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Latest Gazette Orders, Audit Framework for Employers, Tax Cases and more

October 2021

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Greetings from Deloitte Malaysia Tax Services

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	31 October
1. 2022 tax estimates for companies with November year-end	√
2. 6th month revision of tax estimates for companies with April year-end	√
3. 9th month revision of tax estimates for companies with January year-end	√
4. Statutory filing of 2021 tax returns for companies with March year-end	√
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1. Rules for special deduction for rental reduction on business premises given to SME and non-SME gazetted

The following Rules were gazetted on 8 September 2021 to legislate the Government's announcement through various Economic Stimulus Packages, that a special deduction be given to property owners who grant a minimum of 30% reduction in rental on business premises to small and medium enterprise (SME) and non-SME tenants.

I. Income Tax (Special Deduction for Reduction of Rental to a Small and Medium Enterprise) Rules 2021 [P.U.(A) 353/2021] which is deemed to have effect from the year of assessment (YA) 2020; and
II. Income Tax (Special Deduction for Reduction of Rental to a Tenant other than a Small and Medium Enterprise) Rules 2021 [P.U.(A) 354/2021] which is deemed to have effect from the YA 2021.

Following the issuance of P.U.(A) 353/2021 and P.U.(A) 354/2021, the Inland Revenue Board of Malaysia (IRBM) has updated the Frequently Asked Questions (FAQs) on special deduction for landlords who provide rental reduction on business premises to SME and non-SME tenants (Available in Bahasa Malaysia only).

Deduction

The Rules provide that for the purpose of ascertaining the adjusted income of a landlord from its rental income under paragraph 4(a) or (d) of the Income Tax Act 1967 (ITA) in a basis period for a YA, a deduction shall be allowed for an amount equivalent to the total amount of reduction of rental of not less than 30% of the rate of monthly rental under the existing tenancy agreement for a business premise for each of the qualifying month.

For the purpose of the Rules:
- "business premises" refers to premises used by a tenant only for the purposes of its business and includes a bazaar lot, stall, vehicle park, storage warehouse or any place;
- "SME" refers to a SME resident in Malaysia and is certified as an SME by SME Corporation Malaysia;
- "tenant" refers to a resident in Malaysia who carries on business at a business premises; and
- "qualifying months" are the months from April 2020 until December 2021 for P.U.(A) 353/2021 and January 2021 until December 2021 for P.U.(A) 354/2021.

For the purpose of qualifying for the deduction under the Rules, the landlord shall keep:
(a) a tenancy agreement which is stamped under the Stamp Act 1949 [*Act 378*];
(b) a separate statement of income for rental income for the qualifying months in the basis period for a YA;
(c) a confirmation made by the—
  (i) landlord stating the amount of reduction of rental given; and
  (ii) tenant stating the receipt of reduction of rental; and
(d) certificate by the SME Corporation Malaysia confirming the status of the SME, where applicable.

Advance rental

With regards to rental for the qualifying months paid in advance, the landlord is eligible for the above deduction provided that the landlord keeps supporting documents stating the reduction of rental given by way of refund or by any other means as agreed between the landlord and the tenant.

Non-application Rule in P.U.(A) 354/2021

P.U.(A) 354/2021 shall not apply to a landlord who has claimed deduction for reduction of rental under the Income Tax (Special Deduction for Reduction of Rental to a Small and Medium Enterprise) Rules 2021 [P.U.(A) 353/2021] (See Note shown below).

Further information provided by the IRBM in the updated FAQs include:

- For the period from January 2021 to December 2021, SME tenants are not required to furnish the SME Status Certificate to landlords in cases where the certificate has yet to be issued by SME Corporation Malaysia.

- To claim the special deduction, the landlord is required to provide information on the tenant, the premises and the rental reduction by completing the Working Sheet (Helaian Kerja) as an attachment to the Income Tax Return Form. The usage of the Working Sheet are as follows:

Working Sheet	Category of taxpayer
HK-C16B	Companies, co-operative societies, limited liability partnerships, and trust bodies
HK-4E	**Other than** companies, co-operative societies, limited liability partnerships, and trust bodies

Please refer to the P.U.(A) 353/2021 and P.U.(A) 354/2021 as well as the FAQs for full details.

[Note: The MOF has clarified on 8 October 2021 that the rationale for the above non-application rule is to prevent a special deduction on the same reduction of rental from being claimed under both the P.U. (A) 353/2021 and P.U. (A) 354/2021. Therefore, the same landlord who rents premises to both SME and non-SME tenants is eligible for deduction under the two rules respectively.]

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2. Income Tax (Exemption) (No. 9) Order 2021 [P.U.(A) 344/2021]

P.U.(A) 344/2021 was gazetted on 23 August 2021 to legislate the proposed tax incentives to tour operators until YA 2022 [*See Tax Espresso (Special Alert) - PEMERKASA – Tax-related measures*]. P.U.(A) 344/2021 has effect from YA 2021 until YA 2022.

Exemption

The Minister exempts a qualifying person from the payment of income tax in a basis period for a YA in respect of the statutory income derived from a qualifying activity. An exemption granted shall only apply if the total number of local tourists for a qualifying activity is not less than 200 person in the basis period for a YA.

The total number of local and foreign tourists for a qualifying activity shall be verified in writing by an authorised officer of the Ministry of Tourism, Arts and Culture Malaysia.

Qualifying activity

A qualifying activity is a tour operating business which provides a domestic tour package for travel within Malaysia utilised by local and foreign tourists, including transportation by air, land or sea and accommodation.

Qualifying person

The qualifying person is a company—

i. resident in Malaysia;
ii. which is licensed under the Tourism Industry Act 1992 to carry out a tour operating business; and
iii. which carries on a qualifying activity.

Separate source and separate account

Where a qualifying person carries on a qualifying activity and an activity other than a qualifying activity, each activity shall be treated as a separate and distinct source of that qualifying person.

For the purpose of the Order:

- "local tourist" refers to individuals who are Malaysian citizens or residents;
- "foreign tourist" refers to individuals other than a local tourist, who are neither Malaysian citizens nor residents; and
- "tour operating business" has the same meaning assigned to it in the Tourism Industry Act 1992 [*Act 482*].

Previously, the tax exemption on statutory income for tour operators organising domestic tour packages and group inclusive tour packages were given up to YA 2020 pursuant to the following gazette orders:

- Income Tax (Exemption) (No. 11) Order 2016 [P.U.(A) 345/2016]
- Income Tax (Exemption) (No. 11) 2016 (Amendment) Order 2017 [P.U.(A) 412/2017]
- Income Tax (Exemption) (No. 12) Order 2016 [P.U.(A) 346/2016]
- Income Tax (Exemption) (No. 12) 2016 (Amendment) Order 2017 [P.U.(A) 413/2017]

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3. Income Tax (Exemption) (No. 10) Order 2021 [P.U.(A) 370/2021]

P.U.(A) 370/2021 (the Order) was gazetted on 21 September 2021 to legislate the special investment tax allowance for the electrical and electronic (E&E) sector announced in the National Budget 2020. The Order is deemed to have come into operation on 1 January 2020.

According to the Order:

1) The Minister exempts a qualifying company in the basis period for a YA from the payment of income tax in respect of statutory income derived from a qualifying project, which is equivalent to the amount of allowance of 50% of the qualifying capital expenditure incurred by that qualifying company. The amount of exemption is capped at 50% of the statutory income from a qualifying project for each YA.

2) The qualifying company is a company which -
   (a) is incorporated or deemed to be registered under the Companies Act 2016 [*Act 777*] which is resident in Malaysia;
   (b) is involved in manufacturing activity in the electrical and electronic sector, in compliance with the Industrial Co-ordination Act 1975 [*Act 156*] for the purpose of reinvestment in the qualifying project;
   (c) holds a business licence issued by the relevant local authority;
   (d) holds a manufacturing licence issued by the licensing officer pursuant to the Industrial Co-ordination Act 1975 or a confirmation letter of exemption from manufacturing licence issued by the Malaysian Investment Development Authority (MIDA), as the case may be; and
   (e) has made a claim for the following incentive for which the period of that incentive has ended in the YA 2019 or any other preceding YAs in respect of the same qualifying project:
      (i) reinvestment allowance under Schedule 7A to the ITA 1967; and
      (ii) any incentive under the Promotion of Investments Act 1986 [*Act 327*].

3) Qualifying capital expenditure is the following capital expenditure incurred by a qualifying company used in Malaysia solely for the purpose of carrying on a qualifying project:
   (a) the cost of purchasing or constructing a building or factory (excluding any building used as living accommodation); and
   (b) the cost of providing a machinery or plant (excluding any machinery or plant which is provided wholly or partly for the use of a director or an individual who is a member of the management or administration, or clerical staff, of that qualifying company).

4) Qualifying project is a project approved by the Minister which is undertaken by a qualifying company in expanding, modernising, automating or diversifying its business of carrying on manufacturing activity in the electrical and electronic sector.

5) The exemption period shall be for a period of 5 consecutive years commencing from the date of the first qualifying capital expenditure incurred by the qualifying company, as determined by the Minister or the Minister charged with the responsibility for international trade and industry, as the case may be.

6) An application for exemption under the Order shall be made to the Minister through MIDA on or after 1 January 2020, but not later than 31 December 2021.

7) An exemption granted under the Order is subject to the qualifying company complying with the conditions imposed by the Minister which include:
   (a) the qualifying company shall invest in the qualifying project at least RM1.5 million within the exemption period;
   (b) the qualifying company shall incur an approved adequate amount of annual operating expenditure in Malaysia to carry on the qualifying project;
   (c) the qualifying company shall employ an approved adequate number of full-time employees in Malaysia to carry on the qualifying project; and
   (d) the qualifying company fulfills one of the following conditions:
      (i) undertakes a vendor development program by developing at least two new local vendor companies; or
      (ii) undertakes a human capital development program by fulfilling one of the following conditions:

(A) undertakes internship program with local university or polytechnic, by taking at least five students who are Malaysian citizens for each YA and undertakes internship program for a minimum period of three months during the exemption period;
(B) collaborates with local university on curriculum enhancement in relation to electrical and electronic syllabus; or
(C) undertakes an upskilling or reskilling program with local university, polytechnic or technical institution.

Please refer to the Order for full details, including the non-application paragraph. You may also refer to the "Guidelines and procedures for the application of special investment tax allowance for the E&E sector" available on the MIDA website for further details.

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4. Stamp duty exemption on loan or financing facility approved under Bank Negara Malaysia's fund

Stamp Duty (Exemption) (No. 10) Order 2021 [P.U.(A) 364/2021] (the Order) was gazetted on 10 September 2021. The order is deemed to have come into operation on 1 January 2021 and is effective retroactively as from this date. The following are some key provisions of the order:

- An instrument of loan or a financing agreement relating to the loan or financing facility executed between an SME and a financial institution is, on application, exempted from stamp duty.
- The stamp duty exemption applies to the said instrument which is executed pursuant to a letter of offer issued by the financial institution from 1 January 2021 to 31 December 2021.
- An application for the stamp duty exemption shall be accompanied by a letter of offer from the financial institution to the SME which states the approval of the loan or financing facility.

Definition of SME	SME as determined by the National SME Development Council
Loan or financing facility approved under BNM's Fund for SMEs that are eligible for stamp duty exemption	a) All Economic Sectors Facility; b) SME Automation and Digitalisation Facility; c) Agrofood Facility.

Please refer to the Order for full details.

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5. Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 3) Order 2021 [P.U.(A) 366/2021]

P.U.(A) 366/2021 (the Order) was gazetted on 14 September 2021 and came into operation on 15 September 2021.

The Order grants remission of tax under Income Tax Act 1967 and stamp duty under Stamp Act 1949 in full in relation to:

- Islamic Medium-Term Notes (IMTN) and Islamic Commercial Papers (ICP) issued by DanaInfra Nasional Berhad (DNB) pursuant to the IMTN and ICP Programme and the Syndicated Revolving Credit Facility (RC-i Facility) obtained by DNB of up to RM7.6 billion in combined aggregate; and
- IMTN and ICP Programme and the RC-i Facility guarantee provided by the Malaysian Government.

Please refer to the Order for full details.

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6. Stamp duty exemption on qualifying loan restructuring and rescheduling agreements

In line with the reintroduction of loan moratorium announced by the Government of Malaysia recently, the Stamp Duty (Exemption) (No. 11) Order 2021 [P.U.(A) 367/2021] (the Order) which exempts qualifying instruments of loan or financing agreements relating to the restructuring or rescheduling of loans or financing between borrowers or customers and financial institutions was gazetted on 15 September 2021. The Order is deemed to have come into operation on 1 July 2021 and is effective retroactively as from this date. The following are some key provisions of the order:

- An instrument of loan or a financing agreement relating to the restructuring or rescheduling of a loan or financing between a borrower or customer and a financial institution which is executed between 1 July 2021 and 31 December 2021 is, on application, exempted from stamp duty.

- The stamp duty exemption shall be subject to the following conditions:
  (a) the existing instrument of loan or financing agreement has been duly stamped under item 22 or 27 of the First Schedule to the Stamp Act 1949; and
  (b) the instrument of loan or financing agreement relating to the restructuring or rescheduling of a loan or financing does not contain the element of additional value to the original amount of loan or financing under the existing instrument of loan or financing agreement.

- Any interest or profit accrued from the restructured or rescheduled payments is not considered as an element of additional value to the original amount of loan or financing under the existing instrument of loan or financing agreement.

- An application for the stamp duty exemption shall be accompanied by relevant document relating to the restructuring or rescheduling of that loan or financing.

- For the purpose of the Order, "restructuring or rescheduling" means any modification made to the existing repayment terms and conditions of the loan or financing agreement pursuant to a concession provided by the financial institution due to the inability of the borrower or customer to comply with the existing repayment schedule consequent to deteriorating financial conditions.

Please refer to the Order for full details.

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7. IRBM issued Transfer Pricing Documentation Flowchart and Self-test

The IRBM has recently issued the following to help taxpayers determine the requirements needed to prepare their transfer pricing documentation (TPD):

- Transfer Pricing Documentation Flowchart
  The Flowchart shows the steps to be taken for identifying the requirement in the preparation of a contemporaneous TPD. It helps to identify the circumstances where a full or minimum TPD is required, and the extent of information needed from the taxpayer.

- Transfer Pricing Documentation Self-test
  The TPD Self-test helps to determine if the taxpayer fulfills the TPD requirement through a series of questions and answers.

Please refer to the TPD Flowchart and TPD Self-test for full details.

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8. IRBM issued Audit Framework for Employers

The IRBM has recently issued the Audit Framework for Employers (*Available in Bahasa Malaysia only*) which is effective from 1 October 2021. The framework outlines the rights and responsibilities of the audit officers, employers and tax agents in an audit on employer. It also explains the basis of audit selection and the procedures involved in an audit on employer.

In general, this Framework aims to:

i. Assist audit officers in carrying out their duties more efficiently and effectively; and
ii. Help employers fulfill their responsibilities under the law.

The salient features of the Framework are as follows:

1) Types of Employer Audit

The employer audit consists of:

- Employer's External Audit – pursuant to Section 107 of the ITA; and
- Employer's Desk Audit – pursuant to Section 83 of the ITA.

This Framework will apply to both types of employer audits and shall be conducted by the IRBM as follows:

	External Audit	Desk Audit
Objective	Ensure correct tax deduction under the Monthly Tax Deduction (MTD) scheme and timely remittance of the MTD.	Ensure compliance with responsibilities provided under Section 83 the ITA which includes Employer's Return (Form E), notification of commencement and cessation of an employee's employment.
Information reviewed	Involves review and verification of records and documents (e.g payroll records) and relevant payroll-related information.	Involves review and verification of documents (e.g payroll records) and written notifications submitted to the IRBM relating to the employees as compared to the information reported by the employer in the Form E and CP8D.
Location of audit	May be conducted at the employer's premises, IRBM office or any mutually agreed upon location.	Conducted at the IRBM office. But employers may be requested to be present at the IRBM office to confirm or discuss the audit findings.

2) Years covered under audit

Employer audit activities can cover up to two current (2) years and may be extended indefinitely for the following cases:-

a) Failure to remit MTD;
b) Insufficient MTD remittance;
c) Repeated failure to comply with tax laws; and
d) Complaint cases.

3) Case selection

The selection of employer audit cases is done via a computer system based on the IRBM's risk assessment criteria and/or based on various sources of information received, such as:

- Industry-specific selection;
- Specific issues for specific groups of employers;
- Location-based selection;
- Information received from 3rd parties.

4) Offences and Power to Compound

If it is discovered following an audit that the employers fail (without reasonable excuse) to comply with their obligations, the IRBM will take the following actions:

No.	Offence	Penalties
1.	**External audit** Failure to comply with the rules in relation to: - payment of amounts deducted and returns; or - notification of cessation of remuneration payment *Ref: Rule 10(1) and 13, Income Tax (Deduction from Remuneration) Rules 1994*	Liable to prosecution and upon conviction, can be fined between RM200 to RM20,000 or to imprisonment for a term not exceeding six (6) months or to both.
2.	**Desk audit** Failure to furnish / issue the Form E, Statement of Remuneration (Form EA) / Statement of Monetary and Non-Monetary Incentives to Agent, Dealer or Distributor (Form CP58) *Ref: Section 83(1), 83(1A) or 83A(1) of the ITA*	Fine between RM200 to RM20,000 or to imprisonment for a term not exceeding six (6) months or to both.
3.	**Desk audit** Failure to issue and submit notification of commencement and cessation of an employee's employment, i.e. Forms CP22, CP22A/ CP22B or CP21 *Ref: Section 83(2) – 83(4) of the ITA*	Fine between RM200 to RM20,000 or to imprisonment for a term not exceeding six (6) months or to both.
4.	**Desk audit** Failure to comply with instructions in relation to withholding of monies / deduction of tax from emoluments and pensions *Ref: Section 83(5) and 107 of the ITA*	Fine between RM200 to RM20,000 or to imprisonment for a term not exceeding six (6) months or to both.

Where an employer is found to have committed repeated offences subsequent to the employer audit, the number of such repeated offences shall be taken into account in determining the amount of compound to be imposed.

The Framework provides that, for purposes of the employer's external audit, the following would be considered as offence committed more than once or repeatedly:

a) Under-deduction of/ failure to deduct MTD
b) Under remittance of/ failure to remit MTD
c) Late remittance of MTD

In cases under (a) above, the first non-compliance, for the purpose of determining the amount of compound, would be from the date of the first audit findings letter issued to an employer.

As for cases under (b) the IRBM shall initiate prosecution. A compound option is not provided for.

5) Voluntary Disclosure

The Framework provides that an employer may make a voluntary disclosure in writing (i.e. letter or email), any time before the IRBM commences any audit action. However, no concessionary penalty rates are explicitly provided for in the Framework should the employer choose to make a voluntary disclosure.

6) Audit Settlement

An employer audit is expected to be resolved within 90 calendar days from date documents are received from the employer or date of field audit. The IRBM will notify the employer if the audit requires additional time to be resolved.

Completed audit cases will not be re-audited for the same year of remuneration and issue. However, a re-audit may be carried out in respect of complaint cases involving the failure to remit/ under-remittance of MTD.

In the event where the employer is dissatisfied with the audit findings, they may formally make an objection within 18 calendar days from the date of the audit findings letter by submitting additional information and supporting evidence to support his objection.

Conclusion

The issuance of the Framework is a timely reminder for employers to review their employer tax obligation processes and the reliability of their payroll systems. As the Framework has clearly spelled out the employer tax obligations which can be audited by the IRBM, employers should embark the following:

- use the remaining months in year 2021 to review their payroll processes and systems;
- this will allow them to take any remedial action as required for the upcoming year of assessment 2021 filing season; and
- setting compliance standards in fulfilling the employer's tax obligations.

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9. MIDA Guidelines

The MIDA has recently issued the following guidelines for the Services Sector:

No.	Guideline	Effective date of application
1.	Guidelines for Principal Hub Incentive 3.0	1 January 2021 - 31 December 2022
2.	Guidelines on Incentive for Setting up a Global Trading Centre (GTC)	1 January 2021 - 31 December 2022
3.	Guidelines and Procedures for the Application of Special Tax Incentive for Selected Services Activities under the National Economic Recovery Plan (PENJANA)	7 November 2020 - 31 December 2022 [**Note:** Applications for the Special Income Tax Rate of 15% to non-citizen individuals who are residents in Malaysia must be made through MIDA from 7 November 2020, but not later than 31 December 2021.]

Guidelines for Principal Hub Incentive 3.0

- The Guidelines provide for the definition of a principal hub (PH) which is a Malaysian company using Malaysia as a base for conducting its regional or global businesses and operations to manage, control, and support its key functions, including management of risks, decision making, strategic business activities, finance, management, and human resource.

- The eligibility criteria for a new manufacturing/services company and existing manufacturing/services company applying for the PH incentive is provided in Appendix A and Appendix B of the Guidelines.

- The Guidelines listed the type of qualifying service for the incentive, the employment requirements, and the facilities accorded to a PH.

Guidelines on incentive for setting up a GTC

- The incentive for GTC was announced in Budget 2021 to provide for a concessionary tax rate of 10% for 5 years which is renewable for another 5 years to qualifying companies carrying out qualifying trading activities. The Guidelines provide the definition of a GTC company which is a Malaysian company using Malaysia as its trading base undertaking strategic sourcing, procurement, and distribution of raw materials, components, and finished products to its related and unrelated companies both locally and abroad.

- To enjoy the incentive, a GTC company must meet the criteria listed in Appendix A of the Guidelines and comply with stipulated conditions throughout the incentive period once approved for the GTC incentive.

Guidelines and procedures for the application of Special Tax Incentive for selected services activities under the National Economic Recovery Plan (PENJANA)

- The Special Tax Incentive was announced under the Economic Recovery Plan (PENJANA) on 5 June 2020 for manufacturing companies wanting to relocate their manufacturing businesses to Malaysia.

- Under Budget 2021, the Government has stated its commitment to spurring economic recovery through investment in key sectors and making Malaysia a destination for high-value service activities. Therefore, the Special Tax Incentive scope has been expanded to selected services activities, including companies adopting Industrial Revolution 4.0 and digitalisation technology which have a significant multiplier effect.

- In addition to the Special Tax incentive, the Government also announced the Special Income Tax Rate at a flat-rate of 15% for a period of 5 consecutive years to non-resident individuals holding key position (C-Suite) for strategic investments made by companies relocating their operations to Malaysia.

- The Guidelines listed the type of special tax incentives as well as the eligibility criteria for tax incentive and special income tax treatment for individuals.

  Please refer to the respective guidelines for full details.

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10. Practice Note 2/2021: Explanation relating to expenditure or additional expenses for the purpose of deduction allowed in P.U.(A) 5/2021

The IRBM has issued Practice Note 2/2021 dated 3 September 2021 to provide guidance relating to expenses or additional expenses which are allowable as deductions under the Income Tax (Deduction For Expenditure On Issuance Of Sukuk And Retail Sukuk Structured Pursuant To The Principle Of Wakalah) Rules 2021 [P.U.(A) 5/2021].

The tax incentive under P.U.(A) 5/2021 is an extension of the tax incentives which have expired in YA 2020, provided previously under the following:

- Income Tax (Deduction For Expenditure On Issuance Of Sukuk) Rules 2019 [P.U.(A) 118/2019]; and
- Income Tax (Deduction For Expenditure On Issuance Of Retail Debenture and Retail Sukuk) Rules 2019 [P.U.(A) 117/2019].

P.U.(A) 5/2021, which is effective from YA 2021 to YA 2025, has the effect of maintaining the tax incentives provided under P.U.(A) 117/2019 and P.U.(A) 118/2019 in one subsidiary legislation.

Item 6.0 of the Practice Note 2/2021 provides scenarios to illustrate the treatment relating to deduction for expenditure and additional expenses on the issuance of sukuk and retail sukuk structured pursuant to the principle of wakalah.

Please refer to Practice Note 2/2021 for full details.

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11. Government of Malaysia v Mahawira Sdn Bhd & Anor (COA)

In the tax case of *Government of Malaysia v Mahawira Sdn Bhd & Anor,* the appellant had, in the High Court (HC), claimed for outstanding tax jointly and severally against the first respondent and the second respondent for the YAs 2001 to 2004. The second respondent is the 20% shareholder and director of the first respondent since 19 December 2003. The HC judge ruled that the second respondent is only liable to tax for YA 2004 and could not be liable for the balance sum for the YAs before the second respondent became the director of the first respondent, i.e. YAs 2001 to 2003. The appellant was aggrieved by that HC's decision and appealed to the Court of Appeal (COA).

Issue:
The issue to be determined by the COA was if the second respondent should be liable for the tax imposed by the appellant for the YAs before she assumed a directorship role in that company, i.e. YAs 2001 to 2003.

Decision:
Upon reading and hearing submissions by both parties, the COA affirmed the decision made by the HC and dismissed the appellant's appeal. In brief, the COA's reasons were as follow:

- The COA could not agree with the submission of the appellant as the appellant's interpretation of Section 75A of the ITA would mean that no matter the point in time anyone becomes a director of a company, he or she would still be held liable for the tax/debt of the company for the YAs preceding their appointment as a director. It was untenable, inappropriate, and unfair. The COA could not find someone who has not assumed the role as a director and thereby willing to take the responsibilities, should shoulder the burden undertaken by any company, including paying the tax. Consequently, the COA agreed with the HC that the second respondent could only be held liable for the tax in respect of YA 2004 but not for YAs 2001, 2002 and 2003. The COA also agreed with the HC that the words 'during the period' as stated in Section 75A(1)(a) of the ITA, must mean only when the second respondent was made a director of the first respondent i.e. on 19 December 2003.

- The second respondent should not be required to seek redress first before the Special Commissioners of Income Tax as provided by Section 99(1) of ITA, as the notices were not served on her and the prescribed time to do so has expired through no fault of hers because again, the notices were not served on her.

- The appellant claiming the tax pursuant to Section 106(1) of the ITA is subjected to a limitation of time of six years since the cause of action as stipulated in Section 6(1)(d) of the Limitation Act 1953. Issuing the notices in 2014 to claim for tax due and payable in 2001 to 2004, simply would be too late as the claim was caught by the above statutory provision regarding limitation.

- When the second respondent became the director of the first respondent, Section 75A(2)(b) of the ITA back then, required a director to hold more than 50% shares before such director was made liable to pay the tax, the amendment to 20% came only in 2014. The statutory position when the second respondent became the director defined a director as someone owning more than 50% ordinary share capital in the company during the period the tax is liable to be paid. Therefore, the second respondent was not a 'director' of the company 'during the period in which that tax is liable to be paid by the company and could not be held liable under the present Section 75A(2)(b) of the ITA as it does not apply retrospectively.

- Knowing about the notices which were served on the first respondent does not necessarily mean that the second respondent was also served the same. It was a legal requirement for the second respondent to be served the notices by the appellant as stipulated in Section 96(1) of the ITA. Section 96(1) must be read together with Section 103(2) of the ITA and that Section 103(2) could not stand alone to indicate the liability of the second respondent in respect of the tax of the first respondent. The service of the notices must come first before the second respondent could be liable to tax.

- The second respondent could not be liable even for the tax for the YA 2004 as:
  i. No notice referring even for this YA was served on the second respondent; and
  ii. The second respondent was not bound by the present Section 75A(2)(b) of the ITA.

However, the second respondent did not appeal against the decision of the HC to find her liable for the YA 2004. Since the second respondent was satisfied with the said decision and did not lodge an appeal, it was only proper for the COA not to disturb this HC's decision. That part of the decision by the HC against the second respondent should remain in favour of the appellant.

[*Note: It was shared at the recent National Tax Conference 2021 that the appellant has filed leave to appeal to the Federal Court.]*

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12. Lee Koy Eng v Pemungut Duti Setem and another appeal (HC)

Issue:
The issue to be determined by the HC was if the Forms 14A attracted ad valorem stamp duty under item 66(c) in the First Schedule of the Stamp Act 1949 (SA) [release or renunciation of property by way of a gift] or a fixed amount of stamp duty of RM10 pursuant to Item 32(i) in the First Schedule of the SA [conveyance or transfer which is not specifically charged with stamp duty].

Decision:
The HC allowed the duty payer's appeal with the following grounds of judgement:

- The HC cited the Federal Court's decision in BASF Services (M) Sdn Bhd v Pemungut Duti Setem [2010] 4 MLJ 596, and held that in determining the applicable stamp duty, the true nature of the instrument (i.e. the Forms 14A) must first be ascertained. The HC held that the Forms 14A attract nominal stamp duty of RM10 as these Forms cannot be regarded as a gift under item 66(c) in the First Schedule of the SA for the following reasons:

    i. The true nature of Forms 14A was solely to give effect to the renunciation [entitlements under the Distribution Act 1958 (DA)] by the deceased's two children pursuant to the Family Deed and the Vesting Order. The true nature of the Forms 14A could not be a gift of the interest of the deceased's two children in the estate from the deceased's two children to the duty payer.

    ii. By virtue of the operation of Section 6(1)(e) of the DA, the deceased's two children are only 'entitled' two-thirds of the estate. An entitlement to an estate is not equivalent to a beneficial and legal right or interest in the estate which can be given absolutely as a gift. Accordingly, when the deceased's two children renounce or disclaim their entitlement to the estate, the renunciation (entitlements under the DA) cannot constitute a gift of the entitlement (deceased's two children) to the appellant.

    iii. It is clear from the Federal Court's judgment delivered by Mohd Dzaiddin FCJ (as he then was) in *Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188*, at pp 195–196, that a beneficiary of a deceased's estate has no right or interest in the estate until the administration of the estate is complete in the sense that the estate has been distributed in accordance with the law of distribution of the estate and the right or interest in the estate has been vested in the beneficiary. The entitlement (deceased's two children) has not been vested in the deceased's two children because of the renunciation (entitlements under the DA). As such, there cannot be any gift in the form of the entitlement (deceased's two children) by the deceased's two children to the appellant.

- The HC having considered the various heads of charge for a conveyance under paragraphs (a) to (i) of Item 32 of the First Schedule of the SA, held that stamp duty of RM10 was chargeable on the Forms 14A under paragraph (i) of item 32 (i.e. conveyance … of any kind not otherwise specifically charged with duty) as the instruments did not fall into any of the other heads of charge under Item 32. Item 46 only applies to a 'gift' and cannot be a lawful basis for assessment of stamp duty regarding Forms 14A in these two appeals. Item 66(c) cannot apply to Forms 14A in this case because the deceased's two children do not have 'any property' in the estate.

- As mentioned above, the collector has erroneously imposed ad valorem stamp duty on Forms 14A in this case. Accordingly, pursuant to Section 39(4) of the SA, the HC ordered the collector to refund to the appellant (refund order) the excess stamp duty paid by the appellant to the collector (excess) with interest at the rate of 5% pa on the excess from the date of the oral decision until the collector's full payment of the excess to the appellant pursuant to Section 11 of the Civil Law Act 1956 and Order 42 Rule 12 of the Rules of Court 2012.

[*Note: It was shared at the recent National Tax Conference 2021 that the HC's decision had subsequently been affirmed by the COA and the collector's application for leave to appeal to the Federal Court against the COA's decision has been allowed.*]

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13. Natasri Sdn Bhd v KPHDN and another civil suit (HC)

Issue:
The issue to be determined by the HC was if the findings of the Special Commissioners of Income Tax (SCIT), that the taxpayer's gains from disposal of the land is taxable as business income under Section 4(a) of the ITA, is supported by evidence and correctly made under the law.

Decision:
The HC affirmed the decision of the SCIT and dismissed the taxpayer's appeal with costs on the following grounds:

- The taxpayer had played an active role in the joint venture (JV) project with Pokta Sdn Bhd (PSB), including obtaining approval for the change of the land category from agricultural to commercial, which constitute an adventure in the nature of trade. The said project had enhanced the value of the land. In addition, the taxpayer shared the same director with PSB, which was the housing developer. This further supported the active role played by the taxpayer.

- Although the JV with PSB had been aborted, the taxpayer's action had increased the value of the land. The character of the land after subdivision and the conversion to commercial land was itself for commercial transaction. The facts had fulfilled the conditions laid down in *Leeming v Jones 15 TC 333* [quoted in the case of *Director General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd (supra)]* regarding the establishment of the existence of an adventure in the nature of trade.

- Even though, the land was earlier an agricultural land and the initial intention was for investment purposes, the fact had changed when the taxpayer acted in an adventure in the nature of trade. Further, the renting of the land by the taxpayer was only for a short period of time and involved only a small area of the land.

- The taxpayer's declaration of the said land as a fixed asset and not a trading stock was not a conclusive evidence that the taxpayer was not involved in an adventure in the nature of trade.

- As the gains from the disposal of the land was a business income, the taxpayer did not fall under the category of investment holding company envisaged under Section 60F of the ITA. The penalty imposed by the Director General of Inland Revenue was in accordance with the discretionary power conferred by Section 113(2) of the ITA.

[*Note: It was shared at the recent National Tax Conference 2021 that the COA had subsequently overturned the decision of the HC and allowed the taxpayer's appeal.]*

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14. Updates on Pillar One and Pillar Two

On 8 October 2021, the OECD/G20 Inclusive Framework on BEPS published a statement on the components of global tax reform, agreed upon by 136 of its members, including Malaysia. This serves as an update to the statement, which was previously published in July 2021. Since 2017, the 140 member countries of the inclusive framework have been jointly developing a "two-pillar" approach to address the tax challenges arising from the digitalisation of the economy. Two detailed "blueprints" were published in October 2020 on potential rules for addressing nexus and profit allocation challenges (Pillar One), and for global minimum tax rules (Pillar Two). Political agreement on key aspects of the proposals was reached by the G7, G20, and many of the OECD inclusive framework countries in June and July 2021.

The political agreement has now been endorsed by G20 Finance Ministers and Central Bank Governors following their meeting on 13 October. The major reform will ensure that MNEs are subject to a minimum 15% tax rate from 2023, and will also re-allocate more than USD 125 billion of profits from around 100 of the world's largest and most profitable MNEs to countries worldwide, ensuring that these firms pay a fair share of tax wherever they operate and generate profit.

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15. Malaysia's Inclusion in EU Tax Watch List

On 5 October 2021, the European Commission officially announced updates to the European Union (EU) grey list. Malaysia, together with Hong Kong, Costa Rica, Qatar, and Uruguay are in the list. In reference to Annex II, the grey list are countries that have yet to comply with international tax standards but have made the commitment to reform tax policies.

As a result of the foreign source income exemption regimes review, the EU considers Malaysia's territorial sourced tax regime harmful. The EU has granted Malaysia a deadline of 31 December 2022 to amend its regime, and it is understood that Malaysia has agreed to do so. As a result of Malaysia's willingness to respond to the EU's concerns, defensive measures by the EU will be suspended, subject to the passing of those amendments. Certain defensive measures that may be applied by EU member states includes non-deductibility of costs, controlled foreign company rules, withholding tax measures, among others.

Based on the EU's guidance, foreign source income exemption regimes that apply on a territorial basis are not inherently problematic. However, the EU is concerned where such regimes create situations of double non-taxation. In particular, they are concerned with the non-taxation of passive income in the form of interest or royalties where the income recipient has no substantial economic activity.

It is understood that Malaysia has committed to amending its tax law by 31 December 2022. This is not unexpected as our country has always been a jurisdiction that promotes tax fairness and transparency. This is evident with our membership in the OECD BEPS Inclusive Framework where we recently supported the Global Minimum Tax proposal. Malaysia also amended its Labuan and other tax incentive regimes previously to be in full compliance with the generally accepted international tax standards.

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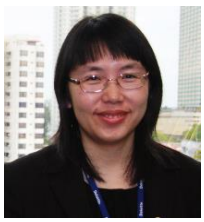

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