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Tax Espresso
A Snappy Delight

Greetings from Deloitte Malaysia Tax Services

Transfer Pricing: Malaysia introduces Country-by-Country Reporting Rules

On 23 December 2016, the Malaysian Inland Revenue Board (IRB) issued Income Tax (Country-by-Country Reporting) Rules 2016 (CbCR Rules), in line with the final recommendations of OECD BEPS Action Point 13. The Rules are based on the model legislation contained in the Country-by-Country implementation package of OECD, which was released on 8 June 2015.

Download the full article here.

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Inland Revenue Board

Takeaways:

New Stamp Duty Orders Released

Three new Stamp Duty Orders have been released on 22 December 2016 which came into operation on 1 January 2017 following the Budget 2017 announcement to extend the stamp duty remission for the purchase of first residential home and the stamp duty exemptions on certain instruments relating to Islamic banking, takaful activities and Islamic capital markets.

The Stamp Duty (Remission) Order 2016 and the Stamp Duty (Remission)(No 2) Order 2016 provide a 100% stamp duty remission on the instrument of transfer and loan agreement for property price of RM300,000 and below. For property price of RM300,000 to RM500,000, the instrument of transfer and loan agreement are given stamp duty remission of RM5,000 and RM1,500 respectively.

Tax Case

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Alcatel-Lucent Malaysia Sdn Bhd & Alcatel International Asia Pacific Pte. Ltd. (Federal Court) 2016

Upcoming events

2016 Employer Income Tax Reporting Seminar

Important deadlines:

Due date for 2017 tax estimates for companies with February year-end (29 January 2017)

6th month revision of tax estimates for companies with July year-end (31 January 2017)

9th month revision of tax estimates for companies with April year-end (31 January 2017)

Statutory filing of 2016 tax returns for companies with June year-end (31 January 2017)

The above stamp duty remission are only applicable to a Malaysian citizen who has never owned a residential property even by way of inheritance or gift and has executed the property's sale and purchase agreement during the period of 1 January 2017 to 31 December 2018.

The Stamp Duty (Exemption)(No 3) Order 2016 provides that (a) instruments relating to Islamic banking or takaful activities

executed between the International Currency Business Unit in certain local licensed bank / licensed international Islamic bank / licensed international takaful operator and a resident / non-resident customer during the period of 1 January 2017 to 31 December 2020; and (b) instruments relating to the issuance of Islamic bonds in ringgit / foreign currencies approved by the Securities Commission Malaysia during the period of 1 January 2017 to 31 December 2020, are exempted from stamp duty.

Public Rulings (PR)

PR 11/2016: Tax Borne by Employers

PR 11/2016 was published by the IRB on 8 December 2016 to replace PR 2/2006 dated 17 January 2006. The issuance of PR 11/2016 is mainly to explain the amendment introduced by the Finance Act 2015 whereby effective year of assessment 2016, all employment income receivable for any particular period will be taxed in the year the payment is received.

PR 12/2016: Taxation of Income from Employment on Board A Ship

PR 12/2016 was published by the IRB on 9 December 2016 to explain the tax treatment of an individual's income derived from an employment exercised on board a ship. The phrase "employment is exercised aboard a ship" in Subsection 13(2) (e) of the Income Tax Act 1967 (the ITA) is explained by defining "ship" and "seafarer".

Tax Case

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Alcatel-Lucent Malaysia Sdn Bhd & Alcatel International Asia Pacific Pte. Ltd. (Federal Court) 2016

1. Whether the letter of the Director General of Inland Revenue (DGIR) dated 14 April 2008 referring to both Sections 109 and/or 109B of the Income Tax Act 1967 (ITA) is bad in law; and

2. If the answer is in the negative, are the payments made for the services as referred in the Agreement exhibited as "PC-3" royalties under Section 109 of the ITA.

The Federal Court overruled the decisions of the High Court and the Court of Appeal and decided in favour of KPHDN. Here are the grounds of judgement:

1. The KPHDN's letter dated 14 April 2008 referring to both Sections 109 and/or 109B of the ITA holds good and is therefore not bad in law.

2. It must be highlighted that the administrative decision contained in the DGIR's letter of 14 April 2008 concerned assessment of withholding tax. An assessment is the official administrative act of the KPHDN who determines the amount of tax to be paid by a taxpayer, after having taken into account all the relevant circumstances. The abovementioned letter was in fact a notice of assessment issued by the KPHDN.

3. The error committed by the KPHDN in the said letter lies in the description of income which was subject to withholding tax. The KPHDN was found to be uncertain and unclear in its decision making when it listed down Section 109 and Section 109B in the said letter. The question then arises: Whether the substance and effect of the assessment and notice issued by the KPHDN could have been affected by such uncertainty and therefore bad in law? After perusing the letter and provisions of the ITA in its entirety the Federal Court found that that was not the case since both Sections 109 and 109B are the withholding tax provisions under the ITA. An erroneous statement of the law as such, would not bar the KPHDN from claiming the withholding tax, as provided for in the ITA.

4. Applying Section 143(2) (b) of the ITA, the assessment contained in the letter dated 14 April 2008 shall not be impeached or affected merely by reason of a mistake therein as to "the description of any income". Hence with the

imposition of withholding tax being an assessment, it is thus subject to appeal to the Special Commissioners of Income Tax (SCIT) under Section 99 of the ITA.

5. The taxpayer had not only failed to seek remedy before approaching the High Court despite the availability of the alternative avenue provided in the legislation but had made a premature filing of judicial review (JR) in that there was no flaw detected in the decision making process i.e. the KPHDN did not commit an error of law in the exercise of his statutory power and that there was no illegality or irrationality in the reason provided by the taxpayer to suffice for a JR. The JR was also submitted out of time [*Note: an application for JR shall be made within 40 days when grounds for the application first arose, or when the decision was first communicated i.e. the KPHDN's letter dated 23 March 2008 which had already decided as to the amount of withholding tax to be paid by the taxpayer*] and no application for extension of time was made hence rendering it flawed, in short the JR application was incompetent.

6. As regards issue No. 2, since the taxpayer failed to file an appeal to the SCIT under Section 99 of the ITA, the Federal Court should not delve into the merits of the matter which in any case ought to be resolved by the SCIT.

Form EA 2016 – Value of Perquisites / Benefits-in-kind

Output tax paid under the Goods and Services Tax Act 2014 and borne by the employer will increase the taxable value of employment income borne by the employer under the proposed new Subsection 13(1A) of the Income Tax Act 1967. An example is gifts to employees which exceed RM500 in value in a year. The Form EA 2016 should thus include any output tax relating to perquisites which are borne by the employer.

Where there is Goods and Services Tax (GST) incurred by the employer relating to perquisites or benefits-in-kind (BIK) provided to employees and the employer is not entitled to claim input tax credit in respect of such GST incurred, the value of

perquisites or BIK shall include such amount of GST. Accordingly, in preparing the Form EA 2016 for each employee, employers are reminded to include the amount of GST relating to perquisites or BIK (examples: telephone bills, recreational club membership, motor car, etc.) paid by the employers as part of the value of the perquisites or BIK provided to the employees in 2016. The common instances where employers would not be entitled to claim input tax credit, are as follows –

(a) the GST is blocked;
(b) the amount of GST cannot be claimed as it relates to exempt supplies made by the employer;
(c) the GST could not be claimed by the employer due to incomplete tax invoice; or
(d) the GST could be claimed but is foregone by the employer.

In Public Ruling (PR) No. 2/2013 "Perquisites from Employment", utility bills that are under an employee's name and are paid by the employer to the authorities, "the amount paid by the employer is a perquisite to the employee". This would include GST, if it is included in the utility bills, as such GST paid generally cannot be claimed as input tax credit by the employer due to the bills being in the employee's name. However, there is a conditional exception for mobile phone expenses billed to the employee, whereby a concession granted by the Royal Malaysian Customs Department ("Customs") allows the employer to claim the GST paid on mobile phone expenses billed to the employee "as long as the expenses are reimbursed (to the employee) and accounted as business expenses (of the employer)" (Customs Panel Decision 2/2014 "Claiming input tax on business expenses billed to employees").

In calculating the BIK under the formula method as described in PR No. 3/2013, the cost of the asset that is provided as benefit/amenity is "the actual cost incurred by the employer". The actual cost would include GST paid by the employer and not claimable as input tax credit from Customs.

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

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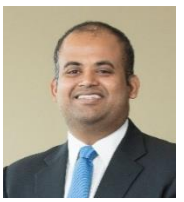
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