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EINSTEIN, UNCERTAINTY AND THE TAX LAW

This article explores the issue of uncertainty in tax law and its impact on the taxpayers, the revenue agencies, the courts, and the economy.

- Tax Judgement of Dato' Seri Mohd Hishamudin Bin Md Yunus: The NV Alliance Case
- The Unilateral Imposition of Section 113(2) Penalty
- Capital Allowances – Hire Purchase

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The Chartered Tax Institute of Malaysia (CTIM) is a company limited by guarantee incorporated on 1 October 1991 under Section 16(4) of the Companies Act 1965. The Institute's mission is to be the premier body providing effective institutional support to members and promoting convergence of interest with government, using taxation as a tool for the nation's economic advancement and to attain the highest standard of technical and professional competency in revenue law and practice supported by an effective Secretariat.

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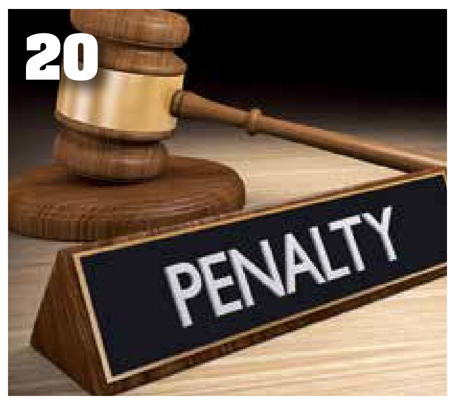

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INVITATION TO WRITE

The Institute welcomes original contributions which are of interest to tax professionals, lawyers, academicians and students. They may cover local or international tax developments. Article contributions should be written in UK English. All articles should be between 2,500 to 3,500 words submitted in a typed single spaced format using font size 10 in Microsoft Word via email. Contributions intended for publication must include the author's name, contact details and a short profile of not more than 60 words (limited to 3 in the case of a team of authors), The Editorial Committee reserves the right to edit all contributions based on clarity and accuracy of contents and expressions, as may be required.

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From the President's Desk

CHOW CHEE YEN

PROPELLING TOWARDS THE MADANI VISION

Greetings!

The Madani Budget 2023 was tabled in Parliament on 24 February 2023 by our Honourable Prime Minister-cum-Minister of Finance, YAB Dato' Seri Anwar Ibrahim. It involves an allocation of RM388.1 billion with RM289.1 billion for operating expenditure, and RM99 billion for development expenditure making it the largest budget in Malaysia's history. With the theme of "*Membangun Malaysia Madani*", it includes tax measures to provide relief to the low-income (B40) and middle-income (M40) groups and raise the share of tax by the high-income (T20) group. It also includes a wide range of improved tax incentives intended to encourage investments in significant industries.

The following are some of the notable tax proposals from Budget 2023 and the Finance Bill 2023 issued on 14 March 2023:

- Reduction in personal income tax rate by 2% for the chargeable income band from RM35,001 to RM100,000. Increase in personal income tax rate by 0.5% to 2% for the chargeable income band from RM100,001 to RM1,000,000.
- Reduction in the income tax rate for micro, small or medium enterprises to 15% for the first RM150,000 of chargeable income.
- Special voluntary disclosure programme with full penalty waiver under the Inland Revenue Board of Malaysia (HASiL) and the Royal Malaysian Customs Department from 1 June 2023 to 31 May 2024.
- Extension of the submission deadline to 31 December 2024 for applications to the Malaysian Investment Development Authority for tax incentives in relation to the relocation of operations to Malaysia for the electrical and electronics sector.
- Tax incentives for automation, electric vehicles charging equipment, aerospace and shipbuilding industries, and carbon capture and storage amongst others.
- New taxes in the form of luxury goods tax and capital gains tax on disposal of unlisted shares.
- Restructuring of investment incentives towards tiered tax rates based on outcomes.
- The roadmap on the implementation of e-invoicing and Tax Identification Number (TIN).

Submissions to the authorities

The following are the key submissions to the authorities from January 2023 to March 2023: -

Inland Revenue Board of Malaysia (HASiL)

- Further comments on Minimum Transfer Pricing Documentation Template (Pin 1/2022) as published by the Inland Revenue Board of Malaysia on 10 November 2022.
- Feedback/comments on the draft updated Malaysian Transfer Pricing Guidelines [extract of Chapter 1, 6 and 9].
- Memorandum on Tax Audit and Investigation Issues.
- CTIM requests pertaining to CP204 and CP204A.
- Issues pertaining to changes in Organisation e-Filing (OeF) login via MyTax.
- Comments on HASiL's Guideline on tax treatment in relation to income which is received from abroad.
- Members' Issues on Gazette Orders [P.U. (A) 291/2022, 187/1998, 272/1999 & 475/2003] and Guidelines.
- Feedback/Comments on Guidelines on Tax Treatment of Digital Currency Transactions.

Royal Malaysian Customs Department (RMCD)

- Sales Tax and Service Tax technical issues paper for deliberation at the Technical Committee on SST Implementation Issues Meeting.

Ministry of Finance (MOF)

- Request for reconsideration of conditions for foreign source income exemption for dividends.
- Tax Incentives and Reliefs from Budget 2023 on 7 October 2022 not included in Budget 2023 (Retabled) on 24 February 2023.

Meeting with the authorities

- Meetings with the RMCD on issue of irrecoverable sales tax on use of inputs in manufacturing of exempt products on 9 January 2023 and 2 February 2023.
- Technical Working Group on Paying Taxes (TWGPT) Meeting No. 1/2023 on 7 February 2023.
- Meeting with HASiL to discuss on tax treatment of intangible assets on 8 February 2023.
- Meeting with the RMCD on removal of sales tax exemption on manufacturing aids on 20 February 2023.
- Technical Committee on Sales Tax and Service Tax Implementation Issues Meeting No. 1/2023 on 22 February 2023.
- Meeting with the RMCD to discuss service tax issues on 23 February 2023.
- TWGPT Subgroup Meeting No. 1/2023 with the RMCD to discuss on Simplification of Advance Ruling Procedure and other indirect tax issues on 6 March 2023.
- Meeting with the RMCD on the proposed the special voluntary disclosure programme 2023 for indirect tax on 23 March 2023.
- Meeting with the RMCD to discuss issues on exemption for machine and equipment for hotel business on 29 March 2023.

CTIM 2023 Budget Seminars

Following the Budget 2023 announcement on 24 February 2023 and the issuance of the Finance Bill 2023 on 14 March 2023, CTIM has organised a series of four 2023 Budget Seminars from 13 March 2023 to 28 March 2023. After a hiatus of two years due to COVID-19, CTIM held its first physical budget seminar on 13 March 2023 at Berjaya Times Square, Kuala Lumpur with the participation of over 500 attendees. We were honoured to have YBhg. Dato' Che Nazli Jaapar, Under-Secretary, Tax Division, MOF as our panellist for the forum discussion on the 2023 Budget proposals. Three virtual budget seminars were held subsequently with a total participation of over 1,300 attendees.

The CTIM 2023 Budget Seminars provided in-depth discussions on the proposed tax changes and tax incentives in Budget 2023 and their impact on taxpayers. The participants were also updated and given insights on the future of taxation, recent tax cases, tax issues affecting small and medium enterprises, the latest public rulings, shadow economy, and environmental, social and governance initiatives. I would like to thank the moderators, speakers, and panellists from CTIM, the tax authorities, and the private sector for giving their time and effort in making the Seminars a success. I would also like to thank the participants for their attendance and participation in the Seminars.

Thank you

I would like to thank all our members for giving the Institute your continued support. Your support and constant feedback add weight to our voice in representing the tax fraternity in Malaysia. We look forward to seeing members at the 2023 Annual General Meeting on 24 June 2023.

Editor'sNote

ALAN CHUNG

At the end of year 2022, there were projections of a looming global wide recession while inflation and high cost of living were the order of the day. We were sailing into headwinds projected for the year. These have continued to dominate discussions as we moved into the next quarter of 2023, but there has been some optimistic outlook since. Bank Negara Malaysia has paused hikes in the overnight policy rate (OPR) after four consecutive rounds of hikes. The pause was to check the effects of past rate hikes on inflation, indicative of the possibility that inflation has peaked and may be tapering. Bear in mind though, that the OPR as of February 2023 is still 0.25% below the pre-pandemic rate of 3%. There may be room for further hikes this year to normalise the OPR to pre-pandemic levels. It is a delicate balance between taming inflation while promoting growth and avoiding recession.

The International Monetary Fund (IMF) noted that it is not expecting a negative growth in global GDP, which would indicate a global recession. It estimated that the slowdown has bottomed out in developing economies in 2022 while there may still be a decline in growth in 2023 driven by advanced economies. The sudden reversal of strict Covid-19 lockdown policies in China and its full reopening may have contributed to the renewed optimism.

The pent-up demand from China during its lockdown in 2022 is hoped by many to result in a revenge spending spree that will revive the battered tourism industry in many countries in the region including Malaysia. There are two contradictory schools of thoughts; on one hand some may be wary that this could fuel inflation as demand increases, and others are of the opinion China's reopening will aid to ease inflation. The latter group is of the opinion that the reopening of China will mend disrupted supply chains, easing the flow of goods and supply and driving prices down. One would wonder if this is sufficient to compensate for the disruptions caused by the conflict between Ukraine and Russia, which shows no signs of abating after more than a year.

High prices and cost of living remain in the minds of many Malaysians. Menu Rahmah may ease the situation in the short term but longer-term solutions would be required. One of the ways to address the cost of living apart from alleviating cost, is to raise the income levels of Malaysians. This has been long overdue as Malaysia has long depended on foreign labour for many reasons. This has created a reliance on foreign labour and artificially kept costs lower domestically. The Covid-19 pandemic has somewhat put this in the spotlight and demonstrated challenges in raising wages. Businesses accustomed to low wages are not able to accommodate a wage increase within a short period of time.

Thus, it is heartening to note Economy Minister Rafizi Ramli's recent comments in Parliament that one of Budget 2023's focal points are programmes to help raise wages, especially for the hardcore poor and B40 households. The Minister also remarked that Malaysia may cross the high-income threshold as early as 2026 if our average growth rate is above 4% for the next three years.

In the past, our policies have focused on job creation. Many of the jobs created were low-waged and in the labour-intensive sectors. While it is still important to keep an eye on past policies on job creation, the focus now has to shift towards higher-wage employment in more value-added sectors. Priority should therefore be on higher-skilled jobs.

On the taxation front, 2023 is the year where Pillar 1 and Pillar 2 initiatives of the OECD's BEPS (Base Erosion and

Profit Shifting) project will be centre-staged worldwide even though there are still issues to be ironed out. While we are still waiting for better clarity on the implementation of measures for these initiatives in Malaysia, our neighbours in Singapore have decided to delay its implementation until 2025. On the other hand, Malaysia has decided to delay its removal for exemptions on the importation of low-valued goods (LVG) until 1 April in quarter two whereas Singapore proceeded to start taxing the importation of LVG from 1 January 2023.

The year 2023 is also unique in that we will have two budgets tabled in Parliament in the span of less than eight months. It may be the shortest pause between budgets and it will be interesting to see if we are able to digest the effects of one budget, before setting the policies and directions for the next budget in such a brief span. Tax practitioners will of course be part of this journey as we will likely be looking at new budget proposals while we are still in the midst of ironing out the implementation of the budget proposals of the previous budget.

Tax Guardian will strive to keep members of the Institute abreast with the latest in the arena of taxation and we intend to bring highlights of both budgets in the coming editions. Aside from that, we will continue our tradition of providing interesting articles to enhance our members' knowledge in various tax areas.

This issue of *Tax Guardian* carries articles covering tax incentives and an interesting contribution from a HASiLian on the taxation of the petroleum industry. The Institute welcomes contributions of articles from HASiL as they will provide members' insights from a different perspective. This is hopefully the first of many articles from HASiL as we wish to deepen our collaborations with HASiL.

Aside from HASiL, the Editorial Committee also welcomes insightful contributions of quality articles from other tax practitioners. Interested and aspiring authors are welcome to contact the Secretariat for further details on how you may contribute articles to *Tax Guardian*.

InstituteNews

CPD EVENTS (1 January – 28 February 2023)

The following CPD events were successfully conducted virtually:

Topic	Date	Speaker/(s)
Workshop: Corporate Tax Strategies	5 January 2023	Mr. Harvindar Singh
Workshop: Tax Audits and Investigations: Principles and the Practical Aspects	9 January 2023	Mr. Vincent Josef
Workshop: Withholding Tax in Malaysia - Principles and Latest Developments	12 January 2023	Mr. Chow Chee Yen
Workshop: Real Property Gains Tax (RPGT)	17 January 2023	Mr. Harvindar Singh
Workshop: Fundamentals of Capital Allowances	30 January 2023	Mr. Harvindar Singh
Workshop: Towards Readiness for Employer's and Payroll Audit by LHDNM	2 February 2023	Ms. Yong Mei Sim
Workshop: Taxation of Property Developers and Contractors	7 February 2023	Mr. Harvindar Singh
Workshop: New Public Rulings in 2022	9 February 2023	Mr. Chow Chee Yen
Workshop: Latest Tax Updates and Tax Cases	13 February 2023	Ms. Yong Mei Sim & Mr. John Ung
Workshop: Most Important Tax Updates in 2022 That You Must Know	15 February 2023	Mr. Zen Chow
Workshop: Employer's Reporting and Compliance Responsibilities	16 February 2023	Ms. Ho Yi Hui
Workshop: Reinvestment Allowance & Automation Capital Allowance	21 February 2023	Mr. Chow Chee Yen
Workshop: Update on Transfer Pricing Documentation Requirements	23 February 2023	Mr. Harvindar Singh

Courtesy Visit to HASiL Sabah State Director

On 1 December 2023, CTIM Sabah Branch paid a courtesy visit to meet HASiL Sabah State Director, Datuk Hajam Lajah bin Alam. CTIM Sabah Branch Chairman, Mr. Chu Vun Henn and CTIM Deputy President, Mr. Soh Lian Seng represented CTIM in the visit.

2023 Budget Seminars

On 13 March 2023, CTIM conducted its physical Budget Seminar after a brief interlude of two years at Berjaya Times Square Hotel. The seminar provided the participants an in-depth analysis of the key tax changes presented in the 2023 Budget Proposals. The physical seminar was attended by more than 500 participants. CTIM also organised a series of 2023 Budget Seminars virtually from 20 March to 28 March 2023. The number of participants for the 2023 Budget Seminars exceeded 1800 persons. The Institute wishes to thank the moderators, speakers and, panellists who have contributed significantly to the success of the 2023 Budget seminars.

Universiti Tunku Abdul Rahman (UTAR) Career Xplorer 2023

Accounting Society of Universiti Tunku Abdul Rahman (UTAR) organised Career Xplorer 2023 from 27 to 28 March 2023 at UTAR Sg Long Campus. Career Xplorer 2023 was a two-day physical event featuring a career fair, career talks, and interview sessions. CTIM was invited to join the event and provided the students with information regarding tax career and CTIM professional examination.

Courtesy Meeting with HASiL Tax Education Division of Corporate Services Department

CTIM organised a courtesy meeting with the Tax Education Division, Corporate Services Department of HASiL on 9 January 2023. The meeting discussed the collaboration between HASiL and CTIM focusing on the HASiL-CTIM Tax Forum and other potential collaborative activities for 2023.

The Corporate Services Department of HASiL was led by Pn Noraini Mustafa, Director of the Corporate Services Department while CTIM was led by Mr. Chow Chee Yen, the President of CTIM. The session was also attended by En. Masrun Maslim, Director of the HASiL Tax Education Division.

CTIM-MTRF-Academicians Forum

The inaugural forum was hosted by CTIM and the Malaysian Tax Research Foundation (MTRF) for tax practitioners, academicians and researchers to share knowledge and discuss tax syllabus, recent tax developments, future tax trends, and tax research ideas. The forum was held on 21 March 2023 moderated by Mr. Chong Mun Yew, Chairman of CTIM Education Committee and Mr. K Sandra Segaran, Chairman of MTRF. It was held in a hybrid mode and participated by 60 attendees.

June 2023 Examination Timetable

SUBJECTS	Details	
	Date	Time
Company & Business Law	19 June 2023	9.00 a.m. – 12.15 p.m.
Personal Taxation	19 June 2023	2.00 p.m. – 5.15 p.m.
Revenue Law	20 June 2023	9.00 a.m. – 12.15 p.m.
Business Taxation	20 June 2023	2.00 p.m. – 5.15 p.m.
Advanced Taxation 1	21 June 2023	9.00 a.m. – 12.15 p.m.
Financial Accounting	21 June 2023	2.00 p.m. – 5.15 p.m.
Advanced Taxation 2	22 June 2023	9.00 a.m. – 12.15 p.m.
Economics	22 June 2023	2.00 p.m. – 5.15 p.m.

DISCLAIMER: The above timetable is correct and accurate at the time of printing. CTIM reserves the right to re-schedule the examination session if there is any disruption due to unforeseen circumstances.

EINSTEIN, UNCERTAINTY AND THE TAX LAW

Dr. Nakha Ratnam Somasundaram

ABSTRACT

This article explores the issue of uncertainty in tax law and its impact on the taxpayers, the revenue agencies, the courts, and the economy.

THE DOCTRINE OF CERTAINTY

In his book, Enquiry into the Wealth of Nations, the Scottish philosopher and economist, Adam Smith wrote in 1776:

> *'The tax which each individual is bound to pay ought to be certain, and not arbitrary ...'*

'Certainty' was one of the key elements of his economic philosophy on taxation because it was elemental on the part of business to plan, invest and structure its affairs in a most profitable manner, with tax as an important and fundamental feature in terms of legal compliance and cost.

Adam Smith also regarded 'certainty' in taxation as guarding against a multitude of vices, among which he included the corruption of the revenue collectors and the extortion of private property. His emphasis on 'certainty' could also be seen as integral to the promotion of individual liberty.

These values featured prominently in his economic philosophy because the 1700s in Britain were a period when the exercise of state authority could be '... particularly harsh, arbitrary and unprincipled.'.[1]

However, since his time, much water has flowed under the bridge and this 'particularly harsh, arbitrary and unprincipled' application of the law may not be so much a concern now as that of the rate of taxation, the manner of its imposition and how tax money is utilised by the government.

Nevertheless, were he to be alive today, he may still be stressing 'certainty' in the interpretation of the tax laws as one of the utmost priorities.

WHAT IS 'CERTAINTY"?

Determined, fixed, settled, not variable, not fluctuating. These meanings may not necessarily be useful for income tax purposes.

Then there is the objective meaning of being 'the quality or fact of being objectively certain'; and then the subjective meaning of a 'state of being certain as in an assurance, confidence or the absence of doubt'.

This last one – 'the absence of doubt' – certainly would be most useful for tax purposes.

Thus, when a legal provision is written, it must have both the objective and subjective components: - it must be written with some objective precision and in an exact language that has the effect ultimately of instilling in the taxpayer the confidence that his interpretation of a particular provision is very clear, i.e. there is 'absence of doubt'.

How do you sniff out this 'absence of doubt'?

The 'certainty' (or the 'uncertainty' aspect) of a specific tax provision might be the extent to which a reading of its language induces a common understanding among a group of taxpayers. Thus, if a group of taxpayers were able to independently read a specific provision and reach a similar understanding of its contents this might prima facie [Latin: at first sight, first view or first impression], be taken as an indicator of a provision that satisfies both requirements.

On the other hand, should there be a common misunderstanding amongst the taxpayers, or its plain reading leads to serious contentions as to the meaning of the specific provision, then it means there is uncertainty - and the legislation has clearly fouled up.

RULE OF LAW

For 'certainty' to be embedded in the law, it must have absolute predominance in the rule of law. In other words, the government implementing the tax law should not have arbitrary authority – or least, not too much.

And it further means that the government in its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its legislative powers in given circumstances - and that accordingly, allow the ordinary citizens who may be affected by the said rules, to plan their affairs on the basis of this knowledge.

ROLE OF 'CERTAINTY'

The value of 'certainty' enjoys a privileged position amidst the pantheon of competing social policy values – which means that governments in power tend to draft legislation cautiously and deliberately. In turn, these legislations are construed formally and narrowly by the courts in a litigation.

And in instances where a statute as

[1] *Shelley Griffiths, "Tax as Public Law" in Maples and Sawyer (ed) Taxation Issues: Existing and Emerging (The Centre for Commercial and Corporate Law, University of Canterbury, 2011) pp215-216, 219-220.*

drafted presented some causes for doubt as to its proper meaning, it was frequently read and interpreted in favour of the taxpayer – part of the reason being that in the early days of taxation, particularly in Britain, the courts tended to view tax as depriving the taxpayer of his property, and even infringing on his individual rights and privileges.

This thinking is fairly evident when one examines closely the words used in the decision in Inland Revenue Commissioners v. Duke of Westminster [(1936) A.C. 1], where Lord Tomlin famously said:

"Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

For some time, this judgment was attractive for taxpayers seeking to order their affairs to avoid tax legally. And still other 'fellow taxpayers ... (with) ingenuity', of course, went to extraordinary lengths to create elaborate and complex structures to achieve this effect of not having 'to pay an increased tax'.

The courts then began to look at other factors, and adopted more restrictive approach. Thus, if a transaction had pre-arranged artificial steps that served no commercial purpose other than to save tax, the courts' approach was to view, and tax, the effect of the transaction as a whole.[2]

Nevertheless, this approach by the bench is not as simple as it sounds and had instead spawned a whole gamut of arguments with regards to 'certainty' and the interpretation of the tax laws in line with the intentions of Parliament.[3]

CERTAINTY AND FAIRNESS

'Certainty' simply means the tax as imposed must be certain i.e. there is 'absence of doubt'.

But must the tax as imposed with certainty, also be fair?

This follows the concept that in a democratic society, there should be 'no taxation without representation', and the courts stood between the State and the citizen to ensure that the tax is 'imposed with certainty and enforced impartially' i.e. it must also be fair.[4] This of course required that the taxpayer must pay his share of the tax in accordance with the tax law. And, more importantly, for the State not to impose the tax arbitrarily or at its discretion.

These two concepts invariably lead to other value issues. For example, one needs to ask which of these would present prominently in the mind of the judges who are required to interpret a complex legislation that covers a legal grey area or is on the borders of tax avoidance?

The Drafting of the legislation in clear language and the interpretation of that legislation as intended by Parliament therefore becomes important - especially in anti-avoidance legislations.[5]

However, in the context of anti-avoidance legislation, this matter of 'certainty' and the value of 'fairness' may

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[2] *see W. T. Ramsay Ltd. v. Inland Revenue Commissioners [(1982) A.C. 300.*

[3] *Judith Freedman, "Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament", (2007) 123 L.Q.R., January Ó Sweet & Maxwell and Contributors*

[4] *This is contained in the Bill of Rights 1688 (UK). This was an original Act of the English Parliament, which among other things, established the principle of free elections and freedom of speech within Parliament – known today as Parliamentary Privilege – and other matters including 'no taxation without representation' – a serious enough matter which later became the rallying call of the early American revolutionaries when tax was imposed on tea by the English. This, among other reasons, directly led to the American War of Independence and the subsequent loss of the vast colony to Britain.*

[5] *Eugen Trombitas "The Conceptual Approach to Tax Avoidance in the 21st Century" (2009) 15 NZJTLP 352.*

be put under great legal stress - and may even lead to breaches of the rule of law.[6]

For instance, Professor Judith Freedman, a tax professor at the University of Oxford in England, contended that while 'certainty' had great significance in the fields of commercial and criminal law, there were circumstances in a tax context in which it should not be the overriding aim and might prove to be elusive - or even undesirable.[7]

This sentiment resonated with the Supreme Court of New Zealand when it remarked that New Zealand's general anti-avoidance rules [GAAR] had been left "deliberately general" and that it was not the role of the courts to create "greater certainty than Parliament had chosen to provide."[8]

To add salt to injury, New Zealand's Inland Revenue had argued in a draft Interpretation Statement that the GAAR was not "as clear cut as might be suggested". And that certainty was neither possible nor desirable in the area of tax avoidance, "particularly where arrangements [were] at the avoidance boundary."[9]

CERTAINTY IN THE INTERPRETATION OF STATUTORY PROVISIONS

From a legal perspective, the traditional approach to the application of the tax laws can best be described as cautious and restrained with any doubts in the tax provisions applied to benefit the taxpayer.

For instance, in the 1833 case of R v Winstanley [5 ER 261] it was held that if there should be any doubt about the words of the legislature, the benefit of that doubt should be afforded the subject. Per Lord Wynford:

> *"In all revenue cases, let the officers of the government take care that the legislature is made to speak plain and intelligible language. If the legislature is not made to speak plain and intelligible language ... (then) ... if there is any doubt about these words, the benefit of the doubt should be given to the subject (i.e. the taxpayer)."*

In Partington v Attorney-General [21 LT 370] the House of Lords took the view that in fiscal cases 'form' (in contrast to 'substance'), was "amply sufficient." According to Lord Cairns:

> **For instance, Professor Judith Freedman, a tax professor at the University of Oxford in England, contended that while 'certainty' had great significance in the fields of commercial and criminal law, there were circumstances in a tax context in which it should not be the overriding aim and might prove to be elusive - or even undesirable.**

> *"If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be.*
>
> *On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be.*
>
> *In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."*

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[6] *Rebecca Prebble and John Prebble: "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" (2012) 2(2) Saint Louis University Law Journal 21.*

[7] *Judith Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle" [2004] 4 BTR 333.*

[8] *Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue (2009) 24 NZTC 23,188 (SC).*

[9] *Inland Revenue (New Zealand), "Interpretation Statement: Tax Avoidance and the Interpretation of Sections BG 1 and GA 1 of the Income Tax Act 2007" (16 December 2011).*

Essentially, this was an era in tax disputes where the courts viewed the sole purpose of taxation was raising taxes; as such, matters of context, equity or statutory purpose which took prominence in later times, were generally considered to be irrelevant to the interpretation of tax legislation.

And as evidenced in the Duke of Westminster case, the courts to some extent also regarded tax legislation as depriving taxpayers of their property, and accordingly construed this as narrowly as any other laws infringing upon individual rights, privileges, and property.[10]

THE LITERAL RULE

And so, among the tools of statutory interpretation, it was the 'literal rule' which was most often preferred as being simple to apply without being side-tracked and sucked into treacherous legal quicksands like intention, purpose, or even noble aspirations like equitable construction.

It was thought to be safer.

One can see this preferred safer thinking mode in the 1921 decision of Rowlatt, J. in the case of Cape Brandy Syndicate v IRC where his Lordship famously said:

> *"... (the literal rule) does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts.... It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".*

This legal quest to 'look fairly at the language used' struck a chord with the bench for a very long time, and Lord Wilberforce in the 1981 House of Lords case of WT Ramsay Ltd v. CIR [(1981) STC 174] echoed the refrain:

> *"A subject is only to be taxed on clear words, not on intendment or on the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle"*

But 'clear words' are not always that clear.

In Barclays Mercantile Business Finance Ltd v. Mawson [(2005) STC 1] their Lordships there apparently made it very 'unclear' when they said:

> *"What are "clear words" is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."*

With 'clear words' becoming more and more 'unclear', the golden rule was at times enlisted and the mischief rule was generally ignored or regarded as inapplicable, insofar as matters such as tax was concerned.

PURPOSIVE RULE

Eventually however, a broader, more purposive approach to the construction of fiscal statutes came to be adopted by the bench. The purposive approach arguably represents the development of the mischief rule, which asked, in essence:

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[10] *Stephen W Bowman, "Interpretation of Tax Legislation: The Evolution of Purposive Analysis" (1995) 43(5) Can Tax J Rev Fiscale Can 1167 at 1170.*

[11] *See Duncan Webb, Katherine Sanders and Paul Scott, 'The New Zealand Legal System: Structures and Processes', (5th Ed, LexisNexis, Wellington, 2010) at p332.*

[12] *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 3 CLJ 421. This was a litigation on withholding tax under section 4A of the Income Tax Act 1967 and relief from double taxation under the Malaysia Singapore DTA [Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Malaysia-Singapore)].*

What was the defect of the common law that Parliament intended to remedy?.[11]

It began in the United Kingdom (UK) with the advent of W T Ramsay v IRC [(1982) AC 300] and in Canada, with the case of Stubart Investments Ltd v R [(1984) 10 DLR (4th) 1.]. In Malaysia, this was applied by the Federal Court in the case of Alam Maritim.[12]

In New Zealand, the Court of Appeal judgment in the case of CIR v Challenge Corporation Ltd [(1986) 2 NZLR 513] would seem to have had a similar effect in ushering in the "scheme and purpose" approach to statutory interpretation.[13]

The emphasis which these said jurisdictions now place upon the role of context and purpose can at times be discerned from the language employed in their respective statutes and case law.

In the UK, for instance, in the case of MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [(2003) 1 AC 311] Lord Hoffmann remarked that there was only one principle of construction, which was:

"The emphasis which these said jurisdictions now place upon the role of context and purpose can at times be discerned from the language employed in their respective statutes and case law."

"... to ascertain what Parliament meant in using the language of the statute."

In New Zealand, Section 5 of the Interpretation Act 1999 states that the meaning of an enactment is to be understood "from its text and in the light of its purpose."[14]

While several other examples might be adduced, the essential point is that the interpretation of fiscal provisions is no longer bound by strict legal forms.

According to authors J. F Burrows and R. I. Carter, the interpretations of fiscal statutes in the last 50 years have witnessed a significant change toward a broader, more contextual approach to statutory construction. However, the extent to which tax statutes are interpreted in the same manner as other statutes like criminal laws remains contentious – in part due to the highly detailed and specific nature of the taxing provisions – resulting in the application of these fiscal legislations becoming less certain.[15]

THE DANGERS OF UNCERTAINTY

When a broad approach is taken for the interpretation of a fiscal statute, especially in a complicated legislation relating to GAAR, it risks the judiciary acting beyond its authority. And in seeking to give effect to the intention of the legislature, they may even end up creating – rather than interpreting – the law.

This danger was expressed in Mangin v CIR [(1971) 2 WLR 739] by Lord Donovan, when he said that judges, in searching for an interpretation of the GAAR which was both "workable and just", approached the line where interpretation ceased and legislation began - a 'thin dividing line' which they were not supposed to cross.

More recently, Judith Freedman drew attention to the contradiction in this "thin dividing line" between "overriding a specific statutory purpose" through the GAAR, which was not permitted, and "employing the GAAR as a tool to protect the specific legislation from frustration," which was permitted.[16]

It would be back to uncertainty – and legal confusion - if one is not careful of this 'thin dividing line'.

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[13] *Thomas Gibbons, "Great Elucidations: The Interpretation of Revenue Statutes in New Zealand" (2001) 9 Waikato Law Review 63 at 64, 65.*

[14] *Section 5 Interpretation Act 1999 (NZ).*

[15] *JF Burrows and RI Carter, Statute Law in New Zealand (LexisNexis, Wellington, 2009) at 217.*

[16] *Judith Freedman "Interpreting Statutes: Tax Avoidance and the Intention of Parliament" (2007) 123 (Jan) LQR 53.*

THE COST OF UNCERTAINTY

The presence of uncertainty in tax legislation may act to inhibit economic activity within a jurisdiction. If taxpayers have a greater need to seek advice as to the legal and commercial implications of their proposed course of dealings, then the cost of transacting will rise and capital will be directed away from more productive employment and towards meeting the costs of compliance instead. It also induces the creation of asset-sheltering tax devices - and even capital flight with the possibility of political instability.[17]

Essentially, complicated legislation, quite often legislated to operate as a deterrent to tax avoidance, is invariably also devoid of certainty ... and often crosses the 'thin dividing line' into uncertainty, giving rise to legal contention, confusion and costly litigation.[18]

CONCLUSION

'Uncertainty' is not a problem in tax laws only – it is also a problem in physics, too.

While the universe appears to be deterministic and measurable, quantum mechanics says there is a world of tiny particles behind everything that is governed by total randomness. Thus, in quantum mechanics, under the Heisenberg's Uncertainty Principle, everything is random, and we can only describe things in terms of probabilities.

Albert Einstein didn't like this idea of randomness and uncertainty in the working of the universe, and was even quoted as saying: 'God does not play dice with the universe.'.

He believed there must be some underlying laws of nature that could be definitive. And so, when his original Theory of General Relativity predicted an expanding universe, he inserted a cosmological constant to enable the theory to predict a stationary universe - the accepted view of the universe at that time.

Later, when astronomical observations showed that the universe was in fact expanding, and that his original theory was indeed correct, Einstein abandoned the cosmological constant, calling it the 'biggest blunder' of his life.

This was the same man who also said that income tax is the most difficult thing to understand.

Well, one has to admit that Einstein certainly got this 'difficult to understand' aspect of the tax law right.

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[17] *Alberto Alesina and Guido Tabellini, "External Debt, Capital Flight and Political Risk" 27 JIE (1989) 199-220*

[18] *Mark Keating and Kirsty Keating, "Tax Avoidance: The Camel's Back that Refuses to Break" 17 NZJTLP 115 at 115, 138.*

[19] *Formulated by the German physicist and Nobel laureate Werner Heisenberg in 1927, the Heisenberg's Uncertainty Principle states that we cannot know both the position and speed of a particle, such as a photon or electron, with perfect accuracy; the more we nail down the particle's position, the less we know about its speed - and vice versa. [https://scienceexchange.caltech.edu/topics/quantum-science-explained/uncertainty-principle].*

[20] *According to Clara Moskowitz, Editor of Space.com, new research finding confirms that the cosmological constant abandoned by Einstein is in fact the best fit for dark energy phenomenon, and offers the most precise and accurate estimate yet of its value. The finding comes from a measurement of the universe's geometry that suggests our universe is flat, rather than spherical or curved [Clara Moskowitz, 'Einstein's 'Biggest Blunder' Turns Out to Be Right', Space.com, 24 November 2010].*

[21] *There is actually much controversy raging about this 'cosmological constant' and 'Einstein's blunder'. For a full discussion, see Steven Weinberg, 'Einstein's Mistakes' in Physics Today, Vol 58, Issue No. 11, Nov. 2005.*

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TAX JUDGMENT OF DATO' SERI MOHD HISHAMUDIN BIN MD YUNUS

THE NV ALLIANCE CASE

Datuk D.P. Naban & S. Saravana Kumar

Dato' Seri Mohd Hishamudin bin Md Yunus is an esteemed and prominent figure in the Malaysian judiciary, well-known for his eloquent legal analysis and application of the law. The retired Court of Appeal Judge was a strong advocate of judicial independence and upholding the separation of powers in dispensing the law. This article discusses a significant Court of Appeal tax decision where he was the presiding judge, which is *NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 441 (NV Alliance).

ISSUE IN DISPUTE

The *NV Alliance* case concerned the deductibility of commission payments made by the taxpayer to its agents under S. 33(1) of the Income Tax Act 1967 (ITA 1967). More pertinent was the question of whether the said commission payments were *"entertainment"* expenses and hence not allowed as a deduction under S. 39(1)(l) of the ITA 1967. This case was significant as it was the first tax case that examined the interpretation and application of "*ejusdem generis*" and "*noscitur a sociis*" principles in Malaysia under the ITA 1967.

BACKGROUND FACTS

The taxpayer was primarily engaged in the business of burial plots, urn compartments and funeral packages. In conducting its business, the taxpayer required the services of marketing agents. In return, the agents receive remuneration with commission for their work. As an incentive for the agents, the taxpayer introduced various types of incentives, including cash payments. This case concerns the cash incentives made to the agents by the taxpayer. Although such incentive programmes are commonplace, the Inland Revenue Board of Malaysia (HASiL) alleged that these cash incentives were not deductible as they were a form of "entertainment" expense. The taxpayer had claimed a deduction under S. 3(1)

on the cash incentive payments made to the marketing agents. Similar issues were raised in the cases of MHL *Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 10-014 and *Mercedes Benz Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2012) MSTC 30-052, which were successfully represented by the authors. These cases held that deductions for sales related incentives ought to be allowed as they are wholly and exclusively incurred in the production of gross income of the taxpayer's business. Similarly, the incentive payments made by the taxpayer in *NV Alliance* were aimed at encouraging higher sales by the marketing agents, which corresponded to a higher gross income received by the taxpayer.

It is pertinent to note that HASiL had agreed that cash incentive payments are deductible under S. 33(1). Nevertheless, the same expense was disallowed under S. 39(1)(l) as a type of "entertainment expense" because the expenses were a form of "hospitality". S. 39(1)(l) reads as below at the material time:

> *"Any expenses incurred in the provision of entertainment including any sums paid to an employee of that person for the purpose of defraying expenses incurred by that employee in the provision of entertainment."*

Correspondingly, the definition of the word "entertainment" under S. 18 of the ITA 1967 is as follows:

> *"Entertainment includes:*
> *(a) the provision of food, drink, recreation or hospitality of any kind; or*
>
> *(b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a), by a person or an employee of his, in connection with a trade or business carried on by that person."*

RELATIONSHIP BETWEEN SECTION 33(1) AND SECTION 39(1)(L) OF THE ITA 1967

The relationship between S. 33(1) and S. 39(1)(l) should be appreciated as a starting point. This was adumbrated in the cases of *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 (FC) as well as *Margaret Luping & Ors v Ketua Pengarah Hasil Dalam Negeri* [2000] 3 CLJ 409 (CA) where these two cases established that an allowable expenditure under the ITA is one that satisfies the requirements as set out in S. 33(1) and is simultaneously not disallowed under S. 39(1). HASiL's position was that although the cash incentives were deductible under S. 33(1), they would be disallowed under S. 39(1)(l) as the cash incentives were a form of "entertainment" expense.

Yet, HASiL maintained that the income earned by the taxpayer through the incentive programmes were taxable business income. If HASiL's position was held true, it would result in a tax loss for the taxpayer who on the one hand could not claim a deduction for the expense to offer the incentive programmes but yet would have to pay taxes on the income earned.

QUESTION BEFORE THE SPECIAL COMMISSIONERS OF INCOME TAX

The question to the court arising from *NV Alliance* was whether cash incentives are a form of "*entertainment*" expenses and hence disallowed any form of deduction under S. 39(1)(l). The Revenue relied on the word "*hospitality*" and took this point to its apex in support of the position that the cash incentives were "*entertainment*" expenses. In response, the taxpayer protested that there were no elements of hospitality or entertainment in the present case. The Special Commissioners of Income Tax (SCIT) ruled in favour of the taxpayer by finding that the cash incentives were deductible.

QUESTION BEFORE THE HIGH COURT

However, the High Court held that the cash incentives were not paid solely for promoting the taxpayer's business. The decision was consequent to the findings that the taxpayer did not have any contractual obligations to make the payments as the ulterior motive for the cash incentives was to reward sales agents who achieve sales targets. Hence, it was not paid solely for the purpose of the taxpayer's business. Further, the High Court was of the view that the incentive payments were given over and above the commissions that the agents were contractually obliged to do under the agency agreements and the incentive payments were gratuitous in nature without consideration. Since *'entertainment'* included *'hospitality of any kind'*, the High Court considered that the SCIT had erred in finding that the cash incentive payments were not a form of *'entertainment'*.

QUESTION BEFORE THE COURT OF APPEAL

Dissatisfied, the taxpayer appealed to the Court of Appeal where the High Court's decision was reversed. Here, Justice Hishamudin applied and explained the *noscitur a sociis* and *ejusdem generis* statutory rules of interpretation, making *NV Alliance* notable for being the first tax decision in Malaysia for expounding these rules.

In his judgement, Justice Hishamudin pointed out that the ITA 1967 does not provide for a definition of the word *'hospitality'* and took cognisance that the nature of the incentive payments must be assessed in light of the taxpayer's business. He noted that the first witness, who was also the taxpayer's executive director, testified before the SCIT that the cash incentives were made to the agents who had achieved the targets set out in the notices issued to them. These incentives were additional remuneration given to agents who successfully met the sales target. The witness added that the incentives were introduced to motivate the agents to work harder to increase the sales of the taxpayer. Meanwhile, according to the second witness, who was the taxpayer's marketing agent, the commission received was performance-based. Additionally, an agent would also be paid through other forms of incentives such as sales target incentives, agency sales competition incentives, quarterly incentives and cash incentives.

> **"Further, the High Court was of the view that the incentive payments were given over and above the commissions that the agents were contractually obliged to do under the agency agreements and the incentive payments were gratuitous in nature without consideration. Since 'entertainment' included 'hospitality of any kind', the High Court considered that the SCIT had erred in finding that the cash incentive payments were not a form of 'entertainment'."**

As the presiding judge, Justice Hishamudin favoured the SCIT's findings in holding that the cash incentives incurred were in the course of the taxpayer's business. The taxpayer introduced the cash incentives to encourage the marketing agents to work harder which was reflected in higher sales by the taxpayer. This was succinctly explained by the taxpayer's first and second witnesses. Given that the expenses were incurred to improve the profit earning operations of the taxpayer, they were closely related to the gross income of the taxpayer and *'revenue'* in nature. Therefore, the Court of Appeal rejected the High Court's findings that the cash incentives paid to the agents were a form of hospitality and restored the SCIT's decision.

Noscitur A Sociis Rule

According to the *noscitur a sociis* rule of statutory interpretation, where two or more words which are susceptible of analogous meaning are coupled together in a statutory provision, they are understood to be used in their cognate sense. Hishamudin relied on *Maxwell on the Interpretation of Statutes*, 12th edition, 1969 to enunciate this rule that words take their colour from each other, the meaning of a more general being restricted to a sense analogous to that of the less general. This means that the

words 'or *hospitality of any kind'* ought to be restricted to a sense analogous to that of the less general words, i.e. *'food, drink, recreation'*. Hence, to determine whether or not the cash incentive expenses fall within the meaning of 'or hospitality of any kind', the preceding words, *'food, drink, recreation'* must be considered. Justice Hishamudin stated that the cash incentive expenses would certainly not fall within the meaning of "or *hospitality of any kind*" whose interpretation is parasitic on the words surrounding it.

Ejusdem Generis Rule

Although Justice Hishamudin was satisfied that reliance and appreciation on the principle of the *noscitur a sociis* rule of statutory interpretation alone would overturn the High Court's decision, he nevertheless went on and explored another anchor where the same conclusion would be reached, which was the *ejusdem generis* rule. It was detailed in Maxwell on the Interpretation of Statutes that this rule of statutory interpretation requires the meaning attached to the general words to be confined to the same genus. This means that the words 'or hospitality of any kind' must be given a meaning that is *ejusdem generis* i.e. restricted to the same genus with *'food, drink, recreation'*. The Court of Appeal was not convinced that the definition of the words 'or hospitality of any kind' could be interpreted so widely to include cash incentives. If the meaning of the expression 'or hospitality of any kind' is confined to expenses bearing the nature of *'food, drink, recreation'*, it would exclude the cash incentive payments. Consequently, as the Court of Appeal did not agree that the incentive payments were *'entertainment'* expenses, the taxpayer was allowed deductions under S. 33(1).

JUDGMENT WITH FAR-REACHING CONSEQUENCES

Justice Hishamudin's intelligible analysis of the law coupled with the innovative application of the rules of statutory interpretation in this case was significant and had far-reaching consequences in Malaysian tax law. First and foremost, this decision instilled commercial confidence that business promotion expenses are not considered as entertainment expenses under S.18 and S.39(1)(l). Second, as a binding precedent, this precludes HASiL from making tax adjustments which disallowed business promotion expenses. After the Court of Appeal's decision in *NV Alliance*, HASiL had withdrawn several appeals involving the same issue such as MHL case which was pending before the High Court and *Ketua Pengarah Hasil Dalam Negeri v Servier Malaysia Sdn Bhd* (2012) MSTC 30-038 before the Court of Appeal. Third, this case is a testament that the rules of statutory interpretation such as the *noscitur a sociis* rule and the *ejusdem generis* rule apply to taxing statutes as well. Lastly, Justice Hishamudin's ruling in this case forced the Revenue to subsequently amend the definition of 'entertainment' in S.18.

SUBSEQUENT AMENDMENT MADE TO THE DEFINITION OF "ENTERTAINMENT"

S.7 of the Finance Act 2014 (Act 761) amended the definition of *'entertainment'* in S.18 to include expenses incurred by a person for the purpose of promoting his business with or without consideration. This amendment took effect from the year of assessment 2014 but the full effect of this amendment and whether the amendment would overrule *NV Alliance* have yet to be tested.

CONCLUSION

All in all, the decision in *NV Alliance* not only accorded progressive development in Malaysian taxation laws but it also ensured that the parties' constitutional rights remain sacrosanct and cannot be sacrificed by the purported exercise of the statutory powers under the ITA 1967 by HASiL.

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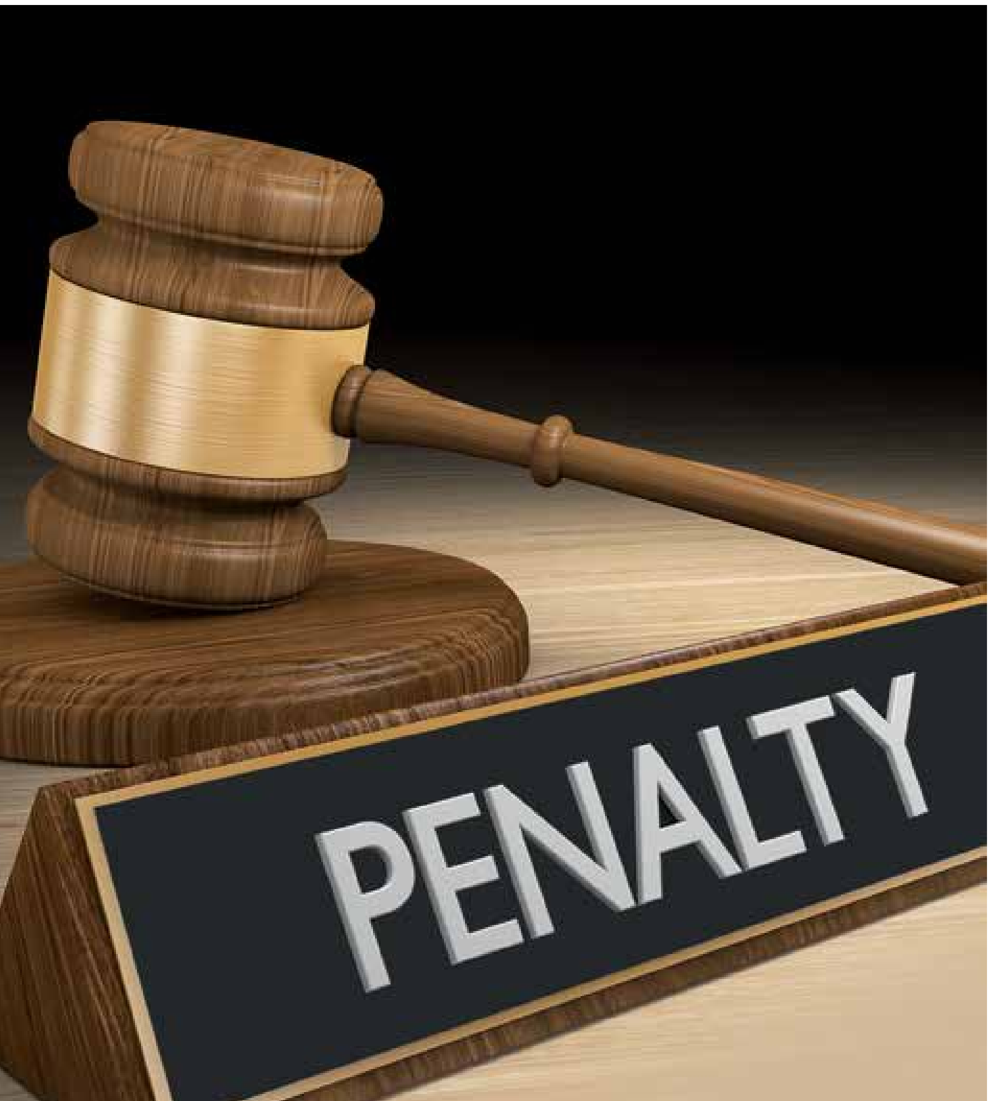
THE UNILATERAL IMPOSITION OF SECTION 113(2) PENALTY[1]

Dr. Andrew Chew Peng Hui



In recent years it has become very common for the Director General of Income Tax, ("DGIR" for brevity), when making assessment or additional assessment under S. 90(3) or 91 of the Income Tax Act 1967 ("ITA 1967") to, unilaterally and automatically, add on to such assessments' penalties under S. 113(2). Not surprisingly, this has given rise to many grievances and substantial and serious litigation. The focus of this litigation has tended, unfortunately, to be on whether the DGIR has exercised his S. 113(2) discretion properly and fairly and the availability of good faith as a defence or a pertinent consideration in such exercise[3]. What has not been explored, as fully as it might have been, is the validity

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[3] *For instances, Seaport Worldwide Sdn Bhd v KPHDN and another appeal [2022] 3 MLJ 330; KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870, KPHDN v Kim Thye & Co [1992] 2 MLJ 708, Syarikat Ibraco-Peremba Sdn Bhd v KPHDN [2017] 2 MLJ 120 Syarikat Ibraco-Peremba Sdn Bhd v KPHDN [2017] 2 MLJ 120, Luxor Network Sdn Bhd v KPHDN [2017] MLJU 1803, Sri Binaraya Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri, Rayuan Sivil No. R1-14-16-2011, KPHDN v Woodville Development Sdn Bhd [2013] 3 MLJ 832, Datuk Yap Pak Leong v Ketua Pengarah Hasil Dalam Negeri [2014] 10 MLJ 255 & Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v KPHDN [2012] 6 MLJ 411.*

or legality or the "merits or demerits"[4] (to employ, perhaps, a less objectionable terminology) of unilateral imposition. This came about, it is surmised, because of the way the battle lines had been drawn in the litigation.

The purpose of this article is to demonstrate that unilateral imposition is not consistent with or supported by the law. It is earnestly hoped that this will stimulate or promote a healthy and constructive discussion by all stakeholders of this thorny issue. Hopefully, it will ultimately lead to the penalty being assessed properly and in the manner that Parliament has intended. After all, and as the courts have reminded on numerous occasions (as recounted later on), everybody, taxpayers and the Inland Revenue Board of Malaysia ("HASiL") alike, must comply with the ITA 1967. This is the rule of law - a cardinal principle of our constitutional law[5]. Though the courts are fully aware that collection of revenue is essential to administration of the country they have not neglected their duty to be fair to taxpayers, maintaining an even keel[6], so to speak, and to see to it that tax laws are correctly interpreted according to established canons of construction and applied[7].

For convenience of reference and to facilitate the ensuing discussion, S. 113, headed "Incorrect Returns", is reproduced here:

"(1) *Any person* who —
(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in *good faith*, be guilty of an offence and shall, on *conviction*, be liable to a fine of not less than RM1,000 and not more than RM10,000 and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(2) Where a *person* —
(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if *no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information*, the DGIR *may require that person to pay a penalty equal to the amount of tax* which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty *(or, where the penalty is abated or remitted under S. 124 (3), so much, if any, of the penalty as has not been abated or remitted)*, he shall not be liable to be charged on the same facts with an offence under subsection (1)"

Similar provisions have been enacted to deal with failure to furnish returns in accordance with S. 77(1) or to give notice under S. 77A(1) "without reasonable excuse" for which a fine (minimum RM200 and maximum RM20,000) or imprisonment (not exceeding six months) or both are provided[8] and the burden is placed on the accused to prove that he has furnished his return or given his notice. "Where no prosecution has been instituted" the DGIR "may require" the alleged offender to pay a penalty "equal to treble the amount of tax which, before any set off, repayment or relief under this Act": S. 112(3). If that (or where it has been remitted or abated, the unremitted or unabated penalty) is paid the offender shall not be charged on the same facts with an offence under subsection (1). The DGIR may require also the payment of an "additional amount of penalty in accordance with subsection (3) in respect of any additional tax which is payable by that person for a year of assessment"[9].

Unless otherwise specifically stated, the arguments raised in this article

[4] *Per Peh Swee Chin SCJ in KPHDN v Kim Thye & Co [1992] 2 MLJ 708.*

[5] *Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1, FC, Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC & Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals [2016] 4 MLJ 455, CA.*

[6] *See the observations of Edgar Joseph Jr FCJ in Government of Malaysia v Jasanusa Sdn Bhd [1995] 2CLJ 701 and Government of Malaysia v Datuk Hj Kadir Mohamad Mastan [1993]] 3 MLJ 514, Ian Chin J at 523*

[7] *See National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339, SC Guan Chit Tuan CJ (Malaya) at page 343. See too Exxon Chemical (Malaysia) Sdn Bhd v KPHDN [2005] 4 CLJ 810, CA.*

[8] *For repeat offenders the fine is not less than RM1,000 and not more than RM20,000 or imprisonment up to six months or both plus a "special penalty" "equal to treble the amount of tax" as determined by the DGIR according to his best judgment: S. 112(1A).*

[9] *S. 112(4).*

pertaining to S. 113(2) should with the appropriate modifications be equally apposite to the S. 112(3) penalty.

KIM THYE DOES NOT SANCTION UNILATERAL IMPOSITION

The highest judicial authority on S. 113(2) has been *Kim Thye & Co* [10]. That case has merely recognised the discretion conferred by S. 113(2) on the DGIR to require the payment of the penalty. It is wrong to treat it as an authority, as some cases did[11], for the proposition that an incorrect return or incorrect information gives the DGIR a right or power or discretion to impose the S. 113(2) penalty without reference to taxpayers because that is clearly not its *ratio decidendi*[12]. The Supreme Court had specifically left open the "merits or demerits" as regard the propriety or legality of the penalty being added onto the assessment for later because, as Peh Swee Chin SCJ explained, the question that was canvassed before the court "was cast in a pure question of law as to whether the said penalty imposed by S. 113(2) of the Act was appealable to the special commissioners"; the application there being for mandamus to direct the DGIR to forward the Form Q onto the special commissioners.

REASONS FOR EXERCISE OF DISCRETION

The Supreme Court in *Kim Thye* has stated, in no uncertain terms, that the discretion conferred by S. 113(2) is not an "unfettered" one[13] - unfettered discretion being described as a "discarded theme", reiterating Raja Azlan Shah Ag CJ's view (as he then was) that an unfettered discretion is contradiction in terms[14]. As such it cannot be exercised at the whims and fancy of the DGIR. He must consider all relevant circumstances and facts on which point there is general consensus[15]. This test, as well as the readiness of the courts to read good faith into S. 113(2), may well be prompted by perception of harshness of unilateral imposition and a need to protect innocent taxpayers by ensuring that discretion is properly exercised.

In *Classic Japan* and *Club Twenty-One Retail (Malaysia) Sdn Bhd v Ketua Pengarah Kastam*[17], the courts have held that DGIR had a legal duty to provide reason for his imposition of the S. 113(2) penalty even if S. 113(2) does not expressly provide for this[18]. "The absence of such provision," the Federal

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[10] *KPHDN v Kim Thye & Co [1992] 2 MLJ 708, FC. (judicial review appeal)*

[11] *See for instance Insaf Tegas Sdn Bhd v KPHDN, [2017] 7 MLJ 640*

[12] *"A case is only an authority," Sir George Jessel M.R said in Osborne to Rowlett, 13 Ch D. 774 at 784., " for what it actually decides. The only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him". See also Re Hallet (1880) 13 Ch.D. 712. The binding principle or ratio decidendi of a case is the reasoning of the decision on the facts. Remarks or observations made in passing which may not be relevant to the decision or obiter are not part of the ratio: A SantamilSelvi A/p Alau Malay @ Anna Malay &Ors v Dato' Seri Mohd Najib Bin Tun Abdul Razak &Ors[2015] MLJU 262(CA). Osborn's Concise Law Dictionary (8th ed) defines ratio decidendi as "[T]he legal reason (or ground) for a judicial decision.] It is the ratio decidendi of a case which will be binding on later courts under the system of judicial precedent." It is according to Mozley&Whiteley's Law Dictionary (12th ed) "the reasons or ground upon which a case is decided..." and obiter dictum is " a statement, of a Judge on a point not directly relevant to deciding the case before him.". This is how Mohd Ghazali Mohd Yusoff FCJ explained the two concepts in Yusof bin Sudin V Suruhanjaya Perkhidmatan Polis &anor[2011] MLJU 656 (FC): "Simply put, the term ratio decidendi means the legal reasons of the judge in reaching a finding in a case before him and it is a fundamental part of establishing precedents that is binding on lower courts... The term obiter dictum in Latin means remarks or comments in passing. These remarks or comments are judicial observation and are not binding. In other words, they are remarks or comments made by judge in a decision that do not form part of the legal reasoning in reaching the decision." Osborn's Concise Law Dictionary defines "precedent" as a " judgment or decision of a court of law cited as an authority for deciding a similar set of facts; a case which serves as authority for the legal principle embodied in its decision."*

[13] *KPHDN v Kim Thye &Co [1992] 2 MLJ 708. Followed by Rohana Yusuf J (as Her Ladyship was then) in Syarikat Pukin Ladang Kelapa Sawit.*

[14] *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 147*

[15] *KPHDN v Kim Thye & Co [1992] 2 MLJ 708, KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870 at [166]; BR Sdn Bhd v KPHDN (2008) MSTC 3,655.*

[16] *KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870. On this aspect, the Court of Appeal when allowing the DG's appeal, did not say anything.*

[17] *[2018] MLJU 1920*

[18] *See Transocean Drilling Sdn Bhd v KPHDN, Rayuan Sivil No: WA-14-8-04/2020 where the DGIR was held to have a similar duty when imposing penalty under S. 112(3). The taxpayer had submitted its returns for years of assessment ("Y/A") 2011 and 2012 based on its management accounts. Slightly more than a year later it submitted amended returns based on its audited accounts which resulted in a substantial overpayment of tax for 2012 and underpayment for 2011, the former exceeding the latter. Instead of refunding the overpayment and imposing penalty in respect of tax underpaid under S. 113(2), the DGIR treated the original returns as nullities and imposed penalties under S. 112(3) for failure to furnish returns, based on the full amounts of the taxes for the two years without assigning any reason. Although the Court of Appeal had allowed HASiL's appeal it did not deal with this aspect. See too Uniglow (Malaysia) Sdn Bhd v KPHDN [2020] 9 CLJ 521 where the Director General of Customs and Excise's rejection of the application for a special refund of tax provided sale tax provided by S. 191 of the Goods and Services Tax Act 2014 without giving any reason was quashed by certiorari. For discussion on the need to give reasons in judgment see Tan Kim Leng & anor v Choong Boon Eng & Nanor [1974] 2 MLJ 151, FC, Raja Aslan Shah FJ at 151.*

Court had said in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd*[19], "ought not be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested party or the public at large". The Federal Court has also said that a reasoned decision is an "additional constituent of the concept of fairness[20] and "one of the fundamentals of good administration".

This duty to give reason is a settled public law principle and principle of natural justice. Unilateral imposition does not sit well with all these.

REDUCED PENALTY

The argument that a reduced S. 113(2) penalty shows that the DGIR must have considered all the relevant circumstances and facts (the test for the proper exercise of the S. 113(2) discretion[21]) has not received favourable consideration by the courts[22].

S. 113(2) specifically refers to the penalty being abated or remitted under S. 124(3). S. 124 (1) provides the DGIR with the power to compound "any offence under this Act" and per its proviso this power cannot be exercised unless the offender "in writing admits that he has committed the offence and requests the Director General to deal with the offence under this section". The ITA 1967 has not defined "abate" or "remit" as they are used in S. 113(2) and 124 (3). These are no terms of art or technical terms. When the DGIR reduces the penalty, he can be said to have abated or remitted part of it. This accords with the ordinary dictionary meanings of the words[23] and the DGIR's tax audit framework[24]. Thus, when the DGIR simply added the reduced S. 113(2) penalty or applied the concessionary rates per his internal guidelines[25] (which has been held not to be an exercise of his discretion[26]), without going through S. 124(3), he has clearly not followed what S. 113(2) clearly envisages. By not going through S. 124(3) he has clearly acted inconsistently with the express stipulation that he may require only a *"penalty equal to the amount of"* the tax undercharged or which would have been undercharged if the returns and information provided has been accepted as correct. S. 113(2) does not say he may require payment of a penalty *up to the amount* of such tax. Unilateral imposition of reduced penalty is clearly contrary to the proviso of S. 124(1). That it is kinder than the full penalty provides no justification.

GOOD FAITH

S. 113(1) specifically mentions good faith, not defined in the ITA 1967, as a defence, if a charge is preferred under S. 113(1). Its manifest absence from S. 113(2) has given rise to some serious

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[19] *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kestuan Kebangsaan Pekerja-Pekerja Bank & anor [2018] 2 MLJ 590*

[20] *Citing Rohana bte Ariffin v anor v University Sains Malaysia [1989] 1 MLJ 487 and Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & ors [2005] 5 MLJ 193*

[21] *See KPHDN v Kim Thye & Co*

[22] *Transocean Drilling Sdn Bhdv KPHDN, Rayuan Sivil No: WA-14-8-04/2020. See BR Sdn Bhd v KPHDN (2008) MSTC 3,655.*

[23] *To abate - per Oxford Lexico, To reduce or remove; per Longman Dictionary of Contemporary English, to make something less strong or decrease; MacMillan Dictionary, to become less in size, amount or value; Stroud's Judicial Dictionary 4Ed, Volume 1, to diminish or take away. To remit Oxford Lexico &Longman Dictionary of Contemporary English, with reference to punishment or debt, to cancel or refrain from exacting or inflicting the same; Free Dictionary and Longman Dictionary of Contemporary English, to cancel or forgive any tax or debt*

[24] *Tax Audit Framework 2019, Para 10 talks about the DGIR under S. 124(3) reducing or eliminating the S. 113(2) penalties. See Tenaga Nasional Bhd v KPHDN where the Revenue abated the RM2 billion S. 113(2) penalties via a consent judgment following the grant of leave to apply for judicial review and a stay of proceedings*

[25] *See for example, the Tax Audit Framework 2019 effective from 15 December 2019, Para 10 and Tax Audit Framework dated January 1, 2007, Para 10.*

[26] *See for example, the Tax Audit Framework 2019 effective from 15 December 2019, Para 10 and Tax Audit Framework dated January 1, 2007, Para 10.*

litigation. The courts and the special commissioners have been seriously divided on whether it is available as a defence or its relevance to the exercise of the DGIR discretion under S. 113(2). There are two divergent lines of judicial thinking on this point; one view exemplified by *Ibraco*[27] says it is not a defence or pertinent to the exercise of the DGIR's discretion under S. 113(2) whereas the other says it is[28] .

It is, analytically, inappropriate, to talk of a defence of good faith with regard to S. 113(2) when this subsection, though predicated on the commission of a S. 113(1) offence, is only applicable if no prosecution is instituted. Be that as it may, it must surely be a relevant fact or circumstance on the question whether the discretion under S. 113(2) has been properly exercised. It is not difficult to rationalise technical adjustment[29] or non-tax evasion[30] cases in which the S. 113(2) penalties had been discharged on the basis of good faith. In relation to the non-tax evasion case, it should be noted that the penalties in both subsections (1) and (2) of S. 113 are calculated by reference to the tax undercharged or which would have been undercharged if the return or information provided had been accepted as correct[31].

REASON FOR ABSENCE OF GOOD FAITH IN S. 113(2)

The reasons why Parliament has not provided for good faith in S. 113(2) but only in subsection (1) are really quite simple. This has sadly and unfortunately been missed in the discussion on or application of S. 113(2). Firstly, the S. 113(2) penalty is a compounding penalty (as discussed later) and compounding can only be done with the agreement of the offender. Secondly, as contended below, the S. 113(2) penalty is intended to be assessed via a composite assessment under S. 96A, which again can only be done with the agreement in writing of the offender as regard both to the amount of the tax or additional tax, as the case may be, and the amount of the S. 113(2) penalty. The assessment is also final and conclusive and not appealable under S. 91: S. 96A(6) . The taxpayer should not be allowed to resile from this agreement, as Peh SCJ observed[32]. From this perspective there is no need to provide for good faith in S. 113(2) penalty. It is really superfluous.

NEGLIGENCE

In *Insaf Tegas*[33] the High Court appeared

[27] *Syarikat Ibraco-Peremba Sdn Bhd v KPHDN [2017] 2 MLJ 120 (CA), Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v KPHDN [2012] 6 MLJ 411 (High Court was affirmed by the Court of Appeal) and Opus International (M) Berhad v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 598. See also Sri Binaraya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri, Rayuan Sivil No. R1-14-16-2011, unreported, (Court of Appeal held as the taxpayer had submitted inaccurate tax return after an audit exercise was conducted on its accounts and "once that fact had been established the DGIR was within his discretion to impose the penalty on the taxpayer"), Datuk Yap Pak Leong v KPHDN [2014] 10 MLJ 255 (RavinthranJ), KPHDN v Dr Zanariah binti Ramli, Rayuan Sivil No. R1-14-12-2011 (Abang Iskandar J, as His Lordship was then), KPHDN v NV Alliance Sdn Bhd [2011] 10 CLJ 345 and Insaf Tegas Sdn Bhd v KPHDN, Rayuan Sivil No W-01(a) -295-08/2016, unreported. More recently see KPHDN v Classic Japan (M) Sdn Bhd, Civil Appeal :No.A-01(A) -100-02/2021, CA.)*

[28] *See for instances Office Park Development Sdn Bhd v KPHDN [2011] 9 MLJ 479 where Alizatul Khair J said that the purpose of S. 113(1) and (2) is to punish tax evasion that is "taxpayers who deliberately submit incorrect tax return and information. It cannot be the intention of Parliament to punish taxpayers who innocently submit incorrect tax returns or those taxpayers who engage professional tax agents to prepare and submit their tax returns."; Ensco Gerudi (M) Sdn Bhd v KPHDN [2016] MLJU 1859 where there was no evidence that incorrect return was intentional or done to evade or avoid tax; there was no concealment of any evidence because there had been "full and frank disclosure" and "full cooperation" during tax audit evident from the "array of correspondence" between the parties; parties had merely differed on the question of deductibility of certain expenditures on which taxpayer had sought and acted on professional advice in making their return. KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870, HC overruled by the Court of Appeal in KPHDN v Classic Japan (M) Sdn Bhd, Civil Appeal: No. A-01(A) -100-02/2021; Pasdec Corporation Sdn Bhd v KPHDN (2016) MSTC 30-126 (Asmabi bt Mohamad J). See also VLSSB v KPHDN (2011) MSTC 10-016 (full disclosure of the item claimed for deduction & expenses incurred and they were clearly and correctly described in the returns; the taxpayer has also acted on professional advice in respect of its claim and there was no intention to evade tax. Also, interpretational dispute. Penalties discharged) and MAAB v KPHDN (is an allowance by HASiL of deductions honestly claimed by taxpayers not equated with making an incorrect return within S. 113). See too Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 10 MLJ 436, Ketua Pengarah Hasil Dalam Negeri v Woodville Development Sdn Bhd [2013] 3 MLJ 832 (though taxpayers failed in their appeals on the merits the penalties were nonetheless set aside), Toxicol Sdn Bhd v KPHDN (2017) MSTC 30-146, KPHDN v Firgos (M) Sdn Bhd [2014] 1 MLJ 701 and Kyros International Sdn Bhd v KPHDN [2013] 2 MLJ 650. See too KPHDN v Shell Refining Co (FOM) Bhd [2014] 9 MLJ 686 (SCIT's discharge of penalty upheld on ground that they had found that Appellant's witnesses had made many mistakes in imposing the penalty).*

[29] *For technical adjustment cases see, inter alia, Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 479 Para 51 and Ketua Pengarah Hasil Dalam Negeri v Firgos (M) Sdn Bhd [2014] 1 MLJ 701 Para 16, MM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] MSTC 10-046 and Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 MLJ 145).*

[30] *See Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 10 MLJ 436 where Mairin Idang JC declined at [39] to equate technical adjustment or differing interpretation of tax legislation with tax avoidance. See also the judgment of Alizatul J in Office Park Development Sdn Bhd v KPHDN [2011] 9 MLJ 479 about S. 113 being targeted at tax evasion and not to punish innocent taxpayers.*

[31] *The reference to tax which would have been undercharged covers unsuccessful attempts.*

[32] *Peh Swee Chin SCJ had so noted in Kim Thye & Co.*

[33] *Insaf Tegas Sdn Bhd v KPHDN, Civil Appeal No: R1-14-14-10/2013, unreported.*

to have contemplated, without providing any reasoning, negligence as entitling the DGIR to impose the S. 113(2) penalty when it said:

"6.11 On the issue as to whether the Respondent have correctly exercised its discretion in the Respondent's imposition of penalty on the Appellant, pursuant to S. 113(2) of the Act, it is clear from the stated provision that the DGIR is given the discretionary power to impose a penalty on an incorrect return filed by a taxpayer. The DGIR has a right to impose the penalty irrespective that the taxpayer's return was made negligently, or in good faith or with intent to deceive or evade tax. The DGIR however, is not duty bound to require penalty payment but to exercise the discretion after due consideration of all relevant facts and circumstances."

The point deserves further consideration. For a start, S. 113(1), which explicitly provides for good faith[34] as a defence, does not say that it must not be accompanied by negligence[35]. Such a restriction should not be implied because the subsection, which is clear and unambiguous[36], imposes criminal liability punishable by a fine and special penalty[37]. There is a judicial support, albeit in different legislative context[38], for the view that good faith and negligence are not mutually exclusive. The English House of Lords, now the Supreme Court, had said that a person may be "honestly blundering and careless" but the "integrity of his motives and the purity of his conduct" might still show his good faith[39]. The nature, extent and circumstances of the negligence may, however, throw light on whether there has been a lack of good faith[40].

For the purposes of S. 113(2) these points can still be appropriately made on the supposition that good faith is pertinent to it.

The second and final part of this article will be continued in the Tax Guardian - 2023 Quarter 3 issue.

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[34] The term is not defined in the ITA 1967. Ordinarily a taxpayer's good faith should be his sincerity or honesty of intention, as to which see for example, The Oxford English Reference Dictionary, 2nd Ed by Oxford University Press. See too Dictionary of English law by Earl Jowitt, 1959 Volume 1.

[35] Negligence is used in S. 91(3)(b) of the ITA 1967. It is not defined in the Act. For this reason, Bache JC has in Infra Quest Sdn Bhd v KPHDN [2017] 7 MLJ 35 adopted Black's Law Dictionary and the Strouds Judicial Dictionary of Words and Phrases which define negligence, respectively, as follows:

Characterised by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances.

Negligence is the omitting to do something that a reasonable man would do, or the doing of something which a reasonable man would not do … (per Alderson B in Blyth v Birmingham Waterworks Co (1856) 11 Exch 781; (1856) 25 LJ Ex 212).

The learned judicial commissioner also cited Whiteman on Income Tax which defined 'neglect' as meaning 'the negligence or failure to give any notice, return … or other information required by the Income Tax Act'.

See Lord Blackburn's view of negligence in Jones v Gordon 2 App. Cas. 616 as basically an omission to do something which a reasonable person would have done, ascertained objectively.

Sometimes ex cautela statutory provisions may make clear that good faith is not to be adversely affected by negligence. See for instance English Bills of Exchange Act 1882 (45 & 46 Vict. c61) S. 90 which says that "a thing is deemed to be done in good faith ...when it is in fact done honestly, whether it is done negligently or not". See too Sale of Goods Act 1893 (c71) S. 62(2)).

[36] On account of which purposive interpretation is not to be applied (Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1 at pp 21–22 Para [33], FC).

[37] For strict construction of tax statutes in favour of taxpayers where there is ambiguity see National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339 Gunn Chit

Tuan SCJ (as he was then) at 344, Re Micklewait [1855] 11 Exch 452 & Cape Brandy Syndicate v IRC. See too KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870.

For strict construction of penal statutes see inter alia, Liew Sai Wah v Public Prosecutor [1968] 2 MLJ 1, PC, where Viscount Dilhorne cited from Halsbury's Laws of England Vol 36 p 415 Para 631, Chow Kok Keong v Public Prosecutor [1998] 2 MLJ 337, FC, Saari bin Jusoh v Public Prosecutor [2006] 6 MLJ 117,CA, S. 39B(1) punishing trafficking (defined to including selling) in drugs not interpreted to include agreement to sell) and Public Prosecutor v Chua Chor Kian [1998] 1 MLJ 167 (per Edgar Joseph Jr. FCJ).

[38] The English Bills of Exchange Act. See S. 29 and 30 of the Bills of Exchange Act 1949 (revised 1978) dealing respectively with holder for value in good faith and presumption of value and good faith. See Sale of Goods Act 1957 (revised 1989), S. 27 buying in good faith from a non-owner of goods.

[39] Per Lord Blackburn at page 629 and Lord O'Hagan at 626 respectively in Jesse Jones v John Gordon 1877] 2 App Cas 616 (where the question was whether value had been given for a bill in good faith and the Court found against the holder for value).

[40] This was the view of Lord Blackburn in Jesse Jones, ibid.

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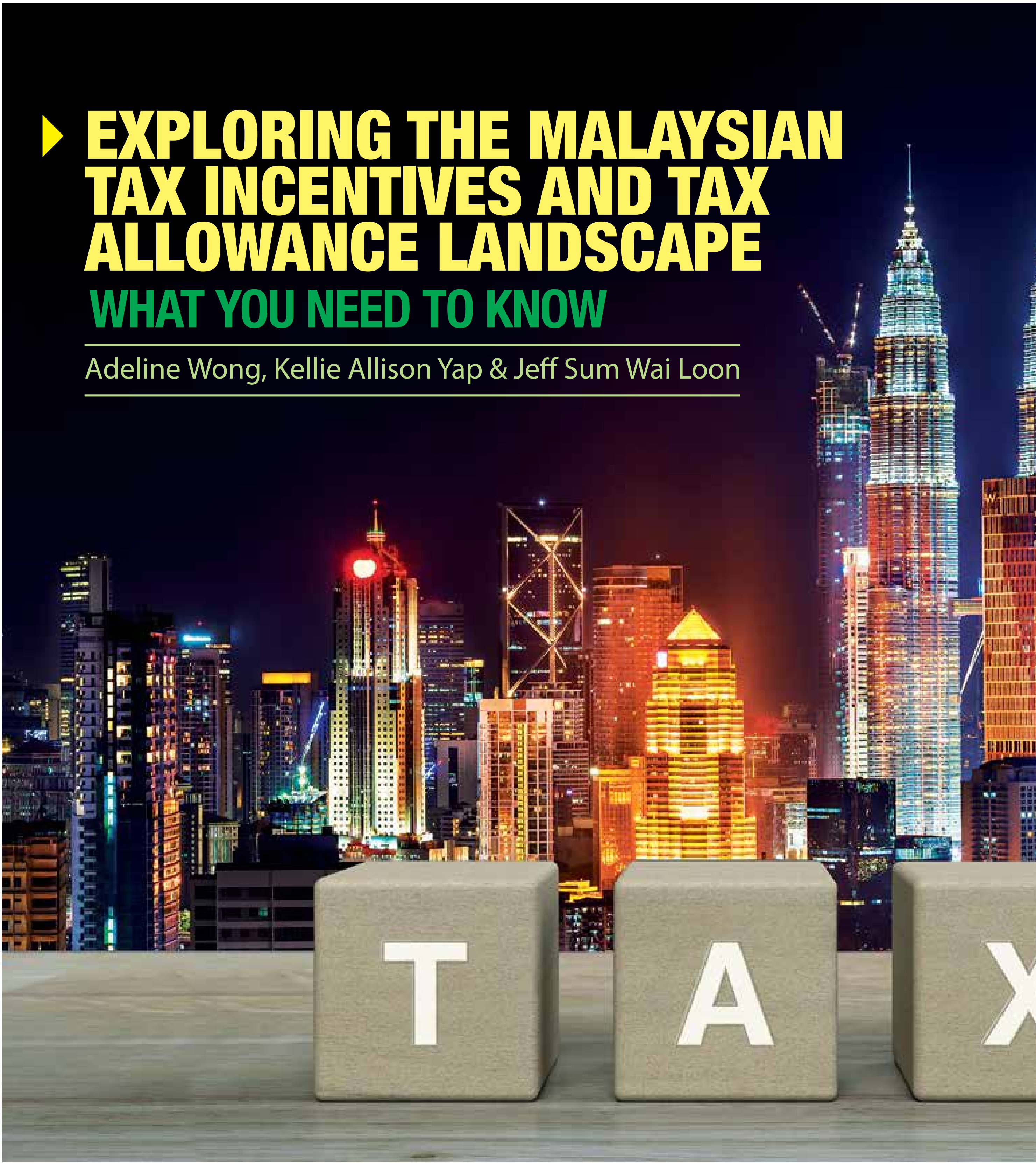
EXPLORING THE MALAYSIAN TAX INCENTIVES AND TAX ALLOWANCE LANDSCAPE

WHAT YOU NEED TO KNOW

Adeline Wong, Kellie Allison Yap & Jeff Sum Wai Loon



A. INTRODUCTION

With a strengthened economy and a growing population, Malaysia has become a popular destination for businesses looking to expand their operations. Against this backdrop, the Malaysian government offers a range of tax incentives and reliefs to businesses operating in the country to attract foreign direct investments and to encourage the growth of Malaysian businesses. These incentives are designed to support businesses in specific sectors or activities and can help reduce eligible companies' overall tax burden. In Malaysia, tax incentives are available to businesses of varied sizes and across many industries.

This article provides an overview of the key incentives and allowances available, eligibility requirements and practical tips from a practitioner's perspective. It discusses the different types of incentives available, how to apply for them, and the benefits they can bring. It will also discuss the various tax laws, rules, and regulations that govern these incentives, so businesses can make informed decisions about their investments and make the most out of the incentives offer

B. MAJOR TAX INCENTIVES IN MALAYSIA

1. Pioneer Status

a) What is Pioneer Status?

Pioneer Status incentive ("**Pioneer Status**") is intended to encourage investment and the development of new industries in Malaysia by providing a tax incentive for companies producing innovative or technologically advanced products or services. Pioneer Status is an incentive in the form of a tax exemption, typically for a period of five years, for up to 70% of a company's statutory income. Some companies may be given up to ten years or even 100% tax exemption.

b) Eligibility Requirements

The Malaysia Investment Development Authority (**MIDA**), the government agency responsible for promoting and facilitating investments in Malaysia, is tasked with evaluating and approving applications for Pioneer Status. Upon granting of Pioneer Status, MIDA together with the Inland Revenue Board of Malaysia (**HASiL**, the agency tasked with administering and collecting taxes in Malaysia) will concurrently monitor and enforce compliance with the conditions of the Pioneer Status.

Companies interested in applying for Pioneer Status can apply to MIDA, along with supporting information relating to their business and the pioneer product or service they are providing.

Pioneer Status is governed under the Promotion of Investment Act 1986 ("**PIA**"). To be eligible for Pioneer Status, the company must engage in a promoted activity or produce a promoted product. The broad categories of promoted activity and product are as follows:

- General promoted activities and products; [1]
- Products that are of national and strategic importance;
- Contract research and development ("**R&D**") activities;
- Products in areas of new and emerging technologies;
- Products and activities in selected industries, i.e., machinery and equipment industry, specialised machinery and equipment industry, utilisation of biomass to produce value-added products, generation of renewable energy;
- Products in the automotive component modules industry;
- Reinvestment during the post-pioneer period; and
- Commercialisation of research and development findings.

c) Practical Tips

As a direct tax exemption, Pioneer Status generally benefits companies that are projected to make substantial profits in the early years of operation. It is less likely to be effective for companies undertaking major capital-intensive projects, which do not generally profit in the early years. Conversely, Investment Tax Allowance is a more suitable incentive to be considered by these companies as it provides an allowance on the capital expenditure

[1] *the list of promoted activities and products is under constant review and is published in MIDA's website https://www.mida.gov.my/wp-content/uploads/2020/12/20200425150812_Appendix20I20General.pdf*

[2] *[2017] 7 MLJ 379*

[3] *[2021] MLJU 1579*

incurred (this is further discussed in Part 2 below).

Companies should be vigilant in ensuring that they comply with the conditions imposed in their pioneer certificate, failing which the pioneer certificate may be cancelled by the Ministry of International Trade and Industry (**MITI**). If a company is unable to meet any conditions imposed, it should proactively engage with MIDA, MITI and other relevant authorities to attempt to have the conditions relaxed or to reach an amicable solution during the course of the incentive.

As Pioneer Status is generally granted for five years, companies must renew their status before it expires to continue benefiting from the incentive. It is essential to keep track of deadlines and requirements and to take timely action to ensure that the company's Pioneer Status remains valid.

It is also essential for companies claiming Pioneer Status to keep accurate records of their business activities and compliance with the incentive requirements. This will help to ensure that the company is able to renew the incentive when it expires, and also prove its compliance with the conditions if the company is subject to an audit or review by MIDA or even HASiL.

HASiL sometimes issues tax assessments against taxpayers for not complying with conditions set in their pioneer certificate, despite MITI not cancelling the certificate. This contradicts the High Court's ruling in *KPHDN v Latex Manufacturing Sdn Bhd*,[2] which held that only MITI has the authority to determine non-compliance with the pioneer conditions and to cancel the certificate. HASiL is not authorised to decide if the taxpayer company meets the pioneer conditions and cannot impose additional tax assessments unless MITI cancels the pioneer certificate.

However, this position has been challenged recently in the case of Sim Leisure *Adventureplay Sdn Bhd v KPHDN*[3]. The High Court held that HASiL has the power to determine if the taxpayer has violated the conditions of the pioneer certificate and can issue tax assessments even if MITI has not yet cancelled the certificate. This recent decision has created confusion and raised questions on the proper authority in determining non-compliance under the pioneer certificate and may require further clarification through judicial precedents at the appellate courts or legislative changes.

2. Investment Tax Allowance

a) What is Investment Tax Allowance?

Investment Tax Allowance ("**Investment Tax Allowance**") is an allowance provided under the PIA (in addition to capital allowance) on the qualifying capital expenditure incurred by the company during the tax relief period. By providing Investment Tax Allowance, the Malaysian Government aims to stimulate economic growth by encouraging businesses to invest more in capital expenditure, i.e., factory, plant, machinery and to expand their operations.

Similar to the Pioneer Status, Investment Tax Allowance is an incentive available only for promoted activities or the production of promoted products. It is mutually exclusive from Pioneer Status, and is granted only to companies that have not been granted Pioneer Status on the same promoted activity or product. Therefore, a company that wishes to apply for Investment Tax Allowance must carefully consider whether Investment Tax Allowance or Pioneer Status is more appropriate for its operations.

Subject to the profile and sector of the applicant, a company that is granted Investment Tax Allowance may be entitled to an allowance of 60% to 100% on its qualifying capital expenditure incurred within five years from the date the first qualifying capital expenditure is incurred. The company can offset this allowance against 70% (or in certain circumstances, up to 100%) of its statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised.

b) Eligibility Requirements

Companies interested in applying for Investment Tax Allowance can apply to MIDA. In addition to the eighth categories of promoted activities or products mentioned in Para 1(b) above, Investment Tax Allowance is also available to companies involved in the following promoted activities or products:[4]

- R&D company;
- Company carrying on in-house research;
- Technical or vocational training company and private higher educational institutions;
- Company undertaking production of halal food product; and
- Company conserving energy for their own consumption.

c) Practical Tips

Since Pioneer Status and Investment Tax Allowance incentives are mutually exclusive, taxpayers should seek professional advice on the most effective incentive to apply for. As a general guide, Investment Tax Allowance, being a capital-based incentive, is more suitable for companies with long gestation periods, requiring large capital investments and where the company is not expected to make profits in the initial years. Unlike Pioneer Status, Investment Tax Allowance is dependent

[4] *Sections 26 to 26N of the Income Tax Act*

on, and draws from the quantum of capital expenditure, and therefore, may provide inferior tax savings (compared to Pioneer Status) for projects which are not capital intensive.

Companies should be vigilant in ensuring compliance with conditions imposed under the Investment Tax Allowance and keep accurate records of their business activities to demonstrate compliance with the conditions if the company is subject to an audit or review by MIDA or HASiL. Companies and their advisors ought to remain aware of the latest case law developments and any changes in regulations to ensure compliance and avoid potential pitfalls.

3. Reinvestment Allowance

a) *What is Reinvestment Allowance?*

Reinvestment Allowance ("**RA**") is an incentive provided under the Income Tax Act 1967 ("**Income Tax Act**") to encourage reinvestment or continued investment by foreign and domestic investors. RA is designed to encourage companies to reinvest their profits in the country rather than repatriating them to foreign countries. By reducing the tax liability of companies that choose to reinvest their profits, the Malaysian Government hopes to stimulate economic growth, create employment opportunities, and promote the transfer of technology and skills within Malaysia.

In practice, RA is one of the most popular incentives because, unlike Pioneer Status and Investment Tax Allowance, there is no requirement of prior approval from any governmental agency. If a company is of the view that it fulfils the stipulated requirements under the Income Tax Act, it may claim RA in the relevant tax return for that basis year.

Similar to Investment Tax Allowance, RA is provided in the form of allowance on the qualifying capital expenditure incurred by the company during the tax relief period. A company granted RA is entitled to an allowance of 60% on its qualifying capital expenditure incurred within 15 years from the first year of claim by a company. The company can offset this allowance against 70% of its statutory income for each year of assessment. Any unutilised RA can only be carried forward for a period of seven consecutive years only.[5]

b) *Eligibility Requirements*

Sch 7A of the ITA 1967 ("**Sch 7A**") provides that RA is available to a resident company that has been in operation for not less than 36 months and has incurred capital expenditure on, generally, a factory, plant or machinery for a 'qualifying project' i.e., a project undertaken by a company:

- in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry; or
- in diversifying its existing business into any related product within the same industry.

c) *Practical Tips*

Since there is no need to obtain prior approval for RA claims, it is common for companies and HASiL to have different interpretations of whether a company meets the conditions to claim RA according to Sch 7A. HASiL has generally taken a narrow approach in interpreting the conditions, when disqualifying a company from claiming RA. For example, in *KPHDN v Kualiti Alam Sdn Bhd*[6], HASiL disqualified the company's claims for RA for capital expenditure incurred on the basis that company did not manufacture or process any "product" within the meaning of Sch 7A. HASiL took the position that the company's business of treatment of scheduled waste was a subtractive process and does not produce a "product" whose value may be realised by way of sale to customers. The High Court held in favour of HASiL and rejected the company's RA claim.

To reduce the risk of a dispute, it is prudent for taxpayers to try and amicably resolve any discrepancies in interpretation with HASiL (with the guidance of tax professionals) before a dispute arises. Even before a dispute

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5 *A company can also claim RA up to 100% of its statutory income in a particular year of assessment if it can demonstrate that the level of process efficiency ratio exceeds the industrial average for the year.*

6 *[2017] MLJU 313*

arises, there are a few key mitigation measures that companies can take when claiming RA to help ensure the success of their claims:

1. Accurate record-keeping of documents to justify the existence of a qualifying RA project. For example, companies engaging in expansion or modernising projects should have ready the project papers, feasibility study, business plan indicating the course of action taken, budget and financing arrangements, directors' resolutions or meeting minutes, and any other relevant documents to support the RA claim.
2. Companies should exclude irrelevant capital expenditure when claiming RA. For example, they should distinguish capital expenditure incurred for the benefit of the directors and the management (not claimable) from plant and machinery directly used in the manufacturing process within the factory itself (claimable).
3. In claiming RA, companies are expected to show that they have a qualifying project which has resulted in an increase in production capacity, cost and time savings etc. The production engineer/technician should verify such improvement. Therefore, it would be prudent for the company to ensure that there are proper measurement tools and reports in place to capture the specific achievement data for RA projects.

4. Tax Incentives for Malaysia Digital Status Companies (formerly known MSC Status)

a) What is Malaysia Digital Status

Malaysia Digital ("**MD**") status, which was formerly known as Multimedia Super Corridor ("**MSC**"), status is a recognition granted by the Malaysian Government through the Malaysia Digital Economy Corporation (MDEC) to information and communications technology ("**ICT**") businesses engaging in certain promoted activities which bear national and strategic importance to Malaysia ("**MD Approved Activities**"). Companies with MD status are entitled to exclusive tax incentives that give them the necessary competitive edge to thrive in the ICT industry.

The grant of MD Status entitles eligible companies to a set of incentives, rights and privileges, namely the MD Bill of Guarantees, which include but are not limited to the following:

- To provide competitive financial incentives, namely income tax exemption (70% or 100% of statutory income for five or ten years, subject to category of applicant company) or investment tax allowance and duty exemption on imported multimedia equipment;
- To provide a world-class physical and information infrastructure;
- To ensure freedom of ownership by exempting MD status companies from local ownership requirements; and
- To give the freedom to source capital globally for MD infrastructure and the right to borrow funds globally.

b) Eligibility Requirements

To be eligible for the award of MD status, a company must:

1. be resident in Malaysia[7] and carries out MD Approved Activities[8];
2. comply with the following conditions[9] within 12 months from the date of award of its MD status:
   - Commence the operation or undertaking of its MD Approved Activities in Malaysia;
   - Employ a minimum of two full-time "knowledge workers" with a minimum average monthly base salary of RM5,000 per month for the MD Approved Activities;
   - Incur a minimum annual operating expenditure of RM50,000 for the MD Approved Activities; and
   - Have a minimum paid-up capital of RM1,000.

c) Practical Tips

Before commencing any MD Approved Activities, the company must obtain an approval letter and a certificate to certify the date of commencement of the incentives from MDEC for its statutory income to be eligible for income tax exemption. The commencement date of the exemption period shall be the date of the first invoice issued by the company after the award of MD status.

Annually, the MD company must submit true, correct and complete information to MDEC to report on the progress of the MD Approved Activities and determine compliance with the applicable conditions. Failure to do so may result in withdrawal of the MD status.

Such information must be verified by an independent external auditor appointed by the MD company at its own costs. The company must also keep a separate account for the statutory income derived from these promoted activities.[10]

5. Green Tax Incentives

a) What are Green Tax Incentives?

Green tax incentives are tax exemptions

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[7] *It is noteworthy that, unlike the old MSC status, MD status companies are not subjected to minimum office space requirements and are now allowed to operate and undertake MD Approved Activities in any location within Malaysia.*

[8] *which are listed in Appendix 1 of the Guidelines on Malaysia Digital Status dated 30 June 2022.*

[9] *Paragraph 3.0 of the Guidelines on Malaysia Digital Status dated 30 June 2022.*

[10] *Paragraph 7, Income Tax (Exemption) (No. 10) Order 2018 [P.U.(A) 389/2018]*

and allowances that are provided to encourage businesses to adopt energy-efficient and environmentally-friendly technologies and practices. These incentives are designed to promote sustainability and reduce the impact of business operations on the environment. Broadly, there are four categories of green tax incentives in Malaysia, namely:

- Green Investment Tax Allowance ("**GITA**") assets: applicable to companies that acquire approved green technology assets listed under the MyHIJAU directory for their businesses' own consumption. Qualifying companies can enjoy Investment Tax Allowance on 100% of the qualifying capital expenditure incurred from 25 October 2013 to 31 December 2023. The Investment Tax Allowance can be offset against 70% of statutory income for the relevant year of assessment.
- GITA projects: applicable to companies that undertake qualifying green technology projects for business purposes or their own consumption. Qualifying companies can enjoy Investment Tax Allowance calculated on 100% of the qualifying capital expenditure incurred within a period of three years from the date of first qualifying capital expenditure incurred. The Investment Tax Allowance can be offset against 70% of statutory income for the relevant year of assessment.
- Green Income Tax Exemption ("**GITE**") on green services: applicable to companies that provide green technology services listed under the MyHIJAU directory to their clients. Qualifying companies can enjoy tax exemption on the income derived from providing such qualifying services, equivalent to 70% of the statutory income for a period of three years of assessment commencing from the year the first invoice relating to green technology services is issued.
- GITE on solar leasing: applicable to companies that provide solar leasing services verified by the Sustainable Energy Development Authority (**SEDA**) and are listed under the Registered Solar PV Investor (**RSPVI**) Directory. Qualifying companies can enjoy a tax exemption equivalent to 70% of the company's statutory income for a period of five or ten years depending on the installed capacity.

b) Practical tips

It is crucial to act quickly to increase the chances of a successful green tax incentive application. A clear and concise project proposal will help the authorities understand the green project proposed and speed up the application process. There are two critical deadlines to be aware of in the process of applying to MIDA:

- The application documents should be received by the MIDA on or before 31 December 2023 (unless extended by the Malaysian Government in the future):
- The date of submission of an application to the MIDA should not be later than the date of the first qualifying capital expenditure incurred (for GITA Project) or date of the first invoice issued (for GITE).

It is possible that a company may qualify for more than one type of tax incentive for the same project. As tax incentives are mutually exclusive, it is important for companies to seek expert guidance to evaluate the tax benefits of choosing one incentive over another to maximise its tax savings.

C. CONCLUDING THOUGHTS

Tax incentives play a crucial role in investment decisions in Malaysia and can help lower the overall tax burden for eligible companies. However, navigating the complex Malaysian tax incentives landscape can be challenging. It is therefore crucial for companies to understand the specific eligibility criteria and comply with the conditions attached to the incentives they claim. Tax practitioners play a vital role in this process by highlighting available incentives and providing practical advice to companies. As such, tax practitioners must be well-equipped to advise and assist companies in understanding the specific eligibility criteria and cost-benefit for each tax incentive they are interested in claiming.

From the business perspective, companies should also keep accurate records of their activities and expenditures related to the incentives they claim and review how these incentives can be utilised to support their operations and growth in Malaysia. Companies seeking and currently enjoying tax incentives must also consider global tax developments such as Pillar 2 of the OECD/G20 BEPS Project and the impact of such developments on the tax incentives. For example, the increasingly imminent implementation of the global minimum tax rate (GMT) under Pillar 2 could impact companies by reducing their motivation to seek out low-tax and high-incentives jurisdictions and increasing transparency of their tax affairs. Companies ought to start rethinking their tax planning strategies, assess their potential exposure, and engage with tax authorities and advisors to prepare for any changes.

By following these best practices, businesses can increase their chances of successfully claiming tax incentives to improve their competitiveness in the market.

*(Wong & Partners) - **Adeline Wong, Kellie Allison Yap** and **Jeff Sum Wai Loon***

International News

The column only covers selected developments from countries identified by CTIM and relates to the period 16 October 2022 to 10 March 2023.

AUSTRALIA

Australian Taxation Office Further Extends Transitional Period for Corporate Residence Determination

The Australian Taxation Office (ATO) has updated Practical Compliance Guideline PCG 2018/19 to extend to 30 June 2023 the transitional period for the determination of corporate residence based on the place of central management and control (CM&C). The transitional period had earlier been extended to 31 December 2022.

Australia Eliminates Withholding Tax on Payments to Indian Technology Companies from 29 December 2022

The Minister for Home Affairs has registered an Instrument that sets the start date of 29 December 2022 for the amendment to the International Tax Agreements Act 1953 reducing Australian withholding tax on certain payments to Indian companies that were classified as royalties under the Australia-India tax treaty.

Australian Taxation Office Settles Tax Dispute with Ampol Limited over Singaporean Hub

The Australian Taxation Office (ATO) has acknowledged an announcement by Ampol Limited that it has reached a settlement with the ATO for AUD 157 million. The settlement relates to the taxpayer's procurement hub in Singapore and covers the transfer pricing outcomes of refined products and crude oil between the taxpayer's operations in Singapore and Australia as well as how Australia's controlled foreign company (CFC) regime applies to the profits of the entity in Singapore.

The settlement relates to the financial years 2014 to 2022, and also locks in the tax outcomes of the arrangements up to 2033. Details of the settlement are covered by confidentiality provisions and the tax secrecy requirements of the Australian taxation law.

The ATO notes that it will continue to closely scrutinise offshore structures and dealings of multinationals to ensure that the right amount of profit is being taxed in Australia under its CFC rules.

CHINA (PEOPLE'S REP.)

China Clarifies Exemption and Reduction of Value Added Tax for Small-scale Taxpayers in 2023

On 9 January 2023, China clarified the value added tax (VAT) treatment of small-scale taxpayers from 1 January to 31 December 2023. A small-scale taxpayer is a taxable person whose business revenue in the last 12 months is less than CNY5 million.

As clarified in Announcement of the Ministry of Finance (MoF) and State Taxation Administration [2023] No. 1, a small-scale taxpayer whose monthly revenue is not more than CNY100,000 is exempt from VAT. Small-scale taxpayers that are subject to the 3% collection rate will be taxed at a 1% collection rate instead. The reduction of the collection rate from 3% to 1% also applies to advance VAT payments.

Taxpayers engaged in services of a productive nature are allowed an additional 5% of input tax credit. These taxpayers are those whose aggregated revenues from postage, telecommunications, modern services (such as research and development (R&D) and technical services), and lifestyle services (including food and beverage, cultural and sports services, education, health care, travel, hotel, entertainment and citizens' daily services such as funeral services, hairdressing, massage, and elderly care) account for more than 50% of their total revenues. This additional 5% input tax credit will be increased to 10% for taxpayers whose revenue from lifestyle services only is more than 50% of the total revenue.

China Exempts Returns of Goods Exported via E-commerce from Import Taxes

From 1 February 2023, goods that have been declared and exported via cross-border e-commerce and sent back to China in their original state by reason of being unmarketable or are returned by customers within six (6) months of export are exempt from VAT at the import stage, import duties and consumption tax. These taxes collected at the time of export can be refunded by reference to the relevant regulations governing the return of goods sold in the domestic market. Where a taxpayer received tax refunds for the export of such goods, they must be repaid to the tax authority.

The expression "sent back in the original state" refers to the goods that have not been modified, processed, supplemented with components or accessories. However, the goods may have been unpacked for inspection, assembled or tested. In addition, the goods may not have been put in use except for those goods that must be tried to test their quality.

CHINESE TAIPEI

MOF Announces Increase in Minimum Corporate Tax to Implement Pillar 2

In response to the European Union (EU) Member States reaching an agreement on the global minimum tax policy earlier in December, the MOF has announced two tax measures to adopt the OECD's Pillar 2 Directive:

- first, the local minimum corporate tax rate under the Income Basic Tax Act will be increased from 12% to 15%, to protect local fiscal revenue if other jurisdictions implement the global minimum tax and the local subsidiaries of foreign multinational enterprises have a low effective tax rate in Taiwan; and
- second, the MoF is studying the Pillar 2 Directive and will propose a "Supplementary Tax Mechanism" to apply on domestic multinational enterprises having foreign subsidiaries with low effective tax rates.

The MoF stated that the taxation administration is preparing the amendments to the Income Tax Act for proposal to the Legislative Yuan (Congress) in 2023, and the expected implementation date is 1 January 2024. It is also important to note that the CFC rules will become effective from 1 January 2023, and the MoF updated the list of low tax jurisdictions on 13 December 2022.

Legislative Yuan Passes New Tax Incentives for R&D and Equipment Investment

The Legislative Yuan (Congress) passed an amendment to article 10-2 of the Statute for Industries Innovation on 7 January 2023 to provide tax incentives in the form of tax credits for investment in R&D and equipment to encourage technological innovation and enhance the country's position in the global supply chain.
The tax credits are summarised as follows:

- pioneer innovation R&D investment credit: 25% of R&D expenditure incurred in a fiscal year; and
- advanced manufacturing equipment investment credit: 5% of equipment purchase price exceeding a certain amount in a fiscal year but no upper limit.

The total tax credit amount for both incentives is limited to 50% of income tax payable in a fiscal year.

To qualify for the tax credit, the following three conditions must be fulfilled:

- the R&D expenditure and the ratio of R&D expenses to operating net revenue must exceed a certain scale in a fiscal year;
- the applicable alternative minimum tax rate is 12% in 2023 and may be raised to 15% in 2024 depending on the legislative progress of the OECD Global Minimum Tax System (Pillar 2); and
- there has been no violation of environmental protection, labour or food safety and public sanitation laws in the past three (3) fiscal years.

The effective period for the two incentives is from 1 January 2023 to 31 December 2029. The detailed regulations on the applicable scope, qualifying conditions, application period, procedures, documentation and calculation of the tax credit amount will be published by the Ministry of Economic Affairs after consultation with the MoF.

HONG KONG

Hong Kong Passes Bill on Foreign-Sourced Income Exemption Regime

The Hong Kong Legislative Council passed the Inland Revenue (Amendment) (Taxation on Specified Foreign-Sourced Income) Bill 2022 on 14 December 2022. The Bill introduces a new foreign-sourced income exemption (FSIE) regime for passive income in Hong Kong, which will take effect on 1 January 2023. The FSIE regime will put into place economic substance and nexus requirements to counter cross-border tax avoidance arising from double non-taxation.

Hong Kong Proposes Tax Concessions for Family-Owned Investment Holding Vehicles

To facilitate the development of family office businesses in Hong Kong, the government recently published in the Gazette the Inland Revenue (Amendment) (Tax Concessions for Family-owned Investment Holding Vehicles) Bill 2022, aiming to provide tax concessions for eligible family-owned investment holding vehicles (FIHVs) managed by single family offices (SFOs) in Hong Kong.

Under the Bill, it is proposed that profits tax exemption will be granted to an FIHV's assessable profits earned from qualifying transactions and incidental transactions subject to the fulfilment of eligibility conditions. To attain the policy objective of bringing investment management and related activities to Hong Kong, the FIHV must be managed by an SFO in Hong Kong and meet the minimum asset threshold and substantial activities requirement.

The Bill will be introduced into the Legislative Council on 14 December 2022.

Hong Kong Proposes Global Minimum Tax in 2025, Patent Box Regime in Budget 2023/24

On 22 February 2023, the Financial Secretary presented the Budget for 2023/24 to the Legislative Council. The Budget proposes to implement a minimum tax in 2025 under Pillar 2 of the OECD's two-pillar plan, introduce a patent box regime and provide more guidance on the taxability of capital gains from the disposal of equity interests. The proposed tax measures are subject to legislative amendments before implementation. The tax proposals are summarised as follows:

- implementation of the global minimum effective tax rate of 15% on large multinational enterprise groups and of the domestic minimum top-up tax in 2025;
- introduction of a patent box tax incentive to provide tax concessions for profits sourced in Hong Kong from qualifying patents generated through R&D activities, with consultation on the patent box tax arrangements in 2023 and legislative amendments aimed to be proposed in the first half of 2024;
- a one-off reduction of 100% of profits tax, salaries tax and tax under personal assessment for the year of assessment 2022/23, subject to a maximum of HKD 6,000 per case;
- an increase in child allowance from the year of assessment 2023/24, i.e., the basic child allowance for each child and the additional child allowance for each child born during the year of assessment will both increase from the current HKD120,000 to HKD130,000;
- a tax deduction for spectrum utilisation fees to be paid by future successful bidders of the radio spectrum;
- an increase in the tax deduction for voluntary contributions made by employers to the Mandatory Provident Fund for employees aged 65 or above from the current 100% to 200%;
- an adjustment of the value bands for ad valorem stamp duty at Scale 2 rates, which will apply to instruments for residential or non-residential property transactions executed on or after 22 February 2023. The adjustment is aimed at reducing costs for first-time buyers of small and medium-size residential homes;
- at rates concession for non-domestic properties for the first two quarters of 2023/24, subject to a ceiling of HKD1,000 per quarter for each rateable property; and
- imposition of an annual special football betting duty of HKD 2.4 billion on the Hong Kong Jockey Club for five (5) years starting from 2023/24, while the current betting duty rates remain unchanged.

The government will also present a proposal in mid-March to provide clearer guidelines on whether onshore gains on the disposal of equity interests are subject to tax.

INDIA

Union Budget 2023: India Proposes Changes to Individual Income Tax Regime, Tax on Winnings from Online Games

The Finance Minister of India presented the Union Budget 2023-24 to the parliament on 1 February 2023. Key direct tax proposals to amend the Income Tax Act, 1961 (ITA) include changes to the new individual income tax regime, new provisions for the taxation of net winnings from online games and an extension of incentives for start-ups. These measures are discussed below.

Corporate taxation

Taxation of winnings from online games

- New sections 194BA and 115BBJ will be introduced to provide for the imposition of tax at 30% and the application of tax deducted at source (TDS) on net winnings from online games effective from 1 July 2023. The mechanism is yet to be prescribed.
- Net winnings from online games will be considered on an aggregate basis (cash or kind) for the purpose of the application of TDS.

Start-ups

- The deduction for eligible start-ups will be extended to entities

incorporated from 31 March 2023 to 31 March 2024.
- The benefit of the carry forward of losses on the change of shareholding of start-ups will be extended from seven years of incorporation to ten years.

Presumptive taxation scheme
- The threshold limit for the applicability of presumptive taxation for businesses and professionals will be increased to INR30 million and INR7.5 million, respectively.
- Losses that are brought forward and unabsorbed depreciation will be rationalised where a non-resident is involved in exploration of mineral gas and the operation of aircraft.

Other measures
- Income from units of business trusts will be brought within the ambit of Section 197 of the ITA, making it eligible for lower a withholding tax rate application.
- The rollover benefit claimed on long-term capital gains from the transfer of capital assets where gains are re-invested in a residential house will be limited to INR100 million.
- Withholding tax will be introduced on payments for interest on listed debentures (in dematerialised form) effective from 1 April 2023.
- Interest on a loan already claimed as an exemption will be excluded from the cost of acquisition of a property.
- The definition of "cost of acquisition" and "cost of improvement" for the purposes of computing capital gains under Section 55 of the ITA will be amended to include intangible assets or any sort of right.
- The receipt of consideration for the issue of shares from any person irrespective of his tax residence will be taxed under Section 56(2)(viib) of the ITA.
- Special economic zone units will be allowed an exemption in relation to the profit attributable to export turnover only if the Return of Income (ROI) is filed before the due date and the export receivable is realised within six (6) months.
- A TDS at 10% will apply on a benefit or perquisite received in cash or partly in cash and in kind arising from a business or profession effective from 1 April 2024.
- The TDS on income from mutual fund units will be the lower of 20% or the rates in the relevant tax treaty effective from 1 April 2023.
- For charitable trusts and institutions, numerous amendments relating to deposits of corpus, treatment of a donation to other trusts, omission of redundant provisions, registration of the said trusts, and the time limit for the submission of ROI and Tax Audit Report are proposed.
- Certain funds will be removed from the ambit of deduction under Section 80G of the ITA.
- A limit will be imposed on interest deduction on borrowings from a foreign associated enterprise with a carve-out for banks. The relaxation will be extended to non-bank financial companies.

JAPAN

Budget 2023: Japan to Introduce New Tax Incentive for Start-ups, Minimum Tax on High Income Earners

Japan's ruling coalition has proposed to introduce a new tax incentive scheme for start-ups and a minimum tax on extremely high income earners, among other measures, in Budget 2023.

The Budget for the fiscal year beginning April 2023 addresses the government's short and long-term goals, such as overcoming the rising cost of living and realising sustainable economic growth. To this end, the government will develop an environment that fosters start-ups and promotes green and digital transformation, and implement measures to strengthen supply chains, develop human resources through education and build up Japan's defence capabilities.

The key highlights of the FY 2023 tax reform proposals are summarised below.
Incentives for start-ups, research and development
- To strengthen the start-up ecosystem, a new tax exemption on gains from stock transfers, capped at JPY2 billion, will be introduced. The exemption will be applied when the gains are used for the establishment of a business or investment in start-ups of pre-seed/seed period. The scope of the exemption will be expanded to promote open innovation activities.
- To encourage larger R&D investments, the R&D tax incentive scheme will be revised. A new system will be introduced wherein the current 25% tax credit limit for R&D expenditure will be changed between 20% to 30% depending on the rate of increase or decrease in R&D spending. Further, the scope of open innovation R&D start-ups will be expanded to encourage joint research and contract research with a wide range of start-ups. Lastly, a new preferential treatment in the R&D tax credit system will be established for corporations that employ PhD holders and researchers with certain experience.

International taxation

The Income Inclusion Rule (IIR) under Pillar 2 of the OECD/G20 Inclusive Framework on BEPS will be implemented.

Individual taxation

- To keep the tax burden fair, a new minimum tax on individuals with extremely high levels of income will be introduced effective from 2025.
- To encourage individuals to invest more in the Nippon Individual Savings Account (NISA), the tax exemption limit for dividends and capital gains derived from NISA will be increased to JPY18 million (from JPY8 million) for the instalment investment type and to 12 million (from JPY6 million) for the growth investment type. The non-taxable holding period will be made permanent (from 20 years and five years for the instalment and growth investment types, respectively). The annual contribution limit will also be increased. The proposed changes will apply from January 2024.

Measures to secure funds for defence spending

The following measures were proposed to be implemented in or after 2024 for the JPY1 trillion defence budget in FY 2027:

- corporate taxation: a new 4%-4.5% surtax on the corporate tax amount will be imposed. A JPY 5 million deduction from the tax base will be allowed considering the impact on small and medium-sized corporations;
- individual taxation: a new 1% surtax on income tax will be imposed. Consequently, the rate of special income tax for reconstruction for the 2011 Great East Japan Earthquake will be reduced by 1% and the taxation period to secure the total reconstruction fund will be extended; and
- the tobacco tax will be gradually increased.

KOREA (REP)

2023 Budget Bill: Ruling and Opposition Parties Agree on 1% Corporate Tax Reduction

The ruling and opposition parties finally came to an agreement on 22 December 2022 to reduce the corporate income tax (CIT) rate for each income bracket effective from 2023. With the reduction, the highest rate will come down from 25% to 24%.

The National Assembly also passed the 2023 Budget Bill on 23 December 2022. The tax changes will generally take effect from 1 January 2023, unless otherwise indicated.

The tax-related changes also include participation exemption for dividends received from foreign subsidiaries, an increase in the deduction limit for carried forward losses for companies other than small and medium-sized enterprises and exemption of interest and capital gains derived from government bonds and monetary stabilisation bonds by non-residents and foreign corporations that do not have a permanent establishment in Korea.

The Bill also contains the following measures:

- extension of the current 5-year limit for the concessional flat tax rate of 19% on salary income earned in Korea by foreign employees to 20 years;
- extension of the current 5-year limit for the 50% tax exemption for foreign technicians to ten (10) years;
- implementation of a global minimum tax of 15%, from 1 January 2024, that will apply to multinational enterprises with revenue above EUR750 million during at least two (2) fiscal years out of the immediately preceding four (4) fiscal years;
- extension of the requirement to retain books and records related to offshore transactions from five (5) years after the expiry of the statutory due date for tax return filings to seven (7) years, which is the same as the statute of limitations for international transactions;
- retention of transfer pricing related documents, including an organisational chart, roles and responsibilities, agreements involving asset sales and purchases, at a place of business in Korea, such as the address registered with the local tax office;
- abolishment of the tax on retained

- corporate earnings; and
- introduction of a special rule addressing the tax issues of Korean institutional investors arising from the EU reverse hybrid entity legislation.

Korea Proposes Increased Tax Credit for Technology Sector Investment

The Ministry of Economy and Finance proposed on 3 January 2023 an expansion of the current tax incentives for national strategic technology sectors, such as semiconductors, in order to promote investment in such industries in view of global competition for technologies and disruptions to the supply chain.

The government has proposed an increase in the tax credit for facility investments by large companies from 8% to 15%. The rate for small and medium-sized businesses will also increase from 16% to 25%.
An additional tax credit rate of 10% will also apply on incremental increases in investment in 2023.

Korea (Rep.) Seeks to Harmoniously Address CHIPS Act and Inflation Reduction Act Issues

Korea (Rep.) seeks to harmoniously address pending trade issues with the United States, including those surrounding the Chips and Science Act of 2022 (CHIPS Act, see US President Signs USD 52.7 Billion Bill Boosting Semiconductor Industry (10 Aug. 2022)) and the Inflation Reduction Act of 2022 (IRA, see Biden Signs Inflation Reduction Act with 15% Corporate Minimum Tax, Other Tax Measures (17 Aug. 2022)).

The Yonghap News Agency, which is partly owned by the government of Korea (Rep.), has reported that Trade Minister Ahn Duk-geun left for the United States on 8 March 2023 to meet with the Biden Administration and discuss the CHIPS Act, which provides subsidies and tax incentives to attract investors in US semiconductor manufacturing.

Korea (Rep.) has raised concerns on the CHIPS Act, especially on its requirement for companies receiving subsidies to share excess profits, submit data on their cash flows and profitability and provide child care for workers. Minister Lee Chang-yang said that Korea (Rep.) will assert that the "unconventional" conditions imposed by the CHIPS Act "would deepen business uncertainties, violate companies' own technology and management rights, and make the US less attractive as an investment destination."

In addition, Korea (Rep.) raised concerns on the IRA's critical mineral and battery component requirements and requested clear guidance from the US Treasury on the matter (see Korea (Rep.) Urges United States to Broadly Define Commercial Clean Vehicles Eligible for Tax Credit Under Inflation Reduction Act (8 Dec. 2022) and Korea (Rep.) Requests Clear Guidance on Inflation Reduction Act Battery Component Requirements (28 Feb. 2023)).

The Yonghap News Agency also reported that during a conference hosted by the American Chamber of Commerce in South Korea (AMCHAM), Finance Minister Choo Kyung-ho asserted their willingness to settle pending issues "to ensure a mutually beneficial and future-oriented development of the bilateral ties".

Note: The requirements under the IRA sparked concerns not just from Korea (Rep.), but also:

- the EU (see France and Germany Raise Concerns Over Inflation Reduction Act (9 Nov. 2022) and (France and Germany Call on United States to Extend Inflation Reduction Act's Environmental Subsidies to the EU (20 Dec. 2022));
- Japan (see Congressional Research Service Discusses Tax Issues Involving US-Japan Relations (10 Jan. 2023)); and
- the United Kingdom (see United Kingdom Raises Concerns on Inflation Reduction Act (20 Jan. 2023)).

PHILIPPINES

Lower House Passes Two Priority Tax Bills: Passive Income and Financial Intermediary Taxation and VAT on Digital Transactions

On 14 November 2022, the House of Representatives passed three priority tax bills of the government with regard to the taxation of passive income and financial intermediaries and VAT on digital transactions.

House Bill (HB) 4339 (Package 4 of the Comprehensive Tax Reform Program)

HB 4339 contains measures that aim to simplify the taxation of the financial sector. The bill specifically proposes to:

- reduce the number of tax bases and rates applicable to passive income, financial intermediaries and financial transactions;
- rationalise the rates on passive income and financial intermediaries by:
  - gradually reducing the tax rates on royalties and interests from 20% to 15%;
  - imposing a single tax rate of 15% on interest income, royalties, dividends, and capital gains on the sale of shares of stock not traded in the stock exchange;
  - imposing a single tax rate of 5% gross receipt tax on the income of banks, quasi-banks and other non-bank financial intermediaries (instead of rates differentiated by the maturity period of the instrument or the type of income);
  - imposing a harmonised 2% tax on premiums for pre-need, life insurance and health maintenance organisations products; and
  - gradually reducing the stock transaction tax from six-tenths of 1% to one-tenth of 1%;
- repeal the income tax exemption of interest on foreign currency deposits;
- rationalise the rates of documentary stamp tax;
- remove the excise tax exemption of pick-up trucks introduced in Republic Act No. 10963; and
- harmonise the threshold in determining whether a citizen or non-resident alien will be considered as a non-resident citizen or non-resident alien engaged in trade or business, respectively.

HB 4122 (VAT on digital transactions)

HB 4122 clarifies the imposition of VAT on electronic or online sale of services, such as online advertisement and digital services rendered in exchange for a regular subscription fee. HB 4122 proposes to:

- define who are liable digital service providers (DSPs);
- require non-resident DSPs to collect and remit the VAT on the transactions that pass through their platform;
- simplify the invoicing and registration requirements for VAT-registered non-resident DSPs;
- provide a transition period of 180 days from when the bill becomes law to enable the Bureau of Internal Revenue to establish implementation systems before VAT is imposed on DSPs; and
- require non-resident DSPs to designate a representative office or agent who shall be a resident corporation registered under Philippine law to assist in compliance.

Supreme Court Upholds Constitutionality of Tax Reform for Acceleration and Inclusion Act

During its session on 24 January 2023, the Supreme Court (SC) En Banc upheld the constitutionality of the Republic Act. No. 10963, otherwise known as the Tax Reform for Acceleration and Inclusion (TRAIN) Act. The TRAIN Act, which was passed into law on 19 December 2017, is the first package of the comprehensive tax reform programme under the previous administration. It implemented changes primarily to personal income, estate, donor's and excise taxes under the National Internal Revenue Code of 1997 (see President signs first package of Tax Reform Bill (3 January 2018)).

The SC dismissed the consolidated petitions in G.R. No. 236118 and G.R. No. 236295 (see Note), which argued, among others, that the TRAIN Act was passed by the House of Representatives despite a lack of quorum and that its provisions imposing excise tax on diesel, coal, liquefied petroleum gas and kerosene were prohibited regressive taxes. The petitioners also argued that such excise taxes were confiscatory and discriminatory against the poor and violated the people's right to due process and equal protection of laws.

In a statement issued by the SC Public Information Office, the SC held that the supposed lack of quorum is contradicted by the official Journal of the House of Representatives. The SC also held that the Congressional Journal must prevail over the video and photographs presented as evidence by the petitioners.

With regard to the imposition of excise taxes, the SC held that the Constitution, in its present form, does not prohibit the imposition of regressive taxes but merely directs Congress to evolve a progressive system of taxation.

Lastly, the SC ruled that the petitioners failed to sufficiently prove that the provisions of the TRAIN Act are "anti-poor".

SINGAPORE

Tax Authority Publishes Indicative Margin for Related Party Loans in 2023

The Inland Revenue Authority of Singapore (IRAS) has published the indicative margin for related party loans not exceeding SGD 15 million obtained or provided during the period 1 January to 31 December 2023. The indicative margin for 2023 is +230 bps or 2.30%.

The IRAS' indicative margin is added to the base reference rate to approximate an arm's length interest rate for a related party loan not exceeding SGD15 million.

The threshold (i.e. SGD15 million) is based on the loan committed and not the loan utilised.

The use of the indicative margin is optional. Taxpayers may adopt a different margin provided that it is consistent with the guidance provided by the IRAS to determine the arm's length interest rates. A taxpayer is exempt from preparing the transfer documentation for such related party loan on which the indicative margin is applied.

The indicative margin is published on the tax authority's website at the beginning of each year.

Budget 2023

Budget 2023 was presented by Minister for Finance, Mr Lawrence Wong, to the Singapore parliament on 14 February 2023.

Corporate income tax

- Under Pillar Two Global Anti-Base Erosion (GloBE) Rules of the OECD/G20 Base Erosion and Profit Shifting (BEPS) 2.0 project, affected multinational groups (MNEs) will be subject to a minimum effective tax rate (ETR) of 15%. Singapore has now confirmed that it intends to implement the GloBE rules and a domestic top-up tax (DTT) to top-up the ETR of large multinational groups (with annual revenues exceeding EUR750 million) operating in Singapore, from businesses' financial year (FY) commencing on or after 1 January 2025. The government will continue to monitor international developments and adjust the implementation timeline as needed if there is a delay to the international implementation of the GloBE rules.
- Budget 2023 introduces a new Enterprise Innovation Scheme (EIS). From years of assessment (Y/A2024) to 2028 (i.e. FYs 2023 to 2027), tax deductions for businesses engaged in prescribed activities, such as R&D conducted in Singapore, registration of intellectual property (IP) rights (for example, patents, trademarks and designs), acquisition and licensing of IP rights for businesses with revenue less than SGD500 million, and approved training courses, will be increased to 400% of the qualifying expenditure for each activity (from the current rate of 250%), subject to a cap of SGD 400,000 per annum per activity. Further, businesses engaged in innovation projects carried out with certain Singapore educational institutions will qualify for a 400% deduction of qualifying expenditure, subject to a cap of SGD50,000 per annum. Businesses without sufficient profits to maximise the benefits of tax deductions will have the option to convert 20% of their total qualifying expenditure per Y/A into a cash pay-out of up to SGD20,000.
- Businesses will be given an option to accelerate the claiming of capital allowances relating to the cost of acquiring plant and machinery and renovation or refurbishment, as a temporary broad-based support to businesses undergoing restructuring.
- Various tax incentives that were due to lapse in 2023 were extended for another 5 years, including the Pioneer Certificate Incentive, Development and Expansion Incentive, IP Development Incentive, Qualifying Debt Securities Scheme (QDS), tax incentive scheme for Approved Special Purpose Vehicles (ASPV) engaged in Asset Securitisation transactions, and the Financial Sector Incentive (FSI) Scheme. Refinements were also introduced to the QDS Scheme, the ASPC Scheme and the FSI Scheme.

Individual income tax

- A new tax incentive scheme will be introduced for qualifying donors with family offices operating in Singapore, subject to qualifying conditions. Qualifying donors can claim 100% tax deduction for overseas donations made through qualifying local intermediaries, subject to a cap of 40% of the donor's statutory income.

Goods and services tax (GST)

- Singapore raised its GST from 7% to 8% on 1 January 2023.
- Budget 2023 confirms that GST will be increased to 9% from 1 January 2024.

Stamp duty on immovable property

- Buyer's stamp duty (BSD) is levied on all purchases of immovable property. With effect from 15 February 2023, the BSD rate for higher value residential and non-residential properties will be raised. Corresponding changes will be made to the additional conveyance duty regime, which applies only to residential properties.

Tax on luxury vehicles

- The Additional Registration Fee (ARF) is a tax paid when a vehicle is registered. The ARF rates are progressive and the tax payable is calculated based on a percentage of the open market value (OMV) of the vehicle. With effect from 22 February 2023, the ARF rates for vehicles will be raised up to 320% of OMV

THAILAND

Thailand Gazettes VAT Exemption for Data Centre Businesses

The government has gazetted a royal decree (Royal Decree 759) exempting data centre businesses from VAT.

A qualifying data centre business is required to submit an application to the Director-General of the Revenue Department within 5 years from 9 November 2022 (the date the royal decree comes into effect).

The tax measure to promote investment in the data centre industry was approved by the Thai Cabinet in June 2022.

Cabinet Approves Extension of Incentive Period for Adoption of Electronic Tax Systems

On 24 January 2023, the Cabinet approved a draft royal decree extending the incentive period for taxpayers that invest in and/or use electronic tax systems to 31 December 2025. Furthermore, a draft ministerial regulation was approved, modifying the incentive for using the electronic withholding tax system and further extending the incentive period to 31 December 2025. Both measures were previously available until 31 December 2022.

The tax measures are as follows:

- a deduction equal to 200% of the amount paid for the following tax systems from 1 January 2023 to 31 December 2025, subject to conditions:
  - investment in electronic tax systems (i.e., e-Tax Invoice, e-Receipt and e-Withholding Tax) including payments for the purchase of computers, related equipment and computer programs; and
  - payments to service providers for the use of electronic tax systems, such as service fees for electronic data preparation, transmission and storage; and
- a reduction of the statutory withholding tax rates on certain payments from 2%, 3% or 5% to 1% between 1 January 2023 and 31 December 2025, provided the tax is remitted through the e-Withholding Tax system. Previously, withholding tax rates on certain payments were reduced from 3% or 5% to 2%, provided the e-Withholding Tax system was used.

These measures aim to promote the digital economy and encourage taxpayers to adopt electronic tax systems. Further details will be reported in due course.

Cabinet Approves Corporate Income Tax Exemption for Electric Vehicle Subsidies, Duty Exemption for Imported Parts

On 7 March 2023, the Cabinet approved, in principle, a draft decree exempting from corporate income tax government subsidies granted to domestic automotive industry operators that manufacture and assemble battery-powered electric cars, pickup trucks and motorcycles in the years 2022-2025. The proposed exemption will apply to companies and juristic partnerships that qualify for subsidies from the state, subject to the rules, procedures and conditions announced by the Excise Department.

The Cabinet also approved, in principle, a draft notification exempting from customs duty the importation of electric vehicle parts and battery-powered electric boats until 31 December 2025, subject to conditions.

The decree and notification will enter into force from the date they are published in the Royal Gazette.

Further details will be reported in due course.

Cabinet Approves Tax Exemption for Digital Token Investments

The Cabinet has approved, in principle, a draft decree exempting from corporate income tax and VAT transfers of digital tokens for investment to the public in the primary market, whereas transfers of digital tokens in the secondary market will be exempt from VAT.

Digital assets, i.e., cryptocurrencies and digital tokens, traded in licensed exchanges are exempt from VAT until 31 December 2023 (see Thailand Gazettes VAT Exemption for Qualifying Digital Asset Transactions (25 May 2022).

The draft decree, if approved, will apply retroactively from 14 May 2018 (the effective date of the Emergency Decree on Digital Asset Businesses B.E. 2561 (2018).

***Rachel Saw** of the International Bureau of Fiscal Documentation (IBFD). The International News reports have been sourced from the IBFD's Tax News Service. For further details, kindly contact the IBFD at ibfdasia@ibfd.org.*

The technical updates published here are summarised from selected government gazette notifications published between 5 November 2022 and 16 February 2023, including Public Rulings (PRs) and guidelines, if any, issued by the Royal Malaysian Customs Department (RMCD) and other regulatory authorities.

INCOME TAX

Incentives for food production projects

In Budget 2016, the Government, recognising that it needs to continue to support the development and growth of the agro-food industry, extended the application period for the following incentives for another five years, to 31 December 2020:

- **Income Tax (Exemption) (No. 6) Order 2020 [PU(A) 373]**
  The Order provides that a qualifying person will be exempted from the payment of income tax in relation to a new project for a period of ten consecutive years of assessment (Y/As) or an expansion project for a period of five consecutive Y/As.
- **Income Tax (Deduction of Investment in New Food Production Project or Expansion Project) Rules 2020 [PU(A) 374]**
  The Rules provide that in ascertaining the adjusted income of a company, which has made an investment in its related company which is undertaking a new or expansion project under the Income Tax (Exemption) (No.6) Order 2020, there shall be allowed a deduction equivalent to the value of investment (as defined) for the sole purpose of financing the new or expansion project in the basis period for a Y/A.

To continue to strengthen food security and reduce reliance on imported food supplies, the Government proposed to expand the scope of the approved food production project and extend the application period for the incentive to 31 December 2022. To legislate this, the following Rules and Order were gazetted on 31 October 2022:

- Income Tax (Deduction for Investment in Approved New Food Production Project) Rules 2022 [PU(A) 351]
- Income Tax (Exemption) (No.6) 2020 (Amendment Order 2022 [PU(A) 352]

Under the new Rules and Order, a new food production project is the first project carried out by a qualified person undertaking a food production project approved by the Minister. An approved new food production project is deemed to be a separate and distinct business. The list of such projects is expanded to include high seas fishing and the planting of seeds for agro food:

a) Planting of industrial crops, vegetables, fruits, herbs, spices or cash crops
b) Aquaculture
c) Rearing of honey or urena lobata bees
d) Rearing of cows, buffaloes, goats, sheep or deer
e) Deep sea fishing or high seas fishing
f) Planting of seeds for agro food
g) Planting of feed mill cultivated in a project which has been identified by the Minister charged with the responsibility of that project and approved by the Minister

<u>Income Tax (Deduction for Investment in Approved New Food Production Project) Rules 2022 [PU(A) 351]</u>
The Rules provide that in ascertaining the adjusted income of a company, which has made an investment in its related company which is undertaking an approved new food production project under the Income Tax (Exemption) (No.6) Order 2020, there shall be allowed a deduction equivalent to the value of investment (as defined) for the sole purpose of financing the approved new project in the basis period for a Y/A.

The new Rules provide that the deduction can only be claimed for a period of three consecutive Y/As, commencing from the Y/A the application is approved by the Minister. A deduction is also no longer available for investment in related companies that undertake the expansion project under the Income Tax (Exemption) (No.6) 2020.

The Rules apply to a company resident in Malaysia which is incorporated under the Companies Act 2016, that has:

a) Made an investment in its related company that undertakes the approved new food production project under the Income Tax (Exemption) (No.6) Order 2020; and
b) Made an application between 1 January 2021 and 31 December 2022 to the Minister of Finance through the Minister charged with the responsibility of an approved new food production project.

The Rules are deemed to have come into operation on 1 January 2021.

Income Tax (Exemption) (No.6) 2020 (Amendment Order 2022 [PU(A) 352]

The Income Tax (Exemption) (No.6) Order 2020 provides that a qualified person (which includes companies, sole proprietorships, partnerships and associations solely engaged in agriculture or fishery) that is resident in Malaysia is exempted from the payment of income tax in relation to:

- A new project for a period of ten consecutive Y/As in respect of its statutory income, commencing from the first Y/A in which the qualified person derived statutory income in relation to that project; or
- An expansion project for a period of five consecutive Y/As in respect of its statutory income from the expansion projects, commencing from the first Y/A in which the qualified person derived statutory income in relation to the expansion projects, and the first Y/A shall not be earlier than the Y/A in the basis period in which the date of approval from the relevant Minister falls.

The application of this incentive is extended to 31 December 2022 in this Amendment Order. The key amendments made in the Amendment Order are as follows:

- The approved new food production project is defined (see above).
- The scope of the exemption for an expansion project is extended to include statutory income from existing projects.
- An expansion of the existing approved food production project is required to be approved by the Minister and must involve a new area of land. The Amendment Order provides that the exemption is only applicable to an expansion project that has not been granted an exemption under the Income Tax (Exemption) (No.6) Order 2020.

The Amendment Order is deemed to have come into operation on 1 January 2016 and extends the application period for this incentive to 31 December 2022. However, the exemption for approved food production projects in relation to high seas fishing and the planting of seeds for agro feed is only available from 1 January 2021 to 31 December 2022.

Tax incentives for companies that adopt Industrial Revolution (IR) 4.0 and digitalisation technology

In Budget 2021, to spur economic recovery through investment activities, the following incentives were proposed for companies in selected services sectors:

- 0% to 10% tax rate for ten years for new companies
- 10% tax rate for ten years for existing companies with a new services segment

The selected services sectors include companies that adopt IR 4.0 and digitalisation technology, with investments that contribute to significant multiplier effects in the following services:

a) Provision of technology solutions
b) Provision of infrastructure and technology for cloud computing
c) R&D or design and development activities
d) Medical devices testing laboratory and clinical trials
e) Any other services, including manufacturing- related services, as determined by the Minister

To legislate the above proposal, the Income Tax (Relocation of Provision of Services Business Incentive Scheme) Rules 2022 [PU(A) 398] were gazetted on 28 December 2022. The Rules provide that a qualifying company which carries on a business in respect of a qualifying activity under the Relocation of Provision of Services Business Incentive Scheme, will be eligible for the following concessionary tax rates on the chargeable income for the specified Y/As:

- New company: Not more than 10%
- Existing company: 10%

The specified Y/As are for a period of up to ten consecutive Y/As, commencing from the Y/A as determined by the Minister. Applications for the incentive must be received by the Minister through the Malaysian Investment Development Authority (MIDA), between 7 November 2020 and 31 December 2022.

The qualifying company which applies for the incentive must comply with the conditions imposed by the Minister as specified in the approval letter, and the Guidelines and Procedures for the Application of Special Tax Incentive for Selected Services Activities under the National Economic Recovery Plan (PENJANA) issued or as revised by MIDA and approved by the Minister. The conditions include that the qualifying company must:

- Hire at least 80% full-time Malaysian employees on or before the third year from the date the first invoice (in relation to the qualifying activity) is issued, until the end of the specified Y/As; and
- Incur an approved adequate amount of annual operating expenditure or investment in fixed assets to carry on the qualifying activity

The Rules are effective from Y/A 2021.

Public Ruling 5/2022 – Taxation of a Resident Individual Part II – Computation of Total Income and Chargeable Income

The Inland Revenue Board of Malaysia (HASiL) has published Public Ruling 5/2022: Taxation of a Resident Individual Part II – Computation of Total Income and Chargeable Income, dated 9 December 2022. This new Public Ruling replaces Public Ruling 5/2018, which was issued on 13 September 2018. The content of this new Public Ruling is broadly similar to the earlier Public Ruling and explains the computation of total income and chargeable income of a resident individual who derives income from business, employment and other sources. The new Public Ruling was updated mainly to reflect the legislative changes from 2018, including the following:

- Effective from the Y/A 2019, the carry-forward period for unabsorbed business losses is limited to ten consecutive Y/As.

- Effective from Y/A 2019, the tax relief on contributions to approved provident funds or payment for life insurance premiums was increased from RM6,000 to RM7,000 (subject to conditions).
- Effective from Y/A 2020, the scope of tax deduction pursuant to S. 34(6)(h) of the Income Tax Act (ITA) 1967 was expanded to include contributions for the maintenance of a building designated as a heritage site by the Commissioner of Heritage under the National Heritage Act 2005.
- Effective from Y/A 2020, the tax deductions given for sponsorship of local arts, cultural and heritage activities in Malaysia (pursuant to S. 34(6)(k) of the ITA 1967) was increased from RM700,000 to RM1 million per Y/A.
- Effective from Y/A 2021, the tax relief for expenses (medical treatment, special needs and carer expenses) incurred for parents was increased from RM5,000 to RM8,000.

Public Ruling 6/2022: Accelerated Capital Allowance (ACA)

HASiL has published Public Ruling 6/2022: Accelerated Capital Allowance, dated 22 December 2022. This new Public Ruling replaces Public Ruling 7/2018, which was issued on 8 October. The new Public Ruling is broadly similar to the earlier Public Ruling and provides clarification in relation to the definition of qualifying expenditure, the conditions that must be fulfilled by a person to qualify for ACA, the qualifying period to claim ACA, the tax treatment where assets are disposed of within two years, and the non-application provisos. It has, however, been updated to reflect and provide clarifications as well as examples on the following ACA PU Orders:

a) Income Tax (Accelerated Capital Allowance) (Mould for the Production of Industrialised Building System Component) Rules 2006 [PU(A) 249/2006]
b) Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2018 [PU(A) 156/2018]
c) Income Tax (Exemption) (No. 8) 2017 (Amendment) Order 2020 [PU(A) 172/2020]
d) Income Tax (Accelerated Capital Allowance) (Automation Equipment) 2017 (Amendment) Rules 2020 [PU(A) 173/2020]
e) Income Tax (Accelerated Capital Allowance) (Machinery and Equipment Including Information and Communication Technology Equipment) Rules 2021 [PU(A) 268/2021]
f) Income Tax (Accelerated Capital Allowance) (Excursion Bus) (Amendment) Rules 2022 [PU(A) 9/2022]

The new Public Ruling also stipulates that a person is given the option to either claim ACA on plant and machinery under the PU. Order or claim capital allowances (CA) at the normal rates as provided under Para (s) 10 and 15, Sch 3 of the ITA 1967. However, the choice should be applied consistently until the CA is fully absorbed.

Public Ruling 7/2022: Venture Capital (VC) Tax Incentives

HASiL has published Public Ruling 7/2022: Venture Capital Tax Incentives, dated 23 December 2022. This new Public Ruling replaces Public Ruling 2/2016, which was issued on 9 May 2016. The new Public Ruling is broadly similar to the earlier Public Ruling and explains the tax incentives for the venture capital industry in Malaysia. The new Public Ruling was updated to reflect, explain and provide examples on the following new PU Orders gazetted in 2022:

a) Income Tax (Exemption) (No.2) Order 2022
b) Income Tax (Exemption) (No.3) Order 2022

c) Income Tax (Deduction for Investment in a Venture Company or Venture Capital Company) Rules 2022

The new Public Ruling also stipulates that the following updated guidelines have been issued by the Securities Commission (SC), which is the body entrusted to assess and certify applications for the tax incentives for the venture capital industry:

- Guidelines on the Registration of VC and Private Equity Corporations and Management Corporations
- Venture Capital Tax Incentives Guidelines

Public Ruling 8/2022: Taxation of Limited Liability Partnership (LLP)

HASiL has published Public Ruling 8/2022:

Taxation of Limited Liability Partnership, dated 23 December 2022. This new Public Ruling replaces Public Ruling 5/2015, which was issued on 14 August 2015. The new Public Ruling is broadly similar to the earlier Public Ruling and explains the tax treatment of an LLP. Some of the key changes are outlined below. The new Public Ruling was updated to reflect the legislative changes since the earlier Public Ruling was issued, including the following:

- Effective 28 December 2018, S. 75B(1)(a)(i) of the ITA 1967 was amended to extend the responsibility for doing all acts and things required to be done by or on behalf of an LLP to a person qualified to act as a secretary under the Companies Act 2016, who is a citizen or permanent resident of Malaysia and ordinarily resides in Malaysia.
- Effective Y/A 2019, the carry-forward period for unabsorbed business losses is limited to ten, instead of seven, consecutive Y/As.
- Effective Y/A 2019, if an LLP changes its accounting year-end, HASiL is to be notified via a prescribed form, i.e., Form CP204B.
- Effective Y/A 2020, an LLP, with a total capital contribution of RM2,500,000 or less at the beginning of the basis period for a Y/A and gross income from business sources not exceeding RM50 million in the basis period for that Y/A, will be eligible for the preferential tax rate of 17% on the first RM600,000 of chargeable income, and 24% on the remaining chargeable income.
- Effective Y/A 2021, an LLP is required to furnish its tax return in the prescribed form via an electronic medium or by way of electronic transmission in accordance with S. 152A, i.e., e-filing. An LLP may thus no longer file a tax return manually.

Public Ruling 9/2022: Property Development

HASiL has published Public Ruling 9/2022: Property Development, dated 23 December 2022. This new Public Ruling replaces Public Ruling 1/2009, which was issued on 22 May 2009. The new Public Ruling is broadly similar to the earlier Public Ruling and explains the basis of ascertaining gross income for the purpose of computing adjusted income derived from the business of property development. Some of the key changes are outlined below.

- The new Public Ruling states that in a situation where a development unit buyer surrenders or cancels his purchase and forfeits the payment that has been made to the property developer, for income tax purposes, the property developer shall make the adjustment in the basis period the cancellation takes place.

  In the earlier Public Ruling, it was stipulated that for income tax purposes, the adjustment is given effect in the Y/A in which the adjustment to the annual account is made.

  The new Public Ruling also reiterates that in a case where a purchaser defaults on his payments, the gross profit is still to be assessed in full as there is no cancellation of the purchase.

- The new Public Ruling stipulates that where a loss is ultimately incurred upon completion of the project, a company may opt not to reopen the prior Y/As and instead make an adjustment to the gross profit in the year the project is completed, on condition that there are no tax implications for all the relevant Y/As.
- The new Public Ruling stipulates that for income tax purposes, the provision for land premium is not an allowable expense.
- The new Public Ruling clarifies the tax treatment for showhouse expenditure.
- The new Public Ruling includes guidance on the tax treatment of compensation receivable arising from stock-in-trade parted with by compulsion under S. 4C of the ITA 1967, which will be treated as gross business income.
- For joint venture (JV) projects:
  a) Where a landowner takes an active role in the property development activities together with the property developer, the landowner is deemed to be undertaking the business of property development.
  b) Where a landowner does not take an active role in the development activities and the land is not a trading stock of his business, the landowner is deemed to not be undertaking the business of property development.

Public Ruling (s) 10/2022 and 11/2022: Reinvestment Allowance

HASiL has published the following Public Ruling (s), both dated 27 December 2022, to provide guidance to Malaysian resident companies engaged in manufacturing and agricultural activities in determining their eligibility to claim reinvestment allowance (RA):

- Public Ruling 10/2022: Reinvestment Allowance Part I – Manufacturing Activity
- Public Ruling 11/2022: Reinvestment Allowance Part II – Agricultural and Integrated Activities

The new Public Ruling (s) 10/2022 and11/2022 replace Public Ruling (s) 10/2020 (dated 6 November 2020) and 11/2020 (dated 10 November 2020) respectively. HASiL has advised that Public Ruling 11/2022 should be read together with Public Ruling 10/2022. The contents of both the new Public Rulings are broadly similar to the earlier Public Rulings. Both Public Rulings have, however, been updated to explain and provide examples to demonstrate the application of the "Special" RA announced under the PENJANA stimulus package. Other updates are as outlined below:

- Effective Y/A 2019, the carry-forward of unutilised RA is restricted to seven consecutive Y/As upon expiry of the qualifying period, with any unutilised allowances to be disregarded thereafter. The new Public Rulings also clarify and provide examples to demonstrate that unutilised PENJANA Special RA are to be tracked separately from the normal unabsorbed RA balances. Any PENJANA Special RA that has not been utilised by Y/A 2024 can be carried forward for a maximum period of seven consecutive Y/As, beginning from Y/A 2025.

- Public Ruling 10/2022 has also been updated to amend Diagram 2 and include two new Diagrams (i.e., Diagrams 3 and 4) (refer to Para 8.2 of the Public Ruling). The diagrams are consistent with the examples outlined in Practice Note (PN) No. 1/2022: Explanation in relation to the definition of factory for the purpose of RA claim under Sch 7A, ITA 1967. The PN was issued to explain the "factory" definition in Para 9 of Sch 7A of the ITA 1967. The PN also clarified that in a situation where the storage space in an extended area exceeds 10% of the total floor area of the extension, RA claims would still be allowed for the portion of the extension used for the purpose of a qualifying project (excluding the storage space).

Public Ruling 12/2022: Commercialisation of Public Resource-Based R&D Findings, Part I – Tax Incentive for Investor Company

HASiL has published Public Ruling 12/2022: Commercialisation of Public Resource-Based R&D Findings, Part I – Tax Incentive for Investor Company, dated 29 December 2022, to explain the tax incentive available to a company that invests in its related company for the sole purpose of financing the commercialisation of public resource-based R&D findings in Malaysia. This Public Ruling should be read together with Public Ruling 13/2022: Commercialisation of Public Resource-Based R&D Findings, Part II – Tax Incentive for Eligible Company.

Public Ruling 13/2022: Commercialisation of Public Resource-Based R&D Findings, Part II – Tax Incentive for Eligible Company

HASiL has published Public Ruling 13/2022: Commercialisation of Public Resource-Based R&D Findings, Part II – Tax Incentive for Eligible Company, dated 29 December 2022, to explain the tax incentive available to a company, in which its holding company has made investments for the purpose of financing a project on the commercialisation of public resource-based R&D findings in Malaysia.

Updated Frequently Asked Questions (FAQs) pertaining to withholding tax (WHT) on payments made to agents, dealers and distributors (ADDs)

HASiL has published the updated version of its FAQs document in relation to S. 107D of the ITA 1967), which provides that companies making payments in monetary form to ADDs arising from sales, transactions or schemes will be required to withhold tax at a rate of 2% on the gross amount. The updated version is dated 21 October 2022.

The only change to the FAQs document is to Item A.6, which relates to credit notes. The updated Item A.6 clarifies that to determine whether the payments made to ADDs are subject to the 2% WHT, it is necessary to consider the substance of the payment, and not its label. Therefore, if a credit note is in substance a commission payment in monetary form to ADDs, the payments should be subject to the 2% WHT under S. 107D. Previously, the FAQs provided that payments by way of credit notes, contra and discounts are not subject to the 2% WHT.

Updated FAQs on the tax deduction on the costs of renovation and refurbishment of business premises

HASiL has published an updated version of its FAQs document in relation to the tax deduction of up to RM300,000 to be given on the costs for renovating and refurbishing business premises, where such costs are incurred between 1 March 2020 and 31 December 2022. The updated version is dated 31 October 2022.

The FAQs were updated to reflect the extension of the tax deduction until 31 December 2022 under the Income Tax (Costs of Renovation and Refurbishment of Business Premise) (Amendment) Rules 2021 [PU(A) 481]. Other key updates in the FAQs are as follows:

- **Item 3**
  HASiL has provided some examples to explain certain types of costs, such as

roofing, curtains and power stations, that will not qualify for tax deduction.

- **Item 7(c)**
  Tax deduction is allowed for qualifying costs incurred from 1 March 2020 until 31 December 2022. The costs can be claimed even though the refurbishments and renovations are not completed during the Y/A.

- **Item 8**
  The landlord and tenants of a multi-storey building are eligible to claim tax deductions as long as the costs of renovation and refurbishment are incurred by them:

a) The floor area (whether on the same floor or different floor) occupied by the landlord and tenants must be identified and differentiated.
b) Each of the respective claims by the landlord and tenants must be verified by external auditors and supported by invoices or other relevant documents.
c) Each claimant would qualify to claim up to RM300,000 for qualifying costs incurred from 1 March 2020 to 31 December 2022.

Additional condition for the foreign-sourced income (FSI) exemption on dividend income

HASiL has published the amended "Guidelines on Tax Treatment in relation to Income Received from Abroad (Amendment)" (Amended Guidelines) dated 29 December 2022. These Amended Guidelines supersede the earlier Guidelines.

Similar to the earlier Guidelines, the Amended Guidelines specify the conditions which must be complied with by taxpayers to qualify for the FSI exemption, and also provide examples and annexes to explain and illustrate the tax treatment of FSI under various scenarios. <u>The Amended Guidelines were updated mainly to include an additional condition for the FSI exemption on the dividend income of companies, limited liability partnerships (LLPs) and individuals earning dividend income in relation to a partnership business in Malaysia.</u>

In a media release dated 29 December 2022, HASiL indicated that this additional condition has been imposed to ensure compliance with current international tax standards, and that taxpayers must demonstrate a clear link between the foreign-sourced dividend income and the activities undertaken in Malaysia in order to qualify for the FSI exemption. This condition is also in line with Malaysia's commitment to avoid double non-taxation of income, in line with the requirements of the European Union (EU).

<u>Existing conditions in Income Tax (Exemption) (No.6) 2022</u>
Pursuant to the Order, the exemption on dividend income available to a qualifying person is on condition that:

a) The dividend income has been subjected to tax "of a similar character to income tax" under the laws of the foreign jurisdiction ("subject to tax" condition), and
b) The "headline tax rate" (i.e., highest rate of tax "of a similar character to income tax" charged under the laws of the foreign jurisdiction) is at least 15%.

For the purpose of the Order, the earlier Guidelines provide guidance and examples on circumstances where the "subject to tax" and "headline tax rate" conditions are considered to have been met.

<u>Additional condition now imposed</u>
The Amended Guidelines stipulate that in addition to the above-mentioned conditions, the qualifying person will also be required to comply with "economic substance requirements" in order to qualify for the exemption on foreign-sourced dividend income received in Malaysia. The qualifying person shall be regarded as having economic substance if the person has:

a) Employed an "adequate number" of employees with the necessary qualifications to carry out the specific economic activities in Malaysia, and
b) Incurred an "adequate" amount of operating expenditure to carry out the specific economic activities in Malaysia

The Amended Guidelines go on to state that since different industries operate in different ways, it is neither feasible nor appropriate to specify the minimum thresholds for the economic substance requirements, as they would depend on the facts of each case. Factors that will be taken into account include:

a) The number of employees having regard to the nature of the relevant activities, e.g., whether it is a capital or labor-intensive industry,
b) Whether the employees are employed on a full-time or part-time basis, and
c) Whether office premises have been used to undertake the relevant activities and whether the premises are adequate for such activities.

HASiL stated in its 29 December 2022 media release that taxpayers who have submitted their relevant income tax return forms (ITRF) on or before 29 December 2022, but have not complied with the economic substance requirements, will be required to submit an amended ITRF. No penalties will be imposed.

Guidelines on the tax treatment of accrued interest/ profit payable to banks/financial institutions (FIs) during the moratorium period

HASiL has published technical guidelines on the tax treatment of accrued interest/ profit payable to banks/FIs during the moratorium period, dated 28 December 2022. The Guidelines stipulate that pursuant to S. 33(4) of the ITA 1967, a taxpayer is eligible to claim a deduction in respect of interest on borrowings when such interest is "due to be paid". This applies even if the interest has not actually been paid on the date the interest is due to be paid. The date the interest is "due to be paid" will be determined based on the loan agreement between the borrower and bank/FI.

Given the above, the Guidelines stipulate that the interest expense accrued during the moratorium period will be deductible in ascertaining the adjusted income of the person in the Y/A that the said interest is due to be paid (as set out in the loan agreement). However, the Guidelines go on to state that if the loan agreement is amended to vary the due dates, the tax implications will need to be ascertained accordingly.

The Guidelines provide four examples to demonstrate the above tax treatment under various scenarios. The Guidelines also reiterate the importance of retaining the necessary supporting documents, to be produced in the event of an audit by HASiL.

New WHT form for payments for recurring small-value WHT transactions

HASiL has stipulated that taxpayers may defer their submissions of WHT forms and payments for small-value WHT, subject to conditions. The submission of WHT forms and the remittance of WHT payments may be made once in every six-month period as outlined below, effective from August 2022:

Payments made to non-residents	Due date for the submission of WHT forms and remittances
1 June to 30 November	By 31 December that year
1 December (in the previous year) to 31 May (of the current year)	By 30 June of the current year

HASiL has released the new WHT tax forms for the above. The following new

WHT forms are available on HASiL's official portal (https://www.hasil.gov.my/borang/muat-turun-borang/muat-turun-borang-cukai-pegangan):

- Form CP37S – for royalty and interest income
- Form CP37DS – for special classes of income

"Bill number" to be used as mandatory reference for most types of tax payments

On 31 December 2022, HASiL issued a media release stating that effective 1 January 2023, a "bill number" will be used as a mandatory reference for direct tax-related payments, except for payments in relation to monthly tax deductions and stamp duty.

Details of the "bill number" can be obtained via the following methods:

- Visit HASiL's MyTax portal (https://mytax.hasil.gov.my) → ezHASiL Services → e-Billing
- The "bill number" will be stated on the notice of assessments / estimates, and letters of demand issued by HASiL

Tax payments can be remitted via the following methods:

a) Online, or
b) At the counters of HASiL's payment centres or banks appointed as collection agents.

For option (b), taxpayers are required to print the payment slip or download the "bill number" by scanning the QR code on the payment slip.

Notwithstanding the above, the media release also clarifies that during the transition phase, taxpayers may continue to use their existing tax identification number or tax reference number for tax payment purposes until 30 June 2023.

Following the above, HASiL has published the FAQs document, titled "Soalan Lazim Pelaksanaan e-Billing Dan Nombor Bil Sebagai Rujukan Mandatori Bagi Pembayaran Cukai LHDNM". The latest FAQs are dated 3 January 2023. HASiL has also issued a "User Manual" to provide further guidance to taxpayers.

2023 income tax return filing programme issued

HASiL has published the 2023 income tax return filing programme (2023 filing programme) titled "Return Form (RF) Filing Programme for the Year 2023", dated 30 December 2022. Where a grace period is given, submissions shall be deemed to have been received by the stipulated due date if received within the grace period. The grace period also applies to the settlement of the balance of tax payable under S. 103(1) of the ITA 1967. Where the ITRF or balance of tax payable is not furnished within the grace period, the original due date will be used for the purpose of calculating penalties (note that all references to the "due date" in the table of the 2023 filing programme refer to the original due date).

Some of the key updates to the 2023 filing programme are as follows:

- The C.P.8D [i.e., Statement of Remuneration from Employment for the Year ending 31 December 2022 and Particulars of Tax Deduction under the Income Tax Rules (Deduction from Remuneration) 1994] can no longer be submitted by way of compact disc or external hard disk.
- Employers are encouraged to furnish the 2022 employee remuneration information via e-Data Praisi / e-CP8D. Further guidance is provided in Item 2 of the Guide Notes to the 2023 filing programme.

2023 Tax Investigation Framework (TIF)

HASiL has issued the updated TIF, titled "Rangka Kerja Siasatan Cukai". This TIF takes effect from 1 January 2023 and replaces the previous TIF that was effective 1 January 2020. The contents of the new TIF are broadly similar to those of the earlier framework. It outlines the HASiL's procedures and practices in conducting tax investigations, as well as the rights and responsibilities of HASiL, the taxpayer and the tax agent in a tax investigation. The 2023 TIF also stipulate that the factors taken into consideration in the selection of tax investigation cases include cases where a person intentionally fails to report his income and those making fraudulent claims.

Guidelines on Transition of Multimedia Super Corridor (MSC) Malaysia Status Company to Malaysia Digital (MD) Status

Malaysia Digital Economy Corporation (MDEC) has published the Guidelines on Transition of MSC Malaysia Status Company to MD Status (Guidelines), dated 29 December 2022. Some of the salient points are outlined below.

- Under the MD initiative, companies are allowed to operate and undertake their approved activities (per the approval letter) in any location in Malaysia. Companies which used to be subjected to the minimum office requirement will no longer need to adhere to that requirement. The Guidelines stipulate that the above is effective from 25 March 2022.
- The company is required to continue to adhere to the existing conditions as stated in the approval letter and/or Conditions of Grants issued to the company. Any variation to the conditions during the tax exemption period is subject to the approval of the National Committee on Investment.
- The company shall not transfer or assign the status or any benefits, rights and/or obligations thereunder to any third party.
- The company will continue to enjoy the offerings under the MD Bill of Guarantees (BoG). Existing approvals for the incentives and/or benefits under the BoG will continue to subsist subject to compliance with existing conditions.

FAQs on Mutual Agreement Procedures (MAP)

The MAP article in tax treaties allows designated representatives (the "competent authorities" (CAs)) from the governments of the contracting states to interact, with the intent to resolve international tax disputes. These disputes include cases involving double taxation as well as inconsistencies in the interpretation or application of a treaty.

HASiL has issued the MAP Guidelines to provide guidance on obtaining assistance from the Malaysian CA by persons that fall within the scope of an effective tax treaty that Malaysia has with its treaty partners. The latest MAP Guidelines are dated 19 December 2017. Following the above, HASiL has recently issued an FAQs document on the MAP.

List of reportable jurisdictions for the Common Reporting Standard (CRS)

Following the enactment of the relevant rules for the Automatic Exchange of Information by the Malaysian government under the CRS, Malaysian FIs are required to collect financial account information from all non-residents and report information in relation to "reportable jurisdictions", to HASiL. HASiL will exchange this information with the relevant foreign tax authorities, from 2018.

HASiL has published the updated list of Reportable Jurisdictions dated 13 January 2023, which consists of 78 jurisdictions. The new additions to the list include Ghana, Jamaica, Maldives and Peru. Costa Rica however has been removed from the list. HASiL has also confirmed that the due date for the upcoming CRS reporting is 30 June 2023.

Please also be reminded that the first US Foreign Account Tax Compliance Act (FATCA) reporting, covering nine reporting years from 2014 to 2022, will also be due on 30 June 2023. FATCA requires Malaysian FIs to report all financial accounts held by US residents and tax residents to HASiL. HASiL will then transmit the relevant account holder and financial information to the US Inland Revenue Service.

REAL PROPERTY GAINS TAX

Updated Real Property Gains Tax (RPGT) Guidelines

HASiL published the RPGT Guidelines dated 6 January 2023 (2023 Guidelines), titled "Garis Panduan Cukai Keuntungan Harta Tanah". The 2023 Guidelines state that the earlier Guidelines dated 13 June 2018 (2018 Guidelines) and 18 June 2013 remain applicable for transactions where the disposal date falls within the period of the earlier Guidelines. Some of the key changes are outlined below.

- The 2023 Guidelines incorporate, explain and provide examples to demonstrate the legislative changes introduced to the Real Property Gains Tax Act 1976 (RPGTA) since the previous 2018 Guidelines.
- The 2023 Guidelines include an additional example to determine the

date of disposal and/or acquisition in a situation where there is no written agreement for the disposal of the asset.

- The 2023 Guidelines provide additional explanations on non-allowable expenditure for the purpose of computing the acquisition price and/ or disposal price.
- The 2023 Guidelines include a new section to explain the tax implications of disposals transacted via a Power of Attorney (PoA). The 2023 Guidelines stipulate that the grant of an irrevocable PoA for valuable consideration is a "disposal" as there is an "assignment". Generally, the disposal date will be the date the PoA is granted to the Donee (recipient of the PoA), and the disposal price will be the market value or consideration given for the grant of the PoA. The 2023 Guidelines go on to state that the ascertainment of whether the interest or right in or over an asset has been granted to the Donee will depend on the terms and conditions of the PoA. An example has also been provided in the 2023 Guidelines to provide further guidance on this.
- The 2023 Guidelines provide more guidance on the responsibilities of disposers / acquirers (e.g., the types of forms to be completed and submitted, how the forms are to be completed). However, the details of supporting documents required from disposers / acquirers, which were outlined in the 2018 Guidelines, have been removed from the 2023 Guidelines. The 2023 Guidelines also explain the penalties that may be imposed on disposers (under S. 29(3), 30(2) and 14(5) of the RPGTA) and acquirers (S. 29(1) and 36 of the RPGTA) for non-compliance.
- The 2023 Guidelines outline the latest procedure for RPGT payments (e.g., by e-TT system) and provide an updated list of authorised banks and available services.
- The 2023 Guidelines explain the penalties that may be imposed in relation to RPGT payments under S. 21B(2) and 21(4) of the RPGTA.

LABUAN

◆◆ Guidelines on the tax treatment of Labuan entities with dormant status

The Labuan Investment Committee (LIC) was established to recommend policies on substantial activity requirements in Labuan and monitor the enforcement of such requirements. Under the LIC Pronouncements 1-2019 (dated 19 June 2019) and 2-2019 (dated 11 December 2019), it was provided that Labuan entities which are dormant or struck off (including those under winding up proceedings or a liquidation process), which do not derive any source of income:

- Do not need to comply with the substantial activity requirements
- Are exempted from statutory audit requirements for the purpose of fulfilling the Labuan Business Activity Tax Act 1990 (LBATA) requirements (however, if such companies require an audit pursuant to any non-tax regulations / rules, such regulations / rules would need to be complied with accordingly.)

HASiL has now published on its website the guidelines issued on 31 October 2022, to provide clarification on the meaning of "dormant" for the purposes of the above LIC Pronouncements and the implications of a dormant company commencing business operations. The guidelines are deemed to be effective from Y/A 2020.

A Labuan entity is considered dormant, if it:

a) has never commenced operations since the date of its incorporation
b) has previously been in operation or carried on business but has now ceased operations or business; or
c) does not have any significant accounting transactionNote for one financial year before the occurrence of substantial change in its equity shareholding (i.e., 50% or more).

<u>Note:</u>
This means that there is no entry recorded in the company's accounts other than the minimum expenses for compliance with stipulated statutory requirements. The minimum expenses referred to are filing of the company's annual return under the Labuan Companies Act 1990, the secretarial fee for filing of the company's annual return, the tax filing fee and the audit fee.

A Labuan entity is not considered as dormant if it owns shares, real properties, fixed deposits or other similar investments, including those from which it derives income such as rents, interests, etc. (if any) by virtue of the mentioned ownership.

<u>Substance requirements</u>
The Guidelines clarify that if a Labuan entity resumes operations, the substantial requirements must be complied with until the last date of the accounting period.

<u>Submission of tax return under LBATA</u>
The Guidelines reiterate that a Labuan entity which is dormant or in the process

of liquidation is still required to file a Form LE1 together with the audited accounts (if any) or management accounts.

Extension of time (EOT) for the submission of Y/A 2022 tax returns under the LBATA for selected Labuan entities

HASiL's Labuan Branch issued a letter dated 8 December 2022 to the Association of Labuan Trust Companies (ALTC) to state that selected Labuan entities have been granted an EOT until 30 December 2022 to submit their tax returns (under S. 5 and 10 of the LBATA) for Y/A2022 (based on the financial year ended in 2021). The EOT was granted on a case-by-base basis based on the date of application and justification provided.

INDIRECT TAX

GENERAL

Policies / Updates

Public Ruling 1/2022 – Prescribed Forms under Customs Act 1967, Excise Act 1976 and Windfall Profit Levy Act 1998

The Public Ruling 1/2022 – Prescribed Forms under Customs Act 1967, Excise Act 1976 and Windfall Profit Levy Act 1998 dated 30 December 2022, came into operation on 1 January 2023. This Public Ruling was issued to establish the form and manner under the Customs Act 1967, Excise Act 1976 as well as the Windfall Profit Levy Act 1998.

CUSTOMS

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Customs (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Customs (Amendment) Act 2022 [PU(B) 639/2022] was gazetted on 27 December 2022 and came into operation on 1 January 2023.

Customs Duties Orders

Customs Duties (Goods under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Order 2022

The Customs Duties (Goods under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Order 2022 [PU(A) 406/2022] was gazetted on 30 December 2022 and is deemed to have come into operation on 29 November 2022. This Order provides for import duty rates for goods originating from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Parties, interpretation of the rates of duties levied and the rules governing the classification of goods. CPTPP Parties consist of countries such as Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam.

EXCISE DUTY

Excise Duty Policies / Updates

Postponement in the imposition of Excise Duty on pre-mix preparations

The imposition of Excise Duty on premix preparations at the rate of RM0.47 per 100g, for sugar content thresholds above 33g/100g was to be effective 1 January 2023. However, this measure has been postponed to a date to be determined later per the notice issued in the RMCD website on 30 December 2022.

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Excise (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Excise (Amendment) Act 2022 [PU(B) 640/2022] was gazetted on 27 December 2022 and came into operation on 1 January 2023.

SALES TAX

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Sales Tax (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Sales Tax (Amendment) Act 2022 [PU(B) 641/2022] was gazetted on 27 December 2022 and came into operation on 1 January 2023.

Appointment of Effective Date for Charging and Levying of Sales Tax on Low Value Goods

The Appointment of Effective Date for Charging and Levying of Sales Tax on Low Value Goods [PU(B) 642/2022] was gazetted on 27 December 2022 and will come into operation on 1 April 2023.

Sales Tax Regulations

Sales Tax (Low Value Goods) Regulations 2022

The Sales Tax (Low Value Goods) Regulations 2022 [PU(A) 408/2022] was gazetted on 30 December 2022 and came into operation on 1 January 2023. This Regulation highlights the regulatory requirements such as registration, display of the LVG Registration Number and information on packages, invoicing and adjustment notes, furnishing of returns and payments, refunds, and other requirements.

Sales Tax Orders

Sales Tax (Persons Exempted from Payment of Tax) (Amendment) Order 2022

The Sales Tax (Persons Exempted from Payment of Tax) (Amendment) Order 2022 [PU(A) 380/2022] was gazetted on 14 December 2022 and came into operation

on 1 January 2023. This Order provides for amendments in Sch A, Sch B and Sch C of the Sales Tax Persons Exempted from Payment of Tax) Order 2018 [PU (A) 210/2018].

◆ Sales Tax (Total Sale Value of Low Value Goods) Order 2022

Sales Tax (Total Sale Value of Low Value Goods) Order 2022 [PU(A) 409/2022] was gazetted on 30 December 2022 and came into operation on 1 January 2023. This Order provides for the total sale value of low value goods for registration.

◆ Sales Tax (Rate of Tax for Low Value Goods) Order 2022

Sales Tax (Rate of Tax for Low Value Goods) Order 2022 [PU(A) 410/2022] was gazetted on 30 December 2022 and came into operation on 1 January 2023. This Order provides for the rate of sales tax for low value goods.

◆ Sales Tax (Determination of Low Value Goods) Order 2022

Sales Tax (Determination of Low Value Goods) Order 2022 [PU(A) 411/2022] was gazetted on 30 December 2022 and came into operation on 1 January 2023. This Order provides for the determination of low value goods for charging sales tax.

◆ Sales Tax (Persons Exempted from Payment of Tax) (Amendment)(No.2) Order 2022

The Sales Tax (Persons Exempted from Payment of Tax) (Amendment)(No.2) Order 2022 [PU(A) 412/2022] was gazetted on 30 December 2022 and came into operation on 1 January 2023. This Order provides for amendments in item 24, Sch A of the Sales Tax Persons Exempted from Payment of Tax) Order 2018 [PU(A) 210/2018].

Sales Tax Policies / Updates

◆ Sales Tax Policy No. 1/2022

The Sales Tax Policy No. 1/2022 dated 16 November 2022, was uploaded on the RMCD website on 16 November 2022. This Policy, provides that pallets purchased or imported by any registered manufacturer or person acting on behalf of a registered manufacturer (herein referred to as the Persons) are to be categorised as packaging materials used in manufacturing and in turn, exempted from sales tax under items 1 and 3, Sch C of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018 [PU (A) 210/2018], as well as other guidelines under this Policy. (Note: this policy was previously uploaded on the RMCD website on 11 April 2022)

◆ News 16: Announcement for Application for Sales Tax Exemption Certificate Under Item 65, Sch A of The Sales Tax (Persons Exempted from Payment of Tax) Order 2018

The Announcement for Application for Sales Tax Exemption Certificate Under Item 65, Sch A of The Sales Tax (Persons Exempted from Payment of Tax) Order 2018, was uploaded on the RMCD website on 20 December 2022. This Announcement provides guidance to haulage operator endorsed by the Malaysian Investment Development Authority (MIDA) to apply for the sales tax exemption certificate under item 65 via MySST system and the Vehicles Tax Exemption Monitoring System (eVTEMS).

◆ Announcement LVG 1 / 2023

The Announcement LVG 1 / 2023 dated 6 January 2023, was uploaded on the RMCD website on 6 January 2023. This Announcement highlights an overview of the implementation of Sales Tax on Low Value Goods as well as the corresponding legislation.

Sales Tax Guide

◆ Application for Sales Tax on Low Value Goods (LVG) Registration User Manual

The Application for Sales Tax on Low Value Goods (LVG) Registration User Manual dated 31 December 2022, was uploaded on the RMCD website on 31 December 2022. This User Manual is provided to guide applicants when registering for Sales Tax on LVG via the MyLVG portal.

◆ Draft Guide on Sales Tax on Low Value Goods (LVG) (First Edition)

The Draft Guide on Sales Tax on Low Value Goods (LVG) (First Edition) dated 9 January 2023, was uploaded on the RMCD website on 9 January 2023. This Draft Guide is provided to explain the implementation of Sales Tax on LVG to persons selling LVG via an online marketplace or operating an online marketplace.

◆ Q&A Session Webinar on Jan 2023: Update on SToDS and Implementation of Sales Tax on Low Value Goods (LVG) Document

The Q&A Session Webinar on Jan 2023: Update on SToDS and Implementation of Sales Tax on Low Value Goods (LVG) Document dated 20 January 2023, was uploaded on the RMCD website on 3 February 2023. This Document is provided to explain questions raised by audiences during the Webinar with regard to the implementation of Sales Tax on LVG.

SERVICE TAX

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Service Tax (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Service Tax (Amendment) Act 2022 [PU(B) 643/2022] was gazetted on 27 December 2022 and came into operation on 1 January 2023.

Service Tax Policies / Updates

Postponement of the effective date for the imposition of Service Tax on Goods Delivery Services

The imposition of Service Tax on Goods Delivery Services was to be effective 1 January 2023. However, this measure has been postponed to a date to be determined later per the notice issued on the RMCD website on 30 December 2022.

Service Tax Guide

Draft Guide on Service Tax on Goods Delivery Services

The Draft Guide on Service Tax on Goods Delivery Services dated 9 January 2023, was uploaded on the RMCD website on 9 January 2023. This Draft Guide is provided to explain the implementation of Service Tax on Goods Delivery Services.

TOURISM TAX

Tourism Tax Updates

Implementation of Tourism Tax on Foreign Tourist Booked Through a Registered Digital Platform Service Provider (DPSP)

Based on a RMCD announcement on 30 December 2022, the imposition of Tourism Tax on foreign tourist staying at an accommodation premise booked via a registered DPSP is 1 January 2023.

Reimposition of Tourism Tax by Registered Operator of Accommodation Premise Effective 1 January 2023

Based on a RMCD announcement on 30 December 2022, the exemption of Tourism Tax on foreign tourists staying at a registered accommodation premise ends on 31 December 2022. In turn, Tourism Tax will be reimposed on foreign tourists staying at a registered accommodation premise, effective 1 January 2023.

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Tourism Tax (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Tourism Tax (Amendment) Act 2022 [PU(B) 644/2022] was gazetted on 27 December 2022 and came into operation on 1 January 2023.

DEPARTURE LEVY

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Departure Levy (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Departure Levy (Amendment) Act 2022 [PU(B) 635/2022] was gazetted on 23 December 2022 and came into operation on 1 January 2023.

WINDFALL PROFIT LEVY

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Windfall Profit Levy (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Windfall Profit Levy (Amendment) Act 2022 [PU(B) 636/2022] was gazetted on 23 December 2022 and came into operation on 1 January 2023.

GOODS VEHICLE LEVY

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Goods Vehicle Levy (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Goods Vehicle Levy (Amendment) Act 2022 [PU(B) 637/2022] was gazetted on 23 December 2022 and came into operation on 1 January 2023.

FREE ZONES

Notification of Commencement Date

Appointment of Date of Coming into Operation of the Free Zones (Amendment) Act 2022

The Appointment of Date of Coming into Operation of the Free Zones (Amendment) Act 2022 [PU(B) 638/2022] was gazetted on 23 December 2022 and came into operation on 1 January 2023.

Contributed by Ernst & Young Tax Consultants Sdn. Bhd. The information contained in this article is intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgement. On any specific matter, reference should be made to the appropriate advisor.

CASE 1

CMMT INVESTMENT LTD V MENTERI KEWANGAN MALAYSIA [2022] MLJU 360 (HIGH COURT)

BRIEF FACTS

The taxpayer is a Labuan company that holds units in CapitaLand and Malaysia Malls Trust, a Malaysian real estate investment trust (REIT) since 2010 and has been obtaining loans from CapitaLand Retail (MY) Pte. Ltd ("CRMY") to acquire such units.

Being a Labuan company, the taxpayer did not subject its interest payments to CRMY ("Interest Payments") to withholding tax ("WHT") by virtue of the Income Tax (Exemption) (No. 22) Order 2007. The taxpayer also did not elect to be taxed under the Income Tax Act 1967 ("ITA 1967") for Y/As 2010 to 2018.

The Inland Revenue Board of Malaysia ("HASiL") conducted an audit on the taxpayer for Y/As 2010 to 2019. It disallowed the interest expense incurred by the taxpayer on the basis that WHT had not been deducted from the Interest Payments made to CRMY.

After a series of correspondences between the taxpayer and HASiL, the taxpayer wrote to the Minister of Finance ("MoF") requesting the MoF to exercise its powers under the following sections, namely:

(i) S. 135 of the ITA 1967 – To give directions to the Director General of Inland Revenue ("DGIR") to review the exercise of his power and function so that the law is applied correctly and fairly.
(ii) S. 27 of the ITA 1967 – To exempt the taxpayer from income tax arising from the disallowed interest expense.

The taxpayer requested the MoF to reply within one week from the receipt of the letter. The MOF did not respond. The taxpayer then filed a judicial review application at the High Court, and the matter was heard at the leave stage.

TAXPAYER'S ARGUMENTS

The taxpayer argued, amongst others, that:

(i) There is an error of law and clear lack of jurisdiction when the MoF failed to consider that since the taxpayer is a Labuan company, the applicable statute would be the Labuan Business Activity Tax Act 1990 and not the ITA 1967.
(ii) It has satisfied all conditions under Exemption Order, and as such, the Interest Payments to the non-resident person i.e., CRMY should not be subject to WHT.
(iii) The decision by the MoF is irrational, and there has been denial and frustration of its legitimate expectation, which is tantamount to a breach of natural justice.

MOF'S ARGUMENTS

HASiL, amongst others, argued that the present application is frivolous and vexatious as there has been no decision made by the MoF that could be subjected to judicial review. For context, Order 53 rule 2(4) of the Rules of Court 2012 provides that there must be a "decision" which can be subject to judicial review:

> *"(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application."*

HIGH COURT'S DECISION

The High Court, in granting leave for judicial review, held that the MoF's failure to respond to the taxpayer's letter falls squarely within the ambit of a "decision" under Order 53 Rule 2(4) ROC. The High Court's reasoning is as follows:

(i) There need not always be an actual decision by anyone for an application for judicial review to be brought (Court of Appeal case of Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413 referred)
(ii) A purported non-decision is amenable to judicial review. So long as the non-response which can be deemed a decision affects the taxpayer either by altering or depriving its rights of the benefits it has been permitted to enjoy, then the decision is amenable to judicial review.
(iii) The application herein concerns the MoF and the MoF alone. There is no statutory appeal procedure or domestic remedy in the ITA 1967 that provides for the challenge of the MoF's decision. Therefore, the present application does not fall under the jurisdiction of the Special Commissioner of Income Tax. When there is no alternative remedy provided under the law, the MoF's decision is amenable to judicial review.

(iv) The taxpayer's judicial review application is neither frivolous nor vexations. The taxpayer's claim of irrationality, unreasonableness and legitimate expectation deserves mature considerations on the merit and must not be refused on the ground of amenability of a domestic remedy.

COUNSEL FOR THE TAXPAYER
S SARAVANA KUMAR (NG KAR NGAI WITH HIM) (ROSLI DAHLAN SARAVANA PARTNERSHIP)

COUNSEL FOR THE MOF
NUR IDAYU BT AMIR (SENIOR FEDERAL COUNSEL, ATTORNEY GENERAL CHAMBERS)

DECISION DATE
21 FEBRUARY 2022

JUDGMENT / GROUNDS OF JUDGMENT
CMMT INVESTMENT LTD V MENTERI KEWANGAN

CASE 2

TENAGA NASIONAL BERHAD V KETUA PENGARAH HASIL DALAM NEGERI (2022) MSTC ¶30-485 (HIGH COURT)

BRIEF FACTS

The taxpayer was involved in the business of the generation, transmission, distribution and sales of electricity. The taxpayer claimed reinvestment allowance ("RA") for Y/A 2018 under Sch 7A of the ITA 1967 ("Sch 7A").

Subsequently, HASiL conducted an audit on the taxpayer and disallowed the taxpayer's RA claim on the basis that the taxpayer does not qualify for RA under Sch 7A. Instead, it should have claimed investment allowance for the service sector ("Investment Allowance") under Sch 7B of the ITA 1967 ("Sch 7B"), which covers utility companies like the taxpayer.

The DGIR subsequently made and issued a notice of additional assessment on the taxpayer. Aggrieved, the taxpayer then filed a judicial review application at the High Court against the decision of the DGIR. The High Court granted the leave application, and the matter was heard at the substantive stage.

TAXPAYER'S ARGUMENTS

The taxpayer argued, amongst others, that:

(i) It is in the business of manufacturing electricity;
(ii) The law on RA and the definition of "manufacturing" must be read purposively. It should not be construed narrowly;
(iii) HASiL's internal interpretation of Sch 7A has no force in law; and
(iv) It does not fall within Para 7 of Sch 7A, which lays out specific circumstances whereby a taxpayer cannot claim RA and does not fall within the Income Tax (Prescription of Activity Excluded from The Definition of Manufacturing) Rules 2012 ("2012 Rules");

HASIL'S ARGUMENTS

HASiL argued that the taxpayer had made a wrong claim under Sch 7A. Instead, it should have claimed Investment Allowance under Sch 7B which applies to the service sector. HASiL based its contention on the following grounds:

(i) The taxpayer is a service provider, not in the business of "manufacturing" electricity.
(ii) The taxpayer's capital expenditure is not incurred for the purposes of a "qualifying project"; and
(iii) There must be a new product for a taxpayer to claim for RA.

HIGH COURT'S DECISION

The High Court, in allowing the taxpayer's judicial review application, held that:

(i) The taxpayer could not be said to merely provide the service of generating or supplying electricity. The Commonwealth cases have established that the process of generating electricity is akin to the manufacture or production of an article or goods or things;
(ii) Parliament cannot be said to restrict the activity of generating electricity as manufacturing and disqualify the same from the RA scheme. If Parliament had intended to exclude such activity, it would have stipulated it in the ITA 1967 or the 2012 Rules;
(iii) There was no legal or factual basis for HASiL to state that the taxpayer was a company that provided services. A utility company could also be a manufacturing company. HASiL failed to proffer any authority to support its averment that the taxpayer was not a manufacturing company;
(iv) What amounts to a "qualifying project" under Sch 7A is not to be construed narrowly. The taxpayer had invested in manufacturing

infrastructure and state-of-the-art facilities to meet the nation's ever-growing demand for electricity. The taxpayer had incurred capital expenditure none other but for a qualifying project i.e., expansion, modernisation and automation of its existing business of manufacturing electricity; and

(v) There is no requirement under law for a new product to be created for a taxpayer to claim for RA.

COUNSEL FOR THE TAXPAYER
S SARAVANA KUMAR WITH NUR AMIRA BINTI AHMAD AZHAR (MESSRS ROSLI DAHLAN SARAVANA PARTNERSHIP)

COUNSEL FOR HASIL
DR HAZLINA BINTI HUSSAIN (SENIOR REVENUE COUNSEL) WITH ASHRINA BINTI RAMZAN ALI (SENIOR REVENUE COUNSEL), NORDIANA BINTI SHAM (REVENUE COUNSEL) AND KWAN HUEY SHIN (REVENUE COUNSEL)

DECISION DATE
6 MARCH 2022

JUDGMENT / GROUNDS OF JUDGMENT
CMMT INVESTMENT LTD V MENTERI KEWANGAN

Adeline Wong, Kellie Allison Yap and Jeff Sum Wai Loon (Wong & Partners)

CAPITAL ALLOWANCES

HIRE PURCHASE

Siva Subramanian Nair

Candidates will note that when an asset is used for the conduct of a business, there are few financing avenues available; ranging from an outright purchase (using either equity funds / savings or through a loan) meandering through hire-purchase or just leasing the asset for the period required.

A comparative matrix is presented below in terms of the qualifying expenditure and the deductible expenditure for the different financing options available.

* Candidates in Advanced Tax 1 will know that a leased agreement will be deemed to be a sale agreement if it falls under any of the six circumstances detailed in Regulation 4 of the Income Tax Leasing Regulation 1986 (which will be detailed in a later article). In this case the treatment for computing the capital allowances will be quite similar to hire-purchase.

FINANCING	OUTRIGHT PURCHASE		HIRE PURCHASE	LEASING
	USING EQUITY	LOAN		Not a deemed sale*
Qualifying expenditure	Full cost of the asset (even though the loan is paid in instalments)		Downpayment & Principal repayments	Not applicable
Deductible expenditure	No deductible expenditure	Loan interest	Hire purchase interest	Lease rentals

This article focuses on the computation of capital allowances on assets acquired through hire-purchase. The law relating to such claim is enshrined in Paragraph 46, Schedule 3 of the Malaysian Income Tax Act 1967 and it states:

Where a person incurs capital expenditure under a hire purchase agreement on the provision of any machinery or plant for the purposes of a business of his, he shall for the purposes of this Schedule be taken to be the owner of that machinery or plant; and the qualifying expenditure incurred by him on that machinery or plant in the basis period for a year of assessment *shall be taken to be the capital portion of any instalment payment (or, where there is more than one such payment, of the aggregate of those payments) made by him under that agreement in that period.*

From the above paragraph 46 provision, it is obvious that the purchaser of the asset under hire purchase will be the one who is eligible to claim capital allowances since he has incurred qualifying capital expenditure, is using it for the purposes of a business and shall be "taken to be the owner of that machinery or plant".

Hire purchase financing generally involves the payment of a downpayment (or some exam questions refer to it as a deposit) and repayments comprising of two elements, that is, the principal portion and the hire purchase interest. As we have seen under the business deductions topic; interest expense is deductible when [amongst others] the borrowing is laid out on assets held for use in the production of income i.e. the purchase of fixed assets. Therefore, the hire purchase interest will qualify for a business deduction as and when it is incurred. The downpayment and the principal portion of the repayments will qualify as qualifying expenditure as indicated in the table above.

Therefore, the first step when dealing with assets purchased under hire purchase would be to determine the portion of repayment relating to principal and interest. As an example, we shall use Taxation II December 2017 Question 3 where a machine was acquired in January 2017 by Setia Sdn Bhd an engineering company with a financial year end of 31 December, on the following hire-purchase terms.

	RM
Cash price	170,000
Hire purchase price	190,000
Deposit paid	70,000
Amount financed	100,000
Term of repayment	24 months

From this question, it is obvious that the repayments made of RM50,000 [100,000 X 12/24] in 2017 refers to the principal portion because RM100,000 is the cash price of RM170,000 less the "deposit" of RM70,000. The interest portion is RM10,000 i.e. ([RM190,000-170,000]) X12/24). Different approaches taken by candidates to arrive at these figures are generally acceptable for marking purposes as long as the final answer is correct

The qualifying expenditure of the asset in the first year of assessment will be the downpayment and the principal repayments whilst the additional qualifying expenditure for the remaining years of assessment will be just the principal portion. Therefore, initial allowances are claimed in each of the years in which there is additional qualifying expenditure (i.e. principal repayments are made) plus annual allowances are claimed on the qualifying expenditure for that year of assessment plus qualifying expenditure brought forward from the previous years of assessment until it is fully claimed.

The above principle is illustrated in Taxation II December 2007 Question 4C [adjusted to current years] which reads:

A Sdn Bhd purchased a van on hire purchase terms for RM150,000 on 1 January 2020. The van is commercially licensed and is used in A's business. The cash price of the van was RM120,000 and the hire charges was RM30,000. The monthly instalment for the van was RM2,500 and this included interest of RM500. A Sdn Bhd prepares its accounts annually to 30 June. Candidates were required to compute the tax written down value [TWDV] of the van as at 30 June 2022.

Solution				
YA	2020	2021	2022	TOTAL
	RM	RM	RM	RM
Qualifying Expenditure	6 instalment payments 12,000	12 instalment payments 24,000	12 instalment payments 24,000	
CAPITAL ALLOWANCES				
YA 2020	4,800			
YA 2021	2,400	9,600		
YA 2022	2,400	4,800	9,600	
TWDV	2,400	9,600	14,400	26,400

Candidates will note that the company is eligible to claim the last 20% capital allowances on the qualifying expenditure incurred in YA 2020, in YA 2023. A common error committed by candidates is to bring forward the qualifying expenditure to YAs 2024 as well!

Another line of questioning for examination purposes is where the candidates are requested to evaluate the "post–evaluation period" benefits of different financing methods discussed in the beginning of this article. For example, if a commercial vehicle (AA rate of 20%) costing 5 million was acquired though outright purchase or hire purchase or leased and a computation of capital allowances were done for a 5-year evaluation period, the discussion of the advantages of the different methods should include the "post–evaluation period" benefit accruing to the hire purchase method as tabulated below.

Financing	Post–Evaluation Period [After Year 5] Capital Allowances Benefits
Outright purchase	All allowances will be claimed by the 4th year [since AA rate is 20%], therefore there are no further benefits
Leasing	No deductions since no lease rentals are paid subsequent to the 5th year
Hire purchase	Further capital allowances can be claimed since qualifying expenditure incurred in the 3rd, 4th and 5th year will only expire through capital allowances claims in the 6th, 7th and 8th years respectively.

Another issue on this topic is the restrictions imposed on non-commercial vehicles ***[refer Tax Guardian Vol.12/No.1/2019/Q1]***. The treatment is the same except that the additional qualifying expenditure (assuming the first year of assessment qualifying expenditure is NOT below the restricted amount) has to be carefully computed for each year of assessment so as to ensure that it does not breach the restricted amount.

Let us use Business Taxation paper June 2016 Question 2a (updated to current years) to demonstrate this principle on the restrictions imposed on non-commercial vehicles. The question dealt with the purchase of a Toyota Camry by Mill Sdn Bhd, a trading company which closes its accounts to 31 October each year. The details of the purchase are as follows:

Cost of car	178,000
Less: Deposit (paid on 1 March 2022)	(42,000)
Amount financed	136,000
Hire purchase interest	(16,000)
Amount repayable	120,000

The above amount is repayable in 48 equal monthly instalments of RM2,500 each, with effect from 1 April 2022.

Solution	
As the cost of the car exceeds RM150,000, the qualifying expenditure will be restricted to RM 50,000.	
YA 2022	RM
Deposit paid 1/3/22	42,000
Instalments	4,800
(5 x 2,500)	12,500
Total Expenditure	54,500

The maximum qualifying expenditure that can be claimed is RM50,000 for year of assessment 2022.

Assuming the instalment payments commenced in August 2022, then computation of qualifying expenditure will be as follows:

YA 2022	
Deposit paid 1/8/22	42,000
Instalments	
(2 x 2,500)	5,000
Total Expenditure	47,000
YA 2023	
Instalments	
(12 x 2,500)	30,000
Restricted to	
RM 50,000 less RM 47,000	3,000

The question continues:
The Toyota Camry was stolen on 28 September 2022. The company received an insurance compensation of RM133,500 after the relevant authorities confirmed that the car could not be recovered. There were five instalment payments made during the year ended 31 October 2022. Therefore the computation of allowances will be as follows:

YA 2022	
Qualifying Expenditure	50,000
IA 20%	(10,000)
AA 20%	NIL (asset NOT in use in the business at the end of the basis period)
Residual Expenditure	40,000 Compensation Received
Compensation Received	24 months
133,500 x 50,000 /178,000	(37,500)
Balancing Allowance	2,500

Additional questions on acquisition of assets through hire purchase can be seen in:

- Taxation II paper December 2010 Question 3B
- Business Taxation paper December 2012 Question 3A(4)
- Business Taxation paper June 2013 Question 3Bii

This concludes our discussion on the capital allowances claim in respect of assets acquired through hire purchase.

***Siva Subramanian Nair** is a freelance lecturer. He can be contacted at sivasubramaniannair@gmail.com*

FURTHER READING

Choong, K.F. Malaysian Taxation Principles and Practice, Infoworld
Kasipillai, J. A Guide to Malaysian Taxation, McGraw Hill
Malaysian Master Tax Guide, CCH Asia Pte. Ltd.
Singh, V. Veerinder on Taxation, CCH Asia Pte. Ltd.
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Thornton, R. 100 Ways to Save Tax in Malaysia for SMEs, Sweet & Maxwell Asia
Thornton, R. & Kannaa T. Manual of Capital Allowances and Charges, CCH Asia Pte. Ltd.
Yeo, M.C., Alan. Malaysian Taxation, YSB Management Sdn Bhd

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: APRIL – JUNE 2023

Month /Event	Details				CPD Points
	Date	Time	Platform / Location	Speaker	
APRIL 2023					
Workshop: Tax Issues and Law Relating to Property Developers, JMB/MC, and Investors	4 April 2023	9 a.m. - 5 p.m.	Zoom Webinar	Dr. Tan Thai Soon	8
Workshop: Highlights of Budget Day & Finance Bill 2023	6 April 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Vincent Josef	8
Workshop: Tax Audits and Investigations	13 April 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Workshop: Review and Update on Public Rulings issued in the last 2 years	19 April 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Public Holiday *(Nuzul Al-Quran: 8 April, Hari Raya Puasa: 22 - 24 April)*					
MAY 2023					
Workshop: Learn to Develop, Build Upon and/or Appreciate the Importance of the Capital Statement in Tax Audits	8 May 2023	9 a.m. - 5 p.m.	Zoom Webinar	Ms. Karen Koh	8
Workshop: Submission of Return Forms 2022	9 May 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Vincent Josef	8
Workshop: Real Property Gains Tax (RPGT) (Re-Run Session)	10 May 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
HASiL-CTIM Tax Forum 2023	16 May 2023	9 a.m. - 5 p.m.	Berjaya Times Square Hotel, Kuala Lumpur	Various Speaker	8
Workshop: Tax Treatment on Interest – Common Issues and Latest Updates	23 May 2023	9 a.m. - 5 p.m.	Zoom Webinar	Ms. Karen Koh	8
Workshop: Business Tax - For Beginners	25 May 2023	9 a.m. - 5 p.m.	Renaissance Johor Bahru Hotel	Mr. Jesu Dason	8
Workshop: Corporate Tax Strategies (Re-Run Session)	31 May 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Public Holiday *(Labour Day: 1 May, Wesak Day: 4 May)*					
JUNE 2023					
Workshop: Tax Incentives	7 June 2023	9 a.m. - 1 p.m.	Zoom Webinar	Mr. Harvindar Singh	4
Workshop: The Appeal Process and Dispute Resolution Proceedings	13 June 2023	9 a.m. - 5 p.m.	Berjaya Times Square Hotel, Kuala Lumpur	Mr. Vincent Josef	8
Workshop: Qualifying Capital Expenditure & Allowances	15 June 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Jesu Dason	8
Workshop: Fundamentals of Capital Allowances (Re-Run Session)	20 June 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Public Holiday *(Agong's Birthday: 5 June, Hari Raya Qurban: 29 June)*					

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ENQUIRIES: Please contact the CPD Secretariat i.e Ms. Yus, Ms. Zaimah and Ms. Jaslina at 03-9212 7850 ext 122, 121 and 123 respectively or email to **cpd@ctim.org.my** for more information.