



CHARTERED TAX INSTITUTE OF MALAYSIA (225750 T)
(Institut Percukaian Malaysia)

PROFESSIONAL EXAMINATION

FINAL LEVEL

REVENUE LAW

DECEMBER 2021

Student
Registration No.

Date

Desk No.

Examination Centre

Time allowed: 3 hours

INSTRUCTIONS TO CANDIDATES

1. You may answer this paper **EITHER** in English **OR** in Bahasa Malaysia. Only **ONE** language is to be used.
2. This paper consists of **SIX** questions. **Candidates are ONLY REQUIRED TO ANSWER FIVE QUESTIONS.**
3. The income Tax Act 1967 (as amended) is referred to as ITA and the Real Property Gains Tax Act 1976 as RPGT.
4. Each answer should begin on a separate answer template.

DO NOT TURN OVER THIS PAGE UNTIL INSTRUCTED BY THE INVIGILATOR

Question 1

- (a) 'In any event, a certificate of registration is *prima facie* and strong evidence of a partnership'.

S. Augustine Paul,
Presiding Commissioner in *SK v Ketua Pengarah Hasil Dalam Negeri* [(1996) MSTC 2,670].

Required:

In the context of the above statement, and the case of *SK v Ketua Pengarah Hasil Dalam Negeri* [(1996) MSTC 2,670], discuss to what extent one could rely on a Certificate of Registration of Business to infer the existence of a partnership for purposes of the Income Tax Act 1967.

(8 marks)

- (b) Mr Hammond Kumar ('Kumar') had in mind to purchase a large piece of land at the edge of the Puchong Forest Reserve in the State of Selangor ('the PFR land') and develop it with the construction of shops and other buildings, for sale. However, he was much hampered in his enterprise by lack of money. He then met his old classmate, Mr Rajendra ('Rajendra'), a wealthy and shrewd businessman, with his plan for the land. The two discussed Kumar's plans and Rajendra agreed to think over the matter. A week after the meeting, Rajendra wrote the following letter to Kumar, setting out his proposal:

To:
Mr Hammond Kumar,
No. 12, Jalan Bintang,
41000 Klang.

26 September 2020

Dear Mr Kumar,

Our discussion last week on the matter of the PFR land refers.

I am prepared to find the necessary money for you to purchase the PFR land from the owner of the said land, and in consideration, you will agree to assist to the best of your judgment, skill and ability to develop the land and sell the properties erected thereon. For this, I hereby agree and undertake to pay you a half share of all the profits received by me thereof. The profit will be paid to you within one month from the date of completion of the sale.

On the other hand, instead of a profit, a loss should be made on account of this arrangement, then you are to be responsible for one half of such loss.

Finally, take note that this arrangement as set out in this letter *shall not* constitute any partnership between us.

Yours faithfully,

[Sgd] RAJENDRA

Kumar was delighted with the letter and immediately arranged an introduction between Rajendra and the owner of the PFR land. The land was duly purchased with money provided by Rajendra, and preparations were made for the construction of the various buildings. As the earthworks were in progress, an unsolicited attractive offer was received from a third party for the purchase of the site. This offer was accepted, and the sale was completed sometime between February and March 2021.

Much of the negotiation, including visiting the land, meeting the accountants, valuers, estate agents and lawyers, were undertaken solely by Kumar and the expenses incurred, including communicating with Rajendra while he was abroad, was paid out of his own pocket, totalling RM128,000.

Rajendra paid the agreed half of the profits to Kumar in early May 2021.

Required:

With reference to the Income Tax Act 1967 and the case of *Fenston v Johnstone* [23 TC 29] discuss whether the arrangement between Hammond Kumar and Rajendra is one of principal and agent or a partnership.

(12 marks)

[Total: 20 marks]

Question 2

- (a) In order to decide whether a person is carrying on a business on his own account or is in employment, what are the aspects that one needs to consider, including the significance of the distinction to be made between a business source and an employment source, and the factors that the court would consider in making such distinction?

Required:

Discuss the matter with reference to the Income Tax Act 1967 and the case of *Hall (HM Inspector of Taxes) v Lorimer* [(1992) BTC 424.

(10 marks)

- (b) Mr James Ravi ("Ravi") was a partner in the accounting firm of C&W based in Kuala Lumpur with several branches in the various states of Malaysia. C&W is affiliated with a firm in India, which is ranked as the second-largest accounting firm in the world. In early 2017, the Indian firm carried out a restructuring exercise worldwide, and this resulted in C&W merging with another firm L&W in Malaysia. However, Ravi and two other partners in C&W were not agreeable to the merger, and legal effect could not be given to the merger. After several rounds of negotiations, except for Ravi, the other two agreed to the merger. C&W then negotiated an agreement with Ravi under which Ravi agreed to the following:

- He will cease to be a partner of C&W with effect from June 2017;
- He will lose all rights in the new partnership between C&W and L&W, which will henceforth be known as CL&W;
- He will not communicate or deal with in any way with the clients of the firm;
- He will waive all rights to legally challenge the merger of C&W with L&W;

In consideration of this agreement, Ravi will receive a sum of RM3 million [the compensation sum] that will be paid in equal instalments over a period of 36 months, commencing from July 2017. The compensation sum was determined taking into account the period of Ravi's service in C&W; the firms projected profit for the three (3) years and Ravi's notional bonus entitlement,

among others. In order to claim a deduction for the compensation sum paid to Ravi, the firm charged the amount as 'consultancy fees' in its books.

The Director General of Inland Revenue raised assessments on Ravi in respect of the compensation he received for the relevant years of assessments.

Required:

(i) **With reference to the Income Tax Act 1967 and the case of *KPHDN v Dato' Hanifah Noordin* [(2003) MSTC 4007], discuss the basis for the Director General of Inland Revenue to assess to tax the compensation amount, and the grounds on which the assessment could be objected to by Mr James Ravi.**

(6 marks)

(ii) **Express an opinion on the payment being labelled as 'consultancy fee' in the books of C&W, and its computation by reference to Ravi's past service and bonus entitlement.**

(4 marks)

[Total: 20 marks]

Question 3

Mr John is a Malaysian citizen and is employed as a General Manager in a firm in Penang. He also owns a shop lot in Penang and a terrace house in Selangor. On 1 Jan 2021, Mr John was seconded by his employer to the firm's Hong Kong office for two (2) months.

While he was in Hong Kong, he let out the shop lot in Penang to Mr Andrew. Mr John received a lump sum payment of RM2,000 on 15 January 2021 from Mr Andrew in consideration for the grant of tenancy. The tenancy was concluded [Tenancy 1] with the following terms and conditions:

1. Rental commencement date: 1 February 2021
2. Rental term: 5 years
3. Rent: RM1,000 per month, payable on 1st day of the month

Mr Andrew paid his rental to Mr John promptly every month in the year 2021.

On 1 December 2021, Mr John let out the terrace house in Selangor to Ms Mary [Tenancy 2] with the following terms and conditions:

1. Rental commencement date: 1 December 2021
2. Rental term: 1-year lease
3. Rent: RM3,000 per month, payable on the first day of the month
4. Deposit: RM3,000 (1-month rental), fully refundable on the expiry of the lease
5. Mr John will provide basic cleaning services, maintenance and support services and laundry services to the tenant every week. Mr John provides a washing machine to the tenant at his own expense as part of the existing furniture and fittings in the said house.

On 1 December 2021, Mary paid John RM3,000 as rental deposit and one (1) year of rental amounting to RM36,000. The rental deposit is refundable at the end of the tenancy.

Required:

Advise Mr John on his tax position on the incomes he received in respect of the properties for the relevant year of assessment, focussing specifically on the following matters:

- (i) To identify each category of gross rent and the amounts received by Mr John for both tenancies. (2 marks)
- (ii) To explain the general principles of taxation of income as one accruing from a source consisting of a business or as received from a rental source. (2 marks)
- (iii) To identify and discuss the taxability of lump sum payment of RM2,000 received for Tenancy 1. (4 marks)
- (iv) To identify and discuss the taxability of the rental of RM11,000 for Tenancy 1. (4 marks)
- (v) To identify and discuss the taxability of the rental and advance rental of RM36,000 from Tenancy 2. (6 marks)
- (vi) To identify and discuss the taxability of the rental deposit of RM3,000 received for Tenancy 2. (2 marks)

Note: Candidates are required to support their answers with reference to the relevant Public Rulings, case laws and provisions of the Income Tax Act 1967.

[Total: 20 marks]

Question 4

- (a) Pavlo Development Sdn Bhd ('Pavlo Development') is a company incorporated in Malaysia. In September 2010, Pavlo Development acquired a piece of land in a strategic location in Kuala Lumpur for RM4.95 million. Mr Bob ('Bob') owns 100% of the shares in Pavlo Development. Bob is also the Chairman of Pavlo Development.

In January 2013, Pavlo Development decided to sell the land to Happy Cakes Sdn Bhd ('Happy Cakes') to build one single cake house on the land and on the adjoining land of which Happy Cakes was the owner. For this purpose, Pavlo Development entered into a sale and purchase agreement ('SPA') with Happy Cakes in December 2013 in respect of the land at an agreed price of RM4.94 million. The land was duly transferred to Happy Cakes by the execution of a Memorandum of Transfer in December 2014.

Sometime in June 2016, the Inland Revenue Board of Malaysia ('IRB') assessed Pavlo Development to real property gains tax ('RPGT') at a rate of 20% based on the market value of RM10 million instead of the sale price of RM4.94 million.

Pavlo Development argued that there was no disposal as Bob's wife, Amy, owns 100% of the shares in Happy Cakes. Pavlo Development also argued that there was no chargeable gain liable to be taxed under the RPGTA.

Required:

- (i) Advise Pavlo Development on the merits of challenging the assessment raised under the Real Property Gains Tax Act 1976 by the IRB. (10 marks based on the quality of the answer)
- (ii) If the Sales and Purchase Agreement was aborted prior to completion, would your answer to (i) above be different? (2 marks)

- (iii) If Mr Bob, a Malaysian citizen and the owner of the land, had transferred the land to Happy Cakes Sdn Bhd in exchange for 100% of consideration in shares issued by that company, would there be any grounds for challenging the assessment raised by the Director General under the Real Property Gains Tax Act 1976?

(3 marks)

- (b) Mr X acquired a 40-year lease for a piece of land in Alor Setar measuring 400,000 sq. ft. at a premium of RM2 million. The land was used by Mr X for farming. After 10 years, Mr X sub-leased 100,000 sq. ft. of the land to Mr Y for a premium of RM1 million.

Required:

With reference to the Real Property Gains Tax Act 1976, state the method of computing the chargeable gain for real property gains tax purposes applicable to Mr X.

Note:

Candidates are required to discuss the provisions of the Real Property Gains Tax Act 1976 and state the formula for computing the chargeable gain, relating to the disposal of a lease. Candidates are *NOT* required to compute the amount of the chargeable gain.

(5 marks)

[Total: 20 marks]

Question 5

- (a) The Genius Worldwide group of companies is in the business of developing and selling various specialised software for businesses. Genius Worldwide Limited is an Irish tax resident company incorporated in Ireland.

Genius Worldwide Limited maintains a branch office in Kuala Lumpur for the management and marketing of its products in Malaysia. The office is also used for the collection of information including user feedback from Malaysian users of the Genius Worldwide's software products.

Required:

With reference to the Income Tax Act 1967 and the Double Taxation Agreement between Malaysia and Ireland discuss whether the profits of Genius Worldwide Limited can be taxed in Malaysia, and if so, to what extent.

Notes:

- 1. You are encouraged to cite at least TWO relevant case laws in your answer.**
- 2. Extract of the Double Taxation Agreement between Malaysia and Ireland is attached.**

(9 marks)

- (b) Galway International Limited ('Galway') is an Irish tax resident company incorporated in Ireland and does not have a permanent establishment in Malaysia. Galway is in the business of providing video streaming services through its websites and other online platforms.

Lucky Advertising Sdn Bhd ('Lucky') is a Malaysian tax resident company incorporated in Malaysia. Lucky utilises Galway's video streaming services for its business. Lucky uploads its videos to Galway's website to be streamed by Galway. Lucky pays Galway a streaming fee for its services. Galway's standard term of services provides, amongst others, that users do not acquire any proprietary rights or know-how through usage of Galway's services. In arriving at the adjusted income from its business, Lucky claims a deduction of the streaming fee under Section 33(1) of the ITA.

Required:

With reference to the Income Tax Act 1967 and the Double Taxation Agreement between Malaysia and Ireland [appended below], discuss the nature of the streaming fee and whether the fee paid by Lucky Advertising Sdn Bhd may be treated as 'royalty' and be subject to withholding tax or other taxes in Malaysia.

Note: You are encouraged to cite at least ONE relevant case law in your answer.

(11 marks)

DOUBLE TAXATION AGREEMENT BETWEEN MALAYSIA AND IRELAND

Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction, installation or assembly project constitutes a permanent establishment only if it lasts more than 9 months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- (a) the use of facilities solely for the purpose of storage, display of goods or merchandise belonging to the enterprise;

- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
- (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
- (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other State for more than 6 months in connection with a building site or a construction, installation or assembly project which is being undertaken in that other State.

6. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 7 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

- (a) has, and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such persons are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
- (b) maintains in the first-mentioned State a stock of goods or merchandise belonging to the enterprise in respect of which he regularly receives and fulfills orders on behalf of the enterprise.

7. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he shall not be considered an agent of an independent status if the transactions between the agent and the enterprise were not made under arm's length conditions.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other State but only on so much thereof as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. If the information available to the competent authority is inadequate to determine the profits to be attributed to the permanent establishment of an enterprise, nothing in this Article shall affect the application of any law of that State relating to the determination of the tax liability of a person by the exercise of a discretion or the making of an estimate by the competent authority, provided that the law shall be applied, so far as the information available to the competent authority permits, in accordance with the principles of this Article.

6. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

7. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

8. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 12

ROYALTIES

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed 8 per cent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion pictures or films, recordings on tape or other media used for radio or television broadcasting or other means of reproduction or transmission), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information (know-how) concerning industrial, commercial or scientific experience.

4. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a statutory body thereof, or a resident of that State. Where, however, the person paying such royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

[Total: 20 marks]

Question 6

Ravi Engineering Sdn Bhd ('the company') provides engineering services to offshore oil drilling companies. In providing these services, it regularly obtains advice and specialised personnel from outside Malaysia to fulfil its contract obligations to its customers. In January 2021, the Inland Revenue Board ('IRB') carried out a tax audit of the company's business.

A major finding of the audit was that several of the payments made to overseas non-resident entities for the years 2017-2020 were payments purportedly falling under section 4A (i) and (ii) of the ITA, but for which withholding tax was not deducted pursuant to section 109B. The company in filing its tax returns for the relevant years of assessment, had claimed full deduction for those payments ('claims').

The IRB raised additional assessment ('the assessments') all dated 1 May 2021 for the years of assessment 2017 to 2020 to disallow the claims made, and imposed penalties. The notices of additional assessment were duly served on the company on 1 May 2021. The company disputed the additional assessments, citing the provisions of the Income Tax (Exemption) (No. 9) Order 2017 [PU (A) 323].

Meanwhile, Mr Ravi, the director of the company holding 40% of the ordinary share capital, is scheduled to leave for Australia on 5 May 2021 to negotiate a new contract with a company in Sydney to provide off shore drilling services in the waters off Papua New Guinea. This trip was planned in February 2021.

Mr Ravi had informed the management that he will discuss the assessments with his tax advisor upon his return from Australia on 5 June 2021. Whether the company would make payments, or not make payments and proceed with a formal appeal, much will depend on the discussion with the tax advisor.

Required:

With reference to the Income Tax Act 1967 and the Public Ruling No. 7 of 2020 dated 7 October 2020 [Appeal against an assessment and application for relief]:

- (i) **Discuss the consequences of Ravi Engineering Sdn Bhd not making payments or not making payments on time, on the additional taxes raised for the years of assessment 2017-2020 vide the notices of additional assessment dated 1 May 2021.**
(3 marks)
- (ii) **Discuss how Mr Ravi's trip to Australia may be affected by any action that the Inland Revenue Board may take in respect of the additional taxes due and payable under the notice of additional assessments for the years of assessment 2017-2020. You must cite any ONE case law, and the relevant provisions of the law in support of your discussion.**
(7 marks)
- (iii) **Briefly discuss the procedures for filing an appeal against an assessment, including filing a late appeal, and the disposal of the appeal subsequently at the Special Commissioners of Income Tax.**
(8 marks)
- (iv) **Can Ravi Engineering Sdn Bhd file a *writ of mandamus* at the High Court, on the grounds that the assessment as raised was incorrectly assessed, and therefore it need not pay the additional taxes as assessed? You must cite any ONE case law in support of your answer.**
(2 marks)

[Total: 20 marks]

(END OF QUESTION PAPER)