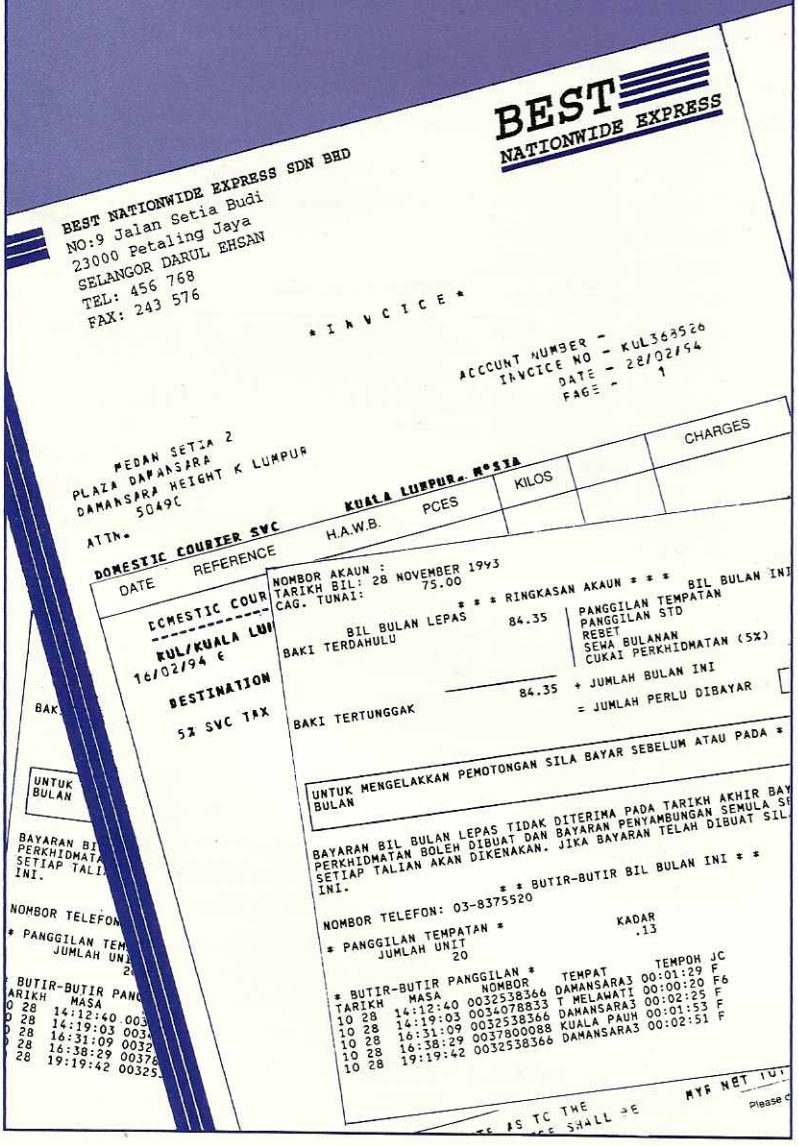
● Price RM20.00

How Would The Sales And Service Tax Impact Malaysian Business?



TAX NASIONAL

OFFICIAL JOURNAL OF THE
MALAYSIAN INSTITUTE OF TAXATION
ISSN 0128-7850 KDN PP 7829/12/93
QUARTERLY MARCH 1994

How Would The Sales And Service Tax Impact Malaysian Business?

RPGT - Date of Acquisition

Employment Income - Scope of Charge -

Malaysian Institute Of Taxation

C O N T E N T S

TAX NASIONAL

OFFICIAL JOURNAL OF THE MALAYSIAN INSTITUTE OF TAXATION

ISSN 0128-7850 KDN PP 7829/12/93

QUARTERLY MARCH 1994

Contents

OFFICE & ADDRESS

The Secretariat, Malaysian Institute of Taxation, c/o Dewan Akauntan, No. 2, Jalan Tun Sambanthan 3, Brickfields, 50470 Kuala Lumpur. Tel: 03-274 5055. Fax: 03-274 1783.

The Tax Nasional is the official publication of the Malaysian Institute of Taxation and is distributed free to all members of the Institute. The views expressed in this Journal are not necessarily those of the Institute or its Council. All contributions, inquiries and correspondence should be addressed to the Secretariat of the Institute.

The Malaysian Institute of Taxation (MIT) is a company limited by guarantee incorporated on October 1, 1991 under Section 16(4) of the Companies Act, 1965.

The objectives of the Institute are, inter alia:

1. To provide an organisation for persons interested in or concerned with taxation matters in Malaysia.
2. To advance the status and interest of the taxation profession and to work in close co-operation with the Malaysian Institute of Accountants (MIA).
3. To exercise professional supervision over the members of the Institute and frame and establish rules made herein for observance in matters pertaining to professional conduct.
4. To provide examination for persons interested in or concerned with the taxation profession.

Malaysian Institute Of Taxation

How Would The Sales And Service Tax Impact Malaysian Business?

The purpose of this Article is to discuss the proposed conversion of the current sales tax and service tax into a single broad based consumption tax (BBCT) to be called Sales and Service Tax (SST). Although the mechanics of this new tax have not been worked out, it was proposed that the rate of SST will not be more than 10% and that exports will be "zero-rated" (see below for further discussion). The concept of a BBCT or as it is also known, the value added tax (VAT), has already been introduced in 6 Asian countries being South Korea, Indonesia, Taiwan, Philippines, Japan and Thailand. Singapore's version of the BBCT is to commence from 1 April, 1994.

Before discussing the possible impact of a BBCT on Malaysian businesses, I now outline the basic design features of this type of tax.

By:
Bhupinder Singh
Tax Manager, Arthur Andersen & Co.

BASIC FEATURES OF A BBCT

What is a BBCT?

A consumption tax can refer to any type of indirect tax which applies to all or some proportion of goods and services which are sold for consumption purposes by end users. The tax is on consumption and although the incidence is on the consumer, currently for convenience, the tax is levied on and collected from manufacturers, importers and persons who provide taxable services.

Basic Operation of SST

The introduction of SST would impose a multi-stage tax on the supply of taxable goods and services. An entity carrying on a taxable activity (i.e. the sale of taxable goods or the provision of taxable services) would be required to collect tax from its customers, equivalent to the sale price multiplied by the SST rate, and remit the tax to the Taxation Office. This entity would, however, also be entitled to claim a credit for any SST paid on purchases for use in its business. This credit is usually referred to as the "input tax credit". Accordingly, the entity would file SST returns on a net basis. That is, it would calculate the amount of tax payable on sales and deduct from that any tax paid on purchases. It should be noted that an input credit can generally be claimed prior to the sale of goods or provision of services to which the input relates.

If major items of capital equipment are purchased in a particular period, the available input credit might exceed the tax payable on sales in that period. In this case, the taxpayer may be entitled to a refund of SST instead of carrying forward the input tax credit.

The following diagrams provide further explanation of how the SST is likely to operate. The diagram I illustrates how an SST system will work. The diagram II illustrates that the end result is the total amount of tax paid (RM2,000) is the same as would be the case if the tax was only paid on the final retail sales (i.e. RM20,000 x 10% = RM2,000). That is, the tax is effectively levied on the added value of each process rather than the final sale value.

Diagram I

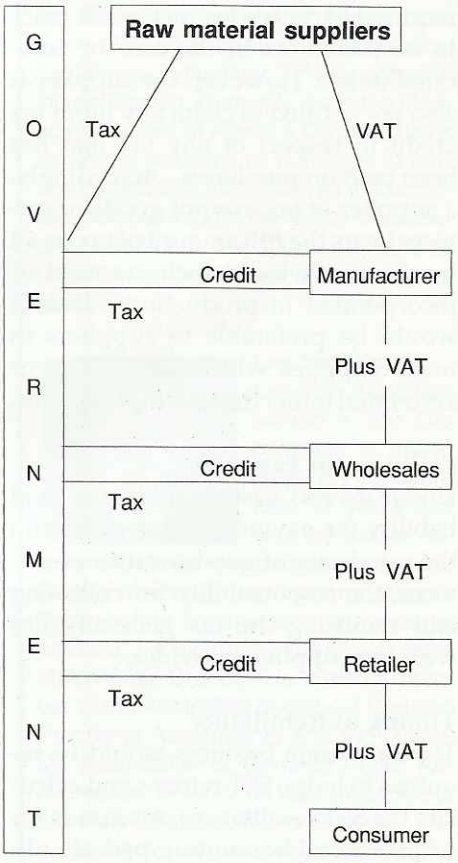


Diagram II

	Purchase RM	Sales (excluding tax) RM	Tax rate RM	Tax on sales RM	Input tax credit RM	Net tax RM
Supplier	-	500	10	50	-	50
Processor	500	1,000	10	100	50	50
Manufacturer	1,000	5,000	10	500	100	400
Wholesaler	5,000	15,000	10	1,500	500	1,000
Retailer	15,000	20,000	10	2,000	1,500	500
Total						**2,000**

Types of Goods and Services

In general the SST would be charged on all the goods and services supplied by businesses in Malaysia, unless they were specifically designated as either "*zero-rated*" or "*tax-exempt*".

Zero-rated goods or services are regarded as taxable supplies. However, the rate of tax that applies to the supply is 0%. Accordingly, although the vendor is not required to charge tax on the sale price, the vendor would be entitled to claim an input tax credit on his/her purchases. In most countries with a BBCT the charges made for exports of goods and services are regarded as zero-rated supplies.

In relation to tax exempt goods or services, the supplier will similarly not be required to charge tax on the sale price to customers as in the case of zero-rated items. However, the supplier is also not entitled to claim any input tax credit in respect of any tax that has been paid on purchases. Accordingly, a supplier of tax exempt goods or services bears the full amount of tax on all goods or services which are used or incorporated in production. Thus it would be preferable to suppliers to make supplies which are taxable or zero-rated rather than exempt supplies.

Liability for Payment

Under the SST system, while the legal liability for payment of tax rests with the purchaser of goods or user of services, the responsibility for collecting and remitting the tax generally lies with the supplier/provider.

Timing of Remittance

Typically each business would be required to lodge SST returns and calculate the SST remittances or refunds for a "prescribed accounting period". In Malaysia it is speculated that the most likely period would be monthly as this is currently the requirement under Sales Tax Act and Service Tax Act.

Registered Business

It is expected that all persons engaged in some taxable activity would be required to be registered and collect SST on all taxable supplies and services provided in Malaysia. It is also expected that there would be an exemption for small businesses.

Unregistered persons would effectively fall outside the SST system and be treated as exempt suppliers. These suppliers would not be required to charge SST on their sales but would also not be able to claim input tax credits for SST paid on their purchases. Accordingly, some small businesses may choose to register so that they may claim input credits to overcome any potential competitive disadvantage that may arise from being classified as an exempt supplier.

Do We Need a SST?

Due to the unpredictability of the petroleum revenue, the Treasury is looking at other avenues to generate income. By introducing the SST the Treasury hopes to double the current revenue without increasing the rates on corporate and personal taxation. In addition the move by other Asian nations to adopt the SST has influenced Malaysian authorities to consider its introduction and to reduce its reliance on direct taxes and traditional taxes on primary commodities.

IMPACT ON MALAYSIAN BUSINESS

Compliance Costs

It is inevitable that businesses will initially incur increased administrative costs for accounting and filing of SST returns as it is likely that detailed records will be required to be kept for SST purposes.

For example, the format of each invoice rendered may need to be changed to include the trader's full name and address, details of the services performed or goods supplied, the invoice amount, the SST charged, and other details prescribed under the proposed SST Act. However, in the long run it is hoped that once the new systems are in place, the additional costs would decline.

Cash Flow Impact

The impact on cash flow will obviously depend on how frequently the tax must be remitted. The most likely collection period would be monthly, on a similar basis to that for Sales Tax where tax on sales in a particular month is payable by the 28th day of the next month. Longer periods may be prescribed for smaller businesses where their annual turnover is less than a prescribed threshold amount.

- *Cash sales*

  Where businesses make cash sales, the SST is likely to have a positive impact on cash flow. This results from the fact that the tax would be collected at the time of sale but the remittance of tax would not occur until the end of the SST reporting period. For large retailers, the cashflow advantage could be substantial.

- *Credit Sales*

  The introduction of a SST could have a negative impact on the cash flow of businesses making sales on credit. The extent of the problem will depend on the period of credit provided to customers and the credit terms available from suppliers to that business.

  It would be necessary for taxpayers to be even more vigilant than at present in ensuring that credit terms were not exceeded. Presumably, special provisions would be included to cover SST paid in relation to bad debts, but this would probably only occur when a bad debt was actually written off.

  This cash flow problem could be overcome if the SST was required

to be remitted on a cash received basis.

- *Sales of zero-rated goods and services* Cash flow problems could also arise where a business makes a significant portion of zero-rated sales. In these circumstances, no tax would be payable on the sales but tax would still be paid on purchases. Businesses would need to claim a refund of the input tax from the tax office and significant delays might be experienced.

  In some countries, the cash flow problem in these circumstances has been so severe that special arrangements have been necessary to enable businesses producing zero-rated supplies to acquire certain inputs on a SST free basis.

  It is not possible to currently assess how significant the cash flow problem could be in Malaysia as we have yet to see who the producers of zero-rated suppliers of services will be.

Transitional Turmoil

An initial state of confusion could be expected to result during the transitional period prior to and after the implementation of a SST.

Malaysian businesses must not only be adequately prepared for the implementation of the new tax but also to handle the transitional period effectively and efficiently to ensure that there is no double taxation, since both SST and Sales Tax or Service Tax may be applicable to certain transactions. For example, a business may have paid sales tax on trading stock, plant and equipment or office furniture acquired before the implementation date which would be entitled to input tax credits if purchased under the SST regime.

Accordingly, companies should be aware of the various purchase deferral strategies and the potential for refunds of Sales Tax or Service Tax under any transitional provisions. Businesses would have to consider various individual deferral strategies to avoid being unduly disadvantaged during the transitional period.

Situations which would demand closer examination during the transitional period include the following:-

- Trading stock which is purchased with Sales Tax or Service Tax paid but sold under the SST regime.
- Long term construction contracts.
- Supply of goods or services under a contract entered into before implementation date but consideration not due or paid until after the implementation.

What Should Your Company Do Now?

The questions listed below are in no way meant to be an exhaustive list of matters your business would have to confront if a SST is implemented in Malaysia. It is clear that the introduction of a SST would give rise to issues that each business would have to address and react to on an individual basis.

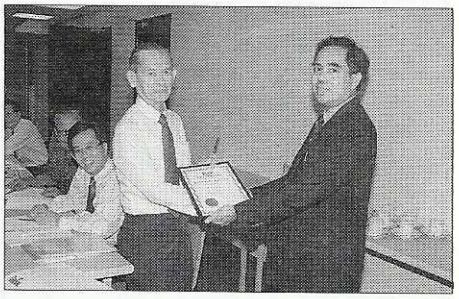
The significance of any issue to a particular business will become clearer as more details are released by the Government on the proposed tax. At this stage, some of the important questions which businesses should consider include:-

- On what purchases are you entitled to claim an input tax credit;
- Do you make zero-rated or tax exempt sales;
- Are you required to register;
- How would the SST affect your cash flow;
- What will happen to your prices and how will your competitors and customers react; and
- What compliance problems will your business face.

All the above issues will be confronted by every business but the importance of them will vary from one to another.

At this stage, the key is to ensure that your particular industry is not disadvantaged. To achieve this, you will need to be well informed on how the tax will affect your business and where necessary, make sure that your concerns are understood and dealt with by the Government. The time to raise your concerns is now, before the design of the tax is set in concrete.

HONOURS FOR MIT FELLOW



Tan Sri Lim Leong Seng receiving his certificate

We are proud to inform that Tan Sri Lim Leong Seng, a former Council Member of the Malaysian Institute of Taxation (MIT), was conferred an Honorary Fellowship. On 28 December 1993, the MIT President, Encik Ahmad Mustapha Ghazali on behalf of the Council presented to Tan Sri Lim his Honorary Fellowship Certificate. Due to his vast experience in the field of taxation and his contribution to the Institute, Tan Sri Lim was made an advisor to the Council of MIT.

NEW COUNCIL MEMBERS

Syed Amin Al-Jeffri

Tuan Syed Amin Al-Jeffri qualified as a Chartered Accountant in 1975 from British Columbia, Canada. He has been a member of the Malaysian Institute of Accountants since 1979 and has 19 years of practical experience in the financial and accounting profession. Currently, he is the Managing Partner of Aljeffri & Co., and holds corporate positions as a director in several companies. He serves as a Committee member in both the Malay Chamber of Commerce of Malaysia and National Chamber of Commerce and Industry of Malaysia.

Lee Yat Kong

Lee Yat Kong has served in the Department of Inland Revenue for more than 17 years and was the Senior Assistant Director (Investigation) for the States of Perak and Johore respectively, before commencing professional practice. He is currently the Chairman of MIA (Perak) Branch. He is also a member of the Australian Society of Certified Practising Accountants and the Malaysia Association of Certified Public Accountants. In 1970, he was seconded to the New Zealand Inland Revenue Department for an Investigation Course under the Colombo Plan.

RAYUAN NO. PKR 538

FACTS

The appellant had entered into a sale and purchase agreement with a housing developer, SP Sdn Bhd on 27.6.1974 to purchase a shop lot for RM112,360.00. He paid the initial 'advance' and 'progressive' payment upfront with the balance of 70% of the purchase price being payable in 120 instalments of RM1,159.96 each. At the date of purchase, there was no strata titles legislation in existence and neither was the ownership of the shop lot transferred to the appellant by registering his name on the title deed or by any deed of assignment. The appellant could not dispose of the asset without the permission of the developer.

On 8.7.1983, the appellant entered into a sale and purchase agreement with C Sdn Bhd to dispose of the property to the latter for RM191,000.00. With the proceeds from the disposal, the appellant settled the balance owing to the developer and the latter thereupon transferred the property to C Sdn Bhd.

A notice of assessment for the year of assessment 1983 dated 21.5.1988 was issued to the appellant on 8.6.1988 and he was assessed to Real Property Gains Tax of RM27,610.00. The assessment was done on the basis that the asset was acquired and disposed of on 8.7.1983. The tax and penalties were settled in full.

The taxpayer appealed against the assessment on the basis that the asset had been acquired on the date of the sale and purchase agreement dated 27.6.1974 and that there was no liability to Real Property Gains Tax as the disposal took place more than six years after the date of acquisition. Alternatively, paragraph 24, Schedule 2 to the Real Property Gains Tax Act 1976 did not apply in this case, i.e. that the periodical payments to the developer were not instalments towards the purchase price but were repayments of a loan from the developer.

HELD

That the date of acquisition of the asset by the appellant was 8.7.1983 when SP Sdn Bhd agreed to the disposal to C Sdn Bhd and that the date of disposal was the same. The notice of assessment was therefore correct and confirmed and the appeal dismissed.

RPGT
Date Of Acquisition

PESURUHJAYA KHAS CUKAI PENDAPATAN
MALAYSIA
RAYUAN NO. PKR 538

DIANTARA
TKF .... PIHAK PERAYU
Dan
KPJHDN .... PIHAK RESPONDEN

ALASAN HUKUMAN

Adapun fakta yang dipersetujui didalam Rayuan ini adalah seperti berikut:-

1. Pihak Perayu adalah Pelupus (Disposer) bagi harta rumah kedai Lot A, Wisma Stephen, Jalan Raja Chulan, Kuala Lumpur. (Selepas ini disebut "Rumah Kedai Lot A").
2. SP Sdn. Bhd. adalah pemaju perumahan.
3. Melalui satu Perjanjian Jual-Beli bertarikh 27.6.1974 yang dibuat diantara SP Sdn. Bhd. dan Perayu (selepas ini disebut "Perjanjian Pembelian" Eksibit B), Pihak Perayu telah memperolehi (acquired) sebuah rumah kedai No. A dengan harga/balasan sebanyak $112,360.00.
4. Melalui satu Perjanjian Jual-Beli bertarikh 8.7.1983 yang dibuat diantara Pihak Perayu dan C Sdn. Bhd. (selepas ini disebut "Perjanjian Penjualan" Eksibit B1), Pihak Perayu melupuskan (disposed) rumah kedai Lot A dengan harga $191,000.00.
5. Pihak Perayu membuat bayaran pembeliannya mengikut terma-terma dan syarat-syarat yang ditentukan didalam Perjanjian Pembelian.
6. (a) Satu Notis Taksiran bagi Tahun Taksiran 1983 bertarikh 21.5.1988 telah diserahkan kepada Pihak Perayu pada 8.6.1988 dimana Pihak Perayu dikenakan Cukai Keuntungan Harta Tanah sebanyak $27,610.00.
   (b) Cukai dan penalti telah dibayar sepenuhnya.
7. Pihak Perayu menyatakan bahawa mengikut Akta 264 yang berkuatkuasa mulai 23.10.1981 keuntungan yang diperolehi daripada jualan itu adalah dikecualikan daripada Cukai Keuntungan Hartanah ataupun, perenggan 24 Jadual 2 Akta Cukai Keuntungan Harta Tanah 1976 tidak terpakai dalam kes ini.
8. Pihak Perayu menyatakan bahawa tidak ada perjanjian yang berasingan mengenai pinjaman yang diberi oleh SP Sdn. Bhd. kepada Pihak Perayu.
9. Pihak Responden menyatakan bahawa keuntungan yang diperolehi adalah keuntungan yang boleh dikenakan cukai mengikut Akta Cukai Keuntungan Harta Tanah 1976 berdasarkan perenggan 24 Jadual 2 Akta Cukai Keuntungan Tanah 1976.

Selain dari fakta yang dipersetujui di atas, fakta-fakta ini telah diperolehi semasa perbicaraan:-

10. Ketika pembelian lot kedai yang berkenaan dibuat pada 1974, Akta Hakmilik Strata 1985 (Akta 318) belum lagi berkuatkuasa dan konsep hakmilik strata masih lagi dalam peringkat cadangan dan tiada seseorang pun memperolehi hakmilik strata di Malaysia ketika itu.
11. Pembelian lot kedai dari pemaju perumahan dengan wang pinjaman dari pihak ketiga seperti dari institusi kewangan atau bank boleh dilakukan semasa itu.
12. Yang menjadi perbezaan di antara pembelian yang dilakukan oleh pembeli seperti di perenggan (11)

dengan Pihak Perayu ialah pembelian oleh Pihak Perayu tidak disusuli dengan perpindahan hakmilik untuk lot rumah kedai yang dibeli itu kepada Pihak Perayu manakala pembeli menurut perenggan (11) akan mendapat hakmilik yang berasingan kepada lot rumah yang dibeli itu.

13. Perjanjian Pembelian yang dimeterai di antara Pihak Perayu dengan Pemaju bertarikh 27.6.1974 adalah perjanjian pembelian dan juga perjanjian pinjaman. Ini bermakna pemaju perumahan bertingkat tersebut SP Sdn. Bhd. bertindak sebagai penjual dan juga pemberi pinjaman wang bersekali.
14. Perjanjian Pembelian tidak menyekat mana-mana pembeli lot rumah kedai ini dari membeli sesuatu lot rumah kedai itu dengan membayar dengan cara lain seperti dengan wang sendiri atau wang dari sumber lain; cuma sekiranya pembelian itu dibeli secara pinjaman yang diambil melaluinya maka Perjanjian Pembelian seperti yang direka oleh pemaju SP Sdn. Bhd. itu mestilah dipatuhi.
15. Pihak Perayu adalah rakan berkongsi didalam suatu perkongsian meniaga jam-jam di bawah nama WHW Company. Walaupun Pihak Perayu adalah seorang rakan berkongsi tetapi beliau mengatakan bahawa beliau membeli lot rumah kedai ini bersendirian walaupun pembayaran awalan iaitu 'advance' dan 'progressive payment' dibayar oleh Pihak Perayu melalui cek perkongsian.
16. Pihak Perayu membeli 3 lot rumah kedai tersebut iaitu Lot A, Lot B dan Lot C.
17. Bagi maksud rayuan ini pembelian dan pelupusan satu lot darinya telah dipersetujui oleh Pihak Perayu dan Pihak Responden untuk menjadi 'test-case'.
18. Pihak Perayu tidak menafikan bahawa selain dari pembayaran advance dan 'progressive payment' pembayaran baki 70% adalah melalui pinjaman yang diberikan oleh SP Sdn. Bhd. Beliau juga tidak menafikan bahawa pembayaran balik pinjaman ini tidak mengikut perenggan 4 sepatutnya.
20. Pihak Perayu mengatakan bahawa pemaju mengeluarkan resit kepadanya tiap-tiap kali pembayaran dibuat tetapi resit-resit itu tidak dapat dikemukakan kepada Mahkamah kerana keraninya ketika itu telah membakar semua resit dan dokumen perkongsian kerana resit-resit dan dokumen tersebut telah rosak diserang anai-anai dan kerani yang berkenaan CKY pula telah meninggal dunia.
21. Dokumen yang dapat dikemukakan oleh Pihak Perayu hanyalah seperti didalam Eksibit "B1", muka 1 sampai 37.
22. Pelupusan dilakukan melalui satu Perjanjian Penjualan bertarikh 8.7.1983 kepada C Sdn. Bhd., setelah Pihak Perayu menjelaskan semua harga belian kepada pemaju SP Sdn. Bhd.
23. Pihak Responden mengemukakan sekeping surat dari pemaju yang disertakan dengan resit penerimaan yang mana telah disalinkan kepada Pihak Perayu dan ditanda Eksibit R1 dan R2. Resit ini menunjukkan diantara lain pembayaran penuh terhadap harga pembelian lot tersebut dan kos berkaitan dengan pelupusan (secara assignment) menurut perenggan 5.08 Perjanjian Pembelian.
24. Isu yang hendak diputuskan ialah samada keuntungan dari pelupusan Lot 1.33 ini kepada C Sdn. Bhd. pada 8.7.1983 boleh dikenakan cukai keuntungan harta menurut Akta Cukai Keuntungan Harta Tanah 1976.

Hujjah Pihak Perayu:

Hujjah Pihak Perayu adalah seperti di dalam hujjah bertulisnya bertarikh 10 Oktober 1991 (bertanda "D"). Ringkasnya beliau menghujjah bahawa beliau tidak boleh dikenakan cukai keuntungan oleh sebab pembelian dan pemerolehan aset itu (Lot A) telah dilakukan sebelum Akta Cukai Keuntungan Harta Tanah 1976 ujud dan pelupusannya pula telah berlaku di luar tempuh yang ditetapkan oleh Akta 264.

Beliau juga berhujjah sebagai hujjah alternatif sekiranya Mahkamah mendapati bahawa pelupusan/pemerolehan tidak berlaku pada tarikh Perjanjian Pembelian pada 27.6.1974, pelupusan/pemerolehan tetap juga telah berlaku kerana beliau telah membelinya mengikut peruntukan perenggan 24(2) Jadual 2 Akta. Beliau berkata peruntukan dan keadaan di mana cukai yang boleh dikenakan menurut perenggan 24(2) tidak terpakai keatasnya kerana pembayaran yang dilakukan olehnya bukannya secara ansuran tetapi secara bayaran 'advance', 'progressive payment', secara "set-off" dari wang pembelian lot-lot lain di Wisma dan dari pemaju yang sama dan akhir sekali secara tunai dengan wang yang diperolehi dari C Sdn. Bhd.

Beliau juga menghujjah bahawa sekiranya Mahkamah mendapati bahawa pembayaran balik itu adalah secara ansuran tetapi pembayaran balik itu bukan terhadap harga pembelian Lot A tetapi adalah terhadap pinjaman wang yang diperolehinya dari SP Sdn. Bhd. yang bertindak sebagai pemberi pinjaman wang dan bukan sebagai pemaju.

Hujjah Pihak Responden:

Pihak Responden pula membalas hujjah seperti di dalam Hujjah Bertulisnya bertarikh 18 Oktober, 1991 (bertanda "E") dan diantara lain hujjahnya ialah bahawa pelupusan Lot A itu patut dikenakan cukai keuntungan kerana pelupusan itu berlaku dalam tahun yang sama dengan tahun pemerolehan iaitu pada 1983. Kesimpulan ini dibuat berdasarkan dari fakta-fakta berikut: Pihak Perayu telah membeli aset ini melalui satu Perjanjian Pembelian yang adalah juga perjanjian pinjaman wang untuk membeli aset tersebut kerana beliau tidak mempunyai wang sendiri yang cukup untuk membayar sepenuhnya harga aset tersebut. Walaupun Perjanjian itu merupakan perjanjian pemerolehan aset tetapi menurut perenggan 6.03 Perjanjian itu hakmilik aset yang dibeli itu tidak dipindahkan kepada pembeli, iaitu Pihak Perayu, kerana semua harga pembelian belum diselesaikan olehnya. Oleh kerana aset yang dibeli itu belum siap dan oleh kerana semua harga pembelian belum dibayar dan tidak diselesaikan sehingga 1983, maka peruntukan perenggan 15 Jadual 2 Akta tidak boleh diambil pakai oleh Pihak Perayu. Perenggan 15 hanya boleh terpakai jika aset itu telah dan boleh dilupuskan tetapi didalam hal ini aset (lot kedai) itu tidak pun dilupuskan

kepadanya sehingga 1983. Aset itu hanya diperolehi dan dilupuskan pada 8.7.1983 setelah mendapat kelulusan dari Pemberi Pinjaman menurut Deed of Assignment bertarikh 8.7.1983, yang dimeterai diantaranya dan C Sdn. Bhd.

Pihak Responden menambah hujjahnya bahawa oleh kerana perenggan 15 tidak terpakai maka dalam keadaan pembelian sebegini rupa maka peruntukan perenggan 24 dengan sendirinya telah terkena keatasnya; khususnya perenggan 24(2)(b).

Membalas hujjah Pihak Perayu bahawa perenggan 24(2)(b) terpakai keatasnya, Pihak Responden menyatakan bahawa perenggan 24 tidak terpakai hanya jika pembayaran pembeliannya diselesaikan bukan dengan secara ansuran. Didalam fakta rayuan ini Pihak Perayu hanya membeli aset ini dengan mula-mula membayar wang "advance" dan `progressive payment' tetapi selepas itu beliau telah membayar balik dengan secara ansuran kepada pemaju SP Sdn. Bhd. dan dengan demikian tertakluk kepada perenggan 24(2)(b) tersebut.

Menjawab hujjah Pihak Perayu bahawa sekalipun pembayaran ini dibuat secara ansuran namun pembayaran ini bukan untuk menyelesaikan harga pembelian tetapi untuk menyelesaikan hutang pinjaman, Pihak Responden menegaskan bahawa apa jua pun wang pembayaran itu adalah terhadap pembelian lot kedai tersebut kerana pemaju dan pemberi pinjaman adalah orang sama. Berlainanlah jika hakmilik lot kedai itu telah berpindah atau terlupus kepada Pihak Perayu semasa menandatangani Perjanjian Pembelian pada 26.7.1974 atau sebelum 1975 iaitu tarikh kuatkuasanya Akta Cukai Keuntungan Harta Tanah ini dan Pihak Perayu telah pula menggadaikan aset itu semula kepada SP Sdn. Bhd. sebagai Pemberi Pinjaman untuk mendapat wang pinjaman darinya untuk membayar balik wang pembelian/ gadaian ini. Tetapi didalam kes di hadapan kita apa yang telah berlaku ialah tiada apa-apa gadaian telah berlaku kerana hakmilik aset itu tidak pernah dilupus kepadanya dan Pihak Perayu tidak pernah mempunyai hakmilik ke atas Lot kedai itu pada bila-bila masa kecuali dan sehingga pada tarikh 8.7.1983 apabila SP meluluskan pemindahan hakmilik itu pada C Sdn. Bhd. Jadi pinjaman yang beliau memperolehi ialah pinjaman untuk membeli Lot kedai itu dan bukan pinjaman gadaian malah pinjaman itu pula dengan jelas mensyaratkan cara-cara membayar balik pinjaman itu ialah dengan secara ansuran. Oleh itu peruntukan perenggan 24(b) semestinya terpakai keatasnya.

Alasan Keputusan:
Dari fakta yang dipersetujui dan yang diperolehi dari saksi, adalah jelas bahawa

1. Pembelian lot kedai ini telah berlaku melalui Perjanjian Pembelian sebelum Akta 1976 berkuatkuasa, tetapi malangnya hakmilik lot tersebut tidak dapat dipindah atau dilupuskan kepada Pihak Perayu kerana menurut Perjanjian Pembelian itu sendiri (perenggan 6.03) hakmilik Lot kedai itu tidak boleh dipindahkan dan dilupus sehingga semua harga pembelian dibayar, malah sehingga ketika itu taraf Pihak Perayu sebagai pembeli adalah hanya sebagai seorang licensee sahaja (perenggan 7.01).

2. Walaupun ketika transaksi ini berlaku iaitu semasa Perjanjian Pembelian itu ditandatangani 26.7.1974, konsep hakmilik strata belum wujud lagi kerana Akta Hakmilik Strata 1985 (Akta 318) belum berkuatkuasa namun suatu pelupusan hakmilik boleh dilakukan diantara pemaju SP Sdn. Bhd. kepada Pihak Perayu umpamanya secara mendaftarkan nama Pihak Perayu di atas hakmilik atau melalui deed of assignment seperti yang dilakukan dengan C Sdn. Bhd. tetapi Perjanjian Pembelian itu sendiri tidak memberi hakmilik kepada Pihak Perayu dan perkara ini jelas termaktub di perenggan 6.03 dan perenggan 7.01.

3. Pada tarikh Akta Cukai Keuntungan Harta Tanah 1976 dan pindaannya Akta 264 berkuatkuasa Pihak Perayu belum pun menyelesaikan semua harga pembelian ini ataupun pinjamannya dan oleh itu hakmilik Lot A tidak mungkin boleh dilupuskan kepadanya.

4. Walaupun baki harga pembelian telah diluluskan kepada Pihak Perayu melalui pinjaman dari SP Sdn. Bhd., hakmilik lot tersebut masih belum berpindah kepadanya, malah Pihak Perayu ditegah membuat apa-apa pelupusan kecuali dengan keizinan pemaju yang juga pemberi pinjaman wang, menurut perenggan 5.08. Ini terbukti apabila Pihak Perayu hendak melupuskan lot kedai itu kepada C Sdn. Bhd. Lihat kandungan dan bayaran seperti yang dicatit di surat dan resit bertanda R1 & R2, dimana Pihak Perayu perlu mendapat terlebih dahulu keizinan pemaju dan pemberi pinjaman wang iaitu SP Sdn. Bhd. sebelum boleh membuat apa-apa 'dealing' dengan Lot A itu.

5. Pendapat kami ialah sekiranya hak milik lot kedai tersebut telah berpindah kepada Pihak Perayu pada tarikh Perjanjian Pembelian pada 27.6.1974 beliau berhak, tanpa mendapat keizinan sesiapapun untuk melupuskan asetnya kepada sesiapa yang ia sukai dan taraf beliau bukanlah sebagai seorang licensee sahaja seperti yang ditetapkan di perenggan 7.01 tetapi sebagai seorang pemilik (proprietor).

6. Untuk mendapat faedah di bawah perenggan 15, sesuatu perjanjian penjualan/ pelupusan itu mestilah memindahkan hakmilik aset yang dilupuskan itu menurut peruntukan perenggan 15(1) atau sekiranya ini tidak ada perjanjian setelah semua balasan atau harga penjualan/pelupusan diterima oleh penjual atau pelupus atau sekiranya perpindahan hakmilik itu telah disempurnakan menurut undang-undang, seperti Kanun Tanah Negara.

   Didalam fakta kes ini walaupun Pihak Perayu telah membuat perjanjian pembelian lot kedai dengan pemaju tetapi pemaju tidak dapat memberi atau memindahkan hakmilik kepadanya kerana Pihak Perayu belum membayar kepada pelupus semua harga pembelian

itu seperti yang disyaratkan oleh Perjanjian Pembelian tersebut dan juga oleh kerana Perjanjian itu sendiri mensyaratkan demikian. Ketiadaan Akta Hakmilik Strata 1985 pada masa itu pada pendapat kami tidak boleh menjadi alasan kerana seorang itu masih boleh membuat perjanjian assignment atau pendaftaran nama boleh dilakukan.

Bersama ini diperturunkan peruntukan perenggan 15 untuk menunjukkan bagaimana hakmilik dapat dilupuskan dan bila masanya:-

"15. (1) Except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place -

(a) where there is an agreement for the disposal of the asset, on the date of such agreement; or

(b) where there is no agreement, on the date of completion of the disposal of the asset.

(2) Except where this Schedule provides otherwise, where there is a disposal of an asset, the date of acquisition of the asset by the acquirer shall be deemed to coincide with the date of disposal of that asset by the disposer to that acquirer.

(3) For the purposes of this Schedule -

(a) the date of completion of a disposal means -

(i) the date on which the ownership of the asset disposed of is transferred by the disposer; or

(ii) the date on which the whole of the amount or value of the consideration (in money or money's worth) for the transfer has been received by the disposer.

whichever is the earlier;

(b) a transfer of ownership of an asset is deemed to take place on the date when the last of all such things shall have been done under any written law as are necessary for the transfer of the ownership of the asset."

7. Memandang bahawa perenggan 15 tidak terpakai kepada fakta kes ini dan memandangkan bahawa peruntukan perenggan 24 telah diungkitkan khususnya perenggan 24(2), maka adalah wajar diperturunkan peruntukan tersebut:

"24. (1) Where in the case of an asset consisting of land -

(a) the land was acquired before the date of coming into force of this Act; and

(b) the construction of a building on the land was either -

(i) begun on or after the date of coming into force of this Act; or

(ii) begun before that date but left unfinished; or

(iii) begun before that date but finished on or after that date, then, without prejudice to any right the owner may have under paragraph (5)(1)(a) or (b) to deduct the cost of construction or any other permitted expenses from the disposal price on any subsequent disposal, the asset shall be deemed to have been acquired on the date the construction was begun in a case where sub-paragraph (1)(b)(i) or (ii) applies or on the date the construction was finished in a case where sub-paragraph (1)(b)(iii) applies at a price equal to the acquisition price of the land:

.....

.....

(2) Where, under an agreement made before the date of coming into force of this Act for the disposal of an asset, payment for the asset is to be in instalments, the date of disposal and acquisition shall be the date on which the ownership of the asset is transferred to the purchaser, unless -

(a) all the instalments were paid before the date of coming into force of this Act, in which case the disposal and the acquisition shall be treated as having taken place before the date of coming into force of this Act.

(b) all the instalments were paid after the date of coming into force of this Act, in which case the disposal and acquisition shall be treated as having been made after that date.

(3) For the purposes of this paragraph the term "instalments" refers to two or more payments of the acquisition price (other than any deposit or advance payment) as stipulated in the agreement as agreed to by the parties."

Pihak Perayu telah menghujjah bahawa peruntukan perenggan 24(2) di atas tidak terpakai keatasnya kerana walaupun perjanjian pembelian itu telah dimeterai sebelum tarikh Akta Cukai Keuntungan Harta Tanah dikuatkuasakan dan walaupun pembayaran sepenuh dibuat selepas tarikh kuatkuasa Akta itu tetapi oleh kerana pembayaran itu bukan secara ansuran (instalment) tetapi secara lain iaitu berperingkat (progressive payment) dan juga "set-off" dari harga pembelian lot lain yang telah dipulangkan semula

kepada pemaju maka peruntukan ini tidak boleh dikenakan keatasnya. Lagipun pembayaran balik itu bukan untuk harga pembelian rumah tetapi untuk melangsaikan hutang atau pinjaman wangnya dengan SP Sdn. Bhd. sebagai peminjam wang.

Menjawab hujjah ini Pihak Responden berkata walaupun Pihak Perayu telah membelinya sebelum tarikh kuatkuasa Akta dan melalui Perjanjian Pembelian tetapi Perjanjian itu malangnya tidak melupuskan hakmilik lot tersebut kepadanya. Tambahan pada itu pula baki kos pembelian dan pembayaran balik telah diteruskan secara ansuran sehingga selepas Akta ini berkuatkuasa dan perbuatan ini pula berbetulan dengan syarat perenggan 4.05 Perjanjian Pembelian iaitu secara ansuran. Syarat perenggan 4.05 memestikan bayaran balik oleh peminjam (Pihak Perayu didalam kes ini) dengan cara ansuran berjumlah 120 kesemuanya, tiap-tiap satu ansuran sebanyak $1,159.96. Dalam hal ini Pihak Responden menerangkan kepada Mahkamah perbezaan diantara bayaran secara ansuran (instalment) dengan bayaran secara berperingkat (progressive) dimana bayaran secara ansuran ialah bayaran berkala dengan jumlah yang sama, manakala bayaran secara berperingkat ialah bayaran mengikut siapnya sesuatu kerja dengan jumlah dan tempuh yang tidak sama. Dalam hal ini Perjanjian Pembelian yang dimeterai oleh Pihak Perayu dengan SP Sdn. Bhd. dengan jelas mensyaratkan penjelasan baki harga pembelian lot kedai itu hendaklah dibayar dengan 120 bayaran ansuran dan syarat Perjanjian ini pula telah tidak dinafikan oleh Pihak Perayu!

8. Kami bersetuju dengan pendapat Pihak Responden. Kami dapati bahawa:

   (i) Pihak Perayu telah membeli lot kedai tersebut pada 27.6.1974 iaitu suatu tarikh sebelum tarikh kuatkuasa Akta 1976.

   (ii) Pembelian dibuat dengan pembayaran 'advance' dan bayaran lain berjumlah 30% kesemuanya manakala bakinya 70% melalui pinjaman. (Fakta ini terdapat dari Fakta yang Dipersetujui dan juga dari keterangan Pihak Perayu sendiri dan berlandaskan dokumen 'B1', R1 dan R2).

   (iii) Tidak ada apa-apa bukti yang boleh menunjukkan bahawa Pihak Perayu telah membuat pembayaran baki 70% ini bukan dengan cara ansuran seperti yang ditekankan oleh Pihak Perayu, malah terdapat resit-resit yang menunjukkan bahawa bayaran baki ini dibuat secara ansuran!

9. Perenggan 13 Jadual 5 Akta Cukai Pendapatan 1976 memperuntukkan bahawa beban membuktikan bahawa sesuatu taksiran itu berlebihan (excessive) atau tidak mengikut undang-undang (erroneous) terletak diatas Pihak Perayu. Perenggan 13 menyatakan:

   "13.The onus of proving that an assessment against which an appeal is made is excessive or erraneous shall be on the Appellant."

   Di sini isu yang dipertikaikan ialah pembuktian samada pengenaan cukai itu menyalahi undang-undang kerana pelupusan aset itu terlepas dari peruntukan Jadual 5 atau sebagai alternatif terlepas dari keadaan seperti ditetapkan oleh para 24. Setelah meneliti fakta-fakta dalam kes ini kami mendapati bahawa Pihak Perayu tidak dapat menunjukkan bahawa fakta-fakta kes ini menyebelahinya. Kami dapati sebaliknya bahawa fakta dalam kes ini telah menyebelahi Pihak Responden iaitu:

   1) Walaupun pembelian telah berlaku pada 27.6.1974 melalui suatu Perjanjian Pembelian tetapi transaksi itu tidak pun melupuskan hakmilik keatas lot kedai itu kepada Pihak Perayu. Ini jelas dari perenggan 6.03 Perjanjian dimana disyaratkan Hakmilik sesuatu tanah hanya akan dipindahkan setelah semua pembayaran harga lot dibayar dan semua harga pembelian ini hanya telah langsai pada 8.7.1983.

   2) Hakmilik keatas Lot A telah diperolehinya hanya pada 8.7.1983.

   3) Hakmilik keatas Lot A telah dilupuskan oleh Pihak Perayu kepada C Sdn.Bhd. pada 8.7.1983 selepas beliau mendapat keizinan SP Sdn.Bhd. untuk melupuskan lot tersebut kepada pembeli iaitu C Sdn. Bhd.

   4) Pembayaran baki harga pembelian telah dibuat secara ansuran sehinggalah 8.7.1983 dan Pihak Perayu tidak dapat membuktikan bahawa baki harga pembelian lot kedai telah dibayar dengan apa jua cara lain khususnya bukan dengan cara ansuran kerana tidak ada keterangan atau dokumen yang menyokong hujjahnya ini.

10. Berdasarkan fakta-fakta kes dan pemutusan-pemutusan di atas, kami menentukan bahawa

    (i) pemerolehan oleh Pihak Perayu telah berlaku pada 8.7.1983 ketika SP Sdn. Bhd. mengizinkannya melupuskan lot kedai itu kepada C Sdn. Bhd., dan,

    (ii) tarikh lot kedai dilupuskan oleh Pihak Perayu pula ialah 8.7.1983 juga iaitu ketika Pihak Perayu menjualnya pada C Sdn. Bhd. setelah selesai membayar balik harga pembelian lot kedai itu kepada SP Sdn. Bhd. dan setelah mendapat keizinannya.

11. Pihak Perayu dan Pihak Responden telah mengemukakan beberapa kes-kes teladan dan rujukan seperti berikut:-
    1. Coren v. Keighley (H.M Inspector of Taxes) 48.T.C. 370.
    2. C.I.R. v. Wesleyan and General Assurance Society 30.T.C.11.
    3. John Cronk & Sons Ltd. v. Harrison (H.M Inspector of Taxes) [1937] A.C.185.

4. Absalom v. Talbot (H.M Inspector of Taxes) [1944] A.C.204.
5. Duke of Westminister v. Commissioner of Inland Revenue 19.T.C.490.
6. Jowitt's Dictionary of English Law, 2nd Edition Vol.1 p.984., on interpretation of the word "instalment".
7. Black's Law Dictionary 5th Edition, p.717 on "instalment".
8. Maxwell on Interpretation of Statutes, 12th Edition, p.256. kaedah tafsiran undang-undng cukai.
9. Canadian Eagle Oil Co. Ltd. v. The King, 27. T.C. 248.
10. London Investment & Mortgage Co. Ltd. v. Worthington 38.T.C. 86/115.
11. Wolfson v. C.I.R. 31. T.C. 141/169.

Kes-kes teladan yang diutarakan telah diteliti tetapi prinsip yang boleh diambil darinya adalah relevan dalam mentafsirkan kandungan sesuatu dokumen tetapi tidak begitu relevan kepada fakta kes di hadapan kami. Adapun fakta kes dalam Rayuan ini berlainan dari fakta kes-kes tersebut kerana kes-kes di atas melibatkan pemaju dan majikan sedangkan fakta kes di hadapan kami ialah berkaitan pembeli dan pemaju perumahan yang juga pemberi pinjaman dan oleh yang demikian rationesnya tidak mengikat kami.

12. Dengan itu kami memutuskan bahawa berdasarkan fakta kes ini yang dipersetujui dan diperolehi dan alasan di atas taksiran yang telah dibuat keatas Pihak Perayu melalui Notis

    Taksiran bertarikh 21.5.1988 sebanyak $27,610.00 adalah betul dan disahkan dan rayuan ini ditolak.

Rider

Berdasarkan fakta-fakta di atas juga, kami berpendapat didalam rayuan ini terdapat suatu keadaan luar biasa iaitu pada tahun 1974 hakmilik strata belum dapat dikeluarkan kerana belum ada Akta mengenainya. Akta mengenainya ujud pada 1985. Sekiranya Akta tersebut telah ujud dalam tahun 1974 iaitu tarikh Perjanjian Pembelian maka Pihak Perayu boleh disifatkan telah memperolehi hakmilik pada lot tersebut pada tarikh itu dan apabila ia melupuskannya pada tahun 1983, pelupusan itu tidak boleh dikenakan cukai kerana pada tarikh itu tempuh pegangan hakmilik itu telah melebihi 6 tahun dan terkecuali dari peruntukan cukai harta tanah mengikut Jadual 5.

PERINTAH KEPUTUSAN

Rayuan ini yang telah dibicarakan pada 13hb dan 14hb Mac 1991, 6hb November 1992 dan 30hb Mei 1993 dengan dihadiri oleh Encik TGT, peguambela dan peguamcara bagi Pihak Perayu dan Puan BH peguam kanan persekutuan dan kemudiannya oleh Puan AAR mewakili Jabatan Hasil Dalam Negeri dan

SETELAH MENDENGAR KEDUA-DUA PIHAK ADALAH DIPUTUSKAN BAHAWA:

1) Perjanjian Jual-Beli bertarikh 27.6.1974 tidak melupuskan hakmilik Lot A kepada Pihak Perayu;
2) Pihak Perayu telah memperolehi hakmilik ke atas Lot A hanya pada 8.7.1983; dan
3) Pihak Perayu telah melupuskan hakmilik Lot A itu kepada C SDN. BHD. pada 8.7.1983.

DENGAN YANG DEMIKIAN

4) oleh kerana pelupusan telah berlaku di dalam tempoh 2 tahun dari tarikh pemerolehan maka taksiran yang telah dibuat ke atasnya itu betul; dan
5) Notis Taksiran bertarikh 21hb Mei, 1988 bagi Tahun Taksiran Tahun 1982 adalah dengan ini disahkan.

Bertarikh di KUALA LUMPUR pada 15hb November 1993.

N O T I C E

CONSULTATIVE PANEL BETWEEN CUSTOMS DEPARTMENT AND PRIVATE SECTOR

As members are aware, the Institute serves on the Consultative Panel between the Customs Department and the Private Sector. The Panel provides a forum for the discussion of practical issues and suggestions relating to customs and excise submitted by the private sector.

The next meeting of the Panel is scheduled to be held in mid May 1994. In this regard, members are invited to inform the Institute of any suggestions or problems that you may have encountered in your work or practice relating to customs and excise which, if the Institute deems necessary, would be raised for discussion by the Panel.

All comments or suggestions are to be submitted in writing and to reach the Secretariat by April 8, 1994.

Employment Income - Scope of Charge -

EXECUTIVE SUMMARY

FACTS

The appellant was an employee of CAL, a company incorporated in and with a place of business in Hong Kong. He was assigned as Area Representative of CAL from 22.1.1979 to 20.1.1981. For reasons of convenience and geographical location and also because the company's largest dealer was located in Malaysia, the appellant resided in Malaysia. CAL did not have an office in Malaysia but the company was allowed to establish a regional office with the approval of the then Ministry of Trade and Industry. A 3-year employment pass was issued to the appellant and a dependant pass for similar period was issued to his wife.

In 1979, he spent 253 out of 344 days in Malaysia and in 1980 he spent 304 out of 366 days in Malaysia. His absence from Malaysia during those years were for periods of leave in the United States, for work visits to Hong Kong to report to and to be instructed by his superiors and for field visits to other countries for which he was responsible.

For the years of assessment 1980 and 1981, the appellant was assessed to additional income tax of RM36,072.20 and RM29,102.40 respectively in respect of income derived from Malaysia for work performed outside Malaysia being "duties incidental and/or attributable to the exercise of the employment in Malaysia". The appellant was unable to provide any records of tax paid elsewhere in respect of his employment income.

HELD

The leave periods abroad were attributable to the exercise of the appellant's employment in Malaysia and the duties performed outside Malaysia were incidental to the exercise of employment in Malaysia. The appeal was therefore dismissed and the Notices of Additional Assessment confirmed.

GROUNDS OF DECISION

A. THE ISSUE

This is an appeal against the two Notices of Additional Assessment both dated 3rd December, 1983 in respect of years of assessment 1980 and 1981 whereby the Appellant was assessed to additional income tax of $36,072.20 and $29,102.40 respectively in respect of income derived from Malaysia as determined by the Respondent for work performed outside Malaysia being "duties incidental and/or attributable to the exercise of the employment in Malaysia" under Section 13(2)(b) & (c) of the Income Tax Act 1967.

2. The issue for determination by the Special Commissioners is whether:-

(a) the part of the Appellant's income which is payment for duties performed by the Appellant in other countries is income which is not derived from Malaysia so that only the part of the Appellant's income which is incidental to the exercise of his employment in Malaysia by virtue of section 13(2)(a) of the Income Tax Act, 1967 is liable to Malaysian income tax and the two Notices of Additional Assessment should be discharged as contended by the Appellant;

OR,

(b) the whole of the Appellant's income paid by CAL his employer is assessable to Malaysian income tax inclusive of income for duties performed by the Appellant in other countries because it is for work incidental to the exercise of the Appellant's employment in Malaysia pursuant to section 13(2)(c) of the Income Tax Act, 1967 so that the income is derived from Malaysia and the Notices of Additional Assessment should stand as contended by the Respondent.

3. Encik S.W., advocate and solicitor (assisted by Cik GKI) appeared for the Appellant while Puan BBH, peguam kanan persekutuan, Jabatan Hasil Dalam Negeri (assisted by Encik ABA, penolong pegawai penaksir, Jabatan Hasil Dalam Negeri) appeared for the Respondent.

4. Hearings were held at Kuala Lumpur on 23rd July and 6th September, 1991.

5. The Appellant called the following witnesses to give evidence:

1. Mr. JMH,
   Area Commercial Representative,
   CFE Limited,
   Wisma S,
   Jalan XX 99/9, Subang Jaya.

2. Encik PCKS,
   Tax Director/Accountant,
   ABCD Sdn. Bhd.
   11th Floor, Wisma FG,
   Jalan Layang Layang,
   Kuala Lumpur.

6. The following documents were produced in connection with the hearing:-

Exhibit A - Statement of Agreed Facts.
Exhibit B - Agreed Bundle of Documents.
Exhibit C - Bundle of Authorities of the Appellant.
Exhibit D - Bundle of Authorities of the Respondent
Exhibit E - Submission of Appellant.
Exhibit F - Submission of Respondent

Exhibit G - Extract of pages 223 and 224 from Stroud's Judicial Dictionary of Words and Phrases (5th Edition) containing definition of the word "attributable".

B. THE FACTS

7. The facts as agreed between the parties and as amended at the hearing are set out in Exhibit 'A' and are as follows:-

(1) The Appellant was an employee of CAL a company incorporated in and with a place of business in Hong Kong which specialises in the sale, distribution and marketing of heavy C equipment and machinery in the Far East region.

(2) By a service agreement dated 1st November, 1978 the Appellant was assigned to be the Area Representative of CAL in the South East Asia region.

(3) The Appellant's tenure as Area Representative was from 22nd January, 1979 to 20th January 1981.

(4) As Area Representative, the Appellant was responsible for:-
   (a) maximising sales opportunity of C products in each location;
   (b) development of an effective dealer organization and merchandising efforts;
   (c) providing necessary technical assistance and support to each dealer organization; and
   (d) compilation of marketing information as required by Regional Marketing Headquarters in Hong Kong.

(5) For reasons of convenience, due to the geographical location of Malaysia in the heart of South East Asia the Appellant had resided in Malaysia and travelled extensively to other countries in the region to carry out duties in the various countries during his tenure as the Area Representative.

(6) CAL does not have an office in Malaysia.

(7) All information compiled by the Appellant from those various countries was reported to his employer, CAL in Hongkong.

(8) By two Notices of Additional Assessment, both dated 3rd December, 1983 for the years of assessment 1980 and 1981 (hereinafter referred to as "the said Notices of Additional Assessment) (Exhibit B pp. 9-10) the Appellant was assessed to additional income tax of $36,072.20 and $29,102.40 respectively for the said years of assessment on account of his income for the work performed by the Appellant in the other countries.

(9) By two Forms Q dated 27th August, 1984 (Exhibit B pp.15-16) the Appellant appealed against the said Notices of Additional Assessment.

C ADDITIONAL FACTS

8. In the course of the hearing, the following are the additional facts found by us:-

(1) The Appellant as one of four Area Representatives of CAL in the South East Asia region with identical duties (as set out in Exhibit A, para 4) made periodic visits to Hong Kong, Indonesia, Singapore, Sri Lanka and Thailand while operating from his base of operations in Malaysia in an office located at Wisma S, Subang Jaya, Selangor Darul Ehsan made available by courtesy of the Malaysian dealer organization viz S (Malaysia) Sdn. Bhd.

(2) The duties of Area Representatives in respect of C heavy equipments were three-fold, namely in the areas of:-
   (i) marketing;
   (ii) mechanical; and
   (iii) management.

   with calls on their time, although dependant on the needs of dealers and customers, about equally apportioned among all three areas.

(3) Both dealer organisations for Singapore and Malaysia namely S Singapore Ltd., and S Malaysia Sdn. Bhd. were at the material time subsidiaries of Malaysian-based conglomerate, FG Bhd.

(4) Although the computation submitted to the Respondent on behalf of the Appellant's employer (Exhibit B, pp.36-37) characterises the entire leave period in each of the years 1979 and 1980 under the category of time spent outside Malaysia on duties performed in other countries, such leave entitlement under the Appellant's service contract (Exhibit B, pp 1-2) was in respect of each full year's service the bulk of which was in Malaysia.

(5) The reason for the Area representatives to be located in Malaysia, quite apart from logistical advantage on account of its central geographical location, was the additional convenience of being with S Malaysia Sdn. Bhd. as the biggest dealer in the region.

(6) CAL was allowed to establish regional headquarters in Malaysia because of requisite approval upon application accorded by the then Ministry of Trade and Industry vide T & I (DT) 08/456/(23) dated 13-2-1978 and pursuant to that a 3-year work pass was issued to him as well as dependent pass for a similar period in respect of spouse. (Exhibit B, pp 19-23).

(7) The monthly and annual reports submitted by the Appellant to the company headquarters in Hong Kong in respect of work detailing progress and market evaluation were all compiled and completed in Malaysia, when not capable of being done in the assigned locations visited.

(8) The data so compiled on field trips to assigned locations was routinely relayed to company headquarters by way of monthly and annual reports.

(9) The written reports were supplemented by briefings to the Appellant's superiors on periodic visits to company's headquarters i.e. two week-long visits in 1979 and two

week-long with two 4-days visits in 1980 (Exhibit 'B', pp. 36 and 37). The total time spent on these visits has also been claimed by the Respondent to be not on work incidental to the exercise of his employment in Malaysia.

(10) The Appellant chose to spend his annual leave entitlement in the United States of America in both years 1979 and 1980 (35 and 33 days respectively).

(11) For years 1979 and 1980, the Appellant had spent a total of 14 days and 22 days respectively in Hong Kong reporting to his employers' regional headquarters there on the business situation/market prospects in the South East Asia region including Malaysia, supplementing the written reports submitted. Likewise the entire period had been categorised under time spent outside Malaysia on duties performed by the Appellant in other countries.

(12) According to his service contract, the countries the Appellant was assigned to were Malaysia, Singapore, Thailand and the Philippines but he had visited Sri Lanka (in 1979 only) and Indonesia (in 1980 only) as well although not the Philippines. The number of days spent in these countries are 47 days in 1979 and 50 days in 1980.

D. CONTENTIONS OF THE APPELLANT

9. It was contended by the Appellant that the additional tax assessed on him is erroneous in being excessive as the income so assessed to tax was income for work not incidental or attributable to the exercise of his employment in Malaysia and thus not derived from Malaysia and therefore not his Malaysian income. This is because:-

1. Facts:

(a) His employer CAL was a company incorporated in and having a place of business in Hong Kong: therefore, he was not exercising a Malaysian employment.

(b) His employer had no branch office in Malaysia but merely a place from which services were rendered, namely at Wisma S in Subang Jaya owned by S (M) Sdn. Bhd. or "S Malaysia" the sole dealer of C heavy equipment in Malaysia.

(c) Although the Appellant, together with his three expatriate colleagues, was resident in Malaysia it was for reasons of convenience only because of its geographical location and proximity to the biggest distributor regionally, which made for close rapport and timeliness of servicing, but he serviced the South East Asia region in the countries mentioned in line with assigned responsibilities.

(d) When in Malaysia the Appellant rendered services to his Malaysia employers' sole dealer and customers. Likewise when in other countries of the South East Asia region services were rendered to and through the independent dealers in such assigned territory and not to the Malaysian dealer and customers.

(e) Although the duties performed by the Appellant and his colleagues as part of job function in each assigned territory were three-fold and parallel comprising marketing, technical and management with time about equally apportioned among all three but they were specific to the problems facing independent dealers and users of C equipment and machinery in each assigned dealer territory;

(f) Although the duties performed by the Appellant and his colleagues in the region were qualitatively similar in nature, those duties cannot be characterised as incidental to their duties in Malaysia as there was no connecting link or nexus; either at the level of dealers or customers.

(g) Monthly reports rendered were based on data compiled on field trips by the Appellant and his colleagues to the employer in Hong Kong where business documents were maintained centrally at company headquarters;

(h) No follow-up service was done in Malaysia for services rendered outside Malaysia on his periodic visits;

(i) A fair and equitable basis for arriving at the Appellant's Malaysian remuneration would be to apply section 13(2) of the Income Tax Act, 1967 and link the Appellant's presence in Malaysia to the exercise of his employment in Malaysia only. In this connection, as had been submitted to the Respondent by his tax agent the Appellant had spent ninety-one (91) days overseas in 1980 and sixty-two (62) days in 1981 and thus the income arising from these 2 periods must be disregarded from the Malaysian income tax;

(j) The Appellant was employed by CAL a foreign company incorporated in and with a place of business in Hong Kong under a contract of service concluded there and his location in Malaysia was for reasons of convenience only in that the bulk of his services were to the Malaysian dealer, S Malaysia but as part of his job function he was also to serve dealers in the Philippines, Indonesia, Thailand and Singapore;

2. Law

(a) In examining the facts sets out above and their application to the provisions of section 13(2)(c) of the Income Tax Act, it was necessary to bear in mind the rules of strict construction particularly in relation to taxing statute. Reference was made to Maxwell On the Interpretation of Statutes (12th Edition) by P. St. J. Langan at page 256 which reads as follows:

"Statutes which impose pecuniary burdens are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words. "In a taxing Act", said Rowlatt J., "one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." But this strictness of interpretation may not always enure to the subject's benefit, for "if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be."

(b) The concern here is with tax on income from employment, in particular precisely where that employment is exercised and whether the income was attributable or incidental to that exercise. No dispute arises over liability to tax where that employment is exercised in Malaysia even if exercised as in the present appeal for and on behalf of a foreign employer, namely CAL of Hong Kong. The reality is that the service rendered to the sole Malaysian dealer i.e. S Malaysia constitutes an exercise of employment in Malaysia and is attributable as such within the meaning of section 13(2)(a). The point in issue is whether when the employment exercised outside Malaysia can be held to be incidental or attributable to the exercise of employment in Malaysia.

(c) The tax treatment of business income offers a contrast in that where a company carries on business in Malaysia and pays taxes thereon but nevertheless has overseas income, that company gets taxed on income derived from Malaysia but where its income is from business attributable to operations outside Malaysia it is deemed not to have been derived from Malaysia. See the case of DGIR v. Robray Offshore Drilling Co. Ltd., High Court Tax Appeal No. A 1/1985 where the decision of the Special Commissioners was upheld by the High Court when it was held that the payments under a hiring agreement were attributable to business carried on outside Malaysia pursuant to section 3 read with section 12 of the Income Tax Act, 1967 and, therefore, not chargeable to Malaysian income tax. The view taken there on the word "attributable" in relation to business income and not employment income as in the present appeal, is nevertheless significant;

(d) As Stroud's Judicial Dictionary of Words and Phases (5th. Edition) points out at p.223, for a result to be "attributable" to anything it must be wholly or, in material part, caused by that thing; therefore, where a workman while being guilty of "serious and wilful misconduct" in his employment met with his death by something, e.g. the fall of a stone from the roof of the tunnel where he was, which had no relation to the misconduct, it was held that the death was not "attributable" to the misconduct, within s.1(1)(c), Workmen's Compensation Act 1897 (c.37) - (Sneddon v. Glasgow Coal Co., 42 Sc.L.R.365,- 7 Fraser 485).

In further amplification of this point could be cited the judgment of Donaldson J. at p.154 in the case of Walsh v. Rother District Council (1978) I All. E.R. 510; He said .....

(e) The word "attributable" in section 13(2)(b) of the Income Tax Act, 1967 carries a broad meaning so long as some connection existed. At the same time, concern here is not overly centred on the word "attributable" within the restricted context of employment but rather on whether given the facts of the case, exercise of employment outside Malaysia was incidental to the exercise of employment in Malaysia. There is no denying that were the Appellant under Malaysian employment, i.e. employed by or on the payroll of a company operating locally, resident or non-resident, then any exercise of employment outside Malaysia would be both attributable and incidental to exercise of employment in Malaysia. Also cited as throwing some light on the word "attributable" is the case of Central Asbestos Co. v. Dodd (1972) 2 All E.R. 1135.

(f) Mere physical residence of the Appellant in Malaysia during the material periods did not count as a factor determining where his employment was exercised. For residence to be relevant, express provision in law to that efect was needed. In support, the following case was cited: Lloyd v. Sulley (1884) 2 TC 37.

(g) No authority with direct bearing on the term "incidental" in relation to the exercise of employment existed. That being so, the case of Robson v. Dixon 48 TC 527 was tentatively cited as providing insight on the word "incidental" in taxing statutes, particularly U.K. tax legislation, although it was stressed that the facts there were applied in respect of cognate duties.

3. On the meaning of the term "incidental" in relation to business income and not employment income as in the present case, the Privy Council had in the case of Great Eastern Life Assurance Co. Ltd. v. DGIR (1987) 2MLJ 529 taken the approach that by virtue of the terms of the express provisions on "incidental gross income" under section 60 of the Income Tax Act that company's

presence in and operation in Malaysia had brought income outside the Malaysian Insurance Fund into charge to tax.

4. Turning to the Appellant's case, a rational approach consistent with that of paragraphs 21 and 22 of Schedule 6 to the Income Tax Act, 1967 dictates that the exercise of employment in Malaysia be linked to the period of physical presence in Malaysia with only the remuneration attributable thereto attracting Malaysian tax.

5. In summing up, the Appellant, stated as an overwhelming fact that the Appellant's employer CAL, had no presence in Malaysia as via registration under the Companies Act 1965, a permanent establishment as defined under Double Taxation Treaties or registration of a place of business under the Business Registration Act. The Appellant and his other colleagues were located in Malaysia primarily for reasons of convenience in servicing effectively the biggest dealer in the South-East Asia region i.e. S Malaysia. Such "parallel" services rendered intermittently by the Appellant outside Malaysia could be characterised as being directed to independent dealers and their associated customers with no nexus of any kind in the services rendered to those in the region and the Malaysian dealer and customers, he added. Upon the facts of the case and the authorities cited, it was urged that the Appellant's duties outside Malaysia could in no way be incidental or attributable to the exercise of employment in Malaysia and the income arising therefrom be derived from Malaysia and be taxable under the Malaysian tax law. Accordingly, Appellant prays that the appeal be allowed and the said Notices of Additional Assessments be discharged.

E. CONTENTIONS OF THE RESPONDENT

(1) For the Respondent, it was argued that the facts of the case, the agreed facts and those additional facts adduced in the course of evidence taken together and the applicable law were solidly on the side of the Respondent making such employment as was exercised by the Appellant in his assigned dealership territories outside Malaysia was incidental and attributable to his employment in Malaysia: This is because the Appellant was from the inception assigned by his employer, CAL to be located in Malaysia and was based in Malaysia throughout the two years. In the 2-year tour of duty, he spent a preponderant period (253 out of 344 days in 1979 and 304 out of 366 days in 1980) servicing the Malaysian dealer, S Malaysia which also significantly was the largest dealer in the South East Asia region. As for the time spent outside Malaysia, close scrutiny reveals that the Appellant spent at his own option his entire leave eligibility both in 1979 and 1980 (35 and 33 days respectively) in the U.S.A. and made a number of work visits (absorbing 14 days and 22 days in 1979 and 1980 respectively) to Hong Kong to report to and be instructed by his superiors. In this fashion, his Malaysian work-related visits would be seen to account for the greater part even of the periods of absence overseas.

(2) The Facts
Besides the facts agreed the following are additional facts disclosed:

(a) The Appellant's colleague, JMH (AWI) had testified that both he and the Appellant albeit at different times served as Area Technical Service Representatives whose job function obliged them to perform common duties specifically:

"..... to provide assistance and advice to the C equipment dealers and customers in the various countries and to compile reports of C's performance and marketing efforts for the company in each location". (Exhibit B, pp. 26-29, 2nd para item 2).

The Respondent's submission is therefore given the open admission that the Appellant's duties "in each location are qualitatively similar in nature". his occasional forays on assignments to other foreign locations must be viewed in proper perspective in relation to the totality of the discharge of the functions of his employment, the overwhelming bulk of it in Malaysia from his base alongside the biggest dealer in the region. (Exhibit B, pp.47 - 48).

(b) Much was sought to be made of the Appellant performing "parallel" services in the other assigned dealer territories but unrelated to Malaysia for reasons that:

(i) the dealers and customers in each were independent of one another; and

(ii) such services related solely to the prevailing circumstances in each. (Exhibit B, pp 47-48)

To this the Respondent submits it seems inconceivable even far-fetched in this day and age, given the ease of and accessibility to modern communications and information technology, for the Appellant to suggest that while physically in Malaysia he invariably paid scrupulous attention to the Malaysia dealer and Malaysian needs and problems to the total exclusion of the needs and problems in his other assigned dealership territories. Surely the preoccupation cannot be such as to preclude for example, technical advice or directions on marketing strategy in the other territories in response to distress calls relayed by telephone and the like even to and at his Malaysian residence.

(c) As regard the Appellant's occasional field visits to other countries which he

was assigned to and had responsibility for or to company headquarters in Hong Kong were ordinarily of short duration not exceeding a week (except on one solitary where the visit was for 9 days). Under these circumtances, the Respondent submits that the work involved could hardly be suggested as being substantial or complex in nature. On the contrary, since his Malaysian duties alongside the biggest C dealer in the region had been shown to be onerous in the scheme of things, this tends to suggest that the work outside Malaysia could rightly be regarded as connected or incidental to work in Malaysia. Reinforcing and underpinning such an inference is the evidence adduced in the course of hearing to the effect that when the assignment is not completed in the assigned country visited, it would be brought back to base for further work preparatory to inclusion in monthly reports to be submitted later to the Company headquarters at Hong Kong.

(d) Respondent also submitted that there has to be a duty of caution and care in evaluating and accepting the evidence of the Appellant's colleague JMH (AW1), in the non-attendance of the Appellant to present personally evidence in support of his appeal. Disparities and discrepancies could not, therefore, be ruled out, for example the witness's mentioned of the Appellant's frequent field trips to the Philippines but which the Appellant had not visited even once in his 2-year stint of duty, although on paper it featured as one of four countries Appellant had responsibility for (Exhibit B, pp 1-2).

Taking due account of the foregoing considerations of the facts, it is the Respondent's submission that any exercise of the Appellant's employment outside Malaysia through his field trips was nothing but incidental to the exercise of his employment in Malaysia and in reality was so inter-twined that it could not realistically be separated one from the other. It therefore follows that by virtue of Section 13(2) of the Income Tax Act 1967 his entire income stemming from his employment outside Malaysia is deemed to be derived from Malaysia and so properly chargeable to tax in Malaysia.

(2) The Law

By way of decided cases, definitions and guidance from textbook on taxation, Respondent cited the following:

(a) In a Singapore case - Re F. (1958) S.B. XXIV - involving a Frenchwoman, employed by a company in France who had spent 86 days in Singapore in 1957 promoting her employer's line of products and who had her remuneration credited to her French bank account, with her employer company in France defraying her hotel, travelling and out-of-pocket expenses, the decision on appeal to the Income Tax Board of Review Singapore as reproduced in Ahmad Ibrahim's Income Tax Law of Malaysia & Singapore Vol. I, pp 488-489 (under "Gains or Profit from Employment") was in the following terms:

"Upon the construction of Section 10(1)(b) and 12(4) of the Income Tax Ordinance the Board is of the opinion that the appellant was exercising an employment in Singapore and that the gains and profits therefrom are deemed to be derived from Singapore notwithstanding that they were not received in Singapore. In the opinion of the Board Section 13(3) does not detract from the above construction. The appeal is dismissed." (Emphasis supplied by the Respondent.)

(b) In the U.K. case of Robson v Dixon (1972) 3 All ER 671) the expression " merely incidental to" was stated as needing to be given its natural meaning in ordinary use in the sense of denoting an activity (there the performance of duties) which did not serve any independent purpose of its own but is carried out to further some other purpose.

(c) According to Black's Law Dictionary, 5th Edition 1979, the expression "incidental to employment" is given the meaning as:

"A risk is "incidental to employment" within Worker's Compensation Act, when it belongs to or is connected with what a worker has to do in fulfilling the duties of his or her employment".

According to the same dictionary the term "incidental" is listed, among others as meaning "something incidental to the main purpose."

(d) In their volume Whiteman and Wheatcroft on Income Tax, 2nd Edition, co-authors Peter G. Whitman and David C. Milne state at p. 60.:

"To determine whether duties in the United Kingdom are "incidental" it is necessary to consider both the nature of the duties in the United Kingdom and their relation to the duties abroad. If the overseas representative of a United Kingdom employer comes to the United Kingdom merely to report to his employer or to receive fresh instruction, the

duties so performed in the United Kingdom will usually be regarded as incidental to the duties carried out abroad .." (Emphasis supplied by the Respondent).

(3) Onus of Proof:

(a) Pursuant to paragraph 13, Schedule 5 to the Income Tax Act 1967 the onus of proving that any assessment appealed against is excessive or erraneous is on the Appellant and it is the Respondent's contention that the onus has not been discharged. For example although requested by the Respondent to clarify what, if any, tax was paid elsewhere in respect his employment income, the tax agent of the Appellant's employer company cited non-availability of relevant records (as they had been consumed by fire) thus precluding any such confirmation. (Exhibit B, p.32). Considering that the service agreement (Exhibit B, pp 1-2) imposes on Appellant the clear-cut responsibility for settling his income tax liabilities, adverse inference should be made on his failure to provide the information sought by making the inference that no such tax was in fact paid to other tax jurisdictions.

(b) CAL denied having an office in Malaysia but the evidence showed the Company did receive upon application an approval to establish a regional headquarters in Malaysia in terms of a letter of approval from the Ministry of Trade and Industry dated 13.2.1978. Again when asked how he operated at the regional headquarters whilst in Malaysia the Appellant stated he was given permission to use Wisma S Building in Subang Jaya as a forwarding address, being convenient as being the centre of the Company's activities in the region and being proximate to its biggest dealer the S Malaysia Co. Bhd., but denied that being his office.

The Appellant did not offer any other address of his office either despite request from the Respondent but it is evidenced after his forays or occassional visits to his assigned territories he would return to Kuala Lumpur!

(4) Conclusion:

(i) Upon scrutiny of the facts of the case and applying the law as contained section 13(2) of the Income Tax Act 1967, clearly the periods of leave that were spent in the United States pursuant to the contract of employment in 1980 and 1981 are part and parcel of the exercise of the employment in Malaysia or in the words of the Act "attributable to the exercise of the employment in Malaysia" and therefore deemed to be derived from Malaysia".

(ii) As regards the other assorted absences from Malaysia on field visits to dealers and customers in other signed territories the work involved though parallel are not independent of that other but so inextricably connected to the exercise of his employment in Malaysia in the words of section 13(2)(c) incidental to the exercise of his employment in Malaysia and should also therefore be aggregated and the income arising therefrom be aggregated as being derived from Malaysia also.

(iii) In sum, taking all relevant facts into consideration and applying the law, the Respondent submits that the appeals be dismissed and that the said Notices of Additional Assessment for Years of Assessment 1980 and 1981, both dated 3rd December 1983 be confirmed.

F. REASONING FOR DECISION

16. Since this appeal is concerned with section 13(2) of the Income Tax Act, 1967, it is convenient here to set out its relevant provisions as pertaining to the relevant years of assessment:

"13. (2) Gross income in respect of gains or profits from an employment -

(a) for any period during which the employment is exercised in Malaysia;

(b) for any period of leave attributable to the exercise of the employment in Malaysia;

(c) for any period during which the employee performs outside Malaysia duties incidental to the exercise of the employment in Malaysia;

(d) ..... or) Omitted as not

(e) .....) relevant.

shall be deemed to be derived from Malaysia."

17. Now the key words concerned with in the present appeal are the trio of "exercise", "attributable" and "incidental". None of these has been defined in section 13 itself, in section 2 or indeed elsewhere in the Income Tax Act, 1967. It is, therefore, left to be decided what meaning to attach to each of them in the specific context of employment in relation to the income of an employee. The examples cited by the Appellant and the Respondent are found to be drawn from fields other than employment - business world and/or industrial relations - and therefore offer scant help.

18. However, in the Appellant's sub-

mission it has been freely conceded, in effect, that for employment to be exercised in Malaysia the said employee's residence is a necessary pre-condition but not in itself a sufficient one. (paras 11 & 38, Exhibit E). Therefore the issue for determination centres round only the remaining two key words "attributable" and "incidental". As there are no definitions provided and no case authorities cited directly in point except for a case heard before the Singapore Income Tax Board of Review, a tribunal of co-ordinate jurisdiction, resort to dictionary for meanings in ordinary everyday usage is inevitable. The Shorter Oxford Dictionary (Clarendon Press, Oxford, 1977) provides the following by way of being closest to the facts before us:

"Attributable" - Capable of being attributed especially as owing to.

"Incidental" - Occurring or liable to occur in fortuitous manner, or in subordinate conjunction with something else, casual as of a charge or expense: such as is incurred apart from the primary disbursements'.

The Appellant rendered some assistance in the definition of the word "attributable" by citing some examples found in English cases and in Stroud's Judicial Dictionary of Words and Phrases (5th Edition) but all the examples cited are all in fields other than income tax relating primarily to the business world and industrial relations arena. For example in Stroud's at p.223 it states:

"For a result to be `attributable' to anything it must be wholly, or in material part, caused by that thing; therefore, where a workman, while being guilty of "serious and wilful misconduct" in his employment, met with his death by something, e.g the fall of a stone from the roof of the tunnel where he was, which had no relation to the misconduct, it was held that the death was not "attributable" to the misconduct, within s.1(1)(c), Workmen's Compensation Act 1897 (c.37) - (Sneddon v. Glasgow Coal Co., 42 Sc. L.R. 365: 7 Fraser 485)."

and again in the case of Central Asbestos Co. v. Dodd [1972] 2.All.E.R at p.1141, Lord Reid said:

"....`attributable'. That means capable of being attributed. `Attribute' has a number of cognate meanings; you can attribute a quality to a person or thing, you can attribute a product to a source or author, you can attribute an effect to a cause. The essential element is connection of some kind."

After quoting the above pronouncement approvingly Donaldson J in Walsh v. Rother District Council (1978) 1 All.E.R 510-514 at p.514 had occasion to add as follows:

"Suffice it to say that these are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient."

19. Be that as it may, it cannot be denied that there is a common element permeating through the two words and that is an element of linkage, however casual, fleeting or ephemeral it may be in any given situation. Still, it has not been suggested that the two words are synonymous to the point of being inter-changeable in ordinary every-day usage. So, it would be instructive to examine carefully also in precisely what respects they differ. Taking the word "attributable" first, for anything to be attributable to some other thing, there must exist a connecting link of causality which provides the nexus to the progenitor. As for the word "incidental", any association, if at all, between the object and that which is incidental can be purely fortuitous in being a chance occurrence such as being no more than occasional incidents or minor adjuncts in the overall larger scheme of things. It will, therefore, be seen that the word "attributable" denotes a stronger direct causal relationship whereas the word "incidental" stands for a looser association as dictated by events and circumstances even of a chance nature.

The issue for determination then centres round

(a) firstly whether the leave period/periods and by extension the corresponding leave pay, is/are attributable to the exercise of employment in Malaysia,

and

(b) secondly whether the duties performed outside Malaysia viz

(i) in Hong Kong reporting to and being instructed by management at Corporate Regional Marketing Headquarters, and

(ii) in the assigned territories of Singapore, Indonesia, Thailand and Sri Lanka.

are duties incidental to the exercise of employment in Malaysia.

a. Whether the leave period is attributable to the exercise of employment in Malaysia:

Thus what is the linkage or connection between the annual leave periods of the Appellant with his employment in Malaysia? We find the following:

1. Although the contract of employment was signed in Hong Kong the Appellant was actually assigned to the South East Asian territories namely to the countries aforesaid with a base in Malaysia i.e. at Wisma S, a building of S Malaysia Bhd. in Subang Jaya, Malaysia.

2. Although the Appellant denied having any office or base in Malaysia (specifically in Subang Jaya at Wisma S) the facts do not support him: firstly, even though Wisma S was not the registered office of the Appellant yet that was his official correspondence address which was made available by the Company's local sole dealer i.e. S Malaysia Bhd., secondly, work pass and dependant's pass were obtained from the

Department of Immigration Malaysia for him to work in Kuala Lumpur and for himself and spouse to be resident in Malaysia.

3. Through regular remittances of funds from his Hong Kong bank account to Malaysia the family's local living and maintenance expenses were taken care of adequately.

4. Although the Appellant chose to spend his entire annual leave eligibility in the USA, the contract of employment signed in Hong Kong did not specify where the leave ought to be utilised and he was free to spend it in Malaysia if he so opted.

5. Finally, there has been no evidence whatsoever of the leave pay attributable to the leave period being subjected to tax in other jurisdictions.

20. The entire 2-year Malaysian-based assignment as substantiated by the facts of the appeal is neatly subsumed into the following broad categories, with the time apportionment indicated against each, and in the interests of ready comparison for perspective in ascertaining the relative weightage or significance of each vis-a-vis the overall job description implied by the functional responsibilities enumerated in the service agreement:

(a) Time spent in Malaysia on active performance of duties to the sole Malaysian dealer and associated Malaysian customers: 253 days in 1979 and 261 days in 1980;

(b) Annual leave entitlement for each of the years 1979 and 1980 which at the Appellant's option were spent totally in the USA: 35 days in 1979 and 33 days in 1980,

(c) Time spent on periodic visits to corporate regional marketing headquarters in Hong Kong to brief and be instructed by management on the due performance of duties under the Malaysian-based regional employment: 14 days in 1979 and 22 days in 1980; and,

(d) Time spent outside Malaysia on duties to sole dealers and sets of customers in other assigned territories of the South East Asia region (Singapore, Indonesia, Thailand and Sri Lanka) - 47 days in 1979 and 50 days in 1980.

21. And in the interests of a comprehensive and systematic evaluation of the duties involved attendant upon the Appellant's job description encompassing duties in three-fold areas namely marketing, technical and management, over and above the residence connection, there are a number of related factors which merit consideration and these are:

(a) the location where the contract of employment was concluded;

(b) the location where work records are stored, maintained and monitored;

(c) the location where duties in exercise of employment in regional appointment are substantially performed;

(d) the identity and location of the end-users or beneficiaries of services under the contract of employment;

(e) the basis and manner of remuneration under the contract of employment; and

(f) the apportionment of time as between the relevant job functions in a Malaysian context and regional job functions exercised outside Malaysia.

22. In determining the two issues posed, it is therefore vital that the facts of the case as agreed and found be analysed with reference to the above factors. To begin with, the Appellant's service contract contains no stipulations on the quantum of annual leave eligibility or where it should be spent. Evidence was, however, given to the effect that the annual leave eligibility was 35 days for each year of completed service and it was at the Appellant's option for reasons of his own that in both material years such leave was spent exclusively in the USA. However no independent work serving a purpose all its own was carried out during leave periods since there were no stipulations to that effect by the employer.

Next concerning factors (a) the location where the contract of employment was concluded and (b) the location where work records are stored, maintained and monitored, while at first sight the Hong Kong factor seems pre-eminent, there is evidence of approval by the relevant authorities on the basis of application made on behalf of the employer company of the regional headquarters set-up in Kuala Lumpur and pursuant to that the issuance of work pass for employment as Technical Service Representative with CAL in Kuala Lumpur only and simultaneously issuance of dependant's pass for the spouse. Although his service agreement made no mention of the specific location he was being assigned to, subsequent developments point to a Malaysian-based regional appointment particularly when factors (c) the location where duties in exercise of employment in regional appointment are substantially performed and (d) the identity and location of the end-users or beneficiaries of services under the contract of employment, are taken into account. It stands to reason that the post allowance covered in the service agreement to top up local purchasing power can be based only on Malaysian circumstances and imperatives.

In any event, the Appellant was not involved in a series of fragmented employments with individual sole dealers but worked under one composite contract of service with merely the beneficiaries of services being the sole dealer and sets of customers in each location which circumstance can in no way detract from the fact of one composite contract of service. Taking factors (e) the basis and manner of remuneration under the contract of employment; and (f) the apportionment of time as between the relevant job functions in a Malaysian context and regional job functions exercised outside Malaysia together, there is evidence of the Malaysian sole dealer being the

biggest regionally and it stands to reason that the Malaysian market was also the biggest, all pointing to Malaysian pre-eminence in the Malaysian-based regional employment and source of income. In this connection, although it was stated that the emoluments were credited monthly in Hong Kong, there is also evidence of regular remittances to Malaysia from his Hong Kong bank account for the family's living expenses and upkeep.

Marshalling all these factors together with the various facets of his job there is ample evidence to show that the leave taken in the 2 years of his service had overwhelmingly stemmed from his exercise of employment in Malaysia and is therefore attributable to the exercise of the said employment.

(b) Whether the duties performed outside Malaysia are duties incidental to the exercise of employment in Malaysia.

(i) **Time spent on duty visits to Company's Regional Marketing Headquarters in Hong Kong to brief and receive instructions**

The six forays over the two years to Hong Kong - ordinarily of a week's duration except on two occasions when they were even shorter ones of four days' each - from the Malaysian-base of operations, come to be seen as an off-shoot of the Malaysian-based regional employment in that these visits besides supplementing the written reports - both monthly ones and special ones dealing with visits abroad or specific topics of interest - were necessary for ensuring effectively that the Appellant operated at all times four square within the policy framework and in conformity with commercial objectives and strategies established/sanctioned by corporate regional marketing headquarters in Hong Kong. In this sense, for all practical purposes, the time so spent, far from being in independent employment divorced from the Malaysian employment was so closely associated in a conjoint and coordinate manner as to be closely intertwined and interlinked with the Malaysian-based regional employment in the sense of being mutually reinforcing and inter-dependent. The consultations in Hong Kong are, therefore, seen to enhance the effectiveness of the Malaysian-based regional employment and for that reason, the time so spent on duties there stands to be seen within the framework of the larger setting of the Malaysian-based job and income since the raison d'etre for the consultations was to strengthen and enhance the effectiveness of the Appellant's job performance in his Malaysian-based regional employment. Seen in context, the total period spent on duties in Hong Kong are clearly on duties not merely incidental but also attributable to the exercise of the employment in Malaysia.

(ii) **Time spent on duties servicing the sole dealers and customers in the assigned territories of Singapore, Indonesia, Thailand and Sri Lanka.**

Turning now to the Appellant's performance of so-called "parallel" duties in the assigned territories of Indonesia, Singapore, Sri Lanka and Thailand with a view to determining whether these in the aggregate were duties incidental to the exercise of employment in Malaysia, consideration of both the scale and nature of such duties in relation to those of the regional Malaysian-based employment within Malaysia assumes significance. Firstly marketing activities and after-sales servicing in those assigned territories, were no different qualitatively except for the smaller scale of operations from the corresponding activities within Malaysia. Secondly, the rationale for locating the regional set-up in Kuala Lumpur/Subang Jaya ostensibly is its central geographic location in the hub of the assigned territories. Although the Appellant's colleague A.W.1 ventured the testimony that the 4-man team could have with equal facility operated out of Singapore commuting to Malaysia as needed however the evidence did disclose that Malaysia being the biggest and most important market for C plant, machinery and equipment and the Malaysian distributor the largest in the region, Malaysia was chosen for its competitive edge. Thirdly the optimum choice for locating the team right alongside the Malaysian sole dealer made for both cost-effectiveness and timeliness of servicing, as admitted by Mr. JMH, being principal factors in helping to maintain a competitive edge. Fourthly the pattern of the travels being brief ones directly to and from the assigned territories underscores the significance of Malaysian-based operations vis-a-vis the rest. Fifthly experience of the diversified and large Malaysian market for C plant, machinery and heavy equipment made for trade-offs in the smaller markets in the assigned territories. Sixthly, the open admission that reports on field visits to the assigned territories were routinely incorporated in monthly reports from Subang Jaya/Kuala Lumpur to Company's Regional Marketing Headquarters in Hong Kong and when for one reason or another reports were not completed in the territory visited, they were brought to Subang Jaya/Kuala Lumpur for completion and onward transmission to Hong Kong. Seventhly, Hong Kong was merely the locus of the Company's Regional Marketing Headquarters but technical directions and guidance had to be sourced from Corporate Headquarters in Illinois, USA just as in the case of Malaysia. Eighthly, Malaysia was a good vantage point for the Appellant's Company to keep a watchful eye on sales and future promotional activities in

respect of plant machinery and heavy equipment in the South East Asia region vis-a-vis corresponding marketing activities and plans of competitors in the interests of maintaining and enhancing if possible, a competitive edge. Ninethly, to take matters to a logical conclusion all the way, there has been no evidence whatsoever to the effect that tax was actually paid in the other tax jurisdictions on the income apportioned as to be consistent with the "parallel" duties in the assigned territories!

23. It has been urged upon us that the dealers and customers in the various territories were independent of each other and the duties performed in each were market-driven. This line of reasoning has been used to assert that the so-called "parallel" services could not possibly be linked to work performed in Malaysia, let alone forming part of Malaysian employment. Given the facts and the evidence and the definition above stated to our mind an organic link is not a pre-requisite for the duties performed outside Malaysia to be constru ed as duties incidental to the exercise of the employment in Malaysia within the meaning of section 13(2)(c) of the Income Tax Act, 1967. In the present case, even if the duties in the other assigned territories were conjoint and co-ordinate in nature, the other surrounding circumstances such as the manner in which they were performed, to what purpose, and the limited time so spent compared to time spent in Malaysia can well be supportive of a finding to the effect that such duties are not merely fleeting but incidental to the exercise of employment in Malaysia.

24. In the present appeal, given all the pertinent circumstances as substantiated by the agreed facts and those additional facts adduced in evidence, the balance of probabilities overwhelmingly points both to the leave period being attributable to the exercise of employment in Malaysia and the duties performed in locations other than in Malaysia - in Hong Kong, Singapore, Indonesia, Thailand and Sri Lanka to be duties incidental to the exercise of employment in Malaysia.

25. Paragraph 13 of the Schedule 5 to the Income Tax Act, 1967 prescribes that the onus of proving that an assessment against which an appeal is made is excessive or erroneous is on the Appellant. In the present appeal, that onus has not been seen to be discharged.

26. Taking due account of the agreed facts and additional facts found in evidence and applying these to the provisions of section 13(2) of the Income Tax Act 1967, it is our finding that:

(i) the leave period was attributable to the exercise of the Appellant's employment in Malaysia; and

(ii) the duties performed outside Malaysia namely Hong Kong, Singapore, Indonesia, Thailand and Sri Lanka are duties incidental to the exercise of employment in Malaysia,

and therefore the whole of the Appellant's income for the years of assessment 1980 and 1981 is covered by limbs (a),(b) or (c) of section 13(2) and on that footing deemed to be derived from Malaysia and so correctly assessable to tax in the respective basis periods for Years of Assessment 1980 and 1981.

We accordingly dismiss the appeal and confirm both the Notices of Additional Assessment for Years of Assessment 1980 and 1981 dated 3rd December, 1983.

PERINTAH KEPUTUSAN

RAYUAN INI yang telah ditetapkan untuk perbicaraan pada 23hb Julai, dan 6hb September 1991 di Kuala Lumpur dengan kehadiran Encik SW dan Cik GKI, peguambela dan peguamcara mewakili Pihak Perayu dan Puan BBH, peguam kanan persekutuan, Jabatan Hasil Dalam Negeri, mewakili Pihak Responden, dan

SETELAH MENDENGAR KEDUA-DUA PIHAK ADALAH DIPUTUSKAN BAHAWA;

(1) bahawa tempuh cuti adalah berhasil (attributable) dari penjalanan penggajiannya di Malaysia,

dan

(2) perlaksanaan tugasnya di luar Malaysia khususnya di Hong Kong, Singapura, Indonesia, Thailand dan Sri Lanka adalah tugas yang bersampingan (incidental) dengan penjalanan penggajiannya di Malaysia,

dan dengan yang demikian kesemua pendapatan Pihak Perayu bagi tahun-tahun 1980 dan 1981 adalah termasuk di bawah seksyen kecil (a),(b) dan (c) kepada seksyen 13(2) dan dengan sebab itu dianggap berpunca dari Malaysia dan taksiran tambahan yang dikenakan bagi Tahun-tahun Taksiran 1980 dan 1981 adalah betul.

MAKA ADALAH DIPERINTAHKAN BAHAWA

Rayuan ini ditolak dan disahkan kedua-dua Notis Taksiran Tambahan bagi Tahun 1980 dan 1981 masing-masing bertarikh 3hb. Disember 1983.

Membership Status of MIT as at January 20, 1994

Honorary Fellows	4
Fellows (Founder Council Members)	15
Associates*	638
	653

* **Associate Members**

Public Accountant of MIA	408
Registered Accountant of MIA	50
Licensed Accountants of MIA	15
Advanced Course Exam of IRD	69
Advocates & Solicitors	4
Approved Tax Agents Sec. 153, ITA	92
	638

Note
It is proposed that a directory of members will be published and distributed to all members

CONTRIBUTION

Tax Nasional invites readers to contribute articles for publication. By contributing to the Tax Nasional, you will gain valuable recognition and our readers will benefit from sharing your experience. An honorarium will be paid to articles which will be published.

TAX NASIONAL SUBSCRIPTION FORM

Post this form to
MALAYSIAN INSTITUTE OF TAXATION
Level 4, Dewan Akauntan,
No. 2, Jalan Tun Sambanthan 3
Brickfields, 50470 Kuala Lumpur
Malaysia
Telephone : 03-2745055
Facsimile : 03-2741783

SUBSCRIPTION RATES		
	RATES	
	PER ISSUE	PER ANNUM
Non MIT member	RM 20.50	RM 62.00
Student	RM 5.50	RM 22.00
Overseas	US$ 11.50	US$ 36.00

The above prices are inclusive of postage.

Please Use Capital Letters

Mr/Mrs/Miss _____ Designation _____

Address _____

_____

_____ Poscode _____

Tel No. _____ Fax No. _____

I enclose a cheque/money order/bankdraft payable to Malaysian Institute of Taxation for RM/US$ _____ for

_____ copy/copies or _____ year/years' subscription of Tax Nasional.

Note: *For overseas subscription, payment is accepted by bankdraft only.*

Malaysian Institute Of Taxation

Jointly present

The Second National Tax Conference On

'Globalisation Of Malaysian Companies'

On 7 April 1994

Session I	: The China Syndrome
Session II	: Double Tax Treaties
Session III	: Current Investment Flows
Session IV	: Corporate Tax Changes-Implications and Effectiveness

at DEWAN TUN DR. ISMAIL, PUTRA WORLD TRADE CENTRE.

For enquires please call:

Ms. Chew Soon See, CPD Officer, Malaysian Institute of Accountants
Dewan Akauntan, No. 2 & 4, Jalan Tun Sambanthan 3, Brickfields, 50470 Kuala Lumpur.
Tel: 03-274 5055. Fax: 03-274 1783

Malaysian Institute Of Taxation

HOW TO BECOME A MEMBER OF THE MALAYSIAN INSTITUTE OF TAXATION

Benefits and Privileges of Membership

The Principal benefits to be derived from membership are:

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

Qualification Required For Membership

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

Associate Membership

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

Fellow Membership

1. A Fellow may be elected by the Council provided the applicant has been an 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.
2. Notwithstanding, Article 8(1) of the Articles of Association, the First Council Members shall be deemed to be Fellows of the Institute.

Application of 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 your application.
2. Two identity card-size photographs
3. Fees:

	Fellow	Associate
(a) Admission Fee:	RM300	RM200
(b) Annual Subscription:	RM100	RM75

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

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

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

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