

(Translation from the original Bahasa Malaysia text)
Public Ruling No. 8/2000

WILFUL EVASION OF TAX AND RELATED OFFENCES

1.0 TAX LAW

This Ruling applies in respect of wilful evasion and other related offences under section 114 of the **Income Tax Act 1967**. This Ruling is effective from 1 January 2001.

2.0 THE APPLICATION OF THIS RULING

This Ruling considers:

- 2.1 what constitutes or amounts to wilful evasion or intent to evade or to assist any other person to evade tax under section 114(1) of the Income Tax Act 1967 [hereinafter referred to as *the Act*];
- 2.2 the nature of assistance or advice given by any person in the preparation of a return that can be regarded as an offence under section 114(1A) of the Act; and
- 2.3 the consequences of such wilful evasion, intent to evade tax or to assist any other person to evade tax, and of giving of assistance or advice in the preparation of a return which results in the understatement of liability for tax.

3.0 HOW THE TAX LAW APPLIES

3.1 General

Generally, where a false statement or false entry or deliberate omission of an entry is made in a return or in any books of account or other records maintained by or on behalf of any person, that person may be presumed to have made that false statement or false entry or deliberate omission with the intention to evade tax.

3.2 Wilful evasion

Wilful evasion of tax means any action or deed deliberately performed or done with the purpose or intention of evading or assisting any other person to evade tax, and (without necessarily

displacing or superseding the general meaning of this statement) would include any of the following:

- 3.2.1 deliberate omission of any income from a return;
- 3.2.2 making a false statement or entry in a return;
- 3.2.3 giving a false answer (orally or in writing) to a question asked or to a request for information made for the purposes of the Act;
- 3.2.4 preparing or maintaining false books of account or other records, or authorizing the preparation or maintenance of false books of account or other records;
- 3.2.5 falsifying books of account or other records, or authorizing the falsification of books of account or other records; and
- 3.2.6 making use of any fraud, art or contrivance, or authorizing the use of any fraud, art or contrivance.

3.3 Assistance in, or advice with respect to, the preparation of a return

- 3.3.1 Where a person assists in, or advises with respect to, the preparation of a return and as a result of that assistance or advice there is an understatement of the liability for tax of another person, the person giving that assistance or advice may be liable for prosecution if it can be construed that there is dishonest intention on his part to assist the other person to evade tax.
- 3.3.2 No inference of dishonest intention should be made if it can be shown that the assistance or advice was given with reasonable care, on the basis of an interpretation of the law as stated in the Act or in the decision in any tax case or in a ruling and that interpretation is one at which any reasonable person with his knowledge and experience would have arrived. The person giving the assistance or advice should have acted in good faith, in the light of all information available after making inquiries that any reasonable person would have made.

3.4 Examination of specific claims for deductions, allowances, reliefs or rebates

- 3.4.1 Any person who assists in, or advises with respect to, the

preparation of a return should examine specific claims for deductions, allowances, reliefs or rebates made in the return [*see paragraph 4.7*] and, where considered necessary or prudent, should scrutinize (or, if not already available, obtain and scrutinize) written analyses or detailed statements in respect of items in the accounts wherein there is a likelihood that expenses or outgoings that are not allowable or are only partially allowable have been included, especially expenses or outgoings that are grouped or categorized collectively (such as bad or doubtful debts, general / miscellaneous / sundry expenses, management expenses, legal or professional fees, repairs, etc.). The person making the return or on whose behalf the return is made should certify or confirm in writing and provide such documents, analyses, statements or other relevant information which might affect his liability for tax, whether requested or not by the person giving the assistance or advice.

- 3.4.2 An adverse inference may be drawn where there is failure to call for or failure to provide the documents, analyses, statements or other information mentioned in paragraph 3.4.1 above, or where there is failure to disclose or draw attention to any matter affecting liability for tax for which disclosure should have been made or to which attention should have been drawn.

3.5

Differing position or stand

Where the person making a return or the person giving assistance or advice in the preparation of a return adopts a position or takes a stand in respect of any provision of the Act:

- 3.5.1 that is not in accordance with any requirement, direction, determination or decision in any guideline, ruling or other published statement or any statutory or prescribed form issued by or furnished to the Inland Revenue Board [IRB]; and / or
- 3.5.2 that constitutes a departure from his normal practice or treatment; and he can show that there are sufficient and reasonable grounds for him to justify that position or stand, he should make a written disclosure of that position or stand and the grounds for it, as well as how it affects the person's tax liability.

3.6

Examples of circumstances or situations

By way of illustration, the following examples indicate

circumstances or situations where a person may be considered liable for prosecution for wilfully evading tax or assisting any person to evade tax or giving assistance or advice in the preparation of a return that results in the understatement of liability for tax of another person. [*The examples are not exhaustive and the title under each example is intended as a description only and should not be regarded as a classification of the type of offence .*]

Example 1

Omission of income

Mr. A submits a duly completed return for year of assessment 2001 on his own behalf. He declares income from the carrying on of a restaurant business only. It is discovered during a tax audit that he has not declared his income from the business of selling imported gift items and souvenirs that he has been carrying on for the past 5 years.

Mr. A may be liable for prosecution for wilful evasion [section 114(1)] for omitting his income from the business of selling imported gift items and souvenirs in his return for the year of assessment 2001 and relevant preceding years.

Example 2

Preparing or maintaining false books of account or other records

Mr. B is an accountant employed by XYZ Sdn. Bhd. He heads the accounting department. He also completes the income tax returns of the company. For a particular year, on the instructions of Mr. C, a director of the company, he reclassifies certain entertainment expenses of the company (which are not allowable for income tax purposes) as purchases of goods and services. By doing so, he manages to underestimate the tax liability of the company by more than RM5,000. This is discovered during a tax audit.

The company may be liable for prosecution for wilful evasion [section 114(1)] or for making an incorrect return [section 113].

The director Mr. C may be liable for prosecution for assisting

another person (the company) to evade tax by authorizing the preparation or maintenance of false books of account or other records [section 114(1)].

The accountant Mr. B may be liable for prosecution for assisting another person (the company) to evade tax by preparing or maintaining false books of account or other records [section 114(1)].

E xample 3

Final accounts prepared from estimated or fictitious figures

A sole proprietor Mr. C, who has not kept proper records or books of account, engages a bookkeeper to prepare the final accounts and to complete the income tax return. The final accounts and the return are signed and submitted by Mr. C. During a tax audit, it is discovered that no proper books of accounts have been kept by Mr. C and that many of the figures in the final accounts are either estimated or fictitious, without any documents / records to support them.

The bookkeeper may be liable for prosecution for assisting in the preparation of Mr. C's return that results in the understatement of his liability for tax [section 114(1A)].

Mr. C may be liable for prosecution for making a false statement or entry in a return [section 114(1)] as well as for failure to keep sufficient records [section 82] [see Public Ruling No. 5/2000].

To avoid any inference of dishonest intention, the bookkeeper should have made a disclosure in the final accounts that they are prepared from incomplete records and that figures shown in the final accounts which are not supported by proper records or documents are based on reasonable estimates that are justifiable or otherwise defensible either by the bookkeeper or Mr. C; and, where appropriate, showing the basis for the estimates. Similarly, Mr. C should have made such a disclosure in his tax computation. Failure to make a disclosure on the part of either person may be regarded as indicative of dishonest intention .

E xample 4

Claim not supported by documents

A tax agent is engaged to prepare the tax computation for a company. The detailed statement for "Sundry Expenses" of RM80,000 provided by the company clearly indicates that a donation of RM10,000 is included therein. The tax agent makes an immediate request in writing for sight of the receipt, advising the company that only donations made to approved bodies or institutions under section 44(6) would be eligible for deduction. The company confirms in a letter that the donation had been made to an approved body and that it was in the process of obtaining a receipt for it. In view of the impending due date for the submission of the return and relying on that confirmation, the tax agent makes the relevant adjustments for the donation in the tax computation. It is discovered during a tax audit that there has been an understatement of the company's liability for tax as the donation had been made to a non-approved body, about which the company has neglected to inform the tax agent subsequently.

The company may be liable for prosecution for making a false claim in the return [section 114(1)] or for making an incorrect return [section 113].

No action should be taken against the tax agent since he has performed his duties with reasonable care by calling for the receipt and advising the company accordingly, and the understatement arises primarily because of his reliance, in good faith, upon the written confirmation given by the company.

Example 5

Claim for deductions or incentives not supported by documents

A tax agent is engaged to prepare a company's income tax return for a particular year of assessment. A director of the company provides a statement (confirmed by him) containing details of research and development (R&D) expenses incurred by the company and instructs the tax agent to make a claim for double deduction for the R&D expenses. The tax agent advises the director of the requirements and conditions for a valid claim under section 34A of the Act and, being satisfied with the director's confirmation that the company is eligible for the double deduction, forwards the claim in the appropriate form duly completed and

signed by the director of the company. During a tax audit, it is discovered that there is insufficient documentation to support the claim. The figures upon which the claim is based are found to be estimated and some of the expenses included are not related to the research project.

The company may be liable for prosecution for making a false claim in the return [section 114(1)] or for making an incorrect return [section 113].

The director of the company may be liable for prosecution for assisting in the preparation of a return that has resulted in the understatement of the company's liability for tax [section 114(1A)].

No action should be taken against the tax agent as he has acted in good faith and the understatement of the company's liability for tax essentially arises from the misrepresentation on the part of the company's director.

Example 6

Non-disclosure by person on whose behalf a return is prepared

A tax agent completes a return on behalf of an individual, who has verbally confirmed that his wife has no income. After the return form has been signed by the individual, it is dispatched on his behalf by the tax agent. Rent of RM12,000 received by the individual's wife is not included in the return as this has not been disclosed to the tax agent.

The individual or his wife may be liable for prosecution for evasion of tax by deliberate omission of income in the return [section 114(1)].

No action should be taken against the tax agent, as no inference of dishonest intention should be drawn against him.

Example 7

Mistake or error in return

A tax consultancy firm is engaged to complete a return on behalf of a company. The tax computation indicating a tax liability of RM144,144 and the duly completed return are submitted to the company for review and approval. The return is later furnished to the IRB by the firm on behalf of the company. In the return, the tax liability is erroneously stated to be RM141,414 . Nevertheless, settlement of tax liability is made by the company on the basis of the correct figure; the return is accompanied by a cheque for RM24,144 (RM144,144 less RM120,000 previously paid by instalments). The under- statement is not detected until a tax audit is carried out 2 years later.

Since the correct amount of tax is paid despite the error in the return, there should be no inference of dishonest intention. No action should, therefore, be taken against either the company or the firm.

Both the company and the tax consultancy firm should have exercised care and diligence in checking and ensuring that the return is correctly completed.

If settlement of tax had negligently been made on the basis of the incorrect figure, action may be considered against the company under section 113 for making an incorrect return.

If there is evidence to indicate that the understatement is made other than innocently (for example, previous or subsequent incidences of a similar nature in the same case and / or a pattern of frequent occurrences of a similar nature in a number of other cases), then action may be considered against the tax consultancy firm under section 114(1A).

3.7

The Consequences of Wilful Evasion, Intent to Evade or Assisting Any Other Person to Evade Tax

A person who performs an action or deed wilfully and with intent to evade tax or assist any other person to evade tax may be liable for prosecution and, on conviction, is liable to a fine of not less than RM1,000 and not more than RM20,000 or to imprisonment for a term not exceeding three years or to both, and as well as a special penalty of three times the amount of tax which has been undercharged or which would have been undercharged if the offence had not been detected.

3.8

The Consequences of Giving Assistance or Advice that Results in the Understatement of Liability for Tax of Another Person

A person who assists in, or advises with respect to, the preparation of a return where the return results in an understatement of the liability for tax of another person may be liable for prosecution and, unless he satisfies the court that the assistance or advice was given with reasonable care, is liable to a fine of not less than RM2,000 and not more than RM20,000 or to imprisonment for a term not exceeding three years or to both.

4.0 **INTERPRETATION**

For the purpose of this Ruling:

- 4.1 "Fraud, art or contrivance" includes any intentional or deliberate concealment, deception, falsehood, forgery or misrepresentation which is contrived and intended to deceive or to gain an illegal advantage.
- 4.2 "Person" includes a company, a co-operative society, a partnership, a club, an association, a Hindu joint family, a trust, an estate under administration and an individual.
- 4.3 "Reasonable care" means the degree of care or conscientiousness in paying proper attention to a task that is expected, in a similar situation, of an ordinary person who, considering the circumstances and the foreseeable consequences, acts with reason, sound judgment and responsibility.
- 4.4 "Return" means any return made for the purposes of the Act.
- 4.5 "Tax computation" means the working sheets, statements, schedules, calculations and other supporting documents forming the basis upon which a return is made and which are required to be submitted together with the return or maintained by the person making the return.
- 4.6 "Understatement of the liability for tax" means the tax liability declared or stated in a return that is less than what it should be under the law. The term implies dishonest intention.
Understatement is normally the result of one or more of the following: understating income, inflating expenses, omitting a source of income or failing to make adjustment for an expense (or part thereof) that is not allowable for the purposes of the Act.
- 4.7 "Examination of specific claims for deductions, allowances, reliefs or rebates" [*see paragraph 3.4.1 above*]:
 - 4.7.1 "Examine" means, in relation to a person who assists in, or

advises with respect to, the preparation of a return, to satisfy himself as to the appropriateness and validity of such claims on the basis of such documents, analyses, statements or other relevant information as certified or confirmed and provided by the person on whose behalf the return is made or by any other person acting for him .

4.7.2 Specific claims for deductions, allowances, reliefs or rebates" refer to claims which are required to be supported by documents such as prescribed forms, certificates and receipts.

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