Chapter 2

IMPOSITION AND SCOPE OF GST

2.0 Overview of imposition and scope of GST

2.0.1 The provisions relating to the imposition and scope of GST are contained in Part III of the GST Act. Section 9(1) is the charging section which provides for the chargeability of tax on any taxable supply made in Malaysia by a taxable person in the course or furtherance of business. This includes goods and services supplied locally as well as imported except in the case of imported services or any local recipient under the Approved Toll Manufacturer Scheme where a non-taxable person is allowed to charge tax. Essentially, the effect of s 9 is that it places the liability of tax on the person who makes the supply except in the case of an auctioneer or a person who sells goods belonging to a taxable person in satisfaction of a debt to be liable to account for tax even though they are not making the supply. Section 9(4) further provides for GST to be charged and payable on all importation of goods into Malaysia as if it were customs duty or excise duty. Pursuant to s 9(5), any registered person must display price of the goods or services inclusive of tax. If he wishes to display the price exclusive of tax, he is required to apply to the Director General for approval. Contravention of this requirement is an offence [see s 9(8) of the GST Act].

2.0.2 The GST Act is a taxing statute and there are ample authorities to show that Courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* [1855] 11 Exch 452 it was held that a subject was not to be taxed without clear words. In other words, the intention to impose a charge upon a subject must be shown by clear and unambiguous language. The Supreme Court in *National Land Finance Co-operative Society Ltd. v. Director General of Inland Revenue (1994) 1MLJ 99* applied the principle of strict interpretation as stated by Rowlatt J. in *Cape Brandy Syndicate v. I.R.C.* (1921) KB 64and approved the following passage:

> *"in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is*

no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used..."

2.0.3 Meanwhile, s 10 of the GST Act states that goods and services tax shall be charged on the value of the supply or importation based on the rate of tax as determined by the Minister. Section 10(2) explains that the Minister may, by order published in the Gazette:

(a) fix the rate of tax to be charged on the supply of goods or services or on the importation of goods; and

(b) vary or amend the rate of tax fixed under paragraph (*a*).

Any order made under s 10(2) shall be laid before the Dewan Rakyat and interestingly, shall, at the expiration of 120 days of being so laid or of such extended period as the Dewan Rakyat may by resolution direct, cease to have effect if and insofar as it is not confirmed by resolution passed by the Dewan Rakyat within the said 120 days or, if such period has been extended, within such extended period.

2.0.4 Sections 10(4) to 10(6) deal with the refund of goods and services tax under specified conditions. Where an order ceases to have effect in whole or in part as provided in s 10(3), any tax charged and levied in pursuance of the order, as the case may be, of such part thereof as ceases to have effect shall be refundable to the persons by whom the tax was paid. However, the refund is subject to s 10(5) and s 10(6), which respectively state the following:

(a) Unless the Minister otherwise directs, no tax refundable under s 10(4) shall be refunded, unless the person by whom the tax was paid makes a claim in writing to the Director General within 1 year from the date on which the order ceases to have effect in whole or in part and the claim shall contain such particulars as the Director General may require; and

(b) The Director General may reduce or disallow any tax refundable under s 10(4) to the extent that the refund would unjustly enrich the person by whom the tax was paid.

2.0.5 Section 11 of the Act is a comprehensive provision that stipulates the time of supply rules and determines the general time of supply rules for goods and services. Section 11(2) states that the general time of supply of goods is:

(a) at the time of removal of the goods if the goods are to be removed;

(b) at the time when the goods are made available to the person to whom the goods are supplied if the goods are not to be removed;

(c) where goods, being sent or taken on approval or sale or return or similar terms, are removed before it is known whether a taxable supply will take place, at the time when it becomes certain that the taxable supply has taken place or twelve months after the removal, whichever is the earlier.

Meanwhile, the general time of supply of services shall be at the time when the services are performed (see s 11(3)).

2.0.6 Sections 11(4) to 11(8) of the Act provide for the determination of time of supply in certain circumstances. The time of supply for instance, differs where a tax invoice is issued or payment is received whichever is the earlier. The time of supply is the date the invoice is issued if the invoice is issued within 21 days after the supply is made. Similarly, the Director General may also determine the time of supply under special circumstances such as when goods are transferred or disposed of and privately used, one-off use or as and when it is used.

2.0.7 The general time of supply and in the certain circumstances described above is subject to s 11(9) which states that where there is:

(a) a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period;

(b) a supply of goods for a consideration the whole or part of which is determined at the time when the goods are appropriated for any purpose;

(c) a supply of services by virtue of paragraph 5(3) of the First Schedule over a period of time;

(d) a supply of goods or services under any prescribed circumstances,

the time at which the supply made in the course or furtherance of any business in Malaysia shall be determined according to the regulations made under this Act.

2.0.8 Section 12 applies in determining whether the goods or services were supplied in Malaysia for the purposes of chargeability to GST. The place of supply is in Malaysia if the supply is made from a place in Malaysia to another place in Malaysia or if the goods are removed from a place in Malaysia to a place outside Malaysia. The place of supply is treated to be outside Malaysia if the goods are brought in from a place outside Malaysia. As provided in s 12(4), the services shall be deemed as made in Malaysia if the supplier belongs in

Malaysia. Meanwhile the place of supply is deemed to be outside Malaysia if the supplier belongs in the other country.

2.0.9 The treatment of imported services as a supply made by the recipient and the chargeability of and liability to pay tax on imported services by a taxable person and any person other than a taxable person is explained in s 13 of the GST Act. The provision also provides for the time of supply to be the time when payment is made by the recipient and the non-applicability of the section to any supply of goods under any lease agreement, from a person who does not belong in Malaysia.

2.0.10 Pursuant to s 14(1) of the GST Act, the supplier of services is treated as belonging in a country if:

(a) he has in that country a business establishment or fixed establishment and no such establishment elsewhere;

(b) he has no business establishment or fixed establishment in any country but his usual place of residence is in that country; or

(c) he has business establishments or fixed establishments both in that country and elsewhere and his establishment which is most directly concerned with the supply is in that country.

This provision basically determines the country where the supplier or recipient of services belong to based on his business or fixed establishment or his usual place of residence in that country. It also provides for any business establishment to be regarded as belonging in Malaysia if the business establishment has a branch or agency in Malaysia. Section 14(2) explains that a fixed establishment in any country includes a branch or agency through which a person carries on a business in that country. This provision resembles the concept of 'permanent establishment' in international tax law.

2.0.11 Subject to the Third Schedule of the GST Act, the rules for determining the value of supply is provided in s 15 of the GST Act. The following are the relevant rules:

(a) where the supply is for a consideration in money, the value of the supply shall be taken to be an amount, with the addition of the tax chargeable, equal to the consideration.

(b) where the supply is for a consideration not in money, the value of the supply shall be taken to be an amount, with the addition of the tax chargeable, equal to the open market value of that consideration.

(c) where the supply is for a consideration not wholly in money, the value of the supply shall be taken to be an amount, with the addition of the tax chargeable, equal to the aggregate of—

(i) to the extent that the supply is for a consideration in money, the amount of the money; and

(ii) to the extent that the supply is not for a consideration in money, the open market value of that consideration.

(d) where the supply is not for a consideration, the value of the supply shall be taken to be an amount, with the addition of the tax chargeable, equal to the open market value of that supply.

(e) where the supply is not the only matter to which a consideration in money relates, the supply shall be deemed to be for the part of the consideration as is properly attributable to the supply.

It must be noted that the value of the supply includes excise duty paid or is to be paid where applicable.

2.0.12 In addition to the above, the Third Schedule of the GST Act deals with the value of supply of goods or services in specific circumstances, which are:

(a) Token, stamp (other than postage stamp) or voucher

Where a right to receive goods or services for a monetary value stated on any token, stamp (other than postage stamp) or voucher is granted for a consideration, the consideration shall be disregarded except to the extent, if any, it exceeds the monetary value.

(b) Business assets

Where there is a supply of goods by virtue of—

(i) paragraph 5(1) of the First Schedule, not for a consideration; or

(ii) paragraph 5(8) of the First Schedule,

the value of the supply shall be the open market value.

(c) Foreign exchange

Where any sum relevant for determining value is expressed in a currency other than the ringgit, it is to be converted into ringgit at the selling rate of exchange prevailing in Malaysia at the time when the supply takes place or in the case of the importation of goods, at the rate of exchange determined by the

Director General at the time applicable for the calculation of customs duty or excise duty and valuation.

(d) Value of supply based on retail price under certain circumstances

Where—

(i) the whole or part of a business carried on by a taxable person consists in supplying to a number of persons goods to be sold, whether by them or others, by retail; and

(ii) those persons are not taxable persons,

the Director General may by notice in writing to the taxable person direct that the value of any such supply by him after the giving of the notice or after such later date as may be specified in the notice shall be taken to be its open market value on a sale by retail.

It is notable that the notice described above may be varied, withdrawn or cancelled by the Director General by a further notice given in writing.

(e) Value of supply of goods from a person licensed under s 65A of the *Customs Act 1967* or operating in a free industrial zone under s 10(1)(b) of the *Free Zones Act 1990*

Where a taxable supply of goods is made by a person licensed under s 65A of the *Customs Act 1967* or a person operating in a free industrial zone under s 10(1)(*b*) of the *Free Zones Act 1990* to any person who is not licensed under s 65A of the *Customs Act 1967* or to any person not operating in a free industrial zone under s 10(1)(*b*) of the *Free Zones Act 1990*, the value of the goods shall be the value as determined under s 16.

(f) Value of betting and gaming supplies

Where a taxable supply of services is made by a person licensed under any written law involving bettings, sweepstakes, lotteries, gaming machines or games of chance, the value of supply shall be determined in accordance with the following formula:

$$\frac{100}{100 + C} \text{ X } (A - B)$$

A: is the total amount received for the supply less any tax or duty under any other written law except excise duty;

B: is the amount of money, if any, payable to any person participating successfully in the bettings, sweepstakes, lotteries, gaming machines or games of chance; and

C: is the rate of tax fixed under s 10.

Where the value of supply determined above is negative, such value shall be treated as nil.

2.0.13 Further, the Third Schedule also deals with the concepts of open market value and connected persons.

The Minister may, by order published in the Gazette, amend the Third Schedule and provide for the determination of the value of a supply otherwise than in accordance with this section. Any such order made by the Minister shall be laid before the Dewan Rakyat.

2.0.14 As prescribed under s 16 of the GST Act, the value of goods imported into Malaysia shall be the sum of the following amounts, namely:

(a) the value of the goods for the purposes of customs duty determined in accordance with the *Customs Act 1967*;

(b) the amount of customs duty, if any, paid or is to be paid on the goods; and

(c) the amount of excise duty, if any, paid or is to be paid on the goods.

2.0.15 Section 17 empowers the Minister to treat any supply of goods or services as a zero-rated supply by way of an order published in the Gazette. The supply of goods if the goods are exported is also treated as a zero-rated supply. The supply of goods or services which are zero-rated shall be treated as a taxable supply and shall be charged at 0%. Section 17 further provides that the liability to pay tax and the seizure of goods that are claimed to have been exported but found in Malaysia.

2.0.16 Meanwhile, s 18 of the GST Act allows the Minister to determine any supply of goods or services to be an exempt supply by way of an order published in the Gazette whereby no tax is to be charged on the exempt supply.

2.0.17 This commentary also covers Part XIV of the Act, which contains special provisions on designated areas. Basically, s 154 defines the meaning of Malaysia to exclude the designated areas for the purposes of Part XIV of the Act. In this regard, s 155 states that no tax to be charged on supplies made within and between designated areas unless the Minister otherwise directs.

2.0.18 Section 156 provides for different tax treatment on goods and services imported into and exported from designated areas or goods and

upon a non-existent sum of tax, did not survive an analysis of the procedure provided by the statutory scheme. The later satisfaction of the conditions for zero-rating did not have retrospective effect. It did not in law 'discharge' a prior liability under reg. 40 of the VAT Regulations or an earlier assessment made on the basis that the supply in question was standard-rated in the sense of either vitiating or withdrawing or reducing to nil the prior assessments and the liabilities thereunder. Satisfaction of the conditions merely entitled the taxable person as at the date of such satisfaction to a credit for the VAT liability previously acknowledged or assessed. The liability and the previous assessment stood, but the credit could be offset against and satisfy the liability for VAT so far as it remained undischarged and entitled the taxable person to repayment of VAT so far as the credit exceeded what was necessary to meet that and any other outstanding liability for VAT and interest thereon.

2. The satisfaction of the liability under the VAT assessment in no way discharged or undermined the assessment for interest. The liability for interest accrued during the period of the VAT liability. On satisfaction of the VAT liability there could be no further accrual of interest, but the liability for accrued interest continued undisturbed. The satisfaction of the conditions for zero-rating gave rise to no separate credit in respect of the liability for accrued interest. Accordingly, upon the true construction of the legislation and in particular Notice 703, the assessment for interest stood undisturbed and undischarged. The liability continued to be enforceable by the Crown.

The following cases were referred to in the judgment:

Burton (HMIT) v Mellham Ltd [2003] BTC 336

C & E Commrs v Peninsular and Oriental Steam Navigation Co [1994] BVC 57 (CA); No. 5828; [1991] BVC 671 (Tr)

Harmony and Montague Tin and Copper Mining Co, Re (Spargo's Case) (1873) LR 8 Ch App 407

R (on the application of Cardiff City Council) v C & E Commrs [2003] EWCA Civ 1456; [2004] BVC 108

Kieron Beal (instructed by the Solicitor of Customs and Excise) for the Crown.

Rupert Baldry (instructed by KLegal) for the taxpayer.

2.3.4 Colaingrove Ltd v Customs and Excise Commissioners. [2004] BVC 209

[2004] EWCA Civ 146.
Court of Appeal (Civil Division).
Thorpe, Arden and Neuberger L JJ.
Judgment delivered 19 February 2004.

Value added tax — Exemption for letting of land — Exclusion from exemption — Seasonal pitches for caravans — Five-year agreements prohibiting occupation of caravans for limited period — Whether pitch fees exempt from VAT — Whether provision of seasonal pitches excluded from exemption — Whether such exclusion from exemption contrary to Community law — Value Added Tax Act 1994, Sch. 9, Grp. 1, item 1(b), Note (14)(b) — Council Directive 77/388, art. 13(B)(b).

This was an appeal by the taxpayer from a decision of the High Court ([2003] BVC 436) dismissing an appeal from the decision of a tribunal (No. 16,187; [2000] EVC 2,054) that the legislature was entitled to exclude caravan pitch fees from the exemption from VAT for the letting of land.

The taxpayer operated 22 caravan parks throughout the UK containing 20,013 pitches of which around 14,500 were let to caravan owners. The remaining pitches were either vacant or occupied by caravans owned by the taxpayer. Overnight stays in the caravans were prohibited for a period during the winter months. The limitation on continuous occupation was a standard provision designed to prevent owners claiming that the caravan was their main residence.

The taxpayer accepted that the pitches were seasonal pitches as defined in Note (14)(b) of Value Added Tax Act 1994 ('VATA'), Sch. 9, Grp. 1 and therefore within the exception to the exemption at para. (f) of item 1 of Grp. 1. However it contended that the exclusion from the exemption of seasonal pitches was not authorised by the sixth directive. Customs argued that art. 13(B)(b)(1) permitted member states to define accommodation and the UK had given it a broad meaning as it was entitled to do. If the exclusion of seasonal pitches was not within art. 13(B)(b)(1), it was nevertheless within the power to make further exclusions contained in the 'tailpiece' to art. 13(B)(b). The VAT tribunal and High Court dismissed the taxpayer's appeal. The taxpayer appealed to the Court of Appeal contending that it was not clear as a matter of Community law whether the tailpiece member state option conferred a power to create a charging provision of the nature to be found in Sch. 9. It sought an order for that question to be referred to the European Court of Justice ('ECJ'). It contended that the licensing of static

caravans on seasonal pitches should be exempt from VAT if they were used for residential purposes because the policy behind the exemption in art. 13(B)(b) was that the supply of land to final consumers on a long-term basis, particularly residential consumers, should be exempt.

Held: dismissing the taxpayer's appeal:

1. The ECJ had not itself enunciated any limits on the tailpiece member state option in art. 13(B)(b). On the contrary, the ECJ had emphasised that the option was a wide one. However, there were some peripheral limits on the exercise of the option as a matter of the interpretation of the sixth directive. Those limits included a restriction that, while a member state was not bound to exercise the tailpiece member state option, if it decided to so do, the member state's policy objective had to be consistent with the rationale of the lettings exemption as explained in the explanatory memorandum to the proposal for the sixth directive and the case-law of the ECJ.
2. A large measure of discretion was given to member states as regards the exclusion from exemption. The test chosen in the case of caravan pitches was seasonality to put seasonal caravan sites on all fours with holiday accommodation. The test of seasonality in the case of static caravan licences met the test of reasonableness: it was a reasonable way of identifying caravan sites which were let for holiday purposes, i.e. not for dwelling purposes. The exclusion of such property from the lettings exemption was consistent with the rationale of the exemption. (*Amengual Far v Amengual Far* (Case C-12/98) [2000] ECR I-527 considered.)
3. The Value Added Tax Act 1994 did not improperly discriminate between different types of lettings for dwelling purposes. A member state was entitled to have regard to its own economic conditions and to take account of the differences between different sorts of immovable property. The conditions suitable for differentiating different categories of hotel accommodation might not be appropriate to other lettings of immovable property. They could not simply be 'read across'.
4. Once the UK decided to exclude seasonal pitches from the lettings exemption it was not bound to do so in the way least burdensome to the taxpayer. That would be inconsistent with the wide discretion conferred on the member state. Having made its decision to restrict the exemption in a particular way, the member state must not impose the restriction in a disproportionate way. (*CR Smith Glaziers (Dunfermline) Ltd v C & E Commrs* [2003] BVC 249 considered.)

5. The applicable principles of Community law necessary for the court's decision were not in doubt. Accordingly, a reference to the ECJ should not be made.

The following cases were referred to in the judgment:

Amengual Far v Amengual Far (Case C-12/98) [2000] ECR I-527
Ashworth No. 12,924; [1996] BVC 2,110
Blasi v Finanzamt München I (Case C-346/95) [1998] BVC 247; [1998] ECR I-481
CR Smith Glaziers (Dunfermline) Ltd v C & E Commrs [2003] BVC 249
Lubbock Fine Co v C & E Commrs (Case C-63/92) [1993] BVC 287; [1993] ECR I-6665
Skatteministeriet v Henriksen (Case 173/88) (1990) 5 BVC 140; [1989] ECR 2763

Roderick Cordara QC and David Scorey (instructed by Eversheds) for the taxpayer.

Rupert Anderson QC (instructed by the Solicitor for Customs & Excise) for the Crown.

2.3.5 Customs and Excise Commissioners v Zielinski Baker & Partners Ltd. [2004] BVC 309

[2004] UKHL 7.
House of Lords.
Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood.
Judgment delivered 26 February 2004.

Value added tax — Zero-rating — Protected building — Listed building — Alterations to outbuilding within curtilage of listed building to make changing rooms and games room — Whether works to outbuilding zero-rated as alteration of protected building — Whether protected building had to be used for residential purposes — Value Added Tax Act 1994, Sch. 8, Grp. 6, item 2, Note (1) — Planning (Listed Buildings and Conservation Areas) Act 1990.

This was an appeal by Customs from a decision of the majority of the Court of Appeal ([2002] BVC 525) that alterations to an outbuilding within the curtilage of a listed building were alterations to a protected building and so were zero-rated for VAT purposes.

The taxpayers were involved in development work within the grounds of a listed building which included the conversion of an outbuilding into a games and changing facility. There was no dispute that the house was a listed building and that the outbuilding fell within its curtilage such that it was protected under the Planning (Listed Buildings and Conservation Areas) Act 1990. The taxpayers contended that the cost of the work done on the outbuilding was zero rated as the 'approved alteration of a protected building', Note (1) of Grp. 6 of Sch. 8 to the Value Added Tax Act 1994 defining protected building as one designed to remain as or become a dwelling and one which was listed within s. 1(5) of the 1990 Act. The tribunal found that there was such an alteration (No. 16,722; [2001] BVC 2,059). The High Court allowed Customs' appeal ([2001] BVC 232). The taxpayers argued and the Court of Appeal (by a majority) accepted that the outbuilding did not have to qualify as a dwelling by itself to be entitled to zero rating, because of the extended definition of listed building to include an outbuilding within its curtilage ([2002] BVC 525). Customs appealed to the House of Lords.

Held: allowing Customs' appeal by a majority, Lord Nicholls of Birkenhead dissenting:

1. The definition of 'protected building' in Note (1) to Grp. 6 referred to two statutory codes which both contained provisions (for these purposes the tailpiece to s. 1(5) of the 1990 Act) which extended the scope of the provision beyond the actual listed building. The definition of 'protected building' in Note (1) could be divided into three integers. A 'protected building' meant (i) a building, (ii) which was designed to remain as or become a dwelling (as defined in Note (2)) after the alteration, and (iii) which was a listed building within the meaning of the 1990 Act. Even assuming that by virtue of s. 1(5) 'listed building' in the third integer must be taken as including, as part of the listed building, a separate structure (built before 1 July 1948) within the curtilage of a listed building, the requirements that the subject-matter of the 'approved alteration' should be (i) a building and (ii) designed to remain or become a dwelling, indicated that Parliament intended to give the benefit of item 2 of Grp. 6, not to the whole set of listed buildings (and scheduled monuments and structures or sites deemed to form part of them) but only to a subset, i.e. those which were buildings to be used for residential purposes. That was the most natural construction of the language of the statute. It was reinforced by considerations of legislative purpose.
2. (Per Lord Nicholls of Birkenhead dissenting) The social purpose of Grp. 6 in Sch. 8 to VATA 1994 was to alleviate the financial burden on the owners of listed buildings. That alleviation was confined to alterations,

which in practice meant improvements, as distinct from repairs or maintenance. Such a strange intention as was involved in Customs' case should not be attributed to Parliament. A meaningful, purposive interpretation was to be preferred. The key lay in recognising that the reference to 'a building' in the singular in the definition of protected building in Note (1) included the plural 'buildings' where appropriate. If the accommodation comprised self-contained living accommodation it mattered not that, structurally, part of it was located in one building and part in another, so long as both buildings fell within the statutory definition of a listed building.

The following cases were referred to in the judgment:

C & E Commrs v Viva Gas Appliances Ltd (1983) 3 BVC 588; [1983] 1 WLR 1445

Debenhams plc v Westminster City Council [1987] AC 396

EC Commission v UK (Case 416/85) (1988) 3 BVC 378; [1990] 2 QB 130

Shimizu (UK) Ltd v Westminster City Council [1997] 1 WLR 168

Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions [2001] QB 59

Paul Lasok QC and Paul Harris (instructed by the Solicitor for Customs & Excise) for Customs.

John Walters QC and Philip Brunt (instructed by Wallis & Partners) for the taxpayer.

2.3.6 WHA Ltd & Anor v Customs and Excise Commissioners. [2004] BVC 485

[2004] EWCA Civ 559.
Court of Appeal (Civil Division).
Waller, Latham and Neuberger L JJ.
Judgment delivered 14 May 2004.

Value added tax — Supply — Input tax — Exempt supplies — Insurance related services — Motor breakdown insurance — Recovery of input tax charged on repairs to insured's car — Motor repairs carried out under motor breakdown insurance cover — Insurance cover issued by UK insurer — Reinsured 100 per cent with Gibraltarian insurer which retroceded 85 per cent of risk to second Gibraltarian insurer — Reinsurer appointed taxpayer in UK to handle claims and pay repair bills — Whether garage repairing car made taxable supply of services to taxpayer — Whether input tax

amount of GST. The value of taxable supplies should be calculated on all taxable supplies made by any person, for a period of 12 months (on either the historical or future method), *excluding* the value of:

(a) capital assets disposed;

(b) imported services; and

(c) disregarded supplies made in relation to Warehousing Scheme or disregarded supplies made within or between designated areas.

It must be noted that the guides on GST issued by the Customs have no legal effect as they merely state the Customs' position and policy on a particular matter.

3.0.6 "Taxable person" is defined in the GST Act to mean any person who is or is liable to be registered under the GST Act. Once a person reaches the threshold of RM500,000, it is considered a taxable person under the GST Act and must register within 28 days from the end of that month in the prescribed form. Failure to do so would mean that the person would be accountable for the GST uncollected and be liable for late registration penalty. Late registration penalty is prescribed to be an amount not less than RM1,500 for a period within 30 days and not more than RM20,000 for a period exceeding 360 days. Refusal to register attracts a fine not exceeding RM50,000.00 or imprisonment for a term not exceeding 3 years or both.

3.0.7 A prerequisite of registration is therefore that the person makes or intends to make a "taxable supply". Taxable supply means a supply of goods or services which are standard-rated and zero-rated supplies (see s 2(1) of the GST Act). It however does not include exempt supply. Section 4(1) of the GST Act defines "supply" to mean all forms of supply done for a consideration, including supply of imported services. Anything which is not a supply of goods but is done for a consideration is considered a supply of services.

3.0.8 A person who is not liable to be registered is not allowed to charge and collect GST, and can only do so after he has registered voluntarily.

3.0.9 Section 24(1) of the GST Act allows any person whose annual taxable turnover does not exceed RM500,000 to apply for voluntary registration, provided that he is carrying on a business and he makes or intends to make a taxable supply in the course or furtherance of that business.

It should be noted that a person who is making wholly out of scope supplies may be allowed to be GST registered subject to the Director General's approval, but a person who makes wholly exempt supplies is not eligible for voluntary registration.

3.0.10 The Director General must be satisfied that the person applying for voluntary registration is carrying on a business. "Business" in s 3(1) of the GST Act is defined to include any trade, commerce, profession, vocation or any other similar activity, whether or not for a pecuniary profit. This means that financial profitability is not a criterion in determining the status of a business.

3.0.11 The following are specifically deemed to be carrying on of a business:

(a) the provision by a club, association, society, management corporation, joint management body or organisation (for a subscription or other consideration) of the facilities or benefits available to its members or parcel proprietors, as the case may be; and

(b) the admission, for a consideration, of persons to any premises.

Further, anything done in connection with the commencement, termination or intended termination of a business shall be treated as being done in the course or furtherance of business.

3.0.12 The Customs in its General Guide on GST has outlined the following criteria which may be used to determine whether an activity qualifies as a business for GST purposes:

(a) it is a serious undertaking or work earnestly pursued;

(b) it is pursued with reasonable or recognisable continuity;

(c) it is conducted in a regular manner and on sound and recognised business principles (of a business-like nature);

(d) it is predominantly concerned with making supplies for a consideration; or

(e) it is making supplies of a kind commonly made by commercial organisations.

Examples of non-business activity include:

(a) holding of shares;

(b) supply of services by employees under contract of employment; and

(c) hobbies.

3.0.13 The General Guide on GST also sets out the types of documents which ought to be submitted in order to satisfy the Customs that the person is committed to doing business for voluntary registration purposes. These are:

(a) details of business arrangements (e.g. business plans, plants, location);

(b) copies of contract for establishment of premises such as rental of premises / construction of pipelines / purchase of equipment;

(c) details of any patents;

(d) details of business purchases; or

(e) other documentary evidence.

3.0.14 Applications for voluntary registration are to be made in the prescribed form and subject to such conditions as the Director General may see fit. Once registered, the person is required to remain registered for at least 2 years or such other shorter period as may be determined by the Director General.

3.0.15 Pursuant to s 24(3) of the GST Act, the Director General may cancel an application for voluntary registration if the person fails to begin making a supply by the intended date stated in his application or is in breach of any condition imposed. Similarly, the Director General may refuse any application for voluntary registration as he deems fit (see s 24(4)).

3.0.16 A refusal of voluntary registration by the Director General is a non-appealable matter falling within the Fourth Schedule of the GST Act. This means the GST Tribunal does not have the jurisdiction to hear an appeal regarding this matter. If the implications are serious, an avenue of appeal which may be available to the aggrieved person is to make an application for judicial review to the High Court.

3.0.17 Once registered, the registered person must comply with the following:

(a) account for GST on taxable supplies made and received;

(b) submit the GST return and pay tax by the due date;

(c) issue tax invoice on any taxable supply made unless as allowed by the Director General;

(d) inform Customs of the cessation of business within 30 days from the date of cessation of business;

(e) inform Customs on any changes of address, taxable activity, accounting basis and taxable period; and

(f) keep adequate records of his business transactions relating to GST for a period of 7 years.

3.0.18 Pursuant to s 22(1) of the GST Act, a taxable person ceases to be liable to be registered where the Director General is satisfied that the value of the taxable supplies for a period of 12 months does not exceed the prescribed threshold.

3.0.19 Once a registered person ceases to make or ceases to have the intention of making a taxable supply, the person must notify the Director General of such cessation within 30 days from the date of cessation or intention to cease. Similarly, a registered person may cancel his registration if his liability to be registered has ceased.

In both instances, the registered person must continue to fulfil his obligations as a registered person (i.e. to charge GST and submit GST return) until the approved effective date of cancellation of his GST registration. It would be useful to note that those who applied for voluntary registration would not be allowed to de-register within 2 years from the date of registration.

Section 23(1) of the GST Act empowers the Director General to direct two or more taxable persons to be registered as a single taxable person. It explains the determination of artificial separation of business to take into consideration the extent of financial, economic and organisational links (see s 23(2)). This provision is essentially a specific anti-avoidance provision which mirrors s 7A of the *Service Tax Act 1975*. Section 23(3) prescribes that the Director General may make a direction naming any person if the Director General is satisfied:

(a) that the person is making or has made taxable supplies;

(b) that the activities in the course of which the person makes or has made those taxable supplies form only part of certain activities in the business and that the other activities in that business whether or not they are similar to the activities carried on by that person are being carried on concurrently or previously, or both, by one or more other persons; and

(c) that if all the taxable supplies made in that business were taken into account, the person carrying on that business would, at

the time of the direction, be required to be registered by virtue of s 20.

Any direction made by the Director General shall be served on each of the persons named in it (see s 23(4)). Section 23(5) enables the Director General to issue a supplementary direction in relation to a direction made earlier. Immediately before any direction, including a supplementary direction is made, any person named in the direction is registered in respect of taxable supplies made by him as specified in s 23(3) or s 23(5), his registration shall be revoked by the Director General with effect from the date the single taxable person is registered under s 23(1). Upon the revocation of his registration, he together with all the persons named in the direction shall be treated as a single taxable person under this section.

Section 23(8) states that where any direction is made under this provision:

(a) the single taxable person carrying on the business specified in the direction shall be registered in the name to be jointly nominated by the persons named in the direction by notice in writing given to the Director General not later than 14 days after the date of the direction or, in default of the nomination, in the name as may be specified in the direction;

(b) any taxable supply made by one of the constituent members in the course of the activities of the single taxable person shall be treated as being a taxable supply made by the single taxable person;

(c) each of the constituent members shall be jointly and severally liable for any tax due and payable by the single taxable person;

(d) without prejudice to paragraph *(c)*, any failure by the single taxable person to comply with any requirement imposed by or under the GST Act shall be treated as a failure by each of the constituent members severally; and

(e) subject to paragraphs *(a)* to *(d)*, the constituent members shall be treated as a partnership carrying on the business of the single taxable person and any question as to the scope of the activities of that business at any time shall be determined accordingly.

Meanwhile, s 23(9) provides that where it appears to the Director General that any person who is one of the constituent members should no longer be regarded as such for the purposes of ss 23(8)

(c) and *(d)* and the Director General gives notice in writing to that effect, that person shall not have any liability by virtue of those paragraphs for anything done after the date specified in that notice and accordingly on that date he shall be treated as having ceased to be a member of the partnership referred to in s 23(8)*(e)*. It is explained in s 23(7) that a business specified in a direction, the persons named in the direction together with the person named in the supplementary direction relating to that business being the persons who together are to be treated as a single taxable person are referred to as "the constituent members" in ss 23(8) and (9).

In cases where a registered person makes a request in writing to cancel his registration or makes a notification under s 25, the Director General may cancel the person's registration from such date as the Director General may determine if he is satisfied that the person can be deregistered (see s 26(1)). Section 26(2) adds that where the Director General is satisfied that a registered person has ceased to be registrable, the Director General may cancel his registration with effect from the day on which he ceased to be registrable or from such later date as the Director General may determine. If the Director General is satisfied that on the day on which a registered person was registered he was not registrable, the Director General may cancel his registration with effect from the date of notification in writing by the Director General (see s 26(3)). For the purposes of this section, "registrable" means liable to be registered under s 20 or eligible to be registered under s 24 (see s 26(4)).

3.0.20 Section 27(1) enables group registration for two or more companies if it meets the conditions prescribed.

Members of a group may apply in the prescribed form to the Director General to be treated as a group. Every member in that application shall nominate a member to be their representative member (see s 27(2)). The Director General may approve or refuse any application and in the event of an approval, may impose conditions (see s 27(3)). The registration of a group shall be in the name of the representative member (see s 27(5)). Section 27(4) allows the Director General to refuse to register the member nominated as the representative member.

Section 27(6) explains that where a company has been treated as a group:

Henderson J held that the Community law principle of effectiveness overrode the domestic statutory scheme where, as in the present cases, the overpayment of VAT was caused by breach of directly effective provisions of Community law, and the principle established in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595, as understood in the light of the judgments of the ECJ in Test Claimants in the *FII Group Litigation v R & C Commrs* (Case C-446/04) [2008] BTC 222; [2006] ECR I-11753 and of the House of Lords in *Sempra Metals Ltd v IR Commrs* [2007] UKHL 34; [2007] BTC 509, required that compound interest should be paid.

However, the judge further held that the taxpayers' claims were statute-barred. The ordinary six-year limitation period for recovery of the most recent overpayments had expired. The extended time-limit for bringing the claims under s. 32(1)(c) of the Limitation Act 1980 had also expired more than six years before the present claims were begun. The operative mistake was the mistaken belief that VAT was due and the taxpayers discovered that mistake in 1997 after the judgments of the ECJ in *Commission v Italy and Elida Gibbs*. The claims were in principle capable of falling within s. 29(5) of the 1980 Act, but they had not been revived by any acknowledgment or part payment within s. 29(5). The principles of Community law did not require the domestic limitation provisions to be disapplied.

The taxpayers appealed and by respondent's notice the Revenue appealed against the decision that an entitlement to compound interest arose under Community law.

Held: dismissing the appeal:

1. It was not clear whether Community law did give rise to an entitlement to compound interest in respect of repayments of overpayments of VAT. In view of the importance of the issue, it was desirable that there should be a reference to the ECJ for a preliminary ruling on the issue. However, a reference could not be made in this case because the ruling of the ECJ was not necessary to enable judgment to be given in the light of the fact that Henderson J was right that the restitutionary claims of the taxpayers for compound interest were statute-barred.
2. A mistake was only relevant for the purposes of s. 32(1)(c) if it was an essential element of the cause of action. Accordingly the only relevant mistake for the purposes of s. 32(1)(c) on that basis was the original overpayment of VAT on the mistaken assumption that it was due. On that basis the extended limitation period had expired more than six years before the proceedings were brought and that ground of appeal failed. (Test Claimants in the *FII Group Litigation v IR Commrs* [2010] EWCA Civ 103; [2010] BTC 265 applied.)
3. The taxpayers could not rely on s. 29(5) of the 1980 Act. The extended limitation period under s. 32(1)(c) in respect of the liability mistake expired before the part payments and acknowledgment relied upon by the taxpayers for the purposes of s. 29(5). The effect of s. 29(7) of the 1980 Act was that once a cause of action was barred under the Act it could not be revived by acknowledgement or part payment.
4. In consequence of the operation of the 1980 Act, under national law, the taxpayers' claim to compound interest was barred by lapse of time.
5. In all the circumstances Community law did not have the effect of disapplying the limitation provisions of the 1980 Act.
6. Even if the three-year cap, together with communications issued by the Revenue, could be regarded as making it excessively difficult for the taxpayers to have brought their proceedings prior to the ECJ's decision in Marks & Spencer in July 2002 that the cap was unlawful, no such difficulty within the principle of effectiveness existed after that date. The judge found that the taxpayers discovered both the *Commission v Italy and the Elida Gibbs* liability mistakes by the end of June 1997. The extended limitation period under s. 32(1)(c) of the 1980 Act therefore expired by the end of June 2003. That meant that the taxpayers had approximately one year after the decision in Marks & Spencer in which to institute proceedings to enforce their Community law rights before being barred under the domestic limitation period. That was certainly adequate time for that purpose. (*Fleming v R & C Commrs* [2008] UKHL 2; [2008] BVC 221 applied.)
7. The Community law principle of equivalence did not require a further extension of the limitation period since the extended period expiring by about the end of June 2003 was applicable equally to ordinary domestic claims as to San Giorgio claims.
8. The taxpayers' only real argument for invoking the Community law principle of effectiveness in respect of the period after the ECJ's judgment in Marks & Spencer was that, until the judgments of the Court of Appeal in Sempra ([2005] EWCA Civ 389; [2005] BTC 202), they were unaware of their right to recover compound interest in domestic law and any proceedings to enforce that right would have been dismissed. However, the taxpayers' reliance on the state of domestic law between Marks & Spencer and the judgments of the Court of Appeal in Sempra in 2005 was misplaced. It was common ground between the parties that Community

law rights could be lost in circumstances where the failure to exercise the right was due to the individual's ignorance of its existence.

The following cases were referred to in the judgment:

Amministrazione delle Finanze dello Stato v San Giorgio Spa (Case 199/82) [1983] ECR 3595

Ansaldo Energia Spa v Amministrazione delle Finanze dello Stato (Joined Cases C-279/96, C-280/96 and C-281/96) [1998] ECR I-5025

Aprile Srl v Amministrazione delle Finanze dello Stato (Case C—228/96) [1998] ECR I-7141

Denkavit International BV v Kamer van Koophandel en Fabrieken voor Midden-Gelderland (Case C-2/94) [1996] ECR 2827

Dilexport Srl v Amministrazione delle Finanze dello Stato (Case C-343/96) [1999] ECR I-579

EC Commission v Italy (Case C-45/95) [1997] BVC 536; [1997] ECR I-3605

EC Commission v Italy (Case C-197/03) [2006] ECR I-60

Edilizia Industriale Siderugica (Edis) v Ministerio delle Finanze (Case C-231/96) [1998] ECR I-4951

Elida Gibbs Ltd v C & E Commrs (Case C-317/94) [1997] BVC 80; [1996] ECR I-5339; [1997] QB 499

Emmott v Minister for Social Welfare (Case C-208/90) [1991] ECR I-4269

Express Dairy Foods Ltd v Intervention Board for Agricultural Produce (Case 130/79) [1980] ECR 1887

Fantask A/S v Industriministeriet (Case C-188/95) [1997] ECR I-6783

FII Group Litigation (Test Claimants) v IR Commrs (Case C-446/04) [2008] BTC 222; [2006] ECR I-11753

FII Group Litigation (Test Claimants) v IR Commrs [2010] EWCA Civ 103; [2010] BTC 265

Fleming (t/a Bodycraft) v R & C Commrs [2008] UKHL 2; [2008] BVC 221; [2008] 1 WLR 195

Haahr Petroleum Ltd v Åbenrå Havn (Case C-90/94) [1997] ECR I-4085

London, Chatham and Dover Railway Co v South Eastern Railway Co [1893] AC 429

Marks & Spencer plc v C & E Commrs (Case C-62/00) [2002] BVC 622; [2002] ECR I-6325

Marleasing SA v La Comercial International de Alimentacion SA (Case C-106/89) [1990] ECR 1-4135

Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No. 2) (Case C-271/91) [1993] ECR I-4367; [1994] QB 126

Metallgesellschaft Ltd v IR Commrs; Hoechst AG v IR Commrs (Joined Cases C-397/98 and C-410/98) [2001] BTC 99; [2001] ECR I-1727; [2001] Ch 620

President of India v La Pintada Cia Navigacion SA [1985] AC 104

R v Secretary of State for Social Security, ex parte Sutton (Case C-66/95) [1997] ECR I-2163; [1997] ICR 961

R & C Commrs v RSPCA; R & C Commrs v ToTel Ltd [2007] EWHC 422 (Ch); [2007] BVC 546

Roquette Frères v EC Commission (Case 26/74) [1976] ECR 677

Royscot Leasing Ltd v C & E Commrs (Case C-305/97) [1999] BVC 419; [1999] ECR I-6671

Sempra Metals Ltd v IR Commrs [2007] UKHL 34; [2007] BTC 509 (HL); [2005] EWCA Civ 389; [2005] BTC 202; [2006] QB 37 (CA); [2004] EWHC 2387 (Ch); [2004] BTC 358

Surrendra Overseas Ltd v Government of Sri Lanka [1977] 1 WLR 565

Thin Cap Group Litigation (Test Claimants) v IR Commrs (Case C-524/04) [2008] BTC 348; [2007] ECR I-2107

Weber's Wine World Handels GmbH v Abgabenberufungskommission Wien (Case C-147/01) [2004] BTC 8,019; [2003] ECR I-11365

Woolwich Equitable Building Society v IR Commrs [1992] BTC 470; [1993] AC 70

Michael Conlon QC and David Scorey (instructed by McGrigors LLP) for the appellants.

Jonathan Swift, Peter Mantle and Philip Woolfe (instructed by HMRC Solicitor's Office) for the respondents.

4.2.10 John Wilkins (Motor Engineers) Ltd & Ors v Revenue & Customs Commissioners. [2010] BVC 948

[2010] EWCA Civ 923.
Court of Appeal (Civil Division).
Laws, Etherton and Sullivan L JJ.
Judgment delivered 30 July 2010.

Value added tax — Interest — Tax paid in accordance with domestic law provisions later found to be incompatible with Community law — Tax repaid to trader with simple interest — Whether sufficient remedy — Whether statutory scheme to be interpreted so as to permit award of compound interest — Whether statutory scheme permitted successive claims for interest — Whether appeal brought in time —

Whether time should be extended — Taxpayers' appeal allowed — Value Added Tax Act 1994, s. 78 — Value Added Tax Tribunal Rules 1986, r. 4(1).

These were appeals by taxpayers against the decision of the Upper Tribunal ([2009] UKUT 175 (TCC); [2009] BVC 1,503) that the taxpayers' respective notices of appeal had been issued out of time and against the tribunal's refusal to exercise its power to extend time for bringing those appeals.

The five taxpayers all carried on business as motor dealers and paid excess output tax on bonus payments made to them by motor manufacturers and on the sales of demonstrator vehicles used for the purposes of their businesses. The excess tax was exacted because the UK had failed to implement provisions of Council Directive 77/388 (the sixth directive) correctly. By the operation of the Value Added Tax (Input Tax) Order 1992, art. 7 and its predecessor equivalents, input tax credit on the purchase of demonstrator cars was blocked, but dealers were required to account for output tax on the profit, if any, they made on the eventual sales of the vehicles. The sales should instead have been treated as wholly exempt. The tax authorities wrongly treated bonus payments as consideration for a supply of services rather than, as art. 11(A)(1)(a) and 11(C)(1) of the sixth directive required, as a discount from the price paid by the dealer to the manufacturer. The tax authorities accepted, following the judgments of the ECJ in *Elida Gibbs Ltd v C & E Commrs* (Case C-317/94) [1997] BVC 80; [1996] ECR I-5339 and *EC Commission v Italy* (Case C-45/95) [1997] BVC 536; [1997] ECR I-3605 that the UK's tax treatment of bonuses and demonstrator car sales respectively had been wrong and that the taxpayers had paid excess tax. The excess tax was repaid to the taxpayers together with simple interest. The taxpayers argued that simple interest was not sufficient recompense and that HMRC should instead pay, in addition to the tax itself, a sum which, whether as a matter of principle or of practical convenience, was calculated as compound interest.

Several motor dealers, including some of the present taxpayers, sought to recover compound interest by means of a restitutionary claim; the attempt failed as the claims were defeated by a limitation defence (see *FJ Chalke Ltd v R & C Commrs* (VAT Interest Cars Group Litigation) [2010] EWCA Civ 313; [2010] BVC 573). The present appeals arose, not out of restitutionary claims at common law, but out of claims for interest pursuant to s. 78 of the Value Added Tax Act 1994. The taxpayers' contention was that, in accordance with the principle in *Marleasing SA v La Comercial Internacional de Alimentation SA* (C-106/90) [1990] ECR I-4135), that

section had to be interpreted so as to conform with EU law, which they said required compound interest to be paid by HMRC on overpayments of VAT.

The Upper Tribunal (Tax and Chancery Chamber) held that the appeals were out of time because the time-limit for bringing an appeal to the VAT and Duties Tribunal, to which these appeals were made and before which they were pending until that tribunal's abolition on 1 April 2009, was 30 days after the date of the document containing the 'disputed decision' of HMRC. The Upper Tribunal found that in the present case the relevant decisions giving rise to a right of appeal were the letters from HMRC received by the taxpayers when the payments of simple interest were made, between September 2003 and February 2005. The tribunal as a matter of discretion refused to extend the time for bringing the appeals. Even if permission had not been refused, the tribunal interpreted s. 78 as providing only for simple interest ([2009] UKUT 175 (TCC); [2009] BVC 1,503).

The taxpayers' appeals against the substantive decision were pending but these appeals were against the decision that the taxpayers' respective notices of appeal had been issued out of time and against the tribunal's refusal to exercise its power to extend time. The taxpayers asserted that the disputed decisions were the letters sent by HMRC following the delivery of the Court of Appeal's judgment in *Sempra Metals Ltd v R & C Commrs* [2005] EWCA Civ 389; [2005] BTC 202, refusing the taxpayers' claims for compound interest.

Held: allowing the taxpayers' appeal (by a majority):

The taxpayers' submission that the disputed decisions were the letters, sent following the judgment in Sempra, refusing claims for compound interest could only be correct if the scheme of s. 78 and associated appeals pursuant to s. 83(1)(s) and the Value Added Tax Tribunal Rules 1986 allowed for successive claims under s. 78 (and thus successive appeals) for all the interest due in respect of the same period. There was nothing whatever in the statute to show that there might not be such successive claims with concomitant rights of appeal. The only formal requirement for a claim was that it be made in writing (s. 78(10)). Accordingly HMRC had to justify a limitation upon the operation of s. 78 which could not be found in the statutory language. The VAT Tribunal had held that there could be successive claims to recover principal sums by way of overpaid VAT within s. 80 of the 1994 Act. That decision of the specialist Tribunal offered, by parity of reasoning, material support to the taxpayers' position on the issue of repeat claims for the purposes of s. 78. The possibility of repeat claims, responsibly conducted, might be perfectly appropriate for the sensible conduct of tax