

MALAYSIAN INSTITUTE OF TAXATION (MIT)
MALAYSIAN INSTITUTE OF ACCOUNTANTS (MIA)
THE MALAYSIAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (MICPA)

Issues To Be Raised With The Technical Division Of The Inland Revenue Board (IRB)

1. Public Ruling on the Scope of Section 75A of the Income Tax Act (ITA)

The earlier amendment to section 75 of the ITA had created concern among the public. Following this, Section 75A of the ITA was introduced. The professional bodies would like to acknowledge the Government's move to further limit the scope of the provisions. The IRB has also indicated that a Public Ruling will be issued to allay the fear of possible abuse by relevant parties.

The professional bodies would like to urge the IRB to expedite the issuance of a Public Ruling to illustrate under what circumstances would Section 75A of the ITA be applied by the IRB in recovering outstanding tax liabilities (if any).

Answer.

IRB takes note of the above concern and will issue a public ruling to provide clarity on the matter.

2. Increase in Debt Due to the Government under Section 109 (2) of the ITA

Pursuant to section 109(2) of the ITA, failure to deduct and remit withholding tax within 30 days of paying or crediting the royalty or interest to non-residents, would be subject to a late payment penalty.

Section 109(2) provides that *inter alia*:-

"where the payer fails to pay any amount due from him, that amount which he fails to pay shall be increased by an amount equal to 10% of the interest/royalty liable to deduction of tax....."

A situation has arisen in which a taxpayer had underpaid the amount of withholding tax due on a particular payment of royalty to a non-resident as follows:-

	RM
Gross royalty	139,802.90
10% Withholding tax due and payable	13,980.29
Withholding tax paid within the stipulated due date	13,908.28
Shortfall in withholding tax due but paid after the stipulated due date upon discovery of the error	72.01

The IRB had subsequently issued a Notification of Increase of Debt due to the Government under which a 10% increase on the gross royalty of RM139,802.90 was imposed.

The professional bodies would like to state that the 10% late payment penalty imposed should be based on the portion of the gross amount relating to the underpaid withholding tax and not on the total gross royalty.

We are of the view that the taxpayer would be unjustly penalised if the late payment penalty is based on the total gross amount since the withholding tax on a substantial portion of the gross royalty was accounted for and remitted to the IRB within the stipulated period.

Answer.

The provision of the law clearly provides for penalty to be imposed on the gross amount of payment even though only a small amount of tax was not paid. However, in the event that there is an unintentional shortfall due to a genuine error and where a substantial amount of the withholding tax payment was accounted for and remitted to the IRB within the stipulated period, the taxpayer may submit an appeal to the Collections Branch.

3. Benefits arising from Employees' Share Option Scheme ("ESOS")

We refer to the prescribed form for ESOS (BT/ESOS/2000) issued by the IRB. It is indicated that the difference between the market price and the option price of the shares under ESOS will be a benefit assessable to income tax on the employees as a perquisite arising from employment under Section 13(1)(a) of the ITA. For listed companies, the market value of ESOS shall be determined based on the following calculation:-

$$\text{Market Value} = \frac{\text{Highest Price} + \text{Lowest Price}}{2}$$

We wish to highlight that the above method of determining the market value of shares for listed companies adopted by the IRB appears to be inconsistent with the Securities Commission's (SC) pricing mechanism.

Under the SC's ESOS guidelines for listed companies, the price payable for the shares under the scheme (option price) shall be based on the 5-day weighted average market price of the shares (with a discount of not more than 10% if deemed appropriate) which is akin to the market price.

The professional bodies would like to propose that the IRB consider adopting the SC's guideline in term of the pricing mechanism (which is reflective of market price of the shares) for purposes of consistency.

Answer.

The formula currently used by IRB to determine the market price will be maintained.

4. Grants/subsidy allocated by Government and donation/contributions received by a Statutory Authority.

The Income Tax (Exemption) (No. 4) Order 2003 provides:-

"2 (1) The Minister exempts-

- (a) any person from the payment of income tax in respect of his or its statutory income in relation to the sources of income derived from the allocations given by the Federal and the State Government in the form of a grant or a subsidy; and*
- (b) a statutory authority from the payment of income tax in respect of its statutory income in relation to the sources of income derived from -*
 - (i) the income received in respect of an amount chargeable and collectible from any person in accordance with the provisions of the Act regulating the statutory authority; or*
 - (ii) any donation or contribution received."*

The professional bodies would like to seek clarification as to whether the "Statutory Income" exempted under the Income Tax (Exemption)(No. 4) Order 2003 refers to the "gross" amount of the grant/subsidy and donation/contribution received. If otherwise, we would like to further seek clarification as to the basis of determining the "Statutory Income" to be exempted under this order.

Answer.

The exemption under the order does not refer to the gross amount of the grant/subsidy. The amount of exemption to be granted is at the statutory stage and is determined as follows:-

$$\frac{\text{Gross grant}}{\text{Gross income from business (including grant)}} \times \text{Statutory income from business (including grant)}$$

5. Guidelines on deduction for contribution to an approved charity and community projects pertaining to education, health etc.

As proposed in the 1996 Budget, Section 34(6)(h) was introduced in the ITA [Finance Act 1997 (Act 557)] to allow deduction for contribution to charity and community projects pertaining to education, health, housing, infrastructure and information and communication technology approved by the Minister.

The professional bodies would like to seek clarification as to the criteria that needs to be fulfilled for obtaining such approval and whether any guidelines are being issued.

Answer.

A guideline which has been issued by the Minister of Finance is now available on the IRB website.

6. Reinvestment Allowance (RA) - Schedule 7A

Schedule 7A, Para 7(a) of the ITA excludes a pioneer company from claiming RA for the period the company has been granted a pioneer certificate in respect of any promoted activity/product. It has been an understanding of our members all these years that it is possible for a pioneer company to claim RA for its non-promoted activity/product since the RA claim exclusion is only in respect of a promoted activity/product. This interpretation was not disputed by the IRB previously as this matter had been confirmed by certain IRB Officers either during public seminars or in conversations with them.

Lately, the IRB has taken the stand that so long as the company is currently enjoying the pioneer status incentive, it is precluded from claiming RA even for its non-pioneer activity/product.

The professional bodies would like to seek reaffirmation as to whether a company is eligible to claim RA under the following circumstances:-

- i. Eligibility to claim RA in respect of its non-promoted activity/product during the pioneer status period for a promoted activity/product.**

- ii. A company has a 31 December year-end. The tax relief period in respect of its Pioneer status expired during the basis period (1 January 2002 - 31 December 2002) on 30 June, 2002. After 30 June, 2002, it incurred capital expenditure on the expansion of its production capacity for which the company would like to claim RA in respect of the capital expenditure incurred after 30 June, 2002.

We wish to highlight that Paragraph 7, Schedule 7A of the ITA refers to the word "period" and not the terms "basis period" or "year of assessment". The word "period" is not defined. As such, one would look to the ordinary meaning of the word. Therefore, "period" may refer to the tax relief period. Under such circumstances, one could claim RA on capital expenditure incurred for purposes of a qualifying project (as defined in Paragraph 8, Schedule 7A of the ITA) after the expiry of the tax relief period.

Answer.

Pioneer Status under the PIA and RA under Schedule 7A are mutually exclusive. IRB confirms that RA is granted on the basis of a particular year of assessment and not a basis on a period. As such, a company enjoying incentive under PIA shall not be eligible for RA for the same year of assessment.

7. Capital Expenditure Qualifying For Reinvestment Allowance (RA) Under Schedule 7A of the ITA

Paragraph 1(b) of Schedule 7A to the ITA provides the following:

"Where a company which is resident in Malaysia has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project, there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty per cent of that expenditure:

Provided that such expenditure shall not include capital expenditure incurred on plant or machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff."

We wish to highlight that the Johor Bahru branch of the IRB has interpreted the above-mentioned to mean only assets which are used directly in the manufacturing process would qualify for RA. Meanwhile, assets which are indirectly used in the manufacturing process are disallowed in claiming the RA. Examples of such assets are as follows:

- i. **Warehouse** located within the vicinity of the factory which is used to store raw material for production use
- ii. **Lorry or van** which is used to transport the raw materials or finished goods
- iii. **Storage cabinets** located in the production area for storage purposes
- iv. **Moveable partitions** located in the factory to demarcate different production areas

With reference to the proviso in Paragraph 1 of Schedule 7A of the ITA, the professional bodies are of the view that the above-mentioned assets are not wholly or partly for the use of directors, administrative, clerical or management staff but for the use in a qualifying project. As such, the assets should be allowable in claiming RA. We would like to seek the IRB's confirmation on this matter.

Answer.

IRB confirmed that only expenditure incurred by a manufacturing or processing company on a factory, plant or machinery and used for the purposes of a qualifying project is entitled to claim RA. IRB will issue a ruling to further clarify the matter.

8. Permitted Expenses under Section 60F of the ITA

Paragraph 60F (2)(d) of the ITA provides that *inter alia*:

*" 'permitted expenses' means expenses incurred by an investment company in respect of secretarial, audit and **accounting fees**, telephone charges, printing and stationery costs and postage;"*

In practice, the IRB by concession allows tax compliance fees as deductible expenses in computing tax liabilities. Therefore, the professional bodies would like to seek reconfirmation as to whether the taxation fees incurred are permitted expenses under Section 60F of the ITA.

Answer.

As a concession IRB confirms that the taxation fee i.e. fees relating to filing and preparing tax computations are allowed to be included as part of the permitted expenses under section 60 F.

9. Treatment of Dividends

MASB 24 - Financial Instruments: Disclosure and Presentation provides:

" Redeemable Preference Share

- 26. ***When a preference share provides for mandatory redemption by the issuer for a fixed or determinable amount at a fixed or***

*determinable future date or gives the holder the right to require the issuer to redeem the share at or after a particular date for a fixed or determinable amount, **the instrument meets the definition of a financial liability and is classified as such.***

Interest, Dividends, Losses and Gains

36. *The classification of a financial instrument in the balance sheet determines whether interest, **dividends**, losses and gains relating to that instrument are **classified as expenses or income and reported in the income statement.** Thus, **dividend payments on shares classified as liabilities are classified as expenses in the same way as interest on bond and reported in the income statement.***

The professional bodies are of the view that such dividend payments (i.e. classified as expenses under the requirements of MASB 24) would still be treated as “dividends” for tax purposes. Clarification is sought as to the treatment of such financial instruments by the IRB.

Answer.

The IRB confirms that the payments will be treated as dividends for tax purposes.

10. Basis Period for Unit Trust Entities

The professional bodies are of the view that in practice, it may be more practical for the preparation of the unit trust entities' tax computations prior to year 2004 to be based on the financial year as the basis period for a particular year of assessment.

As a concession, the IRB has confirmed that it is agreeable for the unit trust entities' tax computations to be computed by taking the financial year as being the basis period provided this is consistently applied.

As such, the professional bodies would like to seek confirmation that the said concession would also apply to unit trust entities established prior to year 2004, i.e from year 2001 onwards (in line with the basis stipulated in the Income Tax (Amendment) Act 2002).

Answer.

IRB informed that the above issue had been discussed in the Technical Dialogue on 17 June 2002. IRB had agreed to accept as a concession tax computation by unit trusts based on financial year being the basis period provided that the method is consistently used. IRB had no objection applying this concession to unit trusts that were established prior to year 2004.

11. Sinking Fund Contribution / Charge

Taxpayers who have been renting out condominiums incur expenses (imposed by the condominium management) in the form of **"sinking fund"** charges. However, it has been the practice of the IRB to disallow a deduction for the said expenses on the basis that the expenses are payments towards funds (saving accounts).

We wish to reiterate that these sinking fund charges are expenses (non-refundable) incurred by the condominium owners in maintaining the condominiums. We are of the view that these expenses are incurred wholly and exclusively in generating the rental income, and therefore these expenses should be allowable.

In this respect, the professional bodies would like to seek clarification on the above-mentioned issue.

Answer.

'Sinking fund' is a payment made by condominium/apartment owners to the developer or management corporation for maintenance and upkeep of the building.

IRB agrees that the sinking fund charges are expenses incurred wholly and exclusively in generating rental income and therefore, are deductible against rental income. This decision will take effect henceforth without reopening previous assessments.

12. Direct Selling Expenses Incurred on Agents / Downliners

We wish to highlight that the set up and operation of direct selling companies is different from that of normal trading businesses. The direct selling companies are operated by having to support their agents and the downliners as the companies are entitled to certain percentages of their agents and downliners incomes (in some cases, the companies' principal income may be generated wholly from the agents and the downliners).

As such, we are of the view that the said expenses are incurred in generating the income. We understand that it has been the practice of the IRB to disallow a deduction for the expenses incurred by the direct selling companies on their agents (though some of these expenses are incurred in the course of earning the commission income) on the basis that the agents are not the employees of the companies and therefore the expenses incurred are private expenses which are not deductible.

In view of the Self Assessment System (SAS), the professional bodies would like to propose to the IRB to issue certain guidelines so as to create certainty with regard to such issues.

Answer.

IRB agrees to study the matter further and requested for examples of expenses incurred by direct selling companies to support their agents and downliners. A guideline will then be issued by IRB on the deductibility of these expenses.

13. Deduction For Expenses Incurred In Obtaining Quality and Halal Certification

Section 34 (6) (m) of the ITA provides the following:

" an amount equal to the expenditure, not being capital expenditure, incurred by the company in the relevant period for the purposes of obtaining certification for recognized quality systems and standards, and halal certification, evidenced by a certificate issued by a certification body as determined by the Minister:

Provided that the expenditure incurred in the relevant period shall be deemed to be incurred by the company in the basis period for the year of assessment in which the certificate is issued.

It is noted that the above-mentioned paragraph of the ITA came into force from the Year of Assessment (YA) 2001. In this respect, the professional bodies would like to seek clarification as to whether:-

- i. the said expenditure incurred during the basis period for the YA 2000 [Current Year Basis (CYB)] but for which the relevant certificate was issued by the approved certification body during the basis period for YA 2001, would be deemed incurred in 2001 and would therefore be deductible in arriving at the adjusted income for YA 2001.**
- ii. any prescribed list of certification bodies (both local and foreign bodies) is available for the purpose of Section 34(6)(m).**

Answer.

- (i) IRB confirmed that expenditure for the purpose of obtaining certification of recognized quality systems and standards, and halal certification incurred from year 2001 onwards, qualify for deduction under section 34(6)(m). However expenses incurred by the company in year 2000, but for which certificates were issued only in year 2001 by an 'approved certification body' would not be deemed incurred in year 2001 as the provision was not in force in year 2000.**
- (ii) The IRB will check with the Ministry of Finance (MOF) on the list of certification bodies.**

14. Incentive under the Income Tax (Allowance for Increased Export) Rules 1999

A manufacturing company whose exported manufactured products have attained at least 30% of value added would be entitled to claim an allowance of 10% of the value of increased exports under the Income Tax (Allowance for Increased Export) Rules 1999.

Rule 2 of the Income Tax (Allowance For Increased Export) Rules 1999 provides *inter alia*:

"value of increased export" means the difference of the Free-on-Board (FOB) value of products exported in the basis period and that of the immediately preceding basis period."

An issue would arise where a company changes its financial year end. As an example, the company's basis periods are as follows :

<i>Year of Assessments</i>	<i>Basis Period</i>	<i>Number of Months</i>	<i>FOB Value of Exports (RM)</i>
2001	01.04.2000 - 31.03.2001	12 months	300,000
2002	01.04.2001 - 31.12.2002	21 months	600,000

We are of the view that for the purpose of determining the value of increased exports for YA 2002, the *duration of the basis period need not be the same as that of the immediately preceding basis period*, i.e as in the situation above, the value of increased exports eligible for the ten per cent (10%) allowance should be amounting to *RM300,000 (RM600,000 - RM300,000) and not RM42,857 [(RM600,000 x 12 months / 21 months) - RM300,000]*

The professional bodies would like to seek clarification as to the treatment adopted by the IRB in determining the value of increased exports in the above-mentioned situation.

Answer.

IRB agrees with the view of the professional bodies in determining the value of increased exports as in the example above.

15. Determination of basis periods for companies under liquidation

The professional bodies would like to seek clarification on the following scenario:-

Company A's financial year-end is 31 December. On 13 November 2001, it was placed under liquidation. As such, the last set of audited accounts was prepared for the period 1 January 2001 to 13 November 2001. Subsequently, the Form 75 was prepared for the following periods :

- a. 14 November 2001 - 13 May 2002 (6 months)
- b. 14 May 2002 - 13 November 2002 (6 months)

Company C was advised by the IRB to submit a Form CP204B on the basis that the company had automatically changed its accounting year end the moment it was placed under liquidation. The IRB advised the following with regard to the basis periods, submission deadlines etc:-

Year of Assessments	Basis Period	Form C submission	CP204 submission
2001	01.01.2001 to 31.12.2001	30.08.2002	30.11.2000
2002	14.11.2001 to 13.11.2002	13.06.2003	15.10.2001
2003	14.11.2002 to 13.11.2003	13.06.2004	15.10.2002

We would like to seek clarification as to whether the company can maintain its existing basis period prior to being placed under liquidation (1 January - 31 December) and re-submit its revised YA2001 Form C disclosing the year end as 31 December 2001 and the subsequent Form C with the basis period remaining as at 31 December yearly. The appointment of the liquidators is to replace the present management in running the company's operations. We are of the view that the appointment of the liquidator should not be construed as the company having changed its financial year end.

Answer.

IRB will apply section 21A(3) of the ITA and Public Ruling 7/2001 in such circumstances. Bahagian Operasi has given a reply on this matter vide letter dated 09 June 2003.

16. Confirmation of whether a management corporation is a body of persons or a corporate entity for tax purposes

Section 39(2) of the Strata Titles Act 1985 (STA) in respect of the "Establishment of a Management Corporation" stipulates that

"The management corporation established by subsection (1) shall be known by the name appearing in the book of the strata register relating to a subdivided building, and shall be a body corporate having perpetual succession and a common seal".

Section 39 (2A) states that :-

" The management corporation may apply to the Registrar for a certificate certifying that the management corporation is a body corporate constituted under this Act on the day specified in the certificate".

Section 39 (3) stipulates that

"The management corporation may sue and be sued."

Section 2 of the Income Tax Act 1967 (ITA) defines a company to mean

"a body corporate and includes anybody of persons established with a separate legal identity by or under the laws of a territory outside Malaysia".

Therefore, it can be implied that a management corporation which is a body corporate under the STA is a company under the ITA. However, notwithstanding this, one should look to the purpose of the setting up of the management corporation (which essentially is made up of all the parcel owners) which is to manage the building (be it a condominium or apartment) for non-profit purposes. In addition, based on the principle of mutuality, for tax purposes the management corporation should not be viewed as being a company but a body of persons. As such, its investment income (if any), non-member income should be taxed at graduated rates and it need not submit an estimate of tax payable pursuant to Section 107C.

As such, the professional bodies would like to seek confirmation as to whether a management corporation is a body of persons for tax purposes.

Answer.

IRB confirms that a management corporation is a body of person and not a body corporate for income tax purposes. Management corporations should therefore have a "F" tax file number and not a "C" tax file number. Management corporations which have been previously allocated a "C" tax file number. Management corporations which have been previously allocated a "C" tax file number may write in to request for a change to a "F" tax file number.

This decision will take effect henceforth without reopening previous assessments.

17. Interest Income Assessable Either Under Section 4(a) or Section 4(c) of the ITA

i. *Interest on Fixed Deposits / Interest on Current Accounts (refer to Minutes of Technical Dialogue held on 17 June 2002)*

We wish to highlight that some companies are required to place funds in fixed deposits as a guarantee in order to obtain banking facilities used for business purposes (and not for investment purposes). We are of the opinion that the interest income from the fixed deposits derived therefrom should be assessable as part of the business source under Section 4(a) instead of as a non-business source under Section 4(c) of the ITA. However, we understand that in practice the IRB has maintained the view that the interest derived from fixed deposit under the above circumstances would generally be deemed to be a non-business source of income.

The professional bodies wish to request the IRB to review and give due consideration to the circumstances under which such interest income is derived which should lead to the income being assessable as business income under Section 4(a). In considering this issue, the IRB should take into consideration the fact that nowadays, there are various circumstances where companies are required by certain authorities to place funds in fixed deposits that generate interest income in order to obtain facilities (or even contracts for contractors) for business purposes (and not investment purposes).

ii. Interest on Multi-Currency Account

Some companies are allowed by Bank Negara to maintain a multi-currency account with licensed banks in order to make overseas purchases / payments and receive export sales proceeds for **business purposes**. We are of the opinion that the interest income from the multi-currency account derived therefrom should be assessable as part of the business source under Section 4(a) instead of as a non-business source under Section 4(c) of the ITA.

The professional bodies would like to seek confirmation from the IRB that the interest income derived from funds placed in multi-currency accounts should be assessable under Section 4(a) of the ITA.

Answer.

(i) IRB maintains that the interest is non-business income under section 4(c) unless the facts are similar to that of the Pan Century Edible Oil case.

- (ii) ***IRB does not concur with the professional bodies and maintains that the interest income in multi-currency accounts will be assessed under section 4(c).***

18. Withholding Tax under section 107A and 109B

Following the 2003 Budget amendments, Section 109B applies only in relation to services in Malaysia. This is also true in respect of Section 107A. The practice has been that Section 107A applies where there is a permanent establishment.

To clear any doubt and to have clarity, the professional bodies would like to seek confirmation from the IRB as to the application of Sections 107A and 109B. Further, which section would be applicable in respect of a non-resident from a country with which Malaysia does not have a double tax treaty.

Answer.

IRB confirmed that in cases where a PE exists, section 107A will apply. Section 109B will apply to non-residents in respect of section 4A - Special Classes of Income. Where the non-resident is from a country with which Malaysia does not have a double tax treaty, section 107A will apply if the non-resident has a business presence in Malaysia.

19. Reimbursements of Out-of Pocket Expenses

(refer to Minutes of Technical Dialogue held on 17 June 2002)

A non-resident consultant comes to Malaysia to perform work for a short period of time (i.e. no PE arises and therefore Section 109B applies) for a local entity. The consultant incurs air fare, taxi fare, hotel accommodation and meal expenses, etc., and these expenses are reimbursed by the local entity. The IRB had re-confirmed in an earlier dialogue that reimbursements of out-of-pocket expenses made to a non-resident would be subject to withholding tax under Section 109B since it is concerned about the possibility of abuse and withholding tax evasion by taxpayers, who may incorporate elements of a fee in the reimbursements. Nevertheless, the IRB had further stated that it will reconsider the above issue in greater detail.

As such, the professional bodies would like to urge the IRB to expedite the review process on this matter as the Collections Branch has started to issue letters stating that the reimbursement of out-of-pocket expenses is subject to withholding tax.

We are of the view that it would not be equitable for the IRB to impose upon all taxpayers a requirement to deduct withholding tax on out-of-pocket expenses on the basis of preventing abuse as in general, the charging of out-of-pocket expenses by the non-residents is genuine and

can be supported by documentary evidence such as receipts, invoices, etc.

Answer.

IRB maintains its stand that reimbursements of out-of-pocket expenses made to a non-resident would be subject to withholding tax under section 109B.

20. Residence of Individuals

Section 7 (1)(b) of the ITA provides the following:

"he is in Malaysia in that basis year for a periodshall be taken to form part of such period or that period, as the case may be, if he is in Malaysia immediately prior to and after that temporary absence."

We refer to the recent amendment made to the above-mentioned paragraph of the ITA and would like to propose to the IRB to provide examples or illustrations, particularly the impact on temporary absence and the limitation of the fourteen (14) days social visits as to avoid any doubt in interpreting the above amendment.

Answer.

IRB provided examples or illustrations (refer to Lampiran)

21. Confirmation of Resident Status

With effect from YA 2001, the Companies Branch will not issue the Certificate of Residence. We understand that the application will be processed by the Unit Pemprosesan which will only issue the Certificate of Residence Status after the Company has submitted the Form C.

We are of the view that the change in the responsibility of issuing the Tax Residence Certificate from the Companies Branch to Unit Pemprosesan and the position taken by Unit Pemprosesan to issue the Tax Residence Certificate only upon submission of the Form C is not practical. As provided by the law, the tax return Form C would only be submitted within 6 months (by concession 7 months) after the close of the financial year-end.

Section 8(1)(c) of the Income Tax Act provides that any company is resident in Malaysia for the basis year for a year of assessment if any time during that basis year the management and control of its affairs are exercised in Malaysia by its directors or other controlling authority. Based on Section 8(2) of the Act, once it has been established that the Company was resident in Malaysia for that basis year for any year of assessment, it shall be presumed until the contrary is proved that the company was resident in Malaysia for the purposes of this Act for the basis year for every subsequent year of assessment.

Hence, we are of the view that there is no requirement for IRB to issue the Tax Residence Certificate only after the submission of the tax return Form C. We are of the view that the Tax Residence Status should be confirmed based on the tax return of the prior year and on the evidence of a Board of Directors' meeting held in the prior year by the Company, as practised by the Companies Branch prior to YA 2001. We wish to highlight that the delay in issuance of Tax Residence Certificate would give rise to withholding tax issues.

Answer.

IRB advised that the respective branches will be issuing Tax Residence Certificates. Applications should be made to the branches and not to the Unit Pemprosesan, Kuala Lumpur.

22. Payment of tax exempt dividends

(refer to Minutes of Technical Dialogue held on 29 June 1992)

The IRB had advised in the Technical Dialogue held on 29 June 1992 that companies may on a prudent basis, pay a portion of the estimated dividend to the shareholders while their tax computations are being reviewed. (copy of extract of the minutes attached herewith).

In the context of Self-Assessment where companies are not required to submit their tax computation and therefore the IRB will not be reviewing the tax computation on an annual basis, this issue has added implications.

The professional bodies wish to seek confirmation that the practice adopted in the 1992 advise still holds.

Answer.

IRB confirmed that the practice adopted previously is still in effect. However the company must ensure sufficient credits in Exempt Income Account for purpose of paying dividend.

23. Time Frame For The Release of Minutes of Dialogues

The professional bodies are concerned with the time taken by the IRB to release the minutes of dialogues held. As such, we would like to propose to the IRB to approve the said minutes within thirty (30) days after submission to the IRB to enable the professional bodies to notify their members of the latest developments and help facilitate compliance with the relevant provisions.

Answer.

IRB agreed to approve the minutes of dialogue within 30 days after submission of minutes.

24. Multi-Purpose Holdings Bhd v KPHDN.

The professional bodies noted that the appeal in respect of the above mentioned case had been withdrawn by the IRB. The professional bodies requested that the IRB inform them of such developments in order that the information may be disseminated to members and in addition, sought to clarify the position of other appeals pending in respect of the same issue.

Answer.

Referring to the request by the professional bodies that the IRB should inform them as and when such decisions are made as that would be more timely, IRB believes that notification through the dialogue is sufficient.

IRB informed that the High Court decision in the Multi-Purpose case will apply with immediate effect. The IRB confirmed that based on the principle established in the above case, all dividends from investments will be treated as a single source. Cases currently under appeal will be reviewed and will not be referred to the Special Commissioners. If the facts of these cases are similar to that of the above case, the appeal will be allowed by the IRB.

PENENTUAN TARAF MASTAUTIN BAGI INDIVIDU BERKUAT KUASA MULAI TAHUN TAKSIRAN 2002 (SEKSYEN 7(1)(b))

Contoh 1:

Encik Jones tiba di Malaysia pada 1 Oktober 2002 dan pulang ke United Kingdom untuk bercuti Krismas dan Tahun Baru pada 24 Disember 2002. Beliau kembali ke Malaysia pada 3 Januari 2003 dan berada di Malaysia sehingga 31 Julai 2003.

TT2002 - Mastautin - S. 7(1)(b)
TT2003 - Mastautin - S. 7(1)(a)

Dengan pindaan, Encik Jones adalah bermastautin bagi tahun 2002 walaupun beliau tidak berada di Malaysia pada 31 Disember 2002 dan 1 Januari 2003 kerana:

- (a) tempoh dari 24 Disember 2002 hingga 3 Januari 2003 dianggap sebagai tempoh ketiadaan sementara kerana tempoh tersebut tidak melebihi 14 hari (lawatan sosial).
[Pindaan membenarkan tempoh ketiadaan sementara terpakai dalam tahun 2002 dan 2003]*
- (b) tahun 2002 dan 2003 adalah tahun bersambung kerana ketiadaan En. Jones pada 31 Disember 2002 dan 1 Januari 2003 dianggap sebagai ketiadaan sementara;*
- (c) En. Jones berada di Malaysia untuk tempoh 182 hari berturut-turut dalam tahun 2003. Tempoh 1 - 3 Januari 2003 menjadi sebahagian daripada tempoh 182 hari atau lebih yang berturut-turut; dan*
- (d) Encik Jones berada di Malaysia sebelum dan selepas tempoh ketiadaan sementara iaitu sebelum 24 Disember 2002 dan selepas 3 Januari 2003.*

Contoh 2:

Encik Jacques telah ditugaskan ke Malaysia dalam tahun 2002 dan dijadualkan bertugas di Kuala Lumpur mulai 1 Disember 2002. Sebelum kedatangannya ke Malaysia, pihak pengurusan memintanya mengawasi beberapa masalah di Bangkok yang berkait dengan kerjanya di Kuala Lumpur. Beliau hanya tiba di Malaysia pada 16 Januari 2003 dan tinggal di Malaysia lebih daripada 182 hari berturut-turut dalam tahun 2003.

TT 2002 - bukan mastautin - S.7(1)(b) tidak terpakai kerana beliau tidak berada di Malaysia sebelum ketiadaan sementara pada 1 Disember 2002. Ketidadaannya untuk bekerja di Bangkok tidak boleh dianggap sebagai ketiadaan sementara kerana beliau tidak berada di Malaysia sebelum tempoh ketidadaannya itu.

Jika beliau datang ke Malaysia sebelum ke Bangkok, beliau adalah bermastautin bagi tahun 2002 kerana beliau memenuhi syarat berada di Malaysia sebelum ketiadaan sementara.

Contoh 3

Encik Suzuki, seorang warganegara Jepun mula berkhidmat di Malaysia pada 10 September 2002. Pada 15 Disember 2002, beliau pulang ke Jepun untuk bercuti dan kembali ke Malaysia pada 3 Januari 2002. Beliau tinggal di Malaysia sepanjang tahun 2003.

***TT2002 - bukan mastautin
TT2003 - mastautin S. 7(1)(a)***

Encik Suzuki bukan mastautin bagi TT2002 kerana tempoh beliau telah keluar dari Malaysia bagi tujuan sosial selama 18 hari (melebihi 14 hari yang diperuntukkan di proviso seksyen 7(1)(b)) dan tempoh tersebut tidak boleh dianggap sebagai ketiadaan sementara.

Jika Encik Suzuki meninggalkan Malaysia pada 17 Disember 2002 dan kembali pada 1 Januari 2003, tempoh 18 hingga 31 Disember 2002 boleh dianggap sebagai ketiadaan sementara. Dalam keadaan ini, Encik Suzuki tidak boleh keluar Malaysia bagi tujuan sosial sehingga sekurang-kurangnya 1 Julai 2003 (selama 182 hari) kerana tempoh kelayakan 14 hari yang diperuntukkan telah digunapakai dalam tahun 2002. Jika Encik Suzuki meninggalkan Malaysia dalam tempoh 182 hari berturut-turut bermula 1 Januari 2003, maka tempoh tersebut (1 Januari - akhir Jun 2003) tidak dianggap berturut-turut dan oleh itu Encik Suzuki tidak dianggap bermastautin bagi tahun taksiran 2002.