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March 2022

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Inland Revenue Board of Malaysia

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Important deadlines:

Task	Deadline
	31 March 2022
1. 2023 tax estimates for companies with April year-end	√
2. 6th month revision of tax estimates for companies with September year-end	√
3. 9th month revision of tax estimates for companies with June year-end	√
4. Statutory filing of 2021 tax returns for companies with August year-end	√
5. Maintenance of transfer pricing documentation for companies with August year-end	√
6. 2022 CbCR notification for applicable entities with March year-end	√

1. Practice Note No. 1/2022: Explanation in relation to the definition of factory for the purpose of RA claim under Schedule 7A of the ITA

On 25 January 2022, the Inland Revenue Board of Malaysia (IRBM) published the Practice Note No. 1/2022 (dated 17 January 2022) to explain the meaning of 'factory' as defined in Paragraph 9, Schedule 7A of the Income Tax Act 1967 (ITA).

The salient points are as follow:

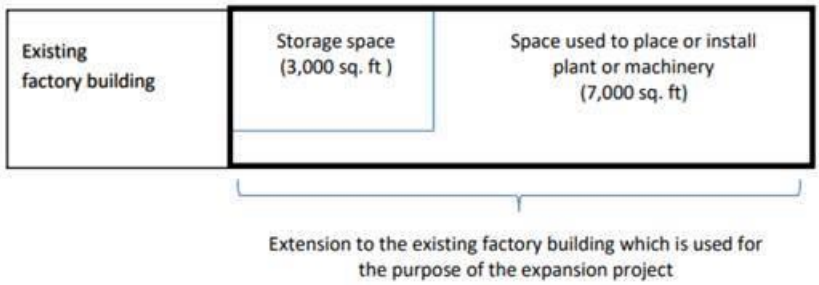
1) Factory means "*portion of the floor areas of a building or an extension of a building used for the purposes of a qualifying project to place or install plant or machinery or to store any raw materials, or goods or materials manufactured prior to sale:*

Provided that in respect of portion of the building or extension of the building used for the storage of raw materials, or goods or materials, or both, it shall not be more than one-tenth of the total floor areas of the building or the extension to that building;"

2) The use of space for the purpose of storage of raw materials or other goods or both which exceeds one-tenth of the total floor areas of the factory shall not be taken into account in calculating reinvestment allowance (RA) claim under Schedule 7A of the ITA. In other words, **only the portion used for the purpose of a qualifying project fulfils the definition of 'factory' and may be allowed RA claim subject to stipulated conditions. This tax treatment also applies in the case of an extension or addition made to an existing factory building.**

Example 1:

Company A constructs an extension to the existing factory building for an expansion project to the manufacturing operation carried out. The total area of the extension to the building is 10,000 square feet (sq. ft). A portion of the extension with an area of 3,000 sq. ft is used to store raw materials while the remaining is used as a space to place plant or machinery as follows:



The capital expenditure incurred for the construction of the portion of space to place or install the plant or machinery in this expansion project (7,000 sq. ft) qualifies for RA. The raw materials storage space (3,000 sq. ft) does not qualify for RA claim because it does not meet the definition of 'factory' as the area exceeds one-tenth (1/10) which is 30% (3,000 sq. ft / 10,000 sq. ft x 100%) of the total area of the extension to the existing building.

3) In the event that a portion of the extension to the building is used for various purposes other than for a qualifying project, only the portion of the extension to the building used for the purpose of a qualifying project may be allowed an RA claim. Please refer to Examples 2 and 3 of the Practice Note for guidance.

Please refer to the Practice Note No. 1/2022 for full details.

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2. Income Tax (Restriction on Deductibility of Interest) (Amendment) Rules 2022 [P.U.(A) 27/2022]

P.U.(A) 27/2022 was gazetted on 31 January 2022 and came into operation on 1 February 2022. The amendment rules amend the Income Tax (Restriction on Deductibility of Interest) Rules 2019 [P.U.(A) 175/2019] as follow:

Amendment of Rule 5 – Ascertainment of tax-EBITDA

The definition of "qualifying deduction" in the formula for ascertaining the tax-EBITDA (i.e. earnings before interest, taxes, depreciation and amortisation) in Rule 5(2) of P.U.(A) 175/2019 has been amended to refer to an amount equal to the difference between the amount of the deduction allowed and the amount of the business expenditure incurred in the profit and loss account; or where there is no business expenditure incurred in the profit and loss account, the amount of deduction allowable under the ITA.

Amendment of Rule 6 – Carry forward of interest expense

- Rule 6(1) of P.U.(A) 175/2019 has been substituted to refer to a person instead of a company, as follows. Effective 1 February 2022, any person may carry forward any interest expense exceeding the amount ascertained under Rule 4 to subsequent years of assessment.

  *"(1) Subject to subrule (2), ~~in the case of a company,~~ where ~~the company~~ **a person** has interest expense which is in excess of the maximum amount of interest as ascertained under rule 4 for a basis period in a year of assessment, the amount of that excess shall be allowed to be carried forward and deducted ~~against~~ **in ascertaining** the adjusted income of the ~~company~~ **person** for the subsequent years of assessment subject to the maximum amount of interest ascertained under rule 4 for the relevant year notwithstanding that the ~~company~~ **person** has no interest expense for any subsequent year of assessment, until the whole amount of that excess has been fully utilized."*

- The words "The excess" in Rule 6(2) of P.U.(A) 175/2019 have been substituted with "In the case of a company, the excess" as follows, to clarify that the condition in Rule 6(2) of P.U.(A) 175/2019 (i.e. shareholding of the company) which restricts the carrying forward of excess interest only applies to a company and not to other persons who are now allowed under the amended Rule 6(1) to carry forward excess interest.

  *"(2) ~~The excess~~ **In the case of a company, the excess** of the maximum amount of interest for a basis period for a year of assessment and any excess of the maximum amount of interest carried forward from any particular year of assessment preceding that year shall be allowed to be carried forward if the Director General is satisfied that the shareholders of that company on the first day and the last day of the basis period for the year of assessment following the year in which such amount was ascertained were substantially the same."*

Please refer to P.U.(A) 27/2022 for full details.

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3. Income Tax (The Incentive for Manufacturers of Pharmaceutical Products Scheme) Rules 2022 [P.U.(A) 34/2022]

On 17 February 2022, the Malaysian government gazetted the "Income Tax (The Incentive for Manufacturers of Pharmaceutical Products Scheme) Rules 2022" [P.U.(A) 34/2022] to implement the tax incentives for manufacturers of pharmaceutical products (including COVID-19 vaccines) as announced in the National Budget 2021. The incentives include a corporate income tax rate of 0% to 10% for qualifying companies for 10 years, and a 10% income tax rate for the subsequent 10 years (the general corporate income tax rate in Malaysia is 24%). The Rules are effective as from year of assessment (YA) 2021.

The Rules are applicable to "qualifying companies," which are manufacturers of pharmaceutical products whose applications for the Manufacturers of Pharmaceutical Products Incentive Scheme ("incentive scheme") have been approved by the Minister of Finance ("Minister") upon receipt of the application through the Malaysian Investment Development Authority (MIDA) between 1 January 2021 and 31 December 2022.

Other key definitions under the Rules are described below, followed by some additional salient points regarding the tax incentives.

Relevant definitions

A "manufacturer of pharmaceutical products" is a company that meets the following requirements:

- The company is incorporated under the Companies Act 2016 (*Act 777*) and is resident in Malaysia;
- The company possesses a manufacturing license issued under the Industrial Co-ordination Act 1975 (Act 156) from the Ministry of International Trade and Industry or a confirmation letter of an exemption from a manufacturing license from the MIDA; and
- The company undertakes manufacturing of pharmaceutical products, including formulation in Malaysia but excluding "fill and finish" activity.

The expression "fill and finish activity" refers to the process of filling vials with vaccines and finishing the process of packaging the medicine for distribution.

As described further below, the incentives under the incentive scheme are available to qualifying companies that carry on business in respect of a qualifying activity. A "qualifying activity" is an activity prescribed by the Minister, as specified in the "Guidelines for Incentive for Manufacturers of Pharmaceutical Products including Vaccines under the 2021 Budget" ("guidelines") issued or as revised by the MIDA and approved by the Minister. The guidelines are available on the MIDA's website.

Other salient points

1) A qualifying company that carries on a business in respect of a qualifying activity under the incentive scheme may enjoy the following tax incentives:
   - An income tax rate of 0% to 10% for the first 10 consecutive YAs (commencing from the date as determined by the Minister); and
   - An income tax rate of 10% for the subsequent 10 consecutive YAs.

2) A qualifying company approved under the incentive scheme is entitled to the tax incentives mentioned above only if it complies with all the following conditions:
   - It incurs the first qualifying capital expenditure (excluding land) within one year from the date the approval letter is issued;
   - It incurs the full amount of the qualifying capital expenditure, as specified in the approval letter, within five years from the date the first qualifying expenditure is incurred; and
   - It complies with the conditions stated in the schedule to the rules (regarding employees and annual operating expenditure, among other things) and any other conditions imposed by the Minister, as specified in the approval letter and the guidelines.

3) The Minister may, at any time (except where the qualifying company fails to comply with any conditions imposed in relation to the incentive scheme), accept a qualifying company's surrender of the incentives granted under the rules by a notice in writing from the qualifying company to the Minister through the MIDA. The surrender of the incentives will have effect on the first day in the basis period for the YA in which the application for the surrender of the incentives is received by the Minister through the MIDA.

Please refer to the Rules for full details.

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4. e-Filing services for the YA 2021 Starting 1 March 2022

The IRBM has announced via a media release (*available in Bahasa Malaysia only*) dated 16 February 2022 that the Return Forms (RF) E, BE, B, M, BT, MT, P, TF and TP for the YA 2021 can be submitted via e-Filing starting from 1 March 2022.

The e-Filing system can be accessed through the IRBM's official portal at www.hasil.gov.my > MyTax > ezHasil Services > e-Filing. First time users of the e-Filing system are required to request for the PIN number from the IRBM through the feedback form on IRBM's website or by visiting the nearest IRBM's branch counter to access the e-Filing system.

A taxpayer who has forgotten the password to the e-Filing system can reset the password online by using his registered email address or handphone number. If the taxpayer faces any issue in resetting the password, the taxpayer can contact the IRBM via HasiL Care Line at 03-8911 1000 (Domestic) / 03-8911 1100 (Overseas), HasiL Live Chat or visit the nearest IRBM's branch counter.

Taxpayers are advised to refer to the RF Filing Programme for the Year 2022 for more information on the deadline for the submission of the above-mentioned RF and adhere to the deadline stipulated. Taxpayers can check their status of submission, refund process (if any), e-Ledger and MTD via MyTax.

Taxpayers are also advised to ensure that all relevant documents such as financial statement, receipts, invoices and other income tax related documents are neatly arranged and stored for a period of seven years as required under Sections 82 and 82A of the ITA to simplify the process of e-Filing and compliance review by the IRBM in the future.

Please refer to the media release for more information.

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5. Release of new Labuan Entity forms for YA 2022 onwards

The IRBM has recently released the following new Labuan Entity forms (dual English-Malay language) for the YA 2022 onwards:

1) Form LE 1 - Return of Profits by a Labuan entity under Section 5 and Section 10 of the Labuan Business Activity Tax Act 1990);
   Please refer to the new Business Activity Code and LE1 Explanatory Notes. It is now a requirement for a Labuan entity that is subjected to the Labuan Business Activity Tax (Country-by-Country Reporting) Regulations 2017 to include the details of the MNE Group in Part C if the entity is a reporting entity or Part D if the entity is a non-reporting entity.

2) Form LE 3 - Irrevocable Election by a Labuan entity under Section 3A of the Labuan Business Activity Tax Act 1990

3) Form LE 4 - Statutory Declaration under Section 5 of the Labuan Business Activity Tax Act 1990

4) Form LE 5 - Statutory Declaration under Section 10 of the Labuan Business Activity Tax Act 1990

5) Form LE 6 - Application for Advance Ruling under Section 17B of the Labuan Business Activity Tax Act 1990
   No changes noted compared to the Form LE 6 for YA 2021 and prior years.

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6. Request forms to forward the relief application to the SCIT / SCPIT

The IRBM has recently released the following forms to its website pursuant to the newly added requirement of completing a prescribed form as provided in the amendments under the Finance Act 2021 (*Act 833*):

- Form RF (CP15G-1/2022) – Request Form to forward the relief application to the Special Commissioners of Income Tax (SCIT); and
- Form RF (CP136A-1/2022) – Request Form to forward the relief application to the Special Commissioners of Petroleum Income Tax (SCPIT).

Taxpayers can now submit the duly prescribed forms CP15G-1/2022 and CP136A-1/2022 to the Director General of Inland Revenue (DGIR) from 1 January 2022 onwards to request the DGIR to forward the relief application to the SCIT and SCPIT respectively in the event the taxpayers are aggrieved by the decision of the DGIR in relation to the following:

(a) Application to the DGIR for relief in respect of non-chargeability case [*Appeals under Section 97A(5) of the Income Tax Act, 1967 (ITA) and Section 41A(5) of the Petroleum Income Tax Act, 1967 (PITA)*];
(b) Application to the DGIR for relief in respect of error or mistake [*Appeals under Section 131(1) of ITA and Section 66(1) of the PITA*]; and

(c) Application to the DGIR for relief other than in respect of error or mistake [*Appeals under Section 131A(1) of the ITA and Section 66A(1) of the PITA*].

The above forms can be accessed on the IRBM's website by going to the Official Portal of the IRBM > Forms > Download Forms > Other Forms > All.

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7. Submission timelines for CRS for the Automatic Exchange of Financial Account Information & the latest List of Reportable/Participating Jurisdictions

The IRBM has issued updates on the Common Reporting Standard (CRS) for the Automatic Exchange of Financial Account Information on its website on 13 January 2022.

Kindly be informed that the CRS reports which include data from January to December are due annually and should be submitted to the IRBM by 30 June the following year.

Malaysian Financial Institutions (MYFIs) are requested to make the necessary arrangement to enable them to prepare the CRS report in the OECD's CRS Extensible Markup Language (XML) Schema and submit to HASiL within the stipulated time provided through the HASiL International Data Exchange Facility (HiDEF) Portal.

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8. Deduction Account of Income received from Distribution by RMMF Unit Trust to Investors other than Individuals – Section 109DA of the ITA

The IRBM has issued a notification to the Chartered Tax Institute of Malaysia on 30 January 2022 regarding the deduction account of income received from distribution by Retail Money Market Fund (RMMF) Unit Trust to investors other than individuals pursuant to Section 109DA of the ITA.

Section 109DA provides that an RMMF Unit Trust shall deduct tax from the distribution of income derived from Malaysia to a unit holder other than an individual. The tax shall be paid to IRBM within one month after distributing the said income. According to Part XIX of Schedule 1 to the ITA, the tax is at the rate of 24% of the gross income. The provisions of Section 109DA and Part XIX of Schedule 1 take effect from 1 January 2022.

The above-mentioned IRBM notification clarifies that the implementation of Section 109DA is for the purpose of standardising the treatment of interest income received by corporate investors from any investments made including investments in unit trusts.

The IRBM has issued the following forms for the above purpose:

- Form CP37E(R) – Pin 1/2022 - Deduction Account of Income received from Distribution by RMMF Unit Trust to Investors other than Individuals (Resident)

- Form CP37E(NR) – Pin 1/2022 - Deduction Account of Income received from Distribution by RMMF Unit Trust to Investors other than Individuals (Non-Resident)

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9. MIDA – Contract R&D and R&D companies require MITI's R&D status company approval with effect from 1 January 2022

The MIDA has announced via a media release dated 3 February 2022 that the definition of research and development (R&D) company and contract R&D company under Section 2 of the Promotion of Investments Act 1986 (PIA) have been amended to include the requirement to be approved as a R&D status company by the Minister of International Trade and Industry (MITI) with effect from 1 January 2022 as proposed in the National Budget 2022.

The new definition and other amendments to the PIA provide that R&D companies and contract R&D companies that have the intention to apply for the R&D tax incentive will be granted R&D status (subject to meeting pre-conditions imposed by MITI for the approval) for a period of five consecutive years.

According to the Finance Act 2021, existing R&D companies or contract R&D companies which fall within the definition prior to the abovementioned amendment are required to notify MIDA within the 6-month grace period from 1 January 2022 to 30 June 2022 to be considered as R&D companies or contract R&D companies under the new definition after the grace period.

Companies approved as R&D status companies may apply to MIDA for extension of another 5 years upon the expiry of its existing term, by providing documents to prove that they are undertaking activities relating to R&D as defined under the PIA and have complied with all conditions imposed previously in their approval letters. However, the granting of the approval is subject to consideration by MITI and the Ministry of Finance.

Any company that fails to comply with the conditions imposed shall be required by the MITI in written notice to remedy the failure or prove that the cause of the failure is beyond the control of the company within 30 days from the date of service of the notice. Failure to comply with the notice may result in a withdrawal by MITI of the company's status as an approved R&D status company in accordance with the new definition of R&D company and contract R&D company.

Please refer to the media release for more details.

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10. Seaport Worldwide Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (COA)

Issues:

IRBM's appeal

- Whether the taxpayer is entitled for remedies sought by way of judicial review before the domestic appeal process under Section 99 of the ITA is exhausted; and

- Whether the High Court's (HC) decision in granting the prohibition order against the IRBM from taking any steps, enforcement actions or proceedings relating to notices of assessment for the YA 2012 and YA 2013 is correct in law.

Taxpayer's appeal

- Whether the transaction under the lease agreement between the taxpayer and ATT Tanjung Bin Sdn Bhd (ATB) was a sale of the leasehold interest of the land or a mere lease and if the development expenses claimed by taxpayer were deductible under Section 33(1) of the ITA; and

- Whether the penalty under Section 113(2) of the ITA which has been imposed by the IRBM at the rate of 60% was in accordance with law.

Decision:

The Court of Appeal (COA) allowed the IRBM's appeal and dismissed the taxpayer's appeal with the following grounds of judgement:

- The SCIT are judges of facts and best for hearing and deciding on tax grievances. Since the taxpayer had filed an appeal to the SCIT, it is an abuse of process to maintain the judicial review application. It is trite principle of law that, where an alternative remedy exists, the remedy by way of judicial review could only be exercised in very exceptional circumstances. The taxpayer has not established the existence of lack or absence of jurisdiction on the part of the IRBM, blatant failure to perform statutory duty or breach of the principle of natural justice by the IRBM.

- A prohibition order may be granted in circumstances where there is an excess or absence of jurisdiction or there is breach of rules of natural justice. Further, the discretionary power to grant the prohibition order should only be exercised if substantial injustice has ensued or likely to ensue. However, there was no excess or absence of jurisdiction on the part of the IRBM in its assessment of tax on the taxpayer. There is also nothing to show that the IRBM has departed from the rules of natural justice in exercising its statutory duty when conducting the assessment. Equally important, there was no substantial injustice that has ensued or is likely to ensue against the taxpayer. Thus,

the granting of prohibition order by the HC was incorrect and ought to be set aside and the matter is to be referred to SCIT for its determination.

- The transaction under the lease agreement is merely a leasing of taxpayer's land to ATB with the agreed sum as rental and not a sale of leasehold interest in the land. Any restriction under the National Land Code for taxpayer to carry out the transaction as a sale or disposal of the leasehold interest in the land does not change the fact that the taxpayer and ATB had entered into a legally valid and binding lease agreement. There is no provision in the lease agreement that shows or indicates the sale or disposal of leasehold interest in the said land to ATB. Conversely, under Clause 2.2C of the lease agreement, it requires taxpayer to sub-divide the land and acquire a separate title for the land leased to ATB. After the sub-division, taxpayer was to register ATB as the lessee. The IRBM was correct in its decision that the development expenses allegedly incurred by the taxpayer is not deductible under Section 33(1) of the ITA.

- The imposition of penalty under Section 113(2) of the ITA by the IRBM is in accordance with the law. The IRBM had established the incorrect tax return form by taxpayer. In addition, as the case was not ventilated before the SCIT, the COA can accept the fact as shown by the IRBM. It was discovered that taxpayer had failed to declare the full rental payment received from ATB arising from the lease agreement in its tax return form. This conduct is an act as described in Section 113(2)(a) and (b) of the ITA. As such, the IRBM has the discretion to impose a penalty equal to the amount of tax which has been undercharged. However, in this case, the IRBM had only imposed a penalty at the rate of 60% on taxpayer.

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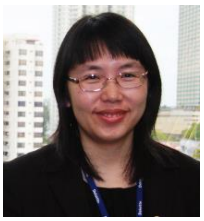

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