JOINT MEMORANDUM ON ISSUES ARISING FROM 2019 BUDGET SPEECH & FINANCE BILL 2018

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A. 2019 Budget Speech, Finance Bill 2018 & Income Tax (Amendment) Bill 2018

1. Proposed Amendments to the Income Tax Act 1967

1.1 Amendment to S.4A(ii) – Special classes of income on which tax is chargeable [w.e.f. the coming into operation of the Finance Act]

"Notwithstanding section 4 and subject to this Act, the income of a person not resident in Malaysia for the basis year for a year of assessment in respect of—

*amounts paid in consideration of ~~technical~~ **any** advice **given**, **or** assistance or services rendered in connection with ~~technical management or administration of~~ any scientific, industrial or commercial undertaking, venture, project or scheme,*

which is derived from Malaysia is chargeable to tax under this Act."

Comments:

i. We understand from the Inland Revenue Board ("IRB"), at the CTIM 2019 Budget Seminar on 21 November 2018, that the provisions of S.15A and S.109B of the Income Tax Act ("ITA") 1967 will also be similarly amended. In view of the above amendment, please confirm that the wording in paragraph 2(1)(b) of the Income Tax (Exemption)(No.9) Order 2017 will be amended accordingly.

IRBM's Comments:

The objectives of the amendment are to ensure the clarity and certainty on the interpretation of section 4A of the ITA to taxpayers. The amendment is considered timely based on the latest development by the UN on the introduction of the new Article 12A recently and also as a response by IRBM to OECD on our commitment in respect of BEPs Action Plans.

With the amendment, any services rendered by non-resident is subject to withholding tax. This amendment further strengthen IRBM's interpretation that section 4A has always been applicable to both technical and non-technical services. Nonetheless, the withholding tax imposed is subject to the Exemption Order 323/2017 which is still applicable. This order need not be amended because it refers to the provisions of paragraph 4A (ii).

ii. We note that the amended S.4A(ii) would cover a wider scope of services as compared to the technical fee articles in Malaysian Double Taxation Agreements ("DTAs") which generally cover fees for services of a "managerial, technical and consultancy nature".

Malaysia's right to tax fees or services rendered by a non-resident where the fees represent business income of the non-resident, is granted under the business profits article of DTAs. Under the business profits article, the right to tax is subject to the non-resident having a permanent establishment ("PE") in Malaysia. Where the services rendered by the non-resident are covered by other specific articles, e.g. technical fee article, such article will override the business profits article. For the technical fee article to apply, the fees must fall within the scope of the technical fee article which is "managerial, technical and consultancy". The taxing right for fees which are outside the scope of the technical fee article would fall back on the business profits article. Please state if the IRB agrees with our view above.

IRBM's Comments:

In the context of a DTA, it should be emphasized that section 4A of the ITA is a not a business source of income (refer section 24(8) of the ITA). Thus, section 4A should be applicable though non-resident did not carry on business through a permanent establishment in Malaysia. As such, the IRBM is unable to agree with CTIM's contention that in the absence of Article 13 /Article on Technical Fees, the business profit Article should be relied on to determine whether the income of a non-resident from services rendered by non-resident is taxable in Malaysia. Thus, in the absence of any Article on Technical Fees, the Article on Other Income may be invoked by the IRBM.

As regards the DTAs which have been concluded in which Article 13 on Technical Fees had been agreed by other countries (i.e DTA Malaysia and Singapore concluded on 5.10.2004 and effective from 1.1.2007), the definition as agreed in the DTAs should override the new section 4A of the ITA. This interpretation should stand so long as the definition on technical fees as mentioned in the Article (there are also treaties in which services have been defined as "Royalty" (see DTA Denmark, Finland, Germany, New Zealand, Saudi Arabia and Spain) had been agreed by both countries prior to the amendment of section 4A.

iii. It is not clear how the second limb of the S.4A(ii), i.e. "in connection with any scientific, industrial or commercial undertaking, venture, project or scheme", will be applied in tandem with "amounts paid in consideration of any advice given, or assistance or services rendered". It would be appreciated if the IRB could provide several examples in the IRB's Public Ruling ("PR") No. 1/2014 on withholding tax on special classes of income to clarify on this.

IRBM's Comments:

Amendment of the PR was released on 5.12.2018 and has been through a process of review and feedback with CTIM (Joint Public Ruling Working Group). At the same time the amendment of this provision has been made under the Finance Act 2018 (Act 812) with effect from 27.12.2018. If the PR is still not clear, CTIM is requested to inform LHDNM in writing the area that requires further clarification.

iv. Paragraph 14.1 of the IRB's PR No. 1/2014 states:

"where withholding tax on payments made to non-resident persons are paid and borne by the payer, that payment is considered net of tax. In such situations, the payment that is received by the non-resident has to be re-grossed to determine the amount of income on which income tax should be charged. The withholding tax should be computed on the re-grossed income."

We understand the IRB takes the view that no deduction is allowed on the "withholding tax portion" of the re-grossed amount based on the Court's decision in the case of Esso Production Malaysia Inc v Ketua Pengarah Hasil Dalam Negeri.

<u>Our view</u>

There is no provision in the ITA 1967 and hence no legal basis for re-grossing the payments to determine the withholding tax amount.

Where the payer and the non resident person agree that the payer will bear the withholding tax, a tax deduction should be allowed for the gross amount (the aggregate of the net amount paid to the non-resident person and the withholding tax paid to the IRB) as a business cost pursuant to S.33(1) of the ITA 1967.

Where there is no agreement between the payer and non-resident person that the withholding tax is to be borne by the payer and the payer having remitted the tax to the IRB, is seeking to recover the withholding tax from the non-resident person, the withholding tax amount paid to the IRB would not be deductible to the payer.

IRBM's Comments:

Effective from the date of publication of the PR No. 11/2018, the payment made to the non-resident need not be regrossed to determine the amount of withholding tax.

vi. This amendment has brought all foreign services within the scope of withholding tax. This will result in: -

(a) increase in the operating cost for Malaysian companies; and

(b) Malaysia being less competitive as compared to many other countries that do not have such a broad definition of services which are subjected to withholding tax.

1.2 Amendment to S.12 – Derivation of business income [w.e.f. the coming into operation of the Finance Act]

New S.12(3) & S.12(4)

"(3) Notwithstanding subsections (1) and (2), the income of a person from a business that is attributable to a place of business in Malaysia shall be deemed to be the gross income of that person derived from Malaysia from the business.

(4) For the purpose of subsection (3), a place of business includes—

(a) a place of management

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a warehouse;

(g) a building site, or a construction, an installation or an assembly project;

(h) a farm or plantation; and

(i) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources,

and without prejudice to the generality of the foregoing, a person shall be deemed to have a place of business in Malaysia if that person—

(i) <u>carries on supervisory activities in connection with a building or work site, or a construction, an installation or an assembly project</u>; or

(ii) has another person acting on his behalf who—

(A) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification;

(B) <u>habitually maintains a stock of goods or merchandise in that place of business from which such person delivers goods or merchandise</u>; or

(C) regularly fills orders on his behalf."

Comments:

i. The insertion of new S.12(3) and S.12(4) which clarifies the meaning of "place of business" is generally similar to the definition of permanent establishment as can be found in the DTA signed with other countries.

We understand that the PE definition that currently exists in DTAs is now being incorporated into S.12(4). If that is the intention then we recommend that the full

definition of PE which includes both positive and negative lists should be incorporated into S.12. These lists are important if Malaysia wishes to use the PE concept in our domestic law which will add more clarity on the interpretation of S.12(4).

The basic rule in Article 5(1) of both the Organisation For Economic Co-Operation And Development (OECD) Model Tax Convention and the United Nations (UN) Model Double Taxation Convention state that a PE is a fixed place of business through which the business of an enterprise is carried on. This is then followed by what a place of business should include:

(a) a place of management

(b) a branch and so on…….

The commentary on Article 5 of the OECD Model indicates that the definition of a PE contains the following components:

- there must be a place of business;
- the place of business must be established at a distinct place for a minimum period of time, and
- the business must be carried on through that place.

The exceptions as provided in Article 5(4) and Article 5(6) (i.e. activities which are regarded to be preparatory and auxiliary in nature and the concept of independent agent) of the OECD/ UN Model Tax Convention are not included in the proposed amendments.

Clarification sought:

We wish to seek clarification why similar exceptions (i.e. activities which are regarded to be preparatory and auxiliary in nature and the concept of independent agent) are not included in the deeming provision of a place of business.

It is important that Article 5(4) which is the negative list be included in S.12(4) as such activities although are carried out in a fixed place of business are deemed not to constitute to have a place of business in Malaysia for tax purposes. The rationale for the exclusion of preparatory or auxiliary activities provided in the commentary on Article 5 of the OECD Model is that such activities are so remote from the actual realization of profits that it is difficult to allocate any profit to the fixed place of business.

If the enterprise is engaged only in the preparatory or auxiliary activities in Malaysia, then even if those activities are conducted through a fixed place of business situated in Malaysia, the said activities are considered to be insufficient to justify as a source of taxation in Malaysia.

ii. Inclusion of a warehouse as a place of business under S.12(4):

A warehouse is not considered as a place of business in Article 5(1) in either the OECD Model or the UN Model. Activities normally carried out in a warehouse are those listed in the negative lists that do not constitute a PE as explained above.

iii. Unlike most DTAs, there is no indication of time-frame under the deeming of place of business if a person *"(i) carries on supervisory activities in connection with a building or work site, or a construction, an installation or an assembly project"*.

a. Where a non-resident from a non-DTA country carries on activity as mentioned above for one month or one week in Malaysia, will the non-resident be deemed as having a place of business in Malaysia?

b. Where a person from a non-DTA country, such as the United States, who provides such service in Malaysia for say 3 days would be deemed to have a place of business in Malaysia and subject to tax, would the income of the US person be regarded as special classes of income subject to WHT under S.109B or business income subject to WHT under S.107A? If it is the latter, the US person would be required to comply with the submission of tax returns for his business income attributable to his 3 day work in Malaysia.

c. The above activities are normally termed as activity-type PE or construction PE. Under the UN Model the prescribed test the threshold for such activities to qualify as a PE is either 6 months or 9 months.

<u>Clarification sought:</u>

We would request the IRB to adopt 6 months as the prescribed test if a person shall be deemed to have a place of business in Malaysia if that person carries out such activities.

As S.107A applies when the service provider has "a place of business in Malaysia" (which is subject to DTA override), we suggest that consequential amendments to S.107A are made in order to make the relationship between S.107A and S.12 clearer.

IRBM's Comments:

IRBM takes note on the issues raised in paragraph 1.2 (i), (ii) and (iii) and will issue a Ruling/ Practice Note/ Guideline to explain the tax treatment in relation to the application of section 12, of the ITA.

iv. We noted that the S.12(4)(ii) is based on Article 5, Paragraph 5 of the UN Model Double Taxation Convention.

a. If the PE definition that currently exists in DTAs is only adopted partly in S.12(4), it can give rise to a lot of complications in due course. According to S.12(4), a person shall be deemed to have a place of business in Malaysia if that person has another person acting on his behalf who regularly fills orders on his behalf. For example, a fulfilment centre in Malaysia acting for a non-resident could potentially create a PE for the non-resident although the non-resident has no other form of presence in Malaysia. The UN Model Double Taxation Convention and the OECD Model Tax Convention provide good examples on how PE can actually be conceptualised within the domestic law itself. In its present form, S.12(4) will surely give rise to a lot of issues going forward.

IRBM's Comments:

There is no conflict between PE definition in the ITA with the PE definition in the DTAs. In a situation where DTA is involved, if the definition of PE provided in the DTA differs from the PE definition in the ITA, the DTA PE definition shall prevail.

b. We seek confirmation on whether a non-resident from a non-treaty country will be deemed to have a place of business in Malaysia, if that non-resident has an independent agent acting on his behalf who merely maintains a stock of goods or merchandise belonging to the non-resident in Malaysia for purposes of delivery.

IRBM's Comments:

Yes, there is a PE in this situation.

1.3 New S.39(1)(r) – Deductions not allowed [w.e.f. 1 January 2019]

"Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of—

a sum equal to ninety seven per cent of any expenditure incurred in relation to a payment made by a person, who is a resident, to any Labuan company."

Comments:

i. We understand from the IRB, at the CTIM 2019 Budget Seminar on 21 November 2018, that a full deduction of the payment could be considered under the ITA 1967 if the Labuan company carries out substantive activities. Kindly confirm that our understanding is correct and indicate when will the relevant changes be made to S.39(1)(r).

IRBM's Comments:

Any payment made to Labuan company by resident is not allowed as full deduction unless authorized by the Minister under the rules of the Income Tax (Deductions Not Allowed For Payment Made To Labuan Company By Resident) Rules 2018 [P.U. (A) 375/2018].

ii. As S.3B of the ITA 1967 is not amended, clarification is sought on whether this new S.39(1)(r) is also applicable for a company which has elected under S.3A of the Labuan Business Activity Tax Act ("LBATA") 1990 to be taxed under the ITA 1967?

Under the proposed changes to S.4 of the LBATA 1990, income from intellectual property rights (IPR) derived by a Labuan entity will be taxed under the ITA 1967. The implications of the proposed changes is that the full amount of the income from IPR is taxed at 24% in the hands of the Labuan entity recipient but only 3% of the same amount is allowed as a deduction to the Malaysian resident payer. As an illustration, where a Malaysian resident makes a royalty payment of, say, RM100 to a Labuan entity, only RM3 is allowed while RM97 is disallowed and subject to income tax at 24%. At the same time, the RM100 derived by the Labuan entity is assessed to 24% tax under the ITA. The royalty of RM100 will therefore be subject to a total tax of RM 47.28 (i.e. 97x24% + 100x24%) which effectively amounts to a double taxation on the royalty.

IRBM's Comments:

Subsection 39 (1) (r) shall not apply to company that chooses to be taxed under the ITA.

iii. S.39(1)(r) has the undesirable effect of discouraging Malaysian residents who presently carry on business (or intend to carry on business) with Labuan companies with heavy and punitive income tax (*). It also has the effect of making a domestic

company ("DC")/ Malaysian resident ("MR") transacting with a Labuan company ('LC") much worse off than those transacting with foreign companies.

(*) If a DC/ MR makes payments for loan interest repayment, re-insurance premium, insurance brokering charges, leasing charges to a LC, 97% of the payments made would not be allowed as a deduction against the gross income of the DC/ MR from that source.

Proposals:

a. We recognise that Malaysia needs to comply with the Forum On Harmful Tax Practices (FHTP) requirements under the BEPS Action Plan 5 and we are aware that some steps have been taken towards this by the authorities. Labuan has scope for growth and activities should be encouraged in Labuan as long it does not overstep the limits that the OECD and FHTP have put in place.

However, the proposed disallowance of 97% of the amount of payments made to Labuan does not seem to be driven by compliance with FHTP, but is instead a local matter. Any concerns of abuse can be dealt with by imposing substantive requirements for Labuan entities on a going forward basis as well as the general anti-avoidance provision. Therefore, the deductibility of payments made to Labuan entities should be allowed in full. As such we propose that the proposed S.39(1)(r) be withdrawn.

IRBM's Comments:

The amendments to paragraph 39(1)(r) has been made. Payment made to Labuan company is not allowed unless authorized by the Minister under *P.U.(A) 375/2018*.

Paragraph 39(1)(r) shall not apply to insurance and takaful business on the expenses that are deductible under section 60 and section 60AA as both provisions should be referred for insurance and takaful business.

b. The proposal has the effect of discouraging the use of Labuan, and therefore raises concerns on the future of Labuan. For instance, with the proposed amendments, Labuan may no longer be an attractive jurisdiction for issuance of bonds or sukuk to foreign investors to raise funds required by Malaysian resident companies (MC) as only 3% of the interest payments to the Labuan company which issues the bonds/ sukuk will be allowed as a deduction to the MC. On the other hand, interest payments by the MC to an issuer in Singapore or Hong Kong can be given full deduction so long as the applicable withholding tax is paid. Likewise, MNCs considering setting up a company to

hold the group's intellectual property rights may not consider Labuan as a suitable location as the income of a Labuan company from such rights will be liable to 24% tax under the ITA whereas other alternative jurisdictions may offer tax rates much lower than 24%.

IRBM's Comments:

The tax treatment shall refer to P.U. (A) 375/2018 where tax deduction allowed is 67% of the amount of the payment.

c. Prior approvals have been given previously by the relevant government agencies to allow certain transactions/ arrangements to be undertaken between Labuan entities and Malaysian entities. There should be grandfathering provisions in place to allow time for the entities to restructure these approved transactions/ arrangements.

An advance notice of at least a year should also be given before the proposed S.39(1)(r) is implemented because it has a drastic impact on all existing transactions, agreements, jobs and operations in respect of the affected Labuan entities.

IRBM's Comments:

This preferential tax rate offered to Labuan entities do not go through the process of application and approval. Therefore, grandfathering could not be granted under the FHTP requirements.

1.4 Amendment to S.43, S.44, Schedule 3, Schedule 7A & Schedule 7B of the ITA 1967, and provisions in the Promotion of Investments Act 1986 on unabsorbed pioneer losses & investment tax allowance [w.e.f. the year of assessment 2019]

According to the amendments to the provisions:

- Unabsorbed losses and unutilised capital allowance are only allowed to be carried forward for a maximum period of 7 consecutive years of assessment;
- Unutilised reinvestment allowance and unutilised investment allowance for service sector are only allowed to be carried forward for a maximum period of 7 consecutive years of assessment upon expiry of qualifying period;

- Unabsorbed pioneer losses after the end of the pioneer period are only allowed to be carried forward for a maximum period of 7 consecutive years of assessment; and
- Unabsorbed investment tax allowance ("ITA") after the end of the ITA period are only allowed to be carried forward for a maximum period of 7 consecutive years of assessment.

Comments:

i. The measures to restrict the carry forward of unabsorbed losses and unutilised allowances to 7 consecutive years of assessment (YA) need advance notice. Such changes would have been best handled if one year or two years advance notice on the changes was given to allow everyone to prepare and take the necessary steps.

IRBM's Comments:

There is no need for advance notice for loss restriction. The 7 years restriction is no longer applicable to capital allowance and investment tax allowance.

ii. The 7-year limitation should be applied prospectively to the unabsorbed losses and unutilised allowances which arise from YA 2019 onwards. It should not be applied retrospectively to unabsorbed losses and unutilised allowances which have accumulated prior to YA 2019. Such accumulated losses and allowances had arisen under the existing law and should accordingly be preserved and allowed to be carried forward indefinitely until it has been fully absorbed/ utilised under the existing law.

IRBM's Comments:

This is a policy decision. The special provisions introduced for the loss restrictions is sufficient.

iii. Please confirm that the 7-year limitation rule above does not apply to P.U. (A) 112/2006 and P.U. (A) 113/2006.

MOF's Comments:

It is confirmed that this 7 year- limitation does not apply to P.U. (A) 112/2006 and P.U. (A) 113/2006.

iv. Businesses with long gestation period (e.g. substantial investment is made but the payback takes a long period to crystallise) would be severely affected by the above amendments.

Projects which were undertaken by taxpayers with the understanding that the returns will be over a long term e.g. road concessions would also be affected. Expenses/ losses incurred in initial years will be used to cover taxable income over a long period of time beyond 7 years.

Hence there is a need for special considerations to address the above anomalies for the 7-year limitation imposed on carry forward of unabsorbed losses and unutilised allowances. It would be good if the Ministry of Finance ("MOF") could look into the matter and consider making an exception for such businesses.

IRBM's Comments:

This is a policy decision. IRBM is of the view that there is no need to include the exception proposal.

iv. The law should expressly empower the Minister to disregard the 7-year time limit where the circumstances require so.

IRBM's Comments:

This is a policy decision.

v. Under S.24(1A) of the ITA 1967, advance receipts are taxed in the year when it is received. This results in a misalignment between the tax treatment and accounting treatment on advance receipts. Consequently, the company may end up having losses when the expenditure is subsequently incurred in the following years. This issue is further aggravated by the 7-year limitation on the losses carry forward. As such, S.24(1)(b) and S.24(1A) of the ITA 1967 should be reviewed.

IRBM's Comments:

IRBM takes note on the issues raised by the institute. However, IRBM is of the view that amendments of S.24(1)(b) and S.24(1A) of the ITA were based from actual cases received and in line with other tax jurisdictions on taxing advance receipts. Therefore, the institute is advised to provide real cases that have been impacted by S.24(1)(b) and S.24(1A) provision and come out with a proposal in order for IRBM to review the provisions.

1.5 Amendment to S.44A – Group relief for companies [w.e.f. the year of assessment 2019]

a. Amendment to S.44A(1)

*"Subject to this section, a company (referred to in this section as a "surrendering company") may****, for the basis period for three consecutive years of assessment*** *surrender not more than seventy per cent of its adjusted loss in the basis period of a year of assessment to one or more related companies (referred to in this section as a "claimant company"):"*

New S.44A(1A)

"(1A) For the purpose of subsection (1), the basis period for three consecutive years of assessment commences—

(a) immediately following the basis period for a year of assessment the surrendering company first commences operation, provided that the basis period consists of a period of twelve months; or

(b) immediately following the second basis period the surrendering company first commences operation (in this paragraph referred to as the "second basis period"), if the basis period for a year of assessment the surrendering company first commences operation is less or more than twelve months and the second basis period consists of a period of twelve months."

Comments:

Under sections 44A(1) and 44A(1A), a company may only surrender its losses for a period of three consecutive years of assessment and the three period commences from the year immediately following the year of commencement of operations.

"Commencement of operations" as can be found in S.21A(8) of the ITA 1967 includes carrying on a business and making of investments or both.

Surrendering companies could have commenced operations (for the purpose of determining its basis period) much earlier before its commencement of business.

Clarification is sought on whether this should be referred to "commencement of business" instead?

IRBM's Comments:

IRBM disagree with the view. The commencement of operations shall refer to subsection 21A(8).

b. New S.44A(10)(aa)

"The provisions of this section shall not apply to a company for a basis period for a year of assessment where the period during which that company—

(aa) has unutilized investment tax allowance or adjusted loss from a pioneer business under the Promotion of Investments Act 1986;"

Comments:

For S.44A(10)(aa), clarification is sought on whether adjusted loss for companies enjoying exemption under S.127(3A) is also included under the new S.44A(10)(aa).

IRBM's Comments:

Subsection 127(3A) is not applicable in paragraph 44A (10) (aa).

1.6 Amendment to S.49 – Deduction for insurance premiums [w.e.f. the year of assessment 2019]

Amendments to S.49(1) & 49(1A)

~~*(1) Subject to this section, in the case of an individual resident for the basis year for a year of assessment who in that basis year has—*~~

~~*(a) paid any premium for any insurance;*~~

~~*(b) as an employee or as a self-employed person within the meaning of the Employees Provident Fund Act 1991 [Act 452] made or suffered the making of a contribution to an approved scheme (other than a private retirement scheme); or*~~

~~*(c) made or suffered the making of any contribution under any written law relating to widows', widowers' and orphans' pensions or under any approved scheme within the meaning of any such law,*~~

~~*there shall be allowed for that year of assessment a deduction of the aggregate amount of the payments or contributions or both or a deduction of six thousand ringgit whichever is the less.*~~

~~*(1A) For the purposes of subsection (1)—*~~

~~*(b) where subsection 50(2) or 50(3) applies, the total deduction under that subsection shall not exceed six thousand ringgit.*~~

"(1) Subject to this section, in the case of an individual resident for the basis year for a year of assessment, there shall be allowed for that year of assessment a deduction—

(a) not exceeding three thousand ringgit, in respect of premium paid by that individual for any insurance;

(b) not exceeding four thousand ringgit, in respect of contribution to approved scheme (other than a private retirement scheme) made or suffered by that individual who is an employee or a self-employed person within the meaning of the Employees Provident Fund Act 1991 [Act 452]; or

(c) not exceeding four thousand ringgit, in respect of any amount made or suffered by that individual on any contribution under any written law relating to widow, widower and orphan's pension or under any approved scheme within the meaning of any such law."

"(1A) For the purpose of subsection (1)—

(a) the total amount of deduction under subsection (1) shall not exceed seven thousand ringgit;

(b) where subsection 50(2) or 50(3) applies, the amount of deduction to be allowed shall be in accordance with paragraphs (1)(a), (b) and (c) and the total deduction under subsection 50(2) or (3) shall not exceed seven thousand ringgit;

(c) in the case of an individual who is a pensionable officer within the meaning of section 2 of the Pensions Act 1980 [Act 227] and no deduction is made under paragraph (1)(b) or (c) to that individual, the amount of deduction under paragraph (1)(a) shall not exceed seven thousand ringgit."

Comments:

With the above amendments to S.49(1), the previously combined RM6,000 tax relief for EPF contribution and life insurance or takaful premium has been separated into RM4,000 and RM3,000 respectively. We would like to request the RM7,000 relief to be granted on a combined basis as the separation of the relief may result in a lower relief to be claimed in the year of assessment (YA) 2019 as illustrated in the examples below:

Example 1 (Employee):

	YA 2018	YA 2019
EPF contribution – RM8,000	6,000	4,000
Life insurance – RM1,500	Nil	1,500
	-----------	-----------
	6,000	5,500
	======	======

Example 2 (Sole proprietor – without EPF contribution):

	YA 2018	YA 2019
EPF contribution – Nil	Nil	Nil

Life insurance – RM4,000	4,000	3,000
	-----------	-----------
	4,000	3,000
	======	======

IRBM's Comments:
This is a policy decision.

MOF Comments:
The separation of income tax relief on contributions to approved funds and contributions for life insurance premiums will encourage taxpayers to do more savings for old age.

1.7 Amendment to S.60A - Inward Re-insurance: Chargeable income, Reduced Rate and Exempt Dividend [w.e.f. the year of assessment 2019]

New S.60A(3)

"This section shall apply to an insurer who has an adequate number of full time employees and has incurred an adequate amount of annual operating expenditure in Malaysia as prescribed by the Minister."

Comments:

What is meant by "adequate" number of employees and amount of annual operating expenditure as prescribed by the Minister? We appreciate if guidance is issued quickly in view that the effective date is the year of assessment 2019.

IRBM's Comments:

Please refer to:

i. Income Tax (Requirements for Insurer Carrying On Re-Insurance Business) Rules 2018 [*P.U.A 383/2018*]

ii. Income Tax (Requirements for Takaful Operator Carrying On Re-Takaful Business) Rules 2018 [*P.U.A 384/2018*]

1.8 Amendment to S.75B – Limited Liability Partnership and Business Trust [w.e.f. the coming into operation of the Income Tax (Amendment) Act]

Amendment to S.75B(1)(a)(i)

The responsibility for doing all acts and things required to be done —

(a) by or on behalf of a limited liability partnership for the purposes of this Act shall lie jointly and severally —

(i) with the compliance officer who is appointed amongst the partners of the limited liability partnership ***or persons qualified to act as secretaries under the Companies Act 2016 who is a citizen or permanent resident of Malaysia and ordinarily resides in Malaysia****; or*

Comments:

The above should be cross referenced to the Limited Liability Partnership ("LLP") Act 2012 rather than defined in the ITA 1967. If there are any future changes to the LLP Act 2012, this Section will have to be amended correspondingly.

IRBM's Comments:

This amendment has been approved by the Attorney General Chamber (AGC).

1.9 New S.140A(5A) [w.e.f. 1 January 2019]

"Without prejudice to the generality of section 139, for the purpose of subsection (5), "control" refers to persons one of whom owns shares of the other person, or a third person who owns shares of both persons, where the percentage of the share capital held in either situation is twenty per cent or more and—

Comments:

This proposed amendment is without prejudice to S.139. In this regard, if Co A does **not** hold shares in Co B (or holds less than 20% shares) but Co A gives a loan to Co B, will S.139(5) be invoked to first re-characterise the loan to share capital and then invoke S.140A(5A)?

IRBM's Comments:

Further clarifications will be issued in the amended Transfer Pricing Guidelines.

(a) the business operations of that person depends on the proprietary rights, such as patents, non-patented technological know-how, trademarks, or copyrights, provided by the other person or a third person;

Comments:

On (a) of S.140A(5A)

There could be many scenarios wherein two independent companies may enter into a transaction that concerns transfer of proprietary rights, technology or brand intangible properties ("IPs"). For example (non-exhaustive):

Foreign Co is a global fast food chain and grants exclusive trademark/brand rights to MY Co for the Malaysia market. The conditions of the agreement may be as follows:
- Foreign Co will get 25% shareholding in MY Co; and
- Foreign Co will get 5% royalty on sales of MY Co in Malaysia.

This type of arrangement between two independent persons is widely seen in the market, and is based on arm's length negotiations between unrelated parties before the actual shareholding/ transaction occurs. However, under the proposed amendment, this payment of royalty would be deemed a controlled transaction and MY Co would have to prove that the rate of royalty is at an arm's length rate. This would further increase the compliance burden of MY Co.

The word **"depends"** may be subject to varying degree of interpretation and may create uncertainties for the taxpayers. The business operations would generally depend on a number of factors, not just the IP. To avoid uncertainties, we would suggest that the words "wholly depends" be inserted in S.140A(5A)(a). It would be very useful if the IRB can provide certain scenarios for a better understanding.

Will MY Co be allowed to apply for an advance ruling to assess whether the transaction with Foreign Co is a controlled transaction? This is an issue of interpretation of law and not pertaining to the "transfer price" per se. Hence, the avenue for advance ruling should be open.

IRBM's Comments:

Further clarifications will be issued in the amended Transfer Pricing Guidelines.

For the purpose of advance ruling, please refer to Income Tax (Advance Ruling) Rules 2008 [P.U. (A) 41/2008].

(b) the business activities, such as purchases, sales, receipt of services, provision of services, of that person are specified by the other person, and the prices and other conditions relating to the supply are influenced by such other person or a third person; or

Comments:

On (b) of S.140A(5A)

The word **"influenced"** may be subject to varying degree of interpretation and may create uncertainties for the taxpayers. It would be very useful if the IRB can provide certain scenarios for enhanced understanding.

Materiality of the concerned business activity (purchases, sales and/or services) relative to the overall business of the taxpayer should be considered in ascertaining control. If the IRB can specify a threshold, that would ease compliance burden – e.g. if the so-called specified and influenced purchases/sales/services account for more than 50% of the total revenue of the taxpayer, then control can be deemed.

IRBM's Comments:

Further clarifications will be issued in the amended Transfer Pricing Guidelines.

(c) where one or more of the directors or members of the board of directors of a person are appointed by the other person or a third person."

Comments:

i. **On (c) of S.140A(5A)**

Does the appointment of one or more directors refer to executive director or non-executive director? Would this include other members of the C-Suite e.g. CEO and CFO? The nature of the directorship and the role played by the concerned director(s) should be considered in ascertaining control.

IRBM's Comments:

Further clarifications will be issued in the amended Transfer Pricing Guidelines.

With regard to the appointment of members of the board of directors, is the reference to more than 50% of Board Members or number of board members with more than 50% voting rights?

IRBM's Comments:

Further clarifications will be issued in the amended Transfer Pricing Guidelines.

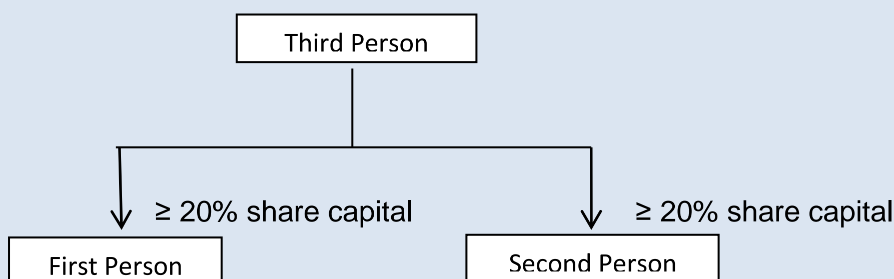
ii. **<u>On “third person” in S.140A(5A) and (a), (b) and (c) of S.140A(5A)</u>**

a. To facilitate understanding, more examples should be given on how “third person” is applied in the provisions of S.140A(5A) and (a), (b) and (c) of S.140A(5A).

IRBM’s Comments:

Further clarifications will be issued in the amended Transfer Pricing Guidelines.

b.



Based on our reading of S.140A(5A), the third person referred to in (a), (b) and (c) of S.140A(5A) holds ≥ 20% of the share capital of the first and second persons as illustrated above. Kindly confirm.

IRBM’s Comments:

Yes.

c. Example 1:
HC owns 100% of A and 30% of B. The business operations of B depends on the proprietary rights of HC.

HC, A & B are associated persons – kindly confirm.

IRBM’s Comments:

Control exists between HC and B. Subsection 140A (5A) is applicable in this transaction.

Example 2:

HC owns 100% of A and 30% of B. The operations of B depends on the proprietary rights of A.

B is not an associated person for A or HC – kindly confirm.

IRBM's Comments:

Based on our understanding of example 2 above, Subsection 140A(5A) is applicable since HC (the third person) owns share of more than 20% in both A and B and B depends on proprietary right of A.

c. The words "a third person" appearing in (a), (b) and (c) of S.140A(5A) should be amended to "the third person".

IRBM's Comments:

The relevant provision will be amended if required.

1.10 New S.140C – Restriction on deductibility of interest (Earnings Stripping Rules) [w.e.f. 1 January 2019]

"(1) This section shall apply without prejudice to section 140 or 140A and subject to any rules made under this Act.

(2) In ascertaining the adjusted income of a person from each of his sources consisting of a business for the basis period for a year of assessment, no deduction from the gross income from that source for that period shall be allowed in respect of any interest expense in connection with or on any financial assistance in a controlled transaction granted directly or indirectly to that person which is in excess of the maximum amount of interest as determined under any rules made under this Act.

(3) In this section—

"control" has the meaning assigned to it in subsection 140A(5A);

"controlled transaction" shall be construed as a financial assistance—

(a) between persons one of whom has control over the other; or

(b) between persons both of whom are controlled by some other person (in this section referred to as "third person");

"financial assistance" includes loan, interest bearing trade credit, advances, debt or the provision of any security or guarantee;

"interest expense" means—

(a) interest on all forms of debt; or

(b) payments economically equivalent to interest (excluding expenses incurred in connection with the raising of finance)."

Comments:

i. We understand that the Earnings Stripping Rules (ESR) will be issued after the Finance Bill has been gazetted. With the proposed effective date of 1 January 2019, it will be difficult for taxpayers to prepare themselves. Therefore, we would like to seek a deferment until 1 January 2020 for the ESR to be implemented with a transitional period for unwinding existing financing arrangements.

IRBM's Comments:

IRBM disagree with this proposal. Taxpayers have ample time to prepare because ESR announcement was made in 2018 Budget Proposal.

ii. Clarification is sought on the following:

a. Whether S.140C is to be computed on a source-by-source basis?

IRBM's Comments:

Yes, it applies for each source of business.

b. Whether third party borrowings are excluded in S.140C? Example – A Malaysian company obtains loan from a foreign third party bank and the loan is guaranteed by a foreign related party of the Malaysian company.

IRBM's Comments:

Borrowing from third party (local or foreign) without any guarantee provided by related party are excluded in Section 140C.

Borrowing from foreign third party and such borrowing are guaranteed by any related party (either local or foreign) will be included under Section 140C.

c. Whether S.140C applies to financial assistance transactions between two Malaysian related companies or is restricted to cross-border related party financial assistance?

IRBM's Comments:

ESR is applicable to cross-border related party financial assistance only.

d. What are examples of "payments economically equivalent to interest'.

IRBM's Comments:

Definition of 'payments economically equivalent to interest' will be provided in the ESR Guidelines.

1.11 Amendment to Schedule 6 – Part I – Income which is exempt [w.e.f. 1 January 2019]

Amendment to Paragraph 35A

"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 wholesale fund which is a money market fund, the exemption shall only apply to a wholesale fund which complies with the criteria as set out in the relevant guidelines of the Securities Commission Malaysia.*~~

Provided that in the case of a wholesale fund which is a money market fund, the exemption shall only apply to such interest income derived by a person other than a company and the wholesale fund complies with the criteria as set out in the relevant guidelines of the Securities Commission Malaysia."

Note: The guidelines mentioned in the above proviso were first issued on 23 December 2016 by the Securities Commission Malaysia (SCM) and in practice, the SCM evaluates and grants the tax exemption to the wholesale money market funds which the IRB will rely on.

Comments:

We understand from the explanatory statement of the Finance Bill 2018 that with the proposed amendment via clause 26, a company is no longer entitled to a tax exemption

under that paragraph for any interest received from a bank or financial institution through a wholesale money market funds which is approved by the SCM.

Clarification sought:

Paragraph 35A of Schedule 6 is a provision to exempt unit trust funds including the wholesale money market funds which complies with the criteria as set out in the relevant guidelines of the SCM, not their unit holders.

As the proposed amendment aims to cease the exemption on interest income received by a company from a wholesale money market fund as approved by the SCM, the relevant amendment should instead be made to S.61(1A) of the ITA 1967 “Assessment of income of unit holders”.

IRBM’s Comments:

Amendment has been made in the Amendment in Committee Finance Bill 2018 (Finance Act 812) on the issue raised.

1.12 Explanatory Statement No. 17 on Clause 23 of the Finance Bill 2018

Clause 23 seeks to amend Schedule 1 to Act 53. Subclause (a) seeks to amend Part I in Schedule I to Act 53 to provide that—

(i) the tax rate for the first five hundred thousand ringgit for a company with a paid-up capital in respect of ordinary shares of less than two million five hundred thousand ringgit and a limited liability partnership which has a total contribution of capital of two million five hundred thousand ringgit and less is reduced from eighteen per cent to seventeen per cent; and

Comments:

The underlined wording above should read *“of two million five hundred thousand ringgit and less”*.

IRBM’s Comments:

IRBM takes note on the comments. However, there is no tax implication as the amended law is in order.

2. Proposed Amendments to the Real Property Gains Tax Act 1976

2.1 Amendment to Schedule 5, Part I [w.e.f. 1 January 2019]

Except where Part II or Part III is applicable, the following rates of tax shall apply:

Category of disposal	*Rate of tax*
Disposal in the sixth year after the date of acquisition of the chargeable asset or thereafter	~~*Nil*~~ ***5 per cent***

Comments:

i. We understand from the MOF, at the CTIM 2019 Budget Seminar on 21 November 2018, that they are considering adopting the market value as at year 2000 as the acquisition price ("AP") for the above category of disposal. We would request that the MOF consider the market value of chargeable asset as at 1 January 2013 (i.e. 6 years prior to the effective date of the above amendment) as the AP of chargeable asset acquired prior to 1 January 2013. This would be in line with the provision under Schedule 2, Paragraph 4(3) of the Real Property Gains Tax Act ("RPGTA") 1976 where the market value of chargeable asset as at 1 January 1970 (i.e. 6 years prior to the enactment of the RPGTA 1976) is the AP of chargeable asset acquired prior to 1 January 1970. Depending on whether a market value as at 1 January 2013 or year 2000 is eventually adopted, we would like to request the IRB to consider allowing the market value to be indicated in the RPGT returns by either one of the following:

(a) based on the market valuation report procured by the taxpayer; or

(b) based on Jabatan Penilaian's value.

IRBM's Comments:

The market value to be indicated in the RPGT returns as at 1 January 2000 shall be based on the value by Jabatan Penilaian dan Perkhidmatan Harta (JPPH).

ii. We understand that the new revenue measures are needed in view of the present fiscal situation, and increasing RPGT rates has lesser impact on the economy than measures such as introduction of capital gains tax It is vital for the Government to announce to the people whether the increase in RPGT tax rate is intended to be a temporary or permanent measure. In our view, this should only be a temporary measure given that the primary intention of RPGT is generally understood to curb speculation in the property market (usually there's no element of speculation if a property is sold after 5 or 10 years of ownership).

Further, we propose the following measure:

a. In relation to individuals, provide a special owner occupied “private residence exemption” for properties owned more than 5 years, in the RPGTA 1976. This would help to reduce many grouses among the people, particularly the elderly.

IRBM’s Comments:

This is a policy decision.

3. <u>Proposed Amendments to the Stamp Act 1949</u>

3.1 Amendment of S.2 – Interpretation [w.e.f. the coming into operation of the Finance Act]

"small and medium enterprise" means—

~~*(a) in relation to the manufacturing, manufacturing related services and agro-based industries sectors, an enterprise with full-time employees not exceeding one hundred and fifty people or annual turnover not exceeding twenty-five million ringgit; and*~~

~~*(b) in relation to the services, primary agriculture, and information and communication technology sectors, an enterprise with full-time employees not exceeding fifty people or annual turnover not exceeding five million ringgit;*~~

(a) in relation to the manufacturing activities, an enterprise with <u>sales</u> turnover not exceeding fifty million ringgit or full-time employees not exceeding two hundred people; or

(b) in relation to the services, and other sectors, an enterprise with <u>sales</u> turnover not exceeding twenty million ringgit or full-time employees not exceeding seventy-five people;'

Comments:

Is the term "sales" is appropriately used? Under the Suruhanjaya Syarikat Malaysia Malaysian Business Reporting System ("SSM MBRS") Taxonomy, the standard term adopted is "revenue" instead of sales and turnover for all type of companies.

IRBM's Comments:

The definition is in line with the definition by SME Corp Malaysia.

3.2 Amendments to S.15 -- Relief from Stamp Duty in Cases of Reconstruction or Amalgamation of Companies [w.e.f. the coming into operation of the Finance Act]

Substitution of the words "Nominal Share Capital"

The words "nominal share capital" wherever appearing in S.15 is substituted with the words "issued share capital".

Comments:

The SSM MBRS Taxonomy has adopted "**<u>Amount of</u>** Share Capital" in value of the shares (in currency) and "Number of Shares" in unit.

IRBM's Comments:

The amendments is in line with Companies Act 2016.

New S.15(6A)

"Where any claim for exemption from duty under this section has been allowed and any of the circumstances specified under subsection (5) occurs, each company which was a party to the instrument shall notify the Collector of the circumstances of the occurrence within thirty days from the date of the occurrence."

Comments:

We note that both parties are required to notify the Collector. We would suggest that it would be more appropriate to merely require the party enjoying the exemption (the transferee) to notify the Collector rather the transferor as well. This is because the management of the transferor would not have submitted the application for relief and accordingly, the transferor entity would not be in a position to assess if the declarations made in support of the application for stamp duty relief by the transferee entity have been adhered to. In addition, the transferor company may not be aware of any cessation in the beneficial ownership of shares by the transferee company within the 3 year period (as provided under S.15(5)(c).

IRBM's Comments:

Both parties shall be responsible. However, IRBM take notes on the proposal for review.

3.3 Amendments to S.15A -- Relief from Stamp Duty in Case of Transfer of Property Between Associated Companies [w.e.f. the coming into operation of the Finance Act]

Comments:

Kindly confirm that the amendments to S.15A will not apply to the sale and purchase agreement executed prior to the coming into operation of the Finance Act even if the application for stamp duty relief is submitted after the amendments have taken effect.

IRBM's Comments:

Section15A is not applicable to the sale and purchase agreement. Instrument applicable under Section 15A depends on the types of transfer, for example, transfer of:

Property - Borang 14A
Shares - Borang 105
Business - Agreement (i.e Business Sale Agreement)

a. New S.15A(2)(b)

"This section applies to any instrument with respect to which it is shown to the satisfaction of the Collector- that the transfer of the property of the associated companies is to achieve greater efficiency in operation; and"

Comments:

i. It is not clear how "greater efficiency" will be measured. We understand from the IRB, at the CTIM 2019 Budget Seminar on 21 November 2018, that guidelines will be issued on "greater efficiency". Kindly confirm that our understanding is correct.

ii. The insertion of S.15A(2)(b) imposes an additional requirement before the Collector's approval can be obtained. As this requirement is a qualitative test, it is subject to interpretation and would not be easy to carry out even with guidelines. Businesses would be in a better position than the authorities to know whether the transfer is to achieve greater efficiency in operation.

As the intent of S.15A is to provide relief for the underlying ownership of properties held by the transferor and transferee companies which are substantially the same – 90 percent associated relationship, we would like to request for removal of this requirement. Alternatively, the amendments should expressly give the stamp duty payer the right to appeal to the Courts if he is aggrieved by the decision of the Collector in regard to whether the transfer is to achieve greater efficiency in operation.

IRBM's Comments:

Further details on the issue raised will be provided in the Guideline and Statutory Declaration that will be issued soon.

b. **New S.15A(2)(c)**

"This section applies to any instrument with respect to which it is shown to the satisfaction of the Collector- that the company referred to as the transferee company under this section is incorporated in Malaysia."

Comments:

Since the intent of S.15A is to provide relief for the underlying ownership of properties held by the transferor and transferee companies which are substantially the same – 90 percent associated relationship, we would like to request for removal of this requirement.

Foreign entities shouldn't be affected, particularly if there is an intention to encourage foreign investment in Malaysia.

IRBM's Comments:

This is a policy decision.

MOF Comments:
MOF takes note on the comments.

c. **Amendment to S.15A(4)(c)**

"the transferor and the transferee were to cease to be associated within the meaning of this section by reason of a change in the percentage of the issued share capital of the transferee in the beneficial ownership (within the meaning of this section) of the transferor or a third company ***within the period of three years from the date of conveyance or transfer****,"*

Comments:

This amendment will result in unnecessary restrictions and practical difficulties for companies to undertake restructuring exercises which may not have been intended to be caught under the proposed amendments. There could be instances where the transferor company may be liquidated within 3 years as maintaining the transferor company creates unnecessary costs for e.g. statutory costs for the group. As liquidation does not involve the transferor company's shares to be

transferred to a non-associated person, the proposed amendment inadvertently creates unnecessary costs to the group.

IRBM's Comments:

The company must remain associated within 3 years to be eligible to this relief. Consideration may be given in the case of bankruptcies, based on the facts of the case and the documentation submitted.

d. New S.15A(4)(d)

S.15A(4)(d) provides that the exemption will not apply where:

"the transferee company disposes of the property that it has acquired within three years from the date of the conveyance or transfer of the property;"

Comments:

We seek clarification that so long as the transferee at each successive stage is within the same group and the final beneficiary is also a member of the same group, the S.15A relief will still apply as the property is still owned by the same group. We would suggest that S.15A(d) be reworded as follows:

"*the transferee company disposes of the property that it has acquired within three years from the date of the conveyance or transfer of the property, to a person who is not associated with the transferee and the transferor within the meaning of this section,*".

The proposed additional requirement for the acquired property to remain with the transferee for a period of three years from the date of transfer, does not fit in with the objectives of the relief, which is to provide stamp duty relief for the transfer of property between associated companies to facilitate restructuring of group companies.

The proposed change is expected to create challenging implications in the context of multiple transfer type transactions which are common in the context of global restructuring exercises involving multinationals (when such restructurings will currently satisfy the multiple transfers provided that the property remains within the group at all times).

Furthermore, the proposed amendment will create adverse implications for certain transactions, which may not have been envisaged. For example, for a transfer of a business as a going concern, the transferred property may include cash, bank balances, accounts receivable, intellectual property, machinery and equipment as

well as stock in trade. In such instances, it will not be possible for the transferee to hold on to the abovementioned property for a period of 3 years, due to the nature of property acquired. As stock in trade is included where there is a business transfer, we propose that this requirement be removed since it will not be possible for the transferee company to retain beneficial ownership of the stock in trade it acquires.

For property for example cash, cash balances which are utilized and property for example accounts receivables which are collected, if this provision is retained, we would like to seek confirmation that this provision is not applicable to the utilization and/or collection of these property.

Recommendations:

It is recommended that S.15A(4)(d) be deleted. In the event that the authorities are of the view that this amendment is necessary, then it should consider restricting the application of this requirement to certain types of property only (for example, land and shares) so that it does not apply to other types of property transferred (for example cash, accounts receivable, stock in trade etc).

The legislation should also provide an exception to this rule to allow the relevant property to be transferred to another associated company so as to allow the multiple transfer type transactions as discussed.

IRBM's Comments:

IRBM takes note on the comments. Consideration of exception may be given a case to case basis depending on the documentation submitted.

e. New S.15A(6)

"Where any claim for exemption from duty under this section has been allowed and any of the circumstances specified under subsection (4) occurs, each company which was a party to the instrument shall notify the Collector in writing of the circumstances of the occurrence within thirty days from the date of the occurrence."

Comments:

We wish to point out there may be situations where one party may not be aware of any change in circumstances resulting from the actions of the other party. For example, where it relates to stamp duty relief granted on the transfer of property, the transferor may not be aware of any subsequent transfer of the property by the transferee to another party. While the transferor and transferee are associated at the time of the relief application, the management of the companies may be different.

IRBM's Comments:

Both parties shall be responsible. However, IRBM take notes on the proposal for review.

f. New S.15A(7)

"Where a claim is made for exemption under this section, the Collector may require the delivery to him a statutory declaration in such form as he may direct made by an advocate and solicitor, or, in the case of Sabah and Sarawak, an advocate, of the High Court, and of such further evidence, if any, as he deems necessary."

Comments:

We would comment that the advocate/ solicitor concerned would not be in a position to affirm future events e.g. what would happen in 3 years' time. As such, please clarify what is to be covered under the declaration by the advocate/ solicitor.

IRBM's Comments:

IRBM takes note on the comments. Further details on the issue raised will be provided in the Statutory Declaration that will be issued soon.

3.4 Amendment to First Schedule, Item 32(a) [w.e.f. 1 January 2019]

Item	*Description of Instrument*	*Proper Stamp Duty*
32	*CONVEYANCE, ASSIGNMENT, TRANSFER OR ABSOLUTE BILL OF SALE*	
	(a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c))	*For every RM100 or fractional part of RM100 of the amount of the money value of the consideration or the market value of the property, whichever is the greater—* *(i) RM1.00 on the first RM100,000;* *(ii) RM2.00 on any amount in excess of RM100,000 but not exceeding RM500,000;*

*(iii) RM3.00 on any amount in excess of ~~RM500,000.~~ **"RM500,000 but not exceeding RM1,000,000;***

(iv) RM4.00 on any amount in excess of RM1,000,000.

Comments:

It is mentioned in Appendix 9 of the 2019 Budget Speech that, for the stamp duty rates imposed on the instrument of transfer of real property, a stamp duty rate of 4% will be imposed based on the price/ market value of the real property band (whichever is the higher) of RM1,000,001 and above.

By amending Item 32(a) as above, the stamp duty rate of 4% on the amount of RM1,000,001 and above is not only applied on the instrument of transfer of real property but also on the instrument of transfer of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in Item 32(c)).

We urge the tax authorities to look into the above matter urgently and make the relevant changes to the proposed amendment where appropriate.

IRBM's Comments:

Please refer *P.U.(A)376/2018*, Stamp Duty (Remission) (No.2) Order 2018. This order is applicable to all instruments under Item 32(a).

4. <u>Proposed Amendments to the Labuan Business Activity Tax Act 1990</u>

4.1 Amendment to S.2B – Labuan entity [w.e.f. 1 January 2019]

~~*"(1) The Labuan entities shall be as specified in the Schedule."*~~
"(1) The Labuan entities—

(a) shall be as specified in the Schedule; and

(b) shall, for the purpose of the Labuan business activity, have—

(i) an adequate number of full time employees in Malaysia; and

(ii) an adequate amount of annual operating expenditure in Malaysia,

as prescribed by the Minister by regulations made under this Act."

Comments:

A Labuan entity as specified in the Schedule must also fulfill the substantive requirements in relation to the number of full time employees and the annual operational expenses in **<u>Malaysia.</u>**

i. We seek clarification on whether the requirements of employees and operating expenditure should be in Labuan instead of in Malaysia. Example: Whether a Labuan company dealing in Labuan business activity having full time employees and incurred adequate operating expenditure in Kuala Lumpur can still be regarded as a Labuan entity under the amended S.2B of the LBATA 1990?

IRBM's Comments:

The requirements of employees and operating expenditure should be in Labuan. Please refer Labuan Business Activity Act (Requirements For Labuan Business Activity) Regulations 2018*[P.U. (A) 392/2018].*

ii. Will the Labuan company be treated as having opted to be taxed under the ITA 1967 if the Labuan company fails to meet the substantive test? If so, we seek clarification on the relevant provision which provides for such treatment.

IRBM's Comments:

If the Labuan company fails to meet the substantive test, it will be taxed under ITA. Please refer subparagraph 2(3)(a) LBATA.

4.2 Amendments to S.4 – Labuan trading activity [w.e.f. 1 January 2019]

New S.4(3) & 4(4)

"(3) For the avoidance of doubt, the net profits referred to in subsection (2) shall not include any income derived from royalty and other income derived from an intellectual property right if it is receivable as consideration for the commercial exploitation of that right.

(4) Any income derived from intellectual property right referred to in subsection (3) is subject to tax under the Income Tax Act 1967."

Comments:

Clarification is sought on the following:

i. Do the above amendments to S.4 of the LBATA 1990 mean that a Labuan entity (which has not exercised an irrevocable election under S.3A of the LBATA 1990) is required to file two returns i.e. a Labuan tax return under the LBATA 1990 for income from Labuan trading activity (excluding income from intellectual property right (IPR)) and an income tax return under the ITA 1967 for income from IPR?

ii.

IRBM's Comments:

Yes. The understanding is in order.

ii. If the above Labuan entity did not receive income from IPR in subsequent years, can it stop filing the income tax return under the ITA 1967?

IRBM's Comments:

Yes. The Labuan company must inform the respective branch in writing.

iii. What are the legislative provisions which are applicable to the above Labuan entity in relation to the taxing of the income from IPR under the ITA 1967, other than S.4(4) of the LBATA 1990?

IRBM's Comments:

The provisions under ITA is applicable to IPR income.

5. 2019 Budget Speech and Appendices

5.1 Paragraph 154 of the 2019 Budget Speech - Enhancement of Principal Hub Incentive

To increase investments of companies already participating in the Principal Hub, the Government proposes to enhance the existing incentives by providing a concessionary income tax rate of 10% on the overall statutory income related to Principal Hub activities for a period of 5 years.

Comments:

i. Clarification is sought on whether the 10% concessionary tax rate is only given to companies currently enjoying the Principal Hub incentive that are expiring soon or extended to companies that are carrying on Principal Hub activities but did not apply for the incentive due to lack of attractiveness. This is especially so for those existing companies that can only enjoy exemption on incremental value based on the current incentive.

MOF Comments:

Income tax at 10% concession rate on the entire statutory income relating to Principal Hub activities for a period of 5 years is meant for existing companies only.

ii. Notwithstanding the above-mentioned proposal, please confirm that 3-tiered preferential corporate tax rates of 0% (for Tier 1 Principal Hub), 5% (for Tier 2 Principal Hub) and 10% (for Tier 3 Principal Hub) up to 5 years (extendable for a second 5 years) under the existing Principal Hub incentive for new companies continue to be applicable.

MOF Comments:

3-tiered preferential corporate tax rates of 0% (for Tier 1 Principal Hub), 5% (for Tier 2 Principal Hub) and 10% (for Tier 3 Principal Hub) up to 5 years (extendable for a second 5 years) continue to be applicable with new terms and condition.

5.2 Special Voluntary Disclosure Program

a. Frequently Asked Questions (“FAQ”)

D. AUDIT / INVESTIGATION CASES

FAQ 18. Are taxpayers subject to audit after voluntary disclosure made under this Special Program?

IRBM will accept in good faith all voluntary disclosures made during the Special Program period. Further review will not be made on the reported information.

FAQ 19. Is a person who made voluntary disclosure on an issue be subject to audit on the same issue?

If additional information from third party shows that the income has not been correctly reported and the information is within the taxpayer's knowledge, penalty will be imposed as per current rules and regulations in force.

Comments:

With reference to FAQ 18 & 19, kindly clarify whether the assessment made by the IRB would be an “additional assessment” or a “composite assessment”

IRBM’s Comments:

The assessment raised would be an additional assessment (not a composite assessment)

FAQ 19 has been cancelled, please refer to latest FAQ dated 1 February 2019

b. Good Faith & Letter of Full Disclosure

LHDNM will accept in good faith all voluntary disclosures made during the Special Program period AND further review will not be made on the reported information. However, taxpayers require to sign a letter of full disclosure.

(Source: IRB Presentation Slides for IRB National Tax Seminar 2018 on 13 November 2018)

Comments:

If the IRB accepts voluntary disclosure, why is there a need for a letter of full disclosure to be signed? As whatever needs to be reported is reported, tax is

assessed and collected, and penalties are imposed, then the need to sign a letter of full disclosure may not be necessary.

IRBM's Comments:

Referring to paragraph 5.2 (iii) of the Operational Guidelines No. 1/2018 dated 30 November 2018, taxpayers are required to submit a written declaration within the Special Program period either via letter or e-mail of the income / gains on disposal of assets not previously declared.

5.3 Government's commitment to pay tax and GST refunds in 2019

Comments:

This announcement provides certainty to investors and hence we welcome it. Further details on the timing of the refund payments in 2019 would be much appreciated (for example, by quarter 2 of 2019).

MOF's Comments:

All outstanding GST refund amounting RM19.4 billion will be paid in 2019 as announced in the 2019 Budget, subject to the claims made by companies are in order.

5.4 Income tax deduction for employers on Perbadanan Tabung Pendidikan Tinggi Nasional (PTPTN) loan amount paid by employers on behalf of employees

Comments:

Would the repayment of employee's PTPTN loan made by the employer be classified as a benefit in kind to that employee?

MOF's Comments:

The repayment of employee's PTPTN loan made by employer is classified as a perquisites to that employee and should be counted as part of the calculation of the personal income tax. However, the government has agreed to exempt the repayment amount from the calculation of the personal income tax for the year of assessment 2019.

B. Outstanding Gazette Orders – 2014 to 2018 Budgets

The Institutes note with concern that several gazette orders pertaining to proposals announced in the 2014 to 2018 Budgets are still outstanding to date. We would request for your urgent attention and update on the status of the relevant gazette orders.

1. 2014 Budget

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

IRBM's Comments:

1. Income Tax Exemption (Services): gazetted on 31.12.2018 [P.U.(A) 388/2018].
2. Investment Tax Allowance (Projects): Currently under IRBM action following to the latest policy dated 12.6.2018.
3. Investment Tax Allowance (Assets): Currently under IRBM action following to the latest policy dated 12.6.2018.

- 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.

MOF's Comments:

The current policy is under review.

2. 2015 Budget

- 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.

MOF's Comments:

The draft order is currently being reviewed by the MOF's legal department.

- 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 2015 and YA 2016.

MOF's Comments: The draft order is currently being reviewed by the MOF's legal department.

3. 2016 Budget

- 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: Currently under IRBM's action.

- 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.

MOF's Comments: The draft order is pending approval from Minister's office.

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

MOF's Comments: The draft order is pending approval from Minister's office.

- 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.

MOF's Comments: Currently under MOF's action.

4. 2017 Budget

- Double deduction for structured internship programme for YA 2017 to YA 2019. Incentive of double deduction given on expenses incurred in respect of structured internship programmes be extended for another 3 years and be expanded to include Malaysian students pursuing full-time courses at vocational level.

MOF's Comments: The draft order is currently being reviewed by the MOF's legal department.

- Expansion of the scope of halal products (nutraceutical and probiotic) eligible for incentives for halal industry players, for applications received by the Halal Development Corporation (HDC) on or after 22 October 2016.

MOF's Comments: Incentives under the Halal Industry Development Corporation (HDC) could not be gazetted as HDC Act has not been gazetted. Therefore, the extension of this scope could not be included in the subsidiary legislation.

5. 2018 Budget

- Tax exemption on rental income from residential homes received by Malaysian resident individuals, from YA 2018 to YA 2020.

MOF's Comments: The draft order is pending approval from Minister's office.

- Tax exemption on employment income up to maximum of 12 consecutive months for women returning to work after career break, from YA 2018 to YA 2020, for applications submitted to Talent Corporation Malaysia Berhad from 1 January 2018 to 31 December 2019.

MOF's Comments: The draft order is currently being reviewed by MOF.

- Tax exemption on income from managing Sustainable And Responsible Investment (SRI) funds, from YA 2018 to YA 2020.

MOF's Comments: The order has been gazetted on 27.12.2018 [P.U.(A) 356/2018].

- Tax exemption increased from 50% to 100% of the value of increased export of private healthcare services to be set-off against up to 70% of statutory income subject to conditions, from YA 2018 to YA 2020.

MOF's Comments: The draft order is currently being reviewed by MOF.

- Capital allowance in respect of qualifying expenditure incurred on the development of customised software comprising of consultation fee, licensing fee and incidental fee related to software development, from YA 2018 onwards.

MOF's Comments: The draft order is currently being reviewed by MOF.

- Expansion of tax incentives for hiring the disabled, from YA 2018 onwards.

MOF's Comments: The draft order is currently being reviewed by MOF and PERKESO.

- Tax incentive for transformation to Industry 4.0, for applications received by the Malaysian Investment Development Authority (MIDA) from 1 January 2018 to 31 December 2020.

IRBM's Comments: Currently under IRBM's action.

- Extension of tax incentive for medical tourism, for applications received by the Malaysian Investment Development Authority (MIDA) from 1 January 2018 to 31 December 2020.

MOF's Comments: The current policy is under review.

- Extension of tax incentives period for automation equipment for Category 1: Labour Intensive industries (i.e. rubber, plastic, wood and textiles products) for another three years, for applications received by MIDA from 1 January 2018 to 31 December 2020 in respect of Category 1.

MOF's Comments: The draft order is currently being reviewed by MOF.

- Extension of application period for tax incentives for Principal Hub for another 3 years, for applications received by MIDA from 1 May 2018 to 31 December 2020.

IRBM's Comments: 1. Principal hub (new company and new commodity based company) - gazetted on 31.12.2018 [P.U.(A) 386/2018] 2. Principal hub (existing company and existing commodity based company) – gazetted on 31.12.2018 [P.U.(A) 385/2018] 3. Principal hub (existing company with approved OHQ/IPC/RDC status with or without incentive) – gazetted on 31.12.2018 [P.U.(A) 387/2018].

- Extension of application period for pioneer status and investment tax allowance for investments in new 4 and 5 star hotels in Peninsular Malaysia, Sabah and Sarawak for another 2 years, for applications received by MIDA from 1 January 2019 to 31 December 2020.

MOF's Comments: This incentive does not to be gazetted since it is given under Income Tax (Exemptions) (No.11) Rules 2006 and Income Tax (Exemptions) (No.12) Rules 2006.

- Income tax exemption on the Green Sustainable And Responsible Investments (Green SRI) Sukuk grant, for applications received by the Securities Commission of Malaysia (SCM) from 1 January 2018 to 31 December 2020.

MOF's Comments: It is the policy decision that this incentive is given under subsection 127(3A) ITA. Thus, no gazette order will be issued.

- Expansion/ review of tax incentives for Venture Capital Management Corporation (VCMC), Venture Capital Company (VCC) and investment in VCC funds created by VCMC, for a period of five years from YA 2018 to 2022, for applications received by SCM from 1 January 2018 to 31 December 2018.

IRBM's Comments: Currently under IRBM's action.