Building a better working world

EY Tax Alert

Vol. 24 – Issue no. 14
13 July 2021

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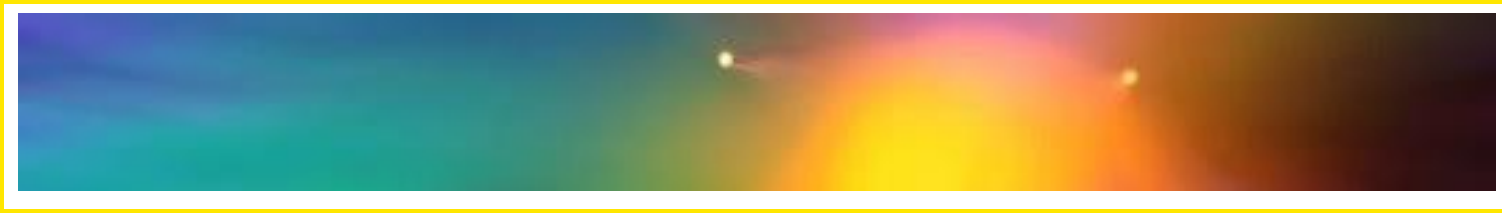
Malaysian developments

Guidelines on incentive for intellectual property (IP) development

In Budget 2020, the Government proposed that qualifying intellectual property (IP)-generated income derived from the development of patents and copyright software be given 100% income tax exemption for a period of up to 10 years (see *Special Tax Alert: Highlights of Budget 2020*). The income which qualifies for the exemption will be calculated based on the Modified Nexus Approach (MNA). This is an Organisation for Economic Co-operation and Development (OECD)-compliant incentive, where the actual research and development (R&D) activities leading to the development, improvement, modification or creation of the qualifying IP asset would generally need to be undertaken in Malaysia in order to benefit from the incentive.

Following the above proposal, the Malaysian Investment Development Authority (MIDA) has recently issued the Guidelines on Incentive for Intellectual Property (IP) Development, dated 1 January 2020.



The Guidelines stipulate that 100% income tax exemption will be given on qualifying IP income for a period of up to 10 years. The exemption will only apply to income derived from IP developed in Malaysia, subject to the Gazette Order on MNA[Note].

Note:
The Gazette Order has yet to be released.

The Guidelines explain who would qualify for the incentive, the types of qualifying IP asset, the types of qualifying IP income, the criteria to qualify for the incentive, what constitutes qualifying R&D expenditure, the determination of the exemption period, situations where the incentive will be withdrawn and the application procedure.

Some of the key points are outlined below.

- The incentive will apply to new or existing companies that own the rights of the qualifying IPs and receive income from the qualifying IP activities related to the promoted activities prescribed under the Promotion of Investments Act 1986 (PIA) and Income Tax Act 1967 (ITA). Companies enjoying incentives under Sections 34A or 34B of the ITA will not be eligible for this incentive.

- The types of qualifying IP income are royalties and licensing fees.

- To qualify for the incentive:
  - The company must be a Malaysian-resident company incorporated under the Companies Act 2016.
  - The company must be conducting R&D activities in Malaysia which lead to the development, improvement, modification or creation of the qualifying IP asset (as defined).
  - The IP must be registered or filed with the Intellectual Property Corporation of Malaysia (MyIPO) or an equivalent body outside of Malaysia.
  - The company must have at least 30% science and technical staff having degree or diploma with a minimum 5 years experience from related fields
  - The company must incur an adequate amount of annual operating expenditure in Malaysia.

- The qualifying R&D expenditure is as follows:
  - The eligible R&D expenditure for the purpose of MNA calculation will be in line with the types of eligible expenditure under Section 34A of the ITA.
  - This includes expenditure under cost-sharing agreements, on condition that the R&D cost is clearly stated in the agreement.
  - Qualifying expenditure can backdated up to three years from the date the IP is filed with MyIPO or an equivalent body outside of Malaysia.

- The incentive will apply to applications received by MIDA between 1 January 2020 and 31 December 2022. Three sets of the application are to be submitted to:

  Chief Executive Officer
  Malaysian Investment Development Authority (MIDA)
  MIDA Sentral
  No. 5, Jalan Stesen Sentral 5
  Kuala Lumpur Sentral
  50470 Kuala Lumpur
  (Attention: Advanced Technology and Research & Development Division (ATRD) Division)

The Guidelines are available on the MIDA website [Forms & Guidelines - MIDA | Malaysian Investment Development Authority → Services Sector → B) Research and Development (R&D) and Intellectual Property (IP)]

Updated guidelines on dispute resolution proceeding (DRP)

The Inland Revenue Board (IRB) has recently published on its website the Guidelines on Dispute Resolution Proceeding (DRP) (DRP Guidelines) dated 15 June 2021. The new eight-page DRP Guidelines replace the earlier DRP Guidelines issued in March 2019 (see *Tax Alert No. 8/2019*).

The new DRP Guidelines are broadly similar to the earlier guidelines, and are issued to:

- Provide information regarding DRP as a mechanism to resolve disputes arising from an appeal or application for relief filed by a taxpayer
- Promote awareness of a taxpayer's rights and responsibilities in relation to the DRP

The DRP Guidelines were updated mainly to additionally include the following categories of appeal and/or application for relief which would also fall within the purview of a DRP:

(a) Appeal

(i) Section 44A(9)(b) of the ITA – appeal against penalties imposed on a surrendering company in the case of a group relief

(ii) Section 68(3) of the ITA – appeal against one's appointment as an agent

(iii) Section 111(1) of the ITA – appeal for a refund of overpayment due to the dissatisfaction of amount refunded

(b) Application for relief

(i) Section 97A(5) of the ITA – relief for non-chargeability cases

(ii) Section 66A of the Petroleum (Income Tax) Act 1967 – relief other than in respect of error or mistake

Updated FAQs on the Deferment of Payment of Estimated Tax Payable (CP204) and Instalment Scheme (CP500) from 1 April 2021 to 31 December 2021

The IRB has published on its website an updated version of the document titled "Frequently Asked Questions on Deferment of Payment of Estimated Tax Payable (CP204) and Instalment Scheme (CP500) from 1 April 2021 to 31 December 2021 under 'Program Strategik Memperkasa Rakyat Dan Ekonomi' (PEMERKASA)'" (FAQs on the Deferment of Payments). The updated document is dated 28 June 2021.

The earlier FAQs on the Deferment of Payments stipulated that the deferment of CP204 and CP500 instalment payments would apply to taxpayers carrying on business activities in the tourism, cinema and spa industries, based on specific business codes outlined in Point 3 of the said FAQs (see *Tax Alert No. 12/2021*).

The FAQs on the Deferment of Payments have now been updated to stipulate that taxpayers who do not fall under the specific business codes, but whose businesses are affected, may also apply for the deferment of instalment payments by providing supporting documents. The applications are to be submitted to the following:

(a) For CP204 instalment payments due between April 2021 and 31 December 2021
- cp204pemerkasa@hasil.gov.my

(b) For CP500 instalment payments due in May, July, September and November 2021
- cp500pemerkasa@hasil.gov.my, or
- IRB branch which handles the file

The applications will be considered based on the merits of the case.

The FAQs are available at the following link: Frequently Asked Questions on Deferment of Payment of Estimated Tax Payable (CP204) and Instalment Scheme (CP500) from 1 April 2021 to 31 December 2021 under 'Program Strategik Memperkasa Rakyat Dan Ekonomi' (PEMERKASA)

Extension of tax exemption for management fee income for *Shariah*-compliant funds

In Budget 2020, the Government proposed to extend the tax exemption for fund management companies managing *Shariah*-compliant funds for another three years (i.e. until YA 2023) (see *Special Tax Alert: Highlights of Budget 2020*).

To legislate this, the following Exemption Orders were gazetted on 29 June 2021 and are effective from YA 2021 to YA 2023:

- Income Tax (Exemption) (No. 6) Order 2021 [P.U.(A) 282]
- Income Tax (Exemption) (No. 7) Order 2021 [P.U.(A) 283]
- Income Tax (Exemption) (No. 6) Order 2021 [P.U.(A) 284]

The Exemption Orders will apply to a company which:

(a) Is incorporated under the Companies Act 2016
(b) Is a Malaysian-resident
(c) Holds a Capital Markets Services Licence under the Capital Markets and Services Act 2007 (CMSA) and carries on a business of providing fund management services to certain categories of recipients (further details outlined below)

The Orders stipulate that the exemption granted does not absolve the company from any requirement to submit any return, statement of accounts or any other information as required under the ITA. The company is also required to maintain a separate account for the income exempted under the Orders. The exempted income is to be treated as a separate and distinct source of business income.

Income Tax (Exemption) (No. 6) Order 2021

The Order provides that a company is exempted from tax on the statutory income derived from the business of providing fund management services to business trusts or real estate investment trusts (REIT) in Malaysia.

The exemption is on condition that the company obtains an annual certification from the Securities Commission Malaysia (SC) that the following conditions have been fulfilled:

(a) The company provides fund management services to business trusts or REITs in Malaysia in accordance with *Shariah* principles.
(b) The company has at least two full-time employees in Malaysia, with one of the employees holding a Capital Markets Services Representative Licence under the CMSA.
(c) The company incurs an annual operating expenditure of at least RM250,000 in Malaysia.

Income Tax (Exemption) (No. 7) Order 2021

The Order provides that a company is exempted from tax on the statutory income derived from the business of providing fund management services to local investors in Malaysia.

"Local investors" are defined in the Order to mean:

(a) Individuals who are citizens of Malaysia and resident in Malaysia
(b) Companies where the entire issued share capital is beneficially owned (directly or indirectly) by any person who is a citizen of Malaysia and resident in Malaysia

(c) A trust fund where the entire interest in the fund is beneficially held (directly or indirectly) by any person who is a citizen of Malaysia and resident in Malaysia. In this case, the trust fund refers to a fund that is created in Malaysia, with trustees who are citizens of Malaysia and residents in Malaysia.

The exemption is provided on condition that the company obtains an annual certification from the SC that the following conditions have been fulfilled:

(a) The company provides fund management services to local investors in Malaysia in accordance with *Shariah* principles.
(b) The company has at least two full-time employees in Malaysia, with one of the employees holding a Capital Markets Services Representative Licence under the CMSA.
(c) The company incurs an annual operating expenditure of at least RM250,000 in Malaysia.

The Order provides that Paragraphs 5 and 6 of Schedule 7A of the ITA will apply to the amount of exempted statutory income. The Order also stipulates that Section 60G of the ITA will not apply to the statutory income exempted under this Order.

Income Tax (Exemption) (No. 8) Order 2021

The Order provides that a company is exempted from tax on the statutory income derived from the business of providing fund management services to foreign investors in Malaysia.

"Foreign investors" are defined in the Order to mean:

(a) Individuals who are not residents in Malaysia or not citizens of Malaysia
(b) Companies where the entire issued share capital is beneficially owned (directly or indirectly) by any person who is not a citizen of Malaysia and not a resident in Malaysia
(c) A trust fund where the entire interest in the fund is beneficially held (directly or indirectly) by foreign investors, where the trustees of the fund are not residents in Malaysia and not citizens of Malaysia. In this case, it does not matter where the trust fund is created (i.e. whether in or outside Malaysia).

The exemption is provided on condition that the company obtains an annual certification from the SC that the following conditions have been fulfilled:

(a) The company provides fund management services to foreign investors in Malaysia in accordance with *Shariah* principles.
(b) The company has at least two full-time employees in Malaysia, with one of the employees holding a Capital Markets Services Representative Licence under the CMSA.
(c) The company incurs an annual operating expenditure of at least RM250,000 in Malaysia.

The Order provides that Paragraphs 5 and 6 of Schedule 7A of the ITA will apply to the amount of exempted statutory income. The Order also stipulates that Section 60G of the ITA will not apply to the statutory income exempted under this Order.

Updated guidelines on the application for a tax clearance letter (TCL) for a company, limited liability partnership (LLP) and Labuan entities

The IRB recently published on its website Operational Guidelines No. 3/2021 in Bahasa Malaysia, titled 'Permohonan Surat Penyelesaian Cukai Bagi Syarikat, Perkongsian Liabiliti Terhad Dan Entiti Labuan' (Operational Guidelines). The Operational Guidelines are dated 30 June 2021 and replace Operational Guidelines No. 2/2019 dated 12 November 2019 (see *Tax Alert No. 21/2019*).

Similar to the earlier guidelines, the new Operational Guidelines explain the procedures for the application of tax clearance letters (TCLs) and provide guidance

on the documents which need to be submitted together with the application, for companies, limited liability partnerships (LLPs) and Labuan entities.

The key changes are outlined below:

- The new Operational Guidelines stipulate that in line with the IRB Client Charter, TCLs will be issued within 14 working days from the date the relevant application forms (together with complete documents and information) are received, subject to conditions. A flowchart has also been included in the new Operational Guidelines to demonstrate the process that will take place in the 14-day period.
- The new Operational Guidelines have been updated to reflect the legislative change to Section 77A(1A) of the ITA with effect from YA 2021, where the Form PT for LLPs is to be furnished to the IRB in an electronic medium or by way of electronic transmission only.
- The new Operational Guidelines stipulate that TCLs will only be issued after the completion of audits. This was not stipulated in the earlier guidelines.
- The application forms as well as the documents which will need to be submitted together in the application for a TCL (outlined in the Appendices of the new Operational Guidelines) have been updated.

Accelerated capital allowance (ACA) for the purchase of new locally assembled excursion buses

In Budget 2020, it was proposed that accelerated capital allowance (ACA), made up of 20% initial allowance and 40% annual allowance, be given on expenditure incurred for the purchase of new locally assembled excursion buses (see *Special Tax Alert: Highlights of Budget 2020*).

To legislate the above, the Income Tax (Accelerated Capital Allowance) (Excursion Bus) Rules 2021 [P.U.(A) 291] were gazetted on 1 July 2021. The Rules provide that a licensed tour operator will be given ACA (20% initial allowance and 40% annual allowance) in respect of capital expenditure incurred on the purchase of excursion buses.

To qualify for the ACA:

(a) The licensed tour operator must:
   - Be a Malaysian-resident
   - Have incurred capital expenditure for the purchase of a new excursion bus (i.e. must be the first registered owner) in the basis period for a year of assessment (YA) for his tour operations business
   - Be a holder of a tourism vehicle licence issued under the Land Public Transport Act 2010 (LPTA) or Tourism Vehicles Licensing Act 1999 (TVLA)

(b) The excursion bus purchased by the licensed tour operator:
   - Shall be used exclusively for the conveyance of tourists pursuant to the LPTA or TVLA
   - Shall be assembled or constructed in Malaysia pursuant to the Motor Vehicles (Registration and Licensing) Rules 1959
   - Cannot be a reconditioned excursion bus

The Rules also provide where the licensed tour operator incurs capital expenditure under a hire purchase agreement for the purchase of an excursion bus for the purpose of his business:

(a) The person shall be treated as the owner of the excursion bus.
(b) The capital expenditure incurred in the basis period for a YA shall be taken to be the capital portion of any instalment payments made in the basis period.

The non-application provisos stipulate that the Rules will not apply to a licensed tour operator where

during the basis period, the licensed tour operator is eligible and has claimed in respect of the purchase of the excursion bus any of the following:

- Investment tax allowance under the Promotion of Investments Act 1986
- Reinvestment allowance under Schedule 7A of the ITA
- Investment allowance for service sector under Schedule 7B of the ITA
- ACA under any Rules made under Section 154 of the ITA
- Tax exemption under any Order made under Section 127(3)(b) or Section 127(3A) or the ITA in respect of his statutory income which is equivalent to any part or the whole amount of the qualifying capital expenditure incurred

The Rules are effective from YA 2020 until YA 2021.

Updated FAQs on Tax Matters during the National Recovery Plan period

The IRB has published on its website the updated version of the document titled "Frequently Asked Questions on Tax Matters during the National Recovery Plan" (FAQs). The latest document is dated 4 July 2021.

Some of the key changes are as follows:

(a) The updated FAQs clarify that the concessions that applied during the MCO 3.0 period, will now apply within phase one of the National Recovery Plan (NRP) period too.

(b) The FAQs have been updated to reflect the IRB services that are available to taxpayers during phase one of the NRP period.

(c) The updated FAQs clarify that although no extension of time (EOT) is given for withholding tax (WHT) payments, payments can be made via interbank GIRO (IBG) transfer or electronic fund transfer (EFT), in addition to the option of telegraphic transfer as stipulated in the earlier FAQs.

(d) A further EOT until 31 August 2021 (previously 31 July 2021) has been given for the submission of real property gains tax (RPGT) return forms which are due within phase one of the NRP period. In addition, this EOT will now also apply to payments of retention sum by acquirers under Section 21B of the RPGT Act 1976.

(e) A 30-day EOT will be given from the last day the stamping and/or payment of stamp duty for an instrument is due, where the due date falls within phase one of the NRP period. For other cases, appeals will be considered based on the merits of each case.

The FAQs are available at the following link: Frequently Asked Questions on Tax Matters during the National Recovery Plan

Overseas developments

Australian Taxation Office issues draft tax ruling expanding scope of royalty withholding tax on software-related payments

The Australian Taxation Office (ATO) has released 'Draft Taxation Ruling TR2021/D4 – Income tax: royalties – character of receipts in respect of software'. The draft ruling is open for public comment and consultation until 23 July 2021 ahead of issuance of a final ruling. The ATO has stated that the final ruling is proposed to apply both before and after its date of issue.

The draft ruling specifically applies to computer software re-sellers and distribution arrangements.

However, the principles conveyed could also be relevant and indicate the likely ATO approach to broader intellectual property transactions, particularly where intermediaries are involved in data streaming and digital media distribution. The long-running ruling *TR93/12 – Income Tax: computer software* was withdrawn effective 25 June 2021. This is a positive development, as it was written in 1993 when the sale of shrink-wrapped software was the prevailing business model.

The controversial aspect of the draft ruling is the potential imposition of Australian royalty withholding tax (RWT) on software re-sellers or distribution agreements for licensing, subscriptions and cloud-based software-as-a-service (SaaS) arrangements. The ATO is seeking to expand the scope of RWT by connecting untested links between the *Copyright Act* and RWT rules. If finalized in its current form, the draft ruling will not be aligned with other developed economies regarding the characterization of software-related payments. However, it may become another example of Australia leading the way for other countries to follow.

The ATO does recognize in the draft ruling that there can be software distribution agreements that do not confer copyright-related rights and therefore would not be expected to attract RWT. However, the only example provided is narrowly expressed as relating to the re-sale of packaged software, notwithstanding that a major reason for issuing the updated ruling is to address new business models such as digital supplies of subscription licenses and cloud-based SaaS. The draft ruling therefore gives extensive guidance on when RWT can apply and very limited guidance on when it would not apply.

Imposing RWT on re-seller arrangements seems punitive as the ATO has encouraged inbound technology groups to restructure into buy/sell business models in response to the Multinational Anti-avoidance Law (MAAL). The draft ruling appears to conclude that the mere existence of a sub-license arrangement between a commercial distributor and customer is sufficient to treat all or part of the master license payment or distribution fee as royalty.

Taxpayers who have responded to the ATO restructure program (in response to the MAAL) and moved to a buy/sell structure may now be at a competitive disadvantage of being exposed to higher levels of tax risk and uncertainty, with outbound transactions potentially subject to Australia's diverted profits tax as well as the broad scope of anti-hybrid rules and now, as proposed in this draft ruling, an expanded scope of RWT – in addition to normal transfer pricing rules.

In contrast, taxpayers who have not re-organized and have retained compliant inbound sales support structures may now be in a better position than those with a buy-sell structure.

The draft ruling is focused on the Section 6(1) definition of "royalties" under Australian domestic tax law. It is silent in respect of Australia's Double Tax Agreements (DTAs) where the royalty definition may differ from the domestic law definition. Further, the ATO's position as demonstrated by this ruling may add challenges to concluding some bilateral Advance Pricing Agreements (APAs) in the future.

The ATO indicates in Paragraph 39 of the draft ruling that it intends to apply the new ruling both retrospectively and prospectively. This may be a significant tax risk issue for some taxpayers where the ruling is an expansion of the scope of the previously understood royalty definition. The draft ruling could also call into question the ability to claim a foreign tax credit in a licensor country if the ATO definition is not acceptable or consistent with the DTA.

Given the developments in the technology sector since 1993, it is time for the ATO to refresh its stated view on RWT and software-related payments. However, this draft ruling will likely be challenging for taxpayers.

While the draft ruling is open for public comment and may be modified by the ATO as a result of this consultation process, taxpayers should assume that the ruling will be finalized as currently drafted. Accordingly, taxpayers should take action and consider the following in reviewing their tax position and updating defense files:

- A tax ruling is not law. It is the ATO's position on how it will apply the law to stated facts and how it would like the untested law to operate in certain circumstances. It is, however, published ATO guidance and as such, is directly relevant to taxpayer penalty exposures for income tax return positions and disclosures, as well as financial statement reporting.
- Taxpayers will need to understand whether the tax profile of their business operating model in the Australian market and prior year positions will be materially impacted.
- Inbound technology groups could be adversely affected by potential new RWT costs imposed on distribution fees or re-seller fees.
- Taxpayers will need to review terms of end-user license agreements and terms of use agreements as well as distribution agreements for potential RWT exposures. They will also need to determine whether the agreements provide legal and commercial flexibility to alter contractual arrangements or pass on any additional costs.
- Taxpayers may also need to consider commercial terms of third-party re-seller agreements where they deal with channel partners to see if any added tax cost can be and should be passed on - this will require consideration from a legal and commercial perspective.
- Taxpayers may need to review the terms of APAs to determine whether any additional RWT costs may trigger rights to re-open those agreements. The ATO has stated in Paragraph 39 that the new ruling will not apply to settlements of past disputes. There appears to be no policy reason why APAs that did not arise out of any dispute with the ATO should not be similarly grandfathered.

China announces new Stamp Duty Law

The Stamp Duty (SD) Law of the People's Republic of China (the SD Law) was officially announced by the Standing Committee of the 13th National People's Congress (NPC) on 10 June 2021.

The SD Law will become effective on 1 July 2022 and will replace the prevailing SD Provisional Regulations. The SD Law contains 20 articles which cover the definition of taxpayers, taxable scope, SD rates, tax basis and preferential SD treatment. There are no fundamental changes made to the current SD system.

Some of the notable provisions are summarized below.

SD rate on the transfer of trademarks, copyrights, patents and know-how

The SD rate on instruments for the transfer of trademarks, copyrights, patents and know-how will be reduced from 0.5% to 0.3%. This is an incentive to support and boost innovation activities of enterprises.

Preferential SD treatment on accounting records

The preferential SD rate of 0.025% (which was reduced from 0.05%) on paid-in capital and capital reserves recorded in the accounting books of an enterprise was originally promulgated in Caishui [2018] No. 50 ("Circular 50", i.e., SD reduction and exemption on accounting records). Circular 50 also provides a SD exemption on dutiable accounting books. These preferential treatments have been adopted in the SD Law.

Value-added tax (VAT)

Pursuant to Article 5 of the SD Law, the dutiable amount of a taxable contract or instrument will

exclude any VAT amount specified in such contract or instrument.

One potential issue is if the VAT amount is not specified in the taxable documents, the entire amount in the contract or instrument may be subject to SD without any deduction of VAT. To mitigate any controversy between taxpayers and tax authorities, it is important that taxpayers segregate the contract price and VAT amount in the taxable contract or instrument.

SD exemption for electronic orders between e-commerce businesses and individual buyers

Electronic orders between e-commerce businesses and individual buyers will not be dutiable transactions under the SD Law. In other words, for electronic orders between e-commerce businesses and individual buyers, both the seller and buyer are exempt from SD, while orders between e-commerce businesses and other buyers (e.g., entities, enterprises, etc.) will still be subject to SD.

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Important dates

15 July 2021	Due date for monthly instalments
31 July 2021	6th month revision of tax estimates for companies with January year-end
31 July 2021	9th month revision of tax estimates for companies with October year-end
31 July 2021	Statutory deadline for filing of 2020 tax returns for companies with December year-end. As a concession, this deadline is extended to 30 September 2021 pursuant to the RF Filing Programme (Amendment 3/2021).
15 August 2021	Due date for monthly instalments
31 August 2021	6th month revision of tax estimates for companies with February year-end
31 August 2021	9th month revision of tax estimates for companies with November year-end
31 August 2021	Statutory deadline for filing of 2021 tax returns for companies with January year-end. As a concession, this deadline is extended to 31 October 2021 pursuant to the RF Filing Programme (Amendment 3/2021).

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