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Greetings from Deloitte Malaysia Tax Services

Public Ruling (PR) No. 6/2017: Withholding Tax on Income of a Non-Resident Public Entertainer

On 12 October 2017, the Inland Revenue Board (IRB) published PR No. 6/2017 which explains the tax treatment of income received by a non-resident public entertainer in Malaysia, the withholding tax requirements relating to that income and the consequences of any failure to comply with such requirements.

PR No. 6/2017 also covers:

(i) the meaning of a non-resident public entertainer;

(ii) circumstances where payments to a non-resident public entertainer are subject to withholding tax;

(iii) computations of tax to be withheld from the non-resident public

Quick links:

Deloitte Malaysia Inland Revenue Board

Takeaways:

Public Ruling No. 6/2017: Withholding Tax on Income of a Non-Resident Public Entertainer

Income Tax (Amendment) Bill 2017 and Labuan Business Activity Tax (Amendment)(No. 2) Bill 2017

Ketua Pengarah Hasil Dalam Negeri v Rapid Growth Technology Sdn Bhd (High Court)

Upcoming events

Deloitte TaxMax – The 43rd series

Important deadlines:

entertainer's income including worldwide income;

(iv) appeal by a payer on payment of withholding tax under Section 109H

(v) classes of persons and types of income on which Section 109A is not applicable and double taxation avoidance arrangements; and

(vi) responsibility of the sponsor or organiser of a foreign artist not falling under the PUSPAL Guidelines to submit information and details to the IRB prior to any performance by the artist in Malaysia

The PR also states that the Director General of Inland Revenue (DGIR) reserves the right to further examine the position of a transaction where required.

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

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

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

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

Income Tax (Amendment) Bill 2017 and Labuan Business Activity Tax (Amendment)(No. 2) Bill 2017

The Income Tax (Amendment) Bill 2017 and Labuan Business Activity Tax (Amendment) (No. 2) Bill 2017 were tabled for the first reading in Parliament on 31 October 2017.

A. Changes under the Income Tax (Amendment) Bill 2017

The Income Tax (Amendment) Bill 2017 proposes to extend the following offences and penalties in regard to an arrangement involving the automatic exchange of information (AEOI) or the furnishing of a country-by-country report (CbCR) to implement or facilitate the operation of a mutual administrative assistance arrangement under Section 132B of the Income Tax Act 1967 (the ITA) to include implementing or facilitating the operation of a double taxation arrangement under Section 132 of the ITA, or tax information exchange arrangement under Section 132A of the ITA:

(i) Failure to furnish a CbCR as required by any rules made under Paragraph 154(1)(c) of the ITA;

(ii) Making any incorrect return, information return or report or giving any incorrect information relating to the arrangement of an AEOI or a CbCR under any rules made under Paragraph 154(1)(c) of the ITA; or

(iii) Failure to comply with any rules made under Paragraph 154(1)*(c)* of the ITA.

Upon conviction, the taxpayer shall be liable to a fine of RM20,000 to RM100,000 or to imprisonment not exceeding 6 months or both.

Effective: Upon coming into operation of the Income Tax (Amendment) Act 2017.

B. Changes under the Labuan Business Activity Tax (Amendment) (No. 2) Bill 2017

Similar provision under Section A above is introduced via the Labuan Business Activity Tax (Amendment) (No. 2) Bill 2017. The proposed amendments empower the Minister to make regulations via Section 21 of the Labuan Business Activity Tax Act 1990 for the purpose of implementing or facilitating the operation of double taxation arrangements and tax information exchange arrangements under Section 132 and Section 132A of the ITA.

Effective: Upon coming into operation of the Labuan Business Activity Tax (Amendment) (No. 2) Act 2017.

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Rapid Growth Technology Sdn Bhd (High Court)

Issues:

1. Whether the taxpayer was entitled to claim for reinvestment allowance (RA) under Schedule 7A of the Income Tax Act 1967 (the ITA) in respect of those non-production areas amounting to RM10,784,349 in the year of assessment (YA) 2009;

2. Whether the taxpayer may apply for relief under Section 131(1) of the ITA to claim for RA under Schedule 7A of the ITA in respect of the non-production areas; and

3. Whether the DGIR has any legal basis to reject the taxpayer's application for relief under Section 131(1) of the ITA.

Decision:

The High Court dismissed the appeal by the IRB on Issues 1 and 2, but decided in favour of the IRB on Issue 3 and subsequently overturned the decision of the Special Commissions of Income Tax (SCIT).

Issue 1

The High Court found that Issue 1 had already been decided in several cases by the SCIT and the High Court that RA may also be claimed for non-production area of a factory, i.e., in *KPHDN v Success Electronics & Transformers Manufacturer Sdn Bhd (2012) MSTC 30-039, Riverstone Resources Sdn Bhd v KPHDN and KPHDN v Firgos (Malaysia) Sdn Bhd (2013) MSTC 30-065, KPHDN v OKA Concrete Industries Sdn Bhd (2015) MSTC 30-091* and *KPHDN v Marigold Industries (M) Sdn Bhd (2016) MSTC 30-116*, along with a case decided by this High Court itself in *KPHDN v Nulogictec Industries Sdn Bhd (2017) MSTC 30-147*.

Issue 2

The High Court found that "mistake" was not defined in the ITA and referred to *J Sdn Bhd v KPHDN [1999] MSTC 3037* which followed Black's Law Dictionary definition of "mistake" as stated in Section 131 of the ITA i.e.:

"**A mistake exists when a person, under some erroneous conviction of law** or fact, does, or omits to do, some act which, **but for the erroneous conviction, he would not have done or omitted**. It may arise either from … or **misplaced confidence**".

The taxpayer had placed his confidence and reliance on the Public Ruling at the time of his submission of tax return for the YA 2009 and thereby did not claim RA on the non-production areas. The High Court was satisfied that the taxpayer had successfully shown that its assessment of 2009 was wrong and must be put right following *ABC v. Comptroller of Income Tax, Singapore (1950–1985) MSTC 527* and *Ben-Odeco Ltd v Powlson (Inspector of Taxes) [1978] STC 375*. Put simply, Section 131(1) of the ITA applies to situations of error or mistake because of misplaced confidence of the taxpayer on the law such as the interpretation of the ITA at the time of submission of the tax return.

Issue 3

The High Court found that the DGIR has the legal basis under Section 131(4) of the ITA to reject the taxpayer's application for relief under Section 131(1) with the following reasons:

1. The provisions in the United Kingdom (UK) statutes referred by the taxpayer were not identical with the ITA although the ITA may have originated from there. In the UK statutes, the relevant phrase was "practice generally prevailing at the time" whereas the applicable provision in the ITA was "practice of the Director General generally prevailing at the time". It was a significant difference. "Practice" based on the UK statute was wider and would, depending on its context, include practice of the taxpayer or even taxpayers generally besides Her Majesty's Revenue & Customs (HMRC). The UK cases must therefore be read with caution.

2. The "practice of the DG" in its ordinary meaning in the ITA, should include the Public Ruling (PR) which formed the policy and procedure of the DGIR as stated in the PR's introduction. The PR has been the practice uniformly applied to taxpayers on the interpretation of Schedule 7A of the ITA and there was no evidence shown by taxpayer that it was otherwise. As held in *Boyer Allan Investment Services Ltd v. Revenue and Customs Commissioners [2013] SFTD 7*, practice may include published statements by HMRC. The PR is similarly a published statement issued by the DGIR pursuant to Section 138A of the Act on the interpretation and application of Schedule 7A of the ITA. This is permissible pursuant to Section 40(1) of the *Interpretation Acts 1948 & 1967* being powers that are reasonably necessary to enable the DGIR to enforce the ITA.

Also, although the PR may also be guidelines that does not deviate from the fact that it is in nature the practice of the DG.

3. There was nothing in the ITA that suggests Section 131(4) of the ITA could not apply to interpretation of law. If Section 131(1) of the ITA could apply to an error or mistake in law due to misplaced confidence, there was no reason in principle as to why the practice of the DG in Section 131(4) of the ITA could not involve a matter of interpretation of law.

4. By the purposive construction of Section 131(1) and Section 131(4) of the ITA, the policy intended by the legislature was for the taxpayer to be pro-active in making challenges on interpretation of any prevailing PR issued by the DG if and when the taxpayer was dissatisfied with the DGIR's interpretation of provisions of the ITA in those PRs. The pro-active challenges relating to the interpretation of Schedule 7A of the ITA took place successfully in *KPHDN v Success Electronics & Transformers Manufacturer Sdn Bhd (2012) MSTC 30-039, Riverstone Resources Sdn Bhd v KPHVDN*, etc. Otherwise, the re-active taxpayer as taxpayer herein was estopped by Section 131(4) of the ITA from recovering relief for error or mistake notwithstanding that the taxpayer might satisfy Section 131(1) of the ITA.

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

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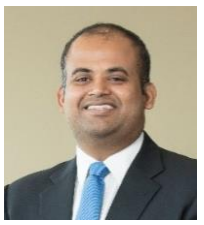

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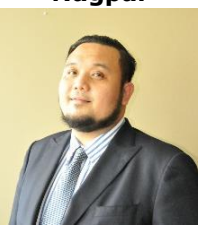

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