

Chapter 6 – Aggregate income and total income

SECTION 43

43. Aggregate income

43(1) Subject to this Act, the aggregate income of a person for a year of assessment (that person and year of assessment being in this section referred to as the relevant person and the relevant year respectively) shall consist of—

- (a) the aggregate of his statutory income, if any, for the relevant year from each of his sources consisting of a business, reduced by any deduction falling to be made for the relevant year pursuant to subsection (2);
- (b) the aggregate of his statutory income, if any, for the relevant year from each of his other sources; and
- (c) any additions falling to be made for the relevant year pursuant to Schedule 4.

43(2) Subject to subsections (3) and (5), there shall be deducted under paragraph (1)(a) pursuant to this subsection from the aggregate of the relevant person's statutory income from each of his sources consisting of a business for the relevant year the amount ascertained under subsection 44(4) or (5) for any particular year of assessment preceding the relevant year or, where that amount exceeds that aggregate, so much of that amount as is equal to that aggregate:

Provided that, where a deduction has been made or may be made pursuant to this subsection from the aggregate of the relevant person's statutory income from each of his sources consisting of a business for a year of assessment following the particular year in question or for more than one year of assessment following that particular year and in either such case ending prior to the relevant year, then, for the purposes of the application of this subsection for the relevant year, there shall be substituted in place of the amount ascertained under subsection 44(4) or (5) for that particular year so much, if any, of that amount as has not been deducted for the year of assessment following that particular year or, as the case may be, for those years of assessment following that particular year and ending prior to the relevant year.

43(3) For the purposes of subsection (2), the reference to the amount ascertained under subsection 44(4) or (5) for a particular year shall, whenever necessary, be taken to be a reference to the aggregate of—

- (a) that amount for the particular year; and
- (b) so much of any such amount for a year of assessment preceding the particular year as has not been deducted pursuant to subsection (2) from the aggregate of the relevant person's statutory income from each of his sources consisting of a business for the particular year or for a year of assessment preceding the particular year.

43(4) For the purposes of subsection (1), a person who for a year of assessment has no statutory income from a source of his or no aggregate statutory income of the kinds referred to in paragraphs (1)(a) and (b) shall be regarded as having for that year a statutory income of zero from that source or, as the case may be, an aggregate statutory income of the kind referred to in paragraph (1)(a) or the kind referred to in paragraph (1)(b), as the case may be, of zero.

43(5) *(Deleted by Act 661 of 2006, s 14)*

43(6) A reference in this section to the aggregate of the relevant person's statutory income from each of his sources consisting of a business or from each of his other sources shall where he has only one source consisting of a business or only one other source, be construed as a reference to his statutory income from that one source consisting of a business or from that one other source, as the case may be.

NOTES

General note. Now we reach the fifth stage in ascertaining chargeable income as mentioned in s5: the ascertainment of a person's aggregate income for a year of assessment. Here is where all of the sources of income come together in the following way:

BEGIN WITH the aggregate of the statutory income, if any, from all of the person's business income sources for the year of assessment (there might be more than one business source).
DEDUCT the amount of unabsorbed business losses (from all sources) brought forward from earlier years, ignoring any unabsorbed business losses of a company which are prohibited from carry-forward as a result of a change in control. This deduction cannot exceed the aggregate of the statutory income from business sources.
ADD the aggregate of the statutory income, if any, from all of the person's other income sources for the year of assessment.
ADD additions, if any, falling to be made pursuant to Sch 4 for the year of assessment.
RESULT = aggregate income for the year of assessment.

The amount ascertained under section 44(4) or (5). For ascertainment of adjusted loss, see s 40 above; for deduction of an adjusted loss from aggregate income, see s 44(2) below; for ascertainment of the excess adjusted loss not deducted from aggregate income, see ss 44(4) and 44(5) below. For restrictions on the availability of adjusted losses in the case of a company after a change of control, see s 44(5A) below and the special provision relating to s 44 below. The deletion of sub-s (5) removes an impediment to the deduction of foreign source losses.

Additions pursuant to Schedule 4. Schedule 4 below applies to ascertain the amount of any addition under this section (sub-s (1)(c)) in respect of expenditure on prospecting operations. For the deduction from aggregate income, see s 44 below.

Adjusted loss from any source of his outside Malaysia. This provision denies relief for an overseas source loss but there is no similar restriction under s 44 below.

Definitions. For "aggregate income", "statutory income", "source", see s 2(1) above.

SECTION 44

44. Total income

44(1) The total income of a person for a year of assessment (that person and year of assessment being in this section referred to as the relevant person and the relevant year respectively) shall consist of the amount of his aggregate income for the relevant year reduced—

- first, by any deduction falling to be made for the relevant year pursuant to subsection (2);
 - next, by any deduction falling to be so made pursuant to Schedule 4 or 4B;
 - next, by any deduction falling to be so made pursuant to subsection (6) or (6A);
 - next, by any deduction falling to be so made pursuant to subsection (8), (9), (10), (11), (11A), (11B) or (11C);
 - next, by any deduction falling to be so made pursuant to section 44A; and
- thereafter, by any deduction falling to be so made pursuant to section 44B.

44(2) Subject to subsections (3) and (5), there shall be deducted pursuant to this subsection from the aggregate income of the relevant person for the relevant year the amount of any adjusted loss from a source of his for the basis period for the relevant year or, where there is an adjusted loss from each of two or more sources of his for the appropriate basis period for each source for the relevant year, the aggregate of the adjusted loss from each of those sources for its appropriate basis period for the relevant year.

44(3) For the purposes of subsection (2), where in relation to a source the basis period for the relevant year overlaps the basis period for the immediately preceding year of assessment, the amount of the adjusted loss from that source for the basis period for the relevant year shall be taken to be reduced by a sum which bears the same proportion to that amount as the length of the period of the overlap bears to the length of the basis period for the relevant year and the amount of that loss as so reduced shall be taken to be the amount of the adjusted loss from that source for the basis period for the relevant year.

44(4) Where the relevant person has no aggregate income for the relevant year, there shall be ascertained for the purposes of section 43 the amount of any adjusted loss from a source of his for the basis period for the relevant year or the aggregate of any adjusted loss from each of his sources for its appropriate basis period for the relevant year, as the case may be, which would have fallen to have been deducted pursuant to subsection (2) but for the absence of aggregate income.

44(5) Where the amount referred to in subsection (4) exceeds the relevant person's aggregate income for the relevant year, so much of that amount as is equal to that aggregate income shall be deducted pursuant to subsection (2) and there shall be ascertained for the purposes of section 43 the amount of that excess.

44(5A) The amount ascertained under subsection (4) or (5) for any relevant year in respect of a company shall be disregarded for the purposes of section 43 unless the Director General is satisfied that the shareholders of that company on the last day of the basis period for that relevant year in which such amount is ascertained were substantially the same as the shareholders of that company on the first day of the basis period for the year of assessment in which such amount would otherwise be deductible under that section and such amount disregarded shall not be allowed as a deduction in subsequent years of assessment.

44(5B) For the purpose of subsection (5A)—

- (a) the shareholders of the company at any date shall be substantially the same as the shareholders at any other date if on both those dates—
 - (i) more than fifty per cent of the paid-up capital in respect of the ordinary share of the company is held by or on behalf of the same persons; and
 - (ii) more than fifty per cent of the nominal value of the allotted shares in respect of ordinary share in the company is held by or on behalf of the same persons; and
- (b) shares in the company held by or on behalf of another company shall be deemed to be held by the shareholders of the last mentioned company.

44(5C) In subsection (5B), “ordinary share” means any share other than a share which carries only a right to any dividend which is of—

- (a) a fixed amount or at a fixed rate per cent of the nominal value of the shares, or
- (b) a fixed rate per cent of the profits of the company.

44(5D) Where there is a substantial change in the shareholders of a company referred to in subsection (5A), the Minister may under special circumstances exempt that company from the provisions of that subsection.

44(5E) Where a partnership or a company is converted into a limited liability partnership in accordance with section 29 or 30 of the Limited Liability Partnerships Act 2012, the amount ascertained under subsection 44(4) or (5) for any relevant year in respect of that partnership or company shall be allowed for the purposes of ascertaining the aggregate income of that limited liability partnership for a year of assessment following the relevant year.

44(6) Subject to subsection (12), there shall be deducted pursuant to this subsection from the aggregate income of a person for the relevant year reduced by any deduction falling to be made for that year in accordance to subsection (1) an amount equal to any gift of money made by him in the basis year for that year to the Government, a State Government, a local authority or an institution or organisation or a fund approved for the purposes of this section by the Director General on the application of the institution or organisation concerned:

Provided that the amount to be deducted from the aggregate income for the relevant year in respect of any gift of money made to any institution, organization or fund approved for the purposes of this section by the Director General shall not exceed—

- (a) in the case of a person other than a company, seven per cent of the aggregate income of that person in the relevant year; or
- (b) in the case of a company, ten per cent of the aggregate income of that company in the relevant year.

44(6A) Subject to subsection (12), there shall be deducted pursuant to this subsection from the aggregate income of a person for the relevant year reduced by any deduction falling to be made for that year in accordance with subsection (1) an amount equal to the value, as determined by the Department of Museums Malaysia or the National Archives of any gift of artefact, manuscript or painting made by him in the basis year for that year to the Government or State Government.

44(6B) Where an institution or organization is aggrieved by the decision of the Director General in respect of an application made under subsection (6), the institution or organization may, within thirty days after being informed of the decision, appeal to the Minister and the Minister may make any decision as he considers fit.

44(7) In subsection (6)—

“fund” means a fund administered and augmented by an institution or organization in Malaysia for the sole purpose of carrying out the objectives for which the fund is established or held and that fund is not established or held primarily for profit;

“institution” means an institution in Malaysia which is not operated or conducted primarily for profit and which is—

- (a) a hospital;
- (b) a public or benevolent institution;
- (c) a university or other educational institution;
- (d) a public authority or society engaged solely in research or other work connected with the causes, prevention or cure of disease in human beings;
- (e) a Government-assisted institution engaged in socio-economic research; or
- (f) a technical or vocational training institution;

“organisation” means an organisation in Malaysia which is not operated or conducted primarily for profit and which is—

- (a) an organisation established and maintained exclusively to administer and augment a public or private fund established or held for the sole purpose of the establishment, enlargement or improvement of an institution or solely for the provision of a scholarship, exhibition or prize for an individual for educational work, research work or other similar work in an institution or in what would be an institution if it were in Malaysia;

- (aa) an organisation established and maintained exclusively to administer and augment a public or private fund established or held for the sole purpose of carrying out the objective in which the institution is operated or conducted;
- (b) an organisation established and maintained exclusively to administer and augment a public fund established or held solely for the relief of distress among members of the public;
- (c) an organisation established and maintained exclusively to administer and augment a public fund established and held solely for the purposes of religious worship or the advancement of religion and such fund is to be used—
 - (i) for the construction, improvement, purchase or maintenance of a building in Malaysia which is—
 - (A) intended to be used (and, when constructed or purchased, is used) exclusively for those purposes; and
 - (B) intended to be open (and, when constructed or purchased, is open) to any member of the public for those purposes; or
 - (ii) to provide facilities to carry on the activity related to those purposes; or
 - (iii) to provide for the management of the activity related to those purposes.
- (d) an organisation which maintains or assists in maintaining a zoo, museum, art gallery or similar undertaking or is engaged in or in connection with the promotion of culture or the arts;
- (e) an organisation engaged in or in connection with the conservation or protection of animals;
- (f) a Government-assisted organisation engaged solely in addressing problems relating to industrial and commercial development and promoting and enhancing the relationship between the public sector and the private sector;
- (g) a Government-assisted organisation established and maintained exclusively to administer and augment a fund established or held solely for promoting national unity;
- (h) an organisation established exclusively for the conservation or protection of the environment;
- (i) an international organisation as defined under the International Organization (Privileges and Immunities) Act 1992 [Act 485] carrying out such charitable activities as determined by the Minister;
- (j) an organisation established and maintained exclusively to administer or augment a fund established or held for the purpose of carrying out projects towards the acculturation of the community in information and communication technology, approved by the Minister; or

- (k) a benevolent fund or trust account established or held for the sole purpose of providing relief or aid to an individual who has no, or insufficient means, or in the case of a dependent individual whose parents or guardian has no, or insufficient means, to pay for the cost of the medical treatment required by such individual to treat a serious disease as defined in subsection 46(2).

44(7A) An institution or organisation referred to in subsection (7)—

- (a) may apply not more than twenty-five per cent of its accumulated funds or that of the fund approved under subsection (6) as at the beginning of the basis period for the year of assessment for the carrying on of, or participation in, a business:

Provided that the profits or income derived therefrom shall be used solely for charitable purposes or for the primary purpose for which the institution, organization or fund was established; or

- (b) may carry out charitable activities outside Malaysia with the prior consent of the Minister.

44(7B) The reference to the carrying on of, or participation in, a business in paragraph (7A)(a) shall not include the carrying on of a business by an institution or organisation where—

- (a) the business is carried on in the course of the actual carrying out of the primary purpose of the institution, organization or fund; or
- (b) the work in connection with the business is mainly carried on by persons for whose benefit the institution, organization or fund was established.

44(8) Subject to subsection (12), there shall be deducted pursuant to this subsection from the aggregate income of a person to whom paragraph 34(6)(g) does not apply, for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to any gift of money made by him in the basis year for that year, for the provision of library facilities which are accessible to the public, to public libraries and libraries of schools and institutions of higher education, not exceeding twenty thousand ringgit.

44(9) There shall be deducted pursuant to this subsection from the aggregate income of a relevant person who is an individual for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to any gift of money or contribution in kind (the value to be determined by the relevant local authority) made by him in the basis year for that year for the provision of facilities in public places for the benefit of disabled persons.

44(10) There shall be deducted pursuant to this subsection from the aggregate income of a relevant person who is an individual for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to

any gift of money or the cost or value (as certified by the Ministry of Health) of any gift of medical equipment made by him in the basis year for that year to any healthcare facility approved by that Ministry, and that amount shall not exceed twenty thousand ringgit.

44(11) Subject to subsection (12), there shall be deducted pursuant to this subsection from the aggregate income of a relevant person for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to the value of any gift of painting (to be determined by the National Art Gallery or any state art gallery) made by him in the basis year for that year to the National Art Gallery or any state art gallery.

44(11A) There shall be deducted pursuant to this subsection from the aggregate income of a person other than an offshore company excluding chargeable offshore company and individual for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to the payment of *zakat perniagaan* which is paid in the basis period for that relevant year to an appropriate religious authority established under any written law or any person authorized by such religious authority:

Provided that the amount to be deducted pursuant to this subsection shall not exceed one-fortieth of the aggregate income of that person in the relevant year.

44(11B) There shall be deducted from the aggregate income of a relevant person for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to any gift of money made by the relevant person in the basis period for that year for any sports activity approved by the Minister:

Provided that the amount to be deducted pursuant to this subsection shall not exceed—

- (a) in the case of a person other than a company, the difference between the amount of seven per cent of the aggregate income of that person in the relevant year and the total amount that has been deducted pursuant to the proviso to subsections (6) and (11C) for that relevant year; or
- (b) in the case of a company, the difference between the amount of ten per cent of the aggregate income of that company in the relevant year and the total amount that has been deducted pursuant to the proviso to subsections (6) and (11C) for that relevant year.

44(11C) There shall be deducted from the aggregate income of a relevant person for the relevant year reduced by any deduction for that year in accordance with subsection (1) an amount equal to any gift of money or cost of contribution in kind made by the relevant person in the basis period for that year for any project of national interest approved by the Minister:

Provided that the amount to be deducted pursuant to this subsection shall not exceed—

- (a) in the case of a person other than a company, the difference between the amount of seven per cent of the aggregate income of that person in the relevant year and the total amount that has been deducted pursuant to the proviso to subsections (6) and (11B) for that relevant year; or
- (b) in the case of a company, the difference between the amount of ten per cent of the aggregate income of that company in the relevant year and the total amount that has been deducted pursuant to the proviso to subsections (6) and (11B) for that relevant year.

44(12) In subsections (6), (6A), (8) and (11), references to basis year in relation to a company, trust body or co-operative society shall be construed as references to the basis period for the year of assessment of that company, trust body or co-operative society.

[CCH Note: Special provision inserted by Act 644 of 2005, s. 10, effective for the year of assessment 2006 and subsequent years of assessment.

Special provision relating to section 44 (Finance Act 2005)

(1) Notwithstanding the provisions of section 43 of the principal Act and subsection 44(5A) of the principal Act as introduced by section 9 of this Act, any amount ascertained under subsection 44(4) or (5) of the principal Act in respect of a company for any year of assessment preceding the year of assessment 2006 shall be disregarded for the purpose of section 43 of the principal Act unless the Director General is satisfied that the shareholders of that company on the last day of the basis period for the year of assessment 2005 were substantially the same as the shareholders of that company on the first day of the basis period for the year of assessment in which such amount would otherwise be deductible under section 43 of the principal Act and such amount disregarded shall not be allowed as a deduction in subsequent years of assessment.

(2) For the purpose of subsection (1)—

- (a) the shareholders of the company at any date shall be substantially the same as the shareholders at any other date if on both those dates—
 - (i) more than fifty per cent of the paid-up capital in respect of the ordinary share of the company is held by or on behalf of the same persons; and
 - (ii) more than fifty per cent of the nominal value of the allotted shares in respect of ordinary share in the company is held by or on behalf of the same persons;
- (b) shares in the company held by or on behalf of another company shall be deemed to be held by the shareholders of the last mentioned company; and
- (c) where the basis period of a company for the year of assessment 2005 ends on or after 1 October 2005, the last day of the basis period for that company for the year of assessment 2005 shall be deemed to be 30 September 2005.

(3) Where there is a substantial change in the shareholders of a company referred to in subsection (1), the Minister may under special circumstances exempt that company from the provisions of that subsection.

(4) In this section, "ordinary share" has the same meaning assigned to it under subsection 44(5C) of the principal Act.]

NOTES

Amendments. S 44(1)(d) amended by Act A1349 of 2009, s 2(a), deemed to have effect for the years of assessment 2008, 2009 and 2010, by deleting ";and" at the end of the paragraph.

S. 44(1)(e) amended by Act A1349 of 2009, s. 2(b)(i) and (ii), deemed to have effect for the years of assessment 2008, 2009 and 2010, by substituting:

(i) the word "next" for "thereafter"

(ii) "; and" for ";," at the end of the paragraph.

S. 44(1)(f) inserted by Act A1349 of 2009, s. 2(c), deemed to have effect for the years of assessment 2008, 2009 and 2010.

S. 44(5E) inserted by Act 755 of 2013, s. 15, in force from 26 December 2012.

S. 44(6) amended by Act 785 of 2017, s. 8(a)(i), effective for the year of assessment 2017 and subsequent years of assessment, by inserting "or a fund" after "local authority or an institution or organization".

S. 44(6) proviso amended by Act 785 of 2017, s. 8(a)(ii), effective for the year of assessment 2017 and subsequent years of assessment, by substituting ", organization or fund" for "or organization".

Proviso to s. 44(6) substituted by Act 693 of 2009, s. 16(a), in effect for the year of assessment 2009 and subsequent years of assessment.

Definition of "fund" inserted by Act 785 of 2017, s. 8(b), effective for the year of assessment 2017 and subsequent years of assessment.

Definition of "organisation" para (aa) inserted by Act A1429 of 2012, s. 2(a), in force from 13 June 2012.

Definition of "organisation" para. (c) substituted by Act A1429 of 2012, s. 2(b), in force from 23 June 2012.

Definition of "organisation" para. (c)(i) amended by Act 761 of 2014, s. 13(a), effective for year of assessment 2014 and subsequent years of assessment, by inserting "purchase" after "improvement".

Definition of "organisation" para. (c)(i)(A) and (c)(i)(B) amended by Act 761 of 2014, s. 13(b) and (c), effective for year of assessment 2014 and subsequent years of assessment, by inserting "or purchased" after "constructed" respectively.

S. 44(7A)(a) amended by Act 785 of 2017, s. 8(c)(i), effective for the year of assessment 2017 and subsequent years of assessment, by inserting "or that of the fund approved under subsection (6)" after "funds".

S. 44(7A)(a) proviso amended by Act 785 of 2017, s. 8(c)(ii), effective for the year of assessment 2017 and subsequent years of assessment, by substituting ", organization or fund" for "or organization".

S. 44(7B)(a) amended by Act 785 of 2017, s. 8(d), effective for the year of assessment 2017 and subsequent years of assessment, by substituting ", organization or fund" for "or organization".

S. 44(7B)(b) amended by Act 785 of 2017, s. 8(e), effective for the year of assessment 2017 and subsequent years of assessment, by substituting ", organization or fund" for "or organization".

S. 44(11B) amended by Act 785 of 2017, s. 8(f), effective for the year of assessment 2017 and subsequent years of assessment, by substituting "made by the relevant person in the basis period for that year for any sports activity approved by the Minister" for "or cost of contribution in kind

made by the relevant person in the basis period for that year for any sports activity approved by the Minister or to any sports body approved by the Commissioner of Sports appointed under the Sports Development Act 1997 [Act 576]".

Proviso to s. 44(11B) substituted by Act 693 of 2009, s. 16(b), in effect for the year of assessment 2009 and subsequent years of assessment.

Proviso to s. 44(11C) substituted by Act 693 of 2009, s. 16(c), in effect for the year of assessment 2009 and subsequent years of assessment.

General note. This section continues the fifth stage in ascertaining chargeable income as mentioned in s 5. Here we progress from aggregate income to ascertain a person's total income for a year of assessment, as follows:

BEGIN WITH the aggregate income for the year of assessment.
DEDUCT the amount of any business loss for the basis period for the year of assessment (from all sources, if more than one) (limited to the aggregate income, if less).
RESULT, if not positive = NIL and STOP. (Adjusted losses which cannot be set off here can be carried forward under s 43.)
RESULT, if positive = CONTINUE.
DEDUCT any amounts falling to be deducted under Schs 4 or 4B.
RESULT, if positive = CONTINUE.
DEDUCT the amount or value of any gift of money, artefact, manuscript or painting which qualifies for deduction under sub-s (6) or (6A).
RESULT, if positive = CONTINUE.
DEDUCT the amount or value of any gift of money or in kind which qualifies for deduction under sub-s (8), (9), (10), (11), (11A), (11B) or (11C).
RESULT, if positive = CONTINUE.
DEDUCT any amounts falling to be deducted under s 44A.
RESULT, if positive = CONTINUE.
DEDUCT any amounts falling to be deducted under s 44B.
RESULT, if positive = total income for the year of assessment.
RESULT, if not positive = IGNORE.

Several new sub-sections have been added in recent years and the order of deduction, which has been restated several times, has become complicated. Also, no provision is made for carry forward of any unused amount where the deductions cannot be made in full due to an insufficiency of adjusted income. With so many different deductions available, the introduction of a carry-forward provision would be welcome.

Priority of set-off. For deductions to be given in priority to any deduction under sub-s (1)(c) of this section, see ss 60F, 60H and 63B below.

Deduction pursuant to sub-section (2). For ascertainment of adjusted loss, see s 40 above; for deduction of excess adjusted loss from statutory business income, see s 43 above. So far as a limited liability partnership is concerned, this is to include the adjusted loss of a company or a partnership converted into a limited liability partnership in accordance with s 29 of the *Limited Liability Partnership Act 2012*. It is not clear how the set off for losses will be achieved in the case of a partnership where adjusted losses are attributed to individual partners and not to the whole partnership (see s 59 below).

Deduction pursuant to Schedule 4. Schedule 4 below applies to ascertain the amount of any deduction under this section (sub-s (1)(b)) in respect of expenditure on prospecting operations. See para 13 as to an insufficiency of defined aggregate income and paras 2 and 3 as to the claim for the deduction. For the addition to aggregate income, see s 43(1)(c) below.

Deduction pursuant to Schedule 4B. Schedule 4B below applies to ascertain the amount of any deduction under this section (sub-s (1)(b)) in respect of pre-operational business expenditure. See para 4 as to an insufficiency of defined aggregate income.

Deduction falling to be so made pursuant to section 44A. Section 44A (group relief) applies to determine the amount, if any, that a claimant company is entitled to deduct in respect of the surrender of losses.

Deduction falling to be so made pursuant to section 44B. Section 44B (carry-back losses) applies to determine the amount of adjusted loss, if any, that an eligible company may deduct. The deduction is only available for the years of assessment 2008 and 2009.

Institution or organisation approved for the purposes of this section by the Director General. For power of the Director General to give approvals, see s 148 below. Many institutions or organisations have been approved by the Director General for the purposes of this section and published in the *Gazette*. Space does not permit the inclusion of the full list in this work. It should be noted that approval for the purposes of this section is given on the application of the institution or organisation. Approval under this section also forms the basis for exempting the income of the institution or organisation itself under para 13(a) of Sch 6 below. New sub-s (6B) makes provision for an institution or organisation aggrieved by the Director General's decision on an application under sub-s (6) to appeal to the Minister of Finance.

Sub-sections 44(7A) and 44(7B) set some specific limits on the organisations which may be approved by the Director General under sub-s 44(6) by defining the extent to which such bodies may use their funds for business purposes. They also confer on the Minister of Finance a discretionary power of consent by which he may control the carrying out of charitable activities outside Malaysia.

Gift of money (sub-section (6)). To constitute a gift, it must appear that the property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it, and that no advantage of a material character was received by the transferor by way of return; see *FCT v Mc Phail* (1968) 117 CLR 111, cited in *SB Sdn Bhd v Director General of Inland Revenue* (1995) MSTC 2,417.

A limit is set upon the amount of cash gifts qualifying for deduction. The deduction cannot exceed, in the case of a company, 10% and, in any other case, 7% of aggregate income of the relevant year in respect of any gift.

In *Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 3 AMR 569, the Court of Appeal overturned the decision of the Special Commissioners and reversed the order of the High Court, holding that a gift of money deductible under this section can be apportioned between exempt and non-exempt income. In the context of s 127 below, income means chargeable income, not gross income, and any exemption can only be applied after the chargeable income is ascertained.

Gifts for sports (sub-s (11B)) and for projects of national interest (sub-s (11C)) also qualify for deduction. The deductions under these headings are also limited to a percentage of aggregate income, 10% in the case of a company and 7% in any other case. However, the limits are

progressively curtailed so that no more than 10%, or 7% as the case may be, of aggregate income for the year is deducted in respect of amounts qualifying under sub-ss (6), (11B) and (11C) combined. The meaning of "projects of national interest" is not stated.

Basis year. To accord with the adoption of the basis period as the basis for all sources of income of a company, trust body or co-operative society (see s 21A), sub-s 44(12) was inserted to ensure that the application of this section, in relation to a company, trust body or co-operative society, will also be by reference to basis periods rather than basis years.

Zakat perniagaan. *Zakat* refers to the religious dues payable by Muslims. *Zakat perniagaan* is paid by companies and other bodies on business profits. Individuals making *zakat* payments can claim a rebate of tax under s 6A above. An offshore (Labuan) company (see s 2 above) which has not opted to pay ordinary income tax can claim a rebate of tax under s 8A of the *Labuan Business Activity Tax Act 1990* [Act 445]. Companies and other bodies paying *zakat perniagaan* are not entitled to a rebate but are given a deduction from aggregate income not exceeding one-fortieth of that income.

Substantial change in the shareholders of a company. Normally, a loss which cannot be relieved under this section due to an absence or insufficiency of aggregate income can be carried forward and utilised in accordance with s 43 below. For a company, sub-s (5A), introduced from year of assessment 2006, has the effect of nullifying any carry-forward where there is a substantial change in shareholding. However, the effect of this is mitigated considerably by a concession announced by the Minister of Finance in January 2008, effective from the year of assessment 2006, wherein it was announced that only dormant companies will be subject to the restriction following a substantial change in shareholding. It has been confirmed that, in the case of multiple holdings, only a change in control by the ultimate shareholder will be taken into account.

It has also been confirmed that changes during the pioneer period of a company will be disregarded, as will changes due to privatisation, nationalisation and reorganisation where the government is an interested party. For affected companies, each year for which there is an unrelieved loss must be examined. There will be no carry-forward if the shareholders at the end of the basis period are not "substantially the same" as those at the first day of the next basis period in which there is statutory business income which would otherwise have allowed the loss to be relieved under s 43. "Substantially the same" means that more than 50% of the paid-up and nominal ordinary share capital is held by or on behalf of the same persons. A change can also affect the availability of losses brought forward from earlier years. See the special provision reproduced below.

See also Sch 3 below for the restrictions on the carry-forward of capital allowances which work in a similar way to the restrictions on relief for unabsorbed losses. For many years, the Inland Revenue Board has tried to counter tax avoidance involving the transfer of ownership of tax loss companies by using the unpredictable general anti-avoidance provisions of s 140, below; see the Special Commissioners' decision in *SBP Sdn Bhd v Director General of Inland Revenue* (1988) MSTC 243; (1988) MSTC 2,053. The new provisions provide more certainty for both the Inland Revenue Board and the taxpayer.

Definitions. For "business", "Minister", "total income", "individual", "aggregate income", "adjusted loss", "source", "basis period", "Director General", "company", "trust body", "co-operative society", "offshore (Labuan) company", "year of assessment", "aggregate income", "limited liability partnership", see s 2(1) above. For "income", see s 2(2) above.

SECTION 44A

44A. Group relief for companies

44A(1) Subject to this section, a company (referred to in this section as a "surrendering company") may surrender not more than seventy per cent of its adjusted loss in the basis period of a year of assessment to one or more related companies (referred to in this section as a "claimant company"):

Provided that the surrendering company and the claimant company shall be resident in the basis year for that year of assessment and incorporated in Malaysia.

44A(2) Subsection (1) shall apply if for any year of assessment—

- (a) the surrendering company and the claimant company—
 - (i) are related companies throughout the basis period for that year of assessment and the twelve months period immediately preceding that basis period;
 - (ii) have paid-up capital in respect of ordinary share of more than two million five hundred thousand ringgit at the beginning of the basis period for that year of assessment;
 - (iii) have twelve months basis period ending on the same day;
 - (iv) make an irrevocable election to surrender or claim an amount of adjusted loss in the return furnished for that year of assessment under section 77A; and
 - (v) are subject to tax at the appropriate rate as specified in paragraph 2 in Part I of Schedule 1; and
- (b) the claimant company has a defined aggregate income for that year of assessment.

44A(3) For the purpose of this section, a surrendering company and claimant company are related companies if at least—

- (a) seventy per cent of the paid-up capital in respect of ordinary shares of the surrendering company is directly or indirectly (through the medium of other companies resident and incorporated in Malaysia) owned by the claimant company; or
- (b) seventy per cent of the paid-up capital in respect of ordinary shares of the claimant company is directly or indirectly (through the medium of other companies resident and incorporated in Malaysia) owned by the surrendering company; or
- (c) seventy per cent of the paid-up capital in respect of ordinary shares of the surrendering company and claimant company are directly or indirectly owned by another company resident and incorporated in Malaysia.

44A(4) Subject to subsection (5), any amount of adjusted loss surrendered under this section for any year of assessment—

- (a) shall be the amount or aggregate amount of the adjusted loss or the excess of that amount of the surrendering company for that year of assessment as ascertained under subsection 44(4) or (5);
- (b) shall be allowed to a claimant company as a deduction in ascertaining the total income of the claimant company in accordance with subsection 44(1); and
- (c) shall not exceed the defined aggregate income of the claimant company for that year of assessment.

44A(5) Where the amount of adjusted loss is—

- (a) surrendered to more than one claimant company, the adjusted loss shall be fully deducted in accordance with subsection (4) to the first claimant company before any excess of the adjusted loss is surrendered and deducted in accordance with that subsection to the second claimant company and so on; or
- (b) claimed by a claimant company from more than one surrendering company, the adjusted loss surrendered from the first surrendering company shall be deducted in accordance with subsection (4) to that claimant company before the adjusted loss is surrendered from the second surrendering company be deducted in accordance with that subsection to that claimant company and so on.

44A(6) For the purpose of subsection (5), the surrendering company and the claimant company shall ascertain the order of priority in respect of the adjusted loss surrendered or claimed but if that loss cannot be effected in accordance with the order of priority specified by any surrendering company or claimant company the amount of adjusted loss surrendered or claimed shall be dealt with in such manner as the Director General thinks reasonable and proper.

44A(7) Notwithstanding that a company to which subsection (3) applies, owns at least seventy per cent of the paid-up capital in the other company, it shall not be treated to have satisfied that subsection unless additionally in the year of assessment the first mentioned company is beneficially entitled to at least seventy per cent of—

- (a) any residual profits of the other company, available for distribution to that other company's equity holders; and
- (b) any residual assets of the other company, available for distribution to that other company's equity holders on a winding up.

44A(8) Notwithstanding any other provision of this section, where—

- (a) a claimant company has made an election under subsection (2), that company shall not in that year elect to surrender its adjusted loss to any other claimant company; or
- (b) a surrendering company has made an election under subsection (2), that company shall not in that year elect to claim any adjusted loss from any other surrendering company.

44A(9) Where—

- (a) in the basis year for a year of assessment the Director General discovers that the adjusted loss as mentioned in subsection (4) ought not to have been deducted in arriving at the total income of the claimant company, the Director General may in that year or within five years after its expiration make an assessment or additional assessment in respect of that company in order to make good any loss of tax; or
- (b) the surrendering company gives an incorrect information in the return furnished under section 77A in respect of the amount of adjusted loss surrendered, the Director General may, by a notice in writing, require the surrendering company to pay a penalty equal to the amount of tax which had or would have been undercharged by the claimant company in consequence of the incorrect information and where the surrendering company is dissatisfied with the penalty, the surrendering company may within thirty days of being notified appeal to the Special Commissioners as if the notice were a notice of assessment and the provision of this Act relating to appeals shall apply accordingly with any necessary modifications.

44A(10) The provisions of this section shall not apply to a company for a basis period for a year of assessment where the period during which that company—

- (a) is a pioneer company or has been granted approval for investment tax allowance under the Promotion of Investments Act 1926,
- (b) is exempt from tax on its income under section 54A, paragraph 127(3)(b) or subsection 127(3A);
- (c) has made a claim for a reinvestment allowance under Schedule 7A;
- (d) has made a claim for deduction in respect of an approved food production project under the Income Tax (Deduction for Investment in an Approved Food Production Project) Rules 2006;
- (e) has made a claim for deduction under the Income Tax (Deduction For Cost of Acquisition of Proprietary Rights) Rules 2002;
- (f) has been granted a deduction under the Income Tax (Deduction For Cost of Acquisition of a Foreign Owned Company) Rules 2003; or
- (g) has made a claim for deduction under any rules made under section 154 and those rules provide that this section shall not apply to that company.

44A(11) For the avoidance of doubt—

- (a) the amount of adjusted loss surrendered under this section shall be disregarded for the purpose of ascertaining the aggregate income of the surrendering company under section 43; and
- (b) the provisions of this Act shall apply to any adjusted loss of the surrendering company which is not surrendered under this section.

44A(12) In this section—

“**commercial loan**” means any borrowing which entitles the creditor to any return which is of only—

- (a) a fixed amount or at a fixed rate per cent of the amount of the borrowing; or
- (b) of a fixed rate per cent of the profits of the company;

“**defined aggregate income**”, in relation to a year of assessment, means the aggregate income of a claimant company for that year reduced by a deduction made pursuant to paragraphs 44(1)(a), (b), (c) and (d);

“**equity holder**” means any holder of ordinary share in the claimant or surrendering company or any creditor of that company in respect of any non-commercial loan;

“**non-commercial loan**” means any borrowing other than a commercial loan;

“**ordinary share**” means any share other than a share which carries only a right to any dividend which is of—

- (a) a fixed amount or at a fixed rate per cent of the nominal value of the shares; or
- (b) a fixed rate per cent of the profits of the company;

“**residual assets**” means net assets of the claimant or surrendering company after distribution made to—

- (a) creditors of that company in respect of commercial loans; and
- (b) holders of shares other than ordinary share,

and where that company has no residual asset, a notional amount of one hundred ringgit is deemed to be the residual assets of the company;

“**residual profits**” means profits of the claimant or surrendering company after deducting any dividend which is of—

- (a) a fixed amount or at a fixed rate per cent of the nominal value of the shares of that company; or
- (b) a fixed rate per cent of the profits of that company,

but before deducting any return due to any non-commercial loan creditor which is not of—

- (i) a fixed amount or at a fixed rate per cent of the amount of the borrowing; or
- (ii) a fixed rate per cent of the profits of that company,

and where that company has no residual profit, a notional amount of one hundred ringgit is deemed to be the residual profits of that company.

NOTES

Amendments. S. 44A(1) amended by Act 693 of 2009, s. 17, effective for the year of assessment 2009 and subsequent years of assessment, by substituting the words “seventy per cent” for “fifty per cent”.

S. 44A(9)(a) amended by Act 755 of 2013, s. 16, in force from 1 January 2014, by substituting “five” for “six”.

Group relief. See Public Ruling No 7/2016 “Group Relief for Companies”.

Irrevocable election. See Forms C(RK-T) Claimant Company and C(RK-S) Surrendering Company.

The surrendering company and the claimant company. A company having an adjusted loss in a basis period may surrender up to seventy per cent (fifty per cent prior to the year of assessment 2009) of that loss to one or more related companies. The loss is relieved by set-off against the “defined aggregate income” of the claimant company for the same basis period. Where relevant, surrendering companies and claimant companies are to decide on the order in which they will apply surrender or set-off. A number of pre-conditions apply; companies must be resident and incorporated in Malaysia; they must be “related companies”; they must have coterminous basis periods of 12 months; each must have a paid-up share capital of more than RM2.5 million; each must be taxed at the full rate of income tax; and any company which is a pioneer company or entitled to any one of a long list of tax incentives is ineligible. The surrender and claim is to be made by an irrevocable election in each company’s Form C.

Defined aggregate income. This means aggregate income as per s 43 above as reduced by the claimant company’s own adjusted loss for the same basis period, if any, and by certain other deductions specified by s 44(1) above.

Related company. The relationship specified is at least 70% common control where one company controls the other or both are controlled by a third company. In addition, there must be the same degree of entitlement to residual profits and assets of the company controlled.

Penalty. It is worth noting that the section provides for a penalty to be imposed on a surrendering company giving incorrect information about the amount of adjusted loss surrendered. The penalty is equal to the amount of tax undercharged as a result of the incorrect information. It is not clear whether this penalty is in addition to or in substitution for the penalty imposed under s 113 below. A right of appeal has been introduced with effect from year of assessment 2007.

Definitions. For “company”, “adjusted loss”, “basis period”, “total income”, “year of assessment”, “resident”, “Director General”, “assessment”, “aggregate income”, “Special Commissioners”, see s 2(1) above.

SECTION 44B

44B. Carry-back losses

44B(1) In this section—

“**adjusted loss**” means the amount or aggregate amount of the adjusted loss of a person from a source of his or the excess of that amount for the basis period for a year of assessment as ascertained under subsection 44(4) or 44(5);

“**defined aggregate income**”, in relation to a year of assessment, means the aggregate income of the person for that year reduced by any deduction made pursuant to paragraphs (a), (b), (c), (d), and (e) of subsection 44(1);

“**immediately preceding**” in relation to a year of assessment, means—

- (a) for the year of assessment 2009, the year of assessment 2008; and
- (b) for the year of assessment 2010, the year of assessment 2009.

44B(2) Subject to subsection (6), this section shall apply if—

- (a) the basis period of a person for the year of assessment 2009 or 2010 and the basis period for the year of assessment immediately preceding the year of assessment 2009 or 2010 ends on the same day; and
- (b) that person is subject to tax at the appropriate rate as specified in paragraph 1, 1A, 2 or 2A of Part I of Schedule 1.

44B(3) Subject to this section, where a person has made an irrevocable election under subsection (4), the amount of the adjusted loss of that person from a source of his for the basis period for a year of assessment 2009 or 2010, other than the adjusted loss surrendered by that person pursuant to section 44A, shall be allowed as a deduction in ascertaining the total income of that person for a year of assessment immediately preceding the year of assessment 2009 or 2010, in accordance with subsection 44(1).

44B(4) For the purpose of subsection (3), a person shall make an irrevocable election, either for the year of assessment 2009 or 2010, in the return furnished for the year of assessment 2009 or 2010 to deduct an amount of the adjusted loss from a source of his for the basis period for that year of assessment in ascertaining the total income of that person for the year of assessment immediately preceding the year of assessment 2009 or 2010.

44B(5) The amount of adjusted loss of a person from a source of his for the basis period for a year of assessment 2009 or 2010 to be deducted pursuant to subsection (3)—

- (a) shall not exceed one hundred thousand ringgit; or
- (b) where the amount of the defined aggregate income for the year of assessment immediately preceding the year of assessment 2009 or 2010 is less than one hundred thousand ringgit, shall not exceed the amount of the defined aggregate income.

44B(6) The provisions of this section shall not apply to a person if during the basis period for a year of assessment 2009 or 2010 and the basis period for a year of assessment immediately preceding the year of assessment 2009 or 2010, that person—

- (a) is a pioneer company or has been granted approval for investment tax allowance under the Promotion of Investments Act 1986;
- (b) is exempt from tax on its income under section 54A, paragraph 127(3)(b) or subsection 127(3A), or tax paid or payable by that person for that year of assessment is remitted under section 129;
- (c) has made a claim for a reinvestment allowance under Schedule 7A;
- (d) has made a claim for deduction in respect of an approved food production project under the Income Tax (Deduction for Investment in an Approved Food Production Project) Rules 2006 [P.U. (A) 55/2006];
- (e) has made a claim for deduction under the Income Tax (Deduction for Cost of Acquisition of Proprietary Rights) Rules 2002 [P.U. (A) 63/2002];
- (f) has made a claim for deduction under the Income Tax (Deduction for Cost of Acquisition of a Foreign Owned Company) Rules 2003 [P.U. (A) 310/2003];
- (g) has made a claim for deduction under any rules made under section 154, other than the rules specified in paragraphs (d), (e) and (f), and those rules made under section 154 provide that this section shall not apply to that person;
- (h) is an investment holding company under section 60FA;
- (i) carries on insurance business under section 60, inward re-insurance business under section 60A or offshore insurance business under section 60B;
- (j) carries on takaful business under section 60AA; or
- (k) in the case of an individual, has no source consisting of a business.

44B(7) Where in the basis year for a year of assessment the Director General discovers that the adjusted loss referred to in subsection (3) ought not to have been deducted in arriving at the total income of a person for the year of assessment immediately preceding the year of assessment 2009 or 2010, the Director General may in the first-mentioned year or within six years after its expiration—

- (a) make an assessment or additional assessment in respect of that person in order to make good any loss of tax; and
- (b) require that person to pay a penalty equal to the amount of tax, which had or would have been undercharged by that person, pursuant to an assessment made under paragraph (a).

44B(8) For the avoidance of doubt—

- (a) the amount of adjusted loss which has been allowed as a deduction pursuant to this section shall be disregarded for the purpose of ascertaining the aggregate income of a person for a year of assessment immediately following the year of assessment 2009 or 2010 under subsection 43(2); and
- (b) the provisions of this Act shall apply to the balance of the adjusted loss (if any) of a person which has not been allowed as a deduction pursuant to this section.

NOTES

Amendments. S. 44B inserted by A1349 of 2009, s 3, deemed to have effect for the years of assessment 2008, 2009 and 2010.

Adjusted loss and defined aggregate income. Eligibility for relief by carry back of losses was made available to implement the Government's 2009 economic stimulus package. It is available in respect of a business adjusted loss sustained in the basis period for either the year of assessment 2009 or 2010. It is not limited to companies but there are other limitations. The relief for any year is capped at RM100,000 or the amount of the defined aggregate income (effectively the aggregate income after all other eligible deductions have been taken into account) for the year of assessment immediately preceding the year of loss. The loss relief is allowed as a deduction in calculating total income (see s 44 above for the order of set off). See sub-s (6) for the list of the situations which disqualify the person from for claiming the relief. For adjusted loss, see s 40 above. For partnership losses, see s 59 below.

Definitions. For "person", "adjusted loss", "basis period", "total income", "year of assessment", "return", "Director General", "assessment", "aggregate income", see s 2(1) above.

Special provision relating to section 44B. The special provision contained in s 4 of the *Income Tax (Amendment) Act 2009* has effect for the years of assessment 2008, 2009 and 2010. It prevents any tax refund made to a company as a result of claiming relief under s 44B from affecting the 108 balance or revised 108 balance of the company.

109(2) Where the payer fails to pay any amount due from him under subsection (1), that amount which he fails to pay shall be increased by a sum equal to ten per cent of the amount which he fails to pay, and that amount and the increased sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109(3) Where in pursuance of this section any amount is paid to the Director General by the payer or recovered by the Director General from the payer—

- (a) the Director General shall, in the manner provided by section 110, apply that amount towards payment of the tax charged on the person to whom the payer was liable to pay the interest or royalty to which that amount relates, and
- (b) if the payer has not deducted that amount in paying the interest or royalty with respect to which that amount relates, he may recover that amount from that person as a debt due to the payer.

109(3A) Notwithstanding the foregoing subsections, where the amount due from the payer under subsection (1) is increased by a sum under subsection (2), the Director General may in his discretion for any good cause shown remit the whole or any part of that sum and, where the amount remitted has been paid, the Director General shall repay the same.

109(4) In this section “person” includes a partnership.

NOTES

Amendments. Proviso to s. 109(1) substituted by Act 693 of 2009, s. 33(a), in operation on 9 January 2009.

S. 109(3A) inserted by Act 693 of 2009, s. 33(b), in operation on 9 January 2009.

General note. This section provides for the deduction of tax from payments of interest or royalty to non-residents. It is not a final liability if the payee is in fact resident or even, in some cases, if he is not. Whether a liability exists, and the extent of it, depends upon other provisions of the Act. For the liability to tax of a non-resident in respect of interest or royalty, see s 6(1)(b) above and Sch 1 below; for the offset of tax deducted under this section against the tax charged on the payee's chargeable income, if any, see s 110(1) below.

Business carried on by such person in Malaysia. See note to s 12 above.

Derived from Malaysia. See note to s 3 above.

Failure to deduct. The amount not deducted, together with the penalty increase applicable to it, becomes a debt due to the Government (sub-s (2)); the amount not deducted may be recovered from the payee as a debt due to the payer (sub-s (3)(b)); the interest or royalty is not deductible by the payer from his gross income, unless he has paid to the Director General the amount referred to in sub-s (2) (s 39(f) above). A similar prohibition on deduction from gross income applies under s 18(h) of the *Petroleum Income Tax Act 1967*. See also failure to deduct under s 109B below.

Late payment. Failure to pay to the Director General an amount deducted under sub-s (1), or an amount which should have been deducted, leads to an increase in the amount payable. Since 2 September 2006 the increase has reverted to 10% of the tax paid late, rather than 10% of the gross amount. Such an increase is not available for offset or repayment.

Interest. See note to s 4 above.

Paying or crediting. See note to s 108 above.

Royalty. See note to s 2 above.

Tax rate. See s 6(1)(b) above and Sch 1, Pt II below.

The Director General may. For powers of the Director General, see s 148 below.

Within one month. See note to s 77 above.

Definitions. For “royalty”, “resident”, “approved loan”, “Director General”, “partnership”, see s 2(1) above.

SECTION 109A

109A. Application of sections 109 and 110 to income derived by a public entertainer

109A The provisions of sections 109 and 110 shall apply *mutatis mutandis* to remuneration or other income in respect of services performed or rendered in Malaysia by a public entertainer.

NOTES

Mutatis mutandis. The generally understood meaning is “in the same manner with appropriate changes for the context”.

Tax rate. See s 6(1)(b) above and Sch 1, Pt II below.

Definitions. For “public entertainer”, see s 2(1) above. For “income”, see s 2(2).

SECTION 109B

109B. Deduction of tax from special classes of income in certain cases derived from Malaysia

109B(1) Where any person (in this section referred to as “the payer”) is liable to make payments to a non-resident—

- (a) for services rendered by the non-resident person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such non-resident;
- (b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or
- (c) for rent or other payments made under any agreement or arrangement for the use of any moveable property,

which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General:

Provided that the Director General may under special circumstances allow extension of time for tax deducted to be paid over.

109B(2) Where the payer fails to pay any amount due from him under subsection (1), that amount which he fails to pay shall be increased by a sum equal to ten per cent of the amount which he fails to pay, and that amount and the increased sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109B(3) Where in pursuance of this section any amount is paid to the Director General by the payer or recovered by the Director General from the payer—

- (a) the Director General shall, in the manner provided by section 110, apply that amount towards payment of the tax charged on the person to whom the payer was liable to pay the payments to which the amount relates; and
- (b) if the payer has not deducted that amount in paying the payment under subsection (1) with respect to which the amount relates, he may recover that amount from that person as a debt due to the payer.

109B(3A) Notwithstanding the foregoing subsections, where the amount due from the payer under subsection (1) is increased by a sum under subsection (2), the Director General may in his discretion for any good cause shown remit the whole or any part of that sum and, where the amount remitted has been paid, the Director General shall repay the same.

109B(4) In this section “person” includes a partnership.

NOTES

Amendments. Proviso to s. 109B(1) substituted by Act 693 of 2009, s. 34(a), in operation on 9 January 2009.

S. 109B(3A) inserted by Act 693 of 2009, s. 34(b), in operation on 9 January 2009.

General note. This section provides for the deduction of tax from payments to non-residents of the kinds covered by s 4A above. It was confirmed by the High Court in *Maach.MY Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2016) MSTC ¶30-132 that this section does not apply to residents. The deduction will usually represent a final liability, but see the note to s 4A. For the offset of tax deducted under this section against the tax charged on the payee’s chargeable income, if any, see s 110(1) below. See also the Inland Revenue Board Public Ruling No 1/2014 “Withholding Tax on Special Classes of Income” which supersedes Public Ruling No 4/2005 and two subsequent Addendums.

Derived from Malaysia. See note to s 3 above.

Failure to deduct. The amount not deducted together with the penalty increase applicable to it, becomes a debt due to the Government (sub-s (2)); the amount not deducted may be recovered from the payee as a debt due to the payer (sub-s (3)(b)); the payments are not deductible by the payer from his gross income, unless he has paid to the Director General the amount referred to in sub-s (2) (s 39(f) above). A similar prohibition on deduction from gross income applies under s 18(h) of the *Petroleum Income Tax Act 1967*.

In *Esso Production Malaysia Inc v Director General of Inland Revenue* (2003) MSTC ¶4016, the High Court confirmed the finding of the Special Commissioners that there is no basis for regrossing under the *Income Tax Act 1967* or under the *Petroleum Income Tax Act 1967*. Withholding tax for

which the company became liable on grossing up payments made to non-residents without deducting tax was not a cost of production or an expense wholly and exclusively incurred in earning income and was prohibited from deduction under the relevant sections of both Acts.

Late payment. Failure to pay to the Director General an amount deducted under sub-s (1), or an amount which should have been deducted, leads to an increase in the amount payable. Since 2 September 2006 the increase has reverted to 10% of the tax paid late, rather than 10% of the gross amount. Such an increase is not available for offset or repayment.

Paying or crediting. See note to s 108 above.

Tax rate. See s 6(1)(e) above and Sch 1, Pt V below.

The Director General may. For powers of the Director General, see s 148 below.

Within one month. See note to s 77 above.

Definitions. For “resident”, “employee”, “rent”, “Director General”, “partnership”, see s 2(1) above.

SECTION 109C

109C. Deduction of tax from interest paid to a resident

109C(1) Where any person (in this section referred to as “the payer”) is liable to pay interest (other than interest exempt from tax under this Act or any order made thereto) accruing in or derived from Malaysia to an individual resident in Malaysia, he shall upon paying or crediting such interest deduct therefrom tax at the rate applicable to such interest, and (whether or not that tax is so deducted) shall within one month after paying or crediting the interest render an account and pay the amount of that tax to the Director General:

Provided that the Director General may under special circumstances, allow extension of time for tax deducted to be paid over.

109C(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109C(3) Where in pursuance of this section any amount is paid to the Director General by the payer and if the payer has not deducted that amount in paying the payment under subsection (1) with respect to which the amount relates, he may recover that amount from that individual as a debt due to the payer.

109C(4) In this section “person” refers to a bank or Islamic bank licensed under the Financial Services Act 2013 or the Islamic Financial Services Act 2013, as the case may be, a registered co-operative society, Bank Simpanan Nasional, Bank Pertanian Malaysia, Lembaga Urusan dan Tabung Haji, Malaysia Building Society Berhad, or any other institution that may be approved by the Minister.

NOTES

Amendments. S. 109C(4) amended by Act 785 of 2017, s. 20, in force from 30 June 2013, by substituting "Islamic bank licensed under the Financial Services Act 2013 or the Islamic Financial Services Act 2013, as the case may be" for "finance company licensed under the Banking and Financial Institutions Act 1989 [Act 372] or the Islamic Banking Act 1983 [Act 276]".

General note. This section provides for the deduction of tax from payments of interest by banks and certain other bodies (see sub-s (4)) to resident individuals. It is a final liability to tax. See s 6(1)(f) above for the liability to tax of such a person.

Accruing in or derived from Malaysia. See note to s 3 above.

Any other institution that may be approved by the Minister. To date, no other institution has been approved by the Minister.

Failure to deduct. The amount not deducted becomes a debt due to the Government (sub-s (2)) and it may be recovered from the payee as a debt due to the payer (sub-s (3)).

Interest. See note to s 4 above.

Paying or crediting. See note to s 108 above.

Tax rate. See s 6(1)(f) above and Sch 1, Pt VI below.

The Director General may. For powers of the Director General, see s 148 below.

Within one month. See note to s 77 above.

Definitions. For "individual", "resident", "Director General", "co-operative society", see s 2(1) above.

SECTION 109D

109D. Deduction of tax on the distribution of income of a unit trust

109D(1) This section shall only apply to income of a unit trust which is exempt under section 61A.

109D(2) Where a unit trust (in this section referred to as the payer) distributes income to a unit holder other than a unit holder which is a resident company which is deemed to be derived from Malaysia, the payer shall upon distributing the income, deduct therefrom tax at the rate applicable to such income and shall within one month after distributing such income, render an account and pay the amount of that tax to the Director General:

Provided that the Director General may under special circumstances allow extension of time for tax deducted to be paid over.

109D(3) Where the payer fails to pay any amount due from him under subsection (2), that amount which he fails to pay shall be increased by a sum equal to ten per cent of that amount, and the amount which he fails to pay and the increased sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109D(4) Where in pursuance of this section any amount is paid to the Director General by the payer or recovered by the Director General from the payer—

- (a) the Director General shall, in the manner provided by section 110, apply that amount towards payment of the tax charged on the unit holder to whom the payer distributes income to which that amount relates; and
- (b) if the payer has not deducted that amount in distributing the income under subsection (2) with respect to which that amount relates, he may recover that amount from that unit holder as a debt due to the payer.

109D(4A) Notwithstanding the foregoing subsections, where the amount due from the payer under subsection (2) is increased by a sum under subsection (3), the Director General may in his discretion for any good cause shown remit the whole or any part of that sum and, where the amount remitted has been paid, the Director General shall repay the same.

109D(5) Section 110 shall apply *mutatis mutandis* to tax deducted under this section.

NOTES

Amendments. Proviso to s. 109D(2) substituted by Act 693 of 2009, s. 35(a), in operation on 9 January 2009.

S. 109D(4A) inserted by Act 693 of 2009, s. 35(b), in operation on 9 January 2009.

Unit trust. This expression as used here has the special meaning given to it by s 61A(2) above.

Deduction of tax. This section provides the mechanism for collection of tax from unit holders other than resident companies on the distribution of the tax-exempt income of a REIT (see s 63C above). Tax is deducted at source at the rates specified by Sch I, Pt X below, but only for the periods fixed by s 6(1)(i) above. Such income is deemed to be derived from Malaysia under s 61(1B) above.

Late payment. Failure to pay to the Director General an amount deducted under sub-s (2), or an amount which should have been deducted, leads to an increase in the amount payable. Since 2 September 2006 the increase has reverted to 10% of the tax paid late rather than 10% of the gross amount.

Definitions. For "resident", "Director General", see s 2(1) above. For "income", see s 2(2) above.

SECTION 109E

109E. Deduction of tax on the distribution of income of a family fund, etc.

109E(1) This section shall only apply to profits distributed or credited out of family fund, family re-takaful fund or general fund under section 60AA where such profits have been claimed as a deduction under subparagraph (3)(b)(ii), (4)(b)(ii), (5)(b)(vii) or (7)(b)(vii) of that section.

109E(2) Where a takaful operator (in this section referred to as “the payer”) distributes or credits any amount of income to a participant other than participant which is a resident company which is deemed to be derived from Malaysia, the payer shall upon distributing or crediting the amount—

- (a) deduct from the proportion of that amount, tax at the rate applicable to that proportion; and
- (b) whether or not that tax is so deducted, within one month after distributing or crediting such amount, render an account and pay the amount of tax to the Director General.

109E(3) The Director General may in relation to subsection (2) under special circumstances allow extension of time for the amount of tax deducted to be paid over.

109E(4) Where the payer fails to pay any amount due from him under subsection (2), that amount which he fails to pay shall be increased by a sum equal to ten per cent of the amount which he fails to pay, and that amount and the increased sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109E(5) Where in pursuance of this section any amount is paid to the Director General by the payer or recovered by the Director General from the payer and if the payer has not deducted that amount in distributing the income under subsection (2) with respect to which that amount relates, the payer may recover that amount from that participant as a debt due to the payer.

109E(6) The proportion of amount referred to in subsection (2) shall be ascertained in accordance with the formula prescribed by the Minister.

109E(7) Notwithstanding the foregoing subsections, where the amount due from the payer under subsection (2) is increased by a sum under subsection (4), the Director General may in his discretion for any good cause shown remit the whole or any part of that sum and, where the amount remitted has been paid, the Director General shall repay the same.

NOTES

Amendments. S. 109E(1) amended by Act 761 of 2014, s. 26, effective for year of assessment 2014 and subsequent years of assessment, by inserting “where such profits have been claimed as a deduction under subparagraph (3)(b)(ii), (4)(b)(ii), (5)(b)(vii) or (7)(b)(vii) of that section” after “section 60AA”.

S. 109E(3) substituted by Act 693 of 2009, s. 36(a), in operation on 9 January 2009.

S. 109E(4) amended by Act 742 of 2012, s. 17, in force from 1 January 2012, by substituting “a sum equal to ten per cent of the amount which he fails to pay, and that amount and the increased sum” for “an amount equal to ten per cent of the income liable to deduction of tax under that subsection and the total sum”.

S. 109E(7) inserted by Act 693 of 2009, s. 36(b), in operation on 9 January 2009.

Deduction of tax. This section provides the mechanism for the collection of tax from non-residents on the distribution of income to a participant in a *takaful* fund (see s 60AA above). Tax is deducted at source at the rates specified by Sch I, Pt XI below.

Late payment. Failure to pay to the Director General an amount deducted under sub-s (2), or an amount which should have been deducted, leads to an increase in the amount payable. The increase is 10% of the tax paid late.

Definitions. For “resident”, “Director General”, see s 2(1) above. For “income”, see s 2(2) above.

SECTION 109F

109F. Deduction of tax from gains or profits in certain cases derived from Malaysia

109F(1) Where any person (in this section referred to as “the payer”) is liable to make payments to a non-resident in relation to any gains or profits falling under paragraph 4(f) which is derived from Malaysia, he shall upon paying or crediting such payments deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payments render an account and pay the amount of that tax to the Director General:

Provided that the Director General may under special circumstances allow extension of time for the amount of tax deducted to be paid over.

109F(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be increased by a sum equal to ten per cent of the amount which he fails to pay, and that amount and the increased sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109F(3) Where in pursuance of this section any amount is paid to the Director General by the payer or recovered by the Director General from the payer—

- (a) the Director General shall, in the manner provided by section 110, apply that amount towards payment of the tax charged on the person to whom the payer was liable to pay the payments to which the amount relates; and
- (b) if the payer has not deducted that amount in paying the payment under subsection (1) with respect to which the amount relates, he may recover that amount from that person as a debt due to the payer.

109F(4) Notwithstanding the foregoing subsections, where the amount due from the payer under subsection (1) is increased by a sum under subsection (2), the Director General may in his discretion for any good cause shown remit the whole or any part of that sum and, where the amount remitted has been paid, the Director General shall repay the same.

109F(5) Section 110 shall apply *mutatis mutandis* to tax deducted under this section.

NOTES

Amendments. S. 109F inserted by Act 693 of 2009, s. 37, in operation on 1 January 2009.

Deduction of tax. This section provides the mechanism for the collection of tax from non-residents on the payment of profits or gains covered by s 4(f) above which are deemed to be derived from Malaysia by virtue of s 15B above. Tax is deducted at source at the rates specified by Sch I, Pt XIII below.

Late payment. Failure to pay to the Director General an amount deducted under sub-s (2), or an amount which should have been deducted, leads to an increase in the amount payable. The increase is 10% of the tax paid late.

Gains or profits falling under paragraph 4(f) (see above). See also Inland Revenue Board Public Ruling No 1/2010 "Withholding Tax on Income under Paragraph 4(f)", effective from 1 January 2009, which provides clarification on the types of income falling under that section to which withholding tax applies and the administrative provisions. This should be read in conjunction with s 15B above and the Income Tax (Exemption) Order 2009 (PU(A) 389/2009).

Definitions. For "person", "resident", "Director General", see s 2(1) above. For "income", see s 2(2) above.

SECTION 109G

109G. Deduction of tax from income derived from withdrawal of a deferred annuity or a private retirement scheme

109G(1) Where a person (in this section referred to as "the payer") makes payment to an individual (in this section referred to as "the recipient") in relation to a withdrawal from a deferred annuity or a private retirement scheme before reaching the age of fifty-five (other than by reason of permanent total disablement, serious disease, mental disability, death or permanently leaving Malaysia) from a fund administered by that payer under a deferred annuity scheme or a private retirement scheme, the payer shall upon paying the amount, deduct from that amount, tax at a rate applicable to such payment, and (whether or not tax is so deducted) shall within one month after paying the amount render an account and pay the amount of that tax to the Director General:

Provided that the Director General may under special circumstances allow extension of time for the amount of tax deducted to be paid over.

109G(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be increased by a sum equal to ten per cent of the amount which he fails to pay, and that amount and the increased sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

109G(3) Where in pursuance of this section any amount is paid to the Director General by the payer or recovered by the Director General from the payer and if the payer has not deducted that amount in paying the amount under subsection (1) with respect to which that amount relates, the payer may recover that amount from the recipient as a debt due to the payer.

109G(4) Notwithstanding the foregoing subsections, where the amount due from the payer under subsection (1) is increased by a sum under subsection (2), the Director General may in his discretion for any good cause shown remit the whole or any part of that sum and, where the amount remitted has been paid, the Director General shall repay the same.

109G(5) In this section, "payer" refers to—

- in the case of a deferred annuity, a life insurer or takaful operator licensed under the Financial Services Act 2013 or the Islamic Financial Services Act 2013; or
- in the case of a private retirement scheme, a private retirement scheme provider as approved under section 139Q of the Capital Markets and Services Act 2007 to provide and manage a private retirement scheme.

NOTES

Amendments. Heading of s. 109G amended by Act 761 of 2014, s. 27(a), in force from 24 January 2014, by substituting "A DEFERRED ANNUITY OR" for "CONTRIBUTION MADE TO".

S. 109G(1) substituted by Act 761 of 2014, s. 27(b), in force from 24 January 2014.

S. 109G(5) substituted by Act 761 of 2014, s. 27(c), in force from 24 January 2014.

109G inserted by Act 755 of 2013, s. 30, in force from 1 January 2013.

Withdrawal of contributions. A resident individual who makes contributions to a deferred annuity or private retirement scheme is entitled to relief on such contributions under s 49 above. However, any amount paid to the individual on the withdrawal of contributions by him before reaching the age of 55 is treated as an amount of income unless it occurs on death or on permanently leaving Malaysia or by reason of permanent total disablement, serious disease or mental disability. Tax is payable at the rate of 8% in accordance with s 6 above and Pt XVI of Sch I. The payer is required to deduct the tax at source and whether or not deducted must pay the amount of tax to the Director General within one month of payment.

Failure to pay to the Director General. The amount not deducted, together with the penalty increase applicable to it (10%), becomes a debt due to the Government (sub-s (2)); the amount not deducted may be recovered from the payee as a debt due to the payer (sub-s (3)).

Definitions. For "resident", "private retirement scheme", "person", "Director General", see s 2(1) above.

SECTION 109H

109H. Appeal by the payer

109H(1) A payer referred to in sections 109, 109B or 109F may, within thirty days (or any period extended by the Director General) from the date an amount is due to be made to the Director General under that section, appeal to the Special Commissioners by reason that such amount is not liable to be paid under this Act and the provision of this Act relating to appeals shall apply accordingly with any necessary modification.

109H(2) Where an amount is due from the payer to a non-resident person, this section shall not apply or cease to apply if—

- (a) an appeal has been filed to the Special Commissioners by the non-resident person to whom the payer was liable to pay the amount of interest or royalty, or payment under section 4A or paragraph 4(f), of which the amount due under subsection (1) relates;
- (b) such payment to the non-resident made by the payer is disallowed as deduction under section 39 in arriving at the adjusted income of the payer; or
- (c) the amount due under subsection (1) has not been made to the Director General by the payer.

NOTES

Amendments. S. 109H inserted by Act 755 of 2013, s. 30, in force from 1 January 2013.

Appeal to the Special Commissioners. Such an appeal would be dealt with in the same way as an appeal against an assessment under s 99 above. No special form is specified and it can be presumed that Form Q must be used. Some confusion can be anticipated in view of the fact that an appeal by the non-resident person (who as the recipient of the income also has the right to appeal) would nullify any appeal made by the payer.

Definitions. For “resident”, “Director General”, “Special Commissioners”, “interest”, “royalty”, see s 2(1) above.

SECTION 110

110. Set-off for tax deducted

110(1) Any tax which is deducted from any interest or royalty under section 109 or from any payment for services, technical advice, assistance, or rental or other income under section 109B (including any amount recovered by the Director General pursuant to subsection 109(2) or 109B(2) but excluding any increase thereof) shall, when the interest, royalty, or payment for services, technical advice, assistance, or rental or other income is gross income of a person from a source of his for the basis period for a year of assessment, be set off against the tax charged on his chargeable income, if any, for that year.

110(1A) *(Deleted by Act 683 of 2007, s. 23(b))*

110(1B) *(Deleted by Act A1093 of 2000, s. 17(b))*

110(1C) *(Deleted by Act A1093 of 2000, s. 17(b))*

110(1D) *(Deleted by Act A1093 of 2000, s. 17(b))*

110(1E) *(Deleted by Act A1093 of 2000, s. 17(b))*

110(2) Subject to this section, where in relation to a year of assessment Chapter 3 or Part III has by virtue of section 41 applied to an accounting period as if it were the basis period for that year of assessment and any interest, royalty, services, technical advice, assistance, rental or other income has been included in the gross income of a person from a business of his for that accounting period, then—

- (a) if that accounting period falls wholly within the basis period for that year of assessment, for the purposes of subsection (1), the interest, royalty, services, technical advice, assistance, rental or other income shall be treated as having been included in that person's gross income from that business for that basis period for that year and regard shall be had to the tax deducted from that interest, royalty, services, technical advice, assistance, rental or other income;
- (b) if that accounting period overlaps the basis period for that year of assessment—
 - (i) the interest, royalty, services, technical advice, assistance, rental or other income and the tax deducted therefrom shall be apportioned in the manner provided by subsection 41(2);
 - (ii) the part of the interest, royalty, services, technical advice, assistance, rental or other income so apportioned to the overlapping part of that accounting period shall be treated for the purposes of subsection (1) as interest, royalty, services, technical advice, assistance, rental or other income included in that person's gross income from that business for the basis period for that year; and
 - (iii) in relation to that part of the interest, royalty, services, technical advice, assistance, rental or other income so included regard shall be had for the purposes of subsection (1) to the part of that tax so apportioned to the overlapping part of that accounting period.

110(3) Notwithstanding subsections (1) and (2), where any interest, royalty, services, technical advice, assistance, rental or other income is included in the gross income of a person from a business for the basis period for a year of assessment or, by virtue of section 41, for an accounting period as if it were the basis period for that year, then, if that interest, royalty, services, technical advice, assistance, rental or other income or a portion thereof is paid to that person after the end of that basis period or accounting period, as the case may be, that tax deducted therefrom shall be set off against any tax charged on his chargeable income for the year of assessment following that in which the interest, royalty, services, technical advice, assistance, rental or other income or the portion thereof was paid or, where there is no tax so payable, the tax so deducted shall be repaid to him.

110(4) For the purposes of subsection (1), where by reason of any provisions of sections 55 to 59 any interest, royalty, services, technical advice, assistance, rental or other income is gross income of a person from a proprietorship or continuing proprietorship business of his for the basis period for a year of assessment, there shall be set off under subsection (1) only so much of the tax so deducted from that interest, royalty, services, technical advice, assistance, rental or other income as

bears the same proportion to the amount of that tax as his share of the divisible income from that business for that period bears to the divisible income from that business for that period.

110(5) For the purposes of subsections (1) and (2), where by reason of any provisions of sections 55 to 59 any interest, royalty, services, technical advice, assistance, rental or other income in gross income of a person from a proprietorship or continuing proprietorship business of his for an accounting period, then, with respect to the amount of the tax to which regard would be had under those subsections in relation to that person but for this subsection, regard shall be had only to the same proportion of that amount as his share of the divisible income from that business for that period bears to the divisible income from that business for that period.

110(6) In any case to which subsection (4) or (5) applies, subsection (3) if applicable shall be modified accordingly.

110(7) For the purposes of the foregoing subsections, where only a portion of any interest, royalty, services, technical advice, assistance, rental or other income is gross income of a person from a source of his for the basis period for a year of assessment or for an accounting period treated as if it were the basis period for that year, regard shall be had to that portion and to so much of any tax deducted from that interest, royalty, services, technical advice, assistance, rental or other income as bears the same proportion to that tax as the amount of that portion of the interest, royalty, services, technical advice, assistance, rental or other income bears to the whole of the interest, royalty, services, technical advice, assistance, rental or other income, as the case may be; and accordingly, where this subsection applies—

- (a) the reference in subparagraph (2)(b)(i) and to the interest, royalty, services, technical advice, assistance, rental or other income shall be taken to be a reference to that portion thereof;
- (b) the reference in subparagraph (2)(b)(i) to the tax shall be taken to be a reference to so much thereof as aforesaid; and
- (c) the reference in subparagraph (2)(b)(ii) to the part of the interest, royalty, services, technical advice, assistance, rental or other income shall be taken to be to the part of that portion of the interest, royalty, services, technical advice, assistance, rental or other income.

110(8) Any tax which is applicable to the statutory income of a person from his ordinary source in relation to a trust for a year of assessment (not being a share of the total income of the trust body for that year which has been deducted from that total income in ascertaining the chargeable income of the trust body for that year) shall, where the statutory income is included in the aggregate income of a person for a year of assessment, be set off against the tax charged on the chargeable income, if any, of that person for that year of assessment.

110(9) For the purposes of subsection (8), the tax applicable to the statutory income for a year of assessment of a person from his ordinary source in relation to a trust shall be taken for that year to be a sum which bears the same proportion to the amount of tax chargeable on the chargeable income of the trust body of the trust

for that year (or, where the trust body is entitled to any relief under section 132 or 133 for that year, to that amount less the amount of that relief) as that person's statutory income from his ordinary source for that year bears to the total income of the trust body for that year.

110(9A) Notwithstanding subsections (8) and (9), where income distributed by a unit trust is included in the aggregate income of a person for a year of assessment, the tax chargeable on the unit trust and attributable to the income included in the aggregate income of that person (or, where the trust is entitled to any relief under section 132 or 133, that tax less the amount of that relief) shall be set off against the tax charged on the chargeable income, if any, of that person for that year of assessment.

110(10) Where in any case to which subsection 68(4) applies any income received by a receiver is distributed to any person entitled thereto, and that income is gross income of that person from a source of his for the basis period for a year of assessment, any tax paid by the receiver and attributable to that gross income shall be set off against the tax charged on that person's chargeable income for that year (the amount of any such tax which is so attributable being determined by the Director General).

110(11) Where tax is set off under this section against the tax charged for any year of assessment or would have been so set off if there had been tax so charged, the tax so set off or which would have been so set off shall not be set off against the tax charged for any other year of assessment.

110(12) Where paragraph 45(2)(a) applies to an individual and to a wife of his for a year of assessment, any reference in the foregoing subsections to a person shall, in the application of those subsections for that year to that individual and that wife, be taken to be a reference to that individual including that wife as if she were that individual and where paragraph 45(2)(b) applies, this subsection shall be applied accordingly.

110(13) *(Deleted by Act 683 of 2007, s. 23(e))*

NOTES

Aggregate income. For ascertainment of aggregate income, see s 43 above.

Chargeable income. For ascertainment of chargeable income, see s 44 above.

Statutory income. For ascertainment of statutory income, see s 42 above.

Total income. For ascertainment of total income, see s 44 above.

Definitions. For "assessment", "royalty", "Director General", "source", "chargeable income", "basis period", "statutory income", "total income", "trust body", "aggregate income", "individual", "wife", see s 2(1) above. For "income", see s 2(2) above.

SECTION 110A

110A. (Deleted by Act 683)

SECTION 110B

110B. Set-off for tax charged on actuarial surplus

110B(1) Notwithstanding section 110, where for a basis period for a year of assessment an amount of actuarial surplus from the life fund of an insurer is transferred to the shareholders' fund pursuant to subsection 60(3A) or (4A), any amount of tax charged on the portion of that surplus shall be set off against the tax charged on the chargeable income from the shareholders' fund of that insurer in respect of the life business.

110B(2) Where—

- (a) tax is set off under this section against the tax charged on the chargeable income of an insurer from its shareholders' fund in respect of life business for a year of assessment and the amount of the tax set-off exceeds the tax charged for that year, the excess shall be disregarded; or
- (b) there is no tax charged for that year, so much of the amount of tax that would otherwise be set off but for the absence of such tax charged shall be disregarded.

110B(3) For the purposes of this section, tax charged on the chargeable income of an insurer from its shareholders' fund in respect of life business shall consist of an amount of tax before taking into account the tax set-off under section 110.

110B(4) The portion of the surplus referred to in subsection (1) shall be ascertained in accordance with the formula prescribed by the Minister.

NOTES

Definitions. For "basis period", "year of assessment", "chargeable income", see s 2(1) above.

SECTION 110C

110C. Set-off for tax charged on actuarial surplus under takaful business

110C(1) Notwithstanding section 110, where for a basis period for a year of assessment an amount of actuarial surplus from the family fund of a takaful operator is transferred to the shareholders' fund pursuant to subparagraph 60AA(9)(a)(vi) or 60AA(10)(a)(vi), any amount of tax charged on the portion of that surplus shall be set off against the tax charged on the chargeable income from the shareholders' fund of that operator in respect of the family business.

110C(2) Where—

- (a) tax is set off under this section against the tax charged on the chargeable income of an operator from its shareholders' fund in respect of family business for a year of assessment and the amount of the tax set-off exceeds the tax charged for that year, the excess shall be disregarded; or

- (b) there is no tax charged for that year, so much of the amount of tax that would otherwise be set off but for the absence of such tax charged shall be disregarded.

110C(3) For the purposes of this section, tax charged on the chargeable income of an operator from its shareholders' fund in respect of family business shall consist of an amount of tax before taking into account the tax set-off under section 110.

110C(4) The portion of the surplus referred to in subsection (1) shall be ascertained in accordance with the formula prescribed by the Minister.

NOTES

Amendments. S. 110C(1) amended by Act 785 of 2017, s. 21, in force from 30 June 2013, by substituting "a takaful operator" for "an operator".

S. 110C inserted by Act 764 of 2014, s. 16, effective for the year of assessment 2015 and subsequent years of assessment.

Definitions. For "basis period", "year of assessment", "chargeable income", see s 2(1) above.

SECTION 111

111. Refund of over-payment

111(1) Subject to this section, where it is proved to the satisfaction of the Director General that any person has paid tax for any year of assessment (by deduction or otherwise) in excess of the amount payable under this Act, that person shall be entitled to have the excess refunded by the Government and, where that person is dissatisfied with the amount to be refunded to him, he may within thirty days of being notified of that amount appeal to the Special Commissioners as if the notification were a notice of assessment, the provisions of this Act relating to appeals applying accordingly within any necessary modifications.

111(1A) Where a person has furnished a return in accordance with subsection 77(1) or section 77A to the Director General for a year of assessment and that person has paid tax in excess of the amount payable—

- (a) that return shall be deemed to be a notification under subsection (1); and
- (b) that person is deemed to have been notified of the excess amount on the day that return is furnished.

111(1B) Where subsection (1A) applies—

- (a) the reference to tax shall be taken to be a reference to an amount of tax set-off under section 110; and
- (b) the reference to amount payable shall be taken to be a reference to the amount of tax payable before taking into account the tax set-off under section 110.

111(2) No claim for repayment under this section shall be valid unless it is made within five years after the end of the year of assessment to which the claim relates or, where the claim relates to repayment of tax charged by an assessment, within five years after the end of the year of assessment within which that assessment was made.

111(3) Nothing in this section shall operate—

- (a) to extend any time limit for appeal, validate any appeal which is otherwise invalid or authorize the revision of any assessment or other matter which has become final and conclusive; or
- (b) to compel the Government to refund the excess amount of tax paid (by deduction or otherwise) in respect of an assessment unless the assessment has been finally determined.

111(4) The representative of a disabled or deceased person shall be entitled to a refund under subsection (1) for the benefit of that person or his estate of any excess within the meaning of that subsection, and for the purposes of this subsection a payment of tax by the representative of such a person shall be deemed to have been made by that person.

111(4A) Any amount of excess in respect of tax payable for a year of assessment which is to be refunded to a person under subsection (1) may be utilized by the Director General for the payment of any other amount of tax which is due and payable (including any amount of instalments which are due and payable) by that person under this Act, or under the Petroleum (Income Tax) Act 1967 or the Real Property Gains Tax Act 1976.

111(4B) Where amount of excess in respect of a person is ascertained in accordance with subsection 50(4) of the Petroleum (Income Tax) Act 1967 or subsection 24(7A) of the Real Property Gains Tax Act 1976 such excess shall be applied for the payment of tax which is due and payable (including any amount of instalments which are due and payable) by that person under this Act.

111(5) *(Deleted by Act 683 of 2007, s. 26(b))*

111(6) In this section—

“disabled person” means a person who through incapacity, bankruptcy or liquidation or for any other reason is unable to manage his own affairs;

“representative” means, in the case of a deceased person, his executor, and, in the case of a disabled person, the guardian, committee, assignee in bankruptcy, liquidator or other person who manages or controls his estate, property, assets or affairs.

NOTES

Amendments. S. 111(1A) amended by Act 719 of 2011, s. 20(a), in force from 28 January 2011, by substituting “subsection 77(1) or section 77A” for “subsection 77(1) section 77A”

S. 111(2) amended by Act 755 of 2013, s. 31, in force from 1 January 2014, by substituting “five” for “six” wherever it appears.

S. 111(4A) inserted by Act 719 of 2011, s. 20(b), in force from 28 January 2011.

S. 111(4B) inserted by Act 719 of 2011, s. 20(b), in force from 28 January 2011.

Appeal. See s 98 to s 102 above and Sch 5 below.

Assessment. For assessments, see s 90 to s 97 above and, in particular, s 97 as to finality of assessments. See also the note to s 90 above.

That person shall be entitled. The entitlement to a refund is not discretionary. It is expressed in mandatory terms, but is subject to two pre-conditions; the entitlement must be “proved to the satisfaction of the Director General” and the repayment must be claimed within six years after the end of the year of assessment to which it relates. This means that no person will lightly obtain a refund. No time is specified for the making of the repayment and no provision is made for the taxpayer to be compensated by way of interest for any delay. In this context, it is relevant to bear in mind the stipulation in s 103 above that tax assessed is due and payable whether the person concerned appeals against the assessment or not.

Tax paid ... by deduction or otherwise. For deduction of tax at source, see ss 107, 107A, 108, 109, 109A, 109B and 109C above.

Within thirty days. See note to s 77 above.

Definitions. For “Director General”, “Special Commissioners”, “executor”, “person” see s 2(1) above.

SECTION 111A

111A. *(Deleted by Act 683)*

PART VIIA FUND FOR TAX REFUND

SECTION 111B

111B. Establishment of Fund for Tax Refund

111B(1) There is hereby established a fund, to be known as the Fund for Tax Refund (in this section referred to as “the Fund”) which shall be specified in and incorporated into the Second Schedule to the Financial Procedure Act 1957 [Act 61].

111B(2) There shall be paid from time to time into the Fund such amount of tax collected under this Act as may be authorized by the Minister.

111B(3) The moneys of the Fund shall be applied for the making of a refund of an amount of tax paid in excess of the amount payable as ascertained in section 111 of this Act or any other refund or payment required to be paid out of the Fund as provided by any other written law.

111B(4) The Fund shall be administered by the Accountant General of Malaysia.

111B(5) Notwithstanding the provisions of subsection (2) and the Financial Procedure Act 1957, the Minister may from time to time authorize the payment into the Consolidated Revenue Account in the Federal Consolidated Fund of all or any part of the moneys of the Fund.

NOTES

Definitions. For “Minister”, see s 2(1) above.

SECTION 111C

111C. Non applicability of section 14A of the Financial Procedure Act 1957

111C Section 14A of the Financial Procedure Act 1957 shall not apply to any refund in excess of the amount payable as ascertained in section 111.

SECTION 111D

111D. Compensation for over-payment of tax

111D(1) Subject to this section and subsection 111(4A), an amount of compensation may be payable to a person if the amount refunded to that person for a year of assessment under section 111 is made after—

- (a) ninety days from the date a return for that year of assessment is required to be furnished under this Act, in the case of return furnished by way of electronic transmission; or
- (b) one hundred and twenty days from the date a return for that year of assessment is required to be furnished under this Act, in any other case.

111D(2) For the purposes of this section—

- (a) the “amount refunded” refers to tax paid in accordance with section 107, 107B or 107C for a year of assessment in excess of tax payable, if any, for that year of assessment as specified in a return furnished under section 77 or 77A; and

(b) the amount of compensation shall be determined in accordance with the following formula:

$$A \times \frac{B}{C} \times 2\%$$

- where
- A is the amount refunded under section 111 for a year of assessment;
 - B is the number of days beginning from the first day after the period specified under paragraph (1)(a) or (b), as the case may be, until the day that amount is made to a person; and
 - C is the number of days in a year.

111D(3) Without prejudice to sections 91 and 113, where the Director General discovers that the whole or part of the compensation—

- (a) is wrongly paid to a person, the Director General may require from that person a return of such amount already paid; or
- (b) ought not to have been paid to that person by reason of an incorrect return or incorrect information furnished by that person, the Director General may require from that person a return of such amount already paid and that amount shall without any further notice be increased by a sum equal to ten per cent of that amount which ought not to have been paid, and the amount of compensation wrongly paid or ought not to have been paid and the sum increased shall be recoverable as if it were tax due and payable under this Act.

111D(4) This section shall not apply—

- (a) if a person fails to furnish return for a year of assessment in accordance with section 77 or 77A;
- (b) in respect of excess of amount payable referred to in subsections 111(1A) and (1B); or
- (c) if a person appeals against an assessment under section 99.

NOTES

Amendments. S 111D inserted by Act 742 of 2012, s. 18, effective from the year of assessment 2013.

Eligibility for compensation. The period for which the compensation can be paid is calculated by reference to the normal due date for submission of a return of income (see s 77A for a company, trust body or limited liability partnership and s 77 for any other person). The actual date of submission is irrelevant. Entitlement only begins after an initial period from the normal due date for submission which is 90 days in the case of electronic submission and 120 days in any other case. Entitlement is not mandatory and there will be no payment where the relevant return has not been submitted or where an appeal against an assessment has been made.

Number of days. See note to s 77 above.

Definitions. For “year of assessment”, “Director General”, “Special Commissioners”, “executor”, “person”, see s 2(1) above.

PART VIII OFFENCES AND PENALTIES

SECTION 112

112. Failure to furnish return or give notice of chargeability

112(1) Any person who makes default in furnishing a return in accordance with section 77(1) or 77A(1) in respect of any one year of assessment or in giving a notice in accordance with section 77(3), if he does so without reasonable excuse, be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding six months or to both.

112(1A) Any person who makes default in furnishing a return in accordance with subsection 77(1) or 77A(1) in respect of any year of assessment for two years or more shall, if he does so without reasonable excuse, be guilty of an offence and shall, on conviction, be liable to—

- a fine of not less than one thousand ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding six months or to both; and
- a special penalty equal to treble the amount which the Director General may, according to the best of his judgment, determine as the tax charged on the chargeable income of that person for those years of assessment.

112(2) In any prosecution under subsections (1) and (1A) the burden of proving that a return has been made or a notice given shall be upon the accused person.

112(2A) Where a person has been convicted of an offence under subsection (1), the court may make a further order that the person shall comply with the relevant provision of this Act under which the offence has been committed within thirty days, or such other period as the court deems fit, from the date the order is made.

112(3) Where in relation to a year of assessment a person makes default in furnishing a return in accordance with section 77(1) or 77A(1) or in giving a notice in accordance with section 77(3) and no prosecution under subsection (1) or (1A) has been instituted in relation to that default—

- the Director General may require that person to pay a penalty equal to treble the amount of the tax which, before any set-off, repayment or relief under this Act, is payable for that year; and
- if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

112(4) The Director General may require any person to pay an additional amount of penalty in accordance with subsection (3) in respect of any additional tax which is payable by that person for a year of assessment.

NOTES

Amendments. S. 112(1) amended by Act 773 of 2015, s. 19(a), in force from 31 December 2015, by inserting “in respect of any one year of assessment” after “77A(1)”.

S. 112(1) amended by Act 764 of 2014, s. 17, in force from 31 December 2014, by substituting “twenty thousand” for “two thousand”.

S. 112(1A) inserted by Act 773 of 2015, s. 19(b), in force from 31 December 2015.

S. 112(2) amended by Act 773 of 2015, s. 19(c), in force from 31 December 2015, by substituting “subsections (1) and (1A)” for “subsection (1)”.

S. 112(3) amended by Act 773 of 2015, s. 19(d), in force from 31 December 2015, by inserting “or (1A)” after “subsection (1)”.

S. 112(4) inserted by Act 702 of 2010, s. 11, in operation on the coming into operation of this Act.

Makes default. For the requirement to submit a return of income or to notify chargeability to tax, see s 77 and 77A above.

Offence. A person committing an offence, without reasonable excuse, may be prosecuted and, on conviction, made liable to the fine and/or term of imprisonment specified under sub-s (1). In any prosecution, the onus is on the taxpayer to prove that he has made a return. For sanction for prosecution, see s 123 below.

Penalty. The procedure under sub-s (3), by which the Director General may impose a penalty, is an alternative to prosecution under sub-s (1). It obviates such prosecution (sub-s (1)(b)). It also applies to additional tax payable for example on submission of an amended return. This part of the section makes no reference to reasonable excuse or the onus of proof. The penalty is based on the amount of tax payable and will often be greater than the potential fine under sub-s (1). The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below. A scale of penalties under sub-s (3), graded according to the seriousness of the offence, has been made available to the public via the Inland Revenue Board website.

Without reasonable excuse. What is a reasonable excuse is largely a question of fact; see *Leck v Epsom RDC* [1922] 1 KB 383. However, ignorance of the statutory provisions is no excuse; see *Aldridge v Warwickshire Coal Co Ltd* (1925) 133 LT 439, neither is a mistaken view as to the effect of those provisions; see *R v Phillip Reid* [1973] 3 All ER 1020. Not overwork, nor the death of the taxpayer’s father nor the taxpayer’s divorce constitutes a reasonable excuse; see *Thorne v General Commissioners for Sevenoaks, ex parte Thorne* [1989] BTC 243. Although the onus is on the prosecution to prove the offence, the onus is on the taxpayer to prove that he had a reasonable excuse; see *Public Prosecutor v Phua Tian Kang* [1971] 2 MLJ 149. The taxpayer is responsible for making his return and the fact that his accountant or tax agent failed to do so is no excuse; see *Inland Revenue Department v Thomas* (1990) 12 NZTC 7,005. A company liquidator, who was unable to gain access to the company’s directors or books and records, had a reasonable excuse for not completing tax returns relating to a period before the date of his appointment; see *Choon Shin Cheong v Public Prosecutor* (1995) 2 MSTC 3,446; [1979-1996] AMTC 1709.

Definitions. For “Director General”, see s 2(1) above.

SECTION 112A

112A. Failure to furnish country-by-country report

112A(1) Any person who makes default in furnishing a country-by-country report in accordance with the relevant rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both.

112A(2) In any prosecution under subsection (1) the burden of proving that a country-by-country report has been furnished shall be upon the accused person.

112A(3) Where a person has been convicted of an offence under subsection (1), the court may make a further order that the person shall comply with the relevant provision of the rules under which the offence has been committed within thirty days, or such other period as the court deems fit, from the date the order is made.

NOTES

Amendments. S. 112A inserted by Act 785 of 2017, s. 22, in force from 17 January 2017.

SECTION 113

113. Incorrect returns

113(1) Any person who—

- (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
- (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

shall, unless he satisfies the Court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

113(2) Where a person—

- (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
- (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person;

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

NOTES

Good faith. The onus is on the taxpayer to satisfy the court that he has made the return or given the information in good faith. This term includes due inquiry and implies not only an upright mental attitude but also a clear conscience and that ordinary prudence has been exercised according to the standard of a reasonable person; see *Gopal & Anor v Awang bin Mona* [1978] 2 MLJ 251. Section 113(2) applies where no prosecution is instituted and it allows the Director General to settle the matter on payment of a penalty. Unlike s 113(1), it makes no reference to “good faith”. Nevertheless, in two cases decided by the Special Commissioners, both of which are under appeal, a determination in the taxpayer’s favour was based on good faith; see *OPD Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2009) MSTC 3,846 and *NVA Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2009) MSTC 3,897. In each case, the validity of a good faith defence was confirmed at the High Court.

Information. See, *inter alia*, ss 78, 79 and 81 above.

Offence. A person committing an offence under sub-s (1), unless in good faith, may be prosecuted and, on conviction, made liable to the specified fine and a (non-reducible) special penalty. No proceedings for an offence under this section may be instituted more than 12 years after the offence was committed (see s 121(1) below). Any person who aids, abets or incites another to commit an offence under this section is deemed to have committed the same offence and to be liable to the same penalty (see s 121(2) below). See also s 123 below as to sanction for prosecution.

Penalty. The procedure under sub-s (2), under which the Director General may impose a penalty, is an alternative to prosecution under sub-s (1), and obviates such prosecution. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below. A penalty imposed under sub-s (2) is an assessment and appealable to the Special Commissioners; see note to s 90 above. A scale of penalties under sub-s (2), graded according to the seriousness of the offence, has been made available to the public via the Inland Revenue Board website.

Return. For the requirement to submit a return of income or to notify chargeability to tax, see ss 77 and 77A above.

Definitions. For “Director General”, see s 2(1) above. For “income”, see s 2(2) above.

SECTION 113A

113A. Incorrect returns, information returns or reports

113A(1) Any person who—

- (a) makes an incorrect return, information return or report by omitting the information required to be provided in accordance with any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B, on behalf of himself or another person; or
- (b) gives any incorrect information in relation to any information required to be provided in accordance with any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B, on behalf of himself or another person,

shall, unless he satisfies the court that the incorrect return, information return or report, or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction be liable to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both.

NOTES

Amendments. S. 113A inserted by Act 785 of 2017, s. 23, in force from 17 January 2017.

SECTION 114

114. Wilful evasion

114(1) Any person who wilfully and with intent to evade or assist any other person to evade tax—

- (a) omits from a return made under this Act any income which should be included;
- (b) makes a false statement or entry in a return made under this Act;
- (c) gives a false answer (orally or in writing) to a question asked or request for information made in pursuance of this Act;
- (d) prepares or maintains or authorizes the preparation or maintenance of false books of account or other false records;
- (e) falsifies or authorizes the falsification of books of account or other records; or
- (f) makes use or authorizes the use of any fraud, art or contrivance,

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both, and shall pay a special penalty of treble the amount of tax which has been undercharged in consequence of the offence or which would have been undercharged if the offence had not been detected.

114(1A) Any person who assists in, or advises with respect to, the preparation of any return where the return results in an understatement of the liability for tax of another person shall, unless he satisfies the court that the assistance or advice was given with reasonable care, be guilty of an offence and shall, on conviction, be liable to a fine of not less than two thousand ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

114(2) Where in any proceedings under this section it is proved that a false statement or false entry (whether by omission or otherwise) has been made in a return furnished under this Act by or on behalf of any person or in any books of account or other records maintained by or on behalf of any person, that person shall be presumed until the contrary is proved to have made that false statement or entry with intent to evade tax.

NOTES

General note. Tax agents and professional tax advisers need to take cognisance of sub-s (1A) under which they can be severely penalised if found guilty of an offence. See the Inland Revenue Board Public Ruling No 8/2000 "Wilful Evasion of Tax and Related Offences" for an explanation of the attitude of the Inland Revenue Board.

False. A statement may be false on account of what it omits even though it is literally true; see *R v Lord Kylsant* [1932] 1 KB 442.

Offence. A person committing an offence under sub-s (1) may be prosecuted and, on conviction, made liable to the specified fine and/or term of imprisonment as well as to a (non-reducible) special penalty. For sanction for prosecution, see s 123 below. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Return. For returns and information, see s 77 to s 89 above.

Wilfully. An act, or an omission, has been held to be wilful where the person concerned knows what he is doing and intends to do what he is doing; see *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407. Sub-section (1), it should be noted, specifies the purpose of the wilful intent, that is "to evade or assist any other person to evade tax".

Definitions. For "income", see s 2(2) above.

SECTION 115

115. Leaving Malaysia without payment of tax

115(1) Any person who, knowing that a certificate has been issued in respect of him under section 104, voluntarily leaves or attempts to leave Malaysia without paying all the tax, sums and debts specified in the certificate or furnishing security to the satisfaction of the Director General for the payment thereof shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding six months or to both.

115(2) A police officer or immigration officer may arrest without warrant any person whom he reasonably suspects to be committing or about to commit an offence under this section.

115(3) In this section "immigration officer" has the same meaning as in section 104.

NOTES

Amendments. S. 115(1) amended by Act 764 of 2014, s. 18, in force from 31 December 2014, by substituting "twenty thousand" for "two thousand".

Offence. No proceedings for an offence under this section may be instituted more than 12 years after the offence was committed (see s 121(1) below). Any person who aids, abets or incites another to commit an offence under this section is deemed to have committed the same offence and to be liable to the same penalty (see s 121(2) below). No legal proceedings may be instituted or maintained against the government, a state government, a police officer or any other public officer in respect of anything lawfully done under sub-s (2) (s 104(5) above). For recovery from persons leaving Malaysia, see s 104 above; for the responsibility of an employer, see s 83(4) above; for sanction for prosecution, see s 123 below. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Definitions. For "Director General", see s 2(1) above.

SECTION 116

116. Obstruction of officers

116 Any person who—

- (a) obstructs or refuses to permit the entry of the Director General or an authorized officer into any land, building or place in pursuance of section 80;
- (b) obstructs the Director General or an authorized officer in the exercise of his functions under this Act;

- (c) refuses to produce any book or other document in his custody or under his control on being required to do so by the Director General or an authorized officer for the purposes of this Act;
- (d) fails to provide reasonable facilities or assistance or both to the Director General or an authorized officer in the exercise of his powers under this Act; or
- (e) refuses to answer any question relating to any of those purposes lawfully asked of him by the Director General or an authorized officer,

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

NOTES

This Act. The reference to this Act in sub-s (c) is deemed to include reference to the income tax laws in force in West Malaysia, Sabah and Sarawak before the coming into force of the Act. See s 2(6) above and Sch 9 (not reproduced) and references to functions under sub-s (b) to include references to functions under the said laws.

Obstructs. Obstruction need not involve physical violence. In fact anything which makes it more difficult for a person to carry out his duty amounts to obstruction; see *Borrow v Howland* (1896) 74 LT 787; *Hinchcliffe v Sheldon* [1955] 3 All ER 406; [1955] 1 WLR 1207. Merely giving a warning to some other person may amount to obstruction of the person carrying out his duty; see *Green v Moore* [1982] QB 1044; [1982] 1 All ER 428. Standing by and doing nothing is not obstruction unless there is a legal duty to act; see *Swallow v LCC* [1916] 1 KB 224; [1914-15] All ER Rep 403.

Offence. No proceedings for an offence under this section may be instituted more than 12 years after the offence was committed (see s 121(1) below). Any person who aids, abets or incites another to commit an offence under this section is deemed to have committed the same offence and to be liable to the same penalty (see s 121(2) below). For returns and information, see s 77 to s 89 above. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Definitions. For "Director General", "authorised officer", "building", see s 2(1) above.

SECTION 117

117. Breach of confidence

117(1) Any classified person who in contravention of section 138—

- (a) communicates classified material to another person; or
- (b) allows another person to have access to classified material,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding four thousand ringgit or to imprisonment for a term not exceeding one year or to both.

117(2) In this section “classified material” and “classified person” have the same meaning as in section 138.

SECTION 118

118. Offences by officials

118 Any person having an official function under this Act who—

- (a) otherwise than in good faith, demands from any person an amount in excess of the tax or penalties due under this Act;
 - (b) withholds for his own use or otherwise any portion of any such tax or penalty collected or received by him;
 - (c) otherwise than in good faith, makes a false report or return (orally or in writing) of the amount of any such tax or penalty collected or received by him;
 - (d) defrauds any person; embezzles any money or otherwise uses his position to deal wrongfully with the Director General or any other person,
- shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

NOTES

Offence. No proceedings for an offence under this section may be instituted more than 12 years after the offence was committed (see s 121(1) below). Any person who aids, abets or incites another to commit an offence under this section is deemed to have committed the same offence and to be liable to the same penalty (see s 121(2) below). The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Compounding. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Definitions. For “Director General”, see s 2(1) above.

SECTION 119

119. Unauthorised collection

119 Any person who, not being authorized under this Act to do so, collects or attempts to collect tax or a penalty under this Act shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

NOTES

Compounding. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

SECTION 119A

119A. Failure to keep records

119A Any person who, without reasonable excuse—

- (a) fails to comply with an order or a notice given under subsection 82(3) or (5); or
- (b) contravenes subsection 82(1), (1A), (6), (7) or (8),

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than three hundred ringgit and not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

NOTES

Compounding. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

SECTION 119B

119B. Failure to comply with rules made under paragraph 154(1)(c) on mutual administrative assistance

119B(1) Except as provided in section 112A, any person who fails to comply with any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both.

119B(2) In any prosecution under subsection (1), the burden of proving that any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B has been complied with shall be upon the accused person.

119B(3) Where a person has been convicted of an offence under subsection (1), the court may make a further order that the person shall comply with the relevant provision of the rules under which the offence has been committed within thirty days or such other period as the court deems fit, from the date the order is made.

NOTES

Amendments. S. 119B inserted by Act 785 of 2017, s. 24, in force from 17 January 2017.

SECTION 120

120. Other offences

120(1) Any person who without reasonable excuse—

- (a) fails to comply with a notice given under section 78, 79, subsection 80(3), section 81, subsection 84(1), section 85 or 87;
- (b) fails to furnish a return in accordance with subsection 83(1) or to prepare and render a statement in accordance with subsection 83(1A) or 83A(1);
- (c) fails to give the notice required by subsection 83(2), (3) or (4);
- (d) contravenes subsection 84(2), 86(1), section 89 or subsection 153(1);
- (e) fails to comply with a direction given under subsection 83(5) or section 107;
- (f) fails to furnish an estimate in accordance with subsection 107C(2), 107C(3) or paragraph 107C(4)(a); or
- (g) *(Deleted by Act 683 of 2007, s. 28)*
- (h) fails to furnish the correct particulars as required by the Director General under paragraph 77(4)(b) or 77A(3)(b),

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than twenty thousand ringgit or to imprisonment for a term not exceeding six months or to both.

120(2) Where a person has been convicted of an offence under subsection (1), the court may make a further order that the person shall comply with the relevant provision of this Act under which the offence has been committed within thirty days, or such other period as the court deems fit, from the date the order is made.

NOTES

Amendments. S. 120(1) amended by Act 764 of 2014, s. 19, in force from 31 December 2014, by substituting “twenty thousand” for “two thousand”.

S 120(1)(b) amended by Act 742 of 2012, s 19, in force from 1 January 2012, by inserting “or 83A(1)” after “subsection 83(1A)”.

S 120(1)(b) substituted by Act 702 of 2010, s 12, in operation on the coming into operation of this Act.

S. 120(1)(e) amended by Act 773 of 2015, s. 20(a), in force from 31 December 2015, by deleting “or” at the end of the paragraph.

S. 120(1)(f) amended by Act 773 of 2015, s. 20(b), in force from 31 December 2015, by substituting “; or” for “;”.

S. 120(1)(h) inserted by Act 773 of 2015, s. 20(c), in force from 31 December 2015.

Offence. No proceedings for an offence under this section may be instituted more than 12 years after the offence was committed (see s 121(1) below). The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Compounding. The Director General is empowered to compound, at any time before conviction, any offence committed under the Act, and to abate or remit any penalty imposed under the Act, except a penalty imposed on conviction; see s 124 below.

Reasonable excuse. See note to s 112 above.

SECTION 121

121. Additional provisions as to offences under sections 113, 115, 116, 118 and 120

121(1) No proceedings for an offence under section 113, 115, 116, 118 or 120 shall be instituted more than twelve years after the offence was committed.

121(2) Any person who aids, abets or incites another person to commit an offence under section 113, 115, 116 or 118 shall be deemed to have committed the same offence and shall be liable to the same penalty.

SECTION 122

122. Tax, etc, payable notwithstanding institution of proceedings

122 The institution of proceedings or the imposition of a penalty, special penalty, fine or term of imprisonment under this Part shall not relieve any person from liability for the payment of any tax (or any penalty deemed under any other Part to be tax payable under this Act) or any debt or other sum for which he is or may be liable or from liability to make any return which he is required by this Act to make.

SECTION 123

123. *(Deleted by Act A1028)*

SECTION 124

124. Power to compound offences and abate or remit penalties

124(1) Where any person has committed any offence under this Act, the Director General may at any time before conviction compound the offence and order that person to pay such sum of money, not exceeding the amount of the maximum fine and any special penalty to which that person would have been liable if he had been convicted of the offence, as he thinks fit:

Provided that the Director General shall not exercise his powers under this section unless that person in writing admits that he has committed the offence and requests the Director General to deal with the offence under this section.

124(2) Where under this section the Director General compounds an offence committed by any person and makes an order accordingly—

- (a) the order shall be made in writing under the hand of the Director General and there shall be attached to it the written admission and request referred to in subsection (1);
- (b) the order shall specify—
 - (i) the offence committed;
 - (ii) the sum of money ordered to be paid; and
 - (iii) the date on which payment is to be made or the dates on which instalments of that sum are to be paid, as the case may be, and, where the order provides for payment by instalments and there is default in payment of any instalments, the whole of the balance then outstanding shall become due and payable forthwith;
- (c) a copy of the order shall be given, if he so requests, to the person who committed the offence;
- (d) that person shall not be liable to any prosecution or, as the case may be, any further prosecution in respect of the offence and, if any such prosecution or further prosecution is brought, it shall be a good defence for that person to prove that the offence has been compounded under this section;
- (e) the order shall be final and shall not be subject to any appeal;
- (f) the order may be enforced in the same way as the judgment of a subordinate court (as defined in Schedule 5) for the payment of the amount stated in the order or the amount outstanding, as the case may be; and
- (g) the order shall, on production to any court, be treated as proof of the commission of the offence by that person and of the other matters set out therein.

124(3) The Director General may abate or remit any penalty imposed under this Act except a penalty imposed on conviction.

NOTES

The Director General may. It should be noted that a written admission of the commission of the offence is a prerequisite for the Director General to exercise his discretion to compound the offence. For powers of the Director General, see s 148 below.

Definitions. For “Director General”, see s 2(1) above.

SECTION 125

125. Recovery of penalties imposed under Part VIII

125(1) Special penalties imposed under subsection 112(1A), 113(1) or 114(1) shall be recoverable in the same way as fines imposed on conviction.

125(2) Any penalty imposed on any person under section 44A(9), 112(3) or 113(2) shall be collected as if it were part of the tax payable by that person, but shall not be treated as tax so payable for the purposes of any provision of this Act other than sections 103 to 106.

NOTES

Amendments. S. 125(1) amended by Act 773 of 2015, s. 21, in force from 31 December 2015, by inserting “112(1A),” after “subsection”.

Penalties. See s 74(6) above (executors), s 75(3) above (liquidator) and s 112 to s 124 above as to offences and penalties generally.

SECTION 126

126. Jurisdiction of subordinate court

126 Notwithstanding any other written law, a subordinate court (as defined in Schedule 5) shall have power to try any offence under this Act and on conviction to impose the full penalty therefor.

NOTES

Subordinate court. See the definition in Sch 5, para 48 below.

PART IX EXEMPTIONS, REMISSION AND OTHER RELIEF

SECTION 127

127. Exemptions from tax: general

127(1) Notwithstanding any other provision of this Act but subject to section 127A, any income specified in Part 1 of Schedule 6 shall, subject to this section, be exempt from tax.

127(2) The Dewan Rakyat may by resolution delete any paragraph or item in Schedule 6 or add further paragraphs or items thereto.

127(3) The Minister may by statutory order—

- (a) provide that the interest payable on any loan charged on the Consolidated Fund or on a State Consolidated Fund shall be exempt from tax, either generally or in respect of interest payable to persons of a particular class;
- (b) exempt any class of persons from all or any of the provisions of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind;