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July 2022

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Greetings from Deloitte Malaysia Tax Services

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Important deadlines:

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

1. Operational Guidelines 1/2022: Application for Tax Clearance Letter for Company, Limited Liability Partnership and Labuan Entity (Updated)

The Inland Revenue Board of Malaysia (IRBM) has recently issued an updated Operational Guidelines on Application for Tax Clearance Letter (TCL) for Company, Limited Liability Partnership (LLP) and Labuan Entity (GPHDN 1/2022) dated 24 May 2022 (available in Bahasa Malaysia only). It supersedes the previously issued Guidelines (GPHDN 3/2021) dated 30 June 2021.

The significant changes are outlined below:

- A company which winds up through a court order does not need to include the "Orders of release or dissolution" under Section 491 of the Companies Act 2016 (the Order) when submitting the required documents for the application of the TCL. Such company will only be required to submit the Order to the IRBM for the purpose of closing its tax file once the TCL has been issued.

- The IRBM also requires a limited liability partnership (LLP) which winds up through a court order to submit the receiving or winding up order together with other required documents when applying for the TCL.

- For the purpose of closing the income tax file after the TCL has been issued, a strike off/dormant company is required to submit a Notice under Section 550 of the Companies Act 2016 to the IRBM.

- There are revised forms and list of supporting documents required for the purpose of TCL application by each category of taxpayer:

Category of taxpayer	Guidelines
Company	- Appendix 1A for Form CP7(C) - Appendix A for supporting documents
Defunct company	- Appendix 1D for Form CP7 - Appendix A for supporting documents
LLP	- Appendix 1B for Form CP7(PT) - Appendix B for supporting documents
Labuan Entity	- Appendix 1C for Form CP7(LE) - Appendix C for supporting documents

Please refer to the updated Guidelines (GPHDN 1/2022) for full details.

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2. Income Tax (Deduction for Investment in a BioNexus Status Company) (Amendment) Rules 2022 [P.U.(A) 212/2022]

P.U.(A) 212/2022 (the Amendment Rules) which was gazetted on 22 June 2022 extends the tax incentive for the investment made in a BioNexus status company as provided under the Income Tax (Deduction for Investment in a Bionexus Status Company) Rules 2016 [P.U.(A) 306/2016] by another two years.

Subrule 3(1) of P.U.(A) 306/2016 allows a qualifying person to claim a deduction in the basis period for a year of assessment in arriving at the adjusted income from its business of an amount equivalent to the actual value of investment made by the qualifying person in a BioNexus status company approved by the Minister of Finance (MOF) between the period of 1 January 2016 and 31 December 2020 (both dates inclusive), provided that the application for an approval to invest in a BioNexus status company has been submitted to the MOF through the Malaysia Bioeconomy Corporation Sdn Bhd on or after 1 January 2016 and such application has been approved by the MOF.

The deduction for the investment as mentioned above and the application period for an approval to make investment under P.U.(A) 306/2016 is now extended from 1 January 2021 to 31 December 2022 (both dates inclusive).

Please refer to the Amendment Rules and P.U.(A) 306/2016 for more details.

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3. Revocation or temporary release of Stoppage Order

The IRBM has recently made an announcement via an e-Newsletter on the revocation and the temporary release of the Stoppage Order.

The salient points are as follow:

- A Stoppage Order is a travel ban that is enforced on individuals or company directors who fail to settle their outstanding tax liabilities in respect of income tax, real property gains tax (RPGT) or corporate tax. As provided under Section 104 of the Income Tax Act 1967 (ITA) and Section 22 of the Real Properties Gains Tax Act, 1976 (RPGTA), the IRBM will issue a Certificate specifying the details of the tax arrears to any Commissioner of Police or Director of Immigration with a request to prevent the taxpayer from leaving the country. The Certificate will also be issued directly to the taxpayer and the Stoppage Order will not be invalidated even if the taxpayer does not receive the Certificate.

- Taxpayers who wish to travel abroad may apply to the IRBM for a revocation of the Stoppage Order by settling their outstanding tax liabilities in full. In the event where a taxpayer is unable to settle his outstanding tax liabilities in full, he may apply for a temporary release to travel abroad subject to fulfilling the following conditions:

  i. He ensures that he has settled at least 50% of his outstanding tax liabilities;
  ii. He or his representative has contacted the IRBM's branch which handled his file at least 7 days prior to his travel period; and
  iii. He ensures that the application letter submitted includes his travelling details such as place, purpose, and duration of his visit.

- Upon fulfilling all conditions specified, the IRBM will issue a temporary release letter to taxpayers informing the period in which taxpayers are allowed to travel abroad.

- Taxpayers are also advised to check the status of the Stoppage Order at https://sspi.imi.gov.my/sspi/ and contact the IRBM if taxpayers are barred from leaving the country.

Please refer to Item 5 of the e-Newsletter for full details.

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4. Labuan Companies (Amendment) Act 2022, Labuan Financial Services and Securities (Amendment) Act 2022 and Labuan Islamic Financial Services and Securities (Amendment) Act

The Labuan (Amendment) Bills 2022 (reported in Tax Espresso April 2022) have been gazetted as the following Labuan (Amendment) Acts on 9 June 2022:

(i) Labuan Companies (Amendment) Act 2022 (available in English and National Language) which came into operation on 10 June 2022;
(ii) Labuan Financial Services and Securities (Amendment) Act 2022 (available in English and National Language) which is deemed to come into operation on 1 January 2019; and
(iii) Labuan Islamic Financial Services and Securities (Amendment) Act 2022 (available in English and National Language) which is deemed to come into operation on 1 January 2019.

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5. Keysight Technologies Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)

Malaysia's High Court (HC) issued a decision on 12 May 2022 regarding whether gains from a transfer of intellectual property (IP) should be treated as revenue in nature, and therefore subject to tax under Section 4(f) of the ITA (the decision was published on 20 May 2022). The HC found that the taxpayer (appellant) was negligent, as defined in Section 91(3) of the ITA. Further, there was no outright sale of the IP. Therefore, it was reasonable for the tax authorities (respondent) to raise the assessment and impose a penalty under Sections 4(f) and 113(2) of the ITA, respectively. However, it is important to note that this case is currently pending before the Court of Appeal (COA).

Issues:

- Whether the respondent was time-barred under Section 91(1) of the ITA from issuing the Notice of Additional Assessment for the year of assessment 2008;

- Whether the proceeds from the sale of marketing and manufacturing intangibles by the appellant to its related company were capital in nature and, therefore, not subject to tax under the ITA or whether they were revenue in nature and thus subject to tax under the ITA; and

- Whether the penalty imposed by the respondent under Section 113(2) of the ITA was correct.

Decision:

After reading and hearing submissions by both parties, the HC affirmed the decision made by the Special Commissioners of Income Tax (SCIT) and dismissed the appellant's appeal. In brief, the HC's reasoning was as follow:

- The time-bar provision in Section 91(1) of the ITA clearly provides that the respondent may only issue an assessment within five years of the year of assessment. However, Section 91(3) of the ITA provides that the respondent may issue an assessment after expiration of the five-year period in cases of fraud, willful default, or negligence. The respondent had proven that the appellant was negligent as the appellant had failed to provide evidence that the transfer of technical know-how (i.e., the marketing and manufacturing intangibles) to its related company in exchange for RM821,615,000 was an outright sale. In addition, the appellant had failed to furnish the documents and information on the valuation of the marketing and manufacturing intangibles as requested by the respondent in a letter dated 6 April 2017. Therefore, the respondent was not time-barred.

- The Manufacturing Services Agreement and the Intellectual Property Transfer Agreement, both dated 1 March 2008, when read as a whole, did not prove that there was an outright sale of IP rights by the appellant. Only the beneficial right to the IP rights had been transferred, not the legal beneficial ownership. There was also no evidence that title to the IP rights had been registered in the related company's name. However, there was evidence that the IP rights to the product in the Manufacturing Services Agreement and the Intellectual Property Transfer Agreement were the same. Therefore, the amount of RM821,615,000 received by the appellant was revenue in nature as the amount was proven to represent the appellant's projected future income for the years 2008 through 2015 resulting from the change of the appellant's function from a full-fledged manufacturer to a contract manufacturer, as found by the SCIT.

- It is up to the discretion of the respondent to impose penalties under Section 113(2) of the ITA after taking into consideration all relevant facts and circumstances of a case. Justification for imposing the penalty in the case at hand was not based on technical adjustments or differences in interpretation but rather on whether the tax treatment adopted by the appellant was wrong and would result in a lower tax payment. The penalty under Section 113(2) of the ITA was correct as it was imposed on the amount of tax undercharged as a result of the appellant submitting incorrect returns or giving incorrect information, which affected its own chargeability.

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6. Ketua Pengarah Hasil Dalam Negeri v Taman Equine (M) Sdn Bhd (COA)

On 17 June 2022, the IRBM uploaded the above tax case on its website. This was an appeal filed by the IRBM against the decision of the HC.

Issues:

Whether the decision of the HC was correct in law and facts in deciding that:

- The expenditure incurred by the taxpayer consisting of 10% refund for the release of Bumiputera quota and 5% penalty for violating the terms of the quota is deductible under Section 33(1) of the ITA; and
- No penalties are to be imposed on the taxpayer under Section 113(2) of the ITA at the rate of 25% on the additional assessments raised for the years of assessment 2011, 2012, and 2013.

Decision:

The COA unanimously held that the expenditure incurred by the taxpayer (i.e. payment made to the State Government for the release of Bumiputera quota) is not deductible under Section 33(1) of the ITA. The COA overturned the HC's decision on all issues and restored the decision of the SCIT.

[*Note: The SCIT dismissed the taxpayer's appeal and ruled that the payments made to the State Government were penalty for the release of Bumiputera quota and not deductible under Section 33(1) of the ITA. As at the date of this publication, the details of the SCIT's decision are not available yet.*]

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7. Idaman Harmoni Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)

In the appeal to the SCIT by the taxpayer, the SCIT's view was that Section 91(3) of the ITA was applicable since the taxpayer had committed wilful default. The findings of the SCIT are as follow:

- Based on the terms of the Development Agreement (DA) and the consideration received by the taxpayer, the SCIT found that a trade exists.
- Both Gombak Land Sdn Bhd (Gombak Land) and Mega First Corporation Berhad (MFCB) are in the business of property development, so had Gombak Land or MFCB transacted the deal in respect of the said lands, the transaction would have been subjected to tax under the ITA.
- The purchase and disposal of the said lands were pre-planned to happen within the exemption period granted under the Real Property Gains Tax (Exemption) (No. 2) Order 2003.
- The taxpayer filed RPGT return (CKHT 1 Form) to avoid paying tax on profits which would have been reported under the ITA.

The taxpayer appealed to the HC against the decision of the SCIT.

Issue:

Whether the Director General of Inland Revenue (DGIR) can apply Section 91(3) of the ITA to raise the Notices of Assessment which were issued beyond the limitation period.

Decision:

The taxpayer's appeal was allowed. The HC overturned the SCIT's decision based on the following grounds of judgement:

- The DGIR alleged that wilful default exists since it was always the intention of the taxpayer, acting in concert with MFCB and Gombak Land, to dispose of the said lands for profit. Since Gombak Land and MFCB are developers, the logical extension is that the taxpayer must also be a property developer and could not have acquired the said lands for the purpose of investment. This assumption cannot be accepted as these companies are distinct and separate from each other.

- Section 91(3) of the ITA provides that where it appears to the DGIR that any form of fraud or wilful default has been committed in connection to tax, he may make an assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question. To invoke Section 91(3) of the ITA, the burden lies on the DGIR to prove wilful default or negligence.

- For wilful default, the DGIR must prove that the taxpayer had failed to exercise care in completing his return of income, in this case, the CKHT 1 Form or the taxpayer was recklessly careless in the sense of not caring if his act or omission was a breach of his duty.

- As to negligence, the DGIR must prove that the taxpayer failed to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances.

- Since the DGIR could not prove that there was any failure to give other information required by the CKHT 1 Form, the taxpayer could not be said to be negligent.

- The taxpayer could not be in wilful default or negligence simply because the joint venture that arose from the DA did not attract RPGT on the ground that it fell within the exemption period. The DGIR can rule that the taxpayer was not entitled to the RPGT exemption and raised assessment. However, there was no evidence of the DGIR challenging the CKHT 1 Form. Thus, the argument that the taxpayer had committed wilful default or negligence within the meaning of Section 91(3) of the ITA was not supported.

- In view of the Notices of Assessment being time-barred, no findings were made on other issues of the case.

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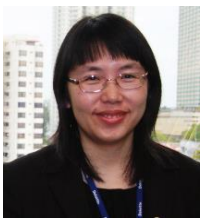

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