Deloitte.

Malaysia | Tax | April 2017

# Tax Espresso
A snappy delight

## Greetings from Deloitte Malaysia Tax Services

### Malaysia Joins the "Inclusive Framework on BEPS"

The OECD announced on 6 March 2017 that Malaysia has become the 94th country to join the "[Inclusive Framework on Base Erosion and Profit Shifting (**BEPS**)]" where a group of countries pledged to implement measures aimed at preventing tax avoidance, designed by the OECD and G20 countries in the 2015 **BEPS** project.

*[Remarks: **BEPS** refers to tax planning strategies that exploit gaps*

**Quick links:**

[Deloitte Malaysia]
[Inland Revenue Board]

**Takeaways:**

Malaysia Joins the 'Inclusive Framework on BEPS'

**Tax Cases**

Positive Vision Labuan Limited & Others v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (Federal Court) 2017

DHTI Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (Special Commissioners of Income Tax) 2017

**Gazette Order**

Income Tax (Deduction for Expenditure in relation to Vendor Development Programme) *and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity].*

As a **BEPS** Associate of the Inclusive Framework, Malaysia has committed to adopt four **BEPS** "minimum standards":

1. Prevent treaty abuse, e.g., tax treaty shopping (BEPS Action 6);
2. Implement country-by-country reporting (BEPS Action 13);
3. Counter harmful tax practices, e.g., limit benefits of any intellectual property or other preferential tax regimes (BEPS Action 5); and
4. Enhance dispute resolution mechanisms, e.g., fully implement the mutual agreement procedure in its tax treaties (BEPS Action 14).

(Amendment) Rules 2017 [P.U.(A) 73/2017]

**Upcoming events**

Real Estate Industry Taxation Workshops

**Important deadlines:**

Due date for 2018 tax estimates for companies with May year-end
(1 May 2017)

6th month revision of tax estimates for companies with October year-end
(30 April 2017)

9th month revision of tax estimates for companies with July year-end
(30 April 2017)

Statutory filing of 2016 tax returns for companies with September year-end
(30 April 2017)

Malaysia will participate on an equal footing alongside the OECD and G20 countries to ensure widespread adoption of the **BEPS** minimum standards, which will be subject to a peer review process; participate in some remaining **BEPS** project on international tax standard setting work; participate in ongoing data gathering on the tax challenges of the digital economy; and work on measuring the impact of **BEPS**.

As at today, the Ministry of Finance has gazetted the rules relating to Country-by-Country Reporting (CbCR) and other related rules, e.g., Common Reporting Standard Rules, to help facilitate the carrying out of CbCR which came into operation on 1 January 2017.

## Tax Cases

### Positive Vision Labuan Limited & Others v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (Federal Court) 2017

**Issues:**

1. Whether the Ministry of Finance could by a policy or administrative decision declare that an Exemption Order i.e. Income Tax (Exemption) (No.22) Order 2007 [P.U.(A) 437/2007] (the Exemption Order), which is a subsidiary legislation under the Interpretation Acts 1948 and 1967, cease to apply from a stipulated date without revoking the same.

2. Whether a Labuan offshore company which elects under Section 3A of the Labuan Business Activity Tax Act 1990 (the LBATA) to be taxed under the Income Tax Act 1967 (the ITA) and Exemption Order acquires a vested right that remains so long as the Exemption Order remains in force.

3. Whether an offshore company that has elected to be taxed under Section 3B of the ITA, which is now known as a Labuan company for the purposes of the Labuan Business Activity Tax Act 1990, is entitled to the tax exemption granted under the Income Tax (Exemption) (No.22) Order 2007.

**Decision:**

Taxpayer’s appeal to the Federal Court on all issues was dismissed.

The three questions were interlinked and thus dealt with altogether at the same time. Section 2(3) of the LBATA reinforced Section 3B of the ITA (before being amended by the Finance Act 2011) whereby it is clear that a Labuan business activity carried on by a Labuan company that made an election under Section 3A of the LBATA was “a chargeable offshore company”.

Paragraph 3(a) of the Exemption Order exempted dividends received by an offshore company from income tax. Paragraph 2 of the Exemption Order defined offshore company by the meaning assigned to it in the LBATA, which was construed as a Labuan company. Thus, a Labuan company which had not elected to be taxed under the ITA would be taxed according to the LBATA and the dividends received would be exempted from tax under the ITA by virtue of the Exemption Order.

The amendments to the ITA and the LBATA by the Finance Act 2007 were intended to distinguish between “a Labuan company” under LBATA and “a chargeable offshore company” under the ITA. Thus, the offshore company under the Exemption Order must be construed as an offshore company (now referred to as Labuan company) that was subjected to tax under the LBATA and not to a chargeable offshore company that was subjected to tax under the ITA.

In interpreting the Exemption Order, which was made pursuant to Section 127(3) of the ITA under the power delegated to the Minister, the Exemption Order was to be read subject to and consistent with the provisions of the ITA. Thus, the Exemption Order must be read in harmony with Sections 3A and 2(3) of the LBATA and Section 3B of the ITA. Doing so, it became very clear that a Labuan company that had elected to be taxed under the ITA could not continue to enjoy the exemption as the Exemption Order was intended to apply to a company that was subject to tax under LBATA. The company that elected under Section 3B of the ITA was no longer “an offshore company” but “a chargeable offshore company”.

As it was clear that the Exemption Order was intended to apply to a company that was subject to tax under the LBATA, the need of revoking the Exemption Order did not arise.

**DHTI Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (Special Commissioners of Income Tax) 2017**

**Issue:**

Whether the taxpayer is entitled to claim capital allowance on the capital expenditure incurred on the telecommunication towers.

**Decision:**

The taxpayer's appeal was allowed by the Special Commissioners of Income Tax (SCIT).

In this case, the Inland Revenue Board (IRB) had disputed the taxpayer's claim of capital allowance (CA) on telecommunication towers by raising additional assessments for the years of assessment (YAs) 2006 to 2008 (the taxpayer had claimed CA since YA 2003) on the basis that the telecommunication towers were not "plant" but premises in which the taxpayer conducted its business. The IRB instead allowed only a small portion of the CA claimed on certain parts of the telecommunication towers, i.e., Aviation Light and Compound Lighting.

The SCIT had relied upon case laws in ascertaining whether the telecommunication towers are "plant" as it was not defined in the Income Tax Act 1967 (the ITA). The SCIT also took a holistic approach following a similar case Tropiland Sdn Bhd v KPHDN [2012] by considering the taxpayer's business in its entirety. The taxpayer's business income was from its licensed network facility, i.e., by providing its telecommunication towers to the telecommunication service providers that installed their antennas to the towers. In order to reach its decision, the SCIT adopted the "apparatus test" from *Yarmouth v France [1887] 19 QBD 647.* A "plant" is an apparatus used in conducting a business and not a premise where the business is carried out. The SCIT found that the towers indeed functioned as the apparatus for the taxpayer's business and not merely as a setting or a place of business. The SCIT concluded that the taxpayer had discharged its onus according to Paragraph 13 of Schedule 5 of the ITA and delivered its judgement in favour of the taxpayer.

Being dissatisfied with the SCIT's decision, the IRB has required the SCIT to state a case pursuant to Paragraph 34 of Schedule 5 of the ITA for the High Court's opinion.

**Gazette Order**

P.U.(A) 73/2017 (the Rules 2017) which amends the Income Tax (Deduction for Expenditure in relation to Vendor Development Programme) Rules 2014 [P.U.(A) 169/2014] was gazetted on 13 March 2017 and takes effect from the year of assessment 2017.

The Rules 2017 amends Rule 2 of the P.U.(A) 169/2014 to extend the incentive for another four years until 31 December 2020, as proposed in the 2017 Budget.

We invite you to explore other tax-related information at:
**http://www2.deloitte.com/my/en/services/tax.html**

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