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NATIONAL TAX CONFERENCE 2023

Taxation: Driving Force for Economic Sustainability

1 & 2 August 2023 | Kuala Lumpur Convention Centre

OFFICIATED BY:

YAB DATO' SERI ANWAR BIN IBRAHIM

PRIME MINISTER

The Wiramuda Case: Tax Provision Ruled Unconstitutional for the First Time

Tax Risk Management from a Legal Perspective

Legal Professional Privilege in the Malaysian Tax Regime

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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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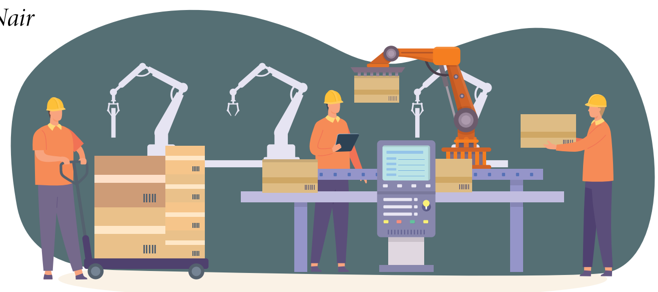
contents

Tax Guardian

VOL.16/NO.4/2023/Q4
October 2023

56



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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CHOW CHEE YEN

TOWARDS ECONOMIC ACHIEVEMENTS AND EXCELLENCE

Greetings!

Welcome to the Quarter 4 issue of the *Tax Guardian*.

It has been an eventful Quarter 3 where on the national front, we have the launch of the Madani Economy, an economic framework for policies to navigate the country through new economic direction. This was followed by the recent tabling of the mid-term review of the 12th Malaysian Plan.

For the Institute, the National Tax Conference 2023 (NTC 2023) jointly organised with the Inland Revenue Board of Malaysia (HASiL) entered its 23rd Edition this year. The premier tax event was held at the Kuala Lumpur Convention Centre over 2 days i.e., on 2 and 3 August 2023 and was attended by over 2,000 participants. The event has the honour of being officiated by the Minister of Finance and Prime Minister, YAB Dato' Seri Anwar Ibrahim. I would like to thank everyone who made this event a successful one. More about the NTC 2023 is available in this issue of the *Tax Guardian*.

Moving into Quarter 4, the focus would be the Budget 2024 scheduled to be announced on 13 October 2023 which will support Malaysia in achieving her economic vision. Budget 2024, themed "Madani Economy: Empowering the People" will work in tandem to move Malaysia towards news heights of achievements and excellence. As tax practitioners, we should keep abreast with these developments to seize opportunities when they come and position ourselves to forge ahead in 2024.

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

Submissions to the authorities

Inland Revenue Board of Malaysia (HASiL)

- Invitation as a panel member for the "Webinar on Tax Agent Licence & MyCukai System" organised by CTIM.
- Clarification sought on the Special Voluntary Disclosure Programme 2.0 Frequently Asked Questions.
- CTIM Memorandum on Tax Audit and Investigation Issues.
- Issues raised on Income Tax (Deduction from Remuneration) (Amendment) Rules 2023 [PU(A) 230/2023].

Ministry of Finance (MOF)

- CTIM Memorandum on 2024 Budget Proposals (Summary).
- Comments on MOF's feedback on request for reconsideration of conditions for foreign source income exemption for dividends.
- Feedback/comments on MOF's proposed implementation paper on Capital Gains Tax.
- Feedback/comments on MOF's proposed implementation paper on Luxury Goods Tax.
- Clarifications sought on Pillar 2 GloBE Rules.

Meetings with the authorities

- Technical Working Group on Taxation (TWGT) Meeting No. 3/2023 & 4/2023 on 11 July 2023 & 27 September 2023 respectively.

- Presentation on tax incentives related to research and development - issues and suggestion for improvement to MoF on 20 July 2023 through the Ministry of Science, Technology and Innovation (MOSTI).
- TWGT Tariff Classification Ruling meeting to discuss improvement of eKKB system on 13 July 2023.
- TWGT Sub-Group Meeting: eKKB, SAR & RMCD No. 3/2023 on 16 August 2023.
- TWGT - Strategic Workshop on World Bank's B-Ready Framework on Taxation on 21 & 22 August 2023.
- Engagement Session on Implementation of Capital Gains Tax on 23 August 2023, chaired by MOF.
- Courtesy Visit to HASiL - Deputy CEO Office (Compliance), Tax Compliance Department & Investigation Department on 29 August 2023.
- Discussion on CTIM Memorandum on 2024 Budget Proposals (Summary) on 30 August 2023, chaired by MOF.
- TWGT - Charitable Hospital Meeting No. 2 on 26 September 2023.

Upcoming Transfer Pricing Conference 2023 and CTIM Budget Seminars

The Institute would be conducting the Transfer Pricing Conference 2023 on 11 October 2023 at the Connexion Conference and Event Centre, The Vertical Bangsar South. Participants in this conference will discover the latest developments in Transfer Pricing Rules and Guidelines as well as benefit from interaction with renowned transfer pricing experts.

The CTIM 2024 Budget Seminar is scheduled to be held on 25 October 2023 at Berjaya Times Square Hotel and will be followed by a series of Budget Seminars in other states in Malaysia. The Budget Seminar will present the key issues arising from the 2024 Budget Proposals with leading tax experts sharing their insights and best practices.

CTIM members and Tax Guardian readers are highly encouraged to attend these events.

Membership

I am pleased to convey that the Institute's membership has grown from 3,813 members as of 31 March 2023 to the current 3,898 members comprising 3,323 of Associate Members, 552 Fellow Members and 23 Provisional Members.

Thank you and well wishes

I would like to take this opportunity to thank everyone for their continuous support and contribution to the Institute in 2023. Let us all wrap up the year well and look forward to more success in 2024.

Editor's Note

CHONG MUN YEW

This fourth quarter edition of the Tax Guardian is my debut after taking over the role as Editor from Mr Alan Chung who has done an outstanding job since the year 2021. Certainly, his shoes are difficult to fill as I humbly take over this position. On behalf of the Institute and the Council, I wish to express our utmost gratitude to him for helming this position for the past few years.

As I composed this message, I could not help but notice the whirlwind of events unfolding in our world at an ever-accelerating pace. From wildfires, heatwaves, earthquakes, droughts, and floods affecting lives across different corners of the globe to the complex geopolitical tensions among major powers and the enduring conflict in Ukraine, it is undeniable that uncertainty has become a certainty in our lives, alongside "death" and "taxes".

Additionally, the rapid ascent of artificial intelligence (AI) is a source of concern, as it threatens to displace vital roles, including those of writers, journalists, coders, and designers. As an editor, I hold the same hope that AI will complement rather than replace the invaluable human touch.

Like in year 1999, this year is special whereby we have two budgets within the same calendar year. The next few weeks leading to Budget 2024 which is scheduled to be tabled in Parliament on 13 October 2023 will be a crucial event as the government draws up the plan and formulate the best way to restore the nation's financial standing by restructuring the economy and improving the quality of life for all Malaysians.

Preparations for Budget 2024 had begun with the presentation of the Madani Economy: Empowering People on 27 July 2023, which also served as a pre-budget statement. The two main objectives of the Madani Economy framework are to restructure the economy to make Malaysia a leader among Asian economies and to provide a pipeline of income to the people to enjoy a better quality of life. The Madani Economy framework will serve as a foundation for other policies, such as the National Energy Transition Roadmap (NETR), the New Industrial Masterplan (NIMP)

2030 and the Mid-Term Review of the 12th Malaysia Plan.
Several tax measures or initiatives were announced in the Madani Economy framework to help the country achieve the targets. For example, investment incentives are to be reviewed to support companies in generating high-income jobs. The government also plans to promote special incentives for green energy activities such as Sarawak's bus project that utilises hydrogen energy, and Carbon Capture, Utilisation and Storage (CCUS) projects. In supporting the second focus of the Madani Economy of elevating the quality of life of the people, a special tax incentive of a concessionary 15% tax rate for knowledge workers will be given for the development of Iskandar Malaysia in Johor.

Following this, the Prime Minster also tabled the Mid-Term Review of the 12th Malaysia Plan at the Dewan Rakyat on 11 September 2023 with the theme Malaysia Madani: Sustainable, Prosperous, High Income. The planning document contains a total of 17 Big Bolds (key measures) and 71 strategies across the key enabler and three main focuses: strengthening sustainability, building a prosperous society and achieving high-income nation status. It covers various areas, including economy, social and politics, incorporating the strategies and initiatives outlined in the NETR and NIMP 2030. Central to the financing or fiscal strategy is the expansion of the tax base, coupled with the adoption of technology and digitalisation for more efficient revenue collection.

We have seen the Inland Revenue Board of Malaysia's (HASiL) implementation of various approaches in this aspect such as the voluntary disclosure programme for both direct and indirect taxes and the electronic invoicing system. On the broadening of the revenue base, the plan was silent on the reintroduction of the consumption tax which is the Goods and Services Tax (GST). Instead, the capital gains tax (CGT) will be introduced in January 2024. This is not surprising as the proposed introduction of the CGT on non-listed shares of corporates was announced in the 2023 budget. Even though the Economic Minister commented that he does not rule out the re-introduction of GST, it is believed that GST will not be introduced in Budget 2024 given that time will be needed to implement the appropriate systems. Having said all the above, I am sure the 2024 Budget proposals will inspire great intellectual debates and trigger yet more areas of tax controversy. Hopefully this will equally generate some great pieces of writing for our future editions!

Turning to the current edition, you will see our extensive coverage of the 23rd National Tax Conference which was held from the 1 to 2 August 2023. We hope you can reflect on the notes we captured for each of the sessions, including the eight topics presented. Pillar 2 of the BEPS Action Plan and taxation on foreign source income were among the prominent themes discussed over the two days conference. In this edition, we also have an article which covers the landmark decision in the Wiramuda case in some detail. Wiramuda marks a significant development in the legal landscape of taxation as it represents the first instance where the Federal Court had struck down a tax provision for being unconstitutional. We also have an article on the legal professional privilege in the Malaysian tax regime as well as another write up on tax risk management from a legal perspective. With the above and the regular columns in place, this edition should be an interesting read.

This fourth quarter edition not only signifies the end of 2023 but also offers a moment for reflection. Throughout the year, we have experienced a blend of triumphs and trials. While challenges have been present, our resilience has consistently proven to be our greatest asset. From our missteps, we have gained wisdom, and from our achievements, we have found cause for celebration.

As we eagerly anticipate the forthcoming new year, there is a tangible sense of hope enveloping us. It serves as a gentle reminder that with each passing year, a bounty of new opportunity unfolds, offering us the potential for personal growth and the assurance of brighter days on the horizon.

InstituteNews

COURTESY VISIT TO HASiL - DEPUTY CEO OFFICE (COMPLIANCE), TAX COMPLIANCE DEPARTMENT & INVESTIGATION DEPARTMENT

The CTIM Tax Audit & Investigation Working Group (TAIWG) organised a courtesy meeting with YBhg. Datuk Abu Tariq Bin Jamaluddin, the Deputy Chief Executive Officer (Compliance) of HASiL, Tuan Abang Ehsan Abang Abu Bakar, Director of the Tax Compliance Department, Tuan Ahmad Khairuddin Abdullah, Director of the Investigation Department and together with their team on 29 August 2023 at the HASiL office, Cyberjaya.

The purpose of the courtesy meeting is to discuss on collaborations pertaining to tax audit and/or investigation matters between CTIM and HASiL.

The courtesy meeting was led by CTIM Deputy President and Chairman of CTIM TAIWG, Mr Soh Lian Seng, together with the Council members of CTIM and our TAIWG members. The Branch Chairmen who are located in other states joined the courtesy meeting by virtual connection.

COURTESY VISIT BY CTIM PERAK COMMITTEE MEMBERS TO RMCD STATE DIRECTOR

The CTIM Perak Branch Committee led by Mr. Lam Weng Keat, Perak Branch Chairman made a courtesy visit to Dato' Abdul Ghafar bin Mohamad (Perak State Director, Royal Malaysian Customs Department (RMCD)) and his senior officers on Thursday, 14 September 2023.

WEBINAR FOR CTIM STUDENTS

The Examination Committee of CTIM organised a webinar on "How to approach exam question and preparing an answer" to 38 CTIM students on 23 September 2023. The webinar was facilitated by Mr Abdul Salam Chandran, who guided students through the steps to answer questions and emphasised the need to regularly review tax laws, regulations, and case studies to improve the ability to spot potential issues in examination questions.

December 2023 Examination Timetable

SUBJECTS	Details	
	Date	Time
Company & Business Law	18 December 2023	9.00 a.m. – 12.15 p.m.
Personal Taxation	18 December 2023	2.00 p.m. – 5.15 p.m.
Revenue Law	19 December 2023	9.00 a.m. – 12.15 p.m.
Business Taxation	19 December 2023	2.00 p.m. – 5.15 p.m.
Advanced Taxation 1	20 December 2023	9.00 a.m. – 12.15 p.m.
Financial Accounting and Reporting	20 December 2023	2.00 p.m. – 5.15 p.m.
Advanced Taxation 2	21 December 2023	9.00 a.m. – 12.15 p.m.
Economics	21 December 2023	2.00 p.m. – 5.15 p.m.

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

CPD EVENTS (1 July 2023 – 30 September 2023)

The following CPD events were successfully conducted:

Topic	Date	Speaker/(s)
Seminar: 2023 Budget Seminar (Re-run)	3 July 2023	Mr. Chow Chee Yen, Datin Azah (HASiL), Mr. Mohd Azizal (MOF) and Ms. Mahfuzah (MOF)
Workshop: Taxation of Digital Nomads, Expatriates' Employees in Malaysia, Employees Seconded Overseas and Share Scheme Benefits Received by Employees	10 July 2023	Ms. Yong Mei Sim
SVDP 2.0 (Central & East Coast)	12 July 2023	Mr. Chow Chee Yen, Datuk Abu Tariq (HASiL) & Ms. Roszita Dim (RMCD)
Workshop: Review and Update on Public Rulings issued in the last 2 years (Re-Run)	13 July 2023	Mr. Harvindar Singh
SVDP 2.0 (Central & East Coast)	14 July 2023	Mr. Soh Lian Seng, Mr. Bacho (HASiL) & Ms. Azrina (RMCD)
SVDP 2.0 (Southern Region)	18 July 2023	Mr. Anil Kumar Puri (CTIM), Ms Zaleha Adam (HASiL) & Ms Zuraidah Zulkifli (RMCD)
Workshop: The Appeal Process and Dispute Resolution Proceedings	20 July 2023	Mr. Vincent Josef
SVDP 2.0 (Northern)	21 July 2023	Ms. Agnes Wong (CTIM), Mr. Marside Zelika (HASiL) & Mr. Elangkumaran (RMCD)
National Tax Conference 2023	1 & 2 August 2023	Various Speakers
Workshop: Malaysian Property Tax, Estates and Trusts	15 August 2023	Dr. Tan Thai Soon
Workshop: Update on Transfer Pricing Documentation Requirements (Re-Run)	17 August 2023	Mr. Harvindar Singh
Workshop: Investment and Other Incentives	22 August 2023	Mr. Vincent Josef
Workshop: Cross Border Transactions And Withholding Tax (Re-Run)	24 August 2023	Mr. Harvindar Singh
Members' Dialogue (Southern)	6 September 2023	Mr. Zen Chow, Ms. Angela Lim & Mr. Choo Ah Kow
Webinar: e-Invoicing	7 September 2023	Mr. Harvindar Singh (CTIM), Dr. Rasyidah (HASiL) & Mr. Song Hock Koon (MDEC)
Members' Dialogue (East Coast)	13 September 2023	Mr. Zen Chow, Mr. Wong Seng Chong & Mr. George Tan
Members' Dialogue (East Malaysia)	20 September 2023	Mr. Zen Chow, Mr. Kenny Chong & Mr. Chu Vun Henn
Workshop: Research & Development: Exemptions and Deductions and Selected Industries	25 September 2023	Mr. Vincent Josef
Workshop: Financing of Corporations	26 September 2023	Mr. Harvindar Singh
Workshop: Essential Tax Updates in 2023	27 September 2023	Mr. Chow Chee Yen

NATIONAL TAX CONFERENCE 2023

TAXATION: DRIVING FORCE FOR ECONOMIC SUSTAINABILITY

Majella Gomes

The 23rd Edition of the National Tax Conference (NTC) was held on the 1 and 2 August 2023 attended by more than 2,000 participants physically and virtually. The Guest of Honour was the Minister of Finance who is also Prime Minister, YAB Dato' Seri Anwar bin Ibrahim.

In his welcoming speech, CTIM president Chow Chee Yen said that the many meetings held between CTIM and Lembaga Hasil Dalam Negeri (HASiL) focused on technical issues, ideas and thoughts on taxation and operational matters in relation to foreign source income, e-invoicing, special voluntary disclosure programme (SVDP) and MyTax. The CTIM and the Ministry of Finance have also worked closely on various tax policy matters such as capital gains tax, tax incentive review and GloBE Rules Pillar 2. Chee Yen noted that the economy grew by 5.6% in the first quarter of 2023, compared to 4.8% in the first quarter of 2022; the reopening of mainland China's international borders had helped the recovery of the international tourism industry.

In his opening address, CEO of HASiL Dato' Sri Dr Mohd Nizom bin Sairi said that the tax system determines economic and social development of the country, besides raising revenue for welfare and security; the redistribution of wealth; and the correction of disparities. "If we had not been able to maintain our revenue stream, it would not have been possible to bring the nation out of the crisis we were in," he pointed out. "The government is dependent on revenue from taxes for economic growth and national development… Economic sustainability is one of the key pillars for the country's recovery. HASiL will ensure the sustainability of this revenue stream through the effective, efficient management of the tax system."

Taxpayers' commitment through tax contribution will help realise the concept of Malaysia MADANI, which focuses on good governance, sustainable development and racial harmony in the country. Another positive outcome was the improved relationship between HASiL and taxpayers. From previously being seen as an aggressive tax collector, HASiL is now seen as a trustworthy administrator of a tax system which is viewed as a community asset by stakeholders.

E-invoicing will be implemented in the first half of 2024; and the tax corporate governance programme (TCG), a collaborative platform for tax administrators and taxpayers, is also being implemented. The Special Voluntary Declaration Programme (SVDP), ongoing from 6 June 2023 to 31 May 2024, is another initiative. Its focus is more on encouraging new taxpayers to report, rather than on increasing tax collection. HASiL's efforts are intended to facilitate the tax compliance journey of all stakeholders with good governance, transparency and certainty, and address revenue leakage from the shadow economy.

Minister of Finance Dato' Seri Anwar bin Ibrahim in his keynote address stressed that there was a need to tax but cautioned against overtaxing because tax should never be seen as a burden. Malaysia has to deal with RM1.5 trillion in debt, and a 5.6% deficit. He said the government's plan to address these challenges included addressing the rising cost of living, ensuring good governance, and coming down hard on corruption. Funds were still being siphoned off, and there was still too much leakage.

Unbudgeted sums of hundreds of millions of Ringgit have had to be given to improve overall conditions for schools, the army and security forces. There was also better support for women, and additional allocations for Kedai Rahmah. "Take an open, positive view of reform and tax policy," he advised. "Our policy is to tax only when absolutely necessary; encourage taxpayers to be more productive and contribute to the nation, to the welfare of the deprived and marginalised."

Topic 1: Achieving Economic Sustainability

Moderated by Professor Datuk Dr Norma Mansor, President, Malaysia Economic Association, this session's speakers were YB Mohd Rafizi Ramli, Minister of Economy Malaysia, and Dr Jomo Kwame Sundaram, Fellow, Academy of Science Malaysia. Dr Norma said that Malaysia had taken a path with a different trajectory from regional counterparts/peers prior to the Asian Financial Crisis, and we were now doubting whether our growth was going to be sustainable. Rafizi said that the primary ailment of the economy now is the middle-income trap.

We were generally afraid to invest in human capital, he said, focusing instead on growth and investments at the expense of equity in society. This short-term approach to managing the economy, had impaired our competitive advantage, and we have lost sight of how others were creating value. We are now a young, cynical, angry society, with mismatched skills and low salaries. "We have a lot of intrinsic advantages in terms of resources, infrastructure and education but foreign investors feel it is quite difficult to get talent," he said, acknowledging that it was no longer about what needs to be done but about making sure everyone gets on board and the whole nation moves in tandem.

"Five years is a short time to do things," he added. "But if we sequence it enough, the reforms will be carried through and be pervasive enough in the government, society and economy." Ideally, major reforms should be made within two years, as research indicates many questions and structural reforms had been discussed previously but had been put on the back burner. "Decisions were made in the second and third year of the administration but were overtaken by other matters," he said. "Getting the decision-making process right is extremely important."

There will be new policies and plans, including on the labour market, wage growth reform and a government commitment to a progressive wage policy, which is ground-breaking as the government has never intervened in wages before. Political will, he said, was no longer an issue but what may be a barrier is sequencing and follow-through. "We have to decide on as many prioritised policy reforms as possible, in the next six to 12 months, so that the results can be felt by the end of 2025."

Dr Jomo Kwame Sundaram pointed out that the country had largely inherited a colonial-structure tax system. "The British colonials were not interested in taxing British companies," he said. Instead, they concentrated on 'sin' taxes – on opium, alcohol, gambling and prostitution. "The British collected taxes in defence of colonial Malaya," he said. "The system which developed post-war was mainly to finance the Emergency." Fundamentally, there has been little improvement; the government has not been progressive from either the spending or saving perspective.

The shift to the Sales and Service Tax (SST) before instituting the Goods and Services Tax (GST) made the tax system more regressive. "It's important to recognise that what replaced consumer subsidies was not progressive, and to recognise the impact of SST over GST," he said. How can the country get out of the middle-income trap? Rafizi cautioned against taking shortcuts, and urged a balance between achieving results, building confidence in the economy and deflecting cynicism because "How will a new government, patched up from people who have been at each other's throats for the last 20 years, be any different?"

Government programmes and interventions need to be accelerated; there is limited time for pilot-testing social or economic programmes before scaling up. Wages have regressed over the years, and micro businesses were having difficulties; 79% of enterprises are micro enterprises. A balance needs to be struck with wage reform that does not cripple the economy. A successful example of wage correction was the approach taken by Singapore in the late 1970s with a mandatory wage increase that resulted in double digit growth for four consecutive years. But the Malaysian economy and fiscal position will not allow this, he said.

An alternative approach was to create a labour market that competes for talent. Eventually, enough companies will adopt the right salary parameters because they see that it is in their best interests to offer better wages. "In an economy that competes on talent and higher content, a company that does not have the right talent will lose out," he said. "Talent becomes critical for companies to create value. We hope it moves the labour market to self-correct with government incentives, to offer much more competitive wages."

On correcting inherited structures for more effective service delivery, Jomo advocated a macro approach that avoided tax populism. The country's debt of close to RM1 trillion, alluded to even before 2018, is currently RM1.5 trillion. Almost a third of the economy was not accounted for, Jomo said. Checks and balances must be instituted to ensure these do not recur. He suggested applying "A modified GST with progressive elements that ensure the comprehensiveness of GST, which will not be so onerous." More privileges for foreign direct investment (FDI) would lead to the neglect of local businesses.

Expressing scepticism of the Organisation for Economic Co-operation and Development (OECD) proposal for the new international corporate taxation framework, he said collecting tax equitably was not enough; it was equally important how these taxes were distributed. "If developing countries are producing items, why are they not getting a share of these taxes? Companies will have to be taxed on their universal income, not just on country-specific income," he said. "This is a time of great change in the world, and we have to learn from one another, and from other countries in similar positions – rather than just look to the West for inspiration."

Topic 2: Trust as a Driver of Voluntary Compliance

Dato' Sri Dr Mohd Nizom Sairi, CEO, HASiL, was the speaker; the session was moderated by CTIM President Chow Chee Yen. Topics included voluntary compliance, the Tax Corporate Governance Framework (TCGF), and the issue of trust. Dato' Sri Dr Nizom said voluntary compliance rarely happens so measures must be put in place to help it along. "Society has changed, and so has people's behaviour," he said. "As administrators, we have to use initiatives to indicate that it does not pay not to comply."

Systems must support voluntary compliance to get the desired level of compliance. He added that the government's tax compliance certificate, for businesses that want to

participate in government contracts, was an example of this. The certificate indicates that the business has been complying with tax laws. "They will be voluntarily compliant because they want this certificate," he said. "We do not have to push it or extract the behaviour but they do it anyway. People need to know about it and understand their roles and responsibilities."

On the recently-implemented Special Voluntary Disclosure Programme (SVDP) 2.0, Dato' Sri Dr Nizom said under the implementation of SVDP 1.0, almost 300,000 taxpayers came forward voluntarily, paying close to RM8 billion. But SVDP 2.0 is about bringing people together so that everyone can move forward, improve the economy and their livelihoods. So far, about 11,000 cases have come forward under SVDP 2.0, with about RM80 million in undeclared taxes. Chee Yen also asked what taxpayers need to show/demonstrate, for HASiL to be able to trust them.

"We trust they are complying unless it is proven otherwise," Dato' Sri Dr Nizom said. "The approach is to see that everything is in line with rules and regulations. If we are certain that there was intent to not comply, we will leave it to the justice system to decide what would be the suitable repercussions or penalties in those situations." One of HASiL's major initiatives, he said, is e-invoicing, which is expected to be operational on 1 June 2024. E-invoicing will make taxation real-time; to move towards compliance by design. "Without technology, our services can be offered only 9 to 5, five days a week but with technology, it can be 24/7," he said. Information will be more freely available and accessible as well.

On the fear of taxpayers that they will be investigated or audited after voluntary disclosure, he said that HASiL's guidelines declared that those who do so will not be audited or investigated. Agreeing with Chee Yen that the TCGF is still a challenge because of the lack of examples and templates to follow, he said that HASiL will continue to fine-tune the system. Noting that tax administration today has shifted to managing compliance, he said tax administrators also needed another skill – psychology. "Tax professionals need to be psychologists. When you manage behaviour correctly, you will get the desired results," he said.

Topic 3: Pillar 2 and Tax Incentives

This session was moderated by Dr Esther A P Koisin, Director, Department of International Taxation, HASiL. Abdul

Muheet Chowdhary, Senior Programme Officer, South Centre, and Anil Kumar Puri, CTIM Council Member made up the panel. Dr Esther said a better understanding of the topic was needed because the global minimum tax of 15% is set to be implemented in Malaysia and many other jurisdictions in January 2024. Under Pillar 2, multinationals with more than €750 million in revenue will be taxed at least 15% wherever they operate.

"Malaysia is allowed to maintain this 15% if we implement the Qualified Domestic Minimum Top-Up Tax (QDMTT)," she said. "But what happens if Malaysia does not implement the global minimum tax? Companies in Malaysia will have to pay the minimum of 15% in other jurisdictions as well. How will tax incentives be impacted by the implementation of the global minimum tax, and will tax incentives still be relevant? What does the OECD say about tax incentives?" In response, Anil said that incentives will still exist as they are useful tools when it comes to drawing investments to countries. "Pillar 2 rules will impact only the largest groups in the world," he said. "These rules are meant to apply only to multinational enterprise groups which have holdings or entities across borders. So, if you only operate in one country, you will not be affected even if you are very large." He added that incentives will still be in demand because of the scope of rules, the jurisdictional blending concept and substance-based income exclusion. The QDMTT will still be relevant as well.

On observations from other countries about Pillar 2, Abdul Muheet said that so far, only Italy has done something practical to review its incentive regime. "It has approved a draft framework to reform its tax system by creating a dual system to attract investment and boost the capitalisation of Italian businesses," he said. This will be a switch from a tax system based on tax credits and deductions, to one that rewards qualifying behaviour." The basic idea is that substance can be encouraged through incentives but incentives which are not really based on substance, will be eliminated. Incentives for accelerated depreciation, investment allowance, longer loss carry-forward periods and preferential treatment of capital gains, for instance, could still continue.

If we do not impose QDMTT, we will be ceding taxing rights to another country. Malaysia will lose out, and the investor will lose too; if the Malaysian government collects the tax, it can be given back to the investor in other ways. However, Abdul Muheet had another perspective. "The standard narrative that has come out of the OECD is that if you do not implement the QDMTT, you will lose the money to another country," he said. "But the OECD realises that if QDMTT is not implemented, countries will bring in minimum taxes – the most popular ones being taxes on turnover. This is really disliked by developed countries."

Taxes on turnover, such as digital services tax, are simple to implement and result in money in the pocket, he added, but will hit big companies hard. "The idea of implementing the QDMTT was to actually restrict the taxing rights of the source country by encouraging everybody to adopt one uniform, very complex law," he said. "A country can introduce QDMTT but still collect zero. The QDMTT does not guarantee tax collection. It is to stop alternative minimum taxes which are simpler to implement and have a higher chance of putting money in the pockets of developing countries."

Countries can no longer use tax when competing for investments, as investors rarely consider tax when deciding where to invest, preferring other things like political stability, economic stability and market size. Can Pillar 2 be seen as a form of protectionism and a trade barrier? "Unambiguously, yes," stated Abdul Muheet. "Donald Trump was the main proponent of Pillar 2. He was not happy about American companies going abroad to China, setting up shop there and taking away jobs from Americans. He wanted to take away tax as a tool to draw investments away from the US. Pillar 2 is essentially meant to stop companies offshoring jobs from developed countries to developing ones."

Topic 4: The Costs of Doing Business v the Deductibility of Expenses

Moderated by NTC 2023 Organising Committee Member K Sandra Segaran, the panel members for this session were Asnidar Mohamad, Director, Policy Review and Technical Enhancement Division, Tax Policy, HASiL Malaysia, and Vijey M Krishnan, Partner and Head of Tax Practice Group, Raja, Darryl & Loh. Segaran said that although deductibility may sound a mundane topic, in today's environment, it confounds even seasoned practitioners and experienced revenue officers. "To the newbie in tax, it can be very puzzling, unfriendly to businessmen, challenging to economists, disturbing to taxpayers, and daunting to the man in the street."

Vijey's comprehensive presentation covered the law and policy pertaining to deductions, particularly S. 33 and S. 39 of the Income Tax Act 1967 (ITA 1967). His presentation detailed matters such as whether there was space for policy considerations within the law, or only for potential amendments to the law; and the extent of the Ministry of Finance's authority over HASil. He also covered the role that policy should play in tax matters before a court.

His examples of recent disputes included Asia Energy Services Sdn Bhd, Mitraland Kota Damansara Sdn Bhd and Multi Square Sdn Bhd. The Asia Energy Services case involved deductibility of expenses of employee stock-based compensation, while the Mitraland Kota Damansara case concerned the payment to the authorities for the release of development units reserved for the Bumiputera community.

In the Mitraland Kota Damansara case, the issue was whether the sum paid to the state authority of Selangor to procure the approval of the Lembaga Perumahan Hartanah Selangor to sell units of the development reserved for Bumiputera buyers, to non-Bumiputera buyers, was deductible. If the developer had sold the Bumiputera Quota units to non-Bumiputera purchasers after approval had been obtained from the relevant authorities, the sum equal to the Bumiputera Discount would have been allowable expenses under S. 33(1). But if the developer had sold the Bumiputera Quota units to non-Bumiputera purchasers before obtaining the necessary approval, the sum equal to the Bumiputera Discount would then be disallowable expenses.

In the Multi Square case, the issue was whether the amount claimed by the appellant as management fees was allowable under S. 33(1). The court held that the management fees incurred by the appellant were not wholly and exclusively in the production of income; the taxpayer had failed to provide evidence that the management fees had been incurred.

Asnidar, at the start of her presentation on the role of the tax administrator, said that to apply the provisions of deductions, a comprehensive understanding of S. 33(1) and S. 39 of the ITA 1967 was necessary. "To be deductible, a payment must be authorised as a deduction under S. 33(1), and not be disallowed by S. 39," she clarified. Subsection 33(1) covers outgoings and expenses wholly and exclusively incurred in the relevant business period, in the production of gross income.

Commenting on the importance of supporting documents in the Multi Square case, she said that these were necessary. "Without proof, expenses may be claimed arbitrarily," she said.

Topic 5: Navigating Transfer Pricing: Policy Perspectives and Practical Considerations

This session was moderated by Leow Mui Lee, CTIM Council Member and Co-Organising Chairman of NTC 2023. On the panel were Suhani Anuar, Director, Transfer Pricing Division, Department of International Taxation, HASiL Malaysia; Anushia Soosaipillai, Senior Executive Director/Transfer Pricing Leader, Pricewaterhouse Coopers Taxation Services Sdn Bhd; and Krystal Ng, Partner, Tax Trade and Wealth Management Practice Group, Wong & Partners. Mui Lee gave a quick overview of Transfer Pricing (TP), covering the evolution of TP and TP milestones, and an introduction to Income Tax (Transfer Pricing) Rules 2023 (TPR 2023). Suhani then presented the policy perspectives of TP issues, rules and regulations.

Pointing out that many TP-related rules have been updated, she said that what has evolved in the past year on TP matters were relevant, and that it was time to "shift to another level" as taxpayers were now more mature and better control of TP domestic law was needed. It is most important, she stressed, to have a completion date and documentation supporting the TP analysis; all non-applicability of the information supporting this analysis must be indicated. These new rules under TPR 2023 were essentially for HASiL to understand the business better, and for a better understanding of why transactions were carried out in a particular way.

"The date of completion is necessary for the document to be considered contemporaneous," she said, adding that the taxpayer does have the freedom to apply the method best suited to the business but needed to show the highest degree of comparability. Responding to why Malaysia was instituting a narrower arm's length range, she said, "We feel we should have our own definition of arm's length range based on our experience and audit cases, from 37.5 percentile to 62.5 percentile of the data set. This is acceptable by HASiL." She stressed that updated TP documentation must be prepared before the submission of the corporate tax returns.

Acknowledging that important and strategic changes have been made to the TP rules, Anushia said that this has brought about the clarity taxpayers needed for preparation of the relevant documents. "It's important to be progressive when it comes to dealing with legislation on taxation," she said. "Now, the prescriptive defined range does not leave taxpayers in doubt." However, some areas may be a bit tricky or need further clarification, to allow taxpayers to comply. "We are waiting with bated breath for HASiL to provide more comprehensive information," she said.

"Some benefit will be given to taxpayers," Suhani said, confirming that HASiL was trying to provide some flexibility to facilitate taxpayers' compliance. Sharing the legal perspective, Krystal gave a short overview of two cases as examples: DGIR v Procter and Gamble, and Sandakan Edible Oils. In both cases, the courts found for the taxpayers, and upheld the decision that HASiL had erred.

What taxpayers should do, Anushia advised, would be to run the most current, reliable set of benchmarking data available, to determine if they fall within the range of 37.5% to 62.5% percentile. "If you fall outside the range, the tax authorities… will likely conclude that your transactions were not conducted on an arm's length basis." To a question on whether minimum transfer pricing document (TPD) thresholds will be amended, and what this would mean under TP 2023 rules, Suhani said that for transactions which do not fall under the RM25 million turnover and RM15 million cross-border controlled transactions, companies can opt to prepare the minimum TPD. Information on this is provided in the HASiL website, and will be spelled out in the revised TP documentation. "These relaxations cannot be put into the rules, but will be put into the guidelines or specific minimum requirements of TPD," she said.

Topic 6: Taxation of Foreign Source Income

The moderator for this session was Thenesh Kannaa, CTIM Council Member; panel members were Mohd Nakhafi Hassan, Head of Direct Tax Section, Tax Division, Ministry of Finance Malaysia, and Tan Hooi Beng, CTIM Council Member. In his overview of Foreign Source Income (FSI) Exemption for Residents, Thenesh covered the conditions pertaining to individuals; companies, LLP and partnerships; and other taxpayers. For individuals, exemptions were available for Y/A 2022 to Y/A 2026 on all income, other than partnership, subject to conditions. For companies, LLP and partnerships, exemptions were available for Y/A 2022 to Y/A 2026 for dividend income only, subject to conditions.

Thenesh detailed the conditions for exemption for these two categories but pointed out that there was no exemption available for all other income, such as business income, interest income and royalty income for the latter category. Other taxpayers who do not fall into either of these two categories will not have any exemptions. Thenesh also dealt with the leniency in the Ministry of Finance's letter dated 11 July 2023. The main issues concerned the allowance of exemption in multi-tier holding structures; in which year the foreign jurisdiction's tax rate should be at least 15%; and the imposition of economic substance requirements.

Mohd Nakhafi's presentation traced the beginnings of FSI from its inception in 1967 to 2022. There were amendments in the 1990s and in 2004. However, with the policy review under Budget 2021, a proposal was made to remove FSI exemption on interest and royalty, and HASiL was tasked to engage with the industry to determine how this could best be done.

He summarised FSI exemptions under two categories: companies, LLPs and individual partners in relation to a partnership business in Malaysia; and individuals. For the first category, dividends were the only type of tax-exempt income, provided the dividend income had already been subjected to tax in the country of origin; the headline tax in the country of origin was not less than 15%; and it complied with the economic substance requirements. For individuals, all types of income other than partnership income was tax-exempt, provided the income had already been subjected to tax in the country of origin.

Hooi Beng's presentation focused on the comparison of FSI regimes of Malaysia, Singapore and Hong Kong, and covered the taxability of FSI; taxability of foreign-sourced gains from the disposal of assets; and the qualifying entities. He also spoke about exemption conditions in each of the jurisdictions; economic substance requirements; and whether the look-through approach was adopted when assessing the "subject to tax condition" for dividend income received.

Topic 7: Updates of Tax Cases

Moderated by retired Court of Appeal Judge Datuk Darryl Goon, the presenters for this session were S Saravana Kumar, Partner, Rosli Dahlan Saravana Partnership, and Muazmir Mohd Yusof, Director, Drafting and Legal Advisory Division, Legal Department, HASiL.

Saravana's presentation on tax cases were on Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2023) MLJU 1180; Ketua Pengarah Hasil Dalam Negeri v Mitraland Kota Damansara (2023) MLJU 1039; and Ketua Pengarah Hasil Dalam Negeri v Ng Huan Tong (2023) MLJU 327.

- Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

The issue in this case was whether the compensation received for the compulsory land acquisition was subject to tax under S. 4C of the ITA 1967, in light of Article 13(2) of the Federal Constitution. The Federal Court reversed the Court of Appeal's decision, and handed down a unanimous ruling that S. 4C of the ITA 1967 was unconstitutional as it contravened Article 13(2) of the Federal Constitution by depriving the taxpayer of adequate compensation arising from the compulsory acquisition of the land by the government.

- Ketua Pengarah Hasil Dalam Negeri v Mitraland Kota Damansara Sdn Bhd

Here, the main issue was whether the Bumiputera Release Payment made to Lembaga Perumahan dan Hartanah Selangor (LPHS) to procure its approval to sell Bumiputera units to non-Bumiputera purchasers, was deductible pursuant to S. 33(1) of the ITA 1967. The Court of Appeal affirmed the High Court's decision, and held that the Bumiputera Release Payment was deductible under S. 33(1) of the ITA 1967 because there was no gain in terms of the net sales income to the taxpayer from the sale of the Bumiputera units to non-Bumiputera purchasers as the taxpayer was required to return the amount equivalent to the Bumiputera discount to the state government.

- Ketua Pengarah Hasil Dalam Negeri v Ng Huan Tong

In this case, the main issue was whether the disposal of the plots of land satisfied the badges of trade test, and was subjected to income tax instead of real property gains tax (RPGT). Affirming the Special Commissioners of Income Tax (SCIT)'s decision in favour of the taxpayer, the High Court held that the taxpayer did not satisfy the badges of trade test. The taxpayer's disposal of his land served as safety net in rescuing his company; the installation of coops and coop fences was not sufficient to conclude that steps had been taken to increase the value of the plots of land. The disposal gains from these should thus be subjected to RPGT instead of income tax.

Muazmir presented four cases:

- Ship Vet Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

The issues in this case were whether the taxpayer's income from providing physical ship inspection services overseas was a 'foreign source income' exempted under Para 28 of Sch 6 of the ITA 1967 or whether it was taxable under S. 3 of the ITA 1967; and whether the penalty imposed under S. 113 of the ITA 1967 was lawful under the circumstances. The taxpayer's appeal was dismissed by the SCIT and the High Court. The Court of Appeal decided that the mere geographical location of the source of the profit derived was not the only determinant in construing whether the exemption under Para 28 of Sch 6 applies; and that the SCIT had applied the correct test in construing whether the same income was tax-exempt under Para 28 of Sch 6. However, the taxpayer's appeal on the penalty of 45% was allowed.

- Ketua Pengarah Hasil Dalam Negeri v Idaman Harmoni Sdn Bhd

There were three issues here: whether the Development Agreement entered into by the taxpayer and IJM Properties was a transaction subject to the Real Property Gains Tax Act 1976 (RPGTA 1976) or a transaction subject to the ITA 1967; whether HASiL was time-barred under S. 91(1) of the ITA 1967 from raising the Notices of Assessments against the taxpayer for the Y/A 2009 (J), Y/A 2010 (JA) and Y/A 2010 (JR); and whether HASiL had correctly imposed the penalties on the taxpayer under S. 113(2) of the ITA 1967. The SCIT dismissed the taxpayer's appeal but the High Court allowed it.

The Court of Appeal allowed HASiL's appeal, setting aside the High Court order, and upholding the SCIT findings that the elements of badges of trade existed; there was wilful default on the part of the taxpayer to avoid tax on the profit gained; assessment can be raised at any time under S. 91(3) of ITA 1967; and maintained the Notices of Assessment for Y/As 2009 (J), 2010 (JA) and 2010 (JR), including the penalties.

- Pemungut Duti Setem v Perbadanan Pembangunan Pulau Pinang

In this case, the issue was whether the Facility Agreement in which the Penang State Government gave an undertaking for full responsibility for a loan of RM100 million, was entitled to the remission of stamp duty. The duty payer's contention was that the facility was an unsecured facility, as Bank Islam's letter of offer had stated 'NIL' under the item 'Security.' The Letter of Undertaking cannot amount to a 'security' within the meaning of the Stamp Act 1949 (SA 1949) as it was a letter issued to the Ministry of Finance pursuant to the requirements under Para 14(1)(d) of the Second Sch of the Incorporation (State Legislatures Competency) Act 1962. Had the duty payer breached the terms, the Bank will be considered as unsecured creditors and have equal rights (pari passu) with other creditors and the Bank cannot use the Letter of Undertaking as reason to execute the undertaking. The

High Court allowed the duty payer's appeal.

The Court of Appeal, in allowing the Collector's appeal, held that it was of the considered opinion that the word 'security' must be given a wide meaning. In Stroud's Judicial Dictionary of Words and Phrases (Seventh Edition): "A "security", speaking generally, is anything that makes the money more assured in its payment or more readily recoverable… Black's Law Dictionary (Tenth Edition) defines security as: "Collateral given or pledged to guarantee the fulfilment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor."

The Letter of Undertaking issued by the Penang State Government to the Ministry of Finance on 9 August 2019 serves as a clear assurance that the state government will take full responsibility for the loan amount. The Penang State Government's explicit undertaking to be responsible for the loan explicitly secures the repayment of the loan facility to Bank Islam. As a result of this assurance provided to the Ministry of Finance, the payment facility is guaranteed by the state government. Thus, the Letter of Undertaking serves as security for the Facility Agreement in multiple ways.

The Facility Agreement is secured by the Letter of Undertaking issued by the state government to the Ministry of Finance. The Bank is a federal government GLC, whilst the Respondent is a state entity. Hence, the relationship between the Bank and the Respondent is not strictly commercial, but is guided by government policies. Therefore, instead of the usual security in the nature of mortgages or charges, the Letter of Offer issued by the Bank specified the requirement of a Letter of Undertaking from the state government, in compliance with the federal government policy.

For the aforesaid reasons, the Court of Appeal find merits in the appeal as the Letter of Undertaking issued by the state government constitutes a security for the said loan. Therefore, since the loan instrument is secured by the Penang Government's Letter of Undertaking, it does not fall within the Remission Order.

- Pemungut Duti Setem v Parkwood Palms Sdn Bhd

The two issues in the case of Parkwood Palms before the Court of Appeal were whether the High Court had erred when it dismissed Jabatan Penilaian dan Perkhidmatan Harta (JPPH)'s valuation and adopted the lower valuation by the property consultant, Landserve, despite the fact that how the valuation had been determined was not explained; and whether the High Court then had to determine the market value of the subject lot based on the common comparables agreed to by all parties, since JPPH's valuation had been deemed flawed. The High Court had allowed the duty payer's appeal; the Court of Appeal allowed the Collector's appeal on the acceptable value of subject lot to be at RM2,421.94 p.s.m. The Court of Appeal preferred the Landserve price after adjustment of RM2,421.94 p.s.m. as it took into consideration the factors to determine market value, which included the adverse factors of cemetery and crematorium. With regard to the sluggish market condition, the National Property Information Centre (NAPIC) report cannot be used as the basis as that report was premised on different footing of property overhang of completed development, as opposed to the subject land which is vacant land.

There was no basis to accept the further adjusted price of RM2,000 p.s.m. Therefore, the Court of Appeal allowed the appeal for an adjusted value of RM2,421.94 p.s.m. No order as to costs was recorded.

Topic 8: Roundtable Discussion on Current Challenges faced by Taxpayers

Moderated by CTIM Deputy President Soh Lian Seng, the Roundtable Discussion focused on several pressing issues with panellists Datuk Abu Tariq Jamaluddin, Deputy CEO (Compliance), HASiL and Kalsumawati Mohd Aris, Country Tax Manager, Shell Malaysia Limited. Noting that most issues, such as e-invoicing, Pillar 2 matters, recent tax developments, capital gains and SVDP 2.0 had been discussed during the Conference, Lian Seng said that this final segment of the event was always conducted for a better understanding of what taxpayers' challenges were, although it was not possible to discuss everything.
Ten poll questions had been circulated to set the parameters for the discussion.

Top of the list were matters pertaining to tax identification numbers, e-invoicing, TCGF and SVDP 2.0. There were also concerns over possible new direction for investigation and audit activities. Referring to the tax self-assessment system, Datuk Abu Tariq said that based on observations, a few adjustments needed to be made. "All information is run through a rigorous examination system based on identified risk," he said. "Certain cases are selected for audit; some cases need intervention. Full audits are conducted to assist and educate taxpayers on how to comply with tax laws."

The number of audit cases would not be increased, he added; instead HASiL was working towards increasing corporate compliance by encouraging participation in the TCGF programme. HASiL's investigative approach has changed, with officers gathering evidence to prove that an offence has been committed. "The ultimate aim is to bring the taxpayer to court for prosecution only when there is sufficient evidence to initiate a case," he explained. "This new approach will be fair to other taxpayers who comply, and will increase voluntary compliance."

Kalsumawati identified increasing transfer pricing cases as a trend, not only in Malaysia but also in Singapore, China and India. She said tax authorities were using data analytics to determine trends and anomalies, saying, "Depending on how you look at it, it is not a science; it is an art." Commenting on a recent newspaper report that a director had been penalised for RM2.4 million, Datuk Abu Tariq said, "The law allows HASiL to impose civil or criminal penalties. One of the criteria is the amount of tax involved. HASiL is mindful of the perception of selective investigation or prosecution, and will make sure the case being investigated falls within the correct criteria. That is the control mechanism."

Queried on what the differences between SVDP 1.0 and 2.0 were, he said that unlike 1.0, SVDP 2.0 offered a complete waiver of penalty, and automatic instalment payment. The taxpayer would not have to provide supporting documents. "There is a clear distinction in 2.0 for voluntary TP and non-TP disclosure, following the procedures that have been laid out in the voluntary TP framework," he said, adding that with 2.0, failure to make payment meant that the taxpayer could still be audited or investigated. Lian Seng urged members who were still encountering SVDP problems to write to CTIM, which would coordinate and provide feedback to HASiL. Kalsumawati said that improvements could be seen but there was generally still a lack of trust between the taxpayer and HASiL.

To Lian Seng's question of who to reach out to if taxpayers were still having problems, Datuk Abu Tariq said, "The CEO or Deputy CEO can be contacted if (you) are still being audited or investigated even after registering for SVDP. We do need to honour our guidelines." He added that the guidelines and FAQs will be updated. Kalsumawati remarked that since there was a move towards cooperative compliance, HASiL should strengthen trust, transparency and assurance. "Once we see certainty in any policy or effort by IRB, that's where you build the trust," she said.

On TCGF, she said that taxpayers do want to cooperate/collaborate because it will result in less cost but both authorities and taxpayers needed a shift in mindset to make this work. "More details will be helpful," she said. "When guidance is there, taxpayers will have the comfort of knowing what to do, and that HASiL knows what it is doing." With more attention required to provide TCGF assistance, Lian Seng asked if tax deduction on the professional fees incurred would be allowed. Kalsumawati advised tax professionals to look at other aspects of tax and tax law such as control frameworks, and advise clients on building their own control framework. "If they already have an existing framework, you can advise how it can be improved, so that HASiL will have the confidence that the client is a good taxpayer with all controls in place," she said.

Commenting on the readiness of businesses for e-invoicing, Datuk Abu Tariq said that several announcements had been made about the implementation timeline but many challenges remained; one was systems testing and validation. Stressing that HASiL was open to feedback from users, Datuk Abu Tariq said that engagement would be conducted on e-invoicing, and that a law on e-invoicing would be tabled. The challenges of e-invoicing include timeline, costs, complexity, compliance, and security.

The issue of refunds was discussed; Datuk Abu Tariq said that taxpayers claimed more every year, and funds for this needed to be increased. One of the reasons for this was that taxpayers tended to overestimate how much needed to be paid at the beginning of the basis period. "Taxpayers are still conservative when making their estimates," he said. "Don't pay so much money to HASiL, as you have to wait for your refund!" Lian Seng remarked that many companies depended on their refunds for their cash flow, and suggested that HASiL could look into a mechanism that could make partial refunds at least, to help the business.

Lian Seng's last poll question was on tax cases; a lot of people perceive that when the dispute favours the taxpayer, the policy-maker changes the law, he said. Datuk Abu Tariq said there were cases where the law was amended after a court decision to clarify the provision in dispute. "Any changes made to the law subsequent to the decision only proves that we agree with the court's decision that the intended policy is not supported by law or has any legal basis," he said. "We need more consultation and engagement with relevant stakeholders to ensure the proposed changes are in line with best practice, are fair and reasonable; with due consideration given to the practice and industries involved."

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THE WIRAMUDA CASE

TAX PROVISION RULED UNCONSTITUTIONAL FOR THE FIRST TIME

Adeline Wong, Jeff Sum Wai Loon & Chloe Ng

A. INTRODUCTION

Recently on 31 May 2023, the Federal Court delivered its decision on the case of *Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2023] 4 MLJ 753 ("**Wiramuda**") which dealt with S. 4C and S. 24(1)(aa) of the Income Tax Act 1967 ("**ITA 1967**") which seek to impose income tax on compensation received from compulsory acquisition granted in accordance with the Land Acquisition Act 1960 ("**LAA 1960**"). This decision marks a significant development in the legal landscape of taxation as it represents the first instance where the Malaysian courts have struck down a tax provision for being unconstitutional.

In this article, we will discuss the key developments in the law prior to the enactment of S. 4C and S. 24(1)(aa) of the ITA 1967 and the main considerations of the Federal Court in *Wiramuda* in concluding that these provisions are unconstitutional. We will also examine the effect and significance of this case from a tax perspective.

B. LEGAL POSITION PRIOR TO THE ENACTMENT OF SECTION 4C

Prior to the enactment of S. 4C, the Malaysian courts have on numerous occasions ruled that income tax was not payable on properties acquired by way of compulsion. This can be gleaned from the Court of Appeal case of *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597 ("**Penang Realty**") where a portion of the land belonging to a taxpayer company carrying on housing development business was compulsorily acquired by the government. The Director General of the Inland Revenue ("**DGIR**") sought to impose tax on the taxpayer's compensation because such compensation amounts to profit from the taxpayer's business activities.

The High Court held, by reference to the Supreme Court decision of *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 ("**Lower Perak**"), that no tax can be imposed against the taxpayer because the element of compulsion vitiates the intention to trade and therefore, the gain could not have been derived from a trading transaction.

It is noteworthy that *Lower Perak* is not a case concerning compulsory land acquisition but a forced sale. In this case, the taxpayer was a co-operative society which had purchased a piece of land to build houses thereon and sell them to its members to ensure that all its members could own houses. To finance the development of the land, the taxpayer had entered into several agreements with a housing developer whereby the developer bought a portion of the subdivided land and was obliged to sell the lots to the taxpayer's members at the same price. In return, the taxpayer agreed to bear the infrastructure cost for the lots. Unfortunately, due to a decreased demand for the houses, the taxpayer was forced to sell the remainder of the houses to the developer to cut its losses. The Court of Appeal held that the forced sale to the developer meant that there was no trading since the element of compulsion vitiated the intention to trade. The Court of Appeal further found that a mere sale at a profit or the acts done to improve the value of the land does not per se signify trading and that due consideration must be given to the motive of the taxpayer, which is not to make a profit but to satisfy the domestic need of providing a roof over the head of its members.

In the subsequent *High Court case of Metacorp Development v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447

("**Metacorp**") concerning compulsory acquisition, the DGIR argued that Penang Realty should not be binding as the courts did not account for the then S. 24(1)(a) of the ITA 1967 which stipulates that a "debt which arises in respect of any stock in trade parted with on compulsory acquisition in the course of carrying on a business shall be treated as gross income of the relevant person from the business for the relevant period". The High Court affirmed the decisions in Penang Realty and Lower Perak. It held that the compulsory acquisition therein was not liable to tax as the element of compulsion vitiated the intention of trade and did not take place in the course of carrying on a business.

However, not long after, on 23 January 2014, the Parliament gazetted the Finance Act 2014, which took effect from Y/A 2014 onwards. Amongst others, the Finance Act 2014 introduced a new S. 4C which reads: *"For the purpose of paragraph 4(a), gains or profits from a business shall include an amount receivable arising from stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner."* S. 24(1)(aa) was also inserted to mirror the then S. 24(1)(a) but with additional terms to cover instances where the stock in trade is parted with by '*element of compulsion*'. In effect, the legislative changes subjected compensation from compulsory acquisition to income tax, negating the principles established by the courts in *Lower Perak, Penang Realty and Metacorp*.

C. SECTION 4C CHALLENGED ON GROUNDS OF CONSTITUTIONALITY IN *WIRAMUDA*

In *Wiramuda*, the Selangor State Government compulsorily acquired land belonging to Wiramuda to construct the Sungai Besi-Ulu Kelang Elevated Expressway (SUKE). Wiramuda was awarded compensation of RM202,552,569.50. Subsequently, Wiramuda received a notice of assessment from the DGIR subjecting the compensation to income tax under S. 4C and S. 24(1)(aa) of the ITA 1967, amounting to RM52,966,517.27.

The taxpayer applied for judicial review in the High Court on the basis that S. 4C was unconstitutional as it purports to take away a person's right to receive adequate compensation for the compulsory acquisition of land guaranteed by Article 13(2) of the Federal Constitution ("**Constitution**"). Article 13(2) of the Constitution reads as follows:

> *"No law shall provide for compulsory acquisition or use of property without adequate compensation."*

The High Court, in dismissing the taxpayer's application, held, among others, that the question of whether there is adequate compensation under Article 13(2) was an issue between the taxpayer and the Land Administrator, and not the DGIR.

On the taxpayer's appeal, the Court of Appeal affirmed the High Court's decision and held that S. 4C of the ITA 1967 was not unconstitutional as the taxpayer was not deprived of its rights to adequate compensation. The taxpayer has the right to object to the amount of compensation by way of land reference to the High Court and has in the present case, exercised such right.

Following this, the taxpayer appealed to the Federal Court and raised the following arguments:

- The Constitution is the supreme law of the Federation and as such, the nation operates under the doctrine of constitutional supremacy rather than Parliamentary sovereignty. If a particular statutory law is in conflict with the Constitution, the particular statutory law shall, to the extent of the inconsistency, be declared void and unconstitutional by the courts.
- "Adequate compensation" as envisaged under the Constitution is the sum that would place the taxpayer in the same financial position as he would have been if there was no question of the subject land being compulsorily acquired. This is known as the principle of equivalence. The affected landowners are entitled to receive compensation that is no more or no less than the loss resulting from the compulsory

acquisition i.e., market value of the land.

- By subjecting the compensation to tax, S. 4C has the effect of removing and/or eroding the taxpayer's fundamental right to be adequately compensated under Article 13(2) of the Constitution, thereby rendering the protection thereunder illusory.

On the other hand, the DGIR raised, amongst others, the following arguments in support of its decision to impose tax:

- The compensation received by the taxpayer from the compulsory acquisition under S. 4C of the ITA 1967 does not contravene Article 13(2) of the Constitution. The taxpayer is precluded from arguing that S. 4C and S. 24 of the ITA 1967 are arbitrary because they have been validly passed by the Parliament. The cases of Lower Perak and Penang Realty which were decided prior to the introduction of S. 4C must be treated with caution.
- The introduction of S. 4C and S. 24(1)(aa) of the ITA 1967 is intended to empower the DGIR to impose tax on the compensation received from the compulsory acquisition of land by the government under the LAA 1960 on condition that such land is a stock in trade, where the profit from the disposal will be taxed as a business income.
- The exercise of judicial power to award adequate compensation for land acquisition lies solely with the High Court judge and the question of adequacy of the compensation has been duly determined by the High Court. The taxpayer was estopped from raising any contention on the adequacy of compensation in the Federal Constitution.

The Federal Court unanimously decided that S. 4C of the ITA 1967 is unconstitutional as it contravenes Article 13(2) of the Constitution. The key reasonings of the

Federal Court in support of its decision are as follows:

- S. 4C of the ITA 1967 is fundamentally flawed in providing that compensation from compulsory acquisition is a profit or gain, as adequate compensation has no element of profit or gain, nor any pecuniary advantage. The taxpayer is merely placed in a situation as if the land had not been acquired.
- Applying the principle of equivalence, since the taxpayer is only receiving compensation which is to put him back to his original position and gains no pecuniary advantage, charging income tax on the compensation received will reduce the compensation paid to the taxpayer such that he would no longer be receiving adequate compensation under Article 13(2) of the Federal Constitution.

It can be observed that the Federal Court has taken a step further by looking into the fundamental basis for taxation provided under S. 4 of the ITA 1967, i.e., there must be a "gain" or "profit" for the tax authority to impose tax under the ITA 1967 and went on to decide that the newly inserted S. 4C of the ITA 1967 cannot stand as it contravenes this fundamental basis.

D. THE SIGNIFICANCE OF *WIRAMUDA*

While the Malaysian courts have been proactive in upholding the principle of constitutional supremacy in Malaysia by striking down legislative provisions which are found to be unconstitutional, *Wiramuda* is the first case in which a tax provision has been held to be unconstitutional. Other attempts to challenge the constitutionality of a provision under the ITA 1967 have failed.[1]

[1] *One such instance can be seen in the High Court case of Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib [2020] 11 MLJ 242 where the taxpayer attempted to argue that S. 106(3) of the ITA which precludes the court from deciding on any pleas that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased, contravenes Article 121 of the Constitution which establishes the judicial powers of the Malaysian courts.*

The landmark decision in *Wiramuda* has a significant impact on taxpayers. Taxpayers, especially property developers, who had received compensation from compulsory land acquisition would be directly affected. However, the Federal Court's decision in *Wiramuda* is silent on how its decision should be applied – retrospectively or solely prospectively. If the decision is to be applied retrospectively, taxpayers who were previously subject to tax on the compensation received under S. 4C of the ITA 1967 may consider the possibility of submitting revised tax computations to obtain a refund on the taxes paid. Should the DGIR refuses to allow a retrospective application of the *Wiramuda* decision, taxpayers may challenge the DGIR's refusal by way of judicial review and seek the High Court's determination on this issue. At the same time, taxpayers who are currently facing similar audits would be able to take the defensible position that income tax should not be imposed on compensation received from compulsory acquisition, in view of the Federal Court's decision in *Wiramuda*. As the DGIR is legally bound by the decision of the courts, any attempts by the DGIR to take a position contrary to the Federal Court's decision in *Wiramuda* is illegal and in excess of its jurisdiction, and may be challenged in a judicial review.

Beyond its immediate consequences for taxpayers, *Wiramuda* sends a clear message to policymakers. It emphasises the need for tax legislation to be drafted carefully, ensuring that it adheres to constitutional principles. In cases where tax provisions are enacted in breach of taxpayers' constitutional rights, they remain open to potential legal challenges. This includes cases where tax laws have been legislated to counter the effect of previous court decisions.

One recent example is in the case of *Ketua Pengarah Hasil Dalam Negeri v Watsons Personal Care Stores (M) Holdings Limited* [2023] MLJU 827, where the High Court dismissed the DGIR's transfer pricing adjustment as he failed to comply with the requirement under the then S. 140A of the ITA 1967 to substitute the arm's length price when seeking to disregard the taxpayer's transaction. Subsequently, effective 1 January 2021, S. 140A(3A) was introduced to allow the DGIR to disregard any structure adopted by a taxpayer in entering into a transaction if, amongst others, "*the actual structure impedes the DGIR from determining an appropriate transfer price*". Arguably, the new provision removed the requirement for the DGIR to provide a substitute price if he deems a transaction to not be at arm's length. While it remains to be seen if and how such legislative changes can be challenged, *Wiramuda* serves as a timely reminder that Parliament does not have the power to enact law including tax law that erodes the fundamental rights guaranteed by the Federal Constitution.

Legislative enactments which seek to alter taxpayer's obligations and liabilities can be onerous for taxpayers, considering that taxpayers bear the legal burden to challenge the decisions made by the tax authorities and prove that those decisions are incorrect and/or in excess of their authority. In this regard, the *Wiramuda* case underscores the significance of a well-informed and vigilant taxpayer community. It serves as a reminder that taxpayers should stay informed about changes in tax laws and be prepared to challenge any provisions that appear to infringe upon their constitutional rights. In this regard, tax practitioners play a pivotal role in assessing the defensibility of the taxpayer's case, the grounds upon which they may rely to challenge tax decisions and devise effective strategies for engagement with tax authorities. This ensures taxpayers can proactively protect their interests, mitigate the risk of unwarranted tax liabilities and achieve a fair and just resolution.

Adeline Wong, Jeff Sum Wai Loon *and* ***Chloe Ng*** *(Wong & Partners)*

TAX RISK MANAGEMENT FROM A LEGAL PERSPECTIVE

S. Saravana Kumar & Nur Amira Ahmad Azhar

Tax risk management (TRM) has become a prevailing theme in the Malaysian tax scene. Its presence and importance are influenced by a number of factors. The emphasis on greater corporate governance and increased focus on compliance by the tax authorities has propelled the importance of TRM. In the wake of corporate scandals, regulators have introduced more stringent corporate governance mechanisms worldwide, including in Malaysia. This article explores the significance of TRM as an integral part of good corporate governance, especially in light of regulatory developments and the Code on Corporate Governance introduced in Malaysia.

Corporate Governance, as understood in the context of Malaysia and the global regulatory landscape, is driven by a growing emphasis on TRM to achieve greater corporate governance and compliance. Regulators, including tax authorities, recognise the necessity of robust TRM frameworks to mitigate tax-related risks, influenced by global responses to corporate scandals such as the Sarbanes-Oxley Act of 2002 in the US and Malaysia's introduction of the Code on Corporate Governance in 2001. This Code, revamped listing requirements for companies on Bursa Malaysia, reinforced provisions governing information disclosure, continuing listing obligations, financial reporting, insider trading and protection of minority shareholders. In

line with the perspective of Sir Adrian Cadbury, corporate governance serves as a mechanism that balances economic and social objectives, aligning the interests of individuals, corporations and society, thereby promoting efficient resource utilisation and demanding accountability for resource stewardship. It is crucial to note that within the broader realm of corporate governance, TRM emerges as a significant subset, contributing to minimising risks faced by businesses.

The self assessment system, which was introduced in Malaysia in 2001, requires taxpayers to determine their taxable income, compute their tax liability and submit their tax returns[1]. In principle, the self assessment system has shifted a substantial burden of responsibility from the Inland Revenue Board of Malaysia (HASiL) to the taxpayers and as a result increased TRM awareness among Malaysian taxpayers. In Malaysia, TRM would entail taxpayers identifying tax risks and putting in place methodologies to eliminate or substantially minimise such risks. The TRM methodologies that are to be put in place to assist taxpayers manage tax risks effectively generally encompass a two-pronged approach. The first is to eliminate all forms of tax risks like reassessments, fines, imprisonment and penalties. If the first approach is not practical, then the alternative is to substantially minimise the tax risks that arise. Fundamentally, the ultimate objective of TRM is to reduce tax incidence without attracting any sanction from the state. Additionally, taxpayers must clearly not be involved in any form of tax evasion and the tax schemes designed by taxpayers must be seen as tax mitigation. In the unlikely event that such schemes are seen as tax avoidance, the objective must be to ensure that the taxpayers are exposed to the least punitive risk.

Taxpayers who are able to successfully identify tax risks (i.e., liabilities that may arise due to certain actions or inactions) and apply the appropriate methodology in place should be able to fulfil the above and accomplish their TRM successfully. In the absence of an official TRM framework in Malaysia, this article aims to highlight the 4 aspects that should be incorporated as methodologies in order for the TRM to be effective. These aspects are compliance (see 1.), documentation (see 2.), awareness (see 3.) and planning (see 4.). As these aspects complement each other, they are to be given equal importance and observed collectively. This is crucial because proper documentation leads to good compliance and sound awareness leads to effective tax planning.

1. Compliance

The most obvious risk to taxpayers is the failure to comply with the procedural requirements prescribed by the Malaysian Income Tax Act 1967[2] (ITA 1967). Although compliance can be time-consuming and tedious, it is the simplest of risks that can be avoided. Procedural compliance should not be seen as a complex creature and be entrusted to tax agents alone. With a sound understanding of the law and proper training, compliance can be observed internally by a business. For example, the failure of an employer to submit the employees' returns to HASiL without reasonable excuse carries a fine of up to RM20,000, 6 months imprisonment or both.[3] This is an unnecessary risk for employers to face, as it is a trite practice in Malaysia that tax returns must be submitted on or before 31 March of each year.[4]

Employers do not have to solely rely on tax agents to perform this relatively straightforward responsibility. All corporations and nearly most mid-sized businesses have accounts and human resource departments, which could cooperate to tabulate remuneration details and prepare the necessary tax documentation. This not only ensures the complete listing of the employees' remunerations but also allows the entities' relevant personnel to identify the employees' taxable benefits in kind and perquisites. As HASiL has issued a number of Public Rulings[5] on the taxability of benefits in kind and perquisites, the identification of such items should not be a problem. The coordinated use of information and internal expertise would benefit employers as tax returns can be submitted on time.

The punitive measures that come with non-compliance may simply be avoided with proper coordination and observance of the law. Employers, especially big corporations, must ensure their compliance personnel is aptly trained to perform these tasks with clearly identifiable responsibilities. There must be effective communication among the relevant departments. In managing the compliance aspect, taxpayers and tax professionals must have a working knowledge of the compliance requirements. Some of the common procedural requirements contained in the ITA 1967 are as follows:

- S. 112(1A) - Failure to furnish a return in respect of any year of assessment for 2 years or more would attract (i) a fine of between RM1,000 and RM20,000, not exceeding 6 months imprisonment or both, or (ii) a penalty of 3 times the tax amount;
- S. 113 - Filing of incorrect returns and/or providing incorrect information would attract a fine of between RM1,000 and RM10,000 and a penalty of 2 times the amount of tax undercharged;

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[1] *Kasipillai, Jeyapalan, A Comprehensive Guide To Malaysian Taxation Under Self-Assessment, 2nd Edition, McGraw Hill Education, Kuala Lumpur (2006)*

[2] *Act 53*

[3] *See S. 83 and S. 120 of the ITA 1967.*

[4] *S. 83 of the ITA 1967.*

[5] *See Public Rulings 11/2016, 5/2019 and 11/2019.*

- S. 116 - Failure to provide access to buildings and documentation would attract a fine of between RM1,000 and RM10,000, not exceeding one year imprisonment or both; and
- S. 120 – Failure to comply with a notice issued under certain specified sections of the ITA 1967 would attract a fine of between RM200 and RM20,000, not exceeding 6 months imprisonment or both.

Besides procedural compliance, taxpayers must ensure they have in place reliable accounting and financial reporting systems. The Financial Reporting Act 1997[6] established the Malaysian Accounting Standards Board, which sets the accounting and financial reporting standards in Malaysia. It is imperative the systems used by businesses are approved by the Board as non-compliance will attract legal sanction.[7]

2. Documentation

The journey to achieve good compliance is incomplete without proper documentation. The documentation process is seen as something tedious and is mainly entrusted to tax agents. Although this is the practice in the industry, businesses must have some understanding of this aspect.

After all, the primary source for documentation is the business itself. S. 82 and S. 82A of the ITA 1967 prescribe the taxpayers' duty to maintain proper documentation, and records are defined under S. 82(9) of the ITA 1967 to be:

- books of account recording receipts, payments, income and expenditure;
- invoices, vouchers, receipts and documents required to verify entries in the books of accounts; and
- any other records specified by HASiL.

The importance of maintaining proper documentation need not be stressed if taxpayers appreciate the powers of HASiL to access taxpayers' documents as follows:

- According to S. 79 of the ITA 1967, a taxpayer may be required to furnish documents and information on his and his family's bank accounts, savings, deposits, assets and sources of income within 30 days.
- According to S. 80 of the ITA 1967, HASiL has full access to search taxpayer's lands, buildings, and places and to inspect books and documents. HASiL may require any person to provide relevant information which are in the person's possession.

Meanwhile, corporate taxpayers must appreciate that documentation is also necessary to adhere to transfer pricing requirements. The comparability analysis and pricing methodology performed to determine the arm's length price must be documented thoroughly.[9]

The penalty for not complying with the documentation requirements is severe.

The relationship between documentation and compliance can be succinctly illustrated with the following example.

For instance, S. 82(1) of the ITA 1967 requires a taxpayer carrying on a business at any one time to keep sufficient records of all transactions that transpired during a seven-year period. If the taxpayer's annual gross income is more than RM150,000 from the sale of goods or RM100,000 from the provision of services, then he is required to issue receipts and retain the duplicates and cause appropriate entries to be made in those records in respect of transactions within 60 days of each transaction.[8] By maintaining proper documentation, the taxpayer would be able to comply with the requirement in S. 82(1) of the ITA 1967, thus avoiding the risk of non-compliance.

Generally, pursuant to S. 119A of the ITA 1967, the failure to maintain proper and furnish proper documentation carries a fine between RM300 and RM10,000, imprisonment for up to a year or both. Meanwhile, the penalty for failure to furnish transfer pricing documents pursuant to S. 113B of the ITA 1967, is between RM20,000 to RM100,000 or not exceeding 6 months imprisonment or both.

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6 *Act 558.*

7 *See S. 26D of the Financial Reporting Act 1997.*

8 *Paragraph 3.3.1, Public Ruling 4/2000 (Revised) on Keeping Sufficient Records (Companies and Co-operatives)*

9 *Naban, D.P. and Saravana Kumar, Introduction to the Transfer Pricing Policy Malaysia, Tax Nasional, Volume 16/2007/Q1, Malaysian Institute of Taxation (2007).*

3. Awareness

Taxpayers and tax professionals must be aware of the laws in relation to tax treatment and tax planning. Failure to understand the law or keep abreast with recent legal and technical developments may result in catastrophic consequences. It must be emphasised that sound awareness leads to effective tax planning and in this regard, the awareness aspect enables individuals to understand the crucial distinctions between tax evasion, tax mitigation and tax avoidance.

3.1 TAX EVASION

The concept of evasion was succinctly elucidated by Lord Templeman in CIR v Challenge Corporation Ltd.[10] Lord Templeman reasoned:

> *… Evasion occurs when the Commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead to a reassessment. Fraudulent evasion may lead to a criminal prosecution as well as reassessment. In the present case Challenge fulfilled their duty to inform the Commissioner of all the relevant facts.*

This received judicial recognition in Malaysia when Justice Gopal Sri Ram endorsed it in Sabah Berjaya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri.[11] There are different forms of evasion, i.e., innocent, negligent, reckless and wilful. In Malaysia, all types of evasion will eventually lead to a reassessment of tax. With the exception of wilful evasion, the reassessment exercise is limited to 5 years. For wilful evasion, there is no such time limit imposed. Among the 4 types of evasion, wilful evasion faces the most severe sanction.

Wilful evasion is defined in the ITA 1967 as well as Public Ruling 8/2000 as any action or deed deliberately performed or done with the purpose or intention of evading or assisting any other person to evade tax which include:

- omitting income in a tax return;
- making a false statement or entry in a tax return;
- giving a false answer;
- preparing, maintaining or authorising false records;
- falsifying accounts or other records; or
- using fraud, art or contrivance.

Penalty for wilful evasion under S. 114(1) of the ITA 1967 carries a fine of RM1,000 to RM20,000, imprisonment for up to 3 years or both. A penalty, which is 3 times the amount of understated tax, is also slapped on the taxpayer. The other forms of evasion attract fine, imprisonment or both.

3.2 TAX AVOIDANCE

While taxpayers may mitigate their tax incidence, they cannot be involved in tax avoidance schemes. However, the distinction between the two is rather difficult to draw. Lord Tomlin in IRC v Duke of Westminister[12] has shed some light in relation to tax mitigation as follows:

> *"Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability."*

The general anti-avoidance rule in Malaysia is contained under S. 140 of the ITA 1967. This provision confers the Director-General of the HASiL wide powers to disregard transactions that:

- alter the incidence of tax payable;
- relieve a person from tax liability;
- evade or avoid any duty or tax liability; and
- hinder or prevent the operation of the ITA 1967.

The anti-avoidance law in Malaysia originates from S. 260 of the Australian Income Tax Assessment Act 1936.[13] Although the Australian anti-avoidance law has seen major changes in recent years, such has yet to happen in Malaysia. Neither has HASiL issued a Public Ruling to clarify when or how the anti-avoidance provision is applied. As the application and operation of S. 140 of the ITA 1967 is shrouded in mystery, one has to resort to case law to obtain an insight into it. In the interesting case of Sabah Berjaya Sdn Bhd v. KPHDN,[14] Justice Gopal Sri Ram held the taxpayer was not engaged in tax avoidance. The taxpayer here was a company owned by the Sabah Foundation. The foundation was a public institution and gifts of money to the foundation were allowed as tax deductions. The taxpayer donated its profits to the foundation for 8 years. Both the Special Commissioners of Income Tax and the High Court held the taxpayer was engaged in a tax avoidance scheme.

The case took an interesting turn before the Court of Appeal when Justice Sri Ram held otherwise. His Lordship reasoned that the taxpayer did not do anything which did not reduce its income or suffer a loss, nevertheless resulting in it obtaining a reduction in its liability to tax as if it had. This case illustrates how a taxpayer is only engaged in tax avoidance when he does not reduce his income, suffer a loss or incur expenditure, but nevertheless obtains a reduction in his tax liability as if he had. Similarly, if a taxpayer invests in a business that enjoys tax incentives and reduces his chargeable income, such is not tax avoidance. Taxpayers and tax professionals must keep abreast with activities that enjoy tax incentives as investments in such activities will certainly minimise one's tax incidence. This correlates with the planning aspect of TRM.

Separately, in Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri, [15] the Court of Appeal held that

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[10] [1986] STC 548 (Privy Council, United Kingdom)
[11] [1999] MLJU 224 (Court of Appeal, Malaysia)
[12] [1936] AC 1
[13] Subramaniam, Arjunan, Malaysian Taxation System 2004, Sweet & Maxwell Asia, Kuala Lumpur (2004).
[14] [1993] 3 MLJ 145.
[15] [2017] 2 MLJ 120.

if there is no commercial nor business reason for a taxpayer to enter into a transaction that would result in the reduction of taxes, the taxpayer may be deemed to be involved in a tax avoidance scheme.

Further, HASiL also imposes a penalty on assessments adjusted because of tax avoidance. However, S. 140 of the ITA 1967 per se does not prescribe any form of penalty for tax avoidance. If the taxpayer has given full disclosure and the tax return was correctly submitted, he is not caught by S. 112 and S. 113 offences.

However, in balancing the rights of a taxpayer and in light of the principles of natural justice, the parliament in enacting S. 140 of the ITA 1967 requires HASiL to provide the grounds and basis of adjustment and particulars of adjustment when invoking S. 140 of the ITA 1967 against a taxpayer. Recently, the Court of Appeal in DGIR v Rainforest Heights Sdn Bhd[16] has decided that the word 'shall' in S. 140(5) deems it mandatory for HASiL to provide the particulars of adjustment along with the notice of assessment. In this regard, taxpayers are advised to keep abreast of the law so as to know their rights in accordance with the law.

3.3 WITHHOLDING TAXES

When dealing with non-residents, certain payments made to them may be subject to withholding tax in Malaysia. As such when payments are made, Malaysian taxpayers should have an internal control that would immediately alert the TRM mechanism. The mechanism should determine whether such payment is subjected to withholding tax. It is important to identify the types of payments that attract withholding tax. Malaysian taxpayers who fail to withhold tax or remit the withheld tax face a penalty equal to 10% of the amount of tax to be withheld.[17] The following payments made to non-residents are subject to Malaysian withholding tax:

- S. 4A of the ITA 1967 special classes of income:
  - payments for services in connection with the use of property or rights or installation or operation of any apparatus from non-residents and technical advice, assistance, or services payments (services performed in Malaysia);
  - rent for use of moveable property (derived in Malaysia);
- interest and royalty payments;
- payments to a contractor in respect of services provided under a contract; and
- payments to public entertainers.

Besides that, the Malaysian taxpayers will not be able to claim tax deduction under S. 33(1) of the ITA 1967 for taxes remitted from their own funds. In EPM Inc. v. Ketua Pengarah Hasil Dalam Negeri,[18] the High Court held that payment or agreement that effectively passes the non-resident's tax burden to a Malaysian taxpayer is not recognised as a deductible business expense.

3.4 ACCOUNTING AND FINANCIAL REPORTING SYSTEM

Corporate taxpayers must be aware of the changes made to the accounting and financial reporting systems. As the Malaysian Accounting Standards Board aims to ensure the systems used in Malaysia meet the international standard, it frequently issues technical releases and interpretation announcements. Taxpayers must ensure their systems adapt to the changes introduced.

3.5 TRANSFER PRICING

Recently, the new Malaysian Transfer Pricing (TP) Rules for 2023 was issued to replace TP Rules 2012 which require significant disclosures by businesses involved in controlled transactions i.e., the preparation of contemporaneous transfer pricing documentation (CTPD). According to Rule 4, any person enters into a controlled transaction shall prepare CTPD before the due date for filing a return in the relevant assessment year. The documentation is to contain various essential elements, such as information about the Multinational Enterprise Group,[19] details of the person's

[16] Rosli Dahlan Saravana Partnership, Nur Amira binti Ahmad Azhar, DGIR v RH Sdn Bhd: The Application Of Section 140 Of The Income Tax Act 1967

[17] See S. 107A(2), S. 109(2), S. 109A and S. 109B(2) of the ITA.

[18] (2001) MSTC 3,306.

[19] As per Schedule 1 of the Income Tax (Transfer Pricing) Rules 2023

business,[20] documentation related to cost contribution arrangements[21], an index of documents prepared, completion date, and documents that serve as the support, or reference for the transfer pricing analysis. Additionally, it should include any information, data, or related documents used to determine an arm's length price, considering the effects of material changes in business conditions during the assessment year. If certain information or documents are not applicable, the person must indicate their non-applicability within the CTPD.

To ensure compliance with the new rules, businesses are required to prepare CTPD based on the most current, reliable information, data, or documents available at the time of determining the arm's length price, as stated in Rule 5. It is crucial for companies to keep and retain the information, data, or documents in a manner that allows easy access and retrieval by the Director General. This organised record-keeping ensures that the relevant documentation can be readily ascertained and accessible during tax audits or upon request by the tax authorities. In fact, the Director General is empowered to issue a notice, requesting any person to furnish the CTPD within 14 days from the date of service. By adhering to these requirements and maintaining proper documentation, businesses can effectively manage their tax risks, demonstrate compliance with the arm's length principle, and facilitate efficient tax audits and dispute resolution processes.

4. Planning

To strategise and implement a successful tax planning scheme, taxpayers must be aware of the legal and accounting developments around them. Taxpayers who fail to constantly update and educate themselves may find that their schemes contain technical imperfections, which result in potential taxation and legal sanction. The interrelation between awareness and planning is obvious. Sound awareness leads to effective planning, which essentially means mitigating tax incidence.

In planning tax schemes, reference must be made to the Public Rulings[22] and Guidelines issued by HASiL. Although these instruments are not legally binding, they provide insights into HASiL's stance. The tax schemes can be adjusted to fit within these instruments.

If taxpayers are not keen to observe these instruments, they must be able to justify the reason for taking such an approach. When there are transactions with associated entities, taxpayers must ensure the transactions are at arm's length. Taxpayers must be aware of the appropriate pricing methodologies used to determine the transfer price. In addition, taxpayers must be able to perform a comparability analysis based on the factors set out in the Malaysian Transfer Pricing Guidelines 2012. The Malaysian Transfer Pricing Guidelines 2012 also outline the factors to be considered when dealing with intangible products and intragroup services.

An understanding of the permanent establishment (PE) concept is necessary for multinationals planning to invest in Malaysia. They may want to avoid business structures that may create a PE in Malaysia. Under most tax treaties ratified by Malaysia, business profits earned by non-residents are not taxed here unless they have a PE. A good working knowledge of the tax treaties would allow taxpayers to plan their transactions accordingly to benefit from such treaties.

In undertaking tax planning, it is imperative that taxpayers are aware of the existing tax incentives. In driving the economy forward, various tax incentive schemes are introduced in Malaysia. These are available under the Promotion of Investments Act 1986[23] and the ITA 1967. By taking advantage of these incentives, taxpayers may effectively reduce tax incidence, thus increasing their profit margin. To achieve this, taxpayers must be aware of the developments in this field.

Conclusion

An integrated approach to TRM would create an overall strategy that would serve as a guide for future investments and business decisions. Ultimately, TRM ensures the identification of tax risks and enables taxpayers to implement mechanisms to overcome them. The compliance aspect in TRM also complements the existing corporate governance culture in Malaysia. Perhaps the most valuable contribution of TRM would be the creation of a tax-efficient environment for taxpayers. In applying the TRM framework, taxpayers should consider the following checklist:

1. Identify tax implications and risks arising from business operations.
2. Obtain a status report on (1).
3. Ensure compliance and documentation.
4. Assess the degree of risks involved.
5. Strategise plans and policies to tackle the risks.
6. Implement the strategies in (5).
7. Evaluate the tax position after the implementation.

Taxpayers must evaluate their tax positions constantly. They must be pragmatic to perform TRM whenever there are major legal and accounting developments. In this regard, the proposed Malaysian TRM framework and checklist serve only as guides. Taxpayers may adjust their TRM approach according to their special needs.

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[20] *As per Schedule 2 of the Income Tax (Transfer Pricing) Rules 2023*

[21] *As per Schedule 3 of the Income Tax (Transfer Pricing) Rules 2023*

[22] *See S. 138A of the ITA*

[23] *Act 327*

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LEGAL PROFESSIONAL PRIVILEGE IN THE MALAYSIAN TAX REGIME

Dr. Benjamin Poh

The Malaysian government has recently responded to international pressures on the Organisation for Economic Co-operation and Development (OECD) Base Erosion Profit Shifting (BEPS) project and harmful tax competitions by introducing new tax administration and collection rules aimed at curbing tax evasion and avoidance both domestically and internationally. These measures may help the government reach its revenue collection targets and achieve its fiscal policy objectives in the post-COVID-19 environment.

However, it is important to consider taxpayers' satisfaction and confidence in government collection and enforcement procedures. To maintain a high level of confidence in the tax regime, the laws must strive to balance the power between taxpayers and the government, especially in the context of tax audits and investigations under the current self assessment system, and during this uncertain business and economic environment.

During tax audits and investigations, key issues often arise relating to the abuse of power by the Inland Revenue Board of Malaysia (HASiL) officials on the confidentiality and accessibility of the taxpayers' information. These issues are closely linked to legal professional privileges (LPP), which tax lawyers or accountants must safeguard to prevent unauthorised access to confidential and privileged information. This is essential to maintain confidentiality and trust on tax and legal advice given by lawyers to their clients without fear of information on tax and legal advice being disclosed to a third party without their clients' consents.

In Part I of this article, the author will outline the principle of LPP. In Part II, the author will discuss how LPP is applicable to tax laws in Malaysia. In Part III, the author will discuss the recent landmark case ***Malaysia Bar Council v Ketua Pengarah Hasil Dalam Negeri*** on the issue of LPP in tax law context. Then in conclusion, the author urges HASiL to take immediate steps to consult the relevant professional bodies and stakeholders in Malaysia on issues relating to LPP which arise from tax audit and investigation to avoid unnecessary disputes in the future, and to achieve the object and purpose of the Income Tax Act 1967 (ITA 1967).

PART I: PRINCIPLES OF LPP

LPP have their roots in common law, which provides for confidentiality in communications between a legal adviser and their client. This confidentiality extends to communications between the client's agent and the legal adviser's subordinate, and even continues after the employment has ended. In Malaysia, the LPP are recognised in **S. 126 to S. 129 of Chapter IX, Part III of the Evidence Act 1950 (EA 1950)**. S. 126 states that:

> *(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.*
>
> *Provided that nothing in this section shall protect from disclosure:*
>
> *(a) any such communication made in furtherance of any illegal purpose;*
>
> *(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.*

The rule of LPP is grounded in an adversarial system, where the court strives to uncover the truth, while at the same time allowing clients to freely communicate with their legal advisors without fear of their information being disclosed. The balance between these two objectives was established in the UK case ***R v Derby Magistrates Court e exp. B [1996] AC 487***.

In the landmark case of ***Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No.3) [1999] 2 MLJ 1, 179 (HC)***, Judge Augustine Paul J. stated, "This rule is established for the protection of the client, not the advocate, and is based on the necessity of conducting legal business with professional assistance and securing full and unreserved communication between the two."

The privileges apply both to civil and criminal proceedings. The distinction should be made between cases where litigation is contemplated or ongoing which is described as 'litigation privilege' and those where it is not, is described as 'advice privilege'. In England as well as the rest of the Commonwealth countries, LPP is now recognised as a substantive rule of law and not merely a procedural one.

PART II: APPLICATION OF LPP TO INCOME TAX LAWS

HASiL has broad powers to access records, books, accounts, bank statements, and other relevant information to assess potential tax liability under S. 78 to S. 81 of the ITA 1967, except that a warrant shall be produced on demand to any person having reasonable grounds to make the demand.

But, does it mean during a tax audit and investigation all information should be given to HASiL upon request? Before answering this question, one should read S. 142(5) of the ITA 1967 as follow:

(a) Save as provided in the paragraph (b) nothing in this Act shall:

> *(i) affect the operation of Chapter IX of Part III of the Evidence Act 1950; or*
>
> *(ii) be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.*

(b) *Notwithstanding the provisions of any other written law, where any document, thing, matter, information, communication or advice consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director General or any authorised officer if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person.*

Chapter IX of Part III of the EA 1950 is mainly concerned with witnesses giving evidence in legal proceedings (both civil and criminal), this includes S. 126 to S. 129 relating to LPP.

The initial reading of S. 142(5)(a) of the ITA 1967 gives the impression of poor drafting, with paragraph (b) appearing to be in conflict with Chapter IX of Part III of the EA 1950. This is compounded by the lack of clear guidance from HASiL, leaving tax advisers or lawyers uncertain as to whether the principle of LPP exists in Malaysian tax laws.

Prior to the recent Federal Court decision in ***Malaysia Bar Council v Ketua Pengarah Hasil Dalam Negeri Appeal No. 01(f)-11-09/2021 (W)*** on the issue of LPP under income tax law, in the author's article published by Malaysian Institute of Accountants (MIA) in February 2007[i], the author argued that LPP is applicable to income tax laws with qualifications. This is because if Parliament intends to remove LPP in income tax laws, it wouldn't include S. 142(5)(a) of the ITA 1967 in the first place.

Further, paragraph (b) of the S. 142(5) should be viewed as a qualifier, stating that certain documents or advice, even between legal advisors, shouldn't be privileged. Allowing privilege would hinder the HASiL tax audit and investigation process. These non-privileged documents include financial statements, tax computations, tax returns, and supporting source documents for expenses, receipts, payment books, bank statements, and related documents.

Further, if even legal advice documents are privileged, HASiL may invoke S. 126(1)(a) of the EA 1950 which is the exception to LPP, claiming suspected income tax fraud. However, HASiL has to present evidence of suspected tax fraud before the exception can be invoked. Privilege can be lost if the client waives it as the privilege is that of the client and not the legal advisers. Or it can be lost if the privileged document gets into a third party's hand whether by accident or fraud.

Does LPP cover communication between parties other than legal advisers and clients in Malaysia? No, it only applies to legal advisers who hold valid practicing certificates from the Malaysian Bar Council. As seen in ***Public Prosecutor v Dato' Seri Anwar bin Ibrahim (2001) 3 MLJ 193, 269 (HC)***, even professionals involved in giving tax advice and compliance works like licensed tax agents, auditors and accountants cannot claim LPP for their clients, though they are bound to observe confidentiality requirements under their professional associations' by-laws or codes of ethics.

The author's arguments are broadly consistent with the recent Federal Court decision in Malaysia Bar Council v Ketua Pengarah Hasil Dalam Negeri Appeal No. 01(f)-11-09/2021 (W). However, the Court went further to hold that financial information under S. 142(5)(b) of ITA 1967 kept by tax practitioners or accountants for their clients is required to be disclosed to HASiL or Court when requested by HASiL, but this is not applicable to advocates and solicitors who can claim LPP for advice and information communicated between the advocates and solicitors and their clients, these advice and information include solicitors' clients' accounts.

PART III: RECENT FEDERAL COURT DECISION ON LPP IN THE TAX LAW CONTEXT

In ***Bar Malaysia v Ketua Pengarah***

Hasil Dalam Negeri [2018] 3 AMR 439, High Court, the Plaintiff, the Malaysian Bar commenced an Originating Summon proceeding against HASiL because one of its members had been audited by HASiL which demanded access to the relevant accounting books and records of the member's firm's clients' accounts.

The Malaysian Bar had taken a stance that tax audit on clients' accounts had breached the principle of solicitor-client privilege or LPP. HASiL maintained that S. 142(5) of the ITA 1967 overrides the provisions of Chapter IX of Part III of the EA 1950, allowing HASiL to conduct an audit of the member's firm's clients' accounts. Dissatisfied with HASiL's reply, the Malaysian Bar filed an Originating Summon in the High Court stating that S. 142(5) of the ITA 1967 does not entitle or empower HASiL to disregard the LPP conferred under S. 126 of the EA 1950; and seek the reliefs.

The High Court allowed the Malaysia Bar's application and said as follows:

"Section 126 of the Evidence Act (EA) 1950 shall prevail over s 142(5) of the Income Tax Act (ITA) but the proviso in s 126 does not protect privilege to disclose or produce any document, thing or information or communication made in furtherance of any illegal purpose and for showing that any crime of fraud has been committed by the advocate."

"Section 142(5)(b) of the ITA at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing their clients and do not extend to "advocates and solicitors". Thus s 142(5)(b) of the ITA cannot be used by the defendant as an excuse to be given access to the clients' account with a view to taxing the advocates and solicitors."

"It was never the intention of Parliament to apply s 142(5)(b) of the ITA to the exclusion of the common law on privilege. At most, s 142(5)(b) of the ITA may only apply to the possible secondary cases."

"Although s 126 of the EA 1950 was enacted before s 142(5)(b) of the ITA, it is a specific provision on privilege and as such excludes the operation of s 142(5)(b) of the ITA to the extent of any inconsistency. Section 126 of the EA 1950 however does not protect privilege in circumstances where the communication is made in furtherance of any illegal purpose or any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client."

"The audits carried out by the defendant are in the guise of a fishing expedition to unlawfully fish for information on the clients of the law firms. Such unmeritorious conduct on the part of the defendant in seeking to use s 142(5)(b) of the ITA as an engine of fraud, is abusive, unlawful and illegal."

"Whilst s 142(5)(b) of the ITA does not protect privileged communication or documents in other written law, the fact remains that solicitor-client privilege under s 126 of the EA 1950 which lies within Chapter IX, Part III of the EA 1950, is not affected by the operation of the ITA."

"Before the defendant is required to view the client's account, there must be some information of an illegal act/purpose and/or any crime or fraud or reasonable belief that the client's account was used as a means to park the law firm's own income which resulted in an understatement of income by the firm which warrants an investigation."

In short, the High Court said S. 142(5)(b) of the ITA 1967 removes privilege in respect of books, accounts, statements or other records kept by tax practitioners such as accountants, tax agents or financial advisers with a view to taxing their clients, but does not extend to advocates and solicitors. However, S.126 of the EA 1950 prevails over S. 142(5) of the ITA 1967, but LPP cannot be claimed if the communication was made in furtherance of illegal purposes as stated in the proviso of S. 126.

Further, HASiL is accused of using S. 142(5)(b) of the ITA 1967 as a means to carry out a "fishing expedition" to illegally access the clients' accounts. Before the Court granting access to the client's account, there must be evidence of an illegal act or a reasonable belief that the client's account was used to park the law firm's income.

Dissatisfied with the High Court's decision, HASiL appealed to the Court of Appeal (COA) which agreed with the views of the High Court, and dismissed HASiL's appeal and held as follows[ii]:

*"The privilege under s 126 EA was an absolute one. The common law principle **"once privileged, always privileged" applied. The only one exception where privilege, when it existed, might cease was if the advocate and solicitor's client expressly consented to its disclosure.** (para 50)"*

"The purpose of s 142(5)(b) ITA was to remove privilege from disclosure in the circumstances set out therein. It did not have the effect of repealing or abrogating s 126 EA or to deny its applicability altogether vis a vis the court, the Special Commissioners, the Director-General or any authorised officer. If that was the intention of the legislature, it would have been clearly spelt out. (para 56)"

"On the appellant's purpose of wanting to access the clients' accounts of advocates

and solicitors to ensure tax compliance by taxpayers, the ITA created a host of offences which included the failure to furnish return or give notice of chargeability (s 112), making incorrect returns (s 113) and wilful evasion (s 114). Further, if there was a legitimate basis for wanting to gain access to the clients' accounts of advocates and solicitors, the appellant could do so by invoking the proviso to s 126 EA. The proviso made it clear that the privilege under s 126 did not apply to communications made in furtherance of any illegal purpose and to any fact observed by an advocate in the course of his employment showing that any crime or fraud had been committed. (paras 69-71)"

"Section 80 ITA ("Power of access to buildings and documents, etc") was a general provision and of no assistance to the appellant in the interpretation of s 142(5) ITA. Section 80 would only provide authority for the Director-General or an authorised officer to gain access to the documents and information sought if s 126 EA was overridden by s 142(5)(b) ITA, which was not the case here. (para 72)"

"The classes of information protected under s 126 EA were very wide as an advocate and solicitor's legal brief could be multifaceted and wide ranging. The client's account and information relating thereto did fall within the purview of s 126 EA. (paras 76 & 79)"

In interpreting S. 126 of the EA 1950, COA said the privilege was an absolute one. The common law principle "once privileged, always privileged" applied, unless waived by solicitors' clients. The COA further distinguish between common law doctrine of LPP and the statutory provision on privilege under S. 126, when HASiL cited a Queensland Supreme Court case ***Re Packers and Others v. Deputy Commissioner of Taxation 53 ALR 589*** to argue LPP does not apply to trust account as stated in this case. In this case, Connolly J of the Supreme Court of Queensland held that LPP only confined to documents brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. The trust account ledgers are not communications made for the purpose of obtaining advice and cannot be regarded as a revelation of the nature of advice given. However, the COA disagreed and said as follows: *"Section 126 of the EA is not as narrowly crafted as is suggested by the appellant. The privilege in s 126 is in respect of three identifiable classes of information namely:*

(i) communication made to an advocate in the course and for the purpose of his employment as such advocate by or on behalf of his client;
(ii) contents or condition of any document with which the advocate has become acquainted in the course and for the purpose of his professional employment; and
(iii) advice given by the advocate to his client in the course and for the purpose of such employment.

The classes of information protected under s 126 are clearly very wide. No doubt this is necessary as an advocate and solicitor's legal brief can be multifaceted and wide ranging."

"As is evident, legal advice given by an advocate to a client is but only one of the three classes of information protected by privilege. [The term communication is not defined in the EA. However, the meaning of the word includes the means of sending or receiving of information (see the Concise Oxford Dictionary) or the imparting or exchange of information or something communicated, eg a message (see Collins Concise Dictionary). Financial information or data exchanged between an advocate and his client and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment as an advocate, would all come within the ambit of s 126 of the EA."

Dissatisfied with the COA's decision, HASiL appealed further to the Federal Court which agreed with the views of the COA and dismissed HASiL's appeal again. The Federal Court pronounced its broad grounds, below is the key pronouncement at Paragraph 6 to 9[iii]:

"This privilege conferred by section 126 of the Evidence Act is of course subject to the proviso. This in turn means that where there is an illegal activity or act or omission which comes to the knowledge of the solicitor, he is not bound by the privilege but bound to report the illegal activity. This provides sufficient safeguard against persons trying to illegally evade the imposition of tax."

"The purpose and object of the Income Tax Act is to impose tax. That is premised on documentation given by the taxpayer. Where there is a clear misleading statement or fraudulent attempt by the taxpayer, here the solicitor or firm of solicitors, that points to other sources of income which has come to the notice of the Inland Revenue, this provision would come into play. But it envisages a situation where there is some basis to enable the Inland Revenue to do so. Not as a fishing expedition to go through all accounts of taxpayers with a view to imposing tax."

"Section 142(5)(b) can only be read with and in conjunction with section 142(5)(a). And that in turn means that solicitor-client privilege is expressly preserved save for the limited purposes of section 142(5)(b). And (b) firstly refers to persons other than advocates and solicitors; secondly it makes no inroads into section 142(5)(a) or Part IX of Chapter 3 of the Evidence Act."

"So, far from encroaching on the solicitor-client privilege, section 142(5)(a) and (b) preserve solicitor-client privilege but ensure that a person cannot utilise 'privilege' to escape or prevent the Inland Revenue from procuring evidence of a receipt or payment out of monies contained perhaps in a series of banking transactions or receipts, simply because they are stored in a client's account."

In short, the Federal Court said the taxpayer is obliged to provide information to HASiL for the purpose and object of the ITA 1967. However, S. 142(5)(a) and (b) of ITA 1967 preserve LPP under S. 126 of the EA 1950 with the exception that if there is an illegal activity or act or omission which comes to the knowledge of the solicitors or where there is some basis to enable the HASiL to invoke the exception, then the information identified under S. 142(5)(b) has to be disclosed. But, not as a fishing expedition to go through all accounts of taxpayers with a view to imposing tax.

The decision in ***Bar Malaysia v Ketua Pengarah Hasil Dalam Negeri (supra)*** has clarified some of the key issues of LPP in the tax law context, however, some issues below are still not settled:

(i) Firstly, can legal advisers make a blanket claim of LPP on all documents without identifying which documents are not subject to privilege? The Court's view of S. 126 of EA 1950 covers wide ranging of information and documents beyond those legal or litigation advices normally given by the advocates and solicitors under the common law doctrine of LPP. The Court's interpretation leaves more doubts than settle the issue of what legal principles and types of documents are or are not subject to LPP.

(ii) Secondly, can corporate lawyers claim LPP if he or she is not in practice? Under the Legal Profession (Practice and Etiquette) Rules, 1978 Rule 44(b), an advocate and solicitor should not be a full-time salaried employee of any person, firm (other than an advocate and solicitor or a firm of advocates and solicitors) or corporation so long as he or she continues in practice. Should an advocate and solicitor take up such appointment, then the advocate and solicitor should take steps to cease practice. Some common law countries such as UK and US allow corporate lawyers to claim LPP, therefore, further clarification on this area is advisable.

(iii) Thirdly, can a part of the document related to non-legal purpose be severed? In an Australian case, ***Esso Australia Resources Ltd v Federal Commissioner of Taxation***, it was held that parts of the document which relate to the subsidiary, non-legal purposes could be severed from the parts relating to the legal purpose.

(iv) Fourthly, is a duplicate copy

of a privileged document also protected from discovery? In ***Commissioner, Australian Federal Police v Propend Finance Pty Ltd, the High Court,*** it was held by a 5:2 majority that privilege is attached to a copy of an unprivileged document if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings.

(v) Lastly, are third parties, such as accountants acting on behalf of their clients seeking legal advice, protected? Section 126 of the EA 1950 states that to claim LPP on documents by a third party acting for his client to seek legal advice, the relationship between an advocate and the client must have been established first. The accountant cannot claim LPP for documents given to a legal adviser for an opinion if there is no contemplated litigation. But where litigation is contemplated, documents created by third parties are privileged so long as the dominant purpose is for possible or existing litigation. It does not have to be the sole purpose, but it must be the dominant purpose.

The author is of the view that further dialogues and discussions between HASiL and the relevant professional bodies such as Bar Council, CTIM, MIA, MICPA, MATA and CPA Australia should be held, so that HASiL can provide further guideline on types of information and advice to be covered by LPP. This is to achieve the object and purpose of the ITA 1967 to impose tax by allowing access to taxpayers' information and documents, but at the same time protecting the taxpayers' rights to legal and tax advice without fear of information on legal and tax advice being disclosed to HASiL without their consents.

CONCLUSION

LPP is recognised as a substantive rule of law and not merely a procedural one. Therefore, HASiL must respect the law and the taxpayers' rights to legal and tax advice when tax audit and investigation are carried out on the taxpayers. The High Court had criticised HASiL for abusing its search powers given under the ITA 1967 by carrying out its audits on the law firm *"in the guise of a fishing expedition to unlawfully fish for information on the clients of the law firm. And such unmeritorious conduct on the part of the defendant in seeking to use s 142(5)(b) of the ITA as an engine of fraud, is abusive, unlawful and illegal".* Similarly, the Federal Court had also said HASiL must have some basis of conducting search on the clients' accounts, *"not as a fishing expedition to go through all accounts of taxpayers with a view to imposing tax".*

Nevertheless, the Federal Court also said *"the purpose and object of the Income Tax Act is to impose tax. That is premised on documentation given by the taxpayer."* hence, it is important that HASiL must have access to information of the taxpayers so that to properly assess the amount of taxes to be collected from the taxpayers to finance Malaysia's budgets and expenditures, and meeting the needs of its people.

Therefore, the author advises HASiL to take immediate actions to consult the relevant professional bodies and stakeholders to clarify the LPP issues applicable to tax audit and investigation. It would be helpful if HASiL provides a separate guideline or incorporate a section into the HASiL Tax Audit & Investigation Framework, on types of information and advice covered or not covered by LPP, as well as procedures to follow when parties are in doubt of whether certain types of information and advice are covered by LPP.

[i] *Perspective: Legal Professional Privileges Under Malaysian Income Tax Law, Accountants Today (February 2007), Malaysian Institute of Accountants, pg 38-39.*

[ii] *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia 110 [2022] 2 MLRA*

[iii] *Malaysia Bar Council Vs Ketua Pengarah Hasil Dalam Negeri Appeal No. 01(f)-11-09/2021 (W)*

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International News

The column only covers selected developments from countries identified by the CTIM and relates to the period 1 July 2023 to 24 September 2023.

ASIA-PACIFIC (GENERAL)

Asia-Pacific Region's Revenues Recovering Slowly from Effects of Pandemic, OECD Report Shows

On 25 July 2023, the OECD issued Revenue Statistics in Asia and the Pacific 2023 noting that tax-to-GDP ratios remained below pre-pandemic levels in most economies in the Asia-Pacific region in 2021. Even though tax-to-GDP ratios increased in 19 of the 27 countries, only 11 countries were able to reach pre-pandemic levels.

In terms of the driving factors for the rise in the tax-to-GDP ratio, the document highlights the recoil of international trade, rising commodity prices (mainly in Central Asia) and loosening restrictions on travel. It explains the tax-to-GDP ratio decrease in Pacific Islands with the effects of the pandemic on tourism.

In general, the report notes that the recovery in the Asia-Pacific's average tax-to-GDP ratio (0.2 percentage points) was weaker than the OECD average in 2021 (0.6 percentage points). The document also underlines the decrease in non-tax revenues in 11 of the 19 economies examined.

Taxes on goods and services remained the main source of tax revenues in the Asia-Pacific region in 2021 (51.6% of total tax revenues), whereas individual income taxes accounted for 16.5%. In terms of corporate income tax, the figure for 2021 was 18.2%, while social security contributions comprised solely 6.9% of total tax revenues.

The report disclosed detailed, internationally comparable data on tax revenues for 30 economies: Armenia, Australia, Bangladesh, Bhutan, Cambodia, People's Republic of China, Cook Islands, Fiji, Georgia, Indonesia, Japan, Kazakhstan, Korea, Kyrgyzstan, Lao People's Democratic Republic (Lao PDR), Malaysia, Maldives, Mongolia, Nauru, New Zealand, Pakistan, Papua New Guinea, Philippines, Samoa, Singapore, Solomon Islands, Thailand, Tokelau, Vanuatu and Vietnam.

AUSTRALIA

Government Continues Consulting on Denial of Deductions Related to Intangible Assets

Following a public consultation process on the proposed denial of deductions for payments related to intangible assets connected with low-tax jurisdictions, the Treasury has acknowledged the feedback and released updated Exposure Draft Legislation (Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions) and Explanatory Memorandum.

The proposed rules are still expected to apply from 1 July 2023, but now include a two-step application sequence:

Firstly, the taxpayer should consider whether the relevant income is derived in a low-tax jurisdiction. A low-tax jurisdiction will now be determined by reference to a rate applicable to income derived in the ordinary course of a business (with any exemptions or concessional rates that may apply to be disregarded).

Secondly, if income is derived in a low-tax jurisdiction, the taxpayer should determine whether the deduction for the payment of the income will not be denied if the income is either (a) subject to Australia's controlled foreign company (CFC) rules or (b) actually subject to foreign income tax at a rate of 15% or more (including any federal, state and municipal taxes, taxation under foreign CFC rules, taxation under foreign hybrid mismatch rules, etc.).

In addition, the deductions are not denied to the extent the payments are subject to Australian royalty withholding tax. Lastly, the Explanatory Memorandum notes that the government is considering the interaction of the proposed denial of deductions with the global minimum tax under BEPS Pillar 2 rules. The government announced the implementation of a 15% global minimum tax and domestic minimum tax in the 2023-2024 Budget.

Australian Taxation Office Consults on Implementation of Pillar Two GloBE Model Rules

The Australian Taxation Office (ATO) announced that it has commenced targeted public consultation on the implementation of the Pillar Two GloBE Model Rules with selected taxpayers that are likely to be in scope of the proposed measures and their advisers with a focus on potential administration issues. The ATO emphasised that the consultation will not cover policy matters, as policy is being developed by Treasury.

The consultation is being undertaken in a phased approach as follows:

- phase 1 with industry groups and their members (July – August 2023);
- phase 2 with mid-tier firms (August – October 2023); and
- phase 3 with large advisory firms (September – November 2023).

The announcement on 11 August 2023 also invited potentially affected taxpayers and their advisers to participate in the consultation process directly by contacting the consultation lead at the ATO.

The Treasurer announced the proposed implementation of the Pillar Two global minimum tax and a domestic minimum tax in the Budget 2023/24 that was delivered on 10 May 2023.

Treasury Announces Reforms to Strengthen Tax Integrity, Counter Multinational Tax Avoidance

The Treasury has announced a package of reforms to strengthen the integrity of the tax and regulatory systems and counter multinational tax avoidance. The announcement was made in a joint media release with the Minister for Women, Finance and Public Service, the Attorney-General and the Minister for Financial Services on 6 August 2023.

The package of reforms announced cover three priority areas:

(1) Strengthening the integrity of the tax system

Changes will be made to the current tax promoter penalty laws, including:

(a) increasing the maximum penalties for the promotion of tax exploitation schemes by 10 times (up to AUD780 million or more);
(b) broadening the penalty laws that apply to the promotion of tax avoidance; and
(c) increasing the time limit for the ATO to bring Federal Court proceedings on promoter penalties from four years to six years after the conduct occurred.

(2) Increasing the power of regulators

Various measures will be made to increase the powers of regulators, including removing limitations in the tax secrecy laws, enabling the ATO and Tax Practitioners Board (TPB) to refer ethical misconduct to professional associations for disciplinary action and protection of whistle-blowers.

(3) Strengthening regulatory arrangements

Consultations on the options to ensure regulatory frameworks are fit for purpose will be held in the coming months, including a Treasury review on the following:

(a) the promoter penalty laws to ensure they address the types of prevalent promoter activities, including schemes that are bespoke, complex and/or operate across jurisdictional boundaries;
(b) emerging fraud and threats to clamp down on systemic abuse of the tax system;
(c) the use of legal professional privilege in Commonwealth investigations (jointly with the Attorney General's Department);
(d) the compulsory information gathering powers of the ATO; and
(e) the secrecy provisions that apply to the ATO and TPB.

Legislation to strengthen the integrity of the tax system and increase the powers of regulators will be introduced in 2023, with consultation on the reforms to begin soon.

CHINESE TAIPEI

Ministry of Finance Announces Plan for Introduction of Global Minimum Tax Regime, No Timeline Set

To assist multinational enterprises in adapting to a global minimum tax under the Pillar Two GloBE Model Rules, the

Ministry of Finance (MoF) has noted that a review of the domestic tax system, providing appropriate tax incentives to maintain the effective tax rate for domestic enterprises at 15% and reducing the compliance costs of multinational enterprises will be a top priority. While Chinese Taipei is not a member of the OECD/G20 BEPS Inclusive Framework, it is following the latest international tax development trends and planning in accordance with the GloBE rules, including having a qualified domestic minimum top-up tax (QDMTT), in order to preserve its taxing rights.

In the short term, the MoF will evaluate industry recommendations to increase the rate of income basic tax from 12% to 15% (statutorily, the tax rate must be between 12% and 15%). In the medium term, the MoF will consider introducing a QDMTT to meet international standards. In the long term, the MoF will evaluate a suitable timing to introduce the income inclusion rule (IIR) and undertaxed payments rule (UTPR) depending on the progress of implementation in other countries. However, no specific timeline for legislation and implementation has been set. The MoF stated that it will continue to pay attention to OECD developments and observe the progress of major international countries in implementing Pillar Two, and consult with all sectors on integrating with the international tax system.

The MoF had previously announced that the taxation administration would be preparing amendments to the Income Tax Act for proposal to the Legislative Yuan (Congress) in 2023, and the expected implementation date would be 1 January 2024, but no measures had been made as yet.

INDIA

India Extends Non-resident Capital Gains Tax Exemption to Transfer of Units of Specific Investment Trust, Scheme, and Fund on IFSC Exchange

The Central Board of Direct Taxes (CBDT)

has issued a notification extending the scope of capital gains tax exemption to non-residents on specific capital assets transferred on a recognised stock exchange located in any International Financial Services Centre (IFSC), provided the consideration for such a transaction is paid or payable in foreign currency.

More specifically, the exemption is extended to the following capital assets:

- unit of an investment trust;
- unit of a scheme; and
- unit of an Exchange Traded Fund launched under International Financial Services Centres Authority (Fund Management) Regulations, 2022 (Regulations).

For this purpose, the terms "investment trust" and "scheme" are defined under the Regulations. Currently, this exemption is applicable to capital assets being specified bonds or global depository receipt, rupee denominated bonds of an Indian company, or derivatives transferred by a non-resident on a recognised stock exchange located in any IFSC, provided the consideration for such a transaction is paid or payable in foreign currency.

G20 Members Adopt Delhi Declaration on Matters of International Taxation, Crypto Taxation

The Indian Prime Minister, Shri Narendra Modi, has announced the consensus and the subsequent adoption of the "G20 New Delhi Leaders' Declaration" at the recently concluded G20 summit in New Delhi.

The declaration provides a commitment of members to specific matters of international taxation, i.e., continued cooperation towards a globally fair, sustainable and modern international tax system appropriate to the needs of the 21st century and the swift implementation of the two-pillar international tax package.

The declaration calls for the swift implementation of the Crypto Asset Reporting Framework "CARF" and asks the Global Forum on Transparency and

Exchange of Information for Tax Purposes "Global Forum" to identify a timeline to commence exchanges by relevant jurisdictions.

Further, the declaration notes the significant progress made on Pillar One, Amount B (framework for the simplified and streamlined application of the arm's length principle to in-country baseline marketing and distribution activities) as well as the development of the Subject to Tax Rule (STTR) under Pillar Two. It calls upon the Inclusive Framework to resolve the pending issues relating to the Multilateral Convention (MLC), with a view to preparing the MLC for signature in the second half of 2023 and completing the work on Amount B by the end of 2023. The declaration also recognises the need for coordinated efforts towards capacity building to implement the two-pillar international tax package effectively and, in particular, welcome a plan for additional support and technical assistance for developing countries.

Additionally, it welcomes the steps taken by various countries to implement the Global Anti-Base Erosion (GloBE) Rules as a common approach. It also makes a note of the OECD Report on Enhancing International Tax Transparency on Real Estate, 2023 update of the G20/OECD Roadmap on Developing Countries and International Taxation and the Global Forum Report on Facilitating the Use of Tax-Treaty-Exchanged Information for Non-Tax Purposes.

INDONESIA

Indonesia Issues Further Guidance on Depreciation and Amortisation

The MoF has recently issued further guidance regarding the depreciation of tangible assets and amortisation of intangible assets. Regulation No. 72 of 2023 (PMK-72) was issued following the issuance of Government Regulation No. 55 of 2022 to provide legal certainty in accordance with Law No. 7 of 2021 on the Harmonisation of Tax Regulations and simplify laws and regulations related to depreciation and amortisation that had previously been spread across several regulations.

The issuance of PMK-72 revokes MoF Regulations No. 96/PMK.03/2009, No. 248/PMK.03/2008, and No. 249/PMK03/2008 as amended by MoF Regulation No. 126/PMK.011/2012.

Indonesia Issues Further Guidance on Tax Treatment of Benefits-In-Kind

The MoF has provided further guidance on the tax treatment of certain benefits-in-kind (BIKs) in Regulation No. 66 of 2023 (PMK-66) of 27 June 2023, which includes a definition of coupons given to employees that can be exchanged for food and beverage for the purposes of non-taxable BIKs, determination of a remote area based on infrastructure indicators, and details and limitations of certain BIKs.

PMK-66 took effect from 1 July 2023 and replaced MoF Regulation No. 167/PMK.03/2018 of 19 December 2018. PMK-66 was issued as a follow-up to Government Regulation No. 55 of 2022 of 20 December 2022 which provides further guidance on BIKs pursuant to Law No. 7 of 2021 on the Harmonisation of Tax Regulations (Harmonisasi Peraturan Perpajakan, HPP Law)

JAPAN

Japan Finalises Ministerial Regulations on Global Minimum Tax Implementation

The Ministry of Finance has issued regulations to amend its corporate income tax rules to implement the main part of the OECD's global minimum tax proposal, i.e. the income inclusion rule (IIR). Japan's IIR will allow to impose additional taxes on Japanese parent entities with subsidiaries in low-tax jurisdictions where effective tax rate is below 15%.

The ministerial regulations, which were issued on 30 June 2023, follow the 2023 tax reform laws approved by the Diet on 28 March 2023 and the governmental regulations issued by the Cabinet on 16 June 2023, and provide the substantive details of Japan's IIR. These laws and regulations take into account OECD publications, specifically the Model Rules of December 2021, the Commentary of March 2022, the Safe Harbour and Penalty Relief Guidance of December 2022, and the Administrative Guidance of February 2023. However, Japanese laws and regulations do not yet reflect the additional Administrative Guidance of July 2023 and the guidance on information returns that were released by the OECD after Japan had finalised its laws and regulations.

While the OECD proposal includes the undertaxed payments rule (UTPR) and qualified domestic minimum top-up tax (QDMTT), Japan has not yet started to codify these two components. The QDMTT will prevent the effective tax rate in Japan from falling below 15%, while the UTPR would allow Japan to impose additional taxes on Japanese entities of multinational enterprise groups that are under-taxed even after considering the IIR taxes and QDMTTs imposed by other countries. The Japanese ruling coalition announced in December 2022 that the UTPR and QDMTT would be addressed in tax reform proposals in 2024 or later.

Government Official Presents Technical Explanation on Japanese Global Minimum Tax Laws

At an online seminar organised by the Japan Tax Association, a Deputy Director of the International Tax Policy Division from the Ministry of Finance presented a technical explanation of the Japanese global minimum tax laws and regulations established over the first half of 2023.

The central part of the presentation was referential information, showing which Japanese provisions correspond to which parts of the OECD rules, but also contained new interpretive insights. Specifically, the technical explanation acknowledges that the definition of "ownership interest" in Japanese legislation is not always identical to that in the OECD model rules. The model states that "Ownership Interest means any equity interest that carries rights to the profits, capital or reserves of an Entity." However, in defining the components of equity interests, Japanese law traditionally employs a dichotomy between rights regarding the Rieki-no-Haitou (non-liquidating distribution) and the Zanyozaisan-no-Bunpai (distribution of residual assets upon liquidation) rather than the trichotomy by payment source ("rights to profits, capital or reserves"). The presentation noted that the Japanese global minimum tax law also employs the traditional dichotomy rather than the trichotomy suggested by the model in defining "Ownership Interest"

The presentation also included a table showing covered taxes in Japan. The table highlights that the per capita levy of corporate inhabitant tax and the pro forma levy of enterprise tax will not be treated as covered taxes.

The seminar was held on 25 July 2023 and followed the release of the detailed ministerial regulations on the implementation of the global minimum tax.

KOREA (REP)

Korea Proposes to Defer Implementation of Global Minimum Tax Backstop Rule to 2025, Expand R&D Tax Credits

The Korean Ministry of Economy and Finance has announced the 2023 tax law amendment proposals that include the deferral of the Undertaxed Payment Rule (UTPR) implementation to 1 January 2025 and expansion of the scope of technologies eligible for research and development (R&D) tax credits. The proposals were announced on 27 July 2023 and are subject to approval by the National Assembly.

The key proposed changes are summarised as follows:

Deferring implementation of UTPR

The Korean global minimum tax rules were supposed to take effect for fiscal years beginning on or after 1 January 2024, but the implementation of the UTPR will be deferred by one year to 1 January 2025. This brings Korea in line with other jurisdictions that have announced the implementation of the UTPR for fiscal years beginning on or after 1 January 2025 (e.g., the European Union, United Kingdom, Japan, Canada, Singapore, Hong Kong, Australia and New Zealand). The Income Inclusion Rule will be effective for fiscal years beginning on or after 1 January 2024, as originally planned.

The terms used in the global minimum tax rules such as the ultimate parent entity, permanent establishment, group, etc., will also be clarified to ensure that the scope of application of these rules is in line with the Pillar 2 Model Rules and Commentary, as well as OECD/IF administrative guidance. Further, the proposed amendment makes it clear that, in accordance with the administrative guidance, the EUR750 million threshold will need to be rebased with reference to the average foreign exchange rate for the December month immediately prior to the commencement of the relevant calendar year.

The rules for calculating global anti-base erosion (GloBE) income or loss will also be clarified, as well as the requirements for a qualified domestic minimum top-up tax. Additionally, changes will be made to the rules for allocating UTPR top-up tax among constituent entities (the rules for allocating UTPR top-up tax to UTPR jurisdictions remain the same), and penalty relief for non-compliance will be allowed during the transition period.

Expanding scope of technologies eligible for R&D tax credits

On 22 March 2023, the Finance Committee of the Korean National Assembly passed a bill known as the "K-Chips Act" to increase the tax credits available for eligible facility investments in qualified technologies and to expand the scope of national strategic technologies.

It is proposed that the biopharmaceutical sector will be added to the list of national strategic technologies and their scope expanded to a total of 62 technologies and 50 facilities in seven sectors, and will apply to R&D expenses incurred, or facility investments made, on or after 1 July 2023. Supply chain-related essential technologies, including core technologies for energy efficiency improvement, refining/smelting technologies for critical minerals, etc., will be added to the list of new growth/original technologies, effective for R&D expenses incurred on or after 1 January 2024.

NEW ZEALAND

IMF Recommends Tax Reforms Encompassing Capital Gains and Land Taxes

The latest International Monetary Fund (IMF) report on the New Zealand economy recommends the introduction of tax reforms, including taxes on capital gains and land. In IMF Country Report No. 23/309 – New Zealand, released on 28 August 2023, the IMF claims that adoption of these taxes, as well as reforming the corporate tax regime, would enhance tax revenue raising options, yield fairer and more equitable tax revenue outcomes, boost business investment, and encourage entry of new businesses.

The report also suggests that the government periodically or systemically raise income bracket thresholds to address the distributional implications of inflation, especially for lower income and vulnerable households, and to partly limit the need for more social welfare transfers. This measure has been included in the main Parliamentary opposition party's tax policy proposals for the 14 October 2023 General Election.

This August report follows the IMF Staff Mission Concluding Statement issued on 13 June 2023. Despite the IMF's recommendations, the three top-polling political parties contesting the General Election (with approximately 79% of committed voter support) have pledged not to introduce capital gains or wealth taxes if they are elected to govern the country.

Government Introduces Digital Services Tax Bill into Parliament

The government introduced the Digital Services Tax Bill into Parliament on 31 August 2023, which proposes a digital services tax (DST) to commence on 1 January 2025. However, this date can be extended for up to five years by Order in Council if the government is satisfied with the progress of OECD's Pillar One multilateral solution. The key features of the Bill are as follows:

- DST would be imposed at 3% on digital services revenues connected to New Zealand users or to New Zealand land;
- DST would be payable by multinational digital services groups that earn at least EUR750 million per year from global digital services and at least NZD3.5 million per year from digital services provided to New Zealand users or connected to New Zealand land;
- in-scope digital services are: (i) intermediation platforms; (ii) social media and content sharing platforms; (iii) internet search engines; (iv) digital advertising; and, (v) activities related to user-generated data;
- registration of a digital services group;
- nomination of a DST representative member who would be required to file an annual self assessment DST return for the digital services group; and
- penalties for failure to register a digital services group or to file a DST return.

Inland Revenue has simultaneously published a Commentary on the DST Bill.

SINGAPORE

Singapore Expresses Interest in Expanding Collaboration with Africa

During the 4th Singapore-Sub-Saharan Africa High-Level Ministerial Exchange Visit (AHLMEV), taking place in Singapore from 29 to 31 August 2023, an official statement highlighted that trade between ASEAN and Africa is only 2.2% of ASEAN's global trade and that this low percentage points to significant untapped opportunities for collaboration. According to Singapore, an encouraging aspect is the active involvement of companies from both regions in the Africa Singapore Business Forum, which is occurring alongside the AHLMEV.

In the statement, Singapore also indicated that government support plays a crucial role in boosting trade and investment, by creating an environment conducive to business growth, covering physical, economic, financial, and digital connections. Singapore suggested to enhance the number of economic agreements, including key elements like tax treaties and investment protection agreements.

Additionally, Singapore stressed the importance of connectivity, especially in air travel. Addressing current connectivity gaps would be essential to unlock greater economic potential and foster stronger connections between the two regions.

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:

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

The scheme will be available from years of assessment (Y/A) 2024 to 2028.

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), 14A (IP registration) and 14U and 19B (acquisition and licensing IP rights), the incentive period under these sections will be extended from Y/A 2025 to Y/A 2028.

THAILAND

Cabinet Approves Extension of VAT Rate Reduction to 30 September 2024

The Thai Cabinet has approved, in principle, a draft decree extending the reduction of the value added tax rate until 30 September 2024. The reduced rate of 7% (inclusive of local taxes) was set to return to 10% after 30 September 2023.

VIETNAM

Vietnam Deposits Ratification Instrument for Convention and Protocol on Mutual Administrative Assistance in Tax Matters

On 31 August 2023, Vietnam deposited its instrument of ratification for the multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 protocol. The convention and the amending protocol will enter into force three months after the instrument of ratification has been deposited.

Government Approves Draft Resolution to Implement Pillar Two in 2024

The government will submit to the National Assembly a draft resolution proposing to implement the global minimum tax rules under Pillar Two in Vietnam in 2024. The draft resolution includes the introduction of a qualified domestic minimum top-up tax and the income inclusion rule.

The impact assessment report accompanying the draft notes that the implementation of the global minimum tax rules will open new opportunities for Vietnam, including additional tax revenues, enhance integration with the international community and minimise tax evasion and profit shifting. At the same time, it acknowledges that Vietnam will need to develop non-tax-based investment policies to retain and attract foreign investment.

Proposed amendments to the Enterprise Income Tax Law will also consider the impact of the global minimum tax rules on tax incentives and foreign investment in Vietnam. The draft resolution will take effect from 1 January 2024 until it is superseded by the amended Enterprise Income Tax Law. Public comments are invited via the government electronic portal. The draft resolution will be submitted for approval to the National Assembly in October 2023.

__Ximena Garcia__ 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 June 2023 and 16 September 2023, including Public Rulings (PRs) and guidelines, if any, issued by the Inland Revenue Board of Malaysia (HASiL), Royal Malaysian Customs Department (RMCD) and other regulatory authorities.

INCOME TAX

Tax incentive for Structured Internship Programmes

The Income Tax (Deduction for Expenditure Incurred for Provision of Approved Internship Programme) (Amendment) Rules 2023 [PU(A) 188/2023], gazetted on 23 June 2023, amend the Income Tax (Deduction for Expenditure Incurred for Provision of Approved Internship Programme) Rules 2019 [PU(A) 398/2019].

The Income Tax (Deduction for Expenditure Incurred for Provision of Approved Internship Programme) Rules 2019 provide that in ascertaining the adjusted income of a qualified person from his business for a basis period for a year of assessment (Y/A), a double deduction shall be given for expenses incurred by the qualified person to conduct an approved internship programme.

The Amendment Rules provide that:

(a) A double deduction will be given for the following expenses:
   - (i) Monthly allowances paid to students pursuing:
     - Malaysian Skills Certificates Levels 1 to 4, Diploma level or its equivalent, of not less than RM500 per student
     - Malaysian Skills Certificate Level 5, Bachelor's degree, Master's degree or its equivalent, or a professional certificate, of not less than RM600 per student
   - (ii) Expenditure incurred for the provision of training
   - (iii) Meals, travelling expenses and accommodation for the students during the internship programme, and
   - (iv) Expenditure incurred for digital and communication costs.

   For items (ii), (iii) and (iv), the total deductions allowable for each student shall not exceed RM5,000.

(b) The double deduction will apply to a qualified person who conducts or has conducted an approved internship programme for a student from Y/A 2017 until Y/A 2025 (previously Y/A 2021).

The following terms have also been redefined in the Amendment Rules:
(a) Higher educational institution
(b) Qualified course
(d) Student
(d) Approved internship programme.

e-Invoice Guideline

Further to the announcement of the Government's implementation of electronic invoicing in 2024, HASiL published on its website the e-Invoice Guideline (Version 1.0) (Guideline) on 21 July 2023.

The Guideline comprises the following paragraphs:
1. Introduction
2. Getting ready for e-Invoice
3. Data security and privacy monitoring by HASiL
4. Assessing readiness of e-Invoice.

The Guideline also lists the data fields (mandatory and optional) required for an e-Invoice and its annexure, as well as Frequently Asked Questions (FAQs) that taxpayers may have regarding e-Invoice.

The Guideline describes two distinct e-Invoice transmission mechanisms, i.e., a portal hosted by HASiL (MyInvois Portal) and Application Programming Interface (API).

e-Invoicing will be implemented in phases, based on the turnover or revenue thresholds of businesses. The e-Invoice implementation timeline is as follows:

Timeline	Targeted taxpayers
1 June 2024	Taxpayers with annual turnover or revenue of more than RM100 million
1 January 2025	Taxpayers with annual turnover or revenue of more than RM50 million and up to RM100 million
1 January 2026	Taxpayers with annual turnover or revenue of more than RM25 million and up to RM50 million
1 January 2027	All taxpayers and certain non-business transactions

Updated technical guidelines on the tax treatment of research and development (R&D) expenditure

HASiL has published on its website the Guidelines on the Application Procedure for a Special Deduction in respect of a Qualifying R&D Activity (Technical Guidelines), dated 26 June 2023. The new 16-page Technical Guidelines replace the earlier Technical Guidelines, which were issued on 29 December 2021. The new Technical Guidelines explain the application procedure for an approved qualifying R&D activity that qualifies for a special deduction under S. 34A of the Income Tax Act 1967 (ITA 1967), and the requirement to submit the relevant forms when a claim is made for deductions under S. 34(7), 34A or 34B of the ITA 1967. The Guidelines are similar to the earlier 2021 Guidelines and were updated to incorporate the revised application forms – see Paragraph 4.1 of the Technical Guidelines.

Amendment to deduction from remuneration rules

The Income Tax (Deduction from Remuneration) (Amendment) Rules 2023 [PU(A) 230/2023], gazetted on 31 July 2023, take effect from 1 August 2023 and amend the Income Tax (Deduction from Remuneration) Rules 1994 [PU(A) 507/1994].

The Income Tax (Deduction from Remuneration) Rules 1994 provide that the employer must determine and make monthly tax deductions (MTD) from employee salaries based on either the Schedule of MTD or the computerised calculation method. Since 1 March 2019, the MTD Schedule issued by HASiL has been in electronic form, namely the e-Jadual PCB which is available via e-CP39.

The amendments made via the Income Tax (Deduction from Remuneration) (Amendment) Rules 2023 [PU(A) 230/2023] are to take into account the revised tax rates with effect from Y/A 2023, where:

(a) the tax rates for the chargeable income band from RM35,001 to RM100,000 are reduced by 2 percentage points
(b) the tax rates for the chargeable income band from RM100,001 to RM1,000,000 are increased by between 0.5 to 2 percentage points.

Tax deduction for the cost of listing on Bursa Malaysia

The Income Tax (Deduction for Expenses in relation to Listing on Main Market, Access, Certainty, Efficiency (ACE) Market or Leading Entrepreneur Accelerator Platform (LEAP) Market of Bursa Malaysia Securities Berhad) Rules 2023 [PU(A) 235/2023] were gazetted on 7 August 2023. The Rules will apply to a technology-based company which applies for listing on the Main Market, ACE Market or LEAP Market of Bursa Malaysia Securities Berhad from Y/A 2023 until Y/A 2025. The Rules provide that in ascertaining the adjusted income of the company for its business for a Y/A, there shall be allowed a deduction equivalent to the amount of the following expenditure incurred by the company in relation to the listing:

(a) Fees to the authorities, i.e., Bursa Malaysia Securities Berhad and Securities Commission Malaysia
(b) Professional fees:
    - Advisory fee to the principal adviser (for listing on the Main Market), sponsor (the main adviser for listing on the ACE Market) or the approved adviser (the main adviser for listing on the LEAP Market); and
    - In relation to the listing exercise, fees to a solicitor, company secretary, tax adviser, reporting accountant, auditor, valuer, independent market researcher, issuing house and share registrar
(c) Fees for underwriting, placement and brokerage.

The Rules stipulate that the tax deduction, capped at RM1.5 million, shall only be claimed by the technology-based company for the basis period in the Y/A when the company is listed on the Main Market, ACE Market or LEAP Market. The total amount of deduction shall not exceed the adjusted income of the company for the basis period in that Y/A, before such deduction.

Relocation of manufacturing business incentive scheme

In the retabled Budget 2023, it was proposed that the special tax incentives for manufacturing companies that relocate their manufacturing operations to Malaysia be extended to 2024. This includes the special tax rate of 15% for non-Malaysian individuals holding key or C-suite positions in the companies relocating their operations to Malaysia.

The following have been published to legislate the proposals and provide guidance to interested investors:

(a) Income Tax (Exemption) Order 2023 [PU(A) 240/2023] – for existing companies
(b) Income Tax (Relocation of Manufacturing Business Incentive Scheme) Rules 2023 [PU(A) 241/2023][1] – for new companies
(c) Income Tax (For an Individual Resident Who is Not A Citizen and Holds C Suite Position in an Approved Company) Rules 2023 [PU(A) 242/2023][1]
(d) Malaysian Investment Development Authority (MIDA) guidelines and procedures for the application of the special tax incentive (relocation) for the manufacturing sector, dated 14 August 2023 (Guideline) – available in MIDA's website.

The Rules are effective from the Y/A 2021.

[1] *Gazetted on 15 August 2023*

Special tax incentive for companies

The following incentives will apply to companies that relocate their manufacturing operations to Malaysia:

Incentive	Incentive period	Capital investment (excluding land)
New company		
0% special tax rate	10 Y/As	Between RM300 million and RM500 million
0% special tax rate	15 Y/As	Above RM500 million
Existing company		
100% investment tax allowance on the qualifying capital investment (excluding land). The allowance can be offset against 100% of statutory income of the qualifying activity. (Note)	5 consecutive years	Above RM300 million
Note: A related company of an existing company which qualifies for the relocation tax incentive will not be entitled to the same incentive on the same qualifying activity.		

Some of the key incentive conditions are outlined below:

(a) The company must be a Malaysian-resident company which is incorporated under the Companies Act 2016, and fulfils the definition of a "new company" or "existing company".

New company
• does not have an existing manufacturing operation in Malaysia; and • relocates its manufacturing facility for a qualifying activity into Malaysia or establishes new operations to carry on a qualifying activity in Malaysia
Existing company
• has an existing manufacturing operation in Malaysia; and • relocates its manufacturing operations to Malaysia for a new business where the product from the new business is not an expansion project for the existing product

(b) The company undertakes manufacturing activities, other than the manufacturing activities listed in the Schedule to PU(A) 240/2023 and PU(A) 241/2023.

(c) The company must incur capital investment:

New company
• The minimum qualifying capital expenditure (QCE) (i.e., the fixed asset investment, excluding land) must be incurred within 3 years from the date the first QCE is incurred. Minimum QCE • RM300 million for the approval of 10 Y/As • Above RM500 million for the approval of 15 Y/As • The Guideline clarifies that the first QCE must be incurred within one year from the date of the approval letter. The capital expenditures incurred before the date of the approval letter will not be included as the qualifying minimum capital investment.
Existing company
• The minimum QCE* of RM300 million must be incurred within 3 years from the date the first QCE is incurred. * "QCE" refers to the cost of the factory, machinery or plant used in Malaysia solely for the purposes of carrying on the qualifying activity, excluding the building used as living accommodations and the machinery or plant provided wholly or partly for the use of a director or individual, who is a member of the management or administration or clerical staff. • The first QCE made must not be earlier than 1 July 2020. • The Guideline clarifies that the first QCE made can be backdated up to 3 years.

(d) The company must hire at least 80% full-time Malaysian employees on or before the third year from the date the first invoice (in relation to the qualifying activity) is issued, until the end of the specified Y/As.

(e) Applications for the incentive must be received by the Minister through MIDA, from 1 July 2020 until 31 December 2024.

Other important notes that are provided in the Guideline are:

(a) The company is required to have a paid-up capital of RM2.5 million or above.

(b) Determination of the effective date

New company	Existing company
• Based on the Y/A the company commences operation of the approved products/ activities. The commencement of operation is defined as when the first sales invoice is issued by the company. • Application for the determination of the effective date must be submitted within 36 months from the date of the approval letter.	• Based on the first QCE incurred for the approved products/ activities • Application for the determination of the effective date must be submitted within 24 months from the date of the approval letter.

(c) The company must provide the annual compliance report within 6 months from the end of the company's Y/As.

(d) The company must comply with the stipulated conditions throughout the incentive period.

Special tax incentive for individuals

A flat tax rate of 15% will apply for 5 consecutive Y/As on the chargeable income of a non-citizen holding a C-Suite position in a company that has been approved for the special tax incentive for the relocation of its manufacturing operations to Malaysia (this includes the previous incentive provided under the Income Tax (Relocation of Provision of Services Business Incentive

Scheme) Rules 2022 [PU(A) 398/2022]. The incentive is limited to 5 individuals per company.

The chargeable income of the qualifying individual for a Y/A is determined as follows:

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

A Statutory income from employment with the approved company during the specified Y/As (i.e., during 5 consecutive Y/As)

B Aggregate income during the specified Y/As from all sources, including the income from the wife or husband (where there is a combined assessment pursuant to S. 45(2) of the ITA 1967

C Chargeable income during the specified Y/As

The remaining balance of the chargeable income of the qualifying individual will be taxed at the prevailing tax rates under Part I of Sch 1 of the ITA 1967.

"C-Suite position" means the position of a top senior executive which relies on functional know-how and technical skills such as the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer and Chief Information Officer. The Guideline further provides that C-Suite executives are responsible for setting the business strategy and making decisions for the business operations.
To qualify for the incentive, the individual must:

a) Be a Malaysian-tax resident for each Y/A throughout the 5 consecutive Y/As; and
b) Receive a basic monthly salary of at least RM25,000.

Applications for the incentive must be received by the Minister through MIDA:

- From 7 November 2020 until 31 December 2024
    - For individuals employed by companies granted an incentive under PU(A) 240/2023 and PU(A) 241/2023
- From 7 November 2020 until 31 December 2022
    - For individuals employed by companies granted an incentive under PU(A) 398/2022.

Principal Hub incentive 2.0

MIDA had issued the Guidelines for Principal Hub (PH) Incentive 2.0, which were effective for applications received from 1 January 2019 to 31 December 2020. To legislate the above, the following, Exemption Orders were gazetted on 23 August 2023:

(a) Income Tax (Exemption) (No. 2) Order 2023 [PU(A) 251/2023] – for existing companies
(b) Income Tax (Exemption) (No. 3) Order 2023 [PU(A) 252/2023] – for new companies.

<u>Income Tax (Exemption) (No. 2) Order 2023</u>

The Exemption Order provides that a PH which carries on core income generating activities under the PH 2.0 Incentive will be eligible for a concessionary tax rate of 10% on statutory income (excluding intellectual property income) derived from core generating activities for a period of 5 consecutive Y/As, commencing from the Y/A as determined by the Minister.

A PH referred to under this Exemption Order is a company which:

- is a Malaysian-resident company which is incorporated under the Companies Act 2016
- has a paid-up capital of more than RM2.5 million
- is already operating in Malaysia which:
  (a) does not have an operational headquarters (OHQs), international procurement centre (IPC) or regional distribution centre (RDC) status ("regional operations")
  (b) has been approved as having regional operations
    - With approved incentives
    - Without approved incentives.

The PH must comply with the conditions stipulated in the Exemption Order and other conditions imposed by the Minister in the approval letter.

<u>Income Tax (Exemption) (No. 3) Order 2023</u>

The Exemption Order provides that a PH which carries on core income generating activities under the PH 2.0 Incentive will be eligible for a concessionary tax rate of either 0% or 5% on the statutory income (excluding the intellectual property income) derived from the core generating activities for a period of 5 consecutive Y/As, commencing from the Y/A as determined by the Minister. The tax exemption on statutory income will be based on the level of commitment of the company.

The PH 2.0 incentive may be extended for another 5 Y/As, subject to the PH fulfilling the specified conditions. The application of the extension of the incentive must be submitted to the Minister, through MIDA, not later than 60 days before the expiry of the exempt Y/As.

A PH referred to under this Exemption Order is a new company which:

- is a Malaysian-resident company which is incorporated under the Companies Act 2016
- has paid-up capital of more than RM2.5 million
- does not have an existing entity or related entity in Malaysia which carries on any qualifying services in Malaysia.

The PH must comply with the conditions stipulated in the Exemption Order and other conditions imposed by the Minister in the approval letter.

Guideline and procedures for the application of the tax incentive for the manufacturing of electric vehicle charging equipment

MIDA has published the guidelines (dated 14 August 2023) for the application of the tax incentive for the manufacturer of electric vehicle (EV) charging equipment – available in MIDA's website. Some of the salient points are outlined below.

Types of incentive

A new company or existing company undertaking expansion and/or diversification activity for the manufacturing of EV charging equipment will be eligible for:

(a) 100% income tax exemption on the statutory income

- The incentive is given for a period of 10 Y/As, from Y/A 2023 to Y/A 2032

  Note: Companies that make investments after Y/A 2023 will only enjoy the incentive on the remaining exemption period, up until Y/A 2032.
- Any unabsorbed losses can be carried forward for 7 consecutive Y/As.
- The incentive will be provided under the Income Tax (Exemption) (No. 11) Order 2006 [PU(A) 112/2006].

(b) 100% investment tax allowance on the QCE. The allowance can be offset against 100% of statutory income of the qualifying business activity

- The allowance is given to the QCE incurred for a period of 5 years.
- Any unabsorbed investment tax allowances can be carried forward until fully utilised.
- The incentive will be provided under the Income Tax (Exemption) (No. 12) Order 2006 [PU(A) 113/2006].

Eligibility criteria

To qualify for the incentives, the manufacturing company must:

(a) be incorporated under the Companies Act 2016
(b) have a Manufacturing Licence from the Ministry of Investment, Trade and Industry (MITI) or a Confirmation Letter of Exemption from Manufacturing Licence from MIDA (whichever applicable)
(c) incur an adequate investment level and operating business expenditures for the proposed project
(d) have full-time employees (FTEs) comprising at least 80% Malaysians
(e) generate at least 20% value add for the company's products
(f) ensure at least 15% of the company's full-time workforce are science and technical staff
(g) nurture/collaborate with local vendors in the sector in terms of technologies, capabilities, certification, human capital development, etc
(h) provide an adequate number of Malaysian internships at the technical and vocational education and training (TVET) level or at least at diploma level; or collaborate with TVET institutions/institutions of higher learning in relevant fields, as proposed.

Updated guidelines and Frequently Asked Questions (FAQs) for the Special Voluntary Disclosure Programme (SVDP) 2.0

On 25 August 2023, HASiL announced on its website that the Operational Guidelines No. 2/2023 – SVDP 2.0 and the FAQs have been updated. One key change, as set out in Paragraph 5.10(a) of the Operational Guidelines, is that:

- audit/investigation action can be taken on transfer pricing (TP) issues if the voluntary disclosure is made on non-TP issues only.
- audit/investigation action can be taken on issues other than TP if the voluntary disclosure is made on TP issues only.

Previously, it was indicated that an audit/investigation would be carried out only if the tax payment on the voluntary disclosure was not made within the stipulated time period.

Discontinuance of the use of adhesive stamps (revenue stamps) and postal franking machines from 1 January 2024

On 21 August 2023, HASiL announced that the use of adhesive stamps (revenue stamps) and postal franking machines as a method of stamping documents or agreements will be discontinued from 1 January 2024. Applications for the stamping and payment of stamp duty can be made through the Stamp Duty Assessment and Payment System (STAMPS) portal.

Duty payers are advised to use up their remaining revenue stamps by 31 December 2023, as no refunds will be provided for any unused stamps.

Mandatory use of e-Services

On 22 August 2023, HASiL announced that the use of e-Services through the MyTax portal will be made compulsory in stages, from 1 September 2023. The use of the e-Services is expected to be fully implemented by 1 January 2024. A list of the e-Services provided by HASiL is available in HASiL's website.

FAQs on tax incentive for equity crowdfunding (ECF)

The Income Tax (Exemption) (No. 4) Order 2022 [PU(A) 142/2022], gazetted on 28 April 2022, provides that a qualifying individual is given an income tax exemption in respect of his aggregate income equivalent to 50% of the amount of investment, up to a maximum of RM50,000 for each Y/A. The amount is limited to 10% of the aggregate income of the qualifying individual for the Y/A in which the exemption is granted.

The Securities Commission (SC) has published on its website the FAQs on ECF tax exemption, issued on 30 August 2023, to provide further clarification on the incentive above. Some of the important clarifications are as below:

- The exemption is given in the second Y/A following the Y/A in which the investment is made by the qualifying individual. The FAQs provide some examples of this, as follows:

	Example 1	Example 2
Year the investment is made	2021	2023
Y/A in which the exemption of aggregate income is to be claimed	2023	2025
Date to file the Income Tax Return Form for qualified individuals	2024	2026

As highlighted in the Exemption Order, to qualify for the exemption, the investment must not be disposed of, either in full or in part, within 2 years from the date the investment is made.

The FAQs provide that the "date of investment" refers to the closing date of the issuer's fundraising campaign on the ECF platform. The investor will not be entitled to apply for the exemption if he or she exercises their cooling off rights.

- The FAQs provide that a qualifying investor may make multiple investments in different ECF platforms in a year. However, the exemption is limited to the specified amount as stated earlier.
- The FAQs reiterate the procedure to obtain an annual certification from the ECF operator in relation to the investment and amount of investment. The annual certification needs to be verified by the SC.

STAMP DUTY

Revocation of the previous stamp duty remission for the transfer of property on grounds of love and affection

The Stamp Duty (Remission) (Revocation) Order 2023 [PU(A) 189/2023] was gazetted on 26 June 2023 to revoke the stamp duty remission of 50% given on the instrument of real property transferred between parents and children by way of love and affection. Any unstamped instrument of transfer executed before 1 April 2023 (i.e., the date Stamp Duty (Exemption) (No. 3) Order 2023 [PU(A) 178/2023] is deemed to have come into operation) will still be entitled to the remission under the revoked Order.

The Revocation Order is deemed to have come into operation on 1 April 2023.

Remission of stamp duty on contract notes for the trading of listed shares or stocks

The Stamp Duty (Remission) (No. 3) Order 2023 [PU(A) 208/2023] was gazetted on 12 July 2023 to reduce the stamp duty on contract notes for the trading of listed shares or stocks to 0.1% and caps the stamp duty at RM1,000. The Order is applicable to contract notes executed from 13 July 2023 to 12 July 2028. The Stamp Duty (Remission) Order 2022 [PU(A) 112/2022] is also revoked.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2023

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2023 [PU(A) 185/2023] was gazetted on 15 June 2023. The Order provides that any tax payable under the ITA 1967 and any stamp duty payable under the Stamp Act 1949 (SA 1949) in relation to the following shall be remitted in full:

(a) Master facility agreement in relation to the Syndicated Term Financing-i Facility amounting to RM3.5 billion made between Perbadanan Tabung Pendidikan Tinggi Nasional and CIMB Investment Bank Berhad, CIMB Islamic Bank Berhad and AmBank Islamic Berhad (Master Facility Agreement)
(b) Guarantee given by the government of Malaysia in relation to the Master Facility Agreement, and
(c) Transfer certificate or other documents in relation to the assignment, transfer or novation of rights, benefits or obligations under the Master Facility Agreement.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2023

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2023 [PU(A) 216/2023] was gazetted on 18 July 2023. The Order provides that any tax payable under the ITA 1967 and any stamp duty payable under the SA 1949 in relation to the following shall be remitted in full:

(a) Syndicated Islamic Revolving Credit Facility obtained or will be obtained by Tenaga Nasional Berhad from CIMB Islamic Bank Berhad and Maybank Islamic Berhad (RC-i Facility); and
(b) Guarantee provided by the government of Malaysia in relation to the RC-i Facility.

The Order came into operation on 19 July 2023.

Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 3) Order 2023

The Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 3) Order 2023 [PU(A) 263/2023] was gazetted on 29 August 2023. The Order provides that any tax payable under the ITA 1967 and any stamp duty payable under the SA 1949 in relation to the following shall be remitted in full:

(a) Islamic Medium-Term Notes (IMTN) and Islamic Commercial Papers (ICP) issued by DanaInfra Nasional Berhad pursuant to the IMTN and ICP Programme, in nominal values of up to RM11.2 billion, provided that the combined aggregate of the outstanding nominal value of the IMTN and ICP and the outstanding principal amount under the Syndicated Islamic Revolving Credit Facility (SFF-i Facility, see (b) below) shall not exceed RM11.2 billion
(b) SFF-i Facility with the aggregate principal amount not exceeding RM2 billion, subject to the combined aggregate referred to in (a) above
(c) IMTN and ICP programme which has been upsized with a nominal value from

(c) RM71 billion to a maximum aggregate value of up to RM82.2 billion, and
(d) Guarantee provided by the government of Malaysia in relation to the IMTN and ICP Programme and the SFF-i Facility.

The Order came into operation on 30 August 2023.

LABUAN

◆ Further 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 has granted further EOT for submission of tax returns under S. 5 and 10 of the LBATA 1990 for Y/A 2023 (based on the financial year ended in 2022) via its letter dated 26 July 2023 to the Association of Labuan Trust Companies (ALTC). The submission deadline of the tax returns for Y/A 2023 has been extended from 31 July 2023 to 30 October 2023.

INDIRECT TAX

GENERAL

Sales Tax and Service Tax Voluntary Disclosure

◆ Notice Regarding Updates on the Voluntary Disclosure Forms comprising the SST-ADM Form and the SST-ADM 2 Form

On 1 August 2023, the RMCD, via their website, issued a notification regarding updates on the Voluntary Disclosure Forms comprising the SST-ADM Form and the SST-ADM 2 Form. This Notification highlights that the SST-ADM Form (including appendices) applies to voluntary disclosures pertaining breaches of exemptions or the disposal of raw materials under an exemption, whereas SST-ADM 2 Form applies to voluntary disclosures arising from late payment, underpayment as well as incorrect collection of taxes.

CUSTOMS

Customs Duties Orders

◆ Customs Duties (Exemption) (Amendment)(No.3) Order 2023

The Customs Duties (Exemption) (Amendment)(No.3) Order 2023 [PU(A) 243/2023] was gazetted on 17 July 2023 and came into operation on 18 July 2023. This Order provides for amendments in the Schedule, in relation to subitems 67(xvii), under column (2) in Part I, of the Customs Duties (Exemption) Order 2017 [PU(A) 445/2017].

Customs Anti-Dumping Duties Orders

◆ Customs (Anti-Dumping Duties)(Administrative Review) Order 2023

The Customs (Provisional Anti-Dumping Duties) (Administrative Review) Order 2023 [PU(A) 225/2023] was gazetted on 25 July 2023 and came into operation from 27 July 2023 to 26 July 2028. This Order provides for provisional anti-dumping duties shall be levied on and paid by the importers in respect of the goods specified in columns (1) and (2) of the Schedule exported from the countries specified in column (3) into Malaysia by the producers or exporters specified in column (4) at the rates specified in column (5).

SALES TAX

Notification

◆ Notification on the Draft Guide on the Imposition of Sales Tax on Low Value Goods (LVG)

On 1 August 2023, the RMCD, via their website, issued a notification on the Draft Guide on the Imposition of Sales Tax on LVG. This Notification provides that the following Draft Guides, comprising Part I - Imposition and Scope on Low Value Goods (LVG) and Part II - Customs Clearance Procedures on the Importation of Low Value Goods (LVG), are being updated and will be uploaded to the RMCD website upon finalisation.

SERVICE TAX

Service Tax Guides

◆ Industry Guide on Accommodation

The Industry Guide on Accommodation dated 27 June 2023, was uploaded in the RMCD website on 9 July 2023. This Guide, which replaces the previous Guide dated 13 October 2020, provides amendments on the scope expansion for tobacco and tobacco related products, per the Service Tax (Amendment) Regulations 2023.

◆ Industry Guide on Food and Beverages

The Industry Guide on Food and Beverages dated 26 June 2023, was uploaded in the RMCD website on 9 July 2023. This Guide, which replaces the previous Guide dated 27 December 2021, provides amendments to reinstate tobacco and tobacco related products as part of the scope of taxable services, per the Service Tax (Amendment) Regulations 2023.

FREE ZONES

Free Zones Regulations

◆ Free Zones (Amendment) (No.2) Regulations 2023

The Free Zones (Amendment) (No.2) Regulations 2023 [PU(A) 224/2023] were gazetted on 24 July 2023 and came into operation on 1 August 2023. These Regulations provide for the amendments to the Fourth Schedule of the Free Zones Regulations 1991 [PU(A) 321/1991].

__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

KETUA PENGARAH HASIL DALAM NEGERI V SANDAKAN EDIBLE OILS SDN BHD [2023] MLJU 635 (HIGH COURT)

BRIEF FACTS

The taxpayer is a company principally engaged in refining, packaging and selling edible oils and related products. The taxpayer applied the Comparable Uncontrolled Price ("**CUP**") method as the transfer pricing methodology to determine the arm's length pricing of its controlled transactions. Following an audit for the years of assessment ("**Y/As**") 2010 to 2013, the Director General of Inland Revenue ("DGIR") rejected the taxpayer's CUP method and instead applied the Transactional Net Margin Method ("**TNMM**"). The taxpayer contended that the DGIR had agreed on or accepted the use of six (6) identified comparable companies in a benchmarking analysis.

Based on the DGIR's benchmarking analysis, the taxpayer's financial results for all audited Y/As fell within the interquartile range except for Y/A 2010, where the margin was below the median. On that basis, the DGIR invoked S. 140A of the Income Tax Act 1967 ("**ITA 1967**") for Y/A 2010 to adjust the margin to the median, resulting in additional taxes on the taxpayer.

Aggrieved by the additional assessment, the taxpayer appealed to the Special Commissioners of Income Tax ("**SCIT**") and succeeded in its appeal. The DGIR then appealed to the High Court.

At the High Court, the main issue was whether the DGIR correctly invoked S. 140A of ITA 1967 for Y/A 2010 to adjust the taxpayer's margin to the median, given that using the CUP method used by the taxpayer, it had fell within the interquartile range.

TAXPAYER'S ARGUMENTS

(i) As the taxpayer's margin fell within the interquartile range, no adjustments should be made by the DGIR to the median to determine the arm's length price.

(ii) The DGIR's adjustment to the median is neither based on provisions of law nor guidelines. It contradicts the powers provided under S. 140A of ITA 1967 and the Organisation for Economic Cooperation and Development (OECD) Guidelines.

DGIR'S ARGUMENTS

(i) The DGIR did not agree to the use of the six (6) comparable companies for the benchmarking analysis.

(ii) The adjustment to the median is justified as the six (6) comparable companies used had comparability defects. In particular, there is a huge difference in the amount of turnover between the taxpayer and the comparable companies. The taxpayer failed to provide an acceptable explanation for this difference.

HIGH COURT'S DECISION

The High Court dismissed the DGIR's appeal and held that:

(i) The DGIR's actions during the audit had shown that he had agreed to use the six (6) comparable companies in the benchmarking analysis. During the audit, the DGIR did not raise any issues about comparability defects under the TNMM method. In any event, the difference in turnover is not a comparability defect. The taxpayer is not required to achieve the same turnover as its competitors.

(ii) Where there is a pattern which shows fluctuating profits between the companies, as one would expect in business, a range rather than a single point should be used to determine arm's length pricing. As per the OECD Guidelines, no adjustments should be made when the taxpayer's margin is within the interquartile range.

(iii) Companies' profitability fluctuates yearly due to various factors such as business decisions and economic factors. The mere fact that the taxpayer's profitability is below the median in 1 out of 4 consecutive years does not mean that the taxpayer had engaged in inappropriate transfer pricing.

(iv) An adjustment to the median point artificially assumes that a company engages in inappropriate transfer pricing if it does not perform in the top 50% of its competitors yearly. However, as recognised by the OECD Guidelines, transfer pricing is not an exact science. There will also be many occasions when applying the most appropriate method(s) produces a range of figures all of which are equally reliable.

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DECISION DATE
5 APRIL 2023

CASE 2

KETUA PENGARAH HASIL DALAM NEGERI MALAYSIA V MITRALAND KOTA DAMANSARA SDN BHD [2023] 4 MLJ 846 (COURT OF APPEAL)

BRIEF FACTS

The taxpayer is a property developer who builds and sells residential and commercial properties. The taxpayer sought to sell Bumiputra lots to non-Bumiputras and applied to the Lembaga Perumahan Dan Hartanah Selangor ("**LPHS**") for permission to do so, which was granted on the following conditions:

(i) For any Bumiputera units sold to non-Bumiputras after LPHS's approval, the taxpayer must pay an amount equivalent to the Bumiputra discount of 7% (commercial units) and 10% of the sale price (residential units) to LPHS ("**Bumiputra Discount Payment**")
(ii) For any Bumiputera units sold to non-Bumiputras prior to LPHS's approval, the taxpayer must pay the Bumiputera Discount Payment and an additional charge/penalty of 5% for breach of the Bumiputra release mechanism ("**Bumiputera Penalty**")
(collectively known as "**Bumiputera Release Fee**").

The taxpayer paid the Bumiputera Release Fee to LPHS and claimed this payment as a business expense. The DGIR disallowed the deductions on the basis that the expenses constituted capital expenditure. Aggrieved by the DGIR's decision, the taxpayer appealed to the SCIT.

SCIT AND HIGH COURT'S RULING

The SCIT disallowed the taxpayer's appeal and held that the Bumiputera Release Fee was not a deductible expense as it was capital in nature. The taxpayer filed a further appeal to the High Court, which allowed the deductions on the basis that they were incurred wholly and exclusively in the production of the taxpayer's gross income under S. 33(1) of ITA 1967. The DGIR appealed further to the Court of Appeal.

TAXPAYER'S ARGUMENTS

(i) The Bumiputera Release Fee is deductible under S. 33(1) of ITA 1967 as it was paid wholly or exclusively in the production of the taxpayer's gross income and is not capital in nature.
(ii) Without the Bumiputera Release Fee, the taxpayer would not have been able to sell the Bumiputera units to non-Bumiputera purchasers and generate its income. The taxpayer's purpose for the payment is to procure a benefit, which is purely a business one.
(iii) The payment is not capital in nature since the taxpayer has, all along, the right to sell the Bumiputera units.

DGIR'S ARGUMENTS

(i) The Bumiputera Release Fee is a penalty imposed on the taxpayer for selling the Bumiputera units to non-Bumiputeras in violation of the State Authority's policy on division of units between Bumiputera and non-Bumiputera purchasers.
(ii) A penalty is not deductible under S. 33(1) of ITA 1967 as it is not wholly and exclusively incurred in the production of the taxpayer's gross income.
(iii) The Bumiputera Release Fee is a capital expenditure as the taxpayer acquires the right to sell the Bumiputera units upon payment of the same.

COURT OF APPEAL'S DECISION

The Court of Appeal allowed the DGIR's appeal in part and held that:

(i) The Bumiputera Discount Payment is a revenue expense deductible under S. 33(1) of ITA 1967. The payment was to achieve sales. Without the payment, the taxpayer would not have been able to sell the Bumiputera units to non-Bumiputera purchasers and generate income as a property developer. A payment that is made to remove an obstacle to profitable trading i.e., enabling a person to carry on and earn profits in the trade is attributable to revenue. It is wholly and exclusively related to the production of income and is a deductible expense.
(ii) The Bumiputera Discount Payment was not a capital expenditure. The taxpayer had the right to sell these Bumiputera units all along, as they were its stock-in-trade. The payment to LPHS merely widens the group or class of people to whom these units can be sold. There is no asset or enduring benefit that has been acquired by virtue of the payment.
(iii) On the other hand, the Bumiputera

Penalty is not deductible under S. 33(1) of ITA 1967. This payment is avoidable had the taxpayer not breached the prohibition by selling the Bumiputera units to non-Bumiputera purchasers prior to obtaining LPHS's approval. Penalty imposed for a breach of the law is not deductible as it is not incurred in the production of gross income.

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DECISION DATE
9 MAY 2023

CASE 3

KETUA PENGARAH HASIL DALAM NEGERI V WATSONS PERSONAL CARE STORES (M) HOLDINGS LIMITED [2023] MLJU 827 (HIGH COURT)

BRIEF FACTS

The taxpayer obtained two loans from a related Labuan company to finance the acquisition of shares in its Malaysian company. It was agreed that the taxpayer would pay interest at the London Inter-bank Bank Offered Rate (LIBOR) plus 3% per annum and the principal sum would be repayable to the lender on demand i.e., the taxpayer would pay only the interest on the loan, while the principal will be paid only when it is demanded. The DGIR relied on S. 140A of ITA 1967 to disallow deductions on interest paid on the loans on the ground that the loans were not undertaken in an arm's length manner. The DGIR contended that an arm's length transaction would provide for the repayment of the principal sum and not just the interest alone. Therefore, the DGIR alleged that the interest rate should be substituted with 0%. In arriving at its additional assessment for Y/As 2010 to 2012, the DGIR did not prepare any transfer pricing report to substantiate his adjustments.

The taxpayer appealed against the DGIR's additional assessments for Y/As 2010 to 2012 to the SCIT, which held in favour of the taxpayer. The DGIR then appealed to the High Court, where the main issue was whether the DGIR's transfer pricing adjustment was made in accordance with S. 140A of ITA 1967.

TAXPAYER'S ARGUMENTS

The DGIR failed to show or provide a satisfactory explanation on (i) how it concluded that the taxpayer's loans were not at arm's length; and (ii) how the 0% interest is a reasonable arm's length price. The DGIR further failed to comply with S. 140A of ITA 1967, which requires the DGIR to substitute an arm's length price when it seeks to disregard the taxpayer's structure.

DGIR'S ARGUMENTS

The taxpayer's transactions were not at arm's length as the loans did not provide for capital repayment. As such, the interest payments in respect of the loans should be disregarded. The interest rate should be substituted with 0% because no independent person or company would enter into a similar transaction.

HIGH COURT'S DECISION

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

(i) S. 140A of ITA 1967 and Rule 8 of the Income Tax (Transfer Pricing) Rules 2012 require the DGIR to substitute the interest rate with the interest rate it deems to be at arm's length, when it seeks to disregard the taxpayer's structure.
(ii) The DGIR's mere "substitution" of the interest rate with 0% is misconceived, and was without valid reasons. It failed to furnish any reason or evidence to reflect that 0% interest is an arm's length price in the transactions between independent parties.
(iii) The DGIR failed to provide any evidence to support its allegations that no commercial party would enter into such transactions entered into by the taxpayer. The loans provided to the taxpayer are similar to an uncommitted facility typically offered by commercial banks whereby parties would have more flexibility on when to make/request a repayment of such debt.
(iv) The DGIR failed to perform any serious transfer pricing analysis to disregard the taxpayer's transactions. In contrast, the taxpayer's transfer pricing report explains how it arrived at the arm's length interest rate of LIBOR plus 3%. Without the DGIR's transfer pricing report, the taxpayer's transfer pricing report must be accepted.
(v) The DGIR's reference to *Investopedia.com* to justify its adjustments is misplaced, as it is not an authoritative source to substantiate transfer pricing adjustments under S. 140A of ITA 1967.

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DECISION DATE
17 APRIL 2023

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

INDUSTRIAL BUILDINGS
WHAT IS AN INDUSTRIAL BUILDING? (PART 1)

Siva Subramanian Nair

Unlike accounting where depreciation is applied to all buildings, in taxation only qualifying expenditure incurred on industrial buildings are eligible for industrial building allowances. Therefore, we shall commence with what constitutes an industrial building.

A building will never be a plant (whereby capital allowances can be claimed) based on the definition of plant in Para 70A(1) of Sch 3 of the Income Tax Act 1967 ("ITA 1967") which reads:

> *"plant" means 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 [emphasis is mine].*

I will not list out all the buildings qualifying as industrial buildings, as this information is easily available in all the books on Malaysian taxation. Instead, we shall look at specific features of qualifying buildings and analyse how examination questions on this topic are framed. References to any numbered paragraphs (para) is in relation to paragraphs contained in Sch 3 of the ITA 1967.

FACTORY

We all know what a factory is but the definition of factory is extended in Para 64 of Sch 3 of the ITA 1967 to include (amongst others), as follows:

1. **Mill**
   In *Ellerker v Union Cold Storage Company Ltd 22 TC 195* it was held that a mill means a building where goods are subjected to treatment or processing of some sort and where machinery is used for that purpose. There was a question in another professional examination (not CTIM) where a mill was constructed on a farm. Some candidates claimed industrial building allowance but the correct treatment was to claim agricultural allowances as the claim was faster. Where two alternatives are available, candidates should choose the one that gives the taxpayer the best tax advantage.

2. **Workshop** (other than a workshop used for the repair or servicing of goods, if the repair or servicing is carried out in conjunction with or incidentally to the business of selling those goods).

This was discussed in the case of *SMT Sdn Bhd v DGIR* (1988) 1 MSTC 106. In this case the main business of the taxpayer was the sale of petroleum products in service stations but in each service station it also constructed a lubritorium providing repairs servicing and maintenance of cars. The lubritorium was held to be an industrial building since it was apparent that the services provided was not in conjunction with nor incidental to the business of selling the petroleum products.

The illustration below serves to explain this point.

Where the main building is selling cars then the workshop does not qualify as an industrial building whereas if the main building was a petrol station, then the workshop qualifies as an industrial building.

An example of this is seen in the *December 2013 Revenue Law Q4* which stated that:

> *"SuperTech Sdn Bhd ("SuperTech") is a company manufacturing electronic transformers used in heavy duty lights, with its factory complex located in the Johor Industrial Park. Recently, SuperTech acquired 2 new buildings nearby its existing factory complex, one which is used as a workshop to repair and service its products."*

Candidates were asked if the workshop would qualify as an industrial building and obviously the answer was in the negative as it was to *repair and service its products.*

Also, in *December 2022 Revenue Law Q5(c)* related that:

> *"Golden Mangoes Sdn Bhd ('the Company') is in the business of growing, processing, and selling mangoes and their related products, including dried mangoes, mango juice, mango chips, and mango jam. In the year 2022, the Company incurred capital expenditure on the construction of a building complex and other construction expenditures…" as follows:*
>
> *(i) RM125,000 on Building A, which was to be used for the cleaning, servicing and repairing of the Company's machines which are used to process the harvested mangoes.*

The solution to the question discussed the Vibroplant (discussed below) and SMT (see above) cases and concluded that the "*workshop should be regarded as an industrial building…since…[t]he repairs and maintenance services on the machines used to process the harvested mangoes cannot be construed as in conjunction with or incidental to the taxpayer's business of growing, processing, and selling mangoes and their related products".*

3. Other buildings for the housing of machinery or plant of any description for the manufacture of any product or the subjection of goods or materials to any process or the generating of power used for the purposes of that manufacture or process.

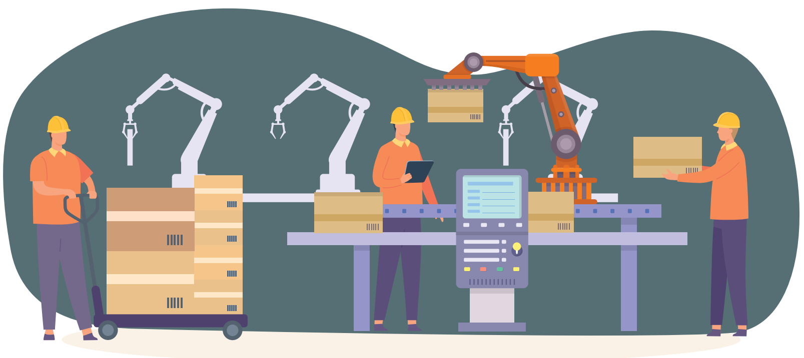
As we saw in the case of a plant the setting does not qualify but here the place where the plant and machinery are kept, qualifies. However, the plant and machinery must be used for the following:

(a) For the manufacture of any product

Manufacturing is generally seen to have occurred where the final product does not resemble the raw material out of which it was made for example like a cow and the leather furniture or crocodile and a handbag.

(b) Subjection of goods or materials to any process. This has been deliberated in numerous cases.

- In *Vibroplant Ltd v Holland (1981) 54 TC 658*, the taxpayer company carries on business as plant hire operators, for which it has a number of depots. The depots included building structures in which the plant is cleaned, serviced and, as may be necessary, repaired after each hiring. The company contended that these buildings were industrial buildings. The Court of Appeal, in dismissing the company's appeal, held that neither the trade of plant hire nor the purposes for which the company's buildings are employed have anything to do with manufacturing or processing.
- Similarly, in *Bourne v Norwich Crematorium Ltd 44 TC 164*, the taxpayer company owned a crematorium which comprised amongst others a furnace chamber and chimney tower where human corpses were reduced to ashes. The taxpayer company claimed an industrial building allowance in relation to the expenditure incurred on the construction of the furnace chamber and chimney tower. It was held that the consumption by fire of the dead body of a human being was not the subjection of goods



or materials to any process, and therefore the furnace chamber and chimney tower were not within the definition of an industrial building.

- Further in *Buckingham v Securitas Properties Ltd 53 TC 292*, the taxpayer Company claimed that the incurred expenditure on the construction of a building which included a secure area for the purposes of storage and wage-packeting of large sums of cash, was an industrial building. Their claim was disallowed by the courts on grounds that the phrase "the subjection of goods to any process" should be considered as a whole; that the words were to be read in their context and in that context the word "goods" was intended to bear its ordinary meaning of "merchandise" or "wares", and did not include coins or notes which were being dealt with as currency.
- Again, in *CIR v Aberdeen Restaurant Enterprises Ltd (1988) 2 HKTC 330*, it was held that cooking of food in a floating restaurant did not amount to the subjection of goods or material to a process or processes and therefore the restaurant boat and kitchen boat, three bridges or gangways do not qualify as industrial buildings.
- Likewise, in *Girobank plc v Clarke (1998) STC 182*, buildings used by banks for processing cheques and other documents did not qualify as industrial buildings, as cheques and other documents are not regarded as "goods or materials".
- However, in *Kilmarnock Equitable Cooperative Society Ltd. V CIR 42 TC 675*, the taxpayer sold coal in 28 lb paper pockets retail through its grocery branches and in its self-service stores and wholesale to other co-operative societies. They built a coal depot to prepack the coal. The packing procedure was to convey the coal by conveyor belt from wagons through machinery which screened the coal to remove dust and then weighed and packed the coal into 28lb bags. It was held that the coal was subject to a process because although the mere conveyance of goods from one part of a building to another would not constitute subjecting the goods to a process BUT the separation of bulk coal into coal suitable for packing in bags was definitely a process.
- In the Hong Kong Board of Review Case No. D3/87 & D4/87 decision on 8 May 1987, the issue at hand was whether certain premises used by the Appellants can qualify as an industrial building. The business of the taxpayer was pest control which comprised the extermination of pests by spraying chemicals onto products and the fumigation of products in a confined area or space such as a container or room. The Board opined:

> *Before fumigation the bamboo ware was infested or possibly infested with pests or bacteria. The fumigation was clearly a process. The ware was fumigated in containers which were covered with gas tight sheets and then subjected to methyl bromide gas which was applied for some period of time at a specified temperature and with a specified dosage of so many pounds per cubic foot. Like the coal in the Kilmarnock case the bamboo ware remained bamboo ware. However, it was more marketable and would probably attract a higher price after fumigation than before. In our opinion fumigation clearly was a process and the goods were clearly subjected to that process. Extermination is likewise a process to which goods were subjected.*

Again, using December 2022 Revenue Law Q5(c) (detailed above), Golden Mangoes Sdn Bhd incurred *"RM325,000 on Building B, where the harvested mangoes are received, graded, sorted, washed, peeled, pitted, sliced, treated, dried, etc., depending on the specific final product that is being produced."*

Applying the discussion in the Kilmanock case, December 2022 Revenue Law Q5(c), came to the conclusion that *"the harvested mangoes have clearly been "subjected to a process" in Building B through, amongst others, the grading, sorting, washing, peeling, pitting, slicing, treating, drying processes. Accordingly, Building B should be regarded as an industrial building."*

(c) the generating of power used for the purposes of that manufacture or process;

These would probably include huge generators, transformers, power plants, solar panels, and hydroelectric facilities but it must be illustrated that the power generated is used for a manufacturing or processing activity.

I shall continue with my discussion on the definition of "factory" in the next article.

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FURTHER READING

Choong, K.F. Malaysian Taxation Principles and Practice, Infoworld.
Kasipillai, J. A Guide to Malaysian Taxation, McGraw Hill.
Malaysian Master Tax Guide, CCH Asia Pte. Ltd
Thillainathan, S., Ong C.C., Edward T.K., Ng Y.L. Veerinder on Taxation, CCH Asia Pte. Ltd
Thornton, R. & Kannaa T. Manual of Capital Allowances and Charges, CCH Asia Pte. Ltd.
Yeo, M.C., Alan. Malaysian Taxation, YSB Management Sdn. Bhd.

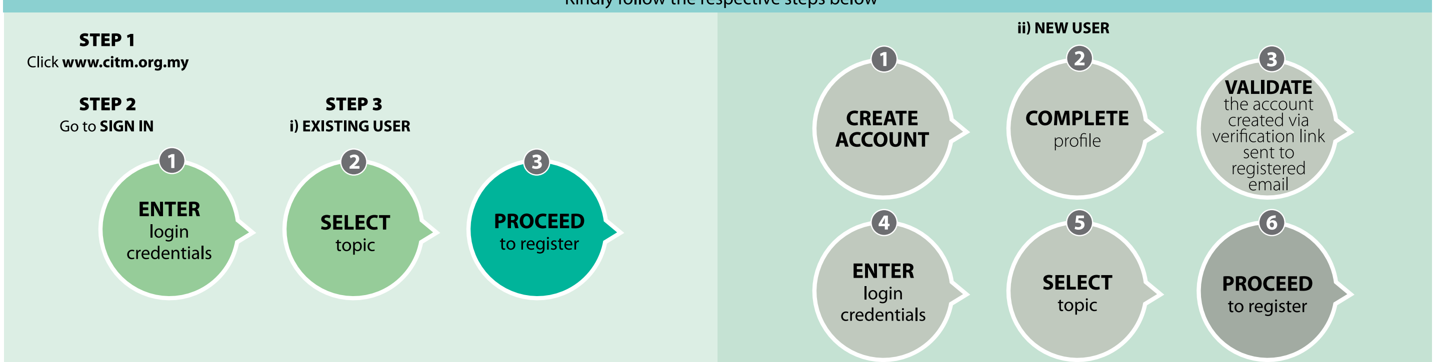
CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

CPD Events: OCTOBER - DECEMBER 2023

Month /Event	Details				CPD Points
	Date	Time	Platform / Location	Speaker	
OCTOBER 2023					
Members' Dialogue (Central)	3 October 2023	9.30 a.m. - 12 p.m.	Zoom Webinar	Various Speakers	0
Workshop: E-invoicing: Is your business ready for new regulations?	5 October 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Workshop: Tax Audits and Investigations (Re-Run) - Postponed from 4 July	10 October 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Transfer Pricing Conference 2023	11 October 2023	9 a.m. - 5 p.m.	The Vertical, Bangsar South	Various Speakers	8
2024 Budget Seminar	25 October 2023	9 a.m. - 5 p.m.	BTS, KL	Various Speakers	10
2024 Budget Seminar	30 October 2023	9 a.m. - 5 p.m.	Jen Hotel, Penang	Various Speakers	10
2024 Budget Seminar	31 October 2023	9 a.m. - 5 p.m.	The Pines Malacca	Various Speakers	10
NOVEMBER 2023					
2024 Budget Seminar	1 November 2023	9 a.m. - 5 p.m.	Weil Hotel, Ipoh	Various Speakers	10
2024 Budget Seminar	2 November 2023	9 a.m. - 5 p.m.	St Giles Southkey Johor Bahru	Various Speakers	10
2024 Budget Seminar	9 November 2023	9 a.m. - 5 p.m.	Kota Kinabalu	Various Speakers	10
2024 Budget Seminar	10 November 2023	9 a.m. - 5 p.m.	Kuching	Various Speakers	10
Workshop: The Tax Appeal Process	14 November 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
2024 Budget Seminar	16 November 2023	9 a.m. - 5 p.m.	The Saujana Hotel, Subang	Various Speakers	10
Workshop: Interest income, interest expenses and remittance of foreign income	30 November 2023	9 a.m. - 5 p.m.	Zoom Webinar	Ho Yi Hui	8
Public Holiday *(Deepavali: 12 November)*					
DECEMBER 2023					
Workshop: Tax Investigation and Enforcement Procedures	5 December 2023	9 a.m. - 5 p.m.	Zoom Webinar	Ms. Yong Mei Sim	8
Workshop: Critical Tax Issues in Malaysia	19 December 2023	9 a.m. - 5 p.m.	Zoom Webinar	Mr. Harvindar Singh	8
Workshop: Tax incentives	20 December 2023	9 a.m. - 5 p.m.	Zoom Webinar	Ho Yi Hui	8
Public Holiday *(Christmas: 24-25 December)*					

ONLINE REGISTRATION PROCESS

*Kindly follow the respective steps below



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

CHARTERED TAX INSTITUTE OF MALAYSIA

UPCOMING EVENTS

Dec 2023

18
2024 BUDGET SEMINAR
ZOOM WEBINAR

21
CAPITAL GAINS TAX - UNDERSTANDING THE TECHNICALITIES
KUALA LUMPUR

Mar 2024

15
SEMINAR: RECENT TAX CASES 2023
JOHOR BAHRU

Jan 2024

09
SVDP 2.0
ZOOM WEBINAR

11
WORKSHOP: DECODING LHDN'S E-INVOICING FOR TAX PRACTITIONERS
ZOOM WEBINAR

16
SEMINAR: RECENT TAX CASES 2023
KUALA LUMPUR

17
SEMINAR: RECENT TAX CASES 2023
PENANG

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