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DATO' SRI DR. MOHD NIZOM SAIRI IN CONVERSATION WITH CTIM

+ Capital Allowance For Computer Software
+ The Unilateral Imposition of Section 113(2) Penalty (Part 2)
+ Malaysian Budget 2023: Key Takeaways for Taxpayers

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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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contents

Tax Guardian

VOL.16/NO.3/2023/Q3
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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

PROPEL TO GREATER HEIGHTS

Greetings!

Welcome to the Quarter 3 issue of the *Tax Guardian.*

In a flash, we have now entered the second half of year 2023. The first six months witnessed successfully held events such as the Budget 2023 Seminars and the HASiL – CTIM Tax Forum 2023. As the President of CTIM, I am honoured to have a sit-down conversation on 11 April 2023 with Dato' Sri Dr. Mohd Nizom Bin Sairi, CEO of Lembaga Hasil Dalam Negeri where he shared with us his thoughts and vision. I am excited that this conversation is featured in this edition of the *Tax Guardian.*

Rounding up the first half of the year, the Institute concluded its 31st Annual General Meeting on 24 June 2023 at the Kuala Lumpur Convention Centre.

I would like to thank the CTIM Council for giving me the opportunity once again to lead CTIM as the President for the 2023/2024 term along with the Deputy President, Soh Lian Seng. I look forward to another exciting and fruitful year.

Datuk Koong Lin Loong and Mr. David Lai have retired from the CTIM Council after serving two consecutive four-year terms. My heartfelt appreciation to them for their immense contribution to CTIM which includes their respective chairmanship of the Membership Services Committee and Technical Committee – Indirect Taxation and their involvement in various other committees and CTIM's events. They have played an integral role in advancing the Institute. I would like to extend a warm welcome to Ms. Hii Chui Yung and Mr. Koo Kian Ming who are the new members of the Council as well as congratulate Mr. Alan Chung and Mr. Chong Mun Yew who have been re-elected to the Council after serving their first four-year term.

The Council for the 2023/2024 term will continue to carry on the agenda and propel CTIM to greater heights.

Besides the above, I am pleased to highlight some of the significant engagements and events that the Institute undertook during the previous quarter (April 2023 to June 2023) in the following order:

Submissions to the authorities

The following are the key submissions to the authorities from April 2023 to June 2023:

Inland Revenue Board of Malaysia (HASiL)

- CTIM Members' Issues Pertaining to the MyTax - Tax Agent e-Filing (TAeF), Organisational e-Filing (OeF) and Bill Number
- Joint Feedback on HASiL's e-Invoice Model
- Issues Pertaining to the Mandatory Field in the Form e-CP204
- Feedback on Declaration of Anti-Bribery & Compliance of Code of Ethics for Tax Agents under S.153(3) of the Income Tax Act 1967 and HASiL's Code of Ethics for Tax Agents (Revised 1-2023)
- Letter to HASiL – TAeF Portal for Special Voluntary Disclosure Programme (SVDP) 2.0
- Feedback/comments on the Income Tax Rules 2023 [P.U.(A) 165/2023 & P.U.(A) 166/2023] in relation to transfer pricing
- Joint Memorandum on Issues arising from the 2023 Budget and Finance Bill 2023
- Further clarification sought / comments on HASiL's response to CTIM's issues arising from HASiL's Guideline on Tax Treatment in relation to Income which is received from Abroad dated 29 September 2022 and 29 December 2022.

Royal Malaysian Customs Department (RMCD)

- Comments on Luxury Goods Tax
- Comments on Voluntary Disclosure Programme (VDP).

Ministry of Finance (MoF)

- Joint Memorandum on Issues arising from the 2023 Budget and Finance Bill 2023
- Memorandum on Indirect Tax Issues arising from the 2023 Budget Speech and Appendices
- Comments on Draft Guidelines and FAQ of the SVDP 2.0 and VDP.

Securities Commission

- 2024 Budget Memorandum on Tax Issues relating to the Capital Market.

Meetings with the authorities

- E-Invoice session chaired by HASiL on 3 April 2023
- Technical Working Group on Taxation (TWGT) Meeting No.2/2023 on 12 April 2023
- CTIM presentation on tax incentives related to research and development to the Minister of Science, Technology and Innovation and his senior ministry officers on 12 April 2023
- Meeting with the Tax Operations Department and the Revenue Collection Department of HASiL on MyTax issues which was held on 14 April 2023
- Capital Gains Tax brainstorming session chaired by MoF on 17 April 2023
- Meeting with MoF on SVDP 2.0 and VDP together with PEMUDAH and the Malaysian Institute of Accountants on 4 May 2023
- Meeting with MoF to discuss CTIM's feedback on SVDP 2.0 and VDP matters on 22 May 2023
- Customs-Private Sector Consultative Panel (CPSCP) Meeting No. 1/2023 (Mesyuarat Panel Perundingan Kastam-Swasta Bil. 1/2023) on 16 May 2023
- TWGT workshop on tax recognition upon physical completion of construction projects on 24 May 2023
- Task Force on Incentive Review meeting on 7 June 2023
- TWGT Subgroup Meeting: RMCD and Simplification of Advance Ruling Procedure (SAR) No. 2/2023 on 12 June 2023
- Dialogue on Joint Memorandum on Issues arising from the 2023 Budget and Finance Bill 2023 chaired by HASiL on 21 June 2023
- Workshop with MoF from 23 to 25 June 2023 on Incentive Review and GloBE Rules, Pillar 2, Taxation of Digital Economy.

CPD Events

One of the Institute's key events, the HASiL - CTIM Tax Forum 2023 was held on 30 May 2023 which has provided a platform for the dissemination and discussion of the latest issues on taxation between the tax authorities and tax professionals. I wish to thank the speakers, moderators and panellists for making the Forum a success and the sharing of knowledge and information that is crucial and beneficial to all.

Another key event, the National Tax Conference 2023 would be held on 1 and 2 August 2023, with the theme of Taxation: Driving Force for Economic Sustainability. This informative conference is now a hybrid event held over two days. This is an event that you would not want to miss with the participation of tax administrators, economists, industry experts and tax practitioners joining hands together to present updates and insights on the economy and taxation.

Examination & Education

The June 2023 Examination was held online from 19 to 22 June 2023. A total of 119 students registered for 149 papers over 8 subjects. My best wishes to them that this will be a further step forward to their respective careers.

On 24 June 2023, CTIM held its 26th Graduation and Prize Giving Ceremony at the Kuala Lumpur Convention Centre. The Guest of Honour; Mr. Hisham Rusli, Deputy Chief Executive Officer (Management) of the HASiL presented certificates to graduates who attained the CTIM Professional Qualification in Taxation. I would like to congratulate all CTIM graduates and book winners.

More information on Examination and Education can be found in the Institute News section of the *Tax Guardian*.

Thank you and well wishes

The Council and I would also like to take this moment to thank all CTIM members and friends for their support and participation in the CTIM's events and activities.

We have lined up exciting events for the second half of 2023 and look forward to your participation. Stay tune and take care.

Editor'sNote

ALAN CHUNG

A delegation from the Institute comprising of our President, Mr Chow Chee Yen, myself as the Editor of *Tax Guardian* and members of the Secretariat had recently visited the office of Dato' Sri Dr. Mohd Nizom bin Sairi, the Director General of Inland Revenue (DGIR) / Chief Executive Officer (CEO) of HASiL, to interview him for an article that is published in this issue of *Tax Guardian*. It was déjà vu as I was also part of the Institute's (known then as the Malaysian Institute of Taxation or MIT) team, when we interviewed the then DGIR/CEO, Tan Sri Zainol Abidin Rashid. I represented the Secretariat then but it is surreal to me now as I had arranged for that interview some 20 odd years ago with Dato' Sri Dr. Mohd Nizom, who was then the Special Assistant for Tan Sri Zainol Abidin Rashid!

The CEO of HASiL shared with us during the interview, the various measures including the Special Voluntary Disclosure Programmes that he has embarked on since assuming the role. He also shared, amongst others, his push to adopt new technologies, the use of data analytics and artificial intelligence in his aspirations to transform the HASiL and foster a compliance culture. This culminated to a record collection by HASiL in 2022 that exceeded RM139 billion. A longtime fan of Arsenal, Dato' Sri Dr. Mohd Nizom also openly shared his personal life in our candid interview, including details of his humble upbringing in a FELDA settlement and how it has shaped him. The Institute appreciates Dato' Sri Dr. Mohd Nizom for taking time off his busy schedule to share these with us. I am sure members will find our interview an interesting read in this issue of *Tax Guardian*.

This year thus far has seen a number of significant changes in the local tax scheme. Several of these were announced in Budget 2023 which was re-tabled in February. One of the most talked about measures announced by the Honourable Finance Minister has to be the re-introduction of the Special Voluntary Disclosure Programme (SVDP) for direct taxes and the renamed Voluntary Disclosure Programme (VDP) for indirect taxes.

Previously taunted as once-in-a-lifetime programmes, the re-introduction of SVDP and VDP has raised a few eyebrows. Such programmes are double-edged swords. While they allow

the government's revenue to be boosted quickly, it does not encourage taxpayers to be diligent and compliant. On the contrary, diligent taxpayers and those who have previously paid penalties could feel that such programmes are inequitable. This unfortunately, could work against inculcating a compliance culture and at its worst, may even promote non-payment of penalties and compounds. If we would just look at our current situation with traffic summons… enough said.

The SVDP and VDP by themselves are not the solutions to improve the nation's fiscal position in the longer term, as they are time-limited and short-term measures. It is not surprising then that other measures including Capital Gains Tax and Luxury Goods Tax were also announced in Budget 2023 to boost the government's revenue base. They are integral to the goal to improve Malaysia's fiscal position which is targeted to be reduced from 5.6% in 2022 to 5% in 2023. In the medium term, the target has been set to reduce further to 3.2% of the country's gross domestic product by 2025. Capital Gains Tax and Luxury Goods Tax are longer term measures towards the goal of a lower fiscal deficit, ultimately to a balance budget which has eluded Malaysia for decades.

The introduction of new taxes is never popular with the public. Negative reactions and push backs are abound for both these taxes since the announcement, despite the fact that details, including the scope and implementation date, are not known as yet. More details will likely be unveiled later in the year, perhaps in Budget 2024. In the meantime, there are intense speculations as to what will be subject to Capital Gains Tax and what will be deemed as luxury goods that will be subject to Luxury Goods Tax.

The implementation of these taxes could be challenging and push-backs from the public is the least of the challenges. Gains from trading in the local stock exchange for example, is one obvious type of capital gains that may be subject to tax. It needs to be carefully deliberated and considered as subjecting gains from the stock exchange to Capital Gains Tax could have various impact on investments including those from abroad, and this will obviously impact the economy.

The concept of Luxury Goods Tax may

also appear to be a simple and easy tax to apply. However, it is a complex exercise to define the types of goods that will be subject to Luxury Goods Tax. A basic good to one person may be a luxury good to the next person. Take mobile phones for instance, it would be quite unimaginable for a majority of us, to go around our daily tasks without one. Yet, if you are struggling to put food on the table, a mobile phone would be the last thing on your mind – a true luxury. In addition, mobile phones and certain types of goods such as watches has a broad price range. They may be cheap for basic models with entry level prices and astronomical prices for high end models and luxury brands that are beyond the reach of an average salaried employee. As the saying goes, the devil is in the details.

Luxury Goods Tax is not as simple as many would imagine, as it is not necessarily easy to apply on goods such as yachts and private jets which are obviously luxuries. After all, how many of these were purchased or registered in Malaysia? If they were to be subjected to Luxury Goods Tax, how can we prevent the uber rich from circumventing it by purchasing them outside of Malaysia and bringing them back into Malaysia?

Surely there have been intense discussions to iron out these before the implementation of these two new taxes. The Institute has already made several representations to the relevant authorities and we will certainly strive to be in the forefront to contribute our comments, to ensure the interest of both the nation and taxpayers alike are safeguarded. We hope that ample time will be provided for consultation with the relevant stakeholders including the Institute and its eventual implementation.

Budget 2024 is just around the corner while the dust from the tabling of Budget 2023 in February is just beginning to

settle. The second budget to be tabled in a short span of just a few months, more proposals are likely to be announced to push the *Rahmah* and MADANI agenda further, and to combat the twin headwinds of inflation and economic uncertainties. The Institute has already presented our views and proposals, and our representative has recently attended a consultation meeting with the Ministry of Finance on Budget 2024. We hope our proposals will be given the due consideration and that more details on Capital Gains Tax and Luxury Goods Tax will be announced to provide better clarity on the roadmap for their implementation.

Moving ahead, the portfolios of members of the Council have changed recently after our Annual General Meeting in June 2023. This will be my last note as the Editor of *Tax Guardian* as I will be assuming different roles in the Council and taking on different challenges. Whilst I will remain in the Editorial Committee, my fellow Council Member, Mr. Chong Mun Yew will take over as the next Editor of *Tax Guardian*. He is no stranger to *Tax Guardian* as he is a long serving member of the Editorial Committee as well as author of several interesting articles.

There are too many positive adjectives to describe my brief journey leading an Editorial Committee comprising of so many esteemed tax practitioners, as well as working with highly regarded authors who are ever ready too to contribute their knowledge and experience. It has been my all too humbling pleasure to have work with all of you. No words could fully describe my gratitude and I thank you from the bottom of my heart for the fantastic experience. To the readers and members of the Institute, we will aim to do even better under the leadership of a very capable and multi-talented new Editor.

Au revoir!!!

InstituteNews

COURTESY VISIT TO HASIL SABAH STATE DIRECTOR

On 23 March 2023, CTIM Sabah Branch paid a courtesy visit to meet HASiL Sabah State Director, Datuk Hajam bin Lajah Alam and his team of Operation Directors. CTIM Sabah Branch Chairman, Mr. Chu Vun Henn represented CTIM in the visit.

CAREER TALKS

The Education Committee of CTIM conducted two career talks on "Career in Taxation" in Sabah to promote and emphasise the importance of obtaining CTIM Professional qualification. Details are as follows:

No	University	Programme	Speakers	Date	No. of students
1	INTI College Sabah	• Diploma in Accounting • Diploma in Business • BA (Hons) Accounting and Finance • BA (Hons) Business Administration	Mr. Chu Vun Henn, Speaker Sharing session: Ms. Peggy Lee Ms. Dora Wong Mr. Ngui Pak Yung Ms. Sandra Thien	15 May 2023	36
2	Tunku Abdul Rahman University of Management and Technology (TARUMT), Sabah	• Diploma in Accounting • Bachelor of Business (Hons) Accounting and Finance;	Mr. Chu Vun Henn, Speaker Sharing session: Ms. Peggy Lee Ms. Dora Wong Mr. Ngui Pak Yung Ms. Sandra Thien	15 May 2023	60

HASIL - CTIM TAX FORUM 2023

The HASiL - CTIM Tax Forum 2023, one of the most exciting events in our collaboration with Lembaga Hasil Dalam Negeri (HASiL), was held on 30 May 2023. The forum comprised five sessions and covered a wide range of tax issues including The Future of Tax Going Forward, the Special Voluntary Disclosure Programme (SVDP 2.0), Taxation of Foreign Source Income, Exemption & Economic Substance Criteria, Topics Related to the 2023 Budget and Current Compliance Issues.

JUNE 2023 CTIM EXAMINATION

The June 2023 Examination was held online from 19 to 22 June 2023. A total of 119 students registered for 149 papers over eight subjects.

CTIM EXAMINATION SYLLABUS REVIEW

The Examination Committee has conducted a syllabus review exercise and the amended syllabus will be effective from December 2023 Examination.

ANNUAL GENERAL MEETING 2023

The Chartered Tax Institute of Malaysia held its 31st Annual General Meeting (AGM) on 24 June 2023 at the Kuala Lumpur Convention Centre.

The Institute would like to thank Datuk Koong Lin Loong and Mr. David Lai for their immense contribution as they ended their tenure as CTIM Council Members. A warm welcome to Ms. Hii Chui Yung and Mr. Koo Kian Ming who were elected as new members of the Council.

The Council has re-elected Mr. Chow Chee Yen as the President and Mr. Soh Lian Seng as the Deputy President for the term 2023/2024. Also re-elected to the Council are Mr. Alan Chung and Mr. Chong Mun Yew after serving their first four-year term.

26th GRADUATION AND PRIZE GIVING CEREMONY

On 24 June 2023, CTIM held its 26th Graduation and Prize Giving Ceremony at the Kuala Lumpur Convention Centre.

Students, families, council members, examiners and sponsors came together to celebrate the achievements of our taxation students.

We are proud to have our Guest of Honour; Mr Hisham Rusli, Deputy Chief Executive Officer (Management) of the Inland Revenue Board of Malaysia to present the certificates to graduates who attained the CTIM Professional Qualification in Taxation.

We would also like to thank our sponsors Grant Thornton Malaysia, BDO, Deloitte, KPMG, YYC, Ernst & Young, Crowe KL, and PricewaterhouseCoopers, who have sponsored the prizes for the book prize winners of the various taxation papers.

Congratulations to all CTIM graduates and book prize winners.

CPD EVENTS (1 March – 30 June 2023)

The following CPD events were successfully conducted:

Topic	Date	Speaker/(s)
Workshop: Tax Implications on Business Restructuring	6 March 2023	Mr. Chong Mun Yew & Mr. Michael Cheah
Workshop: Most Important Tax Updates in 2022 That You Must Know (Re-Run)	10 March 2023	Mr. Zen Chow
Workshop: Tax Agents Under Section 153(3) of the Income Tax Act 1967	15 March 2023	Ms Karen Koh
2023 Budget Seminar	20 March 2023	Various Speakers
2023 Budget Seminar	23 March 2023	Various Speakers
2023 Budget Seminar	28 March 2023	Various Speakers
Workshop: Cross Border Transactions And Withholding Tax	30 March 2023	Mr. Harvindar Singh
Workshop: Tax Issues and Law Relating to Property Developers, JMB/ MC, and Investors	4 April 2023	Dr. Tan Thai Soon
Workshop: Highlights of Budget Day & Finance Bill 2023	6 April 2023	Mr. Vincent Josef
Workshop: Tax Audits and Investigations	13 April 2023	Mr. Harvindar Singh
Workshop: Review and Update on Public Rulings issued in the last 2 years	19 April 2023	Mr. Harvindar Singh
Workshop: Learn to Develop, Build Upon and/or Appreciate the Importance of the Capital Statement in Tax Audits	8 May 2023	Ms. Karen Koh
Workshop: Submission of Return Forms 2022	9 May 2023	Mr. Vincent Josef
Workshop: Real Property Gains Tax (RPGT) (Re-Run)	10 May 2023	Mr. Harvindar Singh
Workshop: Tax treatment on Interest – Common issues and latest updates	23 May 2023	Ms. Karen Koh
Workshop: Business Tax - For Beginners	25 May 2023	Mr. Jesu Dason
HASiL-CTIM Tax Forum 2023	30 May 2023	Various Speakers
Workshop: Corporate Tax Strategies (Re-Run)	31 May 2023	Mr. Harvindar Singh
Workshop: Tax Incentives in Malaysia (HALF-DAY WORKSHOP)	7 June 2023	Mr. Harvindar Singh
Module 1: Basics of the Malaysia Tax System (Collaboration with MAICSA)	7 June 2023	Mr. Chong Mun Yew & Mr. Michael Cheah
Module 2: Basics of the Malaysia Tax System (Collaboration with MAICSA)	14 June 2023	Mr. Chong Mun Yew & Mr. Michael Cheah
Workshop: Qualifying Capital Expenditure & Allowances	15 June 2023	Mr. Jesu Dason
Members' Dialogue (Northern)	19 June 2023	Mr. Zen Chow & PPC Members
Workshop: Fundamentals of Capital Allowances (Re-Run)	20 June 2023	Mr. Harvindar Singh
Module 3: Capital Allowances and Reinvestment Allowance (Collaboration with MAICSA)	20 June 2023	Mr. Chong Mun Yew & Mr. Michael Cheah
Module 4: Business or Employment Income (Collaboration with MAICSA)	26 June 2023	Mr. Chong Mun Yew & Mr. Michael Cheah
Workshop: Taxation of Foreign Source Income (FSI)	26 June 2023	Ms. Yong Mei Sim

DATO' SRI DR. MOHD NIZOM SAIRI

IN CONVERSATION WITH CTIM

Good Morning Dato' Sri Dr. Mohd Nizom Bin Sairi. It is a great pleasure to meet you in person and having this opportunity to speak to you on current issues and your thoughts on some of the important issues as the CEO of the HASiL. The recent hot topics have been the Budget 2023, the Special Voluntary Disclosure Programme 2.0, Tax Corporate Governance and Digitalisation. Besides that, many would be interested to know you better in person. I look forward to our conversation and we would like to hear more from you.

Q1 BUDGET 2023 ANNOUNCED THAT HASIL WILL REINTRODUCE THE SPECIAL VOLUNTARY DISCLOSURE PROGRAMME OR I WOULD CALL IT SVDP 2.0 FROM JUNE 2023 TO MAY 2024 WITH 0% PENALTY.

- **(a) Will SVDP 2.0 be similar to the previous SVDPs and what would be the pertinent disparity, if any?**
- **(b) What kind of assurance can HASiL give to taxpayers in relation to this coming SVDP 2.0?**
- **(c) What would be HASiL's expectation or target with regard to SVDP 2.0 in terms of participation from taxpayers and the revenue collection?**

Dato' Sri Dr. Mohd Nizom Bin Sairi

Thank you for the opportunity to discuss these important points. I believe it is crucial that the information we cover today reaches your members and taxpayers. Let's start by addressing the comparison between the first and second versions, 1.0 and 2.0, of the special voluntary disclosure programmes or SVDP. While there may seem to be some similarities in the initiatives, nevertheless there are some notable differences. One of the key differences is in terms of the penalty structure. Under SVDP 2.0, a 0% penalty regime is in place, as compared to the reduced penalty rate of 15% and 10% under the previous SVDP.

In terms of participation, we have estimated around 50,000 individuals to be involved, which we believe will contribute to increasing compliance in the country.

One of our objectives is to align with the current government's initiatives, particularly their focus on building a civilised society (Membina Negara Madani). We aim to create avenues for people to come on board and actively participate in the initiative. Rather than dwelling on past mistakes, we are determined to focus on moving forward and ensuring a smooth journey for all taxpayers involved.

We acknowledge that many potential new taxpayers may be hesitant to come forward due to a lack of proper documentation. It is crucial for them to understand that we are here to support and accept them, placing emphasis on tax declaration as a key priority. Our primary goal is to guide and assist individuals in becoming good taxpayers. Rest assured, our promise to provide guidance and support remains unwavering.

In summary, our focus is bringing people on board, streamlining the process, and expending energy in assisting individuals to fulfil their tax obligations. We are committed to working closely with taxpayers, providing them the necessary guidance and assurance, while aligning ourselves with the vision of the current government. Our objective is to ensure everyone gets on board the voluntary compliance journey, as we work to build this nation through the taxes we pay.

Q2 HAS THE GOVERNMENT OR HASIL DECIDED WHETHER THE CAPITAL GAINS TAX WILL BE PART OF THE INCOME TAX ACT 1967 OR WOULD IT BE A STAND-ALONE ACT?

Dato' Sri Dr. Mohd Nizom Bin Sairi

Thank you for raising this important topic. I must emphasise that the Tax Division under the Ministry of Finance (MOF), along with HASiL is currently dedicating substantial efforts to study this matter. We understand the significance of benchmarking best practices from various jurisdictions to ensure that we adopt the most effective approach.

By examining the experiences and practices of other countries, we aim to identify the best way to initiate and spearhead this initiative. This comprehensive research will serve as a foundation for policy decisions, which will be disclosed in the upcoming Budget 2024. It is essential to take a thoughtful and strategic approach to ensure that our policies are well-informed and comprehensive.

We acknowledge that there is much to consider in terms of the best practices and the specific steps needed to move forward. Therefore, we are committed to utilising the information gathered through our studies and leveraging the budget announcement as an opportunity to present a well-rounded and comprehensive plan.

It is crucial to approach this initiative with the utmost care and diligence to ensure its success. As we delve deeper into our research and analyse the practices implemented by other countries, we will be better equipped to make informed decisions and develop a framework that addresses the specific needs of our nation.

Rest assured, we are dedicated to creating a robust and effective approach that aligns with our objectives and priorities. By leveraging the insights gained from our studies and capitalising

> **"One of our objectives is to align with the current government's initiatives, particularly their focus on building a civilised society (Membina Negara Madani). We aim to create avenues for people to come on board and actively participate in the initiative. Rather than dwelling on past mistakes, we are determined to focus on moving forward and ensuring a smooth journey for all taxpayers involved."**

on the upcoming Budget 2024, we will be able to unveil a comprehensive strategy that sets us on the right path to achieving our goals.

Q3 ONE OF THE 12 MAIN MEASURES OF BUDGET 2023 IS "PRIORITISING DIGITAL AGENDA". CAN YOU SHARE MORE ON DIGITALISATION OF HASIL ITSELF AND THE INTRODUCTION OF E-INVOICING?

- **(a) Would we be expecting further updates on the guidelines or FAQ on e-invoicing? It is crucial for taxpayers to be aware of its implementation issues.**
- **(b) Can you share more on HASiL's plans in supporting taxpayers on their tax obligations in relation to e-invoicing?**
- **(c) What about the deployment of AI (Artificial Intelligence)? Will it affect the role of tax agents?**
- **(d) How do you think ESG (Environmental, Social and Governance) will affect taxation?**

Dato' Sri Dr. Mohd Nizom Bin Sairi

In our organisation, we have been at the forefront of rolling out the government's plans, and it is indeed an exciting and transformative initiative. The advantages it brings are numerous, especially considering the present status of digitalisation. By implementing this plan, we are capitalising on the opportunities presented in the digital era, where business transactions and documentations are conducted entirely in a digital format.

The integration of machines and advanced technologies allows for a streamlined and efficient process. With everything being interconnected in one system, businesses can benefit from increased accuracy, reduced manual errors and enhanced productivity. The implementation of standardised invoices, not only in appearance but also in terms of the required content such as descriptions and pricing, is a significant advancement.

It is important to acknowledge that implementing such a comprehensive system was challenging when it was first introduced 20 years ago. However, with the rapid advancements in technology, we now have the tools and capabilities to successfully execute this plan. Leveraging cutting-edge technology enables us to simplify and automate complex processes, ultimately improving the overall business environment.

> **"The integration of machines and advanced technologies allows for a streamlined and efficient process. With everything being interconnected in one system, businesses can benefit from increased accuracy, reduced manual errors and enhanced productivity. The implementation of standardised invoices, not only in appearance but also in terms of the required content such as descriptions and pricing, is a significant advancement."**

By embracing this digital transformation, we are positioning ourselves and our taxpayers to reap the rewards of a modern and efficient system. The opportunities presented by this initiative are significant, and it is essential that we act now to ensure we do not miss out on the benefits. We are committed to staying ahead of the curve and leveraging advanced technology to drive positive changes and enhance business perspectives. In summary, the government's plans are

"One key aspect of this transformation is the integration of artificial intelligence (AI) into our processes. AI has the ability to analyse vast amounts of data and identify patterns that may indicate potential discrepancies or irregularities. For example, by analysing transactional data over a span of five years, AI can detect anomalies that deviate from the norm. This proactive approach allows us to alert businesses to any unusual activities, encouraging them to review and rectify any potential errors or omissions."

exciting opportunities for us to embrace digitalisation and leverage advanced technology. By implementing these initiatives, we can streamline processes, standardise invoices, and seize the advantages presented by a fully digitalised business environment.

The e-invoice initiative is underway currently, with numerous engagement sessions taking place between the tax authority and the relevant stakeholders. The benefits of implementing e-invoice are well acknowledged by tax administrations around the world. In general, the implementation of e-invoice in Malaysia has the potential to improve the quality of services, reduce compliance costs for taxpayers, and enhance the efficiency of business operations. By implementing e-invoice, the government is able to tackle the issue of the shadow economy that results in leakages of national tax revenue. We will provide taxpayers with e-invoice implementation guidelines and Frequently Asked Questions (FAQs). In addition, there will be explicit instructions for transmitting the invoice.

As regard to data analytics, indeed, it has become a critical component in today's business landscape. The availability of vast amounts of data presents us with an incredible opportunity to leverage its potential and extract valuable insights. By analysing this data, we can uncover meaningful patterns, trends, and correlations that can drive informed decision-making and shape strategies for success.

The dynamic nature of the tax profession demands that we adapt to the evolving landscape. As we move forward, we anticipate both minor and major changes in our roles and responsibilities. Technology will play a significant role in shaping these changes, particularly in the area of tax audit and compliance.

One key aspect of this transformation is the integration of artificial intelligence (AI) into our processes. AI has the ability to analyse vast amounts of data and identify patterns that may indicate potential discrepancies or irregularities. For example, by analysing transactional data over a span of five years, AI can detect anomalies that deviate from the norm. This proactive approach allows us to alert businesses to any unusual activities, encouraging them to review and rectify any potential errors or omissions.

As tax professionals, the role of tax agents will shift towards managing risks and looking ahead. They will need to be more focused on analysing and interpreting real-time data to identify potential tax implications and mitigate risks for their clients. Instead of relying solely on retrospective audits, they will need to proactively assist businesses in complying with tax regulations by providing real-time insights and guidance.

This shift towards real-time tax compliance is aimed at driving voluntary compliance among taxpayers. By showcasing the power of technology and its ability to identify discrepancies, we can encourage taxpayers to come forward and meet their tax obligations promptly. Real-time tax monitoring and analysis will provide

businesses with greater transparency and enable them to make informed decisions in real-time, ensuring compliance and minimising potential risks.

In summary, the tax profession is on the cusp of significant change. The integration of AI and real-time tax monitoring will transform the way they operate, shifting focus towards managing risks and providing proactive guidance. By leveraging technology and embracing real-time compliance, together we can create an environment of voluntary compliance, foster transparency, and ensure the efficient and effective management of tax obligations for businesses and individuals alike.

I believe that the majority of people strive to comply with the law because they understand the importance of doing what is right and contributing to the betterment of society. Compliance with tax obligations is a natural part of being a responsible citizen and fulfilling our civic duties. Coming from the tax administration viewpoint, my vision is to create a future where individuals and businesses can go to bed each night with the peace of mind that their tax obligations have been met. This dream encompasses a society where compliance is not viewed as a burden or a chore, but rather as a natural and integral part of our daily lives.

By fostering an environment of education, transparency, and support, we can empower individuals and businesses to understand their tax obligations and fulfil them willingly. It is crucial to provide clear guidance, accessible resources, and effective communication channels to ensure that taxpayers have the knowledge and tools they need to comply with tax laws. Additionally, simplifying the tax system and reducing unnecessary complexities can contribute to a more seamless and efficient compliance process. When individuals and businesses find it easier to meet their tax obligations, it enhances their willingness to comply and reduces the likelihood of unintentional errors or omissions.

Furthermore, fostering a culture of trust between taxpayers and tax authorities is essential. Open and honest communication, as well as fair and consistent enforcement, can go a long way in building this trust. When taxpayers have confidence that their compliance efforts will be recognised and appreciated, it further reinforces their motivation to fulfil their tax obligations diligently. By promoting education, transparency, simplicity, and trust, we can build a culture of voluntary compliance and ensure that individuals and businesses fulfil their tax obligations willingly. This vision aligns with the shared goal of a thriving and prosperous society where everyone contributes their fair share towards the common good.

To achieve higher compliance rates, it is important to adopt a comprehensive and sustainable approach rather than relying solely on enforcement measures. While enforcement plays a role in ensuring compliance, it is not the sole solution to fostering a culture of tax compliance. In today's digital era, technology has become a powerful tool that can facilitate and streamline tax compliance processes. By harnessing the potential of technology, we can create an environment where compliance becomes a natural and seamless part of business operations and individual responsibilities.

In conclusion, to achieve higher compliance rates, we must embrace technology as a catalyst for sustainable compliance. By leveraging technological advancements, simplifying processes, and enhancing taxpayer education, we can create an environment where compliance comes naturally. This approach not only improves efficiency but also promotes a culture of voluntary compliance, ultimately leading to a more equitable and prosperous society.

Q4 THE GOVERNMENT HAS ALLOCATED RM386.1 BILLION IN THE BUDGET 2023, BEING THE LARGEST SO FAR. THE YEAR 2022 WAS THE YEAR HASIL RECORDED THE BIGGEST COLLECTION IN ITS HISTORY EXCEEDING THE TARGET SET OF RM139 BILLION. CONGRATULATIONS DATUK. THIS ACHIEVEMENT ALSO STRENGTHENS THE BOARD'S POSITION AS THE NUMBER ONE AGENCY IN TERMS OF CONTRIBUTIONS TO THE COUNTRY'S REVENUE.

WITH THAT SAID, HOW WOULD HASIL MEET THE TARGETED REVENUE COLLECTION OF OVER RM164 BILLION (42.5% X RM386.1 BILLION) AS PROJECTED? WILL WE EXPECT MORE TAX AUDITS AND INVESTIGATIONS BEING CONDUCTED BY HASIL IN THE YEAR 2023?

Dato' Sri Dr. Mohd Nizom Bin Sairi

In 2022, our original target was

set at RM160 billion. However, we surpassed expectations and achieved a remarkable RM175.4 billion, making it a record-breaking year for us. This exceptional performance demonstrates our commitment and competence in improving the compliance level in the country.

Looking ahead to 2023, the government has set a target of RM176.1 billion, reflecting confidence in sustaining and building upon our success. We believe that with our continued efforts and the evolving strategies implemented, this target is attainable.

In order to achieve the original target in 2022, we recognised the need to approach our audit and investigations differently. Rather than solely focusing on enforcement measures, we have shifted our focus to facilitating compliance and supporting taxpayers. We have adopted a more cooperative and educative approach, guiding and explaining the necessary processes to ensure compliance. By doing so, we aim to build trust and create a safe tax ecosystem that encourages voluntary compliance. To efficiently carry out audits and ensure that all relevant cases are thoroughly examined, we have embraced technology as a valuable tool. Leveraging technology has allowed us to streamline our processes and improve the effectiveness of our audit and investigations. This approach enables us to identify potential discrepancies and address them promptly, thereby promoting a higher level of compliance. One important aspect we have come to understand is the role of human nature in the audit process. Historically, confrontational approaches would often result in defensive behaviour from taxpayers. However, by adopting a more cooperative stance, explaining and guiding taxpayers through the process, we have witnessed a significant change in their responses. Taxpayers are more willing to accept our guidance

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and adhere to the regulations, which further strengthens compliance.

Our ultimate goal is to instil trust in our taxpayers towards the tax system. By adopting a more supportive and educational approach, we are building relationships based on mutual understanding and cooperation. We want taxpayers to trust that we are here to assist and guide them, rather than merely being an authority figure demanding compliance. This shift in focus has not only improved the taxpayer experience but also enhanced overall compliance levels.

In conclusion, we are proud of our achievements in surpassing targets and fostering a more cooperative environment in tax compliance. With the lessons learned and strategies implemented, we are confident that we will continue to build trust, enhance compliance and create a safe tax ecosystem in the years to come.

Q5 TAX CORPORATE GOVERNANCE OR TCG WAS INTRODUCED IN MALAYSIA IN APRIL 2022. TCG IN MALAYSIA IS CURRENTLY BEING IMPLEMENTED AS A PILOT PROJECT AND IT WILL BE IMPLEMENTED IN TWO PHASES. THE PILOT PROJECT PHASE COMMENCED IN JUNE 2022 AND IS EXPECTED TO END IN JUNE 2024. THE PROGRAMME WILL BE OPENED TO EVERYONE DURING THE SECOND PHASE (POST-PILOT).

- **(a) Since the implementation of the TCG, can you share with us, what is the progress of TCG in phase 1 so far in terms of creating awareness and educating corporate taxpayers?**
- **(b) What are the feedback / responses from taxpayers?**
- **(c) What would be your advice to taxpayers out there in relation to TCG?**

Dato' Sri Dr. Mohd Nizom Bin Sairi

At this stage, we are still in the initial phase of implementing the project. We have received a good response from the taxpayers and while we have started with a few participants, we acknowledge that we are relatively new to this initiative. However, we have sufficient resources allocated, and both parties involved are actively engaged in the learning process.

We understand the importance of taking a measured and realistic approach rather than being overly ambitious in terms of the number of participants. We have carefully considered the level of engagement and feedback received, which has been largely positive. This feedback has given us confidence that we are heading in the right direction.

We are also mindful of learning from the experiences of other countries that have successfully implemented similar programmes, incorporating good governance practices into our own implementation strategy. We are committed to adapting and refining our approach based on these learnings.

Currently, we have secured the participation of more than 10 taxpayers and we believe that this number is sufficient to initiate the programme. Our focus is on ensuring a successful implementation that generates interest and participation from taxpayers. We are optimistic that both parties involved will learn and adapt quickly to ensure the programme's success.

In summary, while we are still in the early stages, we have received positive responses and have enough participants to begin the programme. We are committed to learning from best practices, adapting our approach and generating interest among taxpayers. Our ultimate goal is to create a programme that benefits all and contributes to a more effective and efficient tax ecosystem.

Q6 AS THE CEO OF HASIL FOR THE PAST TWO YEARS, WHAT WOULD YOU SAY IS YOUR BEST ACHIEVEMENT? WHAT ARE THE FUTURE GOALS OF HASIL FOR THE TAX FRATERNITY IN MALAYSIA?

Dato' Sri Dr. Mohd Nizom Bin Sairi

As a leader, I believe that revenue should not be the sole measure of achievement. It is merely an outcome of the work we do. For me, the task of driving major changes starts from within, right from the first day in office. One of the key changes I implemented was dropping the focus on the amount of revenue collected as a key performance indicator (KPI) for the auditors. Instead, we shifted our focus to measuring their performance through other KPIs that truly reflect their contributions. When I communicated this to my team, the feedback was encouraging and I could sense a feeling of relief among them. I strongly believe in treating people as human beings and understanding human nature. We all strive to do our best and as we progressed, it became evident that this approach was successful.

Q7 TELL US MORE ABOUT YOUR HOME (FAMILY), HOBBY, HIGH SCHOOL, YOUR HERO AND TELL US SOMETHING ABOUT YOURSELF THAT NOBODY KNOWS.

Dato' Sri Dr. Mohd Nizom Bin Sairi

If we delve into my personal life, my upbringing in Felda played a significant role in shaping me. I grew up in one of the earliest Felda settlements in the country, in Ulu Selangor, about 25 kilometres from Tanjung Malim. It

was a humble upbringing with limited opportunities to go out, as we lacked transportation. The bicycle was the primary mode of transportation for my family. Despite these challenges, I was fortunate enough to be selected by the government to attend SMK Tuanku Abdul Rahman, a boarding school in Ipoh. Those years from 1975 to 1979 brought about a significant change in my life. Living in a boarding school environment was different, and it had a profound impact on me. It instilled discipline, resilience, and independence, which have shaped my character.

In terms of personal heroes, I don't have a specific person in mind. However, throughout my life, I have admired national leaders who have dedicated themselves to developing people and making a positive impact on society.

As for hobbies, they have evolved over time. During my childhood, I enjoyed activities like fishing. As I grew older, my interests shifted toward outdoor sports, such as scuba diving. I have even obtained a diving license and conquered Mount Kinabalu. I have also indulged in thrilling adventures like water rafting in Raub, Padas, and Kulim.

When it comes to my nature, I am generally reserved and find happiness in being with myself. I appreciate solitude and value introspection.

In summary, my approach to leadership focuses on more than just revenue. I believe in driving major changes from within and I have witnessed the positive impact it has had on my team. My upbringing in Felda and experiences in a boarding school have shaped me and I admire leaders who prioritise the development of the people. My hobbies have evolved over time, and I find contentment in my own company.

MALAYSIAN BUDGET 2023 KEY TAKEAWAYS FOR TAXPAYERS

Adeline Wong, Kellie Allison Yap & Jeff Sum Wai Loon

A. INTRODUCTION

Previously on 7 October 2022, the then Minister of Finance, Datuk Seri Tengku Zafrul Abdul Aziz, tabled the Malaysian Budget 2023 with the allocation of RM372.3 billion (surpassing the RM322.1 billion allocated for Budget 2022). However, the Budget 2023 was not passed as the Malaysian Parliament was dissolved shortly after on 10 October 2022, leading to the 15th general election. This led to a temporary impasse and a state of uncertainty as the government's budget is pivotal in outlining the agenda and fiscal strategy for the year.

After the new Unity Government took office, the Prime Minister and Minister of Finance, YAB Dato' Seri Anwar Ibrahim re-tabled the Malaysian Budget 2023 themed 'Building Malaysia Madani' ("Budget") on 24 February 2023. The Budget revolves around the core values of Sustainability, Compassion, Respect, Innovation, Prosperity and Trust. The Budget has three primary areas of focus, which are:

(i) driving an inclusive and sustainable

economy
(ii) inspiring confidence through institutional and governance reforms; and
(iii) facilitating social justice through reducing inequality.

The Budget was announced against a backdrop of projected economic growth of 4.5% this year. At RM388.1 billion, it is Malaysia's largest expansionary budget in history.

In administering taxes, the government plans to implement a tax structure that is progressive and equitable in its allocation of revenue, where taxpayers shoulder a tax burden that is proportionate to their income level. Whilst there are no plans at this stage to re-adopt the goods and services tax (GST) due to the current economic headwinds, the Budget proposes various measures to diversify revenue streams, including the introduction of a luxury goods tax, capital gains tax for disposal of unlisted shares and re-introduction of the special voluntary disclosure programmes for direct and indirect taxes.

This article discusses the key tax measures under the Budget. Some of these measures have been passed into law, amongst others, through the Finance Act 2023, which was recently gazetted on 31 May 2023.

B. INCOME TAX

1. PERSONAL INCOME TAX - REVISED RATES

The government has, through the Finance Act 2023[1], reduced the resident individual income tax rate by 2% for each chargeable income band between RM35,001 to RM100,000. Meanwhile, there is an increase of 0.5% to 2% for the chargeable income band between RM100,001 to RM1 million. This is illustrated below:

Chargeable Income (RM)	Current Tax Rate (%)	Proposed Tax Rate (%)	Annual Taxes (Saved) /Increase (RM)
0 - 5,000	0	0	-
5,001 - 20,000	1	1	-
20,001 - 35,000	3	3	-
35,001 - 50,000	8	6	(300)
50,001 - 70,000	13	11	(700)
70,001 - 100,000	21	19	(1,300)
100,001 - 250,000	24	25	200
250,001 - 400,000	24.5	25	950
400,001 - 600,000	25	26	10,950
600,001 - 1,000,000	26	28	10,950
1,000,001 - 2,000,000	28	28	10,950
Over 2,000,000	30	30	10,950

Reduced **Increased**

On a broad level, the personal income tax rates are reduced for the M40 group (households with monthly income between RM4,850 to RM10,959) but increased for the T20 group (households with monthly income of RM10,960 and above). This is aligned with the government's policy to reduce income inequality, where those who earn more contribute a larger share of their income to support the nation's development.

This measure is also targeted at increasing the disposable income among the M40 group, a segment often overlooked as attention is typically directed towards the financially vulnerable B40 group (households with a monthly income of less than RM4,850) and hardcore poor communities.

The reductions are expected to provide approximately 2.4 million taxpayers with excess disposable income of up to RM1,300 annually. However, these tax cuts are not expected to reduce the government's revenue collection by a significant margin. A higher disposable income for the M40 group is expected to be contributed back to the economy through higher consumption, which could increase the demand for goods and services.

2. CORPORATE INCOME TAX

(a) Review of Income Tax Treatment for Micro, Small and Medium Enterprises (MSMEs)

A company or a limited liability partnership (LLP) with a paid-up capital not exceeding RM2.5 million and an annual sales turnover not exceeding RM50 million is categorised as a micro, small and medium enterprise (MSME). Under the Finance Act 2023, the tax rate for the first RM150,000 chargeable income of MSMEs will be reduced by 2% effective from Y/A 2023.[2]

Chargeable Income (RM)	Proposed Tax Rate (%)	Annual Taxes (Saved) / Increase (RM)
First RM150,000	15%	(3,000)
RM150,001 –RM600,000	17%	-
RM600,001 and above	24%	-

Reduced

(b) Capital Gains Tax for Disposal of Unlisted Shares

To align with global best practices, the government plans to consult with relevant stakeholders to explore the possibility of implementing capital gains tax (CGT) from Y/A 2024 in the case where a company disposes of unlisted shares.

[1] *S 16(a) of the Finance Act 2023.*
[2] *S 16(b) of the Finance Act 2023.*

Currently, there is no CGT regime in Malaysia except as regards the disposal of real property and shares in real property companies. For now, the specifics of how the proposed CGT will be implemented are still unclear, such as the CGT rate which will be imposed, the computation method for determining capital gains or losses, and any possible exemptions or reliefs that may apply.

While a CGT regime could potentially increase the government's revenue, it is crucial to consider whether the tax may discourage investment. The introduction of CGT on the sale of unlisted shares may increase business costs and affect merger and acquisition (M&A) and intra-group restructuring activities in Malaysia. Companies may have to factor in the cost of CGT before engaging in such activities and allocate additional resources to comply with the new tax regime, including monitoring and reporting requirements.

To mitigate potential increases in business costs, the government may wish to consider exploring options for exemptions and reliefs. For instance, the government may consider exempting CGT for intra-group transactions to avoid discouraging corporate restructuring activities that can enhance the efficiency and profitability of a group.

(c) Capital Allowance for Intangible Assets

Currently, taxpayers that incur qualifying plant expenditure on assets, which are used for the purpose of their businesses, may be eligible to claim capital allowances. Intangible assets are expressly excluded from the definition of "plant" under Sch 3 of the Income Tax Act 1967 ("ITA 1967").

The Finance Act 2023 introduced an amendment to the definition of "plant" in Sch 3 of the ITA 1967 so that such exclusion of intangible assets no longer applies.[3] Arguably, this would allow taxpayers to claim capital allowances on the qualifying expenditure they incur for

intangible assets such as software and intellectual property.

This amendment is consistent with the High Court's recent decision in *CPAM v Ketua Pengarah Hasil Dalam Negeri [2022] 1 LNS 2047*, which allowed the taxpayer's claim for capital allowance on expenditure incurred to purchase, customise and improve computer software. The amendment is welcome as software and intellectual property abound in businesses today, especially those operating in the technology and knowledge-based sectors.

(d) Global Minimum Tax (GMT) and Qualified Domestic Minimum Top Up Tax (QDMTT)

As a member of the Organisation for Economic Co-operation and Development ("OECD") Inclusive Framework on Base Erosion and Profit Shifting ("BEPS") since 2017, Malaysia is committed to internationally agreed tax standards and rules. Under the Budget, it is proposed that the following initiatives be introduced in line with the Global Anti-Base Erosion Model Rules (i.e., the GloBE Rules):[4]

(i) Minimum effective tax rate at 15%

It is proposed that a minimum effective tax rate of 15% be introduced. This will apply to multinational enterprises with consolidated revenues of above EUR750 million (about RM3.5 billion) annually. This is consistent with the GloBE Rules, which is intended to reduce tax leakages and profit transfers to low-tax jurisdictions and ensure that there is a level playing field for attracting foreign direct investment.

(ii) QDMTT

The government has proposed that a QDMTT be introduced to ensure that Malaysia does not forego any top-up tax in respect of profits earned in Malaysia to other countries. If Malaysia does not introduce a QDMTT, the country of the ultimate parent company of the multinational company (MNC) will potentially be entitled to collect the top-up taxes that Malaysia forgoes.

The government's statements on GMT and QDMTT demonstrate that their implementation can be reasonably expected in the near future. In the circumstances, potentially impacted MNCs should take proactive measures by conducting early impact assessments across the entire group to minimise uncertainties surrounding the impact of these changes, which may be relevant to their operations and cash flow decisions.

In addition, MNCs should start considering their tax incentives on a jurisdictional level and consider the effective tax rates of other companies in the same jurisdiction

[3] *S 17 of the Finance Act 2023.*

[4] *The Budget Text does not mention specific timelines for the implementation of the GMT and QDMTT.*

to minimise the top-up tax payable. For instance, MNCs that have benefited from tax incentives may need to reassess and potentially renegotiate them or replace them with incentives that will result in a reduced effective tax rate impact.

C. REINTRODUCTION OF VOLUNTARY DISCLOSURE PROGRAMME

The Inland Revenue Board of Malaysia ("HASiL") and the Royal Malaysian Customs Department ("RMCD") have relaunched the Voluntary Disclosure Programme ("VDP") to encourage taxpayers to disclose any unpaid taxes and to increase overall revenue collection. The HASiL and RMCD have since issued their respective Guidelines for the VDP on 2 June 2023.[5]

Under the VDP, a 100% penalty waiver will be granted for voluntary disclosures that are made during the period from 6 June 2023 to 31 May 2024, covering both direct and indirect taxes.

Similar to the previous HASiL's SVDP 1.0 and RMCD's VA Programme[6], no audit will be conducted in relation to the declared Y/A and taxable periods in which voluntary disclosure is made under the VDP. The relevant payment (whether lump sum or instalment payment) for the disclosed/declared taxes must be settled on or before 31 May 2024.

The SVDP 1.0 for direct taxes is largely regarded as a success. This is since 286,482 taxpayers participated in the program, collecting RM7.877 billion in additional taxes for HASiL. To date, HASiL estimates to collect RM10 billion in additional taxes under the VDP and increased participation from taxpayers, given that it offers a complete penalty waiver for voluntary disclosures of unreported taxes (as compared to the 10-15% penalty under SVDP 1.0).[7]

The outcome of the VDP this time round is dependent on several factors, including:

(i) taxpayers being assured that there will be no future audits or investigations for the years declared; and

(ii) taxpayers being assured that the terms of payment for any additional taxes, including instalments will be reasonable.

D. INDIRECT TAX - IMPOSITION OF LUXURY GOODS TAX

Another noteworthy development is the proposed introduction of a luxury goods tax regime from this year, i.e., 2023. The proposed luxury goods tax will apply to, among other things, luxury watches and fashion items. At present, further clarification is needed on how the proposed luxury goods tax will be implemented, especially regarding the specific price thresholds, tax rates and categories of goods subject to the tax.

The introduction of luxury goods tax without careful studies could reduce demand for certain luxury items and potentially impact the sales generated by businesses operating in the sector. For example, in the early 90s in the United States, there was a sharp decline in sales of fur, expensive jewelry, airplanes and yachts when a 10% luxury tax was levied on these goods. The taxes collected from the luxury tax was less than projected as there was less demand for these goods, which resulted in a repeal of the luxury tax given the high costs of administering this tax.

Notwithstanding that a luxury goods tax may come across as a straightforward means for increasing revenue collection from higher-income taxpayers, its effectiveness should be thoroughly evaluated as it is subject to the spending behaviour of consumers. The introduction of such a tax in Malaysia may have unintended effects, such as consumers being inclined to spend less domestically on luxury goods or being driven to spend more in jurisdictions without a luxury goods or similar tax.

The risk of black market activity should be considered when implementing a luxury goods tax. If the tax rate is too high or the price threshold is too low, it may encourage black market patronage as consumers seek to avoid paying higher prices associated with the tax. This may ultimately erode the tax base.

Additionally, the collection and registration mechanism for the proposed luxury goods

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[5] *IRB Operational Guidelines No. 2/2023: Special Voluntary Disclosure Programme 2.0 and RMCD's Guidelines for Voluntary Disclosure Programme: Indirect Taxes dated 2 June 2023.*

[6] *Previously, the IRB's Special Voluntary Disclosure Programme (i.e., the SVDP 1.0) applied to direct taxes disclosed from 3 November 2018 to 30 September 2019. The RMCD also introduced a Voluntary Disclosure and Amnesty Programme (i.e., VA Programme) for indirect taxes disclosed from 1 January 2022 to 30 September 2022.*

[7] *Setting your tax records straight | The Star dated 18 May 2023.*

tax must be clearly delineated, such as which party is responsible to account for the tax. For example, in Canada, legislation requires manufacturers, wholesalers, retailers and importers of luxury goods to be registered as a "registered vendor" with the Canada Border Services Agency. The registered vendor that delivers a subject item to a non-registered end consumer will be responsible for paying any applicable luxury tax and completing the related returns.

E. STAMP DUTY

The Budget also covers various stamp duty exemptions for instruments in the following transactions:

(b) First-Time Home Ownership

The stamp duty remission for all instruments of transfer and loan agreement to finance the purchase of first residential property with a value exceeding RM500,000 but below RM1 million has been increased from 50% to 75%. Properties valued at RM500,000 or below will be entitled to 100% stamp duty exemption. This is subject to the sale and purchase agreement for the purchase of the residential property being executed on or after 1 June 2022 but not later than 31 December 2023 and is duly stamped not later than 31 January 2024. This measure has been passed into law.[8]

(a) Transfer of Property - Love and Affection

Presently, there is a 100% stamp duty exemption on instruments of transfer of property between spouses, and a 50% stamp duty remission on transfers between parents and children.

The government has extended the 100% stamp duty exemption for instruments executed from 1 April 2023 onwards for transfers between parents and children and grandparents and grandchildren, for the first RM1 million of the property's value. The remaining balance of the property's value is subject to ad valorem stamp duty and is given a 50% remission on the stamp duty imposed. This measure has been implemented through the Stamp Duty (Exemption) (No. 3) Order 2023.

(c) Restructuring or Rescheduling Loan or Financing Agreements

The 100% stamp duty exemption which is presently accorded for the restructuring or rescheduling of loan/financing agreements between borrowers and financial institutions will be extended for another two years to cover qualifying agreements executed from 1 January 2023 to 31 December 2024. The qualifying conditions remain unchanged, namely, such agreements must be duly stamped and not increase the original loan or financing amount. This measure has been implemented through the Stamp Duty (Exemption) (No. 11) Order 2023.

F. TAX INCENTIVES TO SUPPORT ENVIRONMENT SUSTAINABILITY

In recent years, environmental, social, and governance ("ESG") themes have taken center stage in the global investment landscape, and Malaysia is no exception to this trend. ESG has become an essential factor for investors when evaluating potential investment opportunities. In line with global developments, the government has proposed various tax incentives to encourage environmental sustainability in businesses, namely:

(a) Enhanced Green Technology Incentives

The government has committed to studying and enhancing the existing green technology incentives, i.e., the Green Investment Tax Allowance (GITA) and Green Income Tax Exemption (GITE) packages.

Briefly, GITA allows companies, which acquire approved green technology assets listed under the MyHIJAU directory or undertake qualifying green technology projects, to claim for allowance that can be used to set off their statutory income. GITE accords income tax exemption to companies that provide green technology services listed under the MyHIJAU directory.

Additionally, the government has proposed to increase the guaranteed value of the Green Technology Financing Scheme ("GTFS") from RM2 billion to RM3 billion until 2025 to support the development of green technology in Malaysia.

(b) New Incentives for Carbon Capture and Storage Technology

Under the Budget, it is proposed that various tax measures be introduced to incentivise companies to utilise carbon capture storage ("CCS") technology, to achieve the treatment and transportation of carbon dioxide emitted from industrial sources to a long-term storage location. This is consistent with Malaysia's National Energy Policy 2022-2040 and the target to achieve net-zero greenhouse gas emissions

[8] *Stamp Duty (Exemption) Order 2023, Stamp Duty (Exemption) (No. 2) Order 2023, Stamp Duty (Remission) Order 2023 and Stamp Duty (Remission) (No. 2) Order 2023.*

by 2050 under the Paris Agreement.

(i) Companies undertaking CCS in-house activity

- Investment tax allowance of 100% on qualifying capital expenditure which can be used to set-off against up to 100% of business statutory income for 10 years
- Full import duty and sales tax exemption on equipment used for CCS technology from 1 January 2023 until 31 December 2027
- Tax deduction for allowable pre-commencement expenses within five years from the date of commencement of operation

(ii) Companies undertaking CCS services

- Investment tax allowance of 100% on qualifying capital expenditure which can be used to set-off against up to 100% of statutory income for 10 years
- Income tax exemption of 70% on statutory income for 10 years
- Full import duty and sales tax exemption on equipment used for CCS technology from 1 January 2023 until 31 December 2027

(iii) Companies using CCS services

- Tax deduction on fees incurred for use of CCS services.

Applications for the above incentives may be submitted to the Ministry of Finance from 25 February 2023 to 31 December 2027. Eligible companies are entitled to claim tax deductions through their income tax returns from Y/A 2023 to Y/A 2027.

(c) Electric Vehicles ("EVs") Incentives

(i) Sales Tax, Import Duty, Excise Duty Exemption

Under the Budget, the government has proposed to extend:

- full import duty exemption on components for completely-knocked-down ("CKD") EVs until 31 December 2027
- full excise duty and sales tax exemption on CKD EVs until 31 December 2027; and
- full import duty and excise duty exemption on imported completely built-up ("CBU") EVs until 31 December 2025.

(ii) Incentives for the Manufacturer of EV Charging Equipment

A 100% income tax exemption on the statutory period from Y/A 2023 to Y/A 2032 is granted to manufacturers of EV charging equipment. In addition, such manufacturers are entitled to claim an investment tax allowance of 100% (to be set off against 100% of their statutory income for five years).

(iii) Incentives for Companies Renting Non-Commercial EV

It is proposed that companies renting non-commercial EVs be given tax deductions not exceeding RM300,000 on the rental amount from Y/A 2023 to Y/A 2025.

G. OTHER TAX INCENTIVES

1. Review of Tax Deduction on Cost of Listing on Bursa Malaysia

The government has identified as one of its focus areas the expansion of businesses by technology-based companies and MSMEs. As such, it is proposed that the existing tax deduction (up to RM1.5 million) for listing costs on Bursa Malaysia's Access, Certainty, Efficiency (ACE) and Leading Entrepreneur Accelerator Platform (LEAP) markets be extended for another three years i.e., from Y/A 2023 to Y/A 2025. This tax deduction also applies to the listing of technology-based companies on the Bursa Main Market.

2. Tax Incentive for Electrical and Electronics (E&E) and Aerospace Companies Relocating Operations to Malaysia

Under the Budget, it is proposed that the existing tax incentive for manufacturing companies to relocate to Malaysia (i.e., special tax rate and investment tax allowance) and the tax rate of 15% for C-Suite executives be extended until 2024. This also applies to the E&E and aerospace sectors.

H. CONCLUSION

The Budget presents a balanced approach towards strengthening the economy and promoting sustainable growth. The government has taken a pragmatic and incremental approach to implement a more progressive tax structure, focusing on redistributing tax revenue to support low and middle-income earners. While economic challenges remain, the government is taking a strategic approach to diversify revenue streams through proposed measures such as CGT and luxury goods tax to ensure that those who derive substantial income pay their fair share of taxes.

Further, by focusing on measures to incentivise digitalisation, incorporate ESG values and commit to international tax standards, Malaysia is positioning itself as an attractive investment destination with a competitive and resilient business landscape.

The proposed implementation of the GMT and a QDMTT under the BEPS 2.0 initiative further highlights Malaysia's commitment to international tax reform. While these measures aim to level the playing field for jurisdictions and ensure that taxpayers pay their fair share of taxes, they also mean that affected businesses must prepare for potential changes to their tax liabilities and compliance obligations. Businesses need to perform impact assessments, identify potential risk areas and seek professional advice to ensure they are well-prepared for the headwinds of potential tax changes.

Overall, the tax measures under the Budget are designed to help Malaysia's economy recover and grow sustainably while ensuring that the tax system is fair, transparent, and effective.

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

CAPITAL ALLOWANCE FOR COMPUTER SOFTWARE

S.Saravana Kumar & Estine Lim

Generally, when a taxpayer incurs capital expenditure on plant and machinery, the taxpayer is entitled to claim capital allowance pursuant to Sch 3 of the Income Tax Act 1967 ("**ITA 1967**").

With the exponential growth of the information and communication technology ("**ICT**") industry since the Covid-19 pandemic, the question of whether taxpayers may claim capital allowance for expenditure incurred on computer software would return to the forefront.

THE LAW ON CAPITAL ALLOWANCE

Pursuant to Para 2 of Sch 3 of the ITA 1967, capital expenditure incurred on the provision of machinery or plant used for the purposes of a business would qualify for capital allowance. It should be noted that only capital expenditure is a qualifying expenditure under Sch 3 of the ITA 1967. In the case of ***Director General of Inland Revenue v Kulim Rubber Plantations Ltd*** **(1981) 1 MLJ 214**, the Federal Court held that capital expenditure is an expenditure made with a view to bringing into existence an asset or advantage for the enduring benefit of a trade.

The term "machinery" is not defined in the ITA 1967. The Special Commissioners of Income Tax ("**SCIT**") in the case of ***Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd* (2012) MSTC 30-039** stated that the word should be interpreted in accordance with its ordinary meaning. According to the Concise Oxford English Dictionary, the word "machine" is defined as an apparatus using mechanical power and having several parts, each with a definite function and together performing a particular task.

Prior to the introduction of Para 70A of Sch 3 of the ITA 1967 via S. 28(a) of the Finance Act 2020, the word "plant" was also not defined in the ITA 1967. The guiding principle of "plant" could only be found in the case of ***Yarmouth v France* (1887) 19 QBD 647**, which held that plant includes whatever apparatus used for carrying on a business that is not stock-in-trade but kept for permanent employment in the business. This test is commonly known as the apparatus test.

Other cases have further developed the apparatus test to determine whether the subject matter is a plant. In ***Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd* (2013) MSTC 30-054**, the Court of Appeal formulated the functional test which requires an asset to perform some function for the taxpayer's business in order to qualify as a plant.

However, with the recent amendment to Para 70A of Sch 3 of the ITA 1967 via S. 17 of the Finance Act 2023, the word "plant" is now defined as an apparatus used by a person for carrying on his business but does not include a building or any asset used and that functions as a place within which a business is carried on. Notwithstanding, Para 70A(2) of Sch 3 of the ITA 1967 provides that the Minister may prescribe any other assets as assets which are excluded from the definition of "plant".[1]

CAPITAL ALLOWANCE FOR COMPUTER SOFTWARE

According to general income tax principles, a computer software qualifies as a plant if it is a tool which is used to carry out a taxpayer's business. In order to incentivise the ICT industry, the Minister of Finance has also issued various Rules under the ITA 1967 to provide for certain ICT equipment including computer software to be claimed at accelerated capital allowance rates.

On 31 December 2014, the Inland Revenue Board of Malaysia ("**IRB**") published the Public Ruling 12/2014 – Qualifying Plant and Machinery for Claiming Capital Allowances ("**Public Ruling**") which explains its interpretation of, among others, whether a computer software is a plant for capital allowance purposes.

Paragraph 8.1(iii) of the Public Ruling provides that the costs of provision of computer software which are software systems or software packages as specified in the Rules are eligible for capital allowances. Software package or software system refers to the computer software purchased together with the computer equipment from a supplier or purchased separately from a software supplier.

However, paragraph 8.2(ii) of the Public Ruling states that payment for developing software such as consulting fees, right to use the software such as licence fee and other incidental charges are not part of the cost for the provision of computer software.

Reading paragraph 8.1(iii) together with paragraph 8.2(ii) of the Public Ruling, the IRB seems to draw a distinction between expenditure incurred on purchased software and developed software, in that the former would qualify for capital allowance but not the latter. The IRB's position is at odds with the standard practice in the software industry whereby in both cases, the purchaser makes payment to acquire a licence to use the software.

Recently, the High Court has shed some light on this matter in the case of ***CIMB-Principal Asset Management Bhd v Ketua Pengarah Hasil Dalam Negeri* (2022) MLJU 2081 ("CIMB Case")**

[1] *Para 70A(2) was recently included in Sch 3 of the ITA 1967 via S. 17 of the Finance Act 2023.*

where the dispute was on the capital expenditure to purchase, customise and improve computer equipment and software and the relevant consulting fees.

THE CIMB CASE

The issue in this case was whether the taxpayer is entitled to claim capital allowance on the capital expenditure incurred with respect to the consultancy fees paid in connection with the implementation, customisation, development, integration, installation, licensing, testing of, and other additional improvement to the taxpayer's computer software, as well as other incidental charges incurred on the provision of computer software for Y/A 2015 under Sch 3 of the ITA 1967, notwithstanding the IRB's Public Ruling. In other words, the disputed capital expenditure relates to the incidental costs to the purchase of the software.

The Director General of Inland Revenue ("**DGIR**") took the position that:

1. The taxpayer acquired the software by way of licence and therefore, the taxpayer does not own the software to qualify for capital allowance under Sch 3 of the ITA 1967.
2. Nonetheless, the Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2014 ("2014 Rules") is a specific rule which allows the taxpayer to claim capital allowance for the purchase of software systems or software packages and its installation.
3. However, the 2014 Rules is limited to the purchase of the software systems or software packages and its installation only and therefore, other incidental payments to the purchase of the software are excluded.

The High Court in allowing the taxpayer's capital allowance claim for the consultancy fees, licence fees and other incidental charges on the provision of computer software held as follows:

1. Once a software is purchased, the purchaser has the right to use the software and has the control of it in terms of its usage. The taxpayer had in fact purchased the whole package of the software and it had to obtain the licence to make it a licensed user of the software. Therefore, since the taxpayer had purchased the software, the taxpayer owns the software.
2. Paragraph 8.2 of the Public Ruling on which the Respondent founded its decision is illegal and in conflict with Sch 3 of the ITA 1967 and the 2014 Rules.
3. Paragraph 2(a) of Sch 3 of the ITA 1967 provides that incidental expenditure to the installation of the plant is a qualifying expenditure. Since ancillary cost should form part and parcel of capital expenditure, the disputed capital expenditure incurred by the taxpayer forms part and parcel of the plant which is the software and must therefore be allowed pursuant to Sch 3 of the ITA 1967.
4. The 2014 Rules cannot expand Sch 3 of the ITA 1967 and make way for the taxpayer to claim for something that is allowed or disallowed by the main legislation. The 2014 Rules only prescribes the rate of specific qualifying plant expenditure.

"Paragraph 2(a) of Sch 3 of the ITA 1967 provides that incidental expenditure to the installation of the plant is a qualifying expenditure. Since ancillary cost should form part and parcel of capital expenditure, the disputed capital expenditure incurred by the taxpayer forms part and parcel of the plant which is the software and must therefore be allowed pursuant to Sch 3 of the ITA 1967."

It is pertinent to note that the Court of Appeal has subsequently upheld the High Court's decision.

CONCLUSION

Following the decision in the CIMB Case, the SCIT in a recent ruling has allowed a taxpayer's appeal in which the crux of dispute was whether the DGIR has any basis in law to disallow the capital allowance claim made by the taxpayer for the customised software development and for the upgrading of the customised software.

In this case, the DGIR alleged that, among others, the 2014 Rules and the Income Tax (Accelerated Capital Allowance) (Information and Communication Technology Equipment) Rules 2018 ("2018 Rules") only permitted the costs incurred in the purchase of any ICT equipment. On this basis, the DGIR disallowed the taxpayer's capital allowance claim.

On the contrary, the taxpayer relied on the CIMB Case and argued that the 2014 Rules and the 2018 Rules do not specify the eligibility for capital allowance. Instead, the 2014 Rules and the 2018 Rules merely prescribe the rate of specific qualifying plant expenditure without addressing whether software packages qualify for capital allowance.

The SCIT ruled in favour of the taxpayer and set aside the assessments raised by the DGIR. The decision of the SCIT therefore confirms that expenditures incurred on computer software are now eligible to be claimed as capital allowance.

This recent SCIT decision and the CIMB Case are welcomed as it takes cognizance of the inherent nature of software – asserting that unlike a physical product, software can be easily replicated and distributed. In order to prevent this, the purchaser is required to pay for a licence to use the software, regardless of whether it is one that has been customised and modified to the needs of the purchaser or one that is sold to the general public.

"Additionally, with effect from Y/A 2018, the Income Tax (Capital Allowance) (Development Cost for Customised Computer Software) Rules 2019 expressly provides that capital allowance may be claimed in respect of the development cost for customised computer software (i.e. consultation fee, payment for rights of software ownership and incidental fee relating to the development of customised computer software) incurred in the basis period from Y/A 2018."

Although the developer of the software continues to own the copyright to the software and only sells the right to use the software to the purchaser, it suffices for one to own beneficial ownership to claim capital allowance for tax purposes. This view is established in the SCIT case of ***TTK v Ketua Pengarah Hasil Dalam Negeri* (1998) MSTC 2949** and confirmed by paragraph 6.2 of the IRB's Public Ruling 5/2014 – Ownership and Use of Asset for the Purpose of Claiming Capital Allowances.

Additionally, with effect from Y/A 2018, the Income Tax (Capital Allowance) (Development Cost for Customised Computer Software) Rules 2019 expressly provides that capital allowance may be claimed in respect of the development cost for customised computer software (i.e. consultation fee, payment for rights of software ownership and incidental fee relating to the development of customised computer software) incurred in the basis period from Y/A 2018.

Another key point to note is that from Y/A 2023, the amendment to Para 70A of Sch 3 of the ITA 1967 has expanded the definition of "plant" to include intangible assets. It remains to be seen what further changes will take place in the tax landscape concerning capital allowance for computer software as it is an area ripe for development.

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THE UNILATERAL
IMPOSITION OF SECTION 113(2) PENALTY (PART 2)

Dr. Andrew Chew Peng Hui

THIS IS THE SECOND AND FINAL PART OF THE ARTICLE PUBLISHED PREVIOUSLY IN THE TAX GUARDIAN - 2023 QUARTER 2 ISSUE.

ADDING S. 113(2) PENALTY ONTO ASSESSMENTS

For the assessment provisions, the ITA 1967 does not treat the S. 113(2) penalty as tax. Two provisions show this very clearly. S. 125(2) states:

> *"Any penalty imposed on any person under subsection 112(3) or 113 (2) shall be collected as if it were part of the tax payable by that person but shall not be treated as tax so payable for the purposes of any provision of this Act other than sections 103 to 106."*

S. 96A, which provides for the assessment of, inter alia, the S. 113(2) penalty via a composite assessment, repeats the same words in subsection (5):

> *"The total amount [i.e. the tax undercharged and the penalty agreed between the DGIR and taxpayer] shall be collected as if it were part of the tax payable by the person in respect of whom the composite assessment has been made but shall not be treated as tax so payable for the purposes of the provisions of this Act other than Sections 103 to 106.*

Sections 103 to 106, under Part VII which is headed "Collection and Recovery of Tax", are the collection provisions of the Act after tax has been assessed and notice of assessment duly served. Collection is by way of legal proceedings. Other than for collection purposes under these sections, the penalty is not tax. The DGIR's unilateral addition of the penalty onto the tax or additional tax renders that penalty part of the assessment appealable under S. 99 according to the Supreme Court in *Kim Thye*. Thus, for purposes of S. 113(2) and the assessment provisions in Part VI, other than S. 96A, the S. 113(2) penalty is not tax[41]. The assessment provisions, other than S. 96A, do not refer to the S. 113(2)

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[41] *This was DG's contention in Kim Thye & Co*

penalty. The Supreme Court noted this in *Kim Thye*. S. 113(2) does not say that the DGIR may assess the penalty. The assessment provisions consistently use the words making "assessment" [42]. In contrast, S. 113(2) says the DGIR "may require" the payment of the penalty. These are not clear words, unlike S. 96A, authorising the making of assessment. These words in S. 113(2) - " and if that person pays that penalty ... he shall not be liable to be charged on the same facts with an offence under subsection (1)" in S. 113(2) is hardly consistent with the outcome of paying an assessment. The placing of S. 113(2) under Part VIII, headed "Offences and Penalties" and not under "Assessment and Appeals" in Part VI is also telling.

It is trite tax law that any assessment to tax can be made only if it is clearly authorised by express provisions of tax legislation and made in strict compliance with the terms of such legislation[43]. In *Mudek Sdn Bhd* [44] Hamid Sultan JCA had this to say about the exercise of assessment powers[45]:

> *" It must also be stated that it is well settled that every exercise of statutory power (in this case the raising of an assessment) cannot be arbitrarily exercised. The Federal Court in Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35 had endorsed the proposition that every exercise of statutory power must not only be in conformity with the express words of the statute but above all must also comply with certain implied legal requirements. And the court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680; Saratogoa Sdn Bhd v Pentadbir Tanah Johor Bahru [2013] 4 MLJ 431). The Revenue Department is not an exception to the said jurisprudence."*

In the premises it is doubtful the DGIR's adding of S. 113(2) penalty onto his assessment unilaterally, relying on S. 91 or 90, as the case may be, and S. 113(2), is consistent with the provisions of S. 125(2) and S. 96A(5). It is also not in accord with the terms of S. 90 and 91 which permit the assessment for "tax" only, of which the S. 113(2) penalty is clearly not[46]. S. 93, dealing with the form and making of assessment, also talks only of tax and not penalty.

PENALTY MUST BE ASSESSED VIA A COMPOSITE ASSESSMENT UNDER S. 96A

How then is the S. 113(2) penalty to be assessed and collected? Parliament has made it very clear that it should be by utilising S. 96A. Several observations about the section may be pertinently made. As Peh Swee Chin SCJ noted[47] only this section specifically mentions the S. 113(2) penalty. None of the other assessment provisions in Part VI of ITA 1967 does this. The identicality of the language used in S. 96A(1), as italised, and S. 113(2) should not be missed. S. 96A (1) (c) and (d), after referring to offences in S. 113(1) (a) and (b), goes on to say that the DGIR and the offender may come to an agreement in writing for the payment of a sum of money comprising (i) the "amount of tax which has been undercharged or not charged" and (ii) "the amount of any penalty or penalties which that person [the offender] may be required to pay[48] ...pursuant to subsection 112(3) or S. 113(2) or both (or where such penalty is abated or remitted under subsection 124(3) so much, if any of the penalty which has not been abated or remitted)". Following such agreement, the DGIR is to make a composite assessment in respect of the amounts of tax and penalty agreed.

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[42] *See S. 90-97, ITA 1967*

[43] *An assessment "in addition to being consistent with normal accounting practice "Lord Guest declared in Ostime (Inspector of Taxes) v. Duple Motors Bodies Ltd [1961] 1 WLR 1, "must be made in accordance with the provisions of the Income Tax Act". Any assessment must be done in accordance with the provisions of the ITA 1967 whether the assessment is by the taxpayer or by HASiL." (per Augustine Paul JCA in Ketua Pengarah Hasil Dalam Negeri v. Daya Leasing Sdn Bhd [2005] 2 CLJ 449). See Teruntum Theatre Sdn Bhd v KPHDN [1998] 4 MLJ 195 where an assessment to Real Property Gains Tax Act 1976 (RPGTA 1976) in respect of gains which were subject to income tax and therefore not "gain" as defined in RPGTA was held to be a nullity even if a certificate of clearance has been issued because the tax had been paid. The tax had not become final.*

From the Commonwealth see Argosy Co Ltd v IRC [1971] 1 WLR 514 (where the Privy Council held that an estimated assessment permitted under S. 48 (4) of the Income Tax Ordinance of Guyana if Revenue formed a "reasonable opinion" that the company was liable to tax, was wrongly made because it had huge trading losses available for carrying forward. The condition precedent for making estimated assessment had not been shown) and G R Mandavia v Commissioner of Income Tax[1959] AC114 (where an estimated assessment permitted by S. 72 of the Income Tax of East Africa to be made where it appears to the Commissioner that no assessment had been made was held to be bad as not in compliance with S. 59 of the Act because he had already required by notice the taxpayer to furnish return within 30 days and the time had not expired)

[44] *Mudek Sdn Bhd v Kerajaan Malaysia [2013] 5 MLJ 840 (making of an RPGT assessment held to be an improper exercise of the assessment power because the disposal had been aborted as a consequence of which there was no disposal within the Act and so no chargeable gain).*

[45] *At Para [17]*

[46] *This was DG's contention in KPHDN v Kim Thye & Co. [1992] 2 MLJ 708*

[47] *In KPHDN v Kim Thye & Co. [1992] 2 MLJ 708*

[48] *A throwback to the DG "may require" in S. 113(2).*

It is these two amounts that explain the use of the term "composite assessment". "As soon as may be" after making the composite assessment, the DGIR is to cause a notice of composite assessment, in the prescribed form[49], to be served on the assessee[50] after which the tax and the penalty "shall be collected as if it were part of the tax payable" by the assessee but "shall not be treated as tax so payable for the purposes of the provisions of this Act other than Sections 103 to 106"[51]. These last quoted words are exactly those used by S. 125 dealing with recovery of penalties imposed under Part VIII in which S. 113 is to be found. The composite assessment shall be "final and conclusive for the purposes of this Act" and no appeal shall lie against such an assessment[52].

The DGIR's unilateral imposition of penalty, if permitted, will render, as it has rendered, S. 96A intended by Parliament for the purposes of assessing the penalty, otiose. This should not be condoned. The assessment provisions in ITA 1967 should not be construed or applied in a manner which renders S. 96A superfluous[53].

SECTION 113(2) PENALTY IS A COMPOUNDING PENALTY

A closer examination of S. 113[54] and related provisions in the ITA 1967 suggests that the S. 113(2) penalty is intended as a

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[49] *Form JB*

[50] *S. 96A(3) and (4)*

[51] *S. 96A(5)*

[52] *S. 96A(6)*

[53] *Siewa Podoyo Sdn Bhd v KPHDN [2022] MLJU 1213 Noorin J at [61] rejecting treatment of incorrect return under S. 113(2)(a) as negligence for purposes of S. 91(3)(b) as this would render the latter superfluous. For the principle against attribution of statutory superfluousness, see Tan ChorJin v. PP[2008] 4 SLR (R) 306, Regina (Hertfordshire County Council and others) v Secretary of State for Housing, Communities and Local Government (No 1)[2021] EWHC1093 (Admin) S. 78 of the Local Government Act 1972 meant actual physical meeting and should not be construed as including remote or virtual meetings which would have the effect of making Coronavirus Act 2020 (permitting regulations to be made in respect of remote or virtual meetings) superfluous. Rashidahbt Abd Ghani (as the administrator of the estate of the deceased Rohaizad bin Naim) v SJ Classic Industries Sdn Bhd [2021] 9 MLJ 128 (on S. 15 of the Occupational Safety and Health Act 1994); Jasmine bt Mohd Haneef v Amanda Jayne Spinks and another appeal [2021] 5 MLJ 659 the Court of Appeal said in "interpreting interpretative issue, every word and provision found in a statute was supposed to have a meaning and a function and for some useful purpose. Parliament did not waste its words or to say anything in vain. Thus, any argument on any words or provisions in sub-s 3(3) being superfluous was untenable." Mohamad Ezam Mohd Nor & ors v Inspector General of Police [2001] 2 MLJ 481 (interpretation not to render S. 73(1)(b) of Internal Security Act 1960 superfluous). In Majlis Peguam& Anor. v Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 the Federal Court said this:*

"In interpreting any statutory provision, no words used by Parliament should be construed as superfluous and of no effect whatsoever simply to enable the Courts to rewrite the Legislative plain language. In our view, the doctrine of absurdity and redundancy in legislative words must be applied with the utmost caution, and it must not be applied when an explanation can in fact be found for such words."

For the legal maxim that Parliament does not act in vain, see KPHDN v Perbadanan Kemajuan Ekonomi Negeri Johor [2009] MLJU 246, KPHDN v Daya Leasing SDn Bhd [2005] 4 MLJ 138 and Heavenly Land Sdn Bhd v MS Elevators Engineering Sdn Bhd [2019] MLJU 1271.

Bindra 's Interpretation of statutes, 6th Edition at Para 183 said: "The presumption is always against superfluity in a statute. An Act should be construed as to avoid redundancy or surplusage. An interpretation which leads to a conclusion that any provision in an enactment of a Legislature is of no effect cannot be lightly made use of and ought not to be applied except under compelling circumstances. In short, a court should not be prompt to ascribe, and should not without necessity or sound reason, impute to the language of a statute tautology or superfluity".

Bennion on Statutory Interpretation, 8th ed (2020), by Bailey &Norbury at Para 24.19: "Where one construction would render a later Act superfluous the presumption that the legislature does nothing in vain may be relevant".

[54] *It is noteworthy that while S. 113(1) employs the indefinite "any person" who makes incorrect return or provides incorrect information, subsection (2) uses the definite "where a person" makes incorrect return or provides incorrect information.*

compounding penalty[55]. Firstly S. 113(1) provides for a penalty on conviction while the subsection (2) penalty applies only "if no prosecution under subsection (1) is instituted". As Rohana Yusuf J (as she then was) quite rightly pointed out [56] the two subsections deal with the "same wrong". Secondly, another legal consequence of compounding is the protection against prosecution or further prosecution. S. 113(2) speaks of this when it states that "if that person [the alleged S. 113(1) offender] pays that penalty (or, where the penalty is abated or remitted under S. 124(3) … so much … 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)". Subsection (2) (d) of S. 124, under heading "Power to compound offences and abate or remit penalties", likewise provides protection against prosecution in these terms: " that person shall not be liable to any prosecution or, as the case may be, any further prosecution in respect of the offence and, if any such prosecution or further prosecution is brought, it shall be a good defence for that person to prove that the offence has been compounded under this section".

The words "may require" in S. 113(2) is not inconsistent with the S. 113(2) penalty being a compounding penalty. As Thomson CJ observed in Mohamed Hussein the primary meaning of "require" is to demand. By itself it does not specifically impose or create any obligation to pay or liability for the penalty on the part of the alleged offender. "The Director General may require that person to pay" the penalty provided in S. 113(2) are not clear words for imposing an obligation to pay upon demand. That such an obligation is not imposed is also clear from these words in the subsection: "and, if that person pays the 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 charge on the same facts with an offence under subsection (1)". These are words pointing to the effect of compounding rather than the consequence of an obligation or liability to pay penalty. The offender, if he refuses to compound, remains liable to be charged under S. 113(1).

In principle compounding cannot be forced on an alleged offender. It follows that the S. 113(2) compounding penalty cannot be imposed unilaterally. The proviso to subsection (1) of S. 124 (which gives power to the DGIR to compound "any offence under this Act") makes it clear that the powers of the DGIR in the section, including the power to compound and abate or remit the S. 113(2) penalty cannot be exercised by him unless the offender in writing admits the commission of the offence and requests for the offence to be dealt with under the section.

The application of S. 113 should be a two-stage process. If the DGIR is satisfied, on credible evidence, that an offence under S. 113(1) has been committed, a charge under subsection should be considered. Subsection (2) only comes in if the DGIR is minded to compound or the offender is prepared to admit his offence and requesting to be dealt under S. 124. This might have prompted Alizatul J's observation[57] that a construction of S. 113(2) without reference to S. 113(1) is "redundant", there being "alternative" provisions. This process is completely missing in unilateral imposition. S. 113(2) should not be treated as if it were a standalone provision[58] available whenever

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[55] *Compounding is not permitted and is itself an offence under the common law, as to which see Sir William Blackstone Knt, Commentaries on the Laws of England. Compounding may be, however, and is often provided by legislations. See for instances, Customs Act 1967 S. 131 (which permits the compounding of offences prescribed as compoundable) and Abadi Motor Sdn Bhd v Ewwa Binti Mohd Yusoff & ors [2018] MLJU 1537, S. 45 of the Environmental Quality Act 1974, S. 260 of the Criminal Procedure Code for offences described in the first two columns of Part A and Ahmad Azhar bin Othman v Rozana bt Misbun [2021] 9 MLJ 82 and S. 92 of the Anti-Money Laundering, Anti Terrorism and Proceeds from Unlawful Activities Act 2001 and Sharil @ Shahril Bin Ab Samad v Ketua Pesuruhjaya Suruhanjaya Pencegahan Rasuah Malaysia & Anor [2020] MLJU 758. For compounding of offences under the Penal Code see S. 260 of the Criminal Procedure Code. Such offences (including their abatements or attempts) described in the first two columns of Part A of the Criminal Procedure Code when no prosecution for them is actually pending may be compounded by the person mentioned in the third column of Part A; or when prosecution for such offences is actually pending, to be compounded by the person with the consent of the Court before which the case is pending. Offences punishable under Part B of the Code may, with the consent of the Court before which the case is pending, be compounded by the person to whom the hurt has been caused. The compounding has the effect of an acquittal. Other than as provided no offence under the Code is compoundable. See Teo Seng Tiong v Public Prosecutor [2021] SGCA 65; [2021] 2 SLR 642 on the propriety of considering compounded offences in sentencing where the Singapore Court of Appeal took the view that a composition or compound, described as a "hybrid" between conviction and acquittal, might or might not involve an admission of guilt.*

[56] *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v KPHDN [2011] MLJU 1297.*

[57] *Office Park Development Sdn Bhd v KPHDN [2011] 9 MLJ 479 at [48]*

[58] *For the principle that statutory provisions must be interpreted as a whole, see Maxwell on Interpretation of Statutes on page 47 (cited by Abdul Razak J with approval by the Federal Court in H Rubber Estates Bhdv DG1R[1979] 1 MLJ 115), Bindra's Statutory Interpretation (9th Ed) at page 508 and Bennion On Statutory Interpretation 6 Ed where in S. 355 at page 1030 the author states: "An Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument". See also Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd v KPHLDN (Tax Appeal No 14-01 of 2005-1), Opto Sensors Sdn Bhd v KPHDN [2012] 1 MLJ 848 and Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & anor [2018] 2 MLJ 590, FC.*

the DGIR feels he has a basis to use it without reference to the alleged offender.

SERIOUS OBJECTIONS IN PRINCIPLE AGAINST UNILATERAL IMPOSITION

In principle unilateral imposition raises a serious objection in that it deprives a taxpayer of his right to be heard and state his position before the penalty is imposed on him. S. 113(2) is predicated on the commission of a S. 113(1) offence[59] because both subsections deal with the "same wrong" which should be obvious from the identicality of Para (a) and (b) of both subsections. Per Rohana Yusuf J as Her Ladyship was then in Syarikat Pukin[60]:

> *"Under S. 113(1) when a person makes incorrect returns or gives incorrect information he can be guilty of an offence and be liable to fine and special penalty double the undercharged tax consequential to that incorrect returns or information. ... S. 113(2) would operate only if there is no prosecution made under S. 113(1). Thus, for the same wrong, that is, making incorrect returns or wrongful information, a person who is not charged under S. 113(1) can be imposed with a penalty under S. 113(2)."*

What this means is that when the DGIR intends to apply S. 113(2) he is actually alleging or accusing a taxpayer of having committed a S. 113(1) offence. Surely it is only right and just that an opportunity to be informed and heard on this allegation or accusation should be accorded. This is consistent with the rules of natural justice if not a right. Such a right is often implicit in statutory provisions which impose a burden, punishment or penalty unless expressly or explicitly excluded[61]. There is nothing in the language of S. 113(2) to clearly exclude the principle of right of hearing implicit in statutory provisions. "[t]he DGIR may require" from S. 113(2) is not such language. Basic tenets of our criminal jurisprudence decree that an accused person is entitled to know the charge against him[62] and to have his day in court[63]. The legal duty of the DGIR to provide reasons for the exercise

[59] *Transocean Drilling Sdn Bhd v KPHDN, Rayuan Sivil No: WA-14-8-04/2020 which involved a corresponding penalty for failure to furnish return under S. 77(1) or S. 77A(1) or to give notice in accordance with S. 77(3), without reasonable excuse, where no prosecution has been instituted.*

[60] *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v KPHDN [2011] MLJU 1297.*

[61] *Bennion On Statautory Interpretation, 6th Ed at 987 states this under heading "S. 341 Hearing both sides: audi alteram partem*

"Unless the contrary intention appears, an enactment by implication imports the maxim audi alteram partem (hear the other side), which is a basic precept of natural justice. The principle that no person is to be condemned unheard is fundamental to justice, and Parliament is presumed not to intend injustice. " For exclusion of natural justice by statutory language see Kumar a/l Gurusamy v Koperasi Jimat-Cermat dan Pinjaman Keretapi Bhd [2011] 2 MLJ 147 CA (bylaws held not to have excluded such rules), Government of Malaysia v XXX (Civil Suit No 95 of 1971, Ipoh High Court) cited by Federal Court in Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC, querying the exclusion of the rules of natural justice by S. 106 of the ITA 1967.

The exercise of discretionary powers affecting rights etc in other areas of law have also attracted the application of the rules of natural justice: Kesatuan Pekerja-Pekerja Keretapi Tanah Melayu Bhd v Menteri Sumber Manusia &Ors [2021] 5 MLJ 180 (Human Resources Minister's grant of recognition to a newly registered trade union under S. 9 of the Industrial Relations Act 1967) FC; Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Berhad v Kesatuan Kebangsaan Pekerja- pekerja Bank & Anor [2017] MLJU 260 ,FC (DGIR's registration of a trade union under S. 12 of Trade Union Act 1959), The State Minerals Management Authority, Sarawak &Ors v Gegah Optima Resources Sdn Bhd [2021]

In relation to the S. 113(2) penalties, see KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870. For S. 112(3) penalty see Transocean Drilling Sdn Bhd v KPHDN, Rayuan Sivil No: WA-14-8-04/2020. See also Uniqlo (Malaysia) Sdn Bhd v Ketua Pengarah Kastam dan Eksais [2020] 9 CLJ 521.

[62] *The right of hearing to have any meaning must carry the right to know the charge and to be furnished with particulars of the case and not just allegations. See Lord Denning MR at 1712 in Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 28 MLJ 169 (PC) as to this. This is a "principle of common sense" according to Lord Mustill which was cited by Low Hop Bing J at pp.3,729-3,730 in Bandar Utama City Corporation Sdn Bhd v. Director General of Inland Revenue (1999) MSTC 3,725.*

[63] *Dato' Sri Mohd Najib bin Haji Abdul Razak v Public Prosecutor [2019] MLJU 264, CA. See also Tengku Adnan bin Tengku Mansor v Pendakwa Raya [2019] MLJU 1826 and Rabing anak Budit v Public Prosecutor [2017] MLJU 1738, both decisions of the High Court.*

of his discretion to impose the penalties[64] reinforces such a requirement.

Unilateral imposition leaves an accused taxpayer in the dark and voiceless. Lest it be overlooked, a taxpayer charged under S. 113(1) is expressly provided with a defence of good faith (which consistent with established principle, he needs to establish only on a balance of probabilities[65]) and the burden is on the DGIR to prove the offence beyond reasonable doubt.

Though the proper exercise of the DGIR's S. 113(2) discretion may be heard by the Special Commissioners, there are three serious setbacks. Firstly, with the dispensation of pleadings before the special commissioners, the charge or its details may not be disclosed to enable a proper preparation in advance of hearing and secondly the burden is on the appellant by virtue of Para 13 of Sch 5 ITA 1967. Lastly, there is the spectre of being charged on the same facts for an offence under S. 113(1) even where such an appeal against the assessment or penalty has been successful for by the words of S. 113(2) protection against prosecution is given when the DGIR requires payment and the taxpayer pays accordingly. The statutory protection provided by S. 124(5)(d) may not be available where the S. 113(2) penalty is reduced other than via S. 124(3). That the DGIR will not institute prosecution is a poor assurance compared to a statutory protection or that he may not succeed in such prosecution is another matter.

ALTERING ESTABLISHED TAX PRINCIPLES

In *American Leaf Blending Co Sdn Bhd*[66], appellant incorporated with the object inter alia of carrying on a tobacco had built a factory on land it had purchased. It ceased this business when it stopped being profitable and let out the factory. HASiL's refusal to allow its unabsorbed losses and capital allowances from its tobacco business to be set off against its rental income was held to be wrong because the rentals were gains and profits from the carrying on of a business within S. 4(a) of the ITA 1967, this being the only one conclusion of fact which the special commissioners could have come to as there was nothing in the evidence capable of rebutting the prima facie presumption that the appellant was carrying on business of renting its property. On the basis of this principle rental incomes had been assessed for many years as business income. The DGIR's attempt to alter or restrict this principle not by procuring the appropriate amendment of the ITA 1967 through Parliament but by using public rulings as was done in *Seaport World Wide Sdn Bhd*[67] has fortunately not been successful where the court following *Strawberry Park Resorts Sdn Bhd*[68], held that such rulings are but "useful guides ...that set out the interpretation of the DGIR in respect of the particular tax law, and the policy and procedure that are to be applied"; they do not have the force of law but are "merely expressive of the views of HASiL". By its terms, S. 138A[69] appears to bind only the DGIR rather than taxpayers for it says that "when" a person applies a provision in the manner stated in the ruling the DGIR "shall apply the provision in relation to the person and the arrangement in accordance with the ruling". The section does not say that taxpayers must comply with or are bound by the ruling. That had not, however, deterred the DGIR from making two alterations of the American Leaf principle, via two rulings namely, Public Ruling of 2004 (which purported to restrict renting businesses to five or more units of rental properties) and then Public Ruling 4/2011 (whereby a renting business must provide comprehensive maintenance etc service to qualify) and imposing unilaterally

[64] *Transocean Drilling Sdn Bhd v KPHDN, Rayuan Sivil No: WA-14-8-04/2020, KPHDN v Classic Japan (M) Sdn Bhd [2021] 9 MLJ 870 (not overruled by the Court of Appeal on this point) and Uniqlo (Malaysia) Sdn Bhd v KPHDN [2020] 9 CLJ 521*

[65] *As to which see Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1 (rebutting presumption of possession and knowledge under S. 37A of the Dangerous Drugs Act 1952); Ng Eng Kooi & anor v PP [1970] 1 MLJ 267 (rebutting presumption of knowledge of goods being uncustomed etc under S. 135(2) of the Custom Act 1967) and PP v Koo Cheh Yew [1980] 2 MLJ 235; Chan Kwee Fong v PP [2010] 1 MLJ 441 (defence of insanity, temporary or otherwise, by reason of intoxication per S. 85(2)(b) of the Penal Code) and PP v Sahifful Filzuad Bin Sa'don [2018] MLJU 230 (proof of insanity); Loo Hwee Hong v PP [1978] 2 MLJ 164. See PP v Lee Poh Chye & anor [1997] 4 MLJ 578 where Jeffrey Tan JC said this: On proof according to S. 3, it is trite that in criminal proceedings, the burden of proving or disproving an issue when it is on the accused – as when the law presumes a fact or issue against the accused 'unless the contrary is proved' – is no higher than that of a party to a civil suit, i.e. the balance of probabilities (see Loo Hwee Hong v PP [1978] 2 MLJ 164 and Akin Khan bin Abdul Rahman v PP [1987] 2 MLJ 217); and if the court accepts the defence story as probable even though it is not convinced of the truth, then the defence has succeeded in proving to the contrary the presumption that has arisen (see Mohamed Yusof bin Hj Ahmad v PP[1983] 2 MLJ 167 at p 171)." See also PP v Yuvaraj [1969] 2 MLJ 89*

[66] *American Leaf Blending Co Sdn Bhd v DGIR [1979] 1 MLJ 1*

[67] *Seaport World Wide Sdn Bhd v KPHDN [2020] MLJU 1502. Appellant though only selling leasehold interests in vacant lots was held to be nonetheless a property developer within the meaning of regulation 3 of the Income Tax (Property Development) Regulations 2007 because the regulation, referring merely to "sale of vacant lots" did not envisage the exclusion of sale of leasehold interest in vacant lots. Its developer status was also established by its development activities including the acknowledgement of this status by the Johor State Government. The DGIR's attempt to deny deduction of its development expenditures and its developer status based on his Public Ruling 1/2009 on Property Development was rejected by the court.*

[68] *Strawberry Park Resort Sdn Bhd v KPHDN, R1-14-17-96, income from disposal of leaseholds for periods one day shorter than their leasehold terms held business income chargeable under S. 4(a) of ITA 1967 and that the appellant qualified as a developer.*

[69] *Public rulings, unlike rules made by the finance minister pursuant to S. 154 of the ITA 1967, are not required to be laid before Parliament nor gazetted.*

the S. 113(2) penalty. The DGIR did not consider whether appellant's tenants required or wanted such services which must inevitably involve increased rentals or payment of services charges. Neither did he consider whether existing tenancies could be varied or replaced contractually midway. The appellant had managed to still qualify under the 2004 ruling. It remains to be seen whether in these circumstances the imposition would be held to be a fair and reasonable exercise of the DGIR's discretion or whether good faith is available[70] or will the imposition be seen by the court as egregiously harsh and unreasonable, if not actually oppressive.

CONCLUSION

In the earlier years of the ITA 1967, S. 113(2) was never unilaterally imposed. The penalties were assessed via S. 96A and there is a prescribed form for this type of assessments. This may account for the absence of litigation on the S. 113(2) penalties during those times.

The S. 96A route may very well be tedious, time-consuming and cumbersome but if this is the law then it must be obeyed. If as a matter of policy, it is considered desirable that the penalty for incorrect return or incorrect information, where no charge is preferred, should be assessed as tax thereby dispensing with the agreement of taxpayer, S. 96A should be amended appropriately. The Hong Kong income tax legislation has adopted such an approach[71].

Nobody will take issue with the legitimacy of using the S. 113 penalties as a deterrence to secure better tax compliance[72]. It is quite another matter if tax penalties are treated as an extra source of revenue[73] because firstly penalties are meant as punishment and not a revenue source and secondly it is likely to be productive of more tax disputes and litigation[74] rather than compliance. This is evident from the cases. The possibility of arbitrary or incorrect imposition of S. 113(2) penalties is just as worrisome, if not more, as the possibility, alluded to by Edgar Joseph Jnr FCJ[75], of "arbitrary or incorrect assessments, brought about by fallible officers" in order to meet "publicly declared targeted amount of taxes".

As the courts have not specifically ruled on unilateral imposition as such[76], no question of over-ruling (which may have serious repercussions) arises. A prospective overruling[77] will, in any event, avoid such repercussions.

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[70] *Quere whether rights to be assessed under S. 4(a) can be said to have been acquired by the appellant?*

[71] *S. 82A of the Hong Kong Inland Revenue Ordinance (Cap112) enables an assessment to additional tax treble the amount of the tax under-charged to be made without the need for an agreement from the taxpayer, "if no prosecution under S. 80(2) or 82(1) has been instituted" where any person "without reasonable excuse" (a) makes incorrect return by "omitting or understating anything in respect of which he is required by this Ordinance to make a return..."; (b) makes any incorrect statement in connection with a claim for deduction or allowance under this Ordinance; (c) gives any incorrect information in relation to any matter or thing affecting his own chargeability (or liability of any other person to tax) .... and other defaults or omissions not relevant to present discussion.*

[72] *HASiL seems to have back-paddled on their previous stand of not imposing S. 113(2) penalties on cases prior to the self assessment regime involving technical adjustment or differing interpretations of the law. See Dialogues with HASiL which recorded a meeting between the Operations Division of HASiL and representatives of several professional bodies (MICPA, MIA, CTIM, MAICSA and MATA) on this concern. There is a dearth of local research on determinants for tax compliance. See, however, "Determinants of tax compliance behaviour of corporate taxpayers in Malaysia" by Noor Sharoja Sapiei, Jeyapalan Kaspillai & Uchema Cyril Eze in e-Journal of Tax Research (2014) Vol 12, pp 383-409 and "Does Compliance Strategy Increase Compliance? Evidence from Malaysia", Asian Journal of Accounting and Governance, ISSN2180-3838 & e-ISSN2716-6060, by Norul Syuhada Abu Hassan, Mohd Rizal Palil Ramli & Ruhanita Marlah which argues for a more accommodative approach instead of focusing on a deterrent strategy*

[73] *The audited accounts of HASiL have reported substantial increases in tax collections over the years from 2000 to 2017 but the amounts of tax penalties have not been separately reflected.*

[74] *In Kim Thye, the taxpayer having paid fully the additional taxes had refused to accept the imposition of the penalties. HASiL was reported in The Edge dated 1 January 2021 to have agreed via a consent judgment to cancel RM2.44 billion in tax penalties imposed on Tenaga Nasional Bhd disallowing its Reinvestment Allowance claim. TNB had obtained leave for judicial review and interim stay of proceedings.*

[75] *See Government of Malaysia v Jasanusa Sdn Bhd [1995] 2 CLJ 701*

[76] *The Special Commissioners declined to deal with this in Hua Seng Shipyard & Dockyard Sdn Bhd v KPHDN, Rayuan No PKCP (R) 45/2009 taking the view that it was academic as they had decided in favour of the appellant on deductibility under S. 33(1) of ITA 1967.*

[77] *As to which see Ling Peek Hoe &anor v Ding Siew Ching and another appeal [2017] 5 MLJ 385 and Letchumanan Chettiar Alagappan @ L Allagappan (As executor to SL Alameloo Achi Alias Sona Lena Alamelo Acho, deceased) & anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, both decisions of the Federal Court; PP v Mohd. Radzi Bin Abu Bakar [2005] MLJU 244, FC and Yugarajan a/l Letchimanasamy & Anor v Public Prosecutor [2020] MLJU 688, CA*

ERRATA

Reference is made to footnote 18 in Part 1 of the article "The Unilateral Imposition of Section 113(2) Penalty" published in the Tax Guardian Quarter 2 Year 2023 issue (page 22).

The sentence which reads as "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....by certiorari."

The sentence should read "Although the Court of Appeal had not allowed HASiL's appeal, it did not deal with this aspect. See too Uniqlo (Malaysia) Sdn Bhd v KPHDN....by certiorari."

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The column only covers selected developments from countries identified by the CTIM and relates to the period 11 March 2023 to 30 June 2023.

AUSTRALIA

Budget 2023/24: Australia to Implement Pillar Two Minimum Tax, Patent box regime dropped

On 9 May 2023, the Treasurer delivered the 2023-2024 Federal Budget. The Budget proposes the implementation of key aspects of Pillar Two of the OECD/G20 Two-Pillar Solution including a minimum tax, changes to the petroleum resource rent tax, a range of measures for small businesses, Medicare relief for individuals and incentives for the housing sector. The Budget forecasts a small surplus in 2022/23 for the first time in 15 years, although it is expected to return to a deficit in the next few years.

Corporate taxation

- The government will implement the Pillar Two 15% global minimum tax with the Income Inclusion Rule applying to income years starting on or after 1 January 2024 and the Undertaxed Profits Rule applying to income years starting on or after 1 January 2025, and a 15% domestic minimum tax (equivalent to the OECD's qualified domestic minimum top-up tax) applying to income years starting on or after 1 January 2024. The minimum tax will apply to large multinationals with annual global revenue of EUR750 million or more.
- The general anti-avoidance rule will be extended so that it applies to schemes that reduce the withholding tax rate on income paid to non-residents, or to schemes that result in a tax benefit in Australia even if the dominant purpose of the scheme is to reduce foreign income tax.
- The tax law will be amended to allow general insurers to continue to use their audited financial reporting information, including those based on AASB17, Insurance Contracts as the basis for their tax calculations. This change will apply for income years commencing on or after 1 January 2023.
- From 1 July 2023 until 30 June 2024, small businesses will be allowed to immediately deduct the full cost of eligible assets costing less than AUD20,000. During the same period, small and medium-sized businesses will be able to deduct an additional 20% of the cost of eligible assets supporting electrification and efficient use of energy.
- The government will not proceed with the patent box regime that was announced in earlier budgets.

Australian Standards Board Amends Accounting Standard to Accommodate Pillar Two Disclosures

The Australian Accounting Standards Board has amended Accounting Standard AASB 112 which deals with accounting for income taxes (equivalent to IFRS IAS 12) to accommodate disclosures related to the introduction of the Pillar Two global minimum tax. The Standard applies to annual periods beginning on or after 1 January 2023 that end on or after 30 June 2023.

The amendments are in line with IAS 12 and require disclosures of any current tax expense or income related to Pillar Two taxes, providing non-recognition and a mandatory exception from disclosure of information about deferred tax assets and liabilities related to Pillar Two income taxes (and requiring the disclosing of the application of the exception).

Further, also in line with IAS 12, during periods when the Pillar Two legislation is substantively enacted, but is not yet in effect, disclosures of qualitative and quantitative information will be required, including in the form of an indicative range or a statement that information is not known or reasonably estimable. These disclosures are not required in the interim 2023 financial statements but are required in the annual 2023 financial statements and going forward.

The amendment also includes examples of such qualitative and quantitative disclosures:

- qualitative information such as

information about how an entity is affected by Pillar Two legislation and the main jurisdictions in which exposures to Pillar Two income taxes might exist; and
- quantitative information such as:
  1. an indication of the proportion of an entity's profits that might be subject to Pillar Two income taxes and the average effective tax rate applicable to those profits; or
  2. an indication of how the entity's average effective tax rate would have changed if Pillar Two legislation had been in effect.

The government announced the implementation of a 15% global minimum tax and domestic minimum tax under the Pillar Two rules in the 202324 Budget in May.

Treasury Defers Public Country-by-Country Reporting to 1 July 2024

Following a public consultation process on the Public Country-by-Country Reporting Integrity Measure, the Treasury has acknowledged the feedback that the proposed disclosures would go beyond the disclosures required by the European Union (EU) or under the OECD/G20 BEPS Action 13 (e.g. listing and valuing of intangible assets, related party expenses and an effective tax rate calculation in line with the Pillar Two solution), and agreed to defer the application date by 12 months to 1 July 2024 to better align the government's proposed reporting requirements with the commencement of the EU's reporting directive, and allow for further consultations on the appropriate level of disaggregated reporting.

Government Introduces Bill to Amend Thin Capitalisation Rules, Require Corporate Subsidiary Disclosures

The government has introduced to Parliament the Treasury Laws Amendment (Making Multinationals Pay Their Fair Share — Integrity and Transparency) Bill 2023 that will amend the thin capitalisation rules and require Australian public companies to disclose information about their subsidiaries with effect from 1 July 2023.

The Treasury noted broad support for the proposed amendments to the thin capitalisation rules, and agreed to a number of changes following the consultation process in March-April. The Treasury further noted that it continued to engage with targeted stakeholder groups after the public consultation closed, focusing on the property and infrastructure sectors.

The main changes to the earlier proposals are summarised below:
- Future availability of deductions disallowed under the fixed ratio test and carried forward will be subject to the business continuity test in addition to the continuity of ownership test (i.e., the availability of carried forward deductions will be subject to the same rules as carried forward tax losses).
- The denial of deductions for interest incurred to derive non-assessable non-exempt income, that was included in the original draft, is removed from the Bill. The Explanatory Memorandum notes that this change was deferred and will be subject to separate consideration.
- The Bill includes new debt creation rules that will deny deductions for interest expenses incurred on borrowings used to acquire assets from related parties, or to fund dividends and other distributions to related parties.
- Changes have been made to the calculation of EBITDA for the purposes of the fixed ratio test, including in respect of the treatment of tax depreciation and franking offsets, as well as the application of the test to trusts and partnerships.

The Bill will also require Australian public companies, both listed and unlisted, to disclose in their financial statements information about their subsidiaries, and these new disclosure requirements are expected to apply to financial years commencing on or after 1 July 2023.

Specifically, Australian public companies will be required to include in their annual financial statements a "consolidated entity disclosure statement" that will provide the following information about its consolidated subsidiaries:
- Name;

- Entity type and capacity;
- Place of incorporation and ownership percentage; and
- Tax residence.

The reporting requirement is aimed at ensuring companies are upfront with how they structure their subsidiaries, including for tax purposes.

Public companies that do not prepare consolidated financial statements will be required to state this fact in their financial statements but will not be subject to these disclosure requirements.

Australian Taxation Office Updates Definition of Financial Institutions and Treatment of Interest Income for Treaty Benefit Entitlement

The Australian Taxation Office has amended Taxation Ruling TR 2005/5 which deals with ascertaining Australia's right to tax interest income of foreign financial institutions.

The amendment clarifies the meaning of the term "financial institution" in Article 11(3)(b) of the treaties with the United Kingdom and the United States. Specifically, the amendment adds a discussion on the definition of "spread activities". It also notes that financial advisory services, share trading, or purchase of receivables would not normally result in the entity being classified as a financial institution, as there would be no provision of finance. It also updates a discussion on the indicia of carrying on a business by a company.

The amendment also extends the application of the Ruling to residents of another country with which Australia has a tax treaty that includes a financial institution interest withholding tax rate exemption or reduction on identical terms as the US or UK treaties, and are classified as financial institutions for the purposes of that treaty.

A consultation on the above was carried out in October 2022.

CHINESE TAIPEI

Government Sets Investment Thresholds for R&D and Equipment Investment Tax Credits

Following the 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 research and development (R&D) and equipment, the Ministry of Economic Affairs has announced the investment thresholds and qualifying conditions which are summarised as follows:

- to qualify for the tax credit of 25% of R&D expenditure, the R&D investment threshold is TWD6 billion and the ratio of R&D intensity is 6% (i.e., the ratio of R&D expenses to operating revenue); and
- to qualify for the tax credit of 5% of investments in advanced manufacturing equipment, the investment threshold is TWD10 billion.

The total tax credit amount for both incentives is limited to 50% of income tax payable in a fiscal year. The incentives are available from 1 January 2023 to 31 December 2029.

Government Reduces Securities Transaction Tax on Warrants Trading

The Executive Yuan has announced an amendment to the Statute for Securities Transaction Tax, to reduce the tax rate on the trading of warrants from 0.3% to 0.1% for risk hedging purposes. This tax reduction is aimed at lowering the costs of fulfilling warrant quotation obligations and attracting more investors to participate in the warrants market. The tax reduction is applicable for five years and will take effect six months after the amendment is passed by the Legislative Yuan. The details on scope and qualifying conditions will be published by the Financial Supervisory Commission.

Government Announces New Carbon Emissions Trading System

Following the enactment of the Climate Change Response Act on 10 January 2023 to establish a sustainable environment for climate change and achieve net-zero carbon emission in 2050, the government has announced the establishment of the Carbon Emission Trading System (ETS). The Environmental Protection Administration and the Financial Supervisory Commission are expected to start operating the ETS from July 2023. The ETS will be an open market with international standards for transparent carbon pricing for enterprises to trade carbon rights and the fundamental mechanism for the government to charge a carbon fee or tax in the future.

HONG KONG

Hong Kong Publishes Advance Tax Ruling on Economic Substance Requirement Under FSIE Regime

On 22 May 2023, the Inland Revenue Department (IRD) published an advance tax ruling (Advance Ruling Case No. 69) that illustrates the application of S. 15K of the Inland Revenue Ordinance (IRO), which provides an exception to the tax treatment of specified foreign-sourced passive income under the foreign-sourced income exemption (FSIE) regime where the economic substance requirement is met.

Briefly, the FSIE regime that became effective from 1 January 2023 subjects specified foreign-sourced income to profits tax if the income is received in Hong Kong by a multinational entity (MNE) carrying on a trade, profession or business in Hong Kong unless economic substance, nexus and/or participation requirements are met. The ruling focuses on the economic substance requirement and applies for the years of assessment (Y/A) 2023/24 to 2027/28.

Facts

The Applicant is a private limited company incorporated in Hong Kong and an MNE entity as defined under the IRO. It holds 20% equity interests in Company F (a company incorporated in Jurisdiction F) from which it derives offshore dividend income but is not a pure equity-holding company. The principal business activities of the Applicant are sales of hospitality packages for sporting events and investment holding.

Arrangements

- The Applicant carries out or arranges to carry out its specified economic activities in Hong Kong, i.e., making necessary strategic decisions in respect of assets it acquires, holds or disposes of and managing and bearing principal risks in respect of the relevant assets.
- The Applicant has several directors and employees in Hong Kong to manage and support its business operations. It also outsources its legal and business support activities to a non-associated service provider in Hong Kong.
- Apart from its principal business activities, the Applicant has advanced two interest-free loans to its related parties in Hong Kong and bears principal risks of the loans. The loan transactions have already occurred and have been made within the same multinational enterprise group, hence minimal activities are required by the Applicant to manage the loans. The relevant activities in relation to overseeing the loans are carried out by the Applicant's director in Hong Kong.
- The Applicant has planned to:
  - have a predetermined number range of employees with the necessary qualifications to carry out the specified economic activities in Hong Kong each year;
  - incur a predetermined amount range of annual operating expenditures in Hong Kong for the specified economic activities; and
  - undertake adequate monitoring of the specified economic activities carried out in Hong Kong by the service provider.

Ruling

The IRD has ruled that the Applicant will satisfy the economic substance requirement under S. 15K of the IRO. Advance Ruling Case No. 68 was also published on 22 May 2023, with similar facts and arrangements and also ruled as satisfying the exception requirement.

Note: Selected rulings are published by the IRD for general reference only. The rulings are edited by the IRD prior to publication and all information that may enable identification of the taxpayer is removed to protect taxpayer confidentiality.

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

On 10 May 2023, the Legislative Council passed the Inland Revenue (Amendment) (Tax Concessions for Family-owned Investment Holding Vehicles) Bill 2022, which gives effect to the profits tax concessions for eligible family-owned investment holding vehicles (FIHVs) managed by single family offices (SFOs) in Hong Kong.

The tax concession regime exempts an FIHV's assessable profits earned from qualifying transactions and incidental transactions from profits tax. The FIHV must be managed by an eligible SFO and fulfil the minimum asset threshold of HKD240 million and substantial activities requirement.

As stated in the government's press release, the concessions are aimed at facilitating family offices in setting up and operating in Hong Kong, creating new business opportunities for the asset and wealth management sector and generating demand for other related professional services, thereby fostering Hong Kong's position as a premier family office hub and an international asset and wealth management centre.

The Inland Revenue (Amendment) (Tax Concessions for Family-owned Investment Holding Vehicles) Ordinance 2023 was gazetted and came into operation on 19 May 2023. The tax concession is applicable to any years of assessment commencing on or after 1 April 2022.

Government Issues Policy Statement on Developing Family Office Businesses in Hong Kong

The Hong Kong Government recently issued the Policy Statement on Developing Family Office Businesses in Hong Kong, setting out its policy stance and measures with a view to creating a conducive and competitive environment for the businesses of global family offices and asset owners to thrive in Hong Kong. The policy measures are summarised as follows:

- A new Capital Investment Entrant Scheme (CIES): based on the original CIES, permissible assets for the scheme will include equities listed in Hong Kong, debts issued or fully guaranteed by companies listed in Hong Kong, by the government or by other entities wholly or partly owned by the government, subordinated debts issued by authorised institutions, and eligible collective investment schemes (including the investment-linked assurance scheme (ILAS)). Besides assets denominated in Hong Kong dollars, assets denominated in Chinese RMB will also be considered. Upon approval, applicants may reside and pursue development in Hong Kong along with their spouse and dependent unmarried children.
- Family-owned investment holding vehicles (FIHVs) managed by single family offices in Hong Kong will be exempt from profits tax, and existing preferential tax regimes for funds and carried interest will be further reviewed.
- Providing market facilitation measures: the Securities and Futures Commission (SFC) has issued quick reference guides to address frequently asked questions about licensing requirements, with one specifically catering for family offices, and has also set up a dedicated communications channel maintained by its licensing team for family office related enquiries. The government will also introduce a set of more risk-based measures to streamline intermediaries' suitability assessment and disclosure processes for sophisticated or ultra-high-net worth individual clients, with due regard to investor protection.
- The government will fund the setup of a new Hong Kong Academy for Wealth Legacy under the Financial Services Development Council.
- Art storage facilities at the airport will enable global family offices with capital allocations in art to benefit from the thriving art ecosystem in Hong Kong.
- Aiming at developing Hong Kong into a philanthropic centre for global family offices and philanthropists to deploy charitable capital benefiting Hong Kong, China and elsewhere, the government will enhance the processing of applications for the recognition of tax exemption status for charities. The Inland Revenue Department (IRD) will devise a standard form to facilitate the submission of applications and streamline their processing, provide further guidance for applicants to facilitate precise statements of charitable objects and enhance the legislative proposal by expanding the extent of beneficial interest that an exempted charity may hold in an FIHV.
- The dedicated FamilyOfficeHK team in InvestHK will expand its role to also cover services like facilitating philanthropic endeavours of wealth owners and assisting in education related matters.
- A new Network of Family Office Service Providers, covering private banks, accounting and legal firms, trusts and other professional services firms, will provide a two-way channel between the government and the industry to communicate on the latest policy developments, and mobilise the industry's global network to advocate and promote opportunities in Hong Kong for family offices.

INDIA

India Passes Finance Act 2023: Debt Mutual Funds Lose Long-term Capital Gains Tax Benefit, Other Key Amendments

The Finance Bill 2023 was recently passed by the Lok Sabha (lower house) and the Rajya Sabha (upper house), incorporating changes in the Finance Bill introduced by the Finance Minister on 1 February 2023. The key amendments, in respect of income tax, in the Finance Act 2023 are as follows:

Marginal relief to resident individuals opting for new scheme

A rebate will be available to resident individuals opting for the new individual income tax scheme if the total income during the previous year did not exceed INR700,000. Furthermore, the amended Finance Act provides a marginal rebate to resident individuals whose income marginally exceeds INR700,000.

Clarity on capital gains from debt mutual funds

Debt mutual funds lose their long-term

capital gains (LTCG) tax benefit if less than 35% is invested in equity instruments. Hence, any income or gain from sales, redemptions or maturities from these funds will be considered short-term capital gains and taxed at the applicable tax slab of the investor, regardless of the investment's holding period.

Change in tax rates on specified income
The amended Finance Act provides the following tax rate changes:

- a concessional tax rate of 10% on dividends (normally 20%) received from an International Financial Services Centre (IFSC) Unit by a non-resident or foreign company; and
- royalty and fees for technical services received by a non-resident or foreign company are to be taxed at 20% (previously 10%).

Applicability of tax deduction at source (TDS) on online gaming winnings from 1st April 2023
The Finance Act brought forward the applicability of the 30% TDS on winnings from online gaming from 1 July 2023 to 1 April 2023.

Expansion of meaning of original funds for providing exemption from capital gains
An investment vehicle in which the Abu Dhabi Investment Authority is the direct or indirect sole shareholder, unit holder, beneficiary or interest holder and such investment vehicle is wholly owned and controlled, directly or indirectly, by the Abu Dhabi Investment Authority or the government of Abu Dhabi shall be eligible for exemption on the transfer of capital assets to the resultant fund formed in India.

Exemption from capital gains on transferring interest in a joint venture (JV)
The transfer of interest in a JV by a public sector company in exchange for shares in a foreign company shall not be considered as transfer and hence is exempted from capital gains tax.

Additional benefits for offshore banking units
Section 80LA previously provided a deduction of 100% of the income from any five consecutive assessment years and a deduction of 50% of the income from offshore banking units for the subsequent five assessment years. However, the amended Finance Act increased the deduction from 50% to 100% for the subsequent five assessment years.

No surcharge and cess on income from securities held by specified fund
In respect of income from securities held by a specified fund referred to in S. 10(4D), no surcharge and cess shall be levied on income tax calculated on the same. This amendment shall be applicable from 1 April 2023.

Maximum rate of Tax Collection at Source (TCS) shall be 20%
The maximum rate of TCS has been capped at 20% in case of persons not having a valid permanent account number (PAN) and non-filers of returns of income.

Introduction of new rate of TDS
Tax shall be deducted at the rate of 9% on sums paid by way of interest on money borrowed from a source outside India by issuing a long-term bond or rupee denominated bond, which is listed only on a recognised stock exchange located in an IFSC, on or after 1 April 2023.

Exemption on income received by non-resident from portfolio of securities
Income received by a non-resident from a portfolio of securities or financial products or funds, managed or administered by any portfolio manager on behalf of such non-resident, in an account maintained with an offshore banking unit in any IFSC is exempt from income tax.

Taxability of specified sum received from business trust
The Finance Act provides that a "specified sum" shall be computed as per the computation mechanism provided in the Act, in order to bring the sums received by a unit holder from a business trust into the ambit of taxation. Further, with effect from 1 April 2023, the cost of acquisition of a unit shall be reduced by any sum received from the business trust, subject to specified conditions.

India Announces E-Appeals Scheme Empowering Joint Commissioner to Hear and Decide Appeals

On 29 May 2023, the Central Board of Direct Taxes (CBDT) issued Notifications 32/2023 and 33/2023 notifying the e-Appeals Scheme, 2023 (Scheme) as envisaged by the Finance Act 2023 vide introduction of S. 246 in the Income Tax Act 1961 (ITA).

The Scheme provides for creation of a new authority, i.e., Joint Commissioner of Income Tax (Appeals) [JCIT(A)] and applies to all the appeals against orders passed by officers below the rank of JCIT(A).

Specifically, the Scheme provides that JCIT(A) is empowered to:

- condone delay in filing an appeal;
- require the taxpayer to make submissions within the prescribed time or provide specified information, documents or evidence;
- procure further information, document or evidence from the taxpayer or any other person;
- obtain a report of the Assessing Officer (AO) on the grounds of appeal or information, document or evidence furnished by the taxpayer;
- admit additional grounds of appeal and/or additional evidence filed by the taxpayer in accordance with the prescribed guidelines;
- prepare a show cause notice and initiate penalty proceedings against the taxpayer to enhance an assessment, penalty or reduce refund;
- issue a penalty order after considering the taxpayer's response; and
- amend its own order to rectify any mistake apparent from record.

Where the taxpayer requests for a personal hearing, JCIT(A) shall provide the opportunity to video conferencing or video telephony to the extent it is technologically feasible. Any appeal against JCIT(A)'s order may be filed before the jurisdictional Income Tax Appellate Tribunal. All communications under the Scheme, between the taxpayer and JCIT(A) as well as internal communications between different Revenue officers must take place electronically.

India Issues Guidance on Withholding Tax on Net Winnings from Online Games

On 22 May 2023, the Central Board of Direct Taxes (CBDT) issued a circular providing guidance on withholding tax on net winnings from online games. The circular provides that:

- each wallet will be considered as part of the user account for the purposes of computing net winnings. The deposit, withdrawal or balance in the user account means the aggregate of deposits, withdrawals or balances in all user accounts (excluding transfers from one account to another);
- borrowed money deposited in any user account will be considered as a non-taxable deposit;
- any deposit in the form of a bonus, referral bonus, incentive, etc., as well as money equivalents of coins, coupons, vouchers and counters will be considered as taxable deposits.

Such deposits will be included under net winnings. Any incentive/bonus which cannot be withdrawn will be considered taxable deposit only after removal of the restriction on withdrawal;
- when an amount is withdrawn from one user account to any other account (apart from an account with the same online gaming company), it shall be considered as a withdrawal. For this purpose, any account of user which is not registered with the online game company, is an account which is not a user account;
- where net winnings are in-kind, the company must ensure that the user pays tax or the company may itself withhold tax on the fair market value of the winnings in-kind; and
- no tax is required to be withheld if the net winnings withdrawn do not exceed INR100 per month, subject to meeting other specified conditions.

Note: Section 194BA of the ITA, inserted from 1 April 2023, mandates a person who is responsible for paying to any person any income by way of winnings from any online game during the financial year to withhold tax on the net winnings in the person's user account. Tax is required to be withheld at the time of withdrawal as well as at the end of the financial year at the rates applicable to the user.

Indian High Court Rules Online Games of Skill Not Gambling/Betting

On 11 May 2023, the Karnataka High Court (HC), in the case of *Gameskraft Technologies Pvt Ltd v. Directorate General Of Goods Services Tax Intelligence (W.P. No. 19561/2022)*, considered whether offline/online games such as rummy which are mainly/preponderantly/substantially based on skill and not on chance, whether played with/without stakes, is tantamount to "gambling or betting" as contemplated in Entry 6 of Sch III of the Central Goods and Services Tax Act 2017 (CGST Act). The HC ruled that such games of skill were not in the nature of "gambling and betting" and consequently, quashed the tax recovery notice issued on the taxpayer.

The taxpayer (GTPL) was an online intermediary company providing technology platforms that allow users to play skill based online games against each other. The tax authorities issued a show cause notice on GTPL for the levy of goods and services tax (GST) of INR210 billion on the basis that online games played on the platform were "games of chance" taxable at 28% and not games of skill.

The HC, however, rejected the tax authorities' arguments and held as follows:

- There is a distinct difference between games of skill and games of chance. Games such as rummy, etc. whether played online or physically, with or without stakes, would be considered as games of skill and a test of predominance would apply. Entry 6 in Sch III to the CGST Act taking actionable claims out of the purview of supply of goods or services would clearly apply to games of skill and only games of chance such as lottery, betting and gambling would be taxable.
- The meaning of the terms "lottery, betting and gambling" as contemplated in Entry 6 should be construed nomen juris in the light of other judicial precedents that do not include games of skill.
- The taxation of games of skill is outside the scope of the term "supply" in view of S. 7(2) of the CGST Act read with Sch III of the Act.
- A game of chance whether played with stakes is gambling; a game of skill whether played with stakes or without stakes is not gambling; a game of mixed chance and skill is gambling, if it is substantially and preponderantly a game of chance and not of skill; a game of mixed chance and skill is not gambling, if it is substantially and preponderantly a game of skill and not of chance.
- Rummy is substantially and preponderantly a game of skill and not of chance; rummy whether played with stakes or without stakes is not gambling; online/electronic/digital rummy whether played with stakes or without stakes is not gambling. Other online/electronic/digital games that are also substantially and preponderantly games of skill and not of chance are also not gambling.
- The Rummy game and other online/electronic/digital games played on GTPL's platforms are not taxable as "betting" and "gambling" under the CGST Act. Consequently, the show cause notice issued by the tax authorities to GTPL is illegal, arbitrary and without jurisdiction or authority of law and deserves to be quashed.

INDONESIA

Indonesia Announces Tax Incentives for Investments in New Capital City

Indonesia has issued Government Regulation Number 12 of 2023 (GR 12/2023) regarding the granting of business licenses, ease of doing business, and investment facilities for businesses in the capital city of Nusantara, the future capital of Indonesia. The regulation aims to provide greater certainty, opportunity and participation for businesses to accelerate the development of the capital city, so that development can be evenly distributed and move the Indonesian economy forward.

The tax incentives available for investments in Nusantara as stipulated under GR 12/2023 include:

- 100% income tax reduction (tax holiday) for domestic taxpayers with capital investments of at least IDR10 billion. The duration of the tax holiday depends on the business sector and timing of the investment as follows:
    - public infrastructure and public services, up to 30 years;
    - economic generation, up to 20 years; and
    - other business sectors, up to 10 years;
- income tax reduction incentive for up to 25 years for investments made from 2023 to 2035 and 20 years for investments made from 2036 to 2045, for financial sector activities as follows:
    - 100% income tax reduction for domestic corporate taxpayers and permanent establishments conducting banking, insurance and sharia finance on the amount of corporate income tax payable on income that is used for investment or financing construction, development and economic activities in Nusantara and/or partner areas;
    - 85% reduction of corporate income tax payable on: (i) income from foreign investments in the financial sector capital markets, derivative finance and carbon exchanges and international commodity trade/exchange; or (ii) the share of income originating from businesses and/or communities located in Nusantara, for other financial services; and
    - tax exemption on income from investments in Nusantara received or earned by non-resident taxpayers for 10 years starting from the initial placement of funds in the financial centre;
- 100% reduction of income tax payable

TAX GUARDIAN - JULY 2023 42

for up to 10 years, followed by a 50% reduction of income tax payable in the following 10 years, available until the year 2045 for the following taxpayers:
- non-residents who establish and/or move their head offices and/or regional offices to Nusantara; and
- domestic taxpayers who establish their head offices and/or regional offices in Nusantara on income received or obtained from businesses or the community in Nusantara; and

- the following incentives are available until the year 2035:
  - gross income reduction of up to 250% of the total costs incurred for work practice, apprenticeships and/or learning activities by domestic taxpayers for the development of specific competency-based human resources;
  - gross income reduction of up to 350% of the total costs incurred for certain research and development activities within a certain period of time for domestic corporate taxpayers that conduct such activities;
  - gross income reduction of up to 200% of the total contribution and/or costs incurred for the construction of facilities, such as public facilities, social facilities or other non-profit facilities, by domestic taxpayers;
  - income tax under article 21 of the Income Tax Law will be borne by the government and is a final tax for the income received by certain employees;
  - final income tax of 0% on income from the gross turnover of certain businesses for micro, small and medium enterprises;
  - reduction of income tax on the transfer of rights over land and buildings;
  - non-collection of value added tax and exemption from sales tax on luxury goods on the delivery of certain taxable goods; and
  - import duty exemption and PDRI (Pajak dalam Rangka Impor) facility for goods imported for the growth and industrial development of Nusantara and partner areas.

SINGAPORE

◆◆ Tax Authority Issues e-Tax Guide on Enterprise Innovation Scheme

The Inland Revenue Authority of Singapore (IRAS) has issued the e-Tax guide on the Enterprise Innovation Scheme (EIS), which was announced in Budget 2023. The EIS provides enhanced or new tax deductions and/or allowances for five qualifying activities:

1. research and development (R&D) activities undertaken in Singapore;
2. registration of intellectual property (IP);
3. acquisition and licensing of IP rights;
4. training; and
5. innovation projects.

The scheme will be available from Y/A 2024 to 2028.

The key features of the EIS are summarised below:

- Qualifying businesses that carry on a trade or business will be able to enjoy enhanced deductions of up to SGD400,000 of qualifying expenditure incurred on each qualifying activity for activities (1) to (4) mentioned above and up to SGD50,000 of qualifying expenditure incurred for innovation projects. The expenditure cap for each qualifying activity is applied on a Y/A basis.
- In lieu of tax deductions/allowances, eligible businesses may opt to convert up to SGD100,000 of total qualifying expenditure across all the qualifying activities for each Y/A to a cash payout at a conversion rate of 20% (i.e., maximum payout of SGD20,000 per Y/A). The payout option is irrevocable once exercised and is available only to businesses that meet certain requirements.
- The expenditure cap for each qualifying activity is applicable at a company level (in the case of companies), at a sole proprietor level (in the case of sole proprietorships) and at a partnership level (in the case of partnerships). A separate expenditure cap on each qualifying activity applies when a sole proprietor is also a partner in one or more partnerships.
- The expenditure eligible for the enhanced deduction or cash payout is net of government grants or subsidies.
- To align the EIS with existing incentives under S. 14D (R&D expenditure), S. 14A (IP registration) and S. 14U and S. 19B (acquisition and licensing IP rights), the incentive period under these sections will be extended from Y/A 2025 to Y/A 2028.

◆◆ Singapore High Court Provides Guidance on Application of Test for Identifying Non-Monetary Consideration under GST Act

The General Division of the Singapore High Court has recently published its decision in *Herbalife International Singapore Pte Ltd v. the Comptroller of Goods and Services Tax* [2023] SGHC 54, in which it reversed the decision of the Goods and Services Tax Board of Review (GSTBR) in *GEV v. the Comptroller of Goods and Services Tax* [2022] SGGST 1 and ruled that the supply of certain nutritional supplements, weight-management products and other personal care products pursuant to a direct selling business model should, for Singapore goods and services tax (GST) purposes, be valued at its consideration under S. 17(2) of the Goods and Services Tax Act 1993 of Singapore (GST Act) – and not its open market value (OMV) under S. 17(3) of the GST Act.

(a) Facts

Herbalife International Singapore Pte Ltd (Herbalife), a GST-registered direct selling company, sells products to its members at four different tiers of discount (25%, 35%, 42% and 50%) off the base value of the products, depending on the sale volume of these members and those of new members referred to Herbalife by such members. The members will in turn sell the products to consumers.

The Comptroller of GST was of the view that the value of the consideration for supply of the products to the members comprised both monetary consideration (the discounted price) and non-monetary consideration (services provided by members to Herbalife), and therefore the value of the supply should be the OMV of the products, and not merely the monetary consideration. The Comptroller accepted that the OMV of the products was the retail price of the products with a 25% discount.

The GSTBR ruled in favour of the Comptroller and set out two "touchstones" in determining whether the undertaking of obligations can constitute non-monetary consideration within the scope of S. 17(3) of the GST Act. First, the undertaking or obligation must be independent of and not ancillary to the supply of goods. Second, the undertaking or obligation must provide a benefit which goes beyond the monetary transaction, to constitute non-monetary consideration. The GSTBR found that both conditions were satisfied in this case.

(b) Issue

The issue before the High Court was whether the value of supply of the products on which GST is levied should be the discounted price paid by the members (under S. 17(2) of the GST Act) or the OMV of the products (under S. 17(3) of the GST Act).

(c) Decision

The High Court reversed the decision of the GSTBR. The High Court found the existence of a special valuation provision in the United Kingdom's value added tax legislation (VAT Act), which is

ostensibly absent in the GST Act, to be a "strong indicator" that direct selling cases normally do not involve supplies made for non-monetary consideration under Singapore law. While the High Court broadly endorsed the two "touchstones" proposed by the GSTBR in ascertaining whether an undertaking or obligation constitutes non-monetary consideration, it disagreed with the GSTBR's decision on the following grounds:

1. Regular terms of trade would not ordinarily be independent of (and not ancillary to) a supply of goods unless the provision of something non-monetary in exchange for such supply is contractually demanded. Here, the terms imposed by Herbalife on its members do not require such members to provide marketing services to Herbalife; instead, the terms were imposed for members to qualify to receive the supply, regulate the use of the products once obtained or regulate their conduct as members - without more, these terms do not constitute non-monetary consideration.
2. For "benefits" to a supplier to be non-monetary consideration, it must be provided by the recipient in exchange for the supply. Benefits arising from regular terms of trade do not ordinarily constitute non-monetary consideration. For something to be considered non-monetary consideration provided by the recipient of the supply of goods for the purposes of S. 17(3) of the GST Act, it must be sufficiently valuable and clear that it was provided by the recipient in exchange for the supply of goods. One indicator of such a "benefit" provided by the recipient would be a parity of value between the non-monetary "benefit" and the goods supplied – i.e., the non-monetary "benefit" should bridge the discrepancy between monies paid and the regular price of the product in question. In this case, what was received by Herbalife was the compliance of its members with the contractual terms of trade. Such obligations were merely "by-products" or "results" of the membership agreement and it was not sufficiently valuable and clear that such obligations were undertaken in exchange for the supply of goods.

As there was no discernible non-monetary consideration provided for the supply of the products, S. 17(3) of the GST Act would not be applicable. GST should be chargeable based on the value of monetary consideration under S. 17(2) of the GST Act.

(d) Reaction

The High Court's decision affirms a narrow interpretation of what constitutes "consideration not consisting or not wholly consisting of money". It would be interesting to see if the GST Act will be amended to provide for special valuation rules for direct selling model businesses.

Tax Authority Updates E-Tax Guide on General Anti-Avoidance Provision

The IRAS has updated the e-Tax guide on the general anti-avoidance provision under S. 33 of the Income Tax Act 1947 (ITA) to include two new examples of tax avoidance arrangements.

The two categories are:

- setting up of a conduit entity to obtain a treaty benefit for the purpose of avoiding withholding tax; and
- assignment of debt to an offshore jurisdiction for the main purpose of obtaining a tax advantage.

The list of tax avoidance arrangements in the e-Tax guide is not exhaustive, and IRAS notes that examples of arrangements that are not described within the guide should not be taken as falling outside the ambit of S. 33(1) of the ITA.

The updated e-Tax guide also includes information on the surcharge to be imposed under S. 33A on the tax or additional tax arising from an adjustment made by the Comptroller of Income Tax if an arrangement falls within S. 33.

__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 17 February 2023 and 16 June 2023, including Public Rulings (PRs) and guidelines, if any, issued by the Royal Malaysian Customs Department (RMCD) and other regulatory authorities.

INCOME TAX

Finance Act 2023 gazetted

The Finance Act 2023, incorporating the changes proposed in Budget 2023, was gazetted on 31 May 2023. The Act adopts all the changes proposed in the Finance Bill, including the additional amendments made when the Finance Bill 2023 was passed by the Dewan Rakyat. The key amendments are discussed below.

- **Extension of personal income tax relief for deposits into the National Education Savings Scheme (SSPN) account**
  On 29 March 2023, the Honourable Prime Minister Dato' Seri Anwar Ibrahim announced that the individual income tax relief of up to RM8,000 for deposits into the SSPN account will be extended for another two years, until the year of assessment (Y/A) 2024.
- **Additional condition for micro, small and medium enterprises (MSMEs) to enjoy preferential tax rates – change in the effective date**
  For MSMEs[Note 1] to qualify for preferential tax rates[Note 2], an additional condition has been proposed such that with effect from Y/A 2024, not more than 20% of the paid-up capital with respect to ordinary shares or total capital contribution (as the case may be) of the MSME at the beginning of the basis period for a Y/A can be directly or indirectly owned or contributed by:

(a) Companies incorporated outside Malaysia, or
(b) Individuals who are not Malaysian citizens.

The effective date of the amendments to Para 2F of Sch 1 of the Income Tax Act 1967 (ITA 1967) have been amended to Y/A 2024 (instead of Y/A 2023) to be in line with the effective date of the introduction of the additional condition above.

Note 1:
An MSME is:

- A resident company incorporated in Malaysia which has a paid-up capital with respect to ordinary shares of RM2.5 million or less at the beginning of the basis period and that satisfies other specified conditions, or
- A limited liability partnership with a total capital contribution of RM2.5 million or less at the beginning of the basis period and that satisfies other specified conditions

which has gross income from a source or sources consisting of a business of not more than RM50 million for the relevant Y/A.

Note 2:
With effect from Y/A 2023, it has been proposed that the preferential tax rate for MSMEs for the first RM150,000 of chargeable income be reduced by two percentage points, as follows:

Chargeable income	Current income tax rate	Proposed income tax rate
First 150,000	17%	15%
RM150,001 – RM600,000		17%
Exceeding RM600,000	24%	24%

Update on Malaysia's double taxation relief agreement (DTA) with Poland

The Malaysia-Poland DTA, which was signed on 8 July 2013, entered into force on 12 January 2023. The DTA is effective from 1 January 2024, with the exception of the provisions of Articles 25 and 26 (Mutual Agreement Procedure and Exchange of Information) which are effective from 12 January 2023.

The table below summarises some of the withholding tax rates under the DTA in respect of payments from Malaysia to a Polish resident:

Payments	Withholding tax rate	
	Normal rate	DTA rate
Interest	15%	0% / 10% Note
Royalties	10%	8%
Fees for technical services	10%	8%

Note:
The 0% applies if the recipient is the Government of Poland or certain qualifying institutions of Poland. In other cases, the 10% rate applies.

Malaysia's new avoidance of DTA with the Republic of Maldives

On 24 May 2023, Malaysia signed a new DTA with the Republic of Maldives for the elimination of double taxation on income tax and the prevention of tax evasion and avoidance.

The DTA aims to avoid double taxation on the same income in Malaysia and the Maldives, which in turn provides tax certainty to taxpayers in both countries. The DTA also covers the right to determine taxation and the reduction of withholding tax rates on certain types of income, such as dividends, interest, royalties and fees for technical services.

The DTA will enter into force after the ratification procedures by both parties are completed.

New system transformations and initiatives by the Inland Revenue Board of Malaysia (HASiL)

On 6 March 2023, HASiL issued a media release stating that four new system transformations for public access and three new initiatives for HASiL's internal outreach were launched at its 27th HASiL Day Celebration Ceremony, to improve governance in its service delivery systems.

The four system transformations are as outlined below:

- e-TCC platform for taxpayers to obtain a tax compliance certificate (TCC[1]), which is a pre-condition for companies that wish to participate in government procurements. This platform allows the certificate to be printed if the taxpayer has a good compliance status in its submission of income tax return forms and income tax payments.
- e-PC system for the public to lodge reports on tax evasions committed by any individual or business taxpayer, instead of writing in by way of e-mails.
- TikTok HASiL to disseminate tax information and announcements
- Upgraded Malaysian Income Tax Reporting System (MITRS 2.0) to facilitate the online submission of taxation worksheets, financial statements and audit supporting documents.

The three initiatives are as outlined below:

- Research clips to display summaries of research papers prepared by the Strategic and Research Department, through a visual approach
- Updated Risk Management Manual 2.0, taking into account the latest information based on the ISO 31000:2018 Risk Management – Principles and Guidelines as well as HASiL's organisational structural changes that came into effect on 1 January 2023
- New version of HASiL's Taxpayer Roadmap, with an improved interactive display, to provide guidance to the public on income tax administration processes.

Update on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), (MLI)

On 24 January 2018, Malaysia signed the MLI. Briefly, the MLI allows the Government to effectively implement the anti-BEPS tax treaty measures by modifying existing tax treaties in a synchronized, simultaneous and efficient manner, without the need to renegotiate each treaty separately.

On 18 February 2021, Malaysia deposited its instrument of ratification for the MLI. The MLI came into force on 1 June 2021. However, the effective date of the relevant provisions under the MLI will depend on the dates the treaty partner countries deposit their instruments of ratification. The extent of modification to the tax treaties will also depend on the final positions adopted by the other countries.

HASiL has recently published on its website the latest list of signatories and parties to the MLI, along with each country's position, as of 6 March 2023. The website also outlines the list of Malaysia's treaties which will be modified by the MLI based on each country's position as of March 2023.

Updated guideline for application of research and development (R&D) status and tax incentives for R&D services

The Malaysian Investment Development Authority (MIDA) has recently published on its website the Guideline for application by Contract R&D companies or R&D companies for (i) R&D status; or (ii) tax incentives for R&D services, under the Promotion of Investments Act 1986 (PIA 1986) , which is effective from 1 January 2022. This new Guideline updates the earlier Guideline dated 31 March 2021.

Some of the key changes are outlined below:

- Pursuant to the Finance Act 2021, with effect from 1 January 2022, an "R&D company" or a "Contract R&D company" under the PIA 1986 is required to apply for and obtain approval from the Minister of International Trade & Industry (MITI) to qualify as a company approved as an 'R&D status company'. The approval, if granted, will be for a period of five years, and is extendable for a further five years (subject to approval).

  Under the savings and transitional rules, a grace period of six months (i.e., from 1 January 2022 to 30 June 2022) is given to existing R&D companies and Contract R&D companies. If the companies intend to retain their R&D status after the grace period, they are required to notify MITI of such intention within the grace period, for MITI's consideration.

  Following the above, MIDA issued a media release on 3 February 2022 to state that the notification by the existing R&D companies and Contract R&D companies are to be submitted to MIDA for consideration.

  The Guideline has now been updated to reflect the abovementioned changes and provides further guidance on the

[1] *This was proposed in Budget 2022*

application procedures, notification requirements and forms to be submitted (where necessary).

- The updated Guideline stipulates the conditions for an existing R&D company or Contract R&D company to be eligible for a second round of tax incentives (i.e., pioneer status or investment tax allowance).
- The updated Guideline clarifies that one of the eligibility criteria is for an R&D company or Contract R&D company to hire a minimum number of full-time employees in Malaysia with a degree or a diploma in science or a technical field, with a minimum of five years' experience in the relevant field.

  The earlier Guideline stated that the employees were to hold a degree or diploma in technical fields with relevant experience.

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

Following the enactment of the relevant rules by the Malaysian Government for the Automatic Exchange of Information under the CRS, Malaysian Financial Institutions (FIs) are required to collect financial account information from all non-Malaysian tax residents and report information in relation to account holders who are tax resident in "reportable jurisdictions" to HASiL. HASiL will exchange this information with the competent tax authorities from the "reportable jurisdictions".

Under the CRS, a professionally managed investment entity that is not an FI in the list of "participating jurisdictions" will be treated as a passive non-financial entity rather than a financial entity for due diligence and reporting purposes. Malaysian FIs will be required to "look through" the passive non-financial entity when undertaking the due diligence procedures to identify its controlling person(s) who are tax resident in reportable jurisdictions and report them accordingly. In this regard, HASiL has recently published on its website the updated list of participating jurisdictions dated 5 April 2023.

On 17 April 2023, HASiL has also announced the availability of an alternative method for Malaysian FIs in filing Foreign Account Tax Compliance Act (FATCA) nil returns (where there are no US reportable accounts) via e-mail, in lieu of the XML returns via the US IDES (International Data Exchange System) portal. The FATCA nil return template is available on HASiL's website and the completed FATCA nil return(s) should be submitted to fatca@hasil.gov.my.

Guidelines on the tax deduction for the donation or sponsorship of Smart Artificial Intelligence (AI)-Driven Reverse Vending Machines (RVMs)

In Budget 2023, it was proposed that a tax deduction be given to taxpayers, with a business source, who donate or sponsor Smart AI-Driven RVMs. The Ministry of Finance (MOF) has recently published on its website the guidelines on the above-mentioned proposal. The Guidelines are titled "Garis Panduan Permohonan Potongan Cukai Di Bawah Seksyen 34(6)(h) Akta Cukai Pendapatan 1967 Ke Atas Sumbangan/ Penajaan Smart Artificial Intelligence (AI)-Driven Reverse Vending Machine (RVM) Bagi Maksud Pengiraan Cukai Pendapatan". Some of the salient points are as outlined below.

- **Qualifying contributions**
  Cash or financing of smart vending machines which adopt smart AI technology

- **Qualifying taxpayers with business income**
  - Companies
  - Individuals
  - Partnerships
  - Trust bodies
  - Cooperative societies

- **Supporting documents**
  (i) Official receipt
  (ii) Letter of acceptance, or
  (iii) Financing agreement (outlining the duration, location and machine's serial number)

  and

  verification by the Ministry of Natural Resources, Environment and Climate Change (NRECC) of the cash, equipment, or services' value.

The format of the letter of acceptance and verification by NRECC is as outlined in Appendix I and II to the Guidelines.

- Taxpayers are required to apply for and obtain approval from the MOF to qualify for the tax deduction. The details to be submitted are as outlined in Appendix III to the Guidelines.
- The tax deduction is applicable for

applications received by MoF between 1 April 2023 and 31 December 2024, where the contributions or sponsorships are made during the same period.

◆◆ Special Voluntary Disclosure Programme (SVDP) 2.0

In Budget 2023, it was announced that HASiL and RMCD would be launching new SVDPs. The SVDPs will grant taxpayers full penalty relief for voluntary disclosures (VDs) made within a stipulated time period.

On 2 June 2023, HASiL published on its website the relevant documents to outline the details for SVDP 2.0, including the following:

- Operational Guidelines No. 2/2023 – SVDP 2.0, and
- Frequently Asked Questions (FAQs).

The SVDP 2.0 is effective from 6 June 2023 to 31 May 2024.

◆◆ Updated Rules on Transfer Pricing (TP) and advance pricing arrangements (APAs)

On 29 May 2023, the following Rules were gazetted:

- Income Tax (Transfer Pricing) Rules 2023 [PU(A) 165/2023]
  This revokes the Income Tax (Transfer Pricing) Rules 2012 [PU(A) 132/2012].
- Income Tax (Advance Pricing Arrangement) Rules 2023 [PU(A) 166/2023]
  This revokes the Income Tax (Advance Pricing Arrangement) Rules 2012 [PU(A) 133/2012].

Broadly, the TP rules stipulate the requirement for taxpayers to prepare contemporaneous documentation and prescribe how related companies should determine and apply the arm's length principle. The APA rules prescribe the application process and the relevant timelines. The covered period under the APA rules is between three to five Y/As.

REAL PROPERTY GAINS TAX

◆◆ Submission of Form CKHT 502 via e-CKHT is mandatory for payments under S. 21B of the Real Property Gains Tax Act 1976 (RPGTA 1976)

On 16 February 2023, HASiL issued a media release stating that for payments under S. 21B of the RPGTA 1976, it will be mandatory for taxpayers to submit the Form CKHT 502 via e-CKHT on the MyTax Portal, effective from 1 January 2023. This is in line with the implementation of the "bill number" which is to be used as a mandatory reference for certain tax-related payments.

Notwithstanding that, the media release also clarifies that during the transition phase, individual acquirers may still submit the Form CKHT 502 manually until 28 February 2023.

STAMP DUTY

◆◆ Extension of stamp duty exemption relating to the restructuring or rescheduling of a business loan or financing agreement executed between a borrower or customer and an FI

In Budget 2023, it was proposed that the stamp duty exemption on the instrument of loan or financing agreement relating to the restructuring or rescheduling of a loan or financing agreement between a borrower or customer and an FI, be further extended for another two years.

To legislate this, the Stamp Duty (Exemption) (No. 11) 2021 (Amendment) Order 2023 [PU(A) 141/2023] was gazetted on 2 May 2023. The Amendment Order provides that the exemption will now apply to the above-mentioned instruments of loan or financing agreements executed until 31 December 2024 (previously 31 December 2022). The Amendment Order came into operation on 1 January 2023.

◆◆ Remission of tax and stamp duty

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2023 [PU(A) 153/2023] was gazetted on 16 May 2023. The Order provides that any tax payable under the ITA 1967 and any stamp duty payable under the Stamp Act 1949 in relation to the following shall be remitted in full:

(a) Islamic Commercial Papers (ICP) and Islamic Medium-Term Notes (IMTN) issued by DanaInfra Nasional Berhad pursuant to the ICP and IMTN Programme, in nominal values of up to RM2.8 billion, provided that the combined aggregate of the outstanding nominal value of the ICP and IMTN and the outstanding principal amount under the Syndicated Revolving Credit-i Facility (RC-i Facility, see (b) below) shall not exceed RM2.8 billion
(b) RC-i Facility with the aggregate principal amount not exceeding RM2 billion, subject to the combined aggregate referred to in (c) below
(c) ICP and IMTN programme which has been upsized with a nominal value from RM13 billion to a maximum aggregate value of up to RM15.8 billion, and
(d) Guarantee provided by the Government of Malaysia in relation to the ICP and IMTN Programme and the RC-i Facility.

The Order came into operation on 17 May 2023.

◆◆ Stamp duty exemptions on the purchase of first residential homes under the Home Ownership Programme 2022/2023

To further encourage Malaysians to purchase their first home, in Budget 2023, the Government proposed to waive 100% of the stamp duty for purchases of residential property valued at RM500,000 or less, and 75% of the stamp duty for purchases of residential property valued between RM500,001 and RM1 million.

To legislate this proposal, the following

Orders were gazetted on 9 June 2023 and are deemed to have come into operation on 1 June 2022:

- **Stamp Duty (Exemption) Order 2023 [PU(A) 176/2023]**
  The Order provides that any loan agreement to finance the purchase of a residential property valued up to RM500,000 will be exempted from stamp duty. This Order applies to loan agreements executed between the individual (as named in the sale and purchase agreement (SPA)) and the following:

(a) A licensed bank under the Financial Services Act 2013 (FSA 2013)
(b) A licensed Islamic bank under the Islamic FSA 2013
(c) A development financial institution (FI) prescribed under the Development Financial Institutions Act 2002 (DFIA 2002)
(d) A co-operative society registered under the Co-operative Societies Act 1993 (CSA 1993)
(e) Any employer who provides an employee housing loan scheme
(f) Borneo Housing Mortgage Finance Berhad incorporated under the Companies Act 2016 (CA 2016)
(g) Mutiara Mortgage and Credit Sdn Bhd incorporated under the CA 2016
(h) A licensed insurer authorised to provide a housing loan under the FSA 2013, or
(i) A licensed takaful operator authorised to provide an Islamic housing loan under the Islamic FSA 2013.

- **Stamp Duty (Exemption) (No. 2) Order 2023 [PU(A) 177/2023]**
  The Order provides that all instruments of transfer executed in relation to the purchase of a residential property valued up to RM500,000 (based on market value) by an individual, will be exempted from stamp duty.
- **Stamp Duty (Remission) Order 2023 [PU(A) 179/2023]**
  The Order provides a 75% stamp duty remission on the stamp duty chargeable on a loan agreement to finance the purchase of a residential property valued between RM500,001 and RM1 million.

  This Order applies to loan agreements executed between the individual (as named in the SPA) and the following:

(a) A licensed bank under the FSA
(b) A licensed Islamic bank under the Islamic FSA
(c) A development FI prescribed under the DFIA
(d) A co-operative society registered under the CSA
(e) Any employer who provides an employee housing loan scheme
(f) Borneo Housing Mortgage Finance Berhad incorporated under the CA
(g) Mutiara Mortgage and Credit Sdn Bhd incorporated under the CA
(h) A licensed insurer authorized to provide a housing loan under the FSA, or
(i) A licensed takaful operator authorized to provide an Islamic housing loan under the Islamic FSA.

- **Stamp Duty (Remission) (No. 2) Order 2023 [PU(A) 180/2023]**
  The Order provides a 75% stamp duty remission on the stamp duty chargeable on any instrument of transfer executed in relation to the purchase of a residential property, valued between RM500,001 and RM1 million (based on market value), by an individual.

The Orders will only apply if:
(a) The residential property is purchased through the Malaysian Home Ownership Initiative (i-Miliki) under the Home Ownership Programme 2022/2023
(b) The SPA for the purchase of the residential property is between an individual and a property developer
(c) The purchase price in the SPA is the price after a discount of at least 10% from the original price offered by the property developer, except for a residential property which is subject to controlled pricing
(d) The SPA is executed between 1 June 2022 and 31 December 2023, and is duly stamped by 31 January 2024, and
(e) The individual has never owned any residential property, including a residential property obtained by way of inheritance or gift, which is held either individually or jointly.

The application for the exemptions and/or remissions will have to be accompanied by a statutory declaration (under the Statutory Declarations Act 1960) confirming points (c) and (e) above.

Stamp duty exemption for the transfer of property on grounds of love and affection

In Budget 2023, it was proposed that all instruments of transfer of property on grounds of love and affection between parents and children, or grandparents and grandchildren, be given a 100% stamp duty exemption on the first RM1 million of the property's value. Any remaining balance will be subject to stamp duty at an ad valorem rate, with a 50% remission on the duty imposed.

To legislate this proposal, the Stamp Duty (Exemption) (No. 3) Order 2023 [PU(A) 178/2023] was gazetted on 9 June 2023 and is deemed to have come into operation on 1 April 2023.

The Order provides a stamp duty exemption on all instruments of transfer for any immovable property operating as a voluntary disposition inter vivos executed between the following:

Donor	Recipient
(a) Mother or father; or (b) Mother and father	Child
Child	(a) Mother or father; or (b) Mother and father
(a) Grandfather or grandmother; or (b) Grandfather and grandmother	Grandchild
Grandchild	(a) Grandfather or grandmother; or (b) Grandfather and grandmother

A 100% exemption will be given on the stamp duty imposed on the first RM1 million or less of the immovable property's market value. A 50% exemption will be given on the stamp duty imposed on the remaining balance (i.e., amount exceeding the first RM1 million) of the immovable property's market value.

The exemption will only apply if:
(a) The instrument of transfer is executed on or after 1 April 2023, and
(b) The recipient is a Malaysian citizen.

LABUAN

Extension of time (EOT) for the submission of Y/A 2023 tax returns under the Labuan Business Activity Tax Act 1990 (LBATA 1990)

HASiL's Labuan branch issued a letter dated 15 March 2023 to the Association of Labuan Trust Companies (ALTC) to confirm that Labuan entities will be granted an EOT until 31 July 2023 to submit their tax returns under S. 5 and S.10 of the LBATA 1990 for Y/A 2023 (based on the financial year ended in 2022).

HASiL also stated that they are in the process of digitalising the LBATA tax filing, with full digitalisation expected by 2025. To facilitate the process, Labuan entities are required to submit a scanned copy of the relevant documents (as outlined below), together with the hard copies, to HASiL's Labuan International Section from Y/A 2023 onwards.

Forms	• Cover letter • LE1 form – Return of profits by a Labuan entity • LE3 form – Irrevocable election by a Labuan entity to be taxed under the ITA, where relevant • LE4 form – Statutory declaration under S. 5 of LBATA (for Labuan trading activities) • LE5 form – Statutory declaration under S. 10 of LBATA (for Labuan non-trading activities) • Audited accounts or management accounts • Payment slips
Tax clearance application	• CP7LE form – Application of tax clearance letter for a Labuan entity • Supporting documents as stipulated in Operational Guidelines No. 1/2022
LE file registration	• CP600LE form – Income tax number registration form for a Labuan entity • Certificate of registration • Forms 7 (Certificate of incorporation of a Labuan company or Labuan protected cell company), 13 (Return of allotment of shares), 25 (Return on particulars and changes of directors and secretaries) and 27 (Annual return) • Memorandum and Articles of Association, Charter of the Labuan Foundation or Deed of Trust • Declaration by a Labuan trust company as trustee • Other relevant documents
Others	Other relevant documents such as changes of Labuan entity's name or changes to Directors

INDIRECT TAX

<u>Indirect Tax Voluntary Disclosure</u>

Voluntary Disclosure Programme (VDP)

The RMCD, via its website, has announced a VDP, which runs from 6 June 2023 to 31 May 2024. This Programme allows taxpayers to perform voluntary disclosures on any outstanding tax liabilities on or before 28 February 2023, pertaining selected indirect taxes administered by the RMCD and be granted a waiver in penalty.

VDP Guideline

The VDP Guideline dated 2 June 2023, was uploaded in the RMCD's VDP website, called the MyVDP portal. This Guideline provides guidance on the procedures to implement the VDP.

MyVDP Registration and Application User Manual

The MyVDP Registration and Application User Manual on the VDP, was uploaded in the RMCD's VDP website, called the MyVDP portal. This User Manual aims to provide users with guidance in performing voluntary disclosures via the MyVDP portal.

Frequently Asked Questions on the Voluntary Disclosure Programme Guideline

The Frequently Asked Questions (FAQs) on the VDP were uploaded in the RMCD's VDP website, called the MyVDP portal. These FAQs aim to provide clarification on the VDP.

Indirect Tax Amnesty

Penalty and Surcharge Remission Programme

The RMCD, via its website, has announced Penalty and Surcharge Remission Programme, which runs from 1 February 2023 to 30 September 2023. This Programme allows taxpayers with Bill of Demand issued for taxable periods ending on or before 31 December 2022, to pay any outstanding tax/penalty/surcharge liabilities pertaining to indirect taxes for selected Acts administered by the RMCD, and be granted a waiver in penalty and surcharge.

Payment to the RMCD

Payments via cheques or bank drafts to "Ketua Pengarah Kastam" through the RMCD counters

The RMCD, via its website, has announced that the addressee has changed from "Pengarah Kastam Negeri" to "Ketua Pengarah Kastam" with immediate effect, for payments via cheques or bank drafts through the RMCD counters. However, there is a transitional period for taxpayers to issue cheques or bank drafts addressed to "Pengarah Kastam Negeri" until 30 June 2023.

Updates on indirect tax measures

Postponement of various indirect tax measures

On 10 March 2023, the RMCD, via their website, announced that the Minister of Finance has agreed to postpone the imposition of the following indirect tax measures to a date to be determined later:

- Sales tax on low value goods (LVG) (with an initial commencement date of 1 April 2023)
- Excise duty on premix preparations
- Service tax on delivery service.

CUSTOMS

Customs Duties Regulations

Customs (Customs Ruling) (Amendment) Regulations 2023

The Customs (Customs Ruling) (Amendment) Regulations 2023 [PU(A) 76/2023] were gazetted on 28 March 2023 and are deemed to have come into operation on 1 January 2023. These Regulations provide for amendments in regulations 2, 3 and 7, and deletion of Schedule A, Schedule B and Schedule C of the Customs (Customs Ruling) Regulations 2007 [PU(A) 149/2007].

Customs (Amendment) Regulations 2023

The Customs (Amendment) Regulations 2023 [PU(A) 133/2023] were gazetted on 20 April 2023 and are deemed to have come into operation on 1 January 2023. These Regulations provide for amendments in regulations 7, 8, 9, 12, 16, 17, 20, 21, 22, 23, 26, 28, 34, 43, 46, 47, 48, 54, and 55, substitution of regulations 19, 51 and 56, and deletion of regulations 11, 13, 14, 15, 57 and the Third Schedule of the Customs Regulations 2019 [PU(A) 397/2019].

Customs Duties Orders

Customs Duties (Goods under the Agreement on Comprehensive Economic Partnership among the Government of the Member States of the ASEAN and Japan) (Amendment) Order 2023

The Customs Duties (Goods under the Agreement on Comprehensive Economic Partnership among the Government of the Member States of the ASEAN and Japan) (Amendment) Order 2023 [PU(A) 52/2023] was gazetted on 28 February 2023 and came into operation on 1 March 2023. This Order provides for the substitution of the Appendix "B" of the First Schedule of the Customs Duties (Goods under the Agreement on Comprehensive Economic Partnership among the Government of the Member States of the ASEAN and Japan) Order 2020 [PU(A) 191/2020].

Customs Duties (Exemption) (Amendment) Order 2023

The Customs Duties (Exemption) (Amendment) Order 2023 [PU(A) 59/2023] was gazetted on 8 March 2023 and came into operation from 9 March 2023. This Order provides for amendments in the Schedule, in relation to item 94 in Part I of the Customs Duties (Exemption) Order 2017 [PU(A) 445/2017].

Customs Duties (Goods under the Regional Comprehensive Economic Partnership Agreement) (Amendment) Order 2023

The Customs Duties (Goods under the Regional Comprehensive Economic Partnership Agreement) (Amendment) Order 2023 [PU(A) 68/2023] was gazetted on 14 March 2023 and came into operation on 15 March 2023. This Order provides for the amendments in paragraphs 3, 6 and the First Schedule, in relation to Appendix "A" and Annex A, of the Customs Duties (Goods under the Regional Comprehensive Economic Partnership Agreement) Order 2022 [PU(A) 64/2022].

◆ Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2023

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) Order 2023 [PU(A) 91/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for the amendments in the First Schedule, in relation to Annex 3 and Annex 4, of the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade In Goods Agreement) Order 2022 [PU(A) 199/2022].

◆ Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment)(No.2) Order 2023

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No.2) Order 2023 [PU(A) 92/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for the amendments in the Second Schedule, in relation to subheadings 2404.12.10 00, 2404.12.90 00, 2404.19.20 00, 2404.92.10 00, 2404.92.90 00 and 2404.99.00 00, in column (5), of the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade In Goods Agreement) Order 2022 [PU(A) 199/2022].

◆ Customs Duties (Exemption) (Amendment) (No.2) Order 2023

The Customs Duties (Exemption) (Amendment)(No.2) Order 2023 [PU(A) 95/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for amendments in the Schedule, in relation to items 10(vii)(f), 10A(vii)(f), 11(vi)(f) and 94(vi) under column (3) in Part I, of the Customs Duties (Exemption) Order 2017 [PU(A) 445/2017].

◆ Customs Duties (Amendment) Order 2023

The Customs Duties (Amendment) Order 2023 [PU(A) 136/2023] was gazetted on 28 April 2023 and came into operation on 1 May 2023. This Order provides for amendments in the First Schedule, in relation to Chapter 24 and Chapter 38, of the Customs Duties Order 2022 [PU(A) 114/2022].

◆ Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment)(No.3) Order 2023

The Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade in Goods Agreement) (Amendment) (No.3) Order 2023 [PU(A) 138/2023] was gazetted on 28 April 2023 and came into operation on 1 May 2023. This Order provides for the amendments in the Second Schedule, in relation to Chapter 24 and Chapter 38, of the Customs Duties (Goods of ASEAN Countries Origin) (ASEAN Harmonised Tariff Nomenclature and ASEAN Trade In Goods Agreement) Order 2022 [PU(A) 199/2022].

◆ Customs Duties (Goods under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) (Amendment) Order 2023

The Customs Duties (Goods under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) (Amendment) Order 2023 [PU(A) 139/2023] was gazetted on 28 April 2023 and came into operation on 1 May 2023. This Order provides for the amendments in the Second Schedule, in relation to tariff heading 38.24, of the Customs Duties (Goods under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Order 2022 [PU(A) 406/2022].

SALES TAX

Notification

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

The Revocation of Appointment of Effective Date for Charging and Levying of Sales Tax on Low Value Goods [PU(B) 161/2023] was gazetted on 15

May 2023. This Notification revokes the Appointment of Effective Date for Charging and Levying of Sales Tax on Low Value Goods [PU(B) 642/2022] which was gazetted on 27 December 2022.

Sales Tax Regulations

Sales Tax (Amendment) Regulations 2023

The Sales Tax (Amendment) Regulations 2023 [PU(A) 97/2023] were gazetted on 31 March 2023 and came into operation on 1 April 2023. These Regulations provide for amendments in regulation 17 of the Sales Tax Regulations 2018 [PU(A) 203/2018].

Sales Tax Orders

Sales Tax (Imposition of Sales Tax in respect of Designated Areas) (Amendment) Order 2023

The Sales Tax (Imposition of Sales Tax in respect of Designated Areas) (Amendment) Order 2023 [PU(A) 94/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for amendments in paragraph 2 of the Sales Tax (Imposition of Sales Tax in respect of Designated Areas) Order 2018 [PU(A) 206/2018].

Sales Tax (Imposition of Sales Tax in respect of Special Areas) (Amendment) Order 2023

The Sales Tax (Imposition of Sales Tax in respect of Special Areas) (Amendment) Order 2023 [PU(A) 100/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for amendments in paragraph 2 of the Sales Tax (Imposition of Sales Tax in respect of Special Areas) Order 2018 [PU(A) 207/2018].

Sales Tax (Rate of Tax) (Amendment) Order 2023

The Sales Tax (Rate of Tax) (Amendment) Order 2023 [PU(A) 102/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for amendments in paragraph 2 of the Sales Tax (Rate of Tax) Order 2022 [PU(A) 176/2022].

Sales Tax (Person Exempted from Payment of Tax) (Amendment) Order 2023

The Sales Tax (Persons Exempted from Payment of Tax) (Amendment) Order 2022 [PU(A) 106/2023] was gazetted on 31 March 2023 and came into operation on 1 April 2023. This Order provides for amendments in Schedule A, in relation to item 24, of the Sales Tax Persons Exempted from Payment of Tax) Order 2018 [PU(A) 210/2018].

Sales Tax (Goods Exempted from Tax) (Amendment) Order 2023

The Sales Tax (Goods Exempted from Tax) (Amendment) Order 2023 [PU(A) 109/2023] was gazetted on 4 April 2023. This Order provides for amendments in Schedule A, in relation to tariff headings 12.07, 30.06 and 84.38, of the Sales Tax (Goods Exempted from Tax) Order 2022 [PU(A) 175/2022].

Sales Tax (Exemption from Registration) Order 2023

The Sales Tax (Exemption from Registration) Order 2023 [PU(A) 142/2023] was gazetted on 2 May 2023. This Order provides for an exemption from registration on the activity of manufacturing finished goods of the Royal Pahang Weave for a period of two years.

SERVICE TAX

Service Tax Regulations

Service Tax (Compounding of Offences) (Amendment) Regulations 2023

The Service Tax (Compounding of Offences) (Amendment) Regulations 2023 [PU(A) 115/2023] were gazetted on 12 April 2023. These Regulations provide for amendments in the First Schedule, in relation to paragraph (a), of the Service Tax (Compounding of Offences) Regulations 2018 [PU(A) 218/2018].

Service Tax (Amendment) Regulations 2023

The Service Tax (Amendment) Regulations 2023 [PU(A) 150/2023] were gazetted on 12 May 2023 and came into operation on 15 May 2023. These Regulations provide for substitution of regulation 14, amendments to regulations 11 and 16, and the First Schedule, in relation to Groups A, B, C, D, G and I, of the Service Tax Regulations 2018 [PU(A) 214/2018].

ERRATA
Reference is made to the Technical Updates published in the Tax Guardian Quarter 1 Year 2023 issue (page 47).

The sentence which reads as "The new forms are CP37S, for royalty and interest income, and CP37DS for dividends, which can be downloaded from HASiL's website."

The sentence should read "The new forms are CP37S, for royalty and interest income, and CP37DS for special classes of income under S. 4A of the ITA 1967, which can be downloaded from HASiL's website."

__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

EMBUNAN HARIAN SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI [2022] MLJU 2858 (HIGH COURT)

BRIEF FACTS

The taxpayer is a company principally engaged in extracting and trading in timber logs. On 12 June 2006, the taxpayer entered into an agreement with Syarikat Keruak Sawmill Sdn Bhd ("**SKS**") ("**Agreement**") to purchase timber logs.

There are two ways for the taxpayer to purchase timber logs from SKS:

(i) SKS can fell the trees and deliver the logs to the taxpayer; or
(ii) the taxpayer can fell the trees itself and collect the logs.

The taxpayer opted for the second method as the logs could be carried out faster using the taxpayer's own workers. In effect, the taxpayer did all the work on the said land instead of SKS. The Agreement provided that at all times, all rights and interests to extract timber remained with SKS – the licenses cannot be transferred or assigned.

The taxpayer incurred total expenses of RM4,600,000 for the timbers as per the Agreement between 2007 to 2011. The taxpayer claimed for deduction of RM925,000.00 as stock purchase expenditure ("**Expenditure**") under S. 33(1) of the Income Tax Act 1967 ("**ITA 1967**") for the year of assessment ("**Y/A**") 2010. However, the Director General of Inland Revenue ("**DGIR**") disallowed the deductions under S. 39(1)(g) of the ITA 1967, where any sum payable for the use of a licence or permit to extract timber from a forest in Malaysia is not deductible. Consequently, the DGIR issued a notice of additional assessment with RM307,677.97 being the additional tax payable and imposing a penalty under S. 113(2) of the ITA 1967.

The Special Commissioners of Income Tax ("**SCIT**") disallowed the taxpayer's appeal against the notice of additional assessment. The taxpayer appealed further to the High Court.

The issues for the determination of the High Court were as follows:

(i) Issue 1: Whether the Expenditure is deductible under S. 33(1) of the ITA 1967 or disallowed under S. 39(1)(g) of the ITA 1967; and
(ii) Issue 2: Whether the DGIR was correct in imposing a penalty under S. 113(2) of the ITA 1967.

TAXPAYER'S ARGUMENTS

The taxpayer argued that the Expenditure is for the purchase of timber stock and not for the use or rights of the license for extraction of timber. The Expenditure should not be disallowed under S. 39(1)(g) of the ITA 1967 as it is not a sum payable for the use of a licence or permit to extract timber from a forest in Malaysia.

DGIR'S ARGUMENTS

The DGIR argued that the Expenditure was not for the purpose of purchase of timber from SKS but was actually to secure the exclusive rights to extract timber from land on which SKS obtained its extraction licenses from the State Government of Terengganu. As such, the payment is caught under S. 39(1)(g) and is thus not deductible under S. 33 of the ITA 1967.

HIGH COURT'S DECISION

The High Court, in dismissing the taxpayer's appeal, held that:

(i) Issue 1: The Agreement is in fact for the taxpayer to secure and obtain the exclusive rights to use the permit to extract timber and not for the purpose of purchase of timber logs. There was no genuine evidence to show that the license holder, SKS, had done any work on the said land. Instead, the evidence shows that the taxpayer had paid the premium and royalties, erect, build and maintain all the access and internal roads including all the necessary drains, culverts and bridges in the said area. Therefore, the Agreement was entered into with the intention of circumventing S. 39(1)(g) of the ITA 1967 to escape tax. Section 39(1)(g) of ITA 1967 applies and it follows that the DGIR correctly disallowed the Expenditure.

(ii) Issue 2: As there was no genuine transaction of buying and selling timber logs, the DGIR had correctly exercised his discretion to impose penalties when raising the additional assessment.

COUNSEL FOR THE TAXPAYER

S SARAVANA KUMAR (WITH NUR AMIRA BT AHMAD AZHAR) (ROSLI DAHLAN SARAVANA PARTNERSHIP)

COUNSEL FOR THE DGIR

AHMAD ISYAK B MOHD HASSAN (WITH MOHAMMAD DANIAL AHMAD (REVENUE COUNSEL, LEMBAGA HASIL DALAM NEGERI MALAYSIA)

DECISION DATE

7 NOVEMBER 2022

GROUNDS OF JUDGMENT

EMBUNAN HARIAN SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI

CASE 2

HAVI LOGISTIC (M) SDN BHD V PEMUNGUT DUTI SETEM [2023] 8 MLJ 1 (HIGH COURT)

BRIEF FACTS

On 6 February 2020, the taxpayer formalised an agreement with a company, Martin-Brower Malaysian Co. Sdn. Bhd. ("**MB**") ("**Agreement**") to buy over MB's assets and liabilities in Malaysia for a total purchase price of approximately RM10.4 million. The Agreement expressly excluded the goodwill of MB's business in Malaysia. The assets earmarked for purchase were computer software and hardware, fittings, renovations, plant, machinery and equipment.

The Collector of Stamp Duty ("**Collector**") levied ad valorem duty of RM399,196 on adjudication of the Agreement on the ground that the Agreement fell under S. 21(1) of the Stamp Act 1949 ("**SA 1949**") and Item 32 of the First Sch of the SA 1949, while the taxpayer claimed that it should be assessed based on Item 4.

Item 4 provides for the general stamping of "agreement or memorandum of agreements made under hand only, and not otherwise specially charged with any duty" which imposes a fixed duty of RM10. Conversely, Item 32 provides for the stamping of a "conveyance, assignment, transfer or absolute of sale" which imposes an ad valorem duty under which the duty varies according to the nature of the instrument and the consideration stipulated in the instrument i.e., it follows the value of the transaction that the legal document or instrument represents, particularly when a property was legally or equitably transferred by the instrument.

Furthermore, in this case, the Collector did not indicate which sub-item under Item 32 he is relying upon to impose ad valorem duty on the instrument.

The taxpayer therefore sought a declaration that the Collector's assessment of the duty was wrong and null and void. The sole issue to be determined by the High Court is whether the Agreement is to be assessed under Item 4 or Item 32 of the First Sch of the SA 1949.

TAXPAYER'S ARGUMENTS

The taxpayer argued that the Agreement should be assessed based on Item 4 as an agreement not otherwise specially charged with any duty, whether the same is only evidence of a contract or obligatory on the parties from its being a written instrument. The taxpayer contended that the Agreement with MB does not involve transfer of properties or interest legally or equitably between the two parties. As such, the Agreement does not involve a conveyance on sale and does not fall within the purview of S. 21 and Item 32.

COLLECTOR'S ARGUMENTS

The Collector argued that the Agreement involved a conveyance of the interest in the property of MB to the taxpayer and thus, fell under S. 21 and Item 32.

HIGH COURT'S DECISION

The High Court, in allowing the taxpayer's appeal, held that:

(i) The Agreement could not be said to be an instrument which fell within the purview of S. 21 and Item 32. Goodwill was not part of the acquired assets and there was no landed property involved and no transfer of properties or interest legally or equitably between the parties.

(ii) *Ad valorem* duty could only be imposed when a property was legally or equitably transferred by an instrument, which was not the case here.

(iii) The Agreement satisfied the requirements of Item 4. Therefore, the stamp duty on the Agreement should be assessed under the same Item.

(iv) The Collector failed to specify which sub-item of Item 32 it relied upon to impose ad valorem duty on the Agreement. In a taxing statute, the tax authority must give reasons for imposing a tax. The burden of proof was on the Collector to prove that the Agreement is assessable to Item 32. There is a breach of natural justice as the taxpayer has a legitimate expectation that the Collector will take into account the circumstances of the matter.

COUNSEL FOR THE TAXPAYER

SARAVANA KUMAR A/L SEGARAN WITH NUR HANINA BT MOHD AZHAM (ROSLI DAHLAN SARAVANA PARTNERSHIP) AND AW KAI XIANG (RAJ, ONG & YUDISTRA)

COUNSEL FOR THE COLLECTOR

MUAZMIR BIN MOHD YUSOF (WITH NORDIANA SHAM) (REVENUE COUNSEL, INLAND REVENUE BOARD OF MALAYSIA)

DECISION DATE

5 NOVEMBER 2022

GROUNDS OF JUDGMENT

HAVI LOGISTIC (M) SDN BHD V PEMUNGUT DUTI SETEM

CASE 3

SIME DARBY PROPERTY (SELANGOR) SDN BHD V MENTERI KEWANGAN MALAYSIA [2023] MLJU 260 (HIGH COURT)

BRIEF FACTS

The taxpayer is principally engaged in the property development business. On 20 December 2019, the DGIR informed the taxpayer that the taxpayer's claim for deduction of losses surrendered under the group relief amounting to RM22,763,355 will be disallowed. Subsequently, on 17 February 2021, the taxpayer was served with the notice of additional assessment for Y/A 2016.

About eight (8) months later, by way of letter dated 14 October 2021, the taxpayer applied to the Minister of Finance ("**Minister**") to exercise his powers under:

(i) Section 135 of the ITA 1967 to give directions to the DGIR to set aside his assessment; and/or
(ii) Section 127(3A) of the ITA 1967 to exempt the assessment made by the DGIR.

The Minister did not respond within the fourteen (14) days period provided by the taxpayer in the letter. The taxpayer treated the Minister's non-response as "having rejected the applicant's application" and the "decision" as amenable to judicial review. The taxpayer sought for, amongst others, an order for the Minister to exercise his powers under S. 135 and/or S. 127(3A) of the ITA 1967.

TAXPAYER'S ARGUMENTS

The taxpayer argued that the "decision" of the Minister i.e., non-response to the letter dated 14 October 2021 was *ultra vires*, illegal, void, unlawful and/or in excess of authority on account of the Minister and is tainted with irrationality.

HIGH COURT'S DECISION

The High Court, in dismissing the taxpayer's application for judicial review leave, held that:

1. The order as framed is an order in the nature of *mandamus* which cannot be granted in law because mandamus does not lie to perform a discretionary power and only lies where the taxpayer has a legal right to compel the performance of a duty. The use of the word "may" in both S. 135 and S. 127(3A) of the ITA 1967 confer discretionary power and not a duty on the Minister.
2. There must be clear evidence of refusal to act. There was no inordinate delay to act by the Minister considering he was only given fourteen (14) days to respond. Therefore, there is no "decision" made by the Minister which is susceptible to the remedy of *certiorari*.
3. Further, the Minister has no power to do what the taxpayer is requesting him to do under S. 135 and/or S. 127(3A):
   (a) The purpose of S. 135 is for the Minister to give directions of an administrative and general character and certainly not directions specific in nature such as giving directions to the DGIR to set aside assessments. The power to set aside assessments is provided only by way of appeal to the SCIT under S. 99 of the ITA 1967.
   (b) Section 127(3A) envisages that the person requesting exemption from the Minister is lawfully liable to pay tax. However, the taxpayer is claiming to be exempted, not from lawfully determined tax but from tax that should not have been levied (since the taxpayer's pleaded case was that tax was illegally and/or wrongfully assessed in law). This is not the purpose of S. 127(3A), which is not applicable here.

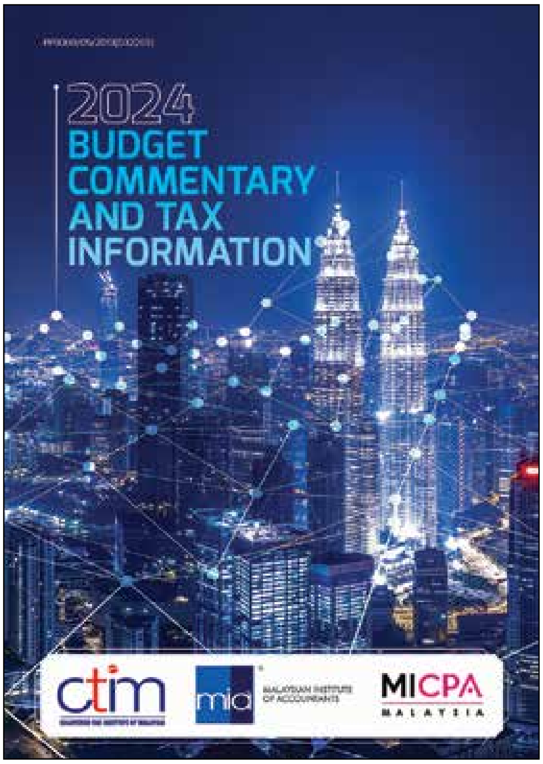
COUNSEL FOR THE TAXPAYER
S SARAVANA KUMAR (WITH DHARSHINI SHARMA) (ROSLI DAHLAN SARAVANA PARTNERSHIP)

COUNSEL FOR THE MINISTER
NIK ISFAHANIE TASNIM BT WAN AB RAHMAN (FEDERAL COUNSEL, ATTORNEY GENERAL'S CHAMBERS)

DECISION DATE
7 FEBRUARY 2023

JUDGMENT / GROUNDS OF JUDGMENT
SIME DARBY PROPERTY (SELANGOR) SDN BHD V MENTERI KEWANGAN MALAYSIA

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



The Economic Scenario

The Prime Minister launched "Ekonomi MADANI: Memperkasa Rakyat" on July 27, 2023, an economic framework for policies such as the National Energy Transition Roadmap, New Industrial Master Plan 2030, and the mid-term review of the 12th Malaysia Plan. "Ekonomi MADANI" aims to realise several macroeconomic targets within 10 years, thereby taking Malaysia to new heights of achievement and excellence. The focus is on propelling Malaysia to become a leading Asian economy and to ensure the equitable distribution of wealth among the Rakyat. The tax-related measures include outcome-based tax incentives that focus on high-impact activities, incentives to encourage new green energy activities as well as to develop the social enterprise sector. Budget 2024 is likely to reflect measures announced in the Ekonomi MADANI framework.

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CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: JULY – SEPTEMBER 2023

Month /Event	Details				CPD Points
	Date	Time	Platform / Location	Speaker	
JULY 2023					
Seminar: 2023 Budget Seminar	3 July 2023	9 a.m. - 5 p.m.	Zoom Webinar	Various Speakers	8
Workshop: Taxation of Digital Nomads, Expatriates' Employees in Malaysia, Employees Seconded Overseas and Share Scheme Benefits Received by Employees	10 July 2023	9 a.m. - 5 p.m.	Zoom Webinar	Ms. Yong Mei Sim	8
SVDP 2.0 (Central & East Coast)	12 July 2023	9 a.m. - 12.30 p.m.	Zoom Webinar	Various Speakers	0
Workshop: Review and Update on Public Rulings issued in the last 2 years (Re-Run)	13 July 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
SVDP 2.0 (East Malaysia)	14 July 2023	9.30a.m. - 12.30p.m.	Zoom Webinar	Various Speakers	0
SVDP 2.0 (Southern)	18 July 2023	9.30a.m. - 12.30p.m.	Zoom Webinar	Various Speakers	0
Workshop: The Appeal Process and Dispute Resolution Proceedings	20 July 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Vincent Josef	8
SVDP 2.0 (Northern)	21 July 2023	9.30a.m. - 12.30p.m.	Zoom Webinar	Various Speakers	0
Public Holiday *(Awal Muharram: 19 July)*					
AUGUST 2023					
National Tax Conference 2023	1- 2 August 2023	9 a.m. - 5 p.m.	Hybrid	Various Speakers	25/20
Workshop: Malaysian Property Tax, Estates and Trusts	15 August 2023	9 a.m. - 5 p.m.	Zoom Webinar	Dr. Tan Thai Soon	8
Workshop: Transfer Pricing Documentation and managing TP Audits	17 August 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Workshop: Investment and Other Incentives	22 August 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Vincent Josef	8
Workshop: Withholding Tax and Tax Implications of Cross-Border Transactions	24 August 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Public Holiday *(Malaysia's National Day: 31 August)*					
SEPTEMBER 2023					
Workshop: Transfer Pricing	5 September 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Vincent Josef	8
Members' Dialogue (Southern)	6 September 2023	10.00 a.m. – 12.00 p.m.	Zoom Webinar	Various Speakers	0
Members' Dialogue (East Coast)	13 September 2023	10.00 a.m. – 12.00 p.m.	Zoom Webinar	Various Speakers	0
Members' Dialogue (East Malaysia)	20 September 2023	10.00 a.m. – 12.00 p.m.	Zoom Webinar	Various Speakers	0
Public Holiday *(Malaysia Day: 16 September, The Prophet Muhammad's Birthday: 28 September)*					

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