Deloitte.



# 马来西亚中国服务部税务月刊

## 马来西亚针对特别类型所得的预扣税

### 介绍

预扣税一直都是马来西亚中资企业，尤其是向非居民支付款项的企业所关注的问题。近期对于特别类型所得预扣税的税法变化值得纳税人的特别关注。

根据 1967 年所得税法（“所得税法”），条款 4A 对于特别类型所得的定义包涵针对下列情形的付款:-

i) 使用财产、使用权或厂房、机械或仪器的安装或操作；
ii) 与科学、工业或商业、投资、项目或方案技术性管理或行政相关技术性咨询、协助或服务；或
iii) 对任何动产的使用；

如果非居民获得此类源自马来西亚的所得，其将需要通过预扣税机制缴纳马来西亚所得税。如果非居民在马来西亚构成常设机构，预扣税的税率为 13%。如果未构成常设机构，则将适用 10%的预扣税税率，并可能适用优惠税率。

### “技术性咨询、协助或服务”的范围

所得税法条款 4A(ii)下的所得（即为技术性咨询、协助或服务所得款项）通常包括以下情形：-

- 设计、工程和其他咨询类服务；
- 项目管理和试运行服务；和
- 集团成员之间的服务如管理、记账、信息技术、人力资源、财务等。

对于所得税法条款 4A(ii)下的范围，一个常见的误解是其只包括技术性咨询、技术性协助或技术性服务付款。而法院在某些案例中的立场则表明非技术性协助和非技术性服务也属于所得税法条款 4A(ii)范围之内。

尽管如此，马来西亚内陆税收局在其关于特别类型所得预扣税的公开裁定中指出，与提供特定服务无关的支付给非居民母公司或总部的款项不在所得税法条款 4A(ii)所述的范围之内。

特别类型所得的产生

特别类型所得将在下列情况下被视为来源于马来西亚:-

- 由马来西亚税收居民、政府、州政府或地方政府承担上述付款义务；或
- 上述付款在马来西亚营业账目对应产生支出或费用

在 2017 年 1 月 17 日之前，只有在马来西亚境内提供的服务对应的服务款项应被视为来源于马来西亚并应缴纳预扣税。因此，在马来西亚境外所提供的服务所对应服务款项不适用马来西亚预扣税。

自 2017 年 1 月 17 日起，所得税法中关于预扣税的修改正式生效，境外服务重新被纳入征税范围，无论服务提供地点在马来西亚境内或境外，所得税法条款 4A(i)和(ii)范围内的服务费都应被视为来源于马来西亚并需缴纳马来西亚预扣税。马来西亚内陆税收局近期表示将发布实践指引以解决政策变化产生的过渡性问题。

马来西亚与中国双边税收协定(DTA)

由于中马双边税收协定并未包含技术服务费条款，此类所得应属于营业利润并适用符合国际惯例的“无常设机构即无税负”原则。因此，在中国企业并未在马来西亚构成常设机构的情况下，其取得的特别类型所得不应适用马来西亚预扣税。

尽管如此，我们认为马来西亚内陆税收局仍有可能依据近期联邦法院做出的一项判决将特别类型所得与营业利润区分开来，从而使其无法享受税收协定营业利润条款所提供的保护，并需要缴纳 10%预扣税。

由于中马双边税收协定并无技术服务费条款，相关马来西亚预扣税是否符合中国境外所得税抵免条件尚存疑问。中国税务机关可能否定相关马来西亚预扣税适用中国境外所得税抵免，其理由在于当中国企业未在马来西亚构成常设机构时，马来西亚并不具备对相关服务费征税的权限。

马来西亚与其他国家的双边税收协定

当中国企业在马来西亚设立子公司（例如私人有限公司）并与其他企业发生业务时，了解相关双边税收协定以确定正确的税务处理是非常重要的。下表列举了马来西亚及其主要的经贸伙伴之间双边税收协定下可能的预扣税处理：

| 协定缔约国 | 预扣税处理 （注 1） |
| --- | --- |
| 中国、日本、泰国、印度尼西亚 – 双边税收协定中无技术服务费条款 | • 如果马来西亚不适用“无常设机构即无税负”原则，则对于在马来西亚境内或境外提供服务所支付的服务费均需扣缴 10%预扣税 |
| 新加坡 – 双边税收协定中有技术服务费条款（注 2）并规定仅当相关服务在马来西亚境内提供时，相关技术服务费被视为来源于马来西亚 | • 对于在马来西亚境外提供的技术服务所支付服务费无预扣税<br>• 对于在马来西亚境内提供的技术服务所支付服务费需扣缴 5%预扣税<br>• 对于在马来西亚境外提供的非技术服务所支付服务费需扣缴 10%预扣税 |

| | |
|---|---|
| 印度、越南 – 双边税收协定中有技术服务费条款（注 2）并规定仅当付款人为马来西亚居民时，相关技术服务费被视为来源于马来西亚 | • 对于在马来西亚境内或境外提供服务所支付的服务费均需扣缴 10%预扣税 |
| 美国 – 有限的双边税收协定 | • 对于在马来西亚境内或境外提供服务所支付的服务费均需扣缴 10%预扣税 |

注 1：假设服务提供方在马来西亚不构成常设机构
注 2：请参考不同税收协定中对于技术服务的定义

结论

为了对境外服务的服务费有效征收预扣税，马来西亚主管当局需要对所得税法及双边协定的有关条款进行修订，截至目前对于所得税法的修订已经完成，而马来西亚内陆税收局近期表示马来西亚财政部计划就马来西亚与部分协定伙伴之间的双边税收协定进行重新磋商。现在看来，马来西亚主管当局似乎坚持要对境外服务的服务费征收预扣税。鉴于财政部有权实施这种转变，相关企业应该充分考虑这种可能性及其对业务的最大限度的影响，尤其是对于现金流的影响，并考虑相关应对措施。

# Deloitte Malaysia Chinese Services Group Publication

## Withholding Tax (WHT) on Special Classes of Income

Introduction

WHT has always been a major concern for Chinese companies operating in Malaysia which make payment to non-resident of Malaysia. The recent changes in the rules on taxing the special classes of income deserve added attention of tax payers.

Section 4A of the Income Tax Act, 1967 (ITA) defines special classes of income to include amounts paid for:-

iv) the use of property or rights or the installation or operation of any plant, machinery or other apparatus;
v) technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or
vi) the use of any moveable property.

If a non-resident derives such income from Malaysia, it shall be chargeable to Malaysian income tax and the collection mechanism is via WHT. If the non-resident has a permanent establishment (PE) in Malaysia, the WHT rate is 13%. In the absence of PE, the rate is 10% and preferential rate may be available.

Scope of 'technical advice, assistance or services'

Common examples of income falling under subsection 4A(ii) (i.e. amounts paid for technical advice, assistance or services) include charges for:-

- Design, engineering and other advisory services;
- Project management and commissioning services; and
- Intragroup services such as management, accounting, IT, human resources, finance etc.

A common misconception is the scope of subsection 4A(ii) includes only payments for technical advice, technical

assistance or technical services. The courts have upheld in multiple cases that non-technical assistance and non-technical services also fall within the ambit of Section 4A(ii).

Despite so, the Inland Revenue Board (IRB) stated in its Public Ruling on Withholding Tax on Special Classes of Income that payments to a non-resident parent company or head office that are not related to the performance of any specialised service do not fall within the ambit of Section 4A(ii).

Derivation of special classes of income

Special classes of income shall be deemed to be derived from Malaysia if the:-

- responsibility for payment lies with a Malaysian tax resident, the Government, a State Government or a local authority; or
- payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.

Prior to 17 January 2017, only amounts attributable to services performed in Malaysia shall be deemed to be derived from Malaysia and taxable in Malaysia. Therefore, payments for services performed outside of Malaysia are not subject to Malaysian WHT.

The ITA was amended to re-impose WHT on payments for offshore services effective 17 January 2017. With this amendment, service fees falling under subsections 4A(i) and (ii) shall be deemed to be derived from Malaysia and subject to Malaysian WHT regardless of the location the services were rendered. The IRB has recently indicated that it will issue a Practice Note to address transitional issues arising from this policy shift.

Double taxation agreement (DTA) between Malaysia and China

Given the absence of Technical Fees Article in the DTA, it is arguable such income should fall within the ambit of Business Profits Article and that the internationally upheld principle of "no PE, no tax on business profit" should apply. As a result, special classes of income derived by Chinese enterprises should not be subject to Malaysian WHT in the absence of a PE in Malaysia.

However, we may not fully discount the possibility of the IRB relying on recent a judgment by the Federal Court to distinguish special classes of income from business profits, thereby negating the protection offered by the Business Profits Article and withhold WHT at 10%.
It is unclear whether the Malaysian WHT deducted is eligible for China's Foreign Tax Credit (FTC). Given the absence of Technical Fees Article in the DTA, China's tax authority may disregard the Malaysian WHT imposed for China's FTC purpose as Malaysia may be perceived to lack the authority to tax service fees paid to Chinese enterprises in the absence of a PE in Malaysia.

DTA between Malaysia and other countries

In the event a Chinese enterprise incorporates a subsidiary (e.g. a private limited company denoted by Sdn Bhd) in

Malaysia and it undertakes business with enterprises of other countries, it is imperative to scrutinise the relevant DTA to ascertain the correct treatment. The possible WHT treatment under the DTA between Malaysia and some of her largest trading partners are as follow:-

| Contracting State | Treatment (Note) |
|---|---|
| China, Japan, Thailand and Indonesia – there is no Technical Fees Article in the DTA | • 10% WHT on payments for services rendered in Malaysia and outside Malaysia if Malaysia does not adhere to the "no PE, no tax on business profit" principle. |
| Singapore – there is a Technical Fees Article* in the DTA and it states technical fees arise in Malaysia only if services are performed in Malaysia | • No WHT on payments for technical services rendered outside Malaysia.<br>• 5% WHT on payments for technical services rendered in Malaysia.<br>• Non-technical services performed outside Malaysia may be subject to 10% WHT |
| India and Vietnam – there is a Technical Fees Article* in the DTA and it states technical fees arise in Malaysia if the payer is a resident of Malaysia | • 10% WHT on payments for services rendered in Malaysia and outside Malaysia. |
| USA – limited DTA | • 10% WHT on payments for services rendered in Malaysia and outside Malaysia. |

Note:

1. Assume the service provider does not have a PE in Malaysia.
2. Please refer to the definition of Technical Services, where applicable, under the respective DTAs.

<u>Conclusion</u>

In order to effectively re-impose WHT on payments for offshore services, the authorities need to amend provisions of the ITA as well as the DTA. The former has been completed and recently, the IRB indicated that the Ministry of Finance (MoF) intends to re-negotiate the DTAs between Malaysia and some of her treaty partners. At this juncture, it appears that the authorities are adamant to re-impose taxes on payments for services performed outside Malaysia. While it is the prerogative of the MoF to effect such policy shift, businesses are advised to factor in this possibility and its impact to the bottom line and cash flow, among others, and consider the approach to deal with this issue.

# 联系我们

| 分支机构/名字 | 职务 | 邮箱 | 电话 |
|---|---|---|---|
| **吉隆坡 Kuala Lumpur** | | | |
| **余永平 Yee Wing Peng** | 董事经理 | wpyee@deloitte.com | (603) 7610 8800 |
| **谭丽君 Tham Lih Jiun** | 执行董事 | ljtham@deloitte.com | (603) 7610 8875 |
| **卓鸿培 Toh Hong Peir** | 执行董事 | htoh@deloitte.com | (603) 7610 8808 |
| **郭川永 Kok Soon Weng** | 副总监 | kekok@deloitte.com | (603) 7610 8157 |
| **夏国辉 Ha Kok Fei** | 副总监 | kha@deloitte.com | (603) 7610 8190 |
| **颜杏蕊 Gan Sin Reei** | 高级经理 | sregan@deloitte.com | (603) 7610 8166 |
| **刘晓劼 Liu Xiao Jie** | 经理 | rogliu@deloitte.com | (603) 7610 8970 |
| **郑顺民 Tey Soon Meng** | 副经理 | sotey@deloitte.com | (603) 7610 8197 |
| **李岸营 Li Anying** | 高级助理 | annanyli@deloitte.com | (603) 7610 7843 |
| **戴蔚 Vivian Dai** | 高级助理 | vdai@deloitte.com | (603) 7610 8646 |
| **黄尹羚 Ooi Ying Ling** | 助理 | aooi@deloitte.com | (603) 7610 8241 |
| **张艾嘉 Zhang Aijia** | 助理 | aijizhang@deloitte.com | (603) 7610 7872 |
| **马冰青 Ma Bingqing** | 助理 | stelma@deloitte.com | (603) 7610 7787 |
| **陈宇骄 Chen Yujiao** | 助理 | yujchen@deloitte.com | (603) 7610 8271 |
| **胡程 Hu Cheng** | 助理 | chhu@deloitte.com | (603) 7610 7614 |
| **王娟 Wang Juan** | 助理 | juanwang@deloitte.com | (603) 7610 8772 |
| **初俊啸 Chu Junxiao** | 助理 | junxchu@deloitte.com | (603) 7610 8732 |
| **古晋 Kuching** | | | |
| **蔡淑萍 Chai Suk Phin** | 高级经理 | spchai@deloitte.com | (608) 246 3311 |
| **黄俊程 Kane Bong** | 高级经理 | kbong@deloitte.com | (608) 246 3311 |
| **新山 Johor Bahru** | | | |
| **吴玉凤 Caslin Ng** | 副总监 | caslinng@deloitte.com | (607) 222 5988 |
| **陈莱玲 Susie Tan** | 高级经理 | susietan@deloitte.com | (607) 222 5988 |
| **怡保 Ipoh** | | | |
| **梅皓然 Terrence Mooi** | 高级经理 | tmooi@deloitte.com | (605) 254 0288 |
| **刘慧婷 Loh Wai Teng** | 高级经理 | wloh@deloitte.com | (605) 254 0288 |
| **槟城 Penang** | | | |
| **黄兰卿 Ng Lan Kheng** | 执行董事 | lkng@deloitte.com | (604) 218 9888 |
| **钟艾玲 Cheng Ai Ling** | 副经理 | alcheng@deloitte.com | (604) 218 9888 |
| **亚庇 Kota Kinabalu** | | | |
| **张济妃 Cheong Yit Hui** | 经理 | yicheong@deloitte.com | (608) 823 9601 |

## 吉隆坡 Kuala Lumpur


余永平


谭丽君


卓鸿培


郭川永


夏国辉


颜杏蕊


刘晓劼


郑顺民

李岸营

戴蔚

黄尹羚

张艾嘉

马冰青

陈宇骄

胡程

王娟

初俊啸

古晋 **Kuching**

蔡淑萍

黄俊程

新山 **Johor Bahru**

吴玉凤

陈莱玲

怡保 **Ipoh**

梅皓然

刘慧婷

槟城 **Penang**

黄兰卿

钟艾玲

## 亚庇 Kota Kinabalu

张济妃

**Deloitte**
Level 16, Menara LGB
1, Jalan Wan Kadir
Taman Tun Dr. Ismail
60000 Kuala Lumpur, Malaysia

英文版本与中文版本倘出现任何歧义，概以英文版本为准。上述仅供阅读参考。
If there is any inconsistency or conflict between the Chinese and English versions, the English version shall prevail for all purposes.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/my/about to learn more about our global network of member firms.

Deloitte provides audit, consulting, financial advisory, risk advisory, tax and related services to public and private clients spanning multiple industries. Deloitte serves four out of five Fortune Global 500® companies through a globally connected network of member firms in more than 150 countries and territories bringing world-class capabilities, insights, and high-quality service to address clients' most complex business challenges. To learn more about how Deloitte's approximately 245,000 professionals make an impact that matters, please connect with us on Facebook, LinkedIn, or Twitter.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

About Deloitte in Malaysia
In Malaysia, services are provided by Deloitte Tax Services Sdn Bhd and its affiliates.

© 2017 Deloitte Tax Services Sdn Bhd

To no longer receive emails about this topic please send a return email to the sender with the word "Unsubscribe" in the subject line.