JOINT MEMORANDUM ON ISSUES FOR POST 2012 BUDGET DIALOGUE

02 APRIL 2012

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1 INTRODUCTION

As in the past, the 2012 Budget has made a number of proposals; however many of the rules, gazette orders and guidelines are still not in place. The Institutes would like to request the Ministry and the relevant authorities to provide the draft rules, gazette orders and guidelines as soon as possible so that a comprehensive and thorough feedback can be forwarded to the relevant authorities. Such feedback will enhance the smooth implementation of the proposals.

2 TAX ADMINISTRATION

2.1. Duty to furnish particulars of payment made to an agent, dealer or distributor, etc. [Section 83A, ITA]

Clause 16 introduces a new statutory reporting requirement by inserting a new S.83A as follows:

"83A. (1) Every company shall for each year prepare and provide to each of its agent, dealer or distributor a copy of the form prescribed by the Director General containing—

(a) particulars of payment (whether in monetary form or otherwise) made during that year of assessment to that agent, dealer or distributor;
(b) name and address of that agent, dealer or distributor; and
(c) such other particulars as may be required by the Director General.

(2) For the purpose of subsection (1), the prescribed form shall be provided to the agent, dealer or distributor not later than 31 March in the year immediately following the year mentioned in that subsection.

(3) The company shall keep and retain the prescribed form in safe custody and shall make it readily accessible to the Director General.

(4) In this section, **"agent", "dealer" or "distributor"** means any person who is authorised by a company to act as its agent, dealer or distributor, and who receives payment (whether in monetary form or otherwise) from the company arising from sales, transactions or schemes carried out by him as an agent, dealer or distributor."

The law comes into operation on 1 January 2012.

It was announced by the IRB on 23 December 2011 that for payments made in the period 1 January 2011 till 31 December 2011, the payer has been granted an extension of time until 31 May 2012 to complete Form CP58 [2011**].**

However, notwithstanding the extension of time, the payees are required to report the receipt of the payment even though they have not received a copy of Form CP58 [2011] from the payer company.

- The retrospective effect of the law has caused difficulties to many companies as

their information systems may not have such information in the year 2011. Further, does the law apply to payments made on or after 1 January 2011 or does it apply to expenses incurred on or after 1 January 2011? The institutes look forward to the amended guidelines, explanatory notes or guide notes for the Form CP58 [2011].

Answer by IRBM:

Concession is given whereby CP58 does not have to be issued by payer company for the year 2011 (January 2011 – December 2011) if the payer company has issued annual statements or any other statements to the agents, dealers or distributors where value of both monetary and non-monetary incentives for that year have been stated. With regard to the Companies which do not issue annual statements to the agents, IRBM agree to extend the concession to file Form CP58 for one month from the date these minutes are published to the public.

Incentives which are not required to be disclosed in the Form CP58 include -

(a) trade discounts and bulk discounts;

(b) promotional items / gifts received which are not stipulated in the contract;

(c) incentives given for an open invitation to encourage the public/ customers to introduce more customers;

(d) special treatment in the form of preferential rate given to an independent agent who buys and sells goods on his own accord. He is a customer to the producers/wholesalers, except that he enjoys preferential rate due to his purchasing power;

(e) Credit rebate – i.e. Company selling products to supermarkets, sundry shops, minimarkets etc. Company gives customers a credit rebate (credit notes to offset their account) when they make a prompt payment & hit the yearly target/quota;

(f) Sub-contractors;

(g) Handling fees (i.e. loading and unloading of goods or luggage, etc) – i.e. company is in air transport business and sells air tickets to travelers. Company sub-contracts its ground handling services to an agent. The agent solely provides ground-services and does not sell air tickets to travelers. The agent is merely a sub-contractor to the company and merely receives handling fees; and

(h) Items such as umbrellas, pens, calendars etc. given to all agent, dealers and distributors which are not based on performance

The payer does not have to provide tax reference number and residence status of the payees in CP 58 if the information is not available. However, it is compulsory for the payer company to provide registration number, identity card number, police number, army number or passport number of the recipients as well as the identity card number and signature of the designated officer.

Monetary and non-monetary incentives received by an agent, dealer or distributor are considered as income from business source. An agent, dealer or distributor needs to declare the income based on accrual basis. CP58 is issued when payment is made. Therefore an agent, dealer or distributor has to do adjustments for tax purposes. No guidelines will be issued on this subject.

IRB has no specific basis of apportionment of an incentive trip between the elements of holiday and training. A fair and reasonable basis of apportionment by a payer company would be acceptable to IRBM. Prior to the introduction of this provision, there would have been some method used by payer company to ascertain the quantum or proportion of benefit in the form of a holiday and training. However, supporting documents are required to substantiate a claim that training was included in the trip.

Where a company (dealer) receives a holiday package and passes on this package to 2 of its agents, it is the responsibility of the payer company to prepare CP58. The name to be reported in CP58 is the dealer (company) and not the 2 agents.

- Is there also a minimum threshold for reporting? In practice, businesses often pay commissions to various parties for sundry services rendered or sundry sales made. For minor payments, the amount may not be significant but the cost of compliance is tremendous by comparison. The Institutes suggest that a threshold be set to enhance the cost-effectiveness of the reporting requirements.

  Answer by IRBM:

  Effective from year end 31/12/2012, Form CP58 only needs to be prepared and issued by the payer company to agents, dealers or distributors if the total value of monetary and non-monetary incentives for the calendar year is more than RM5,000.

- The IRB has clarified in their IRB Budget Seminar that the intention for this amendment is to empower IRB to gather information from multi-level marketing (MLM) companies and direct sales companies on payments made to these companies' distributors.

  The Institutes are of the view that to reduce the costs of doing business, the DGIR may issue a direction under S.81(1) to all MLM, direct sales companies and targeted taxpayers to furnish the information rather than impose a statutory reporting responsibility on all the employers.

  Answer by IRBM:

  Section 83A applies to incentive payments made by the payer company to an agent, dealer or distributor. An agent, dealer or distributor is not an employee of the payer company.

- The Institutes wish to seek clarification from the IRB as to whether this provision also applies to a Permanent Establishment of a non-resident company in Malaysia?

  Answer by IRBM:

  Yes.

Note:

1. **Monetary and non-monetary incentives received by an agent, dealer or distributor are considered as business source income. That agent, dealer or distributor should file in Form B if he receives such income. He may submit appeal (*No need to file amended ITRF*) on penalty for late submission to the relevant LHDNM branch if he has declared the income in Form BE after 30 April 2012 but before 30 June 2012. *Penalty will be imposed on submission after 30/6/2012.***

2. **If an employee receives monetary and non-monetary incentives and such payment is provided for in his contract of employment, the income is considered as employment income. He should file in Form BE.**

3. **Incentive payments based on performance of an agent, dealer or distributor in the sale of products or services, whether stipulated in the contract or otherwise, need to be declared. Trade discount is not an incentive. Tax agents, lawyers and architects are not included in this provision. An agent, dealer or distributor who is merely a consumer of the product or services does not have to declare the amount of discounts or rebates received.**

4. ***CP58 is a prescribed form. The payer company is not allowed to -***

   i. **provide stamped signature on the Form CP58, or**
   ii. **generate the Form CP58 by computer (i.e. PDF or Excel), without signature or stamp, or**
   iii. **generate Form CP58 with digital signature or electronic stamp of the company**
   iv. **modify the Form CP58, for example changing the alignment, insert a line, etc.**

5. **The name, designation and NRIC number of the preparer of the payer company are required. Although NRIC number of the preparer is irrelevant to the agent, it becomes important to IRBM when CP58 is produced as evidence in court in the event a case is brought to court.**

6. **The original copy of Form CP58 must be retained by the payer company for a period of seven (7) years from the end of the calendar year in which the incentive is paid to the agent, dealer or distributor for the purpose of reference and examination by Lembaga Hasil Dalam Negeri Malaysia. A copy of the form should be given to the agent, dealer or distributor.**

2.2 Duty of Representative [Section 67(4A), ITA]

Clause 13 of the Bill proposed to introduce a new Section 67(4A), which would come into operation on 1 January 2012 , as follows :

"(4A) For the purposes of subsection (4), where a representative is a person appointed as an agent under section 68, the Director General may, by way of a notice in writing, require the representative to remit to him any accessible moneys for the purpose of payment of any tax due from the principal or for any debt so due

referred to in that subsection, notwithstanding that no assessment in respect of such tax has been made in the name of the representative:

Provided that the accessible moneys shall not include any moneys held by the representative in his custody and control on behalf of the principal."

The Institutes would like to know the definition of *"any moneys held by the representative in his custody and control on behalf of the principal."*

Answer by IRBM:

"Any moneys held by the representative in his custody and control on behalf of the principal" means savings or deposits in the bank, contributions to Employee Provident Fund (EPF) and PCB deductions.

The Institutes note that this amendment has 3 major ramifications. Firstly, the proposed section 67(4A) would give the DGIR the power to appoint an agent to collect an amount of money, without making an assessment on the agent for the payment of any tax due from a principal, from any accessible moneys held by the agent. This is a departure from the principle that there must be an assessment issued on the agent to create a tax liability. For this assessment, the DGIR is required to show that the tax liability is properly computed and the assessment is appropriate.

Answer by IRBM:

The agent can refuse to be an agent under section 67(4A). However, IRBM may still issue assessments on the agent under section 68.

Secondly, the proposed amendment does not provide the opportunity for the agent (or the principal) to appeal against the notification issued by the DGIR. Similarly, no opportunity is given to the agent (or the principal) to appeal against the requirement to make payment of the amount of moneys to the DGIR since no assessment had been issued by the DGIR.

Answer by IRBM:

Tax payers (the principal) may appeal against the assessments. IRBM will appoint agents to collect the overdue tax only as a last resort.

Thirdly, in the case of debtor-creditor relationships commonly found in businesses, the proposed amendment would enable the DGIR, to appoint a person as the agent and impose on him the obligation to deduct amounts due to his creditor for the payment of any tax due from the creditor even though the creditor arose from normal business transactions. Hence, the debtor would be required to pay moneys to the IRB instead of to the creditor. In addition, the DGIR is not required to provide to the payer, who has been appointed as the agent, the basis of how the amount to be paid to the DGIR is arrived at. The appointment of the agent is made because the creditor has not submitted a tax return to the DGIR or had submitted incorrect returns.

Answer by IRBM:

Section 67(4A) does not apply to cases involving debtor-creditor relationship.

Due to the above reasons, the proposed amendment would appear to give disproportionate powers to the IRB to collect taxes from an appointed agent. The institutes are of the view that if the agent does not perform his duties or does not carry out his obligations as required by the existing subsection 67(4) on behalf of the principal, including the preparation and submission of the tax return, the agent or the principal should be charged in court for such failure. For this purpose, there are adequate provisions in the Act to enable the DGIR to deal with the offence. There is no necessity to amend the Act.

Answer by IRBM:

No legal action will be taken against an agent who does not perform his duties.

Furthermore, the proposed legislation may disrupt ordinary commercial practice. For example, an agent may purchase goods from its principal on credit terms of 6 months. However, before the due date for payment, the IRB may request the agent to pay to the IRB within 30 days, the amount owing to the principal. Alternatively, on the due date, the agent may not have sufficient funds and wish to delay payment to the principal. The agent is however, compelled to make payment to the IRB even though, in ordinary circumstances, he would negotiate a delay in payment to the principal. This proposed measure therefore has serious implications on business activities.

The Institutes sincerely hope that the MOF will reconsider introducing the new provision.

Answer by IRBM:

This provision will only be invoked as a last resort to collect overdue tax. An assurance is given that this provision will not be misused.

2.3 **Compensation for Over-payment of Tax (Appendix 19) [Section 111D, ITA]**
Clause 21 proposes to insert a new Section 111D as follows:

"111D. (1) Subject to this section and subsection 111(4A), an amount of compensation may be payable to a person if the amount refunded to that person for a year of assessment under section 111 is made after —

(a) ninety days from the date a return for that year of assessment is required to be furnished under this Act, in the case of return furnished by way of electronic transmission; or

(b) one hundred and twenty days from the date a return for that year of assessment is required to be furnished under this Act, in any other case.

(2) For the purposes of this section—

(a) the amount refunded refers to tax paid in accordance with section 107, 107B or 107C for a year of assessment in excess of tax payable, if any, for that year of assessment as specified in a return furnished under section 77 or 77A; and

(b) the amount of compensation shall be determined in accordance with the

following formula:

$$A \times \frac{B}{C} \times 2\%$$

Where A is the amount refunded under section 111 for a year of assessment;
B is the number of days beginning from the first day after the period specified under paragraph (1)(a) or (b), as the case may be, until the day that amount is made to a person; and
C is the number of days in a year.

(3) Without prejudice to sections 91 and 113, where the Director General discovers that the whole or part of the compensation —

(a) is wrongly paid to a person, the Director General may require from that person a return of such amount already paid; or

(b) ought not to have been paid to that person by reason of an incorrect return or incorrect information furnished by that person, the Director General may require from that person a return of such amount already paid and that amount shall without any further notice be increased by a sum equal to ten per cent of that amount which ought not to have been paid,

and the amount of compensation wrongly paid or ought not to have been paid and the sum increased shall be recoverable as if it were tax due and payable under this Act.

(4) This section shall not apply—

(a) if a person fails to furnish return for a year of assessment in accordance with section 77 or 77A;

(b) in respect of excess of amount payable referred to in subsections 111(1A) and (1B); or

(c) if a person appeals against an assessment under section 99.".

i. Definition of Amount Refunded

We wish to highlight that the amount refunded as defined by S. 111D(2)(a) does not cover the excess of tax paid in a year of assessment arising from voluntary payments or overpayments made for that year of assessment.

The Institutes suggest that the definition of amount refunded be aligned with Section 111(1), i.e. the amount refunded should be defined as *"tax paid for a year of assessment in excess of tax payable, if any, for that year of assessment as specified in a return furnished under Section 77 or 77A".*

Answer by IRBM:

According to section 111D of the ITA 1967, the amount refunded

refers to tax paid in accordance with sections 107, 107B or 107C. Voluntary payments or other payments are not included.

ii. Formula for Computing the Compensation

For simplicity, the Institutes suggest that "A" be defined as *the amount refunded.*

Answer by IRBM:

Not applicable.

iii. Non-application of the new Section 111D

a. One of the non-applicability factors of the above provision is when tax returns are not submitted by the due date. In this respect, the Institutes wish to seek clarification that the due date includes extended due dates (e.g. grace period granted by the IRB across the board, or specific extension of time granted to taxpayers).

Answer by IRBM:

Section 111D is not applicable where the tax returns are not submitted by the due date. Due date includes grace period and extension of time granted to taxpayers.

b. The other non-applicability factor is when the person appeals against the assessment. When a person is appealing against a deemed assessment, it is most likely that the assessment is excessive, or in other words, the amount refunded would have been higher if not because of the issues in dispute. Such appeals demonstrate that a compliant taxpayer has declared a higher income in his tax return while awaiting the outcome of the appeal.

Due to the above, the Institutes are of the opinion that the provision is unfair to compliant taxpayers and discourages compliant behaviour.

Answer by IRBM:

Section 111D is not applicable for appeal cases.

iv. Compensation for Other Cases

a. Under the existing provisions of the tax law, taxpayers are required to pay the tax-in-dispute notwithstanding that an appeal has been made. In practice, reduced assessments are not issued by the IRB even though the taxpayers have won their appeals to the Special Commissioners of Income Tax and/or High Court. The tax will only be discharged and subsequently refunded by the IRB when the IRB decides not to appeal further or when the case is finally won by the taxpayers in the Court of Appeal.

The whole appeal process usually takes quite a number of years and the IRB also takes time to process the refund. As the IRB has retained the tax-in-dispute for such a long time, it would only be equitable if the taxpayers are

compensated as in the case of *P Sdn Bhd v KPHDN*.

The Institutes strongly suggest that the payment of compensation for such cases be included in Section 111D as well.

Answer by IRBM:

Please refer to answer for subparagraph 2.3(i) above.

b. The MOF and IRB may also consider extending the compensation to all excess tax paid in a year of assessment under all types of assessment.

Answer by IRBM:

Please submit the proposal for consideration of MOF.

v. Taxability of Compensation

The Institutes would like to confirm that the compensation is not taxable in the hands of the taxpayers.

Answer by IRBM:

IRBM confirms the compensation received by the taxpayer is not taxable.

vi. Implementation

The Institutes would like to enquire whether the compensation will be computed and processed by the IRB automatically or would the taxpayer have to make an application.

Answer by IRBM:

Yes. The compensation will be computed and processed by the IRBM without requiring the taxpayer to make an application.

vii. Penalty rate of 10% on amount wrongly refunded

The Institutes would like to appeal to the MOF and the IRB to reconsider the penalty rate of 10% on the amount wrongly refunded due to incorrect returns or incorrect information, as a penalty would have already been imposed under field audit at the minimum rate of 45% (for first offence) or the maximum rate of 300% of tax undercharged.

Answer by IRBM:

IRBM will impose penalty at a rate of 10% on the amount wrongly refunded due to incorrect returns or incorrect information. Appeal on penalty rate will not be considered. Tax payer is advised to declare and give the right information to avoid being penalised.

2.4 Time Bar for Tax Audit (Appendix 20) [To amend the Tax Audit Framework]

It was indicated in Appendix 20 to the 2012 Budget Speech that with effect from YA 2013 the time frame for tax audit is to be reduced from 6 years to 5 years from the YA a return is furnished, except for cases of false declaration, willful late payment and negligence. The Audit Framework will be amended accordingly. However, no amendment to S. 82, 82A and 91(1), ITA will be made.

Since Section 91(1) ITA 1967 is not amended, the Director General of Inland Revenue Board may still raise an assessment or additional assessment within 6 years after the expiration of the year of assessment. Similarly, Sections 82 and 82A ITA 1967 are not amended and taxpayers are still required to keep records for 7 years. Hence, there will not be a significant benefit to the taxpayers as they still have to keep records for 7 years.

The Institutes are of the view that *Sections 91(1), 82 and 82A* should be amended accordingly to align these provisions with the time bar for tax audit so as to reduce the cost of doing business.

Answer by IRBM:

Since Tax Audit Framework (amendment 2009) states that a tax audit may cover a period of 1-3 years, therefore the proposal to reduce the time frame for audit from 6 to 5 years is irrelevant. No amendments would be made to Sections 91(1), 82 and 82A.

2.5 Enhancing Administration System and Tax Compliance [To be done administratively] (Appendix 21)

e-Filing was introduced in 2004 to enhance tax administration and improve compliance by facilitating tax submission via computer. To further enhance the e-Filing system in line with current technological advances, it is proposed that effective from year of assessment 2012:

(i) Individual taxpayers be allowed to furnish tax returns through e-Filing via mobile devices

Answer by IRBM:

Yes. An individual taxpayer who is resident but not carrying on business is allowed to furnish his tax return through M-Filing. M-filing was launched on 1 Mac 2012. Please visit IRBM website (www.hasil.gov.my) for details.

(ii) Information on total income, PCB deductions, EPF contributions, insurance and zakat are pre-filled by IRB for salaried taxpayers using the e-Filing system. Such information must be submitted by their employers to IRB.

The "Enhanced administration system" requires employers to submit a substantial amount of information for the employees. This places a heavy administrative burden on employers. Employers would then need to know more about what information is required. Some of the information is not in the payroll records and may require the employee to provide to the employer independently. It was stated that the system would be effective from YA 2012. Does this mean that the system will only start in 2013, i.e. employers will have to furnish the information of their employees relating to 2012?

Answer by IRBM:

It is not a compulsory but IRBM encourages all employers to provide such details. Employers should voluntary provide the details which can be provided in softcopy (CD) or via e-mail to bantuan_praisi@hasil.gov.my.

2.6 Power to Call for Information [Section 81, ITA]

Clause 15 of the Bill seeks to amend S 81(1) as follows :

"(1) The Director General may require any person to give orally or may by notice under his hand require any person to give in writing within a time specified in the notice all such information or particulars as may be demanded of him by the Director General for the purposes of this Act and which may be in the possession or control of that person:

Provided that, where that person is a public officer or an officer in the employment of a local authority or statutory authority, he shall not by virtue of this section be obliged to disclose any particulars as to which he is under a statutory obligation to observe secrecy."

The Institutes are concerned with the implications of inserting the phrase "in control". A person may be "in control" of certain information of another person in the course of carrying on his business, particularly information obtained by a service provider from the taxpayer. The amendment places Malaysian businesses in a difficult position as there may be an issue of confidentiality. The Institutes suggest that the provision be redrafted to reflect the specific intention of the IRB. It is not advisable to extend the scope of IRB's power and thereby curb business activities.

Answer by IRBM

The amendment is to comply with OECD standards (exchange of information). IRBM will only furnish such information to the relevant parties if it is absolutely necessary.

3. INDIVIDUAL INCOME TAX

3.1 Relief for Contribution to Private Retirement Scheme (PRS) (Paragraph 108, Appendix 18) [Sections 2 and 49(1) of Income Tax Act 1967(ITA)]

Clause 4 of the Finance (No.2) Bill 2011 (the Bill) stipulates that PRS is an approved scheme and that it is a retirement scheme approved by the Securities Commission (SC) in accordance with the Capital Markets and Services Act 2007 (Act 671).

Clause 10 of the Bill further introduces Section 49(1D) & (1E), ITA as follows:

"(1D) In the case of an individual resident for the basis year for a year of assessment who has—

(a) paid any deferred annuity; or

(b) made or suffered the making of a contribution to a private retirement scheme,there shall be allowed for that year of assessment a deduction of the aggregate amount of the payments or contribution or both or a deduction of three thousand ringgit whichever is

the less.(1E) For the purposes of subsection (1D), where subsection 50(2) or (3) applies, the total deduction under that subsection shall not exceed three thousand ringgit."

(i) A self-employed person/sole proprietor/partner in a partnership who contributes to the Employees Provident Fund (EPF) will be allowed personal relief under S.49(1)(b) i.e the person is able to obtain deduction for the employee's EPF portion. However, the EPF contributions made by the person as an employer (i.e the employers' EPF) will not be allowed a deduction against the person's business income. In addition, as no consequential amendment to Section 34(4) ITA has been proposed, the deduction of employer's contributions to PRS and EPF, shall not in total exceed 19% of the employee's remuneration.

To encourage the self-employed/ sole proprietor/partner in a partnership to contribute to the PRS, it is suggested that the contribution made to the PRS (employer's portion) be allowed a deduction as staff costs. It is further suggested that the restriction imposed on employer's contributions of 19% be removed or applied separately, if a restriction on the amount of contribution to PRS is deemed appropriate.

Answer by MOF:

Contribution (employer's portion) made to the PRS is allowed as deduction as staff costs and restricted to 19% of the employee's remuneration (subsection 34(4) ITA 1967). Self-employed, sole proprietor or partner in a partnership who contributes to the PRS for himself is not eligible for deduction under subsection 34(4) ITA 1967 but he is eligible to claim a relief of up to a maximum of RM3,000 under subsection 49(1D) ITA 1967.

(ii) The amendment allows an additional deduction on any deferred annuity or contribution to PRS up to a maximum of RM3,000. It is not clear whether the employer is required to contribute as well and if so, whether the employer's contribution is allowed as a deduction against the employer's income.

Answer by MOF:

It is not a requirement for the employer to contribute PRS. Any such contribution is on a voluntary basis. Deduction can only be allowed if the contribution is for the employees.

(iii) Generally, the payments made for deferred annuity are classified as (or together with term life insurance premium as) "life premium" in the statements issued by the insurance companies to taxpayers for tax relief claim purposes. Hence, unless the insurance companies segregate the life insurance premium and deferred annuity in the statements, there will be practical difficulties in determining the amount which qualifies for life insurance relief of RM6,000 and deferred annuity relief of RM3,000.

Answer by IRBM:

For contribution to PRS, Bank Negara Malaysia will issue the statement showing the amount of contribution. Since the relief of RM3,000 is for PRS and deferred annuity, hence the taxpayer needs to know the amount of

deferred annuity. The insurance company should segregate the life insurance premium, medical insurance premium and deferred annuity in the statements to assist taxpayers in claiming the relief for income tax purposes. MOF is in the process of getting LIAM to confirm that such action will be taken by insurance companies in future.

(iv) Based on the reply to CTIM's enquiry by the Securities Commission on 8 December 2011, the operational details of the PRS framework are being refined and subject to further consultation. The Institutes hope that the information can be made available to the public soon.

Answer by MOF:

Please refer to Guidelines on Private Retirement Schemes issued on 5th April 2012 by the Securities Commission.

(v) It was stated in Appendix 18 that contributions withdrawn from PRS prior to attaining the mandatory retirement age are subject to tax. The Institutes would like to seek confirmation from the MOF on the treatment in the following circumstances:

(a) Employment contracts for private sector employment sometimes do not specify a retirement age. Under such circumstances, would the employee be allowed to withdraw contributions from PRS upon retirement (at any age) free of tax?

Answer by MOF:

Please refer to Guidelines on Private Retirement Schemes issued on 5th April 2012 by the Securities Commission.

(b) Some companies may continue to fix the retirement age at 55 even though the Government has raised the retirement age to 60 for civil servants. Would the employee be allowed to withdraw contributions from PRS upon reaching the age of 55 free of tax?

Answer by MOF:

Any withdrawal after the retirement age of 55 is not subject to tax.

3.2 Approved Individual under Returning Expert Programme [Schedule 1, Part XV, ITA]

Clause 24 of the Finance (No.2) Bill 2011 (the Bill) proposes that, with effect from year of assessment (YA) 2012, the chargeable income of an approved individual under the Returning Expert Programme (REP) in respect of having or exercising an employment in Malaysia shall be assessed at a preferential tax rate of 15% for a specified year of assessment.

The following shall be determined by the Minister by rules made under this Act:

(a) an approved individual and the specified year of assessment, and

(b) where the individual has income other than employment income, or where combined assessment (S 45(2)) applies, the chargeable income.

From the information posted on the website of Talent Corp, the conditions for eligibility for REP are as follows:

(i) The expert must be a *Malaysian Citizen* currently *employed and residing overseas* for at least up to *three (3) years* prior to application; (Internal transfer within the same group of companies is also allowed provided the applicant has been based overseas for a minimum period of five (5) years. A letter of support from companies to waive this requirement is welcomed.)

(ii) The expert does *not hold an outstanding scholarship bond or study loan* with the Malaysian Government;

(iii) The expert is able to contribute to the *National Key Economic Areas (NKEAs)* in the *Economic Transformation Programme (ETP)* ;

(iv) Possess the following academic qualifications and the corresponding cumulative overseas work experience. Discretion granted for specialised job skills/exceptional work experience needed by companies/industries.

Academic Qualification *	Diploma or Supervisory Experience	Bachelor's Degree	Master's Degree or Professional Qualification	PhD
Cumulative Overseas Working Experience *	10 years	6 years	4 years	2 years

The benefits of the REP are as follows:

(i) An *optional Flat Tax Rate of 15%* for Employment Income for *five (5) years*;
(ii) *Tax Exemption* for all personal effects brought into Malaysia;
(iii) *Two (2)* locally assembled/manufactured *Completely-Knocked-Down (CKD) vehicles tax-free*;
(iv) *Foreign spouse/children* are eligible for *Permanent Resident (PR)* status within six (6) months upon submission of complete application to Immigration Department of Malaysia (notwithstanding Sabah & Sarawak);
(v) Foreign-born children or children already studying in an international stream overseas are allowed to enrol in any *international school of choice in Malaysia*.

The Bill is not clear on the duration of the preferential rate and the availability of choice (i.e. to be assessed at normal tax rate or to be assessed at the preferential tax rate). However the Talent Corp website has indicated that the flat rate of 15% is an option for a period of 5 years. We would like to seek confirmation from the MOF/IRB on the matter.

Answer by IRBM:

It is confirmed that an individual has an option to be assessed on his employment income at normal tax rates or at preferential tax rate. The duration of the preferential rate of 15% is 5 consecutive years of assessment. The individual has the option of being taxed at 15% beginning in the year he returns to Malaysia or the following year. However, this is subject to the final income tax rules to be gazetted.

Talent Corp has indicated that discretion will be granted for specialised job skills/ exceptional work experience needed by companies/industries.

The Institutes wish to find out the circumstances / criteria which could be considered for the exercise of such discretion. It is suggested that the Rules referred to in clause 24 of Bill 2011 be issued as soon as possible.

Answer by IRBM:

According to Talent Corporation Malaysia Bhd (Talent Corp), discretions may be exercised under the following circumstances:

(1) Where an individual does not meet the qualifications required, flexibility may be given if he has vast relevant experience;

(2) Where there is skill shortage in certain industries (e.g. oil & gas industry – drilling engineer, reservoir engineer etc); or

(3) The individual has expertise required under any of the 6 National Key Results Areas (NKRAs).

However, recommendations made by Talent Corp for such cases is subject to the approval of Minister of Finance.

4 INCOME TAX FOR BUSINESSES AND CORPORATIONS

4.1 Rationalisation of Tax Incentives for Shipping Companies (Appendix 10) [Section 54A, ITA]

Clause 11 of the Bill amends Section 54A of ITA by substituting for the words "*the statutory income*" in subsection (1), the words "*seventy per cent of the statutory income of that person*"; and introduces a new subsection (2) as follows:

"(2) Notwithstanding the provisions of this Act—

(a) the income derived from each Malaysian ship referred to under subsection (1) shall be treated as income from a separate and distinct business source of that person;

(b) the adjusted loss (if any) of the person for any year of assessment in respect of a source consisting of a Malaysian ship shall not be available as a deduction in arriving at the total income of that person for that year of assessment;

(c) an amount of statutory income of a person from a source consisting of a Malaysian ship referred to in paragraph (b) which is exempt under this section

for the following year of assessment shall be reduced by the adjusted loss referred to in that paragraph, and if by reason of insufficiency or absence of that statutory income, the amount of adjusted loss which has not been so utilized shall further reduce the amount of statutory income of that person from that source which is exempt under this section for any subsequent years of assessment until the amount of adjusted loss is fully utilized; and

(d) an amount of statutory income of a person for a year of assessment from a source consisting of a Malaysian ship which is not exempt under this section shall be deemed to be the total income of that person.".

Clause 28 further provides the tax treatment of balance of capital allowances and adjusted loss of a person in respect of a Malaysian ship as follows:

"28. *(1) Subject to subsection (2), the balance of allowances in respect of any Malaysian ship for a year of assessment 2011 referred to under paragraph 54A(2)(a) of the principal Act prior to the amendment of that paragraph under section 11 of this Act, shall be made to a person in ascertaining the statutory income of that person for the year of assessment 2012 from a source consisting of that ship only.*

(2) For the purpose of subsection (1), where the balance of allowances referred to in that subsection is in respect of more than one Malaysian ships, such balance of allowances shall be apportioned to each of the ships in accordance with the following formula:

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

Where A *is the gross income of a person in respect of a Malaysian ship for the year of assessment 2011;*

B *is the total gross income of a person in respect of all Malaysian ships for the year of assessment 2011; and*

C *is the balance of allowances for the year of assessment 2011 in respect of any Malaysian ship referred to under paragraph 54A(2)(a) of the principal Act prior to the amendment of that paragraph under section 11 of this Act,*

and the amount apportioned to each of the ships shall be made to that person in ascertaining the statutory income of that person from a source consisting of the same ship in the year of assessment 2012, and if by reason of an insufficiency or absence of that statutory income of that person from that source, effect cannot be given or cannot be given in full to any of the apportioned sum, so much of the sum which has not been so made shall be made in arriving at the statutory income of that person from that source for the year of assessment 2013 and so on for subsequent years of assessment until the whole amount of the apportioned sum is fully made to that person.

(3) Subject to subsection (4), the balance of adjusted loss in respect of any Malaysian ship for the year of assessment 2011 referred to under paragraph 54A(2)(b) of the principal Act prior to the amendment of that paragraph under section 11 of this Act, shall be deducted against the statutory income of a person which is exempt for the year of assessment 2012 from a source consisting of that ship only.

(4) For the purpose of subsection (3), where the balance of adjusted loss referred to in that subsection is in respect of more than one Malaysian ships, such balance of adjusted loss shall be apportioned to each of the ships in accordance with the following formula:

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

Where A *is the gross income of a person in respect of a Malaysian ship for the year of assessment 2011;*

B *is the total gross income of a person in respect of all Malaysian ships for the year of assessment 2011; and*

C *is the balance of loss for year of assessment 2011 in respect of any Malaysian ship referred to under paragraph 54A(2)(b) of the principal Act prior to the amendment of that paragraph under section 11 of this Act,*

and the amount apportioned to each of the ships shall be deducted against the statutory income of that person which is exempt from a source consisting of the same ship in the year of assessment 2012 and if by reason of an insufficiency or absence of that statutory income, effect cannot be given or cannot be given in full to any of the apportioned sum, so much of the sum which has not been so deducted shall be deducted against the statutory income of that person from that source which is exempt for the year of assessment 2013 and so on for subsequent years of assessment until the whole amount of the apportioned sum is fully deducted."

Under the proposed amendment, a ship with a significant amount of brought forward losses will be worse off under Section 54A ITA compared to Section 54 ITA because it has to pay tax on 30% of the current year gross income. In contrast, a ship assessed under Section 54, ITA will be allowed to set off its losses brought forward against the current year gross income. This unfavourable tax treatment under Section 54A ITA for shipping companies with losses brought forward will have a negative impact on local shipping companies.

The Institutes are also of the view that the change has made the tax administration and compliance more complicated.

Answer by IRBM:

Enforcement of the amendment has been deferred to the year of assessment 2013.

4.2 Tax Deduction on Franchise Fee (Paragraph 33 and Appendix 15) [Income Tax Rules will be issued]

Franchising local businesses will strengthen the Malaysian brands. Among other expenses imposed upon a franchisee are franchise fee, royalty, promotion and advertisement fee, training fee and service fee. Franchise fee is an expenditure incurred before commencing the franchise business and hence is not deductible against the income for a franchising business.

To further develop a local product brand to become strong in the domestic market and accepted in overseas market, it is proposed that deduction be given on franchise fee for local franchise brands.

In this context, the Institutes wish to enquire as to what is a local franchise brand?

Answer by IRBM:

Please refer to the Income Tax (Deduction for Expenditure on Franchise Fee) Rules 2012 [P.U. (A) 76/2012] issued on 23 February 2012 for details.

"Local franchise brand" means a trade mark or service mark that is registered under the Trade Marks Act 1976 (ACT 175) by a franchisor whose franchise business is registered with Franchisor Registrar, Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (KPDNKK) under section 6 of the Franchise Act 1998.

Does the franchise have to originate / be developed in Malaysia?

Answer by IRBM:

Please refer to answer above.

In addition, does a qualifying franchise include foreign franchise brands acquired by local companies?

Answer by IRBM:

No, it is for local franchise brands. In the case where the franchisor who owns the local franchise brand is a company incorporated under the Companies Act 1965 (Act 125), at least 70% of the issued share capital of the company is owned by Malaysians.

Where a franchise is developed by a Malaysian, but is "parked" overseas, say in a company in Singapore, for the purpose of global marketing, will the franchise be considered as a local franchise brand?

Answer by IRBM:

Please refer to the Income Tax (Deduction for Expenditure on Franchise Fee) Rules 2012 [P.U.(A) 76/2012] for the definition of local franchise brand. If it fulfills the conditions, it can be considered as a local franchise brand.

4.3 Incentives for Development of Human Capital

4.3.1 Double Deduction for Structured Internship Programme [Paragraph 46, Appendix 12] [Income Tax Rules to be Issued]

Expenditure incurred by a person "on the provision of practical training in Malaysia, in relation to his business, to an individual who is resident in the basis year for a year of

assessment and is not an employee of that person" is allowed for a deduction under Section 34(6)(n), ITA.

To enhance the quality of training provided, double deduction is now given to a company on expenditure incurred in providing structured internship programmes for fulltime undergraduate students from Public/Private Higher Educational Institutions for a minimum of 10 weeks with a monthly allowance of not less than RM500.

The Institutes would like to enquire on the following details:

- Some manufacturers and service providers such as hotel operators, tour operators, freight forwarders, telecommunications operators, etc. contribute to the Human Resource Development Fund (HRDF) at the rate of 2% of wages. For these HRDF

contributors, training costs and internship costs are presently being reimbursed from the HRDF. However, the Income Tax (Deduction for Cost of Training for Employees) Rules 2009 [P.U.(A) 261] exclude the contributors from enjoying the incentive if they have already made a claim to HRDF for the cost of training. It is not clear in this case whether the contributors will also be restricted from claiming the double deduction of the internship costs incurred.

The Institutes are of the view that the interns' costs are incurred by these contributors, i.e. the contributors pay the HRDF first and then pay the interns' costs before they get reimbursement of the interns' cost from the HRDF. Therefore, they should be eligible for the double deduction. The Institutes would like to seek confirmation from the Ministry on this matter.

Answer by MOF:

Internship Programme is only for fulltime students pursuing degree programme or equivalent (for non-employees) whereas HRDF applies to training for employees. Contributions for internship programme for employees are not eligible for double deduction.

Based on the guidelines issued by the Talent Corporation Malaysia Berhad (TCMB), in addition to cash or/and cash equivalent of RM500 monthly allowance, the participating companies are allowed to claim tax deduction on other direct expenses, limited to a maximum where the average total expenses is RM5,000 per student per year of assessment. The direct expenses include training offered during the internship programme.

- The Institutes would like to confirm that where the training is provided internally by the participating company, the costs of conducting the training, including time cost of speaker and course co-ordinator, costs of printing, etc. will be eligible for double deduction.

Answer by IRBM:

Cost incurred on fees paid to speaker, course coordinator and printing will be part of the cost of structured internship programme which qualify for double deduction if the participating company fulfills all the criteria as specified in the Income Tax (Deduction For Expenditure Incurred for the Provision of an Approved Internship Programme) Rules 2012 [P.U.(A) 130/2012] issued on 7 May 2012. Other details can be obtained from the Talent Corporation Berhad which certifies the programme.

4.3.2 Double Deduction for Awarding Scholarships [Paragraph 46, Appendix 13] [Income Tax Rules to be Issued]

Expenditure incurred by a company on the provision of a scholarship to a student for any course of study leading to an award of a diploma, or degree (including a degree at a Masters or Doctorate level) or the equivalent of a diploma or degree undertaken at a higher educational institution established or registered in Malaysia or authorised under section 5A of the Universities and University Colleges Act 1971, is allowed deduction under Section 34(6)(l) of ITA;

Provided that the scholarship-

(a) shall only be given to a full-time student who has no means of his own and the total monthly income of whose parents or guardian, as the case may be, does not exceed five thousand ringgit; and

(b) shall not include payments other than payments required by such higher educational institution relating to the course of study and educational aids and reasonable cost of living expenses during the student's period of study at such higher educational institution

To encourage private companies' participation, double deduction is now accorded to private companies for scholarships awarded to Malaysian students pursuing studies at diploma and bachelor's degree level in local institutions of higher learning.

The Institutes would like to enquire on the following details:

(a) Are there any restrictions imposed on the scholarship (such as those under S.34(6)(l))?

Answer by IRBM:

Double deduction is given to companies awarding scholarships to students:

(a) who is a citizen and resident in Malaysia;

(b) who receives full time course of study leading to an award of a diploma or degree (excluding a degree at master or doctorate level) at higher educational institution;

(c) who has no means of his own; and

(d) whose parents or guardians, as the case may be, have total monthly income not exceeding five thousand ringgit.

(b) It was stated in the IRB seminar that the incentive does not extend to scholarships for post-graduate degrees / courses, e.g. Masters or Doctorates. It would appear that the exclusion contradicts the objective to encourage the private sector to cultivate local talent.

Answer by IRBM:

Yes, the incentive is not extended to scholarships for post-graduate degrees / courses, e.g. Masters or Doctorates. The tax measure is to encourage companies to provide financial assistance to needy students for higher education. Extending it to post-graduate degrees/courses will result in further tax foregone.

(c) Who is eligible for the scholarship? If the scholarship is given to an employee of the company or employee of a related company, can the company still qualify for the incentive? Will the children of the employee be eligible for the scholarship? It was stated in the IRB seminar that the incentive is not applicable to its former employee. The Institutes would like to know the objective of the exclusion.

Answer by IRBM:

For the student eligible for the scholarship, the answer is as for (a) above. Other issues will be addressed in the income tax rules.

(d) The Institutes note that while the academic year will be starting soon, the relevant guidelines have not been issued. The interested sponsors may need some time to study and assess the impact of participation on their company. The Institutes would also like to request the authority to issue the relevant Gazette Order at least one month before the University/College enrolment starts so as to give certainty to the sponsors on the conditions of sponsorship, etc. Similarly, any prescribed forms to be completed by the applicant should be issued early so that the sponsor can have sufficient time to study the information required to claim the double deduction.

Answer by IRBM:

The relevant income tax rules will be issued soon and IRBM would like to confirm that there is no prescribed form to be completed by applicants.

(e) In order for the sponsorship to qualify, the student must have no sources of income and their parents/guardian should not have income exceeding RM5,000 per month. This gives rise to the following practical issues:

(i) How is the RM5,000 income calculated? Does it include bonus or should the RM5,000 refer solely to monthly salaries? Should benefits-in-kind be included in calculating the RM5,000 income? Does it refer to the monthly total incomes of both parents or income of each parent?

Answer by IRBM:

The income (RM5,000) is based on fixed income for a month only and does not include bonus or benefits-in-kind.

(ii) Is the above condition required for each year that the sponsorship is given or only at the time when the scholarship is first given? If it is an annual requirement, then it creates uncertainty for the student and the sponsor. It will be an administrative burden for the sponsor to verify the income level of the student and his parents / guardians before giving the next year's sponsorship to ensure that he obtains double deduction for the scholarship sponsored. For the student, it is difficult to ensure that he can complete his studies with the scholarship provided because he cannot guarantee that his parents/guardian will continue to earn RM5,000 and below for year 2 onwards of his studies.

Answer by IRBM:

The RM5,000 monthly income refers to total monthly salary income of the parents or guardian at the point of application for the scholarship.

(iii) What is the evidence acceptable to TalentCorp/IRB that the student has no sources of income? Will a confirmation from the student suffice?

Answer by IRBM:

Yes, confirmation from the student is sufficient.

(iv) The criterion that the student has no income may exclude children from the hard core poor as this group of people will seek every opportunity to earn some money, not only for themselves, but also for their family! Poor students usually have to do some part time work to supplement their income so that they can cover the costs of their own food, lodging, travelling, books, etc because most scholarships only cover tuition fees. If the student has some part time income by doing odd jobs or working part-time in a fast food restaurant, will the sponsorship qualify for double deduction even though the student is not in full time employment, i.e. they are in full time study but doing some part time work to get some side income? If the policy is to ensure that the scholarship does not enrich the rich students, the Institutes suggest that the government put a cap on the amount of income received or earned by the students.

Answer by IRBM:

The students from the less fortunate families in this case should focus on their studies and not make working or making money as their priority.

(v) How do we confirm that the parents / guardian income is RM5,000 or less in a month? Can the tax returns for the latest year be sufficient appropriate evidence? If the parents / guardian do not file tax returns because they are not taxable, what documentation is required as evidence by the IRB or TalentCorp? Can a confirmation from the parents / guardian together with the relevant EA form (where available) for the latest year be sufficient?

Answer by IRBM:

The tax returns or relevant EA form for the latest year is sufficient. For cases where the parents are not employed or self-employed and have no tax returns or EA form, a written confirmation from the parents/guardian would be sufficient.

(f) The institutes propose that the scholarship be awarded based on the merit of a student and not on the wealth of the parents.

Answer by IRBM:

This is a policy matter.

(g) CTIM would like to seek clarification whether firms and partnerships will qualify for the double deduction since the 2012 Budget Speech indicates that the double deduction is for "scholarships awarded by private companies".

Answer by IRBM:

The incentive is only given to the companies Incorporated under the

Companies Act 1965 and resident in Malaysia for tax purposes.

Note: Institute Kemahiran Malaysia (IKM) is not considered a higher educational institution.

4.3.3 Double Deduction for Expenses for Participation in Career Fairs Abroad [Paragraph 46, Appendix 14] [Income Tax Rules to be Issued]

To attract more talented Malaysians and students to return home, career fairs abroad are important to disseminate information and raise the awareness of the Malaysian diaspora on job opportunities in Malaysia. It is proposed that a double deduction be given for expenses incurred by companies in participating in career fairs abroad that are endorsed by Talent Corporation Malaysia Berhad (TalentCorp).

The Institutes wish to obtain further details on the following:

i. Types of expenses that qualify for double deduction;

Answer by IRBM:

List of qualifying expenditure will be provided in the Income Tax Rules.

ii. Procedures for application, and whether there are any prescribed forms to be completed.

Answer by IRBM:

Organisers of the career fairs need to fill up Career Fair Incentive Application forms and submit to Talent Corporation Malaysia Berhad (TalentCorp). The forms can be obtained from TalentCorp's website. Please refer to the Income Tax (Deduction for Participation in an Approved Career Fair) Rules 2012 [P.U.(A) 129/2012].

iii. Criteria applied by TalentCorp in endorsing the career fair.

Answer by IRBM:

Details of the criteria applied in endorsing the career fair can be obtained from the TalentCorp.

4.4 Incentives for Private Schools (Paragraph 44 & Appendix 17) [Income Tax Exemption Order to be issued]

It is proposed that the following tax incentives be given to profit-oriented private schools and international schools which are registered with, and have fulfilled the requirements stipulated by the Ministry of Education as follows:

1) Profit Oriented Private Schools

Income Tax exemption of 70% of statutory income for a period of 5 years; or Income Tax exemption equivalent to Investment Tax Allowance of 100% on the qualifying capital expenditure incurred within a period of 5 years, to be set-off against 70% of the statutory income for each year of assessment

Application must be received by Malaysian Investment Development Authority

(MIDA) from 8 October 2011 until 31 December 2015.

2) Profit Oriented International Schools

Income Tax exemption of 70% of statutory income for a period of 5 years. Application must be received by Malaysian Investment Development Authority (MIDA) from 8 October 2011 until 31 December 2015.

3) Profit Oriented Private Schools and International Schools

a) Import duty and sales tax exemption for educational equipment;

Application must be received by Malaysian Investment Development Authority (MIDA) from 8 October 2011.

and

b) Double deduction for overseas promotional expenses.

Applicable from year of assessment 2012

- The Institutes would like to seek confirmation on the following:

(i) that private schools include technical and vocational schools and therefore technical and vocational schools are also eligible for the above incentives.

Answer by IRBM:

The incentive is only given to a school which is not a government school that provides private primary education, private secondary education, private religious primary education, private religious secondary education, private Chinese primary education or private secondary Chinese education that complies with the requirements of the National Curriculum and Examinations under the Education Act 1996 and approved by the Ministry of Education but does not include a school which solely provides for pre-school education.

A private technical and vocational school should qualify for the exemption if those schools comply with the requirements of the National Curriculum and examinations under the Education Act 1996 and other criteria specified in that exemption order.

(ii) that a sole proprietor or partnership operating a private school or international school is eligible for the incentive.

Answer by IRBM:

This incentive is only given to a society or a company. Additional criteria to be fulfilled will be specified in the exemption order.

(iii) that Proposal 3 is applicable to both profit-oriented and non profit-oriented international schools

Answer by IRBM:

Double deduction for overseas promotional expenses is only applicable to profit-oriented international schools.

- The Institutes would like to seek clarification on the following:

(i) Are there any equity conditions or other criteria that must be met to be eligible for the incentive?

Answer by IRBM:

The criteria will be specified in the Exemption Order and must be met before the exemption can be given on the statutory income of the schools.

(ii) What are the types of capital expenditure that would qualify for ITA (Proposal 1)?

Answer by IRBM:

Types of capital expenditure will be specified in the Exemption Order.

(iii) What are the types of expenses that would qualify for double deduction for overseas promotional expenses [Proposal 3(b)]?

Answer by IRBM:

Please refer to the Income Tax (Deduction for Promotion of International or Private School) 2012 [P.U.(A) 110/2012] for details.

4.5 Reinvestment Allowance (RA) [Schedule 7A, ITA]

Clause 26 of the Bill proposes to amend Schedule 7A in the following manner:

i. In Paragraph 3 (restriction on utilization of RA),

- Delete the proviso relating to locations of qualifying project, with effect from YA 2012

ii. In Paragraph 7 (on non-applicability of Schedule 7A), with effect from YA 2011

- Replacing subparagraphs (b) & (e) with the following respectively:

  "(b) for the basis period for which the company has been granted approval for investment tax allowance under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product for the period prescribed under the relevant provisions of that Act;"

  "*(e) for the basis period for which the company has been granted approval under section 31c of the Promotion of Investments Act 1986 prior to the coming into operation of section 37 of the Promotion of Investments (Amendment) Act 2007 [Act A1318] in respect of a manufacturing activity or manufactured product for the period prescribed under paragraph 31e(2)(b) of that Act*."

- Substituting the words *"the period"* in subparagraph (d) with the words "*the basis period".*

iii. In Paragraph 9 (on interpretation), with effect from YA 2012

- Insert the definition of factory as follows:

"factory" means portion of the floor areas of a building or an extension of a building used for the purposes of qualifying project to place or install plant or machinery or to store any raw material, or goods or materials manufactured prior to sale:

Provided that in respect of portion of the building or extension of the building used for the storage of raw material, or goods or materials, or both, it shall not be more than one-tenth of the total floor areas of that building or extension;"

- Delete definition of ***Eastern Corridor of Peninsular Malaysia.***
- Pursuant to item i, the RA incentive for projects located in promoted areas is to be aligned with that for non-promoted areas effective from YA 2012. Would existing qualifying projects located in promoted areas (i.e. qualifying projects that commenced before YA 2012) therefore continue to qualify for the 100% deduction of RA against statutory income until the expiry of the 15-year incentive period or until completion of the project, whichever is earlier?

  Answer by IRBM:

  The deduction of RA against 70% of statutory income for each year of assessment is effective from the year of assessment 2012. This treatment applies to all projects, including those that commenced prior to year of assessment 2012. For example, Company A whose qualifying period of 15 years is from year of assessment 2009 to 2023. As the company is located in a promoted area, it is eligible for deduction of RA against 100% of statutory income for years of assessment 2009 to 2011. However, with effect from year of assessment 2012, the deduction of RA is restricted to 70% of statutory income.

- Item ii above is effective from YA 2011, where the basis year is in 2011. Under the current-year basis of self-assessment, amendment of legislation which has an effect on tax computations will have retrospective implications on tax compliance, such as estimation of tax payable. In this case, if the taxpayer has an early financial year end, such as 31 January 2011, he would already have filed his tax return before the first reading of the Bill. It will therefore be unfair to penalise the taxpayer for non-compliance as he has no knowledge of the pending changes in law. The Institutes would like to propose that the amendment be made prospective. Where penalty was imposed as a result of the retrospective effect of the law, it is proposed that a waiver on the penalty be given.

  Answer by IRBM:

  Appeal on waiver of penalty may be submitted to Jabatan Dasar Percukaian for consideration.

- The new definition of factory under item iii is very restrictive. It may be difficult in practice to ascertain the floor areas, especially where the floor areas used as storage are not clearly designated due to the movement of finished goods and/or raw materials. Will an addendum to the Public Ruling No.2/2008 on Reinvestment Allowance be issued to clarify the new definition?

  Answer by IRBM:

  Addendum to Public Ruling No. 2/2008 will be issued.

- The Institutes understand that the MOF is tightening the claim of RA due to a large loss of revenue collection through abuse. However, the corrective approach taken currently, i.e. by re-defining the scope of basis periods, the meaning of factory, manufacturing, processing, projects, qualifying expenditure, etc. and by requiring extensive management/operational details, is not cost effective and creates much dissatisfaction amongst taxpayers as they had already incurred the expenditure. Consequently, more unproductive time is spent on audit, appeal, justifying claims etc. Further, it does not seem consistent with the Government's policy of promoting a conducive investing environment.

4.6 Incentives for 4- & 5-Star Hotels [(Paragraph 36 & Appendix 6) Promotion of Investment Act 1986 (PIA)]

To encourage development of new 4- and 5-star hotels and to provide better accommodation facilities to attract high spending tourists, it is proposed that investors undertaking new investments in 4- and 5-star hotels in Peninsular Malaysia be given the following incentives:

- Pioneer Status with income tax exemption of 70% of statutory income for 5 years; or
- Investment Tax Allowance of 60% on the qualifying capital expenditure incurred within a period of 5 years and to be set-off against up to 70% of the statutory income for each year of assessment.

The Institutes would like to clarify whether the above incentive has any equity conditions imposed, and whether 4-star or 5-star hotels owned by foreigners will be allowed the tax incentive.

Answer by MOF:

No equity condition is imposed.

4.7 Deductions Not Allowed [Section 39(1)(f), (i) & (j), ITA]

It is proposed that in the event withholding tax on an expense has not been remitted to the IRB, the expense incurred by a company exempted under Promotion of Investment Acts 1986, Section 127(3)(b) or Section 127(3A) of the Income Tax Act 1967 would not be disallowed. The effective date is 1 January 2012.

The Institutes would like to seek clarification on whether the above effective date of 1 January 2012 refers to:-

- The date of filing of tax return,
- The date when the withholding tax is due and payable, or
- The date the service is rendered by the non-resident.

The Institutes would like to seek clarification as to whether the disallowance provisions under Section 39(1)(f), (i) and (j) also apply to a company which is partly exempted (i.e. exemption of less than 100%), such as a taxpayer who is enjoying the capital based incentives?

Does it also apply to a company which has been granted Pioneer status for certain activities/products but at the same time, has non-promoted product/activities?

Answer by IRBM:

The effective date 1st January 2012 refers to the date when withholding tax is due and payable. It is confirmed that the amendment only applies to income of a person who is fully exempt from tax under the PIA or ITA 1967.

4.8 Providers of Industrial Design Services (Paragraph 40 & Appendix 9) [Promotion of Investments Act 1986]

It is proposed that providers of industrial design services be given pioneer status with income tax exemption of 70% on statutory income for 5 years.

The incentive is given to industrial design service providers that fulfill the following criteria:

i. new service providers who employ at least 50% Malaysian designers; and

ii. existing industrial design service providers undertaking expansion and non-industrial design service providers which would be carrying out industrial design activities:
   a. upgrading the design facilities by increasing the capital investment of at least 50%; and
   b. employ an additional 50% qualified Malaysian designers.

The incentive is subject to the following conditions:

i. the industrial design service providers and Malaysian designers must be registered with the Malaysia Design Council (MDC);

ii. the industrial design service providers must be incorporated under the Companies Act 1965 or registered under the Business Registration Act 1956 and shall provide industrial design services to non-related companies; and

iii. the industrial design services provided are meant for the purpose of mass production.

Membership of Malaysia Design Council (MDC) is offered to individuals (professional and design graduates who are unemployed or employed for less than 6 months) and design students. The membership is free and will enable MDC to promote designers within the country as well as overseas.

It is not clear as to what are the requirements for registration with MDC as a company and as an individual. To facilitate the application of the incentive, it is proposed that the requirements be made public as soon as possible.

One of the qualifying conditions is 50% increase in “capital investment”. What is the meaning of “capital investment”? Does it refer to capital expenditure incurred?

Answer by MOF:

Please refer to Malaysia Design Council (MDC) for registration purpose. For further details on capital investment, check with MOF. Cost of land and building are not included in capital investment.

4.9. Incentives for Treasury Management Centre (TMC) (Paragraph 23 & Appendix 8) [Income Tax (Exemption) Order and Stamp Duty (Exemption) Order to be issued]

To develop Malaysia as a competitive financial centre, an incentive package is granted to make Malaysia a preferred location for TMC of multinationals. It is anticipated that the establishment of TMC will benefit the local financial market through injection of new funds, increased activities in foreign currencies and provision of high income employment opportunities. The incentive package includes the following:

(i) 70% tax exemption on the statutory income of the following types of income arising from provision of qualifying treasury services to its related companies for a period of 5 years:

(a) All fee income and management income from provision of qualifying services to related companies,
(b) Interest income from related companies,
(c) Interest income and gains from placement of funds with licensed onshore banks or from short term investments (onshore and offshore),
(d) Foreign exchange gains on risk management,
(e) Guarantee fees;

(ii) Exemption from withholding tax on interest payment to overseas banks and related companies provided funds raised are used for conduct of qualifying TMC activities;

(iii) Stamp duty exemption on all loan and service agreements executed by TMC in Malaysia for qualifying TMC activities;

(iv) Expatriates working in TMC are taxed on their portion of chargeable income attributable to the number of days in Malaysia

The list of qualifying services includes the following:

i. Cash management services
ii. Current account management services
iii. Financing and debt management services
iv. Investment services
v. Financial risk management services, including hedging
vi. Corporate and financial advisory services

The incentive is only applicable to TMC applications received by Malaysian Investment Development Authority (MIDA) from 1 October 2011 until 31 December 2016.
The incentive package is similar to that offered to Operational Headquarters (OHQ). Are the OHQ and TMC incentives mutually exclusive?
Section 140A was introduced in 2009 and came into operation on 1 January 2009. However, the detailed rules have not been gazetted yet. It is suggested that the relevant Income Tax Exemption Order be gazetted and the Application Guidelines be issued as soon as possible to create the maximum impact.

Answer by IRBM:

OHQ and TMC are mutually exclusive.

The Institutes would like to seek confirmation on the following:

(a) Thin Capitalisation Rules will be deferred indefinitely and shall not be applicable to TMC.

If affirmative, a confirmation circular should be issued. Otherwise, a set of guidelines should be made available to the public. This is for the purpose of transparency and also to ensure certainty as it would affect the activities of the TMC.

Answer by IRBM:

Thin Capitalisation (TC) has not been addressed in the preparation of the draft. This issue will be forwarded to MOF for policy decision.

(b) Will the incentive package be also available to local multinationals and existing foreign OHQ/TMC. Are there also any spending requirements similar to the OHQ incentives?

Answer by IRBM:

Guidelines will be issued by MIDA.

(c) The qualifying services listed in (i) to (v) above will not be subject to service tax.

The Institutes propose that corporate and financial advisory services (item vi) provided by the TMC be also exempt from service tax. This will make the package more attractive.

Answer by MOF:

The corporate and financial advisory services are not exempted from service tax.

4.10. Donations to Schools and Registered Places of Worship [Paragraph 45]

It was indicated in Paragraph 45 of the 2012 Budget Speech that to encourage more charitable activities, financial contributions from companies and individuals to all registered places of worship and registered primary and secondary schools, including national schools, national-type schools, mission schools and Government-assisted religious schools, *to upgrade facilities are eligible for tax deductions*. The Government will expedite tax exemption approvals for education institutions and all places of worship. Currently any gift of money to institutions or organisations approved by the Director General of Inland Revenue Board under Section 44(6) will enjoy tax deduction. Section 44(7) defines an institution and organisation as follows:

"institution" means an institution in Malaysia which is not operated or conducted primarily for profit and which is-

(a) a hospital;
(b) a public or benevolent institution;
(c) a university or other educational institution;
(d) ……

(e) …….
(f) a technical or vocational training institution;

"organization" means an organisation in Malaysia which is not operated or conducted primarily for profit and which is-

(a) an organization established and maintained exclusively to administer and augment a public or private fund established or held for the sole purpose of the establishment, enlargement or improvement of an institution or solely for the provision of a scholarship, exhibition or prize for an individual for educational work, research work or other similar work in an institution or in what would be an institution if it were in Malaysia; or

(b) an organization established and maintained exclusively to administer and augment a public fund established or held solely for the relief of distress among members of the public; or

(c) an organization established and maintained exclusively to administer and augment a fund established and held solely for the construction, improvement or maintenance of a building in Malaysia which-
  (i) is intended to be used (and, when constructed, is used) exclusively for the purposes of religious worship or the advancement of religion; and
  (ii) is intended to be open (and, when constructed, is open) to any member of the public for those purposes; or

(d) …….
(e) …….
(f) …….
(g) ……
(h) …….
(i) an international organization as defined under the International Organization (Privileges and Immunities) Act 1992 carrying out such charitable activities as determined by the Minister; or
(j) …….
(k) …….

- The Institutes would like to seek confirmation that "*registered primary and secondary schools, including national schools, national-type schools, mission schools and Government-assisted religious schools"* fall within the definition of institution(s) under Section 44(7).

  Answer by IRBM:

  There are three categories of schools registered with Ministry Of Education, namely government schools, government–assisted schools and private schools. Only government schools fall under subsection 44(6). All others fall under subsection 44(7).

- The Institutes would like to seek clarification on the meaning of registered schools and registered places of worship?

Answer by IRBM:

Registered schools are schools registered with Ministry Of Education and religious schools are registered with *Majlis Agama Islam* of each state.

Mosques and *surau* are registered with *Majlis Agama Islam* of each state whilst other places of worship are not required to be registered under any authority. Supporting documents and confirmation by relevant religious council e.g. Christian Federation of Malaysia (CFM) for churches, on the existence of a church, would be acceptable to IRBM.

Any changes to current policy will be addressed in the guidelines to be issued by IRBM, subject to approval by MOF.

- The 2012 Budget talks about donations for *upgrading of facilities.* However, Section 44(7) organisation (c)(i) provides deduction only for donations to a *fund established and held solely for the construction, improvement or maintenance of a building*. Since there is no consequential amendment in the Finance Act 2012, the Institutes suggests that a subsidiary legislation be issued as soon as possible to give effect to the tax deduction.

  Answer by IRBM:

  The related Bill has been passed by Parliament but not gazetted.

  The relevant Guidelines have been prepared and is currently under the consideration of MOF.

- To obtain S.44(6) status, applicants have to fulfill the stringent requirements and follow through an elaborate process. In view of the large number of places of worship and not-for-profit-making private schools, it will place a huge burden on the IRB to administer and approve each and every institution/organisation, thereby leading to dissatisfaction among the applicants.

  Since it is the intention of the Government to allow deduction of all contributions to registered places of worship and registered schools, the Institutes suggest that for administrative efficiency, an Order should be issued to that effect.

  Answer by IRBM:

  An Order is not required since the law has been amended.

4.11 Kuala Lumpur International Financial District (KLIFD) [Paragraph 24]

The incentive package proposed to accelerate the development of KLIFD is:

i. Income tax exemption of 100% for a period of 10 years and stamp duty exemption on loan and service agreements for KLIFD status companies;
ii. Industrial Building Allowance (IBA) and Accelerated Capital Allowance (ACA) for KLIFD Marquee Status Companies; and
iii. Income tax exemption of 70% for a period of 5 years for property developers in KLIFD.

KLIFD is part of the Greater Kuala Lumpur project and is one of the main thrusts of KL development. The first phase is expected to be operational by 2016 and there are still a lot of unknown details.

The Institutes would like to seek clarification on the following:

- Will there be exemption of withholding tax on interest payments made to non-residents similar to the TMC?
- Will the relocation of an existing company in Malaysia to the KLIFD qualify for the incentive package?
- What are the industries/sectors that will be eligible for the status?
- KLIFD Marquee companies are anchor companies of the KLIFD. They enjoy IBA and ACA. Who are eligible and what are the requirements to apply for this status?

In view of the size of the project and the time required to plan for participation in the project, the Institutes suggest that full information be disclosed as soon as possible to maintain the thrust of the program and ensure successful participation.

Answer by MOF:

MOF is in the process of discussing with the relevant agencies.

5 OTHER TAXES

5.1 Increase in RPGT Tax Rates [Paragraph 37 & Appendix 2]

With reference to the Appendix 2 of the 2012 Budget speech, it is proposed that PRGT rates be increased to 10% on the gains from the disposal of residential and commercial properties for holding period up to 2 years.

Due to the change of RPGT rate, the Institutes would like to enquire whether there will be any amendment to the calculation of loss relief.

Answer by IRBM:

Prior to 1.1.2012, **tax relief in respect of the allowable loss was calculated by applying to every ringgit of such allowable loss the appropriate rate of tax specified in schedule 5 in respect of each category of disposal.**

However, with the amendment to subsection 7(4)(a) of the RPGT Act 1976 with took effect from 1.1.2010, for the purpose of calculating loss relief, the amount of allowable loss sustained on the disposal of any real property occurring after 1.1.2010 will be allowed as a deduction against chargeable gains arising from any subsequent disposal of any real property.

Hence, any changes in RPGT rates will be of no consequence to the computation of allowable loss.

5.2 Stamp duty exemption on loan agreement under Skim Perumahan Rakyat 1Malaysia (PR1MA)

It is proposed that full stamp duty exemption be given on loan agreements for the purchase of residential properties under the PR1MA Scheme priced up to RM300,000.

The Institutes would like to seek clarification on the following matters:

i. The definition of PR1MA Scheme. Does it refer to PR1MA homes built by the PR1MA Corporation Malaysia?

ii. How do we identify / recognise the residential properties which are developed under the PR1MA Scheme; and

iii. Are there any conditions to be fulfilled?

Answer by IRBM:

Please refer to Stamp Duty (Exemption) (No.3) Order 2011 [P.U. (A) 441/2011].

6 OUTSTANDING MATTERS

6.1 2004 Budget

It was announced in the 2004 Budget that in order to stimulate the capital market and diversify sources of financing for economic development, the Government intended to ensure neutrality in tax treatment between asset-backed securities and other securities approved by the Securities Commission. On this matter, CTIM had submitted its comments on the draft **Income Tax (Asset-Backed Securitisation) Regulations 2003** to the IRB on 4 July 2007. CTIM had also been invited to a dialogue with the IRB and the Securities Commission on the draft **Income Tax (Asset-Backed Securitisation) Regulations 2007** on 21 February 2008.

The Institutes would like to have an update on the progress of the regulations.

Answer by MOF:

The Regulations have been submitted to Attorney General's (AG) office.

6.2 2009 Budget

a) Transfer pricing rules and guidelines
b) Advance pricing arrangement rules and guidelines

Although the relevant law has come into operation with effect from 1.1.2009, the Rules for the above have not been gazetted and guidelines too have yet to be issued in respect of these matters. This has caused uncertainty in handling cases pertaining to such matters.The Institutes would like to know the status of the Rules and Guidelines.

Answer by MOF:

Draft documents have been received from AG office recently. Since the issues are are highly technical, MOF requires a little more time.

c) Thin capitalisation guidelines

It was disclosed by the official from the MOF during the 2012 Budget Talk organised by CTIM that the above will be deferred indefinitely until further notice.

For purpose of transparency, the Institutes propose that the MOF issue a written confirmation pertaining to the deferment.

Answer by MOF:

Please submit the letter to MOF.

6.3 2010 Budget

The Institutes would like to have an update on the following guidelines:

(i) Item No. 6 of the minutes of Post 2010 Budget Dialogue has indicated that Guidelines on the 16 qualifying services eligible for the promotion of export incentives will be issued.

Answer by MOF:

The said Guidelines will be issued soon.

(ii) It was also stated in item 9 of the minutes of the Post 2010 Budget Dialogue (in respect of tax incentives for buildings awarded Green Building Index (GBI) certificate) that *"Guidelines relating to taxation matters will be issued soon by IRBM*" and that the Guidelines will be available on the IRB's website.

Answer by IRBM:

IRBM is in the midst of preparing the guidelines and requires another 2 months to complete.

(iii) Even though it has been proposed in Budget 2010 that the tax exemption be extended to the profit derived from the issuance of non-ringgit *sukuk* approved by the Labuan Financial Services Authority, no PU Order has been issued to effect the proposal.

Answer by IRBM:

No exemption order is required as the exemption is provided under paragraph 33B, Schedule 6 Income Tax Act 1967.

6.4 2011 Budget

The Institutes would like to have an update on the following guidelines:

(i) Tax incentive for extension of application period for the generation of energy from renewable resources and energy conservation were extended to 31 December 2015 from 31 December 2012, however, no gazette order has been issued to effect the proposal.

Answer by IRBM:

Generation of energy from renewable resources and energy conservation are promoted activities under the Promotion of Investments Act 1986. The promoted activities will be listed in the gazette order to be issued by Ministry of International Trade and Industry (MITI).

(ii) The Budget 2011 has proposed that the incentives for *last mile network facilities provider for broadband* will further be extended to 31 December 2012. However, no gazette order has been issued to effect the proposal.

Answer by MOF:

The Gazette Order will be issued by Malaysia Investment Development Authority (MIDA).

6.5 Draft Guidelines on e-Commerce

The Joint Public Ruling Working Group (JPRWG) had submitted its comments on the draft e-Commerce Guidelines to the IRB on 28 September 2010. The JPRWG would like to have an update on the progress.

Answer by MOF:

The said Guidelines will be issued soon.

6.6 Outstanding Public Rulings

The Institutes would like to know the status of the following draft public rulings (PR) on which the JPRWG had submitted its comments:

(a) Draft Addendum to PR on Reinvestment Allowance (Comments submitted on 14 April 2009)

(b) Draft PR on Club, Association or Similar Institutions (Comments submitted on 27 August 2009)

(c) Draft PR on Employee Share Schemes Benefit (Comments submitted on 26 April 2010)

(d) Draft Addendum 3 to PR on Computation of Income Tax Payable by A Resident Individual (Comments submitted on 14 July 2010)

(e) Draft PR on Real Estate Investment Trust / Property Trust Fund (Comments submitted on 13 October 2010)

Answer by IRBM:

Bil.	Topics of Public Rulings	Status
1	Reinvestment Allowance	Expected to be issued by end of June 2012.
2	Club, Association or Similar Institutions	Expected to be issued by end of June 2012.
3	Employee Share Schemes Benefit	Expected to be issued by end of Aug 2012.
4	Computation of Income Tax Payable by A Resident Individual	Expected to be issued by end of July 2012.
5	Real Estate Investment Trust / Property Trust Fund	Expected to be issued by end of June 2012.