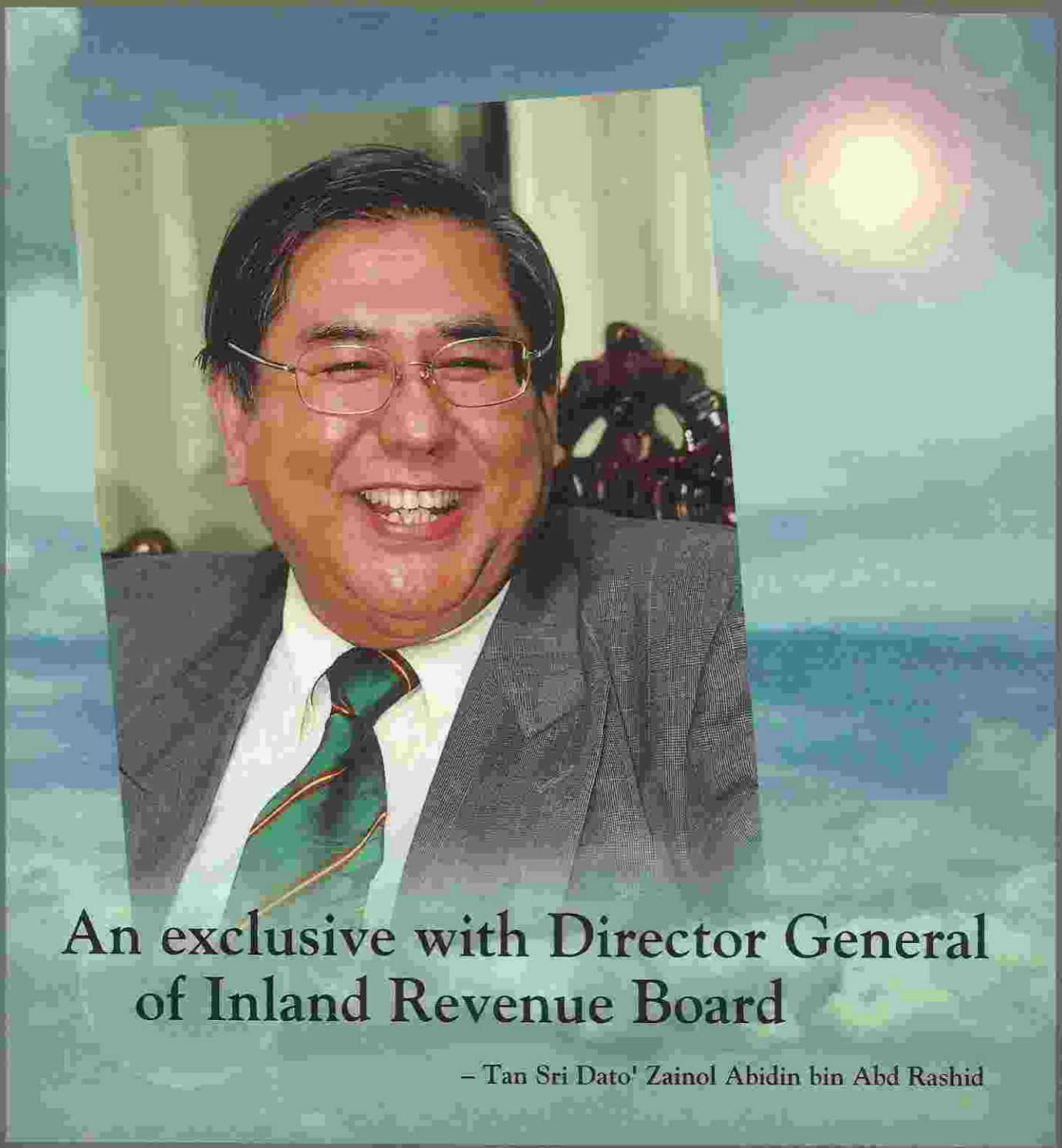
Malaysian Institute Of Taxation

TAX NASIONAL

Official Journal of The Malaysian Institute of Taxation

Vol.13/2004/Q3 RM38.00



An exclusive with Director General of Inland Revenue Board

– Tan Sri Dato' Zainol Abidin bin Abd Rashid

ISSN 0128-7680
KDN PP 7829/12/2004

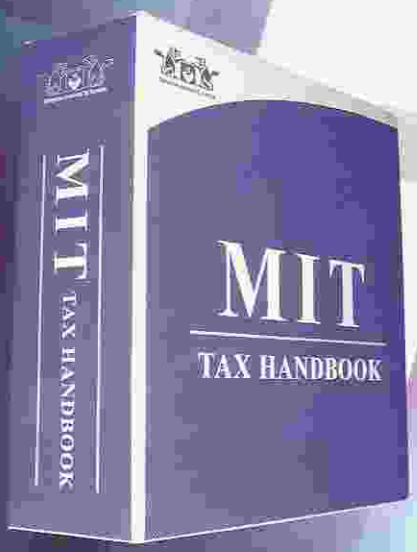
Malaysian Institute Of Taxation

MIT

TAX Handbook

produced by tax practitioners for tax practitioners

The MIT Tax Handbook is a comprehensive 600 page manual covering a wide range of tax related topics



Malaysian Institute Of Taxation

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Malaysian Institute Of Taxation

MIT TAX Handbook

produced by tax practitioners for tax practitioners

Most tax practitioners would at one time or another, felt discouraged at being unable to locate a particular issue or tax ruling, etc. From a practitioner's perspective, one must acknowledge that a substantial amount of time and cost is being needlessly wasted on researching and looking for tax materials / rulings, etc. that one had come across previously.

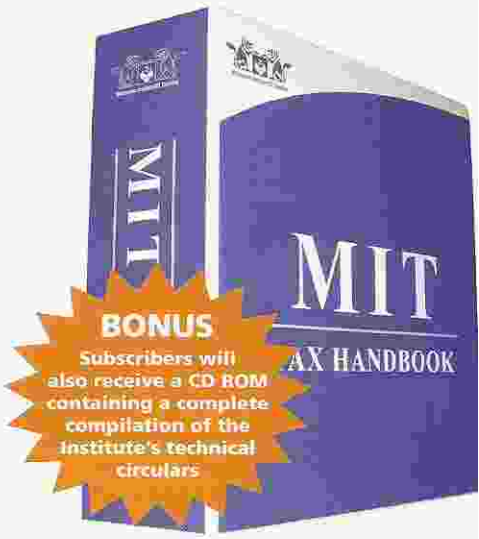
Hence, the Malaysian Institute of Taxation (MIT) decided to publish a comprehensive tax manual containing a complete categorisation of tax materials and issues that are normally referred to by our practicing members. This publication was undertaken as part of the Institute's continuing mission to assist and ease, members in discharging their respective duties as tax advisors under Self Assessment.

The MIT Tax Handbook is a comprehensive 600 page manual covering a wide range of topics which include:-

i. a complete reproduction of all the Guidelines, Rulings and Practice Notes issued by the Inland Revenue Board
ii. a comprehensive summary of the P.U. Orders issued in the last few years
iii. a summary of tax cases
iv a short introduction on Field Audits
v sample engagement letters
vi. simple notes on how to apply for a tax agent's licence under Section 153
vii. a complete collection of the technical and operational dialogues

The MIT Tax Handbook will be updated annually, and the first update is already in the pipeline and will extend the current number of tax cases summarized to include tax cases reported in the last 25 years. No longer would practitioners need to read voluminous legal cases, as the MIT Tax Handbook will summarise each tax case into "fact, judgement and tax issue", for ease of reference.

In short, the MIT Tax Handbook is the most comprehensive compilation of practice notes, guides and summaries and practitioners will find this easy-to-use reference, a useful tool in locating answers that will illuminate the fog of uncertainty.



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How to become a member of the Malaysian Institute of Taxation

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BENEFITS AND PRIVILEGES MEMBERSHIP

The Principal benefits to be derived from membership are:

- Members enjoy full membership status and may elect representatives to the Council of the Institute.
- The status attaching to membership of a professional body dealing solely with the subject of taxation.
- Obtain of technical articles, current tax notes and news from the Institute.
- Obtain of the Annual Tax Review together with the Finance Act.
- Opportunity to take part in the technical and social activities organised by the Institute.

CLASSES OF 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 in the case of a Fellow the letters Fellow of Taxation Institute, Incorporated (F.T.I.I.), and in the case of an Associate the letters Associate of Taxation Institute, Incorporated (A.T.I.I.).

Qualification required for Associate Membership

1. Any Registered Student who has passed the examinations prescribed (unless the Council shall have granted exemptions from such examinations or parts thereof) and who has had 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 three (3) years practical experience in practice or employment relating to taxation matters approved by the Council.

3. Any person who has passed the Advanced Course examination conducted by 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.

4. Any person who is registered with MIA as a Chartered Accountant and who holds a Practising Certificate and an audit licence issued pursuant to the Section 8 of the Companies Act, 1965.

5. Any person who is registered with MIA as a Chartered Accountant with Practising Certificate only and has had not less than two (2) years practical experience in practice or employment relating to taxation matters approved by the Council.

6. Any person who is registered with MIA as a Chartered Accountant without Practising Certificate and has had not less than three (3) years practical experience in practice or employment relating to taxation matters approved by the Council.

7. Any person who is registered with MIA as a Licensed Accountant and who has 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.

8. Any person who is an approved Tax Agent under Section 153 of the Income Tax Act, 1967.

Fellow Membership

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

APPLICATION FOR MEMBERSHIP

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

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

	Fellow
(a) Upgrading Fee	*RM300*
(b) Annual Subscription	*RM200*
	Associate
(a) Admission Fee	*RM200*
(b) Annual Subscription	*RM150*

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 admission and thereafter annually before January 31 of each year.

The President's Note

On 10th September 2004, we saw YAB Dato' Seri Abdullah Ahmad Badawi deliver his first Budget as Prime Minister. I was pleased to hear the government announce its plans to review the current tax regime and implement the much-awaited goods and services tax and to establish a fund set aside for the refund of income tax. I trust with these plans in the pipeline the Malaysian tax system will improve to be more efficient and business friendly.

The MIT-IRB annual tax conference was held over the 24th and 25th August this year and I was glad to see a bigger participation from our members. We also saw more foreign delegates at the conference emphasising the foreign interest in the developments of our tax laws. On behalf of the secretariat for the National Tax Conference, I would like to thank everyone for their support.

A memorable event during the conference was the launch of the MIT Tax Handbook by the Second Finance Minister, YB Tan Sri Nor Mohamed Yakcop. With the support of members of the Editorial Committee the handbook was published in record time. The main purpose for producing the handbook is to equip members of the Institute and tax practitioners with greater knowledge on tax laws thus enabling them to practice with greater confidence.

This year we had the inaugural Annual Dinner organised by the East Coast Branch. On behalf of the Institute, I wish to congratulate the Chairman of the East Coast Branch, Mr Wong Seng Chong, and the organising committee of the Annual Dinner for successfully organising this event. Their perseverance and hard work paid off as we had over 400 members and other professionals present at the dinner. The guest of honour for the event was Deputy Minister of Finance, YB Dato' Dr Ng Yen Yen.

I wish to end by expressing my best wishes to members of the Institute who will be celebrating the coming Deepavali and Hari Raya festivals.

Ahmad Mustapha Ghazali
President

The Editor's Note

"Syabas" to the Institute for another successful National Tax Conference 2004 jointly organised with the Inland Revenue Board. During this premier tax event, the Institute has also officiated the launching of the first ever MIT Tax Handbook. The MIT Tax Handbook has since received positive response from members and the Institute should be lauded for marking another achievement.

Our East Coast Branch has also experienced a bout of excitement with its annual dinner held on the 28 August 2004 in Kuantan, Pahang. An extensive coverage of this event has been included under the Institute News.

In conjunction with the recent 2005 Budget announcement, this issue will also bring to you a commentary by Nakha Ratnam Somasundram on some of the key proposals in the Budget.

Other articles of interest covered in this issue include:

An Exclusive with Director General of Inland Revenue Board – Tan Sri Dato' Zainol Abidin bin Abd Rashid

A special dedication on the life and achievement of Tan Sri Dato' Zainol Abidin bin Abd Rashid, the current Director-General of Inland Revenue Board, Malaysia.

A Matter of Interest

In his article, Dr. Arjunan Subramaniam discussed on the circumstances underlying situations when interest income is business income through analysing the United Kingdom case of Nuclear Electric plc and its application in Malaysia.

Overview of the Anti-Money Laundering Act 2001

With the enforcement of the Anti-Money Laundering Act 2001, Lee Weng Chiew, Yee Fook Weng and Haznizuraini Hassan provide readers with an overview of the Act and its provisions in the battle against money laundering.

Keeping Tax Risks At Bay

In view of the self-assessment regime which has commenced since YA 2001 for companies and commencing in YA 2004 for individuals, Chow Chee Yen and Tan Hooi Beng highlight some of the practical ways in managing and mitigating tax risks in the self-assessment system.

Shares and Shares Alike

In this article, Vincent Josef examines the issues arising from an Employee Share Option Scheme with reference made to principles derived from British cases as well as the practical formalities for employers if they wish to grant this scheme.

Republic of Singapore's 2004 Budget

Assoc. Prof. Lee Fook Hong provides a summary of the key proposals in Singapore's 2004 Budget.

Sales Tax Audit – Recognising The Areas of Importance

A discussion by Thomas Selva Doss on the subject of sales tax audit providing readers with insights of the key areas that a sales tax auditor would probe into when conducting a sales tax audit.

Learning Curve

From the previous discussion of what constitutes the commencement of business, Siva Nair now brings us to look at when business income is deemed to be derived from Malaysia based on provisions of the tax law and decided tax cases.

Harpal S. Dhillon
Editor of Tax Nasional

Malaysian Institute Of Taxation

The Malaysian Institute of Taxation ("the Institute") is a company limited by guarantee incorporated on October 1, 1991 under Section 16(4) of the Companies Act 1965. The Institute's mission is to enhance the prestige and status of the tax profession in Malaysia and to be the consultative authority on taxation as well as to provide leadership and direction, to enable its members to contribute meaningfully to the community and development of the nation.

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Tax Nasional

Official Journal of the Malaysian Institute of Taxation

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Editorial	:	The Secretariat, Malaysian Institute of Taxation
Subscription and other enquiries	:	Commerce Clearing House (M) Sdn Bhd
Designer	:	Red DNA
Printer	:	Line and Tone Sdn Bhd

Commerce Clearing House (M) Sdn bhd are the official publishers of Tax Nasional

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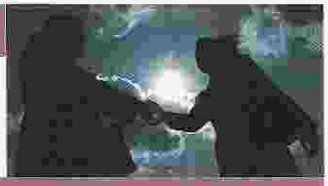

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Note : The views expressed in the articles contained in this journal are the personal views of the authors. Nothing herein contained should be construed as legal advice on the applicability of any provision of law to a given set of facts.

National Tax Conference 2004

The National Tax Conference organised by the Institute with the collaboration of Lembaga Hasil Dalam Negeri was successfully held on the 24 and 25 August 2004 at the Sunway Lagoon Resort Hotel, Selangor.

The conference certainly lived up to the expectation of the public and private sector as the premier tax event when over 500 delegates consisting of tax practitioners, accountants, financial planners, lawyers, academicians and government officials participated in the conference.

This year's conference entitled "Gaining a Competitive Edge" addressed the main issues emerging in the tax system locally and in the international front. Leading local and foreign experts from revenue authorities, government agencies, professional bodies, industry and financial sectors shared with the delegates on the experience and views on the practical tax strategies in order to gain a competitive edge in the complex global arena. Some of the issues addressed in the conference were Islamic financing, indirect taxes and taxation of intellectual property.

Over the years, the National Tax Conference has garnered the reputation of being the much anticipated tax event of the year in light of the increasing number of local and international delegates participating every year. With this in mind, the Institute pledges to organise a more successful conference next year.

MIT President, En Ahmad Mustapha Ghazali giving his opening speech.

Tan Sri Dato' Zainol Abidin bin Abd Rashid addressing participants at the conference.

Official address by Finance Minister II Tan Sri Senator Nor Mohamed Yakcop.

Official Launch of MIT Tax Handbook

Tan Sri Nor Mohamed Yakcop launching the MIT Tax Handbook.

IRB on track to meet RM50bil revenue target

Launch of MIT Tax Handbook The STAR, 28 August 2004.

The Second Finance Minister, Y.B Tan Sri Nor Mohamed Yakcop launched the first ever, MIT Tax Handbook on 24 August 2004 after officiating the National Tax Conference 2004.

The MIT Tax Handbook is a comprehensive 600 page manual covering a wide range of tax related topics and was published as part of the Institute's continuing mission to assist and ease its members in discharging their respective duties as tax advisors under the Self-Assessment System.

The ceremony received extensive coverage from the media.

Kwangsi Local Province Tax Bureau Visits MIT

A total of 26 members of the Kwangsi Local Province Tax Bureau from China paid a visit to the Institute recently. The visit was part of a study tour by the Chinese delegates to understand the tax system in Malaysia. Honorary Secretary, Mr Chow Kee Kan briefed the delegation on the tax system and also the Institute's role as the only tax professional body in Malaysia.

Dispute Settlement under Self-Assessment

The MIT organised a seminar on 'Dispute Settlement under Self-Assessment System' on 2 June 2004 at the Westin Hotel, Kuala Lumpur. A panel of speakers consisting of Special Commissioner of Income Tax, Mr Hariraman Palaya, MIT Deputy President Tuan Haji Abdul Hamid bin Mohd Hassan and leading counsels, Dr Arjunan Subramaniam and Mr Anand Raj provided a comprehensive and practical guide on the rights of appealing, the procedures of a tax appeal, as well as one's role under a tax appeal.

Dispute Settlement – The speakers From left: Mr Hariraman Palaya, Dr Arjunan Subramaniam and Mr Anand Raj.

Annual General Meeting (AGM) and Graduation & Prize Giving Ceremony

The Institute's AGM and Graduation & Prize Giving Ceremony were held on 12 June 2004 at the PJ Hilton, Selangor. Several resolutions were adopted at the AGM and members were briefed on the activities undertaken by the Institute last year. En Nujumudin bin Mydin and Mr Aruljothi Kanagaretnam were elected as new Council Members whereas Mr Venkiteswaran Sankar and Dr Ahmad Faisal bin Zakaria were re-elected to the Council.

Top students and graduates were honoured at the Institute's Graduation & Prize Giving Ceremony. The ceremony was officiated by Dr Mohd Shukor b. Hj Mahfar, Director, Operations Division, Inland Revenue Board.

The prize winners with En. Ahmad Mustapha Ghazali, Dr. Mohd Shukor b. Hj Mahfar and Prof Dr. Jeyapalan Kasipillai.

Sharing a light moment with some of the prize winners.

The successful students at the December 2003 examinations.

The MIT President, En Ahmad Mustapha Ghazali, guest of honour, Dato' Dr Ng Yen Yen, East Coast Branch Chairman, Mr Wong Seng Chong and guests gathered for a photo session.

EAST COAST BRANCH ANNUAL DINNER

In conjunction with our National Day, celebrated this year in Kuantan, the Malaysian Institute of Taxation (MIT), East Coast Branch, held its annual dinner in Kuantan on 28 August 2004. We are deeply honoured to have our Guest of Honour, YB Dato' Dr Ng Yen Yen, Deputy Minister of Finance I, and the President of MIT, Encik Ahmad Mustapha Ghazali and his wife Puan Narimah Mohd Perai, representative of Malaysian Institute of Accountants, various representatives of Government Departments, professionals from various fields, bankers, President of Pahang Bar Council, Mr Wong Siew Wan, representatives from Chamber of Commerce and Industry and others to grace this function. About 350 invited guests attended this function, marking yet another milestone to the lustre of MIT in general and to the East Coast Branch in particular.

In his welcoming address, Mr Wong Seng Chong, the Organising Chairman cum East Coast Branch Chairman, stated that in recent months tax professionals and accountants were making preparation to deal with individuals self-assessment introduced in 2004. Obligations and duties imposed on accountants and company secretaries with effect from 30 September 2004 under the Anti-Money Laundering Act 2001 add in yet another heavy task on tax professionals, rendering tax professionals more vulnerable than ever in the practice of taxation. We are trapped between an outdated pass and an uncharted future. MIT will invariably be called to play a more active role in the combat of these challenges. These sentiments were echoed in unison by our MIT President, Encik Ahmad Mustapha Ghazali, in his speech. In addition, he also stated the role MIT had played and would continue to play. He is confident with the support of everyone; MIT would stand tall, of world class standard and a body for the tax professionals.

In her speech, YB Dato' Dr Ng Yen Yen stressed the importance of taxation. With the tax collected, the Government would be able to build more infrastructure, roads, bridges, hospitals, schools and to provide better services to the "rakyat". She emphasized that tax professionals must disseminate information to the taxpayers so that they become informed, knowledgeable taxpayers. This invariably would make our tasks as tax professionals much easier. Taxpayers will soon realise it is their duty to pay taxes and understand the philosophy of taxation. It is a smart partnership. Tax professionals will be the catalyst to make this mission possible. In any tax system, YB Dato' Dr Ng Yen Yen said it must be prudent, flexible, accountable and transparent. Tax consultants must have positive and not negative attitude to ensure the success of our self-assessment tax system. As tax professionals, we must be reliable, responsible, knowledgeable, continuously updating ourselves. "This must be the role you must play and continue to play" she emphasized.

In conclusion, a pleasant personality, neither arrogant not meek, tax professionals being friendly, warm, thoroughly well-equipped and obviously sincere will rule the day.

The MIT President, En Ahmad Mustapha Ghazali and East Coast Branch Chairman, Mr Wong Seng Chong welcoming guest of honour, Deputy Minister of Finance 1, Dato' Dr Ng Yen Yen.

The MIT President, En Ahmad Mustapha Ghazali presenting a copy of the MIT Tax Handbook to Deputy Minister of Finance 1, Dato' Dr Ng Yen Yen.

DECEMBER 2003 EXAMINATIONS

List of prize winners, graduates & successful students

List of prize winners

Ho Nyuk Ching
Best Performance in Taxation I
Sponsored by: Atarek Kamil Ibrahim & Co.

Lee Sau Wai
Best Performance in Taxation II
Sponsored by: PricewaterhouseCoopers

Au Yeong Pui Nee
Best Performance in Taxation V
Sponsored by: En Ahmad Mustapha Ghazali

Lai Seow Hong
Best Overall Performance in Foundation Level / Level I
Sponsored by: Deloitte KassimChan

Kong May Lee
Best Overall Performance in Intermediate Level / Level II
Sponsored by: PricewaterhouseCoopers

The following candidates have graduated in the December 2003 examination session:

Angie Ng Cheng Ling
Soon Hock Lai
Chan Yew Ming
Tan Soo Fong
Daljit Kaur
Teh May Ling
Foong Kok Keong
Wong Chui Hua
Lai Kiat Yeen
Yeap Boey Peng
Lau Aik Fang
Yeong Choy Yin
Murugu Tamil Selvan
Yii Hieng Hoon
Shalini Chandrarajah
Yogarani Sugunasundran

The following candidates completed the Foundation Level

Sin Poh Chan
Ho Nyuk Ching
Jimmy Tan Koon Teng
Jang Vun Ket
Lai Seow Hong
Sai Mee Siong
Lai Kin Kiaw
Tan Boon Chang

The following candidates completed the Intermediate Level

Chan Yee Meng	Intermediate
Cheng Yew Leak	Intermediate
Yeo Liu Choo	Intermediate
Kong May Lee	Intermediate
Mohd Fadzlee Mohd Sani	Intermediate
Wong Siew Fong	Intermediate
Lee Har San	Intermediate
Lee Sau Wai	Intermediate
Shamini Ramachandran	Intermediate
Lau Yong Hwa	Intermediate
Yee Chia Ping	Intermediate
Tee Sock Ching	Intermediate
Josephine Wong Shun Lee	Intermediate
Lee Kim Eng	Intermediate
Liew Siew Meen	Intermediate
Kok Chooi Fung	Intermediate
Teong Chwee Le	Intermediate
Kumaran Muthukarupen	Intermediate
Law Kien Khok	Intermediate
Tsen Len Chu	Intermediate
Lau Tuck Wai	Intermediate
Ng Lai Lai	Intermediate
Tan Ah Hong	Intermediate
Angie Ng Cheng Ling	Intermediate
Lee Bee Chin	Intermediate
Soon Hock Lai	Intermediate
Goh Hock Gin	Intermediate
Wang Pui Leng	Intermediate
Pang Huey Mein	Intermediate
Wong Moi Hiong	Intermediate
Chong Pak Chung	Intermediate
Chin Oi Len	Intermediate

The following candidates completed the Final Level

Wong Chui Hua
Lau Aik Fang
Yogarani Sugunasundran
Daljit Kaur Nirmal Singh
Chan Yew Ming
Lai Kiat Yeen
Shalini Chandrarajah
Murugu Tamil Selvan
Too Chang Kit
Yeong Choy Yin
Foong Kok Keong
Angie Ng Cheng Ling
Yeap Boey Peng
Soon Hock Lai
Teh May Ling
Yii Heng Hoon
Tan Soo Fong

An Exclusive with Tan Sri Dato' Zainol Abidin bin Abd Rashid

For someone who classifies everything in life as " important" and "exciting", Tan Sri Dato' Zainol Abidin began his life journey in October 1945 in Alor Setar. He attended Sekolah Melayu Sungai Korok Lama for his primary education before proceeding to Kolej Sultan Abdul Hamid and later to the Royal Military College.

Tan Sri Zainol furthered his tertiary education in University Malaya obtaining a Bachelor Degree in Economics in 1970 and a Diploma in Public Administration in 1972. His hunger for knowledge led him to Boston University from which he obtained a Masters Degree in Economic Development in 1975. A two-month stint at Harvard earned him credentials in Public Enterprise Management in 1978.

Little did Tan Sri Zainol know of the exciting career that lay ahead of him and the challenges that would come with that. Upon his return to Malaysia he served in INTAN till 1980. His home state beckoned and so in the same year, he accepted the appointment as Kedah State Development Officer. During his term in office in Kedah trouble developed over the issue of rice and his 13 months in office was a garden plagued by thorns.

Subsequently Tan Sri Zainol was appointed Director of Sabah Institute of Administration and Research, a post which he served for 3 years. With his foresight and innovativeness he introduced several changes which transformed the Institute into a much respected one.

Tan Sri Dato' Zainol and wife, Puan Sri Azizah.

In 1983 he returned to West Malaysia. By this time Tan Sri had gained vast knowledge and experience. His innovativeness was also noted. Between the years 1983 and 2000, he served in various high ranking positions as Deputy Secretary of Economics and International Division, Treasury, Director of Human Resource Section of the Economics Planning Unit, Director General of the Manpower Department and Secretary General of the Ministry of Human Resource.

The big moment in his career finally arrived in August 2000 when Tan Sri Zainol was appointed Chief Executive / Director General of Inland Revenue Board (IRB). Tan Sri Dato' Zainol Abidin was given two weeks notice to join the IRB. When asked of his reaction to the sudden appointment, he had this to say, "we were taught to obey orders and not to question them". His answer describes the man he is today, disciplined, loyal and determined and this he credits to the training he had acquired during the years he spent as a student in the Royal Military College.

Being the charismatic man that he is, Tan Sri Zainol managed to steer the IRB to collect RM41.2 billion in taxes within his first year in office, an enormous achievement by any standards. This feat earned him the title of RM42 billion man, an honour bestowed upon him by none other, Tun Dr Mahathir Mohamed (the then Prime Minister of Malaysia). Recollecting the incident, he says it took place at a Hari Raya gathering at the Ministry of Finance when he was approaching the premier's table, "here comes the RM42 billion man" said Tun Dr Mahathir referring to Tan Sri Dato' Zainol Abidin. He recounts the experience as one of his most memorable incidence in his life.

As expected by many factions, Tan Sri Zainol brought about several instrumental changes within the IRB. They include the continuing implementation of the self-assessment system, improved services with the implementation of 3M (mesra, membantu, memuaskan), upgrading of the IRB' computer system to handle the new and improved tax regime. He also played a pivotal role in the physical expansion of Akademi Percukaian Negara which happens to be the teaching and education arm of the IRB.

Council member, Harpal Singh Dhillon and Tan Sri Dato' Zainol sharing a light moment.

For a man whose passions are among others, reading, his principle in life is that if one is hungry enough for success, success is inevitable. Tan Sri Zainol loves to learn from others and this he says, makes the path to success shorter.

Brought up by his grandparents, it is no wonder Tan Sri Zainol views them as his source of motivation. Tan Sri Zainol recounts his experience before entering the varsity, "my father asked me to meet Tun Dr Mahathir, the first Malay doctor in Alor Setar, before entering university and he gave me some important advice on career guidance". Tan Sri Zainol pointed out that "Tun Dr Mahathir has always been an inspiration to me since then".

His accomplishments in the government sector and now in the Inland Revenue Board would be a difficult feat to emulate. It is undeniable that Tan Sri Dato' Zainol Abidin has indeed set a benchmark for his successor.

A Matter of Interest

By DR ARJUNAN SUBRAMANIAM

I thought that the last word on the circumstances of interest income being business income was said by the Court of Appeal in ***Director General of Inland Revenue v. Pan Century Edible Oils [2002] MSTC 3967.*** But the Inland Revenue is again pursuing the subject, which is not a bad thing for lawyers. So I thought I should revisit this subject, in particular against the background of the Scheduler System of Taxation in the United Kingdom.

In 1996, ***Nuclear Electric plc v. Bradley (Inspector of Taxes [1996] STC 405*** *was decided by the House of Lords.*

Facts

The facts were:

"On 1 April 1990 NE acquired from the CEGB the business of generating and supplying electricity from nuclear fuel (although for the purposes of the Corporation Taxes Acts NE was to be treated as always having carried on that business). The main production costs of the business were incurred over a very long period of time during the final stage of manufacture, namely in storing and reprocessing the spent fuel and disposing of the radioactive waste (the back-end costs). Thus, for the purpose of fixing the price at which the electricity was sold and to calculate the amount of each year's trading profit or loss, provision had to be made for the back-end costs. This was done by averaging such costs over the five year period in which the fuel was used in the reactor to generate electricity. The proportion attributable to any given year was then discounted back from the dates when the expenditure was expected to be incurred at the rate of 2% pa and that discounted amount was then deducted in computing the profit or loss for that year. However, no provision had ever been made in CEGB's accounts for back-end costs or for the costs of decommissioning a reactor, with the result that NE had a very large liability for future back-end and decommissioning costs. Funds set aside for meeting the future liabilities were invested with the aim of producing a return at a rate of 2% (equaling the rate at which the future liabilities were discounted). Such investments were not placed in a segregated fund so that it would have been possible for NE to use them for purposes other than for meeting trading liabilities. In the year ending 31 March 1991 NE had substantial carried forward trading losses available to be set off against its trading income for that year pursuant to section 393. However, following the deduction of the provision for future liabilities NE incurred a loss and therefore had insufficient income against which the carried forward losses could be set off. Hence, it claimed pursuant to section 393 (8) to take income received from its investments into account in calculating its trading income for the year ending 31 March 1991 for the purposes of the claim to relief under section 393 (1). The inspector refused the claim on the ground that the investment income could not be treated as 'trading income' within the meaning of section 393 (8) because it would not have fallen to be taken into account as a trading receipt in computing NE's trading income."

Issue

The issue was, whether investment income accruing to ***Nuclear Electric plc (NE)*** during the year ending 31 March 1991 was trading income against which losses could be set off under section 393 (8) of the Income and Corporation Taxes Act 1988 (the 1988 Act).

Conclusions

The House of Lords drew the following principles:

(a) the sum of money was invested for a long period indicating an investment not trading (at page 412);

(b) but interest from sums in deposits to meet current or short term trading liabilities may not be investment but trading income. (at page 412);

(c) whether income from investments held by a business is trading income must ultimately depend upon the nature of the business and the purpose for which the fund is held;

(d) there are businesses of which the making and holding of investments form no part of the businesses (at page 411) and

(e) in this case, the investments were in no sense employed in the business of producing electricity and therefore, not trading income (at page 411).

Application of Nuclear Electric (supra) in Malaysia

While the case provides interesting angles to when interest is trading income, the application of some of the principles are relevant to Malaysia and other principles cannot be imported. Firstly the case was decided against a scheduler system of taxation under section 393 which reads as follows:

"(1) Where in any accounting period a company carrying on a trade incurs a loss in the trade, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods; and (so

long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot, on that claim or on a claim (if made) under subsection (2) below, be relieved against income or profits of an earlier accounting period...

(8) for the purposes of this section 'trading income' means, in relation to any trade, the income which falls or would fall to be included in respect of the trade in the total profits of the company; but where –

(a) in an accounting period a company incurs a loss in a trade in respect of which it is within the charge to corporation tax under Case I or V of Schedule D, and

(b) in any later accounting period to which the loss or any part of it is carried forward under subsection (1) above relief in respect thereof cannot be given, or cannot wholly be given, because the amount of the trading income of the trade is sufficient,

any interest or dividends on investments which would fall to be taken into account as trading receipts in computing that trading income but for the fact that they have been subjected to tax under other provisions shall be treated for the purposes of subsection (1) above as if they were trading income of the trade."

In ***Hanover Agencies [1967] 1 All ER 954***, a warning not to import cases from the UK Scheduler System to other non-scheduler tax system was framed in these terms:

"Counsel attempted to draw an analogy from the case of Fry v. Salisbury House Estate Ltd. This company formed to acquire and manage a block of building, let out the rooms as unfurnished offices to tenants. The company also provided services at an additional charge. They were assessed under Sch. A to income tax on the gross annual value of the building. The Revenue claimed, in making an assessment under Sch. A, to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Sch.A. This claim failed, the House of Lords holding that the assessment under Sch. A was exhaustive. There are expressions of opinion in some of the speeches that the company were not carrying on a trade, but these expressions must be taken in the context of the British Income Tax Law and particularly in the context of Sch. D. The real ratio decidendi is contained in the speech of Lord Atkin, when he says that annual income from the ownership of land can be assessed only under Sch. A and that the option of the revenue to assess under whatever schedule they prefer does not exist. The schedulers are mutually exclusive. In their lordships' opinion the decision in the Salisbury House case has no bearing on the construction of the provisions of the Income Tax Law of Jamaica, where there is no parallel to the division of the charge to income tax into various separate and distinct Schedules. Section 5 already referred to is an omnibus section which treats all profits and gains together whether arising from property or from a trade, business, employment or profession or in respect of rent or emoluments, salaries or wages."

Secondly, since section 4 of the Malaysian Income Tax Act 1967, is an 'omnibus' interest under section 4 (c) of the Income Tax Act 1967 can be business income under section 4 (a) of the Income Tax Act 1967. See ***American Leaf Blending (infra)***.

Thirdly, business is defined to include an 'adventure in the nature of a trade'. Thus, short term deposits repeated during a financial year would have the marks of an 'adventure in the nature of a trade'. The same would apply to long term deposits, particularly where higher yields result.

Fourthly, where the fixed deposits were segregated into specific accounts to meet business liabilities, such interest is an integral part of the business. [See Nuclear Electric (supra)].

Fifthly, if the objects of the company include investments in fixed deposits surely the interest arises from a business object and thus 'business' income. It does not matter that the deposits are long term. A company can have several sources of income ***(River Estates Sdn Bhd v DGIR [1984] 1 MLJ 1)***.

Sixthly, the concept of ***'trading'*** was considered in this case, ***not the concept of 'business' which is a wider concept.*** See ***American Leaf Blending Co. Sdn Bhd v Director General of Inland Revenue [1979] 1 MLJ*** 1. There is nothing in this case ***(Nuclear Electric)*** to contradict the principles established in ***American Leaf Blending (supra)*** and ***Director General of Inland Revenue v. Pan Century Edible Oils [2002] MSTC 3967***.

The case of ***Nuclear Electric*** (supra) has, therefore, limited application in Malaysia in view of the wider concept of 'business' as opposed to 'trading' as considered in ***Nuclear Electric (supra)***. This point needs to be emphasized when reading ***Nuclear Electric (supra)***.

So why are cases on the subject still in the process of the Court system? As I said above it is not a bad thing. It keeps me going...

The Author

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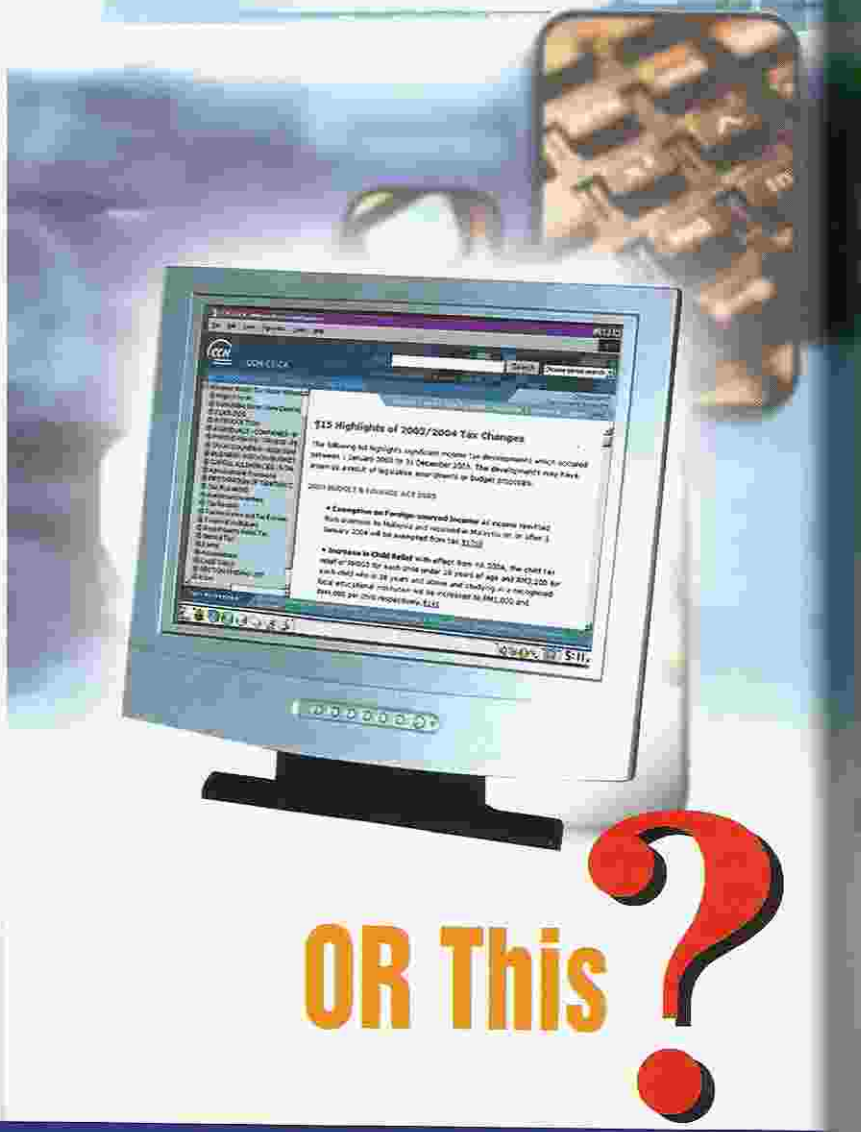

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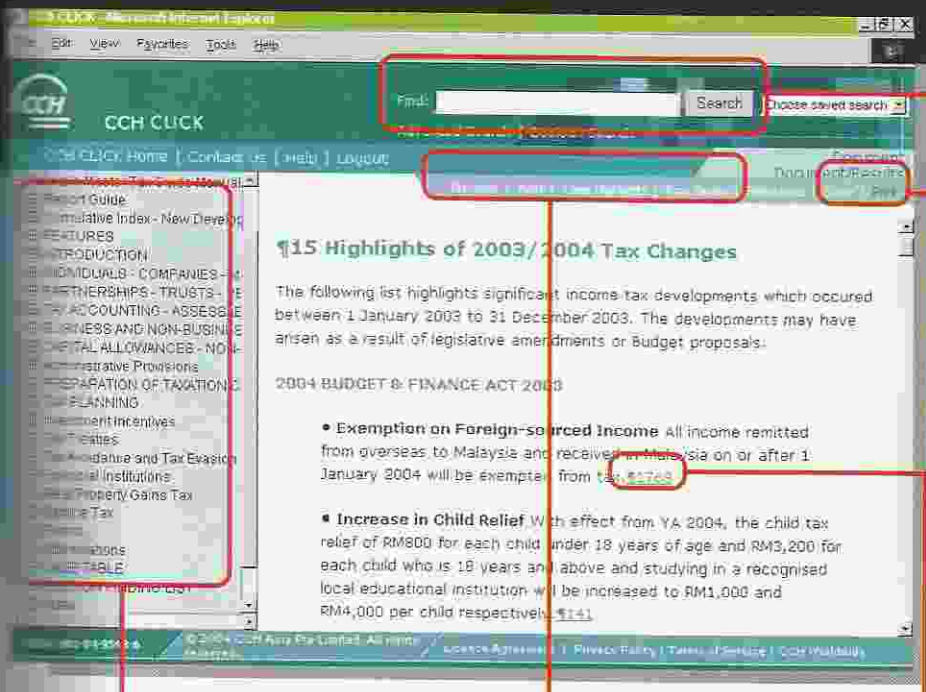

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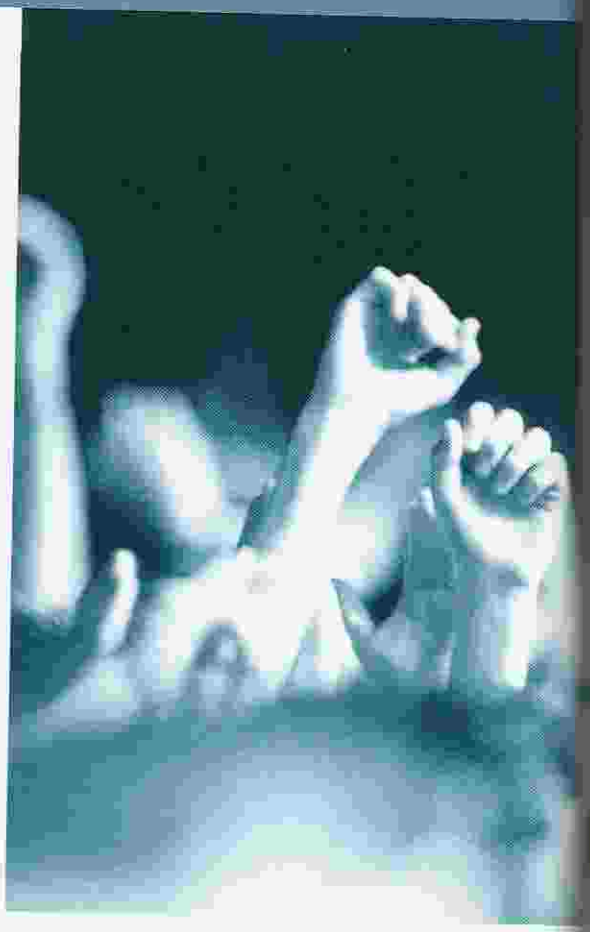
2005 Budget – A Commentary



By NAKHA RATNAM SOMASUNDARAM

On 10th September 2004 the Prime Minister Datuk Seri Abdullah Ahmad Badawi presented his maiden budget with the proclamation of building on past achievement towards greater success. It was presented against the background of a volatile world economy, threatening oil price surges, and terrorist attacks in the region.

Malaysia had registered an impressive 8% growth in the second quarter of 2004 and this is expected to provide the momentum for the GDP to grow at an impressive 7%. The private investment rebounded by almost 15% and the private consumption is at a healthy 10%. This hold good promises for the private sector to act as the new engine to lead the economic growth.

The Budget Strategy

The budget adopted four strategies, namely:

1. Enhancing the effectiveness of the government financial management and its delivery efficiency, and competitiveness;
2. Accelerating the shift towards a higher value added economy;
3. Developing the human capital as a catalyst for growth; and
4. Ensuring the well being of the citizens through improving their qualify of life.

The budget did not contain any boat-rocking proposals; however the following proposals were of significant long-term interest.

1. The setting up of a panel for the review of the Malaysian taxation system.
2. The implementation of the Goods and Services Tax (GST) in January 2007.
3. The establishment of a special fund for tax refund.

The Review of the Tax System

It is the stated purpose of the Government 'to ensure that the tax system is more efficient, equitable and business friendly as well as capable of generating a stable source of revenue'[1]. Towards this end a panel will be set up comprising of representatives from the public and the private sectors. They will review the present tax system, including provisions of the Income Tax Act 1967 (as amended) [ITA]. Admittedly the focus as regards to the ITA is to ensure that the various provisions remain current and relevant while displaying some clarity and transparency.

It is a known fact that the ITA is no easy 'book' to read. And even if you do read it (you must be a very brave soul) it will not lend itself to any straightforward understanding. Even Albert Einstein once mentioned that the most difficult thing to understand is income tax (talk about 'relativity of understanding'). Given that the ITA is known more for its murky contents than its transparent clarity, it is time the whole 'book' is overhauled to something more readable and understandable. The timing too is perfect, given that with the imposition of the self-assessment on unincorporated taxpayers, the hawkers and the fisherman too may now want to read it – at least out of curiosity.

[1] The Budget Speech, p. 4.

Goods and Services Tax (GST)

Proponents of the indirect taxes would be leaping for joy now that the Government has indicated a commitment to implement such a tax on 1 January 2007. The sales tax and service tax will be replaced by the single value added consumption tax, the GST. The budget claims that it 'will be more comprehensive, efficient, transparent and effective, thereby enhancing tax compliance'[2]. However a taxpayer's response immediately after the Budget 2005 was that the GST would be of inconvenience to small traders and the lower income group, notwithstanding the zero-rating on some essential consumption items. He believes that it will also impose an ethical dilemma on the trader as to whether to pay or not to pay the GST. In a retail market system where the supply chain runs very well without being hindered by documentation (e.g. the pasar malam traders), combined with the lack of proper, efficient enforcement system, this taxpayer is of the opinion that it will lead to a situation like in Thailand where (he claims) a dual economy exists – a 'GST economy' and a 'non-GST economy'. He also thinks that the 'high-street-shop' merchant will be the most affected as compared with the roadside and curbside trader.

Nevertheless there is plenty of time for the Government to review the system of GST carefully before implementing it.

Income Tax Refunds

At the moment most corporate taxpayers are faced with a real situation of having overpaid their taxes (when completing the Form C), and a most unreal situation of having received an immediate 'deemed refund' (when filling the Form R).

If they insist on an immediate real-time refund, they are faced with another frightening reality – an immediate real-time tax audit on their tax affairs (or so I was told!).

Hopefully, the Government's Fund for Tax Refund, to be established to provide for income tax refunds, will improve the delivery systems that the Prime Minister cherishes so much.

It also means that there should not be any situation of slow refunds by the Inland Revenue Board in the near future.

But then again, there is always the danger that the Fund might be running out of money![3]

Tax Deductions for Zakat

Zakat is now allowable as a deduction against the aggregate income, not exceeding 2.5% of such income. This will reduce the cost of doing business to some extent.

Agriculture

The high food import bill of RM14 billion in 2003 was apparently a cause for concern. The budget therefore focused on revamping the agricultural sector and designated it as the third engine of growth (the manufacturing being first and the service sector being the second). A wide range of incentives and a generous allocation were made for the promotion of commercialisation of the agricultural sector.

2 The 2005 Budget Speech, p. 5

3 Income tax monies collected go to the Consolidated Fund in the Treasury, and are not available for use by the Inland Revenue Board. Instead, refunds are made from special repayment votes given by Treasury to the Inland Revenue Board. Application for refunds are processed by the Inland Revenue Board (when funds are available) and sent to the Accountant-General's office that will then issue the repayment cheque direct to the taxpayer. The repayment vote for 2004 was RM 4b. A special allocation for RM 120m in November 2003, for example, was exhausted in three days. The Treasury subsequently directed that credits in the taxpayer's accounts be set off against future tax liability, to ease refund delays. [see *Tax Intelligence* Vol. 21-Issue 51/52 of 2003 -8th September 2003].

For agricultural food production, the equity condition for a company, which invests in a subsidiary and claims tax deduction (equivalent to the amount of the investment made in the subsidiary), has been reduced from 100% to 70%; and the incentive scheme was extended to applications received until 31 December 2010.

Accelerated capital allowance is now given for the cost of labor saving as well as mechanization and automation expenditures by companies in the agricultural sector, including plantations. The new proposals will enable the writing off of such cost in two years. The reinvestment allowance for modernizing chicken and duck rearing was extended to rearers of parent and grandparent stock of chickens and ducks.

The Halal Hub

Double deduction is now available for the cost of obtaining halal certification from the Jabatan Kemajuan Islam Malaysia (JAKIM) and also for obtaining international quality system and standards certification.

Production of halal food too received some incentive by way of investment tax allowance of 100% on qualifying capital expenditure incurred within a period of 5 years. These incentives are in addition to the pioneer status granted earlier.

Commercialization of Research and Development (R&D)

Much focus has been placed on public sector research institutions and institutions of higher learning that have produced significant research findings in the resource-based industries. It is thought that the initiative to commercialize the findings remain limited due to the high cost and risks involved. The Budget proposes that a locally owned company, which invests and owns at least 70% equity in the company that undertakes commercialization projects would be granted a tax deduction equivalent to the amount of the actual investment made in the subsidiary. And the subsidiary company that undertakes the commercialization projects will be granted pioneer status of 100% for 10 years.

These are very attractive incentives, but the question remains as to why research findings are not commercialized in the first place. If the findings were indeed viable it would not need any incentive for commercialization. It is also not understood why such incentives are limited to only R&D activities of public research institutions, and that too only for resource based R&D.

Some Administrative Hiccups

Several tax incentives given, are again, as in previous years, subject to some other government agencies being involved in its processing and approval. For example the Syariah-compliant instruments must be approved by the Syariah Advisory Council of Bank Negara Malaysia. The halal certification must be given by the Jabatan Kemajuan Islam Malaysia and relocation of manufacturing activities to promoted areas would be handled by the Malaysian Industrial Development Authority (MIDA).

These administrative procedures for claiming tax benefits may be time consuming and add to the cost and complexity of doing business. A centralized Inland Revenue Board related 'one-counter processing' approach would make Malaysia much more competitive.

Good news for accountants and tax agents

Accountants and tax agents can breath more easily, now that sole proprietors, partnerships, clubs and association will be allowed to submit their income tax returns by 30th June instead of 30th April.

What was missing

There was no corporate tax cut. And there was no individual tax cut. There was no consumption-based tax – the GST was only a proposal and we will have to wait till January 2007 to see whether it will see daylight.

Group relief was not made available contrary to general expectation. There was no drastic change in the personal relief either (other than that for disabled persons, EPF contributions, and books etc).

Conclusion

Overall the Budget 2005 was a rattle-free proposition. It focused on the macro-economic aspects while laying down the framework for some long-term economic growth and tax reforms. It acknowledges the uncertainties and turbulent future posed by external environment and accordingly set about to work within those parameters. The challenges of developing the human capital and ensuring dynamic private sector participation to make the nation more resilient were some of the challenges that the budget had to address. The idea is to ensure continuity and sustainability of growth. And the Budget 2005 has indeed addressed these issues very well.

The Author

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holds a Masters degree from Universiti Utara Malaysia. He is an Associate Member of the Malaysian Institute of Taxation. Mr. Nakha served the Inland Revenue Board for 30 years in various capacities. He retired in 2001 as State Director of Inland Revenue Board, Kelantan. He is currently a tax consultant to Chua and Chu and a tax advisor to Shamsir Jasani Grant Thornton.

Overview of the Anti-Money Laundering Act 2001

By LEONG WENG CHIEW, YEE FOOK WENG & HASNIZURAINI HASSAN

The global money laundering watchdog organisation, the Financial Action Task Force (FATF) was established by the G-7 Industrial Democracies in 1989 in response to mounting international concerns over money laundering. FATF subsequently developed recommendations setting out framework and measures that should be taken by governments around the world to combat money laundering. As a result, the FATF Forty Recommendations were issued in 1990 and subsequently revised in 1996 and 2003[1].

[1] Refer to the publication in item A of the Appendix.

The FATF reports indicated that entities providing professional services were increasingly used by organised crime and other criminal organisations to assist them to launder their funds by acting as financial intermediaries or providing expert advice or by providing other services useful to the money launderers such as the creation and management of companies and other legal entities or arrangements.

The framework of the FATF Forty Recommendations is widely viewed as the leading international anti-money laundering standard that serves as a benchmark for national governments to implement anti-money laundering measures within their respective national jurisdictions. As such, Malaysia has adopted the approach set out in the recommendations and, subsequently, the Anti-Money Laundering Act 2001 ("Act") came into being.

The Act was published in the Gazette on 5 July 2001 and subsequently came into effect on 15 January 2002. It is a statute enacted to provide for:

i) the offence of money laundering[2];
ii) the measures to be taken for the prevention of money laundering;
iii) the forfeiture of property derived from, or involved in, money laundering; and
iv) matters incidental or connected to the above.

It is recognised that there are essentially three stages involved in money laundering[3]:

i) Placement
The physical disposal of cash proceeds derived from an illegal activity. This is where the proceeds of crime are mixed with the profits of legitimate businesses or cash and are turned into bank credits or deposits.

ii) Layering
Separating illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the audit trail and provide anonymity. In other words, the funds are passed through so many transactions that it becomes very difficult to establish the original source.

iii) Integration
The turning of criminally derived wealth into "legitimate funds". The "tainted" money is passed to legitimate organisations with no provable links to organised crime. Once this stage is reached, the criminal has, or can have, a legitimate reason for having the funds and he does not need to hide the funds any longer.

On 23 April 2004, the Act took centre stage with the news of the first person charged under the Act[4]. The accused was reported to have been charged with 7 charges of receiving proceeds worth about RM37 million from unlawful activities using various bank accounts. The accused was charged under section 4(1)[5] of the Act, which is categorised as a serious offence under the Second Schedule of the Act, and the court proceedings have yet to be concluded. It was also reported that to date, about RM34 million of the proceeds have been frozen by the banks concerned.

Part I: Preliminary

1. The Act criminalises money laundering as a separate offence. There are 119 offences and any dealing with the proceeds of these offences also constitutes an offence of money laundering. These predicate offences are contained in the Second Schedule of the Act, with the majority of those listed being offences under section 4(1) of the Act as well as the following statutes:

   i) Anti-Corruption Act 1997;
   ii) Banking and Financial Institutions Act 1989;
   iii) Betting Act 1953;
   iv) Child Act 2001;
   v) Common Gaming Houses Act 1953;
   vi) Companies Act 1965;
   vii) Copyright Act 1987;
   viii) Corrosive and Explosive Substances and Offensive Weapons Act 1958;
   ix) Customs Act 1967;
   x) Dangerous Drugs Act 1952;
   xi) Dangerous Drugs (Forfeiture of Property) Act 1988;
   xii) Explosives Act 1957;
   xiii) Firearms (Increased Penalties) Act 1971;
   xiv) Futures Industry Act 1993;
   xv) Insurance Act 1996;
   xvi) Internal Security Act 1960;
   xvii) Kidnapping Act 1961;
   xviii) Money-Changing Act 1998;
   xix) Optical Discs Act 2000;
   xx) Penal Code;
   xxi) Securities Industry Act 1983; and
   xxii) Takaful Act 1984.

2 Defined under section 3 of the Act to mean the act of a person who (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity; (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity.
3 Refer to the publication in item B of the Appendix.
4 The Star, 24 April 2004.
5 "Any person who-
(a) engages in, or attempts to engage in; or
(b) abets the commission of,
money laundering commits an offence and shall on conviction be liable to a fine not exceeding 5 million ringgit or to imprisonment for a term not exceeding 5 years or to both."

2. In the preliminary part, section 2 provides that the Act shall apply to any of the following:

2.1 serious offence[6];

2.2 foreign serious offence[7]; or

2.3 unlawful activity[8]

whether committed before or after the commencement date of the Act. The application of the Act is also extended to any property situated in or outside Malaysia.

Part II: Money Laundering Offences

1. The offence of money laundering is created under section 4(1) of the Act when one abets, attempts to or actually commits money laundering. Under section 4(2) of the Act, a person may be convicted of an offence under section 4(1) irrespective of whether:

(i) there is a conviction in respect of a serious offence or foreign serious offence; or

(ii) a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

2. One objective of the Act is to encourage more insiders to the offence or people privy to the information in relation to the offence to come clean with the authorities. As such, section 5 provides for the protection of informers and information which includes the following:

2.1 the informer shall not be deemed to have committed money laundering:-

2.1.1 if he discloses the information relating to the offence before its commission and the offence was committed with the consent of the enforcement agency[9] (for instance to pursue further investigations in identifying all parties involved with the offence);

2.1.2 if he discloses the information relating to the offence after its commission on his own initiative and as soon as it is reasonable for him to do so;

2.2 the disclosure shall not be treated as a breach of any restriction on the disclosure of information imposed by any law, contract or rules of professional conduct; and

2.3 the informer shall not be liable for damages for any loss arising out of the disclosure or any act done or omitted to be done in relation to the property in consequence of the disclosure.

3. Part II of the Act also provides that the disclosure and any information related to the disclosure shall not be revealed by any means including by publication in writing or broadcasting by the informer or any person who knows about the disclosure. However, this restriction shall not apply to a witness in a civil or criminal proceeding for an offence under section 4(1) and section 6(3)[10] of the Act and where the court opines that disclosure of the informer's identity is essential to do justice between the parties involved.

4. Any publication or broadcasting of the disclosure or any information related to it shall be an offence under the Act.

Part III: Financial Intelligence

1. The Minister of Finance may appoint a person to be the competent authority[11] who may authorise any of his officers or any other persons to perform his functions or render assistance in the performance of his functions under the Act.

2. The powers of the competent authority, which is defined in section 3 as the person appointed under section 7(1) of the Act, include the following:

2.1 to recommend to the Minister of Finance to invoke provisions[12] regarding reporting obligations under the Act in respect of any reporting institution[13];

2.2 to exercise powers in respect of reporting institutions which are carrying on activities listed in the First Schedule;

2.3 to give instructions to a reporting institution in relation to any report or information received under the Act;

2.4 to authorise the Labuan Offshore Financial Services Authority or its designated officers to have access to information received from a reporting institution which is carrying on business listed under Part II of the First Schedule in the Act;

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6 Defined under section 3 of the Act to mean any of the offences specified in the Second Schedule, an attempt to commit any of those offences or the abetment of any of those offences.

7 Defined under section 3 of the Act as an offence against the law of a foreign State stated in a certificate purporting to be issued by or on behalf of the government of that foreign State and also an offence that consists of or includes an act or activity, if it had occured in Malaysia, would have constituted a serious offence.

8 Defined under section 3 of the Act as any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence.

9 Defined under section 3 of the Act to include a body or agency that is for the time being responsible in Malaysia for the enforcement of laws relating to the prevention, detection and investigation of any serious offence.

10 "No person shall publish in writing or broadcast any information including a report of any civil or criminal proceedings but excluding information published for statistical purposes by a competent authority or the Government so as to reveal or suggest: (a) that a disclosure was made under section 5; or (b) the identity of any person as the person making the disclosure."

11 Bank Negara Malaysia has been appointed by the Minister of Finance as a competent authority (as indicated by its website).

12 Provisions to invoke the applicability of specific sections in the Act to certain institutions carrying out specific businesses in Malaysia. Refer to the publications in items D, E and F of the Appendix.

13 Defined in section 3 of the Act as any person, including branches and subsidiaries outside Malaysia of that person, who carries on any activity listed in the First Schedule. Such listed activities include banking, money changing, insurance, futures broking and offshore financial services.

2.5 to communicate anything disclosed to him under the Act to a corresponding authority[14] of a foreign State if there is a mutual arrangement between Malaysia and the foreign State that is consistent with the provisions of the Act; and

2.6 to issue guidelines, circulars or notices to reporting authorities necessary to give full effect to the provisions of the Act in detecting and preventing money laundering[15].

3. Section 11 of the Act prohibits any disclosure or the making of any record or communication of the information obtained under the Act. However, this prohibition is relaxed by section 12 which permits disclosure of information under the following circumstances:

3.1 prosecution or legal proceedings in connection with the commission of a serious offence, a foreign serious offence or an offence under section 4(1) of the Act; and

3.2 disclosure of the affairs of a person by the person authorised under section 9 of the Act to:

3.2.1 if the person is not a company, that person;

3.2.2 if the person is a company, any person who is, or has been a director or an officer of the company or any person who is or has been directly involved in or responsible for the preparation of information furnished on behalf of the company; or

3.2.3 the person who furnished the information to the competent authority.

Part IV: Reporting Obligations

1. Part IV of the Act can have effect notwithstanding any obligations as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise. It prescribes reporting obligations and further measures of vigilance on the reporting institutions to enable, among others, early detection of money laundering. The reporting institutions under the Act are required to take various measures including the following:

1.1 to keep records containing information prescribed by the Act of any transaction involving domestic or any foreign currency exceeding such amount as may be specified by the competent authority[16];

1.2 to promptly report to the competent authority any transaction exceeding the amount prescribed by the competent authority under the Act;

1.3 to promptly report to the competent authority upon any suspicion of a transaction that involves proceeds of an unlawful activity;

14 Defined under section 10(2) of the Act to mean the authority of the foreign State responsible for receiving information that corresponds to any thing required to be disclosed to a competent authority under the Act.

15 Section 83 of the Act. Refer to the publication in item B of the Appendix.

16 Section 13(4) provides that for the purpose of Part IV of the Act, multiple cash transactions in the domestic or foreign currency which, in aggregate, exceeds the amount specified by the competent authority pursuant to section 13(1) shall be treated as a single transaction if they are undertaken by or on behalf of any one person during any one day or such other period as the competent authority may specify.

1.4 to verify the information prescribed by the Act through the use of documents prescribed by the Act when establishing or conducting business relations;

1.5 to take reasonable measures to obtain and record information about the true identity of the person[17] on whose behalf an account is opened or transaction conducted;

1.6 to maintain any record for a period of not less than six years from the date an account has been closed or the transaction has been completed or terminated;

1.7 to adopt, develop and implement internal programmes under the Act, policies, procedures and controls to guard against and detect any offence under the Act; and

1.8 to designate compliance officers at management level in each branch and subsidiary who will be in charge of the application of the internal programmes and procedures, including proper maintenance of records and reporting of suspicious transactions.

2. The Act also provides for the following measures to be complied with by private persons:

2.1 not to open, operate or authorise the opening or the operation of an account with a reporting institution in a fictitious, false or incorrect name;

2.2 where a person is commonly known by two or more different names, not to use one of those names in opening an account with a reporting institution unless the person has previously disclosed the other name or names to the reporting institution; and

2.3 to declare to the competent authority an amount in cash exceeding such value prescribed by the competent authority if he is leaving or entering Malaysia with such amount in cash.

3. The Act further prescribes obligations on the supervisory[18] or licensing authority, which include the following:

3.1 to adopt the necessary measures to prevent or avoid having any person who is unsuitable from controlling, or participating, directly or indirectly, in the directorship, management or operation of the reporting institution;

3.2 to examine and supervise reporting institutions, and to regulate and verify the reporting institutions' compliance with the programmes under the Act;

3.3 to issue guidelines to assist reporting institutions in detecting suspicious patterns of behaviour in their clients; and taking into account modern and secure techniques of money management as an educational tool for reporting institutions' personnel;

3.4 to revoke or suspend the reporting institution's licence if it has been convicted of any offence under the Act; and

3.5 to promptly report to the competent authority any information received from any reporting institution relating to transactions or activities that could be related to any unlawful activity or offence under the Act.

4. The reporting institutions and competent authority are also provided with the powers to enforce compliance of Part IV of the Act. Among the main powers provided are the following:

4.1 an officer of the reporting institution shall take all reasonable steps to ensure the reporting institution's compliance with its obligations under Part IV of the Act;

4.2 the competent authority may obtain an order from the High Court against any or all of the officers or employees of that reporting institution on such terms as the High Court deems necessary to enforce compliance with such obligations; and

4.3 the competent authority may also direct or enter into an agreement with any reporting institution that has failed to comply with any obligations under Part IV of the Act without reasonable excuse, and to implement any action plan to ensure compliance with its obligations under Part IV of the Act.

5. Under Part IV of the Act, the persons reporting the information required under the Act are protected against any civil, criminal or disciplinary proceedings, unless the information was disclosed or supplied in bad faith.

6. Part IV of the Act also provides for the examination of a reporting institution, where an examiner shall be appointed by the competent authority and conferred with powers which include the following:

6.1 to examine any of the reporting institution's records or reports and the system used for keeping those records or report, that relate to its obligations under Part IV of the Act which are kept at, or accessible from, the reporting institution's premises;

[17] Section 16(4) of the Act provides that this term includes a person who is a nominee, agent, beneficiary or principal in relation to a transaction.

[18] Not defined in the Act. Section 21 of the Act indicates that it is more of a regulatory body to each type of reporting institution, such as the Securities Commissions for the securities industry and Bank Negara Malaysia for the banking industry.

6.2 to make note or take any copy of the whole or part of any business transaction of the reporting institution;

6.3 to examine a person who is, or was at any time, a director or an officer of a reporting institution, its agent or a person who is or was a client of the reporting institution; and

6.4 to examine a person whom he believes to be acquainted with the facts and circumstances of the case, including an auditor or an advocate and solicitor[19] of a reporting institution.

7. The competent authority may destroy any document or copy of such document made or taken pursuant to an examination under Part IV of the Act within 6 years of the examination except where a copy of the document has been sent to an enforcement agency[20].

Part V: Investigation

1. Under Part V of the Act, where the competent authority or an enforcement agency has reasons to suspect the commission of an offence under the Act, they shall cause an investigation to be made and may exercise all the powers of investigation provided under the Act. In this regard, the competent authority or enforcement agency may instruct any person to take such steps as may be necessary to facilitate the investigation. The competent authority or enforcement agency is also entrusted with the duty to co-ordinate and co-operate with any other enforcement agency in and outside Malaysia with respect to an investigation into any serious offence or foreign serious offence[21].

2. The competent authority or the relevant enforcement agency may appoint its employee or any other person to be an investigating officer who shall be subject to the direction and control of the competent authority or the relevant enforcement agency which has authorised him to act on its behalf. An investigating officer shall also be deemed to be a public servant for the purposes of the Penal Code and to be a public officer for the purposes of the Criminal Procedure Code.

3. The wide powers and duties of an investigating officer under Part V of the Act include the following:

3.1 to enter any premises belonging to or in the possession or control of the person or his employee, and in the case of a body corporate, its director or manager;

3.2 to inspect, make copies of or to take extracts from any record, report or document so seized;

3.3 to take possession of, and remove from the premises, any property, record, report or document so seized and detained and detain it for such period as he deems necessary;

3.4 to search any person who is in, or on, such premises, if the investigating officer has reason to suspect that the person has on him any property, record, report or document including any personal document that is necessary in the investigating officer's opinion, for the purpose of investigation into an offence under the Act;

3.5 to order orally or in writing, any person whom he believes to be acquainted with the facts and circumstances of the case to attend before him for an examination, to produce any property, record, report or document or to furnish a statement in writing made on oath or affirmation setting out such information as he may require[22];

3.6 to detain the person searched under the Act for such period as may be necessary to have the search[23] carried out without an authorisation of a magistrate[24]; and

3.7 to arrest a person whom he reasonably suspects to have committed or may commit any offence under the Act without any warrant.

4. The powers and duties of the investigating officer are supplemented with provisions that deem it an offence to obstruct the exercise of powers by an investigating officer under the Act. Without limitation, offences are committed where a person:

4.1 refuses any investigating officer access to any premises or fails to submit to the search of his person;

4.2 assaults, obstructs, hinders or delays an investigating officer in effecting any entrance which he is entitled to effect;

4.3 refuses to give any property, document or information to an investigating officer which may be reasonably required of him;

4.4 breaks or destroys anything before or after any search to prevent its seizure or the securing of the property record, report or document; or

4.5 tips-off any information which may prejudice the investigation or proposed investigation.

19 Section 26(3) of the Act provides that notwithstanding any other written law, an agent, including an auditor or an advocate and solicitor of a reporting institution, shall not be liable for breach of a contract relating to, or a duty of, confidentiality for giving any document or information to the examiner. Section 47 also imposes an obligation on advocates and solicitors to disclose information relating to money laundering offences except for any privileged information or communication which came to his knowledge for the purpose of pending proceedings.

20 Section 28 of the Act.

21 Section 29 of the Act.

22 The person may refuse to answer any question which answer would have the tendency to expose him to a criminal charge, penalty or forfeiture although he shall be legally bound to state the truth in answering the questions posed by the investigating officer. The investigating officer must inform the person of these rights prior to the examination.

23 The search shall be carried out by the investigating officer of the same gender and with strict regard to decency.

24 The detention shall not exceed 24 hours and if necessary, the person may be moved to another place to facilitate such search.

5. In relation to the information referred to in paragraph 4.5 above, Section 35(2) of the Act provides that it is not an offence for an advocate and solicitor or his employee to disclose any information[25]:

   5.1 to his client or the client's representative in connection with the giving of advice to the client in the course and for the purpose of the professional employment of the advocate and solicitor; or

   5.2 to any person in contemplation of and for the purpose of any legal proceedings.

Part VI: Freezing, Seizure and Forfeiture

1. Under Part VI of the Act, the investigating officer is given additional powers in relation to financial institutions. It is a condition under the Act that before the property of a financial institution is seized, the relevant supervisory authority has to be consulted.

2. The Act also allows for the freezing of any property of the person suspected of committing money laundering and provides powers to seize the property which the enforcement agency has reasonable grounds to suspect is the subject matter of the money laundering offence. In addition, there are also special powers provided in relation to movable and immovable property and businesses.

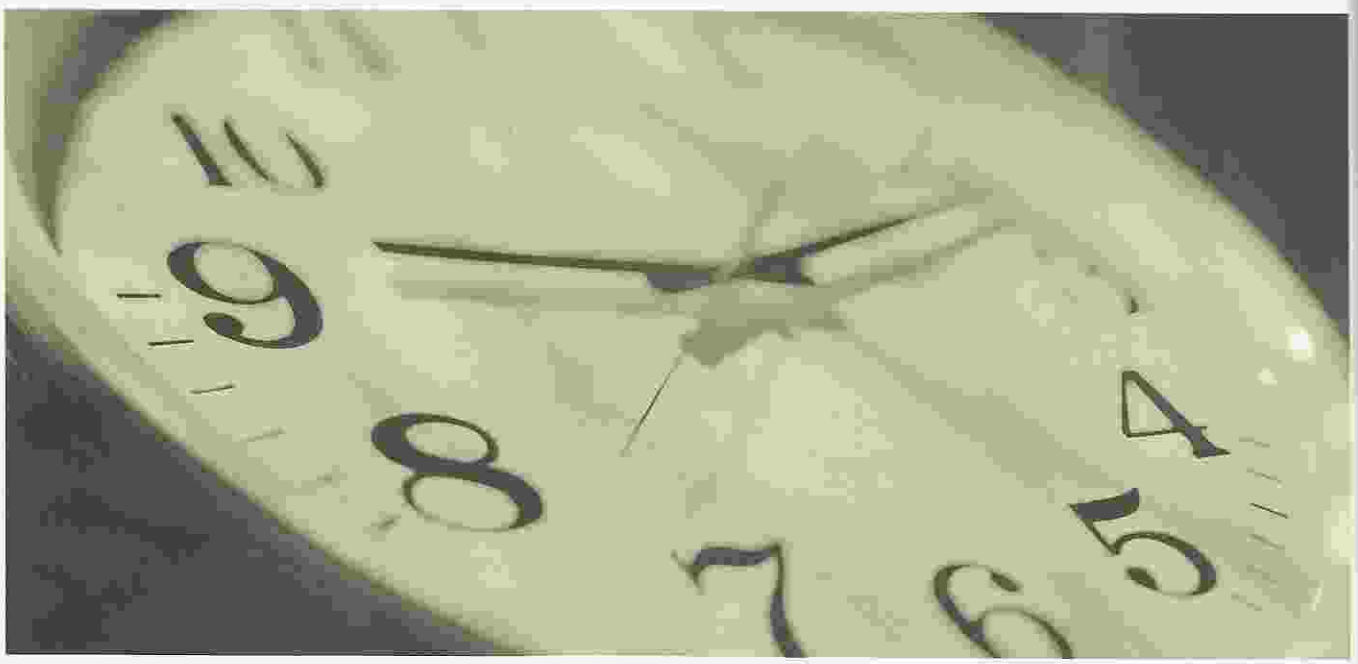
3. The Act further provides for the forfeiture of property (that is the subject of the offence) by the court in various circumstances if there is a prosecution for a money laundering offence. If there is no prosecution, the public prosecutor may also apply to the court for forfeiture of property that has been frozen or seized if he is satisfied that the property has been obtained as a result of or in connection with a money laundering offence.

4. Both forfeiture provisions are subject to a notice being given for the bona fide third parties to attend before the court on the date specified in the notice to show cause as to why the property should not be forfeited. In addition, persons who have absconded shall be treated as convicted of the serious offence to which money laundering is related.

5. The court may also make a forfeiture order in respect of property that is the subject matter of the money laundering offence or property obtained as a result of or in connection with the money laundering offence, if the court is satisfied on the balance of probabilities that the person has absconded and there is a prima facie case of the predicate offence.

6. The Act further provides for a pecuniary order to be made in respect of benefits derived from the commission of a money laundering offence.

25 Except if it is disclosed with a view to furthering any illegal purposes.



Part VII: Miscellaneous

1. The Act provides for the tracking of property related to the money laundering offence. This is done where the competent authority or an enforcement agency has reason to believe that a person is committing, has committed or is about to commit an offence under the Act. In such a case, an order may be made by the competent authority or enforcement agency for:

   1.1 the delivery of any document relevant to identifying, *locating or quantifying any property, or identifying or* locating any document necessary for the transfer of the property belonging to or in possession or under the control of that person or any other person; or

   1.2 the production of information on any transaction conducted by or for that person with the first-mentioned person.

2. The powers given to the competent authority or enforcement agency in the Act are additional to the powers conferred to them under any other written law and any evidence gathered by them under the powers conferred by the Act shall be deemed to be evidence gathered under the Act.

3. No agent provocateur[26] shall be presumed to be unworthy of credit by reason of his attempt to commit, abet, or having abetted or engaged in a criminal conspiracy to commit such offence under the Act, if the main purpose of such attempt, abetment or engagement was to secure evidence against the money laundering offender under the Act. A conviction for any offence under the Act which rests solely on the uncorroborated evidence of any agent provocateur shall not be illegal or set aside merely because the court which tried the case has failed to refer to the need to warn itself against the danger of convicting on such evidence in its judgment.

4. The standard of proof for the determination of any question of fact to be decided by a court in proceedings under the Act shall be on the balance of probabilities but it shall not apply in relation to any question of fact to be proved by the prosecution in any proceedings under the Act or any subsidiary legislation under it.

5. The Act also provides for the conditions regarding the admissibility of evidence gathered under the Act as follows:

   5.1 Admissibility of documentary evidence.

   Any document, copies of it or other evidence obtained by the Public Prosecutor or any enforcement agency in the exercise of their powers under the Act shall be admissible in any proceedings under the Act as evidence, notwithstanding anything to the contrary in any written law.

   5.2 Admissibility of statements by accused persons.

   5.2.1 In any trial or enquiry by a court into an offence under the Act, any voluntary statement made by the accused at any time shall be admissible as evidence at his trial and if that person tenders himself as a witness, such statement may be used in cross-examination and for the purpose of impeaching his credit.

26 The Act does not define the term 'agent provocateur'. The relevant definition from The Concise Oxford Dictionary (9th Edition) is a person employed to detect suspected offenders by exempting them to overt self-incriminating action. A similar term and provision is found in the Anti-Corruption Act 1997, Dangerous Drugs (Amendment) Act 1984, Dangerous Drugs Act 1952, Dangerous Drugs (Forfeiture of Property) Act 1988 and the Law Reform (Eradication of Illicit Samsu) Act 1976.

5.2.2 Any person who is arrested or informed that he may be prosecuted for any offence under the Act shall be served with a notice in writing advising him of the following:

a) to mention facts which may be relied on in his defence;
b) the holding back of such facts may have adverse effect to his case in general; and
c) the facts mentioned by him shall be reduced to writing if he wishes so.

5.2.3 The statement or facts mentioned by the person shall still be admissible if the notice pursuant to paragraph 5.2.2 above is given to him after the making of such statement (as soon as is reasonably possible) and it shall still be deemed voluntary if the statement is made in answer to the notice served to such person.

5.2.4 In determining whether the prosecution has established a prima facie case against the accused and whether the accused is guilty of the offence charged in any criminal proceedings for the money laundering offence under the Act, the Court may draw inferences and treat the failure of the accused to mention facts as a corroboration or capable of amounting to a corroboration of any evidence given against the accused.

5.3 Admissibility of statements and documents of persons who are dead or cannot be traced, etc.

Any statement, document or copy of any document made or seized from any person who later dies, cannot be traced or found, has become incapable of giving evidence or whose attendance cannot be procured without an unreasonable delay shall still be admissible as evidence in any proceedings under this Act.

5.4 Admissibility of translation of documents.

A translation of documents which shall be used in any proceedings under the Act shall be admissible if it is certified by the person who translated the document who shall set out in the certificate that the translation is accurate, faithful and true and the translation had been done at the instance of the Public Prosecutor or an officer of any enforcement agency.

5.5 Evidence of corresponding law or foreign law.

A document issued by or on behalf of the government of a foreign state purporting to state the terms of a corresponding law in force in the foreign State or a law in relation to a foreign serious offence in force in that foreign State shall be admissible on its production by the Attorney-General, or by any person duly authorised by him, for the purpose of proving the matters referred to in the Act.

6. Proof of conviction and acquittal.

6.1 The proceedings under the Act shall also take into consideration any proof of conviction and acquittal of an offender under the Act[27]. The fact that a person has been convicted or acquitted before any Malaysian or foreign court shall be admissible as evidence to prove whether he did or did not commit the offence, whether he was a party to the proceedings, and whether he was so convicted upon a guilty plea or otherwise.

6.2 However, the court shall not accept the conviction as conclusive if it is subject to a review or an appeal that has not been determined, it has been quashed or set aside or the court is of the view that it is contrary to the interests of justice or the public interest.

7. Exemptions.

The Minister of Finance may exempt a person or class of persons from all or any of the provisions of Part III or Part IV for such duration subject to such condition as the Minister may specify, upon the recommendation of the competent authority and if he considers it consistent with the purposes of the Act or in the public interest.

8. Power to issue guidelines, etc.

8.1 The competent authority may issue guidelines, circulars or notices to the reporting institutions to give full effect to the Act for the detection or prevention of money laundering. However, the competent authority shall consult the relevant supervisory authority prior to issuing such guidelines, circulars or notices.

8.2 The Minister of Finance or Minister of Home Affairs may also make regulations to give full effect to the provisions of the Act and amend the First and Second Schedules of the Act.

9. Power of competent authority to compound offences.

The Act provides further powers to the competent authority to compound any offence under the Act with the consent of the Public Prosecutor. The competent authority may accept from the suspected offender such amount not exceeding 50% of the amount of the maximum fine for that offence, including the daily fine in the case of a continuing offence.

27 Proof of such local conviction or acquittal shall be by means of a certificate of conviction or acquittal signed by the Registrar of the court. In addition, proof of conviction or acquittal in the foreign court shall be by means of a certificate or certified official record of proceedings issued by that foreign court and duly authenticated by the official seal of a minister of the foreign State.

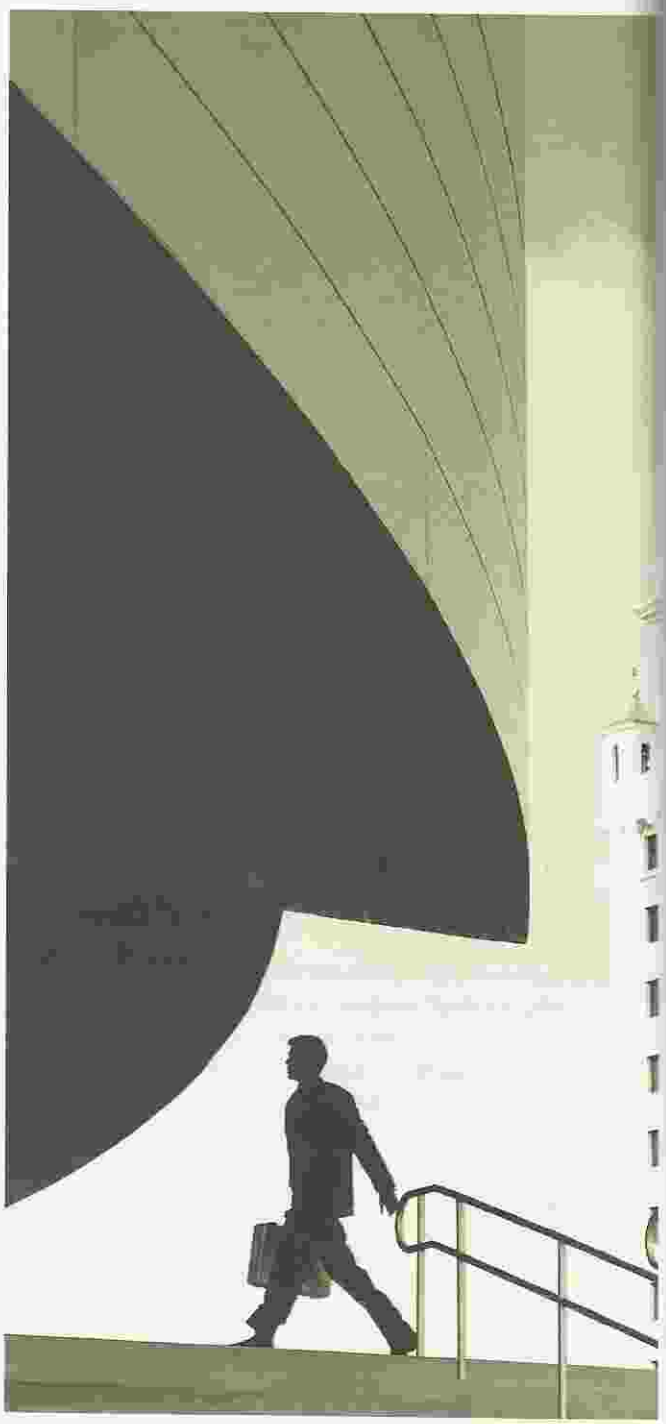
Conclusion

The Act is intended to have far-reaching effects in the battle against money laundering. Apart from providing for the offence of money laundering, and the consequent forfeiture of property related to money laundering, it further provides for stiff penalties against the offenders and abettors as well. The provisions are drafted with a clear aim to alleviate money laundering at the grassroots by providing measures of detection from the early stage.

Taking into consideration the important roles that can be played by the financial and non-financial businesses and professionals in tackling the problem, the Act has roped in merchant banks, financial and securities market intermediaries such as dealers, fund managers, futures brokers and futures fund managers (which fall under the definition of reporting institutions under the Act), insurance intermediaries (such as direct insurers, professional reinsurers and insurance brokers), the professionals and the public to assume certain duties and obligations under the Act. This is intended to give it a more comprehensive approach in eradicating money laundering in Malaysia. In this regard, certain provisions of the Act including those elaborated in paragraph 2 of Part III, paragraphs 1, 2, 3, 4 and 6 of Part IV and paragraphs 3 and 5 of Part V as highlighted above are of particular relevance to these parties. A list of some other related guidelines and publications is also set out in the Appendix.

To address the cross-border issues of enforcement, the financial intelligence unit formed under the Act cooperates with foreign enforcement agencies to facilitate better tracing of money laundering offences that may involve foreign jurisdictions.

Thus, with the framework now in place, effective implementation of the Act (as reflected in the recent first prosecution under the Act) must now take priority so as to ensure that money laundering does not become a serious problem in Malaysia.



Appendix

A. The Forty Recommendations by the Financial Action Task Force (FATF) on Money Laundering dated 20 June 2003.
B. Bank Negara Malaysia Guidelines BNM/GP9 – Guidelines on Money Laundering and 'Know Your Customer Policy'.
C. Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries issued by Securities Commission.
D. Anti-Money Laundering (Invocation of Part IV) Order 2003.
E. Anti-Money Laundering (Invocation of Part IV) (No. 2) Order 2003.
F. Anti-Money Laundering (Invocation of Part IV) Order 2004.
G. Newspaper report, The Star dated 24 April 2004.
H. Bank Negara Malaysia Guidelines JPI/GPI 27 - Guidelines on Anti-Money Laundering Measures for the Insurance Industry.
I. Bank Negara Malaysia Guidelines BNM/GP7 – Code of Ethics.

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Keeping Tax Risks at Bay

By CHOW CHEE YEN & TAN HOOI BENG

Self-assessment taxation regime entails a taxpayer not only to pay its taxes promptly but also to have reasonable tax knowledge. The onus is now placed on the taxpayers to submit accurate tax returns. Simply put, there is not much room for error on submission of tax return based on mere estimates these days. Unless a taxpayer can prove that the errors in the return are genuine and bona fide, hefty penalties will be imposed. For corporate taxpayers, the directors can also be held responsible for tax irregularities. In the recent months, the public had witnessed several listed companies being raided by the Inland Revenue Board (IRB). These events signify the seriousness of the IRB in collecting taxes. In view of this development, a taxpayer has to start preparing himself for any eventualities. Early backroom preparation will definitely alleviate the fear and panic during a tax audit. Against the above backdrop, this article is aimed at highlighting some of the practical ways in managing and mitigating tax risks in view of the self-assessment system (SAS).

1 Filing of Tax Return

One of the most fundamental ways in managing tax risks is to ensure a timely filing of the tax return. In light of the self-assessment regime for companies which has commenced in the year of assessment (YA) 2001 and individuals commencing from YA 2004, the tax filing deadlines are indicated below:

- Individuals – on or before 30 April (eg for YA 2004, the due date is 30 April 2005)
- Companies – on or before the last day of the 7th month following the accounting year-end (eg for a company that closes its accounts on 31 December, the due date is 31 July 2005 for YA 2004)

An early completion of the tax return is vital. This will enable the tax return to be reviewed and checked thoroughly prior to its submission. More often than not, the tax return would only be lodged on the last day itself. This is evident by the huge crowd at the IRB's submission centre on the last day of each month. Amidst the rush, it is inevitable to make mistakes. Certainly, one should avoid from revising the tax return later by reason of errors or mistakes, as this would entail unnecessary costs and time. Constant revisions of the tax return for a particular YA will not reflect well on the taxpayer as the IRB may start to have a negative perception on the former.

Additionally, apart from the penalty imposed, a constant late filing of tax return may result in the taxpayer being

the apparent target for tax audit. Naturally, one is likely to perceive that the late submission of tax returns means that the taxpayers do not have proper supporting documentation or having unsatisfactory bookkeeping.

2 Completion of the Supporting Worksheets, Attachments and Tax Computations

Under the self-assessment regime, there are some changes in terms of the types of documents to be filed. In the past, besides the Form C and Form B, the taxpayers must also submit the detailed tax computations, withholding tax receipts and remittance forms, audited accounts and other relevant receipts (particularly for individual taxpayers). With the implementation of the SAS, only the Form C, Form R and Form B need to be forwarded to the IRB while the tax computation and the specifically designed Worksheets and Attachments (e.g Lampiran A1 etc) must only be prepared and made available during a tax audit. It is worthwhile to note that the amount to be inserted in the said attachments are linked to the Form C and Form B.

In this regard, it is practical and wise to prepare all the following documents prior to the submission:

- Detailed tax computation
- Form C (for companies), Form B (for individuals) and Form R (for companies)
- Worksheets
- Attachments (eg Lampiran A1 etc)

This will facilitate the future tax audit. However, some taxpayers may prefer to dedicate attention and time in completing the Form C, Form R and Form B based on the tax computation prepared while ignoring the importance of completing the worksheets and attachments. The rationale is that the worksheets and attachments are not relevant at that juncture, given that they could be completed after the due date. Unfortunately, the reality is that no one would even look at this matter after the tax submission. Consequently, say 5 years later where a tax audit takes place, one could imagine the unnecessary hassle in obtaining the old tax files from the warehouse and having to recall how the relevant figures in the forms were arrived at 5 years ago. Again, this reflects badly on the taxpayers from the eyes of the IRB.

3 Payment of Taxes

A good tax management includes timely payment of taxes. Under the self-assessment tax regime, the following tax payments must be made accordingly:

- For companies, the monthly instalment which is due on the 10th day of every month.
- For individuals, the bi-monthly instalment.
- The balance of final tax payable on the day where the Forms B and C are lodged.

Taxpayers should be made aware of the penalties imposed on late payment of taxes and this should be avoided. Moreover, it is important for a taxpayer to remain in the good books of the IRB. Needless to say, prompt payment of taxes would contribute to this.

4 Estimate of Tax Payable/ Revision of Estimated Tax Payable

Based on the present income tax legislation, a company is required to estimate its tax payable before the commencement of the new YA. However, for individual taxpayers the IRB will continue to issue the estimate of tax payable based on the tax payable for the preceding year.

Both companies and individuals are permitted to revise its tax payable upwards or downwards later. The opportunity to revise the estimate of tax payable should be utilized wisely. A proper planning in revising the estimated tax is a key tool in cash management. Ideally, no taxpayers wish to pay excessive tax instalment as taxpayers will have to apply to the IRB for refund of tax overpaid. On the other hand, a taxpayer should not be underpaying tax instalment, otherwise a penalty would be imposed subsequently.

5 In-House Tax Department

In the past, most of the corporate taxpayers would engage tax agents to handle their tax matters which include the preparation and submission of annual tax returns. Having said this, however, the Finance Department's personnel of the company would continue to undertake the groundwork such as extracting the relevant information and documents and thereafter to provide them to the agent. As the SAS is onerous coupled with the complexity of tax law and rules, the setting up of in-house tax department may be a good idea in terms of managing tax risks.

The coordination and cooperation between the tax agent and the staffs of the company who are tax-savvy will ensure that the information provided by the latter to the former for the preparation of tax return will meet the objective of lodging an accurate tax return with the IRB. For example, the personnel of the in-house tax division are aware of what data to be furnished for interest restriction calculation. Moreover, a taxpayer could not afford to rely solely on tax agent given the fact that the latter has to serve a wide range of clients. Hence, the setting up of an in-house tax department will ensure that routine tax matters are handled smoothly.

6 Internal Procedures for Tax Matters

As mentioned above, the establishment of an in-house tax department will definitely mitigate the tax risks from the operational standpoint. Nevertheless, even if a corporate taxpayer is not able to have its own tax department due to

various reasons, a set of internal procedures or rules should be put in place with a view to disposing the tax issues timely and effectively. This is imperative as tax matters normally involve large amount of money.

The following issues must be taken into account when setting out the procedures:

- The reporting line for tax issues.
- What needs to be done upon the receipt of queries from the IRB?
- What is the time frame for disposing a tax issue?
- Who is in-charge of tax payments?
- Who will be the liaison person with the tax agents and IRB?

7 Proper Record Keeping

Most of the time, taxpayers would be scrambling to extract or provide information when faced with tax audit or tax queries. This can be avoided by having proper record keeping. The records should be kept in an orderly manner and readily accessible as prescribed under the public ruling on "Keeping Sufficient Records". Among the documents to be kept are:

- Tax returns, worksheets and attachments;
- Detailed tax computations;
- Withholding tax payments records and receipts;
- Income tax payments records and receipts;
- Transfer pricing policy and records; and
- Tax relevant information (eg. entertainment claims form) should be separately filed.

By having the above records in place, it will ensure that tax audit and queries can be handle on a timely basis and with confidence.

8 Tax Savvy

Although most of the corporate taxpayers are presently assisted by tax agents in fulfilling their tax compliance obligations, it is for the benefit of the company if the company's financial personnel possess some reasonable tax knowledge so as to enable the fundamental tax issues to be identified before major transactions or deals are being undertaken.

Among the fundamental tax issues that must be understood are as follows:

- What constitutes taxable income?
- What constitutes deductible expenses?
- General overview of withholding tax (especially when dealing with foreigners).
- What are the incentives available?
- What are the transactions that require special attention from a tax perspective?

To achieve the understanding of the above, the company's key personnel should keep abreast with new development of the tax rules and regulations. These can be achieved by attending tax seminars, subscribing weekly or monthly tax bulletins and undergoing tax trainings from time to time.

9 Information Technology (IT)

With the implementation of e-filing by the IRB since May 2004, it is vital for taxpayers to upgrade their IT system. The security feature of the taxpayers' IT system must be enhanced so that all data and information sent to the IRB remain private and confidential. Moreover, the improvement of the IT would result in a better and efficient bookkeeping.

10 Staff Training

If a corporation does not have a tax unit within its finance department (that means the accounting firm solely handles the tax compliance affairs), then regular tax training would then become more crucial. The trainings will at least ensure that the finance personnel are aware of what information are required for annual tax filing and other documents for the day-to-day tax matters e.g. the types of form for withholding tax payment etc as well as being up to date on the latest tax developments. The basic tax knowledge will enable the taxpayers to be dependent and not to rely heavily on accounting firms for tax services.

11 Tax Audit and Investigations

Under the self-assessment regime, tax audit is imminent. It is expected that each taxpayer will be audited once in every five years. Depending on the findings, a tax audit may lead to a more serious probe, namely the tax investigation.

While tax audit may be a mere routine, tax investigation may give rise to serious consequences in terms of reputation, costs and time. As such, it is crucial for every taxpayer to be prepared for any eventualities and should start on the backroom maintenance. All the supporting documents, be it in hardcopies or softcopies, should be properly kept and made available whenever there is an audit. Taxpayers must also learn the best way to handle and manage the tax auditors. Reasonable facilities and assistance should be provided to the IRB. However, this does not mean that a taxpayer should be afraid or panicked during the tax audit and investigation. Rather, he or she should stay composed and ideally, the tax advisers or counsel should accompany the taxpayers during the audit and investigation.

12 Professional Advice

Naturally, one would visit a doctor if he is sick or a lawyer if he encounters legal difficulties. Likewise, a taxpayer should seek the assistance of a tax adviser if he faces complicated tax issue. This also applies to a corporation that already has its own tax unit, let alone those that are without one. At the end of the day, the tax professionals are the one who has the most experience dealing with various tax related issues and are indeed familiar with the current practice.

The Way Forward

Given that tax is a major cost of doing business, a proper tax management is essential. Effective tax management will minimize, if not eliminate, the risks. All in all, various ways suggested above may serve as a checklist for a taxpayer. However, the tips given above are not exhaustive. From time to time, a taxpayer's policy in tax management must be reviewed and improved so as to take into account the latest development in the tax law, rules, regulations and common practice.

TAX RISKS MANAGEMENT CHECKLIST FOR SAs

- ☐ Timely submission of estimated or revised estimated tax payable
- ☐ Timely payment of income tax
- ☐ Prepare and complete tax computation, worksheets and attachments
- ☐ Timely filing of income tax return
- ☐ Proper record keeping
- ☐ Setting up an in-house tax department
- ☐ Review internal procedures for tax matters
- ☐ Upgrade IT system
- ☐ Attending tax training, workshops and tax updates sessions
- ☐ Seek professional advice
- ☐ Be prepared for tax audit

The Authors

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Shares and Share Alike

By **VINCENT JOSEF**

While they may not be renowned for their presence in abundance, there are employers who may wish to reward their employees beyond what is spelled out in any contract of employment. Such rewards could be in recognition of particularly commendable achievements or as an incentive for employees to remain with the organisation. This may sometimes be in the form of simple subsidies for food purchased in the canteen to somewhat more ambitious gifts like interest subsidies for the purchase of cars or houses. Strictly speaking, such subsidies could constitute a profit arising from employment and thus be liable to tax, but the Inland Revenue Board, bless their hearts, often choose to look the other way especially where the subsidies are "humane" in nature.

Nevertheless, even the IRB has a limit to its largesse and they revert to their vigilant selves when it comes to Employee Share Option Schemes (ESOS). ESOS is an arrangement undertaken by employers where shares in the company are offered to employees at a price lower than the prevailing market price. What the employee enjoys is the difference between the market price of the shares and the amount he paid for them. The employees are usually given a period within which the option to purchase the shares must be exercised, otherwise the option lapses. This benefit granted by the employer leads to two questions; firstly, whether the amount or value is liable to tax and secondly, if liable, what are the mechanics of determining the benefit.

The Malaysian Income Tax Act, 1967 (the "Act") does not directly address this issue but persuasive assistance can be drawn from several classic British cases that have examined the points in depth. The first is ***Weight vs. Salmon*** (19 TC 174) where the Revenue's attempt to tax the benefit was given supportive weight by the House of Lords. The case involved the managing director of a company who in addition to a fixed

salary was entitled to subscribe to shares in the company at par value when the market price was much higher. It was held that the difference between the cost of the shares to the employee and its market value was a benefit accruing from the employment and accordingly was liable to tax. One of the governing principles was that gains from an employment did not need to be monetary; liability would be present as long as the employee enjoyed "money's worth." It must be remembered that the price at which the shares are offered need not be par value; the benefit would still arise as long as the offer price was less than the market value. This would be chargeable to tax in Malaysia under Section 13(1)(a) of the Act, as a perquisite arising out of holding or exercising an employment. It must be noted that the employment benefit was not the shares themselves but the option given to the employee.

A variance to this carrot is the Share Incentive or Share Inducement Scheme where shares are similarly offered to employees at a price below the market value so as to encourage better performance. In the case of ***Tyrer vs. Smart*** ([1979] STC 34), a company was being floated and employees were given a preferential right to subscribe to shares being offered at a privileged price. Lord Edmund-Davies in his ruling stated that the advantage to employees of being able to secure shares at a favoured price was a benefit not open to the general public and was thus an 'emolument' of employment, making it liable to tax. A contrast was present in the case of ***Pritchard vs. Arundale*** (47 TC 680) in which an accountant was given free shares in a company as an inducement for him to join the company. As no employment subsisted at the time the offer was made, it was held that the benefit could not be regarded as an emolument or reward from employment.

One of the governing principles was that gains from an employment did not need to be monetary; liability would be present as long as the employee enjoyed "money's worth." It must be remembered that the price at which the shares are offered need not be par value; the benefit would still arise as long as the offer price was less than the market value.

Once it has been determined that an employment benefit accrues to the employee, the question of quantifying the advantage should be examined and the House of Lords' case of ***Abbot vs. Philbin*** (39 TC 82) provides the necessary guidance. The principle set by this case is that profits, if any, would fall liable **when the option was exercised** but would be taxed in the year the option was **granted**. Thus what is of importance in bringing the gains to tax was not so much the date on which the option was exercised but the date it was granted. The contrast between the cases of ***Weight vs. Salmon*** and ***Abbot vs. Philbin*** is that the former spells out the basis of calculating the profit arising from enjoying an option while the latter governs the timing of the resultant assessment.

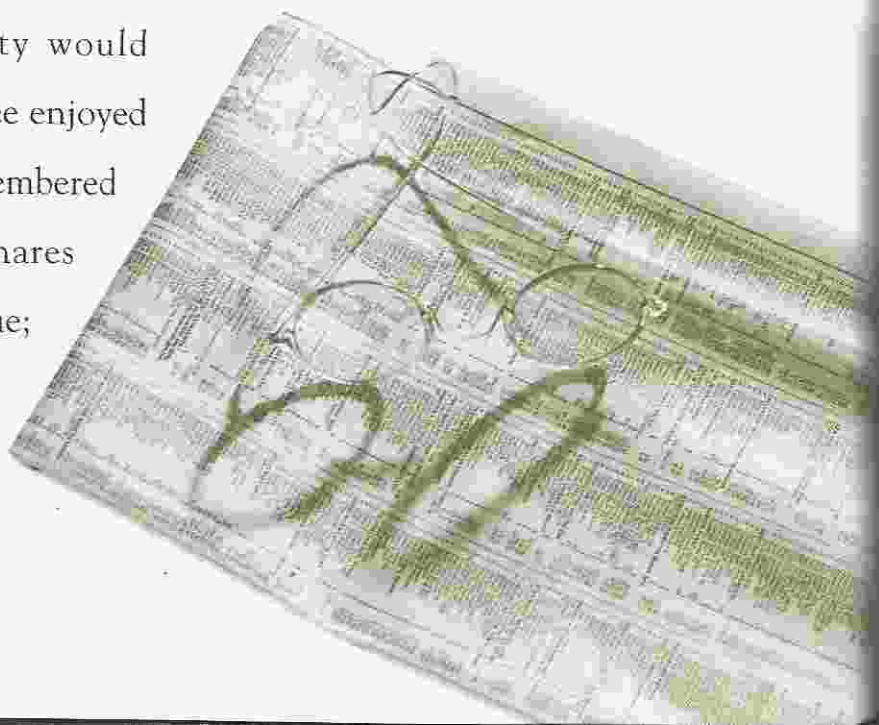
These two principles are illustrated in the following example:

Mr. Sam Wallue is an employee of Tolling Bells Sdn. Bhd. and on 25 September 2001 was given an option to purchase 15,000 shares in the company at RM3.20 a share. The market value of the shares on that date was RM4.40. On 16 May 2003, Mr. Wallue exercised the option, taking up all the 15,000 shares offered to him. The market price of the shares on 16 May 2003 was RM5.45 per share.

The first step to be taken is to determine the "emolument" that Mr. Wallue earned from taking up the shares, which would be as follows:

Market value of shares taken up	(RM4.40 x 15,000)	RM66,000
Cost of acquisition of shares	(RM3.20 x 15,000)	RM48,000
Benefit enjoyed		**RM18,000**

As the option was granted free of charge, the option cost to be deducted would be Nil and therefore the entire RM18,000 would be taxable. It should also be noted that the market value of the shares on the date the option was exercised is of no bearing to the liability to tax.



The next point to be considered is the date on which the RM18,000 should be brought to tax. Since the option was given on 25 September 2001, the benefit of RM18,000 would be liable for Year of Assessment 2001. Again, the actual exercise date of 16 May 2003 is immaterial to the calculations.

The principles derived from the two cases mentioned above are quite clear yet under certain circumstances, they could prove ironical! Let us assume in the example above that on the exercise date of 16 May 2003, the market value of the shares was RM2.80 each, that is, **below** the offer price of RM3.20. In such a case, any prudent man, should he harbour expectations that the shares would rise considerably in value at a future date, would purchase the shares in the open market rather than by way of the option. However, let us further assume that for some strange reason, possibly an inability to buy the shares in the open market or Mr. Wallue being blessed with more funds than brains, he acquires the shares through the option. He would consequently have incurred a paper loss of RM6,000, having paid RM48,000 for shares with a value of RM42,000. Nevertheless, he would still be assessed on a benefit of RM18,000 since the effective date for comparison of share cost and market value would be the date on which the option **was granted**!

Another point to be remembered is that the shares need not be all acquired at the same time, they could be purchased "in instalments" over the option period. But whatever the dates on which the shares acquisition was made, the necessary assessments would always be related to the date the option was granted. Thus where this occurs several times, more than one additional assessment could result. Under these circumstances, all additional assessments in the example given above would be for the year of assessment 2001.

It would be wise of an employer who wishes to grant this Share Option benefit to his employees to bear in mind the following practical formalities:

a) Notify the Inland Revenue Board (IRB) of his intention and seek their clarification on issues he may be uncertain about. This would go a long way in avoiding any unpleasant tax shock unexpectedly befalling the employees who naturally would have been blissfully counting their blessings, imagining the tax implications to be at worst minimal. The employer should give details of the share option scheme, *including its purpose, the eligibility of employees to this offer, and the option period.*

b) It would also be useful if confirmation were received from the IRB that profits from the subsequent sale of the shares would not attract any tax. A possible exception to this non-liability could be where a company involved in share dealings employs the individuals concerned.

c) When completing an employee's EA Form (Statement of Remuneration) DO NOT state the expected 'share' benefits if the option has not yet been exercised by the employee as this may result in the IRB raising an assessment. And undoing an erroneous assessment can often be a long and cumbersome process. Of course all relevant details should be reflected on the EA Form once the employee has exercised the option.

c) Since the granting of share options is a form of providing benefits to employees, all expenses incurred in executing the scheme would be allowable, in as much as the expenditure suffered in paying salaries would be. Such expenses can therefore be charged to the accounts.

Another issue to be considered is the deduction of tax from the "share emolument" enjoyed by relevant employees. An underlying feature of Scheduler Tax Deductions is that deductions are generally made only in respect of monetary receipts; other emoluments like 'benefits-in-kind' and value of living accommodation are brought into account only at the assessment stage upon submission of the employees' returns. The rationale is to spare employees the burden of suffering tax deductions where no monetary payments have been received and thus only Section 13(1)(a) receipts would be included. However, the benefit enjoyed from a share option scheme is a perquisite and would thus be captured by Section 13(1)(a) and accordingly, scheduler tax deductions would be due.

As such, where an employee has received some benefit from exercising a share option, the Scheduler Tax Deduction Rules need to be applied with the quantum of deductions being determined by using the "bonus formula". Should the option be exercised in a year after that in which the option was granted, the STD must be remitted separately from the usual monthly amount.

The downside to harvesting the benefits of a share option scheme is that the benefits are chargeable to tax. But with proper planning, this tax implication can be restricted to a least painful level and at the same time, one can render unto Caesar what is Caesar's!

Note: Reprinted with permission from 4E Journal (Volume 4, No.1, March 2004), the official publication of the Financial Planning Association of Malaysia.

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In addition, Mr Josef has wide experience in lecturing at IRB events and professional institutions. Apart from being a member of the Examination Panel of the Financial Planners Association of Malaysia, Mr Josef lectures on Malaysian Taxation at various institutions and provides taxation consultancy services.

Republic of Singapore's 2004

By Assoc. Prof. LEE FOOK HONG

The Finance Minister, Lee Hsien Loong, presented Singapore's Budget for the year 2004 in Parliament on 27 February 2004.

The Minister reported that the Singapore economy had managed to grow by 1.1 per cent in 2003 despite a very difficult first half-year due to the Sars outbreak and the war in Iraq. The employment situation has also improved as more jobs opened up as companies regained confidence and began to hire more employees again.

Despite the quick turning around towards the end of the year, the Minister said that restructuring the economy, upgrading industries and creating new and better jobs would be the key to achieve and sustain long-term growth.

The Minister said that macro-economic policies help to support the economic growth. The Monetary Authority of Singapore (MAS) maintained a neutral policy stance for the trade-weighted exchange rate of the Singapore dollar, after re-centering the policy band at a lower level. Both monetary and fiscal policies are important to support the economy.

To stay relevant in an increasingly competitive global environment, the Minister outlined the importance of the following fundamental measures to sustain growth and prosperity despite uncertainties in the external factors: -

- To continue to grow the manufacturing and services sector.
- To reform labor market so that workers and companies could response to fast-changing business conditions.
- To boost entrepreneurship.
- To promote competition and free markets in all sectors of the economy.

Looking ahead, the Minister warned that despite the upturn in the global economy in 2004, more shocks and uncertainties might be encountered. These include fresh terrorist attacks and emergence of new and more dangerous diseases than Sars which could undermine confidence in the growing economy.

To confront the challenges in this competitive global environment and the uncertainties, the budget, according to the Minister, is designed to help keep the economy open and continue to enhance competitiveness to achieve long-term economic growth.

TAX CHANGES

In his announcement on the proposed tax changes, the Minister explained that the measures and incentives introduced were aimed at remaking Singapore as a land of opportunity for enterprising people.

The tax changes announced are as follows:

1 TAX CHANGES FOR COMPANIES AND BUSINESSES

Corporate Income Tax

The corporate income tax rate will be reduced from 22% to 20% with effect from Year of Assessment 2005. The reduction will make Singapore a more attractive business hub, encourage new investments, and spur entrepreneurship.

Regional HQ Incentive

The maximum duration of the existing Regional Headquarters (HQ) Scheme has been extended from 3 years to 5 years with effect from 27 February 2004.

This will strengthen Singapore's reputation as a prime location for HQ operations and attract more HQ companies to Singapore.

Pioneer Incentive

The maximum duration for the pioneer incentive has been extended from 10 to 15 years.

BUDGET

Withholding Tax on Royalty Payments

As the economy upgrades, more Singapore companies will develop their businesses by exploiting Intellectual Property (IP). Much IP is held outside Singapore and companies have to pay royalties to the IP owners to be licensed to use them.

The withholding tax on royalty payments will be lowered from 15% to 10% with effect from 1 January 2005.

Withholding tax on royalties is a business cost that will discourage Singapore companies from exploiting IP. The reduction will help companies that are not enjoying any of the existing incentives for royalty payments.

Tax exemption for new companies

The first $100,000 of normal chargeable income (excluding Singapore dividends) will be fully exempt from tax.

The exemption will apply to new companies for each of their first 3 years of assessment that fall within the period of Year of Assessment 2005 to Year of Assessment 2009.

Financing for Start-ups

The existing Technopreneur Investment Incentive (TII) has been expanded to include all forms of start-ups and not just high-tech start-ups. The TII will be renamed as Enterprise Investment Incentive (EII). Investors in start-ups, which were awarded the EII, will enjoy tax deductions for losses incurred if these companies fail, or if they have to sell their shares at a loss.

Enhanced Tax Incentives for Wealth Management

The tax exemption schemes for foreign investors and foreign trusts whose funds are managed by any fund manager or trustee company in Singapore have been enhanced by increasing the scope of exemption to cover the following income:

i) rental and other income derived from immovable properties outside Singapore and received in Singapore;
ii) discount income derived from outside Singapore;
iii) interest from Qualifying Debt Securities (QDS);
iv) discount income from QDS, the tenure of which is less than one year;
v) distributions from foreign unit trusts received in Singapore;
vi) fees and compensatory payments from securities lending and repurchase arrangements with specified financial institutions in Singapore; and
vii) fees and compensatory payment from securities lending and repurchase arrangement with person outside Singapore.

The above changes took effect from 27 February 2004.

Qualifying Debt Securities Scheme

To encourage further development of the short-term debt market, which typically involves discount debt instrument, the Qualifying Debt Securities (QDS) scheme has been enhanced to cover discount income arising from QDS. The QDS scheme will be expanded to provide:

i) Tax exemption on discount income on any QDS, the tenure of which is one year or less, derived by any person:
   a) Who is not resident in Singapore and who does not have a permanent establishment in Singapore, or
   b) Who is not a resident in Singapore and carries on any operation in Singapore through a permanent establishment in Singapore, where the funds used by that person to acquire the QDS are not obtained from the operation in Singapore.
ii) Concessionary tax rate of 10% on discount income derived by companies and bodies of persons in Singapore from QDS, the tenure of which is one year or less.

The above will apply to QDS issued during the period 27 February 2004 to 31 December 2008.

Asset Securitisation

A concessionary tax treatment will be conferred on Special Purpose Vehicle (SPVs) engaged in asset securitisation. This concessionary tax treatment will apply to SPVs set up for asset securitisation on or after 27 February 2004.

Commodity Derivatives Trading

To encourage commodity derivatives trading in Singapore, a 5% concessionary tax rate on qualifying income derived from trading in commodity derivatives has been introduced with effect from 27 February 2004.

Secondary Loans Trading

With effect from 27 February 2004, secondary loans trading have been included as a qualifying activity under the Financial Sector Incentive Scheme.

Withholding Tax Exemption on Payments on Over-the-Counter (OTC) Financial Derivatives

Payments on OTC financial derivative contracts made by financial institutions to non-residents, excluding permanent establishments in Singapore, will be exempted from tax. This exemption will apply to payment due and payable during the period 27 February 2004 to 19 May 2007.

Members of Singapore Exchange (SGX)

To encourage the development of indigenous financial products as well as to foster SGX trading activities, the current tax incentive scheme for SGX members has been enhanced.

The current 5% and10% concessionary tax rates have been extended to products denominated in Singapore dollars with effect from 27 February 2004.

In addition, the 5% concessionary tax rate on new products will be extended to any company that is a member of the SGX as long as it qualifies as one of the top 20 members, as determined by SGX in respect of the total volume of transactions in approved derivative products in the preceding year.

Approved International Shipping (AIS) Enterprise Scheme

With effect from Year of Assessment 2005, all onshore charter income received by an AIS company will be tax exempt.

II TAX CHANGES FOR INDIVIDUALS

Tax exemption of Foreign-sourced Income

All foreign-sourced income received in Singapore by resident individuals will be exempt from tax with effect from Year of Assessment 2005. This exemption would not be applicable if the foreign-sourced income is received through a partnership in Singapore.

Tax exemption of Singapore-sourced Investment Income

Singapore-sourced investment income derived by individuals from financial instruments will be exempt from tax, with effect from Year of Assessment 2005.

III OTHER TAX CHANGES

Streamlining of Estate Duty Processes

- For deaths occurring on or after 1 January 2005, the first six months from the date of death will now be an interest-free period. Executors/administrators will now have six months from the date of death to file a complete return to the Inland Revenue Authority of Singapore (IRAS) before interest starts accruing on the duty.
- After the Notice of Assessment has been issued by IRAS, the executor/administrator will have a 30-day grace period to make payment.

Motor-Vehicle Taxes

With effect from 27 February 2004, the Additional Registration Fee (ARF) has been reduced from 130% to 110% of Open Market Value (OMV). However, the Excise Duties for tax has been increased from 10% to 20% of OMV.

Duties on Liquor and Tobacco

The excise duty on certain types of liquor has been increased while duties on beer/ale and sparkling wine reduced with effect from 27 February 2004.

The excise duty on all cigarettes has been increased from $255 per 1,000 sticks to $293 per 1,000 sticks.

CONCLUSION

In his conclusion, the Minister said that looking ahead there was much to be hopeful about. He said opportunities abounded in the region and beyond, and adjustment to change, overcoming adversity and confronting challenges courageously would be important to sustaining long term economic growth.

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Assoc. Prof. Lee Fook Hong, Ph D. FCIS

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Derivation of Business Income

By **SIVA NAIR**

Having seen how the commencement of a business is determined in Malaysia and deliberated on the significance of determining the commencement date, we shall move on to find out how to determine when business income is deemed to be derived from Malaysia.

DERIVATION OF BUSINESS INCOME

As we had seen in an earlier article where an employment income is deemed to be derived from Malaysia under Section 13(1) and 13(3) of the *Income Tax Act 1967* ("the Act")(as amended), sec. 12 of the Act contains rules relating to the derivation and deemed derivation of gross business income of a person from Malaysia. Section 12(1)(a) states:

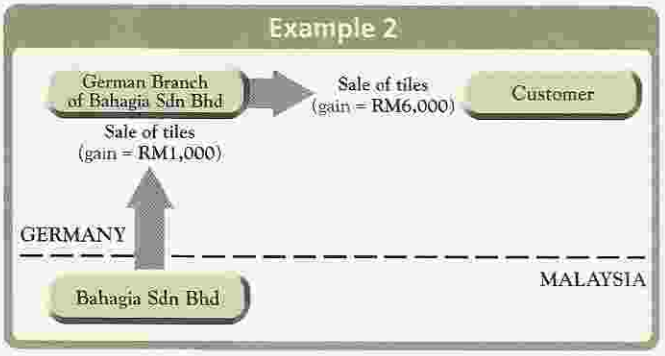
"...so much of the gross income from the business as is not attributable to operations of the business carried on outside Malaysia shall be deemed to be derived from Malaysia."

Note that the provision does not talk about income from operations of a business carried on in Malaysia (which would obviously be Malaysian income) but rather widens the scope of assessability of business income by stating that whatever cannot be attributed to outside Malaysia, is deemed to be Malaysian derived income. Therefore, although the income is not physically derived from Malaysia it would be deemed to be derived from Malaysia. As such the exemption under para. 28 of sch. 6 of the Act cannot be used to shelter such income from being taxed because although it is income from overseas, but for tax purposes it is deemed to be Malaysian income.

Example 1

Bahagia Sdn Bhd, a company manufacturing tiles in Malaysia, sold some tiles to a customer in Germany for RM10,000. The cost of the tiles is RM3,000.

The gain of RM7,000 will be deemed to be derived from Malaysia because it cannot be attributed to a place of business outside Malaysia.



Example 2

What if Bahagia Sdn Bhd has a branch in Germany to which it sells the tiles for RM4,000 and the branch in turn sells the tiles to the customer in Germany for RM10,000?

Only the RM1,000 gain from the sale of tiles to the branch would be Malaysian income. The profit of RM6,000 would not be deemed to be derived from Malaysia, since it is attributable to the branch which is a place of business outside Malaysia and therefore, not subject to Malaysian tax.

Further, since Bahagia Sdn Bhd is not involved in the business of insurance, banking and sea and air transport, if the RM6,000 is received in Malaysia, the exemption under para. 28 of sch. 6 will apply whereby the income will be credited to an exempt account from which Bahagia Sdn Bhd can distribute tax exempt dividends to its shareholders. In the event the shareholder is a corporate entity, it can pay a second tier tax exempt dividend to its own shareholders from the dividends received from Bahagia Sdn Bhd.

The term *operations of the business carried on outside Malaysia* is not clearly defined in the Act and therefore, guidance should be sought from precedents established in tax cases.

CHUNILAL B. MEHTA V COMMISSIONER OF INCOME TAX, BOMBAY (10 ITC 395)

Background

- The taxpayer was trading as a broker and speculator in cotton, silver and other commodities.
- He traded from his only office in Bombay.
- The business was conducted in British India (as it was then), and overseas namely Liverpool, London and New York.
- He entered into future delivery contracts with foreign parties.
- No delivery of goods was ever undertaken – only the difference between buying and selling prices were settled.
- The profits were NOT remitted to British India.

Issue

Revenue: Profits derived from foreign markets were assessable to tax because:

- direction were given from Bombay to carry out the transaction; and
- there was the exercise of skill and judgment in Bombay.

Taxpayer: Profits derived from foreign markets were NOT assessable to tax because:

- They did not accrue or arise in British India.

Decision

Privy Council: One must look not only at the place where the decision was taken but more importantly, the place where the transaction took place. The purchase and sale took place in New York and the profits were in the hands of the broker in New York who held them on behalf of the taxpayer. It made no difference to the result whether the transactions were dealings in goods or differences.

Therefore, the profits were NOT assessable to tax.

COMMISSIONER OF INCOME TAX, BOMBAY V GOVINDRAM SEKSARIA [10 ITC 406 AND (1938) 6 ITR 584]

Background

- The taxpayer was a firm of brokers and speculators in cotton, silver and other commodities.
- The firm's office was in Bombay.
- The speculation business was done both directly and through other brokers.
- The taxpayer gave instructions to another firm of brokers (SP & Co.), whose business was in Bombay, to buy and sell cotton on the New York exchange.
- SP & Co. gave instruction to brokers in New York to carry out the transaction.
- Any profits arising were payable by SP & Co. to the taxpayer in Bombay.
- No privity of contract between the taxpayers and the brokers in New York.
- Profits on two transactions were not remitted to British India but retained in New York.

Issue

- Were the profits derived or accrued in British India?

If the person is not resident in Malaysia but is resident in a country with which Malaysia has a double tax treaty, it will be relevant to peruse the provisions of the treaty.

Decision

High Court: The profits from the contract arose in British India because

- No privity of contract between the taxpayers and the brokers in New York i.e. dealings were between the taxpayer and SP & Co. in Bombay.
- SP & Co. were directly responsible to the taxpayers and vice versa.
- The taxpayers placed orders to buy and sell with SP & Co. in British India and not with the brokers in New York.

THE X COMPANY LIMITED [(1963) 1 MLJ iv]

Background

- X Company Ltd was the sole distributing agent in Singapore and Malaya for a group of manufacturing companies in UK and USA.
- The manufacturing companies were prohibited from selling in Singapore and Malaya (other than through the X Company Ltd).
- However, there was a proviso reserving the right of some manufacturers to sell direct without going through the distributors where the sales were to Governments in that area.
- To compensate the distributors for the loss of profits, they were paid commissions known as " territorial commissions".
- Generally, there was no legal obligation to pay such commissions.
- The US manufacturers accumulated the commissions paid and when they reached a substantial sum, remitted them to Singapore.
- The UK manufacturers set-off the commissions against amount due from X Company Ltd and the balance was paid into X Company Ltd's account in London which was used to purchase stocks and pay for leave passages for the employees of X Company Ltd.

Issue

- Were the territorial commissions received in the US and the UK derived in Singapore?

Decision

Board of Review: The territorial commissions were derived from or accrued in Singapore because

- The trading activity of X Company Ltd was in Singapore.
- The whole purpose of buying in the US and the UK was to sell in Singapore and Malaya and such buying did not establish a business in neither the US nor the UK.
- The territorial commissions were compensation for the infringement of the sole right to trade in Singapore and Malaya.
- Whatever had to be done to earn the profits were done in the territory concerned although payments were made elsewhere.
- The territorial commissions were owing to the fact that the company traded as a sole distributing agent in Singapore.
- Chunilal Mehta was distinguished on the ground that the taxpayer bought and sold in foreign countries; the transactions being influenced by conditions in New York, Liverpool and London, while in X Company Ltd the trade was influenced mainly by local demand.

In ***AJE Sdn Bhd v KPHDN [(2001) MSTC 3357]***, where a bus company which operated an express bus service for various routes in Malaysia was granted approval to operate the buses into Singapore by the relevant authorities in Singapore, on condition that passengers embarking the buses in Singapore to a Malaysian destination bought tickets in Singapore, the sale of which was undertaken by the agents of AJE Sdn Bhd.

The Revenue applied sec. 12(1)(a) of the Act to contend that the sale of tickets in Singapore was a deemed Malaysian source of income but the taxpayer argued that the income was attributable to operations of a business carried on outside Malaysia by virtue of the presence of the agent in Singapore.

The courts held that considering the ambiguity of the statutory language and the alternative tenable interpretation, the interpretation most favourable to the taxpayer should be adopted.

Dr. Veerinderjeet Singh states that there are no fixed rules to follow and a case will have to be considered on its own facts with guidance from case law decisions.

Richard Thornton opines that there are no definite rules and each case must be considered by reference to its own circumstances. If the person is not resident in Malaysia but is resident in a country with which Malaysia has a double tax treaty, it will be relevant to peruse the provisions of the treaty.

Section 12(1)(b) states that
"...if the business consists wholly or partly of the manufacturing, growing, mining, producing or harvesting in Malaysia of any article, product, produce or other thing,

(i) the gross income from the sale of such articles, product, produce or other thing taking place outside Malaysia in the course of carrying on business .....shall be deemed to be gross income of that person derived from Malaysia from the business."

Example 3
Paramount Sdn Bhd owns an acre of land in Kedah where it grows rice. In 2004, the grains which were harvested was transported to Thailand and sold for a profit of RM70,000.

The income although physically derived from Thailand would be deemed to be derived from Malaysia under sec. 12(1)(b)(i) because the grains were grown and harvested in Malaysia.

Example 4
Asia Jaya Sdn Bhd manufactures cars in Johore Bahru. The cars are then driven to Singapore for sale. Would the receipts in Singapore be deemed to be derived from Malaysia?

The answer is in the affirmative, because the products are manufactured in Malaysia and therefore, any profits arising from the sale would come under the ambit of sec. 12(1)(b)(i).

The *Income Tax Act 1967* continues to state in sec. 12(1)(b)(ii) that
".....where the article, product, produce or other thing is exported in the course of carrying on the business and where **(i)** *does not apply, then the market value of the article, product, produce or other thing at the time of its export shall be deemed to be the gross income of that person derived from Malaysia from the business."*

Example 5
Taman Jaya Sdn Bhd manufactures computers and exports them to the Middle East by ship through Port Klang. In 2004, the company's export sales amounted to RM250,000. The market value of the computers sold at the time of export was RM200,000.

The market value of the computers at the time of export i.e. RM200,000 shall be deemed to be the gross business income derived from Malaysia and subject to income tax.

Dr. Choong states that the use of market value in sec. 12(1)(b)(ii) is to prevent group companies entering into "transfer pricing" techniques to minimise or eliminate Malaysian tax exposure. He differentiates sec. 12(1)(b)(i) and (ii), by using the example of a company which manufactures refrigerators in Malaysia. Where the company sells its products to a person outside Malaysia, the income from the sale is deemed to be derived from Malaysia under sec. 12(1)(b)(i). However, where the company exports its products to its wholly owned subsidiary outside Malaysia, the market value of the product at the time of its export, will be deemed to be income derived from Malaysia under sec. 12(1)(b)(ii).

Section 12(2) states that where a business or a part thereof is carried on in Malaysia and the gross income of the business (from wherever derived) consists of a dividend or interest to which sec. 24(4) and (5) applies and the dividend or interest relates either to a share, debenture, mortgage or other source forming part of the stock in trade of the business carried on in Malaysia or to a loan of the kind mentioned in sec. 24(5) granted in the course of carrying on the business (which includes the regular lending of money), then the dividend or interest shall be deemed to be derived from Malaysia.

Dr. Choong Kwai Fatt explains that sec. 24(4) and (5) generally state that dividend and interest income is to be treated as gross income from a business in the period it accrues notwithstanding that such dividend is paid, credited or distributed or the interest income is received in a later period.

Example 6
Universiti Sdn Bhd is an investment dealing company in Malaysia. Part of its stock-in-trade includes investments in Vietnam and China.

The dividend received in respect of these investments will be deemed to be derived from Malaysia by virtue of sec. 12(2).

Example 7
Kerinchi Sdn Bhd, a bank licensed under the *Banking and Financial Institutions Act 1989* in Malaysia lends money to customers in New Zealand.

The interest received in respect of these investments will be deemed to be derived from Malaysia by virtue of sec. 12(2).

Our understanding of the derivation of business from Malaysia can be consolidated by referring to the following question in the last examination session, which relates to determining if the income derived from the sale of furniture to a customer overseas is subject to Malaysian tax.

MIT TAX IV DEC 2003 Q2

Meja Sdn Bhd, is a newly-incorporated company, established to carry on business in Malaysia as an importer and exporter of furniture. It is scheduled to commence business in January, 2004. Mr Kayu, the newly-appointed finance director of Meja Sdn Bhd describes the company's business activities and his concerns are as follows:

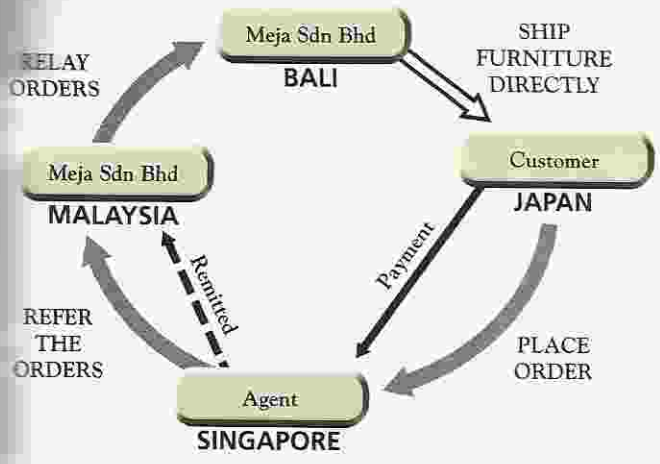
"The customers for the furniture are entirely from Japan. The customers would place orders with agents in Singapore who would then refer the orders to Meja Sdn Bhd. The agents in Singapore are NOT related to Meja Sdn Bhd and would be paid a commission for their efforts. Orders for the furniture would then be relayed to the manufacturer in Bali, Indonesia. Upon completion of the furniture, the manufacturer would ship the furniture directly to Japan. Payment would then be remitted by the customers in Japan to Meja Sdn Bhd through a bank account in Singapore. Upon payment of commission and cost of manufacturing, the balance will be remitted to Malaysia.

The only problem yet to be resolved is the Malaysian income tax implications on the proceeds derived from the sale of furniture".

Required:

Based on the provisions of the Act and relevant case law, advise Mr Kayu.

A diagrammatic representation of the transactions will provide a clearer picture of the issues involved.



After settling commission and cost of manufacturing, the balance will be remitted to Malaysia.

SOLUTION

THE LAW

Firstly, the scope of charge in Malaysia must be defined i.e. under sec. 3 of the *Income Tax Act 1967* (as amended), income tax is charged on income accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.

CASE PRINCIPLE

Reference to *CIR v Hang Seng Bank Ltd [1991] 1 AC 306* would be useful in determining whether the proceeds from the sale of furniture are accruing in or derived from Malaysia for the purposes of sec. 3. In that case, the following principles were established:

- The question whether the gross profit resulting from a particular transaction arose in or derived from one place or another is always in the last resort a question of fact depending on the nature of the transaction. It is impossible to lay down precise rules of law by which the answer to that question is to be determined.
- The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question. If he has rendered a service or engaged in an activity such as manufacture of goods, the profit will have arisen or derived from the place where the service was rendered, or the profit making activities were carried on.

FIRST ISSUE

- The orders for buyers in Japan were concluded in Singapore with agents independent of Meja Sdn Bhd; and
- The furniture are manufactured in Indonesia and shipped directly to Japan.

CONCLUSION

Therefore, it is arguable that the proceeds from the sale of furniture did not accrue from Malaysia and are not derived from Malaysia. Also, it is arguable that the transaction for the sale was concluded in Singapore between the buyers and the agents. Hence, the proceeds from the sale of furniture when received in Singapore are not, at first instance, within the ambit of sec. 3 of the *Income Tax Act 1967* (as amended).

SECOND ISSUE

Upon payment of sales commission and costs of manufacturing the balance of the sales proceeds would be remitted to Malaysia.

CONCLUSION

- The remittance is *prima facie* income received in Malaysia from outside Malaysia, when credited into a bank account in Malaysia. It is therefore subject to income tax by virtue of sec. 3 of the Act.
- However, with effect from year of assessment 2004, para. 28 of sch. 6 has been amended whereby a resident company is exempted from the payment of income tax in respect of income derived from sources outside Malaysia and received in Malaysia by that resident company.
- Paragraphs 5 and 6 of sch. 7 of the Act shall apply *mutatis mutandis* to the amount of income exempted i.e. the income exempted from tax would be credited to a tax exempt account from which "two-tier" tax exempt dividends may be payable.

Thus we shall conclude our analysis of the deemed derivation provisions relating to the determination of gross income from a business in Malaysia.

FURTHER READING
Alan Yeo Mlow Cheng – Malaysian Taxation (latest edition) PAAC Sdn Bhd
Awther Singh – Malaysian Income Tax (4th Edition) – Quins Pte. Ltd
Dr. Arjunan Subramanian – Malaysian Taxation System 2004 – Sweet & Maxwell
Dr. Chin Yoong Kheong – Malaysian Taxation (Fourth Edition) – Butterworths
Dr. Choong Kwai Fatt – Malaysian Taxation – Principles and Practice (2004) Infoworld
Dr. Veerinderjeet Singh – Malaysian Taxation: Administrative and Technical Aspects (Sixth Edition) Longman
Malaysian Master Tax Guide 2004 – CCH Asia Pte. Ltd
Richard Thornton – Thorntons Malaysian Tax Commentaries (latest edition) – Sweet & Maxwell, Asia.

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Sales Tax Audit

Recognising the Areas of Importance

By THOMAS SELVA DOSS

The Customs Department conducts audits on companies and businesses, which are licensed with it. One type of audit is the audit on sales tax licensees. Section 13(1) of the *Sales Tax Act 1972* ("the Act") requires every person who manufactures taxable goods in the course of business to apply for a sales tax licence. Once the taxable person has applied for a sales tax licence, he has to fulfill numerous obligations and responsibilities. He is now known as a licensee. Sales tax standing instructions state that every licensee should be audited once in two years. Most people fail to realise that from the very first day of starting business they have to prepare for a sales tax audit. This is something that does not seem very important at that moment. After all, one has just gone through the hassle of applying and obtaining a sales tax licence, it is now time to sit back and get accustomed to the provisions of the Act.

Preparing for a sales tax audit involves understanding the areas the sales tax auditor will examine. One must be prepared to answer every query arising from the audit. Of course there are numerous areas that the tax auditor will look at to see whether sales tax has been correctly charged, levied, collected and remitted to the Customs Department. Here we examine some of the areas the sales tax auditor will probe into.

Determination of the company's manufacturing process as according to the definition of manufacture

As stated in section 13(1) of the Act, one must be a manufacturer of taxable goods in order to be subject to the Act. How does one know that he falls within the definition of manufacture under section 2 of the Act?

Section 2 states that "manufacture" means –

i) in relation to goods other than petroleum, the conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the size, shape or nature of such materials and includes the assembly of parts into a piece of machinery or other products, but does not include the installation of machinery or equipment for the purpose of construction; and

ii) in relation to petroleum, refining or compounding and includes the addition of any foreign substance.

In the first part of para (i) the person concerned must employ manual or mechanical means to convert organic or inorganic materials into a "new product". By changing the size, shape or nature of such materials, the result would have to be a new product. In the second part, the assembly of parts into a piece of machinery or other products would also constitute manufacture. The person need not manufacture these parts but the process of merely putting the parts together would constitute manufacture.

Para (ii) refers to petroleum producers. The process of refining, compounding, or the addition of any foreign substances constitutes manufacture and the taxable person has to apply for a sales tax licence.

Branches of the licensed manufacturer

The licensed manufacturer may have branches either in the same state or in other states. The tax auditor will also inquire whether these branches are covered by the same sales tax licence or whether they are licensed separately. He will also look at the products these branches are manufacturing and determine whether they are taxable or not.

The sale of goods in local and export markets

Another area covered by the tax audit is the sale of goods. This is a very important area as sales tax is levied at the time of sale. Section 17 of the Act requires every taxable person who sells taxable goods to issue an invoice and state the sales tax separately on the prices for which the goods are sold. This means that the invoice must clearly indicate the taxable and non-taxable goods manufactured by the licensee and state the sales tax separately. Sales under the Act can be divided into two categories – domestic sales and export sales.

Domestic Sales

Sales of taxable goods in the domestic market are subject to sales tax. The term sales include barter, goods on hire, hire purchase and goods on consignment. Disposal otherwise than by sale is also taxable – goods given away free of charge, goods applied for own use and goods destroyed etc. The auditor will scrutinise each and every sales invoice to ascertain whether sales tax has been charged and levied, collected and remitted to the Customs Department.

Again, domestic sales can be further classified into two sub-headings:

i. Sales to traders and unlicensed manufacturers; and

ii. Sales to licensed manufacturers.

When a licensed manufacturer sells to traders and unlicensed manufacturers, sales tax is due at the time the goods are sold. For sales to licensed manufacturers, sales tax need not be charged if they are in possession of a sales tax exemption. Those without a sales tax exemption will be charged sales tax on the goods.

Sales to Duty Free Shops are exempted only if the Duty Free Shop has the goods listed in their exemption. Goods moved to a Bonded Warehouse are deemed to be exported.

Export Sales

Export sales are exempted from sales tax. The term export includes:

i. sales to customers overseas,

ii. sales/movement of goods to Free Zones,

iii. sales to Labuan, Langkawi and Tioman,

iv. sales to Licensed Manufacturing Warehouses (LMW),

v. sales to Duty Free Shops and

vi. movement to Bonded Warehouses.

For items (i), (ii) and (iii) above an export declaration form, Customs No. 2, is to be completed. For sales to LMWs and companies in the Free Zones care must be taken to ensure that the LMWs possess the relevant exemption or the goods entering the Free Zones are automatically exempted from sales tax.

Sales to Duty Free Shops are exempted only if the Duty Free Shop has the goods listed in their exemption. Goods moved to a Bonded Warehouse are deemed to be exported. The tax auditor will study each sale to determine whether it constitutes a domestic sale or export sale. The licensee must not only be prepared to answer these queries but also to substantiate them with documentary evidence.

Exemptions applied for under the Sales Tax Act 1972

The tax auditor will also scrutinise the various exemptions applied. The exemptions under the Sales Tax Act 1972 can be classified as follows:

i.	S.T.5	Sales tax exemption to import/purchase materials and components free of sales tax for use in the manufacture of goods.
ii.	S.T.5A	Sales tax exemption to import/acquire on behalf of and for delivery to a licensed manufacturer; materials and components free of sales tax for use in the manufacture of goods.
iii.	S.T.5B	Sales tax exemption to a licensed manufacturer to deliver goods to another manufacturer to complete their manufacture and to acquire back such goods free of sales tax.
iv.	S.T. No.10	Credit system.

v. The various exemptions under the *Sales Tax (Exemption) Order 1980*.

The tax auditor will examine these exemptions to determine whether the licensee is actually eligible to use them and whether proper records of their purchase, usage and wastage are maintained. The description of the goods, the quantity approved, the quantity purchased and their value in Malaysian Ringgit will also be noted.

It is important to emphasize here that on no account should the licensee exceed the amount approved. Should the purchases exceed the quantity approved, the tax auditor will assess the sales tax on the excess and claim the tax from the licensee. It will also be subject to a penalty of up to 50%. If the licensee is found to have abused the exemption given, future applications may be rejected. It must be borne in mind that the exemption is a facility given to the licensee and does not constitute his right. It can be withdrawn at any time by the Customs.

The sale value of locally manufactured goods

Another area the auditor will observe is the sale of goods between the licensed manufacturer and a related company. In most cases, this would not constitute an arms length transaction. The value of the goods that the licensed manufacturer sells to his marketing arm should be the 'transaction value'. Regulation 4(1) of the *Sales Tax (Rules of Valuation) Regulations 2002* states:

'The sale value of the goods shall be the transaction value, that is, the price for which the goods are actually sold by the taxable person to the purchaser provided that –

a. there are no restrictions in respect of the disposition or use of the goods by the purchaser, other than restrictions that –

   i. are imposed by law;

   ii. limit the geographical area in which the goods may be resold; or

   iii. do not substantially affect the value of the goods.'

   It is understood that once the seller exerts any form of influence on the buyer, the price would be affected. There should be an independent sale between the two of them.

b. 'the sale of the goods or the price for which the goods are actually sold is not subject to some condition or consideration where its value cannot be determined.'

   For example if A sells the chocolates he manufactured to B at a special price on condition that B also buys a certain quantity of fruit cakes from him, he lays down a condition which affects the sale value of his chocolates. The extent to which the condition has affected the sales value of his chocolates cannot be determined.

c. 'no part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser is to accrue, directly or indirectly, to the taxable person; or

d. the purchaser and taxable person of the goods are not related at the time the goods are sold or where the purchaser and the taxable person are related at that time, but the proper officer is satisfied that their relationship did not influence the price for which the goods are actually sold.'

One advantage of these new Rules of Valuation is that they are based on the WTO Customs Valuation System – a system that conforms to commercial realities and which outlaws the use of arbitrary customs values.

A person is deemed to be related to another person if –

a. they are officers or directors of one another's business;
b. they are legally recognised partners in business;
c. they are employer and employee;
d. another person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;
e. one of them directly or indirectly controls the other;
f. they are directly or indirectly controlled by a third person;
g. together they directly or indirectly control a third person; or
h. they are members of the same family.

In cases where the tax auditor is satisfied that the relationship between the purchaser and the taxable person of any goods influenced the price paid or payable for the goods, he shall inform the taxable person, in writing, if so requested, of the grounds on which the proper officer formed that satisfaction, and shall give the taxable person a reasonable opportunity to prove that the relationship did not influence the price of the goods. If the taxable person is unable to prove as such, the case will be classified as a valuation case. A file will be opened and a letter will be issued to the taxable person requesting information regarding his transactions.

Once the taxable person has supplied the information requested, the tax auditor will apply the Rules of Valuation. The order of application of the rules of valuation will depend on the amount of information provided by the taxable person. If none of the methods of valuation under the *Sales Tax (Rules of Valuation) Regulations 2002* can be used, then the tax auditor will adopt a flexible valuation method, using any reasonable means and consistent with generally accepted accounting principles. The taxable person will be notified as to how the tax auditor arrived at that value and will be given an opportunity to accept that value or provide sufficient evidence to prove otherwise. One advantage of these new Rules of Valuation is that they are based on the WTO Customs Valuation System – a system that conforms to commercial realities and which outlaws the use of arbitrary customs values.

Artificial separation of business

Section 12A(1) of the Act states that "where the Director-General is satisfied that any separation of business is artificial, he may make a direction under this section directing that the persons named in that direction shall be treated as a single taxable person…".

In determining whether any separation of business activities is artificial, the Director-General shall regard the extent to which the different persons carrying on those business activities are closely bound to one another by certain links. The links must be present in order for any business to be construed as artificial separation of business. Basically it means that the activities of the different persons form a part of the manufacturing process and if taken together they would constitute a complete manufacturing process. After analysing the company if the tax auditor arrives to the conclusion that any separation of business activities is artificial, he will exercise the powers under section 12A of the Act and serve the direction on the taxable persons concerned and within twenty-one days from the date of the direction, the persons concerned shall apply for a sales tax licence.

The tax auditor can also gain access to any recorded information or computerised data, whether stored in a computer or otherwise. "Access" includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of recorded information or computerised data. Most licensees keep their information in their hard disk, diskette or CD. Whatever form the information is kept in, the tax auditor has the power to gain access to this information.

One must bear in mind that the tax auditor will adhere strictly to sales tax standing instructions. These instructions will determine the course of action the auditor will take. In the conduct of an audit, there are also numerous areas that the tax auditor can examine. This depends on the initiative of the tax auditor and the amount of discretion he is going to exercise. If he suspects that there is tax evasion, then there is no limit to how far he can go. An experienced auditor will normally be able to gauge the performance of the business and the level of compliance after an initial interview with the management. All the customs auditors have to undergo a crash course in Customs Auditing at the Malaysian Customs Academy before they are assigned to the Audit Division. Many of them have years of experience in conducting tax audits on companies and this is something that cannot be ignored. The more experienced the tax auditor is, the more he will be able to comprehend the business. Some of them are even trained in the art of interrogation and questioning. Their style of interrogation will often elicit the answers they are looking for.

The audit process can take anywhere between one week to one year depending on the size of the company. The auditor may have to seek information from other government departments. Afterall the Customs Department has gone online. Once the audit is completed, the books of account and other records will be returned to the licensee. If the books are not in order, the licensee may be compounded to a maximum of RM5,000.00. As for any sales tax that remain unpaid, the tax auditor will assess the amount of tax payable and impose a penalty of up to 50%. This will be stated in a Bill of Demand issued to the licensee. He has fourteen days to settle the bill or face court action. The Director-General may allow the sales tax and penalty to be paid in instalments, in such amounts and on such dates as he may determine. In cases involving fraud, a thorough investigation will be conducted and every document will be scrutinised thoroughly.

Recovery of sales tax from persons leaving Malaysia

Section 27A(i) of the Act states that where the Director-General has reason to believe that any person is about or is likely to leave Malaysia without paying sales tax, penalty or surcharge payable by him, he may request the Director of Immigration that such person be prevented from leaving Malaysia unless and until he pays the sales tax, penalty or surcharge payable. In most cases, this section is invoked. Once the Bill of Demand has been issued, and there is no response from the licensee, a notice will be issued to the Director of Immigration requesting him to prevent the person from leaving Malaysia. Unless and until the whole amount is settled, the restriction will stay.

Tax Agents

Licensees often turn to their tax agents once they receive a letter from the Customs Department informing them of the tax audit. Care must be taken to ensure that the tax agents are proficient with sales tax procedures. It would be better if the tax agents were former officers of Customs who are trained in Customs Audits. Tax consultants are now offering Customs Compliance Reviews to their clients to ensure that they are in compliance with the provisions of the Act. This is strongly recommended, as it is always better to identify areas of non-compliance and take the appropriate measures before the tax auditor arrives. Experience has shown that companies which have conducted compliance reviews on their records are not only able to face a sales tax audit with confidence but are also exempted from the hefty fines and compounds that are imposed on licensees who do not comply.

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Case Digest

Company's Debt Not to be Attached to Shareholders

THE TAXPAYER WAS ONE OF THE SHAREHOLDERS OF A REAL PROPERTY COMPANY ("THE COMPANY"). THE COMPANY ACQUIRED A PIECE OF LAND IN 1994 AND INCURRED LIABILITY.

In the year 1999, the taxpayer and another disposed of shares in the Company. In the agreement for the disposal, it was covenanted that the consideration for the purchase of the shares was RM30,295.00 and a discharge of the Company's liabilities of RM969,705.00.

The Revenue raised real property gains tax on shares disposed by the taxpayer via the sale and purchase agreement. The taxpayer then filed this appeal and contended that the RM969,705.00 was to discharge the liabilities of the Company to the taxpayer and did not form part of the consideration for the disposal of the shares whilst the disposal price of the shares in the Company was RM30,295.00.

The issue before the Special Commissioner was therefore whether the disposal price of the shares in the Company was RM1,000,000.00 being the value of the land, the only asset of the Company, or RM30,295,000, the amount received by the taxpayer and another as shareholders of the Company, being separate from the amount of RM969,705.00 received by the taxpayer to discharge off the liabilities of the Company.

The Special Commissioner allowed the appeal and held that a company is a separate legal entity distinct from its shareholders. It is therefore entitled to incur debts and whatever liabilities incurred are the responsibility of the company alone and it is not attached to the shareholders. So in this case, in determining the value of the shares, the sum of RM969,705.00 which was a debt incurred by the Company should therefore be taken into account. However, whilst the sum formed part of the sale price of the shares, it was a debt owed by the Company to the creditors when the sale transaction took place. It does not become a debt of the shareholders. The disposal price of the shares was therefore RM30,295.00. The Revenue has since appealed against the decision.

TTK v. Ketua Pengarah Hasil Dalam Negeri.
Pesuruhjaya Khas Cukai Pendapatan. Rayuan No. PKCP (R) 16/2002
Case Stated on 14 April 2004

Kalearasu Veloo (Advocate and Solicitor) for the taxpayer.
Ahmad Khairuddin bin Abdullah and Shafini binte Abdul Samad (Legal Officers, Inland Revenue Board) for the Revenue.
Before: Dato' Ahmad Zaki Bin Husin, Haji Kamarudin bin Mohd. Nor, Hariraman Palaya.

"Editorial note: This case will be reported in the forthcoming issue of the Malaysia and Singapore Tax Cases."

Deductibility of Expenses Incurred for Providing Overseas Trips

THE TAXPAYER CARRIED ON A BUSINESS OF SELLING COOKWARE, KITCHEN UTENSILS AND WATER FILTERS TO THE PUBLIC THROUGH INDIVIDUALS TO WHOM IT PAID COMMISSION. IN ADDITION, THE TAXPAYER PROVIDED FREE OVERSEAS TRIPS AND TICKETS WHICH INCLUDED ACCOMMODATION, FOR THOSE INDIVIDUALS WHO ATTAINED CERTAIN SALES QUOTA.

For the years of assessment 1982 to 1988, the expenses incurred for providing overseas trip were allowed as a deduction by the Revenue. However, from the year of assessment 1989, they were not allowed by the Revenue. The taxpayer thus appealed against this position.

The issue before the Special Commissioners was therefore whether the said expenses incurred by the taxpayer were expenses wholly and exclusively incurred in its business pursuant to section 33(1) of the Income Tax Act 1967 ("the Act") or whether they were expenses incurred in the provision of entertainments and should be disallowed under section 39(1)(*l*) of the Act.

The Special Commissioner dismissed the appeal.

The issue centred on the question of whether the individual salesmen were employees or non-employees of the taxpayer. The facts and the evidence adduced showed that there was no contract of employment between the individuals and the taxpayer but only a sales consultant contract. There was also specific reference in the contract that there was no employer-employee relationship. From the totality of the evidence adduced therefore, the individual salesmen were independent contractors engaged under a contract for service and not employees employed under a contract of service. The Special Commissioner held that the Revenue was correct in disallowing the expenses under Section 39(1)(*l*).

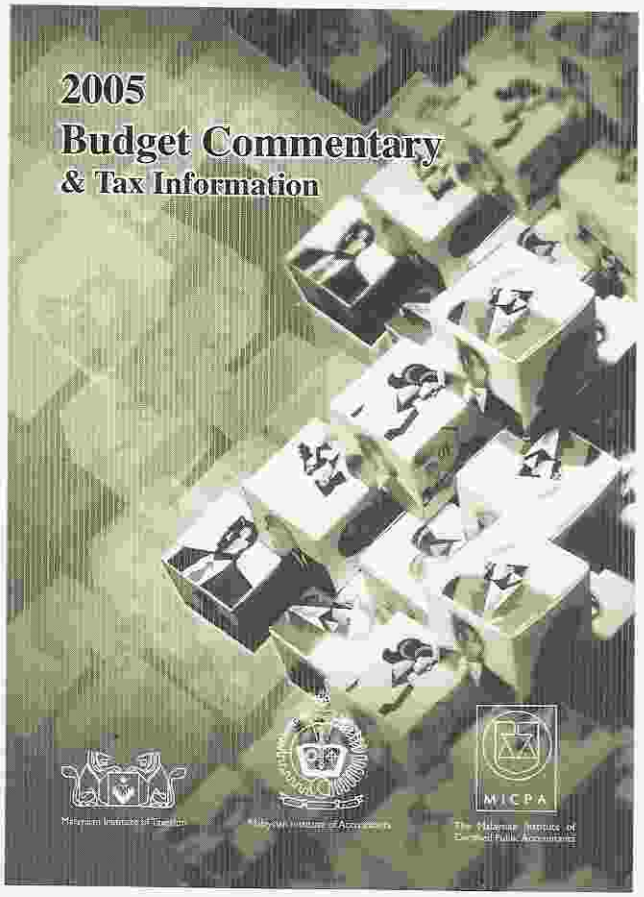
Section 91(1) of the Act further enabled the Revenue to raise assessments or additional assessments where it appeared that no or no sufficient assessment had been made on a person chargeable to tax.

The taxpayer has since appealed against the decision.

AMC Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri.
Malaysia Pesuruhjaya Khas Cukai Pendapatan. Rayuan No. PKCP (R) 10/2002
Judgment delivered on 19 April 2004.

James Loh Ching Yew (Advocate and Solicitor) for the taxpayer.
Norhisham bin Ahmad (Legal Officer, Inland Revenue Board) for the Revenue.
Before: Dato' Ahmad Zaki Bin Husin, Haji Ahmad Padzli Bin Mohyiddin, Haji Kamarudin bin Mohd. Noor.

"Editorial note: This case will be reported in the forthcoming issue of the Malaysia and Singapore Tax Cases."



2004 has been an eventful year thus far. The happenings in the first half of the year go a long way to prove that no one economy is completely insulated from external factors. The regional economies are slowly but surely recovering from setbacks suffered because of the economic crisis.

The country is still going through various phases to enhance its competitiveness in the global environment. The Government has implemented stimulus packages and deficit budgets to stimulate the nation's economic growth. These strategies are important measures to ensure that the nation's economy growth rate is again in the positive territory and hopefully, will trigger the return to pre-crisis rates. The 2005 national budget proposals, to be tabled in Parliament on September 10, 2004, are expected to contain measures that will help the nation's economy move into a positive direction.

This year's budget is anticipated to be geared to counter external destabilizing factors and to ensure sustainable growth. As we eagerly await the budget proposals, the **Malaysia Institute of Accountants,** the **Malaysian Institute of Certified Public Accountants** and the **Malaysian Institute of Taxation** are proud to once again bring to you the Budget Commentary & Tax Information booklet.

The latest edition of this popular booklet will contain an exclusive summary and commentary on the 2005 national budget proposals as well as other taxation information for quick and easy reference. A practical and informative guide, the *2005 Budget Commentary & Tax Information* is a useful tool that no financial or taxation professional should do without.

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MALAYSIAN INSTITUTE OF TAXATION

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

UPCOMING EVENTS

Event (s)	Date	Time	Fees			Proposed Venue
			MIT Member	Member's Firm Staff	Non-Member	
1) MIT Workshops: Conducted by Mr Chow Chee Yen						
• Tax Aspects of Real Property Companies & Taxation of Construction Companies and Property Developers	23 Oct 2004	9 am – 5 pm				Cititel Mid Valley, KL
• Manufacturing Companies – Tax Incentives	30 Oct 2004	9 am – 5 pm				Cititel Mid Valley, KL
• Corporate Tax Planning	27 Nov 2004	9 am – 5 pm				Cititel Mid Valley, KL
• Preparation of Tax Computations for Companies	4 Dec 2004	9 am – 5 pm				Cititel Mid Valley, KL
Individual Workshops			**RM280.00**	**RM330.00**	**RM390.00**	
Attend All 4 Workshops			**RM1000.00**	**RM1200.00**	**RM1400.00**	
2) Seminar: Year End Tax Planning Areas that will be covered: • Tax and Financial Planning for Individuals and Business Owner • Tax Planning for Proprietors and Partnerships • Tax Planning for Corporation • Practical Issues Relating to Inbound and Outbound Investment • Goods and Services Tax (GST)	4 Nov 2004 (Thursday)	9 am – 5 pm				KL Hilton, K. Lumpur
Early Bird Fee (before 20 Oct 2004)			**RM325.00**	**RM375.00**	**RM445.00**	
Normal Fee (closing date: 30 Oct 2004)			**RM375.00**	**RM425.00**	**RM495.00**	
3) Seminar: Tax Cases & Critical Technical Issues Discussion on: • Deductibility of Borrowing Costs - Key Concerns • Common Expenses for Leasing & Non-Leasing Activity - Method of Apportionment • Tax Appeals to the Special Commissioners of Income Tax - Pre & Post the Self Assessment System • Conflict between Accounting Practice & Tax Principles - which do you follow? • Taxation of Interest Income under Section 4(a) of the Income Tax Act, 1967	2 Dec 2004 (Thursday)	9 am – 5 pm				JW Marriott Hotel, Kuala Lumpur
Early Bird Fee (before 22 Nov 2004)			**RM325.00**	**RM375.00**	**RM445.00**	
Normal Fee (closing date: 26 Nov 2004)			**RM375.00**	**RM425.00**	**RM495.00**	

Tax Nasional

Malaysian Institute Of Taxation

Invitation to Write

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

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

Contributions may be sent to:
The Editor of Tax Nasional,
Malaysian Institute of Taxation.

For further information, please contact The Secretariat, Malaysian Institute of Taxation.

Malaysian Institute Of Taxation

TIME TABLE FOR THE MIT PROFESSIONAL EXAMINATIONS

20 – 24 DECEMBER 2004

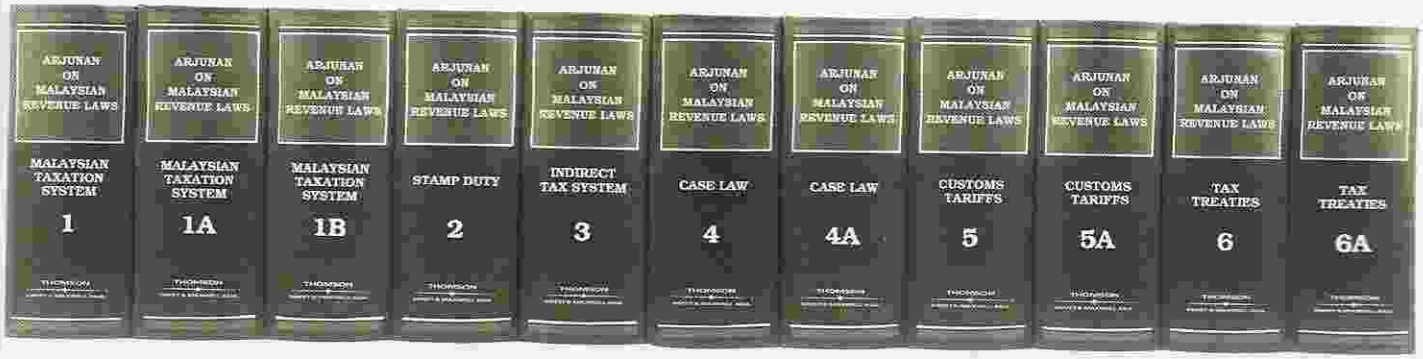
TIME	20.12.2004	21.12.2004	22.12.2004	23.12.2004	24.12.2004
9.00 am to 12.10 pm*	Taxation I	Business & Financial Management	Financial Accounting II	Economics & Business Statistics	Financial Accounting I
2.00 pm to 5.10 pm*	Company & Business Law	Taxation II	Taxation III	Taxation IV	Taxation V

** Includes 10 minutes reading time*

Book Review

Book Review by : Professor Dr Jeyapalan Kasipillai
Title of Book : Arjunan on Malaysian Revenue Law
Author : Dr Arjunan Subramaniam
Publisher : Sweet & Maxwell Asia

"Arjunan on Malaysian Revenue Laws" in six subject volumes is brilliantly authored by Dr Arjunan Subramaniam who has an unrivalled reputation for excellence on the legal aspects relating to taxation. The author is long acknowledged as Malaysia's leading revenue law expert.



Volume 1 covers the basis of the Malaysian Taxation System inclusive of self-assessment. In this volume, there are chapters on the law of direct taxation, capital gains taxation and petroleum tax. The following volume (Volume 2) covers stamp duty which is a difficult branch of revenue law. The law of stamp duties rests entirely upon the language of the legislature, that is, the Stamp Act 1949. The author has skillfully covered the general principles of stamp duties in Malaysia supported by case law from Malaysia and other jurisdictions.

The indirect taxation system, comprising customs duties, excise duties, service tax and sales tax is well elaborated in Volume 3. The scope of each of the taxes is outlined and recent cases in respect of service tax and customs duties have been included in this chapter. National and multinational enterprises will find this volume extremely useful in understanding the procedures of the Customs Department, which oversees and implements indirect taxes.

Case law development has become an important tool in the understanding of the tax systems. Volume 4 contains over 250 decided cases in respect of income tax, real property gains tax, stamp duties and customs cases under the various statutory provisions.

The updated rates of customs duties laid down by the Customs Duties Order 1996 are elaborately covered in Volume 5. The up-to-date information contained in this volume will be invaluable to businesses involved in the import and export of Malaysian products. Finance managers and logistics managers will also benefit from this volume.

The final volume (Volume 6) contains Malaysia's tax treaties with its trading partners. The volume is essential in framing tax opinions in respect of cross-border transactions. The rising importance of international business transactions makes this volume critically needed by every serious tax practitioner.

The author has painstakingly researched over the years to complete the volumes. It is recommended that every practising accountant make regular reference to Arjunan's Revenue Law publication. Practicing lawyers as well as students pursuing law or accounting degrees would find the volumes extremely useful as there is an exhaustive review on case laws, tax compliance issues and aspects of indirect taxation. The volumes are written in a unique but clear manner that would be easily understood by the readers. This comprehensive coverage of Malaysian taxation that includes direct and indirect taxation, real property gains tax, stamp duties and tax treaties is an invaluable contribution to the existing revenue law literature.

Professional

Examinations

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

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

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

c) Full Members of local and overseas accounting bodies

Exemption

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

Malaysian Institute Of Taxation

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Intermediate	RM 60.00
Final	RM 70.00

Examination Fees (per paper)

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Examination Structure

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

Foundation Level

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

Intermediate Level

- Taxation II
- Taxation III
- Company & Business Law

Final Level

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

MIT Professional Examinations

CALENDAR FOR YEAR 2004

January 1	Annual Subscription for 2004 payable.
February	Release of the 2003 Examinations results. Students are notified by post. No telephone enquiries will be entertained.
March 31	Last date for payment of annual subscription fee for the year 2004 without penalty (RM50).
April 30	Last date for payment of annual subscription for year 2004 with penalty (RM100).
	Question & Answer Booklets are available for sale.
September 1	Closing date for registration of new students who wish to sit for the December 2004 examination sitting.
September 15	Examination Entry Forms will be posted to all registered students.
October 15	Closing date for submission of Examinations Entry Forms. Students have to return the Examinations Entry Form together with the relevant payments to the Examinations Department.
November 30	Despatch of Examinations Notification Letter.
December 20 - 24	MIT Examinations.

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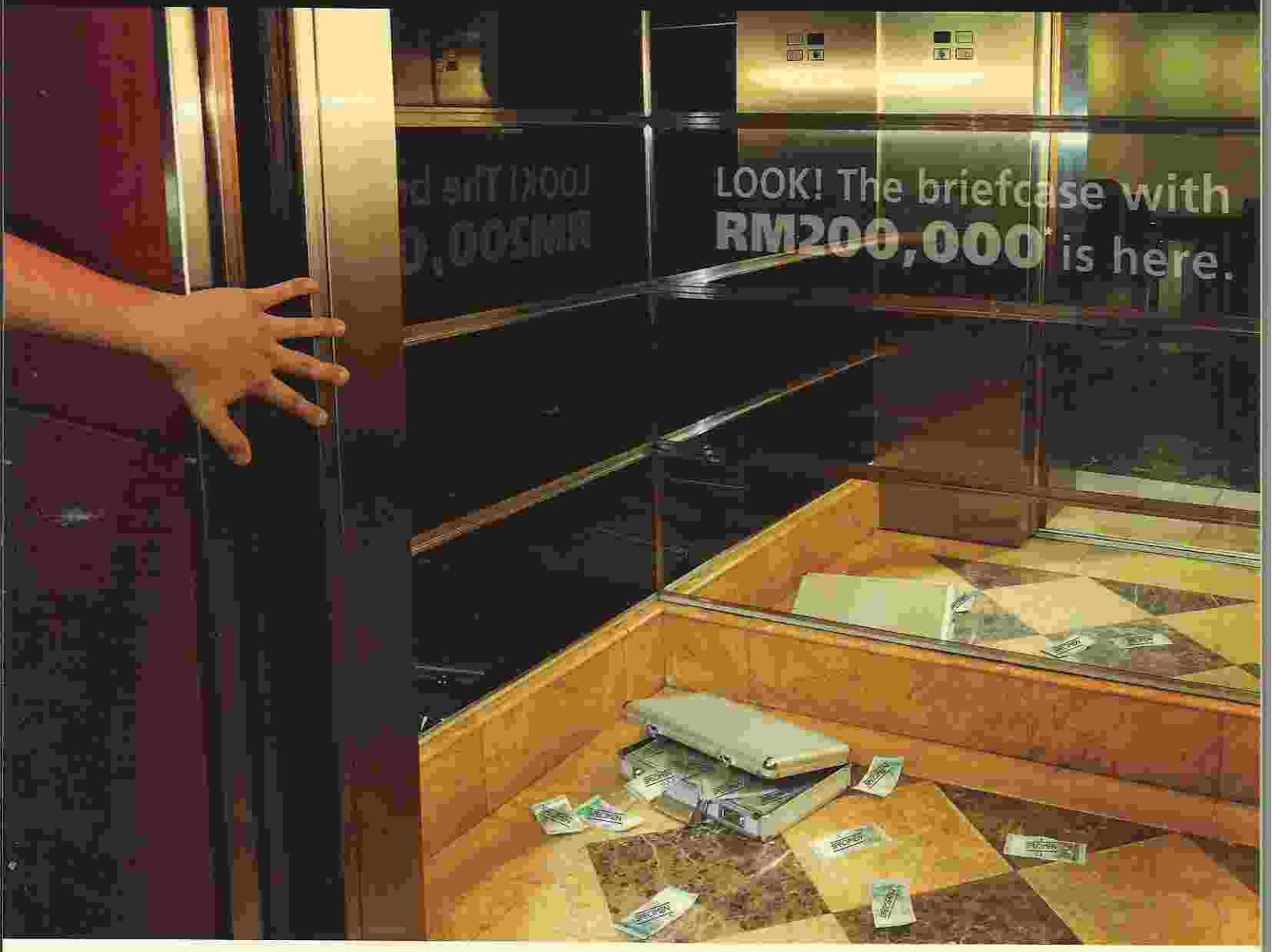

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October	**November**	**December**
		
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