KETUA PEGAWAI EKSEKUTIF/KETUA PENGARAH HASIL DALAM NEGERI
(CHIEF EXECUTIVE OFFICER/DIRECTOR GENERAL OF INLAND REVENUE)
IBU PEJABAT LEMBAGA HASIL DALAM NEGERI MALAYSIA
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PERSIARAN RIMBA PERMAI
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Ruj. Kami : LHDN.01/35/(S)/1.5/28/3/1
Tarikh : 21 April 2017

Tetuan
Chartered Tax Institute of Malaysia
Unit B-13-1 (Unit 1-5), Block B
13th Floor, Megan Avenue II
No. 12, Jln Yap Kwan Seng
50450 Kuala Lumpur

Tuan,

DIALOG ISU-ISU BAJET 2017 & RANG UNDANG-UNDANG KEWANGAN 2016 DI ANTARA LHDNM DENGAN PERSATUAN PERAKAUNAN DAN PENGAMAL PERCUKAIAN

Saya dengan hormatnya merujuk kepada perkara di atas.

2. Bersama-sama ini disertakan salinan dokumen seperti di bawah untuk perhatian dan tindakan pihak tuan selanjutnya.

a. Minit dialog yang diadakan pada 24 Januari 2017 antara Lembaga Hasil Dalam Negeri Malaysia dengan pihak Persatuan; dan

b. Lampiran kepada minit iaitu draf *Joint Memorandum On Issues Arising From 2017 Budget & Finance Bill 2016 & Other Technical Matters* berserta jawapan kepada komen daripada pihak Persatuan untuk perhatian pihak tuan.

3. Diharap pihak tuan dapat membuat edaran kepada semua ahli persatuan yang berkenaan.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"
"BERSAMA MEMBANGUNKAN NEGARA"

[DATUK NOOR AZIAN BINTI ABDUL HAMID]
Timbalan Ketua Pegawai Eksekutif (Dasar)
b.p Ketua Pegawai Eksekutif / Ketua Pengarah Hasil Dalam Negeri
Lembaga Hasil Dalam Negeri Malaysia

DIALOG ISU-ISU BAJET 2017
& RANG UNDANG-UNDANG KEWANGAN 2016
DI ANTARA LHDNM
DENGAN PERSATUAN AKAUNTAN
& PENGAMAL PERCUKAIAN

24 JANUARI 2017

Bilik Mesyuarat Bendahara,
Aras 1, Menara Hasil, Cyberjaya

MINIT DIALOG ISU-ISU BAJET 2017
DAN RANG UNDANG-UNDANG KEWANGAN 2016
DI ANTARA LHDNM DENGAN PERSATUAN AKAUNTAN DAN PENGAMAL PERCUKAIAN

Tarikh : 24 Januari 2017

Masa : 2.30 petang – 5.00 petang

Tempat : Bilik Mesyuarat Bendahara, Aras 1, Menara Hasil, Cyberjaya.

Kehadiran :

LEMBAGA HASIL DALAM NEGERI MALAYSIA		
BIL	**NAMA**	**JABATAN/BAHAGIAN/PPN/CAWANGAN**
1	YBhg Datuk Noor Azian bt Abdul Hamid	Timbalan Ketua Pegawai Eksekutif (Dasar)/ Pengerusi Jawatankuasa Penggubalan Rang Undang-Undang (JKPRUU)
2	Pn Nor'aini bt Ja'afar	Pengarah Jabatan Dasar Percukaian /Timb. Pengerusi I JKPRUU
3	Tn Hj Romli B A.Hamid	Pengarah Negeri Selangor
4	Tn Hj Adzhar B Sulaiman	Pengarah Jabatan Penyelidikan Percukaian
5	En Abdul Manap b Dim	Pengarah Jabatan Pematuhan Cukai
6	Cik Puteh Mariah bt Harun	Pengarah Cawangan Pembayar Cukai Besar
7	En. Mohd Jaafar b Embong	Pengarah Jabatan Pungutan Hasil
8	En. Mohammed Noor b Ahmad	Pengarah Jabatan Percukaian Antarabangsa
9	Pn Salamatunnajan bt Besah	Pengarah Cawangan Cukai Multinasional
10	Pn Siti Aisah bt Abd Khalid	Pengarah Cawangan Petroleum
11	Pn Hazlina Bt Hussain	Pengarah Jabatan Resolusi Pertikaian & Sekretariat Lembaga / Ahli JKPRUU

LEMBAGA HASIL DALAM NEGERI MALAYSIA		
12	Pn Eng Choong Meng	Pengarah Cawangan Tidak Bermastautin
13	Pn Zaleha bt Adam	Pengarah Bahagian Litigasi Cukai, Jabatan Undang-Undang/Ahli JKPRUU
14	En Sohaimi b Sabri	Pengarah Bahagian Operasi Dasar, Jabatan Operasi Cukai
15	En Marside Bin Zelika	Pengarah Bahagian Pembangunan Dasar Percukaian, Jabatan Penyelidikan Percukaian /Ahli JKPRUU
16	En Nazri b Ismail	Pengarah Bahagian Penyelarasan, Pejabat Pengarah Negeri Selangor
17	Pn Siti Norrizan bt Abd Hadi	Pengarah Bahagian Industri Khas, Jabatan Dasar Percukaian/Ahli JKPRUU
18	Cik Norhanadia bt Samsudin	Pengarah Bahagian Komunikasi, Pejabat Ketua Pegawai Eksekutif
19	Pn Norfaizah bt Mat Idris	Bahagian Ketetapan, Jabatan Dasar Percukaian/Ahli JKPRUU
20	Pn Nooriah bt Mohd Mainuri	Bahagian Perjanjian, Jabatan Percukaian Antarabangsa
21	Pn N.Juliana Bt Ismail	Bahagian Gubalan & Advisori Perundangan, Jabatan Undang-Undang / Ahli JKPRUU
22	En Mohamad Harzani B Tahir	Bahagian Gubalan & Advisori Perundangan, Jabatan Undang-Undang / Ahli JKPRUU
23	Pn Anizah Bt Ahad	Jabatan Dasar Percukaian / Ahli JKPRUU
24	Pn Rosnita Bt Ahmad	Bahagian Konsultansi Galakan Cukai, Jabatan Dasar Percukaian/Ahli JKPRUU
25	Pn Faizah Bt Aman	Bahagian Konsultansi Dasar, Jabatan Dasar Percukaian/Ahli JKPRUU
26	Pn Nor Ashikin bt Mohd Nadzari	Pegawai Penyelidik Timbalan Ketua Pegawai Eksekutif (Dasar)
27	En Mazlan B Alias	Bahagian Gubalan & Advisori Perundangan, Jabatan Undang-Undang / Ahli JKPRUU
28	Pn Che Wan Norazura Bt Wan Nordin	Bahagian Gubalan & Advisori Perundangan, Jabatan Undang-Undang / Ahli JKPRUU
29	Pn Nur Farahida Bt Kamarudein	Bahagian Gubalan & Advisori Perundangan, Jabatan Undang-Undang / Ahli JKPRUU

KEMENTERIAN KEWANGAN		
BIL	**NAMA**	**JABATAN/BAHAGIAN**
1	En John Patrick Antonysamy	Timbalan Setiausaha Bahagian Cukai (Sektor Dasar Dan Sektoral)
2	Pn Mahfuzah bt Baharin	Ketua Seksyen (Dasar Cukai Langsung)
3	Pn Siti Norazlina bt Seni	Ketua Seksyen (Dasar Galakan)
4	En Mohd Fadzlee b Malik	Ketua Penolong Setiausaha(Dasar Cukai Langsung)
5	Pn Syakirah Md Nor	Ketua Penolong Setiausaha(Dasar Cukai Langsung)
6	Pn Norkhairiah Zainuddin	Ketua Penolong Setiausaha(Dasar Cukai Langsung)
7	En Muhammad Afnan b Basir	Penolong Setiausaha (Dasar Cukai Langsung)
8	Pn Azniza Ramli	Penolong Setiausaha (Dasar Cukai Langsung)
9	Puan Nurul Hafidzah	Penolong Setiausaha (Dasar Cukai Langsung)
10	Cik Masyita Ismail	Penolong Setiausaha (Dasar Cukai Langsung)
11	Cik A'ina Iryani Bt Dol Razlan	Ketua Penolong Setiausaha (Seksyen Perkhidmatan 1)
12	Pn. Sharifah Um Liyana Binti S Md Nasir	Ketua Penolong Setiausaha(Dasar Galakan)
13	Mr Palani a/l Kumarasamy	Ketua Seksyen (Seksyen Perkhidmatan 1)
14	En. Mohd Zainal Bin Othman	Ketua Penolong Setiausaha(Dasar Galakan)

PERSATUAN AKAUNTAN & PENGAMAL PERCUKAIAN		
BIL	**NAMA**	**ORGANISASI**
1	En Aruljothi Kanagaretnam	Chartered Tax Institute of Malaysia (CTIM)
2	Cik Seah Siew Yun	Chartered Tax Institute of Malaysia (CTIM)
3	Cik Phan Wai Kuan	Chartered Tax Institute of Malaysia (CTIM)
4	En David Lai Shin Fah	Chartered Tax Institute of Malaysia (CTIM)
5	Cik Theresa Goh	Chartered Tax Institute of Malaysia (CTIM)
6	En Thong Vee Kean	Chartered Tax Institute of Malaysia (CTIM)/ Secretariat

PERSATUAN AKAUNTAN & PENGAMAL PERCUKAIAN		
7	Cik Yamuna Supperamaniam	Chartered Tax Institute of Malaysia (CTIM)/ Secretariat
8	En Beh Tok Koay	The Malaysian Institute of Certified Public Accountant (MICPA)
9	Cik Fo Wai Lan	The Malaysian Institute of Certified Public Accountant (MICPA)
10	En Tai Lai Kok	The Malaysian Institute of Certified Public Accountant (MICPA)
11	Cik Woon Yoke Lee	The Malaysian Institute of Certified Public Accountant (MICPA)
12	Cik Tan Yu Yin (Secretariat)	The Malaysian Institute of Certified Public Accountant (MICPA)
13	Dr Veerinderjeet Singh	Malaysian Institute of Accountants (MIA)
14	Cik Carol Eng	Malaysian Institute of Accountants (MIA)
15	Cik Yeo Eng Ping	Malaysian Institute of Accountants (MIA)
16	Cik Wong Yok Chin	Malaysian Institute of Accountants (MIA)
17	Pn Azlina bt Zakaria (Secretariat)	Malaysian Institute of Accountants (MIA)
18	En Peter Lim Thiam Kee	Chartered Secretaries Malaysia (MAICSA)
19	En Ong Whee Tiong	Chartered Secretaries Malaysia (MAICSA)
20	En Eric Yong Siew Meng (Secretariat)	Chartered Secretaries Malaysia (MAICSA)
21	Pn Siti Zaiton bt Buyong	Malaysian Association of Tax Accountants (MATA)
22	Pn Khalijah bt Awang	Malaysian Association of Tax Accountants (MATA)
23	Dato Dr Fam Seng Choy	Malaysian Association of Company Secretaries (MACS)
24	En Tang Chan Ming	Malaysian Association of Company Secretaries (MACS)
25	En Jaydev Singh	CPA Australia
26	En Surin Segar	CPA Australia
27	En Priya Terumalay	CPA Australia

1. UCAPAN PENDAHULUAN PENGERUSI

1.1 Pengerusi memulakan dialog dengan mengucapkan salam sejahtera kepada semua yang hadir dan turut mengalu-alukan kehadiran semua yang dapat menghadiri dialog yang diadakan. Pengerusi kemudiannya memaklumkan bahawa ada beberapa isu yang telah menarik perhatian media, seperti pindaan kepada paragraph 13(1)(b), Jadual 6 dan seksyen 15A. Walau bagaimanapun, ada isu yang telah diselesaikan di peringkat Kementerian Kewangan seperti isu berkenaan paragraph 13(1)(b), Jadual 6 tersebut.

1.2 Pengerusi juga sedia maklum bahawa terdapat permintaan supaya dialog ini diadakan lebih awal namun tidak dapat dipenuhi kerana kekangan masa ketika musim penggubalan Bajet 2017.

1.3 Menurut Pengerusi, objektif dialog pada hari ini adalah untuk memberikan pencerahan berkenaan pindaan undang-undang percukaian yang telah dilakukan. Sebagaimana yang telah diketahui, pindaan lazimnya dilakukan untuk memperjelaskan undang-undang sedia ada, menutup apa-apa *loophole,* membendung penyalahgunaan, meningkatkan kecekapan perkhidmatan, sebagai contohnya e-services dan mempastikan undang-undang sentiasa mengikut peredaran semasa.

1.4 LHDNM sangat menghargai maklumbalas pihak persatuan terhadap pindaan undang-undang yang telah dilakukan serta terhadap panduan dan ketetapan umum yang terpakai.

1.5 Pengerusi selanjutnya memohon agar semua ahli mesyuarat dapat memperkenalkan diri masing-masing serta memaklumkan jabatan/bahagian/organisasi yang diwakili.

2. PERBINCANGAN ISU-ISU BERBANGKIT

2.1 Ms. Phan Wai Kuan dari Chartered Tax Institute of Malaysia (CTIM) membentangkan isu-isu yang dibangkitkan dalam *Joint Memorandum on Issues Arising From 2017 Budget Speech and Finance Bill 2016* bertarikh 29 November 2015 ("Memorandum") bagi pihak persatuan.

2.2 Ahli-ahli mesyuarat telah membincangkan isu-isu yang dinyatakan dalam Memorandum. Sebanyak 20 isu utama di bawah Bahagian A *2017 Budget Speech & Finance Bill 2016* telah diketengahkan manakala Bahagian B *Outstanding Gazettte Orders – 2013 to 2016 Budgets* adalah bertujuan untuk mendapatkan kedudukan terkini perintah-perintah (rujuk **Lampiran**).

3. HAL-HAL LAIN

Dr Veerinderjeet dari Malaysian Institute of Accountants (MIA) memberi komen bahawa setiap tahun setelah Bajet dibentangkan dan pindaan undang-undang dilakukan, dialog seperti ini akan diadakan, panduan, ketetapan umum dan perintah akan diperlukan. Lebih kurang 5 tahun yang lepas, panduan, ketetapan umum dan perintah tersebut akan dikeluarkan dalam bulan Januari tetapi sekarang keadaan tidak lagi begitu. Ini mungkin berpunca dari kekangan untuk merumuskan polisi. Walau bagaimanapun harus difahami bahawa pihak persatuan menghadapi tekanan daripada pembayar cukai untuk mendapatkan penjelasan berkenaan pindaan undang-undang dan tarikh pemakaiannya. Oleh itu suatu mekanisme dan *timeline* amat diperlukan untuk menangani perkara ini.

4. PENUTUP

Pengerusi mengucapkan ribuan terima kasih kepada semua yang hadir dalam sesi dialog pada hari ini. Mesyuarat ditamatkan pada jam 5.17 petang.

Disahkan oleh :

Untuk dan bagi pihak Lembaga Hasil Dalam Negeri Malaysia,

.....
Datuk Noor Azian Bt. Abdul Hamid
Pengerusi Dialog
Timbalan Ketua Pengarah Eksekutif (Dasar)
Lembaga Hasil Dalam Negeri Malaysia

Untuk dan bagi pihak Chartered Tax Institute of Malaysia, Malaysian Institute of Accountants,The Malaysian Institute of Certified Public Accountants dan The Malaysian Institute of Chartered Secretaries and Administrators,

.....
En. Aruljothi Kanagaretnam
Presiden
Chartered Tax Institute of Malaysia

JOINT MEMORANDUM ON ISSUES ARISING FROM 2017 BUDGET SPEECH & FINANCE BILL 2016

Date: 29 November 2016

Prepared by:

Chartered Tax Institute of Malaysia;

Malaysian Institute of Accountants;

The Malaysian Institute of Certified Public Accountants; and

The Malaysian Institute of Chartered Secretaries and Administrators.

JOINT MEMORANDUM ON ISSUES ARISING FROM 2017 BUDGET SPEECH & FINANCE BILL 2016

Contents

A. 2017 Budget Speech & Finance Bill 2016

1. S.2(1) – Wider Scope of the Term "Public Entertainer" (w.e.f. operation of the Finance Act)

Proposed:-

~~*"public entertainer" means a stage, radio or television artiste, a musician, sportsperson or an individual exercising any profession, vocation or employment of a similar nature;*~~

"public entertainer" includes—

(a) a compere, model, circus performer, lecturer, speaker, sportsperson, an artiste or individual exercising any profession, vocation oremployment of a similar nature; or

(b) an individual who uses his intellectual, artistic, musical, personal or physical skill or character in,

carrying out any activity in connection with any purpose through live, print, electronic, satellite, cable, fibre optic or other medium, for film or tape, or for television or radio broadcast, as the case may be;

Comments:

1.1 We would like to seek your confirmation that the paraphrasing of the proposed amendment should be as follows:-

"public entertainer" includes—

(a) a compere, model, circus performer, lecturer, speaker, sportsperson, an artiste or individual exercising any profession, vocation oremployment of a similar nature; or

(b) an individual who uses his intellectual, artistic, musical, personal or physical skill or character, in carrying out any activity in connection with any purpose through live, print, electronic, satellite, cable, fibre optic or other medium, for film or tape, or for television or radio broadcast, as the case may be;

If the additional words cover (a), a further proviso / limitation has actually been introduced to (a) which is the traditional definition of "public entertainer". The Institutes would like a confirmation of that. Otherwise as long as you are a model, a speaker or a sportsmen, there is no need to consider further whether the person is "*carrying out any activity in connection with any purpose through live, print, electronic, satellite, cable, fibre optic or other medium, for film or tape, or for television or radio broadcast, as the case may be".* The

Institutes have been of the understanding that the new definition is meant to extend not to restrict.

IRBM's Comments

The words, "…*carrying out any activity in connection with any purpose through live, print, electronic, satellite, cable, fibre optic or other medium, for film or tape, or for television or radio broadcast, as the case may be."* in the new definition of "public entertainer" should not be paraphrased as suggested because they are applicable to both categories of public entertainer under paragraphs (a) and (b) of the definition.

1.2 Many Double Tax Agreements (DTA) signed by Malaysia have an article entitled *"ARTISTES AND SPORTSMEN"* which typically use the phrase *"an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman"*. Lecturers and speakers would not fall under the meaning of entertainer in a DTA. Given that the definition in a DTA prevails over domestic law, we seek confirmation that withholding tax under S.109A would not apply to the income of a lecturer or speaker in situations where the DTA has the above-stated article.

IRBM's Comments

In current Double Tax Agreements (DTA) signed by Malaysia, under the article entitled *"ARTISTES AND SPORTSMEN"* it uses the phrase *"an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman"*. This is not a definition per se. Therefore, IRBM still have the right to withhold the income of a lecturer or speakers under S.109A.

1.3 (i) In view of the wide definition of the term "public entertainer" which includes a model, lecturer, speaker, trainer, the provisions of S.109A may overlap with that of S.109B. Based on Example 12 in *Public Ruling (PR) No. 1/2014 – Withholding Tax On Special Classes Of Income*, fees paid to a non-resident model for a photo shoot would be subject to withholding tax under S.109B because it is considered a special class of income for a commercial undertaking as there was no element of entertainment during the photo-shoot.

In a situation where there is an overlap, in a scenario where one can fall under the entertainer taxing section or section 4A or 109B(1), where should the priority lie? Sometimes 109A or 109B may give a better result, depending on the DTA in question. In other words, if 2 laws potentially apply, would LHDNM resist if the taxpayer took the more advantageous route?

IRBM's Comments

The relevant public ruling will be amended to be in line with the changes to the law.

With regard to the Institutes' additional comment, the most important point to begin with is to determine what is the type of income? Does it fall under public entertainer or services? The terms of the contract may be able to determine this. The contract may show that the income falls under section 4A and therefore section 15A will apply but if the contract shows that the income is the income of a public entertainer according to the new definition, section 109A will then apply. If there are any contentious issues, the answer would fall back on determining what exactly is a person doing or the facts of the case.

Additional comments from CTIM / MIA / MICPA / MAICSA :

The above comments do not clearly address the situation where there is an overlap of the definitions. If the services of a 'speaker' technically falls within both the definitions under Section 4A AND the new wider definition of Public Entertainer, what would be the IRB's treatment?

IRBM's Comments

IRBM is of the opinion that the overlap situation will never arise as the distinction between a speaker as public entertainer or as a technical person can be determined through the contract. The speaker that falls under the public entertainer definition is meant for the public whereas a speaker that falls under the technical service is meant for a specific group of people only.

(ii) Example 11 in PR No. 1/2014 indicates that payments for a specially-tailored training course conducted in Malaysia by a non-resident would also be subject to withholding tax under S.109B.

IRBM's Comments

Refer IRBM's comments in paragraph 1.3 (i).

(iii) Where a non-resident lecturer or speaker speaks at an event in Malaysia, would S.109A or S.109B apply?

IRBM's Comments

Refer IRBM's comments in paragraph 1.3 (i).

(iv) Where payment is made to a non-resident speaker at an event which takes place outside Malaysia, would this now be caught by Section 109B?

IRBM's Comments

Refer IRBM's comments in paragraph 1.3 (i).

2. S.2(1) – Wider Scope & Clarity in Respect of the Term "Royalty" (w.e.f. operation of the Finance Act)

Proposed:-

~~*"royalty" includes*~~

~~*(a) any sums paid as consideration for the use of, or the right to use —*~~

~~*(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;*~~

~~*(ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;*~~

~~*(b) income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of this definition;*~~

"royalty" includes any sums paid as consideration for, or derived from—

(a) the use of, or the right to use in respect of any copyrights, software, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks or other like property or rights;

(b) the use of, or the right to use tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

(c) the use of, or the right to use know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(d) the reception of, or the right to receive, visual images or sounds, or both, transmitted to the public by—

(i) satellite; or

(ii) cable, fibre optic or similar technology;

(e) the use of, or the right to use, visual images or sounds, or both, in connection with television broadcasting or radio broadcasting, transmitted by—

(i) satellite; or

(ii) cable, fibre optic or similar technology;

(f) the use of, or the right to use, some or all of the part of the radiofrequency spectrum specified in a relevant licence;

(g) a total or partial forbearance in respect of—

(i) the use of, or the granting of the right to use, any such property or right as is mentioned in paragraph (a) or (b) or any such knowledge, experience or skill as is mentioned in paragraph (c);

(ii) the reception of, or the granting of the right to receive, any such visual images or sounds as are mentioned in paragraph (d);

(iii) the use of, or the granting of the right to use, any such visual images or sounds as are mentioned in paragraph (e); or

(iv) the use of, or the granting of the right to use, some or all such part of the spectrum specified in a spectrum licence as is mentioned in paragraph (f); or

(h) the alienation of any property, know-how or information mentioned in paragraph (a), (b) or (c) of this definition;.

Comments:

2.1 With regard to the new definition of royalty under paragraph (a):-

a. What is the significance of the phrase *"in respect of"* which has been inserted in part (a) of the new definition? If there is no significance, we would suggest that the phrase be omitted.

IRBM's Comments

The phrase *"in respect of"* which has been inserted in part (a) of the new definition is a drafting style used in carving out the provision. We do not agree with your suggestion.

b. Paragraph (a) of the new definition includes software. This appears to be contrary to the trend of tax case decisions, both domestically and internationally. The OECD Commentary on Royalty states:-

"…… copyright provisions of the Royalty Article requires software be classified as a literary, artistic or scientific work. None of these categories seems entirely apt. The copyright laws of many countries deal with this problem by specifically classifying software as a literary or scientific work. For other countries treatment as a scientific work might be most realistic approach……..."

Based on the OECD Commentary, unless the software is in respect of a literary work or scientific work, it cannot fall under the definition of royalty in the double tax treaty. It further clarifies that payment for multi usage through arrangements such as 'site licences', 'enterprise licences' or 'network licences' will in most cases be dealt with as business profits in accordance with Article 7.

It also appears that, as a consequence of including software in the new definition of royalty, individuals who make online payments to non-residents for software applications downloaded from the internet would also be required to deduct withholding tax and remit this to the IRB. In practice, this would give rise to difficulties in compliance as full payment for the software application is required before it can be downloaded from the internet leading to a likely situation of the individual bearing the withholding tax and thus increasing costs for the individual.

In view of the above, we seek clarification from the tax authorities on the intention of including software in the new definition of royalty and the scope of coverage as to whether this would cover payments by individuals as well. We would also urge the tax authorities to consider the guidelines / practices (*) issued in other jurisdictions on the tax treatment of similar types of software so as to adopt something similar which is practical for Malaysia and which is in line with international practice so as to ease the cost of doing business in Malaysia. Paragraph 7.2.1 of IRB's Guidelines On Taxation Of Electronic Commerce issued on 1 January 2013 also needs to be considered.

(*) E.g. Singapore IRAS e-Tax Guide on Rights-Based Approach for Characterising Software Payments and Payments for the Use of or the Right to Use Information and Digitised Goods; IRD Hong Kong Departmental Interpretation and Practice Notes No. 39 on Profits Tax Treatment of Electronic Commerce.

This issue also relates to the meaning of "use of" and "right to use". In many literature, in many countries, "use of" or "right to use" means the exploitation of intangible property but when one is just using it, for instance for personal use, that is not "use of" or "right to use" in the context of royalty. This needs to be clarified to give a better understanding of software in the definition of royalty.

It is important that the guidelines and public rulings be issued very soon as the amendments are already in force. It is important for the business community and the practitioners to understand clearly the position taken by LHDNM whatever that may be.

In the Guidelines On Taxation Of Electronic Commerce issued by LHDNM, it says that if a person is paying for a product, that does not constitute royalty. Therefore until the guidelines are reviewed should the guidelines be relied on?

On the issue of the effective date of the new definition of royalty. Does this cover the effective date when one has the right to use or use of the software or when payment is made?

IRBM's Comments

The intention of including software in the new definition of royalty is to keep up with advancements in technology in this digital economy era and to be in tandem with the definition in our DTAs. We do not subscribe to the stand of OECD where a payment is said to be a royalty once there is an exploitation of any rights. Our stance is reflected in cases such as Alcatel and Thomson Reuters.

Additional comments from CTIM / MIA / MICPA / MAICSA :

1) The IRB's answer above should be similar to the IRB's comments in item 4.2. The definition of "Royalty" in most DTAs are not as wide as that in the Income Tax Act 1967 (ITA). Where the payment is not covered under the definition of "Royalty" in the DTA, such payment shall not be subject to withholding tax under Section 109.

IRBM's Comments

IRBM agrees with the statement that the definition of royalty in DTA prevails if the definition differ from the Income Tax Act 1967

2) Also, the IRB's comments above should further clarify whether payments for the purchase of software product (as opposed to for the use of copyright) is included under the new definition. For example, in the case of a software distributor buying and selling software.

IRBM's Comments

IRBM further clarifies that the amended definition also covers payments for the purchase of software product

2.2 We would request for clarification / examples / guidance / public ruling to be provided for all the paragraphs in the new definition of royalty so that taxpayers are aware of the potential scope and coverage of this new definition.

IRBM's Comments

IRBM takes note of the request.

2.3 With regard to the new definition of royalty under paragraph (d):-

a. Please confirm that this new definition is confined to payments made to a person where the payer then has the right to transmit the image/sound to the public. Typically, where such payments are made, the transmission would not be the public as a whole but to subscribers for personal consumption rather than for commercial use, etc.

IRBM's Comments

This new definition is confined to payments made to a person where the payer then has the right to transmit the image/sound to the public.

Additional comments from CTIM / MIA / MICPA / MAICSA :

As requested in item 2.3 a. above, please also confirm that this new definition of royalty under paragraph (d) does not include such payments made where the transmission would not be to the public as a whole but to subscribers for personal consumption rather than for commercial use, etc.

IRBM's Comments

IRBM has raised this concern to MOF because in reference to the new definition, it also includes such payments made where the transmission would not be to the public as a whole but to subscribers for personal consumption rather than for commercial use.

b. There is a potential overlap in terms of payments to non-resident telecommunication service providers i.e. whether the payment is a royalty subject to withholding tax under S.109 or a payment for services subject to withholding tax under S.109B. There is a need for clarification on this aspect.

IRBM's Comments

Regarding payments to non-resident telecommunication service providers, whether the payment is a royalty subject to withholding tax under S.109 or a payment for services subject to withholding tax under S.109B would depend on the facts, contract entered into and business structure carried out.

c. What is the difference between paragraph (d) and paragraph (e) of the new definition of royalty? We would like to seek clarification on the circumstances in which paragraph (d) would apply given that paragraph (e) has covered radio or television broadcasting transmitted by satellite, cable, fibre optic or similar technology.

IRBM's Comments

The difference between paragraph (d) and paragraph (e) of the new definition will be clarified in due course.

2.4 We seek confirmation from the IRB that in interpreting the law, the tax authorities would consider the view expressed in the commentary of the OECD Model DTA so as to align Malaysian tax rules with international practices and enhance certainty in tax treatment for the investors and tax practitioners.

IRBM's Comments

International practice also includes views expressed by developing countries who are not members of the OECD.

References need also be made to the UN Model Tax Convention. Presently, UN is in the midst of reviewing its Art 12 on Royalties, taking into consideration current challenges faced by developing countries.

In light of the above explanation, it is hoped that taxpayers (investors) and practitioners are aware of the alternative views (aside from OECD) available when looking for references and guidance relating to international tax.

3. New S.13(1A) – GST on Benefits in Kind (BIK), Perquisites & Value Of Living Accommodation (w.e.f. YA 2015)

Proposed:-

The total amount of gross income referred to in subsection (1), where applicable, shall include any amount of output tax paid under the Goods and Services Tax Act 2014 in connection with the gross income which is borne by the employer.

Comments:

3.1 It is noted that S.13(1A) is effective from the year of assessment (YA) 2015 onwards. As the filing programme for YA 2015 income tax returns and 2015 Form E is already over, and the 2015 Forms EA/EC have already been rendered to employees by 29 February 2016, we propose that a concession be given for S.13(1A) to be effective on a prospective basis from YA 2017 onwards.

3.2 It would not be cost effective from the perspective of the taxpayer and the tax administrator to ascertain the amount of output tax (6% of the principal amount where applicable) to be assessed as gross income. It would also be administratively cumbersome for employers (particularly those with many employees) to keep track of the amount of output tax paid under the GST Act 2014 in connection with the gross income borne by the employer e.g. aggregate of gifts to each employee equivalent to at least RM500 in a calendar year. We would request that this new provision be reconsidered or made simpler so as not to require tracking employee by employee.

IRBM's Comments

No penalty will be imposed for the YA 2015.

Additional comments from CTIM / MIA / MICPA / MAICSA :

Notwithstanding the IRB's response that no penalty will be imposed for YA 2015 as a consequence of taking S.13(1A) into account, we would request that a concession be given for S.13(1A) to be effective on a prospective basis from YA 2017 onwards. Retrospective application of S.13(1A) would be an administrative headache as the YA 2015 tax return would need to be revised and re-submitted. It is noted that the law takes effect from YA 2015 as GST was introduced then but seeking a prospective change to take effect from YA 2017 is a logical request.

IRBM's Comments

IRBM takes note of this but IRBM's maintains its answer on penalty.

4. S.15A – Income from Services Deemed Derived from Malaysia (w.e.f. operation of the Finance Act)

Proposed:-

Gross income in respect of—

(a) amounts paid in consideration of services rendered by a person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person;

(b) amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;

(c) rent or other payments made under any agreement or arrangement for the use of any moveable property,

shall be deemed to be derived from Malaysia—

(i) if responsibility for payment of the above or other payments lies with the Government, a State Government or a local authority;

(ii) if responsibility for the payment of the above or other payments lies with a person who is a resident for that basis year; or

(iii) if the payment of the above or other payments is charged as an outgoing or expense in the accounts of a business carried on in Malaysia~~:~~.

~~Provided that in respect of paragraphs (a) and (b), this section shall apply to the amount attributable to services which are performed in Malaysia.~~

Comments:

4.1 The removal of the proviso in S.15A would lead to a significant increase in the cost of doing business as the payer would be compelled to bear the withholding tax and the non-deductibility of the withholding tax borne increases business costs further. In this respect, we request that the removal of the proviso be reconsidered to make the business environment more competitive for Malaysian businesses.

IRBM's Comments

IRBM maintains its stand on the amendment to section 15A of the Income Tax Act 1967. Technological advancements enable services to be conducted anywhere in the world. Therefore to enable tax to be imposed on all income under section 4A of the Income Tax Act 1967 derived from Malaysia, whether the services were performed in or out of Malaysia, the removal of the proviso to section 15A is necessary. This amendment will enable withholding tax to be imposed under section 109B without being limited to where the services were performed.

4.2 It is generally accepted that where there is a conflict between the provisions in a Double Tax Agreement (DTA) that is in force and the provisions in a domestic law, the former will override the domestic law provisions to the extent of the conflict. As such, please confirm that where the relevant DTA (e.g. the DTA with Singapore) provides that technical fees would only be subject to tax if the services are rendered in Malaysia, the S.109B withholding tax should not be applicable if the services are not rendered in Malaysia. In view of the changes proposed, the Institutes request that the *Public Ruling No. 1/2014 – Withholding Tax On Special Classes Of Income* be updated accordingly as soon as possible and more guidance be given in terms of handling cross border transactions and the interaction between the domestic law and DTAs.

IRBM's Comments

MOF will be negotiating Malaysia's DTAs nevertheless where the relevant DTA provides that technical fees would only be subject to tax if the services are rendered in Malaysia, S.109B withholding tax should not be applicable if the services are not rendered in Malaysia.

IRBM takes note of the Institutes' request for *Public Ruling No. 1/2014 – Withholding Tax On Special Classes Of Income* to be updated.

4.3 We also request for more clarification to explain the following situations:-

- where there is no DTA;

  IRBM's Comments

  The normal withholding tax rate will be applicable.

- where there is no technical fee article in the DTA;

  IRBM's Comments

  "Royalty" article where applicable or "Other Income" article will be used, subject to DTA negotiations.

- where there is a technical fee article in the DTA; and

  IRBM's Comments

  Generally, there are is no conflict between 'source rule' in the "Technical Fee" article and the amendment to section 15A. Technical Fee is said to be derived from a country if the payer is a resident of that country.

- on the positions taken in the DTAs with Singapore and Spain & the Government to Government agreement between Malaysia & Australia on technical fees.

  IRBM's Comments

  Refer to the IRBM's comments under 4.2.

4.4 For contracts already existing on 21 October 2016 (2017 Budget Day), we would request for the amended S.15A to apply prospectively, from the expiry of the contract OR 5 years from the effective date of the amended S.15A, whichever is the earlier. Otherwise, the payer will have to bear the withholding tax as it will be difficult or almost impossible to re-negotiate existing contracts and this will lead to a significant increase in business costs as outlined above.

IRBM's Comments

These issues will be addressed in a Practice Note that will be issued in due course.

4.5 We seek confirmation that the deletion of the proviso to S.15A would not be implemented retrospectively. In the event that the Finance Act is effective from 1 December 2016, kindly confirm / clarify the following:-

(a) Withholding tax should not apply on payments made after such date in respect of services rendered from outside Malaysia before 1 December 2016.

(b) Where an invoice is received after 1 December 2016 for services rendered from outside Malaysia over a period that commences before 1 December 2016 and ends after 1 December 2016, apportionment should be made on a just and reasonable basis.

(c) We refer to Example C of Appendix 2 of the IROU publication on the 2017 Budget which reads as follows:-

"Services performed outside Malaysia after amendment, payment made before amendment

Facts are as presented in Example A above. Except that Worldwide Go Sdn Bhd had made payment for the contracted services carried out in Germany on 18 November 2016. The services were only carried out during the period of 1 January 2017 to 31 January 2017.

Service Period	*Service Performed*	*Service Received*	*Section 4A*
1.1.2017 – 31.1.2017	*Outside Malaysia*	*Derived from Malaysia*	*Proposed amendment*

This payment is subject to withholding tax because it is an income for services performed after the commencement of the Act and thus is an income derived from Malaysia."

The Institutes are of the view that this payment is not subject to withholding tax although it is an income for services performed after the commencement of the Finance Act. This is because the Finance Act is not in place at the time when this payment is made and hence the obligation to withhold tax does not arise. Please confirm that IRB is agreeable with the Institutes' position.

IRBM's Comments

These issues will be addressed in a Practice Note that will be issued in due course.

5. New S.46(1)(p) – Lifestyle Relief (w.e.f. YA 2017)

Proposed:-

In the case of an individual or a Hindu joint family resident for the basis year for a year of assessment, there shall be allowed for that year of assessment personal deductions of—

(p) an amount expended or deemed expended under subsection (3) in that basis year by that individual—

(i) for the purchase of books, journals, magazines, printed newspaper and other similar publications for the purpose of enhancing knowledge for his own use or for the use of his wife or child, or in the case of a wife, for her own use or for the use of her husband or child;

(ii) for the purchase of a personal computer, smartphone or tablet (not being used for the purpose of his own business) for his own use or for the use of his wife or child, or in the case of a wife, for her own use or for the use of her husband or child;

(iii) for the purchase of sports equipment for any sports activity as defined under the Sports Development Act 1997 (excluding motorized two-wheel bicycles)

and gym memberships for his own use or for the use of his wife or child, or in the case of a wife, for her own use or for the use of her husband or child; and

(iv) for the payment of monthly bill for internet subscription under that individual's name for his own use or for the use of his wife or child, or in the case of a wife, for her own use or for the use of her husband or child,

as evidenced by receipts issued in respect of the purchase or payment, as the case may be, and the total deduction under this paragraph is subject to a maximum amount of two thousand five hundred ringgit; and

Comments:

5.1 We welcome the initiative to include newspapers in the relief under S.46(1)(p)(i). However, to be coherent with technology-orientated initiatives, the relief should be extended to e-newspapers, rather than being confined to "printed newspapers".

5.2 With regard to gym memberships in S.46(1)(p)(iii), please confirm / clarify the following:-

- Does the amount expended or deemed expended only refer to annual payments and does this exclude registration fees?
- Do gym memberships include club membership with gym facilities?

5.3 Does the relief for internet subscriptions in S.46(1)(p)(iv) include mobile data plans?

IRBM's Comments

The policy decision for newspapers under this relief is, it does not include e-newspapers.
The amount expended or deemed expended only refers to annual payments.
Gym memberships do not include club membership with gym facilities.
The relief for internet subscriptions in subparagraph 46(1)(p)(iv) does include mobile data plans.

6. New S.46(1)(q) – Tax Relief for the Purchase of Breastfeeding Equipment (w.e.f. YA 2017)

Proposed:-

In the case of an individual or a Hindu joint family resident for the basis year for a year of assessment, there shall be allowed for that year of assessment personal deductions of—

(q) an amount limited to a maximum of one thousand ringgit expended in that basis year for that year of assessment by that individual for the purchase of breastfeeding equipment for that individual's own use for a child of that individual aged two years old and below, as evidenced by receipts issued in respect of the purchase:

Provided that—

(a) for the purpose of this paragraph, breastfeeding equipment refers to a breast pump kit and an ice pack, a breast milk collection and storage equipment, and a cooler set or bag; and

(b) the deduction under this paragraph shall not be allowed for a year of assessment immediately following that year of assessment; and

Comments:

6.1 Use of the phrase *"…for that individual's own use…"* is restrictive as husbands who buy the equipment for the wife's use wouldn't be able to claim the relief. Working mothers with low income will not be able to enjoy the benefit as they are not in the taxable bracket. The relief for such an essential item should not be too restrictive. Please indicate the rationale for this restriction.

6.2 In circumstances where the wife is not working and the husband buys the equipment, we suggest that flexibility be given to allow the husband to claim the relief.

6.3 According to the IROU slide no. 18 which was presented at IRB's National Tax Seminar 2016, the relief is allowable if the assessment is in the wife's name for a combined assessment. We would suggest that the relief be given even if the combined assessment is in the husband's name.

MOF's Comments

The policy decision for this tax relief is focused on working mothers with taxable income. It is not meant to be claimed by husbands under any condition.

7. New S.46(1)(r) – Tax Relief for Fees Paid to Child Care Centres and Kindergartens (w.e.f. YA 2017)

Proposed:-

In the case of an individual or a Hindu joint family resident for the basis year for a year of assessment, there shall be allowed for that year of assessment personal deductions of—

(r) an amount limited to a maximum of one thousand ringgit expended or deemed expended under subsection (3) in respect of the payment of child care fees to a child care centre registered with the Director General of Social Welfare under the Child Care Centre Act 1984 [Act 308] or a kindergarten registered under the Education Act 1996 [Act 550] in that basis year by that individual for a child of that individual aged six years and below as evidenced by receipts issued by such child care centre or kindergarten:

Provided that where a wife living together with her husband is assessed separately for that year, the deduction under this paragraph shall only be allowed either to the husband or to the wife.

Comments:

7.1 According to the above, the relief is *".. limited to a maximum of one thousand ringgit .. for a child .."*. It appears that where there is more than one child, the relief can be claimed up to a maximum of RM1,000 for each child. We seek confirmation that this is the case.

With regard to the requirement that the relevant child care centre has to be registered with the Director General of Social Welfare under the Child Care Centre Act 1984 [Act 308] or a kindergarten registered under the Education Act 1996 [Act 550], will IRBM insist upon audit that the taxpayer obtain proof of that registration?

IRBM's Comments

This relief of RM1,000 is given to a person regardless of how many children aged six years and below that the person has sent to child care. As such, if there is more than one child, the relief given is still RM1000 for all.

Yes, the tax payer will be required to submit the proof of that registration.

8. New S.97A(1A), (5) – (10) & S.97A(2), (3) – Appeal for Non-Liable (NL) Cases (w.e.f. 1 January 2017)

New S.131A(1) – (5) – Relief Other Than In Respect Of Error Or Mistake (w.e.f. 1 January 2017)

Proposed (selected only):-

97A(1A) *– Where a person has furnished to the Director General a return for a year of assessment in accordance with subsection 77(1) or 77A(1) and there is no chargeable income for that year of assessment, then if the person in respect of such return is aggrieved by the public ruling made under section 138A or any practice of the Director General generally prevailing at the time when the return is made —*

(a) the return shall be deemed to be a notification made by the Director General under subsection (1) on the day the return is furnished; and

(b) the notification deemed to have been made under paragraph (a) shall be deemed to have been notified to the person on the day on which the Director General is deemed to have made the notification.

97A(5) *– Where a person has furnished to the Director General a return for a year of assessment in accordance with subsection 77(1) or 77A(1) and there is no chargeable income for that year of assessment, then if the person in respect of such return alleges that –*

(a) there is an error or a mistake made by him in that return, the person may make an

application in writing to the Director General for an amendment to be made in respect of such return; or

(b) the amount that have been computed in the return is inaccurate by reason of –

(i) any exemption, relief, remission, allowance or deduction granted for that year of assessment under this Act or any other written law published in the Gazette after the year of assessment in which the return is furnished;

(ii) the approval for any exemption, relief, remission, allowance or deduction is granted after the year of assessment in which the return is furnished; or

(iii) a deduction not allowed in respect of payment not due to be paid under subsection 107A(2) or 109(2), section 109A, or subsection 109B(2) or 109F(2) on the day a return is furnished,

the person may make an application in writing to the Director General for relief.

***97A(6)** – The application under subsection (5) shall be made –*

(a) in respect of paragraph (5)(a), within six months from the date the return is furnished;

(b) in respect of subparagraphs (5)(b)(i) and (ii), within five years after the end of the year the exemption, relief, remission, allowance or deduction is published in the Gazette or the approval is granted, whichever is the later; or

(c) in respect of subparagraph (5)(b)(iii), within one year after the end of the year the payment is made.

***131A(1)** – Where any person who has furnished to the Director General a return for a year of assessment in accordance with subsection 77(1) or 77A(1) and has paid tax for that year of assessment alleges that the assessment relating to that year of assessment is excessive by reason of —*

(a) any exemption, relief, remission, allowance or deduction granted for that year of assessment under this Act or any other written law is published in the Gazette after the year of assessment in which the return is furnished;

(b) the approval for any exemption, relief, remission, allowance or deduction is granted after the year of assessment in which the return is furnished; or

(c) a deduction not allowed in respect of payment not due to be paid under subsection 107A(2) or 109(2), section 109A, or subsection 109B(2) or 109F(2) on the day the return is furnished,

the person may make an application in writing to the Director General for relief.

***131A(2)** – The application under subsection (1) shall be made —*

(a) in respect of paragraphs (1)(a) and (b), within five years after the end of the year the exemption, relief, remission, allowance or deduction is published in the Gazette or the approval is granted, whichever is the later; or

(b) in respect of paragraph (1)(c), within one year after the end of the year the payment is made.

Comments:

8.1 We welcome the initiative to introduce a specific provision for relief other than in respect of error or mistake. However, S.131A(1) should not be confined to the three reasons ((a), (b) and (c)) stated therein. It should cover other situations as well such as the situations in Examples 18(*) & 20(*) of Public Ruling No. 6/2015 (Qualifying Expenditure & Computation of Capital Allowances), etc.

(*) The company chose to have the gain or loss on foreign currency exchange deducted or added from or to the original cost of the fixed asset and submitted revised capital allowance computation for all relevant years of assessment to IRB.

IRBM's Comments

IRBM will review / amend Public Ruling No. 6/2015 (Qualifying Expenditure & Computation of Capital Allowances) accordingly.

8.2 Is the timing of deductibility of interest expense under S.33(4) covered under the new S.97A(1A), (5), (6) and S.131A?

IRBM's Comments

The timing of deductibility of interest expense under subsection 33(4) is not covered under the new subsections 97A(1A), (5), (6) and section 131A.

8.3 According to the new S.97A(5) and S.131A(1), an application can be submitted to the DG to amend the return in respect of *"any exemption, …. granted for that year of assessment under .... any other written law published in the Gazette after the year of assessment in which the return is furnished;"*. In the circumstance where the Gazette is published in the same year that the return is furnished (e.g. the return was furnished in January and the Gazette came out in September of the same year), the taxpayer cannot rely on the provisions of the new S.97A(5) and S.131A(1) to submit such an application to amend the return. In this respect, we would suggest that the wording *"the year of assessment in which"* be omitted from the new S.97A(5)(b)(i) & (ii) and S.131A(1)(a) & (b).

IRBM's Comments

In the circumstance where the Gazette is published in the same year that the return is furnished (e.g. the return was furnished in January and the Gazette came out in September of the same year), this would already involve a different year of assessment and the taxpayer can claim the current exemption in the current return form but now this new provision allows the taxpayer to claim for a preceding year of assessment where the exemption should be applicable to the taxpayer.

IRBM will not be amending the new subparagraphs 97A(5)(b)(i), (ii) and paragraphs S.131A(1)(a) and (b). The provisions should be maintained.

8.4 According to the new S.97A(6)(a), the application to the Director General for an amendment of the tax return or for relief must be made within six months from the date the return is furnished. As an error or mistake in the tax return would most likely be detected much later e.g. when preparing the following year's tax return i.e. more than six months after the date the return is furnished, could all types of errors or mistakes including grievances due to compliance with public ruling or any practice of the DG generally prevailing at the time when the return is made, be given up to 5 years after the end of the year of assessment within which the assessment was made to submit an appeal just like S.131 for a person who has paid tax to appeal for his return within 5 years after the end of the year of assessment within which the assessment was made?

IRBM's Comments

No.

9. New S.112A, S.113A & S.119B – Penalty for Not Complying with Country-By-Country Report (CBCR), Common Reporting Standard (CRS) & Foreign Account Tax Compliance Act (FATCA) (w.e.f. operation of the Finance Act)

Proposed:-

112A(1) *– Any person who makes default in furnishing a country-by-country report in accordance with the relevant rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both.*

112A(2) *– In any prosecution under subsection (1) the burden of proving that a country-by-country report has been furnished shall be upon the accused person.*

112A(3) *– Where a person has been convicted of an offence under subsection (1), the court may make a further order that the person shall comply with the relevant provision of the rules under which the offence has been committed within thirty days, or such other period as the court deems fit, from the date the order is made.*

113A(1) *– Any person who —*

(a) makes an incorrect return, information return or report by omitting the information required to be provided in accordance with any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B, on behalf of himself or another person; or

(b) gives any incorrect information in relation to any information required to be provided in accordance with any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B, on behalf of himself or another person,

shall, unless he satisfies the court that the incorrect return, information return or report or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction be liable to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both.

119B(1) *- Except as provided in section 112A, any person who fails to comply with any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both.*

119B(2) *- In any prosecution under subsection (1) the burden of proving that any rules made under paragraph 154(1)(c) to implement or facilitate the operation of an arrangement having effect under section 132B has been complied with shall be upon the accused person.*

119B(3) *- Where a person has been convicted of an offence under subsection (1), the court may make a further order that the person shall comply with the relevant provision of the rules under which the offence has been committed within thirty days or such other period as the court deems fit, from the date the order is made.*

Comments:

9.1 When will the following be issued?

- CBCR Rules
- CBCR Guidelines
- Revised Transfer Pricing (TP) Rules
- Revised TP Guidelines

Will the above be issued for comments before they are finalised? The Institutes would be pleased to provide comments before these are finalised.

IRBM's Comments

The CBCR Rules have been gazetted on 23/12/2016 [P.U.(A) 357/2016].

The CBCR Guidelines, Revised Transfer Pricing (TP) Rules and Revised TP Guidelines will be published soon.

There have been engagements/dialogues with the Institutes, regulators and taxpayers.

10. Paragraph 2A & 2D, Part I, Schedule 1 – Review of Corporate Income Tax for Small and Medium Enterprises (SME) (w.e.f. YA 2017)

Proposed (selected only):-

Paragraph 2A *- Subject to paragraphs 2B, 2C and 3, income tax shall be charged for a year of assessment on the chargeable income of a company resident and incorporated in Malaysia which has a paid-up capital in respect of ordinary shares of two million five hundred thousand ringgit and less at the beginning of the basis period for a year of assessment at the following rates:*

Chargeable income	*RM*	*Rate of income tax*
For every ringgit of the first	*500,000*	~~*20 per cent for the year of assessment 2015 and 19 per cent for the subsequent years of assessment*~~ ***18 per cent***
For every ringgit exceeding	*500,000*	*25 per cent for the year of assessment 2015 and 24 per cent for the subsequent years of assessment*

Comments:

10.1 Based on the new Companies Act 2016 (Act) which has been gazetted but is not in operation yet, share premium will be merged with share capital. This may result in the paid up ordinary share capital of a SME exceeding RM2.5 million. In such a situation, we request that, for income tax purposes, the share premium amount at the time when the Act comes into operation be ignored, thereby maintaining the status of the SME. Subsequently, if additional share premium is created, that would be part of the paid up ordinary share capital for income tax purposes.

IRBM's Comments

The draft has been sent to MOF on 10/2/2017.

MOF's Comments

All these issues may be raised separately with MOF.

11. New Paragraphs 16B(2) & 16B(3), Schedule 3 – Industrial Building Allowance (w.e.f. YA 2016)

Proposed:-

Paragraph 16B(2) *- Where part of the building used by that person referred to in paragraphs 37A, 37B, 37C, 37E, 37F, 37G, 37H, 42A, 42B and 42C for the purpose of letting of property is not more than one-tenth of the floor area of the whole building, the whole building qualifies as industrial building under those paragraphs.*

Paragraph 16B(3) *- Where part of the building used by that person referred to in subparagraph (2) is more than one-tenth of the floor area of the whole building, such part of the building shall not be treated as industrial building for the purpose of those paragraphs and any allowance to be made to that person under those paragraphs shall consist of so much of what would have been the amount of allowance claimed on the expenditure incurred on the floor area on the part of the building which is not used by that person for the purpose of letting of property.*

Comments:

11.1 In circumstances where there are fluctuations in the floor area rented out (e.g. between up to 10% of the floor area and >10% of the floor area) within a year of assessment (YA) or from one YA to another YA, we would request for illustrations to be provided on the calculation of industrial building allowance (IBA) and residual expenditure.

Additional comments from CTIM / MIA / MICPA / MAICSA :

Kindly provide a response to item 11.1 above.

IRBM's Comment

In the year 2017, Sentinel Sdn Bhd (SSB) purchased an 11 storey building in Cyberjaya to be converted into a 5 star hotel which cost RM11,000,000. The hotel will be managed by SSB. The hotel building qualifies as an industrial building under paragraph 37F, Schedule 3 of the Income Tax Act 1967.

The Ground Level of the building is rented out to Skids Enterprise who operates a restaurant and a convenience store. As it has been determined that the portion of the rented area is not more than 10% of the whole building, the cost of the whole building qualifies for the purpose of Industrial Building Allowance (IBA).

In the year 2020, in addition to the Ground Level, SSB also rented out Level 2 of the building to Sideswipe & Co to run a gymnasium and a spa. As the rented area is now more than 10% of the whole building, the total area of the Ground Level and Level 2 do not qualify to be taken

into account as cost for IBA. The cost of building qualifies for the purpose of IBA is restricted to 80% of the total cost. (assume the rented out area is 20%)

Then, in the year 2024, the area rented out becomes 15%. Therefore, the cost of building which qualifies for the purpose of IBA becomes 85% of the total cost.

The calculations of IBA for SSB are as follows –

YA		IBA ('000)	RM ('000)
2017	Qualifying Building Expenditure (QBE) (Cost)		11,000
	Initial Allowance (10%)	1,100	
	Annual Allowance (AA) (3%)	330	1,430
	Residual Expenditure (RE)		9,570
2018	AA (3%)	330	330
	RE		9,240
2019	AA (3%)	330	330
	RE		8,910 [A]
2020	QBE = 8,800,000 (80% X RM11,000,000)		
	RE = 8,910,000 [A] - 1,782,000 [B]		7,128
	AA (3%)	264	264
	RE		6,864
2021	AA (3%)	264	264
	RE		6,600
2022	AA (3%)	264	264
	RE		6,336
2023	AA (3%)	264	264
	RE		6,072 [C]
2024	QBE = 9,350,000 (85% x RM11,000,000)		
	RE = 6,072,000[C] +1,518,000[D] - 1,138,500[E]		6,451.5
	AA (3%)	280.5	280.5
	RE		6,171
2025	AA (3%)	280.5	280.5
	RE		5,890.5

Notes : Computation of the RE with respect to the area rented out

When the rented area is 20%

YA		IBA ('000)	RM ('000)
2017	QBE		2,200
	Initial Allowance (10%)	220	
	Annual Allowance (3%)	66	286
	RE		1,914
2018	AA (3%)	66	66
	RE		1,848
2019	AA	66	66
	RE		1,782[B]
2020	Notional Allowance (NA)	66	66
	RE		1,716
2021	NA	66	66
	RE		1,650
2022	NA	66	66
	RE		1,584
2023	NA	66	66
	RE		1,518[D]

Rented area is 15%.

YA		IBA ('000)	RM ('000)
2017	QBE		1650.0
	Initial Allowance (10%)	165	
	Annual Allowance (3%)	49.5	214.5
	RE		1435.5
2018	AA (3%)	49.5	9.5
	RE		1386.0
2019	AA	49.5	9.5
	RE		1336.5
2020	NA	49.5	49.5

	RE		1,287.0
2021	NA	49.5	49.5
	RE		1,237.5
2022	NA	49.5	49.5
	RE		1,188.0
2023	NA	49.5	49.5
	RE		1,138.5[E]

11.2 As stated in the Minutes of the Dialogue on the Joint Memorandum on Issues Arising from 2016 Budget and Finance Bill 2015, Paragraph 16B, Schedule 3 shall only apply to expenditure incurred on new buildings acquired from the year of assessment (YA) 2016 onwards. In this respect, we seek your clarification on the following examples:-

a. ABC Sdn Bhd (financial year ended 30 June 2016) acquired and rented out a hotel building in YA 2010 onwards and incurred refurbishment / renovation costs in YA 2016 and subsequent YAs on that building. Would Paragraph 16B apply to the said refurbishment / renovation costs?

IRBM's Comment

Since the expenditure incurred in YA 2016 and it is used for the purpose of letting property, that part does not qualify for the Industrial Buildings Allowances (IBA).

b. ABC Sdn Bhd (financial year ended 30 June 2016) acquired and rented out a hotel building in YA 2010 onwards. ABC incurred renovation costs in YAs 2015 and 2016 to extend / refurbish / renovate the hotel building. No IBA was claimed on the renovation costs incurred in YA 2015 as the construction work was still in progress. When the renovation is fully completed in YA 2016 and the extended hotel is fully operational in the same year, would Paragraph 16B apply to the extended building cost incurred in YA 2015 and YA 2016?

IRBM's Comment

Under paragraph 55(a) of Schedule 3, ITA the day on which the expenditure is incurred is the day the construction of the building is completed. Therefore, in reference to the example above, as the renovation is completed in YA 2016, therefore the cost is incurred in YA 2016.

However ABC Sdn Bhd does not qualify for the Industrial Buildings Allowances (IBA) for that part as it does not operate the hotel business.

c. If Paragraph 16B is applicable in items a. & b. above, we would like to seek clarification on how the industrial building allowance and residual expenditure should be calculated

where up to 10% of the floor area is rented out or where >10% of the floor area is rented out. We would also request for illustrations to be provided on the calculation.

IRBM's Comments

Please consider the following examples of calculation of IBA when part of the building is let out (paragraph 16B is applicable) –

Example 1:

In the year 2017, ABC Sdn Bhd purchased a 11 storey building in Cyberjaya to be converted into a 5 star hotel. The hotel will be managed by ABC Sdn Bhd. The hotel building qualifies as an industrial building under paragraph 37F, Schedule 3 of the Income Tax Act 1967. ABC Sdn Bhd proceeds to rent out the Ground Level of the building to XYZ Co. to run a restaurant and a convenience store.

As it has been determined that the portion of the rented area is not more than **10%** of the whole building, the cost of the whole building qualifies for the purpose of Industrial Building Allowance (IBA).

Example 2:

Take the same facts as in Example 1 and in addition to renting out the Ground Level, ABC Sdn Bhd has also rented out Level 2 of the building to OPQ Ent. to run a gymnasium and a spa.

As the rented area is now more than **10%** of the whole building floor are, only the cost on the part of the building which is not rented out qualifies for the purpose of IBA.
Assuming the cost of the whole building is RM11,000,000 and the cost on the part of the building which is not rented out is RM9,000,000, the calculation of IBA is shown below-

Year of Assessment		IBA ('000)	RM ('000)
2017	Qualifying Expenditure		9,000
	Initial Allowance (10%)	900	
	Annual Allowance (3%)	270	1,170

	Residual Expenditure		7,830
2018	Annual Allowance (3%)		270
	Residual Expenditure		7,560

12. Paragraph 12B, Schedule 6 – Expenses in Relation to Exempt Dividend (w.e.f. YA 2017)

Proposed:-

Any dividend paid, credited or distributed to any person where the company paying such dividend is not entitled to deduct tax under this Act and any ~~expenses incurred~~ ***deductions*** *in relation to such dividend shall be disregarded for the purpose of ascertaining the ~~adjusted income~~* ***chargeable income*** *of the person.*

Comments:

12.1 We request for clarification on the objective and rationale for this proposed amendment.

IRBM's Comments

Before the amendment was made, only expenses in arriving at the adjusted income will be taken into account. However when dividend income is treated as a business source and charged under paragraph 4(a) ITA, deductions in related to the source (dividend) should also include capital allowances and donations which can be deducted after the adjusted income / in determining the chargeable income. The amendment was therefore necessary to provide that any deductions relating to the dividend income that is exempted shall be disregarded in determining taxable income of a taxpayer.

12.2 Please indicate the type of deductions which are envisaged to be covered. Does it include current year losses and group relief? Please confirm that it does not include capital allowances (CA) as CA are not deductions.

IRBM's Comments

If current year losses and group relief are not related to the earning of exempt dividend income, then it will not be disregarded. The deduction under the paragraph includes capital allowances.

13. Paragraph 13(1)(b), Schedule 6 – Exempt Income of Religious Institutions / Organisations (w.e.f. YA 2017)

Proposed:-

The income, other than dividend income, of —

(b) ~~*a religious institution or organisation which is not operated or conducted primarily for profit and which is established in Malaysia exclusively for the purposes of religious worship or the advancement of religion.*~~ ***a religious institution or organization in respect of any contribution received for charitable purposes in the basis year for a year of assessment provided such institution or organization is not operated or conducted primarily for profit and is established in Malaysia exclusively for the purpose of religious worship or the advancement of religion.***

Comments:

13.1 We note that the existing provision exempts all income earned / received by religious institutions. We are puzzled as to the proposed amendment which now states that exemptions are limited to contributions received. We are of the view that contributions are not taxable in the first place as contributions do not have the characteristics of income and therefore seek to understand and appreciate the rationale for the change that is being proposed under the Act.

We believe full exemption should be maintained on religious institutions. This change will now create more burden for religious institutions in terms of meeting their tax obligations, preparing documents and filing tax returns. This change will also require all religious institutions (mosques, temples, churches etc, even very small ones) to file tax returns so long as they have some interest income, which can give rise to unproductive practical implications.

IRBM's Comments

Please refer to the Media Release by the Minister Of Finance II dated 10//1/2017. The gist of the Media Release is, the Minister has agreed to issue an exemption order under section 127 of Income Tax Act 1967 to exempt all income of religious institutions that are registered under The Registry of Societies Malaysia or under any written law that governs these institutions. The prerequisite to register and qualify for the exemption would be in line with the government's intention that religious institutions are well managed and not abused by irresponsible parties.

MOF's Comments

The relevant exemption order has been gazetted on 15/2/2017 [*P.U.(A) 52/2017*].

14. New Paragraph 33B(2), Schedule 6 – Amendments to Exemption of Interest Income from Sukuk (w.e.f. YA 2017)

Proposed:-

33B(1) *- Interest paid or credited to any person in respect of sukuk originating from Malaysia, other than convertible loan stock –*

(a) issued in any currency other than Ringgit; and

(b) approved or authorized by, or lodged with, the Securities Commission, or approved by the Labuan Financial Services Authority.

33B(2) - The exemption under subparagraph (1) shall not apply to —

(a) ***interest paid or credited to a company in the same group;***

(b) ***interest paid or credited to —***

(i) a bank licensed under the Financial Services Act 2013;

(ii) an Islamic bank licensed under the Islamic Financial Services Act 2013; or

(iii) a development financial institution prescribed under the Development Financial Institutions Act 2002.

Comments:

14.1 What is the definition of "same group" in the proposed Paragraph 33B(2)(a)? Does it include associate companies?

IRBM's Comments

Yes. Refer new Companies Act 2016 [Act 777].

15. Paragraph 35A, Schedule 6 – Amendment to Exemption on Interest Income of a Unit Trust (w.e.f. YA 2017)

Proposed:-

~~*Income of a unit trust in respect of interest derived from Malaysia and paid or credited by any bank or financial institution licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983, or any development financial institution regulated under the Development Financial Institutions Act 2002.*~~

Income of a unit trust in respect of interest derived from Malaysia and paid or credited by —

(a) a bank licensed under the Financial Services Act 2013;

(b) an Islamic bank licensed under the Islamic Financial Services Act 2013; or

(c) a development financial institution prescribed under the Development Financial Institutions Act 2002:

Provided that in the case of a unit trust which is a money market fund, the exemption shall only apply to a wholesale fund which complies with the relevant guidelines of the Securities Commission Malaysia.

Explanatory note in Finance Bill 2016:-

Subclause 29(h) seeks to amend paragraph 35A of Schedule 6 to Act 53 to provide that the interest income received by a company from a bank licensed under the Financial Services Act 2013, an Islamic bank licensed under the Islamic Financial Services Act 2013 or any development financial institution prescribed under the Development Financial Institutions Act 2002 under that paragraph is not exempt from tax if the receipt of the interest income is through a wholesale money market fund as determined by the Securities Commission of Malaysia.

Comments:

15.1 The proposed amendment and the explanatory note in the Finance Bill appear to differ and so seems to contradict each other. Please clarify the position.

IRBM's Comments

The position as clearly stated in the amended paragraph 35A, Schedule 6 is, the income of a unit trust in respect of interest derived from Malaysia and paid or credited by a bank licensed under the Financial Services Act 2013, an Islamic bank licensed under the Islamic Financial Services Act 2013 or any development financial institution prescribed under the Development Financial Institutions Act 2002 under that paragraph is ~~not~~ exempt from tax if the receipt of the interest income is through a wholesale money market fund as determined by the Securities Commission of Malaysia.

MOF Comments

Securities Commission already issued a Guidelines on Tax Exemption for Wholesale Money Market Funds on 23 December 2016.

16. S.41A(1) (Petroleum (Income Tax) Act 1967) – Appeal for Non-Liable (NL) Cases (w.e.f. 1 January 2017)

Proposed:-

~~*Where in ascertaining the chargeable income of a chargeable person, it appears to the Director General that no assessment shall be made in respect of that person for any year of assessment by reason of no adjusted income, statutory income, assessable income or chargeable income, he shall notify that person in writing that no assessment shall be made for that year of assessment and the computation with regard to it.*~~

Where in ascertaining the chargeable income of a chargeable person, it appears to the Director General that—

(a) no assessment shall be made in respect of the chargeable person for any year of

assessment by reason of—

(i) absence of adjusted income, statutory income, assessable income or chargeable income of a chargeable person from any of his sources of income; or

(ii) exemption granted to that person under this Act,

the Director General may notify the chargeable person in writing that no assessment shall be made for that year of assessment and provide a computation with regard to it; or

(b) assessment has been made in respect of the chargeable person, but the chargeable person has no statutory income from a source consisting of a business, the Director General may notify the chargeable person in writing of an adjustment, if any, made in respect of that source consisting of a business and provide a computation with regard to it.

Comments:

16.1 The references to *"source consisting of a business"* should be replaced as the word "business" is not defined in the PITA and it only makes reference to "petroleum operations".

IRBM Comments

Amendments have been made to the Finance Bill, please see Finance Act 2017 (Act 785).

17. Paragraph 12(2), Schedule 2 (RPGTA) – Gifts / Hibah (w.e.f. 1 January 2017)

Proposed:-

12(1) Subject to subparagraph (2), where a donor disposes an asset by way of a gift to a recipient, the disposal shall be deemed to be a disposal at the market value of the asset.

(2) Where the donor and recipient referred to in subparagraph (1) are husband and wife, parent and child, or grandparent and grandchild—

(a) the donor shall be deemed to have received no gain and suffered no loss on the disposal ***if the donor is a citizen; and***

~~*(b) in the case of a donor who is not a citizen or permanent resident, the recipient shall be deemed to acquire the asset at an acquisition price equal to the acquisition price paid by the donor plus the permitted expenses incurred by the donor; and*~~

(c) ~~in the case of a donor who is a citizen or permanent resident and~~ ***where*** *the gift is made within five years after the date of acquisition by the donor, the recipient shall be deemed to acquire the asset at an acquisition price equal to the acquisition price paid by the donor plus the permitted expenses incurred by the donor.*

Comments:

17.1 Pursuant to the proposed amendment to Paragraph 12(2)(c) of Schedule 2 to the RPGT Act, the recipient of a gift from a donor who is not a citizen may be deemed to acquire the asset at an acquisition price paid by the donor plus the permitted expenses incurred by the donor even though the donor is deemed to have made a disposal at the market value of the asset. This treatment is clearly unintended. It is suggested that Paragraph 12(2)(c) be amended by substituting for the words *"in the case of a donor who is a citizen or a permanent resident and"* the words *"where the donor is a citizen and"*.

17.2 There seems to be disconnect between Paragraph 12(2)(a) and Paragraph 12(2)(c), which may result in double taxation.

Say, Mr A, a non-citizen, gifted a property to his grandson within 5 years of acquisition. For Mr A, the gift would be treated as a disposal at market value (Paragraph 12(1)) and not as a no-gain-no-loss transaction (Paragraph 12(2)). It is ambiguous as to what would be the grandson's acquisition price. One may argue that Paragraph 12(2)(c) applies (i.e. grandson's Acquisition Price = Mr A's Acquisition Price + Permitted Expenses) as the donor's citizenship status is relevant as it is stated in Paragraph 12(2)(a) but not in the opening words of Paragraph 12(2). This may effectively result in double taxation of the same capital appreciation.
Thus, we propose that it be expressly stated in the law that Paragraph 12(2)(c) will only apply when Paragraph 12(2)(a) applies to the donor. We also propose that the law expressly state that the recipient's acquisition price for a transaction under Paragraph 12(2) is the market value where the gift is made more than five years after the date of acquisition by the donor.

IRBM's Comment

The amendments to subparagraph 12(2), Schedule 2 of the RPGTA has taken out a donor who is not a citizen or a permanent resident from that subparagraph. Therefore the treatment for gifts where the donor and recipient are husband and wife, parent and child, or grandparent and grandchild under the amended subparagraph 12(2) shall only apply to the donor who is a citizen. In other cases, where a donor disposes an asset by way of a gift to a recipient, the disposal shall be deemed to be a disposal at the market value of the asset. Please take note

that the word "and" and the end of subsubparagraph 12(2)(a) joins that provision with subsubparagraph 12(2)(c).

IRBM retains its stand on this amendment and will not be making any further amendments to subparagraph 12(2), Schedule 2 of the RPGTA.

18. S.2 (Labuan Business Activity Tax Act 1990) – Labuan Non-Trading Activity (w.e.f. operation of the Finance Act)

Proposed:-

"Labuan non-trading activity" means an activity relating to the holding of investments in securities, stock, shares, loans, deposits or any other properties ***situated in Labuan*** *by a Labuan entity on its own behalf;*

Comments:

18.1 We seek clarification / confirmation on the following:-

a. What is the meaning / definition of *"holding of investments in any other properties situated in Labuan"*?

b. The Labuan entity's return is filed on a preceding year basis under the Labuan Business Activity Tax Act 1990. When the definition of Labuan Non-Trading Activity becomes effective when the Finance Act comes into operation, does it refer to the preceding year basis of the return that will be filed in the current year or does the new definition only apply to the activity from the period when the Finance Act comes into operation?

c. Kindly confirm that *"properties"* in this context excludes intellectual property.

IRBM's Comments

The words "Holding of investments in any other properties situated in Labuan" mean any immovable property, held as an investment by a Labuan entity, must be situated or located in Labuan.

Thus, only real estate investment activities in Labuan are considered as having carried on a Labuan non trading activity and are not taxed under Labuan Business Activity Tax Act 1990.

Conversely, if the rental income from investment received by Labuan entities located outside Labuan, it will be taxed under Labuan Business Activity Tax Act 1990 either 3% of the chargeable income or RM20,000 because it does not fall under the scope of the definition of non-Labuan trading activity.

When the definition of Labuan Non-Trading Activity becomes effective it will apply to rental income derived after the enforcement of the Finance Act.

"properties" in this context excludes movable property, namely intellectual property. The tax treatment of intellectual property still falls under the interpretation of a Labuan non-trading activity.

19. Reduction of Corporate Income Tax Based on Increase in Chargeable Income (YA 2017 & YA 2018)

Comments:

19.1 With regard to the above Budget proposal, kindly confirm / clarify the following:-

a. Please confirm that it only applies to the incremental chargeable income from a business source ("Incremental Chargeable Business Income") and does not apply to passive income e.g. interest income under S.4(c), rental income under S.4(d), etc.

b. Please confirm that it applies to the "Incremental Chargeable Business Income" of a company (paid up ordinary share capital of not more than RM2.5 million) or LLP (total contribution of capital of not more than RM2.5 million) in respect of the portion of chargeable income exceeding RM500,000.

c. If the company has more than one business source, how will the exempted chargeable income based on "Incremental Chargeable Business Income" be calculated?

d. Would the company be eligible for the incremental reduction in tax rates in the following scenarios?

- Where the basis period for the immediately preceding year of assessment (YA) is less than 12 months due to a change in the accounting year end.
- Where the company has undergone a tax audit or revised its tax return resulting in an increase in chargeable income compared to the immediately preceding YA.
- Where the company enjoys tax incentive (e.g. reinvestment allowance, 70% tax exemption under pioneer status, etc) and the tax incentive ends in the immediately preceding YA leading to higher chargeable income / statutory business income in the current YA.

IRBM's Comments

Please refer to the Income Tax (Exemption) (No.2) Order 2017 [P.U.(A) 117/2017] gazetted on 10.4.2017.

19.2 Based on verbal clarifications given by the MOF and IRB at the 2016 National Tax Seminar and CTIM 2017 Budget Seminar, the above Budget proposal will not apply to companies which were in a tax loss position in the immediately preceding YA.

The intention of this particular proposal is to incentivise companies to grow, enhance their revenue and therefore ultimately their taxable income. Whether or not the company made losses or had no chargeable income or had chargeable income in the preceding year is irrelevant. The whole idea of giving this incremental reduction in tax rates is to enhance, encourage and to incentivise. Restricting it to only profitable companies to take advantage of this provision seems to be discriminating against companies which have not been doing well in the previous year. It should also be noted that tax losses brought forward from the preceding year would have reduced the chargeable income in the current year, that could have been subjected to the incremental reduction in tax rates. Therefore we hope that MOF and IRB will reconsider and perhaps apply this provision to a wider spectrum of companies.

IRBM's Comments

Please refer to the Income Tax (Exemption) (No.2) Order 2017 [P.U.(A) 117/2017] gazetted on 10.4.2017.

19.3 It is noted that a gazette order on the above Budget proposal will be issued. It is hoped that the formula to calculate the exempted chargeable income based on "Incremental Chargeable Business Income" will be simplified to facilitate implementation. Please advise when the order will be gazetted.

IRBM's Comments

Please refer to the Income Tax (Exemption) (No.2) Order 2017 [P.U.(A) 117/2017] gazetted on 10.4.2017.

19.4 A simplified formula for exempt income (EI) is given below for consideration:

$$EI = \text{Incremental Chargeable Business Income} \times \frac{\text{Reduction in Tax Rate}}{\text{Normal Tax Rate}}$$

IRBM's Comments

Please refer to the Income Tax (Exemption) (No.2) Order 2017 [P.U.(A) 117/2017] gazetted on 10.4.2017.

19.5 A company applied the incremental reduction in tax rate in its YA 2017 tax return. Subsequently, a tax audit was carried out for YAs up to YA 2016 and tax adjustments made resulted in an increase of chargeable income for YA 2016. As a consequence, the increment of chargeable income for YA 2017 compared to YA 2016 is reduced and a lower incremental reduction in tax rate should now be used for YA 2017. The company as a responsible taxpayer wants to volunteer to revise its YA 2017 tax return. In this respect, we seek clarification on the following –

- Would the company be penalised for YA 2017?

- In the process of making that particular amendment for YA 2017, would the relevant changes relating to the error and mistake provisions of the Income Tax Act 1967 apply to this?

IRBM's Comments

Please refer to the Income Tax (Exemption) (No.2) Order 2017 [P.U.(A) 117/2017] gazetted on 10.4.2017.

20. Establishment of the Collection Intelligence Arrangement (CIA) under Ministry of Finance

Comments:

20.1 This initiative to have the CIA is noteworthy and perhaps will help to enhance tax compliance in the country but however we take note that S.138 of the Income Tax Act 1967 refers to classified information and therefore there is prohibition in terms of how information available to the IRB can be accessible to other agencies or other persons. We seek to inquire whether an amendment to this Section would be made in due course so as to allow the sharing of information. Notwithstanding that, we wish to express concern in the sense that S.138 has been there for all these years for specific purposes and as such, the confidentiality of information should be maintained.

20.2 In addition, in order to protect the confidentiality of information in the context of greater sharing of information internationally and locally, we would like to ask as to what safeguards will be in place to ensure that tax information related to taxpayers will be safeguarded in an effective manner.

20.2 Kindly clarify the following:-

a. Is there a mechanism in place? How is information going to be shared? Are there any specific systems in place?

IRBM's Comments

No amendments will made to section 138 of the Income Tax Act 1967 as the current provision is sufficient to allow sharing of information. Please see subsection 138(2) of the Income Tax Act 1967.

b. Will this mechanism give rise to joint audits or specific audits by the Inland Revenue Board (IRB), Royal Malaysian Customs Department (RMCD) and Companies Commission of Malaysia (CCM)? Information gathered by one of the three agencies should not necessarily mean that all three agencies need to undertake an audit as the information should be analysed beforehand to see if it is really a problem. -

IRBM's Comments

The information will only be shared between the agencies and it is the responsibility of each agency to protect and preserve the integrity and confidentiality of the information received to make sure that it will not leak to third party.

c. What is the status of the MyCOID system?

IRBM's Comments

MyCOID is under the jurisdiction of CCM. The IRBM only receive the information from CCM and will generate the tax number of a company.

B. Outstanding gazette orders – 2003 to 2016 Budgets

The Institutes note with concern that several gazette orders pertaining to proposals announced in the 2003 to 2016 Budgets are still outstanding to date. We would request for your urgent attention and update on the status of the relevant gazette orders.

1. 2003 Economic Stimulus Package

- Hypermarkets and direct selling companies that export locally produced goods will be given income tax exemption on statutory income equivalent to 20% of their increased export value.

MOF's Comments

This will most probably not be revived and MOF will come up with a written confirmation that this is no longer relevant.

2. 2014 Budget

- Incentives in relation to the Green Lane Policy Programme be extended to applications received by the MOF on or before 31 December 2017.

MOF's Comments

- Gazetted on 23/3/2016 (P.U.(A) 68 / 2016)
- Income Tax (Deduction for Expenditure to Obtain The 1-InnoCERT Certification) Rules gazetted on 14/6/2016 (P.U.(A) 168 / 2016)

- ITA for purchase of green technology equipment and tax exemption on the use of green technology system and services be granted.

IRBM's Comment

Draft subsidiary legislation is currently with MOF

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

- Applications for research and development projects of bio economy which are viewed as viable and received from 1 January 2014 to 31 December 2018 by the Malaysian Biotechnology Corporation Sdn. Bhd. be granted tax deductions on acquisition of technology platform, exemption on import duty on R&D equipment, as well as special incentive to companies in respect of Centre of Excellence for R&D.

IRBM's Comments

Only the Income Tax (Deduction for Invesment in a BioNexus Company) Rules 2016 has been gazetted on 7/12/2016 - P.U.(A) 306 / 2016.

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

3. 2015 Budget

- Automation capital allowance of 200% for increased automation be given to manufacturers in high labour intensive industries (such as rubber products, plastics , wood, furniture and textiles) on the first RM4 million qualifying expenditure incurred from YA 2015 to 2017 and manufacturers in other industries on the first RM2 million qualifying expenditure incurred from the year of assessment (YA) 2015 to YA 2020.

  Many cases MIDA has given approval based on the old gazette order which has already expired. The eligibility of claiming is misleading as the new order has not been gazetted and taxpayers have been claiming based on the old gazette order.

IRBM's Comments

Draft subsidiary legislation is currently with MOF.

With regard to the MIDA issue, IRBM wishes to clarify that in the approval letter, MIDA did not refer to the old gazette order but MIDA actually referred to Income Tax (Exemption) (No.12) Order 2006 [P.U (A) 113]. IRBM has advised MIDA to amend the approval letters which have been issued and send out new letters that only state paragraph 127(3)(b) of the Income Tax Act. Therefore companies can only claim after the the order has been gazetted.

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations.

- Extension of application period for tax incentives in relation to medical tourism until 31 December 2017.

IRBM's Comment

Draft subsidiary legislation is currently with the AG Chambers.

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

- Double deduction on expenses incurred by companies for scholarships awarded to students pursuing diploma or bachelor's degree at higher education institutions be extended to include scholarships provided to students pursuing studies in the vocational and technical fields for the YA 2014 and YA 2015.

IRBM's Comments

Draft subsidiary legislation is currently with MOF

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

- Double deduction on expenses incurred by companies participating in structured internship programmes to recruit students pursuing full-time degree programmes in higher education institutions be extended to include full-time students pursuing courses at the vocational and diploma levels for YA 2014 and YA 2015.

IRBM's Comments

Draft subsidiary legislation is currently with MOF

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

- Double deduction for expenses incurred by companies on approved training programmes participated/attended by employees be extended to include obtaining industry certifications and professional qualifications from YA 2015.

IRBM's Comments

Draft subsidiary legislation is currently with MOF

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

4. 2016 Budget

- Deduction be extended to the expenses incurred on the issuance of *sukuk* that complies with the requirement of Sustainable and Responsible Investment (SRI) approved or authorized by, or lodge with the Securities Commission of Malaysia.

IRBM's Comments

Draft subsidiary legislation is currently with MOF

MOF's Comments

MOF is targeting to gazette the subsidiary legislations in 1st quarter of 2017.

- Double deduction on additional issuance cost of retail bonds and additional issuance costs of *sukuk* under the *Mudharabah* (principle of profit sharing), *Musyarakah* (profit and loss sharing), *Istisna* (purchase order), *Murabahah* (cost plus sale) and *Bai'Bithaman Ajil* (deferred payment sale) based on *Tawarruq* (Tripartite sales) and further deduction on additional issuance costs of *sukuk* under the principle of *Wakalah* (agency) and *Ijarah* (leasing) for YA 2016 to YA 2018

IRBM's Comment

Draft subsidiary legislation is currently with the AG Chambers.

MOF's Comments

Gazetted on 22 December 2016 : P.U.(A) 347/2016

- Income tax exemption of 100% on statutory income derived from business of operating tours be extended to YA 2018.

IRBM's Comments

Income Tax (Exemption) (No.11) Order 2016 (P.U.(A) 345/2016) and Income Tax (Exemption) (No.12) Order 2016 (P.U.(A) 346/2016) has been gazetted on 22/12/2016

MOF's Comments

These orders are currently being amended for a minor mistake.

- Extension of application period for tax incentive for food production projects until 31 December 2020 and qualifying approved food production projects be extended to include planting of coconuts, mushrooms and cash crops; rearing of deer; cultivation of seaweed; rearing of honey and planting of animal feed crops.

IRBM's Comments

Pending policy letter from MOF.

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

- Tax incentives for increase of exports incentive to Small and Medium Enterprises for YA 2016 to YA 2018:

  - Exemption of statutory income equivalent to 10% of the value of increased exports for manufacturers where goods exported attain at least 20% value added.
  - Exemption of statutory income equivalent to 15% of the value of increased exports for manufacturers where goods exported attain at least 40% value added.

IRBM's Comments

Draft subsidiary legislation is currently with the AG Chambers.

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations

- Income tax exemption of 100% on statutory income derived from qualifying activities for a period of 5 years or Investment Tax Allowance of 60% on qualifying capital expenditure for a period of 5 years to be offset against 100% of the statutory income for newly established Independent Conformity Assessment Bodies (ICAB), or

  Investment Tax Allowance of 60% on qualifying capital expenditure for a period of 5 years on additional qualifying activities to be offset against 100% of the statutory income.

IRBM's Comments

Draft subsidiary legislation is currently with MOF

MOF's Comments

MOF will take 6 months to finalise the subsidiary legislations