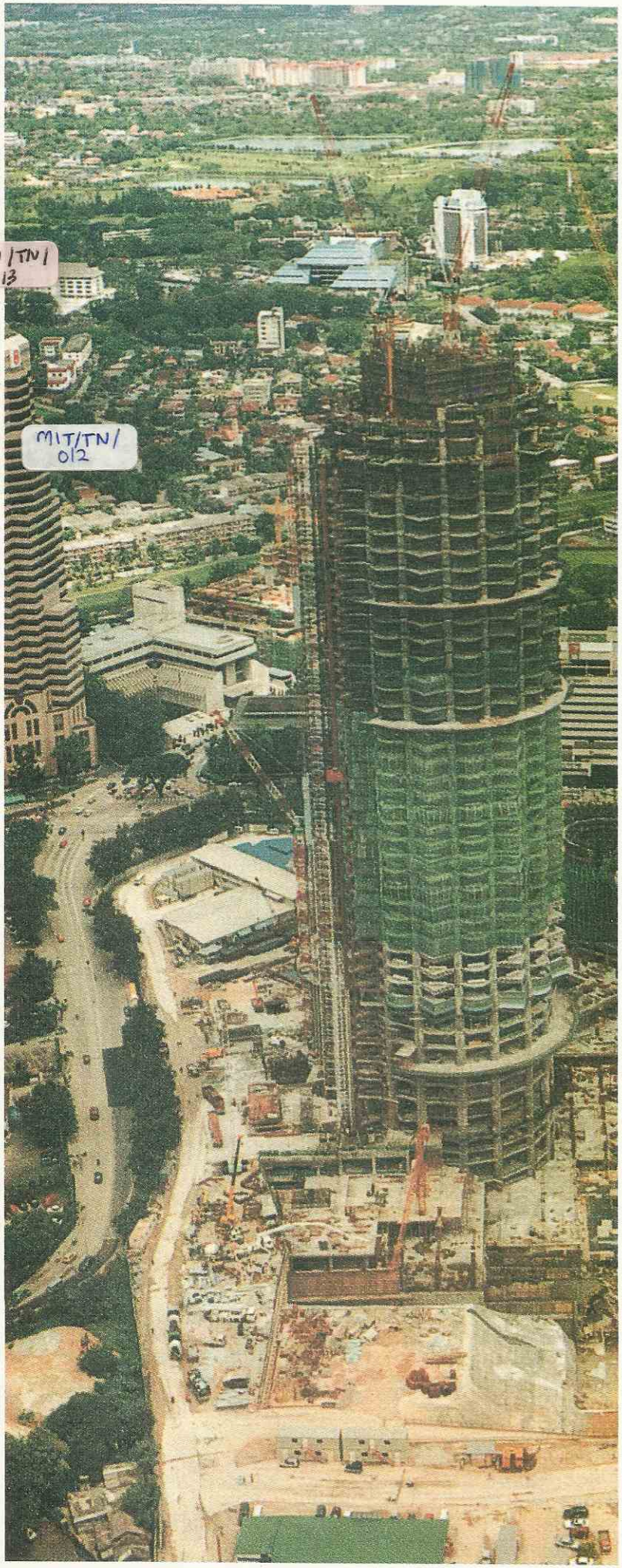

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C O N T E N T S

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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.

TAXATION OF HOUSING DEVELOPERS

An extract from the Case Stated PKR 601

THE ISSUES

The issues arise from the completion of the Taxpayer's building project in the Year of Assessment 1986 with only about half the units sold.

REVENUE

The Revenue has excluded the cost incurred in respect of the unsold units in its tax computation.

TAXPAYER

The Taxpayer contended that the completed contract method ought to be followed whereby an assessment can be made only when all the units have been sold.

What requires consideration is the manner of computing the tax before and after completion of the building project. This mandates two matters to be taken into consideration. They are:

(i) Whether the expenses incurred in building the unsold units ought to be taken into account in assessing the tax payable and

(ii) Whether the unsold units ought to be taken into account in assessing the tax payable.

GENERAL PRINCIPLES

The provisions of the Income Tax Act 1967 must be strictly applied in the computation of profits or gains of a person chargeable to tax. For a full discussion on the Malaysian scheme of taxation, which is not relevant for the purposes of this appeal, reference may be made to Director General of Inland Revenue v ALB (1979). The general scheme of the Act is that income tax is chargeable on the income earned in the relevant basis year. Some of the provisions of the Act which can be cited in support of this statement are as follows:

> the completed contract method ought to be followed whereby an assessment can be made only when all the units have been sold

Section 3

"Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia."

Section 5

"(1) Subject to this Act, the chargeable income of a person upon which tax is chargeable for a year of assessment shall be ascertained in the following manner:

(a) first, the basis period for each of his sources for that year shall be ascertained in accordance with Chapter 2 of Part III;

(b) next, his gross income from each source for the basis period for that year shall be ascertained in accordance with Chapter 3 of that Part;

(c) next, his adjusted income from each source (or, in the case of a source consisting of a business, his adjusted income or adjusted loss from that source) for the basis period for that year shall be ascertained in accordance with Chapter 4 of that Part;

(d) next, his statutory income from each source for that year shall be ascertained in accordance with Chapter 5 of that Part;

(e) next, his aggregate income for that year and his total income for that year shall be ascertained in accordance with Chapter 6 of that Part; and

(f) next, his chargeable income for that year shall be ascertained in accordance with Chapter 7 of that Part:

Provided that in ascertaining the chargeable income of an individual resident in Malaysia there shall be excluded the income consisting of interest accruing in or derived from Malaysia and received from a person referred to in subsection (4) of section 109C in respect of interest paid or credited to that individual.

(2) For the purposes of this Act, any income of a person from any source or sources, and any adjusted loss of a person from any source or sources consisting of a business, may

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be ascertained for any period (including a year of assessment) notwithstanding that -

(a) the person in question may have ceased to possess that source or any of those sources prior to that period; or

(b) in that period that source or any of those sources may have ceased to produce gross income or may not have produced any gross income."

Section 20

"For the purposes of this Act, the calendar year immediately preceding a year of assessment shall constitute the basis year for that year of assessment. "

Section 21

"S21(1) Subject to this section, the basis year for a year of assessment shall constitute, in relation to a source of a person, the basis period for that year of assessment.

S21(2) Where a company has made up its accounts for a financial year ending on a day other than 31st December in the basis year for a year of assessment and where the accounts of a business of a person other than a company have been made up for an annual accounting period ending on such a day in the basis year for a year of assessment, then, subject to subsections (3) and (5), that financial year shall as regards the company constitute the basis period for that year of assessment for any of its sources which consist of a business and that accounting period shall as regards that person constitute the basis period for that year of assessment for the source consisting of that business of that person.

S21(3) Where-

(a) by virtue of subsection (2) there has been taken as the basis period for a year of assessment -

(i) in the case of a company, a financial year; or

(ii) in any other case, an accounting period, ending on a day other than 31st December in the basis year for that year of assessment; and

> Whether the expenses incurred in building the unsold units ought to be taken into account in assessing the tax payable

(b) there is a failure to make up the accounts of the company, or of the business to which the accounting period relates, for a financial year or an accounting period, as the case may be, ending on the corresponding day in that year of assessment,

the Director General may direct that, for any of its sources consisting of a business (in the case of a company) or for the source consisting of the business to which the accounting period relates (in any other case), the basis period for the following year of assessment or the basis periods for the two following years of assessment shall consist of a period or periods (which may be of any length) specified in the direction; and any period so specified for that following year of assessment and any period so specified for the later of those two following years of assessment shall constitute the basis period for that following year of assessment and for that later year respectively,

> Whether the unsold units ought to be taken into account in assessing the tax payable

S21(4) Where-

(a) a person commences to carry on a business on a day in the basis year for a year of assessment (that year of assessment being referred to in this subsection as the first year);

(b) the first accounts of the business delivered to the Director General are made up for a period of twelve months beginning on that day; and

(c) subsection (2) is applicable with respect to that person, the business and the year of assessment immediately following the first year,

there shall (except where subsection (5) provides otherwise) be no basis period in relation to the business for the first year.

S21(4A) Where -

(a) a company commences to carry on a business and -

(i) is required under any law to make up its accounts for a financial year ending on a specified day; or

(ii) being a company within a group of companies makes up its accounts for the financial year ending on the same day as that of all other companies in that group;

(b) a person becomes a partner in an existing partnership in the basis year for a year of assessment and the accounts of a business of that

An assessee cannot claim a postponement of the ascertainment of his profits until all his outlay has been recouped

partnership have been made up for an annual accounting period ending on a day in that basis year for that year of assessment and the accounts of that business continue to be made up for an annual accounting period ending on a corresponding day in the next following basis year for the next following year of assessment; or

(c) a person is conducting a business as a sole proprietor in the basis year for a year of assessment and another person joins that sole proprietor in that business as a partner and the accounts of that business have been made up for an annual accounting period ending on a day in that basis year for that year of assessment and the accounts of that business continue to be made up for an annual accounting period to a corresponding day in the next following basis year for the next following year of assessment,

the Director General may direct in respect of that business of the company referred to in (a) or that business source of that person referred to in (b) or that business source of the other person referred to in (c), the basis periods for the first and second years of assessment of that business or business source following the end of the year of assessment in which -

(i) the company under paragraph (a) commences business;

(ii) the person under paragraph (b) becomes a partner in an existing partnership; or

(iii) the other person under paragraph (c) becomes a partner.

S21(5) Where a company on the day on which it commences to carry on a business (in this subsection referred to as the new business) is already carrying on another business of the company (in this subsection referred to as the old business) -

(a) the old period (that is to say, the basis period appropriate to the old business for a year of assessment) in which that day falls shall constitute for the new business the basis period for that year; and

(b) there shall be no basis period for the new business for any year of assessment preceding that first-mentioned year.

S21(6) Where in a case to which subsection (5) applies a company is on the day referred to in that subsection already carrying on two or more businesses of the company, whichever of those businesses was first carried on by the company shall be taken to be the old business for the purposes of that subsection:

Provided that, where by reason of the fact that two or more of those businesses commenced to be carried on simultaneously sly or for any other reason it is impossible or impracticable to ascertain which of those businesses was first carried on by the company, the Director General shall give a direction specifying which of those businesses is to be taken as the old business for those purposes.

S21(7) References in subsections (4), (5) and (6) to a person or company commencing to carry on a business shall be construed only as references to cases where the person or company in question commences to carry on -

(a) his or its own business; or

(b) the business of another person or company, being a business not previously carried on by that other person or any agent of his."

Without going into a detailed treatment of the sections of the Act referred to above it is sufficient for us just to state that each year is a self-contained period and profits earned or losses sustained before it or after it are not relevant (see CIT, CP v Sir S Chitnavis 59 IA 290). This is subject to section 40 of the Act which deals with the carrying forward of losses. The said section reads as follows:

"S40. Subject to this Act, where but for an insufficiency of gross income of a person from a business for the basis period for a year of assessment there would have been an amount of adjusted in-

The principle which inspires the completed contract method is that a project does not yield a profit or an income until the project has been completed and proceeds of sale are or can be realised

come of that person from the business for that period, the amount by which the total of all such deductions as would then have been allowed under the foregoing provisions of this Chapter in ascertaining that adjusted income exceeds his gross income from the business for that period shall be taken to be the amount of his adjusted loss from the business for that period."

An assessee cannot claim a postponement of the ascertainment of his profits until all his outlay has been recouped, though it may be convenient to the Income Tax authorities to agree to such a course (see British South Africa Co v CIT Rhodesia (1946) 14 ITR 17). However, the Director General of Inland Revenue has power to direct special treatment in the computation of business income in certain cases. This is provided by section 36 of the Act which reads as follows:

"S36(1)Notwithstanding any other provision of this part, where the Director General is satisfied that there is a need for some treatment in computing -

(a) the gross income from a business with respect to -
  (i) a hire-purchase transaction;
  (ii) a transaction under which a debt is payable by instalments;
  (iii) a lease transaction in respect of moveable property; or
  (iv) any other transaction involving a debt or stock in trade; and

(b) the adjusted income from the business,

he may give directions and formulate regulations to be published in the Gazette for special treatment with respect to any such transaction, either in relation to a particular business or in relation to any business having any such transaction:

Provided that no such directions and regulations shall have effect in relation to a business for any year of assessment with respect to which an assessment wholly or partly relating to income from that business has become final and conclusive or is the subject of an appeal which has been sent forward to the Special Commissioners.

S36(2) Any direction given under subsection (1) with respect to the gross income and adjusted income from a business or businesses may -

(a) provide that the gross income to which it relates (or any part thereof) shall be taken to be gross income for such basis period or periods for such year or years of assessment with respect to that business or those businesses as may be specified in the direction;

> This is so although the whole of that expenditure may not bear fruit in that year

(b) provide for special treatment with respect to the ascertainment of the adjusted income from that business or those businesses for the basis period or periods for any year or years of assessment.

GAZETTE

The section makes it abundantly clear that this power lies only with the Director General of Inland Revenue and not the Special Commissioners. We interpolate to add that Thomson Hill Ltd v Comptroller of Income Tax (1984) STC 251 which recognised the completed contract method was a case where the method was accepted with the agreement of all parties concerned. In the absence of any such agreement that case is no authority for inducing us to accept the completed contract method. We must however add that the Director General of Inland Revenue can agree to the method only after having given directions and formulating regulations to be published in the Gazette as stipulated in section 36.

We shall now deal together the two issues that we have earlier identified for examination .

COST OF UNSOLD UNITS

As we have previously stated, the complaint of the Taxpayer is that the Revenue has excluded the cost incurred in respect of the unsold units in its tax computation. It is the contention of the Taxpayer that the completed contract method ought to be followed whereby an assessment can be made only when all the units have been sold. This to our mind is a misconception of the true meaning and scope of the completed contract method of accounting. In this respect reference may be made to Thomson Hill Ltd v Comptroller of Income Tax (1984) STC 251 where Lord Templeman said at p 254,

" The principle which inspires the completed contract method is that a project does not yield a profit or an income until the project has been completed and proceeds of sale are or can be realised. Until completion, that is until profit or income can be realised, revenue is not recognised or attributed to enhanced work in progress and on the other hand costs and expenses are not brought into account. There is thus no need to value work in progress from year to year in order to arrive at the profit for that year. Profit only arises when the contract or development is completed.

Property tax in respect of a development site is part of the overall cost of the development. The cost to the developer includes the purchase price, the expenses incurred by the developer in respect of the site and

the expenses involved in carrying out on the site and housing and other works which must be carried out before the development is completed. If, in respect of the Golden Hill project, the company wished to ascertain whether the project had yielded a profit or a loss the company would have been bound to compare all the money which the company had paid out to acquire and hold and develop the site with the proceeds of sale received by the company for the development after completion. Similarly, in respect of every other site held by the company, the company will not show an income until the development is completed. The amount of that income will be the difference *between all the costs incurred by* the company, in respect of the site and the development between the date of acquisition of the site and the date of completion of the development on the one hand, and the net proceeds of sale realised or realisable by the company on completion of the development on the other hand." (Emphasis added)

Thus what is critical in the completed contract method of accounting is the date of completion of the development and not the date when all the units have been sold. This method, as we have stated earlier, would amount to a special treatment in the tax computation of the Taxpayer under section 36 of the Act. Unless the prescribed procedure in the said section is followed, the special treatment claimed by the Taxpayer cannot be acceded to.

As the Taxpayer was left with unsold units together with expenditure incurred in constructing them, its position would come within the direction of Lord President Clyde in Whimster & Co v CIR 12 TC 813 for the purpose of computing the balance of profits and gains at p 823 as follows:

"In computing the balance of profits and gains for the purposes of Income Tax, or for the purposes of Excess Profits Duty, two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market *price, whichever is the lower: although there is nothing about this in the taxing statutes."*

> So the question is not what expenditure it is proper to leave in the account as attributable to goods sold during the year

Lord President Clyde has laid down two rules to be kept in mind in computing the balance of profits and gains for the purposes of income tax. We shall now consider whether the Act is capable of accommodating these two rules.

The first rule requires the expenditure incurred in earning the receipts to be taken into account. An analysis of the meaning and scope of this rule would determine whether the expense incurred in building the unsold units is to be taken into account as an expenditure for earning the profits arising from the units that were sold. The taking into account of an expenditure to ascertain the adjusted income of a person is governed by section 33(1) of the Act which reads as follows:

Section 33(1)

"Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, . . ."

Section 33(1) is clear in its meaning. It is settled law that in a taxing Act one has to look merely at what is clearly said (see Cape Brandy Syndicate v IRC 12 TC 358). The section plainly refers to the allowability of a deduction from the gross income of a person from a source for a particular period all outgoings and expenses wholly and exclusively incurred during that period in the production of the gross income. It does not say that the deduction of an expense must be referable to the income earned in that year as the reference to the gross income in the section is general and not specific or restricted in any way. It refers to "all" the expenses incurred in the production of gross income by a person during the period in question without any qualification subject only, of course, to the overriding condition that it must have been wholly and exclusively incurred in the production of gross income. If the requisite purpose for incurring the expenditure is established, the question of whether that expenditure produces or increases profits is not within the contemplation of the section. The fact that the expenditure can only produce a return in the future, if at all, does not prevent its being incurred for the purposes of the trade.

The stand taken by the Revenue in the appeal before us was taken by the Crown in 1910 in Vallambrosa Rubber Co Ltd v Farmer (Surveyor of Taxes) 5 TC 529 where they urged the Court to accept the proposition *". . . that nothing ever could be deducted as an expense unless that expense was purely and solely referable to a profit which was reaped within the year."* The Lord President (Dunedin) was quick to reply that *". . . that proposition has only to be stated to be defeated by its own absurdity."* In that case the taxpayer company was incorporated in Scotland in April 1904 and the case concerned its first accounts for the year to 31 March 1905. Its business was the sale of rubber produced on rubber plantations in Malaya which it owned. The evidence was that rubber trees do not yield rubber until they are about six years old. During the accounting period only one-seventh of the company's rubber trees began to bear rubber, but the company incurred expense in tending all the plantations, the six-sevenths which did not bear rubber as well as the one-seventh which did. The company contended that all this expense represented money wholly and exclusively laid out or expended for purposes of the company's trade. The surveyor of taxes argued that as only one-seventh part of the plantations had begun to produce rubber a deduction of only one-seventh of the expenditure on the whole of the plantations should be allowed as being a fair estimate of the proportion thereof expended in obtaining the rubber actually produced. In rejecting the argument advanced the Lord President said at p 535,

". . . But to say that that expression of lord Esher's lays down that you must take each year absolutely by itself and allow no expense except the expense which can be put against the profit which is reaped for the year is in my judgment to press it much further than it will go. Something seems to have been tried in other cases like it, because I notice in the case of Watson v The Royal Insurance Company (1897 AC I) 2 TC 239 which went to the House of Lords, that their Lordships took occasion there to say that they must not be held as agreeing in certain expressions which fell from certain of their Lordships in the Court below, because these expressions were not to be taken too literally.

I think the proposition only needs to be stated to be upset by its own absurdity. Because what does it come to? It would mean this, that if your business is connected with a fruit which is not always ready precisely within the year of assessment you would never be allowed to deduct the necessary expenses without which you could not raise the fruit. This very case, which deals with a class of thing that takes six years to mature before you pluck or tap it, is a very good illustration, but of course without any ingenuity one could multiply cases by the score. Supposing a man conducted a milk business, it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year, towards the end of the year of assessment, that cow was not in milk, and therefore the profit which he was going to get from the cow would be outside the year of assessment. As I say, it is easy to multiply instances, but the real truth is that it is just one of those mistakes which are made by fixing your eyes too tightly upon the words of Rules and Cases which are given in the Act of 1842. These after all, are only guides, because the veal point is, What are the profits and gains of the business ? Now, it is quite true that in arriving at the profits or gains of a business you are not entitled, simply because - for what are likely quite prudent reasons - you either consolidate your business by not paying the profit away or enter into new speculations or increase your plant and so on - you are not entitled on that account to say that what was a profit is a profit no more. The most obvious illustration of that is a sum carried to a reserve fund. It would be a perfectly prudent thing to do, but none the less if that sum is carried to a reserve fund out of profit it is still profit, and on that Income Tax must be paid. But when you come to think of the expense in this particular case that is incurred for instance in the weeding which is necessary in order that a particular tree should bear rubber, how can it possibly be said that that is not necessary expense for the rearing of the tree from which alone the profit eventually comes? And the Crown will not really be prejudiced by this, because when the tree comes to bear the whole produce will go to the credit side of the profit and loss account. When the year comes when the tree produces the only deduction will be the amount which has been spent on the tree in that year; they will not be allowed to deduct what has been deducted before . . .

Kulim Rubber Plantation Ltd

In Kulim Rubber Plantation Ltd v DGIR (1979) 2 MLJ 298 Vohrah J in following the Vallambrosa decision said that it is clear that the expenses sought to be deducted need not be referable to the profits of a particular year. The decision of the House of Lords in Ostime (Inspector of Taxes) v Duple Motor Bodies Ltd (1961) 1 WLR 739 is to the same effect. Viscount Simonds said at pp 748 - 749,

"My Lords, a first principle of tax law is that the taxpayer in ascertaining his profit is entitled to debit his expenditure in the year of assessment unless it is excluded by section 137 of the Income Tax Act, 1952. And this is so although the whole of that expenditure may not bear fruit in that year: see, for instance, Vallambrosa Rubber Co Ltd v Farmer. In other words, it is no ground for refusing a deduction in one year that the expense may be recoverable in another. Put in yet another way, the Crown is not entitled to anticipate a profit which may or may not be made, as it might do if too high a value were put on stock-in-trade or work in progress. This principle must be harmonised with another, which I have already mentioned, namely, that at any rate some value must

be placed on these things. That is recognised by the so-called "direct cost" method even if it is confined to the cost of labour and material. But the danger of putting too high a value on stock-in-trade is also recognised, for, whatever method is adopted, the trader is by any theory of accountancy allowed to value it at cost or market value, which I take to mean market value at the end of the accounting period. This is of greater significance in the case of work in progress than of stock-in-trade. Counsel for the Crown admitted that the market value of an unfinished motor body made to order might be negligible but that, nevertheless, that value might be taken. Of this the respondent company may yet, I suppose, take advantage. They could not be blamed for doing so if the so-called "on-cost " theory is pressed to a manifestly unfair conclusion. My Lords, I think that in this dilemma the prevailing consideration must be that the taxpayer should not be put to any risk of being charged with a higher amount of profit than can be determined with reasonable certainty. He may concede that stock-in-trade and work in progress must for tax purposes be regarded as a receipt. Upon that professional accountants appear to be universally agreed, though it might not be at once obvious to the layman. But this concession should not be pressed beyond the point at which the profession is widely, if not universally, agreed, and I should, therefore, if I had to choose (which I have not) between two vaguely defined methods, choose the "direct cost" method as the less likely to violate the taxing statute. I should be supported in this choice by the reflection that, if the cost is put at too low a figure, the error will be made good to the advantage of the Crown in the following year."

In that case Lord Reid rejected the Crown's first argument, that all expenditure should be attributed to goods manufactured or partly manufactured during the year. He pointed out, relying on Vallambrosa, that expense might be deductible even though it led to no production during the year and continued at p 754,

"So the question is not what expenditure it is proper to leave in the account as attributable to goods sold during the year, but what expenditure it is proper, in effect, to exclude from the account by setting against it a figure representing stock-in-trade and work in progress. You must justify what you seek to exclude in this way as being properly attributable to, and properly represented by, those articles."

Lord Guest described it in that case as a "familiar principle of income tax law that the expense lies where it falls, that is in the year in which it was incurred" (at p 758). In our opinion, therefore, the Vallambrosa principle accords with the language and spirit of section 33(1) of the Act.

Gallagher v Jones

Having said that what now requires some thought is the effect of rules of commercial accountancy on section 33(1) of the Act. In this regard we refer to Gallagher v Jones (1993) STC 537. The issue for determination in that case was not whether expenditure should be charged during the year when it is incurred but whether one of two acceptable accountancy principles should be preferred to the other, which the taxpayer company had consistently adopted. In answer to that Bingham MR said at p 555,

"Despite the length of this judgment, the central issue is at root a very short one. The object is to determine, as accurately as possible, the profits or losses of the taxpayer 's businesses for the accounting periods in question. Subject to any express or implied statutory rule, of which there is none here, the ordinary way to ascertain the profits or losses of a business is to apply accepted principles of commercial accountancy. That is the very purpose for which such principles are formulated. As has often been pointed out, such principles are not static: they may be modified, refined and elaborated over time as circumstances change and accounting insights sharpen. But so long as such principles remain current and generally accepted they provide the surest answer to the question which the legislation requires to be answered. As Pennycuick V-C pointed out in Odeon Associated Theatres Ltd v Jones (Inspector of Taxes)(l971) I WLR 442, 48 TC 257 different considerations arise where there is no accounting evidence or where there are two or more principles either or any of which is generally accepted. But those considerations do not apply here.

'The authorities do not persuade me that there is any rule of law such as that for which the taxpayers contend and the judge found. Indeed, given the plain language of the legislation, I find it hard to understand how any judge-made rule could override the application of a generally accepted rule of commercial accountancy which (a) applied to the situation in question, (b) was not one of two or more rules applicable to the situation in questions, and (c) was not shown to be inconsistent with the true facts or otherwise inapt to determine the true profits or losses of the business. I need not pursue this speculation, however, since I do not understand it to be challenged that the principles embodied in SSAPs 2 and 21 meet these three conditions and I find no judge-made rule which could require these principles to be displaced. " (Emphasis added).

Bingham MR in his leading judgment in that case said of the Vallambrosa case at p 547,

"Once it is accepted that the company's payments were of a revenue nature, the decision in that case seems inevitable."

And with regard to the Duple Motor's case his Lordship said at p 553,

" The issue in Duple Motors was, it

seems to me, far removed from that in the present case . . . I do not question the correctness of the decision . . ."

Thus the Gallagher decision, whilst not departing from the Vallambrosa principle, stressed that the ordinary way to ascertain the profits or losses of a business is to apply accepted principles of commercial accountancy subject to any express or implied statutory rule ". . .of which there is none here." As section 33(1) of the Act is a specific provision to ascertain the profits of a business it must be adhered to notwithstanding any other rule of commercial accountancy. Thus the expenditure incurred in building the unsold units must be taken into account in assessing the tax payable for the relevant years of assessment.

The corollary to what we have just determined is whether the unsold units should be brought into account. That is the basis of the second rule enunciated by Lord President Clyde in the Whimster case which requires that in the profit and loss account of a manufacturer' s business the values of the stock in trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is lower. Before considering whether this rule can be said to apply to the appeal before us with regard to the unsold units a preliminary matter that requires deliberation in order to make the rule applicable is whether the units built by the Taxpayer constitute its stock in trade.
Section 2 of the Act says that,

Section 2

"'stock in trade', in relation to a business, means property of any description, whether movable or immovable, being either -

(a) property such as is sold in the ordinary course of the business or would be so sold if it were mature or if its manufacture, preparation or construction were complete; or

(b) materials such as are used in the manufacture, preparation or construction of any such property as is referred to in paragraph (a) of this definition,

and includes any work in progress."

There can be no dispute that the units which were constructed by the Taxpayer were immovable properties and were sold in the ordinary course of its business. Thus the units are stock in trade within the meaning of the Act. As they are stock in trade they fall within the second rule enunciated by Lord President Clyde. According to his Lordship the English taxing statutes contain no provision for this rule. However, section 35 of the Act is a statutory reincarnation of the second rule. The material parts of the section read as follows:

Section 35

(1) "Notwithstanding any other provision of this Part, in ascertaining the adjusted income of a person from a business for the basis period for a year of assessment, the value of the stock in trade of the business at the beginning and at the end of that period shall be taken into account in accordance with the following subsections (that person, business, period and stock in trade being referred to in those subsections as the relevant person, the business, the relevant period and the stock respectively).

(2) Where the value of the stock at the end of the relevant period exceeds the value of the stock at the beginning of the relevant period, the total of all amounts otherwise deductible under sections 33, 34 and 34A in ascertaining the adjusted income of the relevant person from the business for the relevant period shall be reduced by the amount of the excess, and, where the value of the stock at the beginning of the relevant period exceeds the value of the stock at the end of the relevant period, the total of all amounts otherwise so deductible shall be increased by the amount of the excess.

(3) Subject to subsections (4) and (5) -

(a) the value of any particular item of the stock at the end of the relevant period shall be taken to be -

(i) an amount equal to its market value at that time; or

(ii) if the relevant person so elects and that item is physically tangible, an amount equal to the total cost to him of acquiring that item (or any materials used in its manufacture, preparation or construction) and bringing it to its condition and location at that time:

Provided that in the case of any item of the stock consisting of immovable properties, stocks, shares or marketable securities, the value thereof at the end of the relevant period shall be taken to be an amount equal to its cost price to that relevant person or its market value at that time, whichever is the lower;

(b) the value of any particular item of the stock at the beginning of the relevant period (except where the business was commenced by the relevant person in the relevant period) shall be taken to be an amount equal to its value as ascertained under paragraph (a) at the end of the basis period for the year of

assessment immediately preceding the year of assessment to which the relevant period relates.

(4) Where-

(a) by virtue of section 41 this Chapter applies in relation to the business as if an accounting period were the relevant period; and

(b) a previous period for which the accounts of the business were made up ended immediately prior to that accounting period,

the reference in subsection (3)(b) to the basis period for the year of assessment immediately preceding the year of assessment to which the relevant period relates shall be construed as a reference to that previous period."

In substance, section 35(1) stipulates that the value of the stock in trade of a person from a business for the basis period for a year of assessment at the beginning and at the end of that period must be taken into account. Section 35(2) provides that where the value of the stock at the end of the relevant period exceeds the value of the stock at the beginning of the relevant period, the allowable expenses under sections 33, 34 and 34A of the Act are reduced by the amount of the excess. Where the value of the stock at the beginning of the relevant period exceeds the value of stock at the end of the relevant period, the expenses deductible must be increased by the amount of the excess. Section 35(3) deals with the methods of valuing stock in trade. Section 35(3)(a)(ii) provides that in the case of, inter alia, immovable properties the value at the end on the relevant period shall be an amount equal to its cost price or market value at that time, whichever is lower. Pursuant to section 35(3)(b) the value at the beginning of the relevant period shall be taken to be an amount equal to its value at the end of the preceding period. It therefore follows that the value at the beginning will cancel the value at the end. The practical effect of bringing into account unsold stock is to disallow the deduction of the trader's expenditure on the unsold stock and carry it forward to be set against the price for which the stock is ultimately sold. That, according to Nolan LJ in Ghallagher v Jones (1993) STC 537 at p 557, is certainly one way of describing the effect of the practice and comes close to the language of Lord Reid in Ostime (Inspector of Taxes) v Duple Motors Ltd (1961) 1 WLR 739 at p 754 where speaking of stock in trade and work in progress he said,

"So the question is not what expenditure it is proper to leave in the account as attributable to goods sold during the year, but what expenditure it is proper, in effect, to exclude from the account by setting against it a figure representing stock in trade and work in progress."

In continuing from there Nolan LJ said,

"That is how he described the effect of the practice, but it is I think clear from the earlier part of his speech ([1961] 1 WLR 739 at 751 - 753, 39 TC 537 at 569 - 571), that as a matter of legal analysis he regarded the practice as involving the deduction of the whole of the expenses incurred during the period but the crediting against them of a closing figure for unsold stock and for work in progress as a notional receipt."

In this regard Whiteman on Income Tax 3rd Ed says at 378,

"Unless a trader is on a 'cash basis' it is clear that at the end of his first trading period some figure must be added to the credit side of his accounts in respect of his stock and work in progress, otherwise his accounts would not fairly show the profit of the period. These items should normally be brought in at the end of the first trading period at their cost and deducted at the same figure in opening the account of the second trading period. Thus stock and work in progress will, in effect, normally be notionally sold at cost from each trading period to the next."

In the final analysis, in the case of a housing developer, the question of whether his project has been completed or not completed or whether he has sold all the units upon completion of the project or not does not arise. A housing developer must be taxed just like any other trader. This means that for ascertaining his gross income for a basis period the sales of units, work in progress and stock in trade must be taken into account. In arriving at his adjusted income all expenses wholly and exclusively incurred in the production of that income during the relevant period must be allowed. In arriving at his statutory income capital allowances allowable under Schedule 3 to the Act must also be taken into account. However, where losses arise in the application of these rules then such losses can be carried forward to the following year of assessment (see section 43(2) of the Act). Unabsorbed capital allowances can also be carried forward and allowed against adjusted income of the same source (see paragraph 75 of Schedule 3 to the Act).

DECISION

In the light of the aforesaid reasons we allowed the appeal and ordered that the assessments made be amended in accordance with the rules that we have adverted to. It follows that in the light of our ruling the assessments for the relevant years of assessment may require recomputation.

NOTE

Revenue has filed an appeal to the High Court.

ANTI-AVOIDANCE

An extract from the Case Stated PKR 536

THE LAW

S140(1)"The Director-General, where he has reason to believe that any transaction has the direct or indirect effect of -

(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;

(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;

(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or

(d) hindering or preventing the operation of this Act in any respect.

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect, of the transaction."

S140(2)"In exercising his powers under this section, the Director-General may -

(a) treat any gross income from any source of any person either as the gross income and source of any other person or, where the gross income is that of a controlled company, as having been distributed to any member (within the meaning of section 139 (7) of that company;

> In cases of this nature the burden of proof is on the Revenue to show that a transaction falls within one of the limbs of section 140(1)

(b) make such computation or recomputation of any gross income, adjusted income or adjusted loss, statutory income, aggregate income, total income or chargeable income of any person or persons as may be necessary to revise any person's liability to tax or impose any liability to tax on any person in accordance with his exercise of those powers; and

(c) make such assessment or additional assessment in respect of any person as may be necessary in consequence of his exercise of those powers, nullify a right to repayment of tax or require the return of a repayment of tax already made."

S140(3)"Without prejudice to the generality of the foregoing subsections, the powers of the Director General conferred by this section shall extend -

(a) to the charging with tax of any person or persons who but for any adjustment made by virtue of this section would not be chargeable with tax or would not be chargeable with tax to the same extent; and

(b) to the charging of a greater amount of tax than would be chargeable but for any such adjustment."

S140(4)"Where in accordance with this section the Director General requires from a person the return of the amount of a repayment of tax already made -

(a) the Director General shall give to that person a notice of that requirement and the notice shall be treated as a notice of assessment for the purposes of any appeal therefrom, the provisions of Chapter 2 of Part VI applying with any necessary modifications; and

(b) that amount shall be deemed to be tax payable under an assessment and section 103 and the other provisions of Part VII shall apply accordingly."

S140(5) "Where in consequence of any adjustment made under this section an assessment is made, a right to repayment is refused or a return of a repayment of tax is required, particulars of the adjustment shall be given with the notice of assessment, with the notice refusing the repayment or with the notice requiring the return of a repayment, as the case may be."

S140(6) "Transactions -

(a) between persons one of whom has control over the other;

(b) between individuals who are relatives of each other; or

(c) between persons both of whom are controlled by some other person.

Shall be deemed to be transactions of the kind to which subsection (1) applies if in the opinion of the Director General those transactions have not been made on terms which might fairly be expected to have been made by independent persons engaged in the same or similar activities dealing with one another at arm's length."

S140(7) "Notwithstanding any other provision of this section, where a transaction to which this section relates consists of a settlement on a relative or on a relative and other persons, nothing in this section and no powers exercised thereunder shall affect the interests of the relative under the settlement."

S140(8) "In this section -

"relative" means a parent, a child (including a stepchild and a child adopted in accordance with any law), a brother, a sister, an uncle, an aunt, a nephew, a niece, a cousin, an ancestor or a lineal descendant;

"transaction" means any trust, grant, covenant, agreement, arrangement or other disposition or transaction made or entered into orally or in writing (whether before or after the commencement of this Act), and includes a transaction entered into by two or more persons with another person or persons."

> In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was, implemented in that particular way so as to avoid tax

BURDEN OF PROOF

In cases of this nature the burden of proof is on the Revenue to show that a transaction falls within one of the limbs of section 140(1) except in instances where section 140(6) applies. Section 140(6) is a deeming provision.

The effect of a deeming provision was considered by the Supreme Court in **Amanah Merchant Bank Bhd. v. Lim Tow Choon (1994) 1 MLJ 413** where Mohamed Dzaiddin SCJ referred to the judgment of **Reading CJ in R v Westminster Unions Assessment Committee, exp Woodward & Sons (1917) 1 KB 832** at p 838:

"A notice prepaid and addressed as directed by s 65 if sent through the post 'shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post'. That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning. The intention is to treat as a fact something which has not been established as a fact - even something which can be shown not to be a fact. The section continues: 'and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the box. In my view, when those conditions have been performed it must be taken as concluded that the notice has been served and received."

Thus once it is established that a transaction between persons specified in the subsection is not one which would have been made by independent persons in the same or similar activities dealing with one another at arm's length then it shall be deemed to be transactions of the kind to which subsection (1) applies. In that event there is no onus on the Revenue to establish that the transaction falls under one of the four limbs of section 140(1). It must be taken as concluded that the transaction falls within section 140(1) of the Act. He may proceed to disregard or vary the transaction as specified in the section upon proof of the basic facts needed to activate the deeming consequence flowing from the deemed state of affairs. We shall now consider whether the facts of this case bring it within Section 140(6) and, if so, whether the basic facts mandated by the subsection have been proved to exist.

ARM'S LENGTH

In this regard what requires consideration is whether the manner in which the payments were made in this case is one that would be made by independent persons dealing with one another at arm's length.

On the meaning of an arm's length transaction useful reference may be made to the Canadian case of **MNR v. Merritt Estate 69 DTC 5159** where Cattanach J said at pp. 5165 - 5166,

"In my view, the basic premise on which this analysis is based is that, where the 'mind' by which the bargaining is directed on behalf of one party to a contract is the same 'mind' that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. In other words where the evidence reveals that the same person was 'dictating' the 'terms of the bargain' on behalf of both parties it cannot be said that the parties were dealing at arm's length."

IN MNR V KIRBY CO. LTD.

In **MNR v Kirby Maurice Co. Ltd. (1958) CTC 41** "arm's length" was explained by Cameron J in this way:

"it is sufficient to state in my opinion, in a vendor-purchaser matter, an arm's length transaction does not take place when the purchaser is merely carrying out the orders of the vendor, and exercising no independent judgment as to the fairness of the terms of the contract, or seeking to get the best possible terms for himself."

JOHNSON & JOHNSON SDN. BHD.

In this context reference may also be made to **Johnson & Johnson Sdn. Bhd. v. DGIR (1994)2 CLJ 767** where Abu Mansor J said at 770 - 771,

"In interpreting the word 'independent' in the context of the said agreement I have to find the intention of the Act that is before me and I ask what was the 'evil' that this taxing Act was trying to cure? I think the answer is if the intention of the Act is gathered from its wording and we consider the words used in s. 7(1) it is abundantly clear what this section tries to cure was in the commercial language is called 'arm's length transaction'. If my understanding of the term is correct, it means that the Act abhores such a transaction and attempts to strike a blow at transactions entered into between two not so independent entities such as between holding companies and their subsidiary and or vice versa which can be called transaction but when examined and dissected in detail reveals one party showing terms favourable to the other which are not dictated by or have no relevance or bears no relations whatsoever to ordinary and everyday current commercial consideration."

FACTS OF THE CASE

It has been established that the Taxpayer are a wholly owned subsidiary of the Foundation. The law recognises the economic reality that a parent company can ultimately control and direct the policies and actions of its subsidiary (see **DGIR v. Rakyat Berjaya Sdn. Bhd. (1984) MLJ 248**). The arrangement in this case was resorted to at the request of the State Government as stated in an earlier part of the judgment. Up to 1985 the Chief Minister was the chairman of both the organizations. Thus he had control over the Foundation and the Appellants. It was a case of the same "mind" "dictating" the "terms of the bargain" on behalf of both the parties (see the **Merrit Estate** case). The Appellants were merely carrying out the "wish" or "instructions" of the State Government without exercising an independent mind as to the fairness of the terms of the transaction (see the **Kirby Maurice Co. Ltd.** case). The transaction bears no relations to ordinary and everyday current commercial consideration bearing in mind the relationship between both the parties (see the **Johnson & Johnson Sdn. Bhd.** case). Thus from the evidence adduced it is clear that the transactions entered into between the parties in this case are not on terms which might fairly be expected to have been made by independent persons dealing with one another at arm's length. The magnitude of the donations made which sometimes exceeds the profit made further supports this conclusion. It must be remembered that the Appellants were a commercial company involved in timber operations and was one of the trading arms of the Foundation. It was expected to make profits. Companies do not make donations in this way in the normal course of events as borne out by the evidence adduced. SP1 said in his evidence that he has not come across other companies giving almost all their profits as donations to approved institutions. SP2 said that the Appellants did not give a substantial donation to any other approved institution. She also agreed that from an accountant's point of view the normal method of distributing income is to declare dividends. SR1 said that in his 22 years of service this was the first time he had come across such a donation. He said that the donations are abnormal, illogical and ridiculous. Even learned counsel for the Appellants interjected and conceded that this type of donation is not a common practice when SP1 was being cross-examined on the size of the donations.

> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be

On the facts of this case there is no difficulty in ruling that the Foundation had control over the Taxpayer within the meaning of section 140(6)(a) of the Act. In the light of the role of the Chief Minister as the head of the State Government and also of the two organizations section 140(6)(c) also comes into play. Accordingly, we were of the view that the Revenue had discharged the burden on him required by section 140(6) to activate the deeming consequence

contained therein. In the upshot the Revenue is empowered to disregard the payments made as donations and make such adjustments as he thinks fit to counteract the effect of the transactions which he has done.

Be that as it may, the method adopted by the Taxpayer to make the payments to the Foundation also has the effect of altering the incidence of tax which would otherwise have been payable within the meaning of section 140(1)(a) of the Act. It cannot be argued by the Taxpayer that the subsection is inapplicable on the ground that they made the payment before any liability to pay tax arose. It is not in dispute that the taxpayer resorted to this scheme to avoid paying tax to which they would have become liable if they had made the payment to the Foundation by way of dividends which, as admitted by SP1 and SP2, would have been the proper way to have made the payment. Such a transaction falls within the scope of the subsection. Under the subsection the Director General of Inland Revenue not only has powers over transactions which alter the incidence of tax which is payable or suffered but also extends to tax "... which would otherwise have been payable or suffered by any person." Thus the subsection is not merely confined to accrued liabilities. In this respect the Privy Council said in **Mangin v. CIR (1971) NZLR 591 at p. 596**,

> *"The second contention of the appellant is that section 108 refers only to accrued liabilities and not to liabilities which may be expected in future ..... There is, however, another possible reasoning. The taxpayer, considering the provisions of fiscal legislation, may discern that by entering into some arrangement he can so distribute the legal incidence of tax upon his income that he himself will pay less. In other words, the economic incidence is altered. In their Lordships view this is what is contemplated by section 108."*

> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be

Thus section 140(l)(a) would also apply to the future liability to tax that would arise if the Appellants were to have paid their profits to the Foundation by way of dividends. In the premises the facts of the case bring it within the ambit of the said subsection.

NEWTON V. COMMISSIONER OF TAXATION

We are also of the view that the facts behind the arrangement entered into by the parties bring it within the scope of the law laid down in **Newton v. Commissioner of Taxation of the Commonwealth of Australia (1958) AC 450** where Lord Denning said at p. 466,

> *"In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was, implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section."*

MANGIN V. COMMISSIONER OF INLAND REVENUE

In explaining this passage Lord Donovan in delivering the majority judgment of the Privy Council in **Mangin v. Commissioner of Inland Revenue (1971) 2 WLR 39** said at p. 47, S140 is pari materia with S260 of the Australian Income Tax Act.

> *".... this passage, properly interpreted, does not mean that every transaction having as one of its ingredients some tax saving feature thereby becomes caught by a section such as section 108. If a bona fide business transaction can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think section 108 can properly be invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen ..... The clue to Lord Denning's meaning lies in the words "without necessarily being labelled as a means to avoid tax." Neither of the examples above given could justly be so labelled. Their Lordships think that what this phrase refers to is, to adopt the language of Turner J. in the present case,*
>
> > *"a scheme ..... devised for the sole purpose, or at least the principal purpose, of bringing it about that this taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived."*

The above two passages were cited with approval by Yusoff J in **L.D Timber Sdn. Bhd. v. DGIR (1976) MTJ 50**. The **Newton** rule was also adopted by Abu Mansor J in **B-Trak Sdn. Bhd. v. Bingkul Timber Agencies Sdn. Bhd. & Anor (1989) 1 MLJ 124** where his Lordship said at pp 127 - 128,

> *"As far as tax avoidance is concerned our revenue law is s 140 of the Income Tax Act 1967 which follows the Australian provision. It is in pari materia with s 260 of the Australian Income Tax Act. Perhaps I should set out s 140 of the Malaysian Income Tax Act relevant to avoidance:*

S140(1) The Director-General where he has reason to believe that any transaction has the direct or indirect effect of

(a) ...

(b) ...

(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act;

or

may ... disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

As it will be seen s 260 of the Australian Income Tax Act uses the same words 'defeating' ... or avoiding any liability imposed ... by the Act' (see **Cases and Material on Taxation (1978)**, p 90 of encl 17). At p 649 of the same **Cases and Material on Taxation (1978)** - Baxt & Ors, p 90 of encl 17 -the learned author discussing the case of **Newton v Federal Commissioner of Taxation [1958] 2 All ER 759** says

> Section 260 is a very widely phrased legislative directive to the courts to strike down transactions which avoid any liability imposed by the Act.

And further on at p 653 thereof the learned author further says:

> In applying the section you must by the very words of it look at the arrangement itself and see which is its effect ... by the overt acts by which it was implemented - that it was implemented in that particular way so as to avoid tax.

and arrangement covers agreements, contracts and less binding arrangements having that effect."

ORDINARY BUSINESS DEALING

Clearly the circumstances of this case do not bring it anywhere near the ambit of ordinary business dealing. In accordance with the **Newton** test it can be said without any difficulty that the overt acts by which the arrangement was implemented, by the admission of the Taxpayer themselves, was done in that particular way so as to avoid tax. As the arrangement was devised for the sole purpose of facilitating the Taxpayer to escape liability to tax it also falls within the test laid in the **Mangin** case which, as noted earlier, qualified the law laid down in the **Newton** case. It also falls within the Supreme Court decision in **Lim Kar Bee v. Duofortis Properties (M) Sdn. Bhd. (1992) 2 MLJ 281** which will be referred to in a later part of the judgment. Thus section 140 of the Act was legitimately invoked on the facts of this case.

S140 & S44(6) - THE CHOICE PRINCIPLE

We shall now consider the contention of the Taxpayer that section 140 must be read subject to the other provisions of the Act. They argued that the existence of section 44(6) in the Act gave them a choice of either paying tax on the profits and then declare dividends or give the profits as donations and claim them as deductions as authorised by the Act. This, they contended, is what has now become known as the "choice principle" as developed in the Australian and New Zealand courts in relation to their provisions similar to our section 140. We shall now refer briefly to the progress of the "choice principle" in Australia. It is a defence against the operation of their section 260 which is similar to our section 140.

W.P KEIGHERY PTY. LTD V. FEDERAL COMMISSIONER OF TAXATION

In **W.P Keighery Pty. Ltd. v. Federal Commissioner of Taxation (1957) 100 CLR 66** it was stated thus:

> *"..... the section intends only to protect the general provisions of the Act from frustration and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them."*

CLARKE V. FCT

In **Clarke v. FCT (1932) 48 CLR 56** Rich, Dixon and Evatt JJ said at P. 77,

> *"where circumstances are such that a choice is presented to a prospective taxpayer between two courses of which one will and the other will not, expose him to liability to taxation, his deliberate choice of the second course cannot readily be made a ground of the application of the provision. In such a case it cannot be said that, but for the contract, agreement or arrangement impeached, a liability under the Act would exist."*

MULLENS V. FCT

The "choice principle" was applied and extended in **Mullens v. FCT (1976) 135 CLR 290** where Barwick CJ said at p. 302 that

> *"..... there will be no relevant alteration of the incidence of tax if the transaction being the actual transaction between the parties, conforms to and satisfies a provision of the Act even if it has taken the form in which it was entered into by the parties in order to obtain the benefit of that provision of the Act."*

However, it must be noted, and this is important, that in **Mullens'** case it was stated by Barwick CJ at p. 298 in plain and unambiguous language that the "choice principle" would not apply

> *"..... if the actual transaction into which the parties have entered involves the taxpayer in liability to tax or does not afford the taxpayer some benefit in taxation, such as a deduction and that transaction is cast into another form which, if effective, would relieve the taxpayer of*

tax, wholly or partially, the intention with which that form of transaction is chosen can properly be said to be an intention 'to alter the incidence of the income tax', as that expression is used in this area of the law of income tax."

And at p. 302,

"..... if there had been some antecedent transaction between the parties, for which the transaction under attack was substituted in order to obtain the benefit of the particular provisions of the Act.

As mentioned earlier the profits of the Taxpayer ought to have been paid as dividends to the Foundation by virtue of their relationship. However, the profits were paid as donations and not as dividends in order to obtain the benefit of section 44(6) of the Act. Furthermore, the payments if received as dividends by the Foundation would have subjected them to tax under Paragraph 13 Schedule 6 of the Act. Thus, even on the application of the "choice principle" the transaction falls within the qualification to it as stated by Barwick CJ in the passage referred to above. We must also point out that the requirement of an "antecedent transaction" did not find favour with **Gibbs CJ in FCT v. Gulland 17 ATR 1** where his Honour said at p. 11,

"In any case, however, there is nothing in s. 260 that supports the view that the section can apply only when there has been an antecedent transaction between parties."

This weakens the case for the Appellants as it is a further restriction on the application of the "choice principle".

DUKE OF WESTMINISTER

We must interpolate to refer to the decision of the House of Lords in **Inland Revenue Commissioners v. Duke of Westminster 19 TC 490** and, in particular, the statement of Lord Tomlin at p 520 that

> It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts..... it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be."

It is this basic reasoning that underlies the development of the "choice principle" in Australia and New Zealand. It is appropriate to note that recent decisions in England have reformulated the ratio laid down in the **Westminster** decision.

W.T. RAMSAY LTD. V. IRC

In **W.T. Ramsay Ltd. v. IRC (1982) AC 300** Lord Wilberforce referred to the principle of the Westminster case and said,

"This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or a transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

IRC V. BURMAH OIL CO. LTD.

In **IRC v. Burmah Oil Co. Ltd. (1982) STC 30** Lord Diplock affirmed the Ramsay approach and considered the ambit of the Westminster principle and said,

*"It must be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that **Ramsay's** case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the overruling of any earlier decisions of this House; but it does involve recognising that Lord Tomlin's oft-quoted dictum in **IRC v. Duke of Westminster***

..... tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straightforward way."

FURNISS V. DAWSON

The strength of Lord Tomlin's principle has been severely weakened as indicated. As Lord Scarman said in **Furniss v. Dawson (1984) AC 474**

"the limits within which this principle is to operate remain to be probed and determined judicially."

ENSIGN TANKERS (LEASING) LTD. V. STOKES

In **Ensign Tankers (Leasing) Ltd. v. Stokes (1992) 2 All ER 275** Lord Templemen said that though the dictum of Lord Tomlin is accurate so far as tax mitigation is concerned it does not apply to tax avoidance.

CRAVEN V. WHITE

In **Craven v. White (1988) STC 476** Lord Templemen said that the trilogy of tax avoidance cases, **Ramsay**, **Burmah**, and **Dawson** decided that a scheme to avoid an assessment to tax on a taxable transaction by a tax avoidance transaction which serves no business purpose apart from the avoidance of the tax which would otherwise be payable in respect of the taxable transaction must be viewed as a whole; the taxing statute must be applied to the scheme and not to the constituent transactions comprised in the scheme.

AUSTRALIAN RESPONSE

Cooper, Krever and Vann's Income Taxation, Commentary and Materials 2nd Ed. at para 25 - 50 summarises the Australian response to these cases in the following terse terms:

> It is settled law that the subject is not to be taxed unless the words of the statute clearly impose a tax upon him

*"The attitude to characterising transactions represented by these cases is not one that has been welcomed in Australia. In **F.C.T v. Ilbery (1981) 81 A.T.C. 4661** the Federal Court observed obiter that this doctrine of fiscal nullity was possibly applicable to the Australian tax system but they expressed some caution in their adoption of it since our legislation has an expressed anti-avoidance rule. The less than wholehearted adoption of **Ramsay** was followed by its explicit rejection in **Oakey Abbattoir Pty Ltd v. F.C.T. (1984) 84 A.T.C. 4718** by the Federal Court. Fox, Fisher and Beaumont JJ. rejected any potential application of the fiscal nullity doctrine in Australia suggesting that the field was covered by our general anti-avoidance provisions: the former s. 260 and Part IVA.*

FISCAL NULLITY DOCTRINE

The Commissioner continued to argue that the fiscal nullity doctrine applied in Australia (see, for example, Taxation Ruling IT 2237) and indicated that he intended to continue to argue before courts and the Administrative Appeals Tribunal that the doctrine applies in Australia despite the dicta in Oakey Abbattoir. The matter has now been put to rest, however, by the High Court in **John** where they observed:

"One general rule [of statutory construction], exposed in the maxim, expressum facit cessare tacitum, is that where there is specific statutory provision on a topic there is no room for any further matter on the same topic. The Act, in s. 260 and now in Part IVA, makes specific provision on the topic of what may be called tax minimisation arrangements and thereby excludes any implication of a further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a taxation advantage."

*Presumably this observation applies equally to sales tax because of the general anti-avoidance rule expressed in the 1992 legislation but whether the **Ramsay** doctrine of fiscal nullity is applicable to other tax regimes such as stamp duty, land tax or payroll tax awaits further exploration."*

LIM KAR BEE V. DUOFORTIES PROPERTIES (M) SDN. BHD.

In the light of these developments in England the statement by our Supreme Court in **Lim Kar Bee v. Duoforties Properties (M) Sdn. Bhd. (1992) 2 MLJ 281** that there

*"..... seems to be some difficulty in drawing the line between the dictum of Lord Tomlin and that of Viscount Simon LC" is sound. What Viscount Simon LC said in **Latilla v. CIR 25 TC 107 at p 117** is that in*

"..... recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country after receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which points out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of

the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire or do not know how, to adopt these manoeuvres. Another consequence is that the legislature has made amendments to our Income Tax code which aim at nullifying the effectiveness of such schemes. "

The result reached by the Supreme Court is, in the words of Peh Swee Chin SCJ at P 291, that

"..... the real test seems to be, in any given transaction, whether the primary purpose of the transaction is to avoid tax; if it is, it is an illegal purpose, i.e. of such a nature that, if permitted, it would defeat the tax law in question, coming under sub- s(b) of s. 24 of the Contracts Act 1950."

DGIR V. HUP CHEONG TIMBER (LABIS) SDN. BHD.

Again in **DGIR v. Hup Cheong Timber (Labis) Sdn. Bhd. (1985) 2 MLJ 322** the Supreme Court held that if a transaction was made for the purpose of evading or avoiding liability to pay income tax then section 140 can be resorted to. Thus the test laid down in both the Supreme Court decisions which is whether the primary purpose of the transaction is to avoid tax is the same as in the **Newton** decision which is whether a transaction was implemented in that particular way so as to avoid tax.

In this case the primary purpose of making the payment to the Foundation in the form of donations was to avoid tax. The consequence of such a transaction has already been answered by our Supreme Court.

We must, at this stage, add that the terms of the Australian equivalent of our section 140, if liberally construed might have proved to be more than equal to the task asked of it but the courts there read into the section a series of limitations which rendered it almost useless. The emasculation of section 260 by the courts in the 1970s led Parliament to introduce a new general anti-avoidance provision in the form of Part IVA (see **Cooper, Krever and Vann's Income Taxation, Commentary and Materials 2nd Ed** para 25-32). The learned authors in commenting on **FCT v. Gregrhon Investments Pty Ltd (1987) 87 ATC 4988** and **FCT v. Gulland (1985) 85 ATC 4765** said at para 25 - 41, 42:

"One of the ironies of tax law in Australia is that s. 260 seems to have acquired after its demise a vigour and potency which the courts denied to it during its currency. It will be recalled from the discussion above, p. 25 - 32, that s. 260 was construed to be subject to a variety of limitations, but courts have now begun re-interpreting the section and doubting the validity of those limitations. " [Emphasis added).

> Tax avoidance schemes largely depend on the exploitation of one or more exemptions or reliefs or provisions or principles of tax legislation

This, perhaps, ought to provide ample justification for giving section 140 of the Act a literal interpretation so that it can play its rightful role as intended by our legislature without being circumscribed in its operation. The "choice principle" conflicts with the unambiguous language of section 140 and, if adopted, would render the existence of the section nugatory. In our opinion section 140 must be nursed and nurtured in its original form without being adulterated by any alien interpretation. The doctrine's entry into the smooth working of our fiscal system would undermine the purpose of the creation of section 140 as a provision designed to combat tax avoidance.

STATUTORY RULES

At this juncture it is pertinent to refer to some rules of statutory interpretation. It is trite law that the words of a statute must be given their natural meaning even if the result is anomalous (see **Rennell v. IRC (1964) AC 173, HL**). Where the words of a statute are clear there is no room for the Court to go beyond the expressed language of a statute (see **Mohamed Noor bin Othman & Ors. v. Haji Mohamed Ismail (1988)3 MLJ 82**).

In **Cape Brandy Syndicate v. The Commissioner of Inland Revenue 12 TC 358** Rowlatt J said at p. 366,

"It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts..... it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."

It is settled law that the subject is not to be taxed unless the words of the statute clearly impose a tax upon him (see **Russel v. Scott (1948) AC 422, HL; Coltness Iron Company V. Block (1881) 6 App Cas 315, HL; Brown v. National Provident Institution (1921) 2 AC 222, HL)**. It is superflous to state that where the statute does not impose a tax on the subject on a certain income then the question of taxing him on that income simply does not and cannot arise. If he is not exigible to tax on an income then the question of tax

avoidance with regard to that income does not arise for consideration for the obvious reason that no tax is payable on such income. He can do what he likes with that income. The logical corollary is that a tax avoidance provision in a taxing Act only applies to a provision in the Act which imposes or creates a liability for the payment of tax or grants an exemption. It follows that such a provision in a taxing statute renders the other provisions in the statute subject to it. Otherwise, a tax avoidance provision in a taxing statute will be rendered otiose. There is no equity about a tax. That section 140 of the Act must be read and interpreted in that line is clearly borne out by its language. The section refers to "any" transaction. That would refer to all transactions contemplated by the Act. Section 140(l)(a) to (d) makes it clear that it refers to transactions carried out under the Act as it refers to any transaction which has the direct or indirect effect of altering the incidence of tax which is payable or of relieving any person from any liability which has arisen or of evading or avoiding any duty or liability which is imposed or of hindering or preventing the operation of the Act in any respect etc. The section authorises the Director General of Inland Revenue to disregard or vary such a transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction.

UHG V. DGIR

The scope of the section was ratiocinated by the Federal Court in **UHG v. DGIR (1974)2 MLJ 33** where Raja Azlan Shah FJ (as His Highness then was) said at pp. 34 -35,

*"The argument an this point is presented in two ways. The first is based on the principle formulated by Sir George Jessel M.R in **Taylor v. Oldham Corporation 4 Ch. D. 395, 410** and later applied by O'Connor J. in **Goodwin v. Phillips (1909) 7 C.L.R. 1, 14** in the following words:*

> *'The conflicts between the two sections is one of the kind to which Sir George Jessel M.R. refers in **Taylor v. Oldham Corporation**. Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject-matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provisions, must be deemed not to apply.'*

GENERAL SECTION V. SPECIAL SECTION

Applying that test learned counsel contended before us that since section 91 is a general section, it cannot overrule section 140 which it is said, is a special section. The latter section must be read as an exception from the operation of section 91. In other words, a general provision is pro tanto avoided by an express provision entirely inconsistent with it.

The principle is familiar to us. Many cases have acted upon it. It is good law. But the question is whether it applies in the instant case?

The answer to this question can only be found by reference to the two sections under consideration. The genesis and purpose of section 140 is clear. It gives the Director General an unfettered discretion in certain matters of tax evasion. The powers under it are wide but they are not plenary. He may, under the section, disregard or vary the transaction of controlled companies and make such adjustments as he thinks fit with a view to counter-acting the whole or a part of any direct or indirect effect of the transaction. To carry out these adjustments, he may make such assessments or additional assessments as he deems necessary to nullify a right to repayment of tax or to require a return of any tax which has been repaid. Section 91 is the foundation of the Director General's power to make an assessment or additional assessment in cases where the machinery of section 77 having been operated, no assessment has been made. He may rectify this anomaly within 12 years. An analogy of this section is provided in the case cited by the learned counsel: see **Mandavia v. Income Tax Commissioners (1959) A.C 114, 123**. Thus section 140 merely superadds a discretion of the Director General's power.

> *"It may well be that in a proper case the special provision of section 140 is excepted out of the general provision of section 91 but this is wholly contingent in each case where the general provision would be rendered inapplicable. In my opinion, it is rendered inapplicable only in those cases where in Director General has exercised the power given to him under the special provision of section 140".*

The judgment of the Federal Court, in particular the last sentence in the passage quoted above, makes it pellucid that where the Director General of Inland Revenue has invoked section 140 the other relevant sections of the Income Tax Act are rendered inapplicable. This shows in crystalline terms that the powers conferred by the section are in addition to those conferred by the other provisions of the Act. As his Lordship said ".....section 140 merely superadds a discretion of the Director General's power." Thus it is illogical to suggest that section 140 has to be read subject to the other provisions of the Act. The position is clearly expressed by Gill J (as he then was) at the High Court stage of the **UHG** case reported in **(1973) 2 MLJ 88 at p. 89**,

"It was argued that the Director General should have acted under section 140 of the Act rather than under section 91(1). A short answer to that argument is that it was open to the Director General to take action under either of these sections at his choice."

CIR V. CHALLENGE CORPORATION LTD.

Support for the stand adopted can be found in the decision of the Privy Council in **CIR v. Challenge Corporation Ltd. (1987) 1 AC 155**. In that case a key issue of contention was the relationship between section 99 of the New Zealand Income Tax Act (similar to our section 140) and the other sections of the Act. It was argued that section 99 did not apply to the other provisions in the Act which provided reliefs or exemptions, once the condition for the reliefs or exemptions were satisfied. In essence it was argued that arrangements altering the incidence of tax in a manner contemplated by the Act should not 'constitute" tax avoidance under section 99. In answer to this Lord Templeman said at pp. 164 -165,

"That argument cannot be correct. Tax avoidance schemes largely depend on the exploitation of one or more exemptions or reliefs or provisions or principles of tax legislation. Section 99 would be useless if a mechanical and meticulous compliance with some other section of the Act were sufficient to oust section 99. Richardson J, giving judgement in the Court of Appeal in favour of the taxpayer, nevertheless recognised that 'section 99 would be a dead letter if it were subordinate to all the specific provisions of the legislation'."

Lord Templeman also referred to some of the leading English cases on tax avoidance such as **IRC v. Duke of Westminster (1936) AC1, Black Nominees Ltd. v. Nicol (Inspector of Taxes) (1975) STC 372, Chinn v. Collins (Inspector of Taxes) (1981) STC 30** and said that

"In New Zealand s 99 would apply to all the cited English cases of income tax avoidance."

We pause to add that learned counsel for the Appellants relied on **CIR v. Challenge Corporation Ltd. (1987) 1 AC 155** in support of his argument that as tax mitigation does not fall within the scope of section 140 the Respondent is not entitled to invoke that section as the arrangement between the parties amounted to only a mitigation of their tax liability. The distinction between tax mitigation and tax avoidance as spelt out by Lord Templemen in the **Challenge** case is in the following terms:

"Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

Section 99 does not apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had

.....

In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers' suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax."

In the light of the distinction between tax mitigation and tax avoidance as stated above it is our view that the payments made in this case fall squarely within the meaning of tax avoidance. On the facts of this case the Taxpayers sought to reduce their liability to tax by making the payments by way of donations without involving them in any loss or expenditure which entitles them to that reduction. This is for the reason that the Taxpayers are seeking to obtain a tax advantage by making a payment through a different route when such payment if paid properly, that is to say, by way of dividends, would have attracted tax consequences. The financial position of the Taxpayers is unaffected because if they did not make the payments by way of donations they would eventually have paid the sum as dividends. The situation would of course be different if they had made a similar payment to a different entity which would result in a loss to them. Even in such a case the wide and clear language of section 140 would attract the attention of the Director General of Inland Revenue.

QUOTE

"Opportunities multiply as they are seized; they die when neglected"

- John Wicker -

TAX AVOIDANCE

A Different Perspective

By Ronnie Chia

Under section 140(1) of the Income Tax Act 1967 (hereinafter referred to as ITA), the Director General of Inland Revenue is conferred wide powers to either disregard or vary any transaction and make any adjustments as he thinks fit with a view to counteracting the effect of the transaction if he has reason to believe that the transaction has the direct or indirect effect of:-

(i) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;

(ii) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a tax return;

(iii) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by the ITA; or

(iv) hindering or preventing the operation of the ITA in any respect.

In this particular section, a "transaction" means any trust, grant, covenant, agreement, arrangement or other disposition or transaction made or entered into orally or in writing and includes a transaction entered into by two or more persons with another person or persons. Section 140 is aimed at tax avoidance schemes in general and its application is extremely wide indeed.

What has intrigued me in the past is the question of whether the scope of Section 140 is as wide as the tax authorities and practitioners have made it out to be. Let us examine the section in greater detail. Section 140(6) states:-

"Transactions -

(a) between persons one of whom has control over the other;

(b) between individuals who are relatives of each other; or

(c) between persons both of whom are controlled by some other person,

shall be deemed to be transactions to be the kind to which subsection (1) applies if in the opinion of the Director General those transactions have not been made on terms which might fairly be expected to have been made by independent persons engaged in the same or similar activities dealing with one another at arm's length."

A "relative" is defined in subsection 8 to mean a parent, a child (including a stepchild and a child adopted in accordance with any law), a brother, a sister, an uncle, an aunt, a nephew, a niece, a cousin, an ancestor or a lineal descendant.

Therefore, a transaction conducted between family members would come under the scrutiny of Section 140. However, the case is not so clear when it comes to other taxpayers. Can one say that transactions between third party taxpayers do not fall under Section 140 even if the said transactions have the clear intention to avoid tax?

There are no general anti-avoidance provisions in the United Kingdom

Imagine the scenario where ABC Sdn Bhd intends to sell a piece of land which it had acquired for RM2 million previously for RM50 million to a third party buyer. Instead of selling the land directly and thereby being subject to income tax, ABC Sdn Bhd undertook the following:-

(i) ABC Sdn Bhd sells the land at RM2 million to DEF Sdn Bhd, a RM2 company owned by third parties;

(ii) Amount due to ABC Sdn Bhd arising from the acquisition of the land will be capitalised via the issue of new DEF Sdn Bhd shares to ABC Sdn Bhd. Effectively, DEF Sdn Bhd becomes a wholly-owned subsidiary of ABC Sdn Bhd; and

(iii) ABC Sdn Bhd sells DEF Sdn Bhd to third party buyer at RM50 million.

Can the Director General exercise his powers under Section 140(1) in respect of the above transactions? Do the transactions fall within the definition of "transactions" as set out in Section 140(6)? The operative word in Section 140(6) is "control". There is no definition of "control" in the ITA apart from the one in Paragraph 38, Schedule 3. Although it is specifically stated that this definition of "control" only relates to that paragraph, it may provide a hint as to what might the legislators consider as "control" for purposes of Section 140. Paragraph 38(b), Schedule 3 states:-

"In this paragraph "control", in relation to a company, means the power of a person to secure, by means of the holding of shares or the possession of voting power in or in relation to that or any other company, or by virtue of any powers conferred by the articles of association or other document regulating that or any other company, that the affairs of the first mentioned company are conducted in accordance with the wishes of that person....."

The word "control" is defined in The Oxford Modern English Dictionary as 'the power of directing; command'. This

definition is very much the same as that of Paragraph 38(b), Schedule 3 of the ITA.

From the above definition, it appears that "persons one of whom has control over another" in relation to companies refers to a parent-subsidiary or parent-associate (significant influence) situation while "persons both of whom are controlled by some other person" would refer to a subsidiary-subsidiary, subsidiary-associate or associate-associate situations. A company may also be said to have control over another if the latter's dealings with the former is of a substantial amount in relation to its total business dealings. This "de facto control" may allow the first company to dictate terms and conditions in relation to their dealings.

As such, transactions between group companies would clearly fall under Section 140. The Director General can also vary or disregard a transaction as defined in Section 140(6) that benefits a third party, even if the related parties entering into the arrangement did not derive any benefit whatsoever. However, the manner in which Section 140(6) is worded suggests that the Director General is not able to exercise his powers under Section 140(1) in respect of transactions (which are not capable of explanation by reference to ordinary business dealing and thus, have the effect of tax avoidance) of companies that are not related in one way or another and would have no dealing with each other if not for the transactions in question.

In the Privy Council case of *Laurie Joseph Newton v. The Commissioner of Taxation of the Commonwealth of Australia* (1958) A.C., it was established that if transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the transactions would not be caught by the anti-avoidance section. In our illustration, the transaction where ABC Sdn Bhd disposes the land at RM2 million (significantly below the market value) would be one whereby the sole purpose is to avoid income tax. However, as the transaction was between third parties and based on the definition of "transaction' in Section 140(6), I would think that Section 140(1) cannot be invoked.

For income tax avoidance purposes, to cover only transactions between related parties

Then, can the Director General view the scheme as a series of transactions as a whole and invoke Section 140 by virtue of ABC Sdn Bhd gaining control of DEF Sdn Bhd after the tax avoidance transaction had taken place and therefore come within the definition of "transaction"? I think not. Section 140(1) states, inter alia, "....believe that <u>any transaction</u> has the direct or indirect effect...." . It should be taken just to mean **a transaction** per se and not to mean "a series of transactions taken as a whole".

In *Cape Brady Syndicate v. IRC* (1921) 1KB 64, Rowlett J. held "In a taxing Act, 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, and nothing to be implied. One can only look fairly at the language used." If a document or transaction is genuine, the court cannot go behind it to examine the underlying substance and determine the tax effect of the document or transaction based on this substance (*IRC v. Duke of Westminster* (1936) A.C. 1; T.C. 200). Although the House of Lords in the United Kingdom have developed a principle which enables the courts to consider a series of closely integrated transactions as a whole rather than restrict itself to a consideration of each single step in isolation (see *W.T. Ramsay Ltd v. Inland Revenue Commissioner* (1981) STC 174), it is doubtful whether this doctrine has any application here as, unlike Malaysia, there is no general anti-avoidance provisions in the United Kingdom. The Supreme Court and the Full Federal Court of Canada and Australia respectively have ruled that the Ramsay doctrine has no application in their respective countries as a general anti-avoidance provision already exists. The Special Commissioners of Income Tax provided an indication on the applicability of the Ramsay doctrine in Malaysia when they noted in *SBP Sdn Bhd v. Director General of Inland Revenue* that "...whilst [the Ramsay line of cases] make very interesting reading and are indicative of certain judicial trends and 'the new approach' to anti-avoidance (or for that matter tax avoidance) in the United Kingdom, these cases - we must stress - do not dictate our approach and our decision on the question for our determination which is: 'whether the Respondent is entitled to invoke the provisions of Section 140 of the Income Tax Act 1967 so as to disregard the following transactions...'...."

From reading Section 140 of the ITA, I believe that the Director General would have to satisfy himself that a particular transaction falls within the definition of Section 140(6) before he can exercise his powers as provided in subsection 1. Otherwise, no action can be taken. Compare this to the anti-avoidance section in the Real Property Gains Tax Act 1976 (hereinafter referred to as the RPGT Act). Section 25(2) of the RPGT Act is silent on the relationship of persons who enter into the transaction in question. Thus, it can be read to cover all transactions whether its between third parties or related parties. The fact that the wordings of Section 140(6) is included in the anti-avoidance provision of the ITA and not in the RPGT Act shows that it is the intention, for income tax avoidance purposes, to cover only transactions between related parties.

The Trends of Anti Avoidance
A review of the Special Commissioners' case

SB Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (1995) 2 MSTC 2.417

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INTRODUCTION

Since the invocation of anti avoidance, namely sec 140 by the tax authorities in the case of SBP Sdn Bhd v DGIR [(1988) 1 MSTC 2,053] in 1985, there is no other case heard on anti avoidance. Through time, business has developed so rapidly and various tax planning strategies have been invented to minimise tax. On one hand, the taxpayers demand certainty in planning their affairs while on the other, one is not able to gauge the tax authorities' attitude towards the invocation of anti avoidance provision, namely sec 140.

In 1995, the tax authorities invoked sec 140 and successfully won a victory on SB Sdn Bhd. It is of paramount importance to draw the guidelines on the circumstances for such invocation and to be mindful of it, before laying down any tax planning schemes or arrangements.

This article will examine the decision of SB case and to establish the judicial attitudes towards anti-avoidance of the Special Commissioners.

THE BACKGROUND

Malaysia has a general anti avoidance rule, namely sec 140, couched in terms wide enough to frustrate any transactions carried out under the Income Tax Act 1967 (the Act) which have a direct or indirect effect of altering the incidence of tax, which is payable or of relieving any person from any liability which has arisen or of evading or avoiding any duty or liability which is imposed or of hindering or preventing the operation of the Act in any respect.

> If a bona fide business transaction, can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think sec 108 can properly be invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen....

The section authorises the Director General of Inland Revenue (DG) to disregard or vary such transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction. In short, it aims to combat the tax avoidance scheme so long as it falls within the ambit of sec 140.

Although sec 140 confers on the DG unfettered discretion on certain matters of tax avoidance, the powers are wide but they are not plenary. [UHG v DGIR (1950-1985) MSTC 145] It is the decision of the judiciary to strike a balance and decide whether the tax authorities are entitled to invoke sec 140. Admittedly, the taxpayers had to seek justice through the appeal tribunal of the Courts.

THE PRECEDENT CASES

There are not many cases heard on anti avoidance in Malaysia. A full case on sec 140 is only found in the Special Commissioner's case of SBP Sdn Bhd v DGIR. Nevertheless, sec 140 had been mentioned in numerous Malaysian cases (both Civil and tax) and the notable one is the LD Timber Sdn Bhd v DGIR [(1976) MLJ 50], where Yusoff J had adopted the Newton rule, which was established from the principles enunciated In Newton v Commissioner of Taxation of the Commonwealth of Australia (1958) AC 450 where Lord Denning said

> *"in order to bring the arrangement within the section, you must be able to predicate - by looking at the over acts by which it was implemented - that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labeled as a means to avoid tax, then the arrangement does not come within the section."*

In explaining this passage, Lord Donovan in delivering the judgment of the Privy Council of a New Zealand case **Mangin v Commissioner of Inland Revenue** [1971] 2 WLR 39 said :

> *"...this passage, properly interpreted, does not mean that every transaction having as one of its ingredients some tax saving feature thereby becomes caught by a section such as section 108. If a bona fide business transaction, can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think sec 108 can properly be invoked to declare the transaction wholly or partly void*

merely because the way involving less tax is chosen...."

Mangin's case is a decision of the Privy Council on the application of sec 108 of the New Zealand Land and Income Tax Act 1954 which is similar in context with the Australian Income Tax Assessment Act 1936 -1960, section 260. Section 260 of the Australian (Commonwealth) Income Tax Assessment Act 1936 - 1960 which is in pari materia with our section 140 of Act 53.

The above two passages were cited in LD Timber. Recent years anti avoidance cases established in the United Kingdom such as Ensign Tankers, Ramsay, Burmal Oil Co however are not cited in Malaysia tax cases.

SB SDN BHD VS KETUA PENGARAH HASIL DALAM NEGERI

SB Sdn Bhd (SB) is a trading company engaged in the timber operations in Sabah and was the trading arm and wholly owned subsidiary of S Foundation, a non profit making institution established by the S Foundation Enactment for educational, social and other like purposes for the benefit of the community.

S Foundation had obtained approval under section 44(6) of the Income Tax Act 1967 (the Act) and also granted exemption status of para 13 sch 6.

For the years of assessment 1980 - 1987, SB had made substantial donations (more than 90% of the profit) to S Foundation. In years of assessment 1985 and 86, the donation even exceeded the profit. SB had claimed a deduction of such donation in arriving at the chargeable income. The tax authorities had invoked sec 140 and disallowed the donation as a deduction and claimed that such donations are in substance a dividend payment.

The issue to be considered by the Special Commissioners is whether the tax authorities are entitled to invoke sec 140 of the Act to treat the payment by SB to Foundation as dividend and to disallow the deduction originally claimed as a deduction under sec 44(6) of the Act.

The Special Commissioners analysed the issue from two angles, that is

(a) to establish whether the amount paid by SB constituted "gift of money" as required under sec 44(6) of the Act. If it does, then the amount would be accorded a deduction in arriving at the chargeable income.

"..to constitute a "gift", it must appear that the property transfered was transfered voluntarily and not as a result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return."

(b) to establish whether there is ground for the tax authorities to invoke sec 140, taking into consideration all the circumstances of the case.

Not surprisingly, both the analysis resulted in the same conclusion, that is neither the amount made constituted a "gift of money" and taking into account all the pertinent features of the case, the tax authorities are entitled to invoke sec 140. It is a scheme of tax avoidance which falls squarely into the regime of sec 140.

"GIFT OF MONEY" - THE PREREQUISITES FOR SEC 44(6)

To decide whether the amount made by SB to S Foundation constituted "Gift of money", the Special Commissioners had adopted the "Substance over form" principle established in Commissioners of Inland Revenue v Wesleyan and General Assurance Society (30 TC 11) where Viscount Simon said at p 25.

"It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is the true nature. The question always is what is the real character of the payment, not what the parties call it"

The meaning of "gift" is not defined in the Act and thus the Special Commissioners had to relied on the Australian case FCT v McPhail (1968) CLR 111 where Owen J said

"..to constitute a "gift", it must appear that the property transferred was transfered voluntarily and not as a result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return."

Using the above guideline, the Special Commissioners had established that the amount paid by SB does not constitute a 'gift" because of the following reasons-

(a) A letter had been issued by the State Government to direct all subsidiaries of S Foundation to donate all surplus funds of the company to S foundation.

(b) Assurance had been given by the State Government to officers of the company to protect

them against any claims of proceedings.

(c) Evidence had showed that the manner in which donation was made was a clear indication that it was something that S Foundation was entitled to.

(d) The holding - subsidiaries relationship of SB with the S Foundation had established that S foundation is entitled to the profits earned by SB.

(e) A donation normally is made where there are surplus funds. SB had donated more than 90% of their profit as donation and in certain years had donated more than the profits and this does not seem to fit in the "reasonable man test ". Apart from the Foundation, SB did not make any other donation to any other approved institution.

(g) The witness, i.e. the Financial controller of SB had said SB decided to donate the sums rather than to declare it as dividend as it was advantageous. She further said:

".. donations were the most tax efficient method. If dividends were to be paid then tax has to be paid first, dividends will only be declared after tax. If it is made as a donation it is an allowable expenditure under sec 44(6) ITA"

(f) SB had received benefit as they did not need to pay dividend to S Foundation. As a subsidiary, there is an obligation for SB to pay dividend to its shareholders. The payment made in the form of donation had discharged this obligation.

The Special Commissioners thus concluded the payment made by SB does not constitute a gift within the meaning of sec 44(6) and therefore, does not qualify for deduction.

THE INVOCATION OF SEC 140

The Special Commissioners had ruled that the tax authorities are entitled to invoke sec 140 because the tax authorities had established the transactions entered by SB and S Foundation are not at arms length as envisaged by sec 140(6). As such, it shall be deemed to fall into sec 140(1). The DG may then proceed to disregard/vary the transactions.

Although it is not required to consider the provision of sec 140(1) because of the deeming provision of sec 140(6), the Special Commissioners however went on to consider facts that are envisaged by sec 140(1). The methods of payment by SB to the S Foundation had the effect of altering the incidence of tax which would otherwise be payable within the meaning of sec 140(1)(a) of the Act.

> Tax mitigation refers to situation whereby the taxpayers obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability

It is not disputed that SB resorted to this scheme to avoid paying tax to which they would have become liable if they had made the payment to the Foundation by way of dividends which would have been the proper way to make the payment by virtue of their relationship.

However, the profit was paid as a donation and not as dividends in order to obtain the benefit of sec 44(6) of the Act. Furthermore, the payment if received as dividends by S Foundation would have subjected them to tax under para 13 of Sch 6.

The Special Commissioners went on to reject the "Form over Substance principle" established in IRC v Duke of Westminister (19 7C 490) and approved the principles enunciated in Ramsay, Burmah Oil and Ensign Tankers, that is to distinguish between tax mitigation and tax avoidance.

The principle established in the Newton case remains good law that is to decide whether sec 140 is to apply is to first decide whether the primary purpose of the transaction is to avoid tax. In this case, it was established that the primary purpose of making the payment to S Foundation is to avoid tax. The consequence is that sec 140 can be resorted to.

THE INTERPRETATION OF SEC 140 - THE DARKNESS OF TAX PLANNING

It should be noted that the Special Commissioners had expressly laid down the grounds in SB case that sec 140 should be given a literal interpretation so that it can play its rightful role as intended by the legislature without being circumscribed in its operation. As such, the "choice principle" which flourished in Australia and New Zealand is rejected in Malaysian tax arena. The Special Commissioners commented at p 2,435

"The "choice principle" conflicts with the unambiguous language of section 140 and, if adopted would render the existence of the section nugatory. In our opinion section 140 must be nursed and nurtured in its original form without being adulterated by any alien interpretation. The doctrine's entry into the smooth working of our fiscal system would undermine the purpose of the creation of sec 140 as a provision designed to combat anti avoidance. At this juncture it is pertinent to refer to some rules of statutory interpretation. It is trite law that words of a statute must be given their natural meaning even if the result is anomalous.....Section 140 of the Act must be read and interpreted in

that line is clearly borne out by its language.....",

It can be observed that the Special Commissioners had prepared to give sec 140 a wide interpretation. As sec 140(1) using the words "any transaction", this would mean that all transactions contemplated under the Act would fall into the ambit of sec 140 using the literal interpretation.

In UHG v DGIR, it has been established that sec 140 is a special provision and once the DG had invoked sec 140 the other relevant sections of the Act are tendered inapplicable. Sec 140 superadds a discretion of the DG's power. This principle had been adhered to in SB case where the Special Commissioners rule that Sec 140 had superseded sec 44(6). The Special Commissioners commented at p 2,437

"...It is illogical to suggest that sec 140 has to be read subject to the other provisions of the Act...."

TAX AVOIDANCE AGAINST TAX MITIGATION

The Special Commissioners also adopted Lord Templemen analysis in CIR v. Challenge Corporation Ltd (1987) 1 AC 155 to distinguish tax avoidance scheme with tax mitigation. Tax mitigation does not fall within the scope of sec 140.

> This change of trend in anti avoidance would certainly deter the development of tax planning schemes in Malaysia

In an arrangement of tax avoidance the financial position of the taxpayer is unaffected and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss of expenditure which other taxpayers' suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax.

Tax mitigation refers to a situation whereby the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

The Special Commissioners concluded that the payments made by SB fall squarely within the meanning of tax avoidance. On the facts of this case, SB sought to reduce their liability to tax by making the payments by way of donation without involving them in any loss or expenditure which entitles them to that reduction.

The financial position of SB is unaffected because if they did not make the payments by way of donations they would eventually have paid the sum as dividends.

CONCLUSION

Although SB case subject to invocation of sec 140 is more based on the facts and evidence admitted, but the judicial mind of the Special Commissioners and their willingness to give sec 140 a wide interpretation is a worrisome one. With this assurance, the tax authorities may apply sec 140 as an all purpose weapon for all seasons. This change of trend in anti avoidance would certainly deter the development of tax planning schemes in Malaysia.

N O T I C E

Questionnaire On Professional Needs of Members

Dear member,

As you are aware, the Institute had recently sent out a questionnaire on professional needs of members to all members as part of a survey conducted by the Institute on issues related to Continuing Professional Development (CPD) and the Institue's journal. Please be informed that your views on the issues raised in this questionnaire are very important in assisting the Insitute in drawing up plans and strategies to meet your needs.

As the questionnaire only garnered a respond of 10%, which is insufficient to do a proper study on the highlighted issues, we hope to have your support by responding to the said questionnaire.

To all those who have responded, we wish to record our thanks and to those who have yet to respond, please be reminded to do so. Please reply either by faxing to 03-2741783 or posting with the self-addressed envelope attached to the questionnaire sent to you earlier. Please be sure that you **either fax or post and not both** in order to avoid duplication. Should you have misplaced or not received the said questionnaire, please contact Ms Amanda or Ms Florence to request for a copy.

Your cooperation in this matter is highly appreciated.

Note:
Members who have also received questionnaire directed to firms are also reminded to send in their responses.

The Malaysian Institute of Accountants jointly with the Malaysian Institute of Taxation collaborating with International Bureau of Fiscal Documentation is pleased to announce the proposed:-

4-DAY INTENSIVE COURSE ON PRINCIPLES OF INTERNATIONAL TAXATION

INTRODUCTION

With rapid economic expansion Malaysian companies and multinational enterprises residing in the country increasingly conducts cross border businesses. As a result, Malaysian accountants are forced to be equipped with international tax planning knowledge to deal with difficult and complex tax questions relating to different laws in two or more countries, each subject to interpretation which may not be uniform. Previously, when Malaysian entrepreneurs did not invest substantially overseas the requirement to know international tax planning is minimal.

With the Government encouragement to penetrate all corners of the global market it is now essential to understand cross-border taxation. It is with this objective that the Malaysian Institute of Accountants and Malaysian Institute of Taxation have sourced the International Tax Academy (ITA) of the International Bureau of Fiscal Documentation (IBFD) to conduct an intensive course on "Principles of International Taxation". The ITA of the IBFD is the world's foremost authority to conduct the course. The IBFD is an independent non-profit research foundation established in the Netherlands. The IBFD's professional staff consists of 45 multilingual lawyers and economists from 20 countries. The IBFD's clients include Ministries of Finance and tax administrators, internationally operating enterprises and their financial and tax advisers, the larger accounting and law firms, international tax consultants and banks, law schools and libraries

THE COURSE OUTLINE

* Essential features of international taxation including
  - jurisdiction to tax
  - international double taxation
  - source principle
  - residence principle
  - territoriality
  - remittance base
  - forms of doing business
* Corporate income tax systems (classical versus imputation systems)
* Taxation of residents and non-residents
* Methods for the avoidance of international double taxation
* Double taxation conventions
  - Types, purpose, structure and operation
  - survey of selected provisions
  - interpretation
* Tax planning
* Anti-avoidance measures including
  - thin capitalization
  - c.f.c. legislation
  - anti-tax haven rules
* International taxation of capital gains
* Transfer pricing

COURSE MATERIALS

* Free copy of IBFD's *International Tax Glossary*
* Complete course materials

LECTURERS

Prof. Dr. Willem G. Kuiper

Willem G. Kuiper studied tax law at the State University of Leiden from which he graduated in January 1974. In the same year, he joined the research staff of the International Bureau of Fiscal Documentation (IBFD) in Amsterdam, where he was, inter alia, involved in a research project on taxation in Eastern European countries. This resulted in the publication of a loose-leaf source book entitled Taxation in European Socialist Countries in 1981. He also acted as the managing editor of several other IBFD publications, including The Taxation of Companies in Europe and Value Added Taxation in Europe (from 1978 - 1986). From 1986 to 1990 he was acting as the editor-in-chief of the IBFD periodical European Taxation.

In December 1988 he obtained a doctor's degree in law from the State University of Leiden by defending his thesis, entitled: (East-West) joint ventures: a special phenomenon in international tax law?

In July 1989s, he became the first technical director of the IBFD International Tax Academy, a division of the IBFD specializing in training and education in international and comparative taxation. In May 1992 he was appointed a deputy director of the IBFD, responsible for training and education. One year later he was appointed the director education of IBFD.

Mr Kuiper was appointed as extraordinary professor of European and international tax law at the University of Lódz, Poland in 1995.

Frank Anthony Ramaizel, Esq.

Mr. Ramaizel is an American tax lawyer associated with the IBFD International Tax Academy in Amsterdam. He has an extensive teaching background in finance, economics and the law. Prior to joining the IBFD, he taught at US universities and worked in private industry. On a regular basis he lectures throughout the world on international tax topics, specializing in Transfer Pricing.

He has graduate law degrees from both Vermont and Syracuse Universities and an M.B.A. in Finance from the New York Institute of Technology. Mr. Ramaizel is a member of the New York and Connecticut Bars, the United States Tax Court and the International Fiscal Association.

REGISTRATION OF INTEREST

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COURSE FEE - RM3,000.00

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PLEASE MAIL OR FAX TO:

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c/o Dewan Akauntan
2 Jalan Tun Sambantan 3
50470 Kuala lumpur
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Tel: (603) 274-5055
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WITHHOLDING TAX

Practical Issues

By Ronnie Chia

INTRODUCTION

The Income Tax Act 1967 (hereinafter referred to as "the Act") contains certain provisions that provide a mechanism for the tax authorities to collect taxes at source from non-residents who are receiving payments which are subject to Malaysian tax. This "tax" is popularly known as "withholding tax". Under the various provisions that govern the withholding tax regime in Malaysia, any person who makes certain specific payments to a non-resident is required to deduct withholding tax at a prescribed rate applicable to the payment and pay the amount so deducted to the tax authorities within a stipulated time.

PROBLEMS ENCOUNTERED

Generally, withholding tax is imposed on the following type of payments made to non-residents:-

(i) royalties;

(ii) interest;

(iii) management/technical fees;

(iv) rents for movable properties;

(v) contract payments;

(vi) public entertainer's remuneration; and

(vii) income from a transport business.

This paper will only deal with the first five types of income of a non-resident.

In order to determine whether a particular payment is subject to withholding tax, and when and how much to deduct from the payment to be made to the non-resident, one must ask the following questions:-

> Disbursements, reimbursements or out-of-pocket expenses are not subject to withholding tax

(i) Does the payment represent an income that is chargeable to income tax in Malaysia?

(ii) Is the income derived from Malaysia?

(iii) Does the Inland Revenue Department (hereinafter referred to as "IRB") have the powers to collect the tax so imposed?

If, having answered the above questions in the positive, you'll encounter further questions which may give rise to problems. Problems mainly relate to the timing and quantum of the withholding tax payment.

Timing of withholding tax payment

A typical provision that deals with the collection of withholding tax would contain the following phrase -

".....he shall within one month after paying or crediting the [income] render an account and pay the amount of that tax to the Director General....."

The above looks simple enough. When you make payments to non-residents that are subject to withholding tax, you'll deduct 10% or 15%, as the case may be, from the payment and pay the IRD the amount so deducted within one month of making the payment. The problem arises when we look at the word "crediting". Does it mean crediting the payee's bank account or does it mean a journal entry or does it take on another meaning? In relation to the meaning of "crediting", the IRD has clarified that it is something more than a mere journal entry or accrual of the liability in the books of the payer. An amount is considered as having been credited to a non-resident if it has been made available to or for the benefit of the non-resident. This clarification raises another question ie. "What is meant by 'made available to or for the benefit of the non-resident'?"

Quantum of withholding tax payment

The amount of withholding tax to be withheld is normally calculated by taking the gross payments and multiplying it by the prescribed rates as set out in the Act. It appears simple enough but that is not always the case.

Typical questions would include:-

"Do I take into account disbursements or out-of-pocket expenses?"

"What about the value added tax?"

"How much should I withhold? The agreement stipulates that the amount payable is to be net of tax."

"Does the tax treaty provides for a lower withholding tax rate?"

"I'm paying to a partnership that includes a non-resident. How much shall I withhold?"

Disbursements, reimbursements or out-of-pocket expenses are not subject to withholding tax. Such expenses would include travelling, accommodation, and sustenance. In practice, the IRD tend to take a very narrow view as to what is reimbursements - the expenses must be those which should have rightly be borne by them in the first place. Salaries are not

considered as reimbursements for such purposes. Value added tax are also not subject to withholding tax.

If an agreement states that payments due represent amounts net of tax, you would have to regross the amount and pay the tax based on the regrossed amount.

Treaties concluded by Malaysia usually provides for a maximum rate of tax for particular types of payments. With the lowering of the withholding tax rates in October 1994, the prescribed rates are currently lower or at par with the maximum allowable under most treaties.

When making payments to a partnership which includes a non-resident taxpayer, only the portion attributable to the said non-resident is subject to withholding tax. The portion accruing to the residents are not subject to withholding tax.

Which form to use?

Another common headache among taxpayers is the type of form that is to be completed and submitted together with the withholding tax payment. Depending on the type of payments made, the more commonly used forms are Form CP 37 for interest and royalties (Section 109), Form CP37A for contract payments (Section 107A) and Form 37D for income classified under Section 4A of the Act (Section 109B).

The mix-up usually occurs when making payments to non-residents for services performed. Should payments be made pursuant to Section 107A or Section 109B? Both payments are made pursuant to an agreement or contract. The distinction lies in whether the non-resident has a permanent establishment (if the non-resident is a resident in a treaty country) or a business presence (if he is in a non-treaty country) in Malaysia? A non-resident cannot maintain both Section 107A and Section 109B accounts. It must be one or the other. A rule of thumb is that if the non-resident has an operation in Malaysia or is present for a period of time, then it is likely that Section 107A would apply.

> The mix-up usually occurs when making payments to non-residents for services performed

Limitation on the scope of Section 4A(ii)

I have encountered many non-residents that are unhappy with the Malaysian payer deducting withholding tax on payments made to them, such as fees for legal, accounting, tax, architect, and audit services. The non-residents argue that such fees do not constitute payments for technical services.

The question we need to ask is whether such services are considered to be "technical" in nature for purposes of Section 4A(ii). In the absence of a definition for the word "technical" in the legislation, the Malaysian tax authorities have taken an aggressive approach in interpreting Section 4A(ii) and has indicated that all payments made to non-residents for services which are not day-to-day routine services will be subject to withholding tax. Payments for the services mentioned above would then clearly fall under the tax authorities' definition of income that is subject to withholding tax.

> Penalties for non-compliance of the withholding tax provisions are severe

It has, however, been contended that the tax authorities' view on the scope of Section 4A(ii) is not consonant with the legal interpretation of the words in that section. It was argued that for Section 4A(ii) to be applicable under its legal construction, the services rendered by the non-resident must be technical in nature as well as in connection with technical management or administration. The taxpayers are saying that legal, accounting, tax, architect, audit services and the like are not "technical" in nature and only services related to sciences, engineering and the like are considered to be "technical" in nature.

HISTORICAL BACKGROUND

To understand the difference in opinion between the tax authorities and the taxpayers on the term "technical", we will have to take a trip back in time to examine the situation before the existence of Section 4A. Section 4A came into being when sub-paragraphs (c) and (d) on the definition of royalty in Section 2 were repealed in 1983. The provisions as contained in Section 4A(i) and (ii) are exactly the same as sub-paragraphs (c) and (d) respectively. Back in 1973, the tax authorities issued a ruling stating that sub-paragraph (d) will not extend to the following types of payments by virtue of the fact that they are not considered "technical" in nature:-

(i) payments for ordinary day-to-day administration and management services; and

(ii) payments for independent professional services rendered by individuals or firms such as accountants, auditors and architects where such services are not associated with the provision of any patents, trademarks, technical know-how or technical advice.

When Section 4A was inserted in the legislation, the tax authorities advised that the 1973 ruling will not be applicable to the new Section 4A(ii) and sought to tax the payments described in part (ii) above. Their stand was made clear to the Malaysian Institute of Accountants, which represented the taxpayers, during a dialogue session held to discuss the provisions of Section 4A.

Relief from tax under DTA

The taxpayers did not give up easily. Turning to another point, it was argued that Section 4A(ii) would not have any application under the provisions of Double Tax Agreements (DTA) that deal with business income. This is because the business article of most DTA concluded by Malaysia provides that income or profits (other than rents, royalties, dividends and interest) of any enterprise shall only be taxed in its country of residence unless the said enterprise carries on a business

through a permanent establishment in Malaysia. Therefore, it follows that if a non-resident provides the services, the nature of services being its trade or business, in its home country, then the Malaysian tax authorities' cannot tax the income. As such, the business article of DTA can be used to override Section 4A(ii) resulting in no withholding tax payable.

The Malaysian tax authorities have, in response, argued that since Section 4A(ii) income, as defined in the legislation, is different from business income (as provided under Section 4), the business article in the DTA will not apply and the income will continue to be subject to withholding tax. This view has been reflected in new DTA negotiated by Malaysia and the protocol entered into with France and the United Kingdom where a separate article on technical fees have been inserted. In these newly inserted articles, the term "fees for technical services" means payments of any kind to any person in consideration for any services of a technical, managerial or consultancy nature.

It appears that the tax authorities, through the tax treaties, are reinforcing their stand that managerial and consultancy services are caught by the definition of the term "technical". The services I mentioned above have an element of consultancy or managerial in nature. Hence, it looks like withholding tax has to be paid on legal, tax, accounting and auditing fees, etc.

Until such a time when some taxpayer presents its case to the courts in respect of the legal interpretation of the wordings of Section 4A(ii) or to the competent authority in his country of residence on the applicability of the business article of DTA to mitigate the withholding tax, the tax authorities' view will prevail. Resident taxpayers will continue to withhold 10% of payments to be made to non-residents as failure to do so will result in severe penalties for the former.

As a result of differing views on the matter, the issue may result in a deterioration of the non-resident's relationship with the Malaysian taxpayer or the non-resident may start charging extra fees to cover for the "losses" as a result of the withholding tax.

Table 1

SCENARIO 1	RM'000	SCENARIO 2	RM'000
In Malaysia		**In Malaysia**	
Management fees	100	Management fees	100
Less: Withholding tax	(10)	Less: Withholding tax	(5)
Cash paid to non-resident	90	Cash paid to non-resident	95
In Country A		**In Country A**	
Management fees	100	Management fees	100
Less: Expenses	(40)	Less: Expenses	(40)
Taxable income	60	Taxable income	60
Tax @ 35%	21	Tax @ 35%	21
Less: Tax credit	(10)	Less: Tax credit	(5)
Tax payable	11	Tax payable	16
Total tax paid		**Total tax paid**	
Income tax payable	11	Income tax payable	16
Withholding tax paid	10	Withholding tax paid	5
Total	21	Total	21

Note: Scenario 1 - No withholding tax planning
Scenario 2 - Withholding tax reduce by 50%

> Overzealous mitigation of withholding tax may land the Malaysian payer in hot soup with the IRB

EFFECTS OF NON-COMPLIANCE

Penalties

Penalties for non-compliance of the withholding tax provisions are severe. Not only is the tax outstanding increased by 10% and 5% after another sixty days, the whole payment would not qualify for a tax deduction under the provisions of Section 39. However, it does not mean that once withholding tax is paid, the expense is automatically deductible. The expenditure would still need to satisfy the provisions of Section 33(1) of the Act.

Hence, it is of utmost importance that the withholding tax provisions are complied with on a timely basis. There is nothing to stop the IRD from disallowing the payment as a tax deduction if the withholding tax was paid a day late.

Although the IRD in practice, after a series of negotiations with the taxpayer, do allow a tax deduction if the withholding tax payment is made together with the penalties levied, such negotiations will normally be cost and time consuming especially if tax consultants are engaged for the negotiations with the IRD.

IRD's field audits

One of the main issues that an IRB field audit team would be looking out

for is whether the taxpayer has complied with the provisions concerning withholding tax. Was the withholding tax payments made within the stipulated time? Was the correct amount deducted and paid to the IRD?

Non-compliance of the withholding tax provisions would not only results in penalties mentioned above but a closer and thorough scrutiny of the taxpayer's affairs, which the taxpayer can do without.

PLANNING FOR WITHHOLDING TAX

Is withholding tax planning necessary?

The very first issue to consider when trying to mitigate the incidence of withholding tax is whether it is at all necessary. Consider this situation. Company X in country A performs services for a company in Malaysia. Malaysia will impose a withholding tax on the payment while country A will grant a tax credit to company X and as company X has sufficient taxable income, it will be able to utilise the tax credit effectively. This would mean that company X will not be worse off, even though there is a withholding tax. This scenario is not uncommon in practice although it may appears simple and idealistic.

Another scenario may be that you have managed to reduce the withholding tax by half or in total. However, when the income is received in the payee's country, it will be tax with no or less corresponding tax credits as no or less tax was suffered. Your excellent planning scheme will be futile as the payee would still pay the same amount of tax in total. Table 1 above shows that withholding tax planning may not be necessary.

The other issue is that, if the parties are not related, the withholding tax is the non-resident's tax. It is not the Malaysian taxpayer's tax. I would hasten to add that if the reduction of withholding tax does not result in a higher bargaining power for the Malaysian payer, then there is no point for the Malaysian payer to go through a withholding tax planning exercise.

If related parties are involved, it is always beneficial to mitigate the withholding tax payment even though a full credit may be available. This is due to the time frame in which a tax credit is invoked. Saving the payment of tax at source can be very advantageous, in terms of cash flow, when amounts are significant.

Withholding tax planning opportunities

Even in the simplest of scenarios, withholding tax planning may prove to be advantageous. In any such planning exercise, it must always be borne in mind that the tax is the non-resident's, not yours. Overzealous mitigation of withholding tax may land the Malaysian payer in hot soup with the IRD. Withholding tax planning would be of significance for transactions between related companies situated in different tax jurisdictions. Such planning is also very significant if the other country does not tax foreign source income.

> Unless payments are between related parties, savings in withholding tax may not be beneficial to the Malaysian payer as the tax is the non-resident's

In mitigating the incidence of withholding tax, the more commonly used methods are the reduction of withholding tax at source and the utilisation of tax credits in the home country. In such cases, reliance is normally placed on tax treaties concluded by Malaysia. However, where no treaty exists, unilateral tax credit may be granted by the other country. Another possible method is using the exemption provisions in the Act eg. approved loan status and exemption under Section 127.

Among the more common withholding tax planning methods employed are:-

(i) Incorporating a Malaysian subsidiary

The use of a Malaysian subsidiary instead of a branch would eliminate the incidence of withholding tax on payments received from a Malaysian payer. A Malaysian subsidiary would be a tax resident and payments made to a resident does not attract withholding tax.

(ii) Separating the foreign portion from the local portion of a contract

By doing the above, only payments for the foreign portion of a contract is subject to withholding tax. Otherwise, the entire value of the contract will attract a withholding tax.

(iii) Identifying the amount related to the supply of equipment and segregating them from services portion

As only services performed under a contract are subject to withholding tax, the above action would reduce the amount of withholding tax to be paid. It is important to note that in cases where there is an offshore supply portion as well, care must be taken to ensure that the supply is not related to the permanent establishment or business presence in Malaysia. Otherwise, the IRD may seek to tax the profits arising from the supply of equipment.

(iv) Classifying reimbursements as a separate item

Reimbursements are not subject to withholding tax.

(v) Employees of non-resident placed under payroll of a Malaysian company

This would involve the secondment of the non-resident's employees to a Malaysian company. The Malaysian company would then pay a much reduced fee to the non-resident as the former would absorb the salary and related costs. This would lead to reduced withholding taxes.

(vi) Use of Labuan

Payments made to non-residents out of Labuan will not attract withholding tax. The use of Labuan is useful in cases where the Malaysian taxpayer has to make interest payments to overseas parties. It must, however, be noted that certain countries have indicated that the treaties concluded by Malaysia will not apply to payments originating from Labuan.

(vii) Exemption from income tax

Applications could be made to have the non-resident's income to be exempted from income tax pursuant to Section 127 of the Act. If it is a borrowing of more than RM250 million, an application for approved loan status could be made thereby exempting the interest arising therefrom from tax pursuant to Paragraph 27, Part I of Schedule 6 of the Act.

(viii) Structure a lease arrangement as a deemed sale

Where a Malaysian taxpayer enters into a lease arrangement for movable properties, the lease rentals will be subject to a withholding tax of 10% under Section 4A(iii). If the arrangement is structured as a deemed sale under the leasing regulations, it will be considered as a hire purchase for tax purposes. In this case, only the interest portion of the lease will be subject to withholding tax.

(ix) Use of Article 21 of the Malaysia-Germany DTA

Under the abovementioned article, any income not expressly mentioned in the DTA shall only be taxed in the country of residence. Hence, it may worthwhile to route Section 4A income subject to withholding tax in Malaysia through a German company as that income is not expressly mentioned in the DTA.

However, it must be borne in mind that the German tax office is one of the most feared in the world and its tax system is very onerous.

In addition to the above, you may want to consider the following methods:-

(i) Use of a third country

In cases where there are no treaties or where only partial credit is granted or where tax credits cannot be fully utilised or where foreign income are not taxed, the use of a third country where no withholding tax is levied on outgoing payments, may be feasible.

This involves the channelling of payments through a conduit company located in a country that has tax treaties with both countries that the payer and payee are resident. Countries usually used are the Netherlands, Cyprus and Switzerland. The payer will make the payments to the company set up in this third country at a reduced rate. No further withholding tax is payable.

(ii) Tax sparing credits

Tax sparing credits can be used to great effect and may reduce or even eliminate taxes payable on that particular income. Tax sparing refers to a situation where the tax on income is exempted or reduced in the payer's country of residence but the tax so exempted or reduced is deemed to be paid by the payee's country of residence. Depending on the amount of tax to be paid in the payee's country of residence, tax sparing credits may actually eliminate altogether any amount of tax to be paid on that income. For example, tax sparing credits of up to 15% of the gross payments are given by the United Kingdom in respect of interest on approved loan which is exempted under Paragraph 27, Part I of Schedule 6 of the Act.

(iii) Ensuring all tax credits granted are utilised

By making sure that tax credits granted are fully utilised, the payee would be able to ensure that there is no additional tax cost in relation to that foreign income. In most countries, tax credits granted would not exceed the actual tax due on the income. If there is a mismatch of costs and income, the actual tax may be less than the amount of tax credits that can be granted. Here, effective planning would involve making sure that the tax payable in respect of the foreign income is at least the amount of tax credits to be granted.

To avoid falling into a situation where there is excess tax credits, proper planning and structuring of expenses have to be put into place at an early stage. for example, financing through equity rather than debt could ensure a higher taxable income and thus, utilisation of tax credits.

The above planning possibilities are by no means exhaustive and there are many other ways to mitigate withholding tax. Usually, planning ideas are only applicable to specific situations. The withholding tax planning methods are only limited by the ingenuity of the human mind working within the ambit of the law.

The principles of the above planning possibilities may also be used for payments flowing from a foreign country into Malaysia.

It is always exciting that withholding tax planning ideas can be put into practice and save the taxpayers some money. In carrying out such planning ideas, you must also bear in mind about the measures that the tax authorities may take to nullify your planning practices. Anti-abuse clauses in tax treaties, transfer pricing laws, anti-avoidance provisions and change in domestic tax laws are some of the things to bear in mind when carrying out any tax planning exercise.

Other considerations such as foreign exchange regulations may also put a damper on your tax planning ideas.

CONCLUSION

Compliance with the withholding tax provisions is extremely important. Unless payments are between related parties, savings in withholding tax may not be beneficial to the Malaysian payer as the tax is the non-resident's.

WHAT IS AN APPROVED DONATION

An extract from the Case Stated PKR 536

The taxpayers contended that the sums paid by them to the Foundation are deductible under section 44(6).

THE LAW

Section 44(6)"There shall be deducted pursuant to this subsection from the aggregate income of a person for the relevant year reduced by any deduction falling to be made for that year pursuant to subsection (2) or Schedule 4 or both, an amount equal to any gift of money made by him in the basis year for that year to the Government, a State Government, a local authority or an institution or organization approved for the purposes of this section by the Director General on the application of the institution or organization concerned."

THE ISSUE

It is the contention of the taxpayer that the payments that they made to the Foundation constitute donations while the Revenue contended that they were not.

THE LABEL

We reminded ourselves of the fact that the label used by a person to describe a transaction is not conclusive of its character.

Wesleyan and General Assurance Society

In Commissioners of Inland Revenue v. Wesleyan and General Assurance Society 30 TC 11 the taxpayer sought to call an annuity a loan while the Revenue contended that it was an annuity and not a loan. The House of Lords decided that it was an annuity. Viscount Simon said at p. 25,

> *"It may be well to repeat two propositions which are well established in the application of the law relating to income* tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more that to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. "

Highlands Malaya Plantation Ltd.

This passage was adopted by the Supreme Court in DGIR v. Highlands Malaya Plantation Ltd. (1988) 2 MLJ 99.

> It is not in dispute that the Foundation is an approved institution within the meaning of the subsection the clear words of which dictate that for a payment made by a taxpayer to qualify as a deduction it must be "..... an amount equal to any gift of money ....."
>
> Before we begin to analyse the words quoted it must be borne in mind that where a taxpayer seeks to rely on a specific exemption or deduction provided in a statute, as in this appeal, the strict rule of construction requires that the taxpayer's claim falls clearly within the exempting provision, and any doubt there would be resolved in favour of the Crown (see Lumbers v. MNR (1944) SCR 167).

FCT v. McPhail

The Act neither defines the word "gift" nor does it prescribe its scope and ambit in any way.

In the Australian case of FCT v. McPhail (1968) 117 CLR 111 the meaning of the word "gift" in section 78 (I)(a) of their Income Tax Assessment Act 1936 - 1966 which allowed deductions to be made when a "gift" is made was considered by Owen J. In that Act too the word was not defined. The meaning formulated by his Lordship in that case (at p. 116) is in the following terse terms:

> *"But it is, I think, clear that to constitute a "gift", it must appear that the property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return."*

QUESTION - IS IT A GIFT?

We then proceeded to consider whether the payments made by the Taxpayer to the Foundation were gifts within the meaning of the subsection bearing in mind

the test laid down in the MacPhail decision which we adopted under the following headings:

(a) The voluntariness of the payments

(b) Contractual obligation and receipt of benefit.

(a) THE VOLUNTARINESS OF THE PAYMENTS

We were of the view that the payments were not made voluntarily for the following reasons:

(i) The assurance by the State Government that the directors and officers of the subsidiaries of the Foundation making the payment will be "..... adequately protected as a result of the companies making the donations in compliance with Government's wish" is difficult to comprehend if the payments were indeed donations and made as authorised by law. Such an assurance is only necessary if what was given as donation was in actual fact something else but described by that name. We can only conclude that the parties were aware of section 132C of the Companies Act 1965 which provides that:

"Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for -

(a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in general meeting."

As the payments made in this case fall under section 132C(b) above the approval of a general meeting is required for making such payments. No evidence was adduced to that effect. In the circumstances the assurance given to the Taxpayer is understandable as section 132C(5) provides that:

"Any director who contravenes the provision of this section shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or thirty thousand ringgit or both."

(ii) The manner in which the payments were made is clear indication that it was something that the Foundation was entitled to. They were usually paid as a result of a phone call from the Foundation's accountant to the financial controller (SP2) of the Taxpayers. When the payments were slow in being made the accountant will write to her. This is an extraordinary way of asking for or making a donation. Although SP2 said that there were Board approvals for each of the donations yet she did not produce them in evidence. Such approvals, if produced, would have shed more light on the character of the payments and are therefore material to the case of the Taxpayers. Thus, we are compelled to conclude that the approvals, if produced, would have been adverse to the Taxpayers (see section 114(g) of the Evidence Act, 1950). In this connection we hasten to add that the contention of learned counsel for the Taxpayers that the Revenue ought to have asked for them in advance is untenable in law. The Revenue is under no duty to ensure that the Taxpayers prove their case. As the onus proof on this issue is on the Taxpayers they are duty bound to marshall all the relevant evidence for use without any prompting from the Revenue.

(iii) The Taxpayers are the trading arm of the Foundation and are wholly owned by them. Thus the Foundation is entitled to the profits earned by the Taxpayers. In the normal course of events what the Taxpayers can properly give the Foundation out of the profits is only something in the form of dividends. This is corroborated by the evidence of SP2 who said in cross-examination that as an accountant she agrees that the normal method of distributing income is to declare dividends. Yet they reached the coffers of the Foundation through a different route. In the circumstances the treatment of the payments as donations by the Taxpayers cannot be considered as conclusive of their character.

(iv) The evidence of SP2 shows in crystalline terms that the payments did not have the characteristics of voluntariness in them. In her evidence she said,

"As far as I know we have to make sufficient payments to Yayasan to fund their activities whether by way of donation or some other option."

"S B was obliged to give these funds to Yayasan every year. I would say that the instructions in R7 started it all."

In re-examination she made a feeble attempt to explain away the use of the word "obliged" by saying that if the subsidiaries of the Foundation did not give it any funds then it will have no means of carrying out its activities. If in fact the payments had been made in their proper course by way of dividends the Foundation would still have been in a position to carry out its activities. Accordingly, we are unable to accept the explanation offered by SP2. We are of the view that it was the "instructions" (to quote SP2) in R7 that compelled the Appellants to make the payments.

(v) A person normally makes a gift only when he has excess funds. In the case of the Appellants the payments that they made to the Foundation constituted almost their entire profits and for years of assessment 1985 and 1986 exceeded their profits. It must be noted that even dividends can only be paid out of profits and the payment of dividends out of funds which do not constitute profits attracts criminal sanctions (see section 365 of the Companies Act, 1965). SP1 said in his evidence that he has not come across companies giving almost all their profits as donations. Learned counsel for the

the payments did not have the characteristics of voluntariness in them

Taxpayers conceded that this type of donation is not a common practice. This is an unusual feature in the movement of the funds between the parties resulting in a deprivation of their voluntary character.

(vi) The transaction was not made at arm's length as will be explained in a later part of the judgment so as to qualify as a voluntary payment.

(vii) In two of the receipts in the Agreed Bundle of Documents part of the payments made have been described as "advance". Generally an advance is a loan while a donation is a gift though part of a gift can be paid in advance. However, the advance paid as reflected on the two receipts cannot be an advance for the donation as the amounts, paid by way of single cheques, describe them separately and distinctly thus confirming their individual and separate character. The onus of proof is on the Taxpayers to explain this peculiar feature of the payments which they have failed to do. In the premises it is reasonable to conclude that such a payment is an indication of the kind of thing that was going on between the Foundation and the Taxpayers. In this respect Raja Azlan Shah FJ (as His Highness then was) said in UHG v. DGIR (1974)2 MLJ 33 at p. 36,

In making the payments the Taxpayers received a benefit as they did not have to declare any dividends to the Foundation

"..... It is no doubt true this is only one discrepancy but one might, I think, expect many similar discrepancies ..... and, therefore, it was open to the Special Commissioners to come to the conclusion that this was not merely an isolated case but showed the kind of thing that was going on. This proposition accords with the view expressed by Dankwerts J. in Rossette Frank v. Dick 36 TC 100 in the following passage:

> *'It is perfectly true that this is one incident and the one incident only which the Inspector of Taxes was able to establish before the Commissioners, but it was open to the Commissioners as it seems to me to conclude that this was not merely an isolated transaction but showed the kind of thing which was going on and they were in view entitled to come to the conclusion to which they did come from this incidents though one only, that there must have been other similar incidents, and therefore, that the accounts of the Company could not be relied upon to show the whole of*

the trading profits of the company'.

(b) CONTRACTUAL OBLIGATION AND RECEIPT OF BENEFIT

(i) Contractual obligation

The Taxpayers are a wholly owned subsidiary of the Foundation. Under such circumstances they are obliged to pay their profits to the Foundation by way of dividends in the normal course of events. This would have happened if they had not received the "instructions" from the State Government. Upon receipt of the "instructions" they merely transferred to the Foundation, at its request, as donation what was otherwise due to it. Thus, what the Taxpayers did was merely to discharge their obligation to the Foundation .

S B was obliged to give these funds to Yayasan every year

(ii) Receipt of benefit

In making the payments the Taxpayers received a benefit as they did not have to declare any dividends to the Foundation. No evidence was led by the Taxpayers to show the contrary. In any event it is ludicrous to expect dividends to be declared under such circumstances. This is a definite advantage to the Taxpayers as they are a separate legal entity with certain obligations with regard to the payment of dividends to their shareholders, the Foundation. The payments made in the form of donations has discharged their obligation to pay the sum as dividends.

DECISION

In the upshot it is our view that the payments made by the Appellants do not constitute a gift within the meaning of the subsection and, in consequence thereof, do not qualify for deduction. This ruling is sufficient, on its own, to make a determination in this case. However, the Respondent proceeded through a different route available to them on the facts, that is to say, by way of section 140 of the Act to disregard the transaction.

NOTE:

This case is under appeal to the High Court.

Papa-Ya & Urtie

Prize Giving Ceremony For Students Of The MIT Examination

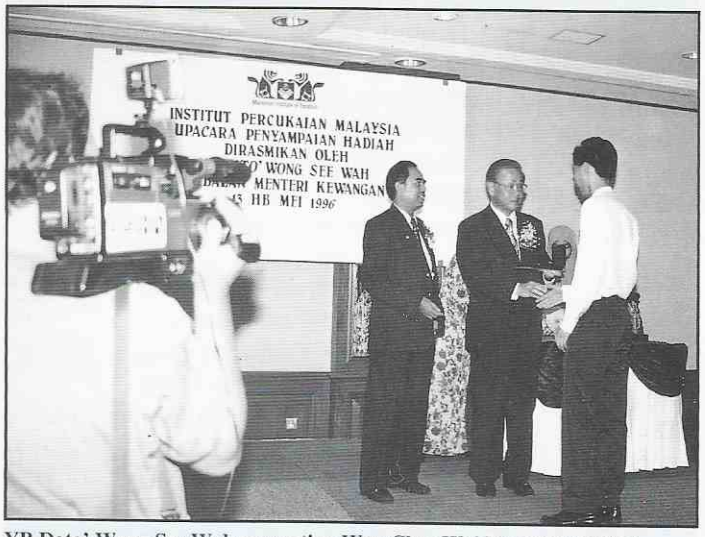
The Institute recently held its prize giving ceremony for students who have excelled in its first professional examinations at a leading hotel in Kuala Lumpur.

The Guest-of-Honour for this ceremony held on 13th May 1996 was Deputy Finance Minister, Y Berhormat Dato' Wong See Wah. About 80 invited guests including senior government personnel, senior partners of audit and tax firms, lecturers and chief examiners of the MIT examinations were present.

The Deputy Minister of Finance in his speech congratulated the Institute for successfully developing the professional examinations which was officially launched on 12th December 1994 by the then Deputy Minister of Finance, Y B Senator Dato' Mustapa. He added that this development is definitely aligned with the direction of the Government, that is promoting greater participation of the private sector in human resource development which is contained in the newly released Seventh Malaysia Plan. Therefore, the action taken by the Institute to provide formal education in taxation is very timely and the Government appreciates the complementary efforts by the Institute to produce more qualified tax practitioners.

The Deputy Minister also urged those interested in a career in taxation to undergo the Institute's examination and form a formidable pool of tax services providers to serve the demands of the nation.

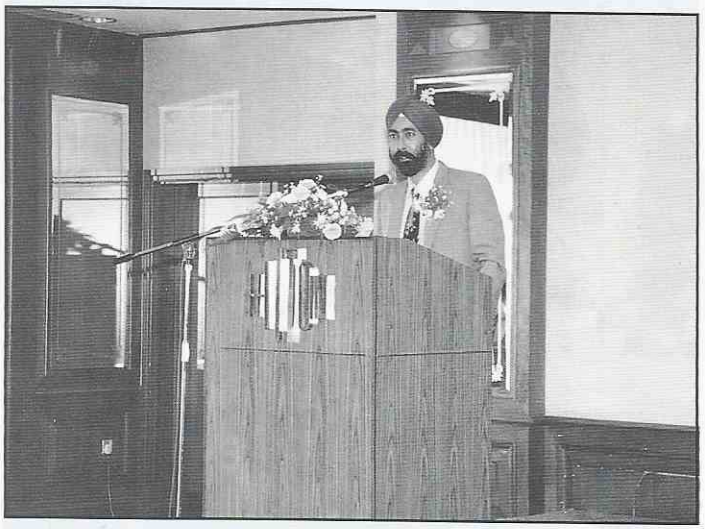
MIT President, En Ahmad Mustapha Ghazali in his speech said that the ceremony is the result of the Institute fulfilling one of its important objectives i.e. providing an examination to produce more qualified tax practitioners. The Institute hopes that this examination will open a door to allow more people to qualify as tax professionals and thus, creating the best avenue to alleviate the current shortage of tax professionals currently faced by the country.



YB Dato' Wong See Wah presenting Wan Chee Wai his prize for Best Performance in Taxation IV. On YB Dato' Wong's right is President, En Ahmad Mustapha Ghazali.

He further added that the duty of the tax professionals are not only to ensure that all tax revenue due to the Government are duly remitted but also to give sound professional advice to their clients in order that the tax payers receive fair and equitable treatment from the assessors.

The Institute will stand by the Government to do its part as one of the professional intermediaries responsible to produce a breed of qualified personnels of integrity with excellent competency in technical skills and expertise in the field of taxation.



Assoc. Prof. Veerinderjeet Singh explaining the examination process to the audience.

In his closing remarks, En Ahmad Mustapha echoed the aspiration of the Institute i.e. that the Government will acknowledge the Institute as the national taxation body in Malaysia as it will increase the public's confidence in the Government and the tax profession in the performance of their respective functions.

Meanwhile, the Chairman of the Examination Committee, Prof Madya Veerinderjeet Singh spoke of the efforts by both the Examination Committee and Education & Training Committee in preparation of the MIT examinations. To ensure that the students were able to prepare adequately for the examinations, the Institute held revision courses from August to November 1995 with the assistance of 3 colleges, namely KLC School of Business and Professional Studies, Kolej Aman and Strategic Business School. The Chairman hopes that more colleges especially those in other states will offer such programmes in the future.

He further added that the Council hopes to have representatives from the Inland Revenue Board to be examiners for the coming examinations. To ensure that the syllabus is kept up-to-date, the Committee intends to regularly update the syllabus. This is important due to the dynamic nature of the field of taxation, both in and outside Malaysia. It was also

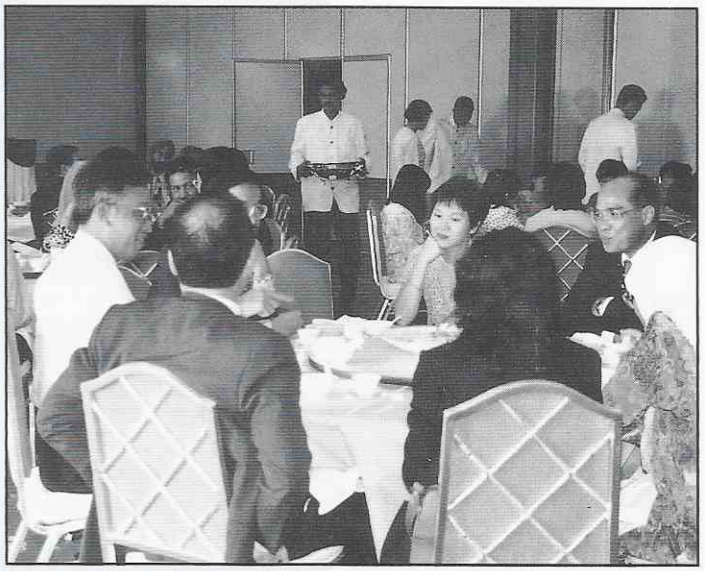
noted that as at 13th May 1996, the Institute has a total of 140 registered students for this year's examinations. The Chairman further informed the guests that the 1996 MIT examinations will be held from 16-20 December 1996.

Following the speeches were the presentation of prizes to the prize winners of the MIT examinations held on 18-22 December 1995. Ms Chan Suet Chin won the prize for the best performance in Taxation I while Mr Wan Chee Wai won for best performance in Taxation IV. Mr Lee Yon Chong won the awards for best performance in Taxation III and best overall performance in Intermediate Level/ Level II.

The ceremony was brought to an end with an enjoyable lunch which was partly sponsored by Sunway College.

YB Dato Wong See Wah delivering his speech.

President, En Ahmad Mustapha Ghazali speaking at the Prize giving ceremony.



A cross-section of the invited guest at the Prize giving ceremony.

N O T I C E

MIT Professional Examinations December 1996

Registered Students wishing to sit for the MIT Professional Examinations in December 1996, please return your Examination Entry Form and payment to the MIT Examination Department by 15 November 1996.

Please ensure that all outstanding dues to the Institute have been settled prior to examination date.

You need to produce your Student Identification Card during the examinations. If you have not receive your card, please submit two passport size photograph with your name and and registration number to the Examination Department.

The MIT Council has issued a booklet on Rules and Regulations (On Professional Conduct and Ethics) in 1995. A copy of the booklet had been sent to all students. If you have not received your copy, please contact us. Please note that Professional Ethics is a topic included in the syllabus of the examinations of the Institute.

For further enquiries, please contact Ms Marian at 03-2745055. MIT, Examination Department, Level 3, Dewan Akauntan, No. 2, Jalan Tun Sambanthan 3, Brickfields, 50470 Kuala Lumpur.

PROFESSIONAL EXAMINATIONS

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

One avenue of producing qualified tax personnel is through professional examinations. As such, MIT conducted its first professional examinations in December 1995. This is the only professional examination in Malaysia in the discipline of taxation. The professional examinations also seeks to overcome the present shortage of qualified tax practitioners in the country.

FEES

Registration	RM150.00
Annual Fee	RM50.00

HOW TO REGISTER

You can contact the Institute's Secretariat for a copy of the Students' Guide. The Guide contains general information on the examinations and a set of registration forms which must be completed and submitted with the necessary documents to the Secretariat.

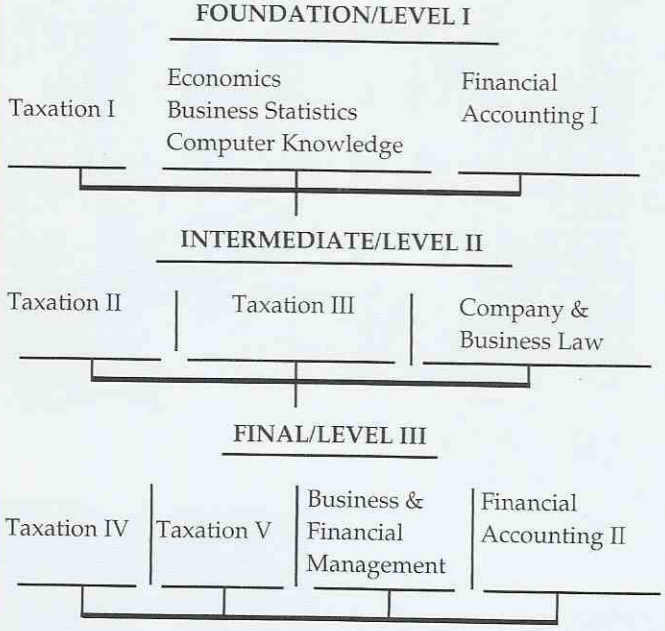
ENTRANCE REQUIREMENTS

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

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

EXAMINATION STRUCTURE

The professional examination is currently held annually and comprises of three levels.



(c) Full Members of local and overseas accounting bodies.

(d) Matured Age Entry (Minimum 23 years).

EXEMPTIONS

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

EXEMPTION FEES

Level I	RM50.00 per subject
Level II	RM60.00 per subject
Level III	RM70.00 per subject

EXAMINATION FEES

Level I	RM40.00 per subject
Level II	RM50.00 per subject
Level III	RM60.00 per subject

HOW TO BE AN ASSOCIATE OF THE INSTITUTE

Any registered student who has passed the professional examinations (unless the Council has granted exemptions) and who has had not less than 5 years practical experience in practice or employment relating to taxation matters approved by the Council would be eligible to be admitted as an Associate of the Institute.

DATES TO REMEMBER

Oct 31	Closing date for registration as a student to sit for the examination of that year.
Nov 15	Closing date for submission of examination entry form for the examination of that year.
December	Examinations

GENERAL INFORMATION

1. ***Date of Examination***
The Institute's examinations are held annually, usually in the month of December.

2. ***Notice of Examination***
An examination docket is sent to each examination candidate about 2 weeks before the examination date stating the examination number, the examination part and subjects entered for and the location of the examination centre.

On receipt of this docket, a candidate should check carefully the information contained therein. Candidates are advised to read carefully the detailed instructions which accompany the docket. If he has any doubt, he should contact the Institute's Examination Officer immediately.

3. ***Rejected Application***
Where an applicant has been refused permission to sit for any parts of the examination, he may make appeal in writing for reconsideration giving his reasons within 7 days of the notification. Such appeal shall be considered by the Examination Committee whose decision shall be final.

4. ***Examination Centre***
The usual centres for the holding of the Institute's examinations are at Kuala Lumpur, Ipoh, Penang, Johor Bahru, Kuantan, Kota Kinabalu, Kuching and Sandakan. A candidate may elect to sit at the centre of his choice. However, if the total number of candidates sitting for any paper at a particular centre is too few, the candidates will be instructed to go to another centre.

5. ***Medium of Examination***
The Institute's examinations are set in the English Language. A candidate may elect to write the examination in either the English Language or Bahasa Malaysia but he must ensure that only one language is being used throughout a particular examination paper.

PILOT PAPERS & DECEMBER 1995 EXAMINATIONS QUESTIONS AND ANSWERS BOOKLET ORDER FORM

To:

Education Officer
Education Department (MIT)
Dewan Akauntan
No. 2 Jalan Tun Sambanthan 3
Brickfields
50470 Kuala Lumpur

Full Name Mr/Mrs/Miss/Ms: _____

Address: _____

_____ Student Reg. No: _____

MIT REGISTERED STUDENTS & MIT MEMBERS			
1995 EXAMINATIONS BOOKLETS		**PILOT PAPERS BOOKLETS**	
LEVEL	**COST PER LEVEL**	**LEVEL**	**COST PER LEVEL**
Level I/Foundation	RM4.00	Level I/Foundation	RM4.00
Level II/Intermediate	RM5.00	Level II/Intermediate	RM5.00
Level III/Final	RM4.50	Level III/Final	RM9.00

NON-REGISTERED STUDENTS & NON-MIT MEMBERS			
1995 EXAMINATIONS BOOKLETS		**PILOT PAPERS BOOKLETS**	
LEVEL	**COST PER LEVEL**	**LEVEL**	**COST PER LEVEL**
Level I/Foundation	RM6.00	Level I/Foundation	RM6.00
Level II/Intermediate	RM7.00	Level II/Intermediate	RM7.00
Level III/Final	RM6.50	Level III/Final	RM11.00

Please tick box(es) to indicate your order.

I enclose Cheque/PO/MO for RM _____(including RM1.00 for postage) payable to ***Malaysian Institute of Taxation***.

_____ _____

Signature: Date:

Taxation Institute of Hong Kong

- An extract from the AOTCA (Asia-Oceania Tax Consultants' Association) Journal, No. 6, December 1995 -

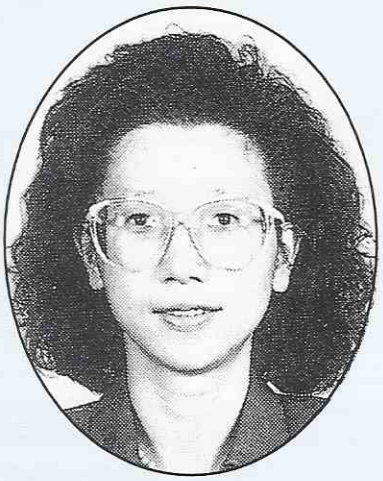
The Taxation Institute of Hong Kong was incorporated in September 1972. At present, the Institute has a total of about 700 members.

Members of the Institute comprise practising professional accountants, tax practitioners, lawyers and university lecturers, who have not less than five years' experience in the field of taxation.

The prime objectives of the Institute are to promote the study of taxation and to facilitate the exchange of information and views on taxation.

The Institute is one of the six constituent members of the Joint Liaison Committee on Taxation which gives submissions to the Hong Kong Government on the technical aspects of tax legislation and other tax matters.

The Institute maintains a liaison role between the Inland Revenue Department and the tax practitioners. It holds an annual meeting with the Commissioner of Inland Revenue to exchange views and discuss matters regarding taxation practice in Hong Kong. The Institute also makes submissions to the Financial Secretary and other relevant authorities on proposed new legislation in taxation.



Ms. Christine Y. S. So, President of Taxation Institute of Hong Kong contributed this article which introduces the profile of the Institute.

The Institute holds regular tax seminars, lectures and luncheon talks on various topics relating to taxation (concerning Hong Kong, the People's Republic of China and other parts of the world) that are of general interest to its members. A budget seminar is held every year after the Financial Budget of the Government is released.

In order to promote the study of taxation, the Institute also organises a number of long-distance courses together with a number of tertiary institutions in Hong Kong, on Hong Kong taxation and PRC taxation. Members of the public who meet the specified qualification are eligible to study the courses.

The Institute has established an educational trust which awards scholarships to students at the various universities in Hong Kong for outstanding academic results in the subject of taxation.

The Institute has started and continued its contact with Chinese tax authorities as early as from 1979. During the past years, tax seminars were organised in both Hong Kong and China to enhance mutual understanding of the taxation systems in both places.

Visits are also made regularly to the Taxation Bureau in China so as to foster closer relationships between the China Taxation Bureau and the Institute.

Q U O T E

"The best executive is the one who has sense enough to pick good men to do what he wants done, and self-restraint enough to keep from meddling with them while they do it.

Theodore Roosevett

EXTRAORDINARY GENERAL MEETING

An Extraordinary General Meeting (EGM) of the Institute was held on 23 March 1996. En Michael Loh Pooh Kee, the Deputy President chaired this meeting where the following resolutions were passed unanimously by the members:

Resolution 1

"That subject to the approval of the Minister of Domestic Trade and Consumer Affairs, Article 58(2) of the Memorandum and Articles of Association be amended by deleting the sentence *'Any member shall be eligible for election to the second and third Council and thereafter, a member shall not be eligible for election to the Council unless he is a Fellow or has been an Associate Member for at least three (3) years.* ' from the said Article."

The Chairman informed that by deleting the said clause, every member including those who are currently serving in the Council would have an opportunity to serve as Council members.

Resolution 2

"That subject to the approval of the Minister of Domestic Trade and Consumer Affairs, Article 19(2) of the Memorandum and Articles of Association be amended by deleting the sentence *'Should the date of admission to the Institute be later than 30 June, then only a half year subscription shall be payable for that particular year.* ' of the said Article."

Deputy President, Mr Michael Loh chairing the EGM

Members were informed that this amendment was proposed to avoid unnecessary administrative work.

Deputy Chairman, Mr Michael Loh welcoming a new member to the Institute, whilst, Chairman of the Membership committee, Mr Tony Seah (centre) looks on

Resolution 3

"That subject to the approval of the Minister of Domestic Trade and Consumer Affairs, Article 7 of the Memorandum and Articles of Association be amended by rearranging the paragraphs, whereby

- paragraph (c) which reads:
  'Any Registered Student who has passed the examination prescribed under Article 13 (unless the Council shall have granted exemption from such examinations or parts thereof in accordance with Article 14) and who has had not less than five (5) years practical experience in practice or employment relating to taxation matters approved by the Council'

  be paragraph (f);while

- paragraph (e) which reads:
  'Any person who is registered with MIA as a Public Accountant '

  be paragraph (c); and

- paragraph (f) which reads:
  'Any person who is registered with MIA as a Licensed Accountant and who has had not less than five f5) years practical experience in practice relating to taxation matters approved by the Council after admission as a licensed accountant of the MIA under the AccounlantsAct, 1967'

be paragraph (e).

The paragraphs (a), (b) and (d) remains in their original places."

The Chairman informed that this resolution was proposed by the Council to rearrange the sequence in which the paragraphs should appear.

Resolution 4

"That subject to the approval of the Minister of Domestic Trade and Consumer Affairs, Article 7(b) of the Memorandum and Articles of Association be amended by substituting the word 'accountant' in the second line of the provision with the word 'tax agent' following amendment in the Income Tax Act, 1967 and reducing the number of years of practical experience required for this category from 5 to 3 years."

A mixture of old and new members ...

The Chairman explained that as the word 'accountant' is protected under the Accountants Act, 1967 and most members of the MIT are usually tax practitioners or consultants in a firm, 'tax agent' will be a more appropriate word to be used. Also this amendment will be in line with the Income Tax Act, 1967.

The Chairman further informed that the reduction of the number of years of practical experience from 5 to 3 years is to be in line with the current environment as individuals involved in the taxation field are now more exposed to higher level of tax work and expected to be more competent in a shorter period than a few years ago.

Members present were also briefed on the current activities and the future plans of the Institute. The Deputy President encouraged members to give their support and co-operation to the Institute in achieving its goal to be recognised as a national taxation body.

Following the EGM was a certificate presentation ceremony. About 20 new members were present to receive their certificates which were presented by the Deputy President.

N O T I C E

The following Special Commissioners' Decisions are available for reference at the Institute's library. Photocopies of these cases are available upon request at a minimal change.

NO.	CASES
PKR 489	K J SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 536	S B SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 537	R B SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 551	T C Y v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 568	D P B S v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 591	M SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 592	K T & CO. v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 601	LIQUIDATOR BAGI Y F D SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 611	GAS (M) SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 626	C (MALAYSIA) SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 627	T T SDN BHD v. TCETUA PENGARAH HASIL DALAM NEGERI
PKR 628	E D (LOW-COST HOUSES) SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
PKR 635	1) SYARIKAT J B (W) SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI
	2) M L AND 2 OTHERS v. KETUA PENGARAH HASIL DALAM NEGERI

VISITOR FROM THE AUSTRALIAN TAXATION BODY

On 29 May 1996, Mr Richard A. Gelski, Vice President of the Taxation Institute of Australia visited the Institute. He was received by President En Ahmad Mustapha Ghazali, Vice President En Hamzah HM Saman and Chairman of the International Relations Committee En Harpal Singh Dhillon, at the Institute. This is the second visit by a representative from the Australian body for this year, the first being on 11 January 1996 by the then President of the Taxation Institute of Australia, Mr Peter J Cowdroy. The Institute was informed that the present President is Mr Jonathan Ilbery.

During this short meeting, Mr Gelski was briefed by the President on the Institute's activities and projects which amongst others included the first examination of the Institute which was successfully held last year. En Ahmad Mustapha further informed Mr Gelski that the Institute is working on the possibility of being recognised by the Government as the national taxation body in the country.

Mr Gelski who was impressed by the progress of the Institute in such a short period, mentioned that unlike Malaysia, there are no examinations for tax practitioners in Australia. He further informed that the Australian body which consist of approximately 10 000 members, plans to develop an internal examination for its tax practitioners.

On being informed that Malaysia is moving towards a self-assessment system which is currently being practiced in Australia, Mr Gelski remarked that this would give the Institute a great opportunity to create dialogue sessions with the relevant authorities. The Institute could liaise with other taxation bodies to gather information on the system and problems associated with it. This proposal was well received and the President also felt that the Institute should play a more active role in the impending implementation of the self-assessment system.

At the end of the meeting, the President presented a souvenir to Mr Gelski.

Having a hearty discussion .. (from left) Mr Harpal Singh Dhillon, En Ahmad Mustapha Ghazali, En Hamzah HM Saman, Ms Ho Foong Chin (Secretariat) and Mr Richard Gelski

President, En Ahmad Mustapha Ghazali presenting a souvenir to Mr Richard Gelski whilst Council member, Mr Harpal Singh Dhillon looks on

MEMBERSHIP OF MIT AS AT 28 MAY 1996

The following persons have been admitted as associate members of the Institute as at 28 May 1996.

NAME	MEMBERSHIP NO.
FAWZI BIN ABD AZIZ	1174
NAVARAJOH D/O SUPRAMANIAM	1175
LIM SWEE CHUAN	1176
WONG LAI YEN	1177
CHAN HENG CHONG	1178
LOI KIM FAH	1179
LIM SIAN EONG	1180
PEGGY LEE PUI KEE	1181
LEONG HOO CHUAN	1182
SIU CHEE KUEN	1183
LEE PECK YOKE	1184
LAI VOON HUEY	1185
LAI CHOONG YIN	1186
WONG SHEUE YANN	1187
LEE LEAN SUAN	1188
CHIN KIANG MING	1189
OOI CHIN GUAN	1190
SHIRLEY LIEW SIAW NEE	1191
LING JIN HOCK	1192
WONG SU KONG	1193
LAU KAH TIEW	1194
WAN FEE LOONG	1195
TAN CHIN FAH	1196
OOI JIT HUAT	1197
MATHEW THOMAS A/L VARGIS MATHEWS	1198
KOONG LIN LOONG	1199
TAN LEA HUAN	1200
NIHAL PETER MONERASINGHE	1201
TEOH SIEW TIN	1202
ALEXANDER CHIN	1203
LING EE CHIEW	1204
LIM LEONG HWA	1205
VANAJA A/P JAYARAMAN	1206
LAI SHIN FAH @ DAVID LAI	1207
TAN BOON LENG	1208
LEE SON CHENG @ JOSEPH LEE SOON CHONG	1209
ONG KOK SAN	1210
LIM KOK HOON	1211
CHANG HWEI SZE	1212
TSEU KHEN FONG	1213
LEE SEET CHENG	1214
NEOH CHOY LENG	1215
LOOI ENG MENG	1216

NAME	MEMBERSHIP NO
TANG CHEE KIN	1217
TAI KOK WAH	1218
YAP HUI HOON	1219
LEE CHEE CHONG	1220
LAU CHUNG FEE	1221
KWAN MING HAP	1222
WEE CHIN SIAN	1223
HASHIM BIN BESRI	1224
SHANTHA KUMARI A/P R BALAN	1225
LIN AH KAW	1226
PHUA TIEN KOON	1227
THANG MEE LEE	1228
RENUKA A/P THURAISINGHAM	1229
WONG SWEE ONN	1230
WONG CHOW YANG	1231
SAFRIZAL BIN MOHD SAID	1232
JEROME CHRISTIAN NICHOLAS DAVID	1233
BHUPENDAR SINGH A/L SEWA SINGH	1234
LOH SOOK KIN	1235
LEE YOON KIT @ JOHNNY LEE YOON FOONG	1236
YEOH SENG LEONG	1237
WONG CHIN KWONG	1238
LEE VOON SIONG	1239
TAN KIM HENG	1240

MEMBERSHIP STATUS OF MIT AS AT 30 MAY 1996

Honorary Fellows	4
Fellows (Founder Council Members)	14
Associate Members* .	1225
	1329

*** Associate Members**

Public Accountants of MIA	772
Registered Accountants of MIA	128
Licensed Accountants of MIA	17
Advanced Course Exam of IRD	98
Advocates & Solicitors	6
Approved Tax Agents	108
Others	99
Deceased	(3)
	1225

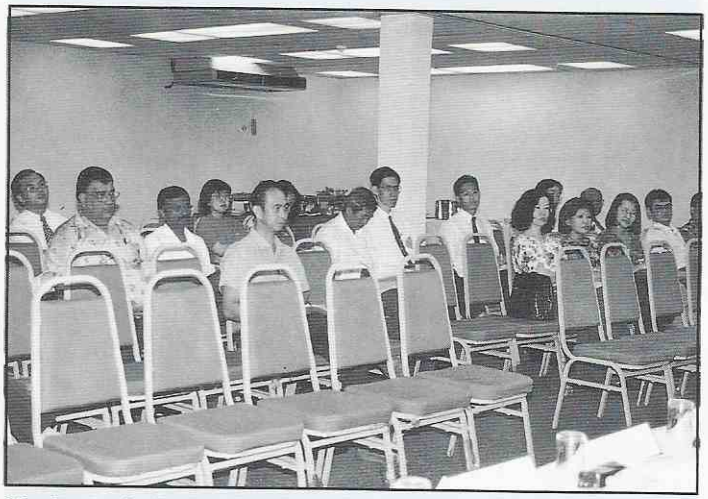
INSTITUTE'S 4TH ANNUAL GENERAL MEETING

The Institute's Fourth Annual General Meeting was held on 29 June 1996 at 10.00 a.m. The President, En Ahmad Mustapha Ghazali, welcomed the members present and thanked them for taking their time to attend the meeting.

The President in his annual address emphasised that a strong membership base is important not only to give the Institute the financial resources to develop and service members but also to allow members to learn from each other's experiences. He further appealed to all present to encourage those individuals who are qualified for membership but have yet to apply, to join the Institute. With strength in numbers, the Institute would be able to speak with one voice to the Government and hopefully gain recognition as the national tax body. Should the Institute gain the recognition, the Institute will have the authority to regulate the profession to ensure that both the Government and the public's interest is taken care of.

The President also spoke briefly on the Institute's professional examinations which was held for the first time in December last year. It is hoped that this examination will provide an avenue for more people to qualify as tax professionals thus, meeting the demand for the said position. Members were also urged to support the examinations by sponsoring and encouraging their staff to sit for the examination. Those who are in the position to employ, were also encouraged to recruit students of this examination to provide practical training which is expected of a tax practitioner.

President, En Ahmad Mustapha Ghazali (third from right) answering an enquiry from the floor



Members at the Fourth Annual General Meeting

New member, David Lai receiving his certificate of membership from En Ahmad Mustapha

Members were further briefed on the conferences and workshops on taxation which the Institute plans to organise in the near future. The President also felt that the association with other international tax organisations like the Australian Institute of Taxation clearly reflects the growing recognition of the Institute internationally.

The Institute noted the retirement of Tuan Syed Amin Al Jefri as a Council Member of the Institute. En Ahmad Mustapha thanked Tuan Syed Amin for his services to the Institute. The Institute also welcomed Mr Thanneermalai s/o SP SM Somasundaram to its Council. The other Council Members who were re-elected were, En Hamzah HM Saman, Mr Michael Loh Pooh Kee, Mr Ranjit Singh, En Atarek Kamil Ibrahim, Mr Kang Beng Hoe, Assoc. Prof. Veerinderjeet Singh and Tuan Haji Abdul Hamid bin Mohd Hassan.

This AGM also saw the re-appointment of En Ahmad Mustapha Ghazali, Mr Chow Kee Kan, Mr Lee Yat Kong, Mr Quah Poh Keat, Mr Chuah Soon Guan, Mr Seah Cheoh Wah and Mr Harpal Singh Dhillon, and the appointment of Ms Teh Siew Lin as MIA appointees to the Institute's Council.

In conjunction with this meeting, a certificate presentation ceremony was held. New members of the Institute were given the honour to receive their certificates from the President himself.

ROYAL CUSTOMS AND EXCISE DEPARTMENT TRANSFER OF SENIOR OFFICERS

	Names	From	To
1.	Zainal bin Rajan	Penolong Pengarah Kastam Sarikei Sarawak	Penolong Kanan Pengarah Kastam Ketua Stesen Labuan, Sabah
2.	Mohd. Yusof bin Mansor	Penolong Pengarah Kastam Caw. Pengurusan Penjenisan Ibu Pejabat	Penolong Kanan Pengarah Kastam Cukai Dalaman Kota Kinabalu Sabah.
3.	Radzi bin Choh	Penolong Pengarah Kastam Import/Eksport Kuching, Sarawak	Penolong Kanan Pengarah Kastam Ketua Stesen Sarikei, Sarawak
4.	Wong Deh Seng	Penguasa Kastam Cukai Perkhidmatan Kuching, Sarawak	Penolong Pengarah Kastam Import/Eksport Kuching, Sarawak
5.	Samsudin bin Tukip	Penolong Kanan Pengarah Kastam Perindustrian Pulau Pinang	Penolong Kanan Pengarah Kastam Pemeriksaan Akaun/Skrutini Ibu Pejabat
6.	Kalikavzndan a/l Sinnan	Penolong Pengarah Kastam Pemeriksaan Akaun Pulau Pinang	Penolong Kanan Pengarah Kastam Perindustrian Pulau Pinang (w.e.f. 1.3.1996)
7.	Yusof @ Che Soh bin Hussin	Penolong Pengarah Kastam Import/Eksport Kota Kinabalu Sabah.	Penolong Pengarah Kastam Pemeriksaan Akaun Kota Kinabalu Sabah.
8.	Abd. Rashid bin Palil	Penolong Pengarah Kastam Kota Kinabalu Sabah	Penolong Pengarah Kastam Import Selangor
*9.	Abu Bakar bin Madun	Penolong Pengarah Kastam Cukai Dalaman Alor Setar Kedah	Penolong Pengarah Kastam Eksport Selangor
10.	Ahmad bin Jii @ Daud	Penolong Pengarah Kastam Penguatkuasaan Pelesenan, Remisyen dan Pelupusan Miri, Sarawak	Penolong Pengarah Kastam Caw. Pengurusan Penjenisan Ibu Pejabat (w.e.f. 1.7.1996)
11.	Sivapathasundram a/l Thambipillai	Penguasa Kastam Ibu Pejabat	Penolong Pengarah Kastam, LTA, Subang (Kargo) Wil. Persekutua
12.	Md. Asari bin Mukhtar	Penguasa.Kastam Batu Pahat Johor	Penolong Pengarah Kastam Zon Bebas Selangor
13.	Makhtar bin Mahmad	Penguasa Kastam Pulau Pinang	Penolong Pengarah Kastam Cukai Dalaman Alor Setar, Kedah
14.	Chua Hong Lian	Penguasa Kastam Johor Bahru Johor	Penolong Pengarah Kastam Perakaunan Hasil Johor Bahru, Johor
15.	Sabariah bt Yusof	Penguasa Kastam, Johor Bahru Johor	Penolong Pengarah Kastam Pemeriksaan Akaun Kuantan, Pahang
16.	Mariana a/l Ramayah	Penguasa Kastam Pulau Pinang	Penolong Pengarah Kastam Pelabuhan Selatan Dermaga Air Dalam Pulau Pinang.
17.	Mohd. Shokri bin Yahya	Penguasa Kastam Pulau Pinang	Penolong Pengarah Kastam Penyelarasan Tindakan Pulau Pinang
18.	Raymond Jutah Darau	Penguasa Kastam Kota Kinabalu Sabah.	Penolong Pengarah Kastam Penguatkuasaan Pelesenan Sandakan, Sabah
19.	Zal Hii Seng Tieng	Penguasa Kastam Miri, Sarawak Remisyen	Penolong Pengarah Kastam Penguatkuasaan Pelesenan, dan Pelupusan Miri, Sarawak
*20.	Nor Fazilah bt. Zainal	Penguasa Kastam Wil. Persekutuan Kuala Lumpur	Penguasa Kastam Johor Bahru Johor

	Names	From	To
21.	Darus Mustapha bin Mat Ibrahim	Penguasa Kastam Padang Besar Kedah	Penguasa Kastam Pulau Pinang
22.	Syed Mohri bin Syed Abu Bakar	Penguasa Kastam Kuching Sarawak	Penguasa Kastam Wil. Persekutuan Kuala Lumpur
23.	Mohamad bin Hj. Botok	Penguasa Kastam Kuching Sarawak	Penguasa Kastam Pelabuhan Kelang Selangor
24.	Mohamad bin Said	Penguasa Kastam Kuching Sarawak	Penguasa Kastam Pulau Pinang.
25.	Saharah bt. Hj. Salleh	Penguasa Kastam Wil. Persekutuan Kuala Lumpur	Penguasa Kastam Muar Johor
26.	Rosinah bt. Ali	Penguasa Kastam Muar Johor	Penguasa Kastam Ibu Pejabat (Jawatan Kumpulan)

	Names	From	To
*27.	Zainab bt. Mohamad Tahir	Penguasa Kastam Wil. Persekutuan Kuala Lumpur	Penguasa Kastam Pulau Pinang (w.e.f. 1.4.1996)
*28.	Rosmila binti Fatahudin	Penguasa Kastam Kota Bharu Kelantan	Penguasa Kastam Wil. Persekutuan Kuala Lumpur
*29.	Sha'arah bt. Hj. Bakar	Penguasa Kastam Kuching Sarawak	Penguasa Kastam Pulau Pinang
*30.	Amin bin Tambi	Penolong Penguasa Kastam Pengkalan Kubor Kelantan	Penolong Penguasa Kastam Wil. Persekutuan Kuala Lumpur
*31.	Mohamad bin Hj. Haron	Penolong Penguasa Kastam Ipoh, Perak	Penolong Penguasa Kastam Pulau Pinang
*32.	Rokiah bt. Ibrahim	Penolong Penguasa Kastam Kuching Sarawak	Penguasa Penguasa Kastam Wil. Persekutuan Kuala Lumpur

SECTION 13A AND 13B CUSTOMS ACT

Payment of CUSTOMS DUTY under protest.

13A. Any person who is dissatisfied with a decision of a proper officer of customs under section 13(1) as to whether any particular goods are or are not included in a class of goods appearing in an order made under section 11 (l) or with the valuation, weighing, measuring or examining of any goods may pay the customs duty levied under protest.

Director General to determine questions on classification and valuation.

13B. Where customs duty has been paid under protest, the proper officer of customs shall, within thirty days of such payment being made, refer any question as to classification or valuation of goods to the Director General for his decision.

Q U O T E

Think like a wise man but
communicate in the language of the people

William Butler Yeats

INCOME TAX ACT 1967
INCOME TAX (EXEMPTION / AMENDMENT / DOUBLE TAXATION AGREEMENT) ORDERS 1995

NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
36.	Income Tax (Qualifying Plant Allowances) (Scheduled Wastes) Rules 1995	339	9/28/95	Refer to the Government Gazette P.U(A) 339 of Appendix: I.	
37.	Income Tax Act 1967 Section 44 (6)	(6703)	9/28/95	List of Approved Institutions or Organisations for the purpose of section 44 (6).	Various Dates
38.	Income Tax (Exemption) (No. 26) Order 1995	355	10/12/95	Refer to the Government Gazette P.U (A) 355 of Appendix: II	
39.	Income Tax (Exemption) (No. 27) Order 1995	370	10/27/95	The Official emoluments received by the following officials who are in Malaysia solely for the purpose of serving with the Sarawak Forest Department exempt from tax:-	
				1. Robert Butler Stuebing PASSPORT NO: Z4970068	24/1/95 to 3/2/95
				2. Svend Korsgaard PASSPORT NO: A002677147	14/3/95 to 22/3/95
				3. Paul Anthony Charles Holmes PASSPORT NO: 740033595	3/4/95 to 1/7/95
40.	Double Taxation Relief (The Government of Mongolia) Order 1995	397	11/9/95	Agreement dated 5/10/95 Between the Government of Malaysia and the Government of Mongolia for the Avoidance of Double Taxation and The Prevention of fiscal evasion with respect to taxes on income.	
41.	Double Taxation Relief (The Government of The Kingdom of Thailand) Order 1995	398	11/9/95	Protocol amending the agreement between the Government of Malaysia and the Government of the Kingdom of Thailand for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income signed at Kuala Lumpur on 29/3/82.	
42.	Income Tax (Exemption) (No. 28) Order 1995	424	12/7/95	Tax exemption up to 50% of the emoluments received by the following officials of Transportation system and Market Research Ltd. (Transmark) for serving as consultants for the Double Tracking Project (KTM).	
				1. Mohamad Arshad PASSPORT NO: C754284 C	1/10/92 to 1/6/93
				2. John Murhpy PASSPORT NO: M 124000	1/10/92 to 31/1/95
				3. Leonard B. Dargue PASSPORT NO: 000030959	1/7/93 to 31/1/95
43.	Income Tax (Exemption) (No. 29) Order 1995	429	12/14/95	Tax exemption for the following artistes who have performed in the Auditorium MPPJ in the Petaling Jaya Selangor on 15/6/95	
				1. Tomoko Kusakari PASSPORT NO: MN7373330	
				2. Michiko Kato PASSPORT NO: MP3074728	
				3. Reiko Mishima PASSPORT NO: MN2901269	
				4. Yoshiko Sakata PASSPORT NO: MN7629979	

NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
				5. Sae Ishida @ Sae Tanno PASSPORT NO: MN0060099 6. Shinobu Kamata PASSPORT NO: MN1783893 7. Wang Wei Hua PASSPORT NO: 2221350 8. Lim Min PASSPORT NO: 1508268 9. Fei Jian Rong PASSPORT NO: 1214319	
44.	Income Tax (Exemption) (No. 30) Order 1995	430	12/14/95	The Minister exempts a borrower and a lender from tax on any income (Other than dividends, lending fees, interest earned on collateral and rebate) arising from a loan of securities listed on the KLSE and, the return of the same or equivalent securities. - and, the corresponding exchange of collateral, in respect of a securities borrowing and lending transaction made under a Securities Borrowing and Leasing Agreement. a) "borrower" and "lender" means a person authorised by the Securities Commission to engage as a borrower or lender, as the case may be, in securities borrowing and lending transactions under a SBLA* that has been approved by that Commission. "equivalent securities" means securities of an identical type, nominal value, description and amount to particular securities borrowed and such term shall include the certificates and documents of or evidencing title and transfer in respect of the foregoing. * Securities Borrowing and Lending Agreement.	
45.	Income Tax (Exemption) (No. 31) Order 1995	450	12/28/95	The Minister exempts from tax, dividend income distributed from income arising from sources outside Malaysia and received in Malaysia by a resident company, (other than a company carrying on the business of banking insurance, shipping and air transport.	
46.	Income Tax (Exemption) (No. 32) Order 1995	453	12/28/95	Tax exemption for the shareholders of Global Maritime Ventures Bhd, in respect of dividend paid by Global Maritime Ventures Bhd from income exempted from tax under para. 54A (3) (e), of the Income Tax Act 1967	

INCOME TAX ACT 1967
INCOME TAX (EXEMPTION / AMENDMENT / DOUBLE TAXATION AGREEMENT) ORDERS 1996

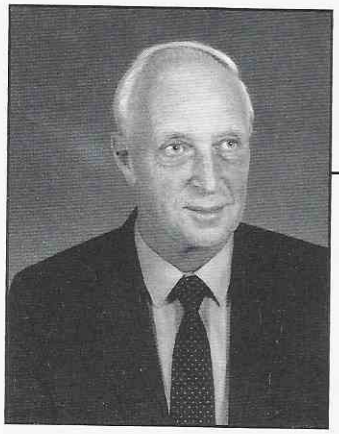
NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
1.	Income Tax (Returns By Employers) Orders 1996	1	4/1/96	Employers to prepare and deliver return	
2.	Income Tax (Exemption) Order 1996	4	11/1/96	All Income of the Malaysian Bar Council (excluding dividend income) exempt from tax.	Y/A 1977 to Y/A 1981
3.	Income Tax (Exemption) (No.2) Order 1996	5	11/1/96	All income of the Badan Penyelidikan Kemasyarakatan Malaysia exempt from tax.	Y/A 1995 to Y/A 1997
4.	Income Tax (Exemption) (No.3) Order 1996	6	11/1/96	All income of the German - Malaysian Institute (excluding dividend income) exempt from tax.	Y/A 1994 to Y/A 1998
5.	Income Tax (Exemption) (no.4) Order 1996	7	11/1/96	All income of the Institute of Management Melaka (excluding dividend income) exempt from tax.	Y/A 1994 to Y/A 1998
6.	Income Tax (Exemption) (No. 5) Order 1996	24	18/1/96	Tax exemption for Agence de 1' Enovionnoment de 1 a Maitrise de l' Energie, in respect of amount not exceeding US$450,000 received from UNDP for consultancy service under the Energy Policy Analysis and Planning to the Year 2020 project.	
7.	Income Tax (Exemption) (No. 6) Order 1996	32	25/01/96	All income of the Syarikat Tanah dan Harta Sdn. Bhd exempt from tax	Y/A 1995 to Subsequent Y/A
8.	Income Tax (Exemption) (No. 7) Order 1996	33	25/01/96	All income of the Malaysian Textile and Appeal Centre (excluding dividend income) exempt from tax.	Y/A 1995 to Y/A 1999
9.	Income Tax (Exemption) (No. 8) Order 1996	34	25/01/96	All income of Khazanah Nasional Bhd (excluding dividend income) exempt from tax	Y/A 1995 to Y/A 1997
10.	Income Tax (Exemption) (No. 9) Order 1996	35	25/01/96	Tax exemption for the following foreign officials, in respect of income received by them. (Being an amount contributed by the International Tropical Timber Organisation:-	
				1. Donald Robinson Morris PASSPORT NO: E 058669	(a) 1/5/95 to 5/7/95 (b) 22/8/95 to 20/9/95
				2. William Bruce Liley PASSPORT NO: L 326777	5/2/95 to 5/7/95
				3. Robert Butler Stuebing PASSPORT NO: Z4970068	(a) 12/6/95 to 12/8/95 (b) 12/9/95 to 31/10/95
				4. Adam Ewing John Ferrie PASSPORT NO: EM270142	11/9/95 to 18/12/95
11.	Income Tax (Exemption) (No. 10) Order 1996	36	25/1/96	All income of the Akademi Sains Malaysia (Excluding dividend income) exempts from tax.	Y/A 1996 to Y/A 2000
12.	Income Tax (Exemption) (No. 11) Order 1996	37	25/1/96	Tax exemption for Dr. Jaafar Bin Ahmad in respect of the overseas allowances of US$3,617 per month, received by him from Bank Negara Malaysia for the duration of his services as the Governor of the Central Bank Namibia.	

NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
13	Double Taxation Relief (**The Government of The Socialist Republic of Vietnam**) Order 1996	60	15/2/96	Agreement between the Government of Malaysia and the Government of the Socialist Republic of Vietnam for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income.	made on 11/1/96
14.	Double Taxation Relief (**The Government of Malta**) Order 1996	61	15/2/96	Agreement between the Government of Malaysia and the Government of Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.	made on 11/1/1996
15.	Income Tax (Exemption) (No.12) Order 1996	64	15/2/96	Tax exemption for individual on:	
				a) Interest accrues from money deposited in any savings account with the Bank Simpanan Nasional	Y/A 1997 and subsequent Y/A
				b) interest or bonus accrues from money deposited with the Bank Simpanan Nasional under the "Save As You Earn " scheme	Y/A 1997 and subsequent Y/A
				c) Interest up to an amount equivalent to interest accruing on a deposit of RM100,000 for calendar year which accrues from money deposited in any savings account with a registered co-operative Society, Bank Pertanian Malaysia, Malaysia Building Society Bhd, Borneo Housing Mortgage Finance Bhd or with any other institution that may be approved by the Minister.	Y/A 1997 and subsequent Y/A
				d) Bonus accrues from money deposited in any savings with Lembaga Tabung Haji;	Y/A 1997 and subsequent Y/A
				e) Interest accrues (up to an amount equivalent to interest accruing on a deposit of RM100,000 for a calender year) from money depoisted in any savings account with a bank or finance company licensed under the **Banking and Financial Institutions Act 1989**.	Y/A 1997 and subsequent Y/A
				f) Interest accrues (up to an amount equivalent to interest accruing on a deposit of RM100,000) from money deposited in any fixed deposit account (including negotiable certificate of deposits) for a period not exceeding twelve months with: (i) Bank Pertanian Malaysia (ii) Bank Kerjasama Rakyat Malaysia Bhd (iii) Bank Simpanan Nasional (iv) Borneo Housing Mortgage Finance Bhd (v) Malaysia Building Society Bhd (vi) a bank or finance company licensed under the Banking and Financial Institutions Act 1989	Y/A 1997 and subsequent Y/A

NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
				g) Interest accrues from money deposited in any fixed deposit account (including negotiable certificates of deposits) for a period of twelve months with: (i) Bank Pertanian Malaysia (ii) Bank Kerjasama Rakyat Malaysia Bhd (iii) Bank Simpanan Nasional (iv) Borneo Housing Mortgage Finance Bhd (v) Malalysia Building Society Bhd (vi) a bank or finance company licensed under the **Banking and Financial Institutions Act 1989** The Income Tax (Exemption)(No.3) Order 1989 is revoked with effect from January 1,1996 **[P.U (A) 293/891]**	Y/A 1997 and Subsequent Y/A
16.	Income Tax (Exemption) (No.13) Order 1996	65	15/2/96	Tax exemption for an individual on savings and investment account: a) gains or profits accrues, (to an amount equivalent to gains or profits accruing on a deposit of RM100,000 for a calendar year) from money deposited in any savings account under the Interest-Free Banking Scheme with a bank or finance company licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983.	Y/A 1997 and Subsequent Y/A
				b) gains or profits accrues (to an amount equivalent to gains or profits accruing on a deposit of RM 100,000 for a calendar year) from money deposited in any investment account for a period not exceeding twelve months with a bank or finance company licensed under BAFIA 1989 or the Islamic Banking Act 1983	Y/A 1997 and Subsequent Y/A
				c) gains and profits accrues from money deposited in any investment account for a period of twelve months or more under the Interest-Free Banking scheme with a bank or finance company licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983. The Income Tax (Exemption)(No.4) Order 1989 and the Income Tax (Exemption) (No.11) Order 1994 are revoked with effect from January 1996. **[P.U(A) 294/89 and P.U(A) 192/94**]	Y/A 1997 and Subsequent Y/A
17.	Income Tax (Exemption)(No.14) Order 1996	82	29/2/96	i) Income received by a trade association established before 1 January 1996 is exempted from tax up to an amount equivalent to 50% of the statutory income.	Y/A 1997 to Y/A 2000

NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
				ii) Income received by a trade association established on or after 1 January 1996 is exempted from tax up to to an amount equivalent to 50% of the statutory income .	For a period of 5yrs of assessment commencing from the yr of assessment in the basis period in which the trade association was established.
18.	Income Tax (Exemption)(No.15) Order 1996	119	14/3/96	All income of Koperasi Kijang Mas Bhd exempts from tax.	Y/A 1990 to Y/A 1991
19.	Income Tax Relief (The Government of Arab Emirate) Order 1996	127	21/3/96	Agreement between the Government of Malaysia and the Government of the United Arab Emirates for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.	Made 13th Februay 1996
20.	Double Taxation Relief (The Government of Belgium) Order 1996	149	4/4/96	Protocol amending the agreement between the Government of Malaysia and the Government of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed at Kuala Lumpur on 24 October 1973 as amended by the supplementary agreement signed at Kuala Lumpur on 25th July 1979	Made 9th Februay 1996
21.	Income Tax (Exemption)(No.16) Order 1996	155	4/4/96	All income of the Keretapi Tanah Melayu Berhad (excluding dividend income) exempt from tax.	Y/A 1996 to Y/A 1997
22.	Income Tax (Deduction of Pre-Commencement of Business Training Expenses) Rules 1996	160	4/11/96	Rules for the purposes of ascertaining the adjusted income of a company from a business under the Act, there shall be allowed as a deduction, **qualifying training expenses** incurred by the company in respect of the training of **potential employees** prior to the commencement of its business . Companies qualifying for a deduction under these Rules shall not include : a) a company receiving training grants from the Government . b) a small or medium scale company (not participating in the Human Resources Development Fund Scheme) claiming double deduction of training expenses under the Income Tax (Deduction for Approved Training) Rules 1992. **potential employees** means an employee of a company who has been contracted as an employee prior to the commencement of the employer's business. **qualifying training expenses** means expenditure incurred:- a) on the training of potential employees to impart basic skills to enable the company to commence its business	Y/A 1996 and subsequent Y/A

NO.	TITLE	REFER P.U. (A)	DATE OF GAZETTE NOTIFICATON	SUBJECT	EFFECTIVE DATE / REMARKS
				b) within the period of one year prior to the commencement of business. c) being of the kind allowable under section 33 of the Income Tax Act 1967.	
23.	Income Tax (Exemption)(No.17) Order 1996	161	4/11/96	Tax exemption for Fong Weng Phak,Deputy Governor, Bank Negara Malaysia; in respect of gratutity payments of RM80,590 received from OCBC Bank (M) Bhd.	
24.	Income Tax (Exemption)(No.18) Order 1996	180	25/4/96	All income of the Regional Centre for Education in Science and Mathematics of the South East Asian Ministers of Education Organisation (SEAMEO RECSAM) are exempt from tax.	from Y/A 1973
25.	Income Tax (Exemption)(No.19) Order 1996	181	25/4/96	Tax exemption for Canada Centre for Remote Sensing in respect of RM3,380,013 received for consultancy services in relation to the Project of Construction of Ground Station at the National Centre of Remote Sensing.	
26.	Income Tax (Exemption)(No.20) Order 1996	201	5/2/96	Tax exemption for fifty five (55) foreign artists who were in Malaysia solely for the purpose of performing in the "The Little Angels" held on 3 to 6 Jan 1996 at the Putra world Trade Centre, K.L .	Refer to the Government Gazette P.U.(A) 201 2/5/1996
27.	Income Tax (Exemption)(No.21) Order 1996	202	5/2/96	All income of the Export-Import Bank of Malaysia Bhd (excluding dividend income) exempt from tax.	Y/A 1997 to Y/A 2001
28.	Income Tax (Exemption)(No.22) Order 1996	207	5/2/96	Tax exemption for seventy one (71) foreign artistes who are in Malaysia for their performance under the 1995 Hong Kong Chinese Orchestra Malaysia Tours, held in Pulau Pinang and Kuala Lumpur on 24 and 26 Dec 1995.	Refer to the Government Gazette P.U.(A) 207 2/5/1996
29.	Income Tax (Exemption)(No.23) Order 1996	208	5/9/96	Tax exemption for nine (9) foreign artistes who were in Malaysia solely for the purpose of performing at the Laos Cultural Show sponsored by the Embassy of the Lao People's Democratic Republic in Malaysia held at the Hotel Crown Princess, Kuala Lumpur on 30 November 1995.	Refer to the Government Gazette P.U.(A) 208 9/5/1996
30.	Double Taxation Relief (**The Government of The Republic of Fiji**) Order 1996	209	5/9/96	Agreement between the Government of Malaysia and the Government of the Republic of Fiji for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income.	Made 20th April, 1996



Death and the taxes

Prepared by:
Richard Thornton

PRACTICAL MATTERS

Death comes to all of us and nothing is more certain. For a individual, death is his final act in this world but he cannot time his departure so that all of his affairs are up to date at the time. Neither can he be sought beyond the grave to help to sort out the things which are uncompleted on his death. This has to be done by those who are left behind in positions of responsibility. So far as his income tax affairs are concerned, this is covered by section 74 of the Income Tax Act 1967 ("The Act") which puts the responsibility on his executors.

RESPONSIBILITY OF THE EXECUTORS

An executor is normally a person who is appointed under a will to administer the estate of the deceased. Not everybody leaves a will behind, so the word executor is defined by the Act as including the administrator or other person administering or managing the estate of a deceased person. Usually this will be the person appointed by the court under letters of administration where there is no will.

The Act makes the executors assessable and chargeable to tax for the year of assessment following the basis year in which the person died, for the following year and, where necessary, for any previous year of assessment. This applies to all income arising to the deceased up to the date of his death and to all income received by the executors which would have been the individual's chargeable income if he had not died and had received it himself at the same time. All rights (for example claims for deductions and repayment of tax) and duties (such as the making of returns and the incurring of penalties) which would have applied to the deceased in respect of such income passes to his executors.

Note the difference between income arising to the deceased and income received by the executors. The normal basis of assessment for Malaysian source income is income accruing in or derived from Malaysia (section 3). Income may be treated as arising, for example, when a debt arises (section 24) or when income becomes receivable (section 27). However, executors can only take responsibility for what comes into their hands and, for this reason, they are only assessable on what is received by them.

Tax payable by the executors on the income in respect of which they are chargeable is a debt due from the estate of the deceased. The executors are prohibited from distributing any assets of the estate unless they have made such provision as they are able to, out of the assets of the estate, for any tax which they know or might reasonably be expected to know is payable by them. Where they fail to make provision, they can be jointly and severally charged with a penalty equal to the amount of tax to which the failure relates.

To protect the executors from uncertainty, it is provided that assessments or additional assessments must be made by the end of the fourth year of assessment following the basis year in which in which the individual died.

EXAMPLE 1

Ah Soh died on 1st April 1995 and left three tenanted properties. By his will, he made his first son, Ah Sing, his executor. Under the will, property number one was to be given to his widow and the title was transferred to her on 1st October 1995. The other two properties were left in trust jointly for Ah Sing and the second son, who was still a minor, subject to the payment of an annuity to the widow for her lifetime.

Just before his death, Ah Soh had submitted his return of income for the year of assessment 1995 and was entitled to a repayment of tax for that year. Previous years had been settled.

Ah Sing will be entitled to negotiate and claim the refund of tax due for the year of assessment 1995. For the year of assessment 1996, he will be assessable and chargeable to tax in respect of:

Income to date of death (1st April 1995)

rents arising from all 3 properties

Income after date of death (2nd April to 31st December 1995)

rents received from the widow's property

up to 30th September 1995

rents received from the joint properties

up to 31st December 1995

Ah Sing will also be assessable and chargeable, for the year of assessment 1997, in respect of rents received by him as executor from the joint properties during the basis year 1996.

INCOME TO DATE OF DEATH

The executors are expected to complete and submit a Form B to include all income arising up to the date of death of the deceased. They will claim deductions for such items as are appropriate including personal deductions for wife, children etc and for gifts of money under section 44(6). Tax is chargeable at the graduated rates if the individual was resident in Malaysia. The personal deductions are given for a full year and not apportioned up to the date of death

INCOME AFTER DATE OF DEATH

Any source of income which is

part of the estate of the deceased is a source of the executors. Chargeable income is arrived at by using the normal rules of computation and determination of basis periods.

Traditionally, the executors are given one year, known as the administration period, in which to take charge of the assets, administer the estate and pay all debts, but this period may be shorter or longer than one year. When the administration is completed they will hand over to the beneficiaries their shares of assets including any income which the executors have received during the administration period.

Assets which are to be given to specific beneficiaries may be handed over to them before the administration period is completed and beneficiaries will then receive the income in their own right and be taxed accordingly.

Where assets are not to be distributed to beneficiaries but are to be held in trust, the provisions relating to trusts, which were covered in the article "Taxation of Trusts" in September 1994, will commence to operate at the end of the administration period.

If the deceased was domiciled in Malaysia (domicile is different from residence and has a longer term implication) at the time of his death, the personal deduction, currently RM5,000, (but no other individual deduction) is given as a deduction from total income for each year of assessment during the administration period. Tax is charged at the graduated rates applicable to a resident individual. Otherwise, the 30% rate applies to all chargeable income.

BUSINESS INCOME

Where a business is carried on both before and after death, the adjusted income is normally apportioned on a time basis between the period up to death and the period after death. The transmission of fixed assets from the deceased to the executors, and ultimately to the beneficiaries, is treated as a disposal subject to control under schedule 3, paragraph 38, so that balancing allowances and charges will not normally arise.

THE BENEFICIARIES

As income received in the administration period is taxed in the hands of the executors, it is not regarded as income of the beneficiaries but as a part of their capital entitlement.

An exception is where an annuity is payable. The amount payable is income under section 4(e) in the hands of the annuitant and is deemed to be derived from Malaysia. In arriving at the total income of the executors, the amount paid can be deducted under section 44 (in priority to gifts of money).

In example 2, the widow's taxable income

EXAMPLE 2

Facts as in example 1. The administration was completed on 31st March 1996 and rental income was received as follows:

	Property number 1	Properties 2 & 3
	RM	RM
31st March 1995	6,000	13,500
30th June 1995	5,500	13,250
30th September 1995	4,750	13,400
31st December 1995	NA	14,150
31st March 1996	NA	13,600

The widow's annuity is RM12,000 per annum payable quarterly. She had no income before Ah Soh's death.

For the year of assessment 1996, Ah Sing will be assessed as executor as follows:

up to date of death

rental income		19,500
personal deduction	5,000	
wife deduction	3,000	8,000
chargeable income taxed at graduated rates		11,500

from date of death

rental income - property		
1 - 5,500+4,750		10,250
2&3 - 13,250+13,400+14,150		41,800
		52,050
less: annuity payments 3 quarters		9,000
		43,050
less: personal deduction		5,000
chargeable income taxed at graduated rates		38,050

For the year of assessment 1997, Ah Soh will be assessed as executor as follows:

rental income - properties 2&3	13,600
less: annuity payment	3,000
	10,600
less: personal deduction	5,000
chargeable income taxed at graduated rates	5,600

for years of assessment 1996 and 1997 will comprise her annuity payments plus the rental income received by her from 31st December 1995. Ah Sing and his brother will have no taxable income from the estate during the administration period and trust provisions will apply thereafter.

REAL PROPERTY ASSETS

Where a disposal has been made by the deceased before his death and a chargeable gain has arisen, a notice of assessment to real property gains tax made be served on the executor and it shall have the same effect as if it had been made on the deceased in his lifetime (Real Property Gains Tax Act 1976 ("RPGTA"), section 14).

An executor is a chargeable person and may be assessed and charged with tax in respect of any chargeable gain accruing on a disposal of a chargeable asset of the estate which is made by him. He is deemed to have acquired the asset on the death of the individual concerned at it's value at that time. Tax is payable at the graduated rates prescribed according to the period of ownership under Schedule 4 of the Act (as increased by the Finance Act 1995).

However, no assessment may be made on the executor more than three years after the end of the year assessment in which the death took place.

Death involves a disposal but one on which no chargeable gain arises. The devolution of the asset on the executor or legatee is deemed to take place at a price equal to the acquisition price.

The recipient of the asset is regarded as having acquired it on the date when the ownership is transferred to him and at the value on that date.

Where a legatee accepts a chargeable asset in place of a legacy, he takes the asset with effect from the date of transfer of ownership at the market value at that time or at the amount of the legacy if less.

MALAYSIAN INSTITUTE OF TAXATION

RULES AND REGULATIONS (ON PROFESSIONAL CONDUCT AND ETHICS)

These rules and regulations are made by the Council of the Malaysian Institute of Taxation pursuant to Article 22 of its Articles of Association and shall come into force on 1 September 1995.

Members are required to observe proper standards of professional conduct and specifically to refrain from acts which have been described in the rules and regulations as misconduct, which includes, but is not confined to, any act or default likely to bring discredit to himself, the Institute or the taxation profession.

Members who fail to observe such standards may be required to answer a complaint before the Investigation and Disciplinary Committees.

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FUNDAMENTAL PRINCIPLES

The fundamental principles set out below frame in broad and general terms the basic guidelines for the professional conduct of members.

1-1 In accepting or continuing a professional assignment or occupation a member should always have regard to any factors which might reflect adversely upon his integrity and objectivity in relation to that assignment or occupation.

1-2 A member should carry out his professional work with a proper regard for the technical and professional standards expected of him as a member and should not undertake or continue professional work which he is not himself competent to perform unless he obtains such advice and assistance as will enable him competently to carry out his task.

1-3 A member should conduct himself with courtesy and consideration towards all with whom he comes into contact in the course of his professional work.

1-4 A member should follow the ethical guidance of the Institute and in circumstances not provided for by that guidance should conduct himself in a manner consistent with the good reputation of the profession and the Institute.

1-5 A member should be truthful and honest in all his professional work. In particular, he should not knowingly or recklessly supply information or make any statements which are false or misleading. Similarly, a member should not knowingly fail to supply relevant information.

1-6 A member should not undertake within his professional practice business activities which are not compatible with those normally undertaken by tax practitioners.

PROFESSIONAL INDEPENDENCE

2-1(i) A member must, at all times, perform his work objectively, impartially and independently. In order to do so, it is essential that a member remains free from any influence which could impair his independence.

(ii) Professional independence is largely an attitude of mind which often cannot be measured or defined precisely. Thus, any evaluation of independence will often be made on the basis of ascertainable facts, taken in conjunction with relationships, generally accepted practices and subjective perceptions. As a result, particular care is needed to preserve apparent, as well as actual, independence.

(iii) If there is any factor which might affect his independence, then a member should take the necessary action to remove it. A client should be advised as soon as it is clear that there is any possible or potential conflict of interest. It will then be for the client to consider whether the member can continue to act or to place any limitations on the scope of the member's work.

(iv) Most problems can be avoided by being alert to potential conflicts of interest and by not accepting assignments where it seems likely that a conflict of interest could occur.

2-2(i) Financial involvement with a client may affect a member's independence. Such involvement could arise in a number of ways, of which loans to or from a client would be an example.

(ii) Thus, where a member, or the spouse or minor child of the member, makes a loan to a client, or guarantees a client's borrowing, or accepts a loan from a client or has borrowings guaranteed by a client, then a conflict of interest could occur. Although such loans cannot be prohibited, a member should consider carefully whether it would be in his best interests not to undertake such financial transactions with a client, or if such arrangements are already in force, not to act for that person. If it was decided to act or to continue to act in such circumstances, then a member should fully discuss the possible conflict with the client and/or ensure that the issue is properly documented (e.g. in the engagement letter.)

(iii) A member should make sure that the foregoing matters do not lead to less favourable service being given to other clients.

2-3(i) A member should not normally act for both parties to a transaction. However, this may present particular difficulties if both the parties are existing clients. The member has an in-built conflict if he shows preference in providing services to one client and not the other and an added conflict if he does not act in the best interest of both.

(ii) The member has three basic choices:

(a) To advise both clients of the conflict and to give both the opportunity to consider whether or not they wish him to act or whether they wish to seek alternative advice.

If both clients are agreeable to him acting he may do so provided there is adequate disclosure of all relevant facts to both parties, so that they may formulate proper business judgements and provided that no preference is shown in advising one against the other. In practice this may be difficult but there may be sufficient "mutuality of interest" between the parties to allow this course to be followed.

(b) To advise both clients of the conflict and then to act for only one. This presents a conflict of duty owed to the client for whom the member declines to act. However, it is appropriate to follow this approach if it is clear which client first sought advice and information has already been supplied to the member in relation to the particular transaction. To change allegiance after accepting instructions could present a conflict in relation to the use of information already supplied as it would be a breach of client confidentiality to release such information, in any form, to another party without express approval of the client providing such information.

Even though a decision is made to act only for the first client and to recommend the other to seek alternative advice in relation to the particular transaction it is still advisable for the member to inform the other client that he is so acting in order to avoid any subsequent suggestion that he may have acted improperly or misused any confidential information concerning that client.

(c) To act for neither. This is the only way totally to avoid the conflict of interest but may not necessarily be the best course as it may not serve the interest of anyone concerned. Nevertheless it is the recommended course in situations of doubt.

2-4 A member may frequently be asked by an employer to provide tax or other advice to his employees. It is important for the member to recognise that although the instructions may be given by the employer, the client relationship is with the individual employee. No confidential information pertaining to the employee should be given to the employer without the express approval of the employee (preferably in writing). Where the nature of the assignment is such that there is a requirement for a report to the employer this fact should be made clear in the engagement letter submitted to the individual employee.

2-5 No member shall give any assistance or his services by the use of his name or in any other manner to advance or promote any illegal activity of a client.

2-6 No member shall make, prepare, attest to or certify any statement which he knows to be -

(a) false, incorrect or misleading; or

(b) open to misconstruc-tion by reason of any error, omission or suppression of a material fact or otherwise.

COMPETENCE AND DUE CARE

3-1 Every member must strive continually to improve his technical services and to keep his knowledge up-to-date. He must bring due care and diligence to bear upon the discharge of his duties to clients or employers.

3-2 A member must not undertake professional work which he is not competent to perform and, when in doubt, must obtain such advice and assistance as will enable him to carry out the work competently.

3-3 A member shall endeavour to enhance his professional competence and comply with the Continuing Professional Development (CPD) guidelines as may be prescribed by the Council from time to time.

3-4 A member shall comply with all the standards and guidelines as may be prescribed by the Council from time to time.

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Manuscripts should cover Malaysia or international tax developments. Manuscripts should be submitted in English or Bahasa Malaysia ranging from 3,000 to 10,000 words (about 10-24 double-space pages). Diskettes, (3 1/4 inches) in, Microsoft Word or Word Perfect are encouraged. Manuscripts are subject to a review procedure and the editor reserves the right to make amendments which may be appropriate prior to publication.

Additional information may be obtained by writing to the TAX NASIONAL Editor.

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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 subsection (2)/(6) of Section 8 of the Companies Act, 1965 to act as an approved company auditor without limitations or conditions.
8. Any person who is granted limited or conditional approval under Sub-section (6) of Section 8 of the Companies Act, 1965 to act as an approved company auditor.
9. Any person who is an approved Tax Agent under Section 153 of the Income Tax Act, 1967.

Fellow Membership

1. A Fellow may be elected by the Council provided the applicant has been an 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.