11. The material part of the Deciding Order dated 9 June 2000 that we made is in the following terms—

"RAYUAN INI setelah dibicarakan pada 25 Mei 2000 dengan kehadiran Encik Paul Kwong Kum Wah, Peguambela dan Peguamcara bagi pihak Perayu dan Y.M. Raja Kamarul Zaman bin Raja Musa dan Encik Norhisham bin Ahmad kedua-duanya Pegawai Undang-Undang, dan Encik Heng Theng Siang, Pegawai Penaksir, Lembaga Hasil Dalam Negeri bagi pihak Responden

ADALAH DIPUTUSKAN bahawa—

(1) bayaran yang diterima oleh Perayu adalah komisyen bagi perkhidmatan yang diberikan dan boleh dikenakan cukai; dan

(2) amaun komisyen yang boleh dikenakan cukai adalah RM3,770,000.00 dan bukan RM4,000,000.00

MAKA ADALAH DIPERINTAHKAN bahawa rayuan ini ditolak

DAN DIPERINTAHKAN SELANJUTNYA bahawa Notis Taksiran Nombor OG 2034648-04 bertarikh 5 April 1996 yang menunjukkan RM1,346,755.00 sebagai cukai kena bayar bagi Tahun Taksiran 1994 dipinda sejajar dengan keputusan di atas.".

12. The Appellant, being dissatisfied with our decision, has, by a Notice of Appeal dated 23 June 2000, required us to state a case for the opinion of the High Court pursuant to para. 34 Sch. 5 of the Act, which case we have stated and do sign accordingly.

13. The question for the opinion of the High Court is whether, on the facts as stated by us, our decision is correct in law.

LCC v. Ketua Pengarah Hasil Dalam Negeri.
Special Commissioners of Income Tax. Rayuan No. PKCP (R) 86/99
Judgment delivered on 27 June 2000.

Income Tax — Double taxation — Claim for unilateral tax credit — Employment in Malaysia — Exercise of employment partly abroad — Wages and bonuses credited in Malaysia — Paragraph 15 Schedule 7 to Income Tax Act 1967 ("the Act") — Principles of statutory interpretation — In respect of taxing statutes — Interpretation of "may" in the context of provision

The taxpayer was a Malaysian citizen employed by a Malaysian company, ITSB. During the year of assessment 1997, he was tax resident in Malaysia within the meaning of section 7 *Income Tax Act 1967* ("the Act"). However, as part of his employment with ITSB, for 302 days of that year of assessment, he performed overseas duties in the United States of America ("USA"). ITSB continued to pay the taxpayer's wages and bonuses ("the taxpayer's income") by crediting the same into his personal bank account in Malaysia. The taxpayer's income was subjected to double taxation in Malaysia and the USA. On this account, the taxpayer argued paragraph 15 of Schedule 7 to the Act, that "income from an employment exercised outside Malaysia" referred to income in respect of an employment pursuant to which the employee performs duties outside Malaysia. As such, the taxpayer claimed he was entitled to RM1,798.38 paid as USA Federal Income Tax as unilateral credit. The Revenue, however, contended that notwithstanding the double tax in respect of the taxpayer's income, that phrase referred only to foreign income, and since the taxpayer's income was banked into his Malaysian account it could not constitute foreign income, thus disentitling the taxpayer to the credit. The taxpayer appealed the matter to the Special Commissioners of Income Tax.

Held: **appeal allowed.**

1. In respect of paragraph 15 Schedule 7 to the Act, considering the scheme of the Act and the clear words employed in this paragraph, it could stand by itself and is specific only to employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax.

2. In statutory interpretation and in the interpretation of tax statutes, the ordinary meaning of the word in question has to be given effect to. To give paragraph 15 Schedule 7 to the Act the meaning contended by the Revenue despite the clear words, would render paragraph 15 redundant and would run contrary to the principle of interpretation.

3. In the context of paragraph 15 Schedule 7 to the Act, the word, "may" means "shall" and no such discretion vests with the Revenue.

[Editorial Note : The Revenue's appeal to the High Court was withdrawn.]

[Headnote by CCH TAX EDITORS]

Anand Raj and Irene Yong for the taxpayer.

YM Raja Kamarul Zaman b. Raja Musa and Naimah bte Abdul Satar (Legal Officers, Inland Revenue Board) for the Revenue.

Before: Noor Azian bte Shaari (Chairman), K.P. Ramachandran and Kamarudin b. Mohd Noor (Special Commissioners of Income Tax).

Noor Azian bte Shaari (Chairman), K.P. Ramachandran and Kamarudin b. Mohd Noor (Sp Commrs):

1. At a hearing held in Kuala Lumpur on 5 May 2000, the Special Commissioners of Income Tax heard the appeal by LCC (hereinafter referred to as "the Appellant") against a Notice of Assessment dated 11 September 1997 showing RM2,124.00 being tax payable for the Year of Assessment 1997 issued by the Director General of Inland Revenue (hereinafter referred to as "the Respondent") under the *Income Tax Act 1967* (hereinafter referred to as "the Act").

2. The issue for our determination is whether the Appellant is entitled to unilateral credit on income subjected to double tax for the Year of Assessment 1997 pursuant to paragraph 15 Schedule 7 of the Act.

3. Encik Anand Raj and Cik Irene Yong, Advocates and Solicitors, appeared for the Appellant while Y.M. Raja Kamarul Zaman b. Raja Musa and Puan Naimah bte Abdul Satar, Legal Officers of the Inland Revenue Board appeared for the Respondent.

4. The Appellant himself ("AW1") gave evidence and called another witness, namely Soon Yean Sun, Executive Director of Ernst and Young ("AW2") to give evidence. The Respondent did not call any witness.

5. The following documents were tendered at the hearing —

(i)	Issue	— "A"
(ii)	Contentions	— "B"
(iii)	Statement of Agreed Facts	— "C"
(iv)	Agreed Bundle of Documents	— "D"
(v)	Appellant's Bundle of Authorities	— "E" and "E1"
(vi)	Respondent's Bundle of Authorities	— "F"
(vii)	Appellant's Submission	— "G" and "G1"
(viii)	Respondent's Submission	— "H"

6. As a result of the evidence adduced before us, both oral and documentary, the following facts were admitted or proved —

6.1. *Facts admitted*

1. The Appellant (NRIC No.: 720507-07-5091) is a Malaysian citizen. At the material time i.e. during the basis year (calendar year 1996) for the Year of Assessment 1997 (hereinafter referred to as "Y/A 1997") the Appellant had his residential address at No. 16 Kelantan Road, 10050 Penang. The Appellant is now 27 years of age.

2. During Y/A 1997, the Appellant was employed by Intel Technology Sdn Bhd ("ITSB').

3. ITSB's registered address is c/o Kennedy Burkill and Company Berhad, 1st Floor Standard Chartered Bank Chambers, Beach Street, 10300 Penang, Malaysia with its main place of business at its plant located at Phase 3 Bayan Lepas Free Industrial Zone, 11900 Penang, Malaysia.

4. During Y/A 1997, the Appellant was tax resident in Malaysia within the meaning of section 7 *Income Tax Act 1967* (hereinafter referred to as "the Act').

5. During Y/A 1997, the Appellant exercised part of his employment with ITSB outside Malaysia (hereinafter referred to as "overseas duties") at Intel Corporation's (ITSB's ultimate holding company) offices in Chandler, in the State of Arizona, a [*sic.*] United States of America (hereinafter referred to as "USA"). USA is a country which constitutes a "territory outside Malaysia" for the purposes of the Act whilst the state of Arizona constitutes "a component part" of USA for the purposes of the Act.

6. For the duration of the overseas duties, which amounted to 302 days in all, ITSB continued to pay the Appellant's wages and bonuses by crediting the same into the Appellant's personal bank account in Penang, Malaysia. The Appellant's wages and bonuses for Y/A 1997 shall hereinafter be referred to as "the Appellant's income".

7. The Appellant's income was subjected to double taxation i.e. the Appellant was charged to and paid (i) Malaysian tax; and (ii) USA federal income tax (hereinafter referred to as "foreign, tax") and Arizona state income tax, which were charged on a world-wide income scope for the duration of the Appellant's overseas duties.

8. The overseas duties were performed by the Appellant as part of his outside Malaysia duties incidental to the exercise of his employment with ITSB in Malaysia.

9. Pursuant to Sections 13(2)(a) and 13(2)(c) of the Act, the Appellant's income for Y/A 1997 was deemed to be derived from Malaysia for the purposes of Section 13(2) of the Act.

10. In regard only to the USA federal income tax referred to above, the Appellant made a claim for RM1,798.38 in "credit in respect of foreign tax" as defined in paragraph 16 of Schedule 7 to the Act (hereinafter referred to as "unilateral credit"), in the belief that the Appellant had a basis to do so (which is in any event denied by the Respondent) i.e. that:

(a) the Appellant had paid both Malaysian tax and foreign tax (hereinafter referred to collectively as "double tax"); and that

(b) the double tax was paid "in respect of income from an employment exercised outside Malaysia";

as required by paragraph 15 of Schedule 7 to the Act.

11. The Respondent, however, did not agree to the basis (referred to in paragraph 10 above) put forward by the Appellant and disallowed the Appellant's claim for unilateral credit. The Respondent subsequently raised a Notice of Assessment to income tax dated 11 September 1997 on the Appellant in the amount of RM2,124 for Y/A 1997.

12. In disallowing the Appellant's claim for unilateral credit, the Respondent did not dispute that the Appellant had paid double tax in respect of the Appellant's income.

13. The singular basis on which the Respondent disallowed the Appellant's claim for unilateral credit was that the requirement of double tax "in respect of

income from an employment exercised outside Malaysia", set out in paragraph 15 of Schedule 7 to the Act, referred to double tax:

(a) "in respect of foreign income" (meaning "income derived from outside Malaysia" as defined in paragraph 16 of Schedule 7 to the Act); and not

(b) "in respect of the Appellant's income" (which is deemed derived from Malaysia pursuant to section 13(2) of the Act).

14. The Appellant objected to the above and accordingly filed this appeal against the disallowance of his claim for unilateral credit.

15. Subject to paragraphs 1 to 14 above, the parties agree to the Appellant's tax computation and other returns and documents for Y/A 1997 which were sent to the Respondent under cover of the letter dated 8 July 1997 by Messrs. Ernst & Young (the Appellant's tax agent). No other disputes arise on the facts of this case.

6.2. *Facts proved*

1. The Appellant was in the United States of America for training to learn new products, technology and to bring back the technology to Malaysia for test production.

2. The Appellant's income received from Malaysia was subjected to the United States tax.

3. While the Appellant was in the USA his salary was paid in Penang.

7. *Contentions*

The Appellant contended that the phrase "income from an employment exercised outside Malaysia" in paragraph 15 Schedule 7 of the Act refers to income in respect of an employment pursuant to which the employee performs duties outside Malaysia and thus he is entitled to unilateral credit.

The Respondent however contended that notwithstanding the double tax in respect of the Appellant's income, the phrase "income from an employment exercised outside Malaysia" refers only to foreign income thus disentitling the Appellant to unilateral credit.

8. We were referred to the following authorities —

8.1. *By the Appellant* —

(i) *Income Tax Act, 1967*;

(ii) *Kanga and Palkhivala's The Law and Practice of Income Tax* (7th Edition) Volume 1 – section 91;

(iii) *Interpretation (Amendment) Act 1997* (Act A996);

(iv) *Craies on Statute Law* (1971) (7th Edition);

(v) *Bennion on Statute Law* (1977-1979) (3rd Edition);

(vi) *Varnam (Inspectors of Taxes) v. Deeble* (1984) STC 336;

(vii) *Leonard v. Blanchard (Inspector of Taxes)* (1992) STC 20;

(viii) *Maxwell On The Interpretation Of Statutes* (12th Edition) by P. St. J. Langan;

(ix) *GBH v. Ketua Pengarah Hasil Dalam Negeri* (1994) 2 MSTC 579;

(x) *Muhammed b. Hassan v. Pendakwa Raya* (1998) 1 AMR 829;

(xi) *Amanah Merchant Bank Bhd (formerly known as Amanah-Chase Merchant Bank Bhd) v. Lim Tow Choon (menerusi Pegawai Pemegang Harta)* (1994) 1 AMR 1;

(xii) *Commissioners of Inland Revenue v. Luke* 40 TC 630;

(xiii) *Mangin v. IRC* (1971) AC 739;

(xiv) In the High Court in Kuala Lumpur – *Director General of Inland Revenue v. Kok Fai Yin Co. Sdn Bhd* Tax Appeal No. 14.1.90 – Judgment;

(xv) *Ketua Pengarah Hasil Dalam Negeri v. Malaysian Co-operative Insurance Society Ltd* (2000) 1 MLJ 561;

(xvi) *Double Taxation Relief (The United States of America) Order*, 1989;

(xvii) *Director General of Inland Revenue v. HMP Ltd* (1988) 1 MSTC 3,032;

(xviii) *Foo Loke Ying & Anor v. Television Broadcasts Ltd* (1985) 2 MLJ 35;

(xix) *National Land Finance Co-operative v. Director General of Inland Revenue* (1993) 2 AMR 52 3581;

(xx) *Kesultanan Pahang v. Sathask Realty Sdn Bhd* (1997) 2 CLJ 723;

(xxi) *Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Another* (1993) 3 MLJ 691;

(xxii) *Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Bhd* (1998) 2 CLJ 266;

(xxiii) *Jaya Kummar a/l Ayadurai v. Hj Aman Shah b. Hj Abdul Rashid & Another* (1995) 3 AMR 2813;

(xxiv) *Macdougall v. Paterson* 11 C.B. 755;

(xxv) *Morisse v. The Royal British Bank* 1 C.B. (N.S.) 65;

(xxvi) *Newmarch v. Atkinson* 25 CLR 381;

(xxvii) *The Metropolitan Coal Company of Sydney Limited and Others v. The Australian Coal and Shale Employees' Federation* 24 CLR 85;

(xxviii) *Smith and Others v. Watson* 4 CLR 802; and

(xxix) *Frederic Guilder Julius v. The Right Rev. The Lord Bishop of Oxford; The Rev. Thomas Thellusson Carter.* H.L. (E.) 1880 214.

8.2. *By the Respondent* —

(i) *Income Tax Act 1967* (Act 53);

(ii) *Malaysian Master Tax Guide Manual* by CCH Tax Editors;

(iii) *Malaysian Taxation* (3rd Edition) by Chin Yoong Kheong;

(iv) *Words and Phrases legally defined* (3rd. Edition);

(v) *Black's Law Dictionary* (Fifth Edition);

(vi) *Stroud's Judicial Dictionary of Words And Phrases* (Third Edition) Volume 1;

(vii) *Stroud's Judicial Dictionary of Words And Phrases* (Third Edition) Volume 3;

(viii) *Commissioner of Inland Revenue v. Hang Seng Bank Ltd* (1990) STC 733; and

(ix) *Commissioners of Taxation v. Kirk* (1990) AC 588.

9. We, the Special Commissioners of Income Tax, who heard the appeal, took time to consider our decision and gave it on 19 May 2000 for the following reasons —

The issue for our determination was whether the Appellant is entitled to unilateral credit on income subjected to double tax for the Year of Assessment 1997 pursuant to paragraph 15 Schedule 7 of the Act.

The relevant parts of the Act are reproduced below for convenience —

Unilateral relief from double taxation

"133. Relief from double taxation in relation to tax under this Act and any foreign tax of any territory shall, where there is no order under section 132 in force in respect of that territory, be given in accordance with the appropriate provisions of Schedule 7;

Provided that no relief shall be given under this section in relation to tax payable under the laws of a province or other component part of that territory or tax levied by or on behalf of a municipality or other local body.".

"SCHEDULE 7

(Section 132 and 133)

DOUBLE TAXATION RELIEF

Bilateral credit

1.	)		
2.	)		
3.	)		
4.	)		
5.	)		
6.	)	...	not applicable
7.	)		
8.	)		
9.	)		
10.	)		
11.	)		
12.	)		

Unilateral credit

13. Subject to paragraphs 14 and 15, unilateral credit shall be allowed in the same way as bilateral credit, and paragraphs 1–12 shall apply accordingly.

14. The unilateral credit allowed in respect of any foreign income for a year of assessment shall not exceed half the foreign tax payable on that income for that year.

15. Where an employee pays Malaysian tax and foreign tax in respect of income from an employment exercised outside Malaysia, then, whether or not he was resident for the basis year for the year of assessment for which the Malaysian tax was paid, unilateral credit may be allowed for foreign tax.

Interpretation

16. In this Schedule —

"bilateral credit" means credit in respect of foreign tax which, by virtue of any arrangements having effect under section 132, is to be allowed as a credit against Malaysian tax;

"foreign income" means income derived from outside Malaysia;

"Malaysian tax" means tax imposed by this Act;

"unilateral credit" means credit in respect of foreign tax payable under the laws of a territory outside Malaysia with respect to which no arrangements under section 132 are in force.".

The Appellant, a Malaysian citizen, was employed by Intel Technology Sdn Bhd which is located in Penang.

The Appellant was sent from Intel Penang to Intel USA for the purpose of training as well as to acquire knowledge and experience needed for the introduction of new products or processes to Intel Penang.

For the duration of the Appellant's overseas duties amounting to 302 days in the whole, his employers continued to pay his wages and bonuses by crediting the same into the Appellant's bank account in Penang, Malaysia.

This income of the Appellant i.e. the wages and bonuses was subjected to double taxation i.e. Malaysian as well the USA Federal tax.

Subsequently, the Appellant applied for unilateral credit in respect of a sum of RM1,798.00 paid as USA Federal income tax by virtue of paragraph 15 Schedule 7 of the Act.

The Respondent disallowed the Appellant's claim for unilateral credit.

Hence the appeal before the Special Commissioners.

The Appellant in support of his contentions submitted as per Exhibits "G" and "G1". The salient points raised by the Appellant are briefly as follows —

a. The clear words "income from an employment exercised outside Malaysia" used in paragraph 15 Schedule 7 of the Act entitles him to unilateral credit as those words refer to income in respect of an employment pursuant to which the employee performs outside Malaysia duties regardless of whether —

i. such duties are incidental to the exercise of such employment;

ii. such employment is in Malaysia; and

iii. such income is derived (or deemed to be derived) from Malaysia or from outside Malaysia.

b. To construe paragraph 15 Schedule 7 of the Act to render unilateral credit only on foreign income would make paragraph 15 redundant giving rise to absurdity and violate the presumption that Parliament does nothing in vain.

The Respondent's submission in support of his contention were as per Exhibit "H" and the grounds which we considered relevant are set out below —

Paragraphs 13 to 15 Schedule 7 of the Act should be read together. This is because paragraph 13 is made subject to paragraphs 14 and 15 and paragraph 14 specifically mentions foreign income. It thus follows that paragraph 15 must refer only to foreign income. Reading these paragraphs together would give the meaning that unilateral credit can only be given in cases of foreign income. "Foreign income" has been defined as "income derived from outside Malaysia". The Appellant's income having being banked into his Penang account, does not constitute foreign income.

The Respondent referred to two books, *Malaysian Master Tax Guide Manual* and *Malaysian Taxation* (3rd ed) by Chin Yoong Kheong to support his contention that unilateral relief in paragraphs 13 to 15 is allowed only in respect of foreign income.

Having heard the evidence adduced, both oral and documentary, the submission of both parties and having read the authorities cited, we considered the following —

The case turns on a question of statutory construction. We most certainly agree that paragraphs 13 to 15 Schedule 7 of the Act should be read together. In fact we would say that Schedule 7 should be read in its entirety together with the other relevant sections of the Act, namely section 13(2) and section 133. Section 13(2) is relevant in that the Appellant's income for Year of Assessment 1997 was deemed to be derived from Malaysia, in accordance with section 13(2)(c).

The heading to Schedule 7 reads "Double Taxation Relief". It is then divided into 4 sub-headings, "Bilateral credit" (paragraphs 1 to 10), "Special provisions for trust" (paragraphs 11 to 12), "Unilateral credit" (paragraphs 13 to 15) and "Interpretation" (paragraph 16).

Bilateral credit is only given to residents (paragraph 2) in respect of foreign income which is referred to in paragraphs 3 to 5 Schedule 7 of the Act. This is where double taxation arrangements with other governments have been entered into and recognised by statutory orders made by the Minister of Finance under section 132 of the Act.

In the absence of such double taxation arrangements, there is provision for unilateral credit under section 133. Unilateral credit shall be allowed in the same way as bilateral credit, with paragraphs 1 to 12 (on bilateral credit) to apply accordingly as provided for under paragraph 13. This is however "subject to paragraphs 14 and 15".

Paragraph 14 Schedule 7 of the Act dealing with unilateral credit on foreign income provides the maximum amount payable to be not exceeding half the foreign tax payable.

However, we find that paragraph 15 Schedule 7 of the Act is in respect of unilateral credit on employment income in respect of an employment exercised outside Malaysia. This is in view of the very clear language used in this paragraph, namely "*where an employee pays Malaysian tax and foreign tax in respect of income from an employment exercised outside Malaysia...*". This means that paragraph 15 can stand by itself and is specific only to employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax.

Thus the qualifying words in paragraph 13 Schedule 7 of the Act "subject to paragraphs 14 and 15" simply mean that unilateral credit on foreign income is made subject to paragraph 14, which stipulates the maximum payable, while unilateral credit on employment income from an employment exercised outside Malaysia is subject to paragraph 15.

The Respondent's reference to *Malaysian Master Tax Guide Manual* and *Malaysian Taxation* do not assist us. While text books by the learned tax editors and authors in question have always been useful references, it is not so in this particular instance. A perusal of the references show the statements to be bare assertions with no authority in support thereof.

In *Malaysian Master Tax Guide* at page 6004 it is stated —

> "¶1990 Relief in respect of foreign income.
>
> Paragraphs 13, 14 and 15 of Schedule 7 provide for the granting of double taxation relief in respect of tax charged on foreign income arising in countries with which Malaysia has no treaty arrangements for relief against double taxation.",

and in *Malaysian Taxation* at page 607 it is stated —

> "Section 133 states that in the absence of a tax treaty, double taxation relief shall be granted according to the relevant provisions of Schedule 7. The grant of unilateral relief is featured under paragraphs 13 to 15 of Schedule 7. The relief is given in respect of foreign income arising in non-treaty countries.".

There is, however, no authority to support these two statements.

In statutory interpretation, the ordinary meaning of the word in question has to be given effect to. In *Foo Loke Ying and Anor v. Television Broadcasts Ltd and Ors* (1985) 2 MLJ 35, the Supreme Court, as it then was, said at page 43 —

"We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification.".

The same principle also applies in the interpretation of tax statutes. Taxing acts are to be construed strictly based on the clear words used in the legislation. This principle is further emphasised by the Supreme Court in the case of *National Land Finance Cooperative v. Director General of Inland Revenue* (1993) 2 AMR 52 3581 where at page 3587 it is stated —

"Firstly, there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed. (per *Rowlatt* J in *Cape Brandy Syndicate v. IRC* 12 TC 358). Another principle is that where the meaning of a statute is in doubt the ambiguity must be construed in favour of the subject. Yet another principle is that an exemption from tax cannot be removed except by sufficiently clear words to achieve that purpose.",

and at page 3590 —

"There are ample authorities to show that the courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* (1844) 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by *Rowlatt* J in *Cape Brandy Syndicate v. IRC*, supra:—

"... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used...".

Further, we find that to give paragraph 15 Schedule 7 of the Act the meaning contended by the Respondent, despite the clear words, to mean relief only in respect of foreign income, would render paragraph 15 redundant. This would run contrary to the principle of interpretation that every word in a statute must be given meaning and effect. Clear authority for this can be found in *Foo Loke Ying and Anor v. Television Broadcasts Ltd and Ors* (supra) where it is stated at page 43 —

"Now if sections 5 and 6 are indeed intended to be read conjuctively, quite apart from the fact that there would be no reason why they could not have been enacted together as a composite section, section 6(2) would be wholly unnecessary and redundant. The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co. Ltd v. Vandry*, Lord *Sumner* in delivering the judgment of the Judicial Committee said (at page 676):

"Secondly, there is no reason why the usual rule should not apply to this as to other statutes – namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.".

(References to sections 5 and 6 are to the *Copyright Act 1969*.)

While holding that paragraph 15 Schedule 7 of the Act does apply to the Appellant, we were however concerned and cautious as to the meaning of the word "may" used in that paragraph, i.e. whether the Respondent has the discretion to grant unilateral credit or otherwise. On the authorities cited by the Appellant, we are of the opinion that in the context of that paragraph, the word "may" means "shall" and no such discretion vests with the Respondent.

In this respect, two clear authorities out of several cases cited by the Appellant as follows would seem appropriate.

In *Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Another* (1931) 3 MLJ 691, the Supreme Court held at page 693 —

"The use of the word "may" or "shall" has led to some confusion in the interpretation

of provision of a statute. In ordinary usage, the word "may" is permissive, and the word "shall" is imperative. The courts have always construed these words with reference to the context in which it used. In order to find out whether these words are being used in a directory or mandatory sense, the intent of the legislature should be looked into, along with the pertinent circumstances. *If it appears to be the settled intention of the legislature to convey the sense of compulsion, then whether the word "may" or "shall" is used, it has the mandatory effect.*".
(Emphasis added)

In *Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Bhd* (1998) 2 CLJ 266 it was said at page 282 —

"First, it has been recognised by high authority that when a provision in a statute uses permissive language such as "may" it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory. As Lord *Campbell* C.J. said in *Liverpool Borough Bank v. Turner* (1861) 30 LJ Ch. 379, 380:

No universal rule can be laid down ... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.".

Again, in *Howard v. Bodington* (1877) 2 PD 203, 211, Lord *Penzance* said —

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of that provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.".

As per the Court of Appeal in *Kekatong Sdn Bhd* (supra) at page 282 —

"It is therefore wrong to assume as a matter of course that whenever Parliament uses the word "may" in a statute it never means "must".".

In view of the foregoing we are of the considered view that the Appellant has successfully discharged his onus of proving that the Respondent's assessment is erroneous as required by paragraph 13 Schedule 5 of the Act.

Therefore, we unanimously allowed the appeal and ordered that the assessment of the Respondent be amended accordingly.

10. The material part of the Deciding Order dated 19 May 2000 that we made is in the following terms —

"RAYUAN INI setelah dibicarakan pada 5 Mei 2000 dengan kehadiran Encik Anand Raj and Cik Irene Yong, Peguambela dan Peguamcara bagi pihak Perayu dan YM Raja Kamarul Zaman b. Raja Musa dan Puan Naimah bte Abdul Satar, Pegawai Undang-Undang, Lembaga Hasil Dalam Negeri bagi pihak Responden

ADALAH DIPUTUSKAN bahawa Perayu boleh dibenarkan "unilateral credit" di bawah perenggan 15 Jadual 7 Akta Cukai Pendapatan 1967 bagi pendapatan daripada pekerjaan yang dijalankan di luar Malaysia yang dikenakan cukai Malaysia dan cukai asing

MAKA ADALAH DIPERINTAHKAN bahawa rayuan ini dibenarkan

DAN DIPERINTAHKAN SELANJUTNYA bahawa Notis Taksiran Nombor SG 5165514–04 bertarikh 11 September 1997 yang menunjukkan RM2,124.00 sebagai cukai kena bayar bagi Tahun Taksiran 1997 dipinda sejajar dengan keputusan di atas.".

11. The Respondent being dissatisfied with our decision, has by a Notice of Appeal dated 1 June 2000, required us to state a case for the opinion of the High Court pursuant to paragraph 34 Schedule 5 of the Act, which case we have stated and do sign accordingly.

12. The question for the opinion of the High Court is whether, on the facts as stated by us, our decision is correct in law.

FR Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri.
Special Commissioners of Income Tax Appeal No. PKCP (R) 8/2000
Judgment delivered on 18 June 2001.

Income Tax — Deductibility of fees for bank guarantee facility — Prerequisites for deduction — Whether of capital or revenue nature — Bank guarantee facility not akin to loan — Common sense and practical business approach not applicable — Sections 33(1) and 39, Income Tax Act 1967

The taxpayer was an investment holding company and held shares and warrants in Pernas International Holdings Berhad which were acquired from Perbadanan Nasional Berhad ("PNS"). A pre-condition for the purchase price of the shares and warrants was a bank guarantee which the taxpayer entered into with some banks so that it could furnish to PNS an irrevocable bank guarantee. The taxpayer serviced this by making quarterly payments of the bank commission and paying extension fees to extend the use of the guarantee facility when it became necessary. The bank guarantee was subsequently surrendered to the bank and the taxpayer paid interests to PNS on the unpaid amount of the purchase price of the shares and warrants. On the purchase price of the shares and warrants, however, there had been no payments made. The taxpayer also received some dividends from holding the title to the shares and warrants.

For the years of assessment 1997 and 1998, the taxpayer sought to deduct the payments paid as bank guarantee commission and extension fees as being expenses wholly and exclusively incurred in the production of its investment income. However, these were disallowed by the Director General of Inland Revenue ("D.G. of I.R.") on the ground that the taxpayer was an investment holding company and was not engaged in the business of buying and selling shares. The taxpayer however argued that as it was an investment holding company and carried on the business as such and its business income was therefore the dividend received from the shares.

The issue before the Special Commissioners was therefore whether the payments made by the taxpayer for the use of the bank guarantee facility qualified for deduction under sec. 33 of the *Income Tax Act 1967* ("the Act").

[Editorial note: The Special Commissioners have stated the case for the opinion of the High Court.]

Held: appeal dismissed.

1. To qualify for deductions under sec. 33(1) of the Act, the following elements have to be satisfied: (a) outgoings and expenses; (b) wholly and exclusively; (c) incurred during that period; (d) in the production of income; and (e) not prohibited by section 39 of the Act, that is, it is of a revenue nature.

2. Expenditure which relates to the acquisition of a source of income or a capital asset would be of a capital nature and expenditure which relates to the performance of profit earning operations would be of a revenue nature.

3. The bank guarantee facility in this case was to enable the taxpayer to acquire the shares and warrants which constituted the capital assets of the taxpayer. They therefore represented the cost of acquiring those assets. The bank guarantee also ensured the full settlement of the purchase price of the shares and warrants by the taxpayer within a stipulated period and which were transferred to the taxpayer upon the receipt of the bank guarantee facility by PNS. As such, the bank guarantee in this case was a prerequisite to the acquisition of the shares and warrants which produced assessable income in the form of dividend. The bank guarantee fees were therefore capital in nature.