Petroleum engineers seconded overseas law equity essay

Law

MSTC 3, 381The FactsThe taxpayer was a Malaysian citizen employed by a Malaysian Company (M. Co). In the year of assessment 1997 (YA97), the taxpayer was resident within the meaning of Section 7 of the Income Tax Act, 1967 (ITA), despite the fact that the taxpayer was present in the United States of America (USA) for 302 days during YA97, (i. e. during 1996). As part of his employment with M. Co. the taxpayer was required to be in the USA for the period of time mentioned above. During this time, his wages and bonuses were paid into his personal account at his bank account in Malaysia. As his duties in the USA were incidental to the exercise of his employment with M. Co, the income arising there from was deemed derived from Malaysia pursuant to sections 13(2)(a) and 13(2)(c) of the ITA. The taxpayer paid Malaysian tax on this income, as well as federal and state taxes in the USA. The taxpayer sought unilateral relief in respect of the federal tax suffered in the USA amounting to RM1, 798. 38. The claim was made pursuant to paragraph 15 of Schedule 7, ITA. The Inland Revenue Board (IRB) did not allow the claim on the basis that the income was not foreign income, as it was deemed derived from Malaysia pursuant to section 13(2), ITA. The ArgumentsThe taxpayer argued that the phrase " income from an employment exercised outside Malaysia" in paragraph 15, Schedule 7, referred to income in respect of an employment pursuant to which the employee is required to perform duties outside Malaysia regardless of whether :(a) the duties are incidental to the exercise of such employment;(b) such employment is in Malaysia; and(c) such income is derived (or deemed to be derived) from Malaysia or from outside Malaysia. DecisionWhile it is important to read paragraphs 13 to 15 of Schedule 7, as well as Section

13(2), etc., the clear language used in paragraph 15, means that this paragraph can stand alone. It is clearly " specific only to employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax." In statutory interpretation, effect should be given to the ordinary meaning of a word. Paragraph 15 uses the word " may", and in this connection, it should be construed as " shall" and does not give the IRB the discretion to decide whether or not to grant unilateral relief.(Note: The IRB had subsequently withdrawn its appeal to the High Court.)

Case Law 2

Ketua Pengarah Hasil Dalam Negeri v Chellam Investment Sdn BhdThe FactsThe taxpayer involved in oil palm cultivation, property letting and investment. In 1981, the taxpayer sold part of its estate to a developer and this land was to be developed as a housing estate, anticipated to be completed by 1984. An agreement was reached with the taxpayer conceding to secure houses for the displaced workers; and for this purpose, the taxpayer requested for 50 houses to be reserved for these workers. Eventually, only 30 of the 50 units were taken up by the workers, leaving the taxpayer to fulfil its obligation to purchases the remaining 20 units. In 1995, the taxpayer sold 19 of the 20 units it held to various purchasers, reserving one unit for its own occupation. The ArgumentsThe appeal was dismissed was due to the intention of the respondent at the time was purchased the house and that it was to provide for houses for its displaced workers. The SCIT specifically found that it was not in the normal courses of its business which is oil palm plantation and investment. The court held that appeal dismissed due to the Special Commissioners’ finding of fact – that the

intention of the taxpayer at the time the residential units were purchased was to provide housing for its displaced workers – was not to be disturbed. The purchase and subsequent disposal of the property was not done in the course of the taxpayer's business. The transaction became an investment due to a change in circumstances, and not due to a change of intention on the part of the taxpayer. The decision of the Special Commissioners that the gain on disposal of the property was subject to RPGT and not income tax under s4 (a) of the ITA 1967 is affirmed. DecisionThe decision of the Special Commissioners that the gain on disposal of the property was subject to RPGT and not income tax under s4 (a) of the ITA 1967 is affirmed.

Case Law 3

In Ho Soon Guan v KPHDN (Civil Appeal No. R1-14-3-99)The FactsThe taxpayer worked for his employer, a bank which offered a separation scheme, (" the Scheme") that provided for early retirement with payment of benefits. Officers were invited to apply to the Scheme. The taxpayer applied to join the Scheme. When he applied to join the Scheme he had taken a special post with the bank which was lower than that which he had occupied before, because he was afflicted with polymyositis which necessitated him having to wear a neck collar. His application was approved and he left the service of the bank about one year before he was actually due to retire. On retirement under the Scheme, he was paid RM390, 437 as " compensation for loss of employment". The Inland Revenue Board (IRB) imposed a tax of RM113, 021. 60 on this amount. The ArgumentsArgument between Employment Law and Trade Union Dispute due to the breach of collective agreement. – Interpretation of the provisions of the collective agreement –

Article 33 of the eighth collective agreement – Whether the employees were forced to retire – Whether the dismissal with just cause or excuse – Whether the complainants come within the scope of Section 56(1) of the Industrial Relations Act – Whether the complainants come within the scope of Section 17(1)(b) of the Industrial Relations Act. DecisionEvery company, trust body or co-operative society shall for each year of assessment furnish to the Director General a return in the prescribed form within seven months from the date following the close of the accounting period which constitutes the basis period for the year of assessment.

Case Law 4

In LCC V. KPHDN [(SCIT)(Appeal No. PKCP(R)86/99the taxpayer was a Malaysian citizen employed by a local company, ITSB. During the basis year for the year of assessment 1997, he was a tax resident in Malaysia. As part of his employment with ITSB, he performed overseas duties in the United States of America (" USA") for 302 days in that year of assessment. While the taxpayer was in USA, his salary was paid by ITSB into his bank account in Malaysia. The taxpayer's income was subjected to tax both in Malaysia and USA. On this account, the taxpayer contended that " income from an employment exercised outside Malaysia" in paragraph 15, Schedule 7 of the Act refers to income in respect of an employment pursuant to which the employee performs duties outside Malaysia and thus he is entitled to a unilateral tax credit under Section 133 of the Act. The IRB however, contended that notwithstanding the double tax in respect of the taxpayer's income, that phrase " income from an employment exercised outside Malaysia" refers only to foreign income. Since the taxpayer's income was

banked into his Malaysian account, it could not constitute foreign income, thus disentitling the taxpayer to the credit. The SCIT allowed the taxpayer's appeal as they found that the provision was specificto employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax. As such, the taxpayer was entitled to the unilateral tax credit. The ArgumentsEmployment Law – Dismissal – Poor performance – Constant failure to meet set performance standards – Whether employer has issued warning to the employee – Whether employee was accorded sufficient opportunity to improve performance – Whether employee failed to improve performance despite warnings – Whether poor performance established – Whether dismissal with just cause or excuse. DecisionFor the purposes of this Act the Director General shall at all times have full and free access to all lands, buildings and places and to all books, documents, objects, articles, materials and things and may search such lands, buildings and places and may inspect, copy or make extracts from any such books, documents, objects, articles, materials and things without making any payment by way of fee or reward.

Case Law 5

EPM Inc v KPHDN [Appeal No. PKCP(R)25/99]The FactsCivil/Structural engineer of an engineering company in Malaysia since 2003. Plans, evaluate, co-ordinate, recommend and implement maintenance, consultancy, research or construction projects and services and engineering designs to serve the needs of the company according to specifications and standards set. In China from 1. 1. 2007 to 31. 12. 2008 (2 years). The secondment overseas was temporary in nature as Peng continued his employment with the same

employer on his return to Malaysia after the completion of the overseas duties. The employer in Malaysia credited the employee‟s bank account with the monthly remuneration but did not bear the remuneration of the employee for the duration of the overseas secondment. The remuneration was recharged to the company in China. The ArgumentsSubsidiary company in China was responsible for the decision making and issued all the instructions for work carried out in China. All plans and evaluation reports were sent to the company in China. The risk related to the work that was carried out by the employee was borne by the company in China and the benefits were also enjoyed by the company in China based on the decision making of the company in China. The duties performed as a civil/structural engineer in both Malaysia and overseas are similar. The work done in China is related to a project that is not connected to the employer in Malaysia as the subsidiary company in China bears all the risks and receives the benefits from the work done in China. The duties performed overseas was independent of the duties in Malaysia as the subsidiary company in China was responsible for all the decision-making of the job done in China. DecisionThe overseas duties are for an independent purpose and not to further the purpose of the employer in Malaysia since the decision making of the work done overseas lies with the company overseas. The employer in Malaysia did not bear any of the risks or receive the benefits from the job done overseas.

Case Law 6

Petroleum engineers seconded overseasThe FactsPetroleum engineers of an Oil & Gas company in Malaysia since 1990. Carry out data analysis and

interpretation of technical studies for formulation and implementation of petroleum engineering projects. Overseas for a period of 1 to 3 years with effect from 2007. The employer in Malaysia credited the employee‱s bank account with the monthly remuneration but did not bear the remuneration of the employee for the duration of the overseas secondment. The remuneration was recharged to the companies overseas. The ArgumentsCompany overseas was responsible for the decision making and issued all the instructions. The company overseas bore the risks and received the benefits from the work that was carried out by the employees seconded overseasbased on the decisions of the overseas company. Although the duties performed as a petroleum engineer in both Malaysia and overseas were similar, the work done overseas was determined by the overseas company which bore all the risks and enjoyed the benefits from the completed job. The overseas duties were not connected to and not part and parcel of the duties in Malaysia. The duties performed overseas were for an independent purpose as all the instructions were issued by and all reports were made to the overseas companies. DecisionThe overseas duties are not for an independent purpose but to further the purpose of the employer in Malaysia, which is responsible for the decision making of the work done overseas. Furthermore, the employer in Malaysia bears all the risks and receives the benefits from the work that was carried out (based on its decision making) by the employee overseas.

Case Law 7

LIM MOON HENG @ LIM BOON SIANG V THE GOVERNMENT OF MALAYSIA & ANOR (2002) MSTC 3, 957 (HIGH COURT)The FactThe taxpayer, an adjudged

bankrupt, had applied to the Official Assignee (" OA") for leave to travel outside Malaysia and a bank guarantee of RM 50, 000 was furnished. The taxpayer then instructed his advocates to write to the IRB to seek leave to travel outside Malaysia. The application was rejected by the IRB under Section 104 of the ITA unless the income tax assessment of RM197, 140. 09 was settled in full or a bank guarantee of RM200, 000 is furnished. The ArgumentsThe taxpayer argued that the ITA is only applicable to a person who is not adjudged as a bankrupt and was therefore not applicable to the taxpayer who was an adjudged bankrupt. The only appropriate legislation governing the affairs, interests and assets of the taxpayer being an adjudged bankrupt was therefore the Bankruptcy Act, 1967 (" BA"). It was further argued that the defendants by submitting their claims for unpaid income tax revenue from the taxpayer to the OA, the OA under Sections 8, 24(4) and 58 of the BA has jurisdiction over all affairs in respect of the assets and interests of the taxpayer and that the IRB is therefore the same as any other creditor of the plaintiff. It follows that the IRB therefore has no authority to intervene by issuing a Section 104 certificate under the ITA. As such, the IRB had no right or jurisdiction to restrict or hinder the taxpayer’s freedom of movement as guaranteed by the Federal Constitution by prohibiting the taxpayer from travelling freely out of Malaysia under Section 104 of the ITA. RespondentThe IRB had the right to restrict the Defendant pursuant to Section 104 of the ITA. Decision(1) Both the BA and the ITA have distinct applications and as such the question of which of the two Acts take precedence over the other does not arise. The ITA was enacted to regulate the collection of revenue of the country and the BA is to protect the creditors’ interests(2) Where a

bankrupt did not owe the IRB any tax, Section 38(1)(c) of the BA was applicable and the OA was the full and final authority to grant leave to a bankrupt to travel abroad. On the other hand, where the taxpayer still owed tax to the IRB or where the IRB had filed a claim with the OA, although the OA had granted leave to a bankrupt to travel abroad, the Director General of Inland Revenue (DGIR) still retains the power under Section 104(1) of the ITA to stop the bankrupt from leaving unless he has fulfilled certain conditions imposed therein.(3) An international passport was not " property" as defined under Section 2 of the BA. Since the taxpayer's international passport was not vested in the OA, the IRB still possessed the right to stop the taxpayer from leaving Malaysia unless he fulfilled the conditions stipulated.(4) Where a bankrupt had settled his tax and was granted leave by the DGIR to travel abroad, the bankrupt still, under Section 38(1) of the BA required the approval of the OA for such trips if he owed other claimants.

Case Law 8

PARAMOUNT (M) (1963) SDN BHD V PESURUHJAYA KHAS CUKAI PENDAPATAN & ANOR (2002) MSTC 3, 908 (HIGH COURT)The FactsThis case concerned a taxpayer seeking a Declaratory Order before the High Court, that proceedings in the income tax appeal to the Special Commissioners was invalidated and thereby the Deciding Order of the Special Commissioners was invalid on grounds, inter alia, for the failure of the DGIR to comply with section 140(5) of the ITA and rules of natural justice. In this case, following investigations conducted by the DGIR, it was alleged that the taxpayer was evading tax. Accordingly, there were " fictitious purchases" and " fictitious lodgments" amounting to willful misconduct by the taxpayer. However, in

spite of the mandatory statutory requirement expressly provided for under section 140(5) of the ITA, no particulars of the alleged willful misconduct were provided to the taxpayer with the Notice of Assessments. The DGIR merely provided a " Summary of Account Irregularities". The chronology of proceedings commenced with the taxpayer seeking leave to apply for an Order of Certiorari (" the Certiorari Application) to quash the assessments. The High Court granting leave, at the same time granted an Interim Order that " all proceedings arising from or relating to or for enforcement of the assessments be stayed" until the Certiorari application is disposed of and determined (" the Interim Order"). Notwithstanding the Interim Order, the taxpayer had requested the DGIR to forward the appeal to the Special Commissioners, CPA Tax & Investment Review 2003 242 which the DGIR did. As a result, the Certiorari Application was adjourned. Later when the Certiorari Application was heard, the application was dismissed. (The taxpayer appealed against the dismissal to the Court of Appeal). When the appeal before the Special Commissioners was heard, it was ruled that there was " fraud or willful default or negligence committed by the taxpayer under section 9(3)" of the ITA. The taxpayer then appealed against the Deciding Order by way ofCase Stated. Upon reviewing of the relevant papers, the new solicitors engaged at that time advised the taxpayer that the proceedings before the Special Commissioners were held in direct breach of the High Court Order which ordered a stay of proceedings. This and the aforesaid contravention of section 140(5) of the ITA formed the " grave concerns" which were brought to the attention of the Special Commissioners, where it was decided that taxpayer seek a Declaratory Order on the validity of the

appeal. The ArgumentsSection 140 of the ITA is a power given to the respondent to disregard certain transactions. It is not a provision for making an assessment but for making adjustments as the respondent thinks fit, with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction. As such, the fundamental rules on natural justice, in particular, audi alteram partem (hear the other side), had no application in relation to the respondent in the circumstances of the case. A taxpayer can never seek judicial review under Order 53 of the Rules of the High Court 1980 as section 99 of the ITA provides taxpayers with a statutory right of appeal to the Special Commissioners. As such, the High Court Order or any other order obtained for judicial review proceedings would be null and void and can be ignored. DecisionHeld: The applicant's appeal was upheld on the following grounds:(1) In order to enable the applicants rightfully to discharge the burden of disproving the assessments, the applicants require particulars thereof. The respondent's failure toprovide these particulars to the applicants would not only be a breach of its statutory duty under section 140(5) of the ITA but also a breach of the rules of natural justice, if not an outright denial of justice itself.(2) In addition, since an adjustment under section 140(1)(c) of the ITA would inevitably encompass an additional assessment or an ordinary assessment, the law imposes a duty on the respondent to furnish the applicant with" particulars" of the adjustment. This is also a correlative requirement under the rules of natural justice which provides for disclosure of particulars in order to give the applicants reasonable opportunity to set out its case and appeal against the assessments.(3) The existence of an alternative remedy is not a bar to

judicial review and cannot operate to oust the jurisdiction of the High Court, much less render the High Court Order null and void. Where there are genuine grounds for judicial review, it is the refusal rather than the grant of the relief which is the exceptional case. Case Law 9HO SOON GUAN V KETUA PENGARAH HASIL DALAMNEGERI (2002) MSTC 3, 887 (HIGH COURT)The FactsThe above case was an appeal by the taxpayer to the High Court from the decision of the SC reported as HSG v. Ketua Pengarah Dalam Negeri, [(2000) MSTC 3, 170]. In the abovementioned case, the taxpayer who worked for a Bank, suffered from a illness which required him to wear a neck collar. In 1997, the Bank introduced a Separation Scheme for Resident Officers. It was open to officers who were, inter alia, suffering from illnesses. However, an employee was not required to furnish any reasons to participate in the Scheme, and similarly the Bank was not obliged to furnish any reason for accepting or rejecting an application. The taxpayer opted for early retire-CPA Tax & Investment Review 2003 236 ment under the Scheme and his application was accepted. He received an amount of RM390, 437 under the Scheme. The amount was brought to tax after deducting the amount exempted of RM4, 000 per completed year of service pursuant to Paragraph 15(1)(b), Schedule 6 of the ITA. The SC dismissed the taxpayer’s appeal and held that the taxpayer’s loss of employment was because he participated in the Scheme and not because of any other reasons. The taxpayer’s loss of employment was a choice made by the taxpayer underthe Scheme which required no reason to be stated in the application nor did the Bank need to specify the reason for approving. As such, the SC held that the compensation qualified for exemption pursuant to only Paragraph 15(1)(b), Schedule 6 of

the ITA. The ArgumentThe taxpayer contended that the compensation was for loss of employment due to ill-health and therefore he was entitled to total exemption under Paragraph 15 (1)(a), Schedule 6 of the ITA. DecisionHeld: The taxpayer's appeal was dismissed. The High Court held that the SC was correct in deciding that the decision to be made was based on a question of fact. In this case, it was to be decided whether the compensation received by the taxpayer was received for loss of employment as a result of ill health or not. The SC's decision was based on the findings of primary facts and was not ex facie bad in law. The SC's findings that ultimately the taxpayer had retired and received the compensation under the Scheme and not on account of his ill health, was not wrong in law. Case Law 10KETUA PENGARAH HASIL DALAM NEGERI V MULTI PURPOSE HOLDINGS BHD (2001) MSTC 3, 880 (HIGH COURT)The FactsThe taxpayer was an investment holding company deriving the following income:- dividends from the holding of shares;- interest from the granting of loans and advances to related companies as well as from the placing of funds on short-term deposits- rental and plantation incomeFor the years of assessment 1982 – 1988, the IRB treated each counter of share investment, each loan/advance and each deposit as a separate source of income, and thereby segregated the income producing sources from the non-income producing sources. The Arguments(1) The IRB's assessments were incorrect in law in that the dividend income and interest income should have been treated as singular sources however or wherever derived.(2) The scheme by which chargeable income is to be ascertained as set out in the ITA had been ignored by the IRB. The sub-division of each source of income as proposed by the IRB was

not authorized by law.(3) There was a failure on the part of the IRB to recognise that income from all sources have to be aggregated pursuant to section 43, ITA. DecisionHeld: The IRB's appeal was dismissed for the following reasons:(1) The manner in which a taxpayer's chargeable income should be ascertained, as set out in section 5(1)(c), ITA is relevant. This section makes reference to " a source consisting of a business", as well as other sources. The other sources must therefore relate the classes of income set out in section 4, which would include a " dividend" source and an " interest" source under section 4(c). Section 4(c) would have been worded differently if Parliament had intended each share counter and each loan to be treated as a separate source.(2) The ITA adopts a comprehensive description of sources in section 4, and imposes tax upon gains and profits of a taxpayer as classified under section 4. There is no sub-division of these classes, and hence the IRB has no authority to further subdivide or disintegrate the groupings of profits and gains as set out in section 4. Case Law 11P. C. SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI(2002) MSTC 3, 469The FactsThe taxpayer was granted investment tax credit in 1980 but commenced business only in December 1983. In the year of assessment 1985 (basis period 1 December, 1983 to 30 April, 1984), the taxpayer claimed investment tax credit (ITC) on qualifying capital expenditure of RM4, 786, 512 of which the amount of RM1, 950, 136 was incurred prior to commencement. The claim for ITC for the amount of RM1, 950, 136 was rejected by the IRB. The Arguments(1) The IRB's claim that ITC was disallowed on the amount in question as the assets were not in use in the year of assessment 1985 was erroneous as the taxpayer had

commenced operations in December 1983. In the event that the IRB's basis of contention is upheld, the deeming provision as provided for in Paragraph 55, Schedule 3 of the ITA would be defeated.(2) The interpretation of Section 26(1) of the IIA should be done in such a way so as to promote the purpose of the IIA, that is, for the establishment and development inMalaysia of industrial and other commercial enterprises for the promotion of exports and for incidental and related purposes.(3) In order to avoid any ambiguity whatsoever, Section 26(1) of the IIA should be read together with Paragraph 55, Schedule 3 of the ITA (which deems capital expenditure incurred prior to the commencement date as having been incurred on that date itself). DecisionThere was no doubt or ambiguity as to the wordings of Section 26 of the IIA. As such, the Special Commissioners (SC) was bound to give those words their natural and ordinary meaning. No absurdity nor injustice would arise by their doing so. There are two conditions to fulfill in order to qualify for ITC: The capital expenditure must be incurred in the basis period for the year of assessment; and (ii) The assets are used in Malaysia in the basis period. Whilst the second condition was fulfilled, the first was not. As such, ITC cannot be granted as Section 26 of the IIA has not been complied with. Case Law 12M HOLDINGS SDN BHD V KETUA PENGARAH HASIL DALAMNEGERI (2002) MSTC 3, 403The FactThe taxpayer was incorporated as a joint venture company in1984. Its principal activity was that of property development. In May 1989, real property (" the subject property") was injected into the company at a cost of RM25 million. The subject property appeared as fixed assets in the annual accounts for the years ended 31 January, 1990 and 1991 respectively. From the years ended 31 January 1992

to 1994, the subject property was classified as ‘ current assets’ and in the year ended 31 January 1995, it was shown under ‘ fixed assets’ as ‘ investment property’. On 11 April, 1995, (four days after the signing of the 1995 accounts), the subject property was sold. Thereafter, pursuant to an agreement between the taxpayer and one of the joint venture parties, a sum of RM2, 000, 000 was paid to the latter on account of the delay in the development project by the taxpayer. The taxpayer submitted a Real Property Gains Tax (RPGT) return and the IRB raised an RPGT assessment. Subsequently, the IRB substituted the RPGT assessment with an income tax Assessment under Section 4(a) of the ITA. The taxpayer appealed. The ArgumentsThe disposal of the subject property was a realization of a capital asset as the business of the taxpayer had not commenced, and in any case, the business was not one of developing and selling properties, but was one of developing property for investment purposes. If the disposal were to be subject to income tax, then the principle in DGIR v. LCW (1975) 1 MLJ should apply and the cost to the business should be taken to be the market value of the property at the time of the transfer from the fixed asset account to the current account. The payment of RM2, 000, 000 to the joint venture party should be deductible in arriving at the taxpayer’s adjusted income. DecisionThe intent to develop the property for sale was clear from the joint venture agreement, and the taxpayer’s acts and conduct also showed the intention to treat the subject property as trading stock, rather than as a fixed asset. The dominant intention for the acquisition can be determined by considering the badges of trade. In the present case, the inference of intention was that of " an adventure in the nature of trade". Further, as the

company described itself as a " property developer", prima facie, its activity must have been that of carrying on the business of property development for sale rather than investment. Additionally, the memorandum of association did not authorize the taxpayer to purchase land for investment. With respect to the applicability of the DGIR v. LCW case, in the latter case, the subject property was transferred from fixed assets to stock-in-trade and hence the market value of the property at the date of transfer was a cost to the business. In the present case, the subject property has been found to be trading stock from the outset and hence the DGIR v. LCW case does not apply. Further, the necessity in costing the stock would only arise where there is an appropriation of stock from one category to another, and in the present case, the transfer of the subject property from current assets to fixed assets on the grounds that it was for long-term investment, and thereafter its sale (4 days after having approved and signed the accounts) was not valid appropriation of the asset. Case Law 13MB v. KETUA PENGARAH HASIL DALAM NEGERI (2004)MSTC 3, 536 (SPECIAL COMMISSIONERS OF INCOME TAX)The FactsMB, the appellant was a body corporate presently established under Section 41 of the Legal Profession Act 1976 [" LPA"]. Members of MB were advocates and solicitors admitted and enrolled under the LPA. Its members did not become members on their own volition but they were required to do so by virtue of Section 43 of the LPA. The main object of MB as provided under Section 42(1)(a) of the LPA was " to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour". MB received the following types of income from its members:-● Subscriptions, which were allocated for

various purposes such as to the Library Fund, Sports Fund, Scholarship Fund, Building Fund, Law Conference Account, etc.● Contributions to the Legal Aid Centre Fund, Building Fund, Compensation Fund, etc.● Donations for the specific purpose of the Defence Fund● Interest income on deposits of various funds consisting of " Subscriptions" and " Contributions". MB did not carry out any other trading or business activity for gain. All its activities were governed by the need to act in the public interest and interests of justice. The Minister of Finance [" MOF"] granted tax exemption status to MB in relation to its income other than income derived from its Compensation Fund and dividends. Despite having obtained a specific Ministerial exemption in terms of P. U.(A) 4/1996, MB had sought clarification on its tax exemption status under Section 142(2) of the LPA both from the MOF and DGIR. While awaiting the clarification, the DGIR sent Forms T to MB to be completed and filed pursuant to the Income Tax Act 1967 (ITA). On 20 November 1986, MB returned the Forms T without completing the same as MB contended that it was tax exempt and it was awaiting confirmation of its status. However, on 2 January 1987, the DGIR wrote to MB directing that it file the Forms T for the years of assessment 1979 to 1991. Meanwhile, the DGIR informed MB that no assessments would be raised until the appellant's status was clarified. Following this direction by the DGIR, MB then wrote to the DGIR that it would file the Forms T on the basis that it was tax exempt and it derived no chargeable income. On the same basis, MB did not claim any revenue expenditure, capital allowance or any other statutory allowances or deductions at the time of filing Forms T. Due to the time taken in determining the status of MB, the DGIR had on 16 December 1991 raised

assessments upon MB on the basis that MB was a trade association deriving business income chargeable to tax for the years of assessment 1979 to 1991. Collection of the tax was stood over until August 1995. MB objected to being classified as a trade association and appealed against the assessments. The Argumentsa) MB contended that it was a non-profit institution incorporated under the LPA and was not created by its members. b) The intention of Parliament was to exclude any liability to tax and typographical errors had crept into the LPAwhen Section 142 of the LPA was drafted. c) The appellant submitted that in any event, Section 53 of the ITA did not, apply to MB. d) Interest income derived from the Compensation Fund was statutorily exempt from tax. e) In the event MB were held to be a trade association under Section 53 of the ITA, the DGIR had no power o deny MB the right to claim all or any of the expensesand allowances available for deduction under the ITA in computing the chargeable income of MB. DecisionThe appellant's appeal was allowed. B was held to be not liable to income tax by virtue of Section 42(2) of the LPA. Based on the language used in the provision f Section 142(2) of the LPA and adopting a purposive approach n interpreting the statutory concerned, it was evident that arliament had clearly envisaged an intention to grant an xemption to the appellant from income tax. The drafting error n Section 142(2) of the LPA did not impair the intention of rliament as envisaged under the law. Case Law 14MDD v KETUA PENGARAH HASIL DALAM NEGERI (2004)MSTC 3581 (SPECIAL COMMISSIONERS OF INCOME TAX)The FactsSyarikat Hamidi Sdn Bhd (" the company") was incorporated on 6 March 1974. On 16 December 1975, the taxpayer transferredtwo properties to the company in return for an

allotment of hares. These shares were subsequently disposed of on 18 December 1989. The DGIR issued a Notice of Assessment dated 6 December 1998 requiring the taxpayer to pay real property ains tax (RPGT) on the gain from the sale of the real property company RPC) shares. The taxpayer appealed against the Notice. The ArgumentThe of acquisition of the shares is the date of registration of the transfer of the two roperties by the taxpayer to the company, i. e, on 16 December 1975. This is evidenced by the Form 14A which was properly stamped and executed. Even though the Company is a RPC pursuant to paragraph 34 A(6)(a)of Schedule 2 of the Act, this provison is only applicable to companies which acquired properties after 21 October 1988. Since the said shares were disposed of on 18 December 1989 which was 14 years after the acquisition date of 16 December 1975, the gain made is not subject to RPGT as provided under Schedule 5 of the Act. DecisionParagraph 34A, Schedule 2 of the Act was enacted for the purpose of imposing RPGT on the gains arising from the disposal of shares in a RPC and to prevent the avoidance of RPGT by way of selling shares in a RPC as stated in the Explanatory Statement of Finance Bill1988. As such, to give an absolute interpretation to paragraph 34A to catch all holders of shares in a RPC as contended by the DGIR would go againstthe intention of the Act of Parliament. Therefore, in applying the law of the facts of the case the taxpayer did not use the company in order to purchase land and then disposed of the shares in the company as it is evident from the facts that the taxpayer had transferred his two properties to the company on 16 December 1975 and in consideration thereof was allotted the said shares. Thus, paragraph 34A is not applicable to the taxpayer. The acquisition date of the

shares is the date of transfer of the land by the taxpayer to the company, i. e, on 16 December 1975 as provided under paragraph34A(2)(b) of the Act. Since the date of acquisition of the shares was more than 6 years from the date of disposal on 18 December 1989, the rate of tax is NIL as provided under Schedule 5 of the Act. Case Law 15ONG BEE YAM v. PENGARAH HASIL DALAM NEGERI, SARAWAK & ANOR (2003) MSTC 3, 979 (HIGH COURT OFSABAH & SARAWAK)The FactsThe Director General of Inland Revenue (" DGIR") obtained judgement against Ong Bee Yam (" OBY"), the administratrix of the estate of a deceased individual (Polycarp Soon), for the income tax due from the deceased on 30 June 1989. Subsequently, almost 10 years later, on 26 April 1999, the DGIR issued a certificate under Section 104 of the Income Tax Act 1967 (" the Act") to prohibit OBY from leaving Malaysia on account of unpaid tax due from the deceased. More than 2 years later, on 13 September 2001, OBY submitted an application for a declaration that:■ OBY is not to be personally liable for the debt due from the estate of the deceased;■ the certificate dated 26 April 1999 issued by the DGIR is null and void; and■ the judgement debt is statute-barred and no longer payable. The ArgumentOBY claimed that, in her representative capacity as the adm inistratrix of the estate of the deceased, she was not held to be personally liable for the payment of debt due from the estate of the deceased and hence, the debt could not be said to be payable by her. As she did not personally owe the debt, the certificate dated 26 April 1999 issued by the DGIR is null and void. In addition, the judgement debt is time-barred under item 98 of the Schedule to the Sarawak Limitation Ordinance, which provides for a limitation period of 12 years from the date of the judgment.

DecisionOBY shall not be personally liable for the debt due from the estate of the deceased on the basis that the tax payable is only a debt due from and payable out of the estate of that deceased individual [Section 74 (4) of the Act], provided that she has not distributed the estate to the heirs or beneficiaries without first having discharged all the legally recoverable debts contracted by the deceased. The certificate dated 26 April 1999 issued by the DGIR against OBY (barring her from leaving Malaysia) is null and void as the plaintiff did not personally owe the debt. The defendants were not barred from enforcing the judgement debt against the estate as there was no express provision or necessary implication in the Ordinance (by virtue of the doctrine of Crown immunity and Section 27 of the Interpretation Act, 1967) that applied to the Government. Case Law 16LIM TIAN HUAT v. KETUA PENGARAH HASIL DALAMNEGERI (2003) MSTC 3, 998 (COURT OF APPEAL)The FactsThe appellant was appointed as the receiver and manager of a company (" the taxpayer") on 14 February, 1994. Subsequent to the appointment, the taxpayer received two notices of assessment and also notifications of increase in income tax for both the years of assessment 1993 and 1994 (" the federal tax"). The taxpayer then sought the direction of the High Court on the Director General of Inland Revenue’s (DGIR) priority of claim in relation to the federal tax over payments to be made to thedebenture holders. The High Court ruled that the where a taxpayer was under receivership as opposed to a winding-up, federal tax had to be paid in accordance with the relevant tax law. In this case, the issue of whether federal tax was a preferential debt or not did not arise. Consequently, the appellant appealed against the decision of High Court. The ArgumentsThe

federal tax was not ranked as a preferential debt on the appointment of a receiver as provided in Section 191 of the Companies Act 1965 (CA). Thus, the federal tax had no priority over payments to be made to the debenture holders. The DGIR contended the fact that since federal tax has to be paid by virtue of Section 103 of the ITA, priority should be accorded to federal tax over other payments to be made to the debenture holders. DecisionThe Appellant's appeal was allowed and it was held that theincome tax due to the DGIR has no priority over the claims of the debenture holders. Where a receiver and manager is appointed (not in the case of a winding up) under Section 191 of the CA, income tax (federal tax) is not one of the preferential debts and therefore, theranking provided in Section 292 of the CA does not apply. Section 103 of the ITA only covers the provisions for the payment of tax assessed (i. e. tax became due and payable upon service of the notice of assessment) and it does not mention anythingabout priority. Accordingly, the DGIR could not rely on Section 103 to claim priority. Case Law 17KETUA PENGARAH HASIL DALAM NEGERI V DATO' HANIFAH NORDIN (2003) MSTC 4007 (HIGH COURTOF MALAYA)The FactsThe taxpayer was a partner in Ernst & Whinney (the firm) in accordance with the terms and conditions of a Partnership Deed dated 1 September 1981. On 1 July 1990, the firm merged with another firm. However, the merger could not be effected as 3 partners had voted against it. Subsequently, under the terms of a settlement agreement dated 31 July 1990, the dissenting partners agree to retire thus enabling the merger to be regularised. On 1 July 1990, a new partnership named Ernst & Young came into existence and therefore, the whole business structure was changed. The taxpayer was paid a compensation amount of

RM1, 199, 651 in 23 equal instalments and RM20, 262 being adjustment payments. These amounts were described as consultancy payments in the accounts. The compensation was predetermined, based on 1. 5 times the firm's 1989 profits and was not related at all to the firm's profits for the year of assessment 1991 and 1992. The payments were also made in consideration of the taxpayer :(a) agreeing to cease as a partner on 31 July 1990 ;(b) losing all rights in the said partnership ;(c) waiving all rights to challenge the merger ; and(d) agreeing to refrain from taking any legal action in respect of the said merger. The taxpayer did not participate in the new or old partnership after 31 July 1990, did not execute any consultancy agreement with the new or old partnership, and did not do any consultancy work for the new or old partnership. The Argumentsthe sums paid are capital consideration for retirement the partnership due to the change in the business structure of the old partnership ; alternatively, the sums paid are withdrawal of capital in respect of the goodwill upon retirement and therefore, capital in nature; alternatively, the consideration received is for loss ofrights under the partnership agreement dated September 1981 ; the condisration received is for all the 3 factors stated above as well as for refraining from competition and therefore, are capital in nature ; the payments are not consultancy payments. DecisionAlthough the compensation amount and adjustment payments were reflected as consultancy payments in the partnership accounts, it is settled law that howparties describe a payment did not decide or determine the nature of payment. The payments received by the taxpayer was capital in nature as these were paid for his retirement from the partnership, agreeing to lose all

his rights under the partnership agreement and taking no legal action against the partnership or to compete with the partnership. The payments were capital even though they were calculated by reference to work in progress. The method of calculation did not in any way make the payments income. Case Law 18KERAJAAN MALAYSIA v. BEYOND GATEWAY SDN. BHD. (2003) MSTC 4, 045 (HIGH COURT OF MALAYA)The FactsA Notice of Assessment [" Form J"] in respect of the year of assessment 1998 for the amount of RM16, 161, 412. 42 was issued to the taxpayer. As this had not been settled, the Director General of Inland Revenue (DGIR) brought a legal suit against the taxpayer pursuant to Section 106(1) of the ITA to recover the outstanding amount. The DGIR was granted a summary judgement for the outstanding tax payable at the first instance hearing before the senior assistant registrar on the basis that there was no defence to the claim. The taxpayer appealed to a Judge in Chambers against the decision of the senior assistant registrar on the grounds that there were triable issues which ought to proceed to full trial. The ArgumentsThe taxpayer argued that the senior assistant examiner did not have the authority to affirm the affidavit submitted by the DGIR; and The certificate that was signed by the former DGIR was invalid. DecisionThe taxpayer’s appeal was dismissed on the basis that the appellant had failed to raise any triable issue against the respondent’s summary judgement. " M" was authorized by the relevant provisions of the legislation. As such, the affidavit deposed by " M" was in order. The certificate granting authorisation to " M" that was signed by the former DGIR was still valid and subsisting. Case Law 19KETUA PENGARAH JABATAN HASIL DALAM NEGERI V ENESTY SDN BHD (2003) MSTC 4, 053The

FactsThe taxpayer's tax agents had requested that the IRB issue notices of assessment under Section 96(1) of the ITA for 1982, 1983 and 1984. The IRB replied that notices of assessment could not be issued because the taxpayer had no chargeable income. The IRB could only produce tax computations, which showed nil chargeable income for those years. The taxpayer appealed against the decision of the High Court in refusing to grant an order of mandamus to direct the IRB to issue and serve on the taxpayer notices of assessment for those years of assessment. The ArgumentsThe IRB had made an assessment for those years and was therefore bound by Section 96(1) of the ITA to cause notices of assessment to be issued to the taxpayer. The IRB has a statutory duty to make an assessment. An assessment is not just the piece of paper, but it is the official act or operation. This means that any work or exercise done by the IRB to ascertain whether or not a person has chargeable income is the making of an assessment. DecisionIt is a question of construction whether Section 90(1) of the ITA makes it mandatory that an assessment must be made in the case of each person who has delivered a return under Section 77 of the ITA. Based on Section 90(1) of the ITA, since in every case the IRB has to determine either from the information given in the return or by using their own judgment, whether the person concerned has chargeable income and what is the amount, it is by implication that Section 90(1) of the ITA requires that an assessment has to be made only if there is chargeable income. The efforts made by the IRB to ascertain the assessment, could not point to an assessment being made by the IRB. Any work, inquiry or calculation done before that would not be the making of an assessment but an effort towards the making of an assessment. Pursuant to

Section 93 of the ITA, there is formality, ritual and deliberateness in making an assessment. The prescribed form must be used. The date on which the form is duly completed must be specified in the appropriate space in the form. Any other determination as to chargeable income or tax liability made in some other medium, for some other purpose other than for completion of the assessment form, or made before that date, is not, or is not yet the making of an assessment. As such, in view of Section 93 of the ITA and the fact that no assessment forms had been completed for the years of the assessment in question, no assessments had been in made in respect of those years and the IRB was under no duty under section 96(1) of the ITA to have notices of assessments served on the taxpayer. Case Law 20KETUA PENGARAH HASIL DALAM NEGERI V PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR (2003) MSTC 4, 059The FactsThe IRB had assessed the taxpayer to income tax by including to nclude income in arriving at the aggregate income of the taxpayer. In addition, the IRB had apportioned the gifts made by the taxpayer in arriving at the chargeable income. The Special Commissioners of Income Tax (the ‘ commissioners’) ruled that the gift made by the taxpayer should only be deducted against the non-exempt income. As such, the commissioners held that the assessments by the IRB were wrongfully made and ordered that it be revised accordingly. The ArgumentsIn the absence of a definition of the word ‘ income’ under Section 127(5) of the Income Tax Act, 1967 (ITA), the term income under the ITA should not be construed as a technical word with specific meaning like adjusted income, statutory income, aggregate income, total income and chargeable income. As such, pursuant to Section 2(2) of the ITA, income

under Section 127(5) of the ITA must mean gross income. DecisionThe legislature would have inserted a special provision if there was an intention that gifts made in relation to the liability to income tax ought to be deducted in proportion to the dividend income as well as the business income exempted from tax. On the matter of levying tax, the reliance on logic is misplaced considering that a tax statute imposes pecuniary burdens on the subject. Case Law 21KERAJAAN MALAYSIA V ONG KAR BEAU (2003) MSTC 4, 061The FactsThe taxpayer had failed to pay tax due to the Government of Malaysia (the ‘ plaintiff’) and as a result penalties were imposed. The plaintiff then filed a writ to recover the sum and penalties due. Subsequently, the plaintiff sought to enter summary judgment against the taxpayer. The taxpayer then lodged an appeal to the Special Commissioners of Income Tax (the ‘ commissioners’) and submitted that the assessment and penalties raised by the plaintiff was excessive and incorrectly assessed. The senior assistant registrar allowed the plaintiff’s application for summary judgment. The taxpayer filed against an appeal. The ArgumentsThe amount claimed was payable notwithstanding the lodgement of the appeal. The challenge by the defendant that the tax raised was excessive and incorrectly assessed was no reason that the court could not enter summary judgment against the taxpayer. DecisionThe tax payable under the assessment becomes due and payable upon service of a notice of assessment on the person assessed, whether or not that person appeals against the assessment. The failure to pay would attract penalties provided under sections 103(4) and 103(5A) of the Income Tax Act, 1967. The amount assessed and penalty imposed can be recovered by way of civil proceedings as a debt due to the government.

The High Court sitting on appeal against the decision of the special commissioners by way of case stated is the proper forum to hear the taxpayer's challenge against the assessment. Case Law 22KOPERASI SERBAGUNA KEBANGSAAN BERHAD v. PEMUNGUT DUTI SETEM (2004) MSTC 4, 091 (HIGH COURTOF MALAYA)The FactsKoperasi Serbaguna Kebangsaan Berhad (the plaintiff) was a co-operative society incorporated under the Co-operative Society Act 1993. The plaintiff purchased a property and entered into a sale and purchase agreement dated 24 May 1995. Accordingly, the appropriate forms for the adjudication of the stamp duty payable for the transfer under Section 35 of the Stamp Act 1949 (the Act) were submitted to the Collector of Stamp Duty (the defendant) and stamp duty of RM30, 000 was paid on 10 October 1995. On 6 August 1997, the plaintiff became aware that pursuant to Section 35 (General Exemptions) First Schedule Paragraph 5 of the Act, co-operatives were exempted from paying stamp duty. As such, the plaintiff sought for a refund of the stamp duty already paid. However, the defendant rejected the claim for refund on the grounds that Section 57 of the Stamp Act 1949 was applicable. The ArgumentsOn the basis that it was a co-operative society, the plaintiff argued that it was exempted from paying any stamp duty pursuant to Section 35 (General Exemptions) First Schedule Paragraph 5 of the Act. As such, the defendant had wrongly imposed the stamp duty on the purchase of the property. Based on Section 57 of the Act, the defendant contended that the period for the application for a refund had lapsed as the application was made more than 12 months after the date of execution of the transfer instrument. DecisionThe defendant was wrong to rely on Section 57 of the Act for rejecting the plaintiff's claim for a refund as

this section provided for " Allowance for spoiled stamp" and this was not the case. The stamp duty exemptions provided under Section 35 (General Exemption) First Schedule Paragraph 5 of the Act are not granted automatically on all instruments executed. The onus was on the plaintiff to seek and apply for the exemption by submitting the relevant document to prove that it was to be exempted under the relevant provisions of the Act when submitting the appropriate form for the adjudication of the proper stamp duty. As this was not done at the time the forms were submitted, the defendant could not be held at fault in imposing the stamp duty. Finally, the plaintiff was not entitled to the refund because the application for a refund had surpassed the time limit of 12 months as specified under Section 58 of the Act. Case Law 23Zali was seconded to PakistanThe FactsSystem design expert for a US multinational company based in Malaysia since 1998. The resident company designs software worldwide through a number of its branches. Trained the staff at the IT Unit at the branch office in Pakistan. Assuming that RM2, 000 was paid. Duration working in Malaysia in 2008: 352 days. The ArgumentsAll decision making and instructions were issued by employer in Malaysia. Since Zali is a systems design expert who designs software, his job responsibilities would include training IT personnel to operate the system. As such, the duties he performed in Malaysia and overseas were connected or part and parcel of his duties with the company in Malaysia. DecisionZali’s duties in Pakistan are considered incidental to the exercise of his employment in Malaysia and his employment income is deemed derived from Malaysia. Although there is a tax treaty between Malaysia and Pakistan, this does not preclude Malaysia from taxing Zali’s

employment income for the duration he performed his services in Pakistan. For the year of assessment 2008, Zali will be taxed in Malaysia on the employment income derived from the exercise of his employment in Malaysia and Pakistan. The allowance paid by the branch in Pakistan is deemed derived from Malaysia since his duties in Pakistan is incidental to the employment in Malaysia and therefore it is taxable in Malaysia. Case Law 24Sabah Berjaya Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam NegeriThe FactsThis is a deductibility of expenses in respect of a business. The taxpayer was a wholly owned subsidiary of the Sabah Foundation (" the Foundation"). The Foundation was an institution of public character under the Sabah Income Tax Ordinance 1956, meaning that gifts of money made to the Foundation were tax deductible in the hands of the donor. By a letter dated 28 December 1979, the State Ministry of Finance indicated that it was the wish of the Government that surplus funds of subsidiaries be donated to the Foundation. Consequently, the taxpayer began donating surplus funds to the Foundation for periods of eight years. The Respondent raised notices of assessments for the years 1980 to 1987, disallowing the sums donated to the Foundation. The Taxpayer’s appeal to the Special Commissioners and the High Court were both dismissed. On appeal before the Court of Appeal, the taxpayer argued that the donations were gifts within the meaning of sec. 44(6) of the Income Tax Act 1967 (" the Act"), and that the payments did not amount to a means of tax avoidance under sec. 140 of the Act. The ArgumentsThe taxpayer argues that the gift of money to an approved institution was not deductible for tax purpose of tax avoidance Income Tax Act 1967, sec. 44(6), 140. DecisionThe High Court fell in error in ruling that

the expression, " voluntarily" meant the absence of some external pressure upon the donor of a gift. The word " voluntary" or " voluntarily" is used to describe a transaction unsupported by valuable consideration. It is derived from the word, " volunteer" meaning a person who has given no valuable consideration for a trust or settlement. It has no relation whatsoever to do with gifts being made in consequence of illegitimate pressure being brought to bear upon the disposer. The Australian cases could not be relied upon as they did not refer to the situation of the making over of money or property by a person acting under pressure. Case Law 25Director General of Inland Revenue v Hypergrowth Sdn BhdThe FactsTaxpayer is a company incorporated under the Companies Act 1965 control by an individual he have 91% of share capital of the company. Taxpayer had acquired certain shares in Ngiu Kee Berhad which subsequently listed on second board of Kuala Lumpur Stock Exchange. The listing was promoted by the need to raise finance for the expansion of Ngiu Kee. Taxpayer enter into an agreement for sale the shares in Ngui Kee, which was triggered by sudden and unanticipated the deterioration in local and regional economy. The respondent of Hypergrowth Sdn Bhd (HSB) acquires shares in company on February 1997. While on June HSB was dispose the shares in Ngiu Kee Berhad, after the latter’s listing on Kuala Lumpur Stock Exchange. Hypergrowth Sdn Bhd was liquidated in 1999 pursuant to members’ voluntary liquidation exercise. Inland Revenue Board sought to tax Hypergrowth Sdn Bhd on gain arise from the sale of the Ngiu Kee Bhd shares in 1997. The receipt from the disposal of shares amounted to the capital gain is under the Special Commission ruled as following reasons; first is

Hypergrowth Sdn Bhd not carry any trading in shares and the case involve an isolated transaction of acquire and dispose of investment shares; second is the intention of the respondent at the acquisition of shares was hold the shares as long term investment. The shares were sold due to the concern arise from unanticipated deterioration in local and regional economies. The ArgumentsWhether an income constitutes the " gain or profits from a business" within the meaning of Section 4 of the Income Tax Act 1967 has been often to the subject of judicial consideration. The difficulty arises from the absence of clear definition in the ITA. Whether the taxpayer’s purchase of shares and disposal the constitute an " adventure in the nature of trade", thus bring such gain from the sales of share within the charge to income tax; or dispose is realization of capital assets, and the proceeds are not be taxable. DecisionHigh court decision may assist to shed of some light on this aspect of revenue law. The Inland Revenue Board appeal to the High Court against the decision of Special Commissioners who held the gain arise from the disposal of shares in the question was capital in nature and that are not taxable. High Court dismiss the Inland Revenue Board appeal, which found the Inland Revenue Board had not demonstrate the decision of the Special Commission based on misconception of the law or conclusion was not supported by the primary facts. Conclude that the Special Commission are right to draw the inferences lead to their conclusion. The Special Commission Income tax’s decision and held on primary facts admitted or prove, the Special Commission Income Tax were right in drawing inference lead to the conclusion and find by the Special Commission Income Tax are not able to disturbed on appeal. Taxpayer at all material times an investment company,

where the dominant purpose for the purchase of the shares, which isolate act and investment. Case Law 26LFC Sdn Bhd v Ketua Pengarah Hasil Dalam NegeriTHE FACTThe principal activity of the appellant was the provision of public transport service via sea route for passengers, vehicles and vehicles with cargo between the Labuan jetty and Menumbuk jetty in Sabah. The appellant leased three vessels belonging to the Sabah State Government to provide its service. The vessels were not registered as ships under the Merchant Shipping Ordinance 1952(" the Ordinance"). The appellant also owned a vessel, which was registered as a ship under the Ordinance and used in the business. The appellant sought exemption from income tax under s 54A of the Income Tax Act 1967 (" ITA") on the basis that the vessels used by the appellant were Malaysian ships and not ferries. The appellant also contended that the vessels need not be registered under the Ordinance as they belonged to the Sabah State Government. The ArgumentsHe respondent rejected the income tax exemption sought by the appellant on the basis that the vessels were not registered under the Ordinance. Further, the respondent argues that even if the vessels were Malaysian ships, they did not qualify for exemption under s 54 A of the ITA as the vessels were ferries and not ships. DecisionThe court held that appeal was allowed. The vessels need not be registered under the Ordinance as they belonged to the Sabah State Government. The respondent’s argument that only vessels belonging to the Agong, State Rulers and State Governors were exempted from registration under Ordinance was rejected. Although the vessels were not registered under the Ordinance, they were still Malaysian ships as they belonged to the Sabah State Government. Based on their size and usage, the

vessels were " Malaysian ships" as envisaged under s 54 A of the ITA. The respondent’s contention that the vessels were " ferries" was without any basis. Case Law 27Ketua Pengarah Hasil Dalan Negeri v Malaysian BarThe FactsTaxpayer is an institution functioning within the provision of Legal Profession Act 1976, its members are Advocates and Solicitors admit and enrol under LPA or precedent Act. The income was receiving on year assessment 1979 to 1991 by taxpayer, which were respect of subscriptions, contributions and donations from members. Director of Inland Revenue Board had raised the assessment on these incomes. Minister of Finance by powers are under section 127(3)(b) of Income Tax Act, that had granted the taxpayer tax exemption in relation to its income other than income derives from Compensation Fund, dividend income and development income. Director treats taxpayer as trade association within the ambit of section 53 of ITA and taxed interest income derived from the Compensation Fund for year assessment 1979 to 1991. Raising the assessment to tax, appellant has treated the respondent as trade association within the ambit of section 53 of ITA 1967. The object to this treatment on the basis of section 53 of ITA is inapplicable and should section53 of ITA, 1967 is applicable, the judicially recognised that the principle of mutuality would apply. The ArgumentsAppellant argue that the SCIT had erred in law by fail to consider that section in statue constitute the principle or enact the part of statute. The Appellant’s counsel argue that the duty bound of Malaysian Bar to bring forward to Parliament for any amendment to made and include the amendment to any error found in LPA. Malaysian Bar has failed to make the effect to such amendment; it cannot invoke section 142(2) of LPA to its

benefit. DecisionThe Special Commissioners were correct to have gone through the historical basis. There clearly is a draft error due to the oversight of drafter of legal profession bill and ambiguity in the bill, it must be construed in favour of taxpayer and provision approach should taken in interpretation of ITA and LPA instead of literal approach to ensure there was no surplus age and absurdity. For organization the term of " trade association" in the context of income tax legislation, must satisfy all the condition which include it formed by two or more persons for common cause; member are voluntarily got together to form the association; object of the association is produce income, profits or gains. Those condition was not satisfied, the organisation could not be recognised as an " association of persons" for tax purpose. Section 80(13) of LPA that are clearly stipulated that the taxpayer be exempted from the tax on Compensation Fund and that was constituted under the Article 96 of the Federal Constitution. The general rules of the tax law is liable to tax, the subject matter must fall clearly within the words of charge impose tax. Appellant submit section 53 of ITA is to establishment of an association as well as activities, in order to ascertain whether an association falls under category of trade association within the ambit section 53 of ITA. Appellant submit the SCIT in case stated that had erred in law by having the considered certain objectives as provided by section 42 of LPA and conclude the respondent is not a trade association. Under section 42 of LPA, it clearly show the establishment and objectives of respondent are accordance with the main object stipulated for " trade association" under section 53(3) of ITA those is " safeguard and promote the business of members". Under section 57(e) of LPA, the respondent is

mandated to represent members of Malaysian Bar in any matter which may be necessary or expedient. Submission of Appellant that the Malaysian Bar is trade association, the income is deemed to be gross income from business by virtue of section 53(1)(a) of ITA. Malaysian Bar is not an " association of persons" because it lack the essential ingredients of an " association of person" which contain it not formed by members but by stature; the advocate and solicitors do not voluntarily become its member, and there is not volition on their part to be members; the object of Malaysian Bar is not to produce income, profit or gain; taxpayer is a creature of statute and primary object to uphold the cause of justice without fear. Case Law 28Kerajaan Malaysia v Kumpulan Pinang Hartanah Sdn BhdThe FactsThe plaintiff made a claim for unpaid real property gains tax. The defendant argued that it did not meet the definition of " chargeable person" in relation to the disposal of a chargeable asset, and there were no chargeable gains on the said disposal. Instead, the defendant argued it had an allowable loss under sec 7(1)(b) of the Real Property Gain Tax Act 1967 (" RPGT Act"). The ArgumentsThe court held the application is allowed because that similar to income tax cases, the principle that tax is to be paid although the assessment is in dispute applies to real property gain tax. The court cannot entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased. Section 21 (1) and 23(3) of the RPGT Act apply as the notice of assessment had been duly served on the defendant. Tax payable under the assessment becomes due and payable regardless of whether the defendant appeals against the assessment, and would be recovered by the Government by civil proceedings as a debt due to

the Government. The question of whether the assessment itself was proper is not for the court to determine. The proper avenue was for the defendant to appeal to the Special Commissioners of Income Tax. DecisionIt is to be noted that section 20(1) of the Real Property Gains Tax Act 1976 provides that an assessment shall become final and conclusive as regards the amount of the tax assessed on the expiry of the time for appeal against the assessment. The contention by the Defendant is considered a plea which the court could not entertain. Case Law 29SE&TM Sdn Bhd v Ketua Pengarah Hasil Dalam NegeriThe FactsTaxpayer is a manufacture of electronic and electrical product which located in Subang Jaya, Selangor. In 1996, taxpayer was expand his business and move to a factory in Sungai Buloh. In between year assessment of 1996 and 1998, taxpayers try to claim and obtain reinvestment allowances on capital expenditure which incurred on Factory B. In 2001, taxpayer decide to build another factory which nearby to Factory B. The new factory are start to operation in July 2002, so that the taxpayer claimed the reinvestment allowances in year assessment 2002 on sum of RM12, 271, 088. 61 which incurred of RM11, 458, 177. 11 on the factory building and RM812, 911. 50 on plant and machinery. The reason for the Inland Revenue Board restrict the reinvestment allowances claim on new factory is because the Factory B was used as warehouse, and the area for the overhead crane, office spaces and meeting rooms were not part of the production area. IRB disallow the reinvestment allowances claimed on capital expenditure incur by taxpayer for the plant and machinery located in aforementioned areas. The ArgumentsThe taxpayer appealed to the Special Commissioners of Income Tax. The taxpayer argued that Schedule 7A of the

Income Tax Act 1967 does not provide for such restriction and that the words in paragraphs 1 and 8(a) of Schedule 7A must be given their ordinary meaning. The IRB contended that paragraph 8(a) restricted the meaning of " factory" in paragraph 1 to " manufacturing and processing only". The IRB stated the words " manufacturing and processing" in paragraph 8(a) allow for the restrictive meaning of " factory". The Special Commissioners allowed the taxpayer’s appeal and set aside the notice of additional assessment. DecisionThe Special Commissioners held that since the word " factory" was not defined for the purposes of reinvestment allowance, the ordinary and usual meaning of the word was to be applied. A factory is a building that is used to manufacture goods may contain areas for production and non-production. The restriction imposed by the IRB, which was based on its internal ruling, was without any legal authority and had no force of law. The " void" area for the overhead crane, office spaces, meeting rooms and the warehouse in Factory B were an integral part of the factory since the areas described above were part of the factory, reinvestment allowance was available on the capital expenditure incurred on the plant and machinery placed in those areas and the installation of air-conditioning, electrical fittings, partition rooms and lighting. Reinvestment allowances are available on capitalised interest expenses incur on the loan that raise to construct new factory, that are not penalty should been imposed as taxpayer that act in good faith, and made full disclosure and obtained professional advice. Taxpayer’s appeals are allow and Inland Revenue Board appeal to the High Court. Case Law 30SPM Sdn Bhd v Ketua Pengarah Hasil Dalam NegeriThe FactsThis is the deductibility of expenses in respect of a business. The

appellant, SPM Sdn Bhd, a company incorporated in Malaysia, entered into a franchise agreement with S Corporation (" SC"), a company incorporated in the United States of America on 6 August 1996. The agreement was for a duration of three years with an automatic option to renew, and could be terminated at any time by providing three months' notice. Under the franchise agreement, the appellant was obligated to pay SC franchise fees equal to 8% of its gross turnover on a monthly basis; in return for which, the appellant received the exclusive right to trade within Malaysia using SC's multi-level marketing system, together with its continued support and assistance during the term of the franchise agreement. The appellant paid franchise fees to SC during the years of assessment 2000 (preceding year basis), 2000 (current year basis), 2001 and 2002; also paying withholding tax thereon under sec 109B of the Income Tax Act 1967 (" ITA"). The Inland Revenue Board (" IRB") issued notices of assessment for the years of assessment 2001 and 2002, disallowing deductions claimed for franchise fees paid to SC under sec 33(1) of the ITA, and imposing penalties. ARGUMENTThe appellant argues that the franchise fees qualified for a deduction under sec 33(1). The fees were a necessary part of the appellant's earning process, paid to obtain continuing services in order to meet the continuing needs of the business. The fees were also directly connected to the appellant's business and must be incurred to generate sales income. The terms of payment characterised the franchise fees as a recurring expenditure, not a lump sum payment. The fees paid did not give rise to the acquisition of any identifiable asset. DecisionThe franchise fees were revenue expenditure, incurred for the sole purpose of producing the

appellant’s gross income, and thus, allowable deductions under sec 33(1) of the ITA. The franchise fees were a necessary part of the appellant’s earning process and directly connected to its business. The fees had to be incurred to obtain continuing services to meet the continuing needs of its business in order to generate sales income. The Commissioners noted that the Privy Council, in BP Australia Ltd v FC of T [1965] 112 CLR 386, commented that the words " every year" must not be taken literally but be construed to mean expenditure which is incurred to meet a " continuous demand". The franchise fees were a recurring payment, not a lump sum payment made, and the fees were not paid " once and for all". Given the conditions of the agreement, the payment of franchise fees neither gave rise to an advantage of " enduring benefit", nor to the acquisition of any identifiable asset. The IRB was not justified in imposing penalties as there was no evidence that the appellant intended to evade tax or attempted to conceal the deductions claimed; and the appellant was fully cooperative during the IRB’s tax audit.