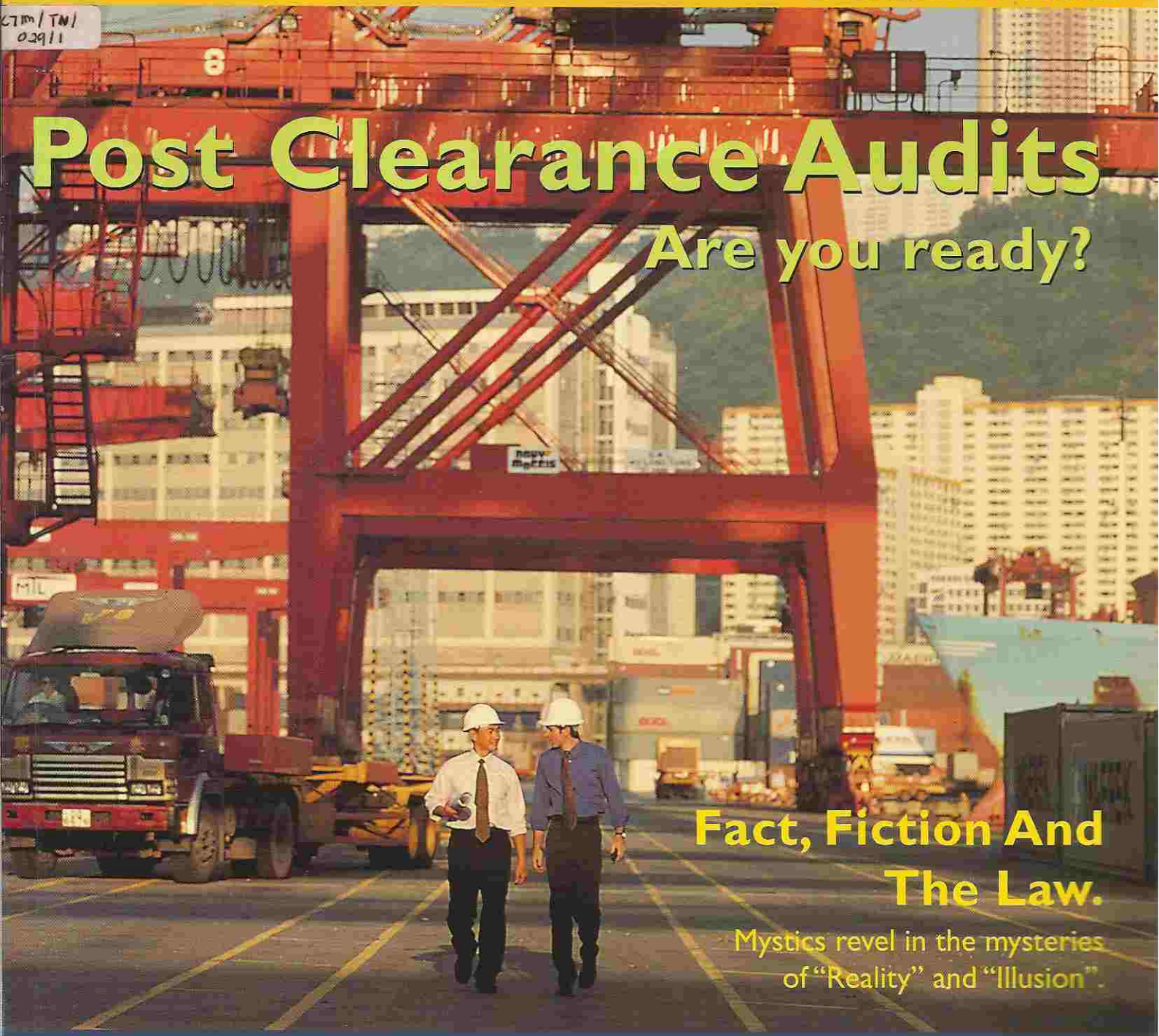
Malaysian Institute Of Taxation

Tax Nasional

Official Journal of The Malaysian Institute of Taxation 2nd Quarter/2002 RM38.00



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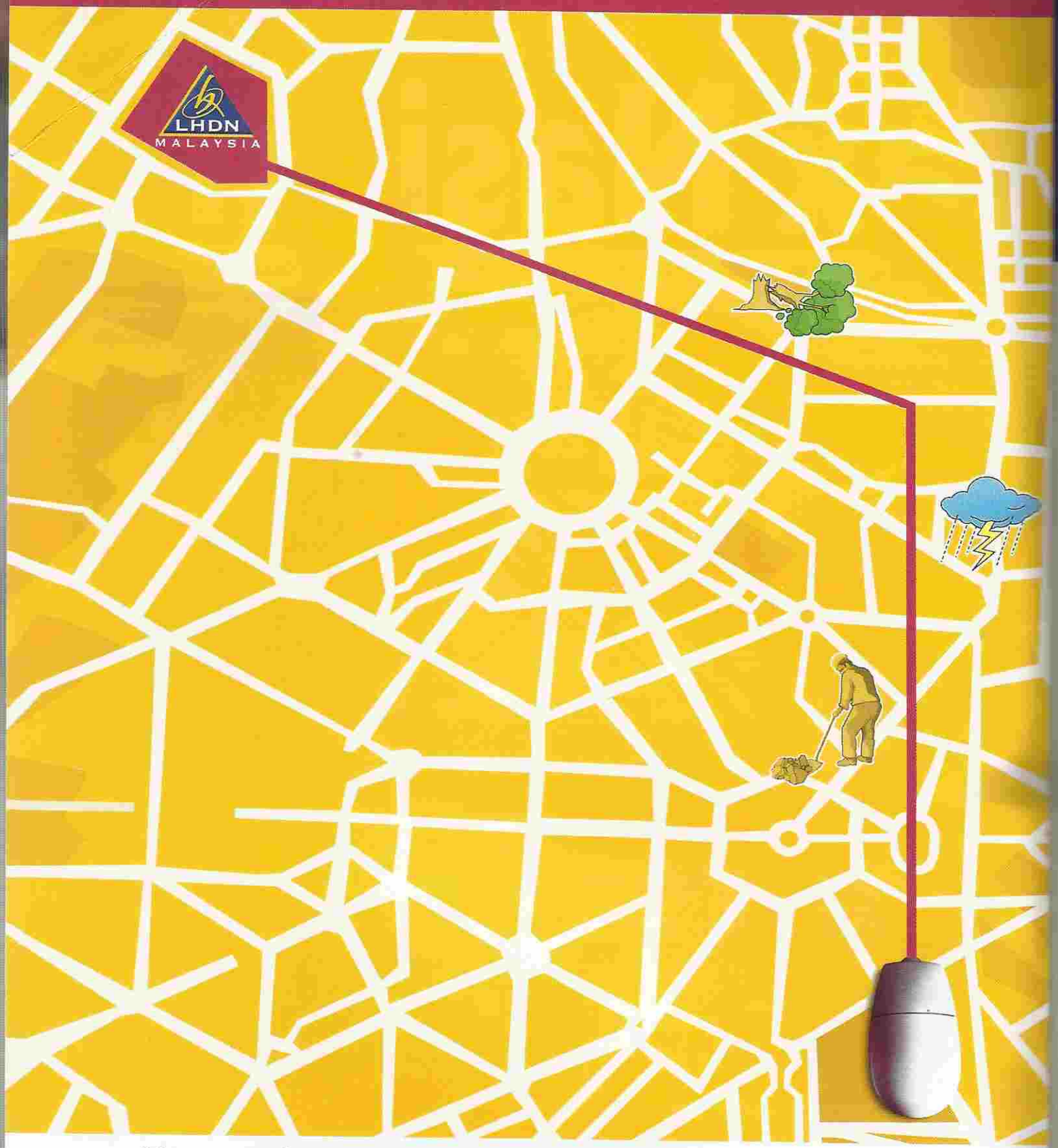

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President's Note

By the time, the 2nd Quarter of the Tax Nasional is published we would have convened the 10th Annual General Meeting of the Institute. Many things have change in the last ten years. I can still recollect, the time when a group of dedicated tax professionals came together and mooted the idea of a local tax body. The idea at that time was both radical and forward thinking as they realised the need for a professional body to protect and advocate the needs of the tax profession in Malaysia.

Hence the Malaysian Institute of Taxation was officially born on 1st October 1991 with the blessing of the Ministry of Finance and the Malaysian Institute of Accountants.

But as I reflect on the pass 10 years as President of the Institute, I have seen many changes in the profession as well as, in the Institute. Most significant, is the constitution and content of the profession. These days' tax consultants would be more familiar with computers and a keyboard, then with a pencil and eraser. Gone are the days, when a change in a tax computation will result in a manual rectification of numerous schedules and sheets, whereas these days with computers, merely by a touch of a keyboard, the computation is rectified.

Also, I see, a change in how we deal with the authorities. In the past, an outstanding tax issue would mean making an appointment with the relevant officer of the Inland Revenue Board and presenting our issues. These days, officers are more likely to request you to e-mail them the issues before coming for a meeting.

The IRB has even gone "cyber" by having a very comprehensive website as a means of highlighting changes in policy and practice. This cyber networking has gone a further step, by certain tax firms frequently e-mailing their clientele, on changes in the tax policy and practice. The Institute has also embraced this new wave of the internet, by instituting a system where members will be notified of changes via their respective e-mail's. I am confident that, we will have a viable system in a month or so.

I am of the opinion that, this revolution in tax practice is merely the beginning as we enter into the second phase of the self assessment tax regime. Tax professionals will be in greater demand as the individual taxpayer is to be empowered to compute and declare his own taxes in 2004. I foresee a time in the near future, that tax advisors will be seen more as partners under self assessment, ensuring that the correct amount of tax if declared by the respective taxpayers.

The past ten years have been a time of change for all, but it is only a beginning of a new era for the Institute.

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Official Journal of the Malaysian Institute of Taxation

The Publisher

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Editor's Note

It is gratifying to note that in the ever changing world of tax regulations and legislation, the recent House of Lords decision in the Morgan Grenfell case, once again upheld the fundamental principle of legal professional privilege. The House of Lords overturned a decision of the Court of Appeal that held that a tax inspector was authorised to require a taxpayer to disclose material despite being covered by legal profession privilege.

Closer to home, we have in this issue included an in depth analysis of the Australian case of *Commissioner of Taxation vs. Century Yuasa Batteries Pty Ltd*, and its application in the Malaysian context by Mr. WSW Davidson and Francis Tan, both of whom are legal practitioners. We are indeed fortunate to be able to obtain material from legal practitioners and will endeavor to obtain and include further articles in our forthcoming issues.

On a more regional note, members will be interested to note that we have included a review of Singapore's budget for the year 2002 and a comparison between the Malaysian and Thai tax systems. We have also covered the recent 9th General Council and Extraordinary General Meetings of the Asia Oceania Tax Consultants' Association.

Finally, a short note that our invitation to all readers for articles has had a positive response but I wish to add that we can do with even more contributions from our members so that we can consistently provide you with interesting and educational reading material.

Harpal S. Dhillon
Editor of Tax Nasional

SOUTHERN TAX CONFERENCE 2002

Following the success of the National Tax Conference 2001 in Kuala Lumpur and the Northern Tax Conference 2001 in Penang, the Lembaga Hasil Dalam Negeri (LHDN) and the Malaysian Institute of Taxation (MIT) once again joined hands to organise the Southern Tax Conference 2002 in Johor Bahru. This is in line with the LHDN's objective of organising a nationwide campaign in educating the people on the new Self Assessment system as well as the Institute's objective of providing value added services to members.

The conference took place at The Puteri Pan Pacific Hotel on 24 January 2002 and attracted more than 170 participants from the southern region and Singapore. This one-day conference was officiated by YB Encik Hashim bin Ismail, Parliamentary Secretary for the Ministry of Finance.

Carrying the theme of "Self Assessment: Towards Better Compliance", conference participants were given the opportunity to listen to the discussion of taxation matters by various speakers from LHDN and professionals from different industries. The first panel was chaired by Tuan Haji Abdul Rahim bin Abdullah from LHDN under the theme of "Managing Self Assessment". Subsequently, Mr Selveindran, a practitioner from KPMG Tax Services and previously of the LHDN, deliberated on the paradigm shift in the responsibilities and obligations of a taxpayer and tax agents. LHDN officer, Encik Mohd Saian bin Haji Ridzuan on the other hand, touched upon the myriad of operational issues, including the role and purpose of the Pusat Pemprosesan in Kuala Lumpur.

A second panel consisting of Puan Ng Oi Leng from LHDN, Mr Ronnie Lim, Executive Director of Deloitte KassimChan and Mr Tony Seah, Council Member of the Malaysian Institute of Taxation, focused on the respective roles of the tax agent, taxpayer and LHDN officers. This panel served as a platform to shed light on the prevailing misconceptions and misunderstandings between the taxpayers and regulators.

The highlight of the conference was the final panel, as participants had the privilege of listening to the Director General of LHDN, Yg. Bhg. Dato' Zainol Abidin bin Abd. Rashid speak on the future policy and direction of the LHDN under the theme "The Next Leap Forward". Later, Mr Michael Loh, Deputy President of the Malaysian Institute of Taxation and Tuan Haji Abdul Hamid bin Mohd Hassan, Vice President of the Malaysian Institute of Taxation, spoke on their respective expectations and hopes for the next phase of the new tax regime.

During the conference, participants were also treated to multimedia presentations by Bumiputra Commerce Bank and KPMG, the co-sponsors of the event.

In conclusion, the Southern Tax Conference 2002 proved to be another successful event under the aegis of the LHDN and MIT. This success, is attributable in no small part to the close cooperation between the Institute and the LHDN Branch in Johor Bahru. Finally, the Institute would also like to thank Pn. Ng Oi Leng and the employees of the Johor branch of LHDN, for their assistance and cooperation in making the conference a resounding success.

Role of a tax agent under self assessment

A tax agent's role became more prominent with the introduction of the Self Assessment system in 2001. In a recent survey conducted by a local tax firm in Malaysia, approximately 64% of the respondents indicated that their tax agents were expected to keep them updated with the latest changes in tax practices. In response to these demands, the Malaysian Institute of Taxation ("MIT") organised a half-day seminar on the Role of a Tax Agent under Self Assessment on the 12th of March 2002 at the Pan Pacific Hotel, Kuala Lumpur. This half day seminar attracted more than 100 participants.

It is imperative that tax professionals be licenced in order to practice. As such, MIT invited Pn. Mimi Pwiziah bte Choo Abdul Majid, an officer from the Ministry of Finance to deliver an in-depth talk on the procedural and eligibility criterion for a tax agent's licence under sec. 153 of the *Income Tax Act, 1967*.

Besides the representative from the Ministry, MIT also invited practitioners to share their views and ideas. Tuan Haji Abdul Hamid bin Mohd Hassan, the Vice President of the Malaysian Institute of Taxation and former Deputy Director General of the Inland Revenue Board gave an in depth analysis on a "Practical Approach to Obtain a Section 153 Licence". His presentation covered the need for the licence, the responsibilities of a tax agent and preparation for the interview.

Participants also had the benefit of listening to Mr. Goh Joon Hai, former Council Member of the Malaysian Institute of Accountants deliver his talk on the "Ethics of the Tax Agent". Basically, his talk covered the code of ethics for tax agents promulgated by the Inland Revenue Board and the new role under the Self Assessment system.

Overall, the seminar was a success in providing the participants with a more comprehensive understanding of the role of a tax agent under the self assessment system.

10th Annual General Meeting & Graduation and Prize Giving Luncheon

The 10th Annual General Meeting and a Graduation & Prize Giving Luncheon is to be held on Saturday, 13 July 2002 at Nikko Hotel, Kuala Lumpur. Mr Lim Heng How, Deputy Director General of the Inland Revenue Board has been invited to officiate the Graduation & Prize Giving Luncheon.

10th Annual General Meeting

Date : 13 July 2002
Time : 10.00 am
Venue : Junior Ballroom 1,
Level 2 Nikko Hotel
165 Jalan Ampang
50450 Kuala Lumpur

Graduation & Prize Giving Luncheon

Date : 13 July 2002
Time : 12.00 pm
Venue : Junior Ballroom 1,
Level 2 Nikko Hotel
165 Jalan Ampang
50450 Kuala Lumpur

ASIA-OCEANIA TAX CONSULTANTS' ASSOCIATION

The 9th General Council Meeting and Extraordinary General Meeting of the Asia-Oceania Tax Consultants' Association (AOTCA) took place in Kuala Lumpur from the 21st to the 22nd of February 2002. This is the second time Malaysia played host to the meeting as the first meeting was held here back in 1998.

The Asia-Oceania Tax Consultants' Association (AOTCA) was established on the 1st of January 1993, following a meeting convened by the Japanese Federation of Certified Public Tax Accountants' Association in Tokyo on the 6th of November 1992, and is the first international body for tax professionals in the region. The Association's objectives are *inter alia* to promote mutual understanding and co-operation amongst the various tax consultants in the Asia-Oceania region and to expand the list of component members. Current members include 13 professional bodies from Australia, Pakistan, Taiwan, Hong Kong, Philippines, Singapore, Japan and Malaysia.

Both the meetings were a success and the 2 day affair witnessed the participation of tax consultants from eight countries. Over 60 delegates from Korea, Japan, Hong Kong, Australia, the Philippines, Taiwan and Malaysia attended the meetings.

The first ever AOTCA International Convention will be held in Kyoto, Japan in addition to the regular meetings this coming November 2002. The idea of an international convention was first mooted at the AOTCA General Council meeting held in Tokyo, Japan in 1994. This convention seeks to address the issues and focus on the management of businesses and future direction of taxation in Asia-Oceania. All member bodies of the AOTCA will be invited to participate in this International Convention, signifying closer ties and the strong recognition between the Institute and the other tax bodies in the Pacific region.

Encik Ahmad Mustapha Ghazali, President of MIT and Deputy President of AOTCA delivering his welcome address during the dinner hosted by AOTCA

Malaysian delegates posing with the office bearers of AOTCA

Office bearers of AOTCA in a private VIP dinner at Mandarin Oriental Hotel, Kuala Lumpur

MIT visits the Lion City

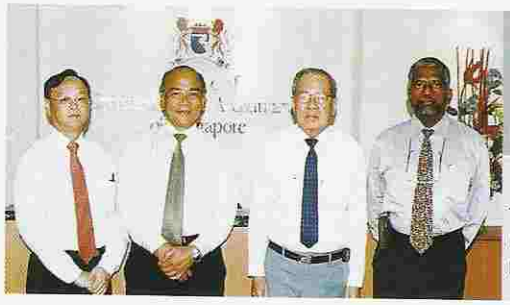
On the 25th of January 2002, the Vice President of the Malaysian Institute of Taxation (MIT), Tuan Haji Abdul Hamid led a delegation of MIT members on a courtesy visit to Singapore. The delegation consisted of Tuan Haji Abdul Hamid, Mr Tony Seah (Council Member), Dr Sivamoorthy (MIT Southern Branch Chairman) and various secretarial staff.

The delegation was received by the President of the Institute of Certified Public Accountants of Singapore (ICPAS), Mr. Tan Boen Eng and Ms. Janet Tan the Executive Director. Mr. Tan welcomed the delegation and shared his views on the role and vision of ICPAS and the current status of tax agents in Singapore. The delegation was informed that ICPAS is in the process of establishing the Singapore Institute of Taxation ("SIT"), which is expected to cater to the specific needs of tax practitioners in Singapore.

Tuan Haji Abdul Hamid conveyed the apologies of the President of MIT for not being able to participate in the visit due to prior commitments. He also touched upon the independence of MIT from being a sponsored body and explained how MIT is poised to become the paramount tax body in Malaysia. Tuan Haji Abdul Hamid stressed the need for MIT to begin establishing links with the various tax bodies in the ASEAN region as part of the Institute's new mission and in anticipation of the impending globalisation of services. He also offered MIT's resources and experiences to ICPAS in its aspiration to create the SIT.

The delegation was given a tour of the facilities in the ICPAS building and subsequently treated to lunch at a hotel.

In short, the visit was beneficial to both bodies as it resulted in a general exchange of views and information. Both MIT and ICPAS, acknowledged the need to forge closer ties between the professional bodies and pledged to maintain the momentum arising from this visit. Tuan Haji Abdul Hamid ended the visit with an invitation to Mr. Tan Boen Eng to visit Kuala Lumpur in the near future.



From left:

Mr. Tony Seah, Council Member
Tuan Haji Abdul Hamid, Vice President of MIT
Mr. Tang Boen Eng, President of ICPAS
Dr. Sivamoorthy, Southern Branch Chairman

INCOME TAX (AMENDMENT) BILL 2001

In 1999, the Ministry of Finance announced that the official assessment system will be changed to the self assessment system in stages, commencing with the self assessment of companies in 2001 and concluding with salaried individuals in 2004. In fulfillment of this policy, the Ministry had tabled an *Amendment Bill** covering the legislative and administrative changes that will affect salaried individuals, companies, sole proprietors, trust bodies and co-operative bodies in YA 2004.

In view of this, the Malaysian Institute of Taxation organised a half day seminar on the *Income Tax (Amendment) Bill 2001* on the 6th of February 2002 at Hotel Istana, Kuala Lumpur. Over 180 participants were given an insight on how the provisions of the new Income Tax (Amendment) Bill 2001 are expected to change the current tax laws and practices.

Mr. Joseph Teo from the Inland Revenue Board and En. Nujumudin Mydin, an Executive Director from a local tax firm were invited to sit as panelists in the open forum session which was chaired by Mr. Venkiteswaran, Council Member of the Malaysian Institute of Taxation. This seminar proved to be a comprehensive session as participants were given the opportunity to listen to and question the experts on the latest tax changes.

* Gazetted as the Income Tax (Amendment) Act 2002 (Act 1151)

profile

Mr Wong Seng Chong
East Coast Branch Chairman

Mr Wong Seng Chong holds a Bachelor of Laws (Hons) degree from The University of London. He has served in the Inland Revenue Board for eleven years and is currently the partner of Messrs Lau, Wong & Yeo, Chartered Accountants.

Mr Wong Seng Chong is a member of the Malaysian Institute of Accountants and the Institute of Certified Public Accountants of Singapore. He also serves as a member in various committees such as the Technical & Public Practice Committee of the Malaysian Institute of Taxation and member of Investigation Tribunal, Advocates & Solicitors' Disciplinary Board and the Malaysian Institute of Accountants, East Coast Branch.

He is also a fellow of the Malaysian Institute of Taxation and the Association of Chartered Certified Accountants, UK and a approved liquidator under sec. 8(3) of the *Companies Act, 1965*.

In the social arena, Mr Wong is currently the 1st Vice President of the Lions Club of Kuantan, advisor to the Kuantan Deaf Club, the Treasurer of Kuantan Chinese Chamber of Commerce & Industry and a committee member of the Pahang Buddhist Association. In recognition of his contribution to the community, Mr Wong was bestowed with an award of A.M.P. (Ahli Mahkota Pahang) by DYMM Sultan of Pahang in the year 2000.

December 2001 Examinations

List of prize winners, graduates & successful candidates

Prize winners

Taxation I
Yang Suit Keng
(Prize sponsored by Atarek Kamil Ibrahim & Co)

Taxation II
Low Fue Cheu
(Prize sponsored by PricewaterhouseCoopers)

Taxation III
Lee Nyong Phin
(Prize sponsored by Ernst & Young Tax Consultants Sdn Bhd)

Taxation IV
Hong Kim Soon
(Prize sponsored by Mr Michael Loh, Deputy President, Malaysia Institute of Taxation)

Foundation Level
Yang Suit Keng
(Prize sponsored by Deloitte KassimChan)

Intermediate Level
Emily Liew Pei Sew
(Prize sponsored by PricewaterhouseCoopers)

Final Level
Hong Mei Lain @ Mei Yan
(Prize sponsored by KPMG Peat Marwick)

The following candidates have graduated in the December 2001 examination session:

Yong Teck Fon
Lee Chin Chu
Leong Moh Jyee
Lim Ai Wah
Yap May Ling
Peggy Lee Pui Kee
Lee Boon Hooi
Hong Kim Soon
Hong Mei Lain @ Mei Yan
Lai Lee Ching
Tan Lee Chin
Khoo Shaw Chyn
Au Lui Fong @ Stephanie Au

The following candidates have been issued with Certificate of Graduateship:

Hong Kim Soon
Yap May Ling

The following candidates completed the Foundation Level:

Yang Suit Keng
Chan Kim Lin
Chuah Hye Lih
Beh Choo Imm
Diong Choong Ling
Kai Won Chin
Yeoh Shan Koon
Lai Poon Chan
Tung Peng Wai
Khoo Kui Hong

The following candidates completed the Intermediate Level:

Chin Hock Soon
Lye Tuck Keong
Yap Lay Ping
Low Fue Cheu
Aaron Tan Say Aik
Teh Siew Ngau
Tan Mee Ling
Shalini Chandrarajah
Tan Siew Ngo
Emily Liew Pei Sew
Ang Beck Teck
Siew Wei Fen
Yap Lisa
Ng Fie Lih
Lim Siew Meng
Lee Nyong Phin
Chan Yew Ming
Christina Lim Luan Hing
Cheong Yee Ching
Kee May Lee
Lee Choo Geok
Sang Siew Ken
Chio Shwu Huey
Lim Shaw Boon
Yeong Choy Yin
Diong Choong Ling
Teh May Ling

The following candidates completed the Final Level:

Yong Teck Fon
Lee Chin Chu
Leong Moh Jyee
Ng Sook Lee
Yap May Ling
Peggy Lee Pui Kee
Lee Boon Hooi
Hong Kim Soon
Hong Mei Lain @ Mei Yan
Lai Lee Ching
Tan Lee Chin
Khoo Shaw Cbyn
Stephanie Au @ Au Lui Fong
Lim Ai Wah

FACT, FICTION AND THE LAW

By Dr Arjunan Subramaniam

Mystics revel in the mysteries of "Reality" and "Illusion". Some see the Reality of the "illusion"; others seek the ONE Reality. Whether there is a difference between "illusion" and "reality" is a subject of absorbing interest; a special privilege of the few mystics. But my urgency is of a lesser kind: Is there a difference between "Fact" and "Law". Can "facts" be just illusions? These questions are of a practical relevance in an appeal to the Special Commissioners and from there to the higher Courts in the judicial system. The subject is of some complexity and to keep it within manageable and understandable proportions, the analysis proceeds on a breakdown under captions.

Special Commissioners are finders of facts.

The position of the Special Commissioners is stated in a number of cases. In ***Chua Lip Kong v. Director General of Inland Revenue [1982] 1 MLJ 235,*** the need to find "facts" is stated thus:

"Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved."

Let us pause.

The important points are:

a) Special Commissioners should state clearly the findings of fact
b) The evidence need not be stated (but see below)
c) Findings of primary facts are unassailable;
d) Primary facts admitted or proved must be stated in the case stated.

Onus of proof on the taxpayer

The onus of proof that an assessment is excessive is upon the taxpayer. [Paragraph 13, Sch. 5 Income Tax Act, 1967). Thus, the establishment of facts before the Special Commissioners is important to the taxpayer.

Dispute as to material facts.

The Special Commissioners need not record all the evidence upon which the facts are found. Nor are Special Commissioners bound to give a copy of the notes of evidence to the taxpayer or the High Court. Thus, in preparing a draft of the Case Stated, both parties are given an opportunity to comment on the draft of the Case Stated. The counsel for the taxpayer may want to add "facts" which in his opinion are material but omitted by the Special Commissioners. The Revenue counsel may also wish to add "facts" favourable to the Revenue and omitted by the Special Commissioners. Or "facts" found by the Special Commissioners may be disputed as not being "facts' by any one of the parties.

Responsibility for Case Stated is on the Special Commissioners

After hearing all the comments, the Special Commissioners would finalise the Case Stated and forward it to the High Court.

Appeal permitted only on Law not fact [paragraph 34. Sch. 5 of the Income Tax Act, 1967]

An appeal to the High Court can be taken only on points of law and not "facts". It is incumbent on the Appellant at the High Court to establish that the learned Special Commissioners erred in law. One must remember law seldom operates in a vaccum. Law is applied to a given set of circumstances and facts. Thus, the first duty that befalls a counsel is establish "facts" and expose "fiction" posed as "facts".

Facts must be supported by evidence

It is imperative to find facts upon evidence. If there is no evidence to support the finding of a fact, that so called "fact" is a "fiction". In ***Ketua Pengarah Hasil Dalam Negeri v. Dr Arunjit Dutt [1995] 2 MSTC 3454*** this principle was stated thus:

"In its approach this Court followed the authority of the decision in ***Mamor Sdn Bhd v. Director General of Inland Revenue [1981] 1 MLJ 117*** *where it was held that is was open for the High Court to review the decision of the Special Commissioners, if inter alia, the Special Commissioners had misdirected themselves on the law or reached a conclusion of facts which is not supported by the evidence before them" [emphasis added].*

In ***Perak Constructions Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri R2-14-6-2000***, a letter from an accountant said the building approvals were granted by the relevant authorities. But the witness for the Appellant said no such approvals were ever granted. The learned Special Commissioners took the letter of the accountant as evidence of a fact of approvals from the

relevant authorities. Thus, the learned judge Y.A. Dato' Faiza b. Haji Tamby Chik held:

"an inference from the letter at page 12, Exhibit F being unsupported by any actual approval from the relevant authorities is an error of law on the part of the learned Special Commissioners."

Such an inference from a fact proved or admitted is an error of law – not an error of fact. This principle was clearly stated in the case of ***Airspace Management Services Sdn Bhd v. Col. (B) Harbans Singh Chingar [2000] 4 CLJ 77.*** This an example of a "fact, which is a "fiction".

Error in findings of facts

While findings of facts of the Special Commissioners are unassailable, there can be circumstances that such findings are assailable as inferences from other facts. In **Perak Constructions Sdn Bhd (supra),** the learned Special Commissioners held as a fact that development expenditure in the accounts referred to the subject lots acquired by the Government when it did not. There was no evidence to support such a finding. The learned judge on appeal held:

"This is even more serious in view of the evidence given by the Appellant's witness to the effect that the said expenditure did not refer to the subject lots."

Statement of Agreed Facts

The Special Commissioners cannot go behind a statement of agreed facts.

This principle is stated in ***Chua Lip Kong v. Director General of Inland Revenue [1982] 1 MLJ 235*** where it was held:

"The Special Commissioners, in their Lordships' view were not entitled to go behind this statement. It was not merely part of the evidence before them which they were entitled either to accept or to reject as they thought fit."

But of course if the agreed fact is that the earth is flat, the situation warrants to the establish the fact that it is not!

Inferences from facts

Inferences drawn from primary facts may be inferences of pure fact. But very often such inferences are conclusions drawn and therefore questions of law. **Chua Lip Kong (supra)** put the matter thus:

"From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; ***but they may be, or may involve (and very often do), assumptions as to the legal effect or consequence of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumption as to the relevant law."***

Sufficient facts to arrive at a decision

A decision of the Special Commissioners if supported by sufficient facts pointing in the direction of their decision cannot be upset on appeal. The reason is that an appellate court's role is not one of arriving at their own decision when there are reasons for the first. This principle is stated in the case of ***St. Aubyn Estates Ltd. v. Strick 17 TC 412*** at page 419. The question is, are the Special Commissioners justified by the facts and evidence in arriving at the conclusion. See ***Director General of Inland Revenue v. Central Sugars [1978] 2 MLJ 71*** at page 74.

Misdirection of the Special Commissioners in law

In ***Mamor Sdn Bhd v. Director General of Inland Revenue [1981] 1 MLJ 117***, the learned judge said,

"It has been argued that the deciding order of the Special Commissioners is entirely based on findings of facts and as such the court cannot interfere with the decision made on such findings by the Special Commissioners. With respect, I am of the opinion that it is open for the High Court to review the decision of the Special Commissioners, if the Special Commissioners.

i) misdirect themselves on the law; or
ii) answer the wrong question; or
iii) omit to answer a question which they ought to have answered; or
iv) took into account factors which they ought not to have; or
v) reached a conclusion on facts which is not supported by the evidence before them; or
vi) made a finding of a facts which is no reasonable person in the circumstances would have arrived at." [emphasis added].

It is clear that the Special Commissioners can commit errors of fact, despite being the sole authority of finding facts.

Findings of facts arising from construing a document is a question of law not fact.

In **Chua Lip Kong (supra),** it is clearly established that inferences of fact from a sale and purchase agreement embodies a question of law, where such a contract gives rise to legal a effect. This principle is stated thus:

"From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; ***but they may be, or may involve (and very often do), assumptions as to the legal effect or consequence of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special***

Commissioners if they can be shewn to have proceeded upon some erroneous assumption as to the relevant law."

In ***SGS Singapore (Pte. Ltd) v. Ketua Pengarah Hasil Dalam Negeri Rayuan Sivil No: R1-14-2-98,*** the learned judge Y.A. Dato K.C Vohrah, J (as His Lordship then was) held that construing a contract wrongly is an error of law. His Lordship in that case held:

"The decision of the Special Commissioners is also erroneous in regard to inferences of fact and is erroneous in regard to inferences of mixed fact and law, as the Special Commissioners failed to distinguish between "project management services" (not carried out by the Appellant) and "inspection and expediting service" (carried out by the Appellant). The former may fall within the exclusion to Article IV DTA applied by the Special Commissioners whilst the latter would not. In doing so, the Special Commissioners' decision was unsupported by the provisions of the contract and was based on an interpretation of the contract, which could not reasonable be entertained. Again, this arose from a failure to read the contract as a whole."

In ***Sarawak Shell Bhd v. Menteri Kewangan [2001] 1 CLJ 694***, a contract had to be construed. And His Lordship, Dato' Faiza Tamby Chik, J held:

"It is observed that the respondent had acted in excess of his jurisdiction and unreasonably in holding that services provided by the applicants under Product Sharing Contracts were subject to service tax."

Again, in ***Mega Air Conditioning Sdn Bhd v. Speedfam Co. Ltd [2001] 4 CLJ 261,*** His Lordship Mohd Noor Ahmad, JCA held:

"Although an appellate court will not readily interfere with the primary findings of fact made by a trial court, there are exceptions to this general rule. It is the duty of the appellate court to intervene and set right the decisions of the trial court if they are unjust or are plainly wrong, or if the trial court has so fundamentally misdirected itself (on the law or the evidence) such that no reasonable court of first instance having properly directed itself would have reached the same conclusion. In the instance case, the trial judge had erred in his findings of fact. He failed to construe and give effect to the sale and purchase contract between the plaintiff and the defendant. The cost of the fibre optic cable – which was axis of the axis of the dispute between the parties – had already been incorporated into the contract price and plaintiff could not additionally charge the defendant for it."

Indeed what appears to be just a fact could be (i) a fact, or (ii) a question of mixed fact and law, or (iii) a point of law or (iv) fiction, that is, such a fact was not in evidence.

Remitting a case to find further facts

There will be occasions when facts found by the Special Commissioners are inadequate for a determination of a case or further facts need be found. Guidelines on the matter of remitting a case to the Special Commissioners were laid in ***Consolidated Goldfisld plc v. Inland Revenue Commissioners [1990] 2 All ER 398*** as follows:

" i) The finding of fact are for the commissioners. They cannot be instructed to find facts, nor as to the manner in which they express their findings.

ii) the parties are entitled to expect that the commissioners will in the case stated make findings covering the matters, which are relevant to the arguments adduced or intended to be adduced on appeal.

iii) If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are: (a) material to some tenable argument; (b) at least reasonably open on the evidence that has been adduced; and (c) not inconsistent with the findings that have already been made."

In ***Sincere Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2000] 3 MLJ 163***, the Court of Appeal approved the guidelines and also confirmed the practice direction in ***E v. Comptroller General of Inland Revenue [1970] 2 MLJ 117***. At the Court of Appeal, Siti Norma Yaakob JCA held:

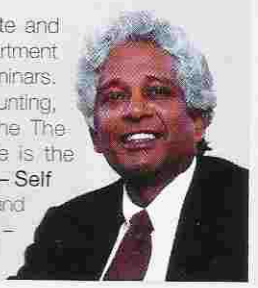
"Clearly the notice of motion was intended to rectify the omissions in the preparation and submission of the case stated. However, it was rejected by the High Court on the ground that there was no justification for such a remission as all the omissions complained of are apparent on the face of the case stated. It was to appeal against the dismissal of the notice of motion that the parties were before us."

The case was remitted to the Special Commissioners.

Conclusion

It is a fact that finding of facts is not an easy task. Facts and law appearing as a fact makes the task of distinguishing facts from law a matter of judgment in law. It is a fact that there is a sunset. But an inference from this fact that the sun has set is a fallacy, an illusion. For it is a fact that the Sun does not set.

The Author



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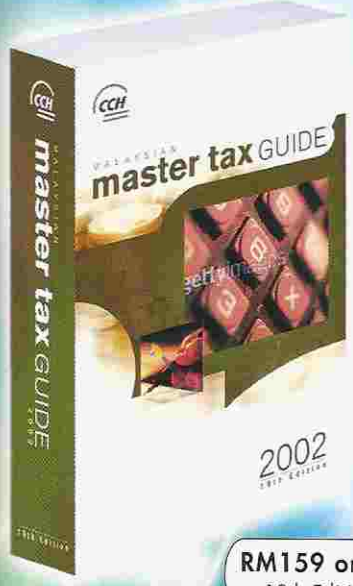

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Tax Treatment of Bad Debts and Recoveries

By Nakha Ratnam Somasundaram

On 2 April 2002, the Inland Revenue Board issued Public Ruling No. 1 of 2002 that deals with deductions for bad and doubtful debts and the taxation of recoveries.

The Ruling approaches the subject matter in three steps:

1. Deduction for bad debts.
2. Deduction for doubtful debts.
3. Treatment of recoveries and related matters.

Deduction for Bad Debts

Trade debts that have been written off are deductible against gross income in arriving at the adjusted income from a business. Before a debt is written off as bad, the Inland Revenue Board expects the taxpayer to carefully consider all the circumstances of the debt and the cost of recovering the debt that had been written off.

A "*Bad Debt*" is a debt that is considered irrecoverable after appropriate action has been taken towards recovery.

Action taken to recover the bad debts will include the issuance of reminder notices, debt restructuring schemes, rescheduling of debts, negotiation and arbitration in respect of the disputed debt, and finally, legal action to recover the said debt. The taxpayer should maintain sufficient documentary evidence of any or all of the foregoing action taken.

It must be noted that the Inland Revenue Board will apply a very stringent criteria before allowing any deduction to be made. This will include the application of sufficient commercial basis for writing off the debt and documenting such a decision to indicate that each debt has been separately and objectively evaluated by an official of the company using valid and relevant information i.e. the reasons for writing off the debt should NOT be based on personal or private considerations. If the taxpayer decides not to pursue the debt, then such a decision should be properly documented, for example, by way of a company resolution.

The Inland Revenue Board will consider a debt as bad ***only*** if it can be proved that all reasonable steps taken to recover the same has failed. This can come about upon the occurrence of one or more of the following circumstances:

1. The debtor has died without leaving any assets that can be liquidated;
2. The debtor is made a bankrupt and does not possess any asset that can be recovered;
3. The debt is statute barred;
4. The debtor has absconded and cannot be traced;
5. Negotiation with the debtor has failed and the cost of litigation will make recovery impractical; and
6. Other similar instances where recovery is not possible or has become financially impractical.

It is important that the debt sought to be written off be included in the gross income of the taxpayer either in the relevant year or in an earlier year of assessment. Further, the debts must be on a trading account but loans made by a trader habitually or regularly in the ordinary course of his business will be an exception. Such loans and the interest thereon, may qualify for a deduction if it does become bad and is written off after taking into account all the circumstances indicated above. This is a grey area and clients are advised to seek a more detailed clarification from their respective tax agents in this regard.

Specific provision for doubtful debts

A provision made for a specific doubtful debt can also be deducted in arriving at the adjusted income from a business source. A "*specific provision for doubtful debts*" simply means making a reasonable determination of the portion of a particular debt that is unlikely to be recovered.

To qualify for a deduction, the taxpayer must establish that every such debt has been evaluated by an official of the company by using valid and relevant information. Information that is considered valid and relevant include the period over which the debt has been outstanding, the current financial status of the debtor and the debtor's credit worthiness. In a nutshell, it means taking into account the history of the debtor, the custom in the particular industry and the age-analysis of the debts.

The specific provision made can be increased or decreased depending on the circumstances of the debtor in the relevant year of assessment.

General provision for doubtful debts

The Inland Revenue Board categorically disallows any **general provision** being made for doubtful debts regardless of any legal or accounting conventions requiring such a provision to be made.

It is important that the debt sought to be written off be included in the gross income of the taxpayer either in the relevant year or in an earlier year of assessment.

Forgiving and waiving payment of debt

The Inland Revenue Board will not regard a decision to forgive or waive payment of a trade debt as a valid business or commercial consideration. This effectively disqualifies forgiven or waived debts from being deductible .

It is the author's opinion that if the businessman can prove that the debt was indeed forgiven or waived, only after a careful consideration of all the facts, and was based on valid commercial reasons, it should be given due regard by the Inland Revenue Board, in a claim for a deduction. This should be particularly so in a clear cut arms-length transaction.

Non-trade debts

Non-trade debts are not given any consideration by the Inland Revenue Board – they are neither allowable if a provision is made, nor taxable should a recovery occur.

Debts due from a related or connected person

The Inland Revenue Board is particularly cautious of any decision to write off debts or specific provisions made for a trade debts due from a related or connected person.

Briefly, a "*related and connected person*" has been defined as any person who is in a position to influence or be influenced by the other person in a significant way or to a substantial degree; it also includes being able to control or be controlled, by the other person, in a significant way or to a substantial degree. As will be immediately apparent, the definition is very wide in its legal context, and covers *inter alia* individuals, companies, partnership, co-operatives, societies, bodies, groups of persons, associates and relatives. If in doubt, clients are advised to seek the opinion of their tax agent.

The Inland Revenue Board will conduct a stringent examination before allowing a deduction for such provisions or write off. In addition to the other conditions mentioned above, the Inland Revenue Board would also need to see evidence that the decision to write off or to create a specific provision is made at an arms-length basis. The taxpayer must show clearly that the decision is made in a professional and objective manner, based on valid business and commercial factors. It is very important that private or personal considerations are excluded in such decisions.

Recoveries

Recoveries will include any money or assets received pursuant to a trade debt that had been written off earlier as a bad debt.

For accounting purposes, specific and general provisions do not alter the amount owing in the debtor's accounts. However, a trade debt that has been written off as bad, reduces the balance in the debtor's accounts. Therefore, any recovery of such written off balances should be entered in the profit and loss account. Alternatively, a suitable tax adjustment may be made to the tax computation if the sum recovered is entered into a reserve account instead of the profit and loss account.

Settlement of trade debts with assets

Sometimes a debt may be settled by foreclosing upon an asset held as security. In such instances, the nett sale proceeds from the sale of the asset or the market value of an asset given to a creditor in settlement of the debt, will be the value credited towards settlement of the debt. Any balance that has not been recovered can then be written off as a bad debt .

However, in a situation where a debtor offers an asset (not previously offered by the debtor and accepted by the creditor as security) in settlement of an outstanding debt, and if the market or realisable value of the asset is less than the value of the debt outstanding, the difference may be written off by the creditor. For example, a debtor may offer a particular machinery worth RM30,000 in settlement of a RM50,000 debt, because he is facing cash-flow problems. If the creditor accepts this offer, the balance of RM20,000 may be written off by the creditor.

At the moment it is not clear whether the Inland Revenue Board will allow this RM20,000 as a deduction, being bad debts written off or whether this balance will fall under the category of debts waived or forgiven, and therefore not deductible.

Conclusion

This article is a brief summary of the more salient features of *Public Ruling No. 1 of 2002*. It is particularly important for clients to keep a record of all the trade debts and action taken towards its recovery. This ruling must be read together with the earlier Inland Revenue Board rulings on record keeping.[1] This will be useful in the context of the self-assessment and the field audit program currently being implemented by the Inland Revenue Board.

[1] See Public Ruling No. 4 of 2000 - Keeping of Sufficient Records (Companies and Co-Operatives; Public Ruling No. 5 of 2000 - Keeping of Sufficient Records (Individuals and Partnership); Public Ruling No. 6 of 2000 - Keeping of Sufficient Records (Persons other than Companies and Individuals).

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TAXATION IN THAILAND

Some comparisons with the Malaysian tax system

By Jeyapalan Kasipillai, Mohamad Tayib & Pairat Watcharapun

Background

The types of taxes imposed by a Government are generally divided into two: direct and indirect taxation. The principal taxes imposed by the Government of Thailand are direct taxes (personal income tax, corporate income tax and petroleum tax) and indirect taxes (Value Added Tax: VAT, specific income tax, customs duties, excise tax and stamp duties). The principal tax legislation in Thailand is the Revenue Code that outlines regulations for the imposition of personal and corporate income taxes, VAT, specific business taxes and the stamp duties. The imposition of Customs duties are regulated by Thailand's *Customs Act*, whereas the *Excise Act* manages the excise taxes and the *Petroleum Income Tax Act* governs the taxation of petroleum income.

In Malaysia, the Inland Revenue Board is responsible for all policies relating to direct taxes (income tax, real property gains tax, stamp duty and petroleum income tax). The Royal Customs and Excise Department is responsible for indirect taxes (service tax, excise duty, sales tax and customs duties). The law governing income tax is the *Income Tax Act 1967* while petroleum income tax is governed by the *Petroleum Income Tax Act 1967*. The various indirect taxes are governed by the *Service Tax Act 1975*, *Excise Duty Act 1976*, *Sales Tax Act 1972* and *Customs Act 1967*, respectively.

Tax Administration

In Thailand, the Ministry of Finance has three distinct departments to manage the administration of taxes. The responsibility for the administration of personal income tax, corporate income tax, petroleum income tax, VAT, specific business tax and stamp duty lies with the Revenue Department. The administration of customs duties is the responsibility of the Customs Department while the excise tax is administered by the Excise Department.

In Malaysia, the Ministry of Finance has two distinct departments to manage the administration of taxes: direct taxes are administered by the Inland Revenue Board while the indirect taxes are managed by the Royal Customs and Excise Department.

The section below reviews some pertinent aspects of corporate income tax in Thailand in comparison to Malaysia. The comparisons are reviewed under the following sub-headings:

- Scope of Charge
- Business Organizations
- Tax Rates
- Treatment of Losses
- Deductions
- Remittance Tax

Scope of Charge

Resident Thai companies are liable to corporation tax on all sources of income and capital gains, wherever it arises. On the other hand, foreign companies that are not registered or resident in Thailand, are subject to tax only on income derived from sources within Thailand including royalties, interest, dividends and rental payments derived in Thailand.

In Malaysia, income tax is chargeable on a company's income that accrues in or is derived from within Malaysia. Income generated overseas by companies and remitted to Malaysia (other than those carrying on sea and air transport business, insurance, and banking) are tax exempt. Resident companies carrying on sea and air transport business, insurance, and banking operations are taxed on a world income basis.

However, no taxes are imposed on offshore income derived by an offshore company. Offshore business activities are governed under the *Labuan Offshore Business Activity Tax Act, 1990*.

In comparison, the scope of charge on income is more favorable for companies based in Malaysia than those in Thailand as income remitted into Malaysia is tax exempted (with some exceptions). There are no capital gains tax under the ITA in Malaysia other than limited taxation of real property under the *Real Property Gains Tax (RPGT) 1976*.

Business Organisations

Businesses in Thailand are generally registered as sole proprietorships, partnerships, limited companies and public limited companies. In addition, branches of foreign corporations are recognized and may be required to be registered in order to do business in many sectors. A "representative" or "liaison" office of a foreign company is not recognised as a distinct legal entity and may be treated as a branch office for tax and other purposes.

Generally, business organizations in Malaysia comprise of sole proprietorships, partnerships and companies. Partnerships, however, are not taxable entities but the income that is allocated to the partners is assessed on them.

In Thailand, corporate income tax is levied on juristic companies and partnerships. Under the Revenue Code, "juristic companies and partnerships" include the following:

i) a limited company, a public company or juristic partnership organized under the Thai or a foreign law;
ii) a joint venture; and
iii) a foundation or association engaged in any revenue producing business.

Tax Rates

Incorporated firms operating in Thailand pay income tax at a rate of 30% of their nett profits. Foundations and Associations pay income tax at a rate of two to ten percent on gross business income, the actual rate depending on the nature of activity. International transport companies face a rate of three percent of gross ticket receipts and three percent of gross freight charges.

In Malaysia, all corporations are subject to a flat 28% tax on its chargeable income while the income of non-resident companies are taxed at varying rates depending on nature of the income (see Table 1). Generally, Thailand has a more flexible corporate tax structure applicable to resident companies if compared to Malaysia.

Table 1 Malaysia: Income Tax Rates

Year of Assessment 2001

Resident companies	
– all income	28%
Non-resident companies	
– royalties	10%
– rental or moveable properties	10%
– technical or management service fee	10%
– interest	15%
– dividends	28%
– business and other income	28%

Treatment of Losses

In Thailand, net business losses can only be carried forward up to a maximum of five consecutive years whereas in Malaysia, such losses can be carried forward indefinitely until fully absorbed by other business losses. The tax treatment of losses in Malaysia encourages tax planning whereby companies in a group are encouraged to inject viable businesses into a loss making company so as to lower their tax exposure.

Inter-corporate dividends declared by Thai companies are exempt from tax on 50% of the dividends received. For holding companies and companies listed on the Stock Exchange of Thailand (SET), dividends are completely exempt, provided the shares are held for three months prior to and after the receipt of such dividends. Malaysian companies do not benefit from such an exemption other than those companies benefiting from varying investment and income tax incentives.

Deductions

Generally, expenses exclusively incurred for the purpose of generating income other than certain expenses specified under sec. 65 of Thailand's Revenue Code are tax deductible. Similarly in Malaysia, expenses wholly and exclusively incurred in the production of income, other than those expenses specifically disallowed under sec. 39 ITA, are tax deductible.

Several unique features for deduction under the Revenue Code are summarised below.

The deductions allowable for gifts and donations in Thailand vary according to the nature of the contribution. For instance, the deductions for gifts and donations up to a total of four percent of nett profits are available, as follows:

- two percent to approved public charities or for public benefit; and
- two percent to approved educational or sports bodies.

In Malaysia, donations to approved institutions are deducted from a corporation's aggregate income in order to arrive at it's taxable income. However, the donations allowed are restricted to 5% of the corporation's aggregate income.

Under Thailand's Revenue Code, no deduction is permitted for any expenditure that is determined on the basis of nett profit. For example, bonuses paid as a percentage of nett profits at the end of an accounting period are disallowed. Entertainment and representation expenses are fully deductible as a percentage of gross sales or of paid-up capital at the close of the accounting period, whichever is greater. In Malaysia, bonuses paid to employees are fully allowed as a deduction but entertainment expenses incurred to lure potential clients are wholly disallowed.

Remittance Tax

In Thailand, remittance tax applies to profits transferred or deemed transferred from a local branch to its head office overseas. It is levied at the rate of 10% of the amount to be remitted before tax, and must be paid by the remitting office of the offshore company within seven days of the date of remittance. However, outward remittances for the purchase of goods, certain business expenses, principal on loans to different entities and returns on capital investment, are not subject to an outward remittance tax. Furthermore, the tax does not apply to dividend or interest payments remitted out of Thailand by a company or partnership; these are taxed at the time of payment. Malaysia on the other hand does not enforce any form of remittance tax whatsoever.

Self Assessment

Broadly speaking, Thailand's tax administration operates on a self assessment basis. Consequently, taxpayers have a legal obligation to voluntarily declare their income and settle their taxes. Under this system, the declaration of taxable income and payment of taxes are regarded as correct. The due process of audit and tax vigilance would however enable the tax authorities to trace cases of taxpayers failing to submit returns or filing false or incomplete tax returns.

The Malaysian Government introduced self assessment for companies from the year 2001. Under this Self Assessment System (SAS), the responsibility for correctly assessing a company's tax liability is transferred from the Inland Revenue Board (IRB) to the taxpayer. The IRB assumes a policing role, with the function (amongst others) of identifying those taxpayers that submit incorrect returns. This is accomplished mainly through the process of field audits, which is an essential enforcement tool of the SAS.

This section deliberates the self assessment tax system for companies under the following sub-headings:

- Filing of Returns
- Payment Date
- Capital Allowances
- Group Relief for Companies

The final sections are devoted to a review of investment incentives that are available in Thailand and Malaysia (sec. 4); followed by a discussion of the double tax treaties (sec. 5); a deliberation of the VAT system in Thailand (sec. 6); and a brief outline of tax treatment of income derived from electronic commerce (sec. 7).

Filing of Returns

A corporate taxpayer in Thailand must file a half-year return and pay 50% of the estimated annual income tax by the end of the eight-month of the accounting period. Failure to pay the estimated tax or underpayment by more than 25% may subject the taxpayer to a fine amounting to 20% of the amount in deficit.

Failure to file a tax return, late filing or filing a return containing false or inadequate information may expose the defaulting taxpayer to various penalties. Failure to file a return, and subsequent non-compliance with an order to pay the tax assessed, may result in a penalty equal to twice the amount of tax due. Penalties are due within 30 days of assessment.

The Revenue Department has the right to audit the books and records of Thai taxpayers for a period of two years after filing returns (which may be extended to five years where the tax authorities suspect tax evasion). As in Malaysia, once fraud or intent to evade taxes is established, the right to audit the books and records runs indefinitely.

In Malaysia, companies are required to submit their returns within six months from the close of accounts. Particulars to be furnished with the return include the amount of chargeable income and tax payable by the company. On submission of the return, an assessment is deemed to have been made on the company. The Return Form is deemed to be a notice of such assessment, and is deemed to have been served on the company on the day the Return is submitted.

Payment Date

In Thailand, corporate tax is collected in two installments. The first installment is due 60 days after six months of operation, based on an estimated income statement. The final installment is due on or before 150 days after the normal business year for the company. Employers are required to withhold personal income tax from their employees.

Thailand is the first country in Asia to introduce investment promotion laws thereby providing tax and other non-tax incentives to potential investors.

Malaysian companies are required to make their tax payments in 12 equal monthly installments, beginning from the second month of a company's basis period (financial year). An estimate of tax payable for the year of assessment must be furnished to the Director General one month before the beginning of the basis period. The balance of the tax payable by a company is due to be paid on the last day by which the return must be submitted. Tax on royalties, rental of moveable properties, technical or management service fees and interest received by non-resident companies are collected by means of withholding tax. The withholding tax is payable within one month of crediting or paying the non-resident company.

Capital Allowances

Businesses in Thailand are eligible for capital allowances in respect of depreciation for equipment and other physical assets (See Table 2). The rates given for the varying assets are as follows:

Table 2

Type of Asset	Rate
Buildings	not more than 50% pa
Machinery & equipment	not more than 20% pa
Motor vehicles	not more than 20% pa

These rates apply to particular assets purchased for a Thai company's business including its foreign branches and to assets purchased by a Thai branch of a foreign company. Capital allowance for buses and passenger cars with a maximum seating capacity of 10 persons and below is based on a maximum allowable value of Baht one million per vehicle.

In Malaysia, the annual capital allowance rates vary in accordance with the type of asset used by a business (See Table 3).

Table 3

Type of Asset	Rate
Office equipment, furniture and fittings	10%
Plant and machinery (general)	14%
Heavy machinery, motor vehicles	20%

Where capital allowance rates exceed 20% for certain types of plant and machinery such as computers and pollution control equipment, companies are allowed to continue using the higher rate. For example, the increased annual rate for computers is 40%.

Group Relief for Companies

In both the corporate tax systems in Thailand and Malaysia, each company within a group is considered a separate legal entity and taxed independently. Consequently, losses incurred by one company cannot be used to off-set the taxable profits of another company within the same group. In Malaysia however, the Inland Revenue Board will consider allowing group relief for agriculture-based companies if they satisfy stringent conditions such as harvesting specific agricultural produce.

Investment Incentives

Thailand is the first country in Asia to introduce investment promotion laws thereby providing tax and other non-tax incentives to potential investors. The investment promotion laws were first enacted in 1954 and the legislation has been reviewed over the years to cater to the ever changing business environment. The laws are overseen by the Board of Investment (BOI), a policy making body that promotes domestic and foreign investments which is vital to the country's economic and social development. The BOI defines priority areas for investments; identifies investment opportunities and ascertains nature of incentives that can be given to qualifying investors.

Currently, the *Investment Promotion Act 1977* publishes a list of activities that qualify for investment promotion. The extensive list covers the manufacturing sector and gives special incentives to certain investments considered important and useful to the social and economic development of Thailand. The Board defines the priority areas for investment. To provide incentives, the BOI divides Thailand into three zones. Zone 1 comprises of highly developed areas whereas Zone 2 covers developed areas located in 10 provinces. Zone 3 covers the remaining 57 provinces. More tax incentives are given to investments in Zone 3. For instance, there is a corporate income tax exemption of eight years for projects located in Zone 3 whereas investments in Zone 1 are only given a three year exemption. Dividends derived from the promoted activity will also be exempted from income tax for a period equal to the exemption period from the corporate income tax.

In Malaysia, the Pioneer Industries Ordinance was introduced in 1958 to encourage the development of the manufacturing sector. As a result, foreign investors were encouraged to concentrate in developing substitutions for import based industries such as food, beverages and tobacco. In 1968, the *Investment Incentives Act* replaced the Pioneer Industries Ordinance to additionally encourage the development of labour intensive industries that produced goods for export. To stimulate the growth of export-oriented industries, Free Trade Zones (FTZs) and Licensed Manufacturing Warehouses (LMWs) were established.

Essentially, the investment incentives lower the initial cost of capital outlay and reduces operating costs resulting in increased profits (after tax) for the investor. In this regard, the *Promotion of Investment Act 1986* (which replaced the *Investment Incentives Act 1968*) provides numerous incentives that either fully or partially exempt the income of investors from taxes. Specific provisions in the *Income Tax Act 1967* also wholly exempt the income of venture capital companies and reduce the taxable income of approved operational headquarters companies.

One important issue that the tax authorities in Thailand and Malaysia need to explore and reach a consensus on is how new technologies can be exploited to provide improved services to taxpayers. Tax authorities should be armed with legislative support so that Revenue agencies can provide an equitable and clear taxation environment for commerce carried out by both conventional and electronic means. Imposition of new taxes such as e-business tax should be such that they do not dissuade commercial development that can be beneficial to the economy.

Treaties to Avoid Double Taxation

Both Thailand and Malaysia have adopted the Organisation for Economic Co-operation and Development (OECD) model in form and in substance, in concluding Double Taxation Agreements (DTAs) with other countries (see Table 4). The principal objective of these agreements is to eliminate double taxation on taxpayer's income. The agreements generally place taxpayers in a more favorable position for Thai income than they would be under the Revenue Code, as profits will only be taxable if the taxpayer has a permanent establishment in Thailand.

The double tax relief or credit pattern adopted by Malaysia in its agreements are a combination of territorial taxation (as opposed to worldwide taxation) and exemption of foreign income unless remitted into Malaysia. Thailand has less double tax treaties in comparison to Malaysia, however, the Thai Government is currently in negotiation with several countries to finalise tax treaties. These countries include Bangladesh, Greece, Israel, New Zealand, Spain, Switzerland Taiwan and the US.

Table 4 Thailand & Malaysia: Double Taxation Agreements

Country	Thailand	Malaysia	Country	Thailand	Malaysia
Albania	✗	✓	Mongolia	✗	✓
Austria	✓	✓	Nepal	✓	✗
Australia	✓	✓	Netherlands	✓	✓
Bahrain	✗	✗	New Zealand	✗	✓
Bangladesh	✗	✓	Norway	✓	✓
Belgium	✓	✓	Pakistan	✓	✓
Canada	✓	✓	Papua New Guinea	✗	✓
China	✓	✓	Philippines	✓	✓
Czech Republic	✓	✓	Poland	✓	✓
Denmark	✓	✓	Romania	✓	✓
Fiji	✗	✓	Russia	✗	✓
Finland	✓	✓	Singapore	✓	✓
France	✓	✓	South Korea	✓	✓
Germany	✓	✓	South Africa	✓	✗
Hungary	✓	✓	Spain	✓	✗
India	✗	✓	Sri Lanka	✓	✓
Indonesia	✓	✓	Sudan	✗	✓
Ireland	✗	✗	Sweden	✓	✓
Israel	✓	✗	Switzerland	✗	✓
Italy	✓	✓	Thailand	✗	✓
India	✓	O	Turkey	✗	✓
Japan	✓	✓	Soviet Union	✗	✓
Jordan	✗	✓	United Arab Emirates	✗	✓
Laos	✓	✗	United Kingdom	✗	✓
Luxemburg	✓	✗	United State	✓	✓
Malaysia	✓	✗	Vietnam	✓	✓
Malta	✗	✓	Zimbabwe	✗	✓
Mauritius	✓	✓			

Value Added Tax in Thailand

The value added tax (VAT) system was introduced in Thailand on 1 January 1992. The VAT system largely replaced the old business tax system, which critics claimed caused inefficient redundancies and facilitated tax evasion. The current VAT rate is 7% on turnover.

Under the new tax regime, the value added at every stage of the production process is subject to a seven percent tax rate. Those who are affected by this tax are: producers, providers of services, wholesalers, retailers, exporters and importers. A zero VAT rate is applicable on exports and services provided in Thailand for persons in foreign countries and on international transportation by air and sea by Thai juristic persons.

Malaysia has not introduced a VAT system but service tax and sales tax are imposed on goods and services. Service tax is a consumption tax levied and charged on any taxable service provided by any taxable person except exported taxable service. The rate of service tax is 5% *ad valorem*. A complete list of taxable persons and taxable services can be found in the Second Schedule to the *Service Tax Regulation 1975*. Sales tax is a single-stage tax imposed on certain locally manufactured goods and on similar goods that have been imported. Labuan, Langkawi, Free Zones and Licensed Manufacturing Warehouses do not fall within the ambit of this tax. Sales tax is a form of consumption tax and under the present system, the onus is on the manufacturers to levy, charge and collect the tax from their customers. In the case of imported goods, sales tax is collected from the importer at the time the goods are released from customs control. Sales tax is generally an *ad valorem* tax and the rates vary between 5% and 15% depending on the nature of manufactured goods.

Tax Treatment of E-Commerce

Thailand initially took the bold step of granting tax-free status to cyber trade transactions in order to encourage Internet activity. However, with Thailand's participation in the World Trade Organisation (WTO), the Government repealed the tax-free status and is now training it's officials in e-commerce taxation with a view to prosecuting e-commerce tax evaders

The IRB of Malaysia has not taken any concrete stand to tax income arising from electronic commerce. It has taken the cautious step of adopting a common platform with other countries through participation in international forums such as the OECD, the Asia Pacific Economic Co-operation (APEC), and the WTO. In the meantime, existing taxation laws govern e-business transactions thus providing ample opportunities for e-commerce to minimise the payment of tax.

Conclusion

The Governments of Thailand and Malaysia offer various tax and non-tax incentives to lure local as well as direct foreign investments. The available data suggests that Thailand offers more liberal tax incentives to lure direct foreign investment compared to Malaysia. Notably, pioneer companies located in Zone 3 are wholly exempt from corporate tax for eight years. Malaysia, on the other hand, has a lower tax rate (28%) in comparison to Thailand (30%). Furthermore, overseas income remitted by companies (other than those carrying on sea and air transport business, insurance, and banking) are wholly tax exempt.

The Ministry of Finance in Thailand has successfully implemented a VAT system that is perceived to be an efficient mechanism to collect a consumption-based tax. Once a VAT system is in place, it will be easier for the Government to collect taxes from businesses executed electronically. Malaysia has yet to introduce such a VAT system.

One important issue that the tax authorities in Thailand and Malaysia need to explore and reach a consensus on is how new technologies can be exploited to provide improved services to taxpayers. Tax authorities should be armed with legislative support so that Revenue agencies can provide an equitable and clear taxation environment for commerce carried out by both conventional and electronic means. Imposition of new taxes such as e-business tax should be such that they do not dissuade commercial development that can be beneficial to the economy.

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Regrossing the legal effect

The case of Commissioner of Taxation v. Century Yuasa Batteries Pty Ltd

1. This case is of importance to practitioners who are faced with the issue of payment by a Malaysian resident service recipient for Malaysian 'withholding tax' on invoices from non-resident service providers, where the contract requires in one form or another that the burden of the withholding tax be borne by the resident party. This we believe is a common situation, since the non-resident service provider often does not budget for or want to become involved in tax problems in foreign locations.

2. The principle established in this case would appear to apply to 'withholding tax' under sec. 107A, 109, 109A, 109B and 109C the Malaysian Income Tax Act 1967.

3. The case was first brought by the taxpayer before a single judge of the Australian Federal Court where it was reported in (1997) 193 F.C.A. (27th March 1997), and was then taken on appeal to a three judge panel of the same court, where it was reported in (1998) 269 F.C.A.

The facts of the case

4. The resident taxpayer ('Century') had borrowed a sum of money from a non-resident lender called BNI. The loan agreement between Century as borrower and BNI as lender contained the following clause:

> *"All sums payable by the Borrower under this Agreement shall be paid in full without set-off or counterclaim and free and clear of and without any deduction or withholding for or on account of any tax. If the Borrower or any other person is required by any law or regulation to make any deduction or withholding from any payment, the Borrower shall together with such payment pay an additional amount so that the Lender receives free and clear of any tax the full amount which it would have received if no such deduction or withholding had been required. The Borrower shall pay to the relevant taxing or other authority the full amount of the deduction or withholding made by it and promptly forward to the Lender copies of official receipts or other evidence showing that the full amount of any such deduction or withholding has been paid over to the relevant taxation or other authority before the date on which penalties attach thereto."*

5. Under the relevant Australian tax legislation income tax dubbed as a 'withholding tax' was imposed upon a non resident who derives income in the form of interest paid to the non resident by a resident borrower. The relevant Act defines interest as including *"an amount in the nature of interest"*. The withholding remains a tax on the income of the non-resident but the legislation imposes a statutory obligation on the resident to withhold and pay to the Revenue the amount of that tax upon terms similar to the obligation imposed on the resident party under the Malaysian legislation.

6. Century, pursuant to its contractual obligation paid to BNI the full amount of the interest charged without deduction, and then voluntarily disclosed the payment to the Australian Taxation Office, who decided that the withholding tax was payable not only on the base amount stipulated in the contract but also on the amount of the withholding tax paid since they claimed it also qualified as interest or in the nature of interest. Both payments were made by the taxpayer to the Taxation Office under protest.

7. This reasoning for this decision of the Taxation Office appears from its *Taxation Ruling IT 2683* of 21st May 1992 which includes the following passage.

> ***"a) Calculating withholding tax paid by a borrower on behalf of a lender***
>
> *4. A borrower may undertake, as a written or implied term of a loan agreement:*
>
> - *to pay to the lender an amount equivalent to the Australian withholding tax for which the foreign lender is liable;*
> - *to indemnify the lender against the withholding tax; or*
> - *to meet the lender's liability by actually paying the withholding tax.*
>
> *In each situation, the borrower must pay an amount of withholding tax calculated as follows:*
>
> *interest withholding tax = 10% of (10/9) x [interest payment]*

5. *This formula is based on the reasoning that the after-tax return required by the lender can only be achieved if interest withholding tax is deducted from a gross amount of interest one-ninth greater than the amount of interest actually paid by the borrower to the lender."*

9. It is noted that a precisely similar formula was used by the Malaysian Revenue for calculation of withholding tax under sec. 109C of the Malaysian *Income Tax Act 1967* in a similar contractual situation in its "Guidelines on Withholding Tax on Interest ... to Individual Resident in Malaysia" found in the Malaysian Master Tax Guide Manual page 2124 to 2142, which gives this illustration.

> "***Tax on Tax in the Case of Withholding Tax on Interest borne by Banks***
> *Where the full interest due on monies placed in the savings and fixed deposit accounts is paid to the depositors and the withholding tax is borne by the bank, the payment of the withholding tax by the bank constitutes additional interest on the monies placed in the savings and fixed deposit accounts to the depositor and is therefore subject to the 5% withholding tax. The total withholding tax to be accounted to LHDN in this instance by the bank should be ascertained by using the regrossing method.*
>
> ***Example***
> *Interest of RM1,000 is paid to the depositor on his savings deposit with the bank and the 5% withholding tax is borne by the bank.*
>
> *The interest is regrossed to arrive at the withholding tax to be accounted to LHDN as follows:*
>
> *Amount of regrossed interest:*
> *(as if tax had been withheld at 5%)*
>
> $\frac{RM1,000}{95} \times 100$ = *RM1,052.63*
>
> *Less: tax deemed to have been deducted at 5%* = *RM52.63*
>
> *Net interest paid to depositor* *RM1,000.00*
>
> *The total withholding tax to be accounted to LHDN is RM52.63 out of which RM2.63 relates to tax on tax."*

10. To avoid confusion of terminology, we will term the RM50 in this example as 'the base amount' and the RM2.63 as the "additional amount".

11. Century also contended before the single judge that it was not liable to pay the base amount because the statutory obligation to withhold did not apply to it since the monies were not remitted directly by them to the overseas lender but remitted to the overseas lender's account with a resident bank. Century failed in this submission and did not pursue it on appeal. It was never argued that the overseas lender was not liable to pay the tax on the base amount.

12. The main issue in the case before the single judge and the only issue on appeal before the full bench was that the additional amount was not payable because it was not payment of interest or in the nature of interest.

13. This issue may be illustrated by an example. Suppose A borrowed RM1m. from B who is a non resident at the interest rate of 10% p.a. and the loan agreement contains a provision similar to the provision in the agreement between Century and BNI, and further assume that there is legal obligation to deduct withholding tax at 10%, A is obliged to:

    a) pay B RM100,000 as interest;
    b) pay the Revenue RM10,000 being 10% withholding tax on the amount of interest.

    If the tax of RM10,000 is to be regarded as additional interest, as the Revenue contended, then further withholding tax of 10% i.e. RM1,000/= would have to be made and paid to the Revenue.

14. The Revenue's argument on the liability of Century for the additional amount failed both before the single judge at first instance and the full bench on appeal, the full Federal Court specifically approved the reasoning of the Court below in the following terms:

> *"They [the Base amount of Withholding Tax] are not calculated by reference to the principal sum advanced and are not in the nature of an additional return or profit to BNI on the money advanced over and above the interest calculated and payable under clauses 5 and 17. The additional amounts relate to costs, expenses, charges and*

liabilities for taxes and other statutory fees and imposts for which BNI is or may become liable. The clauses dealing with the additional amounts transfer as between the applicant and BNI the liability to pay these amounts to the applicant. The purpose of the clauses was not to enable BNI to earn an additional profit or return on the loan over and above that which it was entitled to under the facility agreement; the purpose, as appears for example in clause 10.2(b), was to ensure that the effective rate of interest earned under clauses 5 and 17 was not reduced by BNI having to pay or bear these additional costs. The purpose was achieved by requiring the applicant to make the payment to the third party or to indemnify BNI for any cost, charge or similar expense incurred by it, which fell within the operation of the relevant clauses. That the additional payments were a cost to the applicant of obtaining the use of the funds does not convert the payment to 'interest' in the hands of the lender where they are referable to costs and liabilities incurred by the lender as a consequence of the loan transaction itself coming into existence and being given effect to by the parties to it. Such payments are not referable to a principal in money being the loan advance actually paid over and do not have the character of a return or profit to the lender on making the loan. They stand apart from the interest paid, although, the fact of their payment undoubtedly enabled BNI to better enjoy the interest earned."

15. The conclusions to be drawn from the above case would appear to be as follows:

    a) the decision does not (in the absence of any statutory restriction) call into question the validity of contractual provisions such as clause 11 in the above case; nor does it affect the contractual obligation of a borrower like Century to bear in addition to the full amount of the stipulated interest a further amount equivalent to the lender's withholding tax on this amount.

    b) it does however answer in favour of the taxpayer as against the Commissioner the issue as to when withholding tax on the initial payment of withholding tax (tax-on-tax) or "the additional amount" is required to be made. In answering this question, it would appear that the courts will look at the substance or real nature of clauses such as clause 11 in the above case, hence their ruling that the payment of the base amount of Withholding Tax was in the nature of an indemnity payment and not a payment in the nature of interest.

    c) the decision does not adversely impact on the deductibility of the gross up amounts payable by the borrower, which was not an issue in the case. In fact the decision confirmed that the additional payments were a cost to the borrower of obtaining the use of the funds. Accordingly they should continue to be deductible.

The main issue in the case before, the single judge and the only issue on appeal before the full bench was that the additional amount was not payable because it was not payment of interest or in the nature of interest.

16. The regrossing formula has a respectable pedigree and has been endorsed by both Malaysian and Australian Revenue authorities as previously mentioned. But the **Century Yuasa Battery** followed a different route. It never challenged the obligation of the resident payer to pay to the Revenue the amount of the withholding tax as an addition to the full amount of the basic charge to the overseas lender as well as the deductibility of the withholding tax in addition to the interest payment. However it held that there was no need for the resident payer to add on the Regrossed Amount because the character of the incremental was not interest (on which withholding tax is payable) but an indemnity payment (on which withholding tax is not payable).

17. There seems no good reason why the principle established in the Australian case should not be followed by the Malaysian Courts.

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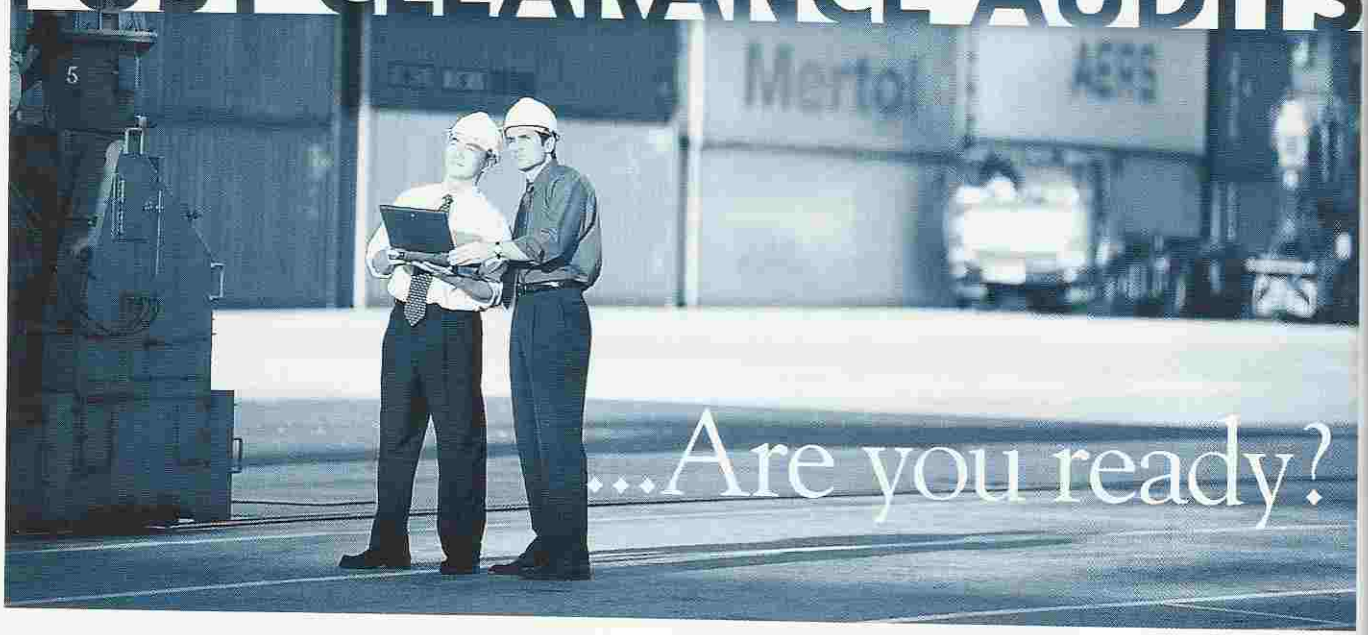
POST CLEARANCE AUDITS



By Bong Sesh Chin

Beginning 1 January 2000, a new system of customs valuation known as the WTO valuation was implemented in Malaysia replacing the Brussels Definition of Value that was previously adhered to. In this regard , the *Customs (Rules of Valuation) Regulations 1999*, made under sec. 142 (3B), of the *Customs Act 1967* (the Act), came into effect on the said date to regulate the valuation of goods imported into Malaysia.

The rationale behind implementing the WTO valuation system is to provide greater transparency in customs valuation as well as expediting the process of importation. The system presupposes a process of consultation between customs and the importers to ensure the accuracy of the determined value. In this respect, importers must make complete and accurate declarations while the customs have to verify the data presented by the importer to ensure its truth and accuracy.

To prevent any loss of Government revenue, a new "Unit Pasca Import" has been set up by the Royal Malaysian Customs Department at both headquarters and state levels to carry out the post audit. The principal task for this unit is to verify the correctness of the value of imported goods declared at the time of clearance of the said goods.

Post Clearance Audit (PCA)

PCA is a process conducted by the Unit Pasca Import after the completion of import clearance to verify the accuracy of declarations, through the examination of account books, business transactions, and other relevant commercial data maintained by persons directly or indirectly involved in international trade.

Simply put, PCA is similar to the auditing of accounts conducted by senior officers of customs from the Internal Tax Divisions on manufacturers and businesses licensed under the *Sales Tax Act, 1972* and *Service Tax Act 1975* respectively.

Why is PCA necessary?

Regulation 3(1) of the *Customs (Rules of Valuation) Regulations 1999* stipulates that the basis of valuation should, to the greatest extent possible, be the transaction value of the goods being valued. It reads:

> "Subject to sub regulation 2, the customs value of imported goods shall be valued on the basis of the transaction value of the good as the primary basis of valuation as set out under regulation 4."

The Regulations also set out conditions under which the transaction value may be accepted as customs value, subject to certain adjustments such as inclusion of royalties, licensing fee, assists, subsequent proceeds and etc. In addition, there are provisions for the Customs to reject the transaction value altogether, after which the imported goods may be valued using secondary methods of valuation according to the order of application.

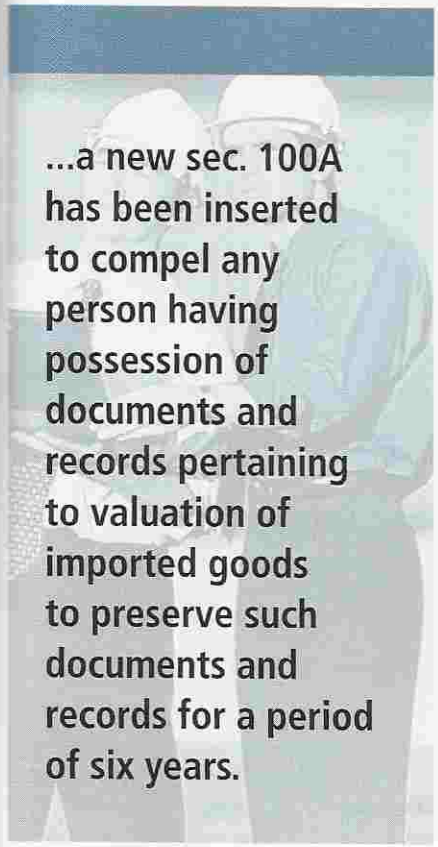
It is the current practice that the customs authority accepts the transaction value declared at the time of import for the purposes of assessment of duty/tax payable. Frequently, the duty/tax payable is assessed based on commercial invoices and occasionally on letters of credit. Obviously, assessment to be based on such documents is desirable, as it facilitates the quicker clearance of goods. The examination of other trade related documents such as distributorship agreements, contract financial accounts etc. is not done at the time of import.

As such, it is imperative that PCA be conducted *inter alia* for the following reasons:

a) To confirm whether conditions for the use of transaction value as the basis of valuation are fulfilled;
b) To confirm whether the declared value includes the total payment made or to be made by the importers;
c) To confirm whether the declared value includes all additions necessary to derive the transaction value;
d) To confirm whether an alternative method of valuation, where indicated, is being used correctly; and
e) To detect valuation fraud.

Legal provisions pertaining to PCA

In view of implementing the WTO valuation system, the *Customs Act 1967* has been amended accordingly to incorporate provisions to provide the customs with the requisite authority and power necessary for effective implementation. These amendments, *inter alia*, include the following:



Records of the imported goods

The success of the PCA is dependent on the completeness of the records of the imported goods. In view of this, a new sec. 100A has been inserted to compel any person having possession of documents and records pertaining to valuation of imported goods to preserve such documents and records for a period of six years. Failure to comply with this requirement constitutes an offence punishable under sec. 100A(2) that reads as follows:

> *"Any person who contravenes subsection (1) shall be guilty of an offence and—*
>
> *a) where value of the goods can be ascertained, shall be liable to a fine of not less than two times and not more than ten times the value of the goods;*
> *b) where the value of the goods cannot be ascertained, shall be liable to a fine of not less than one hundred thousand ringgit."*

The imposition of such hefty fines demonstrates the seriousness of the customs authority in dealing with efforts to undermine the successful conduct of PCA.

Confidentiality of information

A proper officer who carries out PCA is certain to receive or have in his possession information relating to valuation in the ordinary course of his duties. The customs authority assures importers of the confidentiality of such information and a new sec. 125A has been inserted to forbid the disclosure of such information. However, disclosure made at the order of the court or with the written consent from the importers is not an offence.

Powers of inspection and investigation

To facilitate the conduct of PCA, several provisions dealing with inspection and investigation have been included. Such powers are provided under sec. 106A and 106B.

Section 106B confers to a proper officer of customs with all powers necessary to carry out inspection and investigation, while sec. 106A empowers a senior officer of customs to access places or premises where an importer or any person having dealings with such importer, conducts his business. In addition, such senior officer of customs shall also have the following powers:

i) power to compel the production of books, data, document, record or other things relating to imported goods;
ii) power to examine books, data, documents, records or things and to make copies of or take extracts from such books or documents;
iii) power to seize and detain any such books, data, documents, record or things which may afford evidence of the commission of any offence under the *Customs Act 1967*;
iv) power to require the importer or the person having dealings with such importer or any person employed by such importer or person to answer questions relating to such books, data, documents or other records, or any imported goods; and
v) power to require any container, envelope or other receptacle in such premises to be opened.

Appeal on valuation of imported goods

Section 143A provides recourse for importers aggrieved by the decision of the Director General of Customs on the valuation of the imported goods to appeal to the Courts which has full authority:

- to dismiss the appeal;
- to substitute for the amount decided upon by the Director General another amount; or
- to make such other decision as the court deems fit.

Audit approach

A comparison of the numbers of senior officers of customs entrusted to carry out post clearance audit and the number of importers nationwide will reveal that it is impossible to conduct PCA on each and every one of these importers.

Risk management
As such, it is believed that the customs authority will initiate risk assessment to determine the cases worth pursuing. Needless to say, a systematic approach towards analysing trade compliance risk will enable the customs authority to manage their workload effectively and efficiently.

Targeting and selection of importers
Having analysed the information available in their database, the customs authority would then be able to target and select importers for audit. Generally, as has been demonstrated in recent practice, the customs authority would base their selection on the following criteria:-

a) Companies importing goods that are subject to high rates of duty such as motor vehicles; and
b) Companies that were imposed agency uplifts previously when valuation of goods was based on the Brussels Definition of value.

Audit proper
The audit proper would normally be initiated by visiting the importers premises. In most circumstances, the importer would be notified in advance of such visits. An initial interview with the importer or his employees would normally be conducted during the visit to enable the senior officer to gain a better understanding of the nature of the importer's business.

The most vital part of the audit proper is of course the examination of the various records pertaining to the importation of goods. It is through this exercise that the senior officers of customs would be able to achieve the objectives of the PCA which include the following:

i) to confirm that the conditions for the use of transaction value are fulfilled ;
ii) to confirm that all additions necessary to derive the transaction value such as assistances, royalty and licence fee, proceeds after sale etc have been included;
iii) to confirm whether an alternative method of valuation is being used correctly; and
iv) to detect valuation fraud.

In the course of an audit, it is envisaged that the senior officer would review documents relating to each stage of the transaction: The documents that may be examined are as follows:

Documents relating to ordering of goods
- Purchase orders
- Purchase agreements
- Pricing agreements
- Royalty/warranty agreement
- Quotations
- Internal requisition note

Document received prior to importation
- Confirmation of orders
- Pricing agreements
- Shipping details/advice
- Commercial invoice
- Customs invoice
- Packing list
- Insurance policy

Documents relating to importation
- Dissection sheet – calculation of duty/tax
- Customs declaration
- Manifest
- Bill of Lading
- Packing List
- Import license/other approvals

Documents relating to receipt of goods
- Goods received note
- Stock card/record
- Carriers receipt
- Tally sheets

Documents relating to payment
- Payment voucher
- Payment cheques
- Telegraphic transfer/bank records/ bank statements
- Letters of credit
- Commercial invoices
- Cash book
- Journals

Final accounts
- Profit & loss account
- Balance sheets
- Costing of product (for secondary method of valuation)
- Selling price in the domestic market (for secondary method of valuation)

Audit report
The senior officer will submit a report of his findings for the consideration of the management. The report would normally include, among others, the computation of duty/tax short paid and his recommendations.

Conclusion

In the course of conducting PCA, it may be discovered that importers have failed to include certain cost elements, whether intentionally or otherwise, in arriving at the customs value. The customs authority would require the importers to pay the deficient duty/tax upon demand. This is obviously a disadvantage to the importers, as the imported goods would have been sold at a price excluding the additional duty/tax. As such, it is essential that all parties involved are well educated as to the methods of computation and the risks involved in making errors. PCA is certain to be an important feature in the WTO valuation system as it facilitates trade by allowing the rapid clearance of goods. Attempting to verify the declarations through a thorough examination of trade related documents when presented at the time of import will cause the clearance of goods to be delayed. This in turn will have a negative impact on our nation's economy.

The popular attitude of "crossing the bridge when it comes" should be discarded. Advance preparation is imperative for all importers as PCA is here to stay.

The Author
Mr. Bong Sesh Chin worked in the Customs Department from 1981 up to 1996. After which he took up employment with PW as a Senior Consultant for indirect taxes. Subsequently he and his partner set up Top Tier Services Sdn. Bhd. Currently he holds the position of Director and is involved in rendering consultancy services in indirect taxes.

Refund and Drawback

By Lee Ah Yem and Ang Weina

This article serves to examine the various statutory provisions and present an overview of the avenues and procedures available for refund and drawback in relation to Customs and Excise Duties, Sales and Service Taxes. The rules and procedures for claiming a refund and drawback are fairly straightforward, but nevertheless a firm grasp of these rules and procedures is necessary if a taxpayer is to reap the maximum benefits. Care and precaution must therefore be taken to avoid claims being nullified and consequently rejected.

What is a "Refund"?

A refund simply means the repayment of import duties/taxes/penalties or other monies that had been overpaid or erroneously paid.

During the clearance of goods declared for home use or after release from customs , the importer or the Customs Department may discover, that the basis upon which the customs duties/taxes were computed is incorrect due, inter alia, to an error by both parties concerned. As a result, the duties/taxes that had been charged, is far greater than that which is actually due. These overpaid sums may then be refunded in whole or in part depending on the circumstances.

When can a refund be made ?

A refund can be made when monies have been overpaid or erroneously paid due to miscalculations, erroneous classification, incorrect rates of foreign exchange, double payment, short shipment, incorrectly declared value of C.I.F or F.O.B and by order of the Minister in back dating approval on rate of duty amendment. Duties paid when goods are imported by visitors as trade samples but subsequently exported can also qualify for a refund as does the case of a vendor who sells goods to a licensed manufacturer .

The legal provisions pertaining to refunds

LEGISLATION

Customs Act 1967	Sales Tax Act 1972	Excise Act 1976	Service Tax Act 1975
• **Section 16** Refund of duty or other charges overpaid	• **Section 31** Refund to vendor	• **Section 13** Refund of duty or other overpaid charges	• **Section 21** Refund of tax overpaid or erroneously paid
• **Section 96** Refund to visitors and owners of samples	• **Section 32** Refund of tax overpaid or erroneously paid	• **Section 11(2) (b)** Powers of the Minister to direct refund	• **Section 6(c) (d)** Powers of the Minister to direct refund
• **Section 14(2) (b)** Powers of the Minister to direct refund	• **Section 10(b) (c)** Powers of the Minister to direct refund		

Provisions For Refund under the Customs Act 1967

a) Section 16

An application is made under this section to claim a refund on customs duties or any other fees or charges that has been overpaid or erroneously paid. Such an application must be made within one year from the date of over-payment. The onus of proof that charges have been wrongly or overpaid is borne by the applicant i.e. the tax payer. Relevant documents that ought to accompany the application include:

- Application Letter
- Form JKED 2
- Original invoice
- Packing list
- Bill of lading / Airway Bill
- Duty receipt Customs No. 1
- Statement of Claim

b) Section 96

An application under this section relates to the refund of customs duties paid by a visitor to Malaysia or commercial travellers on their personal effects or trade samples. To fall within this category, it is important that the said goods must be re-exported within a period of three months from the date of import. The applicant is required to submit the duty receipt to the Customs at the exit point and produce the goods to the Customs for verification.

Provisions For Refund under the Sales Tax Act 1972

a) Section 31

Vendors who sell goods to a licensed manufacturer can apply for a sales tax refund. The claim should not be less than RM50 except with the special permission of the Director General. Applications should be made in Forms JKED2 within one year of the date of payment and be supported with relevant documents such as:

- Application letter
- Customs Form No. 1 (import)/Form CJ3
- Bill of Lading/Airway Bill
- Packing list
- Sales invoice to manufacturer
- Statement of claim
- Form CJ5
- Invoice

b) Section 32

This section relates to a refund of sales tax and/or penalties that have been overpaid or erroneously paid. An application for a claim must be made within one year from the date of payment of the said duty. The claim should not be less than RM50 unless approved by the Director General. In the formal application, reasons for the claim must be stated for example miscalculation, erroneous classification or valuation. The burden of proof is on the licensee who has to show that the refund will not enrich the claimant.

Relevant documents to be included with the application include:

- Application Letter
- Form JKED 2
- Form CJ3
- Invoice
- Statement of Claim
- Other relevant documents

Provisions For Refund under the Excise Act 1976

a) Section 13

An application under this section relates to a refund of excise duty, warehouse rent or other charges which have been overpaid or erroneously paid. Such a claim must be made within one year from the date of payment of the said duty. In the formal application, reasons for the claim must be indicated and the relevant documents to accompany the application include:

- Application Letter
- Form JKED 2
- Form Excise No. 7
- Invoice
- Statement of Claim
- Other relevant documents

Provisions For Refund under the Service Tax Act 1975

a) Section 21

An application under this section relates to a refund of service tax or penalties that have been overpaid or erroneously paid. Such a claim must be made within one year from the date of payment of the said duty. The claim should not be less than RM50. In the formal application, reasons for the claim and proof that the refund would not enrich the claimant must be indicated. The relevant documents to be included with the application include:

- Application Letter
- Form JKED 2
- CP 3 Form / receipt
- Invoice
- Statement of Claim

Powers of Minister

Under sec. 14 of the *Customs Act*, sec. 10 of the *Sales Tax Act*, sec. 11 of the *Excise Act* and sec. 6 of the *Service Tax Act*, the Minister may approve refund of duty, taxes and penalty to any person, if he thinks it is equitable to do so.

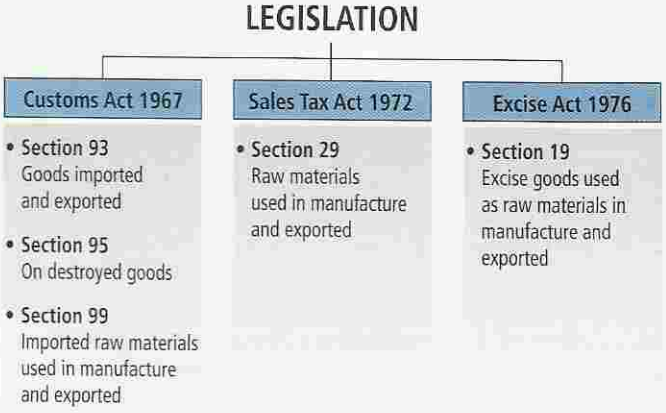
What is a "Drawback"?

All duties paid on raw materials, components and packaging materials which are used as a part or an ingredient in the manufacturing of goods that are exported, will be eligible for a drawback if the requisite conditions are fulfilled.

The drawback provision is a useful and practical avenue for manufacturers who are ineligible for incentives under sec. 14 of the *Customs Act 1967*. The drawback of import duty, sales tax and excise duty on raw materials, allows the manufacturers to be more competitive in the export market.

Manufacturers can also apply and claim drawback of customs duty paid on waste or refuse resulting from the manufacturing of goods which are exported, provided that the drawback on the quantity of such waste or refuse has been proven to the satisfaction of the Director General.

The legal provisions for drawback



Provisions For Drawback under the Customs Act 1967

a) Section 93

This section provides that nine-tenth (9/10) of the duties paid shall be refunded as a drawback when goods upon which customs duty has been paid are subsequently exported.

Conditions for drawback include:

- Identification of the goods by a senior Customs officer at the place of export.
- Claim for drawback is not less than RM50.00.
- The goods are to be exported within twelve (12) months from the date the customs duty was paid.
- The export of the said goods has not been prohibited by regulations made under this Act.
- A written notice to be given to a senior officer at Customs when or before the goods are exported stating that a claim for drawback will be made and such claim will be made in the prescribed form within three (3) months of the date of export.
- The goods have not been used after import.

Supporting documents required include:

- Export Declaration (Customs No. 2) with notice of claim for goods declared.
- Extra copies of Export Declaration (Customs No. 2) for purposes of claim to the customs claim section.
- Claim Form JKED 2.
- Import Declaration Customs No. 1 & receipt for the payment of duty.
- Statement of Claim.
- Sales invoice/purchase receipt.

b) Section 95

This section provides for drawback on the full amount of customs duties paid on goods that have deteriorated or become damaged and are destroyed in the presence of a senior Customs officer.

Conditions for drawback include:

- The goods have deteriorated or become damaged
- Other conditions in sec. 93 apply

Supporting documents required include:

- Destruction Certificate
- Import Declaration Customs No. 1
- Claim Form JKED 2
- Statement of Claim
- Invoice/purchase receipt

c) Section 99

Customs duties paid on imported goods used as parts, ingredients or packing materials of any goods manufactured in Malaysia and subsequently exported, can be subject to a drawback for the full amount of duty paid. Claims will be paid within twenty one (21) days provided the applications are in order. Once payment is made, Customs will visit the factory to verify the claims. Goods exported to Labuan, Langkawi or to a Free Trade Zone are deemed exported goods and eligible for a drawback claim.

Conditions for a Drawback

- Finished goods that are exported must be manufactured in Malaysia and import duties must have been paid on such parts, ingredients or packing materials.
- The goods exported must have been manufactured in premises approved by the Director General.
- The manufacturing process must conform to the definition of "manufacture" in the *Customs Act 1967*.
- Proper books of accounts are kept in respect of such goods used in manufacture.
- Goods to be exported within twelve (12) months of the date upon which the import duty was paid.
- There must be a written notice on the export declaration form for drawback claim and such claim is made in the prescribed form within six (6) months or such further period of the date of such re-export.
- The finished goods shall be exported through such places or routes as the Director General may approve.

Supporting document required include:

- The approval for drawback facility
- Form JKED 2
- Customs Declaration Form No. 1 (2 copies)
- Purchase Invoice (2 copies)
- Customs Declaration Form No. 2 (2 copies)
- Export invoice and packing list (2 copies)
- Working notes on claim (2 copies)
- Export confirmation statement

Provisions For Drawback under the Sales Tax Act 1972

a) Section 29

A drawback for the full amount of sales tax paid on packing and raw materials used in manufacture and exported goods is available. Claims should not be less than RM50.00 except with the special permission of the Director General.

Conditions for the drawback are similar to the drawback of customs duty under sec. 93 and sec. 99 of the *Customs Act 1967*.

Supporting documents required include:

- The Approval for Drawback Facility
- Form JKED 2
- Form CJ3
- Receipt/invoice
- Statement of Claim
- Export Declaration No. 2
- Import Declaration No. 1
- Export confirmation statement

Provisions For Drawback under the Excise Act 1976

a) Section 19

A drawback facility which is similar to that under sec. 99 of the *Customs Duty Act* is available.

Conditions for Drawback

- The finished goods have been manufactured on premises approved by the Director General.
- Books and accounts are kept as the Director General may require.
- Goods are exported within twelve (12) months of the date upon which excise duty was paid or such further period as the Director General may approve.
- Written notice has been given on the export declaration form (K2) that a claim for drawback will be made and such claim is made in the prescribed form within six months from the date of export.

Supporting documents required include:

- The Approval for Drawback Facility
- Form JKED 2
- Excise Form No. 7
- Receipt/ invoice
- Export Declaration No. 2
- Working Notes on claim
- Export confirmation statement

Conclusion

Although problems occasionally arise in claims for drawback and refund, it should also be noted that appeals can be lodged for the consideration of the Customs Department and further to the Minister of Finance for a final decision in the event the claim is rejected. Given the availability of the provisions mentioned above, an understanding of the drawback and refund will place our manufacturers in a more competitive position in the global export market.

The Authors

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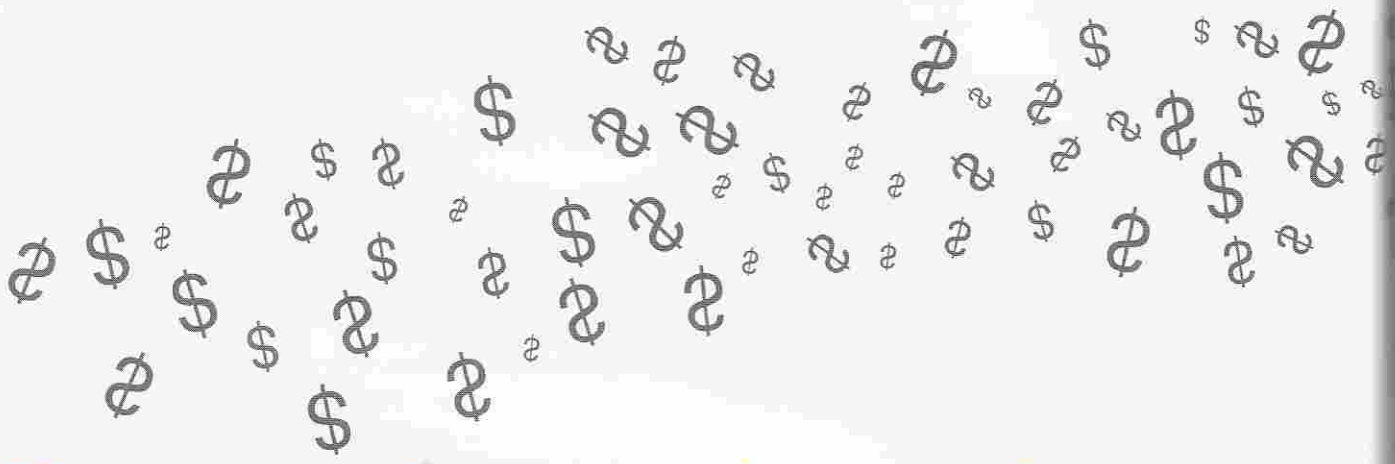
Ang Weina is an Associate Director of Deloitte KassimChan Tax Services Sdn Bhd and leads in the Foreign Direct Investment Services group with over 10 years experience in Singapore, Japan and Malaysia of MIT, A member of the Indirect Taxation Working Group of MIT.

SINGAPORE'S BUDGET FOR THE YEAR 2002:



To attract foreign talent and encourage risk-taking and enterprise

by Lee Fook Hong

On 3 May 2002, Singapore's Budget for the Year 2002 was unveiled in Parliament by the Deputy Prime Minister and Minister for Finance. The budget is balanced between large tax cuts and generous hand-outs and also between boldness and prudence. The tax changes introduced in the Budget, aim at providing a good basis for Singapore's economic restructuring in reaction to intensified global competition. A summary of the tax changes announced in the budget is stated on this page.

Generally, the ordinary people who cursorily view the budget welcome the tax cuts and hand-outs. However, those who conduct a more critical examination of the implications of the tax changes remark that the tax reforms, though bold, are not really bold and far enough. They hold the view that the tax cuts and incentives benefit only the taxpayers with income at the top brackets. There are yet others who comment that the tax changes introduced are recommended by a committee from the rich, by the rich and for the rich. More bold and drastic changes should be introduced to help the poor, the unskilled and the untalented.

This article will focus only on a few of the tax changes announced in the Budget.

SUMMARY OF THE MAIN TAX CHANGES IN THE BUDGET FOR 2002

For Businesses

- Corporate Income Tax rate reduced to 22% in YA2003
- Group relief in respect of loss-transfer, from YA2003
- One-tier corporation taxation system, from 1 January 2003
- Tax incentives for the Financial Sector
- Reduced minimum tax rate of 5% under the Development and Expansion Incentive, with immediate effect
- Double tax deduction for approved R&D expenses, from YA2003
- Unilateral tax credit extended to all services income, from YA2003
- Approved International Shipping Enterprise Scheme to be expanded, from YA2003

Others

- Goods and Services Tax increased from 3% to 5%, from 1 January 2003
- Reduction in motor vehicle taxes
- Withdrawal of tax remission for allowance for Members of Parliament, from YA2003
- Economic Restructuring Shares for Singaporean
- Double tax deduction for donations to Institutions of Public Characters on or after 1 January 2002
- Service and Conservancy Charges and Rental rebates and other assistances

For Individuals

- Top marginal tax rate reduced to 22% in YA2003
- New class of "Not Ordinarily Resident" (NOR) taxpayers, from YA2003
- Changed to Employee Stock Option incentive scheme, from YA2003
- National Service Relief increased by 50%, from YA2003
- Divorcees continue to draw their procreation tax rebates, from YA2003
- Handicapped Parent Relief of $3,000, from YA2003
- Withdrawal of Double Child Relief for children studying overseas, from YA2003
- Payments to international arbitrators exempt from withholding tax, with immediate effect
- Final income tax of 15% on the gross income of non-resident professional, with effect from 3 May 2002
- Movable assets of non-domiciles situated in Singapore exempt from estate duty for deaths occurring on or after 1 January 2002

The Budget's main priority is to continue to attract investors and talent to relocate in Singapore and help nurture Singapore's economy. But investors and talent are highly sensitive to the taxes they have to pay, especially direct taxes on their income. A few aspects of this Budget and their implications are worthy of further attention:

a) the lowering of personal income tax rate and the corporate tax rate, and the introduction of a new class of "Not Ordinarily Resident" (NOR) taxpayers, and

b) the introduction of group relief and a one-tier corporate taxation system.

TO ATTRACT FOREIGN TALENT TO RELOCATE IN SINGAPORE

For resident individuals, with effect from the Year of Assessment 2003, there will be a cut in personal income tax rates. The top marginal tax rate will be reduced from 26% to 22%. The income bands will be reduced from ten to seven and the top marginal rate will be reduced to 20% in three years.

As Singapore is moving towards the knowledge-based economy, talent is an essential requisite for businesses to progress and grow. When talented people consider accepting a job, they are mindful of the tax residence status and how much personal income tax they have to pay in the country they work in.

To attract and retain the talent, a new class of taxpayers called "Not Ordinarily Resident" (NOR) taxpayers will be introduced.

The NOR Taxpayer Scheme extends favourable tax treatment to qualifying individuals for a period of five years of assessment with effect from the Year of Assessment 2003. A NOR taxpayer must meet the following criteria:

i. He must not have been a Singapore tax resident in the three years of assessment before the year he first qualifies for the NOR scheme; and

ii. He must be a tax resident for the year of assessment in which he wishes to qualify for the NOR scheme.

A NOR taxpayer will be exempt from tax on income earned before he relocates in Singapore. For non-citizen NOR taxpayers, employers' contribution to their overseas pension fund will also be tax-exempt.
In addition, a NOR taxpayer will enjoy the benefit of time apportionment of income provided he spends at least 90 days a year outside Singapore for business. Under the time apportionment incentive, a NOR taxpayer will pay tax only on his total Singapore employment income based on his number of days in Singapore subject to a floor tax rate of 10% on his total employment income.

Besides the NOR Taxpayer Scheme, the rate of personal income taxes has also been lowered to lighten the tax burden of individuals. This is in line with the move to enhance efforts to attract and retain talent.

With the introduction of these measures, many are of the view that Singapore's tax rates are now lower than most countries except Hong Kong. The cuts in tax rates are widely expected to help in attracting foreign talent to Singapore. For the talent already here, they may be inclined to stay on because of the lower personal tax burdens with effect from the Year of Assessment 2003.

Some believe that these measures will put Singapore on a more competitive footing with other countries. Foreigners who are already staying and working in Singapore are happy with the NOR scheme and lowered tax rates. The new Scheme will also apply to Singaporeans who return home after three or more years abroad to reap the tax benefits.

Conversely, some expatriate employees in Singapore argue that the move only benefits individuals who work for companies that have not practised tax equalisation. If an individual's tax liability is equalised, he will pay no more or less tax than he would have had to pay in his home country. So in effect, the tax cuts only benefit the employers as opposed to the employees.

Admittedly, a lighter tax burden can assist in attracting foreign talent. However, other non-tax factors should also be taken into consideration. Factors such as the nature of the job, the working conditions and the political climate are equally important to any person thinking of investing in or relocating to Singapore.

Although the cut in income tax rates is an essential step to help bridge the gap with regional rivals, there are lingering doubts as to whether the tax cuts will encourage the type of entrepreneurs Singapore is trying hard to attract. Critics feel that the Government has done nothing to attract entrepreneurs but is more inclined to attract those in the high-tech IT sector. Shanghai and Penang are attracting IT businesses out of Singapore and the tax measures do little to stop this.

As such, whether the NOR Taxpayer Scheme and the tax cuts will be effective in attracting talent to relocate to Singapore is something that can only be seen in the coming years .

TO ENCOURAGE RISK-TAKING AND ENTERPRISE

Another dynamic aspect of the Budget aimed at encouraging risk-taking and enterprise, is the introduction of group relief as well as the shift to a one-tier corporate taxation system together with the reduction in corporate tax rate. The measures will enhance Singapore's competitiveness in the regional and international markets.

i. Group relief

Corporations often organise themselves into multiple holding companies, subsidiaries and associates to reflect the structure of their business and to limit liabilities. In certain industries, corporations are required by law to set up separate companies for specific purposes.

Under the existing rules, corporations are not allowed to offset the losses of one company against the taxable profits of another within the same group. Each company in a group pays tax as a separate, stand-alone entity. As a result, the overall effective tax rate for the whole group is higher.

To lower the tax burden on companies, a loss-transfer system of group relief will be introduced with effect from the Year of Assessment 2003. A "group" consists of a Singapore incorporated parent company and all its Singapore incorporated subsidiaries. Two Singapore incorporated companies can also be members of the same group if one is 75% owned by the other or both are 75% owned by another Singapore incorporated company. Group companies will be allowed to transfer their current years unutilised capital allowances and losses. However, investment allowances and foreign losses may not be transferred.

The purpose of introducing the group relief is to lower the tax burden and encourage more risk-taking and enterprise. It may also help taxpayers during early years of new ventures, when they are likely to incur losses.

With the group relief, taxpayers may set up more separate entities to undertake risky ventures and yet still offset those losses against profits of other entities in the same group.

ii. One-tier corporate taxation system

The corporate income tax rate will be reduced from 24.5% to 22% in the Year of Assessment 2003. This will be further reduced to 20% in three years.

The one-tier corporate taxation system will be introduced to replace the current full imputation corporate taxation system with effect from 1 January 2003.

It has been argued that the full imputation system discourages companies with insufficient dividend franking credits from distributing dividends. Furthermore, the full imputation system is not well adapted to sophisticated business transactions, such as share buy-backs and share borrowing and lending.

With the one-tier corporate taxation system, the tax collected from corporate profits is final. Singapore dividends will be tax exempt in the hands of shareholders. The one-tier taxation system will work in tandem with the group relief together with the lower corporate tax rate to make more profits available for distributions as dividends allow unlimited flow-through of exempt dividends to all tiers of shareholders.

However, many companies will not be able to make full use of the dividend franking credit that they have accumulated by 1 January 2003. A five-year transition period for companies to pay franked dividends out of any unutilised dividend franking credits will be allowed.

Most corporate taxpayers welcome the measures introduced to allow more profits to be distributed as dividends to the shareholders. Property developers, in particular, are the ones cheering the introduction of group relief the most. By law, property developers are required to set up a separate company for each residential development project that they undertake. With the group relief now, losses of one company can be offset against the taxable profits of another company in the same group.

However, there are those who express disappointment over the requirement of the minimum 75% threshold to qualify for the group relief. They argue that such requirements may cause a restriction of joint venture companies as joint venture partners prefer a 50:50 structure, or have more than two partners with each taking an equal stake. All of these structures will not qualify for the group relief. Needless to say, this contradicts the call by the Singapore Government to encourage companies to venture into new businesses and markets. In this respect, some suggest introducing consortium relief, which

allows more joint venture partners with each holding a much smaller stake, as being more attractive.

There is also criticism on the uncertainty of using losses incurred by a company with concessionary tax rates, to set off the income of another company in the same group which is taxed at the full corporate tax rate.

It is believed that new system will simplify the tax code by reducing the cost of compliance and administration for corporations. The one-tier system also allows the flow-through of tax-exempt dividends to all tiers of shareholders, regardless their shareholding levels.

Tax consultants point out that the measure puts Singapore on par with Hong Kong, which has a one-tier corporate taxation system. They say the new system will also help promote Singapore as tax-efficient holding company location.

With the one-tier taxation system, corporations can now pay tax faster and companies that have untaxed capital gains can also distribute them as dividends to shareholders.

However, not all companies will benefit from the one-tier tax system. These include companies which are highly-geared and will not be able to get a tax deduction for their interest expenses since there will be no more tax credits attached to future dividends they receive. Effectively, without the tax credits, the interest cost incurred on debts borrowed by shareholders would have to be funded with post-tax profits.

Under the imputation system, if the personal marginal tax rate of an individual is less than the corporate tax rate, he will get a tax refund being the difference of the attached tax credits of dividends he received and the tax payable on those dividends.

With the one-tier tax system, the individual shareholders are effectively taxed at the corporate tax rate. Some critics remark that the one-tier system will benefit the rich with a lot of dividends,

The one-tier system also allows the flow-through of tax-exempt dividends to all tiers of shareholders, regardless their shareholding levels.

while the lower income group especially those who were not liable to any income tax before will now be worse off. They will not be able to claim any tax refund or tax credit. Instead, they are effectively taxed on the dividends at a flat rate of 22%.

Despite all these measures, some have argued that the issue of entrepreneurship is much more than the tax system or anything that can be addressed in any Budget. They say to encourage risk-taking and enterprise, more has to be done with the education system, and the risk and reward structure in Singaporean society.

Conclusion

This is a reactive budget crafted in response to the changing global economic environment. Although there are significant income tax cuts in this Budget, the feedback received indicates that the major concerns for businesses are the high operating costs arising from government's levies and charges and not just the income tax rate. Critics argue that more should be done on the problem of high operating costs that has gradually eroded the competitiveness of doing business in Singapore. Despite the numerous measures introduced, many are still disappointed that the other recommendations made by the Economic Review Committee have not been implemented.

It has also been suggested that the existing estate duty should be abolished so as to further encourage the flow of foreign investments into Singapore. It is argued that by doing this, the government will not only encourage wealth creation but also help to avoid the transfer of wealth out of Singapore into countries like Malaysia, India and Australia where estate duties have been abolished.

A few have also expressed regret that the proposed personal tax exemptions for foreign income and interest income by individuals have not been introduced in this Budget, despite the recommendations made by the Economic Review Committee. It has been suggested that the government should be bold enough to reduce the corporate tax rate to as low as 12.5% as in the case of Ireland.

Regarding the GST, many are worried that the GST hike may hit businesses and consumers hard while the economy is still in recession. Some wonder why an increase in the GST could not be shelved until economic recovery was more certain.

Lastly, although taxes are not everything, they are major adjustments which need to be made for economic restructuring and long term growth. No one can be sure about the final outcome, but it is encouraging to note that the Government is aware of, and is attempting to respond to, a more competitive external environment. Notwithstanding all the adverse comments, the Budget for 2002 does provide the basis for springing forward the economic restructuring of Singapore from the current state of uncertainty. As the old adage says, prevention is better than cure.

The Author

Lee Fook Hong *(PhD, FCIS)* is currently the Principal Consultant of Lee Fook Hong & Co, Chartered Secretaries and Management Consultants and formerly an Adjunct Associate professor of the Nanyang Business School, Nanyang Technological University.

Case Digest

Local companies entitled to West Malaysia Credit

PRIOR TO 31 JANUARY 1997, TEN UK COMPANIES ("UK LTDS.") OWNED PLANTATIONS AND CARRIED OUT BUSINESS IN MALAYSIA AS OWNERS OF ESTATES. THE UK LTDS WERE HOWEVER INCORPORATED AND RESIDENT IN THE UNITED KINGDOM. IN COMPLIANCE WITH THE NEW ECONOMIC POLICY, THE UK LTDS WENT INTO VOLUNTARY LIQUIDATION AND ALL THEIR ASSETS WERE DISTRIBUTED IN SPECIE TO GUTHRIE MALAYSIA PLANTATIONS BHD ("GMP") PURSUANT TO "THE TEN FIRST AGREEMENTS" ENTERED INTO BY EACH OF THE UK LTDS WITH GMP. GMP THEN ENTERED INTO AGREEMENTS TO SELL CERTAIN ASSETS TO SIX MALAYSIAN COMPANIES ("THE SIX SDN BHDS"). IN EFFECT, ALL THE ESTATES THAT THE UK LTDS OWNED IN MALAYSIA WERE EVENTUALLY TRANSFERRED TO THE SIX SDN BHDS VIA GMP, TOGETHER WITH CERTAIN OTHER ASSETS AND LIABILITIES

Subsequently, pursuant to the provisions of Sch 9 of *Income Tax Act 1967*, certain entitlements, referred to as the "West Malaysia Credit ("WMC"), in the sum of RM10,109,127.60 became refundable to the UK Ltds by the Inland Revenue for double taxation. An issue arose as to whether the liquidators of the UK Ltds or the six Sdn Bhds were entitled to the WMC.

The court was of the view that as the terms of the ten first agreements caused the whole of the undertaking and the assets of each of the UK Ltds to become vested absolutely and beneficially in GMP, the UK Ltds' entitlement to WMC therefore became similarly vested. Further, the court also held that the WMC was definitely an asset attributable to the Estates as referred to in item 10 Schedule 1 of the agreements between GMP and the Six Sdn Bhds. As such the WMC had been transferred by contract to GMP which in turn transferred the WMC by contract to the Six Sdn Bhds.

Lastly, the court also found that the intention of the New Economic Policy was to allow the ownership of the estates to pass from the hands of foreign companies to local ones and as such whatever was attributable to these interests should also likewise pass.

KS & Ors v. GE Holdings Ltd & Ors.
High Court (Kuala Lumpur).
Originating Summons No. D4-24-262 of 1989.
Judgment delivered on 1 June 2001 and reported at (2002) MSTC 3,904

(Visnu Kumar (Messrs Rashid & Lee) for the applicant/KS, Robert Lazar with Goh Ka Im (Messrs Shearn Delamore & Co) for the 2nd to 7th respondents, Vinayak Pradhan (Messrs. Skrine) for the 8th and 9th respondents).

Invalidity of Tax Appeal

THE TAXPAYER OBJECTED TO CERTAIN NOTICES OF ASSESSMENT WHICH WERE RAISED BY THE DGIR AND APPEALED TO THE SPECIAL COMMISSIONERS OF INCOME TAX ("THE TAX APPEAL"). THE TAXPAYER ALSO SOUGHT LEAVE FROM THE HIGH COURT TO APPLY FOR AN ORDER OF CERTIORARI TO QUASH THE ASSESSMENTS ("THE CERTIORARI APPLICATION"). ON 26 SEPTEMBER 1995, THE HIGH COURT GRANTED LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND FURTHER GRANTED AN INTERIM ORDER THAT ALL PROCEEDINGS ARISING FROM OR RELATING TO OR FOR THE ENFORCEMENT OF THE ASSESSMENTS BE STAYED UNTILL THE CERTIARARI APPLICATION WAS DISPOSED OF ("THE HIGH COURT ORDER").

In the tax appeal to the Special Commissioners, it was held, amongst others, that there had been "fraud or wilful default or negligence" committed by the taxpayer under sec. 91(3) of the Income Tax Act 1967 ("the Act"). The Special Commissioners dismissed the taxpayer's appeal by way of a Deciding Order dated 19 January 1998. The Taxpayer then appealed against the Deciding Order by way of a Case Stated for the opinion of the High Court.

When the Certiorari Application was subsequently heard, the taxpayer argued that the DGIR's failure to give it particulars of the Assessments, as required under sec. 140(5) of the Act, invalidated the Assessments. However, the Certiorari Application was dismissed on 30 September 1998. An appeal against the dismissal was then filed to the Court of Appeal on 27 October 1998.

Subsequently, upon a review of the relevant documents and papers conducted by the taxpayers new solicitors, the taxpayer on 7 May 1999 filed an Originating Summons to seek Declaratory Orders on the invalidity of the Deciding Order and the proceedings of the tax appeal before the Special Commissioners.

The Declaratory Orders were sought on the basis that the High Court Order had been breached and the DGIR's failure to furnish particulars of the alleged wilful misconduct on the taxpayer's part in direct contravention of the mandatory statutory requirement under sec. 140(5) of the Act and the rules of natural justice.

The High Court found, amongst others, that no amount of consent or conduct by the parties could "obliterate" the illegality resulting from the breach of the High Court Order and that the duty to provide particulars of the Assessments is a mandatory requirement of statute and natural justice. The High Court then held that the Special Commissioners' Deciding Order and the tax appeal proceedings were invalid and granted the Declarations sought.

PM (1963) Sdn Bhd v. Pesuruhjaya Khas Cukai Pendapatan & Anor
High Court of Malaya at Kuala Lumpur
Originating Summons No. R2-24-32-1999
Judgment delivered on 9 January 2002 and reported at (2002) MSTC 3,908.

(Anand Raj, Dipendra H Rai and Irene Yong (Messrs. Shearn Delamore & Co.) for the taxpayer. Lynette Pereira (Federal Counsel) for the Special Commissioners and Abu Tariq Jamaluddin (Legal Officer, Inland Revenue Board) for the Director General of Inland Revenue).

[Editorial Note: The Special Commissioners and DGIR have appealed to the Court of Appeal]

A Student's Guide to Tax

Employment Income (cont'd)

by Siva Subramaniam Nair

Having understood the fundamentals of what is employment income, how it differs from a profession and evaluated the significance of the differentiation and having analysed situations whereby employment income is deemed to be derived from Malaysia, we shall now proceed to determining statutory income from employment.

BASIS OF ASSESSMENT - *S25*

As in the case of all non–business related income for individuals, employment income is assessed on a current calendar basis. A person derives the income when the legal entitlement to receive the income has accrued to the person. Therefore, the income is taxable once it is credited to the individual's account although not physically withdrawn by him.

Similarly, any attempt to camouflage the remuneration received by offsetting the employment income with amounts due to the employer, is doomed to fail.

E.g. 1 Mr. Albert purchases RM2,000 shares in May 2002 from the company in which he works but sets of the amount against his salary of RM2,000 for the month of May 2002. i.e. instead of the following accounting entries of

Dr.	Salary	and	Dr.	Bank	
	Cr. Bank			Cr. Share capital	

the entries in the company's books are netted off i.e.

Dr.	Salary	
	Cr.	Share capital

The absence of an entry in the bank account of the company does not negate the fact that Mr. Albert did receive his salary for the month of May and in consequence will be assessed on the RM2,000.00

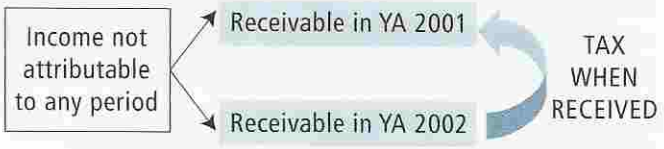
However, if the employee genuinely waives his right to receive his salary for a particular period, then he will not be taxed on the amount receivable, provided:

- **the waiver is exercised before the entitlement to the remuneration becomes due**
  an employee who effects a waiver of his June 2002 salary after having worked for the whole month i.e. after 30th June 2002, will be deemed to have received the employment income but then donated it back to the company. Therefore, he will be taxed on the salary but if the company is an approved institution, then he can deduct the amount as an approved donation from his aggregate income.
- **the waiver should be without consideration.**
  As in the above example, if the waiver is in lieu of the receipt of another benefit either in cash or in kind such as receiving investments, equipment or stocks from the employer, then the market value of the "receipt" will be taxable as employment income.
- **the waiver should be either supported by documentation or highlighted in the accounts.**
  Documentary evidence must be available to support the claim of a formal waiver.

SECTION 25 (1) ***Where gross income from an employment is not receivable for any particular period and first becomes receivable in a particular period, it is taken into account when received in calculating the gross income of the basis period in which it was first receivable.***

This basically means that if a source of employment income cannot be attributable to any particular period, then it will be taxed, when received, in the period it becomes receivable.

E.g.2 X Sdn Bhd gives all employees an incentive payment of RM5,000. The payment was accrued in the books of the company for the year ended 31/12/01 but due to administrative problems was only paid out on 15/08/02.

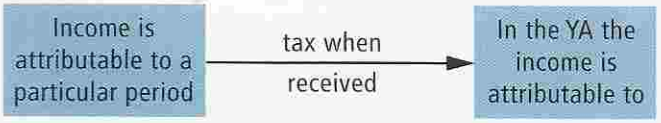


For the employees, the incentive payment will be taxed in YA 2001 but only when received in 2002.

SECTION 25 (2) ***Where the gross income is receivable in respect of a particular period, then when the income is received, it is related to the period for which it was receivable***

E.g. 3 Mr A received his overtime allowance for December 2001 together with his February salary on 28/02/02.

This amount will be reported in the YA 2002 return form but assessed for YA 2001.



MIT TAX- I DEC 1996 Q5

The bonus for Mr. Gear of RM20,000 (half paid in December 1995 and the balance in January 1996 is fully taxed as income for the year ended 31/12/1995 because it is attributable to the year 1995.

SECTION 25 (3) ***If the receipt of employment income first becomes known to the DG on a day more than five years after the end of the relevant basis year, it will be treated as gross income of the relevant person for the basis year for the year of assessment which began five years before the beginning of the year of assessment (which includes the day when the receipt first becomes known)***

This is to circumvent the provision in sec. 91(1) that an assessment cannot be raised more than six years after the relevant year of assessment unless fraud or willful default is involved. Otherwise, all

a person has to do to avoid paying his taxes is to manage for six years without a salary and start receiving his salary for year one in year seven. In accordance with sec. 25(2), the income (for year one) should be declared when received (in year seven) and will be taxed in the year it is attributable to (year one).

Hey, but hold on, that is more than six years from the relevant year (year one) and there is no fraud or wilful default, therefore the income cannot be taxed by the IRB! This can be practiced for every year and the Inland Revenue will stand to lose millions of ringgit annually.

To prevent this, the Act states that if the income received relates to a period, which is more than five years before the beginning of the year of assessment of receipt, it will be deemed to be income of the relevant person for the fifth year of assessment before the beginning of the year of assessment of receipt. The fifth year is within the six-year time span and therefore taxable .

E.g. 4 Mr. B received his bonus for the year 1994 on 12/05/01. As the relevant basis year i.e. 1994 is more than five years ago, the DG can relate the income to the 5th year before 2001 i.e. YA 1996. An additional assessment for YA 1996 will be raised in relation to the bonus received in 2001.

SECTION 25 (4) ***If the income is receivable for a period which overlaps the basis period, then the income is allocated to the appropriate basis periods on a time basis***

This sub section provides for apportionment of income which straddles over two basis periods.

E.g. 5 If bonus of RM10,000 is receivable for a period October 2001 - September 2002, then it would be assessed as follows:

YA	RM
2001	2,500 (3/12 X RM10,000)
2002	7,500 (9/12 X RM10,000)

Proviso: *Where an employee receives a lump sum payment by way of deferred pay, gratuity etc. other than gross income under S13(1)(d) or (e), on the cessation of his employment, the lump sum is spread either:*

a) if the employment began more than five years before the beginning of the basis period in which the employment ceased, over the last six basis periods

b) otherwise over the period of employment including periods during which the employee was employed by a different company but within the same group of companies

E.g. 6 Mr. C started work on 1/10/00 and ceased employment on 1/3/06 receiving a retirement gratuity of RM48,000. Since the employment commenced more than five years before 1/1/06, therefore the gratuity is spread back equally over the last six basis periods i.e. RM8,000 for each of the years of assessment 2001 - 2006.

E.g. 7 If Mr. C commenced employment on 1/9/00 and ceased employment on 28/2/03 than the RM48,000 would be spread back equally over the period of employment as follows:

YA	Months	Apportionment		RM
2000	4	4/30 x RM 48,000	=	RM 6,400
2001	12	12/30 x RM 48,000	=	RM 19,200
2002	12	12/30 x RM 48,000	=	RM 19,200
2003	2	2/30 x RM 48,000	=	RM 3,200
				RM 48,000

However, before taxing an individual, the IRB must first check if he qualifies for the exemption provided under Schedule 6, which reads as follow:

Paragraph 25 of Schedule 6

Gratuities paid on retirement from an employment are exempt from tax in the following circumstances: Where;

- *the DG is satisfied that the retirement was due to ill-health; or*
- *the retirement takes place on or after the age of 55 or on reaching the compulsory age of retirement (under any written law) provided that in both cases the employment has lasted 10 years with the same group.*

The DG may regard the period of employment with the same employer as including employment by different employers provided that the control and management of the business remains substantially with the same person or persons or the businesses of these different employers are conducted by or through a central agency.

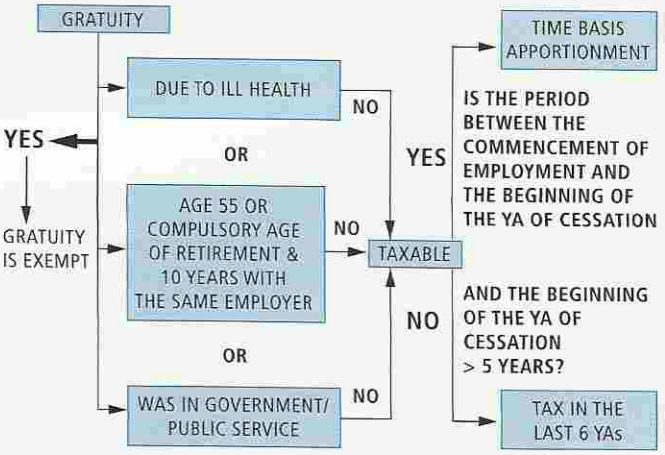
Paragraph 25A of Schedule 6

Where the gratuity or payment in lieu of leave is paid out of public funds on retirement from an employment under any written law

Paragraph 25B of Schedule 6

Sums received by way of gratuity paid out of public funds on termination of a contract of employment (less the employer's contribution to EPF, if any, and interest thereon).

Therefore, the tax treatment of gratuity can be summarized as follows:



SECTION 25 (5) ***Where gross income from a employment first becomes receivable in a particular period and is, in effect, a payment in advance, the income is taken into account in the basis period in which it is received.***

This sub-section states that any income received in advance is taxed in advance.

E.g. 8 If an employee retires in December 2002 but has one month's leave pay due on the 31st of January 2003 and the employer decides to pay the said employee his salary for January 2003 together with his December salary, the employee will be taxed on the leave pay in year of assessment 2002 although it relates to year of assessment 2003.

MIT TAX- I, PILOT PAPER Q3

The leave pay for Mr. Lim of RM30,000 (for the period 10/10/93 to 31/3/94 but received on 30/9/93) is fully taxed as income for the year ended 31/12/1993 because the full amount was received on 30/9/93.

SECTION 25 (6) Where an employee leaves Malaysia in a basis year and

- ***is non-resident for the following basis year***
- ***has no pension derived from Malaysia for the following basis year***
- ***the income from employment ceases to be derived from Malaysia at the end of any leave period following the employee's departure from Malaysia***

then employment income for the basis year following the year of departure is taken into account as income for that basis year

Proviso: *However, an election can be made in writing for that income to be assessed in that basis year. The election must be made when making the income tax return for the year of assessment in the basis year in which he left Malaysia or within such period of time after making the returns, as the DG may allow.*

E.g. 9 Mr. D retires on 31/12/01 and plans to settle down in England. His leave pay in respect of January and February 2002 would be paid to him at the end of the relevant months.

Without election under sec. 25(6)	Leave pay will be taxable in YA 2001
With election under sec. 25(6)	Leave pay will be taxable in YA 2002

Equipped with the knowledge relating to basis of assessment of employment income, it can be determined what constitutes gross income derived from an employment. The rules relating to this are enshrined in sec. 13 (1). Due to space constraints, this article shall concentrate on sec. 13(1)(a) only. The remaining sub-sections will be discussed in future articles.

GROSS EMPLOYMENT INCOME - S13(1)

SECTION 13(1)(a) any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising employment

Having or exercising an employment

As long as a person holds an office and is remunerated (although he does not exercise the employment) he is taxable on that income. An example of this is salary attributable to public holidays or periods of leave where the employee does not exercise employment. Some tax cases have deliberated on what constitutes employment income.

- ***Hochstrasser v Mayes***

To be taxable the payments must made in reference to the services the employee renders by virtue of his office and be rewarded for past, present or future services i.e. a nexus must exist between the services performed and the remuneration received

- ***Ball v Johnson***

Money paid to an employee after passing his exams was to reward his personal qualities and unrelated to his employment, therefore it is held to be not taxable. Therefore, if you are the gold medallist for any of the MIT tax papers and receive a monetary token from your employer; just enjoy the money – it is not taxable!

Payments from persons other than the employer such as rewards from the public or third parties can also be assessable because the employment creates the situation which enables the employee to obtain these payments

- ***Calvert v Wainwright***

Tips received by taxi drivers were held to be assessable as being remuneration from an employment. However, the learned judge in this case did point out that "personal gifts which means gifts to a person on personal grounds irrespective of and without regard to the question whether services have been rendered or not, are not assessable." He also illustrated this point by confirming that a tip given to a taxi driver who was hired by a passenger frequently on a special occasion would not be assessable because " it has been given to the man because of his qualities, his faithfulness and the way he has studied the passenger's interests and has always been available."

This may be better illustrated with an example. If someone is late for an examination, and a particular taxi driver weaves expertly through the traffic and arrives at the examination center in the nick of time and is paid a tip - **that is taxable**. However, if he tells the client to go ahead whilst he collects his/her belongings, takes it to the hall, brings in the client's jacket and stationery and receives a tip for his troubles, this tip would cease to be taxable since it is attributable to the driver's personal qualities and **NOT** earned by virtue of him having or exercising an employment.

Similarly, gifts received by priests and clergymen from their congregation on special occasions or for performing special prayers are also subject to tax.

- ***Cooper v Blakiston***

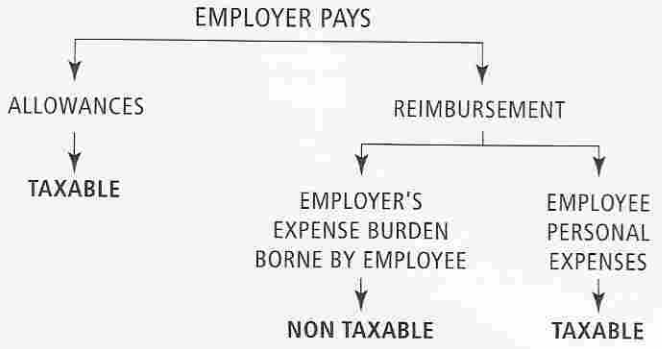
In this case, the Easter collections were presented to the clergyman for his personal use since "the clergyman was poorly remunerated." It was held that since the offering had been given for the purpose of augmenting the taxpayer's stipend, the sum was assessable to income tax as being profits accruing to him by reason of his office.
Allowance v Reimbursement

In ***Pook v Owen (1969) 45 TC 571,*** mileage paid to a part-time hospital doctor to cover the cost of travel from his place of practice to the hospital did not constitute taxable income. This was due to the fact that the expense burden is that of the employer (to provide transportation) but is initially borne by the employee and subsequently reimbursed by the employer. When a tax assistant is required to travel to IRB to settle some tax matters, on his return he will claim the taxi fare incurred by him from petty cash or through his time sheet. This would not be assessable because it is the responsibility of the employer to provide the necessary transportation for his employees to perform their official duties. Of course the employer will be able to claim the traveling expense as a cost in running the business.

However, where the employer reimburses the personal expenses of the employee, then these will be taxable benefit for the employee. For example if the employer settles the personal liabilities of the employee i.e. pays for his home electricity bills, settles his income tax payable or reimburses him for the salary of a servant or gardener employed by the employee for his personal home, these would be assessable on the employee as gross income under sec. 13(1)(a).

This has to be differentiated from allowances because these supplement the salary of the employee and may be in surplus of the amount to be actually spent on behalf of the employer. Therefore, it is taxable and consequently any expense incurred on behalf of the employer can be deducted in arriving at the adjusted income from employment.

In summary:



Perquisites
The word perquisite is not defined in the Act but generally represents any regular or casual emolument, fee or profit attached to an office or position in addition to salary or wages.

Inducement Payments
This is an area which is not addressed by the *Income Tax Act 1967* and therefore reference has to be made to case law. Two sets of cases can be used to illustrate the taxability of inducement payments clearly.

- ***Pritchard v Arunsdale***

A senior partner of a firm of chartered accountants, allotted shares in a company by its principal shareholder as an inducement to be its joint managing director was held to be **NOT TAXABLE** because:

> the shares were given before the commencement of employment
> there was no need to return shares if he ceases employment, and
> it was an inducement to take up the risk of the employment and not reward for future employment

As compared to:

- ***Glantre Engineering Ltd v Goodhand***

A chartered accountant, paid a sum of money by a company on taking up an appointment as a finance director of the company was held to be TAXABLE because:

> the payment was by the company (employer) not the shareholder of the company (not the employer) as in *Pritchard's* case
> the accountant here was taking up a similar position as a finance director compared to *Pritchard's* case where the accountant was not just changing employments but changing the status from a senior partner to a joint MD post
> shares in *Pritchard's* case were given before commencement of employment whereas in this case on taking up the employment.
> in *Pritchard's* case, there was no need to return the shares if the accountant decided to return to his practice.

Similarly, in the sports arena two contrasting cases are as follows:

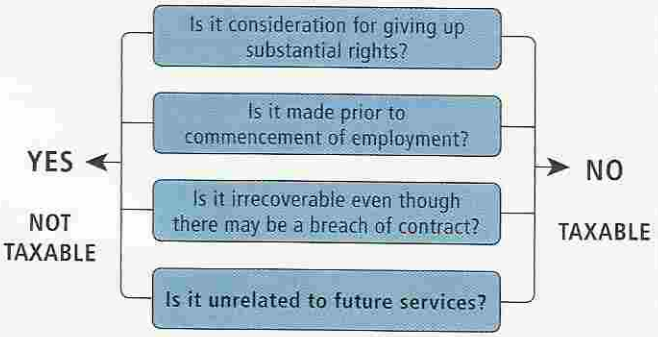
- ***Jarrold v Boustead*** (1964) 41 TC 701

An individual relinquishing his amateur status and receiving a signing-on fee to sign up as a professional footballer was held to be **NOT TAXABLE** because the fee received comprised an inducement for giving up his amateur status and did not reflect a reward for services rendered. However in:

- ***Riley v Coglan***

An amount was paid to the taxpayer in consideration of him agreeing to serve the Club for a stipulated period of time, subject to the liability to repay a proportionate part of the sum received if during the course of his career he did not make himself available to play (other than owing to physical injury). This was held to **TAXABLE** because the payment was clearly in respect of remuneration for future services.

General Principles for inducement payment



Gift and Testimonial Payments
These types of payments are problematic in that we need to ascertain whether the payments are voluntary payments for personal qualities or one enforceable under a employment contract. Lets look at some of the precedents established.

- ***Reed v Seymour***

Proceeds from a cricket benefit match held on occasion of the retirement of a professional cricketer was given to him.

Held to be NOT TAXABLE because it was a gift on personal grounds not payment for services

- ***Moore v Griffiths***

Captain of a football team received bonus and prizes from a manufacturer.

Held to be NOT TAXABLE because:
> **bonus was an accolade rather than payment for services**
> **prizes were to publicise the manufacturer's products**

- ***Cowan v Seymour***

Shareholders of a company made a voluntary payment to the secretary of the company after his termination for working without pay and acting as liquidator without pay.

Held to be NOT TAXABLE because:
1. **the payment was by the shareholders, not the company (employer)**
2. **it was a voluntary payment after employment had been terminated**
3. **the payment was given on personal grounds, as a token of gratitude or as a testimonial.**

However, other cases illustrate situations where gifts are taxable.

- ***Wright v Boyce***

A huntsman received cash presents at Christmas.

Held to be TAXABLE because it was custom to make cash presents at Christmas to the person who held the office or position of huntsman i.e. there is no question of "regard for outstanding personal qualities"

- ***Moorhouse v Dooland***

Cricketer's agreement provided for receipt of "collections made for meritorious performance."

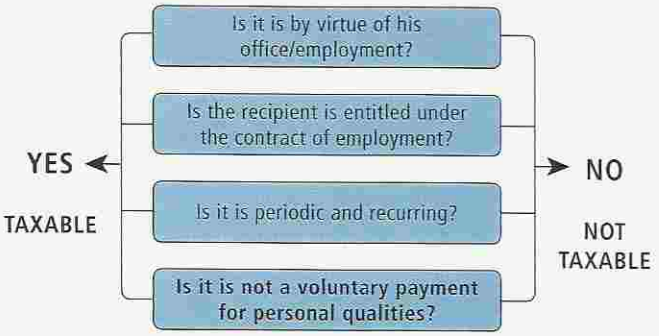
Held to be TAXABLE because (as distinguished from Reed case)
> **there is a contractual right to the benefit**
> **he was entitled to have a collection made whenever his performance was outstanding**

- ***Laidler v Perry***

Practice of a group of companies to give a gift voucher at every Christmas to staff employees.

Held to be TAXABLE because:
> **the gifts are regularly over a number of years**
> **the staff expect the gift as a regular thing**
> **the gifts were made with the object of obtaining some beneficial results for the company in future**

General Principles relating to taxability of gifts and testimonial payments



So far we have seen the taxability of monetary benefits received by the employee. An employee can also receive benefits in specie but which he can convert to cash. A typical example would be shares.

Shares

The *Income Tax Act 1967* does not address the issue of how benefits relating to shares and share option should be taxed. Therefore, reference has to be made to case law.

- ***Weight v Salmon***

Where shares are issued to employees under favorable terms for:
> free - market value of shares is taxable
> nominal value - market value less nominal value is taxable

E.g. 10 Libra S/B offers each employee the chance to purchase one lot of shares in the company for RM2.00 per share on 21 April 2002 when the market value of the shares was RM4.30.

Therefore, every employee who purchases the shares will have a taxable benefit of RM2,300 [(RM4.30 – RM2.00) X 1,000 shares]

- ***Tyrer v Smart***

Under a share inducement scheme, employees offered a preferential right to apply for shares at a preferential price were held to be a taxable emolument from employment

Employee Share Option Schemes

- ***Abbott v Philbin (1960) 39 TC 82***

For share option schemes
> the value assessable to tax is the variance between the market value of the shares at the date of granting the option less the option price offered to the employees plus any option costs, and
> the liability to settle the tax arises only upon exercise of option **but is related back to date of granting.**

The formula for the taxable benefit will be:

Market value per share @ date of granting the option **less** (Option price + Option costs) **X** Number of shares

If option costs is a lump sum:

Market value per share @ date of granting the option **less** Option price **X** Number of shares **less** Option costs

MIT TAX I DEC 2000 Q2 (author's addition in italics)

On 1 January 1997, Mr. Singh received a ten-year non-transferable option to purchase 10,000 shares at RM4.50 each when the market value was RM6.00 per share. Mr. Singh exercised the option on 1 November 2000 when the share price rose to RM10.00 per share. *Assume there was a option cost of:*

a) RM 0.03 per share, or
b) RM 5.00 flat.

Solution: Taxable benefit

a) [RM6 – (RM4.5 + RM0.03)] X 10,000 shares = RM14,700
b) [(RM6 – RM4.5) X 10,000 shares] – RM5.00 = RM14,995

When the benefit crystallizes in the year 2000 i.e. when the option is exercised, then the benefit is taxed, but as income for year in which the option was granted i.e. 1997.

In summary:

GROSS INCOME UNDER SECTION 13(1)(a) includes

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.

Practical Exercises

Q1. Wilma is a non-resident who exercised an employment in Malaysia as a financial consultant for the following periods:

22 November 2001 - 5 January 2002
16 July 2002 - 18 August 2002

Required:
State with reason(s), whether Wilma 's employment income is chargeable to the Malaysian Income Tax for the years of assessment 2001 and 2002 (Ignore provisions in Double Tax Agreements)

Q2. Wilfred left Malaysia for Sydney on 12 December 1999 to take up employment with a fund management consultancy company there. In January 2002, the company set up branches in Kuala Lumpur, Kota Kinabalu, Jakarta and Ho Chi Minh City. Wilfred was seconded to each of these branches for periods of 30 days to set up the operations but after his stint in KL and Kota Kinabalu he took leave and returned to Taiping to be with his parents for 2 weeks, before leaving for Jakarta. The respective branches paid his salary for the respective periods that worked with them. He returned to Sydney permanently on 18 May 2002, but all the income received during his overseas stints were remitted and received in Malaysia in 2002.

Required:
Would Wilfred's employment income in Malaysia, and from overseas received in Malaysia be subject to Malaysian tax for the years of assessment 2002?

Q3. Siew Beng was granted an option on 214. 2001 to acquire 1,500 shares in the company that employed him. He was allowed to acquire the shares at RM 1.00 per share although the market value was RM1.75. The option cost was 3 sen per share.

Siew Beng exercised the option on 27.5.2002 when the market value was RM4.15 using a bank loan, which entailed an interest cost of RM19.50 and immediately sold of the shares in the open market.

a) Are there any tax implications arising from this transaction?
b) Determine taxable benefits, if any and specify the year of assessment in which it would be payable.
c) What is the nett gain accruing to Siew Beng assuming his marginal tax rate is 20%?

Q4 Sinbad and Alauddin are renowned financial accounting lecturers employed with AccEdu Sdn. Bhd., an accountancy tutorial college. In early 2002, they both received tempting offers from two rival colleges to join their respective accounting faculties.

Sinbad's offer included a 30% increase in his present salary plus profit sharing. He was required to head the Finance Department comprising the schools of Accounting, Financial Management and Corporate Administration in addition to overseeing human resource and other administrative issues. He would be teaching only the advanced accounting papers for some of the courses. His offer came from a major shareholder of AccEdu Sdn. Bhd., who promised him a 20% stake in the company. The shares would be given based on a gentleman's agreement before he signs the employment contract and there would be no stipulation that it has to be returned if he decide to leave the college.

Alauddin's offer entailed a 10% increase in his present salary. He would head the School of Accounting and be the main lecturer for all the financial accounting papers. To make the offer more attractive, Alauddin was promised a capital sum of RM20,000 upon signing the acceptance letter, which states amongst others conditions, that he must work for a minimum period of 2 years with the college unless his death, permanent disability or some serious ailment rendered this impossible.

Discuss the tax implications relating to the amounts received by Sinbad and Alauddin as an incentive to join the new colleges.

Subsidiary Legislation

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 71/2002	Stamp Duty (Exemption) (No. 7) Order 2002	1 January 2002 – 30.6.2002	***Exemption*** Certain instruments for purchase of residential property from a developer registered with the Real Estate and Housing Developers' Association of Malaysia, Sabah Housing Developers' Association (1992) or Sarawak Housing Developers' Association are exempted from stamp duty. a) all Sale and Purchase Agreements executed between 1.1.2002-30.6.2002; b) all instruments effecting transfer of title from developer to purchaser named in an Agreement in para. (a) above; c) all instruments in the nature of security executed between a purchaser who is named in an Agreement that falls within para. (a) above and a bank or financial institution or employer under a housing loan scheme.
P.U. (A) 73/2002	Stamp Duty (Exemption) (No. 8) Order 2002		***Exemption*** All instruments executed pursuant to a corporate debt restructuring scheme completed between 1.1.2002-30.6.2002 under the supervision of the Corporate Debt Restructuring Committee, the Central Bank of Malaysia or under the Pengurusan Danaharta Nasional Bhd. are exempted from stamp duty.
P.U. (A) 74/2002	Customs (Provisional Anti-Dumping Duties) Order 2002	21.2.2002 – 20.6.2002	***Duties*** Provisional anti-dumping duties to be levied on and paid by importers of certain goods specified in column (2) and (3) of the Schedule and exported from Indonesia into Malaysia by the exporters or producers listed in column (5) at a rate of 20.4% of the export price. Previous imposition of nil anti-dumping duties pursuant to P.U. (A) 156/97 is revoked.
P.U. (A) 78/2002	Customs ("Completely Knocked Down" and "Completely Built Up") (Definitions No. 1) (Amendment) Regulations 2002	1.1.2002	***Amendment*** *P.U.(A) 406/87*, the *Customs ("Completely Knocked Down" and "Completely Built Up") (Definitions No. 1) Regulations 1988* are amended in Schedule C by:- a) deleting items (10), (11), (13), (16), (19), (20), (23), (25), (27) and (32) and the particulars relating to the items; and b) deleting the words "spring coils" in item (21)
P.U. (A) 94/2002	Stamp Duty (Exemption) (No. 7) Order 2002	1.1.2002	***Corrigendum*** The word "proeprty" appearing in the second line of paragraph 3 of the English language text to P.U. (A) 71 published on 21.2.2002, to be replaced with "property".
P.U. (A) 98/2002	Income Tax (Exemption) (No. 13) Order 2002	Y.A. 2000 – Y.A. 2004 (inclusive)	***Exemption*** The Minister exempts The Partnership For Equitable Growth from paying income tax in respect of statutory income on all sources save income through dividends from Y.A. 2000-2002. However, this exemption does not release the said entity from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 99/2002	Customs Duties (Amendment) (No. 2) Order 2002	14.3.2002	***Amendment*** *Customs Duties Order 1996 [P.U. (A) 15/96]* is amended in the First Schedule in column (4) in relation to sub heading numbers 8536.50 990 and 8536.90 900 by substituting the words "10%" for "15%".
P.U. (A) 103/2002	Customs Duties (Amendment) (No. 3) Order 2002	15.3.2002	***Amendment*** Take note that the *Customs Duties Order 1996 [P.U. (A) 15/96]* is amended in the First Schedule in column (4) in numerous subheadings
P.U. (A) 108/2002	Stamp Duty (Exemption) (No. 9) Order 2002		***Exemption*** The agreement for a loan of RM28,560,000.00 between Bank Pembangunan dan Infrastruktur Malaysia Bhd. (as borrower) and the Government of Malaysia on 3.12.2001 has been exempted from stamp duty.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 109/2002	Income Tax (Exemption) (No. 14) Order 2002	Y.A. 1998 – Y.A. 2002	***Exemption*** The Minister exempts the Institut Kefahaman Islam Malaysia (IKIM) from the payment of income tax in respect of statutory income on all sources from Y.A. 1998-2002. However, this exemption does not release IKIM from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 113/2002	Income Tax (Exemption) (No. 14) Order 2002	Y.A. 2002	***Exemption*** The Minister exempts any locally incorporated promoter of international trade exhibitions from income tax on statutory income derived from organizing an international trade exhibition in Malaysia provided, the total number of foreign trade visitors (non resident foreign visitors) brought in is not less than 500 as verified by the Malaysian External Trade Development Corporation (MATRADE) However, this exemption does not release such an international trade exhibition promoter from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 114/2002	Income Tax (Deduction for Promotion of Export of Services) Rules 2002	From Y.A. 2002	***Deduction*** Expenses falling within the categories detailed below are allowed as a deduction as outgoings and expenses provided they were incurred primarily and principally for the purpose of promoting the export of services. a) expenses incurred in respect of feasibility studies for overseas projects identified for the purpose of tender; b) expenses incurred in respect of participation in a trade or industrial exhibitions in Malaysia or overseas; c) expenses incurred in respect of participation in exhibitions held in a Malaysian Permanent Trade and Exhibition centre overseas; d) expenses by way of air fares in respect of travel to a country outside Malaysia by a representative of the company; and e) actual expenses subject to a maximum of RM300 per day for accommodation and RM150 per day for sustenance for the period commencing from the representative's departure from Malaysia and ending with his return.
P.U. (A) 115/2002	Income Tax (Deduction for Promotion of Export of Services) Rules 2002	Y.A. 2002	***Deduction*** Expenses falling within the categories detailed below are allowed as a deduction as outgoings and expenses provided they were incurred primarily and principally for the purpose of promoting exports. a) expenses incurred in respect of participation in a virtual trade show as verified by MATRADE; b) expenses incurred in respect of participation in a trade portal as verified by MATRADE; and c) costs of maintaining warehouse overseas.
P.U. (A) 116/2002	Income Tax (Deduction for Promotion of Exports) (No. 2) Rules 2002	Y.A. 2002	***Deduction*** Expenses in respect of registration of patents, trademarks and product licensing overseas are allowed as a deduction as outgoings and expenses provided they were incurred primarily and principally for the purpose of promoting exports.
P.U. (A) 117/2002	Income Tax (Deduction for Promotion of Exports) (No. 3) Rules 2002	Y.A. 2002	***Deduction*** Expenses falling within the categories detailed below are allowed as a deduction as outgoings and expenses provided they were incurred primarily and principally for the purpose of promoting exports. a) expenses incurred in respect of hotel accommodation up to a maximum of three nights subject to a maximum of RM300 per day; and b) expenses incurred in respect of sustenance up to a maximum of RM150 per day Further, to qualify for the deduction, the following conditions must be satisfied: i) that the potential importers are invited to Malaysia as a follow up to trade and investment mission organized by the Government agencies or trade associations; and ii) that proof is provided verified by MATRADE that the company had participated in the abovementioned missions.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 119/2002	Stamp Duty (Exemption) (No. 9) Order 2002	3.6.2001	***Exemption*** All instruments relating to the settlement of non performing loans and in the nature of security for the purpose of issuing new loans executed between bumiputera entrepreneurs and financial institutions under the Tabung Pemulihan dan Pembangunan Usahawan (TPPU) programme managed by Syarikat ERF Sdn. Bhd. are exempted from stamp duty.
P.U. (A) 135/2002	Income Tax (Exemption) (No. 16) Order 2002	20.10.2001	***Exemption*** The Minister exempts a non resident franchisor from the payment of income tax in respect of royalty received from a registered institution in relation to a course of study or training approved under sec. 38 of the *Private Higher Educational Institutions Act 1996*. For these purposes, the word "franchisor" has the meaning defined in sec. 4 of the *Franchise Act 1998*.
P.U. (A) 136/2002	Income Tax (Exemption) (No. 17) Order 2002	Y.A. 2002	***Exemption*** The Minister exempts non-residents of Malaysia from paying income tax in respect of income derived from the rental of International Standard Organisation containers by companies resident in Malaysia carrying on a business of transporting passengers and cargo by sea on a ship, or letting out a ship on a voyage or time charter basis
P.U. (A) 144/2002	Banking and Financial Institutions (Exemption) Order 2002		***Exemption*** Subject to terms, conditions, restrictions or limitations as may be specified, all parties to an arrangement or agreement for the securitization of assets of licensed institutions are exempted from para. 49(1) (B) of the *Banking and Financial Institutions Act 1989*
P.U. (A) 151/2002	Stamp Duty (Exemption) (No. 18) Order 2002		***Exemption*** All instruments executed pursuant to a scheme of merger of insurance companies completed on or between 1.4.1999 until 30.6.2002 and approved by the Central Bank of Malaysia are exempted from stamp duty.
P.U. (A) 151/2002	Real Property Gains Tax (Exemption) (No. 2) Order 2002		***Exemption*** Any insurance company licensed under the Insurance Act 1996 is exempted from the payment of real property gains tax in respect of chargeable gains accruing on the disposal of any assets to another insurance company pursuant to a scheme of merger of insurance companies approved by the Central Bank
P.U. (A) 157/2002	Stamp Duty (Exemption) (No. 19) Order 2002	1.1.2002	***Exemption*** The following instruments for the purchase of property from Pengurusan Danaharta Nasional Bhd. or its fully owned subsidiaries sold during the period of 1.1.2002 to 31.12.2003 are exempted from stamp duty. a) all instruments of Sale and Purchase Agreement; b) all instruments effecting the transfer of title of the property; and c) all instruments in the nature of security
P.U. (A) 158/2002	Stamp Duty (Exemption) (No. 20) Order 2002		***Exemption*** All instruments executed in connection with a scheme of merger of Arab-Malaysian Finance Bhd. ("AMFB") and MBf Finance Bhd. pursuant to a Sale and Purchase Agreement dated 3.8.2001 are exempted from stamp duty.
P.U. (A) 160/2002	Real Property Gains Tax (Exemption) (No. 3) Order 2002		***Exemption*** The Minister exempts Arab-Malaysian Finance Bhd. ("AMFB") and MBf Finance Bhd from the payment of real property gains tax in respect of chargeable gains accruing on the disposal of all chargeable assets in connection with a merger scheme pursuant to a Sale and Purchase Agreement dated 3.8.2001
P.U. (A) 189/2002	Income Tax (Exemption) (No. 18) Order 2002	Y.A. 1999	***Exemption*** The Minister exempts Syarikat Prasarana Negara Bhd. from the payment of income tax in respect of statutory income in relation to : a) provision given by the State/Federal Government in the form of grants for financing the operating expenditure;

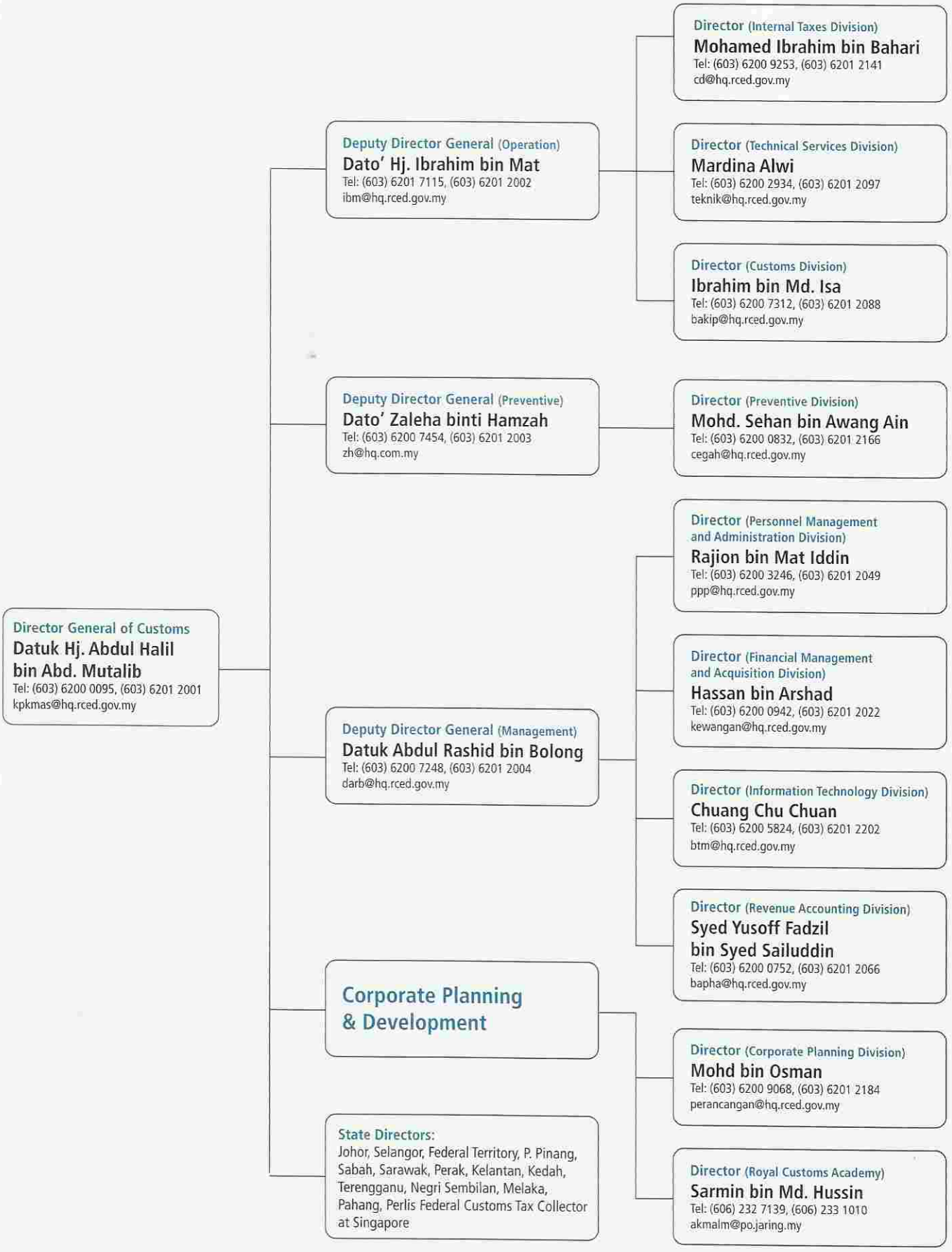
P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 189/2002 (Cont'd)	Income Tax (Exemption) (No. 18) Order 2002	Y.A. 1999	***Exemption*** b) provision given by the State/Federal Government in the form of grants for financing the development expenditure; and c) any donation or contribution received. However, this exemption does not release the said company from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 190/2002	Income Tax (Exemption) (No. 19) Order 2002	Y.A. 2002	***Exemption*** The Minister exempts Lembaga Tabung Haji from the payment of all income tax from the year of assessment 2002 until 2006. However, this exemption does not release the Lembaga from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 206/2002	Income Tax (Exemption) (No. 20) Order 2002	Y.A. 2002	***Exemption*** The Minister exempts Lembaga Air Sibu from the payment of income tax in respect of statutory income in relation to: 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 in the form of grants to finance development expenditure; and c) any donations or contributions received However, this exemption does not release the Lembaga from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 207/2002	Income Tax (Exemption) (No. 21) Order 2002	3.6.2001	***Exemption*** The Minister exempts the Malaysian Communications and Multimedia Commission from the payment of income tax in respect of statutory income in relation to: 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 in the form of grants to finance development expenditure; c) any donations or contributions received; and d) income from the collection of licence and levy paid to the Malaysian Communications and Multimedia Commission under the *Communications and Multimedia Act 1988* However, this exemption does not release the Commission from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 208/2002	Income Tax (Exemption) (No. 22) Order 2002	Y.A. 2001	***Exemption*** The Minister exempts a political association from the payment of income tax in respect of all income from the *year of assessment 2001*. However, this exemption does not release the political association from filing its returns or furnishing any statement of accounts or information that may be required under the Act.
P.U. (A) 209/2002	Income Tax (Exemption) (No. 23) Order 2002	20.10.2001	***Exemption*** The Minister exempts a company resident in Malaysia from the payment of income tax in respect of statutory income derived from the provisions of services approved by the Minister for a period of five consecutive years of assessment commencing from the year of assessment in the basis period in which the approval is in effect. However, this exemption does not release the resident company from filing its returns or furnishing any statement of accounts or information that may be required under the Act. "Provision of services" means provision of chartering services of a luxury yacht, as verified by the Ministry of Transport, departing from and ending at any port in Malaysia.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 210/2002	Income Tax (Exemption) (No. 24) Order 2002	20.10.2001	***Exemption*** The Minister exempts a non resident person from the payment of income tax in respect of income derived from the rental of International Standard Organisation containers by a Malaysian shipping company. "Malaysian Shipping Company" in this case means a company resident in Malaysia which carries on a business of transporting passengers and cargo by sea on a ship; or letting out a ship on a voyage or time charter basis.
P.U. (A) 215/2002	Stamp Duty (Remission) (No. 5) Order 2002	20.10.2001	***Remission*** The stamp duty payable on the instrument of agreement dated 29.9.2001 for a loan of RM11,500,000.00 executed between the Malaysian Exchange of Securities Dealing & Automated Quotation Bhd. (MESDAQ) as the borrower and the Government of Malaysia is fully remitted.
P.U. (A) 216/2002	Income Tax (Exemption) (No. 25) Order 2002	Y.A. 2000	***Exemption*** The Minister exempts Huaren Education Foundation from the payment of income tax in respect of income except dividend income for the year of assessment 2000. This however will not absolve Huaren Education Foundation from complying with any requirement to submit any return or statement of accounts or to furnish any other information under the Act.
P.U. (A) 217/2002	Entertainments Duty (Exemption) Order 2002	28.3.2001	***Exemption*** The wrestling competition "WWF Smackdown tour" held on 4.3.2002 at the Stadium Putra, Kompleks Sukan Negara, is exempted from entertainment duty.
P.U. (A) 219/2002	Stamp Duty (Exemption) (No. 22) Order 2002	28.3.2001	***Exemption*** The following instruments for the purchase of property between the period of 28.3.2001 to 31.12.2001, where the construction has been fully completed from a developer who is registered with the Real Estate and Housing Developers' Association of Malaysia, Sabah Housing Developers' Association (1992) or Sarawak Housing Developers' Association, are exempted from stamp duty. a) all instruments of Sale and Purchase Agreements executed between the purchaser and the developer on or after 28.3.2001 but not later than 31.12.2001; b) all instruments effecting the transfer of title of the property from the developer or the registered land owner to the purchaser; c) all instruments in the nature of security executed between the purchaser and a bank or financial institution for money advances to finance the purchase; d) all instruments in the nature of security executed between an employee and an employer under an employee housing loan scheme for money advances to finance the purchase. ***Revocation*** The Stamp Duty (Exemption) (No. 6) Order 2001 [P.U. (A) 134/2001] is revoked.
P.U. (A) 220/2002	Stamp Duty (Exemption) (No. 23) Order 2002	1.1.2002	***Exemption*** The following instruments for the purchase of residential property between the period of 1.1.2002 to 30.6.2002, from a developer who is registered with the Real Estate and Housing Developers' Association of Malaysia, Sabah Housing Developers' Association (1992) or Sarawak Housing Developers' Association, are exempted from stamp duty. a) all instruments of Sale and Purchase Agreements executed between the purchaser and the developer on or after 1.1.2002 but not later than 30.6.2002; b) all instruments effecting the transfer of title of the property from the developer or the registered land owner to the purchaser named in the Sale and Purchase Agreement in para (a) above; d) all instruments in the nature of security executed between the purchaser and a bank or financial institution or an employee and an employer under an employee housing loan scheme for money advances to finance the purchase. "Residential property" is defined as houses, condominium units, apartments and flats built as a dwelling house. ***Revocation*** The Stamp Duty (Exemption) (No. 6) Order 2001 [P.U. (A) 134/2001] is revoked.

P.U.(A) No.	Title	Effective Date	Details
P.U. (A) 221/2002	Stamp Duty (Exemption) (No. 24) Order 2002	1.1.2002	***Exemption*** The following instruments for the purchase of residential property from a statutory body or statutory body and developer, sold during the period between 1.1.2002 to 30.6.2002 are exempted from stamp duty. a) all instruments of Sale and Purchase Agreements executed between the purchaser and the statutory body or between the purchaser, the statutory body and developer on or after 1.1.2002 but not later than 30.6.2002; b) all instruments effecting the transfer of title of the property from the statutory body to the purchaser named in the Sale and Purchase Agreement in para (a) above; d) all instruments in the nature of security executed between the purchaser and a bank or financial institution or an employee and an employer under an employee housing loan scheme for money advances to finance the purchase. "Residential property" is defined as houses, condominium units, apartments and flats built as a dwelling house. "Statutory body" is defined as a body established under state or Federal law.
P.U. (A) 223/2002	Income Tax (Exemption) (No. 26) Order 2002	Y.A. 2001	***Exemption*** The Minister exempts Lembaga Kemajuan Wilayah Kedah from the payment tax on the following income: 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 in the form of grants to finance development expenditure. c) any donation or contribution received. This however will not absolve the Lembaga from complying with any requirement to submit any return or statement of accounts or to furnish any other information under the Act.
P.U. (A) 224/2002	Income Tax (Exemption) (No. 27) Order 2002	Y.A. 2000	***Exemption*** The Minister exempts Sistem Pendidikan Islam Pahang Sdn. Bhd. from the payment of income tax in respect of statutory income in relation to allocations given by the state government in the form of grants from the year of assessment 2000 until 2004. This however will not absolve Sistem Pendidikan Islam Pahang Sdn. Bhd from complying with any requirement to submit any return or statement of accounts or to furnish any other information under the Act.
P.U. (A) 225/2002	Stamp Duty (Exemption) (No. 25) Order 2002		***Exemption*** The instrument of agreement for a loan of RM280,000,000.00 dated 24.9.2001 executed between Keretapi Tanah Melayu (as borrower) and the Government of Malaysia is exempted from stamp duty.
P.U. (A) 226/2002	Stamp Duty (Exemption) (No. 26) Order 2002		***Exemption*** The following instruments, executed by TPPT Sdn. Bhd. relating to the scheme known as Project Ushawan Bumiputra Dalam Bidang Peruncitan (PROSPER) under the Bumiputra Enterprise Development Programme are exempt from stamp duty. a) all instruments executed by TPPT Sdn. Bhd. relating to the purchase of commercial properties only. b) the instrument of agreement for a loan of RM500,000,000.00 executed on 7.11.2001 between TPPT Sdn. Bhd., as borrower, and Bank Negara Malaysia.
P.U. (B) 116/2002	Notice of Surrender of Licence	Y.A. 2000	***Details*** The following is a list of licensed offshore banks whose licenses have been surrendered as at 31.12.2001: 1. Allied Irish Banks PLC 2. Morgan Guarantee Trust Company of New York; 3. Merril Lynch Capital Markets Bank Ltd.; 4. The Asahi Bank Ltd.; and 5. Rabobank Nederland

P.U.(A) No.	Title	Effective Date	Details
Pensions Adjustment (Amendment) Bill 2002		1st reading on 9.4.2002	***Details*** This Bill seeks to amend the Pensions Adjustment Act 1980 ("Act 238") Clause 2 seeks to delete paragraph 4(5)(a) of Act 238 to enable derivative pension to continue to be granted to a widow or widower even if she or he remarries. Clause 3 seeks to delete paragraph 5(6)(a) of Act 238 to enable derivative pension to continue to be granted to a widow even if she remarries. ***Implications*** This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.
Customs (Amendment) Bill 2002		1st reading on 25.3.2002	***Details*** This bill seeks to amend the Customs Act 1967 Clauses 2 & 6 seek to amend sections 154 and 163A of Act 235 to exclude Tioman from the interpretation of "principal customs area". Clauses 3 and 7 seek to amend sections 155 and 163B of Act 235 so as to be consistent with the existing provisions in the *Sales Tax Act 1972* and the amendments made to the *Excise Act 1976* and to delete subsection 11(6) Clause 11 seeks to introduce a new part XIXc into Act 235 to provide special provisions for Tioman as a free port. ***Implications*** This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.
Free Zones (Amendment) Bill 2002		1st reading on 25.3.2002	***Details*** This bill seeks to amend the Free Zones Act 1990 ("Act 438") Clause 2 seeks to amend section 2 of Act 438 to insert the definition of "Tioman" and to exclude Tioman from the interpretation of "principal customs area" ***Implications*** This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.

Organisation Chart



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The Principal benefits to be derived from membership are:

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2. The status attaching to membership of a professional body dealing solely with the subject of taxation.
3. Supply technical articles, current tax notes and news from the Institute.
4. Supply of Annual Budget Booklet and 4 issues of Tax Nasional per annum.
5. Opportunity to take part in the technical and social activities organised by the Institute.

Qualification Required for Membership

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

Associate Membership

1. Any person who has passed the Advanced Course examination conducted by the Department of Inland Revenue and who has not less than five (5) years practical experience in practice or employment relating to taxation matters approved by the Council.
2. Any person whether in practice or in employment who is an advocate or solicitor of the High Court of Malaya, Sabah and Sarawak and who has had not less than five (5) years practical experience in practice or employment relating to taxation matters approved by the Council.
3. Any Registered Student who has passed the examinations prescribed (unless the Council shall have granted exemptions from such examinations or parts thereof) and who has had not less than five (5) years practical experience in practice or employment relating to taxation matters approved by the Council.
4. Any person who is registered with MIA as Registered Accountant and who has had not less than two (2) years practical experience in practice or employment relating to taxation matters approved by the Council after passing the examination specified in Part I of the First Schedule or the Final Examination of The Association Of Accounts specified in Part II of the First Schedule to the Accountants Act, 1967.
5. Any person who is registered with MIA as a Public Accountant.
6. Any person who is registered with MIA as a Licensed Accountant and who has had not less than five (5) years practical experience in practice relating to taxation matters approved by the Council after admission as a licensed accountant of the MIA under the Accountants Act, 1967.
7. Any person who is authorised under subsection (2) (6) of Section 8 of the Companies Act, 1965 to act as an approved company auditor without limitations or conditions.
8. Any person who is granted limited or conditional approval under Sub-section (6) of Section 8 of the Companies Act, 1965 to act as an approved company auditor.
9. Any person who is an approved Tax Agent under Section 153 of the Income Tax Act, 1967.

Fellow Membership

1. A Fellow may be elected by the Council provided the applicant has been an Associated Member for not less than five (5) years and in the opinion of the Council he is a fit and proper person to be admitted as a Fellow.
2. Notwithstanding Article 8(1) of the Articles of Association, the First Council Members shall be deemed to be Fellows of the Institute.

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Every applicant shall apply in a prescribed form and pay prescribed fees. The completed application form should be returned accompanied by:

1. Certified copies of:
   a) Identity Card
   b) All educational and professional certificate in support of your application.
2. Two identity Card-size photographs
3. Fees

	Fellow	Associate
a) Admission Fees	RM300	RM200
b) Annual Subscription	RM145	RM120

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

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

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

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

Malaysian Institute Of Taxation