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December 2022

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Greetings from Deloitte Malaysia Tax Services

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Inland Revenue Board of Malaysia

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Upcoming events:

1. 2022 Employer's Income Tax Reporting seminar

Important deadlines:

Task	Deadline	
	31 December 2022	**1 January 2023**
1. 2024 tax estimates for companies with January year-end		√
2. 6th month revision of tax estimates for companies with June year-end	√	
3. 9th month revision of tax estimates for companies with March year-end	√	
4. Statutory filing of 2022 tax returns for companies with May year-end	√	
5. Maintenance of transfer pricing documentation for companies with May year-end	√	
6. 2022 CbCR notification for applicable entities with December year-end	√	

1. Technical Guidelines on Tax Treatment for Labuan entities with Dormant Status

The Inland Revenue Board of Malaysia (IRBM) issued the Technical Guidelines (herein after referred to as the Guidelines) on Tax Treatment for Labuan Entities with Dormant Status dated 31 October 2022 on its website. The Guidelines which were deemed effective from the year of assessment (YA) 2020, aim to enhance taxpayers' understanding of the IRBM's interpretation of Labuan entities with dormant status under the Labuan Business Activity Tax Act 1990 (LBATA), following the exemption provided to such entities from complying with the substantial activity requirements and audit requirements as prescribed under the Labuan Investment Committee (LIC) Pronouncement 1-2019 and 2-2019 respectively.

Salient points

1. A Labuan entity is considered dormant if it:
   (a) has never commenced operations since the date of its incorporation;
   (b) has previously been in operation or carried on business, but has now ceased its operations or business; or
   (c) does not have any significant accounting transaction for one financial year before the occurrence of substantial change in its equity shareholding (i.e. 50% or more) other than the minimum expenses incurred in compliance with the stipulated statutory requirements such as:
      i. secretarial and filing fee for filing of the company's annual return to the Labuan Financial Services Authority under the Labuan Companies Act 1990;
      ii. tax filing fee; and
      iii. audit fee.

2. A Labuan entity will not be considered as dormant if it owns shares, real property, fixed deposits, and other similar investments including the receipt of any investment income (if any) such as rents, interest, etc. by virtue of the mentioned ownership.

3. Labuan entities which are dormant or have been struck off, including those under winding up proceeding or under liquidation process, which do not derive any source of income need not comply with substantial activity requirements. However, if such entities resume operations, substantial requirements must be complied with until the end of the accounting period.

4. A Labuan entity which is dormant under the LBATA is responsible to submit documents as listed below:

Labuan Entities	Documents to be Submitted
Dormant / under liquidation process	▪ Form LE1 ▪ Audited accounts (if any) / management accounts

Please refer to the Guidelines for full details and illustrative examples for guidance.

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2. Updated Restriction on Deductibility of Interest Guidelines [Section 140C of the Income Tax Act 1967 (ITA)]

On 15 November 2022, the IRBM issued the updated Restriction on Deductibility of Interest Guidelines (updated 2022 Guidelines) on its website. The updated 2022 Guidelines supersedes the Restriction on Deductibility of Interest Guidelines (superseded 2022 Guidelines) dated 22 August 2022.

The updates and amendments are listed in Paragraph 13 of the updated 2022 Guidelines. The salient changes are outlined below:

1. Annex A and Annex B of the superseded 2022 Guidelines have been amended to substitute the item "Audit fee" with the item "Secretarial and tax filing fee" in the updated 2022 Guidelines. The respective annexes illustrate the application of the change in the definition of "qualifying deduction" in accordance with P.U.(A) 27/2022.

2. **Note 1 to Annex A** of the superseded 2022 Guidelines has been updated in the Updated 2022 Guidelines to provide clear references to taxpayers with regards to the determination of an expense falling under the new definition of "qualifying deduction" pursuant to P.U.(A) 27/2022.

Please refer to the blue fonts in the updated 2022 Guidelines for changes noted.

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3. Minimum Transfer Pricing Documentation Template

The IRBM issued the Minimum Transfer Pricing Documentation (MinTPD) template on 10 November 2022 to assist taxpayers that fall outside the scope of paragraph 1.3.1 of the Malaysian Transfer Pricing Guidelines 2012 (MTPG 2012) to prepare MinTPD.

Paragraph 1.3.1 of the MTPG 2012 requires taxpayers with the following criteria to prepare contemporaneous TPD:

a) carrying on a business with gross income exceeding RM25 million, and the total amount of related party transactions exceeding RM15 million; or
b) providing financial assistance exceeding RM50 million (excluding transactions involving financial institutions).

Paragraph 1.3.2 of the MTPG 2012 provides that taxpayers who do not meet the above criteria may opt to fully apply all relevant guidance as well as fulfil all Transfer Pricing Documentation requirements in the Guidelines; or alternatively may opt to comply with Transfer Pricing Documentation requirements under paragraph 11.2.4 (a), (c) and (d) (i.e., preparing a MinTPD that outlines the general business description of all relevant associated persons, which includes group organisational structure, details of controlled transactions and pricing policies adopted).

[***Note***: *Section 113B of the ITA which comes into operation on 1 January 2021, stipulates a penalty of RM20,000 to RM100,000 for failure to furnish contemporaneous TPD for any YA. In the event of a conviction, the taxpayer could also be prosecuted resulting in a prison term of up to 6 months. The updated MTPG 2012 (on 29 January 2021) clarifies that the introduction of Section 113B of the ITA, requires the TPD to be made available within 14 days upon request by the IRBM. This requirement will apply to transfer pricing audit cases which have commenced on or after 1 January 2021.*]

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4. Income Tax (Deduction for Investment in Approved New Food Production Project) Rules 2022 [P.U.(A) 351/2022]

P.U.(A) 351/2022 (the Rules) was gazetted on 31 October 2022 and was deemed to have come into operation on 1 January 2021.

<u>Application</u>

The Rules shall apply to a company incorporated under the Companies Act 2016, and that is resident in Malaysia:

(a) which has made an investment in its related company undertaking an approved new food production project under the Income Tax (Exemption) (No. 6) Order 2020 [*P.U.(A) 373/2020*]; and
(b) which has made an application to the Minister through the Minister charged with the responsibility of an approved new food production project and such application is received on or after 1 January 2021, but not later than 31 December 2022.

<u>Relevant definitions</u>

"Investment" refers to an investment in the form of cash or holding of paid-up share capital in respect of ordinary shares in a related company.

"Approved new food production project" refers to a project which is deemed to be as a separate and distinct business in relation to:

(i) planting of industrial crop, vegetables, fruits, herbs, spices or cash crop;
(ii) aquaculture;
(iii) rearing of honey or urena lobata bees;

(iv) rearing of cows, buffaloes, goats, sheep or deer;
(v) deep sea fishing or high seas fishing;
(vi) planting of seeds for agro food; or
(vii) planting of feed mill cultivated in a project which has been identified by the Minister charged with the responsibility of that project and approved by the Minister.

"Related company" refers to a company incorporated under the Companies Act 2016 where at least 70% of its paid-up share capital in respect of ordinary shares are directly owned by a company that makes an investment for the purpose of an approved new food production project.

Deduction

For the purpose of ascertaining the adjusted income of a company from its business, there shall be allowed as a deduction in the basis period for a YA an amount equivalent to the value of investment for the sole purpose of financing the approved new food production project under *P.U.(A) 373/2020* undertaken by the related company.

The value of investment which is claimed as a deduction:
(a) shall be equivalent to the expenditure incurred by the related company in the basis period for the same YA;
(b) shall be made for a period and up to an amount as approved by the Minister through the Minister charged with the responsibility for the approved new food production project; and
(c) shall not be disposed of within 5 years from the date of the last investment made if such investment is in the form of holding of paid-up share capital in respect of ordinary shares.

The deduction can only be claimed by a company for a period of 3 consecutive YAs commencing from the YA in which the application is approved by the Minister.

Where a company which has made an investment in the form of holding of paid-up share capital, in respect of ordinary shares and claimed a deduction in respect of that investment receives an amount as consideration for the disposal of such shares within 5 years from the date of the last investment made, the amount so received by that company shall be added in ascertaining its adjusted income in the basis period for the YA, in which that amount was received. The amount added shall not exceed the total deductions allowed in relation to that investment.

Cessation of deduction

Where an investment is made by a company for the purposes of the approved new food production project under *P.U.(A) 373/2020*, that deduction to the company shall be ceased in the basis period for a YA in which the period of exemption of the related company commences upon the related company deriving its first statutory income from that project.

Non-application

The Rules shall not apply to a company which:
(a) has been granted an exemption under Sections 127(3)(b) or 127(3A) of the ITA; or
(b) has made a claim for deduction under any rules made under Section 154 of the ITA except—
    (i) the rules in relation to allowance under Schedule 3 to the ITA;
    (ii) the Income Tax (Deduction for Audit Expenditure) Rules 2006 [*P.U.(A) 129/2006*]; or
    (iii) the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020 [*P.U.(A) 162/2020*].

Please refer to P.U.(A) 351/2022 for full details.

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5. Income Tax (Exemption) (No. 6) 2020 (Amendment) Order 2022 [P.U.(A) 352/2022]

P.U.(A) 352/2022 (the Amendment Order) was gazetted on 31 October 2022 and was deemed to have come into operation on 1 January 2016 except for Paragraph 4 relating to the new subsubparagraphs 5A(1)(f) and (g) of the Income Tax (Exemption) (No. 6) Order 2020 [*P.U.(A) 373/2020*] which are deemed to have come into operation on 1 January 2021.

P.U.(A) 373/2020 which is in respect of tax exemption of statutory income from a new food production project and an expansion project, has been amended as follows:

Amendment of Paragraph 3 – Application

Paragraph 3 of *P.U.(A) 373/2020* is substituted with the following paragraph to extend the period of applications received by the Minister to 31 December 2022:

"3. This Order shall apply to a new food production project or an expansion project—

(a) which an application is received by the Minister through the Minister charged with the responsibility for that project, on or after 1 January 2016 but not later than 31 December 2022;

(b) which has not commenced on the date the application is received by the Minister; and

(c) which commences within one year from the date of approval given by the Minister.".

Amendment of Paragraph 4(1)(b) – Exemption

The tax exemption for expansion projects has been extended to include statutory income from existing projects as indicated in green fonts below:

"4. (1) The Minister exempts a qualified person resident in Malaysia from the payment of income tax in relation to –

(a) ….. ; or

*(b) an expansion project for a period of five consecutive YAs (referred to in this Order as the "exempt YAs") in respect of the statutory income from **the existing projects and** expansion projects, commencing from the first YA in which the qualified person derived statutory income in relation to the **existing projects and** expansion projects, and the first YA shall not be earlier than the YA in the basis period in which the date of approval from the Minister falls."*

Insertion of new Paragraph 5A

This is a new paragraph inserted after Paragraph 5 of *P.U.(A) 373/2020*. Its contents are similar to Paragraph 6 (before amendment) except for the list of approved food production project which is now extended to include high seas fishing and planting of seeds for agro food.

"Approved food production project
5A. (1) An approved food production project referred to in this Order is a project in relation to—
(a) planting of industrial crop, vegetables, fruits, herbs, spices or cash crop;
(b) aquaculture;
(c) rearing of honey or urena lobate bees;
(d) rearing of cows, buffaloes, goats, sheep or deer;
(e) deep sea fishing;
(f) high seas fishing;
(g) planting of seeds for agro food; or
(h) planting of feed mill, subject to subparagraph (2).

(2) The planting of feed mill which is referred to in subsubparagraph (1)(h) shall be cultivated in a project which has been identified by the Minister charged with the responsibility of that project and approved by the Minister.

(3) An approved food production project in this paragraph shall be regarded as a separate and distinct business in determining the statutory income of qualified person for the purpose of exemption under this Order."

Amendment of Paragraph 6 – New food production project

The wordings in Paragraph 6 have been replaced to clarify the meaning of a new food production project, as shown below:

"6. A new food production project referred to in this Order is the first project carried out by a qualified person for the purpose of undertaking an approved food production project, and the new project is approved by the Minister.".

Amendment of Paragraph 7 – Expansion project

Paragraph 7 of *P.U.(A) 373/2020* is substituted with the following paragraph to provide further clarification on the expansion project exempted under Paragraph 4(1)(b):

"7. An expansion project which is exempted under subsubparagraph 4(1)(b) is a project carried out by a qualified person for the purpose of expanding its existing approved food production project where the expansion project—

(a) has not been granted an exemption under this Order;
(b) involves a new area of land; and
(c) is approved by the Minister.".

Please refer to P.U.(A) 352/2022 for full details.

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6. Updated FAQ on Tax Deduction on Costs of Renovation and Refurbishment of Business Premise under P.U.(A) 381/2020 and P.U.(A) 481/2021

Further to the issuance of Income Tax (Costs of Renovation and Refurbishment of Business Premise) (Amendment) Rules 2021 [P.U.(A) 481/2021], the IRBM updated the Frequently Asked Questions (FAQ)* dated 31 October 2022 on tax deduction on costs of renovation and refurbishment (R&R) of business premise provided under the Income Tax (Costs of Renovation and Refurbishment of Business Premise) Rules 2020 [P.U.(A) 381/2020] and P.U.(A) 481/2021 respectively. The updated FAQ supersedes the previous FAQ that was issued on 11 March 2021.

**Available in Bahasa Malaysia only.*

Salient points

1) Addition of examples (a) and (b) in **FAQ No. 3** as shown below:

Contoh:

(a) Syarikat XYZ Sdn Bhd telah membuat pengubahsuaian bumbung (*roofing*) dan pemasangan tirai (*curtain*) di premis perniagaannya sebanyak RM50,000.

Pengubahsuaian bumbung (roofing) dan pemasangan tirai (curtain) yang dilakukan pada premis perniagaan bukan merupakan kos R&R premis perniagaan bagi maksud yang dinyatakan dalam Jadual Pertama [Kaedah 2] di bawah P.U.(A) 381/2020, maka, kos R&R tersebut tidak layak dituntut.

(b) Syarikat telah membuat pengubahsuaian penjana kuasa Tenaga Nasional Berhad (TNB) di premis perniagaannya.

Lazimnya, penjana kuasa TNB merupakan sebuah stesen jana kuasa TNB yang terletak di luar sesebuah premis perniagaan. Oleh itu, kos pengubahsuaian penjana kuasa TNB tidak memenuhi kehendak tafsiran dalam kaedah 2 di bawah P.U.(A) 381/2020 dan juga tidak termasuk dalam senarai kos R&R yang boleh dituntut pada Jadual Pertama P.U.(A) 381/2020.

2) Addition of example (c) in **FAQ No. 7** as shown below:

(c) Tuntutan kos R&R bagi perniagaan sedia ada boleh dituntut mulai dari tarikh kerja-kerja R&R dimulakan hingga tarikh kerja-kerja R&R berakhir / selesai dengan syarat kerja-kerja atau kos R&R tersebut dilakukan dalam tempoh 1 Mac 2020 sehingga 31 Disember 2022 serta kos R&R disahkan oleh juruaudit luar yang bertauliah dan disokong oleh invois berkaitan. Rujuk contoh di bawah ini.

Tempoh perakaunan Syarikat A dan B berakhir pada 31 Dis.

Sykt	Tarikh Mula R&R	Tarikh Tamat R&R	Tarikh Pemis digunakan dalam perniagaan
A	1.5.2020	30.06.2022	30.06.2022
B	1.1.2020	30.08.2021	30.08.2021

Sykt	Jumlah kos R&R dilakukan				Jumlah dibenarkan potongan		
	Tahun 2020		Tahun		Tahun		
	Sebelum 1.3.2020	Pada atau selepas 1.3.2020	2021	2022	2020	2021	2022
A	-	90,000	60,000	-	90,000	60,000	-
B	20,000	50,000	-	-	50,000	-	-

Berdasarkan contoh (c), layanan tuntutan kos R&R seperti berikut:

Syarikat A layak menuntut kos R&R yang dilakukan dalam tempoh 1 Mac 2020 sehingga 31 Disember 2020 berjumlah RM90,000 walaupun kerja-kerja R&R masih belum berakhir/selesai.

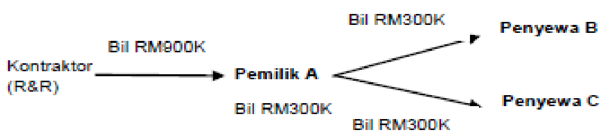
Syarikat B hanya layak menuntut kos R&R yang dilakukan dalam tempoh 1 Mac 2020 sehingga 31 Disember 2020 yang berjumlah RM50,000. Manakala, kos R&R yang berjumlah RM20,000 yang dilakukan sebelum 1 Mac 2020 tidak layak dituntut.

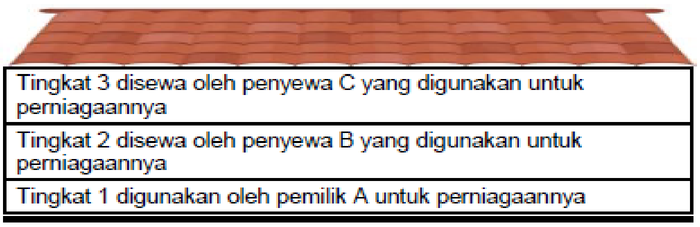
3) Addition of FAQ No. 8 in relation to R&R claim on multi-storey buildings as shown below:

Kos R&R boleh dituntut oleh pemilik dan penyewa ke atas bangunan bertingkat sama ada dilakukan terhadap tingkat yang berlainan atau di tingkat yang sama. Pemilik dan penyewa **layak untuk menuntut kos R&R** jika:

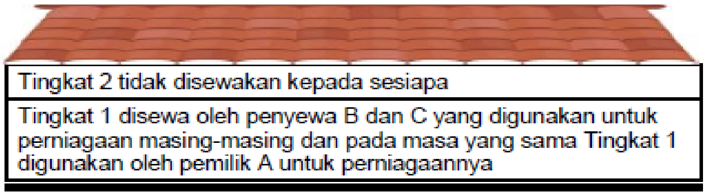
Contoh:

(a) menyewa di tingkat yang berlainan - keluasan lantai setiap tingkat bangunan hendaklah dikenalpasti dan dibezakan di antara pemilik dan penyewa atau penyewa dengan penyewa lain.





(b) menyewa di tingkat yang sama - keluasan lantai boleh dibezakan dan dikenalpasti di antara pemilik dan penyewa atau penyewa dengan penyewa lain.



Bagi contoh (a) dan (b) di atas, pemilik dan penyewa layak menuntut kos R&R tersebut tertakluk kepada syarat seperti berikut:

(i) Setiap tuntutan hendaklah disahkan oleh juruaudit luar bertauliah masing-masing;

(ii) Setiap tuntutan dapat dibuktikan dengan invois atau dokumen sokongan berkaitan; dan

(iii) Tuntutan kos R&R bagi setiap pemilik dan penyewa terhad kepada maksima RM 300,000 yang dilakukan bagi tempoh Mac 2020 hingga Disember 2022.

Please refer to the FAQ (updated on 31 October 2022) for full details.

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7. Updated FAQ on 2% withholding tax deducted from payment by payer companies to agents, dealers, or distributors

The IRBM has updated the FAQ on 2% withholding tax deducted from payment by payer companies to agents, dealers, or distributors (ADD). This FAQ supersedes the previous FAQ that was updated on 19 August 2022.

The updates are highlighted in yellow below:

6.	Adakah nota kredit termasuk dalam bentuk bayaran kepada EPP yang tertakluk kepada potongan cukai 2%?	Penentuan sama ada sesuatu bayaran kepada EPP tertakluk kepada potongan cukai 2% atau tidak adalah bergantung kepada *substance* bayaran tersebut dan bukannya label bayaran. Sekiranya terbukti nota kredit adalah bayaran komisen berbentuk tunai yang terbit daripada jualan, transaksi atau skim yang dijalankan oleh EPP maka peruntukan di bawah seksyen 107D ACP adalah terpakai.

Please refer to the FAQ (updated on 21 October 2022) for full details.

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8. Ketua Pengarah Hasil Dalam Negeri v Cash Band (M) Berhad (HC)

This was an appeal filed by the Director General of Inland Revenue (DGIR) against the decision of the Special Commissioners of Income Tax (SCIT) that the disposal of the land was capital receipts taxable under the Real Property Gains Tax Act 1976 (RPGTA).

The DGIR was of the view that the disposal of the land was taxable under Section 4(a) of the ITA.

Issue:

Whether the Deciding Order of the SCIT was tainted with any appealable error that warrants an intervention.

Decision:

The High Court (HC) dismissed the DGIR's application based on the following grounds:

- There was no evidence to suggest that at the time of the acquisition of the land, the taxpayer had intended to dispose of the same at a profit.
- The taxpayer's dominant intention at the point of acquisition of the land was to manage and run the golf club.
- Since the golf club was running at a loss, the taxpayer had explored the steps to be taken to determine the potential and maximum value of the land.
- The fact that the consideration was based on the sales revenue and not profit lends credence to the finding of the SCIT that the taxpayer did not play an active part in the development of the said land. The guaranteed profit in the Development Agreement was not considered as profit as the taxpayer was not exposed to business risk. These can hardly be described as an adventure by the taxpayer in the business of trading in land.
- The SCIT's deciding order was not tainted with any appealable error that warranted an intervention.

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9. Akamai Technologies International AG v Ketua Pengarah Hasil Dalam Negeri (HC)

This was an application for a judicial review filed by a non-resident taxpayer, Akamai Technologies International AG, for an order of certiorari to quash the impugned decision of the DGIR.

Issues:

- Whether the application for judicial review was not frivolous and the taxpayer had an arguable case at the substantive stage;
- Whether the payments in respect of the Service Reseller Agreement (SRA) from Akamai Malaysia to the taxpayer was subject to withholding tax under Section 109 of the ITA, and if so, whether such payment falls within the definition of a royalty under Article 12 of the Double Tax Agreement between Malaysia and Switzerland (the DTA), or under Section 2 of the ITA; and
- Whether an alternative remedy existed for the taxpayer to appeal to the SCIT under Section 109H of the ITA.

Decision:

The HC allowed the taxpayer's judicial review application based on the following grounds of judgement:

- Going by the cases of *Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor* and *R v Monopolies and Mergers Commission Ex p Argyll Group plc*, it was a trite law that the taxpayer must show that the application for leave for judicial review was not frivolous, and the taxpayer must substantiate that it had an arguable case at the substantive stage. Additionally, if the subject matter of a dispute was non-justiciable, it shall not be amenable to judicial review [as per *Tan Sri Musa bin Hj Aman & Ors v Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors*].
- According to the case of *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*, substantive issues should not be determined at the leave stage. As such, the issue on whether the SRA payment from Akamai Malaysia to the taxpayer constituted a royalty subjected to withholding tax under Section 109 of the ITA or whether the term royalty should be defined under Article 12 of the DTA or under Section 2 of the ITA, were substantive issues which should not be determined at the leave stage.

- Although the impugned e-mail employed the word “berpandangan”, the HC was of the view that the DGIR’s impugned e-mail was not an opinion as it was assertive in nature. Due to that, the HC held that the impugned e-mail falls within the meaning of “decision” or “action” under Order 53 Rule 2(4) of the Rules of Court 2012.

- Finally, the HC also held that there was no provision in the ITA that gave a right of appeal to the SCIT by a non-resident who had not been assessed. This is because Section 109H of the ITA stipulates that “*A payer referred to in Sections 109, 109B or 109F may, within thirty days (or any period extended by the Director General) from the date an amount is due to be made to the Director General under that section, appeal to the Special Commissioners by reason that such amount is not liable to be paid under this Act and the provision of this Act relating to appeals shall apply accordingly with any necessary modification.*” As the taxpayer was not the payer in this case, the alternative remedy to appeal to the SCIT was not applicable to the taxpayer.

- With the above in mind, the HC concluded that the taxpayer had successfully established an arguable case which warrants that the judicial review application was not frivolous.

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10. CFE Ltd v Ketua Pengarah Hasil Dalam Negeri (SCIT)

This was an appeal filed by the taxpayer, CFE Ltd to the SCIT under Section 99(1) of the ITA, to dispute the additional assessments imposed by the DGIR on the taxpayer for the YAs 2009, 2010, 2011, and 2012.

Issues:

- Whether the DGIR had any legal or factual basis to raise additional assessments through the issuance of Notices of Additional Assessments for the YAs 2009 to 2012 pursuant to Section 140A of the ITA;

- Whether the DGIR had made the transfer pricing adjustment correctly based on existing transfer pricing legal provisions in relation to the choice of comparable companies, benchmarking analysis, and interquartile range;

- Whether the DGIR had any legal or factual basis to state that the Direct Marketing Expenses (DME) was subject to the 8% mark-up; and

- Whether the DGIR was right in law and order to impose penalty pursuant to Section 113(2) of the ITA.

Decision:

The SCIT allowed the taxpayer’s appeal in dismissing the DGIR’s additional assessments based on the following grounds of judgement:

- Other than the transactional net margin method (TNMM) that was agreed to be used by both the taxpayer and DGIR, the taxpayer carried out comparability analysis by benchmarking controlled transactions with uncontrolled transactions as provided under Rule 6(1) of the Income Tax (Transfer Pricing) Rules 2012 (the 2012 Rules). The most basic and primary comparability factors were the functions and the type of services of the comparable companies should be sufficiently similar as provided in Rule 6(3) of the 2012 Rules.

- With regards to the functions and characteristics of the services provided by the taxpayer and the comparable companies chosen by the taxpayer and the DGIR respectively, the SCIT was more inclined towards the consistent evidence provided by the taxpayer, as the taxpayer did not only provide marketing services, but also other services namely research and reporting as well as technical and quality control, which was similar to the services provided by the taxpayer to TCCEC as stated in the Service Agreement between the taxpayer and TCCEC.

- The SCIT was also satisfied that the taxpayer prepared a transfer pricing document which fulfilled the legal requirements as it contained functional analysis which was essential as per Rule 4 of the 2012 Rules. Rule 6(3) of the 2012 Rules did not distinguish between the primary or secondary functions or services carried out by the comparable company. To determine the selection of a comparable company, the overall functions and services of the company should be considered. As such, the SCIT held that the DGIR was wrong in law and order to limit the selection of comparable companies.

- Although the taxpayer's comparable company did not have complete financial information and the same costs as the taxpayer, the SCIT could not accept that the DGIR had rejected the taxpayer's comparable company solely because it conflicted with the evidence provided by the DGIR as well as from the trial documents. The SCIT was of the view that the pass-through costs or other costs of foreign comparable companies were not information that could be obtained through publicly available data unless such companies were being audited or investigated. Therefore, the taxpayer's failure to submit such information was justified. The DGIR also failed to prove that all comparable companies chosen met the criteria imposed on the taxpayer to fulfill, as the DGIR did not examine all selected comparable companies to check if they had pass-through costs. The SCIT also could not agree with the comparative analysis carried out by the DGIR by using a comparable company which had 20% controlled transactions as it was inconsistent with the provisions provided under Rule 6 of the 2012 Rules, paragraph 8 of the Transfer Pricing Guidelines 2012, and the OECD Guidelines. There was also no satisfactory evidence given by the DGIR to justify its action.

- The SCIT was of the view that the selection of comparable companies and benchmarking analysis would produce an interquartile range which would determine if the transfer pricing in the transaction carried out was an arm's length price. Since there was a flaw in the DGIR's selection of comparable companies, the DGIR had to choose the median point on its interquartile range to determine the arm's length price on the transactions between the taxpayer and TCCEC. The SCIT referred to the case *Macmine Pty Ltd v FCT* and held that the taxpayer had proven the non-existence of the state of facts that supported the DGIR's decision / assessment to make a transfer pricing adjustment on the arm's length price determined by using the median point which also contradicted the meaning of power as provided in Section 140A of the ITA and Rule 13(1) of the 2012 Rules.

- The agreement for DME was entered between the taxpayer and the third-party service provider instead of a 3-party agreement with TCCEC. There was thus no evidence that the taxpayer had added value to the DME related services as the taxpayer only acted as an intermediary in coordinating and assisting the third-party to ensure that the third-party fulfills the rules set by TCCEC. The SCIT was also satisfied that the taxpayer did not bear any risk in relation to the DME as the DME were reimbursed by TCCEC, in accordance with the terms provided under the Service Agreement, and further supported by the taxpayer's audited financial statements for the YAs 2009, 2010, and 2011. Therefore, the SCIT held that the DGIR had no legal or factual basis to say that the DME, which the taxpayer considered to be pass-through costs, were subject to an 8% mark-up.

- Based on the decision of the High Court judge in the case of *Re Ex Parte Application For Leave To Apply For Judicial Review By Shell People Services Asia Sdn Bhd*, the DGIR had discretionary power under Section 140A of the ITA on whether to make adjustments to the transfer price. On the other hand, the taxpayer had the right to appeal under Section 99(1) of the ITA to the SCIT against the DGIR's decision, and rely on the breach of statutory conditions as a ground of appeal. Going by Rule 13(1) of the 2012 Rules, when the DGIR had reason to believe that the price charged in the controlled transaction was not an arm's length price, the DGIR had the discretion on whether to make an adjustment to indicate the arm's length price for the transaction by substituting or charging the price. It was not a mandatory requirement but a discretion to adjust the transfer price to reflect arm's length price. The DGIR also did not carry out a proper selection of comparable companies, benchmarking analysis, and correct application of the interquartile range which further reinforces the fact that the transfer pricing adjustment was incorrectly made by the DGIR in accordance with the existing transfer pricing law.

- With the above in mind, the SCIT held that the taxpayer had successfully proved that the additional assessments issued by the DGIR for the YAs 2009 to 2012 were excessive or wrong. Therefore, it should not be disputed that the DGIR was wrong in law and order to impose a penalty on the taxpayer under Section 113(2) of the ITA.

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11. MDEC signs Memorandum of Understanding with IRBM to implement National e-Invoicing Initiative

The Malaysian Digital Economy Corporation (MDEC) signed a Memorandum of Understanding (MoU) with the IRBM on 25 October 2022 to establish strategic cooperation for the implementation of the National e-Invoicing Initiative (the Initiative).

The Initiative led by MDEC with the support of the Ministry of Communications and Multimedia Malaysia, aims to drive the country's digitalisation agenda in line with the Malaysian Digital Economy Action Plan (MyDIGITAL) and the National E-Commerce Strategic Roadmap 2.0 (NESR). Along with the rapid development of digitalisation, businesses needed an easier way to exchange information and trade transactions globally. The Initiative forms a part of a more comprehensive digitalisation agenda for business documents, which starts with e-invoices, and will then be expanded to include other business documents such as deliveries, catalogues, and orders.

The Initiative is also one of Malaysian Digital Catalytic Programmes (PEMANGKIN) under the Digital Trade sector, which aims to accelerate the growth of the country's digital economy by supporting the coordination of regulatory standards and approaches to facilitate local and cross-border trade.

Upon signing the MoU, MDEC and IRBM will work together in coordinating the implementation of the Initiative with the tax compliance model across the country, as well as sharing the implementation status and framework regarding planning, strategy, and the development of the implementation of the Initiative. The collaborative implementation of the Initiative will consider the taxation requirements for the development of the e-invoicing framework that will be implemented in Malaysia and promote the importance and advantages of e-invoicing to businesses.

The collaboration between MDEC and IRBM is in line with the aspirations of the 12th Malaysia Plan 2021-2025 (12MP) which aims to strengthen the digital service infrastructure and digitalise the tax administration to improve tax collection and the quality of services offered by tax administrators. The implementation of e-invoicing will provide many benefits for taxpayers, such as improving the efficiency of business operations, simplifying the record keeping process, and reducing their tax compliance costs, apart from improving the transparency of business transactions, which helps the government to overcome the problem of shadow economy in transactions.

Please refer to the media release dated 25 October 2022 issued by MDEC for full details.

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