

YBhg Dato' Siti Halimah bt Ismail
Setiausaha, Bahagian Analisa Cukai
Kementerian Kewangan
No. 5, Persiaran Perdana
Presint 2, Pusat Pentadbiran Kerajaan Persekutuan
62592 WP Putrajaya

13 November 2013

Y Bhg Dato'

2014 Budget – Finance Bill (No. 2) 2013

Further to our letter dated 4 November 2013 on the above matter, we would like to provide the Chartered Tax Institute of Malaysia's (CTIM's) feedback on five main proposals in the Finance Bill (No. 2) 2013 for your urgent attention. These proposals which involve amendments to the Income Tax Act 1967 (the Act), have **wide implications to the development of Malaysian tax laws, local businesses and foreign direct investments.**

1. Appeal against deemed assessment (Subsection 99(4))

Proposal	Taxpayers will not be able to appeal to the Special Commissioners of Income Tax in relation to a deemed assessment made under subsection 90(1) or section 91A of the Act. The only exception is where the taxpayer adopts a position as stated in a Public Ruling which the taxpayer does not agree with.
CTIM's comments	<p>The above proposal effectively denies taxpayers the right to appeal under section 99 against a deemed assessment, except where the assessment is based on a position in the public ruling which the taxpayer does not agree with due to difference in the interpretation of the law.</p> <p>The right to appeal against an assessment is a fundamental right and should not be denied to taxpayers under any circumstances. Public rulings are issued by the Inland Revenue Board (IRB) to set out the IRB's interpretation of the law. However, it is not possible for the IRB to issue public rulings on all potential areas of technical dispute. Hence, there will be situations of technical uncertainty, where taxpayers may file returns based on a conservative position to mitigate penalties in an audit, but would wish to appeal against the position taken to ensure that they are given an opportunity to benefit from their interpretation of the law. Denying taxpayers the right to such appeals will inevitably lead to the unsatisfactory situation where taxpayers are left with no avenue to seek remedy for deemed assessments.</p> <p>This amendment will have a wider implication to the Malaysian economy. The right to appeal is a very important pillar that provides credibility to any tax system. Therefore the denial or limitation of this right will be viewed negatively by foreign investors for whom a transparent and equitable tax system will be a key consideration in their investment decisions.</p> <p>We kindly request that the proposal be withdrawn.</p>

2. Disallowance of expense due to failure to furnish information (Subsection 39(1A))

Proposal	Where the Director General of Inland Revenue (DG) requests for information in relation to an item of expenditure for which a deduction has been claimed and the taxpayer is unable to furnish the information within the time-frame requested, the expenditure will not be deductible.
CTIM's comments	<p>The deductibility of expenditure should be based on the tenets set out in Section 33(1) of the Act. The failure of a taxpayer in furnishing information within the time specified by the DG may be due to various reasons, e.g. difficulty in retrieving information, information which may be lost due to unforeseen circumstances such as fires, floods, and various other bona fide reasons. It is therefore not just or equitable to automatically deny a tax deduction of the item upon the taxpayer's failure to provide information as requested by IRB within the specified time frame.</p> <p>As there is an existing penalty provision under section 120 for non-compliance with section 81, there is no necessity to disallow the tax deduction. The proposal effectively bars the taxpayer from exercising his right to appeal against the disallowance of the expense where he has not been able to furnish the DG with the relevant information on a timely basis. With the proposed amendment to Section 39, there would be no further remedy under the Act.</p> <p>Businesses and potential investors will see this proposal negatively as it affects taxpayers' right of appeal.</p> <p>We kindly request that the proposed section 39(1A) be withdrawn.</p>

3. Filing of corporate tax returns based on audited accounts (Subsection 77A(4))

Proposal	Tax returns furnished by a company shall be based on accounts audited by a professional accountant in accordance with sections 174(1) and (2) of the Companies Act 1965.
CTIM's comments	<p>We agree that companies should furnish tax returns based on audited accounts.</p> <p>However, audited accounts are currently not required to be prepared in certain situations; e.g. companies under liquidation have been preparing and filing tax returns based on Form 75 upon the appointment of liquidators, a permanent establishment of a non-resident is not required to prepare separate accounts to be audited, and Malaysian branches of foreign companies may be granted a waiver from preparing audited accounts in certain circumstances under the Companies Act 1965.</p> <p>In practice, there could also be practical difficulties of not being able to finalise the audit of accounts due to various commercial reasons, including family disputes, etc.</p>

	<p>Under the above circumstances, it would not be possible for companies to fulfil the requirement under the proposed subsection 77A(4).</p> <p>Currently in the absence of audited accounts, companies have been submitting tax returns based on management accounts with the intention of complying with the tax laws, and paying up any balance of tax due to the government. With the proposed amendment, a submission of tax return without audited accounts would render the return invalid, thus subjecting the company to late/non-filing penalties under section 112 of the Act. The above proposal does not seem to be in line with the spirit of self-assessment as it effectively bars a company from fulfilling its compliance obligations under the Act to the best of its ability if the audited accounts cannot be finalised on time.</p> <p>In view of the above, we kindly request that the authorities review the proposed subsection 77A(4) and consider incorporating the following suggestions:-</p> <ul style="list-style-type: none"> • allow exceptions to be given for cases where currently no audited accounts are being prepared; and • where a company is not able to submit its tax return based on audited accounts, the onus will be placed on the company to prove that the return is submitted in good faith, rather than not accepting that the return is a valid return under section 77A of the Act.
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4. Definition of “entertainment” (Section 18)

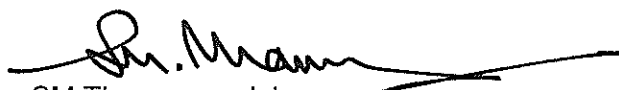
Proposal	<p>The existing definition of “entertainment” has been widened to include:-</p> <ul style="list-style-type: none"> • entertainment expenses in promoting a business or trade; and • the provision of entertainment with or without consideration whether in cash or in kind.
CTIM's comments	<p>The above proposal has the effect of widening the definition of “entertainment” and more disturbingly, tainting any provision of food, drinks, recreation or hospitality as well as accommodation or travel <u>for the purpose of promoting business</u>, as “entertainment”. With this proposal, promotional expenses which are currently deductible in full under section 33(1) as expenses which are wholly and exclusively incurred in the production of gross income, as ruled by the courts in various cases, are forced into the bucket of “entertainment” expenses which only qualify for a 50% deduction unless they fall into proviso (i) to (viii) to subsection 39(1)(l).</p> <p>This proposal has severe and wide-ranging implications as all businesses incur promotional expenses. The automatic “deeming” of such promotional expenses as “entertainment” expenses and hence taxpayers being denied 50% of the deduction which would otherwise be given under section 33(1). Advertising and promotion are very essential to the successful building of a world class brand and growing of a business in the current competitive business environment. The above proposal would put businesses in Malaysia at a disadvantage as the proposed tax treatment will increase the cost of business promotion and doing business in Malaysia.</p> <p>We kindly request that the proposed amendment to the definition of “entertainment” be withdrawn.</p>

5. Definition of “director” (Subsection 75A(2)(b))

Proposal	The threshold of shares held by a director as defined in subsection 75A(2) is to be reduced from “more than 50%” to “not less than 20%”, whereupon the director may be held liable for the payment of a company’s taxes under section 75A.
CTIM’s comments	<p>A director who individually or jointly with one or more associates as defined in subsection 139(7), holds 20% equity interest in a company would not generally be able to control the management or affairs of the company. Hence reducing the shareholding threshold from 50% to 20% to impose a liability on directors for the company’s taxes is inequitable and is not in our view justifiable. We note that the rationale for the proposed amendment has not been made clear.</p> <p>In practice, this provision will likely affect directors of family owned and private companies. However with the lowering of the shareholding threshold, directors of public listed companies could also be affected.</p> <p>We are concerned that this proposed amendment will impede the growth of new business start-ups and small and medium enterprises (SMEs). There are many businesses in Malaysia that require equity participation from investors for growth purposes. The proposal will lead to the risk of deterring potential investors from investing into businesses in Malaysia in view of the onerous liabilities placed on directors, especially where the directors do not have control over the management or affairs of the company.</p> <p>We kindly request that the minimum percentage shareholding to qualify the director as being liable for payment of a company’s taxes be not reduced but maintained at the current level of “more than 50 per cent”.</p>

In view of the significant implications of the above proposals, we hope the authorities will give our comments and requests above due consideration. We would like to request for a meeting to discuss the above in greater detail. Thank you.

Yours sincerely,
CHARTERED TAX INSTITUTE OF MALAYSIA


SM Thanneermalai
President

Copy:

YBhg Tan Sri Dr Mohd Shukor Bin Haji Mahfar
Ketua Pegawai Eksekutif / Ketua Pengarah
Hasil Dalam Negeri
Ibu Pejabat Lembaga Hasil Dalam Negeri Malaysia
Menara Hasil Aras 18
Persiaran Rimba Permai
Cyber 8, 63000 Cyberjaya
Selangor

YBhg Tan Sri Dr Mohd Irwan Serigar bin Abdullah
Ketua Setiausaha Perbendaharaan
Kementerian Kewangan
No. 5, Persiaran Perdana
Presint 2, Pusat Pentadbiran Kerajaan Persekutuan
62592 WP Putrajaya