

“The government has also prescribed the Incentive Based Regulation (IBR) framework, which sets the base tariff for industrial customers for three years from January 2017 to December 2019. This IBR framework allows changes in the gas costs to be passed through via the Gas Cost Pass-Through (GCPT) mechanism every six months. GCPT is the mechanism to pass through the gas cost differential which incurred due to the difference between gas cost forecasted in base tariff and actual gas cost. GCPT is implemented every 6 month in January and July. The rate will be either a rebate or surcharge”

42. Regarding the contention of the GOM that the program is not available to the industrial customers, the Authority observes that the GOM has admitted the existence of the subsidy element in the gas pricing mechanism which is supplied to the industrial producers. The Authority notes that it is not necessary for a subsidy to be countervailable that it should be made available to the concerned enterprise directly. In this context, it would be appropriate to refer to the definition of “subsidy” under Section 9(1) of the Customs Tariff Act, 1975.
43. The Authority takes note of the fact that neither the Malaysian Government nor the cooperating producer from Malaysia has made any submission against the countervailability of this scheme. Nevertheless, the Authority examines the countervailability of the scheme below:
- i. The response submitted by the GoM states that the gas prices in Malaysia are regulated by the Government.
 - ii. The response submitted by the GoM acknowledges that there is a price differential in the market prices of gas and the prices of gas for industrial users.
 - iii. Further, the response of GoM also states that the gas price charged to industrial customers is based on tariff category, indicating consumption based tariff system.
44. In view of the aforesaid, the program is noted to be countervailable.

(ii) Program No. 2: The Market Development grant

a. Submission by the petitioners

45. The Petitioner submitted that the scheme is introduced by Malaysian Investment Development Authority (MIDA) for SMEs to promote export promotional activities. The maximum grant for an SME under the MDG program is RM 200,000. The SME should have been incorporated under the Companies Act, 1965 with at least 60% Malaysian equity ownership. The evidence and the legal basis are General Policies, Facilities, and Guidelines for Market Development Grants (MDG)-2016

b. Submission by the Government of Malaysia/ other interested parties

46. It is a continuous program structured under the 11th Malaysia Plan (Rmk11, 2016 - 2020) for increasing the SME’s participation in export promotional activities.

47. The MDG provides an opportunity for Malaysian SMEs to apply for a reimbursable grant up to RM200,000 for participation in export promotional activities namely International Trade Fairs, Trade & Investment Missions /Export Acceleration Missions, International Conferences Overseas and Listing Fees for Made-in-Malaysia Products in supermarkets, hypermarkets or retails centres overseas

c. Examination by the Authority

48. The Authority notes that the Market Development Plan (MDP) was introduced in 2002. It is part of the 11th Malaysian Plan (2016-20). It is intended to increase the participation of SMEs in export promotional activities. The MDP provides SMEs with a reimbursable grant up to RM 2,00,000 for their participation in export promotional activities such as International Trade Fairs, Trade & Investment Missions /Export Acceleration Missions, International Conferences Overseas and Listing Fees for Made-in-Malaysia Products in supermarkets, hypermarkets or retails centres overseas.

49. The subsidy program provides for financial contribution in the form of direct transfer of funds and benefit is thereby conferred to the recipient. The subsidy program is also specific because is contingent on export. Therefore, this program is noted to be countervailable. However, the benefit under this program is not availed by the cooperating exporter.

(iii) Program No. 3: Pioneer Status

a. Submission by petitioners

50. The Domestic Industry has submitted that under this program a company granted Pioneer Status will enjoy tax exemption from corporate income tax. The program encourages investments in promoted activities/products in the manufacturing sector that can contribute to development and growth of economy. It applies to both local and foreign investors for approved promoted products/activities in the manufacturing sector. Five-year partial exemption is provided from payment of income tax. A company pays tax on 30% of its statutory income, with exemption period commencing from its Production Day. Unabsorbed capital allowances and accumulated losses incurred during the pioneer period can be carried forward and deducted from post pioneer income of company. As evidence of existence of the program, petitioners have relied on:

- Promotion of Investment Act, 1986
- New and full notification pursuant to article xvi:1 of the GATT 1994 and article 25 of the Agreement on Subsidies and Countervailing measures-Malaysia dt. 5 October, 2017
- <http://www.mida.gov.my/home/incentives-in-manufacturing-sector/posts/>
- List of promoted activities and products which are eligible for consideration of pioneer status and investment tax allowance under the Promotion of Investment act, 1986
- Laws of Malaysia Act 327 of Promotion of Investment act, 1986 Part-II Sec 5,6,7, deals with pioneer status
- Web Report: EXIM Bank's Export Credit Refinancing
- US Extruded through Malaysia

b. Submission by the Government of Malaysia/ other interested parties

51. Companies are required to submit the applications for the Pioneer Status program to the Malaysian Investment Development Authority (MIDA), an agency under Ministry of International Trade and Industry (MITI). The company will then be required to get the Pioneer Certificate from MIDA. This is to ensure that the company has complied with the conditions imposed. After MIDA is satisfied that the company has complied with the conditions, MIDA will determine the production date for the company and determine the start and ending date of the program. Later, companies approved with the program submit their claims to the Inland Revenue Board together with their annual tax returns containing the calculation of claim for the tax deductions. The applicants will need to go through the Approval Committee also.
52. The major tax incentives for companies investing in the agricultural and manufacturing sectors are the Pioneer Status and Investment Tax Allowance. These incentives are mutually exclusive. Sections 5-25 Promotion of Investments Act 1986 are evidence of the same. The benefit is an exemption from taxes owed. Also, losses can be carried forward.
53. The eligibility criteria for the Pioneer Status is case such as capital intensive, capable of generating significant linkages, import substitution, high value added, technology, green technology, job creation, contribution to the development of manufacturing support services and spillover effect to the country.

c. Examination by the Authority

54. The Authority notes that Sections 5 to 25 of the Promotion of Investment Act 1986 provides for pioneer status program. The program provides for tax incentives in the form of exemption from income tax. Losses incurred during the exemption period can be carried forward for subsequent years to offset taxable income/net profit. The program is available for a pre-specified list of promoted products/activities.
55. The program provides for financial contribution in the form of revenue foregone, which is otherwise due and benefit is thereby conferred. The program is also specific because it is available to promoted activity/product mentioned in the list. Therefore, this program is noted to be countervailable. However, the benefit under this program is not availed by the cooperating exporter.

(iv) Program No. 4: Investment Tax Allowance

a. Submission by petitioners

56. The Petitioner submitted that under this program, a company granted Investment Tax Allowance (ITA) is entitled to offset this allowance against the statutory income for each year of assessment. The program encourages investments in promoted activities/products in the manufacturing sector, that can contribute to development and growth of economy. It applies to both local and foreign investors for approved promoted products/activities in the manufacturing sector. An allowance of 60% on its qualifying capital expenditure incurred within 5 years from the date the first qualifying capital expenditure is incurred is given. Company can offset this allowance against 70% of its statutory income for each year of

assessment. Remaining 30% of its statutory income will be taxed at the prevailing company tax rate. As evidence of existence of the program, Petitioners have relied on:

- Promotion of Investment Act, 1986
- New and full notification pursuant to article xvi:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing measures-Malaysia dt. 5 October, 2017
- <http://www.mida.gov.my/home/incentives-in-manufacturing-sector/posts/>
- List of promoted activities and products which are eligible for consideration of pioneer status and investment tax allowance under the Promotion of Investment act, 1986

b. Submission by the Government of Malaysia/ other interested parties

57. Investment Tax Allowance (ITA) may be granted to any company intending to participate in a promoted activity or to produce a promoted product including an activity/product which is of national and strategic importance to Malaysia. Promoted activities and promoted products are determined and gazetted by the Minister of International Trade and Industry. Sections 26 – 29 of the Promotion of Investments Act 1986 (Act 327) are evidence of the same.
58. The allowance is only given on capital expenditure incurred on industrial buildings, plant and machinery directly used for promoted activities or the production of the promoted products. Companies are required to submit the applications for ITA program to MIDA, an agency under MITI. The company will then be required to establish the commencement of ITA period which is on the incurrence of the first capital expenditure duly certified by MIDA. Later, companies approved with the program submit their claims to the Inland Revenue Board (IRB) together with their annual tax returns containing the calculation of claim for the tax deductions.
59. The eligibility criteria for the ITA are value added (VA) percentage and level of technology as measured by the MTS Index.
60. Not all individuals/firms who applied and met all the eligibility criteria are approved. The applicants will need to go through the Approval Committee. The assistance is a deduction from taxable income. The allowance can be carried forward until fully utilized.
61. A company can elect to receive Pioneer Status but not receive the Investment Tax Allowance, or can elect to receive the Investment Tax Allowance, but not Pioneer Status.

c. Examination by the Authority

62. Authority notes that Sections 26 to 29 of the Promotion of Investments Act 1986 provides for Investment Tax Allowance program. Promoted activities and promoted products are granted a capital allowance. Value addition and technological requirements are also to be fulfilled. Out of the total capital expenditure, 60% of the capital expenditure is granted as allowance and can be deducted against 70% of statutory income for 5 years. Remaining income can be taxed at the normal income tax rate. Even for companies that meet the listed

criteria of promoted activity, value addition and level of technology, the Authority retains the discretion to reject the applicant seeking benefit under this program.

63. The program provides for financial contribution in the form of revenue foregone and benefit is thereby conferred. The program is also specific since it is limited to certain enterprises, which meets the promoted product and are approved by the Authority. A company that has received income tax exemption from Pioneer Status cannot avail benefit under this program. The Authority has already determined that countervailing duty should be imposed for exemption from income tax under Pioneer Status. Therefore, the Authority notes that no additional countervailing duty should be imposed against this subsidy program.

(v) Program No. 5: Accelerated Capital Allowance

a. Submission by Petitioners

64. The Domestic Industry has submitted that under this program a special allowance, where the capital expenditure is written off within 3 years, i.e. an initial allowance of 40% and an annual allowance of 20%, is given. After the 15-year period of eligibility for Reinvestment Allowance, companies that reinvest in the manufacture of promoted products are eligible to apply for Accelerated Capital Allowance. Applications have to be submitted to the IRB accompanied by a letter from MIDA certifying that the companies are manufacturing promoted activities/products. As evidence of existence of the program, Petitioners have relied on:

- i. Promotion of Investment Act, 1986
- ii. <http://www.mida.gov.my/home/incentives-in-manufacturing-sector/posts/>
- iii. List of promoted activities and products which are eligible for consideration of pioneer status and investment tax allowance under the Promotion of Investment act, 1986

b. Submission by Government of Malaysia/other interested parties

65. Accelerated Capital Allowance (ACA) provides allowances to write off the capital expenditure within two years, i.e., an initial allowance of 20 percent in the first year and an annual allowance of 40 percent. This program is available to all companies and the IRB applies objective criteria in granting ACA. Program does not constitute a countervailable subsidy because it is not linked to export conditions, not specific and it is generally available. The assistance is an accelerated capital allowance to be deducted from taxable income. The allowance can be carried forward. Generally, to be eligible for accelerated capital allowance (ACA), a person must meet the following conditions:

- He was carrying on a business during the basis period
- He has incurred qualifying expenditure in the basis period
- The asset was used for purposes of a business, and
- At the end of the basis period, he was the owner of the asset and the asset was in use

66. The companies under investigation will be eligible to claim ACA if they fulfil the criteria and government doesn't exercise discretion as to which firm is eligible to benefit.