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Malaysian developments

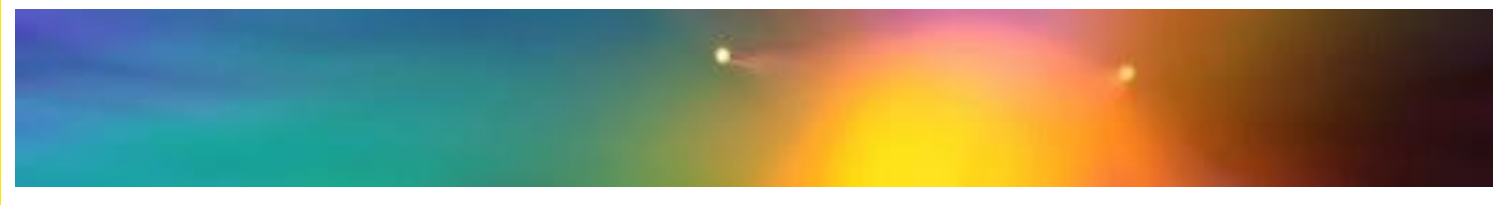
Deferment of withholding tax (WHT) form submissions and payments for recurring small-value WHT transactions

The Inland Revenue Board (IRB) has issued a letter dated 12 August 2022 to the Chartered Tax Institute of Malaysia stipulating that for ease of administration and to reduce compliance costs for taxpayers, effective August 2022, taxpayers may defer their submissions of WHT forms and payments for small-value WHT (defined below), subject to conditions.

The submission of WHT forms and remittance of WHT payments may be made once for every six-month period as outlined below:

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

Note: Whilst going-forward the deferred submissions for WHT would apply based on the schedule above, for the year 2022 the deferment will be effective from August 2022.



The deferment applies to WHT on royalty and interest (Section 109 of the Income Tax Act 1967 (ITA)), and special classes of income under Section 4A of the ITA (Section 109B of the ITA), on condition that the:

- ▶ Amount of the WHT does not exceed RM500 per transaction, and
- ▶ Taxpayer is aware that the relevant WHT payment will be made more than once within the stipulated period

The IRB will be issuing specific WHT forms for this purpose.

Amended guidelines on deductions for secretarial fees and tax filing fees

The IRB has published on its website amended guidelines dated 17 August 2022 on tax deductions for secretarial and tax filing fees. The guidelines are in Bahasa Malaysia and are titled “Pindaan Garis Panduan Potongan Bagi Perbelanjaan Berhubung Dengan Yuran Kesetiausahaan Dan Yuran Pemfailan Cukai Mulai Tahun Taksiran 2022” (Guidelines). The new 11-page Guidelines replace the earlier guidelines dated 11 May 2021 (see *Tax Alert No. 11/2021*).

The new Guidelines were amended mainly to reflect the legislative changes which came into effect from the year of assessment (YA) 2022 as outlined below.

Effective from YA 2020

The Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020 [P.U.(A) 162/2020] provide a deduction, capped at RM15,000 per YA, to a resident person who has incurred and paid certain secretarial and tax filing fees (as outlined in the Rules) in the basis period for that YA.

Effective from YA 2022

The Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) (Amendment) Rules 2021 [P.U.(A) 471/2021] provide that a deduction, capped at RM15,000 per YA, shall be given to a resident person who has incurred the secretarial and tax filing fees in the basis period for that YA (i.e., the requirement for the fees to have also been paid has been removed). That said, the requirements per P.U.(A) 162/2020 would remain in force for YAs 2020 and 2021.

The new Guidelines also provide examples to demonstrate the methodology to ascertain the total tax deduction for secretarial and tax filing fees for a particular YA based on the application of the above-mentioned Rules.

Further extension of time (EOT) for the submission of tax returns under the Labuan Business Activity Tax Act 1990 (LBATA) for the year of assessment (YA) 2022

The IRB's Labuan Branch has issued a letter dated 17 August 2022 to the Association of Labuan Trust Companies (ALTC) to confirm that Labuan entities will be granted an automatic further EOT until 31 October 2022 (previously 30 August 2022) to submit their tax returns (under Sections 5 and 10 of the LBATA) for YA 2022 (based on the financial year ended in 2021).

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

The IRB has published on its website the updated version of its FAQs document in relation to Section 107D of the ITA, 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 is dated 19 August 2022.

Some of the key changes are outlined below.

- ▶ The FAQs were updated mainly to reflect the IRB's media release dated 9 July 2022 announcing the following administrative requirements (see *Tax Alert No. 14/2022*):
 - Effective 1 July 2022, companies making payments to ADDs are required to compute the total WHT applicable for a specific month (i.e., on a monthly basis) and remit the accumulated amount to the IRB by the end of the following month. Examples have also been provided in the updated FAQs to demonstrate this.
 - Companies are required to submit the latest Form [CP107D - Pin 2/2022](#) and [Appendix CP107D\(2\)](#) to the relevant IRB payment centres, by e-mail, before remitting the WHT. A copy of the e-mail must be presented to the payment centre for verification and checking purposes when the WHT payment is made.

The e-mail addresses of the respective payment centres are as outlined below:

- Kuala Lumpur payment centre:

pbkl-cp107d@hasil.gov.my

- Kuching branch: pbkc-cp107d@hasil.gov.my
- Kota Kinabalu branch: pbkk-cp107d@hasil.gov.my

- ▶ There is no longer any restriction to the number of ADDs that can be listed in the [Appendix CP107D\(2\)](#) (it was previously capped at 20 recipients).
- ▶ The updated FAQs clarify that official receipts for the WHT payments will be issued to all payer companies. Previously, the FAQs stated that official receipts would be issued only if the payments were made at the IRB's payment centres (i.e., excluding payments made by post).

Overseas developments

Hong Kong delays the implementation of Organisation for Economic Co-operation and Development (OECD)'s Pillar Two rules

The Global Anti-Base Erosion (GloBE) Rules under Pillar Two of the OECD's Base Erosion and Profit Shifting (BEPS) 2.0 project seek to introduce a global minimum effective tax of 15% through the Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR).

In line with the delay of the implementation of the GloBE Rules in other jurisdictions, the Hong Kong Secretary for Financial Services and the Treasury (the SFST) has recently confirmed that Hong Kong will also delay the implementation of the IIR from the original OECD timeline of 2023 to 2024 at the earliest.

As for the implementation of the UTPR and by extension the domestic minimum top-up tax, the

SFST only indicated that he will continue to monitor the implementation targets of other jurisdictions as regards those measures without providing any specific timeline.

The SFST also indicated that the Government intends to launch a consultation exercise towards the end of 2022 so that the consultation exercise can benefit from the Implementation Framework for the GloBE Rules, which is scheduled to be released by the OECD later this year. The consultation exercise will then gauge the views of stakeholders on how best to translate the GloBE Rules into the domestic legislation and relevant requirements for the purposes of implementing the GloBE Rules in Hong Kong.

Deferral of the implementation timeline will provide more time for in-scope multinational enterprises to review their structures and assess the tax implications thereon, as well as to get prepared in terms of the process and system upgrades for the collation of relevant data for the complex tax reporting and compliance requirements under the GloBE Rules.

German Ministry of Finance issues official guidance on WHT for software development services

On 2 August 2022, the German Federal Ministry of Finance (MoF) issued guidance on the WHT treatment of remuneration paid to non-residents for software development services.

The WHT treatment of remuneration in connection with software purchases or software development - even after a basic classification of the payments was made by the MoF guidance dated 27 October 2017 - repeatedly gives rise to discussions between remuneration creditors and remuneration debtors regarding the obligation to withhold tax pursuant to Section 50a (1) No. 3 German *Income Tax Act* (ITA).

The discussions center around whether transactions should be viewed as a final transfer of a right or as a (temporary) license to use a right for a limited period of time, as only the latter gives rise to WHT under domestic law.

Detailed discussion

Whether a right can be viewed as being finally transferred critically depends on the underlying copyright provisions. Until a change in copyright law with effect from June 2021, certain specifics of the German copyright law caused significant uncertainty with respect to whether software development agreements could be viewed as finally transferring the rights in the developed software to the entity ordering the services as only in this case, remuneration would be outside the scope of German WHT.

The copyright provisions for computer programs have been amended as of 7 June 2021 in such a way that: (i) the author's right to subsequent remuneration; and (ii) the right of recall in the event of non-exercise no longer apply to computer programs. The MoF guidance now comments on the tax implications of these changes in the copyright law to software development services.

In the opinion of the MoF, an economic purchase of rights (which is not subject to WHT) should from the date of the law change in principle be possible - even if the copyright still cannot be legally transferred. The MoF explains this with the fact that since the amendment of the Copyright Law, it is possible in principle to transfer the legal position in computer programs in such a way that no further economic position remains with the author. However, it depends decisively on the details of the contractual provisions as to whether they provide for the granting of comprehensive, exclusive and irrevocable rights of use and exploitation to the computer program for an unlimited period of time.

According to the MoF, the following factors would indicate that there was not a final transfer of rights:

- ▶ The author/developer (or another person or company) has been granted a right to a further (financial) participation.
- ▶ The author/developer (or another person or company) is granted the right to another exploitation of the work.
- ▶ The transfer is limited in time. Such a limitation may also exist if it arises only as a result of the occurrence of further conditions.
- ▶ The author/developer (or other person or company) has the right to revoke the transfer. It is irrelevant whether these exist only in specific (previously defined) individual cases, since in that case the economic rights of use are generally not transferred comprehensively.
- ▶ Certain areas of the rights of use and exploitation are retained by the author (or other persons or companies). This criterion is met if the exercise of certain rights of use/exploitation is made dependent on the consent of the author (or other persons or companies).

For the assessment of the criteria, it is irrelevant whether those rights of the author/developer arise from the contract itself or from the law of another country applicable in the specific individual case.

The MoF also comments on multi-level contractual relationships (e.g., back-to-back transactions) and clarifies that it must be examined at each level whether an economic purchase of rights or a licensing is given. If a licensing is given at one level, an economic purchase of rights is ruled out for all subsequent levels in the view of the MoF, even if the party assigns all rights that it has received itself. The principles of the guidance apply to all payments made after 6 June 2021. The MoF does not explicitly comment on the tax treatment of payments prior to that date. However, the comments in the Tax Authority's guidance suggest that the tax authorities would view these payments as subject to WHT.

Implications

It is a positive development that the MoF has addressed this highly relevant question, which is often a source of conflict in practice, and thus provides taxpayers with the criteria for classifying existing contracts and aligning future contracts accordingly. However, the (still) strict interpretation of the requirements for the economic purchase of rights by the MoF means that - where strict criteria for such purchase are not met - compliance means increased administrative work and potentially lengthy discussions with the remuneration creditors for taxpayers in double tax treaty situations (which often provide for a reduction of the WHT to zero anyway), as such a strict standard is not known in many other countries and the procedure for obtaining an exemption certificate with the Federal Central Tax Office often leads to long delays.

Non-resident service providers offering software development services to German customers should be aware of the criteria set forth by the MoF and should consider aligning their contractual terms with these requirements to ensure that their services do not trigger WHT in Germany. If it is not possible to adapt the contractual terms for business reasons, a WHT exemption certificate should be applied for from the German Federal Tax Office as early in the project as possible, as the average processing time for applications is currently around 6 to 12 months and customers would need to withhold 15.8% WHT on payments made in absence of such certificate.

Contact details

Principal Tax

Yeo Eng Ping (EY Asia-Pacific Tax Leader)

eng-ping.yeo@my.ey.com

+603 7495 8288

Amarjeet Singh (EY Asean Tax Leader)

amarjeet.singh@my.ey.com

+603 7495 8383

Farah Rosley (Malaysia Tax Leader and Malaysia Global Compliance and Reporting Leader)

farah.rosley@my.ey.com

+603 7495 8254

People Advisory Services

Tan Lay Keng (EY Asia-Pacific People Advisory Services Leader)

lay-keng.tan@my.ey.com

+603 7495 8283

Christopher Lim (EY Asean Immigration Leader and Malaysia People Advisory Services Leader)

christopher.lim@my.ey.com

+603 7495 8378

Irene Ang

irene.ang@my.ey.com

+603 7495 8306

Business Tax Services

Robert Yoon (EY Asia-Pacific Fixed Assets Services Leader)

(based in Johor)

robert.yoon@my.ey.com

+603 7495 8332

Wong Chow Yang

chow-yang.wong@my.ey.com

+603 7495 8349

Bernard Yap

bernard.yap@my.ey.com

+603 7495 8291

Chan Vai Fong

vai-fong.chan@my.ey.com

+603 7495 8317

Chua Siong Chee

siong-chee.chua@my.ey.com

+603 7495 8410

Global Compliance and Reporting

Julian Wong (EY Asean Global Compliance and Reporting Leader and EY Asean Managed Services Leader)

julian.wong@my.ey.com

+603 7495 8347

Farah Rosley (Malaysia Tax Leader and Malaysia Global Compliance and Reporting Leader)

farah.rosley@my.ey.com

+603 7495 8254

Janice Wong (EY Asean Japan Business Services (JBS) Tax Leader)

janice.wong@my.ey.com

+603 7495 8223

Asaithamby Perumal

asaithamby.perumal@my.ey.com

+603 7495 8248

Julie Thong

julie.thong@my.ey.com

+603 7495 8415

Liew Ai Leng

ai-leng.liew@my.ey.com

+603 7495 8308

Linda Kuang

(based in Kuching)

linda.kuang@my.ey.com

+6082 752 660

Mark Liow

(based in Penang)

mark.liow@my.ey.com

+604 688 1899

Jaclyn Tan (Payroll Operate Services)

jaclyn.tan@my.ey.com

+603 7495 8404

Contact details

International Tax and Transaction Services

Yeo Eng Ping

eng-ping.yeo@my.ey.com
+603 7495 8288

Amarjeet Singh

amarjeet.singh@my.ey.com
+603 7495 8383

Sockalingam Murugesan (EY Asean Transfer Pricing Leader and Malaysia Transfer Pricing Leader)

sockalingam.murugesan@my.ey.com
+603 7495 8224

Anil Kumar Puri

anil-kumar.puri@my.ey.com
+603 7495 8413

Andrew Loh

andrew.loh@my.ey.com
+603 7495 8313

Chua Meng Hui

(based in Kota Kinabalu)
meng-hui.chua@my.ey.com
+603 7495 8261

Sharon Yong

sharon.yong@my.ey.com
+603 7495 8478

Derek Chan

derek.chan@my.ey.com
+603 7495 8336

Florence Tan

florence.tan@my.ey.com
+603 7495 8585

Shalini R Chandrarajah

shalini.chandrarajah@my.ey.com
+603 7495 8281

International Tax and Transaction Services (cont'd)

Gary Ling (Transfer Pricing)

gary.ling@my.ey.com
+603 7495 8388

Hisham Halim (Transfer Pricing)

hisham.halim@my.ey.com
+603 7495 8536

Vinay Nichani (Transfer Pricing)

vinay.nichani@my.ey.com
+603 7495 8433

Indirect Tax

Yeoh Cheng Guan

cheng-guan.yeoh@my.ey.com
+603 7495 8408

Aaron Bromley

aaron.bromley@my.ey.com
+603 7495 8314

Jalbir Singh Riar

jalbir.singh-riar@my.ey.com
+603 7495 8329

Financial Services

Koh Leh Kien

leh-kien.koh@my.ey.com
+603 7495 8221

Bernard Yap

bernard.yap@my.ey.com
+603 7495 8291

Gary Ling (Transfer Pricing)

gary.ling@my.ey.com
+603 7495 8388

Important dates

31 August 2022	6 th month revision of tax estimates for companies with February year-end
31 August 2022	9 th month revision of tax estimates for companies with November year-end
31 August 2022	Special 11 th month revision of tax estimates for YA 2022, for companies with September 2022 year-end
31 August 2022	Statutory deadline for filing of 2022 tax returns for companies with January year-end. A blanket extension of time has been provided until 30 September 2022.
31 August 2022	Extended 2021 tax return filing deadline for companies with December year-end.
15 September 2022	Due date for monthly instalments
30 September 2022	6 th month revision of tax estimates for companies with March year-end
30 September 2022	9 th month revision of tax estimates for companies with December year-end
30 September 2022	Special 11 th month revision of tax estimates for YA 2022, for companies with October 2022 year-end
30 September 2022	Statutory deadline for filing of 2022 tax returns for companies with February year-end. A blanket extension of time has been provided until 31 October 2022.
30 September 2022	Extended 2022 tax return filing deadline for companies with January year-end.

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Publisher:

Ernst & Young Tax Consultants Sdn. Bhd.
Level 23A Menara Milenium
Jalan Damanlela, Pusat Bandar Damansara
50490 Kuala Lumpur
Tel: +603 7495 8000
Fax: +603 2095 7043