Building a better working world

EY Tax Alert

Vol. 24 – Issue no. 21
18 October 2021

Malaysian developments

Flexible Work Arrangement (FWA) incentives

Under the Short-term Economic Recovery Plan (PENJANA) announced on 5 June 2020, to encourage work-from-home arrangements, the Government proposed certain flexible work arrangement (FWA) incentives. One of the incentives proposed was a double deduction to be given to employers that implement FWAs, effective 1 July 2020 (see *Take 5: COVID-19: Short-term Economic Recovery Plan*).

To legislate the above, the Income Tax (Deduction for the Cost of Implementation of Flexible Work Arrangements) Rules 2021 [P.U.(A) 377] were gazetted on 4 October 2021.

The Rules provide that in ascertaining a qualifying person's adjusted income from his business for a year of assessment (YA), a double deduction shall be given for expenses incurred by the person for that YA for the implementation of FWAs. A double deduction is given for the following expenses:

(a) Consultation fees
(b) Cost of capacity development (defined below)
(c) Cost of software
(d) Software subscriptions

The implementation or enhancement of existing FWAs by the qualifying person will need to be certified by Talent Corporation Malaysia Berhad (TalentCorp). Applications must be received by TalentCorp between 1 July 2020 and 31 December 2022.

The total amount of expenses referred to in (a) to (d) above is capped at RM500,000 for each YA, and will need to be verified by TalentCorp. The deduction is given for a period of three consecutive YAs, commencing from the YA in which the certification of the implementation of FWA is given by TalentCorp.

The following terms have been defined in the Rules:

(i) Qualifying person

A Malaysian-resident, which is a:

(a) Company incorporated under the Companies Act 2016
(b) Limited liability partnership registered under the Limited Liability Partnerships Act 2012, or
(c) Partnership registered under the Partnership Act 1961

(ii) FWA

Flexible arrangements for:

(a) Place of work
(b) Scheduling of working hours, or
(c) Number of hours worked

(iii) Cost of capacity development

(a) Training courses or programme fees
(b) Internal trainer fees
(c) Cost of training materials
(d) Rental of training space
(e) Examination fees, and
(f) Training-related travelling expenses incurred by the trainers and employees as follows:
   i. Transportation:
      a. Travels from Malaysia to outside Malaysia, and vice versa
         - Amount equal to economic class air fare
      b. Travels within Malaysia
         - Air transport: Amount equal to economic class air fare
         - Land or water transfer: Actual cost
   ii. Accommodation: Capped at RM300 per day
   iii. Meals: Capped at RM150 per day

The Rules stipulate that in a situation where the expenses which would have been allowed as a deduction under these Rules exceed the amount which, in the opinion of the Director General (DG), would reasonably be expected to have been incurred in the ordinary course of business, the DG may disallow a deduction on the excess under these Rules. The Rules also provide that no claim shall be made under Section 33 and Schedule 3 of the Income Tax Act 1967 (ITA), or any rules made under Section 154 of the ITA, for the same expenditure, where a deduction has been claimed under these Rules.

The Rules are deemed to be effective from YA 2020.

Stamp duty exemptions for the Targeted Relief and Recovery Facility (TRRF)

In Budget 2021, the Targeted Relief and Recovery Facility (TRRF) was introduced to provide relief and support for the recovery of small and medium enterprises (SMEs) in the services sector, which have been affected by the reintroduction of containment measures due to COVID-19 since June 2020. The TRRF is a financing facility established by Bank Negara Malaysia (BNM).

Following the above, the two Exemption Orders outlined below were gazetted on 8 October 2021 and are deemed to have come into operation on 1 December 2020.

Stamp Duty (Exemption) (No. 12) Order 2021 [P.U.(A) 385]

The Order provides a stamp duty exemption on the instrument of loan or financing agreement for the TRRF approved under BNM's Fund for SMEs, executed between a participating financial institution (FI) and an SME. The list of participating FIs is outlined in the Order.

The exemption:

- Applies to the instrument of loan or financing agreement executed pursuant to a letter of offer issued between 1 December 2020 and 31 December 2021, and
- Is subject to the condition that the instrument of loan or financing agreement is accompanied by a letter of offer from the participating FI to the SME stipulating the approval of the loan or financing facility.

For the purpose of this Order, the term "SME" is as defined in Section 2 of the Small and Medium Industries Development Corporation Act 1995.

Stamp Duty (Exemption) (No. 13) Order 2021 [P.U.(A) 386]

The Order provides a stamp duty exemption on the instrument of loan or financing agreement for the TRRF approved under BNM's Fund for SMEs, executed between BNM and the participating FI. The list of participating FIs is outlined in the Order.

The exemption is given on condition that the relevant instrument is executed between 1 December 2020 and 31 December 2021.

Stamp duty exemption for the High Tech Facility – National Investment Aspirations (HTF-NIA)

In Budget 2021, the HTF-NIA was introduced to support high-tech and innovation-driven SMEs affected by COVID-19 to recover and revitalize the nation's innovation capacity. The HTF-NIA is a financing facility established by Bank Negara Malaysia (BNM).

Following the above, the Stamp Duty (Exemption) (No. 14) Order 2021 [P.U.(A) 387] was gazetted on 8 October 2021. The Order provides a stamp duty exemption on the instrument of loan or financing agreement for the HTF-NIA approved under BNM's Fund for SMEs, executed between a participating FI and an SME. The list of participating FIs is outlined in the Order.

The exemption:

- Applies to the instrument of loan or financing agreement executed pursuant to a letter of offer issued between 15 December 2020 and 31 December 2021, and
- Is subject to the condition that the instrument of loan or financing agreement is accompanied by a letter of offer from the participating FI to the SME stipulating the approval of the loan or financing facility.

For the purpose of this Order, the term "SME" is as defined in Section 2 of the Small and Medium Industries Development Corporation Act 1995.

The Order is deemed to have come into operation on 15 December 2020.

Tax incentive for companies participating in the National Dual Training Scheme (NDTS)

In Budget 2019, it was proposed that a double deduction be given for expenses incurred by companies participating in the NDTS approved by the Ministry of Human Resources (MOHR). The double deduction would apply to programmes implemented between 1 January 2019 and 31 December 2019. Thereafter, in Budget 2020, it was proposed that the incentive be extended for another two years (i.e., until 31 December 2021).

To legislate the above proposal, the Income Tax (Deduction for Training Costs under the National Dual Training System (NDTS) Rules 2021 [P.U.(A) 390] were gazetted on 11 October 2021.

The Rules provide that in ascertaining a qualifying company's adjusted income from its business for a YA, a double deduction shall be given for expenses incurred and paid by the qualifying company during that basis period for its participation in a qualifying programme. The double deduction is given for the following expenses:

(a) Monthly training allowance of not less than RM300 paid to the apprentice
(b) Expenses incurred for the provision of the qualifying programme
(c) Expenses incurred for food, travelling and accommodation allowances for apprentices during the qualifying programme
(d) Expenses incurred for insurance provided to the apprentice

For items (b) and (c), the total deductions allowable for each apprentice shall not exceed RM5,000 for each YA.

The Rules shall apply to a qualifying programme which is implemented and approved by MOHR between 1 January 2019 and 31 December 2021.

The following terms have been defined in the Rules:

(i) Apprentice
A Malaysian citizen and resident registered with the Department of Skills Development (DSD) to undergo the qualifying programme, who is:
(a) An employee of the qualifying company, or
(b) A school leaver

(ii) Qualifying programme
A programme which:
(a) Complies with the National Occupational Skills Standard (NOSS)
(b) Is accredited by the DSD
(c) Is certified as a National Dual Training System (NDTS) – Industry4WRD Programme, and
(d) Implements two modules of training which are:
- Practical training at the company which covers 70% - 80% of the training (performance), and
- Theoretical training at the training centre which covers 20% - 30% of the training (knowledge)

(iii) Qualifying company
A company:
(a) Incorporated in Malaysia under the Companies Act 2016
(b) Accredited as an Accreditation Center by DSD to implement the NDTS Programme
(c) Implementing the NDTS Programme based on the NOSS, and
(d) Participating in the NDTS Programme

The non-application provisos stipulate that the Rules shall not apply where a claim for the following has been made for the same expenses:

- For any fund or Government grant related to the training, or
- Any exemption or deduction under any other provision of the ITA

The Rules are deemed to have come into operation from YA 2019.

Guidelines and procedures for the application of the special tax incentive for selected services activities under the National Economic Recovery Plan (PENJANA)

Under the Short-term Economic Recovery Plan (PENJANA) unveiled on 5 June 2020, a special tax incentive was announced for manufacturing companies that relocate their manufacturing operations to Malaysia (see *Take 5: COVID-19: Short-term Economic Recovery Plan*).

In Budget 2021, to spur economic recovery through investment activities, it was proposed that the special tax incentive be expanded to selected services activities, including companies adopting Industrial Revolution 4.0 (IR 4.0) and digitalization, with investments that contribute to significant multiplier effects. It was also proposed that a special tax rate of 15% be given to non-Malaysian individuals holding key or C-suite positions in the companies relocating their operations to Malaysia (see *Take 5: Malaysia Budget 2021*).

Following the above, the Malaysian Investment Development Authority (MIDA) has recently published on its website, the "Guidelines and procedures for the application of special tax incentive for selected services activities under the National Economic Recovery Plan (PENJANA)" (Guidelines).

Special tax incentive for companies

The Guidelines stipulate that the following incentives will apply to companies for the relocation of selected services activities:

- New companies: 0% to 10% tax rate for 10 years
- Existing companies: 10% tax rate for 10 years

The definitions of "new company" and "existing company" are as outlined below:

(a) New company
A company that does not have any:
- Existing operation or entity in Malaysia (including a related company), or
- Existing services operation in Malaysia, but has an existing operation or entity for non-services operation (e.g., manufacturing)

and
- Relocates its facility for selected services activities from any country to Malaysia,
- Relocates new services activities which are different from the existing services operation in Malaysia (diversification activity), or
- Establishes a new operation in Malaysia

(b) Existing company
A foreign or locally owned company with existing services operation (including selected services activities) in Malaysia and proposes to undertake selected services activities for a new business segment, which is separate from the operation of its existing services activities.

To qualify for the incentive, some of the key conditions are as outlined below:

(a) The company must be a Malaysian-resident company which is incorporated under the Companies Act 2016, and fulfils the definition of a "new company" or "existing company"

(b) The company is adopting IR 4.0 and digitalization technology, and undertaking any of the following selected services activities:
- Provision of a technology solution, or more typically, the development and provision of a technology solution based on substantial scientific or engineering challenges by technology companies
- Provision of infrastructure and technology for cloud computing

- Research and development or design and development activities
- Medical devices testing laboratory and clinical trials, and
- Any services or manufacturing-related services activities, as determined by the Minister of Finance

(c) The company must incur capital investment or business expenditure in the following areas:
- Adoption of IR 4.0 or digitalization technology
- Employment opportunities for Malaysians, including fresh Malaysian graduates
- Technology transfer
- Utilization of local goods and services
- Internship for Malaysian students
- Collaboration with local industries, institutions or universities

Specific conditions will be imposed in the approval for the incentive.

(d) The company is required to:
- Commence its operation within one year from the date of approval for the incentive, or
- Incur the first capital expenditure within one year from the date of approval for the incentive, to be completed within three years from the date the first capital expenditure was incurred

(e) The application for the incentive must be received by MIDA between 7 November 2020 and 31 December 2022.

Special tax incentive for individuals

The Guidelines stipulate that a flat tax rate of 15% will apply to a Malaysian-resident who is a non-citizen, holding a key or C-Suite position in a company that has been approved for the special tax rate for the relocation of business to Malaysia, for five consecutive years. The incentive is limited to five individuals per company.

To qualify for the incentive, the individual must:

(a) Receive a basic monthly salary of at least RM25,000, and
(b) Be a Malaysian-tax resident for each YA throughout the five consecutive YAs

Applications for the incentive must be made through MIDA between 7 November 2020 and 31 December 2021.

Further details are available on the MIDA website [Forms & Guidelines - MIDA | Malaysian Investment Development Authority → PENJANA Incentives and Grants → Special Tax Incentive under PENJANA for the Services Sector]

Special treatment for banks or development financial institutions adopting the Malaysian Financial Reporting Standard (MFRS) 9: Financial Instruments

The "Malaysian Financial Reporting Standard 9 Financial Instruments" was issued to replace the "Malaysian Financial Reporting Standard 139 Financial Instruments: Recognition and Measurement" effective 1 January 2018. The MFRS 9 provides updated guidance for the recognition and measurement of financial instruments.

Following the above, the Income Tax (Special Treatment for Bank or Development Financial Institution which Adopt Malaysian Financial Reporting Standard 9: Financial Instruments) Regulations 2021 [P.U.(A) 400] were gazetted on 14 October 2021. The Regulations apply to a bank or development FI, as listed below, which adopts the MFRS 9:

(a) A licensed bank under the Financial Services Act 2013 (FSA),
(b) A licensed Islamic bank under the Islamic FSA, or

(c) A development FI prescribed under the Development Financial Institutions Act 2002

The Regulations stipulate the methodology of ascertaining the "gross income" and "adjusted income" of a bank or development FI from its business in a basis period for a YA in respect of a financial instrument. The Regulations also outline the tax treatment for the following:

- Financial assets on capital account
- Impairment loss of financial assets
- Reversal of impairment loss of financial assets
- Transaction costs
- Gain or loss in respect of hedging instrument
- Gain or loss in respect of financial instrument arising from foreign exchange transactions

The Regulations provides transitional provisions for certain situations. In addition, the Regulations also stipulate that for the purpose of ascertaining the income of a bank or development FI, the bank or development FI shall for each YA, maintain separate records in respect of the:

(a) Particulars of financial assets measured at amortised cost,
(b) Movement of financial assets measured at fair value through other comprehensive income,
(c) The impairment losses which were allowed as a deduction and the reversal amount treated as gross income relating to such impairment losses from the date of initial application, and
(d) Any other records as may be specified by the DG

The Regulations are deemed to be effective from:

- YA 2018: Bank or development FI with accounting period ending on 31 December
- YA 2019: Bank or development FI with accounting period ending on a day other than 31 December

Overseas developments

Hong Kong may implement substance requirements related to offshore claims

Recently the European Union (EU) completed its review of the foreign-source income exemption (FSIE) regime in Hong Kong (Malaysia's FSIE was also reviewed – please see *Special Tax Alert: No. 7/2021 - Malaysia added to the European Union's tax "grey list"*). Though the EU acknowledges that FSIE regimes are not in themselves problematic, it is concerned that corporates with no substantial economic activity in Hong Kong are not subject to tax in respect of certain offshore passive income (such as interest and royalties), thereby leading to circumstances of double non-taxation.

On 5 October 2021, Hong Kong was placed on Annex II of the EU list of non-cooperative jurisdictions for tax purposes (the so-called "grey list"). Other countries placed on the Annex on this day due to their FSIE regimes were Malaysia, Qatar, Cost Rica and Uruguay.

Hong Kong's response to the EU's assessment

In response to the EU's assessment of Hong Kong, the Hong Kong Government stressed that Hong Kong will continue to adopt the territorial source principle of taxation, in respect of both passive and active income.

That being said, Hong Kong has committed to amend or impose additional conditions in relation to offshore claims on passive income by the end of 2022, but effective in 2023.

The Hong Kong Government has indicated that the proposed legislative amendments will merely target corporations with no substantial economic activity in Hong Kong that make use of passive income to evade tax across a border. The Hong Kong Government further states that it will consult the stakeholders on the specific contents of the legislative amendments and strive to minimize the compliance burden of corporates.

It appears that Hong Kong may implement adequate substance requirements for offshore claims in the future, and if so, they should be evaluated along with other changes in legislation. Taxpayers should closely monitor these developments and assess how the changes would impact their current operations or tax policies / position.

Canada announces it will enact Digital Services Tax but states its implementation is conditional

On 8 October 2021, following the announcement on the same day of the international agreement reached by the Organisation for Economic Co-operation and Development (OECD) on the core design features of the two-pillar solution developed in the Base Erosion and Profit Shifting (BEPS) 2.0 project, Deputy Prime Minister and Finance Minister Chrystia Freeland issued a statement confirming that the Canadian Federal Government intends nevertheless to move ahead with legislation finalizing the enactment of a Digital Services Tax (DST) by 1 January 2022. This step is in keeping with a proposal first announced in the 2020 Fall Economic Statement and again in Budget 2021. However, the statement added that the DST would only be imposed as of 1 January 2024, rather than 1 January 2022 (as originally announced), and only if the convention implementing the BEPS 2.0 tax regime under the international agreement has not come into force by 31 December 2023. This change is consistent with the agreed statement released by the OECD under which no newly enacted DSTs or other relevant similar measures will be imposed on any company from 8 October 2021 until the earlier of 31 December 2023 or the coming into force of the implementing convention.

In the event that the implementing convention does not come into force by 31 December 2023, the Canadian DST would be payable as of 2024 in respect of revenues earned as of 1 January 2022. The statement added that it is the Deputy Prime Minister's sincere hope that the timely implementation of the new international system will make this unnecessary.

Background

In its Fall Economic Statement of 30 November 2020, the Federal Government stated:

Canada has been working with our international partners in a process led by the Organisation for Economic Co-operation and Development with a view to developing a coordinated approach by mid-2021. The government remains committed to a multilateral solution, but is concerned about the delay in arriving at consensus. The government therefore proposes to implement a tax on corporations providing digital services, with effect from January 1, 2022, which would apply until such time as an acceptable common approach comes into effect. (See EY Global Tax Alert, *Canada: Income tax measures from the 202 Fall Economic Statement*, dated 3 December 2020 and the 2020 Fall Economic Statement.)

Budget 2021, tabled on 19 April 2021, provided additional details, stating that the DST would be imposed at a rate of 3% on revenue from certain digital services that rely on the engagement, data and content contributions from Canadian users and that the tax would apply to large businesses with gross revenue of €750 million or more in the previous calendar year and in-scope revenue associated with Canadian users of more than CA$20 million in the particular calendar year. (See EY Global Tax Alert, *Canada issues Federal budget 2020-21: Highlights*, dated 21 April 2021 and the 2021 Federal Budget Plan.)

The October 2021 statement from the OECD/G20, which was agreed to by 136 of the 140 member jurisdictions in the OECD/G20 Inclusive Framework on

BEPS, updates and finalizes a July 2021 statement regarding the conceptual agreement on fundamental reforms to international tax rules through a two-pillar solution to address the tax challenges arising from the digitalization of the economy (the BEPS 2.0 project). The July statement is described in detail in an EY Global Tax Alert issued on 1 July 2021 (see "*OECD announces conceptual agreement in BEPS 2.0 project*"), as is the October statement, in the EY Global Tax Alert issued on 11 October 2021 (see "*OECD releases statement updating July conceptual agreement on BEPS 2.0 project*"); both Alerts are cited in the second paragraph above.

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Important dates

31 October 2021	6th month revision of tax estimates for companies with April year-end
31 October 2021	9th month revision of tax estimates for companies with January year-end
31 October 2021	Statutory deadline for filing of 2021 tax returns for companies with March year-end. As a concession, this deadline is extended to **31 December 2021** pursuant to the RF Filing Programme (Amendment 4/2021).
15 November 2021	Due date for monthly instalments
30 November 2021	6th month revision of tax estimates for companies with May year-end
30 November 2021	9th month revision of tax estimates for companies with February year-end
30 November 2021	Statutory deadline for filing of 2021 tax returns for companies with April year-end. As a concession, this deadline is extended to **31 January 2022** pursuant to the RF Filing Programme (Amendment 4/2021).

APAC no. 07003074
ED None.

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