Malaysian Institute Of Taxation

Tax Nasional

Official Journal of The Malaysian Institute of Taxation

1st Quarter/2002 RM38.00

SECTION 75 IS NOT A TAX ON OFFICE BEARERS

ISSN 0128-7580
KDN PP 7829/12/2002

Official Publisher
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President's Note

The Year of the Horse is associated with strength and vigour, the very attributes that MIT will epitomise in its quest to become the paramount tax body in Malaysia. Since gaining independence from its sponsored body in 2001, MIT has intensified efforts in providing value added services to its members.

One such effort embarked by MIT is to send out questionnaires on a mired of issues to all members. The feedback obtained will be used to better focus MIT's resources on members needs and concerns.

In another move, MIT is in the midst of updating members' e-mail addresses. In this age of information technology where speed is essential, it is imperative that members receive information in the fastest way possible. Hence, all technical updates and related information will be disseminated electronically once a current listing of members' e-mail addresses is obtained. Members who have yet to inform MIT's Secretariat of their e-mail addresses are requested to do so soonest.

In early December 2001, I was informed that approximately 207 students had taken the MIT Professional examinations at various levels. This is certainly encouraging as this marks a significant increase in the number of students taking the examinations as compared to the previous sittings. I believe this is a good start towards ensuring that the MIT Professional examinations set the path for individuals seeking a career in taxation.

Lastly, the latest edition of Tax Nasional has been in print for approximately a year and based on feedback received, members seem in favour of its new look and content. Yet, it is disheartening to note the lack of contribution from qualified members in terms of written articles. As such, I would like to take this opportunity to extend a warm invitation to all members to put forth their thought and opinions in the upcoming issues of Tax Nasional, as it has been said many a time, "variety is indeed the spice of life..."

As we forge ahead in this New Year, the MIT Council will remain unbridled in its drive to firmly establish MIT as the paramount tax body of Malaysia and will continue to undertake various projects that will be of direct benefit to all members.

With this, I wish all members a very prosperous and Happy New Year and may the Year of the Horse bring you good fortune and good health.

Ahmad Mustapha Ghazali
President of the Malaysian Institute of Taxation

To the family of Mr Yue Sau Him, PJK, CA(M), CPA, FCPA, LLB(Hons), CLP
with deepest condolences from
the Malaysian Institute of Taxation

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1st Quarter 2002

Tax Nasional

Official Journal of the Malaysian Institute of Taxation

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Editorial	:	The Secretariat, Malaysian Institute of Taxation
Subscription and other enquiries	:	CCH Asia Pte Limited c/o Commerce Clearing House (M) Sdn Bhd
Designers	:	Magic Nine Studio
Printers	:	Hopak Sdn Bhd

Editor's Note

2002 is going to be an exciting/interesting year for the tax profession as some thought provoking changes are expected. The High Court has given its decision on the *FSB* Case — whether guarantee fee is tax deductible; we can expect the High Court to give its decision on the *Multipurpose* Case — whether service tax can be levied on group management fee; the Revenue is expected to carry out large-scale field audit assignments; the Transfer Pricing rules should be released very soon; the OECD is expected to finalise the amendments to the Model Draft Convention especially those relating to e-commerce; sec. 75 of the *Income Tax Act* has been put in place to impose personal income tax liability on management.

E-Commerce — U.S. & India Disagrees

The characterisation issues in e-commerce have again surfaced in the dispute between India and the US group of companies. At the heart of the disagreement is a difference in view as to whether software and other digital products sold for the buyer's internal use or consumption should be treated for tax purposes like other products, or should instead be taxed under a unique set of rules. The OECD is of the view that transactions involving internal use of software and other digital products should be taxed in a manner that is consistent with the taxation of sales of other products and efforts should be taken to maintain the neutrality principle.

MASB 24 — Equity v. Debt — Tax Issues

When IAS 17 (which applies to leases) was adopted, the issue was similar to that caused by MASB 24. The Revenue continued to be guided by tax principles, instead of accounting practice. It is trite law that accountancy evidence, which is not in conflict with statute law, is relevant. This was supported by the High Court in the case of *Perak Construction Sdn Bhd*. The principle can also be found in commonwealth cases such as *Gallagher v. Jones*. Financial accounts could treat the leases as either operative or finance leases but the Revenue was guided by the *Income Tax Leasing Regulations 1986*. In the case of the debate between debt and equity, the first source of the guiding tax principles would be derived from tax legislation and common law. Accounting practice would only come into acceptance, when there is an absence of guidance in the first source. With the coming in of Self Assessment, it is important that tax computations are prepared based on tax principles instead of accounting practice and the procedure is as follows:

- Tax statutory law;
- Ordinary principles of commercial accountancy;
- Judge-made rules.

In *Gallagher v. Jones* it was held that no judge-made rule could override the application of a generally accepted rule of commercial accountancy. A similar outcome is expected with MASB 24. However, a clarification could help especially in view of the Self Assessment System.

IAS 41: Radical Changes to the Recognition of Income for Agriculture Activity

IAS 41, which becomes operative for annual financial statements covering periods beginning on or after 1st January 2003 brings about radical changes to the recognition of profit for agricultural activity and widens the differences in recognition of income for tax and accounting purposes. It appears that this standard is getting wider acceptance overseas especially in the EU and if Malaysia is to adopt it, it will be necessary to prepare two sets of accounts, one for accounting purposes and the other for tax purposes. This is going to pose a lot of problems with the Revenue where taxpayers will have to explain to the Revenue officers that their income shown in the accounts are actually not taxable as yet.

Harpal S. Dhillon
Editor of Tax Nasional

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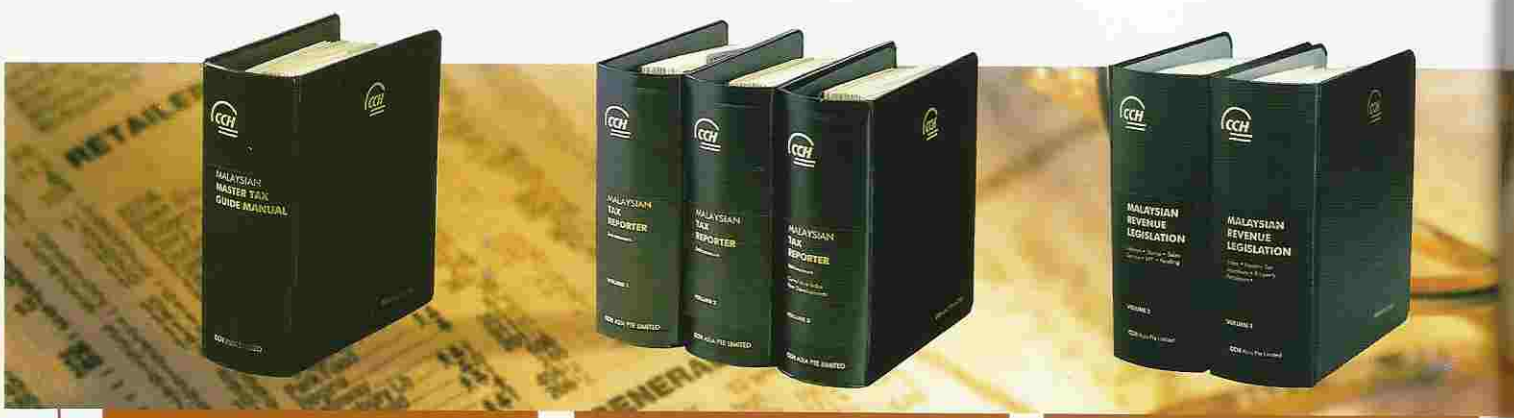

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Post-Budget Luncheon Talk 2002

The much awaited event, Budget 2002 was presented in the Dewan Rakyat on the 19 October 2001 by our Prime Minister and Finance Minister Yang Amat Berhormat Dato' Seri Dr. Mahathir Mohamed amidst the slow world economy.

In line with it's continuing vision of providing value added services to it's members, the Malaysian Institute of Taxation (the Institute) organised the Post-Budget Luncheon Talk 2002 on 23 October 2001 at Nikko Hotel. This annual affair of the Institute attracted more than 280 participants consisting of tax practitioners, tax agents, accountants and members of the public. This informative Luncheon Talk was headed by none other than Puan Kamariah Binti Hussain, Head of the Tax Analysis Division, Treasury Department, Ministry of Finance. To further provide a better understanding as well as an insight to the various measures in the Budget the Institute invited Puan Haji Mardinah bt Hj Alwi, Pengarah Bahagian Perkhidmatan Teknik, Jabatan Kastam & Eksais Diraja Malaysia and Dr Veerinderjeet Singh, Executive Director of Arthur Andersen & Co and Council Member of the Malaysian Institute of Taxation as panelists.

Although the issues discussed were serious, the whole affair was kept alive, thanks to our excellent Chairperson and Deputy President, Mr Michael Loh.

Participants were not only treated to a sumptuous lunch but were also given an in-depth analysis of the key issues contained in the Year 2002 Budget Proposals and other significant recent tax developments in Malaysia. The presentation by Puan Haji Kamariah Hussain was divided into three main areas namely economic challenges, budget strategy 2002 and tax measures. Puan Kamariah in her talk highlighted that one of the economic challenges for Malaysia is to improve competitiveness and to increase the dynamism of the private sector. The Ministry according to Puan Kamariah has set out numerous strategies under the Budget 2002 to further enhance the economy. One of the strategies is to strengthen the nation's economic growth through increased domestic expenditure, enhancing the role of the private sector and increasing competitiveness. To add on, Bank Negara Govenor, Datuk Zeti Akhtar Aziz in one of her speeches on the Budget said that the Government has acted swiftly to the global slowdown and the recent events in the America. The Government has done its part. It is therefore now the private sector's response that will be the key determining element in how Malaysia will weather the current challenging environment.

Participants were also given an insight into the focus of the recent budget dialogues with various organisations. Amidst the many memorandums including MIT's to the Ministry proposing for the reduction of corporate tax. The budget 2002 surprised many as the corporate tax rate was retained at 28%. Puan Kamariah went on to explain that Malaysia's corporate tax is still one of the lowest and most competitive in the region. Furthermore, a one percentage point reduction in tax rate results in a revenue loss of RM634 million.

The panelists namely Puan Haji Mardinah bt Hj Alwi from the Jabatan Kastam & Eksais DiRaja Malaysia and Dr Veerinderjeet Singh from Malaysian Institute of Taxation went on to further analyse the recent tax changes and the Budget 2002.

A question and answer session followed. This session gave participants an opportunity to seek clarification and to clear their doubts. There was an active discussion due to the various questions raised by the participants. Unfortunately due to the time constraint, all issues could not be discussed and participants were advised to seek further clarification from the Ministry of Finance.

All in all, it was a good day for those attending the luncheon talk as not only did they leave with a comprehensive understanding of the budget 2002 but in addition were among the first in the nation to have understood the policies behind the changes proposed in the budget 2002.

profile

Dr Sivamoorthy Shanmugam,
Southern Branch Chairman

Dr Sivamoorthy Shanmugam hails from Sungei Bakap, Penang; married with a son.

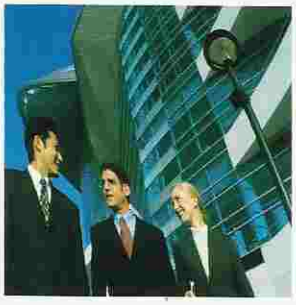
Dr. Sivamoorthy is the Tax Principal of **CNM TAXLINK SDN BHD** and Executive Director of **CNM MANAGEMENT SUITE SDN BHD** (HRDC Approved Training Provider). He served the Inland Revenue for 20 years and held the post of Assistant Director (Tax Investigation Unit) prior to his optional retirement. He has published articles in local and international journals/publications.

This has earned him commendation in the ***Commonwealth Association of Tax*** *Administration* ***(CATA)*** Essay Writing Contest. He holds a Bachelor of Economics (Hons) from University of Malaya; Masters in Management from Asian Institute of Management (Philippines), Ph. D from California University (U.S) and Fellow of Malaysian Institute of Taxation (MIT).

Currently, he is also the Advisor to Malaysian Indian Business Association (MIBA) and actively involved in community services in the Education Welfare Research Foundation (EWRF) and Rotary Club of Johor Bahru.

ARK'S EDUCATION FAIR ROADSHOW 2001

Over 3,000 students from the Klang Valley swarmed the Ark's Education Fair Roadshow (the Education Fair) held from 8th to 9th December 2001 at the Putra World Trade Centre. As in previous years, the Malaysian Institute of Taxation (The Institute) had the privilege once again of participating in this yearly affair organised by the Ark Publications Sdn Bhd. It was fortunate for participants of the Education Fair that PWTC was concurrently hosting the 2001, PC Fair. As such, throngs of Klang Valley residents headed towards PWTC that weekend.

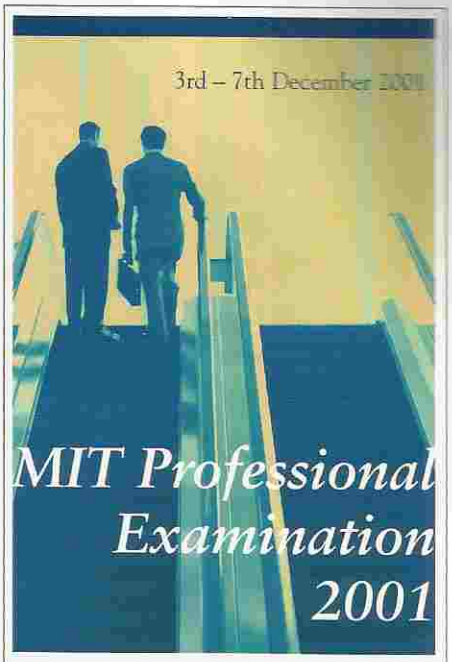


Bustling crowds of fresh school leavers packed the exhibition hall and the many booths available. Private institutions of higher learning which included some of the more prominent names in the education field like Taylor's College, HELP Institute, Kolej Damansara Utama and etc participated in this gala fair, as the enviorement was ideal to reach out to potential students. The Institute joined in the rat race to further promote the professional examinations as the Institute is the only premiere organisation in the country providing professional examinations on taxation.

Being the only professional body in Malaysia providing entry level opportunity to the world of taxation, the Institute's objective is to train and build up a pool of qualified taxation personnel to foster and maintain the highest standard of professional ethics and competency among it's members. As such, the Institute, will continue to create a base for the young tax consultants as they are the future of the tax fraternity. The professional examinations were given the due recognition when the Ministry of Finance acknowledged it as one of the requirements to be complied with when applying for a tax agent's license under sec. 153. This was indeed a new beginning for the Institute as the recognition confirmed the high standards and competency of the professional examinations.

Free career talks and counseling by prominent academicians and consultants were one of the many programmes during the Education Fair. Many participating institutions distributed flyers and brochures and these items were hot grabs. The institutions were running out of these items even before the end of the event.

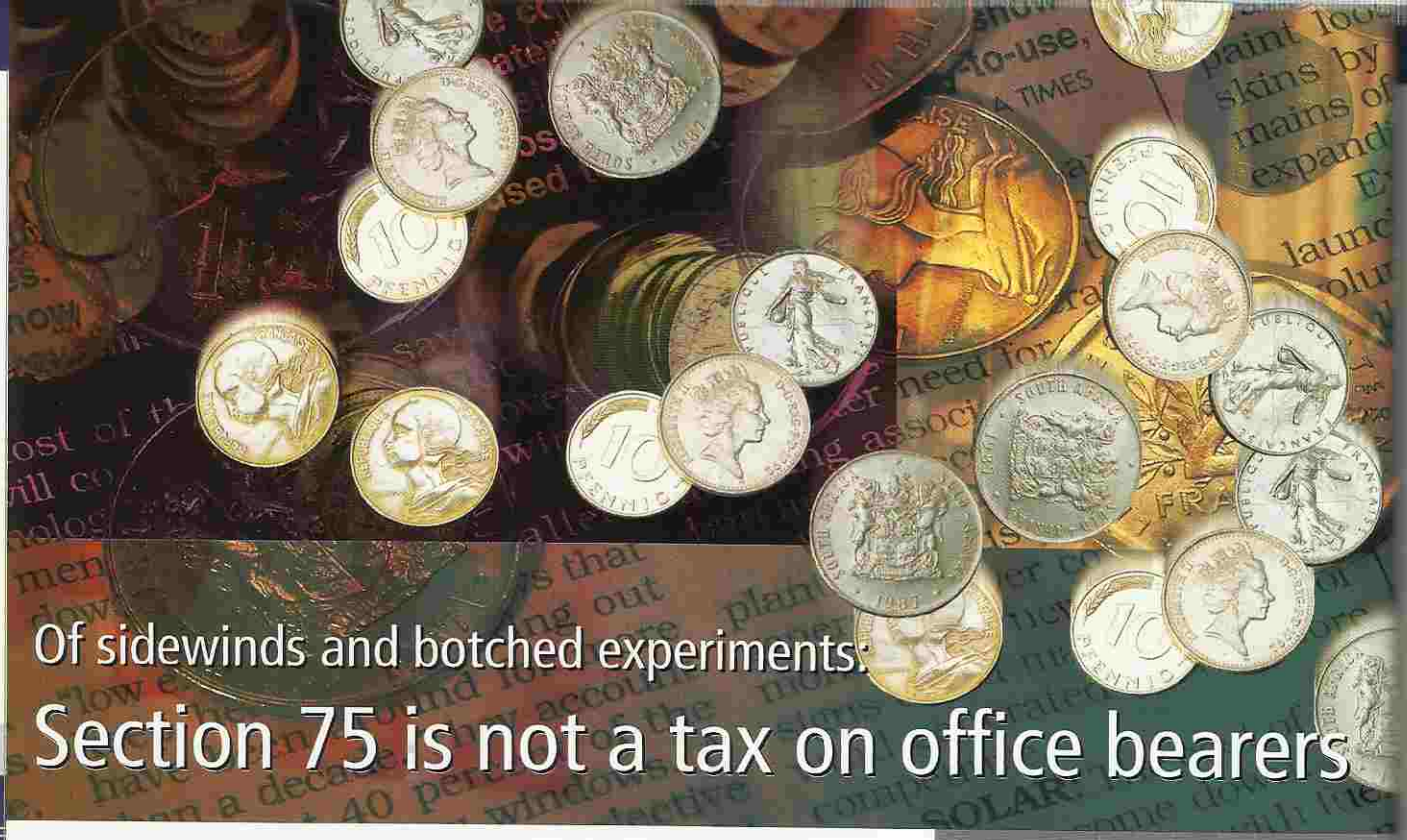
The Institute's secretariat was in full force during the Education Fair, explaining the vision and mission of the new MIT. There were numerous enquiries by a myriad of people, on the benefits of undertaking a career in taxation as many fresh school leavers preferred to embark on more commercial and glamorous careers in other disciplins such as accountancy, law, medicine, engineering and etc. After a brief but comprehensive explanation from the Institute's staff, the secretariat is now assured that these school leavers are aware of the advantages and benefits awaiting them in the event they choose a career in taxation. As the saying goes, *"there is nothing as certain as death and taxes"* .



The Malaysian Institute of Taxation (MIT) successfully conducted it's 7th professional examination from 3rd to 7th December 2001. The examination was held simultaneously in nine examination centers namely Kuala Lumpur, Georgetown, Ipoh, Kota Bahru, Melaka, Kuantan, Johor Bahru, Kota Kinabalu and Kuching.

Since the establishment of the professional examination in 1995, MIT is proud to announce that the number of students registering for the examination has been increasing gradually. The total number of students who registered for the 2001 examinations was 209.

MIT would like to take this opportunity to express it's sincere gratitude and many thanks to the Council Members of MIT, the Malaysian Institute of Accountants (MIA), Ms Loh Chih Wai from MIA Northern Branch, Mr Chu Eng Chiau from Kota Bahru, Mr Wong Seng Chong (MIT Branch Chairman – East Coast), Mr Koh Kay Cham (MIT Branch Chairman – Melaka), Ms Lucy Read from MIA Sarawak Branch and Ms Freda Fung from MIA Sabah Branch in assisting MIT in its endeavour to conduct the 7th professional examination successfully.



Of sidewinds and botched experiments:

Section 75 is not a tax on office bearers

By Anand Raj

The amendments introduced to Section 75(1) of the *Malaysian Income Tax Act 1967* (Act 53) ("ITA") by sec. 6 of the *Finance Act 2002* (Act 619) do not have the effect of imposing "personal liability" *(to borrow a phrase frequently used by proponents of a more draconian interpretation)* upon directors, company secretaries and other officers of companies and bodies of persons (hereinafter referred to collectively as "office bearers") for the non-payment of tax by such company or body of persons.

Although the amendments only enhance the *vicarious responsibilities* (as distinct from *vicarious chargeability*, or even "personal liability") of office bearers, certain conservative elements in the Revenue and private sector appear to have misconstrued the amendments as having the draconian effect of holding office bearers "personally liable" for the non-payment of taxes by a company or other body of persons (the "draconian view"). This draconian view is plainly wrong and, upon an analysis of the authorities, cannot be sustained, unless one employs an artistic licence hitherto unknown in Malaysia.

From the outset, it should be noted that sec. 75(1) is found in Part IV of the ITA and that the language of Part IV distinguishes between the less onerous concept of *vicarious responsibility* and the more onerous concept of *vicarious chargeability*. *Vicarious responsibility* arises where a person is required to discharge certain ministerial or administrative duties on behalf of another person (e.g. under sec. 67(4) ITA), whilst *vicarious chargeability* arises where a person is held to be vicariously "assessable and chargeable" on behalf of another person (e.g. under sec. 67(3) ITA). Section 67(1) provides that the former is referred to as the "representative" whilst the latter is referred to as the "principal".

Even so, *vicarious chargeability* is still subject to the important safeguards set out in sec. 67 e.g. payments of tax etc. are restricted to "accessible moneys"[1] of the principal, the representative is indemnified for acting in such capacity (sec. 67(6) ITA) and, for the avoidance of doubt, cannot be prosecuted for offences committed by the principal in which he had no part (sec. 67(5) ITA). These safeguards shall, for ease of reference, be referred to as "the Section 67 safeguards". The post amendment sec. 75(1), which came into force on 8th February 2002, only deals with *vicarious responsibility* and now reads as follows (amendments shown in bold):

"1) **Notwithstanding anything to the contrary to this Act or any other written law**, the responsibility for doing all acts and things required to be done by or on behalf of a company or body of persons for the purposes of this Act **including the payment of tax** shall lie jointly and severally –

a) in the case of a company, with –
   i) the manager or other principal officer in Malaysia;
   ii) the directors;
   iii) the secretary; and
   iv) any person (however styled) exercising the functions of any of the persons mentioned in the foregoing sub-paragraphs; and

b) in the case of a body of persons, with–
   i) the manager;
   ii) the treasurer;
   iii) the secretary; and
   iv) the members of its controlling authority."

1 "accessible moneys" means "... any moneys (including any pension and any salary, wages or other remuneration) which – (a) from time to time are due from the representative to the principal or are held by the representative in his custody and control on behalf of the principal; or (b) being then moneys of or due to the principal, are obtainable on demand by the representative." – see sec. 67(7) ITA

It should be noted that the concept of "liability", adopted in certain provisions of the ITA and other legislation, is always used in a very different sense from the concepts of *vicarious chargeability* and *vicarious responsibility*, which have altogether different meanings. Upon a considered and reasoned analysis of the authorities, it is undeniable that the correct interpretation of the amended sec. 75(1) is that it does not make office bearers *vicariously chargeable* (or even "personally liable", which is a more onerous concept) for the taxes of a company or other body, but merely serves to reinforce the *vicarious responsibilities* of such office bearers.

Turning to the authorities, our starting point in the interpretation of the amended sec. 75(1) is the following extract from the classic treatise of *Maxwell on the Interpretation of Statutes*, 12th edition (1969), at page 288:

> "Lord Uthwatt said that "the introduction of new words into an existing section may alter the meaning of words already there. But no such alteration can result unless (1) the requirements of the English language demand it, or (2) those requirements permit it and the sense of the section demands it. [*Lord Howard de Walden v. I.R.C* [1948] All E.R. 825 at page 830]." " (emphasis added)

Taxing/Penal Statutes – Cardinal Principles

The cardinal principles, so blatantly overlooked by the proponents of the draconian view, were affirmed and applied by the Supreme Court in *National Land Finance Co-operative v. Director General of Inland Revenue* [1993] 2 AMR 52 3581 – page 3590, where it was held by Gunn Chit Tuan, CJ (Malaya) that:

> "...there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed. ... Another principle is that where the meaning of a statute is in doubt the ambiguity must be construed in favour of the subject. ... There are ample authorities to show that the courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. ..." (emphasis added)

The judgment of the Supreme Court in *Yap Sing Hock & Anor v. P.P.* [1992] 4 CLJ 1950 clearly confirms that similar principles apply to the interpretation of penal statutes. As will be seen from a discussion of the *Chatani* case below, the language of sec. 75(1) lacks the precision required to impose a tax (or even "personal liability") on office bearers, which can only be achieved by the use of clear and unambiguous language.

The Botched Jamaican Experiment

In the Jamaican appeal case of **Income Tax Commissioner v. *Chatani* [1983] STC 477** decided by the Judicial Committee of the Privy Council ("JCPC"), Revenue Jamaica purported to rely upon sec. 52 of the Jamaican Income Tax Act in attempting to hold *Chatani*, a director of the delinquent taxpayer company, "personally liable" for the taxes of such company. That section provides:

> " (1) Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act.
>
> *(2) The manager or other principal officer of every body of persons shall be answerable for doing all such acts, matters and things as shall be required to be done by virtue of this Act for the assessment of such body and the payment of the tax." (emphasis added) ..."*

It is abundantly clear from the language of the foregoing provision – specifically the words ***"...answerable for doing all such acts, matters and things as shall be required to be done by virtue of this Act for the assessment of such body and the payment of the tax..."*** – that said provision is in pari materia with our own post–amendment sec. 75(1) – specifically the words ***"...responsibility for doing all acts and things required to be done by or on behalf of a company or body of persons for the purposes of this Act including the payment of tax..."***.

Accordingly, the decision of the JCPC in interpreting the Jamaican provision would be equally applicable to the interpretation of sec. 75(1). On this important question of law, the following passages of the JCPC's judgment in *Chatani* clearly establish that "answerable", in the context of the Jamaican provision, meant no more than "responsible". It was held that the relevant provision simply imposed a form of administrative or ministerial duty or responsibility upon a director (*Chatani*) to ensure that the company pays its taxes, without going to the extent of imposing any "personal liability" upon said director:

> "The only issue ... is whether, as contended by the commissioner, sec. 52(2) of the Income Tax Act ... renders the respondent personally liable for the income tax charged on the company of which he was managing director. In their Lordships' opinion it clearly does not. ... there can be no doubt that the words "the payment of tax" are to be linked, not with the words "answerable for" but with the words 'doing all such acts, matters and things as shall be required to be done by virtue of this Act for ...'. ... the plain intention is that the manager or other principal officer of a company or other body is to be **responsible (which is what "answerable" must mean in this context)** for taking all administrative or ministerial action which the Act requires to be taken for the assessment of the body and the payment of tax to which it is chargeable."

The JCPC went on to hold that the company was chargeable to and liable for its own taxes and that the statutory provision in question was not sufficiently clear to hold *Chatani* jointly and severally liable with the company:

> "It is the body itself which is made chargeable to and liable for tax. ... It is ... observed that sec. 41 ..., which deals with payment over to the Revenue of tax deducted at source, provides, by sub-s (4), that, where a body corporate has deducted tax and failed to pay it over by the due date, the directors of the body ... are to be jointly and severally liable with it to pay or account for the tax... subject to a proviso relieving from liability a director who proves inter alia that there was no negligence on his part. **It thus appears that where in the Act the legislature intended to make officers of a body corporate jointly and severally liable with it to pay tax for which the body was accountable, it expressed that intention explicitly and in clear language.** If a similar intention had existed as regards the content of sec. 52(2), one would have expected it to be clearly expressed there also." (emphasis added)

The authoritative text of *Simon's Taxes* (Revised 3rd Edition), A3.302 – Persons Assessable (page 692) – treats the JCPC's analysis in the *Chatani* case as a correct statement of legal principle both in the interpretation of the relevant Jamaican provision as well as the equivalent provision in U.K. legislation (see sec. 71(2) and 108 of the *Taxes Management Act 1970*).

In this regard, the Malaysian Parliament's avoidance of the use of phrases such as "assessable and chargeable" and "liability" and the retention of the structure of sec. 75(1) in terms of "responsibility" against the background of Part IV is to be regarded as a deliberate and considered exercise of Parliamentary wisdom – see the judgment of Gopal Sri Ram JCA in the Federal Court case of *Lim Phin Khian v. Kho Su Ming* [1996] 1 MLJ 1 that "there is a presumption of great antiquity which operates in the sphere of statutory interpretation. It is an irrebuttable presumption ... that Parliament is presumed to know all the relevant law upon the particular subject upon which it legislates. ...".

It is clear that the concept of "responsibility" in our sec. 75(1) does not mean anything substantially different from "answerability" for administrative acts performed on behalf of a company or other body as in *Chatani's* case. *Chatani's* case cannot be construed or, rather, misconstrued, to equate the more onerous concept of "joint and several liability" with the less onerous concept of "joint and several responsibility" in the context of sec. 75(1) as the JCPC drew a clear distinction between both such concepts.

Presumption against surplusage – "responsibility" does not mean "liability" or "chargeability"

Yet another principle of interpretation which has been blithely ignored by the proponents of the draconian view is that of *ut res magis valeat quam pereat* – i.e. every word in a statute must be given meaning and effect and no part of a statute should be treated as mere surplusage or dead letter – see *Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors.* [1985] 2 MLJ 35, where Abdoolcader S.C.J. held that:

> "The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded." (emphasis added)

In more colourful language, it was held by the court in *A.G. v. Sillem* (1864) 2 H&C 431, 515, cited at page 108 of *Craies on Statute Law*, 7th edition, 1971 that:

> "In order to know what a statute does mean, it is one important step to know what it does not mean; and if it be quite clear that there is something which it does not mean, then that which is suggested or supposed to be what it does mean must be in harmony and consistent with what it is clear that it does not mean. What it forbids must be consistent with what it permits. ..."

Hence, the retention of the phrase "responsibility" in sec. 75(1) is significant and cannot be treated as mere surplusage nor can it be lightly assumed that Parliament had acted in vain by adopting the less onerous concept of "responsibility" in preference to other alternative available statutory formulations or concepts such as that of "liability" or the concept of holding another person vicariously "assessable and chargeable" (i.e. *vicarious chargeability*).

Instances where such alternative formulations[2] have been adopted in Malaysia include:

a) the "liability" formulation adopted in sec. 75(3) and other sections of the ITA which deal with the imposition of "liability" upon various persons;

b) the "joint and several liability" formulation adopted in regard to certain individuals under sec. 17 of the *Service Tax Act 1975* (Act 151), sec. 26 of the *Sales Tax Act 1972* (Act 64) and sec. 46 of the *Employees Provident Fund ("EPF") Act 1991* (Act 452); and

2 Unlike the ITA formulation, the alternative formulations contained in the service tax, sales tax and EPF enactments ("the Other Acts") are merely discussed by way of analogy. I have deliberately avoided a detailed consideration of the Other Acts, which would require a separate and distinct exercise in forensic analysis, due to constraints of time and space. Consequently, nothing herein contained should be construed as a conclusion on the meaning of any of the Other Acts.

c) the *vicarious chargeability* formulation (which includes important safeguards) adopted throughout Part IV ITA, with the notable exception of sec. 75(1).

However, such alternative formulations operate on a different basis and/or are subject to safeguards which mitigate the burden of the liability/*vicarious chargeability*[3] imposed upon individuals e.g.

a) the "liability" formulation – "liability" only arises in cases of default by the "liable person" – e.g. sec. 74(6), 75(3) etc. This is very different from the draconian view which seems to suggest that office bearers are "jointly and severally liable" in their personal capacities even in the absence of any default on their part;

b) the "joint and several liability" formulation – the Service Tax, Sales Tax and EPF Acts are distinguishable as they operate on a different rationale e.g. for all practical purposes, such taxes are recoverable from customers whilst EPF contributions are made for the benefit of employees;

c) the vicariously "assessable and chargeable" (i.e. *vicarious chargeability*) formulation – though adopted throughout Part IV ITA, with the exception of sec. 75(1), is also distinguishable as it is subject to the sec. 67 safeguards i.e. the *vicarious chargeability* of certain specified representatives is confined to "accessible moneys" of the principal, the representatives are indemnified for acting in such capacity and, for the avoidance of doubt, cannot be prosecuted for offences committed by the principal in which the representative had no part.

Had Parliament amended sec. 75(1) with a view to imposing joint and several liability or *vicarious chargeability* upon office bearers, it could have elected to adopt any one of the alternative statutory formulations referred to above. In light of this, we must conclude that the recent amendments leave the structure of Part IV ITA and sec. 75(1) intact and do not impose *vicarious chargeability* or even "personal liability" upon office bearers.

The omission of the statutory formula of "assessable and chargeable" and reading Part IV ITA as a whole - what does the amended sec. 75(1) really mean?

The most serious failing of the draconian view is to read the sec. 75(1) amendments out of context, by overlooking the elementary principle of reading the statute as a whole – see *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1997] 2 CLJ 723 and its corollary principle i.e. that "law should be coherent and self-consistent" – *Statutory Interpretation, A code* – Third Edition (1997) by *F A R Bennion*, page 623.

Upon a reading of Part IV, it is clear that sec. 66 enacts the general principle that a chargeable person is "assessable and chargeable" to tax on his own account unless a specific provision of Part IV holds another person *vicariously chargeable* (and not merely *vicariously responsible*) on his behalf. Section 66 provides:

> "**66. Personal chargeability: general principle.**
> Where under this Act the income of any person is assessable and chargeable to tax, that person shall, subject to this Part, be the person assessable and chargeable to tax in respect of that income." (emphasis added)

This general principle is in turn subject to three exceptional classes ("the three classes"), set out in sub-secs. 67(1)(a), (b) and (c), where a "representative" may be vicariously "assessable and chargeable" on behalf of his "principal":

> "**67. Vicarious responsibility and chargeability.**
> 1) Subject to this Part, the following subsections shall apply where by or under any of the following sections of this Part a person (in this section referred to as the representative) –
>
> a) is appointed to be the agent of any other person;
> b) is assessable and chargeable to tax on behalf of any other person; or
> c) is a person in whose name another person is assessable and chargeable to tax,
>
> any such other person being in this section referred to as the principal. ..."(emphasis added)

Close attention should also be paid to secs. 67(3) and 67(4)[4] which, as alluded to in the marginal note to sec. 67, contain the different concepts of *vicarious chargeability* and *vicarious responsibility*:

> "(3) Where the representative is assessable and chargeable to tax on behalf of the principal, the representative shall be assessable and chargeable to tax in like manner and to the like amount as the principal would be assessed and charged to tax; and, where the principal is assessable and chargeable in the name of the representative, the principal shall be so assessable and chargeable in like manner and to the like amount as he would be assessed and charged to tax if he were assessable and chargeable in his own name.

3 Research into this area has identified an area of doubt, namely, the formulation found in the *Real Property Gains Tax ("RPGT") Act 1976* (Act 169). It is submitted that the vicariously "assessable and chargeable" formulation contained in sch. 1 to the RPGT Act arguably only applies in the administrative/ministerial sense discussed in the *Chatani* case. The weak language of para. 10 of sch. 1 appears to contain the formulation of *vicarious responsibility* as it has no equivalent to the imperative language of sec. 67(3) ITA. Nevertheless, even if the RPGT formulation is sufficient to impose "*vicarious chargeability*", it would still be distinguishable from sec. 75(1) as it operates on a different rationale i.e. RPGT is a tax on specific transactions and it cannot be said that the incidence of RPGT would recur with any great degree of frequency, unlike income tax which is assessed annually. This is a significant restriction in itself. In any event, I do not propose to conclude on the RPGT formulation, which, as it stands, is distinguishable from sec. 75(1) in material respects.

4 It would be seen that the amendments to sec. 75(1) bring its language in line with the *vicarious responsibility* language contained in the first limb of sec. 67(4) ITA, but without the *vicarious chargeability* referred to in sec. 67(3). However, it should also be noted that the language of sec. 67(4) goes further than that of sec. 75(1).

(4) The representative shall be responsible for doing all such acts and things as are required by or by virtue of this Act to be done by him as representative or by the principal for the purposes of this Act, and in particular for the payment of any tax due from him as representative or from the principal and for the payment of any debt so due to the Government under sec. 107A, 108, 109 or 109A, or 109B; and, in default of payment, any such tax or debt (together with any penalty to which he as representative or the principal is or would be liable in respect of the default) shall be recoverable from the representative either as such or as if he were the principal, as the case may be:

Provided that the representative shall not be required to pay any such tax, debt or penalty (or any other penalty incurred by the principal) otherwise than from the accessible moneys. ...." (emphasis added)

To repeat, sec. 66 ITA enacts the general principle that a person (which includes a company or other body) is "assessable and chargeable" in his(its) own right, unless some other provision of Part IV ITA provides otherwise i.e. one of the three classes in sub-secs. 67(1) (a) to (c) ITA is applicable, in which case another person (i.e. the representative) would be *vicariously chargeable* and *vicariously responsible* on behalf of the first-mentioned person (i.e. the principal). However, it should always be remembered that all such cases of *vicarious chargeability* are subject to the sec. 67 safeguards.

Examples of representatives falling within the three classes are enumerated in the following sections which all contain the crucial statutory phrase **"assessable and chargeable"**, which is necessary to make a representative *vicariously chargeable* on behalf of his/her principal:

- **Section 68**[5] – agents appointed by the D.G. of I.R. – the appointment may be appealed against.
- **Section 69** – guardians of incapacitated persons.
- **Section 70** – attorneys, factors, agents, receivers or managers of non-residents.
- **Section 71** – masters of ships and captains of aircrafts owned by the principal.
- **Section 72** – the manager or *karta* of a Hindu joint family.
- **Section 73** – trustees.
- **Section 74** – executors (defined to include administrators).
- **Section 76** – a nominee on behalf of a Ruler or Ruling Chief.

Section 75 is the only section in the whole of Part IV ITA that does not refer to another person (i.e. a "representative") being "assessable and chargeable" on behalf of another (i.e. a "principal"). Hence, the office bearers referred to in sec. 75(1) do not automatically fall within any of the three classes of representatives[6] referred to in sec. 67(1) unless the D.G. of I.R. appoints an office bearer as an agent under sec. 68. In this regard, sec. 75(1) (independently of sec. 67(4)) only provides that office bearers have the "responsibility" to do all administrative/ministerial acts and things for the purposes of the ITA, including the payment of tax.

Accordingly, sec. 75(1) has a more limited scope of application[7] than sub-secs. 67(3) and 67(4) ITA. This again confirms that sec. 75(1) only has the effect of imposing *vicarious responsibility* upon office bearers, without imposing *vicarious chargeability* or even "personal liability" upon them.

In all, this is a classic case of the application of the principle of *expressio unius est exclusio alterius*, which, in the context of Part IV ITA, has the following effect:

a) Parliament has, under sec. 67(1), enacted only three classes of exceptions to the general principle of chargeability in sec. 66;

b) the specific situations in which the three classes of representatives are *vicariously chargeable* on behalf of a principal are enumerated under secs. 68 to 74 and 76, as all such sections contain the "assessable and chargeable" linguistic formula;

c) all these specific situations are subject to the sec. 67 safeguards;

d) these specific situations are deemed to be exhaustive under the *exclusio unius* rule;

e) accordingly, sec. 75(1) is not a statutorily recognised exception to sec. 66 as Parliament has deliberately omitted the "assessable and chargeable" formulation from sec. 75(1), leaving sec. 75(1) to impose only *vicarious responsibility* (i.e. ministerial or administrative duties in the *Chatani* sense) upon office bearers and not *vicarious chargeability*; and finally

f) as no clear contrary language exists under sec. 75(1), it falls under the general principle in sec. 66 i.e. the company or other body is "assessable and chargeable" in its own right and no *vicarious chargeability* is imposed upon any office bearer unless the D.G. of I.R. invokes sec. 68(1) to appoint him/her as an agent, which is a power that existed even before the amendments to sec. 75(1).

5 Section 68(1) ITA provides "The Director General may, if he thinks fit, by notice in writing appoint any person to be the agent of any other person for all or any of the purposes of this Act; and, where any person is so appointed for all those purposes, he shall be assessable and chargeable to tax on behalf of that other person." (emphasis added)

6 By way of further illustration of Part IV and the three classes of sec. 67(1)(a), (b) and (c), it would be noted that:
a) an agent appointed under sec. 68 or a deemed agent under sec. 71 are examples of sec. 67(1)(a) representatives;
b) persons referred to in sec. 69, 72, 73 and 74 are examples of sec. 67(1)(b) representatives; and
c) persons referred to in sec. 70 and 76 are examples of sec. 67(1)(c) representatives.

7 Given that sec. 75(1) is more limited in its scope than sec. 67(4) ITA, this would explain the new opening words **"Notwithstanding anything to the contrary to this Act or any other written law..."** i.e. for the avoidance of doubt, sec. 75(1) should not be read to extend as far as sec. 67(4), which has a broader scope of application. Section 76(2) is a further example of Parliament avoiding doubt and/or conflict with the duties set out in sec. 67(3) and (4) ("the sec. 67 duties") i.e. the nominee referred to therein may treat the property of Rulers and Ruling Chiefs in a manner similar to the "accessible moneys". Section 76(2) goes further than sec. 67 to provide that the taxes

Proponents of the draconian view may argue that there is then no difference between having an office bearer appointed as an agent under sec. 68(1) and the draconian view that provides that an appointment is not necessary as *vicarious chargeability* (or perhaps even "personal liability") is automatic under the amended sec. 75(1). This would be a flawed analysis as there are significant differences between a sec. 68(1) appointment by the D.G. of I.R. and the draconian view of sec. 75(1) i.e.:

- the sec. 67 safeguards are not clearly expressed to apply to office bearers[8].
- under sec. 67(4), an agent's "liability" is restricted to "accessible moneys" of the principal. This clearly excludes the personal assets of such agent, which may not be the case (in relation to the assets of office bearers) according to the draconian view of sec. 75(1).
- most importantly, the person appointed as an agent by the D.G. of I.R. under sec. 68(1) has a statutory right of appeal, against such appointment, to the Special Commissioners of Income Tax and from there to the courts. This serves as a valuable protection against arbitrary and capricious conduct of the Revenue, if any. Such right of appeal would not exist in the context of the draconian view of sec. 75(1).

Hence, we are led to the irresistible conclusion that Parliament did not intend to impose *vicarious chargeability*, much less "personal liability", upon office bearers but only a limited form of *vicarious responsibility*. Any other interpretation would mean that Parliament had intended to legislate in an incoherent fashion by imposing undue burdens upon office bearers without clearly expressing whether or not the sec. 67 safeguards apply and without an express right of appeal[9]. Such a draconian interpretation would do great violence to the language of Part IV ITA, which would be turned on its head. That surely cannot be the law.

No Sidewind Tax or Absurdities

In dealing the final deathblow to the draconian view, one is constrained to emphasise, in addition to the various interpretive criteria already discussed, two further principles i.e.:

a) it cannot be argued that the concept of limited liability of companies, so entrenched in Malaysia (see the *Yap Sing Hock* decision and the discussion of the limited exceptions in which the corporate veil may be lifted), may be eroded by a Parliamentary sidewind ("the no sidewind principle"); and

b) Parliament is presumed to not legislate absurdities ("the no absurdity principle").

The no sidewind principle was applied in the U.K. cases of *R v. Owens* (1859) 28 LJQB 316 and *Re Seaford* (1968) 2 WLR 155 and in the Malaysian case of *Chan Chin Min & Anor v. Lim Yok Eng* [1994] 3 AMR 39, where it was held, "...it is in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness." The principle is encapsulated in more lucid terms in *Statutory Interpretation, A code* – Third Edition (1997) by *F A R Bennion*, at page 627:

> "The presumption that Parliament does not intend to make a radical change in existing law by a sidewind arises from the nature of the legislative process. It is, or should be, a serious business. Changes in the basic law, since they seriously affect everybody, are to be carefully worked out. The more fundamental the change, the more thoroughgoing and considered should be the provisions by which it is implemented. Such is the proper way to conduct the legislative processes of a civilised state." (emphasis added)

The "no absurdity" principle was applied by Gopal Sri Ram JCA sitting in the Federal Court in *Lim Phin Khian*, where his lordship held that "...it is the duty of the court, to have regard to the consequences that would ensue..... and to avoid any construction that would produce absurd results." Edgar Joseph Jr. SCJ (as his lordship then was) put it differently in *Public Prosecutor v. Alcontara a/l Ambross Anthony* [1993] 2 AMR 39, 2226, at 2245 when his lordship held, "In other words, courts do not wear blinkers and construe statutes with narrow and legalistic literalness."

The following absurdities would ensue by a sidewind, should the draconian view be applied:

- Parliament intended even independent non-executive directors sitting on the boards of public listed companies to put their personal assets at stake
- Parliament intended to introduce an unlimited "personal liability" concept which would go much further than the existing *vicarious chargeability* and *vicarious responsibility* concepts comprehensively set out in Part IV ITA by creating a different and more onerous obligation within Part IV ITA without amending the general principle in sec. 66
- Parliament intended to impose *vicarious chargeability* (or even "personal liability") upon office bearers without the sec. 67 safeguards (or any other safeguards)

of Rulers and Ruling Chiefs may be paid out of "accessible moneys" in addition to properties which are held by or are in the possession of the nominee. This is why sec. 76(2)(d) states that the provisions of sec. 67 shall be modified accordingly. In contrast, the conflict or doubt, if any, between the duties of an office bearer under sec. 75(1) and the sec. 67 duties would only arise because the sec. 67 duties go further than the sec. 75(1) duties and it was necessary to provide, out of an abundance of caution, that the less onerous sec. 75(1) language would apply notwithstanding the more onerous language of sec. 67.

8 Though this ambiguity may be resolved in favour of office bearers by arguing that the sec. 67 safeguards would apply by necessary implication in the unlikely event the draconian view is upheld. However, time and space do not permit a comprehensive discussion of such issues in this article.

9 It may be possible to argue that an implied right of appeal exists or that arguments against an office bearer's chargeability, if any, may be put forward in an appeal against an assessment (e.g. if issued in the name of the office bearer) under sec. 99 ITA. It should also be possible to challenge the conduct of the Revenue by filing proceedings for judicial review under Order 53 of the *Rules of the High Court 1980*.

- Parliament intended to impose *vicarious chargeability* upon office bearers over and above the "accessible moneys" of the principal and in the absence of any material wrongdoing on the part of such office bearers
- the concept of limited liability of companies would have to be reconfigured for income tax purposes
- the corporate veil may be lifted without any special circumstances or just reasons for so doing (contrast this with the *Yap Sing Hock* case)

Parliament cannot be said to have amended sec. 75(1) with a view to introducing draconian liabilities by a sidewind and in a manner which would result in absurdity. If Parliament intends to alter the structure of sec. 75(1) to impose greater "liabilities" upon office bearers, Parliament would have to do so in language which is clear and unambiguous and which retains coherence with Part IV read as a whole.

Interpretive criteria – a conclusion

For the reasons discussed above, it is obvious that the draconian view is untenable as the following critical principles of statutory interpretation have been violated by the proponents of that view i.e.:

- ambiguities in taxing/penal statutes are to be construed in favour of the individual;
- clear words must be used by Parliament to hold office bearers *vicariously chargeable* or even "personally liable" for the taxes of a company or other body – this cannot be achieved by a contrived process of inference and implied assertion;
- *Ut res magis valeat quam pereat* – every word in a statute must be given meaning and cannot be treated as dead letter – regard must be had to Parliament's retention of the less onerous concept of "responsibility" in preference to other more onerous concepts such as "liability" or "*vicarious chargeability*";
- statutes must be read as a whole – Part IV ITA should be read in a coherent fashion;
- *Expressio unius est exclusio alterius* – "express enactment shuts the door to further implication" – the express provisions of secs. 66 – 74 and 76 preclude any implication of *vicarious chargeability* under sec. 75(1);
- substantial changes in law cannot be casually inferred to arise by a sidewind; and/or
- statutes should not be read so as to result in absurdity.

A darker agenda?

I suppose the concern is really whether or not there was any design, however reckless or remote, to amend sec. 75(1) to tax office bearers without the sec. 67 safeguards[10]. Had there been any such intention, and though it has thus far misfired to an incurable degree, the greater fear is that further amendments would be promulgated to push this darker agenda through.

If the Revenue seek to enact the draconian view as law, such an unfortunate course of conduct would lead to grave, if not disastrous, economic consequences for Malaysia. I doubt there are many provisions of Malaysian law which would succeed in frightening foreign investment away from Malaysia better than a tax on office bearers which creeps into the statute books without much publicity and even less consultation or debate.

The observations of the author of *Statutory Interpretation, A code* – Third Edition (1997) by *F A R Bennion*, at pages 617 and 618, serve as a warning:

> "Herman went on to say that 'if private actors know in advance the incidence of state intervention, they can adjust their activities to account for it, thereby avoiding the effect of sporadic legal catastrophes.' ...
>
> For the law not to be known is the ultimate injustice."

A recurrent overriding concern of foreign investors is the level of caprice prevailing in foreign jurisdictions in which they propose to invest. By this it is meant, do the authorities say one thing one day and then shift the goalposts the day after? Is the law subject to strained and unnatural constructions? No one wishes to invest in a foreign land where interpretations of the law change from day to day, are incoherent and premised upon contrived, draconian and/or strained constructions of legal language, in accordance with the whims and fancies of the authorities, the flavour of the month, or whatever you will.

Attempting to push a draconian legislative agenda through would only serve to demonstrate how far removed the Revenue are from the business and economic imperatives of corporate Malaysia. Such an agenda would also undermine the efforts of the government in stimulating the economy and only succeed in deflecting prospective foreign investment in Malaysia to other Asean countries like Thailand and, of course, Singapore in a manner rivalled only by the excesses of currency speculators during the height of the Asian economic crisis.

Many a country has suffered for its indifference to such investor concerns and it would be desirable for the proponents of the draconian view to think through the very significant catastrophe that would be visited upon the country before seeking to pursue such an ill advised agenda. Malaysia underestimates such concerns at its own peril.

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This article sets out the views of the author and may not necessarily reflect the views of the firm.

10 It would be a tragedy if the amendments to sec. 75(1) were not intended by Parliament to have a draconian effect but, notwithstanding such lack of intent, certain conservative elements within the Revenue have embarked upon an interpretive "frolic of their own", to borrow the words of the court in **Rose v. Plenty**.

What happens after SGSS and BPS Ltd?

So the saga continues... as an ordinary taxpayer, does one deduct or not deduct withholding tax when making payments to non-residents? On the one hand, the Double Tax Agreement (DTA) says that we do not. On the other hand, the Malaysian Inland Revenue Board (IRB) is adamant that sec. 4A of the *Income Tax Act 1967* (the Act) imposes an obligation on the taxpayer to deduct. How does one tell the non-resident recipient that the IRB insists on a deduction being made when the DTA, an authoritative document signed by the relevant ministers of two countries, have agreed that the one party is not taxable on income derived from the other contracting state if the conditions within the relevant DTA are satisfied?

In practice, it has been difficult to persuade the non-resident recipient to accept the payment net of withholding tax and then to claim tax relief from their tax authorities when the DTA clearly spells out that they are not subject to tax. The reality is that in a lot of situations, the payer has been made to bear the withholding tax and this amount is an additional cost of doing business for the Malaysian company. To rub salt into the wound, the IRB has in some instances disallowed this "withholding tax" paid by the Malaysian company as a tax deduction.

So, what is the historical development to this ongoing saga ?

As a result of the decision in the Euromedical[1] case (which established the principle that the provisions of the DTA over-ride those in the domestic law where there is a conflict), the legislators amended the Act to introduce a new section which covers "special classes of income" now listed under sec. 4A. Section 4A is a charging section that charges the particular income to tax where the income is deemed to be derived from Malaysia by a non-resident. Section 109B is a collection mechanism, similar to sec. 107A and sec. 109. The rationale for this is based on the view that by bringing such income within the ambit of the new provision in the domestic law, they would be brought to charge under the domestic law, as income sources, which are not covered by the respective DTA's. The IRB has always maintained the view that sec. 4A is not overridden by the provisions of a DTA and that despite the absence of a Permanent Establishment (PE), income which would constitute business profits could be taxed under sec. 4A as "other classes of income" under the domestic law. However, there is the alternative view that these special classes of income are also covered by the business article in the various DTA's and this view is upheld by the decision in the case of *SGSS (Pte) Ltd v. Ketua Pengarah Hasil Dalam Negeri*.[2]

SGSS (Pte) Ltd v. Ketua Pengarah Hasil Dalam Negeri

SGSS is a company incorporated in Singapore. Its business in Singapore includes inspection and superintendence of minerals, petroleum and petrochemical products, industrial and consumer products and carrying on business of transport forwarding, shipping agent and customs agent. The company was awarded a contract by Petronas Carigali Sdn Bhd (PCSB) mainly to provide inspection services and liaison and co-ordination in respect of the inspection services; recommendation of remedial action on production delays; preparation and submission of daily inspection reports; and the provision of full time personnel as required. 98 per cent of these services were performed offshore whilst the remaining two per cent were rendered in Malaysia by its Malaysian affiliate company.

1 Cited in Malaysia and Singapore Tax Cases as *Director General of Inland Revenue v. EIL* (1950 – 1985) MSTC 256, and in CLJ as *Director General of Inland Revenue v. Euromedical Industries Ltd.* (1983) 1 CLJ 281

2 (2000) MSTC 3,814

Payments made by PCSB after 21 October 1983 were regarded as amounts paid in consideration of services rendered "technical advice, assistance or services in connection with technical management or administration of a scientific, industrial or commercial undertaking, venture, project or scheme". SGSS appealed against assessments issued for the years of assessment 1984 and 1985.

The question for the Special Commissioners to decide was whether having regard to the *Double Taxation Relief (Singapore) Order 1968* (the DTA), the payments were chargeable to tax under sec. 4A of the Act. Notwithstanding that the SGSS appeal was dismissed by the Special Commissioners, it is interesting to note that the Special Commissioners were of the view that –

- Based on the provisions of sec. 132, it is clear that the arrangements set out in the DTA have predominance over any written law relating to tax under the Act. However, it must be noted that, as stated in para. 1 of Article XVIII in the DTA, "The laws of Malaysia shall continue to govern the taxation of income derived from Malaysia except where express provision to the contrary is made in the DTA";
- Section 4A of the Act cannot operate so as to override the provisions of the DTA or to alter the character of the payments;
- It is a fact that the Appellant was a Singapore enterprise which did not carry on business in Malaysia through a PE situated in Malaysia, and the Special Commissioners would have to agree with the Appellant's contention that the relevant payments were not chargeable to Malaysian tax if the Special Commissioners could be convinced that the payments came within the meaning of the term "income or profits of a Singapore enterprise" as used in the DTA.

The Special Commissioners were of the view that the services provided by SGSS were activities, which would have to be performed by PCSB as part of its technical management function had it not contracted them out to be performed on its behalf to SGSS or some other third party. As such, the payments would fall within the meaning of the term "fees or other remuneration derived from the management, control or supervision of the trade, business or other activity of another enterprise or concern" as used in the exclusionary definition of the term "income or profits of a Singapore enterprise" appearing in Article IV of the DTA. Consequently, Article IV would not have the effect of rendering the payments not chargeable to tax in Malaysia even though the Appellant had not carried on business in Malaysia through a PE situated in Malaysia. Therefore, it is irrelevant whether or not the Appellant had a PE in Malaysia, as the entire Article IV is inapplicable because the payments have been excluded by the Article II definition from the meaning of the term "income or profits of a Singapore enterprise". The Special Commissioners decided that since there is no provision in the DTA to preclude the imposition of Malaysian tax on income under sec. 4A of the Act, the domestic law as expressed therein must prevail.

At the High Court, the decision of the Special Commissioners was reversed.

It was found that the various provisions of the Contract awarded to SGSS showed that SGSS was not a Project Management Contractor exercising "management, control or supervision" of PCSB's trade or business within the meaning of Article II (1)(l) of the DTA. The "services rendered by SGSS were all carried out and performed outside Malaysia. In this express context these services may be brought under Article XII(4) of the DTA by the very terms of Article XII (4) and on the basis that no services were rendered in Malaysia by the Appellant, the Appellant cannot be liable to tax in Malaysia".

The SGSS case has established the position that the DTA over-rides domestic law. It is also interesting to note that this case has highlighted a peculiarity of the Malaysia – Singapore DTA where Article XII(4) allows income from services rendered to be taxed in the country in which the services are performed notwithstanding the business article of the DTA, i.e. it does not matter whether the person or company has a PE or not. Therefore, one has to consider whether the services can be regarded as having been performed in Malaysia.

So, does the taxpayer breathe a sigh of relief after SGSS and does it mean that the taxpayer is now entitled to stop deducting witholding tax? Before, the taxpayer celebrates, he should first consider the case of *BPS Ltd*[3].

BPS Ltd v. Ketua Pengarah Hasil Dalam Negeri

In *BPS Ltd*, the taxpayer was a company incorporated in the United Kingdom. Its principal activity was the care and supervision of vessels during lay-up in Sabah. For the purpose of carrying out its business, the taxpayer hired ships and certain equipment from a shipping company, a non-resident in Malaysia. Payments for the hire of the ships and hire of equipment were paid by the taxpayer to the shipping company. The taxpayer however did not deduct tax from the payments as required under sec. 109B of the *Income Tax Act 1967*.

Subsequently, the IRB wrote to the taxpayer's tax agent stating that the hire of ships and equipment were subject to tax deduction under the provisions of sec. 109 and 109B of the Act. Further, as there were no deductions made or paid under those sections, the deductions claimed by the taxpayer for the hire of the ships and equipment which were initially allowed by the IRB would be disallowed and added back to the total amount of tax payable. Consequently, the taxpayer paid the IRB the full amount of tax deductions it made for the payment for the hire of ships and equipment.

3 *BPS Ltd v. Ketua Pengarah Dalam Negeri* (1997) MSTC 2,847

The IRB however denied the taxpayer deductions on the payments for the hire of the ships and equipment from the taxpayer's gross income under sec. 39(1)(j) of the Act. The taxpayer appealed against the additional assessments.

The issue for determination was whether the IRB was correct in disallowing the taxpayer a deduction from its gross income as a result of the taxpayer's failure to deduct tax upon payment to a non-resident for the hire of ships.

The taxpayer contended that the payments were part of the shipping company's business income and by virtue of the United Kingdom/Malaysia Double Taxation Agreement; the income was exempt from Malaysian income tax, as the shipping company had no PE in Malaysia. As such, the taxpayer was not obligated to deduct tax in accordance with sec. 109B of the Act. The taxpayer further contended that the IRB should exercise its discretion by allowing an extension of time to make payment under sec. 109B and not disallow the deduction for the hire.

The IRB contended that the taxpayer was under an obligation to withhold an amount at the rate applicable before paying for the hire of ships and hire of equipment to the recipient irrespective of whether or not the recipient was liable to Malaysian tax.

The taxpayer's appeal was dismissed.
It was held that:

1. Section 109B clearly states that it is mandatory for any person making payment of rental to a non-resident to deduct tax at the rate applicable and submit the amount to the IRB. If the payments are not deducted and remitted, the person paying the rental will not be allowed deductions in respect of the rental against the gross income in ascertaining the adjusted income. As such, the taxpayer was not allowed a deduction from the gross income.

2. Section 109B imposes an obligation on the taxpayer to deduct tax whether or not the recipient of the payment was taxable in Malaysia. It was not for the taxpayer to determine whether or not the recipient of payment was exempt from Malaysian tax, as this was a matter for the IRB to decide.

3. On the facts, the IRB had rightly refused the extension of time to make payment. Further, even if the IRB had wrongly refused the extension of time, the Special Commissioners did not have the power to interfere with any discretionary powers of the IRB. If the taxpayer was dissatisfied with the decision of the IRB in exercising his discretionary powers, the taxpayer's remedy was by way of judicial review.

Having regard to both the SGSS and *BPS Ltd* cases, it would appear that the taxpayer is in a dilemma as to whether to deduct withholding tax or not.

To Deduct Or Not ?

There is nothing to indicate at this point in time, that the IRB has adopted any firm position in relation to the issue of whether withholding tax provisions under sec. 109B has to be complied with. However, we need to ask ourselves whether sec. 109B is relevant at all in our circumstances.

BPS Ltd was specifically about sec. 109B which imposes an obligation on the taxpayer to withhold tax but does not consider the issue of how the source of income is to be determined [whether sec. 4A or 4(a) (i.e. a business source under the Act)]. One would first need to establish whether a source comes under sec. 4(a) of the Act, where relief under the business article of the DTA may be available, or under sec. 4A in which case sec. 109B would require the taxpayer to withhold tax.

If relief is available under the DTA, then clearly sec. 109B should not be considered at all. Before making a decision, one should also note the exclusions from the definition of business profits under the relevant article of the DTA concerned. Therefore, if any of the exclusions apply then the taxpayer would not be eligible for relief under the business article of the relevant DTA.

Conclusion

In the absence of clear official guidelines from the IRB, one may want to consider the prudent view that there is a *prima facie* case for the taxpayer to withhold tax unless the taxpayer is satisfied on the basis of known facts about the recipient that payments received constitute a business source, which is not subject to Malaysian tax by virtue of the relevant DTA.

If one is absolutely certain of the facts and that all the relevant DTA requirements are met, there should be no basis for the taxpayer to withhold tax. From a practical point of view, it would be extremely difficult to convince the recipient of the necessity to deduct first and then claim a refund later, especially as the expected amount of time and money spent may be considerable. As the time and cost involved may be unacceptably high, it may jeopardise the entire business transaction resulting in the recipient choosing to do business with another country. It is therefore imperative that the taxpayer obtains the full facts before making a decision. If DTA relief is clearly available, no deduction should be made.

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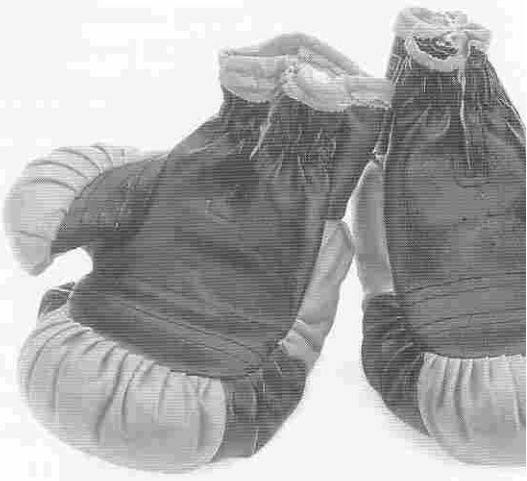

Taxation of E-Commerce
A Singapore Perspective

By Lee Fook Hong

INTRODUCTION:

As the use of websites to transact business gets more popular, many companies and individuals have started to put most of their business transactions online. Technological advancements have enabled more and more users of computers to achieve their business objectives via e-commerce.

The advent of e-commerce has removed the inconvenience caused by physical distance between trading partners from different geographical locations. With websites, transactions may now go borderless and businesses may be done online with less cost incurred and at a faster speed. The governments of most countries have recognised the importance of e-commerce and are encouraging businesses to establish their electronic presence on the global platform. The Singapore Government is no exception to this and has always been in the forefront to encourage e-commerce.

However, e-commerce transactions have raised problems for the tax authorities. The most significant of these problems is that relating to collection of taxes. Most tax regimes have all along adopted the territorial principle of income taxation. Tax is imposed only on income that is sourced within the territorial borders of the country. Income derived outside the territorial borders is not subject to income tax unless it is remitted into the country.

In the context of e-commerce, it is not always easy to determine the source of income i.e. whether it is sourced within the country and subject to tax or outside the country where tax will not be imposed unless the income is remitted. Many questions arise as to whether the mere presence of a website server would constitute a permanent establishment as far as international trade is concerned.

In an effort to continue encouraging e-commerce in Singapore, the Inland Revenue Authority of Singapore (IRAS) has issued Income Tax Guides[1] to clarify a few broad areas of taxation issues arising from e-commerce.

INCOME FROM AN E-COMMERCE INTERMEDIARY BASED IN SINGAPORE

An e-commerce intermediary is defined as a company that provides intermediary services such as hosting services, technical services to set up e-commerce facilities, internet connectivity services or exchange facilities that bring buyers and sellers together. By virtue of the definition, a portal that allows buyers or sellers to meet would constitute an e-commerce intermediary.

The income of the e-commerce intermediary is always in the form of subscription fees, commission or advertising fees. Whether the income of the intermediary is subject to income tax in Singapore or not, depends very much on several factors such as the substantial presence of personnel and technical know-how and other essential resources deployed in Singapore. If the presence of these few factors are substantial, the income derived will be regarded as Singapore-sourced income and therefore subject to tax.

On the other hand, if the intermediary has only the mere presence of a website but does not have other essential physical resources in the form of personnel, or know-how within Singapore, it will not be regarded as a taxable entity.

DIFFERENT MODELS OF E-COMMERCE ENTITIES

Entities with different transactional arrangements in their e-commerce trades will have different taxation impacts. The location of the website servers, branch offices and the main offices are taken into account when deciding whether the income of the e-commerce entity is taxable.

1 The Income Tax Guides can be found at the website of the Inland Revenue Authority of Singapore (www.iras.gov.sg)

The following are a few models of e-commerce entities with different operational arrangements:

Business operations in Singapore and website is hosted in Singapore

Entities of this model carry out all their operations and sales within Singapore and also set up websites within Singapore to undertake e-commerce activities in Singapore.

The websites hosted in Singapore are used for transactions with customers including allowing customers to view and order goods or accepting payments for goods sold online. The obligations arising from the website transactions are fulfilled through the resources from the operations in Singapore.

In such cases, the income derived from the internet transactions would be regarded as income sourced in Singapore and accordingly be subject to income tax.

Business operations in Singapore but website is located outside Singapore

Generally, companies which have business operations carried out in Singapore are liable to income tax in Singapore on the income derived from such operations.

For certain reasons, such companies may establish internet websites in other countries to complement their business operations in Singapore. The websites may be used for activities such as disseminating information about the company's products, advertising, ordering of goods through the website, accepting payment for online transactions or delivering of goods sold online.

With these arrangements, some may argue that the website has performed all the necessary business activities and therefore the operation should be deemed to be carried out outside Singapore.

However, counter arguments are that the mere presence of a website can not constitute the presence of a business operation. Regardless of the type of activity performed via the internet websites, the obligations resulting from the e-commerce activities of the business will still have to be fulfilled through the physical business resources in Singapore.

Accordingly, income derived from such arrangements is regarded as Singapore sourced income and assessable to Singapore income tax.

Notwithstanding the position taken by the Singapore tax authorities, double taxation agreements may have a clause stating that in the event the country in which the website is hosted treats the presence of the website as a permanent establishment, it will impose tax on the income and the Singapore Government will be bound by the double tax agreement to grant double tax relief in respect of income remitted to Singapore. In the absence of such a clause, incidence of double taxation may arise, as the Singapore Government is not obligated to grant double tax relief.

Business operations in Singapore but website and branch outside Singapore

There are three different constituents in this network and each has to be considered together with the other two constituents in order to determine whether the business operations are in Singapore or otherwise.

Whether the business operations are regarded to be in Singapore is a question of fact. A lot will depend on which business centre fulfils the obligations incurred by the internet transactions.

If the website is maintained by the branch and the supplies and deliveries of the goods ordered are performed by the branch, it is then obvious that the business transactions are carried through the physical resources of the branch, therefore the operations would be held to be carried out in the country where the branch is located. Accordingly, income derived therefrom will be taxed in that country. It will only be taxed in Singapore if the income is remitted to Singapore.

However, if the products or goods advertised on the website are the products of an operation centre in Singapore and the maintenance of the website and deliveries of goods ordered are performed by the physical resources of the Singapore centre, then, the income derived from the e-commerce activities will be considered as income sourced from operations in Singapore and will be taxable in Singapore.

Business operations outside Singapore but website is located in Singapore

Companies with business operations outside Singapore are generally not regarded as taxable entities in Singapore.

Some companies may wish to base their website in Singapore to expand their e-commerce activities. The business activities of the website include advertising products, updating information about company products, ordering goods and accepting payment. The website is maintained by resources outside Singapore.

If the products are advertised over the website in Singapore and subsequently the e-commerce obligations are fulfilled through the physical resources outside Singapore, then, the income arising from the e-commerce transaction will not be subject to Singapore income tax.

On the other hand, if the products can be directly downloaded from the internet websites in Singapore, withholding tax issues may arise if the payments are in the form of interest or royalties. Buyers of the products will have to withhold tax, based on the prevailing tax rate and account for the tax withheld to the Inland Revenue Authority of Singapore (IRAS).

However, not all royalty payments are subject to withholding tax as certain categories of software payments have been exempted from withholding tax as announced in the Singapore Budget for the year 2001. In fact, there is an ambiguity regarding the treatment of royalty payments by IRAS for the purchase of software.

Business operations outside Singapore but website and branch are located in Singapore

The Singapore *Income Tax Act* provides that a branch in Singapore will constitute a "permanent establishment" and income derived from the branch will be subject to tax in Singapore.

However, if the income derived from the website which is maintained and the obligations of the website transaction are fulfilled by the foreign business centre but not by the Singapore branch, such income will not be taxable in Singapore.

On the other hand, if the branch in Singapore is marketing, selling and delivering the products ordered from the website, it will be deemed to be carrying on operations in Singapore and accordingly income arising from the e-commerce transactions will be taxed in Singapore.

CROSS-BORDER TRANSACTIONS

E-commerce activities are usually cross-border. It is therefore imperative that internet transactions will result in issues pertaining to double taxation and withholding tax.

a. Double taxation

Double taxation occurs where income from a source is brought to tax in more than one country. Thus, when two countries impose tax on the same income, the taxpayer will have to shoulder a heavier tax burden. To relieve the taxpayer of the heavier tax burden, most countries including Singapore have entered into bilateral tax agreements with other countries to avoid the incidence of double taxation.

As already clarified earlier, the mere presence of an internet website in Singapore without substantial presence of resources will not constitute a taxable entity, and as such e-commerce traders who transact business over the website located in Singapore will not face problems of double taxation.

Even if the other country wishes to tax the income derived from an internet portal located in Singapore, this will not result in double taxation as Singapore will not tax the income arising from the mere presence of the website.

However if a company has operations in Singapore and also has income from a website located in another country, where the mere presence of the website is treated as a "permanent establishment", then the income derived therefrom will be subjected to tax in that country.

This will result in incidence of double taxation as the same income will be regarded as income sourced in Singapore and be taxable as part of the business income in Singapore. In such a case, double taxation reliefs may be available in accordance with the Double Taxation Agreement concluded between Singapore and the other country.

b. Withholding tax

Withholding tax issues will arise when payments in respect of interest and royalties have to be made to non-residents for certain categories of software whether directly downloaded from the internet websites or delivered physically.

Where the internet server is based in Singapore and the software provider has operations based in another country, the customer of the software products may have to withhold tax if he has to make payment in the form of royalties for the right to use the software. The tax withheld must be accounted for to the IRAS within the stipulated period in accordance with the *Income Tax Act*.

GST ON E-COMMERCE

The Goods and Services Tax (GST) is a tax on consumption. It is otherwise known as a value added tax because it is imposed on the value added at each stage of the production cycle, but with a provision for claiming input credit, if eligible.

As more businesses involving supply of goods and services are transacted electronically, the basic principles for charging GST will have to apply to the e-commerce transactions. A GST-registered person making a taxable supply must charge GST regardless of the medium through which the goods are ordered and supplied or delivered.

In relation to e-commerce, all products or goods ordered and supplied over the internet website are subject to GST if the supplier is a GST-registered person and the supply is made in Singapore, even if the sale is made through a third party internet portal.

E-commerce generally consists of sale of goods and services that are ordered through the websites and delivered physically. In the case of digitised goods, they can be delivered electronically, that is, directly downloaded from the websites.

To clarify the numerous grey areas concerning GST treatment for e-commerce transactions, the IRAS has issued tax guides clarifying the following:

- An e-commerce service provider is liable to collect GST if he is a GST-registered person making a taxable supply.
- Digitised goods such as music and software sold over the internet to customers are subject to GST unless the customers do not belong to Singapore.
- The supplier of digitised goods should take reasonable steps to determine where the customer belongs:-
  - > If the customer is an individual and has a Singapore domain name or Singapore IP address, GST must be charged.

> If the customer does not have a Singapore domain name nor a Singapore IP address, then the supplier must obtain declaration stating the customer's usual place of residence. If the customer does not declare his usual place of residence, he would be treated as belonging to Singapore, and GST will be imposed.

- For a customer who is a business entity, GST will be applicable if the customer has business in Singapore or has a fixed establishment in Singapore.

- Unlike import by post or by air, the import of digitised goods such as downloading software materials from a website is not subject to GST.

APPROVED CYBER TRADER

To encourage more businessmen to hub their e-commerce activities in Singapore, the Singapore Government announced in the 1998 Budget an Approved Cyber Trader Scheme. Effective from Year of Assessment 1999, approved traders are subject to tax at a concessionary rate of 10% on incremental income derived from qualifying e-commerce transactions with trading partners outside Singapore for a period of up to five years. The approved cyber trader is also eligible for investment allowance for approved expenditure. In addition, approved royalty payments to non-residents are subject to a concessionary withholding tax at 10%.

To qualify as an approved cyber trader, the company must be incorporated in Singapore. In addition, the following requirements must also be satisfied:

- The company is well-established in its business sector or industry.

- The company must trade in products sourced overseas.

- The company must host its websites and contents in Singapore.

- The company must use the Internet to conduct its international trading and marketing activities.

- At least one leg of the transactions must be with non-residents.

- The cyber trader's total business spending in Singapore must be at least $1 million.

- The company must employ three key personnel to be based in Singapore.

Conclusion

E-commerce has become part and parcel of today's business. The use of the website as part of a company's business may enable the company to enter new businesses or even to create unique businesses in any part of the world. This is possible because the server used for e-commerce activities can be located anywhere.

However, e-commerce has also created issues pertaining to taxation. In e-commerce, business transactions are concluded without regard to physical or national frontiers. Thus, making it difficult to identify where the business is transacted and where the income is sourced. The consequence of that is the difficulty for countries that claim to have the jurisdiction to tax the income arising from the e-commerce activities.

Moreover, as e-commerce transactions are done electronically, it will be difficult to trace the parties to the transactions. Therefore, it will be extremely difficult if not impossible to ensure tax compliance and/or to form an audit trail, especially if the transactions involved are voluminous. Additionally, different countries may have different views in respect of the treatment of digitised software products, the meaning of royalties and the definition of fixed place of business for the purpose of taxation on e-commerce.

Notwithstanding the above, many countries including Singapore have sought to resolve these differences by adopting a common platform with other trading partners through the forums such as OECD, APEC and WTO to weed out the differences. At the international level, trading partners have concluded double taxation agreements with one another to avoid incidence of double taxation while at the home front, the local tax regimes have issued tax guides clarifying the problematic issues arising from the e-commerce activities.

With all these measures in place, and the continuing effort to fine tune the e-commerce system, Singapore is well placed to become a major e-commerce hub in the Asian region.

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... of refunds and refund claims ...

by Mokhtar Mahmud

Customs duties/taxes are required to be paid before goods are released from customs control. It is the obligation of importers, in this case, to make such payments before taking delivery of the goods. In the case of licensed manufacturers or service providers of taxable goods or services who are agents of the tax authorities, tax payment is made routinely. In the process of making payment, there may be occasions, for some reason or other, for overpayment or erroneous payment of duty/tax. This being the case, such overpayment by the taxpayer entitles him to a refund of the duty/tax so overpaid or erroneously paid.

The Webster's Dictionary defines "refund" as "to make repayment", "to pay back (money spent)", or "to reimburse (someone)". Whatever you may want it defined as, refund of duty/tax paid by importers/manufacturers/service providers, as the case may be, appear to be a recourse to overpayment of duty/tax or erroneous payment of duty/tax to the tax authorities. Generally, occasions for refund may be caused for various reasons, ranging from a simple calculation error to a complex dispute with respect to classification of goods.

Refunds

Refunds are actually recourse provided to the taxpayer for overpayment or erroneous payment of duties and taxes. They are provided under the relevant legislation, which are discussed below. There are numerous instances where taxpayers have genuine cases for refund claims. Under the related legislation, claims for refunds may either be made to the Director General of Customs or the Minister of Finance, depending on the time frame within which the claim is made.

Refunds under the Customs Act, 1967

1. Refunds under section 14(2)(b)

Under this stipulated provision, the Minister of Finance is empowered to grant refunds of customs duty. However, it must be noted that this grant is at the pleasure of the Minister who may impose conditions he deems fit. There have been occasions where the claimants were granted partial refunds as a "punishment" for contributing to the overpayment or erroneous payment.

Section 14(2) reads as follows:
"The Minister may in any particular case —

b) direct the refund to any person of the whole or any part of the customs duties or any other prescribed fees or charges which have been paid by such person on any goods, and in granting such exemption or directing such refund, impose such conditions as he may deem fit."

A refund claim to the Minister is generally made when the overpayment or erroneous payment is detected after more than a year of such overpayment or erroneous payment. This is because the Minister is not limited by legislation in his power to grant such refunds.

2. Refunds under section 16

The Director General is empowered to grant refunds, however, only to claims made within the stipulated time frame of one year after the overpayment or erroneous payment was made. Common among such claims are cases of dispute in classification. This is where payment of duty and tax is made based on the classification by the assessing officer of customs. The importer is entitled to make such refund claim when the Director General makes a ruling in favor of the importer that such classification is wrong and hence the payment of duty/tax is erroneous. However, in this case, the time starts to run from the date of the Director General's ruling.

Section 16 reads as follows:
"It shall be lawful for the Director General, if it is proved to his satisfaction that any money has been overpaid or erroneously overpaid as customs duties or any other fee or charge under this Act, to order the refund of this money so overpaid or erroneously overpaid:

Provided that —

a) no such refund shall be allowed unless a claim in respect of it is made in the prescribed form within one year after the overpayment or erroneous payment was made; or
b) in the case where any customs duty has been paid under protest under sec. 13B, no claim of refund shall be allowed unless such claim is made in the prescribed form within one year after the decision on classification or valuation is made known to the claimant."

Since the Director General is limited only to claims made within one year from the time the overpayment or erroneous payment is made, claims for refund of overpayment or erroneous payment that occurred beyond this time frame should be addressed to the Minister of Finance.

Refunds under the Sales Tax Act, 1972

1. Refunds under section 10

Under this provision, the Minister of Finance is empowered to grant refunds of sales tax or penalty wholly or partially. This grant is at the pleasure of the Minister who may impose conditions he deems fit. The *Sales Tax Act 1972* also empowers the Minister to grant refunds to claims made beyond a year from the date of overpayment or erroneous payment .

Section 10 reads as follows:
"The Minister may, in any particular case, subject to such conditions as he may deem fit to impose —

c) direct the refund to any person or class of persons of the whole or any part of the sales tax paid by such person or such class of persons; or

d) direct the refund to any person or class of persons of the whole or any part of the penalty paid by such person or such class of persons."

2. Refunds under section 31

Refunds under this provision pertain not to overpayment or erroneous payment, but to cases where a trading company (or vendor) supplies tax-paid goods to a licensed manufacturer. In order to uphold the single stage tax principle, the vendor is allowed to make a claim to the Director General for the tax paid provided he sells the goods to the licensed manufacturer at a tax-exclusive price. It is worthwhile noting that the Director General may consider only refund claims made within one year from the date of the business transaction.

Section 31 reads as follows:
"Subject to such conditions as may be prescribed, where any licensed manufacturer acquires from a person goods, in respect of which sales tax has previously been paid, the vendor may apply to the Director General for a refund of the sales tax so paid in respect of the goods to which the transaction so relates, provided such manufacturer holds the approval and authorisation of the Director General to acquire such goods free of sales tax; and where the Director General is satisfied that the prescribed conditions have been complied with, he shall refund the vendor the amount of sales tax previously paid by such person in respect of such goods;

Provided that no such refund shall be allowed unless a claim in respect thereof is made within one year after the date of the transaction to which the claim relates."

3. Refunds under section 32

Under this provision, refund claims for overpayment or erroneous payment made within one year may be made to the Director General for consideration. However, a pertinent condition is that the refund claim should not "unjustly enrich" the claimant. The customs authorities consider this condition as a pertinent consideration for rejecting such claims. As such, claimants for refunds of this nature should satisfy the Director General that they will be able to pass on such refunds of tax to their customers.

Section 32 reads as follows:
"It shall be lawful for the Director General, if it is proved to his satisfaction that any sales tax or penalty has been overpaid or erroneously paid under this Act, to order the refund of the sales tax or penalty that was overpaid subject to such limits as may be prescribed by regulations made under this Act:

Provided that —

a) no such refund shall be allowed unless a claim in respect of it is made in the prescribed form within one year after the overpayment or erroneous payment was made; and

b) the Director General may reduce or altogether disallow any refund due under this section to the extent that the refund would unjustly enrich the claimant."

Refunds under the Service Tax Act, 1975

1. Refunds under section 6

Under this provision, the Minister of Finance is empowered to grant a refund of service tax or penalty paid, either in whole or in part. This grant of a refund is also at the pleasure of the Minister who may impose conditions that he may deem fit. Pursuant to the *Service Tax Act 1975* the Minister has the power to grant refunds to claims made beyond one year from the time the overpayment or erroneous payment was made.

Section 6 reads as follows:
"The Minister may, in any particular case, subject to such conditions that he may deem fit to impose —

c) direct the refund to any person or class of persons of the whole or any part of the service tax paid by the person or that class of persons; or

d) direct the refund to any person or class of persons of the whole or any part of the penalty paid by the person or that class of persons."

2. Refunds under section 21

Under this provision, claims for a refund of overpaid or erroneously paid service tax, made within one year, may be made to the Director General for his consideration. However, just like the case of sales tax refunds, it is imperative to consider the condition to be complied with by the claimant, which is that the claim should not "unjustly enrich" the claimant. The customs authorities consider this condition as imperative for rejecting such a claim. As such, claimants for refunds of this nature should satisfy the Director General that they are able to pass on such refunds to their customers.

Section 21 reads as follows:
"It shall be lawful for the Director General, if it is proved to his satisfaction that any service tax or penalty has been overpaid or erroneously paid under this Act, to order the refund of the service tax

or penalty that was overpaid or erroneously paid subject to such limit as may be prescribed by regulations:

Provided that —

a) no such refund shall be allowed unless a claim in respect of it is made in the prescribed form within one year after the overpayment or erroneous payment was made; and
b) the Director General may reduce or altogether disallow any refund due under this section to the extent that the refund would unjustly enrich the claimant."

Refunds under the Excise Act, 1976

1. Refund under section 11(2)

Under this provision, the Minister of Finance is empowered to grant refunds of excise duties either in whole or in part. This grant is also at the pleasure of the Minister who may set conditions that he may deem fit to impose. Under the *Excise Act 1975* the Minister may grant refunds to claims made in respect of overpayment or erroneous payment going beyond the period of one year from the date the overpayment or erroneous payment was made.

Section 11(2) reads as follows:
"The Minister may in any particular case:

c) direct the refund to any person of the whole or any part of the excise duties which have been paid by such person on any goods, and in granting such exemption or directing such refund may impose such conditions as he may deem fit."

2. Refund under section 13

As with the other respective legislations, under this provision of the *Excise Act 1975* the Director General is empowered to grant refunds on claims for overpayment or erroneous payment of excise duties. However, he is restricted to granting refunds only for claims made within one year after the overpayment or erroneous payment was made.

Section 13 reads as follows:
"It shall be lawful for the Director General, if it is proved to his satisfaction that any money has been overpaid or erroneously paid as excise duties or warehouse rent or as any other charges under this Act, to order the refund of the money so overpaid or erroneously paid:

Provided that no such refund shall be allowed unless a claim in respect thereof is made in writing to the Director General within one year after the overpayment or erroneous payment was made."

Application Process for Refund of Claims

Claims for refund of overpayment or erroneous payment of custom duties/sales tax/service tax/excise duties shall be made to the Director General in the prescribed form "JKED 2", together with the supporting documents such as invoices and the K1s. However, a claim for refund of overpayment or erroneous payment of less than RM50.00 is not allowed, except with the permission of the Director General.

In the case of refund claims made to the Minister of Finance, there is no prescribed form used. Instead, a claimant needs to submit a covering letter stating the case together with the relevant supporting documents.

Rejection of Refund Claims

Although there are provisions provided in the respective legislations for taxpayers to make claims of refunds for overpayment or erroneous payment of duty/tax, the same provisions under the respective legislations also provide conditions for approval. The reasons for rejection are aplenty and since the decision-making process is discretionary, there will always be a reason for rejection. Consider for example the following case:

An importer imports in paper bags a kind of chemical to be used as raw material in its manufacture. In the import declaration it was inadvertently declared as paper bags by the forwarding agent though the chemical name was also typed in. The assessing officer approves the importation based on the description of the goods typed in the import declaration form even though the invoice clearly puts the description of the goods as the chemical. Customs duty was paid based on the rate of duty for paper bags (which was clearly an error). Subsequently, efforts to claim a refund from the Director General under sec. 16 of the *Customs Act 1967* (after the mistake was detected) was rejected on the ground that the importer did not dispute the classification at the time of importation.

Clearly, this is a case of erroneous payment. However, the authorities saw fit to reject the refund claim based on sec. 13A of the Act (which is payment of customs duty under protest) and hence require a notice of payment under protest on the part of the importer. The absence of such notice became the pertinent reason for the decision to reject the refund claim.

There are numerous other cases where the reasons for rejection may not really be acceptable to the logical mind.

Conclusion

It is a cardinal rule in taxation that tax is only paid when it is due and payable. In view of this rule, it was obviously the intention of the legislators to include the refund provision as a mechanism for recourse. However, of late, there have been numerous cases where claims for refunds have been rejected for reasons which are difficult to comprehend. The amendment to include the condition of "unjust enrichment" is an additional hurdle taxpayers have to face when making such claims. As with the time tested adage, "it is easier to pay than to get paid", the inclusion of such a condition further amplifies this notion.

While the requirement is to satisfy the Director General or the Minister that an overpayment or erroneous payment has been made, the tax administrators when exercising this discretionary power, must do so in a judicious manner. Otherwise, the provisions in the respective legislation remain mere "nice to read kind of thing". On the part of the taxpayers, it is my suggestion that you "get it right the first time." Careful planning and foresight would spare you the trouble of trying to battle the authorities to get your refund claim.

The Author: En. Mokhtar Mahmud worked in the Customs Department since 1973. Upon his optional retirement, he took up employment with PW as a Managing Consultant in the Indirect Tax Advisory Group in 1996. After 2 years with PW, he and his partner set up their own Indirect Tax Consultancy Practice (Top Tiers Services Sdn Bhd).

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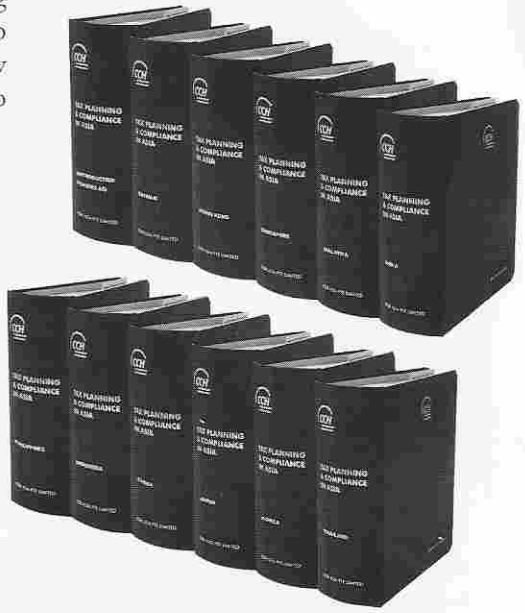

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Inherent discrepancies in the valuation of goods for sales tax purposes

By Sitartha Raja Kumaran

The principal legislation governing sales tax is the *Sales Tax Act, 1972*. Sales tax is a form of consumption tax levied on the sale value of a wide variety of goods manufactured in Malaysia, or imported into Malaysia for local consumption.

Section 7 of the *Sales Tax Act, 1972* *inter alia* states,

"1) For the purposes of this Act, the sale value of goods shall be –

a) in the case of goods sold by a taxable person to a person independent of him, the price for which the goods are actually sold;

b) in the case of goods sold otherwise by a taxable person, the price at which such goods would have been sold if they had been sold in the ordinary course of business to a person independent of the taxable person;

c) in the case of goods manufactured or acquired under the provisions of sec. 9 by a taxable person and —

i. used by him otherwise than as materials in the manufacture of taxable goods, or

ii. disposed of by him otherwise than by sale,

the price at which such goods would have been sold if they had been sold in the ordinary course of business to a person independent of the taxable person at the time they were first so used or were so disposed of;

d) in the case of goods imported in to the Federation for home consumption, the sum of the following amounts, namely —

i. the value of such goods for the purpose of customs duty, ascertained in accordance with the Customs Act, 1967, and

ii. the amount of customs duty, if any, payable on such goods:

Provided that in cases where the value of such goods cannot be ascertained in accordance with sub-paragraph (i), the value shall be determined in accordance with the definition of "value" in relation to imported goods in sec. 2 of the *Customs Act, 1967*.

The Sales Tax Act does not define "value" for the valuation of locally manufactured goods for the purpose of sales tax. However, for the valuation of imported goods, sec. 7(d) does make reference to the definition of "value" in relation to imported goods under sec. 2 of the *Customs Act, 1967*.

Prior to 1st January 2000, Customs generally adopted the Brussels Definition of Value (BDV)[1] i.e. the price that the goods **would** fetch. Using this as a basis, Customs adopted the position that for sales between suppliers/manufacturers and its related parties, the value of goods imported/sold must approximate the open market value of the goods. To arrive at the open market value Customs have generally added back to the price of the goods such elements as cost of brand advertising and promotions as deemed supplier's/ manufacturer's cost.

However, with effect from 1 January 2000, Customs has adopted in the *Customs (Rules of Valuation) Regulations, 1999* the basis of valuation endorsed by the World Trade Organisation (WTO)[2] for imported goods. Under the WTO rules, the customs value shall be the transaction value, i.e. the price **actually** paid or payable, and should incorporate all costs of the goods up to the Customs' port of entry. Further to determine the value of imported goods the Interpretative Notes in Annex 1 to the Agreement on Implementation of Article VII of The General Agreement on Tariffs and Trade 1994, *inter alia* mentions if a buyer undertakes on his own account, even through a by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of customs value nor shall such activities result in rejection of the transaction value.

Although with effect from 1 January 2000 Customs has adopted WTO Rules of Valuation to determine the value of imported goods, for the purposes of sales tax, they have maintained the BDV "open market" methodology for locally manufactured goods (excluding goods manufactured in Free Zone (FZ) and Licensed Manufacturing Warehouse (LMW)).

To sum up the position, Customs has now adopted two different valuation methodologies:

i) In respect of sales of locally manufactured goods to related parties, Customs has adopted BDV's notional concept of valuation, thus, incorporating post manufacturing expenses (e.g. advertising and promotion expenses) in determining the sale value.

ii) In respect of imported goods, Customs will levy sales tax on the value of the goods (as determined under the *Customs (Rules of Valuation) Regulations, 1999)*, i.e. the positive concept of value, thus, excluding post import expenses (e.g. advertising and promotion expenses) in the determination of sale value.

1 The definition was incorporated in the Convention on the Valuation of goods for Customs Purposes which was signed in Brussels on 15 December 1950.

2 Article VII of the General Agreement on Tariffs and Trade 1994.

It is suggested that Customs should use only one valuation methodology to determine sale value for the purpose of sales tax. Customs should adopt the basis of valuation under WTO for both imported goods and local goods.

It is to be further noted that this principle is also applied to goods sold for local consumption by Manufacturers situated in Free Zones or by Licensed Manufacturing Warehouses, both being deemed as a place outside Malaysia.

The Discrepancies
– Unfair Treatment of Importers and Local Manufactures in the Allocation of Advertising and Promotion Expenses.

With the change in the principles of valuation under the *Customs Act 1967*, there appears to be discrepancies in the treatment by importers/local manufacturers in the allocation of advertising and promotion cost when determining the sale value of goods for sales tax purposes as outlined below:

Importers
Under the WTO Rules of Valuation, the Rules state that post-importation expenses should not be included in computing import duty. Similarly, post-importation expenses should not be taken into account when computing sales tax. As such, where importers are responsible for advertising and promoting goods, the costs relating to advertising and promoting incurred and carried out by importers would not be incorporated into the value of goods imported by the importers. This is because advertising and promoting is an activity carried out after the importation of goods.

Local Manufacturers
On the other hand, the situation would differ for local manufacturers. Under the BDV "open market" methodology of valuation, Customs has traditionally allocated advertising and promotion costs relating to creating brand awareness to the sale value of goods, as they feel that this should be part of the cost of goods in the market place. This uplift is regardless of whether the local manufacturer is the brand owner of the goods. Where the local manufacturers are not brand owners, it is unjust and unreasonable to impose such an uplift, because advertising and promotion on the brand is not undertaken by the local manufacturers. Traditionally, many manufacturing companies produce and market their own products. However, with specialisation of functions, manufacturing companies have either incorporated marketing companies to market and distribute their products or become contract manufacturers to independent distributors and trade mark holders. With globalisation, it is important and cost efficient for manufacturers to specialise in a single core activity, i.e. manufacturing.

The Customs' practice in adopting different valuation methodologies in determining the sale value of goods for sales tax purposes for related party transactions of locally manufactured goods vis a vis imported goods would have a negative impact on local manufacturers.

This discrepancy in the treatment between importers and local manufacturers would unduly prejudice local manufacturers, as it would result in a higher sale value being attributed to local goods for sales tax purposes, as compared to imports.

Moreover, the situation is aggravated where there is no import duty imposed on certain goods and if advertising and promotion costs are allocated to the sale value of local goods, the sale value of local goods would be higher than the sale value for imports for sales tax purposes. Consequently, goods manufactured in Malaysia would become more costly.

Conclusion

In view of the change in principles of valuation under the *Customs Act*, a similar change should be reflected when determining the sale value of locally manufactured goods for sales to related parties.

In addition, it is the Malaysian Government's policy to encourage investments in the manufacturing sector. This is evident in the launching of the Second Industrial Master Plan (IMP2), 1996-2005, where the private sector is encouraged to take advantage of the facilities and incentives provided by the Government. In order to facilitate the IMP2, the practice of Customs in imposing an uplift for local goods should be abolished.

In fact, sec. 7 of the *Sales tax Act 1972* merely refers to arms length pricing and there is no reference to the BDV valuation in the Act. The BDV principle was incorporated under internal guidelines and used to ensure consistency in valuation with imports. It is ironical that now though the import valuation follows WTO rules, they do not follow through in their internal guidelines with the WTO rules to ensure consistency especially when local manufacturers are prejudiced.

It is suggested that Customs should use only one valuation methodology to determine sale value for the purpose of sales tax. Customs should adopt the basis of valuation under WTO for both imported goods and local goods. Where costs relating to advertising and promotion are incurred post-manufacture, such costs should not be included in the sale value of the goods for the purpose of determining sales tax.

The Author: Mr Sitartha Raja Kumaran *B.Soc.Sc (Econs), LLB (London)*, is a Tax Director in KPMG's Investment and Indirect Tax Practice, advising clients in areas such as Customs and indirect taxes, i.e. sales tax, service tax, VAT, customs, excise duties and customs procedures/licensing and investigations. Prior to this Mr S Raja Kumaran served the Royal Customs and Excise Department as senior officer for 21 years. He is also a member of the Trade Facilitation Committee of the Malaysian International Chamber of Commerce.

Case Digest

Compensation paid for early retirement is taxable

THE TAXPAYER WAS EMPLOYED BY A BANK WHICH OFFERED A SEPARATION SCHEME ("THE SCHEME") THAT PROVIDED FOR EARLY RETIREMENT WITH PAYMENT OF BENEFITS. OFFICERS WERE INVITED TO APPLY TO THE SCHEME AND THE TAXPAYER DID.

At that time, he had taken a special post with the Bank, lower than that which he had occupied before, because he was afflicted with polymyositis which required him having to wear a neck collar. His application was approved and he left the service of the Bank about one year before he was actually due to retire. On retirement under the Scheme, he was paid "compensation for loss of employment". The D.G. of I.R. imposed a tax on this amount.

The taxpayer argued that he was exempted from tax because of ill health. The D.G. of I.R. refused to allow an exemption. The Special Commissioners ruled that the taxpayer's loss of employment was a choice made by the taxpayer when he participated in the Scheme and not because of health reasons. The taxpayer appealed to the High Court which confirmed the Special Commissioners' finding.

HSG v. Ketua Pengarah Hasil Dalam Negeri
High Court, Kuala Lumpur,
Rayuan Sivil No. R1-14-3-99
(2002) MSTC 3,887

Malaysians performing overseas duties entitled to unilateral tax credit

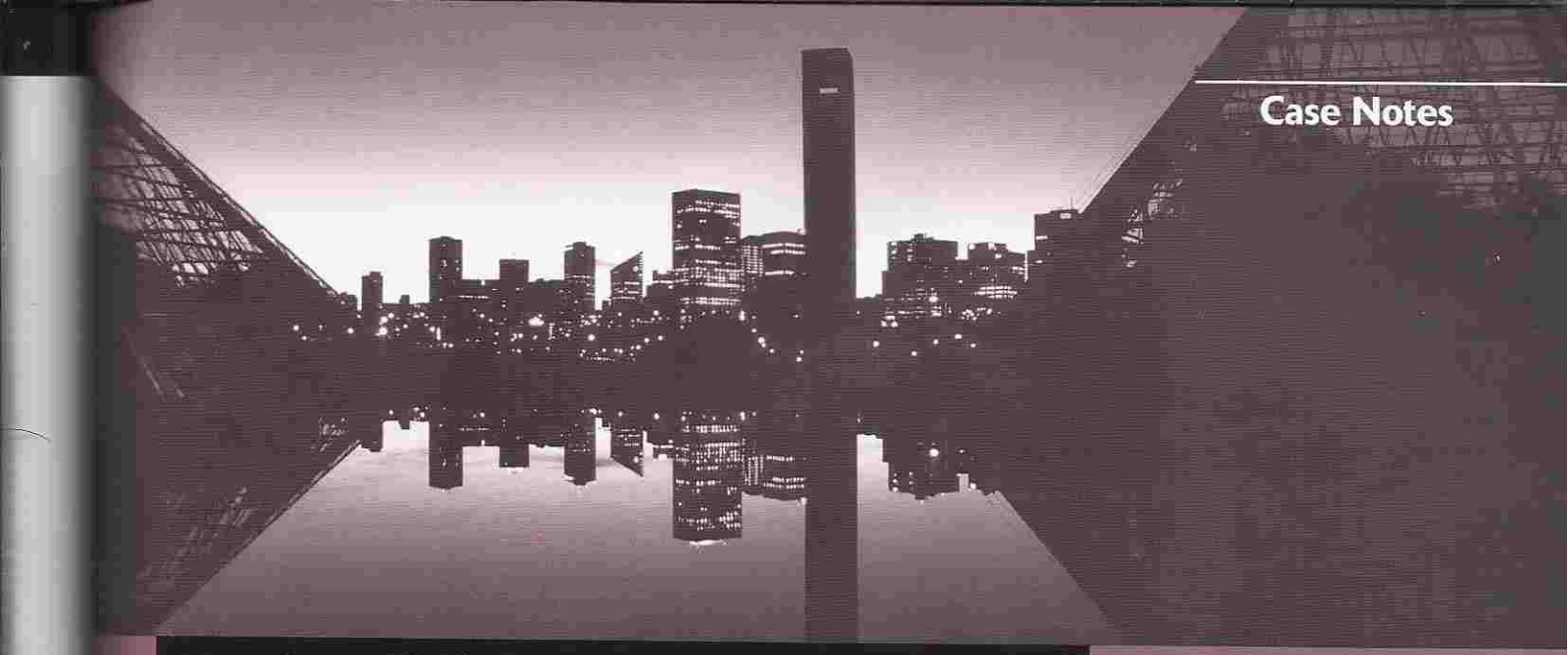
THE TAXPAYER WAS A MALAYSIAN CITIZEN EMPLOYED BY A MALAYSIAN COMPANY. IN 1997, HE WAS TAX RESIDENT IN MALAYSIA WITHIN THE MEANING OF THE *INCOME TAX ACT 1967* ("THE ACT"). HOWEVER, AS PART OF HIS EMPLOYMENT, FOR 302 DAYS OF THAT YEAR, HE PERFORMED OVERSEAS DUTIES IN THE USA. THE TAXPAYER'S COMPANY CONTINUED TO PAY HIS WAGES AND BONUSES INTO HIS PERSONAL BANK ACCOUNT IN MALAYSIA. THE TAXPAYER'S INCOME WAS SUBJECTED TO DOUBLE TAXATION IN MALAYSIA AND THE USA.

On this account, the taxpayer argued that the provision on unilateral tax credit states "income from an employment exercised outside Malaysia" referred to income in respect of an employment pursuant to which the employee performs duties outside Malaysia. As such, the taxpayer claimed unilateral tax credit for monies which he had paid as USA Federal Income Tax. However, the D.G. of I.R. contended otherwise and restricted the said provision to foreign income only, and since the taxpayer's income was banked into his Malaysian account it could not constitute foreign income, thus disentitling the taxpayer to the credit.

The taxpayer's appeal to the Special Commissioners of Income Tax was allowed and they found that the provision was specific to employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax. As such, the taxpayer was entitled to unilateral tax credit.

Editorial Note : The D.G. of I.R. has lodged an appeal to the High Court.

LCC v. Ketua Pengarah Hasil Dalam Negeri.
Special Commissioners of Income Tax.
Rayuan No. PKCP (R) 86/99
(2002) MSTC 3,381



Deductibility of Guarantee Fee
The Case of FR Sdn Bhd

Issue
The issue in this case was whether the payments made by FR Sdn Bhd (FR) for the **use of the bank guarantee facility** were wholly and exclusively incurred in the production of gross income under sec. 33 of the *Income Tax Act 1967* (the Act).

Facts
FR carries on business of an investment holding company.

In furtherance of a privatisation exercise, FR signed a sale and purchase agreement to buy a large block of shares and warrants in a public listed company.

A precondition for the purchase of the shares and warrants was that an irrevocable bank guarantee was to be given to the vendor until such time as the full consideration was paid. It was to be returned to FR upon full payment of the purchase price. The shares and warrants were used as collateral for the bank guarantee.

In consideration of the bank guarantee, FR paid commission to the bank, quarterly at the rate of 1.2 % per annum for the use of the facility.

The full settlement of the purchase price was to be made within twelve months from the date of completion of the sale and purchase agreement. At the end of the period of twelve months due to the economic situation, the value of the shares depreciated and FR was given an additional twelve months to make full settlement. It has come to my knowledge that subsequently the deal was called off.

FR also paid extension fees amounting to almost a million ringgit to extend the use of the bank guarantee facility for one year.

After the extended 12 months period, the bank guarantee was surrendered back to the Bank and FR paid interest to the Vendor on the unpaid balance.

The title to the shares and warrants was transferred to FR upon the issuance of the irrevocable bank guarantee and FR received the dividends declared in 1997 and 1998.

For year of assessment 1997 and year of assessment 1998 FR sought to deduct the payments made as commission and the additional fee incurred for extending the use of the guarantee as expenses wholly and exclusively incurred in the production of its business investment income.

Revenue's Stand
The Revenue disallowed the payments made as commission from being deducted from the taxpayer's dividend income on the grounds that it was an investment holding company and was not engaged in the business of buying and selling shares.

Arguments By FR – Revenue Payment
Payments for the use of the guarantee facility were **revenue expenses** wholly and exclusively incurred in the production of FR's income, being an expense analogous to an **operating cost** or the **cost of maintaining its business** as an investment company.

Alternatively and inter alia, if there is a reasonable doubt as to whether the business expense is of a revenue or capital nature, in law the approach should be to adopt a **practical business approach** and to **regard it as wholly and exclusively incurred in the production of business income**.

Arguments By Revenue – Capital Payment
The payments for the use of the guarantee facility were **not wholly and exclusively incurred in the production of income** and therefore not deductible under sec. 33(1) of the *Income Tax Act* and prohibited by sec. 39(1)(c) of the Act.

The Hearing before the Special Commissioners

FR being dissatisfied with the Revenue's decision lodged a case with the Special Commissioners.

Arguments raised by FR

1. **Payment of interest on loan and that the bank guarantee is in lieu of a loan**

   The consideration for the **purchase of the shares and warrants** was to be differentiated from the consideration for the **use of the bank guarantee facility**.

   FR is an **investment holding company** carrying on the business of an investment holding company. Its business income is mainly the dividends received from the shares.

   The quarterly payments made by FR for the **use of the bank guarantee facility** was for the purpose of enabling FR to carry on business and therefore it constituted FR's business expense. These payments were made so that FR **could continue to earn its business income**.

   Payment for the use of the bank guarantee facility represented the **cost of generating** the dividend income of FR.

   The payment of the bank guarantee commission was akin to **payment of interest on loan and the bank guarantee was in lieu of a loan**. The payment should therefore be deductible under sec. 33(1)(a) of the Act.

2. **Ambiguity** – Alternatively, if the Special Commissioners were uncertain whether the bank guarantee commission/ fee was revenue or capital in nature, then the benefit of the doubt or ambiguity should be resolved in favour of FR.

3. **Conclusion** – The payment made by FR was therefore wholly and exclusively incurred in the production of FR's gross income in accordance with sec. 33(1) of the Act.

Revenue's Argument

The payments by FR for the use of the bank guarantee facility were not deductible pursuant to sec. 39(1)(c) of the Act i.e. they were **capital in nature**.

The purpose of the bank guarantee facility was to **guarantee payment** for the purchase of the shares and warrants.

The payments for the bank guarantee facility were **not the purchase price** of the shares and warrants.

The payments were incurred for the **purpose of acquiring assets of a capital nature** – see the case of *KPHDN v. Seabanc Kredit SB*[1].

FR had yet to pay the Vendor for the shares and warrants it purchased.

FR had **not acquired any loan for payment** of the shares and warrants.

Findings of the Special Commissioners [2]

The Special Commissioners found as a fact that the purpose of the bank guarantee facility was to **enable FR to acquire** the shares and warrants which constituted the capital assets of FR and held therefore that the bank commission paid by FR **represented the cost of acquiring those assets.**

The bank guarantee also ensured the full settlement of the purchase price of the shares and warrants by FR within the stipulated period agreed, upon the receipt of the bank guarantee facility by the Vendor.

The bank guarantee in this case was a **prerequisite to the acquisition** of the shares and warrants, which produced assessable income in the form of dividends. Hence the bank guarantee fees were **capital in nature**.

The purpose of the bank guarantee facility was to enable FR to acquire the shares and warrants which constituted the capital assets of FR by ensuring settlement of the purchase price of the shares and warrants by FR within the stipulated period. The shares and warrants were transferred to FR upon the receipt of the bank guarantee facility. Therefore the bank commission paid by FR represented the cost of acquiring those assets.

Reasoning of the Special Commissioners

1. **In The Production of Gross Income**
   Upon examination of the facts, the Special Commissioners found that the use of the bank guarantee facility was:

   a) an outgoing and an expense;
   b) wholly and exclusively;
   c) incurred during that period

   however, it was **not incurred in the production of gross income** of FR.

   Since the fourth element was not satisfied the Special Commissioners found that the payment for the use of the bank guarantee facility was not an allowable deduction under sec. 33(1) of the Act.

2. **Recurring**
   FR also submitted that the payment for the bank guarantee was a recurrent expense and as such it further supported its submission that the expense was of a revenue nature.

   The Special Commissioners found that the argument could not be accepted as they had to look for the true nature of the transaction to ascertain whether the payments were really revenue payments for the use of an asset or instalments of a capital sum for the acquisition of an asset. The mere fact that the expense recurs does not necessarily mean that the payments were of a revenue nature. In this case though the payment recurred, the character of the payments had not changed.

1 (1998) MSTC 3,695

2 The decision of the Special Commissioners in Malaysia and Singapore tax cases and is cited as *FR Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (2002) MSTC 3,309.

3. **Bank Guarantee Not A Loan**
FR argued that the bank guarantee facility was akin to a loan. The payments of the bank commission was similar to payment of interest on a loan and as such the payments were deductible under sec. 33(1)(a) of the Act.

The life and limb of sec. 33(1)(a) of the Act is that what is deductible as interest paid upon any money borrowed must be employed in the production of gross income. Thus, before the interest paid under the section can qualify as deduction two conditions must be satisfied. They are —

i) a sum of money must have been borrowed; and

ii) it must have been employed in the production of gross income.

It is therefore clear that the borrowed money must have been used in producing income. In other words the borrowed money must have been the cause of the income.

The Special Commissioners held that the bank guarantee facility was only an undertaking given to the Vendor by the bank so as to ensure that FR would make payment to the Vendor for the full purchase price of the shares and warrants. Upon full settlement of the purchase price the Vendor was to return the bank guarantee to FR. FR had not taken a loan for the full settlement of the purchase price of the shares and warrants. A standby bank loan of RM250 million made available was never drawn down. The bank guarantee was not used to settle the full purchase price.

High Court

The High Court allowed the appeal by FR and held that the guarantee fee was tax deductible. The written judgement of the High Court has not been issued as yet.

Note:
1. *At the High Court FR was represented by Dr. Arjunan Subramaniam of Messrs. Geraldine Yeoh, Arjunan & Associates.*
2. *The Revenue has lodged an appeal.*

Packing materials – deductible expense for retailers
The Case of ZMSB

Issue

The cost of canvas bags provided to customers who purchase goods of a certain value are deductible and considered not entertainment expenditure under sec. 39(1)(I) of the *Income Tax Act 1967*.

In the recent case of ZMSB, the issue for the determination of the Special Commissioners was whether the expenses incurred by the taxpayer for the provision of canvas bags were expenses wholly and exclusively incurred in its business pursuant to sec. 33(1) of the *Income Tax Act 1967* (The Act) or whether they were expenses incurred in the provision of entertainment and should be disallowed under sec. 39(1)(I) of the Act. Both the taxpayer and the Revenue agreed that if not for the prohibition contained in sec. 39(1)(I), the expenditure would be allowed.

Facts

The taxpayer carries on the business of manufacturing and selling pewter wares. It provides canvas bags which bear the name of the taxpayer and some other words having the effect of promoting the tourist industry of Malaysia. The bags are provided to customers who purchase goods of RM400 and more. If the purchase is less than RM400, then a charge of RM18 per bag is levied.

In the account books of the taxpayer, the expenditures were described as "promotional gifts" in some instances and in other instances as "packing expenditures".

The Revenue disallowed the expenditures on the basis that they were entertainment and therefore caught by the prohibition contained in sec. 39(1)(I) of the Act. The Revenue relied on the letters of the taxpayer's Tax Agents as well as the accounts of the taxpayer which described the expenditures as promotional gifts.

Hearing before the Special Commissioners

At the hearing, the taxpayer called its Administration Manager to give evidence. The witness explained that the Tax Agent was wrong in describing the expenditures as promotional gifts. Similarly, the classification in the accounts was also erroneous. He then testified that the bags were provided for the carrying of pewter wares and the true nature of the expenditures was packing material.

Counsel for the taxpayer argued that unlike situations where gifts were handed out after a sale or as an incentive to induce sales, the bags have a direct connection and utility in the carrying on of the taxpayer's business. The Special Commissioners held that no evidential value can be attached to the letter from the Tax Agent and they accepted the uncontradicted evidence of witness for the taxpayer. They accordingly allowed the appeal holding that sec. 39(1)(I) of the Act had no application.

Note:
1. *This case concerned years of assessment 1989 to 1984 i.e. before the introduction of proviso (vi) to sec. 39(1)(I).*
2. *The taxpayer was represented by Messrs Azman Davidson & Co.*
3. *No appeal has been lodged by the Revenue.*

A Student's Guide to Tax

Employment Income

by Siva Subramaniam Nair

In the last article, we meandered through the journey of ascertaining the chargeable income of a taxable person and were also introduced to the different classes of taxable income in Malaysia. Next, we shall analyse the different types of income, by understanding the rules and principles set out in the *Income Tax Act 1967* (as amended) relating to determining the gross, adjusted and statutory income from each of these types of income. We shall start with employment income, the discussion of which will also be covered in the next article.

Employment Income

Employment income is chargeable to tax under sec. 4(b) of the *Income Tax Act 1967*. The definitions of employment, employee and employer are given below.

Employment is defined as:

a. employment in which the relationship of master and servant subsists.
b. any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable.

Employer is defined as:

a. where the relationship of master and servant subsists, the master;
b. where that relationship does not subsist, the person who pays or is responsible for paying any remuneration to the employee who has the employment, notwithstanding that person and the employee may be the same person acting in different capacities.

Employee is defined as:

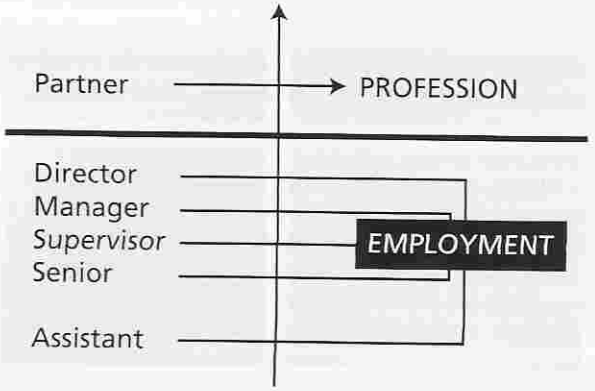
a. where the relationship of master and servant subsists, the servant;
b. where that relationship does not subsist, the holder of the appointment or office which constitutes the employment.

Therefore, in employment there is a "master" (boss) who directs and controls the activities and a "servant" (subordinate) who obeys and complies. However the absence of the master-servant relationship can still result in an employment i.e. it covers situations where there is little or no control by the employer over the manner in which the employee carries out his task. Sometimes, the immediate superior is unable to control the activities of his subordinate due to the fact that the latter has a specific skill or capability, which the former does not. For example, in a small company the GM or CEO may be a non-financial person, but the accountant might still be reporting to him (due to the corporate hierarchy). Nevertheless the accountant would still be exercising an employment, since he occupies an appointment/office for which remuneration is payable. Similarly, a directorship in a company would constitute an office.

In tax, income derived from the exercise of a profession constitutes business income under sec. 4(a) because the definition of the word business encompasses the word profession. Legally speaking, a profession entails a contract for services and an employment involves a contract of services. In exercising a profession a person is self-employed i.e. he is his own boss. At any one time, he probably has a number of clients or business engagements. In an employment, generally a person is appointed to a position and continues in office until he resigns, retires, is retrenched, etc.

A distinction has to be made between employment and profession. Persons employed as accountants, doctors, engineers, etc. are professionals but need not necessarily be carrying on a business. However, this indicator has to be used with caution. For example, an accountant with the relevat qualification and having the necessary working experience, can either work as an accountant in a company or organisation, whereby he will be having an employment or alternatively, he can open his own firm, in which case he would be exercising a profession, but in both cases he is a PROFESSIONAL ACCOUNTANT!!

A good example would be an individual who joins an accounting firm. Throughout his career as an assistant, senior, supervisor, manager and director, he would be exercising an employment, but the moment he crosses the threshold and is admitted as a partner of the firm, he would then be exercising a profession.



To provide you with a clear understanding of the differences between an employment and a profession, I will take you through two past year questions set for the Taxation IV paper.

MIT TAXATION IV DEC 1996 Q2(a)

With reference to the provisions in the *Income Tax Act, 1967*, and cases, state and explain the principles applicable to determine whether a gain or profit received by an individual is assessable as income from a profession or an employment.

MIT TAXATION IV DEC 1998 Q1(a)

A professional entertainer engaged by a hotel to provide floorshows was held by the Courts to be employed under a contract of service, because her performances were an integral part of the business operations of the hotel (*FY v. DGIR* [1988] 1 MSTC 288). Another professional entertainer carrying out various stage, radio and recording engagements in a number of countries was held to be exercising a profession, not a series of (or concurrent) employments (*Davies v. Braithwaite* 19 TC 198).

Required:
With reference to the above-mentioned cases and/or other relevant case law, discuss the legal distinction between a contract of service and a contract for services and its general significance under the *Income Tax Act, 1967*.

TAX CASES

Since there are few Malaysian cases, reliance on foreign cases may be needed. However it is pertinent to note from the outset that the system governing taxation of employment income is peculiarly Malaysian and reference should be made to established foreign precedents and or legal interpretation of the various statutory provisions only if the statutory provisions are in pari materia or they discuss a general concept.

Some tax cases, which have discussed the distinction between employment and profession include the following:

Davies v. Braithwaite

- Mrs. Braithwaite's activities included
  - stage, film, radio and gramophone recording
  - performances in the UK and
  - stage performances in US.
- She claimed to hold a series of separate employments.
- HELD: she was carrying on a profession.

FY v. DGIR

- A professional public entertainer,
- who contracted with a hotel to provide floorshows,
  - she was paid a fixed remuneration,
  - was not allowed to contract with other parties and
  - the duration of her performance was controlled.
- HELD: employed under a contract of service because her performance was integrated with the hotel's business.

Re A Taxpayer

- The taxpayer was employed as a legal assistant in a law firm and subsequently was admitted to the partnership.
- HELD: his income was assessed as employment income up to his admittance to the partnership but was subsequently assessed as business income.

Mitchell & Edon v. Ross

- A radiologist had a private practice but also held a part-time National Health appointment
- HELD: he was **NOT** engaged in a single activity i.e. his activities were those of:
  - a radiologist holding an employment; and
  - a radiologist engaging in private practice;
  - a person can have an employment and a profession at one and the same time.

IRC v. Brander & Cruickshank

- A firm of lawyers acted as secretaries and registrars for a number of companies.
- For two of the companies they received a terminal payment.
- HELD: where a person holds himself out as a professional registrar/secretary, that person has a business source.

X, Trustee of the Estate of Y (Deceased) v. Comptroller of Income Tax

- A trustee received remuneration of 5% of gross asset value.
- He argued that they were gifts under a will and not employment income because there was no master-servant relationship.
- HELD: even in the absence of a master-servant relationship, the trustee can be viewed as holding an office for which he is remunerated. This is therefore taxable as employment income.

Market Investigations Ltd v. Minister of Social Security

- A was a part-time interviewee.
- She was free to choose to accept or reject the jobs offered, and she was free to work whenever she choose to.
- HELD: she was exercising an employment.
  - No exhaustive list has or perhaps can be compiled of the considerations to be taken into account in determining whether a person is employed or self-employed.
  - Fundamental test – is the person who has engaged himself to perform these services performing them as a person in business on his own account? If
    - YES – contract for services i.e. profession;
    - NO – contract of services i.e. employment.
  - Control has to be considered although it can no longer be regarded as the sole determining factor. Other factors are also relevant (discussed later in the article).

Professional Examinations

Be Among The Best

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

One avenue of producing qualified tax personnel is through professional examinations. As such, MIT conducted its first professional examination in December 1995. To date, the MIT has successfully conducted seven examinations. The professional examination also seeks to overcome the present shortage of qualified tax practitioners in the country.

How to Register

You can contact the Institute's Secretariat for a copy of the Student's Guide. The Guide contains general information on the examinations. Interested applicants must submit a set of registration forms as well as the necessary documents to the Secretariat.

Entrance Requirements

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

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

c) Full Members of local and overseas accounting bodies

Exemption

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

Malaysian Institute Of Taxation

Exemption Fees

Foundation	RM 50.00
Intermediate	RM 60.00
Final	RM 70.00

Examination Fees

Foundation	RM 50.00
Intermediate	RM 60.00
Final	RM 70.00

Examination Structure

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

Foundation Level

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

Intermediate Level

- Taxation II
- Taxation III
- Company & Business Law

Final Level

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

MIT Professional Examinations

CALENDAR FOR YEAR 2002

January 1	Annual Subscription for 2002 payable.
February	Release of the 2001 Examinations results. Students are notified by post.
March 31	Last date for payment of annual subscription fee for the year 2002 without penalty (RM50).
April 30	Last date for payment of annual subscription for year 2002 with penalty (RM100).
April 30	Question & Answer Booklets available for sale.
September 1	Closing date for registration of new students who wish to sit for the December 2002 examination sitting.
September 15	Examination Entry Forms will be posted to all registered students.
October 15	Closing date for submission of Examinations Entry Forms. Students have to return the Examinations Entry Form together with the relevant payments to the Examinations Department.
November 30	Despatch of Examinations Notification Letter.
December	MIT Examinations.

YGL v. DGIR

- A company secretary;
- Acted for several companies.
- HELD: The company secretary was exercising a profession for the following reasons:
  - engaged by many companies;
  - paid professional fees and not salaries/wages;
  - carrying on business "on her own account";
  - employed staff and paid them salaries.

S Sdn Bhd v. DGIR

- A director (also the major shareholder) was appointed as a consultant by a medical clinic.
- HELD: His appointment was an employment and
  - a contract of (and not for) services;
  - with fixed consultation charges of RM3,000 per month + 40% of net profits restricted to RM100,000 per annum.

The various features (persuasive but not necessarily conclusive) of an employment has been deliberated upon in many tax cases, some of which are discussed below.

1. **Master-servant relationship**
   - Selection: Able to select your workers.
   - Remuneration: Even if not received from the employer but from third parties (e.g. tips).
   - Dismissal/suspension
     - Able to terminate a person's services.
2. **Control and Superintendence (this factor has since lost favour)**
   - Able to tell the employee what he must do and how he must do it.
   - Cannot decline work given by the employer.
3. **Freedom to contract with other parties**
   - Generally employees are not allowed to "moonlight" unless specific permission is obtained from their employer. A self-employed person handles a series of engagements simultaneously.
4. **Sharing of profits and losses**
   - Irrespective of whether their employer is making profits or losses, an employee would expect to get his salary, but in the case of a self-employed person, he celebrates with prosperity but also weeps with business deterioration, i.e. he bears all the financial risks.
5. **Tools and equipment**
   - Employees are provided with all the necessary equipment, tools and accessories to perform their tasks (e.g. calculators for accountants) whereas a self-employed person would have to use his own tools.
6. **Defined hours of work**
   - An employee has to adhere to the working hours stipulated in the employment contract whereas a self employed person can arrange his activities to suit his convenience.
7. **Contribution to EPF, SOCSO, medical, dental benefits and STD deductions**
   - Applicable only to employees.
8. **Affiliation to the Organisation**
   - an employee is part of the organisation "and his work is done as an integral part of the business" whereas for a self employed person, "his work although done for the business, is not integrated into it but only accessory to it."

So, we have an idea now as to how to distinguish between the exercise of an employment and a profession, but what is the significance of this distinction?

SIGNIFICANCE OF DISTINGUISHING BETWEEN EMPLOYMENT AND PROFESSION

FACTORS	EMPLOYMENT	PROFESSION
Basis of assessment	Basis year	Financial year
Assessment of income	Receipt basis	Accrual basis
Deductions	Fewer deductions	More deductions
60 day exemption rule	Exemption available	Not applicable
Compensation for loss of employment	Taxable under sec. 13(1)(e) and eligible for maybe an exemption	Not taxable
Capital allowances	No claim for capital allowances	Can claim capital allowances
Losses - If allowable expenses exceed gross income	The excess cannot be utilised as current year losses, nor be carried forward	The excess becomes current year losses and if unutilised, can be carried forward

DEEMED DERIVATION OF EMPLOYMENT INCOME FROM MALAYSIA (SECTION 13(2))

When we were discussing the scope of taxation in Malaysia, we recognised the existence of deeming provisions in the *Income Tax Act, 1967*. Deemed means something which is not the thing that it is supposed to be but nevertheless, for the purpose of the Act, is deemed to be that thing. In the case of employment, there are circumstances where the employment income is physically derived outside Malaysia but is deemed to be derived from Malaysia. Therefore, it would be taxable even for non-residents because, since it is deemed to be derived from Malaysia, the question of whether it is received in Malaysia or not does not arise. These situations are set out in detail in sec. 13(2) and (3) of the Act as follows:

1. For a period during which employment is exercised in Malaysia
   - place of discharge of duties is Malaysia;
   - the source of employment/place of contract of services/ location of employer is irrelevant.
2. For any period of leave attributable to the exercise of an employment in Malaysia
   - remuneration received during public holidays/annual leave etc.
3. For any period during which the employee performs outside Malaysia duties incidental to the exercise of the employment in Malaysia

   GBH v. KPHDN
   - A regional representative employed by a HK company;
   - he resided in Malaysia on a work pass and had a correspondence address in Malaysia;
   - he travelled to other countries to perform duties;
   - his reports were compiled and completed in Malaysia.
   - his periods of leave were spent in the US;
   - **HELD: Income is taxable in Malaysia because**
     a) his exercise of employment was in Malaysia;
     b) the period of leave was attributable to the exercise of employment in Malaysia;
     c) the duties performed outside Malaysia were incidental to the exercise of an employment in Malaysia.
4. For any period during which a person is a director of a company and that company is resident in Malaysia for the basis year for a year of assessment
   - directors fees paid to directors of a Malaysian resident company, who are exercising their duties outside Malaysia;
   - holding the position of director would suffice — no requirement to exercise the functions of a director.
5. For any period during which employment is exercised aboard a ship or aircraft used in a business operated by a Malaysian resident for the basis year for a year of assessment
   - pilot/steward flying on a MAS aeroplane on overseas routes;
   - captain/sailor on MISC ships sailing between destinations outside Malaysia;
   - however, under para. 34 sch. 6, income of an individual derived from exercising employment aboard a Malaysian ship is exempt. A Malaysian ship is defined as a sea-going ship; registered under the *Malaysian Shipping Ordinance 1952*; but excludes the following:

– ferry	– supply vessel	– dredger
– barge	– crew boat	– lighter
– tugboat	– fishing boat	– other similar vessel

EMPLOYMENT IN PUBLIC SERVICES/STATUTORY AUTHORITY (SECTION 13(3))

Gross income from an employment in the public services or the service of a statutory authority (embassies, high commissions, tourists promotion centres, etc.)

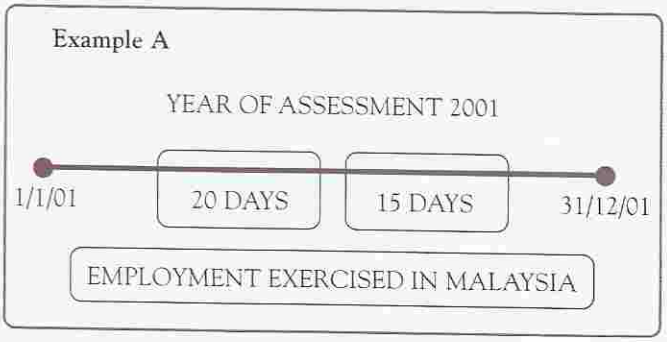
- for a period during which employment is exercised outside Malaysia;
- for any period of leave attributable to the exercise of an employment outside Malaysia.

EXEMPTION FOR SHORT-TERM EMPLOYMENT (60 DAY RULE) – PARAGRAPHS 21 AND 22, SCHEDULE 6

Income derived by a non-resident individual from an employment exercised in Malaysia is exempt from tax under the following situations:

- the period or periods do not exceed 60 days in that basis year.

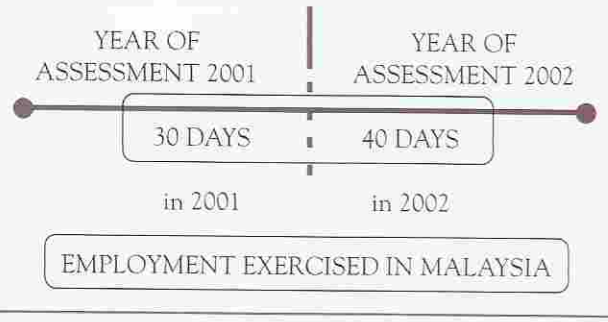
Example A



The employment income received will be exempt since employment is exercised for less than 60 days.

- the period does not exceed a continuous period of 60 days which overlaps two successive basis years.

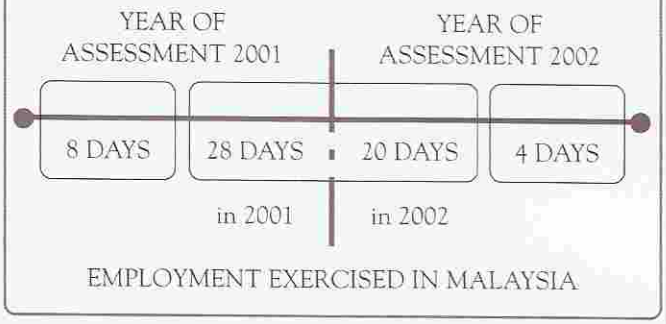
Example B



The employment income received will not be exempt because although the employment is exercised for less than 60 days in each year of assessment, it is a continuous period straddling two years and the total period of exercising an employment is 70 days i.e. more than 60 days

- the continuous period above together with another period or periods do not exceed 60 days.

Example C



The employment income received will be exempt since the continuous period straddling the two years plus other periods (when an employment was exercised) in both the years total 60 days.

- This exemption does not apply to a public entertainer who is defined as
  - any professional entertainer, artiste, athlete or an individual who entertains whether in public or private for profit on stage, radio or television, at a stadium or sports ground or otherwise.

  UNLESS they are paid out of public funds of a foreign government.
- 60 day exemption rule does not extend to directors of Malaysian resident companies.

The Author: Siva Nair holds an Honours Degree in Accounting from University of Malaya and an MBA (Acct). He is a Chartered Accountant (Malaysia) and a fellow of the 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, MACPA, AIA and also tutoring undergraduates undertaking Accountancy Degree programmes in both local and foreign universities.

ERRATA in Categories & Classes of Income Article

1. The adjustments between statutory income and aggregate income, erroneously displayed in the last article, is corrected below:

STATUTORY INCOME
(now add up all business sources together)

Less: Brought forward business losses [Section 43(2)]

Add: Statutory income from non-business sources

Add: Recovered abortive prospecting expenditure/recovered approved agricultural expenditure

AGGREGATE INCOME

2. The trading business in the Practical Exercise had a claim for capital allowances of RM5,500 and RM3,000 for the years of assessment 2000 and 2001 respectively.

We apologise for the above errors.

Solution for Practical Exercise on
Categories & Classes of Income

Gemini Sdn Bhd
Tax Computation
Year of Assessment 2000
Basis period: 1/7/99– 30/6/00

Mining Business	RM	RM	RM
Adjusted Income		NIL	
Add: Balancing Charge		5,000	
		5,000	
Less: Capital allowances		4,000	
Statutory income			1,000
Trading Business			
Gross Income		35,000	
Less: Expenses	34,000		
less: depreciation	(3,500)		
approved donation	(1,000)	29,500	
Adjusted Income		5,500	
Less: Capital allowances		8,000	
[Unabsorbed capital allowances carried forward of RM2,500]			
Statutory income			NIL
Total Statutory income from business sources			1,000
Less: Brought forward business losses			(2,200)
			NIL
[Business loss carried forward of RM1,200]			
Add: Non business Income			
- Adjusted rental income			4,000
- Interest income			3,200
- Dividend income			1,900
Aggregate income			9,100
Less: Current year business loss			(10,000)
Business loss carried forward		900	
Total income / Chargeable income			NIL
Abortive Prospecting Expenditure carried forward			10,000

Gemini Sdn Bhd
Tax Computation
Year of Assessment 2001
Basis period: 1/7/00– 30/6/01

Mining Business	RM	RM	RM
Adjusted Income		NIL	
Capital allowances carried forward		1,000	
Statutory income			NIL
Trading Business			
Net profit		3,000	
Add: Non-allowable expenses			
- depreciation		4,500	
- approved donation		500	
Adjusted Income		8,000	
Less: Capital allowances			
- brought forward		(2,500)	
- current year		(3,000)	
Statutory income			2,500
Total Statutory income from business sources			2,500
Less: Brought forward business losses			(2,100)
			400
Add: Non business Income			
- Adjusted rental income			6,000
- Interest income			4,150
			10,550
Add: Recovered Abortive Prospecting Expenditure			20,000
Aggregate income			30,550
Less: Current year business loss			(5,000)
Abortive Prospecting Expenditure			
- brought forward			(10,000)
- current year			(12,500)
Approved donation			(500)
Total income / Chargeable income			2,550

Subsidiary Legislation

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 376/2001	Service Tax (Amendment) (No.7) Regulations 2001	1 January 2002	**Taxable persons under the *Service Tax Regulations* 1975:** 1. Persons operating one or more restaurants, bars, snack bars, coffee-houses or places providing food, drinks or tobacco products, whether eat in or take-away, with an annual sales turnover, combined or singly, of more than RM300,000 of any one or more taxable services located in a hotel having 25 rooms or less; 2. Persons operating one or more restaurants, bars, snack bars, coffee-houses or places providing food, drinks or tobacco products, whether eat in or take-away, with an annual sales turnover, combined or singly, of more than RM300,000 of any one or more taxable services located outside a hotel excluding canteens in educational or religious institutions; 3. Persons operating one or more private clubs and having a total annual sales, combined or singly, of more than RM300,000 of any one or more taxable services mentioned within the Group E of the Second Schedule of the *Service Tax Regulations*; and 4. Persons (including that in (3) above) other than taxable persons in Groups A and E operating any golf course or golf driving range. **Taxable service *Service Tax Regulations* 1975:** 1. Provision of food, drinks or tobacco products in one or more restaurants, bars, snack bars, coffee-houses or places, whether eat in or take-away, with an annual sales turnover, combined or singly, of more than RM300,000. **Taxable persons under Group G of the *Service Tax Regulations* 1975:** 1. Any person who is a **public accountant** registered under the relevant laws for the time being in force having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group; 2. Any person who is an **advocate and solicitor** registered under the relevant laws for the time being in force having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group; 3. Any person who is a **professional engineer** registered under the relevant laws for the time being in force having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group; 4. Any person who is an **architect** registered under the relevant laws for the time being in force having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group; 5. Any person who is a **licensed or registered surveyors** including **registered valuers, appraisers or estate agents** licensed or registered under the relevant laws for the time being in force having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group;

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 376/2001 (cont'd)	Service Tax (Amendment) (No.7) Regulations 2001	1 January 2002	6. Any person who provides **consultancy services** having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group excluding approved companies with status or definitions as research and development companies and contract research and development companies under sec. 2 of the *Promotion of Investments Act 1986* and approved institute under sec. 34B of the *Income Tax Act 1967*; 7. Any person who provides **management services** having a total annual sales turnover, combined or singly, of more than RM150,000 of any one or more taxable services mentioned in this Group; and 8. Any person, government agency or semi-government agency who provides **advertising services** having a total annual sales turnover, combined or singly, of more than RM300,000 of any one or more taxable services mentioned in this Group
P.U. (A) 2/2002	Income Tax (Returns by Employer) Order 2002	Y/A 1999 until the Y/A 2003	***Employer to prepare and deliver return*** 1. Every employer shall prepare and deliver to the Director General within thirty days immediately following the date of the publication of this Order in the Gazette, a return in the prescribed form containing the names and places of residence of the following classes or persons who were employed by him for the year 2001 (whether or not for full year) and the full amount of the gross income falling within sec. 13 of the Act paid, payable or provided by him or on his behalf in the year 2001 to those persons in respect of their employment: a) every person (including a widow or married woman) whose gross income exceeds RM22,000 per annum; and b) notwithstanding paragraph (a), every person employed by him for any period in the year of 2001 who was also engaged for any period in the year 2001 in some other gainful occupation (eg. company director who was at any time in the year 2001 also engaged in business on his own account, or who for any period in the year 2001 held other directorships).
P.U. (A) 4/2002	Income Tax (Exemption) (No.2) Order 2002		***Exemption*** 1. The Minister exempts Edward Tiger Woods Corporation from the payment of income tax in respect of appearance fees received by the Corporation for the advertisement and promotion of the World Cup Golf Tournament 1999 held on 18 November 1999 until 21 November 1999 at the Mines Resort Golf and Country Club.
P.U. (A) 11/2002	Income Tax (Exemption) (No.3) Order 2002		***Exemption*** The Minister exempts non-resident individuals who were in Malaysia for their performance or work in connection with the Deep Purple Concert at the Kuala Lumpur International Airport in conjunction with the Formula 1 event held on 16 March 2001 until 19 March 2001, from the payment of income tax in respect of the income received by them from the performance or work.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 12/2002	Income Tax (Exemption) (No.2) Order 2002	1 April 1999	***Exemption*** 1. All instruments executed pursuant to a scheme of merger of insurance companies which is completed on or between 1 April 1999 until 31 December 2001 and approved by the Central Bank of Malaysia ("CBM")are exempted from stamp duty. 2. The completion date of the merger scheme is on the date that the CBM receives the sale and purchase agreement or the conditional sale and purchase agreement signed by the relevant insurance company for the purpose of the merger.
P.U. (A) 25/2002	Income Tax (Exemption) (No. 4) Order 2002	Y/A 2002	***Exemption*** 1. The Minister exempts the Johore State Islamic Economic Development Corporation from the payment of income tax in respect of the statutory income in relation to the sources of income specified in the Schedule from the year of assessment 2002 and subsequent years of assessment. 2. Nothing stated in (1) above shall absolve or be deemed to have absolved the Johore State Islamic Economic Development Corporation 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. ***Schedule*** a) Allocations given by the Federal/State Government in the form of grants to finance operating expenditure; b) Allocations given by the Federal/State Government whether in the form of grants or loans to finance development expenditure; and c) Any donation or contribution received.
P.U. (A) 42	Income Tax (Exemption) (No. 6) Order 2002	Y/A 2002	***Exemption*** 1. The Minister exempts the Jemaah Pemasaran Lada Hitam from the payment of income tax in respect of the statutory income in relation to the sources of income specified in the Schedule from the year of assessment 2002 and subsequent years of assessment. 2. Nothing stated in (1) above shall absolve or be deemed to have absolved the Jemaah Pemasaran Lada Hitam 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. ***Schedule*** d) Allocations given by the Federal/State Government in the form of grants to finance operating expenditure;2002Regulatory Watch e) Allocations given by the Federal/State Government whether in the form of grants or loans to finance development expenditure; and f) Any donation or contribution received.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 55/2002	Income Tax (Exemption) (No. 7) Order 2002	Y/A 2002	***Exemption*** 1. The Minister exempts a trade association resident in Malaysia from the payment of income tax in respect of the statutory income from member's subscription fees derived in the basis period for a year of assessment which shall be determined in accordance with the formula – $A \times \frac{B}{C}$ Where A is the statutory income from the business of the trade association in the basis period; B is the gross member's subscription fees in the basis period; and C is the gross income from the business of the trade association in the basis period. ***Non-application*** 2. The exemption under (1) above shall not apply to a trade association for the year of assessment in which the trade association has claimed an exemption under the *Income Tax (No.8) Order 2002* [P.U. (A) 56/2002].
P.U. (A) 56/2002	Income Tax (Exemption) (No. 8) Order 2002	Y/A 1996	***Exemption*** 1. The Minister exempts from tax, in the manner prescribed in para. (2), income received by a trade association resident in Malaysia. ***Exemption from tax up to fifty percent*** 2. a) Income received by a trade association established before 1 January 1996 is exempted from tax up to an amount equivalent to fifty percent of the statutory income for each year of assessment from the year of assessment 1996 until the year of assessment 2000 (on preceding year basis). b) Income received by a trade association established on or after 1 January 1996 until 31 December 2001 is exempted from tax up to an amount equivalent to fifty percent of the statutory income for a maximum period of 5 years of assessment from the year of assessment in the basis period in which the trade association was established. ***Non-Application*** 3. The exemption under paragraph (2) above shall not apply to a trade association where the trade association has claimed an exemption under the *Income Tax (Exemption) (No.7) Order 2002* [P.U. (A) 55/2002] for the year of assessment to which the trade association would otherwise be entitled under this Order.
P.U. (A) 57/2002	Income Tax (Exemption) (No.9) Order 2002	Y/A 2002	***Exemption*** *1. The Minister exempts a person resident in Malaysia from the payment of income tax in respect of income derived from the export of qualifying services specified in the Schedule (refer to* P.U. (A) 57 for details of the Schedule) *in the basis period for a year of assessment, in a manner and amount set out in para. (2).* 2. a) The amount of income referred to in para. (1) shall be equal to 50 per cent of the value of increased exports.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 57/2002 (cont'd)	Income Tax (Exemption) (No.9) Order 2002	Y/A 2002	b) Where an amount of income equivalent to 50 per cent of the value of increased exports has been determined for a year of assessment, so much of the statutory income of the business of that person for that year of assessment as is equal to that value of increased exports (or to the aggregate amount of any such value of increased export, as the case may be) but not exceeding 70 per cent of the statutory income shall be exempted from tax. ***Insufficiency of income*** 3. Where by reason of the restriction of 70 per cent of the statutory income or of an insufficiency or absence of statutory income from a business of the person for the basis period for a year of assessment, effect cannot be given or cannot be given in full to the amount of the determined value of increased exports to which the person is entitled under paragraph (2) for that year of assessment, then so much of that amount or the aggregate amount as cannot be given for that year shall be given to the person for the first subsequent year of assessment for the basis period for which there is statutory income from that business, and for subsequent years of assessment until the person has received the whole of that amount or the aggregate amount to which the person is so entitled. ***Non-application*** 4. This Order shall not apply to a person – a) for the period during which the person has been granted any incentives (except for deductions for promotion of exports) under the *Promotion of Investments Act 1986* [Act 327]; b) for the period during which the person has been granted investment allowance under sch. 7B *of the Income Tax Act 1967*; and c) for the period during which the person has been granted an exemption under para. 127(3)(b) *of the Income Tax Act 1967* in respect of an approved service project.
P.U. (A) 58/2002	Income Tax (Exemption) (No.10) Order 2002	Y/A 2002 to Y/A 2006	***Exemption*** 1. a) The Minister exempts a company resident in Malaysia, which is licensed under the *Tourism Industry Act 1992* to carry on a tour operating business, from the payment of tax in respect of the statutory income derived from domestic tours. b) The exemption in subparagraph (a) shall not apply if the total number of local tourists on domestic tours relating to that company is at least one thousand two hundred in the basis period for a year of assessment which is certified by a letter from the Ministry of Culture, Arts and Tourism.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 59/2002	Income Tax (Exemption) (No. 11) Order 2002	Y/A 2002 to Y/A 2006	***Exemption*** 1. a) The Minister exempts a company resident in Malaysia, which is licensed under the *Tourism Industry Act 1992* to carry on a tour operating business, from the payment of tax in respect of the statutory income derived from group inclusive tours (a tour package to or of Malaysia or any place within Malaysia undertaken by tourists from outside Malaysia, inclusive of transportation by air, land or sea and accommodation). b) The exemption in subparagraph (a) shall only apply if the total number of tourists outside Malaysia on group inclusive tours relating to that company is not less than five hundred in the basis period for a year of assessment which is certified by a letter from the Ministry of Culture, Arts and Tourism.
P.U. (A) 60/2002	Income Tax (Exemption) (No. 12) Order 2002	Y/A 2002	***Exemption*** 1. a) The Minister exempts a Malaysian International Trading Company (a company approved by the Malaysia External Trade Development Corporation ("METDC")) ("MITC") from the payment of income tax in respect of income derived from export sales in the basis period for a year of assessment, in the amount and manner set out in para. (2) subject to the conditions in para. (4). b) The exemption in subparagraph (a) shall be granted to the MITC for five consecutive years of assessment beginning from the year in which the company first qualified for the exemption. ***Amount of Income to be exempt*** 2. a) The amount of income referred to in para. 3 shall be equal to 10 per cent of the value of increased exports. b) Where an amount of income equivalent to 10 per cent of the value of increased exports has been determined for a year of assessment, so much of the statutory income of the business of the MITC for that year of assessment as is equal to that value of increased exports (or to the aggregate amount of any such value of increased export, as the case may be) but not exceeding 70 per cent of the statutory income shall be exempted from tax. ***Insufficiency of Income*** 3. Where by reason of the restriction of 70 per cent of the statutory income or of an insufficiency or absence of statutory income from a business of the MITC for the basis period for a year of assessment, effect cannot be given or cannot be given in full to the amount of the determined value of increased exports to which the MITC is entitled to under para. (2) for that year of assessment, then so much of that amount or the aggregate amount as cannot be given for that year shall be given to the MITC for the first subsequent year of assessment for the basis period for which there is statutory income from that business, and for subsequent years of assessment until the MITC has received the whole of that amount or the aggregate amount to which it is entitled.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 60/2002 (cont'd)	Income Tax (Exemption) (No. 12) Order 2002	Y/A 2002	***Conditions for exemption*** 4. To qualify for exemption under paragraph (1), the MITC shall obtain a letter from the METDC certifying that the following has been fulfilled– a) that the company is incorporated in Malaysia and at least 60 per cent of the issued share capital of the company is Malaysian owned; b) that the company has achieved annual sales of more than RM10 million; c) that not more than 20 per cent of the company's annual sales is derived from the trading of commodities; and d) that the company uses local services for the purposes of banking, finance and insurance and uses local ports and airports.
P.U. (A) 61/2002	Income Tax (Approved Agricultural Projects) Order 2002	Y/A 2002 to Y/A 2006	***Amendment*** The Order sets out a list of the approved agricultural projects, the species of crops relating to the approved agricultural project, their relevant stipulated periods and dates of commencement, and minimum hecterage.
P.U. (A) 62/2002	Income Tax (Deduction for Advertising Expenditure on Malaysian Brand Name Goods) Rules 2002	Y/A 2002 to Y/A 2006	***Allowable deduction*** 1. a) To ascertain the adjusted income of a company from its business for the basis period for the relevant year of assessment under the Income Tax Act, a company that satisfies the conditions below shall be allowed, as a deduction, any qualifying expenditure specified in the Rules incurred by the company in respect of Malaysian brand name goods. b) The deduction allowed hereunder shall be in addition to any deduction allowable under section 33 of the *Income Tax Act*. ***Qualification for Deduction*** 2. The company claiming deduction shall satisfy– a) the company is incorporated in Malaysia and at least 70 per centum of its issued share capital is Malaysian owned; b) the company is the registered proprietor of the Malaysian brand name used in the advertisement; c) the Malaysian brand name goods are of export quality; d) the expenditure incurred in advertising the Malaysian brand name goods must be incurred within Malaysia; e) the expenditure incurred on professional fees must be incurred within Malaysia; and f) the expenditure incurred in advertising the Malaysian brand name goods or on professional fees must be of a kind allowable under section 33 of the *Income Tax Act*.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 63/2002	Income Tax (Deduction for Cost of Acquisition of Proprietary Rights) Rules 2002	Y/A 2002 to Y/A 2006	***Deduction*** 1. a) To ascertain the adjusted income of a manufacturing company which has incurred costs of acquisition of proprietary rights in the basis period for a year of assessment, a deduction shall be allowed of an amount equal to one-fifth of the costs of acquisition of the proprietary rights for that year of assessment and for each of the following 4 years of assessment. b) To ascertain the adjusted income of the subsidiary company where the proprietary rights are transferred or purchased from the holding company which is the manufacturing company referred to in subparagraph (a) a deduction shall be allowed for an amount equal to one-fifth of the costs of acquisition of the proprietary rights for each year of assessment, subject to the amount of the cost of acquisition that is unallowed to the holding company. c) Where the proprietary rights cease to be used in the basis period for a year of assessment no deduction shall be made for that year of assessment. ***Cost of acquisition of proprietary rights incurred prior to the year of assessment 2002*** 2. Subject to 1(a) and 1(b), where a manufacturing company has incurred cost of acquisition of proprietary rights in the basis period for any year of assessment from the year of assessment 1997 to the year of assessment 2001, a deduction of an amount equal to one-tenth of the original cost of acquisition of the proprietary rights shall be allowed for each of the years of assessment commencing from the years of assessment the cost of acquisition was incurred and a deduction of an amount equal to one-tenth of the original cost of acquisition of the proprietary rights shall be allowed for the year of assessment 2002 and subsequent years of assessment, subject to the amount of the cost of acquisition remaining unallowed to the company.
P.U. (A) 66/2002	Stamp Duty (Exemption) (No. 6) Order 2002		**Exemption** The instrument of agreement for a term loan of Thirty Three Million Four Hundred and Sixty Thousand Ringgit (RM33,460,000.00) executed between the Government of Malaysia and the Malaysian Wetlands Foundation (as the borrower) is exempted from stamp duty.
P.U. (A) 67/2002	Real Property Gains Tax (Exemption) Order 2002		**Exemption** The Minister exempts certain individuals who are settlers of Felda L.B. Johnson specified in the Schedule from the payment of real property gains tax in respect of chargeable gains accruing from the disposal of chargeable assets to Perbadanan Kemajuan Negeri, Negeri Sembilan. For details please refer to P.U. (A) 67

P.U.(A) No.	Title	Effective Date	Details
P.U. (B) 10/2002	Notice of Initiation of an Anti-Dumping Duty Investigation with regard to Imports of Carbon Black from India, Republic of Korea and Thailand (A/D 01/02)	Y/A 2002	The Government of Malaysia is initiating an investigation pursuant to subregulation 7(1) of the Countervailing and Anti-Dumping Duties Regulations 1994 [P.U. (A) 233/94]. This is in pursuance of a petition alleging that imports of carbon black from India, Republic of Korea and Thailand are being dumped in Malaysia and are thereby causing material injury to the domestic industry in Malaysia producing the like product ("Malaysian Industry"). ***Questionnaires*** The Government will send questionnaires to the Malaysian Industry, any association of producers, the producers/exporters in India, R.O Korea and Thailand, to the importers and to the Indian, R.O Korea and Thai Government to obtain information necessary for the investigation. Interested parties not contacted by MITI are invited to contact MITI by facsimile. ***Collection of information*** All interested parties are invited to forward their views in writing and by providing supporting evidence.

Public Ruling

Public Ruling No.	Title	Issued Date	Details
1/2002	Deduction for Bad & Doubtful Debts and Treatment of Recoveries	2 April 2002	Please refer to IRB website: www.hasilnet.org.my

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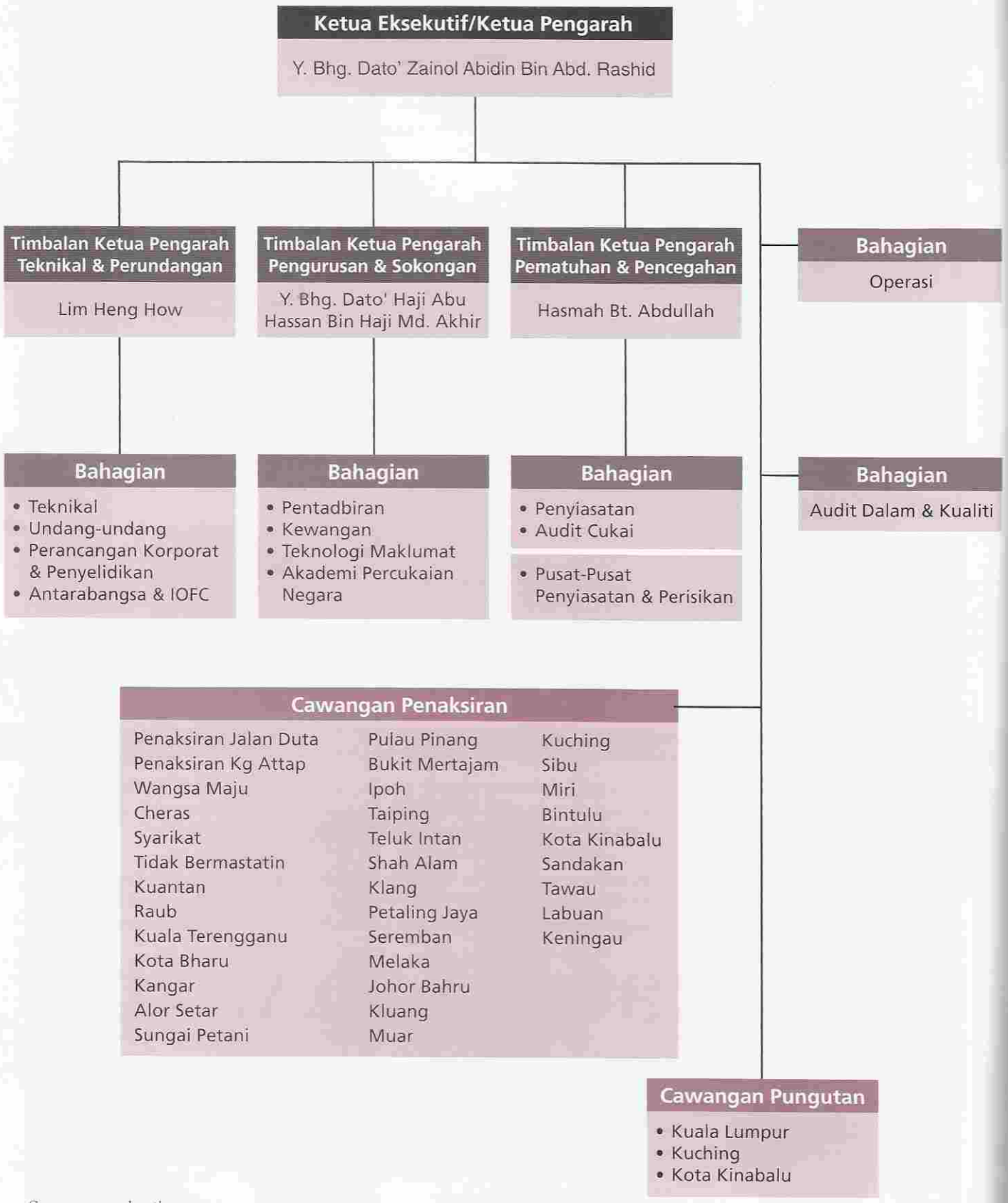

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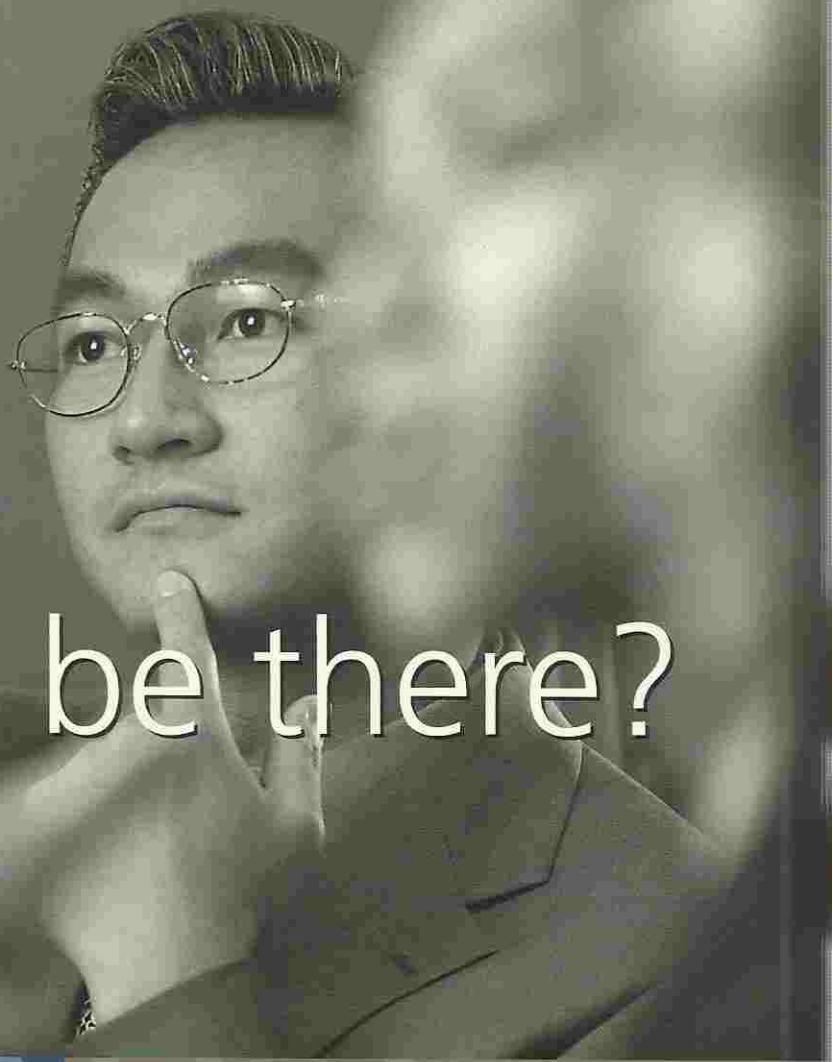

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