

EY Tax Alert

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Malaysian developments

Updated Frequently Asked Questions (FAQs) pertaining to withholding tax (WHT) on payments made to agents, dealers and distributors (ADDs)

The Inland Revenue Board (IRB) has published on its website the updated version of its FAQs document in relation to Section 107D of the Income Tax Act 1967, which provides that companies making payments in monetary form to ADDs arising from sales, transactions or schemes will be required to withhold tax at a rate of 2% on the gross amount. The FAQs document is in Bahasa Malaysia, titled “Soalan Lazim Berkaitan Potongan Cukai 2% Terhadap Pembayaran Oleh Syarikat Pembayar Kepada Ejen, Pengedar Atau Pengagih Di Bawah Bajet 2022”, and the updated version is dated 21 October 2022.

The only change to the FAQs document is to Item A.6, which relates to credit notes. The updated Item A.6 clarifies that to determine whether the payments made to ADDs are subject to the 2% WHT, it is necessary to consider the substance of the payment, and not its label. Therefore, if a credit note is in substance a commission payment in monetary form to ADDs, the payments should be subject to the 2% WHT under Section 107D.

Previously, the FAQs provided that payments by way of credit notes, contra and discounts are not subject to the 2% WHT (see *Tax Alert No. 5/2022*).

Updated FAQs on the tax deduction on the costs of renovation and refurbishment of business premises

The IRB has published on its website an updated version of its FAQs document in relation to the tax deduction of up to RM300,000 to be given on the costs for renovating and refurbishing business premises, where such costs are incurred between 1 March 2020 and 31 December 2022. The FAQs document is in Bahasa Malaysia, titled "Soalan Lazim Potongan Cukai Bagi Kos Pengubahsuaian Dan Pembaharuan (R&R) Premis Perniagaan Di Bawah P.U.(A) 381/2020 Dan P.U.(A) 481/2021", and the updated version is dated 31 October 2022.

The FAQs were updated to reflect the extension of the tax deduction until 31 December 2022 under the Income Tax (Costs of Renovation and Refurbishment of Business Premise) (Amendment) Rules 2021 [P.U.(A) 481]. Other key updates in the FAQs are as follows:

► Item 3

The IRB has provided some examples to explain certain types of costs, such as roofing, curtains and power stations, that will not qualify for tax deduction.

► Item 7(c)

Tax deduction is allowed for qualifying costs incurred from 1 March 2020 until 31 December 2022. The costs can be claimed even though the refurbishments and renovations are not completed during the year of assessment (YA).

Example

Company A and B's financial year ends on 31 December.

Company A

| Renovation and refurbishment | | Date the premise is used in the business |
|------------------------------|--------------|--|
| Start | End | |
| 1 May 2020 | 30 June 2022 | 30 June 2022 |

| YA 2020 (amount incurred) (RM) | | YA 2021 (amount incurred) (RM) | Allowed for tax deduction (RM) | |
|--------------------------------------|--------------------------|--------------------------------------|--------------------------------|---------|
| Before 1 March 2020 | On or after 1 March 2020 | | YA 2020 | YA 2021 |
| NIL | 90,000* | 60,000* | 90,000 | 60,000 |

* Company A can still claim the tax deduction in YA 2020 and YA 2021 on the amounts incurred in those respective YAs, even though the renovation was only completed on 30 June 2022.

Company B

| Renovation and refurbishment | | Date the premise is used in the business |
|------------------------------|----------------|--|
| Start | End | |
| 1 January 2020 | 30 August 2021 | 30 August 2021 |

| YA 2020 (amount incurred) (RM) | | YA 2021 (amount incurred) (RM) | Allowed for tax deduction (RM) | |
|--------------------------------------|--------------------------|--------------------------------------|--------------------------------|---------|
| Before 1 March 2020 | On or after 1 March 2020 | | YA 2020 | YA 2021 |
| 20,000** | 50,000 | NIL | 50,000 | NIL |

** Company B would not be able to claim the cost of RM20,000 in YA 2020, as this was incurred before the qualifying period of the incentive (i.e., from 1 March 2020 to 31 December 2022).

► **Item 8**

The landlord and tenants of a multi-storey building are eligible to claim tax deductions as long as the costs of renovation and refurbishment are incurred by them:

- a) The floor area (whether on the same floor or different floor) occupied by the landlord and tenants must be identified and differentiated.
- b) Each of the respective claims by the landlord and tenants must be verified by external auditors and supported by invoices or other relevant documents.
- c) Each of the claimant would qualify to claim up to RM300,000 for qualifying costs incurred from 1 March 2020 to 31 December 2022.

New WHT form for payments for recurring small-value WHT transactions

The IRB has stipulated that taxpayers may defer their submissions of WHT forms and payments for small-value WHT, subject to conditions. The submission of WHT forms and the remittance of WHT payments may be made once in every six-month period as outlined below, effective from August 2022 (see *Tax Alerts No. 17/2022* and *No. 18/2022*):

| Payments made to non-residents | Due date for the submission of WHT forms and remittances |
|---|--|
| 1 June to 30 November | By 31 December that year |
| 1 December (in the previous year) to 31 May (of the current year) | By 30 June of the current year |

The IRB has released the new WHT tax forms for the above. The following new WHT forms are available on the IRB's official portal

(<https://www.hasil.gov.my/borang/muat-turun-borang/muat-turun-borang-cukai-pegangan>):

- Form CP37S - for royalty and interest income
- Form CP37DS - for special classes of income

Guidelines on the tax treatment of Labuan entities with dormant status

The Labuan Investment Committee (LIC) was established to recommend policies on substantial activity requirements in Labuan and monitor the enforcement of such requirements. Under the LIC Pronouncements 1-2019 (dated 19 June 2019) and 2-2019 (dated 11 December 2019), it was provided that Labuan entities which are dormant or struck off (including those under winding up proceedings or a liquidation process), which do not derive any source of income (see *Tax Alert No. 23/2019*):

- Do not need to comply with the substantial activity requirements
- Are exempted from statutory audit requirements for the purpose of fulfilling the Labuan Business Activity Tax Act 1990 (LBATA) requirements (however, if such companies require an audit pursuant to any non-tax regulations / rules, such regulations / rules would need to be complied with accordingly.)

The IRB has now published on its website the guidelines issued on 31 October 2022, to provide clarification on the meaning of "dormant" for the purposes of the above LIC Pronouncements and the implications of a dormant company commencing business operations. The guidelines are deemed to be effective from YA 2020.

A Labuan entity is considered dormant, if it:

- a) has never commenced operations since the date of its incorporation
- b) has previously been in operation or carried on business but has now ceased operations or business; or
- c) does not have any significant accounting transaction^{Note} for one financial year before the occurrence of substantial change in its equity shareholding (i.e., 50% or more).

Note:

This means that there is no entry recorded in the company's accounts other than the minimum expenses for compliance with stipulated statutory requirements. The minimum expenses referred to are filing of the company's annual return under the Labuan Companies Act 1990, the secretarial fee for filing of the company's annual return, the tax filing fee and the audit fee.

A Labuan entity is not considered as dormant if it owns shares, real properties, fixed deposits or other similar investments, including where it derives income such as rents, interests, etc. (if any) by virtue of the mentioned ownership.

Substance requirements

The Guidelines clarify that if a Labuan entity resumes operations, the substantial requirements must be complied with until the last date of the accounting period. The following example was provided:

Extract from Example 3 of guidelines

Tvios (Labuan) Ltd. was established on 1 March 2021 and carries on business activities as a leasing company. The accounting period for the company is 1 March 2021 to 28 February 2022. Tvios (Labuan) Ltd. did not conduct any business activities until 1 December 2021. At the end of the accounting period, its net profit as per the audited accounts was RM300,000.

Based on the facts, Tvios (Labuan) Ltd. is deemed as a dormant company for the period 1 March 2021 until 31 August 2021. As the operation of the business commenced on 1 September 2021, it must comply with the substantial requirement of a sufficient number of full-time employees in Labuan from 1 September 2021. Meanwhile, the requirement for an adequate amount of annual operating expenses of Labuan entities must be complied with before or no later than 28 February 2022.

Submission of tax return under LBATA

The Guidelines reiterate that a Labuan entity which is dormant or in the process of liquidation is still required to file a Form LE1 together with the audited accounts (if any) or management accounts.

Incentives for food production projects

In Budget 2016, the Government, recognizing that it needs to continue to support the development and growth of the agro-food industry, extended the application period for the following incentives for another five years, to 31 December 2020 (see *Tax Alert No. 1/2021*):

- ▶ Income Tax (Exemption) (No. 6) Order 2020 [P.U.(A) 373]
The Order provides that a qualifying person will be exempted from the payment of income tax in relation to a new project for a period of ten consecutive YAs or an expansion project for a period of five consecutive YAs.
- ▶ Income Tax (Deduction of Investment in New Food Production Project or Expansion Project) Rules 2020 [P.U.(A) 374]
The Rules provide that in ascertaining the adjusted income of a company, which has made an investment in its related company which is undertaking a new or expansion project under the Income Tax (Exemption) (No. 6) Order 2020,

there shall be allowed a deduction equivalent to the value of investment (as defined) for the sole purpose of financing the new or expansion project in the basis period for a YA.

To continue to strengthen food security and to reduce reliance on imported food supplies, the Government proposed to expand the scope of the approved food production project and extend the application period for the incentive to 31 December 2022. To legislate this, the following Rules and Order were gazetted on 31 October 2022:

- ▶ Income Tax (Deduction for Investment in Approved New Food Production Project) Rules 2022 [P.U.(A) 351]
- ▶ Income Tax (Exemption) (No. 6) 2020 (Amendment Order 2022 [P.U.(A) 352])

Under the new Rules and Order, a new food production project is the first project carried out by a qualified person undertaking a food production project approved by the Minister. An approved new food production project is deemed to be a separate and distinct business. The list of such projects is expanded to include high seas fishing and the planting of seeds for agro food:

- a) Planting of industrial crops, vegetables, fruits, herbs, spices or cash crops
- b) Aquaculture
- c) Rearing of honey or urena lobata bees
- d) Rearing of cows, buffaloes, goats, sheep or deer
- e) Deep sea fishing or high seas fishing
- f) Planting of seeds for agro food
- g) Planting of feed mill cultivated in a project which has been identified by the Minister charged with the responsibility of that project and approved by the Minister

Income Tax (Deduction for Investment in Approved New Food Production Project) Rules 2022 [P.U.(A) 351]

The Rules provide that in ascertaining the adjusted income of a company, which has made an investment in its related company which is undertaking an approved new food production project under the Income Tax (Exemption) (No. 6) Order 2020, there shall be allowed a deduction equivalent to the value of investment (as defined) for the sole purpose of financing the approved new project in the basis period for a YA.

The new Rules provide that the deduction can only be claimed for a period of three consecutive YAs, commencing from the YA the application is approved by the Minister. A deduction is also no longer available for investment in related companies that undertake the expansion project under the Income Tax (Exemption) (No. 6) 2020.

The Rules apply to a company resident in Malaysia which is incorporated under the Companies Act 2016, that has:

- a) Made an investment in its related company that undertakes the approved new food production project under the Income Tax (Exemption) (No. 6) Order 2020; and
- b) Made an application between 1 January 2021 and 31 December 2022 to the Minister of Finance through the Minister charged with the responsibility of an approved new food production project.

The Rules are deemed to have come into operation on 1 January 2021.

Income Tax (Exemption) (No. 6) 2020 (Amendment Order 2022 [P.U.(A) 352])

The Income Tax (Exemption) (No. 6) Order 2020 provides that a qualified person (which includes companies, sole proprietorships, partnerships and associations solely engaged in agriculture or fishery) that is resident in Malaysia is exempted from the payment of income tax in relation to:

- ▶ A new project for a period of ten consecutive YAs in respect of its statutory income, commencing from the first YA in which the qualified person derived statutory income in relation to that project; or
- ▶ An expansion project for a period of five consecutive YAs in respect of its statutory income from the expansion projects, commencing from the first YA in which the qualified person derived statutory income in relation to the expansion projects, and the first YA shall not be earlier than the YA in the basis period in which the date of approval from the relevant Minister falls.

The application of this incentive is extended to 31 December 2022 in this Amendment Order. The key amendments made in the Amendment Order are as follows:

- ▶ Approved new food production project is defined (see above).
- ▶ The scope of the exemption for an expansion project is extended to include statutory income from existing projects.
- ▶ An expansion of the existing approved food production project is required to be approved by the Minister and must involve a new area of land. The Amendment Order provides that the exemption is only applicable to an expansion project that has not been granted an exemption under the Income Tax (Exemption) (No. 6) Order 2020.

The Amendment Order is deemed to have come into operation on 1 January 2016 and extends the application period for this incentive to 31 December 2022. However, the exemption for approved food production projects in relation to high seas fishing and the planting of seeds for agro feed is only available from 1 January 2021 to 31 December 2022.

Overseas developments

Hong Kong introduces bill to refine its foreign source income exemption (FSIE) regime

The Hong Kong Government introduced the Inland Revenue (Amendment) (Taxation on Specified Foreign-Sourced Income) Bill 2022 on 2 November 2022 and subsequently submitted committee stage amendments on 10 November 2022 in response to the European Union's latest comments to its FSIE regime (collectively the Bill). The Hong Kong Inland Revenue Department (IRD) also published on its website administrative guidance with "Frequently Asked Questions" and Illustrative Examples to assist taxpayers to better understand the proposed refined FSIE regime.

As outlined in our earlier [Global Tax Alert](#), there are proposed amendments to Hong Kong's tax exemption on certain foreign-sourced passive income which will be subject to additional economic substance, participation and nexus requirements. The provisions in the Bill are substantially consistent with the proposed framework in the original consultation, but with several positive enhancements. The Bill is currently under review by the Hong Kong Legislative Council and is expected to take effect from 1 January 2023, with no grandfathering provision.

The key provisions of the Bill are summarized below.

Detailed discussion

Scope of the regime

Under the refined FSIE regime, specified foreign-sourced income (i.e., interest, dividends, income from the use of intellectual property (IP) and disposal gain on equity interest) will be deemed to be sourced from Hong Kong and chargeable to profits tax if the following conditions are met:

- ▶ The income is received in Hong Kong by a multinational enterprise (MNE) carrying on a trade, profession or business in Hong Kong irrespective of its revenue or asset size.
- ▶ The recipient entity fails to meet the additional requirements, as prescribed and discussed below.

The deeming provision will also apply to foreign-sourced disposal gain on equity interest even it is capital in nature.

There are certain exclusions for income derived by a regulated financial entity and those benefitting from preferential tax regimes or specific tax exemption regimes. A foreign permanent establishment of a Hong Kong resident person will not be subject to the refined FSIE regime.

The Bill has adopted the definition of the corresponding term as elaborated in Singapore law in determining whether income is “received in Hong Kong” and hence subject to the refined FSIE regime. As per the definition, a sum will be regarded as “received in Hong Kong” if the sum meets one of the following conditions:

- ▶ Remitted to, or is transmitted or brought into, Hong Kong
- ▶ Used to satisfy any debt incurred in respect of a trade, profession or business carried on in Hong Kong
- ▶ Used to buy movable property, and the property is brought into Hong Kong

While the IRD has provided two illustrative examples in its administrative guidance, it is still unclear to

what extent a covered taxpayer needs to track the income flow and how the deemed receipt of income in Hong Kong will be applied.

Exceptions from the deeming provision

The specified foreign-sourced income will not be deemed taxable if the MNE entity meets the economic substance requirement (for non-IP income) or participation exemption (for dividend and equity disposal gain) or complies with the nexus requirement (for IP income).

The economic substance requirements for non-IP income requires the entity to have adequate employees and to incur adequate operating expense for carrying out the specific economic activities in Hong Kong. Such activities include making necessary strategic decisions and managing and assuming principal risks in respect of the assets. The IRD has indicated that a Hong Kong tax residency certificate for tax treaty purposes in itself cannot be used to demonstrate the satisfaction of the economic substance requirements under the refined FSIE regime. Meanwhile, pure equity-holding companies will be subject to a reduced substance test.

Outsourcing of the relevant activities will be permitted to fulfil the economic substance requirements provided that the taxpayer is able to demonstrate adequate monitoring of the outsourced activities and that the relevant activities are conducted in Hong Kong.

As an alternative to satisfy the economic substance requirements, an MNE entity can also rely on the new participation exemption for foreign-sourced dividends or equity disposal gains, provided the following conditions are met:

- ▶ The MNE entity is a Hong Kong resident person (or has a permanent establishment in Hong Kong to which the income is attributable).
- ▶ The MNE entity has continuously held not less than 5% of equity interests in the investee entity

concerned for a period of not less than 12 months immediately before the income accrues.

It is important to note that the participation exemption is subject to specific anti-abuse rules, including a “subject to tax” condition of at least 15%.

Regarding foreign-sourced IP income, the nexus requirement will be applied to determine the extent of the tax exemption. It is modelled on the nexus approach adopted by the Organisation for Economic Co-operation and Development as a minimum standard under Base Erosion and Profit Shifting (BEPS) Action 5. Under the nexus requirement, only IP income from a qualifying IP asset (i.e., patent and software copyright) will be exempt from profits tax based on a nexus ratio in proportion to the qualifying research and development expenditure. Income from marketing-related IP assets henceforth will not qualify for tax exemption and will be taxed on a remittance basis.

Other provisions

To alleviate taxpayers from possible double taxation, the Bill grants a unilateral tax credit on overseas taxes paid in non-treaty jurisdictions in respect of the relevant specified foreign-sourced income now deemed taxable under the refined FSIE regime. For dividends received from treaty or non-treaty jurisdictions, a tax credit will be allowed in respect of both the foreign taxes paid on the dividend and the underlying profits out of which the dividend is paid. A look-through approach will be adopted subject to prescribed conditions.

There are also several additional provisions included in the Bill to address treatment of losses and operating expenditures regarding specified foreign-sourced income, as well as the compliance obligations to be fulfilled by the taxpayers.

Japan's consumption tax reform will be effective from 1 October 2023

Japan is introducing a Qualified Invoicing System for consumption tax purposes (JCT) from 1 October 2023. In many cases, taxpayers may not appreciate the full impact of this change on their systems and business processes. In addition, the efforts and time required for the implementation are often underestimated. It is important to be aware of the new rule-set, since non-compliance would negatively impact both the taxpayer as well as its business partners. For example, buyers could find themselves in a situation where they cannot credit input JCT on domestic purchases of goods and services, or they may face penalty taxes if they incorrectly claim an input JCT credit in their tax returns. Sellers could also damage their business relationship with their partners if they do not issue proper Qualified Invoices.

The implementation of the JCT Qualified Invoicing System and common practical issues to consider are summarized below.

Detailed discussion

Japanese consumption tax (JCT) is similar to the European Value Added Tax in many respects. It applies at 10% on domestic sales of goods and services as well as upon importation into Japan. A reduced 8% rate is applicable to certain food products and beverages. In addition, some transactions, such as export transactions, are exempt from JCT.

Japan is introducing a new invoicing system (Qualified Invoicing System) from 1 October 2023 that will closely follow VAT invoicing requirements and hence will have features that are largely absent from the current JCT legislation. In summary, the fundamental changes are: (i) JCT taxpayers should register with the Tax Office to get a registration number as Qualified Invoice Issuers; (ii) Such

Qualified Invoice Issuers need to issue Qualified Invoices to their business partners; and (iii) A buyer of products or services can only credit input consumption tax if the buyer receives a Qualified Invoice from a Qualified Invoice Issuer.

In our interaction with companies, we see cases where taxpayers believe that the only thing they need to do is to register as a Qualified Invoice Issuer to get a registration number and to start to issue Qualified Invoices by adding that number and making some other changes to the content and format. However, the introduction of the Qualified Invoice System goes beyond tax technical aspects and may require significant changes to companies' operational processes and IT systems on both their purchase and sales side.

Common issues

The following is a (non-exhaustive) list of questions frequently asked by taxpayers that want to prepare for the introduction of the new rules.

Issues for the sales side:

- ▶ How to change the current invoice format and who can implement the changes in the IT systems?
- ▶ What to do with transactions where no invoices will be issued but other transaction documents such as contracts are used for billing?
- ▶ How are amounts rounded for JCT purposes?
- ▶ What foreign exchange translation method should be used for JCT purposes?
- ▶ How are invoices for discounts and returns of goods treated?
- ▶ What needs to be done when a commissionaire is involved in the transaction?
- ▶ How is output JCT declared? Can it be based on invoices only or on accounting records still?
- ▶ How to meet the requirements for electronic retention of transaction documents?

Issues for the purchase side:

- ▶ How to handle purchases from JCT exempt sellers, particularly where part of a deemed JCT is still creditable as an interim measure from 1 October 2023 and beyond?
- ▶ How can it be confirmed whether the invoices are proper Qualified Invoices?
- ▶ How to confirm that the seller is a Qualified Invoice Issuer?
- ▶ How is input JCT declared? Can it be based on invoices only or on accounting records still?
- ▶ How to meet the requirements for electronic retention of transaction documents?

The scope of the questions show that the impact of Qualified Invoices is not limited to tax. Taxpayers also need to consider upgrades to their IT systems and must revise their internal procedures to address the above issues. Changes in IT systems can require time, especially in cases where the taxpayer uses a global IT system which needs to be amended to meet Japan-specific requirements for Qualified Invoices.

An approach towards implementation

As the above shows, the introduction of Qualified Invoices can become a complex matter, and taxpayers need to adopt a systematic and organized approach to this matter. As a first step, taxpayers should look at their current operations and systems (as-is) and conduct a Fit-Gap analysis. The second step would be to identify and to agree on what changes need to be made from an operational and IT systems perspective to be in line with the Qualified Invoicing System. The third step would be to implement these changes.

Potential next steps

Time is of the essence as there is less than one year remaining to implement the necessary changes. It is sometimes difficult to estimate how long it would actually take for an entity to be ready to issue Qualified Invoices. Generally speaking, our experience shows that the length of the process would largely

depend on the scale of the business, the volume of transaction types and complexity and number of IT systems at the taxpayer.

It is important to keep in mind that non-compliance with these new rules can cause issues for the taxpayer and its business partners as well. For example, the buyer cannot credit input JCT if it does not receive a proper Qualified Invoice. Taxpayers should start implementation of the Qualified Invoicing System as soon as possible if they have not done so yet.

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Important dates

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|------------------|--|
| 30 November 2022 | 6 th month revision of tax estimates for companies with May year-end |
| 30 November 2022 | 9 th month revision of tax estimates for companies with February year-end |
| 30 November 2022 | Statutory deadline for filing of 2022 tax returns for companies with April year-end. A blanket extension of time has been provided until 31 December 2022. |
| 30 November 2022 | Extended 2022 tax return filing deadline for companies with March year-end. |
| 15 December 2022 | Due date for monthly instalments |
| 31 December 2022 | 6 th month revision of tax estimates for companies with June year-end |
| 31 December 2022 | 9 th month revision of tax estimates for companies with March year-end |
| 31 December 2022 | Statutory deadline for filing of 2022 tax returns for companies with May year-end. A blanket extension of time has been provided until 31 January 2023. |
| 31 December 2022 | Extended 2022 tax return filing deadline for companies with April year-end. |

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