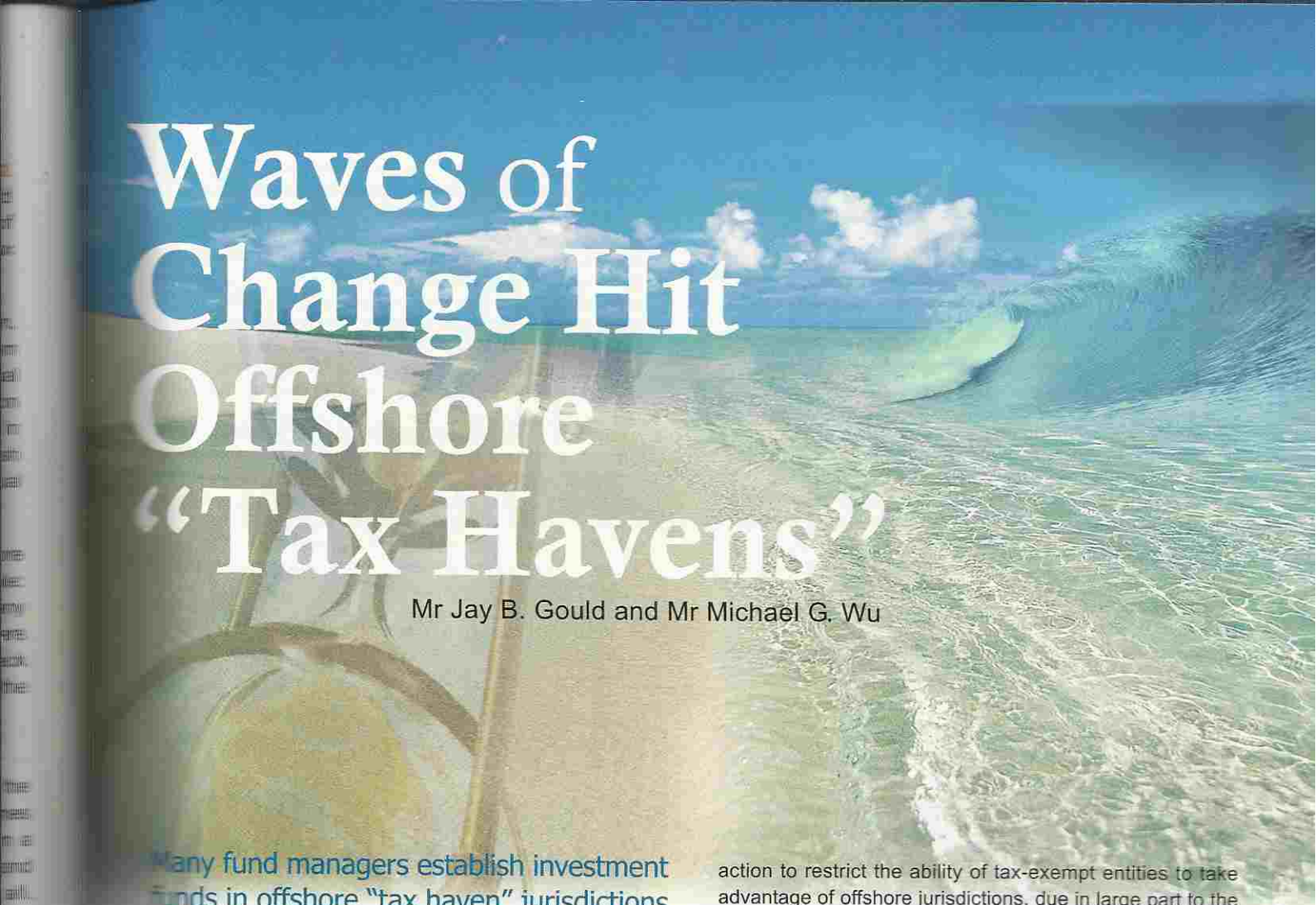
As the public is already wary on account of some recent high profile expenditure patterns of government agencies buying tools at grossly inflated prices, paying rates for non-existent buildings and repairing vehicles that exceed the cost of the *vehicle itself*, the theme of the budget of 'Together building the nation and sharing prosperity' may end up to be a partisan affair if not managed and delivered to the right parties at the right time.

Footnotes

1. *For more details see Dr. Nakha Ratnam Somasundaram (2007), 'Professional Indemnity Insurance', The Chartered Secretary Malaysia, Journal of the Malaysian Institute of Chartered Secretaries and Administrators, Sept – Oct 2007, pp. 32-34*
2. *For details of the legal hassle of what is repair, alteration and renovation etc see Dr. Nakha Ratnam Somasundaram (2004), 'Repair and Despair Under Self Assessment', The Chartered Secretary Malaysia, Journal of the Malaysian Institute of Chartered Secretaries and Administrators, September 2004, pp. 8-10.*
3. *SUNDAY STAR, 16 September, 2007*
4. *Personal relief is available under section 46 to 50 of the Income Tax Act 1967 (as amended) for individuals.*

Author's Profile

Dr Nakha Ratnam Somasundaram *holds a PhD in Taxation from the University of Newcastle and is a member of MIT. Dr Nakha served the LHDNM for 30 years, retiring in 2001 as the Kelantan State Director. He is currently a Specialist in Taxation at the Multimedia University Cyberjaya campus. Any views expressed herein are the author's own personal views.*



Waves of Change Hit Offshore "Tax Havens"

Mr Jay B. Gould and Mr Michael G. Wu

Many fund managers establish investment funds in offshore "tax haven" jurisdictions to satisfy the tax efficiency requirements of their tax-exempt investors (i.e., non-profit entities such as foundations and pension funds). The use of offshore jurisdictions for the purpose of tax avoidance has been a great success for tax-exempt investors, much to the chagrin of the U.S. Congress, which recently estimated that more than $100 billion in tax revenue is lost each year due to investments in offshore funds.

Congress is currently contemplating restricting the ability of U.S. tax-exempt entities to generate tax-free income from investments in offshore funds. Specifically, Congress is scrutinizing the tax-exempt entities' use of offshore "blocker" corporations to avoid paying unrelated business taxable income ("UBTI"). Under current law, certain tax-exempt entities may avoid paying UBTI merely by investing through a company organized in an offshore jurisdiction.

The last time Congress passed significant legislation regarding offshore funds was in 1997, when it repealed the "Ten Commandments." As a result, offshore funds that trade for their own accounts are deemed not to be engaged in a U.S. trade or business even if the fund manager maintains its principal office in the U.S. However, Congress did not take action to restrict the ability of tax-exempt entities to take advantage of offshore jurisdictions, due in large part to the commitment of the U.S. to foster economic development in the Caribbean region. Whether or not the current Congress is fully committed to restricting the use of offshore jurisdictions remains to be seen. For now, it appears that offshore jurisdictions will continue to be attractive to U.S. fund managers and their clients.

Traditionally, offshore jurisdictions have been attractive to fund managers because the offshore jurisdictions typically subject the fund managers and their clients to a reduced regulatory regime and favorable tax treatment. However, based on recent developments, offshore jurisdictions appear to be at a crossroads. In an attempt to attract and retain fund managers from the U.S., the U.K., Japan, Switzerland and other "money center" jurisdictions, offshore jurisdictions have had to satisfy the infrastructure demands of fund managers, address anti-money laundering and fraud considerations, and, at the same time, find ways to raise additional revenue to support the implementation of their policies, while still holding themselves out as "low tax" or "no tax" jurisdictions. In the last few months, we have seen a significant amount of new law being passed in offshore jurisdictions – some of which seek to raise revenue through additional filing fees and annual updating fees, while others seek to attract new fund managers by streamlining the organization process for new funds.

To help fund managers with offshore funds stay apprised of changes to the laws in these jurisdictions, we have summarized below recent developments in some of the more popular offshore jurisdictions.

Bermuda

Bermuda's House of Assembly has passed the Investment Funds Act 2006 ("IFA"), which replaces the Bermuda Monetary Authority (Collective Scheme Classification) Regulations 1998.The IFA will regulate "investment funds," which are broadly defined to include companies, unit trusts and partnerships organized in Bermuda that permit investors to redeem their rights or interests (i.e., open-ended investment funds). Under the IFA, three types of investment funds may be authorized: (i) an institutional fund (i.e., a fund only available to sophisticated or high-net-worth investors or a fund that requires each investor to invest at least $100,000 in the fund); (ii) an administered fund (i.e., a fund that uses a licensed administrator and requires investors to invest at least $50,000 in the fund or a fund that is listed on a recognized stock exchange); and (iii) a standard fund (i.e., a fund that does not qualify under either of the categories above).

An investment fund subject to the IFA may not operate in Bermuda unless it receives authorization from the Bermuda Monetary Authority (the "BMA") or qualifies for an exemption. To qualify for an exemption, the investment fund must meet the following criteria: (i) it is open only to qualified investors (based on income, net worth and level of investment sophistication); (ii) it is administered by an administrator recognized by the BMA; (iii) it appoints an auditor; and (iv) there is an officer, trustee or representative living in Bermuda with access to the fund's books and records. In addition, the BMA must deem the investment fund's operator (e.g., general partner of a limited partnership) and its service providers to be fit and proper. An exempted investment fund must file an annual notice stating that it remains qualified for the exemption and pay an annual fee.

Investment funds that are "private funds," or funds that do not allow more than 20 investors and are not advertised to the general public, are excluded from the IFA's regulation, provided that the BMA is promptly notified that the fund qualifies for an exclusion from the IFA's requirements.

British Virgin Islands

The British Virgin Islands have introduced a web-based information system called the Virtual Integrated Registry and Regulatory General Information Network ("VIRRGIN"). The Financial Services Commission of the British Virgin Islands launched phase one of the system at the end of 2006, which allows documents to be filed electronically with the Registry of Corporate Affairs twenty-four hours a day. Once the implementation of VIRRGIN is completed, which is expected to occur in 2007, users will be able to (i) search for public company records online, and (ii) electronically file their documents and electronically signed certificates, and receive electronically stamped/returned memoranda and articles of association from the system.

Cayman Islands

The Cayman Islands Monetary Authority ("CIMA") has amended the Cayman Islands Mutual Funds Law. Although no major change was made to the regulatory regime, the following changes should be noted:

- The CIMA instituted a new electronic reporting initiative that requires funds regulated under the Mutual Funds Law (2003 Revision, as amended) to file their audited annual reports electronically, preferably in a machine-readable, portable document format. The operator of a fund must complete and file a Key Data Elements ("KDE") Form, which requires basic information about the fund. The audited annual reports and the KDE Forms must be submitted to the CIMA through the fund's approved Cayman Islands audit firm. Fund managers should be aware that in many cases, this new requirement will add significant expense to the cost of the audit.
- A fund that is administered in the Cayman Islands, but not incorporated there, is no longer deemed to be conducting business in the Cayman Islands, as long as it does not offer investments to the general public in the Cayman Islands. For this purpose, the general public does not include high-net-worth or sophisticated investors, exempted companies, foreign registered companies, general partners of exempted limited partnerships or exempted trusts.
- Fund administrators are now required to satisfy themselves that each fund to which they provide administration services (i) uses a promoter that has a sound reputation, (ii) has someone with sufficient expertise and a sound reputation performing the fund's administration, (iii) conducts its business and offers securities in a proper manner, and (iv) is organized in a country approved by CIMA.
- The auditor of a fund or of a fund administrator must notify CIMA if the auditor believes that the fund or the fund administrator is (i) insolvent or nearly insolvent, (ii) conducts business or voluntarily winds up in a manner prejudicial to its investors and creditors, (iii) keeps inadequate accounting records, (iv) conducts business in a fraudulent or criminal manner, or (v) is not in compliance with applicable law.
- The minimum subscription for funds wishing to register under Section 4(3) of the Cayman Islands Mutual Funds Law has been raised from $50,000 to approximately $100,000.

Ireland

Ireland has revised its fund authorization process for qualifying investor funds by dispensing with a detailed review by the Irish Financial Regulator. Ireland will now allow qualifying funds to be approved within twenty-four hours of filing the required documentation. In order to qualify for the "fast track" filing process, (i) the fund must have a minimum subscription amount of ¤250,000 and (ii) the promoter, fund managers and directors must have been previously approved by the Irish Financial Regulator.

Guernsey

The Guernsey Financial Services Commission ("FSC") has streamlined its consent process for closed-end funds. The consent process, which previously could take up to several weeks, can now be completed within three days if the required fee and the following documents are submitted to the FSC:

- Certified final copy of the offering document or the equivalent, including the subscription agreement or the equivalent;
- Certified copies of the constitutive documents (e.g., memorandum and articles or limited partnership agreement);
- Certified final copies of all material agreements (e.g., the investment management agreement);

- A certificate from the fund's administrator certifying that the fund's promoter and the fund's associated parties are fit and proper, that the fund will not offer securities directly to the public in Guernsey, and that the offering document contains the required disclaimers; and
- Forms GFA and APC, Forms PQ to be completed by the directors of the fund, and Forms PQ for any controllers, directors or senior management of the promoter.

Jersey

There have been three significant developments in 2007 relevant to Jersey's funds industry:

- The Dutch Financial Markets Authority has determined that Jersey funds may be listed on the Euronext exchange without a license in the Netherlands.
- The Jersey Financial Services Commission ("JFSC") has introduced the Listed Fund Guide, which ensures that closed-end investment funds may be eligible for a streamlined 72-hour approval process. In order to qualify for the 72-hour approval process, the fund must: (i) be listed on a recognized stock exchange or market; (ii) be incorporated as a Jersey closed-end company; (iii) have a majority of independent directors on the board; (iv) have a fund manager that has suitable experience and is regulated in its own jurisdiction; (v) satisfy the JFSC's corporate governance principles; and (vi) meet other requirements set forth under the "Expert Fund" regime.
- The States of Jersey have amended the Island's Income Tax Law to ensure that Jersey companies are treated as non-residents for tax purposes, provided that certain conditions are satisfied.

Luxembourg

In February 2007, Luxembourg enacted the specialized investment fund law that replaces its 1991 institutional investor fund law. The new law provides for light regulation of funds created under the new law ("Specialized Investment Funds" or "SIFs") and emphasizes self-regulation by the fund manager. The main features of the new law are as follows:

- Investments in a SIF may be offered to an institutional investor, professional investor, or any other investor who declares in writing that he is an informed investor and either (i) invests at least ¤125,000 or (ii) has a bank or finance professional certify that he has the experience and knowledge to adequately understand the investment in the SIF.
- The fund manager must be organized in Luxembourg; the custodian must have its registered office in Luxembourg; the SIF must be audited by an auditor who is authorized in Luxembourg; and the SIF must have ¤1,250,000 of assets under management within 12 months of the Commission de Surveillance du Secteur Financier's ("CSSF") authorization. The CSSF will not perform checks on the status or financial condition of the fund manager.
- No prior authorization from the CSSF is required to set up a SIF. However, the SIF's constitutional documents, choice of custodian and information regarding its directors and officers must be provided to the CSSF within one month of the SIF's formation. The SIF law does not require the offering documents to contain certain minimum information.
- SIFs are also not required to provide investors with semi-annual reports, but must provide investors with an annual report.
- The terms and conditions of a subscription or redemption of interests are subject only to the constitutional documents.
- SIFs are not subject to any investment or leverage restrictions.

Conclusion

The multi-headed Hydra facing offshore jurisdictions includes the need (i) to constantly innovate to meet the demands of fund managers and their clients, while keeping taxes and related costs at a minimum, and (ii) to build the regulatory and market infrastructure necessary to withstand the criticism of money-center jurisdictions that will point to lax regulatory standards as further reason to disallow the tax benefits of doing business from offshore jurisdictions. How these offshore jurisdictions handle these issues could have a profound impact on fund managers and their clients. We will continue to monitor legislative and regulatory initiatives in both money-center and offshore jurisdictions, and keep you informed of new developments that may affect your business.

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San Francisco, Jay B. Gould (bio), +1.415.983.1226, jay.gould@pillsburylaw.com or Michael G. Wu (bio), +1.415.983.1655, michael.wu@pillsbury.com

Legal Professional Privilege -A Fundamental Taxpayer's Right

Mr Sudhar Thillainathan

"Legal Professional Privilege is an important safeguard of a man's legal rights. It is the basis on which he and his advisers are free to speak as to matters in issue in litigation and otherwise without fear that it will subsequently be used against them" (English and American Insurance Co. Ltd. v Herbert Smith & Co. *(1987) 137 N.L.J 148 at 149 per Sir Nicholas Browne-Wilkinson V.C.)*

Introduction

At its most basic, Legal Professional Privilege (LPP) is a rule of law that protects the confidentiality of communications made between a lawyer and a client, by conferring immunity against the compulsory disclosure of that communication, subject to defined circumstances and exceptions.

The law reports tend to show that the matter of LPP tends to arise frequently in tax matters. Thus, many of the leading cases in the Commonwealth, in particular, Australia and the United Kingdom, on the application and the operation of LPP, have arisen in the arena of taxation - please see: **Baker v Campbell** (1983) 153 CLR 152, **Esso Australian Resources Ltd v FCT** (1999) 201 CLR 49, **R (Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax and another** [2003] 1 AC 563, **Pratt Holdings Pty Ltd v FCT** (2004) 207 ALR 217, to name some of the significant ones.

This article seeks to provide an outline of LPP taking into account some of the more recent and significant developments in Australia and the UK, which have been an important hub of activity, in this evolving area of law, with special reference to the tax context.

The article begins with an outline of the concept of "Privilege" (LPP being one of the established Privileges that the law recognizes), which may perhaps be more usefully explained and understood, by comparison with and by contrast to the more familiar concept of "Confidentiality".

The Concept of "Privilege"

It may be said that confidentiality is a hallmark of any relationship between a professional adviser and his or her client.

A client seeking advice should be able to tell everything to her professional adviser secure in the knowledge that the adviser will not reveal what she has been told to anyone else. It is important that the client does give all the facts to the adviser otherwise the professional will not be able to properly advice the client.

In practice there are two aspects to confidentiality. First, there is the legal and professional duty of the adviser not to voluntarily reveal what she has been told by the client – this is the duty of "Confidentiality".

Secondly, there is the question of whether the professional adviser can be compelled, against the client's wishes, to reveal what her client has told her or whether she has what is known as "Privilege".

All professionals have a duty of confidentiality but only communications between clients and lawyers are subject to "Privilege" to *wit.* LPP (Legal Professional Privilege).

"Privilege" is a much more limited concept than "Confidentiality" but the law gives a greater protection to the former as compared with the latter. This is true because:

"[l]egal professional privilege protects communications from compelled disclosure, while the professional's duty of confidentiality protects communications from voluntary disclosure by the professional".[1]

As Lord Scott observed in the well-known case of **The Three Rivers D.C. v Bank of England** (2005) 1 AC 610 at para. 28 (p. 647):

" In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice."

The position in Malaysia is the same. As Ong CJ observed in **PP v Haji Kassim** (1971) 2 MLJ 115 at 116:

" The only relevant provision in our Evidence Ordinance excluding professional confidences is section 126, which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course of his employment as such.... This privilege does not protect professional disclosures made to clergymen or doctors..."

LPP: A Fundamental Right

In common law legal systems, such as ours, LPP, where it applies, is a fundamental rule of evidence but more importantly, a substantive and fundamental common law right.

In **R (Morgan Grenfell & Co. Ltd)**, *supra*, the House of Lords unanimously and unequivocally upheld, as a fundamental human right, privilege in tax investigations.[2] The case concerned whether a Revenue inspector could demand production of documents, which are subject to the protection of LPP.

In that case, the Inland Revenue inspector, in the course of investigating Morgan Grenfell's tax position, requested, among other documents, the legal opinions that Morgan Grenfell had obtained from its solicitors and from counsel in relation to a tax planning arrangement that Morgan Grenfell had entered into with a client. Morgan Grenfell refused to hand over the documents to the Inland Revenue inspector.

It was common ground between Morgan Grenfell and the Revenue that these documents qualified for LPP. The Inland Revenue inspector, however, contended that the right to LPP was, by implication, excluded under section 20 of the Taxes Management Act 1970(TMA). Morgan Grenfell disagreed.

The Inland Revenue successfully applied to a special commissioner for permission to issue a notice under section 20 of the TMA requiring disclosure of the documents protected by LPP.

Section 20, in so far as it was material, allowed an Inland Revenue inspector to require a person to deliver to him such documents as are in that person's possession or power as contain or may contain information relevant to that person's tax liability. Section 20 contained a number of specific safeguards which, generally, placed limits on the type of documents that can be demanded by the Inland Revenue. In particular, it expressly stated that documents held by lawyers are not subject to disclosure. However, section 20 of the TMA did not expressly preserve LPP in all circumstances, particularly in respect of documents held by a client.

Morgan Grenfell issued judicial review proceedings to quash the section 20 notice.

The question to be decided was whether, by including the express safeguards in section 20 of the TMA, mentioned above, Parliament had implicitly excluded LPP.

The notice was upheld by both the High Court and the Court of Appeal, but was finally quashed by the House of Lords. The House of Lords held that the Inland Revenue inspector's investigative powers under section 20 of the TMA were insufficient to override such a fundamental right as LPP and did not entitle them to documents protected by the privilege. The House of Lords came to that conclusion on the following basis:-

(a) LPP is a fundamental right that protects from disclosure all correspondence with and documents produced by a lawyer for a client for the dominant purpose of providing or obtaining legal advice; and

(b) the express safeguards in section 20 were insufficient to give rise to a clear implication under section 20 to exclude LPP, and consequently to override such a fundamental common law right as LPP.

The clear principle that emerges from **R (Morgan Grenfell & Co. Ltd),** is that being a fundamental common law right, the Courts will only override LPP where compelled to do so by a specific and unequivocal law.

The Rationale for LPP

The importance of LPP in the administration of justice by encouraging free and full disclosure by clients to legal advisers has been emphasized over a long period.

In Grant v Downs (1976) 135 CLR 674, the High Court of Australia said:

"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of fair trial litigation should be conducted on the footing that all relevant documentary evidence is available".

More recently, Lord Taylor CJ in **R v Derby Magistrates Exparte B** (1995) 4 All ER 526 restated the rationale for LPP in this way:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

The passages above underscore the point that LPP is a rule of public policy in the form of the promotion of the administration of justice.

The Scope of LPP

Although, the precise scope of the right has not been conclusively settled, the following principles may be accepted as being well established and therefore uncontroversial.

LPP is established for the protection of the client, not of the lawyer. Thus, the privilege is that of the client, and not of the lawyer.

It is not every communication between a client and a lawyer that is privileged from disclosure. But when LPP applies,

neither the client nor the lawyer can be compelled to disclose details of the communication to which the privilege applies.

LPP has two limbs, Legal Advice Privilege and Litigation Privilege.

Legal Advice Privilege attaches to bona fide confidential communications between clients and their lawyers, or their agents, if those communications were made for the dominant purpose of enabling the clients to obtain, or the lawyers to give, legal advice, in a relevant legal context (see **Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)** [2005] 4 All ER 948).

Litigation Privilege applies to bona fide confidential communications between clients and their lawyers, or their agents (and in certain circumstances between the lawyer or the lawyer's agent and a third party, or the client or the client's agent and a third party), made for the dominant purpose of obtaining or giving legal advice or of collecting or preparing evidence in relation to or for use in litigation that is actually taking place or reasonably anticipated at the time the communication was made.

In this way, Legal Advice Privilege may be claimed in a wider range of circumstances than Litigation Privilege, which can only be claimed when litigation is current or reasonably contemplated.

Litigation is reasonably anticipated or contemplated where there is a reasonable probability or likelihood that such proceedings will be commenced. Whether such a probability or likelihood exists is determined by an objective view, not the subjective view of the person making the communication. A general apprehension, or the mere possibility that litigation might occur, is not sufficient (please see **United States of America Philip Morris** [2004] EWCA Civ. 330).

Litigation Privilege will apply in the context of judicial or quasi-judicial proceedings. It is thought that since proceedings before the Special Commissioners operate on an adversarial basis, LPP will apply to such proceedings.[3]

Thus, in essence, LPP provides taxpayers with the right to expect that communications that they have with their legal advisers (including communications through employees or agents) will be protected from compulsory disclosure if those communications are for the dominant purpose of either the provision of legal advice or contemplated or current litigation. The dominant purpose test applies to each individual communication, and essentially means that, although that communication must be made for the dominant purpose mentioned above, a communication may be made for more than one purpose and may, in this connection, also deal with non-legal matters.

It is pertinent to note that in Australia and the UK, the application of LPP has not been confined to judicial and quasi-judicial proceedings. Indeed, LPP has also been held to apply to inquiries or investigations undertaken pursuant to statutory forms of compulsory disclosure, which, in this regard, would include the access and information-gathering powers of the Revenue authorities under their respective national tax laws (please see for instance **R (Morgan Grenfell & Co. Ltd)**. The essential point to note here is that a denial of privilege at the investigation stage may potentially make redundant any claim for privilege in judicial and quasi-judicial proceedings. In **Baker v Campbell,** supra, Wilson J explained the point in this way:

"...to deny the relevance of a valid claim to legal professional privilege in the face of a search warrant would effectively deny the availability of the privilege in any prosecution that followed. The same is probably true in the case of other forms of legislation, which provide statutory authority to extra-judicial measures requiring compulsory disclosure. The very existences of the privilege as providing any significant protection and thereby making its contribution to the public welfare must be threatened unless as a matter of principle the protection extends to all forms of compulsory disclosure".

In that same case, Dawson J said:

"...the protection which is unquestionably afforded by legal professional privilege in judicial proceedings ...would be set at naught if by executive or administrative processes revelation of professional confidences could be compelled...".

Thus, the writer observes that the Australian Tax Office (ATO) has expressly recognized that the position in Australia, in light of the decisions of the Australian High Court in **Baker v Campbell**, supra, and **Daniels Corporation International Pty. Ltd Anor. v Australian Competition and Consumer Commission** [2002] HCA 49,[4] is that the ATO's access and information-gathering powers are subject to LPP. Consequently, the express policy of the ATO is that if a communication is subject to LPP, the ATO is not entitled to use its statutory powers to obtain it or to informally request it. Conversely, if a communication is not privileged, the ATO is entitled to do so.

A significant difference between Litigation Privilege and Legal Advice Privilege arises in respect of communications with third parties (non-employees or non-agents of the client). This can be particularly relevant in the arena of taxation, where third-party advisers such as tax planners, auditors, forensic accountants and actuaries may be involved.[5]

Litigation Privilege extends to communications with third parties (please see: **Wheeler v Le Marchant** (1881) 17 Ch D 675 and **Waugh v British Railways Board** [1980] AC 521). It is said that the "rationale for extending litigation privilege to cover communications with third parties is that it is important for a party faced with litigation to be able to communicate with third parties in order to build his case without being concerned that communications in this regard could be revealed to the opposing party and thus potentially damaging his position."[6]

By contrast, the conventional understanding has been that Legal Advice Privilege does not extend, as litigation privilege does, to third parties, even though the communications were made for the purpose of giving or obtaining legal advice.

Hence in the UK, the traditional position that Legal Advice Privilege does not extend to communications between a client or his lawyer and a third party (who is not the agent of either of them), even though the communications were made for the purpose of giving or obtaining legal advice, continues to hold sway.

However, since the Full Federal Court's unanimous decision in **Pratt Holdings Pty Ltd v Federal Commissioner of Taxation** (2004) 207 ALR 217, there has been a recent and significant departure in Australia from that position, which has brought about a sharp divergence of approach between the UK and Australia.

The facts of **Pratt Holdings** were that the taxpayer was restructuring its corporate group. An issue arose with respect to the tax consequences of some accumulated losses within one of the entities in the group. The taxpayer sought legal advice from its lawyers. The lawyers advised the taxpayer to obtain an independent valuation of assets to assist in determining the losses. The taxpayer approached an accounting firm directly and received the valuations before passing them on to the lawyers. The evidence was that the purpose of the valuation was to help the taxpayer give instructions to its lawyers in relation to obtaining the advice sought. The evidence was also that the accounting firm was not the agent of the taxpayer for the purpose of making or receiving communications from the taxpayer's lawyers. During the course of a subsequent tax audit, the Commissioner sought access to communications passing between the accountants and the taxpayer. The taxpayer asserted LPP to resist the Commissioner's claim. The Commissioner then sought a declaration that LPP did not apply. The Full Federal Court held that where a person requests a third party to prepare a documentary communication for the dominant purpose of that person to whom the document is furnished sending it to a lawyer to obtain legal advice, that document attracts LPP. At para. 41, the Full Federal Court noted that:

"...The important consideration in my view is not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party. If that function was necessary to enable the principal to make the communication necessary to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party".

Thus, it would seem that the Full Federal Court has essentially removed "agency" as a necessary precondition to Legal Advice Privilege in the context of third party communications and allowed the taxpayer to claim privilege, even though no litigation was contemplated at the time the advice from the lawyers was sought. It must, however, be emphasized that the decision in **Pratt Holdings**, does not extend to a third party communication to a client where the third party is not acting for the relevant purpose. To be privileged, there must be a dominant purpose that the communications, authored by the third party, be used by the client to seek or to assist the client's lawyers to give, legal advice.[7]

As a prelude to the next section of the article, it may be noted that when a claim to LPP is established, the relevant protected communication will remain privileged indefinitely, unless privilege is waived. Typically, once privilege in a communication is lost, it is lost for all time.

Exclusion of LPP

Abrogation of LPP is the province of the legislature and not the courts. Mason J (as he then was) affirmed this in **Baker v Campbell**, supra, when he said that the privilege could not be "...abolished by the flourish of the judicial pen".

The requirement for legislative abrogation is that it must be done by express words or by necessary implication (please see **Daniels Corporation International v ACC**, supra). Thus, in the interpretation of legislation, which purports to abrogate LPP, the courts will presume that there is no intention to interfere with the privilege unless the words of the statute expressly or necessarily require that result. Thus, in the leading judgment, which was jointly delivered by Gleeson CJ, Gaudron, Gummow and Hayne JJ, their Honours commented:

"Legal professional privilege is not merely a rule of substantive law. It is an important common law right, or, perhaps more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect...."

LPP does not apply to a communication if it is made for the purpose of facilitating a crime or fraud (please see **R v Cox and Railton** (1884) 14 QBD 153. Thus, in the taxation arena, LPP will not apply where there is tax evasion and fraud. This position applies equally in relation to both Legal Advice Privilege and Litigation Privilege.

Finally, since the privilege belongs to the client, only the client may waive it. The client may expressly or impliedly waive LPP. For example -

- by the client or the client's agent intentionally disclosing a privileged communication to third parties; or
- by implication, in circumstances where there is conduct by, or on behalf of, the client which is inconsistent with the maintenance of the privilege, whether the client intended that result or not.

Generally speaking, an involuntary disclosure will not be sufficient to constitute a waiver of the privilege (please see **Mann v Carnell** (1999) 201 CLR 1.

Concluding remarks

LPP is very important to lawyers and clients alike. It has evolved within the common law world over a period of centuries. As noted above, in countries like Australia and the UK, LPP is now a fundamental common law right. This applies equally in the arena of taxation.

In those countries, where it is now an established fundamental common law right, LPP offers taxpayers limited but significant protection to pursue the legitimate goal of tax minimization with minimal interference to their privacy and confidentiality, which may otherwise be impossible, in the face of the Revenue's extensive and excessive access and information-gathering powers. From this perspective, LPP serves as a bulwark against the vast and encroaching investigatory powers of the administrative arm of the Executive, as represented in tax matters by the Revenue authorities. However, it must be emphasized that the ultimate aspiration of the doctrine of LPP is to serve the greater public interest by promoting the administration of justice, by allowing for confidentiality of communications between client and lawyer. In this way, clients are able to engage in free and frank exchanges of advice. The privilege is, however, as noted above not unlimited, but operates subject to checks and balances. Wilson J in the seminal case of **Baker v Campbell,** supra, said:

" The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to relationship of solicitor and client is an important element in that protection.

It is not only a matter of protection of the client. The freedom to consult one's legal advisor in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for and observance of the law within the community..." (emphasis added)

Thus in its operation in the tax arena, the doctrine of LPP seeks to achieve a balance between, on the one hand, the power of the Revenue authorities to collect tax revenue as efficiently and equitably as possible, and, on the other hand, the legitimate right of the taxpayer to minimize his tax burden within the parameters of the law without unnecessary intrusion. It may therefore be fairly and objectively said that LPP is a doctrine of great utility and importance, which must be effectively safeguarded by law.

By way of conclusion, this article has sought to examine and to discuss LPP generally and to draw attention to some of its more important principles. It must be highlighted that LPP is a complex and difficult area of the law and that this paper is not an exhaustive treatment of the subject.

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- *Undisclosed author, "Tax advice wins clearance from Three Rivers opinion", International Tax Review(November 2004).*

Footnotes

1. *Maria Italia, "The History of Legal Professional Privilege and its Role in Tax Advice by Tax Professionals", Occasional Papers, Victoria University/3/2004.*
2. *In Australia, the fundamental nature of LPP in tax matters has been accepted by her apex Court, the High Court, in **Baker v Campbell**, supra.*
3. *Jean-Paul Douglas-Henry and Paul Smith, "Legal Professional Privilege: Litigation privilege and some practical issues", The Tax Journal (August 13, 2007.*
4. *Please see also **FC of T v Citibank Limited** 89 ATC 4598.*
5. *Jean-Paul Douglas-Henry and Paul Smith, "Legal Professional Privilege – Part 2: Litigation Privilege and some practical issues", The Tax Journal, Monday, 13 August 2007 at p. 18.*
6. *Ibid.*
7. *Kevin Pose, "Judges highlight legal advice privilege", International Tax Review (March 2005).*

Author's Profile

***Mr Sudhar Thillainathan** , B. Comm./LL.B (Hons) (Mon.), LL.M (LSE), Advocate & Solicitor, is a partner of Shook Lin & Bok, KL. Any views expressed herein are the author's own personal views.*

Can the IRB disregard the Judicial Pronouncement in the Penang Realty case?

A Legal Perspective on the Decision Impact Statement

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

I. Introduction

In February 2007, the Director General of Inland Revenue (DGIR) released three issues of the Decision Impact Statement (DIS) over the Inland Revenue Board's homepage.[1] The DIS outlines the DGIR's position in relation to three recent Court of Appeal decisions.[2] Although the DGIR acknowledges the DIS is not a public ruling, the DIS is treated as the DGIR's explanatory statement on how the law will be administered by the Inland Revenue Board (IRB) as result of these cases. The DIS, which is issued for the first time in Malaysia, is modelled after the DIS issued by the Australian Commissioner of Taxation.[3]

This article will look at the DIS's impact on the Court of Appeal's decision in ***Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd.***[4] The DGIR has firmly reiterated the IRB's stand that the proceeds from compensation for compulsory acquisition of land are taxable. The question arises whether the DGIR will apply the DIS, which is not in tandem with the judicial pronouncement in Penang Realty case? To answer this question, the authors will first analyse the court's reasoning in Penang Realty before discussing the DIS's legal impact.

II. The *Penang Realty* Case: Facts & Decision

The taxpayer, a realty company, purchased a plot of land in 1956. A portion of that land was compulsorily acquired by the Penang state government in August 1980 under the Land *Acquisition Act 1960.*[5] *The sum of RM 1,035,762.91 was paid* as compensation to the taxpayer in May 1982. The IRB sought to tax the compensation received. The taxpayer lost its appeal before the Special Commissioner of Income Tax. The Special Commissioners accepted the IRB's position and held the proceeds from the compensation were profits derived from a business activity. The taxpayer appealed by way of case stated and won the appeal before the High Court. The High Court held the compulsory acquisition cannot constitute a sale as the element of compulsion vitiates the intention to trade.[6] As such, the profits derived from the compensation did not arise from the taxpayer's business activity. Dissatisfied with the decision, the IRB appealed to the Court of Appeal. The Court of Appeal in an unanimous decision delivered by Justice Mokhtar Sidin, dismissed the IRB's appeal. The Court of Appeal endorsed the reasoning articulated by Justice Abdul Kadir Sulaiman in the High Court. The reasoning enunciated by the High Court and Court of Appeal forms the essence of paragraphs III, IV and V below.

III. The Element of Trading

Section 4 of the Income Tax Act 1967 (ITA)[7] lists the classes of income subject to income tax. Insofar as a business is concerned, it is the gains and profits from the business that are chargeable to income tax. Thus under section 4, which outlines the types of income chargeable, not all income is chargeable to income tax. For the present purpose, the word "business" is defined in section 2 of the ITA as any adventure or concern in the nature of trade.

Our courts have on more than one occasion held that where a property is compulsorily acquired, the element of trading is vitiated. Thus, the proceeds from the compensation should not be subjected to income tax as such proceeds do not fall within the ambit of section 4. The fact that a taxpayer's land was compulsorily acquired vitiates the element of trading. This was clearly established by the Court of Appeal in *Penang Realty.* The following forms the crux of the court's reasoning:[8]

"...The compulsory acquisition by the Government of the appellant's land in the instant case cannot constitute a sale the proceeds of which are subject to tax because the element of compulsion vitiates the intention to trade. In the circumstances, that part of the order of the Special Commissioners that the profits derived from the compensation paid to the appellant on account of the compulsory acquisition...are profits arising out of the appellant's business activity cannot sustain..."

The Court of Appeal in *Penang Realty* was influenced and guided by the Supreme Court's decision in ***Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri***.[9] Justice Mokhtar Sidin endorsed the principle that a forced sale cannot constitute a sale. His Lordship rightly observed that the element of compulsion vitiates the intention to trade.

In *Lower Perak*, Justice Edgar Joseph Jr referred to English cases[10] and provided a thorough analysis of the concept of intention to trade. His Lordship came to the conclusion that there cannot be a sale or intention to sell where there is an element of "forced" sale and articulated the following principles:

a) the paramount object of the transaction must have a commercial purpose;
b) a transaction that has all the attributes of trade, must still have a commercial purpose;
c) the sale must be based on a profit-making operation;
d) the relevant transaction entered into by the parties had a commercial purpose or object from the taxpayer's point of view;
e) non-commercial motivation may affect the nature of trading transactions that they cease to be normal trading;
f) a mere sale at a profit is not a trading activity;
g) a sale must be consensual and of one's own free will before the proceeds can be chargeable to income tax; and
h) the circumstances necessitating the realisation of an asset may afford an explanation for the realisation that negates the idea that any plan of dealing motivated the original purchase.

Hence his Lordship reasoned that the element of compulsion vitiates the intention to trade and observed:[11]

"The finding of the special commissioners that 'there was some element of "forced" selling of the subject lots', and the further finding that 'the object the appellant [the taxpayer] in acquiring the land was to develop it and sell the lots to its members and hence had to sell the subject lots in dispute to a non-member, i.e. the developer', were findings which were amply justified by the evidence.

Unfortunately, however, the special commissioners failed to recognise the significance of these findings in the context of the taxpayer's contention that a forced sale cannot constitute a sale the proceeds of which are subject to tax because the element of compulsion vitiates the intention to trade..."

IV. A Mere Change of Customer?

Similarly, the argument that the compulsory acquisition is a form of trading in land as it did not change the nature of transaction and merely involved a change of customer is not valid. The IRB had raised this argument in *Lower Perak* and *Penang Realty* but failed to move the Supreme Court and Court of Appeal on this point. Justice Edgar Joseph Jr elucidated his reasons clearly in the following paragraph, which was subsequently endorsed in *Penang Realty*:[12]

"Indeed, nowhere in their case stated did they direct their attention to the question of intention to trade but instead adopted the over-simplistic approach that although the taxpayer had to sell the lots concerned to the developer, this merely indicated 'a change of customers' which was of 'no importance for it did not change the colour of transactions which constituted trading in land within the meaning of s 4(a) of the Act'. Clearly, therefore, the special commissioners overlooked the salutary words of Lord Wilberforce in Simmons v IRC at page 800e that 'trading required an intention to trade' and that, therefore, the state of mind of those in control of the taxpayer and their motives were most material..."

In this regard, the relevant question to be asked is whether the taxpayer was trading or engaged in an adventure in the nature of trade in the circumstances in which the land was acquired. Although there was "a change of customers", in the sense that the government became the "purchaser", that does not make the transaction a trading. As explained earlier, the element of compulsion vitiates the intention to trade. This proposition was accepted recently in the High Court case of ***Perak Construction Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri***.[13] Justice Faiza Thamby Chik made the following comment:[14]

"The learned special commissioners erred in law when they held 'that the asset...acquired by the Government was still stock in trade and the nature of the asset remains the same and is not vitiated by the said acquisition'.

This conclusion of the learned special commissioners is against the principle in the Supreme Court case of Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri. Edgar Joseph Jr SCJ also held that the proposition advanced on behalf of the revenue that the sale of stock-in-trade in difficult or hard pressed situations does not change the character of stock-in-trade or trading activities assist the revenue thus:

Nor, for that matter, does the proposition advanced on behalf of the Revenue that the sale of stock-in-trade in difficult or hard pressed situations does not change the character of stock-in-trade or trading activities, assist the Revenue because in the present case, what is also in dispute is whether the subject matter of the disposal by the taxpayer to the developer, to wit, the lots concerned were stock-in-trade and also whether the taxpayer was at the material time, engaged in trading activities which could be described as an adventure in the nature of trade."

V. The *F Housing* case

In the course of its submission, the IRB sought rely on the High Court case of ***F Housing Sdn Bhd v Director General of Income Tax***.[15] In this case, the government had paid compensation for the land acquired from the taxpayer. The

question for determination by the court was whether the proceeds made by the taxpayer from the acquisition were subject to income tax as profits from a business. In his judgment, Justice Mohamed Azmi held:[16]

"Before dealing with these grounds of appeal, I am of the view that it is necessary first to decide whether the land in question is stock-in-trade or capital of the appellant company. The distinction between the two is, of course, important for tax purposes because, if the company were to make profit from the sale of its capital, then the profit is not taxable, but on the other hand, if the company were to make profit from the sale of its stock-in-trade, then the profit is taxable as trade profits under section 4(a)…Whether the land in question is the appellant's capital or stock in trade is, of course purely a question of fact. In this case, the Special commissioners have found as a fact that it is stock-in-trade and not capital. Unless there is no evidence to support this finding or unless the Special Commissioners can be shown to have erred in their conclusion on primary facts, I do not think this court should interfere with their finding".

In Penang Realty, the IRB relied on this passage as the authority for the proposition that the principle applicable to compulsory acquisition was the same in Malaysia as that in England. The taxability of the payment made for the compulsorily acquired property depended on whether it was held as stock in trade or capital, and that the element of compulsion was irrelevant.

The authors submit that the decision in F Housing, while correct on its own facts, did not lay down any principles on whether payment made for the compulsory acquisition is assessable to income tax. The facts of F Housing were peculiar to that case as it was established that the taxpayer had purchased the land with knowledge of the intended *compulsory acquisition, and with the intention to profit from* such acquisition. Therefore, there was no element of "compulsion" in the compulsory acquisition. The following extract from the case supports this reading of the case:[17]

"The fact that the appellant company acquired the land in question with the knowledge that it is to be compulsorily acquired is sufficient to show that they acquired it for the purpose of reselling the property at a profit without developing it… and by taking various steps to develop the land, they were successful in convincing the Collector of Land Revenue that the undeveloped land had immediate potential value as building land and that its market value… was higher than the purchase price… I hold that the compensation should be treated as income and, therefore, taxable as gains or profits from a business within the meaning of section 4(a)…"

Nevertheless, the Court of Appeal in *Penang Realty* rightly observed that the facts of *F Housing* are distinguishable on its own facts. As such, the decision in *Penang Realty* remains as clear authority on the issue whether proceeds from compulsory acquisition are taxable. Justice Mokhtar Sidin in his judgment endorsed the High Court's finding in *Penang Realty*, which reads as follows:[18]

"I am of the view that F Housing Sdn Bhd can be easily distinguished on its own facts and in the light of the clear authority of Lower Perak Co-operative Housing Sdn Bhd, the Special Commissioners had misdirected themselves by so holding. The compulsory acquisition by the Government of the appellant's land in the instant case cannot constitute a *sale the proceeds of which are subject to tax because the element of compulsion vitiates the intention to trade…"*

VI. The Decision Impact Statement

The DIS states the decision enunciated in *Penang Realty* was heavily relied upon the *Lower Perak* case and did not consider section 24(1)(a) of the ITA 1967. The DIS is effectively treating the Court of Appeal's decision in *Penang Realty* as *per incuriam*. *Per incuriam* is the legal term used by lawyers to describe an instance where a statute, which would have affected the decision was not brought to the attention of the court. The meaning of *per incuriam* was succinctly articulated by Justice Donaldson in the English Court of Appeal case of ***Duke v Reliance Systems Ltd***,[19] which was subsequently endorsed by Justice Eusoffe Abdoolcader in the Supreme Court case of ***Government of Malaysia v Lim Kit Siang***.[20] Justice Eusoffe Abdoolcader reasoned:[21]

"…And as to the decision being per incuriam, I would suggest that before any argument on this line is ever to be raised, it would be highly instructive to first refer to the latest observation in this regard by Sir John (now Lord) Donaldson MR in the English Court of Appeal in Duke v. Reliance Systems Ltd. [1987] 2 WLR 1225 (at p. 1228):

I have always understood that the doctrine of per incuriam only applies where another division of this Court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the Court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today…"

It must be appreciated that section 24(1)(a) deals with circumstances when a debt owed by a relevant person constitutes gross income for a relevant period. In *Penang Realty,* there was no direct relevance to this issue. Furthermore, the High Court in Perak Construction came to the same conclusion as in *Lower Perak* and *Penang Realty* despite being well aware of section 24(1)(a).

As illustrated earlier, the classes of income chargeable to income tax are outlined in section 4 of the ITA 1967. As such, if the proceeds are to be taxed, it must fall within the ambit of section 4 and not

section 24(1)(a). This means, only gains or profits from a business are chargeable to income tax. The word "business" is defined in section 2 of the ITA as any adventure or concern in the nature of trade. And, cases like *Lower Perak, Penang Realty* and *Perak Construction,* clearly establish that the element of trading is vitiated in cases of compulsory acquisition and does not fall within the ambit of a trading activity. Section 24(1)(a), on which the DIS is based, has no direct relevance to the taxation of proceeds from compulsory acquisition. In this regard, it is clearly arguable that the IRB's contention is misconceived and open to challenge.

Furthermore, the Special Commissioners of Income Tax would be certainly inclined to conform to the Court of Appeal's decision in *Penang Realty.* If the Special Commissioners decide otherwise, the taxpayer may appeal to the High Court. Based on the doctrine of judicial precedent, the High Court is bound by the decision of the Court of Appeal. This position was clearly articulated by the Federal Court in ***Co-operative Central Bank v Feyen Development***.[22] In this case, Justice Edgar Joseph Jr endorsed Lord Hailsham's judgment in the House of Lords case of ***Cassell & Co Ltd v Broome***[23] and quoted the following:[24]

"In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty to apply with full force…we adopt what his Lordship said. Clearly, the Court of Appeal in Harta Empat flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles."

Given the above stated stern reminder by the Federal Court, would the Special Commissioners or High Court be prepared to incur the "wrath" of the Court of Appeal for departing from the *Penang Realty* decision? In light of the doctrine of judicial precedent, which is strongly enshrined in our legal system, the authors doubt the Special Commissioners will be moved by the DIS.

VII. Conclusion

A compulsory acquisition is not a sale in the true sense of trade. If the element of compulsion is the reason for the land disposal, then the intention to trade is vitiated. This means the land was not disposed in the course of trading. The authors stress that the mere fact the taxpayer made a profit does not make the compulsory acquisition a trading activity and the proceeds as trading income. As such, the proceeds cannot not be subjected to income tax. The authors opine the DIS cannot overrule a judicial pronouncement and thus, it lacks legal effect. It is not a legal document and does not bind the taxpayer. The DIS merely serves as a guideline issued by the DGIR to state the IRB's stand. Since the legal position is in favour of the taxpayers, the authors urge the IRB to reconsider its position and the DIS. If the objective behind the DIS is to educate taxpayers, then the DIS on *Penang Realty* confuses and creates uncertainly among the taxpayers.

Under the self-assessment system, taxpayers are required to determine their taxable income, compute their tax liability and submit their tax returns.[25] In principle, this system has shifted a substantial burden of responsibility from the IRB to the taxpayers. However, the DIS has placed the taxpayers in a dilemma when it comes to determining whether proceeds from compulsory acquisition are taxable income. Such confusion and uncertainty are undesirable in light of the self-assessment system. Hence, it is only appropriate that the DGIR withdraws the DIS and accepts the *Penang Realty* decision as good law.

Note: Datuk D.P. Naban alongside his colleague, Mr Nitin Nadkarni, appeared on behalf of the taxpayer in the Penang Realty case.

Footnotes

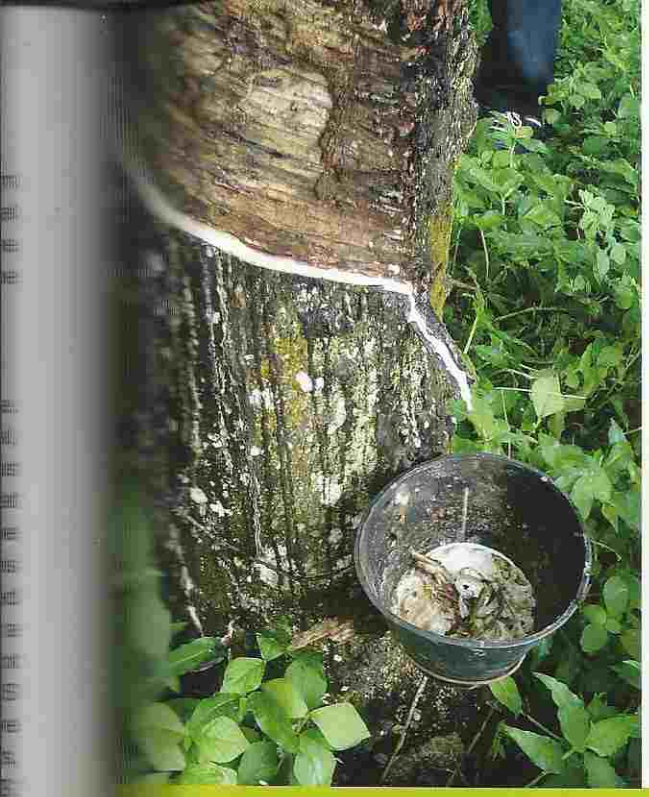
1. http://www.hasil.org.my/english/eng_DecisionImpact.asp
2. The three cases are Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd [2006] 3 MLJ 597, Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685, Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 1 MLJ 428.
3. http://law.ato.gov.au/atolaw/general.htm?ldbcontents.htm#dis
4. [2006] 3 MLJ 597
5. Act 486
6. [1997] 1 LNS 453
7. Act 53
8. at page 605
9. [1994] 2 AMR 1735
10. see Ransom v Higgs [1974] 3 AER 949, Simmons v IRC [1980] STC 350 and Cunliffe v Goodman [1950] 2 KB 537
11. at page 1784
12. at page 604
13. [2002] 1 MLJ 363
14. at page 374
15. [1976] 2 MLJ 183
16. at page 184
17. at page 185
18. at page 605
19. [1987] 2 WLR 1225
20. [1988] 1 CLJ 219
21. at page 262
22. [1997] 2 MLJ 829
23. [1972] AC 1027
24. at page 836
25. Kasipillai, Jeyapalan (2007), A Comprehensive Guide To Malaysian Taxation Under Self-Assessment, 3rd Edition, McGraw Hill Education, Kuala Lumpur.

Author's Profile

Datuk D.P. Naban *LL.B(Hons)(London), Barrister-at-Law, Advocate & Solicitor, is a Senior Partner of Lee Hishammuddin Allen & Gledhill. He also heads the firm's tax practice group. He was called to the English Bar in 1980. Datuk Naban has appeared before the Special Commissioners of Income Tax, High Court and Court of Appeal for various tax matters. Besides tax litigation, he advises multinational and local enterprises on tax advisory and tax planning matters. He is also the Chairman of the Bar Council's Tax Practice Sub-Committee. Datuk Naban can be contacted at tax@lh-ag.com.*

Mr S. Saravana Kumar *LL.B(Hons)(London), LL.M(Taxation)(LSE), M.Sc(UCL), Barrister-at-Law, Advocate & Solicitor, has been with Lee Hishammuddin Allen & Gledhill since 2006 and specialises in tax practice. He can be contacted at tax@lh-ag.com.*

Any views expressed herein are the authors' own personal views.



Customs Exemptions on Raw Materials, Machinery and Equipment

Mr Thomas Selva Doss

The Customs Department grants import duty and sales tax exemptions on raw materials, components, packing materials as well as machinery and equipment used directly in the manufacture of furnished goods. Under the Sales Tax Act 1972, companies manufacturing sales taxable goods are eligible to apply for sales tax exemptions for these raw materials, subject to a number of conditions. In the same way Treasury exercising the powers under section 14(2) of the Customs Act 1967 also grants import duty exemptions on those raw materials to manufacturing companies provided a number of conditions are met. The Licenced Manufacturing Warehouse licenced under section 65A of the same Act is also given import duty and sales tax exemption on these raw materials which are used to manufacture goods approved by the Director General of Customs. The same conditions also apply to manufacturing companies in the Free Industrial Zone. But what criteria does Customs actually use in determining whether or not to grant exemptions to a particular manufacturing company?

Raw materials are basically unfinished goods used by a manufacturer in providing finished goods. They come in many forms – wood, metal, plastic, rubber etc. Whatever form they come in, they undergo a process where their size, shape and nature changes. Components are also considered to be raw materials and also qualify for the same exemptions as long as they form part and parcel of the finished product. In most cases, components are assembled into the finished product. As for packing materials, they must be used to pack the finished good which is sold in the retail market. The idea here is that raw materials, components and packing materials must be physically incorporated into the finished goods to qualify for any exemption.

Sales Tax

Manufacturers licenced under the Sales Tax Act 1972 usually apply for sales tax exemptions under the Ring System – the C.J.5, C.J.5A, C.J.5B and the C.J.(P)2 as well as the credit system facility. Many are not aware as to what type of raw materials qualify for these exemptions. For example, a manufacturer of speaker boxes once applied to Customs to obtain sales tax exemption for chipboard, edging, glue and glue guns. Customs approved the first three items but rejected the third as glue guns constitute 'manufacturing aids' and are not raw materials. Another manufacturer of bus coaches applied to Customs to purchase steel sheets, plywood, iron rods, seats, paint, tyres and toilet bowls free of sales tax. The application was approved as the toilet bowl was actually a component assembled into the coach as it came fitted with a toilet. In another case, a beverage company applied to Customs to use ceramic mugs to pack their beverage. Again, this was rejected by Customs as beverages are not usually packed in ceramic mugs. This company was actually giving the mugs away as a free gift. One must bear in mind, that containers which are used for packing must usually be disposable containers. Packing items which are for repetitive

use are usually not considered to be standard packing materials. The most common packing item is the carton box which is used to pack a multitude of items. It is such an essential item that the government decided to exempt it from sales tax. Even the carton box manufacturers are given sales tax exemption on the raw materials, mainly the corrugated paper or paper board, which are used to manufacture the boxes. Other items such as labels and stickers which are used to identify the finished goods are also granted exemption. Another item commonly used for the transportation of the goods is the pallet which is usually made of wood or sometimes of plastic. The pallets which are used by forklifts for loading goods into a container or a lorry are not given exemption as they do not constitute packing or raw material. Apart from pallets, wooden boxes and crates which are commonly used to pack foodstuffs also qualify for exemption as long as the finished good is subject to sales tax. It must be noted that many small manufacturers purchase small quantities of raw material from wholesalers who have either imported the material or purchased them from a local manufacturer and have paid the sales tax. Since they are not able to use the C.J.5 facility they can utilize the credit system and make the necessary deductions when they submit the sales tax returns.

Sales tax officers in the Facilities Division of the Customs usually scrutinize each and every application for exemption making sure that the raw materials are actually physically incorporated into the finished good which should be subject to sales tax. In many instances, even after careful scrutiny and inquiry by these officers, there have been cases where the raw materials were not incorporated into the finished goods or were used to manufacture non-sales taxable goods. Even if this escapes the eye of the sales tax officer, the sales tax auditor is bound to pick it up during a sales tax audit. Another area to look at when applying for sales tax exemption is the tariff code of the item. Many manufacturers wrongly classify the item, assigning a tariff code which is taxable and then applying for sales tax exemption when the item is actually not subject to sales tax under the correct tariff code. Sales tax officers in the Facilities Division are quite well-versed with the various types of raw materials used in the manufacture of various goods as they are constantly scrutinizing application for exemptions. Sometimes a physical inspection at the factory is done to ascertain that the raw material is actually used in manufacture. There are numerous types of raw materials and components used for manufacturing and the officer in charge of granting exemptions usually has a good database of raw materials.

The Licenced Manufacturing Warehouse (LMW)

The LMW is also given a number of exemptions. Raw materials, components, machinery and equipment which are used directly in the manufacturing process are exempted from import duty and sales tax. An LMW is not allowed to sell any of these raw materials to another company even if it constitutes raw materials for the other company's manufacturing process. LMW procedures dictate that a proper inventory of these raw materials or components must be kept for the inspection of customs officers. Any raw material which cannot be accounted for is deemed to be illegally removed from the LMW and any import duty and/or sales due on these goods may be reassessed by the Customs. LMW procedures also require a security to be furnished to Customs for these materials and only certain personnel in the LMW are given access to these materials. As for machinery and equipment which are given exemption, Customs always ensures that these items are used directly in the manufacturing process. Items such as air-conditioning equipment, compressors, cleaning equipment, forklifts etc. are not given exemption. In an LMW audit, the auditors are always concerned with the way the raw materials and components are used in the manufacturing process. As such a stock movement of these materials must be submitted monthly to the Industries Division of the Customs. The LMW officer in charge of the factory will continuously monitor the use of these materials.

Companies in the Free Industrial Zone

Manufacturing companies in the Free Industrial Zone (FIZ) are also given import duty and sales tax exemption on raw materials, components and packing materials as well as machinery and equipment which are used in their manufacturing process. The procedure is similar to that of the Licenced Manufacturing Warehouse. Because a FIZ is deemed to be a place outside the Federation, these goods are deemed to be exported when they are moved to an FIZ. Therefore, they need to be declared on the Export Declaration Form Customs No.2. Once inside the FIZ they have to be used in the manufacturing process. If the owner wishes to sell any of these raw materials or components in the domestic market, prior approval must be obtained from the Zone Authority and the goods should be declared on the Import Declaration Form Customs No.1 and the import duty and/or sales tax due should be paid. Usually this is not encouraged and seldom does the Zone Authority give any approval for domestic sale of raw materials. Companies in the FIZ usually export their finished goods and these raw materials and components constitute part of the finished goods exported. Recently Customs has been flexible in granting exemptions and many electronic companies have been given tax and duty exemption on industrial manuals packed together with the electronic equipment. Companies in electronic industry

are given exemption in the electronic on clean room equipmentwhich are a necessary part of their manufacturing process. Pharmaceutical companies which need to keep their medicines at a low temperature are given exemption on the air-conditioners used for that purpose. These exemptions are not automatic but given on a case by case basis after careful consideration by Customs.

Other types of exemptions

The Customs Duties (Exemption) Order 1988 and the Sales Tax (Exemption) Order 1980 also lists out certain companies which qualify for exemption. Certain shipbuilding companies such as the Malaysian Shipyard and Engineering Sdn. Bhd. and the MARA Shipyard and Engineering Sdn. Bhd. are given import duty and sales tax exemption on materials and equipment which are used directly for the construction or repairing of vessels. Petroleum companies such as Exxon-Mobil Exploration and Production Malaysian Inc., Sabah Shell Petroleum Co. and Petronas Carigali Sdn. Bhd. are given the same type of exemption on materials and equipment which will be used directly for petroleum and gas upstream operations. The same goes for materials and equipment used in the Joint Development Area which is managed by the Malaysia-Thailand Joint Authority. Apart from this, the Malaysian Industrial Development Authority (MIDA) grants import duty and sales tax exemption on machinery and equipment used in the plantation sector for controlling pollution, recycling activities, integrated logistics services, integrated market support services, energy conversion, biomass activity as well as equipment used for private higher educational institutions, private language centres and approved training institutions. Research and development companies and companies involved in product testing and quality control also qualify for the same type of exemption.

The application has to be made to MIDA but the approval is given by Treasury. One copy of the approval letter will be forwarded to the Industries Division of the Customs. These companies who are given exemption must maintain a proper inventory of these machinery and equipment for an indefinite period of time as the Customs Act 1967 does not specifically state as to how long this inventory and proper documents should be kept. Customs officers can conduct spot checks at any time and many companies have been compounded for either not keeping proper records or having no records at all. These machinery and equipment cannot be disposed of and anyone wishing to sell them must obtain prior approval from Customs. The relevant import duty and /or sales tax must also be paid.

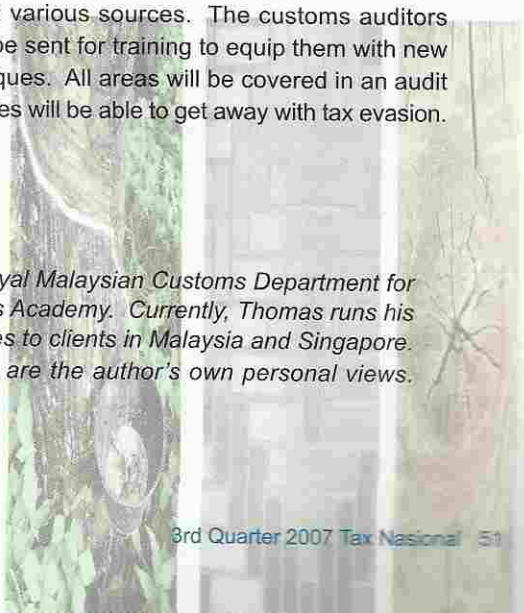
The need to keep proper records

The Customs Act 1967 does not specify as to how long an importer or any person who has dealings with Customs needs to keep records and documents for the inspection of Customs officers but documents and records pertaining to valuation of goods imported need to be kept for a period of six years. Many companies face problems in this area, as not only is it bulky and occupies much needed space but quite a number of documents have not been filed properly or misplaced altogether. Forwarders are also in the habit of not returning the original documents to the importer once the importation process is complete. In a Customs investigation, the investigating officer will always insist on checking the original copies. If an importer or any other person is unable to produce these documents, they will probably be compounded for non-compliance which can be quite substantial.

As for sales tax, section 18 of the Sales Tax Act 1972 clearly states that every taxable person shall keep full and true records of all transactions that affect his liability to sales tax for a period of six years from the latest date. In a sales tax audit, the auditors often pay careful attention to the various sales tax exemptions enjoyed by the licencee. This is an area where most licencees do not comply with as much of the raw material granted exemption do not end up as part of the finished product. Keeping records of all purchases and usage is often a tedious process especially when the manufacturer is dealing with tonnes and tonnes of raw material. Non-compliance is a costly affair as the sales tax auditors are only too quick to reassess the sales tax on the materials which cannot be accounted for and issue a Bill of Demand which is payable within fourteen days from the date of the bill.

The Goods and Services Tax

Once the Goods and Services Tax (GST) is introduced, it is most probable that these exemptions will be retained. MIDA will probably continue to grant exemptions to those sectors it currently controls. However, there will be changes in procedures and customs documentation. All parties concerned need to adjust to these new procedures as well as the new record-keeping requirements. The nature of customs audits will change with the customs engaging new methods in conducting audits as they will be able to obtain information from various sources. The customs auditors themselves will be sent for training to equip them with new skills and techniques. All areas will be covered in an audit and few companies will be able to get away with tax evasion.



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. Any views expressed herein are the author's own personal views.*

Self Assessment of a Company Part I

Associate Professor Hajjah Faridah Ahmad

Introduction

With effect from year of assessment 2001, companies are under the self assessment system. This refers to the basis period for the financial year ending in 2001. Section 21A was inserted which requires that all sources of income earned by the company will be assessed to income tax in accordance with the financial period. This will help and facilitate the company to estimate the amount of income tax payable for the year of assessment 2001 and its subsequent years of assessments.

What is meant by self assessment?

Self assessment system is an approach whereby taxpayers are required to determine their taxable and chargeable income, compute their tax liabilities, submit their tax returns and pay the amount due to Inland Revenue Board (IRB). These are done based on the existing laws and policies issued by the tax authorities. With the implementation of self assessment system, means the responsibility and obligation to comply with the tax laws will transfer to the tax payers. They are required to understand the law, interpret them and apply them to their own situation.

Once self assessment is implemented, there will be no notice of assessment issued to the taxpayer. The tax return submitted and furnished by the taxpayer is deemed to be a notice of assessment and it will not be subject to a detailed technical scrutiny by the tax authorities. However the tax authorities will carry out a tax audit on the tax return on a post-assessment basis. The purpose of the audit is to check and verify the information submitted by the taxpayer, i.e. whether taxpayer has complied with the tax law in making the return. The time limit given for the IRB to carry out the audit is six years following the filing period. In carrying out the audit, tax officers will be able to demand a taxpayer to provide records that they may think relevant and useful in relation to the return submitted.

Steps carried out in the self assessment system of a company

1. Existing Company

Every company is required to furnish an estimate of its tax payable for each year of assessment in a "prescribed form" (CP 204) to the IRB not later than 30 days before the beginning of the basis period for that year of assessment. The form CP 204 will be issued by the IRB.

Example 1

Tiara Sdn. Bhd. closes its accounts on 31 October each year.

For the Y/A 2005, the basis period of the company is 1 November 2004 to 31 October 2005.

Therefore, Tiara Sdn. Bhd. needs to submit the estimate of income tax payable via Form CP204 the latest by 1 October 2005, for year of assessment 2005. The tax estimate for YA 2005 cannot be less than the tax estimate for YA 2004.

Example 2

Using facts in Example 1, if let's say the tax estimate for Y/A 2004 is RM 180,000, therefore the tax estimate for YA 2005 cannot be lower than RM 180,000, i.e. the original tax estimate.

If let's say, Tiara Sdn. Bhd. revised the tax estimate for Y/A 2004 to RM 210,000, therefore the tax estimate for Y/A 2005 cannot be lower than RM 210,000.

With effect from Y/A 2006, companies are allowed to furnish estimates of tax payable for a year assessment;

(i) Not less than 85% of the revised estimate of tax payable for the immediate preceding year of assessment, or
(ii) If no revised estimate is furnished, the estimate shall not be less than 85% of the estimate of tax payable for the immediate preceding year of assessment.
(iii) Taxpayers are required to indicate the percentage of such tax over the previous year's estimate on the CP 204 form.

Example 3

Mawar Sdn. Bhd. ends its accounts on 31 July each year. For Y/A 2007 (i.e. year ended 31/7/07), the company's estimated tax payable is RM 240,000 and the company did not revise it's original tax estimate.

Therefore, for Y/A 2008, the estimate tax payable for Mawar Sdn. Bhd. cannot be less than RM 204,000 (85% x 240,000).

Example 4

Using facts in Example 3, let's say Mawar Sdn. Bhd. revised the original tax payable to RM 260,000, therefore for Y/A 2008, the estimate tax payable for Mawar Sdn. Bhd. cannot be lower than RM 221,000 (85% x 260,000).

2. Payment of Tax

All payments of estimated tax payable must be made using the prescribed remittance slips (CP 207). The payment is made in equal monthly installments, by the tenth day of each month beginning from the second month of the basis period for the year of assessment. The number of installment is determined according to the number of months in the basis period.

Example 5

Kiko Sdn. Bhd. closes its accounts on 31 August each year. For the Y/A 2007, the company has an estimated tax payable of RM 240,000.

Kiko Sdn. Bhd. will have 12 monthly installments of RM 12,000 each (240,000 ÷ 12). The first installment is due on the 10 October 2006 [Basis Period 1 September 2006 to 31 August 2007] and the last installment is due on the 10 September 2007.

3. Penalty for late Payment – Sec 107C (9)

A 10% penalty will be imposed on any amount of tax unpaid on or before the due date.

Example 6

Using facts in Example 5, what will happen if Kiko Sdn. Bhd. fails to pay the 5th installments of RM 12,000 which is due on 10 February 2007?

There will be a penalty of RM 1,200 (i.e. 10% x RM 12,000) imposed on the company. The tax and penalty will be debts due to DGIR (government).

4. Revision of estimate tax payable – Sec 107C (7)

A company is allowed to revise the original estimate tax payable if the company foresees changes to the tax payable. These changes can be as a result of the fluctuations in the business profit (i.e. drop in sales revenue, more revenue expenses were incurred in running the business, more capital allowances can be claimed due to buying of fixed assets to be used in the business operations). Revision of estimate tax payable can be upwards or downwards. Upwards revision can be due to increase in sales (normally happen when there is seasonal demands of the goods or products, decrease in revenue expenses and some fixed assets, plant and machinery which are disposed of and resulting in balancing charges which are subject to tax).

Revision of estimate tax payable can be done in the sixth month or ninth month of the basis period of a year of assessment via Form CP 204A.

Where the revised estimate is lower than the tax installments paid for the year, the difference (balance) will be payable in the remaining installment in equal proportion or ceased immediately. However where the revised estimate is higher than the tax installment paid for the year, the difference will be payable in the remaining installment in equal proportion.

Example 7

IKO Sdn. Bhd., a manufacturing company, closes its account on 31 March 2007. For the Y/A 2007, IKO Sdn. Bhd. furnished an estimated tax payable of RM 360,000. In September 2006, the company revised its estimate tax payable to RM 220,000. The amount of installments will be as follows:

Based on the original estimate, the amount per installment will be RM 30,000 (360,000 ÷ 12). Since revision was done in the sixth month, the revised installment will be as follows:

Revised Estimate Tax Payable	RM 220,000
(-) Tax paid as per original estimate (5 x 30,000)	(150, 000)
Total balance of installment	70, 000

Amount per installment = 70,000 x 1/7
= RM 10,000

Installments for the original estimate tax payable will be paid from the month of May 2006 to September 2006 at RM 30,000 per installment. New installment for the revised estimate tax payable will be paid from the month of October 2006 to April 2007 at RM 12,000 per installment.

Example 8

Using facts in Example 7, let's say the revised estimate payable for IKO Sdn. Bhd. is RM 140,000.

Therefore, there will be no more installments after the payment of the first 5 installments since the total amount already paid is RM 150,000 (RM 10,000 more than the revised amount).

(5) Penalties on underestimate – Sec 107C (10)

There will be 10% penalty imposed on the difference if the actual tax payable exceeds the original tax estimate or the revised tax estimate by an amount of more than 30%.

Example 9

Wira Sdn. Bhd. closes its account on 30 June 2007. The estimate tax payable for the Y/A 2007 is RM 140,000. The company did not do any tax revision for the Y/A 2007. For the year ended 30 June 2007. Wira Sdn. Bhd.'s final tax liability is RM 240,000. Will there be any penalty imposed?

Final tax liability	RM 240,000
(-) Tax paid (original tax estimate)	(140,000)
Shortfall	100,000
(-) 30 % Margin of Error (30% x 240,000)	(72,000)
Difference / Excess	28,000

Thus, penalty = 10 % x 28,000 = RM 2,800

The penalty of RM 2,800 and the shortfall of RM 100,000 equal to RM 102,800 is due and must be paid to IRB not later than 31 January 2008 (i.e. within 7 months of closing the account).

Author's Profile

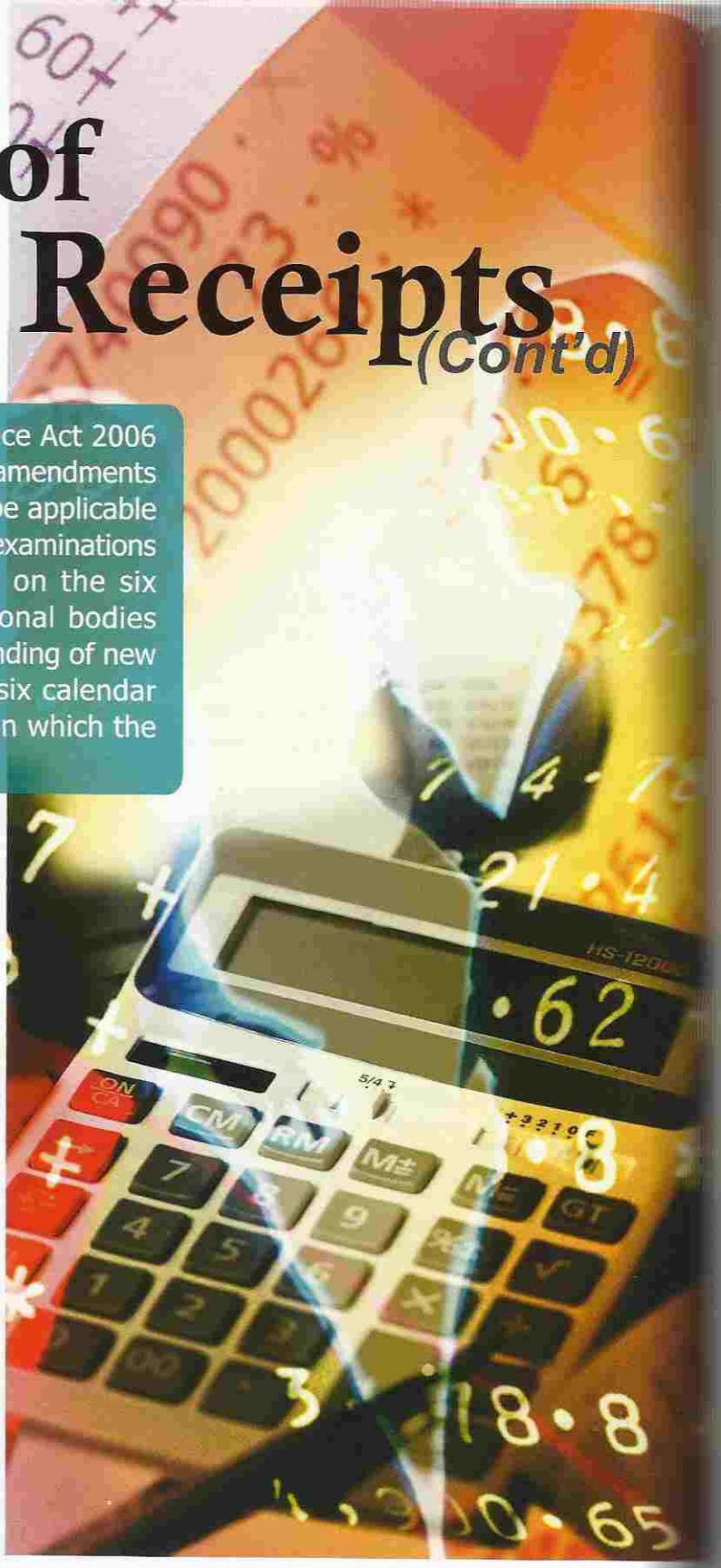
Hajjah Faridah Ahmad *is an Associate Professor at the Faculty of Accountancy, UiTM specialising in Malaysian Taxation. She has also taught the various levels of professional courses of ACCA, MICPA and ICSA.*

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 organised jointly by ACCA Malaysia, SMEDEC, JELITA and FELDA.

Learning Curve

Taxability of Business Receipts (Cont'd)

Mr Siva Nair



Students should be aware that the Finance Act 2006 which legislates most of the 2007 budget amendments was gazetted on 31/12/2006 and would be applicable for the candidates sitting for professional examinations in November/ December 2007 [based on the six months rule adopted by most professional bodies whereby questions requiring an understanding of new legislation will not be set until at least six calendar months after the last day of the month in which the legislation is gazetted.]

Incidentally the Exemption order that I had mentioned in my last article in respect of Government grants **(INCOME TAX (EXEMPTION) (NO. 4) ORDER 2003)** has been revoked and replaced with the following order: **INCOME TAX (EXEMPTION) (NO. 22) ORDER 2006,** whereby;

The Minister exempts

(a) any person from the payment of income tax in respect of income relating to the allocations given by the Federal Government or the State Government in the form of a grant or a subsidy; and

(b) a statutory authority from the payment of income tax in respect of income derived from—

(i) the income received in respect of an amount chargeable and collectible from any person in accordance with the provisions of the Act regulating the statutory authority; or

(ii) any donation or contribution received.

[This order is definitely clearer since its predecessor used the term **"statutory income"** in relation to the sources of income derived from the allocations given by the Federal and the State Government in the form of a grant or a subsidy.....'].

However note that in this order, "...any deduction or allowances to be made or would have been made under the [Income Tax] Act 1967 or the Promotion of Investments Act 1986...in respect of an expenditure incurred out of the [above] income...shall be disregarded for that year of assessment and subsequent years of assessment."

Also its makes it clear that where "...the expenditure incurred...is reimbursed, in full or in part, by the [above] income any deductions or allowances to be made or would have been made under the [Income Tax] Act or the Promotion of Investments Act 1986 in relation to that expenditure shall be disregarded for that year of assessment and subsequent years of assessment."

As with the earlier order, this one also neither absolves nor can be deemed to have absolved "the person or the statutory authority from complying with any requirement to submit any return or statement of accounts or to furnish any other information under the provisions of the Act."

Let us now continue with other types of receipts which would be assessable to tax

Recoveries from Insurance Policies

Section 22(2)(a) of the Income Tax Act 1967 (as amended), provides that

"....the gross income of a person from a source of his for the basis period for a year of assessment shall include **any sums receivable or deemed to be have been received** for that basis period in relation to that source of income **by way of insurance**, indemnity, recoupment, recovery, reimbursement or otherwise where such sums are in respect of the kind of outgoings and expenses deductible in ascertaining the adjusted income of that person from that source...":

So are all insurance recoveries taxable?

Students should not forget the first thing that we had learnt in relation to the scope of charge in Malaysia i.e. section 3 states that

"...A TAX TO BE KNOWN AS INCOME TAX SHALL BE CHARGED FOR EACH YEAR OF ASSESSMENT **UPON THE INCOME** OF ANY PERSON...."

This is further reinforced by the second half of the provision which states that "where such sums are in respect of the kind of outgoings and expenses deductible in ascertaining the adjusted income of that person from that source...": Since only revenue expenditure will rank for a deduction, obviously the insurance premium paid must be in respect of a revenue item.

Therefore, it is clear that we are only referring to receipts which are of a revenue nature as opposed to capital receipts. They must be in respect of circulating assets in general or recoveries in respect of revenue expenditure.

GREEN v J GLIKSTEN & SONS LTD. [14 TC 364]

Facts of the case

A company carrying on the business of timber merchants lost a quantity of timber in a fire. The timber [its stock in trade] was insured and therefore the company received insurance compensation from its insurance company. However, the sum received was in excess of the cost of the timber that was lost in the fire because the insurance claim was based on a replacement cost basis.

Decision of the Court

It was held that the recovery constituted a trading receipt since it was for the loss of stock in trade. Also it was decided that the actual amount received would be included as gross income.

The analogy used was that if the timber had been sold in the normal course of business, the whole sales proceeds would have been included as gross income so why should we treat the loss through fire any differently!

Note for Students:

Once it is confirmed to be a revenue receipt the full amount of the insurance recovery is included as gross income and not only the cost of the item lost!!!

The types of receipts that should be included as gross income would be insurance recoveries in respect of:

~ loss of profits,
~ repairs to business premises,
~ defalcation by employees, or
~ theft of trading stock.

In ***CRABB v BLUE STAR LINE LTD 39 TC 482,*** the receipt was from an insurance claim recovered by a shipowner on a policy insuring against delivery of entire new ships and it was held to be a receipt on capital account on the analogy *of a reduced price paid for the delayed ships. [I.e. as if you* got a discount when buying the ships.]

Let us now look at another special insurance policy, which has gained prominence by virtue of the fact that there is a dedicated public ruling just for it.

Key Man Insurance Policies

A comprehensive explanation is provided in Public Ruling No: 2/2003 which was issued on 30 December 2003. Pertinent points from this ruling in relation to the taxability of insurance proceeds received on "key-man" insurance are discussed below.

What is a "Key-man" insurance policy?

The ruling explains that it is "generally, a premium paid on an insurance, which is intended wholly and exclusively to recover moneys that would replace a loss of profits on the happening of the event insured against...." This event could be "death, critical illness, sickness, accident or injury of an employee or a director [which] may result in a loss of business income for the employer or company. Insurance may be taken on the life of an employee or a director who is a "key" person to cover the risk of loss of business income."

Further it states that "the right to the insurance proceeds of a "key-man" insurance must remain with the employer or company and the proceeds must not be payable to the "key-person" or his family.

Taxability of insurance proceeds

Lord President Clyde in ***KEIR & CAWDER LTD. v CIR [38 TC 364]*** (which is discussed below) states "in the ordinary case where a company insures the life of an employee whose services are valuable to them, the sums received by the company on his death is a revenue receipt"

In shedding light on the above, the ruling clarifies that "the proceeds receivable on a **term life policy or an accident policy is taxable** on the employer or the company as the sum is receivable in respect of an insurance premium that has been allowed previously. On the other hand, the proceeds receivable in connection with a **whole life or an endowment policy is not taxable** as the insurance premium has not been allowed."

This is in line with the provision in Section 22(2), which essentially states that for the recovery to be taxable, the premium should have been deductible. The ruling explains that "the premium on the policy is allowable if the insurance

has no element of investment and the insurance is taken on the life of a "key-person" whose absence would result in a reduction in the profits of the employer or the company"

"Policies that have no element of investment are term life and accident policies. These policies expire at the end of the insured period and there is no return on the premium paid if the insured person lives or is not injured. The premium payable on a term life policy or an accident policy of a "key-man" insurance is allowable as a deduction against gross income from a business.

However, it continues "a whole life policy and an endowment policy have elements of investment and are therefore regarded as capital assets of a company. Both policies have cash values that can be redeemed after being in force for several years. For an endowment policy there is a lump sum payable upon maturity of the policy. The premium payable on a whole life or an endowment policy is not allowable in arriving at the adjusted income from a business of a company.

The ruling provides a simple example to illustrate the taxability of insurance recoveries under this policy which is reproduced below for convenience of reference,

Example

A company acquired a "key-man" term life policy on the life of the managing director with an annual premium payable of RM30,000. It also acquired a "key-man" whole life policy on the life of the sales manager with an annual premium payable of RM20,000. The premium of RM30,000 had been allowed and the premium of RM20,000 had been disallowed in the tax computation. Both the managing director and the sales manager were killed in an accident and the company received cash payments of RM2,000,000 and RM500,000 in respect of the term life and whole life policies.

Solution:

The sum of RM2,000,000 received by the company is taxable on the company as it is received in respect of a policy where the premium had been allowed previously while the sum of RM500,000 will not be taxable as the premium had not been allowed previously.

Key-Man Policies	Premiums Paid	Recoveries
Term / Accident Policies	**Deductible**	**Taxable**
Whole Life Endownment Policies	**Not Deductible**	**Not Taxable**

There are couple of tax cases which deal with such policies.

CIR v WILLIAM'S EXECUTORS [26 TC 23]

Facts of the case

A company insured its directors against death or disablement, whereby it paid the premiums relating to and was the beneficiary under, the policies. This was because the business of the company depended on the personal connections of the directors. One of the directors died as a result of an accident and the company received £15,000 from the insurance company.

Decision of the Court

Since the expenditure incurred by the company in securing and retaining his services is a proper revenue charge, accordingly the benefits derived from these services being reflected in the profits of the company are also of a revenue character.

KEIR & CAWDER LTD. v CIR [38 TC 364]

Facts of the case

A company which was involved with the supply of materials for civil engineering work, decided to become civil engineering contractors. To facilitate the procurement of contracts, the company engaged the services of a firm of consultant engineers for five years. The firm's advice was given by one of the partners who had an international reputation in the civil engineering field.

The company took out policies under which lump sums were payable to the company in the event of the expert adviser's death. The expert adviser was killed in an air crash, and the company received £50,000. The company argued that their employment of the expert adviser was to obtain an asset in the shape of goodwill and therefore, the insurance receipt was compensation for loss of a capital asset.

Decision of the Court

Lord Russel stated "...money received under a policy against loss of profits through the loss of a valuable servant must in essence be a receipt of a revenue nature."

The company tried to use an alternative argument by using the principle established in the Van den Bergh case. *[We discussed this case in Tax Nasional Vol. 14/2005/Q2 at pg 48. Students will probably remember that in this case it was held that compensation received due to the destruction of the profit making apparatus was capital in nature]*

The company had contented that the activity of civil engineering contracting was fundamental to the organisation of the company's trading activities. Its discontinuance [due to the death of the expert adviser] vitally affected the whole profit-making apparatus of the business and therefore the compensation was capital in nature.

THE COURT REJECTED THIS ARGUMENT!!!

Having dealt with insurance recoveries let us look at unclaimed monies **UNCLAIMED JOHNSON v WS TRY LTD. [27 TC 167]**

MONIES

In Malaysia, we have the Unclaimed Moneys Act 1965 (as amended), whereby any unclaimed amounts should be sent to the Unclaimed Moneys department once the claim has become statute barred. Therefore obviously such amounts cannot constitute gross income of a person since he is not entitled to appropriate the moneys to himself or his business.

However there are tax cases in other countries which have thrown some light on the tax treatment of such unclaimed amounts.

MORLEY V TATTERSALL [22 TC 51]

Facts of the case

A firm of auctioneers received moneys from the sale of horses on behalf of their clients, i.e. clients' moneys. These are not its trading profits because the firm is liable to account for such amounts to the clients [e.g. estate agents, receivers etc.] The amounts remained unclaimed after many years, and the firm appropriated the amounts to their individual partners. The Revenue authorities in the UK sought to tax the partnership on the amounts thus appropriated.

Decision of the Court

Sir Wilfrid Greene MR held that "a receipt which at the time of its receipt was not a trading receipt" could not by "some subsequent operation be turned into a trading receipt."

The principle here is that the money never belonged to the trader, was never part of his income and cannot subsequently become so.

However, this should be contrasted with the precedent in the following cases.

JAY'S THE JEWELLERS LTD. v CIR [29 TC 274]

Facts of the case

The company carried on the business of pawn broking. In line with the law in the UK, in the case of a default of payment by the pawner, the broker could sell the unredeemed pledge. The balance of the proceeds from the sale, after satisfying the amounts due under the pledge, can be claimed by the client but within a stipulated period of time, failing which the pawnbroker became entitled to retain them.

Decision of the Court

The pawner's unclaimed balance was held to be not trading receipts at the time of sale but be came taxable once the pawner's claim was statute-barred

ELSON v PRICE TAILORS LTD [40 TC 671]

Facts of the case

A company carrying on a tailoring business required customers to pay a deposit in respect of order for garments made-to-measure. The company gave them a slip that did not disclose the deposit specifically but reflected the price of the garment and the balance payable. In many cases both the garments and deposits were not claimed by the customers, so the company transferred the deposits to an unclaimed deposits account and any future claims were debited to this account.

Decision of the Court

The unclaimed deposits were held to be trading receipts because the deposits were in essence "security for the completion of the purchase" The Judge had distinguished that this was actually part-payments as opposed to being genuine refundable deposits. He opined "...the deposits became the taxpayers' property on payment, and it was only those whose return was requested by the customers which were paid to them; and then not on account of any right of the customer to what was the taxpayer's property, nor on account of any obligation under the contract, but because it was decided by the taxpayers' of their own volition, as a separate matter of policy, that it would be helpful to the taxpayers' goodwill."

The next issue was when does it become taxable? Distinguishing this case from the earlier two that we have discussed, the Judge remarked"...in these cases [Morley & Jay], the balances in the traders' hands were not theirs at all but were held for others..... The traders had no beneficial interest in them at the relevant time, and, although it was because they were traders that they received them, they were not receipts of their trade at all..... [Therefore,] the deposits became the taxpayer's property on receipt. It is a trading receipt in the year in which it is received....." Of course, any refunds made would rank for a deduction in ascertaining the adjusted income.

An interesting point to note is generally in tax, a receipt of a trader is only assessable when the goods have been delivered or the services rendered. In line with the accrual principle in accounting, any advance receipts should be recorded as a current liability i.e.

Dr. Bank

Cr. Advanced receipt (current liability)

This is also followed generally in tax.. Until the trader has fulfilled all the terms of the contract which entitle him to claim the money as his own, the money has not in fact been earned.

Students would probably remember the case of **JOHNSON v WS TRY LTD. [27 TC 167]** which was discussed in Tax Nasional Vol.14/2005/Q3. In this case Lord Greene M.R. remarked: "Money must not be taken as being, so to speak, in hand until all the conditions to earn it has been fulfilled."

We shall continue our discussion on other forms of business receipts in the next article.

Further Reading

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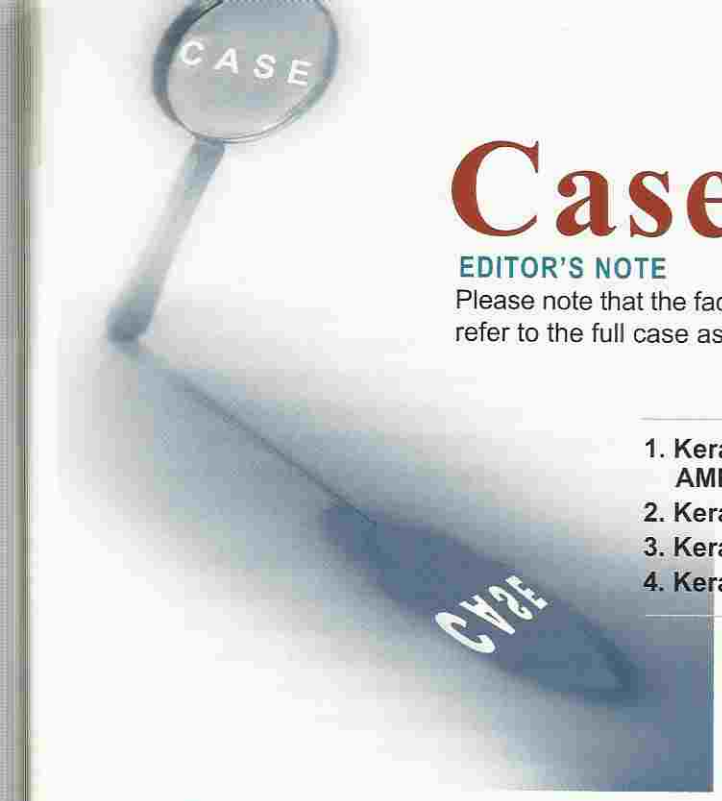
Author's Profile

Mr Siva Nair *holds an Honours Degree in Accounting and a MBA (Accountancy) from University of Malaya. He is a Chartered Account (Malaysia) and a fellow of Malaysian Institute of Taxation. He has gained extensive experience in the field of taxation whilst being employed in one of the big five firms and again as a Senior Finance and Tax Executive in an established property development company. Currently he is a freelance lecturer preparing students for the examination of ACCA, ICSA, MIT, AIA, and also tutoring undergraduates undertaking Accountancy Degree programmes in both local and foreign universities. Any views expressed herein are the author's own personal views.*



Case Summaries

EDITOR'S NOTE

Please note that the facts / details have been shortened due to space constraints. Please refer to the full case as cited for a detailed and accurate reading of the cases.

1. **Kerajaan Malaysia v Sun City Development Sdn Bhd (2007) AMR 589**
2. **Kerajaan Malaysia v Saratoga Sdn Bhd (2007) 1 AMR 285**
3. **Kerajaan Malaysia v Plaza Rakyat Sdn Bhd (2007) 1 AMR 60**
4. **Kerajaan Malaysia v Kemayan Bina Sdn Bhd (2007) 1 AMR 120**

Mr S. Kalisewaran

Kerajaan Malaysia v Sun City Development Sdn Bhd (2007) AMR 589

Income Tax – Service by Post – Denial of Receipt of Notice of Assessment – presumptions under Interpretation Acts 1948 & 1967 and Income Tax Act 1967

Defendant tax payer had appealed against an Order of Summary Judgment by Plaintiff. Plaintiff argued that Notice of Assessment sent by post to defendants address and was not returned, therefore proper service by way presumptions under Interpretations Act 1948 & 1967 and Income Tax Act 1967 was not effected.

Issue: Whether the service of a tax assessment notice was properly effected

Held

The appeal was allowed with costs. Before the "postal" presumptions can be accepted, must first prove that documents were indeed posted. The absence of such evidence is a triable issue sufficient to set aside the Summary Judgement.

Statute

Sec 12 & 66 Interpretation Acts 1948 & 1967 Sec 145(2) Income Tax Act 1967 (as amended)

Kerajaan Malaysia v Saratoga Sdn Bhd (2007) 1 AMR 285

Income Tax – Service by Post – Denial of Receipt of Notice of Assessment – presumptions under Sec 145(2) Income Tax Act 1967

Defendant tax payer had appealed against an Order of Summary Judgment by Plaintiff. Plaintiff argued that Notice of Assessment sent by post to defendants address and was not returned, therefore proper service by way presumption under Sec 145 (2) Income Tax Act 1967 was not effected.

Issue: Whether the service of a tax assessment notice was properly effected

Held

It was decided that proper service was proved as the Plaintiff had produced a letter from the Defendant appealing against the assessment as evidence that the defendant had indeed received the Notice of Assessment. Furthermore the Plaintiff's failure to exhibit the certificate of title was not fatal in this case as provided for in Sec(s) 99, 103 & 106 of the Income Tax Act.

Statute

Sec 145 (2), 99, 103 & 106 Income Tax Act 1967

Kerajaan Malaysia v PLaza Rakyat Sdn Bhd (2007) 1 AMR 60

Income tax – Assessment – Whether forum of appeal against revised assessment was correct – whether the (revised) assessment was based on an estimate or true income

Revenue had raised ordinary and additional assessments for various years of assessment. Defendant appealed against order for summary judgment among others on the increased assessments claiming that the increases were based on estimated income and not true income.

Held

The appeal was dismissed. No triable issue was raised by the Defendant. Further more the correct forum of appeal was the Special Commissioners Court under Sec 99 and Sec 106 of the Income Tax Act 1967with regards to revisions on assessments made under Sec(s) 103(4), (5) or (5A).

Statute

Sec 99, 160, 103 (4) (5) (5A)of the Income Tax Act 1967 (as amended)

Kerajaan Malaysia v Kemayan Bina Sdn Bhd (2007) 1 AMR 120

Income tax – Notice of Assessment – Service of Notice by Post

Defendant tax payer had appealed against an Order of Summary Judgment by Plaintiff. Plaintiff argued that Notice of Assessment sent by post to defendants address and was not returned, therefore proper service was not effected. Plaintiff also argued that the Notices themselves had complied with the requirements of Sec 96(4) (c) of the Income Tax Act 1967. And that the Plaintiff had delayed in applying for Summary Judgement.

Issue: 1.Whether the service of a tax assessment notice was properly effected by post
2. Whether the Notices themselves had complied with the requirements of Sec 96(4) (c) of the Income Tax Act 1967

Held

The appeal was allowed. On the facts Plaintiff had failed to prove effective service. Also on the facts Plaintiff had failed to comply with the Sec 96(4) (c) . However a mere delay in applying for Summary Judgement should not be a ground for setting it aside or disallowing such application.

Statute

Sec 96(4) (c), 103 (4), (5A), 103A (6), (7), 145(2) Income Tax Act 1967 (as amended)

Author's Profile

Mr. S. Kalisewaran *LLB(Hons) University of Wolverhampton, CLP currently practicing as an advocate & solicitor at Messrs. Azim S Kalis & Co. He can be contacted at rukalis2005@yahoo.com.*

Aspac Lubricants (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2007) MSTC 4,271

Mr S. Saravana Kumar

Aspac Lubricants (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2007) MSTC 4,271

Facts

The taxpayer (previously known as Castrol (Malaysia) Sdn Bhd) is a company that blends and sells lubricants for motor vehicles. Between 1989 and 1992, the taxpayer gave away promotional items to its customers and dealers. Customers who purchased the taxpayer's products were given mugs, T-shirts and umbrellas, each of which carried the taxpayer's logo. The taxpayer sought to deduct the expenses incurred on the promotional items from its gross income. However, the respondent invoked Section 39(1)(l) of the Income Tax Act 1967 (the Act) and disallowed the deduction of those expenses. The respondent categorised the cost of the promotional items as entertainment expenses. Both the Special Commissioners of Income Tax and the High Court upheld the respondent's contention. The taxpayer appealed to the Court of Appeal.

Issue

The sole issue before the Court of Appeal was whether the expenses were wholly and exclusively incurred in the production of the taxpayer's gross income within the ambit of Section 33(1) of the Act or whether the expenses were entertainment expenses pursuant to Section 39(1)(l).

Decision

Justice Dato' Gopal Sri Ram in delivering the judgment observed that in determining the nature of the expenses, one has to examine the crux of the transaction between the taxpayer and its customers. Relying on the English Court of Appeal's decision in ***Bentleys, Stokes & Lowless v Beeson [1952] 2 All ER 82,*** his Lordship enunciated that the examination of the transaction is essentially a question of fact.

In *Bentleys,* Justice Romer explained that entertaining involved the characteristic of hospitality. Meanwhile, a contribution to charity would inevitably involve the object of benefaction. Similarly, an undertaking to guarantee an exhibition meant support for the purpose of the exhibition. In these circumstances, the expenses were not deductible as they were not incurred in the course of business. However, according to Justice Romer, if the entertaining, contribution and guarantee were undertaken solely with the intention of promoting the business or profit earning capacity, then such expenses were deductible. Principally, if the sole object of an expense was for business promotion, then that expenditure is deductible.

Justice Sri Ram endorsed this proposition and observed that if the expenses were incurred by the taxpayer to promote its business, then the expenses cannot be described as entertainment within the meaning of Section 39(1)(l). His Lordship added that the taxpayer's case has merit from the contract law perspective as well. According to Justice Sri Ram, when the customers paid for the taxpayer's products and received the promotional items, the law of consideration came into play in the contractual relationship. The fact that there was no additional payment for the promotional items did not matter. His Lordship referred to the celebrated case of ***Chappell & Co Ltd v Nestle Co Ltd & Anor [1960] AC 87,*** where Lord Somervell famously held that chocolate wrappers sent in exchange for a promotional music recording made good consideration.

In essence, Justice Sri Ram reasoned that customers, who purchased the taxpayer's products, obtained a practical advantage when they received the promotional items. His Lordship came to the conclusion that the promotional items were given for the sole purpose of business promotion. Hence, the transactions between the taxpayer and its customers were solely in the course of business. As such, the expenses were not entertainment expenses under Section 39(1)(l) as contended by the respondent.

The appeal was allowed.

Author's Profile

S. Saravana Kumar *LL.B(Hons)(London), LL.M(Taxation)(LSE), M.Sc(UCL), Barrister-at-Law, Advocate & Solicitor, has been with Lee Hishammuddin Allen & Gledhill since 2006 and specialises in tax practice. He can be contacted at tax@lh-ag.com.*

Book Review by

Mr Kalisewaran Sinniah
LLB(Hons) University of Wolverhampton, CLP

A Comprehensive Guide to Malaysian Taxation, Third Edition by

Professor Dr Jeyapalan Kasipillai

Professor Dr Jeyapalan Kasipillai is a well known tax academic in Malaysia

Beginning as a journalist with the New Straits Times, he went on to serve with the Inland Revenue Board (IRB) for 14 years whilst teaching taxation on a part time basis at University Kebangsaan Malaysia and University Malaysia. Simultaneously he studied and completed his master's degree at University of Stirling, Scotland.

He then joined University Utara Malaysia and went on to complete his doctorate at the University of New England, Armidale, Australia. He was awarded a full professorship in 2003.

He is currently a Professor and Chair of Malaysian Business, School of Business, Monash University, Sunway Campus.

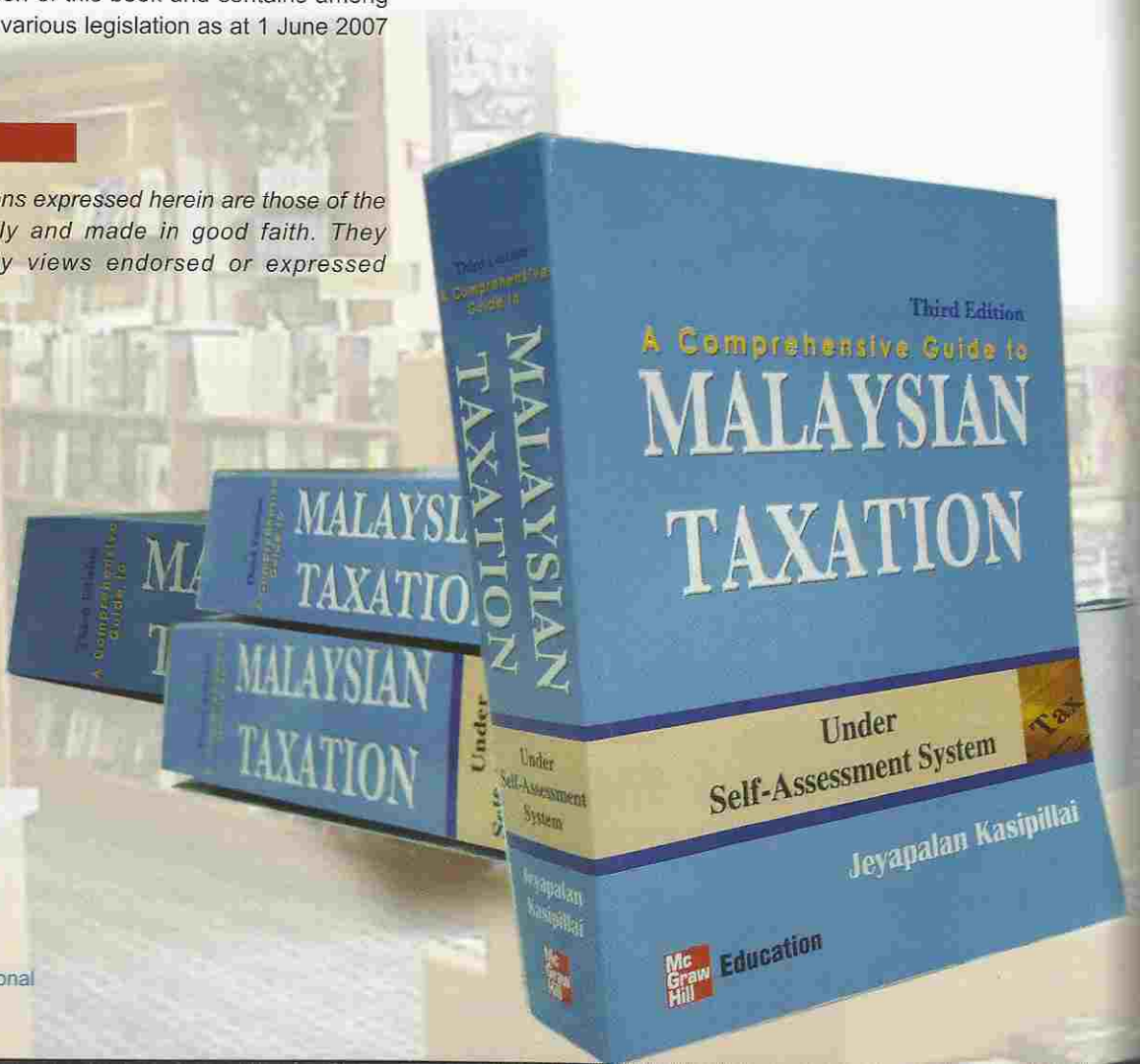
This is the third edition of this book and contains among others extracts from various legislation as at 1 June 2007 (covering the 2007 Budget amendments). It highlights all major administrative, judicial and legislative tax laws and changes. It also introduces the concept of "Advance Rulings" in Chapter 2.

As the author states in his preface "In the selection of the extracts from an array of various pieces of legislation, there will be differing opinions as to what should and should not be included." Nonetheless Professor Dr Jeyapalan has attempted to opt for those sections of the various Acts which he believes are most likely to cater for a wide range of basic and advanced taxation courses.

Among the changes addressed are the change from official assessment to self assessment system, preceding year basis of assessment to current year basis of assessment, the IRB's strategy of compliance management through taxpayer education, desk & field audits and tax investigation. As the tax laws and compliance issues have placed an ever heavier burden on the taxpayer, self assessment therefore poses a greater challenge than ever to the taxpayer and tax practitioner. This book, in its third edition, seeks to assist all who require some education in this field!

Disclaimer

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



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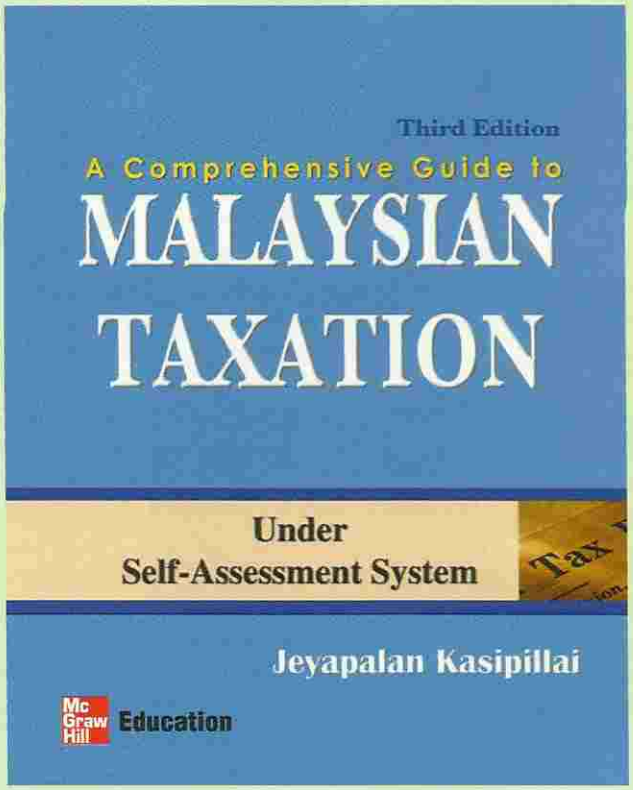

A Comprehensive Guide to Malaysian Taxation

THIRD EDITION

A Comprehensive Guide to Malaysian Taxation is an all-inclusive book covering every aspect of taxation, both direct and indirect taxation. It provides an in-depth analysis of the legal, technical and administrative aspects of the Malaysian tax system. It covers all the latest amendments including those arising from Budget 2007. This book will prove to be invaluable for income tax practitioners, accountants, businessmen, business consultants and corporate managers. Accounting and law students preparing for the various university and professional examinations in Malaysian taxation will find this book useful for its worked examples, questions and answers and clear exposition of the applicable law, thus giving a firm grasp of the law and its practice. The law is stated as at 1 June 2007.

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ABOUT THE AUTHOR

Jeyapalan Kasipillai is a Professor and Chair of Malaysian Business, School of Business, Monash University, Sunway Campus. He is a fellow member of the UK Chartered Institute of Secretaries and the Malaysian Institute of Taxation. Currently, he is the Council Member of the Malaysian Institute of Taxation (MIT), and serves as Chairman of its Examination Committee. He acts as the consulting editor for *The Malaysian Tax Reporter* and is involved in the editorial committees of *Accountants Today*, *International Journal of Accounting, Governance and Society* and *Tax Nasional*. The author who is the official tax correspondent on Malaysian taxation for *Tax Notes International*, USA, is also a member of the Editorial Board of the *e-Journal of Tax Research*, Sydney, Australia. Jeyapalan also periodically contributes articles to his column *Current Tax Matters* in *The Star* newspaper.

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Book Review by

Jude Alexander
LLB (Hons) University of London, CLP

Chan & Koh on Malaysian Company Law Principles & Practice 2nd Edition

by Ben Chan Chong Choon, Phillip Koh Tong Ngee and Peter SW Ling

Company Law is a tricky, treacherous morass of legal complexity. The Companies Act is made up of almost 400 sections not to mention the bewildering number of schedules, provisions of the Companies Regulations 1966, subsidiary legislation under the Companies Act and companion statutes and case laws dealing with interpretation and lacunae(s) in the law. Additionally a reasonable degree of familiarity is required with the laws of contract, rules of agency and equity as applied within the corporate context.

The second edition of this book which was published by Thomson Sweet & Maxwell Asia is a timely update. Since the first edition there have been various developments in Malaysian company law & practice. It follows the previous edition's clarity and accuracy in a simple and reader friendly format. It headings and sub-headings in an attractive layout makes it easy for the busy practitioner and/or student looking for answers.

To take a sentence from the foreword of the book "This book explains the ways in which Malaysian Company law has attempted to balance the issues which confront investors, employees, creditors and the economy as a whole..."

As preface states this book is unique in that it draws from the analysis of core Malaysian company legislation and case law and is not mainly dependant on the Commonwealth jurisdictions for its text.

In conclusion it is a book that will assist legally trained professionals, company secretarial practitioners, accountants and other professionals in the areas of banking, accountancy, insolvency and business and students of those disciplines in Malaysia.

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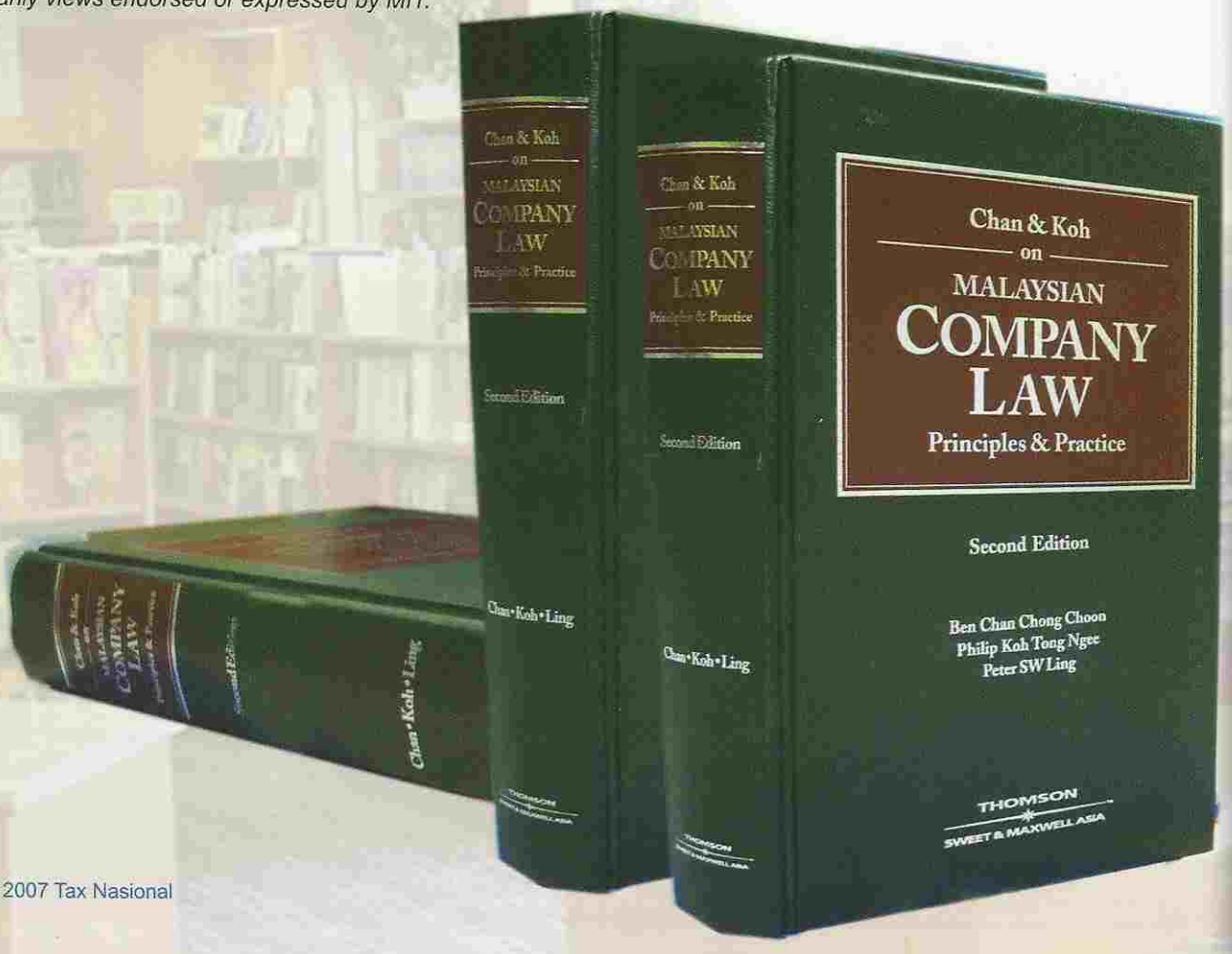
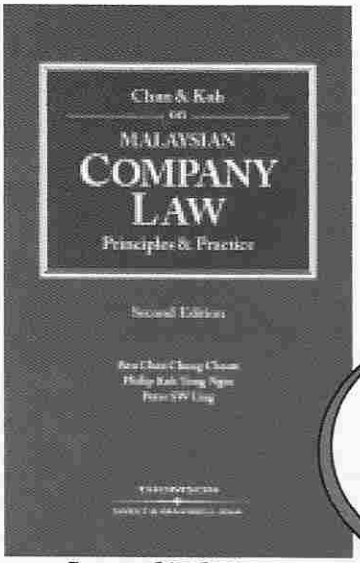


Chan & Koh on Malaysian Company Law: Principles and Practice

BEN CHAN CHONG CHOON, PHILIP KOH TONG NGEE , PETER SW LING



Second Edition

"[This book] is a comprehensive and clear text on the principles and practice of Malaysian company law. The previous edition of this book is well respected for its accuracy and clarity."

ABDUL KARIM ABDUL JALIL *CEO, Companies Commission of Malaysia*

RM 495.00

ISBN: 978 983 2631 68 2
Hardback
Extent-1223pp

This authoritative work provides a good exposition of company law in Malaysia. It offers comprehensive and in-depth coverage on this increasingly complex area of law. Taking into account case law and legislative developments, the presentation of the law in the book is clear and the analysis is enlightening. References to authorities from other jurisdictions which have been made, where applicable, reflect the depth of the discussion available in this book. Anyone interested in Malaysian company law should have this book close by for reference.

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News on Tax

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

(Disclaimer – Please take note that the news stated herein is only a brief outline. MIT is not responsible for any error/omission/inaccuracies contained herein.)

Malaysia

The 2008 Budget was announced on 7 September 2007. The significant tax issue was the implementation of the single-tier tax system which is a step towards the tax-reform aligning Malaysia in an increasingly competitive economic environment. The reduction of corporate taxes to 25% in 2009 which follows through from the last Budget is also another step forward.

The 7th Annual National Tax Conference (NTC) was held in Kuala Lumpur on 17 and 18 July 2007. Jointly organised by the Lembaga Hasil Dalam Negeri Malaysia (LHDNM) and the Malaysian Institute of Taxation (MIT), it is the premier tax event of the year. The NTC had speakers from from Malaysia, Australia, Hong Kong, India, the OECD and the IBFD.

Among the topics discussed were:

~ the Malaysian taxation system in the context of the current global economic environment. Issues discussed included dependency on income as a tax base, using GST as an alternative to broaden the tax base, streamlining investment tax incentives to include the removal of ineffective / under-utilised tax incentives, introduction of new incentives to promote growth especially of the knowledge based sector, multi-tier corporate tax rates for SME's, a one-tier corporate tax system where corporate profits are taxed and recipients of dividends from such taxed profits are exempted and a possible widening of the income bands in personal income tax rates and whether or not to accord a similar tax treatment to residents and non-residents;

~ the achievements, challenges and future plans of the LHDNM in the context of progressing with the nation;

~ achieving the goal of an efficient and transparent Malaysian tax system. A discussion on the introduction of the in Malaysia which included a look at the experiences of the Australian Taxation Office. The that was released in early 2007 was also commented upon as was the experience of the Hong Kong Inland Revenue Department in conducting audits and investigation on taxpayers;

~ legal issues regarding the tax treatment of guarantee fees and the tax implications of real property transactions;

~ developing Malaysia as an Islamic Financial Centre and Malaysian tax legislation concerning Islamic financing;

~ recent trends and developments in transfer pricing with emphasis on India and the OECD 's review on and through mutual agreement procedures were discussed;

~ Labuan offshore companies, tax treaties and tax planning for outbound investments including the use of intermediary companies;

~ tax risk management for companies;

~ the impact of globalisation and taxation on SME's.

Hong Kong

The Hong Kong government has published its final report with regard to the public consultation on tax reform, which has recommended that several options be explored to widen the territory's narrow tax base.

Options for broadening the tax base included introducing a green tax, a land and sea departure tax, a tax on luxury goods, and a progressive profits tax, as well as reducing personal allowances under salaries tax.

It has been suggested that the Government should not rely on a single option, but should deploy a basket of options to broaden the tax base and stabilise sources of revenue. The final report appears to have made four suggestions:

- Having raised public awareness on the deficiencies of a narrow tax base, the Government should continue to study options for broadening the tax base and address this fundamental issue at a suitable time in the future;
- In studying the options for broadening the tax base, the Government should take into full account the views collected in this consultation exercise and consult the public further on those options which are more practical;
- As the problem of ageing population is getting more serious and this would bring additional pressure to bear on public finances, the Government should consult the public on healthcare-financing proposals as soon as possible; and
- To enhance Hong Kong's competitiveness, the Government should continue to advance education and manpower training, and explore sustainable financial arrangements to respond to the long-term needs.

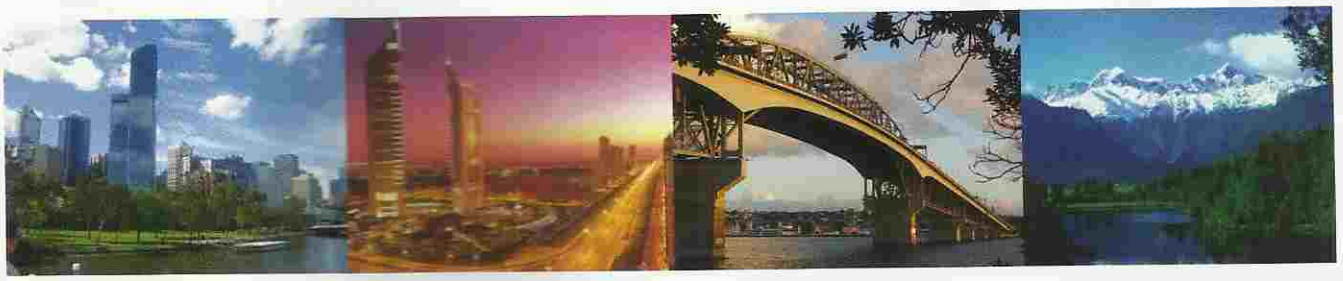
The following principles should be taken into account when broadening the tax base:

- The option must be effective in broadening the tax base and providing stable and considerable revenue for the Government to meet its future needs;
- The option must be fair and in line with the "capacity to pay" principle, and should not widen the wealth gap; and
- The option should be in line with Hong Kong's simple and low-tax system to attract capital and talent, and maintain the territory's competitiveness.

A narrow tax base will necessarily limit the ability to allocate resources for future investment and to deal with challenges like aging population and globalisation.

Singapore

The Inland Revenue Authority of Singapore (IRAS) issued a circular (2007/IT/5) which provides for a deduction for borrowing costs other than interest expenses. These include borrowing costs that are incurred as a substitute for interest expenses or to reduce interest costs. These deductions are granted to align the tax treatment of interest expenses withsuch other borrowing costs and to reduce business costs as the cost of borrowing is no longer confined to interest expenses alone. The other borrowing costs which will be granted tax deductions are listed in the Annexe of this circular and takes effect from YA 2008.



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Exploring a **world** of opportunities

At Valentine Stewart International Recruitment our goal is simply to provide the best service to qualified **Tax professionals** looking for new **career opportunities around the globe.**

We source **exciting roles** with the world's leading employers, in some of the most **fascinating** and **appealing** international destinations.

After all, moving abroad is as much about your **lifestyle aspirations** as it is about your **career challenges**.

Long gone is the attitude that your career suffers when you move overseas. Employers now want to see that candidates have the initiative and strength of character to take control of their careers and gain a **global** perspective.

We pro-actively manage your career from location to location, and because our team have all travelled extensively we can offer first hand experience of living and working in many locations around the world.

This means that we can offer a truly **consultative experience** for candidates and can advise you of the best locations to suit your skills and achieve your career and lifestyle goals.

Ideally you will be **qualified** with at least three years experience working within a **Top Tier firm or Multinational company** - however if you are in your final year of qualification we would also be keen to hear from you.

You will ideally have experience within **International Corporate Taxation**, and will have worked with large multinational comapnies in the financial services, manufacturing or consumer sectors.

You will need to have a **keen desire to travel** and to experience new working methods and cultures. You will also need to be committed to the idea of moving overseas for a minimum of 2 years – however many of our roles offer fantastic long term career opportunities.

We are currently recruiting for a number of **exciting opportunities** in great locations, and at a variety of levels, including:

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NAC 2007

NATIONAL ACCOUNTANTS CONFERENCE 2007

THE MEGA EVENT OF THE YEAR FOR FINANCIAL & BUSINESS LEADERS!

KUALA LUMPUR CONVENTION CENTRE
12 & 13 NOVEMBER 2007

> **If we are to successfully compete for tomorrow, we need to understand that being world-class does not begin and end with building world-class facilities. We need, above all else, world-class management and working practices.** —Datuk Seri Abdullah Ahmad Badawi

Are you leading your organisation towards excellence—benchmarking your processes against the world's best? Have you set your sights on and put in place the requisite metrics to achieve a truly world-class performance?

Business-as-usual no longer cuts it, even if your present processes have served you well. Discover what it takes to achieve world-class performance at the National Accountants Conference 2007—the MEGA EVENT of the year for financial and business leaders!

Among the highlights at this year's Conference are: The Economic Outlook for 2008/09, Doing Business in Indochina, Global Updates on Islamic Finance, Technology Updates, Towards Customer Centric Public Sector, Implementing IFRSs, Climate Change, and more.

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NATIONAL ACCOUNTANTS CONFERENCE 2007

KUALA LUMPUR CONVENTION CENTRE
12 & 13 NOVEMBER 2007 (MONDAY & TUESDAY)

BENEFITS OF ATTENDING

The National Accountants Conference (NAC) 2007, organised by MIA for the 23rd successive year, is an important event in the calendar of any accountant, finance professional and business owner.

NAC 2007 provides a rare opportunity for you to learn first-hand from some of our country's leading professionals, administrators and business leaders. You will gain valuable insights on how you can achieve world-class performance in the face of challenges and opportunities coming our way.

NAC 2007 also provides an ideal platform for you to network with professionals and business leaders.

WHO SHOULD ATTEND

All Finance Professionals, CEOs, Directors, GMs, Business Managers, Corporate Planners, Investors, Entrepreneurs and Senior Government Officials.

TERMS & CONDITIONS

CONFERENCE FEES

Registration includes conference sessions and materials, admission to exhibition hall, refreshments, luncheons and entertainment.

PAYMENT

Please make cheque/bank draft payable to "**MIA-CPE**"; state your name, phone number and "NAC 2007" at the back of cheque; and send to :

Malaysian Institute of Accountants
Dewan Akauntan
No. 2, Jalan Tun Sambanthan 3
Brickfields, 50470 Kuala Lumpur

CPE CREDIT HOURS

15 credit hours are awarded. Participants will be presented with a Certificate of Attendance, and for MIA members the CPE hours will be credited in the Membership System within 2 weeks after the Conference.

REFUND OF FEES

All cancellations of registration must be made in writing.
If cancellations are received:

- more than 14 days before the event: a full refund of the fee less 10% administrative charges will be given
- 7–14 days before the event: a 50% refund of the fee will be given
- Less than 7 days before the event: no refund will be given but
  i. a substitute delegate is welcomed to take your seat, or
  ii. a set of conference documentation in a satchel/folder will be given

DISCLAIMER

The Organiser reserves the right to change the speakers, date, venue, cancel the programme or part of it and/or make alternative arrangements without prior notice, should circumstances beyond its control arise.

Upon signing the registration form, you are deemed to have understood and agreed to the above terms and conditions.

IMPORTANT NOTICE

Payment is required with registration and must be received prior to the conference to guarantee your place.

Registration without payment will not be processed.

ENQUIRIES & REGISTRATION

Tel 03-2279 9200 | **fax** 03-2273 5167 | **email** nac@mia.org.my

- **Cik Maria** at ext 333 | **email** maria@mia.org.my
- **Ms Yoges** at ext 332 | **email** yoges@mia.org.my

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Please tell us how you got to know about this event:

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FOR OFFICE USE ONLY

Date Received :
Reg No :
Others :

REGISTRATION FORM

register online at **www.mia.org.my/nac**

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Name as per I/C. Please indicate title: Dato'/Datin/Dr/Mr/Mrs/Ms

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DESIGNATION : **MIA MEMBERSHIP NO. :**
EMAIL : ☐ VEGETARIAN

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NAME :
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EMAIL : ☐ VEGETARIAN

ORGANISATION'S DETAILS & APPROVAL

ORGANISATION :
INDUSTRY :
ADDRESS :

POSTCODE : **STATE :**
CONTACT PERSON : **TEL :**
EMAIL : **FAX :**

COMPANY STAMP & SIGNATURE **DATE :**

FEE SCHEDULE & PAYMENT DETAILS

	FEE / PAX	NUMBER OF ATTENDEES	TOTAL (RM)
MEMBER	RM 1,200	x	
NON-MEMBER	RM 1,300	x	
		TOTAL PAYABLE (RM)	

PAYMENT BY CHEQUE

BANK : **CHEQUE NO :**

*Make cheque payable to "**MIA-CPE**". Please write NAC 2007, your name and tel no. at the back of the cheque.*

PAYMENT BY CREDIT CARD

CARD ISSUER : ☐ VISA ☐ MASTER **EXPIRY DATE :** ☐☐/☐☐

CARD NO. : ☐☐☐☐–☐☐☐☐–☐☐☐☐–☐☐☐☐

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