JOINT MEMORANDUM ON POST 2009 BUDGET ISSUES

By MALAYSIAN INSTITUTE OF TAXATION (MIT) MALAYSIAN INSTITUTE OF ACCOUNTANTS (MIA) THE MALAYSIAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (MICPA)

Content

A. GENERAL

The Institutes would like to enquire as to the expected time frame when the gazette orders/guidelines relating to the 2009 budget proposals and the amendments to the following Public Rulings/guidelines would be issued:

Gazette Orders relating to

- Review of the tax treatment for perquisites provided to employees
- Tax exemption on income of corporate advisors on the issuance and trading of Sukuk
- Enhancing tax incentives for hotels in Sabah and Sarawak
- Tax incentives to enhance training in selected fields
- Stimulating the development of the venture capital industry
- Tax incentives for listing of foreign companies and foreign products on Bursa Malaysia

Public Rulings

- o No. 2/2008: Reinvestment Allowance
- o No. 1/2008: Special Allowances for Small Value Assets
- o No. 1/2006: Perquisites from Employment
- o No. 6/2005: Trade Association
- o No. 4/2005: Withholding Tax on Special Classes of Incomes
- o No. 2/2004: Benefits-in-kind
- o No. 2/2002: Allowable Pre-operational and Pre-commencement of Business Expenses for Companies

Guidelines

- Guidelines on Advanced Pricing Arrangement
- Guidelines on Thin Capitalisation
- Transfer Pricing Guidelines
- Guidelines on the Types of Treatment/Medicines Eligible For Exempt Medical Benefits
- Guideline on the Expenditure Eligible for Deduction Under Section 34(6)(h).
- Guidelines on Section 4(f) Income Subjected to Withholding Tax under Section 109F

Answer by IRBM:

As per appendix A

B. INCOME TAXATION

1. Reduction in Income Tax Rates for Individuals (Schedule 1)

The Institutes welcome the proposal for the reduction of the tax rates for individuals (both resident and nonresident) and co-operatives.

In view of the above proposal, the current schedular tax deduction (STD) table needs to be revised accordingly based on the proposed income tax rates for the tax deductions in 2009. The Institutes understand that the revised STD table would be gazetted by the end of the year.

The STD deduction is merely a 'pay as your earn' system in order to ensure timely payments of estimated income tax liability by individual taxpayers. The balance is invariably to be settled upon returns being filed. To facilitate and simplify the STD compliance, the Institutes are of the opinion that calculations should be made as simple as possible and complicated calculations should be avoided.

Although STD rules have been improved over the years, the need to apply STD on all cash remuneration, particularly those which are not fixed in nature e.g. bonus; compensation for loss of employment and other forms of perquisites which are not paid monthly creates a heavy administrative burdens to the employers.

The Institutes are of the opinion that it would be helpful if firstly, STDs are applied purely on fixed monthly cash remuneration and secondly, to find a simpler way of effecting STDs for non fixed payments.

Answer by IRBM:

The IRBM has amended the STD table due to the amendments of the law and the draft is with the Attorney General to be gazetted and to be effective by 1 January 2009. If it has not yet been gazetted, the old table will be applicable. The IRBM has been trying to improve the STD system to ensure that estimated tax is almost the same as the actual tax paid. Previously, the proposal paper has been discussed with all the professional bodies and MEF(Malaysia Employers Federation).

In the implementing of the new STD rules, IRBM will ensure education programmes and publicity will be held to make it easier for employers to be aware and understand the changes made. For this purpose, IRBM has started giving talks to all IRBM branches regarding the implementation of the new STD system. Talks to employers such as banks, big employers, Accountant General Department and software provider have been held. Positive feed backs have been received from these employers.

2. Re-definition of Small and Medium Enterprises (SME)

The definition of an SME has been restricted to exclude those companies held by or owning an investment in a company with a paid-up ordinary share capital of more than RM2.5 million.

(i) Application of the Law

In respect of the eligibility for exemption from furnishing tax estimates under Section 107C(4A), the re-definition will take effect from YA 2010. For the purposes of applying the preferential tax rate under Schedule 1, Paragraph 2A, the re-definition takes effect from YA 2009. Similarly, for the purpose of claiming small assets allowances, the re-definition takes effect from 2009. For the purposes of applying Income Tax (Accelerated Capital Allowance)(Plant and Machinery) Rules 2008, the re-definition shall have effect from YA 2009 to 2012.

The Institutes are of the opinion that the relevant effective dates should be streamlined so as to avoid the undue complication now arises.

Answer by IRBM:

The different effective date is to give more benefits to the tax payers.

The government's intention is to help SMEs to improve cash flow and competitiveness in view of the rising cost of doing business. As such, the government has proposed accelerated capital allowances for plant & machinery purchased by SMEs from YA 2009 to YA 2012 as an additional tax incentive.

Section 107C(4A) takes effect from YA 2010 - to give due consideration to companies which have commenced their operations in 2008 and have began their YA 2009 to continue enjoying the preferential tax treatment of not furnishing estimates and making installment payments for the first two years of assessment.

In view of the above, the relevant effective dates cannot be streamlined to YA 2009 as suggested by the Institutes.

(ii) Exemption from Furnishing Tax Estimates Under Section 107C(4A)

Under current legislation, SMEs are not required to furnish any estimated tax payable or make installment payments for 2 years under Section 107C(4A) of the Income Tax Act 1967 (the Act). The re-definition of a SME takes effect from YA 2010 and subsequent years.

For those SMEs which commence operations in YA 2009 and which are excluded in YA 2010 following the re-definition, do they still enjoy the two(2) year waiver (i.e. for YA 2009 & 2010) or only one year (i.e. YA 2009)? When should they start furnishing tax estimates and making instalment payments?

Where an SME commences business on say 1 May 2009 and in 30 November 2009 is taken over by another company with ordinary paid-up share capital, say RM50 million and the holding accounting year end is say 30 March 2010, will the taxpayer, being disqualified as SME after 30

November 2009, penalised for non compliance to furnish estimate tax payable under Section 107C(4)?

The Institutes are of the view that once the SME is eligible in YA 2009 for waiver under Section 107C(4A), it should continued into YA2010, even though it may have become eligible by the new definition.

Answer by IRBM:

The company concerned would still enjoy the two years of waiver and would start furnishing estimates and making installment payments under subsection 107C(2) & (3) of the ITA on the third year just like any other existing companies (i.e for examples 1 and 2 above, the waiver years would be YA 2009 to 2010 and YA 2010 to 2011 respectively).

The company would not be penalized for non-compliance.

(iii) Preferential Tax Rate Under Schedule 1, Paragraph 2A

It is not clear whether the conditions laid down in Paragraph 2B refers to shareholding structure of the company at the beginning of the basis period of a year of assessment or at the end of the basis period of a year of assessment, or even any point in time during the basis period. It is envisaged that there could be a situation where an SME is bought over by an investor company during the first year of commencing operations and now loses its privilege under Schedule 1, Paragraph 2A of the Act.

For example, a SME is acquired by a related Company on 1 June 2009. The basis period for year of assessment 2009 for the SME is 1 January 2009 to 31 December 2009. When would the SME cease to be considered as a SME for the purpose of Schedule 1, Paragraph 2A of the Act?

The Institutes are of the opinion that the law should apply progressively. The Institutes propose that if the first day of the basis period of a company falls before 29 August 2008, the existing rule shall apply (i.e. the new definition of SME shall not apply).

Answer by IRBM:

The status of SME is determined at the beginning of the basis period for a year of assessment.

For the example illustrated by the Institutes, the SME would cease its privilege on 1 January 2010.

(iv) Review of Restriction on Group Relief Under Section 44A(2)(ii) of the Act

Since the new SME definition would exclude many companies, it is the Institutes view that Section 44A(2)(ii) of the Act should be amended and such a company be allowed to claim group relief, even though their paid-up share capital in respect of ordinary share is RM2.5 million or below at the beginning of the basis period for that year of assessment.

Answer by IRBM:

***For the purpose of group relief, the surrendering company and the claimant companies must have paid-up capital in respect of ordinary shares of more than RM2.5 million as at beginning of the basis period for a year of assessment. Thus any company that does not fulfill the condition is not entitled to the group relief. It is a policy matter to be considered by MOF if paragraph 44A(2)(ii) were to be amended as suggested by the Institutes*.**

(v) Exclusion

The new definition of an SME excludes a company where more than 50% of its ordinary paid-up share capital is directly or indirectly owned by a related company or vice versa.

It is not clear whether the conditions laid down refers to shareholding structure of the company at the beginning of the basis period of a year of assessment or at the end of the basis period of a year of assessment, or to any point in time during the basis period.

As the exclusion is determined by direct or indirect ownership, the Institutes would like to clarify how many levels/tiers of ownership must taxpayers/tax practitioners examine to determine the SME status, i.e. would the taxpayers/tax practitioners need to determine ultimate ownership? The Institutes are of the opinion that this will be difficult to do, particularly in the case of foreign ownership .

Answer by IRBM:

The determination of direct and indirect ownership is at the beginning of the basis period for a year of assessment and is up to ultimate holding company level regardless of whether the company is foreign holding company or local holding company.

(vi) Definition of Related Company

A related company is defined as “a company which has a paid up capital in respect of ordinary shares of more than two million and five hundred thousand ringgit at the beginning of the basis period for a YA”.

The Institutes seek clarification as to whether this means that the related company must be a Malaysian company. If not, what is the position where the paid up share capital in respect of ordinary shares of a foreign related company (say a Thailand or Indian resident company) which will be recorded in foreign currency? If it is meant to be an amount equivalent to RM2.5 million, then the SME status of the Malaysian resident company may thus be subjected to foreign exchange fluctuations.

The Institutes suggest that in such a situation, the authorities should take the SME status of the company for the YA 2009 and continue to maintain the SME status unless there is a subsequent change in the paid-up ordinary share capital of the foreign related company via an increase in the issued share capital.

The Institutes would like to highlight that there may also be a situation where the company is owned by a foreign entity which has no share capital, for example, a partnership, in which case the status of the company would remain unchanged. In such a situation, the Institutes would view these as not been subjected to the new definition of a SME.

Answer by IRBM:

The related company may be a Malaysian or a foreign company with a paid-up capital in respect of ordinary shares of more than RM2.5 million or its equivalent. The Institutes' suggestion that the SME status at the beginning of the basis period for YA 2009 to remain until there is a change in share capital is not agreed. SME status in every YA is always determined by RM2.5 million at the beginning of the basis period of each YA as illustrated below:

Basis period for Company A is 31 December.
Paid up capital for Company A on 1 January 2009 is USD 0.6million which is equivalent to RM 2.4million. On 1 June 2009, the paid up capital is still USD 0.6 million but it is equivalent to RM 2.6 million. On 1 January 2010 there is still no change in paid up capital of USD 0.6million and it is still equivalent to RM 2.6 million. In this situation, Company A is SME for YA 2009 eventhough on 1 June 2009 the paid capital is RM2.6 million. In YA 2010, Company A is no longer SME since on 1 January 2010 the paid up capital is RM 2.6 million.

Partnership does not fall under the definition of "related company".

(vii) Confusion over the definition of SME

The Institutes note that there is a different definition for SME used by The Small and Medium Industries Development Corporation (SMIDEC) and Bank Negara Malaysia (BNM) for the purpose of granting financial assistance. The SMIDEC and BNM definition is as follow:

(a) For Manufacturing, Manufacturing Related Services and AgroBased Industries --- Small and Medium Enterprises are enterprises with fulltime employees not exceeding 150; OR with annual sales turnover of RM25 million and below.

(b) For Services, Primary Agriculture and Information & Communication Technology (ICT) Sectors --- Small and Medium Enterprises are enterprises with fulltime employees not exceeding 50, OR with annual sales turnover not exceeding RM5 million.

The Institutes are of the opinion that this will certainly cause confusion to the lay businessmen when they are eligible for the SME financing package but not qualified for the SME tax incentive due to their paid-up capital structure. This will in turn hinder the effort to strengthen the SME sector in our economy. The Institutes would suggest that the tax authorities streamline the definition in future to reduce unnecessary misunderstanding and confusion.

Answer by IRBM:

The definition is for tax purposes only. The Act does not refer to such company as an SME but the term is used to simplify the meaning during seminars and talks. The Act merely states that a company with paid-up capital in respect of ordinary shares of not more than RM2.5 million as at beginning of the basis period for a year of assessment is entitled to enjoy the preferential tax treatment as spelt out in the relevant provisions of the Act.

However, MOF takes note of the issue raised.

3. Tax Treatment of Bonuses and Director’s Fee [Section 25 (2A)]

The Institutes welcome the move that bonuses and director’s fees are assessed in the year of receipt as this will reduce administrative burdens.

The Institutes would like to seek confirmation on the following

(i) that “bonus” in Section 25(2A) covers bonus paid to an employee and is not restricted to only bonus paid to directors.

Answer by IRBM:

Yes. Section 25(2A) covers bonus paid to an employee and is not restricted to only bonus paid to directors. The intention is to cover all employees.

(ii) For a leaver case, an expatriate may receive his bonus in respect of a prior year after he left the country. How should the bonus be reported?

Answer by IRBM:

Bonus should be reported in the year of receipt as per amendment of the Act. As far as practical aspect is concerned, the employer has to withhold the money until the clearance letter is issued by IRBM. If the employer bears his tax, the clearance letter should be issued to the employer.

4. Exemption on Allowances, Benefits-in-kind and Perquisites

(i) Disclosure in Form EA

The Institutes would like to enquire as to what should be disclosed in respect of allowances, benefits-in-kind and perquisites in the EA Form, i.e. the gross or net amount or the prescribed value of benefits?

Answer by IRBM:

The net/taxable amount in respect of allowances, benefit in kind and perquisites should be disclosed in Part B of the EA Form. The exempted amount should be disclosed in a lump sum in Part G of the EA Form. Notes to Part G of the EA Form will be issued together to employers to assist them in the calculation of the exempted amount for disclosure in Part G of the EA Form.

The Institutes would like to confirm that where full exemption is given, such as meal allowance, telephone bills, etc., no disclosure is required.

Answer by IRBM:

All allowances are to be disclosed in the EA Form irrespective of whether full exemption has been allowed. The exempted allowances will be aggregated and disclosed in Part G of the EA Form.

(ii) Computation of Schedular Tax Deductions (STD)

The Institutes understand that with effect from YA 2009, subject to the agreement by the employer, an employee is allowed to take into account all reliefs, rebates and deductions allowed under the Act in arriving at the STD. Option is also given to employers and employees to deduct STD on benefits-in-kind given to employees. Where the employee wishes to deduct STD on benefits-in-kind, employer may not oblige if he is not willing to deduct.

Answer by IRBM:

Yes. If employee opts to deduct STD on benefit in kind, the employer may opt not to agree to oblige. In such situation, the employee will have to settle any difference in taxes upon filing his return.

Pending the gazetting of the statutory order, the Institutes would like to confirm that employers are allowed to exclude all exempted allowances/ perquisites when calculating STD for the rest of the months in 2008.

Answer by IRBM:

Yes, with effect from September 2008, employers are allowed to exclude all exempted allowance/perquisites when calculating STD.

To enhance the objective of increasing the disposable income of the rakyat, the Institutes are of the opinion that the STDs for the coming months (September to December 2008) should be allowed to be reduced by what have already been paid on the exempt allowances from January to August 2008.

Answer by IRBM:

Employers are not allowed to reduce the STD with effect from September 2008 by taking into account the amount that has already been paid on the exempt allowances from January to August 2008.

(iii) Petrol Card/Petrol or Travel Allowance between home and work place (up to RM2,400 p.a.)
Petrol Card/Petrol or Travel Allowance/Toll Card for Official Duties (up to RM6,000 p.a.)

(a) Currently an employee provided with a motorcar may be assessed on the benefit of a motorcar and petrol pursuant to the prescribed values as stated in Appendix 2 of the Public Ruling No.2/2004.

Will the prescribed annual benefit of petrol as per Appendix 2 still be available to those who are provided with a car and fuel? Will there be any changes to the value of prescribed annual benefits?

Answer by IRBM:

If an employee is provided with a motorcar and free petrol he will be assessed on the annual prescribed benefit of a motorcar as per Appendix 2 of PR 2/2004.

As for free petrol, the annual prescribed benefit of petrol as per Appendix 2 of PR 2/2004 is no longer applicable with effect from year of assessment 2008 to year of assessment 2010.

However, employers will have to determine the actual value of petrol used by employee whether it is from home to work place and vice versa or for official duties.

(b) Where an employer opts to deduct STD on the petrol allowance, how should the STD on the allowance computed? Should the exempted amount be apportioned evenly throughout the year or fully allowed until the threshold is met.

For example, where an employee is paid travelling allowance of RM1,000 a month would STD be calculated at RM (1,000 – 8,400/12)=RM300 a month, OR no STD for the first 8 months, and STD calculated on RM600 for the month of September and thereafter on RM1,000 per month. (Refer to the table below) :

	Travelling Allowance (RM)	**Amount Exempted**	**Balance for STD Computation**	**Amount Exempted**	**Balance for STD Computation**
Jan	1,000	1,000	0	700	300
Feb	1,000	1,000	0	700	300
Mar	1,000	1,000	0	700	300
Apr	1,000	1,000	0	700	300
May	1,000	1,000	0	700	300
Jun	1,000	1,000	0	700	300
July	1,000	1,000	0	700	300
Aug	1,000	1,000	0	700	300
Sept	1,000	400	600	700	300
Oct	1,000	0	1,000	700	300
Nov	1,000	0	1,000	700	300
Dec	1,000	0	1,000	700	300
Total	**12,000**	**8,400**	**3,600**	**8,400**	**3,600**

Answer by IRBM:

Employers who opt to deduct STD should apportion the exempted amount evenly throughout the year.

(c) The Institutes would like to confirm that no supporting document is required if the claim for exemption on travelling allowances (both for official duties and to/from home-work place)are below the thresholds of RM6,000 and RM2,400 respectively. Where an employee wishes to claim deduction for more than RM6,000, then he may do so by maintaining the necessary details and documentation e.g. log book, receipts etc of ALL the travelling expenses which need to be maintained for the purpose of a tax audit, if any.

Answer by IRBM:

Yes. IRBM confirms that no supporting document is required if the claim for exemption is below the thresholds.

(iv) Meal Allowance

Since there is no limit for the exemption of meal allowance, the Institutes are of the view that employees are not required to keep any supporting documents. The Institutes wish to confirm this.

Answer by IRBM:

Employers are required to disclose meal alowances in Part G of the EA Form. Employees are not required to keep any supporting documents with regards to this meal allowance.

The Institutes would like to clarify on the tax treatment for a composite allowance which consists of travelling and meal allowance. As the exemption is effective from YA 2008, there is a practical difficulty in identifying and determining the amount for each element of the composite allowance from 1 January until 31 August 2008. Since there is no threshold for exemption on meal allowance, the Institutes are of the opinion that the full composite allowance will be exempted.

Answer by IRBM:

***Where there is a composite allowance which consists of both travelling and meal allowance, employers are required to identify and determine the actual value of travelling and meal allowance for the period from 1.1.2008 to 31.8.2008. If employers fail to identify and determine the actual value of these allowances, it would be difficult to ascertain whether the threshold for travelling exemption has been reached*.**

(v) Childcare Allowance or Subsidies (up to RM2,400 p.a.)

The Institutes seek clarification as to whether there would be an age limit in respect of the child. In addition, would there be any conditions on the types of childcare provided? Is the exemption allowable for payment to a childcare centre or payment to any person taking care of the child? Is employing a maid to take care of the child also eligible?

Answer by IRBM:

- ***The age limit in respect of child for this purpose of claiming exemption of childcare allowance or susidies provided by employer is 12 years old and below.***
- ***There are no conditions on the types of childcare provided. As long as the child is 12 years or below, the childcare allowance or subsidy provided by the employer is exempted.***
- ***An employee may claim an exemption on the childcare allowance or subsidy provided by the employer if the child is 12 years old or***

below and the payment is made to a childcare centre or any person taking care of the child including a maid.

- ***In cases where husband and wife both receive child care allowances and they have only one eligible child, both husband and wife can still claim child care allowance exemption of RM 2,400 per annum each.***

(vi) Telephone/Mobile Phone, Telephone Bills, Pager, PDA and Internet Subscription

The Institutes understand that this applies to both the hardware as well as the telephone bills. Does the exemption on telephone bills extend to telephone allowance? Will the exemption extend to related charges such as registration and access fee, etc.?

The Institutes would also like to confirm that telephone bills and internet subscribed in the name of the employee will also enjoy the exemption.

Answer by IRBM:

- ***Exemption is allowed to both hardware (personal data assistant, telephone, mobile phone, pager) and telephone bills only. Telephone allowance is not exempted from tax.***
- ***Related charges such as registration & access fee is also exempted from tax.***
- ***Telephone bills and internet subcribed in the name of the employee will also enjoy the exemption.***

(vii) Employers' Own Goods Provided Free of Charge or At A Discount Where The Value of Discount Does Not Exceed RM1,000 p.a.

The Institute would like to confirm that where the discount exceeds RM1,000, only the excess will be liable to tax. Does the exemption apply to goods received free of charge or at a discount from related companies in a group?

Answer by IRBM:

- ***Discount on employers own goods which exceeds RM1,000 p.a is taxable.***
- ***The exemption does not apply to goods provided by related companies. For this purpose, the meaning of employer does not extend to group of companies. It will be addressed in the Public Ruling.***

(viii) Services Provided Free of Charge or At A Discount

The Institutes would like to confirm whether the exemption applies to services provided free of charge or at a discount from related companies in a group? Does exemption include services enjoyed by the staff as well as the immediate family members?

Answer by IRBM:

The exemption does not apply to services provided by related companies. For this purpose, the meaning of employer does not extend to group of companies.

Exemption includes services enjoyed by the spouse or unmarried child of the employee. The age limit of unmarried child is the same as provided under section 48 of the ITA.

(ix) Interest Subsidies On Loans Up To RM300,000 For Housing, Passenger Motor Vehicles and Education.

a. The Institutes would like to enquire whether the exemption includes a personal loan taken by an employee from the bank and the employer subsidises the interest paid by way of reimbursing the employee OR must the loans be taken through the employer?

Answer by IRBM:

The IRB confirm that the exemption includes a loan personally taken by an employee from the bank and the employer subsidises the interest paid by way of reimbursing the employee.

b. The Institutes would like to confirm that where an employer borrows from a bank and provides an interest free loan to his employee, the interest incurred by the employer on the free loan will also be considered as a subsidy on interest on loan and will enjoy the tax exemption

Answer by IRBM:

The IRB confirm that where an employer borrows from a bank and provides an interest free loan to his employee, the interest incurred by the employer on the free loan will also be considered as a subsidy on interest on loan and the employee will enjoy the tax exemption on the subsidy.

c. In addition, would any conditions be imposed on the loans, e.g. only for the first residential house, for passenger saloon car, etc.?

Answer by IRBM:

There is no condition imposed on loan for a residential house. However, a loan for a car is restricted to vehicle for personal use and not vehicle for commercial use.

d. How does one determine the amount of loans? Is it based on the original loan amount or outstanding loan balance in any one year? If the loans taken were more than RM300,000 but part of them have been repaid and the total of outstanding loans is now (YA 2008) below RM300,000, would the full interest subsidy still be exempted or a portion of it will be exempted?

Answer by IRBM:

The amount of loan is principal amount.

The loan amount is based on the original loan amount and the outstanding loan balance in any one year. The interest exemption in the basis year for a year of assessment is calculated using the following formula:

$$\text{Interest paid by employer} \times \frac{\text{Balance of loan sum or RM300,000 whichever is lower}}{\text{Original loan sum taken}}$$

Example:

Year	*Original loan amount*	*Balance of loan amount @ 31.12.2008*	*Interest paid by employer*	*Calculation of interest exemption*
2008	*350,000*	*290,000*	*10,000*	$10{,}000 \times \frac{290{,}000}{350{,}000}$ = 8,285

Year	*Balance of loan amount @ 1.1.2009*	*Balance of loan amount @ 31.12.2009*	*Interest paid by employer*	*Calculation of interest exemption*
2009	*290,000*	*240,000*	*10,000*	$10{,}000 \times \frac{240{,}000}{350{,}000}$ = 6,857

Year	*Balance of loan amount @ 1.1.2010*	*Balance of loan amount @ 31.12.2010*	*Interest paid by employer*	*Calculation of interest exemption*
2010	*240,000*	*190,000*	*10,000*	$10{,}000 \times \frac{190{,}000}{350{,}000}$ = 5,428

e. Is the loan for education restricted to the employee's education only or would it cover the loans for children's education?

Answer by IRBM:

The loan for education is restricted to the employee's education only.

f. Where the loans exceed RM300,000, will the full interest subsidy be brought to tax or will only the interest subsidy on the excess portion of the loan be taxed?

Answer by IRBM:

***Where the loans exceed RM300,000, the interest subsidy on the excess portion of the loan will be taxed*.**

(x) Tax Exempt Medical Benefits Extended to Include Expenses on Maternity and Traditional Medicines

The Institutes would like to enquire as to whether a guideline will be issued on the types of treatments/medicines eligible for exemption.

Answer by IRBM:

No guidelines will be issued but there will be an amendment to the Public Ruling No 2/2004.

(xi) Non-Application to Directors of Controlled Companies, Sole Proprietors and Partnerships.

Section 2 of the Act defines service director as "a director, not being a person to whom, together with his associates within the meaning of Section 139(7), if any, there would be distributed, on the distribution of a dividend by the company, more than 5% of the dividend) who is employed in the service of the company in a managerial or technical capacity, and is not, either on his own and with any associate or associates within that meaning, the beneficial owner of (or able directly or through the medium of other companies or by any other indirect means to control) more than 5% of the ordinary share capital of the company."

The Institutes are of the view that a service director is eligible for the exemptions in the same way as the employees of a company or soleproprietorship and a partnership are eligible for the exemptions.

The Institutes are of the opinion that if the intention of the restriction is the prevention of abuse by these persons due to their ability to control the entity, then service directors ought not to be included in the restriction, even if they are the director of a controlled company.

As for the directors of subsidiaries of a Multinational Corporation or Public Listed Company, the director is just a representative of the holding company and is liable to the supervision of holding company. The factor of abuse will not arise as these people are accountable to the public (shareholders) and the parent company. The Institutes therefore suggest that there should be no restriction for these categories of directors.

Answer by IRBM:

Yes, service director is eligible for the exemption. The exemption is not applicable to director/employee who has control over the employer, partner of a partnership and the owner of a soleproprietorship.

5. Accelerated Capital Allowance (ACA) for SMEs

The Income Tax (Accelerated Capital Allowance) (Plant and Machinery) Rules 2008 [P.U. (A) No. 357/2008] were gazetted on 25 September 2008 to give effect to the 2009 Budget proposal that ACA on expenses incurred on plant and machinery in YAs 2009 and 2010 will be given to a SME in the year of assessment in which the asset is fully acquired.

(a) Meaning of Plant and Machinery

The Institutes assume that ALL expenditure on plant and machinery qualifying for Schedule 3 capital allowances are eligible for this ACA.

Answer by IRBM:

Yes, all expenditure on plant and machinery that qualify for Schedule 3 capital allowances are eligible for ACA.

(b) Application of SME Definition

It is a good practice that the new law should apply prospectively. The Institutes therefore suggest that where the first day of the basis period for YA2009 for an SME falls before 29 August 2008, the new definition of SME shall not apply for YA 2009.

Answer by IRBM:

IRBM confirms that the new definition of SME is applicable to all SMES for YA 2009 including SMES where the first day of the basis period for YA 2009 falls before 29 August 2008.

(c) Restriction on Assets Acquired Under Hire-Purchase Arrangement

Based on Rule 3 of the Order [P.U. (A) No. 357/2008], where an asset is purchased in YA 2009 under a 36 months hire-purchase arrangement, the capital expenditure incurred after YA 2010 would not eligible for ACA. This is not consistent with the objective of the incentive i.e. to give financial assistance to the SME. The longer period of hire-purchase term reflects the need for financial assistance. Rule 3, when reading together with Rule 2(c) may be interpreted as hire-purchase assets acquired in prior years but whose payment term stretches over YA 2009 and 2010 would be allowed to claim the ACA on capital expenditure incurred on the assets during YAs 2009 and 2010! Such practice will also complicate the calculation of balancing allowances/charges on disposal as the claim for allowances are at different rates for different Yas.

The Institutes suggest that the full capital expenditure of the assets acquired in YA 2009 and 2010 should qualify for the ACA. For those assets acquired under hire-purchase in YA 2009 and/or 2010, capital expenditure incurred after YA 2010 should be allowed ACA when it is incurred.

Answer by IRBM:

No, only capital portion of any instalment payment for assets acquired under hire-purchase arrangement in 2009 and 2010 qualify for ACA in accordance with para 46 Sch 3. ACA is only claimable up to YA 2010. Capital expenditure incurred after 2010 is not eligible for ACA.

(d) Claw Back of ACA

Rule 6(3) of the Order stipulates claw back for a disposal made within 2 years.

The Institutes would seek confirmation that where there is commercial justification for the disposal, e.g. theft, obsolescence, damage, fire, etc., the claw back provision shall not apply.
In view of the high obsolescence of ICT equipment, the Institutes are of the opinion that claw back should not be imposed on ICT equipment.

Answer by IRBM:

The Order stipulates claw back within 2 years of disposal. Disposal means sold, conveyed, transferred, assigned or alienated with or without consideration. IRBM confirms that if there are bonafide reasons e.g. theft, obsolescence, damage, fire for disposal within 2 years, claw back will not apply.

Claw back within 2 years of disposal is for all assets including ICT equipments.

6. Residence Status of Civil Servants [Section 7(1A)]

An employee in public service and in a statutory authority, who is not in Malaysia by reason of exercising his employment outside Malaysia or attending any course of study in any institution or professional body outside Malaysia which is fully-sponsored by the employer, shall be deemed to be a Malaysian resident provided he is a citizen.

The Institutes would request that in the interest of equity and simplicity, all citizens who are not in Malaysia by reason of attending any course of study (fully sponsored by the employer) in any institution or professional body outside Malaysia shall be deemed to be Malaysian residents.

Answer by IRBM:

It is a policy matter. MOF will take note.

7. Withholding Tax (WHT) On Technical Fees

It was proposed that reimbursement of hotel accommodation in Malaysia is no longer subject to WHT. This is welcomed by the Institutes. However, due to the rigid restriction, this measure is instead going to cause more administrative burden and is extremely narrow in its scope.

(i) Segregation of Hotel Expenses

If the hotel accommodation charges are inclusive of other incidental cost such as rental of training room, projector, etc., would these incidental expenses be subjected to WHT? What happens if the hotel does not segregate these expenses?

This now requires the non-resident to provide a detailed analysis of all reimbursements/disbursements so that hotel accommodation can be excluded. Thus causes more administrative work both for the resident payer and the IRB.

Answer by IRBM:

IRBM clarifies that in order for the hotel accommodation expense to be excluded from the gross income of technical fees, either the non-resident (payee) or a payer himself has to provide a detailed analysis or segregate all charges that relates to that reimbursement/disbursements of hotel accomodation only. It should not cause any extra administrative work both to the payer or non-resident payee since nowadays all documentations are computerised and details can easily be retrieved.

(ii) Disbursements

The proposal refers to the exclusion of reimbursement of hotel accommodation charges from withholding tax.

The Institutes would like to confirm that disbursements of hotel accommodation charges are also excluded.

Answer by IRBM:

The IRBM clarifies that disbursements of hotel accommodation charges are also excluded from witholding tax.

The Institutes are of the opinion that withholding tax should not be imposed on ALL reimbursements/disbursements as these are incidental costs for providing the service rather than fees earned on the services provided. Reimbursements/ disbursements are not consideration for services per se. It is rather strange that only reimbursements relating to hotel accommodation in Malaysia are excluded from withholding tax.

Answer by IRBM:

It is a policy decision.

The Institutes would like to confirm that pending the amendment to the Public Ruling No.4/2005 (Withholding Tax on Special Classes of Income), the taxpayers are allowed to rely on the Budget proposal and exclude the reimbursements relating to hotel accommodation from the computation of withholding tax.

Answer by IRBM:

The IRBM confirms that pending the amendment to the Public Ruling No. 4/2005, and if the amended Public Ruling is not being issued by 31 December 2008, the taxpayers are allowed to rely on the Budget proposal and exclude the reimbursements/disbursements relating to hotel accommodation from the computation of withholding tax which relates to the services performed on or after 1 January 2009.

8. Tax Treatment of Cost of Dismantling (Schedule 3 Paragraph 67C)

In line with FRS116, the dismantling costs will now be considered as a qualifying expenditure and added to the residual expenditure of the asset on disposal and the balancing allowance/charge would then be computed accordingly.

(i) The Institutes welcome the move. However, the current treatment will involve additional administrative reconciliations. It is suggested instead of being recognised as capital expenditure qualifying for capital allowances, it would be administratively simpler if the dismantling costs are allowed as a deduction against gross income.

Answer by IRBM:

The dismantling cost is a capital expenditure and does not qualify for deduction against gross income under section 33(1) of the ITA.

(ii) The Institutes would like to confirm that if the dismantling cost is incurred after the year of cessation, the costs will deemed to be incurred in the year of cessation. In such a case, the tax return for the year of cessation would need to be amended.

Answer by IRBM:

Yes. However the taxpayer has to inform IRBM by a letter that the asset has been disposed of and the IRBM will issue a Reduced Assessment if applicable. The tax payer need not submit an amended Return.

(iii) The proposed tax treatment is very restrictive. It is available only to a person who is required by any law or agreement to dismantle and remove assets as well as restore the site. It appears that if the factory is owned by the taxpayer and there is no need in law to dismantle asset and restore the site, the treatment is not applicable.

Answer by IRBM:

Yes, the proposed provision is related to dismantling of plant & machinery that is required by law/agreement to dismantle and removed the plant & machinery because the plant & machinery concerned cannot be used anymore.

(iv) Further, since the obligation to restore the site is required by written law or agreement, it creates an accrued liability. An accrued liability is incurred when the obligation to pay is established, i.e. at the beginning of the agreement. It follows that the cost of dismantling should be included as cost of acquisition of the asset and capital allowances claimed accordingly.

Answer by IRBM:

The cost of decommissioning at the beginning of the agreement is not ascertained yet and is merely a provision. Thus the amount does not qualify for capital allowances.

(v) Paragraph 67C(3) of the Act stipulates that if the dismantled asset is subsequently used for any other business, this treatment shall not apply.

The Institutes would like to have further clarification on the interpretation of Paragraph 67C(3). Where an asset is dismantled and used to trade in for a new asset, would the dismantled asset be deemed not in use for any other business and the cost of dismantling be eligible to be added to the residual expenditure?

Answer by IRBM:

The treatment does not apply to trade-in cases. Thus it is not eligible for capital allowances. Please refer to (iii)

9. Extension of Scope of Deductible Expenditure to Promote Corporate Social Responsibilities [Section 34(6)(h)]

With effect from year of assessment 2009, expenditure incurred by the taxpayer on "conservation and preservation of environment (and) enhancement of income of the poor" are deductible against gross income. Under Section 34(6)(h) of the Act, expenditure on such projects must be approved by the Minister.

(i) For a company having an early year-end, YA 2009 would have already commenced. Will the Minister grant retrospective approval for such cases and will these be accepted by IRB?

Answer by IRBM:

Ministry of Finance (MOF) confirms that the approval is also applicable to the expenses incurred before the budget day which falls in YA 2009. IRBM confirms that as far as IRBM is concerned, those expenses that are approved by the MOF are eligible for deduction.

(ii) For the purpose of transparency and clarity, the Institutes suggest that the authority issue a guideline in respect of examples of the various types of expenditure that will be eligible.

Answer by IRBM:

The guideline that has been issued by Ministry of Finance (MOF) will be updated.

10. Extension of the Definition of a Trade Association to include Professional bodies (Section 53)

With effect from YA 2009, professional bodies will be considered as trade associations.

The Institutes are of the view that a trade association and a professional body are two different kind of entities. Unlike a trade association, members of a professional body include academics, practitioners and professionals under employment. Not all of them are carrying on a business, which is the main attribute of a trade association.

The main objective of a professional body is invariably to advance the interest of the profession. It regulates and promotes the profession for the benefit of the profession and the society.

A professional body may sponsor and conduct related research, and occasionally advises the government authority on the development of the profession. On top of that, they are non-profit making bodies and do not conduct business to earn profits or distribute gains to members.

The activities of a professional body generally revolve around its members. It collects subscription from members to fund their activities which are mainly educational, e.g. conducting continuing professional education programmes, publishing professional journals, sponsoring research, etc, or social events, e.g. annual dinners, sports functions, etc. Non-members participation in the continuing professional education programmes is incidental to the activities provided to the members and the participation is allowed to advance the interest of the profession as well as to provide knowledge on developments in the relevant field.

From the above, it can be seen that a professional body is more akin to a club whereby members help themselves by organising their financial resources to advance the interest of the body. As such, a professional body should be taxed as a club rather than a trade association. In fact, it is the view of the Institutes that special preferential tax treatment should be accorded to professional bodies to assist them in discharging their objectives to members, the Government and the nation at large.

Answer by IRBM:

This is a policy decision and the law is very clear on that. The Institute is merely expressing its view which is general and subjective. The statement that a professional body is more akin to a club is very disputable. Infact there are much more similarities between a professional body and a trade association than with a club or society that only focuses on recreational, charitable and social aims. The fact that the definition of business itself includes "profession, vocation and trade ... " shows that there is a very thin line between profession and trade.

Before the Public Ruling 6/2005 was issued, the tax treatment accorded were similar for both the professional bodies and the trade assoiciations. However the Public Ruling 6/2005 brought about a bit of problem due to the statement that the membership of the bodies cannot be extended to those exercising employment.

However with the budget amendments of 2009, this problem is overcomed and the situation returns to status quo.

IRBM is of the view that the extension of the definition of a trade association to include professional bodies is correct and appropriate.

11. Taxation of a Club, Association and Similar Institutions (Section 53A)

Section 53A stipulates that clubs, associations and similar institutions should maintain a separate account in respect of income derived from its members and non-members. The Institutes would suggest that a provision similar to what currently exists for a trade association should be introduced to deem income derived from non-members to be business income of the club.

Answer by IRBM:

All along receipts from non-members have always been treated as business income of the clubs and associations. This is based on the case law decision of The Carlisle and Silloth Golf Club V Smith and on the doctrine of mutuality. The proposal by the Institutes is to go one step further by introducing a specific legal provision regarding the said practise. The institutes' intention in suggesting that we believe is to ensure certainty. The IRBM appreciates the suggestion and we will give due consideration and decide whether there is a real need for such a provision to be introduced as section 53A is a clear taxing provision.

12. Tax Exemption on Interest Income

The Income Tax (Exemption) (No. 7) Order 2008 [P.U. (A) No. 351/2008] was gazetted on 25 September 2008 to give effect to the 2009 Budget proposal that with effect from 30 August 2008, interest income received by a resident individual from money deposited in approved financial institutions will be exempted from income tax. The Order revoke previous income tax exemption orders [P.U.(A) No. 64/1996, 65/1996, 383/1997 and 155/1998].

The Institutes wish to clarify the following:

(i) In the revoked orders, it was specifically mentioned that interest received from saving accounts/fixed deposit accounts/investment accounts were exempted from income tax. However, the current order only states that interest received from money deposited at approved institutions are exempted from income tax.
The Institutes would like to clarify whether the exemption is applicable to interest from all types of money deposited with the approved institutions, including REPO, short term money market, current account as well as Islamic financial instruments and other types of structured financial products which pay interest to the depositors as well as interest received under various insurance policies.

Answer by IRBM:

The Guidelines will be amended to address the issue.

(ii) Whether the exemption is on interest paid on or after 30 August 2008 or interest accrued on or after 30 August 2008.

For example, interest of say, RM3,000 on a 6month (from July to December 2008) fixed deposit will be paid on 31 December 2008. Will the full RM3,000 be exempted or only interest accrued for the period from 30 August till 31 December 2008, i.e. RM(124/184 X 3,000) = RM2,021.74 be exempted?

Answer by IRBM:

***The IRBM confirms that the exemption is applicable to the interest paid to the depositors on or after 30 August 2008. Hence, based on the example given, the full RM3,000 will be exempted*.**

(iii) Whether the exemption would also apply to Joint Account holders. Where the deposits are made under the business name of a sole-proprietorship or a partnership, will the sole-proprietor and partners be exempted on the interest?

Answer by IRBM:

The deposits which are made under the business name of a sole proprietorship or partnership will not be exempted. The exemption is only given to the deposits made under the name of an individual resident including joint-account holders of individuals such as mother and son or brother and sister eventhough one of the individuals is non-resident.

13. Self-Amendment of Tax Return (Section 77B)

The Institutes generally welcome the move to allow self-amendment of a tax return.

(i) Disincentive for Self-Amendment

In practice, a voluntary declaration of error within a year after due date of submission of a tax return will attract a 15% penalty under Section 113(2). However, self-amendment of a tax return form under Section 77B stipulates that a taxpayer would be penalised for late payment penalty of 10% if self-amendment is made and additional tax paid within 60 days from the due date of submission. Where the self-amendment or tax payment is made after 60 days from date of submission, the penalty is 15.5%. This is a disincentive for self-amendment of tax return.

It is unclear as to how revision of tax returns would be dealt with in situations where there have been no errors but the need to revise arises due to claw back of capital allowances, etc. which is outside the control of taxpayer.

The Institutes suggest that the period for self amendment be increased to one year rather than be confined to six months. This will also avoid the need to revise the current penalty rate for voluntary disclosure after the six month period which, upon revision, will invariably be higher than the current 15%. As such, an attempt to introduce the right for a taxpayer to self-amend his tax return (which is laudable) will not be seen as an attempt to actually increase penalty rates instead.

The contention by the tax authority that it has been denied the use of tax revenue that should have been collected on the due date of submission is not tenable unless and until a corresponding provision is incorporated in the Act wherein interest on late refund of the tax overpaid is also introduced as a taxpayer would also be denied the use of the funds that should have been received earlier.

Answer by IRBM:

The imposition of late payment penalty and time frame for self amendment are policy matters. Any claw back of capital allowances for the YA concerned would have been known at the time of submitting the current year tax return. Self amendment due to claw back should not arise, bearing in mind self amendment is for the current YA only.

Whether IRBM should pay interest on late refund of tax overpaid is also a policy matter to be considered by MOF.

However, where the claw back is not apparent at the time of submission of tax return for example the claw back is due to the disposal of asset within two years, the taxpayer has to inform IRBM and additional assesment will be raised and no penalty be imposed.

(ii) Commencement of Business / Change of Accounting Date

The proposed legislation does not cover situations for commencement of business where the income for a YA may need to be revised in the following YA. An example [extracted from Example 1, Paragraph 3.5.3, Public Ruling No.7/2001 Basis Period for Business & Nonbusiness Sources (Companies)] is as follow:

A company commences operations on 26.06.2001 and accounts are made up to 30.04.2002 (>10 months), and subsequently to 30.04.2003.

Y/A	Accounting period	Basis Period	Deadline for filing
2001	No Accounts	26.06.2001 to 31.12.2001	30.11.2002
2002	26.06.2001 – 30.04.2002	01.01.2002 to 31.12.2002	30.11.2002
2003	01.05.2002 – 30.04.2003	01.05.2002 to 30.04.2003	30.11.2003

It can be seen from the above that at the time of submitting the tax return for YA 2002, the income for the basis period from 01.05.2002 to 31.12.2002 cannot be ascertained until the finalisation and audit of the accounts ended 30.04.2003. Thus, a revised return has to be made in 2003 to take into account the income for the period.

Similarly, the proposed legislation does not appear to provide for returns furnished under Section 77A(2), i.e. in the event where there is change in the company's accounting period. For illustration, Example 2, Paragraph 3.6.1, Public Ruling No.7/2001 [Basis Period for Business & Nonbusiness Sources (Companies)] is reproduced below:

A company which normally closes its accounts on 31 December changes its accounting date to 31 March and prepares accounts as follows: 01.01.2001 to 31.03.2002, and subsequently to 31 March each year.

Based on Section 77A(2), the return form for Y/A 2001-2003 must be filed as follows:

Y/A	Accounting period	Basis Period	Deadline for filing
2001	No Accounts	01.01.2001 to 31.12.2001	31.10.2002
2002	01.01.2001 – 31.03.2002	01.01.2002 to 31.12.2002	31.10.2002
2003	01.04.2002 – 31.03.2003	01.04.2002 to 31.03.2003	31.10.2003

The tax return form for the year of assessment 2002 has to be amended in 2003 because at the time of submission, income for the basis period from 01.04.2002 to 31.12.2002 cannot be ascertained.

Under both the above circumstances, will the revision of the tax return be considered as a self-amendment and subject to a penalty?

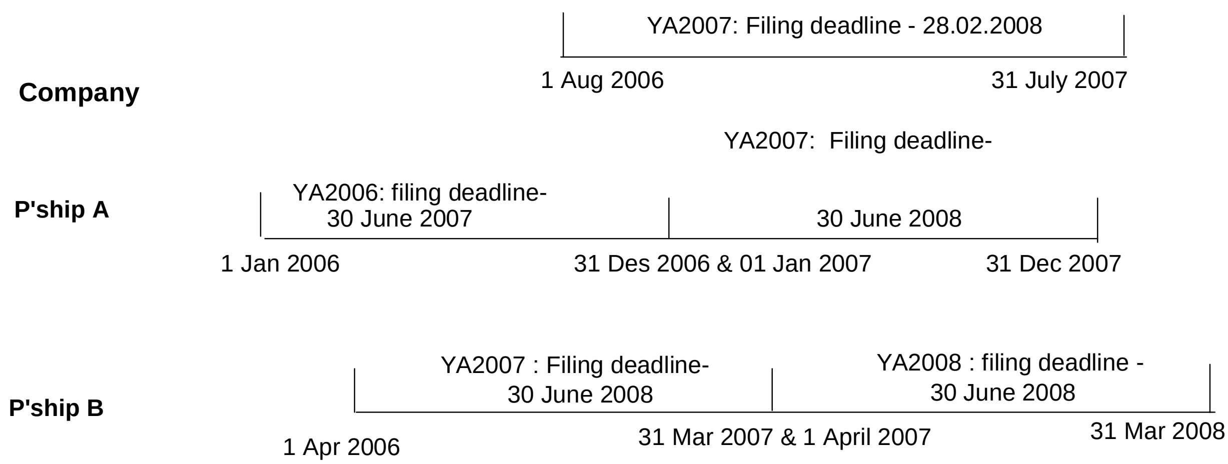
Answer by IRBM:

Self amendment does not cover commencement of business and change of accounting date cases as these cases involve amendment to prior years' tax computation and most likely fall outside the time frame for self amendment.

The detail explanation of the above circumstances is as per appendix B.

(iii) Companies in Partnerships

A company enters into several partnerships having different year-ends as illustrated below. Company X has a July year-end whilst Partnership A has a December year-end and Partnership B has a March year-end. The Company is required to submit 2 revisions to its original tax return.



At the time of submitting the tax return form for YA 2007, i.e. 28.02.2008, Company X is unable to ascertain the incomes for partnerships A & B. Under such circumstances, will the revision of the tax return for YA 2007 by Company X when the incomes for partnerships A and B are finalised be considered as self-amendment and subject to penalty?

Answer by IRBM:

Self-Amendment shall apply on the amendment in accordance with subsection 77(1) or 77A(1) and does not apply on partnership since it is not a taxable person. Current operational practice for partnership cases will continue to apply on the revision for finalisation on distribution of profit from the partnership. However, self-amendment will be applicable for amendment on the partnership income pertaining to omission or understatement of partnership income.

In a case where the amendment pertaining to the understatement of partnership income is made beyond the 6 month period, the amendment on the partnership income will be subjected to penalty and the amount of the penalty is as provided in the audit framework.

(iv) Extension of Time to File Tax Returns

Where a taxpayer has been granted extension of time to file a tax return, either specifically or across the board (e.g. extension of time up to 14 August for companies with December year end to file tax returns), it is assumed the due date as referred to in Section 77B would be moved forward accordingly.

Answer by IRBM:

The granting of extension of time is not provided in the ITA. It is merely an administrative concession given by IRBM. The due date would not be moved forward accordingly.

(v) Amended Tax Liability Lower Than Estimated Tax Paid

Where the amendment result in higher tax payable than the original return but LOWER than the instalments paid pursuant to Form CP204/CP204A, would a penalty still be imposed on the difference between the amended assessment and the original assessment?

Example: A Company with financial year ended 31 12 2007 submitted its CP204 on 0.12.2006 with an estimated tax payable RM12,000. The tax instalment payments were settled by December 2007. The YA 2007 original tax return was filed on 30 July 2008 with the tax payable of RM5,000. Subsequently the Company made a self-amendment for YA 2007 and submitted it on 1 October 2008. The revised tax payable for YA 2007 is RM8,000

Is there any penalty for the difference in tax payable between the YA 2007 original return and the self-amended return of RM3,000, bearing in mind that the tax already paid is RM12,000? The Institutes believe that in such a situation, no penalties would arise.

Answer by IRBM:

The amended return submitted by the company is subjected to penalty under sub-section 77B(4) as a result of additional assessment. The penalty is based on the difference between the amended and the original assessment. The company entitles for a refund if the amount paid is excessive.

14. Notification of Non-Chargeability (Section 97A)

The issuance of a notification of non-chargeability is welcomed by the Institutes as it provides an avenue for a taxpayer to appeal to the Special Commissioners in respect of a dispute with the IRB.

(i) It was clarified during the IROU Seminar held on 3 September 2008 that in the event of a tax audit where there is no assessment, the letter issued to the taxpayer notifying of the tax audit findings and any adjustments required to the tax computation is deemed to be the notice of non-chargeability under new Section 97A.

The Institutes wish to confirm that normally in an audit which does not involve a liability to tax (due to losses, etc) , the IRB officer would let the taxpayer know what the proposed adjustments are and obtain the taxpayer's agreement to the audit findings. This would allow the taxpayer an opportunity to forward explanations and evidence to support his arguments against the audit adjustments that are proposed. If the two parties cannot come to agreement on the adjustments, then IRB may proceed to issue the Notification of non-chargeability and the taxpayer then can consider whether to proceed to appeal to the Special Commissioners.

0Alternatively, the Institute proposes that a specific notice be introduced and issued under the new Section 97A and that the letter notifying tax audit findings shall not be deemed to be a notification of nonchargeability under Section 97A.

Answer by IRBM:

The IRBM confirms that there will be a standard form of notification of non-chargeability for both audit and non-audit cases.

(ii) Section 97A(1) states that the DG may issue the notification of nonchargeability together with the tax computation with regard to it. The Institutes wish to seek clarification as to whether the notification will be issued in all relevant cases or whether a taxpayer would need to request that the IRB issues such a notification.

Answer by IRBM:

Notification of non-chargeability will be issued on both audit and non-audit cases. All audit cases will be issued with a notification of non-chargeability upon completion of audit. However, for non-audit cases it will be issued upon request by the tax payer to the IRBM branches, for example in cases where a tax payer is not liable to tax and yet has to comply with public rulings or stand taken by IRBM. This is to enable him to make an appeal to the Special Commissioner of Income Tax (SCIT).

15. Withholding Tax on Section 4(f) Income (Section 109F)

With effect from 1 January 2009, new Sections 6(1)(k), 15B and 109F will be introduced to widen the tax net as it applies to non-resident in respect of gains or profits under Section 4(f).

The Institutes would like to seek clarifications on the following:

(i) Nature of Receipts

It is clear that whether a payment is a gain or profit under Section 4(f) or business income depends on the facts of the case. Generally it is determined in the context of the recipient's activities as a whole. It is therefore very difficult for a Malaysian payer to determine whether the payment to a non-resident recipient is income under section 4(f) or business income. For example, a commission payment may seem to be a Section 4(f) income, but it may also be business income if the recipient is also carrying on business as a commission agent. Subjecting such a payment to a withholding tax when it is actually business income of a non-resident (who does not have a permanent establishment in Malaysia) will result in trade disputes and tax disputes. Furthermore, if the non-resident is a resident of a double taxation treaty partner, a more serious problem might occur as different types of income are treated differently in various double taxation agreements.

Answer by IRBM:

The IRBM confirms that for the purpose of this section the payer or the non- resident recipient himself has to determine whether the receipts are income under this section 4(f) or business income. As guidance, it would be necessary to determine that:

- ***the payment is income and not capital in nature:***
- ***the payment is for any job or arrangement made;***
- ***the payment is not income that falls under paragraph 4(a) to (e) and section 4A, ITA;***
- ***the payment is often "one off" in nature.***

If the non-resident recipient can verify that the payment received in relation to the job/arrangement made is in relation to its income from carrying on of a business whether the business operation is carried on in or outside Malaysia, then that payment should not be subjected to withholding tax under this paragraph 4(f), ITA. IRBM will not specify the types of supporting document as it is subject to case to case basis.

For the purpose of DTA, income under this paragraph will be dealt with under the "Other Income" Article. As the wordings in each DTA may vary, reference has to be made to the relevant DTA when necessary.

(ii) Overlapping of Section 4(f) with other Sections of the Income Tax Act

There is a potential overlap among Section 4(a), Section 4(f) and Section 4A. The Institutes would like to clarify that Section 4(f) will only be invoked after Section 4(a) to (e) and Section 4A are considered and that in the case of a business source, the payer will be required to establish if the non-resident is actually receiving the payment as part of its business operations carried on whether in or outside Malaysia, in which case, no withholding tax would apply under Section 109F.

Answer by IRBM:

The IRBM confirms that there is no overlapping among paragraphs 4(a), section 4(f) and section 4A. Section 4(f) will only be invoked after Section 4(a) to (e) and Section 4A are considered and the details will be addressed in the Public Ruling.

(iii) Basis of Withholding

Unlike Section 4A income, Section 4(f) refers to gains or profits not falling under Section 4(a) to (e). Section 109F stipulates withholding the tax on a payment to a non-resident in relation to any gains or profits. The Institutes are of the opinion that it would not be right if the withholding tax is deducted based on the gross payment since the Act only provides for withholding tax on gains or profits. The payer however is not likely to know the costs of the recipient.

Theoretically, the nonresident should file a tax return and claim the amount of tax over deducted. In practice, the non-resident will not bother to file the tax return and the local payer has to bear the excessive tax.

The Institutes are of the view that detailed guidelines should be issued, indicating the types of income envisaged, rules for determination whether a payment is subjected to WHT and the types of documentation required, etc. so that taxpayers can easily comply with the provisions.

Answer by IRBM:

Witholding tax on a payment to a non-resident in relation to any gain/profit under paragraph 4(f) is at gross and the details will be addressed in the Public Ruling.

(iv) Income Excluded From Section 4A

Public Ruling No.4/2005 (Withholding Taxes on Special Classes of Income) has specifically excluded the following payments made to nonresidents:

(a) commission paid to non-resident general commission agent for deals transacted overseas;

(b) guarantee fees connected with any loan or indebtedness, or commission for letter of credit;

(c) deposit paid on signing of a technical services agreement which is refundable upon completion of the service;

(d) testing services for the provision of test results on finished products to meet required standards which do not involve technical advice or consultation.

With the extension of Section 4(f), it appears that these payments may be brought into the WHT net again. The Institutes would reiterate that such items mentioned above should not be subject to WHT under Section 4(f).

Answer by IRBM:

The IRBM clarifies that those payments made to non-residents which are excluded in the Public Ruling No. 4/2005 is for the purpose of clarifying that such payments will not fall as special class of income for the purpose of section 4A.

However, with the introduction of this new provision, the IRBM confirms that those payments now fall under paragraph 4(f) and subject to withholding tax under section 109F if such payments do not falls under paragraph 4(a)-4(e).

(v) Services Performed Outside Malaysia

Public Ruling No.4/2005 (Withholding Taxes on Special Classes of Income) also specifically excludes payment made to non-residents for management, marketing and legal services from Section 4A income on condition that the services are performed outside Malaysia, even though the responsibility for payment lies with a Malaysian resident and the payment is charged as an outgoing in the accounts of a business carried on in Malaysia.

Based on the same rationale, the Institutes would suggest that payments in relation to services performed outside Malaysia should also not be subjected to WHT under Section 109F.

Answer by IRBM:

The IRBM clarifies that under this new proposal, income under paragraph 4(f) received by a non-resident is deemed to derived from Malaysia irrespective of whether the services/job/arrangement are performed outside Malaysia and subject to witholding tax under section 109F. The issue will be addressed further in the Public Ruling.

(vi) Treatment of Disbursements and Reimbursements

The Institutes seek clarification as to whether disbursements and reimbursements are considered as Section 4(f) gains and profits and subjected to WHT under Section 109(F).

Answer by IRBM:

The IRBM confirms that disbursements and reimbursements are considered as section 4(f) gains and profit and subject to withholding tax. MOF also confirms that no exemption is given for

disbursements and reimbursement that relates to hotel accomodation under section 4(f).

(vii) Payment to Permanent Establishment (PE) in Malaysia.

Where amounts, including commissions, arrangement fee, guarantee fee, etc. are paid to a PE in Malaysia, is the payer required to withhold the tax? The Institutes hold the view that this would not be the case as such a payment constitutes business income instead of Section 4(f) gains or profits.

Answer by IRBM:

The IRBM clarifies that it depends on the fact of each case. If the payment to PE is a business income under section 4(a) ITA, then such payment is not subject to withholding tax under this section 109F.

(viii) Application of DTA

The Institutes would like to seek confirmation from the IRB that where the DTA provides that the right to tax under the "Other Income" Article rests with the country of residence of the non-resident, then the WHT would not apply to the non-resident person.

Answer by IRBM:

If the section 4(f) income falls under the scope of the "Other Income" Article of a DTA, and the said article provides for exclusive rights to the country of residence of the non-resident, the witholding tax under section 109F is not applicable. To be eligible for the exemption provided in the DTA, a letter from the Revenue Authority of the relevant country confirming resident status should be obtained.

(ix) Application of the Law

The Institutes would like to seek clarification as to whether the effective date refers to the date of performance of the service or the date of payment. If the effective date refers to the date of payment, it would constitute a retrospective application of the law because when the party entered into the transaction, no one was aware of the impending changes!

Answer by IRBM:

In principle, for the purpose of withholding tax on income falling under paragraph 4(f), the effective date for derivation of such income is when the liability to make payment arises. This issue will be

addressed in the Public Ruling and ample examples will be shown for clarification.

The Institutes are of the view that detailed guidelines should be issued so that taxpayers can easily determine whether a payment is subject to WHT and the types of documentation required for tax audit. The Institutes understand that a public ruling will be issued on the new WHT and hopes that there would be adequate time provided to the profession to provide its views on the draft public ruling so that the new provision will be simple and takes into account all practical matters and issues.

Answer by IRBM:

The IRBM is in the midst of preparing the PR and IRBM will try to take note all practical matters.

16. Advance Pricing Arrangement (APA) (Section 138C)

(i) Section 138C is applicable to “any person who carries out a cross border transaction with an associated person”. The Institutes suggest that this facility should also make available to local resident groups of companies as well.

(ii) As the APA is being introduced in Malaysia in 2009, the concern is whether IRB will seek to adjust prior year prices upon taxpayers applying for an APA? The Institutes would like to confirm that the tax authorities would not seek to adjust prior year prices in any APA negotiations and no penalty will be imposed.

(iii) If no agreement is reached with the IRB, will this trigger a tax audit? Will the information provided for an APA be used solely for the purpose of that particular APA? The Institutes are of the opinion that this should not be the case and would like to seek IRB confirmation.

The Institutes wish to point out that unlike Malaysia, an APA in most other countries are negotiated and agreed upon between taxpayer and the Ministry of Finance (the competent authority under double tax treaties) while the enforcement is carried out by agencies such as the IRB. The Institutes are concerned with the possible conflict of interest where the IRB is empowered to negotiate an APA and to enforce income tax law. The Institutes would suggest that a specific team be set up and entrusted with the responsibilities of APA negotiation and members of the team shall not be involved in Transfer Pricing audits, tax audits and investigation. There should not be a sharing of information provided during an APA as confidential information would be divulged during the negotiations. Information provided for an APA should be used solely for that purpose only.

In view of the significant implications on the implementation of an APA, the Institutes would like to enquire when the relevant guidelines can be issued. The

Institutes hope that the authority could allow the professional bodies to present their feedback on the draft guidelines before these are finalised.

Answer by IRBM:

The issue is to be discussed separately in the consultation meeting conducted by MOF and will be addressed in the Rules/Guidelines.

17. Transfer Pricing Adjustments [Section 140A (1), (2)& (3)]

(i) The Institutes seek confirmation that compensating adjustments will be given for onshore transfer pricing adjustments.

(ii) The Institutes wish to seek clarification as to the scope of the term “acquisition or supply of property or services” as well as to the definition of the terms ‘property’ and ‘services’.

(iii) The Institutes would like to seek clarification on the treatment of interest free loans and advances between companies in view of the introduction of the new provisions in the law.

In view of a recently reported matter where the IRB imputed interest income on all interest free loans provided by a company, the Institutes would like to enquire why there is a departure from the past practice of accepting interest free loans?

The institutes are of the view that there are genuine commercial reasons for not charging interest particularly among companies of a group. This departure will have a serious impact on Malaysian groups of companies. If there is indeed a departure, the Institutes would request the IRB to apply it prospectively and allow the companies affected a transitional period to rearrange their financial structure.

(iv) In view of the effective date of the amendments, the Institutes would also like to seek clarification that all existing intercompany loans/advances would continue to be accepted and that the new provision would apply to all loans/advances made or entered into from 1 January 2009. This would be the logical treatment as the IRB and the Ministry of Finance are both fully cognisant that interest free loans/advances have been the way in which business activities have been carried on among groups of companies.

The Institutes would also like to know if there would be any additional guidelines issued on transfer pricing or whether the existing transfer pricing guidelines will be amended as well as the time frame for this.

Answer by IRBM:

The issue is to be discussed separately in the consultation meeting conducted by MOF and will be addressed in the Rules/Guidelines.

18. Thin Capitalisation Rules [Section 140A (4) & (5)]

(i) The Institutes would like to seek clarification on what is meant by

(a) "financial assistance which is excessive in relation to the fixed capital";
(b) "debts"; and
(c) "equity".

What debt-equity ratio would be used?

The Institutes are of the view that thin capitalisation in many countries applies to cross border lending as it is a means of curtailing any perceived excessive outflow of funds /profits to nonresidents. In this context, the Institutes wish to seek confirmation that the proposed thin capitalisation rules will only be applied to cross border transactions.

In addition, the Institutes would also like to know what debt-equity ratio would be used? The Institutes also hope that there will be flexibility in adopting different debt-equity ratios for different sectors as the type and the manner of carrying on business differs among various sectors.

(ii) The Institutes would like to point out that existing loans or financial assistance made prior to the introduction of thin capitalisation rules should not be affected, i.e. a grandfathering provision should be in place. Thus, the rules should apply only to new loans/financial assistance made from 2009 onwards.

(iii) The Institutes would like to seek confirmation that there would be a compensating adjustment on the other party if an adjustment is made.

(iv) It is felt that thin capitalisation, when taken together with the Section 33(2) interest restriction, can lead to a double restriction and thus be detrimental to a business. Although these are different concepts, they add complexity to the tax system. Such complexity adds to administrative burdens. The Institutes also seek confirmation that the Section 33(2) provision will be applied to all borrowings and then when it comes to thin capitalisation, the restriction will apply to only the inter-company borrowing which exceeds the relevant debt-equity ratio.

Answer by IRBM:

The issue is to be discussed separately in the consultation meeting conducted by MOF and will be addressed in the Rules/Guidelines.

19. Donations to Approved Institution

The increase in the limit from 7% to 10% of aggregate income for a company is noted. However, the Institutes would also suggest that there should be flexibility in such cases. For example, there could be a small company which made a small profit say, RM100,000 and which wishes to donate say RM25,000 to a charitable institution. Under the proposed change, this will be restricted to RM10,000. It is suggested that the law be amended to stipulate the lower of 10% of aggregate income or RM25,000 (or some other practical threshold). In addition, the Institutes wish to point out that the provision should apply to all taxpayers instead of only companies.

Answer by IRBM:

It is a policy matter. If the Institutes wish to pursue the issue, it is advisable to make a proposal to the MOF.

20. Reinvestment Allowance (RA)(Schedule 7A)

The Institutes take note of the proposed amendments which it is understood are due to the perception that there had been an element of abuse in claiming the RA. However, the Institutes would like to express the view that an incentive should not become a disincentive. If there is abuse, the answer lies in effective enforcement rather than imposing stringent rules which, in most cases, practically nullify the RA as an incentive. To some companies, the proposals have come as a total disincentive at a time when the economy is facing challenges and the need to face challenges would involve modernisation of the business in order to survive and take up new opportunities that may surface. The extension of the eligibility period to 36 months, the withdrawal of the RA if the assets are disposed within 5 years to related parties and the narrow definition of 'manufacturing' are seen as negative steps for the business community. As a temporary measure, the Institutes hope that the IRB can amend the Public Ruling 2/2008 and introduce a transitional provision for the implementation of the new law.

Answer by IRBM:

An Addendum to Public Ruling 2/2008 is being prepared. It will incorporate the Budget 2009 amendments on Reinvestment Allowance (RA). Relaxation on certain issues will also be incorporated.

(i) Introduction of new definition of manufacturing

The Institutes would like to highlight that the new definition of manufacturing introduced in Schedule 7A is different from the definition of manufacturing activity in the Industrial Coordination Act 1975 (ICA) and definition of manufacture in the Sales Tax Act 1972 (STA). It also differs from the definition contained in the Public Ruling No.2/2008 (Reinvestment Allowance) issued in April 2008. This may create confusion as businessmen may not understand why they are not eligible to claim the incentive when they have the manufacturing licence under STA or ICA. It makes our tax system appear complicated. There is a need for the various authorities to streamline the terms used in formulating fiscal policy so as to achieve greater efficiency.

Answer by IRBM :

MOF has studied the various definitions before deciding on the new definition as a provision in the Schedule 7A.

(ii) Processing Activity

With effect from YA 2009, processing activity is excluded from the definition of a qualifying project and therefore will not be eligible for the RA. Paragraph 2 of Schedule 7A provides that RA shall be given in respect of capital expenditure incurred in the basis periods for 15 consecutive YA beginning from the YA for the basis period in which a claim for RA was first claimed in respect of that capital expenditure.

The Institutes would like to seek clarification as to whether companies which previously qualified for RA for processing activity would still be able to claim RA on expansion after YA 2009 onwards?

Answer by IRBM:

Yes. A company which previously qualified for RA for 15 consecutive YA for processing activity (which qualifies for RA under the current schedule) but is no longer a qualifying activity from YA 2009 onwards due to the exclusion of processing activity from the definition of a qualifying project would continue to be eligible for RA as long as all other conditions are met.

Example 1

Company A is engaged in processing activity and it had first claimed RA in YA2005 to 2007 under the current rules. The qualifying project was completed in YA2007. In YA2010 to 2013 Company A will embark on another 3 year expansion project of its existing business, which is a processing activity. Under the new provision, this activity will not be considered as a qualifying project. Is Company A still eligible to claim RA for YAs 2010 to 2013 pursuant to Paragraph 2 of Schedule 7A?

Answer by IRBM:

Company A's qualifying period is from YA 2005 to YA 2019. Within this 15 consecutive years of assessment, the company is eligible to claim RA on any qualifying project in processing activity undertaken by the company since the qualifying period has commenced prior to YA 2009.

Example 2

Company B is engaged in the processing of a product and has embarked on a 3year expansion project from YA 2008 to 2010 under the current rules. Will Company B still eligible to claim RA for YAs 2009 and 2010?

The Institutes are of the view that those companies which qualified for RA previously should still be eligible for the RA until the expiry of the 15 year time limit.

Answer by IRBM:

Since Company B's qualifying period had commenced prior to the amendment coming into effect in 2009, therefore Company B is eligible for RA for YA 2009 and 2010 for the activities that would qualify under the current schedule.

IRB agrees with the view of the Institutes on these 2 Examples**.**

(iii) New Terms Used in the Definition of Manufacturing

Paragraph 9(i)(c) define manufacturing to include "mixing of materials by a chemical reaction process including biochemical process…."

The Institutes would like to seek details in respect of the various new terms used in the new definition such as "biochemical process'', etc.

Paragraph 9(iii) defines simple as "an activity which does not need special skills, machines, apparatus or equipment especially produced or installed for carrying out the activity." However, what constitutes special is not defined.

In this respect, the Institutes would like to enquire when will the Public Ruling be amended and hopes that the profession would have the opportunity to comment on the draft amendments to the Public Ruling.

Answer by IRBM:

Addendum to PU 2/2008 is in the process of being prepared. The Institutes' request to see the draft is noted and will be given due consideration.

(iv) Exclusion of Packaging Activity

Paragraph 9(i) specifically excludes any activity of packaging or presenting goods for sale, or facilitating shipment and transportation from the definition of manufacturing.

The Institutes are of the view that manufacturing activity should be the whole process of manufacturing, including the packaging activity. Without packaging, the goods will not be in a saleable state. In fact, some of our goods are losing out in the export market not due to price competition or quality of product, but due to unattractive packaging! In an integrated manufacturing system, different manufacturing processes are linkup and automated. It may be difficult to segregate the cost of one processing machine.

The Institutes suggest that where the packaging is not the only activity, it should be considered as part of the manufacturing activity and Paragraph 9(i)(aa) to (hh) shall not apply

Answer by IRBM:

The packaging activity in paragraph 9(i)(bb) refers to a business whose activity is not manufacturing but one where the activity is merely buying in bulk and repackaging the product.

Where the activity is manufacturing, packaging activity such as bottling, placing in boxes, bags and cases as a saleable state would be part and parcel of the manufacturing process.

The policy makers' intention is to ensure that RA is not claimed by companies whose activities are basically only those listed under paragraph 9(i)(aa)to (hh).

(v) Controlled Transfer Assets and Assets Transfer under a Scheme of Reconstruction and Amalgamation

With effect from YA 2009, the above assets will not be qualifying assets to the acquirer if the assets were purchased by the disposer for the purposes of qualifying project.

In a controlled transfer or transfer under a scheme of reconstruction and amalgamation, where a qualifying asset was purchased and disposed by the disposer within 5 years and the RA claimed was clawed back, why would the acquirer not be eligible to claim RA on that asset in view that no RA has effectively been claimed by the disposer.

The Institutes would like to confirm that the restriction is confined to assets on which RA have been claimed by the disposer, i.e. if RA is not claimed by or has been clawed back from the disposer, then the acquirer could claim RA on the asset.

Answer by IRBM:

IRBM confirms that in relation to control transfer under paragraph 1B, Schedule 7A ITA 1967, the acquirer is not entitled to RA although RA has been clawed back from the disposer (paragraph 2A applies).

(vi) Claw Back for Disposal of Asset Within 5 Years

With effect from YA 2009, where an asset is disposed of within 5 years from the date of acquisition, the RA in respect of the asset will be clawed back. The Institutes would like to confirm that the claw back will be effected in the year of disposal.

The Institutes are of the view that the 5 year period is extremely long as the asset may become technologically obsolete before the 5 years. The move will restrain the company from investing in new technology and this will be detrimental to the overall economic positioning of Malaysia. This is in direct contradiction of the Government's intention to encourage businesses in modernisation and expansion of their activities. The Institutes would suggest that the two year period is the norm that is used in the various provisions in the law affecting controlled transfers. As the IRB is concerned about possible abuse, the very fact that the claiming of RA may trigger a tax audit will serve as an adequate deterrent to would be abusers.

Answer by IRBM:

For ease of administration, the claw back will be effected in the year of disposal. However, if a taxpayer does not agree, RA will be clawed back in the respective years.

The "five year period" is a policy maker's decision.

(vii) Eligible for RA 36 Months After Commencement of Business

Where a company has commenced business, say on January 2007, for 12 months and is claiming RA in YA 2008 under current rules, but has not reached the 36 months tests in YA 2009, can the company continue to claim RA in YA 2009?

Answer by IRBM:

Yes. For a company which has already claimed RA prior to 2009, the old provision (12 months) applies.

(viii) Companies with Early Year-end.

For a company with an early year-end (say basis period from 1 February 2008 to 31 January 2009), it may have decided to embark on an expansion project and acquired assets from related companies in say March 2008. The expansion project is implemented after having factored in the RA. Such a company is now affected by the amendments which are certainly retrospective in its effect on such companies. For such entities, the proposed amendments are certainly not fair. One possible solution would be to apply the proposed amendments from a specific date say 1 January 2009 or Budget Day so that such investments that have already been made are not affected.

Answer by IRBM:

The suggestion is noted. This would involve the policy maker's decision.

21. Single Tier System

Although the Single Tier System has been introduced for one year, various issues are still unresolved in respect of the transitional provisions illustrated below.

(i) Parallel Existence of Imputation and Single Tier System

It was indicated in the 2008 National Tax Conference that dividends paid (under the imputation system) by way of off-setting inter-company balances will be treated similar to the way dividends- in-kind are treated, i.e. such dividends will be deemed as single-tier dividends (just like dividends in kind paid to ordinary shareholders). As such, the Section 108 balance will remain intact. The Institutes would like to confirm that the above treatment is in order.

Answer by IRBM:

Yes, the above treatment is in order. Dividends paid (under the imputation system) by way of off-setting inter-company balances will be treated similar to the way dividends-in-kind are treated, i.e. such dividends will be deemed as single-tier dividends (just like dividends in kind paid to ordinary shareholders). As such, the Section 108 balance will remain intact.

(ii) Section 110 Set-off for Dividend not Paid in Cash

Clause 50 of Finance Bill 2008 stipulates that Section 110 set-off is not available to recipient if the dividend is not paid in cash when the Finance Act 2008 comes into operation. The Institutes would like to clarify that Section 110 set off is available to dividend paid by way of set off prior to coming into operation of Finance Bill 2008.

Answer by IRBM:

Under section 40 of Finance Act 2007, a company is entitled to deduct tax if dividend is paid in cash in respect of ordinary share. Clause 50 of Finance Bill 2008 is to clarify that dividend must be paid in cash.

22. Power of DGIR to Direct Instalment Payments for Companies [Section 107C(8A)]

With effect from year of assessment 2010, the DGIR is empowered to direct instalment payments of a company before the 6th month of the basis period for a year of assessment and be deemed as estimate of tax payable for the Company. The penalty of 10% will be imposed on the excessive difference between the actual tax payable and the amount of deemed tax estimate.

The Institutes wish to seek confirmation/clarification as to whether there is any restriction on the revised amount.

Answer by IRBM:

There is no restriction on the revised amount.

23. Deduction on Expenses for Recruitment of Worker

The Income Tax (Deduction of Pre-commencement of Business Expenses Relating to Employee Recruitment) Rules 2008 [P.U. (A) No. 361/2008] were gazetted on 25 September 2008 to give effect to the 2009 Budget proposal that deduction be granted for recruitment expenses of workers incurred before commencement of business. The Institutes applaud the Government’s efforts to assist the private sector in setting up businesses.

However, the Institutes would like to seek clarification on the following issues:

(i) What constitutes “expenses on the recruitment of employees to enable the person to commence its business”? Would payment to a human resource agency for recruitment of receptionist and accounts personnel, which is necessary for the maintaining an office, be eligible?

Answer by IRBM:

Yes, the deduction includes expenses on the recruitment of administrative employees.

Expenses on the recruitment of the administrative employees incurred prior to the commencement of the business constitutes “expenses on the recruitment of employees to enable the person to commence its business”. Therefore, payment to human resource agency for recruitment of receptionist and account personnel are also expenses which falls under that Rules.

(ii) The expenses must be incurred within the period of one year prior to the commencement of its business. It is believed that a one year period refers to a 12 month period preceding the actual date of commencement of business.

The Institutes would suggest that on the same rationale, the staff costs, including salary, wages, EPF and SOCSO etc. should also be given deductions. This will certainly assist the SMEs in starting up businesses.

Answer by IRBM:

The policy is to exclude administrative expenses. In other words, expenses such as salary and EPF incurred prior to the commencement of the business are not eligible for deduction.

24. Tax Incentives to Enhance Training in Selected Fields

To ensure the development of a sufficient pool of skilled manpower, it is proposed that:

i. Double deduction be given on expenses incurred by employers in training their employees in the following fields:
   a. Post graduate courses in information communication and technology (ICT), electronics and life sciences;
   b. Post basic courses in nursing and allied health care; and
   c. Aircraft maintenance engineering course.

ii. Withholding tax exemption be given to non resident experts on income received by providing technical training services in the above fields.

The Institutes would like to confirm that where a non-resident expert is only receiving income from providing the above technical training services in Malaysia, he need not have to file his tax return since the income is exempt.

***Answer by IRBM*:**

Yes. The non-resident expert need not have to file his tax return if the fees from providing qualifying technical training services is the sole income that derived from Malaysia.

25. Extension of Accelerated Capital Allowance (ACA) on Security Control Equipment

The government recognises that other business premises such as hotels and banks also install security control equipment. In recognising their effort to ensure security, it was proposed in the 2009 budget that ACA on Security Control Equipment will be extended to all business premises (Appendix 24, 2009 Budget).

However, the Income Tax (Accelerated Capital Allowance) (Security Control Equipment and Monitor Equipment) Rules 2008 [P.U.(A) No. 359/2008] stipulates that ACA is only available to

(i) a resident individual for security control equipment installed at any building of permanent structure used for the business.

(ii) a resident company incorporated under Companies Act 1965 and approved under the Industrial Coordination Act 1975, for security control equipment installed at its factory;

(iii) a resident company incorporated under Companies Act 1965 for Global Positioning System (GPS) for vehicle tracking for its

(a) container lorry bearing Carrier Licence A, and
(b) cargo lorry bearing Carrier Licence A or C

The Order does not extend the claim of ACA to all business premises as proposed in the 2009 Budget. It only extends to business premises of individuals only. For companies, the position remains the same as before. Non-manufacturing companies such as the hotel, banks, shopping malls, restaurants, etc. are not eligible to the ACA.

The Institutes would therefore like to enquire whether another Order would be issued to address these non-manufacturing business premises. If not, will the current Order be amended?

Answer by IRBM:

A new Exemption Order will be issued to replace Exemption Order P.U.(A) 359/2008 and to include non-manufacturing companies.

26. Improvement of ACA on Information and Communication (ICT) Equipment

To encourage the private sector to invest in the latest ICT equipment and in line with the development in ICT, the 2009 Budget propose to shorten the 2 year ACA claim to one year. The Income Tax (Accelerated Capital Allowance)(Information and Communication Technology Equipment) Rules 2008 [P.U.(A) No. 358/2008] were gazetted on 25 September 2008 to give effect to the 2009 Budget proposal.

Contrary to the intention stated in the 2009 Budget proposal, the Order appears to be more restrictive than the old rules in that it introduces a claw back provision and excludes companies enjoying incentives under Promotion of Investments Act 1986 and reinvestment allowance from claiming the ACA.

The Institutes suggest that the authority consider withdrawing the claw back provision as it is a restriction contrary to the intention and reality of technology advancement.

Answer by IRBM:

IRBM confirms that the claw back provision will not be withdrawn as it is a policy matter.

C. STAMP DUTY

1. Stamp Duty on Loan, Services, Equipment Lease Agreement or Instrument [Stamp Act 1949, First Schedule, Item 22(1)]

With effect from 1 January 2009 a loan agreement, service agreement and equipment leasing agreement will be subjected to ad valorem stamp duty. This will add to the costs of doing business in Malaysia. The result of this is far reaching.

The Institutes wish to highlight that the change will have a negative impact on the service industry. It runs against the Government's efforts to promote the development of the services sector.

The Institutes suggest that the actual type of agreements intended to be covered be specified. A general coverage of everything is an unacceptable approach as this will result in unintended outcomes and is particularly 'painful' under current economic circumstances.

Answer by IRBM:

<u>Documents chargeable under Item 22:(Ad Valorem Duty)</u>
1. Loan agreement
2. Service agreement
3. Equipment lease agreement
4. Annuity
5. Covenant
6. Licence agreement

<u>Document under item 22 but chargeable with fixed duty (RM10.00)</u>
1.Financing under the Syariah principle of Al Bai Bithaman Ajil
2. Higher education loan agreement

<u>Documents chargeable under Item 27 (Ad Valorem Duty)</u>
1. Charge or agreement for a charge
2. Mortgage
3. Loan for small and medium size industry
4. Loan in foreign currency
5. Memorandum of deposit for share certificate or fixed deposit receipt

Loan and service agreement will be subject to ad valorem duty based on equitable ground as well as to prevent manipulation to avoid ad valorem duty.

Tenancy agreement is also subject to ad valorem duty.

D. OTHER TECHNICAL ISSUES

1. Tax Treatment of Unabsorbed Losses and Capital Allowances

Section 44(5A) and Paragraph 75A, Schedule 3 of the Income Tax Act 1967 stipulates that a company with a substantial change in ownership/shareholders are not allowed to carry forward its accumulated losses and unabsorbed capital allowances. However, with the directive issued in early 2008, it is stated that the above is applicable to a dormant company only.

The Institutes would like to seek clarification on the meaning of a dormant company.

Answer by IRBM:

The IRBM confirms that the Minister of Finance recently has provided the meaning of dormant for the purposes of section 44(5A) and paragraph 75A, Schedule 3 of ITA as follows:

Meaning of a dormant company:

"A company is considered dormant if it does not have any significant transaction in its accounts in a financial year before a change of 50% or more in shareholdings. As such, there will not be any entries in the company's accounts except for the minimum expenses to fulfill the statutory requirements.

The minimum expenses referred to are as follows;
1) Cost of filing of annual returns to Companies Commission of Malaysia;
2) Secretarial fees for services rendered in filing company's annual return;
3)Tax filing fees for tax return and tax computation
4)Statutory audit fees; and
5) Accounting fees for preparation of accounts."

(i) There are cases where owing to huge losses, the company is unable to sustain its business and hence ceases to operate until a 'white knight' decides to invest to revive the business. This is particularly true in the construction industry where a project may be abandoned due to cash flow problems, and the developer/contractor find an investor later to inject funds into the company to revive the project. Will the company be considered dormant and thus be denied the carry forward of its capital allowances and accumulated business losses?

Answer by IRBM:

Based on the scenario given, the company has ceased its business permanently and that company is considered as dormant for the purpose of section 44(5A) and paragraph 75A, Schedule 3 of the Income Tax Act 1967. However if it can be proven that the company has a significant transaction in the account such as expenses for

getting a new project or maintaining an abandoned project, the company is not considered as dormant.

(ii) There are instances where a company temporarily ceased business to sort out various problems and issues. It may take a few years and the company is then finally sold to new shareholders who then invest and start a new business. Is such a company considered dormant?

Answer by IRBM:

Not dormant if that company is still has a significant account transaction and not only minimum expenses incurred.

2. Permitted Expenses of Investment Holding Company (IHC)

Section 60F(2) of ITA defines "permitted expenses" as expenses incurred by an investment holding company in respect of—

a. directors' fees;
b. wages, salaries and allowances;
c. management fees;
d. secretarial, audit and accounting fees, telephone charges, printing and stationary costs and postage; and
e. rent and other expenses incidental to the maintenance of an office,

which are not deductible under subsection 33(1) of the Income Tax Act 1967.

The Institutes are of the view that since wages, salaries and allowances paid to employees are permitted expenses, it would therefore also include incidental expenses such as EPF, SOCSO contributions, etc paid for the employees.

Answer by IRBM:

IRBM confirms that incidential expenses to wages, salaries and allowances such as EPF and SOCSO contributions paid to employees are not permitted expenses as it is a policy decision.

3. Rental Income of IHC

With the amendment of Section 60F in YA 2006, rental income received by IHC is no longer treated as a business income.

However, in view of the fact that the rental income of some earlier IHCs have been treated as business income all along under the Director General Ruling No.1/95, the IRB has by concession allowed the practice to continue until such time when the IHC no longer fulfills the conditions laid down in Director General Ruling No.1/95 (due to the disposal of the properties held earlier). Upon the occurrence of this, then Section 60F shall apply to these IHCs.

The Institutes seek confirmation that this concession is available to all IHCs whose rental incomes have been treated as business income pursuant to Director General's Ruling No. 1/95.

Answer by IRBM:

The Director General's Ruling No 1/1995 on treatment of rental income is no longer applicable with the amendments of Section 60F. With effect from YA 2006, tax treatment of rental income is in accordance with the revised provisions of Section 60F ACP 1967.

4. Public Ruling No. 2/2008 Reinvestment Allowance

(i) Definition of Factory

The Institutes wish to highlight that the Public Ruling has defined "factory" using the literary meaning. However, Schedule 3 of the Act defines factory under Paragraphs 64 and 65. There is inconsistency between what qualifies as a factory for industrial building allowance purposes and what qualifies for RA.

Example 1:Canteen is defined to be part of an industrial building under Schedule 3 while the Public Ruling specifically disallows it.

Example 2:Where part of the factory is used to store raw materials for use and total floor space used for storing does not exceed 10% of total factory floor area, then the storage area is considered part of factory. Otherwise, the proportion of floor space used for storage of raw materials is excluded from cost of factory that qualify for RA. Para. 64(b) of the ITA specifically defines the storage area of raw materials used for the manufacturing process to be part of factory when determining qualifying expenditure for industrial building allowances.

As a result of the new definition on manufacturing introduced in the Schedule 7A, the qualifying expenditure on a factory may be affected. There is also a more detailed definition of factory under Section 2 of the Factories and Machineries Act 1967.

It is the view of the Institutes that the Public Ruling ought to adopt the definition laid down in Schedule 3 because both are referring to the same capital expenditure. Having a new definition on factory complicates the income tax system

Answer by IRBM:

As an incentive, it is appropriate to adopt a separate and different definition for the meaning of "factory" for the purposes of RA.

(ii) Backward Integration

The existing Public Ruling on Reinvestment Allowance excludes any capital expenditure with regard to expansion which involves backward integration. The rationale for this is unclear.

The Institutes are of the view that expansion of capacity should not be restricted to activities related to only forward integration. Under current circumstances, as the cost of raw materials increase, many businesses seek to have better control over their prices. In this regard, backward integration is likely to be beneficial towards keeping the final product cost down (i.e. being produced internally compared to importing materials, etc). Therefore, there are arguments for backward integration projects to qualify for RA.

Answer by IRBM:

Backward integration is undertaken not with the intention to diversify into related products but more for the purpose of cost-cutting and to ensure control over supply of raw materials and components. MOF will take note as policy matter.

5. Gazetting of Prior Years' Budget Proposals

Under the self-assessment system, the burden is on the taxpayers/tax agents to file a correct return, failing which a penalty will be imposed. However, the Institutes notice that there are still a number of prior years budget' proposals which have not been gazetted. If the law is not in place, it will put the tax practitioners and taxpayers in dilemma when filing the annual tax return, i.e. whether they should give effect to the proposals based on the Budget proposals. The question is particularly acute for the tax agents as taxpayers are wondering why certain expenses are not given due deduction as announced by the Finance Minister in the Budget.

A list of the proposals that have not been gazetted are summarised below:

2003 Budget

1. A company that invests in a whollyowned subsidiary company involved in the consolidation of management of smallholdings or idle land will be allowed a deduction equivalent to the amount of the investment, and the whollyowned subsidiary company involved in the consolidation of management of smallholdings or idle land will be exempted from service tax.

   Answer by IRBM:

   The draft of the Rules has been prepared and to be submitted to MOF.

2. Companies that invest in knowledge intensive activities will be given the following tax deduction: Expenditure incurred by a company for drafting the individual Corporate Knowledgebased Master Plan will be allowed as a deduction in the tax computation.

   Answer by IRBM:

   The draft Order is with Ministry of Finance (MOF**).**

2003 Economic Stimulus Package

1. Group relief will be extended under a prepackaged scheme to forest plantations, including rubber plantations, and to selected products in the manufacturing sectors such as biotechnology, nanotechnology, optics and photonics.

   Answer by IRBM:

   <u>Forest Plantation Project:</u>
   The draft Order is with Ministry of Finance (MOF**).**

   <u>Biotechnology:</u>
   More attractive tax incentive has been provided for biotechnology sector. Please refer to the Income Tax (Exemption) (No.17) and No. (18) 2007 and Income Tax (Deduction for investment in a BioNexus Status Company) Rules 2007. Malaysian Biotechnology Corporation will issue guidelines on the application of the incentive.

   <u>Nanotechnology, optics and photonics:</u>
   IRBM has not been informed on the implementation of these tax incentives.

2. Hypermarkets and direct selling companies that export locally produced goods will be given income tax exemption on statutory income equivalent to 20% of their increased export value.

   Answer by IRBM:

   The draft of the Rules has been prepared and to be submitted to MOF.

2007 Budget

1. Bionexus companies will be given a concessionary rate of 20% on income from qualifying activities for 10 years upon expiry of the tax exemption period.

Answer by IRBM:

***The draft Order is with Ministry of Finance (MOF*).**

2008 Budget

1. Premium paid on professional indemnity insurance be allowed as a tax deduction.

   Answer by IRBM:

   The Public Ruling has been redrafted after Joint Public Ruling Working Group's (JPRWG's) comment and submitted to MOF for policy decision on certain issues.

2. Incentives for ICT activities including computer software development be rationalised as follows:

   (a) Companies undertaking ICT activities including computer software development located outside Cybercities be centralised in the Cybercities and Cybercentres and be given MSC Malaysia status company incentives;
   (b) Incentives for companies undertaking ICT activities including computer software development located outside Cybercities and Cybercentres be discontinued; and
   (c) MDeC be the sole agency to process and recommend incentives for companies undertaking ICT activities including computer software development.

   Answer by IRBM:

   There is no Rules/Order to be gazzetted. The governing law of this incentive is the Promotion of Investment Act 1986. Incentive 2(b) will be revoked by MITI and the application for the ICT incentive has to be submitted to the Mdec.

3. (a) Companies investing in a new testing laboratory for testing medical devices be given pioneer status with 100% income tax exemption for a period of five years or investment tax allowance of 60% on the qualifying capital expenditure incurred within a period of five years.

   (b) Companies upgrading an existing testing laboratory for testing medical devices be given an investment tax allowance of 60% on the qualifying capital expenditure incurred within a period of five years.

Answer by IRBM:

***There is no Rules/Order to be gazzetted. Testing medical devices is a promoted activity under the Promotion of Investment Act 1986. This activity will be gazetted as a promoted activity by MITI and the application has to be submitted to the MIDA*.**

4. Companies that have been successful in reducing emission of CHG and granted tradeable CERs certificates be given tax exemption on the income derived from the trading of CERs certificates.

Answer by IRBM:

Please refer to the Exemption Order (No.8) 2008 which is gazetted on 23 September 2008.

5. Recipients of the Export Excellence Award (Services) and Brand Excellence Award be given a 100% tax exemption on the value of increased exports.

Answer by IRBM:

***The draft Order is with Ministry of Finance (MOF*).**

E. Supplementary Issues

1. Single Tier System

(i) Section 108 Balance

Section 39 of Finance Act 2007 stipulates that the credit of a company as at 31 December 2007 shall consist of --

(a) the amount of the balance for the credit of that company at the end of the basis period for a year of assessment 2007 ascertained under subsection 108(8) of the principal Act prior to the coming into operation of this Act;

(b) …………

(c) ………….

As a concession to companies having early financial year end (i.e. financial year ending other than 31 December), it was agreed that Section 110 tax credit on dividend income received on or before 07 September 2007 be allowed to be taken into Section 108 credit balance.

However, the IRB has taken the view recently that Section 110 credit of all dividend incomes received after 07 September 2007 are not allowed to be taken into the Section 108 credit balance, even though the recipient financial year end falls on 31 December 2007. This is not consistent with the law as dividends received between 7 September 2007 to 31 December

2007 still falls within the year of assessment 2007 for companies with 31 December year end.

The Institutes would like to seek clarification on this. The Institutes are of the view that for companies with December year end, Section 110 credit on dividend received on or before 31 December 2007 ought to be allowed to be taken into the Section 108 credit balance.

Answer by IRBM:

Determination of section 108 balance of a company as at 31 December 2007 is as provided under section 39(1) of saving and transitional provision.

As concession, a company is allowed to increase its section 108 balance as at 31 December 2007 by an amount equivalent to:

a) an amount of section 110 set-off on dividends received on or before 7 September 2007 for company that close account other than 31 December.

b) an amount of advance payment made on or before 7 September 2007.

It is a policy matter .

IRBM confirms that for a company with December year end, section 110 credit on dividend received on or before 31 December 2007 are allowed to be taken into section 108 balance.

2. Improvement of ACA on Information and Communication (ICT) Equipment

The Income Tax (Accelerated Capital Allowance)(Information and Communication Technology Equipment) Rules 2008 [P.U.(A) No. 358/2008] is applicable to person resident in Malaysia. In addition, Income Tax (Qualifying Plant Allowances)(Computers and Information Technology Equipment) Rules 1998 [P.U.(A) 187/1998] and Income Tax (Qualifying Plant Allowances)(Cost of Provision of Computers Software) Rules 1999 [P.U.(A) 272/1999] are revoked.

The Institutes would like to confirm that for permanent establishment and non-resident companies, qualifying capital expenditure incurred after year of assessment 2009 will no longer enjoy the accelerated capital allowances under the revoked rules. However, they may still claim the normal capital allowances on the expenditure. For qualifying capital expenditure incurred prior to year of assessment 2009, the revoked rules still apply.

Answer by IRBM:

Yes, IRBM confirms that for permanent establishment and non-resident companies, qualifying capital expenditure incurred from year of

assessment 2009 are not eligible for accelerated capital allowances under the revoked rules. However, permanent establishment and non resident companies can still claim capital allowances according with Schedule 3 on the capital expenditure.

For qualifying capital expenditure incurred prior to Y/A 2009, the revoked rules ([P.U.(A) 187/1998] and P.U.(A) 272/1999]) still apply.

Appendix A

Orders/Rules relating to the 2009 budget proposals

Bil.	Orders/Rules	status
1	Review of the tax treatment for perquisites provided to employees	Both Orders and Rules have been gazetted on 16 April 2009 - P.U.(A) 152 and P.U.(A)153 respectively.
2	Tax exemption on income of corporate advisors on the issuance and trading of Sukuk	Has been gazzetted on 23 Oct 2008 - P.U(A) 394
3	Enhancing tax incentives for hotels in Sabah and Sarawak	Prepared by MIDA
4	Tax incentives to enhance training in selected fields	Has been drafted and now is with MOF
5	Stimulating the development of the venture capital industry	Has been drafted and now is with the Attorney General (AG)
6	Tax incentives for listing of foreign companies and foreign products on Bursa Malaysia	Has been gazetted on 6 November 2008 - P.U(A) 410.

Appendix A

Public Ruling relating to the 2009 budget proposals

Bil.	Public Rulings	status
1	Addendum to Public Ruling No.2/2008:Reinvestment Allowance	The Addendum has been drafted and discussed. IRB needs confirmation from MOF regarding a certain issue. The draft Addendum will be sent to the Joint Public Ruling Working Group (JPRWG) as soon as the issue is resolved.
2	Addendum to Public Ruling No. 1/2008: Special Allowances for Small Value Assets	The Addendum has been drafted and discussed. IRB is in the midst of preparing an amended draft to be sent to JPRWG.
3	Addendum to Public Ruling No. 1/2006: Perquisites from Employment	The Addendum has been drafted and discussed. IRB is in the midst of preparing an amended draft to be sent to JPRWG.
4	Addendum to Public Ruling No. 6/2005: Trade Association	The Addendum has been drafted and discussed. IRB is in the midst of preparing an amended draft to be sent to JPRWG.
5	Addendum to Public Ruling No. 4/2005: Withholding Tax on Special Classes of Incomes	The Addendum has been drafted and sent to JPRWG for comments on 26.11.2008.
6	Addendum to Public Ruling No. 2/2004: Benefits-in-kind	The Addendum has been drafted and discussed. IRB is in the midst of preparing an amended draft to be sent to JPRWG.
7	Public Ruling No.2/2002: Allowable Pre-operational and Pre-commencement of Business Expenses for Companies	A new Public Ruling (Issue B) to replace Public Rulling No.2/2002 has been drafted. The draft new issue will be sent to JPRWG after discussion at IRB level.

Appendix A

Guidelines relating to the 2009 budget proposals

Bil.	Guidelines	status
1	Guidelines on Advanced Pricing Arrangement	Will be issued by Jabatan Pematuhan
2	Guidelines on Thin Capitalisation	Will be issued by Jabatan Pematuhan
3	Transfer Pricing Guidelines	Will be issued by Jabatan Pematuhan
4	Guidelines on the Types of Treatment/Medicines Eligible For Exempt Medical Benefits	No guidelines will be issued. The explanation will be incorporated in the Addendum to Public Ruling No. 2/2004 - Benefit -In -Kind.
5	Guideline on the Expenditure Eligible for Deduction Under Section 34(6)(h).	Has been issued by the Ministry of Finance (MOF)
6	Guidelines on Section 4(f) Income Subjected to Withholding Tax under Section 109F	No guidelines will be issued. Instead, a new Public Ruling- Witholding Tax On Other Payment To Non-Resident has been drafted and sent to JPRWG for comments on 26.11.2008 and meeting will be held soon with JPRWG

Appendix B

13 (ii) Case 1: Commencement of Business

Y/A	Accounting Period	Basis Period	Deadline to file in R/F by law	Concession from Operational Division	Remarks
2001	No account	26.06.2001 to 31.12.2001	30.11.2002	To quote in the R/F for the YA 2001 the 2nd basis period – to prevent the penalty	Since the account for the Y/A 2001 will only be ready when the company closes the account for the Y/A 2002, IRBM allows the company to submit Return for the Y/A 2001 together with Return for the Y/A 2002 and the deadline for the submission of both Returns is within 7 months from 30.04.2002 – refer to the dialogue 2/2001 between MIT and Revenue Operational Department of IRBM.
2002	26.06.2001 to 30.04.2002	01.01.2002 to 31.12.2002	30.11.2002 – sec 77A(2)	none	Return must be submitted by 30.11.2002 whereby the company has to estimate the income for a period 01.05.2002 until 31.12.2002. A revision can be done subsequently when the company submits Return for Y/A 2003. **No concession is given by the IRBM to submit R/F 2002 together with 2003 on 30.11.2003.** The company can make a self amendment for the Y/A 2002 from 01.12.2002 until 31.05.2003 which is 6 months from the due date. Since account for Y/A 2003 end on 30.04.2003, company only has **1 month** to ascertain the actual income for Y/A 2002 and makes the self amendment.
2003	01.05.2002 to 30.04.2003	01.05.2002 to 30.04.2003	30.11.2003 – sec 77A(2)	none	none

Case 2: Change of Accounting Date

Y/A	Accounting Period	Basis Period	Due date to filing R/F by Law	Concession from Operational Division	Remarks
2001	No account	01.01.2001 to 31.12.2001	30.10.2002	To quote in the R/F 2001 the 2nd basis period – to prevent the penalty	Since account for Y/A 2001 only will be ready when company closed the account for Y/A 2002, so IRB allowed the company to submit R/F for Y/A 2001 and 2002 together and due date for submitting both returns are within 7 months from 31.03.2002 – refer to dialog 2/2001 between MIT and Operational
2002	01.01.2001 – 31.03.2002	01.01.2002 to 31.12.2002	30.10.2002 – sec 77A(2)	none	R/F must submit by 30.10.2002 whereby company has to estimate the income for period 01.04.2002 until 31.12.2002. Revision can be done subsequently when company submitted R/F for Y/A 2003. ***No concession given by the Operational Division to submit R/F 2002 together with 2003 on 30.10.2003.*** Company can make self amendment for Y/A 2002 from 01.11.2002 until 30.04.2003 which is 6 months from the due date. Since the account for the Y/A 2003 ends on 31.03.2003, the company has only **1 month** to ascertain the actual income for Y/A 2002 and make self amendment.
2003	01.04.2002 – 31.03.2003	01.04.2002 to 31.03.2003	30.10.2003 – sec 77A(2)	none	none