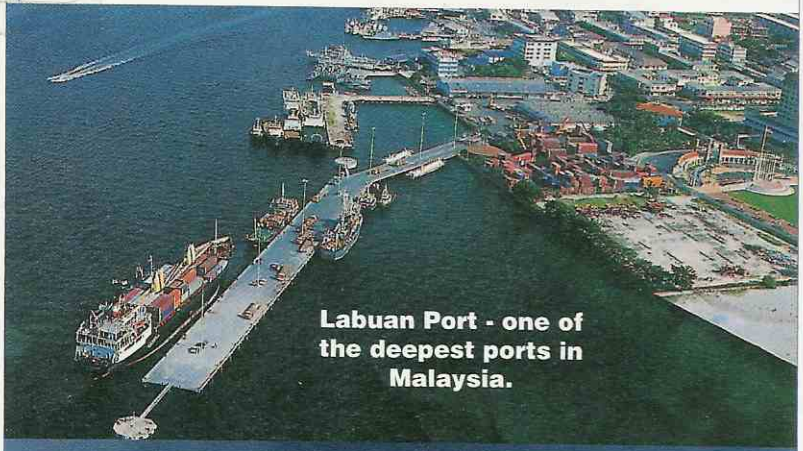
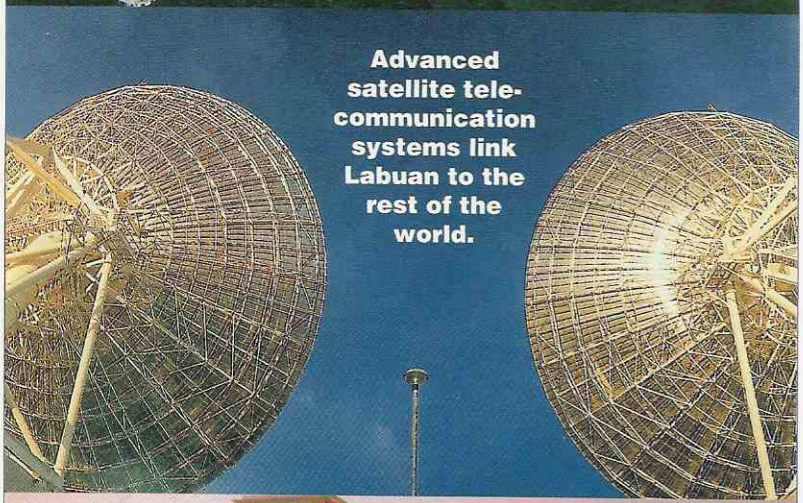
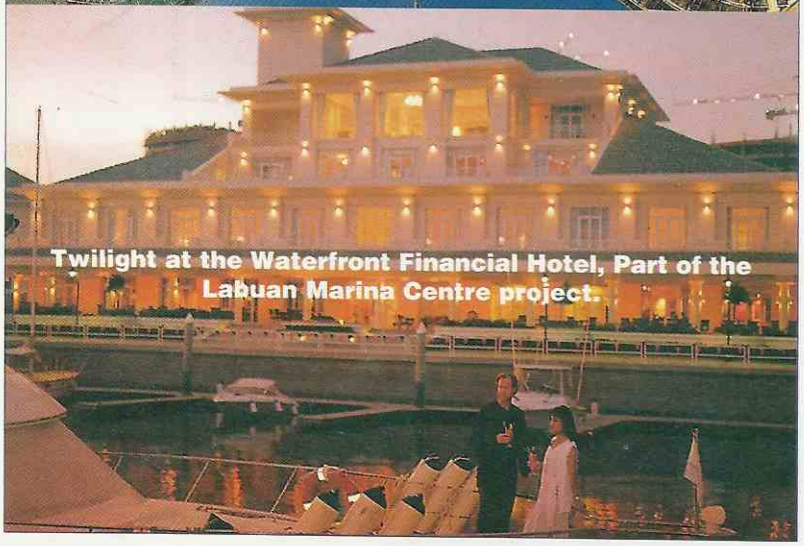
The island of Labuan was established by the Malaysian government as an International Offshore Financial Centre (IOFC) in October 1990.



Labuan Port - one of the deepest ports in Malaysia.



Advanced satellite tele-communication systems link Labuan to the rest of the world.



Twilight at the Waterfront Financial Hotel, Part of the Labuan Marina Centre project.

● Price RM30.00
US$17.00

TAX NASIONAL

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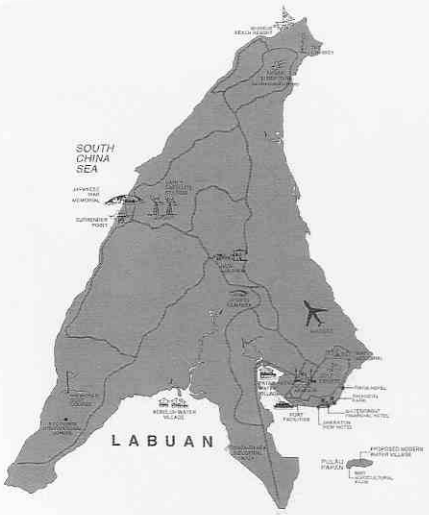
Malaysian Institute of Taxation

C O N T E N T S



OFFICE & ADDRESS

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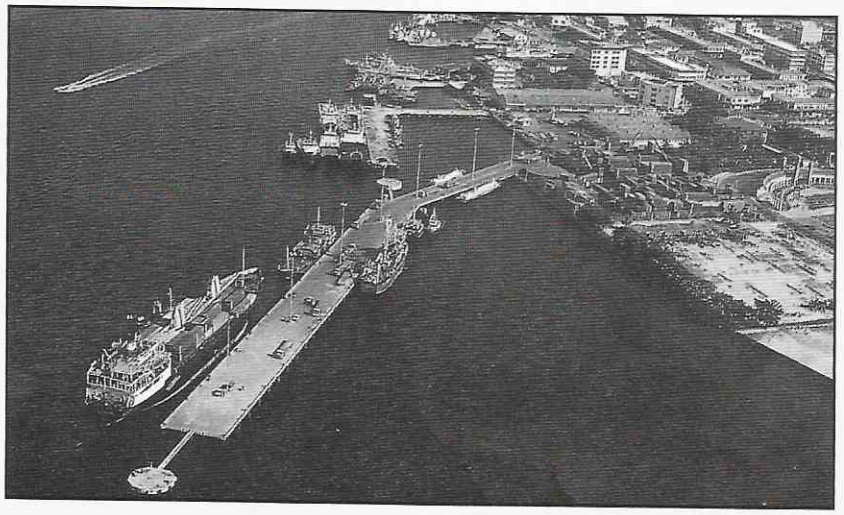
The Malaysian Institute of Taxation (MIT) is a company limited by guarantee incorporated on October 1, 1991 under Section 16(4) of the Companies Act, 1965.

The objectives of the Institute are, inter alia:

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

OFFSHORE BANKING



INTRODUCTION

An offshore bank is generally organised in an international offshore financial centre by a bank or a multinational to meet the banking requirements of its international customers without the restrictions of its home country.

Q - Who Qualifies For A License?

An offshore banking business may be organised in Labuan by the below stated after careful screening by the Malaysian Central Bank. The applicant should be of sound international standing.

A Malaysian Bank
A Foreign Corporation
An Individual
Any Other Body

LICENSING REQUIREMENT

Offshore Company / Foreign Offshore Company
Only a company incorporated or registered as an offshore company or foreign offshore company under the Offshore Companies Act, 1990, for the sole and exclusive purpose of carrying on an offshore banking business in Labuan may apply to the Malaysian Central Bank for a license.

Share Capital - RM 10 Million
An offshore bank must have a minimum paid up capital, unimpaired by losses, of not less than RM10 million or its equivalent in a foreign currency.

Guarantor For Financial Obligation
A guarantor to provide an undertaking that the offshore bank will comply with its financial obligations is required.

ANNUAL FEE

An annual license fee of RM60,000 is payable to the Central Bank by 15 January of each year.

To promote the establishment of offshore banks in Labuan the annual license fee in 1991, 1992, and 1993 the annual fee was pro rated at RM5,000 per month.

Thereafter, from 1994 the annual fee of RM60,000 is payable upon the grant of the license.

SECRECY PROVISIONS

Bank secrecy and confidentiality are provided for in the Offshore Banking Act:-

Disclosure Of Information / Documents
Disclosure of any information or documents whatso-

ever by a director or an officer of the offshore bank in matters relating to the affairs or accounts of the customer is prohibited.

Identity Of Accounts
The identities, accounts and affairs of the customers of the offshore bank are protected from disclosure even to the Central Bank.

However, the offshore bank cannot open an account for any unidentified customer.

Court Orders
There is no absolute secrecy as the disclosure may be required pursuant to a court order.

Penalties are provided for any person convicted of contravening the non disclosure provisions.

ACCOUNTS & AUDIT

The accounts must be audited annually by an auditor approved under the Offshore Companies Act, 1990 and submitted to the Malaysian Central Bank.

The auditor must submit his report with his comments on the accounting system and controls employed by the offshore bank to its shareholders and to the Central Bank.

SCOPE OF ACTIVITIES

An offshore bank may conduct a wide spectrum of financial activities including the management of investment portfolios which is usually provided by merchant banks. Offshore banking activities include:-

Foreign Currency Deposits
Accepting foreign currency deposits from residents and non residents, excluding checking accounts.

Capital Market Instruments
Securitising and dealing in capital market instruments.

Captive Banking
Captive banking arrangements may be used.

Foreign Currency Loans
Granting foreign currency loans of unlimited amounts to non-residents.

Granting foreign currency loans up to RM1 million to any resident. Any loan exceeding this amount requires prior approval of the Malaysian Central Bank.

Foreign Currency Transactions
Undertaking any foreign currency transactions. This includes forward and spot purchases of foreign currency and sales and currency swaps against the Malaysian dollar with both non residents and Malaysian commercial banks.

Making payments or remitting funds abroad or to Malaysia on behalf of any non resident.

Hire Purchase / Leasing
Providing funds for hire purchase and leasing transactions.

Property Purchases
Granting loans in foreign currency to non residents for the purchase of real property in Malaysia.

Investment Banking Services
Undertaking investment banking services including project evaluation, feasibility studies, capital restructuring and tailoring financial packages.

PROHIBITED ACTIVITIES

Although a Labuan offshore bank operates in a liberal regime it is prohibited from doing the following:-

Numbered Accounts
Opening of accounts for unidentified customers. This is to ensure that Labuan is a legitimate financial centre and discourages laundering activities.

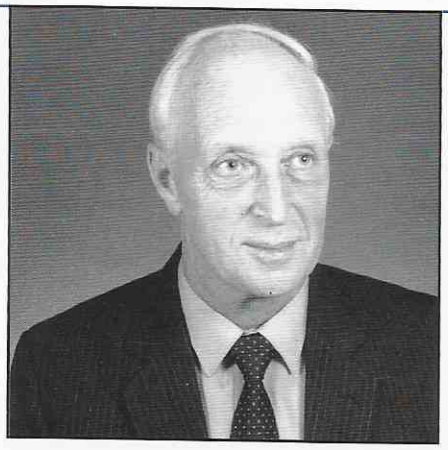
Amounts Repayable On Demand
Accepting money on deposit or loan on terms which are repayable on demand by cheque or any other instrument drawn by the depositor on the offshore bank. This is to alleviate the requirement of having to clear cheques across national borders.

Transactions In Ringgit
Conducting transactions in the Malaysian Ringgit. This is to prevent the internationalisation of the Malaysian currency.

In a number of limited circumstances this is allowed.

Branches in Malaysia
Establishing branches to carry on offshore banking business in any part of Malaysia. This is to prevent the offshore bank from encroaching on the activities of the domestic banking system.

Israel
Undertaking any transaction with residents of Israel.



THE 1997 BUDGET CHANGES

By
RICHARD THORNTON

Although the Budget introduced no major changes, it did contain a large number of measures, many aimed at addressing the needs of the time.

All of the changes detailed below are effective from year of assessment 1997, unless otherwise stated.

PERSONAL TAXATION

DEDUCTION FOR OWN MEDICAL COSTS

In addition to the existing deduction given for parents' medical costs, a deduction of up to RM5,000 is to be given for medical costs incurred by the taxpayer in respect of himself, his wife or child, or in the case of a wife, on herself, her husband or child, who is suffering from a serious disease. Where, in the case of a married couple, both are eligible to claim, the total deduction cannot exceed RM5,000.

A child has the same meaning as for child relief purposes. Serious diseases are acquired immunity deficiency syndrome (AIDS), Parkinson's disease, cancer, renal failure, leukemia and other similar diseases. The claim needs to be supported by a receipt and certification by a medical practitioner.

LIFE INSURANCE LIMITATION REMOVED

The 7% limitation on life insurance premiums is to be removed. The overall limit of RM5,000, covering also contributions to the Employees Provident Fund and approved schemes and payments under written law for widows and orphans pensions is unchanged.

PROVISION OF CHILD CARE NOT A BENEFIT IN KIND

The enjoyment of child care facilities provided by an employer will no longer be treated as a benefit in kind for the employee concerned.

EXEMPTION FOR PERFORMERS

The income of an individual resident in Malaysia in respect of his appearance in cultural performances approved by Minister of Finance will be exempted from income tax, except where the payment is part of the emoluments for his official duties.

PARTIAL TAX EXEMPTION FOR FOREIGN LECTURERS

Non-resident lecturers and speakers who lecture in approved educational and training institutions or organisations in the fields of science, engineering and technical skills, high technology, information technology and other critical disciplines will be given an exemption of 50% of gross income. Effective from year of assessment 1997, the exemption will continue up to year of assessment 2001.

BUSINESS TAXATION

NEW DEDUCTION - CHARITY AND COMMUNITY

A deduction is to be given in calculating the adjusted income of a business for amounts expended on services, public amenities and contributions to a charity or community project pertaining to education, health, housing and infrastructure approved by the relevant authority. Where such expenditure is claimed as a business deduction, a further deduction will not be given for it under s.44(6) as a cash gift. Although not specified, it is presumed that the relevant authority will be the ministry appropriate to the matter concerned.

NEW DEDUCTION - PROVISION OF CHILD CARE FACILITIES

A deduction is to be given in calculating the adjusted income of a business for amounts expended on the provision and maintenance of a child care centre for the benefit of persons employed by the business. Capital expenditure on land, premises, buildings, structures or works of a permanent nature or on alterations, additions or extensions thereof or in the acquisition of any rights in or over any property will not be deductible. Capital expenditure on equipping the child care centre is not excluded.

NEW DEDUCTION - PROVIDING CULTURAL GROUPS

A deduction is to be given in calculating the adjusted income of a business for amounts expended in establishing a musical or cultural group approved by the Minister of Finance.

THE 1997 BUDGET CHANGES

NEW DEDUCTION - COST OF ACQUIRING INTANGIBLE PROPERTY

Expenditure incurred for the outright acquisition of patents, designs, models, plans, trade marks or brands and other similar rights will be allowed as a tax deduction. At present, only payments for the use of such assets can be allowed as a business deduction. The proposal did not mention payments for the outright acquisition of know-how.

NEW DEDUCTION FOR TECHNICAL ASSISTANCE TO SMALL AND MEDIUM SCALE INDUSTRIES

Large companies providing assistance to small and medium scale industries (SMIs) will be given a deduction for expenditure incurred including the training of employees, product development and testing and factory audit to ensure the quality of vendors' products. At present, no specific deduction is available for the costs of giving such assistance.

DOUBLE DEDUCTIONS - WITHDRAWAL AND IMPROVED PROCEDURES

The double deduction given, with effect from year of assessment 1994, for freight charges paid to a Malaysian incorporated shipping company for transportation on board a Malaysian ship is to be withdrawn with effect from year of assessment 1998. Freight charges will still be eligible for the normal single deduction.

With effect from 1st January 1997, applications for approval for double deduction in respect of approved research will need to submitted only to the Inland Revenue Board.

CAPITAL ALLOWANCES FOR NATURAL GAS VEHICLES AND EQUIPMENT

An initial allowance of 40% and an annual allowance of 20% are to be given for monogas buses and for NGV equipment at petrol stations i.e gas compressor unit, ground storage cascade, dispenser unit, control panel, electrical control panel and others such as compressor bay, electric cable and high pressure pipes. As a result, such assets will be fully written off over three years.

INDUSTRIAL BUILDINGS ALLOWANCE FOR EMPLOYEE HOUSING

The 10% per annum allowance on buildings constructed or purchased for the housing of employees in a manufacturing business will also apply to hotel and tourism business and to approved service projects. The latter is a project qualifying for the investment allowance or income tax exemption introduced by the 1996 Budget.

PARTIAL TAX EXEMPTION FOR PROVIDERS OF FOREIGN LECTURERS

The providing of services of lecturers and speakers by non-resident organisations or companies will qualify for an exemption of 50% from year of assessment 1997 to year of assessment 2001. It will only apply to those who lecture in the fields of science, engineering and technical skills, high technology, information technology and other critical disciplines.

TAX EXEMPTION FOR CONFERENCE PROMOTION

Local companies which promote conferences held in Malaysia will be granted tax exemption on income earned from bringing in at least 500 foreign participants.

WITHHOLDING TAX - APPROVED LOAN STATUS CURTAILED

Interest on an approved loan which is paid to a non-resident is exempt from tax and does not therefore suffer withholding tax. The definition of an approved loan now includes loans made to governments, local authorities and statutory bodies and, in the case of other borrowers, loans exceeding RM250 million. Approval of the Ministry of Finance is needed in any case. Loans will not be approvable on the basis solely of exceeding RM250 million unless the application is submitted on or before Budget Day. Loans to government etc. will still qualify.

REPEAL OF FILM HIRE DUTY AND WITHHOLDING TAX CONSEQUENCES

The Cinematographic Film-Hire Duty Act 1965, which imposes a tax at effectively 15% on payments for the renting of films for exhibition, is to be repealed with effect from 1st January 1997.

Consequent upon the repeal, film rentals paid to non-residents will become liable to tax as royalties at the existing 10% rate. The charge will apply to sums paid as consideration for the use of, or the right to use, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are likely to be used or reproduced in Malaysia.

WITHHOLDING TAX COMPLIANCE

The penalties on late payment or non-payment to the Director General of withholding tax in respect

THE 1997 BUDGET CHANGES

of certain payments to non-residents are to be revised. This applies to contract payments, interest, royalties and payments for the special services falling under s.4A.

At present, where the tax is not paid within 30 days of the date of paying or crediting the amount to the non-resident, the tax due is increased by 10%. After it remains unpaid for a further 60 days, the total amount is increased by a further 5%. With effect from 25th October 1996, there will be only one increase of 10% applying on nonpayment after 30 days, but this increase will be based on the gross amount payable to the non-resident rather than on the amount of the tax.

A change is also being made in the position of the payer who fails to deduct the tax. Where the increased amount is paid in full, the payer will not be denied a deduction for the amount payable to the non-resident in ascertaining his adjusted income. At present, failure to deduct has the result of disqualifying the expense as a deduction, even though the payer accounts for the tax which should have been deducted.

IMPROVED EXEMPTION FOR CO-OPERATIVES

A co-operative society is exempt from tax on its income for five years from date of registration. Thereafter it is exempt for any year in which members funds (as defined for this purpose), at the beginning of the basis year were less than RM500,000. The threshold for members funds is to be increased to RM750,000.

REDUCED TAX RATE FOR FOREIGN FUND MANAGEMENT NOW AVAILABLE TO LOCALLY CONTROLLED COMPANIES

Introduced by the 1996 Budget, the incentive is restricted to companies providing fund management services to foreign investors. A concessionary tax rate of 10% applies to income derived from such services and the income after tax may be used to pay exempt dividends. Initially available only to companies which were fully or partly foreign-owned, it is now to be made available to fully locally owned companies.

As a result of the change in the definition of a foreign fund management company, it seems that a wholly foreign-owned company will no longer be restricted to servicing foreign investors only.

TAX EXEMPTION FOR CLOSED-END FUNDS

A closed-end fund company is to be given tax exemption on gains from realisation of investments. The closed-end fund company must be a public limited company incorporated and resident in Malaysia and approved by the Securities Commission to engage wholly in the investment of funds in debentures, stocks and shares in a public company or corporation, or bonds of any government or any body corporate or incorporate, including any right or option in respect thereof and any interest in unit trust schemes.

A listed closed-end fund already enjoys tax exemption on interest derived from securities or bonds issued by the Government and from various other bonds

Under the new proposal, exempt gains and exempt income from securities and bonds, will be available for the payment of exempt dividends.

There are also new rules affecting the deductibility of expenses from non-exempt income. No deduction will be given for expenses, except by a restrictive formula which is similar to that applied to investment holding companies. This is based on permitted expenses, which are defined as manager's remuneration, maintenance of register of shareholders, share registration expenses, secretarial, audit and accounting charges, printing and stationery costs and postage. Interest is not a permitted expense.

The fraction to be used in calculating the restriction is:

$$\frac{A \times B}{4C}$$

where A is the total permitted expenses, B is dividends and interest chargeable to tax and C is all dividends, interest and gains from realisation of investments, whether chargeable to tax or not. The minimum deduction to be given is 10% of the permitted expenses. Any unrelieved balance may not be carried forward to future years.

EMPLOYERS OBLIGATIONS RELAXED

It will no longer be necessary for an employer to give notice of an intended cessation of employment where monthly tax deductions are being applied, or the monthly pay is below the deduction threshold, except where it is known that the employee is retiring from any employment.

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CHANGES APPLICABLE TO ALL

NEW DEDUCTION FOR A GIFT OF ARTEFACTS

A deduction will be given in calculating total income to any person for the value of a gift of artefact or manuscript to the Government or a state government. The value will be determined by the Department of Museums and Antiquities or the Department of National Archives, as the case may require. The deduction is given in the same way as for gifts of money under s.44(6) with the same priority of set-off against income.

NEW DEDUCTION FOR CASH CONTRIBUTIONS

With effect from year of assessment 1998, a deduction will be given to any person who makes a cash contribution to a trust account under the relevant ministry or department for the purposes set out below:

- Ministry of Culture, Arts and Tourism to sponsor cultural performances including orchestra, theatre and other local cultural performances recognised by the Ministry as national culture
- Department of Museums and Antiquities or the Department of National Archives to fund research and activities related to preservation of the national heritage
- Ministry of National Unity and Community Development to fund research and activities to overcome social problems.

DEDUCTION FOR GIFTS FOR TRAINING - IMPROVED CONDITIONS

From 1995 a deduction was given in calculating total income to any person for any cash gift made to a technical or vocational training institute. The requirement that such an institute must be one established and maintained by a statutory body is to be removed.

TAX EXEMPTION FOR INTEREST ON BONDS

Interest on bonds issued by Malaysian Rating Corporation Berhad is to be exempted from income tax. Rating Agency Malaysian Berhad bonds already qualify for exemption

TAX INCENTIVES

WIDER SCOPE OF REINVESTMENT ALLOWANCE FOR AGRICULTURE

The following types of association will be eligible to claim the reinvestment allowance for capital expenditure in relation to an agricultural project:

- an agro-based co-operative society
- an Area Farmers' Association
- a National Farmers' Association
- a State Farmers' Association
- an Area Fishermen's Association
- a National Fishermen's Association, and
- a State Fishermen's Association

By the 1996 Budget proposals, the reinvestment allowance was extended to agriculture but it was only made applicable to companies.

FULL SET-OFF OF REINVESTMENT ALLOWANCE FOR PRODUCTIVITY IMPROVEMENT

From year of assessment 1998, a 100% set-off against statutory income will be available for reinvestment allowance given in respect of projects undertaken to improve productivity. As a result of the 1996 Budget proposals, the rate of reinvestment allowance was increased to 60% but its effectiveness was reduced by restricting the set-off to statutory income instead of adjusted income and then only for 70% of the statutory income, unless the project was located in a promoted area. The new proposal is not included in the Finance Bill and it is not known whether the productivity improvement will need to be proved before the 100% set-off can be claimed.

INCENTIVES FOR THE MULTIMEDIA SUPER CORRIDOR ("MSC")

In conjunction with the introduction of the MSC, eight special areas will be promoted, including telemedicine, smart schools, research and development clusters, multipurpose cards and electronic Government. The incentives, to be given to companies approved by the Multimedia Development Corporation, comprise:

- pioneer status for 10 years or investment tax allowance of 100% for new companies and for existing companies on additional income
- tax exemption on multimedia equipment
- a special incentive for companies whose presence will attract other companies to establish their operations in the IT City

THE 1997 BUDGET CHANGES

- special foreign currency guidelines
- SMIs to be given special funding for research and development
- expatriate recruitment according to needs

This proposal is not included in the Finance Bill and the effective date has not been announced.

INCENTIVES TO STRENGTHEN INDUSTRIAL LINKAGES

Suppliers of intermediate goods on the promoted list in an approved scheme will be given pioneer status with 100% exemption, or investment tax allowance of 60% with 100% exemption (normally for 5 years in either case). Those capable of achieving world class standards in terms of price, quality and capacity will be granted pioneer status for 10 years with 100% exemption.

This incentive, which will be effective for applications made after 25th October 1996, is related to the deduction to be given to large companies which give assistance SMIs.

INCENTIVES FOR HOTELS AND HOLIDAY CAMPS

Investment tax allowance or pioneer status will be given for the construction of medium and low-cost hotels (up to 3 star category) and for expansion/modernisation of existing hotels. This will apply with effect from 1st January 1996, on condition that the project has not commenced operation as of 25th October 1996

Investment tax allowance or pioneer status will also be given for the construction of holiday camps, recreational projects including summer camps. It is effective for applications received after 25th October 1996.

INCENTIVES FOR CONSTRUCTION OF CONFERENCE CENTRES

For the construction of convention centres with a hall capable of holding at least 3,000 participants, pioneer status or investment tax allowance will be given for 5 years with 70% exemption of statutory income (85% in the promoted areas). Investment tax allowance will be at 60% of qualifying expenditure.

PETROLEUM COMPANIES

DEDUCTIONS FOR CULTURE, CHILD CARE ETC.

The following deductions (covered in detail above) are also to be given for the purposes of this tax:

1. cost of establishing and managing theatrical/cultural groups
2. cost of providing services, public amenities and contributions to a charity or community project re education, health, housing and infrastructure
3. value of any gift of artefacts to the Government or a State Government
4. cost of providing and maintaining a child care centre for the benefit of persons employed in the business.

DEDUCTION FOR ABANDONMENT CESS

With effect from year of assessment 1989, a deduction is to be given for contributions to the abandonment cess fund maintained by Petronas to cover the cost of removing oil/gas platforms when production ceases. The contributions are required under the terms of the production sharing contracts

LABUAN

EXEMPTIONS CONTINUED

Two existing exemptions which were due to expire after year of assessment 1997 are to be continued.

Income derived from providing legal, accounting, financial or secretarial services to an offshore company is 50% exempt. The exemption will be extended up to year of assessment 2000 and, with effect from year of assessment 1997, at the increased rate of 65%.

Income of a non-citizen employed in a managerial capacity with an offshore company in Labuan is also 50% exempt. This exemption will also be extended up to year of assessment 2000 without any change in the rate.

LABUAN OFFSHORE TRUSTS AND OFFSHORE COMPANIES

Effective from year of assessment 1997, an offshore trust will be defined by reference to the Labuan Offshore Trusts Act 1996 which was gazetted on 26th October 1996 and will come into force on a date to be appointed

The Offshore Companies Act is to be amended to allow Malaysians to own offshore companies and for non-Malaysian owned offshore companies to undertake portfolio investment in Malaysia

THE 1997 BUDGET CHANGES

DUTY-FREE GOODS AND ROAD TAX

With effect from 25th October 1996, duty-free goods can be enjoyed after a stay of only 24 hours in Labuan, reduced from the previous 72 hours.

Road tax in Labuan is to be reduced to 50% of normal rates with effect from 1st January 1997.

REAL PROPERTY GAINS TAX

DEFINITION OF RELATIVE

The definition of a relative will no longer include uncle, aunt, nephew, niece and cousin but will continue to include child, brother, sister, ancestor and lineal descendant. For the purposes of the tax a relative is a connected person. This change may affect transactions between connected persons, where the disposal is deemed to take place at market value, and the transfer of real property to a company wholly or substantially in exchange for shares, where the gain is effectively 'rolled-over' into the shares.

DATE OF DISPOSAL REDEFINED

Where there is an agreement for the disposal of an asset, the date of the agreement is treated as the date disposal of the asset. With effect from year of assessment 1997, this will only apply where there is an agreement is in writing. In cases where an agreement is not in writing, or where there is no agreement at all, the date of disposal will be the date of completion of the disposal.

INDIRECT TAXES

SERVICE TAX

A number of changes apply to service tax:

- With effect from 25th October 1996, the export of services is to be removed from the scope of the tax. Export means service supplied for and to a person in a country other than Malaysia (excluding Langkawi, Labuan and free zones), provided that the service is not supplied in connection with goods or land situated in Malaysia and that the person is not in Malaysia at the time the service is performed.

- Effective from 1st January 1997, charges made by private hospitals will not be liable to service tax, except for the provision of accommodation and food cost.

- Charges for services provided by approved research and development companies will be exempt. This is also effective from 1st January 1997

- From 1st January 1997 a charge is to be imposed on the issue of credit cards, including those issued free, at the following rates depending upon the period of validity:

	RM
up to one year	50
more than one year but not more than two years	100
more than two years but not more than three years	150
more than three years but not more than four years	200
more than four years	250

- From 21st July 1995, where charges made for taxable services or taxable goods remained unpaid after six months, the appropriate amount of service tax became due on the following day. The concession under which this period was extended to twelve months is to be made statutory with effect from 25th October 1996.

IMPORT DUTY AND SALES TAX

The following changes, all effective from Budget Day, apply to import duty and sales tax:

- A warehouse licenced under s. 65 of the Customs Act 1967, which has been granted an additional licence under s. 65A of the Act, will be deemed to be outside Malaysia and not required to be licenced for sales tax.

- A range of inputs/components used in the manufacture of selected non -taxable goods is to be exempted from sales tax.

- Sales tax is to be abolished on a range of paper and paper products.

- Import duties, export duties and sales tax are to be reduced or abolished on a wide range of goods.

- Import duty, at rates varying from 5% to 20%, is to be imposed on range of heavy machinery.

- Exemption from import duty is to be withdrawn on spares and consumables used in manufacturing, with the exception of products required for research and development, products required for approved training and spares and consumables imported together with equipment/machinery required to start a new business in quantities within the norms of the industry. Spares and consumables are

THE 1997 BUDGET CHANGES

considered to be replacement parts for machinery/equipment used directly or indirectly in production and organic or inorganic consumables used directly or indirectly in the manufacturing process but not embodied into the finished product.

- Exemption from import duty is to be withdrawn on the import of equipment for hotels, except for those which are essential for security or the hygienic preparation of food.

- The exemption from import duty in excess of 3% ad valorem on imported components for the assembly of products for the local market will be curtailed by increasing the threshold limit to 5%.

- Local vehicle assemblers/ manufactures are to be given tax exemption on kits and necessary components for conversion of vehicles to utilise natural gas.

ROAD TAX

With effect from 1st January 1997, the road tax for vehicles powered by natural gas will be reduced to 50% of the normal rate and, for petrol or diesel vehicles converted to use natural gas, to 75% of the normal rate.

INTERNATIONAL PROCUREMENT CENTRE INCENTIVES ("IPCs")

The following incentives will be offered to encourage the establishment off IPCs in Malaysia:

1. approval for expatriate posts to be based on requirements

2. foreign currency accounts with licenced commercial banks of unlimited amount, to be permitted for the retention of export sale proceeds

3. freedom to enter into foreign exchange forward contracts with licenced commercial banks to sell forward export proceeds based on projected sales

4. exemption from the requirements on foreign equity ownership on wholesale and retail trade

5 customs duty exemption for bringing raw materials, components or finished goods into Free Zones or Licenced Manufacturing warehouse for repacking, cargo consolidation and integration before distribution to the final consumers

IPCs, which may be local or foreign companies, must undertake procurement of raw materials, components or finished goods for sale to group related or unrelated companies in Malaysia or abroad. They must satisfy the following requirements:

- incorporated in Malaysia with a minimum paid-up capital of RM500,000

- minimum total business spending of RM1.5 million per year

- minimum annual business turnover of RM100 million

No commencing date has been specified.

NO CHANGE

Income tax and real property gains tax rates were left unchanged, there was no mention of the introduction of sales and service tax and the exemption for overseas income of companies was not extended to the income of individuals and other persons.

WITHHOLDING TAX AND PENALTIES - ILLUSTRATION

Payment to non-resident Tax rate	**Interest** RM20,000 15%	**Royalty** RM20,000 10%
Position before the Budget tax to be withheld	3,000	2,000
increase if unpaid after 30 days 10%	300	200
total amount due	3,300	2,200
increase if unpaid after a further 60 days 5%	165	110
total amount due	3,465	2,310
Position after the Budget tax to be withheld	3,000	2,000
increase if unpaid after 30 days, 10% of gross amount	2,000	2,000
total amount due	5,000	4,000

MUSHARAKAH (PARTNERSHIP)

Introduction

An entrepreneur who has a promising idea for a new venture has a financing problem. How is he to raise the capital necessary to launch the venture ? Borrowing the money is probably out of question. If the normal interest rate is 6% but the venture has a 10% chance of failing within a year, the lender will probably charge interest at a rate of 16%. High interest, plus amortization, will impose heavy fixed costs on the venture from the outset and this will increase the danger of failure, and in turn the interest rate. Moreover, if the venture's prospects can not be predicted with reasonable confidence, it will be very difficult even to calculate an appropriate interest rate. The alternative must be for the entrepreneur to admit a partner to the business who is entitled to receive a portion of profits from the venture, if any, in exchange for contributing the necessary capital to it. The partner's compensation is determined automatically by the fortunes of the business. There is no need to compute an interest rate and there are no fixed costs of debt, the partner will receive his profits only if and as earned.

However, Islam aims at establishing a social order where all individuals are united by bonds of brotherhood and affection like members of one single family. This brotherhood is universal and not parochial. It is not bound by any geographical boundaries and encompasses the whole of mankind and not any one family group, tribe or race.

> Musharakah or shirkah can be defined as a form of partnership

What is Musharakah (equity participation)

Musharakah or *shirkah* can be defined as a form of partnership where two or more persons combine either their capital or labour together, to share the profits, enjoying similar rights and liabilities.

From the very inception of human society, the methods to meet day to day needs have been changing with the change of social, economic, scientific, cultural and political circumstances, especially habits, fashions and the standard of living. These methods regulate the commercial activities and vary from place to place and time to time. The Arab society at the time of the rise of Islam had very simple financing methods and forms of business peculiar to that society.

The advent of the Holy Prophet saw the practice of *musharakah* already prevailing over the commercial activities in Arabia. He not only ratified it, but also himself did business on the basis of *musharakah*.

> The jurists, however, differ over its form, conditions and other details

After *Hijra*, the *muhajireen* and the *ansar* were declared by the Prophet to be brothers. Subsequently they joined as partners, in the form of *musharakah*, *muzara* and *musaqat*, in their trade and commerce. The nature of the transaction, in the different forms, is identical. The difference nomenclature in arabic refers to diverse activities such as *muzara* in agriculture, *musaqat* in gardening and *musharakah* in trade. These four forms were so developed that they became independent institutions and jurists formed detailed rules about them. There is consensus of opinion among the jurists of all schools of thought (including *Hanfia, Maleki, Shafei, Hanbali* and *Shia*) that *musharakah* is a valid and legitimate contract in Islam. The jurists, however, differ over its form, conditions and other details.

Types of Musharakah

Originally *musharakah* or *shirkah* (Partnership) was two types, namely,

(a) *Shirkah al-milk* (non-contractual partnership)

(b) *Shirkah al-uqood* (contractual partnership)

Shirkah al-milk (non-contractual) implies co-ownership and comes into existence when two or more persons happen to get joint-ownership of some asset without having entered into a formal partnership agreement; for example, two persons receiving an inheritance or a gift of land or property which may or may not be divisible. The partners have to share the gift, or inherited property or its income, in accordance with their share in it

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until they decide to divide it. If the property is divisible and the partners still decide to stick together, the *shirkah al-milk* is termed as *ikhtiyariyyah* (voluntary). However, if it is indivisible and they are constrained to stay together, the *shirkah al-milk* is characterised as *jabriyyah* (involuntary).

Shirkah al-uqood (contractual partnership) can, however, be considered a proper partnership because the parties concerned have willingly entered into a contractual agreement for joint investment and the sharing of profits and risks. The agreement need not necessarily be formal and written, it could be informal and oral. Just as in *mudarabah*, the profits can be shared in any equitably agreed proportion. Losses must, however, be shared in proportion to the capital contribution.

Shirkah al-uqood has been divided in the *fiqh* books into four kinds :

- *al-mufawadah* (full authority and obligation);
- *al-inan* (restricted authority and obligation);
- *al-abdan* (labour, skill and management);
- *al-wujuh* (goodwill, credit-worthiness and contracts)

In the case of *mufawadah* the partners are adults, equal in their capital contribution, their ability to undertake responsibility and their share of profits and losses. They have full authority to act on behalf of the others and are jointly and severally responsible for the liabilities of their partnership business, provided that such liabilities have been incurred in the ordinary course of business. Thus each partner can act as an agent (*wakil*) for the partnership business and stand as surety or guarantor (*kafil*) for the other partners.

Inan on the other hand implies that all partners need not be adults or have an equal share in the capital. They are not equally responsible for the management of the business. Accordingly, their share in profits may be unequal, but this must be clearly specified in the partnership contract. Their share in losses would of course be in accordance with their capital contributions. Thus in *shirkah al-inan* the partners act as agents but not as sureties for their colleagues.

Shirkah al-abdan is where the partners contribute their skills and efforts to the management of the business without contributing to the capital.

> Islam aims at establishing a social order where all individuals are united by bonds of brotherhood and affection like members of one single family

In *shirkah al-wujuh* the partners use their goodwill, their credit-worthiness and their contracts for promoting their business without contributing to the capital. Both these forms for partnership, where the partners do not contribute any capital, would remain confined essentially to small-scale businesses only.

These are of course models. In practise, however, the partners may contribute not only finance but also labour, management and skills, and credit and goodwill, although not necessarily equally.

Types of Modern Musharakah and its Conditions

The modern business concerns being run on the basis of *musharakah* (as defined above) are as under :

1. Partnership: It is regulated by-
   (a) Partnership rules framed by the government,
   (b) Business practices prevailing in the business community.
2. Limited company. This type of *musharakah* is strictly controlled by the statutory rules framed by the government. Its commercial activities are, however, influenced by the business practices (*urf*).
3. Co-operative societies. This *musharakah* is also governed by statutory rules. Its commercial activities are influenced by the practices prevailing in the business community.

The above modern *musharakah* principally resembles *shirkah al-inan*. The details are, however, considerably different due to change of urf and other factors including modern commercial techniques, economic conditions and legal requirements. Let us discuss briefly the conditions of *musharakah*, which are those of *shirkah al-inan*. Other types of *musharakah* mentioned by jurists are nearly obsolete nowadays.

MUSHARAKAH (PARTNERSHIP)

> Musharakah is run and managed by the will and equal rights of participation of all the partners

Capital to be invested by the partners may be unequal. For the majority of the jurists the capital should be in the shape of currency and not in the shape of goods. The condition for capital to be in the form of currency only was imposed when it was difficult to refer to the goods in terms of currency. This was true in the days of barter systems when the jurists framed the rules, but now goods are generally referred or accounted for in terms of currency. This condition should, therefore, be waived. In limited companies and co-operative societies the capital is invested in the form of equal units of currency called shares and the intended partners buy as many shares as they wish. This practice has universally been accepted as *urf* and is therefore according to Islamic principles.

Management

Musharakah is run and managed by the will and equal rights of participation of all the partners. Different aspects of *musharakah* business are as follows :-

1. Every partner is an agent for the others, as all the partners benefit from the *musharakah* business. When a contract of *musharakah* is made the condition of agency is automatically presumed to be in existence in the contract. The actual possession of a partner over a property of the *musharakah* business is considered as possession of other partners in as much as if a partner purchases half portion of a specific good for himself and half portion thereof for the *musharakah*. When he takes possession of that specific good, this possession will be considered as possession of all the partners. If, however, a partner purchases some goods for himself only, it is exclusively for him and not for the *musharakah* business.

2. Every partner enjoys equal rights in all respects in the absence of any condition to the contrary.

3. Any condition regarding participation in and administration of the *musharakah* and variation in the share of profit in this ground is valid. The contract of *musharakah* is not invalid on grounds of a condition of non-participation in the *musharakah* business, but on the ground that a share in the profit exists.

4. Every partner has a right to participate actively in the affairs of *musharakah* if he wishes.

In all modern forms of *musharakah*, the partners have equal rights as mentioned above. In the limited companies and co-operative societies the shareholders delegate their powers (rights in respect of administration etc.) to some among them to be called directors or given any other appropriate title. In a partnership concern the partners, by a mutual agreement, distribute among themselves their responsibilities, duties and jobs. As mentioned above these practices are valid being urf of business community.

Distribution of Profit

The basis for entitlement to the profits of a *musharakah* are capital, active participation in the *musharakah* business and responsibility. Profits are to be distributed among the partners in business on the basis of proportions settled by them in advance. The share of every party in profit must be determined as a proportion or percentage. No fixed amount can be settled for any party.

Limited companies and co-operative societies distribute their profit according to the capital of share-holders. If any share-holder participates actively in these modern *musharakah* he is paid for it and such payments are regarded as the expenditure of *musharakah*. This is modern *urf* and there is nothing un-Islamic in this *urf*.

Liability of Loss

All the jurists are, unanimously, of the view that the loss shall be borne by the partners according their capitals. In all forms of *musharakah* (i.e. limited companies, co-operative societies and partnership) the loss is borne on the basis of capital invested.

There can be little doubt, after the citations above, of the unanimity of the principle. The jurists have categorically laid down that a party which has no capital invested in an enterprise, does not have to share its loss. From the explanation of the jurists, it is clear that it

> Every partner enjoys equal rights in all respects in the absence of any condition to the contrary

is not possible, after investment of capital, to avoid the risk of loss in the enterprise. This is a direct consequence of the prohibition of interest in Islam and is of fundamental importance for our analysis. The jurists point out that this is because of the fact that loss means destruction of a part of the capital and hence, as it occurs, is a liability of the owner of capital alone.

However, according to modern commercial practices the loss does not cut down the respective capitals of the partners or share-holders, but remains as it is in the accounts books of the *musharakah* in order to be adjusted against the future profits. It is pertinent to note that while adjusting the loss against future profits the accounting procedure automatically works in a manner so as to bear on the capitals subsequently.

Withdrawals of Members

In the early days of Islam the *musharakah* were generally formed on a short term basis, mostly of a joint venture type. It was, therefore, quite easy for a partner to withdraw from a *musharakah*. The withdrawal did not create many problems such as the taxation of capital expenditure, the continuous nature of business activities and goodwill. This is why the old jurists did not feel any need to impose restrictions on the withdrawal of a partner, but in the present complicated commercial practices, legal requirements and public control entangle a *musharakah* for a considerable period so deeply and firmly that no partner or shareholder can be absolved of his liability as such. So according to a modem *urf* the shareholder of a limited company cannot withdraw from it and receive back his capital invested therein. He can, however, sell his share to any person desirous of becoming a shareholder of that company. In a partnership business a partner can be permitted to withdraw and receive his capital back after fulfilling his liabilities as a partner according to terms and conditions settled between the partners.

> A distinguishing feature of modern *musharakah* (except the partnership) is the limited liability of their shareholders

Limited Liability

A distinguishing feature of modern *musharakah* (except the partnership) is the limited liability of their shareholders. They cannot be held liable for more than the amount of capital they have invested. This requirement makes it necessary to regard the *musharakah* as an entity separate from the individuality of the shareholders. This common *urf* has given way to safe and stable *musharakah* resulting in big commercial organizations and flourishing business.

To sum up this section, the *shirkah alInan*, which implies unequal shares and is recognised by all schools, may tend to be the most popular. In this case, the profits are divided in accordance with a contractually agreed proportion, since the *shariah* admits an entitlement to profit arising from a partner's contribution to any of the business assets. However, the *shariah* makes it clear that losses are to be shared in proportion to the contribution made to capital. This is because losses, constitute an erosion in equity and must be charged to the capital. If a loss has been incurred in one period, it must be offset against profits in the subsequent periods until the entire loss has been written off and the capital sum restored to its original level. However, until the total loss has been written off; any distribution of "profit" will be considered as an advance to the partners. Accordingly, it would be desirable to build reserves from profits to offset any losses that may be incurred in the future.

The real world situation may be a combination of *mudarabah* and *musharakah* where all partners contribute to the capital but not to the entrepreneurship and management. In this case profits need not be shared in accordance with capital contributions. They may be shared in any proportion agreed to by the partners, depending on their contribution to the success and profitability of the business.

Equity Financing

Equity financing in an Islamic economy may have to be for either an indefinite period, as it is in the case of the stock of the joint stock companies or shares in partnerships, or a definite (short, medium or long) period as it is in the case of borrowed capital (loans, advances, bonds and debentures). Since borrowed capital would also be on the basis of profit and loss sharing and could not be interest-based, it would be in the nature of temporary equity financing and would mature on the expiry of the specified period. Such financing would hence not carry the same connotation as it does in the capitalist economies. It would, like equity capital but unlike *qard alhasanah*,

not enjoy any lien on the assets of the firm.

The inability to secure a lien on the assets of the business financed, possible in the case of interest-based lending, would make the financiers more careful in evaluating the prospects of the business and cautious in providing finance. Moreover, it would be difficult to find medium or long term financing in an Islamic economy without sharing the ownership and control of the business. Expansion of the business would hence be closely related to the distribution of ownership and control. Similarly it would not be possible for anyone to earn an income on savings without being willing to share in the risks of business. Thus ownership, fruits and risks of business would become more widely distributed in an Islamic economy than is possible under capitalism.

There are three types of borrowers who are looking for funds to satisfy their financing needs. These are (i) private sector investors looking for funds to finance their expanding business; (ii) private sector borrowers seeking funds to finance their consumption needs; and (iii) governments seeking funds to finance their budgetary deficits. Can the needs of all three categories of borrowers be satisfied within the framework of equity financing? It is only the subject of private sector equity finance which is discussed in this section.

Channels of Equity in an Islamic Society

Islamic banking is equity-oriented and the Islamic instruments of financing would ideally be based on profit and loss sharing. This would bring a fundamental change in the role of Islamic banks and would convert them from creditors to partners.

The channels that equity investment may take in an Islamic society are the same as elsewhere, namely, sole proprietorship, partnership (including both *mudarabah* and *musharakah*) and joint stock companies. Cooperation can also play an important role in an Islamic economy because of its harmony with the value system of Islam and the valuable contribution it can make to the realisation of its goals.

> The Islamic system should be able to ensure justice between the entrepreneur and the financier

(i) **Sole Proprietorship**

Generally speaking, the entrepreneur depends essentially in this case on his own finance and management. He may be able to supplement his financial resources by supplier's credits which played an important role in Muslim society in the past and tends to be a major source of short-term capital.

If the sole proprietor needs substantial extra resources on a temporary basis for a specific consignment or profitable opportunities, he may raise the necessary finance from individuals or firms or financial institutions on a profit and loss sharing basis, in which case his sole proprietorship will merge into the *mudarabah* form of organisation. If his need for funds is of a permanent nature, he may consider the entry into his business of other partners and take advantage of the *mudarabah* or *musharakah* forms of partnership, depending on whether he needs merely finance or managerial ability as well to complement his own business talent.

What this implies is that an enterprising businessman in an Islamic society need not be constrained in his ambitions by his own finance. He can still expand his business by securing funds on a profit and loss sharing basis. This should actually be better for him as well as the financier in terms of justice; the entrepreneur does not have to pay a predetermined rate of return irrespective of the outcome of his business and the financier does not get a low return even when the business is paying high dividends. Since the ultimate outcome of business is uncertain, one or other of the two parties, entrepreneur or financier, suffers from injustice in an interest-based arrangement and Islam wishes to eliminate injustice.

To sum up the sole proprietorship form of business organisation, along with *mudarabah* financing, needs to be encouraged as it will help achieve the goals of Islam. It provides self-employment, and enables the entrepreneur to stay in his own town or village, thus helping reduce concentration of population in a few large urban centres.

(ii) **Partnership**

It is the relationship which exists between two or more persons carrying on a busi-

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ness in common with a view to profit.

The definition provides us with three requirements for a partnership in that there must be a business, that it must be trading (carrying on), and that it must have the capability of making a profit.

Where, at the beginning of a business, one partner provides, say RM5,000 in cash and the other provides the professional skill and expertise to make the venture work it will be a matter for them to decide how the rewards of the business are to be shared out. In the absence of any agreement no interest will be paid on capital, profits will be divided equally and, in the event of a dissolution, the second partner will be required to bear an equal share of any loss of capital, although he will not be entitled to share in the increase in value of capital unless it has been turned into partnership property.

The distinctive features of the partnership is the right of each of the partners to participate in running the firm and it is this right which gives rise to a number of obligations which partners have towards each other. If it is accepted that each partner participates then it is obviously important that there is a sound relationship between them.

Partnership in an Islamic society may take one of two juristic forms, *mudarabah* or *musharakah*. The Islamic jurists have proposed other forms of partnership to provide credit and finance for Agricultural, manufacturing and trading purposes. These are:

(1) Consecutive Partnership

This instrument of financing is a real innovation on the part of the Islamic banks. The formula is used as a basis for the distribution of profits among depositors, who, in Islamic banks, hold a middle place between shareholders of equity, on the one hand and depositors and or lenders on the other. (Consecutive partnership formula, practised by all Islamic banks, considers depositors of one financial year as partners in the proceeds of that financial year, regardless of matching between the periods of projects in which their funds were used. Indeed, even some proceeds pending from previous years, for which accruals or provisions were made, are included in the proceeds of the year in question. On the other hand, some yields corresponding to the said financial year are excluded, if they are not yet due, and left to a future year.

Such an accounting system was necessary to reconcile the depositors' need to withdraw funds, regardless of the liquidation of investment in which their funds are used, with the continuity of the bank's investments which constantly flow in a mixed basket, and the need to make regular accounts every financial year, as an accounting unit for this basket.

(2) Agricultural Partnerships

Privately owned agricultural land could be exploited in one of the three ways: (a) directly by the owner, (b) indirectly by renting it (ijara), (c) through agricultural partnership.

The two main frameworks in traditional Islamic law for agricultural enterprise are (a) *muzara'a* (share cropping) and *musaqat* (water partnership or tree-sharing). Both these techniques typically afford a partnership between capital and labour.

(a) Sharecropping

Muzara'a (sharecropping or crop partnership) is a contract whereby the landlord puts his agricultural land at the farmer's disposal to farm and the farmer undertakes to give the owner an amount of the agricultural products. This framework is, of course, based on the generally accepted view that there should be a partnership between capital and labour.

(b) Tree-sharing

A contract is termed *musaqat* (water partnership or tree-sharing) when one person strikes a deal with another person calling for the latter to trim and water those fruit trees whose fruits

are either one's own, or are at his disposal, in exchange for an amount of the fruits, as agreed upon. If a contract of *musaqat* or tree-sharing related to fruitless trees, like willows and sycophants, it is not valid. However, it would be valid in such trees as henna whose leaves are used or in those trees whose flowers are used.

(iii) **A combination of sole proprietorship and partnership**

In practice, business organisations would reflect a combination of sole proprietorship and *mudarabah* or a combination of *musharakah* and *mudarabah*. Not all savers can, or are interested in participating in the management of a business and may be just looking for opportunities to invest their surplus funds for short, medium or long-term periods.

They could in this case make financing available to ongoing businesses and share in the profits and losses in accordance with agreed ratios.

(iv) **Joint stock companies**

These constitute along with financial institutions the most convenient form of investment available to a majority of savers, who have neither their own businesses to invest in nor the ability to evaluate running business or become sleeping partners. Corporate shares would be more attractive to them because of the relative case with which they can acquire them when they wish to invest, or to sell them when they need the liquidity. In the light of Islamic teachings it will however be necessary to reform joint stock companies to safeguard the interests of share holders and consumers, and also to reform stock exchanges to ensure that share prices reflect more or less the underlying economic conditions and do not fluctuate erratically in response to speculative forces.

> The elimination of interest and its replacement by profit-loss-sharing would not only change the level of uncertainty but also redistribute the consequences of uncertainty over all parties to a business

(v) **Cooperation**

In addition to the above forms of business organisation, which are all profit-oriented, "cooperation", which is service oriented, could make a rich contribution to the realisation of the goals of an Islamic economy. With the emphasis of Islam on brotherhood, "cooperation" in its various forms to solve the mutual problems of producers, businesses, consumers, savers, and investors should receive considerable emphasis in a Muslim society.

Cooperative societies could render a number of valuable services to members, including temporary financial accommodation when necessary through a mutual fund, the economies of bulk purchases and sales, maintenance facilities, advisory services, assistance or training for solving management and technical problems, and mutual insurance. Cooperation is a mutually beneficial relationship for all concerned, and everyone's participation is completely voluntary.

Informal cooperation between craftsmen and businesses is quite widespread in Muslim history. In all these forms of informal cooperation, businesses rendered services to each other without receiving any profit, commission or remuneration. These different forms reflected not only Islamic brotherhood and mutual trust but also fulfilled the common needs of businessmen on a mutually cooperative basis.

Historical experience has shown that during the *jahiliyah* (prelslamic) period, trade (over many territories) stretched over long distances and all financial resources were mobilised on the basis of either interest or *mudarabah* and *musharakah*. Islam, however, abolished the interest basis and organised the entire production and trade on the basis of *mudarabah* and *musharakah*. With the abolition of interest, economic activity in the Muslim world did not suffer any decline. In fact there was increased prosperity.

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A combination of several economic and political factors, including the ability to mobilise adequate financial resources, were responsible, for this prosperity. All these factors together provided a great boost to trade which flourished from Morocco and Spain in the west, to India and China in the east, Central Asia in the north, and Africa in the south. Therefore, the economic prosperity in the Muslim world had made possible a development of industrial skill which brought the artistic value of the products to an unequalled height.

Mudarabah and *musharakah* were the basic methods, by which financial resources were mobilised with entrepreneurial and managerial skills for purposes of expanding long-distance trade and supporting crafts and manufacture. They fulfilled the needs of commerce and industry and enabled them to thrive to the optimum level given the prevailing technological environment.

Steps To Transfer To An Equity Financing System

It was mentioned earlier that to abolish interest implies that all businesses in Muslim countries, including industry and agriculture, currently operating on the basis of a mix of equity and interest-based loans, would have to become primarily equity based.

This requires that all financial needs of a permanent nature, whether for fixed or working capital, should normally be expected to come out of equity capital in an Islamic economy. This broader equity-capital base may be supported to the extent necessary by medium-and long-term *mudarabah* advances. Short-term loan financing, even though in a profit-and-loss sharing framework, may be resorted to only for bridge-financing or temporary shortage of liquidity resulting from seasonal peaks in business for which purpose it may not be desirable or feasible to have a permanent increase in equity.

A number of steps would need to be taken to bring about the transformation to an equity-based financing system in the gradual Islamisation of the economy of Muslim countries.

Firstly, projects should be selected for funding through partnerships primarily on the basis of their expected profitability rather than the creditworthiness or solvency of the borrower. This factor, together with the predominance of equity markets and absence of debt markets, has led Muslims scholars to conclude that, potentially, in an-Islamic system, there would be : (a) a greater number and variety of investment projects that would be seeking financing; (b) a more cautious, selective, and perhaps more efficient project selection by the savers and investors; and (c) a greater involvement by the public in investment and entrepreneurial activities, particularly as private equity markets develop.

Secondly, to enable firms to increase their equity it may be necessary to "regularise" the existing stock of "black" money (arising from tax evasion), the major outlet for which currently is mainly capital outflows or conspicuous consumption. This move should help draw a substantial volume of such funds into the fold of investment. Without this move it may be difficult to equity because there may not be sufficient volume of "white" money in the economy for this purpose. In the next chapter we will be discussing this issue in the context of the middle east stock markets.

Thirdly, tax laws should be revised to treat interest payments in the same way as dividends and profits are now being treated, and taxes should be levied on gross profits before interest payments. In fact, it would be desirable to impose a higher rate of tax on the interest portion of the gross income than that applied to profits to accelerate the transformation to an equity-based financing structure.

Fourthly, the tax structure of Muslim countries should be streamlined to ensure that it does not discourage investment and channel even legally earned profits into "black" money. While Islam does allow the levying of taxes to a reasonable extent to meet all necessary and desirable state expenditures, it does not permit an unjust tax structure which penalises honesty and creates the un-Islamic tendency of evading taxes.

Finally, the formation of appropriate financial institutions and investment banks should be encouraged to make venture capital available to businesses and industries and thus enable them to undertake necessary investments. In the process they would also provide investment opportunities, for direct investment, or are unable to find lucrative opportunities, for direct investment, or are unable to locate partners or *mudaribs* for profitable investment of their savings.

Role of Equity Financing in Mobilizing Funds

Given Islam's emphasis on equity financing, there should be a greater urge to save for investment in one's own business. If there are profitable opportunities for investment which cannot be exploited by reliance merely on internal cash flows, access could be had for premises, equipment and supplies through leasing, *murabaha* or *bai muajjal*, and supplier's credits. Businesses desiring further expansion could also mobilise resources on the basis of profit, *mudarabah* or *musharakah*. Market forces will take care of those who act in a self-defeating manner. Nevertheless, a state-regulated proper auditing system can be instituted to safeguard the interest of investors.

Joint stock companies should also play an important role in an Islamic economy. Their shares would be available to investors who are not active or do not wish to make their funds available to sole proprietors or partnerships. Corporate equities constitute a substantial proportion of total capital formation in capitalist societies.

In an Islamic economy, it is always possible for an individual investor to diversify and reduce his risk by making financial institutions and investment trusts a vehicle for his investment because such institutions diversify their own risk by properly regulating their exposure to different sectors of the economy as do individuals and firms. It must be clearly understood that the return on equity in an Islamic economy will not be equal to just "profit" but will rather be the sum of what constitutes "interest plus profit" in the capitalist economy and is called "return on capital". It will include the reward for saving and risk-taking, on the one hand, and entrepreneurship, management and innovation, on the other.

Hence the Islamic system should be able to ensure justice between the entrepreneur and the financier. No one would be assured of a predetermined rate of return. One must participate in the risk and share in the outcome of business. This may not necessarily change the total outcome. It would no doubt change the distribution of the total outcome in accordance with the Islamic norm of socio-economic justice. It would also eliminate the erratic and irrational fluctuation cautious.

> Islamic banking tends to reduce the vulnerability of the capital importing country to fluctuations in the level of capital inflows and to a sharp slowdown of new investment due to uncertainty among investors

Empirically, the simulation of an econometric model of a given economy has been successfully tried to evaluate stability. The results of such investigations, however, lack the generality of analytical results. Furthermore, this approach cannot be employed in the present case since a full-fledged Islamic economic system does not as yet exist.

Analytical methods of examining stability have also been developed by economists and have provided important general results. Such methods have not yet been applied to study an Islamic economy and have in any case their own limitations. More importantly, stability is quite responsive to government action and regulations, hence a definitive analysis requires the specification of several institutional details.

All things considered, there appears to be room for offering some remarks on the stability of an equity-based Islamic economy. The profit in the equity-based system will be dependent on the profit-sharing ratio and the ultimate outcome of the business. The share of the entrepreneur or financier cannot fluctuate violently from month to month. Moreover the distribution of the total return on capital (profit plus interest) between the entrepreneur and the financier would be determined more equitably by economic considerations and not by speculative financial market forces. In case of dividends it can however, be reduced in bad times and, in extreme situations, even passed. So the burden of finance by shares is less. There is no doubt that in good times an increased dividend would be expected, but it is precisely in such times that the burden of higher dividend can be borne.

This factor should tend to have the effect of substantially reducing business failures, and in return dampening, rather than accentuating, economic instability. Minsky argues that when each firm finances its own cash flow and plans to invest its own retained profits, there is no problem of effective demand, the financial system is robust and investment has great inertia. When firms can raise outside finance direct from rentiers or through the banks, they are liable to instability. Schemes of investment are planned that are viable

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only if the overall rate of investment continues to rise. A fragile debt structure is built up. When the acceleration in the rate of investment tapers off, some businesses find current receipts less than current obligations, and a financial collapse occurs. During a boom, equity holders experience capital gains and increase the ratio of expenditure to income; when the boom breaks, thriftiness increases. Thus, long-run average growth may occur in cycles.

Interest rate volatility has defeated all efforts to restore stability to exchange rates. In a fixed parity system it is impossible to keep the exchange rates pegged because of the movement of "hot" money to take advantage of interest rate differentials. The effort to keep the exchange rate pegged leads to a significant loss of central bank reserves and impairs confidence in the strength of the currency. In a floating exchange rate system where the rate tries to find its own equilibrium level and fluctuate excessively from day to day in response to international interest rate movements bearing no relationship to underlying economic conditions, it becomes difficult to predict exchange rates. This renders long-term planning almost impossible. A country facing a recession is unable to keep its interest rates low because such a policy leads to an outflow of funds, depreciates the exchange rate of its currency, and raises the cost of living. To prevent an even deeper plunge in the value of its currency, the recession-ridden country is forced to maintain interest rates at a higher level than dictated by the need for recovery. This, in turn, slows down the recovery and undermines confidence in the government.

The elimination of interest and its replacement by profit-loss-sharing would not only change the level of uncertainty but also redistribute the consequences of uncertainty over all parties to a business. It would moreover, by removing the daily destabilising influence of fluctuating interest rates, bring about a commitment of funds for a longer period and also introduce a discipline in investment decisions. In such an environment the strength or weakness of a currency would tend to depend on the underlying strength of the economy, particularly the rate of inflation, and exchange rates. Accompanied by the Islamic emphasis on internal stability in the value of money, exchange rates should prove to be more stable because all other factors influencing exchange rates, such as cyclical developments, structural imbalances and differences in growth rates, developments, structural imbalances and differences in growth rates, are of a long-run nature and influence expectations about long-term trends in exchange rates.

Moreover, in the Islamic system, there will also be a greater interdependence and a closer relationship between the investment and deposit yields because banks can primarily accept investment deposits on the basis of profit sharing and can provide funds to the enterprises on the same basis. Due to the fact that the return to liabilities will be a direct function of the return to asset portfolios and also because assets are created in response to investment opportunities in a real sector, the return to financing is removed from the cost side and relegated to the profit side, thereby allowing the rate of return to financing to be determined by productivity in the real sector. It will be the real sector that determines the rate of return to the financial sector in the Islamic financial system rather than the other way around. For these reasons, Islamic banking tends to reduce the vulnerability of the capital importing country to fluctuations in the level of capital inflows and to a sharp slowdown of new investment due to uncertainty among investors.

In the Islamic system, no such instability exists when a bank, rather than issuing fixed liabilities, issues shares to its depositors. In this case, assets acquired by the banks are transparent. Also the welfare of a depositor does not depend on the actions of other depositors, because each gets a share in the bank's value which is independent of whether some withdraw their shares while others do not. In fact there is a greater incentive to remain in the bank when it suffers a decline in the value of its assets because otherwise it will mean acceptance of a loss on initial deposit, whereas retaining shares in the bank will give hope for a revaluation of the bank's assets in the future. Perhaps the greatest advantage of such a system is that it not only resolves the bank's problem of panic among its clients but it also does not require the provision of deposit insurance and other government interventions surrounding banking institutions.

THE RIGHT TO CHALLENGE TAX CASES

By
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Statute-Barred- Assessments Made After 12 years

The Director General of Inland Revenue is empowered under section 91(1) and (3) to raise assessments after a lapse of 12 years in cases of fraud, wilful default or negligence and the onus of proof is upon the Director General. The legality of raising assessments after a lapse of 12 years was raised in Government of Malaysia v Gan Chuan Lian [1992]1 MLJ 449.

FACTS

In this case the facts in brief were:

i. the Director General issued notices of additional assessments for income tax in 1995 and 1986 in respect of years of assessment 1967 to 1973.

ii. the taxpayer failed to pay the taxes and the Director General applied for and obtained a summary judgment .

iii. the taxpayer appealed to the High Court.

Under section 91(1), the Director General can raise assessments within a period of 12 years of a relevant year of assessment.

Under section 91(3) the Director General can raise assessments at any time in cases of loss of tax attributable to fraud, wilful default or negligence on the part of the taxpayer.

It will be noticed that the issue was not whether the Director General had the right to issue the assessment but whether the Director General discharged his onus - that is to prove fraud, wilful default or negligence on the part of the taxpayer. The Director General failed to raise this issue in his pleading. And the general rule is that parties are bound by their pleadings . In Government of Malaysia v Ng Song Choon [1975] 1 MLJ 131 Arulanandom J said of a similar case thus:

"In this case the plaintiff relies on s 91(3) for the legality and validity of its assessments but s 91(3) only gives the Director General a right to impose tax for any year of assessment where it appears to him that (a) any form of fraud or wilful default has been committed by or on behalf of any person; or (b) any person has been negligent. As this is a penal law it must be construed strictly and therefore the courts can only pronounce judgment on the claim if the claim is supported by allegations of fraud or wilful default or negligence. It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessment but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or wilful default or negligence on the part of the tax payer before it can decide whether the assessment was barred by limitation . It is essentially a legal issue and it falls outside the scope of s 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court. Although this may be a tax case as was stated earlier one cannot read more into the Act than what is expressly and unambiguously stated. The taxpayer, the defendant in this case, is not precluded from raising the plea that the claim is statute-barred and until and unless the court is satisfied that the Director General exercised his powers correctly when making the assessment under s 91(3) the court cannot possibly adjudicate."

> The case has far reaching implication for tax administration for it was once thought there was no appeal from a penalty

Mohamed Noor J in the case under consideration was in complete agreement with the observations of Arulamandom J as cited above. His Lordship added that Revenue should have raised the issue of fraud, wilful default and negligence at the stage of O 14 application:

"To my mind, that will be at the stage of O 14 application and by raising the elements of fraud, wilful default or negligence in conformity with the pleadings. As none of these elements have been pleaded by the plaintiff in the affidavit supporting the O-14 application, to my mind, the plaintiff cannot do so now because as the application by the plaintiff is for final judgment, to

allow the plaintiff to do so would be repugnant to the principle of pleadings which dictates that parties are bound by their pleadings."

The assessment in this case was held statute barred for failure of pleading by the Director General. In Government of Malaysia v Chong Woo Yit [1988] 2 M.L.J. 534, it was decided that the Revenue could go beyond the 12 years. It is not very clear from this case if the Revenue proved fraud, wilful default or negligence. But Mohamed Noor J said of Chong Woo Yit and NTS Arumugam Pillai Government Of Malaysia (1976) 2 MLJ, thus:

"The Supreme Court recognized the burden on the part of the Revenue to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment for the purpose of an assessment or additional assessment of tax under s 91 of the Act not made in any year of assessment or within 12 years after its expiration. Therefore, it follows that if the Revenue fails to discharge that burden it cannot legally make the additional assessment after a lapse of 12 years. To my mind, in that restrictive sense, limitation can be said to exist."

Certificate under section 142(1) & (2):

A certificate issued under section 142(1) of the Income Tax Act, 1967 is sufficient authority for the court to give judgment for the amount stated in the certificate . This principle has been well established in leading cases such as Government of Malaysia v DC [1973] 1 M.L.J.161. In 1992 it was again raised in the case of Government of the Federation of Malaysia v Lee Tain Tshung [1992], MLJ 629. In this case the Director General claimed $592,524.24 from the defendant and there was a delay of six months in applying for summary judgment . In this case, Syed Ahmad I did JC (as he then was)

"Whether the applicant has a right of appeal to the commissioners against imposition of the penalty depends on whether the penalty can be considered to be on assessment within the meaning of s.99(1)."

held that immediately upon the issuance of the certificate the amount of income tax due could no longer be questioned and the certificate is sufficient authority for the court to give judgment particularly where the taxpayer has not proved that the certificate is "neither genuine nor true" . It would appear that there could be cases where section 142 certificate may be insufficient for a judgment where it can be proved that the contents cannot be supported by the facts.

Appeal against penalty

In Kim Thye Co. v Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur [1991]3 CLJ2507, the question arose whether an appeal lies against the imposition of penalty. The facts in brief were:

i. the Inland Revenue Department contended that the taxpayer gave incorrect information to evade timber profit tax and, therefore, imposed a penalty under section 113(2), Income Tax Act 1967.

ii. the taxpayer claimed there was a technical error and that there was no intention to mislead the Revenue and requested the case be sent to the Special Commissioners.

iii. the Revenue refused and required the payment of penalty,

iv. the taxpayer applied for an order of certiorari and in alternative directing the Inland Revenue Department to refer the appeal to the Special Commissioners.

The case has far reaching implication for tax administration for it was once thought there was no appeal from a penalty.

Richard Talalla J viewed the matter right in the following terms:

"Whether the applicant has a right of appeal to the commissioners against imposition of the penalty depends on whether the penalty can be considered to be on assessment within the meaning of s.99(1)."

His Lordship held a penalty imposed as an "assessment":

I am with respect in agreement with the dictum of Wan Hamzah J. as he then was, in Government of Malaysia v Preston Corp. (m) Sdn. Bhd.[1982] 1 MLJ 293 where his Lordship said at p.294:

It should be noted that s.99(1) refers to "assessment" generally and not specifically to assessment of tax ". The question may be asked whether the Director General in fact "made an assessment" when he imposed the penalty. In my opinion there should not be any doubt as to this . The notices which were served on the defendant giving notification of the imposition of the penalty were notices of assessment in form JA which is a form prescribed under s.152 of the Act. The prescribed form contains a column for penalty imposed under s.113(2). Therefore the imposition of the penalty is an assessment, and the assessment of penalty is subject to appeal to the Special Commissioners under s. 99(1). So,in order to contest against the penalty the defendant should lodge an appeal to the Special Commissioners under s.99(1).

THE RIGHT TO CHALLENGE
NOTES

TOPIC	SECTION	REMARKS
Tax Returns	Section 77(1), Income Tax Act 1967	Return forms must be duly completed & returned to Inland Revenue Department within the period extended by Inland Revenue Department .
Non-Receipt of Returns	Section 77(2), Income Tax Act 1967	Within 14 days of the end of March taxpayers must inform Inland Revenue Department that Return Form not received.
New Arrivals	Section 77(3), Income Tax Act 1967	Taxpayers arriving in Malaysia must inform Inland Revenue Department within 2 months of arriving that they are chargeable to tax.
Audited Accounts	Section 77(1), Income Tax Act 1967	Returns issued under Section 77(1) require Audited Accounts in case of incorporated companies. See P.P. v Tee Teong Tong (1964) M.L.J. 288.
Returns Accepted, Assessment	Section 90(1)(a), Income Tax Act 1967	Inland Revenue may accept returns as submitted.
Returns Not Accepted, Assessment	Section 90(1)(b), Income Tax Act 1967	Inland Revenue may reject returns and raise an assessment: "Best Judgment Assessment"
Returns Not Filed	Section 90(2), Income Tax Act 1967	Where taxpayer files no returns Inland Revenue Department can raise an assessment,"best judgment".
Additional Assessment	Section 91(1), Income Tax Act 1967	Time limit - within 12 years after the event where no assessment or insufficient assessment took place.
Increased Assessment	Section 101(8), Income Tax Act, 1967	There must be an agreement under section 101(2) before an increased assessment is raised or there must be final determination by a court.
Reduced Assessment	Section 101(2), Income Tax Act, 1967	As under increased assessment.
Advanced Assessment	Section 92, Income Tax Act, 1967	Inland Revenue Department can raise advance assessments.
Composite Assessment	Section 96A, Income Tax Act, 1967	Composite assessments comprise a number of years. But there must be an agreement between the Inland Revenue Department and taxpayer.
"Discovery"	Section 91(1), Income Tax Act, 1967 Section 91(2), Income Tax Act, 1967	Inland Revenue has right to change its mind. See Ceylon Finance Co. Ltd. v Ellwood 40 T.C. 176.
Fraud, Default & Negligence	Section 90(3) Income Tax Act, 1967 Section 91(1)&(30) Income Tax Act, 1967	Derry v Peek (1889) 14 App. Cas. 337; J.O. Mullan & Co. v. Walmsley 42 T.C. 573. Wellington v Reynolds, 40 T.C. 209 & Re York & Harstons Contract (1885) 31 Ch. 168. Assessments not time barred in case of fraud, default or negligence.
Right of Appeal	Section 99(1) Income Tax Act, 1967	Appeal must be filed within 30 days of notice of assessment.
Written Agreement	Section 101(2) Income Tax Act, 1967	Agreement based on mistake of fact may not be final. See R. v Inspector of Taxes (1993) S.T.C. 122.
Civil Suits	Section 106(1) Income Tax Act, 1967 Section 106(3) Income Tax Act, 1967 Section 142(1) Income Tax Act, 1967	Tax payable, even if appeal is lodged. Stay of execution - Government of Malaysia v. Jasanusa (1995) 2 CLJ 701. Certificate by Director General. Correctness of an assessment can only be decided by the Special Commissioners. See IRC v Napier (1993) STC 815, circumstances where count may intervene.
Order 14	Section 106 Income Tax Act, 1967	Defence of set off is not available to taxpayer see Kerajaan Malaysia v Gan Chuan Lian (1994) 2 CLJ 397.
Case Laws		See Attached Paper

Form JA is of course a form prescribed by the Director General under s.152(1) and as stated by Wan Hamzah J. has a column for the penalty imposed under s.113(2), the amount whereof would have been duly assessed before imposition. The form itself appears to have been designed to fit into the scheme created by ss. 93, 96 and 99(1) of the Act and thus making the assessment of the penalty by a person aggrieved thereby appealable to the Special Commissioners.

HZHS v DGIR [1991] 1 CLJ746

Mandamus and Certiorari

The facts in this case are as follows:

i. the DGIR raised additional assessments on Z.

ii. Z appealed to the Special Commissioners of Income Tax.

iii. Z by way of ex-parte originating motion Under Order 53 Rule 1 of Rules of High Court 1980 sought the following orders from the High Court:

   a. Certiorari to quash the additional assessment.

   b. Mandamus to the DGIR to consider all the facts and documents presented by Z and to determine the additional assessment.

Z claimed breach of natural justice by DGIR

Z argued that he was not obliged to have exhausted his right of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a court of law in seeking an order of certiorari.

Held by Haidar Mohd. Noor J.

i. In Regina v Special Commissioners of Income Tax (1972) 49T. C. 71 it was held that:

> certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice

In answer to the find question we would therefore hold that the discretion is still with the court but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

ii. In Government of Malaysia & Anor v Jagdis Singh (1987) 2 MLJ 191 it was held:

In Re Preston was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not available where an alternative remedy exists except in very exceptional circumstances.

iii. The application is frivolous or vexatious.

H. Industries Bhd. v D.G. of Inland Revenue

i. application for declaration that the Plaintiff as a taxpayer is entitled to the choice of the accounting method by which to reflect its financial position for purposes of income tax.

ii. the Inland Revenue Department is not justified in the facts and circumstances of this case in directing the taxpayer to submit revised tax computations on the "source by source" method in respect of dividend income and interest income as follows:

   a. interest incurred on loans taken for purposes of producing dividend income is strictly restricted to that dividend. Any interest unabsorbed cannot be allowed against another shareholding dividend income. The unabsorbed interest could not be carried forward.

   b. interest received on the loans made by taxpayer the interest incurred on loans taken strictly restricted against each loan made and the unabsorbed interest could not be allowed.

Orders of Court

i. Mandamus - additional assessments.

ii. Declaration - sources of income.

iii. Certiorari - section 108 cases.

Tax Incentives For Shipping - Implications For Shipowners

By

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Introduction

This paper address itself to a very narrow compass of tax incentives to resident Shipping Companies. Malaysian tax policy has recognised that to effect a greater development of the local shipping industry, it must be free of tax. But like all man made laws, there are bound to be grey areas arising from either not a too clear policy or from interpretations of words of a statute.

The Law

Section 54(2) Income Tax Act, 1967 addresses the issue of taxation of resident shipping companies. Section 54A, effective from year of assessment 1984, address itself to the conditions under which Malaysian resident ships are exempt from taxation. And double deduction for freight charges are embodied in the Income Tax (Deduction For Freight Charges) Rules 1995.

Conditions For Exemption

There are four basic conditions that must be met for exemption. These are:

i. the person, including individuals and partnerships and companies must be resident in Malaysia;

ii. the ship must be a Malaysian Ship;

iii. the ship must be transporting passengers or cargo; and

iv. the ship must be sea-going.

Residence of a Company

Section 8(1)(b), Income Tax Act, 1967 determines the residence of a company as the place where "Control and Management" are exercised which means where the board of directors meetings are held.

Malaysian Ship

A Malaysian Ship is defined in section 54A(6), thus:

"Malaysian Ship" means a sea-going ship registered as such under the Merchant Shipping Ordinance 1952, other than a ferry, barge, tug-boat, supply vessel, crew boat, lighter, dredger, fishing boat or other similar vessel. "

Speaking generally, shipowners offer the services of their vessels in two ways

"transporting passengers or cargo" is the business of carrying of passengers, mails, livestock or goods by sea-going Malaysian ships owned by the person and includes the chartering of Malaysian ships by him for such business.

Capital Allowances: Section 54A(2)(a)

The rule in respect of capital allowances is that capital allowances claimed in respect of a Malaysian ship can be allowed against the income exempt and unabsorbed allowances cannot be allowed against other income, if any. Paragraph 75, Schedule 3, allows capital allowances to be carried forward to the subsequent years of assessment until fully absorbed.

Adjusted Losses: Section 54A(2)(b)

Any adjusted loss in respect of a Malaysian ship can only be deducted against exempt income, the balance of such a loss, if any, cannot be allowed against non-exempt income. Section 43, Income Tax Act, 1967 allows unabsorbed losses to be carried forward and allowed against income in subsequent years of assessment. Under this section 43, read with section 54A(2)(b) unabsorbed

losses carried forward can be allowed against exempt income in subsequent years of assessment.

Method of Carrying on Business

The methods employed in the business of shipping is described in Canzer's Carriage By Sea Volume 1 pg. 23 as follows:

"Speaking generally, shipowners offer the services of their vessels in two ways: either the ship is put for a defined voyage, and takes the goods of any persons willing to ship in her; or the owner seeks for a merchant who will employ the whole vessels upon some voyage, or during some period of time, purposes and upon terms to be agreed with him.

When a ship is put up to carry for any persons, indifferently, who may be willing to ship goods on her on the particular voyage, she is said, among lawyers, see Gilmore & Black, Law of Admiralty (1957), p 13 to be employed as a general ship. The expression does not appear to be used by merchantile men, but it is convenient. Putting the ship "on the berth" is a phrase commonly used. When the whole, or substantially the whole, of her services are let to one person, or set of persons, the contract used is known as a charter party, and she is said to be chartered by the merchant. Contracts relating to shipments is general ships are embodied in documents called bills of lading. Charter parties are used to carry our a greater variety of purposes;"

Time Voyages and Charter Voyages are means by which a shipping company carries on its shipping business. In executing such a business it is not necessary that the shipping company own the ships. It could lease them from others.

The case of **S.K. Sdn. Bhd. v Director General of Inland Revenue P.K.R. 643** is before the High Court and the decision would add to the development of law in this area.

> Where there is an agreement for slot hire or space to the exclusive use or exclusion of others, the case for an application of Section 4A(iii) would become tenable

Demise

Under a "demise" the charterer puts his own stores, fuel, oil and hires his own crew. In this instance, the master and crew are servants of the charterer and the charterer has "possession and control" of the ship. The ship owner takes no responsibility for the goods shipped.

Thus, if "A" a shipowner charters or leases his ship to "B", in circumstances where the terms fall under the concept of "demise" of a ship, then the shipowner does not qualify for exemption under section 54A. This is because he is not in the business of "carrying passengers or cargo" in respect of that ship. The operator of the ship would qualify if the other conditions are fulfilled.

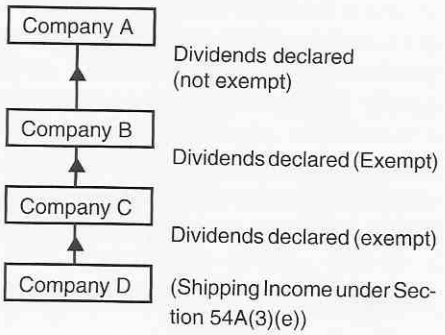
Leases of ships must thus be analysed to establish whether the shipowner qualifies for the exemption or the ship's operator. Note that "Ownership" is not the only condition for the granting of an exemption under section 54A, Income Tax Act, 1967. It also includes chartering, whether the owner charters his ship under a time or voyage charter or where a shipping company leases ships, to carry on the business of transporting passengers or cargo. Thus the owner of a ship who leases his ship to another under a demise agreement is not in the business of transporting passengers or cargo. The operator of the ship is in such a business.

> The renting or leasing of ships resulting in payments for the same may or may not attract Section 4A(iii) withholding tax

Two Tier Exemption

The exemption granted under Section 54A is only to a two tier level. The following illustrates the position.

Diagram I



In the above diagram, the flow of dividends is from Company D to Company A. Note that dividend flows from company B to A are not exempt. This fact must be taken into account when planning shipping ventures or structures.

Withholding taxes: Section 4A(iii), Income Tax Act, 1967

The provisions of section 4A(iii) need to be analysed in respect of the shipping industry. Section 4A(iii) reads as follows:

"rent or other payments not being payments of film rentals where the duty is leviable under the Cinematograph Film Hire Duty Act, 1965 made under any agreement or arrangement for the use of any moveable property".

The following observations can be made:

i. Section 4A(iii) is not applicable to freight charges

ii. Where there is an agreement for slot hire or space to the exclusive use or exclusion of others, the case for an application of Section 4A(iii) would become tenable.

iii. The renting or leasing of ships resulting in payments for the same may or may not attract Section 4A(iii) withholding tax.

Where A leases his ship to B under:

i. a time charter, or

ii. voyage charter, or

iii. demise terms,

Only the rent payable under the demise terms would attract withholding tax as under (i) and (ii) the payments made are freight charges in the business of transporting passengers or cargo. Under the demise terms A is not in the business of transporting passengers or cargo. Yet it might be argued that "A" is in the business renting and should be taxed to income tax under Section 4(a) Income Tax Act, 1967.

Where payments are made to non-residents as in the case of Section 4A(iii) the relevant Double Taxation Agreement must also be studied.

Paragraph 34 Schedule 6 - Employees

Income of any person derived from exercising an employment on board a Malaysian ship as defined in this Act.

For the purpose of this paragraph "a Malaysian Ship" means a ship registered as such under the Merchant Shipping Ordinance 1952.

Income Tax (Deduction For Freight Charges) Rules 1995

The above rules are effective from year of assessment 1994 and subsequent years of assessment.

Under the rules :

"there shall be allowed as a deduction any freight charges incurred by him provided that such freight charges were paid to a Malaysian incorporated shipping company for transportation on board a Malaysian ship".

The meaning of a Malaysian Ship is the same as under 54A(6), Income Tax Act, 1967.

Where a Malaysian Shipowner charters a vessel to a non-Malaysian Company, and the non-Malaysian Company sub-charters the vessel to a Malaysian Company which transports passengers or cargo, any freight charges incurred by any person in respect of such transportation qualifies for double deduction.

Evidence of Freight Paid

The I.R.B. (Inland Revenue Board) has not implemented any set guidelines to the evidence of such payment of freight. But to qualify for a double deduction, the following must be attached (or proved) to the claim:

i. the receipient is a Malaysian incorporated shipping company. (Incorproation documents, if required by the Inland Revenue Board need to be provided otherwise, name and registered address of the company should be sufficient);

ii. the ship must be a Malaysian ship. (Name of ship and registration details, and if necessary a copy of the registration certificate may have to be tendered to the Inland Revenue Board);

iii. receipt of payment; and

iv. identification in the profit and loss accounts, as to where it is charged.

Conclusion

The onus of proof in establishing a claim for exemption under section 54A, Income lax Act, 1967 is upon the taxpayer. It is important, therefore, to keep all

Q U O T E

'The mind grows by what it feeds on.'

-Josiah Gilbert Holland

Minit Dialog Cukai Perkhidmatan-perkhidmatan Eksport

KATA-KATA ALUAN

Puan Pengerusi memberi salam dan mengucapkan terima kasih atas kehadiran semua yang hadir. Tujuan dialog ini diadakan untuk mendapatkan maklumbalas tentang perkhidmatan eksport khususnya bagi mengenalpasti perkhidmatan-perkhidmatan yang boleh dieksport dari skop cukai perkhidmatan dan menentukan kawalan / prosedur terlibat.

Seterusnya Puan Pengerusi memperkenalkan pegawai-pegawai Jabatan dari Cawangan-Cawangan Cukai Perkhidmatan & Eksais, Bahagian Cukai Jualan / Perkhidmatan Ibu Pejabat, dan pegawai-pegawai Bahagian Cukai Dalaman dari stesen Wilayah Persekutuan dan Pelabuhan Kelang yang turut hadir dalam sesi dialog ini.

TAKLIMAT RINGKAS PENDIRIAN JABATAN BERHUBUNG PERKHIDMATAN EKSPORT

Puan Pengerusi memaklumkan bahawa tiada sebarang perubahan dasar atau polisi tentang konsep cukai perkhidmatan termasuk perkhidmatan eksport. Tidak wujud peruntukan bagi perkhidmatan eksport dalam Akta / Peraturan-Peraturan Cukai Perkhidmatan 1975. Seksyen 1 Akta menyatakan Akta ini terpakai di seluruh Malaysia kecuali Langkawi dan Labuan sahaja. Manakala Seksyen 3 Akta menyatakan bahawa cukai perkhidmatan hendaklah dikenakan dan dilevi atas perkhidmatan-perkhidmatan yang bercukai yang disediakan atau dibekalkan oleh atau dalam tempat-tempat perniagaan / perniagaan profesional yang ditetapkan dan atas barang-barang yang ditetapkan yang dijual atau dibekalkan oleh atau dalam tempat-tempat perniagaan yang ditetapkan. Oleh yang demikian, mana-mana barang atau perkhidmatan yang ditetapkan yang disediakan dalam Kawasan Utama Kastam (kecuali Langkawi, Labuan dan Zon Bebas) sama ada penerima ('recipient') berada didalam atau diluar Malaysia adalah tertakluk kepada cukai perkhidmatan. Terdapat satu penjelasan tentang perkhidmatan eksport dalam buku panduan 'Prosedur Cukai Perkhidmatan' yang diterbitkan pada 1992. Malangnya tiada penjelasan lanjut tentang perkara tersebut sehingga menimbulkan berbagai tafsiran dan kekeliruan. Selama Ini Jabatan (Cawangan Cukai Perkhidmatan) berpendirian bahawa hanya sekiranya perkhidmatan disediakan di luar Malaysia dan kepakaran profesional dibawa keluar, barulah bermaksud perkhidmatan eksport dan tidak tertakluk kepada cukai perkhidmatan. Puan Pengerusi menjelaskan bahawa dari segi konsep cukai perkhidmatan tidak sesuai untuk membandingkan perkhidmatan dengan barang.

Memandangkan kini Malaysia telah berkembang dan sedia untuk bersaing, kerajaan menggalakkan perkhidmatan-perkhidmatan untuk eksport atau diberi diperingkat antarabangsa Seksyen 6 Akta memberi kuasa kepada YAB. Menteri untuk memberi pengecualian / pulangbalik cukai perkhidmatan. Oleh yang demikian, untuk perkhidmatan eksport, seksyen ini boleh digunapakai, tetapi perlu mendapatkan kelulusan YAB. Menteri terlebih dahulu dan cara ini akan melibatkan jumlah permohonan yang amat tinggi. Untuk menyenangkan semua pihak, kerajaan sedang mengkaji meminda undang-undang berkenaan. Seterusnya Puan Pengerusi meminta pandangan perkhidmatan-perkhidmatan yang boleh dieksportkan dan tidak perlu dikenakan cukai perkhidmatan dan membuka majlis dialog / perbincangan untuk dimulakan .

SESSI DIALOG / PERBINCANGAN

Perkara 1:
CADANGAN PERKHIDMATAN EKSPORT

Hj. Zakaria mewakili ISM (Persatuan Jurukur Malaysia) meminta penjelasan dan mengemukakan cadangan seperti berikut:

i. Bagi ahli yang dilantik oleh pihak luarnegeri, bayaran dibuat di luarnegeri, cukai perkhidmatan tidak dikenakan.

ii. Memasukkan atau mengadakan peruntukan undang-undang yang khusus bagi perkhidmatan eksport ke dalam Akta & Peraturan Cukai Perkhidmatan. Ini adalah

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kerana didapati perkhidmatan eksport hanya dijelaskan dalam surat pekeliling dan surat ini boleh dipinda bila-bila masa.

Puan Pengerusi menjelaskan bahawa dibawah seksyen 6 Akta, cukai perkhidmatan boleh dikecualikan jika perkhidmatan disediakan di Malaysia untuk pelanggan di luarnegeri. Permohonan pengecualian perlulah dibuat kepada YAB. Menteri.

Berkaitan peruntukan undang-undang, memang hasrat Jabatan untuk mengkaji dan sekiranya wajar mengujudkan peruntukan khusus bagi perkara ini. Ini merupakan salah satu matlamat sesi dialog ini. Cuma dimaklumkan bahawa untuk membuat pindaan akta / undang-undang akan mengambil masa yang agak lama. Contohnya pindaan seksyen 14 Akta menghadkan tempoh pembayaran cukai bagi pembayaran yang belum diterima kepada 6 bulan. Secara pentadbiran kelulusan ini telah dilanjutkan kepada 12 bulan tetapi Akta masih belum dipinda lagi.

En. Beh mewakili MACPA memberi penjelasan berhubung beberapa perkara dan memberi cadangan seperti berikut:

i. Hasil perbincangan pihak Kastam dan MACPA yang lalu, persatuan mereka telah dimaklumkan bahawa tiada peruntukan pengecualian untuk perkhidmatan eksport.

ii. Persatuan pernah memberi cadangan supaya perkhidmatan eksport dikecualikan daripada cukai, dan pihak Jabatan juga telah memberi pengesahan bahawa perkhidmatan eksport ke luarnegeri dan juga melalui "subsidiary company' juga dikecualikan.

iii. Mengkaji dan membandingkan perundangan dan perkhidmatan eksport dengan mana-mana negara-negara yang telah melaksanakan sistem percukaian VAT dan GSP.

iv. Mencadangkan supaya memberi definisi jelas tentang 'Perkhidmatan Eksport'.

Puan Pengerusi menjelaskan mengikut rekod Jabatan, keputusan terdahulu ialah hanya perkhidmatan yang disediakan di luarnegeri sahaja tidak dikenakan cukai. lanya juga telah dijelaskan dalam jurnal "Tax Nasional" yang diterbitkan oleh Malaysian Institute of Taxation.

Namun begitu, beliau bersetuju bahawa definisi perkhidmatan eksport perlu diujudkan dahulu bagi mengenalpasti perkhidmatan eksport. Beliau seterusnya memberitahu bahawa definisi berikut mungkin boleh digunapakai

"Services supplied for and to a person who belongs to a country other than Malaysia, provided that the services are not supplied in connection with land situated inside Malaysia or goods inside Malaysia and the person is not in Malaysia at the time the services are performed"

En. Quah mewakili MIT menimbulkan beberapa masalah berkaitan perkhidmatan eksport sebelum ini

i. Terdapat beberapa kes perkhidmatan yang diberi kepada pelanggan di luarnegeri dikenakan cukai perkhidmatan dan atas kelewatan pembayaran cukai telah dikenakan penalti. Dalam kes ini sekiranya dianggap sebagai perkhidmatan eksport, maka ianya tidak sepatutnya dikenakan cukai dan tidak akan timbul masalah penalti.

ii. Jabatan pernah memberi keputusan bahawa perkhidmatan yang disediakan oleh pelesen di Kawasan Utama Kastam untuk Zon Bebas adalah tidak dikenakan cukai.

Puan Pengerusi meminta En. Quah supaya merujuk perkara ini secara berasingan kepada Ibu Pejabat. Cadangan Jabatan adalah untuk mengadakan peruntukan khusus bagi perkhidmatan eksport bagi tempoh masa hadapan. Berkaitan perkhidmatan eksport ke Zon Bebas, perkara ini akan diambil perhatian.

En. Subramaniam mewakili Bar Council memberi penjelasan dan cadangan berkaitan perkara-perkara berikut:

i. Ahli persatuannya sentiasa mengeluarkan bil kepada pelanggan di luarnegeri

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dengan mengenakan elemen cukai perkhidmatan sekali.

ii. Mencadangkan kepada Jabatan untuk mengkaji perkhidmatan eksport dengan lebih mendalam dengan sistem yang diamalkan di UK dan Singapura. Dinegara-negara ini perkhidmatan eksport tidak dikenakan cukai. Keadaan sekarang mewujudkan "disadvantages" dalam persaingan peringkat antarabangsa sekiranya perkhidmatan yang sama dikenakan cukai perkhidmatan.

Puan Pengerusi bersetuju dengan cadangan tersebut.

En. Boon mewakili MIT memberi pandangan beliau seperti berikut:

i. Perkhidmatan eksport telah dijelaskan dalam buku panduan 'Prosedur Cukai Perkhidmatan'.

ii. Hampir kesemua perkhidmatan adalah wajar dipertimbangkan sebagai perkhidmatan eksport. Oleh itu lebih mudah untuk membuat "exclusion list" bukannya senarai perkhidmatan yang dibenarkan untuk tidak dikenakan cukai apabila dieksport.

iii. Perkhidmatan yang disediakan di luarnegeri adalah tidak berkaitan langsung dengan perkhidmatan eksport. Oleh yang demikian, tidak timbul perkhidmatan eksport dengan Akta Cukai Perkhidmatan 1975 dalam situasi ini.

Puan Pengerusi menjelaskan bahawa pemahaman berkaitan perkhidmatan eksport adalah secara terus sekiranya buku tersebut dibaca sepintas lalu. Namun begitu, setelah kajian dibuat dan berdasarkan keputusan-keputusan terdahulu, didapati keterangan tersebut adalah tidak jelas. Hanya perkhidmatan yang disediakan di luarnegeri dianggap sebagai perkhidmatan eksport.

Majlis bersetuju dengan cadangan untuk mempertimbangkan kesemua perkhidmatan boleh diterima untuk perkhidmatan eksport kecuali perkhidmatan tertentu seperti yang berkaitan dengan tanah. ("service relating to land')

Cik. Teh mewakili MACPA menjelaskan perkara berikut:

i. Syarikat multinasional diberi kemudahan 10% "preferential rate" oleh kerajaan bagi menjalankan perniagaan di Malaysia. Cukai perkhidmatan 5% yang dikenakan akan menambahkan kos dalaman / kos operasi ("internal cost / operational cost"). Dengan demikian keadaan ini seolah-olah kemudahan yang diberi adalah tidak seperti yang dinyatakan.

Puan pengerusi bersetuju perkara ini diberi perhatian.

En. Boon berpendapat bahawa Jabatan perlu melihat dari segi pendapatan ("income") kepada negara. Dengan perkhidmatan eksport, kemasukan hasil adalah sebanyak 95% manakala amaun cukai hanyalah 5% sahaja. Oleh yang demikian, sekiranya skopnya dihadkan dan kawalan untuk perkhidmatan eksport dirumitkan kerana 5% cukai, maka kehilangan pendapatan ("income") negara adalah besar. Beliau mencadangkan supaya Jabatan memberi perhatian keatas perkara ini.

En Mathew mewakili MAS meminta penjelasan tentang perkara berikut:

i. Pihak MAS (local) memberi kontrak untuk iklan Malaysia di luarnegeri.

ii. Pelanggan luarnegeri memberi kontrak untuk iklan di Malaysia

iii. Pelanggan luarnegeri memberi kontrak untuk iklan di dalam dan di luarnegeri.

Puan Pengerusi menjelaskan hanya perkhidmatan yang dibuat di luarnegeri tidak dikenakan cukai. Perkhidmatan-perkhidmatan yang diberikan / dibekalkan kepada orang asing ("a person belonging to a country outside Malaysia") boleh dipertimbangkan sebagai perkhidmatan eksport. Namun begitu, secara konsepnya Jabatan bersetuju bahawa perkhidmatan yang diberi kepada pelanggan luarnegeri tidak dikenakan cukai dan akan memperuntukkannya dalam undang-undang yang berkenaan.

En. Beh memberi pandangan tentang hubungan barangan (goods) dengan perkhidmatan yang

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diberi. Boleh jadi wakil syarikat luarnegeri akan berada di Malaysia untuk mendapat perkhidmatan bagi digunakan di luarnegeri. Oleh yang demikian, definisi eksport berhubung dengan kenyataan "provided the person is not in Malaysia" perlu dikaji dan diberi perhatian yang lebih mendalam.

Perkara 2:
CADANGAN KAWALAN PERKHIDMATAN EKSPORT

Puan Pengerusi menjelaskan tujuan kawalan adalah untuk memastikan dan mengawasi prosedur dan kawalan dokumen dibuat dengan sebaiknya. Ianya bertujuan memastikan penerima perkhidmatan dan hasil perkhidmatan digunakan di luarnegeri serta mengelakkan penipuan. ('export to ghost companies'). Oleh itu beliau meminta pandangan berkaitan kawalan sebagai bukti perkhidmatan telah dieksport.

Hj. Zakaria mencadangkan selain daripada invois, "letter of appointment" adalah mencukupi sebagai bukti perkhidmatan eksport.

En. Quah menjelaskan bahawa invois adalah mencukupi bagi tujuan tersebut. Kadangkala tidak ada perjanjian / "letter of appointment" dibuat, atau hanya atas permintaan sahaja melalui telefon dan sebagainya. Walaubagaimanapun, beliau berpendapat terpulang kepada pelesen untuk membuktikan cara / dokumen tertentu bahawa perkhidmatan telah dieksport. Salah satu caranya adalah bukti tempat pembekalan / penyediaan perkhidmatan "worksite" boleh dipertimbangkan. Oleh yang demikian, tidak perlu dokumen tambahan bagi perkhidmatan eksport. Dokumen yang biasa digunakan dalam perniagaan adalah mencukupi.

Pegawai Bhg. Cukai Jualan Perkhidmatan, Ibu Pejabat, En. Paddy bersetuju bahawa "normal business documents" adalah mencukupi. Namun begitu beliau telah membangkitkan masalah yang timbul untuk bukti eksport sekiranya perkhidmatan dibuat melalui pihak ketiga ("sub-contract").

Hj. Zakaria menimbulkan situasi dimana terdapat kontrak yang diberi kepada satu konsortium tetapi pembekalan / penyediaan perkhidmatan dilakukan oleh dua atau lebih syarikat / pelesen berasingan. Dalam perkara ini pembayaran dibuat kepada konsortium walaupun perkhidmatan dibekalkan melalui lebih daripada satu syarikat / pelesen. Pada pandangan beliau, dokumen pembayaran / kontrak kepada konsortium mencukupi bagi membuktikan perkhidmatan eksport dilakukan oleh syarikat-syarikat / pelesen-pelesen berkaitan. Beliau juga menyentuh tentang perkhidmatan yang diberikan secara berkumpulan ("package') untuk eksport. Cadangan dibuat supaya Jabatan memberi garis panduan yang jelas tentang perkara ini.

En. Lim mewakili PIAM menjelaskan bahawa perkhidmatan insuran adalah lebih rumit daripada lain-lain perkhidmatan. Belau meminta supaya diadakan satu perbincangan secara berasingan diadakan dengan pihak / wakil insuran. Terdapat beberapa prosedur dan kemudahan yang diberikan tidak sesuai dengan perkhidmatan insuran, contohnya sistem kontra.

En Boon mencadangkan supaya prosedur kemudahan CJ5 dijadikan sebagai panduan. Walaubagaimanapun, dirasakan bahawa kawalan Jabatan dengan pemeriksaan akaun mencukupi. Ini adalah kerana menjadi tanggungjawab pelesen untuk membuktikan perkhidmatan eksport sehingga pegawai pemeriksa berpuashati dengan penjelasan dan bukti (dokumen) yang dikemukakan.

Pegawai-pegawai Bahagian Cukai Dalaman dari stesen Wilayah Persekutuan dan Pelabuhan Kelang bersetuju dengan pandangan diatas bahawa "burden of proof" adalah menjadi tanggungjawab pelesen.

Puan Pengerusi memberitahu bahawa segala penjelasan dan pandangan yang diberi akan diberi perhatian. Secara keseluruhan, segala perkhidmatan boleh dianggap sesuai untuk dieksport. Beliau merumuskan hasil dialog dengan persetujuan oleh semua peserta yang hadir seperti berikut:

i. Definisi perkhidmatan eksport perlu diwujudkan.

ii. Perkhidmatan eksport terbuka kepada semua perkhidmatan dengan "exclusion" beberapa perkhidmatan tertentu.

iii. Dokumen perniagaan yang biasa (normal business document) adalah mencukupi sebagai dokumen kawalan eksport. Manakala "burden of proof" adalah menjadi tanggungjawab pelesen.

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LAIN-LAIN HAL

Hj. Zakaria mencadangkan supaya Jabatan menjemput lain-lain badan/persatuan profesional seperti Persatuan Jurutera Profesional (ACEM), Persatuan Perubatan dan lain-lain untuk dialog dan perbincangan akan datang.

Beliau juga membangkitkan masalah interpretasi. Kebiasaannya jabatan kerajaan akan merujuk kepada AG Chambers khususnya perkara-perkara tentang hasil / pungutan cukai. Masalah timbul apabila pegawai bertukar dan pegawai baru bertugas memberi interpretasi yang berbeza. Oleh yang demikian, dicadangkan supaya diwujudkan satu panel khas dari kedua-dua pihak (Kastam & AG) untuk memberi interpretasi sesuatu perkara dan keputusan yang akan diambil.

Beliau juga mencadangkan supaya tempoh pembayaran cukai bagi pembayaran yang belum diterima dilanjutkan daripada tempoh 12 bulan yang dibenarkan sekarang.

Puan Pengerusi memberitahu bahawa jemputan boleh diperluaskan kepada badan-badan profesional lain untuk dialog / perbincangan akan datang. Berkaitan cadangan perlanjutan tempoh melebihi 12 bulan, perkara ini adalah di luar bidang kuasa Jabatan. Terpulang kepada YAB. Menteri untuk menentukannya.

UCAPAN PENUTUP

Puan Pengerusi mengucapkan setinggi penghargaan atas maklumbalas yang diberikan. Jabatan akan memberi perhatian sewajarnya atas perkara yang dibangkitkan dan cadangan-cadangan yang dikemukakan. Minit dialog / perbincangan akan diedarkan kepada semua yang hadir. Sekiranya ada perkara / cadangan tambahan berkaitan isu perkhidmatan eksport, para hadirin diminta mengemukakannya kepada Ibu Pejabat ini secara bertulis.

Puan Pengerusi mengucapkan ribuan terima kasih atas kerjasama dan kehadiran semua peserta dan seterusnya menutup majlis dialog ini.

Disediakan oleh

(BADARUDDIN AHMAD)
Penguasa Kastam
Bahagian Cukai Dalaman
(Caw. Cukai Perkhidmatan)
Ibu Pejabat

Disahkan oleh

(LYDIA WONG)
Pen. Kanan Pengarah Kastam
Bahagian Cukai Dalaman
(Caw. Cukai Perkhidmatan)
Ibu Pejabat

Jawapan Kepada Usul-Usul Panel Perundingan Kastam/Swasta 2/1996

Dengan hormatnya saya merujuk kepada perkara di atas.

2. Berikut adalah jawapan kepada usul-usul yang telah dikemukakan oleh pihak tuan di dalam Mesyuarat Panel Perundingan Kastam/ Swasta 2/1996 yang lalu:-

2.1 *Service Tax on Export Services*

Masalah ini telah diselesaikan melalui perundangan yang dibentangkan di dalam Belanjawan 1997 di mana definisi *eksport of services* telah diperuntukkan di bawah Akta Cukai Perkhidmatan 1975. Dengan ini semua perkhidmatan yang dieksport adalah dikecualikan daripada cukai perkhidmatan.

Rayuan kepada pihak berkuasa bolehlah dikemukakan sekira terdapat sebarang masalah yang timbul sebelumnya berkaitan perkara tersebut.

2.3 *Provision of Company, Secretarial Services*

Menurut Jadual Kedua, Peraturan-peraturan Cukai Perkhidmatan 1975, disahkan bahawa perkhidmatan kesetiausahan syarikat bukanlah perkhidmatan yang ditetapkan. Oleh yang demikian ia tidaklah tertakluk kepada cukai perkhidmatan.

Walau bagaimanapun perkhidmatan tersebut yang disediakan oleh pelesen akauntan awam adalah tertakluk kepada cukai perkhidmatan disebabkan perkhidmatan kesetiausahaan syarikat (*company secretarial services*) dianggap sebagai perkhidmatan profesional yang biasa disediakan oleh akauntan awam. Ia diliputi oleh perkara 12, Bahagian C kepada Jadual Kedua, Peraturan-peraturan Cukai Perkhidmatan 1975. Perkhidmatan kesetiausahaan syarikat yang disediakan oleh tempat-tempat perniagaan profesional lain yang ditetapkan seperti syarikat *consultancy* juga tertakluk kepada cukai perkhidmatan. Memandangkan terdapat ketidak seragaman di dalam perkara ini, satu kajian akan dijalankan.

2.3 *Secondment of staff*

Secara tidak langsung, perkhidmatan pembekalan pekerja mahir/pakar atau peminjaman anggota (*secondment of staff*) dianggap sebagai pemberian khidmat perunding dan *passing of skills* iaitu melalui pekerja pakar berkenaan. Semasa perbincangan sesi dialog dengan pihak swasta pada tahun 1993, Jabatan telah memutuskan bahawa *secondment of staff* adalah tertakluk kepada cukai perkhidmatan. *Conducting training/teaching* sahaja tidak tertakluk kepada cukai perkhidmatan.

2.4 *Annual Sales Turnover Treshold*

Untuk tujuan pengiraan jualan peolehan tahunan (treshold), semua perkhidmatan yang ditetapkan yang disediakan oleh tempat perniagaan yang ditetapkan hendaklah diambil kira. Ia tidak meliputi jualan/hasil daripada perkhidmatan yang tidak ditetapkan sekiranya ia boleh ditunjukkan berasingan di dalam bil atau invois yang dikeluarkan oleh syarikat.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

(SORIA OSMAN)
b.p. Setiausaha,
Panel Perundingan Kastam/ Swasta,
Ibu Pejabat Kastam dan Eksiais DiRaja,
Malaysia.

Customs Valuation Of Goods

BY EN IBRAHIM B. KAIMI

INTRODUCTION

Custom duties are instruments of fiscal and trade policy which may be calculated with reference to specific, ad valorem and a combination of the two types of duties. Most of Malaysian Customs tariff falls under ad valorem type and this is widely used in advanced countries.

Now, we have two valuation systems, Brussel Definition of value (B.D.V) which is applied by Malaysia and GATT Customs Valuation Code by vast majority of countries.

The Brussels Definition of value is based on a Notional concept which treats the Customs value as the price at which in an assumed condition, the merchandise to be valued would be sold; the essential elements of this definition are price, time, place, quantity and commercial level.

CONCEPTS OF VALUE (B.D.V)

Customs valuation is to be distinguished from commercial valuation in that it brings in a third party, the Customs, who is concerned not only with the transaction between the buyer and the seller but with all similar transactions between other buyers and sellers. The Customs must ensure impartial application of ad valorem rate of duty so as to avoid any discrimination between one importer and another.

Every trader has in his own mind a concept of value. If he is the buyer, his thinking is, whether goods offered are worth to him with regard to the price at which competing goods are being offered at the same time. If he is a seller, his estimate of what he can get for the goods in consideration to his outlay and the price of competing goods. These two concepts are complementary, their main point of difference is that the buyer wants the lowest price and the seller the highest price. The meeting point of their divergent interests will result in an agreed price.

B.D.V. as Notional concept would be the price at which, in assumed conditions (e.g. independence buyer and seller) the merchandise to be valued would be sold. This corresponds with Definition of value under section 2 of the Customs Act in relation to imported goods (see Appendix A).

DEFINITION OF OPEN MARKET

The conditions of open market was laid down in Article I, II and III. Brussel Definition of value (see Appendix B). Whilst the Brussels Definition does not authorise the acceptance of contract prices resulting from circumstances differing from those the notional concept which it embodies, in application, such contract price, if they can be adjusted in respect of those circumstances, may still be used as a basic. This may be the case, for example when prices are influenced:-

i. by special relations or arrangements between the buyer and the seller.

ii. in other respects, e.g. the buyer has obtained special rebates or reductions in price which are not freely or generally available to all buyers.

ADJUSTMENT

From the definition of value, it will be observed that the prices of goods in respect of the following imports are not the result of Open Market transactions:-

i. prices which do not measure up to the Notional concept.

ii. prices which are reduced in favour of sole agents or concessionaries.

iii. prices which in other circumstances have been abnormally discounted or reduced for example, certain sales for financial reasons such as bankruptcy or the winding up of a business entity.

A price paid by an importer, who is an agent, is not acceptable to the Customs (an agent means a representative of a foreign supplier, a branch or subsidiary, a sole distributor or sole concessionaire, an associate or profit sharing person or firm). In this case the Customs will establish a price based on particulars supplied by the importer, such as the cost to find, establish and maintain a market on behalf of the supplier. Using the invoice as a basis, the price is adjusted by including the expenses incurred by the agent in finding, establishing and maintaining market. This is normally expressed as a percentage of invoice price to be added to the CIFC price and is thus defined as agency uplift.

The basis for the agency uplift comes about because of expenses incurred by an agent as an obligation placed on him for the benefit of his principal under conditions of the agreement.

On the other hand, where an import is not the subject of a sale and ownership of the goods is still with the supplier, then customs would

proceed to establish the price at which the goods could be expected to be sold or would be likely to be sold. The method adopted is to deduct from the nett selling price, the post importation expenses, and the duty element and the result would be taken as the price acceptable by customs confirming to the concept of open market valuation.

When assessing expenses of finding, establishing and maintaining a market, all relevant activities and services are taken into account e.g.:

(a) direct general advertising of all kinds, such as in trade magazines, newspapers, commercial radio or television, hoardings, posters on trains and buses;

(b) circulating sales and technical literature either to particular potential users or to general lists of possible customers;

(c) exhibitions and fairs both public and trade;

(d) demonstrations of all kinds, both to the trade and users;

(e) maintenance of showrooms;

(f) sponsoring and co-ordinating sales drives in selected areas;

(g) editing the supplier's sales technical literature.

OTHER COSTS

To include, if not already included in the price,

- insurance
- freight
- commission
- brokerage
- cost charges and expenses incidental to purchase (incl. duties and taxes applicable outside Malaysia except those from which the goods have been exempted, relieved or refunded consular fees, royalties, and etc.)
- cost charges and expenses incidental to delivery (incl. cost of containers except those which are treated as separate articles for the purpose of levying duties of customs; cost of packing).
- loading and unloading charges.

In simplicity in the value for duty in the case of goods imported on a sale/purchase in the open market will be the sum of the following:-

(a) cost)
(b) insurance) C.I.F.C
(c) freight)
(d) other charges)

The proceeding paragraphs attempts to explain where valuation can proceed on the basis of price paid or payable. Goods may not, in some cases, be the subject of a real sale at the time of import. As such there will be no price paid or payable. Valuation can then proceed on the following.

(a) on the basis of expected, or where valuation can be deferred, actual realisation of the goods to be valued.

(b) on the basis of acceptable price for identical or similar goods. (Note: "Identical goods" means imported goods alike in all respects, including quality brand, reputation, etc. "Similar goods" means imported which, although not like the goods to be valued in all respects, nevertheless have charactistics close to those of the goods to be valued, particularly as regards kind and quality).

PRACTICAL APPROACH

Valuation under the Definition requires knowledge of the facts relating to the goods to be valued, their importation, and in some cases their subsequent disposal. The requisite facts are not all self evident from examination of the goods and in so far as they are not self evident, they are known to or can be ascertained by the importer and it is necessary for him to furnish them as required under the Customs Act, (Sections 100 and 101).

Where goods are imported persuant to a sale and valuation can proceed on the basis of price paid or payable, the determination of value will take account, as appropriate, of at least the following element of fact:

(a) the contract price with the seller;

(b) expenses for transport;

(c) insurance premium;

(d) expenses for containers and packing;

(e) commission and brokerage;

(f) royalties;

(g) other expenses incidental to purchase and delivery of the goods at the place of import.

These elements of fact will be substantiated by the submission of invoice, bills of lading and any other document necessary.

At the time when duty is to be assessed, officers would have before them the goods, import declaration, an invoice, bill of lading etc. As a check that the goods is imported as a result of an outright purchase sale, the invoice must be made out in the name of the importer as a buyer or purchaser. Invoices made out in the name of the importer as a consignor only and buyer or purchaser in some other names may not be an outright purchase of the goods by the importer, goods may be on consignment or resold by the buyer or purchaser named in the invoice. In the case of the latter there would

probably be another invoice issued by the buyer or purchaser which may be relevant to valuation depending on circumstances of the whole series of transactions between them. Invoice price is usually made out in accordance with what is agreed in a contract between buyer and seller on the following term:

- ex-factory
- free on board (F.O.B) or free along side (f.a.s)
- cost and freight (C&F)
- cost, insurance and freight (C.I.F)

To arrive at the value, adjustment is necessary to take into account of any part of the value in the Definition that is not so included.

Reference should be made to Agency Dockets for adjustment of prices not in the open market. Adjustment for freight, insurance, other charges, etc. should be made on facts available where ever possible.

Prices found to differ substantially from that on record should be verified with the importer by way of proof before the declared value is accepted. By way of proof the importer should have correspondence on the negotiation for the sale, price quotations, printed catalogues, contracts, sales confirmation note price lists and etc. If fraud is suspected appropriate action should be taken.

In the comparison of declared prices with the dockets or circular prices allowance must be made for quantity, time and place. Docket prices are for given quantity, time and place.

Where discounts and price reductions are claimed, their admissibility must be in line with Valuation Circular. The fundamental concept of price is that of a open market price. Therefore, discounts and price reductions given freely to any buyer in the open market generally are allowable reduction, subject to, that they are real and that the giving is for an explicit purpose. The following are normally allowed:-

- cash discount
- trade discount
- quantity discount

Unspecified discount should never be acceptable without obtaining full explanation satisfactorily from the importer, (e.g. less X% or discount shown on invoice, has no meaning for customs valuation.)

Goods, when imported, not the subject of sale e.g. on consignment may also be invoiced to the importer for stock accounting or for purpose of Customs declaration and has no significant to price. They are not sale invoices and therefore serve no purpose for valuation. The goods has to be valued on the basis as described earlier. This involve the use of the expected or actual local selling price less allowable deduction on account of the duty element, allowance for post importation expenses and a certain margin, if relevant, to arrive at the dutiable value.

Note: This paper was presented during the National Customs & Indirect Taxation Conference on 7 - 8 August 1996.

APPENDIX A

CUSTOMS ACT, 1967

"value" in relation to imported goods means the price which an importer would give for the goods on a purchase in the open market if the goods were delivered to him at the place of payment of customs duty and if freight, insurance commission and all other costs, charges and expenses (except any customs duties) incidental to the purchase and delivery at such place had been paid;

"value" in relation to goods to be exported means the price which an exporter would receive for the goods calculated to the stage where such goods are released by Customs at the place of export;

APPENDIX B

DEFINITION OF VALUE

Article 1

(1) For the purposes of levying ad valorem duties of customs, the value of any goods imported for home use shall be taken to be the normal price, that is to say, the price which they would fetch at the time when the duty becomes payable on a sale in the open market between a buyer and a seller independent of each other.

(2) The normal price of any imported goods shall be determined on the following assumptions:

(a) that the goods are delivered to the buyer at the port or place of introduction into the country of importation;

(b) that the seller bears all costs, charges and expenses incidental to the sale and to the delivery of the goods at the port or place of introduction, which are hence included in the normal price;

(c) that the buyer bears any duties or taxes applicable in the country of importation, which are hence not included in the normal price.

Article II

(1) A Sale in the open market between a buyer and a seller independent of each other pre-supposes:

(a) that the price is the sole consideration;

(b) that the price is not influenced by any commercial, financial or other relationship, whether by contract or otherwise, between the seller or any person associated in business with him and the buyer or any person associated in business with him, other than the relationship created by the sale itself;

Definition

(c) that no part of the proceeds of any subsequent resale, other disposal or use of the goods will accrue, either directly or indirectly, to the seller or any person associated in business with him.

(2) Two persons shall be deemed to be associated in business with one another if, whether directly or indirectly, either of them has any interest in the business or property of the other or both have a common interest in any business or property or some third person has an interest in the business or property of both of them.

Article III

When the goods to be valued

(a) are manufactured in accordance with any patented invention or are goods to which any protected design has been applied; or

(b) are imported under a foreign trade mark; or

(c) are imported for sale, other disposal or use under a foreign trade mark,

the normal price shall be determined on the assumption that it includes the value of the right to use the patent, design or trade mark in respect of the goods.

LICENSED MANUFACTURING WAREHOUSE (LMW)

By
Mr. Ahmalu Rajah Rayagopal

CONCEPT AND OBJECTIVE

i. LMW is a premise within the Principal Customs Area (Principal Customs Area means Malaysia exclusive or Labuan and Langkawi) which is licensed under Section 65 and Section 65A of the Customs Act, 1967.

ii. LMW facility is primarily intended to cater for export oriented industries (minimum of 80% export) the actual rate of export being decided under the ICA's Manufacturing License.

iii. The object of the LMW facility is to enable Industries to locate their manufacturing operations in suitable areas in terms of availability of materials for manufacture; labour, etc.

iv. LMW is controlled documentarily and is subject to all laws and regulations of the Customs department.

LOCATION OF LICENSED MANUFACTURING WAREHOUSE

i. A Company wishing to have Licensed Manufacturing Warehouse facilities should be located in less developed areas so as to be in line with the government policy to disperse export oriented and labour intensive industries to less developed areas. However, a certain degree of flexibility is exercised. If there are reasons in selecting specific areas, on account of special nature of operations, not in less developed areas, the Director General of Customs may consider granting Licensed Manufacturing Warehouse in such a case.

ii. Warehouse must be within a Principal Customs Area (PCA) and subjected to license from Local Authorities.

APPLICATION OF LICENSE

i. Application to establish warehouse for storage of dutiable goods under section 65 and to manufacture such goods for production under the provision of Section 65A can be made simultaneously.

ii. Application should be submitted to the State Director Of Customs where proposed warehouse is to be located.

iii. License under section 65/65A is issued at the discretion of the Director General of Customs for a period of two years subject to renewal. Application for renewal of license must be made at least one month before expiry date of the existing license.

iv. Payment of fees currently fixed is RM 1201.00, that is, RM 1200.00 for license under section 65 and a nominal RM 1.00 for license under section 65A.

v. License granted shall be subjected to such conditions as specified by the Director General of Customs.

vi. If goods manufactured falls under categories of goods liable to excise duty or sales tax, then application for excise and sales tax license should also be forwarded as prescribed under Section 20 (2) Excise Act, 1996 and Section 15 Sales Tax Act, 1972.

REQUIREMENTS OF PREMISES

i. The buildings must be strong, permanent, safe and adhere to the requirements of FIRE DEPARTMENT and LOCAL AUTHORITIES. All buildings should be issued a CF by Local Authorities before approval for license / changing of premises can be done.

ii. Space must be created for storage of raw materials, storage of finished goods and for storage of scraps/wastage/rejects.

iii. Any proposal on changes to structure of buildings must have a written approval from State Director of Customs.

iv. Transferring or changing of premises can only be done after approval from Customs has been obtained.

BANK GUARANTEES

i. Application and renewal of License will require a bank guar-

antee determined by Customs.

ii. Bank guarantee will be returned after expiry of 3 months from date of expiry of license, subjected to the company not owing any amount of duties to the department.

iii. Bank guarantee must adhere to the format prepared by the department without any variations.

EXEMPTIONS OF CUSTOMS DUTY

i. Customs Duty exemption is given to all raw materials / components used directly in the manufacturing process of approved products from the initial stage of manufacturing until the finished products is finally packaged and ready for export. This includes packaging materials and casings (casings for calculators and cameras).

ii. The list of Raw Material / Components that can be imported and taken into the Licensed Manufacturing Warehouses without payment of customs duty is issued together with the Licensed Manufacturing Warehouse License. Addition or deletion to the list can be made from time to time.

iii. Goods subjected to Excise Duty incorporated in the final products may be exempted from excise duty.

iv. Exemption for raw material / components is also applicable for goods obtained from Bonded Warehouse.

v. Machinery, equipments and spare parts required for direct manufacturing process of approved final products are entitled to exemptions from Customs Duty and Sales Tax under item 88, Customs Duties (Exemption) Order 1988 and item 83, Schedule B Sales Tax (Exemption) Order 1980 respectively.

vi. All machinery imported must be new. Written approval from MIDA Customs must be obtained for Used Machinery Imported. No machinery can be sold, transferred, exported or removed from approved premise without written approval from Customs Department.

MOVEMENT OF GOODS

i. Movement of raw materials/ components/machineries/ equipments and spare parts from a place of import to a licensed manufacturing warehouse must be covered by Customs Form 1 to be submitted to the Customs at the place of import.

ii. For finished goods to be exported, the licensee is required to submit Customs Form No. 2 at the place of export together with the invoices and the Foreign Exchange Documents (KPWX).

iii. For finished goods permitted to be sold to the domestic market, submission of Custom Form No. 9 is required. Local sales will be assumed as if imported and import duty will have to be paid in line with Section 65A (3) (b) Customs Act 1967 and sales tax to be paid via Form CJ 3.

iv. For movement of goods sold to Free Zone Area, Custom Form No. 2 is required at the point of Entry.

v. For goods sold to another LMW, licensee is required to obtain approval before sales is made. Form GPB 1 is used for movement of finish goods to another LMW Licensee.

vi. For LMW finished goods exported via a trading company using facilities of item 165 Customs Duties Order (Exemption) 1988 and item 91 Sales Tax Order (Exemption) 1980, approval has to be obtained from States Custom Director where trading company is situated. In situations where dutiable goods is exported direct from LMW, usage of Custom Form No. 2 is allowed under the name of the trading companies approved. If goods bought by trading company is transferred to another premise then declaration on Customs Form No. 9 is required and exemption of duties declared as approved. During exportation, trading company should also declare on Customs Form No. 2 the names and license of suppliers as well as approval issued.

IMPORT AND EXPORT PROHIBITION

i. If a licensee manufactures goods that are prohibited either on importation or exportation, the release of the goods concerned, will be subjected to the Prohibition Orders.

ii. Import or Export License whenever applicable must be obtained from the Ministry Of International Trade and Industry and presented to Customs at the port/place of import/export.

DESTRUCTION OR SALES OF SCRAP OF RAW MATERIALS, COMPONENTS, FINISHED GOODS AND WASTAGE

i. Application for destruction of raw material can be made to States Customs Director for approval. Blanket approval

LICENSED MANUFACTURING WAREHOUSE (LMW)

can be given for wastage which has no economic value.

ii. Destruction of raw materials and finished goods must be witnessed by the officer of Customs, once arrangements has been made to either bury or burn the goods concerned. Destruction certificate will then be issued.

iii. Destruction of normal wastage without economic value can be controlled by the Company Manager and certificate to be signed by him to be submitted to the department for record purposes.

iv. Sales of raw materials, components and finished goods as scraps must be approved by Customs and declarations of sales to be made through Customs Form No. 9 and duties to be paid where applicable.

v. All records of destructions and sales of scraps must be kept by the LMW companies and submitted to the officer of Customs on request.

SUBCONTRACT / FARMING OUT

Subcontract work here means the transfer/movement of raw materials/components which are exempted from customs duty from one manufacturing company to another manufacturing company to undergo a specific production process.

i. Types of subcontracting work are as follows:

   a. From Licensed Manufacturing Warehouse to another Licensed manufacturing Warehouse.

   b. From Licensed Manufacturing Warehouse to Free Industrial Zone.

   c. From Licensed Manufacturing Warehouse to a factory in the Principal Customs Area.

ii. Application must be made to Customs Department together with CJ5B approval (where necessary) and approval must be obtained from States Customs Director BEFORE proceeding of subcontracting works.

iii. Monthly statements on subcontracting work must be submitted to customs each month.

ADDITIONAL FACILITIES

i. Subcontractors are allowed to export on behalf of their principals after having undertaken the subcontract work direct from their premises provided that the invoice be issued by the principal and the export declaration state the Principal as the exporter.

ii. Import of raw materials/components may be sent direct to the subcontractor by the principal provided that a declaration is made to that effect at the time of import. Quantity allowed in this instances cannot exceed 50% of the actual production of the principal.

Note: This paper was presented during the National Customs & Indirect Taxation Conference on 7 - 8 August 1996.

(CP. 37—Pin. 1/96)

(Sila baca nota di muka sebelah sebelum mengisi borang ini)
(Please read the notes overleaf before completing this form)

Seksyen 109 Akta Cukai Pendapatan, 1967	MALAYSIA	*Section 109* *Income Tax Act, 1967*

CUKAI PENDAPATAN - INCOME TAX

AKAUN POTONGAN-POTONGAN DARIPADA BAYARAN ROYALTI DAN FAEDAH KEPADA ORANG YANG TIDAK BERMASTAUTIN
ACCOUNT OF DEDUCTIONS FROM ROYALTY AND INTEREST TO A NON-RESIDENT PERSON

A	**BUTIR-BUTIR PEMBAYAR/*PARTICULARS OF PAYER***
1. Nama Pembayar/*Name of Payer*	
2. Alamat Pos/*Postal Address*	
3. No. Cukai Pendapatan dan Cawangan (Jika tiada, nyata : No. Pendaftaran Sykt/Pern'gaan) *Income Tax No. and Branch (If none, state : Registration No. of Company/Business)*	

B	**BUTIR-BUTIR MENGENAI ORANG YANG TELAH DIBAYAR/DIKREDITKAN FAEDAH/ROYALTI** ***PARTICULARS OF PERSON TO WHOM INTEREST/ROYALTY HAD BEEN PAID/CREDITED***
4. Nama Penuh Penerima *Full Name of Payee*	
5. Alamat/*Address*	
6. Negara Asing/*Foreign Country*	
7. No. Cukai Pendapatan (Jika tiada, nyata : No. Paspot/No. Pendaftaran Sykt/Pern'gaan) *Income Tax No. (If none, state : Passport No. /Registration No. of Company/Business)*	

C **BUTIR-BUTIR MENGENAI POTONGAN-POTONGAN/*PARTICULARS OF DEDUCTIONS***

	8. Tempoh diliputi oleh bayaran royalti/faedah *Period for which royalty/interest paid/credited*	9. Tarikh bayaran royalti/faedah telah dibayar/dikreditkan *Date royalty/interest paid/credited*	10. Amaun Kasar *Gross Amount* (sertakan salinan) *(invois/debit note)*	11. Amaun Potongan *Amount of Deduction*	12. Amaun Bersih dibayar/dikreditkan *Net Amount paid/credited* (sertakan salinan dokumen bayaran)
ROYALTI/ *ROYALTY* (Kadar/*Rate* 10%)			**RM**	**RM**	**RM**
FAEDAH/ INTEREST (Kadar/*Rate* 15%)			**RM**	**RM**	**RM**

Saya, bagi pihak saya sendiri/bagi pihak Pembayar di atas telah membuat potongan-potongan dari amaun Faedah/Royalti yang disebutkan di atas ini
I, on my own behalf/on behalf of the above mentioned Payer have made deductions from the above-mentioned amount of interest/royalty paid/credited
yang telah dibayar/dikreditkan dan mengemukakan akaun ini menurut peruntukan-peruntukan Seksyen 109 (1) bersama dengan bukti dokumen tarikh
and render this account in accordance with the provisions of Section 109 (1) together with documentary evidence of the date payment was
pembayaran telah dibuat/dikreditkan.
paid/credited.

Saya sertakan bersama-sama ini wang tunai/cek. No.: ..... Amaun: RM.....
I enclose herewith cash/cheque. No. *Amount*

.....
Cop Rasmi Syarikat/*Official Company Chop*

Tarikh/*Date:* .....

Nama/*Name:* .....

Jawatan: .....
Designation

Tandatangan: .....
Signature

Kegunaan Pejabat LHDN
No. Akaun 9999054-07

Seksyen 109 Akta Cukai Pendapatan, 1967 nyatakan:

"(1) Jika mana-mana orang (dalam seksyen ini disebut sebagai pembayar) kena membayar faedah atau royalti yang diperolehi dari Malaysia kepada mana-mana orang lain yang tidak dikenali olehnya sebagai pemastautin di Malaysia, selain daripada faedah atau royalti yang berkaitan dengan suatu perniagaan yang dijalankan oleh orang itu di Malaysia, dia hendaklah apabila membayar atau mengkredit faedah (selain daripada faedah ke atas suatu pinjaman yang diluluskan atau jenis faedah yang disebut dalam perenggan 33 atau 35 Bahagian I Jadual 6) atau royalti memotong cukai pada kadar yang terpakai kepada faedah atau royalti, dan (sama ada atau tidak cukai itu dipotong) hendaklah dalam tempoh satu bulan selepas membayar atau mengredit faedah atau royalti mengemukakan suatu akaun dan membayar amaun cukai itu kepada Ketua Pengarah:

Dengan syarat bahawa Ketua Pengarah boleh—

(a) memberi notis secara bertulis kepada pembayar menghendakinya memotong dan membayar cukai pada kadar yang lain atau membayar atau mengkreditkan faedah atau royalti tanpa potongan cukai; atau

(b) dalam hal-keadaan tertentu, membenarkan perlanjutan masa bagi cukai yang yang telah dipotong dibayar.

(2) Jika pembayar gagal membayar apa-apa amaun yang kena dibayar olehnya di bawah subseksyen (1) amaun yang gagal dibayarnya itu hendaklah menjadi hutang yang kena dibayar olehnya kepada Kerajaan dan hendaklah dibayar dengan segera kepada Ketua Pengarah."

Cek-cek yang dibayar oleh bank-bank di luar Malaysia tidak akan diterima. Cek-cek hendaklah dipalang dan dibayar kepada KETUA PENGARAH HASIL DALAM NEGERI, D/A LEMBAGA HASIL DALAM NEGERI MALAYSIA, Karung Berkunci No. 11061, 50990 KUALA LUMPUR. Pembayaran juga boleh dibuat di Tingkat Bawah, Blok 8A, Komplek Pejabat Kerajaan, Jalan Duta, Kuala Lumpur.

Nota:

Bahagian A — Jika pembayar belum ada Nombor Rujukan Cukai Pendapatan, sila catatkan nombor pendaftaran syarikat/perniagaan.

Bahagian B — Gunakan Borang CP. 37 dan cek berasingan untuk tiap-tiap orang yang tidak bermastautin kepada siapa bayaran royalti/faedah telah dibayar/dikreditkan. (Borang CP. 37 mesti **diisikan dengan lengkap).**

Bahagian C — Jika mana-mana bahagian cukai yang kena dibayar tidak dibayar dalam tempoh satu bulan selepas pembayaran faedah/royalti telah dibuat/dikreditkan, cukai akan dinaikkan, tanpa notis selanjutnya, sebanyak jumlah yang sama banyak dengan sepuluh peratus daripada cukai yang tidak/lewat dibayar itu. Apa-apa baki yang masih belum dibayar selepas tamat tempoh enam puluh hari dari kenaikan itu hendaklah, tanpa apa-apa notis selanjutnya dinaikkan sebanyak jumlah yang sama dengan lima peratus daripada baki yang tidak dibayar itu (Seksyen 103, Akta Cukai Pendapatan, 1967).
Bayaran kenaikan cukai jika berkenaan, hendaklah dibayar secara berasingan dengan menggunakan Borang CP. 147 dan cek berasingan.

PNMB., K.L.

Section 109 Income Tax Act, 1967 states:

"(1) Where any person (in this section referred to as the payer) is liable to pay interest or royalty derived from Malaysia to any other person not known to him to be resident in Malaysia, other than interest or royalty attributable to a business carried on by such other person in Malaysia, he shall upon paying or crediting the interest (other than interest on an approved loan or interest of the kind referred to in paragraph 33 or 35 of Part I, Schedule 6) or royalty deduct therefrom tax at the rate applicable to such interest or royalty, and (whether or not that tax is so deducted) shall within one month after paying or crediting the interest or royalty render an account and pay the amount of that tax to the Director General:

Provided that the Director General may—

(a) give notice in writing to the payer requiring him to deduct and pay tax at some other rate or to pay or credit the interest or royalty without deduction of tax; or

(b) under special circumstances, allow extention of time for tax deducted to be paid over.

(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be a debt due from him to the Government and shall be payable forthwith to the Director General."

Cheques drawn on banks outside Malaysia are not acceptable. Cheques should be crossed and made payable to the DIRECTOR GENERAL OF INLAND REVENUE, C/O INLAND REVENUE BOARD OF MALAYSIA, Locked Bag No. 11061, 50990 KUALA LUMPUR. Payments may be made at the Ground Floor, Block 8A, Government Offices Complex, Jalan Duta, Kuala Lumpur.

Notes:

Section A — If the payer has not been allocated Income Tax Reference Number, please state the registration number of the company/business.

Section B — Use separate Form CP. 37 and cheque for each non-resident person to whom royalty/interest was paid/credited. Form CP. 37 must ***be duly completed.***

Section C — If any part of the tax payable has not been paid within one month after paying or crediting the interest/royalty, the tax will be increased, without further notice, by a sum equal to ten percent of the tax so unpaid. Any balance remaining unpaid upon expiration of sixty days from the date of such increase shall, without any further notice, be increased by a sum equal to five percent of the unpaid balance (Section 103 of the Income Tax Act, 1967).
Payment of increase of debt if any, should be paid separately using Form CP. 147 and separate cheque.

CALENDAR FOR 1997

January 1	Annual Subscription for 1997 payable.
February 14	Release of the 1996 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 1997 without penalty (RM50).
April 30	Last date for payment of annual subscription for 1997 with penalty (RM100). Students who fail to pay will be removed from the Student Register and will have to Re-Register.
May 31	Question & Answer Booklets available for distribution.
September 1	Closing date of registration of new students who wish to sit for the December 1997 examination sitting.
September 1 5	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 Examinations Department, before 15 October 1997.
November 30	Despatch of Examination Notification Letter.
December (dates to be confirmed)	MIT Examinations

From 16 to 20 December 1996, about 130 Registered students will sit for the MIT Examination. All papers will be examined this year. Examination centres have been set up in almost all states including states in East Malaysia.

SPONSORING OF STUDENTS FOR EXAMINATION OF THE MALAYSIAN INSTITUTE OF TAXATION

As you may be aware, the Institute has develop an examination which it hopes will overcome the present shortage of qualified tax professionals in the country. This is often the result of staff leaving the practice for another once they are fully trained. The continuous migration of staff from one firm to another is not healthy. Thus to avoid this, the Institute has come out with a plan to train more tax specialists and thereby minimising this problem.

As a start, the Institute is encouraging all practicing firms to sponsor their staff, who are not yet professionally qualified as tax practitioners, to sit for the MIT examination. The Institute has arranged with various commercial colleges in organising various courses leading to the students qualifying as associate members upon passing its examinations.

Should you be interested to know more about the MIT examination please do not hesitate to contact the MIT Secretariat. Our staff will also be pleased to meet with you should you so require.

We look forward to hearing from you. Let us together make our profession a success.

Professional Examinations

of

The Malaysian Institute of Taxation

Now Open For Registration

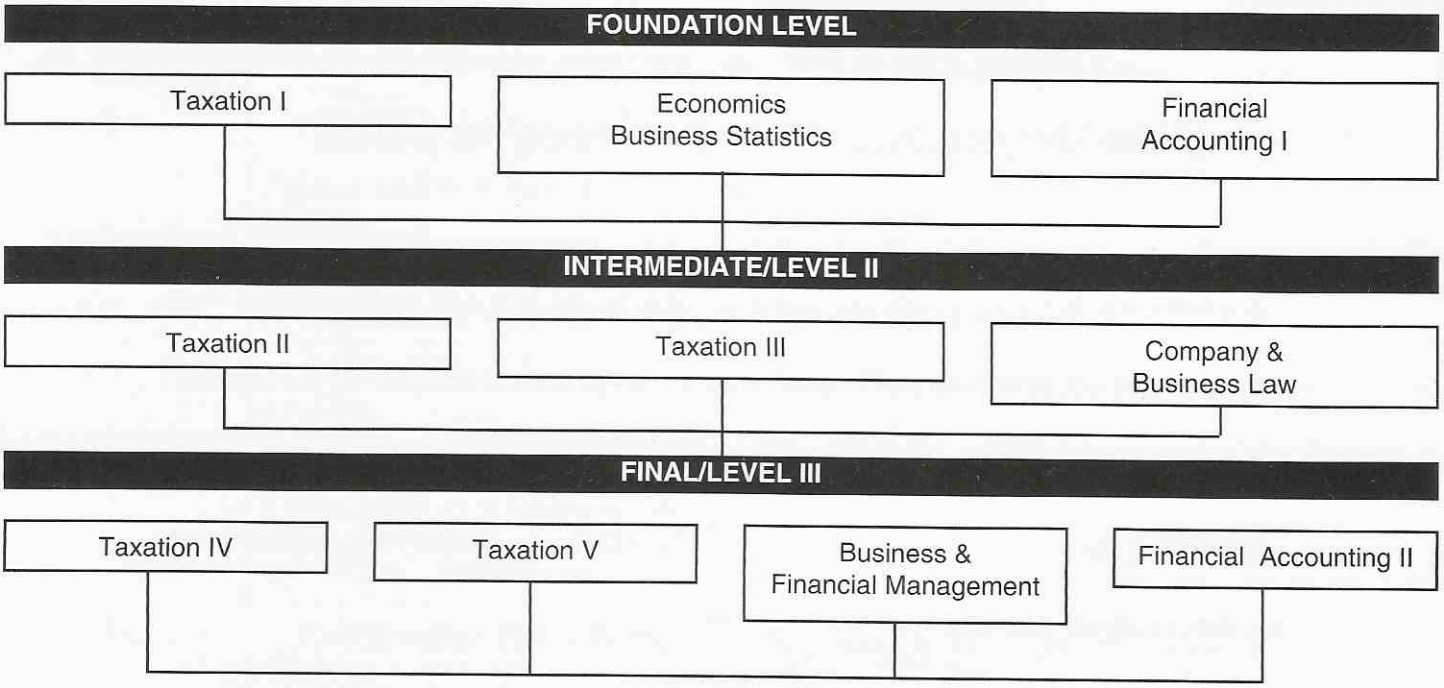
Professional Examinations

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

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

Examination Structure

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



How to Register

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

DATES TO REMEMBER	
Oct 31	Closing date for registration as a student to sit for the examinatin of that year.
Nov. 15	Closing date for submission of examination entry form for the examination of that year.
December	EXAMINATION

Entrance Requirements

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

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

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

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

Exemptions

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

Exemption Fees

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

Examination Fees

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

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

To:

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

Full Name Mr/Mrs/Miss/Ms: _____

Address: _____

_____ Student Reg. No: _____

MIT REGISTERED STUDENTS & MIT MEMBERS

	1995 EXAMINATIONS BOOKLETS			PILOT PAPERS BOOKLETS	
	LEVEL	COST PER LEVEL		LEVEL	COST PER LEVEL
	Level I/Foundation	RM4.00		Level I/Foundation	RM4.00
	Level II/Intermediate	RM5.00		Level II/Intermediate	RM5.00
	Level III/Final	RM4.50		Level III/Final	RM9.00

NON-REGISTERED STUDENTS & NON-MIT MEMBERS

	1995 EXAMINATIONS BOOKLETS			PILOT PAPERS BOOKLETS	
	LEVEL	COST PER LEVEL		LEVEL	COST PER LEVEL
	Level I/Foundation	RM6.00		Level I/Foundation	RM6.00
	Level II/Intermediate	RM7.00		Level II/Intermediate	RM7.00
	Level III/Final	RM6.50		Level III/Final	RM11.00

Please tick box(es) to indicate your order.

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

Student's Signature: _____ Date: _____

VISIT TO NEW CHAIRPERSON OF SPECIAL COMMISSIONERS

Members of the delegation with Pn Noor Azian Shaari,

Ms Teh Siew Lin presenting a momento to Pn Noor Azian

On 13 December 1996, the Goverment Affairs Committee led by Chairperson, Ms Teh Siew Lin met with Pn Noor Azian Shaari, the new Chairperson of the Special Commissioners of Income Tax at her office. Pn Noor Azian was appointed as the new Chairperson in August this year. During the visit, Ms Teh and fellow Council members, En Hamzah HM Saman and Mr Harpal Singh Dhillon briefed Pn Noor Azian on the Institute and its activities. The meeting also led to a discussion on matters where the Institute and Special Commissioners could co-operate. After the meeting, the delegation was shown around the premises including the court room.

Budget 1997

YB En Lee Hwa Beng expressing the views of the accountants. On the right is Assoc. Prof. Veerinderjeet Singh.

At the Press Conference ....

Hotline Handless ... efficiently answering and eagerly waiting for calls.

The Institute had again jointly with the Malaysian Institute of Accountants, organised a number of events in conjunction with the Budget. As soon as the Budget was announced by the Honorable Minister of Finance, YAB Dato' Seri Anwar Ibrahim, the Institutes were contacted by the media to obtain views of the professional tax practitioners and accountants. On hand to answer questions fielded were MIT Vice President, Mr Chow Kee Kan, MIT Council member, Mr Lee Yat Kong, MIA Council member, Mr Neoh Chin Wah and MIA East Coast Branch Chairman, Mr Wong Seng Chong. This was immediately followed by a Live Interview by the television station, TV3. MIT Council member, Associate Professor Veerinderjeet Singh and MIA Council member, YB En Lee Hwa Beng were ready with reactions of both Institutes.

The day after the Budget was announced, the Institutes organised a Budget Hotline to assist members of the public who sought clarification on the Budget. As in the previous years, this activity was in collaboration with the New Straits Times Group. The Hotline operated from 9.00 p.m. to 12 noon. The Institute would like to take this opportunity to acknowledge the assistance of the following individuals who assisted during the Hotline. They are:

Adeline Toh
Arthur Andersen/HRM

Carol Yong
Kassim Chan

Patrick Chan
KPMG Peat Marwick

D. Sevaraj
Coopers & Lybrand

Lee Poh Peng
Price Waterhouse

Leow Mui Lee
Arthur Andersen/HRM

Lim Phaik See
Kassim Chan

Linus Yeoh
Ernst & Young

A Press Conference was also held the next day where Mr Quah Poh Keat and Mr Lee Yat Kong represented the Institute. MIA was represented by Vice President Mr Soon Kwai Choy, and Council members, Mr Neoh Chin Wah, Y Bhg Dato' Lau Ban Tin and En Jeremy Nasrulhaq.

Over the next month, a series of seminars were organised around the country including various towns in Sabah and Sarawak. The response to the seminars were positive, especially with the presence of a senior Customs Officer who spoke on indirect taxation matters.

In conjunction with the seminars in Sabah and Sarawak, Vice President and the Chairman of the Institute's Membership Committee, En Hamzah HM Saman took the opportunity to speak to participants at the seminars on the Institute and encouraged those who have yet to be members, to apply for membership.

TWO COUNCIL MEMBERS ELECTED TO THE ADVISORY BOARD OF THE NATIONAL TAX ACADEMY

The National Tax Academy was formed on 22 September 1994 as a training Institute under the auspices of the Inland Revenue Department currently known as the Inland Revenue Board (IRB). The Academy is responsible for the development of the human resource for the entire IRB. It has also expanded to include the training of members of the public and holding courses at international level. The Academy is located at Bandar Baru Bangi, Selangor Darul Ehsan and has many impressive facilities for both educational and recreational purposes such as lecture theatres, auditoriums and a sports complex.

Late this year, the IRB formed an Advisory Council to guide the Academy and to advise on matters relating to the planning, management and training development towards making the Academy a centre of training excellence in the field of taxation. This Council is chaired by Y Bhg Dato' Mohd Ali bin Hassan, the Executive Chairman of the IRB and members of this Council comprises of officers from top management of the IRB, members of the Board of Directors of the IRB, a representative from local universities and a representative from the private sector who is proficient in the tax profession.

We take opportunity to inform that our President, En Ahmad Mustapha Ghazali has been elected as a Council Member to the Advisory Council of the Academy. Assoc. Prof. Veerindeerjeet Singh is another of the Institute's Council Members who was elected to the said Advisory Council as a representative from local universities.

The Academy was officially launched on 13 September 1996 by Yang Amat Berhormat Dato' Seri Anwar Ibrahim, the Deputy Prime Minister and Finance Minister. Among those who graced the ceremony were Y.M. Raja Dato' Seri Abdul Aziz bin Raja Salim (Director General of IRB from 1.7.1980 to 31.5.1990) who inspired the idea of establishing a tax institution and Y.Bhg. Tan Sri Dato' Abu Bakar bin Mohd Noor (Director General of IRB from 1.6.1990 to 31.5.1996) who through his hard work, made his predecessor's dream into a reality.

The Academy has its own bulletin called 'Ilham' which was first published in the month of October of this year. The bulletin is aimed to provide information and updates on the activities of the Academy as well as the tax profession. It also provides information on the facilities of the Academy such as library facilities and programmes conducted to create awareness among the public on the tax system in *our country as well as their responsibility as a tax payer.*

The Institute is proud to have two of its Council Members in the Advisory Council of the Academy. It hopes to play an active role through this special responsibility given to the Institute.

MIT TO HOST 1ST AOTCA CONVENTION IN KUALA LUMPUR

The second regular General Meeting and the fourth General Council Meeting of the Asia-Oceania Tax Consultants' Association (AOTCA) was held in Kyoto, Japan on November 6 - 8, 1996. The Institute was represented by its President, En Ahmad Mustapha Ghazali who is also a Vice-President of the AOTCA.

The highlights of the meetings include the election of a new President and Secretary General and the decision on the venue and host of the first AOTCA convention in 1998. The new President and Secretary General elected are David Russell QC and Peter Cowdroy respectively from the Taxation Institute of Australia. They take over from Teruaki Kataoka and Norihisa Maeda respectively from the Japan Federation of Certified Public Tax Accountants' Associations. The Secretariat of the Association will now move to Australia.

Accompanying Ahmad Mustapha Ghazali at the meetings in Kyoto were Kang Beng Hoe, Chairman of the Institute's Conference Organising Committee and Honorary Secretary, Chuah Soon Guan. The latter two members of Council were there to assist in the lobby to clinch the right to host the first AOTCA convention. It turned out that the Institute was the favourite to be the host and it was unanimously agreed by the AOTCA's Council that Kuala Lumpur will be the venue for the convention in November 1998.

President, Ahmad Mustapha Ghazali with the outgoing AOTCA President, Teruaki Katooka.

Ahmad Mustapha Ghazali and Council member Kang Beng Hoe with Prof. Yoshihiro Adachi of Japan's Ministry of International Trade and Industry.

Ahmad Mustapha Ghazali sandwiched by new Secretary-General (left) and President (right) of AOTCA.

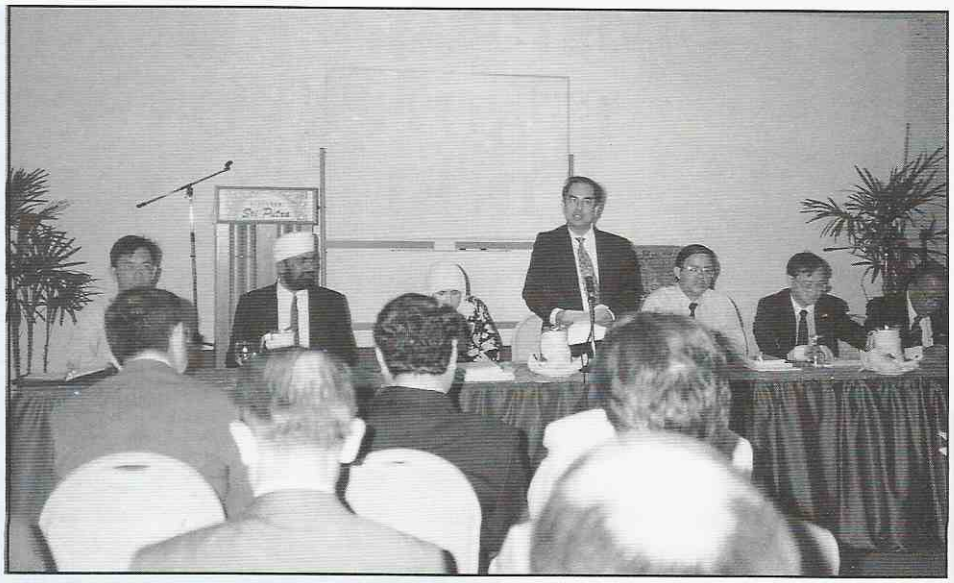
Honorary Secretary, Chuah Soon Guan Presenting a momento to officials of JFCP TAA

VISITS BY JAPANESE DELEGATIONS

Among the many activities of the Institute for this year were visits by delegations from the Japan Federation of Certified Public Tax Accountants' (CPTAs') Association and the Tokyo CPTAs' Association, who were on their study tours to Malaysia.

23 delegates from the Japan Federation of CPTAs' Association led by Mr Takami Yumioka, senior managing director of the Federation met with our Council Members and representatives from the Inland Revenue Board (IRB) on 18 September 1996 at Sri Putra Restaurant. MIT was represented by its President En Ahmad Mustapha Ghazali, Vice President En Hamzah HM Saman, Honorary Secretary Mr Chuah Soon Guan, Chairman of the International Relations Committee Mr Harpal Singh and Mr Tony Seah Cheoh Wah, while the Board was represented by Pn Sharazad binti Yahya, Assistant Director-General and Mr Tang Kok Kee, Assistant Director of the Board.

The delegation was briefed on our membership and the recent activities of the Institute by the President which was followed by a discussion on the tax professionals in Malaysia and the technical support being rendered by the Institute to the industries by Mr Tony Seah. Both the representatives from the Board went on with a discussion on the special tax privileges for foreign corporations and on how the tax authorities



ABOUT THE INSTITUTE... En. Ahmad Mustapha Ghazali briefing the members of the delegation on the Institute. Seated (from left) is Mr. Chuah Soon Guan, Mr. Harpal Singh Dhillon, Pn Sharazad binti Yahya (IRB rep.) Mr. Tang Kok Kee (IRB rep.), Mr Tony Seah and En. Hamzah HM Saman.

EXCHANGING GIFTS... En. Ahmad Mustapha receiving a souvenir from Mr Takami Yumioka, leader of the delegation while the Council members and representative from IRB, Mr. Tang Kok Kee (far left) looks on.

ONE FOR THE ALBUM... Members of the delegation posing with Council members of the Institute and representative of IRB.

ALL SMILES... Mr. Michael Loh (facing the camera) sharing a light moment with the Japanese delegates.

ALL EARS... (from right) Mr Chow Kee Kan, Tn Hj. Abdul Hamid and Mr Michael Loh listening attentively to Mr. Katsumasa Aruga, Leader of the delegation, briefing them on his organisation.

ALBUM POSE... Mr. Michael Loh, Tn. Hj. Abdul Hamid and Mr. Chow Kee Kan posing with members of the delegation.

in our country dealt with taxation on small businesses.

The fruitful discussion was followed by lunch, which gave more opportunities to the parties involved to informally socialise and to a better understanding of the roles of the Federation, Institute and the Board respectively.

Subsequent to that meeting, another group of 23 Japanese delegates from the Tokyo CPTAs' Association also took the opportunity during their study tour to visit our Institute on 6 November 1996. This group was received by Mr Michael Loh the Deputy President of the Institute, Mr Chow Kee Kan the Vice President and Tn. Hj. Abdul Hamid bin Mohd Hassan. The delegation led by Mr Katsumasa Aruga, Vice President of the Association was given an overview on the Institute and its progress over the years by Mr Chow Kee Kan. This was followed by a discussion on the tax profession in our country by Mr Michael Loh. The Council Members were then briefed on the roles of the Association by the leader of the delegation.

Meetings such as these definitely gives an acknowledgement that taxation bodies in the developing countries such as ours, have an important contribution to make to the world taxation profession.

VISITS BY JAPANESE DELEGATIONS

MEMBERSHIP OF MIT AS AT 29 OCTOBER 1996

The following persons have been admitted as associate members of the Institute as at 29 October 1996.

NAME	MEMBERSHIP NO
LAU SIE HOCK	1241
SARASVATHI SRI VANI D/O V. MAHADEVAN	1242
AUGUSTINE LAW SEK HIAN	1243
CHEE YONG HWA	1244
PARTHIBAN A/L RENGAIYAH	1245
WONG SHIH LI	1246
KONG SAN HOE	1247
WONG KWAN KONG	1248
LUKE CHAN CHOK YONG	1249
HEADIR BIN MAHFIDZ	1250
DING TAI HEAN	1251
JAMES WOON CHONG EU	1252
NG HOONG KEE	1253
RICHARD LING PENG LIING	1254
MOLLY FOO SWEE KIM	1255
LAU KIM SEONG	1256
BEH WING SUN	1257
CHAN CHIN YEN	1258
LIM LAY CHOO	1259
SOH FONG WAI	1260
FUNG MEI LIN	1261
LOW GEE LIEN	1262
CHONG KAN HIUNG	1263
YIP KIT WENG	1264
PETER WEE BOON KEAN	1265
CHEW KOK LIAN	1266
LAI BOON CHEK	1267
CHUAH TIAM HOCK @ CHUAH YEW HUAT	1268
PHANG CHIN PIN	1269
LIEW PUI HENG	1270
CHONG KEE WAH	1271
PANG CHEE MING @ PHANG CHEE MING	1272
TAN I EE	1273
MAH FOONG SEIN	1274
LOW TEN POW	1275
MAK JOON CHEONG	1276
TAN BEONG CHU	1277
CHOI YEW SENG	1278
TANG CHAN MING	1279
NG SEOH PHENG	1280
EWE HONG CHYE	1281
WONG WEE CHIT	1282

NAME	MEMBERSHIP NO
LEE KON PIAU	1283
LAN HAW CHONG @ LAU HAW CHONG	1284
LEONG CHOY LOON	1285
TAN KEOK LAY	1286
LIM KIM HOCK	1287
LEOW KUAN SHU	1288
PHAN OOI TONG	1289
VOO MENG HENG	1290
WAI AH KAU	1291
LEE SIEN FONG	1292
TEE CHIAU CHAI	1293
LIM PENG HIAM @ LIM PENG THIAM	1294
DOONG NENG SING	1295
NG SENG @ NG KIN SIN	1296
ANNE HSU	1297
KHOO AH KOO @ HOR SAI PING	1298
FONG KEE KIN @ PHANG KEE KIN	1299
CHONG KOOI HENG	1300
TEO CHIN KEONG	1301
CHAN KEE HONG	1302
LEE SIONG LIOW	1303

MEMBERSHIP STATUS OF MIT AS AT 26 OCTOBER 1996

Honorary Fellows	4
Fellows	14
(Founder Council Members)	
Associate Members*	1284
	1289

*** Associate Members**

Public Accountants of MIA	788
Registered Accountants of MIA	135
Licensed Accountants of MIA	17
Advanced Course Exam of IRD	98
Advocates & Solicitors	6
Approved Tax Agents	110
Others	133
Deceased	(3)
	1284

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Q U O T E

'Good communication is stimulating as black coffee, and just as hard to sleep after.'

- Anne Morrow Lindbergh -

INCOME OR CAPITAL GAIN

Prepared by:
Richard Thornton

THE DISTINCTION

Almost all countries base their revenue collection mainly on the taxing of income. Malaysia is no exception. When income gains are taxed but capital gains are not taxed at all or taxed at a lower rate, there will always be an incentive for taxpayers to try to avoid categorising their gains as income. This applied in the United Kingdom before the introduction of capital gains tax in 1965 and gave rise to a plentiful crop of tax cases for the courts to consider. Since then, we have seen very few case precedents from there but here in Malaysia there have been many new decisions in recent years.

Although many countries subject all capital gains to tax, Malaysia does not and has never done so. A full capital gains tax seemed to be suggested by Tun Tan Siew Sin in his 1964 Budget when he said that "Such an individual, next year, would have to pay .... capital gains tax if he has been speculating successfully in the stock market or in real estate", but this was never followed through.

Much later, the tax on real property gains was introduced in the form of the Land Speculation Tax Act, 1974. This gave way to the Real Property Gains Tax Act, 1976, effective from 7th November, 1975. Confined to real property gains, the tax does not call itself a capital gains tax, although it has many of the features of one. It's objective is clear from the title of the original act, to curb speculation in land.

INCOME TAX

Without doubt income tax is a tax on income ('a tax to be known as income tax shall be charged .....upon the income of any person.....' - s.3 Income Tax Act 1967). The correct classification of a transaction as either capital or income in nature is of great importance. If a receipt does not have an income nature, it will not be liable to tax unless it comes within the real property gains tax.

Our taxing acts give little help in defining what is income and what is capital gain, but these terms have been considered by the courts and we can get some guidance from the words of the judge in CIT v. Shaw Wallace (6 ITC 178) where he said that income is "a periodical monetary return coming in with some sort of regularity, from a definite source.....excluding anything in the nature of a mere windfall". He likened it to a tree which produces a fruit, where the tree represents capital and the fruit is the income it produces. From this we could probably get some sort of guide as to when a receipt is income:

- *when it is regular.* This is an indication but it is not conclusive because there are cases where something only comes in once, for example a salary from a temporary employment or an isolated transaction in the nature of trading
- *when it has a definite source.* The source or cause of the income might be capital invested or it might be the work or labour put in to generate the income.
- *when it is not a mere windfall.* A lucky win on the 4-digit numbers would not be income.
- *when it is not capital.* A sale of 'the tree' itself would be capital

It is not difficult to apply these principles in a straightforward case such as that of the property developer who puts in his money and his effort with the specific intention of producing regular profits from land transactions. He is like any other businessman who makes and sells something. His landbank is not his capital, but merely his stock in trade which he constantly turns over to generate a profit. Only if he sold his whole business (i.e the source of his income) lock stock and barrel would we say that he has got rid of a capital asset. The difficulty comes about when looking at the marginal cases, those where the transaction is a one-off or where the intentions are not clearly defined.

Land acquisition and holding covers a wide spectrum of intention and activity. At the one extreme is the pure investment situation where land is acquired, and perhaps developed, with the intention of holding it purely for the sake of deriving an income in the form of rents. At the other is the land dealer or commercial developer. In between come many other situations and it was the difficulty of categorising some of the borderline cases that led to the introduction of real property gains tax.

THE NATURE OF A PROFIT OR GAIN

Not every gain on disposal of property is treated as income but it is still a gain and , with the advent of real property gains tax, it can be taxed. Double taxation is prevented by stating that a gain for real property gains tax purposes is 'gain other than gain or profit chargeable with or exempted from income tax under the income tax law".

In two recent cases (MR Properties Sdn. Bhd. v. DGIR and TT Sdn. Bhd. v. DGIR, MSTC 2728 and 2603), the Special Commissioners considered the effect of these words. Assessments to real property gains tax had been raised by the Revenue who then had a change of mind and decided to raise income tax assessments on the same gains. In both cases, the Special Commissioners decided in favour of income tax treatment and went on to conclude that

once a gain has been found to be a gain under the Income Tax Act 1967, then an assessment (in respect of the same gain) issued under the Real Property Gains Tax Act 1976 ceases to have any effect .

It should be noted that it is not the proceeds of sale which are left out of account for real property gains tax but the gain or profit. This might work well in a straightforward case, but it is not inconceivable that a gain on sale may be only partly chargeable to income tax. This could apply, for example, where land had been appropriated from investment to trading stock so that only the gain from the point of transfer became liable to income tax. How would it work then?

The principle of introducing the asset into trading stock at its market value at the time of transfer was considered and appears to have been found acceptable in MP Corporation v. DGIR (MSTC 2390). However, there seems to be no basis for treating it as a disposal at the same time for real property gains tax. In only one special case does real property gains tax deem a disposal to have taken place on transfer to trading stock (para. 17(2), Schedule 2). Perhaps the correct method is to calculate the gain under real property gains tax for the whole period of ownership based on the actual sale price and then deduct the income gain from the real property gain.

GAIN OF PROFIT CHARGEABLE WITH INCOME TAX

In order to bring a gain under income tax, it would have to come within the description 'gains or profits from a business, for whatever period of time carried on (s.4(1) Income Tax Act 1967). What is meant by business?. The Income Tax Act 1967 defines business as including "...trade and every adventure or concern in the nature of trade" (s. 2 Income Tax Act 1967).

Business and trade are not quite the same but for practical purposes there is little difference. It is obvious from the definition given above that business can include trade and this was confirmed by the Privy Council in the case of ALB Co. Sdn. Bhd. v. DGIR (MSTC 33)where it was said that business is a wider concept than trade.

In that same case, it was also said that "in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets *prima facie* amounts to the carrying on of a business". Business can therefore be said to be a matter of intention, in other words the intention expressed by the objects of a company. For this reason, drafting of objects clauses is of considerable importance. They will tell us not only that the company is incorporated for the purposes of making profits but how those profits are to be made i.e whether by way of investment or trading.

If a company incorporated to make profits is to be presumed to be carrying on business, the same cannot be said of an individual. "An individual comes into existence for many purposes, or perhaps sometimes , for none, whereas a limited company comes into existence for some particular purpose....." (The Commissioners of Inland Revenue v. Korean Syndicate 12 TC 181,202, cited by Raja Azlan Shah F.J. in I. Investments v. Comptroller of Income Tax, 2 MLJ 19). Thus, in the case of an individual, there is no presumption that when he buys and sells a property he does so with the intention of profiting from the sale of it.

Wherever the intentions of the taxpayer, whether a company or an individual, may be in doubt, the "badges of trade" tests should be applied to determine his intentions.

ADVENTURE IN THE NATURE OF TRADE

The concept of an adventure in the nature of trade was introduced into the Income Tax Act 1967 to capture profits or gains which could not be definitely identified as arising in the course of a business but nevertheless had many of the features of trading.

A number of tests (known as the badges of trade) have been evolved by the courts to help to define "the nature of trade". The tests were developed in the case of Leeming v. Jones (15 TC 333) and have been used many times by the Malaysian courts. In each situation, the evidence must be considered in the light of the tests and a decision made as to whether the taxpayer has discharged the onus of proving that an assessment.....is excessive or onerous (para. 13, Sch5, Income Tax Act 1967).

The tests:

- Subject matter of the disposal
- Period of ownership
- Frequency of transactions
- Alterations to property to make it more saleable
- Methods employed in disposing of the property
- Circumstances responsible for the sale

Two other tests are frequently applied:

- Special knowledge or skill

A land developer or property expert is more likely to use his special knowledge to make a profit than the ordinary individual who buys merely in the reasonable anticipation that his investment will increase in value. A builder who put into his wife's name land which he knew had building potential was assessed to tax on the profit from the sale of the land on the basis that it was part of his trading stock held in his wife's name as bare trustee (Smart v. Lowndes 52 TC 436).

- The method of financing the activity

If you want to say that you are holding a property as a long-term investment, you need to be able to demonstrate that you are capable of servicing your borrowings from the income. If your borrowings are short-term and your investment intentions long-term, they do not match.

INTENDING TO TRADE

As we have seen, the categorisation of a property transaction depends very largely upon what was intended and the

evidence that can be brought forward to show what the real intention was and whether the intention has changed. In Simmons v. IRC (2All ER 798), Lord Wilberforce said:

"Trading requires an intention to trade; normally the question to be asked is whether the intention existed at the time of acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions; a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an intention to trade, whether the first investment is sold at a profit or a loss. Intentions may be changed. What was first an investment may be put into trading stock, and I suppose, vice versa. If findings of this kind are to be made, precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and possible, a liability to tax..... What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status, neither trading stock not permanent asset. It must be one or the other, even though, and this seems to me to be legitimate and intelligible, the Company, in whatever character it acquires the asset, may reserve an intention to change its character. ".

Precision is required. It is either an investment or trading stock. The taxpayer should make up his mind and let the facts support it. He is allowed to change his intention but, if he does, he needs to be able to prove that he has. What he does must be consistent with what he says that he intends.

Consider the following:

- A finance company used its funds to buy land and then sell it as an isolated transaction. Its objects clauses included "To carry on all or part of the business.....builders etc:. It was held that the buying and selling was an integral part of its business of making profits for its shareholders (E Finance Co. v. C of IT, MSTC 643).

- A co-operative society used its funds to buy land with the intention of building houses for sale to its members, but the land had to be sold because of poor demand. The objects of the society included the building of houses for members and the society was exempt from tax when its principal activities were with its members. It was held that the profit on sale was a capital gain because the society did not intend to trade and only sold the land because it was forced to (Lower Perak Co-operative Housing Society Bhd. v. DGIR, MSTC 3407).

Accounting treatment is often a good guide to what was intended. By itself, it is not conclusive but it might support the taxpayers statement of his intentions or contradict it. In the case of A Properties Sdn. Bhd. (1995)(MSTC 2340), it did not do either. The classification of land as "Development Properties", neither under fixed assets nor under current assets, was criticised. It was pointed out that international accounting standards require long-term investments to be classified under fixed assets, whereas land held for development and resale should be considered as inventories and classified under current assets. This lack of precision did not help the taxpayer's case.

CONCLUSION

It is always important to know whether a receipt is income or capital. Usually, it is not difficult to decide, but in difficult situations, useful guidance can be obtained from decisions of the courts and of the Special Commissioners. Many of the recent decisions have been reported in detail in Tax Nasional and students should study these reports in order to familiarise themselves with the principles involved.

MALAYSIAN INSTITUTE OF TAXATION

RULES AND REGULATIONS (ON PROFESSIONAL CONDUCT AND ETHICS)

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

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

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

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CLIENTS' MONIES

8-1 A member in practice is strictly accountable for all clients' monies received by him. Such monies should be kept separate from all other monies in his hands and be applied only for the purposes of the client.

Explanatory Note:

(i) Clients' monies should be paid without delay into a separate bank account which may be either a general account or an account in the name of a specific client but which shall in all cases include in its title the word 'client'. Any such account is referred to herein as 'a client account'.

(ii) Where a practice receives a cheque or draft which includes both clients' monies and other monies he should cause the same to be credited to a client account. Once the monies have been received into such client account a practice may withdraw from that account such part of the sum received as can properly be transferred to the office account in accordance with the principles set out in paragraph (iv) of this explanatory note.

(iii) Save as referred to in paragraph (ii) of this explanatory note no monies other than clients' monies should be paid into a client account.

(iv) Drawings on a client account may be made only:

(a) To meet payments due from a client to the practice for professional work done by the practice for that client provided that:-

(i) the client has been informed in writing, and has not disagreed, that money held or received for him will be so applied; and

(ii) a bill has been rendered.

(b) To cover disbursements made on a client's behalf.

(c) To or on the instructions of a client.

(v) Money held by a member as stakeholder should be regarded as clients' money and should be paid into a separate bank account maintained for the purpose or into a client account.

(vi) Every member in practice should at all times maintain records so as to show clearly the money he has received, held or paid on account of his clients, and the details of any other money dealt with by him through a client account, clearly distinguishing the money of each client from the money of any other client and from his own money.

FEE

9-1 Professional fees charged by members should be a fair reflection of the value of the work performed for the client, taking into account:-

(a) the skill and knowledge required for the type of work involved;

(b) the level of training and experience of the persons necessarily engaged on the work;

(c) the time necessarily occupied by each person engaged on the work; and

(d) the degree of responsibility and urgency that the work entails.

Explanatory Note:

(i) In order to carry out the professional service for which he is engaged a practising member must first consider the instructions of his client in conjunction with any statutory duty relating thereto and then discharge his responsibility by applying to the affairs of his client the professional skill and knowledge which he and his staff have acquired by training and experience. His fees for that service should provide him with appropriate remuneration for the time and skill which he has personally devoted to his client's affairs and the responsibility he has accepted together with reimbursement of and a suitable margin of profit on his overhead expenses and the salaries of his staff for whose work he takes responsibility. Fees should therefore normally be computed by reference to the above factors (a) to (d).

(ii) It is neither usual nor necessary for bills submitted to clients to be fully detailed but the member's records should be adequate to enable this to be done if required either to satisfy the client or in the unfortunate and rare event of it becoming necessary to take legal proceedings to recover unpaid fees.

9-2 A member is entitled to charge for his services such fees as he may consider appropriate in connection with the professional services that he undertakes. Provided always that no member shall propose to a prospective client unrealistically low professional fees or free services.

9-3 (i) No member shall mislead his clients or the public by charging an unrealistically low professional fee which may result in the lowering or compromise of professional standards.

(ii) Notwithstanding sub-paragraph (i), a member may charge charitable bodies and non-profit organisations low professional fees or provide free services provided always that the provision of such services are not used as an inducement to secure professional appointments or engagements which may arise therefrom.

9-4 In specific circumstances where a member feels there are genuine grounds to propose a lower fee than another member undertaking the same or similar work (other than non-recurring or specialist work including management consultancy services) care must be taken to ensure that the lower fee is in line with the provisions of paragraph 1. In proposing a fee which is lower than that charged by another member the member concerned should note that the lower fee proposed is a valid reason for another member to complain to the Institute that in the particular circumstances the acceptance was improper.

Explanatory Note:

The fact that one member may charge a lower fee than another for undertaking the same or similar work is not improper provided care is taken to ensure that the client is not misled:-

(a) as to the precise range of services that a quoted fee is intended to cover.

(b) as to the likely level of future fees for any work undertaken for the client.

The member intending to charge a lower fee shall inform the client as to the precise range of services covered by the quoted fee.

9-5 Fees should not be charged on a contingency, percentage or similar basis, save where that course is authorised by statute or is generally accepted practice for certain specialist work.

Explanatory Note:

Members should be aware that where fees are charged on a contingency basis such fees may be perceived by third parties, in particular the Revenue Departments, as reflecting adversely on the independence of the member. Accordingly, where a contingency fee basis is adopted, the member should take special care to ensure that his conduct meets, and is seen to meet, the required standards of independence and impartiality, and that he cannot be challenged by the Revenue Departments on the standard of disclosure adopted in connection with his client's affairs.

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

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Malaysian Institute of Taxation

HOW TO BECOME A MEMBER OF THE MALAYSIAN INSTITUTE OF TAXATION

Benefits and Privileges of Membership

The Principal benefits to be derived from membership are:

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

Qualification Required For Membership

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

Associate Membership

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

Fellow Membership

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

Application of Membership

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

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

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

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

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

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

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