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# EY Tax Alert

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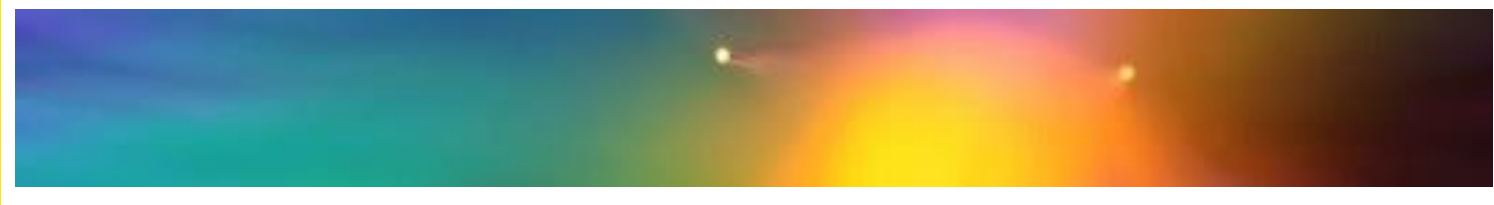
## Overseas developments

- ▶ India and US agree on transitional approach for India’s 2% Equalization Levy prior to the implementation of Pillar One rules
- ▶ Thailand amends Revenue Code to facilitate the international exchange of tax information

## Malaysian developments

### Submission of tax returns for Labuan entities carrying on “other trading” activities

Following the gazettelement of the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 [P.U.(A) 423/2021] on 22 November 2021 (Regulations), the Inland Revenue Board (IRB)’s Labuan Branch has issued a letter dated 29 November 2021 to the Association of Labuan Trust Companies. As the IRB now accepts that Labuan entities carrying on certain service activities (previously referred to as “other trading” activities) are able to submit their income tax return forms (ITRF) under the Labuan Business Activity Tax Act 1990 (LBATA) instead of under the Income Tax Act 1967 (ITA) effective from 1 January 2019 in line with the Regulations, the IRB has provided relevant Labuan companies with deadlines to decide on their tax filing positions and to submit the relevant ITRF or election forms to be taxed under the ITA, for the years of assessment (YAs) 2020 and 2021. Please see the Appendix to this Alert for an unofficial English translation of the Appendix to the IRB’s letter. As the Appendix is subject to interpretation and the next course of action may depend on the filing and technical positions adopted by the relevant Labuan entity previously as well as the activities carried



on by the entity, affected Labuan companies should seek immediate advice on next steps.

The service activities outlined in Item 20 of the First Schedule of P.U.(A) 423/2021 are as follows:

- i) administrative
- ii) accounting
- iii) legal
- iv) backroom processing
- v) payroll
- vi) talent management
- vii) agency
- viii) insolvency-related
- ix) management

## Rules for the exchange of information

The Income Tax (Exchange of Information) Rules 2021 [P.U.(A) 436] were gazetted on 1 December 2021. The Rules provide that the competent authority of a jurisdiction that has entered into an arrangement with the Government of Malaysia may request information on any person, from the Director General (DG).

The request for information made to the DG shall state the following:

- (a) The identity of the person under examination or investigation
- (b) The period for which the information is requested
- (c) A statement of the information sought including the details and form
- (d) The tax purpose for which the information is requested
- (e) The grounds for believing that the information requested is found in Malaysia or is in the possession or control of a person in Malaysia

- (f) To the extent known, the name and address of any person believed to be in possession of the requested information
- (g) A statement that the request is in conformity with the law and administrative practices of the territory of the competent authority and would have been obtainable, had the requested information been available in that jurisdiction
- (h) A statement that the competent authority has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties

Upon receiving the request, the DG may by notice under Section 81 of the Income Tax Act 1967 (ITA) require the person referred to in the request to provide the information as requested by the competent authority within the time specified in the notice. Any person who fails to comply with such notice will be deemed to have committed an offence under Section 120 of the ITA.

Should the DG fail to obtain information from the person concerned, the DG may by notice under Section 81 require a bank to provide the information as requested by the competent authority. The DG may also request the information of a person directly from a bank, without first making a request from that person. Any bank which fails to comply with such notice will also be deemed to have committed an offence under Section 120 of the ITA.

The following terms have been defined in the Rules:

- (i) **Bank**
  - (a) A bank, finance company, or a banking and finance company licensed or deemed to be licensed under the Financial Services Act 2013 (FSA)
  - (b) An Islamic bank licensed or deemed to be licensed under the Islamic FSA

- (c) A prescribed institution under the Development Financial Institutions Act 2002
- (d) A Labuan company or bank licensed under the Labuan Financial Services and Securities Act 2010 (FSSA)
- (e) A Labuan company or bank licensed under the Labuan Islamic FSSA

**(ii) Information**

Information required to be disclosed pursuant to the provision on exchange of information in an arrangement

**(iii) Arrangement**

- (a) The Convention on Mutual Administrative Assistance in Tax Matters
- (b) Any arrangements with participating jurisdictions to improve international tax compliance through -
  - i) Any bilateral or multilateral tax convention
  - ii) Any bilateral or multilateral competent authority agreements, or
  - iii) Any tax information exchange agreement

**(iv) Competent authority**

Duty authorized servant or agent of a government of any territory outside Malaysia with which the Government of Malaysia has entered into an arrangement

With this, the Income Tax (Exchange of Information) Rules 2011 have been revoked.

**Updated Frequently Asked Questions (FAQs) on the revision of estimate of tax payable in the 11<sup>th</sup> month of the basis period and the deferment of payments of the estimated tax payable (CP204) and instalment scheme (CP500)**

The IRB has published on its website the updated version of its FAQs document on the revision of estimate of tax payable in the 11<sup>th</sup> month of the basis period and the deferment of payments of the estimated tax payable (CP204) and instalment scheme (CP500), dated 3 December 2021. The FAQs are in Bahasa Malaysia, titled “Pindaan Anggaran Cukai Kena Dibayar (CP204) Pada Bulan Ke-11 Tempoh Asas Bagi Tahun Taksiran 2021 Dan 2022 Dan Penangguhan Bayaran CP204 Dan Skim Bayaran Ansuran (CP500) Bagi Perusahaan Mikro Kecil Dan Sederhana (PMKS) Mulai 1 Januari 2022 Hingga 30 Jun 2022 Di Bawah Bajet 2022”.

Some of the key changes to the FAQs are highlighted below:

► **Part A - Question 7**

The updated FAQs now stipulate that for the purpose of assessing the underestimation penalty under Section 107C(10) of the ITA, the 11<sup>th</sup> month revision will be taken into consideration.

Previously, the FAQs stated that if the company's final tax liability per the tax return exceeded the revised estimate of tax payable in the sixth or ninth month of the basis period by more than 30% of the final tax, the amount in excess of 30% will be subject to a 10% penalty - this did not appear logical as the 11<sup>th</sup> month revision was not taken into account.

▶ **Part A – Question 8**

The updated FAQs now state that the initial estimate of tax payable for YA 2022 and YA 2023 must be at least 85% of the latest revised estimate of tax payable.

Previously, the FAQs stated that the initial estimate of tax payable for YA 2022 must not be less than 85% of the initial or revised estimate of tax payable in the sixth or ninth month of the basis period for YA 2021.

The FAQ response is not consistent with the provisions of Section 107C(3) of the ITA, read together with the definition of “revised estimate” in Section 107C(12). This FAQ response may also not be implementable for entities adopting a 31 December financial year-end, which had submitted their initial estimate of tax payable for YA 2022 by 30 November 2021 and had then made an “11<sup>th</sup> month” revision to their YA 2021 tax payable by 10 December 2021, i.e., within the special extended deadline provided by the IRB. Clarification is being sought from the IRB on this point.

▶ **Part A – Question 10**

Previously, the FAQs stated that where the 11<sup>th</sup> month of a company’s basis period falls in October, November or December 2022, the “11<sup>th</sup> month” revision must be submitted to the IRB before 31 October 2022.

Based on the updated FAQs, the concession would now only apply to a company where the 11<sup>th</sup> month of the basis period falls in November 2022. The “11<sup>th</sup> month” revision would not apply where the companies’ 11<sup>th</sup> month of the basis period falls in December 2022.

▶ **Part B – Question 2**

The updated FAQs clarify that a limited liability partnership (LLP) is also eligible for the deferment of CP204 instalment payments. The LLP must have:

- Total capital contribution (in cash or in kind) of RM2.5 million or less at the beginning of the basis period, and
- Gross income from business sources of not more than RM50 million for the relevant YA

▶ **Part B – Questions 10 and 11**

The updated FAQs clarify that the following taxpayers will not receive a notification from the IRB on the deferment of their CP204 payments, even if they are eligible:

- A taxpayer who is eligible for the deferment based on his current microenterprises and small and medium enterprises (MSME) status, but did not qualify previously, and
- Taxpayers who have not registered their e-mail addresses with the IRB.

To qualify for the deferment, such taxpayers will be required to submit an application to [penangguhancp204@hasil.gov.my](mailto:penangguhancp204@hasil.gov.my).

This is essential to ensure that the IRB’s records are updated and that the increase in taxes under Section 107C(9) of the ITA is not imposed.

For reference, the FAQs are available at the following link:

[Pindaan Anggaran Cukai Kena Dibayar \(CP204\) Pada Bulan Ke-11 Tempoh Asas Bagi Tahun Taksiran 2021 Dan 2022 Dan Penangguhan Bayaran CP204 Dan Skim Bayaran Ansuran \(CP500\) Bagi Perusahaan Mikro Kecil Dan Sederhana \(PMKS\) Mulai 1 Januari 2022 Hingga 30 Jun 2022 Di Bawah Bajet 2022](#)

## Extension of stamp duty exemption relating to the restructuring or rescheduling of a business loan or financing executed between a borrower or customer and a financial institution (FI)

In Budget 2022, it was proposed that the stamp duty exemption on the instrument of loan or financing agreement relating to the restructuring or rescheduling of a loan or financing between a borrower or customer and an FI, be extended for another year (see *Take 5: Malaysia Budget 2022*).

To legislate this, the Stamp Duty (Exemption) (No. 11) 2021 (Amendment) Order 2021 [P.U.(A) 439] was gazetted on 6 December 2021. The Amendment Order provides that the exemption will now apply to the above-mentioned instruments of loan or financing agreements executed until 31 December 2022 (previously 31 December 2021).

The Amendment Order comes into operation on 1 January 2022.

## Remission of tax and stamp duty - Amendment

As highlighted in an earlier alert (see *Tax Alert No. 16/2021*), the Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) Order 2021 [P.U.(A) 322] was gazetted, to provide that any tax payable under the ITA and any stamp duty payable under the Stamp Act 1949 in relation to the following, shall be remitted in full:

- (a) Islamic Commercial Papers (ICP) and Islamic Medium-Term Notes (IMTN) issued or to be issued by Syarikat Prasarana Malaysia Berhad pursuant to the *Sukuk Murabahah* Programme, in nominal values of up to RM17 billion, provided that the

combined aggregate of the outstanding nominal value of the *Sukuk Murabahah* and the outstanding principal amount under the Syndicated Revolving Credit-i Facility (RC-i Facility, see (b) below) shall not exceed RM17 billion

- (b) RC-i Facility obtained or to be obtained by Syarikat Prasarana Malaysia Berhad with the aggregate outstanding principal amount not exceeding RM4 billion, subject to the combined aggregate referred to in (a) above
- (c) Guarantee provided by the Government of Malaysia in relation to the *Sukuk Murabahah* and RC-i Facility referred to in (a) and (b) above

Following the above, the Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 2) (Amendment) Order 2021 [P.U.(A) 432] has been gazetted on 30 November 2021 to stipulate that the above will apply to the ICP and IMTN issued by (refer to Point (a) above), or RC-i Facility obtained by (refer to Point (b) above) Prasarana Malaysia Berhad (instead of "Syarikat Prasarana Malaysia Berhad").

The Amendment Order is deemed to have come into operation on 31 July 2021.

## Tax incentive for commercializing research & development (R&D) findings

Following Budget 2013, the Income Tax (Exemption) (No. 13) Order 2013 was gazetted on 24 September 2013 (see *Tax Alert No. 21/2013*). The Order provides a 100% tax exemption on the statutory income (as determined under the Order) derived by a qualifying resident company from the business of commercializing R&D findings for non-resource-based activities or products listed in the Schedule of the Order (i.e. electrical and electronics, medical devices, technical or functional textiles, machinery and equipment, metals and transport equipment) and wholly owned by a public research institute or public institute of higher learning in Malaysia. The exemption is for a period of 10 consecutive YAs.

In Budget 2021, it was proposed that the tax incentives for the commercialization of R&D findings by public research institutions be extended to private higher education institutions.

To legislate the above, the Income Tax (Exemption) (No. 13) 2021 (Amendment) Order 2021 [P.U.(A) 448] was gazetted on 9 December 2021. The Amendment Order provides that the income tax exemption would now also apply on the statutory income derived by a qualifying resident company from the business of commercializing R&D findings for non-resource-based activities or products (as defined) and wholly owned by a private institution of higher learning in Malaysia, i.e., the exemption is no longer limited to R&D findings owned by public research institutes or public institutes of higher learning.

The Amendment Order also provide that an “investor company” and “qualifying company” as defined in the Order are to be companies incorporated under the Companies Act 2016 (previously Companies Act 1965).

The Order is effective from YA 2021.

## Overseas developments

### India and US agree on transitional approach for India’s 2% Equalization Levy prior to the implementation of Pillar One rules

On 24 November 2021, the Government of India issued a [Press Release](#) stating that India and the United States (US) have agreed on a transitional approach to the treatment of the current Indian e-commerce Equalization Levy (EL) during the interim period before the Organisation for Economic Co-operation and Development (OECD)’s BEPS 2.0 new Pillar One rules come into effect.

The transitional treatment includes the continuation of the 2% EL charge by India, subject to a partial future credit to the multinational enterprise (MNE) against that MNE’s future “Pillar One Amount A” tax liability. The US Government, in turn, agreed to terminate its proposed trade actions against India with respect to the current 2% EL.

This development and its implications for non-resident taxpayers are summarized below.

### Detailed discussion

#### Background

In October 2021, the OECD released a statement reflecting the agreement which has now been reached by 137 of the 141 member-jurisdictions of the OECD/G20 Inclusive Framework on BEPS, on the two-pillar project to address the tax challenges of the digitalization of the economy. Pillar One of the two-pillar project aims to allocate new taxing rights to market jurisdictions, through new nexus and profit allocation rules. The profits to be allocated to market jurisdictions under Pillar One are defined as “Amount A.”

Under the agreed Amount A framework, the Multilateral Convention (MLC) implementing Amount A of Pillar One will require countries to remove all Digital Services Taxes (DSTs) and other relevant similar measures (i.e., unilateral measures) and not to enact new DSTs or other relevant similar measures from 8 October 2021 until the earlier of 31 December 2023 or the coming into force of the MLC. Subsequent to the OECD statement, the US has entered into negotiations with a number of European countries to agree on a transitional approach to the treatment of unilateral measures until the new Pillar One rules come into effect. The agreement was reflected in a statement released on 21 October 2021 between the US and certain European countries (the 21 October 2021 Joint Statement).

India introduced the 2% EL on e-commerce supplies or services undertaken by non-resident e-commerce operators (NR EOP) not having a permanent establishment in India, as of 1 April 2020. Pursuant to trade investigations, the US found India's 2% EL to be discriminatory and proposed tariff retaliatory measures on India, which were subsequently suspended for 180 days in lieu of the ongoing discussions on the BEPS two-pillar solution.

With the deadline of 180 days soon approaching and several other countries reaching a compromise with the US in respect of their unilateral measures, a similar announcement between India and the US was anticipated.

### Current Press Release

The Press Release issued by the Indian Government states that India and the US have agreed that the same terms that apply under the 21 October 2021 Joint Statement will apply between the US and India with respect to India's charge of the 2% EL. The final terms of the agreement will be finalized by 1 February 2022.

Considering the Press Release and the 21 October 2021 Joint Statement, the impact on India's EL may be as follows:

- ▶ India will not be required to withdraw the 2% EL until Pillar One takes effect. However, India will allow a credit of a portion of the 2% EL chargeable on NR EOP (belonging to an MNE) during the "interim period" against that MNE's future Pillar One Amount A tax liability when the Pillar One rules are in effect.
- Pursuant to the Press Release, the interim period will be from 1 April 2022 until the implementation of Pillar One or 31 March 2024, whichever is earlier.
- The US will terminate its proposed trade actions against India regarding the 2% EL.
- India and the US will remain in close contact to ensure that there is a common understanding of the respective commitments and will endeavor to

resolve any further differences of views on this matter through constructive dialogue.

### Implications

The Press Release is an important development in the ongoing dispute between the US and India over the 2% EL. The final terms of the agreement are still outstanding and will be available by 1 February 2022. However, as the Press Release states that the same terms that apply under the 21 October 2021 Joint Statement will apply between the US and India with respect to India's charge of the 2% EL, the final agreement between the US and India is likely to be similar to the text of the 21 October 2021 Joint Statement.

The Press Release only refers to the 2% EL on e-commerce supplies or services. Consequently, it is not clear whether the agreement will cover other unilateral measures, such as the EL on advertising services or the provisions relating to significant economic presence, which are currently in force under the Indian tax laws.

The 21 October 2021 Joint Statement does not provide any credit for an EL liability of an MNE that is not subject to a Pillar One liability in a particular country within four years after Pillar One comes into effect in such country. Accordingly, pending the final terms, clarity is needed to understand whether MNEs that are not within the scope of Pillar One would receive any form of relief for an EL liability.

## Thailand amends Revenue Code to facilitate the international exchange of tax information

Thailand's Revenue Code Amendment Act (No.54) B.E. 2564 (2021) (the Amendment) was published in the Royal Gazette on 8 November 2021 (effective 9 November 2021), to accommodate the ratification process of the Multilateral Convention on Mutual

Administrative Assistance in Tax Matters (the MAC), which Thailand signed on 3 June 2020.

The MAC empowers tax officials to exchange tax information with other jurisdictions which are party to the MAC (MAC jurisdictions). As the next step, Thailand is expected to deposit the instrument of ratification during December 2021. With this development, Thailand is also expected to be removed from Annex II of the European Union (EU) list of non-cooperative jurisdictions for tax purposes (the List), when the List is next updated in early 2022.

The update on Thailand's ratification process of the MAC is outlined below.

### **Detailed discussion**

The Amendment was made specifically to accommodate the ratification process of the MAC in Thailand. The purpose of the MAC is to extend the information exchange network to all MAC jurisdictions (144 jurisdictions as of September 2021) and to ultimately help tax authorities worldwide to integrate and synchronize their data and information, in line with the objectives of the Organisation for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), as well as the Global Forum on Transparency and Exchange of Information for Tax Purposes.

The Amendment empowers the Director-General of the Thailand Revenue Department to exchange tax information, for the purpose of combatting tax avoidance, with other jurisdictions under Double Tax Avoidance Agreements or other similar agreements (including the MAC) to which Thailand is, or is going to be, a counterparty.

Thailand has been included on the List since 2017 due to its non-compliance with the EU's tax transparency and fair taxation criteria. In response, Thailand abolished its previous tax incentivized headquarter regimes, i.e., ROH I (Regional Operating Headquarters I), ROH II (Regional Operating

Headquarters II), IHQ (International Headquarters) and ITC (International Trading Centers) since 2019 to be compliant with the EU's fair taxation criterion. Additionally, Thailand had committed to sign and ratify the MAC in order to comply with the tax transparency criterion, so that Thailand could be eventually removed from the List.

### **Timeline for deposit of the instrument of ratification**

As noted, Thailand is expected to submit the instrument of ratification of the MAC in December 2021, which is viewed as the final stage of the MAC ratification process.

### **Implications**

Thailand will be automatically eligible to exchange tax information with all MAC jurisdictions when the MAC enters into force. The MAC would enter into force for Thailand on the first day of the month following the expiration of three months after the deposit of its instrument of ratification.

With this development, Thailand is expected to be removed from the EU's List in early 2022. More specific details relevant to the Amendment will be subsequently published in ancillary laws and announcements.



## Due date for submission of the ITRF

As the summary below is subject to interpretation and the next course of action may depend on the filing position and technical position adopted by the relevant Labuan entity previously as well as the activities carried on by the entity, affected Labuan companies should seek immediate advice on next steps.

Category	Due date for submission of the ITRF	Notes	Contact person
Entities that have submitted Form LE (LE 1, LE 4) under Code 23	15 December 2021	Labuan entities carrying on "other trading" activities that have submitted the Forms LE need not resubmit the ITRF	<ol style="list-style-type: none"> <li>Laura Helga Benard E-mail: <a href="mailto:laura.h@hasil.gov.my">laura.h@hasil.gov.my</a></li> <li>Dayang Maimunah Awang Yusop E-mail: <a href="mailto:dayangmaimunah@hasil.gov.my">dayangmaimunah@hasil.gov.my</a></li> </ol>
Entities that have submitted Form LE (LE 1, LE 4) and Form C	15 December 2021	Labuan entities carrying on "other trading" activities opting to be taxed under the ITA will need to make an irrevocable election by submitting the Form LE 3 to the IRB's Labuan International Unit	<ol style="list-style-type: none"> <li>Lenny Salamat E-mail: <a href="mailto:lenny@hasil.gov.my">lenny@hasil.gov.my</a></li> <li>Virnelea Gipin E-mail: <a href="mailto:virnelea@hasil.gov.my">virnelea@hasil.gov.my</a></li> </ol>
Entities that have submitted Form LE (LE 1, LE 4) under Code 23, and Form C	15 January 2022	<ul style="list-style-type: none"> <li>▶ Labuan entities carrying on "other trading" activities opting to be taxed under the ITA will need to make an irrevocable election by submitting the Form LE 3 to the IRB's Labuan International Unit</li> <li>▶ Labuan entities carrying on "other trading" activities submitting their ITRF under the LBATA will need to inform the IRB's Labuan Branch via a written notification</li> </ul>	<ol style="list-style-type: none"> <li>Hasmah Abd Latif E-mail: <a href="mailto:hasmah.a@hasil.gov.my">hasmah.a@hasil.gov.my</a></li> <li>Mohamad Shahril Mohamad Sadik E-mail: <a href="mailto:mshahril@hasil.gov.my">mshahril@hasil.gov.my</a></li> </ol>

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## Important dates

15 December 2021	Due date for monthly instalments
31 December 2021	6 <sup>th</sup> month revision of tax estimates for companies with June year-end
31 December 2021	9 <sup>th</sup> month revision of tax estimates for companies with March year-end
31 December 2021	Special 11 <sup>th</sup> month revision of tax estimates for YA 2022, for companies with January 2022 year-end
31 December 2021	Statutory deadline for filing of 2021 tax returns for companies with May year-end.
15 January 2022	Due date for monthly instalments
31 January 2022	6 <sup>th</sup> month revision of tax estimates for companies with July year-end
31 January 2022	9 <sup>th</sup> month revision of tax estimates for companies with April year-end
31 January 2022	Special 11 <sup>th</sup> month revision of tax estimates for YA 2022, for companies with February 2022 year-end
31 January 2022	Statutory deadline for filing of 2021 tax returns for companies with June year-end.

### EY | Building a better working world

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ED None.

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