



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

PROFESSIONAL EXAMINATION

FINAL LEVEL

REVENUE LAW

DECEMBER 2020

Student
Registration No.

Date

Desk No.

Examination Centre

Time allowed: 3 hours

INSTRUCTIONS TO CANDIDATES

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

DO NOT TURN OVER THIS PAGE UNTIL INSTRUCTED BY THE INVIGILATOR

Question 1

- (a) *'The multiplicity of forms which 'income' may assume is beyond enumeration'*
Lord Wright in *Kamakshya Narain Singh v CIT* [11 ITR 513]

Required:

With reference to the ITA, the Public Ruling No. 12 of 2018 (Income from Letting of Real Property) and relevant case law, discuss briefly the meaning of 'income', and how 'rent' may take the form of a 'business income', or a 'rental income', as the case may be, and accorded different tax treatment on that account.

(10 marks)

- (b) With reference to the ITA, discuss briefly the concept of 'accrued', 'derived' and 'received in Malaysia from outside Malaysia' as contained in section 3, and in the context of the decision in the case of *KPHDN v Aneka Jasaramai Ekspres Sdn Bhd* [(2005) MSTC 4,095], highlighting the salient features of the case.

(10 marks)

[Total: 20 marks]

Question 2

- (a) Malaysia Mask Sdn Bhd (MM) is a local company dealing with various types of disposable surgical and face masks for use in medical and certain manufacturing environments. It had placed an order for the supply of 50 million mask in late 2018 with the Shenzhen Medical Products Company in China (Shenzhen). Shenzhen had serious financial difficulties at that time, and therefore an arrangement was made whereby MM advanced a sum of money that represented the full value of the order placed. The repayment of the sum was to be by way of supply of mask over the period from July 2019 to June 2020. Interest was payable by Shenzhen on the balance outstanding not fulfilled by the supply.

Sometime in October 2019, China was affected by a new disease caused by a strange hitherto unknown airborne virus which leads to respiratory complications and death. The disease which was spreading at a catastrophic rate, has no vaccine or cure at the point in time it emerged, and one of the containment measures for the spread of the disease was by the use of face mask.

To ensure local availability of mask, the Chinese government issued an emergency prohibition order to ban all exports of mask manufactured in China. Supply to MM was immediately stopped, and all mask outputs by Shenzhen owned factories were accordingly diverted for domestic use. Shenzhen also terminated the supply arrangement with MM and disclaimed any liability on the sums advanced and the interest due.

MM in closing its accounts for the year ended 31 December 2019, claimed a sum of RM45 million as a charge against profits.

Required:

In the context of the deduction provisions of the ITA and relevant case law, discuss whether Malaysia Mask Sdn Bhd can claim the sum of RM45 million charged in the accounts.

Note:

Candidates are required to highlight the salient features of the case law quoted and discuss it with relevance to the company's claim.

(10 marks)

- (b) *'It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading.'*

Lord Sterndale in *CIR v Alexander von Glehn*

Required:

With reference to the above dictum of Lord Sterndale and the deductibility provisions of the ITA, discuss briefly the deductibility of expenses incurred by a taxpayer in the course of carrying on a business distinguishing between a commercial loss and a penalty, whether restitutionary or punitive in nature, with reference to the case of *CIR v Alexander von Glehn*.

(10 marks)

[Total: 20 marks]

Question 3

- (a) Ms Ivy is the sole owner of a business selling cow's milk for many years, under the style of 'Cow Fresh'. In January 2016, Ivy converted the sole proprietorship business into a partnership business. She entered into a Partnership Agreement with her four (4) cousins, Keith, Steward, Chris and Tiffany. Among other matters, the Partnership Agreement provided that:
- (i) The partnership capital will be contributed equally by the five (5) partners;
 - (ii) The partners are entitled to the net profits of the business in equal shares;
 - (iii) The partners must be engaged full-time in the partnership business;
 - (iv) Each partner has the right to sign and endorse cheques on behalf of the partnership;
 - (v) The accounts of the partnership will be closed to 31st December in each year; and
 - (vi) Should any partner die, the remaining partners may buy the deceased partner's share.

Sometime in February 2020, the partnership's business was inspected by the Malaysian Inland Revenue Board (IRB). During the IRB's inspection, it was discovered that in spite of the partnership agreement, only Ms Ivy had been signing and issuing cheques in the name of the partnership. Furthermore, no proper accounts had been prepared in respect of the partnership business transactions, including records of the partnership profit distribution for the YA 2016 to 2019. The available bank records showed that Keith, Steward, Chris and Tiffany received a fixed monthly sum together with a further sum that Ms Ivy contends is their share of the partnership profits.

Subsequently, assessments were raised on the profits of the business in the name of Ms Ivy alone. The IRB contended that the business was a sole proprietorship. Ms Ivy, on the other hand, argued that she and her four (4) cousins are running the business as a partnership and the assessment should be raised on the five (5) partners.

Required:

Advise Ms Ivy on whether she has legal grounds to dispute the tax assessments raised against her by the Inland Revenue Board, specifically on whether a partnership exists between her and her four (4) cousins.

(12 marks)

- (b) Sunday Development Pte Ltd (Sunday Development) is a non-resident construction company based in Singapore, while Mah Wing Development Sdn Bhd (Mah Wing Development) is a Malaysian resident contractor.

In 2009, the two (2) companies formed a consortium to construct a 280-kilometers tolled highway for the Malaysian government, connecting Kuala Lumpur to Singapore.

Each company will perform certain functions as stipulated in the contract with the government. According to the agreement between the two (2) companies, all contract income and expenses will be reflected in the consortium's accounts. At the end of the contract, the net profit will be ascertained and allocated to Sunday Development and Mah Wing Development based on an agreed ratio of 45:55. Any losses incurred would be borne by the contract parties in the same ratio.

Required:

Advise the Mah Wing Development Sdn Bhd on whether a partnership exists and how should it file a return of its income under the ITA.

(8 marks)

[Total: 20 marks]

Question 4

The CoolBro Group of Companies (CoolBro) is in the business of manufacturing and distributing stationery. The ultimate holding company is CoolBozz Pty Ltd (CoolBozz), a company incorporated and tax resident in the United Kingdom (UK). It does not currently have a permanent establishment (PE) in Malaysia.

CoolBro expanded its business operations into Malaysia by incorporating a Malaysian subsidiary company CoolKiddoz (M) Sdn Bhd (CoolKiddoz), in January 2019. The majority of the shares in CoolKiddoz are held by the directors of CoolBozz. CoolKiddoz closes its accounts on 31 December each year.

All business decisions for CoolKiddoz are made by CoolBozz's directors in the UK. However, in July 2019, the UK directors travelled to Malaysia and held a Board of Directors' meeting at which the senior executive directors of operations, marketing and finance participated in person and decided on key business strategies, including expansion plans, for the Malaysian subsidiary.

Under the expansion plans, CoolKiddoz will construct a manufacturing plant in Malaysia that will be completed by 2022. CoolBozz will deploy five (5) of its British employees to provide supervisory, engineering and technical support services ('services') for five and a half months in 2019 in Malaysia, in relation to the manufacturing plant construction. An arm's length based fee will be charged for the services provided.

Whilst waiting for CoolKiddoz's plant to be completed, CoolBozz will sell its products directly to Malaysian distributors and stores. CoolKiddoz will hire three (3) individuals to promote the products currently manufactured in the UK to customers in Malaysia, in return for a fee to be paid by CoolBozz

to CoolKiddoz. The sales contracts for these products would be concluded outside Malaysia directly between CoolBozz and the Malaysian distributors. Acceptance of purchase orders and issuance of invoices will be done by CoolBozz but, to assist CoolBozz, the three (3) individuals employed by CoolKiddoz may play a role in negotiations with Malaysian customers

CoolBozz will rent a warehouse in Malaysia for the storage of its goods imported from outside Malaysia. This is to facilitate prompt delivery of the goods to the Malaysian customers. A third-party logistics provider (3PL) will manage the warehousing and distribution of the goods which will be owned by CoolBozz during the storage period.

The CFO of CoolKiddoz has approached you for advice on the concept of tax residency, PE, its impact on CoolBozz viz a viz taxation, and the income tax implications if a PE of CoolBozz is created in Malaysia.

Required:

- (i) **By reference to the ITA, briefly comment on whether CoolKiddoz (M) Sdn Bhd would be classified as a tax resident in Malaysia.**

(2 marks)

[For simplicity, when responding to questions (ii) to (iv) below, you do not need to consider the impact of the Multilateral Instrument on the UK-Malaysia DTA]

- (ii) **By reference to the ITA and the *Malaysia - United Kingdom Double Tax Agreement (“the DTA”)*, discuss the concept of a PE and the tax implications of CoolBozz providing supervisory, engineering and technical support services in Malaysia for the duration of five and a half months in the year of assessment 2019.**

(5 marks)

- (iii) **By reference to the ITA and the DTA, consider whether the activities carried out by CoolKiddoz (M) Sdn Bhd in relation to the sales of the products of CoolBozz Pty Ltd would trigger a PE for CoolBozz Pty Ltd in Malaysia.**

(3 marks)

- (iv) **By reference to the ITA and the DTA, discuss if the warehousing arrangement where CoolBozz Pty Ltd will store inventory in Malaysia, would trigger a PE in Malaysia for CoolBozz Pty Ltd.**

(2 marks)

- (v) **Assuming CoolBozz was a tax resident of the United States of America instead of the UK, discuss the tax implications under the ITA for CoolBozz in the context of sections 12 and 107A and the Inland Revenue Board’s “Guidelines on the Application of Subsections 12(3) and 12(4) of the ITA in Determining a “Place of Business”, based on your understanding of the fact pattern in the background above.**

(8 marks)

**DOUBLE TAX AGREEMENT
MALAYSIA – UNITED KINGDOM**

Article 1

PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term “permanent establishment” includes especially:
 - (a) a place of management;
 - (b) a branch;
 - (c) an office;
 - (d) a factory;
 - (e) a workshop;
 - (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources including timber or other forest produce;
 - (g) a farm or plantation;
 - (h) a building site or construction, installation or assembly project which exists for more than six months.
3. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
 - (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
 - (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
 - (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
 - (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e) of this paragraph, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
4. An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it carries on supervisory activities in that other State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other State.

5. A person (other than a broker, general commission agent or any other agent of an independent status to whom paragraph 6 applies) acting in a Contracting State on behalf of an enterprise of the other Contracting State shall be deemed to be a permanent establishment in the first-mentioned State, if:
 - (a) he has, and habitually exercises in the first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or
 - (b) he maintains in the first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise.
6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.
7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much thereof as is attributable to that permanent establishment.
2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.
3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses, including executive and general administrative expenses which would be deductible if the permanent establishment were an independent enterprise insofar as they are reasonably allocable to the permanent establishment, whether incurred in the State in which the permanent establishment is situated or elsewhere.
4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.
5. Where the profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 13

TECHNICAL FEES

1. Technical fees derived from one of the Contracting States by a resident of the other Contracting State who is the beneficial owner thereof and is subject to tax in that other State in respect thereof may be taxed in the first-mentioned Contracting State at a rate not exceeding 8 per cent of the gross amount of the technical fees.
2. The term “technical fees” as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a technical, managerial or consultancy nature.
3. The provisions of paragraph 1 of this Article shall not apply if the beneficial owner of the technical fees, being a resident of a Contracting State, carries on business in the other Contracting State in which the technical fees arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the technical fees are effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.
4. Technical fees shall be deemed to arise in a Contracting State when the payer is that State itself, a statutory body thereof, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the technical fees, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment of fixed base in connection with which the obligation to pay the technical fees was incurred, and such technical fees are borne by such permanent establishment or fixed base, then such technical fees shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.
5. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the technical fees paid exceeds, for whatever reason, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

[Total: 20 marks]

Question 5

Greenland Sdn Bhd (Greenland) is a company incorporated in 2010 with its principal activities being investment holding. Greenland's nature as an investment holding company and its principal activity of holding investments are reflected in its Memorandum and Articles of Association. Greenland's shares were held in equal portions of 25% by each of Ahmad, Benedict, Charles, and Daniel.

Upon incorporation, Greenland acquired two (2) parcels of land in 2010 i.e. Land A and Land B. Both Lands A and B were both recorded as 'fixed assets' in Greenland's audited accounts. It was also duly recorded in Greenland's Directors' Resolution and board minutes that both parcels were purchased for investment purposes and would be held long term. The two (2) parcels together constitutes more than 75% in value of Greenland's total tangible assets.

In 2015, Ahmad sold the entirety of his shareholding in Greenland to Edmund for RM3.5 million. In the subsequent year, Edmund transferred half of his shares in Greenland to his wife Sarah.

In 2016, Greenland entered into a sale and purchase agreement (SPA) with Great World Sdn Bhd (Great World) for the sale of Land B to Great World. The transaction was duly recorded in Great World's audited accounts. However, the transaction was aborted prior to completion.

In 2017, the State Government acquired Land A from Greenland by way of compulsory acquisition and paid Greenland compensation amounting to RM35 million.

In 2018, Greenland was approached by Good Life Sdn Bhd (Good Life) with an offer of RM20 million for the purchase of Land B. Greenland agreed and Good Life entered into a SPA for the sale of Land B to Good Life. However, due to financial difficulties faced by Good Life, Greenland subsequently agreed to give a rebate of RM200,000. In total, Greenland only received the sum of RM19.8 million from the sale of Land B to Good Life.

Required:

Based on the above facts, and with reference to the RPGTA and ITA, and relevant case laws (where applicable), discuss:

- (i) Whether the disposal of Ahmad's shares in Greenland to Edmund in 2015 amounted to the disposal of a chargeable asset.**
(4 marks)
- (ii) What was the amount of chargeable gain on which real property gains tax (RPGT) would have been payable on Edmund's disposal of half of his shares in Greenland to his wife Sarah in 2016?**
(4 marks)
- (iii) Whether RPGT would have been payable on Greenland's aborted SPA with Great World in 2016.**
(4 marks)
- (iv) Whether RPGT or income tax would be chargeable on RM35 million received by Greenland from the compulsory acquisition of Land A by the State Government.**
(4 marks)
- (v) Whether the disposal price for Greenland's sale of Land B to Good Life should be the SPA price of RM20 million, or the amount of RM19.8 million actually received by Greenland after the rebate of RM200,000.**
(4 marks)

[Total: 20 marks]

Question 6

Simpan Tanah Sdn Bhd (Company) is a locally incorporated company. Among the powers vested in the Company was the power to acquire land and hold investments in landed properties as well as dealing in landed properties. In April 2014, the Company bought a large piece of land. Three (3) months later after its purchase the management of the Company changed with a whole set of new directors coming in. However, no change to the objects of the Company was made by the new management.

The land was an agricultural property but without any profitable agricultural activity taking place. It was very remote from any urban centre and is accessible only through a long and winding dirt road. Part of the land suffered soil erosion and some earthworks was done to rectify and contain the erosion. This was the only activity carried out to the land before it was sold to another party five (5) years later. The Company made a modest profit on the transaction. The sale was not necessitated by any financial need or constraints to the Company.

Required:

With reference to the ITA and relevant case law, discuss the transaction from the following point of view:

- (i) Should the Director-General of Inland Revenue view the profit as one arising from an adventure in the nature of trade, how will he support his stand? (8 marks)**
- (ii) Advise Simpan Tanah Sdn Bhd why the profit made from the disposal of the land could be treated as one of capital gains, not liable to income tax. (8 marks)**
- (iii) The arguments and decision in the relevant case law. (4 marks)**

[Total: 20 marks]

(END OF QUESTION PAPER)