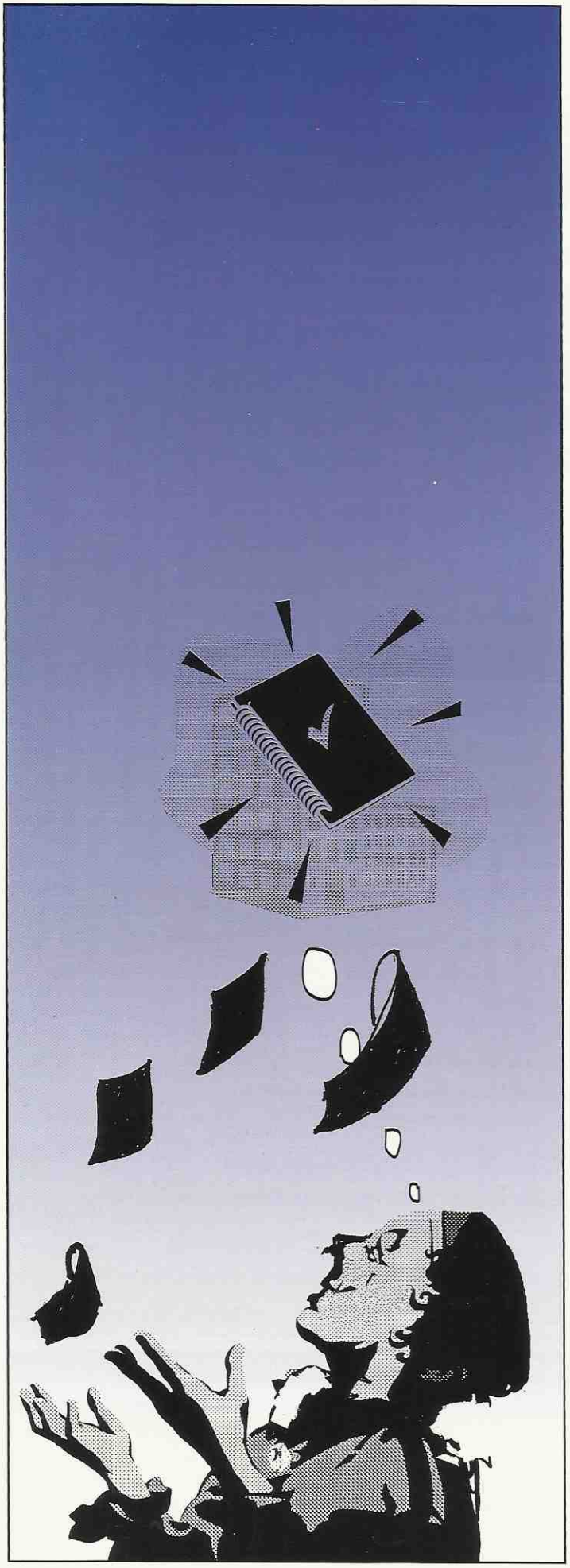

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Malaysian Institute of Taxation

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 objective 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.

4. To provide examination for persons interested in or concerned with the taxation profession.

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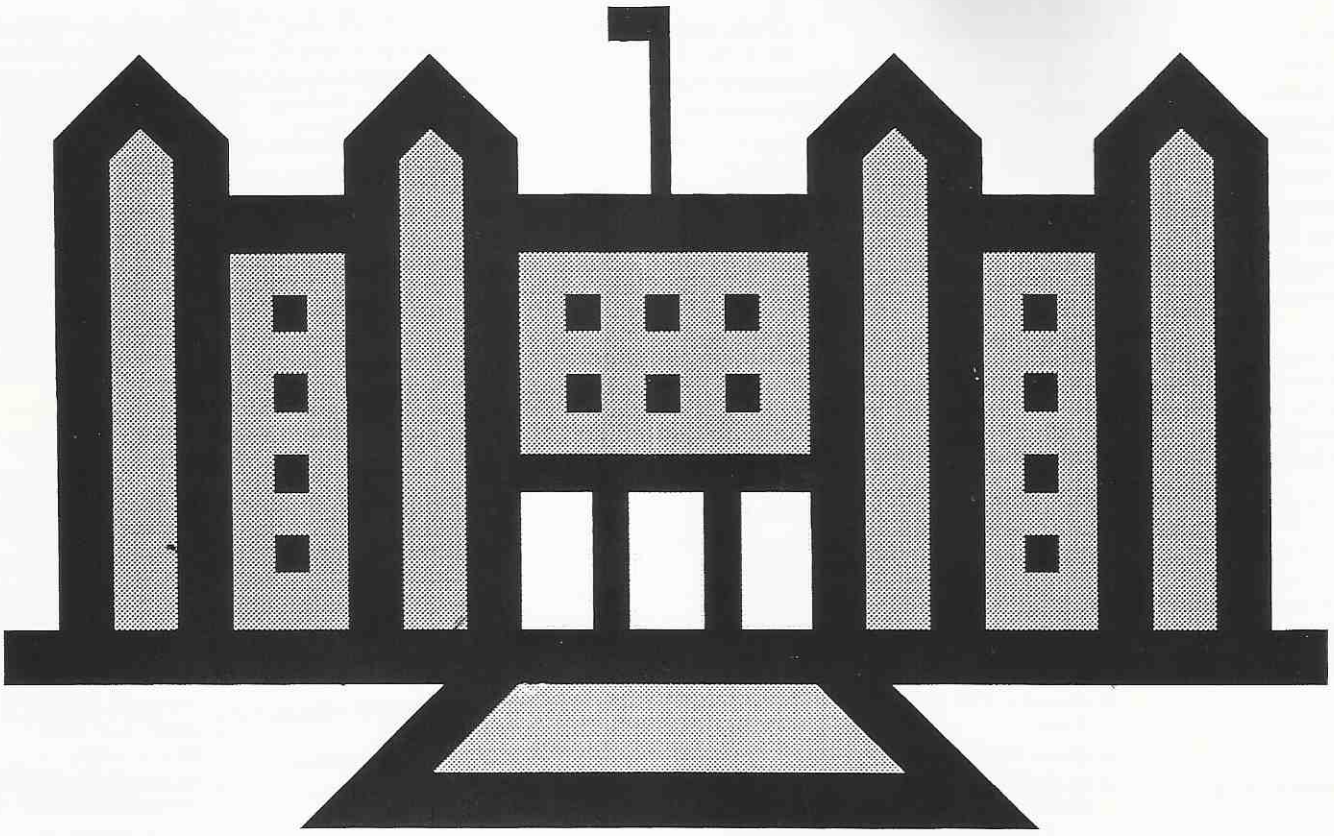


IBA Document Processing

The Court of Appeal in England rejected the claim by Giro Bank plc for industrial building allowances on a bank building that was used for processing large number of documents at high speed using machinery.

The issue was whether the treatment of documents as a process, a requirement for the claiming of industrial building allowances.

DTA Myanmar

Malaysian and Myanmar have signed an agreement on the avoidance of double taxation.

Labour cost is between USD 30 to 50 per month. As yet Western countries have not committed much investment to Myanmar with Korean and Singapore businessmen having a large presence. Following the recent visit by Dr Mahathir there could be more opportunities and further investment by Malaysians.

Summer Vacation

ISSUE

Whether the taxpayer's absence from Malaysia for 14 days on a summer vacation can be taken into account to form part of the period of 182 days under section 7(1)(b) of the Income Tax Act, for the purpose of determining his tax residence status.

HELD

By a majority decision (2:1) the Special Commissioners allowed the 14 days to be part of the 182 continuous days. The DGIR has appealed to the High Court and the case is up for hearing on the 23 March 1998 (Monday).

Export Incentives - Goods & Services

Companies exporting goods and services in the manufacturing, agricultural and services sector will qualify for a new tax incentive from 1 January 1998.

The Export Incentive is given as an exemption against statutory income as a percentage of the value of increase in qualifying exports.

The guidelines for the Export Incentive have still not been issued. What is certain is that qualification hinges on: -

- Achieving an increase in export sales; and
- The content of exported goods must be at least 30% valued added.

Companies can maximise the benefit of the incentive in the Year of assessment 1999:-

- Increasing export sales in the accounting period ending during the calendar year ending 31st December 1998;
- Where appropriate making specific provisions for credit notes (for return export sales) and or irrecoverable amounts, in the accounting period ending during 31st December 1997; and
- Reviewing their agreements to contract for export sales in foreign currencies.

Quotations Interpretation of Tax Statutes

Special Commissioners In PKR

"It is trite law that taxing statutes must be strictly interpreted and the words givens its plain and ordinary meaning."

The Special Commissioners drew upon the words of Gunn Chit Tuan C.J. in National Land Finance Co-Operative v DGIR (1993) and Rowlatt J in Cape Brandy Syndicate v CIR (12 TC 358)

"..... certain principles relating to interpretation of taxing statutes must be followed. Firstly, there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed. (per Rowlatt J. In Cape Brandy Syndicate v IRC 12 TC 358). Another principle is that where the meaning of stature is in doubt the ambiguity must be construed in favour of the subject (taxpayer). Yet another principle is that an exemption from tax cannot be removed except by sufficiently clear words to achieve that purpose.

ROWLATT J

"..... it means that in taxation you have to look simply at what is clear said. There is no room for any intendment; there is no equity about a tax; there is no presumption as to 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".

Inland Revenue Board

The IRB in a letter dated 12 March 1998, has confirmed the following: -

- **Bonus Restriction**

Bonus restriction only applies for payments made after 17 October 1997. The restriction is applicable to fixed wages/salary without taking into account variable allowances.

- **Compensation For Loss of Employment**

STD deductions are to be made on the balance of the taxable compensation (after the RM 4000 exemption). The formula is the same as bonus payments.

- **Mobile Telephone**

Owned By Employer

The mobile telephone is required to be disclosed as a benefit in kind (BIK).

Where employee can prove that the mobile telephone is for official use and there is no element of private use or private use is reimbursed, the value of RM600 will be proportionately reduced.

Owned By Employee

Where rentals and all official calls are paid by the employer, the employee will be assessed on the value of RM600.

- **Loan Interest**

The value of the benefits is the cost to the Employer in providing the benefit. Where there is no cost, Revenue has confirmed that there will be no taxable benefit.

- **Insurance Premiums**

Where the employee (or some other relative) is the beneficiary in the policy, a benefit in kind is assessable. Payments for aviation travel insurance and to Healthcare Management Organisation are not taxable.

- **Tuition/School Fees**

Fee payable on the employees behalf is taxable as a benefit. However payments under the Education Refund Plan (ERP) is not regarded as a taxable benefit.

- **Club Membership**

Individual Membership

Entrance fees and monthly subscriptions are taxable on the employee.

Co. Membership

Entrance fees is not taxable.Monthly subscriptions for one recreation club is exempted if it is utilised by senior staff for business purposes.

Guideline

Insurance premiums paid by an individual (including wife and child) up to RM2000 on any insurance on education or medical benefits is allowed as a deduction in arriving at chargeable income.

A guideline on the criteria to qualify for an education and a medical policy has been issued.

R & D

A relaxation of time to submit the R & D application from 3 to 6 months from the end of the financial year, is now allowed.

Reinvestment Allowance

In order to determine the eligibility for RA, it is based on the company and not any particularly project.

PER is not pro rated where the company commences business during the year. Foreign exchange losses are not taken into account in the computation of PER.

MALAYSIA

- **Beneficial Owner Entitled To Capital Allowances**

The High Court has upheld the decision of the Special Commissioners in allowing capital allowances to the beneficial owner of the asset instead of the legal owner.

The proprietor of a lorry transport business has been allowed capital allowances for expenditure incurred on motor lorries despite the fact that he was not the registered owner, but the beneficial owner of the assets.

- **What Is A Manufacture**

The High Court has confirmed the Special Commissioner's decision of what is a manufacture. In the case of DGIR v Sebangun Sdn Bhd, the processing of raw silica sand into high grade silica sand was held to be a manufacture.

- **Holday Leave**

The High Court has heard all submissions on this case and is expected to give a decision on the issue sometime in late June 1998.

INTERNATIONAL UNITED KINGDOM

- **Transfer Pricing**

For accounting periods ending on or after 1 July 1999, companies doing business in the UK will:

- ✦ Need to certify in their Self Assessment tax returns that they have dealt with connected parties on an arm's length basis;
- ✦ Be obliged to keep extensive documentation to prove it;
- ✦ Be exposed to potentially draconian penalties if they get it wrong or cannot prove they got it right.

- **Corporate Tax Rate**

From 1 April 1999 the full rate of Corporation Tax will reduced to 30%. The small companies rate will also be reduced to 20%.

- **Self Assessment**

Self Assessment for companies will apply to accounting periods ending on or after 1 July 1999.

Under the Pay-and-File system introduced with effect from 1 October 1993 companies already calculate their own Corporation Tax liability; the move to full self assessment should be a relatively small step and will bring companies into line with personal taxpayers.

IRB Clarification

The MIA in its circular dated 25 March 1998 to all members informed that the IRB has clarified certain issues as follows: -

1. Compensation for loss employment Standard Deduction Payments.

2. Benefits in kinds.

3. Guidelines on criteria for an education policy and a medical policy.

4. Guidelines for double deduction for expenditure on research and development under Section 34A.

Tax Incentives

Double Deduction for advertising local brand names and Deduction for acquisition of proprietary rights. These matters are under discussion with the Ministry of Finance.

Capital Allowances On Computers

The IRB is not permitting claims of AA of 40% on computers and information technology assets as the 1996 Budget proposal has not yet been gazetted. The previous AA of 16% is instead granted by the IRB.

Foreign Equity Participation Relaxed

On 9 April 1998 the Deputy Prime Minister announced that the decision to allow non-Bumiputera and foreign investors to buy equity in existing companies previously reserved for Bumiputera as will be made a permanent Government policy. The Bumiputera share in these Bumiputera companies will however continue to be maintained to at least 30%.

This is a further relaxation regarding foreign equity participation in Malaysian companies. Other recent relaxations allow foreigners to acquire up to 49% in the telecommunications sectors, 49% in the stock-broking sector and 51% in the insurance sector.

And with effect from 1 January 1998, manufacturing companies which sell up to 50% of their products to the Malaysian market can be 100% foreign owned. Previously 100% foreign ownership was only permitted where domestic sales did not exceed 20%. This relaxation is available up to 31 December 2000. Existing and new manufacturing companies can apply to MITI for this relaxation.

These recent measures are aimed at stimulating direct foreign investments into Malaysia.

Service Tax On Management Fees

Released officially on 3 April 1998,the product includes a Methodology (flowchart) to mitigate the incidence of service tax on management fees with explanation notes. These techniques includes:-

- ✦ Service Tax Threshold.
- ✦ Exported Taxable Services.
- ✦ Fragmentation of Services to Below the Service Tax Threshold.
- ✦ Notional Charges.
- ✦ Identifying the Component of Services Provided.
- ✦ Directors and High Value Managers.
- ✦ Cost Sharing Arrangements.

RM100,000 Property Levy

Although withdrawn effective 28 August 1997,certain State Governments continue to impose the levy as the National Land Code has yet to be amended to remove the requirement. However, the Deputy Minister of Land & Cooperative Development, YB Dr Goh Cheng Teik, in his keynote address in a Land Law Seminar in February 1998 informed that levy collected after 28 August 1997 will be refunded.

DTA

Two new DTA have been signed and gazetted with Egypt and Argentina. The Argentinean agreement is limited to income from the operation of ships and aircraft in international traffic only.

Labuan

Income received by a non-resident person has been exempted from tax in respect of income arising from the use of any moveable property by an offshore company licenced under Offshore Banking Act 1990 or approved by LOFSA to carry out leasing business in Labuan.

In addition deduction of tax under Section 109B ITA 1967 will also not apply such income.

The Labuan Offshore Securities Industry Act 1998 (Act 579) has been gazetted.

The Money Laundering Bill is currently being looked into.

Customs Duty Refund

Export based companies wishing to apply the duty refunds are required to write first to the Customs Authorities, so that they can inspect their premises to determine the quantum of refund, based on the percentage of imported raw materials they use.

Original export documents are required to be submitted with the application.

It takes 21 days for the claim to be processed. Companies can also apply the refund directly from the Treasury but it will take nearly three months.

Failure to comply with this requirement will result in the rejection of the claim.

Electronics Commerce

The Malaysian Inland revenue Board has commenced looking into issues related to electronic commerce.

HONG KONG

- **Corporate Profits Tax**

The CPT has been reduced from 16.5 % to 16 %. The profits tax rate for unincorporated business remains at 15 %.

- **Salaries Tax**

The standard rate remains at 15 %. Changes have been made to the marginal rates and bands. Personal allowances and deductions have also been changed. The highest rate of tax now has been reduced from 20 % to 17 %.

- **Advance Rulings**

In light of recent difficulties in ascertaining the precise scope of the territorial basis of taxation in Hong Kong, the Inland Revenue Department will provide advance ruling on the source of profits. This service is available from the 1st of April 1998.

- **Tax Arrangement With Mainland China**

The Hong Kong government announced that Hong Kong and mainland China signed an arrangement for the avoidance of double taxation. The arrangement is in line with the OECD Model Convention. This is a 'first' for Hong Kong.

Deductibility Under S33 (1) ITA

The High Court has decided in the case of Mengawati Sdn. Bhd. v KPHDN (PKR 591). The issue, whether expenses incurred in buying land can be deducted from the assessment under section 33 (1) of the Income Tax Act. Details of the decision will be published as soon as a copy of the judgement is received.

Stamp Duty Case

What amounts to an assessment under the Stamp Duty Act was considered in a High Court decision in the case of Shell Malaysian Trading Sdn. Bhd. v Pemungut Duti Setem. The other issue which was discussed in the same case was how the 21 day appeal period was filed out of time. Justice Vincent Ng allowed the appeal. The IRB filed an appeal to the Court of Appeal, which has now been withdrawn.

State Level Sales Tax

Sarawak is set to become the first state in Malaysia to have a sales tax at state level.

Taxation Of Global Trading Of Financial Instruments

The OECD has issued a guideline on the taxation of global trading of financial instruments.

UK TAX CASES

'A Pound Of Flesh Too' - False Accounting

The taxpayer had produced false invoices in order to evade both corporation and income tax. The Revenue agreed to accept the tax, penalties and interest in exchange for prosecuting the taxpayer. However, the Crown Prosecution Service (which is independent of the Revenue) commenced criminal proceedings for false accounting. The Court of Appeal allowed the CPS to proceed with the prosecution.

Labuan Offshore Securities Act

The Labuan Offshore Securities Industry Act 1997 has been gazetted to come into force on 1 April 1998.

KL Options & Financial Futures Exchange

Individuals holding a Trading Permit to trade on the KLOFFE on their own account in futures markets are exempted from paying income tax of

up to 70 % of their adjusted income derived from carrying on business at the KLOFFE for YA 1996 to 2000.

Global Tax Havens Blacklist

The OECD is to draw up a blacklist of global tax havens providing "harmful tax competition".

US SEEKS E-COMMERCE ACCORD AT WTO MEET

The United States is pushing for a declaration to be issued at a WTO summit in May 18 committing member countries (including Malaysia) not to tax electronic commerce.

The United States in February proposed an accord that would permanently exempt products transmitted over the Internet, like computer software, architectural drawings and audio-visual products from custom duties.

DTA TAIWAN

A memorandum has been signed with Taiwan to prevent the double taxation of income. It is expected to be gazetted under Section 127 of the Income Tax Act unlike traditional methods.

DTA UK

The UK has approved the new protocol.

Promotion of Investments Act

✦ The Promotion of Investments (Promoted Activities and Products for Small Scale Companies) Order 1989 has been revoked and replaced with an 1998 Order. There are 21 promoted industries with various promoted products and activities.

✦ The Promotion of Investments (Promoted Activities and Promoted Products (Amendment) Order 1998 has been gazetted to list out activities and products promoted for the Federal Territory of Labuan. Various other amendments have been made to the 1995 Order.

AUSTRALIAN BUDGET

The 1998-99 Australian Budget was handed down on 12 May 1998.The budget contains a wide range of taxation and related announcements but no new taxes and no increases in taxes. Two measures were significant:-

✦ The allowance of an immediate tax deduction for expenses incurred in remedying Year 2000 computer software problems; and

✦ The government will extend the additional funding provided to the Australian Tax Office to investigate and audit high net worth individu to ensure compliance with the t laws.

NEW OFFSHORE TAX REGIME IN MAURITIUS

Due to it's favourable offshore ta regime and extensive treaty network Mauritius increasingly is being use to route investments into Asia an Africa. Beginning July 1st 1998, a new offshore tax regime will b introduced.

Currently offshore companies may elect to pay income tax at 0 % up to a maximum of 35 %.

Under the new regime, offshore companies incorporated on or after July 1 1998, will be taxed at a flat rate of 15 %.

US CHALLENGES EUROPEAN TAX PRACTICES AT WTO

The US has gone to the WTO to challenge income tax subsidies offered by some European countries. These practices constitute prohibited subsidies under WTO rules. Disputed issues are:

✦ French law allowing income tax deductions for start-up expenses incurred by the foreign operations of a French company;

- A Dutch special export reserve fund for small and medium-sized businesses;
- An annual tax deduction for Greek exporters;
- Tax breaks for special Irish trading houses that serve as an access mechanism for Irish-manufactured products in foreign markets; and
- A special tax exemption for Belgian corporate taxpayers who recruit personnel with export-related functions.

The Ultimate Tax Haven

There is a proposal to build a 25-storey Freedom Ship, which will nearly be a mile long and 750 ft wide. This will be a mobile modern city featuring 17,000 luxurious condominium units and the world's largest tax-free shopping mall. A two year round the world journey, docking at all the playgrounds of the idle rich. All residents will be heavily vetted.

Tax Exemption For Non Malaysian Source Income Remitted By Resident Individuals

The Tax Analysis Division of Treasury has issued a policy statement dated 20 May 1998 exempting Non Malaysian Source Income from Income Tax for resident Individuals.

The following are the conditions necessary for the income to be exempted:

1. The income should be non Malaysian source Income;
2. The Income has to be remitted to Malaysia;
3. Prior permission has to be obtained from the Treasury. This is a simple process. The Taxpayer has to show that the income is derived from sources outside Malaysia. The Treasury has given oral assurances that no other questions will be asked.
4. Exempted income need not to be declared in the YA 1999 Tax Returns.
5. This exemption expires on 31 December 1998.

The above is in addition to the former Section 3C exemption which is available to resident companies.

Relaxation Of Conditions On The Acquisition Of Properties By Foreign Interest

- Above RM 250,000.

All type of residential units, shop houses, commercial and office spaces above RM 250,000 per unit; Property developers cannot modify existing design or structure of their buildings with the intention of increasing the unit price to more than RM 250,000;

- Newly Completed / 50 % In Progress.

This relaxation is only applicable to projects that are newly completed or at least 50 % in progress;

- Overseas Financing

Financing must be obtained from overseas financials institutions outside Malaysia;

- Automatic Approval.

Approvals are expected to be granted automatically, when the above conditions are fulfilled.

- Other Properties.

For other properties acquired, the existing FIC guideline dated 1st November 1995 is still applicable.

Cost Of Borrowing Loans By Leasing Company - Not Deductible

The High Court has overturned the Special Commissioner decision in allowing the deductibility for loan processing fee, legal fee, stamping fee, guarantee fee etc. incurred in securing bank loans by a leasing company.

The High Court held these expenses to be capital in nature. The case in now under appeal to the Court of Appeal.

WTO Agrees to Waive Tariff On Internet Trade

The 132 nation World Trade Organisation has agreed to temporarily refrain from imposing custom duties on business conducted over the Internet while it studies US proposal to make the ban permanent.

40 % Annual Allowances For Computers & Information Technology Equipment

The long awaited rules have been finally gazetted, which are effective from YA 1996.

Initial allowance of 20 % and annual allowances of 40 % are available for the following qualifying plant expenditure incurred on the provision of computers and information technology equipment used for the purpose of a business:

- Access control system,
- Banking system,
- Barcode equipment,
- Bursters / decollators,
- Cables & connecters,
- Computer assisted design,
- Computer assisted manufacturing,
- Computer assisted engineering,
- Card readers,
- Computers and components,
- Central processing unit,
- Storage,
- Screen,
- Printers,
- Scanner / reader,
- Accessories,
- Communication & network

Initial Allowance For Mining, Timber & Construction Business

Special Initial Allowance for the mining, timber and construction business have been withdrawn by the Tax Laws (Amendment) Bill 1998,with effect from YA 1998.

Sanction For Prosecution

Section 123, where sanction for prosecution is required from the Public Prosecutor and the Director General has been deleted under the above mentioned bill.

Recent Decision On Malaysian Land Cases

Land - Fixed Asset Or Stock-In Trade - Objective Test

The High Court has confirmed that the test is objective rather than subjective when determining whether land has been held as fix asset or stock-in-trade. Land w acquired in 1971 as a fixed asset. 1979 the taxpayer changed t intention when their application operate a casino was rejected. T taxpayer argued that the land shou be valued at the date it w appropriated to stock-in-trade 1979 in accordance with section (3) (a) (i) of the Act.

The Revenue argued that th property was stock-in-trade from th date of purchase in 1971.There w no change of intention on the part o the taxpayer. The cost of the sai property should be the original cos at 1971 instead of the value i 1979.The High Court, which is the final authority on a question of fac agreed with the Specia Commissioners.

COMMENT:

What the taxpayer has done must be consistent with his original intention. Since the taxpayer failed to prove intention at the Special Commissioners hearing and the evidence of a sole witness was held to be hearsay and therefore inadmissible, his subsequent acts were important. The Judge quoted Whiteman on Income Tax.

Company's Intention Sourced From 3rd Party

The taxpayer acquired land for long term investment. The issue was the intention of the taxpayer. The taxpayer appealed on the decision of the Special Commissioners on the ground that they had failed to

consider the intention of the taxpayer after the acquisition of the subject land.

The intention of the taxpayer cannot be sourced from third parties (companies within the group) but it is necessary that Minutes of Board Resolutions of the taxpayer be submitted to support the intention.

The High Court held that the Special Commissioners were full entitled to find that the audited accounts showed that the taxpayer acknowledged that the subject land was not an investment.

The gains of sale appeared in the Trading and Profit and Loss Account.

The Special Commissioners and the High Court made a number of references to the accounts to support their decision why the intention of the company did not support their case.

S4A - Does The DTA Provide Any Protection?

The issue was whether the provision of DTA override the provision of Section 4A.

SGSS had no PE in Malaysia and provided technical services to a Malaysia tax resident company. 98 % of the services were performed outside Malaysia and 2 % in Malaysia through a subsidiary.

The Special Commissioners held that Section 4A does not conflict with nor does the Singapore DTA override it. They held that specific words must be used in the DTA to override the provisions of the Act and cited HH Co. Sdn. Bhd. v DGIR to support their argument.

COMMENT:
Relief from double taxation in respect of section 4A income is now available to UK residents under Article XIA of the Agreement. There is no such relief available for Singapore residents, hence the domestic law as expressed in section 4A must prevail and be applied to the relevant payments.

Is RPGT Payable Where There Is No Change In Beneficial Ownership But Only Legal Ownership?

Land was transferred between companies with common share holding. The taxpayer argued that there was a change in legal ownership but not beneficial ownership.

The Special Commissioners rejected the taxpayer's claim and confirm the assessments. The disposal price is the market value and not the transaction price. This case is under appeal to the High Court.

Comment:
There are certain circumstances where relief for the above is specifically provided for in the Act, for e.g. paragraph 3 and 17 of Schedule 2 RPGT Act. In the absence of specific provisions, the transaction is taxable. This case has interesting significance where there is no change in beneficial ownership.

In a recent income tax case (TTK v DGIR) involving capital allowances, the above argument was allowed.

Donations/Gifts - Is It Income???

"FURORE OVER RM 2.65M TAX ON SCHOOL - THE STAR"

A RM 2.65m tax bill from 1988 to 1994 has been slapped on an independent Chinese school and many order independent schools in Malaysia.

Datuk Wong See Wah (Deputy Finance Minister), according to the report, said that any income, including donations, unless given tax exemption, was taxable under the income tax law. Tax exemption can only be considered if made before any fund raising activity is carried out.

Comment:
Donations and gifts per se are not income under trite law. The IRB usually looks for a two year track record for the donee before an exemption is considered under paragraph 13 Schedule 6, ITA. The donor needs a section approval to obtain a tax deduction.

Labuan

The Labuan Offshore Securities Industry Act 1998 is in force with effect from 1 April 1998. However, the Labuan authority is working on

the establishment of the "Labuan International Financial Exchange". The Labuan securities exchange hopefully to be established by January 1999.

As you are aware the amended Section 147 of the OCA provides that an LOC may hold securities in a domestic company so long as such holding does not amount to a controlling interest in the domestic company and is approved by LOFSA.

Payments For Guarantee Fees

FACTS.
The company entered into a plant lease agreement with a leasing company. The leasing company required a bank guarantee from the company that lease payments would be made on time.

The English Special Commissioners allowed deductions for:

- Commitment fee.
- Guarantee fee
- Agency fee

However management fee was not allowed.

COMMENT :
In FCD (PKR 502) the Malaysian Special Commissioners and the High Court has allowed a deduction for guarantee fee. The IRB is however appealing to the Court of Appeal.

WTO - No Barter Deals

The word 'barter' or 'counter-trade' cannot be used to ease the impact of the regions currency crisis as it appears to be against the principles of WTO.

MALAYSIA

Acquisition Price Of RPC Shares

Disposed On Or After 17 October 1997

Since the last amendment to paragraph 34A of Schedule 2 of the RPGT Act in the 1998 Budget, two schools of thoughts have developed as to how the Acquisition Price of RPC shares which are disposed off on or after 17 October 1997 is to be determined.

The 'Old Law' school held that the applicable law in determining the 'Acquisition Price' of shares held before 17 October 1997 is based on the law provided prior to the Budget day.

The 'New Law' school held that the applicable law is the post Budget day law.

The IRB has confirmed that the applicable law is the 'New Law'.

Pernas Security Decision

The IRB has stated that they will n be following the Speci Commissioners and the High Cou Decisions in the above mentione case. The IRB is currently workin on a new case to be brought up wit the Special Commissioners t challenge the PS decision.

COMMENT :
As the PS decision is in clients' favou and that is the current law, ta computations can be prepared base on the decision until such time as th IRB wins or Parliament changes th law.

CA On Assets Owned Beneficially

IRB has agreed to accept the Specia Commissioners and the High Court Decision in Teo Tuan Kwee.

Capital allowances now will also be given to beneficial owners of assets.

DTA With Taiwan

As Malaysia does not have diplomatic ties with Taiwan an exemption has been granted under 127 (3) (b) of the ITA to give DTA benefits to enterprises of Taipei Economic and Cultural Office in Malaysia.

Tax Exemption For Locals On KLCE

An authorised individual trading on the Kuala Lumpur Commodity Exchange as a 'local' for his own account in any futures market wil

ave 70 % of his adjusted income empted from income tax from YA 996 to 2000.

Developer Need Not Pay Tax Before Project Copletion

In a landmark ruling by the Singapore Income Tax Board of Review, a property developer's profits which had been estimated based on the percentage of completion method were found not to be assessable to income tax.

MPD Pte. Ltd. had adopted the percentage of completion method to compute its profits from a project to develop private residential property. The taxpayer was assessed to income tax on the profits estimated at the 21 % point of completion.

Upon appeal, the Board of Review found that the taxpayers income received in the form of progress payment had not been realised for the purposes of tax because firstly, they were subject to legal contingencies and qualification in the use and secondly, the taxpayer had substantial outstanding obligations to the purchaser's under the sale and purchase agreement.

The Board held the view that the taxpayer should be liable for income tax if any, only at the time of issue of the Temporary Occupation Permit, when income and all substantive expense would be known.

Lawyer's Expenses Fail Deduction Test

The strict test for the deduction of expenses in ascertaining taxable income was adopted by the Singapore Income Tax Board of Review.

The taxpayer in the case was a lawyer who was employed by a law firm. She had purchased a notebook computer and a briefcase and made a claim for deduction of the expenses incurred.

The Board found that the expenses had not been incurred wholly and exclusively in the production of income as the purchases could have been and were capable of other uses not connected with the production of income.

OECD

The OECD has come up with a guideline on harmful tax competition, which could have effect on some of the Malaysian tax incentives.

Recomendations Concerning Domestic Law & Practice

✦ Adoption or strengthening of CFC rules to curb harmful tax practices;

✦ Adoption or strengthening of foreign investment fund rules to apply to harmful tax practices;

✦ Adoption by countries that exempt foreign source income of rules disqualifying foreign source income that benefits from harmful tax competition;

✦ Adoption of information reporting rules concerning foreign operations and international transactions and exchanges of information obtained under such rules;

✦ Publicizing the conditions for granting, denying or revoking advance rulings on specific transactions;

✦ Following the principles set out in the OECD 1995 Guidelines on Transfer Pricing; and

✦ Removing impediments to access to banking information for tax purposes.

Latest Development In Labuan IOFC

LOFSA has implemented the electronic lodgement of Statutory Documents effective 22 June 1998. Under the new system, all prescribed forms to be lodged with LOFSA must be generated by LOFSA software program (provided to all trust companies in Labuan). Other means of printed prescribed forms are not acceptable for lodgement with LOFSA.

Tax Treatment Of Chinese Representative Office

Representative offices that apply the

cost-plus method for calculating profits are required to follow the following guideline.

First, the cost of fixed assets (e.g. buildings, cars and computers) and the fitting-out costs (e.g. for decorations, carpets) must be fully included in the taxable base at the time they are incurred .If the costs are high and representative office therefore have difficulty paying the tax due, they are allowed to write off the costs, provided they have established and kept complete accounting records, invoices and depreciation schedules.

Second, gifts to Chinese charities are not considered costs for purposes of calculating profits according to this method.

The notice was issued on 30 April 1998 and is effective from 1st April 1998.

COMMENT :
Not all Representative Offices are subject to Chinese taxation. Treaty protection may be available to certain types of operation which are auxiliary or preparatory to carrying on business.

Final ATO Guidelines On Transfer Pricing

On 24 June 1998 the Australian Taxation Office (ATO) issued in final form its ruling setting out the documentation which taxpayers are required to maintain in order to demonstrate compliance with Australian's transfer pricing rules.

The release of this ruling, along with the methodologies ruling issued on 5 November 1997,signifies the ATO's formal and public viewpoint on two of the most fundamental transfer pricing issues - arm's length methods and documentation requirements. The ATO has announced that from September 1998, it will commence a Transfer Pricing Record Review and Improvement Program to gauge taxpayers level of application of the arm's length principle.

Transfer pricing is of significant importance to Malaysians investing in Australia. All transactions between head office and their Australian operation must be reported to the ATO annually. The declaration requires not only details concerning the method used for pricing the transaction but also the documentation in support of the method used. If the responses in either areas do not satisfy the ATO, they will shortlist the taxpayer for a tax audit. The ATO have allocated considerable resources to transfer pricing audits and they mean business!

Having said this, transfer pricing is a 'two edged' sword in Australia. Whilst the ATO have declared war on tax minimisation via 'negative' transfer pricing activities, taxpayers can take advantage of 'safe-harbour' or 'positive' transfer pricing planning which are available to them.

INDONESIA - New Business Registratio Law

A new decree requires all domest and foreign companies licensed t conduct business in Indonesia t register with the Office of Corporat Registration, except small individua companies. The registratio requirement extend to branches agencies and representative offices o foreign companies.

Summer Vacation Is Not A Social Visit

THE ISSUE

Whether the taxpayer's absence from Malaysia for 14 days on a summer vacation can be taken into account to form part of the period of 182 days under section 7 (1) (b) of the Income Tax Act, for the purposes of determining his tax residence status.

SPECIAL COMMISSIONERS

By a majority decision (2:1), the Special Commissioners allowed the 14 days to be part of the 182 continuous days.

HIGH COURT

The High Court rejected the majority view of the Special Commissioners.

- A summer vacation is not a social visit.
- The High Court has also confirmed that the 14 days absence need not to be taken together at one time, they may be taken at intervals, and if so taken, then the total numbers of days must not exceed 14 days.

COMMENT

There is no definition of a social visit in the Act and normal meaning is to be applied. However the major dictionaries do not carry a meaning of the word 'social visit'. It will be interesting to know, what constitutes a 'social visit'.

SINGAPORE

3% Limit For General Provision For Banks

To encourage banks and merchant banks to further build up their general provisions for loan exposure to the region and to further promote stability in the banking sector, the current limit of 3 % of qualifying loans and investments on the tax deduction for general provision made by banks and merchant banks will be lifted with effect from YA 1999.

The Monetary Authority of Singapore, however, will have to approve the tax deduction of general provisions which exceed 3 %. General provisions in excess of 3 % which are subsequently written back as trading receipts to the bank's Profit and Loss Account will be taxed at the rate prevailing when the provisions were made. In addition, general provisions which exceed 3 % at the end of the five years will also be brought to tax at the rate prevailing at the time the provisions were made.

OECD - Harmful Tax Competition

Recommendations concerning tax treaties :

✦ Increasing exchanges of information concerning transactions in tax havens and preferential tax regimes;

✦ Including in tax treaties provisions restricting entitlement to treaty benefits for entities and income covered by measures constituting harmful tax practices and modifying the OECD Model Tax Convention as necessary in this respect;

✦ Amending the commentary to the OECD Model Convention to clarify that domestic anti-abuse measures are compatible with the Model;

✦ Use by the Member countries of a list, to be prepared and maintained by the OECD Committee on Fiscal Affairs of limitation on benefits provisions used in tax treaties as a reference point for future negotiations and discussions;

✦ Termination of tax treaties with tax havens;

✦ Undertaking of coordinated enforcement programs (such as joint training, information exchange or examination projects) relating to income or taxpayers benefiting from harmful competition; and

✦ Review of current rules applying to the enforcement of tax claims of foreign countries and considering the drafting of suitable provisions for inclusion in tax treaties.

Electronic Business

✦ The European Commission has formulated a policy against any new taxes being introduced to deal with electronic trading. Instead, indirect taxation of 'electronic business' should adapt existing taxes and be considered as the provision of a service if it involves the supply of a product. In addition, tax rules should have a neutral effect and not distort the market, and make compliance straightforward. The Commission aims to ensure that electronic trade can develop with minimal burden and within a clear framework.

The guidelines it has proposed are intended to prepare the EU's contribution to an international ministerial conference being held in October 1998 by the OECD.

AUSTRALIAN Tax Treatment Of Y2K Problem

Guidelines on the Malaysian Tax Treatment of the Y2K problem have as yet not been formulated. The following is a note of the Australian tax treatment: -

✦ Revenue v Capital.

The extent to which the expenditure is capital or of a capital nature and specifically excluded from deductibility depends on the type of work undertaken.

✦ Initial Audit & Diagnostic Work.

Expenditure incurred in undertaking initial audit and diagnostic work on computer software to determine the extent to which it is Y2K compliant is revenue expense and not of a capital nature. This is the case even if the computer system is found to be fully Y2K compliant.

✦ Modifying Computer Software.

Expenditure incurred in modifying computer software to make it Y2K compliant, and in testing the modifications, is also accepted as a revenue rather than a capital nature provided the work does not result in what is, in essence, a complete replacement of the computer software.

✦ Complete Replacement Of Computer Software.

Expenditure incurred in respect to what is, in essence, the complete replacement of computer software, is of a capital nature and is treated as an acquisition of new software. The written down value of the replaced software can be written off in the year it is replaced. Rewriting of source or assembler code does not, by itself, constitute a replacement of computer software.

However, under the Government's Federal Budget proposal, expenditure incurred in respect of the complete replacement of computer software, and testing the replacement, is immediately deductible if it has the predominant nature of ensuring Y2K compliance.

The proposal only applies to such expenditure incurred after 10am on 11 May1998 and up to and including 31st December 1999. The deductibility of Y2K cost is being monitored and updates will be given in subsequent additions of "Tax Alert".

Other issues concerning the Y2K problem will be discussed in the Tax Discussion Database.

Franchise Bill 1998

A new bill is being passed through Parliament to provide for the registration and regulation of franchises. It is applies to the sale of any franchise in Malaysia: in respect of:

✦ Right to operate a business according to the franchise system;

✦ Right to use a mark, trade secret, confidential information or intellectual property;

✦ Right to administer continuous control during the franchise term over the franchise's business operations.

Employer Provident Fund (EPF)

New EPF tables for both employer and employee contributions have been gazetted with effect from 1st August 1998.

Table A:
The new table applies to Malaysian citizens. Non Malaysian citizens who have elected to contribute before 1st August 1998 and Malaysian permanent residents.

Table B:
Non Malaysian citizens wh contribute on or after 1st Augus 1998 or those who have elected t contribute under section 54(2) of th EPF Act on or after 1st August 1998

A significant differences is that unde Part A employers contribute at 12% whereas under Part B employers contribute a flat rate of RM5 per month. Non Malaysian employees have also been brought into the EPF deduction scheme.

Thanks to Roger Lum for the information.

Double Taxation Relief (Netherlands) Order 1998

Amendments to the above DTA have been gazetted. There are certain significant changes which will be highlighted in the future.

Reinvestment Allowance

The IRB has confirmed in writing that the Auditor does not have to complete Part F of the RA Claim. The other changes which involve in the change of law are expected to be tabled in the October Budget session.

Investment Holding V Share Dealing

It is understood that the Singapore Income Tax Board of Review recently ruled on the tax treatment of surpluses

derived by the taxpayer from the disposal of shares.

The taxpayer consistently prepared financial statements and tax returns as an investment holding company which acquired investments for capital growth and dividend yield.This basis was accepted for a number of years by the Singapore Revenue until, upon review, they subsequently asserted that the taxpayer was a share-dealer. The back years were then re-opened and revised assessment issued. The taxpayer appealed.

Broadly, the Revenue's change of heart was based upon the taxpayer's habit of disposing of two shareholdings annually which over the period in question resulted in significant gains in excess of S$30 million. The holding period ranged from 1 month to 16 years with the later period in relation to holding of shares in associated companies held for the purpose of impeding any hostile takeover. Further the company's documentation and procedures were inconclusive as to whether the taxpayer's activities were for investment holding purpose.

The Board of Review considered that the lack of documentation and procedures were not fatal. Also the nature of the investments being shares gave no presumption of trading stock or investment holding, nor did the period of holding gave an inference that they were purchases on dealing account. The Board of Review considered that the evidence produced by the taxpayer relating to the disposals was not inconsistent with an investment holding intention and additionally the number of transactions was low in frequency.

The Board of Review decided in favour of the taxpayer.

AUSTRALIA

As a general rule of thumb, the survival instincts of politicians tend to steer them away from going into an election on a platform of new taxes.

In recent history, the Australian Liberal-National Coalition Party did just that and had defeat snapped from the jaws of victory. Undaunted they are about to have another go.

Voters have been put on notice that the Australian tax system is to undergo major reform. Central to the reform package is a 'Goods and Service Tax' which will be set at 10% on virtually everything purchased. By corollary, personal income tax rates would be cut so that most taxpayers pay no more than 30%. A classic consumption tax scenario whereby taxpayers are taxed according to their spending patterns.

Not to be left out the Oppositions party have joined into the fray with a 'No-GST Tax Package' preferring instead to revamp the less visible (but no less taxing) Sales Tax regime.

Both packages have been aimed at garnering votes from low to middle income earners. More 'wealthy' taxpayers, who do not fair too well out of the proposal's, will carry a greater share of the tax burden particularly under the Opportunities package.

Ensuring Treaty Benefits For Offshore Companies

Labuan Offshore Companies (LOC) can now, incorporate a wholly owned subsidiary under the Companies Act 1965. This is to enable the LOC to benefit from Malaysian DTA's. The approval is subject to the following conditions: -

- The subsidiary company can only undertake business outside Malaysia and is not allowed to conduct any domestic business including dealing with Malaysian residents except as allowed under section 7(4) of the OCA;
- Income remitted by the subsidiary to its parent company in Labuan must be in foreign currency;
- The subsidiary company is subject to the ITA 1967 and is required to keep business records and declare its income as required by the Act;
- The FIC will not impose any conditions on the subsidiary of the offshore company provided that it only conducts business outside Malaysia. The subsidiary company is required to inform FIC providing information with regard to foreign interest and background of the company within a period of one year from the date of incorporation;
- The offshore company is to seek LOFSA's approval prior to setting up

its domestic subsidiary. The approval is required under section 7(3)(a) OCA

✦ The offshore company is to submit consolidated audited financial statement to LOFSA within nine months from the end of its financial year.

Malaysian Capital Gains Tax

Malaysia may impose a capital gains tax on share transaction or some similar measures to curb "contra" activities. This was reported in The Business Times on Friday 11th September, quoting the Prime Minister and First Finance Minister, Datuk Seri Dr. Mahathir Mohamad.

He said that contra trade is one of the problems they are looking at and there is a possibility of some sort of capital gains tax being introduced to curb such trades.

COMMENT

Currently only land and real property company shares are subject to tax on any capital gain.

EPF Contributions By Expatriates

The American Malaysian Chamber of Commerce has issued a letter to its members stating that its President met with Dato' Rafidah Aziz on a number of issues important to foreign investors. At this meeting the latter indicated that the cabinet has decided to rescind the requirements that expatriates contribute to the EPF. She expects the Prime Minister to make a formal announcement soon.

COMMENT

As the law is already in place, any change will have to be gazetted, before it takes legal effect.

Expenses Incurred Prior To Voluntary Winding Up Are Tax Deductible

A taxpayer won an appeal against the disallowance of certain expenses incurred prior to voluntary winding up at the Special Commissioners.

FACTS

The client engaged the services of a consultant to provide advice on maximising the utilisation of manpower. Following the recommendation of the study, the services of a number of employees who were considered redundant were terminated. Subsequently the client went into voluntary liquidation. The Revenue disallowed the consultancy fees and the retrenchment benefits paid by the client on the grounds that these were expenses incurred before winding up of the business and could not possibly be said to have been wholly and exclusively incurred in the production of income within the meaning of Section 33(1) of the ITA 1967.

ISSUE

Whether the above expenses qualify for deduction under Section 33(1).

HELD

The Special Commissioners upheld taxpayer's claim for deduction of the above expenses on the grounds that the Revenue failed to establish a link between the expenses incurred and the winding up of the company. Also evidence adduced by the client adopting and implementing the consultant's recommendation. As such the above expenses satisfy the requirements for deduction stipulated under Section 33(1).

EPF & Foreigners

The EPF has confirmed that a foreigner who has been issued a professional pass by the Immigration Department for a period of three months to assist a Malaysian company to install a piece of equipment is not required to contribute to EPF.

The above is based on the following facts:

The foreigner is an employee of the machine supplier who is located outside Malaysia and he is not paid by the Malaysian company. The foreign company has no permanent establishment in Malaysia.

Qualifying Plant Allowances

Two new gazettes were issued last week.

✦ Income Tax (Qualifying Plant Initial Allowances) Rules 1998.

Initial Allowances of 30% to 60% are available instead of the normal 20% if the following conditions are met.

Qualifying Plant Expenditure on the provision of machinery or plant [other than imported heavy machinery which is set out in the Income Tax (Qualifying Plant Allowances) (No.2)

Rules 1997] used for the purposes of a business of a person carried on in Malaysia, which consists of:

i. The construction of any works, roads, structures and buildings - 30% of QPE;

ii. The extraction of timber from a forest - 60% 0f QPE; and

iii. The working of a mine for getting tin-ore or extracting or dressing tin concentrates - 60% of QPE.

The Taxpayer can elect in writing, when claiming an allowance for that year in respect of the qualifying expenditure to claim 20% instead of the higher amount.

W.e.f.: YA 1998.

- Income Tax (Qualifying Plant Allowances) (Control Equipment) Rules 1998.

Initial Allowances of 40% and Annual Allowances of 20% can be claimed on qualifying plant expenditure incurred on the provision of control equipment used for the purposes of a business.

Control equipment is defined to include equipment and facility used for collecting wastes, for limiting pollution of the environment, for indicating or recording or warning of excessive pollution and for securing more efficient use of the equipment.

A schedule to the Rules specify what type of equipment qualify.

AUSTRALIA - Golden Hallo - Taxable

Compensation received by an Employee from his new employer to compensate him for losses on a share option scheme of the old employer were held to be taxable.

Case: Andrew Charles Pickford v COT (Australia)(1998).

Further Reading: - If you are interested in other cases on the same issues, please refer to the following cases:

- Glantre Engineering Ltd v Goodhand (1983)
- Pritchard v Arundale (1971)
- Jarrold v Boustead (1964)
- Hochstrasser v Mayes (1958)
- Edwards v Bairstow (1955)

Update On Foreign Equity Policy - Manufacturing Sector

MITI has announced changes to the current policy on equity for the manufacturing sector, applicable from 31st July 1998 to 31st December 2000.

All new projects in the manufacturing sector are exempted from both Equity and Export Conditions except those in the exclusion list. This means that project owners can hold 100% equity and will not have to comply with any export requirements.

Conditions.

- This policy will apply to all applications received from 31st July 1998 to 31st December 2000, as well as applications already received, but for which decisions are pending;
- All projects approved under the new policy will not be required to restructure their equity after the period;
- The Government will review this policy after 31st December 2000.

Exclusion List of Activities & Products.

- Paper Packaging, Plastic Packaging (Bottles, Films, Sheets & Bags)
- Plastic Injection Moulded Components, Wire Harness, Printing, Steel Service Centre.

SC Allows Variations To Facilitate Capital Raising

In order to alleviate some of the problems that companies are facing in raising funds, the SC has announced several variations to the requirements of its Policies and Guidelines on Issue / Offer of Securities (Issues Guidelines) to facilitate the raising of funds through the capital market.

Widow To Pay Income Tax

A widow has been asked to pay income tax for YA 1984 & 1985 for her deceased husband from the Estate of the deceased, even though she is not the Executor or Administrator.

This was reported in The Sun newspaper on 1st October.

Source Of Interest

South Africa has changed it's rule on the source of interest. The CIR v Lever Brothers case, which has been regularly used, determines the source of interest as the place where the capital is made available.

Now the source of interest will be where the capital or credit in respect of which the interest is payable is utilized or applied.

The Malaysian interest source rule is in Section 15 of the Income Tax Act.

EPF Exemption

The following categories of workers are exempted from contributing to the EPF: -

i. Workers holding employment passes or expatriates on temporary employment passes earning not less than RM2, 500 per month;

ii. Workers who are Thai citizens entering Malaysia with a Border pass; and

iii. Sea-men

The official announcement will be made by the Minister of Finance shortly.

Human Resources Development Fund

From August 1998 onwards, employers in the manufacturing and services sectors are again required to contribute levy to the HRDF, according to Human Resources Minister Datuk Lim Ah Lek in a STAR report on 9 October. These sectors were initially exempted in February 1998 from contributing for six months to help them tide over the economic slowdown.

Shipping

An Exemption Order will be issued to grant retrospective exemption from YA84 for shipping income from time-charter and voyage-charter. Bareboat charter remains taxable.

Group Relief

Deep-sea fishing and fish- rearing will be added to the qualifying activity list.

Puan Sharazad, Assistant Director-General, Technical Division clarified the following: -

RESTRICTIONS ON PAYMENT OF DIVIDENDS.

When deciding on the amount of dividends that can be paid, not only is the availability of Section 108 franking credits important but also the amount of available accumulated reserves. The new Section 365, introduced by the Companies (Amendment) (No 2) Act 1998 effective from 1 November 1[illegible] seeks to restrict the payment[illegible] dividends in respect of a finan[illegible] year to an amount not exceeding[illegible] greater of: -

a. After-tax profit of that finan[illegible] year; or

b. The average of the divide[illegible] declared for the two years preced[illegible] that financial year.

Companies which have built [illegible] substantial accumulated reserves o[illegible] years may now find it difficult [illegible] distribute them.

There are exemptions to th[illegible] restriction which do not apply to: -

a. Subsidiaries of any holdi[illegible] company;

b. Private companies which a[illegible] wholly-owned by Malaysians; and

c. A company whose financial ye[illegible] commenced before 1 July 1997.

The Dutch Baby Decision

FACTS

The Appellant (DB) is a manufacture[illegible] and distributor of food-based[illegible] products. Under two separate lease[illegible] agreements (Sweden and Hong Kong[illegible] lessors), DB paid lease rentals for[illegible] machinery hire comprising of three[illegible] components: -

✦ *A Base Rental of Sw.*Crs.650, 900[illegible] payable in one lump sum on the[illegible] machinery from Hong Kong and a[illegible] *Base Rental* of Sw.Crs.690, 000 on the[illegible] machinery from Sweden - the *Base*[illegible] *Rental* to Sweden was payable in three[illegible]

equal instalments: -

i. The first on signing of the lease agreement;

ii. The second on dispatch from the Swedish Port; and

iii. The final on arrival at Malaysia.

- A Quarterly Rental of Crs 4,864 payable in advance for each quarter in respect of the Swedish machinery.
- A Production Rental based on the number of filled, sold packages from the machine in respect of both the machinery.

The IRB disallowed as a deduction the Base Rentals.

ISSUES.

a. Whether the Appellant is entitled to a deduction for the Base Rental of RM806, 077.41 under Section 33(1) of the Income Tax Act 1967 (ITA).

b. Alternatively, the Appellant further contends that since the above Base Rental was amortised over 5 years, the amount of RM161, 215.00 charged in the Appellant's Profit & Loss account for 1979 be allowed as deduction for the year of assessment 1980.

HELD BY SPECIAL COMMISSIONERS & UPHELD BY HIGH COURT.

The *Base Rentals* do not come within the term "rent" as defined under Section 2(1), ITA but was in fact premium paid to obtain possession and the use of machinery. Premium payment being capital in nature is not tax deductible. The Appellant's alternative ground of appeal was disallowed on the same premise.

AUSTRALIA

Ruling On Penalty Tax Guidelines - International Transfer Pricing

The ATO issued a ruling TR98/ 16 effective from the date of issue (4th November 1998) for taxpayer who are international transfer pricing "delinquents".

- General framework of penalties;
- Mitigating circumstances - the "reasonably arguable position";
- Increased penalties where hindrances encountered in enquiries
- Anti-avoidance measures; and
- Remission policies; e.g. voluntary disclosure, culpability, advance pricing arrangement etc.

Of interest is the "Reasonably Arguable Position" - the taxpayer needs to demonstrate it is reasonable to conclude, having regard to the relevant authorities and the facts of the matter, the correctness of its "chosen" treatment or its application of a piece of legislation or another matter.

Residency Status Of Individuals Entering Australia

The Australian Taxation Office has released in final form, the Taxation Ruling (TR 98/17), which seeks to clarify the definition of 'resident' for Australian income tax purposes.

The Ruling may result in expatriate employees working in Australia being treated as residents for Australian tax purposes, even if they are in Australia for as little as six months.

This has significant implications for employees and employers as it will increase the amount of Australian tax payable by the expatriate and under certain tax equalization payments made by the employer.

Management Expenses - Not Allowable

Management expenses of a pure investment holding company have been held by the Special Commissioners of Income Tax as not to be deductible under Section 33(1) of the ITA. These expenses only qualify for deduction under Section 60F of the ITA. Some of the relevant expenses are:

- Directors fee
- Wages, salaries and allowances
- Management fee
- Secretarial fee

- ✦ Audit fee
- ✦ Accounting fee
- ✦ Telephone charges
- ✦ Printing & stationery cost
- ✦ Postage
- ✦ Rent and other expenses incidental to the maintenance of the office.

To qualify for a deduction under Section 60F, these expenses need to be incurred by an investment holding company whose activities consist wholly on the making of investments.

Expenses incurred before of the coming into force of Section 60F will not qualify for any deduction.

The Company is appealing to the High Court against the Special Commissioners Decision.

Service Tax On Management Service Goes To Court

A Group holding company is challenging the imposition of Service Tax on group management charges. The case is expected to be heard by the High Court in about six months time.

Interest Restriction

The Special Commissioners of Income Tax has reconfirmed the decision in Pernas Securities on the interest expenses restriction. Dividend source of income is to be treated as one source irrespective of the number of shareholding. The same rule applies to the interest source of income.

No Double Taxation

The Revenue is not entitled to double taxation of the same income. This principle is derived form the oral High Court Judgement in the case of Johawaki Sdn.Bhd. The case is now under appeal before the Court of Appeal.

Beneficial Ownership

The Special Commissioners of Income Tax has reconfirmed that the beneficial owner of the asset is entitled to capital allowances. This is in line with the recent High Court decision.

The Revenue has recently started allowing capital allowances to the beneficial owners of assets instead of the legal owners.

Tax computations done on behalf of beneficial owners should show that the legal ownership is with another person.

Valuation For Stamp Duty Purposes

The High Court has reconfirmed the basis for valuation for Stamp Duty purposes.

Resort World Berhad appealed to the High Court and was recently awarded a lower market value for a piece of land it had purchased in Genting.

The Judge approved the following cases as authorities in arriving at the basis of valuation for stamp duty purposes.

- ✦ Nanyang Manufacturing Co. v CLR (1954).

" the market value of land may be roughly described as the price that an owner willing, but not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land."

- ✦ Bukit Rajah Rubber Co. v CLR (1968)

"In any view the market value must be based on a rational enquiry of the value of the property to the owner which is an objective assessment of all the surrounding circumstances. Ordinarily, the objective assessment would be the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale of the land."

In summary the following points are important :

- ✦ It must be within a reasonable time of the date of notification of the date of transfer of ownership;
- ✦ It should be a bona fide transaction;
- ✦ It should be a sale of land acquired or of a land adjacent to the land acquired; and
- ✦ It should possess similar advantages.

It is only when all these factors are present that it could merit consideration as comparable sale.

Schedular Tax Deductions For Employees In 1999

The Inland Revenue Board issued guidelines advising employers to cease deductions in 1999 in respect of the following employees under the Schedular Tax Deduction Scheme.

No Deductions in 1999

- Employees in peninsula Malaysia who commenced employment on or after 1 January 1995
- Employees in Sabah and Sarawak
- Local employees who commence work for the first time in 1999

Deductions in 1999

Deductions should continue for the following categories of employees

- Employees who commence employment before 1 January 1995
- Non Malaysian employees who are not resident and who commence/cease employment in 1999.

Outstanding Taxes

- Employees with outstanding taxes as 31st December 1998 will be issued with CP38 deduction orders.

Individual Letters

- The IRB is issuing individual letters to every employee who need not suffer a tax deduction in 1999.

Some Aspects To Be Considered In Tax Planning For The 1999 Tax Waiver

Several tax plans have been put into place to optimise the tax advantage in 1999, because of the proposed tax waiver for financial year ending in 1999.

While it must be noted that it is not illegal to undertake a tax avoidance scheme or to maximize the benefit of the waiver, due regard must be made of the the following issues, before implementing the tax plan since the powers of the IRB are very wide:

1. Business Purpose Test

It must be ensured that the business purpose test can be satisfied so that it difficult for the IRB to invoke anti-avoidance provisions.

2. See Through Provisions

Special See through provisions can be expected. Special care should be taken in situations where stock-in-trade is artificially disposed off. In the case of 'land banks for example which are disposed of to crystallise a tax free profit in 1999 and to have a higher cost base in the acquiring company for future tax purposes. The IRD may deem this to be a single transaction, so that on the eventual disposal the original cost is used to compute the profit.

3. Source Rules

The expressions 'accruing in' and 'derived from' therefore determine the scope and extent of taxation in Malaysia, and it is from these two expressions that the source concept as it applies to Malaysia is evolved. There are several cases that must be considered having regard to the complexity of the issue. Some cases for immediate reference are as follows:

- CIR v Lever Brothers & Unilever Ltd. (14 SATC 1)
- Grainger & Son v Gough (3 TC 462)
- ROD CO. Ltd. V DGIR (1990) 1 MSTC 422
- Orion Carribean Ltd. (In Liquidation) (1997)
- Chunilal B. Metha (1935)
- Hong Kong & Whampoa Dock Ltd (1960)
- Hang Seng Bank Ltd (1990)

4. Incurred

Incurred means money actually laid out or money for which a legal liability to pay has arisen. It includes amount paid, payable or becoming payable. A mere diminution in the value of an asset does not mean a loss has been incurred.

Whether the liability has been actually discharged in that year is not relevant. It is in the basis year in

which the expenditure is incurred that a deduction is made and not in the basis year in which the expenditure is actually paid. Case law is again of profound importance.

5. DGIR Directed Basis Periods

The DGIR guidelines are not statutory in nature and can be changed.

Foreign Income Repatriated Into Malaysia

In 1998, about RM180 million was brought back by about 246 individuals. This averages to about RM730,000 for each individual.

Tax Waiver And Withholding Taxes

The IRB has confirmed that all withholding tax provi4ons for 999 have to Been complied with.

The 1999 tax waiver will not be applicable to interest technical fees royalties, and foreign public entertainers payable to non-residents. Only income which falls under section 107A of the income tax act in respect of contract payments will be considered for tax waiver. However compliance with Section 107A in respect of withholding taxes is still necessary. This is to ensure that non-resident contractors file in their tax returns to obtain a refund of tax which is waived at the tax payable stage. The IRD considers Sections 109, 109A and 109B as final tax but not Section 107A.

Based on the above position, it would appear that non-resident shipping and airlines operators under the 5ive percent method will also be liable to withholding tax as directed by the IRB

Tax Waiver And Non Resident Individuals

The following categories of taxpayers are not expected to benefit from the tax waiver.

✦ Foreign employees and non-resident individuals who commence or terminate their employment in year 1999;

✦ Taxpayers subject to withholding tax where the tax is a final tax.

This would raise issues on the application of the Double Tax Treaties which determine tax residence.

Dividend Income In The Tax Waiver Year Of 1999

Income derived in the basis period 1999 is to be waived except for dividend income. This is in respect of such dividend income declared out of pre 1999 profits. It appears that dividend income received in 1999 will be taxable unless there is a change in policy.

Individuals hoping to save the 2% tax difference (30% - 28%) should wait for the legislation to be released some time in April this year before venturing on a tax planning scheme.

The authorities have in the pa confirmed that repayments will b made where the personal rate of tax i less than 28% after the Section 1 credit.

Shipping Business - Charter Income

Charter income from time charte and voyage charter received by a resident company was made ta exempt in the Budget 1999 wit effect from Year of Assessment 199 This change came about as a resul of the decision in Sobrin Kapal and representation made to the Government by the shipping industry.

The income tax Order 29 of 1998 has now retrospectively extended this exemption from Year of Assessment 1984 to 1998.

International Transfer Pricing For Services

After struggling to get to grips with the issues relating to international transfer pricing for intra-group services the Australian Taxation Office has issued two administrative practices to assist taxpayers with calculating a suitable arm's length value.

✦ Firstly, the transfer price for services that are 'non core' services will not be adjusted. Non-core services are defined as those services that are not integral to the profit making activities of the multinational group.

✦ Secondly, no adjustment will be made where the costs of all intra-group services is relatively small and within a specified range.

It is anticipated that with the advent of self assessment in Malaysia, intra group service charges will be a significant issue. Aside from intra group services transfer pricing also applies to services provided at a non-arm's length value by Malaysian entities to other group members outside of Malaysia.

The Repatriation Levy

The details of the Repatriation Levy became effective from 15 February 1999. The levy replaces the 12-month holding period imposed on 1st September 1998 on repatriation of portfolio funds.

The scope of the levy

The levy covers foreign portfolio funds investing in the equities, bonds and properties market. The levy does not affect local investors.

The levy does not also affect Foreign Direct Investments (FDI) as these are long term investments which the Malaysian, Government encourages. The levy does not apply to foreign direct investments in respect of the principal sum including profits, dividend, interest and rental earned from such investments. FDI is an investment made by a non-resident as in the following:

✦ A Malaysian incorporated company where the non-resident is entitled to exercise or control the exercise of not less than 10% of the votes attached to the voting shares of the company

✦ A Malaysian incorporated company where the directors are accustomed, or are under obligation to act in accordance with the directions, instructions or wishes of the non-resident; or

✦ A body, whether corporate or unincorporated, where the management is accustomed, or is under an obligation to act in accordance with the directions, instructions or wishes of a non-residents instruction.

In addition, the following are also exempted from the levy:-

✦ Non-resident salaried individuals working in Malaysia

✦ Embassies

✦ Consulates

✦ High-commissions of foreign countries

✦ Offices of supranational or international organizations in Malaysia

✦ Non-resident tourists

✦ Participants and delegates to conferences and seminars and foreign guests of similar nature.

The term "levy"

The term levy is used as it is imposed under the Exchange Control Act 1953. The levy is often referred mistakenly as an "exit tax" and this results in confusing it with the current capital gains tax.

Factors that affect the quantum of the levy

The amount of the levy depends on the following factors:-

✦ Are the funds brought into Malaysia before or after 15th February 1999

✦ Is it principle or profits that is being repatriated

✦ The duration the funds remain in Malaysia

- **FUNDS BROUGHT IN BEFORE 15TH FEBRUARY 1999**

PRINCIPAL

Principal sum brought into Malaysia before 1st September 1998 are deemed to have been brought in on 1st September 1998. For amounts brought in after that date, the 12 months period commences from the date the principal sum was brought in.

✦ More than 12months
- No levy

✦ Within 12 months
- 10% levy

✦ Within 9 months
- 20% levy

✦ Within 7 months
- 30% levy

- **PROFIT**

Profits repatriated after 12 months

suffer a levy of 10%.

- **FUNDS BROGHT IN ON AND AFTER 15TH FEBRUARY 1999**

Profits repatriated from the date of the investment, will be subject to a levy at the following rates:

- ✦ Within 12 months - 30%
- ✦ More than 12 months - 10%

- **TRANSFER OF FUNDS**

Principal sums brought in before 15th February 1999 and any profit on such sum upon payment of the levy can be treated as being brought into Malaysia on or after 15th February 1999

- **IMPLEMENTATION**

The levy is implemented by financial institutions who will collect the levy and forward it to Bank Negara.

A licensed financial institution is a bank, merchant bank and an Islamic bank.

- **AGENT**

Any repatriation by a resident on behalf of a non-resident will also be subject to a levy.

- **PENALTY**

Any person who contravenes the regulation commits an offence ans is liable to a fine not exceeding RM10,000 or imprisonment for a term not exceeding three years or both.

- **WEBSITE**

Bank Negara Malaysia has a website providing up to date information regarding this levy. The address of the website is as follows:

http:/www.bnm.gov.my/feature/ecm/faq9.htm

Properties
Real property has been excluded from this category as of 19th February 1999. Thus investments in real property are exempted from this levy.

- **COMMENT**

Foreign portfolio investors should note in particular that:

✦ The levy is not a tax and hence may not be eligible for foreign tax credit relief in their jurisdiction or receive any treaty benefits and

✦ Separate accounts will have to be maintained to distinguish between capital and profit due the nature of this levy.

Windfall Profits Levy Tax Act 1998

The above Act has been gazetted with effect from 31st December 1998 as ACT 592. This levy is imposed with effect from 1st January 1999.

This Act is to provide for the imposition of a levy on windfall profit derived from the production of goods.

Goods have been defined to mean all kinds of movable and immovable property.

Presently only crude palm oil and crude kernel oil have been gazetted as goods subject to the levy.

The defination of crude palm oil and crude palm kernel oil have the same meaning assigned to the word palm oil under the Malaysian Palm Oil Board Act 1998, Act 582.

The price of locally delivered crude palm oil and crude palm kernel oil per metric ton is based on the monthly national price published by the Malaysian Palm Oil Board.

Every producer of prescribed goods is required to register with the Customs Department.

The Windfall Profit Levy Regulations 1998 have also been gazetted with effect from 31st December 1998.

The 1999 Singapore Budget

The Singapore 1999 Budget contains the following proposals: -

Income Tax
✦ No change in rates

✦ 10% rebate given to corporate and individual taxpayers for 1999.

Financial Sector
✦ Refinement of Bond Market tax exemption

- New tax exemption for primary dealers in Singapore Government Securities.

- Extension of tax exemption for approved syndicated facilities extended to 2003.

- Approved Fund Manager tax exemption extended to 'boutique' fund managers.

- Restriction on tax deduction for general provisions of finance companies suspended for 2 years.

Other Measures

- OHQ incentives to be offered to 'Global' headquarters companies based in Singapore.

- Organisers of International Conferences to enjoy concessionary 10% tax rate.

- Operation of storage offloading vessels used in the oil industry to be eligible for tax exemption under the approved International Shipping Incentive.

Indirect Taxes

- Removal of GST on certain goods manufactured under contract for overseas clients but delivered locally.

- Waiver of GST for goods removed from bonded warehouses.

Social Activist Challenges Government

The Canadian Federal Court has allowed a social activist to continue his challenge of a Revenue Canada decision to allow a powerful family move millions of dollars out of the country tax free.

Harris, a member oof a Winnipeg-based social justice group, went to the Canadian Federal court seeking a public interest standing to pursue his case because the Canadian Revenue appeared to incorrectly give a well-connected family favourable tax treatment. Harris has argued that they must re-assess the case.

Revenue Canada based their decision on an unpolished ruling. Soon afterwards Revenue Canada published a ruling that denied the same kind of treatment to anyone else. In the words of Justice Muldoon ".... the fair minded objective observer must surely smell great maladministration here".

Canadian constutional law experts are left to puzzle over this case because neither Revenue Canada nor the tax payer involved might be expected to litigate the case.

Tax practitioners are also concerned with what this case may mean for the administration of the tax system. Essentially the Court will be asked to decide whether an individual who is not directly impacted can challenge the government if he considers their actions to be wrong. This case therefore is of significant relevance to the binding status of unpublished (private) rulings ans general rulings under the Canadian self-assessment system.

Double Tax Treaty With Japan

Japan and Malaysia has signed a new tax treaty replacing the old tax treaty. This treaty, based on the OECD Model Convention takes into consideration the changing relations between Japan and Malaysia.

The major provisions of the new treaty are generally as follows:

Permanent Establishment (PE)

Only operating income of companies who have PE's within their borders can be taxed. It is understood that Section 4A income will be affected by this new Article.

International Transportation

Income from international transportation will not be taxed despite the presence of a PE.

Withholding tax

The rate of withholding tax remains the same as for interest and royalties.

Tax Sparing

Tax sparing has been extended.

The treaty will take effect 30days following notice of approval by each state in accordance with domestic procedures. In the case that such ratification takes in 1999, the treaty shall take effect for taxation year beginning after January 2000.

Domestic Tour Operators Are Tax Exempt

Income Tax Exemption Order 1999 has been gazetted to exempt a

licenced resident company carring out a business of operating domestic tours.

The exemption does not apply if the total number of local tourists on domestic tours is less than 1200 persons in the basis period.

Domestic tours have been defined to mean tour packages for travel within Malaysia taken by local tourists inclusive of transportation (by air, land, or sea) and accommodation.

Local tourist means individuals who are Malaysian citizens or residents in Malaysia.

Separate accounts are to be kept for the exempt business. Tax exempt dividends up to two tiers can be declared out of this exempt profits.

The exemption is only for Year of Assessment 1999 and 2000 only.

Taxpayers Documents - A Sham

The UK high court has overturned the decision of the Special Commissioners and allowed the appeal by the taxpayer in holding that the documents executed by the taxpayer did not constitute a sham because the documents took effect, and were intended to take effect, according to their terms.

A documents is a sham when it is intended to give the appearance of creating legal rights and obligations between parties different from the actual legal rights and obligations which the parties intended to create.

The Court held that a question of fact determined by the Special Commissioners could be challenged on appeal when it was based on inferences drawn from other facts. If an inference could not be drawn from all circumstances and on the totality of the facts found, then an appeal must succeed.

The Court found that the existence of the following did not necessarily point to a sham:

- the fact that a supposedly sham document had not been performed in all respects according to its terms.
- the fact that the parties to a transaction subsequently varied its terms in a plainly uncommercial manner and
- The fact that the purchaser intended to immediately sell the assets sold to it by the vendor.

Double Tax Treaty Signed With Ireland

Malaysia has now signed a treaty with Ireland. Some of the more pertinent provisions are as follows:

Interest

The rate of tax on interest has been reduced from 15% to 10%.

Royalties

The rate of tax on royalties has been reduced from 10% to 8%.

Corporate tax rate

Effective from January 1st 1999, the standard rate of corporate tax is 28%. Companies are subject to tax at a rate of 25% on the first IRL 100,000 of income, excluding chargeable gains

Reduced tax rate in Ireland

A reduction in the tax rate is available on income from the sale of goods manufactured in Ireland and from some service activities, giving an effective rate of 10%. The 10% rate also applies until December 31st 2005, to approved service operations in the Shannon Airport Development zone and to approved international financial activities carried on in the International Financial Service Centre (IFSC) in Dublin. Activities carried on in the IFSC include international banking, insurance, fund management, brokerage and dealer operations, treasury management financial advice and back office operations.

Tax Treatment Of Y2K Expenditure

INDIA

India has allowed full revenue deduction on all expenditure incurred in making computer systems Y2K compliant.

UNITED KINGDOM

The UK Inland Revenue has stated that an in-house or contracted-out software project to ensure that existing systems can be adapted for the millennium will always be a revenue matter and be deductible unless it is part of a major new project instituting other changes and the project is of a capital nature.

The example the Inland Revenue has given is of a business that may decide

that for strategic reasons the need for the specific millennium conversion expenditure, which otherwise have been necessary, should be pre-empted by a much more substantial undertaking, such as the development of an entirely new and of course millennium proof business system.

In that case, the expenditure would be treated as capital rather than revenue and therefore not deductible in computing trading profits. On the other hand, expenditure on off-the shelf software designed specifically to solve the year 2000 problem would normally be expected to be revenue and therefore tax deductible.

Harmful Tax Competition

Harmful tax competition has become a hot topic recently, sparking a lively exchange of views and an outpouring creating great concern on the true intentions of the OECD and the European Union.

Some of the recommendations that have been made to counter low tax jurisdictions like Labuan are as follows:.

- Member countries should ensure that income derived from those other countries should not enjoy exemption from taxation in the home country.

- All member countries should adopt effective controlled foreign company and foreign investment fund rules, or equivalent

- Foreign information reporting rules should be strengthened.

- Member countries should co-ordinate their enforcement regimes and provide assistance to each other in the recovery of tax claims.

- Countries should consider including limitations on benefit or anti-abuse rules in their treaties.

- The status of domestic anti-abuse rules should be clarified when there is an applicable tax treaty.

- Countries should consider terminating their treaties with tax haven countries and should not enter into treaties with such countries in future

WTO Financial Services Agreement In Force

The 52 WTO member governments, representing over 90% of the global financial services market, agreed on 15th February 1999 that the WTO financial services agreement would enter into force on 1st March 1999.

The agreement covers the banking, securities and insurance sectors and substantially eliminates or reduces current domestic restrictions on the commercial presence of foreign suppliers of financial services.

The 52 states comprise all the OECD Member countries except Australia and Luxembourg, including Bahrain, Chile, Colombia, Cyprus, Equador, Egypt, Hong Kong, India, Indonesia, Israel, Kuwait, Macau, Malaysia, Malta, Mauritius, Pakistan, Peru, Romania, Senegal, Singapore, South Africa, Sri Lanka, Thailand, Tunisia and Venezuela.

It was also decided to allow the other 18 signatory countries an extension to 15th June 1999 to complete their domestic ratification procedures. This group comprises Australia, Bolivia, Brazil, Bulgaria, Costa Rica, Dominican Republic, Luxembourg, El Salvador, Nigeria, Philippines, Poland, Slovenia and Uruguay.

Cost Of Road Diversion Is A Revenue Expense

In the case of Pine Creek Goldfields Ltd., the Australian Federal Court held that the expenditure was revenue in nature where a gold mining company incurred cost in diverting a road.

No proprietary right or asset was acquired as a result of the expenditure and the advantage gained was not an enduring one. The expenditure merely led to the continuation of the business for the purpose of earning assessable income.

Further, the expenditure was of a kind which an open cut miner could be expected to incur from time to time where the mine is adjacent to a highway. It was therefore an ordinary outlay of the business of an open cut miner which produced advantages of a revenue rather than of a capital nature.

Income Tax (Deduction Of Cost Of Acquisition Of Proprietary Rights) Rules 1999

The 1997 Budget proposed that the cost of acquiring proprietary rights be allowed a deduction. The Rules have been published on 2 April 1999 and take effect from YA 1997.

A company that is eligible must be a manufacturing company that is at least 70% owned by Malaysians. The deduction is 10% per annum of the cost of acquisition of proprietary rights. The Budget proposed for full deduction however here it is over 10 years. The cost of acquisition of the proprietary rights includes consultancy fee, legal fees and stamp duties but excludes royalty. Proprietary rights are the rights to patents, industrial design or trademarks.

Where the proprietary rights are transferred to or acquired from the manufacturing company by its subsidiary, the subsidiary can enjoy a deduction equal to 10% per annum of the original cost of acquisition, subject to the amount of the cost of acquisition remaining unclaimed by the holding company.

Where such costs of acquisition are incurred prior to commencement of business i.e. pre-operating, the Rules provide that in such cases, the cost shall be deemed to be incurred on the day of commencement of business.

Income Tax (Deduction Of Advertising Expenditure On Malaysian Brand Name Goods) Rules 1999

This was proposed in the 1998 Budget and now the Rules have been published on 2nd April. The rules take effect from Year of Assessment 1998. The double deduction. Is in respect of Malaysian branded goods. The conditions to qualify are as follows:

- ✦ The claimant must be a Malaysian -incorporated company and at least 70% of its issued share capital must be Malaysian- owned.
- ✦ The Company must be the registered proprietor of the Malaysian brand name used in the advertisement
- ✦ The Malaysian brand named goods must be of export quality
- ✦ Advertising expenditure is to be incurred in Malaysia
- ✦ Advertising expenditure must be allowable under section 33 of the Income Tax Act 1967.

Income Tax (Allowance For Increased Exports) Rules 1999

The Rules for the above, which were proposed in the 1998 Budget, were published on 2nd April 1999 and are effective from 1st January 1998.

The eligible company must be a Malaysian- resident manufacturing company or company engaged in agriculture, the export of manufactured products or agricultural produce. Selected service sectors are not included in the rules though proposed in the Budget. The 10% or 15% allowance is deductible against 70% of statutory income. The amount exempted is available for a two- tier dividend payment.

Stamp Duty (Remission) Order 1999

It was proposed in the 1999 Budget that stamp duty will be exempted on refinancing instruments on existing term loans. The Order has now been published dated 24th December 1998 and takes effect from 24th October 1998. The amount of duty remitted is the duty that would be chargeable on the balance of the principle amount of the existing term loan.

Bank Negara's Automatic Approval For Overseas Investment By A Domestic Company Owned By A Labuan Offshore Company

Bank Negara Malaysia (BNM) is prepared to grant a blanket approval

a domestic company owned by a Labuan Offshore Company to invest abroad in foreign currency, other than the currencies of Israel, Serbia and Montenegro.

The approval would be subject to the conditions that the domestic company:

- Does not obtain any domestic borrowing or foreign currency borrowing from any party other than from its non-resident parent company in foreign currency;
- Finances all its overseas investments with its equity funds and foreign currency funds borrowed from its non-resident parent company in Labuan;
- Completes all the necessary statistical forms which are applicable to a resident; and
- Submits a quarterly report on overseas investment to BNM within two weeks from the end of the reporting quarter in the format as approved,

Upon approval by LOFSA for the LOC to set-up the domestic subsidiary company, the subsidiary company may write to the Exchange Control Department BNM for a blanket approval to invest abroad.

Labuan Limited Partnership

The Labuan Offshore limited Partnership came into force on 1st August 1997. Regulations to the Act gazetted in May 1999 effectively puts the Act in place.

A Labuan Offshore Limited Partnership (LLP) may be formed by any person for any lawful purpose. An LLP consists of not less than two partners and not more than twenty partners of whom at least one has to be a general partner and the other a limited partner.

The Act allows the same person to be a limited and general partner at the same time in the same partnership. Offshore professional partnerships are also allowed in the field of accounting, actuarial science, engineering law and other prescribed fields.

Fees Payable To LOFSA

Registration fee:
- **RM1,000**

Certificate of registration:
- **RM50**

Fee for renewal of registration:-
RM50

Fee for filing notice of changes to partnership agreement:
- **RM50**

Fee for filing notice of change of the address of the registered Office:
- **RM50**

Fee for filing an application to register an assignment:
- **RM50**

Fee for filing notice of dissolution:
- **RM50**

Fee for filing an application to restore the name of the partnership which has been struck off:
- **RM100**

Annual fee to be paid by the offshore limited partnership:
- **RMI,000**

Clearly it is cheaper and more tax efficient to have an Offshore limited partnership than an offshore company.

Restrictions on payment to Directors of Controlled Companies

Section 13 of the Income Tax (Amendment) Bill 1999 restricts on how much can be paid to directors of a controlled company for financial year ending in 1999 for year of assessment 2000 on a preceeding year basis.

The Restriction

When ascertaining the adjusted loss of a controlled company from a business, no deductions are to be allowed in respect of any payment made to a director, who is not a full time director, which is in excess of payments made for the preceeding basis period ending in the year 1998.

The Gap

If the financial year ends before 31st December 1999, there will be a period of time when Section 13 of the Bill is not applicable.

Example

For year ending 31st January 1999. the period from 1st February 1999 to

31st December 1999 will not be covered by the Bill.

Attempts to take advantage of this situation should take into account that Section 140 of the Income Tax Act is still very much in place. In addition there is sufficient case law to disallow a deduction where the amount is excessive.

Overseas Bonus Taxable

The company paid a bonus to a director by means of an overseas trust. The UK special Commissioners of Income Tax applied the Ramsay Principle and held it to be taxable.

The Ramsay Principle

The Special Commissioners found that the four essentials of the Ramsay principle were present.

✦ Preordained

The series of transactions was pre-ordained to produce the result that Mr. M received GBP 40,000;

✦ Tax Mitigation

The intermediate transaction had no other purpose than tax mitigation;

✦ No Practical Likelihood

There was no practical likelihood that the preplanned events would not take place in the order ordained and

✦ As Planned

The events did take place

Limited Liability Partnership- Company Or Partnership

The UK High Court ruled that it would not review unfavourable pretransaction tax advice by granting declaratory relief in advance of the actual implementation of a transaction.

Two leading UK accounting firms were exploiting ways of avoiding having all the partners of a partnership being subject to unlimited liability for future claims for audits a d advisory work when they are not personally at fault.

The firms had contacted the Inland Revenue to determine the likely tax status of a Jersey Limited Liability Partnership(LLP), that is, whether it would be regarded as a partnership or a company for UK tax purposes.

The Inland Revenue stated that it could not give the assurances sought. Nevertheless, it did indicate that it considered a UK partnership registered as a Jersey LLP to a company for UK tax purposes. The firms sought a declaration from the courts that a Jersey LLP would be a partnership for the purposes of English tax law.

The court held that it had jurisdiction to make this sort of declaration. It concluded, however, that it should use caution when issuing this sort of declaratory relief, given the reluctance Parliament had shown in implementing statutory mechanism that would allow for pretransactional rulings upon which the taxpaye could reply.

Thus, the court ruled that it normall refuse to answer abstract question particularly if the dispute is based o hypothetical facts.

New DTA With Japan Gazetted

A new DTA with Japan was gazette in May. This treaty is expected t replace the 1971 Tax Treaty with Japan. The new treaty takes effec after the exchange of notes informing the other party that all lega procedures have been met and

✦ Tax Withheld

In respect of taxes withheld at source, to income derived on or after the first day of January in the calendar year following the year in which this Agreement enters into force.

✦ Other Taxes On Income

Taxes chargeable for any year of assessment beginning on or after the first day of January of the second calendar of the second calendar year following the year in which this Agreement enters into force.

The new treaty recognizes Malaysia's right to the Exclusive Economic Zone. Thus 200 miles off the Malaysian coast is now part of the treaty. Previously it was only the Federation of Malaysia. The Treaty does not apply to Labuan.

Tax sparing is also provided for in the new treaty. Bare boat charters of ships and aircraft have been included as part

of the royalty definition.

The definition of Interest includes not only debt claims of every kind but also premiums and prizes attached to such securities, bonds or debentures.

Export of Services

Double deduction for certain expenses is available under the Income Tax (Deduction For Promotion of Export of Services) Rules 1999 which were gazetted under PU(A) 193 of 1999.

These rules are effective from Year of Assessment 1996 and subsequent years of assessment.

Qualifying Expenses

The expenses are incurred by a resident company primarily and principally for the purpose of promoting the export of services.

- Market Research

Expenses incurred in respect of market research for the purpose of the export of services;

- Tender Preparation

The cost of tender preparations for the purpose of the export of services;

- Technical Information

The cost of preparing technical information for the export of services;

- Overseas Expenses

Expenses by way of fares in respect of travel to a country outside Malaysia by a representative of the company being travel necessarily undertaken for the promotion of export of services and actual expenses subject to a maximum of two hundred ringgit per day for sustenance for the whole of the period commencing with the representative's departure from Malaysia and ending with his return to Malaysia;

- Sales Office

Expenses for the cost of maintaining sales office overseas for the purpose of promoting the export of services; and

- Publicity & Advertisement

Expenses incurred in respect of publicity and advertising in any media outside Malaysia for the promotion of the export of services.

DTA With Jordan

A new DTA with Jordan has been gazetted. This is a routine agreement with no major tax planning opportunities.

Malaysian Notes

All payments of principal, interest, commitment and other commissions, fees, charges, expenses and other amounts made by Malaysia in respect of the Malaysian USD 10 million 6.875 % Notes due on 2001 has been exempted from present and future taxes :!duties and levies imposed or to be imposed and also from any restrictions relating to exchange control.

The above only applies to recipients who are not resident or does not have a permanent establishment in Malaysia.

CFC Legislation Incompatible With Tax treaty

A French company had a Swiss finance subsidiary.

Having established that the Swiss subsidiary benefits from a low tax regime, the French tax authorities assessed the French parent company to corporate tax over a number of years, pursuant to French controlled foreign corporation rules (CFC), on income derived by the Swiss subsidiary.

The Court held that the assessment, under the CFC rules was in conflict with Article 7 the France Switzerland tax treaty pursuant to which the profits of a company of one state are not taxable in the other state unless attributable to a permanent establishment therein. In reaching this conclusion, the Court stated unequivocally that Article 7 prevents France from assessing the profits of a Swiss enterprise without a permanent establishment in France, even if the assessment is actually made at the level of the French resident shareholder.

This case is interesting as developed countries have always used CFC to overcome low tax jurisdiction benefits.

Tax Mitigation And Section 140

Tax obligations as developed out of the New Zealand case of Challenge Corporation Ltd has found support in the Malaysian Court of Appeal. The Court of Appeal confirmed that Section 140 does not apply to tax mitigation but to tax avoidance.

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitles him to a reduction of his tax liability.

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.

Examples of tax mitigation

✦ Settlement

When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income, If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income

✦ Premium

Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitles the taxpayer to a reduction of tax liability. The tax advantage results from the expenditure on the premium.

Section 44(6) and Donations

The Malaysian Court of Appeal has stated that for an approved donation to qualify as a gift, the issue is whether there is no consideration and whether title to the. property has passed to the receipient.

The test as provided for by the Special Commissioner and the High Court of whether the payment is voluntary or not is not the issue.

J.C.A. Gopal Sri Ram, said to enable for a donation to qualify for deduction under section 44(6) of the Income Tax Act, what is Important is nor the feelings of the disponor(donor) towards the disponee (recipient) but the enquiry relates to the pecuniary and proprietary benefits which in all the circumstances the disponor is moved to confer and confers on the disponee and to the pecuniary and proprietary benefits which in all the circumstances the disponor seeks to obtain and obtains by the disposition.

Sabah Berjaya Sdn Bhd

Facts

A private limited company which was one of the several wholly owned subsidiaries of the Sabah Foundation made large sums of donations to its parent. In some years the donations were more than its profit for the year.

Special Commissioners

Disallowed the donations under Section 44(6) as they were not voluntary and section 140 applied.

High Court

Upheld the decision of the Special Commissioners on the first ground and did not go into the second ground.

Court of Appeal

The Court of Appeal has reversed the decision of the Special Commissioners of Income Tax and the High Court. The Court of Appeal has held that the donations made are tax deductible.

Hong Kong Court Rejects National Profit Doctrine

A Hong Kong court has rejected the Tax Commissioner's attempt to apply the doctrine of Sharkey v Wernher to a change of intention on the pan of a property hoWing company.

Facts

The company was established for the purpose of acquiring two buildings and redeveloping them into a single

new building. This process took eight years, after which the company rented out the units in the building. The company never sold any part of the building.

The company changed hands twice during the initial period of redevelopment. The Commissioner asserted that, on the second change of ownership, the company's intention regarding the use of the property changed from an intention to sell the completed units(a trading intention) to an intention to hold the units for rental income(investment income). As a result, the Commissioner maintained that the company realised a taxable profit from the notional disposition of inventory at fair market value. The company's property had appreciated in value.

The Commissioners position was based on the English case of Sharkey v Wernher (1956). In this case the English House of Lords held that a taxpayer who transferred trading stock (inventory) to a separate activity carried on by the same taxpayer for use in the second activity as a capital asset must recognise a trading profit or loss in the books of the first business as though the inventory had been sold at Fair Market Value.

OECD Model Update

It has been announced that a revision of the OECD Model Tax Convention will be published in 2000. The revised treaty is scheduled to be finalised in September 1999 and approved within the OECD in January 2000. It is expected to be published in March 2000.

The following changes are expected:

Article 14 - Professional Activities
Article 14 concerns the taxation of independent personal services. This will be eliminated and replaced by Article 7, concerning the taxation of business profits.

Fixed Base Concept
The OECD study group has concluded that there is no difference between the fixed base concept used in Article 14 and the permanent establishment concept used in Article 7.

Software Payments
The revised treaty will include new commentary on the treatment of software payments under Article 12.

Legal Expenses Incurred In Disciplinary Proceedings

The UK House of Lords has held that a sole proprietor stockbroker can deduct the legal expenses he incurred in defending himself in disciplinary proceedings, because the expenses represented money wholly and exclusively laid out or expended for the purposes of the trade -.

KLSE New Rules On Non-Performing Accounts For Stockbrokers

The KLSE has announced new rules to standardise interest income recognition and debt provisioning for stock broking Companies

The new Rule 16A on Suspension of merest and provision of bad and doubtful debts cover the following key areas:

- ✦ Classification as non-performing account;
- ✦ Suspension of interest for bad and doubtful accounts;
- ✦ Reclassification of non-performing account to performing account; and
- ✦ General provision for bad and doubtful debts.

The default period for contra losses is between 16 and 30 calendar days. The Stock Broking companies are required to have 50% specific provision for the debts and interest charges will be suspended starting from the 16th calendar day.

The rule also requires a SBC to make 100% provision for margin accounts when the equity has fallen below 130% of the outstanding balance.

It is understood that to lighten the SBC tax burden, the KLSE has obtained from the Finance Ministry a tax relief for SBC's whereby 50% of the interest suspended will not be regarded as income tax until it is collected. The tax relief is for this year and next year.

New Product - MSC Venture Capital

The MSC VC was launched by the Prime Minister last Monday. The Minister of Finance has already approved the venture capital incentives for the company.

Currently the company has RM12O million.

To be eligible the following criteria important:

General Criteria

MSC VC will not fund basic innovation i.e. companies or individuals that are researching or developing a concept. Companies will be considered only after they have developed a marketable product or service and are in the process of commercialising their innovation.

Qualities

Notwithstanding the general criteria for eligibility, certain qualities are essential for success and have the potential to provide attractive returns:

- ✦ Competent, committed and focused management;
- ✦ Commercially viable product in a high-growth sector;
- ✦ Niche and sizeable market;
- ✦ Unique or leading edge technology with the ability to innovate and evolve;
- ✦ Ownership of intellectual property rights; and
- ✦ Potential for IP0 or strategic partnerships.

Reverse Premium- Capital In Nature

The U.K. Special Commissioners have held that a Society's payment for "reverse premium' expenditure, made in connection with an agreement for the assignment of a lease was not deductible in computing the Society's taxable profits, because it was a capital expenditure.

Facts

In 1970, the Society entered into a thirty-five years lease agreement of premises for their base of operations. Under the agreement they covenanted to maintain the premises and to return them to its prelease condition, by repairing all dilapidations, at the end of the lease term.

Despite these covenants, they were lax in maintenance of the premises, and by mid-1995, the premises had dilapidated by over GBP 170,000.

In late 1994, they decided to relocate operations and to assign its lease for the premises. Within six months of making the decision to move, they assigned the lease for the Premises to another company for GBP 1. As part of the agreement, the Society paid to the new tenant GBP 150,000 as a reverse premium", and the new tenant covenanted to indemnify the Society from its obligations to repair and maintain the premises.

Revenue Tax Position

The Inland Revenue in assessing the Society for the accounting per[iod] ending in 31 January 1996, did [not] allow the Society, to deduct [the] "reverse premium" payment wh[en] computing the company's prof[its] because the payment was a capit[al] expenditure.

The Society argued that the "revers[e] premium" payment was deductible [in] computing the company's income because the payment was an incom[e] type expenditure, intended for th[e] repair of the premises.

Special Commissioners - The Test

The Special Commissioners decided that the test for determining whether a payment is a capital or income expenditure is to weigh the characteristics of the payment in question against the characteristics of payments that are traditionally capital or income in nature, without recourse to the motives of the parties.

They found that the Society's payment of a reverse premium was a capital expenditure because it involved the transfer of both advantageous and disadvantageous capital assets, including the disposal of the burden to repair the premises, as well as the assignment of two leases.

Accordingly, the Special Commissioners dismissed the appeal and held that the Society could not deduct the "reverse premium" payment in computing its taxable profits for the accounting period ending 31 January 1996.

Transfer Pricing - Quality Discount - No Adjustment Necessary

A Belgian company that had accorded its English sister company a 'quality discount' to cover for losses connected with a shipment of poor quality merchandise.

A quality problem was confirmed by an independent research institute, which also provided indications of the amount of the loss incurred, which corresponded with the quality discount.

Based on these facts, the Belgium court held that the discount that the Belgian company offered its related English company was not an abnormal or gratuitous advantage," subject to a transfer pricing allocation under article 26 of the 1992 Belgian Income Tax Code.

Similarly, the court ruled that a 'quantity discount' accorded to the English company by reason of its regular, large purchases was also not subject to a transfer pricing adjustment, because the price reduction was a normal discount in comparison with ordinary commercial usage.

According to the court, the Belgian tax authorities are not supposed to second-guess a taxpayer's business decisions relating to the profitability of a transaction (a blow to the comparable profit approach?).

Thus, the court said that in this particular case, the objectives of the group in granting these discounts were valid and acceptable.

Monetary Award Payable Under Suggestion Award Program -Taxable

An employee who submitted a suggestion with respect to a throttle control assembly of a fighter aircraft was awarded $4005 by his employer under a suggestion award program, which resulted in a saving of $300,000.

The Revenue held the amount to be taxable as being a benefit received or enjoyed by the employee in respect of, in the course of or, by virtue of his office or employment.

The issue was whether the amount received under the program was an honorarium or in the form of a voluntary payment rather than an amount which would fall into income which is subject to income tax as part of employment

The Tax Court of Canada held the amount to be taxable. This case follows a long line of similar commonwealth precedents.

Case: Thomas Mielken
The Queen (1999)

The Law

Gains and profits from an employment is subject to income tax under the Malaysian Act. However the definition of gains and profits is much wider than what is stated in Section 13 of the Act and reliance has to be placed on case law.

It has been held in AG V Ostrum (1904) that their Lordsbips are of the opinion that there is no ground for cutting down the plain and ordinary meaning of the word 'income". In their view, the expression was intended to include and does include, all gains and profits derived from personal exertion whether such gains and profits are fixed or fluctuating, certain or precarious , whatever may be the principle or basis of calculation.

Gifts unrelated to services pose a problem as they may not be a reward for services.

It is not true to say that a voluntary and unsolicited payment will never be income. There are circumstances in which such payments will clearly be income from personal exertion.

Guide To Non Taxable Income

✦ *A gift is prima facie not income,* so that if further evidence is not available there is no 3ustification for treating it as income,

✦ In deciding whether or not the presumption is displaced, it is necessary to characterise the payment in the hands of the taxpayer, as either a reward for services or a token of appreciation given on grounds personal to the recipient.

✦ This characterisation must be objective. The taxpayers own opinion will not be conclusive.

✦ The motive of the payer is indicative of the nature of the receipt but is by no means conclusive.

✦ If the taxpayer has been adequately rewarded for his services, the gift is less likely to be income.

✦ If the taxpayer has a right to or expectation to the payment, it is more likely to be income.

✦ The fact that the taxpayer regards the payment as pan of the total receipts upon which he depends to keep himself and his family weight in favour of its being Income.

✦ The fact that the payment has an element of recurrence will point towards its being income in nature

Tax Treaty Overrides Domestic Law

The US Court of Federal Claims has reconfirmed the understanding that Tax Treaty provisions override domestic law,

The Bank, a UK Corporation was engaged in banking and - other financial activities throughout the world. The US branch was supported by its parent and was not required to maintain separate capital reserves.

The Branch generally borrowed from headquarters or ocher branches and other banks for the funds to conduct its banking operations. The US branch then lends those funds to its customers or to other branches. The same applies for intra corporate borrowing and lending.

Thus the US branch books reflect both interest income and interest expense.

The IRS disallowed a portion of the claimed interest expense relating to the US branch, determining that the allowable interest deduction for calculating profit attributable to the US branch has to be calculated under the formula set forth under US domestic law and not as provided for under tax treaty.

This case of National Westminster Bank is important, particularly in relation to Malaysian resident employees who may not otherwise enjoy tax waiver in 1999 on their employment income which commences or is terminated in the waiver year.

Deductibility For Future Losses

In a surprise move, the UK Inland Revenue conceded defeat by announcing it would nor appeal two landmark tax cases that involve the deductibility of future losses from current profits. The Revenue has been expected to appeal on the recent adverse rulings from British courts.

The first case involved a Scottish departmental store, which sought to currently deduct repairs planned for future tax years.

The second dispute involved a law firm that attempted to deduct anticipated rental losses on surplus property.

In both matters, the Revenue initially disallowed the deductions, which would only be allowed when the future expenditure was actually incurred.

The taxpayers litigated the matter, claiming their tax liability should be based on "economic reality which often includes binding commitments to incur future expenses.

The Revenue's decision not to appeal the cases will result in a huge cashflow benefit" for many companies. The new tax doctrine may have its greatest impact on businesses engaged in long-term contracts, such as utilities, construction companies, and engineering firms.

These cases may have persuasive effect in Malaysia.

case section

MYAA
ADIK BERADIK
V
DIRECTOR GENERAL OF INLAND REVENUE

THE ISSUE

Whether the arrangement between the Appellant and a developer in respect of the subject land constitutes the disposal under paragraph 2 Schedule 2 of Real Property Gains Tax Act, 1976.

THE FACTS

When the legal owner of a piece of land held under Grant No. 2968, Lot 475, Mukim of Port Dickson, Negeri Sembilan died, it was distributed to his seven children including the taxpayer.

The seven beneficiaries entered into an Agreement with one Development Company to develop the land into a housing scheme in exchange for a certain number of shop lots and terrace lots.

The taxpayer and other beneficiaries notified the Respondent vide Form CKHT.1 i.e. Return of Disposal of Chargeable Asset under the Real Property Gains Tax Act, 1976.

The Revenue raised tax based on the CKHT.1

The schedule of events were as follows:

27 May 198	-	Abdul Aziz (legal owner of subject property and father of Appellants) died.
28 August 1982	-	Application to Land Office for distribution; and
6 July 1987	-	Agreement between beneficiaries and developer to develop the land.

Arguments by the taxpayer

The taxpayer contends that there was no sale of the land, only development into a housing scheme and therefore no tax was payable.

Argument by the Revenue

There was a disposal within the ambit of paragraph 2 Schedule 2 of Real Property Gains Tax Act, 1976.

Authorities referred by Revenue

1. Real Property Gains Tax Act 1976;
2. Words and Phrases Legally Defined - Third Edition - John B. Saunders;
3. Black's Law Dictionary by Henry Campbell Black;
4. AN (M) Sdn.Bhd. v. KPHDN [1995] 2 MSTC 2321;
5. The Cape Brandy Syndicate v. CIR [1921] 1 K.B.64; and
6. ABC v. CIR [2959] 25 MLJ 162.

HELD

Appeal dismissed and the assessments were confirmed. The arrangement amounts to a disposal under paragraph 2 Schedule 2 of the Real Property Gains Tax Act, 1976.

FRANK EDWARD NOAH
V
KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT OF MALAYA, KUALA LUMPUR

THE ISSUE

Whether the compensation so paid was income from an employment exercised by the appellant.

Whether the income must be from employment for a period or periods which together did not exceed 60 days in the basis year.

Whether the appellant is qualified for tax exemption under paragraph 21 of Schedule 6.

Cases referred to :

1. H. v. Comptroller of Inland Revenue (1974) 2 MLJ.

Legistration referred to :

Income Tax Act 1967 , ss. 13 (1) (e) , 83 (5) , 127 (1) , paragraph 21, 22 of Schedule 6 , Part IX.

THE FACTS

The taxpayer, a non-resident, was employed for 44 days by employer companies at a salary of RM 72,500.00 per month. His employment was terminated. He received no salary for the period of employment, but was paid RM 700,000.00 as compensation for loss of employment. He was assessed to tax by the respondent. He claimed for exemption from tax under paragraph 21 of Schedule 6 to the Income Tax Act 1967 on the ground that the compensation was income from employment exercised by him, but his appeal was rejected by the Special Commissioners.

The Arguments by Taxpayer

The taxpayer contended that the compensation payment is income from an employment by virtue of section 13 (1) (e) of the Act. Since the period of employment was exercised by the Appellant in Malaysia for forty-four days (which is less than sixty days) and the Appellant was at all material times a non-resident, the income from that employment must necessarily be for the same period, namely forty-four days, and accordingly, the taxpayer is therefore qualified for tax exemption under paragraph 21 of Schedule 6.

The Arguments by Revenue

Revenue argued that the compensation payment of RM 700,000.00 is not an income from an employment exercised by the Appellant in Malaysia. Thus, paragraph 21 of Schedule 6 is not applicable

Schedule 6 is not relevant for consideration in this case as it concerns the income of an individual from an employment in Malaysia for a period of more than sixty days in a basis year or the income exercised by a public entertainer. Since the Appellant was in Malaysia for less than sixty days, the provision is therefore not relevant.

HELD

The compensation payment was not an income from the employment exercised by the Appellant in Malaysia. The purpose of paragraph 21 of Schedule 6 is to allow a non-resident individual to enjoy tax exemption on income which is (i) from an employment exercised by him while in Malaysia, and (ii) for a period or periods which together do not exceed sixty days in the basis year.

In order to qualify for tax exemption under paragraph 21, the compensation payment in the instant case has to satisfy two conditions: firstly, it must be income from an employment exercised by the taxpayer while in Malaysia and, secondly, it must also be income for a period or periods which together did not exceed sixty days in the basis year 1989. The expression "for a period or periods which together do not exceed sixty days" appearing in paragraph 21 relates not only to the taxpayer's period of employment, but also to the taxpayer's income. Thus, the important question to ask is whether the compensation payment itself was income "for a period or periods which together do not exceed sixty days" in that basis year. While it is true that the compensation payment of RM 700,000.00 is income from an

employment made under section 13 (1) (e) of the Act, but the payment cannot be construed as income from employment for forty-four days in 1989 because the taxpayer was actually exercising employment on an agreed salary of RM 72,500.00 per month. The compensation payment which represented the equivalent of nearly ten month's salary was paid to the taxpayer as compensation for the premature termination of his employment on 15 October 1989 which would otherwise have carried on for at least the next twenty two and a half months since he had a real prospect of continued employment under the terms of his employment. The compensation payment, being compensation for loss of employment, cannot be made in respect of employment or in respect of having or exercising the employment. The two things are mutually exclusive. Viscount Dilhorne in the Privy Council appeal from Malaysia in the case of Inland Revenue (1974) 2 MLJ 135 at p. 138 said:

" A payment made as compensation for loss of employment cannot be made in respect of employment or in respect of having or exercising the employment. The two things are mutually exclusive."

TERUNTUM THEATRE SDN.BHD.
V
KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT OF MALAYA, KUALA LUMPUR

THE ISSUE

The issue is whether the gain made from the disposal of a property is assessable to income tax under section 4(a) of the Income Tax Act 1967 or to real property gains tax (RPGT) under the Real Property Gains Tax Act 1976 (RPGTA).

The question for determination are:

Whether subject properties were purchased for purposes of investment and whether subsequent disposal, alleged as being a forced sale is a realisation of a capital asset.

Principles relating to determination of intention considered.

Whether credibility of witnesses is a matter strictly for Special Commissioners.

THE FACTS

Briefly, the facts are that by an agreement dated 10th March 1973, the Appellant, through its nominees, purchased 3 lots of land in undivided shares (the subject properties) totalling 4 acres (174,240 square feet) for RM2, 331,480.00. However, clause 7 of the agreement provides that should the appropriate authority do not give approval for the erection of a cinema-hall on any part of the subject properties, the purchase price was to be increased to RM2, 613,600.00. The purchase price was paid by way of a bank loan. The Appellant had to pay enormous amounts as interest on the loan taken to purchase the land which produced no income. The Appellant applied for convension of land use from residential to limited commercial on 2 May 1978. The application for conversion was approved on 21 March 1979. The Appellant paid the development charges amounting to RM265, 000.00. The Dewan Bandaraya Kuala Lumpur (DBKL) rejected the Appellant's application to build a cinema-hall on the subject properties on 21 October 1980. The Appellant,however, did not appeal against the rejection.

By an agreement dated 4 December 1980, the Appellant sold to Tessin Development Sdn.Bhd.

Arguments By The Taxpayer

Whether respondent is debarred from raising assessments to income tax after having previously charged appellant to real property gains tax and after having issued a certificate of clearence under RPGTA.

Whether respondent has the power to vacate and discharge the RPGT assessment.

Whether imposition of RPGT and then income tax is a double taxation.

Cases referred to:

1. Scorer (Inspector of Texas) v. Olin Energy System Ltd. (1985) STC 218.
2. Re XY & Co. (1966) 2 MLJ. 11.
3. Government of Malaysia v. Sarawak Properties Sdn.Bhd. (1994) 1 MLJ. 14.
4. Bye (Inspector of Texas) v. Coren (1986) STC 393.
5. Craven v. White (1987) STC 297.
6. Chua Lip Kong v. DGIR (1982) 1 MLJ. 235.

Legistration referred to:

1. Income Tax Act 1967, ss.4 (a), 101, paragraph 34 Schedule 5.
2. Income Tax Act (UK) 1952, s. 510 (1).
3. Taxes Management Act (UK) 1970, ss.3 (1), 19(1), 20(2).
4. Interpretation Acts 1948 and 1967, s. 40(1).

HELD

Appeal dismissed.

The principle of res judicata has no application if the gain assessed to RPGT turns out in law to be a gain assessable to income tax. What is final and conclusive in the RPGT assessment is the amount of real property gains tax assessed under the RPGTA. The issue of whether the gain was chargeable to income tax or real property gains tax had not been determined. Thus, there was no finality on this case. Alternatively, if the gain is found to be income in nature as opposed to capital in nature, then the RPGT assessment is a nullity because under the RPGTA, real property gains tax is chargeable only in respect of a chargeable gain accruing on the disposal of real property. Thus, the assessment for capital gain issued by the respondent against the appellant became invalid. Therefore, there was no prohibition against the respondent issuing the subsequent assessments under the Act; Scorer (Inspector of Texas) v Olin Energy Systems Ltd (1985) 2 All ER 375 distinguished.

Under s 20(2) of the RPGTA, an assessment which has become final and conclusive for all purpose of the RPGTA shall not prevent the Director General from making a revision under s 19(1). Therefore, the respondent has the power to vacate and discharge an assessment; Craven (Inspector of Texas) v White [1987] 3 All ER 27 distinguished.

Double taxation occurs where a taxpayer is subject to two different charges in tax in respect of the same receipt. There was no question of double taxation in this case because the respondent was not seeking to impose both real property gains tax and income tax on the appellant. The RPGT assessment would be amended and the amount of tax would be transferred to the appellant's account.

The special commissioners decision that the subject properties were not investment was essentially a question of fact. They had thoroughly considered and determined the issue of the intention on the part of the appellant. The subject properties were not investment because cl 7 of the agreement provided that the erection of the cinema hall was conditional upon approval being obtained from the DBKL. Since no approval was obtained, cl 7 became null and void and the appellant could no longer rely on it in support of its argument that the subject properties were acquired as an investment.

No evidence was led to show why the appellant could not proceed with the development of the subject properties after the rejection by the DBKL. However, the appellant did not appeal against the decision of the DBKL and the company had decided to abandon undertaking the business of theatre proprietors and managers following the rejection. Since the subject properties were already approved by the DBKL for limited commercial use, it could not be said that the subject properties were of no use to the appellant.

MALAYSIA
IN THE HIGH COURT OF SABAH & SARAWAK
AT KOTA KINABALU REGISTRY

THE NORTH BORNEO TIMBERS BERHAD
V
KETUA PENGARAH HASIL DALAM NEGERI

THE ISSUE

In the assessment of the taxpayer company's income for the year of assessment 1984, the sum of RM96732.00 representing the value of unused obsolete spare parts written off by the taxpayer company was not regarded as deductible under the provisions of section 33(1)(c) of the Income Tax Act 1967.

THE FACTS

The Appellant's activities were logging and export of logs, manufacturing and plantation.

The timber logging activity ceased in 1985.
For carrying on the timber logging activity, the Appellant had to maintain a large fleet of heavy mobile equipment, three (3) factories with machineries and quarters for workers at three (3) logging camps. For the camps, the Appellant had to supply free electricity, water, recreational facilities, a clinic with free medical services.

In order to ensure continuous logging activities, the Appellant had to stock spare parts for the machineries and mobile equipment. These spare parts were imported mainly from Canada and the U.S.A.

When spares were purchased, the Appellant debited "Stocks of Spares" and credited "Cash" and when the spares were utilised, the Appellant debited "Repairs and Maintenance" and credited "Stocks of Spares".

Some machineries and heavy equipment were superseded or ran out of their useful life and as a result the related spares which were in stock had to be written off. Exhibit "A2" lists out all the written off spares with a total value of RM96,733.05.

For the Year of Assessment 1984, the Respondent issued a Computation of Repayment dated 10 June 1988 showing RM1, 939,501.00 as tax payable and a refund of RM60,499.00 by the Respondent.

The Appellant filed an appeal against the Computation of Repayment. Form Q dated 12 July 1988 was filed citing the following grounds-

"That an amount of $96,732.00 written off in respect of obsolete stock for consumable stores and spare parts used by the company to maintain and service income-producing plant and equipment for timber operations had been denied as a deduction for income tax purposes under section 33(1) (c) of the Income Tax Act".

Arguments By Taxpayer.

The contention of the taxpayer was that the amount RM96,732.00 written off should be allowed as deduction for income tax purposes under section 33 (1) (c) of the Income Tax Act 1967.

In order to qualify for deduction under section 33 of the Act it is not necessary that a taxpayer must show that the expenses and outgoings, for which a claim for deduction is made, fall within one of the expenses and outgoings specifically mentioned in paragraphs 33 (1)(a) to 33(1)(d) of the section. The taxpayer can rely on the general provisions of that section to claim for deduction if the taxpayer is able to show that such outgoings and expenses are actually incurred wholly and exclusively during the period in the production of gross income. In Director-General of Inland Revenue v. Rakyat Berjaya Sdn. Bhd. the Federal Court held: -

"(1) Interest on a debt owing, as opposed to a debt for money borrowed, cannot be deducted under section 33(1)(a) of the Income Tax Act but can be so deducted under the opening part of section 33(1) as one of the "outgoings and expenses wholly and exclusively incurred during the period by that person in the production of gross income from that source."

Arguments By Revenue

The Revenue contention was that the said amount should not be allowed as deduction under section 33 (1)(c) of the Income Tax Act 1967.

Subsection (1)(c) of section 33 is very clear, it only allows deduction from the gross income outgoings and expenses incurred inter alia for the repair of plant or machinery employed in the production of gross income.

Revenue referred to the case of The Comptroller of Income Tax v. X Rubber Co. Ltd. (1961) 27 MLJ 191 (where the replacement of a gate contributed to revenue expenditure and hence deduction was allowed) .In this case the replacement of the gate was "a repair of premises, such premises being the whole drainage system of the ten Watergates and the construction of the single Watergate, taken by itself, was not an independent entity which could be said to create any new asset and as a consequence the cost of the construction of such Watergate ought to be regarded as income expenditure".

From the facts of this case, the provision of section 33(1)(c) of the Act and authorities cited, the amount written off for the unused spare-parts cannot fall section 33(1)(c) of the Act for the reason the amount written off was not expended for the repair of the machinery or equipment for the production of income. It is not denied that the spare parts were purchased but they were kept in stock as reserves and were never used for the repair of machinery or equipment necessary for the production of income."

The provisions of the Income Tax Act, 1967, relevant to this appeal read:-

"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 from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including Expenses incurred during that period for the repair of premises, plant, machinery or fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensils, article, (the expenditure on which would be qualifying plant expenditure for the purposes of Schedule 3) or any means of conveyance, excluding the cost of reconstructuring or rebuilding".

"Its trite law that in order to qualify a deduction under section 33(1) an expenditure must have been wholly and exclusively incurred in the production of gross income. The question whether the requirement that the expenditure must have been wholly and exclusively incurred also applies to expenses for the repair if premises, plant, machineries of fixture employed in the production of gross income under section 33(1)(c). The use of the word "including" at the end of section 33(1) means that the section is not exhaustive. As the word "including" in effect means "and the following" what it means is that what is set out after that word is something which would not normally fall within the main word of the section. The section 33(1)(c) is not governed by the requirement of the expenditure having been wholly and exclusively incurred appearing in section 33(1). Section 33(1)(c) stand in its own unaffected by the requirements of section 33(1). Section 33(1)(c) must be read as a proviso to section 33(1). Anything in section 33(1) which is inconsistent with section 33(1)(c) must be deemed not to apply. The corollary is that the expenses incurred for the repair of machineries can only fall under section 33(1)(c) and not under section 33(1).

One of the authorities cited by Counsel for Revenue i.e. Guinea Airways Ltd. v. General Commissioners of Taxation 83 C.L.R. 589 is of particular assistance to the Court Counsel says that she relies mainly on that case as the facts were similar to the facts in the present appeal. In that case Guinea Airways Ltd. was an air transport Company operating in New Guinea. It carried on the business of transporting passengers and goods by air in Papua New Guinea. The Company's building stores and equipment were destroyed. Among the property destroyed were large quantities of spare parts which it maintained for the maintenance and repair of its aeroplanes. The spare-parts destroyed were valued at 25361. The War Damage Commission awarded the Company an amount of 19570 in respect of the spares under the National Security (War Damage to Property) Regulations. The difference of 5791 the Company claimed to deduct from its assessable income in arriving at the taxable income of the accounting period. The Commissioner for Taxation disallowed the claim and an appeal from the disallowance was dismissed by Dixon J.

HELD

The claim for deduction of the taxpayer company comes within the general provision of section 33(1), that is, as outgoings and expenses wholly and exclusively incurred during that period by the taxpayer in the production of gross income.

FOCUS DYNAMICS PLC
(formerly EUROVEIN PLC)
V
(H M INSPECTOR OF TEXAS)

UK SPECIAL COMMISSIONERS

THE ISSUE

Section 77 Income and Corporation Texas Act 1988 provides, where relevant, as follows:

"77. (1) Subject to subsection (5) below, in computing the profits or gains to be charged under Case I or II of Schedule D there may be deducted the incidental costs of obtaining finance by means of a qualifying security; and the incidental cost of obtaining finance by those means shall be treated for the purposes of section 75 as expenses of management."

"(6) In this section "the incidental costs of obtaining finance" means expenditure on fees, commissions, advertising, printing and other incidental matters (but not including stamp duty), being expenditure wholly and exclusively incurred for the purpose of obtaining the finance (whether or not it is in fact obtained), or of providing security for it or of repaying it."

Were the costs incurred in the flotation of the Company incurred wholly and exclusively for the purpose of repaying loan finance?

THE FACTS

Eurovien Plc had been engaged in the engineering business since September 1989. The company was under-financed and heavily in debt. In November 1993 Eurovien attempted to acquire another company, Sisson Lehmann. In June 1994 Eurovien decided to move forward with a company flotation. In October 1994 a Financial Times article asserted that it wished to expand. Eurovien's flotation prospectus stated that the repayment of debt was only one of the purposes in arranging its flotation.

Under section 77 of the Income and Corporation Taxes Act 1988, a company is permitted a deduction when computing profits for the incidental costs of obtaining finance by means of qualifying loan stock. Under section 77(6), incidental costs include expenditures on fees and commissions if the expenditures are wholly and exclusively incurred for the purpose of obtaining the finance.

HELD

The costs of raising funds by a public share issue were not exclusively incurred for the purposes of repaying qualifying loan finance, and therefore, they were not an allowable deduction for corporation tax purposes.

This is not a case where unconscious or subconscious motives can be considered as in Mallalieu v Drummond 57 TC 330 or MacKinlay v Arthur Young McClelland Moores & Co 62 TC 704. The clear conscious motive of the Company in arranging for the flotation in November 1994 was not limited wholly and exclusively to raising funds in other to repay loan finance. There was also the clear desire to enable the Company to expand and to make acquisitions.

Although the whole of the funds raised by means of the flotation were used to repay its existing borrowings, the clearance of those debt enabled the Company to borrow from its bankers on short term funds to enable it to, for example, acquire FBT (Shears) Ltd in April 1995 and the motive of expansion existed at least from early 1993.

PUAN TAN SEOW OON
V
KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT KUALA LUMPUR

THE ISSUE

The issue for determination here is

1. The date of acquisition of the subject land by the taxpayer from the Vendors.
2. Whether the disposal of the said property subsequently would attract the property gains tax under the Act.
3. What is the nature of the acquisition that would attract real property gains tax? It must be the acquisition of asset which by definition of the Act includes an interest or right in or over an asset.

THE FACTS

The taxpayer on 16th November 1973, i.e. before the coming into force of the 1976 Act, entered into a sale and purchase agreement (hereinafter referred to as "the Purchase Agreement") with 5 joint proprietors to purchase a piece of land held under Certificate of Title No. 18186 for Lot No. 62 in the Village of Simpang Districts of Larut and Matang, State of Perak of 4 acres 1 rood 01 pole more or less in area (hereinafter referred to as "the subject land"). The purchase price was RM350, 000.00 to be paid in instalments by the taxpayer as follows:

a) The sum of RM80, 000.00 on the execution of the Purchase Agreement;

b) The sum of RM80, 000.00 on or before 16th December 1973;

c) The sum of RM80, 000.00 on or before 16th January 1974;

d) The final sum of RM110, 000.00 "on the execution of the Transfer of the said Land (or the subdivided titles (if issued) and delivery of vacant possession (i.e. free of all tenants and squatters) of the said Land by the Vendors to the Purchaser

At the time of the execution of the Purchase Agreement the beneficiaries in respect of whom the taxpayer was the trustee were not as yet being disclosed. They were only disclosed on 30th November 1973 when the taxpayer made a declaration of trust naming the beneficiaries of 10 in number of which the taxpayer herself was one of them.

The final sum of RM110, 000.00 towards the cost of the purchase of the subject land was paid to the Vendors on 23rd December 1981. Up to that date the transfer of the subject land by the Vendors to the taxpayer as trustee was never executed to vest the subject land in the taxpayer. The registered title over the subject land remained in the Vendors in the Purchase Agreement. However, on 1st December, i.e. 22 days before the settlement of the final sum, by which time the 1976 Act was already in force, the taxpayer as trustee entered into another sale and purchase agreement (hereinafter referred to as "the Sale Agreement") with Simpang Plaza Sdn.Bhd. a company, agreeing to sell the subject land to the company for RM2,837,000.00.

Though the Sale Agreement did not provide for any part of the purchase price to be paid in the form of shares of the company, it was agreed between the parties that the purchase price of RM2, 837,000.00 was satisfied substantially by issuing the shares of the company to the beneficiaries named in the trust instrument of 30th November 1973.

By a transfer instrument in Form 14A of 9th April 1982 submitted to the Collector of Stamp Duties there was evidence that the ownership of the subject land was to be transferred by the Vendors in the Purchase Agreement to Simpang Plaza Sdn.Bhd, the purchaser in the Sale Agreement. On 20th October 1982 the Collector valued the subject land for RM1, 8000.00 for purpose of stamp duties. In the said instrument the consideration for the transfer was given as RM350, 000.00 only.

By a notification of disposal of chargeable asset dated 13th October 1987 the taxpayer informed the Revenue that on 1st December 1981 she had agreed to dispose the subject land to Simpang Plaza Sdn.Bhd. She stated that the asset was acquired on 16th November 1973.

On these gains the Revenue issued a Notice of Assessment dated 16th September 1989 for real property gains tax amounting to RM99, 480.00 computed at 40% (the tax rate for a disposal within two years after acquisition) of the gain of RM248,700.00 from the disposal of Appellant's own 1/10th share in the subject property. Subsequently, a Notice of Additional Assessment dated 30th May 1992 for additional real property gains tax amounting to RM895, 320.00 was raised against the taxpayer as trustee, in respect of the disposal of the other 9/10th share.

Arguments By Taxpayer

The taxpayer contentioned that the date of acquisition of the said Property by the Appellant as trustee was 16th November 1973, that is, the date of the agreement for the acquisition of the said Property;

Further the disposal of the said Property was a transfer of asset within the meaning of paragraph 3(b) of Schedule 2 to the Act; and

That RPGT in respect of the disposal of property held in trust for the Trust Beneficiaries cannot be assessed on her as trustee because paragraph 35(1) of the same Schedule is not applicable to this case.

HELD

It cannot be disputed that by the execution of the Purchase Agreement on 16th November 1973, the taxpayer by virtue of the contract with the Vendors has acquired an interest or right in or over the subject land. Thus the date of acquisition by her of the asset cannot be any other date than 16th November 1973. Paragraph 24 (2) of the Schedule is not of general application in determining the acquisition date. It applies only to certain acquisitions before the coming into force of the Act where there is a dispute over the dates of disposal and acquisition of an asset on account of the payment for the asset is to be by way of instalments. If sub-paragraph (a) or (b) does not apply, then the date of disposal and acquisition of such an asset shall be the date on which the ownership of the asset is transferred to the purchaser, which in this case is the taxpayer. But on the facts, the ownership of the subject land was never transferred to the Appellant at all. The Appellant merely acquired an interest or right in it over the asset. Therefore, paragraph 24(2) would not apply. The authority for the Appellant to deal with the land is the Purchase Agreement of 16th November 1973 which confers on her with an interest or right in or over the subject property. This must be the date the Appellant acquired the asset for purpose of the 1976 Act.

By the Sale Agreement of 1st December 1981 the taxpayer purports to sell the subject land to the company. However, on the facts, the title to the land was never in her. All that she possessed was merely an interest or right in or over the subject land. It is trite that she cannot give more than what she has. In any event, it is now academic because the subject land was to be transferred from the original Vendors to the company. But nevertheless, the Appellant disposed off her interest in the land which is an asset to the company for a consideration. Therefore, this date of 1st December 1981 is the date of her disposal of the asset. The facts speak for itself that the acquisition price paid by the Appellant was not equal to the disposal price received by her.

The taxpayer in purport of exercising her powers of the disposal of the subject property had entered into the Sale Agreement with the company.

Q U O T E

'The deepest principle in human nature is the craving to be appreciated'

- William James -

UNITED DETERGENT INDUSTRIES SDN.BHD. V DIRECTOR GENERAL OF INLAND REVENUE

HIGH COURT KUALA LUMPUR

THE ISSUE

The issue is whether such expenses incurred by the Appellant in the purchase of the consumer premium items which is to be sold together with its own products to the wholesalers and retailers constitute entertainment within the contemplation of section 39(1) (1) of the 1967 Act.

THE FACTS

The taxpayer is a manufacturer and wholesale supplier of detergents. For the respective years of 1989, 1990 and 1991, the taxpayer incurred additional expenses in the purchase in bulk of some items of goods to be offered to its customers along with its own detergent product not for free but at the discounted price of the bulk purchase of those items of goods purchased for the purpose of promoting the sales of its own detergent product.

These items of goods that went along with the products, known as the consumer premium items, were not forced upon its customers but they were given a choice of either to buy the products alone or the products with these consumer premium items.

The consumer premium items were items such as glass tumblers, glass bowls, dinner plates, laundry baskets, flint bowls and plastic pails. Of attraction to the customers in respect of the premium items is that the price of these items is cheaper than their actual market price as the taxpayer bought them in bulk from the suppliers of those items. In the circumstances, the net selling price of the products with consumer premium items to be paid by the customers to the taxpayer was higher than the net selling price of the products without these premium items.

The taxpayer claimed a deduction for the expense and the Revenue disallowed it.

Arguments By Taxpayer

Being expenses incurred in the purchase of the consumer premium items intended to be sold together with its own products, the taxpayer regarded that as being deductible from its gross income of the business under section 33(1) of the Income Tax Act 1967 (hereinafter referred to as "the 1967 Act") as outgoings and expenses wholly and exclusively incurred during the relevant period in the production of its gross income.

Arguments By Revenue

The Revenue disagreed on the ground that those expenses were in fact entertainment expenses under section 39(1) (1) of the 1967 Act which is not allowable deduction from the Appellant's gross income for the relevant periods.

HELD

The consumer premium items were given away by the Appellant to its customers who were wholesalers and retailers, not as a free gifts but subject to the payment of the cost incurred by the taxpayer in the purchasing of the items from its suppliers, and also that upon the wishes of the taxpayer's customers only in respect of the items, it can no longer be considered as a form of entertainment upon its customers by the taxpayer. Accordingly the expenses so incurred by the taxpayer is not for purpose of the provision of entertainment of its customers within the context of section 39 (1) (1) of the 1967 Act.

KETUA PENGARAH HASIL DALAM NEGERI
V
TAN SRI KISHU T. JETHANAND (Respondemt)

HIGH COURT

THE ISSUE

The issue that required to be determined by the Special Commissioners was whether in the light of S. 64(1) of the said Act, the income of the estate of the Testator should be treated as the income of the executor or the income of the beneficiary (the Respondent).

THE FACTS

The facts of the case are as follows.

- The Respondent is the only son of Tirthdas Jethanand Lakhiani (the Testator) who died on 1st May 1972 having made and executed his last will dated 1st July 1968.

- Probate of the will was granted on 2nd May 1973. Estate Duty was assessed on 14th August 1974 and paid in that month.

- In July 1975 the Testator's contribution to the Employees Provident Fund was paid.

- In August 1975, the National Westminster Bank Ltd of London accepted the Grant of Probate as sufficient to enable the Testator's name to be deleted from the fixed deposit account in the joint names of the Testator and the Respondent.

- On 23rd March 1983, the Sindhu Settlement Corporation Ltd agreed to transfer two shares of Rupees 1000/= each to the Respondent.

The Respondent is the sole executor and sole beneficiary of the estate of the Testator.

- Initially the Appellant assessed the income of the estate of the Testator for the relevant years of assessment as income of the executor of the Testator's estate under S. 64(1) of the Income Tax Act 1967.

- Subsequently these assessment were vacated and the income of the Testator's estate was assessed in the name of the Respondent, thereby treating the income as that of the Respondent.

- The assets of the estate have not been transferred into the name of the Respondent as sole beneficiary, and this was still the position as of the date of the hearing of the Appeal before this Court.

Arguments By Revenue

It was argued by the Revenue that this was a special situation where the Respondent was an executor as well as the beneficiary at the same time. In such capacity he has enjoyed the benefits of the income of the estate. The Revenue also argued that the period of the administration of the executor was when on the date when the executor is able to define the residue of the estate for distribution to the beneficiaries. And when the residue of the estate has been determined the beneficiaries have a right to the assets of the estate.

Authorities referred to:

Malaysian Taxation by Chin Yoong Kheong which states that

"The provisions in the Act which govern taxation of income arising from the estate of a deceased person apply only during the administration period. This period starts on the date of death and ends on the date when the executor is in a position to define the residue of the estate for distribution to the beneficiaries. Where there is a will and the will provides for a trust, the administration of the estate is regarded as completed when the executor is in a position to transfer the trust to the trustees.

It is to be noted that a beneficiary does not have a definite interest in the estate, which will ultimately fall to him until the residue of the estate has been defined so that the aliquot portion passing to him can be defined (for authority, see CIR v. Sir Aubrey Smith (15 TC 661). Since the residue of an estate cannot be defined until the administration period is strictly assessable in the name of the executor. The income comprising the residue at the completion of the administration will be distributed to the beneficiaries to the beneficiaries as capital."

Cases Referred To:

1. The Commissioner of Inland Revenue v. Sir Aubrey Smith 15 TC 662.

2. Barnado case in the Court of Appeal 7 TC at p.664.

PARTIES:

1. Encik Abu Tariq bin Jamaluddin of Income Tax for the Applicant.

2. Encik N. Nadkarni of Tetuan Lee Hishammuddin for the Respondent

CASES:

1. National Land Finance Co-operative v. Director General of Inland Revenue [1993] 2 AMR 3581.

2. Re Micklewait (1855) 11 Exch.452.

3. Cape Brandy Syndicate v. IRC 12 TC 358.

4. The Commissioner of Inland Revenue v. Sir Aubrey Smith [1930] 1 KB 713.

5. Rex v. Special Commissioner of Income Tax (ex-parte Doctor Barnado's Home National Incorporated Association) 7 T.C. 646.

HELD

Appeal dismissed S. 64(1) of the Act clearly states that the income of the estate of a deceased individual is to be taxed as the income of the estate, and not as the income of the beneficiaries of the estate. And when this S. 64(1) is read together with S. 64(1) which states that payment made by the executor to a beneficiary is not to be regarded for tax purposes, it would be quite difficult to interpret S. 64(1) to mean anything else. To put it simply, it would be contrary to the rules of construction to interpret S. 64(1) to mean that the income of the estate is the income of the beneficiaries.

Cases referred to:

1. National Land Finance Cooperative v. Director General of Inland Revenue [1993]

2. Re Micklewait (1855) 11 Exch.

3. Rowlatt J in Cape Brandy Syndicate v. IRC.

• Q U O T E

'The Secret of contentment is knowing how to enjoy what you have, and to able to lose all desire for things beyond your reach'

- Lin Yufang -

MIT Professional Examination

CALENDAR FOR 1999

January 1	Annual Subscription for 1999 payable.
February 14	Release of the 1998 Examination results. Students will be notified by post. No telephone enquiries will be entertained.
March 31	Last date for payment of annual subscription fee for 1999 without penalty (RM50).
April 30	Last date for payment of annual subscription for 1999 with penalty (RM100). Students who fail to pay will be transferred to the inactive file.
May 31	Question & Answer Booklets available for distribution.
September 1	Closing date of registration of new students who wish to sit for the December 1999 examination sitting.
September 15	Examination Entry Forms will be posted to all registered students.
October 15	Closing date for submission of Examination Entry Forms. Students have to return the Examination Entry Form together with the relevant payments to the Examination Department, before 15 October 1999.
November 30	Despatch of Examination Notification Letter.
December (dates to be confirmed)	MIT Examination.

PILOT PAPERS , DECEMBER 1995, 1996 , 1997 & 1998 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

YEAR	COST PER LEVEL		
	Level I/Foundation	Level II/Intermediate	Level III/Final
1998 EXAMINATIONS BOOKLETS	RM5.00 ☐	RM6.00 ☐	RM 11.00 ☐
1997 EXAMINATIONS BOOKLETS	RM5.00 ☐	RM6.00 ☐	RM11.00 ☐
1996 EXAMINATIONS BOOKLETS	RM5.00 ☐	RM6.00 ☐	RM11.00 ☐
1995 EXAMINATIONS BOOKLETS	RM5.00 ☐	RM6.00 ☐	RM 5.50 ☐
PILOT PAPERS BOOKLETS	RM5.00 ☐	RM6.00 ☐	RM11.00 ☐

NON-MIT REGISTERED STUDENTS & NON-MIT MEMBERS

YEAR	COST PER LEVEL		
	Level I/Foundation	Level II/Intermediate	Level III/Final
1998 EXAMINATIONS BOOKLETS	RM7.00 ☐	RM8.00 ☐	RM13.00 ☐
1997 EXAMINATIONS BOOKLETS	RM7.00 ☐	RM8.00 ☐	RM13.00 ☐
1996 EXAMINATIONS BOOKLETS	RM7.00 ☐	RM8.00 ☐	RM13.00 ☐
1995 EXAMINATIONS BOOKLETS	RM7.00 ☐	RM8.00 ☐	RM 7.50 ☐
PILOT PAPERS BOOKLETS	RM7.00 ☐	RM8.00 ☐	RM13.00 ☐

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.

Student's Signature: _____ Date: _____

INSTITUTE HOLDS 7th AGM

President, En Ahmad Mustapha Ghazali (centre) delivering his address.

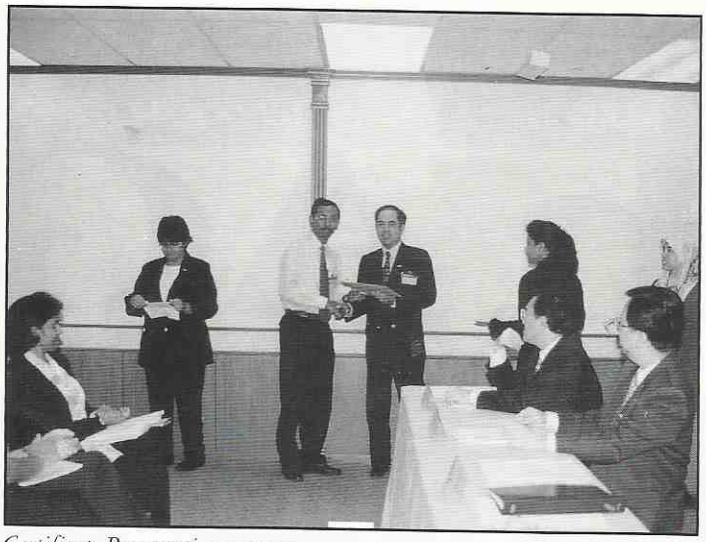
The Institute held its Seventh Annual General Meeting on 3 April 1999 at 10.00 a.m. The President, En Ahmad Mustapha Ghazali, in his annual address, updated members on the Institute's activities and latest developments.

Members took note that the Council of the Institute is in the midst of setting up a task force to look into the possibility of creating a category of membership to admit indirect tax practitioners who are professionals in their own specialised field. Members were also informed that the Institute is regularly invited and actively participates in various dialogue sessions pertaining to tax issues with the relevant authorities, namely, the Inland Revenue Board and the Royal Customs and Excise Department. During such meetings, the Institute gives feedback on the various issues faced by the taxpayers and the need for close co-operation.

On the international arena, the President informed that the Institute had made a fair bit of impact, that is, the Institute is being recognised as the professional taxation body of Malaysia.

The President later briefed members on the progress of the Institute's professional examination. Members present noted that the Institute had so far produced a total of 17 graduates.

The President encouraged members to contribute articles to the Institute's journal, Tax Nasional and also to provide feedback and ideas on the Institute's current services. In addition, members were also encouraged to participate in dialogues and forums organised by the Institute as practitioners' problems should be communicated to the MIT and this can be raised to the relevant authorities.



Certificate Presentation ceremony.

During this General Meeting, members were informed of the retirement of Mr Kang Beng Hoe as a Council Member of the Institute. The President on behalf of the Institute expressed gratitude to Mr Kang Beng Hoe for his services and the wealth of experience which he had willingly shared with the Institute. The President at the same time also welcomed Dr Ahmad Faisal Zakaria to the Council. The other Council Members who were re-elected during this meeting includes, Tn Hj Abdul Hamid bin Mohd Hassan, En Atarek Kamil Ibrahim, En Hamzah HM Saman, Dr Jeyapalan Kasipillai, Mr Michael Loh, Mr SM Thanneermalai and Mr Veerinderjeet Singh.

This AGM also saw the re-appointment of 8 members to the Institute's Council as MIA Appointees namely En Ahmad Mustapha Ghazali, Mr Chow Kee Kan, Mr Chuah Soon Guan, Mr Harpal Singh Dhillon, Mr Lee Yat Kong, Mr Quah Poh Keat, Mr Seah Cheoh Wah and Ms Teh Siew Lin.

At the end of the session, a Certificate Presentation Ceremony was held. New members and members who were conferred Fellow status recently received their certificates from the President.

Members listening attentively.

4th Graduation & Prize giving ceremony

Following the excellent performance of the students in the 1998 MIT professional examinations held in December 1998, the Institute once again organised a Graduation & Prize Giving Ceremony on 29 April 1999. This ceremony was held in Legend Hotel in the presence of close to 70 guests that includes invited guests from the government and private sector, representatives from professional accountancy bodies, colleges, examiners, employers as well as family members of the students who have excelled in the examinations.

Graduates and prize winners were awarded their certificates and medals by the Guest-of-Honour for the ceremony, Dr Syed Muhamad bin Syed Abdul Kadir who is the Secretary to the Tax Analysis Division of the Ministry of Finance.

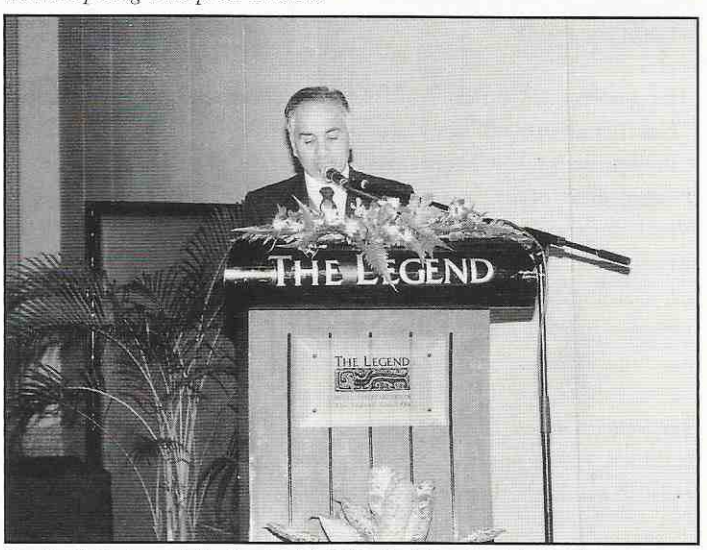
Dr Syed in his speech commended the Institute on its task of developing and conducting professional examinations in taxation for the past four years that incorporates and emphasizes on local needs. He was confident that the MIT, being led and managed by competent professionals, will/would continue to strive for excellence and is committed to continually upgrade the syllabus of its examinations and to focus on the latest development in the field of taxation so as to ensure that the graduates produced are of high caliber.

Dr Syed also informed that the Treasury had enhanced its working relationship with the MIT in finding new ways to improve the taxation system in the country and both parties have agreed that regular dialogues be held to search for new ideas from both sides in order to enhance effectiveness and institute new changes and reform in taxation. He further urged the students not to look at the training or credentials strictly for advancement in their career but also to think and search for new ideas that can provide constructive development in the field.

President of MIT, En Ahmad Mustapha Ghazali on the other hand briefed the guests on the Institute, its activities and current developments. He informed that the intention of the Institute is to have every qualified tax practitioner in the country to be registered with the Institute. The composition of the MIT membership comprises of accountants, tax agent license holders, IRB Advanced course holders as well as lawyers.

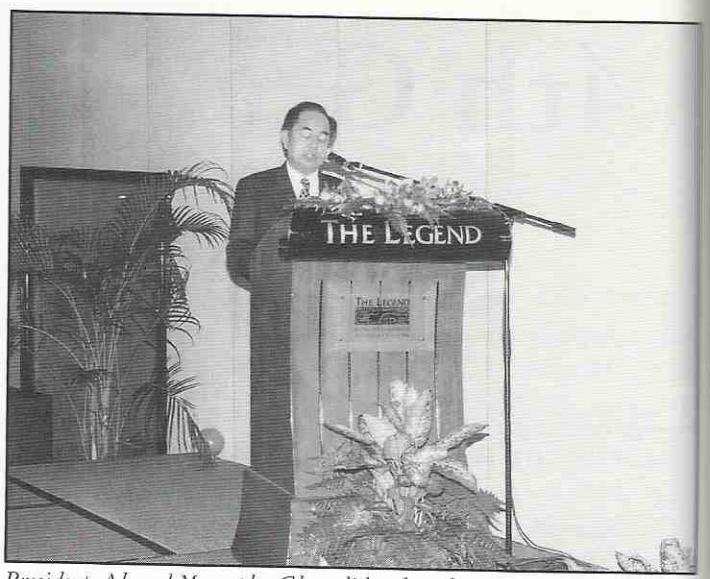
He also informed that the Institute is aware of the urgent need to produce qualified individuals with greater numbers, especially with the impending implementation of the self-assessment system by the Government. Hence, to ensure that taxpayers and tax advisers are adequately prepared for this new system, the Institute will not only assist members by disseminating relevant information to them, but the syllabus of the MIT Examinations will also include the topic on self assessment. It is therefore a fervent hope that the well-trained graduates of the Institute will be able to contribute effectively when the system is implemented.

Dr Syed Muhamad bin Syed Abdul Kadir, the Guest-of-Honour and Council members posing with prize winners.

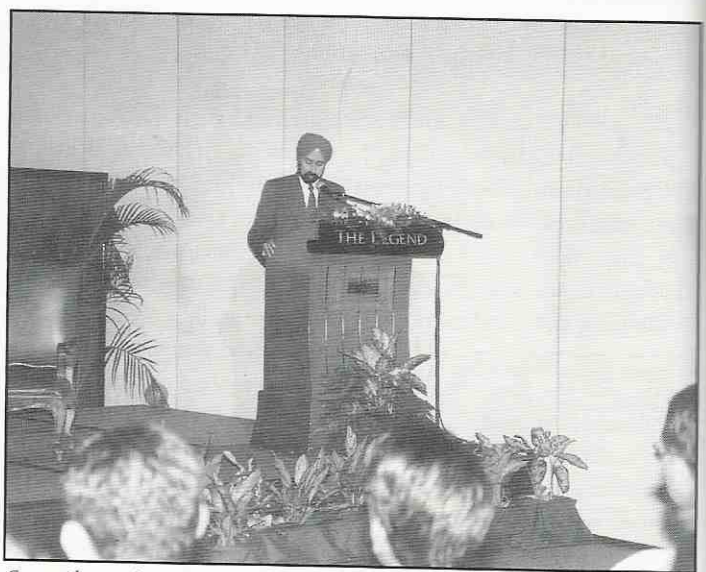


Dr Syed Muhamad bin Syed Abdul Kadir delivering his speech.

Dr Syed Muhamad presenting certificates.



President, Ahmad Mustapha Ghazali briefing the guests on the developments of the Institute.



Council member and Chairman of the Examinations Committee, Mr Veerinderjeet Singh updating members on the MIT examinations.

A cross - section of guests at the ceremony.

The President also took the opportunity to thank employers who have been encouraging and sponsoring their staff to do the MIT Examinations. This, he said, is a good sign which indicates support and confidence in the Institute and its examinations.

Subsequent to this, the Chairman of the Examination Committee, Mr Veerinderjeet Singh in his speech, informed that the MIT Examinations had only about 100 registered students during the first sitting in December 1995 and today, there are close to 400 students registered for the Examinations. This, he explained, indicates a growing awareness of the role and function of the MIT among the public.

The guests also noted from his speech that the Examinations Committee comprises of academicians from local universities/ colleges, tax practitioners from the major accounting firms, senior government officials and senior corporate tax personnel. Mr Veerinderjeet expressed his gratitude, in particular, to the Inland Revenue Board and the Royal Customs and Excise Department, for providing examiners for the taxation papers of the examinations. He also briefed the guests on the syllabus and structure of the examinations.

Mr Veerinderjeet further informed that his Committee plans to conduct, where possible, sessions on examination techniques and publish guidance notes to assist students in their examinations.

Finally, on behalf of the Institute, he expressed gratitude to a number of firms namely Kassim Chan & Co, PricewaterhouseCoopers, KPMG, Arthur Andersen, Atarek Kamil Ibrahim & Co as well as the President, En Ahmad Mustapha Ghazali and Deputy President, Mr Michael Loh for having contributed prizes for best performance in specific subjects and levels of the examinations.

The ceremony ended with a light refreshment where students and guests took the opportunity to meet the Council Members of the MIT.

dialogue session with colleges

The Institute since the last dialogue session with the colleges in 1997 once again had a dialogue session with the colleges on 3 April 1999 at the MIT office to discuss the possibility of colleges conducting an internal diploma programme which may be tied up with the MIT Examinations.

The session was chaired by the Chairman of the Institute's Examinations Committee, Mr Veerinderjeet Singh and the Chairman of the Institute's Education & Training Committee, Mr Michael Loh.

A suggestion was made by the Institute to the colleges to either offer a new internal diploma programme or modify their existing diploma programme to include the syllabus of the MIT Examinations. The proposed diploma programme would initially cover the Foundation Level and later, Intermediate Level of the MIT Examinations. This programme is hoped to eventually lead students to sit for the Final Level of the Examinations which will be conducted by the Institute. Colleges were also informed to include other subjects in the proposed diploma programme besides the papers in the MIT Examinations.

The representatives of the colleges later took the opportunity to voice their opinions and suggestions on the proposal. When asked on how the Institute plans to cater for the existing working students of the MIT in view of the proposed diploma programme, Mr Veerinderjeet replied that the Institute would continue to conduct the MIT Examinations and simultaneously, provide accreditation to colleges to run the internal diploma programme for a transitional period of between 2 to 3 years. Thereafter, the Institute will concentrate only on the Final Level of the MIT Examinations.

The colleges that are interested in running the internal diploma programme were told to submit their proposals to the Institute for accreditation purposes which should include the subjects that they are planning to offer besides papers of the MIT Examinations.

The Institute would then arrange for a meeting with the respective colleges to discuss further on their proposals.

courtesy visits to NATIONAL TAX ACADEMY & PUBLIC SERVICE DEPARTMENT

On 8 April 1999, Members of the Council paid a courtesy visit to the office of the Director of National Tax Academy, Tn Hj Ab. Rahim b Abdullah. The delegation from the Institute comprised of the Vice President of the Institute En Hamzah HM Saman, the Chairperson of the Government Affairs Committee Ms Teh Siew Lin and the Chairman of the Examinations Committee Mr Veerinderjeet Singh.

The MIT representatives took the opportunity to brief the Director as well as his officers on the Institute's activities, its objectives as well as its role in the development of the tax profession in Malaysia. The Director was impressed with the Institute's development in such short span, in particular, conducting our own professional examinations since 1995. He also expressed keen interest in having his officers from NTA being admitted as members of the MIT.

Both parties expressed hope in continuing to work together for the betterment of the tax profession in the country.

In the same month, Members of the Council also paid a courtesy visit to the office of the Director-General of Public Service Department (PSD), Y Bhg Dàtuk Samsudin bin Osman. Members of the delegation during this visit on 20 April 1999 were Vice President of the Institute Mr Quah Poh Keat, Chairman of the Examinations Committee Mr Veerinderjeet Singh and Council Member Tn Hj Abdul Hamid bin Mohd Hassan.

The Director-General was briefed on the Institute's role, activities as well as its examinations. The representatives also highlighted on the good relationship between the Institute and the Government authorities namely the Ministry of Finance, Inland Revenue Board and the Customs & Excise Department.

It is to be noted here that the Institute had submitted an application for recognition from Public Service Department for members of the Malaysian Institute of Taxation sometime in June last year to the then Director-General of PSD, Y Bhg Tan Sri Dr Mazlan bin Ahmad.

The following persons have been admitted as associate members of the Institute as at 25 May 1999.

Name	Membership No.
TEH CHOR SIN	1559
CHAN YEN ING	1560
ANG AH LECK	1561
TING TIE HAU	1562
TEO KOK KHOON	1563
NG WEI LI	1564
ANDREW LAI TSUN KHIONG	1565
HAH KAT GIN	1566
TANG TZE MIEN	1567
PEE CHE HONG	1568
WONG CHIN TECK	1569
TAN BOON KANG @ TAN WERN CHIANG	1570
YOK KOK WAH	1571
PUN KONG YEE	1572
YEOH YIN TUAN	1573
YIP BENG FATT	1574
TAN LAY KHENG	1575
SUNDARASAN A/L ARUMUGAM	1576
TERSAIM LALL A/L SADHU RAM	1577
LIAW AIK LING	1578
YONG NYET YUN	1579
LEE FATT SEONG	1580
DAVID VICTOR RAJ A/L SINNAPPAN	1581
NG HONG CHAI	1582
KUNG KIM MING	1583
CHEAH SOO JIN	1584
LOK KIM FONG	1585
HOW YONG KONG @ HUR TZE HUAN	1586
LIM CHOR GHEE	1587
LOH EE SUM	1588
KU SIEW FUNG @ KU SIEU FUNG	1589
TAN CHENG HOOI	1590
LIM TEIK WEE	1591
TAN KOK TONG	1592
TAN KIM GUAN	1593
NG CHEE FOOK	1594
YAP SING KHON	1595
MD DAUD BIN AB RAHMAN	1596
MANSOR BIN HASSAN	1597
CHRISTOPHER CHANG TZE KUN	1598
IVAN LIM NYONG HOI	1599
CHIA MUI ING	1600
LEE MEE HONG	1601
WONG CHENG JAM	1602

The following persons have been admitted as fellow members of the Institute as at 25 May 1999.

Name	Membership No.
LOW CHOI KAM	323
WONG KUAN BENG	398
TEO AH TONG	551
BALBIR SINGH @ DERBAL SINGH A/L BABU	568
OH EI FUN	571
CHOONG LEE MEI	607
SIM SU HUAT	616
WONG SOON MOI @ WONG SOON MIN	617
SOH LAI SIM	619
SATHYA SEELAN CHELLIAH	622
CHOONG KWAI FATT	625
LAU SIE JOOE	628
YONG WENG FAI	629
LIEW YU TECK	630
PETER RETHINASAMY, DR.	632
LAI KHENG HEONG	633
SU BUONG KIONG	634
BOBBY TAN KOK LI	636
SU HOW SOON	639
CHIN KUI VUN	640
TEOH GAIK HONG	641
LIAU SIEW KIM	643
CHO WAI LOON	650
LEE YAT KONG	651
LIM PEY LIN	656
TEH CHEE GHEE	658
TIO JOON GUAN	669

MEMBERSHIP STATUS OF MIT AS AT 25 MAY 1999

Honorory Fellows	7
Fellows Members*	388
Associate Members*	1190
	1578

*** Fellow and Associate Members**

Public Accountants of MIA	935
Registered Accountants of MIA	188
Licensed Accountants of MIA	15
Advanced Course Exam of IRD	124
Advocates & Solicitors	7
Approved Tax Agents	126
MIT Graduates	6
Others	177
	1578

CHANGE OF PARTICULARS

Name _____

Membership No: _____

Postal Address: _____

_____

_____

I.C No: _____

H/p No: ( ) _____

PRACTISING AS/PLACE OF EMPLOYMENT

Name of Firm _____

Position _____

Address: _____

_____

_____

Tel. ( ) _____

Fax ( ) _____

E-mail Address:

1. Latest Tax Agent No.* _____
2. Latest Audit LIcence No.* _____
3. Advance Course Examination and Date Certificate Issued: _____

RESIDENTAIL ADDRESS

Address: _____

_____

_____

Tel: ( ) _____

_____

** This information will determine whether you will be under the category of practising or non-practising.*

NOTE

You are requested to return the completed form to the Secretariat by fax or post to:

MALAYSIAN INSTITUTE OF TAXATION (225750 T)
Level 4, Dewan Akauntan
No. 2, Jalan Tun Sambanthan 3
50470 Kuala Lumpur
Tel No. (03) 2274 5055
Fax No. (03) 2274 1783

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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 if the case of a Fellow the letters F.T.I.I. and in the case of and Associate the letters A.T.I.I.

Associate Membership

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

Fellow Membership

1. A Fellow may be elected by the Council provided the applicant has been an Associated Member for not less than the 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 certificate in support of your application.
2. Two identity Card-size photographs
3. Fees

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

Every member granted a change in status shall thereupon pay such additional fee for the yar 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.